

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

PUBLIC
ORIGINAL



In the Matter of)
)

PUBLIC

MCWANE, INC.,)
a corporation)
_____))
_____)

DOCKET NO. 9351

**RESPONDENT MCWANE, INC.'S PROPOSED
FINDINGS OF FACT**

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Dated: December 21, 2012

RECORD REFERENCES

References to the record are made using the following citation forms and abbreviations:

JX#– Joint Exhibit

CX#– Complaint Counsel Exhibit

RX# – Respondent Exhibit

Name of Witness, Tr. xx – Trial Testimony

JX/CX/RX# (Name of Witness, Dep. at xx) – Deposition Testimony

JX/CX/RX # (Name of Witness, IHT at xx) – Investigational Hearing Testimony

JSLF ¶ x – Joint Stipulations of Law and Fact

Complaint ¶ x – Complaint Counsel’s Complaint filed January 4, 2012

Answer ¶ x - Respondent McWane, Inc’s Answer to Complaint

RRFA No. x - Respondent’s Response to Complaint Counsel’s Requests for Admission.

CRFA No. x – Complaint Counsel’s Response to Respondent’s Requests for Admission

{ **bold** } - In Camera Material

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PROPOSED FINDINGS OF FACT

I. Fittings Industry History and Background

A. McWane, Inc.

1. Respondent McWane, Inc. (“McWane”) is a privately-held, family run company that manufactures, markets, and sells products for the waterworks industry, including ductile iron pipe Fittings that are 3” to 24” in diameter. (JSLF ¶ 1).

2. Dr. Schumann testified that the scope of the alleged conspiracy is limited to Fittings of 24” in diameter and smaller. (Schumann, Tr. 3769 (“And these are markets for ductile iron pipe fittings of 24 inches and below”), 3788--3793 “...so to simplify and condense all these different but identical analyses, I treated then all as one cluster market, and that’s why the market is 24 inches and less”), 4111 (“I found in my analysis of the data that only about 5 percent of large fittings were produced by McWane in 2008, it was very small, so my presumption was their influence on that would have been proportionally very small.”).

3. McWane manufactured Fittings at its Union Foundry facility in Anniston, Alabama and at its Tyler Pipe & Foundry Co. facility in Tyler, Texas. (Tatman, Tr. 209 (“The south plant was a ductile iron plant, and it produced the fittings of which you described here...”), 212-214 (Q: “McWane reorganized the fittings business to be together?” A: “Yes, they did ... I took the Tyler south plant. I picked up Union Foundry in Anniston, Alabama. Sometimes I’ll refer to that as Union. sometimes I’ll refer to it as Anniston. I mean the same thing.”).

4. The Fittings division of McWane is known as “Tyler/Union.” (Tatman, Tr. 213 (“I was the vice president and general manager of what we call now Tyler/Union”).

5. Fittings are a small segment of McWane’s business, representing only about 5% of McWane’s overall business. (Tatman, Tr. 218-219 (“If you look at McWane, Inc., the fittings

business is a gnat. Certainly it's a gnat in terms of profitability. It's a gnat in terms of sales with that."); JX 642 (Page, Dep. at 42)).

6. Tyler/Union is at best a break-even business for McWane. (JX 642 (Page, Dep. at 64); JX 638 (McCullough, IHT at 92)).

7. Mr. Page testified that since the early 2000's "this [Fittings] business has been a thorn in our side and a millstone around our neck. If I could figure out a way to get out of it without making all of my customers angry, I'd have done it. But I can't. And so my goal is just not to have it hurt." (JX 642 (Page, Dep. at 132)).

8. McWane manufactures approximately 4,000 individual ductile iron pipe Fittings in a wide range of diameters, configurations, joints, coatings, and finishes at its last remaining foundry in the U.S., the Union Foundry, and at its foundry in China, Tyler Xin Xin. (JX 643 (Tatman IHT at 14, 23-27); see also <http://www.tylerunion.com>).

9. Approximately 80 percent of the demand for Fittings may be serviced with only 100 or fewer commonly used sizes and configurations of Fittings. These Fittings are commonly referred to in the industry as "A" or "B" Fittings. (JSLF ¶ 9).

10. Fittings typically comprise five (5) percent or less of the total cost of a typical waterworks project. (JSLF ¶ 10).

11. 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. (JSLF ¶ 11).

B. Macroeconomic Backdrop

12. The Fittings market includes several thousand unique configurations of Fittings in different sizes, shapes and coatings. (JSLF ¶ 8).

13. The collapse of the housing market in 2007-2008 triggered an economic recession that had a particularly adverse impact on the waterworks industry, which depends on new housing starts to drive demand. (Tatman, Tr. 269 (“So, again, when you have a marketplace that has plummeted, I think, if you look at 2006 and then you look at 2010, the market volume is half of what it was in 2006. It was decimated. That changes a lot of behavior. It changes a lot of competitive dynamics”), 271-272 (Q: “The testimony that you just gave about the change in the market moving towards from more of a relationship, I’m going to call McWane because that’s my supplier -- that changed as a result of the downturn that began in 2006; is that right?” A: “My understanding, yes.” Q: “And it hastened in 2007 as the market got worse?” A: “The market was worse in ’7 than ’6. It was in ’8 than ’7. It was worse in ’9 than ’8. And it was worse in ’10 than ’9”); McCutcheon, Tr. 2654 (Q: “Do you recall the global financial crisis really going in -- really hitting full steam in about September of 2008?” A: “Yes, sir, I recall that.” Q: “Okay. Did your business suffer to some -- suffer a drop-off as well in the fourth quarter of 2008?” A: “Yes, sir.”)).

14. Mr. Sheley, of distributor Illinois Meter, testified that the 2008 housing decline reduced overall demand for Fittings by 35 to 55 percent. (JX 675 (Sheley, Dep. at 58)).

15. Mr. Rybacki of Sigma testified that, in 2009, residential construction rates were the lowest they had been in 70 years. (Rybacki, Tr. 3664 (Q: “And then on residential construction you’ve got the lowest rates in roughly 70 years?” A: “Correct.”) & RX 242 *in camera*).

16. In late 2007 and 2008, a variety of macroeconomic factors in China resulted in a substantial increase in production costs for importers of non-domestic Fittings. (Rybacki, Tr. 3661-3662 (Q: “You had mentioned this morning, Mr. Rybacki, that your costs were going up in

the 2008 time frame. Does that sound right?" A: "Yes, it does." Q: "What costs were going up? Do you remember? Was it -- was it the raw material costs going up?" A: "Raw materials was going up. Freight was going -- ocean freight was going up. Our workers in -- overseas wages and benefits were going up. Everything was going up. Freight here." Q: "Scrap iron?" A: "Scrap iron was way up." Q: "Pig iron?" A: "Way up.;" JX 687 (Pais, Dep. at 39-41); JX 639 (McCullough, Dep. at 182-184); JX 638 (McCutcheon, IHT at 401-402, 418-19)).

17. Unprecedented increases in scrap iron prices were having a "tremendous negative effect" on Sigma's business in early 2008. (Rybacki, Tr. 3711 (Q: "All right. And you say, in the second paragraph, that you'd been hit with unprecedented price increases, unprecedented increases in scrap iron prices, which have increased sevenfold in just a few short years; is that right, sir?" A: "That's correct." Q: "And what effect was that having on your business at Sigma in early 2008?" A: "Negative effect, tremendous negative effect.")).

18. Prices for scrap iron and other raw materials increased for all Fittings suppliers between 2008 and 2010. (JX 675 (Sheley, Dep. at 58-59)). At the same time, shipping costs contributed to a slightly disproportionately higher increase for imported Fittings.. (JX 675 (Sheley, Dep. at 59)).

19. Mr. Sheley testified that "the offset in wage rates in China rising has narrowed the spread between domestic and offshore production costs dramatically in the last five years." (JX 675 (Sheley, Dep. at 59)).

20. Mr. Tatman testified that in 2007 and early 2008, "I think we saw about a \$300 per ton effective cost increase based on raw material costs, pig iron, coke, and the effective exchange rate of those when we -- we have to pay in RMB currency and convert that into U.S. dollars." (Tatman, Tr. 871).

21. McWane's actual costs to buy pig iron, scrap, and other raw materials increased by 42% during the first six months of 2008. (Expert Rpt. of Parker Normann ¶30 Fig. 2B).

22. McWane's costs for non-domestic Fittings increased roughly ■■■ percent in 2008, while its non-domestic Fittings prices increased only about ■■■ percent. (Tatman, Tr. 860 *in camera* (Q: "So your costs went up for imported fittings roughly ■■■ percent in 2008 and your price only went up roughly ■■■ percent; is that what that says?" a: "Yes.")).

23. McWane's prices for non-domestic Fittings did not keep pace with inflation in 2008. (Tatman, Tr. 879-881 (Q: "All right, sir. Now, this 10 to 12 percent that you have here, was this keeping pace with inflation, sir?" A: "No." Q: "You mean your price -- your price was not keeping pace with your raw material cost increases you were seeing?" A: "No."), 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.")).

24. McWane's average blended Fittings price (the price of imported or domestic Fittings sold for open source jobs) declined relative to inflation throughout 2008, 2009, and 2010. (Normann, Tr. 4791-4797 ("So roughly, if you look at it kind of from the mid-2007, beginning of 2008, the price decline is in the double digits percentage-wise into 2009."; "You notice that these input costs have been going up essentially continuously from 2007 through 2010, which is the time period captured in the figure, but what is most noteworthy is really this dramatic increase in 2008 where these input costs have gone up, you know, 40-50 percent in 2008 and again I think it's 70 or 80 percent from earlier in 2007."); RDX-016).

25. Average net prices for non-domestic Fittings were lower during the latter half of 2008 than during the first half of 2008. (Tatman, Tr. 971-972 (Q: "Okay. Mr. Tatman, did the

business improve after September of '08 for the rest of the year?" A: "No." Q: "Did pricing get worse, sir?" A: "Worse."); Pais, Tr. 2129-2131 (Q: "All right. So here you are in the second half of '08 and you say that prices -- there's been an equally quick and sharp erosion in market pricing, and you say it's an alarming double whammy. What did you mean by that, sir?" A: "Well, as I preface there with the volume dropping down and the prices falling, that is certainly a one-two punch.") & RX 116, 2134-2135 (Q: "So a little while after DIFRA actually becomes operational, we see you say there's been this equally quick and sharp erosion in market pricing, the double whammy, and you say it's been especially severe in the southeast and especially in Florida; right, sir?" A: "Yes.") & RX 115, 2137-2140, 2151 (Q: "All right. And when you said 'pricing pressures,' you're referring to that sharp erosion in prices in the second half of 2008 after DIFRA was operational?" A: "Yes.") & CX 1744; Rybacki, Tr. 3660-3661 (Q: "Did prices -- did your average prices go down in the second half of '08, sir?" A: "Our volumes went down. I don't know -- I don't think our average pricing -- you know, we tried to hold the line because volume was going down, but -- but our volume definitely took a hit from August through September of '08."), 3717-3719 (Q: "And in fact, Mr. Rybacki, pricing got worse in the second half of '08. We already saw that; right?" A: "Pricing got worse.")).

26. Mr. Rybacki testified that, from a market perspective, "The second half of '08 turned gloomy." (Rybacki, Tr. 3702).

27. From 2008 to 2010, McWane's share of the overall Fittings market declined, while its competitors' share increased. (Expert Rpt. of Parker Normann ¶¶82, 88).

28. In 2008, McWane's share of the overall Fittings market fell about eight percentage points, from the upper 40s to low 40s. (Tatman, Tr. 971 (Q: "All right. And you say your share -- I guess your share is down at this point in 2008?" A: "And that's eight points, so

that's a -- that's a lot of percent movement.” Q: “All right. And so that's down from, what, somewhere in the upper 40s to low 40s?” A: “Yeah.”) & RX 616).

29. Throughout 2008, McWane’s two domestic foundries – its Tyler South Plant and its Union Foundry – were operating at only about one-third capacity. (Tatman, Tr. 960 (Q: “Roughly, how much could the Tyler south plant produce in terms of tons of fittings?” A: “If you're running it like you should, about 36,000 tons a year.” Q: “All right. And roughly how much was it producing back then in 2008?” A: “I think we had it scaled all the way back down to around 13,000 tons.” Q: “All right. So you're saying it was operating somewhere around 30 percent capacity?” A: “Yes.” Q: “What about Union Foundry? What's its rated capacity?” A: “In the mid-30s also.” Q: “And roughly what's Union operating at in the 2008 period, 2009 period?” A: “I'd have to look at the blue books for sure but again still in that kind of mid to low teen range or, you know, about 30 percent of what they could do.”)).

30. On November 8, 2008, McWane closed its Tyler South foundry, because the Fittings business was so poor. (Tatman, Tr. 958-960 (Q: “We heard that you shut down Tyler, and I forget. Is it Tyler south or Tyler north?” A: “The Tyler south plant in November of 2008. I think it's the 8th of November.”), 960 (“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 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.”)). Mr. Tatman did not “see any indications in the marketplace that housing is going to recover or the economy is going to recover.”) (Tatman, Tr. 967). Prior to closing Tyler South, both of McWane’s U.S. 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."

31. Throughout 2008, the Fittings market remained extremely competitive. (Minamyer, Tr. 3277-3278 (Q: "Okay. And I know you don't -- this has been some years ago and you don't have specific recollection, but what were the competitive conditions in 2008? What do you remember about that time frame?" A: "I remember that everything -- the market was always very competitive. We -- we had to fight pretty hard for every order."); McCutcheon, Tr. 2275 ("It's a very chaotic pricing strategy because pricing is not consistent, and so there's buy programs, there's project buy programs, there's one-time buy programs, there's good-till-Friday buy programs. It's an extremely competitive industry. And the buying of pipe fittings, the pricing, changes daily.")).

32. Mr. Tatman testified that pricing wars have continued from the time he first took over the management of McWane's Fittings unit through the present. (Tatman, Tr. 974-975 ("Q: All right. So were you in fact seeing a pricing war from your perspective in the spring of 2009? A: Yes. Q: And when had that started, that pricing war, from your perspective? A: I don't think it ever ended. I mean, I walked into the fight and the fight kept going. I've never seen it end.")).

33. Mr. McCullough testified that the Fittings business "is a nasty business. It's one of those businesses that like you can see, for us it's a break even business." (JX 638 (McCullough, IHT at 219-220)).

C. McWane's Share of the Fittings Market Has Steadily Declined

34. McWane's share of the overall Fittings market in the United States has steadily declined from approximately 70-80% in 2003 to approximately 41% in 2009. (Tatman, Tr. 240-242 (Q. "Early 2009, sir, what would your estimate be of McWane's share of the 2" to 24"

domestic fittings market?" ... A: "It's tough for me to factor in Metalfit because that's the unknown for me, but let's agree that it's around 90 percent." Q: "And so in the overall fittings market, as of early 2009, you estimated that Tyler/Union had 41 percent of that market?" A: "That's the estimate I have for whatever data point I used at this time."); JX 642 (Page, Dep. at 23-24); McCutcheon, Tr. 2638-2639 (Q: "Just so we're clear on the record, that refreshes your memory that you told the ITC under oath in 2003 that McWane had 70 percent or more of all the U.S. fittings sales; right?" A. "Yes, sir."), 2585 (Q: "And you believe today McWane's share of the overall fittings has declined further still to somewhere in the 40 percent range; right, sir?" A. "Yes, sir, I believe so.").

35. McWane's Fittings market share has been steadily declining relative to Star's since 2003. (McCutcheon, Tr. 2584-2585 (Q: "Now, in fact, McWane's share of the fittings market, by your own estimation, has been declining ever since 2003; right, sir?" A. "By our estimation, that's correct." Q: "And at the same time Star's share has been steadily increasing; right, sir?" A. "Yes, sir.") & CX 532, 2638-2639 (Q. "Just so we're clear on the record, that refreshes your memory that you told the ITC under oath in 2003 that McWane had 70 percent or more of all the U.S. fittings sales; right?" A. "Yes, sir." Q. "A number that's been in steady decline since then, in your estimation; correct, sir?" A. "In my estimation, that's correct.").

D. The Fittings Market is an Oligopoly

36. McWane, Star, and Sigma account for at least 90 percent of the Fittings sold in the United States. (Tatman, Tr. 241-242 ("Q. And so in the overall fittings market, as of early 2009, you estimated that Tyler/Union had 41 percent of that market? A: That's the estimate I have for whatever data point I used at this time. Q: And Star you estimated had 23 percent? A: That's what I'm estimating. Q: And you estimated that Sigma had 26 percent? A: That's what I'm estimating. Q: And so the three together, Sigma, Star and McWane or Tyler/Union, had

greater than 90 percent share of the fittings market as of early 2009? A: You're probably faster adding those three numbers up. What does it say? It's a test. Q: So I did it by subtracting the other ones. I've 3, 3, 2, 2. A: Okay. That's 6 and 4. That's 90 percent"); McCutcheon, Tr. 2256 (Q: "Do you have an estimate of the share of the market that McWane, Sigma and Star covered in the fittings market in the 2008 time frame?" A: "I have an educated guess." Q: "And what would that be?" A: "It would be 90 to 95 percent.")).

37. The Fittings market is an oligopolistic market. (Opinion of The Commission on Cross-Motions for Summary Decision at 9).

E. Fittings Customers are Distributors with Substantial Market Power

38. McWane, Sigma, Star, and other suppliers sell Fittings directly to Distributors, which then re-sell the Fittings to End Users. (JSLF ¶ 14).

39. All or virtually all of McWane, Sigma, and Star Fittings sales are to Distributors. (JSLF ¶ 15; Tatman, Tr. 251-252 (Q: "McWane sells all or virtually all its fittings through distributors; is that right, sir?" A: "And that would be virtually all. We do sell a little bit direct, but that's -- I think we went through that in deposition -- that's a very small percentage of what we do"); McCutcheon, Tr. 2256-57 (Q: "When you're selling fittings, who are your customers?" A: "Oh. We sell to the water and wastewater wholesaler community." Q: "Are those entities also referred to as distributors?" A: "Yes, sir."); Rybacki, Tr. 1094-1095 (Q: "And the fittings that you have virtually manufactured, who do you sell them to?" A: "We sell our fittings through a distribution network throughout the United States through wholesalers only.")).

40. There are at least 630 separate waterworks Distributors in the United States. (Schumann, Tr. 4432-3 (Q: "Now, Dr. Schumann, your report says there are 630 total distributors of waterworks fittings in the country; is that right?" A: "That's what we -- my -- the

people who were working with the data for me calculated at my request the total number of unique distributors they could find in the data.”)).

41. Distributors sell pipe, valves, hydrants, and other waterworks products, appurtenances, and accessories, in addition to Fittings. (Webb, Tr. 2706 (“For the underground construction market that we call the waterworks market, it's primarily pipe, which would be PVC and ductile iron pipe, valves, hydrants, fittings, brass items and appurtenances.”); Thees, Tr. 3050-3051 (“There’s pipe ... You've got gate valves. You've got fire hydrants. You've got butterfly valves. You've got mechanical joint and flanged fittings. You've got service brass. Marking tape. Water meters.”) ; JX 705 (Gibbs, Dep. at 10-13); JX 675 (Sheley, Dep. at 11); JX 650 (Morrison, Dep. at 18-19); JX 661 (Prescott, Dep. at 8-9).

42. Fittings typically comprise a relatively small portion of a Distributor’s business. (Thees, Tr. 3111 (Q: “And I believe you also testified that domestic fittings actually make up a very small percentage of your business?” A: “Of our overall waterworks business, yes.”); JX 705 (Gibbs, Dep. at 12-13); JX 672 (Webb, IHT at 42); JX 652 (Johnson, Dep. at 9-10); JX 661 (Prescott, Dep. at 10-11); JX 703 (Coryn, Dep. at 11-12); JX 669 (Groeniger, Dep. at 13)).

43. McWane’s domestic Fittings line was “not a big portion” of the products sold to HD Supply. (JX 672 (Webb, IHT at 82-83)).

44. Many Distributors are large firms, and some are much larger than the McWane, Sigma, or Star. (Thees, Tr. 3042 (Q: “How many branches does Ferguson have?” A: “Approximately 1300.” Q: “And how many waterworks branches are there within Ferguson Waterworks?” A: “167 as of yesterday.”); McCutcheon, Tr. 2261-2262 (“Q. Who are the largest distributors? A. The top two would be HD Supply and Ferguson Supply. Q. And what's your estimate of their share of the fittings distribution market? A. I would estimate HD to be

somewhere between 30 and 35 percent. I would estimate Ferguson to be somewhere between 15 and 20 percent.”); JX 672 (Webb, IHT at 42-43); JX 663 (Thees, Dep. at 11-14); JX 705 (Gibbs, Dep. at 11-12); JX 675 (Sheley, Dep. at 12-13); JX 652 (Johnson, Dep. at 9-10); JX 661 (Prescott, Dep. at 9-11); JX 650 (Morrison, Dep. at 24-25).

45. HD Supply is the largest waterworks Distributor in terms of sales in the United States, (JSLF ¶ 24), with revenue in 2010 of \$1.6 billion and in 2011 “right at 1.8 billion” dollars. (JX 673 (Webb, Dep. at 13-14)).

46. HD Supply carries as much as \$174,000,000 in inventory at any given time. (JX 673 (Webb, Dep. at 48)). Fittings sales represent about 12 per cent of HD Supply’s waterworks revenue. (JX 672 (Webb, IHT at 42)).

47. HD Supply’s share of the Fittings distribution business in the United States is approximately 28 to 30 per cent, (JX 672 (Webb, IHT at 43), and “garner[s] a certain amount of buying power” because of its large size. (JX 673 (Webb, Dep. at 45-46)).

48. Ferguson is the second largest waterworks Distributor in terms of sales in the United States, (JSLF ¶ 25), with share of the overall waterworks distribution market of “[c]lose to 25 percent.” (JX 663 (Thees, Dep. at 15)).

49. Mr. Webb, of HD Supply, testified that, in the Fittings segment of the waterworks distribution market, Ferguson is roughly the same size as HD Supply. (JX 672 (Webb, IHT at 44-45)).

50. Distributor Dana Kepner carries about \$11 million in inventory at any given time. (JX 652 (Johnson, Dep. at 11)). Fittings represent about 4.5 per cent of Dana Kepner’s annual revenue. (JX 652 (Johnson, Dep. at 9-10)).

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

52. Mr. Sheley testified that, in 2008, Illinois Meter played Fittings suppliers off one another in order to try and negotiate better prices. (Sheley, Tr. 3444-3445 (Q: "In 2008, Mr. Sheley, were you playing suppliers off one another to try and get a better price?" A: "Yes.")).

53. Distributors generally prefer higher fittings prices, because they sell to end users at a mark-up; the same percentage mark-up on a higher priced item will result in greater revenues for the Distributor. (Minamyer, Tr. 3245-3247 (Q: "And why would a customer want its price to be higher?" A: "There's a couple reasons. One is, if you buy something and you mark it up a percentage, the more it costs, the more that that dollar markup becomes."); Tatman, Tr. 567-68 ("Q. And why don't you give us your best understanding of what Mr. McCullough meant by "until there is pricing stability and market share maintenance." A. Well, what I can tell you that I believe that he means is it's normal in the industry to send out a price increase in January, normal. It happens almost every year. What he is saying here is that he's not going to do it. And quite frankly, our customers want us to send out a price increase notice every year. All things being created equal, raising published prices is good for distribution because to them it sets an expectation with their customers over where price is going to be. So when I raise prices 5 or 6 percent in January, they use that with their contractors to say, "Look, I got to raise my prices. Market prices are going up 5 percent." So distributors actually don't like it when you don't send out a price increase notice."); JX 638 (McCullough, IHT at 88); JX 672 (Webb, IHT at 144-146)).

54. Distributors generally prefer higher fittings prices, because declining Fittings prices reduce the value of existing inventory carried by the Distributors. (Minamyer, Tr. 3246

(“And another reason would be that they have existing inventory, and if they buy more material cheaper than they bought that inventory, it devalues that inventory.”)).

55. Star’s Distributor customers were “constantly” telling Mr. Minamyer and his sales team that they wanted price increases. (Minamyer, Tr. 3245-3246 (Q: “Had [Distributor] senior management encouraged you to try and take a price increase?” A: “Constantly.”)).

56. Distributors have the ability to “punish” the Fittings suppliers. (Tatman, Tr. 251-252 (“It would be better for us if we sold direct. However, the distributors have the power in this marketplace. And quite frankly, if I sold direct to a contractor, they would punish me, take the business away from us. So there's no distributors in the room, but, you know, it's a little bit of an extortion business.”)).

F. Fittings Pricing

1. List Prices and Multipliers

57. McWane publishes its list price for its Fittings on the Tyler/Union web site. (JX 644 (Tatman, Dep. at 15)).

58. Historically, Fittings suppliers have published list price increases once per year, or once every couple of years. (Tatman, Tr. 256-257 (Q: “And you didn’t do that very often, changed that list price?” A: “No. We did one in 2007. We did one in 2009, which was a very large restructuring of how we were going to price in 209. And then I’ve done one in 2011.”)).

59. List price changes usually occur during the first quarter of a calendar year. (Sheley, Tr. 3422 (“A list price change typically comes in the first quarter in the form of new price sheets for your catalog.”), 3436-3437 (Q: “Okay. And either a new list will be published, which you said is generally around the first of the year?” A:” Yes.”)).

60. McWane publishes different multipliers, in every region and state, for its domestic and non-domestic (“blended”) Fittings. (Tatman, Tr. 258-259 (“Q. And so McWane's customers don't pay list price; they typically pay a multiplier? A. Nobody pays list price. I mean, if you look at it, your published list price and your published multipliers, what that establishes is the absolute highest price you could ever sell something for. You're never going to be able to sell lower than that. That's the absolute highest you could ever sell it for. And then the discounting starts from there and starts going way down. Q. You refer, sir, to the list times multiplier as the published price; is that right? A. I would say that if you take our list price and a published multiplier for a geographic region, that would establish published pricing. So to just give an example of that, you have a list price and you have the state of North Carolina has a published multiplier of .25. Then we would say that what the customer would do is he would take the list price, multiply every list price by .25, and he would say that is your published pricing.”); Tatman, Tr. 262-263 (“Q. McWane publishes a map with its multipliers? A. We do not publish a map of our multipliers. We have an internal map of our multipliers. And our larger national customers ask us to send that to them because it's easier for them to put the pieces together than have to look at every individual state. We do not send out publicly a national map. We send out a letter to each individual region or regions that have common pricing. But as you've seen through my documents, a picture of the country, all the states and a multiplier for every state, that's an internal document, internal document only. It will get into the hands of large customers that are nationals because they ask for it.”) & RX 410; CX 0165; CX 1181; CX 1655; CX 1665; (JX 643 (Tatman, IHT at 32-34); JX 637 (Jansen, Dep. at 265-267)).

61. Virtually no Fittings customer pays list price for Fittings. (JX 639 (McCullough, Dep. at 170); McCutcheon, Tr. 2269 (Q: “Does Star's customers pay list price?” A: “No, sir.”);

Rybacki, Tr. 1096-1097 (“List price” means you set a price for a product that customers will put in a – you know, we have a book. We have a price book with the list prices for everybody to have a standard price to look at, and then we offer a multiplier or a discount off of the list price. A list price is just a gauge to go by.”)

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

63. A multiplier is “one way to discount off of the published list price.” (McCutcheon, Tr. 2269 (Q: “And can you explain what a multiplier is?” A: “Yes, sir. It's -- a multiplier is a -- one way to discount off of the published list price.”)

64. 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 (Q: “And there's a cost associated with publishing a new catalog and sending it out to your customers?” A: “There is. And you know, you've got the cost of developing it internally. You've got the cost of printing it. Then you have the cost of mailing it.” Q: “And you previously estimated those costs at about \$30,000 for the cost of printing and mailing?” A: “I've said -- well, I think when I say 25 or 30 thousand dollars, that's total cost, including the internal burden of doing that, the cost of printing and cost of mailing, and that's an estimate. I don't have an exact number on that. But it's not -- it's not -- let's agree it's not \$2,000. It's something of significance.”); JX 644 (Tatman, Dep. at 43-46); Rybacki, Tr. 3542 (“The list prices are expensive to do and if -- a multiplier increase is easier, but way less effective.”)).

65. 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 their published list prices are the same. (Tatman, Tr. 258

“Customers like things easy, and so customers, all things being equal, would prefer that there's one list price so when someone is quoting a job and they're just quoting a multiplier, it's a published 25, I'll give you 21, the other guy comes in and says, I'll give you 20, he knows what the price differential is there. If everybody had different list prices, he'd have to throw everything in a spreadsheet and figure out who had the better price.”); McCutcheon, Tr. 2527-2528 (Q: “And tell us why, in your view, customers expected you to have the same published prices as McWane.” A: “The -- for the most part, every project order is a negotiation, an auction, between the fitting manufacturers. And the customers wanted to be able to get a discount or a multiplier from the manufacturers that they could apply to the same published list and published multiplier so they would know where they were on the same starting point, so they didn't have to independently analyze each manufacturer's bid.”), 2271 (“The customer requires that we give them a similar list price, if not the same, similar published multiplier, if not the same, so they can more quickly analyze the net transactional prices and discounts that we give the distributor/wholesaler.”); JX 694 (Bhutada, Dep. at 101-102)). (Tatman, Tr. 257-258 (Q: “And your customers want it that way as well?” A: “Customers like things easy, and so customers, all things being equal, would prefer that there's one list price so when someone is quoting a job and they're just quoting a multiplier, it's a published 25, I'll give you 21, the other guy comes in and says, I'll give you 20, he knows what the price differential is there. If everybody had different list prices, he'd have to throw everything in a spreadsheet and figure out who had the better price.”); McCutcheon, Tr. 2271 (“The customer requires that we give them a similar list price, if not the same, similar published multiplier, if not the same, so they can more quickly analyze the net transactional prices and discounts that we give the distributor/wholesaler.”), 2527-2528 (Q: “And tell us why, in your view, customers expected you to have the same published prices as

McWane.” A: “The -- for the most part, every project order is a negotiation, an auction, between the fitting manufacturers. And the customers wanted to be able to get a discount or a multiplier from the manufacturers that they could apply to the same published list and published multiplier so they would know where they were on the same starting point, so they didn't have to independently analyze each manufacturer's bid.”); JX 694 (Bhutada, Dep. at 101-102)).

66. Fittings suppliers typically announce multiplier changes to their customers by letter. (Sheley, Tr. 3437 (Q: “Or a multiplier change letter will go out; correct?” A: “That's correct.”)).

2. Job Pricing and Other Price Concessions

67. 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, freight concessions, cash discounts, extended payment terms, cash-backs, corporate rebates, and branch rebates. (Tatman, Tr. 257-260 (Q: “But you sell some of your fittings at published prices, don't you, sir?” A: “We do. But then you also have to understand, when we sell at the published price, we turn around and give a rebate to that customer. We turn around and give them discounts for paying on time. We give them the freight allowances going on there. We've got all other sort of incentives, so I'm not netting in price. Even if I sell at the published price, that's not what I put in our coffers. I put something significantly lower than that in there.”); JX 644 (Tatman, Dep. at 15-17)).

68. “Job prices,” “special prices,” or “project prices” are further discounts off the published multiplier. (JX 643 (Tatman, IHT at 37-38) (“A job price is just a discount off published. If it's the State of Texas the published multiplier is a .29 and the customer calls up and says, Look, I need a .25; I need a .23, if we give that to him, that's going to be a job price.”)).

69. Job-pricing is a standard practice in the Fittings market. (JX 639 (McCullough, Dep. at 189-190)). As Mr. McCullough testified, "Everything is bought off of a job price." (JX 638 (McCullough, IHT at 220); Rybacki, Tr. 1101-1108 (Q: "Who has -- who has the authority at Sigma to approve a job price?" A: "Our regional managers to some extent, and ultimately it lies with me."); (McCutcheon, Tr. 2271-72 (Q: "Does Star offer discounts off its published multipliers?" A: "Yes." Q: "And is there a term you use for offering a multiplier discount off the published multiplier?" ... A. " A. Special Price."))).

70. A salesman often will convey a job price verbally to a customer, and then provide the customer with a copy of a written proposal or quotation. (Sheley, Tr. 3437 (Q: "And for example, job prices, someone would tell you about that verbally; right?" A: "They would tell us verbally, and we would get a copy of the proposal or of a quotation."))).

71. Star offers customers discounts off its published multipliers; at Star, such a discount is often referred to as a "special price." (McCutcheon, Tr. 2271-72 (Q: "Does Star offer discounts off its published multipliers?" A: "Yes." Q: "And is there a term you use for offering a multiplier discount off the published multiplier?" ... A. " A. Special Price."))).

72. Mr. McCutcheon testified that Star's internal processes for approving a special price for a customer are called a special pricing request - "SPR" - or a "a pink, like the color." (McCutcheon, Tr. 2273 (Q: "And is there a name for the form that's used -- that was used in 2007 and 2008 within Star for this approval process?" A: "Yes, sir. There's a couple of names. One of them is an SPR, a special pricing request. And the other one, internally we call it a pink, like the color."))).

73. Mr. McCutcheon testified that Star also offers a discount called a "buy plan," which is "a negotiated price with a distributor/wholesaler that's their everyday purchase price. It's not necessarily attached to a project." (McCutcheon, Tr. 2274).

74. List prices, multipliers, and job pricing represent only three of many points of price competition. (Tatman, Tr. 1017-1019 ("A: "...discounts in here, changes in freight terms, quarterly rebates, annual rebates, branch-level rebates. There's -- when they showed that price waterfall, this is only what is charged at invoice, not all the other discounts that happen." "So when you say a distributor has locked in a lower price here, he may in the end get even a lower price effectively because of rebates or other --" A: "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 ■ percent cash discount, we'll give you ■. 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."); Minamy, Tr. 3266-3267 ("Q: Okay. Were there other components of price other than the list and the multiplier and special pricing? A: There are other components of the whole deal. Q: I'm sorry? A: There are other components of the entire deal that we had with a customer, yes. Q: Did sometimes while you were national sales manager would you adjust payment terms on occasion? A: Yes. Q: How about freight allowances? A: Yes. Q: Are you familiar with branch rebates? A: Yes. Q: Okay. Would those be sometimes adjusted? A: Yes. Q: All right. Rebates to corporate. A: That was all part of the total deal. Q: And those were all different price terms that could be adjusted all to arrive at a final bottom transactional price? A: That's correct."); McCutcheon, Tr. 2509-2510 ("Q: And does that include lowering prices when you think it's necessary to win the business at times? A: Yes, sir. Q: Does that include pricing below your published multipliers at times? A: Yes, sir. Q: Does

that include offering rebates at times? A: Yes, sir. Q: Does that include offering to absorb freight expenses at times? A: Yes, sir. Q: Does that include other types of price concessions, extension of credit terms, for example? A: Yes, sir. Q: Cash discounts at times? A: Yes, sir.”).

75. McWane, Sigma, and Star provide additional discounts and price concessions to Distributors in the form of rebates, reductions in freight charges, and/or extensions of credit or payment terms. (JSLF ¶ 16).

76. Fittings suppliers try to outbid one another by offering customers more favorable payment terms, early payment discounts, cash discounts, freight discounts, discounts for larger shipments, rebates, and other concessions. (Tatman, Tr. 1017-1019 (“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 ■ percent cash discount, we'll give you ■. 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.”); Minamyer, Tr. 3266-3269 (Q: “And those were all different price terms that could be adjusted all to arrive at a final bottom transactional price?” A: “That's correct.” Q: “Okay. And in fact, those are price components that you did adjust on occasion in the 2007-2008 time frame; correct?” A: “Yes.”) & RX 79; McCutcheon, Tr. 2509-2510 (“The -- and I'll speak for the fitting industry as opposed to the waterworks industry. But in the fittings industry, it's very competitive. It's driven on project and daily pricing. And there may be attempts by people to change price lists, multipliers, et cetera, but the reality of it is we -- well, I can only speak for Star. We do what we think we need to do every day to try to take the order.”)).

77. Mr. McCutcheon testified that “90 to 95% of our [Star's] net realized prices to the customer have some type of discount variable to it.” (McCutcheon, Tr. 2509-2510 (Q: “And did

you continue at Star to provide all those different types of price concessions throughout your tenure with the company?" A: "Yes, sir. I think -- just to try to ball it up, I think 90 to 95 percent of our net realized prices to the customer have some type of discount variable to it. The reason I bring that up is to make the point that it is -- that is the standard way Star Pipe does business.")).

78. Mr. Bhutada testified that, when the various forms of price concessions are taken into account, a Fittings supplier's "net price is all over the map," (JX 694 (Bhutada, Dep. at 17-18)), and that there are "too many" price concessions which ultimately determine the net price of Fittings. (JX 694 (Bhutada, Dep. at 111)).

79. Mr. Tatman testified that it is difficult to assess the bottom line impact of an adjustment of one pricing variable without also assessing changes in other variables in what he refers to as the pricing "waterfall." (Tatman, Tr. 571 (Q: "So to the extent that you lost market share, it was because of pricing?" A: "That's one element and we talked about pricing. There's a price waterfall, but there's twelve different steps of pricing, so I don't know for sure.")).

II. McWane Charted Its Own Course in Winter 2008 and Did Not Follow SIGMA and Star

80. At all relevant times, Fittings importers' production costs have been lower than McWane's. (JX 642 (Page, Dep. at 112)).

81. By late 2007, Sigma and Star each had Fittings sales forces that were approximately twice as large as McWane's sales force of 8-10 persons. (Tatman, Tr. 269-270 ("I mean, we have a sales force. And what we talk about is our sales force at this time was half the size of our competitors. We had half the number of boots on the ground than what Star had and what Sigma had."), 281-282 (Q: "And I think you mentioned earlier that McWane's sales force was about half the size of its competitors; is that right? A: "Yes. Roughly." Q: "And you're not combining your competitors here. In other words, Star had a sales force that was twice the

size of McWane's?" A: "Yes." Q: "And Sigma had a sales force that was twice the size of McWane's?" A: "Yes."), 1025 ("In any organization, if we have eight or ten salespeople, we've got good ones and we've got not so good ones.").

82. McWane's smaller sales force inhibited its ability to detect and respond to project-specific price competition in the field. (Tatman, Tr. 281-283 ("It was harder for us to get visibility into where the true competitive level was."), 285-286 (Q: "And so you have a hard -- McWane has a hard time competing in that market when you don't know where to aim, where to shoot?" A: "A. That was our perception, and we'd obviously been getting beat for several years."), 342 (Q: "And when you say you didn't know where to shoot, that's because the prices weren't stable?" A: "Small sales force, not able to pick up information there, didn't have a good feel for really where the competitive market was, shooting in the dark.")).

83. Sigma's and Star's larger sales forces gave them a competitive advantage over McWane, because they were better able to offer additional discounts off published multipliers to customers on a job-by-job basis. (Tatman, Tr. 281-283 (Q: "And I think you indicated that as a result of having, as you put it, less boots on the ground, it was harder to work in a market where the prices weren't stable?" A: "It was harder for us to get visibility into where the true competitive level was."), 285-286 (Q: "And one of the ways you were getting beat at the game was through this evolution into job pricing; is that right?" A: "Job pricing would raise the spread naturally between what's published and where the actual floor is. And when that spread gets bigger, I lose track of what's going on because I have a lot less data points than my competitors do because I have a smaller field sales force covering larger territories. And it's the old rule. I don't know where to aim if I can't see it. I don't know where to shoot."), 342 ("Historically, we had lost share year over year. We had made the assumption, based on the information that we

had available to us, our own internal data, that we were losing share because we were getting beat at the pricing game, because we didn't know where to shoot.”)).

84. Beginning in 2007, demand for Fittings was falling because of the economic downturn and decreased demand for new housing. (Tatman, Tr. 269 (“So, again, when you have a marketplace that has plummeted, I think, if you look at 2006 and then you look at 2010, the market volume is half of what it was in 2006. It was decimated. That changes a lot of behavior. It changes a lot of competitive dynamics.”), 271-272 (Q: “And it hastened in 2007 as the market got worse?” A: “The market was worse in '7 than '6. It was in '8 than '7. It was worse in '9 than '8. And it was worse in '10 than '9”); McCutcheon, Tr. 2654 (Q: “Do you recall the global financial crisis really going in -- really hitting full steam in about September of 2008?” A: “Yes, sir, I recall that.” Q: “Okay. Did your business suffer to some -- suffer a drop-off as well in the fourth quarter of 2008?” A: “Yes, sir.”)).

85. 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. (JX 642 (Page, Dep. at 165-167)).

86. 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. (Tatman, Tr. 214-215 (Q: “And what issues did you inherit from Mr. Green?” A: “I think one of the -- my perception -- again, I wasn't privy to the exact reasons David was let go, but the perception I had was that one of the main reasons he got let go was runaway inventory levels;” Tatman, Tr. 214-215 (“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.”).

87. McWane's chief financial officer advised Mr. Tatman that he should address the excess inventory problem before it became "his problem" rather than his predecessor's. (Tatman, Tr. 215 (“I also distinctly remember Charlie Nowlin, is our CFO corporate. Charlie is a good guy. And his advice to me was -- and this is a kind of good old boy's advice, and he said, Rick, just let me tell you something. He said, For the first couple years that inventory was David's problem. After that, it's your problem.”)).

88. Mr. Tatman's main concern in late 2007 was to increase McWane's sales volume in order to reduce excess inventory. (Tatman, Tr. 215-216 (“So I was very fixated on getting that inventory down.”), 340 (“That will be a by-product, but my primary concern at this point in time, given the threefold inventory situation, given what I inherited, given my CFO's advice to me, was I got a volume problem, and my financial problem, if you look at our records, was clearly tied towards volume. It was not what we were selling it for. We were not selling enough.”)).

89. Mr. Tatman was more concerned about volume than price, because increased volume was needed to justify keeping McWane's foundries open. (Tatman, Tr. 215 (“Also because, if you look at 2007, we've got two manufacturing facilities. They're running three days a week of production, so there's no work for the other two days of the week. They're running single shifts. And I think in 2007 we booked \$7 million of idle plant. When we don't run our facilities, we consider that idle plant, so it doesn't affect what we show as our manufacturing cost in our financials. It goes on a separate line in the income statement as idle plant. But essentially we burned \$7 million that year, 2007, not operating our facilities, at the same time we're swimming in inventory.”), 340 (Q: “You were looking to improve the profitability of McWane's

fittings business at this point in time?” A: “If you look at this point in time, I'm really looking for volume.”, 347 (Q: “And when you say ‘pressure on volume,’ can you explain what that means.” A: “Well, the marketplace is tanking. We went through that yesterday. And I need volume. My competitors need volume. Everybody needs volume. So essentially our -- what bullet number 1 says, inflation is going up and prices are not keeping pace with inflation because we're all grabbing -- we're all more concerned about volume than price. Or I shouldn't say -- at least I'm more concerned about volume than price, but that's a general statement for me.”)).

90. Mr. Tatman did not believe it was possible for McWane to increase sales volume while at the same time increase its prices, as desired by Mr. Tatman's boss, Mr. Walton--a philosophical disagreement that led to a series of internal “brainstorming sessions” during December 2007 among Messrs. Tatman and Walton, and McWane's executive vice president over the Fittings business, Mr. Leon McCullough. (Tatman, Tr. 345-346 (“We were brainstorming on how to competitively react to what was going on in the marketplace.”), 1069-1071 (“What I'm saying down below that Mr. McCullough will understand is that you are still going to have to job-price, because if you only go to bullet 3, which Thomas would want, it 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, number one. Number two is, the only way that's going to work is if your competitors stop doing it. And you have no control over that, sir. I can't do that. Number three is, you would need your customers to change their complete behavior from what they're doing and stop asking you for a better price, and you'd have to meet with them face to face. And do you think Mr. McCullough, who runs the valve and hydrant business with these customers and has a long history of sales, would think that's a great

idea, Rick, let's run around to our 250 customers, let's sit down and have a face-to-face meeting with them and let's tell them they should never ask us for another better price. Fourth, you've got three primary people here and then you've got four, five, six other ones. It's like herding cats. So if you look at that bottom portion and you look at the audience and you look what I'm trying to say, it's bullet 3. That's the primary strategy I want, but, Mr. Walton, if you think that's the only thing we're going to be able to do, you're crazy because our competitors are going to keep job-pricing and we're going to have to keep job-pricing, so I hope that solves the mystery.”) & CX 627).

91. In late 2007, Mr. Tatman prepared a series of PowerPoint slides (CX 627) for an internal “brainstorming” session with his bosses. (Tatman, Tr. 345-346, 355 (“I don’t see where we have a plan here”), 362-363 (“Actually, no. . . .If you look at our letter that we put out, it has none of these four elements in it, not one”), 1069-1071 & CX 627).

92. Mr. Tatman believed that the escalation of raw material, labor, and shipping costs in China could have a potential silver lining for McWane. (Tatman, Tr. 346-347 & CX 627 (“Due to Domestic Mfg our average [domestic] inflation is well below Sigma and Star’s”).

93. Mr. Tatman’s PowerPoint slides (CX 627) contain his own independent internal analysis and recommendations for improving McWane’s competitive position. (Tatman, Tr. 357-358 (“That's the core of where my thought process was”); CX 627; JX 644 (Tatman, Dep. at 70-72)).

94. Mr. Tatman’s internal brainstorming analysis (CX 627) was kept internal and was never shared with anyone at Sigma or Star. (Tatman, Tr. 1069-1070 (“This is a brainstorming document that was used for a discussion, and the two audience members were [McWane employees] Leon McCullough and Thomas Walton.”).)

95. Mr. Tatman's internal brainstorming analysis was never implemented by McWane. (Tatman, Tr. 363 ("If you look at the letter that we put out, it has none of these four elements in it, not one."))

96. In response to escalating input costs in China, Sigma announced, in an October 23, 2007 letter its customers, that it intended to raise both its list price and published multipliers for its Fittings in January 2008. (Rybacki, Tr. 3661-3662, 3683-3684 (Q: "Now, as I understood your testimony, Mr. Rybacki, this is a letter that you sent to your customers in the fall of 2007, announcing both a multiplier increase and also a list price increase; is that right, sir?" A: "Yes." Q: "And you sent that because of increased costs in raw materials, freight and personnel, et cetera; right?" A: "Yeah. All our costs were going up. Correct." Q: "So that was a decision that you made at Sigma with others at Sigma?" A: "Yes." Q: "Did you talk to anybody at McWane about that?" A: "No.") & CX 2457; Tatman, Tr. 346-347 & CX 627).

97. Mr. Rybacki testified that Sigma did not communicate with anyone at McWane before announcing its 25 percent price increase in December 2007. (Rybacki, Tr. 3684 (Q: "Did you talk to anybody at McWane about that?" A: "No.") & CX 2457).

98. Star sent a letter dated November 30, 2007, to its customers stating that "Star Pipe Products will be publishing a new Price List" for its Fittings "to be effective January 1, 2008." (Minamyer, Tr. 3152-3153 & RX 406).

99. Mr. Tatman recommended internally to his bosses that McWane not follow what was Sigma's proposed 25 percent list price increase, but instead publish a much lower average multiplier increase of approximately 8 percent – less than the amount of inflation. (Tatman, Tr. 215-216, 340, 345-349 (Q: "So what you did pay attention to is you pulled their list price off their Web site and did some calculations based on what those list price represents in terms of

changes?" A. What I did, I believe, is I pulled their list price down. I put it in a spreadsheet. I took a look at what I thought our mix of volume would be. That's all I have. I only know what I'm selling. I don't know what they're selling. And on a weighted average, I said it was a 25 percent increase change, and I'm showing that on the next slide. There's part of an analysis there that I did. Q: And you believed the 25 percent increase would be too high at this point in time?" A: I believe that I couldn't -- I believed if I followed a 25 percent price increase that what I would have is I would lose more visibility into where the competitive environment was. Would I have gotten quite a bit of traction off of that and raised my prices? Yes. But the end result would be that it would be, to me, that I would lose more visibility and I really wouldn't know where the competitive environment was and I wouldn't be able to meet my volume objectives."), 357-361 (Q: Lowering prices against what you were actually charging in the market; is that what you're saying, sir? A: This is -- if you look at what we actually did -- okay -- so you look at the letter we put out in mid-January and what was the action, I think the net result of that price increase on a weighted average basis was 8 percent. We have a competitor that announced a 25 percent increase with a list price change. What we decided to do is come out with changing multipliers by region as we would normally do. Our effective price increase for us, the way we sell and the mix we sell, was 8 percent. That is less than inflation. We're not recovering inflation with that move. And it is certainly less than a 25 percent increase. So this action that we took -- the action that we took in January came out of this initial discussion and other discussions that followed, and the end result of that is, compared to where a competitor's price was, we lowered it and we didn't recover inflation. Q: But compared to your then existing prices, you raised prices by 8 percent; is that right, sir? A: If we -- we have to look at the multiplier map that we have there. I'm going from memory. I think our weighted average increase was 8 percent. But on a relative

basis, we were offering significantly lower prices than what our competitors were offering”), 379 & CX 627, 882-884 (“I believe at that point in time -- oh, I think Sigma had announced a list price change that when we analyzed it was about a 25 percent increase. So Sigma had announced a 25 percent increase with a change in published, and we put that -- actually they announced a letter that said around 6 percent or up to 16 percent, and when we analyzed it, we viewed it as 25 percent. And in the face of a competitor taking their list prices up 20 percent, we've elected to change multipliers, maintain our list, and we're giving a target of 8 to 10, and I think -- or 10 to 12, and I think we actually came out with 8.”).

100. McWane did not follow Sigma's proposed list price increase, but instead sent its customers a letter dated January 11, 2008, stating that McWane would adjust its multipliers effective February 18, 2008. (Tatman, Tr. 882, 884, 892-893; CX 1178/RX 591; Pais, Tr. 2055-2056 (Q: “And in fact they did not follow; correct?” A: “Sadly so.”); Rybacki, Tr. 1114-1115 (Q: “What are you conveying to your customers in this letter?” A: “That one of our competitors did not increase their list prices, and as a result, we will not increase ours.” Q: “And do you remember which one of your competitors did not increase their list prices at this point in time?” A: “I believe it was McWane.”), 1126-1127 (Q: “So you say in this letter, on that point, the key word -- well, let me read a sentence before that. "When one of our competitors chose not to have a list price increase but rather have a multiplier increase" -- is that a reference to the McWane -- what McWane did and what we saw in your prior letter?” A: “Yes.”), 3623-3624 (Q: “And in this letter in the second paragraph, you say, "Unfortunately for you and us one of our competitors in the fitting industry 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 us." Is that a reference to McWane not following the list price increase?” A: “Yes.”)).

101. Mr. Tatman recommended that McWane announce in its January 11, 2008 customer letter an intention to reduce job pricing, but in fact continue to offer its customers job pricing, favorable payment terms, early payment discounts, cash discounts, freight discounts, discounts for larger shipments, rebates, and other price concessions. (Tatman, Tr. 893-894 (“And what you see here is it's our intention in going forward to sell products only off newly published multipliers. Well, we all knew internally that we would have -- to meet our objectives, we would have to job-price. But it is self-serving for us, based on what we were doing, is to do a head fake that we were not going to and then do as we see or was as appropriate, and you will see in our records we job-priced continually.”) & CX 1178, 930-931 (Q: “Did you ever stop job-pricing?” A: “No.”), 934-935 (Q: “And so that means there are others out there that are not recorded here?” A: “This obviously doesn't include anything like discounted freight terms, discounted cash rebates. It doesn't account for branch-level rebates. It doesn't account for changes in your other corporate-level rebate programs.”), 1017-1019 (Q: “So when you say a distributor has locked in a lower price here, he may in the end get even a lower price effectively because of rebates or other --“ A: “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 ■ percent cash discount, we'll give you ■. 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).

102. McWane's January 2008 multiplier adjustment resulted in actual reductions of McWane's published multipliers, vis-à-vis its 2007 multipliers, in 28 states and no change to prices in another 8 states. (Tatman, Tr. 885 & CX 1664; see also Normann, Tr. 4778 (“It gives -- so what this shows is July 2007 to the first multiplier, new multiplier map of 2008, and you'll see

-- I think I touched on some of this already -- but, for example, that first time period when the allegations are of price increases, 28 states, McWane lowered the multiplier in 28 states, and 8 states it was unchanged, so, again, very inconsistent with allegations of price increases.”).

103. Mr. Tatman believed that, although adopting a lower multiplier increase rather than following Sigma’s lead would not help McWane to recoup as much of its own rising production costs or keep up with inflation, it was nevertheless in McWane’s best economic interest and would increase McWane’s sales volumes and reduce inventory. (Tatman, Tr. 346-349 (“I believed if I followed a 25 percent price increase that what I would have is I would lose more visibility into where the competitive environment was. Would I have gotten quite a bit of traction off of that and raised my prices? Yes. But the end result would be that it would be, to me, that I would lose more visibility and I really wouldn't know where the competitive environment was and I wouldn't be able to meet my volume objectives.”), 359-361 (“I could only control what I do. I can't control what my competitors do. I -- it's procompetitive for me to not let prices run away so that I can't see where the competitive environment is, so I'm going to take actions that are procompetitive for myself. And if you look at doing this, it was not the smartest move to gain short-term price, if that was my primary directive. This is an action clearly gained at driving volume and driving share because I'm not even recovering inflation with what I actually did.”), 379 & CX 627).

104. Mr. Tatman believed that if Star and Sigma chose not to follow McWane’s lower multiplier increase, McWane would be able to immediately increase sales volume with its price advantage, (Tatman, Tr. 346-349, 359-361, 379 & CX 627), and if Star and Sigma decided to follow McWane’s smaller price increase, they would have less “headroom” to undercut McWane with job pricing, given their rising input costs. (Tatman, Tr. 346-349, 356 (“This is an action

clearly gained at driving volume and driving share because I'm not even recovering inflation with what I actually did."), 359-361, 379 & CX 627).

105. Mr. Tatman's hope was that, by narrowing the range, or "headroom," within which Star and Sigma could maneuver to undercut McWane on price in the field, McWane could gain better visibility of the "competitive level" - the true market price - and therefore compete more effectively on price, even with its smaller sales force. (Tatman, Tr. 346-349 (Q: "And that would be because you wouldn't have that compression between where the prices should be and where the prices are based on published." A: "Yes. If this is a 25 percent price increase, and the end result is real prices go up 15 percent, and we're already 10 percent instability, well, I get 15 percent in my pocket. That's good. But now the gap is 20 percent between where it used to be and now. So to me, all this is going to do, I'm going to get price out of this thing more than likely I could assume, but it's going to create for me a more unstable environment. I'm not going to be able to see where the competitive market is, and it's going to make it more difficult for me to meet my primary objective, which is share and volume." Q: "So it was going to give your competitors more headroom for discounting, in other words." A: "That would be in our perception."), 359-361 (Q: "And that pricing plan was designed to reduce job pricing in the market; is that right, sir?" A: "It was designed to put financial pressure on a competitor, which is procompetitive, so that we could get better visibility into what was going on in the marketplace. It was reducing the wiggle room that they had from a financial standpoint so that I could see what was going on. If I can see it, I can shoot it." Q: "When you say reduce -- better visibility and reduce wiggle room, that's another way of saying reduce their project pricing, their job pricing; is that right, sir?" A: "Or other mechanism. If a customer 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.”), 379 (Q: “What do you mean by ‘competitive level’? A: “That's where is the actual market selling at. 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.”) & CX 627).

106. Because McWane's January 11, 2008 multiplier increase was not large enough to cover inflation and increased production costs, Mr. Tatman's hope was that the range within which Star and Sigma could profitably job price in the field would narrow, improving McWane's ability to compete for projects with its smaller and less nimble sales force. (Tatman, Tr. 345-349 (“So if you're looking there, we did not recover, 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.”), 357-361 (“Basically what we're trying -- we've gotten beat for years. We're just trying to change, play on a different playing field, hide our weaknesses, play to our strengths, get greater visibility to what's going on there because we feel we can't see it.”), 379, 1069-1071 (“...you would need your customers to change their complete behavior from what they're doing and stop asking you for a better price, and you'd have to meet with them face to face.”) & CX 627, CX 1178).

107. Mr. Tatman hoped that McWane, by announcing in its January 11, 2008 customer letter a purported intent to eliminate job pricing, might lull (or “head fake”) Star and Sigma into temporarily reducing their job pricing; meanwhile, he intended for McWane to continue job pricing, recapture lost market share, and ultimately solve its acute inventory problem. (Tatman,

Tr. 893-894 (“And what you see here is it's our intention in going forward to sell products only off newly published multipliers. Well, we all knew internally that we would have -- to meet our objectives, we would have to job-price. But it is self-serving for us, based on what we were doing, is to do a head fake that we were not going to and then do as we see or was as appropriate, and you will see in our records we job-priced continually.”); CX 1178; (Tatman, Tr. 386 (“Well, if you go back to what we really wanted to do, you go back to all the documents, we talked about I think ad nauseam about how we wanted to compress pricing, okay, so we could get better visibility. That's all very clear. And then the other thing we wanted to do is we wanted to create quite frankly, the perception that that's the only way we were going to compete. That's a head fake. So that we'd like to compress that and if we got it compressed and we need to offer job pricing to get volume growth, I'll go in and offer job pricing.”)).

108. McWane intended to continue to offer discounts to its customers at other, less visible levels of pricing within what he described as the “pricing waterfall.” (Tatman, Tr. 1017-1019 (Q: “Do the numbers on this document reflect any rebates that would be involved?” A: “No, sir. You don't have cash discounts in here, changes in freight terms, quarterly rebates, annual rebates, branch-level rebates. There's -- when they showed that price waterfall, this is only what is charged at invoice, not all the other discounts that happen.” Q: “So when you say a distributor has locked in a lower price here, he may in the end get even a lower price effectively because of rebates or other --” A: “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 ■ percent cash discount, we'll give you ■. 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.”)).

109. Witnesses from McWane, Sigma, and Star all testified that they mistrusted each other's customer pricing letters. (Tatman, Tr. 306-307 (Q: "And do you use that as an input into your pricing decisions?" A: "I look at those letters, and I read them, and I, quite frankly, don't believe what it says."), 415-416 ("So what I'm saying is, I don't believe it. Wait and see. It would be a typical response when we receive any of this type of information."), 899-901 ("So, you know, like I said, all these time we have competitive inputs that come in from our customers. We take them. We digest them, step back a little bit and try and figure out is it real, can we get confirmation of that, what actually happens."); Rybacki, Tr. 1108-1109 (Q: "When you get them, what do you do with them?" A: "I review it and think about it and try to determine whether they're serious or not serious." Q: "Do you find them to be serious for the most part?" A: "For the most part, not all."), 3559-3560 ("I get my information from the customer. I don't get it from a piece of paper written by a competitor. I get it from my customers. If my customers say my competitors are going up, then I believe it; if they don't, I don't believe it."); Minamyer, Tr. 3240-3242 (Q: "Did you believe pricing letters that you obtained from customers about your competitors' pricing?" A: "I believed only list price change letters." Q: "Okay. You didn't believe letters having to do with multipliers?" A: "No." Q: "Okay. Was that because you had found them in the past while you were national sales manager not to be accurate at times?" A: "That's correct." Q: "And in fact, you'd go so far as to say that a competitor would lie in a pricing letter about a multiplier, wouldn't you?" A: "I didn't really trust anything they put out referring to multipliers."), 3241 ("Q. Okay. You didn't believe letters having to do with multipliers? A. No. Q. Okay. Was that because you had found them in the past while you were national sales manager not to be accurate at times? A. That's correct. Q. And in fact, you'd go so far as to say that a competitor would lie in a pricing letter about a multiplier, wouldn't you? A. I didn't really

trust anything they put out referring to multipliers.”); McCutcheon, Tr. 2507-2509 (Q: “And you don't necessarily trust what's being conveyed on a letter like this, do you, sir?” A: “No, sir. That's correct.”)).

110. After seeing McWane's January 11, 2008 customer letter, Mr. McCutcheon testified that he did not believe “for one second” that McWane was actually going to stop job pricing. (McCutcheon, Tr. 2386-2387 (“Q: But do you read the letter to say that McWane is done job-pricing. A: I read the letter that that's what they're saying. You're mashing the two things together. And I think we're given the wrong impression. Is this what I thought Jerry Jansen meant in his letter? Yeah, that's what I thought he meant. Did I believe that that's what was going to happen? Not for one second. Two very different things.”); CX 1178; McCutcheon, Tr. 2507-08 (Q: “Why do you not necessarily trust these customer -- these competitor letters when you get them from customers? “ A: “Because they're competitors, and the fittings market is very competitive, and occasionally in the industry, not just in the fitting industry, this kind of letter is -- is a very regular -- or an increase or a price change letter happens on a regular basis, and I just don't take a whole lot of stock into what the competition puts in a letter.”)).

111. Mr. McCutcheon testified that it was “the norm” for a competitor to announce one thing in a customer pricing letter, but actually do something quite different. (McCutcheon, Tr. 2509 (Q: “Have you -- in your experience, Mr. McCutcheon, have you seen examples where one competitor or another has announced something in a letter and then you hear through the grapevine from customers they're actually doing something quite different?” A: “Yes, sir. That's the norm.”)).

112. Mr. Rybacki testified: “I get my information from the customer. I don't get it from a piece of paper written by a competitor. I get it from my customers. If my customers say

my competitors are going up, then I believe it; if they don't, I don't believe it.” (Rybacki, Tr. 3559); Rybacki, Tr. 3508 (“nobody trusted anybody in the industry.”)

113. Mr. Rybacki testified that “it was always a tremendous case of mistrust between Victor, Siddharth and Ramesh always.” (Rybacki, Tr. 3566 (“Because there's such a mistrust amongst the group as a whole anyway”), 3595-3596 (Q: “And at what point in those discussions did you and Mr. McCutcheon decide that you would be the point of contact for Sigma?” A: “He just told me one time -- I can't -- I have no specific -- he just said that Victor and Ramesh were oil and water and nothing was ever going to get done.” Q: “And do you remember what year that decision took place in?” A: “No. I don't specifically recall when that -- but it was always -- it was always a tremendous case of mistrust between Victor, Siddharth and Ramesh always.”)).

114. Matt Minamyler, Star's national sales manager, instructed his sales team to obtain competitors' pricing letters when possible. (Minamyler, Tr. 3240 (Q: “Okay. Now, I think you said you -- you instructed your sales team to try and gather pricing letters when they were available; is that correct?” A: “Yes.”)).

115. Star considered competitors' customer pricing letters as marketplace information, along with many other competitive inputs. (Minamyler, Tr. 3240 (Q: “Okay. And that was a competitive input that you considered?” A: “Yes.” Q: “And that was one input among lots of inputs that you considered; correct?” A: “That's correct.”)).

116. Mr. Minamyler testified that “I didn't really trust anything they [Star's competitors] put out referring to multipliers.” (Minamyler, Tr. 3241).

117. Mr. Minamyler testified that Star based its pricing on feedback it received from customers with respect to what was happening in the market. (Minamyler, Tr. 3241-3242 (Q.:

“Okay. You believed on feedback from your customers about what was happening in the market; correct?” A: “That's what we based our decisions on.”).

118. Witnesses for Sigma and Star testified that McWane did not discuss its early 2008 multiplier changes with either Competitor before implementing it. (Rybacki, Tr. 3693 (Q: “Did you ever call anyone at McWane and discuss that with them?” A: “No.”), 3693 (“Q. All right. And I take it you didn’t have any advanced knowledge since you’re all wondering what they’re doing, let’s analyze it; right, sir? A. Correct.”); & RX 23; Pais, Tr. 2058-2059 (Q: “All right. But did anyone at McWane send it directly to you, sir?” A: “Oh, no. No.”) & CX 1145, 2060 (Q: “And that's because, again, you never discussed with anyone at McWane the multipliers it was going to issue; correct, sir?” A: “No. Never.”); Minamyler, Tr. 3242 (Q: “And you don't have any advanced knowledge of what those letters are going to say, do you?” A: “I don't remember ever getting any advance knowledge on this.”) & CX 752; McCutcheon, Tr. 2506-2507 (Q: “And at no time did anyone from McWane provide this to you ahead of time; right, sir?” A: “That's correct.”) & CX 38).

119. On January 29, 2008, Sigma rescinded the list price increase it had proposed in its October 23, 2007 customer letter, and instead independently chose to selectively follow McWane’s January 2008 multiplier adjustments, to the extent those adjustments exceeded its then prevailing multipliers. (Rybacki, Tr. 1114-1115 (Q: “What are you conveying to your customers in this letter?” A: “That one of our competitors did not increase their list prices, and as a result, we will not increase ours.”), 1124-1127 (Q: “So you say in this letter, on that point, the key word -- well, let me read a sentence before that. ‘When one of our competitors chose not to have a list price increase but rather have a multiplier increase’ -- is that a reference to the McWane -- what McWane did and what we saw in your prior letter?” A: “Yes.” Q: “And you

go -- you say 'we decided to follow suit.' Are you following McWane there?" A: "They're the leader and we follow the leader." Q: "So do I understand correctly that you followed them up, the McWane multipliers up but not down?" A: "We could not afford to follow them down.") & CX 1189, CX 2455).

120. Mr. Pais testified that Sigma was "at liberty" to price however it chose: "So we have sold at higher prices than our competition, and we have sold at lower prices than our competition. There was no one size fits all. Prices in our product range and our business is very dynamic, and as I said last time, it's like stock prices on Nasdaq. They varied day to day and order to order, especially in the last four, five years." (Pais, Tr. 1907); (Pais, Tr. 2045 ("Q: All right. So we've got one, two, three decisions on published pricing by McWane, all to keep their prices, published prices, lower than Sigma's; correct, sir? A: Yes."), 2044 (Q: "You do recall, sir, that Sigma announced a very large list price increase in the fall of '07 which McWane did not follow; right?" A: "We tried to introduce, and I remember, yeah, they did not follow, yes."), 2055-2056 (Q: "And in fact they did not follow; correct?" A: "Sadly so."), 2080-2081 (Q: "All right. Now, were you hoping that my client and other companies would follow it?" A: "I certainly hoped." Q: "But they didn't, did they, sir?" A: "No, they didn't." Q: "All right. In fact, my client didn't follow this at all; right?" A: "Not at all.")).

121. Sigma considered McWane's announced multipliers to be "discouraging" and lower than even Sigma's existing discounted job prices in some areas. (CX 1145; Pais, Tr. 2059-2061 ("Q. So you say: When we compare apples to apples, Tyler's new multipliers do not provide much of an improvement in many territories, with reasonable improvement in just--one, two, three, four, five, six, seven and parts of Texas--seven states and parts of Texas; is that right, sir? A. Yes. Q. But only marginal or no improvement in many territories, like Ohio, Arizona,

Florida,; right, sir? A. Yes. Q. And even a lower in some, like Maryland and Idaho? A. That's correct."), 2061 ("Q. The last paragraph on that first page, you found these multipliers by Tyler discouraging; right, sir? A. Yes.".)

122. Mr. Rybacki testified that Sigma followed some of McWane's early 2008 multiplier adjustments, but not the ones that resulted in a net drop below Sigma's existing published multipliers. (Rybacki, Tr. 1126-1127 (Q: "So do I understand correctly that you followed them up, the McWane multipliers up but not down?" A: "We could not afford to follow them down." Q: "And down would be lower than your --" A: "Published multipliers."), 3694-3697 (Q: "And so when you analyzed McWane's multipliers in the beginning of 2008, you saw that some of them were in fact well below Sigma's multipliers at the time; right, sir?" A: "Correct." Q: "Now, you say you're almost -- your new multipliers will be in effect for almost every territory, and that's because you did not actually follow all of the multipliers that McWane sent out, did you, sir?" A: "We did not." Q: "So you selectively followed the ones you thought made sense to Sigma, and you disregarded the ones that you thought did not make sense, sir?" A: "That's correct." Q. And you made those decisions internally at Sigma? A. Right. Q. And you never talked to anybody about--McWane about any of those decisions, did you, sir? A. None, no."), 3690 ("Q. All right. And did you discuss--by the way when you got that letter, did you--at Sigma did somebody evaluate that letter? Trying to figure out what Tyler was doing with its multipliers? A. Yes"); 3692-3693 ("Q. Once you got that, did you and Mr. Fox and the others discuss let's analyze that an figure out what Tyler is doing with its multipliers? A. Yes"); 3695 ("Q. The multipliers were much lower than the list price that you'd sent out. A. Yes.".)

123. Star learned about McWane's early 2008 multiplier adjustments only after the fact, and from its customers. (McCutcheon, Tr. 2506-07 ("Q. All right. And this is a copy [of

Tyler/Union's price announcement in January 11, 2008] that you at Star obtained from a customer after the fact after it was announced; correct, sir? A. Yes, sir. Q. And at no time did anyone from McWane provide this to you ahead of time; right sure? A. That's correct.").

124. Mr. Minamyer testified that Star did not receive any advance knowledge of what McWane's customer letters would say; instead, Star would wait to see what McWane was going to do and "react" once McWane's customer letters "hit the streets." (Minamyer, Tr. 3242 (Q: "All right. I understand, as of January 22, 2008, Mr. Minamyer, that you say Tyler multiplier letters are hitting the streets. Correct?" A: "That's correct." Q: "And you don't have any advanced knowledge of what those letters are going to say, do you?" A: "I don't remember ever getting any advance knowledge on this." Q: "In fact I think you say, 'We need to be able to react quickly'; correct?" A: "Yes.") & CX 752).

125. On January 22, 2008, Mr. Minamyer sent an email to Star's sales team instructing them how to react to McWane's new multipliers. (CX 752 ("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.").)

126. Mr. Bhargava testified that Star did not always match McWane's multipliers. (Bhargava, Tr. 1098 (Q: "And in general do your multipliers match those for McWane and Star?" a: "It doesn't work out that way. No. I mean, you know, you're trying to get ballpark, but it doesn't work out that way.)).

127. In early February 2008, Star rescinded the list price change it had proposed in its November 30, 2007 customer letter, and instead independently chose to selectively follow McWane's adjustments, at least in part. (Minamyer, Tr. 3155-3158, 3190 (Q: "And you write, 'Our plan is to adjust multipliers to be on an even playing field on up-front pricing with our

competitors.’ ‘Evening playing field,’ that’s a reference to your multipliers?” A: “Yes, sir.” Q: “And was ‘up-front pricing’ a reference to the standard list times published multiplier?” A: “Yes, sir.”) & CX 2300).

III. McWane Charted Its Own Course In Spring 2008 With Lower Published Multipliers Than SIGMA and Star

128. Sigma attempted a large price increase in April 2008. (RX 47). Mr. Pais characterized this effort as “BIG BOLD MOVES (BBM, baby!).” (RX 47; see also Pais, Tr. 2044-2045, 2080 (Q: “All right. You say it’s time for big bold moves, baby -- “BBM, baby,” is that your phrase for your proposal at Sigma to increase multipliers?” A: “Yes.”) & CX 1138).

129. Sigma sent its customers a letter dated April 24, 2008, announcing a significant price increase for its Fittings. (Pais, Tr. 1963 (Q: “Sir, is CX 1858 the letter Sigma sent out to its customers on April 24, 2008 announcing its price increase?” A: “It surely seems that way.”) & CX 1858; Rybacki, Tr. 3571 (Q: “And you had a price increase that we saw earlier that was effective May 19. Did you keep that effective date of May 19 in light of the fact that Tyler wasn’t going to go up until June 16 at the earliest?” A: “Our regions have flexibility, and when they saw that Tyler was not following, I believe that the regional managers just kept pricing at the old -- old levels.”), 3710-3711 (Q: “Now, Mr. Rybacki, you were asked some questions about this, and if I understand your testimony, if we go to the next page, this is a letter that you sent to customers, and it’s got your signature down at the bottom on April 24, 2008, announcing a multiplier increase by Sigma; correct, sir?” A: “Yes.”) & CX 1858).

130. Sigma’s April 24, 2008 customer letter proposed a multiplier increase of up to ten points, equal to a price increase of approximately 25 to 30 percent, depending on the geographic region. (Rybacki, Tr. 3710-3711 (Q: “All right. And the big bold move, as we see in this second paragraph, is a multiplier increase up to ten multiplier points, depending on your region; right,

sir?" A: "Correct." Q: "And ten multiplier points is a fairly large increase that's somewhere in the range of a 30 percent increase; right?" A: "25 to 30, correct.") & CX 1858).

131. 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. (Minamyer, Tr. 3209 & CX 819).

132. Sigma did not discuss its April 24, 2008 price increase with anyone at McWane. (Rybacki, Tr. 3708 (Q: "Did you discuss it with anybody at McWane, sir?" A: "Never"), 3710-3711 (Q: "And the reason -- you were not doing this because of any discussion and agreement with anyone at McWane, were you, sir?" A: "No, I was not."); Pais, Tr. 2080-2081 (Q: "Now, did you call anyone at McWane and say, 'Hey, I got a plan, big bold move. I'm going to increase prices. You guys do it, too'?" A: "No. Never"), 2101-2102 (Q: "And again, just so we're clear on the record, at no time did you ever talk to anybody about McWane -- at McWane about those prices; correct?" A: "Not at all.")).

133. McWane obtained Sigma's April 2008 letter after the fact from a customer. (Tatman, Tr. 488-489; CX 176.)

134. McWane did not follow Sigma's April 24, 2008 price increase. (Pais, Tr. 2080-2081 (Q: "All right. Now, were you hoping that my client [McWane] and other companies would follow it?" A: "I certainly hoped." Q: "But they didn't, did they, sir?" A: "No, they didn't."); Tatman, Tr. 520-522, 958, 954-958 (Q: "All right. So you said Sigma had put out an announcement, and you said you think it was in what percentage, 20 to 40 percent range?" A: "I think when we analyzed it, depending on the product, 20 to 40 or 18 to 40. There's, you know, got to be a spreadsheet from me someplace." Q: "And so yours is significantly smaller, and how much smaller was it, sir?" A: "I think this is around another 8 percent again.") & CX 1576).

135. Mr. Tatman made an independent decision, in light of McWane's steadily declining market share, that McWane should issue a much smaller published multiplier increase than that set forth in Sigma's April 24, 2008 customer letter. (Tatman, Tr. 955-956, 489-491 ("Just as we always do, we get competitive information. We look at it. We speculate what's going on. We make our own internal decisions on what we're going to do, and we act in our own best interest.") & CX 176, 538-540, 954-958 (Q. "All right. So you said Sigma had put out an announcement, and you said you think it was in what percentage, 20 to 40 percent range?" A: "I think when we analyzed it, depending on the product, 20 to 40 or 18 to 40. There's, you know, got to be a spreadsheet from me someplace." Q: "And so yours is significantly smaller, and how much smaller was it, sir?" A: "I think this is around another 8 percent again") & CX 1576).

136. On or about June 17, 2008, McWane announced a smaller multiplier increase of approximately 8 percent on average, about one-third of the increase Sigma and Star had previously announced to their respective customers. (Tatman, Tr. 538-540 ("And if you look at what we had done prior, we had two options, an 8 percent and a 12 percent. The DIFRA data came in. It's like oh, crap, the share loss is worse than we thought. What are we going to do? Let's go with the lower number because we obviously must be getting beat on price again, and so that action actually ends up on a relative basis lowering prices in the industry."), 544 (Q: "And after -- once you received that information, between yourself and Mr. McCullough, you made a decision on price; is that right, sir?" A: "We elected to go with the lower number. Yes.", 954-958 (Q. "All right. So you said Sigma had put out an announcement, and you said you think it was in what percentage, 20 to 40 percent range?" A: "I think when we analyzed it, depending on the product, 20 to 40 or 18 to 40. There's, you know, got to be a spreadsheet from me someplace." Q: "And so yours is significantly smaller, and how much smaller was it, sir?" A: "I think this is

around another 8 percent again.”) & CX 1576); (Schumann, Tr. 4284-4287) (“Q. Okay. Let's go to RX 424. If we go down to that bottom e-mail, Andrew, maybe we can pull that out. This is Mr. Tatman's June 17 quick and dirty analysis of that first DIFRA report; right, sir?... Q. Well, Dr. Schumann, let's start with the multiplier maps. What they did after they got this DIFRA data was send out a multiplier map. We just looked at it. It was lower in every state than Sigma's big bold move which Star had followed; correct? A. The multiplier map that -- it is correct that the multiplier map that McWane began circulating in -- on June 17 had state multipliers that were lower than the multipliers that Sigma had on a map that was never effective as their published multipliers. Q. Now, Dr. Schumann, Mr. Tatman says right here that he believes it will be difficult to get back their share, but he's hoping that with the lower multipliers they're sending out that that will make it possible and make victory all the more sweeter; right? That's what he says right here. A. That's what he says right there.”) On or about June 17, 2008, McWane announced a smaller multiplier increase of approximately 8 percent on average, about one-third of the increase Sigma and Star had previously announced to their respective customers. (Tatman, Tr. 538-540 (“And if you look at what we had done prior, we had two options, an 8 percent and a 12 percent. The DIFRA data came in. It's like oh, crap, the share loss is worse than we thought. What are we going to do? Let's go with the lower number because we obviously must be getting beat on price again, and so that action actually ends up on a relative basis lowering prices in the industry.”), 544 (Q: “And after -- once you received that information, between yourself and Mr. McCullough, you made a decision on price; is that right, sir?” A: “We elected to go with the lower number. Yes.”, 954-958 (Q. “All right. So you said Sigma had put out an announcement, and you said you think it was in what percentage, 20 to 40 percent range?” A: “I think when we analyzed it, depending on the product, 20 to 40 or 18 to 40. There's, you

know, got to be a spreadsheet from me someplace.” Q: “And so yours is significantly smaller, and how much smaller was it, sir?” A: “I think this is around another 8 percent again.”) & CX 1576).

137. Sigma rescinded the price increase it had proposed in its April 24, 2008 customer letter, because McWane did not follow it. (Rybacki, Tr. 3571, 3712-3713 (Q: “My client [McWane] did not increase its multipliers, and Sigma decided to pull back and go back to its prior multipliers from January; right, sir?” A: “Yes, we did. We had to”) & RX 76).

138. Star rescinded its May 2008 price increase in a letter to its customers dated June 27, 2008, following McWane’s smaller multiplier increase. (McCutcheon, Tr. 2424 (Q: “Do you recall that Star put its recently announced -- do you recall whether Star put its recently announced fittings multiplier increase on hold in May of 2008?” A: “I don't recall this specific period, but I do know in the suspect period or subject period there was a time that we were taking a fitting -- attempted to take a fitting increase and we rescinded it. This is probably it. I just don't recall specifically the dates.”), 2448 in camera (Q: “Is this a Star price announcement dated June 27, 2008 for a price increase effective Monday, July 14, 2008?” A: “Yes, sir.” Q: “Was Star following -- was Star matching McWane's price announcement that we saw a couple of moments ago that was also effective on July 14, 2008?” A: “I would assume so.” Q: “You assume so because was that Star's practice at the time?” A: “Yes, sir.”) & CX 2430; Minamyer, Tr. 3217-3218 (Q: “Do you know if these multipliers were the same as the ones McWane was using at that point in time?” A: “I don't know that.” Q: “Would that have been your practice?” A: “Yes.”) & CX 2430).

139. Mr. Rybacki testified that in June 2008, Sigma’s Fittings prices in its Northeast region were higher than McWane’s prices. (Rybacki, Tr. 3572 (Q: “Do you recall any of your

regions having prices that were higher than McWane's –“ A: “Yes. The northeast region, Mike Walsh's region.”)).

140. Dr. Schumann acknowledged that McWane decided not to follow Sigma and Star's large list prices in Winter 2008 or their large multiplier increases in Spring 2008. (Schumann, Tr. 4061-4062 (“Q. I understand, sir. But just so we're clear, those list prices, when McWane did not follow, that's competitive, that's an independent decision, isn't it, sir? A. That-yes, it is. . . .Q. And my client, McWane, did not follow that big multiplier increase; did it, sir? A. No, they did not.”), 4268, 4286, 4167-4169, 4269-4273, 4279-4280.)

IV. McWane, SIGMA, and Star Continued to Provide Job Pricing and Other Price Concessions Throughout 2008

141. Complaint Counsel's expert, Dr. Schumann, concedes that McWane, Sigma, and Star all continued offering job pricing and other forms of customer discounts throughout all of 2008. (Schumann, Tr. 4290-4291 (“So if we look at this waterfall of discounts, job pricing in the third line there, all three companies were offering job pricing throughout 2008; right? A: There was some job pricing offered throughout 2008. Q: All three companies were offering freight concessions, and that's another form of a discount; right, sir? A: I don't recall if all of them were or not. I know McWane was offering freight concessions to certain customers, not to others. Q: And that's a form of a discount; right? A: It can be. Yes. Q: And all three companies were offering rebates to purchasers of imported fittings; right? A: That's the standard. Yes. Q: That's another form of discount; right? A: Pardon me? Yes. Q: Another form of discount? A: Another form of discount. Q: And all three were offering other concessions, extension of credit terms, cash discounts, credit backs, and so forth; right? A: It is correct that there were other terms that were offered.”).)

A. McWane continued aggressively offering price concessions

142. McWane continued to aggressively job price after issuing its January 11, 2008 customer letter and throughout 2008. (Tatman, Tr. 924, 893-894 (“And what you see here is it's our intention in going forward to sell products only off newly published multipliers. Well, we all knew internally that we would have -- to meet our objectives, we would have to job-price. But it is self-serving for us, based on what we were doing, is to do a head fake that we were not going to and then do as we see or was as appropriate, and you will see in our records we job-priced continually.”) & CX 1178, 930-931 (Q: “Did you -- at Tyler/Union did you continue to job-price throughout 2008 as these reports were coming in?” A: “You -- look at a file from us. We've job-priced continually every month.”), 934 & RX 396).

143. Throughout 2008, McWane was engaged in war of survival in a “vicious marketplace.” (Tatman Tr. 974-975 (Q: “Tell us what you -- well, first of all, what's a pricing war, sir?” A: “That's just the competitors in the marketplace slugging it out every day. There's not enough volume and too many people chasing it.” Q: “All right. So were you in fact seeing a pricing war from your perspective in the spring of 2009?” A: “Yes.” Q: “And when had that started, that pricing war, from your perspective?” A: “I don't think it ever ended. I mean, I walked into the fight and the fight kept going. I've never seen it end.” A: “So you're saying it started when you joined Tyler/Union in 2006?” A: “I saw it from the time I came -- David -- David was controlling the pricing at that point in time, but ever since I had any exposure to it, it's just -- it's a vicious marketplace with competitors beating each other up.”)& CX 569).

144. McWane continued to offer both job pricing and a host of other price concessions to its customers throughout 2008, 2009, 2010 and into the present. (Tatman, Tr. 387, 904-905, 907, 909-910, 914-915 & RX 399, 921, 930-931 (Q: “Are you -- are you job-pricing in response

to some of these do you think?" A: "She just said that she did, I gave them a 23, so she's job pricing.") & RX 598, 933-934, 995-998 & RX 396 1071-1072 (Q: "Is that a yes, you continued to job-price or a no, you tried to stop job pricing?" A: "We continued to job-price every stinking month and we've never stopped."); Sheley, Tr. 3445 (Q: "In 2008, was Tyler extremely aggressive in going after jobs?" A: "Yes." Q: "And they did that by offering better pricing, didn't they?" A: "Yes." Q: "They priced below their published multiplier to Illinois Meter?" A: "Yes.")).

145. During 2008 alone, McWane approximately 500 different job prices to its customers. (RX 396 (McWane 2008 price protection log); JX 644 (Tatman, Dep. at 109)).

146. McWane's gross profits on non-domestic Fittings fell by nearly a [REDACTED] in 2008, in part because of job pricing. (Tatman, Tr. 991-994 (Q: "Mr. Tatman, did your gross profit on nondomestic fittings for Tyler/Union decline it looks like by about -- it's not a third, but by a good chunk there in 2008?" A: "Yeah. It went from roughly 37 down to 28." Q: "Is part of the reason your profitability, your gross profit on nondomestics declined because of job pricing?" A: "Yes.") & CX 2416).

147. Mr. Page, McWane's president, testified that job pricing has "always been around and always will be around" in a "commodity business" like Fittings. (JX 642 (Page, Dep. at 156-157)).

148. Mr. Sheley of Illinois Meter testified that in 2008, McWane was extremely aggressive in offering better pricing to go after jobs, (Sheley, Tr. 3445 (Q: "In 2008, was Tyler extremely aggressive in going after jobs?" A: "Yes"), and that McWane priced below its published multiplier on jobs for Illinois Meter. (Sheley, Tr. 3445 ((Q: "They priced below their published multiplier to Illinois Meter?" A: "Yes.")))

149. Mr. Sheley testified that throughout 2008, Illinois Meter was playing Fittings suppliers off one another to try and get a better price. (Sheley, Tr. 3444-3445 (Q: "In 2008, Mr. Sheley, were you playing suppliers off one another to try and get a better price?" A: "Yes.")).

B. Sigma continued aggressively offering price concessions

150. Sigma never stopped or reduced job pricing. (Rybacki, Tr. 1107 (Q: "Was there a special effort that you made in 2008 to reduce job pricing, in other words, job pricing below?" A: "No."), 3715).

151. Mr. Pais testified that in 2008, Sigma had never stopped or reduced job pricing. (Pais, Tr. 2192 (Q: "All right. So you've got job price discounts throughout 2008, sir, that Sigma was offering?" A: "Sure."), 1918 ("pricing was all over the map so - and figures and analysis bears that out."), 2075 (Pricing "varied every day with every customer in every territory.")).

152. Mr. Rybacki testified that Sigma had "[n]o choice but to" offer job discounting throughout 2008. (Rybacki, Tr. 3701 (Q: "And did Sigma continue to offer job discounting throughout 2008, sir?" A: "No choice but to do it.")).

153. Mr. Rybacki received reports from Sigma's regional sales managers reporting that both McWane and Star were job pricing aggressively. (Rybacki, Tr. 3698-3699, 3700-3701; CX 1726.)

154. Mr. Rybacki testified that job pricing has continued unabated in the Fittings market for at least 20 years. (Rybacki, Tr. 3522-3524 ("I joined Sigma in 1990. We tried to do it since 1990, so every month, every week, every year, every day, I try to be consistent and disciplined in pricing, but unfortunately our industry doesn't allow that to happen."), 3658-3659 ("We've failed at this for my twenty years. We've not been able to do this."), 3706-3707 & CX 1002 in camera, 3743).

155. Mr. Rybacki testified that Sigma has been trying unsuccessfully to reduce job pricing for over 20 years, because job pricing reduces Sigma's profit margins, but it has never had any success in doing so. (Rybacki, Tr. 3522-3524, 3658-3659, 3701 & CX 1002 *in camera*), 3522-3524 (Q: "What efforts, if any, did Sigma make in 2008 to reduce project pricing?" A: "Project pricing is an ongoing battle within Sigma, within the industry of -- that goes on all the time on special projects, and it -- we're always trying to curtail project pricing, always have.")).

156. With regard to Sigma's job pricing in 2008, Mr. Rybacki testified: "Q. Well, that's a lot of different prices. Well, this is a summary of all of your '08 prices for the year; is that right? A. Correct. Q. Well, did all these salespeople have some authority to price within a certain area within certain ranges however they needed to get the jobs? A. The regional manager controls the salesmen, but the salesmen all have some latitude, a little, just a little latitude, but they have to prove it by their regional manager, and if it's really off the charts, then the regional manager will call me and I'll say yea or nay. Q. But, Mr. Rybacki, I thought you guys had reined in all the special job pricing. I thought your goal always was to rein it in. Isn't that right, sir? A. That's the goal. Q. But this doesn't look like you're reining it in very well, does it, sir? A. No. We've failed at this for my twenty years. We've not been able to do this. Correct." (Rybacki, Tr. 3658-3659).

157. Sigma did not take any steps to centralize pricing authority or remove pricing authority away from its salespeople in 2008. (Rybacki, Tr. 3696-3697 (Q: "Well, does it say anywhere in here that you're going to centralize pricing authority at Sigma and take away pricing authority from line personnel or salespeople at Sigma?" A: "No.") & CX 1189; JX 687 (Pais, Dep. at 55-56)).

158. Throughout 2008, Sigma's salespeople retained pricing authority and offered job pricing all over the map. (Rybacki, Tr. 3697 (Q: "No. And in fact, we just saw a big spreadsheet in camera -- and don't discuss the details, but we just saw a spreadsheet that shows that at the end of the year, all of your salespeople in every region still had a lot of pricing authority and were pricing all over the map, didn't we, sir?" A: "Correct.") & CX 1189 & CX 1002-4 in camera).

159. As Mr. Rybacki testified: "Q. And in fact, again, so we're clear on the record, job pricing at Sigma continued throughout this period in every region with every salesperson, didn't it, sir? A. It did." (Rybacki, Tr. 3715).

C. Star continued aggressively offering price concessions

160. Star in 2008 was facing rising production costs in China. (McCutcheon, Tr. 2516-2518 (Q: "Were you seeing a material cost increase at the time or a trivial cost increase?" A: "A material.")).

161. If Star could limit job pricing, it would make more money. (Minamyer, Tr. 3246-3247 (Q: "And you believed that taking a price increase and attempting to limit project pricing was in Star's best interest, didn't you?" A: "If it worked, we would make more money, so yes.")).

162. In an attempt to minimize the impact of its rising production costs, Star made an independent decision to try to reduce its job pricing - or at least more effectively document the need for job pricing to meet and beat competitors' bids. (McCutcheon, Tr. 2516-2520, 2522-2523).

163. Mr. Minamyer testified that in January 2008, Star's independent "goal" was to take a price increase and to stop project pricing unless there was documentation of competitors offering project pricing or a buy plan that was lower than the published multiplier. (CX 752; Minamyer, Tr. 3242-3244 (Q: "Why would you typically take a price increase? Was margin

erosion be one of the reasons, do you recall?” A: “At Star specifically, we took price increases when we followed Tyler.” Q: “ Okay. You followed Tyler, and that was Star's history while you were national sales manager?” A: “That's correct.” Q: “Okay. And so your plan was not to stop entirely, it was to stop unless you had correct documentation; correct?” A: “That -- that was the plan, yes.” Q: “And correct documentation would be, I think you testified, some indication that a competitor was pricing below a published price; correct?” A: “Yes. We would like to get it in writing.”).

164. When Star announced a price increase, Mr. Minamyer “hoped” his competitors would stop job pricing. (Minamyer, Tr. 3162, 3253-3254 (Q: “And then I think you testified that you -- earlier that you hoped your competitors would follow and not price below published multipliers; correct?” A: “That's correct.”)).

165. Mr. Minamyer understood that a price increase would not hold if Star or any of its competitors undercut the price increase with project pricing.

Q. Okay. You understand, again, if you want to take a price increase, you can't then project-price below it and have that price increase stick; correct?

A. That's correct.

Q. Okay. And again, you reiterate, if you document that the competition is not holding, then you need to do the same thing; correct?

A. Correct.

Q. And so, again, you've hoping, you're wishing, you're wanting. You want the competition [to charge published prices and not project price] because you want the higher price, right?

A. Correct.

Q. Okay. But you don't know that's what they're going to do; correct?

A. That's correct.

Q. And if they don't, if the competition doesn't take the higher price, if they project-price, then Star has to as well; right?

A. That's correct. (Minamyer, Tr. 3256-3257).

166. Star's independent attempt to reduce its job pricing was not successful, as reflected in the job prices it offered throughout 2008. (McCutcheon, Tr. 2689-2690, 2540-2541 (Q: "And it sounded like from your testimony yesterday that the company continued to offer a lot of job price discounts in 2008." A: "Yes, sir."); 2547-2548 (Q: "All right. Now, you had said yesterday that the company provided lots and lots of job prices during 2008; is that right?" A: "Yes, sir.") & RX 557, 2550-2551 (Q: "All right. So the report you requested in July of 2011, and it contains a report of the pinks from 2008 final; right, sir?" A: "Yes, sir."), 2553-2554 (Q: "All right. So am I right, Mr. McCutcheon, did I understand your testimony correctly yesterday that the company had job pricing and special prices throughout 2008; right?" A: "Yes, sir."); Minamyer, Tr. 3174-3175 (Q: "Was Star successful at reducing project pricing for a period in time?" A: "To my recollection, no."), 3274-3275 (Q: "And you were matching lowering prices below the published multiplier frequently; correct?" A: "I believe so."), 3277-3278 (Q: "Okay. And I know you don't -- this has been some years ago and you don't have specific recollection, but what were the competitive conditions in 2008? What do you remember about that time frame?" A: "I remember that everything -- the market was always very competitive. We -- we had to fight pretty hard for every order.")).

167. Star did not cease or curtail job pricing in 2008. (McCutcheon, Tr. 2512). In fact, Star's special pricing requests, or SPRs, actually *increased* in 2008. (McCutcheon, Tr. 2402-2403) ("And we've been looking at SPRs [special pricing requests] ever since this thing happened. Since we were accused of price fixing, we've gone back and looked at our SPRs, and

we figured out that during this whole process that we were accused of price-fixing, our SPRs went up, 20 percent. And that's bizarre to us, that we could be accused of price fixing in a period that SPRs go up 20%.”).

168. Mr. McCutcheon asked Star's national sales manager, Mr. Minamyler, to make sure that the sales force provided proper documentation for special pricing requests: “Q: So you'll continue project pricing. You'd just like to see some documentation; right? A: Yes, sir.” (McCutcheon, Tr. 2517)

169. Star's documentation procedures for special pricing requests had been in existence long before January 2008. (McCutcheon, Tr. 2519 (“Q: And if I understood you yesterday, you said this process of requiring documentation before Star gives a job price was in place actually a year before. A: Yes, sir. Q: And was that a process that was essentially something Star people were always supposed to follow? A: Yes, sir. It was our procedure for at least ten years prior. Q: All right. So this was not a change in your procedure at all, was it? A: The change--it was not a change in the procedure. It was a change in monitoring it and managing it.”).).

170. Star continued offering job pricing and other price concessions to its customers throughout 2008, 2009, 2010 and up through the present. (McCutcheon, Tr. 2553-54 (“Q: “Do you see where I am, sir? January '08 267, February of '08 300, and so forth, down to the year end 2,669?” A: “Yes, sir.” Q: “Is that data that you saw in summary form?” A: “Yes, sir. I believe I got four years running with that information that's in the far right-hand column, that exact information in totals.” Q: “All right. So am I right, Mr. McCutcheon, did I understand your testimony correctly yesterday that the company had job pricing and special prices throughout 2008; right?” A: “Yes, sir.” Q: “And throughout 2009; right?” A: “Yes, sir.” Q: “And continuing

to 2010?" A: "Yes, sir." Q: "And continuing to today?" A: "Yes, sir."); Minamyers, Tr. 3265 (Q: "So again, in May of 2008, Star would continue to project-price under the right circumstances, and that would be to meet competition; correct?" A: "That's correct."), 3275 (Q: "And you were matching lowering prices below the published multiplier frequently; correct?" A: "I believe so.)).

171. Star did not enter into any agreement with Sigma or McWane to stop offering price concessions to its customers. (Q: "And did you at any time have any agreement to stop doing any of those things, any of those price concessions?" A: "No, sir.)).

172. Star continued to offer job pricing at a rate of a couple hundred per month in 2008. (Minamyers, Tr. 3251-3252 (Q: "Do you recall getting 10 to 15 pinks a day?" A: "I recall getting a lot of pinks routinely." Q: "Okay. And that works out on business days to a couple hundred a month. Is that consistent with your recollection?" A: "Yes.") & CX 815; McCutcheon, Tr. 2512 (Q: "That was not a fact. You did not stop pricing in -- job pricing in 2008, did you, sir?" A: "No, sir.)).

173. Star priced job-priced whenever it needed to get business in 2008. (Minamyers, Tr. 3277-3278) ("Q. And you had a plan that you would try and limit job pricing, but we've seen that really didn't play out either, did it? A. Right . . . Q. Okay. And Star job-priced whenever it needed to job price in 2008 to get business, didn't it? A. Yes.)).

174. By February 2008, Mr. Minamyers reported that he was receiving 10 to 15 requests per day for pricing below the published multipliers from his sales team (internally referred to at Star as "pinks"). (CX 815; Minamyers, Tr. 3252 (Q: "Do you recall getting 10 to 15 pinks a day?" A: "I recall getting a lot of pinks routinely." Q: "Okay. And that works out

on business days to a couple hundred a month. Is that consistent with your recollection?" A: "Yes.")).

175. Most of the several hundred requests per month were without documentation, but Mr. Minamyer approved them anyway. (Minamyer, Tr. 3255).

176. Star observed that its competitors were routinely offering job pricing and offering other concessions to win business from McWane and Sigma. Minamyer, Tr. 3275 (Q. And so in this e-mail [CX 831], if you continue in the second paragraph, you indicate that you've documented the competition selling under our multipliers in almost every market with varying strategies; correct? A. Yes . . . Q. Would the varying strategies refer to things other than job prices? A. Yeah. That would include the terms and loss leaders and whatever other tricky things they could come up with."); Minamyer, Tr. 3255 (Q: "Okay. And this is receiving pinks without justification; correct?" A: "That's what I'm talking about here. Yes.")).

177. By late November 2008, it was clear to Mr. Minamyer that the market was not accepting Star's desired price increases and that Star's competitors had continued to project price below the published multipliers. (Minamyer, Tr. 3274 (Q: "Okay. And you had told us I guess back in January that your plan was to stop project pricing unless you had documentation. How did the plan work out?" A: "Well, reading different e-mails, I come out it looks like it was working on our part but maybe not in the market. The market wasn't really accepting the increase.") & CX 831).

178. Mr. Minamyer testified that the Fittings market "was always very competitive. We – we had to fight pretty hard for every order." (Minamyer, Tr. 3277-3278)

179. Star's CEO, Mr. Bhutada, testified that job pricing was always the norm in the Fittings market, including in 2008. (JX 694 (Bhutada, Dep. at 18-19)).

180. Mr. McCutcheon testified that, during 2008, Fittings prices were falling, and “Every project required special pricing it seemed. It seemed like it was a -- projects were all auctioned, all the fitting manufacturers were bidding them, and there was just no consistency to our pricing.”). (McCutcheon, Tr. 2568).

181. Mr. McCutcheon described Fittings pricing in the second half of 2008 as “chaotic.” (McCutcheon, Tr. 2568 (Q: “And I think I heard you testify yesterday that pricing was chaotic at this point. Did I get that right?” A: “Yes, sir.”)).

182. Dr. Schumann admitted that McWane, Sigma and Star all offered job price discounts and other price concessions, including rebates, freight absorption, and credit extension, throughout 2008. (Schumann, Tr. 4287:21-4288:1 (“yes, there was job pricing during 2008”), 4288:23-4289:1 (“I believe they did offer job pricing throughout 2008”), 4290:3-13.) He also admitted that he ignored McWane and Star spreadsheets and other documents recording each company’s job discounts. (Schumann, Tr. 4082:3-11, 4084:16-4086:6 (“Well, I meant I didn’t consider it”), 4086:21-4087:3 (“No, I did not”), 4090:3-9, 4091:9-23 (“No, I did not discuss this”).)

D. McWane’s Actual Invoice Prices for Non-domestic Fittings Declined Relative to Inflation in 2008

183. McWane’s non-domestic Fittings prices for 2008 declined relative to inflation, because its non-domestic production costs rose by roughly [REDACTED] (Tatman, Tr. 860-862 (Q: “So your costs went up for imported fittings roughly [REDACTED] in 2008 and your price only went up roughly [REDACTED] percent; is that what that says?” A: “Yes.” Q: “Why were your -- why were your prices lagging inflation by so much, sir?” A: “Well, we kind of spent a couple of days beating that around. We had a -- an issue where we needed volume. We wanted market share, and the volume and the share was more important to us than recovering price, and we made an

internal strategic decision to act procompetitively and on a relative basis compress prices downward in the industry, trying to get volume.”), 856, 859 (Q: “Now, you mentioned this. As I read it, your gross profit in 2008 was █████ percent on your utility fittings, your imported fittings, down from roughly █████ percent in 2007; is that right?” A: “Yes, sir.” Q: “And it looks like your costs went up quite substantially; is that what that is?” A: “They went up █████. -- yeah. Almost █████ percent.”)-861 (Q: “Now, we see that your prices don't come close to keeping pace with inflation; is that what this shows?” A: “Yes. Yes.”), CX 2416.)

184. During 2008, McWane’s Fittings unit continued to lose market share, failed to solve its excessive inventory problem, was forced to shut down its Tyler South Plant, and ultimately suffered a poor financial year. (Tatman, Tr. 562-563 (“And if you read this, 2008 was not a good year for me. I started with hope and intention of being able to change the game and make myself more competitive and to get my volume back, and it looks like I failed miserably.”), 967-968 (“From a competitive environment, I went out and I tried to get volume, I tried to get share, and I tried to change my tactics to get that, and basically I got hammered again, I got beat up and I lost share. So this is a little bit of a cold dose of reality, is our situation is not going to get any better in the foreseeable future. We can't keep having two plants limp along, spending idle plant. I don't see the world converting back to domestic specs. I don't see a reason why McWane would ever need 70,000 tons of domestic manufacturing capacity in two facilities. And as painful as it sounds, you know, the decision here, what I'm recommending, is to have a bunch of good people lose their jobs because I can't give them the business to support it.” ... Q: “Okay. And what does that mean in practical terms? Did you have to shut down the facility after this?” A: “Yeah.” Q: “And roughly how many people had to lose their jobs, sir?” A: “Sorry. A couple hundred.”)

185. In 2008, McWane's non-domestic Fittings prices fell relative to inflation, due to spiking raw materials costs. (Tatman, Tr. 970-971 (Q: "All right. And then price, it looks like although you had just tried to keep pace with inflation, you're actually lagging inflation; is that right?" A: "Yes. We went through the blue book yesterday on that.") & RX 616).

186. In 2008, McWane's Fittings unit lost market share to its competitors. (Tatman, Tr. 971 (Q: "All right. And you say your share -- I guess your share is down at this point in 2008?" A: "And that's eight points, so that's a -- that's a lot of percent movement.") & RX 616; JX 644 (Tatman, Dep. at 19-20)).

187. McWane's margins and gross profits on non-domestic Fittings declined in 2008. (Tatman, Tr. 992-994 (Q: "All right. So the only thing we can tell is that you didn't keep pace with inflation and your gross margin declined from [REDACTED] percent for nondomestics?" A: "Yes." Q: "Is part of the reason your profitability, your gross profit on nondomestics declined because of job pricing?" A: "Yes."); RX 631).

188. McWane closed its Tyler South Plant and laid off hundreds of workers in November 2008. (Tatman, Tr. 967-968 (Q: "Okay. And what does that mean in practical terms? Did you have to shut down the facility after this?" A: "Yeah." Q: "And roughly how many people had to lose their jobs, sir?" A: "Sorry. A couple hundred.") & RX 616).

189. Dr. Normann testified: "And what we see is we see a general trend--I mean, there's a little bouncing around here and there, but McWane's prices decline for essentially a multiple-year period, which is happening before and after and also during the alleged conspiracy period, and that to me is inconsistent, as a factual matter, with the allegations." (Normann, Tr. 4789)

190. Dr. Normann testified “that even during the alleged collusive period, the prices for [McWane’s] imports were lower by the end of the time period compared to domestic than they were at the beginning, and that again is evidence inconsistent and rejects the notion of a conspiracy to raise prices on the imported side.” (Normann, Tr. 5021 in camera)

V. There Is No Evidence of Advance Price Discussions or Agreements

A. Complaint Counsel and Dr. Schumann Concede That There is No Direct Evidence of Advance Price Discussions or Agreements

191. Complaint Counsel concedes that it lacks evidence “that McWane directly communicated its prices to any other DIWF manufacturer or supplier in advance of communicating them to its customers or potential customers.” (See CRFA No. 19).

192. Complaint Counsel’s expert, Dr. Laurence Schumann, conceded that there were no express agreements or meetings between McWane, Sigma, and Star to fix prices. (Schumann, Tr. 3847 “No . . . I don’t happen to believe that the parties, as I said in my deposition, they met in some smoke-filled room and hammered out some sort of an agreement on who would charge what for what or who would win what bid.”), 4171-4173 (“And as I said, there was no meeting in a smoke-filled room, at least not that I’m aware of. . . . “I have not found anything to suggest that executives at Sigma and Star and McWane met in a specific place and had a meeting to hammer out some sort of agreement.”); Schumann, Tr. 4265 (“Q. Dr. Schumann, I’ll be very clear about this. There is no document that Mr. Pais wrote in January of 2008 that talks about being of one mind with McWane on further price increases later in 2008, is there, sir? A. I would say literally that is true.”).

B. Star and Sigma learned about McWane’s 2008 multiplier adjustments from their own customers after the fact

193. Sigma and Star learned about McWane’s pricing changes only after the fact, and from their own customers. (Rybacki, Tr. 3559-3560 (“I get my information from the customer. I

don't get it from a piece of paper written by a competitor. I get it from my customers.”); Minamyer, Tr. 3148 (Q: “When you were at Star, when you were the national sales manager, how would you learn if one of your competitors had changed its pricing?” A: “We would ask the customers.”); Pais, Tr. 2049-2050 (Q: “All right. Now -- and I think I heard you, but you tell me, sir, that you typically would find out the prices of what another company had announced in the market from customers after they were announced; is that right, sir?” A: “Always.”), 2058-2060 (Q: “And did somebody send them directly to you, sir?” A: “It's pretty customary, whenever a competitor sends a letter, the customers would provide a copy to us and then someone would send it to a team through electronic --“)).

194. Star did not receive any advance notice of McWane's multiplier changes. (McCutcheon, Tr. 2511 (Q: “And that's because Star Pipe had no advanced knowledge of what those prices were, did it, sir?” A: “No, sir.”).).

195. Sigma learned about McWane's and Star's pricing decisions only after the fact, and from its own customers. Pais, Tr. 2049-2050 (Q. All right. Now – and I think I heard you, but you tell me, sir, that you typically would find out the prices of what another company had announced in the market from customers after they were announced; is that right, sir? A. Always.”).)

196. Mr. Rybacki testified that 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).

197. McWane learned about Sigma's and Star's pricing decisions only after the fact, and from its own customers. (Tatman, Tr. 306 (Q: “From time to time, sir, when your competitors announce a price action through a letter, do you get copies of those letters?” A: “We

do. And it usually comes through a customer. And sometimes we pick them up in a day. Sometimes it's two weeks till we know what's going on.”)).

VI. The Trial Record Contains Dozens of Sworn Denials of Any Advance Price Discussions or Agreements

A. McWane Denied Advance Price Discussions or Agreements

198. McWane’s Vice President and General Manager, Rick Tatman, testified at trial that he priced independently at all times, and did not discuss his January or June 2008 multipliers (or his April 2009 list prices or his June 2010 multipliers) with anyone from Star or Sigma. (Tatman, Tr. 978). Instead, McWane decided those prices independently and internally and issued them on its own. (Tatman, Tr. 363-364 (“Q. You never spoke to your competitors? A. I’ve never had a pricing discussion with a competitor. Q. You’ve never once talked a competitor about their prices or your prices in the marketplace; is that your testimony? A. I said I’ve never had a pricing discussion with a competitor.”).)

199. Mr. Tatman testified that he never had any advance price discussions with anyone at Sigma or Star and that McWane never entered into any agreement with Sigma or Star to fix prices. (Tatman, Tr. 924 (“No.”), 1005-1006 (“Q: Mr. Tatman, did you -- at all times, 2008, 2009, 2010, did you make independent decisions on your list price? A: Always. Q: Published multipliers, sir? A: Always independent. Q: So you had independent decisions on your list price you said? A: Yes. Q: Multipliers? A: Yes. Q: Job price discounts, sir? A: Yes. Q: Freight concessions? A: Yes. Q: Other price concessions? A: There’s a big bucket there. Yes. Q: All right. Rebates? A: Yes. Q: And at any time did you discuss and agree with anyone from Sigma and Star -- A: No. Q: -- that you would stop doing any of this? A: No.”), 978 (Q: “All right. And do you take that, the fruits of your labor, and did you give it to

Star and Sigma in advance?" A: "No." Q: "Made an independent decision, sir?" A: "Independent decision.").

200. Mr. Tatman testified that he "always" made "independent decisions" on list prices, multipliers, rebates, job pricing, other price concessions, and "never" discussed prices with his competitors. (Tatman, Tr. 978, 1005-1006.)

B. Sigma Denied Advance Price Discussions or Agreements

201. Sigma's Vice President of Sales, Larry Rybacki, likewise testified that he "never" discussed Fittings prices or reached an agreement of any kind with anyone at McWane, including Mr. Tatman, Mr. Jansen, Mr. Frank, or Mr. Page. (Rybacki, Tr. 3649-3651 ("Never." ... "Never." ... "No." ... "No."), 3659 "No, I did not."), 3682-3683 ("Never." ... "No." ... "No." "No." ... "No."), 1115-1116 (Q: Did you speak to anybody at McWane about that?" A: "No.").

202. Mr. Rybacki denied entering into any agreement with McWane to stop or reduce job pricing. (Rybacki, Tr. 3661 ("Never.")).

203. Mr. Rybacki testified that he never discussed Fittings prices with anyone at McWane, including Mr. Tatman, Mr. Jansen, Mr. Frank, or Mr. Page. (Rybacki, Tr. 3649-3651 ("Never." ... "Never." ... "No." ... "No."), 3659 "No, I did not."), 3682-3683 ("Never." ... "No." ... "No." "No." ... "No." "No." ... "No.").

204. Mr. Rybacki of Sigma had no price related discussions with McWane before making any of the price decisions for Sigma. (Rybacki, Tr. 3683-3684 ("Q: And did you ever discuss and agree upon fittings prices with Mr. Page? A: "No. Q: And what about Jerry Jansen? Did you discuss and agree upon fittings prices with Mr. Jansen? A: No. Q: "But at no time did you call anyone at McWane and say, 'Hey, we're going to stop job pricing in Florida or California or anywhere else,' did you, sir? A: Never did.... Q: Mr. Rybacki, at some point in here did you call up someone at McWane and say, 'Hey, guys, let's call the dogs off, let's

just all stop all this kind of crazy job pricing and let's raise prices together?' A: Never....Q: Did you -- sometime around June 10, 2010, did you ever discuss this letter or Sigma's idea with anyone at McWane, sir? A: Never discussed it with McWane. Q: Did you have any communications at all with anyone at McWane in June of 2010 about pricing? A: Absolutely not."); (Rybacki, Tr. 3716-3722, 3693 (Q: "Did you ever call anyone at McWane and discuss that with them?" A: "No."), 3708 (Q: "Did you discuss it with anybody at McWane, sir? A: "Never.")).

205. Mr. Rybacki denied receiving any advance knowledge regarding McWane's prices. (Rybacki, Tr. 3683 (Q: "Now, the fact is, Mr. Rybacki, that you did not have advanced knowledge of any decision that McWane was making with regard to its prices, did you, sir?" A: "No.")).

206. Mr. Rybacki testified that Sigma's prices and McWane's prices "are never really the same" because of all of the pricing variables that exist, including rebates. (Rybacki, Tr. 3576 (Q: "Was it Sigma's intent to also go up the same amount?" A: "That's a hard question because our prices are not the same. I mean, their rebates are different than ours. Their terms are different than ours. So when you say "the same," our prices are really never the same. But I wanted to go up and I wanted to be consistent.")).

207. Mr. Brakefield denied entering into any agreement with McWane to fix prices. (Brakefield, Tr. 1333-1334 ("No, sir."), 1337 ("No, sir." ... "No, sir.")).

208. Victor Pais, Sigma's President and CEO, testified repeatedly that he "absolutely" "never" had any pricing discussions with anyone from McWane. (Pais, Tr. 2028 ("No, I did not."), 2035 ("No, we didn't."), 2080 ("No. Never."), 2102 ("Not at all."), 2130-2131 ("No." ... "None.")).

209. Mr. Pais also specifically denied coming to any agreements with McWane regarding the January 2008, June 2008, and June 2010 multipliers. (Pais, Tr. 2045-2048 (“Absolutely not.” ... “Never.” ... “Not at all.” ... “Never.”).)

210. Mr. Pais denied having any advance knowledge of McWane’s pricing decisions. (Pais, Tr: 2060 (Q: “Did you know in advance what those multipliers were going to be?” A: “No.”)).

C. Star Denied Advance Price Discussions or Agreements

211. Mr. McCutcheon denied entering into any agreement with McWane to fix prices. (McCutcheon, Tr. 2524-2525 (“No, sir.” ... “No, sir.” ... “No, sir.” ... “No, sir.” ... “No, sir.” ... “No, sir.” ...)).

212. Dan McCutcheon testified that he never called anyone at McWane about agreeing to raise prices. (McCutcheon, Tr. 2516 (“Q: . . . did you call anyone at McWane and say, “Hey, guys, let’s all agree to raise prices together”? A: No, sir.)).

213. Mr. McCutcheon specifically testified that he never discussed or agreed upon fittings prices with Mr. Page, Mr. McCullough, Mr. Walton, Mr. Tatman, Mr. Jansen, or anyone else at McWane – at any time. (McCutcheon, Tr. 2524-25).

214. Mr. McCutcheon denied entering into any agreement with McWane to stop or reduce job pricing. (McCutcheon, Tr. 2554 (“No, sir.”), 2689-2690 (“No, sir.”)).

215. Mr. McCutcheon denied any agreement to centralize pricing authority:

Q: Now, Mr. McCutcheon, did you call up anyone from McWane or Sigma and say: Hey, this is what I’m doing, I’m asking McCutcheon to get more firsthand involved in this--or Mr. Minamyer to get more firsthand involved in this?

A: No, sir. (McCutcheon, Tr. 2519-2520).

216. Mr. Minamyer denied entering into any agreement with McWane to fix prices or reduce job pricing. (Minamyer, Tr. 3238-3240 (“No, sir.” ... “No, sir.” ... “No, sir.” ... “No, sir.” ...)).

...“No, sir.” ...“No, sir.” ... “Never.” ...”No, sir.” ... “No, sir ” ... “No.”), 3278 (Q: “And you didn’t have any agreements with Tyler/Union; correct?” A: “That’s correct” Q: “On any prices; correct?” A: “Correct.” Q: “On any job pricing; correct?” A: “Correct.” Q: “On anything you did?” A: “I had no agreements with Tyler.”).).

217. Matt Minamyler from Star similarly had no conversations with anyone at McWane concerning Star’s proposed 2007 list price or multiplier changes. (Minamyler, Tr. 3238-3239 (“No, sir.” ... “No, sir.”)).

218. Mr. Minamyler also testified that he had no conversations with anyone at McWane concerning Star’s Spring, 2008 proposed multiplier increase. (Minamyler, Tr. 3239 (“No, sir.”)).

219. Mr. Minamyler denied having any advance knowledge of McWane’s pricing decisions. (Minamyler, Tr. 3253-3254 (Q: “Did you have any knowledge as to what they were going to do? Did you know what they were going to do with certainty?” A: “No. The only thing we knew what they said they would do is by their letters.”).).

220. Mr. Minamyler never discussed job pricing with anyone at McWane or had any agreements concerning job pricing. (Minamyler, Tr. 3239 (“No, sir.”); see also Minamyler, Tr. 3240 (not aware of anyone else at Star having conversations or agreement with anyone at McWane regarding list or multiplier changes or job pricing (“No, sir.” ... “No, sir.” ... “No.”)).

221. Mr. Minamyler had no conversations with anyone at McWane concerning Star’s Spring, 2008 proposed multiplier increase. (Minamyler, Tr. 3239 (“No, sir.”)).

222. Mr. Bhargava denied discussing prices with anyone at McWane. (Bhargava, Tr: 3027 (Q: “Are you aware, Mr. Bhargava, of anyone at Star at any time who’s had any discussions with anybody at McWane about pricing?” A: “I’m not aware of it.”).).

VII. The Deposition and Investigational Hearings Testimony Contains Hundreds of Sworn Denials of Any Advance Price Discussions or Agreements

A. McWane Denied Advance Price Discussions or Agreements

223. Rick Tatman testified at length that McWane made its pricing decisions independently at all times. (Tatman, Tr. 978; JX 644 (Tatman, Dep. at 138-139) (“independent decision”); JX 643 (Tatman, IHT at 108-109. (“an independent decision”)).

224. Jerry Jansen, McWane’s National Sales Manager, likewise testified that McWane has always made pricing decisions independently. (JX 637 (Jansen Dep. at 271)).

B. Sigma Denied Advance Price Discussions or Agreements

225. Mr. Pais, testified that he never had discussions with McWane regarding price. (Pais, IHT 68 (“Not at all.”), 109 (“at no time”), 104 (“No”), 110 (“No, there was no discussion about that”)).

226. Mr. Pais testified that he never discussed his spring 2008 idea of a large price increase he referred to internally at Sigma as a “big bold move” with anyone at McWane. (JX 687 (Pais, Dep. at 76)).

227. Mr. Pais testified that he had no assurance that McWane or Star would follow a large non-domestic Fittings price increase in the spring of 2008, because he did not discuss it with either Competitor. (JX 687 (Pais, Dep. at 92-93)).

228. Mr. Rybacki testified that he never had any discussions with McWane regarding price. (JX 690 (Rybacki, Dep. 91 (“No”); 192 (“Never.”)).

229. Mitchell Rona denied any discussions with McWane regarding pricing. (JX 688 (Rona IHT Tr. 203 (“Q. Did you discuss import pricing at any point with Mr. Tatman during - - A. No. Q. – these discussions? A. No”)).

C. Star Denied Advance Price Discussions or Agreements

230. Mr. McCutcheon testified that he and McWane employees never discussed prices, market share, or any other competitive factors. (JX 698 (McCutcheon Dep. at 31 (Q. . . . never agreed with him on a price for ductile iron pipe fittings . . . ? A. That's correct."); 32 ("No, sir."); 34. ("No, sir.")).

231. Matt Minamyler testified that he never discussed pricing or marketing strategy with McWane personnel. (JX 685 (Minamyler, Dep. 14 ("Q. Okay. During the time that you were national sales manager at Star, did you have any communications with anyone at McWane about pricing or market strategy? A. No.") (objections omitted), 15-16 ("Q. Okay. Did you personally every have any communications with any competitor while you were with Star about pricing? A. No.")).

232. Dr. Schumann conceded that every single McWane, Sigma, and Star witness affirmatively denied any agreement on the January and June 2008 multipliers and any agreement to eliminate or reduce job price discounts. (Schumann, Tr. 4236-4237.)

233. Dr. Normann observed that McWane, Sigma, and Star priced independently in 2008:

So I found, for example, that for Star, Sigma and McWane, during the time period of 2008...but over roughly that 2008 time period, McWane's prices were trending downward from the end of 2007 into 2009. Star's prices, Sigma's prices, they rose modestly, but not by a significant degree....But what we see is not parallel movements in price that are going up and going up by significantly more than cost increases. What we in fact see are prices moving independently of one another and, you know, declining for some and modest increases for others, so that's fundamentally inconsistent with a conspiracy. (Normann, Tr. 4747-48)

234. After analyzing 2008 non-domestic Fittings prices, Dr. Normann concluded:

It's just--you know, it's very inconsistent and fundamentally rejects the notion of the allegations of the conspiracy of, you know, coordinated parallel movements, you know, in prices, this notion of price increases between the three firms, that

they were reducing job pricing and that they, you know, were following each other's multiplier changes, for example. (Normann, Tr. 5014 *in camera*)

235.

VIII. DIFRA did Not Facilitate Price Coordination Among McWane, Sigma, and Star

236. The Ductile Iron Fittings Research Association ("DIFRA") had four members: McWane, Sigma, Star, and U.S. Pipe. (JSLF ¶ 17; Brakefield, Tr. 1227-1228 ("Q. Who were the members of DIFRA? A. The members of DIFRA was Star, Sigma, U.S. Pipe and McWane or Tyler/Union. Q. Those were the four members? A. Yes, sir."), 1259-1260 ("Q. Mr. Brakefield, in 2008, who were the members of DIFRA? A. In 2008? Q. At this time in February of 2008. A. It was U.S. Pipe, Star, Sigma and Tyler/Union/McWane. Q. And those were the only four members? A. Yes, sir.")).

237. DIFRA was operational for "[r]oughly six months." (Tatman, Tr. 935 ("Q. All right. We'll have to look at the details of that in camera, so let's move on to something else. Now, you mentioned yesterday and complaint counsel asked you about DIFRA, sir. And as I understand it, DIFRA was operational for roughly six months at the end of 2008; is that fair? A. Roughly six months, correct.")).

238. Mr. Brakefield, DIFRA's former president, testified that DIFRA met a total of two or three times, and was short-lived in its operation. (Brakefield, Tr. 1359 ("Q. And so is it fair to say that as of February 7, 2008, DIFRA was not functioning? A. That's correct."), 1422 ("Q. And the last DIFRA meeting was in March of 2008; is that correct? A. March of -- yes, sir. Q. And the last DIFRA conference call was in April of 2008; is that correct? A. That's correct, yes, sir. Q. So there have been no meetings since April of 2008 at which DIFRA members discussed standards or other activities? A. None that I know of. Q. And in total, DIFRA had approximately four meetings; is that correct? A. Yes, sir. I think you're correct.")).

239. DIFRA was incorporated in January 2007, but only functioned from June 2008 through January 2009. (Brakefield, Tr. 1227-1228 (“Q. Okay. And then let's turn to -- well, actually in -- you can put that one aside. In January of 2007, is that when DIFRA was incorporated? A. Yes, sir. Q. Is that also when you became president of DIFRA? A. I think so, sir, yes, sir. Q. Who were the members of DIFRA? A. The members of DIFRA was Star, Sigma, U.S. Pipe and McWane or Tyler/Union. Q. Those were the four members? A. Yes, sir. Q. And just to kind of put bookends on things, when were the -- when was the last time DIFRA was active? A. I would say the last time that I would recall that it was active would probably be mid-January of '09, and that was with the reporting of the December '08 numbers.”), 1359 (“Q. And so is it fair to say that as of February 7, 2008, DIFRA was not functioning? A. That's correct.”), 1383 (“Q. And that's the June 17, 2008 DIFRA report; correct? A. That's correct. Q. This is the first report that was issued by the CPAs to the DIFRA members? A. That's correct.”), 1400 (“Q. This is the January -- it's dated January 15, 2009. It's the last -- is this the last DIFRA report issued by Sellers Richardson? A. Yes, sir, I think it was.”) & RX 127; CX 1480-001-07; CX 52).

240. The first DIFRA tonnage report was circulated in mid-June 2008. (Brakefield, Tr. 1395 (“Q. So is it fair to say then if the first report was in June and there was a July report that it took three months of reporting before the first accurate report was issued by DIFRA? A. That's correct, yes.”); JX 679 (Haley, Dep. at 24 (“Q. But as of -- at least, assuming this e-mail that's in Exhibit 11 is correct, June 17th was the date of the first report that Sellers was -- A. June 17th would have been when we received -- yes, June 17th is when we would have submitted the first reports.”))).

241. The last DIFRA tonnage report was circulated in January 2009, for the month of December 2008. (Brakefield, Tr. 1228 (“Q. And just to kind of put bookends on things, when were the -- when was the last time DIFRA was active? A. I would say the last time that I would recall that it was active would probably be mid-January of '09, and that was with the reporting of the December '08 numbers.”), 1400 (“Q. This is the January -- it's dated January 15, 2009. It's the last -- is this the last DIFRA report issued by Sellers Richardson? A. Yes, sir, I think it was.”) & RX 127).

242. McWane and Star did not submit tonnage shipped data to DIFRA’s accountants after January 2009 and December 2008, respectively. (Brakefield, Tr. 1419-1420 (“Q. And that's CX 1325 . . . A. Okay, sir. Q. And you remember that I had asked you a few minutes ago whether or not following the January 2009 DIFRA report whether or not any of the other members continued to submit their tonnage data to DIFRA? A. Yes, sir, I remember that. Q. If you look at the second page of this document, sir -- A. Bree Holland sent me that. Yes. Q. And she says that -- and this is May 12 of 2009. Do you see that? A. Yes, sir. Q. She says, "It looks like we are missing February 2009 through April 2009 for McWane and January 2009 through April 2009 for Star Pipe." Do you see that? A. Yes, sir. Q. So it was the case that after January, McWane did not submit any of its tonnage data at least through April; am I correct? A. That's correct. Q. And the same for Star, they did not submit any tonnage data from January till April; correct? A. That's correct.”) & CX 1325).

A. DIFRA’s Activities were Monitored by Antitrust Counsel

243. Mr. Brakefield, DIFRA’s former president, testified that DIFRA was a trade association created, organized, supervised, and monitored by experienced antitrust counsel. (Brakefield, Tr. 1229-1230 (“Q. Article III is the purposes of DIFRA. Do you see that? A. Yes. Q. It's at the bottom of the page? A. Yes, sir, I see that. Q. The first purpose that's listed is "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." Do you see that? A. Yes, sir. Q. What activities did DIFRA take to fulfill this purpose? A. I think the first thing we did was select an attorney that was recommended with antitrust credentials from Bradley Arant, and we tried to follow every guideline that he gave us to make sure that we were in compliance with what an organization like this should be."), 1236-1237 ("Q. When DIFRA was incorporated in January 2007, did DIFRA retain an accounting firm? A. Yes, they did. Q. What was the purpose of retaining the accounting firm? A. That was recommended to us by Wood Herren and the Bradley Arant people, that they suggested an accounting firm to take the numbers that were submitted by the members. Q. So what were the -- can you explain that to me more? What were the -- what was the purpose of the recommendation? A. They advised us through -- counsel advised us that this was a benefit that we could have under establishment of a trade organization, that we could actually submit shipments, and they would be billable shipments in a certain geographic area which basically was discussed and agreed upon, and that those numbers could be submitted. And there was a lot of discussion about how we would present those numbers and what those numbers represented and how they had to be in terms of aggregate, not small, unique numbers but basically an aggregate or a large bucket, the way I like to describe it, to where you submitted those large buckets of tons, the way we looked at it, short tons, to an independent CPA firm who published back to the individual members an aggregate total of the market size."), 1244-1245 ("Q. Mr. Brakefield, as Sigma's representative to DIFRA, did you know why Sigma did not want to submit its sales dollars information to DIFRA? A.... the attorneys steered us in directions that

said this is risky and we shouldn't do, and so we went away from that. But I don't know if I ever heard Victor or anybody from Sigma say that we would not do that. We just wanted to know could we extract that information from our IT department, and probably there's some documentation that actually shows we did a similar template to this in response to this suggestion by McWane.”), 1337-1338 (“Q. Were you involved in the retention of Bradley Arant to advise DIFRA? A. Yes, sir. Q. And why did you want to hire Bradley Arant? A. I asked a longtime friend, Joe Spransy, who was U.S. Pipe's corporate attorney for 25-plus years, who would be someone that he would recommend. He said he had worked with Thad for many years, and he recommended he and Bradley Arant and Mike McKibben and -- and I didn't know Wood Herren at the time but had a lot of positive things to give me direction to make that call.”), 1341 (“Q. And both Michael McKibben and Herren Wood were both lawyers who worked at Bradley Arant? A. That is correct. Q. And they would from time to time give advice, legal advice, to DIFRA? A. Yes, sir. Q. So the -- were there -- and then there's three lawyers who were advising DIFRA. Were there any others besides Mr. Long, Mr. Herren and Mr. McKibben? A. Correct. Q. There were only three? A. There were only three, correct.”), 1343 (“Q. And the meetings that you just referred to, they were always supervised by outside counsel? A. Yes, sir.”), 1346-1347 (“Q. This was -- these are minutes of the meeting that Mr. Long was trying to organize in the previous e-mail that we just saw; correct? A. That's correct....Q. All right. And if you look at the top again, it confirms, doesn't it, that the meeting was held at the offices of Bradley, Arant, Rose & White; correct? A. That's correct. Q. To discuss the organization of a new trade association? A. Yes. Q. And it then lists the attendees, of which you are one; correct? A. Yes, sir. Q. And then it looks like below that, the last sentence of the first paragraph, there were three lawyers from Bradley Arant, Thad Long, Mike McKibben and K. Wood Herren of Bradley,

Arant, Rose & White LLP, involved in this meeting; correct? A. Correct. Q. Do you remember those three lawyers being present at the meeting? A. Yes, sir.”), 1350-1351 (“Q. And if you actually would start -- this is actually a document that complaint counsel I believe went over with you. If you would start at the second e-mail on the first page, this again is another e-mail from lawyers for DIFRA; correct? A. That's correct. Q. K. Wood Herren? A. Yes. Q. And he sent it to, amongst others, yourself? A. Yes, sir. Q. TB2, that's you; right? A. Yes, sir. Q. And in this e-mail, your lawyer or DIFRA's lawyer attached a copy of an engagement letter that you had signed; correct? A. That's correct. Q. And that was an engagement letter to retain independent outside CPA services to assist in the future DIFRA; correct? A. Yes.”), 1358 (“Q. Did you have telephone meetings with DIFRA members? A. We had telephone conference calls for various things. Q. And those were always presided over by Bradley Arant lawyers? A. Wood Herren usually conducted that.”), 1371-1373 (“Q. If you would turn to RX 044. . . And Mr. Long writes, "I have received proposed reporting forms from two of the four DIFRA participants, and I find that they are fairly consistent in approach and seem to minimize antitrust concerns." Do you see that? A. Yes, sir. Q. That was his advice to DIFRA at that point? A. Yes, sir. Q. And then Mr. Long continues, in parens, "This does not mean all antitrust concerns are definitely gone, as you always have some concerns with information aggregations when there are relatively few participants, but the suggested approach is designed to minimize possible antitrust exposure down to a level which is acceptable." Do you see that? A. Yes, sir. Q. And that was Mr. Long's advice -- A. That's correct.”) (objections omitted); RX 40, RX 44; RX 11; CX 1333-001-010; CX 1473-001-03; CX-048-001-02; CX-1480-001-07; CX-0158-001-020; CX 1486-001-02; CX 1479-001-005; CX-1090-001-08; CX 0052-001-07; CX 1081-001-03; JX 654 (Brakefield, Dep. at 13-17, 19)).

244. Antitrust counsel attended each of the few DIFRA meetings and telephone conferences that were convened. (JX 687 (Pais, Dep. at 31 (“1 Q. When you attended a meeting of DIFRA, however many meetings there were, were there lawyers present, sir? A. Absolutely. It was held in a lawyer's office with two or three members of the law firm. Q. I'm sorry, you said two or three members of the law firm were there? A. Yeah, yeah. The partners or associates, yes.”)).

245. DIFRA's attorneys frequently counseled the membership on antitrust issues. (Brakefield, Tr. 1347-1349 (“Q. And then it looks like below that, the last sentence of the first paragraph, there were three lawyers from Bradley Arant, Thad Long, Mike McKibben and K. Wood Herren of Bradley, Arant, Rose & White LLP, involved in this meeting; correct? A. Correct. Q. Do you remember those three lawyers being present at the meeting? A. Yes, sir . . . Q. And then if you would look at the fifth paragraph, it says that Mr. Long discussed the antitrust concerns with associations in which competitors are members and work together on industry matters. Do you see that? A. Yes, sir. Q. And then in the paragraph below that there is also a discussion that Mr. Long discussed with the membership or the potential membership of this association antitrust dos and don'ts? A. Yes, sir. Q. Antitrust discussions with Mr. Long and the other attorneys from Bradley Arant were a common discussion at meetings and phone calls, were they not? A. Yes, sir, they really were.”), 1371-1373 (“Q. If you would turn to RX 044 . . . [a]nd Mr. Long writes, "I have received proposed reporting forms from two of the four DIFRA participants, and I find that they are fairly consistent in approach and seem to minimize antitrust concerns." Do you see that? A. Yes, sir. Q. That was his advice to DIFRA at that point? A. Yes, sir. Q. And then Mr. Long continues, in parens, "This does not mean all antitrust concerns are definitely gone, as you always have some concerns with information aggregations when there

are relatively few participants, but the suggested approach is designed to minimize possible antitrust exposure down to a level which is acceptable." Do you see that? A. Yes, sir. Q. And that was Mr. Long's advice -- A. That's correct. Q. And then following that, Mr. Long writes -- there's three numbered paragraphs, and he says, as the intro to that, "There are some assumptions which accompany this form, and it is contemplated all participants would uniformly apply these assumptions in their reporting." Do you see that? A. Yes, sir. Q. And then he says that the geographic scope -- that the geographic extent of the reporting would be the United States and Puerto Rico? A. That's correct.") (objections omitted); RX 442, RX 44).

246. All of the membership fees associated with the organization of DIFRA were used to pay antitrust counsel fees and fees charged by the independent accounting firm hired by DIFRA at the advice of counsel to collect, aggregate, and disseminate historic tons-shipped data of DIFRA members. (Brakefield, Tr. 1272-1274 ("Q. And then for item F, was a fee structure for funding the operations of DIFRA set up at this meeting? A. Yes, it was. Q. What was that fee structure? A. That fee structure was to continue to split it one-fourth per member company, and there was a lot of things discussed, but that was what was eventually agreed to. Q. And what do you refer to when you say "split it"? A. In other words, if it was a dollar, everybody paid 25 cents. Q. And what was the dollar being used for? A. If the expenses were a dollar, everybody paid 25 cents of that dollar. Q. And what expenses did DIFRA have at this point? A. Mostly attorney's fees. And the attorney, Bradley Arant, would -- for example, the CPA had quoted us certain things. That was going to go through Bradley Arant, so we would get a bill from Bradley Arant split in one-fourths, and it would be sent to the member companies. That was the fee. That was the structure. Q. In addition to the attorney's fees were there any other fees? A. I don't recall any. JUDGE CHAPPELL: Didn't he just tell you the CPA had fees that he ran through the

law firm? MR. ANSALDO: I understood those to be included in the legal fees, Your Honor. I may have misunderstood the testimony. JUDGE CHAPPELL: I want to make sure you're not -- I want to make sure you're not confused on this. There was a CPA fee involved. THE WITNESS: We had not at that time had a CPA fee, but it was the understanding that when we got it, since we didn't have a checking account, that all of that would go through Bradley Arant until we got a checking account established, and then we would -- Bradley would pay the CPA, and then we would split it one-fourth, one-fourth, one-fourth, one-fourth. JUDGE CHAPPELL: So that CPA fee would appear on the law firm bill. THE WITNESS: Eventually would appear, yes. Because at that time we had not submitted anything to them other than just the trial and error-type templates that we had submitted, can you do that.”).

247. Mr. Haley, DIFRA’s independent lead accountant, testified that each DIFRA member sent a discrete category of data, limited to tonnage of Fittings shipped, to Sellers Richardson, a third party accounting firm retained by DIFRA’s antitrust counsel. (JX 679 (Haley, Dep. at 8-9 (“Q. Have you or your firm performed work for the Ductile Iron Fittings Research Association -- A. Yes. Q. -- or DIFRA? A. Yes. Q. We're going to spend some time talking about that here today, but can you just generally tell us what types of work you've performed for DIFRA? A. We did agreed-upon procedures, basically taking information we received directly from each member, compiled that data together, and issued a report of the total information. The information we received was -- I'll have to look -- it was either footage or tonnage of fittings shipped.”), 11 (“Q. If you recall, who first contacted you concerning DIFRA? A. I believe it was Wood Herren. Q. Who is Mr. Herren? A. The attorney at Bradley, Arant. I believe he was the attorney for DIFRA at that time. Q. And he contacted you rather than a member of DIFRA? A. He contacted us directly, correct.”), 19 (“Q. And likewise, I note in

paragraph 1 of Mr. Long's e-mail, that the information will be provided on shipment tonnage rather than on date of sale. Do you see that? A. Yes. Q. To your knowledge, is that consistent with how information was reported to you? A. Yes. Q. And that was because the date of shipment could be some lengthy period of time after date of sale? A. They just wanted shipment, so I don't -- you know, we just did shipment. There was no discussions about sales. Q. And you were never provided any sales information, no dollar pricing? A. No. Q. Only tonnage shipped? A. Only tonnage shipped.”) (objections omitted).

248. The accounting firm retained by DIFRA, Sellers Richardson, Holman & West, was overseen by the Bradley Arant law firm and was not “controlled” by DIFRA or any of its members. (Pais, Tr. 2109-10 (“Q. So in April, late April 2008, Mr. Brakefield asked you for a conference call to discuss DIFRA; is that right? . . . Did the DIFRA information that the members sent to the accounting firm -- did that include any dollar information, sir? A. None whatsoever. Q. Was any pricing information ever exchanged? A. Not at all. Q. And just so we're clear, this was an outside accounting firm; is that right? A. Yes. Q. You didn't control the accounting firm? A. No, we didn't. Q. And it was set up by a law firm? A. A law firm, yes. Q. Now, there's a reference here to Tad and Wood, and that's a reference to two of the three or so lawyers who were working for DIFRA at the time? A. That's right. Q. And that's Mr. Long, Thad Long, and Wood Herren? A. Yes.”).)

249. Sellers Richardson Holman & West aggregated all of the member firms' tonnage shipped data and then distributed the aggregate figure in a report to all DIFRA members. (JX 679 (Haley, Dep. at 8-9 (“Q. Have you or your firm performed work for the Ductile Iron Fittings Research Association -- A. Yes. Q. -- or DIFRA? A. Yes. Q. We're going to spend some time talking about that here today, but can you just generally tell us what types of work you've

performed for DIFRA? A. We did agreed-upon procedures, basically taking information we received directly from each member, compiled that data together, and issued a report of the total information. The information we received was -- I'll have to look -- it was either footage or tonnage of fittings shipped.”), 11 (“Q. If you recall, who first contacted you concerning DIFRA? A. I believe it was Wood Herren. Q. Who is Mr. Herren? A. The attorney at Bradley, Arant. I believe he was the attorney for DIFRA at that time. Q. And he contacted you rather than a member of DIFRA? A. He contacted us directly, correct.”), 23 (“Q. Again, how would that work in practice logistically? What happened? A. The four member firms, whoever was responsible at that entity, would send an Excel spreadsheet via e-mail to either Margaret or Bree. So once we got all four spreadsheets, then we would just compile the information into another Excel spreadsheet. Q. And was the member information that you received from the four entities, was that individual information ever shared with a larger group, or was it always aggregated? A. No, huh-uh. Q. It was aggregated? A. Correct. We were the only one that had that information, and the report we issued was all four of them in total.”).

250. No DIFRA member was permitted to review the tonnage shipped data of any other member; only the aggregate figure was made available. (JX 679 (Haley, Dep. at 23 (“Q. Again, how would that work in practice logistically? What happened? A. The four member firms, whoever was responsible at that entity, would send an Excel spreadsheet via e-mail to either Margaret or Bree. So once we got all four spreadsheets, then we would just compile the information into another Excel spreadsheet. Q. And was the member information that you received from the four entities, was that individual information ever shared with a larger group, or was it always aggregated? A. No, huh-uh. Q. It was aggregated? A. Correct. We were the only one that had that information, and the report we issued was all four of them in total.”), 36

“Q. I may have gotten my pages confused there. Thank you. We've talked about that only aggregated information was provided back to the members, correct? A. Correct. Q. Were you ever told why that was the case or why that was important? Alternatively, were you just told, "This is the way we want it done," and you complied? A. Well, we knew that it had to be the strictest of confidence so that none of the members knew any of the information of the other members. Q. That was the intent? A. That was the intent. Q. That was the whole reason for hiring your firm, correct? A. Exactly.”).

B. DIFRA Members Exchanged No Pricing Information

251. DIFRA never collected from, or disseminated any revenue or pricing information to, any DIFRA member. (McCutcheon, Tr. 2561-2562 (Q. All right. Now, let's look at the actual DIFRA report, CX 52, which Mr. Hassi asked you some questions about yesterday. This is -- I think you said yesterday this is the first DIFRA tons shipped report that you received at Star Pipe; right, sir? A. Yes, sir. Q. And if we look in -- let's pick page 6. This is the independent accountant's report on applying the agreed-upon procedures, and those are the procedures that Mr. Long and the other lawyers had outlined and the members had agreed to; right? A. Yes, sir. Q. And there's a reference here -- the third line of the first sentence, there's a reference to trade tons shipped. And what we're talking about with the DIFRA data was not pricing data, was it, sir? A. No, sir, no pricing data. Q. It was not revenue data or dollar figures of any kind, was it, sir? A. No, sir. Q. And in fact, Mr. McCutcheon, there was never any discussion of prices at any DIFRA meeting; right? A. That's correct.”), CX 52; JX 694 (Bhutada, Dep. at 26 (“Q. Mr. Bhutada, I'm handing you what I've marked as Exhibit 5 to your deposition, for the purpose of just having an example of a report from DIFRA. If you would, take a moment to look over that. If I'm correct, I think this shows that Mr. McCutcheon on October 1 of 2008 forwarded the report from DIFRA to your attention? A. Yes, sir. Q. Do you know the mechanics of how Star

provided information to DIFRA and received information in return worked and practiced? A. Broadly, yes. Q. If you can, broadly explain that, please. A. When the request would come to Dan, he would send it to procurement group, which will do the analysis based on what DIFRA needed the data for as far as sales and shipments go. And that data will come back to Dan after they compute it, and then Dan would send it to the third party at DIFRA. Q. Is my understanding that no information was exchanged directly between suppliers correct? A. That is correct.”.); Pais, Tr. 2109-2110 (“Q. So in April, late April 2008, Mr. Brakefield asked you for a conference call to discuss DIFRA; is that right? A. That's -- that's right. Q. All right. Up at the top, Mr. Brakefield says a little bit about the conference call. So he says, if we can highlight this, right in the middle, "Tons by month and 2006, 2007. No dollars." Did the DIFRA information that the members sent to the accounting firm -- did that include any dollar information, sir? A. None whatsoever. Q. Was any pricing information ever exchanged? A. Not at all. Q. And just so we're clear, this was an outside accounting firm; is that right? A. Yes. Q. You didn't control the accounting firm? A. No, we didn't. Q. And it was set up by a law firm? A. A law firm, yes. Q. Now, there's a reference here to Tad and Wood, and that's a reference to two of the three or so lawyers who were working for DIFRA at the time? A. That's right. Q. And that's Mr. Long, Thad Long, and Wood Herren? A. Yes. Q. All right. So DIFRA had no dollars, no price; right? A. No. Nothing at all.”.); Brakefield, Tr. 1240-1241 (Q. Mr. Brakefield, what is the attachment that's reflected on page 9 of this document? A. On page 9? Q. Yes, sir. A. On CX 1333-009? Q. Yes, sir. A. Okay. That is a -- that is a suggested or a template that we were thinking -- you know, basically trying to come to an agreement as to what would be acceptable, could the accounting firm handle all of these additions, all of the uniqueness of these items. And eventually this was changed and was not what we eventually approved and used to report

numbers. This was too detailed. It explained too much as far as uniqueness of manufacturing by members that would expose them to basically certain items that they only made, no one else made. And eventually Mr. Herren and Thad Long and Mr. McKibben made us come to the realization that we could not use this form. This was simply something that was sent to them as to this may be the way we do this, can you handle adding all of this up. And if you will look at 007, you see all the arrows and everything that was going to have to be performed by the CPA, and all of this basically didn't fly. And we had several members that presented this, and to try to get everybody on the same page we basically -- until Mr. Herren and Mr. Long said you're running a risk here by reporting this kind of template or using this kind of template to report, you need to reconsider that. And this basically was a mere suggestion sent to the CPA to see if they could handle all of this. And obviously they did not want to do that, and we corrected that and came up with another form.”), 1244-1245 (“Q. Mr. Brakefield, as Sigma's representative to DIFRA, did you know why Sigma did not want to submit its sales dollars information to DIFRA? A. I don't believe Sigma -- in fact, we actually had templates -- Sigma actually tried to do that themselves. And there's templates that show that Sigma had a very similar form to this but with less buckets in it to where we felt could we extract that data. I don't think we had any objection to that. I never heard any objections to that. We had actually been prepared to do that, and then it was -- it was changed. So to say that we did not want to do that, we just basically were trying to get something -- or I was trying to get something, here again speaking for DIFRA, trying to get everybody on the page to where we could agree on something. And if that was X, it was X; if it was Y, it was Y. And the attorneys steered us in directions that said this is risky and we shouldn't do, and so we went away from that. But I don't know if I ever heard Victor or anybody from Sigma say that we would not do that. We just wanted to know could we extract

that information from our IT department, and probably there's some documentation that actually shows we did a similar template to this in response to this suggestion by McWane.”); Brakefield, Tr. 1352-1353 (“Q. You had testified earlier on this very document that the attachment here, this spreadsheet or the Excel -- that Excel spreadsheet on page 7, was in fact a draft; correct? A. That's correct. Q. And if you look at the bottom of page 0007, it's zeroed out, but there is a reference to, very last line, net net sales in dollars. Do you see that? A. Yes, sir. Q. That was never incorporated in any reporting form that was submitted to DIFRA, to your knowledge, by any member; correct? A. That's correct. Q. And it was also never -- net net sales or any other sales information was never on any report that was disseminated by DIFRA, the CPAs, to any DIFRA member, to your knowledge. A. That's correct.”).

252. The reporting format used by DIFRA’s accountants referred only to historic tons-shipped data that would then be aggregated before being disseminated by the independent accountants to the DIFRA membership. (CX 1479-001-005).

253. Mr. McCutcheon testified that the parties did not facilitate the “exchange” of information between the DIFRA membership: “Well, my problem is with you using the word “exchange.” (McCutcheon, Tr. 2416-2417 (“Q. Sir, you mentioned that the reason that you joined -- that Star joined DIFRA was to find out the market share information. How did you expect to do that without a data or information exchange? A. Well, my problem is with you using the word "exchange." We didn't exchange anything. We provided data to a third party. The third party mashed it together, gave us our percentage. We never one time exchanged any data or information. Q. I think -- A. And it was never discussed.”)).

C. The Aggregated DIFRA Tonnage Report Shed No Light on Prices

254. DIFRA’s accountants collected and aggregated tons-shipped data across broad product size ranges containing literally thousands of different SKUs--all with unique physical

attributes and pricing points--that mirrored major size groupings of pipe and disseminated the data to DIFRA members. (RX 113; Brakefield, Tr. 1396-1397.)

255. DIFRA's accountants did not receive any sales or pricing data from DIFRA members, and included no such data in any report. (JX 679 (Haley, Dep. at 19 ("Q. And likewise, I note in paragraph 1 of Mr. Long's e-mail, that the information will be provided on shipment tonnage rather than on date of sale. Do you see that? A. Yes. Q. To your knowledge, is that consistent with how information was reported to you? A. Yes. Q. And that was because the date of shipment could be some lengthy period of time after date of sale? A. They just wanted shipment, so I don't -- you know, we just did shipment. There was no discussions about sales. Q. And you were never provided any sales information, no dollar pricing? A. No. Q. Only tonnage shipped? A. Only tonnage shipped.") (objections omitted.); McCutcheon, Tr. 2561-2562 (Q. All right. Now, let's look at the actual DIFRA report, CX 52, which Mr. Hassi asked you some questions about yesterday. This is -- I think you said yesterday this is the first DIFRA tons shipped report that you received at Star Pipe; right, sir? A. Yes, sir. Q. And if we look in -- let's pick page 6. This is the independent accountant's report on applying the agreed-upon procedures, and those are the procedures that Mr. Long and the other lawyers had outlined and the members had agreed to; right? A. Yes, sir. Q. And there's a reference here -- the third line of the first sentence, there's a reference to trade tons shipped. And what we're talking about with the DIFRA data was not pricing data, was it, sir? A. No, sir, no pricing data. Q. It was not revenue data or dollar figures of any kind, was it, sir? A. No, sir. Q. And in fact, Mr. McCutcheon, there was never any discussion of prices at any DIFRA meeting; right? A. That's correct."), CX 52; Pais, Tr. 2109-2110 ("("Q. So in April, late April 2008, Mr. Brakefield asked you for a conference call to discuss DIFRA; is that right? A. That's -- that's right. Q. All right.

Up at the top, Mr. Brakefield says a little bit about the conference call. So he says, if we can highlight this, right in the middle, "Tons by month and 2006, 2007. No dollars." Did the DIFRA information that the members sent to the accounting firm -- did that include any dollar information, sir? A. None whatsoever. Q. Was any pricing information ever exchanged? A. Not at all. Q. And just so we're clear, this was an outside accounting firm; is that right? A. Yes. Q. You didn't control the accounting firm? A. No, we didn't. Q. And it was set up by a law firm? A. A law firm, yes. Q. Now, there's a reference here to Tad and Wood, and that's a reference to two of the three or so lawyers who were working for DIFRA at the time? A. That's right. Q. And that's Mr. Long, Thad Long, and Wood Herren? A. Yes. Q. All right. So DIFRA had no dollars, no price; right? A. No. Nothing at all.").

256. The DIFRA accountants' report did not break down the tonnage shipped data by state. (JX 694 (Bhutada, Dep. at 111-112 ("Q. The next area that I wanted to touch on was regarding DIFRA. And I believe you testified that DIFRA helped Star make its decision to enter the domestic market. Is that correct? A. Yes, sir. Q. With the DIFRA reports that you received, did you receive specific breakdown of the sales among the participating companies between their domestic sales and their imported sales? A. No, sir. Q. And so the DIFRA data didn't provide you any information as to the total sales of domestic product versus imported product? A. No, sir. Q. And the DIFRA data wasn't -- let me rephrase that. DIFRA didn't provide data that identified the aggregate sales by the participating members of DIFRA in individual states? A. No, sir. Q. Star generated reports after it received the DIFRA report for the month that calculated the total sales of fittings in each state, didn't it? A. No, sir. That had no correlation with DIFRA.").

257. DIFRA's lead accountant, Richard Haley, testified that his staff understood and acted in accordance with the directive of DIFRA's counsel to be "very conservative" about sharing data with DIFRA members. (JX 679 (Haley, Dep. at 36-37 ("Q. I may have gotten my pages confused there. Thank you. We've talked about that only aggregated information was provided back to the members, correct? A. Correct. Q. Were you ever told why that was the case or why that was important? Alternatively, were you just told, "This is the way we want it done," and you complied? A. Well, we knew that it had to be the strictest of confidence so that none of the members knew any of the information of the other members. Q. That was the intent? A. That was the intent. Q. That was the whole reason for hiring your firm, correct? A. Exactly. Q. They could have -- A. Somebody different could have done it. It was just a compilation of information that they hired us to keep the confidence and the integrity of the data separate. I think that's one reason it was sent directly to us and not to DIFRA, and then from DIFRA to us.")), 73-74 ("Q. Mr. Haley, you testified earlier that Sellers, Richardson kept the individual's submissions of different data in the strictest confidence; is that correct? A. Correct. Q. Could you explain for me why Sellers, Richardson kept the different individual submissions in the strictest of confidence? A. The entity did not want the individual members knowing the amount of shipments by each individual company. Q. Did you have discussions about that requirement with Wood Herren? A. Yes. Q. What is your understanding of why DIFRA does not want the members knowing individual shipment data? A. They didn't want any issues dealing with collusion between members. Q. What is your understanding of why the individual shipment data would be related to collusion between members? A. I mean, my perception was that they were being very conservative, and they didn't want anybody knowing any information.")).

258. It would have been impossible for a DIFRA member to determine from any DIFRA report containing the tons-shipped data what any other member's pricing was for any Fittings product. (Brakefield, Tr. 1352-1353 ("Q. You had testified earlier on this very document that the attachment here, this spreadsheet or the Excel -- that Excel spreadsheet on page 7, was in fact a draft; correct? A. That's correct. Q. And if you look at the bottom of page 0007, it's zeroed out, but there is a reference to, very last line, net net sales in dollars. Do you see that? A. Yes, sir. Q. That was never incorporated in any reporting form that was submitted to DIFRA, to your knowledge, by any member; correct? A. That's correct. Q. And it was also never -- net net sales or any other sales information was never on any report that was disseminated by DIFRA, the CPAs, to any DIFRA member, to your knowledge. A. That's correct. Q. And if you would look, sir, then above on that same page, I think you had made reference to this -- passing reference to this before when you were asked by counsel about this document. There's a number of arrows and circles and whatnot on the left-hand side of that Excel spreadsheet; correct? A. Yes, sir. Q. And what that is, sir, isn't it, that counsel was saying that these different categories consistent with the arrows would need to be compressed into larger -- I think the word you used was "buckets"; right? A. That's correct. That was the recommendation that we ended up with, yes."); JX 654.

259. The tons-shipped information that was disseminated by DIFRA's accountants contained historic tons-shipped data that represented sales that were weeks, months, even up to a year old. (JX 654-655 (Brakefield, Dep. at 109-111 ("Q. And you also discussed with Mr. Ostoyich the selection of shipments in tons, and you referred to sometimes delivery can be a long time after the sale; is that correct? A. That's correct. Q. And how often does that happen? A. In any public job, it happens pretty much every time. A. Well, public work that had public funds

had certain parameters or processes that you had to go through before you received a notice to proceed on the project; that normally took a period of time. It could vary, 60 days to 120 days. And then after that, once that had been decreed, you could start this job. Purchase orders were issued and all the documentation to make sure that the orders were placed occurred at that time. Sometimes they were placed in advance because they had items that were maybe 30-week delivery. So you were trying to get the jump on that so you could make it in a timely manner to get the schedule of the job. Okay. So most -- and I would say 99.9 percent of the public work, it was at least a 60 to 120-day period before you got an order, and then usually 8 to 10 weeks after that that you would ship that order. Private work was all over the map.”) (objections omitted), 134-136 (“Q. Is there -- in the industry, is there a typical lag time between when the sale takes place and when the fitting is shipped leaving aside the public works? A. No. Again, like I stated, if you took the public out, you would just have private, and private is all over the map. It is like a shotgun effect. It could be a day; you could ship something that day; you could ship it in, you know, 30 days; you could ship it in 30 weeks. It's -- that's a very difficult assessment to say that there is a rule of thumb. No, I don't know of one. Q. So it's not the case that most fittings are shipped within a month of when they're are sold? A. You know, I would say that depending upon the configuration and the fitting itself, it's hard to say there's a rule like that. Each category, restraints, grooved, flanged, mechanical, push-on, all of those would have some different applications in different jobs, and it can be random. Q. What percentage of fitting sales -- strike that. What percentage of fittings are shipped within one month of the date of invoice sale? A. Here, again, I would say, you know, it's 70/30, 60/40, within a timeframe. It's just -- it's just like a Willow tree, it will blow. It's very difficult to pin that down in a manner that you say, hey, this is so repeatable, here is the rule.”) (objections omitted); McCutcheon, Tr. 2563 (“Q. And you say

not the days you actually received a purchase order. What do you mean by that? A. It's very possible to, for an example, receive an order, a purchase order, in January, but the project may not require it for six, eight months, sometimes up to a year. Q. Am I right then, sir, that there's a lag time between when you actually clinch the sale and what the price is going to be on the sale and when it actually ships out the door from Star Pipe? A. On some orders, yes, sir. Q. A big utility plant, for example, water treatment plant, might take -- A. Yeah. Q. -- quite a while? A. Yes, sir.”).

260. The DIFRA aggregated tons-shipped reports were not sufficiently detailed to enable a DIFRA member to determine the respective market shares of the any other DIFRA member, whether the data represented domestic or non-domestic fittings shipped, or the timing, geographic location, or dollar amount of any sales. (JX 694 (Bhutada, Dep. at 28 (“Q. By looking at the data that's on the page that's Bates labeled 17016, could Star determine the volume that any of the other suppliers were selling, or only your own market share? A. Only our own market share.”)); JX 654 (Brakefield, Dep. at 82-83 (“Q. Now, how many of those tons could you tell are Star Pipe tons versus SIGMA tons versus -- A. You cannot. Q. How many were domestic products made in the USA versus made outside the USA? A. You can't tell. Q. Can you tell -- are domestic fittings, are they typically the same price as imported fittings, do you know? A. The domestics fittings would be higher than imported fittings. Q. Where in the country -- can you tell which region in the country the 1,139 tons were sold in January of 2008? A. No, sir. Q. Are prices the same across the country or are there different prices in different regions? A. No, sir, different prices for different regions. Q. Can you tell anything about what sort of coating or configuration or lining this 1,139 tons in January of 2008 were? A. No, sir. Q. Can you tell, Mr. Brakefield, when the products were actually sold? A. No, sir. Q. Just so we're

clear on the record, the tons that are shipped in January of 2008 -- A. Yes. Q. -- is there any way to determine at what point in time they were sold? A. No, sir.”); JX 638 (McCullough, IHT at 209 (“Q. Can you use the data either reported through DIFRA on the fittings side or VMA on the valve and hydrant side to track your market share? A. You can track your market share and you can track the size of the industry, but you can't track the market share of the other members.”); (JSLF ¶ 18)).

261. Of the DIFRA report, Mr. Rybacki testified: “the only thing it helps for was planning purposes for, you know, your inventory, and so forth, and we already knew where we were anyway, so to me it had zero effect.” (Rybacki, Tr. 3540-3541).

262. Most of the DIFRA tonnage reports contained errors--of the eight (June 2008-January 2009) reports issued by DIFRA, five contained incorrect data (June-October). (Brakefield, Tr. 1318 (“Q. Mr. Brakefield, did DIFRA members ever submit data that had errors? A. Yes, they did. Q. Would you turn to RX 86. This one will be in the very back. A. Yes, sir. Q. Does this document reflect Sigma correcting one of its errors? A. That's correct. Q. And so the reports prior to June 30 contained erroneous data? A. That's correct. Q. And reports after June 30 contained corrected data? A. That's correct. Q. Were those reporting errors corrected voluntarily? A. Yes, sir. We notified and corrected and reissued our numbers.”), RX 86,; 1391-1394 (“Q. If you would turn to RX 86, 086, please. Do you see this document, sir? A. Yes. Q. And if you could turn your attention to the second page. It's an e-mail from yourself to Bree Holland, dated June 30, 2008. Do you see that? A. Yes, sir. Q. And you write, "During a routine audit, the above corrections to the DIFRA numbers submitted early were found by Sigma. We regret this and apologize for any inconvenience." Do you see that? A. Yes, sir. Q. And is this the instance of the erroneous data that you had testified to earlier? A. That's correct.

Q. And after you brought this information to the attention of the accounting firm, it was then -- you then sent that information to Mr. Herren and Thad Long; correct? A. I notified them, yes, I did, and then basically said that we would resubmit it. Q. And if then you look at the top e-mail from Margaret Powell, she's from Sellers Richardson; right? A. Correct. Q. She writes, on the last sentence of the first paragraph, "However, looking at these differences reported by Sigma" -- and by "differences" she meant errors; correct? A. Correct. Q. -- "it looks like every month that was reported was incorrect." A. Correct. Q. "I am not really sure the best way to handle it." Do you see that? A. Yes, sir. Q. And that "every month" again referred to all of '06, all of '07 and the first three months of '08? A. Yeah. I think it would be -- since '06 was only an aggregate only and not months, it would be '07 and '08. Q. If you would turn to RX 090? A. RX-what now? Q. 090. A. Yes, sir. Q. That's a July 17 -- well, I'm looking at the second e-mail down -- July 17, 2008 e-mail from Mr. Herren? A. Yes, sir. Q. To yourself, copying Mr. Long and Mr. McKibben again; correct? A. That's correct. Q. And he's also e-mailing the other members of DIFRA at this point. A. That's correct. Q. And he's disclosing on July 17 the error that Sigma discovered and brought to the attention of the accountants and the lawyers? A. Yes, sir. Q. Now, your earlier e-mail was a June 30 e-mail that disclosed the errors; correct? A. That's correct. Q. And it wasn't until almost three weeks later, two and a half weeks later that the lawyers then told the membership about the error; correct? A. Yeah. I think they wanted to have everything in place with the new numbers or something of that -- or maybe this is when Thad was on vacation for a couple of weeks. I forgot. But there was a reason why it didn't happen just right at that time. I forgot what it is."), 1396-1397 ("Q. And he says that the tonnage data was underreported, McWane's tonnage data was underreported; correct? A. Let's see. Yes, sir. It sure was. Q. And then if you look at the page before, at page 3? A. Yes, sir. Q. And you have an e-

mail at the top that's responding to Bree Holland's e-mail below saying what should we do; correct? A. That's correct. Q. And you say, "My suggestion" -- and I'm looking at -- one, two -- the fifth or sixth line down in your e-mail. You say, "My suggestion is to restate the reports from May 2008 to October 2008, just like we did when Sigma found an error." Do you see that? A. Yes, sir. Q. And so you felt that as of November 17, 2008 that all of the DIFRA reports from June through October were actually containing errors; correct? A. That's correct."); RX 113.

263. Star's May 6, 2008 multiplier change had nothing to do with DIFRA. (McCutcheon, Tr. 2554-55 ("Q. All right. Mr. McCutcheon, I want to switch gears. You were asked some questions about DIFRA yesterday, and let me see if we can clarify a few things. First, if we can pull up CX 37. This is a Star Pipe letter regarding a multiplier change May 6, 2008 you were asked some questions about yesterday. Do you see that, sir? A. Yes, sir. Q. At Star Pipe did you decide to send this letter out because DIFRA was up and running? A. No, sir. Q. Did this letter have anything to do with DIFRA? A. No, sir.")).

264. DIFRA failed to breed trust among its members, including McWane, Sigma, and Star, who all remained wary of and fiercely competitive with each other. (Rybacki, Tr. 3566-3567 ("Q. And you mentioned a moment ago that you wanted Star to get its -- you wanted Star to get its data in because DIFRA might be in danger of disbanding. Why would it be in danger of disbanding? A. Well, if you don't participate in the agreed-upon conditions, then I was afraid it might disband. Q. And what were the agreed-upon conditions at that point in time? A. Well, that the principal parties would submit data, tonnage data, was one of the things we talked about. Q. And were you concerned that if the principal parties didn't submit their tonnage data, all of DIFRA might fall apart? A. Yeah. I thought that was a distinct possibility. Q. And why did you think that? 4 A. Because there's such a mistrust amongst the group as a whole anyway. Q. Did

participating in DIFRA help build trust in the group? A: Again, I'd be guessing. I would say not really. Q. From your perspective, did it build any trust? A. Not really.”) (objections omitted or overruled?).).

265. DIFRA did not serve as a vehicle to permit Sigma, Star, and McWane to fix and stabilize prices for Fittings. (Brakefield, Tr. 1333-1334 (“Q. And just to be clear, in January of 2008, did you, Mr. Brakefield, communicate with anyone at McWane and agree upon multipliers for Mr. Rybacki's business with anyone at McWane? A. No, sir. Q. In June 2008, did you, Mr. Brakefield, communicate with anybody from McWane and agree upon multipliers that Sigma and McWane would charge customers? A. No, sir. Q. In June 2010, did you communicate with anyone at McWane and agree upon the prices that Sigma and McWane would charge customers? A. No, sir.”), 1337 (“Q. I would like to ask then the last question that I had just finished with before the objection, that in June of 2010, as part of the alleged conspiracy, did you communicate with anyone at McWane and agree upon the prices that Sigma and McWane would charge customers? A. No, sir. Q. At any time did you discuss in advance with anyone from McWane any multiplier that Sigma was about to issue? A. No, sir. Q. Did DIFRA serve as a vehicle to permit Sigma, Star and McWane to fix and stabilize prices for ductile iron fittings? A. No, sir.”), 1384-1389 (“Q. Is it consistent with your understanding that Sigma at least submitted unaudited data to DIFRA -- or -- excuse me -- to the CPAs? A. Say that again. Am I? Q. The information that was submitted by Sigma to the CPAs referenced here was unaudited data? A. That's correct, yes. Q. And if you would turn to the next page, please, this is a spreadsheet that shows trade tons, aggregated trade tons shipped for the year ended December 31, 2007; correct? A. That's correct. Q. And if you look under the diameter -- the heading Diameter, it says 2" to 12" Flanged and All Other. Do you see where I'm referring? A. Yes, sir. Q. Could you tell me

how much of -- and then to the right of that there is units, which is the number of fittings that were shipped in January and then for the corresponding months; correct? A. Yes, sir. Q. Could you tell me under 2" to 12" flanged how many of the 1258 fittings that are referenced were McWane fittings? A. No, sir. Q. Could you tell me how many of the fittings were Star fittings? A. Could not. Q. And if you look actually at the next -- excuse me -- two pages in, it's the 2008 report. Do you see that? A. Yes, sir. Q. And that has the same heading Diameter 2" to 12" Flanged and All Other? A. Yes, sir. Q. Could you tell me in that category how much of these fittings that are represented are domestic fittings? A. Cannot. Q. Can you tell me how many are imported fittings? A. Cannot. Q. Can you tell me in this spreadsheet now, whether it's the 2" to 12", 14" to 24", or over 24", at what price did any of the products ship out at? A. Could not tell you at all. Q. Can you tell me where in the country or in Puerto Rico were any of these products sold? A. No, sir, I could not. Q. Now, going back specifically to the 2" to 12" flanged reference, how many different -- do you know what a SKU is? A. Yes, sir. Q. What do you understand a SKU to be? A. A SKU is just an individual item that you manufacture or sell. It's an item -- it's part of an item list that you produce. You keep up with it electronically. I don't know what the "SKU" stands for, but something unit I guess. I'm sorry. Q. Could you tell me how many different SKUs are represented in the 2" to 12" flanged category? A. Oh, wow. Just regular A items there would probably be hundred. And then if you basically start with the B and C items, which are the way you use the terminology in terms of the configurations of the fitting as far as the A items are the most commonly used, B are the less used, C are the less and D are the less, you could have 600-700 items, SKUs there for flanged. Q. And then -- A. 2 through 12. Q. 2 through 12, six or -- I'm sorry -- 600 or -- A. Six to seven hundred. Q. And then in the "all other" you would have hundreds or thousands of other SKUs? A. Yes, sir. As it goes up with the

more reduction of tees and crosses and bends and stuff like that, you get -- because you have more sizes, it exponentially goes up. And also under the other, so then every time you have a restrained joint, every time you have a push-on joint, every time you have a mechanical joint that's pictured over there, it's just that many more configurations (indicating). So if you've got 600 in flanged, so mechanical would be another -- in, say, 14 through 24 it would -- in 2 through 12 it will be the same, six, seven hundred, but if you go 14 through 24 it could be 2000. If you go 30 and up -- or 24 and up, rather, it could be -- it could be another 2700. Q. I was just want to make sure I get this straight. So 2" to 12" inch flanged is six or --: Q. 2" to 12" flanged six to seven hundred? A. Correct. Q. 2" to 12" all other would be several thousand? A. I would say that when you add each of the configurations, mechanical joint, restraints, push-on joint, and grooved, which was included in the "all other," you would multiply that times four. Q. And then under 14" to 24" flanged how many different SKUs are we talking? A. And I'd say the six to seven hundred items that we talked about for flanged, that could be 1000 to 1200, and then you would multiply that times four. Q. Okay. And then the 14" to 24" all other? A. Well, that would be multiplied by four. Q. That's the -- okay. A. Yeah. Q. And then over 24" flanged? A. Over 24" flanged you could have that 1000 to 1200 go to 1400 to 1500 and then multiplied by four for all other. Q. Okay. And can you tell me, based on this spreadsheet, when any of the fittings that are represented here were actually sold? A. No, sir.") (objections omitted).

D. Non-domestic Fittings Prices Declined During DIFRA's Brief Operation in the Second Half of 2008

266. During the second half of 2008, McWane's net prices for non-domestic Fittings prices declined. (Tatman, Tr. 971-972 ("Q. All right. And that's what we just saw where your price change in January of '08 was far below the inflation level? A. Yes. Q. Your price change in June of '08 was far below the inflation level? A. Yes. Q. All right. And you say your share --

I guess your share is down at this point in 2008? A. And that's eight points, so that's a -- that's a lot of percent movement. Q. All right. And so that's down from, what, somewhere in the upper 40s to low 40s? A. Yeah. Q. So about a 20 percent actual decline in share? A. Yeah. Q. All right. There's an asterisk here. It says, "Leading price stability has been detrimental to share." Can you tell us what that is? A. Well, you know, we tried to change the game by compressing prices and holding down prices there and trying a little head fake on that and job-price when it's appropriate, but, you know, it didn't want work. It was a plan, didn't work. Q. Okay. Mr. Tatman, did the business improve after September of '08 for the rest of the year? A. No. Q. Did pricing get worse, sir? A. Worse.").

267. During the second half of 2008, Sigma's Fittings prices declined. (Pais, Tr. 2129-2131 ("Q. This is an e-mail, sir, that you sent to Mr. Rybacki and others in the sales organization on November 24, 2008, so this is a few months after DIFRA started. A. Yes. Q. Okay. Now, you refer here, in the very first sentence, "Dear Larry, "With the severe contraction in market volume over the recent few weeks, the equally quick and sharp erosion in market pricing" -- had market prices been declining at Sigma, your prices had been declining since DIFRA was founded? A. Absolutely. Q. When you say "absolutely," sir, tell us what you're referring to here. A. Because in the second half the volume kept on dropping, and as you know, by September, there was a cataclysmic decline, and the prices were in a pretty steep decline because all suppliers were trying to grab whatever business there was. Q. All right. So here you are in the second half of '08 and you say that prices -- there's been an equally quick and sharp erosion in market pricing, and you say it's an alarming double whammy. What did you mean by that, sir? A. Well, as I preface there with the volume dropping down and the prices falling, that is certainly a one-two punch. Q. Okay. Now, when you saw this double whammy, did you call up anyone at

McWane and say, "Hey, guys, let's all raise the price together"? A. No. Q. Okay. Let's scroll down if we can. You say, in the second sentence, "I suggest we do all we can to reverse it," and were you proposing to your team at Sigma that you announce an increase to see if you could reverse that? A. Well, either announce an increase or try and see where we were in the actual pricing and then try to hold the line towards high pricing, through multipliers. Q. And was that something you were internally discussing at Sigma at the time? A. Yes. Q. Did you call up anyone at any competitor and discuss that with them? A. None. Q. Let's go to RX 115, and again, before we put it on the screen I'm going to ask the witness a few questions about it. Oh, I'm sorry. Can we go back for a second to RX 116. Can we highlight -- yeah. There's that third paragraph: "I suggest we do all we can to reverse it." Then in the next sentence, you say, "Though I am not sure if the trend is similar at other parts, too, it seems to be most severe in the southeast, especially in Florida." Is that what you said, sir? A. Yes. Q. Yeah. So was the price erosion, the sharp erosion, really severe in the fall of 2008, especially -- in the southeast but especially in Florida? A. It was.”), RX 116; 2134-2135 (“Q. So a little while after DIFRA actually becomes operational, we see you say there's been this equally quick and sharp erosion in market pricing, the double whammy, and you say it's been especially severe in the southeast and especially in Florida; right, sir? A. Yes.”) & RX 115, 2137-2140 (“Q. So Mr. Fox reports to you and the others that he believes, based on whatever information he has, that my client was actually lowering prices, leading to this sharp erosion in price in the southeast; correct? A. Yes. That's what he's trying to convey. Q. And then he says at the bottom of -- Then he says, at the bottom of that paragraph in the last sentence, "Interestingly, we have found Union/Tyler" -- and again, that's McWane; right, sir? A. Yes. Q. All right. Interestingly, we have found McWane leading markets downward in Tennessee and Alabama and the Carolinas. And that's the report you got

from the guy in charge of Sigma of selling in those territories; right? A. Yes. Q. And all of these are reports you got about three and a half months after DIFRA actually started up; is that fair? A. That's correct. Q. All right. Now, if we go to the bottom of the second page -- well, I'm sorry. Let's go to the -- let's go to the first page. Down at the bottom. Now, here's an e-mail. It's quite a long e-mail, but we'll start here. This is an e-mail which you read and respond to your southeast territory manager, regional manager, Mr. Fox; right, sir? A. Yes. Q. And if we scroll over and then go on to the next page, if we look at number 4 there, you say, "I am sure that Tyler is as guilty of starting the price decline as any of the other two of us." And that's what your view was; you thought Tyler might very well have started that price decline. A. Sure. Q. Right. Two sentences after that, you say, "Here, the culprit again may be the plant work 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 three to four years." Do you mean, sir, that here at the end of 2008 you had urged Mr. Rybacki and urged and urged him to change that plant work pricing, and he just had never done it, had he? A. Yes. Yeah. It sure seems that -- whether he did it or not I'm not sure, but it was not effective. And it also points to the fact that we were not trying to eliminate a special pricing, we were trying to minimize it, and apparently it has continued to be so, continued to be available to the salespeople.") (objections omitted), 2151 ("Q. All right. And when you said "pricing pressures," you're referring to that sharp erosion in prices in the second half of 2008 after DIFRA was operational? A. Yes.") & CX 1744); (Rybacki, Tr. 3660-3661 ("Q. Go ahead. Did prices -- did your average prices go down in the second half of '08, sir? A. Our volumes went down. I don't know -- I don't think our average pricing -- you know, we tried to hold the line because volume was going down, but -- but our volume definitely took a hit from August through September of '08. Q. Yeah. And if we look at

some of your regions -- first of all, your price in the second half of '08 is different in every region; right? A. Yes. Q. And if we look at -- let's pick Alex City, the eighth month, so that's August, and if we can highlight that line. So in August, the average price for group A -- and group A is just your top-selling fittings of all sizes? Is that what that is? A. Correct. Q. All right. Your average price was a .28, but then it declined down to a .24 by the end of the year; right, sir, Alex City? A. Yeah, that's correct. Q. And then if we look down at the Chicago area, it was .27, .28 in the middle of the year, declined down to .26 by the end of the year; right, sir? A. Correct. Q. Mr. Rybacki, was there any time during 2008 when you discussed your job pricing with anyone at McWane and agreed upon let's reduce job pricing? A. Never.”), 3717-3719).

268. Star's gross and net profits for Fittings declined during the second half of 2008 (McCutcheon, Tr. 2573 (“Q. All right. And am I right then that in fact Star's gross and net profits for fittings did decline during the DIFRA period in the second half of 2008? A. Yes, sir, you are correct.”)).

269. Star's net margins were declining in the second half of 2008. (McCutcheon, Tr. 2571 (“Q. And if I understood you yesterday, your gross margins were declining in the second half of 2008 as the year went on; is that right? A. I recall the nets declining, yes, sir, net margin.”)).

E. DIFRA Members Used the Aggregated DIFRA Tons-Shipped Data for Pro-Competitive Purposes

270. DIFRA members used the tons-shipped reports to better manage production schedules and inventory. (JX 694 (Bhutada, Dep. at 20-21 (“Q. What benefits did DIFRA offer that made you decide that Star would like to be a member? A. It offered a fair amount of benefits. It gave us an idea of our market share, which helped us to plan our business strategy, whether we are on the right track or not. It also helped for presentations to the bank. And

ultimately, it helped us to make a decision about going into domestics in 2009. Q. Correct me if I'm wrong. Knowing your market share, I think you told me, just helped you to plan your business strategy -- correct? -- as one of the reasons? A. That is correct. Q. How does knowing your market share help you plan your business strategy? A. Whatever sales strategy or business strategy we are using, if 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. Q. Did different types of jobs use different types of fittings sizes? A. That is correct. Q. So for example, would plant work use, typically, a different size of fitting than subdivision work? A. Usually. Q. Could knowing your market share help you plan production schedules? A. That is correct. Q. I think you also told me that knowing your market share would help with presentations to the bank? A. That is correct.”); JX 654 (Brakefield, Dep. at 77-78 (“Q. Does this data, does it give you an indication of whether different parts of the economy are moving in different ways? A. Exactly. It identifies segments of the market that leads you to understand the product you need to be making and the size range you need to be dwelling on and having inventory to meet customers' needs, yes, sir. Q. And why was that of interest to the DIFRA member? A. Again, operation efficiencies, cost efficiencies, and able to service customers in a timely manner.”) (objections omitted)); Rybacki, Tr. 3539-3541 (“Q. You can take that down, Brian. Did you believe Sigma's participation in DIFRA was a great step in its effort to strengthen the industry? A. I had hopes for it. Q. Did you believe that Sigma's participating in DIFRA would lead to economic benefits? A. The economic benefits if we standardize linings and coatings alone would be a tremendous economic benefit. Q. Would the information exchange lead to economic benefits? A. Not really. The information exchange, as I stated in my earlier testimony, was pretty much what I expected. All we got was our numbers, what our percentage of the market was, and I was

pretty much right on the number anyway. Q. Did Sigma make an effort to analyze those numbers? A. You analyze all information you receive. Of course. Q. And how did Sigma use that -- how did Sigma use that analysis? Q. Do you need the question again? A. No. I did not analyze any of this information. That was done by our people in Cream Ridge, New Jersey, our IT people, and obviously Tom and Victor mostly. And I think to me, to me, it didn't do anything because, like I said, stated before, I got pretty strong market -- I got a pretty strong market feel, and my feel was correct. So, therefore, I kind of knew where we were, and it didn't make a -- the only thing it helps for was planning purposes for, you know, your inventory, and so forth, and we already knew where we were anyway, so to me it had zero effect.”).

271. The DIFRA aggregated tonnage report helped McWane decide, in June 2008, to chose the low end of a range of multiplier increases he had been considering, because the DIFRA report confirmed his suspicion that McWane was continuing to lose market share. (Tatman, Tr. 536-540 (“Q. And when you received this report, you analyzed it; is that right, sir? A. I believe so. And you probably got a spreadsheet from me. Q. Well, let's look at CX 0139. And so you received it at 2:41, and you circulated a copy of the report with some analysis at 3:20; is that right, sir? A. That appears to be the timestamps. Q. And you, as you put it, threw together a simple summary and comparison in Excel? A. Yes. I'm pretty good with that. Q. And you and Mr. McCullough used that to make a decision on the price increase; is that right, sir? A. I'd have to look at the date when we actually sent out the letter, but I've said that Mr. McCullough was waiting for this, and so this would have come into our consideration. Q. And what you did in the intervening time to when you received it to when you circulated the analysis was a quick market share analysis; is that right? A. I would have done that. Q. And you compared that to other benchmarks you'd been using that you've mentioned, for example, the VMA data? A. Yes. And

what -- what the initial -- and again, DIPRA -- DIFRA then sent out revised data because this was erroneous here. But I took the initial snapshot of data and analyzed it. And I told you before that I didn't think that I needed this because I thought I knew where we were. I said I knew we were losing share. I was correct. But what the DIFRA data showed is that our share loss was larger than I would have thought. And because of that, we had two options discussed earlier in a brainstorming session for price increase, an 8 percent and a 12 percent. Because our share loss was greater than what we thought, we went out with the 8 percent, which is consistent with the strategy I've been discussing all day long. Q. Do you know whether Mr. McCullough sent that on to the -- your brief analysis on to Mr. Page, the CEO of McWane? A. There's a timestamp there. Q. Okay. Let's go to CX 1576. A. You've switched books on me again. I have that. Because I'm old and my memory is poor, was the dates on the prior e-mails that we discussed June 14? Q. No. They were June 17, sir. A. They were June 17. Okay. Q. So in other words, McWane announced a price increase the same day it received the DIFRA data; right? A. If those dates align, that would be correct. Q. So you got the data at 2:41 and by 6:26 you were announcing a price increase to your big customers; right? A. Yes. And if you look at what we had done prior, we had two options, an 8 percent and a 12 percent. The DIFRA data came in. It's like oh, crap, the share loss is worse than we thought. What are we going to do? Let's go with the lower number because we obviously must be getting beat on price again, and so that action actually ends up on a relative basis lowering prices in the industry. Q. So the DIFRA data helped you determine that you were getting beat on pricing; is that right, sir? A. The DIFRA data let me understand that my loss was larger than I thought. Now I have to speculate of why. Q. And you deduced from the share loss being larger than you thought, based on the DIFRA data, that that was because you were getting beat on pricing; is that right, sir? A. We -- we made a decision

because our share loss was greater than what we thought that we were going to go out with a smaller price increase. Q. And you made that decision based on the DIFRA data; right, sir? A. That DIFRA data reaffirmed the decision we made. If you will notice, if we go back, when I had a draft letter, before receiving the DIFRA data, my draft was 8 percent. The brainstorming discussion with Mr. McCullough was 8 to 12 percent. As I told you before, in my heart I knew the answer. I knew we were losing share. My draft letter before the DIFRA data is 8 percent. Now that we have the DIFRA data, that confirms it. It's 8 percent when we have competitors asking for 20 to 40 percent. Q. Sir, when you prepared your drafts that we looked at earlier, you had an 8 percent and a 12 percent; right? A. There's -- there's two bits of data we looked at. We have a brainstorming discussion about what do we do, and there's an option for an 8 percent, there's an option for 12 percent. You also had me look at a draft price increase letter that I put together, and it says "draft." And that didn't say 12 percent; that said 8 percent. And if we could go back to the timestamp on that, I do not have the DIFRA data at the time I wrote that draft. But I'm telling you I know what the answer was going to be, that we were losing share, because I had reported that throughout other documents there. All the DIFRA data did to me -- again, I said it's important to Leon. I knew the answer -- it just reconfirmed what I already knew, that I was losing share, and it reinforced that the situation was worse than I thought, so we pulled out the lower price option, 8 percent, and initiated it."), 958 ("Q. And so then you had pretty much decided on the 8 percent. You got the -- which the draft which counsel showed you. You got the DIFRA data, and then you did something in what range, sir? A. We -- then the 8 percent is a weighted average aggregate. Everything changes by state. Q. So if I understand, what that means is your change in price in June of 2008 after seeing the DIFRA data was roughly only a third of the price that the other guys had out there? A. Yes.") & CX 139, CX 1576) ;

(Schumann, Tr. 4284-4287) (“Q. Okay. Let's go to RX 424. If we go down to that bottom e-mail, Andrew, maybe we can pull that out. This is Mr. Tatman's June 17 quick and dirty analysis of that first DIFRA report; right, sir?... Q. Well, Dr. Schumann, let's start with the multiplier maps. What they did after they got this DIFRA data was send out a multiplier map. We just looked at it. It was lower in every state than Sigma's big bold move which Star had followed; correct? A. The multiplier map that -- it is correct that the multiplier map that McWane began circulating in -- on June 17 had state multipliers that were lower than the multipliers that Sigma had on a map that was never effective as their published multipliers. Q. Now, Dr. Schumann, Mr. Tatman says right here that he believes it will be difficult to get back their share, but he's hoping that with the lower multipliers they're sending out that that will make it possible and make victory all the more sweeter; right? That's what he says right here. A. That's what he says right there.”). The DIFRA aggregated tonnage report helped McWane decide, in June 2008, to chose the low end of a range of multiplier increases he had been considering, because the DIFRA report confirmed his suspicion that McWane was continuing to lose market share. (Tatman, Tr. 536-540 (“Q. And when you received this report, you analyzed it; is that right, sir? A. I believe so. And you probably got a spreadsheet from me. Q. Well, let's look at CX 0139. And so you received it at 2:41, and you circulated a copy of the report with some analysis at 3:20; is that right, sir? A. That appears to be the timestamps. Q. And you, as you put it, threw together a simple summary and comparison in Excel? A. Yes. I'm pretty good with that. Q. And you and Mr. McCullough used that to make a decision on the price increase; is that right, sir? A. I'd have to look at the date when we actually sent out the letter, but I've said that Mr. McCullough was waiting for this, and so this would have came into our consideration. Q. And what you did in the intervening time to when you received it to when you circulated the analysis was a quick market share

analysis; is that right? A. I would have done that. Q. And you compared that to other benchmarks you'd been using that you've mentioned, for example, the VMA data? A. Yes. And what -- what the initial -- and again, DIPRA -- DIFRA then sent out revised data because this was erroneous here. But I took the initial snapshot of data and analyzed it. And I told you before that I didn't think that I needed this because I thought I knew where we were. I said I knew we were losing share. I was correct. But what the DIFRA data showed is that our share loss was larger than I would have thought. And because of that, we had two options discussed earlier in a brainstorming session for price increase, an 8 percent and a 12 percent. Because our share loss was greater than what we thought, we went out with the 8 percent, which is consistent with the strategy I've been discussing all day long. Q. Do you know whether Mr. McCullough sent that on to the -- your brief analysis on to Mr. Page, the CEO of McWane? A. There's a timestamp there. Q. Okay. Let's go to CX 1576. 1 A. You've switched books on me again. I have that. Because I'm old and my memory is poor, was the dates on the prior e-mails that we discussed June 14? Q. No. They were June 17, sir. A. They were June 17. Okay. Q. So in other words, McWane announced a price increase the same day it received the DIFRA data; right? A. If those dates align, that would be correct. Q. So you got the data at 2:41 and by 6:26 you were announcing a price increase to your big customers; right? A. Yes. And if you look at what we had done prior, we had two options, an 8 percent and a 12 percent. The DIFRA data came in. It's like oh, crap, the share loss is worse than we thought. What are we going to do? Let's go with the lower number because we obviously must be getting beat on price again, and so that action actually ends up on a relative basis lowering prices in the industry. Q. So the DIFRA data helped you determine that you were getting beat on pricing; is that right, sir? A. The DIFRA data let me understand that my loss was larger than I thought. Now I have to speculate of why. Q. And you

deduced from the share loss being larger than you thought, based on the DIFRA data, that that was because you were getting beat on pricing; is that right, sir? A. We -- we made a decision because our share loss was greater than what we thought that we were going to go out with a smaller price increase. Q. And you made that decision based on the DIFRA data; right, sir? A. That DIFRA data reaffirmed the decision we made. If you will notice, if we go back, when I had a draft letter, before receiving the DIFRA data, my draft was 8 percent. The brainstorming discussion with Mr. McCullough was 8 to 12 percent. As I told you before, in my heart I knew the answer. I knew we were losing share. My draft letter before the DIFRA data is 8 percent. Now that we have the DIFRA data, that confirms it. It's 8 percent when we have competitors asking for 20 to 40 percent. Q. Sir, when you prepared your drafts that we looked at earlier, you had an 8 percent and a 12 percent; right? A. There's -- there's two bits of data we looked at. We have a brainstorming discussion about what do we do, and there's an option for an 8 percent, there's an option for 12 percent. You also had me look at a draft price increase letter that I put together, and it says "draft." And that didn't say 12 percent; that said 8 percent. And if we could go back to the timestamp on that, I do not have the DIFRA data at the time I wrote that draft. But I'm telling you I know what the answer was going to be, that we were losing share, because I had reported that throughout other documents there. All the DIFRA data did to me -- again, I said it's important to Leon. I knew the answer -- it just reconfirmed what I already knew, that I was losing share, and it reinforced that the situation was worse than I thought, so we pulled out the lower price option, 8 percent, and initiated it.”), 958 (“Q. And so then you had pretty much decided on the 8 percent. You got the -- which the draft which counsel showed you. You got the DIFRA data, and then you did something in what range, sir? A. We -- then the 8 percent is a weighted average aggregate. Everything changes by state. Q. So if I understand, what that

means is your change in price in June of 2008 after seeing the DIFRA data was roughly only a third of the price that the other guys had out there? A. Yes.”) & CX 139, CX 1576).

272. The DIFRA tons-shipped data helped McWane in its internal analysis of its pricing for DIPF in order to lower McWane’s list price for medium and large diameter Fittings in early 2009. (Tatman, Tr. 594-595 (“Q. Now, going back to the 2009 price restructuring, you went up in the 3" to 12" segment? A. I'd have to take a look what we actually published. I could tell you the analysis on the spreadsheet and roughly what it did. You probably have a copy of that. But I think we went up 3 to 4 percent 3 through 12, down 11-ish, 12-ish percent 14 through 24, and down maybe 15-some percent from the large diameter. And I did that from information that I learned from DIFRA data. That DIFRA data gave me knowledge that allowed me to make that decision. Q. And what the DIFRA data told you is that McWane was the strongest in the 3" to 12" segment; right? A. Yes. And I did -- Q. So in that segment you went up; right? A. We went up 3-4 percent. Q. And McWane was weaker in the other two segments where you went down; correct? A. Yes. And that came from looking at DIFRA data. Q. And the DIFRA data told you that Sigma and Star were stronger than McWane in the two segments where you went down; right? A. Remember, I only know what I do. I have to take a look at the other folks, and it doesn't say where that share of volume is coming from.”), 972-973 (“Q. Can we go to -- complaint counsel marked yesterday CX 569. Now, here you are in the spring of '09 and you're talking about your list price change, and this is a document that you remember from yesterday, sir? A. Yeah. Yes. Q. All right. And as I understand your testimony yesterday, you restructured your list price in the spring of '09? A. We did. Q. And I think you said that you raised the small diameter 3" to 12" prices a small amount? A. Yeah. Like 5 -- 4 -- 3, 4, 5 percent depending on which time I did it. Q. And then you lowered the 14" to 24" medium diameter list prices? A.

Double-digit down. Q. And you lowered the 30" and above large diameter prices? A. Even farther than the 14 through 24. Q. And you did that it sounds like partly to try to get share back from Sigma and Star? A. Yeah. Some of our competitive inputs were that competitors were line item pricing, which means not even giving a multiplier but just giving a fixed price on there, harder to track. We also -- when I looked at the DIFRA data, that's the first time that I actually saw two things, which is what was -- I always had a reference to what my share was in total. Now, I was wrong, it was worse than I thought, but at least I had a reference. But I never had a reference of how my share was segmented by those sizes or how my share was segmented between flanged and nonflanged.")& CX 569).

273. Mr. Tatman testified that Mr. McCullough's interest in the DIFRA tonnage report was driven by the legitimate business need to assess, to the extent possible, McWane's competitive performance and market share. (Tatman, Tr. 536-537 (Q. And you and Mr. McCullough used that to make a decision on the price increase; is that right, sir? A. I'd have to look at the date when we actually sent out the letter, but I've said that Mr. McCullough was waiting for this, and so this would have come into our consideration. Q. And what you did in the intervening time to when you received it to when you circulated the analysis was a quick market share analysis; is that right? A. I would have done that. Q. And you compared that to other benchmarks you'd been using that you've mentioned, for example, the VMA data? A. Yes. And what -- what the initial -- and again, DIPRA -- DIFRA then sent out revised data because this was erroneous here. But I took the initial snapshot of data and analyzed it. And I told you before that I didn't think that I needed this because I thought I knew where we were. I said I knew we were losing share. I was correct. But what the DIFRA data showed is that our share loss was larger than I would have thought. And because of that, we had two options discussed earlier in a

brainstorming session for price increase, an 8 percent and a 12 percent. Because our share loss was greater than what we thought, we went out with the 8 percent, which is consistent with the strategy I've been discussing all day long.”); CX 139; CX 627).

274. Sigma used the DIFRA tonnage report to help it determine market trends, and therefore better manage its inventory. (Brakefield, Tr. 1305-1306 (Q. Were there any specific decisions that you made using either the DIFRA reports or Raju's analysis of those reports? A. That I would make personally or that I would suggest something or what -- what do you mean? Q. Were there any specific suggestions that you made based on the reports? A. We would look at that and look at the size ratio or whether or not the trend is small diameter or large diameter or intermediate diameter, and we would basically not order as much large diameter if that trend was going down or order more small diameter. That would be the context that I would make suggestions from.”), 1308 (“Q. When did you specifically recommend to a regional manager that they change their ordering based on DIFRA data? A. I would just have to go back and look. I mean, I couldn't give you a specific, but that would be one of the contexts as I used it. It could be anywhere from the time we started getting numbers to October, the date of this. Q. So is there a -- can you give me an example of a specific use of the DIFRA data? A. 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.”), 1369-1370 (“Q. And the issue of standardization and elimination of SKUs, as you just referenced, that would have lowered costs of manufacturing? A. No question.”), 1389-1391

“Q. What did you mean by the DIFRA data helped Sigma determine trends? A. Well, if the projects are small or large diameter or midrange diameter, that's a trend towards size. If it's plant work versus subdivision work, that's a trend toward flanged, if it's plant work or public work rather than underground, which would be a subdivision. So as we've experienced lately in the housing industry, we've seen a reduction into the smaller sizes. For example, there's a -- one sort of item that people sort of gear with housing. It's called an eight-by-six hydrant valve tee. And that's a tee that's used to set fire hydrants, and you can't set a fire hydrant without that tee. Every fire hydrant in this country you have a tee just exactly like that. And if you want to look at when you say, hey, what the trend is going to be, when you see that small diameter starts going down, you need to start reducing all of those because your subdivision work is not producing -- not giving you the kind of trend as far as you've got to ship a thousand eight-by-six hydrant tees. You just -- you have to use that and understand that. Housing starts have a relationship with certain items, too, because they -- they're used in subdivisions. And so you have some ratios that you develop, so when you see the trend of small diameter going down, you have to make that reduction in those key items. If housing is off 15, 20, 30, 40 percent, whatever it is -- it's pretty substantial now -- you want to take those key items that tie to housing and reduce those the same amount. So there's some interpolation -- interpretation there that you can use and get pretty good information out of ordering the right fitting at the right time. Q. Do you know, sir, then whether or not the DIFRA data permitted Sigma to manage its inventory? A. I think that's probably the best way to put it, is that it helps you literally see sizes, configurations, and whether or not it's public work, private work, that would be flanged or other. It's difficult with the other, you know, but with flanged it gives you a pretty good -- a really pretty good test there.”), 1429-1430 (“Q. And you discussed that the DIFRA information exchange showed trends relating to the demand

for fittings, and you specifically mentioned a single item that was -- that's used for fire hydrants. What item was that? A. That was an eight-by-six hydrant tee, hydrant valve anchoring tee. Q. And the DIFRA data helped you understand the demand for that specific item? A. In that the small diameter, which is basically private work, subdivision work, you could utilize that in a way to where that item, that unique item, geared to fire hydrants could help you with that. Q. Why couldn't Sigma use its own sales of that unique item to project the trend? A. It could. It could. But nationally, when you look at the whole marketplace, it gives you a much better picture. Sigma wasn't every place in the country, so Sigma's numbers could be up in this area, down in that area, so it was hard to really utilize that, although you could do some of that. You could test it and say here's what the DIFRA numbers are, here's what our numbers are, and see if there's a correlation.”).

275. Mr. Pais testified that, at the time DIFRA was formed, he believed the DIFRA data could potentially assist Sigma with inventory planning and in managing its supply chain, which had “long lead times of almost six to eight months’ time in some cases”. (JX 687 (Pais, Dep. at 27-28 (“Q. All right. Mr. Pais, I think you said that you thought the DIFRA would be a good idea; is that right? A. Yes. Q. And what did you think would be a good idea with DIFRA? What was the benefit that you saw? A. For us, our industry lacks, as I saw it, a lot of other industries like automotive, et cetera, lacked any data as to the market demand, and I felt someone like us who has a burden of a long supply chain, long lead times of almost six to eight months’ time in some cases, were really going in a very, if not arbitrary, somewhat like as throwing dots with no particular guidance to plan our business, plan our purchases, and inventory for a business like us was the mother's milk. And we were shooting and with the vast product lines that we have, we just were not being able to plan both on upside and downside.”)).).

276. Mr. Pais testified that: “To me, I think I testified this morning, the primary purpose of DIFRA, the primary benefit from this effort was to know the market size and the trends that we can use to great advantage, and we did for a short amount of time by planning our supply chain, planning the capacity, being better prepared to respond to the market potential up or down.” (JX 687 (Pais, Dep. at 126)).

277. Mr. Pais expected to be able to use the DIFRA tonnage report to lower Sigma’s inventory and supply chain costs. (JX 687 (Pais, Dep. at 128 (“Q. Was it your expectation that you would be able to use that data to lower your inventory cost and your supply chain costs? A. Absolutely.”))).

278. Star used the DIFRA tonnage report in presentations to its lenders, and in making its decision to become a domestic Fittings supplier in 2009. (JX 694 (Bhutada, Dep. at 20-21 (“Q. What benefits did DIFRA offer that made you decide that Star would like to be a member? A. It offered a fair amount of benefits. It gave us an idea of our market share, which helped us to plan our business strategy, whether we are on the right track or not. It also helped for presentations to the bank. And ultimately, it helped us to make a decision about going into domestics in 2009. Q. Correct me if I'm wrong. Knowing your market share, I think you told me, just helped you to plan your business strategy -- correct? -- as one of the reasons? A. That is correct. Q. How does knowing your market share help you plan your business strategy? A. Whatever sales strategy or business strategy we are using, if 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. Q. Did different types of jobs use different types of fittings sizes? A. That is correct. Q. So for example, would plant work use, typically, a different size of fitting than subdivision work? A. Usually. Q. Could knowing your market share help you plan production

schedules? A. That is correct. Q. I think you also told me that knowing your market share would help with presentations to the bank? A. That is correct.”.)

279. Dr. Normann testified that there is no economic evidence that the McWane, Sigma, and Star price changes in January 2008 and June 2008 were coordinated--prices were largely unchanged on average despite significant increases in cost, average prices did not move in parallel, but rather, average prices moved in different directions, and McWane did not follow Sigma’s large list price increase in the fall of 2007 (for January 2008), but instead issued lower multipliers for most states effective February 2008 and did not follow Sigma’s large multiplier increase announced in April 2008. (Normann, Tr. 4777-4779 (“What conclusion do you ultimately draw from your figure 1, Dr. Normann? A. Well, first let me just say, if you go through the rest of column E, you’ll see that there’s a great number of states that saw their multipliers decrease in a year-to-year comparison of Alabama, Alaska, Arizona, Delaware, Florida. Then there’s -- you know, Indiana. Then there’s many that are unchanged. About half the states or over half the states the published multiplier was unchanged or reflected a decrease. So I think what that means, first of all, it’s fundamentally inconsistent with the allegations in the complaint about price announcements of price increases. I think it’s fundamentally at odds with that. Number two, we’re talking about allegations of a cartel and communication and a conspiracy to raise prices, yet what we see is on a state-by-state level some are going -- the multiplier is going down by five percentage -- or five points, rather, some by three. Some it’s remaining the same. Some it goes up slightly. The changes are all over the place. And that type of variability in pricing, of price changes, that seems to me much more consistent with normal competitive behavior, normal independent decision-making, than it is with some sort of coordinated price action. And then finally, another important I think takeaway of this is,

remember, at both these time periods, prior to McWane's changes, Sigma and Star had made their own price announcements, which represented significant increases in their published multipliers, but McWane's are all over the place, decreases, stays the same, decreases in a year-to-year comparison. This to me is consistent with independent decision-making. Q. All right. Now, we've created a demonstrative that puts this -- depicts this in numbers. And if we can call up RDX 73, I'll ask you to take a look at this. Is this a fair summary of that figure 1 in numerical form, which states went up, how many states went down, and so forth? A. Yes. It gives -- so what this shows is July 2007 to the first multiplier, new multiplier map of 2008, and you'll see -- I think I touched on some of this already -- but, for example, that first time period when the allegations are of price increases, 28 states, McWane lowered the multiplier in 28 states, and 8 states it was unchanged, so, again, very inconsistent with allegations of price increases. But also notice the variability. You know, 28 went down, 8 were unchanged, 14 increased. That to me does not strike a notion of coordinated price increases. And then in the second set of bullet points -- once again, I think I've touched on this as well -- we see that comparing 2007 to 2008, mid-2008, we see more than half the states decreased or were unchanged.”)

280. Dr. Normann testified that there is no economic evidence of an agreement to reduce job pricing. (Normann, Tr. 4746-4749) (“Let's start with the allegations involving the conspiracy that there was an attempt to raise multipliers and reduce job pricing. I think as first sort of the top-level summary, I literally found no evidence consistent with those allegations. All of the evidence that I found rejected or was inconsistent with those allegations really fundamentally. So I found, for example, that for Star, Sigma and McWane, during the time period of 2008 -- and I realize that, at least from my perspective, the exact timing of the alleged cartel is really very vague -- but over roughly that 2008 time period, McWane's prices were

trending downward from the end of 2007 into 2009. Star's prices, Sigma's prices, they rose modestly, but not by a significant degree. And Star's and Sigma's actually went up by a different amount, probably by -- well, they were very modest to begin with, but the price increase between the two of them over about a 12 to 13-month period was different by, you know, 40-50 percent, for example. But this is happening during a time where there's enormous cost increases that had started taking place in 2007. Raw material, the energy, the scrap, the pig iron costs in China were going up dramatically. So we'd expect to see some changes in price because of increases in cost, as a fundamental matter in a competitive market, put upward pressure on prices. But what we see is not parallel movements in price that are going up and going up by significantly more than cost increases. What we in fact see are prices moving independently of one another and, you know, declining for some and modest increases for others, so that's fundamentally inconsistent with a conspiracy. But that's not all I looked at. I also looked at the prices for the imported product against what I consider a relevant benchmark, which is the domestic side. Because there's no allegations on the domestic side of the product, so what I would expect to see is -- domestic product is sold into the same marketplace. Domestic product is completely physically fungible. Domestic product faces the same underlying demand, housing starts, for example. So if there was a conspiracy in 2008, I would expect to see the price of imports rise against -- compared to the price of domestic, but I don't see that. In fact, it declines over the time period. Additionally, I also looked at -- I mentioned a few minutes ago I looked at the pattern of sales because a fundamental question that one needs to address and ask and look at in a cartel case is there evidence of withholding, because you can't raise prices, the cartel can't raise prices, absent the ability to withhold product from the market. And so I looked at inventory data. I looked at 1 sales data controlling for seasonality. And what I found is completely inconsistent. It goes in the

opposite direction. I found an increase in output, an increase in sales, not a withholding. So my conclusions are, you know, I ran these tests, and I literally, on the attempt to raise prices, found no evidence of it. I also looked specifically at the job pricing question. And what I did there is I looked at essentially the variation in prices, the dispersion of price point, to see if that was reduced in a parallel way among the three sellers in 2008, and I don't see that. It doesn't happen. Some go up. Some are steady. There's no parallel reduction. There's no evidence in the data suggesting a reduction in job pricing.”).

IX. McWane’s Independent Decision to Lower List Prices on Medium and Large Diameter Fittings in Spring 2009

A. Dr. Schumann Testified the Alleged Conspiracy Regarding Non-domestic Fittings Prices Ended in 2008

281. Dr. Schumann testified that the conspiracy was collapsing by the end of 2008. (Schumann, Tr. 4297-8 (Q. Okay. Now, you agree with me, right, that within a few months of the first DIFRA report coming out and being corrected that the conspiracy you found collapsed? A. I believe that by the end of 2008, that last quarter, the conspiracy was collapsing.”), 4298 (“My belief is around the end of the year, November or December, in that last quarter of the year, that it collapsed.”), 4304 (“Q. October 23, 2008, so right around the time you say the conspiracy is falling apart and ending; correct? A. This is around the time- Q. Yeah. A.--it seemed to be really starting to collapse.”), 4064-4065 (“Q. Dr. Schumann, the conspiracy you found in the odd year of 2008 collapsed, was over, in the fourth quarter of 2008, in your opinion; correct? A. I believe that that episode was over at the end of 2008. Q. No, I'm not talking about that episode. I'm talking about the conspiracy that you claim existed -- A. Yes. Q.-- was over at the end of 2008, fourth quarter; correct, sir? A. Yes. That's my opinion.”); 4200-4201).

282. Dr. Schumann testified that the alleged conspiracy did not extend into 2009 or 2010. (Schumann, Tr. 4066 (“Q. And therefore, Dr. Schumann, you did not find one big, long

conspiracy that lasted into 2010 --A. Right. Q.-- correct? A. Yes, that's correct.”), 4067 (“Q. Now, you're the expert. That's not what you found. You found one seven-month conspiracy that ended in the fall of '08; correct, sir? A. I concluded that the conspiracy of 2008 ended at by the end of the year. But, I mean, as I said earlier, when the Bureau of Competition took me on as an expert, it was at their risk. My conclusion was things fell apart at the end of 2008.”).

B. McWane's April 2009 List Price Restructuring To Lower Prices for its Medium and Large Diameter Fittings Was Based on Mr. Tatman's Independent Analysis

283. In April 2009, McWane independently restructured its list price to raise the prices of its small diameter Fittings by a small amount, and reduce the prices on its medium and large diameter Fittings by about 12 to 15 percent. (Tatman, Tr. 594-596 (“Q. Now, going back to the 2009 price restructuring, you went up in the 3" to 12" segment? A. I'd have to take a look what we actually published. I could tell you the analysis on the spreadsheet and roughly what it did. You probably have a copy of that. But I think we went up 3 to 4 percent 3 through 12, down 11-ish, 12-ish percent 14 through 24, and down maybe 15-some percent from the large diameter. And I did that from information that I learned from DIFRA data. That DIFRA data gave me knowledge that allowed me to make that decision. Q. And what the DIFRA data told you is that McWane was the strongest in the 3" to 12" segment; right? A. Yes. And I did -- Q. So in that segment you went up; right? A. We went up 3-4 percent. Q. And McWane was weaker in the other two segments where you went down; correct? A. Yes. And that came from looking at DIFRA data. Q. And the DIFRA data told you that Sigma and Star were stronger than McWane in the two segments where you went down; right? A. Remember, I only know what I do. I have to take a look at the other folks, and it doesn't say where that share of volume is coming from.”).

284. McWane's April 2009 List Price change was based on Mr. Tatman's independent product weight analysis. (Tatman, Tr. 976 ("Q. And the same thing, you went sort of product by product or group by group and state by state? A. Yes. We took a look -- you know, that went into that, but then we actually took our list price and got all the weights of all our product and verified all the weights of our product and got the true dollars per pound and looked at how that varied. This was -- I started this in I think August or September the prior year, so this -- this took a while to evolve.")).

285. Mr. Tatman did not share the results of his product weight analysis with Star or Sigma. (Tatman, Tr. 976-977 ("Q. All right, sir. And did you share the fruits of all your analysis with Star or Sigma ahead of time? A. No.")).

286. McWane did not consult with Star or Sigma before restructuring its list prices in 2009. (Tatman, Tr. 978 ("Q. All right. And do you take that, the fruits of your labor, and did you give it to Star and Sigma in advance? A. No. Q. Made an independent decision, sir? A. Independent decision."), 1005-1006 ("Q. Mr. Tatman, did you -- at all times, 2008, 2009, 2010, did you make independent decisions on your list price? A. Always. Q. Published multipliers, sir? A. Always independent. Q. All right. Can we call up as a demonstrative aid RXD 001. Let's look at this. So you had independent decisions on your list price you said? A. Yes.")).

287. 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 ("Q. All right. And as I understand your testimony yesterday, you restructured your list price in the spring of '09? A. We did. Q. And I think you said that you raised the small diameter 3" to 12" prices a small amount? A. Yeah. Like 5 -- 4 -- 3, 4, 5 percent depending on which time I did it. Q. And then you

lowered the 14" to 24" medium diameter list prices? A. Double-digit down. Q. And you lowered the 30" and above large diameter prices? A. Even farther than the 14 through 24. Q. And you did that it sounds like partly to try to get share back from Sigma and Star? A. Yeah. Some of our competitive inputs were that competitors were line item pricing, which means not even giving a multiplier but just giving a fixed price on there, harder to track. We also -- when I looked at the DIFRA data, that's the first time that I actually saw two things, which is what was -- I always had a reference to what my share was in total. Now, I was wrong, it was worse than I thought, but at least I had a reference. But I never had a reference of how my share was segmented by those sizes or how my share was segmented between flanged and nonflanged. So when we got hammered that year and had to shut that plant down, started looking for, you know, what's going on there, and I just analyzed that and noticed that huge spread on a dollar-per-ton basis on the list price. I think there was a 250 percent spread within the list price between what the dollars per ton list price was on small-diameter fittings versus some large-diameter fittings. And I thought to make us more competitive out there that I was going to change the game again and just structure our list price the way that I would want to have it structured based on how I wanted to compete. And this was a pretty rational move."); CX 569; McCutcheon, Tr. 2584-2585 ("Q. Right. Now, in fact, McWane's share of the fittings market, by your own estimation, has been declining ever since 2003; right, sir? A. By our estimation, that's correct."); CX 532 (McWane's market share has been falling relative to Star's since 2003).).

288. Mr. Rybacki testified that he was so angry about McWane's 2009 list price restructuring that he wanted to sue McWane for predatory pricing. (Rybacki, Tr. 3719 ("Q. In fact, Mr. Rybacki, you were so -- so upset, you thought they were predatorily low, those prices; right? A. Yes. I wanted to sue.")).

289. McWane kept its 2009 list price reductions for medium and large diameter Fittings in place. (Rybacki, Tr. 3664-3665 (“Q. And let's look at the next page. I think, if I understood your testimony, one of the reasons business was horrendous was because my client, McWane, significantly lowered its fittings list prices in 2009; is that right? A. Yes. Q. And that's what this is a reference to right here in the board materials; right, sir? A. Correct. Q. The largest competitor, McWane, significantly reduced prices on medium and large size fittings, medium [REDACTED] percent decrease; right, sir? A. Yes. Q. Large-diameter fittings down [REDACTED] percent; right, sir? A. Yes. Q. And that had an overall impact on Sigma's sales in the range of about a [REDACTED] percent decline; right, sir? A. Correct. Q. And you were asked some questions about whether that was concerning to you. Was it concerning to you, sir? A. Very much so. Q. And just so we're clear on the record, this is your year-end board minutes -- materials. McWane left that lower price -- those lower list prices in place throughout 2009, didn't they, sir? A. Throughout the year.”); RX 242 in camera; Pais, Tr. 2046 (“Q. And in fact, we know McWane kept its price list decline in place throughout 2009; correct, sir? A. Yes. Q. All right. A. Till this day.”).).

290. Complaint Counsel has failed to establish any evidence that a call between Mr. McCutcheon and Mr. Tatman in the spring of 2009--after McWane had already announced its list price adjustments--bears any relation to allegations in the Complaint or constitutes an agreement to do anything unlawful.

291. Mr. McCutcheon and Mr. Tatman did not discuss prices or the nature of McWane's announced list price change; Mr. Tatman merely confirmed publicly available information that McWane's *previously* announced price change would be implemented. (McCutcheon, Tr. 2529-2530 (“Q. Now, so you called Mr. Tatman in the spring of '09 and, as I

heard you yesterday, you didn't discuss prices with him at all, did you, sir? A. No, sir. Q. And you simply called and asked about whether you should go ahead and print your list, whatever it was; right? A. Yes, sir. Q. Whether there was some remote chance Mr. Tatman was going to rescind the list he'd already sent out; right? A. Yes, sir. Q. And you didn't offer to change your position, did you? A. No, sir. We didn't talk about my position. Q. And you didn't say to him, "Hey, please rescind that big price decrease," did you, sir? A. No, sir. Q. And that was the entire extent of the conversation, was just are you going to rescind, he said no, and then that was it? A. The -- we had a short conversation right after that -- I think I talked about it some yesterday -- that Mr. Tatman jokingly said that if he didn't print it, he would pay our \$25,000 printing fee, and that was the extent of the conversation. Q. Kind of like "I'll eat my hat if it doesn't happen" sort of a thing? A. Yes, sir, very similar thing. Q. Any secret message going on there that you intuited, Mr. McCutcheon? A. No, sir.”.)

292. The cost of printing a new price list is roughly \$30,000. (Tatman, Tr. 257 (“Q. And you previously estimated those costs at about \$30,000 for the cost of printing and mailing? A. I've said -- well, I think when I say 25 or 30 thousand dollars, that's total cost, including the internal burden of doing that, the cost of printing and cost of mailing, and that's an estimate. I don't have an exact number on that. But it's not -- it's not -- let's agree it's not \$2,000. It's something of significance.”); JX 644 (Tatman, Dep. at 45-46 (“Q. And you mentioned it being expensive. Do you have a ballpark on what one of these things costs to change? A. Well, are you going to count the internal cost? Q. No. The external cost. That's a fair point. A. Okay. I think printing and mailing is around a \$30,000 bill, and that's -- that's a real rough estimate.”)); Rybacki, Tr. 3542 (“Q. There's a reference here to McWane -- strike that. Were you thinking about a multiplier increase or a list price increase? A. We wanted a price -- a list price increase

because they're more effective, but I think it was going to be a -- we were looking at maybe a multiplier increase. Q. And why were you looking at a multiplier increase if a list price increase was more effective? A. The list prices are expensive to do and if -- a multiplier increase is easier, but way less effective.”).

293. Star independently chose to follow McWane’s announcement lowering its prices because that was Star’s standard operating procedure. (McCutcheon, Tr. 2462 (“As soon as the McWane announcement came out, we internally chose to follow it, because that was our standard operating procedure, and I believe the process had already begun to follow McWane's price change.”).)

X. McWane Independently Decided Its June 2010 Multipliers

294. In June 2010, Sigma distributed a price increase letter to its customers which did not specify whether it was a list or multiplier change. (CX 1413; JX 687 (Pais, Dep. at 372-377); (JX 690 (Rybacki, Dep. at 210-213)).

295. On June 17, 2010, McWane made its June 2010 pricing decision to adjust Fittings multipliers independently and did not communicate with anyone at Sigma or Star regarding the multiplier adjustments. (Tatman, Tr. 978 (“Q. All right. And do you take that, the fruits of your labor, and did you give it to Star and Sigma in advance? A. No. Q. Made an independent decision, sir? A. Independent decision.”); 1005-1006 (“Q. Mr. Tatman, did you -- at all times, 2008, 2009, 2010, did you make independent decisions on your list price? A. Always. Q. Published multipliers, sir? A. Always independent. Q. All right. Can we call up as a demonstrative aid RXD 001. Let's look at this. So you had independent decisions on your list price you said? A. Yes.”); RXD 001 in camera; Rybacki, Tr. 3720-3722; CX 2453; Pais, Tr. 2048 (“Q. Now, did you discuss and agree with anyone at McWane your multipliers in June 2010; sir? A. No. Not at all.”); Brakefield, Tr. 1337 (“Q. I would like to ask then the last

question that I had just finished with before the objection, that in June of 2010, as part of the alleged conspiracy, did you communicate with anyone at McWane and agree upon the prices that Sigma and McWane would charge customers? A. No, sir. Q. At any time did you discuss in advance with anyone from McWane any multiplier that Sigma was about to issue? A. No, sir.”); CX 2440; CX 2450; CX 2453; CX 1396).

296. Mr. Tatman performed complex internal analyses with respect to McWane’s June 2010 pricing decisions. (Tatman, Tr. 978 (“Q. And did you do the same kind of state-by-state analysis internally? A. Yes, I would have. Q. All right. And do you take that, the fruits of your labor, and did you give it to Star and Sigma in advance? A. No. Q. Made an independent decision, sir? A. Independent decision. Q. All right. All these price moves that we saw, January '08, June '08 multipliers, April '09 list price, June 2010 multipliers, did you make these decisions independently on your own, sir? A. They were done independently.”).).

297. Star subsequently announced a multiplier change in June 2010. (CX 1406; CX 2441.)

298. Sigma subsequently announced a multiplier change at the end of June 2010. (CX 1396)

299. McWane, Sigma, and Star did not discuss or agree upon any multiplier adjustments or other pricing in 2010. (Tatman, Tr. 978 (“Q. All right. And do you take that, the fruits of your labor, and did you give it to Star and Sigma in advance? A. No. Q. Made an independent decision, sir? A. Independent decision.”); 1005-1006 (“Q. Mr. Tatman, did you -- at all times, 2008, 2009, 2010, did you make independent decisions on your list price? A. Always. Q. Published multipliers, sir? A. Always independent. Q. All right. Can we call up as a demonstrative aid RXD 001. Let's look at this. So you had independent decisions on your list

price you said? A. Yes.”); RXD 001 in camera; Rybacki, Tr. 3720-3722; CX 2453; Pais, Tr. 2048 (“Q. Now, did you discuss and agree with anyone at McWane your multipliers in June 2010; sir? A. No. Not at all.”); Brakefield, Tr. 1337 (“Q. I would like to ask then the last question that I had just finished with before the objection, that in June of 2010, as part of the alleged conspiracy, did you communicate with anyone at McWane and agree upon the prices that Sigma and McWane would charge customers? A. No, sir. Q. At any time did you discuss in advance with anyone from McWane any multiplier that Sigma was about to issue? A. No, sir.”); CX 2440; CX 2450; CX 2453; CX 1396).

XI. Complaint Counsel’s “Opportunity to Conspire” Evidence Does Not Support Any Inference of Collusion

300. Complaint Counsel failed to offer any evidence to support its contention that phone calls between Larry Rybacki and McWane employees had anything to do with the allegations in the Complaint, and witnesses expressly denied that any such calls have any relation to fittings, pricing, or the allegations in the Complaint. (CX 1621A in camera; Complaint ¶ 2).

301. Both Mr. Tatman and Mr. Rybacki testified that they never discussed or agreed upon Fittings prices. (Rybacki, Tr. 3626-3628 & CX 1621A in camera, 3650 (Q: “Mr. Rybacki, do those few phone calls we saw to Mr. Tatman or from Mr. Tatman -- did you and Mr. Tatman discuss and agree upon fittings prices that you were going to charge or he was going to charge?” A: “Never.”), 3682; Tatman, Tr. 367-370 & CX 1621A in camera).

302. Mr. Rybacki recalled that one phone call was likely a “welcome[] to the waterworks business” conversation shortly after Mr. Tatman accepted his new position with McWane. (Rybacki, Tr. 1088-1089 (“I just welcomed Rick to the waterworks industry, a very short call and, you know, just kind of, you know, social. You know, it was holiday season and I

just welcomed him to the waterworks business.”), 1120 (“I think I stated that I think I talked to him once or twice only in all -- forever, and I think I -- I welcomed him to the waterworks industry.”), 3626 (“I think I wished him welcome to the waterworks industry. I think I did that once.”)).

303. Mr. Rybacki recalled that one call likely related to Sigma’s interest in participating in DIFRA. (Rybacki, Tr. 3536-3537 (Q: “Okay. And what did you speak to Mr. Tatman about?” A: “That the DIFRA should continue, that we want -- we will continue being part of DIFRA, and that Star would participate as well.”) & CX 1284).

304. Mr. Rybacki testified that the vast majority of any remaining calls to McWane were personal calls between Mr. Rybacki and his personal friend and former colleague, Tom Frank, who at the time was working at McWane. (CX 1621A in camera and RX 467).

[REDACTED]

[REDACTED]

305. Mr. Rybacki testified that he would periodically call Mr. Frank to check on Mr. Frank and his family. (Rybacki, Tr. 3610-3611 (Q: “Did you speak to him about anything business related when he was at McWane?” A: “We had a mutual friend at -- it could have been Peter Prescott. We were very close to -- we were both very close to one customer in particular, and [REDACTED]

(Q: "And you said you periodically would call him just to check in and see how he's doing?" A:

[REDACTED]

306. Mr. Rybacki did not discuss Fittings prices with Mr. Frank. (Rybacki, Tr. 3650-3651 (Q: "And in any of your discussions with Mr. Frank, did you and Mr. Frank discuss and agree upon the fittings prices that you were going to charge or he was going to charge?" A: "No."), 3682 (Q: "What about your friend Tom -- I forgot his last name -- Tom Frank?" A: "No.")).

307. Mr. Rybacki does not remember the particular substance of any of these calls, and it is unclear that he actually spoke with anyone on the phone on the calls of two minutes or less, as opposed to being put on hold or sent to voice mail. (Rybacki, Tr. 3634-3636 ("I have no idea" ... "We obviously didn't talk; it was a one-minute phone call." ... "No idea." ... "I have no idea." ... "I don't know." ... "I don't recall." ... "Not a clue."), 3638 (I have no idea."), 3642-3645 ("I have no idea." ... "No idea." ... "I don't know what I talked about. No idea." ... "No idea" ... "I do not." ... "I do not." ... "No idea." ... "No idea.", 3647-3649 ("I have no idea" ... "Well, obviously I didn't get him because the phone call was one minute or something, and I don't remember what we talked about. Well, I mean, we didn't obviously talk, but I don't remember why I called him.")).

308. Complaint Counsel identifies two emails - dated March 10, 2008 and August 22, 2008, respectively - from Sigma employee Mitchell Rona to other Sigma employees mentioning two complaints Rick Tatman allegedly made about the state of the Fittings market. (CX 1124, CX 1149).

309. At the time of the emails and the calls referenced therein, Mr. Rona was Sigma's OEM business manager, with absolutely no involvement in or authority over Sigma's pricing decisions for Fittings. (Rona, Tr. 1437-1440 (Q: "Who are your OEM customers?" A: "OEM customers would be customers who bought fittings similar to the fittings Sigma produced for the distribution business. Then we sold special proprietary products to some of those same OEM customers who were in the pipe fitting business."), 1453-1454 (Q: "Are you involved in setting prices for fittings at Sigma?" A: "No." ... Q: "Do you participate, sir, in the discussions with Mr. Rybacki and perhaps others about pricing at Sigma?" A: "I can't -- I can't recall sitting down and in any session or formal dialogue discussing it with Mr. Rybacki. No."), 1627-1628 (Q: "And did you have any authority or responsibility for sales into the distribution channel?" A: "No.")).

310. "OEM" stands for "original equipment manufacturer" and is different from selling to Distributors. (Rybacki, Tr. 1095 ("OEM stands for original equipment manufacturer, and basically we make product for various companies in the -- mostly in the water industry, some outside. We make parts, you know, for valve and hydrant manufacturers. We make -- you know, we've made widgets for automotive. We made barbells for a company at one time.")).

311. In the OEM business, McWane and Sigma were not competitors, but customers of each other.

Okay. Now, McWane was one of your regular customers with whom you negotiated prices for OEM products; correct?

A: Correct.

Q: And Mr. Tatman was one of your customers; correct?

A: Correct.

Q: And you were a customer of Mr. Tatman's; correct?

A: Correct."

Q: And you did not compete with Mr. Tatman on OEM sales; correct?

A: Correct.

Q: Okay. And it was normal for you and Mr. Tatman to have e-mail and phone conversations about these kind of sales; correct?

A: Correct.

(Rona, Tr. 1628-1629, *see also* 1446-1449, 1626; Tatman, Tr. 365-366 (“I do speak to Mitchell Rona. Mitchell Rona is the OEM product manager at Sigma. He is a customer of mine. He buys things from me. He's also a supplier. I buy things from him. In the normal course of business in an arm's length agreement I'd have discussions with Mitchell Rona.”)).

312. In the OEM context, Mr. Rona and Mr. Tatman, regularly negotiated arms-length buy-sell agreements with each other and therefore had legitimate business reasons to communicate with one another. (Tatman, Tr. 365-366 (“I do speak to Mitchell Rona. Mitchell Rona is the OEM product manager at Sigma. He is a customer of mine. He buys things from me. He's also a supplier. I buy things from him. In the normal course of business in an arm's length agreement I'd have discussions with Mitchell Rona.”), 639-641 (Q: “And you sent it to Mitchell Rona?” A: “Yeah. He would be my normal -- he's my customer and my supplier.”) & CX 1434; Rona, Tr. 1446-1449, 1626 (Q: “And as part of your job, it's normal for you to e-mail and speak with McWane regarding the negotiation of these buy-sell agreements; correct?” A: “From time to time, yes.”), 1628-1629 (Q: “Okay. Now, McWane was one of your regular customers with whom you negotiated prices for OEM products; correct?” A: “Correct.”)).

313. Mr. Rybacki was the person at Sigma with ultimate authority for setting prices of Fittings for sale to Distributors during the time frame at issue in this action. (Rybacki, Tr. 1096 (“All pricing at the end of the day stopped with me, so I had authority over pricing product.”))

314. Complaint Counsel presented no evidence that the two Rona emails had any impact on Sigma's pricing of Fittings for sale to Distributors or on Mr. Rybacki, the Sigma executive responsible for Distributor pricing. (Rona, Tr. 1453-1454, 1627; Rybacki, Tr. 1096, 3715-3717).

315. Mr. Rona did not direct the March 10, 2008 email to Mr. Rybacki. (Rona, Tr. 1641-1642 (“I did not send this e-mail to Mr. Rybacki.”) & CX 1124).

316. Mr. Rona sent the August 22, 2008 email to a general email group “OEM5” that happened to include Mr. Rybacki, but Mr. Rybacki does not recall receiving the email and testified that he never discussed it with Mr. Rona. (Rybacki, Tr. 3715-3717 (Q: “It says ‘To: OEM5.’ Do you have any recollection at all of this e-mail?” A: “I don't -- you know, I -- I don't remember seeing it. Maybe I did, but I don't remember seeing it.” ... Q: “And did you call Mr. Rona up and say, ‘Hey, Mr. Rona, go call Tatman up and tell him we'll stop our job pricing?’” A: “Never told him that.”) & CX 1149).

317. Mr. Rona testified that he never had a discussion with Mr. Rybacki or anyone else at Sigma about setting Fittings prices for distribution channel sales. (Rona, Tr. 1454 (Q: “Do you participate, sir, in the discussions with Mr. Rybacki and perhaps others about pricing at Sigma?” A: “I can't -- I can't recall sitting down and in any session or formal dialogue discussing it with Mr. Rybacki. No.”)).

318. Mr. Rybacki never spoke with anyone at McWane about stopping or reducing job pricing and never asked Mr. Rona to do so. (Rybacki, Tr. 3716-3717 (Q: “Did you call Mr. Tatman or anyone at McWane when you got this and say, ‘Hey, let's all stop job pricing?’” A: “No.” Q: “And did you call Mr. Rona up and say, ‘Hey, Mr. Rona, go call Tatman up and tell him we'll stop our job pricing?’” A: “Never told him that.”) & CX 1149).

319. The two Rona emails had no effect on Sigma's Fittings prices in the distribution channel. (Rybacki, Tr. 3715-3717 (Q: “Q. And in fact, Mr. Rybacki, pricing got worse in the second half of '08. We already saw that; right?” A: “Pricing got worse.” Q: “And in fact, pricing specifically got worse in Florida and California and some other states, didn't it?” A: “It

did.”) & CX 1149; Rona, Tr. 1645 (Q: “And your e-mail did not result in any multiplier changes in the distribution channel that you're aware of, did it?” A: “No. I don't recall any -- any -- any -- I don't recall there being any change in pricing.”), 1647 (Q: “You're not aware of any pricing changes at Sigma that resulted from your e-mail, are you?” A: “No.”), 1662 (Q: “Your e-mail did not result in any price changes at Sigma that you're aware of, did it?” A: “Not that I'm aware of.”)).

320. Fittings prices continued downward after Mr. Rona's August 2008 email. (Rybacki, Tr. 3577-3579 (Q: “[w]hat happened in the third week in August of 2008 in the fittings market?” A: “It's not specifically the third week of August. August 2008 the market started to deteriorate -- the demand for our products in the waterworks industry started to deteriorate. The market was getting -- started to get soft. The demand for all waterworks products started to get soft.” Q: “And what effect did the soft demand in August of 2008 have on your pricing?” A: “It makes you more competitive, makes you lower pricing because there's less -- less demand for it.”) & CX 1149; Tatman, Tr. 971-972 (Q: “Okay. Mr. Tatman, did the business improve after September of '08 for the rest of the year?” A: “No.” Q: “Did pricing get worse, sir?” A: “Worse.”); (Rybacki, Tr. 3717-3719 (Q: “And in fact, pricing specifically got worse in Florida and California and some other states, didn't it?” A: “It did.”); CX 1687, CX 1149).

321. Mr. Rona testified that he did not attach any significance to Mr. Tatman's comments, and merely passed them on “FYI” as he would any other competitive intelligence he received in the ordinary course of his business. (Rona, Tr. 1658-1659 (Q: “So according to your e-mail, you just forwarded this entire discussion along to the OEM5 e-mail group as information; correct?” A: “That's what I did, yes.”) & CX 1149).

322. Mr. Rona testified that he does not recall receiving any response to his August 22 email. (Rona, Tr. 1658-1659 (Q: “And in fact, to your knowledge, no one at Sigma ever even responded to your e-mail, did they?” A: “I don't recall ever -- I don't recall seeing a response to the e-mail. No.”) & CX 1149).

323. Of the Sigma employees who responded to Mr. Rona's March 10, 2008 email, none of them mentioned or referred to Mr. Tatman's comments. (Rona, Tr. 1647-1648 (“Q: “So Mr. Bhattacharji only responded to the terms of the offer that Rick Tatman was making with regard to selling domestic fittings; correct?” A: “His response was only related to the opportunity that McWane had presented to us.”), 1653-1654 (Q: “And there's no mention of Mr. Tatman's comments regarding his hopes or prices in the market in these e-mails, is there?” A: “No.”) & CX 1124, CX 2014, CX 2015).

324. Mr. Rona's comments passed unnoticed by the Sigma personnel, who focused instead on the negotiation of the ordinary, arms-length buy-sell agreement that was the subject of Mr. Rona's March 10, 2008 email. (Rona, Tr. 1647-1648, 1653-1654 & CX 1124, CX 2014, CX 2015).

325. Mr. Rona, Mr. Tatman, and Mr. Rybacki all expressly denied reaching or discussing any agreement related to distribution prices at any time. (Tatman, Tr. 456-457 (Q: “But is it your understanding that you could talk about any prices on anything with Mr. Rona or just if there's a particular buy-sell arrangement that the two of you negotiate?” A: “I think our policy is very clear and that we should not have pricing discussions with a competitor.”); Rona, Tr. 1643-1644 (Q: “According to your e-mail, Mr. Tatman did not ask you to agree to anything related to prices and distribution, did he?” A: “No.” ... Q: “You did not agree to anything with Mr. Tatman regarding distribution prices, did you?” A: “Correct.”), 1656-1659 (Q: “Okay. And

Mr. Tatman, according to your e-mail, Mr. Tatman didn't ask you to agree to anything, did he?"

A: "No.") & CX 1149, CX 1124, CX 2014, CX 2015).

326. Complaint Counsel offered no evidence that arms-length communication between Mr. Pais and Mr. Page had anything to do with the allegations in the Complaint and both witnesses testified that they communicated from time to time to discuss foreign business opportunities, merger discussions, and other legitimate business opportunities.

327. Mr. Page, McWane's President and CEO, had no involvement in Fittings pricing decisions. (JX 642 (Page, Dep. at 14, 43-45)).

328. Mr. Pais, Sigma's CEO during the time period relevant to this action, had no involvement in Fittings pricing decisions. (JX 687 (Pais, Dep. at 7, 13, 15-17)).

329. Mr. Pais testified that he contacted Mr. Page after learning, in 2003, of McWane's interest in sourcing non-domestic Fittings from China. (Pais, Tr. 1868-1870 ("I went to meet Mr. Ruffner Page and just introduced myself and Sigma and proposed that we would like to supply them, under private label, fittings if they were interested in sourcing.")).

330. Mr. Pais agreed to travel to China with Mr. Page, to introduce him to suppliers and reassure him of the quality of the Fittings they produced. (Pais, Tr. 1869-1871 (Q: "Did there come a time where you traveled with Mr. Page to China?" A: "Yes. I traveled with him one time." Q: "And why did you travel with Mr. Page?" A: "Because he and his president of -- in charge of this business wanted to visit our suppliers to check our quality systems and to make sure that if they committed to sourcing fittings through us that the supply chain would be assured and quality will be met according to their standards.")).

331. Sigma began supplying non-domestic Fittings from China to McWane. (Pais, Tr. 1870 (Q: "And did Sigma commence supplying McWane with private label fittings around that time?" A: "Not at that time. It took a while."); JX 642 (Page, Dep. at 28-29)).

332. This interaction between Mr. Page and Mr. Pais pre-dates the alleged 2008 conspiracy by several years. (Complaint ¶ 2).

333. Mr. Pais continued to seek out Mr. Page on occasion during the subsequent years, when he thought there might be international business opportunities for joint ventures between the two companies, but Fittings prices were not discussed on these occasions. (Pais, Tr. 1886-1887 ("And we had the capability of that, and I was trying to supply them towards their global needs, world markets. Plus there were some opportunities that I saw for them to invest in India. So I talked to him to talk about these global opportunities."), 2039-2043 ("Well, I knew that McWane had tried to invest in China in the ductile iron pipe industry and they'd not succeeded. And a little while later, at about this time, in 2007, I thought there was an opportunity. We had separately organized a joint venture with a Chinese manufacturer in India. This is in the iron ore processing industry. And that group had plans to set up a ductile iron pipe plant production in India. And since Mr. Page had expressed interest in investing in global waterworks opportunities, I was trying to -- over a period of time trying to interest him to enter or invest in India." Q: "It had nothing to do with the U.S., nothing to do with fittings, did it, sir?" A: "No.") & CX 2037, CX 2119, CX 2120; JX 642 (Page, Dep. at 117-123)).

334. Mr. Pais approached Mr. Page in the second half of 2008 to discuss a possible merger between Sigma and McWane. (JX 687 (Pais, Dep. at 141-142)).

335. McWane was not interested in combining its business with Sigma. (JX 642 (Page, Dep. at 30-32, 123-124)).

336. Fittings prices were not discussed at any of the meetings between Mr. Pais and McWane personnel where a potential combination of Sigma and McWane was discussed. (JX 687 (Pais, Dep. at 141-142)).

337. Complaint Counsel identified two specific meetings between Mr. Pais and Mr. Page: one in September 2007, and one on or around December 3, 2007 that had nothing to do with fittings pricing. (Pais, Tr. 1881-1886 & CX 2118, CX 2037).

338. Mr. Pais sought the September 2007 meeting because he had learned of David Green's termination from McWane, (Pais, Tr. 1883-1884 (Q: "And he told you about letting Mr. Green, the former president of the fittings business, go?" A: "Yes.") & CX 2118), and inquired regarding with whom Sigma would interact in the future with respect to the ongoing buy-sell arrangement. (Pais, Tr. 1884 ("By the way, that meeting I had sought because we had certain ongoing procurement and supply business of a smaller level. Mr. Green was the primary person along with his other team, and so I wanted to know who will now be interacting with us and what's the outlook of some of that small remnants of business.")).

339. Mr. Pais testified that the subject of the December 2007 meeting was gauging global or international opportunities. (Pais, Tr. 1886-1887 (Q: "Q. Do you know what you discussed at that meeting?" A: "Yes. Earlier that year -- no. I -- we discussed -- he was interested in growing their global business. They sell pipe and other products internationally, but they did not have a range of metric-size fittings, that is, the same fittings but in metric sizes, which are used in world markets. The same fittings cannot be used in -- outside U.S. because we use inches. And we had the capability of that, and I was trying to supply them towards their global needs, world markets. Plus there were some opportunities that I saw for them to invest in India. So I talked to him to talk about these global opportunities.") & CX 2037).

340. Mr. Pais and Mr. Page have both testified that they never discussed Fittings prices. (Pais, Tr. 1897 (Q: "Sir, during your meeting with Mr. Page in September of 2007, did the two of you discuss Star's low pricing in the fittings market?" A: "No." Q: "Did you discuss Mr. Green's decision to respond aggressively with equally low pricing?" A: "No. We didn't -- I didn't discuss it with him."); JX 642 (Page, Dep. at 80-82)).

341. Mr. McCullough is the executive vice president for McWane's valve and hydrant and waterworks Fittings business units, to whom Mr. Tatman reports. (JX 639 (McCullough, Dep. at 8, 17)).

342. Mr. Pais met with Mr. Page and Mr. McCullough in April 2009 in an effort to convince McWane to sell private-label, domestically-manufactured Fittings to Sigma following ARRA's enactment. (Pais, Tr. 1744-1745 (Q: "Sir, in 2009, did you approach McWane about selling you domestic fittings under a private label arrangement?" A: "Yes, I did."), 1756-1757 (Q: "After McWane turned down your private label request for the first time, did you go back and meet with McWane executives and make an effort to get them to change course again and offer private label fittings to Sigma?" A: "Yes." Q: "And who did you -- which executives did you meet with?" A: "I met with both Mr. Leon McCullough once and Mr. Page again."); JX 639 (McCullough, Dep. at 61-64); JX 687 (Pais, Dep. at 188-189)).

343. Mr. Page and Mr. Pais discussed legitimate business topics, and not pricing or market strategy. (Pais, Tr. 1897, 2035 (Q: "And during that meeting with Mr. Page, did you talk about McWane's list price restructuring and your reaction to it?" A: "No, we didn't."), 2045-2048 (Q: "Mr. Pais, did you ever discuss and agree upon the price of any fittings sale by Sigma or McWane with Mr. Page?" A: "Absolutely not." Q: "And Mr. Hassi asked you about a discussion you had with Mr. McCullough at McWane in the spring of '09. And just so we're

clear, this was in April of '09, after McWane had announced a very drastic decrease in its medium and large-diameter fittings; right?" A: "Yes." Q: "And he asked you did you have a discussion with him, and I think you said the answer was not about prices; is that right?" A: "Absolutely."); JX 642 (Page, Dep. at 117-124); Pais, Tr. 2028 (Q: "Did you discuss McWane's new pricing move with Mr. McCullough when the two of you met on April 28, 2009?" A: "No, I did not.").

XII. Dr. Schumann's Conspiracy Opinion

A. Dr. Schumann concedes that a conspiracy could be formed only if McWane, Sigma, and Star communicated terms and acceptance to each other

344. Dr. Schumann testified regarding the formation of the alleged conspiracy: "Q. Now, Dr. Schumann, you do agree with me, however, that for them to have an agreement they do have to -- somebody has to communicate something from one company to the other, and the other companies have to communicate back some sort of understanding and acceptance of that; right? A. Yes. I very much believe that." (Schumann, Tr. 4173).

345. Dr. Schumann's opinion that McWane, Sigma, and Star formed a conspiracy relating to small and medium-diameter non-domestic Fittings in early 2008 is based solely on his interpretation of a handful of documents, specifically:

CX 1117 – February 1, 2008 email from Mr. Tatman to Mr. Pais re: offer to sell private label Fittings (Schumann, Tr. 4181-4182);

CX 1189 – Sigma's January 29, 2008 customer letter (Schumann, Tr. 4219-4221);

CX 1571 – Internal email exchange among Mr. Tatman, Mr. Page and Mr. McCullough in late February 2008 re: McWane's offer to sell Sigma private label Fittings (Schumann, Tr. 4177-4178);

CX 848 – Internal Star email dated February 7, 2008 attaching Sigma's Florida customer letter (Schumann, Tr. 4221-4222);

CX 1145 – January 24, 2008 email from Mr. Pais to Sigma regional managers re: multipliers (Schumann, Tr. 4225);

RX 591 – McWane’s Jan 11, 2008 customer letter (Schumann, Tr. 4202-4205);

RX 415 – Tyler/Union Executive Report for 1st Quarter 2008 (Schumann, Tr. 4239-4244);

CX 893 – Star’s February 7, 2008 customer letter (Schumann, Tr. 4228-4230);

CX 178 – Internal email exchange dated January 31, 2008 among Mr. Page, Mr. McCullough and Mr. Tatman, commenting on Star salesman Mr. Leider’s January 30, 2008 email to HD Supply re: Star plans to match McWane multipliers effective February 18. (Schumann, Tr. 4230-4234) (Expert Report of Dr. Schumann).

346. Dr. Schumann opined that no conspiracy or agreement existed with respect to domestic Fittings or large-diameter Fittings in 2008. (Schumann, Tr. 4251-4254 (“Q. And you're not saying that domestic fittings that McWane sold were part of any one-mind agreement, are you, sir? A. Well, I guess literally they were. There was only one mind, but I'm not saying they're part of a conspiracy. That's correct. It's to the extent we're talking about the market for domestic only. Q. I'm asking you about your one mind theory. A. My one mind, as I had just testified, was referencing the plan and the indirect and direct communication to reduce project pricing to create greater visibility, as Mr. Tatman described. Q. Dr. Schumann, let me be clear. Star and Sigma did not compete with McWane by selling domestic fittings in 2008, did they? A. Star and Sigma did not manufacture or sell domestic fittings, that's my understanding, that is -- I believe is correct. Q. And you're not testifying that domestic fittings were the subject of a one-mind agreement to reduce project pricing on those, were there -- are you? A. No, I'm not. Q. All right. And you're not testifying that large-diameter fittings were involved in this one mind that you came up with, are you, sir? A. They are not a relevant -- the relevant antitrust market in this matter. Q. Well, it's more than that; right? You reached an affirmative conclusion that they were not implicated by the alleged conspiracy. A. I reached a conclusion that my market -- the relevant market was fittings of 24 inches and less in diameter. I didn't analyze competition in a

large-diameter fittings market. Q. Well, Dr. Schumann, you did conclude that large-diameter fittings were not implicated in the Star, Sigma and McWane conduct that you analyzed, didn't you? A. I'm not sure if that would be described as a conclusion or just not part of my assignment to analyze. I -- Q. All right. Well, let's go to your own report. Let's go to CX 2260. It's paragraph 28. And unfortunately, I don't have the page in front of me, Andrew. You'll have to scroll back. There we go. Right up there at the top, if we can highlight that paragraph, this is what you wrote; right, Dr. Schumann? Right, sir? A. It's true I don't include fittings with diameters more than 24 inches. Q. Yeah. And you say one of the reasons is -- A. Right. Q. -- you conclude -- Q. One of the reasons, Dr. Schumann, is you conclude -- you say right there "I conclude," and that's you when you say "I" in your report, isn't it, sir? Right? A. Yes, that's correct. Q. You, Dr. Schumann, concluded that large-diameter fittings were not implicated by McWane, Sigma and Star's conduct; right, sir? A. Yes. Q. So domestic fittings are not implicated and large-diameter fittings are not implicated; right? A. Large -- yes, that's correct. Q. Where in these communications back we saw in paragraph 88, where do those communications carve those products out of your alleged one-mind conspiracy? A. They don't, but they're not the relevant market.”.)

347. Dr. Schumann cannot identify “a bright-line point” when the alleged conspiracy began. (Schumann, Tr. 4187-4188 (“Q. Well, I'm actually not asking you about what Mr. Tatman wrote. I'm asking you what your opinion is. This is your expert opinion, sir. Did this or did this not, this February 1 e-mail, contribute to the formation of a conspiracy between Sigma and McWane to reduce project pricing? A. It contributed to Mr. Tatman's plan to stabilize prices, and that would imply, yes, that that was part of his plan. I mean -- Q. Are you done, sir? A. Yes. Q. All right. So prior to February 1, 2008, there was no agreement to reduce project pricing;

correct? A. As I said, there was not a bright-line point. I mean, there were -- there were -- there was information that was communicated before this point in time. And the fact that these three paragraphs don't describe that or cite to it doesn't mean it wasn't there. I mean, I do cite to other forms of communication that were taking place during January of 2008.”).

348. Dr. Schumann testified that by November 2008, the alleged conspiracy “was in the process of collapsing.” (Schumann, Tr. 4200-4201 (“Q. All right. Let's go back to Dr. Schumann's report, and if we can go to paragraph 86, which is on the next page I believe, Andrew. In fact, just so we're clear on the record, Dr. Schumann, the document we were just looking at, that Star e-mail from the middle of October 2008, that's right around the time you say the conspiracy finally collapsed; right? A. That is around the time. I think it's more in November, but that is around that time. Q. Yeah, so within a couple of weeks or so this conspiracy collapsed, in your opinion. A. Within a couple of weeks of when this e-mail was sent, I think the conspiracy was in the process of collapsing.”)).

349. Dr. Schumann testified that the method of his analysis was as follows: “Q. Well, I want to be clear on the record because I'm trying to figure out how someone would duplicate what you did, sir. What you did was you reviewed documents and testimony and interpreted them based on your understanding of oligopoly theory; right? A. What I did was start with oligopoly theory and models of oligopoly and how markets operate in the real world, real studies of cartels, studies of oligopolies, studies of agreements, and I then -- yes, I read and reviewed as much of the material as I could to develop a background understanding of the market, of developing the facts that happened or were alleged to have happened in this case and the documents that might support them or not, and I applied those facts to the theory as I've described in my testimony.” (Schumann, Tr. 4156)

B. Dr. Schumann's Conspiracy Opinions are Based Solely on His Interpretation of Documents

1. The documents do not contain price communications between McWane and its competitors

350. Dr. Schumann relied on CX 1117, an email from Mr. Tatman to Mr. Pais dated February 1, 2008, as part of the basis for his opinion that McWane, Sigma, and Star formed a price-fixing conspiracy. (Schumann, Tr. 4181-4183 ("Q. All right. Now, let's bring up if we can, Andrew, CX 1117. If you scroll down to the bottom, that's the document that you're citing in footnote 110? A. Yes. That's the e-mail that Mr. Tatman had at the end of the previous document. Q. Now, this is the first communication we've actually seen from McWane to Sigma; right? That you're citing in your report in paragraph 79 and 80. A. I say it's the first one that I ever seen? I'm not sure where -- where are you -- do you see that? Q. It's the first document you cite on pages 79 and 80 of your report that constitutes a communication from McWane to Sigma or Star; right, sir? A. That is correct. Q. Now, is this a document that you say led to the formation of the conspiracy, sir? A. As you would have seen if you go back to the documents that we had been looking at, one factor that -- one activity that Mr. Tatman wanted to do -- and this e-mail was discussed both in the previous e-mail and the basic strategy in the others -- was to convince Sigma and Star that their costs were lower than the costs that Sigma and Star could obtain from Star -- I mean -- I'm sorry -- that they could obtain from China. And that was, as Mr. Tatman had described in two e-mails back, a way to help support price stability by convincing your rivals that your costs were lower than theirs. Q. Are you done, sir? A. I believe so. Q. Now, Dr. Schumann, my question is, is this document that you cite in footnote 110 one of the documents you rely on as the basis for your opinion that the parties formed a price-fixing agreement? A. Yes. Q. And just so we're clear, up at the top of this, it's dated February 1, 2008; right, sir? A. That is the date, yes, it is. Q. Yeah. And that's three weeks after McWane had already sent out its

multiplier announcement on January 11, 2008. A. Yes, it is. Q. And it's several days -- A. No. Actually the multiplier -- well, they sent out the announcement that they were going to have an announcement on the 11th, and then they sent out the announcement of the multiplier change on the 18th I believe. Q. All right. Fair enough. But it's after McWane already announced its multipliers at the beginning of 2008; correct? A. That is correct. Q. And the fact is after Sigma had announced its multipliers at the beginning of '08. A. I believe so. Yes.") (objections omitted).

351. CX 1117, which is an offer from McWane to sell Sigma private label Fittings, is dated three weeks after McWane announced its multiplier adjustments on January 11, 2008. (Schumann, Tr. 4183 ("Q. Yeah. And that's three weeks after McWane had already sent out its multiplier announcement on January 11, 2008. A. Yes, it is").).

352. CX 1117 had no impact on McWane's January 11, 2008 and January 18, 2008 multiplier adjustments. (Schumann, Tr. 4184 ("Q. -- let's be very clear about this. You're not saying that an e-mail dated February 1, 2008 led McWane to send out its multiplier increases on January 11 and January 18, 2008; correct? A. I'm absolutely not saying that").).

353. CX 1117 did not impact Sigma's job pricing decisions. (Schumann, Tr. 4189 ("Q. Dr. Schumann, you don't cite a single document or piece of testimony that shows that Sigma got this e-mail on February 1, 2008 and as a result decided to reduce project pricing because it got this e-mail, do you, sir? A. I do not. As I described, I view this as part of, as a one piece. It's - - and as I had testified earlier, there was not a single meeting. There was not a single memo. But that doesn't mean there was not agreement. This is one piece").).

354. Dr. Schumann acknowledged that there was no evidence to support his opinion that anyone at Star or Sigma believed that McWane's January 2008 customer letter was "clear"

that McWane, Sigma, and Star must cooperate to curtail job pricing. (Schumann, Tr. 4204 (“I did not cite anything that said that. . . .Oh, right. There’s no--nothing cited at the end of that paragraph.”).)

355. Dr. Schumann conceded that the Sigma and Star customer letters he claimed “accepted” McWane’s “clear” offer in January 2008 did nothing of the sort.

Q. Now, this letter does not say Sigma is matching all of McWane’s multipliers, does it, sir?

A. No, it does not.

Q. It says they’re going to pick and choose, they’re going to match the ones they want to match and they’re going to not follow the ones they don’t want to follow, right?

A. That is what it says.

Q. This letter does not say anything about centralizing pricing authority, does it, sir?

A. No, it does not.

Q. It doesn’t say anything about reducing job pricing, does it, sir?

A. No, it does not.

(Schumann, Tr. 4221:4-17.)

356. Dr. Schumann conceded that McWane obtained Star’s January 2008 customer letter from its customers (not Star) - - and was entirely uncertain about Star’s intentions and did not consider it to “accept” any conspiratorial offer:

Q. Yeah. What this does not say, Dr. Schumann, is: Aha, I see this email from Star. We have an agreement and one mind. We’re all going to reduce job pricing; That’s not what it says, does it, sir?

A. No, it doesn’t.

Q. And, in fact, you yourself on your direct testimony said there was a lot of uncertainty in this period; right?

A. Yes.

* * *

Q. And you testified that McWane and Star and Sigma, all three companies, were uncertain in 2008, in the beginning of 2008, about what their rivals were going to do with regard to project pricing; correct, sir?

A. They didn't have - - certainly that is correct.

(Schumann, Tr. 4234:15-23, 4235:8-22.)

2. Several of the documents are entirely internal

357. Dr. Schumann admits that there is no evidence that the so-called "Tatman Plan" (CX 627) or that the various internal McWane e-mails or internal McWane documents cited by Dr. Schumann in his expert report were ever communicated by McWane to Star or Sigma. (Schumann, Tr. 4174-4179, 4201-4202, 4211-4212, 4227).

358. CX 1571 was not communicated to Star or Sigma. (Schumann, Tr. 4177-4178 ("Q. And just so we're clear on the record, CX 1571, you're not citing anything showing that this internal McWane e-mail was sent to anybody at Sigma or Star; right? A. I don't believe so. There is a second page"), CX 1571).

359. CX 848 was not communicated to McWane. (Schumann, Tr. 4222 ("Q. All right. Now, this document -- if we go to the CX 848, Andrew . . . This does not show any communication from Star to McWane, does it, sir? A. No, it doesn't. Q. Now, let's go to the second page. This one, the second page, doesn't show any communication from Star to McWane, does it, sir? A. Not directly. It's a dear Florida customer letter"); CX 848).

360. CX 1145 was not ever communicated to McWane. (Schumann, Tr. 4225 ("Q. You don't cite anything in your report showing that this internal Sigma e-mail was transmitted to McWane, do you, sir? A. I don't believe so."), CX 1145).

361. RX 415 was not communicated to Star or Sigma. (Schumann, Tr. 4240-4241 ("Q. Now, this document, RX 415, is the document you've cited in footnote 121; right? A. That's correct. Q. Now, this is the only thing you've cited for your support that Star and Sigma

indirectly communicated back to McWane that they were of one mind and that further price increases may be imposed without the ordinary risk of market share loss due to cheating on the consensus price; right, sir? A. This is the document that I cite to support that. Q. Now, the document itself doesn't say that Star and Sigma communicated back to McWane, does it, sir? A. No, it does not. Q. In fact it says that McWane, based on its competitive feedback log -- which is just a log that McWane salespeople prepare; right, sir? A. I believe so. That is correct.”), RX 415).

3. The remaining documents are merely communications from McWane, Sigma, and Star to their Distributor customers, with no hidden messages

362. Dr. Schumann admitted that McWane’s January 11, 2008 customer letter does not state that Sigma and Star must reduce job pricing or McWane will not support further price increases. (Schumann, Tr. 4203 (“Now, Dr. Schumann, you say this letter is clear McWane's rivals must cooperate or prices will not increase further, but the word "rivals" is not in this at all, is it, sir? A. That is correct. Q. And the words "Star and Sigma" aren't in it at all, are they, sir? A. That is correct. Q. And the words "must cooperate" aren't in this at all; right? A. That's also correct. Q. And it doesn't say you must cooperate or prices will not increase further, does it, sir? A. That is correct.”), RX 591).

363. Dr. Schumann admitted that McWane’s January 11, 2008 customer letter does not say anything about centralizing project pricing authority. (Schumann, Tr. 4204 (“21 Q. Right. Now, can we go back to RX 591. This letter doesn't say anything about centralizing project pricing, does it, sir? A. It does not.”), RX 591).

364. Mr. Rybacki testified that Sigma did not centralize pricing authority or reduce job pricing in 2008, and that its January 29, 2008 customer letter (CX 1145) did not say anything about taking either type of action:

- Q. Now, your letter -- let's be clear about your letter. First, does your letter say anything about Sigma stopping job pricing, sir?
- A. It does not.
- Q. Well, does it say anything that Sigma is going to reduce job price discounts?
- A. No.
- Q. Well, does it say anywhere in here that you're going to centralize pricing authority at Sigma and take away pricing authority from line personnel or salespeople at Sigma?
- A. No.
- Q. No. And in fact, we just saw a big spreadsheet in camera -- and don't discuss the details, but we just saw a spreadsheet that shows that at the end of the year, all of your salespeople in every region still had a lot of pricing authority and were pricing all over the map, didn't we, sir?
- A. Correct.
- Q. And that was for the entire year of 2008, wasn't it, sir?
- A. Correct. (Rybacki, Tr. 3696-3697 & CX 1145).

365. Mr. Pais testified that “[w]e never took out the authority or the flexibility from any salesperson to vary the price as he or she felt right, and that continued.” (Pais, Tr. 1919 (“Q. Okay. You write, "I have urged Larry to initiate a new committed and serious effort to normalize all pricing for fittings -- at same levels -- plant work as well as other orders, to eliminate the confusion we are creating with customers and competitors, leading to lower overall pricing levels." Is that a reference to what we were just talking about getting -- trying to get to one price so that the customer was getting one price and not multiple -- not multiple prices? A. Well, in a way it looks like I may have anticipated your question and answered previously a lengthy explanation. But let me correct your notion. Again, you come back to this one price. Mr. Hassi, our pricing was all over the map, so -- and figures and analysis bears that out. All that this meant was we detected, after doing the same practice for several years, that something that we were doing internally was causing needless confusion and costing us money because then we were forced to give the lower of the two prices, and we could have gotten a slightly higher price for the same order. So we advised our salespeople about this trend and not treat just because a

customer sends a list to check stock and treat that as a special plant work, et cetera. So it was not to have just one price. We never took out the authority or the flexibility from any salesperson to vary the price as he or she felt right, and that continued. At the same time, there were so many variations with terms, et cetera, and I was urging Larry, let's try and streamline our pricing policy.”).

366. Dr. Schumann testified that Sigma’s January 29, 2008 customer letter (CX 1189) does not state that Sigma will centralize pricing authority or reduce job pricing. (Schumann, Tr. 4221 (“Q. This letter does not say anything about centralizing pricing authority, does it, sir? A. No, it does not. Q. It doesn't say anything about reducing job pricing, does it, sir? A. No, it does not.”)).

367. Sigma’s January 29, 2008 customer letter (CX 1189) and Star’s February 7, 2008 customer letter (CX 893) state nothing about centralizing pricing authority or eliminating or reducing project pricing, and Star’s January 30, 2008 email to HD Supply (CX 178) states nothing about centralizing pricing authority. (Schumann, Tr. 4229-4230 (“Q. And if we go to CX 893, down at the bottom you see the Bates number; right, sir? A. Yes, I do. Q. That's the document you cite; correct, sir? A. Yes, it is. Q. All right. Now, this document on its face, correct, sir? A. On its face nothing shows that it was communicated, correct, to McWane, that is correct. Q. And if we scroll down a little bit, Andrew, and we blow up the text, nothing on this document says that Star is going to centralize pricing authority; correct, sir? A. Nothing on that document that I see says Star is going to centralize pricing, project pricing. Q. Nothing on this document says they're going to match all of McWane's prices, multiplier prices; correct, sir? A. That is correct. Q. Nothing on this document says that Star is going to reduce job pricing; right, sir? A. That is correct.”), 4233 (“Q. Now, the Star e-mail to HD Supply does not say anything

about centralizing project pricing; right? A. That's correct.”), 4258-4259 (“Q. All right. Now, let's look at this one, CX 1189. Now, this one actually doesn't show it was communicated to McWane either; right? A. That's correct. Q. It doesn't say anything about centralizing pricing authority; right? A. It does not say that. Q. It doesn't say anything about eliminating or reducing job pricing; right? A. It doesn't say that either.”), 4263 (“Q. In fact, you didn't cite any Sigma documents showing that they believed they were of one mind that further price increases may be imposed without the risk -- ordinary risk of market share loss due to cheating on the consensus price, did you, sir? A. Not in this paragraph. Q. You didn't cite any Star documents showing that they believed they were of one mind; right, sir? A. Not in this paragraph I didn't have any Star documents cited that --.”); CX 1189, CX 178, CX 893). See also RX 36 (“We are still figuring out what Sigma’s plan is as it looks like they have elected to let their regional Managers run individual plans on how to manage the increase and they all have different plans.”).

368. McWane’s January 11, 2008 customer letter (RX 591), Sigma’s January 29, 2008 customer letter (CX 1189), and Star’s February 7, 2008 customer letter (CX 893) do not distinguish between large-diameter Fittings and small to medium-diameter Fittings. (Schumann, Tr. 4256-4257 (“Q. Now, if we go to RX 591, the January 11 letter from McWane to its customers, this letter doesn't distinguish between large-diameter, medium-diameter and small-diameter imported fittings, does it, sir? A. No, it does not. Q. And if we go to CX 1189 and the second page, the Sigma January 29, 2008 letter, this letter doesn't distinguish between large diameter, medium diameter and small diameter; right, sir? A. It does not. Q. And if we go to CX 893, Star's letter February 7, 2008 doesn't draw any distinction among those different size ranges, does it, sir? A. I don't believe so. I think it doesn't.”).).

369. Dr. Schumann concedes that he ignored substantial record evidence, including trial testimony from Mr. McCutcheon, Mr. Pais, Mr. Minamyler, and Mr. Bhargava, and contemporaneous documents, including spreadsheets of McWane's job discounts and Star's job discounts, and McWane's "blue book" financial statements. (Schumann, Tr. 4084-4091, 4142-4145, 4149, 4263-4264, 4345-4346, 4367, 4371, 4379-4381). Instead, he stuck with an opinion he formed six months before the litigation began. (Schumann, Tr. 4050, 4053 ("That - - that was about six months, yes, it was"), 4082, 4085-4086 ("Well, I meant I didn't consider it"), 4086:21-4087:4 ("No, I did not"), 4088, 4089-4091, 4264 ("I did not get through it, that's correct. . . . Actually, I think I did not. I - - I - - I know I - - I believe I did not. That - - I did not"), 4367 ("I did not report the blue books. That's correct"), 4371)).

4. Dr. Schumann concedes that his opinions are not based on testable methodology

370. Dr. Schumann did not measure project pricing in any way, let alone conduct any independent analysis quantifying a decline in project pricing during 2008. (Schumann, Tr. 4070:4-13, 4292:5-20 ("Q. You did not do any independent measurement of any curtailment of project pricing in forming your opinions in this case, did you, sir? A. No, I did not. Q. And you didn't present any numbers to the court in your testimony; correct, sir? A. That is correct. Q. In fact, you didn't measure anywhere, in any of the work you did in this case, any actual amount of job pricing in any particular year; correct? A. That is correct. . . .Q. And you haven't quantified, in preparing your opinion in this case, any actual reduction in the number of job prices, the incidences of job prices, have you, sir? A. No, I have not. Q. You haven't quantified in any fashion, in preparing your opinion in this case, that the average amount of the job price discount changed in 2008, have you, sir? A. I've not calculated the average. Q. In fact, you haven't measured job pricing, quantified it in any fashion for any year for any company; right?

A. I have not counted - - I have not done a quantification of the number of job pricing that went on in 2008.”.)

371. Dr. Schumann admitted that his opinions cannot be statistically proven or tested:

“Q. Dr. Schumann, my question is, there is no statistical test that can tell us whether your read of the documents and application of oligopoly theory or my read of the documents and application of oligopoly theory is right, is there, sir?

A. There's no sociological test. There's no anthropological test. I mean, to have a statistical test you have to have a test statistic. You have to have a random variable of some known or estimated distribution. I don't have a hypothesis that is testable, as you've described it. I mean, you have to have a testable hypothesis to start with. And you haven't described a testable hypothesis, so I don't know how to answer your question.

Q. Just so we're clear, there is no statistical test that can tell us whether your opinion is right or wrong, is there, sir?

A. That's certainly true of my opinion as it's true of anyone's opinion.”
(Schumann, Tr. 4158-4159, 4155-4156.)

XIII. Ductile Iron Waterworks Fittings (“Fittings”) are a Commodity Product, Regardless of Country of Origin

372. Fittings are commodity products produced to American Water Works Association (“AWWA”) standards and specifications. (JSLF ¶ 7).

373. 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. (JSLF ¶ 6).

374. The end users of Fittings are typically municipalities, regional water authorities, and the contractors they engage to construct waterworks projects (collectively, “End Users”). (JSLF ¶ 12).

375. 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 fitting?” A: “In functionality, no”); Tatman, Tr. 878 (non-domestic and domestic Fittings are “exact one for one. You know, it’s corn”); Schumann, Tr. 4535-4536 (“The imported fittings are marked as imported. They’re marked with the country of origin. Besides that distinction, they’re homogeneous products. They’re essentially identical.”), 4638-4639; JX 694 (Bhutada, Dep. at 14); JX 659 (Swalley, Dep. at 63); JX 669 (Groeniger, Dep. at 36); JX 650 (Morrison, Dep. at 57-58); JX 661 (Prescott, Dep. at 29); JX 646 (Burns, Dep. at 147); JX 701 (Morton, Dep. at 13-14); JX 675 (Sheley, Dep. at 51-52); Complaint ¶ 27(a)).

XIV. A Flood of Cheap Non-Domestic Fittings Decimated Domestic Foundries

376. At one time, most Fittings used in waterworks projects in the United States were manufactured in the United States, and full-line Fittings manufacturers included U.S. Pipe and Foundry Company (“U.S. Pipe”), Griffin Pipe (“Griffin”), and American Cast Iron Pipe Company (“ACIPCO”). (Tatman, Tr. 1046-1047 (“Well, if you -- we -- if you look historically, you got to go back at a point in time. At one point in time there were multiple manufacturers producing domestic fittings, and then because the industry died and it wasn't profitable to keep spending the high capital dollars, they all independently chose to exit. U.S. Pipe exits. Griffin exits. ACIPCO exits.”); JX 644 (Tatman, Dep. at 191); JX 675 (Sheley, Dep. at 57)).

377. 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”). (JSLF ¶ 13).

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

379. Non-domestic Fittings have accounted for the majority of sales of Fittings in the United States in the last five years. (JSLF ¶ 5; see also Tatman, Tr. 879 (Q: “[T]he domestic fittings is a small piece of the overall fittings purchased in the U.S.; is that right?” A: “We’ve used the estimate of 15 to 18 percent of the total market.”); JX 669 (Groeniger, Dep. at 34-35); JX 661 (Prescott, Dep. at 33); JX 672 (Webb, IHT at 70-71)).

380. Beginning in the mid-1980s, Fittings importers began to successfully convert End User’s domestic-only specifications to “open” specifications, which permitted the use of both domestic and non-domestic Fittings on a particular project. (Tatman, Tr. (“Q. So in going back to the multiplier map, this is a blended utility fittings multiplier map, this particular? A. Yes. But let's clarify the word "blended." Okay? We talked about that what a domestic fittings sale was. When we call something that's domestic, that means when the customer calls us up, he's saying, I need you to ship me a domestic fitting. It has to say "made in the USA" on it because that's the requirement for this job. If it doesn't require made in the USA, we call that an open spec job, meaning they don't care whether that fitting was made in China, Korea, South Vietnam, Cambodia. It doesn't matter. All they want is a fitting. So that is domestic-only jobs, and let's call that open spec, or sometimes I'll refer to that as import job, because it doesn't have to be made in the USA. We no longer use this word "blended" internally, but we did out here. So for us, where that comes from is, you have certain jobs that come in or orders that you have to ship a domestic fitting. If it doesn't require domestic only, customers give us the option of shipping them a fitting made in China or India or made in the USA. They don't care. So what we were doing is when we'd get an open spec order, it doesn't have to be domestic only, we would ship a portion of that with import fittings, and because we didn't have enough sales volume to keep our domestic plants running, and we had so much inventory out there, we would substitute domestic product

and we would fill that order with partial import product, partial domestic product, and that's where the word "blended" comes from. It's what we filled the order with. And I will say that every time we ship a domestic fitting we lose money. I'm wrapping a dollar bill around that fitting when I ship it against an import price and I use a domestic fitting.”); McCutcheon, Trans. 2266 (“Q. Do you use the term "open spec," open specification? A. Occasionally, yes, sir. Q. And how do you use that term? A. It's -- it can be used a variety of ways. The majority of the time I believe it's used to mean that a fitting manufactured anywhere in the world could be used on that product -- I mean, on that project.”); (JX 644 (Tatman, Dep. at 192-193); JX 694 (Bhutada, Dep. at 12-13); JX 669 (Groeniger, Dep. at 33-34, 49); JX 650 (Morrison, Dep. at 55-56)).

381. Domestic-only specifications now comprise only a small percentage of the Fittings market in the United States. (Morton, Tr. 2864-2866 (Q: “And are you aware, sir, of the -- I think complaint counsel asked you some questions based on the document where I believe you forecasted that the domestic compared to import fittings market was 18 percent domestic and then the balance was import. Do you remember that testimony and that document?” A: “I believe it was 12 percent and 88 percent.”); Schumann, Tr. 4634-4635 (“Q. In other words, even under ARRA in 2010, domestic fittings were not close to being the majority of the fittings sold in the U.S., were they, sir? A. They were not. We discussed that. They were to 20 percent or so.”); (JX 643 (Tatman, IHT at 47-48); JX 667 (Kuhrts, Dep. at 30). JX 672 (Webb, IHT at 70-71, 74)).

382. 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, because production costs in those countries are lower. (Tatman, Tr. 275 (Q: “Has it always been the case that your domestic cost of production is higher than your imported cost of production?”

A: "Always been the case."), 879 (Q: "Now, are the costs of production different in the U.S. versus your China plant, Tyler Xian Xian?" A: "The costs in the U.S. are much higher, both in direct manufacturing cost, and then when you apply the idle plant cost, it makes the spread significantly different."); JX 642 (Page, Dep. at 112); JX 694 (Bhutada, Dep. at 13-14); JX 669 (Groeniger, Dep. at 40-41); JX 661 (Prescott, Dep. at 29-30, 33); JX 673 (Webb, Dep. at 24-25); JX 646 (Burns, Dep. at 20-21); JX 658 (Keffer, Dep. at 58); JX 672 (Webb, IHT at 70-71); JX 675 (Sheley, Dep. at 55)).

383. 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).

384. 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. (Schumann, Tr. 4639 (Q: "We see -- up here we see the determination of the ITC in December 2003, and they found that ductile iron waterworks fittings from China are being imported into the U.S. in such increased quantities or under such conditions as to cause market disruption to the domestic producers of ductile iron waterworks fittings; right, sir?" A: "That's exactly what it says."). cite ITC document

385. The ITC found that imported Fittings manufactured in China were materially injuring the domestic Fittings producers in the United States. (Schumann, Tr, 4638-4639 (Q. "Now, the ITC found that Chinese imports were coming in and materially injuring the domestic fittings producers; right?" A. "Yes. Prior to the Chinese imports, my recollection is that most fittings sold in the U.S. were made in the U.S."; RX 730).

386. Sigma, Inc. (“Sigma”), a fittings importer, describes itself as a “virtual manufacturer,” because it does not actually own any manufacturing facilities, but controls the elements of design, quality control, and supply chain planning for the products it sells. (Pais, Tr. 1732 (Q: “Does Sigma itself manufacture the fittings it sells?” A. “The term I have used over the years is Sigma was a virtual manufacturer.” Q. “And can you explain what that term means to you?” A: “Yes. We did not own any manufacturing facilities ourselves, but then we owned all other responsibilities of design, quality control, supply chain planning, product approval, et cetera.; Rybacki, Tr. 1092 (“We call ourselves a virtual manufacturer. We're responsible for all the technical know-how that goes into producing our product, but our product is actually made overseas, for the most part, in China and Mexico and India, so -- at foundries. And we have people that will administrate and make sure that our drawings are done to our specifications and testing. You know, we have a couple engineering groups, one in China, one in India.”); (JSLF ¶ 2).

387. Over the past 25 years, Sigma’s non-domestic fittings sales in the United States have steadily grown. (Pais, Tr. 1977-1978 (“Q. Could we go to the second to last paragraph on the page. You refer to this -- you say, "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." The huge step, was that your participation in DIFRA? A. Yes. Q. And how did Sigma demonstrate its commitment to grow in a responsible manner? A. Well, to me, as I said -- I think I've said it a couple of times -- our industry, because the complexion of the market and market acceptance for foreign fittings shifted about just 20-25 years back, and in the beginning all the importers were considered as a big threat or that they didn't have the quality and they didn't understand the market requirements, service requirements,

so on and so forth, so we had made great strides. And to be able to have a trade organization based upon which American businesses thrive and get organized and get stronger, I thought it was a good symbolic -- it may be just me, but it was a good achievement.”); (JX 687 (Pais, Dep. at 9-10)).

388. By 2012, Sigma’s share of the Fittings market in the United States was 25 to 30 percent. (JX 687 (Pais, Dep. at 10-12)).

389. Star Pipe Products Ltd. (“Star”) imports and sells Fittings, including non-domestic Fittings, and other waterworks products in the United States. (JSLF ¶ 3); McCutcheon, Tr. 2249 (“Q. And what products does Star sell? A. Ductile iron pipe fittings, joint restraint products, castings and accessories.”).)

390. Star does not own or operate the foundries where any of its foreign or domestically manufactured Fittings are made. (JX 694 (Bhutada, Dep. at 7-9, 72-73); McCutcheon, Tr. 2251 (Q: “Where are the fittings that Star sells manufactured?” A: “In mostly China, India, and the United States.” ... Q. “Well, does Star own the foundries where the fittings are manufactured” A: “Star has several joint ventures that we have controlling interest in foundries.” Q: “Q. And where are the foundries -- where are the foundries for which you have a controlling joint -- controlling interest in a joint venture?” A: “In China.” Q: “Does Star have employees in China who manage those foundries? A: “Yes, sir.” Q: “Does Star own any foundries, in whole or in part, in the United States?” A: “No, sir.” Q: “Does Star have any joint ventures with foundries in the United States?” A: “No, sir.”).)

391. President Bush declined to impose the tariffs recommended by the ITC. (RX 730.009; JX 642 (Page, Dep. at 18-19)).

392. ACIPCO ceased its domestic production of Fittings of less than 30 inches diameter, due to declining domestic sales and lack of profitability. (JX 646 (Burns, Dep. at 25-28)).

393. U.S. Pipe ceased domestic production of Fittings at its Chattanooga, Tennessee manufacturing facility 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 (“Q. I want to shift gears a little bit and talk about -- complaint counsel asked you a little bit about the closure of the Chattanooga facility. I want to talk a little bit in more detail about the closure of that facility. I believe you testified that the Chattanooga facility was closed in June 2006? A. April. Q. April of 2006. Thank you. And as part of the reason for closing the Chattanooga facility, U.S. Pipe did a series of internal analyses of profitability; correct? A. I wasn't involved in doing any of those analyses, but I presume that there was. Q. I'm sorry. I didn't hear the last part. A. I wasn't involved in doing any of the analysis on the Chattanooga facility. Q. But you became aware of the decision and some of the reasons behind the closure of the Chattanooga facility; correct? A. Correct. Q. And you became aware of the fact that U.S. Pipe determined that from a financial point of view, it could not justify keeping the Chattanooga facility open just to produce fittings; correct? A. I did become aware. That facility produced both fittings and hydrants, but it was not financially viable.”) (objections overruled); JX 701 (Morton, Dep. at 10).

394. Griffin Pipe ceased domestic production of Fittings because of the flood of cheaper imported fittings eroding the fittings market. (Tatman, Tr. 198 (“Griffin Pipe is a big pipe manufacturer. Griffin Pipe used to make foundry fittings -- fittings in the U.S. at a domestic facility. But it shut down a few years ago because of the flood of cheap imports coming in”); JX 643 (Tatman, IHT at 47)).

395. Mr. Tatman testified that, by late 2007, McWane was “the last guy standing producing fittings domestically” in the under 30-inch diameter segment of the Fittings market. (JX 643 (Tatman, IHT at 47)).

396. In the Fall of 2008, McWane closed its domestic Fittings manufacturing facility in Tyler, Texas, the Tyler South Plant because of cheaper imports, which caused underutilization of McWane fittings plants and unsustainable production levels. (Tatman, Tr. 963-964 (Q. “All right. Now, so in the fall of 2008 were you -- were you thinking of closing the Tyler south plant?” A. “I was.”), 966-968 (Q. All right. Now, you say here right below this -- there's a paragraph that says "I don't believe." Can we highlight that one. You're telling Mr. McCullough and Mr. Walton, the executive vice president and senior vice president of McWane, "I don't believe the market or competitive conditions over the next three to five years will provide a reasonable opportunity to generate acceptable income or normalize inventory levels with the current structure." What does that mean? A. Like I said, at this point in time I'm feeling pretty beat up. You know, I had a hold of that business late in 2007, kind of came into 2008 with let's change the game plan, let's get more competitive, let's find a way to compete on a different level, let's go get some volume, let's go get some share. And I had great intentions, and basically I got beat up all year long. And so I'm looking forward. I don't see any indications in the marketplace that housing is going to recover or the economy is going to recover. If you talk to economists or people that were talking about the industry, nobody is talking about a near-term recovery here or any strong recovery. From a competitive environment, I went out and I tried to get volume, I tried to get share, and I tried to change my tactics to get that, and basically I got hammered again, I got beat up and I lost share. So this is a little bit of a cold dose of reality, is our situation is not going to get any better in the foreseeable future. We can't keep having two plants limp along,

spending idle plant. I don't see the world converting back to domestic specs. I don't see a reason why McWane would ever need 70,000 tons of domestic manufacturing capacity in two facilities. And as painful as it sounds, you know, the decision here, what I'm recommending, is to have a bunch of good people lose their jobs because I can't give them the business to support it. Q. All right. And is that what the end result of this discussion you had was? A. Yeah. Q. Okay. And what does that mean in practical terms? Did you have to shut down the facility after this? A. Yeah. Q. And roughly how many people had to lose their jobs, sir? A. Sorry. A couple hundred.) & RX 616; JX 643 (Tatman, IHT at 47-51)).

XV. ARRA's Impact on the Demand for Domestic Fittings Was Short-Lived and Minimal

397. In February 2009, Congress passed the American Recovery and Reinvestment Act of 2009, known as "ARRA." (JSLF ¶ 19).

398. ARRA allocated more than \$6 billion to water infrastructure products and contained certain Buy-American provisions applicable to Fittings. (JSLF ¶¶ 20, 21.)

399. In the years immediately preceding the adoption of ARRA and following the expiration of ARRA, domestic Fittings comprised approximately 12 to 20 percent of the overall Fittings market. (Tatman, Tr. 235-236 ("And we've said that the overall market of everything that's out there, that about 15 to 18 percent of it is domestic"), 280-281 ("I think I said 15 to 18 percent. That's my perception"), 879 ("We've used the estimate of 15 to 18 percent of the total market"); McCutcheon, Tr. 2279-2280 (Q. "Did Star estimate the size of the domestic market before the ARRA was enacted?" "A. Yes, sir." Q. "And what was Star's estimate of the market at that point in time?" A. "We believed it was 15 to 20 percent."), 2282 (Q. "Does Star have an estimate of the size of the domestic market today?" A. "Yes, sir. ... Today we believe it's 20 percent."); Webb, Tr. 2732 (Q: "Prior to the ARRA, what percentage of your sales were

domestic fittings?” A: “When we discussed this before, the -- well, both prior to the ARRA and currently I would say it's 80 percent import and 20 percent domestic.”); Morton, Tr. 2864-2866 (Q: “And are you aware, sir, of the -- I think complaint counsel asked you some questions based on the document where I believe you forecasted that the domestic compared to import fittings market was 18 percent domestic and then the balance was import. Do you remember that testimony and that document?” A: “I believe it was 12 percent and 88 percent.”)).

400. Dr. Schumann testified that, during ARRA, domestic Fittings comprised 15 to 20 percent of the overall Fittings market in the United States. (Schumann, Tr. 4634-4635) (“Q.

And you know that imported fittings were three or four times the number of domestic fittings sold in the United States in 2010; right? A. I believe somewhere around that multiple. I just don't remember. Q. In other words, even under ARRA in 2010, domestic fittings were not close to being the majority of the fittings sold in the U.S., were they, sir? A. They were not. We discussed that. They were 15 to 20 percent or so.”)

401. McWane's Mr. Tatman testified that “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” (Tatman, Tr. 281) and that “[w]e didn't really understand the impact of the ARRA but we all knew that it was a short-term event.” (Tatman, Tr. 981).

402. McWane did not see any effects at all from ARRA until February of 2010. (JX 643 (Tatman, IHT at 92-94)).

403. Although the peak year for ARRA funding was 2010, (Tatman, Tr. 1003 (Q: “Now, if we look at -- 2010 is sort of the peak year of the ARRA money; right, sir?” A. “It was - - yes.”)), McWane saw only a [REDACTED] percent increase in domestic Fittings sales in 2010. (Tatman, Tr. 1004 in camera (Q: “And if we look down at the bottom, it says "Total Utility

Fittings - Domestic," and then we go across and it's got sales, and if I'm reading it right, it says you had a ■ percent price increase for the entire year of 2010, sir, for your -" A. "That's ■ Correct.""))

404. ARRA did not provide an opportunity to McWane to raise domestic Fittings prices and, in any event, McWane did not opt to increase its domestic Fittings price as a result of the passage of ARRA. (Tatman, Tr. 979-981) ("Can we take a look at RX 595, which I believe is a one-page e-mail, so you should be able to see it on the screen. Do you recognize this e-mail from Mr. McCullough, the executive vice president, to you and Mr. Walton? A. Yes, I do. Q. The subject says "BA Substitution Policy." Do you understand what that is, sir? A. Buy America substitution policy. It had to do with the American Recovery and Reinvestment Act Q. And then in the middle here, towards the bottom of that first paragraph, he says, "It has never been our intent to overcharge because of the Buy America provision." Do you understand what that is a reference to? A. Yeah, I do. I mean, we -- you know, we're a fourth-generation company. We've been around for a long time. We intend to be around for a long time. We didn't really understand the impact of the ARRA, but we all knew that it was a short-term event. And what we didn't want to do because we think long term is 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. Q. All right. Or in this particular instance it sounds like you just lowered your domestic price so they could buy at an import price? A. We would have lost money on this sale. Q. And then down below he's saying we can't make a practice of that or we won't be here any longer; is that what that is? A. Yeah.").

405. Mr. Page testified that ARRA did not reinvigorate “Buy American” sentiment as a more general matter. (JX 642 (Page, Dep. at 175-176)).

406. Mr. Tatman testified that the overall trend in the Fittings market has been the same after ARRA as it was before ARRA: “domestic-only specs have done nothing but erode over time.” (Tatman, Tr. 280-281 (Q: “The -- you mentioned earlier that the domestic share of the overall fittings market was -- I think you used 15 to 20 percent. Previously you've used - ” A: “I think I said 15 to 18 percent. That's my perception. I have no hard facts on that.” Q: “And that was before the ARRA, the stimulus bill?” A: “I believe so. And that's probably what it is now or slightly lower. Domestic-only specs have done nothing but erode over time.”)).

407. Mr. Rona testified that, “[f]or domestic fittings specifically associated with ARRA, we knew that it was not forever.” (Rona, Tr. 1671 (Q: “It was a very short time window.” A: “Short time, correct.”)).

408. Mr. Pais, Sigma’s former CEO (JX 687 (Pais, Dep. at 6-7)), testified that “[b]y the definition of that law and the scope, we knew it was going to be a short-term impact.” (Pais, Tr. 1738).

409. Mr. Morton of U.S. Pipe testified that ARRA “had a limited life.” (Morton, Tr. 2888 (Q: “And ARRA had a limited window; right?” A: “That's right.” Q: “About a year, year and a half?” A: “I can't recall that, the extent of it, but it had a limited life.”)).

410. Mr. Webb of HD Supply testified that ARRA’s impact on demand for domestic Fittings was “mild, at best.” (JX 673 (Webb, Dep. at 29); Webb, Tr. 2731-2732 (“I’m not entirely certain how long it lasted. The effect of it for us was very minimal and mostly played out in 2009 and 2010.”)).

411. Mr. Webb explained that, while HD Supply experienced some pickup in business due to ARRA, the pickup was not very robust for the waterworks infrastructure side of its business. (JX 673 (Webb, Dep. at 28)).

412. Mr. Sheley, President and Owner of Illinois Meter, testified that ARRA “had a small effect” on sales of Fittings, (Sheley, Tr. 3446 (Q: “And so at the end of the day, ARRA didn't really affect your sales during that time period, did it?” A: “It had a small effect.”)), and that “in reality, I don't believe that's [ARRA's] impacted our business at all.” (JX 674 (Sheley, IHT at 74-75)); (Sheley, Tr. 3402 (Q: “When did you see those jobs stop coming through?” A: “Mid to late 2010”), 3446-3447 (Q: “When was the last ARRA job? What was your testimony when you recall the last ARRA job? In your market area.” A: “I believe in mid to late 2010 -- ... -- second, third quarter of 2010.”)).

413. Mr. Sheley testified that less than 5% of municipalities in Illinois Meter's service area have domestic-only specifications today, (Sheley, Tr. 3447 (Q: “And today, only a handful of municipalities in your service area have a domestic specification; right?” A: “That's correct.” Q: “5 percent?” A: “Probably less than that.”)), and that with regard to domestic-only specifications: “That's gone. Yeah, that ship's sunk,” (JX 674 (Sheley, IHT at 71)), and that, in the absence of a strong union and municipal push for domestic-only specifications, “It's over.” (JX 674 (Sheley, IHT at 71-72)).

414. Mr. Webb of HD Supply testified that, over time, fewer and fewer municipalities call for domestic Fittings in job specifications. (JX 673 (Webb, Dep. at 23)).

415. Mr. Swalley, of pipe and Fittings importer Electrosteel, testified that by the third quarter of 2010, bidding on ARRA jobs had ceased. (JX 659 (Swalley, Dep. at 158)).

416. Mr. Keffer from EBAA testified that ARRA's impact did not last long. (JX 658 (Keffer, Dep. at 11-12)).

417. Mr. Backman, owner of Backman Foundry, a domestic foundry, testified that ARRA funded only "a finite amount of jobs." (JX 648 (Backman, Dep. at 109-110)).

418. Mr. Johnson, an owner of distributor customer Dana Kepner, testified that ARRA's impact was "minimal." (JX 652 (Johnson, Dep. at 30)).

419. Mr. Gibbs of distributor Winwater testified that ARRA did not have much impact on Fittings sales. (JX 705 (Gibbs, Dep. at 23, 106)).

420. Mr. Coryn of Utility Equipment testified that ARRA did not have much impact on business. (JX 703 (Coryn, Dep. at 24)).

421. 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 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."); JX 646 (Burns, Dep. at 30-31, 35-36, 176-177); JX 667 (Kuhrts, Dep. at 38, 49-50, 74)).

422. Mr. Backman testified that Backman Foundry never considered expanding its production from specialty domestic Fittings to a fuller line of domestic Fittings as a result of ARRA "when anybody and their dog can see that this market is going to end at some point." (JX 648 (Backman, Dep. at 109-110)).

423. Some ARRA funds were diverted, and therefore had no impact on demand for Fittings; for example, some municipalities were allowed to use ARRA funds to pay off previously installed projects. (JX 672 (Webb, IHT. at 93)).

424. The United States Environmental Protection Agency (EPA) granted a nationwide public interest waiver of ARRA's Buy American requirements "for de minimis incidental components of eligible water infrastructure projects funded by ARRA." (RX 195; RX 155).

XVI. Star Quickly and Successfully Expanded Into Domestic Fittings

A. Star was undeterred by McWane's September 2009 Rebate Policy

425. Star sold domestic Fittings to many distributors after the Rebate Policy was issued, including [REDACTED]

[REDACTED] (McCutcheon, Tr. 2590-2594 ("Q. And you sold domestic fittings to [REDACTED], and we saw that yesterday; right, sir? A. Yes, sir. Q. You sold domestic fittings to [REDACTED]; right, sir? A. Yes, sir. Q. You sold domestic fittings to a company called [REDACTED]; right, sir? A. Yes, sir. Q. They're a big regional distributor? A. Yes, sir. Q. You sold domestic fittings to a company called [REDACTED]; right, sir? Q. After Star had product available, domestic product available, which was sometime in the fall of 2009; right, sir? A. Yes, sir. Q. And after Tyler's rebate policy was issued; right, sir? A. Yes, sir. Q. You sold to [REDACTED] We saw that yesterday. A. Yes, sir. Q. In fact, you sold to [REDACTED] the very same month the rebate policy came out, September; right, sir? A. Yes, sir. Q. After the policy came out, you sold to [REDACTED]? They purchased your domestic fittings? A. Yes, sir. Q. You sold to [REDACTED]; right, sir? Q. Well, I'll ask the witness to clarify. Do you remember when [REDACTED] started buying domestic fittings from you? A. No, sir. Q. You just know that they did buy domestic fittings from you? A. I believe that they did,

yes, sir. Q. And a regional chain, [REDACTED], started buying domestic fittings from you after the policy came out; correct? A. Yes, sir. Q. And a company called [REDACTED], they started buying domestic fittings from Star after the policy came out; right? A. Yes, sir. Q. And a company called [REDACTED], they started buying fittings from Star after the policy came out? A. Yes, sir. Q. [REDACTED]; right? A. Yes, sir. Q. [REDACTED] A. Yes, sir. Q. [REDACTED] in Tulsa, Oklahoma; right? A. Yes, sir. Q. [REDACTED]; right? A. Yes, sir. Q. [REDACTED] A. I'm not sure. Q. [REDACTED] buys domestic fittings from you? A. I believe so. Yes, sir. Q. [REDACTED] buys fittings, domestic fittings, from you after the policy came out? A. Yes, sir. Q. [REDACTED] in California, they bought domestic fittings from you after the policy came out? A. Yes, sir. Q. [REDACTED], they purchased domestic fittings from you? A. I don't recall. Q. Okay. [REDACTED], they purchased domestic fittings from Star Pipe? A. I don't recall. Q. [REDACTED] A. Yes, sir. That's R-A-M-S-C-O. Q. [REDACTED], they purchased domestic fittings after the policy came out? A. I don't recall. Q. [REDACTED] A. Yes, sir. Q. In fact, Mr. McCutcheon, the company sold to more than a hundred individual customers domestic fittings after the policy came out and during 2010; right? A. I believe that to be true, but I'd need to see a document to confirm it, but I think it's true.”).

426. As early as April 2010, Star’s sales staff recognized that the Rebate Policy was “all bark and no bite.” (McCutcheon, Tr. 2617 (“Q. That was part of his job responsi- -- job and responsibilities, right? A. Yes. Q. Okay. And part of his job as a salesman was to go out and get this information, correct? A. Yes. Q. All right. And is it fair to say that it at least appears from here that he's reporting this information within a week of the time he got it? A. I would assume so, yes. . . . Q. Okay. All right. The second bullet point where Mr. Lisowski writes: "There have

been no repercussions from Tyler to Mainline for buying Star Pipe Products domestic fittings. The Tyler program seems to be all bark and no bite." What did you understand him to be reporting in that bullet? A. I don't know what Pete's full thought process was on that.").

427. Mr. McCutcheon emailed a copy of the Rebate Policy to his division managers, commenting in his email that the Rebate Policy "will actually benefit Star" because customers were angered by it. (McCutcheon, Tr. 2588-2590 ("Q. And so having gotten the rebate policy, this contains your immediate comments; right, sir? That's what it says in the first line? A. Yes, sir. Q. You say -- let's see -- halfway down, "Tyler tried this 'loyalty' program before and we beat them down with better service, flexibility, price, et cetera"; right, sir? A. Yes, sir. Q. And in fact, you gained share throughout the period; right? A. Yes, sir. Q. And you say, actually, "Every customer I talked to is pissed. This will actually benefit Star." That's what you said at the time; right, sir? A. Yes, sir. Q. And you say, right above that, to the sales force, "Get with all of your guys to make sure we hang on to as many independents as we can for now. We only need a few into each market to be successful"; right, sir? A. Yes, sir. Q. And above that, you're talking about the big guys, and by "the big guys" you're talking about HD and Ferguson? A. Yes, sir. Q. And you say they'll probably do this for the time being because they can't take the risk, and then you say, "They all committed to give us more import," and that means support, sir? A. Did you say does it mean support? Q. Yeah. A. I don't understand the question. Q. What did you mean when you said, "They all committed to give us more import"? A. That they agreed to give us more of the import pipe fittings because they couldn't buy domestic. Q. I got you. So they said they're risky on the domestic, buying domestic from you, and then they said but they'll switch to you the second you prove you're ready; right? That's what it says? A. That's correct, yes, sir. Q. And in the meantime they said they'll give you more of their import business; right? A. Yes, sir, I said

that. Q. And that's a benefit to Star Pipe if you get more of their import business; correct, sir? A. It would be, yes, sir. Q. Now, in fact, the company -- as we heard yesterday, the company has domestic product. You started from scratch in 2009, and by the fall of 2009 you actually had fittings, domestic fittings; right, sir? A. Yes, sir. Q. And you sold domestic fittings in 2009; right, sir? A. Yes, sir. Q. And you sold more domestic fittings in 2010; right, sir? A. Yes, sir.”); CX 0009).

B. Star quickly became a domestic Fittings supplier and has steadily increased its share of domestic Fittings sales

428. Beginning in 2009, Star contracted with foundries in the United States to manufacture domestic fittings. (JSLF ¶ 4).

429. 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 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.)

430. At a June 2009 AWWA industry conference, Star publicly announced that it would offer Domestic Fittings starting in September 2009. (JSLF ¶ 23; McCutcheon, Tr. 2603-2604 (“Q: Okay. Fair enough. So you had the idea in the spring, and by June of 2009 you’d announced at the AWWA meeting that you were going to sell domestic fittings; right? A: Yes, sir.”).)

431. Star’s initial plan to supply Fittings for use in ARRA-funded projects was to import foreign-made Fittings from countries that were members of the World Trade Organization

(Korea) or were parties to the North American Free Trade Agreement (Mexico). (Bhargava, Tr. 2927-2928 (“Q. When you first decided to enter the domestic market, what options for sourcing did you consider? A. We started to -- with seeing whether WTO countries could use it, which was -- Korea was one of the options that we talked about, and we started to look into it. And then we looked also whether NAFTA country would be able to fulfill the requirements, so we looked at Mexico to be able to do it. But after some investigation, we found that it would be -- it would not be a very profit sources to really meet all the requirements of ARRA projects. Q. And why not? A. Because for WTO and NAFTA there were so many different states, there were so many different regulations that products from one country will not qualify for all the different jobs even in the same state, and it would be very difficult practically to follow that and bid on any jobs, so that was not considered a practical option.”).).

432. Star concluded by March or April of 2009 that ARRA’s “Buy American” provisions would require the products actually to be manufactured in the United States. Star then focused on three (3) possible courses of action: (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. 2928-9 (“Q. What alternatives did Star identify for domestic production? A. We had looked at three, three different options, that we could set up our own foundry from ground zero, that we could buy an existing foundry and use it for whatever needs, or we could go to contract manufacturing and use them for making of products. Q. When you say set up your own foundry from ground zero, did you mean build a completely new foundry? A. Yes.”).).

433. Star realized that ARRA provided a limited time window of opportunity, and 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 (Q. In the spring of 2009, what option did you choose? A. After looking at everything, we had -- our preference was that we should have our own foundry, but we also knew that we need to come out in the market pretty quickly, so we said we'll start with contracting the foundry. Q. You concluded that contracting an existing -- with an existing foundry would allow you to enter the market, domestic market, more quickly? A. That we can enter the market more quickly. Q. And why is that? A. Because whether -- the process of buying a foundry would take a few months or some time and starting up a foundry will take a longer time, but with the contracting a foundry we could get into production within two to three months. Q. In the spring -- and was this in March-April of 2009? A. That was around March and April 2009. Q. Is it fair to say that in March and April 2009 that there were many foundries in the U.S. with excess capacity? A. Yes, it is.”), 2989-2990 (“Q. I think you testified yesterday that as a result of the ARRA, Star decided to sell domestically produced fittings; correct? A. Yes. Q. And I think you identified three alternatives for us that Star considered. The first was to start from scratch and build its own foundry; correct? A. Yes. Q. The second was to what I call source or use contract foundries; correct? A. Yes. Q. And the third was to buy an existing foundry; correct? A. Yes. Q. Okay. And I think you said you needed to move quickly because ARRA provided a limited window of opportunity; correct? A. Correct. Q. Okay. So from the beginning, Star ruled out starting from scratch, building from the ground up; right? A. Yes. Q. That would take too long. A. That would take too long. Q. And considered buying a foundry but ruled that out; correct? In March or April of 2009. A. We did not rule out buying a foundry. Q. You decided in March or April of 2009 not to purchase a foundry at that point; correct? A. No. We did not say that we will not purchase a foundry. What we decided was we will enter the market quickly with the contract manufacturing while we are

looking for a foundry to buy. Q. Okay. And the purchasing a foundry would take a good deal longer than enter through contract manufacturing; right? A. Yes. That's correct.”).

434. Star concluded in the March/April, 2009 timeframe that contracting with existing U.S. foundries to produce domestic castings would be the quickest path. (Bhargava, Tr. 2930-2931, 2989-2990; (JSLF ¶ 4.))

435. Star had a “preference” for owning its own foundry, but made the deliberate decision in the Spring of 2009 to source instead: “[O]ur preference was that we should have our own foundry, but we also knew that we need to come out in the market pretty quickly, so we said we’ll start with contracting the foundry.” (Bhargava, Tr. 2930).

436. Star did not consider purchasing a foundry until the September or October 2009 time frame. (Bhargava, Tr. 2956 (“Q. Did you ever consider purchasing a specific foundry? A. Yes. Q. When did you first consider purchasing a foundry? A. Towards the -- in third, fourth quarter of 2009, about September or October of 2009.”)).

437. In March and April 2009, Star determined that there were many foundries in the United States with excess capacity. (Bhargava, Tr. 2931; JX 643 (Tatman, IHT at 63 (“Q Have you given any thought to selling the foundry rather than carrying the costs of an unused foundry on your books? A It's not sellable. I mean, the problem you've got -- that's the other problem with the industry. There's over-capacity. A lot of the foundry business has moved offshore. That's why we felt it was fairly -- the entry barriers were low. If you want to come in the U.S. and you want domestic production, there's foundries tripping all over themselves to get some work. All their work has been pushed offshore.”)); JX 638 (McCullough, IHT at 41 (“Q. Can you give me an example of that? A. Yes, because Star was having fittings made in China. They were having all the tooling made to produce these fittings. That tooling was made in China also, and

when they decided to get into the business domestically here in the states, they went out to a number of domestic foundries, and capacity is not an issue today. I mean, foundries have excess capacity from coast to coast, and so they went to X number of foundries, and if you ask these foundries to have them and their pattern shops or the pattern shops on the outside contractors that they would use develop that tooling, let's say on a given time, that set of tooling may cost you as much as \$10,000 or so. But by going to China and having that tooling made in China and then sent to the domestic foundries here, that set of tooling would cost not \$10,000 but we're seeing that it's probably \$2,500, maybe as much as \$3,000, but it's probably a third of what it would be domestically.”).

438. Star had no prior experience with U.S. foundries and started the process of finding possible foundries from which to source from scratch. Star's Mr. Bhargava explained that he began with a list of foundries he identified using a trade association's website, the American Foundry Society. (Bhargava, Tr. 2996- 2997 (“Q. Let's talk about the contract foundries for just a second. I think you testified that you started with a list from a trade association. You literally got online and found the identity of foundries on the American Foundry Society Web site; is that right? A. That was one of the sources. Yes. Q. Okay. And I mean, literally you didn't know which foundries to go to. You started from scratch. A. Yes.”)).

439. Star never operated its own Fittings foundry, whether inside or outside of the United States, yet has managed for years to be a viable competitor. (JX 694 (Bhutada, Dep. at 72-73 (“Q. I'm sorry, Mr. Bhutada. I was starting to ask a question about whether Star ever contemplated its own domestic foundry. A. Yes, sir. Right early on. Q. When you say early on, when would that have been? A. That is back in May, June of 2009. Q. May or June of 2009? A. Yes, sir. Q. What led to that consideration? A. We knew that to be viable competitor we had to

have our own foundry where we could manufacture the substantial line of product and finish them at the same place. Q. Star has never operated a foundry before in its history. Correct? A. That is correct. Q. Was Star a viable competitor in the import market? A. Yes, sir. Q. So it became a viable competitor by sourcing from a number of different foundries. Correct? A. That is correct.”).

440. Star began phoning and emailing potential foundry candidates that could make domestic castings for Star. Mr. Bhargava and his staff contacted more than 60 foundries. (Bhargava, Tr. 2931 (“Q. Is it fair to say that in March and April 2009 that there were many foundries in the U.S. with excess capacity? A. Yes, it is. Q. How many foundries did you initially contact about being a source of domestic fittings for Star? A. We must have contacted at least 60 to 70 foundries, if not more.”)).

441. Star visited approximately 20 foundries, ultimately settling between April and August, 2009 on 6 different foundries from which to source product. (Bhargava, Tr. 2997-2999 (“Q. Okay. And I think you told us that you contacted 70-plus foundries. A. That's true. Q. Now, was that every foundry that you were aware of that was on the list or were those just 70 that you contacted? A. No. There are more foundries than that. We did not contact every foundry in the USA. Q. Okay. And you -- with that list, after e-mails and phone calls and communications, you narrowed it down to somewhere in the neighborhood of 20 that you thought might best suit your purposes? A. Yes. That's my estimate at this time. Q. Okay. And those are the ones you visited. A. Yes. Q. Okay. And again, that's not every foundry in America that could make fittings; those are the ones that you just determined could possibly best suit your needs. A. Yes. Q. Okay. We've heard some testimony about Eureka Foundry. Was Eureka Foundry one of the ones you visited? A. No. We did not go to Eureka Foundry. Q. How about

Talladega Foundry in Talladega, Alabama? A. We went to them. Q. You did go to them, and they didn't make the cut of the first five or six that you -- A. Actually, no, we did not use them in the first -- in the beginning, but we did use them for certain products later on. Q. So you didn't visit Eureka, but you did visit the Talladega Foundry. A. Yes. Q. Okay. Tell me the locations, please, sir, of the six foundries that you identified. A. One was in [REDACTED] Q. Which city? A. [REDACTED] Q. All right. A. One was in [REDACTED] Another one was in -- I don't remember the name of town, but it was in Pennsylvania. One was in [REDACTED] I'm trying to remember. Just give me a minute. Q. Sure. (Pause in the proceedings.) If you can't remember, sir, I'll move on. A. Let me come back to it if I can. Q. If it occurs to you, just tell me, and we'll go back to that. But so far we have [REDACTED] [REDACTED] Is that correct, sir? A. That is correct. Q. All right. I know where [REDACTED] is. I'm not familiar with [REDACTED] A. [REDACTED] Q. I'm sorry. A. [REDACTED] Q. Near? Near [REDACTED] Okay. And when had Star arrived at these six foundries? At what point in time had you decided on those six? A. Somewhere between April and August.”).

442. Each of the foundries that made castings for Star had different size ranges that they were capable of producing. (Bhargava, Tr. 2934 (We had one foundry which makes only small size products. When I say “small size”, that they can make fittings only up to eight inches size. Then we have another foundry that can make slightly larger but up to 12” fittings. And they can make some large size fittings using a different manufacturing process, which is a slow speed process. And then we have a foundry that could make just large size fittings. They would not make a small size fitting.”)).

443. No single contract foundry could manufacture all of the various size ranges that Star needed, so Star would be required to utilize multiple foundries in different locations. (Bhargava, Tr. 3000 (“Q. Okay. Now, I think you told us yesterday that there was no single foundry that you could locate that could make all the fittings that Star desired; is that correct? A. That is correct. Q. Okay. And so each of these six foundries had a size range that it made or specialized in; correct? A. That is correct.”), 2932 (“Our – the product range that we wanted to make is very wide in size and type of product, so we were looking at foundries which could do some part of that product line.”)).

444. Star decided that it would be a full-line supplier, and ordered all of the patterns needed for a complete line. (Bhargava, Tr. 3011 (“Q. Thank you. When Star made the decision to become a domestic supplier, it had decided to become a full-line supplier; correct? A. Correct. Q. And so regardless of whether or not you had orders, you continued to order patterns from China during this time frame; right? A. That is correct.”); McCutcheon, Tr. 2605-2606; RX 234).

445. In addition to identifying contract foundries and buying patterns, Star also set up a facility in Houston, Texas to perform finishing operations. (Bhargava, Tr. 2999-3000 (“Q. And was that process under way? Were you already -- was Star already by August in the process of constructing the finishing building and building out that line? A. Yeah. We had -- we were setting up the -- we were planning for the setting up that facility by that time.”), 3001 (“Q. Okay. And so in the summer of 2009, I think you told me that you were in the process of securing patterns; correct, from China? A. That is correct. Q. And identifying these foundries -- A. That is correct. Q. -- correct? And basically mounting those patterns on the machinery and developing the patterns; correct? A. That is correct. Q. Okay. And building out the finishing

line; correct? A. That is correct.”), 3017 (“Q. What about your finishing line? You just finished building out a finishing line; right, in Houston? A. That is correct.”); JX 696; McCutcheon, IHT at 40-41); McCutcheon, Tr. 2618-2620; RX 572.)).

446. Finishing is the process, after the foundry makes a casting, of drilling holes, adding lining, and painting the fitting. (Bhargava, Tr. 2937 (“Finishing is the process that after the foundry makes a casting, in a fitting there are several operations that are needed to make the finished product, which is – the first one is drilling the holes, then – I’ll take the example of MJ Fittings, so the first one is drilling the flange holes. Second is putting the cement lining inside the fitting. The third part is to do the painting and then packing and putting it in the warehouse.”)).

447. 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. (Bhargava, Tr. 2940 (“[T]he foundries are not set up to do these kind of operations. . . .[S]ometimes they don’t have the space, they don’t have the capital, and they don’t have the labor trained to do these kind of things”).).

448. In March or April 2009, Star recognized that its fittings from domestic foundries would result in inefficiencies and higher costs to Star. (Bhargava, Tr. 2990-2991 (“Q. And Star considered at that time some of the negatives associated with contract manufacturing; right? A. We knew what the limitations for the contract manufacturing are. Q. And that was in March or April of 2009; correct, sir? A. That was in the beginning. Yes. Q. And it was -- contract manufacturing was more costly I think you told us. A. Yes. Q. Because we don't know what the profit margin was, but we know that there was some profit that those contract foundries were going to see; correct? A. It's not the cost -- their high cost was not just because of their profit

margins, but it's also associated with the whole process of manufacturing, what equipment they have, what they do today, and what would it take for us to finish it and the logistics that goes with it. Q. And it's less efficient; correct? A. The DISA is less efficient. Q. You knew at that point in time that you'd have at least several foundries spread around the country, and there would be freight, materials handling, those sorts of inefficiencies; correct? A. Yes.”).

449. Star understood that the contract foundries manufacturing fittings for Star would build a profit margin into the price they charged Star. (Bhargava, Tr. 2991).

450. Having multiple foundry locations and a separate finishing facility would result in additional freight charges and materials handling inefficiencies. (Bhargava, Tr. 2991).

451. Rather than shipping finished goods directly to a customer or distribution yard, Star's process necessitated raw castings from six locations across the country [REDACTED] [REDACTED] [REDACTED] to be shipped to the Houston finishing facility. (Bhargava, Tr. 2991, 2998-3000).

452. 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 (“Q. And I think you also told us the contract manufacturing wouldn't allow you to secure the supply source; correct? A. I'm not sure what you mean that we knew it would not secure that. What we know is that it's subject to that, but not necessarily it will or it will not. But it has -- potentially it can result in that. Q. Potentially, those foundries that you source from at some point in the future might decide not to do your work; correct? A. Correct. Q. They might have other alternatives. A. Correct. Q. Okay. And they might raise their prices; correct? A.

Correct. Q. And in the spring of 2009, those were all factors that were known and considered by Star. A. Yes.”).).

453. Star decided in March/April, 2009 to pursue the sourcing option. (Bhargava, Tr. 2991-2992 (“Q. And in the Spring of 2009, those were all factors that were known and considered by Star? A. Yes.”).).

454. Star entered the domestic Fittings market in 2009 with the most commonly sold fittings. (McCutcheon, Tr. 2289-90 (“Q. Why don't I ask you that question. Tell me -- what -- what sort of an assortment of domestic fittings did Star plan on entering the market with in 2009? A. We decided to enter the market with the highest-moving, highest-selling fittings, so we decided to provide C153 full range of fittings. . . flanged fittings full range. C110 fittings were per project, and we were -- and we planned on manufacturing the A items, which we did. We planned on not manufacturing push-on, domestic push-on fittings. That's a general overview.”).).

455. By September 2009, Star recorded its first sales of domestically-manufactured Fittings to customers. (Bhargava, Tr. 3002 (“Q. Okay. So September of 2009 you're actually selling fittings to customers, domestic fittings to customers at that point; right? A. The first sale I think was around that time.”).).

456. By the end of 2009, Star had [REDACTED] patterns in place at third-party domestic foundries. (Bhargava, Tr. 3010 (“Q. Okay. And we were talking about the number of patterns that you had. At the end of 2009, Star had [REDACTED] patterns in place; is that right? A. That is correct. Q. Okay. At domestic foundries. A. At -- in our possession.”).).

457. As early as January 2010, Hajoca's Tulsa branch had ordered over [REDACTED] of domestic Fittings from Star. (JX 671 (Pitts, Dep. at 102-103 (“Q Mr. Pitts, I'm handing you what has been marked as Exhibit 61. I apologize for the look of these e-mails. This is how they were

produced to us. There is no real formatting to them. They look like plain text. So it's a little hard to identify the different strings. But I'm referring to the e-mail from Mr. Greg Dill, who was one of your former coworkers and employees, to Susan Schepps at Star dated Wednesday, January 13th, 2010 at 8:42 a.m. Do you see that? A Yes. Q The original e-mail. And the subject line is, Domestic product. Have you seen this e-mail? A No, I have not. Q Can you read the single paragraph of its body into the record? A Susan, you guys have me feeling like I need to go back and beg Tyler to let me buy from them. When we get to the point of customers pulling orders and us losing jobs over not being able to ship product, it is time to do something. Knowing that I have over a million dollars in domestic booked with you for the year is making me very nervous right now. Signed, Greg Dill. Q When he says he has over one million in domestic booked with Star, does that mean [REDACTED] A I assume it does. Q That's your reading? A Yes. We are talking in terms of dollars. Not pounds."); RX 61).

458. By roughly mid-year, 2010, Star had patterns available domestically that were equivalent to McWane's in-stock items. (Bhargava, Tr. 3012 ("Q. And as I read this e-mail, RX 234, I'm looking at the -- toward the end, it says, the target is to have these fittings available in stock by June 2010 to basically be equivalent to McWane's in-stock availability. Do you see that? A. Plan to develop additional patterns to be equivalent? Is that the line? Q. "The target is to have these fittings available in stock by June 2010." Do you see where I'm reading from? A. Yes. Q. What does "these fittings" referring to? What are you trying to achieve by June 2010? A. Well, what we are trying to do is that can we have in -- at least the patterns and the capacity to develop the fittings that if a customer orders we can supply them any fitting that our company orders -- or supplies.").).

459. By the end of 2010, Star had close to [REDACTED] patterns in stock. (Bhargava, Tr. 3011-3012 (“Q. Thank you. When Star made the decision to become a domestic supplier, it had decided to become a full-line supplier; correct? A. Correct. Q. And so regardless of whether or not you had orders, you continued to order patterns from China during this time frame; right? A. That is correct. Q. And I think by the end of 2010 you had roughly [REDACTED] patterns? A. Close to [REDACTED] patterns.”).).

460. Star’s CEO Mr. Bhutada testified that, by 2010, Star was supplying the same full line of domestic Fittings as McWane. (JX 694 (Bhutada, Dep. at 77-78 (“Q. Can Star now provide 100 percent of all requirements? A. Just about. Q. And Star can provide -- A. -- 100 percent of requirement of what we say we're going to provide. Q. I'm not sure I understand that. Can you provide 100 percent of requirements of what your customers would order? A. Yeah. What the customers would order, we would provide if we commit to those deliveries. Q. Was there something that Tyler can provide that Star is not capable of providing now, currently? A. I wouldn't say not capable, but Star is carrying -- there are 2 million lines of domestic fittings Star carries in stock, which get us to 96 percent of the market requirement. Q. What are those two major lines? A. C-153 MJ and C-110 flange. Q. And Star carries both of those lines? A. That is correct. Q. What is the 4 percent of the market that Star does not carry? A. That is C-110 MJ and C-153 push-on. Q. Could Star obtain patterns to make C-110 MJ? A. We regularly do. Q. You regularly make the C-110 MJ? A. Yeah. If customer asks, if we have the patterns, then we are able to do it. If we don't have the patterns, we get the pattern made and we are able to do it.”), 82 (“Q. Could Star provide the same range of fittings in 2010, albeit not a 100 percent, that Tyler could provide? A. Yes, sir.”).).

461. In September 2010, Star touted on its website that it was “very proud of what we have been able to achieve in such a short period.” (RX 572.)

462. Mr. Sheley, of Illinois Meter, testified that Star sells a wide range of domestic Fittings. (JX 675 (Sheley, Dep. at 61 (“Q. Does Star sell a wide range of fittings? A. Yes.”).)).

463. Since its initial entry in 2009, Star has sold domestic Fittings every month and every year since then. (Bhargava, Tr. 3027 (“Q. Okay. Let me circle back to domestic fittings and Star's production of domestic fittings. I understand you began selling -- Star began selling domestic fittings in September 2009; correct? A. That is correct. Q. And you sold them every month and every year thereafter; right? A. That is correct.”), 3002, 3027; McCutcheon, Tr. 2300 (“Q. Did Star actually start having domestic fittings manufactured in 2009? A. Yes, sir.”), 2590 (“Q. Now, in fact, the company -- as we heard yesterday, the company has domestic product. You started from scratch in 2009, and by the fall of 2009 you actually had fittings, domestic fittings; right, sir? A. Yes, sir. Q. And you sold domestic fittings in 2009; right, sir? A. Yes, sir.”).).

464. Star’s domestic Fittings sales rose from 2009 to 2010. (McCutcheon, Tr. 2590 (“Q. And you sold domestic fittings in 2009; right, sir? A. Yes, sir. Q. And you sold more domestic fittings in 2010; right, sir? A. Yes, sir.”).).

465. On November 10, 2009, Star CEO Ramesh Bhutada sent an email stating that Star’s success in domestic fittings was “better than. . .expected.” (RX 231 (“our domestic quote log is very impressive. . .lot better than I expected at this stage. . . [c]congratulations...”).).

466. Star sold domestic Fittings to many distributors during the last quarter of 2009, 2010 and 2011, including McWane’s largest customers, HD Supply and Ferguson. (McCutcheon, Tr. 2590-2592 (“Q. And you sold domestic fittings in 2009; right, sir? A. Yes,

Q. And you sold more domestic fittings in 2010; right, sir? A. Yes, sir. Q. sir? A. Yes, sir. Q. You sold domestic fittings to a company called Winwater; right, sir? A. Yes, sir. Q. They're a big regional distributor? A. Yes, sir. Q. You sold domestic fittings to a company called Dana Kepner; right, sir? Q. After Star had product available, domestic product available, which was sometime in the fall of 2009; right, sir? A. Yes, sir. Q. And after Tyler's rebate policy was issued; right, sir? A. Yes, sir. Q. You sold to HD Supply. We saw that yesterday. A. Yes, sir. Q. In fact, you sold to HD Supply the very same month the rebate policy came out, September; right, sir? A. Yes, sir. Q. After the policy came out, you sold to Ferguson? They purchased your domestic fittings? A. Yes, sir.”) (objections omitted); Webb, Tr. 2798-2800 (“Q. Let's talk about how this policy played out sort of in practice in the real world. To get down -- let's see. HD Supply actually purchased domestic fittings from Star beginning in September of 2009 and has continued doing so every single quarter since that time; isn't that correct? Q. Do you know whether HD Supply purchased domestic fittings from Star in September of 2009 and has continued to buy them from Star since that time? A. I do know that we have bought domestic fittings from Star. I do not know the time frames associated as to when that started. And you said it continues today. I would -- I'll take your word for that. Q. And I don't want to get into the specific numbers. We'll have to do that later. But do you understand that HD Supply purchased - - it purchased tens of thousands of dollars of domestic product from Star in 2009 and purchased many hundreds of thousands of dollars of domestic product from Star in 2010? A. I guess that's yes, I can answer that. Again, I'm aware that we have bought domestic fittings from Star. The hundreds of thousands and the tens of thousands, I would have to look at a report to see what that -- what that -- the specifics dollars are. Q. But you don't have any reason sitting here today to believe that that's not true, do you? A. I don't.”); Thees, Tr. 3084 (“Q. Currently who do you buy

domestic ductile iron pipe fittings from? A. Primarily McWane, a little bit from Star.”), 3111-3112 (“Q. You testified earlier that Star had been producing -- Star started producing domestic fittings in September 2009; is that right? A. I don't believe I mentioned a month. 2009. Q. Fair. And Ferguson started purchasing domestic fittings from Star in 2010; is that right? A. I don't recall. Q. Does Ferguson purchase domestic fittings from Star? A. We have purchased domestic fittings from Star. Q. In fact, Ferguson has purchased hundreds of thousands of dollars in domestic fittings from Star; is that correct, sir? A. Yes. A report I looked at, 2011 it was less than a million dollars. Q. But hundreds of thousands of dollars? A. Yes. Q. Are you aware that Ferguson has increased its purchases of domestic fittings from Star year over year since Star began selling them? A. Yes. Q. In fact, Ferguson has almost tripled its purchases of domestic fittings from Star between 2010 and 2011; is that right, sir? A. I don't know if it's triple. Q. Is it fair to say it's increased significantly? A. Yes.”); Morton, Tr. 2860 (“Did I hear your testimony right that U.S. Pipe bought Star domestic products after September 2009 -- excuse me -- after the September 2009 policy of McWane was enacted? A. That's correct. We bought a minor percentage -- Q. Okay. A. -- after that time. Q. And you purchased them after the October 2009 meeting with Mr. Tatman as well. A. That's correct. Q. And it's true, isn't it, that as early as January of 2010, U.S. Pipe took at least, I think your term was, a minor percentage of domestic product from Star? A. That's correct.”), 2867 (“Q. Mr. Morton, is it true that -- isn't it true that U.S. Pipe bought significant quantities of domestic products from Star Pipe starting in September 2010? A. I believe that's correct.”); JX 652 (Johnson, Dep. at 17-18 (“Q Do you purchase domestic fittings from Star? A Yes. Q And do you also purchase domestic fittings from Tyler? A Yes. Q When did you start purchasing domestic fittings from Star Pipe? A I would guess about the middle of '10, 1 2010. We may have purchased some earlier, but the majority . . .”))).

467. Star's success continued into the first and second quarters of 2010, the peak of the ARRA period. (McCutcheon, Tr. 2613-2614.)

468. In February 2010, Mr. McCutcheon responded to news that large regional distributor Dana Kepner would be using Star for all of its domestic Fittings needs with an enthusiastic "Yahoooooo!!" (McCutcheon, Tr. 2612-2613, 2595; CX 0585.)

469. Star – not McWane – was selected as the preferred domestic Fittings supplier for The Distribution Group (TDG) in 2010. (JX 694 (Bhutada, Dep. at 155 ("Q. Was Star identified as a TDG-preferred vendor for domestic in 2010? A. Yes, sir.")); JX 652 (Johnson, Dep. at 35-36 ("Q Did Tyler have a program with TDG for domestic fittings in 2010? A I don't -- I don't remember if they did or not. Q Do you recall TDG rejecting a proposal from Tyler for domestic fittings? A Yes, we did reject one. Q Do you remember when that was? A I'm not sure which year it was. Q See if I can refresh your recollection. Would you flip to Page 81. It's on Page 21. And on Line 3 the question was, "Did Star have a program for domestic fittings with TDG in 2010?" You replied "Yes." Next question, "Did Tyler"? And you replied "No." So does this refresh your recollection that in 2010 Tyler did not have a program with TDG for domestic fittings? A I guess that's correct. Q But Star did, right? A Yes. Q So the vendor selection committee of TDG rejected Tyler's proposal for domestic fittings but accepted Star's proposal, correct? A Apparently they did, yes.") (objections omitted)); JX 675 (Sheley, Dep. at 68 ("Q. Do you recall that you decided to go with Star for domestic fittings in 2010 and not Tyler? A. Yes. Q. So, through TDG, distributors could buy Star's domestic fittings, but not Tyler's for 2010. Right? A. No. We can't tell our members who to buy from. We can only offer them a program with an incentive to buy from a particular manufacturer. Q. And for domestic fittings in

2010 Star was in that program but not Tyler? A. That's correct. Q. Did Star offer a rebate to get in the program? A. Yes.”).).

470. In some states, Star’s share of domestic Fittings sales has been as high as 20-30% of total domestic Fittings sales. (Normann, Tr. 4930-31 (“Q. Did you at all -- Dr. Normann, did you test whether the rebate policy was consistent across the country, it might have different effects in different parts of the country? Was that part of your study here? A. Well, one of the things I did as well -- I did a couple things. Number one, I made reference in my report that I believe Star sold -- I don't know if this is in camera or not, but Star sold in 2010, for example, to -- in almost all 50 states. Also I did analysis, I looked at Star's share by state. And I think that's relevant because if the rebate policy were effective in foreclosing Star, then I think we'd expect to see them struggle, you know, kind of uniformly across the nation, for example. But what I found is that there's several states where Star actually has a significant share of that state's domestic sales. There's some states where they have 10 percent, 20 percent, 30 percent of the share, just in 2010. Remember, 2010 is the first full year they've been participating in the sale of domestic spec. Q. And does that lead you to draw any conclusions with regard to Star's sales of domestic? A. Again, I think it indicates that, you know, Star had success in the market and that there's several states where, you know, Star capturing 20-30 percent of that state's share, to me, I do not see how that's consistent with the notion of Star being significantly impeded.”).).

471. On average, Star sold domestic fittings to two new customers a week in 2010. (McCutcheon, Tr. 2595 (“Q. Now, you sold -- I think you said you believe you sold to more than a hundred customers; right, in 2010? A. That's possible. Yes, sir. Q. So roughly two a week new customers throughout 2010; right? A. You could say that. Yes, sir. Q. And you had ██████ in domestic sales in 2010; right? A. I believe so. That's what I remember.”).).

472. In the 200 business days between September 2009 and June 2010, Star submitted roughly four bids a day for domestic Fittings jobs. (McCutcheon, Tr. 2602 (“Q. So in those 200 business days between September of '09 and June of 2010, Star submitted roughly four bids a day for domestic jobs; right? A. Yes, sir.”); CX 2294).

473. Mr. Bhutada, Star’s CEO, testified that Star’s share of domestic Fittings sales increased from “hardly any” in 2009 to approximately 5 to 6 percent in 2010, and approximately 7 to 8 percent in 2011. (JX 694 (Bhutada, Dep. at 71 (“Q. In 2010, were there any internal estimates with what Star market share in domestic fittings was? A. About 5 to 6 percent. Q. And then 2011, any internal estimates by Star of what its market share of the domestic fittings market share is? A. About 7 to 8 percent.”)).).

474. Star had ██████████ in domestic Fittings sales in both 2010 and 2011, and expects to sell more domestic Fittings in 2012. (Bhargava, Tr. 3027-3028 (“Q. Okay. Let me circle back to domestic fittings and Star's production of domestic fittings. I understand you began selling -- Star began selling domestic fittings in September 2009; correct? A. That is correct. Q. And you sold them every month and every year thereafter; right? A. That is correct. Q. All right. And I think you brought a chart yesterday that showed ██████████ in sales in 2010? A. Yes. Roughly that. Q. And roughly ██████████ in sales again in 2011; right? A. That is correct. Q. And Star's records will show whoever its customers were and how many. You'd agree with what your records are; right? A. That is correct. Q. And you're on pace to have your best year in sales you've had ever in 2012; right? A. That is correct.”); JX 694 (Bhutada, Dep. at 68-69 (“Q. Were there any sales that were actually made and completed in 2009? A. Yes, sir. Small amount. Q. Do you know what that amount was? A. Somewhere between hundred to 200,000. Q. Do you know what your sales of domestic fittings were -- your Star sales of

domestic fittings in 2010? A. Six and a half million dollars. Q. Do you know Star's sales of domestic fittings in 2011? A. About the same, six and a half. Q. Is Star currently in 2012 in the domestic fittings market? A. Yes, sir. Q. Through first quarter of 2012, do you know your sales? A. I'm not exact, but about \$1.7 million.”); McCutcheon, Tr. 2595 (“Q. Now, you sold -- I think you said you believe you sold to more than a hundred customers; right, in 2010? A. That's possible. Yes, sir. Q. So roughly two a week new customers throughout 2010; right? A. You could say that. Yes, sir. Q. And you had ██████████ in domestic sales in 2010; right? A. I believe so. That's what I remember.”), 2597 (“Q. All right. Well, when you looked at the annual report, you did see the ██████████ total sales of domestic in 2010; right? A. Yes, sir. That's a number I remember. Q. And you saw a similar amount, roughly ██████████ for sales of domestic fittings in 2011; right? A. Yes, sir. That's what I remember.”); Schumann, Tr. 4423).

475. Star is on pace in 2012 to ██████████ (Bhargava, Tr. 3028 (“Q. And you're on pace to ██████████ ██████████ in 2012; right? A. That is correct.”)).

476. Dr. Normann concluded that the steady growth of Star's domestic Fittings sales “is inconsistent with a rebate policy that effectively forecloses them from the market and forces them to sell oddball Fittings and not be--not have access to distributors and end customers.” (Normann, Tr. 5041 in camera.)

477. Dr. Norman testified that Star achieved greater market share in states where it had more competitive pricing. (Normann, Tr. 042 in camera (“We would expect that if the rebate policy were effective in foreclosing Star that it would have some uniformity across the country. . . . But instead what we see is that we see that there's some variability among the states. And then if you keep in mind the analysis that we talked about this morning, that Star--there's

evidence that Star did better where they had more competitive pricing, then that's consistent with what we're seeing in figure 21.").

478. Dr. Normann concluded that the Rebate Policy did not exclude Star from selling to over 75 distributors, including 14 of the 20 largest. (Normann, Tr. 5044 in camera ("So as a factual matter, the notion that the rebate policy foreclosed Star from selling to these 76 distributors is inaccurate....The rebate policy, if intended to be completely exclusionary and foreclose Star, did not have that effect with 76 of these distributors and 14 of the 20 largest, including both HD and Ferguson.")).

479. Dr. Norman concluded that Star competed with McWane on high-volume domestic fittings. (Normann, Tr. 5054 in camera ("Star was not relegated to some sort of oddball fittings"), 4943 ("So what you are seeing here is that the top-selling products for Star of domestic are very similar to the top-selling products for McWane, which I think strongly indicates that Star is not relegated to, you know, fittings 500 or 100, you know, or 1,000, for example, while McWane is capturing sort of the bulk of the sales of the higher-volume product, for example....--I think it's inconsistent with some of the suggestions that have been made during the trial that Star was relegated to oddball fittings. I also think it's inconsistent with the notion that Star was marginalized and only able to sell uncommon fittings.").).

C. To the extent Star's domestic expansion was slower than it might have wished, factors other than the Rebate Policy were to blame

480. Some Distributors were cautious about purchasing domestic Fittings from Star in 2009 and early 2010 because of prior problems with Star, Star's reputation with certain Distributors, certain Distributors' lack of confidence in Star, and some delivery and inventory issues. (Bhargava, Tr. 3003 ("Q. Okay. And some of those delays were filling orders to customers; right? A. In the beginning. Q. Okay. Well, in the beginning and into 2010; right? A.

Early part of 2010.”); McCutcheon, Tr. 2634 (“Q. 130. I apologize. Now, Mr. McCutcheon, there are lots and lots of other reasons in here completely unrelated to the rebates; correct, sir? A. That's correct, yes, sir. Q. And many of them -- I don't want to go through the whole thing, but many of them are related to can't meet delivery times, delay in delivery; correct, sir? A. Yes, sir, that's correct. Q. And in fact, that happened quite a bit in fall of 2009; right? A. Yes, sir, it did.”); Sheley, Tr. 3448-3451 (“Q. When Star first entered the market -- I'm sorry. When Star first started offering domestic fittings for sale in early 2010, you weren't willing to buy from Star because of a bad experience you had with them in another product line at that time; isn't that right? A. That's correct. Q. Okay. You had a -- had a negative experience when Star first entered the joint restraint business; right? A. That's correct. . . . Q. Okay. And so when Star decided to sell domestic fittings, you didn't want to repeat that experience; right? A. That's correct. Q. Okay. And so you weren't willing to give Star any domestic fittings orders until they had demonstrated they had a sufficient inventory to meet your needs; right? A. That's correct. Q. And you made that determination around late summer of 2010; right? A. To the best of my recollection..”); Thees, Tr. 3102-3104 (“Q. And I believe you also testified earlier that when Star started supplying domestic fittings, you had a variety of concerns about purchasing domestic fittings from Star; is that right, sir? A. That is correct. Q. When Star began supplying domestic fittings, they didn't own any of their foundries, did they, sir? A. That is correct. . . . Q. And also it wasn't just using -- strike that. Star wasn't just using one central foundry to cast its fittings, it was using a number of them; right, sir? A. That is correct. Q. And was that also concerning to you? A. That is correct. . . .Q. And one of your concerns was that any one of these foundries could abandon Star, leaving Star unable to supply Ferguson with domestic fittings; is that right, sir? A. That is correct. . . .Q. And also depth and breadth of inventory was a concern for you;

right, sir? A. Yes, it was.”, 3107-3108 (“Q. So at the time, you didn't trust Star as a supplier; is that right, sir? A. That is correct. . . . Q. And in January 2010, this is shortly after Star started selling domestic fittings; is that right, sir? A. That's correct. . . . Q. And this strain made Star -- strike that. This strain made Ferguson not want to grow its business with Star at this time; is that right, sir? A. That was a leading component. Yes.); Webb, Tr. 2788-2789 (“Q. Was it Home Depot's -- was it HD Supply's -- I'm going to ask you was it yours, based upon your history. Was it your position and understanding that Star was not in a position to provide all of the domestic fittings that HD Supply would need to service its domestic fittings in June of 2009? A. Based on my understanding of Star's entry into the domestic manufacturing at that point in time I did not believe they had the capacity to service our company. . . .Q. And it's true, is it not, that HD Supply would be hesitant to buy only a few A items from Star for a particular job and then buy only the oddball items from McWane? A. That's largely correct. Yes.”), 2792 (“Q. Okay. Was there a question in your mind during the relevant time period as to whether Star as a new -- starting this new venture would be able to provide product and delivery times that were required by HD Supply? A. Domestic.”); JX 705 (Gibbs, Dep. at 25-28 (“Q. And in your previous testimony you indicated that you had some large concerns about buying domestic fittings from Star; is that right? A. Yes. Q. What were those concerns? A. In January of 2010? Q. Yes. A. They had no history of being in the product. They were making the product in seven different foundries. They had presented no test results, no quality inspections, nothing to indicate to us that they were a credible source for domestic. Q. You just mentioned one of your concerns was that they sourced from seven different foundries? A. Yes. Q. Why is that a concern? A. Consistency of product, consistency of manufacture, consistency of testing, and those seven different foundries that they spoke of were not related to any --1 certainly not related to

WinWholesale. So, we had no idea who they were, where they were, and what kind of fittings they were producing. Q. Did you have concerns that that would affect the quality of the fittings that you would be getting from Star? A. Yes. Q. And you also said a concern was no test results and no quality inspections. Why are those important? A. Again, they didn't present anything to us other than a program and the fact that they were getting into the domestic business. As it relates to the quality of these foundries and the products they had produced and test results that they had from the various people that had -- they had produced fittings for -- well, products for before they got in the fittings business and, quite frankly, these guys may have been in the fitting business, but there was nothing that Star related to WinWholesale that gave us any level of comfort that their products were of the standard that we were buying from other domestic sources or even Star. . . .Q. You testified in your previous deposition that you had grave concerns about Star regardless of anything McWane was doing, right? A. That is correct. Q. So, these concerns that you just described to me today -- these concerns had nothing to do with McWane, right? A. Nothing to do with McWane, that is correct.” (objections omitted), 85 (“Q. Because of that concern, isn't it true that WinWholesale listed Star as a not approved vendor for domestic fittings? A. I would not put it that way. In fact, the McWane rebate probably had less to do with the reason that Star in 2010 was listed as not approved than the fact that, as I've already stated in my testimony, we had no -- we had no background on Star, where they were making the products. . . .I was more concerned about the vendor itself. Didn't have anything to do with the rebate.”) (objections omitted), 87-88 (“Q. Did the policy -- did the Tyler/Union policy as laid out in the September 22nd, 2009, letter play any role in WinWholesale listing Star as a not approved vendor for domestic fittings? A. I think I've already stated, the issue with us in 2010 for Star domestic fittings had nothing to do with the rebate, had all about the fact are they committed to

the business, do they have the capacity, do they have the quality, can they ship the product, do they have the consistency. It had nothing to do -- if Tyler/Union had never written this letter, I would still have the same issues that I've stated.”) (objections omitted)).

481. Illinois Meter was not willing to buy domestic Fittings from Star in early 2010 because it had 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 until Star had demonstrated it had sufficient inventory to meet Illinois Meter’s needs. (Sheley, Tr. 3448-3451.)

482. The Rebate Policy did not effect Illinois Meter’s decision not to buy domestic Fittings from Star in 2009. (JX 675 (Sheley, Dep. at 162-163 (“Q. (By Mr. Lavery) 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.”) (objections omitted)).

483. Illinois Meter still would have purchased 90-plus percent of its domestic Fittings from McWane, whether the Rebate Policy existed or not. (JX 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 Tyler.”)).

484. WinWholesale was concerned about Star’s reliability as a domestic Fittings supplier regardless of McWane’s Rebate Policy. (JX 705 (Gibbs, Dep. at 93-94 (“Q. Did Star compensate you for taking the risk to do business with them on their domestic fittings? A. No. Q. Did the Tyler/Union September 2009 policy impact your willingness to deal with Star on their domestic fittings? A. As I previously stated, regardless of what the September 22nd, 2009,

Tyler/Union letter said, that was not our concern. Our concerns were Star entering a business that they had never been in.”) (objections omitted).).

485. Because McWane was a known, stable full-line Fittings supplier with a good track record, HD Supply probably would not have purchased discernibly more domestic Fittings from Star than it did, regardless of the Rebate Policy. (JX 673 (Webb, Dep. at 123-25 (“Q. And do you also recall testifying that McWane's policy did not change your behavior discernibly? A. I -- I -- yes, I do recall that. Q. Because would you have continued to purchase Tyler fittings regardless of the policy? A. As I recall, that is the way I believe it would have panned out, regardless, because of the capacity that McWane has versus anybody who may have a domestic agenda. Q. Meaning McWane has a larger capacity than anyone else? A. Yes. Q. So McWane's September 2009 rebate policy did not change HD Supply's purchases -- purchasing habits in any way, is that fair? A. I would have to say it -- I put out a memo as a result of it, so, to that extent, it, m'mm -- whether it changed anything from a functional standpoint, it did -- it was -- it was significant enough that I put out a memo regarding what our branch expectations were. Q. But it did not change HD Supply's purchasing behavior? A. I'll go back to the probably not discernibly.”)); JX 672 (Webb, IHT at 201 (“A. And for the near future we haven't ruled out anything as far as, you know, where our domestic purchases will be made. But I think for -- for the most part it would have been the former part of the conversation, just not enjoying being on the side of being told how we'll purchase. And again, I don't think it would have demonstrably changed our purchase habits, but it's telling the branches what they have to do for -- for the interim.”)).

486. Ferguson had concerns about purchasing domestic Fittings from Star because Star did not disclose which foundries it was using to source Fittings. (Thees, Tr. 3102-3103 (Q. And

I believe you also testified earlier that when Star started supplying domestic fittings, you had a variety of concerns about purchasing domestic fittings from Star; is that right, sir? A. That is correct. Q. When Star began supplying domestic fittings, they didn't own any of their foundries, did they, sir? A. That is correct. Q. Star was using jobber foundries with extra capacity to produce fittings for them; is that right? A. That is correct. Q. Did Star disclose which foundries it was using to you, sir? A. They did not. Q. And that also concerned you; right, sir? A. Yes, it did. Q. And also it wasn't just using -- strike that. Star wasn't just using one central foundry to cast its fittings, it was using a number of them; right, sir? A. That is correct. Q. And was that also concerning to you? A. That is correct. Q. Because Star was not controlling the manufacturing process of domestic fittings; right, sir? A. Yes. Q. And also because you didn't know the relationship between Star and these foundries that Star was using; correct, sir? A. That was a concern. Yes.”).

487. Ferguson’s Mr. Thees testified that, at least in early 2010, Star did not have the depth and breadth of inventory required to supply Ferguson with domestic Fittings. (Thees, Tr. 3104 (“Q. And at the time, Star didn't have the depth and breadth of inventory to supply Ferguson with domestic fittings; is that correct, sir? A. That is correct.”)).

488. An earlier “breach of trust” between Star and Ferguson regarding restraints and Fittings had put a strain on the relationship between the two companies, and was a “leading component” in Ferguson’s reluctance to buy domestic Fittings from Star in early 2010. (Thees, Tr. 3105-3107 (“Q. Now, the second e-mail down on the page is an e-mail that you received from Dan McCutcheon on January 21, 2010; right, sir? A. Yes. Q. And you received that in the ordinary course of your business? A. Yes. Q. On the first line, Mr. McCutcheon wrote, "It is obvious we dropped the ball the last couple of years;" right, sir? A. Yes. Q. And do you recall

what Mr. McCutcheon was referring to in this e-mail? A. Yes, I do. Q. What was that, sir? A. Well, we had a multitude of issues around the country that really we felt like were a breach of trust, and a lot of it was around the combination of fittings and restraints. Historically, we had sold -- one product we keep in the DC are restraints because it's something you can use all throughout the country, and we had both Star and Sigma in there. And I point to an instance in Texas where we felt as if Star, because they had our captive restraint business, had -- was giving a -- one of our primary competitors a better price for fittings and restraints because they knew we were buying our fittings from one place, being a competitor of theirs, and our restraints from them, because we were a captive audience it being in the DC. Q. And you refer to this as a breach of trust; right? A. Yes. Q. So at the time, you didn't trust Star as a supplier; is that right, sir? A. That is correct. Q. And did this put a strain on the overall relationship between the two companies? A. Yes. Q. And in January 2010, this is shortly after Star started selling domestic fittings; is that right, sir? A. That's correct. Q. So around that time, the relationship was strained between the two companies; is that fair? A. That's fair. Q. And Ferguson's decisions regarding whether to purchase from a company can be affected by a strain on a relationship; right, sir? A. Yes. Q. And is it fair to say that Ferguson doesn't want to do business with a company it doesn't trust? A. That is correct. Q. And this strain made Star -- strike that. This strain made Ferguson not want to grow its business with Star at this time; is that right, sir? A. That was a leading component. Yes.”); RX 255).

489. Ferguson’s decision to buy all of its domestic Fittings from McWane in September 2009 was made regardless of the Rebate Policy. (Thees, Tr. 3108-3109 (“Q. Because you were still uncertain of Star's ability to supply Ferguson with domestic fittings at that time; right, sir? A. That's correct. Q. Now, earlier Mr. Mann asked you some questions about a

September 22, 2009 letter that you received from Tyler/Union; right, sir? A. Yes. Q. And I believe that was CX 506. Armando, do you want to go ahead and put that on the screen. The second page, please. Thank you. Now, in September 2009, when you received this letter, you intended to purchase all of your domestic fittings from Tyler unless they were unable to supply them; is that right, sir? A. That is right. Q. And this was regardless of this letter; correct, sir? A. That is right. Q. And Ferguson was planning on purchasing all its needs from Tyler because Ferguson was comfortable with the relationship with Tyler; right, sir? A. That is correct. Q. And at the time, you didn't feel the need to shift your business to Star; is that fair, sir? A. That is fair.”); CX 506).

490. Regardless of the Rebate Policy, some Distributors simply were not going to switch to Star until Star was able to supply a full line of domestic Fittings. (JX 652 (Johnson, Dep. at 106 (“Q (By Mr. Mann) And what was the overall picture? A Well, we had to have a complete line. Tyler was the only one that could supply that to us. Yeah, maybe we could have bought onesies and twosies, but until Star had a complete line, we wouldn't have bought from them no matter what anybody said. Q Earlier you said it was in July of 2010 that you started to give Star domestic business; is that correct?”)).

491. 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 (“Q. All right. Now, the ramp-up time essentially was that you didn't expect to have all the patterns available in actual product until sometime around December 2009; right? A. I don't recall that date. Q. Okay. But you do know that there was a ramp-up. You weren't going to have them all on day one; right, sir? A. Yes, sir. Q. Yeah. And they were going to be phased in, and it was going to be sometime much later in the year, after the AWWA

meeting in June, when the company would actually have domestic fittings to sell; right, sir? A. Yes, sir.”).

492. Star experienced problems and delays in filling orders for domestic fittings in 2009 and early 2010. (Bhargava, Tr. 3003 (“Q. Okay. And now, like with any start-up operation, there were delays that were involved; correct? A. Yes. Q. Okay. And some of those delays were filling orders to customers; right? A. In the beginning. Q. Okay. Well, in the beginning and into 2010; right? A. Early part of 2010. Q. I'm sorry. Say that -- A. Early part of 2010. Q. Early part of 2010. A. Right.”)).

493. Factors other than the Rebate Policy affected Star's domestic Fittings sales in 2009, including Star's delays in delivery and failure to meet delivery times. (McCutcheon, Tr. 2634 (“Q. 130. I apologize. Now, Mr. McCutcheon, there are lots and lots of other reasons in here completely unrelated to the rebates; correct, sir? A. That's correct, yes, sir. Q. And many of them -- I don't want to go through the whole thing, but many of them are related to can't meet delivery times, delay in delivery; correct, sir? A. Yes, sir, that's correct. Q. And in fact, that happened quite a bit in fall of 2009; right? A. Yes, sir, it did.”)).

494. Early in Star's domestic development process, its customer, U.S. Pipe, had concerns about Star's ability to provide a full line of domestic Fittings. (Morton, Tr. 2892-2894 (“Q. And so some of the fittings, for example, the C153s up to 24 inches, would not be available, according to Star in September 2009, until as late as February 15, 2010; correct? A. That's correct according to this memo. Q. And you'll see under the DI flanged there are also some references to product not being developed until as late as February 15; correct? A. Correct. Q. And under DI full-body MJ fittings up to 24" by project, do you know what "by project" means? A. It means that if a customer such as U.S. Pipe had a requirement for a ductile iron full-body MJ

fitting, then we would submit it, and they would provide us with a lead time. They wouldn't make any specific commitments to a range of fittings. It would be by project. . . .Q. And the production time for them could take up to 90 days, do you know? A. My understanding is that they would not commit to putting the tooling in place in advance of getting a requirement for volume"); 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 so none of these fittings in these eight pages were expected to be available until the end 2009; right? A. That's what I believe. Yes. 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? Q. Sir, do you know whether or not all of the fittings that were listed in the eight pages that we're discussing were actually available from Star by the end of 2009? A. I do not believe they were. Q. And then in the next sentence -- sorry. Going back up to the shaded portion of this document on page 2, you say, "In addition, we can supply any fitting, not on this list, in 90 days. After December, we shall continue to add more patterns to the domestic line." Do you see that? A. I do. Q. And so the fittings that were not listed in the eight pages that we've just referenced would take an additional minimum of 90 days for them to produce for U.S. Pipe; is that correct? A. That's what I understand. Yes. Q. And then it would still be after December before they would add additional patterns; correct? A. Correct. Q. And is it true, sir, do you know, whether or not Star actually has a complete line of domestic products today? A. I don't believe they do."); CX 1936; RX 213).

495. Star's "Domestic Bid Log" indicates that Star repeatedly lost bids due to delays beginning in the fall of 2009 and continuing into the peak of ARRA during the first and second quarters of 2010. (McCutcheon, Tr. 2632-2634.)

496. Complaint Counsel's expert conceded that Star did not have sufficient product available in Fall 2009 as it ramped up its production - - and even well into 2010 as ARRA wound down - - and, thus, lost business for reasons entirely unrelated to McWane. Dr. Schumann acknowledged, for example, that:

Q. All right. Now, this document reflects a lot of domestic bids that Star submitted that they didn't win.

A. Uh-huh.

Q. Because they had delays and couldn't fill the orders in time in the second half of 2009, the fall of 2009 and into early 2010.

A. Well, that was when they were first getting -- trying to get started

(Schumann, Tr. 4379; CX 2294.)

497. McWane's rebate policy was not exclusionary as Star was able to quickly enter into the domestic fitting segment, capture market share, and sell to more than 100 distributors including many of the largest distributor customers. (Normann, Tr. 5042-43 ("Q. All right. Let's go to the next RDX, 50. Dr. Normann, tell us what this demonstrative is. A. So what you see here is that these are just some numbers that I've referenced, and these give the actual numbers so that just the first bullet point you see that Star sold to [REDACTED] unique distributors in 2010. So they sold -- they actually sold domestic product -- we've been saying over a hundred, so they sold domestic product to more than [REDACTED] distributors in 2010. So then just mathematically if you work that out, they've been on the market for approximately 60 weeks or so, 60-65 weeks they've been selling, so that works out to roughly [REDACTED] distributors per week on average is what they're gaining. It's obviously not, you know, constant or uniform, but that's what it works out to roughly just mathematically. And then again, the third bullet point you see there, you know, instead of saying dozens and dozens, we can now see that Star sold domestic product, they were the

exclusive provider of domestic product, they were the only ones selling domestic product to [REDACTED] distributors.”); 4913-4915 (“Q. Now, let's turn then to the rebate letter. Did you analyze, in preparing your opinions in this matter, how Star did in the marketplace with its domestic fittings? A. Yes. I think -- I mean, that's sort of the factual question that we wanted to look at. Starting from the notion that -- this is where I started from. I said, well, let me assume that the rebate policy was designed to be exclusionary. I recognize, you know, you might disagree with that, but from my perspective as an economist, I said let me start from the assumption that the intention, the design, is to be exclusionary and to foreclose Star. I think given that starting point I think it's relevant to look at how did Star actually do, what was Star's market share over time, how did Star do selling to distributors, how did Star do selling to large distributors, did they sell to some of the same distributors as McWane. I think these are all very important questions to ask. Q. All right. And tell us in a broad sense, without getting into the specific in camera figures, what you found in that inquiry. A. Well, I found -- for example, I found that Star had -- on a monthly basis that they had steady share gains. Sort of month after month their share increased of domestic spec sales. Beginning with September and continuing through 2009, 2010, into 2011, their share showed steady growth. And I think what's also relevant about that is is that there wasn't some sort of hockey-stick growth -- and what I mean by that is some kind of exponential growth -- once they had effectively a full range of fittings. Star has testified in IH testimony that -- I think the October 2010 -- that effectively they had a full range of fittings or that even if they didn't have it on hand that they could supply a customer in a reasonable delivery time, so by 2010, mid to late 2010, they could compete on an equal footing with McWane, so there's no potential for exclusion any longer because Star could fully supply. But we don't see this exponential growth, for example. We see steady growth, so Star is getting successful market share gains. Q. What

about sheer numbers of distributors? Were they able to scabble together a few distributors? A. Well, more than that. I think it came out yesterday, for example, that just looking at 2010, just 2010 -- and remember, this is Star's first year on the market, first full year on the market. They first started shipping product in September. So looking just at 2010, you know, they're newly participating in domestic spec sales. They sold to more than a hundred distributors, well over a hundred distributors.”).

XVII. McWane’s Rebate Policy Protected Its Remaining Domestic Fittings Foundry And Was Not Enforced

498. The purpose of McWane’s September 2009 Rebate Policy 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—to generate enough sales volume to keep McWane’s last remaining domestic manufacturing facility open. (JX 638 (McCullough, IHT at 34-36 (“Q. Sir, if it's not a -- if the policy is not a real obstacle to your customers in terms of considering purchasing from Star Pipe, why go through the trouble of having the policy at all? A. Well, I think that we need a policy. What we try to do -- one of the things that this policy also tries to do is to generate enough business for us that we can continue to operate the hard facilities that we have. As I said, we're the 1 only company left in the states up until the entry of Star still producing waterworks fittings. Now, to be able to do that, we have to have a certain level of volume to operate our foundries, and I have to go back a little bit here. When I started in this industry, 100 percent of the waterworks fittings were domestic made, 100 percent of them, and you look at what's happened over the past 25, 30 years here, the Tyler Union was the last man standing basically, the last man standing in domestic production, and even then in response to the competition from offshore, we were forced to go to China and invest millions of dollars and build a foundry there.

Now, at the same time we're doing that, we're idling plants. We're laying off people, which is very difficult, and so we're trying to establish programs and policies that will let us generate enough tonnage and demand to operate the one facility that we have left. Q. So one purpose of the distribution policy in the September 22 letter is to retain volume for McWane to run its domestic foundry; is that correct? A. Oh, yes, yes. I mean, I don't know if you've ever had to layoff 150 people. Q. Are there any other purposes for the distribution policy embodied in the September 22 letter? A. We did want our customers to support our efforts. I think we say that in here somewhere. We want our customers to fully support our product line. By supporting our product line again we're able to go back and load the foundry. Q. But any other purpose behind the distribution policy in the September 22 letter? A. Not that I can think of at the moment. Q. How does this policy help McWane generate volume for its domestic foundries? A. You know, there's only so much business out there, and what we're trying to do is capture a share of that business that will let us continue our operations and hopefully a policy like this does that. It lets us continue to maintain a presence in the market and to have a reasonable market share that allows us to continue the operations.”); (JX 643 (Tatman, IHT at 151 (“Why? It all kind of comes down to this volume thing. This is 2009. ARRA is out, but we don’t see it. We’re not feeling it. . . .I’ve got a plant that’s running 135 days a year. I’m losing skilled employees. I’m budgeting to lose \$5 million pre-tax for 2010. . . .I’m not in a real good position to give up volume. The problem is the pie is so small. The pie is not big enough to feed--I’ve got an idle foundry. I’ve got another along that’s capable of producing 40,000 and I am going to put 12 in it. I have to take into consideration with production of volume.”))).

499. Mr. Tatman was concerned that Star would choose to manufacture only the highest-selling, fastest-moving items. (JX 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. . . .”)).

500. McWane wanted to incentivize customers not to buy those items from Star while relying on McWane only for the slower-moving, infrequently-needed “C” and “D” items that it kept in inventory as a full-line manufacturer. (Morton, Tr. 2845-2846; JX 638 (McCullough, IHT at 34-36)).

B. Distributors Were Free to Buy Domestic Fittings From the Supplier of Their Choice

501. McWane’s September 22, 2009 customer letter states:

[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. . . . 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*.

(Tatman, Tr. 687-689; CX 1606 (emphasis added)).

502. Mr. Tatman testified that he purposefully included the soft language “may” and “or” in McWane’s September 22, 2009 customer letter announcing the McWane Rebate Policy.

(Tatman, Tr. 687-689 (“Q. The policy you adopted, sir, was effective October 1, 2009? A. Yes.

Q. And you adopted a program whereby McWane's domestic fittings and accessories would be available only to customers who elect to fully support McWane branded products for their domestic fitting and accessory requirements? A. Yes. With the big words "may" and "or" below.

Q. And the big words "may" and "or" below, those refer to the consequences a customer might suffer if they were not to be exclusive with McWane? A. Those were put in there to give me an

out clause. Q. But those out clauses are outs from a consequence that a customer might experience should they choose not to be exclusive with McWane; correct, sir? A. Yes. But go back to what letters read and what practicality is through the whole history of discussions that we've had here. Q. So the letter might not actually reflect what happens in the marketplace or the marketplace's understanding of that letter; is what you mean? A. I think everything that we've talked about so far is that there's a letter that goes out, and then competitive conditions determine what actually happens in the marketplace. 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. Q. And you actually went out before you announced this policy and met with customers to discuss it with them? A. I think one of them or two of them. I couldn't recall for sure.”); CX 1606).

503. McWane recognized that it 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.”)).

504. McWane’s customers were always free to purchase domestic Fittings from other suppliers. (JX 643 (Tatman, IHT at 157-160 (“Q Yes, sir. A And then you look at the dialogue around that. It's got the words "may" and "or" in it. Purposefully I put those in there because I knew what was going to happen after that letter comes out. It's got all these sort of exceptions. You got to support our product. If we have it available, if it's not part of your buying your fittings as part of a pipe package, if we've got it available, and then if you don't do that, here's what may

happen: may or or. And then if you look at -- I had a conference call with the salespeople right before -- the morning before that letter went out. I think the letter went out in the afternoon. We got together with the sales team in the morning. There's a list of questions they're going to come up in answers. I'm sure in the e-mail trail, you got that. And even if you look at that document, I'm kind of priming the sales force that here's what the letter says, but we're not necessarily going to take a hard line stance. This is "may" or "or." And that letter is kind of analogous to these price increases. When I say I'm raising prices seven percent, would I like to get a seven-percent price increase? Yes. That's what I would like. I hope to get it. That's almost like my Christmas wish list. The reality is, the marketplace will determine what I actually get, and that was the same thing with that letter. We wanted customers to support us because we needed the volume. We wanted them not to cherry-pick us because that's not good for us. It's not good for our volume. It's not good for our business. We're just not set up to compete very well in that type of environment. We know that the customer bears the power and that we would need some sort of flexibility there. So specifically, I had the words "may" and "or" and some conditions in that letter.”).

505. The McWane Rebate Policy, announced in September 2009 as effective October 1, 2009, was only in effect for a short time. By January 2010, McWane issued a new and superseding policy. (Tatman, Tr. 707-709 (“Q. The policy changed -- the policy change you made was made in the form of changes to your rebates with your customers that became effective in 2010? A. We can look at the documents, but from my memory, by the time January 2010 came out and we look at our rebate programs, there was no hint that regardless of what the customers did that there would be any reduction in access to our product. It was only if -- what level of rebate they were going to earn. Where you look at the September 22 letter, although it

said "may" and "or," it had a component of shipment of product. We had more competitive information. I just said earlier we understood late in the year about how many patterns Star had. We made an adjustment. We had market provisions. By the time we hit January, we've taken away any allusion that anything that a customer did in terms of buying Star that we would not at all change shipping them product. So we made that adjustment in January 2010.”.)

506. Mr. McCutcheon testified that many distributors, including customers of McWane, purchased domestic Fittings from Star after the Rebate Policy was adopted. (McCutcheon, Tr. 2591-2594 (“Q. After Star had product available, domestic product available, which was sometime in the fall of 2009; right, sir? A. Yes, sir. Q. And after Tyler's rebate policy was issued; right, sir? A. Yes, sir. Q. You sold to HD Supply. We saw that yesterday. A. Yes, sir. Q. In fact, you sold to HD Supply the very same month the rebate policy came out, September; right, sir? A. Yes, sir. Q. After the policy came out, you sold to Ferguson? They purchased your domestic fittings? A. Yes, sir. Q. You sold to Winwater; right, sir? Do you remember when Winwater started buying domestic fittings from you? A. No, sir. Q. You just know that they did buy domestic fittings from you? A. I believe that they did, yes, sir. Q. And a regional chain, Dana Kepner, started buying domestic fittings from you after the policy came out; correct? A. Yes, sir. Q. And a company called Hajoca, they started buying domestic fittings from Star after the policy came out; right? A. Yes, sir. Q. And a company called Mainline Supply, they started buying fittings from Star after the policy came out? A. Yes, sir. Q. Minnesota Pipe; right? A. Yes, sir. Q. Michigan Pipe & Supply? A. Yes, sir. Q. Utility Supply in Tulsa, Oklahoma; right? A. Yes, sir. Q. H.D. Fowler; right? A. Yes, sir. Q. Illinois Water? A. I'm not sure. Q. C.I. Thornburg buys domestic fittings from you? A. I believe so. Yes, sir. Q. Western Water buys fittings, domestic fittings, from you after the policy came out? A. Yes,

sir. Q. Groeniger in California, they bought domestic fittings from you after the policy came out? A. Yes, sir. Q. Atlantic Plumbing, they purchased domestic fittings from you? A. I don't recall. Q. Okay. Brown Supply, they purchased domestic fittings from Star Pipe? A. I don't recall. Q. Ramsco? A. Yes, sir. That's R-A-M-S-C-O. Q. Schmidt's Wholesale, they purchased domestic fittings after the policy came out? A. I don't recall. Q. Cohen? A. Yes, sir. Q. In fact, Mr. McCutcheon, the company sold to more than a hundred individual customers domestic fittings after the policy came out and during 2010; right? A. I believe that to be true, but I'd need to see a document to confirm it, but I think it's true.”).

507. Ferguson understood when it received the Rebate Policy that its terms could be negotiated. (Thees, Tr. 3109-3111 (“Q. And I believe that was CX 506. Armando, do you want to go ahead and put that on the screen. The second page, please. Thank you. Now, in September 2009, when you received this letter, you intended to purchase all of your domestic fittings from Tyler unless they were unable to supply them; is that right, sir? A. That is right. Q. And this was regardless of this letter; correct, sir? A. That is right. Q. And Ferguson was planning on purchasing all its needs from Tyler because Ferguson was comfortable with the relationship with Tyler; right, sir? A. That is correct. Q. And at the time, you didn't feel the need to shift your business to Star; is that fair, sir? A. That is fair. Q. Now, to be clear, this letter didn't prevent Ferguson from purchasing domestic fittings from Star, did it, sir? A. No. There's some verbiage in there about Tyler/Union or McWane's ability to supply that would -- according to this policy, it would be okay to purchase product from them. Q. And if you could take a look at the sixth paragraph down beginning with "Customers who elect." At the time you received this letter, you thought that it was actually unlikely that Tyler would enforce what's written in paragraph 6 here of this letter; is that right, sir? A. Yeah. More so on the rebate side. When I look back and think

about that, the supplying product, and really the issue around that was, if you were to supply product with Star and they could not perform, picking up shorts from Tyler/Union. Q. When you received this, you thought that the rebate and lead times mentioned in this paragraph were points that could be negotiated; is that fair? A. That's fair. Q. Because Ferguson is a very large customer of McWane's; right, sir? A. That is correct. Q. And has been for many, many years? A. That is correct. Q. And Ferguson is one of the largest waterworks distributors in the United States; right, sir? A. Yes, we are. Q. And you sell -- I believe you said you sell a number of products, not just fittings? A. That is correct. Q. And I believe you also testified that domestic fittings actually make up a very small percentage of your business? A. Of our overall waterworks business, yes. Q. So if McWane chose to take a hard line regarding paragraph 6 of this letter, Ferguson could take its business elsewhere; right, sir? A. That could be a reaction, yes.”).

508. As Mr. Thees, of Ferguson, testified, because Fittings – and particularly domestic Fittings - were a relatively small part of a Distributor’s business, a Distributor had the option of taking a hard line against McWane in other product areas if McWane refused to negotiate the Rebate Policy. (Thees, Tr. 3111 (“Q And I believe you also testified that domestic fittings make up a very small percentage of your business? A. Of our overall waterworks business, yes. Q.

So if McWane chose to take a hard line regarding paragraph 6 of this [September 22, 2009] letter, Ferguson could take its business elsewhere; right, sir? A. That could be a reaction, yes. Q. For not only fittings but for a number of waterworks products; right, sir? A. Sure.”).

509. McWane did not refuse to sell domestic Fittings or refuse to pay rebates to its customers who bought domestic Fittings from Star. (Tatman, Tr. 714-718 (“Q. Going into that

discussion, did you have an understanding that Hajoca still believed it could not place orders with McWane because of the September 22, 2009 policy? A. I don't recall that, but 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. Q. Well, sir, in 2009, you told Hajoca that they could no longer place orders as a result of this policy; correct, sir? A. You're going to have an e-mail from me November 23 that says we weren't going to honor orders. You're going to have an e-mail from me December 26, after I had a conversation with Sean Ray and Roy Pitts, very cordial, and I said, Look, guys -- I'm paraphrasing here, but I'm sure you got the document-- we're honoring the orders you have in-house, and if you have any incremental requirements, new requirements, send us the orders, and we'll honor those, too. 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. Like I said, our records will show shipments to Hajoca October, November, December, January, February, March, April, May, June, July. It never stopped. And to our knowledge, they kept buying from Star, and we kept selling them product. . . . I am not personally aware of any circumstances in the month of November or December where we negatively impacted Hajoca's ability to service their customers. And regardless of what we said with Hajoca, we continued to ship them product. They continued to buy from Star.”); JX 638 (McCullough, IHT at 157 (“Q. Has McWane ever not paid a corporate rebate that was otherwise accrued and due because of a distributor's failure to live up to one or more of the requirements? A. To my knowledge, no, we never have. We make it an effort not to.”), 173 (“Q. In your estimation, sir, would purchases by Win Wholesale of domestic ductile iron waterworks fittings from Star Pipe possibly disqualify Win Wholesale for eligibility under the McWane corporate

rebate program due to this requirement 3? A. And again I think as you said the key word is possibly. Possibly it could. Has it ever? No, it has not. Have there been instance when it could? Yes. Again has it? No. Chris, we're so easy to do business with, it's amazing.”); Webb, Tr. 2798-2800 (“Q. Do you know whether HD Supply purchased domestic fittings from Star in September of 2009 and has continued to buy them from Star since that time? A. I do know that we have bought domestic fittings from Star. I do not know the time frames associated as to when that started. And you said it continues today. I would -- I'll take your word for that. . . .Q. And no one at McWane ever threatened to cut HD Supply off from domestic fittings since September of 2009, did they? A. I don't recall ever being threatened to be cut off. Q. And McWane never refused to sell or deliver domestic fittings to HD Supply since September of 2009, did they? A. Not that I'm aware of, no. Q. And McWane has never refused to pay HD Supply rebates that it earned on domestic fittings, has it? A. That's correct.”) (objections omitted); Thees Tr. 3111-3113 (“Q. In fact, Ferguson has purchased hundreds of thousands of dollars in domestic fittings from Star; is that correct, sir? A. Yes. A report I looked at, 2011 it was less than a million dollars. Q. But hundreds of thousands of dollars? A. Yes. . . .Q. Now, I'd just like to clarify, McWane has never refused to pay Ferguson a rebate it earned on domestic fittings; right, sir? A. Not that I'm aware of. Q. And McWane has never refused to supply Ferguson with domestic fittings; right, sir? A. Not that I'm aware of. Q. Never threatened to cut off Ferguson; right, sir? A. Not that I'm aware of. Q. So is it fair to say McWane never enforced the September 22 letter on Ferguson? Is that fair, sir? A. Yes. Q. And Mr. Thees, there are currently no restrictions that keep your branches from purchasing domestic fittings from Star; is that right? A. Not that I'm aware of. Q. So your branch managers are free to purchase domestic fittings from Star today; is that correct, sir? A. Yes.”); Morton, Tr. 2860-2862 (“Q. And it's true, isn't it, that as early as

January of 2010, U.S. Pipe took at least, I think your term was, a minor percentage of domestic product from Star? A. That's correct. Q. And it's also true, isn't it, that prior to the end of 2009, Star was not manufacturing many of the fittings that U.S. Pipe required? A. I believe that's correct. Q. You also bought domestic fittings from Eureka Foundry after the September 2009 McWane rebate policy; correct? A. We began buying fittings from Eureka Foundry approximately June 2010. Q. And I think it's also true that prior to that agreement that you just referenced that U.S. Pipe actually had always purchased some amount and some type of fittings from Eureka; is that correct? A. Prior to closing the Chattanooga foundry in 2006, there were minor purchases from Eureka with U.S. Pipe's tooling when U.S. Pipe didn't have the capacity to meet customer requirements. I don't believe after we closed the foundry in 2006 until June of 2010 that there were any fittings purchased from Eureka Foundry. Q. Okay. So from June 2010 until today, from the date that you left U.S. Pipe, there were purchases of domestic product from Eureka. A. 30" and larger. Q. Thank you. And U.S. Pipe also bought domestic fittings from ACIPCO after the September 2009 rebate policy? A. 30" and larger. Correct. Q. And you also - - U.S. Pipe also bought these domestic products after the October 2009 meeting with Mr. Tatman? A. Correct. Q. And McWane never cut U.S. Pipe off from domestic supply of fittings, did it? A. No. Q. And McWane never altered any rebate policy for U.S. Pipe at any point; correct? Q. Is it the case, Mr. Morton, that there was never any rebate policy between McWane and U.S. Pipe, to your knowledge? A. To my knowledge.”).

510. Since September 2009, Hajoca's domestic Fittings purchases have been split about 50/50 between McWane and Star. (Pitts, Tr. 3337 (“Q. And in fact, is it fair to say that since the time of the McWane domestic policy, Hajoca's domestic fitting business has been split about 50/50 between McWane and Star? A. That's probably fair, yeah.”)).

511. The Rebate Policy did not prevent the Hajoca branches that preferred buying domestic Fittings from Star from doing so. (Pitts, Tr. 3337 (“Q. So the McWane domestic policy never prevented Hajoca from buying domestic product from Star, did it? A. That's correct.”)).

512. McWane continued to pay rebates to Hajoca, although its Tulsa branch continued to buy Star domestic Fittings while its Lansdale branch bought McWane domestic Fittings. (Pitts, Tr. 3366 (“Q. And it's true that since that time Hajoca, the Tulsa branch, has continued to buy Star domestic fittings; correct? A. Correct. Q. And it's true that the Lansdale branch has continued to buy McWane domestic fittings; correct? A. Correct. Q. And it's true that McWane has continued to pay you your rebate; correct? A. Correct, sir.”)).

513. McWane permitted Hajoca's Lansdale branch to pre-order domestic Fittings to meet its contractor needs during the time that McWane and Hajoca successfully negotiated the terms and effect of the Rebate Policy going forward. (Pitts, Tr. 3355-3356 (“Q. Does this document reflect that McWane continued to ship domestic fittings to the Lansdale branch in January, February and March of 2010? A. That's correct Q. And then I think you testified earlier that in early April you sat down with the McWane people; correct? A. Correct, sir. Q. And you all negotiated, and McWane agreed to continue selling the Lansdale branch product; correct? Domestic fittings; correct? A. Correct.”); RX 289).

514. McWane paid rebates and shipped domestic Fittings to distributor Illinois Meter in 2010 and 2011, despite the fact that Illinois Meter bought domestic Fittings from Star. (Sheley, Tr. 3462-3463 (“Q. Tyler/Union paid you your rebate in 2010, sir, didn't they? A. That's correct. Q. And they didn't cut you off, did they? A. That's correct. Q. And Tyler/Union paid you your rebate in 2011, didn't they? A. That's correct. Q. Tyler/Union didn't cut you off in 2011, did they, sir? A. That's correct. Q. And you bought product from Tyler/Union this year;

correct? A. Yes, sir. Q. And they've never cut you off. A. No."); (JX 675 (Sheley, Dep. at 160 ("Q. And earlier you said that you purchase Star domestic product also now. Right? A. Occasionally. Yes, we are. Q. And you purchase Tyler's domestic product? A. Yes. Q. Has Tyler ever refused to tell sell you domestic product? A. I don't think they know we're buying Star. Q. I'll repeat the question. Has Tyler ever refused to sell you domestic product? A. No. They have not. Q. Even though you do purchase from Star? A. Yes.")).).

515. McWane never enforced the Rebate Policy against Groeniger, even though it bought domestic Fittings from Star. (JX 669 (Groeniger, Dep. at 99 ("Q. In the 2009 time frame after receiving this letter, Mr. Groeniger, did Tyler ever refuse to sell you something because you had a relationship with Star? A. Not to my knowledge. Q. In the 2009 time frame after receiving Exhibit 2 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."); JX 643 (Tatman, IHT at 197-198 ("Then, you know, you go beyond that. The next situation that came up was Groeniger's out there. They were 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.")).).

516. McWane never refused to pay rebates to or sell domestic Fittings to Dana Kepner, even though Dana Kepner purchased domestic Fittings from Star since 2010. (JX 652 (Johnson, Dep. at 17-19 ("Q Do you purchase domestic fittings from Star? A Yes. Q And do you also purchase domestic fittings from Tyler? A Yes. Q When did you start purchasing domestic fittings from Star Pipe? A I would guess about the middle of '10, 2010. We may have purchased some earlier, but the majority . . . Q Has Tyler ever refused to sell you domestic fittings? A Not

that I recall. Q Did you ever personally witness Tyler refuse to sell domestic fittings to any other waterworks distributor? A My personal knowledge, not that I can recall. Q Has Tyler ever refused to give Dana Kepner a rebate that it earned on fittings? A No. Q And have you ever personally witnessed Tyler refuse to give a rebate to any other waterworks distributor? A Not to my personal knowledge, no.”).).

517. McWane never cut off, threatened, or refused to pay rebates to WinWholesale, even though WinWholesale bought domestic Fittings from Star. (JX 705 (Gibbs, Dep. at 35-39 (“Q. So, despite WinWholesale purchasing from -- strike that. Despite WinWholesale's purchase of domestic fittings from Star in 2010 and 2011, McWane never cut you off, right? A. No, they did not. Q. And they never refused to pay WinWholesale a rebate? A. That is correct. Q. Is there anything in McWane's policy that prevents WinWholesale from purchasing domestic fittings from Star Pipe in the future? A. No. Q. And would you consider purchasing domestic fittings from Star Pipe in the future? A. Yes. Q. So, WinWholesale's business is open to Star Pipe on the domestic fittings side going forward right now? A. That is correct.”) (objections omitted).).

518. McWane never refused to sell, cut off, or refused to pay rebates to HD Supply, despite the fact that HD Supply bought and continues to buy domestic Fittings from Star. (JX 673 (Webb, Dep. at 46-47 (“Q. Has McWane ever refused to sell HD Supply domestic fittings? A. Not that I'm aware of. Q. Has McWane ever refused to pay HD Supply rebates that it earned on domestic fittings? A. Not that I'm aware of. Q. So at no time has McWane ever cutoff or refused to pay rebate to HD Supply? A. None that I can recall. Q. And you testified earlier that HD Supply does buy domestic fittings from Star, is that right? A. Yes, we have.”).).

519. McWane's Rebate Policy had no effect on Utility Equipment's willingness to buy domestic Fittings from Star. (JX 703 (Coryn, Dep. at 134-135 ("Q. Is it fair to say that this policy did not have any effect on your willingness to deal with Star? A. Yes. Q. And also on Page 131, Line 6, you said, "I mean, they can't refuse to sell to you. That wasn't going to work." Did I read that correct? A. Yes. Q. So when you received this letter, was it your opinion that Tyler could not refuse to sell to you? A. What I was referring to there is that they wouldn't be so stupid to actually say to someone, Because of this you are not -- we are not going to sell you anymore. Q. And, in fact, did Tyler ever refuse to sell you domestic product? A. No.") (objections omitted).).

520. Ferguson purchased hundreds of thousands of dollars worth of domestic Fittings from Star, yet McWane has never cut Ferguson off from McWane's domestic supply or refused to pay Ferguson a rebate. (Thees, Tr. 3112-3113 ("Q. So is it fair to say McWane never enforced the September 22 letter on Ferguson? Is that fair, sir? A. Yes. Q. And Mr. Thees, there are currently no restrictions that keep your branches from purchasing domestic Fittings from Star; is that right? A. Not that I'm aware of. Q. So your branch managers are free to purchase domestic Fittings from Star today; is that correct, sir? A. Yes.")).

521. U.S. Pipe bought domestic fittings from Star since September 2009, despite the Rebate Policy and McWane never cut off supplying U.S. Pipe with domestic fittings. (Morton, Tr. 2860 ("Did I hear your testimony right that U.S. Pipe bought Star domestic products after September 2009 -- excuse me -- after the September 2009 policy of McWane was enacted? A. That's correct. We bought a minor percentage -- Q. Okay. A. -- after that time. Q. And you purchased them after the October 2009 meeting with Mr. Tatman as well. A. That's correct."), 2867 ("Q. Mr. Morton, is it true that -- isn't it true that U.S. Pipe bought significant quantities of

domestic products from Star Pipe starting in September 2010? A. I believe that's correct. Q. And that's less than a year after your meeting with Mr. Tatman; correct? A. Correct.”); CX 2215’ CX 1936).).

C. Complaint Counsel and Dr. Schumann Cannot Identify a Single Distributor Who Wanted to Buy Star Domestic Fittings But Could Not Because of the Rebate Policy

522. Complaint Counsel failed to allege or offer evidence that McWane’s 2009 Rebate Policy constituted below-cost pricing to customers.

523. Complaint Counsel failed to allege or offer any evidence that McWane’s 2009 Rebate Policy constituted a contract.

524. Dr. Schumann was unable to identify a single distributor that wanted to purchase domestic fittings from Star but was unable to because of McWane’s Rebate Policy. (Schumann, Tr. 4400 (“Q. And sitting here today you can't point to a single month when their share actually didn't increase, can you, sir? A. I didn't memorize their sales by month. Q. That's not my question. My question is, sitting here today, you can't point to a single month after the letter came out that their share was not increasing, can you? A. I cannot as I sit here today. Q. And sitting here today you can't point to a single customer that didn't buy any Star domestic Fittings that wanted to, can you? A. I can't recall the name or names.”).).

525. Dr. Normann concluded that there were no Distributors who wanted to buy Star domestic Fittings but were unable to do so because of the Rebate Policy. (Normann, Tr. 4929-4930 (“Q. Dr. Schumann was unable to identify any distributor that wanted to buy Star domestic but was unable to. Were you able to find one? A. Any distributor who wanted to buy but was unable to buy? Q. Who wanted to buy Star domestic but was unable to. A. No. . . .”).).

D. The Rebate Policy Consisted of Above-Cost Customer Discounts, and Was Not a Contract

526. McWane's September Rebate Policy announced McWane's MDA with Sigma and set forth some general guidelines about how McWane's corporate rebate plans may be handled in the coming months. (Tatman, Tr. 687-689 ("Q. And the letter you put out, that was an outgrowth of those discussions that you had with Mr. McCullough and Mr. Walton from the slides we were just talking about; is that right, sir? A. That probably would have been the first of many discussions. Q. Let's go to that letter. We looked at it earlier. It's 1606. And Terri, if you could just go to page 2, that's the letter itself. A. I'm pretty familiar with that, so I'll work off the screen. Q. The policy you adopted, sir, was effective October 1, 2009? A. Yes. Q. And you adopted a program whereby McWane's domestic fittings and accessories would be available only to customers who elect to fully support McWane branded products for their domestic fitting and accessory requirements? A. Yes. With the big words "may" and "or" below. Q. And the big words "may" and "or" below, those refer to the consequences a customer might suffer if they were not to be exclusive with McWane? A. Those were put in there to give me an out clause. Q. But those out clauses are outs from a consequence that a customer might experience should they choose not to be exclusive with McWane; correct, sir? A. Yes. But go back to what letters read and what practicality is through the whole history of discussions that we've had here. Q. So the letter might not actually reflect what happens in the marketplace or the marketplace's understanding of that letter; is what you mean? A. I think everything that we've talked about so far is that there's a letter that goes out, and then competitive conditions determine what actually happens in the marketplace. 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. Q. And you actually went out before you announced this policy and met with customers to discuss it with them? A. I think one of them or two of them. I couldn't recall for sure."); CX 1606).

527. The letter states in pertinent part: “[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 product for their domestic fitting and accessory requirements. . .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 manufacturer’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.” (CX 1606) (emphasis added).

528. On its face, the September 22 letter does not require preclude McWane’s customers from purchasing domestic Fittings from other suppliers. (CX 1606).

529. Regardless of the Rebate Policy, McWane’s customers remained free to buy domestic Fittings from the supplier of their choice. (JX 643 (Tatman, IHT at 157-160 (“Q Did you generate significant goodwill with your distributor customers from the program you announced in September of 2009? A A mix. If you look at the accounts that were traditional domestic accounts -- that were traditional domestic accounts and were good long-term supporters of Tyler Union, they were very much in support of that. They wanted that to happen because they felt that, okay -- although nobody knew what it was. ARRA is going to be a market opportunity. We don't know what it is, but it's not going down. We're your Tyler Union

distributor. That means we will have a good -- better opportunity to participate in that than a guy that's down the street that's never bought from you or doesn't care to buy from you. You got a real mixed bag. Some people said that was great. You did the right thing. Glad you did it. Thank you. And you got other people that said, you know, I don't like this. You're taking away my free choice. And as we said, you can do as you want to. You got to go back to that letter -- is that the September 22nd one? Q Yes, sir. A And then you look at the dialogue around that. It's got the words "may" and "or" in it. Purposefully I put those in there because I knew what was going to happen after that letter comes out. It's got all these sort of exceptions. You got to support our product. If we have it available, if it's not part of your buying your fittings as part of a pipe package, if we've got it available, and then if you don't do that, here's what may happen: may or or. And then if you look at -- I had a conference call with the salespeople right before -- the morning before that letter went out. I think the letter went out in the afternoon. We got together with the sales team in the morning. There's a list of questions they're going to come up in answers. I'm sure in the e-mail trail, you got that. And even if you look at that document, I'm kind of priming the sales force that here's what the letter says, but we're not necessarily going to take a hard line stance. This is "may" or "or." And that letter is kind of analogous to these price increases. When I say I'm raising prices seven percent, would I like to get a seven-percent price increase? Yes. That's what I would like. I hope to get it. That's almost like my Christmas wish list. The reality is, the marketplace will determine what I actually get, and that was the same thing with that letter. We wanted customers to support us because we needed the volume. We wanted them not to cherry-pick us because that's not good for us. It's not good for our volume. It's not good for our business. We're just not set up to compete very well in that type of environment. We know that the customer bears the power and that we would need some sort of

flexibility there. So specifically, I had the words "may" and "or" and some conditions in that letter.”)).).

530. Mr. Bhutada and Mr. McCutcheon testified that Star offered rebates to its customers on its domestic Fittings. (JX 694 (Bhutada, Dep. at 65 (“Q. What rebates, if any, were you offering on your domestic fittings? A. I think we offered rebates between 2 to 8 percent. Q. And was that competitive with the market? A. I don't know. Q. Was that an attempt, do you know, to be competitive in the market? A. Yeah, that was an attempt.”)); McCutcheon, Tr. 2341 (“Q. Did Star offer discounts off its published prices for domestic fittings in 2009 and 2010? A. Yes, sir. Q. And can you describe what form those discounts took? A. I don't understand the question. Q. Well, did you offer rebates? A. Yes, sir.”), 2635-2636 (“Q. And your rebates are competitive with Tyler's rebates; right? A. I don't know. Q. Okay. But you do know that you're offering rebates on domestic where necessary? A. Yes, sir. We did.”), 2646-2647 (“Q. Fair enough. Just so we're clear on the record, so this is a proposal that Star made to give all members of the TDG group, buying group, a [REDACTED] on all purchases of domestic fittings 3" through 48" mechanical joint, push-on and flanged; right? A. Yes, sir. Q. In fact TDG accepted that and this program was in their 2010 program; right, sir? A. Yes. Excuse me. Yes, sir.”); RX 601 in camera).

531. Star offered a rebate to get TDG preferred vendor status for domestic Fittings in 2010. (JX 675 (Sheley, Dep. at 68 (“Q. And for domestic fittings in 2010 Star was in that program but not Tyler? A. That's correct. Q. Did Star offer a rebate to get in the program? A. Yes.”)).).

532. Star's executives testified that Star's domestic fittings prices were competitive with McWane. (McCutcheon, Tr. 2635 (“Q. -- and have it cast? And I think you said your

pricing is you believe competitive with Tyler/Union on your domestic; right? A. Yes, sir.”); JX 694 (Bhutada, Dep. at 82-83 (“Q. I think you told me earlier Star's price was competitive. Correct? A. Yes, sir”))).

533. Complaint Counsel offered no evidence that fittings output decreased or that fittings prices increased relative to the rate of inflation as a result of the McWane 2009 Rebate Policy.

XVIII. SIGMA Was Not Prepared To Enter The Domestic Segment In Time To Compete For ARRA Jobs

A. Sigma was not a viable domestic Fittings supplier in 2009 because it was in dire financial straits

534. Sigma knew that ARRA was a short term stimulus program. (JX 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.”).)

535. In early September 2009, Sigma did not have a viable domestic production option. (Pais, Tr. 1799 (“Q: At this point in time on September 8, 2009, did you believe, sir, that Sigma had a somewhat viable SDP option or Sigma domestic plan option? A: No, we didn't.”).)

536. Sigma’s financial condition in the second half of 2008 was very poor. (JX 687 (Pais, Dep. at 153-154 (“Q. How was the company's profitability at the time in 2008? A. Good question. 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.”.)

537. Sigma had a loss of [REDACTED] million in 2008. (Pais, Tr. 2193 in camera (“Q. You had a loss of [REDACTED] million in 2008? A. Yes. After all the interest expenses.”).)

538. [REDACTED]
[REDACTED] (Pais, Tr. 2195-2196 in camera (Q. Then if we go over to the next page, you got this whole section here on the second lien term loan. This is the loan that Sigma had from companies like Ares Capital. A. That's correct. Q. Now, that's another [REDACTED] [REDACTED] so that gets up to [REDACTED]; right, sir? A. Yes. Q. And the interest on that is higher yet; right, sir? A. Yes. Q. That's somewhere between [REDACTED] percent; right, sir? A. That's correct. Q. [REDACTED] A. Absolutely. Q. And the company's performance was hurt in part because there was a sharp erosion in prices during 2008; right, sir? A. Yes. Q. [REDACTED]
[REDACTED]

539. Throughout 2009, Sigma was in a “precarious position overall in financial terms.” (Pais, Tr. 1760 (“Q. But did the board or Frontenac ever give Sigma a limit to the capital expenditure they would entertain? A. I don't think there was any limit other than the fact that both the board and the team were very aware of our precarious position overall in financial terms.”).)

540. In the spring and summer of 2009, Sigma was in a “grave” financial situation. (Pais, Tr. 2163-2164 (“Q. All right. The bottom of the first paragraph, you're talking about updating the board with a midterm review, and you refer to recent -- current trends and recent developments and their collective gravity. Right at the bottom of that first paragraph, sir. A. Yes.

Q. And the fact is is that Sigma in May of 2009 was in a grave situation. A. Grave, yes. Q. Yeah. Right below that you point out that the update is definitely and mostly bleak; right, sir? A. Yes. Q. And may cause a certain amount of concern or even anxiety in some or all of you, the board members; right? A. Yes.”).

541. In April 2009, Sigma experienced what Mr. Pais described as a “[p]erfect storm:” at the same time that Sigma’s April 2009 revenue was about two-thirds of what was needed to meet bank covenants, McWane announced a price decrease on large and medium diameter Fittings. (Pais, Tr. 2165 (“Q. And you had a target for revenue, which is referred to in the last sentence there. Your target for April of '09 was \$22-1/2 million; right? A. Yes. Q. And then in the beginning of the next paragraph, you say you didn't come close; right? The actual April of '09 revenue was only going to come in around \$16 million. A. Yes. Q. So only about two-thirds of what you were hoping. A. That's true. Q. Now, that \$6 million swing, that was important to Sigma at the time, wasn't it, sir? A. Very.”), 2167-2168 (“Q. Now, let's go to the next page, page 5 of this document. Now, if I'm right, we're here in the beginning of May of '09, and things are bleak. You've just barely made your covenants at the end of '08. A. Uh-huh. Q. Prices have sharply eroded in '08 -- A. Yes. Q. -- right, sir? And the beginning of '09 isn't turning out to be any better; right? A. No. Q. In April, the critical month, you just missed your targets by a third; right, sir? A. Yes. Q. Now, April is also the same month that my client announced a huge list price decline on the medium and large-diameter fittings; right? A. Yes. Included that as well. Q. You mentioned that to the board. A. Yes. Q. That's a significant material event for the board, isn't it, sir? A. Yes. Q. And so you're getting hit not just with the double whammy of the decline in demand and the sharp erosion in prices, now you're getting hit with the triple whammy; right?

A. Perfect storm. Q. Perfect storm. That's that movie where those three waves combine to make a gigantic wave and flood the boat -- A. Yes.”); CX 214).

542. Mr. Pais testified that 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 (“Q. Understood. Did the banks ever authorize Sigma to exceed its capital expenditures limits -- A. No. Never. Q. -- to get into domestic production? A. No, they did not. Q. Did the board ever authorize the company to take money and put additional money into virtual domestic manufacturing beyond what had been incurred? A. No, they did not. Q. Did you have sufficient funds at the time to do that, sir, given the amount of debt the company had at the time? A. I wish we did. No. Q. The plan that I saw, the investigation, the exploration, and so forth, was going to take a certain amount of time if you'd had the money; right, sir? A. Yes.”)).

543. Mr. Rybacki testified that 2009 was “a horrendous year” for Sigma. (Rybacki, Tr. 3663-3664 (“Q. All right. This was your year-end financials that were discussed at the board meeting; correct, sir? A. Correct. Q. If we look at page 3, RX 242.0003, and call that up. A. I have it. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] In 2009, Sigma was [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

545. A significant portion of Sigma's [REDACTED]

[REDACTED] (Rybacki, Tr. 3672 *in camera*).

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (Rybacki, Tr. 3670 *in camera* [REDACTED])

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] In 2009, Sigma's [REDACTED]

[REDACTED]

[REDACTED] As a result of the [REDACTED]

[REDACTED]

[REDACTED] (Rybacki, Tr. 3670-3671 *in camera* [REDACTED])

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

550. The financial situation for Sigma [REDACTED]

[REDACTED]

[REDACTED] (Pais, Tr. 2199-2203 (Q. Below that, you say it's the right time to review Sigma's

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] RX 163 *in camera*).

[REDACTED] Sigma simply had no money to invest in a high-risk, uncertain domestic Fittings program in 2009. (Pais, Tr. 2210 [REDACTED])

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

552. Mr. Pais testified that, in the summer of 2009, “There were no really good options. The SDP [Sigma Domestic Production] plans were a not very discrete or quantifiable effort. It was – we were at the early stages.” (Pais, Tr. 1761-1762 (“Q. And you say -- you used the term "nominal." Can you tell me why you referred to this as a nominal offer? A. Yeah. Because after all our efforts to come to a more wholesome arrangement for a private label production, we got this offer, which was to just to let us have access to fittings without any real margins. Q. But you referred to it at the time as a patronizing accommodation. What did you mean by that? A. Well, we have to be aware these were all very stressful and somewhat emotional times, so a lot was said to reflect our, you know, feelings. But we felt, despite our lengthy discussions, what they offered was, as I call it, a nominal, you know, without any room for any margins for us to recover from this business. Q. Did Sigma accept this offer? A. No, we did not. Q. And what did you -- strike that. Were your instructions to your team instead to seriously go ahead with your SDP plans? A. Mr. Hassi, at that time, as I've repeatedly said, it was just not one or the other. There were no really good options. The SDP plans were a not very discrete or quantifiable effort. It was -- we were at the early stages. There were a lot of variables, a lot of uncertainties, so we naturally wanted to continue that effort because that is independent of anything else. So that effort was ongoing, and something like this made us even more to put somewhat more urgency if at all possible because it looked like they just were not keen to accommodate us at that point. Q. And because they weren't keen to accommodate Sigma -- A. In

private label, yes. Q. -- on private label, you asked your team to regroup and get serious and develop a thorough and detailed SDP plan? A. Yes. That need, that request, was ongoing. Because domestic manufacturing is a new activity for us, there were a lot of moving parts. It's a very daunting task, so the advice to our team to continue was ongoing.”).

553. Although Sigma would have had to contract with at least three different domestic foundries to produce the range of approximately 730 different types of domestic Fittings it needed in order to become a viable domestic supplier, it had no contracts with domestic foundries as of September 2009. (Rona, Tr. 1672-1673 (“Q. And I believe you also testified that Sigma would have to contract with more than one foundry to make these 730 -- well, let me take that back because I'm not sure you testified to this. Is it true that Sigma would have to contract with more than one foundry to make these 730 different types of fittings? A. There was no question that if we were going to develop the full range which was included in the 730 items that it would take -- you know, we had at least three foundries that we thought that would require. Q. And in September of 2009, at the time Sigma signed the MDA, Sigma had not entered into any contracts with domestic foundries to produce domestic fittings, had it? A. No.”)).

554. Although Sigma required a minimum of 450 core patterns to produce 730 types of Fittings, very few of those patterns were even physically present in the United States, as of September 2009. (Rona, Tr. 1673- 1675 (“Q. Okay. And would the manufacture of 730 different types of domestic fittings require approximately 730 different types of patterns? A. As I -- as I testified earlier or -- that's a very broad question. It could take 730 and it could be done in part modular, part lost foam, and I would be speculating that it could be done with 457 core patterns, core patterns and a lot of adaptation and modular patterns and lost foam, or it could be done as 720 individual or 30 patterns. . . . Q. And in September of 2009 you did not have any contracts

with any pattern shops to build these patterns, did you? A. No. Q. And you have to have a fitting pattern before you can pour a fitting, don't you? A. You have to have -- in a broad response, you have to have some type of pattern equipment to make a fitting. That's correct. Q. And in September of 2009, how many different patterns did Sigma have in the United States? It didn't have any, did it? A. You need to specify for which products. Q. Okay. Well, you might have had a couple of lost foam patterns; correct? A. For AWWA fittings we had not brought in any patterns for making fittings here at that time. Q. So in September of 2009 you didn't have any AWWA patterns in the United States; correct? A. Correct.”); Brakefield, Tr. 1417-1418 (“Q. Thank you. Do you know, sir, had -- did Sigma have any manufacturing facilities of its own? If you know. A. At one time they had some in Mexico, but they gave that up, but no, they did not. They were -- they were like a broker. They -- if they owned anything, they owned the patterns and maybe a small equity position because of the patterns. Q. I'm sorry. The small equity position because of the -- A. Yeah. In other words, the patterns -- in other words, let's say they had all these thousands of SKUs and patterns. Well, they would own that, and that would be their equity position in the facility. Overseas. Q. Did they -- did Sigma have any patterns in the United States for -- A. No, they did not.”).

555. Mr. Rona testified that Sigma would have required at least 18 to 24 months lead time to begin production of a full range of Fittings, and approximately 6 months to produce even one fitting. (Rona, Tr. 1673 (“Q. And it takes many months to be build, test and -- build patterns and run samples and test the samples, doesn't it? A. As I stated earlier as well, it would have been a long process that would have rolled out. It was not like flipping a light switch and 730 items would have come out. It would have been a gradual increased program over 18 to 24 months to get to completion.”), 1676-1677 (Q. And I believe you testified earlier today when you

were examined by Mr. Hassi that you thought it would take six to eight months from the time you started to get the first few fittings up and out the door. Correct? A. From the day you would issue a tooling order to a tooling supplier, it could take 60 to 90 days to get the tooling here. And then it would take 60 days to set it up, produce it, qualify it, get it ready, finish it. So one -- one -- the first fittings I think six to eight months as an estimate is a fair estimate, and then obviously every month you'd be getting more fittings every month. So once it started, you -- Q. All right. Now, you didn't have any pattern orders out in September of 2009, did you? A. That's correct. Q. All right. So if you were to have started in September of 2009, is it fair to say that you couldn't have even had the first fitting out the door until February or March, April, May? A. That's correct.”).

556. Sigma's 18-24 month timetable would have been unworkable, given ARRA's short window of opportunity. (Rona, Tr. 1671, 1673).

557. 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 for domestic Fittings. (Pais, Tr. 2173-2175 (“Q. Now, complaint counsel asked you -- this is three months right after ARRA is passed; right, in May of 2009? A. Yes. Q. Mr. Hassi asked you a lot of questions about, well, did you explore domestic, and you said you explored it; right? A. Sure. Q. You investigated it? Yes? A. Yes. Q. You -- I think he showed you a model that Mr. Rona prepared. Sir, did you have a model? Modeling was done? A. Preliminary estimates, yes. Q. But ultimately, sir, the fact is, Sigma had no foundries in the middle of 2009. A. No. Q. No contracts with any foundries. A. None. Q. You had, if I understand it, a couple of patterns to make fittings out of the 700-plus that you needed to have a full line of fittings? A. Yes. That's what we borrowed from our Mexico supplier. Q. You had no core boxes? A. None. Q. You had no

machining facilities? A. None at all. Q. What about coating, painting, lining? A. No. Q. No contracts to line up any of those at this point in the middle of 2009? A. No. Q. And ARRA is three months old, already into three months. Shovel-ready projects were necessary; right? A. Exactly. That's what was announced. Q. And it's going to expire nine months later; right? A. About a year. Yeah. Q. Yeah. Now, you had, as I understand it, two fittings, the judge asked you the other day, at the AWWA show which was a month after this, you had two fittings. A. Yes. Q. And they were not commercially ready to sell, they were just trial runs; right? A. Yes. Q. And in fact, he asked you, and I think you said you didn't even display those fittings at the show that year? A. No. Q. Even though you typically would display new products, or so forth, these were just not ready for prime time, were they, sir? A. Yes.”).

558. By September 2009, Sigma had not taken any concrete steps to supply its own domestic Fittings. (Rona, Tr. 1693-1694 (“Q. I'd like to pull up the first -- expand the first paragraph, please. No. The second paragraph. I'm sorry. And you write, "To date Sigma has not made any concrete plans to either invest in all the required tooling or not invest at all." So I just want to confirm what Mr. Hassi asked you yesterday. As of August 17, you told Mr. Morton that Sigma had not made any concrete plans to invest in the toolings and patterns necessary for domestic production; correct? A. If the question -- if the question is at the point where this e-mail had been written, that at that point we had not invested in or made a decision to invest in any equipment, that's correct. Q. And as of August 17, Sigma had not made any formal decision to go ahead with domestic manufacturing because obviously you would need the tooling and patterns to do that; correct? A. That's correct.”) (objections omitted); CX 258; RX 200.0002 (“To date Sigma has not made any concrete plans to either invest in all the required tooling or not invest at all.”).

559. Obtaining domestic fittings from McWane was one way Sigma could effectively supply domestic Fittings to its customers during ARRA's short time window. (Rona, Tr. 1481 ("Q. Did that -- did McWane -- well, backing up a second, was obtaining domestic fittings from McWane an alternative that you -- that Sigma pursued in response to the ARRA in 2009? A. Yes."), 1671 ("Q. You personally didn't -- didn't know how much of ARRA was going to be spent on domestic waterworks fittings, did you? A. No. Q. And you had no basis to understand the volume of the domestic fittings market that would continue after ARRA expired, did you? A. No. Whatever -- whatever numbers we would have come up with at that time would have been our own internal calculations and estimations. Q. But you did know that time was of the essence if you were going to take advantage of the ARRA window; is that correct? A. For domestic fittings specifically associated with ARRA, we knew that it was not forever. Correct. Q. It was a very short time window. A. Short time, correct.")).

560. The McWane MDA was Sigma's only viable option to service its customers. (Pais, Tr. 1800-1801 ("Mr. Hassi, you have to see the context of this. This is a very difficult time when the customers are looking to Sigma to come up with an option of 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. And there was a lot of agitation by the customers as to what our options were. And 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. We were getting orders and requests, et cetera. 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. As such, I wanted to signify to them that we just didn't go running to our competitor, that we did try and we are a viable option.")); CX 1166).

561. Sigma approached McWane about the MDA and McWane supplying domestic fittings to Sigma. (JX 688 (Rona, IHT at 184-188 (“Q. Sir, let me show you a document that's marked Exhibit 243. Exhibit 243 is an e-mail that you wrote, sir, to Thomas Walton at McWane - - A. Okay. Q. -- dated July 4, 2009. Sir, is this the document -- is this the offer you were referring to? A. Yes. Q. Had you had any communications with anyone at McWane in between the time you sent this e-mail and the time that you had received the unacceptable offer in Exhibit 225? A. I probably spoke to someone from McWane, and I believe I spoke to Thomas that one time and -- I believe I spoke to Thomas and just generally, you know, probably discussed that we thought the 5 percent offer was unfair, or we didn't think it was fair, commensurate or whatever, and that, you know, we would hope that they would see some way to give us an improved offer. And he encouraged me to send them an offer. . . .Q. Do you remember, did you initiate that conversation or did Mr. Walton? A. I called him. Q. You called him. During that phone call, did you make -- did you make the point that McWane might need help meeting demand for ARRA projects and that SIGMA's distribution might be able to help McWane meet that demand? A. I don't recall if I said that in that conversation, but I know I discussed that later on with Rick.”); JX 643 (Tatman, IHT at 149-150 (“Q After the ARRA was passed, did SIGMA approach Tyler Union for access to domestically produced fittings for SIGMA's use in ARRA-funded projects? A I'm thinking if you look at the time analogy, SIGMA approached us about selling them fittings for private label. Yes. They approached us after the ARRA Buy America provision came out, and they actually approached us prior to Star's announcement or our acknowledgement of Star having domestic fittings that we didn't know about until they showed it at the trade show. I think SIGMA came to us before we realized Star had a program.”).)

562. Mr. Pais testified that the MDA did not hamper any domestic production effort of Sigma. (Pais, Tr. 1854-1855 (“Q. Was one of the -- was the reason that fittings were languishing because you at this point had a master distribution agreement with McWane? A. No. One doesn't really have -- the feasibility and economics and operations for the domestic production through our own had -- has no -- that is not hampered by the MDA. It had just -- we had found these problems to be so overwhelming. That is why we had to sort of reduce the pace at which it was being looked at.”).).

563. Around the time ARRA was adopted, Sigma attempted to become a supplier of domestically produced pipe restraints, a product distinct from Fittings which required less initial investment. (Rybacki, Tr. 3672-3673 in camera (“Q. Do you know, sir, whether Sigma during this period pursued getting into buying and reselling domestically made restraint products? A. Buying and reselling? Q. Yeah. A. Domestically made restraint? Q. Pipe restraints? [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

564. Mr. Rybacki described Sigma's domestic restraints project as [REDACTED] [REDACTED] (Rybacki, Tr. 3672-3673 in camera).

565. Mr. Rybacki believed that it was inadvisable for Sigma to attempt to become a domestic Fittings supplier in 2009, because [REDACTED]

[REDACTED]

[REDACTED] Rybacki, Tr. 3682 ("Q. Tell us what you considered for your NAPPCO experience in 2009 when you were at Sigma. A. I just let everybody know that it -- it cost a lot more money than I was -- than we were prepared to spend, it cost a lot more money than we budgeted and that getting into domestic fittings was -- was dangerous and expensive. Q. You didn't think it was a good idea? A. For us to get into it? No.")).

566. The MDA did not eliminate a potential rival, as Sigma was not positioned to enter the domestic market in a timely manner during the ARRA period. (Normann, Tr. 4757-4759 ("Q. Dr. Normann, did you also reach summary conclusions about the Sigma allegations? A. Regarding the MDA, I did. Again, the MDA, in my opinion, I think there's clear procompetitive reasons for the MDA. If you can consider -- if you consider the situation at the time, the position that Sigma was in, for example, there were financial difficulties. ARRA was expected to be short-lived. You know, the -- the -- there was not necessarily huge returns to selling domestic product. But Sigma was in the situation where they clearly wanted to be a participant in domestic

sales and potentially the ARRA money because they didn't know how big of an effect ARRA would have, so Sigma really -- they had essentially three choices: not to participate in the sales of domestic at all, try to independently enter, or enter as part of the MDA. And as of the time right before the MDA, Sigma was still clearly not well-positioned to enter. I think the testimony is that they had taken no concrete steps, they'd indicated to U.S. Pipe. So as of August-September they were not well-positioned to participate in domestic sales, so the MDA allowed them immediate access to the market beginning right after it was signed, so clearly for Sigma had procompetitive justifications.”).

B. Dr. Schumann’s Assumption That Sigma Would Have Become a Domestic Fittings Supplier Is Purely Hypothetical

567. Dr. Schumann did not make an independent determination that Sigma could have become a viable supplier of domestic Fittings; rather, he was merely asked by Complaint Counsel to make an unsupported assumption. (Schumann, Tr. 4473-4474 (“Q. You were asked by the lawyers to assume that Sigma would have entered but for the MDA. A. My assignment was to assume that but for the MDA Sigma would have entered, that is correct. Q. Let's be clear what that means. What that means is you didn't study and reach a conclusion in your report that Sigma had the financial ability to do that, did you, sir? A. I did not do that. ... I didn't do a separate study.”); Schumann, Tr. 4495 (“Q. Now we're getting to the rub of it, right, Dr. Schumann, because what you assumed was that they would have entered and their cost structure would have been such a level that they would have had product available that was efficiently made and would have been able to sell it at a price lower than the prevailing market price. Those are all the assumptions you actually -- A. Absolutely not. Q. No. Okay. Then tell us again. What assumption on cost did you make? A. I made an assumption that Sigma would have entered. Had Sigma entered, the -- the act of entering would have been selling output. Had Sigma sold output,

it could only do so at the expense of one of its rivals. It could only do so by underbidding them. So when I start, as I was asked to, with the assumption that Sigma had entered the market, that it was selling fittings made in America, that would imply that, having sold those fittings, it was underbidding its competitors in one way or another, that price would have been lower and consumer welfare would have been higher., 4508 (“Q. Well, go back to my hypothetical. Let's assume that Sigma enters with inefficient manufacturing capacity and its products are very high-priced, but let's also assume that some people really like Sigma and they're willing to pay a little more for Sigma's fittings. Then your conclusion here is different, isn't it, sir? A. I haven't done that analysis. I simply assumed, as I was asked to, that Sigma would have entered. And I performed an analysis of the MDA under that assumption that but for the MDA Sigma would have entered.”).).

XIX. The MDA had Procompetitive Benefits and was Limited in Time Scope and in its Terms

A. MDA Had Limited Scope

568. The MDA was a one-year agreement, terminable by either party with 180 days notice. (Rona, Tr. 1699-1700 (“Q. Isn't it true that Sigma originally asked McWane for a three-year term on the MDA? A. I believe at the time when the original offer was made, or counteroffer as it's been referred to, that we had -- we were seeking to have an agreement that would last for three years. That's what I recall. Q. And McWane said no and the MDA ultimately -- the term of the MDA was ultimately limited to a year; correct? A. That's what I recall. Q. And the MDA could be terminated at any time, but you had to give a hundred days -- 180 days notice; correct? A. That's what I understood.”); CX 1194).

569. The MDA was in effect for less than a year, from September 2009 to August 2010. (JX 689 (Rona, Dep. at 303-304 (“Q. Okay. I'm going to show you a document that I've

marked as CX 1435. It's an e-mail with an attachment you received on February 17th, 2010. I'm just going to ask you to identify it. A. Yes. Q. Is this an e-mail with an attachment that you received in the regular course of business? A. Yes. Q. Tell me what you understand it to be. A. As per the terms of our agreement with the MDA, McWane needed to give 180 days notice if they wanted to terminate the agreement, and this is the termination of the agreement.”); CX 1435).).

570. In accordance with the written terms of the MDA, Sigma was free to offer customers cash discounts, freight terms, or payments terms that it chose. (Tatman, Tr. 801-803 (“Q. Okay. Terri, that's on page 15. A. Now, what I can't tell you, because I'm not an attorney, the way that language is written, it says not a requirement but a suggestion, so you'll all have to figure out how that plays in the law. But let's just say that this is a suggestion here, because that's all I can understand here because I'm a simpleton. All this says is that over a quarter period, for the 5,000 line items that you're going to sell, that on a weighted average, the suggestion is for that to be within 98 percent of published. You could decide to sell one job at 20 percent off, but of all the thousands of jobs you have, it should come up to 98 percent. The other element that's critical here is this only has to do with published pricing. Sigma is allowed to give any rebate that they want. They're allowed to give any cash discounts that they want. They're allowed to give any freight terms that they want or any payment terms that they want. So they may elect to go to a customer and say, "I'm going to give you 5 percent off there, but I'm going to ship you free freight and I'm going to give you a 15 percent rebate program." They have that flexibility in how they price this. All this is, again, get with the lawyers on whether it's a suggestion or a guideline, but under that 98 percent, on any job they can do whatever they want to, and that only affects how they have to price against published. It has no restrictions on the complete liberty

they have in terms to freight terms, cash discount terms, rebate terms or whatever money they want to give back to these guys. Q. Sir, going back to Exhibit A, did you have an understanding that this agreement with Sigma would terminate immediately if Sigma did not sell within 98 percent of the published as set out under Exhibit A? A. I've just told you I don't have an understanding of the legalese language of how that works. You're going to have to ask an attorney how that's written. Q. If you go back to pricing, paragraph d, about -- tell me when you're there. About two-thirds of the way down the paragraph, you see a sentence that reads, "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." Do you have an understanding of that? A. As I said before, I don't truly understand the difference between that and the suggestion up above. Ask a lawyer. But what I do understand, the things that are easier for me to understand, the simple things, is a rebate program -- that's just a minimum. They can offer 20 percent if they want to. They could offer zero if they want to. And that's only -- they only have to offer at least an 8 percent rebate if you do more than \$200,000 worth of business. Most accounts don't do \$200,000 worth of business for them, so that doesn't apply. They could offer no rebate to somebody. They could offer 10 -- if the guy is doing a quarter million dollars with them, it just says they have to give him 8. They could give him 20 if they want to. And again, no restriction on freight terms, cash discount terms, length of payment terms. Buy this domestic fitting from me at published pricing, and I'll give you a 30 percent discount off my import product. Complete flexibility here with what they do."); CX 1194).

571. The MDA permitted Sigma to purchase domestic Fittings from a source other than McWane if McWane could not provide delivery within a reasonable and customary period

of time. (JX 689 (Rona, Dep. at 248 (“Q. Okay. And you left your door open to get your domestic fittings from someone other than McWane, if McWane couldn't provide delivery within a reasonable and customary period of time; right? A. Right.”).)).

B. The MDA had Pro-Competitive Effects

1. The MDA expanded the customer base for McWane’s domestic Fittings

572. Sigma was able to reach and service customers that McWane could not. (JX 643 (Tatman, IHT at 176-178); JX 642 (Page, Dep. at 61-63)).

573. Sigma had relationships with certain distributors and in certain geographic areas that McWane lacked. (JX 642 (Page, Dep. at 69-73)).

574. Mr. Rona testified that 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. (JX 688 (Rona, IHT 95-96)).

575. Consolidated Pipe also bought domestic Fittings from Sigma, a vendor they preferred, when they likely would not have bought from McWane. (JX 659 (Swalley, Dep. 275-276)).

576. Mr. Tatman testified regarding Sigma’s established relationship with ACIPCO and fabricators such as Custom Fab:

Well, if you look at this in practice, Sigma had a relationship with ACIPCO, American Case Iron Pipe. I did not. We did not want to get into the middle of that relationship. That was theirs. . . So they can resell our fittings to [ACIPCO], their customer, go, and other customers, including distributors. . . . And they can sell to fabricators. Fabricators are people like Custom Fab or other people that buy pipe and specialize and do special things to it. They can sell to there.

(Tatman, Tr. 797-798).

2. The MDA resulted in improved customer service

577. 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 purchasers of domestic Fittings. (JX 689 (Rona Dep. at 120-124, 133-134); JX 643 (Tatman, IHT at 176-177 (“Q Is eliminating that uncertainty just as an uncertainty, was that one of the purposes of the M.D.A. with SIGMA? A And for us, it was probably better when we think long-term to -- essentially all you have with doing business with SIGMA is they do provide some benefits that we don't have. They got regional distribution yards that we don't have. That's a benefit to customers that we don't have. They have some relationships out there with accounts that are much better than ours. That's a benefit to our customers. That's primarily what they bring to bear. They've got feet on the street there. Theoretically, if they are our master distributor and selling our product, they are at least going to be neutral on any future legislation for domestic-only specs. You would hope that they wouldn't fight it because that's not promoting or protecting your brand. You're at least going to have them be neutral. So those are benefits. . . .And since, by everybody else exiting the marketplace, I essentially -- volume comes from my base, right, and then we have customers that would value those regional distribution yards. We have customers that SIGMA has a better relationship 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.”); JX 688 (Rona, IHT at 176-178 (“Q. And why was that? A. . . . Now the ARRA comes, and there's an immediate demand for fittings. 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. Q. Did you make that argument to Rick Tatman at McWane as part of these negotiations? A. I don't exactly -- I mean, I'm not exactly sure if I specifically recanted

(sic) those words, but I extolled the value that SIGMA would bring by the network, you know, meaning that was what we believed in, that we had the network of locations and that we could sell to them.”).

578. Sigma’s distribution centers were more strategically located for more efficient customer delivery than McWane’s. (JX 689 (Rona, Dep. at 311-313 (“Q. You take great pride in your ability to service the customer, don't you? A. I would say that's correct. Q. And Sigma has regular customers that don't buy from McWane in the ordinary course -- during this 2008-2009 time frame; correct? A. I can't answer with specifics on a customer by customer basis, but I'm sure based on the number of customers in the country that there are some that buy from us that don't buy from McWane for whatever reason. Q. And your geographically disbursed distribution -- would it be a center? A. Logistic centers. Q. Logistic centers. You have more of those than McWane does, don't you? Q. Do you know? A. I know where Sigma's current locations are. I'm not totally clear on each and every one of McWane's fittings warehouse locations. And I believe we have more. Q. You believe that your distribution systems are better than McWane's? A. I think that our distribution facilities are more strategically located to the customers in the market.”) (objections omitted).).

579. ACIPCO benefitted logistically from buying McWane domestic Fittings from Sigma, rather than McWane, and found the pricing to be competitive. (JX 646 (Burns, Dep. 139-140 (“Q. Were you concerned when you learned of the MDA that it would give McWane too much control over your costs? A. Concern may be may be too strong. I thought there was -- you know, I was interested to see how this all would play out; you know, how McWane and Sigma were going to work together. I don't think I was that concerned -- or recall being that concerned. Q. How has that arrangement worked out for ACIPCO? A. It's worked out okay. As I mentioned

before, I have always complained about the pricing. I think we should get the best price in the industry from everybody. So -- but it's -- you know, frankly speaking, working with Sigma has helped us because they apparently buy domestic fittings from McWane. They have a stock of those. And as far as the logistical aspects, it has really worked out well for us; and the pricing, I feel like has been competitive.”, 175 (“Q. So would you say that the MDA between McWane and Sigma was beneficial to ACIPCO? A. Yes, sir. Q. And it provided ACIPCO competitive pricing? A. In general, yes.”) (objections omitted).).

580. Mr. Groeniger testified that his firm preferred buying domestic Fittings from Sigma, because he preferred Sigma’s service to both Star and McWane. (JX 669 (Groeniger, Dep. 87-88 (“Q. Yes, sir. What are the ramifications that you were concerned about that you testified earlier that are embodied in Exhibit 2? A. Well, at first appearance this didn't seem like a major threat, mainly because the word SIGMA was involved. 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 forehead, that we really did not need Tyler. And going through the hoops and jangles, the policemen looking over our fences, taking pictures of what we did, 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. So we felt, we didn't -- if this was as it was on the face of the letter, I could have lived with it. Didn't turn out to be that way, but as this letter here shows, I felt confident that we were, that we would be able to supply through SIGMA and everything was going to be the same format.”).).

581. Mr. Prescott testified that distributor Everett J. 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. (JX 661 (Prescott, Dep. 35-36 (Q. Is it fair to say that you benefited from Sigma having a master distributorship agreement with McWane? A. The -- the benefit is -- the benefit from us buying from Sigma was we bought a hundred percent domestic came from Tyler, or Sigma, because they were all the same fitting, as you know. We bought most of them from Tyler, but when we were short on foreign, in other words we -- we needed to fill out a load, became very convenient to -- to -- to fill out that shipment because we could get domestic and they were the same. Do you follow? Q. I think so. So, it was beneficial to be able to get fittings from Sigma to fill out orders, correct? A. To fill out an order. The majority came from Tyler direct, but to fill out an order we would do that, yes.”), 122-123 (“Q. Yeah, you can just leave it right there. Earlier you stated that you are -- you are currently not purchasing domestic fittings from Star; is that correct? A. Right. Q. Why not? A. I -- I just think because we're so used to Tyler, and they are getting back on track, and it is a good -- you know, it is a good fitting, and I can't -- I can't see the -- the advantage of it. And this -- you know, everything has been kind of resolved, and -- and we're over the hump of this, and that -- you know, that ARRA caused us a lot more trouble than these fittings, you know, as time and effort and everything, so I -- we just haven't done it. We haven't talked about doing it, and -- and to be perfectly honest with you we was hoping that that deal with Sigma lasted so that we could do that, you know. Q. You could fill your trucks? A. Yeah, and so it was convenient in -- in both ways, so.”).).

582. There is no evidence that Sigma intended to install McWane as a domestic Fittings monopoly. (JX 688 (Rona, IHT at 187-188 (“Q. Was there ever a concern discussed by you or Rick Tatman that if Star Pipe entered domestic production with its service it may be able to gain significant market share from McWane and that having a joint venture between SIGMA

and McWane would help McWane prevent that from happening? Did you ever discuss that? A. That, no. Q. Did you discuss anything similar to that? A. We certainly discussed that I thought that we would be able to extend their brand, make it available, and that obviously with customers having an interest in fulfilling the requirements under the MDA that we would, you know, certainly be able to facilitate that and be a good master distributor for them.”); 218-220 (“Was the MDA designed to allow SIGMA to compete effectively against Star Pipe on the domestic side? A. In my opinion, the MDA was designed so that we would get access to domestic fittings so that we could sell the immediate need for customers. The alternative was -- from Exhibit 240 was not viable. And I think from SIGMA's -- from my perspective with SIGMA, we -- I was concerned in my initial thinking that not anyone -- manufacturers, but distributors would have a fear or feel that they had to make choices because they needed to get domestic fittings. So without domestic fittings we might lose business not because of any other reason other than the distributor would be -- feel maybe an obligation to McWane or anyone who could supply them fittings. And as a result for us, we felt, I felt, we needed to have domestic fittings so that people could feel free to assure to give us the business, other business they had already been giving us. And when jobs were changing overnight from jobs that had been previously quoted foreign and now they require domestic, and then we don't have that and they give the order to somebody else, whether it be Star or McWane, and we don't have anything to offer, well, while you're filling up the truck, why don't you give us, you know, 5,000 pounds of restraints, too. That was going to be a SIGMA order. So I think -- I felt that distribution felt that we needed to show up in order for them to feel reliable to buy the other stuff that they historically bought from us. Having domestic fittings for us was not about worrying about whom else, just we needed to have them.”).).

583. Sigma's focus in signing the MDA was on keeping its customers happy and providing domestic Fittings to those customers when needed. (JX 689 (Rona, Dep. at 240 ("A. From my perspective, I was focusing and telling McWane, Sigma needs to do something. I mean, they were probably clear, all the little things that were going on with the waivers, and they probably knew, you know, information gets around. I was focused on the fact that I said we absolutely need to do something, and, obviously, if we don't get this, we'll do something else. And I don't think that that -- that was how I was playing it. Q. And I understand that you believe that Sigma needed to be in this market one way or another; correct? A. Correct."); JX 688 (Rona, IHT at 218-220).).

584. 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. (JX 689 (Rona, Dep. at 118-120 ("Q. If Sigma did not have domestic fittings, would that be a problem for Sigma's customers? A. I perceived that without domestic fittings, that it could hurt our other fitting or our other products' business. Q. Explain to me why you felt that way. A. 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. Q. If your customers were required to turn to McWane or Star for domestic fittings, they might also purchase their imported fittings from them; correct? A. Some customers might choose one-stop shop, some customers might not, but it -- yes. Q. That was a risk presented to Sigma? A. That would be a risk. Q. And one of the advantages of entering into the master distributor agreement

was it resolved that risk? A. Entering into the master distribution agreement with McWane was a solution to the problem we had. Q. It enabled you to handle all of your customers needs; correct? A. It didn't close doors that I felt might possibly get closed.”) (objection omitted)); JX 688 (Rona, IHT at 218-220).).

XX. Complaint Counsel Has Not Established Consumer Injury

A. Non-domestic Fittings

585. Complaint Counsel failed to offer any evidence that any fittings customer complained that the prices for McWane, Sigma, or Star’s non-domestic fittings were too high during the alleged conspiracy.

586. Complaint Counsel failed to offer any evidence that consumers were forced to pay supra-competitive prices for McWane, Sigma, or Star’s non-domestic fittings during the alleged conspiracy.

2. McWane’s non-domestic Fittings prices did not even keep pace with inflation in 2008-2010

587. Dr. Normann observed that McWane’s non-domestic Fittings prices declined while its costs increased. (Normann, Tr. 4791-4792 (“Q. Now, did you find that McWane's raw materials costs were declining at the same steep rate as the decline in its prices? A. No. No. You know, I've said this. We'll see this in a later figure. Their costs were going up dramatically. It wasn't just McWane's. It was McWane's. It was Sigma's. It was Star's. The costs were going up dramatically. I mean, it's really -- it's very stark. They go up -- you know, essentially they almost double over the relevant time period. Q. And did you plot that out in preparing your opinion and report in this case? A. I did. Q. And is that in figure 2 of your report? A. Well, I believe it's figure 2B, so not in this figure, but there's a figure 2B. Q. All right. Now, just so we're clear on the record, by the way, on this decline in McWane's nondomestic fittings price index, what's the

magnitude of that decline in prices that you found? A. So roughly, if you look at it kind of from the mid-2007, beginning of 2008, the price decline is in the double digits percentage-wise into 2009.”).

588. Dr. Normann concluded that McWane’s falling prices in the face of rising costs was inconsistent with allegations of anticompetitive price increases. (Normann, Tr. 4796-4797 (“Q. Now, is there a conclusion you can draw from the fact that McWane's prices declined and its costs are going up? A. I think -- well, I think there's a few conclusions. Number one, obviously it's very inconsistent with allegations of anticompetitive price increases. I think what's also interesting is that if you recall, you know, when we looked at the first figure, McWane was lowering their published multipliers. You know, they want to capture share, so they were being very competitive on their pricing. You remember -- I think there's been testimony about Sigma and Star initiated or they had announced price increases. I think maybe it was Sigma first. McWane didn't follow. You know, McWane was doing their own independent pricing. They were lowering their published multipliers. Mr. Tatman has testified that they were trying to capture volume. His main concern was to push volume. Remember, in 2008 -- and I mean, I -- I shouldn't chuckle or anything. Remember what's going on in 2008. McWane was forced to close down one of their last two facilities in the United States. They had to shutter their plant because it was so unprofitable and there was so much competition going on. McWane was in a situation where they wanted to push volume both from their domestic product going into domestic and also imports but also from Xian Xian, so they were trying to push volume. This to me is behavior consistent with aggressive independent pricing.”).

589. Dr. Schumann testified that he performed no independent analysis of McWane, Sigma, and Star’ job pricing in formulating his opinions in this case. (Schumann, Tr. 4070 (“Q.

You did not do any independent measurement of any curtailment of project pricing in forming your opinions in this case, did you, sir? A. No, I did not. Q. And you didn't present any numbers to the court in your testimony; correct, sir? A. That is correct. Q. In fact, you didn't measure anywhere, in any of the work you did in this case, any actual amount of job pricing in any particular year; correct? A. That is correct.”).

590. Dr. Schumann performed no regression analysis, or any other type of quantifiable analysis, of any of McWane, Sigma, or Star's pricing data, including actual invoice prices paid by their respective customers. (Schumann, Tr. 4076-4077 (“Q. And you as all part of your work in the case that the judge asked about when you took the -- you know, before my exam started, in all your work, you didn't test, by measuring actual job pricing, whether that appearance was reality or not, did you? A. No. I did not have the data to do that.”), 4364 (“Q. I don't want to split hairs, Dr. Schumann, but I want to be clear. There's no quantification at all in your report of any reduction in job pricing, regression analysis or any other type of quantification; correct? A. There's nothing that I did up -- I reference -- well, for example, in the first quarter report. There's also the variance reports. There -- but no, I did not perform regression analysis. I did not perform statistical analysis.”)).

591. Dr. Schumann did not analyze any of the McWane, Sigma, and Star's actual invoice prices, study the job prices charged by McWane, Sigma, or Star in 2008, or otherwise quantify any alleged curtailment of job pricing in 2008. (Schumann, Tr. 4070, 4076-4077, 4142-4145 (“Q. And nowhere in your report do you analyze and report invoice prices for McWane or Sigma or Star; correct? A. That is correct. . . . Q. Dr. Schumann, I want to be clear about this. The invoice data, that's the job price; right? That's the effective multiplier that the companies charge when they sell product; right? A. Yes. Q. And that invoice data does not reflect, in a way

that you categorized, rebates, freight absorption, cash discounts or extension of credit terms or other discounts below the job price; correct? A. That is correct, yes, though -- Q. Go ahead, sir. A. Well, yeah, that is correct. It does not reflect that. Q. And one of the reasons you chose not to use the invoice data to determine whether or not there was collusive pricing was because there were too many of those other discounts; right? A. We didn't -- no. No. I mean, we couldn't link -- like rebates, we couldn't link rebates to specific sales. We couldn't look at a fitting that had a list price, that had a multiplier or implicit multiplier and -- and have any way of linking a rebate to that or a freight discount or a cash discount. But, you know, that was one part of the issue.”), 4149 (“Q. Dr. Schumann, there were price concessions, rebates, credit extension terms, freight absorption, cash discounts, price concessions that weren't in the invoice data; right, sir? A. That is my understanding. Q. And one of the reasons you chose not to use the invoice data to determine and analyze whether or not there was a collusive behavior here was because there were price concessions that were not in that data; correct, sir? A. That was one of the three reasons. It really wasn't necessarily the most important. I mean, there were like agreements for rebates and things like that, but yes, that was a problem we had with the data.”), 4153 (Q. So you don't report any actual invoice prices, you don't report any actual transaction prices that were paid by customers in your report; correct? A. We do not. We don't have transaction prices. I did not report invoice prices. Q. And you didn't create a but-for world where you report out what you believe the prices would have been for either invoice or transaction; correct, sir? A. Without having in -- transaction prices, we couldn't have even started to do that. But with the invoice data that we had, we could not construct a but-for world. And I mean, the data wasn't appropriate for that. It would have -- no. So I did not do it.”.)

592. Dr. Schumann's opinion that job discounting declined is based on Mr. Tatman's speculation in a draft internal report (which Dr. Schumann misquoted) that it "appears" that Sigma and Star have reduced job pricing. (CX 1177.)

593. CX 1177, an internal draft executive report prepared by Mr. Tatman, is a document on which Dr. Schumann relies to reach his conclusion that instances of job pricing declined in 2008. (Schumann, Tr. 4080-4081 ("Q. Dr. Schumann, let's be clear. That document, which says on its face appearance, it appears that something happened, which Mr. Tatman testified was his speculation, that's one of the documents that you cite in your PowerPoint for the conclusion that there was actually a curtailment of job pricing; isn't that right, sir? A. That is correct, that it's one of the documents that I cite. Q. And that's based on the speculation of the witness who wrote the document -- A. It's based on -- Q. -- for your conclusions, sir. A. It was based on the document."); CX 1177).

594. Dr. Schumann testified that he does not know whether CX 1177 is a draft or a final document. (Schumann, Tr. 4094-4095 ("Q. Well, do you know if this is a draft document or a final document? A. I don't recall it -- I believe it was the final document. Q. Dr. Schumann -- A. To the best of my knowledge, I thought it was the final document. Q. Sitting here today, do you know in fact know whether this is a final document or is it a draft document? A. My understanding is that it was the final document. Q. Dr. Schumann, I'm not asking for your understanding. I'm asking -- A. I don't know with a hundred percent certainty. Q. The fact is you don't know with any certainty, do you, sir? A. I had thought -- I thought this was the final document. That doesn't mean that it wasn't used in other documents. I know it was an input into the end-of-year blue book.."); CX 1177).

595. Dr. Schumann admits that, in his expert report, he misquoted a statement that Mr. Tatman made in CX 1177, by leaving out the word "appears." (Schumann, Tr. 4071 ("Q. And let's take a look at page 77 of your PowerPoint here. In fact, this is the same document. Do you see up at the top you quoted CX 1177? That's the first quarter executive report the company prepared; right, sir? A. Yeah. That's the number. Q. And you say here, "By the end of Q1 2008 McWane perceived," and then you have a quote; right, sir? A. Yes, there is a quote. Q. Yeah. And you say the level of multiplier discounting -- "the level of multiplier discounting by both Star and Sigma to have died down significantly"; right, sir? A. That's -- yes. Q. Now, that's not the actual quote in the document, is it, sir? A. I had thought it was. I -- I --"), 4073 ("Q. This quote is not accurate, is it, sir? A. My recollection is that there was a word that was inadvertently dropped. I think there may have been an "appears," but I'm not a hundred percent sure. Q. Yeah. You left the word, out of your quote, appears to have died down significantly; right, sir? A. Yes."), 4076-4077 ("Q. So you inadvertently left out the word "appears," but you do agree with me that appearances and reality are not always the same, are they, sir; right? A. That can be true. Q. And in fact, you agree with me that this is an appearance, which may or may not reflect reality, and that's what the document actually says; right, sir? A. I think it's consistent with other documents and -- but it is -- it says what it says. It says it appears. Q. Yeah. What it says, so we're clear on the record, is it's an appearance, which may or may not be reality; correct, sir? A. "Appearance" means that's how it appears. It -- I guess it's a possibility is it may not be reality. Q. And you as all part of your work in the case that the judge asked about when you took the -- you know, before my exam started, in all your work, you didn't test, by measuring actual job pricing, whether that appearance was reality or not, did you? A. No. I did not have the data to do that. Q. Now, you were here in the courtroom when Mr. Tatman testified about this particular

document and that particular language in the document, weren't you, sir? A. Yes. Q. And you were here when Mr. Tatman said he was just speculating; right? A. I heard him say that.”); CX 1177).

596. CX 622 is another document on which Dr. Schumann relied in reaching his conclusion that instance of job pricing declined in 2008. (Schumann, Tr. 4125-4126 (“Q. Now, here's another document that you relied upon for the basis for your opinion that project pricing was curtailed, and that's CX 22 -- 622; right, sir? A. Yes. Let me -- the 2009 sales meeting. Q. Can we call up CX 622. Now -- do you have that document, Dr. Schumann? A. Yes, I do. Q. Now, this document is a draft; right? A. Pardon me? Q. This is a draft. A. It may be. Yes.”); CX 622).

597. Dr. Schumann testified that he does not know whether CX 622 is a draft or a final document. (Schumann, Tr. 4128-4129 (Q. As I understand your PowerPoint, this is the slide in this document that you quote in the PowerPoint. Is that right, sir? A. I believe so. I don't have the PowerPoint in front of me, but I think that's correct. Unless it was a reference to page 4. But I think it was page 5. They're both pretty much based on the same argument. Q. Well, it's not argument. It's just a slide in a PowerPoint; right? A. Well -- I'm sorry. I didn't mean argument in the sense of controversy or arguing as much as I guess in I think in sort of a mathematical way that they're basically stating the same idea. Q. So you quote -- we have at the top of the screen, Dr. Schumann, you quote "more discipline in '08," and then that comes right off -- Q. You quote on your PowerPoint up at the top of the screen from CX 622 "more discipline," and then that comes straight off that page 5 from that document; right, sir? A. Yes, that is correct. Q. And you don't know sitting here today if the document is a draft or a final; correct? A. Pardon me? Q. You

don't know if that's a draft or a final document; right? A. I can't say for certain.”) (objections omitted); CX 622).

B. Domestic Fittings

598. Complaint Counsel failed to offer any evidence that fittings customers complained that the price of non-domestic fittings was too high during the alleged conspiracy.

599. Complaint Counsel failed to offer any evidence that consumers were forced to pay supra-competitive prices for non-domestic fittings during the alleged conspiracy.

600. Dr. Normann observed that McWane's domestic Fittings prices were essentially flat, even during the ARRA period:

“Q: All right. And so what conclusions do you then draw from the fact that McWane's domestic prices as graphed out in your Figure 17 look like they don't keep pace with their raw material costs?

A: So again, you know, remember what my, you know initial conclusions were for the pre-ARRA period. I found what I thought was strong evidence that imported product was replacing domestic....So now what I'm looking to see is was there a change during the ARRA period or potentially as a result of ARRA, you know, 2009 going forward, and there is not this significant increase in domestic prices for that ARRA period, so that to me is inconsistent that--inconsistent with the notion of ARRA granting market power for McWane.” (Normann, Tr. 4894-95)

601. Dr. Schumann testified that he did not examine or quantify alternative explanations for why Star may have missed out on some domestic sales in late 2009. (Schumann, Tr. 4386 (“Q. Dr. Schumann, my question was, you made no effort to quantify the various reasons why Star did not get orders for its domestic Fittings in the fall of 2009, did you, sir? A That is correct.”), 4379-4381 (“Q. All right. Now, this document reflects a lot of domestic bids that Star submitted that they didn't win. A. Uh-huh. Q. Because they had delays and couldn't fill the orders in time in the second half of 2009, the fall of 2009 and into early 2010. A. Well, that was when they were first getting -- trying to get started. Q. So, for example --

if we could call this up, CX 2294, Andrew. Maybe we can go to -- see, Andrew, in the left-hand column there's rows. Let's just pick a few. Let's go to row 496, which is going to be pretty far into it. Row 496? There we go. Perfect. There we go. Thanks. Do you see, Dr. Schumann, this has a job from November, late November 2009, a domestic job, it says right there in the middle in yellow, lost, lead times were too long? Do you see that? A. Yes. Q. Then we got one a little lower in row 500, November 30, so now we're after Thanksgiving, bought from Tyler because of lead times. Do you see that? A. I see that, too. Q. Do you see row 502, early December, the 11th, lost due to lead times? Do you see that, sir? A. Yes, I do. Q. If you go down to row 525, we got lost due to delivery requests? Do you see that? That's in the beginning of January 2010. Do you see that? A. That is January 2010, and I see that. Q. If we go down to 529, we see lost, beginning of January 2010, due to delivery requests; right? A. I see that line, yeah. Q. The same thing on the next line, 530, lost job, domestic job, beginning of 2010, due to delivery requirements; right? A. I see that line, yes. Q. If we go down further, 592, more jobs lost because Star didn't have product available; right? Do you see that? A. I'm not -- are these jobs lost or sales of individual parts? Q. You're the expert, sir. A. Well, as I said, I'm not particularly familiar with this document. Q. Because you didn't actually look at the company's bid records -- A. I saw documents that looked very much like this, and I may have, but I don't know as I sit here. I certainly tried to look for documents like this, but even so, I would have just been reading them as I am now and not necessarily understanding. I mean -- Q. Well, Dr. Schumann, you even interviewed Star people in preparing your opinions and report in this case; right? A. Pardon? Q. You even interviewed people from Star as part of preparing your opinions and report in this case? A. I did talk to someone from Star regarding a specific topic. It had -- wasn't related to this. At least not directly.”), 4458 (“Q. You don't know when the projects supposedly required the

products, do you, sir? A. Not as I sit here, no. Q. You don't know if Star had the product available when they were required, do you, sir? A. You know, I don't know. What I do know in terms of the requirements was that Star had told its potential customers they could fulfill orders for whatever fittings they needed. Q. Sure. But as we saw on CX 2294, they had lots and lots of jobs that they had to cancel or they lost because they couldn't fill them because they didn't have product available in 2009 going into the beginning of 2010; right, sir? A. There were orders, projects that were canceled because of that. I don't know how many "lots and lots" are and relative to what it might be. There were orders that were canceled, yes.”); CX 2294).

(b) Star was a less efficient domestic producer than McWane

602. Mr. McCutcheon testified that Star’s domestic production costs were higher than they should be because Star used third party foundries for domestic production, rather than its own foundry. (McCutcheon, Tr. 2343 (“Q. Are Star's costs higher because it's using third-party foundries? A. Higher than what? Q. Higher than they would be if you had your own foundry. A. We believe so. Yes, sir.”).).

603. Dr. Normann concluded that Star was not as efficient a competitor as McWane. (Normann, Tr. 4980-81 (“Q. And what conclusions do you draw from the fact that in many of these states Star's domestic prices are higher than McWane's? A. Again, I think it's consistent with the record, that Star was not as efficient a competitor as McWane, and that that's consistent with the notion that now selling domestic product, Star does not have the cost advantages that they had in China, for example, so they're facing a similar cost structure or higher cost structure than McWane.”).).

604. Dr. Schumann conceded that Star’s decision to rely on jobber foundries for its domestic Fittings production made it a less efficient competitor than McWane. (Schumann, Tr. 4440-4442 (Q. All right. Now, Dr. Schumann, you would agree with me that Star was not an

efficient competitor relying on jobber foundries to make its fittings; right? A. Yes. If they had had sufficient sales to support a foundry, I think they would have been much more efficient. Q. Just so we're clear, what that means is by contracting with third-party foundries to make their fittings, it was more expensive for them; right? A. That contract foundries would be more expensive than owning and controlling their own foundry. That is correct. Q. And Star decided to go that route rather than buy its own foundry or build its own foundry before the letter came out; right? A. No, that's not right. They were still looking into buying a foundry after the letter came out. Q. That's not what I asked you, sir. What I asked you was, they decided to contract with jobber foundries rather than buy or build before the letter came out. A. Before the letter came out, they -- their plan was to start with contract foundries and then have their own, and not long after the letter came out they were still looking to buy a foundry. Q. But they made the decision to buy from third-party jobber foundries, knowing they were going to be more expensive, they made that decision before the letter came out to Star; right? A. They -- I don't -- I presume they would have known about the expense. Their plan was to enter in a process which involved using contract foundries initially and then buying their plant and having their own foundry. Q. And that's a decision they made before the letter came out, to start with jobber foundries; correct, sir? A. That is correct.”.)

(c) Dr. Schumann’s opinion that Star could have offered lower domestic Fittings prices if it had purchased a domestic foundry is pure speculation

605. Star chose not to build or buy a domestic foundry because it could more quickly and cheaply increase domestic output by contracting with existing jobber domestic foundries. (Bhargava, Tr. 2989-2990 (“Q. I think you testified yesterday that as a result of the ARRA, Star decided to sell domestically produced fittings; correct? A. Yes. Q. And I think you identified three alternatives for us that Star considered. The first was to start from scratch and build its own

foundry; correct? A. Yes. Q. The second was to what I call source or use contract foundries; correct? A. Yes. Q. And the third was to buy an existing foundry; correct? A. Yes. Q. Okay. And I think you said you needed to move quickly because ARRA provided a limited window of opportunity; correct? A. Correct. Q. Okay. So from the beginning, Star ruled out starting from scratch, building from the ground up; right? A. Yes. Q. That would take too long. A. That would take too long. Q. And considered buying a foundry but ruled that out; correct? In March or April of 2009. A. We did not rule out buying a foundry. Q. You decided in March or April of 2009 not to purchase a foundry at that point; correct? A. No. We did not say that we will not purchase a foundry. What we decided was we will enter the market quickly with the contract manufacturing while we are looking for a foundry to buy. Q. Okay. And the purchasing a foundry would take a good deal longer than enter through contract manufacturing; right? A. Yes. That's correct.”).

606. Because of ARRA's short-term window of opportunity, Star studied both third-party vendors and building its own foundry. (McCutcheon, Tr. 2284-85 (“Q. What steps did Star take to investigate producing domestic fittings? What were your first steps? A. Identified what we thought the market share was of domestic fittings. Investigated buying a foundry. Investigated green fielding a foundry. Investigated using third-party vendors for our fittings. Q. Do I understand you went with third parties at least at this time for your -- let me back up. You chose to use third-party manufacturers for your domestic fittings? A. Yes, sir. Q. Why did you choose to use third-party manufacturers for your domestic fittings? A. Because it looked like it was the most cost-prudent thing to do. Q. Was there a speed factor in terms of using third-party foundries? A. Yes, sir. Q. And can you explain that? A. We felt that the stimulus was a -- going to provide more opportunity, more short-term opportunity, and we felt that we needed to have a

domestic product to the market as quickly as possible, so we simultaneously studied third-party vendors and having a foundry of our own.”).

607. Star did not buy a domestic foundry because Star did not believe it would be able to sell enough domestic fittings to sustain the foundry. (McCutcheon, Tr. 2285 (“Q. Did Star believe in 2009 that the domestic market would be large enough for two suppliers? A. Yes, sir. Q. You mentioned investigating a foundry. Why did Star -- why didn't Star buy a foundry? A. We believed at the time that we wouldn't be able to sell enough to sustain the foundry. Q. Did you have an estimate in terms of how much you would have to sell to sustain a foundry? A. Yes, sir. At the time, we believed it was I believe \$20 million worth of sales. Q. And when you say "\$20 million worth of sales," is that an annual figure? A. Yes, sir. Q. And when did you make this estimate? A. I don't recall. It would have been mid-2009 to third quarter 2009.”)).

608. Star has never operated its own Fittings foundry, whether inside or outside of the United States, before, during, or after the McWane Rebate Policy, yet has managed for years to be a viable competitor. (JX 694 (Bhutada, Dep. at 72-73 (“Q. I'm sorry, Mr. Bhutada. I was starting to ask a question about whether Star ever contemplated its own domestic foundry. A. Yes, sir. Right early on. Q. When you say early on, when would that have been? A. That is back in May, June of 2009. Q. May or June of 2009? A. Yes, sir. Q. What led to that consideration? A. We knew that to be viable competitor we had to have our own foundry where we could manufacture the substantial line of product and finish them at the same place. Q. Star has never operated a foundry before in its history. Correct? A. That is correct. Q. Was Star a viable competitor in the import market? A. Yes, sir. Q. So it became a viable competitor by sourcing from a number of different foundries. Correct? A. That is correct.”)).

APPENDIX A

WITNESS INDEX

Respondent's Trial Witnesses

Name	Identification	Transcript Pages	In Camera
Dr. Parker Normann	Respondent's Expert Witness	4713-5785	5012-5070; 5664-5783

Witnesses Appearing At Trial

Name	Company	Job Title
Bhargava, Navin	Star Pipe	Executive Vice President
Bhattacharji, Siddarth	SIGMA	Consultant, Former Executive Vice President
Brakefield, Tom	DIFRA; SIGMA	President; Former National Sales Manager
Gibbs, Roger "Eddie"	WinWholesale, Inc.	Vice President of Vendor Relations
McCutcheon, Dan	Star Pipe	President; Former Vice President of Sales
Minamyer, Matt	Star Pipe	Former National Sales Manager
Morton, Thomas	U.S. Pipe	Former Vice President of Purchasing
Normann, Dr. Parker	Edgeworth Economics	Senior Vice President; Respondent's Expert Witness
Pais, Victor	SIGMA	Former President & CEO
Pitts, Roy	Hajoca Corporation	Director of Vendor Relations
Rona, Mitchell	SIGMA	OEM Business Manager
Rybacki, Lawrence	SIGMA	President, Former Vice President of Sales and Marketing
Saha, Suvabrata "Steve"	North American Cast Iron Products, Inc.	President

Schumann, Dr. Laurence	FTC	Complaint Counsel's Expert Witness
Sheley, Dennis	Illinois Meter	President & Owner
Tatman, Rick	McWane	General Manager of Waterworks Fittings
Thees, Bill	Ferguson Enterprises, Inc.	Vice President of the Waterworks Business Group
Webb, Jerry	HD Supply Waterworks	CEO

Witnesses Deposed and/or Questioned in Investigational Hearing (And Not Appearing At Trial)

Name	Company	Job Title
Agarwal, Bharat	Serampore Industries Private Ltd. d/b/a SIP Industries	Vice President of Business Development
Alvey, Laura	McWane	Administrative Assistant to the General Manager
Backman, Alan	Backman Foundry and Machine, Inc.	Owner
Berry, Michael	Star Pipe	General Sales Manager, Former Regional Manager
Bhutada, Ramesh	Star Pipe	CEO, Chairman
Box, Stuart	SIGMA	Director of Engineering
Burns, Jerry	American Cast Iron Pipe Company	Division Sales Manager for the Ductile Iron Pipe Division
Coryn, Michael	Utility Equipment Company	President
Crawford, Gary	U.S. Pipe	Sales Director, Former Vice President of Sales
Ewing, Lee Ann	Frazier & Frazier Industries	Secretary & Treasurer
Fairbanks, Karen	The Distribution Group	Staff Member
Fairbanks, Richard	The Distribution Group	President
Frazier, Charles William	Frazier & Frazier Industries	Owner
Glidewell, David	Glidewell Specialties Foundry Co., Inc.	President & CEO
Groeniger, Michael	Groeniger & Company	President
Gupta, VJ	Frazier & Frazier Industries	Sales Manager
Haley, Richard	Sellers, Richardson, Holman & West LLP	CPA & Partner

Hall, Eddie N.	Mabry Castings, Ltd.	Sales Manager
Hays, Michael	American Cast Iron Pipe Company	Director of Supply Chain Management
Jansen, Jerry	McWane	National Sales Manager
Johnson, Wayne	Dana Kepner Company, Inc.	President
Keffer, Jim	EBAA Iron	President of the Sales Division
Kuhrts, Douglas	Griffin Pipe Products Company, Inc.	National Customer Service Manager
Leider, Leroy "Bud"	Star Pipe	General Sales Manager
Long, Thad	DIFRA; Bradley Arant Boulton Cummings LLP	Attorney; Former Partner
McCullough, Leon	McWane	Executive Vice President of Valve & Waterworks
Meyer, Mark	Metalfit, Inc.	Vice President
Morrison, Edward J.	C.I. Thornburg Co., Inc.	President
Napoli, Vince	McWane	Pricing Coordinator
Nowlin, Charles	McWane	Senior Vice President & CFO
Page, Ruffner	McWane	President
Prescott, Peter	Everett J. Prescott, Inc.	CEO
Sharda, Pawan	Star Pipe	Senior Financial Analyst
Swalley, Danny	Electrosteel USA	Business Development Manager
Teske, Thomas M.	East Jordan Iron Works	Vice President & General Manager of the Americas
Walton, Thomas	McWane	Former Senior Vice President

All Witnesses

Name	Company	Job Title
Agarwal, Bharat	Serampore Industries Private Ltd. d/b/a SIP Industries	Vice President of Business Development
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Backman, Alan	Backman Foundry and Machine, Inc.	Owner
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Crawford, Gary	U.S. Pipe	Sales Director, Former Vice President of Sales
Ewing, Lee Ann	Frazier & Frazier Industries	Secretary & Treasurer
Fairbanks, Karen	The Distribution Group	Staff Member
Fairbanks, Richard	The Distribution Group	President
Frazier, Charles William	Frazier & Frazier Industries	Owner
Gibbs, Roger "Eddie"	WinWholesale, Inc.	Vice President of Vendor Relations
Glidewell, David	Glidewell Specialties	President & CEO

	Foundry Co., Inc.	
Groeniger, Michael	Groeniger & Company	President
Gupta, VJ	Frazier & Frazier Industries	Sales Manager
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Normann, Dr. Parker	Edgeworth Economics	Senior Vice President; Respondent's Expert Witness

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Thees, Bill	Ferguson Enterprises, Inc.	Vice President of the Waterworks Business Group
Walton, Thomas	McWane	Former Senior Vice President
Webb, Jerry	HD Supply Waterworks	CEO

CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2012, I filed the foregoing document electronically using the FTC's E-Filing System. I also certify that I delivered via electronic mail a copy of the foregoing document to:

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Counsel for McWane, Inc.

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

PUBLIC
ORIGINAL



_____)
In the Matter of)

MCWANE, INC.,)
a corporation)
_____)

PUBLIC

DOCKET NO. 9351

RESPONDENT MCWANE, INC.'S
PROPOSED CONCLUSIONS OF LAW

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Dated: December 21, 2012

I. BURDEN OF PROOF

1. Complaint Counsel must prove its case under FTC Act Section 5 by “substantial evidence.” *FTC v. Cement Institute*, 333 U.S. 683, 705 (1948); *California Dental Ass’n v. FTC*, 224 F.3d 942, 957 (9th Cir. 2000); *Cinderella Career & Finishing Schools, Inc. v. FTC*, 425 F.2d 583, 592 fn.2 (D.C. Cir. 1970); *Rayex Corp. v. FTC*, 317 F.2d 290, 292 (2d Cir. 1963).

2. “Substantial evidence is more than a scintilla, and must do more than create a suspicion of the existence” of the fact to be established.” *Rayex Corp. v. FTC*, 317 F.2d 290, 292 (2d Cir. 1963).

3. To prove a violation under FTC Act Section 5 Complaint Counsel must proffer “substantial evidence” of: (1) an unfair method of competition, (2) that causes substantial injury, (3) to consumers, (4) is not reasonably avoidable by the consumers, and (5) is not outweighed by countervailing benefits to consumers or competition. (15 U.S.C. § 45(n).)

4. Sherman Act Sections 1 and 2 case law is a guide in evaluating whether Complaint Counsel has met its “substantial evidence” burden under Section 5. *See., e.g. California Dental Ass’n v. FTC*, 526 U.S. 756, 762 n.3 (1999); *Cement Institute*, 333 U.S. at 691-92 (1948).

II. McWane Did Not Constrain Price Competition, Exchange Competitively Sensitive Sales Information, or Invite its Competitors to Collude (Counts 1-3)

A. The Government Must Establish the Existence of an Agreement.

5. Section 1 of the Sherman Act prohibits contracts, combinations, and conspiracies that unreasonably restrain trade. 15 U.S.C. § 1.

6. To establish a horizontal price-fixing claim, a plaintiff must demonstrate the existence of an agreement, combination, or conspiracy among actual competitors with the

purpose or effect of “raising, depressing, fixing, pegging or stabilizing” the price of a commodity product. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223-24 (1940).

7. Section 1 does not prohibit independent decisions, “even if they lead to the same anticompetitive result as an actual agreement among market actors.” *White v. R.M. Packer Co., Inc.*, 635 F.3d 571, 575 (1st Cir. 2011) (“*White*”).

8. Because the existence of an agreement is the “very essence” of a Section 1 price-fixing claim, the plaintiff must prove that the conduct at issue resulted from an agreement, rather than the defendant’s independent decisions. *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 356 (3rd Cir. 2004) (citations omitted) (“*Flat Glass*”); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 553 (2007) (“*Twombly*”). At a minimum, this element requires “a ‘unity of purpose or a common design and understanding or meeting of minds’ or ‘conscious commitment to a common scheme.’” *Flat Glass*, 385 F.3d at 357 (citations omitted).

9. “Unilateral action, regardless of the motivation, is not a violation of Section 1.” *Burtch v. Milberg Factors, Inc.*, 662 F.3d 212, 221 (3rd Cir. 2011) (“*Burtch*”).

B. The Government Lacks Direct Evidence of an Agreement.

1. The Nature of Direct Evidence.

10. Direct evidence of an agreement to fix prices is “the most compelling means” of establishing a Section 1 claim. *See Rossi v. Standard Roofing, Inc.*, 156 F.3d 452, 465 (3rd Cir. 1998) (“*Rossi*”).

11. “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 Litigation*, 166 F.3d 112, 118 (3rd Cir. 1999) (“*Baby Food*”). *See also In re Citric Acid Lit.*, 191 F.3d 1090, 1093-94 (9th Cir. 1999) (“*Citric Acid*”).

12. Evidence demonstrating opportunities to conspire or consciously parallel pricing behavior does not constitute direct evidence of conspiracy, but is, at most, circumstantial. *See Cosmetic Gallery, Inc. v. Schoeneman Corp.*, 495 F.3d 46, 52-53 (3rd Cir. 2007) (“*Cosmetic Gallery*”)); *See also, Superior Offshore International, Inc. v. Bristow Group, Inc.*, 2012 WL 3055849, *5 (3rd Cir. July 27, 2012) (“*Superior Offshore*”) (vague statements, such as admonitions to competitors to “play by the rules,” do not constitute direct evidence).

2. The Government Concedes it Has No Direct Evidence Of An Illicit Agreement.

13. Complaint Counsel and its expert conceded that it lacks evidence “that McWane directly communicated its prices to any other DIWF manufacturer or supplier in advance of communicating them to its customers or potential customers.”

14. There is no direct evidence of an agreement to fix prices or to eliminate or reduce job pricing.

C. Circumstantial Evidence Does Not Establish McWane Had An Agreement to Fix Prices or Reduce Job Pricing.

15. To prove a case with circumstantial evidence, the Supreme Court has held that a plaintiff must not only produce evidence that reasonably tends to prove parallel conduct, it must also prove that this conduct was contrary to self interest. *Matsushita*, 475 U.S. at 588; *In re Beef Industry Antitrust Litig.*, 907 F.2d 510, 514 (5th Cir. 1990).

16. “When an antitrust plaintiff relies on circumstantial evidence of conscious parallelism to prove a § 1 claim, he must first demonstrate that the defendants’ actions were parallel. . . . The cattlemen have not done this.”).

17. Courts are cautious about inferring antitrust conspiracies from circumstantial evidence, because such an inference could “chill the very conduct the antitrust laws are designed

to protect,” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986) (“*Matsushita*”).

18. According to the well-established “theory of interdependence,” any rational firm in a oligopolistic market, such as DIWF, must take into account the anticipated reaction of its competitors when making its own pricing decisions. *Flat Glass*, 385 F.3d at 359.

19. In a concentrated market like DIWF, parallel pricing by competitors “can be a necessary fact of life but be the result of independent pricing decisions” rather than illicit agreement. *Baby Food*, 166 F.3d at 121-22.

20. Even if Complaint Counsel was able show parallel behavior - - which they did not - - “follow-the-leader” pricing is normal oligopoly behavior and is perfectly lawful. *Blomkest Fertilizer*, 203 F.3d at 1032-33 (affirming summary judgment because “[e]vidence that a business consciously met the pricing of its competitors does not prove a violation of the antitrust laws”); *Reserve Supply Corp. v. Owens-Corning Fiberglas Corp.*, 971 F.2d 37, 50 (7th Cir. 1992) (“the 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”); *Clamp-All Corp. v. Cast Iron Soil Pipe Inst.*, 851 F.2d 478, 484 (1st Cir. 1988) (“One does not need an agreement to bring about this kind of follow-the-leader effect in a concentrated industry”); *In re Citric Acid Litigation*, 191 F.3d 1090, 1102 (9th Cir. 1999) (“A section 1 violation cannot, however, be inferred from parallel pricing alone, nor from an industry’s follow-the-leader pricing strategy”) (internal citations omitted).

21. Because interdependent pricing behavior is not an “agreement” as defined by the Sherman Act, such conscious parallelism is not prohibited under the antitrust laws, despite its “noncompetitive nature.” *Id.* at 359-60 (citations omitted). *See also Citric Acid*, 191 F.3d at

1102-03; *Burtch*, 662 F.3d at 226-27; *In re Travel Agent Commission Antitrust Litg.*, 583 F.3d 896, 903 (6th Cir. 2009) (“*Travel Agent*”). See also *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993) (“*Brooke Group*”); *Twombly*, 550 U.S. at 553-54, 556-57.

22. Such conscious parallelism, while *possibly* indicative of a conspiracy, is “just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market.” *Burtch*, 662 F.3d at 227 (quoting *Twombly*, 550 U.S. at 554).

23. As a result of the inherent economic realities of oligopolistic markets, courts require a plaintiff relying on evidence of conscious parallelism to establish that certain “plus factors” also exist. *Flat Glass*, 385 F.3d at 360.

24. Requiring plaintiffs to meet this heightened standard of proof “tends to ensure that courts punish ‘concerted action’ – an actual agreement – instead of the ‘unilateral, independent conduct of competitors.’” *Id.* (citing *Baby Food*, 166 F.3d at 122); see also *Intervest*, 340 F.3d at 159-60 (plaintiff relying on circumstantial evidence must meet heightened burden of proof).

25. Thus, to distinguish between legitimate parallel conduct and an illegal price-fixing scheme, an antitrust plaintiff must present “plus factor” evidence that “tends to exclude the possibility” that the defendant acted independently of its competitors. *Matsushita*, 475 U.S. at 588; *Flat Glass*, 385 F.3d at 360

26. Plus factors include: (i) a motive to conspire; (ii) noncompetitive behavior contrary to the defendant’s own economic self-interest; and (iii) hallmarks of traditional conspiracy. *Baby Food*, 166 F.3d at 121-22.

27. The overwhelming evidence is that McWane, lacking any motive to conspire with Star and Sigma, acted independently and in its own economic self-interest.

28. The government has failed to establish the existence of any plus factors.

1. McWane lacked motive or incentive to collude, no conspiracy can be inferred.

29. The government has failed to adduce any evidence to establish the plus factor of motive in this case.

30. “An inference of conspiracy is impermissible if the defendants ‘had no rational economic motive to conspire, and if their conduct is consistent with other, equally plausible explanations.’ *Cohlma v. St. John Medical Center*, 693 F.3d 1269, 1284 (10th Cir. 2012) (citing *Matsushita*, 475 U.S. at 596). *See also In re Ins. Brokerage Antitrust Lit.*, 618 F.3d 300, 322 n. 20 (3rd Cir. 2010); *Southway Theatres v. Georgia Theatre Co.*, 672 F.2d 485, 494 (5th Cir. Unit B 1982).

31. McWane stood to gain the most by charting its own independent course to lower prices in order to gain share from its competitors, move volume, and significantly reduce its inventory. McWane stood to gain nothing by colluding with Star and Sigma, because such collusion would only have “locked in” McWane’s severely eroded and unsustainably low share of the Fittings market, which led to the idling and ultimate closure of one of McWane’s two domestic manufacturing facilities and the lay off of hundreds of workers. McWane’s legitimate business justifications are the more plausible explanation for its pricing actions than the alleged conspiracy posited by the government.

32. Because McWane lacked a rational business motive to enter an unlawful conspiracy, an inference of conspiracy is unwarranted. *See Matsushita*, 475 U.S. at 596-97 (if defendant had no rational economic motive to conspire, or if colluding would offend the

defendant's self interest, then conspiracy should not be inferred from ambiguous evidence or mere parallelism). *See also Abraham v. Intermountain Health Care, Inc.*, 461 F.3d 1249, 1257-58 (10th Cir. 2006) ("the antitrust defendants' economic motive is highly relevant;" if the defendant has no economic motive to conspire, an inference of conspiracy is not proper); *Burtch*, 662 F.3d at 228.

2. Because McWane refused to act contrary to its own economic self-interest, a conspiracy cannot be inferred.

33. Complaint Counsel has failed to establish the "plus factor" of noncompetitive behavior, because McWane's pricing actions were completely consistent with its own legitimate, economic self-interest: namely, to increase sales volume, reduce excess inventory, keep its foundries operational, and ultimately increase profits. *See Burtch*, 662 F.3d at 229 (citing *Baby Food*, 166 F.3d at 137) (all businesses have a "legitimate understandable motive to increase profits" and such motive is not evidence of a "plus factor").

34. The alleged conspiracy would have been directly contrary to McWane's legitimate, economic self-interest. As stated, a conspiracy would have locked McWane into an unsustainable share of the Fittings market, whereas undercutting competition to drive sales and therefore volumes, and reduce inventory, was in McWane's economic self-interest.

35. The conspiracy inference Complaint Counsel has asked this Court to draw is not only not the most likely inference to be drawn from the evidence, it is actually the *least likely* inference to be drawn from the evidence and, as a result, the requested conspiracy inference should be rejected. *See In re Ins. Brokerage Antitrust Lit.*, 618 F.3d at 322 n. 20, 330 (evidence equally consistent with unconcerted action does not support an inference of conspiracy).

3. The Government has Failed to Establish Hallmarks of Traditional Conspiracy involving McWane.

36. Ordinarily in an oligopolistic market, motive and noncompetitive behavior are present. *See Flat Glass*, 385 F.3d at 360.

37. Even when the first two plus factors are present, a plaintiff also must present substantial evidence of “customary indications of traditional conspiracy,” which “tends to exclude the possibility” that the defendant acted independently of its competitors. *Matsushita*, 475 U.S. at 588; *Flat Glass*, 385 F.3d at 360

38. Customary indications of traditional conspiracy can include ambiguous participant admissions, solicitations of agreement, pricing or output communications between parties, and parallelism that is difficult to explain absent an agreement. VI Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1434b, at 243 (2d ed. 2003); *See Matsushita*, 475 U.S. at 588; *Flat Glass*, 385 F.3d at 360.

39. Where a defendant’s actions are equally consistent with a plausible, non-collusive explanation, as with a conspiracy, the defendant is entitled to judgment in its favor. *See Burtch*, 662 F.3d at 228; *In re Ins. Brokerage Antitrust Lit.*, 618 F.3d at 330. In this case, McWane’s actions are much *more* consistent with a plausible, non-collusive explanation than with the conspiracy alleged by the government.

40. Because courts recognize that it is perfectly legitimate for a firm to receive its competitors’ pricing information from customers, *Citric Acid*, 191 F.3d at 1103, the fact that McWane, Sigma, and Star each came to possess copies of each other’s customer pricing letters does not support an inference of a conspiracy. *See Baby Food*, 166 F.3d at 126.

41. In an oligopolistic market like fittings, a competitor’s decision to follow an industry leader’s price increase is legitimate, *Baby Food*, 166 F.3d at 128, and it is well

established that such “bare ‘conscious parallelism’ is ‘not in itself unlawful.’” *White*, 635 F.3d at 575 (quoting *Brooke Group Ltd.*, 509 U.S. at 27)).

42. To distinguish a tacit price-fixing agreement from legitimate conscious parallelism, Complaint Counsel must proffer evidence of “uniform behavior among competitors, preceded by conversations implying that later uniformity might prove desirable or accompanied by other conduct that in context suggests that each competitor failed to make an independent decision.” *White*, 635 F.3d at 576.

43. Courts have held that evidence of “opportunity to conspire” is insufficient to infer an antitrust conspiracy. *Travel Agent*, 583 F.3d at 905; *Cosmetic Gallery*, 495 F.3d at 53.

44. It is well-established that competitor communications alone are insufficient evidence of a price-fixing conspiracy. *White*, 635 F.3d at 583-84. *See also Baby Food*, 166 F.3d at 133 (competitors’ “chit chat” and “chance meetings” do not constitute plus factors); Appendix of Horizontal Cases.

45. On the record before this Court, as Complaint Counsel is “[f]acing the sworn denial of the existence of conspiracy, it [is] up to plaintiff to produce *significant probative evidence*” that a conspiracy existed, even to avoid summary judgment, let alone judgment after a full-blown trial. *City of Moundridge v. Exxon Mobil Corp.*, 429 F. Supp. 2d 117, 130 (D.D.C. 2006) (emphasis added) (citation omitted).

46. A “few scattered communications” and other evidence “falls far short” of overcoming defendants’ sworn denials. *City of Moundridge v. Exxon Mobil Corp.*, 409 Fed.Appx. 362, 364 (D.C. Cir. 2011); *see also Superior Offshore*, 2012 WL 3055849, *7 (statement that “everyone more or less agreed to the necessity of a more or less equal rate hike for everyone” insufficient).

47. Complaint Counsel must prove that any alleged exchange of pricing information actually made an impact on pricing decisions. *Id.* at 369; *Baby Food*, 166 F.3d at 125. Complaint Counsel has failed to do so. Complaint Counsel established no evidence if an exchange of price information beyond normal pricing letters to customers.

48. Complaint Counsel has thus failed to meet its burden of presenting evidence which tends to exclude the possibility that insert legal cite/quote.

D. The Short-Lived Trade Association the Ductile Iron Fittings Research Association (DIFRA) Did Not Facilitate Price Coordination

49. It is well established that legitimate trade associations are perfectly legal. *Citric Acid*, 191 F.3d at 1097-98. Courts have also rejected any antitrust liability premised upon the theory that a company's decision to participate in a trade association that gathers and disseminates aggregated tons-shipped data somehow "facilitated" price collusion. *Williamson Oil*, 346 F.3d at 1313 ("exchange [of] information relating to sales . . . does not tend to exclude the possibility of independent action or to establish anticompetitive collusion"). Even if DIFRA had gathered pricing information (which it did not), it is well-settled that "[g]athering information about pricing and competition in the industry is standard fare for trade associations. If we allowed conspiracy to be inferred from such activities alone, we would have to allow an inference of conspiracy whenever a trade association took almost any action." *Citric Acid*, 191 F.3d at 1097-98.

50. As DIFRA did not disseminate pricing data of its members but rather, only historic, aggregated tons-shipped data, McWane's participation therein is entirely lawful. *Williamson Oil*, 346 F.3d at 1313.

E. Complaint Counsel Has No Evidence of Price-Signaling.

51. Count Three of the Complaint alleges that McWane, through “price signaling” and other unilateral actions, invited its competitors to collude to restrain price competition.

52. Because the existence of an actual agreement is the essence of a Sherman Act § 1 claim, one firm’s “price signal” or “invitation to collude” is not actionable under the antitrust laws. *See Twombly*, 550 U.S. at 553.

53. Absent proof that such unilateral actions actually harmed competition, neither are they actionable under Section 5 of the FTC Act. *See Boise Cascade Corp. v. FTC*, 637 F.2d 573, 581-82 (9th Cir. 1980).

54. In an oligopolistic industry, even proof that a firm’s conduct reduced competition is not sufficient to establish a violation of Section 5. *E.I. DuPont de Nemours & Co. v. FTC*, 729 F.2d 128, 137-40 (2nd Cir. 1984).

55. Labeling an oligopolist’s pricing changes as “price signals” does not convert them into “unfair competition.” *Id.* at 139.

56. Instead, Complaint Counsel must prove that indicia of oppressiveness existed, such as (i) evidence of the defendant’s anticompetitive intent; or (ii) the absence of legitimate business justifications for the defendant’s actions. *Id.* at 139.

57. Complaint Counsel failed to meet its burden regarding McWane’s alleged intent and lack of legitimate business justification. Moreover, the overwhelming evidence establishes that McWane lacked anticompetitive intent and had legitimate business justifications for its actions.

II. McWane Did not Monopolize, Attempt to Monopolize, or Conspire to Monopolize the Alleged Domestic Fittings Market (Counts 5-7)

A. Standard of Proof

58. Complaint Counsel’s Section 5 claims alleging that McWane monopolized, attempted to monopolize, or conspired to monopolize the so-called domestic fittings market must meet the same burden of proof as Sherman Act Section 2 claims. *See, e.g. FTC v. Cement Institute*, 333 U.S. 683, 691-92 (1948).

59. Section 2 of the Sherman Act prohibits a firm from monopolizing, attempting to monopolize, or conspiring to monopolize the relevant market. 15 U.S.C. § 2.

60. “The purpose of the Act is not to protect businesses from the workings of the market; it is to protect the public from the failure of the market. The law directs itself not against conduct which is competitive, *even severely so*, but against conduct which unfairly tends to destroy competition itself.” *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993) (emphasis supplied).

61. Because “[i]t is sometimes difficult to distinguish robust competition from conduct with long-term anticompetitive effects,” federal courts have been careful to avoid construing Section 2 in a way that would chill, rather than foster, competition. *Spectrum Sports*, 506 U.S. at 458-59.

62. The Supreme Court has made clear that: “[t]he mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices – at least for a short period – is what attracts ‘business acumen’ in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct.” *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) (“*Verizon*”). *See also United States v. Microsoft Corp.*,

253 F.3d 34, 51 (D.C. Cir. 2001) (“merely possessing monopoly power is not itself an antitrust violation”).

63. Acquiring or maintaining monopoly power through “growth or development as a consequence of a superior product, business acumen, or historic accident” is not a violation of Section 2. *Verizon*, 540 U.S. at 407 (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966)).

64. McWane’s share of the Fittings market is not the result of willful misconduct, but of its own business acumen and even historic accident – i.e. the exit of other domestic DIWF manufacturers from an unprofitable industry in the wake of a flood of cheap imports. Thus, Complaint Counsel must establish not only that McWane possessed monopoly power in the relevant market, but also that it willfully acquired or maintained that power through anticompetitive conduct. *See Verizon*, 540 U.S. at 407.

65. Because Complaint Counsel cannot meet this burden, McWane is entitled to judgment in its favor on Counts Five through Seven of the Complaint, and Count Four to the extent it is based on monopoly.

B. McWane Lacked Market Power.

66. McWane’s market share does not rise to the level of “monopoly power.” *See Barr Laboratories, Inc. v. Abbott Laboratories*, 978 F.2d 98, 112-13 (3rd Cir. 1992) (market share of 50% did not establish monopoly power). As numerous witnesses confirmed at trial, both before ARRA and after ARRA, domestic fittings comprise only about 15-20% of the fittings market.

67. “Monopoly power” is “the ability to (1) 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, 226-27 (2nd Cir. 1999) (italics in original, bold supplied).

68. Large market share does not conclusively establish monopoly power. *See, e.g., Tops Markets, Inc. v. Quality Markets, Inc.*, 142 F.3d 90, 99 (2nd Cir. 1998) (70% share); *Epicenter Recognition, Inc. v. Jostens, Inc.*, 81 Fed.App. 910, 911-12 (9th Cir. 2003) (80% share).

69. If a defendant with large market share is unable to control prices or exclude competitors, then it is not a monopoly. *Tops Markets*, 142 F.3d at 99; *see also Metro Mobile CTS, Inc. v. NewVector Comms., Inc.*, 892 F.2d 62, 63 (9th Cir. 1989) (“*Metro Mobile*”) (a defendant’s possession of even 100% market share does not necessarily establish defendant has power to charge monopoly prices or control output); *Oahu Gas Serv., Inc. v. Pacific Resources, Inc.*, 838 F.2d 360, 366 (9th Cir. 1988) (“*Oahu Gas*”) (a high market share will not raise an inference of monopoly power in a market with low entry barriers or other evidence of a defendant’s inability to control prices or exclude competitors).

70. The ability to maintain prices above a competitive level “for an extended period” is a key element of monopoly power. *Rebel Oil Co., Inc. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995) (“*Rebel Oil*”).

71. Where barriers to entry¹ into a market are low, a defendant’s market power is often much less than its market share would seem to indicate. *Moeckler v. Honeywell International, Inc.*, 144 F.Supp.2d 1291, 1308 (M.D.Fla. 2001).

¹ Barriers to entry are additional long-run costs that must be incurred by new entrants but not by incumbent competitors, or “factors in the market that deter entry while permitting incumbent firms to earn monopoly returns.” *Rebel Oil*, 51 F.3d at 1439. Entry barriers are typically legal licensing requirements, control of an essential or superior resource, entrenched buyer preferences for established brands, capital market evaluations which impose higher capital costs on new entrants, and economies of scale. *Id.* To support a finding of monopoly power, entry barriers must be high enough to constrain the normal operation of the market to the extent that natural market forces cannot self-correct the market. *Id.*

72. “Market share reflects current sales, but today’s sales do not always indicate power over sales and price tomorrow.” *Ball Memorial Hospital v. Mut. Hospital Ins., Inc.*, 784 F.2d 1325, 1336 (7th Cir. 1986); *see also Oahu Gas*, 838 F.2d at 366 (a firm with a high market share may be able to exert market power in the short run, but substantial market power can persist only if there are significant and continuing barriers to entry).

73. The evidence demonstrates that McWane lacks such power.

C. McWane’s September 2009 Rebate Policy Did Not Exclude Star and is Pro-competitive.

74. Even if Complaint Counsel could establish that domestic DIWF is a separate relevant market in which McWane has monopoly power (which it cannot), McWane is nevertheless entitled to judgment in its favor because there is no evidence that McWane engaged in anticompetitive conduct to acquire or maintain monopoly power. *See Verizon*, 540 U.S. at 407.

75. Complaint Counsel alleges two instances of supposed anticompetitive conduct: McWane’s September 2009 Rebate Policy (“Rebate Policy”) and McWane’s Master Distributorship Agreement with Sigma (“MDA”). both are pro-competitive.

1. The Rebate Policy is Presumptively Legal

76. “As a general rule, businesses are free to choose the parties with whom they will deal, as well as the prices, terms, and conditions of that dealing.” *Pacific Bell Tel. Co. v. Linkline Comm., Inc.*, 555 U.S. 438, 448 (2009).

77. The rebates referenced in the Rebate Policy are customer discounts. Because discounts are beneficial to consumers, “price cutting is a practice the antitrust laws aim to promote.” *Cascade Health Solutions v. Peacehealth*, 515 F.3d 883, 896 (9th Cir. 2008); *see*

Nicsand, Inc. v. 3M Co., 507 F.3d 442, 452 (6th Cir. 2007) (“[c]utting prices in order to increase business often is the very essence of competition”).

78. Discounted prices that remain above a firm’s average variable cost are presumptively legal, because a firm’s ability to offer above cost discounts represents competition on the merits. *Concord Boat v. Brunswick Boat Corp.*, 207 F.3d 1039, 1061 (8th Cir. 2000) (“*Concord Boat*”).

79. Too much judicial oversight of discounting creates “intolerable risks of chilling legitimate price cutting.” *Id.* at 1061 (quoting *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 223 (1993)). See also *Southeast Missouri Hosp. v. C.R. Bard, Inc.*, 642 F. 3d 608, 623 (8th Cir. 2011) (plaintiff must overcome a strong presumption of legality where defendant’s discounted prices are above its average variable cost).

80. There is no evidence that the customer discounts McWane offered under its Rebate Policy were below its average variable cost. See *Safeway, Inc. v. Abbott Laboratories*, 761 F.Supp.2d 874, 898 (N.D.Cal. 2011) (granting summary judgment for defendant on predatory pricing monopoly and attempted monopoly claims, where plaintiff failed to present evidence that defendant priced below cost).

81. A defendant’s above-cost customer discounts are presumed legal even if those discounts are offered under an exclusive agreement. See, e.g., *Cascade Health Solutions v. Peacehealth*, 515 F.3d 883, 903 (9th Cir. 2008); *Concord Boat*, 207 F.3d at 1061; *Nicsand*, 507 F.3d at 451-52, 457.

82. This presumption of legality even applies where the defendant has a supermajority share of the relevant market, provided the exclusive agreement is terminable at will and

on short notice. *Epicenter Recognition, Inc. v. Jostens, Inc.*, 81 Fed.App. 910, 911-12 (9th Cir. 2003).

83. McWane's Rebate Policy is not only terminable at will and on short notice, it is terminable *at any time*, because it is not a legally enforceable contract or agreement.

84. The possibility that the Rebate Policy increased Star's costs is of no consequence, because the antitrust laws are designed to protect *competition*, not competitors. *Bacchus Inds., Inc. v. Arvin Inds., Inc.*, 939 F.2d 887, 894 (10th Cir. 1991) (citing *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488, 97 S.Ct. 690, 697, 50 L.Ed.2d 701 (1977)) ("Whether or not a practice violates the antitrust laws is determined by its effect on competition and not its effect on an individual competitor.")

85. Although conduct that eliminates rivals reduces competition, "reduction of competition does not invoke the Sherman Act until it harms consumer welfare." *Rebel Oil*, 51 F.3d at 1433.

86. As one circuit court put it: "cutthroat competition is a term of praise rather than condemnation. . . consumers gain when firms try to 'kill' the competition and take as much business as they can." *R.J. Reynolds Tobacco Co. v. Cigarettes Cheaper*, 462 F.3d 690, 696 (7th Cir. 2006) (citations omitted).

2. Star's Successful Entry as a Domestic Fittings Supplier Refutes any Inference of Monopoly Power.

87. The trial evidence proves that Star quickly became a supplier of domestic fittings within months of ARRA's passage and dramatically increased its domestic fittings sales.

88. These facts establish that the Rebate Policy is not anticompetitive. *See, e.g., Omega Environmental*, 127 F.3d at 1164 ("actual entry and expansion" of competitor demonstrated that the defendant's policy did not deter entry into the relevant market); *Sterling*

Merchandising, 656 F.3d at 126 (attempted monopolization claim “presumptively implausible where the challenged conduct has been in place for at least two years and the market remains competitive, as evidenced by ongoing entry, profitability of rivals, and stability of their aggregate market share.”)

89. The allegation that Star did not increase its domestic fittings sales as much or as quickly as it would have preferred does not support a monopoly claims or prove that the Rebate Policy is anticompetitive. *See, e.g., Roland Machinery*, 749 F.2d at 394-95; *Sterling Merchandising*, 656 F.3d at 123 n.5.

90. First, the antitrust laws are designed to protect competition, not competitors. *Brunswick Corp.*, 429 U.S. at 488.

91. Second, factors other than McWane’s Policy explain why Star may not have increased domestic fittings sales as much as it would have liked, including Star’s own reputation, distributors’ lack of confidence in Star, and Star’s own delivery and inventory issues.

92. It is well recognized that “it is sometimes difficult to distinguish robust competition from competition with long-run anticompetitive effects.” *Arther S. Langenderfer, Inc. v. S.E. Johnson Co.*, 917 F.2d 1413, 1433 (Sixth Cir. 1990).

93. Ultimately, by pushing Star to develop a full line of domestic fittings - rather than merely the most commonly used fittings - in order to compete most effectively with McWane, the Rebate Policy had a pro-competitive purpose.

3. The Rebate Policy did Not Cause Anticompetitive Effects.

94. Because the Rebate Policy is not a contract, it is less restrictive than most of the exclusive agreements and arrangements found to be perfectly legal by the courts.

95. Even if the Rebate Policy were a legally enforceable contract, it is well settled that exclusive contracts can have legitimate economic benefits, and must therefore be evaluated in accordance with the rule of reason. *Stop & Shop*, 373 F.3d at 65-66; *Omega Environmental*, 127 F.3d at 1162; *Roland Machinery*, 749 F.2d at 395.

96. Under the rule of reason, Complaint Counsel must prove that the Rebate Policy caused anti-competitive consequences that outweigh its pro-competitive benefits. *Stop & Shop*, 373 F.3d at 65-66.

97. Anti-competitive consequences would be a reduction in domestic DIWF output or a supracompetitive rise in domestic DIWF prices. *See CDC Technologies*, 186 F.3d at 80-81. Evidence that a competitor such as Star may have been harmed is insufficient. *See Dentsply*, 399 F.3d at 187; *Stop & Shop*, 373 F.3d at 65-66.

98. Complaint Counsel presented no evidence that the Rebate Policy caused domestic DIWF output to fall.

99. To the contrary, the evidence is that domestic DIWF output increased.

100. Complaint Counsel presented no evidence that the Rebate Policy caused the price of domestic DIWF to rise to supracompetitive levels.

101. To the contrary, the evidence is that domestic DIWF prices did not keep pace with inflation in 2009-2010.

D. The MDA Did Not Foreclose Sigma as a Competitor and Was Pro-competitive.

102. To succeed on its claims relating to the MDA, Complaint Counsel must prove that – as of September 2009 when the MDA was executed - Sigma was prepared and intended to enter the domestic fittings market. *See Gas Utilities Co. of Alabama, Inc. v. Southern Natural Gas Co.*, 99 6 F.2d 282, 283 (11th Cir. 1993) (“Inquiry into procedures is insufficient to

establish preparedness . . . party must take some affirmative step to enter”). To meet this burden, Complaint Counsel must prove that Sigma had secured financing and consummated contracts to supply domestic Fittings. *See id.* Evidence that Sigma may have had access to financing in the abstract is not sufficient. *Id.*; *see also Case Cable Holdings of Ga., Inc. v. Home Video, Inc.*, 825 F.2d 1559, 1562 (11th Cir. 1987) (requiring “an intention to enter the business” and a “showing of preparedness”); *Sunbeam Television Corp., v. Nielsen Media Research, Inc.*, 136 F.Supp.2d 1341, 1354 (S.D. Fla. 2011) (“a would-be purchaser suing an incumbent monopolist for excluding a potential competitor . . . must prove the excluded firm was willing and able to supply it but for the incumbent firm’s exclusionary conduct”).

103. As Complaint Counsel failed to offer any proof that Sigma was prepared to and intended to enter domestic production and, in fact the evidence unequivocally established that Sigma had taken no concrete steps to produce domestic fittings, liability cannot be founded on the MDA.

E. McWane Is Entitled to Judgment in Its Favor on the Attempted Monopolization and Conspiracy to Monopolize Claims.

104. For all of the reasons Complaint Counsel’s monopoly claims fail, as set forth above, its attempted monopoly and conspiracy to monopolize claims also fail. These two claims also fail for the independent reasons set forth below.

1. Attempted Monopolization

105. To establish an attempted monopoly claim, a plaintiff must prove that the defendant possessed the specific intent to achieve monopoly power by predatory or exclusionary conduct; that the defendant in fact engaged in such anticompetitive conduct; and that a dangerous probability existed that the defendant might have succeeded in its attempt to achieve monopoly power. *U.S. Anchor Mfg. Inc. v. Rule Inds., Inc.*, 7 F.3d 986, 993 (11th Cir. 1993).

106. With regard to the specific intent element, the desire to maintain or increase one's market share is not in itself an antitrust violation. *Oahu Gas*, 838 F.2d at 368.

107. For a claim of attempted monopolization, even "[d]irect evidence of intent to vanquish a rival in an honest competitive struggle cannot help to establish an antitrust violation. It must also be shown that the defendant sought victory through unfair or predatory means." *William Inglis & Sons Baking Co. v. ITT Continental Baking Co., Inc.*, 668 F.2d 1014, 1028 (9th Cir. 1982).

108. Because Complaint Counsel has failed to establish that McWane engaged in unfair or predatory conduct. McWane is entitled to judgment in its favor on Count Seven of the Complaint.

2. Conspiracy to Monopolize

109. To establish conspiracy to monopolize, a plaintiff must prove: (i) the existence of a conspiracy to monopolize; (ii) overt acts done in furtherance of the conspiracy; (3) an effect upon an appreciable amount of interstate commerce; and (4) a specific intent to monopolize. *Lantec, Inc. v. Novell, Inc.*, 306 F.3d 1003, 1028 (10th Cir. 2002).

110. Conduct as consistent with permissible competition as with illegal conspiracy does not support an inference of antitrust conspiracy. *Id.* at 1030.

111. Thus, Complaint Counsel must prove that *both* McWane *and* Sigma had a specific intent to endow McWane with monopoly power. *ID Security Sys. Canada, Inc. v. Checkpoint Sys., Inc.*, 249 F.Supp.2d 622, 660-61 (E.D.Pa. 2003).

112. Proof that McWane and Sigma shared an intent to prevail over rivals or to improve market position is insufficient; the shared intent must have been to make McWane a monopolist. *Id.*

113. Further, even if Complaint Counsel could establish that McWane had an intent to achieve a monopoly (which it cannot), Complaint Counsel has no evidence that Sigma shared the same intent.

114. To the contrary, Sigma's focus in signing the MDA was on keeping its own customers happy and providing domestic DIWF to those customers when needed, not on Star.

115. Sigma perceived that if it was unable to supply domestic DIWF to its customers, it might also lose some portion of its non-domestic business with those customers.

116. Thus, McWane is entitled to judgment in its favor on Count Five of the Complaint *See Belfiore v. The New York Times Co.*, 826 F.2d 177,183 (2nd Cir. 1987) (no conspiracy where plaintiff failed to prove that alleged co-conspirator shared intent to make primary conspirator a monopoly).

III. The MDA Was Not a Restraint of Trade in Violation of Section 5 (Count 4)

117. Count Four of the Complaint consists of a bare, conclusory allegation that the MDA unreasonably restrains trade and constitutes an unfair method of competition in violation of Section 5.

118. As established in Section above, the MDA did not violate Section 2 of the Sherman Act, and was actually procompetitive.

119. Complaint Counsel has not presented any other evidence of any other manner in which the MDA has allegedly restrained trade.

120. Moreover, it is well established that vertical agreements such as the MDA can be procompetitive. *See Brantley*, 675 F.3d at 1198, 1202.

121. Without more, even evidence that such an agreement increases consumer prices or reduces consumer choice is not sufficient to establish an antitrust violation. *Id.* at 1202. Therefore, McWane is entitled to judgment in its favor on Count Four.

IV. DR. SCHUMANN’S OPINIONS ARE LEGALLY FLAWED AND SHOULD BE IGNORED

122. Dr. Schumann did not quantify or otherwise provide any economic analyses demonstrating that imported Fittings prices would have been lower but-for the alleged conduct in 2008, nor that domestic Fittings prices would have been lower but-for the rebate letter or the MDA. *St. Francis Medical Center v. C.R. Bard, Inc.*, 657 F.Supp.2d 1069, 1102-03 (E.D. Mo. 2009) (a manufacturer’s rebate policy was not anticompetitive where there was no evidence that it led to higher prices or that customers who bought products in various categories under the policy did so unwillingly). His opinion was nothing more than assumption and speculation. That is not enough. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 579-80 (1993) (untestable say-so is not reliable evidence at trial); *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1977) (“Nothing . . . requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert”); *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 242 (1993) (“when indisputable record facts contradict or otherwise render the opinion unreasonable, it cannot support a jury’s verdict.”). As such, the Court should not consider any of Dr. Schumann’s opinions.

V. THE GOVERNMENT IS NOT ENTITLED TO ANY REMEDY

123. The proposed remedy should be denied because there was no proof at trial of any ongoing actual or threatened injury to competition or consumers.

124. Federal judicial power is limited by Article III of the Constitution to live “Cases” or “Controversies.”

125. Courts cannot grant injunctions unless a plaintiff shows ongoing or imminent harm. The Supreme Court has repeatedly denied injunctive relief to plaintiffs, like Complaint Counsel here, who cannot meet that proof.

126. The plaintiff “must show that he is under threat of suffering ‘injury in fact’ that is *concrete and particularized*” and “the threat must be actual and imminent, not conjectural or hypothetical[.]” *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009).

127. A plaintiff, like Complaint Counsel here, that fails to meet these requirements is not entitled to injunctive relief. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2559-60 (2011) (“plaintiffs no longer employed [by Wal-Mart] lack standing to seek injunctive and declaratory relief against its employment practices”); *City of L.A. v. Lyons*, 461 U.S. 95, 105 (1983) (past injury at hands of police did not entitle plaintiff to enjoin future police practices).

128. The mere possibility that past conduct might occur again is insufficient. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008); *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006)

129. It is undisputed that the conduct that is alleged to be unlawful in the Complaint has long since ended. Complaint Counsel’s own expert testified that the alleged conspiracy ended over four years ago in late 2008, and has suggested no conspiratorial conduct beyond June 2010. Likewise, it is undisputed that McWane’s 2009 Rebate Policy is terminated in early 2010 and is no longer in effect. Finally, the undisputed evidence also establishes that the MDA executed by McWane and Sigma was terminated in 2010. Thus, there is no possibility that the challenged conduct could reoccur.

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CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2012, I filed the foregoing document electronically using the FTC's E-Filing System. I also certify that I delivered via electronic mail a copy of the foregoing document to:

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