UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

	)	**PUBLIC**
In the Matter of	)	
	)	
McWANE, INC.,	)	DOCKET NO. 9351
Respondent.	)	
	)	

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I. INTRODUCTION

McWane, Inc. violated Section 5 of the FTC Act when it engaged in a series of illegal efforts to protect and increase the profitability of its Tyler/Union division, which sells Fittings. Fittings are a commodity product and all three major Fittings suppliers offer largely identical published prices. Project Pricing, or individually negotiated discounts on Fittings for specific waterworks projects, is the main form of price competition among Fittings suppliers. As the economy declined in 2007 and the demand for Fittings dropped, Project Pricing predictably prevailed and profits fell. McWane hatched a Plan whereby Star, Sigma and McWane would stem this decline by agreeing to stabilize Fittings prices. They agreed to curtail Project Pricing and increase price transparency.

When a government program designed to resurrect the economy in early 2009 offered McWane a windfall in the Domestic Fittings market, where it was the only manufacturer, McWane sought to protect its monopoly from potential competitors, Sigma and Star. McWane first entered into an agreement with Sigma, the "MDA," whereby Sigma agreed to cede the Domestic Fittings market to McWane in exchange for distributing McWane-branded Domestic Fittings. McWane then implemented an "all or nothing" exclusive dealing policy that threatened to cut off all access to McWane's Domestic Fittings if Distributors purchased any Domestic Fittings from Star. As a result of McWane's anticompetitive conduct, municipalities and public water districts – the ultimate end users of Fittings – paid supracompetitive prices for Fittings and Domestic Fittings.

McWane, which had been the dominant Fittings supplier, did not like Project Pricing and was ill-equipped to compete with the upstart importers. McWane's sales force was smaller, less nimble, and by McWane's own estimation, simply less effective than Star or Sigma at identifying and responding to Project Pricing. When the housing market began to fall in 2007

and Project Pricing grew, McWane lost share and its profits plummeted. By December 2007, however, Mr. Tatman, McWane's new Fittings Division Vice President and General Manager, recognized that his competitors were "desperate" for a price increase due to recent rises in import costs. Mr. Tatman knew that Sigma and Star could bring prices down on their own, but they needed McWane's support to bring prices up. Mr. Tatman seized on this "unique" opportunity, and implemented a plan to bring "stability and rational pricing" to the Fittings market. He laid out his Plan in a presentation to his superiors. Central to the Tatman Plan was McWane's "Desired Message to the Market & Competitors:" McWane would drive price stability and transparency; and McWane would support net price increases only in stepped and staged increments, provided that the prior price was "stable," *i.e.*, Sigma and Star curtailed discounting. A key to the Plan's success would be Sigma and Star pulling pricing authority away from their front line sales teams "to add discipline to the process."

Mr. Tatman initially described his Plan as mere "brainstorming," but he later admitted at trial that McWane executed one part of the Plan by sending a January 11, 2008 letter. Mr. Tatman also admitted that the letter, although ostensibly addressed to McWane's Distributor customers, was a message to his competitors. McWane's January 11, 2008 letter announced that McWane was raising prices and would no longer offer Project Pricing, and that McWane would consider additional price increases later in the year only "as conditions require." Consistent with the Tatman Plan's call to compress or minimize Star and Sigma's ability to cheat by Project Pricing, McWane rejected Sigma's planned double-digit price increase and announced an eight percent price increase.

Sigma and Star quickly followed McWane's price increase and began acting in accord with the Tatman Plan. Sigma and Star took steps to curtail Project Pricing, and they wanted to

send a message to McWane that they "are capable of being a part of a stable and profitability conscious industry."

Absent an agreement that its competitors would also curtail Project Pricing, McWane's January 11, 2008 announcement that it would forgo competing on such a major price element would be irrational and akin to unilateral disarmament in the midst of a competitive firestorm. And, consistent with an agreement, Sigma and Star – in an abrupt change of their prior business practices – followed McWane with their own announcements that they too would stop Project Pricing. Before long, Mr. Tatman was able to report that Project Pricing was down and that Star and Sigma had complied with the Tatman Plan by centralizing pricing authority away from their sales representatives in the field.

While price fixing agreements are *per se* unlawful even if unsuccessful, the evidence here shows that McWane's agreement with its primary competitors to curtail Project Pricing was largely effective. In contemporaneous documents, Mr. Tatman reported to his superiors that Project Pricing, while not eliminated entirely, had "died down significantly" in the first and second quarters of 2008. McWane's and Star's price protection logs confirm his observation. There were fewer instances of Project Pricing in response to competition in 2008 as compared to 2007 or 2009. And McWane's financial documents show that McWane was able to maintain higher prices in 2008 notwithstanding a precipitous drop in demand. Mr. Tatman attributed this increased profitability to "pricing discipline."

The conspirators' blanket denials of a conspiracy to curtail Project Pricing are simply not credible. Telephone records show numerous communications between McWane, Sigma and Star's senior executives with pricing authority in late December and early January, when the Tatman Plan was first developed and implemented. Those phone records also show

communications between those same key executives over the next several months at times and dates that coincide with internal documents complaining about "cheating," *i.e.*, pricing below published prices. The conspirators offered no explanation for these phone calls. To the contrary, Star's former National Sales Manager, Mr. Minamyer, testified that his boss at Star (Dan McCutcheon) admitted that he had convinced Sigma's head of sales (Larry Rybacki) to implement a Fittings list price increase. Likewise, McWane and Sigma had no explanation for e-mail records reflecting Mr. Tatman's phone conversations with Sigma's Mr. Rona wherein Mr. Tatman complained about Sigma's (and Star's) Project Pricing. Although Mr. Tatman emphatically denied participating in a conspiracy, he did not deny that these conversations took place; he simply claims to have no recollection of them. Mr. Tatman's complaints had no legitimate purpose; complaints about 'cheating' and a competitor's low pricing is hallmark evidence of a price fixing conspiracy.

Finally, Star, the smallest of the three major Fittings suppliers, had long used Project Pricing as its primary strategy to successfully grow its market share. Star's announcement that it was ending its long-standing practice of Project Pricing is inexplicable absent an agreement. Star's now-President, Dan McCutcheon, could not explain how ending Project Pricing was in Star's unilateral business interest, and instead described Star's decision as "unusual," "irrational," and "bizarre." Indeed, contemporaneous Sigma and Star documents talk about the decision to curtail Project Pricing as being good for the "industry," not for their own companies.

The co-conspirators had a history of mistrust, and this did not change overnight. Obtaining greater pricing transparency was necessary to the success of the cartel, and the co-conspirators began in early February to create an information exchange through the newly formed Ductile Iron Pipe Fittings Association ("DIFRA"). DIFRA's only activity was to operate

an information exchange that reported the co-conspirators' aggregated monthly Fittings sales in tons shipped (together with the insignificant shipments of one sham participant, U.S. Pipe). The DIFRA information exchange facilitated price coordination by allowing the co-conspirators to monitor their market shares and to identify cheating. As contemporaneously explained by the then-President of Sigma, Mr. Pais: "the market data produced by DIFRA… helps maintain the pricing discipline… It has helped all of us not to allow the sharp market decline to be mistaken as a 'loss of market share,' which mostly causes price reaction."

Participation in DIFRA was an extension of the Tatman Plan and a *quid pro quo* for McWane issuing a second price increase in the Spring of 2008. Within days of setting up the DIFRA information exchange, Sigma and Star announced double-digit Fittings price increases. McWane, however, refused to support any increase until it received the actual DIFRA report. So McWane circulated a May 7, 2008 letter to clarify the "misperceptions" in the market, and make clear that McWane would not increase prices until it had more information, *i.e.*, the DIFRA report. Star had been a reluctant participant in DIFRA because it had misgivings that McWane would use the data to disadvantage Star in the market. But Star understood McWane's message loud and clear. Immediately upon receiving a copy of McWane's May 7, 2008 letter, Star committed to producing its data to DIFRA. Recognizing the *quid pro* quo offered in McWane's May 2008 letter, Star quoted McWane's letter verbatim when it held up its end of the bargain and produced its data to DIFRA.

McWane decided not to issue a second price increase until it had received the DIFRA sales report -- even though it was "somewhat painful to the bottom [line] in the short term" -- because it would "re-enforce the message [McWane had] been trying to drill in which when successful will pay long term dividends." That message was that McWane was "not going to

lose visibility of where the competitive level in the marketplace is." Within hours of receiving the first DIFRA report, McWane rewarded its co-conspirators by announcing an 8% price increase. Like McWane's January price increase, this increase was not as large as the announced increase by Sigma, and instead was consistent with the Tatman Plan to only raise prices incrementally. Once again, Sigma and Star followed McWane's price increase.

Like many cartels, the temptation to cheat and gain market share proved to be too great. While there is no evidence that any party ever actually renounced the price fixing conspiracy, the terms of coordination appear to have broken down in the Fall of 2008 as Sigma and Star began to "cheat" by offering Project pricing more readily. For example, in a November email from Mr. Minamyer to Star's Regional Managers he announced Star would "take the gloves off" and resume competing:

> We have all been extremely diligent in protecting the stability of our market pricing… However, some of our competition has not performed as admirably… We have many instances where we have documented the competition being irresponsible (Mostly Sigma)… ***We will take every order we can after exhausting all avenues to document the competitors pricing… Do it with a combination of buy plans, short term buys, and project pricing. Do this quietly and selectively and as much under the radar as you can but, if it is necessary, be sure to do it. Go get every order!!!!!***[1]

Coordination broke down further with the passage of the Buy American provision of the American Recovery and Reinvestment Act ("ARRA") in February 2009, although improper price communications and actions among the co-conspirators continued into 2009 and 2010.

The ARRA allocated $6 billion in funds for waterworks projects built with products made in the United States, including Domestic Fittings. This gave Star and Sigma a strong incentive to enter the Domestic Fittings market – not only to compete for ARRA-funded

[1] CX 0831 (emphasis in original).

projects, but also to protect their sales from erosion by an expected increase in nationalist sentiment that threatened to expand the Domestic Fittings market. In June 2009, Star announced that it would begin selling Domestic Fittings in Fall 2009, while Sigma pursued a two-pronged approach for entering the Domestic Fittings market – independent entry, similar to Star; or in the alternative, purchasing Domestic Fittings from McWane for resale.

Faced with this competition, McWane was concerned that Domestic Fittings prices would "get creamed" as they had when the importers (Star and Sigma) had originally entered the Fittings market. Rather than offering better prices and services than its competitors, McWane protected its Domestic Fittings monopoly by implementing an Exclusive Dealing Policy aimed against Star and by co-opting Sigma's entry through a "Master Distribution Agreement" ("MDA").

McWane implemented its Exclusive Dealing Policy with the specific intent to "block" Star's entry and to protect its monopoly prices on Domestic Fittings. On September 22, 2009, McWane announced that any Distributor that purchased Domestic Fittings from any other supplier, *i.e*. Star, would be barred from purchasing Domestic Fittings from McWane, and would lose any accrued rebates previously earned on their purchases of McWane's Domestic Fittings.

In response to McWane's announced policy, distributors withdrew requests for quotes, canceled previously placed orders, and the two largest national distributors, HD Supply and Ferguson, instructed their combined 400+ branches that they could not purchase Domestic Fittings from Star. Distributors repeatedly testified that they were less willing to purchase Domestic Fittings from Star because of McWane's Exclusive Dealing Policy.

Star, which had expedited its initial entry into the Domestic Fittings market by contracting with existing domestic foundries, needed a minimum volume of sales to purchase a

dedicated Domestic Fittings foundry. Producing Domestic Fittings in its own foundry, rather than by contracting with existing foundries, is more cost efficient and would have allowed Star to lower its prices to compete with McWane. McWane's Exclusive Dealing Policy denied Star the minimum efficient scale necessary to make purchasing a domestic foundry an economically viable option. By raising its rival's costs and impairing its ability to constrain McWane's monopoly prices, McWane's Exclusive Dealing Policy unlawfully extended McWane's Domestic Fittings monopoly.

McWane's position at trial that its Exclusive Dealing Policy is a mere rebate policy is contradicted by overwhelming evidence that the policy, as enforced, was an "all or nothing" Exclusive Dealing Policy that cut off a Distributor's access to McWane's Domestic Fittings line if even one branch purchased a competing Domestic Fitting. This evidence of the Policy's formation, how it was communicated to Distributors and the industry, and how McWane terminated a Distributor for purchasing Domestic Fittings from Star, all disprove McWane's rebate claim.

McWane adopted a different, but related, approach to eliminate the competitive threat from Sigma's entry. Sigma was a potential competitor in the Domestic Fittings market: it was very motivated to enter that market and it had the capability to do so. Recognizing that more suppliers would not expand the domestic market, McWane was only willing to share its monopoly margins with Sigma as an "insurance policy" against Sigma's probable entry. Through the MDA agreement, McWane offered to supply Sigma with Domestic Fittings in exchange for its promise to, among other things, abstain from its own independent entry and to enforce its Exclusive Dealing Policy. Thus, McWane used the MDA to turn Sigma from a competitor to a mere distributor. Because the MDA eliminated competition between potential

competitors, it is analogous to a horizontal market allocation agreement, where one firm cedes the entire market to another.

But the MDA did more than co-opt Sigma, it also permitted Sigma and McWane to "put pressure on Star" and "hopefully to drive Star out of business" because McWane would "rather have competition other than Star." By helping McWane enforce its unlawful monopolization scheme, *i.e.*, its Exclusive Dealing Policy, the MDA also represents an unlawful conspiracy between McWane and Sigma to monopolize the Domestic Fittings market.in the Fittings market

II. STATEMENT OF FACTS

A. Background

1. Fittings

Ductile iron pipe fittings connect the pipes, valves, and hydrants that make up pressurized municipal waterworks systems, and change or direct the flow of drinking and waste water.[2] The sizes of fittings at issue in this case – 24" or less in diameter ("Fittings") – are commonly used in underground water distribution networks, whereas larger diameter fittings are more commonly used in treatment plants or large transmission lines.[3] Fittings come in thousands of configurations of shape, size, and coating, but about 100 commonly used configurations ("A" and "B" items) account for approximately 80% of all Fittings sales.[4]

[2] CCPF 371. The term "Fittings," except where otherwise indicated, refers to Fittings that are 24" or less in diameter.

[3] CCPF 379-385, 608-609.

[4] CCPF 378, 399.

Fittings are homogeneous commodity products produced to American Water Works Association ("AWWA") standards and specifications.[5] Any Fitting that meets an AWWA specification is functionally interchangeable with any other Fitting that meets the same specification.[6] There is no meaningful physical difference between Fittings produced by different manufacturers, or between imported Fittings and those manufactured in the United States.[7] Fittings are a small sub-segment of the overall waterworks market, comprising 5% or less of the total cost of a typical waterworks project, and demand for Fittings is inelastic – *i.e.*, an increase in price leads to only a very small reduction in demand.[8]

2. Market Participants

a) Suppliers

The market for the supply of Fittings in the United States is a highly concentrated oligopoly. There are three main Fittings suppliers: Respondent, McWane, Inc. ("McWane"), Sigma Corporation ("Sigma"), and Star Pipe Products, Ltd. ("Star").[9] Together, McWane, Star, and Sigma accounted for over **{ }**% of U.S. Fittings sales in 2008 and 2009.[10]

McWane manufactures, markets and sells products for the waterworks industry, including Fittings.[11] Its Tyler/Union division manufactures Fittings at foundries located in Anniston,

[5] CCPF 415.

[6] CCPF 416.

[7] CCPF 417.

[8] CCPF 419-424.

[9] CCPF 455.

[10] CCPF 456-457.

[11] CCPF 6.

Alabama and Hebei, China.[12] McWane had a **{ }**% share of the United States Fittings market in 2008, and a **{ }**% share in 2009.[13] From April 2006 until Star's entry in 2009, McWane was the only significant supplier of Fittings manufactured in the United States, *i.e.*, "Domestic Fittings."[14]

Sigma imports and sells Fittings and other waterworks products that are made in China, India, and Mexico.[15] Sigma engages in "virtual manufacturing" whereby it provides significant engineering support to foundries that make its Fittings.[16] Sigma had a **{ }%** share of the United States Fittings market in 2008, and a **{ }**% share in 2009.[17]

Like Sigma, Star also imports Fittings from China for sale in the United States.[18] Star had a **{ }**% share of the United States Fittings market in 2008, and a **{ }**% share in 2009.[19] In 2009, Star began contracting with foundries in the United States to manufacture Fittings domestically.[20]

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[12] CCPF 10.

[13] CCPF 457.

[14] CCPF 224, 1659.

[15] CCPF 55, 59.

[16] CCPF 60.

[17] CCPF 457.

[18] CCPF 124, 132.

[19] CCPF 457.

[20] CCPF 1713-1725.

In addition to McWane, Sigma, and Star, there is a fringe of small suppliers of Fittings, including Serampore Industries ("SIP"), NAPAC, Inc., North American Cast Iron Products ("NACIP"), Metalfit, Backman Foundry, and, starting in 2009, Electrosteel.[21] Combined, the fringe sellers represented approximately **{ }**% of the U.S. Fittings market in 2008 and 2009.[22]

Any potential new entrant to the Fittings supply business faces high barriers to entry. It must establish a supply chain, stocking yards, and a marketing force throughout the United States, develop or recruit relevant expertise in design engineering, build relationships with Distributors, and have its products tested and approved by End Users.[23]

The three main Fittings suppliers know each other well, and have a history of close relationships and extensive communications.[24] Sigma's CEO Victor Pais and McWane's CEO Ruffner Page have developed "a very trusting relationship" over the years, and often discuss competitive dynamics and pricing practices in the Fittings market.[25] Telephone records reveal numerous calls between high level executives of the three companies,[26] and Fittings market competitive dynamics – including pricing – are regular topics of discussion in conversations between the suppliers.[27]

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[21] CCPF 459.

[22] CCPF 457 (showing **{ }**% combined market share by volume of McWane, Sigma, and Star).

[23] CCPF 642-650.

[24] CCPF 699-841.

[25] CCPF 828-841.

[26] CCPF 715, 723-786.

[27] *E.g.*, CCPF 701-712.

b) End Users

Fittings end users – the entities that ultimately paid the supracompetitive prices that are at issue in this case – are typically municipalities, regional water authorities, and the contractors they hire to construct waterworks projects (collectively, "End Users").[28]

c) Distributors

McWane, Sigma, and Star sell "all or virtually all" of their Fittings to a relatively unconcentrated group of wholesale waterworks distributors ("Distributors"), which then re-sell the Fittings to End Users.[29] There are two large national Distributors, HD Supply and Ferguson, which have 235 and 167 locations nationwide, respectively.[30] Together, they account for approximately 50% of all Fittings sales in the United States.[31] The remaining direct purchasers of Fittings consist of a number of regional waterworks distributors with multiple branches that service specific regional areas, and hundreds of small, local companies with just one or a few distribution yards.[32]

Direct sales from suppliers to End Users are virtually non-existent, because Distributors provide important services to both Fittings suppliers and End Users.[33] Indeed, McWane views

[28] CCPF 466.

[29] CCPF 475-479.

[30] CCPF 266, 275, 481.

[31] CCPF 482-483.

[32] CCPF 480-484.

[33] CCPF 475-479.

Distributors as being "critical to [its] success."[34] The benefits to Fittings suppliers of selling through Distributors rather than directly to End Users include the following:

- Distributors provide End Users with one-stop shopping for the full spectrum of waterworks products required for a particular project (pipe, valves, Fittings, restraints, castings, etc.), and Fittings suppliers can compete for sales to Distributors without entering all of the adjacent waterworks product markets.[35]

- Distributors carry Fittings inventory, freeing up suppliers' working capital and allowing for much faster delivery from the Distributors' local branches to End Users than a Fittings supplier could achieve by selling directly to End Users.[36]

- Contractors often purchase on credit, and Distributors carry the credit risk of dealing with thousands of End Users. Suppliers avoid these credit costs by dealing through Distributors.[37]

- Distributors provide a local market presence for suppliers, and employ sales personnel dedicated to identifying business opportunities and servicing End Users, saving suppliers from having to employ their own large, nationwide sales forces.[38]

Suppliers obtain additional benefits from selling to the major national Distributors such as HD Supply and Ferguson, due to the large number of branch locations operated by these Distributors and the resulting scale efficiencies.[39] Sales to large Distributors also can provide a supplier seeking to enter the market with an important measure of "commercial validation"– *i.e.*, a signal that the supplier's products are technically sound and commercially viable.[40]

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[34] CCPF 512.

[35] CCPF 513.

[36] CCPF 514-517.

[37] CCPF 518.

[38] CCPF 519-524.

[39] CCPF 525.

[40] CCPF 527-528, 2099.

3. Bidding Process

When a municipality or regional water authority undertakes a waterworks project, it will generally issue specifications for all of the pipes, valves, hydrants, Fittings and related waterworks equipment needed for the project, and seek bids from contractors for its completion.[41] These specifications may identify which brands can be used for the project, as well as whether domestically manufactured Fittings are required.[42] Once contractors receive the specifications, contractors will solicit bids and other assistance from Distributors that supply the various components for that project.[43]

4. Domestic-Only Specifications

Waterworks project specifications that require domestically manufactured Fittings are sometimes referred to as "Domestic-only Specifications," while those that do not specify the country of origin are referred to as "Open Specifications."[44] A project may have a Domestic-only Specification either because of End User preference or because municipal, state, or federal law imposes a "Buy American" requirement.[45] Domestic Fittings can be used in Open Specification projects, but imported Fittings cannot be used in Domestic-only Specifications.[46] Domestic Fittings sold for use in Domestic-only Specifications are sold at substantially higher

[41] CCPF 427-428.

[42] CCPF 427-435, 447.

[43] CCPF 434-439.

[44] CCPF 448, 450. Except where otherwise noted or where the context otherwise requires, the term "Domestic Fittings" will refer herein to Domestic Fittings sold into Domestic-only Specifications.

[45] CCPF 448-449.

[46] CCPF 451.

prices than Fittings (whether imported or domestically manufactured) that are sold into Open Specification jobs.[47]

5. Fittings Pricing

For all three of the major Fittings suppliers, published Fittings prices have two components: a nationwide list (or catalog) price, and a state or regional "multiplier."[48] The published price for a given Fittings item in a given state is the list price multiplied by the then-applicable multiplier for that state.[49] For example, if a Fitting has a $1,000 list price, and the Texas Open Specification multiplier is .28, the "published price" for that individual Fitting in Texas will be $1,000 x .28, or $280.[50] During the relevant period, McWane used a separate map with higher multipliers for Domestic Fittings; so if the Domestic multiplier for Texas were .42, the same Fitting would cost $420 if Domestic-only was specified.[51]

Published prices for Fittings are highly transparent. Each major supplier publishes list prices for thousands of individual Fittings items in price books and on its website, and announces regional multiplier changes through customer letters disseminated to Distributors.[52] Suppliers quickly receive copies of their competitors' price letters, sometimes directly.[53] They know that

[47] CCPF 628-633.

[48] CCPF 543.

[49] CCPF 543.

[50] CCPF 543, 545.

[51] CCPF 628-633.

[52] CCPF 670-671.

[53] CCPF 672-673.

their pricing letters end up in their competitors' hands.[54] When McWane announces an increase in its list prices or published multipliers, Sigma and Star nearly always follow the increase with identical published price increases of their own.[55] Suppliers cannot sustain a published price increase unless the other suppliers follow suit and also increase their prices.[56]

When they are competing for a sale, Fittings suppliers may offer Distributors with discounts from their published prices on a transaction-by-transaction basis, a practice known in the industry as "Project Pricing" (or "Job Pricing" or "Special Pricing").[57] Because it is individually negotiated, not published, Project Pricing is less transparent than published prices. Project Pricing is a significant form of competition for business between Fittings suppliers.[58]

Greater Project Pricing frequency leads to price "instability" and can cause the prevailing transaction price in a given area to deteriorate.[59] When one supplier competes aggressively with Project Pricing, the others must meet that supplier's price or risk losing business.[60] A single reduced price offer can snowball quickly: as other Distributors in the region learn of the new

[54] CCPF 674.

[55] CCPF 667.

[56] CCPF 668.

[57] CCPF 550.

[58] CCPF 553-554.

[59] CCPF 555-558.

[60] CCPF 669.

price, they will demand the same discount in order to be competitive on bids for the same job.[61] Conversely, reducing the incidence of Project Pricing tends to lead to stable, higher prices.[62]

Suppliers, especially McWane and Sigma, view Project Pricing as a drag on their profitability, and would prefer not to use it at all.[63] Star has traditionally taken a different approach and made Project Pricing a cornerstone of its pricing strategy. Despite typically following the industry's *published* prices, Star has been considered the most aggressive of the big three Fittings suppliers when it comes to Project Pricing.[64] Star's competitive use of Project Pricing has been described at various times by Sigma and McWane as "aggressive," "disruptive," "confusing," "irrational," "undisciplined," "unpredictable," "unhealthy," "reckless," and "irresponsible."[65]

Although Project Pricing is the principal means of price competition between Fittings suppliers, there are other price terms involved in the sale of Fittings. Suppliers may offer volume rebates to a Distributor on an annual or other periodic basis.[66] Rebates may be calculated and paid at the branch level or the corporate level, and in some cases rebate programs encompass other products in addition to Fittings.[67] Functionally, Distributors view rebates as different from

[61] CCPF 555.

[62] CCPF 559.

[63] CCPF 560-561.

[64] CCPF 860-869.

[65] CCPF 860-869.

[66] CCPF 563.

[67] CCPF 564 *in camera*, 568.

Project Pricing, because rebates do not apply to a specific job that a Distributor is bidding.[68] Each supplier has standard freight terms pursuant to which it may pay for shipping of Fittings to Distributors, and offer discounts to customers by providing free shipping for under-sized orders.[69] Suppliers also offer certain standard payment terms that incentivize prompt payment by providing a discount for payment within a certain time period, and those payment terms may be modified to extend the payment period or increase the discount (though not typically on a project-by-project basis).[70]

B. McWane Conspired With Sigma and Star to Stabilize and Raise Fittings Prices

1. Late 2007 Market Environment

In 2007, McWane, historically the dominant Fittings supplier in the United States, was losing share to Sigma and Star. The two importers had taken advantage of their lower overseas cost bases and larger, more nimble sales forces to steal market share from McWane through aggressive Project Pricing.[71] When the economic downturn began and Fittings market growth slowed in 2007, Star continued to compete vigorously with Project Pricing.[72] David Green, who was then in charge of McWane's Fittings division, decided "to respond aggressively with equally low pricing."[73] McWane's Fittings profits declined as it chased prices down, carried idle

[68] CCPF 567.

[69] CCPF 570-571.

[70] CCPF 572-576, 554.

[71] CCPF 843-844, 853-859.

[72] CCPF 843-844, 854.

[73] CCPF 855.

capacity, and developed excess inventory.[74] The company's CEO, Ruffner Page, fired Mr. Green and restructured the Fittings business, tasking Rick Tatman with turning it around.[75] As the newly installed General Manager of McWane's Tyler/Union Fittings division, Mr. Tatman reported to Thomas Walton and Leon McCullough, and was responsible for McWane's Fittings pricing strategy.[76]

Market conditions changed in late 2007, and Mr. Tatman saw an opportunity to re-take control of the Fittings market. Sigma's and Star's margins were coming under pressure because raw material prices and other costs were increasing in China relative to the U.S., and they both sought to increase Fittings list prices in late 2007.[77] Recognizing that McWane's U.S. manufacturing base had become a cost advantage,[78] McWane refused to follow its competitors' list price changes, despite direct and indirect entreaties from Sigma to do so.[79] Instead, Mr. Tatman developed a plan to use McWane's newfound leverage to forge cooperation among the suppliers – McWane would only agree to higher published prices if Sigma and Star would curtail

[74] CCPF 846-857.

[75] CCPF 21-22, 45. In a September 2007 meeting, Mr. Page described this restructuring to Mr. Pais of Sigma, who later wrote that he "was surprised to hear from [Mr. Page] directly, several major changes that he has initiated to respond to the weak market conditions." CCPF 837 (CX 2118 at 001).

[76] CCPF 21-23.

[77] CCPF 871-887.

[78] CCPF 874-877. As Mr. Page wrote in January 2008, "The Chinese importers in water works fittings are seeking price increases [and] we are now in a position to resist." CCPF 876 (CX 1183 at 001).

[79] CCPF 878-906.

the Project Pricing wars that had been eroding McWane's share and profitability – that is, only if its competitors committed to ***stable*** and ***transparent*** pricing ***at published levels***.[80]

2. The Tatman Plan to Bring Stability and Transparency to the Fittings Market

Mr. Tatman developed and implemented a multi-stage plan to communicate these conditions to Sigma and Star, and thus to establish a pricing agreement among the suppliers.[81] In a December 22, 2007, email to his boss Leon McCullough, Mr. Tatman previewed his plan:

> Given both the change in the Tyler/Union leadership structure and the accelerated inflation in China compared to Domestic cost, I believe we're in a unique position to help ***drive stability and rational pricing with the proper communication and actions***.[82]

Mr. Tatman described his full plan as part of a January 6, 2008 slide presentation (the "Tatman Plan"). In a slide titled "**Desired Message for the Market & Competitors**," he proposed that, rather than accepting the large price increases proposed by Sigma and Star, McWane would only agree to smaller price increases, "in stepped or staged increments," requiring "stability and transparency" at published pricing levels as a "prerequisite" for any further increases.[83] To achieve transparency, McWane would initially seek to curtail the level of Project Pricing engaged in by all suppliers – McWane would inform its competitors that it would only sell at published prices, and that it would discipline the other suppliers by lowering its

[80] CCPF 907-913.

[81] CCPF 907-913.

[82] CCPF 909 (emphasis added).

[83] CCPF 913-916.

published multipliers to match any consistent Project Pricing it detected in the market.[84] Mr. Tatman recognized that the plan would be more likely to succeed if McWane's competitors removed pricing authority "away from line sales and customer service personnel to add discipline to the process."[85]

McWane delivered its "message for competitors" to Sigma and Star through meetings, telephone calls, and indirectly through pricing communications to customers. In meetings in September and December of 2007, Mr. Page had already made Mr. Pais aware of McWane's general dissatisfaction with market trends and pricing practices in the Fittings market.[86] As Mr. Tatman formulated his plan between December 22, 2007, and January 11, 2008, he spoke with Mr. Rybacki of Sigma at least four times.[87] Mr. Rybacki, in turn, spoke with Mr. McCutcheon of Star at length on January 9, 2008.[88] Finally, McWane's "message for competitors" was driven home through a carefully drafted January 11, 2008 pricing letter.

[84] CCPF 913, 916; CX 0627 at 004 ("T/U will adjust multipliers as required to remain competitive within any given market area. (Consistent Job Pricing will be met with general market actions)."). In parallel with its effort to curtail Project Pricing, McWane also pursued establishment of the DIFRA information exchange as a means of increasing market transparency. *See infra* Part B.4 (describing "phase two" of the Tatman Plan involving DIFRA).

[85] CCPF 913, 918.

[86] CCPF 837-838; CX 2119 at 001 (at their September 2007 meeting, Mr. Page expressed to Mr. Pais that he was "disappointed at our failure to get a better landscape"); CCPF 953 (Mr. Pais told Mr. Rybacki that McWane was upset because of the "overcompetitiveness of the marketplace" and the "downward spiral of pricing in the marketplace.").

[87] CCPF 923.

[88] CCPF 743-744.

3. Phase One of the Tatman Plan: Partial Multiplier Increases in Exchange for Reduction in Project Pricing

In a January 11, 2008, letter to Distributors, McWane announced that it would be retaining its current list prices (*i.e.*, declining to follow Sigma's announced list price increase), increasing multipliers by 10-12% (much less than the 25% increase sought by Sigma), and cutting back on Project Pricing ("it is our intention going forward to sell all products ***only*** off the newly published multipliers").[89] By announcing its intention to sell "only off the newly published multipliers," McWane was communicating its intention not to offer Project Pricing.[90] In the letter, McWane offered to "announce another multiplier increase within the next six months," but stated that it would "only do so as conditions require" – *i.e.*, depending upon whether Sigma and Star also curtailed Project Pricing, resulting in pricing stability and transparency in the Fittings market.[91]

Although nominally addressed to customers, McWane's January 11, 2008 letter did not announce McWane's new multiplier prices. Those were communicated in letters sent out a week later. The January 11 letter was actually an invitation to collude directed at Sigma and Star, and an integral part of the "Message to Competitors" envisioned by the Tatman Plan. Drafts of the letter were attached to Mr. Tatman's January 6, 2008 presentation,[92] and Mr. Tatman conceded at trial that the final letter – and particularly the message about curtailing Project Pricing – was

[89] CCPF 932 (emphasis added).

[90] CCPF 938.

[91] CCPF 932, 937.

[92] CCPF 936-937.

intended for Sigma and Star (claiming – not that it makes a difference – that the communication was intended as a "head fake" to these competitors).[93]

As a further measure to encourage Sigma and Star to go along with its plan for collusion, McWane provided its competitors with evidence of its then-current cost advantage.[94] Mr. Tatman understood that "our ability to stabilize the market is tied to our competitor's perception of our cost structure and our ability to sustain aggressive pricing if our share position is threatened."[95] To convey McWane's cost advantage, Mr. Page sent an email directly to Mr. Pais on January 4, 2008, offering to sell to Sigma Fittings that McWane produced in the United States.[96] The price McWane offered to Sigma was below McWane's total cost of production, and calculated to be below what McWane understood Sigma's landed cost of production to be.[97] Through this offer, McWane successfully communicated that now it was the low cost Fittings producer, had excess capacity, and would be a dangerous rival if Sigma and Star did not cooperate with the Tatman Plan.[98] Sigma later passed this information on to Mr. McCutcheon of Star, who understood the message, writing to a colleague, "During the negotiation, [McWane]

[93] CCPF 939.

[94] CCPF 1072-1088.

[95] CCPF 1075.

[96] CCPF 1076; CX 1113 at 001 ("It has occurred to me that with China costs rising . . . we could supply you with small compact fittings at a competitive price.").

[97] CCPF 1081.

[98] CCPF 1085; CX 1142 at 002 (Pais describing McWane quote as an "interesting and revealing price").

stated that they are now the low cost producer and said they could prove it. I think there is some exaggeration in this statement, but I believe the core point."[99]

In late January and early February 2008, and after a series of telephone calls between Star's vice president of sales (Mr. McCutcheon) and Sigma's vice president of sales (Mr. Rybacki),[100] Sigma and Star accepted McWane's proposal for a Project Pricing ceasefire.[101] Both companies rescinded their previously announced list price changes and followed McWane's new price multipliers,[102] told their customers there would be no more Project Pricing,[103] and instructed their sales teams to curtail Project Pricing.[104] Sigma's documents show that the company had a complete understanding of its role and responsibilities in the Tatman Plan. Specifically, Sigma recognized McWane's invitation to collude as "an opportunity for SIGMA and Star to . . . demonstrate to [McWane] that we are capable of being part of a stable and profitab[ility] conscious industry."[105] Mr. Pais embraced the pursuit of increased transparency and stability, and, on January 24, 2008, urged Mr. Rybacki to "normalize" all pricing for Sigma Fittings "TO ELIMINATE THE CONFUSION WE ARE CREATING WITH

[99] CCPF 1087.

[100] CCPF 952-953.

[101] CCPF 951-1028.

[102] CCPF 965-966, 1008.

[103] CCPF 965-967, 997-1007.

[104] CCPF 953-958, 972-990.

[105] CCPF 956.

CUSTOMERS AND COMPETITORS."[106] In a draft customer letter that Mr. Pais considered sending to earn McWane's "TRUST and CONFIDENCE in our plan to improve the industry," he confirmed that Sigma had decided to "cease to use any varying 'special' pricing."[107]

On January 22, 2008, Star's National Sales Manager, Matt Minamyer, directed the Star sales force to "stop project pricing."[108] Star also adhered to the Tatman Plan's dictate to take "price authority away from line sales and customer service personnel to add discipline to the process."[109] Star centralized pricing authority with Mr. Minamyer, and limited the ability of its sales force to offer discounts.[110] On January 31, 2008, Star informed its largest customer, HD Supply, that it would be following McWane's announced multiplier increases, and that there would be "NO UTILITY PROJECT PRICING NATIONWIDE."[111] A similar message was communicated to all of Star's customers.[112]

When any of the three suppliers detected a competitor Project Pricing, it complained about the cheating. In addition to repeatedly communicating by telephone at key pricing

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[106] CCPF 956.

[107] CCPF 1159.

[108] CCPF 971; CX 0752 at 001 (Minamyer, January 22, 2008: "Our goal is to take a price increase and to stop project pricing.").

[109] CCPF 913, 918.

[110] CCPF 993; CX 0752 at 001 (Minamyer, January 22, 2008: "[A]ll project pricing has to go through me . . . . This is an effort to do the right thing for the industry."). McWane also centralized pricing authority in January 2008, creating a new "pricing coordinator" position for Vincent Napoli and removing pricing authority from McWane's field sales team. CCPF 924-929.

[111] CCPF 999-1000.

[112] CCPF 1005.

decision points, Sigma, McWane and Star (and in particular Mr. Rybacki, Mr. McCutcheon and Mr. Tatman) periodically spoke by telephone to complain about perceived "cheating."[113] Each of the suppliers set March 1, 2008, as the last day for Project Pricing, and as that date passed they closely monitored each other's pricing conduct.[114] For example, on March 8, 2008, Mr. Tatman complained to Sigma about continued Project Pricing in the market. Mitchell Rona, Vice President of Operations for Sigma, relayed Mr. Tatman's message to Mr. Pais and Mr. Rybacki, Sigma's vice president of sales: "[Tatman] says he hears that some of the new prices in the market are being compromised with deals. He hopes the market will improve and hopes [we] do our part."[115] On March 6, 2008, a Sigma regional sales manager reported an incident of McWane Project Pricing, and asked his superiors: "Can Larry [Rybacki] make a call and see if this can be stopped."[116] A Sigma manager responded (reflecting consciousness of guilt) that "Jim should not write that last sentence!;" but no one admonished him that such a call was not possible or inappropriate.[117] On April 2, 2008, Star's Mr. McCutcheon received a report of Project Pricing by Sigma on a project in Tulsa.[118] He requested more information from the responsible sales manager, and **{**

[113] CCPF 1030-1040, 1451-1455.

[114] CCPF 1051-1052.

[115] CCPF 1035.

[116] CCPF 1031.

[117] CCPF 1032.

[118] CCPF 1038.

}.[119] On August 22, Mr. Tatman again voiced his displeasure with Sigma's *and* Star's Project Pricing to Mr. Rona. Mr. Rona reported the complaint about cheating to Sigma's management team: "Guys, Rick [Tatman] was upset by the numbers in Florida and California based on what he has seen from us and Star. He said the .26 and .30 were available from us both without any second thought."[120]

Absent concerted action, Project Pricing would not be viewed by the suppliers as a form of illegitimate behavior, or as "cheating" on a deal.[121] And absent agreement, the curtailment of Project Pricing engaged in by all three major Fittings suppliers in the spring of 2008 would have made no economic sense for any one of the suppliers acting unilaterally.[122] A supplier pursuing such a strategy on its own would have lost business to its competitors' Project Pricing. The suppliers acknowledged this in contemporaneous documents and testimony. For example, Mr. Tatman stated from the outset that his plan would only work "with the proper communication and actions."[123] Mr. Pais of Sigma later echoed this, explaining with respect to the elimination of Project Pricing that Sigma "will NOT – and can NOT – do this unilaterally,"[124] and Star's National Sales Manager testified that Star knew that it needed its competitors to participate in

[119] CCPF 1039-1040.

[120] CCPF 1452.

[121] CCPF 943, 1019-1021, 1440-1445.

[122] CCPF 1055-1071.

[123] CCPF 1059.

[124] CCPF 1060.

any effort to stabilize prices.[125] Star, in particular, had relied on a strategy of undercutting its larger rivals through Project Pricing.[126] Star executives acknowledge that the company's change of course was "unusual," "irrational," "bizarre," and contrary to its traditional practice of using Project Pricing.[127] In trying to explain to his sales force why Star was abandoning what had been a cornerstone of its competitive strategy, Star's national sales manager Mr. Minamyer betrayed the collusive nature of the suppliers' curtailment of Project Pricing: "What we are doing is what is right for the industry."[128]

4. Phase Two of the Tatman Plan: Additional Multiplier Increases Conditioned on Participation in the DIFRA Information Exchange

The suppliers monitored compliance with the agreement to curtail Project Pricing through their ordinary competitive intelligence channels, but they also wanted to establish a formal information exchange, both to foster increased "trust and respect" among the suppliers and to better enable them to monitor market shares and detect cheating under their price fixing agreement.[129] This added measure of transparency was especially important because of the declining Fittings market in 2008 – each supplier would be able track its market shares and

[125] CCPF 1061; CX 2526 (Minamyer, Dep. at 141-142 ("Q. In other words, you would need your competitors to participate in an effort to stabilize prices? A. We believe that to be true.")).

[126] CCPF 860-869, 1062; McCutcheon, Tr. 2387 (Project Pricing was "a significant part of Star's competitive strategy").

[127] CCPF 1063.

[128] CCPF 1067; *see also* CCPF 993 (Minamyer describing centralization of pricing authority as "an effort to do the right thing for the industry").

[129] CCPF 1279(a) (Pais describing the benefits of DIFRA in June 2008: "Though most of the initial benefit is intangible such as increased trust and respect between members, it is also the first step fro [*sic*] more substantial economic benefits in the future.").

ascertain whether a loss in volume was attributable to a loss in market share (*i.e.*, cheating by other suppliers) or to a general market decline.[130]

For several years, McWane, Sigma, and Star had discussed forming a "trade association" called the Ductile Iron Fittings Research Association ("DIFRA"),[131] and in February 2008, Mr. Tatman and Mr. Rybacki agreed to restart these efforts.[132] Notwithstanding the many potentially procompetitive purposes set forth in DIFRA's bylaws (such as standard setting, education, outreach, advocacy, and research),[133] the association's actual objective from its conception – and ultimately the only activity it engaged in – was to operate an information exchange aimed at reducing competition and stabilizing prices in the Fittings market.[134] Advised by counsel that DIFRA's information exchange would need at least four members to mitigate antitrust concerns,[135] McWane, Sigma, and Star brought on a sham fourth member, U.S. Pipe, which was not even a Fittings producer.[136]

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[130] *E.g.*, CCPF 1304 (Tatman using DIFRA data to evaluate the success of the Tatman Plan); CCPF 1279(e) (Pais writing in February 2009 that DIFRA "helps maintain the pricing discipline, as the market and market share data point to a relatively consistent and stable market pattern. It has helped us not to allow the sharp market decline to be mistaken as a 'loss of market share', which mostly causes price reaction.").

[131] CCPF 1090-1106.

[132] CCPF 1111-1113.

[133] CCPF 1262.

[134] CCPF 1261-1274 (stated purposes of DIFRA were not pursued); CCPF 1275-1296 (actual purpose of DIFRA was to facilitate information exchange and stabilize the Fittings market); CCPF 1297-1337 (McWane, Sigma and Star used DIFRA to monitor their market shares, detect cheating and inform their pricing decisions).

[135] CCPF 1122; CX 2272 (counsel advising "With four, you can just barely justify it."); CX 0048 at 001 (counsel "noted the significant anti-trust issues when an association consists of only two

By April 25, 2008, McWane, Sigma, and Star had agreed (at a meeting that DIFRA's sham fourth member, U.S. Pipe, did not even attend), to proceed with the DIFRA information exchange, with May 15, 2008, set as the deadline for the members' submission of Fittings sales data.[137] Each member would report to DIFRA its own volume, in tons, of Fittings shipped within the United States in six categories divided by size (2"-12", 14"-24", and greater than 24") and type (flanged and non-flanged).[138] Members' initial submissions were to include annual data for 2006, monthly data for 2007, and monthly data for 2008; going forward, they would report each months' data by the 15th day of the following month.[139] DIFRA engaged an accounting firm ("SRHW") to collect the member data and return reports reflecting aggregate U.S. Fittings shipments in various categories.[140]

Star was a reluctant participant in the DIFRA information exchange, so in May and June of 2008 McWane again withheld its assent to a price increase in order to gain leverage – this time to procure Star's agreement to proceed with the anticompetitive information exchange.[141]

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or three competitors, whereas an association with five, six, or more competitors is less problematic.").

[136]CCPF 1117-1130; U.S. Pipe had stopped manufacturing Fittings years before, and the small number of Fittings that it sold were supplied to it largely by Sigma, were not sold through Distributors (a requirement of the DIFRA's own bylaws), and were below the minimum volume required for DIFRA membership. McWane, Sigma, and Star nevertheless permitted U.S. Pipe to participate as a member of DIFRA. CCPF 1125-1129.

[137] CCPF 1139-1140, 1145.

[138] CCPF 1141.

[139] CCPF 1140-1141.

[140] CCPF 1105, 1140.

[141] CCPF 1155-1259.

Sigma was eager for a further price increase,[142] and in late April, just as the parties reached agreement on the DIFRA procedures, Sigma released a new letter announcing a multiplier price increase effective May 19, 2008.[143] On May 7, 2008, Star announced multiplier price increases that matched Sigma's.[144] McWane refused to support a price increase until itactually received the DIFRA data,[145] so Mr. Tatman drafted a letter to address Star and Sigma's "misperceptions."[146] McWane's May 7, 2008 customer letter that, like its January 11, 2008 letter, was actually directed to McWane's competitors. The May 7 letter did something McWane had never done before in a pricing letter: It announced that McWane was ***not*** yet changing its price.[147] Instead, it was a message for Sigma and Star:

> Before announcing any price actions, ***we carefully analyze all factors*** including: domestic and global inflation, market and competitive conditions within each region, as well as our performance against our own internal metrics. ***We anticipate being able to complete our analysis by the end of May***. At that point, we will send out letters to each specific region detailing changes, if any, to our current pricing policy.[148]

[142] CCPF 1156-1167.

[143] CCPF 1168-1172.

[144] CCPF 1173.

[145] CCPF 1177-1178; CX 0137 at 001 (describing McWane's "approach of waiting until the DIFRA data is available before announcing any price actions").

[146] CCPF 1179.

[147] CCPF 1182, 1187.

[148] CCPF 1182.

This language was unusual, and was of no use to its nominal recipients, McWane's customers.[149] The real intended audience for this coded language was Sigma and Star, and the message was unmistakable in the context of the DIFRA members' recent agreement on timing of their data submissions: McWane would support higher Fittings prices only after it began receiving DIFRA reports.[150]

Star understood McWane's message. Within hours of receiving McWane's coded letter, Mr. McCutcheon confirmed to the other DIFRA members, including Mr. Tatman, that Star intended to submit its DIFRA data.[151] But Star missed the May 15 deadline and Mr. Tatman repeatedly hounded DIFRA's accounting firm, its lawyers, and Mr. Rybacki and Mr. Brakefield at Sigma.[152] **{**

}[153]

McWane's May 7, 2008, letter had told the market to expect a price increase effective June 16, 2088, but when Star continued to drag its feet, McWane executives remained steadfast in their resolve to "stand pat until market share info is available" before announcing a price

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[149] CCPF 1186-1191.

[150] CCPF 1179-1191.

[151] CCPF 1201-1207.

[152] CCPF 1212-1215.

[153] CCPF 1206, *in camera* **{(**

}; CCPF 1216, *in camera* **{(**

}; CCPF 1221, *in camera* **{(**

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increase.[154] This decision was designed to actively reinforce the *quid pro quo* message: McWane concluded that the withholding of a price increase, "[a]lthough somewhat painful to the bottom line in the short term, . . . would re-inforce the message we've been trying to drill in which when successful will pay long term dividends."[155]

Indeed, when Star finally did submit its data to SRHW on June 5, 2008,[156] it notified Sigma by email that it had done so, and openly acknowledged the *quid pro quo* agreement by repeating back the language in McWane's May 7, 2008 invitation to collude.[157]

On June 17, 2008, SRHW issued the first DIFRA report,[158] and that same day McWane upheld its end of the bargain by announcing an eight percent price increase for Fittings, effective July 14, 2008.[159] **{**

} quickly followed the McWane price increase.[162]

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[154] CCPF 1229.

[155] CCPF 1230.

[156] CCPF 1223.

[157] CCPF 1224-1225.

[158] CCPF 1238-1239.

[159] CCPF 1242.

[160] CCPF 1246, *in camera.*

[161] CCPF 1192-1200.

[162] CCPF 1247-1250.

Absent McWane's agreement to raise Fittings prices, it would not have been in Sigma's or Star's unilateral interest to participate in DIFRA, because the DIFRA market share data would (and in fact did) show McWane that it had lost market share to them, inviting reprisals.[163] Indeed, Star was openly reluctant to participate.[164] The understanding that had been established among the competitors, however, transformed what would have been a senseless and dangerous unilateral action into a calculated, profitable, and concerted one.

5. Trust Between the Conspirators Broke Down in Late 2008

McWane, Sigma, and Star continued to monitor each other for signs of "cheating" through the Summer and early Fall of 2008,[165] and complained to each other when they detected such misconduct.[166] In August 2008, the housing market declined precipitously,[167] creating additional pressure to discount.[168] Complaints about cheating – especially by Sigma – increased through September and October,[169] until in late November, Star finally gave up on the conspiracy

[163] *E.g.*, CCPF 1241; CX 2068 (McWane learned from DIFRA data that Star and Sigma had taken more of McWane's share than previously thought).

[164] CCPF 1151-1154.

[165] CCFP 1439-1450; *e.g.*, CCPF 1441; CX 1695 at 001 (Star district manager Shaun Smith telling his sales force: "We need to stay on the high road . . . It doesn't help that the market is soft, but let's be as diligent as we can gathering the proper data needed if the other suspects are cheating."); CCPF 1442; CX 0814 (Minamyer August 25, 2008 email) ("I know we have been very careful on special pricing and it seems to be working pretty good. But the competitors are starting to get weak and we can't sit back and let them play games and lose our market share.").

[166] CCPF 1451-1455.

[167] CCPF 1437; CX 1651 at 026, *in camera* **{( )}**.

[168] CCPF 1437.

[169] CCPF 1444-1446. By late October, Mr. Minamyer wrote that "Sigma is silently bringing markets down and acting as if they are being good stewards." CCPF 1446; CX 0827.

and decided to quietly resume Project Pricing to gain share. On November 25, 2008, Mr. Minamyer told his sales team to "take the gloves off": although "[w]e have all been extremely diligent in protecting the stability of our market pricing," Star was nevertheless losing revenues, and would henceforth "take every order we can" to recapture the lost share.[170]

When the price fixing agreement dissolved, the information exchange lost its purpose. DIFRA broke down at the beginning of 2009.[171] Sigma and Star stopped submitting data, and the last DIFRA report was the January 2009 report, reflecting data through December 2008.[172] Sigma tried unsuccessfully to revive DIFRA in May 2009 in an effort to "restore the badly dented competitive confidence" and to demonstrate that Sigma's "efforts to commit to a new pricing discipline would succeed."[173] Although Sigma submitted its data, it failed to breathe new life into DIFRA.[174]

6. The Agreement Was Effective During 2008

Although compliance with the Tatman Plan was not perfect, and Project Pricing was not entirely curtailed, the agreement was largely effective – the suppliers centralized pricing authority, and reduced Project Pricing industry-wide, resulting in higher prices and improved financial performance **{**

[170] CCPF 1457-1458.

[171] CCPF 1473-1483.

[172] CCPF 1474.

[173] CCPF 1484-1489.

[174] CCPF 1490.

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In his quarterly reports for the first quarter of 2008, Mr. Tatman reported observing a reduced level of Project Pricing: "[T]he level of multiplier discounting by both Star and Sigma appears to have died down significantly."[176] Over the next three months, according to Mr. Tatman's next quarterly report, the level of Project Pricing continued to slow.[177] **{**

[178]}

Star also observed that McWane and Sigma were following through with the reduction in Project Pricing, with a Division Manager reporting to Mr. Minamyer on March 11, 2008 that "they have been pretty discipline[d] in my Division" and "everyone seems to be playing fair."[179] On August 25, 2008, Mr. Minamyer noted the success of the initiative to reduce Project Pricing:

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[175] CCPF 1041-1047, *in camera*, CCPF 1048-1054; CCPF 1338-1355; CCPF 1356-1358, *in camera*; CCPF 1359-1360; CCPF 1361-1369, *in camera*; CCPF 1370-1372; CCPF 1373-1383, *in camera*; CCPF 1410-1423.

[176] CCPF 1054.

[177] CCPF 1339; CX 1562 at 004 ("The level of [Project Pricing] activity appears to have slowed over the past several months . . . ").

[178] CCPF 1047, *in camera* (documenting McWane pricing actions in response to competition an average of 3.7 times per month in the second and third quarters of 2008, an average of 27 times per month in the fourth quarter of 2008, and an average of 55 times per month in the first quarter of 2009); *see also* CCPF 1410-1423 (similar Star reports showing less Project Pricing activity in 2008 than in 2007).

[179] CCPF 1018.

"I know we have been very careful on special pricing and it seems to be working pretty good."[180] Sigma as well observed that the Fittings market had stabilized in 2008, with Mr. Pais noting that the three suppliers had maintained relatively steady market shares through October 2008, which "should bode well for a more mature and responsible pricing strategy for 09, which focuses on realizing higher prices."[181]

The success of the conspiracy impacted McWane's bottom line, resulting in a 2008 financial performance that – inexplicably, but for the conspiracy – surpassed the performance of both 2007 and 2009. Despite falling demand, Fittings prices rose over the course of 2008.[182] McWane budget variance analyses throughout 2008 show substantial pricing gains contributing to increased gross profits, even as volumes fell.[183] In fact, the gross profitability of McWane's Fittings business on a percentage basis for the first nine months of 2008 was higher than that for every full year from 1999 through 2007.[184] And in 2009, McWane's Fittings profits fell back to earth. McWane's year-to-date Fittings' profits through October 2009 were down $7.36 million compared to the same period in 2008, with approximately $1.18 million of the drop being attributable to Fittings being sold at lower prices in 2009 than in 2008.[185] In a 2009 presentation to his sales team, Mr. Tatman attributed McWane's increased 2008 profits to increased pricing

[180] CCPF 1340.

[181] CCPF 1341.

[182] CCPF 1345, 1356-1357, *in camera*.

[183] CCPF 1346-1349.

[184] CCPF 1350.

[185] CCPF 1355.

discipline ("more discipline") – the same discipline that had been the subject of the conspiracy among McWane, Sigma, and Star.[186]

7. McWane, Sigma and Star Have Continued Their Inappropriate Price Communications

The suppliers' improper pricing communications did not cease with the conclusion of their 2008 agreement and information exchange. On at least two more occasions they sought to coordinate industry-wide pricing actions.[187]

a) April 2009

On April 15, 2009, McWane announced that, on May 1, 2009, it would begin using a new, restructured price list, with higher prices for small diameter fittings (where McWane's share was highest) and lower prices for medium and large diameter Fittings (where McWane had little or no share and Sigma and Star were stronger).[188] A week later, Star announced it would also change its price list, effective May 19, 2009, but did not specify whether it would match McWane.[189]

Sigma vehemently objected to the list price restructuring, which had the potential to negatively impact Sigma's bottom line by $5 million,[190] and lobbied strenuously on multiple

[186] CCPF 1359.

[187] CCPF 1491-1553 (April 2009 McWane price restructuring and exchange of pricing assurances); CCPF 1554-1571 (June 2010 coordinated price increase).

[188] CCPF 1492-1498.

[189] CCPF 1499-1500.

[190] CCPF 1503; Pais, Tr. 2171 (Sigma price restructuring was "potentially a knockout punch" for Sigma).

fronts among the suppliers.[191] **{** [192]**}** and Mr. Pais sought and obtained in-person meetings with Mr. McCullough and Mr. Page at which, among other things, he sought their intervention on the price list change – or at least a "stay of execution."[193] Mr. Rybacki and Mr. Pais also intensively lobbied Star and SIP, seeking their support in resisting the price restructuring announced by McWane.[194] Telephone records show four calls from Mr. Rybacki to Mr. McCutcheon in this time period, and Mr. McCutcheon testified that Mr. Pais also called him directly.[195]

After Sigma issued an April 27, 2009 customer letter declining to follow McWane's restructuring,[196] McWane and Star were uncertain about each other's intentions: McWane wondered whether Star would follow, as Mr. Tatman acknowledged in an email to his bosses, sent the morning of April 28, 2009, in which he described Star as "The Wild card."[197] Star wondered whether McWane would retract the new list prices in the face of Sigma's opposition

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[191] CCPF 1505; Rybacki, Tr. 3580-3581 (Mr. Rybacki "tried to let the whole world know that we weren't happy").

[192] CCPF 1504, *in camera*.

[193] CCPF 1509-1510; 1520-1524.

[194] CCPF 1525-1532.

[195] CCPF 1532, 1529-1531; CX 2539 (McCutcheon, Dep. at 230-231) ("Mr. Pais told me that he was very confident that he was going to change McWane's mind, and he told me that he had -- I believe in that phone conversation he told me he had spoken to SIP-Serampore, and that I think he had insinuated he had already spoken to McWane and that he felt that they weren't going to make that change. And he was encouraging me to join them to give strength to there not being a change in the price list to McWane.").

[196] CCPF 1512.

[197] CCPF 1537; CX 1180 at 002 ("The Wild card right now is Star . . . there is now some probability that Star may change direction and retract their list price change.").

(as Sigma and Star had been forced to do in the face of McWane's opposition in early in 2008).[198] To eliminate this uncertainty, Mr. McCutcheon called Mr. Tatman directly to ask him whether McWane would follow through with its announcement or stay with the old price list.[199] Mr. Tatman assured him that McWane was "absolutely" going to proceed with the new price list.[200]

On the afternoon of April 28, just six hours after describing Star as a "Wild card" with "some probability" of "chang[ing] their direction and retract[ing] their list price change," Mr. Tatman emailed Mr. McCullough to report that he was "now highly confident that Star will follow our List Price."[201] Mr. Tatman claims to have no recollection of his telephone call with Mr. McCutcheon, but does not deny that it took place, and he has no plausible alternate explanation for how he became "highly confident" about Star's plans.[202]

b) June 2010

In June 2010, after having already received FTC subpoenas in this matter, McWane, Sigma, and Star nevertheless continued to engage in improper signaling practices in an effort to coordinate their Fittings pricing. On June 8, 2010, in response to a Star communication, Sigma circulated a customer pricing letter that it described as "largely a 'heads up' to the customers *and*

[198] CCPF 1538-1539.

[199] CCPF 1539; CX 2539 (McCutcheon, Dep. at 230-231 ("I did have a doubt in the back of my mind – I wanted to make sure before we moved ahead and printed all these price lists, so I called Rick just to make sure.")).

[200] CCPF 1540.

[201] CCPF 1543.

[202] CCPF 1542-1547.

the market about our intention to follow suit when Star or others take a definitive action on price increases" in Fittings.[203]

By June 11, 2010, McWane had received a copy of Sigma's "heads up" and analyzed it carefully for messages about Sigma's pricing intentions.[204] McWane correctly understood that Sigma and Star had communicated their willingness to follow a McWane price increase, and so announced a multiplier increase a few days later.[205] Star did as expected and announced its increase on June 18, 2010.[206] Sigma, as promised, sent its price increase letter by the end of the following week.[207] This was exactly what Sigma had hoped for, and a Sigma regional manager described the result as "a huge victory in [the] war we have been fighting."[208]

C. McWane Monopolized the Domestic Fittings Market by Implementing an Unlawful Exclusive Dealing Policy

1. ARRA Increased the Importance of the Domestic Fittings Market and Threatened Sigma and Star

In February 2009, the President signed into law the American Recovery and Reinvestment Act of 2009 ("ARRA"), which allocated more than $6 billion to water infrastructure projects.[209] Waterworks projects receiving ARRA funding were required to use

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[203] CCPF 1556.

[204] CCPF 1564-1565; CX 2442-A at 001 (Tatman: "I believe Sigma is waiting for either a supporting communication from us or an announcement on specific price actions").

[205] CCPF 1566.

[206] CCPF 1567.

[207] CCPF 1568-1569.

[208] CCPF 1570-1571.

[209] CCPF 1572-1573.

domestically produced materials, including Fittings (the "Buy American" requirement).[210] ARRA significantly altered the competitive dynamics of the Fittings industry. Prior to ARRA, about 15% to 20% of United States Fittings sales were sold into projects with Domestic-only specifications.[211] McWane was the only domestic producer of Fittings, and charged significantly higher prices on Domestic Fittings sales.[212]

ARRA posed a serious threat to Sigma and Star's import-based U.S. Fittings business. First, both companies projected that the Domestic Fittings market would increase under ARRA, and that they would lose that entire segment of the industry to McWane.[213] Second, Sigma and Star feared that ARRA was part of a larger groundswell of Buy-American sentiment that would spread beyond just ARRA-funded projects and outlast the stimulus bill.[214] Third, McWane might leverage its position in Domestic Fittings to get Distributors to shift their non-Domestic Fittings business to McWane.[215] Sigma and Star unsuccessfully lobbied against the application of the Buy American provision to Fittings, and investigated, but ruled out, various potential

[210] CCPF 1575-1577.

[211] CCPF 1619.

[212] CCPF 628-630, 1659..

[213] CCPF 1618-1627.

[214] CCPF 1628-1638; CX 1997 at 007 (Pais, June 5, 2009: "[Buy American] sentiment is gaining traction and may just become a regular and growing part of our industry.").

[215] CCPF 1639-1646; CX 1998 at 003 (minutes of April 14, 2009 Sigma board meeting: "SIGMA has to be watchful that McWane is not able to leverage its domestic product into an unfair gain in market share.").

waivers and loopholes that might allow them to sell imported Fittings for use on ARRA projects.[216]

Accordingly, in the first half of 2009, Sigma and Star each decided to pursue entry into the Domestic Fittings market. Star considered various business models by which it might produce Domestic Fittings in the United States.[217] Sigma took a dual track approach, pursuing domestic production while also seeking to enter into a Domestic Fittings sourcing agreement with McWane.[218]

Successful entry by Sigma or Star would challenge McWane's comfortable monopoly position in Domestic Fittings, and deprive it of an ARRA-fueled windfall. Star was of particular concern because of its history of aggressive pricing tactics – McWane's "chief concern" upon hearing of Star's intended entry into the Domestic Market was "that the domestic market gets creamed from a pricing standpoint just like the non-domestic market has been driven down in the past."[219]

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[216] CCPF 1578-1615.

[217] CCPF 1720-1725.

[218] CCPF 2171-2176.

[219] CCPF 1790; CX 0074 at 001; s*ee also* CX 0076 at 006, 009(expressing concern that Star would "drive profitability out of our business," and that "Star would not be a responsible competitor [in the domestic market] as long as incremental sales generate incremental margins for their business."); CX 0105 at 001 ("Star has historically shown that they will just continue incremental discounting down to the point where they're selling near breakeven."); CX 2483 (Tatman, IHT at 183-184) (Star "would normally be very, very, very aggressive with pricing"); CX 2483 (Tatman, IHT at 232-234).

McWane developed and pursued a two-pronged strategy to protect its monopoly in the Domestic Fittings market from entry by Star and Sigma.[220] First, it would freeze out Star by threatening to punish any Distributor that did business with Star;[221] and second, it would co-opt Sigma's entry, and further hobble Star's entry efforts, by supplying Sigma – on terms dictated by McWane – with the Fittings it needed to compete in the Domestic market.[222]

2. McWane Implemented an Exclusive Dealing Policy to "Block Star"

At the June 2009 AWWA industry conference, Star publicly announced that it would offer Domestic Fittings starting in September 2009.[223] Star had decided to start producing Domestic Fittings by contracting with existing independent foundries in the United States.[224] **{**

[225]} Star also planned to begin by selling the "A" items that make up the vast majority of sales, and expand its product offerings over time.[226] This piecemeal approach to entry is the same approach that Star and others had taken when entering the import Fittings market.[227] As an established importer of Fittings, Star did not face the most significant barriers to entry into the Domestic Fittings market – it had engineering expertise, a

[220] CCPF 1805, 2189-2191.

[221] CCPF 1712-2166.

[222] CCPF 2167-2465.

[223] CCPF 1713-1715.

[224] CCPF 1720-1725.

[225] CCPF 1729-1732, *in camera*.

[226] CCPF 1726-1727.

[227] CCPF 1728.

nationwide distribution network, a sales force, and established relationships with the major Distributors that would purchase Domestic Fittings.[228]

Mr. Tatman proposed that McWane implement an exclusive dealing policy to "block Star" from entering the Domestic Fittings market.[229] He proposed that McWane – while it still had leverage as the sole Domestic supplier, could force Distributors to "Pick their Horse" among Domestic Fittings suppliers.[230] Under what he described as the "Hard Approach" version of this tactic, McWane would not sell any Domestic Fittings to Distributors that did not source Domestic Fittings exclusively from McWane.[231] Mr. Tatman observed that this would literally avoid competition ("Avoids the job-by-job auction scenario"), and that if the strategy were successful it would deter independent entry by both Sigma and Star.[232]

McWane formally announced its Domestic Fittings exclusivity policy (the "Exclusive Dealing Policy") in a September 22, 2009 letter to Distributors. The letter stated that, with limited exceptions (such as where McWane did not have product available), any Distributor that did not "elect to fully support McWane branded products" for Domestic Fittings" (*i.e.*, purchased Domestic Fittings from a supplier other than McWane) "may forgo participation in any unpaid

[228] CCPF 1665-1668.

[229] CCPF 1804-1813; CCPF 1814, *in camera*; CCPF 1815.

[230] CCPF 1808.

[231] CCPF 1809-1812.

[232] CCPF 1808(c), 1811; CX 0076 at 008 ("[T]he only reason for [Sigma] not to pursue [Domestic entry] is if they feel McWane's response will make Star's or their programs un-successful which may cause them to hold off making any heavy investments.").

rebates for domestic fittings and accessories or shipment of their domestic fitting and accessory orders . . . for up to 12 weeks."[233]

Notwithstanding the soft "may/or" language of the Exclusive Dealing policy, McWane's sales team consistently conveyed to Distributors a harder penalty for disloyalty: Distributors that purchased Domestic Fittings from Star would ***certainly***, not possibly, be punished by McWane, and they would ***both*** lose their rebates ***and*** lose access to Domestic Fittings, not "either/or."[234] McWane's managers instructed sales representatives to tell Distributors that if they bought from Star, "We are not going to sell them our domestic . . . . Once they use Star, they can't EVER buy domestic from us."[235] McWane's own documents reflect that the market understood McWane's Exclusive Dealing policy to mean that McWane "will" – not "may" – cut them off,[236] and McWane followed through on this threat.[237] McWane also made it clear to Distributors with multiple branches that "if one branch uses Star, every branch is cut off."[238]

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[233] CCPF 1826. The same letter announced McWane's master distribution agreement with Sigma, discussed *infra* Part II.C.3.

[234] CCPF 1829-1849.

[235] CCPF 1832.

[236] CCPF 1845; CX 0119 at 002 ("Although the words "may" and "or" were specifically used [in the September 2009 announcement], the market has interpreted the communication in the more ***hard line "will" sense***." (emphasis added)); CCPF 1835; CX 0172 (McWane territory sales manager writing to national sales manager Jerry Jansen in February 2010: "I know the fax stated that we could and or cut people off but we were told to tell them more than one time that ***if you support Star then we will not sell to you***." (emphasis added)).

[237] CCPF 1850-1892 (describing McWane cutting off Hajoca).

[238] CCPF 1832.

McWane's Exclusive Dealing policy was effective.[239] Distributors, including the two largest Distributors, HD Supply and Ferguson, believed that penalties for disloyalty would be severe, and acted accordingly, instructing branches not to purchase Domestic Fittings from Star.[240] Distributor testimony,[241] Star testimony,[242] and Star's quote logs for Domestic Fittings[243] all indicate that, but for McWane's Exclusive Dealing policy, Distributors would have purchased more Domestic Fittings from Star. As McWane recognized, if Star had been free to win business from the major national Distributors, these accounts would have offered Star a quick and efficient way to win large volumes of business as well as a measure of commercial validation.[244]

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[245]} Star has not been able to reach – and knows it could not reach and sustain in the presence of McWane's Exclusive Dealing Policy – sales levels that would justify investment in its own foundry and thereby enable the realization of the attendant cost

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[239] CCPF 1893-2031.

[240] CCPF 1903-1935; CCPF 1936, *in camera* (McWane got HD Supply to issue an internal "mandate letter" instructing its branches to "adhere to this mandate and purchase all of our American made fittings through [McWane] or Sigma." (CCPF 1910)); CCPF 1937-1949; CCPF 1950-1951, *in camera*; CCPF 1952 (Ferguson instructed its branches to support McWane's policy. (CCPF 1942)).

[241] *E.g.*, CCPF 1917, 1940, 1987, 2010, 2018, 2096, 2098.

[242] *E.g.*, CCPF 1927, 1990, 2011, 2021.

[243] CCPF 1935 ("HD will not buy from Star"); CCPF 1949 ("All Ferguson are lost-they only get quotes from us for reference.").

[244] CCPF 2099.

[245] CCPF 2101-2108, *in camera*.

efficiencies.[246] McWane's Exclusive Dealing Policy has thus achieved its goal of effectively "blocking" Star's entry, keeping it from being in a position to drive down prices in the Domestic Fittings market.[247]

3. McWane Conspired with SIGMA to Monopolize the Domestic Fittings Market by Entering into the MDA

After ARRA was enacted, Sigma considered Domestic Fittings sourcing to be its "#1a priority,"[248] and it pursued two potential avenues for Domestic entry: (1) obtaining Domestic Fittings from McWane, and (2) entering the domestic market using the same "virtual manufacturing" model that it used for imported Fittings.[249] Prior to Star's announcement of its planned entry in June 2009, Sigma made little progress in its efforts to source through McWane,[250] and by early June it was prepared to "**{**

}"[251]

Sigma formed an "SDP" team,[252] and the team developed and carried out a plan,[253] visiting foundries, securing offers to produce Domestic Fittings, and conducting a series of

[246] CCPF 2109-2159.

[247] CCPF 2160-2166.

[248] CCPF 2176.

[249] CCPF 2172-2173.

[250] CCPF 2177-2181; CX 0908 (McWane informing Mr. Pais that McWane's Fittings team had "decided not to sell Sigma private label product from its domestic foundries"); CCPF 2203-2207; CCPF 2208-2209, *in camera*; CX 1993 at 003 (Pais referring to a subsequent McWane offer at a 5% discount as "little more than a patronizing accommodation").

[251] CCPF 2209, *in camera*.

[252] CCPF 2211-2220.

production trials.[254] Sigma had the expertise and resources necessary to develop and manufacture a competitive range of Domestic Fittings,[255] and absent an agreement with McWane, Sigma would have entered the domestic market.[256]

McWane believed that Sigma planned to enter the Domestic market – an action made far more likely once Star announced its entry into the Domestic Fittings market at the June 2009 AWWA conference.[257] Once McWane executives realized that Star and Sigma intended to enter the Domestic market, McWane negotiated a Master Distribution Agreement (MDA) with Sigma in earnest.[258] Although McWane would have to give up some of its margin on any Domestic Fittings it sold through Sigma,[259] and despite some uncertainty regarding Sigma's ability to succeed if it entered the Domestic Fittings market on its own,[260] Mr. Tatman and Mr. McCullough agreed that an "insurance policy" against another Domestic Fittings entrant was

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[253] CCPF 2221-2228.

[254] CCPF 2229-2248.

[255] CCPF 2267; CX 0803 at 001 (Sigma customer letter: "SIGMA has adequate engineering and production expertise and the needed resources to develop and manufacture a competitive range of AWWA Fittings using a few quality foundries in USA.").

[256] CCPF 2266; CX 2527 (Pais, IHT at 179-180) ("[I]f [McWane] had stuck with that initial offer [of a 5% discount] . . . then we certainly would have gone another – to Plan B, which is our [domestic] production.").

[257] CCPF 2316-2335; CCPF 2335; CX 0074 at 001; CX 1179 at 002 (McWane customer letter: "[T]he reality of [the] situation is that in the absence of the MDA with [McWane], Sigma was going to develop their own domestic sourcing options to the extent they could.").

[258] CCPF 2336-2366.

[259] CCPF 2367-2371.

[260] CCPF 2334.

best, and that it would be better financially for McWane to collaborate with Sigma rather than compete with it.[261] Moreover, both McWane and Sigma recognized and intended that a supply agreement between Sigma and McWane would make it even harder for Star to successfully enter.[262] McWane also recognized that entering an agreement with Sigma would not increase the size of the Domestic Fittings market served by the two companies.[263]

McWane eventually offered to sell Domestic Fittings to Sigma at a 20% discount, but conditioned its offer on Sigma's agreement to join McWane in blocking Star's entry through the Exclusive Dealing Policy.[264] In September 2009, McWane and Sigma signed an OEM Distribution Agreement (referred to as the Master Distribution Agreement, or "MDA") for the supply of Domestic Fittings.[265] McWane announced the MDA to the market on September 22,

[261] CCPF 2332, 2349, 2458 (referring to MDA as "insurance policy" against Sigma entry); CCPF 2200; CX 0070 at 001 (describing loss of margin as a potential drawback); CCPF 2326; CX 0076 at 008 ("If they are truly committed to make the investment level required to be a viable competitor regardless of our actions, then producing for [Sigma] is probably of greater financial benefit to our business then having them source elsewhere.").

[262] CCPF 2454-2465; CX 0465 at 010 (Tatman: having Sigma sell McWane branded product should "reduce Star's ability to grow share"); CCPF 2461, *in camera*; CX 1022 at 004 (Pais: agreement with McWane was "likely to have the intended effect of marginalizing Star"); CX 0997 at 003 (Pais September voicemail: "[I]f we do our job right, it might isolate Star and make them suffer with their investment even more, because they may not be able to gain credibility."); CX 2353 at 004 (describing McCullough view that selling Domestic Fittings to Sigma would "continue to put pressure on Star.").

[263] CCPF 2341; CX 0729 (Tatman: "This is certainly a choice of evils as having more Domestic suppliers doesn't really increase the size of the pie.").

[264] CCPF 2345.

[265] CCPF 2168.

2009, in the very same letter that contained the new Exclusive Dealing policy against Star.[266]

The MDA impaired competition in the Domestic Fittings market in a number of ways, including:

- Policing Exclusive Dealing. The MDA required Sigma to enforce (and Sigma did enforce) McWane's Exclusive Dealing policy by refusing to sell Domestic Fittings to any distributor that purchased Domestic Fittings from Star.[267]

- Restrictions on Independent Entry. The MDA expressly precluded independent entry by Sigma in competition with McWane, requiring that, with few exceptions, "McWane shall be Sigma's sole and exclusive source for Domestic Fittings."[268] The MDA thus brought Sigma's Domestic "SDP" efforts to a halt.[269]

- Restrictions on Prices. Under the MDA, Sigma was required to sell Domestic Fittings at a weighted average of no less than 98% of McWane's published prices,[270] and the parties understood that McWane had also committed to maintain the same pricing levels.[271]

These provisions, and the parties' conduct in implementing them, reveal the true purpose and effect of the MDA as an anticompetitive, output restricting mechanism, rather than an arms-length buy-sell agreement between McWane and Sigma.

[266] CCPF 2374.

[267] CCPF 2394-2409; *see* CCPF 2403; CX 0803 002 (Sigma announcing to its customers that it was enforcing the McWane Exclusive Dealing policy).

[268] CCPF 2379-2385.

[269] CCPF 2386-2393.

[270] CCPF 2411-2417.

[271] CCPF 2418-2434; CX 0347 at 001 (Tatman: under the MDA, "Sigma (and in theory [McWane]) is supposed to sell within 98% of the published levels."); CCPF 2431; CX 0106 at 002 (Jansen: "[W]e need to make sure all domestic is right down the line since Sigma is involved").

4. Domestic Fittings Prices Rose as a Result of the Exclusive Dealing Policy and the MDA

McWane has successfully used the Exclusive Dealing Policy and the MDA to insulate the Domestic Fittings market from competition.[272] Having co-opted Sigma as a competitor and impeded Star's growth, depriving it of the scale necessary to invest further, lower its costs, and become a more effective competitor,[273] McWane did not need to take competition into account when setting prices on Domestic Fittings.[274] McWane (and therefore Sigma) raised Domestic Fittings published prices in December 2009.[275] Distributor testimony and McWane's financial records show that Domestic Fittings prices (and McWane's margins) increased in both 2009 and 2010.[276] McWane successfully avoided what Mr. Tatman had identified as the "biggest risk" to its 2010 profitability, the "erosion of domestic pricing if Star emerges as a legitimate competitor."[277]

[272] CCPF 2466-2491.

[273] CCPF 2109-2166. As Tatman put it, a purpose of the Exclusive Dealing Policy was "to make sure that they [Star] don't reach any critical market mass that will allow them to continue to invest and receive a profitable return." CCPF 1791.

[274] CCPF 2160-2166, 2475-2484; CX 2480 (Napoli, Dep. at 71-72) (explaining that he is not concerned about Star driving down the prices of Domestic Fittings); CCPF 2476; CX 0108 at 001 (Jansen instruction to McWane sales team regarding Domestic Fittings: "[W]hen you have someone say that we need to match pricing due to the other guys we need to take a firm stance and ask who is going to use them.").

[275] CCPF 2422-2425, 2481-2482.

[276] CCPF 2481; CCPF 2483, *in camera*.

[277] CCPF 1796.

III. JURISDICTION

The FTC has jurisdiction over McWane's acts and practices, including the acts and practices alleged in the Complaint. Under Section 5 of the FTC Act, the FTC may exercise jurisdiction over "persons, partnerships, or corporations," with certain exceptions not relevant here. 15 U.S.C. § 45(a)(2). At all times relevant herein, McWane has been, and is now, a "corporation" as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.[278] The FTC is "empowered and directed to prevent" the use of "unfair methods of competition in or affecting commerce." 15 U.S.C. § 45(a)(2). McWane's acts and practices with respect to Fittings, as alleged in the Complaint, are in or affect commerce in the United States, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.[279]

IV. STANDARD OF REVIEW

Complaint Counsel must prove that Respondent unreasonably restrained trade by establishing each element of the seven counts of the Complaint by a preponderance of the evidence. *See In re Adventist Health Sys./West*, 117 F.T.C. 224, 297 (1994) ("Each element of the case must be established by a preponderance of the evidence . . . ."); *Steadman v. SEC*, 450 U.S. 91, 101-102 (1981) (requirement under Section 556(d) of the Administrative Procedure Act that agency orders be "supported by and in accordance with the reliable, probative and substantial evidence" are satisfied by the preponderance-of-the-evidence standard). The preponderance of the evidence standard can be met through the use of direct or circumstantial evidence. *See In re Washington Crab Ass'n*, 66 F.T.C. 45, 55 (1964) (violation of Sherman Act, Section 2, and thus FTC Act, "established by a preponderance of the reliable, probative and

[278] CCPF 2; Joint Stipulations of Law, JX0001 ¶ 1.

[279] CCPF 3; Answer at ¶ 10 (admitting that sales of Fittings are interstate commerce).

substantial evidence and the fair and reasonable inferences drawn therefrom") (Initial Decision, *aff'd* by Commission).

Conduct unreasonably restrains trade when it has or is likely to have a substantial anticompetitive effect in the relevant market, such as by increasing prices, reducing output, reducing quality, or reducing consumer choice. *See, e.g.*, *Standard Oil Co. v. United States*, 283 U.S. 163, 175 (1931); *Realcomp II, Ltd. v. FTC*, 635 F.3d 815, 825 (6th Cir. 2011); *Hahn v. Ore. Physicians' Serv.*, 868 F.2d 1022, 1026 (9th Cir. 1988). Courts consider one or more of three factors in making this determination: the nature of the restraint; market power; and evidence of actual effects.

Determining whether a restraint is likely to harm competition is judged along an analytical continuum from conduct that is judged to be *per se* unlawful without any market analysis, to an abbreviated market analysis under an "inherently suspect" or "abbreviated rule of reason" analysis, to a more plenary market analysis under a full blown rule of reason analysis. In many cases, the likely harm to competition is apparent from the nature of the restraint. For example, restraints such as naked price fixing and market allocation agreements, are known to have a "pernicious effect on competition and lack any redeeming virtue," and are thus deemed to be *per se* unlawful. *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958); *see also Realcomp*, 635 F.3d at 825. Conduct that is *per se* unlawful is condemned without any further market inquiry once the conduct itself has been proven. *Id.*

Restraints that bear a "close family resemblance" to "another practice that already stands convicted in the court of consumer welfare" are presumed to harm competition without proof of market power or actual effects, unless the defendant proffers a competitive justification for the practice. *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 37 (D.C. Cir. 2005); *see also Realcomp*,

635 F.3d at 826 n.4. This "inherently suspect" analysis is appropriate if "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets." *Realcomp*, 635 F.3d at 825 (quoting *Cal. Dental Ass'n v. FTC*, 478 U.S. 756, 770 (1999)); *Polygram*, 416 F.3d at 35-36; *N. Tex. Specialty Physicians v. FTC*, 528 F.3d 346, 362 (5th Cir. 2008) (physician group's collective negotiations of fee for service contracts "bear a very close resemblance to horizontal price fixing" such that inherently suspect analysis was appropriate).

Even where the anticompetitive nature of a restraint is less obvious, courts need not engage in a full rule of reason or "plenary market examination." *Cal. Dental Ass'n*, 526 U.S. at 779 (1999) (the need for a "[m]ore extended examination of the possible factual underpinnings… [does] not, of course, necessarily [] call for the full market analysis"). The essential inquiry is "whether or not the challenged restraint enhances competition." *Id.* at 780. Thus, the court need only conduct a sufficient analysis to arrive at a "confident conclusion about the principal tendency of a restriction . . . ." *Id.* at 781.

Under a full-blown rule of reason analysis, evidence of the anticompetitive nature of the restraint and market power presumptively establish anticompetitive effects, even in the absence of direct proof of actual anticompetitive effects, such as higher prices. *E.g.*, *In re Realcomp II, Ltd.*, FTC Docket No. 9320, 2007 WL 6936319, at *19 (Oct. 30, 2009) (reasoning that because market power is a "surrogate for detrimental effects," that "if a tribunal finds that the defendants had market power and that their conduct tended to reduce competition, it is unnecessary to demonstrate directly that their practices had adverse effects on competition."); *see also United States v. Brown Univ.*, 5 F.3d 658, 668 (3d Cir. 1993); *Flegel v. Christian Hosp.*, 4 F.3d 682, 688 (8th Cir. 1993). Thus, plaintiffs may prove that a restraint violated the FTC Act under a plenary

rule of reason analysis by showing *either* that the defendants had market power and the nature of the restraint *or* direct evidence of actual effects. *In re Realcomp II*, 2007 WL 6936319, at *19. Notably, direct proof of adverse effects can be established in numerous ways, and does not necessarily need to involve elaborate econometric proof that the conduct resulted in higher prices. *See Indiana Fed'n of Dentists*, 476 U.S. at 460-461 (actual anticompetitive effects proven by evidence that insurers in two localities over a period of years were "actually unable to obtain compliance with their requests for submission of x-rays"); *In re Realcomp II*, 2007 WL 6936319, at *19.

If it is shown that conduct is likely to harm competition under an abbreviated or plenary rule of reason analysis, then the burden shifts to respondent to show that the challenged conduct has a "plausible" and "cognizable" procompetitive justification. *See In re Polygram Holding, Inc.*, 136 F.T.C. 310, 345-347 (2003). A justification is cognizable if it is compatible with the goal of the antitrust laws to further competition. *Id.* at 345. It is plausible if it will "plausibly create or improve competition," such as by increasing output or improving product quality, service, or innovation, and "cannot be rejected without extensive factual inquiry." *Id.* at 347.

The respondent must show evidence that supports the proposed justification, and that the challenged conduct is reasonably necessary – and no broader than necessary – to achieve the alleged procompetitive effects. *See, e.g.*, *Realcomp*, 635 F.3d at 835 (finding procompetitive justification – the prevention of free-riding – insufficient where the petitioner "has not demonstrated a connection between the [restraint] and the prevention of free-riding"). If a respondent is able to make that showing, then Complaint Counsel bears the burden of proving that the anticompetitive effects outweigh the procompetitive efficiencies. *Polygram Holding*,

Inc. v. FTC, 416 F.3d 29, 36 (D.C. Cir. 2005). Absent such a showing, the conduct is condemned.

V. LEGAL ANALYSIS

McWane engaged in a long series of anticompetitive acts in the Fittings and Domestic Fittings markets. In Sections A and B below, we discuss the two relevant product markets at issue and how the Fittings market is conducive to collusion. Section C discusses how McWane violated Section 5 of the FTC Act by unlawfully inviting its competitors to collude in an *per se* illegal price fixing agreement. Section D details how McWane conspired with Sigma and Star to stabilize and increase Fittings prices by curtailing Project Pricing and increasing price transparency. Section E discusses how McWane's participation in the DIFRA information exchange, independent of the price-fixing claim, violates Section 1 of the Sherman Act because DIFRA's exchange of Fittings sales volume is likely to lead to price coordination. Acting to protect its monopoly in the Domestic Fittings market, Section F discusses how McWane's Master Distribution Agreement with Sigma violates Section 1 because it eliminated Sigma as a potential competitor in the Domestic Fittings market. Sections G and H then discuss how McWane monopolized, attempted to monopolize, and conspired to monopolize the Domestic Fittings market by implementing its Exclusive Dealing Policy, which had the purpose and effect of excluding rivals and maintaining supracompetitive prices.

A. Fittings and Domestic Fittings Represent Two Relevant Markets That Each Have High Barriers to Entry

Market definition is an important tool for antitrust analysis because it assists the Court in its assessment of whether one firm has, or several firms acting together have, the ability to raise prices above the levels that would exist in a competitive market. *See, e.g., Consul, Ltd. v. Transco Energy Co.*, 805 F.2d 490, 495 (4th Cir. 1986). In other words, market definition is an

"an aid in determining whether power exists." *Gen. Indus. Corp. v. Hartz Mountain Corp.*, 810 F.2d 795, 805 (8th Cir. 1987) (*quoting* Lawrence A. Sullivan, *Handbook of the Law of Antitrust* 41 (1990)).

Here, the record evidence establishes that there are two relevant markets: (1) the supply of Fittings, *i.e.*, ductile iron pipe fittings of 24" and smaller in diameter, that are sold for use on Open Specification jobs (the "Fittings market"); and (2) the supply of Domestic Fittings, *i.e.*, ductile iron pipe fittings of 24" and smaller in diameter that are made in the United States, that are sold for use on jobs with Domestic-only Specifications (the "Domestic Fittings market"). The relevant geographic market for both product markets is the United States. Both of these markets have high entry barriers.

1. General Principles of Market Definition

The standards for defining a relevant antitrust market under the Sherman Act are the same as those developed for the analysis of mergers under the Clayton Act. *See, e.g.*, *United States v. Grinnell Corp.*, 384 U.S. 563, 572-573 (1966) (noting that there is "no reason to differentiate between 'line' of commerce in the context of the Clayton Act and 'part' of commerce for purposes of the Sherman Act"); *Image Tech. Servs. v. Eastman Kodak Co.*, 125 F.3d 1195, 1204 n.3 (9th Cir. 1997) (same). A well-defined antitrust market consists of "any grouping of sales whose sellers, if unified by a hypothetical cartel or merger, could profitably raise prices significantly above the competitive level." *Coastal Fuels Inc. v. Caribbean Petroleum Corp.*, 79 F.3d 182, 197 (1st Cir. 1996), *cert. denied*, 519 U.S. 927 (1996); *see also Brown Shoe Co., Inc. v. United States*, 370 U.S. 294, 325-326 (1962) (emphasizing analysis of "lessen[ed] competition" in relevant market definition); 2010 Horizontal Merger Guidelines at § 4.1.1 (describing the hypothetical monopolist test as a measure of a combined firm's ability to

raise prices, or market power). A relevant market is comprised of a relevant product market and a relevant geographic market. *Brown Shoe,* 370 U.S. at 325-326 (1962).

A relevant product market includes all products or services that are reasonable substitutes for the same purpose or use from a buyer's point of view. *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 394-395 (1956); *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1435 (9th Cir. 1995) (hereinafter "*ARCO*"); *see also In re: R.R. Donnelley & Sons Co.*, 120 F.T.C. 36, 153 (1995) (defining a relevant market as "the smallest grouping of products whose sellers, if unified by a hypothetical cartel or merger, could profitably increase prices significantly above the competitive level"). In determining the relevant product market, courts have traditionally emphasized two factors: "(1) the reasonable interchangeability of use [by consumers] and (2) the cross-elasticity of demand between the product itself and substitutes for it." *FTC v. Arch Coal, Inc*., 329 F. Supp. 2d 109, 119 (D.D.C. 2004) (*quoting Brown Shoe*, 370 U.S. at 325).

"Interchangeability of use and cross-elasticity of demand look to the availability of products that are similar in character or use to the product in question and the degree to which buyers are willing to substitute those similar products for the product." *FTC v. Swedish Match*, 131 F. Supp. 2d 151, 157 (D.D.C. 2000) (citations omitted). Thus, two products are reasonably interchangeable if they can be used for the same purpose. *FTC v. Staples*, 970 F. Supp. 1066, 1074 (D.D.C. 1997). Cross-elasticity of demand refers to the "responsiveness of the sales of one product to price changes of the other." *E.I. du Pont de Nemours & Co.*, 351 U.S. at 400 (1956).

The Horizontal Merger Guidelines analyze cross-elasticity of demand by determining whether a hypothetical monopolist (or cartel) could profitably impose a small but significant and non-transitory increase in price (a "SSNIP"). 2010 Horizontal Merger Guidelines at § 4.1.1. If a

SSNIP of the hypothetically-monopolized products is profitable, then the market is properly defined to include only those products. *Id.; see also FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1038 (D.C. Cir. 2008) (applying the Merger Guidelines SSNIP test to defining a relevant product market); *FTC v. Swedish Match N. Am., Inc.*, 131 F. Supp. 2d 151, 160-66 (D.D.C. 2000) (same). On the other hand, "[i]f a small price increase would drive consumers to an alternative product, then that [alternative] product must be reasonably substitutable for those in the proposed market and must therefore be part of the market, properly defined." *Whole Foods*, 548 F.3d at 1038 (*citing* the 1992 Horizontal Merger Guidelines).

A relevant geographic market is defined as "the 'area of effective competition . . . in which the seller operates, and to which the purchaser can practicably turn for supplies.'" *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 359 (1963) (quoting *Tampa Elec. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961); *see also Morgenstern v. Wilson*, 29 F.3d 1291, 1296 (8th Cir. 1994) (defining the relevant geographic market as the "area to which consumers can practicably turn for alternative sources of the product and in which the antitrust defendants face competition."); 2010 Horizontal Merger Guidelines at § 4.2.2 (describing geographic market definitions based on the location of customers). In *In re Polypore*, this Court further explained that:

> The boundaries of [the relevant geographic market] are shaped by the geographic structure of supplier-customer relations. Those boundaries must both correspond to the commercial realities of the industry and be economically significant, because Congress prescribed a pragmatic, factual approach to the definition of the relevant market and not a formal, legalistic one.

2010 FTC LEXIS 17, at *492 (internal citation omitted). This Court also considered whether there are any "producers who can provide substitutes, and constrain any such exercise of market power" in the relevant geographic market. *Id.*; *see also Rothery Storage & Van Co. v. Atlas Van*

Lines, Inc., 792 F.2d 210, 218 (D.C. Cir. 1986); *United States v. Rockford Memorial Corp.*, 717 F. Supp. 1251, 1261 (N.D. Ill. 1989), *aff'd*, 898 F.2d 1278 (7th Cir. 1990); Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 551 (Supp. 2012) (hereinafter "Areeda & Hovenkamp, Antitrust Law").

2. The Supply of Fittings For Waterworks Projects With Open Specifications in the United States is a Relevant Market

a) Fittings Sold For Use on Waterworks Projects With Open Specifications Are A Relevant Product Market

Fittings are a small but essential part of any waterworks project that involves pressurized water distribution and treatment systems, such as potable water lines that connect water supply facilities to neighborhoods and certain sewer lines.[280] Fittings attach to the ends of pipes in order to: change the direction of water flow; connect pipes of different sizes; merge two pipelines to one, or branch one pipeline off into two; and attach pipes to valves, fire hydrants, or water meters.[281] There are thousands of different types and sizes of Fittings that each serve a different purpose, such as connecting to different sized pipes or providing various degrees of "bend."[282]

Fittings sold into Open Specifications, *i.e.*, those specifications that do not specify a country of origin, are a relevant product market because there are no widely used substitutes that constrain their price, and because analytical convenience dictates that the thousands of different types and sizes of Fittings may be grouped together into one relevant market of 24" and below. *See Brown Shoe*, 370 U.S. at 325 (identifying "reasonable interchangeability of use" between products as determinative of product market parameters); *Swedish Match*, 131 F. Supp. 2d at 157

[280] CCPF 371-372 (uses); CCPF 420 (small sub-segment of waterworks projects).

[281] CCPF 371; *see* 596 (illustrating various Fittings uses).

[282] CCPF 378 (number of fittings); CCPF 596 (describing different purposes of fittings).

(considering both the "similar character or use to the product in question" and whether "buyers are willing to substitute those similar products" when analyzing substitution); *In re: Evanston Northwestern Healthcare Corp.*, 2007 F.T.C. LEXIS 210 (2007) (adopting *Swedish Match's* substitutability standard).

(1) There are No Widely Used Substitutes That Constrain the Price of Fittings

Fittings sold into Open Specifications are a relevant product market because there are no widely used substitutes that constrain their price. *See Swedish Match*, 131 F. Supp. 2d. at 157. McWane admits that there are no "widely used substitutes" for Fittings.[283] According to McWane's economic expert, Dr. Normann, the closest substitute for Fittings are fittings made from a type of plastic: polyvinyl chloride ("PVC fittings").[284] PVC fittings, however, do not generally compete against Fittings and are not a sufficiently close substitute as to be included in the relevant market.

PVC fittings are not reasonably interchangeable with Fittings. In the view of consumers, PVC fittings are more expensive, have lower pressure ratings, are more difficult to restrain and install, and are viewed as more susceptible to fracture than Fittings.[285] Moreover, some jurisdictions simply do not allow plastic fittings.[286] These conclusions are echoed by McWane's Price Coordinator and Quality Manager, Mr. Napoli, who has over 20 years of industry

[283] Answer at ¶ 23; *see also* CCPF 578-594.

[284] RX-712A (Normann Rep. at 24).

[285] CCPF 581 (PVC fittings are more expensive); CCPF 582 (PVC fittings have lower pressure ratings); CCPF 586 (PVC fittings are more difficult to restrain and install); CCPF 583 (PVC fittings are more susceptible to fracture).

[286] CCPF 585.

experience and was formerly responsible for interpreting product specifications and suitable product applications at McWane. Mr. Napoli testified at his deposition that, "[n]o one, to my knowledge, has come up with a good plastic substitute for the strength of ductile iron."[287] Mr. Napoli further explained that, in connection with high-pressure applications, "I don't recall ever seeing a PVC fitting even attempt to be used by an engineer [End User]."[288] Consistent with this testimony, there is no record evidence indicating that End Users would switch from Fittings to another product in response to a small, but significant, price increase.[289]

Indeed, Fittings suppliers do not track the price of PVC fittings, and do not take the price of PVC fittings into account when setting Fittings prices.[290] This is powerful evidence that Fittings and PVC fittings are not sensitive to each other's price changes, and therefore are in separate markets. *See Beatrice Foods v. FTC*, 540 F.2d 303, 309 (7th Cir. 1976) (finding separate market when manufacturers of one product did not consider price of other product in setting prices); *Staples*, 970 F. Supp. at 1075-1079 (failure to track or react to prices of other products is evidence of separate markets); *see also Brown Shoe*, 370 U.S. at 325 (identifying "sensitivity to price changes" of other products as a factor for market definition).

[287] CCPF 583; *see also* CCPF 580-582, 584-588 (other reasons why PVC fittings are not Fittings substitutes); CCPF 1276 (DIFRA's inaction regarding a "PVC threat"); CCPF 589-91 (brass, steel, cast iron, or gray iron fittings are not Fittings substitutes).

[288] CCPF 587 (statements from Fittings supplier executives, Messrs. Tatman, Jansen, Minamyer, McCutcheon, Saha, and Napoli).

[289] *See* CCPF 592 (distributors do not leverage PVC prices in negotiations with Fittings suppliers).

[290] CCPF 592-593.

Industry participants' contemporaneous business documents also help to define the relevant product market as Fittings because they indicate that Fittings suppliers do not consider PVC fittings (or other products) to constitute a competitive threat. *See FTC v. CCC Holdings, Inc.*, 605 F. Supp. 2d 26, 43 (D.D.C. 2009) (finding relevant product market of total loss software based on industry documents grouping software together while excluding other means of calculating total loss); *Staples*, 970 F. Supp. at 1076 (defendant's internal documents comparing its prices to some companies' prices, but not to other companies, indicate the boundaries of the product market). Here, McWane, Sigma and Star's planning and strategy documents confirm they are meaningfully constrained only by competition from each other, and that they are not concerned about losing sales to alternative products.

For example, in a January 2008 presentation discussing McWane's reaction to recent developments in the Fittings market, Mr. Tatman stated that a Fittings price increase would be successful if supported by "the Big 3" Fittings suppliers, *i.e.*, McWane, Sigma and Star.[291] The only other company mentioned in the presentation is Serampore, a much smaller Fittings seller.[292] Likewise, in a January 2008 memo to Sigma's top managers, Sigma's President, Mr. Pais, wrote that curtailing discounting on Fittings would be profitable if McWane, Sigma, and Star acted with "discipline;" he did not express any concern about losing sales to alternative

[291] CCPF 913; *see also* CCPF 1054 (Tatman Plan successful thanks to Big 3 curbing discounting); CCPF 460 (McWane budget planning document describes Sigma and Star as "primary" competitors); CCPF 962, 1341 (Sigma emails describing McWane, Sigma and Star as primary Fittings suppliers).

[292] CCPF 219, 459-460.

products or other suppliers.[293] In fact, the pricing strategy discussed by Mr. Tatman and Mr. Pais largely collapsed in the Fall 2008 because of cheating, *i.e.*, discounting by other suppliers of Fittings, not because of lost sales to alternative products.[294]

Finally, the finding that Fittings are a distinct relevant product market is confirmed by the acknowledgement of McWane's economic expert, Dr. Normann, that "industry demand for [Fittings] is likely inelastic," *i.e.*, that demand does not decline significantly as price increases.[295] This acknowledgment that consumers cannot substitute an alternative product when faced with a price increase for Fittings indicates that the Fittings market satisfies the SSNIP test, and therefore constitutes a relevant antitrust market. *See Whole Foods Mkt., Inc.*, 548 F.3d at 1038; 2010 Horizontal Merger Guidelines at § 4.1.1.

(2) It is Appropriate to Group All Fittings 24" in Diameter and Below Into A Single "Cluster" Market

While there are thousands of different Fittings, it is appropriate to group all Fittings (24" and smaller in diameter) into a single product market. The thousands of different types and sizes of Fittings generally are not a substitute for each other. For example, a four inch diameter Fitting cannot substitute for an eight inch Fitting because it would not fit on an eight inch pipe; and a Fitting with a ninety degree "bend" cannot substitute for a Fitting with a forty-five degree bend

[293] CCPF 956; *see also* CCPF 1161 (boosting price would be a result of actions by Star, Sigma, and McWane).

[294] CCPF 1439-1450 (Fittings suppliers monitoring and detecting cheating starting in August 2008); CCPF 1451-1455 (Fittings suppliers complaining to one another about cheating); CCPF 1456-1466 (Fittings suppliers resume Project Pricing); *see also* CCPF 579-594 (no substitutes for Fittings).

[295] RX-712-A (Normann Rep. at 24).

(or for a straight Fitting).[296] Accordingly, each discrete size and type of Fitting could properly be viewed as a distinct product market. However, different types and sizes of Fittings may also be grouped together into a single cluster market for analytical convenience. *See In re: Promedica Health Sys., Inc.*, 2012 FTC LEXIS 58, at *48-49 ("cluster markets are based on analytical convenience [and are] both useful and appropriate for evaluating competitive effects" under appropriate circumstances); *Emigra Group v. Fragomen*, 612 F. Supp. 2d 330, 353 (S.D.N.Y. 2009) (no need to analyze complements in separate markets when the market shares are the same); Jonathan B. Baker, *The Antitrust Analysis of Hospital Mergers and the Transformation of the Hospital Industry*, 51 L. & Contemp. Probs., at 93, 138 (Spring 1998) (stating that smaller markets may be analyzed as a collection when geographic markets are the same and market shares are also similar).

Using cluster markets is appropriate when the applicable competitive conditions are identical or nearly so for the entire class of products. For example, in *Brown Shoe*, the defendant appealed the district court's finding that children's shoes represented one relevant product market, arguing that such a market includes products that are not reasonably interchangeable for one another: "Brown argues, for example, that 'a little boy does not wear a little girl's black patent leather pump' and that '[a] male baby cannot wear a growing boy's shoes.'" 370 U.S. at 327. The Court reached the pragmatic conclusion that to subdivide the children's shoe market on the basis of size, age, and sex would not advance the antitrust analysis, and therefore was unnecessary:

> Further division does not aid us in analyzing the effects of this merger. . . . Appellant can point to no advantage it would enjoy

[296] CCPF 596.

> were finer divisions than those chosen by the District Court employed. Brown manufactures significant, comparable quantities of virtually every type of nonrubber men's, women's and children's shoes. Thus, whether considered separately or together, the picture of this merger is the same.

Id.

Likewise, in *In re ProMedica Health Sys., Inc.,* the Commission grouped into a single relevant product market a collection of individual hospital services that were not substitutes for one another. *In re ProMedica Health Sys., Inc.,* FTC Docket No. 9346, 2012 FTC LEXIS 58, at *48-51 (2012). For example, hospital obstetrical services generally may not be substituted for general surgery services. The Commission explained that all hospital services should nevertheless be "clustered" in a single market for analytical convenience because it would facilitate the analysis of the competitive effects of a merger of the two hospitals. *Id*.; *see also* Commentary on the Horizontal Merger Guidelines (2006) at 8-9 ("when the analysis is identical across products or geographic areas that could each be defined as separate relevant markets using the smallest market principle, the Agencies may elect to employ a broader market definition that encompasses many products or geographic areas to avoid redundancy in presentation"); *Polypore*, 2010 FTC LEXIS 17, at *485-86 (citing *Brown Shoe* and refusing to further subdivide a product market just because some customers require unique battery separators of unusual widths, because doing so is "impractical" and unwarranted where the market participants and entry conditions are the same).

In the present case, for ease of analysis, the Court may aggregate all Fittings (sized 24" and smaller) into one product market. This is an efficient way of assessing the competitive effects of McWane's conduct on numerous narrower markets sharing the same relevant competitive conditions. For each Fitting (sized 24" and smaller), the suppliers, customers,

distribution channels, and inputs are substantially the same.[297] McWane, Sigma and Star provide the same Fittings to the same network of wholesale waterworks Distributors, for resale to the same End Users, for use in the same applications. As Dr. Schumann testified, given the identity of these market facts, determining whether McWane's conduct is anticompetitive in the aggregate market is analytically identical to a competitive analysis of each size and type of Fitting within the cluster.[298] *See ProMedica*, 2012 F.T.C. LEXIS 58, at *58; *Polypore*, 2010 FTC LEXIS 17, at *485-86. In other words, no information is lost or changed; the evidence is simply processed more efficiently.

Notably, the rationale supporting the Fittings cluster market (24" in diameter and smaller) does not support the inclusion of large ductile iron pipe fittings in the same market. Large diameter fittings are subject to market conditions that vary too greatly from those affecting small and medium Fittings. Foremost among these is the fact that there is a fourth substantial supplier of ductile iron pipe fittings of 30" and larger, ACIPCO.[299] ACIPCO has an approximate market share of 40-45 percent in ductile iron pipe fittings of 30" and larger in diameter.[300] Thus, any analysis of conduct relating to large diameter fittings must account for the actions of ACIPCO; whereas no similar accounting is required with respect to any or all of 24" and smaller diameter Fittings because ACIPCO does not sell those items. Accordingly, "Fittings," *i.e.*, ductile iron

[297] CCPF 599; *see also* CCPF 603 (suppliers); CCPF 601-602 (inputs); CCPF 605-606 (distribution channels); CCPF 607 (customers); *see generally* CCPF 595-616 (Fittings may be treated as a cluster market).

[298] CCPF 596.

[299] CCPF 610-614.

[300] CCPF 613.

pipe fittings with 24" and smaller diameter, sold into Open Specifications is the properly defined relevant product market.

b) The Relevant Geographic Market for Fittings is the United States

"The geographic market need not be identified with 'scientific precision,' or 'by metes and bounds as a surveyor would lay off a plot of ground.' Nonetheless, the relevant geographic market must be sufficiently defined so that the court understands in which part of the country competition is threatened." *FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34, 49 (D.D.C. 1998) (citations omitted). Complaint Counsel and McWane agree that one relevant geographic market is the United States.[301]

The "market area in which the [Fittings suppliers] operate and to which the purchasers can practicably turn for supply," is the United States. *See Tampa Electric*, 365 U.S. at 327. For example, McWane, Sigma and Star use warehouses and distribution centers located throughout the United States to supply Fittings to waterworks distributors across the United States.[302] Specifically, McWane has distribution centers that enable one to two-day delivery to 95 percent of the United States.[303] Sigma has five main warehouses, some satellite warehouses, and distribution centers in Florida, California, Washington, and Arizona.[304] Star has thirteen

[301] CX 2260-A (Schumann Rep. at 17); RX-712A (Normann Rep. at 31) (for some customers the market is national in scope).

[302] CCPF 636.

[303] *Id.*

[304] *Id.*

distribution centers in the United States, in order to "stock product closer to [customers] for better delivery times."[305]

Defining the relevant geographic market as the United States is common where, as here, firms use competing distribution networks supplying the entire nation. *E.g.*, *FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34, 50 (D.D.C. 1998) ("the wholesale [drug] industry is largely driven by the competition that takes place on a national level"); *Frito-Lay, Inc. v. The Bachman Co.*, 659 F. Supp. 1129, 1138 (S.D.N.Y. 1986) ("Defendant's contention that the entire United States constitutes the relevant geographic market is a logical one since Frito-Lay distributes [salted snack foods] throughout the United States"). No witness, including McWane's economist, has ever suggested the geographic market is *larger* than the United States.

Dr. Normann suggests that, in theory, the geographic market *may be smaller* than the United States (*e.g.*, particular states) if the suppliers are able to engage in price discrimination.[306] However, Dr. Normann does not indicate whether or how the competitive analysis is altered if these distinct submarkets were identified. Indeed, the market characteristics that make the Fittings market conducive to collusion apply to all markets throughout the United States. *See infra* Part V.B (discussing the Fittings market characteristics as conducive to collusion). Thus, it is convenient and appropriate for the Court to focus its analysis upon the broader U.S. market. *Cf. Brown Shoe*, 370 U.S. at 338-339 (upholding a more narrow relevant geographic market definition encompassing cities with populations exceeding 10,000 based on evidence that competitive dynamics are different in these cities as compared to smaller communities).

[305] *Id.*

[306] RX-712A (Normann Rep. at 30-31).

3. The Supply of Domestic Fittings For Waterworks Projects With Domestic-Only Specifications in the United States is a Relevant Market

There is also a separate and distinct relevant product market for Domestic Fittings, *i.e.*, ductile iron pipe fittings of 24" and smaller in diameter that are made in the United States, for use in waterworks projects with Domestic-only Specification (*i.e.*, those specifications with a Buy American requirement). Domestic Fittings are properly grouped into Fittings sized 24" and smaller in diameter for the same reasons as Fittings sold into Open Specifications. *See supra* Part V.A.2.a(2). The market includes Domestic Fittings sold into all Domestic-only Specifications, including Domestic-only Specifications required by law and those based upon End User preference. The geographic market is limited to the United States.

a) Domestic Fittings Sold Into Domestic-Only Specifications Are a Relevant Price Discrimination Market Because There Are No Reasonable Substitutes

Domestic Fittings sold into waterworks projects with Domestic-only Specifications are a relevant price discrimination market because there are no reasonable substitutes for Domestic Fittings. *See E.I. du Pont de Nemours & Co.*, 351 U.S. at 394-395 (defining relevant product market to include all products that are reasonable substitutes for the same purpose for a buyer); *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, at 1435 (9th Cir. 1995) (same). Domestic Fittings and imported Fittings are admittedly functionally interchangeable, and are substitutes for waterworks projects with Open Specifications: they are manufactured with the same general materials; meet the same AWWA standards; and provide the same functionality and role in

waterworks projects.[307] And indeed, McWane sometimes sells bundles of domestic and imported Fittings for use on waterworks projects with Open Specifications.[308]

By definition, however, only Domestic Fittings – and ***not*** imported Fittings – satisfy the Buy American requirements for Domestic-only Specifications.[309] Thus, for a buyer, *i.e.*, the Distributor having to supply Fittings for the waterworks specification as written, imported Fittings are not interchangeable or a reasonable substitute for Domestic Fittings on Domestic-only Specifications. *See E.I. du Pont de Nemours & Co*, 351 U.S. at 394-395; *ARCO*, 51 F.3d at 1435.

Reflecting the lack of substitutability from imported Fittings, there is a significantly higher price for Domestic Fittings sold into Domestic-only Specifications compared to Fittings sold into Open Specifications. McWane, the sole supplier of Domestic Fittings from 2006 until Star entered in late 2009, generally charges a 20% to 50% price premium on the sale of Domestic Fittings sold into Domestic-only Specifications.[310] For any of its Domestic Fittings that are sold

[307] CCPF 415-416, 418.

[308] CCPF 452 (McWane refers to the mix of imported and domestically manufactured Fittings that it supplies to Open Specification projects as "blended"); CCPF 628-630 (discussing the pricing of blended fittings sold by McWane).

[309] CCPF 621, 1576 (Domestic Fittings required for ARRA-funded projects); CCPF 625 (other government entities have Domestic-only Specifications unrelated to ARRA); *see also* CCPF 621 (generally no exceptions to ARRA Domestic-only specification); CCPF 1596-1599 (only three public interest waivers to ARRA's Domestic-only specification granted); CCPF 1600-1615 (*de minimis* waiver to ARRA's Domestic-only specification had limited, if any, application to Domestic Fittings); CCPF 1583-1588 (Mexico, South Korea and NAFTA countries did not satisfy ARRA's Domestic-only specification).

[310] CCPF 628-630.

into Open Specifications, McWane lowers the price of its Domestic Fittings to be competitive with its importing rivals.[311]

The fact that McWane charges different prices for Fittings sold into Open and Domestic-only Specifications is strong evidence that they are in separate markets. When, as here, suppliers can profitably charge different prices (net of costs) to different customers depending on known customer preferences, the relevant market is defined by the purchasing requirements of those customers that are vulnerable to the price increase. *United States v. Archer-Daniels-Midland Co.*, 866 F.2d 242, 248 (8th Cir. 1988) (holding that significant price differential between high fructose corn syrup and sugar (functionally interchangeable products) evidenced low cross-elasticity of demand, leading the court to conclude that the products are in two different product markets); *see also Geneva Pharms. Tech. Corp. v. Barr Labs., Inc.* 386 F.3d 485, 496-97 (2d Cir. 2004) (finding that generic and branded drugs were not in the same market despite therapeutic equivalence because sustained price differential showed that neither product constrained the other's pricing).

A separate price discrimination market is appropriate because a dominant supplier can exercise monopoly power over the vulnerable customers and charge higher prices even if the supplier lacked such power with respect to other customers. As the Horizontal Merger Guidelines explain:

> If a hypothetical monopolist could profitably target a subset of customers for price increases, the Agencies may identify relevant markets defined around those targeted customers, to whom a

[311] CCPF 631-632 (discussing the pricing of blended fittings sold by McWane); *cf.* CCPF 848 (selling Domestic Fittings into Open Specification jobs reduced McWane's profits in 2007; less substitution has increased McWane's present Fittings gross margins); CCPF 631 (McWane does not provide quotes for Domestic Fittings to be used in Open Specifications).

> hypothetical monopolist would profitably and separately impose at least a SSNIP. Markets to serve targeted customers are also known as price discrimination markets.

2010 Horizontal Merger Guidelines at §4.1.4.; *see also U.S. Anchor Mfg., Inc. v. Rule Indus., Inc.*, 7 F.3d 986, 997-98 (11th Cir. 1993) (noting "that the ability to discriminate against a distinct group of customers by charging higher prices for otherwise similar products demonstrates the existence of market power with respect to that group," and concluding that a high-priced line of anchors "may have constituted its own market" because of evidence of "price discrimination against a distinct group of customers"); *cf. United States v. Rockford Mem'l Corp.*, 717 F. Supp. 1251, 1267 n. 12 (N.D. Ill. 1989), *aff'd*, 898 F.2d 1278 (7th Cir. 1990) (recognizing that price discrimination makes it possible to exercise market power over certain customers with fewer alternatives and not others with more potential alternatives); Areeda & Hovenkamp, *Antitrust Law* ¶ 534d ("the seller who can segregate a substantial group of buyers and charge them monopoly prices for a significant period has market power over the group of buyers who pay these prices").

McWane disputes the existence of a separate Domestic Fittings market by arguing that the price of Domestic Fittings for use in Domestic-only Specifications is constrained by the customers' theoretical ability to "flip" specifications from Domestic-only to Open. *See* Respondent's Pre-Trial Brief at 58; RX-712A (Normann Rep. at 27). This argument fails for several reasons.

As a preliminary matter, with the exception of the ARRA period where the number of waterworks projects with Domestic-only Specifications *increased*,[312] the number of Domestic-

[312] CCPF 1647-1649, 1652-1654.

only Specifications as a percentage of the overall Fittings market has remained fairly constant over time. In 2003, the International Trade Commission issued a report, relying largely on a representation from McWane, finding that Domestic-only Specifications were approximately 10%-20% of the overall Fittings market; and present-day estimates suggest that Domestic-only Specifications currently represent approximately 20%-25% of the overall Fittings market.[313] This evidence suggests that such 'flipping' does not occur, or at least not to any great extent.

Additionally, there is no reasonable ability to flip Domestic-only Specifications that are based on specific federal, state and local laws and regulations that require End Users to use Domestic-only Specifications for their public waterworks projects. These laws represent a regulatory barrier to entry that definitively excludes all import competition. *See ARCO*, 51 F.3d at 1439 (noting that one of the "main barriers to entry" in the retail sale of gasoline is "legal license requirements"); *United States v. Syufy Enterprises*, 903 F.2d 659, 673 (9th Cir. 1990) ("It is well known that some of the most insuperable barriers in the great race of competition are the result of government regulation."); *Apani Southwest, Inc. v. Coca-Cola Enters, Inc.*, 300 F.3d 620, 626 (5th Cir. 2002) (considering government regulations in defining relevant market); *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 426 (2nd Cir. 1945) (same). Jurisdictions that legally require Buy American specifications include the State of Pennsylvania,[314] the State

[313] CCPF 1700 (ITC report), 1654 (present day estimates).

[314] The Pennsylvania Steel Products Procurement Act, 73 Pa. Stat. §§ 1881-1887 (requiring that only iron and steel products made in America be used in all construction, repair, and maintenance contracts let by public bodies, including the Commonwealth, its political subdivisions, and authorities); *see also* CCPF 625-626, 449; CX 2523 (Bhattacharji, Dep. at 127) (acknowledging Pennsylvania Buy American limitation on Fittings); CX 2531 (Rybacki, Dep. at 270-272) (same); RX-637 (Jansen, Dep. at 99-100) (same).

of New Jersey,[315] the United States Air Force,[316] and various municipalities located across the United States.[317] Additionally, waterworks projects funded by ARRA were also required by federal law to use Domestic Fittings.[318]

For these Domestic-only Specifications required by law, there is no prospect of flipping the specifications except by changing the applicable law or regulation. McWane – who as the sole domestic supplier was in the unique position to observe, and who had every incentive to introduce at trial – did not introduce any evidence that buyers in Buy American jurisdictions ever lobbied (successfully or not), or were even likely to lobby, their legislature to repeal their Buy American requirements for future projects in response to a small but significant and non-transitory increase in the price of Domestic Fittings.[319] McWane's contention is contrary to common sense; it is contrary to antitrust precedent that presumes that government regulations that impede market entry will persist; and it was even rejected by McWane's own economic expert who opined that, "It is unlikely that state laws could be easily changed based on short-

[315] N.J. Stat. § 52:33-3 (requiring that "every contract for the construction, alteration or repair of any public work in this state shall contain a provision that in the performance of the work the contractor and all subcontractors shall use only domestic materials in the performance of the work"); *see also* CCPF 1701; CX 2523 (Bhattacharji, Dep. at 127-128 ("New Jersey is another state which is Buy America").

[316] CCPF 449, 625 (federal government projects and Air Force bases require Domestic Fittings).

[317] CCPF 449, 625, 626 (some municipalities have strong preference for domestic).

[318] CCPF 621, 1576. While there some was limited ability to obtain certain waivers to the Buy American requirement under ARRA, the evidence introduced at trial demonstrated that the use of such waivers was insignificant. CCPF 1589-1615.

[319] *But see* CCPF 1699 (McWane and Star admit they were unable to "flip" domestic specifications).

term fluctuations in relative prices."[320] *See ARCO*, 51 F.3d at 1439 (noting that one of the main barriers to entry in market was government regulations); *Syufy*, 903 F.2d at 673 (same); *see also FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 456 (1986) (in assessing an argument, the Commission may rely on common sense).

Thus, McWane's argument about 'flipping' specifications is really about the size of the Domestic Fittings market and whether it includes Domestic-only Specifications based on End User preference, and not whether such a market exists at all. At a bare minimum, a monopolist supplier of Domestic Fittings would find it profitable to charge supracompetitive prices for projects governed by legally required Buy American provisions. This is sufficient to establish the existence of a discrete product market for Domestic Fittings sold into Domestic-only Specifications. *See* Areeda & Hovenkamp, *Antitrust Law* ¶ 572b ("To the extent that regulation limits substitution, it may define the extent of the market."); *accord New York Citizen Comm. on Cable TV v. Manhattan Cable TV, Inc.*, 651 F. Supp. 802, 807-808 (S.D.N.Y. 1986) (lower Manhattan is a relevant cable television market because franchise issued by the city excludes entry).

McWane's argument about the potential "flipping" of Domestic-only Specifications as the reason for there being one large Fittings market is also contradicted by the available pricing data, which supports a separate market for Domestic Fittings sold into all Domestic-only Specifications. As previously discussed, McWane charges significantly higher prices for Domestic Fittings sold into all Domestic-only Specifications than it does for Fittings sold into

[320] RX-712A (Normann Rep. at 28).

Open Specifications.[321] This is strong evidence that Fittings sold into Open Specifications and all Domestic-only Specifications are in separate markets. *See Archer-Daniels-Midland Co.*, 866 F.2d at 248; *Geneva Pharms. Tech.*, 386 F.3d at 497.

Moreover, if there were a single market, the prices for Fittings sold into Open and Domestic-only Specifications – to the extent that they differed – would move in parallel. As antitrust scholars Areeda and Hovenkamp have explained:

> Without correlation in their price changes, two products are probably in separate markets. Uncorrelated price movements mean that the respective producers of each product either do not need to or, because of cost constraints, cannot react to changes in the prices charged by the producers of the other product.

Areeda & Hovenkamp, *Antitrust Law* ¶ 562a. Here, the price of Fittings sold into Open Specifications and the price of Domestic Fittings sold into all Domestic-only Specifications do not move in parallel.[322] This indicates that they respond to separate demand curves, and provides strong support for the conclusion that Domestic Fittings sold into Domestic-only Specifications is a distinct market from Fittings sold into Open Specifications. *See United States v. Aluminum Co. of Am. (Rome Cable)*, 377 U.S. 271, 276 (1964) (despite functional interchangeability between products, court held that copper conductors and aluminum conductors used in power lines were in different markets because their prices did not respond to one another).

Finally, McWane's own conduct is inconsistent with the claim that the company is constrained from charging supracompetitive prices for Domestic Fittings sold into Domestic-only Specifications. By its own admission, McWane adopted an Exclusive Dealing Policy in

[321] CCPF 628-630, 1694-1697 (higher prices for Domestic Fittings than for blended Fittings).

[322] CCPF 632.

order to impede Star from competing for Domestic-only projects.[323] McWane feared that Star's entry into Domestic Fittings market would cause the price of Domestic Fittings to get "creamed" as prices had in the import market.[324] Contemporaneous business documents of industry participants recognizing separate markets is strong evidence of separate markets. *See FTC v. CCC Holdings, Inc.*, 605 F. Supp. 2d at 43 (finding relevant product market of total loss software based on industry documents grouping software together while excluding other means of calculating total loss); *Staples*, 970 F. Supp. at 1076 (defendant's internal documents comparing its prices to some companies' prices, but not to other companies, indicate the boundaries of the product market). Thus, Domestic Fittings sold into Domestic-only Specifications is a properly defined product market.[325]

b) The Relevant Geographic Market is the United States

"The relevant geographic market inquiry focuses on that geographic area within which the defendant's customers who are affected by the challenged practice can practicably turn to

[323] CCPF 1804-1814; *see also* CCPF 1782-1786.

[324] CCPF 1790; CX 0074 ("Whether we end up with Star as a complete or incomplete domestic supplier my chief concern is that the domestic market gets creamed from a pricing standpoint"); *see also* CCPF 1787-1797.

[325] McWane also has suggested that the Domestic Fittings market is too small to merit antitrust concern. This argument has no merit. Here, the evidence suggests that Domestic Fittings market comprises approximately 15-20 percent of the overall Fittings market in jurisdictions around the country. Anticompetitive conduct directed at markets as small as a single customer are actionable. *FTC v. Alliant Techsystems*, 808 F. Supp. 9, 20 (D.D.C. 1992) (finding a relevant market where the sole purchaser was the Department of Defense); *cf. United States v. Southwest Bus Sales, Inc.*,20 F.3d 1449 (8th Cir. 1994) (party injured by anticompetitive conduct was a governmental entity); *United States v. Ashley Transfer & Storage Co.*, 858 F.2d 221, 222 (4th Cir. 1988) (same); Horizontal Merger Guidelines at § 4.1.4 ("If prices are negotiated individually with customers, the hypothetical monopolist test may suggest relevant markets that are as narrow as individual customers.").

alternative supplies if the defendant were to raise its prices or restrict its output." *E.I. du Pont de Nemours & Co. v. Kolon Indus.*, 637 F.3d 435, 441 (4th Cir. 2011).

It is axiomatic that a foreign manufacturer cannot compete in the Domestic Fittings market. From 2006 until late 2009, there was one and only one manufacturer of Domestic Fittings:[326] McWane, which sold Domestic Fittings throughout the United States that were made from its foundry in Anniston, Alabama.[327] When Star entered the Domestic Fittings market in 2009, it likewise used foundries in Texas and elsewhere in the United States to produce Fittings that it then finished and sold for use in Domestic-only Specifications.[328] It follows that in connection with the supply of Domestic Fittings, the relevant geographic market is the United States. Further, as Dr. Schumann testified, the anticompetitive effects of McWane's conduct would be the same irrespective of whether the relevant geographic market was deemed the entire U.S. and/or smaller parts thereof.[329] Accordingly, the United States is the properly defined geographic market.

4. The Relevant Fittings and Domestic Fittings Markets Have High Barriers to Entry

Barriers to entry are factors that prevent new entrants from timely responding to supracompetitive pricing. *See United States v. Microsoft Corp.*, 253 F.3d 34, 51 (D.C. Cir. 2001). There are high barriers to entry in the Fittings and Domestic Fittings market.

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[326] CCPF 1659.

[327] McWane's foundry in Tyler, Texas, closed in November 2008. (CCPF 10).

[328] CCPF 128, 1725, 1733-1735, 1738, 1740.

[329] CCPF 639. Indeed, because the attainment of scale efficiencies would depend on Star's overall sales, its exclusion from local markets or submarkets might have anticompetitive ramifications nationwide irrespective of how geographic market is formally defined.

A *de novo* entrant must make a significant capital investment to enter the Fittings market. For example, a new entrant must build its own foundry or develop a supply chain of foundries that can produce its Fittings, and develop or purchase the hundreds of patterns or moldings necessary for making a full line of Fittings covering thousands of items.[330] A new entrant would then have to have its products tested and certified to conform to AWWA standards and get on "approved" lists for engineers and municipalities.[331] An entrant must also develop expertise in design engineering, and develop a marketing force and relationships with Distributors that will carry its products.[332] All of these factors make entry into the supply of Fittings expensive, difficult, and time consuming, and thus prevent "new rivals from timely responding to an increase in price above the competitive level." *Microsoft*, 253 F.3d at 51.

Generally speaking, there are fewer barriers to entry for an existing imported Fittings supplier that wishes to enter the Domestic Fittings market. As exemplified by Star's Domestic Fittings market entry , the new entrant would have the expertise necessary from its import business to operate its own fittings foundry,[333] and it would have well-established relationships

[330] CCPF 648 (new entrant needs to develop hundreds of patterns and moldings); CCPF 646 (new entrant must build foundry or develop supply chain of foundries); *see also* CCPF 1721 (for its domestic entry, Star considered building a foundry, purchasing a foundry, or contracting with independent foundries in the United States); CCPF 1738, CCPF 1755-1757 (Star expanded a finishing facility for its Domestic Fittings); CCPF 644 (Sigma identified "the high cost of tooling" as a "prohibitive barrier to entry"); CCPF 649 (SIP took 3 years to develop a full line of 3500 Fittings up to 48 inches in diameter); CCPF 2277 (Sigma estimated that the tooling for a full line of Domestic Fittings would number 700 items and cost $3 to $5 million); CCPF 1749 (Star invested $3.5 million in patterns for Domestic Fittings).

[331] CCPF 647.

[332] CCPF 646, 1682 (entrant needs to develop expertise in design engineering); CCPF 645 (developing relationships with Distributors is important).

[333] CCPF 1666, *in camera*.

with the major Distributors to purchase and distribute its products.[334] Like Star, the entrant could leverage its existing sales team, regional distribution centers, and back office support.[335] However, a significant barrier to entry for the Domestic Fittings market is McWane's Exclusive Dealing Policy, which restricts Distributors' ability to purchase Domestic Fittings from any supplier other than McWane.[336] Courts recognize exclusionary conduct as a barrier to entry. *See United States v. Dentsply Int'l, Inc.*, 399 F.3d 181, 189 (3d Cir. 2005). Thus, with McWane's Exclusive Dealing Policy in place, there are high barriers to entry in the Domestic Fittings market, even for experienced suppliers of imported Fittings.

B. The Fittings Market Is Highly Susceptible to Collusion

The Fittings market is conducive to collusion. Courts look to the market's characteristics to help evaluate the plausibility of conspiracy allegations. *See In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 360 (3d Cir. 2004) (identifying market characteristics as a "plus factor" to be used in determining whether an illegal agreement has occurred). In this case, several of the Fittings market's "salient features" increase the likelihood of price fixing by providing Respondent with the motive and opportunity to restrain Fittings price competition. *In re Blood Reagents Antitrust Litig.*, 756 F. Supp. 2d 623, 631 (E.D. Pa. 2010). Those features include: (1) a highly concentrated market with few rivals; (2) product homogeneity; (3) barriers to entry; (4) inelastic demand; (5) price transparency; (6) common membership in a trade association; and (7) industry social structure.[337] Not all of these characteristics are necessary for successful coordination to

[334] CCPF 1667.

[335] CCPF 1668.

[336] CCPF 1669-1670.

[337] *Blood Reagents*, 756 F. Supp. 2d at 631-632; CCPF 663.

occur.[338] But the Fittings market exhibits most – if not all – of the characteristics that promote successful coordination, thus making coordinated interaction, and collusion, more likely.[339]

1. High Concentration of Suppliers

"[T]he possibility of anticompetitive collusive practices is most realistic in concentrated industries." *Todd v. Exxon Corp.*, 275 F.3d 191, 208 (2d Cir. 2001); *see also Blood Reagents*, 756 F. Supp. 2d at 631 (same). A concentrated market with few rivals facilitates collusion because there are fewer firms to coordinate, and cheating can be quickly detected. *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 656 (7th Cir. 2002). It also allows each firm to recognize that its profit-maximizing price and output decisions depend on the price, output, and strategic behavior of each of the other firms in the market, thereby increasing the incentive to conspire.[340]

Here, the Fittings market is a highly concentrated oligopoly with three dominant firms.[341] Together, McWane, Sigma, and Star account for more than 95 percent of the Fittings (including both domestic and imported) sold in the United States, with a small number of fringe suppliers constituting the balance of the market.[342] For each year in the period 2007 to 2011, the Herfindahl-Hirschman Index ("HHI") for the Fittings market exceeded 3400.[343] An HHI above

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[338] CCPF 663; *see also* George J. Stigler, *A Theory of Oligopoly*, 72 J. POLITICAL ECON. 44-61 (1964); George A. Hay & Daniel Kelly, *An Empirical Survey of Price Fixing Conspiracies*, 17 J.L. & ECON. 13-38 (1974); *Blood Reagents*, 756 F. Supp. 2d at 631-632.

[339] CCPF 664.

[340] CCPF 652.

[341] CCPF 651.

[342] CCPF 456-457.

[343] *Id*.

2,500 is classified by federal antitrust enforcement agencies as reflecting a highly concentrated market.[344] Moreover, consistent with oligopoly theory, McWane, Sigma, and Star recognized that their price interdependence required all three suppliers to participate for any price increase to be effective.[345] Thus, the highly concentrated nature of the Fittings market heightened McWane's ability and incentive to collude on prices with its co-conspirators.

2. Product Homogeneity

Product homogeneity is an additional characteristic conducive to anticompetitive coordination. *Blood Reagents*, 756 F. Supp. 2d at 632; *United States v. Alcoa, Inc.*, No. 2000-954, 2001 WL 1335698, at *12 (D.D.C. June 21, 2001). A highly standardized product permits colluding sellers to detect cheating more easily than if the product required individualized pricing or specific "quality, design, post-sale services, and the like." *High Fructose Corn Syrup*, 295 F.3d at 657. Here, Fittings are commodity products made to AWWA standards; any individual Fitting is interchangeable with any other Fitting that meets the same AWWA standards and specifications.[346]

3. High Barriers to Entry and Few Product Substitutes

High barriers to entry also facilitate collusion. *Blood Reagents*, 756 F. Supp. 2d at 632 ; *In re Chocolate Confectionary Antitrust Litig.*, 602 F. Supp. 2d 538, 551 (M.D. Pa. 2009) (describing high barriers to entry as "material" to Sherman Act Section 1 claim). The existence of significant barriers to entry "mitigates the risk that defendant's illegal conduct would cause new companies to enter the market with lower prices[.]" *Blood Reagents*, 756 F. Supp. 2d at

[344] *Id.*; *see also* 2010 *Horizontal Merger Guidelines* at 19.

[345] *Cf.* CCPF 652, 655.

[346] CCPF 415-417.

629. As discussed more fully, *supra* Part V.A.4, the Fittings market has high barriers to entry and there are "no widely used substitutes" for Fittings.[347]

4. Inelastic Demand

Demand inelasticity also makes anticompetitive coordination more likely. *Todd v. Exxon Corp.*, 275 F.3d at 211 (finding market susceptible to tacit coordination where supply had "inherently inelastic quality"); *Blood Reagents*, 756 F. Supp. 2d at 631-632 (describing inelastic demand as a characteristic conducive to anticompetitive coordination); *Alcoa*, 2001 WL 1335698, at *12 (D.D.C. June 21, 2001) (same). Inelastic demand increases the likelihood of collusion because price increases do not decrease demand. *Blood Reagents*, 756 F. Supp. 2d at 629.

Fittings demand is highly inelastic over the range of Fittings prices for several reasons: (i) there are no economically relevant or practical substitutes for Fittings; (ii) Fittings costs represent a very small portion (about 5 percent) of the overall cost of constructing a waterworks system or plant; and, (iii) the decision to build or repair waterworks systems or treatment plants depends on many factors unrelated to the Fittings cost.[348] Inelastic Fittings demand indicates that the rewards for price cutting are likely to be small and the rewards from collusion are likely to be large.[349]

[347] CCPF 579-591.

[348] CCPF 578-594 (no economically relevant or practical substitutes); CCPF 419-424 (describing inelastic nature of Fittings market); CCPF 664(d).

[349] CCPF 650; *see also* George A. Hay & Daniel Kelley, *An Empirical Survey of Price Fixing Conspiracies*, 17 J.L. & ECON. 13, 15 (1974).

5. Price Transparency

Price transparency can also facilitate coordination and collusion. *See In re Rail Freight Fuel Surcharge Antitrust Litig.*, MDL No. 1869, 2012 WL 2870207, at *64, *65 (D.D.C. June 21, 2012) (adopting expert's assessment that transparent pricing is a characteristic of the rail freight industry "that make[s] it conducive to price fixing"). Price transparency mitigates the costs of implementing and maintaining a conspiracy by allowing rivals to easily detect cheating, thereby increasing the risk of punishment and creating a disincentive for participating firms to cheat.[350] *Rail Freight Fuel Surcharge*, 2012 WL 2870207, at *64.

At some levels, Fittings market prices are highly transparent: list prices and multipliers are published and readily available.[351] However, Project Pricing offered on specific waterworks jobs, and the actual transactional price paid by distributors, often differ from the published price and lack transparency.[352] Here, the conspirators curtailed the incidence of Project Pricing in order to gain "visibility" in the marketplace.[353] While cartel participants could monitor their competitors' Project Pricing through competitive feedback from their sales force and tracking their own sales,[354] the formation of the DIFRA information exchange was designed to further

[350] CCPF 659.

[351] CCPF 670-678.

[352] CCPF 679-683.

[353] CCPF 681; *see also* CCPF 956-961, 963-964 (Sigma curtailed its Project Pricing); CCPF 977-987 (Star curtailed its Project Pricing).

[354] CCPF 683; CCPF 682 (recognizing that the companies use their sales forces to monitor Project Pricing offered by competitors).

increase price transparency.[355] As discussed more fully, *infra* Part V.E, the DIFRA information exchange of monthly sales reports allowed the Fittings suppliers to determine monthly changes in their market share, and, if the Fittings volume fell, each supplier could determine whether its shipment volume was falling because of decreased demand (indicated by a stable market share), or because its rivals were cutting prices (indicated by a declining market share).[356]

6. Trade Association Membership

Common trade association membership may also promote collusion.[357] *See In re Blood Reagents Antitrust Litig.*, 756 F. Supp. 2d at 632. A trade association can facilitate the exchange of competitively sensitive information and communication among rival firms' executives, thus increasing opportunities to conspire.[358] Here, the evidence shows that top executives with pricing authority from McWane, Sigma, and Star met and spoke with each other formally at DIFRA meetings as well as in private dinners and lunches in conjunction with DIFRA meetings.[359] And those same executives called and emailed each other directly, ostensibly to discuss DIFRA issues.[360] Accordingly, participation in DIFRA, including its information exchange, was a key element of the price fixing agreement among McWane, Sigma, and Star.

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[355] CCPF 664(f); CCPF 1275; CCPF 1279; CCPF 1284; CCPF 1288-1289; CCPF 1273 (the only thing DIFRA did was to report aggregated Fittings sales data of its members).

[356] CCPF 1297-1299; CCPF 1300-1333 (describing how the companies used the DIFRA data); *see also* CCPF 659 and CCPF 661.

[357] CCPF 661.

[358] *Id.*

[359] CCPF 794; CCPF 796; CCPF 1036; CCPF 1131-1150.

[360] CCPF 1131-1150.

7. Social Structure

An industry's social structure can also facilitate collusion among market players by increasing opportunities to interact, coordinate, and thus conspire with competitors. *See In re Urethane Antitrust Litig.*, 237 F.R.D. 440, 450-451 (D. Kan. 2006) (evidence was sufficient to show class-wide antitrust injury where expert testified that the "industry social structure . . . lends itself to opportunities for direct contacts with counterparts at competitors").

Here, the evidence shows familiarity as well as regular interaction and communication among senior executives from McWane, Sigma, and Star. Certain senior executives at McWane, Sigma, and Star have known each other for many years.[361] Mr. Pais worked for Star before founding Sigma in 1985.[362] Mr. Pais also has a "mutually trusting and mutually respectful" relationship with Ruffner Page, the CEO of McWane.[363] Mr. Pais and Page met numerous times in 2007 and 2008 to discuss business opportunities and challenges.[364] McWane, Sigma, and Star executives met for dinners and lunches. For example, Mr. Tatman had dinner with Mr. McCutcheon in March 2008,[365] and Mr. Pais met for lunch with Mr. McCutcheon on Feb. 19, 2008.[366] There are also over **{ }** Sigma, McWane and Star executives.[367] Many of those **{ }**

[361] CCPF 701-712.

[362] CCPF 68.

[363] CCPF 828-841.

[364] *Id.*

[365] CCPF 795.

[366] CCPF 792.

[367] CCPF 713-786.

coincided with key events in the price fixing conspiracy. Thus, the Fittings market's social structure enabled McWane, Sigma, and Star's senior executives to meet and communicate often enough to coordinate and fix Fittings prices. *See In re TFT-LCD (Flat Panel) Antitrust Litig.*, 267 F.R.D. 583, 601, 606 (N.D. Cal. 2010) (concluding that plaintiffs' expert presented plausible methodologies to show class-wide antitrust injury, where market characteristics, including "regular meetings and interactions that allowed defendants to exchange information, come to agreements, and police cheating," indicated that industry was "highly susceptible to cartelization and price fixing"), *amended in part on other grounds*, No. M 07-1827 SI, 2011 WL 3268649 (N.D. Cal. July 28, 2011).

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Thus, numerous market characteristics – including high supplier concentration, product homogeneity, inelastic demand, common trade association membership, high barriers to entry, and the industry social structure — indicate that the stage was set for a conspiracy in the Fittings market.

C. McWane Unlawfully Invited Its Competitors to Collude in Violation of Section 5 of the FTC Act (Count Three)

Count Three of the Complaint charges McWane with violating Section 5 of the FTC Act by unlawfully inviting Sigma and Star to participate in a *per* se illegal price fixing conspiracy. An invitation to collude constitutes an unfair method of competition in violation of Section 5 of the FTC Act. *McWane*, slip op. at 20-22.[368] An unlawful invitation to collude occurs when a

[368] This conclusion has been affirmed by leading antitrust scholars and by the First Circuit interpreting the Massachusetts baby FTC Act. Areeda & Hovenkamp, *Antitrust Law* ¶ 1419; Stephen Calkins, *Counterpoint: The Legal Foundation of the Commission's Use of Section 5 to Challenge Invitations to Collude is Secure*, ANTITRUST Spring 2000, at 69 ("As a matter simply of the English language, intercepting attempted price fixing would seem the quintessential example of restraining a practice that otherwise would ripen into a Sherman Act

respondent explicitly or implicitly proposes to a competitor terms of coordination that, if accepted by the competitor, would constitute a *per se* violation of the Sherman Act. *See* Areeda & Hovenkamp, *Antitrust Law* ¶ 1419e4. An attempt to secure a price fixing agreement, even if unsuccessful, "is pernicious conduct with a clear potential for harm and no redeeming value whatever." McWane, slip op. at 21 (*quoting Liu*, 677 F.3d at 494). Invitations to collude are therefore *per se* unlawful. *See* Analysis of Agreement Containing Consent Order to Aid Public Comment, *In re U-Haul, Int'l Inc.*, FTC File No. 081 0157, at 4 (2010) ("It is not essential that the Commission find repeated misconduct attributable to senior executives, or define a market, or show market power, or establish substantial competitive harm, or even find that the terms of the desired agreement have been communicated with precision."), *available at* http://www.ftc.gov/os/caselist/0810157/index.shtm; *see also In re Quality Trailer Prods.*, 115 F.T.C. 944, 949 (1992) (concurring statement) (showing of market power not necessary for Section 5 invitation to collude cases).

To determine whether a communication constitutes an actionable invitation to collude, the solicitation should be evaluated within the business context in which it arises. *See* Joseph Kattan, *Facilitating Practices and Section 5: The Evidence of Life After Ethyl,* ABA Section of Antitrust Law, Annual Symposium, at 20 (1992). The solicitation does not need to be devoid of all ambiguity to be actionable; rather, courts should rely upon common sense. *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 456 (1986) (FTC may rely on common sense when appropriate); Areeda & Hovenkamp, *Antitrust Law* ¶ 1419e4 (describing common sense approach as using "practical judgment").

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violation, and of banning a practice that conflicts with the Sherman Act's basic policies."); *Liu v. Amerco*, 677 F.3d 489 (1st Cir. 2012).

Demanding utter clarity before finding a solicitation unlawful "would unrealistically ignore the diverse and often veiled language of would-be conspirators." Areeda & Hovenkamp, *Antitrust Law* ¶ 1419e4. As the Seventh Circuit noted when assessing conspiratorial communications, the law "has some obligation to keep up with the ingenuity and subtlety of sophisticated businessmen…." *United States v. Consol. Packaging Corp.*, 575 F.2d 117, 126 (7th Cir. 1978). As one antitrust scholar explained,

> In evaluating communications to competitors, both the content and the context of each communication must be scrutinized closely to ensure that the communication is no more than a naked invitation to fix prices or divide markets. It should be understood that to be actionable a solicitation need not take place in a smoke-filled room or be couched in the express terms of an offer. The content of the communication, not the specific words used, will be decisive. And communications that invite conspiracy should be actionable even when made through the media or third parties, rather than directly to a competitor, although public speech may be less likely to contain explicit solicitations to collude because of greater susceptibility to detection.

See Joseph Kattan, *Facilitating Practices and Section 5: The Evidence of Life After Ethyl*, ABA Section of Antitrust Law, Annual Symposium, at 20-21 (1992).

Here, the trial record establishes that McWane unlawfully invited Sigma and Star to collude on two separate occasions: McWane's January 11, 2008 letter; and McWane's May 7, 2008 letter. Both letters unlawfully invited McWane's primary competitors in the Fittings market to participate in a *per se* illegal price fixing agreement. And, although a showing of market power is unnecessary, the evidence shows that McWane, Sigma, and Star collectively had the power to raise prices in the Fittings market, and any such price fixing agreement likely would have raised Fittings prices. Accordingly, McWane's invitations to collude with competitors should be summarily condemned.

1. McWane's January 11, 2008 Letter Unlawfully Invited Its Competitors to Curtail Project Pricing

On or about January 11, 2008, McWane publicly issued a letter ostensibly addressed to its Distributor customers that announced McWane's intent to increase prices and to stop Project Pricing.[369] In this letter, McWane also offered to support a second price increase later in the year (quid) – but only if pricing had stabilized, *i.e.*, Sigma and Star also curtailed Project Pricing (quo).[370] This letter was the product of a management presentation prepared by Rick Tatman on January 6, 2008 for his superiors, which memorialized the Tatman Plan's "concept" for stabilizing and increasing Fittings prices.[371] The proposed terms of coordination in McWane's January 11, 2008 letter, if accepted, would constitute a *per se* unlawful price fixing agreement. *See infra* Part V.D.

The fact that McWane's January 11, 2008 letter is nominally directed to McWane's Distributor customers does not exempt the communication from Section 5 scrutiny. Courts

[369] CCPF 932; CX 1178 (January 11, 2008 letter stating that "[t]he increase will be 10% to 12% above the current prevailing multiplier levels" and that it is McWane's "intention going forward to sell all products only off the newly published multipliers"); *see also* CCPF 933-938 (letter was the "message to competitors" envisioned by the Tatman Plan); CCPF 939 (letter directed at competitors, not customers); CCPF 951 (Sigma and Star executives received the letter); *cf.* CCPF 940-949 (letter proposed a modest increase designed to decrease Project Pricing).

[370] CCPF 944 (letter offered to "announce another multiplier increase within the next six months…only…as conditions require"; condition required was "stability in pricing"); *see also* CCPF 940-945 (modest price increase designed to decrease Project Pricing and improve price visibility).

[371] *See* CCPF 907-923 (discussing Tatman Plan); CX 0627 at 004 (Tatman presentation explains "I believe that Sigma and Star will mimic and follow any program we publish.…keys to actual success are…Sigma & Star[] mgt pulling price authority away from front line sales and customer service personnel to add discipline to the process"); CX 1702 (email about Tatman Plan "concept" describes McWane as "in a unique position to help drive stability and rational pricing with the proper communication and actions"); *see also* CCPF 934; Tatman, Tr. 371 (admitting that letter was a result of Tatman's "brainstorming session" with McCullough and Walton for which he prepared the Tatman Plan); CX 1178 (January 11, 2008 letter).

repeatedly have recognized that communications supporting an illegal conspiracy "can occur in speeches at industry conferences, announcements of future prices, statements on earnings calls, and in other public ways." *In re Delta/AirTran Baggage Fee Antitrust Litig.*, 733 F. Supp.2d 1348, 1360 (N.D. Ga. 2010) (citing complaint in *In re Valassis Commc'ns, Inc.*, 2006 FTC LEXIS 25 (April 19, 2006)); *see also In re Petroleum Prods. Antitrust Litig.*, 906 F.2d 432, 445-447 (9th Cir. 1990); *Standard Iron Works v. ArcelorMittal USA, Inc.*, 639 F. Supp. 2d 877, 892-95 (N.D. Ill. 2009); *In re Travel Agency Comm'n Antitrust Litig.*, 898 F. Supp. 685, 690 (D. Minn. 1995). The Commission has likewise challenged public invitations to collude in *In re Valassis Commc'ns, Inc.*, 2006 FTC LEXIS 25 (April 19, 2006), and most recently, in *In re U-Haul Int'l Inc.*, FTC File No. 081 0157 (2010).

Indeed, pricing letters are an effective way for Fittings suppliers to communicate with one another. McWane, Sigma and Star routinely obtain and read copies of price letters for messages directed to them, and consider the content of those letters when devising their own pricing strategy.[372]

Although McWane originally told this Court that the January 11, 2008 letter was directed to distributors alone, and contained only "ordinary and commonplace language," Respondent's

[372] CCPF 672-675. The clearest evidence of McWane Sigma and Star communicating through nominal price letters comes from a June 2010 price increase. At that time, Sigma drafted a letter that included a "heads-up" to McWane that it would follow a Fittings price increase. (CCPF 696, 1554). Mr. Tatman received a copy of Sigma's letter, considered it a "communication," and considered what "communication" (in the form of its own price letter) McWane would send back to Sigma and Star. (CCPF 697-698). Mr. Tatman saw two options "In regards to recent communications from Star and Sigma….1. Send out an 'it's coming' communication prior to any further announcements from either Sigma or Star…[or] 2. Send out communication supporting the need for a price increase, wait for Sigma or Star." (CCPF 1565). McWane chose to lead the requested price increase. (CCPF 1566). Sigma and Star followed the increase, which Sigma considered a "big victory:" "We had a game plan. We stuck to it. It has worked. And now it has turned into a big victory." (CCPF 1567-1571).

Pretrial Brief at 42, 45, Mr. Tatman admitted at trial that the January 2008 letter was actually a message directed to McWane's competitors.[373] Consistent with the "Desired Message to Market and Competitors" featured in the slides describing his Plan, Mr. Tatman admitted that the goal of his letter was to induce his competitors to curtail Project Pricing.[374] The letter did so by not only announcing McWane's intention to stop Project Pricing, but also by dangling the prospect that McWane would support another price increase ***if*** Sigma and Star cooperated by similarly curtailing Project Pricing.[375]

At trial, Mr. Tatman referred to his strategy as a "head fake" – meaning that McWane did not necessarily intend to implement the announced program even if Sigma and Star proceeded down this path.[376] While this claim strains credulity,[377] it is nevertheless irrelevant – a firm that deliberately invites its rivals to collude does not escape liability by claiming that it secretly harbored an intention not to follow through with the plan. VI *Antitrust Law* ¶ 1404

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[373] CCPF 939; Tatman, Tr. 894-895, 1065-1067 (letter directed at competitors, not customers); CCPF 951 (Sigma and Star executives received the letter); *see also* CCPF 686-698 (Fittings suppliers routinely use pricing letters to communicate with one another); CCPF 684-685 (Fitting suppliers regularly receive each other's pricing letters).

[374] CCPF 940-949 (letter proposed a modest increase designed to decrease Project Pricing).

[375] CCPF 944 (offered another price increase for less Project Pricing); CX 1178 ("If the current inflationary trends continue as forecasted, we anticipate the need to announce another multiplier increase within the next six months. However, we will only do so as conditions require.").

[376] CCPF 934 (letter was a head fake to competitors).

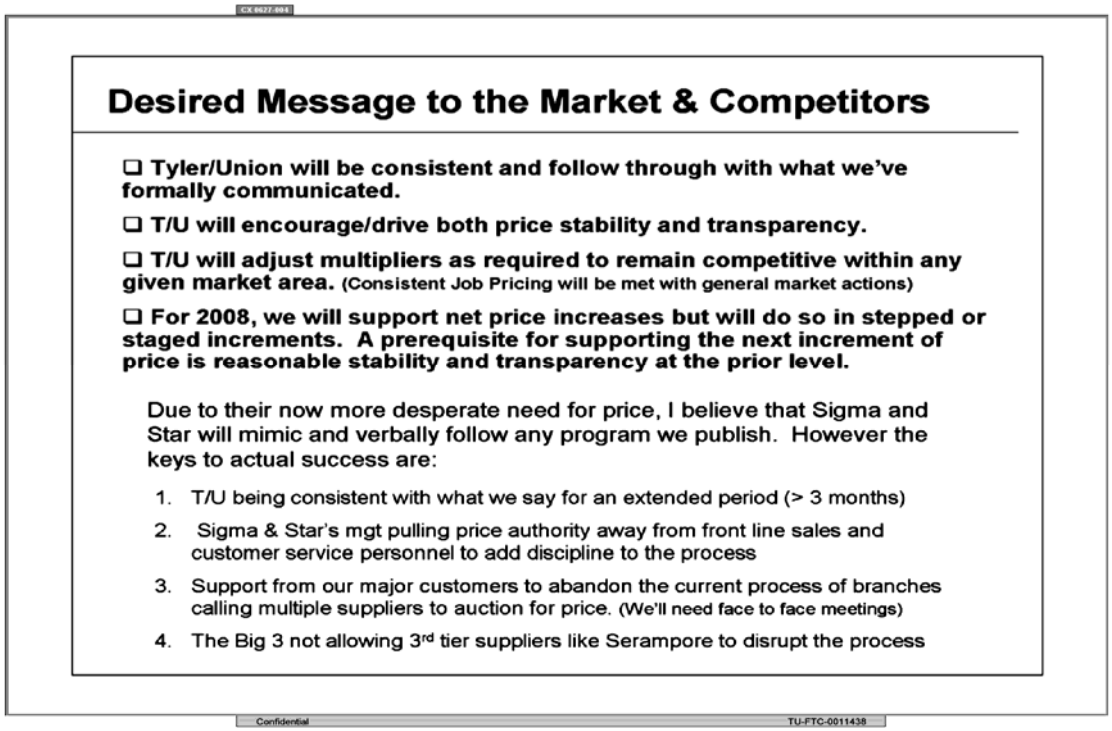
[377] This claim strains credulity given McWane's admitted poor performance in identifying and responding to Project Pricing, its desired goal (as repeatedly stated at trial) to compress the gap between published and transactional prices by minimizing Project Pricing, and its admitted preference to compete in a market without Project Pricing. *See* CCPF 853-859 (McWane struggled to compete with Star and Sigma because of Project Pricing); CCPF 861-869 (McWane believed Star's Project Pricing was detrimental).

("[O]bjective manifestations of assent form an ordinary contract notwithstanding any private reservation or intention to perform incompletely or not at all. The same would be true of an agreement for antitrust purposes."); *see also United States v. Giordano*, 261 F.3d 1134 (11th Cir. 2001) (affirming criminal price fixing conviction notwithstanding defendant's claim that he intended only to "play along" and to take advantage of pricing information collected from rivals).

McWane's communication to its competitors proposed an unlawful price fixing agreement. A proposed *quid pro quo* is often communicated by the respondent to the rival in language that is not perfectly clear to an outsider. Here, the *quid pro quo* becomes apparent when the paper trail is followed from the original unvarnished message in Mr. Tatman's management presentation, to the first drafts of the January 11, 2008 letter, to the ultimate letter that was publicly published.

The original, unvarnished message to competitors is set forth in Mr. Tatman's January 6, 2008 slides outlinng his Plan. In a slide entitled "Desired Message to Market and Competitors," Mr. Tatman stated that McWane will "encourage/drive both price stability and transparency," and that for 2008, a prerequisite for McWane supporting any future price increases would be "reasonable stability and transparency at the prior level": [378]

[378] CX 0627 at 004; *see also* CCPF 907-923 (discussion of Tatman Plan).



For Mr. Tatman, price stability means that transaction prices are kept close to published prices (*i.e.*, there is little Project Pricing).[379]

Included in Mr. tAtman's January 6, 2008 slides were two "Rough Drafts" of a letter that communicated Mr. Tatman's "Desired Message to the Market & Competitors" by means of a letter ostensibly addressed to McWane's Distributor customers.[380] In the first "Rough Draft' of a Stronger Language Letter," Mr. Tatman wrote:

> Dear Valued Customer,
>
> Due to continued rising costs . . . we find it necessary to increase prices on Utility Fittings and Accessories.
> . . .

[379] CCPF 908; Tatman, Tr. 283-285, 338-339 (defining price stability as within 10% of published multipliers); *cf.* CCPF 557 (pricing *in*stability is when regional discounting below published pricing exceeds 10 percent); CCPF 859; Tatman, Tr. 338-339 (increasing price stability meant compressing the gap beween published prices and actual invoice prices).

[380] CX 0627 at 006; *see also* CCPF 936 (discussion of drafts).

> [W]e don't believe the industry's your best interests are served by publishing [price] increases at levels that are not supported, leading to instability and ultimately erosion of market level pricing.
> . . .
>
> ***If the current inflationary trends continue as forecasted, we may need to announce another multiplier increase within the next 3 to 6 months. However, we will do so if both conditions require and the increase can be supported within stability market conditions***.[381]

The second attached "'Rough Draft' of a Softer Language Letter" omitted the paragraph blaming steep price increases for leading to instability and price erosion (see second paragraph above), but maintained the key solicitation that McWane may support price increases again in 3 to 6 months if stable market conditions persist.[382]

On January 8, 2008, Mr. Tatman circulated another draft of the January 11, 2008 letter, which explicitly stated McWane's intention not to offer Project Pricing and retained the key solicitation that McWane would support another price increase if there are "stable market conditions":

> Dear Valued Customer,
>
> Due to continued rising costs, especially within our off shore operations, we find it necessary to increase pricing on Utility Fittings and Accessories.
> …
> ***It is not our intention to provide job pricing***. In an effort to support Distribution and stable market conditions, we will continue to monitor the competitive environment and will adjust regional multipliers as required.
> …
> ***If the current inflationary trends continue as forecasted, we anticipate the need to announce another multiplier increase within the next 6 months. However, we will only do so if conditions require and the increase can be supported by stable market conditions.*** …[383]

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[381] CX 0627 at 006 (emphasis added); *see also* CCPF 936 (discussion of drafts).

[382] CX 627 at 007; *see also* CCPF 936 (discussion of drafts).

[383] CX 0375 at 001 (emphasis added); *see also* CCPF 938 (discussion of draft).

The final letter reflects Mr. Tatman's apparent attempt to balance McWane's desire for clarity of communication with a concomitant desire to maintain some deniability. The "stronger" language from the original "Rough Draft" blaming price instability upon unsupported price increases was not included in the final letter. Mr. Tatman informed his competitors that McWane will bring its multipliers down in areas where it observed Project Pricing.[384] The operative *quid pro quo* message is still present and apparent to competitors:

> Dear Valued Customer,
>
> Due to continued rising costs . . . we find it necessary to increase prices on Utility Fittings and Accessories.
>
> . . . .
>
> … ***it is our intention going forward to sell all products only off the newly published multipliers***. We will continue to monitor the competitive environment and adjust regional multipliers as required to provide you with competitive pricing.
>
> . . . .
>
> ***If the current inflationary trends continue as forecasted, we anticipate the need to announce another multiplier increase within the next six months. However, we will do so only as conditions require***….[385]

This invitation to competitors to curtail Project Pricing, if accepted, becomes a *per se* illegal price fixing agreement.[386] But even if Sigma and Star did not accept the proposal, the invitation to collude is a violation of Section 5.

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[384] CX 2538 (McCutcheon, IHT (Vol. 2) at 413-414 (a reasonable interpretation fo McWane's letter by someone with experience in the industry would be that McWane was saying, "I'm done job pricing, if I see my rivals job pricing, I'm going to bring multipliers down in the areas where I observed job pricing.")); *see also* CCPF 938 (discussion of draft).

[385] CX 1178 (emphasis added).

[386] *See infra* Part V.D.

2. McWane's May 7, 2008 Letter Unlawfully Offered to Raise McWane's Fittings Prices in Return For Its Competitors Submitting Proprietary Sales Information to DIFRA

The next stage of the Tatman Plan was for the Fittings competitors to launch an exchange of Fittings sales data (by tons shipped) under the auspices of the new trade association, DIFRA.[387] DIFRA's purpose was to increase market transparency, engender inter-firm trust, and discourage cheating on the parties' price fixing agreement.[388] Star had long resisted entreaties to share its sales information, but had finally relented in early 2008 under significant pressure from its competitors.[389]

In an April 25, 2008 conference call, McWane, Sigma, and Star negotiated the terms of the information exchange, and tentatively agreed that each company would submit its sales data (by tons shipped) by May 15, 2008 to the accounting firm (SRHW) that would aggregate the members' sales data on behalf of DIFRA.[390] With this understanding in place, on April 25,

[387] *See, infra*, Part V.E.

[388] *See* CCPF 1277 (Mr. Pais indicating that DIFRA was to increase transparency, and to help suppliers optimize their production); *see also* CCPF 1278 (Mr. Pais described the purpose of DIFRA as stabilizing markets and supplier shares); CCPF 1279 (Mr. Pais's documents describe the purpose of DIFRA as overcoming cultural differences); CCPF 1280 (Mr. Pais indicates describes fewer misunderstandings among firms about the reasons for market share decline). *See generally* CCPF 1276-1296 (actual purpose of DIFRA).

[389] *See* CCPF 1107 (Mr. McCutcheon felt pushed to join DIFRA by Mr. Rybacki); CCPF 1152 (Mr. McCutcheon pressured by Mr. Pais, Mr. Rybacki, and Mr. Brakefield); *see also* CCPF 1151-1154 (Star was reluctant to join DIFRA).

[390] CCPF 1139-1145 (agreement regarding DIFRA data).

2008, Sigma released a letter announcing an increase in its Fittings multipliers.[391] Star followed suit not long thereafter.[392]

McWane was not satisfied with only its rivals' verbal commitment to share sales information in the future. McWane resolved to wait "until the DIFRA data is available before announcing any price actions,"[393] and elected to communicate this requirement to Sigma and Star. So once again, McWane drafted a letter ostensibly addressed to its distributor customers that invited its competitors to collude, striving to balance the company's desire for clarity of communication with a desire to maintain deniability.

On May 7, 2008, McWane issued to its distributors a "pricing letter" that did not actually communicate any change in McWane's prices, and that had no meaning to or value to them. The operative language of the May 7, 2008 letter intentionally but implicitly communicates to McWane's rivals that they must submit their sales data to DIFRA in order to induce McWane to raise its prices:

> Before announcing any price actions, we carefully evaluate all factors including: domestic and global inflation, market and competitive conditions within each region, as well as our performance against our own internal metrics. We anticipate being able to complete our analysis by the end of May. At that point, we will send out letters to each specific region detailing changes, if any, to our current pricing policy.[394]

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[391] CCPF 1168; *see* CCPF 1168-1173 (describing Sigma multiplier announcement).

[392] *See* CCPF 1174-1185; CCPF 1208-1221 (Tatman testimony admits he was waiting for the DIFRA data to take pricing actions).

[393] CCPF 1177; CX 2484 (Tatman, Dep. at 132); CX 0137 at 001 (draft letter "would align with the approach of waiting until the DIFRA data is available before announcing any price actions").

[394] CX 0138; *see also* CX 0137 at 002 (draft of May 7, 2008 letter identifying purpose of letter: "Since several misperceptions are starting to circulate, we wanted to send out this general

The business context in which this letter was issued makes the actual and intended meaning of the May 7, 2008 letter apparent. "By the end of May" refers to the time that McWane expected to receive the DIFRA data, and evaluating McWane's "performance against our own internal metrics" referred to McWane's ability to calculate its market share by using the DIFRA data.[395] In short, senior executives at McWane intended to delay any price move until after the DIFRA data became available.[396]

Sigma and Star – but not Distributors – were aware that McWane anticipated the receipt of DIFRA data "by the end of May," and that McWane could use this data to evaluate company "performance" against "internal metrics."[397] Sigma and Star also knew that DIFRA could not compile and distribute its report until each company submitted their raw data to the accounting firm working for DIFRA.

Additionally, the factors McWane claimed it would "analyze" before issuing a price increase were never before, and never after, included in pricing letters.[398] Nor did McWane

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communication to clearly define our intention in regards to any future pricing actions."). *See generally* CCPF 1174-1274 (discussion of May 2008 letter).

[395] *See* CCPF 1182; CX 0138 ("We anticipate being able to complete our analysis by the end of May"); *see also* CCPF 1176-1179 (discussing Mr. Tatman's timing expectations); CX 0139 at 001 (Tatman email calculating market share within hours of receiving DIFRA data); CCPF 1240-1244 (McWane issues pricing letter within hours of receiving DIFRA data).

[396] *See* CCPF 1230 (McWane decides to "stand pat"); *see also* CCPF 1229 (Messrs. McCullough, Tatman, and Walton agreed McWane should stand pat on prices until DIFRA data was available).

[397] *See* 1193 (only DIFRA members knew when McWane would receive DIFRA data); CCPF 1192-1207 (Sigma and Star understood McWane's message); CCPF 1186-1189 (Distributors did not understand meaning of McWane's reasons for delay).

[398] CCPF 1187; *see also* CCPF 1186-1189 (Distributors did not understand meaning of McWane's reasons for delay).

actually analyze those factors before eventually announcing its price increase. The "pricing" letter was "odd" because the letter did not actually announce a price increase. When a supplier chooses to take a price increase, "he just announces we're taking an increase."[399] For the distributors, the ostensible target of this letter, this language was meaningless "fluff."[400]

At trial, Mr. Tatman suggested that the "misperceptions" in the marketplace that this letter was designed to resolve began when Sigma announced a large price increase and there was confusion as to what McWane intended to do.[401] However, Sigma had announced a similarly large double-digit price increase in October 2007, and McWane did not see the need to issue any misperception-correcting communication to the market.[402] Mr. Tatman could not explain this apparent discrepancy, or why McWane needed to issue the May 7, 2008 letter when it was expecting to announce the actual price increase just a few weeks later (once the DIFRA report became available).[403]

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[399] CCPF 1190 (Mr. Rybacki calls the May 2008 letter "quirky"); CCPF 1191 (Mr. McCutcheon calls the May 2008 letter "odd," "arrogant," and "humorous"); CX 2539 (McCutcheon, Dep. at 179) (In other instances in which a supplier chooses to take a price increase "he [just] announces we're taking an increase.").

[400] CX 2516 (Sheley, Dep. at 153); CCPF 1186-1189 (language had no meaning to Distributors).

[401] CCPF 1180; Tatman, Tr. 491-493 (Mr. Tatman drafted the customer letter to dispel "misperceptions"); CCPF 1179; CX0137 at 002 (draft letter explains: "[s]ince several misperceptions are starting to circulate, we wanted to send out this general communication to clearly define our intention in regards to any future pricing actions").

[402] *See* CCPF 878-906 (Sigma and Star sought price increases in late 2007); CCPF 881; CX 2457; ; CCPF 882; RX-406 (proposing Star's increase); CX 1178 (McWane's January 11, 2008 letter announcing a smaller price increase); CCPF 940 (clarifying to HD that the increase was smaller than Sigma's proposed increase).

[403] CCPF 1187.

As McWane had expected, Sigma and Star quickly obtained the May 7, 2008 letter.[404] The fact that the May 7, 2008 letter solicits specific activity by McWane's competitors is best confirmed by the fact that Star understood this message and proceeded to comply. Within hours of receiving McWane's coded message, Star's Mr. McCutcheon informed the other DIFRA members, including Mr. Tatman, that Star would submit its data.[405] Further, when Star submitted the data to SRHW on June 5, 2008, it notified Sigma by email that it had done so, and acknowledged the *quid pro quo* arrangement by quoting verbatim the precise language constituting McWane's May 7, 2008 invitation to collude:

> Good morning Mr. President. I just sent our info in. Sorry it took so long, but we were "carefully analyzing all factors including: domestic and global inflation, market and competitive conditions within each region, as well as performance against our own internal metrics." (Does that look familiar?).[406]

McWane upheld its end of the bargain. Within hours of receiving the first DIFRA report, McWane announced an eight percent Fittings price increase.[407] Sigma and Star quickly followed McWane's price increase.[408]

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[404] CCPF 1195 (Sigma's Mr. Rybacki received the May 2008 letter); CCPF 1198 (Star's Mr. Prado forwarded May 2008 letter); *see also* CCPF 1192-1200 (Star and Sigma understood message of May 2008 letter).

[405] CX 0863 at 001 (Star receives McWane's letter at 1:06 p.m.); RX-580 at 001 (Star confirms that it will submit DIFRA data at 4:12 p.m. Eastern); *see also* CCPF 1201-1207 (Star understood meaning of McWane's May 2008 letter).

[406] CX 1091; CX 2538 (McCutcheon, IHT (Vol. 2) at 311-313); *see also* CCPF 1222-1226 (Star submits its data invoking May 2008 letter's language).

[407] CCPF 1242 (average increase "approximately 8%" to distibutors within 4 hours of receiving data); *see generally* CCPF 1240-1245 (McWane's analysis and price increase took little time after receiving first DIFRA report).

[408] CCPF 1246-1250 (Star and Sigma price increases announced 10 and 20 days, respectively, after McWane's increase).

The proposal that McWane will raise prices (quid) in return for Sigma and Star's submission of shipment data to the information exchange (quo) – if accepted – is a restraint on price competition and *per se* unlawful.[409] McWane's invitation to collude – whether or not accepted – is a violation Section 5.

D. McWane, Sigma and Star Conspired to Stabilize and Increase Fittings Prices By Curtailing Project Pricing and Increasing Price Transparency (Count One)

Count One of the Complaint charges McWane with conspiring with its primary competitors, Sigma and Star, to raise and stabilize prices in the Fittings market. Agreements among horizontal competitors to raise, lower, stabilize, or otherwise restrain price competition strike an "actual or potential threat to the central nervous system of the economy," and are summarily condemned as *per se* illegal under Section 1 of the Sherman Act. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224, n.59 (1940); *see also Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 648 n.10 (1980) (per curiam) (Section 1 of the FTC Act and Section 5 of the FTC Act apply same *per se* standard to price fixing agreements); *Gen. Motors Corp.*, 384 U.S. at 148 ("[P]rotection of price competition from conspiratorial restraint is an object of special solicitude under the antitrust laws.").

Accordingly, Complaint Counsel need not establish that McWane and its co-conspirators had the ability to achieve their unlawful ends, took any overt acts in furtherance of the conspiracy, or were successful in their conspiracy. The only question for this Court is whether McWane entered into such an agreement. *McWane*, slip op. at 7 ("[T]o establish a horizontal price fixing scheme, a plaintiff need only demonstrate the existence of an agreement, combination or conspiracy among actual competitors with the purpose or effect of 'raising,

[409] *See infra* Part V.D.2.

depressing, fixing, pegging or stabilizing the price of a commodity.'") (citations omitted); *see also Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 692 (same); *Socony-Vacuum*, 310 U.S. at 224-25, n.59 ("a conspiracy to fix prices violates [Section One] … though it is not established that the conspirators had the means available for accomplishment of their objective").

An agreement is established when two or more firms share "a unity of purpose or a common design and understanding, or a meeting of the minds," *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771 (1984), or in other words, shared a "conscious commitment to a common scheme designed to achieve an unlawful object." *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 768 (1984). Agreements may be shown through "direct or circumstantial evidence, or a combination of the two." *W. Penn Allegheny Health Sys., Inc. v. UPMC*, 627 F.3d 85, 99 (3d Cir. 2010).

Courts have long recognized that most price fixing agreements will be proven through circumstantial evidence:

> [It is unlikely] that a formal signed-and-sealed contract or written resolution would conceivably be adopted at a meeting of price-fixing conspirators in this day and age . . . it is well recognized law that any conspiracy can ordinarily only be proved by inferences drawn from relevant and competent circumstantial evidence.

ESCO Corp. v. United States, 340 F.2d 1000, 1006-1007 (9th Cir. 1965); *see also W. Penn Allegheny Health Sys., Inc.*, 627 F.3d at 99. As the Seventh Circuit explained in *In re High Fructose Corn Syrup Antitrust Litigation*, most conspiracy cases "are constructed out of a tissue of such [ambiguous] statements and other circumstantial evidence, since an outright confession will ordinarily obviate the need for a trial." 295 F.3d 651, 662 (7th Cir. 2002); *see also McWane*, slip op. at 7 (citing Areeda & Hovenkamp, *Antitrust Law* ¶ 1410c (an agreement "can exist without any documentary trail and without any admission by the participants")); *see also Consol.*

Packaging Corp., 575 F.2d 117, 126 (7th Cir. 1978) (agreement can still be found unlawful even when conspirators "leave few tracks or fingerprints" behind).

The most common method for proving a price fixing agreement is through evidence of the conspirators' parallel pricing conduct along with evidence of various "plus" factors that tend to exclude the possibility that the alleged conspirators acted independently. *See In re Travel Agent Comm'n Antitrust Litig.*, 583 F.3d 896, 907 (6th Cir. 2009); *Cason-Merenda v. Detroit Med. Ctr.*, 2012-1 Trade Cas. (CCH) ¶ 77,893 (E.D. Mich. Mar. 22, 2012). Alternatively, price fixing agreements may be proven through evidence of a *quid pro quo* arrangement related to price or mutual assurances to adhere to previously published prices. *Sugar Inst. v. United States*, 297 U.S. 553, 601 (1936) (condemning agreement to adhere to previously published prices, even when those prices were unilaterally set); *United States v. Gen. Motors Corp.*, 384 U.S. 127, 142-43 (1966) (finding "that each party acted in its own lawful interest" to be "of no consequence" where "joint and collaborative action was pervasive in the initiation, execution, and fulfillment of the plan"); *see Isaksen v. Vt. Castings, Inc.*, 825 F.2d 1158, 1164 (7th Cir. 1987) (establishing that a conspiracy had been formed "by conduct in lieu of promissory language"); Areeda & Hovenkamp, *Antitrust Law* ¶¶ 1404, 1410c (noting that "an addressee of a proposal for common action who behaves in accordance with the proposal may find it difficult . . . to persuade us that it acted unilaterally and without regard to the proposal" and that "reciprocal assurances can be communicated by conduct rather than by words").

Here, McWane, Sigma and Star shared a "conscious commitment to a common scheme" to stabilize and increase Fittings prices by curtailing Project Pricing and increasing price transparency. *See Monsanto*, 465 U.S. at 768. This price fixing agreement manifested itself in three distinct episodes. First, in or around January 2008, McWane and its co-conspirators

abruptly changed their prior business practices and began to reduce their Project Pricing, a key form of discounting and price competition in the Fittings market. This parallel conduct reflects an agreement – and not independent action – because, among other "plus" factors to be discussed, it was against the unilateral economic interest of the conspirators absent an agreement.

Second, in or around May 2008, in an effort to further increase the transparency of Fittings prices, the conspirators unlawfully exchanged assurances related to the formation of DIFRA and the exchange of the Fittings suppliers' sales data. Specifically, McWane unlawfully promised to increase prices (quid) if Sigma and Star submitted competitively sensitive sales data to DIFRA (quo). This invitation to collude was accepted – and therefore became an unlawful price fixing agreement – when Sigma and Star submitted their sales data to DIFRA and McWane promptly announced a price increase. Third, in or around April 2009, McWane and Star exchanged mutual assurances to adhere to McWane's newly announced price list.

Each of the three distinct episodes of the overall conspiracy to stabilize and increase Fittings prices is discussed more fully below. Once proven, each episode is sufficient to independently establish liability. *See Turner v. United States*, 396 U.S. 398, 420 (1970) ("[W]hen a jury returns a guilty verdict charging several acts in the conjunctive, . . . the verdict stands if the evidence is sufficient with respect to any one of the acts charged."); *ESCO Corp. v. United States*, 340 F.2d 1000, 1005-06 (9th Cir. 1965) (explaining that "where several acts or transactions are alleged to constitute a single general conspiracy" it is not required that "each defendant or all defendants must have participated in each act or transaction").

1. Episode One: Beginning in or around January 2008, McWane, Sigma and Star Agreed to Curtail Project Pricing

Parallel conduct, by itself, generally does not establish an agreement because it may reflect oligopoly interdependence rather than an unlawful price fixing agreement. *See*

Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588 (1986); *see also McWane*, slip op. at 8 (parallel pricing conduct insufficient to alone establish liability); *In re Baby Food Antitrust Litig*., 166 F.3d 122, 122 (3d Cir. 1999) (same).[410] Accordingly, to find liability, additional circumstances or "plus factors" must support the inference of conspiracy – *i.e.*, tend to exclude the possibility that the conspirators were acting independently. *Matsushita Elec*, 475 U.S. at 588 ("[C]onduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy . . . [A] a plaintiff . . . must present evidence that 'tends to exclude the possibility' that the alleged conspirators acted independently."); *City of Tuscaloosa v. Harcros Chems., Inc.*, 158 F.3d 548, 571 & n.35 (11th Cir. 1998); *In re High-Tech Emp. Antitrust Litig.*, 856 F. Supp. 2d 1103, 1118 (N.D. Cal. 2012).

The existence of plus factors makes it more likely than not that the parallel pricing behavior was a result of an unlawful price fixing agreement rather than unilateral action. These "plus" factors must be considered as a whole, and not individually dissected:

> In antitrust conspiracy cases, plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each. The character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole.

In re High-Tech Emp. Antitrust Litig., 856 F. Supp. 2d at 1118 (internal quotation marks omitted) (quoting *Continental Ore Co. v. Union Carbide & Carbon Corp*., 370 U.S. 690, 699 (1962)); *see also High Fructose Corn Syrup*, 295 F.3d at 655 ("The second trap to be avoided in evaluating

[410] The theory of interdependence (sometimes referred to as oligopoly price leadership) posits that in a highly concentrated market, any single firm's price and output decisions will have a noticeable impact on the market and on its rivals. Competing firms may be able to raise prices to supra-competitive levels by observing and reacting to the price and output decisions of a market leader. *See In re Petroleum Products Antitrust Litig*., 906 F.2d 432, 443 (9th Cir. 1990); Areeda & Hovenkamp, *Antitrust Law* ¶ 1429.

evidence of an antitrust conspiracy for purposes of ruling on the defendants' motion for summary judgment is to suppose that if no single item of evidence presented by the plaintiff points unequivocally to conspiracy, the evidence as a whole cannot defeat summary judgment.").

Here, McWane, Sigma, and Star agreed to curtail Project Pricing in early 2008. This is an "historically unprecedented change[] in pricing structure made at the very same time by multiple competitors, and made for no other discernible reason," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 n.4 (2007), and itself constitutes a "plus" factor, *see In re Text Messaging Antitrust Litig.*, 630 F.3d 622, 628 (7th Cir. 2010). Further, there are numerous other "plus" factors that support the inference that the Fittings suppliers' parallel curtailment of Project Pricing in January 2008 was pursuant to an unlawful conspiracy and not the result of independent action. First, the Fittings market is an oligopoly market conducive to collusion, and by late 2007, all of the Fittings suppliers had a motive to conspire. Second, the curtailment of Project Pricing was in accord with a written strategy authored by McWane (the Tatman Plan). Third, abandoning Project Pricing was against the conspirators' unilateral business interests absent assurances that the others would act similarly. Fourth, the parties formed DIFRA and instituted an information exchange to facilitate their collusion. Fifth, the conspirators complained to each other about cheating. And finally, there is a high volume of communications among top executives from each company with pricing authority during the conspiracy period, including at least some discussions on price or other competitively sensitive information.

a) Parallel Pricing Conduct: McWane, Sigma and Star Each Curtailed Project Pricing In or Around January 2008

In the years prior to 2008, Fittings suppliers generally offered at least some level of Project Pricing to their customers.[411] In 2007, as the economy declined and Fittings demand dropped, Fittings suppliers began offering more Project Pricing as they competed for fewer jobs.[412] In January 2008, however, even as demand continued to drop, all three Fittings suppliers abruptly changed their prior business practice by curtailing their use of Project Pricing. *See Baby Food*, 166 F.3d 112, 132 (3d Cir. 1999) (recognizing that parallel pricing need not be uniform); *In re Blood Reagents Antitrust Litig.*, 756 F. Supp. 2d 623, 630 (E.D. Pa. 2010) ("Plaintiffs are not required to plead simultaneous price increases—or that the price increases were identical—in order to demonstrate parallel conduct.").

Specifically, on or about January 11, 2008, McWane issued a letter publicly announcing to the "Market & Competitors" that it would increase prices and no longer offer Project Pricing, effective March 1, 2008.[413] On January 24, 2008, Sigma's then-President emailed his regional managers that they should initiate a "new" effort to minimize Project Pricing:

> I HAVE URGED LARRY [RYBACKI] TO INITIATE A ***NEW*** COMMITTED AND SERIOUS EFFORT TO NORMALIZE ALL PRICING FOR FITTINGS – AT SAME LEVELS – PW AS WELL AS OTHER ORDERS, TO ELIMINATE THE CONFUSION WE ARE CREATING WITH CUSTOMERS AND COMPETITORS, LEADING TO LOWER OVERALL PRICING LEVELS!
>
> Though Tyler's NEW multipliers are discouraging, this is both a lesson and an opportunity [for] SIGMA and Star to develop a

[411] CCPF 549-554.

[412] CCPF 843, 871-875.

[413] CCPF 932-939.

> patient and disciplined Marketing approach and demonstrate to [McWane] that we are capable of being part of a stable and profitability conscious industry. This is the 'leadership capital' we created when we acquired PCI and reduced the supply base to just 3 – but so far, we have NOT been astute enough to derive any returns from this capital![414]

On or about January 28, 2008, Sigma announced a price increase mimicking McWane's price increase in a letter that also made a commitment to curtail Project Pricing and to adhere to published pricing levels.[415]

On January 22, 2008, Star's National Sales Manager, Mr. Minamyer likewise instructed his division sales managers that Star was going to increase its prices and "stop project pricing."[416] Shortly thereafter, Star began informing its major customers that it would follow McWane's price increase and that it would not offer Project Pricing: "NO UTILITY PROJECT PRICING NATION WIDE."[417] For example, Mr. Minamyer informed the TDG Distributor Group that Star would offer "no more project pricing after March 1st," as part of Star's effort to create an "even playing field on up front pricing with our competitors" and to "bring stability to the fitting market."[418] Mr. Minamyer repeated his instruction that "we can no longer project price" to Star's sales force on June 19, 2008.[419]

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[414] CCPF 956-963; CX 1145 at 002 (emphasis added); Pais, Tr. 1920-1925 ("eliminating [Project Pricing] is wishful thinking. I was just trying to have them minimize it."); Rybacki, Tr. 1129 (understood Mr. Pais's message was to pull back on Project Pricing).

[415] CCPF 965-966.

[416] CCPF 977; CX 0752 at 001; Minamyer, Tr. 3160 (email was a plan to react to information from McWane).

[417] CCPF 998-1008; CX 1566 at 001; McCutcheon, Tr. 2409-2410; Minamyer, Tr. 3185-3186.

[418] CCPF 1002; CX 2300; Minamyer, Tr. 3188-3191.

[419] CCPF 985; CX 2254 at 001, 003.

As discussed more fully, *infra* at Part V.D.1.a, the Fittings suppliers were largely successful in reducing Project Pricing through at least the Fall of 2008. By January 2009, however, all three Fittings suppliers had once again renewed their efforts to compete vigorously through Project Pricing.[420] Throughout this time period – 2007, 2008 and 2009 – the economy continued to decline, Fittings demand had continued to drop, and costs generally had continued to rise.[421]

Notably, the parallel curtailment Project Pricing may be more aptly described as a "kind of 'parallel plus' behavior" because it represents a significant change in the pricing structure of the Fittings market. *See In re Text Messaging*, 630 F.3d at 628 ("[C]hanges in pricing structure made at the very same time by multiple competitors, and made for no other discernible reason" is the "kind of 'parallel plus' behavior" that "enables parallel conduct to be interpreted as collusive.") (quoting *Twombly*). In *Twombly*, the Supreme Court identified a "plus" factor when it noted that an agreement can be inferred from "complex and historically unprecedented changes in pricing structure made at the very same time by multiple competitors, and made for no other discernible reason[.]" 550 U.S. at 556 n.4. Here, Project Pricing represented the primary form of price competition in the Fittings market, and all three Fittings suppliers taking steps to curtail it represent a significant change in the market's pricing structure. This parallel pricing action is therefore particularly probative evidence of a price fixing conspiracy. *See Twombly*, 550 U.S. at 556 n.4.

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[420] CCPF 1456-1464.

[421] CCPF 843-844, 870-877, 1437-1438.

The parallel conduct by all three major Fittings suppliers to curtail Project Pricing in 2008 (and only 2008) is best explained by an unlawful price fixing agreement, whose terms of coordination began in January 2008 and largely fell apart in the Fall of 2008. *See Twombly*, 550 U.S. at 556 n.4; *see also In re Text Messaging*, 630 F.3d at 628. The following discussion of "plus" factors supports this inference of conspiracy.

b) Plus Factor: The Conspiracy Is Plausible Because It Occurred in the Context of a Market Conducive to Collusion and the Suppliers Had a Motive to Conspire

McWane, Sigma and Star's parallel curtailment of Project Pricing occurred in the context of a Fittings market that is conducive to collusion and where all the primary Fittings suppliers had a motive to conspire.[422] These are plus factors that tend to exclude the possibility of independent action because in such an environment "it would not be difficult for a small group to agree on prices and to be able to detect 'cheating' (underselling the agreed price by a member of the group) without having to create elaborate mechanisms, such as an exclusive sales agency, that could not escape discovery by the antitrust authorities." *In re Text Messaging*, 630 F.3d at 627-28 (evidence of "an industry structure that facilitates collusion constitutes supporting evidence of collusion"); *see also In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 360 ("evidence that the defendant had a motive to enter into a price fixing conspiracy" is a plus factor).

As discussed more fully in Part V.B, *supra*, the Fittings market is an oligopoly with many salient features that make it highly susceptible to coordination. Briefly, the evidence shows that the Fittings market: is highly concentrated with few rivals and high entry barriers; has a social structure where top executives with pricing authority have frequent contacts with each other; is comprised of homogeneous products with few substitutes and inelastic demand; and there was

[422] CCPF 651-665; CCPF 842-877.

somewhat transparent pricing, which transparency was improved upon by the parties setting up an information exchange of sales data through DIFRA. *See infra* Part V.E. These market features make conspiracy allegations more plausible because they facilitate coordination between suppliers and allow easier detection of any cheating. *See supra* Part V.B.

The Fittings suppliers also had a motive to conspire. During 2007, the increase in Project Pricing drove Fittings prices down.[423] As Mr. Rybacki of Sigma explained at trial, Star in particular had been "overly aggressive" in its Project Pricing for most of 2007, and took prices to a "new depressed level, and it was hard to compete with."[424] At the same time, costs for producing Fittings were increasing.[425] Sigma and Star were particularly "desperate" for a price increase because inflationary costs for producing Fittings in China were outpacing domestic manufacturing costs.[426] By the end of 2007, all the suppliers had declining profits and wanted a price increase.[427] Declining profits provides a strong motive for parties to enter into an agreement to raise prices. *Cf. In re Blood Reagents*, 756 F. Supp. 2d at 631 ("[L]osing so much money before the conspiracy . . . provide[s] the motive for a conspiracy to raise prices.").

In addition to the general economic motive to conspire, McWane had motives of its own. In 2007, McWane had followed Star's low prices, but as the sole manufacturer, it also had a problem of excess capacity and inventory, and was incurring "idle plant" charges that were

[423] CCPF 555-561.

[424] CCPF 854; Rybacki, Tr. 1136-1137.

[425] CCPF 843.

[426] CCPF 870-877.

[427] CCPF 879-883, 917.

eroding its profitability.[428] Moreover, throughout 2007, McWane was losing volume and market share because McWane's sales force was smaller, less nimble and, per Mr. Tatman's own estimation, less effective at identifying and responding to Project Pricing.[429] Accordingly, Mr. Tatman, who had recently been put in charge of McWane's Fittings division through a restructuring, felt that McWane was "shooting in the dark" when trying to ascertain the prevailing transaction prices in the market.[430] As Mr. Tatman repeatedly admitted at trial, McWane wanted to compress the difference between published prices and actual transaction prices, *i.e.*, reduce Project Pricing.[431]

c) Plus Factor: The Parallel Conduct of all Suppliers Curtailing Project Pricing Conformed to McWane's Written Strategy To "[D]rive [S]tability and [R]ational [P]ricing"

One of the most powerful pieces of evidence supporting the inference of conspiracy in this matter is the fact that Sigma, Star and McWane's actions comport with a written strategy authored by Mr. Tatman in late December 2007/early January 2008.[432] Evidence that conspirators are acting pursuant to a written plan is a significant "plus" factor tending to exclude independent action because it provides context for understanding the parallel pricing behavior and is suggestive of an agreement. *In re Sulfuric Acid Antitrust Litig.*, 743 F. Supp. 2d 827, 858. (N.D. Ill. 2010) (defendants' written plan for inducing its competitors to reduce output was the "most damaging" evidence "tending to exclude the possibility of independent action"); *In re*

[428] CCPF 846-850; 854-858.

[429] CCPF 857.

[430] CCPF 679.

[431] CCPF 859; 919.

[432] CCPF 907-922.

Linerboard Antitrust Litig., 504 F. Supp. 2d 38, 59 (E.D. Pa. 2007) (noting that other "evidence is contextualized" when defendant's internal documents reflect the "search for 'a strategy to help this highly rational behavior [reducing inventory] become contagious in this industry'").

Here, Mr. Tatman prepared a written blueprint for the conspiracy, which he first conceptualized in late December 2007 and began to implement in January 2008.[433] Mr. Tatman knew that Sigma and Star were "desperate" for a price increase, and that their production costs from China were increasing more rapidly than McWane's costs.[434] Mr. Tatman saw these market facts as providing McWane with a "unique" opportunity to bring price stability to the Fittings market. Thus, on December 22, 2007, Mr. Tatman emailed his superiors that he had a "concept" to drive "stability and rational pricing with the proper communication and actions" in the Fittings market:

> Given both the change in the Tyler/Union leadership structure and the accelerated inflation in China compared to Domestic cost, **I believe we're in a unique position to help drive stability and rational pricing with the proper communication and actions**. I have a concept that I believe will work if properly executed. . . .[435]

Mr. Tatman's recognition that his plan needed the "proper communication" to work demonstrates that McWane needed (and was seeking) the active cooperation of its competitors, Sigma and Star, to successfully drive "stability and rational pricing" in the Fittings market.

Three days later, Mr. Tatman emailed Messrs. McCullough, Jansen, and Walton a draft First Quarter Review for McWane's Fittings division, where he restated the same point of McWane having a "unique opportunity" to drive "stable pricing:"

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[433] CCPF 907-922.

[434] CCPF 917.

[435] CCPF 909; CX 1702.

> Our past attempts to **drive stable pricing** haven't been too successful. However, our new leadership structure coupled with China inflation out pacing domestic costs may provide a **unique opportunity for success** provided our strategy and execution is correct. [436]

Mr. Tatman has defined pricing as "stable" when the gap between published prices and actual transactional prices, *i.e.*, the discount associated with Project Pricing, is less than 10%.[437]

On January 6, 2008, Mr. Tatman outlined his multi-prong "Tatman Plan" to improve the profitability of McWane's Fitting business in a presentation that he sent to and discussed with his superiors.[438] In a slide detailing McWane's "Desired Message to the Market **& Competitors,**"[439] Mr. Tatman explained that McWane would support a series of small increases in multiplier prices if Sigma and Star curtailed their use of Project Pricing and moved toward greater transparency in their pricing actions. Specifically:

> - Tyler/Union [McWane] will be consistent and follow through with what we've formally communicated.
> - T/U will ***encourage/drive both price stability and transparency***.
> - T/U will adjust multipliers as required to remain competitive within any given market area. (Consistent Job Pricing will be met with general market actions).
> - ***For 2008, we will support net price increases but will do so in stepped or staged increments. A prerequisite for supporting***

[436] CCPF 910; CX 2327 at 001.

[437] CCPF 908.

[438] CCPF 911-913; CX 0627 at 004.

[439] CCPF 913; CX 0627 at 004 (emphasis added).

> ***the next increment of price is reasonable stability and transparency at the prior level.***[440]

Mr. Tatman then explained that one of the keys to the success of his plan was for "Sigma and Star's mgt [management] pulling price authority away from front line sales and customer service personnel to add discipline to the process."[441]

McWane's January 11, 2008 customer letter was one of the early steps McWane took to implement the Tatman Plan.[442] In it, McWane communicated to the "Market & Competitors" that McWane was increasing its prices, that it did not intend to offer Project Pricing, and that it would support future increases in prices only if pricing had stabilized, *i.e.*, only if Sigma and Star also curtailed Project Pricing.[443] Notably, the January 11, 2008 letter announced a smaller price increase than what Sigma had announced (but never implemented) in late 2007. This more measured price increase was consistent with the Tatman Plan's support for increasing prices only in "stepped or staged increments."[444] Mr. Tatman's boss, Mr. Walton, further commented that he "like[d] [Mr. Tatman's] strategy of only giving them half of what they want to try to prevent cheating and fire sales."[445]

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[440] *Id.*

[441] *Id.*

[442] CCPF 920, 922.

[443] CCPF 932.

[444] CCPF 913.

[445] CCPF 942-943; CX 2327 (email from Walton to Tatman); *see also* Tatman, Tr. 882 (McWane moderated the amount of its price increase so as not to "lose visibility on where the true competitive level was.").

Suppliers, including McWane, frequently use customer letters to communicate with their competitors, and they read competitor's letters, nominally addressed to customers, for messages directed to them.[446] Mr. Tatman admitted at trial that his January 11, 2008 letter was specifically directed to his competitors, and that he intended to induce his competitors to curtail Project Pricing.[447] This is similar to *In re Delta/AirTran Baggage Fee Antitrust Litig.*, 733 F. Supp. 2d 1348, 1360 (N.D. Ga. 2010), where the court recognized public communications such as "speeches at industry conferences, announcements of future prices, statements on earnings calls, and [] other public ways" as part of an unlawful price fixing conspiracy. This letter likely was not the only communication among the competitors. For example, from late December 2007 to mid-January 2008, **{**

}[448]

Regardless of the mode of its communication, Sigma and Star received and understood McWane's message, and acted upon it.[449] As previously noted, Sigma and Star announced they would curtail Project Pricing shortly after receiving McWane's January 11, 2008 letter. Part V.C.1.a. Even more importantly, Sigma admitted that it did so in order to please McWane. As Mr. Rybacki explained at his deposition, Sigma's then-current President, Mr. Pais, wanted to pull back on Project Pricing because it was "upsetting the gorilla in the room," McWane.[450]

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[446] CCPF Section 6.3.5.

[447] CCPF 934.

[448] CCPF 923, *in camera*.

[449] CCPF 951.

[450] CCPF 964; CX 2531 (Rybacki, Dep. at 229).

Sigma's contemporaneous business documents also show that it curtailed Project Pricing to demonstrate to McWane that it was capable of being a disciplined and reliable coconspirator. Days after receiving McWane's January 11 pricing letter, Mr. Pais wrote:

> Though Tyler's NEW multipliers are discouraging, this is both a lesson and an opportunity [for] Sigma and Star to develop a patient and disciplined Marketing approach and ***demonstrate to [McWane] that we are capable of being part of a stable and profitab[ility] conscious industry***.[451]

Thus, Sigma understood the Tatman Plan's central message: that if Sigma and Star followed McWane's initial, small price lead, and eschewed excessive discounting, then further McWane price increases would follow. Sigma was willing to play its assigned role in the Tatman Plan.

Star likewise took steps to ensure that McWane knew that it was curtailing Project Pricing. For example, on January 23, 2008, Star's National Sales Manager, Mr. Minamyer, informed his sales force that they needed their customers to accept shipment of products that had received earlier Project Pricing by March 1, 2008, the effective date through which Star was honoring prior Project Pricing.[452] Mr. Minamyer gave this directive because he feared that if these special pricing projects lingered, McWane would not be able to "figure it out" and think that Star had not taken the price increase.[453] Evidence of "compliance" with the written plan is further evidence supporting the inference of conspiracy. *See In re Sulfuric Acid*, 743 F. Supp. 2d at 858*; see also In re Linerboard*, 504 F. Supp. 2d at 59.

[451] CCPF 956; CX 1145 (emphasis added).

[452] CCPF 1010-1013; CX 0847 at 001; Minamyer, Tr. 3180-3181.

[453] CCPF 1013; CX 0847 at 001; Minamyer, Tr. 3180-3181.

The suppliers also complied with one of the Tatman Plan's "keys to actual success:" centralizing their pricing authority away from the front lines of their sales force.[454] In January 2008, Mr. Tatman followed his Plan by creating a brand new Pricing Coordinator position; a central person who was responsible for approving all requests for Project Pricing from McWane's sales force.[455] Previously, McWane's sales force had some limited authority to offer customers Project Pricing. At or about the same time in January 2008, Star too removed pricing authority from its sales force, requiring them to get the National Sales Manager's approval before they could offer Project Pricing.[456] Sigma had always used its regional sales managers to approve requests for Project Pricing from its lower level sales agents, but Mr. Tatman reported in his First Quarter Report that Sigma, too, appeared to have added more discipline to the process of offering Project Pricing.[457]

Finally, as discussed *infra* Part V.D.1.h.(2), Sigma and Star had considerable insight into the details of the Tatman Plan when they discussed adhering to certain aspects of it with each other. The level of detail known to Sigma and Star is best explained by agreement among the three suppliers to follow the Tatman Plan.

d) Plus Factor: Curtailing Project Pricing Was Against the Conspirators' Unilateral Business Interest Absent Assurances That Their Competitors Would Also Curtail Project Pricing

Actions contrary to a co-conspirator's independent self-interest is another significant plus factor from which the finder of fact may infer a conspiracy. *Harcros Chems.*, 158 F.3d at 572

[454] CCPF 1054; CX 0627 at 004.

[455] CCPF 924-929.

[456] CCPF 991-996.

[457] CCPF 1054.

(actions against interest are "prominent" plus factor); *Merck-Medco Managed Care, LLC v. Rite Aid Corp.*, 1992-2 Trade Cas. ¶ 72,640, 1999 U.S. App. LEXIS 21487, at *26 (4th Cir. 1999) ("Evidence of acts contrary to an alleged conspirator's economic interest is perhaps the strongest plus factor indicative of a conspiracy."). Acting contrary to one's own interests absent an agreement is powerful evidence of a conspiracy because it "excludes the likelihood of independent conduct." *Re/Max Int'l, Inc. v. Realty One, Inc.*, 173 F.3d 995, 1009 (6th Cir. 1999) ("Ordinarily, an affirmative answer to the first of these factors [actions against interest] will consistently tend to exclude the likelihood of independent conduct.").

In evaluating this 'plus' factor, it is important to assess the conspirators' actions against a competitive market – as a price fixing conspiracy that increases prices and profits would be in the individual firm's economic interests. *See, e.g., Flat Glass Litig.*, 385 F.3d at 360-61 ("Evidence that the defendant acted contrary to its interests means evidence of conduct that would be irrational assuming that the defendant operated in a competitive market. In a competitive industry, for example, a firm would cut its price with the hope of increasing its market share if its competitors were setting prices above marginal costs.").

Here, McWane, Sigma, and Star all acknowledge that if they unilaterally stopped Project Pricing, they would lose business to their competitors.[458] Despite this reality, McWane announced in its January 2008 letter that it would no longer Project Price.[459] McWane has failed to explain how telegraphing to its competitors that it would stop competing on price could be in

[458] CCPF 668-699

[459] CCPF 932-939.

McWane's unilateral business interest. In fact, Mr. Tatman knew that the only way for this plan to be successful was for Sigma and Star to join McWane in stopping Project Pricing.[460]

Star also acted contrary to its unilateral interests by altering its historic business model, which had been to gain market share by aggressively discounting. Star is the smallest of the three Fitting suppliers and its core strategy involved undercutting its larger rivals' prices to gain market share. Star believed that unless its Fittings prices were the lowest of the three, it would not win sales.[461] Yet, beginning in January 2008, after receiving McWane's January 2008 price increase letter, Star pulled back on its strategy of aggressive discounting. Mr. Minamyer explained that Star was not pursuing this change in strategy because it needed to, but because it would be better "for the industry":

> You need to know that we are strong in revenue and profit. We will have no problems weathering any price wars, even if they are prolonged. ***What we are doing is what is right for the industry.*** So, don't think we need the price increases, as that is not the case. A price increase will be good for us on the short and long term profit situation but are not vital to our strength. The truth is that we would come out of a price war stronger than ever and with a bigger market share, but we don't think the industry needs that right now.[462]

Mr. Minamyer never tried to justify Star's change in strategy as being good for Star's unilateral interest. Further, Star's President, Mr. McCutcheon, acknowledges that this change of course was "irrational" and "bizarre," and ordinarily would threaten his company's competitive viability.[463]

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[460] CCPF 918.

[461] CCPF 444.

[462] CCPF 1067.

[463] CCPF 1063.

Star's "irrational" and "bizarre" actions are similar to the actions of the defendants in *Standard Iron Works v. ArcelorMittal*, 639 F. Supp. 2d 877 (N.D. Ill. 2009), and as the court found there "plausibly suggest[] agreement." *Id.* at 897. In *Standard Iron Works*, the defendants (steel mill operators) "coordinated supply cuts," which was "an abrupt departure from each firm's prior behavior" and contrary to each producer's self-interest. *Id.* at 893, 896. Plaintiffs argued that, "had the producers behaved independently, they would have operated their mills at a profit while competing with each other for market share. Giving up a part of that share, and the concomitant profit, at least plausibly infers that Defendants agreed to do so." *Id.* at 896. The court agreed: "[A]bsent coordination and agreement by each producer to give its 'pint of blood,' no Defendant would have sacrificed profitable production. But all eight Defendants made that sacrifice, and did so on multiple occasions. This, I find plausibly suggests agreement." *Id.* at 897. Here, Star's decision to give its "pint of blood" by foregoing its strategy of discounting represents "an abrupt departure from [its] prior behavior" and was contrary to its own competitive interest. *Id.* at 893, 896-897. Absent coordination and agreement with McWane and Sigma, Star would have continued to compete aggressively on price in order to gain market share. These facts are highly indicative of a price fixing agreement.

Star's decision to join DIFRA was also against its economic self-interest, but in accord with the Tatman Plan. McWane and Sigma had long pressured Star to participate in an information exchange program.[464] When Star was competing aggressively, the company resisted these petitions out of fear that the information they would be required to submit would be used

[464] CCPF 1151-1154.

by McWane to injure Star.[465] Nevertheless, in 2008, Star succumbed to McWane and Sigma's requests and decided to make its pricing more transparent by participating in DIFRA.[466] Because Star viewed its sharing of confidential business information as contrary to its interest, the fact that Star did so is probative of the alleged conspiracy. *In re High Pressure Laminates Antitrust Litig.*, No. MDL 1368, 2006 WL 1317023, at *2 (S.D.N.Y. 2006) (defendant's sharing of confidential information with competitors was against its individual economic self-interest, and therefore probative of conspiracy); *Petroleum Prods.*, 906 F.2d at 450 (the disclosure of "sensitive price information might be considered contrary to a firm's self-interest," and thus could support a jury's finding of a "common understanding" among the companies sharing this information); *In re Currency Conversion Fee Antitrust Litig.*, No. 05 Civ. 7116, 2012 U.S. Dist. LEXIS 19760, at *17-18 (S.D.N.Y. 2012) (providing competitors with sensitive business information is against unilateral interest and may be viewed as a tacit invitation to collude).

e) Plus Factor: Membership In DIFRA and Taking Actions That Facilitate Collusion

Actions that facilitate interdependent pricing are recognized as plus factors because, although not illegal on their own, these practices can facilitate coordination and make it more difficult to detect price fixing activity. *Text Messaging*, 630 F.3d at 627-28; *see also* Areeda & Hovenkamp, *Antitrust Law* ¶ 1434a. As discussed, *infra* Part V.E, McWane, Sigma, and Star's participation in the DIFRA information exchange facilitated collusion by allowing the Fittings suppliers to monitor their market shares and detect cheating on the collusive scheme. *See Todd v. Exxon Corp.*, 275 F.3d 191, 198 (2d Cir. 2001) (competitors' use of facilitating practice,

[465] CCPF 1154.

[466] CCPF 1284.

including an information exchange, is a plus factor that supports an inference of a price fixing agreement); *Petroleum Prods.*, 906 F.2d at 461-462 (same). Indeed, merely participating in a trade association is a plus factor. *See, e.g.*, *Blood Reagents*, 756 F. Supp. 2d at 632 (identifying "common membership in trade associations" as "yet another feature of the factual background" that raises suspicion of collusive agreement).

f) Plus Factor: Internal Documents Tracking "Cheating" Constitute Co-Conspirator Admissions

Acknowledgments of a conspiracy, explicit and implicit, are also evidence of an agreement. *High Fructose Corn Syrup*, 295 F.3d at 661-662; *Re/Max Int'l*, 173 F.3d at 1009-1010. One Star document refers specifically to the industry agreement to fix prices, but bemoans the failure of all (Sigma) to adhere. In an email to Mr. Minamyer, a Star regional sales manager wrote: "I think we are doing better since figuring out that Sigma was cheating on the fitting deal."[467] Furthermore, all three Fitting conspirators keep track of their co-conspirator's "cheating on the fitting deal" internally.

Throughout 2008, Star monitored the level of Project Pricing offered by McWane and Sigma and limited its own Project Pricing offerings to instances where there was "real" proof that McWane and Sigma were "cheating."[468] By August, however, Star "noticed that recently we have been seeing more pricing pressure."[469] After multiple instances of McWane's Project Pricing were reported to Star's executives, Star's sales force was reminded in an email to "stay on the high road" and to "be as diligent as we can gathering the proper data needed if the other

[467] CCPF 1444.

[468] CCPF 1016-1021, CCPF 1439-1448.

[469] CCPF 1439.

suspects are cheating" before offering Project Pricing.[470] Also in August, Mr. Minamyer asked his sales team to compile evidence of "Sigma's Antics" because "we can't sit back and let them play games and lose our market share."[471] Throughout September, October and November, Star identified more and more instances of Sigma and McWane "cheating on the fittings deal":

- In an October 22, 2008 email to Mr. Minamyer and Mr. McCutcheon, a Star division sales manager reported "catching Sigma cheating more and more."[472]
- Mr. Minamyer wrote on October 22, 2008, that "Sigma is silently bringing markets down and acting as if they are being good stewards."[473]
- In an October 28, 2008 email to Mr. Minamyer, a Star division sales manager reported "we are seeing cheating all over from Sigma."[474]
- On November 20, 2008, a Star regional sales manager emailed Mr. McCutcheon real-time pricing Sigma was offering in Florida: "Sigma pricing fittings and joint restraint at a .25 multiplier as of this afternoon" to which Mr. McCutcheon responded by writing "Too bad they keep doing this."[475]

Internally, Sigma and McWane also monitored Project Pricing and cheating. Sigma used the DIFRA reports to ensure that it was not losing market share to Star and McWane.[476] In an email from Mr. Pais to Sigma's executive management team, Mr. Pais explained that Sigma "kept up our DIFRA membership thru 08 and had used the monthly data in an useful manner to keep track of both the total market size and our SMS (Sigma Market Share)," and as overall

[470] CCPF 1441.

[471] CCPF 1442.

[472] CCPF 1445.

[473] CCPF 1446.

[474] CCPF 1445.

[475] CCPF 1448.

[476] CCPF 1449.

volume continued to decline in 2008, Sigma was "able to stay reassured that we were holding on to our [market share] . . . or close to it!"[477] McWane tasked its sales representatives with logging instances of Project Pricing in its "price protection log" and reporting instances of cheating in its "competitive feedback log," which Mr. Tatman used to conclude in a Quarterly Executive Report to McWane management that "the level of multiplier discounting [cheating] by both Star and Sigma appears to have died down significantly."[478]

All of this "cheating on the fitting deal" presupposes a deal or commitment to forbear from competing, and is "highly suggestive" of an agreement. *See High Fructose Corn Syrup*, 295 F.3d at 661-663 (finding similar statements referring to a possible conspiracy were "highly suggestive of the existence of an explicit" albeit covert agreement among the manufacturers); *Re/Max Int'l*, 173 F.3d at 1009-1010.

g) Plus Factor: Complaints to a Competitor About Low Prices or Cheating

Complaints to a competitor about their low prices or "cheating" is a "plus" factor because "the 'objective' meaning of such a statement to the reasonable observer seems clear: the only business rationale for complaining is to induce a higher price." Areeda & Hovenkamp, *Antitrust Law* ¶ 1419(a); *see McWane*, slip op. at 17 ("These references to 'cheating' and 'agreements' clearly support the possibility of a conspiracy."); *United States v. Giordano*, 261 F.3d 1134, 1139 (11th Cir. 2001) (sustaining price fixing conviction based on testimony that defendant had contacted his competitor "on at least one occasion to complain that [the competitor] was cheating" on the agreement); *United States v. Beaver*, 515 F.3d 730, 738 (7th Cir. 2008)

[477] CCPF 1449.

[478] CCPF 1450.

(rejecting appeal from criminal price fixing conviction based on evidence that defendant "confronted others about cheating on the cartel"); *In re Scrap Metal Litig.*, 2006 U.S. Dist. LEXIS 75873, at *41 (N.D. Ohio 2006) (sustaining price fixing verdict based on evidence of inter-company complaints when one scrap dealer bid on an account that "belonged" to a competitor), *aff'd*, 527 F.3d 517 (6th Cir. 2008).[479] Complaints about cheating suggest the breach of an agreement, not independent action. *McWane*, slip op. at 17.

There are at least four instances of complaints between the Fittings conspirators about low prices or cheating. First, in March 2008, Mr. Tatman complained to Mr. Rona, Sigma's OEM Business Manager and a member of Sigma's executive management team, that Sigma's Project Pricing in the Fittings market was compromising the newly established multipliers. Mr. Rona relayed Mr. Tatman's message to Mr. Pais: "He said he hears that some of the new prices in the market are being compromised with deals. He hopes that market will improve and hopes [we] do our part."[480]

Second, on April 2, 2008, Mr. Minamyer reported to Mr. McCutcheon that Star had lost a bid for a project with WinWholesale, because Sigma had offered Project Pricing and Star had not.[481] Mr. Minamyer wrote: "They [Sigma] should be very careful if they want to hold this price increase as we will not lose our partners or any more orders because they are not

[479] When competitors supplement their own observations and responses to their rivals' pricing or other decisions in the market with market communications that facilitate, stabilize, or strengthen this natural market coordination, they cross the line into concerted action. *See* William H. Page, *Communication and Concerted Action*, 38 LOY. U. CHI. L.J. 405, 434, 446 (2007) (concerted action is distinguished from interdependence by the presence of a communication that conveys the intention to act to achieve a common goal and reliance on one's rivals to do the same).

[480] CCPF 1035.

[481] CCPF 1038.

responsible in the market."[482] At trial, Mr. Minamyer explained that his comment calling Sigma "not responsible" referred to the fact that Sigma was pricing below its published multiplier letters.[483] Mr. McCutcheon asked for additional information about the project: "Please give me more info. Bid date, value, selling price, etc…"[484] A Star employee told Mr. McCutcheon that he would provide all the requested information the next day.[485] **{**

} Sigma's Project Pricing (*i.e.*, cheating), however, was surely discussed at some point during these conversations.

In August 2008, Mr. Tatman complained of cheating to Sigma when he communicated to Mr. Rona that Sigma and Star had been offering Project Prices in California and Florida.[489] Mr. Rona forwarded Mr. Tatman's complaint in an email to Sigma's highest executives (Mr. Pais, Mr. Rybacki, Mr. Brakefield, and Mr. Bhattacharji):

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[482] CCPF 1038.

[483] CCPF 1038.

[484] CCPF 1039.

[485] CCPF 1039.

[486] CCPF 1040, *in camera*.

[487] CCPF 1040, *in camera*.

[488] CCPF 1040, *in camera*.

[489] CCPF 1452.

> Guys, Rick [Tatman] was upset by the numbers in Florida and California based on what he has seen from us and Star. He said the .26 and .30 were available from us both without any second thought.[490]

At trial, Mr. Rybacki explained that he "already knew that" Mr. Tatman was upset about the pricing. Mr. Rybacki also testified at trial that he told Mr. Rona, after receiving this email, that "Mr. Tatman needs to look in the mirror because pricing from McWane was a little inconsistent as well."[491] Mr. Rona testified at his deposition that he did not recall the purpose of his phone conversation with Mr. Tatman.[492] Finally, in late November 2008, Mr. Pais circulated an email captioned "URGENT" and requested that Sigma act to "stabilize market pricing" in the Southeast, where Sigma had been viewed as pulling down prices:

> With the severe contraction in market volume over the recent few weeks, the equally quick and sharp erosion in market pricing is an alarming 'double whammy'! What's even more disturbing is our two main competitors in Fittings seem to see SIGMA as 'leading' this recent price decline . . . .[493]

Mr. Pais's statement about the state of mind of "our two main competitors" can only be the result of complaints from McWane and Star to Sigma about its discounting practices.

h) Plus Factor: Inter-Firm Communications

In addition to inter-firm complaints about cheating, a high volume of communications among top level executives are a "plus" factor tending to exclude the possibility of independent action because this type of evidence provides "proof that the defendants got together and

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[490] CCPF 1452.

[491] CCPF 1453.

[492] CCPF 1454.

[493] CCPF 1455; RX-116 at 0001.

exchanged assurances of common action or otherwise adopted a common plan[.]" *Flat Glass*, 385 F.3d at 361. Here the record is overflowing with evidence that McWane, Sigma, and Star executives were communicating frequently with each other. Examples include, but are not limited to: (1) Star convincing Sigma to take a List Price increase in 2007; (2) Sigma seeking Star's agreement to stay within a couple multiplier points of McWane's prices in early 2008; (3) Sigma trying to influence McWane and Star to not issue a new list price in April 2009; (4) McWane communicating its competitive advantage in late 2007 and early 2008 by offering to sell Fittings to Sigma; (5) meetings between Mr. Pais and Mr. Page in late 2007: and (6) hundreds of phone calls between McWane, Sigma, and Star executives at competitively significant times.

(1) Admission that Star Convinced Sigma to Take a List Price increase

On multiple occasions, Mr. McCutcheon (Star) communicated with Mr. Rybacki (Sigma) on the subject of "mostly list price changes, timing on list price changes, and things like that."[494] While Mr. Minamyer was the National Sales Manager at Star, Mr. McCutcheon convinced Mr. Rybacki to announce a list price increase.[495] Mr. Minamyer testified that he did not remember when this episode took place.

Conversely, Sigma announced a list price increase on or about October 23, 2007, and on November 30, 2007 Star announced it would also issue a new price list.[496] In the time between Sigma's announcement and Star's announcement, **{**

[494] CCPF 708-709.

[495] CCPF 709-710.

[496] CCPF 882-883.

}

There is no evidence of a legitimate business purpose for these communications, and Mr. Rybacki admitted he had none. When provided with the opportunity to explain the purpose of these (and other) communications, the witnesses repeatedly testified that they did not remember them, or did not know why the communications took place**. {**

}[497]

(2) Admissions that Sigma Sought Star's Agreement to Stay Within One or Two Multiplier Points of McWane's Prices

In early 2008, Mr. Pais, Sigma's CEO, met with Mr. McCutcheon, Star's Vice President of Sales, and expressly reiterated the essential terms of the Tatman Plan.[498] Mr. Pais told Mr. McCutcheon that Sigma planned to keep its prices close to McWane's published prices, and that if Star did the same then McWane would lead another price increase:

> [W]e should ***agree to stay within to two to three points***, discount points, of McWane, and if we did, he felt that they would behave differently and not be so overbearing towards us. That ***if we were good, then they would be good -- they would treat us better and we could live happily ever after***. . . . [H]e just said that they would

[497] CCPF 884, *in camera* (Rybacki, Tr. 3606-3614, *in camera* ("I have no idea what I talked to him about"; "I have no idea what the subject could have been"; "I have no idea"; "no idea"; "Not a clue"; "Not a clue"; "I don't know")).

[498] CCPF 1036-1037.

> treat us differently and it would firm up the market and that there was a lot of benefit to it.[499]

Mr. McCutcheon further admits to numerous additional calls on which Mr. Pais told him Sigma and Star "need[ed] to stay within two to three [multiplier] points of McWane."[500] In return, McWane would "stop being as aggressive," and then McWane would treat Sigma and Star "better" and "firm up the market."[501] Mr. Pais and Mr. McCutcheon admit to participating in these discussions about price.[502]

In early 2008, Sigma knew and understood that McWane would support a price increase only if Sigma and Star reduced discounting. This precise insight into McWane's strategy could have come only through conversations. That is, McWane told Sigma the terms of the Tatman Plan. Sigma agreed and convinced Star to join the Plan as well.[503]

(3) Admission that Sigma Tried to Influence McWane and Star's Price Lists in April 2009

After McWane announced in April 2009 that it would implement a new price list,[504] Sigma contacted McWane and Star, hoping to influence their respective plans for pricing. Sigma was upset with McWane for restructuring the price list and "took affront" because Sigma had

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[499] CCPF 1037.

[500] CCPF 1036.

[501] CCPF 1036-1037.

[502] CCPF 1037; Pais, Tr. 1958-1959 (Mr. Pais's version of events is that it was actually Mr. McCutcheon who was "berating" Sigma and "accusing [Sigma] of dropping price."); CCPF 706; Pais, Tr. 1961-1963(explaining that Star would complain that Sigma was "spoiling the market," "not being responsible," and "using aggressive tactics").

[503] CCPF 952; CCPF 1029-1040.

[504] CCPF 1492

been trying to stop Project Pricing and instead be "consistent in [its] pricing."[505] Mr. Pais and Mr. Rybacki contacted McWane in the hopes that McWane would not follow through with its announcement. They also sought Star's assistance resisting the change, telling Star that Sigma would not follow McWane's announcement and seeking assurances that Star would do the same.

Sigma was upset by McWane's price list, "took affront," and "tried to let the whole world know [they] weren't happy."[506] On April 16, 2009, the day after Mr. Rybacki found out about the new price list, **{**

}[508] Sigma decided to persuade McWane to withdraw the price list, which was not yet in effect. On April 23, 2009, Mr. Pais laid out his strategy for discussing the price list with McWane:

> I meet [Leon McCullough] 4/28 and I will go all out to get the MOST from this rare mtg. Pvt Label is just 1 part. He needs to hear our version of a grand strategy and 1 may layout the P2 potential to grab his interest and that ***there is an end game in helping us with the PL [Price List]***.[509]

In a subsequent email, Mr. Pais elaborated:

> I have a full plate with [Leon McCullough] . . . Pvt Label is one issue and their new Pricing move is even bigger!...
>
> ***[Sigma] decided to try Option 3 …being somehow seek a one mth's hold to implement our new pricing discipline*** -- Old PL + FIRM MULT ! You may have seen letr draft. I hv coached LR to

[505] CCPF 1505-1508.

[506] CCPF 1505-1506.

[507] CCPF 1504, *in camera*.

[508] CCPF 1504, *in camera*.

[509] CCPF 1509.

> blitz the G3 to support our move by NOT pandering/pressuring for LOWER prices etc...[510]

Mr. Pais then traveled to Iowa to meet with Mr. McCullough, and two days later on May 1, 2009, Mr. Pais traveled to Birmingham for a meeting with Mr. Page to "have a frank and open talk" and "review a host of issues all related."[511] After the meeting, Mr. Pais reported to the Sigma Board of Directors that he met with Mr. Page to address the "Major Price Restructuring" which presented "another major challenge from Tyler":

> As [Sigma] also faced another major challenge from Tyler, as addressed below ["Major Price Restructuring"], Larry and I sought and met Ruffner Page, CEO of the McWane Inc. last week, for a major review of industry trends.[512]

Although Mr. Page denies discussing prices, Mr. Rybacki believes Mr. Pais communicated that "Sigma was not happy."[513]

Mr. Pais and Mr. Rybacki also admit to discussing McWane's prices with Star, including whether Sigma and Star could do anything to resist the change or to convince McWane to withdraw its new list prices.[514] As Mr. Pais lobbied McWane to withdraw its revised price list, he worked to convince Star to join the effort and comply with his plan for a new commitment to disciplined pricing:

> I will then seek [from McWane] a special ***'stay of execution' of 1 month***… HTN [Star] promises to comply -- I am prepared to then

[510] CCPF 1510.

[511] CCPF 1520-1522.

[512] CCPF 1523.

[513] CCPF 1522.

[514] CCPF 1505.

> visit HTN [Star] to ensure they do … You have already seen my 'personal olive branch' to [Ramesh Bhutada][515]

Mr. McCutcheon acknowledges that he "definitely talked to Victor" about Sigma's efforts to resist the price change.[516] When Star ultimately decided to follow McWane's price list, Mr. McCutcheon gave Mr. Pais advanced notice of Star's plans.[517]

This example is powerful evidence of inappropriate inter-firm communications regarding price that excludes the possibility McWane, Sigma and Star were acting independently.

(4) Discussion to Sell Domestic Fittings

In late 2007 and early 2008, McWane communicated its competitive position – costs and capacity – to Sigma through an offer to sell fittings to Sigma. Mr. Tatman had explained to his superiors at McWane that "[t]here is a theory that our ability to stabilize the market is tied to our competitor's perception of our cost structure and our ability to sustain aggressive pricing if our share position is threatened."[518] Mr. Page did not expect Sigma to accept this offer, but he believed that, "supplying that quote should reinforce the point that with the DISA and our TXX facility we're in a very different competitive cost game then what they've been used to with us."[519] To this end, McWane told Sigma that McWane's Domestic Fittings costs were

[515] CCPF 1527-1528 (At trial Mr. Pais admitted that "HTN" sometimes refers to Star, but denied that it did in this context).

[516] CCPF 1526.

[517] CCPF 1529. Mr. McCutcheon also contacted Mr. Tatman at McWane to discuss their plans for the price list. Those communications are described *infra* Part V.D.3.

[518] CCPF 1075.

[519] CCPF 1083.

competitive, if not lower, than Sigma's and Star's cost of importing from China, and offered to sell Sigma some of those Fittings.

Mr. Tatman conveyed this information by offering to sell certain Domestic Fittings to Sigma at exceptionally low prices.[520] This offer, however, was sent to Sigma's CEO, Mr. Pais, rather than through the traditional buy-sell channels between the two companies, and after making one shipment, McWane refused to sell any further Fittings to Sigma under the arrangement.[521] Mr. Pais got the message: he noted McWane's "interesting and revealing price" and that McWane was "perhaps the most competitive source" for Fittings.[522]

Later in 2008, **{**

}[523] Mr. McCutcheon emailed Mr. Bhargava and Mr. Bhutada informing them of Sigma's Fittings purchase from McWane, and pointed out that McWane had highlighted the fact that McWane was now the low cost producer and they could prove it.

> Sigma recently bought 8 t/l's [truck loads] from tyler because sigma said "they could buy them for 15% cheaper from tyler than they could get them from china". After the 8 t/l's, tyler would not take any more orders. My guess is tyler took these orders to try to make a point. During the negotiation, tyler stated that they are now the low cost producer and said they could prove it. I think there is some exaggeration in this statement, but I believe the core point.[524]

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[520] CCPF 1076-1081.

[521] CCPF 1076-1077, 1087; CX 0534 at 001("[T]yler would not take any more orders.").

[522] CCPF 1085.

[523] CCPF 1088, *in camera*.

[524] CCPF 1087; CX 0534 at 001.

This incident shows the consistent nature and frequency of inappropriate communications between executives at McWane, Sigma and Star, which chips away at the possibility that the coconspirators were acting independently, absent an agreement.

(5) Pais- Page Discussions on Competitively Sensitive Information

In late 2007, Mr. Pais of Sigma and Mr. Page of McWane met privately and communicated repeatedly. Among the topics of conversation: McWane was dissatisfied with the prevalence of aggressive Project Pricing and competition in the Fittings industry. In September of 2007, Mr. Pais and Mr. Page had a long meeting at which Mr. Page shared McWane's market analysis, competitive pricing strategy, and its plans for structural and managerial changes in McWane's Fittings business.[525] McWane had fired Mr. Green, McWane's former General Manager of its Fittings business, and Mr. Tatman was coming in to change the game. Mr. Page told Mr. Pais that he was disappointed in the "failure to get a better landscape" in the Fittings industry.[526] In December 2007, Mr. Page and Mr. Pais met again in Birmingham. After this meeting, Mr. Page threatened to "clos[e] down the direct access," and would only accept Mr. Pais's further requests for meetings if there was a legitimate business purpose to serve as pretext.[527]

These meetings and communications between Mr. Page and Mr. Pais were not isolated incidents. The two had at least eight in-person meetings between August 2007 and May 2009.[528]

[525] CCPF 2118.

[526] CCPF 838.

[527] CCPF 887.

[528] CCPF 788-804.

Overall, they had a "very trusting relationship" dating back to 2003, when Sigma helped McWane establish a manufacturing plant in China in a manner that "discouraged the creation of new capacity" for Fittings.[529] Over time, this "trusting" relationship between Sigma and McWane "generated an all round goodwill, which in turn led to tangible benefits such as higher market pricing and profits for all including Sigma."[530]

These illustrations of executive communications between competitors supports a finding of agreement and should be condemned.

(6) Other Communications

Evidence of direct competitor contacts permits the inference that the competitors had other similar contacts. *See Petroleum Prods.*, 906 F.2d at 454 n.18. This inference seems particularly appropriate in this case because the evidence shows that top executives at Sigma, McWane and Star exchanged over **{ }** telephone calls from January 2007 through May 2012.[531] Many of these phone calls were placed at competitively significant times. For example:

- **{**

  } in late 2007 when Sigma and Star were trying to implement a list price increase;[532]

[529] CCPF 831.

[530] CCPF 841.

[531] CCPF 713-786. A complete listing of these phone calls is attached as Exhibit A.

[532] CCPF 884, *in camera*.

- **{**

  } late in December 2007 and early January 2008 when Mr. Tatman was developing the Tatman Plan;[533]

- **{**

  } shortly after McWane released its January 11, 2008 price letter announcing a multiplier increase and no more Project Pricing;[534]

- **{**

  } the same day Mr. McCutcheon received details regarding a project where Sigma was cheating;[535]

- **{**

  };[536]

- **{**

  };[537]

- **{**

  } after McWane released its coded letter to the market;[538]

[533] CCPF 923, *in camera*.

[534] CCPF 952, *in camera*.

[535] CCPF 1040, *in camera*.

[536] CCPF 1162, *in camera*, 1164.

[537] CCPF 1163, *in camera*.

- On May 16, 2008, the day after the date McWane, Sigma, and Star had agreed to submit their data to DIFRA, **{ };**
- Between May 30, 2008 and June 5, 2008 (the day Star finally submitted its sales data to DIFRA), calls were placed between **{**

}[539]

- Later in June 2008, right before McWane led a second multiplier increase, **{**

}[540]

Before they were confronted with their phone records, the witnesses testified that they had very infrequent telephone conversations with each other during the relevant time period.[541] Other than Mr. Rybacki suggesting that one call in December 2007 to Mr. Tatman may have been a happy holidays or welcome to the industry message, no executive provided a single innocent explanation for these phone calls, and Mr. Rybacki admitted that he had no business purpose for speaking with his competitors.[542] Instead, the witnesses uniformly testified that they did not know what was discussed or did not recall the phone calls.[543]

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[538] CCPF 1206, *in camera*.

[539] CCPF 1221, *in camera*.

[540] CCPF 1246, *in camera*.

[541] CCPF 717; CX 2531 (Rybacki, Dep. at 191) (Mr. Rybacki testifying that he has talked to Mr. Tatman "maybe once, once or twice maximum my whole career."); CCPF 721; (CX 2531 (Rybacki Dep. at 192-193) (Mr. Rybacki testifying that the frequency of his past contacts with Mr. McCutcheon has been "relatively infrequent, but, you know, once in a great while.")).

[542] CCPF 716-719.

[543] CCPF 884, 894, 923, 952, 1040, 1088, 1110, 1164, 1221, 1449, 1532.

i) Instances of McWane, Sigma and Star Project Pricing During 2008 Does Not Defeat a Claim of Parallel Pricing Conduct to Support a Price Fixing Claim

McWane denies that there was parallel conduct supporting an inference of an illegal price fixing agreement by pointing to evidence that Fittings suppliers continued to offer at least some Project Pricing in 2008. This argument is flawed for three reasons.

First, in assessing the existence of an agreement, it is important to distinguish "between the existence of a conspiracy and its efficacy." *High Fructose*, 295 F.3d at 656. It is unnecessary to prove that a price fixing agreement was effective in order to establish that the agreement existed. *United States v. Socony-Vacuum*, 310 U.S. 150, 218-219 (1940). Moreover, evidence that suppliers cheated on their agreement by occasionally continuing to offer Project Pricing does not mean there was no agreement in the first place. *McWane*, slip. op. at 18 ("The fact that not all of the claimed conspirators complied fully with the conspiracy does not mean that there is no conspiracy."); *see also United States v. Andreas*, 216 F.3d 645, 669, 679 (7th Cir. 2000) (cheating by cartel members did not disprove conspiracy claim); *United States v. SKW Metals & Alloys, Inc.*, 195 F.3d 83, 86 (2d Cir. 1999) (same); *High Fructose*, 295 F.3d at 656 (same); *Alexander v. Phoenix Bond & Indemnity Co.*, 149 F. Supp. 2d 989, 1008 (N.D. Ill. 2001) (same). The Seventh Circuit cautioned against falling into this "trap" because cheating is endemic to all cartels:

> [Defendant asserts that] the concrete producers' occasional cheating on the discount limit shows that no agreement was ever reached. But this argument is illogical; certainly [defendant] would agree that a breach of contract does not mean that the parties never entered into a contract in the first place. And the argument is also beside the point because § 1 of the Sherman Act does not outlaw only perfect conspiracies to restrain trade. It is not uncommon for members of a price-fixing conspiracy to cheat on one another occasionally, and evidence of cheating certainly does not, by itself, prevent the government from proving a conspiracy.

Beaver, 515 F.3d at 739.

Second, the continued existence of some Project Pricing is not inconsistent with the alleged conspiracy, which was to curtail – not eliminate – Project Pricing. As Mr. Pais admitted, the goal was not to end Project Pricing entirely because that was "wishful thinking," but merely to minimize it.[544]

And finally, the evidence here reflects that the Fittings suppliers were largely successful in reducing the amount of Project Pricing in 2008.[545] For example, McWane tracked its instances of Project Pricing in a "Price Protection Log" that included an entry with the reason for the offered discount. According to McWane's Price Protection Log, there were far fewer instances of Project Pricing to meet competition from Sigma and Star in 2008 than there were in 2009. For example, in the Second and Third Quarters of 2008 (or the height of the conspiracy period), the Price Protect Log reflects an average of 3.7 instances of McWane offering Project Pricing to match Star or Sigma, compared to an average of 27 instances of Project Pricing to match Sigma or Star in the Fourth Quarter 2008 and an average of 55 instances in the First Quarter 2009 (when the conspiracy largely collapsed).[546] Mr. Tatman acknowledged the low incidence of Project Pricing to meet competition from Star and Sigma in early 2008 with 2009, but he could not explain it.[547]

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[544] CCPF 957.

[545] Dr. Normann's conclusion to the contrary ignores all of the evidence cited herein, and relies solely on his analysis of unreliable sales data that is rife with errors and a flawed methodology. *See* Rebuttal Report; Findings.

[546] CCPF 1047.

[547] CCPF 1046. McWane did not institute its price protection program until 2008 and therefore its Price Protection Log did not contain data for 2007.

Star kept a similar log of Project Pricing, which showed that Star offered substantially less Project Pricing in 2008 from the prior year, 2007.[548] Assuming the accuracy of Star's Project Pricing log,[549] Star generally offered 15 to 48 percent less Project Pricing from March to November 2008 than the prior periods in 2007 – notwithstanding the fact that Star implemented two price increases in 2008, which typically cause a spike of Project Pricing (as the old pricing is extended for a period of time after the new price increase's effective date).[550] In December 2008, however, when Star returned to its aggressive pricing, Star's Project Pricing increased 70% from December 2007. These before-and-after comparisons from McWane and Star support the existence of a price fixing agreement. *In re Graphics Processing Units Antitrust Litig.*, 527 F. Supp. 2d 1011, 1024 (N.D. Cal. 2007) (using a "before-and-after comparison of pricing behavior" to show that the changes in pricing were unprecedented).

Additionally, in April 2008, Mr. Tatman admitted in his First Quarter Executive Report that Project Pricing had "died down significantly:"

> Based on our competitive feedback log, the level of multiplier discounting by both Star and Sigma appears to have died down significantly. As we understand it, both have removed pricing authority from the front line sales team and pushed it up higher within their organizations. Discounting is still available, but it now requires a more structured decision process…[551]

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[548] CCPF 1411.

[549] Star's report of Project Pricing contains numerous errors, thereby limiting its reliability as a reliable source for the amount of Project Pricing offered by Star. However, notwithstanding these errors that overstate the incidence of Project Pricing, the log still shows that Project Pricing declined in 2008 from 2007. *See* CCPF Section 7.7.5.

[550] *See* CCPF Section 7.7.5.

[551] CCPF 1054; CX 1564 at 004; Tatman, Tr. 423-424.

This conclusion is consistent with Mr. Minamyer's admission that Star had "work[ed] extremely hard to bring [price] stability to the fitting market."[552]

Finally, this reduction in Project Pricing appears to have met the conspirators' goals of increasing Fittings prices during 2008 and, therefore, the suppliers' financial performance notwithstanding the down market. For example, Star's **{**

.[553]**}** Sigma's **{**

}[554] At McWane, **{**

"}.[556]

[552] CCPF 1002-1004; Minamyer, Tr. 3192-3193. *See also supra* Part II.B.5, discussing efforts to resume Project Pricing in late 2008, which supports inference that Star and McWane had curtailed Project Pricing.

[553] CCPF Section 7.7.3, *in camera*.

[554] CCPF Section 7.7.4, *in camera*.

[555] *See* CCPF 629 (describing McWane's price per ton had increased in 2008).

[556] CCPF 1358, *in camera* -1359; CX 0622 at 005.

2. Episode Two: On or Around May 2008, McWane Agreed to Lead Another Price Increase in Fittings Once Pricing Transparency was Established Through DIFRA

The conspiracy's second episode began in or around May 2008 and related to the formation of the DIFRA information exchange. As previously discussed, *supra* Part V.C., McWane's May 7, 2008 letter was an unlawful invitation to collude that offered to raise Fittings prices in exchange for Star and Sigma submitting their sales data (in tons shipped) to DIFRA. This invitation to collude became an unlawful price fixing agreement when Star and Sigma accepted the invitation by submitting their sales data.

Concerted action occurs when two or more firms exchange mutual assurances to adhere to a common course of action. *In re Flat Glass Litig.*, 385 F.3d 350, 361 (3d Cir. 2004) ("The most important evidence will generally be non-economic evidence that there was an actual, manifest agreement not to compete. That evidence may involve customary indications of traditional conspiracy, or proof that the defendants got together and exchanged assurances of common action or otherwise adopted a common plan even though no meetings, conversations, or exchanged documents are shown.") (internal quotations omitted) (quoting Areeda & Hovenkamp, *Antitrust Law* ¶ 1434b); *see also* William E. Kovacic, *The Identification and Proof of Horizontal Agreements Under the Antitrust Laws*, 38 ANTITRUST BULL. 5, 7-8 (1993).

The exchange of assurances proscribed by the antitrust laws need not be explicit, as in "I promise to do X provided that you promise to do Y." Reciprocal assurances may be communicated by vague words or by conduct. *United States v. Gen. Motors Corp.*, 384 U.S. 127, 142-43 (1966) ("[I]t has long been settled that explicit agreement is not a necessary part of a Sherman Act conspiracy."); *see Isaksen v. Vt. Castings, Inc.*, 825 F.2d 1158, 1164 (7th Cir. 1987); Areeda & Hovenkamp, *Antitrust Law* ¶¶ 1404, 1410c (noting that "an addressee of a proposal for common action who behaves in accordance with the proposal may find it difficult . .

. to persuade us that it acted unilaterally and without regard to the proposal" and that "reciprocal assurances can be communicated by conduct rather than by words"). Consistent with contracts law, acceptance by performance can form the basis for an illegal Section 1 conspiracy. *Isaksen v. Vt. Castings, Inc.*, 825 F.2d 1158, 1164 (7th Cir. 1987) (establishing that a conspiracy had been formed "by conduct in lieu of promissory language").

For example, the plaintiff dealer in *Isaksen v. Vermont Castings, Inc.* alleged an (at the time) *per se* illegal vertical price fixing agreement between himself and his supplier. *Isaksen*, 825 F.2d at 1161-62. The defendant supplier denied that there was a conspiracy because the dealer had never voiced his assent to the supplier's alleged coercion to raise prices. *Isaksen*, 825 F.2d at 1164. The Seventh Circuit rejected this argument, holding that if a would-be price fixer proposes a conspiracy and the co-conspirator "merely grunts, but complies," a conspiracy has been formed because the agreement to a common course of action may "be implicit, or signified by conduct in lieu of promissory language." *Isaksen*, 825 F.2d at 1164; *see also United States v. Parke, Davis & Co.*, 362 U.S. 29, 43 (1960) ("Wholesalers 'accepted Soft-Lite's proffer of a plan of distribution by cooperating in prices, limitation of sales to and approval of retail licensees. That is sufficient . . . . Whether this conspiracy and combination was achieved by agreement or by acquiescence of the wholesalers coupled with assistance in effectuating its purpose is immaterial.'") (quoting *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707, 723 (1944)); *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 227 (1939) ("It is elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators. Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy

under the Sherman Act.") (internal citations omitted)); *see also United States v. MMR Corp.*, 907 F.2d 489, 498 (5th Cir. 1990) (finding that defendant had manifested it agreement to join a bid-rigging conspiracy by not submitting a bid).

One of the Tatman Plan's key elements to stabilizing and increasing Fittings prices was that McWane would only increase prices "in stepped or staged increments" and there was a "prerequisite for supporting the next increment of price."[557] McWane had succeeded in bringing at least "reasonable stability" to the market by the parallel curtailment of Project Pricing by the three primary Fittings suppliers, but it still needed greater price transparency in order to determine if it would support the next "stepped or staged increment[]", or in other words a *quid pro quo*.[558] DIFRA reports would provide the transparency McWane required.

In February 2008, McWane and Sigma agreed to restart efforts to form the DIFRA information exchange.[559] On February 7, 2008, Mr. Tatman reported to his superiors that Mr. Rybacki called him that day to express Sigma's willingness to participate in a Fittings trade association.[560] Later that same day, Mr. Tatman emailed Mr. Brakefield (of Sigma) regarding "next steps" toward restarting DIFRA, including suggesting meeting dates for face-to-face meetings and membership requirements.[561] In order to mask antitrust concerns, U.S. Pipe and

[557] CCPF 913; CX 0627 at 004.

[558] CCPF 913; CX 0627 at 004.

[559] CCPF 1107-1116. McWane, Sigma, Star and others had discussed forming DIFRA since at least as early as 2005. In 2005, the DIFRA members engaged Thad G. Long of the law firm Bradley Arant Rose & White to assist in setting up DIFRA. CCPF 1094. The first official DIFRA meeting occurred in March 2005. CCPF 1096.

[560] CCPF 1111.

[561] CCPF 1113-1115.

ACIPCO were invited to join, although they did not meet the membership requirements.[562] ACIPCO passed on the invitation, but U.S. Pipe joined.[563] On March 28, 2008, representatives from all four DIFRA members held a meeting. One of the main agenda items was the format and frequency of the DIFRA reports:

> Status of Reporting of production and/or sales data to independent CPA, including (1) reporting form, (2) reporting frequency, (3) identification of CPA, (4) dissemination and form of reports to membership (if any) based on reports input, and (5) proper and improper utilization of the data. To the extent one or more of the four remaining interested members opt out of the Association or out of the reporting aspect, there should be a discussion as to whether a continuation of the reporting program can be legally justified.[564]

Indeed, the only item of interest Mr. Tatman reported to Mr. McCullough was regarding the DIFRA reports:

> The DIFRA session was interesting. It would appear the association is a go with a tentative target to report 2006, 2007 and 2008 (Jan-Mar) data around mid April. McWane, Sigma, Star and U.S. Pipe will be the reporting members.[565]

To ensure that the DIFRA reports provided the exact level of price "transparency" McWane needed to support the next price increase, within days of the March 28 DIFRA meeting, Mr. Tatman emailed Mr. Long and Mr. Herren of Bradley Arant Rose & White (DIFRA's law firm) suggesting input and output formats for the DIFRA reports and proposing an

[562] CCPF 1122-1123.

[563] CCPF 1124-1129.

[564] CCPF 1133.

[565] CCPF 1136.

April 14, 2008 target date for all members to submit their initial data.[566] On April 4, 2008, Mr. Long sent an email to the four DIFRA members, noting that he had received proposed reporting forms but he still had some antitrust concerns:

> I find that they [DIFRA report formats] are consistent in approach and seem to minimize antitrust concerns. (This does not mean all antitrust concerns are definitely gone, as you always have some concern 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.)[567]

Mr. Long also relayed Mr. Tatman's suggested target date of April 14 for the submission of data.[568]

Sigma put in motion a plan to announce a 'BIG BOLD" price increase on the same day Mr. Tatman originally proposed the DIFRA data should be submitted: April 14, 2008.[569] In an April 11, 2008 email to Sigma's management team, Mr. Pais described this "BIG BOLD MOVE" and pointed out that a key component to its success was that Sigma "earn their [McWane's] TRUST and CONFIDENCE."[570] Attached to the email was a draft pricing letter to customers that Mr. Pais wanted to out on April 14, 2008, however, Mr. Tatman's proposed DIFRA data submission date did not hold, and the new pricing announcement was also delayed.[571]

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[566] CCPF 1137.

[567] CCPF 1138.

[568] CCPF 1138.

[569] CCPF 1158.

[570] CCPF 1158; CX 1138 at 001.

[571] CCPF 1159.

On the morning of April 25, 2008, Messrs. Tatman, Pais, Brakefield, and McCutcheon held a conference call on which they finalized and agreed upon the information exchange reporting format.[572] U.S. Pipe did not join the call. The three suppliers agreed that each member would submit data regarding its Fittings sales by tons shipped to DIFRA's accounting firm (SRHW), which would then aggregate the data and provide reports to the DIFRA members reflecting industry-wide sales by the 20th of the month.[573] The three suppliers agreed that they would submit their data by "no later than" May 15, 2008. Going forward, members would report, by the 15th of each month, their prior months' data.[574]

Later that same day, Sigma pulled the trigger on its "BIG BOLD" price increase plan and issued the letter to its customers announcing a multiplier increase of up to ten multiplier points, with an effective date of May 19, 2008, the approximate date the first DIFRA report was expected.[575] Not long after Sigma's announcement, Star announced a multiplier increase to match Sigma's in amount and effective date.[576] Star and Sigma, however, misread the *quid pro quo*. They thought agreeing to form the DIFRA information exchange was enough to secure McWane's support for a price increase. But McWane wanted to review the actual DIFRA data report before supporting any price increase.

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[572] CCPF 1139-1140.

[573] CCPF 1140.

[574] CCPF 1140.

[575] CCPF 1168-1169.

[576] CCPF 1173.

Recognizing that Sigma and Star did not understand the *quo* (*i.e.*, the actual DIFRA report) for McWane's *quid* (*i.e.*, support for another price increase), on May 5, 2008, Mr. Tatman sent Mr. McCullough an email emphasizing that McWane would wait for the DIFRA data before issueing a price increase, and pointing out that McWane would not "follow that lead [Sigma's price increase amount] regardless of the DIFRA data" because he believed "it would lead to instability," or in other words, increase Project Pricing.[577] Attached to the email was a draft letter that would correct Star and Sigma's misperceptions. The letter stated that McWane would wait before announcing any price increases until it had "updates" on several unnamed "factors" that would become available at the same time McWane expected to receive the first DIFRA report:

> Since several ***misperceptions*** are starting to circulate, we wanted to send out this general communication to clearly define our intention in regards to any future pricing actions.
>
> Before announcing any price actions we carefully analyze all factors including: Domestic and Global inflation, market & competitive conditions within each region as well as performance against our own internal metrics. ***We are currently waiting on updates for several factors but anticipate being able to complete our analysis towards the middle of the month.*** At that point we will be sending out specific letters to each region detailing changes, if any, to our current pricing policy.[578]

On May 7, 2008, McWane issued a letter to the market that did not communicate any specific change in McWane's prices, but communicated in veiled terms that McWane would not yet follow Sigma's price increase until after it received the DIFRA report:

[577] CCPF 1175-1177.

[578] CCPF 1179; CX 0137 at 002 (emphasis added).

> We are sending this general communication to our waterworks distribution customers to more clearly define our intention in regards to future pricing actions.
>
> Before announcing any price actions, we carefully analyze all factors including: domestic and global inflation, market and competitive conditions within each region, as well as our performance against our own internal metrics. ***We anticipate being able to complete our analysis by the end of May***. At that point, we will send out letters to each specific region detailing changes, if any, to our current pricing policy.[579]

Mr. Tatman conceded at trial that McWane was waiting for the first DIFRA report before issuing the price increase.[580] Distributors testified that the coded language in this letter did not help them run their business as distributors and was meaningless "fluff."[581]

McWane's decision to not issue a second price increase until it had received the DIFRA sales report was "somewhat painful to the bottom [line] in the short term," but McWane wanted to "re-enforce the message we've been trying to drill in which when successful will pay long term dividends."[582] Mr. Tatman admitted at trial that the message McWane had been "trying to drill in" to his competitors was that McWane was "not going to lose visibility of where the competitive level in the marketplace is."[583]

Star had been a reluctant member of DIFRA and had not yet submitted its data, but it understood McWane's message loud and clear.[584] Almost immediately upon receiving a copy of

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[579] CCPF 1182; CX 0138 (emphasis added).

[580] CCPF 1185.

[581] CCPF 1186-1188.

[582] CCPF 1230-1231.

[583] CCPF 1232.

[584] CCPF 1204.

McWane's May 7, 2008 letter, Star committed to producing its data to DIFRA.[585] **{**

}[586] When Star produced its DIFRA data several weeks later, Mr. McCutcheon immediately informed Messrs. Rybacki and Brakefield at Sigma in an email that quoted the letter verbatim:

> Good morning Mr. President. I just sent our info in. Sorry it took so long, but we were "carefully analyzing all factors including: domestic and global inflation, market and competitive conditions within each region, as well as performance against our own internal metrics." (Does that look familiar?).[587]

McWane was anxious to get the DIFRA reports and on June 10, 2008, Mr. Tatman "harass[ed]" DIFRA's accounting firm (SRHW)for the aggregated DIFRA report.[588] On June 17, 2008, McWane, Sigma, and Star received the first DIFRA report, which contained annual data for 2006, monthly data for 2007, and monthly data for the first four months of 2008.[589] Now McWane had the requisite pricing transparency for the next price increase, within hours of receiving the first DIFRA report, and based on a quick analysis of the DIFRA data, not the more involved analyses described in its May 7, 2008 letter, McWane rewarded its co-conspirators by

[585] CCPF 1204.

[586] CCPF 1206, *in camera*.

[587] CCPF 1224; CX 1091 at 001.

[588] CCPF 1235.

[589] CCPF 1238-1239.

issuing a letter it had previously prepared announcing an 8% price increase.[590] Sigma and Star followed.[591]

McWane made an offer to raise prices (*quid*) that was conditioned on Star and Sigma submitting their sales data to DIFRA (*quo*). As soon as McWane received and reviewed the DIFRA data, McWane upheld its part by issuing the next "stepped and staged" price increase; all in accordance with the Tatman Plan. Acceptance by performance, as seen here, constitutes agreement.

3. Episode Three: McWane and Star Conspired in April 2009 to Increase Prices for Fittings

McWane's April 2009 exchange of assurances on price with Star is on its face *per se* unlawful. *See generally* Jonathan B. Baker, *Two Sherman Act Section 1 Dilemmas: Parallel Pricing, The Oligopoly Problem, and Contemporary Economic Theory*, 38 ANTITRUST BULL. 143, 179 & n.73 (1993) (explaining how the private exchange of "mere assurances . . . may nevertheless facilitate coordination by helping firms establish an equilibrium outcome as focal"). Agreements on list prices are *per se* unlawful even if list prices are only the starting point in negotiations with customers. *High Fructose Corn Syrup*, 295 F.3d at 656 (Posner, J.); *Plymouth Dealers' Ass'n of N. Cal. v. United States*, 279 F.2d 128, 132 (9th Cir. 1960). Agreements to adhere to published price levels are also *per se* unlawful, even when those price levels are set unilaterally. *Sugar Inst. v. United States*, 297 U.S. 553, 580-81, 601 (1936).

The Supreme Court's decision in *Sugar Institute*, established the longstanding rule that an agreement to adhere to previously announced prices and terms of sale is *per se* unlawful under

[590] CCPF 1242.

[591] CCPF 1247-1249.

the Sherman Act, "even though advance price announcements are perfectly lawful and even though the particular prices and terms were not themselves fixed by private agreement." *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647 (1980) (per curiam) (discussing *Sugar Institute*, 297 U.S. at 601-602); *TFWS, Inc. v. Franchot*, 572 F.3d 186, 191-193 (4th Cir. 2009); *Costco Wholesale Corp. v. Maleng*, 522 F.3d 874, 895-96 (9th Cir. 2008) ("an agreement to adhere to posted prices is a *per se* violation[,]" explaining that "agreements to adhere to posted prices are anticompetitive because they are highly likely to facilitate horizontal collusion"); *Energex Lighting Industries, Inc. v. North American Philips Lighting Corp.*, 765 F. Supp. 93, 106 (S.D.N.Y. 1991) ("An agreement that a published price list will be adhered to is a violation of the Sherman Act because it interferes with the setting of prices by free market forces.") (citing *United States v. Container Corp. of America*, 393 U.S. 333, 337 (1969)).

Here, McWane and Star unlawfully exchanged assurances to adhere to McWane's newly announced, but not yet effective, price list. Specifically, in April 2009, McWane had issued a new list price that significantly altered its pricing structure, by increasing list prices in the smaller diameter Fittings where McWane was strongest and decreasing list prices in larger diameter fittings where Sigma and Star had a stronger market share.[592] Due to its product mix, the net impact of McWane's new price list was about zero, but McWane recognized that it could have a different, and more negative, impact on Sigma and Star.[593] McWane designed its new price list to accomplish three goals: (1) realign its prices among different fittings size ranges in order to better align McWane's prices with its production costs; (2) squeeze margins and give

[592] CCPF 1492.

[593] CCPF 1493.

less room for Project Pricing on larger diameter Fittings, where Star and Sigma had significantly larger shares; and (3) attempt to achieve greater price transparency.[594]

As previously discussed, Sigma did not want to follow McWane's new list prices and communicated with McWane and Star to try to dissuade them from implementing the announced price list. *See supra* Part V.D.1.h. This created uncertainty in the marketplace.[595] To eliminate the uncertainty, Mr. McCutcheon called Mr. Tatman to ask whether McWane would follow through with its announcement or stay with the old price list.[596] Mr. Tatman told Mr. McCutcheon on the phone call that McWane was "absolutely" going to follow through and that he was so sure of it he offered to "pay the $25,000 [for printing a new price list] if we don't." Mr. McCutcheon described the conversation as follows:

> It cost[s] us about $25,000 to print a new price list. So, I picked up the phone and I called Rick Tatman. And I said, I'm only going to ask you one question, are you guys going to come out with a new price list, because I'm getting ready to approve it and spend $25,000 to do it. And he said, we absolutely are, and he says, I'm so sure that I'll pay the $25,000 if we don't. And I said, I appreciate that, nice talking to you, and hung up the phone.[597]

Prior to Mr. Tatman's phone conversation with Mr. McCutcheon, Mr. Tatman was uncertain whether or not Star would follow McWane with the new list price or follow Sigma's plan to stick to its old price list. In an email to Mr. Walton on April 28, 2009, Mr. Tatman expressed his uncertainty: "The Wild card right now is Star . . . [T]here is now some probability

[594] CCPF 1493.

[595] CCPF 1534.

[596] CCPF 1539.

[597] CCPF 1540.

that Star may change their direction and retract their list price change."[598] Six hours later, however, Mr. Tatman was no longer uncertain. In an email to Mr. McCullough, Mr. Tatman reported that he was "now highly confident that Star will follow our List Price."[599] Only the phone call explains how Mr. Tatman's confidence changed so quickly.

When McWane provided the requested assurance to Star that it would adhere to its previously announced price list, this express exchange of assurances created an unlawful price fixing agreement under Section 1. *See, e.g., ESCO Corp. v. United States*, 340 F.2d 1000, 1007-08 (9th Cir. 1965) (finding such an express exchange of oral assurances unnecessary to establish an agreement); *see also* Areeda & Hovenkamp, *Antitrust Law* ¶1405 ("Clearly sufficient [evidence of agreement] would be explicit, personally expressed reciprocal assurances of common action").

The Supreme Court's decision in *Sugar Institute*, 297 U.S. 553, is controlling here. In *Sugar Institute*, the Court examined the rule of the Sugar Institute, a combination of competing sugar refiners that required sugar refiners to implement any announced price increase for a period of time. *Sugar Institute*, 297 U.S. at 582 (describing "a requirement of adherence, without deviation, to the prices and terms previously announced"). The rules did not require that the price increases had to be reported or had to be agreed among competitors before being announced; there was also no guarantee that rivals would follow announced increases, and in fact, the evidence showed that price changes taken by one firm were often not followed by its rivals. *Sugar Institute*, 297 at 579-580. The Supreme Court found no problem in pricing

[598] CCPF 1537; CX 1180 at 002.

[599] CCPF 1543; CX 1180 at 001.

announcements made in advance, but condemned the "steps taken to secure adherence, without deviation, to prices and terms thus announced. It was that concerted undertaking which cut off opportunities for variation in the course of competition[.]" *Sugar Institute*, 297 at 601. The Court reasoned that "[i]f the requirement that there must be adherence to prices and terms openly announced in advance is abrogated and the restraints which followed that requirement are removed, the just interests of competition will be safeguarded and the trade will still be left with whatever advantage may be incidental to its established practice." *Sugar Institute*, 297 at 602.

The Court's decision in *Sugar Institute* is soundly grounded in fundamental cartel theory. Firms seeking to fix prices must: (i) reach consensus on the prices to be charged; (ii) monitor adherence to those prices; and (iii) have the ability to punish defection. *See generally* George J. Stigler, *A Theory of Oligopoly*, 72 J. POL. ECON. 44 (1964). Agreements to adhere to already-announced prices facilitate the process of reaching consensus by eliminating uncertainty among rivals as to future prices. *See Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 727 (1988) ("Cartels are neither easy to form nor easy to maintain. Uncertainty over the terms of the cartel, particularly the prices to be charged in the future, obstructs both formation and adherence by making cheating easier."); *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 238 (1993) ("Uncertainty is an oligopoly's greatest enemy."); *see also* Areeda & Hovenkamp, *Antitrust Law* ¶ 1407e ("Uncertainty is the most general of the impediments to cartel-like results in oligopoly. It follows that collective practices to reduce such uncertainty . . . are dangerous to competition").

The McWane/Star communication should be condemned under *Sugar Institute*. As in *Sugar Institute*, McWane announced a price increase and then privately provided its rival with assurances of its firm and settled intent to implement its announced price list. As in *Sugar*

Institute, the exchange of assurances facilitated price coordination and "cut off opportunities for variation in the course of competition." *Id.*, 297 U.S. at 601. In fact, this case is stronger than *Sugar Institute*: in that case there was no pre-announcement discussion of pending price changes, and list prices sometimes varied, while here McWane offered its "guarantee" knowing that Star proposed to match McWane's announced prices once it understood what prices McWane proposed to charge. Thus, even assuming that McWane had unilaterally decided to announce a new price list in April 2009, and that Star had unilaterally decided to follow that price list by adopting a substantially similar or identical price list, the exchange of assurances around McWane's intent to implement its previously announced price increase was a *per se* illegal price fixing agreement. Star solicited an agreement unlawful under *Sugar Institute* when it requested McWane's assurance, and McWane consummated the agreement by providing it.

The evidence illustrates how communications can facilitate collusion by providing conspirators with a "focal point" on which to coordinate their prices. *See* Jonathan B. Baker, *Two Sherman Act Section 1 Dilemmas: Parallel Pricing, The Oligopoly Problem, and Contemporary Economic Theory*, 38 ANTITRUST BULL. 143, 179 & n. 73 (1993) (explaining how the private exchange of "mere assurances … may nevertheless facilitate coordination by helping firms establish an equilibrium outcome as focal"). Before the McWane/Star communication, both McWane and Sigma had announced their intentions with respect to future prices: McWane preferred its new price list and Sigma preferred the old price list. As a result, Star was uncertain as to what price to set to coordinate prices with its rivals. To eliminate this uncertainty, and to increase the chances of successful coordination, Star called McWane and requested an assurance that McWane would follow through with its new price list. This negotiated elimination of uncertainty as to future prices is precisely the process forbidden *per se* by Section 1 of the

Sherman Act. *See Sugar Institute*, 297 U.S. at 601 (agreement to adhere to published prices "cut off opportunities for variation in the course of competition"); Baker, *Two Sherman Act Section 1 Dilemmas*, 38 ANTITRUST BULL. at 179 ("[b]y raising the costs of reaching such complex bargains, antitrust law hopes to reduce the prevalence of such bargains").

Accordingly, McWane's assurance to Star that it would adhere to published price levels, even when those price levels are set unilaterally, constitute an agreement and are *per se* unlawful.

4. McWane Has Not Offered Evidence to Rebut the Inference That It Conspired with Sigma and Star

All this varied evidence of McWane's conspiracy to raise and stabilize Fittings Prices shifts the burden to McWane to prove that "drawing an inference of unlawful behavior is unreasonable." *Petruzzi's*, 998 F.2d at 1230. McWane is unable to do so. Complaint Counsel repeatedly confronted executives from McWane, Sigma and Star with the above evidence, and no witness ever provided a single alternate explanation for any of the evidence that would support a finding that the Fittings suppliers acted independently. Instead, McWane, Sigma and Star executives testified that they "don't know" or "don't recall" over 500 times at trial in response to questions such as, what they meant when they wrote certain documents, why they did certain things, or what they spoke about in their discussions with their competitors.[600] And,

[600] *See, e.g.*, CCPF 717 (Tatman Tr. 364 ("I've talked to Mr. Rybacki two, three, a couple of times. I don't know when and I don't know what the topics were.")); CCPF 884 (Rybacki, Tr. 3606-3614, *in camera* **{**

}); CCPF 923 (Tatman, Tr. 367-370 ("Q. But you don't know what you and Mr. Rybacki might have talked about on December 27? A. I don't know if he said, 'Merry Christmas. Welcome to the rat race.' I have no clue.")); CCPF 1221 (Rybacki, Tr. 3564 (Q. Did you contact Mr. McCutcheon in late May, early June to encourage him to get his DIFRA data in? A. Again, I'm -- I don't know specifically. Maybe. I don't know.")); CCPF 1452 (Tatman, Tr. 364 ("I do not remember the call.")).

in fact, there is no possible alternate explanation. The evidence all points to one conclusion: that McWane conspired with Sigma and Star to stabilize and increase Fittings prices by curtailing Project Pricing and increasing price transparency.

E. McWane Violated Section 5 by Participating In an Anticompetitive Information Exchange (Count Two)

Count Two of the Complaint charges McWane with violating Section 1 of the Sherman Act by exchanging competitively sensitive information with its primary competitors through the information exchange operated by DIFRA. Specifically, McWane, Sigma and Star (and a fourth sham participant, U.S. Pipe) shared competitively sensitive sales data through DIFRA with the purpose and effect of facilitating collusive pricing. In addition to condemning the DIFRA information exchange as part of the *per se* illegal price fixing conspiracy (Count Three), *see supra* Part V.D.2, the DIFRA information exchange independently violates the antitrust laws as an agreement that facilitates price coordination (Count Two).

An information exchange, although not inherently anticompetitive, is well-recognized as a potential tool for facilitating coordinated behavior. *See, e.g.*, DOJ & FTC, *Statements of Antitrust Enforcement Policy in Health Care*, Statement 6 (1996) ("DOJ/FTC Guidelines") (noting that absent "appropriate safeguards . . . information exchanges among competing providers may facilitate collusion or otherwise reduce competition on prices or compensation, resulting in increased prices, or reduced quality and availability of health care services"). As the Commission has explained, facilitating practices are condemned because they increase the likelihood of supracompetitive prices and other anticompetitive behavior:

> A facilitating practice is one that "makes it easier for parties to coordinate price or other anticompetitive behavior in an anticompetitive way. It increases the likelihood of a consequence that is offensive to antitrust policy." AREEDA ¶ 1407b, at 29-30; *see also In re Brand Name Prescription Drugs Antitrust Litig.*, 288 F.3d 1028, 1033 (7th Cir. 2002) (recognizing that "there is

> authority for prohibiting as a violation of the Sherman Act or of Section 5 of the Federal Trade Commission Act an agreement that facilitates collusive activity").

McWane, slip op. at 19; *see also* Areeda & Hovenkamp, *Antitrust Law* ¶ 1407b (an arrangement facilitates collusion when it makes it easier for parties to coordinate price or other behavior in an anticompetitive way).

An exchange of sales volume data, for example, can facilitate coordinated behavior and increase the likelihood of supracompetitive prices in two ways. First, it can reduce the incentive for participating firms to compete for sales because their rivals can more easily detect lost sales and therefore invite a competitive response. Second, it can help participating members determine whether a decline in their own sales is due to a general decline in market demand or due to sales lost to rivals. The former implies that it is safe to continue charging high prices (stabilizing prices); the latter implies a need to lower prices or otherwise compete more aggressively. *See* Massimo Motta, *Competition Policy: Theory and Practice* 151 (2004).; *see also In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 906 F.2d 432, 461-462 (9th Cir. 1990) (holding that the exchange of non-price sales information can facilitate collusion).

An information exchange, therefore, may harm competition by facilitating coordination alone. It is not necessary to establish an illegal price fixing conspiracy before the information exchange can be condemned. *See United States v. Container Corp. of Am.*, 393 U.S. 333, 334 (1969) (upholding the sufficiency of a complaint charging "an exchange of price information but no agreement to adhere to a price schedule"); *Todd v. Exxon Corp.*, 275 F.3d 191, 198 (2d Cir. 2001) ("the violation lies in the information exchange itself – as opposed to merely using the information exchange as evidence upon which to infer a price fixing agreement"); *Petroleum*

Prods., 906 F.2d at 448 ("One may reluctantly tolerate interdependent pricing behavior as such and still condemn [those agreements involving] practices which unjustifiably facilitate interdependent pricing and which can be readily identified and enjoined.") (internal quotations omitted); *Fleischman v. Albany Med. Ctr.*, 728 F. Supp. 2d 130, 162 (N.D.N.Y. 2010); DOJ/FTC Guidelines, at Statement 6 (information exchange may raise antitrust concerns where it facilitates collusion or otherwise reduces competition).

In order to establish that McWane's participation in the DIFRA information exchange violated Section 1 of the Sherman Act, the evidence must show (1) the existence of a contract, combination or conspiracy between two or more separate entities (concerted action), that (2) unreasonably restrains competition. *E.g., Valuepest.com of Charlotte, Inc. v. Bayer Corp.*, 561 F.3d 282, 286 (4th Cir. 2009); *Law v. NCAA*, 134 F.3d 1010, 1016 (10th Cir. 1998). Participation in an information exchange is assessed under the Rule of Reason. *See Todd v. Exxon*, 275 F.3d at 198.

Here, the DIFRA information exchange represents concerted activity among rivals, and it is anticompetitive because the likely effect of exchanging sales volume data in the Fittings market, which is highly conducive to collusion, is to facilitate non-competitive or collusive pricing.

1. The DIFRA Information Exchange Represents Concerted Action

The reciprocal exchange of information among competitors "is of course sufficient to establish the combination or conspiracy, the initial ingredient of a violation of [Section 1] of the Sherman Act." *Container Corp.*, 393 U.S. at 335; *see also Todd v. Exxon*, 275 F.3d at 196 (information exchange that used third-party consultant that "compiled the information, then analyzed, refined, and distributed it to the defendants" constituted agreement); *Antitrust Law* ¶ 1409a ("[W]hen two competitors exchange information about their past or future prices, we can

see a conspiracy to make the exchange. . . . The agreement to make the exchange is obviously present . . . .") *see also In re N. Tex. Specialty Physicians*, 140 F.T.C. 715, 738 (2005) ("The Commission has also held that when an organization is controlled by a group of competitors, the organization is viewed as a combination of its members, and their concerted actions will violate the antitrust laws if an unreasonable restraint of trade.").

Here, DIFRA was incorporated in 2007, with four members: McWane, Sigma, Star and U.S. Pipe.[601] McWane, Sigma and Star are competing Fittings suppliers, but by 2007, U.S. Pipe no longer produced Fittings.[602] In February 2008, McWane, Sigma and Star began actively working to create DIFRA's information exchange.[603] The DIFRA members reached agreement as to the reporting format and timing of the Information Exchange on April, 25, 2008, and each subsequently confirmed the agreement via email.[604] From June 2008 through January 2009, each DIFRA member submitted its monthly sales data (in tons shipped) to an accounting firm that, acting on behalf of DIFRA, aggregated each member's sales data.[605] DIFRA then issued to each of its members a summary report showing the prior month's total volume (in tons) of Fittings

[601] CCPF 363-364.

[602] CCPF 224-225; CCPF 454-455.

[603] CCPF 1107-1116; *see also* CCPF 1090-1106 (describing DIFRA organizational efforts, which began as early as 2005); CCPF 1104-1106 (after incorporating in January 2007, DIFRA was dormant for the remainder of the year); CCPF 1131-1150, 1201-1221 (describing DIFRA meetings, calls, and other communications between February 2008 and April 2008).

[604] CCPF 1139-1141, 1147-1149, 1201-1205.

[605] CCPF 1139-1142; CCPF 1238-1239 (The first DIFRA report contained catch up data for 2006 and 2007.); CCPF 1473-1483.

shipped in the United States by Fittings category.[606] These activities satisfy the concerted action element of a Sherman Act Section 1 claim.

2. The DIFRA Information Exchange Unreasonably Restrained Trade

The DIFRA information exchange was likely to unreasonably restrain competition in the Fittings market because its members collectively possess market power, the Fittings market is conducive to collusion, and the nature of the sales volume data exchanged has the potential or tendency to facilitate coordination. *See McWane*, slip op. at 19; *see also In re N.C. Bd. of Dental Examiners*, FTC Docket No. 9343, 2011 FTC LEXIS 290 (Dec. 7, 2011), slip op. at 29-30 (under rule of reason, competitive harm can be established by showing that conspirators possess market power, and the anticompetitive nature of the challenged agreement). There are no procompetitive justifications that outweigh its anticompetitive effects.

a) DIFRA Members Collectively Have Market Power

McWane, Sigma and Star collectively possess market power in the Fittings market. *See supra* Part V.A.1 (defining relevant Fittings market). In 2007, 2008, and 2009, McWane, Sigma and Star's collective market shares were **{ }**, respectively.[607] The remaining portion of the market is spread among a small group of fringe suppliers that do not impact market prices.[608] Market power can properly be inferred from collective market shares in excess of 90% when, as here, the market is characterized by high barriers to entry. *See supra*

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[606] CCPF 1238-1239; CCPF 1473-1483.

[607] CCPF 456-457; *see also* McWane Response to RFA at ¶ 40, *in camera* (admitting that McWane {

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[608] CCPF 459-461.

Part V.A.4 (describing high entry barriers in Fittings market); *see also Jacobs v. Tempur-Pedic Int'l, Inc.*, 626 F.3d 1327, 1339-1340 (11th Cir. 2010) ("Market share is frequently used in litigation as a surrogate for market power.") (internal quotation marks and citation omitted); *United States v. Microsoft Corp.*, 253 F.3d 34, 54-56 (D.C. Cir. 2001); *Graphic Prods. Distribs. v. Itek Corp*., 717 F.2d 1560, 1570 (11th Cir. 1983) (market share between 70 and 75 percent supports "significant market power."); *FTC v. Staples*, 970 F. Supp. 1066, 1081-82, 1086 (D.D.C. 1997) (evidence of market share and entry barriers have commonly been central to market power analysis).

This finding of market power is supported by the parties' contemporaneous documents recognizing McWane, Sigma and Star as the three primary suppliers in the Fittings market,[609] and by Star's admission that the small, fringe Fittings suppliers do not impact the ability of the big three suppliers to implement a price increase.[610] *See FTC v. Staples*, 970 F. Supp. at 1075-1079 (firms' identification of competitive threats significant for determining ability to exercise market power).

b) The DIFRA Information Exchange Likely Harms Competition

Complaint Counsel establishes a *prima facie* case of competitive harm by showing that the structure of the market is susceptible to coordination, and that the nature of the information exchanged has the potential or tendency to facilitate coordination. *See McWane*, slip op. at 19 ("[T]he susceptibility of the industry to collusion and the nature of the information exchanged are the most important factors in determining likely effects."); *Gypsum*, 438 U.S. at 441 n.16;

[609] CCPF 455; CCPF 460; CCPF 1279e; CCPF 1279d.

[610] CCPF 461.

Todd v. Exxon, 275 F.3d at 207-08. Here, the evidence establishes that the Fittings market is highly conducive to collusion, and that exchanging sales volume data facilitates coordination.

(1) The Domestic Fittings Market is Highly Susceptible to Coordinated Interaction

As previously discussed, the Fittings market is susceptible to coordination. *See supra* Part V.B; *see also McWane*, slip op. at 19. Briefly, the evidence shows that the Fittings market: i) is highly concentrated with few rivals and high barriers to entry; ii) has a social structure where top executives with pricing authority have common contacts with each other; iii) is comprised of homogeneous products with few substitutes and an inelastic demand; and iv) has somewhat transparent pricing, which transparency was improved upon by the parties setting up an information exchange of sales data through DIFRA. *See supra* Part V.B. Notably, McWane's economic expert, Dr. Normann, does not dispute (nor even address in his report) any of these market factors or the conclusion that the Fittings market is highly susceptible to coordination.[611]

(2) The Information Exchanged Has the Nature and Tendency to Facilitate Coordination

While exchanging price information is the most suspect, exchanging sales volume can be a proxy for price and may therefore also harm competition. *See Petroleum Prods.*, 906 F.2d at 462 (exchange of production and supply data can be used to police a cartel or to facilitate interdependent action); *see also* George A. Hay, *Oligopoly, Shared Monopoly, and Antitrust*

[611] CX 2265-A (Schumann Rebuttal Rep. at 4-5) (describing Dr. Normann's failure to acknowledge the tight-knit oligopoly structure of the Fittings market and Dr. Normann's failure to discuss oligopoly theory or oligopolistic interdependence versus price fixing, and apply these economic theories to the Fittings market); *cf.* RX-712A (Normann Rep. at 5, 24) (acknowledging Fittings are a commodity product that can be cast by virtually any foundry given the correct patterns, and industry demand for Fittings is likely inelastic).

Law, 67 CORNELL L. REV. 439, 454 (1982) ("[F]irms can use information about sales volume, which would indicate an unusual increase in one firm's sales (presumably associated with secret discounts), to monitor adherence to consensus prices.").[612] Here, economic theory and the parties' contemporaneous documents establish that the sales volume data exchanged through DIFRA had the potential and tendency to facilitate coordination. *See Gypsum*, 438 U.S. at 457-458.

(i) Economic Theory Shows How the DIFRA Information Exchange Is Likely to Harm Competition

As previously discussed, economic theory explains that sales volume can facilitate coordination by allowing suppliers to determine their market shares and whether their volume loss is due to a general decline in demand or due to "cheating," *i.e.*, discounting from published prices. *See* Massimo Motta, *Competition Policy: Theory and Practice* 151; *see also In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 656 (2d Cir. 2002) (recognizing that the ability to detect cheating "tends to shore up a cartel"); *Petroleum Prods.*, 906 F.2d at 462 (exchange of production and supply data can be used to police a cartel or to facilitate interdependent action); George A. Hay, *Oligopoly, Shared Monopoly, and Antitrust Law*, 67 CORNELL L. REV. 439, 454 (1982) (same).

Additionally, exchanging sales volume data can facilitate coordination by providing more price transparency because the lack of price transparency can drive price instability or discounting. As sellers in an oligopoly succeed in raising market prices to supracompetitive levels, it creates an incentive for a seller to secretly discount and take business (and profits) from

[612] The Commission's summary judgment decision rejected McWane's contention that the exchange of tons-shipped data cannot facilitate price collusion. *McWane*, slip op. at 19.

its rivals. *See United States v. Heffernan*, 43 F.3d 1144, 1149 (7th Cir. 1994) ("The temptation of a member of a price fixing conspiracy to cheat his fellows by shading the agreed price is very great, and is the bane of price fixers . . . ."). As firms in the oligopoly engage in secret price cutting, market prices fall.[613]

On the other hand, if prices are transparent (visible to rivals), then the opportunity to engage in secret price cutting is lessened, and a seller's fear that rivals may be engaging in secret price cutting is likewise diminished. Consequently, inter-firm trust is enhanced and supracompetitive pricing is rendered more stable. *See Gypsum Co.*, 438 U.S. at 457 (when "each seller would know that his price concession could not be kept from his competitors" the consequence is that "no seller participating in the information-exchange agreement would . . . have any incentive for deviating from the prevailing price level in the industry").[614] By increasing price transparency, an information exchange of sales volume data can therefore facilitate price coordination. *See Cason-Merenda v. Detroit Med. Ctr.*, 862 F. Supp. 2d 603, 643-647 (E.D. Mich. 2012) (describing causal link between increased transparency and decreased competition); *DOJ/FTC Guidelines*, at Statement 6 ("information exchanges among competing providers may facilitate collusion or otherwise reduce competition on prices or compensation, resulting in increased prices . . . .").[615]

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[613] CCPF 659.

[614] CCPF 659 (transparency of pricing is conducive to coordination; transparency of pricing is one way of providing a means for rivals to detect cheating on any consensus price, which increases the risk of punishment and thereby creates a disincentive for such cheating in the first instance).

[615] CCPF 661.

(ii) The Record Evidence Shows That the DIFRA Information Exchange Likely Harmed Competition

McWane, Sigma and Star's contemporaneous documents confirm that the purpose and effect of DIFRA was to stabilize collusive pricing in precisely the manner predicted by economic theory. The evidence establishes that each supplier used the DIFRA reports to calculate their market shares, to evaluate the level of discounting in the market, and to make pricing decisions.

From the beginning, McWane intended to use the DIFRA reports to track market share and make pricing decisions.[616] For example, after receiving the first DIFRA report, Mr. McCullough emailed McWane's market share findings to McWane's CEO, Mr. Page, explaining how McWane could use the DIFRA data to enforce pricing discipline on Sigma and Star:

> I believe that until they feel prolonged profit margin pressures they will continue their historical practice of undisciplined market pricing. Until we see at least minor market share improvement I am in favor of no price increase support in the utility fittings market.[617]

Mr. Page concluded from that first DIFRA report that McWane had lost market share due to discounting by its competitors.[618] McWane was hopeful that, "DIFRA will eventually add some increased stability."[619] In McWane parlance, "stability" means reduced Project Pricing so that overall prices are within 10% of published multipliers.[620]

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[616] CCPF 1288 (CX 2047 at 020 (reporting that DIFRA reporting was about to commence and McWane would be able to monitor its market shares)); *see also* CCPF 1289-1296; CCPF 1300-1314.

[617] CCPF 1301.

[618] CCPF 1302.

[619] CCPF 1305.

[620] *E.g.* CCPF 557; CCPF 561; CCPF 859; CCPF 908.

Throughout the course of DIFRA, McWane used the information exchange to draw conclusions regarding the level of its competitors' Project Pricing, and to plan McWane's future pricing. For example, in his January 21, 2009 email forwarding the most recent DIFRA Market Share Analysis, Mr. Tatman concluded:

> As we've historically seen, as the market volume tightens up our import competitors tend to be less and less disciplined with pricing and more and more creative with making and hiding deals.[621]

Mr. McCullough also viewed the DIFRA data as a way to measure price stability and market share when making pricing decisions. In response to Mr. Tatman's email, he wrote:

> My inclination is to "not" send a revised multiplier notice and "not" send a letter of explanation but simply let our customers know that price instability has led to Tyler/Union market erosion and that we cannot support higher pricing until there is pricing stability and market share maintenance.[622]

Although McWane has argued that DIFRA data had nothing to do with price, the evidence demonstrates that McWane used DIFRA reports to reach conclusions about its competitors' pricing, and to make its own pricing decisions. This use of the DIFRA data to monitor market prices is consistent with McWane's early desire for reports to include sales dollars in addition to shipment tons, which would have allowed DIFRA members to compare their average price per ton – a key industry metric – and confirm whether and to what extent competitors were stabilizing prices.[623] Indeed, once McWane received the DIFRA reports, it

[621] CCPF 1308; CCPF 1304 (RX-616 at 0005 (observing that, based on DIFRA data, "Leading price stability has been detrimental to share")).

[622] CCPF 1312.

[623] CCPF 1290-1296.

never pursued the other purported purposes of DIFRA: "as soon as [McWane] got what they wanted to get, there was never another conversation about having a meeting."[624]

Star also used the DIFRA reports to track its market share and to make determinations about price strategy decisions.[625] Star's sole motivation for joining DIFRA was to obtain market share data, and Star never believed DIFRA had any other purpose for the group.[626] Indeed, Star was initially hesitant to join DIFRA because it was afraid that McWane or Sigma would use Star's market share data to compete against Star.[627]

Specifically, Star used the DIFRA reports to assess whether any decline in Star's Fittings sales was due to the economic decline or due to sales lost to McWane or Sigma.[628] **{**

[630]}

Sigma's admissions about the use and competitive effect of DIFRA data are particularly telling.[631] For example, Sigma's President, Mr. Pais, reported in December 2008 how the

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[624] CCPF 1287.

[625] CCPF 1284-1287; CCPF 1315-1323.

[626] CCPF 1284-1287.

[627] CCPF 1151-1154.

[628] CCPF 1321.

[629] CCPF 1317 *in camera*.

[630] CCPF 1318 *in camera* -1319 *in camera*.

[631] CCPF 1276-1283; CCPF 1324-1333.

DIFRA reports had assured members that lost sales were due to the declining market, and that they did not need to respond to competition from each other:

> [A]ll competitors are shaken by the severe decline in the market volume and thanks to DIFRA data, the 3 are somewhat reassured that it's the market weakness that's costing them the volume and they are not losing to the competition.[632]

In a letter responding to questions from one of Sigma's lenders, Mr. Pais again explained that the DIFRA information exchange helped to stabilize Fittings prices and reduce discounting:

> In Fittings, there are effectively 3 – McWane, Sigma, and Star – and all suffer from the same challenges and there seems to be a great desire to improve the pricing and each one has demonstrated thru a reasonable amount of discipline, even being protective of our respective market share. ***This is where the monthly market size data produced by DIFRA***, an association that Sigma helped to form, with 4 member suppliers fro [sic] Fittings (one, U.S. Pipe, actually is not a producer anymore, but a small player buying almost all their needs from SIGMA), ***helps maintain the pricing discipline, as the market share data point to a relatively consistent and stable market pattern. It has helped us not to allow the sharp market decline to be mistaken as a 'loss of market share', which mostly causes price reaction***. Our [gross margins] have continued to be strong, throughout the year, even as the volumes have been weak.[633]

According to Sigma, the DIFRA information exchange enabled McWane, Sigma, and Star to not only monitor competitor discounting, but to avoid lowering their own prices.[634]

At trial and at his deposition, Mr. Pais explained how the DIFRA reports influenced Sigma's pricing and discounting strategy. Specifically, Mr. Pais admitted to using the DIFRA data to help set Sigma's prices:

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[632] CCPF 1279d.

[633]CCPF 1279e.

[634] CCPF 1279.

> Q. At this point, in December of 2008, are you – you're planning pricing strategy for 2009?
> A. Certainly. As it is the norm in every December.
> Q. When Sigma was doing that pricing strategy planning, were you using the DIFRA data?
> A. Certainly.[635]

Mr. Pais also acknowledged that "[i]f the DIFRA data pointed to that we were really losing market share, ***then we would have used price to get it back***".[636]

This evidence conclusively disproves McWane's contention that the DIFRA shipment data afforded each Fittings seller no insight into competitors' pricing.[637]

c) There is No Pro-Competitive Justification For the Challenged Restraint

Once it is established that the DIFRA information exchange served to facilitate price coordination, the burden shifts to McWane to demonstrate a countervailing efficiency justification for this concerted activity. *See In re Indiana Fed. of Dentists*, 101 F.T.C. 57, 175 (1983); *Realcomp*, FTC Docket No. 9320, 2009 F.T.C. LEXIS 250, at *48, *74 (2009). Because the information exchange is implemented by sellers in a tightly-knit oligopoly, the potential for

[635] CCPF 1324.

[636] CCPF 1333 (quoting CX 2527 (Pais, IHT at 85-86) (emphasis added)).

[637] In addition, it is instructive to compare the DIFRA information exchange to the standards set forth in the Agency Guidelines for structuring an information exchange that will not trigger concerns of anticompetitive effects. *Cf. Cason-Merenda v. Detroit Medical Center*, 862 F. Supp. 2d 603, 629-631 (E.D. Mich. 2012) (measuring challenged information exchange against Agency Guidelines). Statement 6 of the Agency Guidelines advises that firms operate within a "safety zone" when (1) the information exchange is managed by a third party, (2) the data exchanged is more than three months old, (3) there are at least five participants reporting data, with no single participant's data representing more than 25% of the total, and (4) the data is sufficiently aggregated so as to mask the individual data of every participant. DOJ/FTC Guidelines, at Statement 6. The DIFRA exchange did not satisfy the "safety zone" criteria: the number of reporting companies (three, or four if one includes U.S. Pipe) is too small; each company's data representation in the total report is too high, and the data is too recent (as recent as 15 days old when reported to DIFRA).

supracompetitive pricing is acute; the Court's efficiency analysis should therefore be rigorous. *See* Andrew I. Gavil, *Moving Beyond Caricature and Characterization: The Modern Rule of Reason in Practice*, 85 S. CAL. L. REV. 733, 782 (2012) ("[C]ourts should be demanding of defendants who proffer economically implausible or noncognizable defenses, or defenses that are not supported by substantial evidence, in cases where the case for anticompetitive effects is comparatively strong.").

At trial, the DIFRA members raised one efficiency defense: that the industry shipment information assembled by DIFRA could be used by a Fittings seller to determine its appropriate inventory level.[638] This naked efficiency claim is insufficient for a number of reasons.

First and foremost, there are no contemporaneous documents showing that any supplier actually used DIFRA data to set its inventory level.[639] The lack of record evidence means that this efficiency justification is without substance, and should be viewed as a *post hoc* rationalization deserving no weight. *See In re Indiana Fed. of Dentists*, 101 F.T.C. at 175 ("Such justifications cannot be speculation alone but must be established by record evidence in order to be considered an adequate justification for otherwise anticompetitive behavior."); *see also United States v. Dentsply Int'l, Inc.*, 399 F.3d 181, 197 (3d Cir. 2005) (alleged justification was

[638] *E.g*. CCPF 1279(b). Notably, McWane's economist, Dr. Normann, did not identify inventory management as a procompetitive efficiency of the DIFRA information exchange. In his expert report, Dr. Normann only stated that, "trade associations are generally considered to have significant potential pro-competitive effects in their ability to create standards and promote industry products." RX-712A (Normann Rep. at 8, n.33). Dr. Normann offered no opinions that the exchange of Fittings sales volume data through the DIFRA information exchange had any procompetitive efficiencies.

[639] *E.g.*, CCPF 1328 (Sigma Executive VP responsible for inventory levels rarely looked at monthly DIFRA reports); CCPF 1323 *in camera* (**{ }**).

pretextual and did not excuse exclusionary practices); *Image Tech. Servs. v. Eastman Kodak Co.*, 125 F.3d 1195, 1219 (9th Cir. 1997) (allowing court to disregard justification for challenged conduct when "evidence suggests that the proffered business justification played no part in the decision to act"). In fact, McWane's initial desire to also include sales dollar figures, which would have had nothing to do with inventory management, further demonstrates the post-hoc nature of this justification.[640]

Second, McWane has not shown that fixing inventory levels on the basis of industry-wide shipments is superior to or more efficient than fixing inventory levels based on the supplier's own sales history or other information available to the company. Absent this showing, the argument is not moored to greater efficiency, and can be dismissed.

Finally, even assuming the validity of this efficiency justification, McWane has not proven that the benefit was non-trivial or outweighed the consumer harm. *Cf. McWane,* slip op. at 19 (Under the rule of reason, "the question is whether the anticompetitive effect of the agreement [to exchange competitive information] outweighs its beneficial effects."). Decisively, the Fittings suppliers themselves have not considered this alleged efficiency benefit to be worth the cost of operating the program. The DIFRA information exchange was launched in order to facilitate collusion in early 2008, and was abandoned when the conspirators ' agreement dissolved into a cheating free-for-all (by January 2009) – the Fittings sellers have not since continued the information exchange in order to "assist with inventory management." *See McWane*, slip op. at 20 ("Additionally, the fact that the data exchange began during the alleged conspiracy period, and stopped shortly after Complaint Counsel alleges that Star ceased

[640] CCPF 1290-1296.

participating in from the conspiracy, raises doubt about whether the exchange of data served any procompetitive objective.") (internal citations omitted). When Sigma attempted to revive DIFRA reporting in May 2009, it did not provide a reason relating to inventory management, but rather because its purpose was "to restore the badly dented competitive confidence" and to demonstrate that Sigma's "efforts to commit to a new pricing discipline would succeed."[641]

In sum, the DIFRA information exchange likely facilitated price coordination by allowing the three Fittings rivals to monitor changes in their respective market shares and to detect cheating on consensus prices. The DIFRA information conferred no offsetting efficiency benefit. This concerted action should therefore be condemned.

F. McWane's Master Distribution Agreement with Sigma Unreasonably Restrained Competition in the Domestic Fittings Market (Count Four)

Count Four of the Complaint charges that McWane violated Section 1 of the Sherman Act by entering into its "Master Distribution Agreement" with Sigma. Specifically, through the MDA, McWane and Sigma agreed that Sigma would abandon its efforts to enter the Domestic Fittings market independent of McWane, and instead distribute McWane's Domestic Fittings under restrictive terms.

For decades, McWane had sold Domestic Fittings directly to Distributors that then re-sold the Fittings to End Users. In 2009, however, Sigma became motivated to enter the Domestic Fittings market by ARRA's allocation of $6 billion in funds for waterworks projects built with American-made products.[642] Recognizing Sigma's incentive to enter, and Sigma's capability to enter, McWane entered into the MDA as an "insurance policy" against Sigma's

[641] CCPF 1486; CX 0319 at 003.

[642] CCPF 1622-1624; CCPF 1573.

independent entry.[643] Because Sigma was a potential entrant in the Domestic Fittings market, the MDA is properly characterized as a horizontal agreement among potential competitors, and not a simple vertical distribution agreement. *See* Areeda & Hovenkamp, *Antitrust Law* ¶ 1901b ("An arrangement is said to be 'horizontal' when its participants are (1) either actual or potential rivals at the time the agreement is made; and (2) the agreement eliminates some avenue of rivalry among them.").

The MDA, by its terms and by the parties' understanding, barred Sigma from independently entering the Domestic Fittings market in competition with McWane.[644] Thus, the MDA is best understood as a naked agreement among potential competitors not to compete, or a horizontal market allocation agreement. *See, e.g., Engine Specialties, Inc. v. Bombardier, Ltd.*, 605 F.2d 1, 11 (1st Cir. 1979); *Eli Lilly & Co. v. Zenith Goldline Pharm., Inc.*, 172 F. Supp. 2d 1060, 1074 (S.D. Ind. 2001). Horizontal market allocation agreements are presumptively harmful to competition because they deny consumers the benefits of competition and they have no redeeming efficiencies. *See United States v. Topco Assocs., Inc.*, 405 U.S. 596, 608, 612 (1972) (condemning agreements among competitors to allocate markets or customers as *per se* illegal). As Judge Posner explains:

> The analogy between price-fixing and division of markets is compelling. It would be a strange interpretation of antitrust law that forbade competitors to agree on what price to charge, thus eliminating price competition among them, but allowed them to divide markets, thus eliminating all competition among them.

Blue Cross & Blue Shield United v. Marshfield Clinic, 65 F.3d 1406, 1415 (7th Cir. 1995); *see also Schering-Plough Corp. v. FTC*, 402 F.3d 1056, 1064 ("[A]n agreement to allocate markets

[643] CCPF 2332; CCPF 2349; CCPF 2354.

[644] CCPF 2379-2382; CCPF 2336-2366.

is 'clearly anticompetitive,' resulting in reduced competition, increased prices, and a diminished output . . . ."); *In re Terazosin Hydrochloride Antitrust Litig.*, 352 F. Supp. 2d 1279, 1313 (S.D. Fla. 2005) ("[A]greements between competitors to allocate markets have the obvious tendency to diminish output and raise prices.").

Here, the signed MDA agreement between McWane and Sigma meets the concerted action prong of a Section 1 violation.[645] *See, e.g., United States. v. Delta Dental*, 943 F. Supp. 172, 175 (D.R.I. 1996) ("[C]oncerted action may be amply demonstrated by an express agreement."). Thus, the only question for this Court is whether the MDA unreasonably restrained trade. *See, e.g., Law v. NCAA*, 134 F.3d 1010, 1016 (10th Cir. 1998) (elements of Section 1 violation are (1) the existence of a contract, combination, or conspiracy among two or more separate entities (*i.e.*, concerted action), that (2) unreasonably restrains trade).

As discussed below, the MDA unreasonably restrains trade because the evidence establishes that Sigma was a potential competitor in the Domestic Fittings market, and that the MDA eliminated Sigma as an independent entrant. These findings establish that the true nature of the MDA is a naked market allocation agreement among potential competitors not to compete with each other. Such agreements are summarily condemned as *per se* illegal. Alternatively, because the parties have market power and there are no procompetitive efficiencies, the MDA can also be condemned under a more plenary market analysis.

1. Sigma was a Potential Competitor in the Domestic Fittings Market

For purposes of a Section 1 analysis, a firm is considered a potential competitor if there is evidence that entry by the firm is reasonably probable in the absence of the relevant agreement. *McWane*, slip op. at 22 n.18 (citing *Yamaha Motor Co. v. FTC*, 657 F.2d 971, 977-979 (8th Cir.

[645] CCPF 2168.

1981); *United States v. Siemens Corp.*, 621 F.2d 499, 506-507 (2d Cir. 1980); FTC & DOJ, *Antitrust Guidelines for Collaborations Among Competitors*, at § 1.1, n.6 (2000) ("A firm is treated as a potential competitor if there is evidence that entry by that firm is reasonably probable in the absence of the relevant agreement, or that competitively significant decisions by actual competitors are constrained by concerns that anticompetitive conduct likely would induce the firm to enter."); Areeda & Hovenkamp, *Antitrust Law* ¶ 1121b.

To determine whether a firm is a potential competitor, courts commonly consider the firm's intent and its ability to enter the market.[646] *Bombardier*, 605 F.2d at 9; *Yamaha*, 657 F.2d at 978. It is not necessary that entry be easy or certain. When a firm invests time and resources toward market entry, and the incumbent firm anticipates that the entry by the would-be rival is likely to occur, courts find that the potential competitor standard has been satisfied. *E.g.*, *Bombardier*, 605 F.2d at 9; *Yamaha*, 657 F.2d at 977-979.

For example, in *Bombardier*, the First Circuit evaluated a challenge to an agreement between Agrati, a minicycle manufacturer, and Bombardier, a snowmobile manufacturer that wished to expand into the minicycle market but ultimately agreed to be an exclusive distributor of Agrati's minicycles. 605 F.2d at 5. As a threshold question, the court considered whether Bombardier was a potential competitor in the minicycle market: if not, then the agreement would be analyzed as a vertical restraint under the Rule of Reason; but if so, then the agreement would be condemned as a *per se* illegal horizontal market allocation agreement. *Id.* at 8-9.

[646] McWane proposes a somewhat different standard for identifying a potential competitor: that the firm has taken affirmative steps to enter the business and has an intention and preparedness to do so. McWane Summary Judgment Brief at 33. This language is derived from Section 2 cases alleging exclusion of a potential entrant. This Count alleges a Section 1 violation because Sigma's independent entry was eliminated by an agreement with McWane. The evidence establishes that Sigma was a potential competitor under either test.

The First Circuit found there was sufficient evidence to support the jury's conclusion that, but for the challenged agreement, Bombardier was a potential competitor in the minicycle market, *i.e.*, that "Bombardier had the necessary desire, intent, and capability to enter the market" in competition with Agrati. *Id.* at 9. The court based its conclusion on evidence that: (i) Bombardier was interested in developing a summertime product for its distributors, and had focused on the minicycle to fulfill this purpose; (ii) Bombardier had developed, manufactured, and tested prototypes of its own minicycle, and could produce all of the necessary parts; (iii) Bombardier's president testified that the agreement with Agrati replaced Bombardier's plans to make its own minicycles; and that (iv) "at various junctures Bombardier had intimidated Agrati with the threat of entering the market immediately with its own minicycle if an agreement could not be worked out between them." *Id*. at 9-10. The court reached this conclusion notwithstanding evidence that Bombardier still had challenges to overcome before it could enter the minicycle market. *Id.* at 5, 10, n.13 (noting evidence that Bombardier had become "increasingly dissatisfied" with its prototype, did not have the required tooling or production experience, and "a great deal of work needed to be done in terms of production orientation"). The court then upheld the jury's verdict that the agreement was a *per se* illegal horizontal market allocation because, by its terms, the agreement prevented Bombardier from selling its own minicycles. *Id.* at 11.

Here, consistent with *Bombardier*, the record evidence amply establishes that Sigma intended to enter the Domestic Fittings market, that Sigma had the capacity to enter, and that McWane viewed Sigma as likely to enter the Domestic Fittings market.

a) Sigma Intended to Enter the Domestic Fittings Market

Contemporaneous documents and testimony establish that Sigma intended to enter the Domestic Fittings market up until the moment that it signed the MDA, when all entry efforts

stopped. Contemporaneous documents and testimony from company executives acknowledging the firm's subjective intent to enter are "the best evidence that a firm is an actual potential entrant." *See In re B.A.T. Indus., Ltd.*, 104 F.T.C. 852, 922 (1984).

Sigma was first motivated to enter the Domestic Fittings market after Congress passed ARRA.[647] Sigma found "the conditions were just so urgent" to enter the Domestic Fittings market because Sigma expected the ARRA's Buy American requirement to increase the size of the Domestic Fittings market by up to 30 percent of all Fittings sales.[648] Sigma also expected that the Buy American sentiment would extend beyond the ARRA period,[649] and feared that Distributors buying Domestic Fittings from McWane would also shift their import purchases to McWane.[650]

For these reasons, Mr. Rona, Sigma's OEM manager, believed that ARRA presented "a very real threat" to Sigma, and that it was "quite clear now that we need a credible plan" to supply Domestic Fittings.[651] On May 4, 2009, Mr. Pais echoed these sentiments in an update to Sigma's Board of Directors, where he stressed the importance of Sigma entering the Domestic Fittings market:

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[647] CCPF 1622-1624.

[648] CCPF 1622-1624; CCPF 2171-2173.

[649] CCPF 1629-1633; CX 0219 ("we are also seeing much more domestic requests and specifications that we expect will stay with our industry for several years if not for the next 3-5 years or even longer."); CX 1997 at 007, *in camera* (**{** **}**).

[650] CCPF 1639-1646.

[651] CCPF 2171.

> [I]t behooves Sigma to review the feasibility of producing a line of 'domestic' Fittings, to meet this growing need, in order to reassure our customer base and retain their loyalty and their business at the current levels.[652]

By the end of May 2009, Mr. Florence (a member of the board from Sigma's majority shareholder, Frontenac) declared that entering the Domestic Fittings market was Sigma's "***#1a priority***."

Sigma's intent to enter the Domestic Fittings market independent of McWane increased in June 2009. When Sigma's request that McWane supply it with Domestic Fittings reached an impasse in early June, Sigma "went back to speeding up [its] review" of domestic production, and Mr. Bhattacharji exclaimed: "I am glad the uncertainty is over and we can hit the untraveled road - once again!"[653] After Star announced it too was entering the Domestic Fittings market at the June 2009 AWWA show, Mr. Rona admitted that he "was ***fixated*** on [the fact] that Sigma had to have an answer because I felt there was some percentage of longevity and damage that could go to our existing business."[654] Mr. Pais likewise reiterated the urgency of Sigma's intention to enter the Domestic Fittings market in his June 2009 update to Sigma's Board:

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[652] CCPF 2175.

[653] CCPF 2255.

[654] CCPF 2254 (emphasis added).

[655] CCPF 2209, *in camera.*

Sigma never wavered from its intent to enter the Domestic Fittings market. Sigma witnesses have admitted that Sigma abandoned its efforts toward domestic entry only because McWane agreed to the MDA:

- Mr. Pais admitted that if Sigma had not agreed to the MDA, then the company would have entered the Domestic Fittings market without McWane: "then we certainly would have gone another - to Plan B, which is our [domestic] production;"[656]
- Mr. Bhattacharji likewise testified that Sigma abandoned independent entry because it understood that McWane would supply Domestic Fittings only if Sigma provided assurances that the company would not source from anywhere else;[657] and
- Mr. Rona testified that Sigma continued to pursue its own independent entry into the Domestic Fittings market until the terms of the MDA required Sigma to cease its own domestic entry efforts.[658]

Sigma's intent to enter the Domestic Fittings market is further demonstrated by the considerable resources it devoted to the project. As discussed more fully below, Sigma formed a task force of high-level executives and engineers – the Sigma Domestic Production team ("SDP team"), who visited foundries, developed plans for production, and identified costs of

[656] CCPF 2266.

[657] CCPF 2381.

[658] CCPF 2385.

production.[659] By June 15, 2009, Sigma had also secured the tooling and patterns necessary to produce two or three sample Domestic Fittings that it ultimately sold (and are likely installed underground today).[660]

Sigma's intent to enter the Domestic Fittings market is established by the same factors as those relied upon by the court in *Bombardier*: both Sigma and Bombardier had a strong financial motive to enter the new market; both companies' executives testified that entry was important for their company; both companies created sample or prototype products; and in both cases, the company continued to pursue independent entry until entering into the respective challenged agreements. *See Bombardier*, 605 F.2d at 9.

McWane nevertheless disputes that Sigma had the requisite intent to enter the Domestic Fittings market because Sigma preferred to source Domestic Fittings from McWane through the MDA rather than independently as a virtual manufacturer. Regardless of the preference Sigma now expresses, its expected profits from independent market entry were sufficient to motivate its entry. A party's preference for an anticompetitive agreement over its other realistic and profitable options does not save the agreement from antitrust scrutiny. *See Bombardier*, 605 F.2d at 9-11 (condemning collaboration pursued in lieu of independent entry even though potential entrant preferred collaboration to the rigors and risks of independent entry); *Yamaha*, 657 F.2d at 978-979 (same). To rule otherwise would allow potential entrants to regularly enter into agreements eliminating competition between them – a result condemned by the antitrust laws. *See,e.g., Eli Lilly & Co. v. Zenith Goldline Pharm., Inc.*, 172 F. Supp. 2d 1060, 1075 (S.D.

[659] CCPF 2211-2220; *see also* 2230-2248 (further detailing Sigma resources devoted to Domestic entry).

[660] CCPF 2249-2252.

Ind. 2001); *Bombardier*, 605 F.2d at 9-11; *Yamaha*, 657 F.2d at 978-980; *In re SKF Industries, Inc.*, 94 F.T.C. 6, 36 (1979); FTC & DOJ, *Antitrust Guidelines for Collaboration Among Competitors* § 3 (2000).

b) Sigma had the Capability to Enter the Domestic Fittings Market

The evidence establishes that Sigma was logistically and financially capable of entering the Domestic Fittings market in this manner. The high-level executives on Sigma's SDP team had the experience and skill-set to plan, implement, and oversee Sigma's entry into the Domestic Fittings market.[661] Sigma had years of experience employing its virtual manufacturing model for imported Fittings, whereby it provides all engineering, design, quality control, and logistical support to the contract foundries that manufacture Sigma's Fittings.[662] Sigma used this experience and took concrete steps toward domestic entry. After engaging in strategic planning for domestic entry from February 2009 to May 2009:[663]

- Sigma identified the "critical mass" of roughly 700 configurations of Domestic Fittings it would need to produce, which could be produced with 400 different patterns;[664]
- Sigma created a detailed cost analysis for producing these Fittings; [665]

[661] CCPF 2212-2216.

[662] CCPF 2217.

[663] CCPF 2218.

[664] CCPF 2227.

[665] CCPF 2277.

- Sigma identified, visited, and received price quotes from foundries capable of producing castings for Domestic Fittings for Sigma;[666]
- Sigma possessed the facilities and expertise for finishing the castings into Domestic Fittings;[667]
- Sigma produced sample or prototype Domestic Fittings;[668] and
- Sigma received the support of its OEM customers, U.S. Pipe and ACIPCO, including the potential use of one of their affiliated foundries for producing Domestic Fittings.[669]

In the words of Sigma's President, Mr. Bhattacharji, Sigma was ready to begin production of Domestic Fittings "once the switch was flipped."[670]

McWane argues that Sigma's "shaky" financial position would have impeded its entry. Respondent's Pretrial Brief, at 60-61. Not a single contemporaneous document, however, supports this claim. Instead, the evidence conclusively establishes that Sigma was aware of the cost, and was prepared and capable of financing domestic entry.

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[666] CCPF 2235-2236.

[667] CCPF 2217 (Sigma planned to do the finishing and painting itself.); CCPF 2231 (Sigma looked at all aspects of the processing from beginning to end steps); CCPF 2212 (Sigma had key personnel who could supervise domestic manufacturing).

[668] CCPF 2249 (Sigma had produced two or three sample Domestic Fittings at the Eureka Foundry in Tennessee); CCPF 2252 (three of the Domestice Fittings Sigma made as part of its plans for Domestic Production were sold).

[669] CCPF 2240-2245; CCPF 2271-2274.

[670] CCPF 2265.

From the beginning, Sigma was aware of the challenges and costs associated with domestic production, as well as its financial situation, including its debt covenants, but Sigma did not waiver on the path towards entering the Domestic Fittings market.[671] Sigma kept its board of directors, lenders, and majority shareholder updated about the challenges and costs involved in entry;[672] and they never discouraged Sigma's efforts or told Sigma's management to cease those efforts or even to limit their expenditures towards entry.[673] To the contrary, following a July 15, 2009 Board meeting discussing Sigma's recent progress towards domestic market entry, Mr. Florence informed Sigma's management that Sigma's investors were prepared to invest up to $7.5 million to fund domestic entry and other strategic initiatives:

> Investors and rollover shareholders are prepared to ***invest up to $7.5m*** in equity but not to pay down debt and add to liquidity but rather ***to fund domestic sourcing*** initiative and to fund the strategic Business additions which will enhance credit quality and help Sigma grow and build equity value.[674]

Sigma's financial activity during 2009 and early 2010 further disproves McWane's contention that Sigma could not finance domestic entry. During 2009 and early 2010, Sigma: **{** **}**; considered acquiring one foundry;[675] acquired **{** **}** which

[671] CCPF 2299.

[672] CCPF 2283; CCPF 2309.

[673] CCPF 2306-2307, 2310.

[674] CCPF 2295 (emphasis added).

[675] CCPF 2289.

was the same approximate cost of domestic entry;[676] and elevated discussions about acquiring Star, which would have been significantly more expensive than domestic entry.[677]

McWane has also argued that Sigma could not have entered the Domestic Fittings market until after the ARRA period ended. Here, McWane is confusing market entry with having a full line of Fittings. Sigma planned to enter the Domestic Fittings market incrementally,[678] shipping Domestic Fittings "as they came off the line."[679] Sigma estimated that it could begin selling any particular Domestic Fitting within four to five months of first commissioning the tooling for that Fitting.[680] Thus, even if Sigma did not begin ordering patterns for any Domestic Fittings until September 2009, when it instead signed the MDA, Sigma could have begun shipping completed Fittings by February 2010.[681] McWane's contention that Sigma could not have entered the Domestic Fittings market during the ARRA period is also disproven by Star's actual entry during that same time.[682]

These facts are more than sufficient to establish that Sigma was capable of entering the Domestic Fittings market. For example, in *Yamaha Motor Co. v. FTC*, the Eighth Circuit upheld the Commission's holding that a joint venture between Brunswick and Yamaha was

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[676] CCPF 2292, *in camera;* CCPF 2305, *in camera*.

[677] CCPF 2293.

[678] CCPF 2222-2223.

[679] CCPF 2228. Even piecemeal entry can have a significant pro-competitive effect upon a monopolized market. *See* Richard A. Posner, *Antitrust Law* 251-53 (2d ed. 2001).

[680] CCPF 2225.

[681] CCPF 2226.

[682] CCPF 1712-1781.

anticompetitive because it eliminated Yamaha as a potential competitor in the United States outboard motor market. 657 F.2d 971, 978-980 (8th Cir. 1981) (applying Section 7 of the Clayton Act). The parties – each with "an incentive to minimize the probability of Yamaha's independent entry" – denied that Yamaha was a potential entrant because Yamaha could not be a substantial factor in the market for several years and because Yamaha lacked a network of dealers to sell and service its motors. *Id.* at 978-979, & n.9. But the court found that Yamaha had the capacity to enter the market, reasoning that Yamaha had the requisite product line, technology, and production and marketing experience, and that the company's lack of a dealer network appeared to be an obstacle that Yamaha could surmount. *Id.* at 978-979. Like Yamaha, Sigma also had the necessary expertise and facilities for domestic entry. Additionally, Sigma – unlike Yamaha – already had an established network of Distributors to sell its product. Thus, the evidence here is more than sufficient to establish that Sigma was a potential Domestic Fittings market entrant.

c) McWane Anticipated and Feared Sigma's Entry

McWane has admitted that it "believed [that] Sigma wished to obtain access to domestically-manufactured fittings after ARRA's enactment, either by manufacturing, through sourcing, or pursuant to a purchasing arrangement with McWane."[683] McWane also has admitted that they believed that Sigma had the capability to enter. Since ARRA was passed, McWane viewed Sigma as being in a "much better position" to enter the Domestic Fittings market than Star because of its existing OEM relationships and its access to financial backing.[684] Mr. McCullough, McWane's executive vice president and the person who ultimately approved

[683] CCPF 2320 (McWane Response to RFA at ¶ 34).

[684] CCPF 2317.

the decision to enter into the MDA, testified at his deposition that he believed that Sigma "did have access to the needed capital, but they also had the contacts and the talent and they've been importing for a very long time."[685] Even in August 2009, when Mr. Tatman had some reservations about the likelihood of Sigma independently entering the Domestic Fittings market, Mr. McCullough still believed that "what Star is able to do, Sigma is able to do, also."[686]

The evidence also establishes that it was this threat of independent entry that motivated McWane to enter into the MDA with Sigma.[687] As Mr. Tatman explained in a July 27, 2009, presentation discussing the decision of whether or not to enter into the MDA:

> The correct decision really depends on whether on their own Sigma truly does have the resolve and financial backing to make a long term strategic commitment to being a supplier of domestic products.[688]

Mr. Tatman concluded that it was a "greater financial benefit" for McWane to sell Domestic Fittings to Sigma than to allow Sigma to independently enter the Domestic Fittings market:

> [if Sigma is] truly committed to make the investment level required to be a viable competitor regardless of our actions, then producing for [Sigma] is probably a greater financial benefit to our business than having them source elsewhere.[689]

[685] CCPF 2313.

[686] CCPF 2334.

[687] CCPF 2321-2335.

[688] CCPF 2327.

[689] CCPF 2326.

McWane then calibrated the terms of the MDA based on its view of the likelihood of Sigma entering.[690] For example, in June 2009, when McWane was less fearful Sigma would enter, it made Sigma an offer it knew was not economically feasible and offered to sell Domestic Fittings to Sigma at only a 5 percent discount.; But when Star's announced entry made Sigma's entry also more likely, McWane upped its offer to a 20 percent discount.[691] Evidence that the threat that Sigma would enter impacted the terms of the agreement with McWane is strong evidence that Sigma was a potential competitor. *See Bombardier*, 605 F.2d at 10 (basing decision that Bombadier was potential competitor in part on evidence that it used the threat of its entry to obtain better agreement terms).

McWane admits its belief that Sigma would have entered the Domestic Fittings market absent the MDA in its internal documents. Specifically, in a September 2009 message to McWane's sales force explaining the MDA, Mr. Tatman stated:

> [T]he reality of the situation is that in the absence of the MDA with [McWane], Sigma was going to develop their own domestic sourcing options to the extent they could."[692]

Thus, in 2009, McWane understood that Sigma was a potential Domestic Fittings market entrant.

2. The MDA Eliminated Sigma as an Independent Competitive Force

The MDA converted Sigma from a potential competitor in the Domestic Fittings market, to a company that would not challenge or threaten McWane's exercise of monopoly power. This

[690] CCPF 2315 (CX 0568 at 003 (based on information he received from Sigma's Mr. Rona, Mr. Tatman reported that "Sigma's preference is to work something out with McWane but [Sigma is] committed and [has] the financial backing to move forward either way.")).

[691] CCPF 2318-2320; CCPF 2344-2345.

[692] CCPF 2320; CCPF 2335.

was the *raison d'etre* for the transaction: McWane executives repeatedly referred to the potential MDA as an "insurance policy" against Sigma's likely entry into the Domestic Fittings market.[693]

The MDA was not a simple buy/sell agreement between competitors.[694] Sigma knew that McWane would not enter into the MDA unless Sigma provided assurances that it would cease its own Domestic Production, and Sigma provided those assurances.[695] Sigma's agreement to abstain from its own domestic entry is memorialized in Section 1(B) of the MDA: "McWane shall be Sigma's sole and exclusive source for Domestic Fittings."[696]

The history of the MDA negotiations between McWane and Sigma eliminate any ambiguity as to the meaning of this exclusivity provision. McWane first demanded exclusivity in early July 2009. According to Mr. Tatman's report of his conversation with Sigma's Mr. Rona, Mr. Tatman told Mr. Rona that Sigma should "come back to us with a counter proposal under the conditions that we would be their exclusive supplier of [D]omestic [F]ittings…"[697] Sigma complied, and sent McWane a counterproposal that "Sigma in turn will not seek any other sources either directly or through 3rd party for the production or distribution of [D]omestic [F]ittings…."[698] In an August 18, 2009 update on the MDA negotiations, Mr. Tatman reported

[693] CCPF 2332, CCPF 2349, CCPF 2354.

[694] CCPF 2378.

[695] CCPF 2381.

[696] CCPF 2382.

[697] CCPF 2338.

[698] CCPF 2340.

that Sigma had "agreed to be exclusive to [McWane] for all sales to Distributors.…"[699] And finally, in an August 24, 2009, letter of intent for the MDA that McWane sent to Sigma, McWane identified the term "McWane shall be Sigma's exclusive source of supply" as a "core agreement element," and further elaborated that Sigma was expected "Not [to] introduce your own domestic product while the Master Distributorship is active."[700]

Consistent with the history of the MDA's negotiations, and the explicit terms of the MDA, Sigma witnesses consistently testified that the MDA did not merely replace independent entry, but prohibited it – Sigma would be "in breach of contract."[701] Thus, by preventing Sigma from entering independently, McWane was assured that there would be no capacity added to the market, and that consumers would not receive the benefits of competition in the form of lower prices, increased supply, or improved quality of Domestic Fittings.

The MDA also ensured that there would be no meaningful intra-brand competition for McWane's Domestic Fittings. Under Section 1(D) of the MDA, Sigma was required to sell Domestic Fittings at a weighted average price of no less than 98% of McWane's published prices.[702] Every time that McWane raised its prices, the MDA required Sigma to immediately follow suit – and Sigma did.[703] Informally, the parties agreed that McWane would also sell

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[699] CCPF 2352.

[700] CCPF 2356-2357.

[701] CCPF 2385; *see also* CCPF 2379-2384.

[702] CCPF 2427; CCPF 2412.

[703] Also per the MDA, Sigma could not offer its normal volume rebates on its sales of Domestic Fittings and was instead obliged to offer an eight percent volume rebate. CCPF 2420; CX 0089 at 003 (Pais noting that Sigma was "obliged to offer the same VR [volume rebate] incentive of 8% [as McWane] for all customers who would purchase over $200,000/per year of domestic

Domestic Fittings at a weighted average price of no less than 98% of the company's published prices.[704] Under Section 1(C) of the MDA, Sigma also agreed that it would not sell Domestic Fittings to U.S. Pipe or to any Distributor that violated McWane's Exclusive Dealing Policy.[705] *See infra* Part V.H. Thus, under the MDA, Sigma could not offer significantly lower-priced Domestic Fittings or expand the customer base of Distributors that could purchase McWane-branded Domestic Fittings.

In effect, Sigma operated as an extension of McWane, as an ally rather than a competitor. *See Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp.*, 959 F.2d 468, 480 (3d Cir. 1992) (competitors strive to take business away from each other); *Weinharther v. Source Services Corp. Employees Profit Sharing Plan & Trust*, 759 F. Supp. 599, 605 (N.D. Cal. 1991) ("[E]ach [firm] tried to take business away from the other. That is the essence of competition."); *cf. In re PolyGram Holding, Inc.*, FTC Docket No. 9298, 2003 WL 21770765, at *24 (July 24, 2003) (competition for sales "drives a market economy to benefit consumers").

3. An Agreement that Eliminates Competition Between Actual or Potential Competitors Harms Competition and Is *Per Se* Unlawful

At its core, the challenged conduct is an agreement between McWane and Sigma not to compete; McWane induced Sigma to cede the Domestic Fittings market to McWane. The Commission, courts, and antitrust scholars have characterized agreements that eliminate competition between potential competitors as "unilateral" horizontal market allocation

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Fittings."); CX 0953 ("Please be very careful in NOT offering any VR plans for 2010 for DOM Fittings as Tyler may reduce the VR% for 2010. As you know, they have been trying to improve this area of the market pricing for a while….").

[704] CCPF 2427.

[705] CCPF 2394-2399, 2441-2448.

agreements, *i.e.*, one firm ceding the entire market to another. As Professor Hovenkamp explained:

> While the "classic" market division agreement such as those contained in *Sealy* or *Topco* is multilateral, many noncompetition covenants are "unilateral" in the sense that only one party promises to stay out of the other party's market, but not vice versa . . . . To be sure, the contract has some consideration going in the opposite direction as well, but that consideration is the payment of a higher price or something other than a promise not to compete.

Areeda & Hovenkamp, *Antitrust Law* ¶ 2134d; *see also In re SKF Industries, Inc.*, 94 F.T.C. 6 (1979) (condemning agreement between competitors FM and SKF that SKF would exit the ball bearing distribution market as an unlawful market allocation agreement in which FM gets 100 percent of the market, and SKF gets 0 percent of the market); *United States v. Gen. Elec. Co.*, No. CV 96-121-M-CCL, 1997 WL 269491 (D. Mont. 1997) (condemning unilateral market allocation agreement as *per se* illegal); *Garot Anderson Agencies, Inc. v. Blue Cross & Blue Shield United*, 1993-1 Trade Cas. (CCH) ¶ 70,235 (N.D. Ill. 1993) (same); *United States v. Am. Smelting & Refining Co.*, 182 F. Supp. 834 (S.D.N.Y. 1960) (same).

The Commission employed the same framework in *In re SKF Industries, Inc.*, 94 F.T.C. 6 (1979). In *SKF*, The Commission evaluated an agreement between competitors FM and SKF that required SKF to exit the ball bearing distribution market. The Commission concluded that this was a *per se* unlawful market allocation agreement in which FM gets 100 percent of the market, and SKF gets 0 percent of the market. *Id.* at 99.

Market allocation agreements between actual or potential competitors are consistently treated by the courts as *per se* unlawful. *E.g.*, *Nynex Corp. v. Discon, Inc.*, 525 U.S. 128, 134 (1998) (horizontal market division is unlawful *per se*); *United States v. Sealy, Inc.*, 388 U.S. 350, 357-358 (1967) (same); *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46 (1990) (*per curiam*) (condemning market allocation agreement between potential competitors); *United States v.*

Topco Assocs., 405 U.S. 596 (1972) (same); *Engine Specialties, Inc. v. Bombardier, Ltd.*, 605 F.2d 1 (1st Cir. 1979) (same); *Eli Lilly & Co. v. Zenith Goldline Pharmaceuticals, Inc.,* 172 F. Supp. 2d 1060 (S.D. Ind. 2001) (same).

Courts recognize that this analysis does not change – and the agreement's anticompetitive effects are not lessened – merely because a potential competitor remained in the marketplace in another capacity, such as a distributor, licensee or supplier. For example, in *Palmer v. BRG of Georgia, Inc.*, the Supreme Court condemned a *per se* illegal market allocation scheme even though the excluded party remained in the marketplace as a licensor to its co-conspirator. 498 U.S. 46, 49-50 (1990); *Eli Lilly*, 172 F. Supp. 2d at 1074-1076 (by agreement, potential competitor converted to supplier); *United States v. Gen. Elec. Co*., No. CV 96-121-M-CCL, 1997 WL 269491, at *2 (by agreement, potential competitor converted to a licensee); *In re SKF Indus., Inc.*, 94 F.T.C. at 99 (by agreement, competitor converted to a supplier).

An arrangement very similar to the MDA was considered to be *per se* illegal in *Eli Lilly & Co. v. Zenith Goldline Pharmaceuticals, Inc.*, 172 F. Supp. 2d 1060 (S.D. Ind. 2001). In *Eli Lilly*, Dobfar was a potential entrant, capable of producing a non-infringing product that competed with Lilly's pharmaceutical drug, cefaclor. The companies agreed that Dobfar would serve as a supplier of bulk product to Lilly, and would not undertake its own sales. *Id.* at 1065. The court concluded that this agreement, if proven at trial, would be *per se* unlawful market allocation agreement. *Id.* at 1074-1076. The court expressly rejected Lilly's claim that this was a vertical restraint subject to rule of reason review, explaining that an arrangement is horizontal when its participants are potential competitors. *Id.* at 1075 ("Potential competitors cannot stifle nascent competition by entering into an agreement restraining trade."). The court reasoned that without a rule condemning agreements whereby a potential competitor abandons entry,

"potential antitrust violators would have an incentive simply to identify probable competitors earlier in the product development process." *Id.* at 1075.

Likewise here, Sigma was a potential competitor and agreed with McWane that it would not enter the Domestic Fittings market. This Court should therefore condemn the MDA as a *per se* illegal horizontal market allocation agreement.

4. In the Alternative, the MDA Can Be Condemned Under An Abbreviated or Plenary Rule of Reason Analysis

Should this Court determine that the MDA is not a naked market allocation agreement among potential competitors, it should still condemn the agreement under an abbreviated or full Rule of Reason analysis.[706] The aim of a Rule of Reason analysis is to reach "a confident conclusion about the principal tendency of a restriction…." *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 781 (1999).

When viewed in the context of the power that McWane possess in the market for Domestic Fittings, the MDA should still be deemed *prima facie* anticompetitive. This is the "traditional" mode of rule of reason analysis: "Market power and the anticompetitive nature of the restraint are sufficient to show the potential for anticompetitive effects under a rule of reason analysis, and once this showing has been made, [the respondent] must offer procompetitive justifications." *Realcomp II Ltd. v. FTC*, 635 F.3d 815, 827 (6th Cir. 2011).

[706] For example, courts have ruled that agreements among competitors not to compete that are part of a legitimate joint venture or marketing agreement should be examined under an inherently suspect analysis, which affords the defendant an opportunity to offer a procompetitive justification for the restraint. *See In re Polypore Int'l Inc.*, Docket No. 9327, 2010 WL 866178, at *240 (2010) (initial decision), *adopted as modified*, 2010 WL 5132519 (2010); *In re Polygram Holding, Inc.*, 136 F.T.C. 310 , 345 (2003). Because there is no corresponding efficient joint venture or marketing agreement here, Complaint Counsel respectfully contends that a *per se* analysis is the appropriate level of analysis.

The anticompetitive nature of the MDA has been discussed at length above: McWane, a firm that already held monopoly power, reinforced that power by eliminating what it perceived to be its most likely rival, Sigma. Antitrust law generally prohibits a monopolist from acquiring a potential rival or excluding a potential rival – absent a compelling efficiency justification. *See* Areeda & Hovenkamp, *Antitrust Law* ¶ 710d ("As a general matter, a monopolist's acquisition of a 'likely' entrant into the market in which monopoly power is held is presumptively anticompetitive."); *see also United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964) (monopolist's acquisition of potential competitor in the natural gas market judged anticompetitive). In such circumstances, the court should infer the likelihood of genuine adverse effects.[707]

Under either an "inherently suspect" or a full Rule of Reason analysis, the anticompetitive nature of the MDA, combined with McWane and Sigma's market power in the Domestic Fittings market, *see infra* Part V.H (explaining that McWane's monopoly position in the Domestic Fittings market was reinforced by its MDA agreement with Sigma), leaves only one remaining question: whether the MDA had any plausible and cognizable efficiencies to offset the MDA's harm to competition. *See Realcomp II*, 635 F.3d at 826-827 (describing inherently suspect and rule of reason analysis, and stating that conduct is *prima facie* anticompetitive if the parties have market power and the nature of the agreement is anticompetitive).

[707] This is consistent with basic economic theory. *See* CX 2260-A (Schumann Rep. at 82-83) ("Had Sigma entered the [Domestic] Fittings market prices would likely have fallen substantially below the prices McWane had commanded as the sole producer of [Domestic] Fittings.").

Because the MDA is not a simple buy-sell agreement, McWane must demonstrate – plausibly and with supporting evidence – that a market in which McWane and Sigma distribute the same Fittings at prices determined by McWane is superior to a market in which Sigma distributes its own Fittings in competition with McWane at prices set by competitive forces. *See generally In re Realcomp II*, FTC Docket No. 9320, 2007 WL 6936319, at *27-28. McWane has not established any such justification.

McWane has advanced two efficiency defenses. First, McWane claims that the company had excess capacity at its U.S. foundry, and that the MDA was a method for securing additional sales. This is not a cognizable antitrust defense and the contemporaneous evidence reflects that McWane did not expect the MDA to lead to more sales.

A cognizable justification is one that advances the goals of antitrust by promoting competition, reducing costs, or increasing marketwide output or quality. *In re Polygram Holding*, 136 F.T.C. at 345-346. Shifting Fittings sales from a foundry operated by Sigma (or its designee) to a foundry operated by McWane may be profitable for McWane, but it presents no benefit for consumers or competition. (Or, in any event, no benefit has been articulated by McWane.) A similar argument was rejected in *Microsoft*.

In *Microsoft*, the monopolist seller of the Windows operating system argued that its exclusive agreements with other internet access providers ("IAPs") that precluded the IAPs from distributing a competing operating system was justified by its desire to keep software developers "focused" on writing programs for Windows rather than rival platforms. *Microsoft*, 253 F.3d at 71. The Court of Appeals rejected this defense, explaining that the desire to maintain favor with developers (and to sell Windows) "is not an unlawful end, but neither is it a procompetitive

justification." *Id.*, *see also id*. at 72 (characterizing the objective as "a competitively neutral goal").

Here, as in *Microsoft*, the relevant issue is not whether a monopolist is permitted to seek additional sales (it may), but whether the strategy employed by the defendant for increasing its sales is procompetitive or anticompetitive. In nearly every case of anticompetitive exclusion, the defendant can claim that it has additional production capacity and wishes to capture additional sales at the expense of a supplier that (absent the restraint) would be preferred by consumers. *E.g.*, *PolyGram*, 136 F.T.C. 310 (2003) (music companies co-producing the newest Three Tenors album wished to capture sales from catalog recordings); *In re N.C. Bd. of Dental Examiners*, FTC Docket No. 9343, slip op (Dec. 7, 2011) (dentists wished to capture sales from non-dentist providers of teeth whitening). The defendant's heartfelt desire to capture sales by pre-empting the workings of the market is not a procompetitive justification. *See Polygram*, 136 F.T.C. at 347 ("[T]he Supreme Court has recognized that a defendant cannot justify curbing access to a more-desired product to induce consumers to purchase larger amounts of a less-desired product.").

Additionally, McWane's argument that the MDA would provide additional volume to its foundry is unsupported by evidence, is a *post hoc* justification, and deserves no weight. *See In re Indiana Fed. of Dentists*, 101 F.T.C. at 175 ("Such justifications cannot be speculation alone but must be established by record evidence in order to be considered an adequate justification for otherwise anticompetitive behavior."); *see also United States v. Dentsply Int'l, Inc.*, 399 F.3d 181, 197 (3d Cir. 2005) (alleged justification was pretextual and did not excuse exclusionary practices); *Image Tech. Servs. v. Eastman Kodak Co.*, 125 F.3d 1195, 1219 (9th Cir. 1997)

(allowing court to disregard justification for challenged conduct when "evidence suggests that the proffered business justification played no part in the decision to act").

The evidence shows that McWane did ***not*** expect the MDA to increase market wide output. McWane viewed the MDA as a "choice of evils" between having Sigma enter independently versus sharing margin with Sigma on sales that McWane would have otherwise made.[708] Contrary to McWane's contention, it was "fairly obvious" that "having more Domestic suppliers doesn't really increase the size of the pie."[709] McWane calculated that the MDA would transfer margin to Sigma and also cause McWane to lose sales of Fittings sold to Open Specification jobs.[710] This defense should therefore be dismissed.

Second, McWane asserts that the MDA provided distributors with a choice of suppliers (either McWane or Sigma), and that some Distributors dislike McWane and prefer to deal with Sigma. This is not a cognizable efficiency because it fails to show the procompetitive benefits from the challenged restraint ***relative to*** the marketplace that would exist but-for that restraint. *See Polygram*, 136 F.T.C. at 347 (as part of efficiency defense, defendant must articulate the specific link between the challenged restraint and the benefit to consumers). Here, the but-for world is independent entry by Sigma as a virtual manufacturer. Even absent the MDA, Distributors would have had the option of buying Domestic Fittings from either McWane or Sigma. The MDA offers no advantage that offsets the loss of competition.[711]

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[708] CCPF 2341.

[709] CCPF 2341.

[710] CCPF 2368-2371.

[711] McWane's admission that having two suppliers of McWane Fittings does not increase total output (CCPF 2450-2452), indicates that the claimed efficiency is trivial at best.

Because McWane has not advanced a legitimate efficiency justification for the MDA, this Court should condemn it under an abbreviated (*i.e.*, inherently suspect) or full Rule of Reason analysis.

G. McWane Monopolized, and/or Attempted to Monopolize, the Market for Domestic Fittings (Counts Six and Seven)

Counts Six (Monopolization) and Seven (Attempted Monopolization) of the Complaint charge McWane with monopolizing and attempting to monopolize the Domestic Fittings market in violation of Section 2 of the Sherman Act. Responding to ARRA's allocation of $6 billion in funds for waterworks projects built with products made in the United States, Star announced at a June 2009 AWWA show that it would begin selling Domestic Fittings by the Fall. Threatened by this new entry, McWane implemented an Exclusive Dealing Policy designed to deter Distributors from dealing with Star and other rivals in the Domestic Fittings market. By denying its competitors a sufficient network of Distributors to sell their Domestic Fittings, McWane effectively prevented its rivals from reaching an efficient scale and, consequently, from constraining McWane's monopoly prices. McWane specifically adopted this policy to exclude competitors and to protect Domestic Fittings prices – where McWane enjoys a **{ }** greater margin on sales than it does for comparable imported Fittings sales.

The offense of monopolization has two elements: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen or historic accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 570-571 (1966). Attempted monopolization requires proof "(1) that the defendant has engaged in predatory or

anticompetitive conduct with a (2) specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." *Spectrum Sports v. McQuillan*, 506 U.S. 447, 456 (1993); *Lorain Journal Co. v. United States*, 342 U.S. 143, 152-153 (1951).

Here, McWane has monopoly power or the dangerous probability of achieving monopoly power in the Domestic Fittings market, and it exercised this power by implementing an Exclusive Dealing Policy with the specific intent of excluding competitors and maintaining supracompetitive prices. McWane's Exclusive Dealing Policy harmed competition by foreclosing its competitors from a key distribution channel and from obtaining a sufficient scale to be able to constrain McWane's monopoly prices. No procompetitive efficiencies that outweigh that harm.

1. McWane Possesses Monopoly Power or the Dangerous Probability of Achieving Monopoly Power in the Domestic Fittings Market

The Supreme Court defines monopoly power as "the power to control prices or exclude competition." *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956); *AD/SAT v. Associated Press*, 181 F.3d 216, 227 (2d Cir. 1999) (citing Areeda & Hovenkamp, *Antitrust Law* ¶ 501) (defining monopoly power as "the ability (1) to price substantially above the competitive level *and* (2) to persist in doing so for a significant period without erosion by new entry or expansion."). Monopoly power can be established by direct evidence of a firm's ability to control prices or exclude competitors, or through indirect proof of high market shares in a market protected by barriers to entry. *Microsoft*, 253 F.3d 34, at 51 (D.C. Cir. 2001).

From 2009 to 2011, McWane had monopoly power, or the dangerous probability of achieving monopoly power, in the Domestic Fittings market, *i.e.*, the market of Domestic

Fittings for use in waterworks projects with Domestic-Only Specifications.[712] *See supra* Part V.A.2 (defining relevant Domestic Fittings market). McWane's power can be inferred from its high Domestic Fittings market shares and the existence of high entry barriers in that market. Direct evidence of McWane's ability to control prices and exclude competitors confirms that McWane has monopoly power, or the dangerous probability of achieving monopoly power, in the Domestic Fittings market.

a) McWane Has High Market Shares in a Market Characterized by High Entry Barriers

Since at least 2006 and until Star entered the Domestic Fittings market in late 2009, McWane admits that it was the only manufacturer of Domestic Fittings.[713] After Star entered the Domestic Fittings market, McWane's share of the Domestic Fittings market in 2010 continued to be over **{ }**; with Star's share of the Domestic Fittings market approximately **{ }**.[714] In 2011, McWane's share of the Domestic Fittings market continued to be over **{ }** Star's approximate share was **{ }**.[715] McWane's market shares of more than **{ }** are more than sufficient to meet the legal standards for monopoly power, given the high barriers to entry into the Domestic Fittings market. *See supra* Part V.A.3 (discussing high entry barriers in Domestic Fittings market); *see also see also du Pont.*, 351 U.S. at 379, 391 (finding 75% of a relevant market sufficient to constitute monopoly power); *Grinnell Corp.*, 384 U.S. at 571 (inferring

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[712] CCPF 1655.

[713] CCPF 1659 (Answer at ¶ 40 ("McWane admits, on information and belief, that is was the only remaining domestic manufacturer of DIPF in sizes below 30" in 2009 until Star expanded its DIPF product offerings and sales to include domestic DIPF in 2009")).

[714] CCPF 1662.

[715] CCPF 1663.

monopoly power from the "predominant share" (87%) of the market); *Eastman Kodak Co. v. Image Tech. Servs.*, 504 U.S. 451, 481 (1992) (holding that a fact finder could infer monopoly power from an 80% market share).

Market shares sufficient to support a monopolization claim are also sufficient to support attempted monopolization. *See, e.g., Defiance Hosp. v. Fauster-Cameron, Inc*., 344 F. Supp. 2d 1097, 1117 (N.D. Ohio 2004) ("Because a lesser degree of market power is sufficient to establish an attempted monopolization claim, [the court] must find that defendants possessed a dangerous probability of achieving monopoly power."); *see also McGahee v. Northern Propane Gas Co.*, 858 F.2d 1487, 1506 (11th Cir. 1988) ("a sixty or sixty-five percent market share is a sufficiently large platform from which such a scheme could be launched to create a genuine issue of material fact as to whether there was a dangerous probability that Northern Propane would succeed in achieving a monopoly"); *Arthur S. Langenderfer, Inc. v. S.E. Johnson Co.*, 917 F.2d 1413, 1443 (6th Cir. 1990) (58% share sufficient).

b) Direct Evidence of McWane's Ability to Control Prices and to Exclude Competitors Confirms McWane's Monopoly Power or Dangerous Probability of Achieving Monopoly Power

Direct evidence of McWane's ability to control prices and to exclude Star confirms McWane's power in the Domestic Fittings market.[716] *See United States v. Dentsply Int'l*, 399 F.3d 181, at 188-190 (3d Cir. 2005) (ability to exclude is direct evidence of power); *Re/Max Int'l v. Realty One*, 173 F.3d 995, 1016, 1018-1019 (6th Cir. 1999) (same). For example, when McWane sells Domestic Fittings into Domestic-Only Specifications, it charges prices that are

[716] CCPF 1657 (Dr. Schumann noted that McWane could not have implemented its "full support" policy without exercising its monopoly power).

significantly higher than for identical Fittings sold into Open Specification jobs.[717] McWane's margins are approximately **{ }** greater on the sale of its Domestic Fittings (sold into Domestic-only Specifications) than for comparable import Fittings.[718] Finally, McWane imposed a price increase on its Domestic Fittings during the ARRA period.[719] As discussed below, McWane's ability to exclude Star through its Exclusive Dealing Policy is also direct evidence of McWane's monopoly power. *See Dentsply*, 399 F3d at 188-190; *see also infra* Part V.G.3.

2. McWane Adopted and Implemented an Exclusive Dealing Policy

After Star announced its intention to begin selling Domestic Fittings in the Fall of 2009, McWane launched a deliberate effort to maintain its monopoly power by impeding Star's entry.[720] The centerpiece of McWane's strategy was an "all or nothing" Exclusive Dealing Policy, *i.e.*, McWane warned Distributors that they would lose access to McWane's Domestic Fittings if they purchased Domestic Fittings from Star.[721] McWane also threatened that they would forfeit their accrued Domestic Fittings rebates and lose their eligibility for future rebates if they purchased Domestic Fittings from Star.[722]

McWane announced its Exclusive Dealing Policy in private meetings with customers and through a public letter to the industry, dated September 22, 2009, that stated:

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[717] CCPF 628-629; CCPF 1695.

[718] CCPF 1702.

[719] CCPF 2481-2482.

[720] CCPF 1824-1849.

[721] CCPF 1841-1842.

[722] CCPF 1843.

> [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. . . .
>
> Exceptions are where Tyler Union or Clow Water products are not readily available within normal lead times or where domestic fittings and accessories are purchased from another domestic pipe and fitting manufacturer along with that manufacture's [sic] ductile iron pipe.
>
> **Customers who elect not to support this program may forgo participation in any unpaid rebates for domestic fittings and accessories or shipment of their domestic fitting and accessory orders of Tyler Union or Clow Water products for up to 12 weeks.**[723]

Pointing to the "may" and "or" language in the September 22, 2009 letter, McWane denies that it adopted an exclusive dealing policy and instead characterizes it as a mere rebate policy.[724] As described below, the evidence of how the policy originated, how the policy was communicated to the industry, and how McWAne terminated a distributor for violating the Policy overwhelmingly establishes that McWane implemented an "all-or-nothing" exclusive dealing policy, and *additionally* threatened Distributors' accrued Domestic Fittings rebates. *See* Dennis W. Carlton and Jeffrey M. Perloff, *Modern Industrial Organization* at 46-27 (4th ed. 2005) (Exclusive dealing is a vertical restraint in which a supplier "prevents its distributors from selling competing brands.").

a) The Policy's Formation Documents Described a "Hard Approach – Full Line or No Line"

Shortly before Star announced its entry, McWane strategized that "any competitor" seeking to enter the Domestic Fittings market could face "significant blocking issues" if it was

[723] CCPF 1826; CX 0010 at 001 (emphasis added).

[724] CCPF 1830-1831.

not a "full line" supplier.[725] Soon after Star announced that it would enter, McWane considered how to use that strategy to "block Star" from entering the Domestic Fittings market.[726]

McWane evaluated three options: (i) a "Wait and See approach," which had the disadvantage of giving Star "time to continue building their business model;"[727] (ii) "Handle on a Job by Job basis," which had the disadvantage of allowing Star to "drive profitability out of the business;"[728] or (iii) "Force Distribution to Pick their Horse."[729] McWane detailed several advantages of "Forc[ing] Distribution to Pick their Horse:"

- It "[a]voids the job by job auction scenario within a particular distributor;"
- It "[p]otentially raises the level of supply concern among contractors;" and
- It "[f]orces Star/Sigma to absorb the costs associated with having a more full line before they can secure major distribution."[730]

Under the "Pick their Horse" option, McWane considered two alternatives: a "Soft Approach," whereby a Domestic rebate would command exclusivity; and a "Hard Approach – Full Line or No Line," which "require[d] exclusivity" for access to "Domestic fitting items we manufacture."[731] McWane's penalty under both alternatives would apply to Distributors on a

[725] CCPF 1806.

[726] CCPF 1806.

[727] CCPF 1808a.

[728] CCPF 1808b; CX 0076 at 009.

[729] CCPF 1808.

[730] CCPF 1808c.

[731] CCPF 1809.

corporate-wide basis, *i.e.*, across all branches of the Distributor, rather than "branch by branch."[732]

McWane determined that "the appropriate response to distribution is probably fairly hard line approach like a full line or no line approach."[733] And, in fact, Mr. Tatman, author of the September 22, 2009 letter, admitted that the letter "more closely align[s] with [] option 3"—"Force Distribution to Pick their Horse."[734]

b) McWane Communicated the "Hard Approach" to the Industry

Consistent with the "Hard Approach" *i.e.*, that McWane would not supply Domestic Fittings to any customer that also purchased Domestic Fittings from Star or others, McWane executives instructed their sales force to tell Distributors that McWane would never again sell Domestic Fittings to any Distributor that purchased Domestic Fittings from Star or another competitor.[735] McWane's National Sales Manager, Mr. Jansen, led a conference call with his sales force on August 28, 2009, where he explained the "new policy on Star Domestic" that they should communicate to Distributors "every day:"

> • What are we going to do if a customer buys Star domestic? We are not going to sell them our domestic . . . .
>
> o This means the customer will no longer have access to our domestic. They can still buy [non-Domestic] from us.
>
> o ***Once they use Star, they can't EVER buy domestic from us***. . . .

[732] CCPF 1810.

[733] CCPF 1807.

[734] CCPF 1827.

[735] CCPF 1832.

> o For companies with multiple branches (HD, Ferguson, Winwater, Hajoca, etc) - if one branch uses Star, every branch is cut off.
>
> . . .
>
> • Make sure you are discussing our stance with all customers, every day.[736]

To ensure that McWane's sales force adequately conveyed this message, Mr. Jansen tasked his territory managers with documenting their communications with Distributors about McWane's new policy.[737]

Mr. Jansen reiterated this same "Hard Approach" message to his sales force on November 3, 2009, noting that McWane had "made it very clear in the market regarding our stance on supporting the McWane domestic brand of fittings . . . . If one branch buys from someone other than [McWane or Sigma], then the whole company will be affected, not just that branch."[738] Mr. Jansen's message was received loud and clear, as indicated in a McWane territory manager's February 13, 2010, email to Mr. Jansen: "we were told to tell them [Distributors] more than one time that if you support Star then we will not sell to you."[739]

McWane executives also personally met with certain customers to make them aware of its "Hard Approach." For example, Mr. Tatman met with Mr. Morton from U.S. Pipe on

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[736] CCPF 1832 (CX 0710 at 001, 002 (emphasis added) (notes summarizing sales conference call); (CX 2477 (Jansen, Dep. at 164-169) (confirming that CX 710 accurately reflected Mr. Jansen's statements during conference call)).

[737] CCPF 1839.

[738] CCPF 1837.

[739] CCPF 1835.

October 13, 2009,[740] to warn him that if U.S. Pipe purchased any Domestic Fittings from Star, U.S. Pipe would lose access to McWane's Domestic Fittings.[741] McWane does not have a rebate program with U.S. Pipe; therefore, Mr. Tatman's communication was not related to a rebate policy.[742]

Mr. Sheley, President and Owner of Illinois Meter, similarly testified that the Exclusive Dealing Policy as written in the September 22, 2009, letter did not accurately reflect the policy communicated to him by McWane.[743] Instead, Mr. Tatman and Mr. Jansen told Mr. Sheley that if Illinois Meter purchased Domestic Fittings from anyone but McWane, that it "would lose the right to buy [McWane's Domestic Fittings] completely."[744] There was "no doubt" in Mr. Sheley's mind that McWane was "serious."[745]

In a presentation to his superiors, Mr. Tatman acknowledged that the market had understood McWane's Exclusive Dealing Policy to mean that McWane "will" – not "may" – cut off Distributors if they purchased any Domestic Fittings from Star:

> ***Although the words "may" and "or" were specifically used [in the September 22, 2009 announcement], the market has interpreted the communication in the more hard line "will" sense***.
>
> . . .

[740] CCPF 2050-2056.

[741] CCPF 2050-2056.

[742] CCPF 2039.

[743] CCPF 1830-1843.

[744] CCPF 2003-2005.

[745] CCPF 2003-2005.

> Access to McWane domestic product either through McWane or Sigma requires distributors ***to exclusively support*** McWane where products are available within normal lead times. ***Violation will result in: Loss of access, loss of accrued rebates***.[746]

c) McWane Terminates A Distributor That Violates Exclusive Dealing Policy

Hajoca Corporation's ("Hajoca") experience under McWane's Exclusive Dealing Policy conclusively establishes that the Policy was not a mere rebate policy. It also illustrates the costs, uncertainty, and risk imposed upon a Distributor that violated McWane's policy.

Hajoca is a national waterworks distributor, but only two of its waterworks locations, Lansdale, Pennsylvania, and Tulsa, Oklahoma, purchase Domestic Fittings regularly.[747] McWane informed Mr. Pitts, Hajoca's Director of Vendor Relations, that McWane would be taking a "hard stance" against Star's entry into the Domestic Fitting market, and that if any Hajoca location purchased Star Domestic Fittings, all Hajoca branches "would" (not "may") lose access to McWane Domestic Fittings:

> I had heard from Jerry Jansen last week that [McWane] would be taking a hard stance regarding domestic fittings manufactured for McWane. . . . Jerry had told me last week that if any [profit center or branch] in the US purchases domestic fittings from Star, all PCs would lose access to McWane's fittings and possibly lose rebates.[748]

[746] CCPF 1844-1845.

[747] CCPF 290, 1859.

[748] CCPF 1853; CX 0021-A at 001 (Mr. Pitts's September 22, 2009, email attaching the McWane Exclusive Dealing Policy).

Mr. Pitts had multiple conversations with Messrs. Jansen and Tatman where they reiterated and explained McWane's "hard stance."[749] These conversations were confirmed in a November 3, 2009, email from McWane to Hajoca:

> [I]f any Hajoca location chooses to buy another domestic fittings supplier['s] product Hajoca ***will not*** have direct access to the McWane ductile iron water main fittings for a period of time as well as loss of any accrued rebate to date.[750]

Ultimately, Hajoca, whose vast majority of branches were unaffected by the policy, decided to "stand by [their business] model" and permit its individual branches to choose their Domestic Fittings supplier.[751] Hajoca's Tulsa, Oklahmoa branch decided to purchase Domestic Fittings from Star.[752] McWane then informed Hajoca that McWane would "discontinue selling Hajoca domestic fittings since they are supporting Star's domestic line"[753] and that the penalty applied to the entire Hajoca company.[754] When Hajoca's Lansdale, Pennsylvania branch asked McWane if it could continue purchasing its Domestic Fittings, but at a higher price, McWane

[749] CCPF 1854-1855.

[750] CCPF 1857; CX 0024 at 001 (emphasis added).

[751] CCPF 1863-1864.

[752] CCPF 1860, 1865.

[753] CCPF 1866-1879.

[754] CCPF 1866-1879, 1889-1892.

told them that this "was not an option."[755] McWane also withheld Hajoca's accrued fourth quarter 2009 Domestic Fittings rebate.[756]

In March 2010, after McWane internally evaluated "[h]ow our potential FTC action might effect [sic] how we do business with them [Hajoca]," executives from both companies met to discuss the Domestic Fittings dispute.[757] As a result of that meeting, McWane agreed to allow Hajoca's Pennsylvania branch to resume ordering Domestic Fittings, starting in April 2010.[758] But Hajoca's Tulsa, Oklahoma branch was still barred from purchasing Domestic Fittings from McWane because it continued to buy from Star.[759]

d) McWane Acted With the Specific Intent to Monopolize the Domestic Fittings Market

Whereas for monopolization "the mere intent to do the act" is sufficient, *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 431-32 (2d Cir. 1945), attempted monopolization requires proof that the defendant had a "specific intent to destroy competition or build monopoly." *Times-Picayune Publ'g Co. v. United States*, 345 U.S. 594, 626 (1953); *accord Spectrum Sports*, 506 U.S. at 456. Specific intent may be proven by direct evidence, or inferred from conduct alone where the defendant's conduct is sufficiently egregious. *E.g.*, *Spectrum Sports*, 506 U.S. at 459 ("Unfair or predatory tactics. . . . may be sufficient to prove the necessary intent to monopolize."); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 602, 603 n.28

[755] CCPF 1868 (CX 1800; CX 2479 (McCullough, Dep. at 142 (CX 1800 accurately describes Mr. McCullough's conversation with Sean Kelly of Hajoca)).

[756] CCPF 1866-1879, 1889-1892.

[757] CCPF 1881-1883.

[758] CCPF 1884-1886.

[759] CCPF 1887-1888.

(1985) ("[N]o monopolist monopolizes unconscious of what he is doing.") (quoting *Alcoa*, 148 F.2d at 432); *Confederated Tribes of Silenz Indians of Or. v. Weyerhaeuser Co.*, 411 F.3d 1030, 1042 (9th Cir. 2005).

Here, as discussed above, McWane drafted and implemented its Exclusive Dealing Policy in direct response to competitive entry and because it wanted to "block" Star from entering the Domestic Fittings market. McWane's free-riding defense also confirms its intent to exclude competitors. McWane asserts that its Exclusive Dealing Policy was designed to prevent Star from free-riding on (i) McWane's lobbying investment to assure that ARRA's Buy-America provision would require the use of Domestic Fittings; and (ii) McWane's investment in a full range of tooling and patterns. By advancing these arguments as the intent behind the Exclusive Dealing Policy, McWane necessarily acknowledges that the policy was intended to exclude Star – that is the nature of avoiding free-riders. *See generally* Areeda & Hovenkamp, *Antitrust Law* ¶ 1812a (noting that "exclusive dealing eliminates all opportunity for interbrand free-riding by eliminating the dealer's right to sell product B at all."). McWane cannot simultaneously assert that the intent of the Exclusive Dealing Policy was to prevent free-riding and deny that it intended to exclude Star.

Direct evidence also proves that McWane implemented its Exclusive Dealing Policy with the specific intent to prevent Star from lowering prices in the Domestic Fittings market.[760] On the import side of the Fittings market, Star had a reputation for aggressive discounting, which caused

[760] CCPF 1787.

McWane to also lower its prices to win business.[761] Thus, upon hearing that Star might sell Domestic Fittings, Mr. McCullough expressed fear that Star would bring the same discounting practices to that market as well: "Star is a determined competitor that just keeps making a bad industry worse."[762]

McWane Executive, Mr. Walton (Mr. Tatman's immediate boss), shared the same concerns:

> Whether we end up with Star as a complete or incomplete domestic supplier my chief concern is that ***the domestic market gets creamed from a pricing standpoint*** just like the non-domestic market has been driven down in the past. That would dramatically effect [sic] our profit potential.[763]

Mr. Tatman agreed with Messrs. McCullough and Walton's assessment that there was a "slim chance for "profitable cohabitation" with Star, and that McWane should "make sure" that Star didn't achieve enough "critical mass" in the Domestic Fittings market to become profitable:

> I agree that at this stage the chance for profitable cohabitation with Star owning a pc of the Domestic market is slim. Their actions in soil pipe are a good indication. If their claims are ahead of their actual capabilities ***we need to make sure that they don't reach any critical market mass that will allow them to continue to invest and receive a profitable return*** . . . . I don't sense that Sigma is yet fully committed and they will be watching our response very closely to assess their strategy and probability of financial success.[764]

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[761] *E.g.* CCPF 854-856 (Star Project Pricing in 2007 takes business from McWane and drives down market prices); CCPF 1793-1795 ("Star has historically shown that they will just continue incremental discounting down to the point when they're selling breakeven.").

[762] CCPF 1788.

[763] CCPF 1790 (emphasis added).

[764] CCPF 1791.

Mr. Tatman feared that Star would not be a "responsible competitor" in the Domestic Fittings market as long as it was able to generate incremental margins for their business, *i.e.*, Star would not be content to price at supracompetitive levels.[765] As such, the biggest risk factor identified in McWane's 2010 Budget was the "[e]rosion of domestic pricing if Star emerges as a legitimate competitor."[766]

McWane also knew that the mere threat of low prices from Star could bring prices down.[767] If Star gained a toehold with Distributors, it would put price pressure on McWane in two ways; not only would Distributors play McWane and Star off one another to gain lower prices, but even loyal McWane Distributors would pressure McWane for a lower price when they faced the prospect of losing downstream sales to competing Distributors bidding with Star's Domestic Fittings.[768] McWane's Mr. Napoli recounted this dynamic, which McWane hoped to avoid:

> We may not be losing business now but I am concerned about the future. Those [Distributors] not aligned with us or Sigma will be aggressive with Star backing them against our people… When that happens our distributors will continually pressure us to 'do something' (lower prices). If [Star] stay[s] in business, we will always see downward pressure in the future.[769]

A Star toehold would also afford it a chance to prove itself a reliable Domestic Fittings supplier and grow its business. As Mr. Napoli explained:

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[765] CCPF 1792.

[766] CCPF 1796.

[767] CCPF 1797.

[768] CCPF 1799.

[769] CCPF 1799.

> Like any - any competitive situation in any industry, I mean, they'll start with the small ones. They won't go after the big fish first. They'll go to the small ones and build their - build their reputation. You know, a competitor is not going to go to - a new competitor in something is not going to go to Walmart from day one. They'll go to somebody smaller. Maybe that's not a good analogy, but they'll go to somebody smaller and build reputation and build a - you know, a base and then go from there to bigger ones, makes them a little more legitimate, let's say, if they have a history or a track record.[770]

Mr. Jansen agreed, and stated that McWane needed to block Star from as many Distributors as it could:

> We need to make sure we are getting into the smaller [Distributor] players up there and keep them from Star. ***That's how a cancer starts***, is by letting them get in with one, two, then three, and it crumbles from there.[771]

McWane intended to fight the cancer from spreading to its Domestic Fittings market. McWane knew that it could maintain its high prices if nobody was willing to buy Domestic Fittings from Star; Star's price would then be "moot" or not "real."[772]

McWane's goal to maintain high profit margins and high prices by preventing Star from becoming a legitimate competitor is not a procompetitive reaction like pursuing greater sales by increasing quality and service or lowering price. McWane did not fear lost sales volume, but rather the overall effect that competition would have on the Domestic Fittings market. This is what distinguishes McWane's intent (to ***avoid*** competition) from the laudable intent to ***win*** the competition and take business from one's rival.

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[770] CCPF 1803.

[771] CCPF 1802 (emphasis added).

[772] CCPF 1800; *see also* CCPF 1801 ("We don't want the market tumbling and if we keep everyone on board we shouldn't have to drop prices.").

3. McWane's Exclusive Dealing Policy is Exclusionary Conduct That Likely Harms Competition

"A firm violates Section 2 only when it acquires or maintains, or attempts to acquire or maintain, a monopoly by engaging in exclusionary conduct…." *Microsoft*, 253 F.3d at 58. Conduct is exclusionary when it tends to exclude competitors "on some basis other than efficiency," *i.e.*, when it "tends to impair the opportunities of rivals" but "either does not further competition on the merits or does so in an unnecessarily restrictive way." *Aspen Skiing Co.*, 472 U.S. at 605 & n.32 (citations omitted).

As a preliminary matter, McWane's anticompetitive intent in adopting its Exclusive Dealing Policy is relevant to understanding that Policy's likely effects. *Bd. of Trade of the City of Chicago v. United States*, 246 U.S. 231, 238 (1918) ("knowledge of intent may help the court to interpret facts and to predict consequences"); *see also Aspen Skiing Co.*, 472 U.S. at 603; *Microsoft*, 253 F.3d at 59. As explained in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, "evidence of intent is … relevant to the question whether the challenged conduct is fairly characterized as 'exclusionary' or anticompetitive." *Aspen Skiing Co.*, 472 U.S. at 602; *see also Microsoft*, 253 F.3d at 59 (finding evidence of intent relevant when it "helps us understand the likely effect of the monopolist's conduct").

In *Aspen Skiing Co.*, the Supreme Court determined that the defendant's exclusionary policy "was not motivated by efficiency concerns and that [the defendant] was willing to sacrifice short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival." 477 U.S. at 610-611. This finding therefore supported the conclusion that the defendant's conduct was exclusionary and anticompetitive. *Id.* Here, the evidence shows that McWane's Exclusive Dealing policy involved a similar sacrifice of its customers' goodwill -

- Distributors resented the Exclusive Dealing Policy.[773] This, coupled with McWane's unambiguous intent to impede Star's entry, supports the conclusion that the Exclusive Dealing policy was anticompetitive in both its intent and in its effect.

Although there is no set formula for establishing the likely competitive effects of an exclusive dealing policy by a monopolist, a *prima facie* case of competitive harm under Section 2 is usually established by demonstrating that: (1) there is a significant degree of market foreclosure; and (2) the ability of one or more significant rivals to compete is thereby impaired. *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 271 (3d Cir. 2012) ("no set formula" for the rule of reason analysis of exclusive dealing by a monopolist, no single way of establishing liability); *Dentsply*, 399 F.3d at 188-190, 194-96 (considering foreclosure and impairment on rivals' ability to compete); *Microsoft*, 253 F.3d at 69 (same); *In re: McWane, Inc.* 2012 FTC LEXIS 155, at *63 ("the question here is whether McWane's conduct foreclosed a substantial portion of the effective channels of distribution, and whether the conduct had a significant effect in preserving McWane's monopoly.").

Two government cases illustrate the required analysis. In *United States v. Dentsply*, the defendant was the largest manufacturer of artificial teeth in the United States, accounting for approximately 75 percent of sales. *Dentsply*, 399 F.3d at 184. Dentsply prohibited its network of authorized dealers, 23 in total, from also marketing the teeth of competing sellers. *Id.* at 184-185. The Government established a *prima facie* case of competitive harm by showing that Dentsply had blocked rival manufacturers from access to these "key dealers," which impeded the

[773] CCPF 1841-1843, 1878, 1889-1902, 1909.

rivals from expanding to where they could pose a "real threat" to Dentsply's monopoly power. *Id.* at 188-191.

Likewise, in *United States v. Microsoft*, the government challenged Microsoft's exclusive dealing agreements with the top Internet Access Providers (IAPs) in North America, accounting for a majority of all IAP subscribers. *Microsoft*, 253 F.3d at 69. IAPs were one of the most efficient channels for distributing browsing software. *Id.* at 70-71. The excluded rival, Netscape, was compelled to use more costly means for reaching consumers, such as by offering free downloads on the Internet. *Id.* The court ruled that Microsoft's exclusive dealing arrangements diminished Netscape's ability to obtain the critical mass of users needed to constrain Microsoft's operating system monopoly, and that this was sufficient to establish a *prima facie* case of competitive harm. *Id.* at 60, 70-71. ("Microsoft's deals with the IAPs clearly have a significant effect in preserving its monopoly; they help keep usage of [Netscape's] Navigator below the critical level necessary for Navigator or any other rival to pose a real threat to Microsoft's monopoly.").

The evidence shows that McWane's Exclusive Dealing Policy substantially foreclosed Star from access to Distributors, a "key" distribution channel for Domestic Fittings, and Star was precluded from reaching a "critical mass" of sales. As a result, McWane impaired Star's ability to compete effectively.

a) McWane's Exclusive Dealing Policy Foreclosed Star From a Significant Portion of the Domestic Fittings Market

Exclusive dealing by a monopolist alters the dynamics of competition. Instead of competing transaction by transaction, the entrant is forced to compete on an all-or-nothing basis. This all-or-nothing policy increases the risk to Distributors of dealing with a new, untested entrant like Star: a Distributor may need to purchase an oddball Domestic Fitting that is

unavailable from Star, but it would be barred from purchasing the Domestic Fitting from McWane;[774] its resulting effect on the Distributor's own ability to service its customer could be disastrous.[775] To avoid this risk, Distributors purchase all of their Domestic Fittings from McWane even though they would have preferred to purchase at least some from Star.[776] *See ZF Meritor*, 696 F.3d at 283 ("due to [defendant] Eaton's position as the dominant supplier, no OEM could satisfy customer demand without at least some Eaton products, and therefore no OEM could afford to lose Eaton as a supplier").[777]

For a Fittings supplier (whether domestic or imported), Distributors are an important link in the supply chain and access to Distributors is essential for effectively reaching the End User.[778] All or virtually all of Fittings are sold through Distributors because they offer numerous advantages. For example, Distributors maintain inventories of Fittings, which reduces the need

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[774] CCPF 2092, 2095.

[775] CCPF 1901; CCPF 2092.

[776] CCPF 2093.

[777] *See generally* RICHARD A. POSNER, ANTITRUST LAW 229, 251-54 (2d ed. 2001). Richard Posner, circuit court judge and eminent antitrust scholar, identifies *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U.S. 346 (1922), as the paradigm example of anticompetitive exclusion through exclusive dealing. Defendant Standard Fashion was a monopolist manufacturer of dress patterns that women could use to make their own dresses. For the convenience of customers, stores needed a full line, consisting of hundreds of patterns. Standard Fashion required the stores to carry its line of patterns on an exclusive basis. Stores were required to choose a supplier on an all-or-nothing basis. As a result, any firm entering the dress patterns business would have to create not a single successful product, but a line as long and as popular as Standard Fashion's line. In this setting, exclusive dealing increases the time necessary for new entry (the duration of monopoly pricing), and thus injures competition. *Id.* McWane's Exclusive Dealing policy precisely mirrors the anticompetitive strategy condemned in *Standard Fashion*.

[778] CCPF 475, 510-512.

for Fittings suppliers to have local warehouses and distribution facilities across the United States.[779] Distributors lower Fitting suppliers' costs by handling billing and invoicing to End Users, and by assuming the credit risk from dealing with End Users.[780] Distributors also provide one-stop shopping for End Users to purchase the entire bundle of waterworks products (pipe, valves, Fittings, hydrants, and accessories), which allows Fitting Suppliers to specialize in one or more product lines and not be at a competitive disadvantage relative to a supplier who may have a broader waterworks products line.[781] For these and other reasons, McWane admits that Distributors are "critical to [its] success" as a Fittings supplier.[782] Distributors are likewise critical to Star's success.[783]

McWane's Exclusive Dealing Policy substantially foreclosed Star from this key distribution channel. For example, Ramesh Bhutada of Star testified that before McWane's September 22, 2009 announcement, Star had received Distributor requests for quotes for Domestic Fittings worth approximately $10 million. Those requests were from the two largest waterworks distributors in the country, HD Supply and Ferguson, important regional distributors, and a variety of independent waterworks distributors.[784] Almost immediately after McWane announced its Exclusive Dealing Policy, those Distributors withdrew their quotes from Star and

[779] CCPF 492-495; CCPF 514-517; CX 2260-A (Schumann Rep. at 63).

[780] CCPF 518.

[781] CCPF 487; CCPF 513; CX 2260-A (Schumann Rep. at 64).

[782] CCPF 510-512.

[783] CCPF 510.

[784] CCPF 2103.

told Star that they were no longer interested in purchasing Domestic Fittings from it.[785] Other Distributors had intended to purchase some of their Domestic Fittings from Star, but decided not to submit requests for quotes to Star after McWane's announcement.[786]

Thus, Distributors that were otherwise willing to purchase Domestic Fittings from Star were deterred from doing so (or purchased less) because of McWane's Exclusive Dealing Policy. For example, HD Supply is the largest waterworks distributor in the United States, and accounts for approximately 25 percent of Fittings sales.[787] HD Supply purchases imported Fittings from

[785] CCPF 2089-2090.

[786] CCPF 2093-2095. Note: Hearsay introduced to prove a buyer's reason or motivation for refusing to do business with a seller, as well as other out of court statements of statements of motive, intent, or plan, is admissible under the "state of mind" exception to the hearsay rule set forth in Federal Rule of Evidence 803(3). *See Calahan v. A.E.V*, 182 F.3d 237, 251 (3d. Cir. 1999); *Mun. Revenue Serv., Inc. v. Xspand, Inc.*, 700 F.Supp.2d 692, 705 (M.D. Pa. 2010) (hearsay regarding the buyer's motives are admissible to establish that seller's marketing strategy caused buyers not to do business with competitor); *Discover Fin. Servs. v. Visa U.S.A. Inc*., 2008 U.S. Dist. LEXIS 80801 at 4 (S.D.N.Y. 2008) ("testimony concerning the motivation of customers for ceasing to deal with a business is admissible under the 'state of mind' exception to the hearsay rule"). Therefore, in evaluating whether the Distributors stopped dealing with Star because of McWane's Exclusive Dealing Policy, the Court should consider the investigational hearing and deposition testimony of Star's witnesses and their business records such as CX 0012 recounting the Distributors' statements, along with the Distributors' testimony and business records introduced by Complaint Counsel. *E.g.*, CCPF ¶¶ 1902, 1931, 1932, 1933, 1946, 1986, 1990, 1991, 2021, 2023, 2024 (deposition testimony of Mr. Berry); ¶ 2090 (testimony of Mr. Bhutada); ¶¶ 1930, 1962, 2021, 2025, 2060, 1962 (Mr. McCutcheon's deposition or investigational hearing testimony and business records). This testimony is admissible even in instances in which the witness did not identify the declarant/customer who made the statement. *Calahan*, 182 F.3d at 252 n.1 ("[W]e do not think the fact that the declarants are not specifically identified is relevant for determining whether their statements fall within the Rule 803(3) hearsay exception."); *see, e.g.*, Complaint Counsel's Proposed Finding of Fact ¶ 1902 (Mr. Berry testified that "Every distributor -- every customer distributor that we talked to or that I talked to after this letter came out, wanted to talk about it. . . . They don't want to take the chance of the what-if.").

[787] CCPF 265-266, 481-482.

Star, and its branch offices had requested quotes from Star for Domestic Fittings.[788] But McWane's Exclusive Dealing policy significantly raised the risk of doing business with Star: if Star was unable to deliver a necessary Domestic Fitting of any size or configuration, then HD Supply might not be able to service its own customers.[789] Consequently, Jerry Webb, CEO and President of HD Supply, directed his district and branch managers to adhere to McWane's "mandate." [790] It was unusual and "perhaps the first time" that Mr. Webb had issued such a "mandate" for the entire HD Supply Waterworks Division.[791] Upon receiving Mr. Webb's directive, the branch offices canceled their requests to Star.[792]

Ferguson Enterprises, Inc., ("Ferguson"), the second largest waterworks distributor in the nation accounting for approximately 25 percent of industry sales,[793] also testified that McWane's Exclusive Dealing Policy was one "component" of the reason why Ferguson did not purchase Domestic Fittings from Star.[794] Ferguson's vice president of waterworks, William Thees, disfavored Star for various reasons, but ordinarily permitted the company's district managers to make sourcing decisions, and Ferguson branches regularly purchased imported Fittings from

[788] CCPF 1921-1922.

[789] CCPF 1908, 1910-1917.

[790] CCPF 1910-1912.

[791] CCPF 1918-1919.

[792] CCPF 1921-1936.

[793] CCPF 274-275, 481, 483.

[794] CCPF 1940.

Star.[795] Upon learning of McWane's Exclusive Dealing policy, Mr. Thees directed his district managers not to purchase Domestic Fittings from Star. While other factors contributed to this decision, McWane's Exclusive Dealing policy was the triggering "catalyst."[796] According to Mr. Thees, there were Ferguson branch managers who had strong relationships with Star that likely would have purchased Domestic Fittings from Star had McWane's policy not been in place.[797] Indeed, Star's Domestic Fitting tracking log shows that Ferguson rejected numerous Star quotes because of the policy.[798]

Other Distributors testified that they too were deterred from purchasing Domestic Fittings from Star because of McWane's Exclusive Dealing Policy:

- WinWholesale, the third largest Distributor in the United States,[799] purchases import Fittings from Star,[800] and was also open to purchasing Domestic Fittings from Star.[801]

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[795] CCPF 1950-1952, 1941.

[796] CCPF 1939-1940, 1942.

[797] CCPF 1941.

[798] CCPF 1948-1949. That there were multiple reasons for Ferguson's decision does not preclude a finding that the Exclusive Dealing policy foreclosed Ferguson from dealing with Star. An antitrust plaintiff is required to show only that the challenged conduct "materially contributed" to the plaintiff's injury. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 702 (1962); *see also Costner v. Blount National Bank*, 578 F.2d 1192, 1195 (6th Cir. 1978) (upholding a jury finding of causation since, even though "[t]here was evidence that general economic conditions and poor management caused a decline in plaintiff's business," there also was "evidence that the illegal tying arrangements contributed to the decline").

[799] CCPF 284.

[800] CCPF 1964.

[801] CCPF 1954-1955.

The day after McWane announced its Exclusive Dealing Policy, WinWholesale placed Star on its "Not Approved" vendor list for Domestic Fittings.[802]

- Groeniger & Co. ("Groeniger"), a leading distributor in northern California,[803] purchases import Fittings from Star[804] and had begun purchasing Domestic Fittings from Star before McWane adopted its Exclusive Dealing Policy.[805] Groeniger had hoped to nurture a rival to McWane in the Domestic Fittings market to secure better pricing and service.[806] McWane retaliated against Groeniger in various ways, including by raising Groeniger's price for a previously ordered product.[807] Fearful of being cut off by McWane entirely, and chastened by the price penalty, Groeniger stopped purchasing Domestic Fittings directly from Star (although they continued to make limited purchases through Griffin Pipe as part of a pipe-Fitting bundled purchase, which was an exception to the McWane Exclusive Dealing Policy).[808]
- Illinois Meter Company, a leading distributor serving southern Illinois,[809] purchases import Fittings from Star.[810] At trial, the President of Illinois Meter testified that but-for

[802] CCPF 1956-1963.

[803] CCPF 317, 321, 323.

[804] CCPF 320.

[805] CCPF 1966.

[806] CCPF 1967-1970.

[807] CCPF 1971-1977.

[808] CCPF 1978-1992.

[809] CCPF 329-339.

McWane's exclusive dealing policy, Illinois Meter would have purchased Domestic Fittings from Star.[811] He also testified that he continues not to purchase Domestic Fittings from Star because McWane has never told him that they have retracted their Exclusive Dealing Policy.[812]

- C.I. Thornburg Company, the leading Distributor serving West Virginia,[813] purchases import Fittings from Star,[814] but declined to purchase Domestic Fittings from Star only because of the penalties embodied in McWane's Exclusive Dealing Policy.[815]
- E.J. Prescott, the leading Distributor serving the New England states,[816] purchases import Fittings from Star,[817] but declined to purchase Domestic Fittings from Star because it feared that McWane would cut off its access to Domestic Fittings.[818]

By any relevant measure, McWane's conduct caused substantial foreclosure. If foreclosure is based on the percentage of McWane's market share sold through the company's exclusive distributors, as suggested in *Omega Envtl., Inc. v. Gilbarco Inc.*, 127 F.3d 1157, 1162

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[810] CCPF 327.

[811] CCPF 2009-2011.

[812] CCPF 2011-2012.

[813] CCPF 345-346.

[814] CCPF 348.

[815] CCPF 2018-2019.

[816] CCPF 308, 314.

[817] CCPF 310.

[818] CCPF 1896; CX 2502 (Prescott, Dep. at 114) (explaining that E.J. Prescott did not want to "turn up any apple carts" by purchasing Domestic Fittings from Star).

(9th Cir. 1997), then the foreclosure rate is in excess of 90 percent.[819] A more conservative measure of foreclosure is the percentage of the market represented by distributors that were affirmatively deterred from buying from Star due to McWane's conduct. *Cf. Stitt Spark Plug Co. v. Champion Spark Plug Co.*, 840 F.2d 1253, 1258 (5th Cir. 1988). Under this measure, the foreclosure rate is in excess of 50 percent. (HD Supply and Ferguson, alone, account for 50 percent of the market.)

The degree of foreclosure present here is far above what is required to establish injury to competition. Exclusive dealing can violate the antitrust laws if the exclusive agreements foreclose "a substantial share of the line of commerce affected." *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961); *Barr Labs., Inc. v. Abbott Labs*, 978 F.2d 98, 110 (3d Cir. 1992); *Am. Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230, 1252 (3d Cir. 1975). Even absent monopoly power, courts have found exclusive dealing arrangements anticompetitive where they foreclose 40-50 percent of the market. *Microsoft*, 253 F. 3d at 70; Areeda & Hovenkamp, *Antitrust Law* ¶ 1821 (foreclosure above 50 percent is "routinely condemned"). The threshold for substantial foreclosure is lower where, as here, the respondent has monopoly power. "[A] monopolist's use of exclusive contracts, in certain circumstances, may give rise to a [Section] 2 violation even though the contracts foreclose less than the roughly 40% to 50% share usually required in order to establish a [Section] 1 violation." *Microsoft*, 253 F.3d at 70.

McWane has argued that not all Distributors nationwide were deterred from dealing with Star, and that Star has made sales to over one hundred customers by the end of 2011. McWane

[819] McWane sold 95 percent of the Domestic Fittings in the United States in 2010, and roughly 99 percent of those sales were through its exclusive distributors, (CX 2483 (Tatman, IHT at 72), resulting in a foreclosure percentage of 94 percent.

argued that such evidence showed that McWane's Exclusive Dealing Policy was not sufficiently exclusionary. The Commission rejected this argument:

> [Under Sherman Act Section 2] a plaintiff is not required to show that the claimed monopolist excluded all entry by rivals. As explained in *United States v. Dentsply International*, "[t]he test is not total foreclosure, but whether the challenged practices bar a substantial number of rivals or severely restrict the market's ambit." 399 F.3d 181, 191 (3d Cir. 2005). Accordingly, the question here is whether McWane's conduct foreclosed a substantial portion of the effective channels of distribution, and whether the conduct had a significant effect in preserving McWane's monopoly.

Summary Judgment Decision at 25. As discussed below, by substantially foreclosing Star from this "key" Distributor channel, McWane preserved its monopoly power in the Domestic Fittings market.

b) McWane's Exclusive Dealing Policy Impaired Star's Ability to Compete Effectively Against McWane

Exclusive dealing is anticompetitive when it impairs the ability of rivals to compete effectively and "gives the defendant the ability (or greater ability) to raise prices over the competitive level." Jonathan M. Jacobson, *Exclusive Dealing, "Foreclosure," and Consumer Harm*, 70 Antitrust L. J. 311, 313 (2002); c*f. ZF Meritor*, 696 F.3d at 271 ("In some cases a dominant firm may be able to foreclose rival suppliers from a large enough portion of the market to deprive such rivals of the opportunity to achieve the minimum economies of scale necessary to compete."). Exclusive dealing can impair the ability of rivals to compete by denying them sufficient scale to be able to lower their costs (and their prices):

> Customer foreclosure refers to using exclusive contracts and other strategies that exclude rivals from access to a sufficient customer base. If the monopolist can reduce the sales of a competitor through the use of exclusive contracts, bundling, or other means, the rival may suffer higher costs that make it a less formidable competitor in selling to other customers.

Steven C. Salop & R. Craig Romaine, *Preserving Monopoly: Economic Analysis, Legal Standards, and Microsoft*, 7 *Geo. Mason L. Rev.* 617, 627 (1999).

By substantially foreclosing Star's access to Distributors, McWane's Exclusive Dealing Policy thwarted Star's strategy to purchase its own domestic foundry for producing Domestic Fittings. Doing so would have lowered Star's costs, allowed it to be a more efficient and effective competitor, and lowered its prices in competition with McWane.

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By the end of 2009, Star had more than 325 patterns, which enabled Star to meet **{ }**% of the Domestic Fittings demand.[823] Star's entry into the Domestic Fittings market was accelerated because Star had the expertise, the distribution network, the sales team, and the existing long-term business relationships with Distributors that it had developed during its two

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[820] CCPF 1722, *in camera*.

[821] CCPF 1722-1725, *in camera*; CCPF 1726-1728.

[822] CCPF 1725, *in camera*.

[823] CCPF 1751, *in camera*; CCPF 1750.

} CCPF 1752, *in camera*. **{**

} CCPF 1753, *in camera*.

decades selling imported Fittings.[824] Star's main barrier to entry was McWane's Exclusive Dealing Policy.

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}[830] Star concluded that its major customers – *e.g.*, **{**

} – would not

[824] CCPF 1758-1765; CCPF 125.

[825] CCPF 1729, *in camera*; CCPF 1732, *in camera*.

[826] CCPF 2130, *in camera*.

[827] CCPF 2132, *in camera*.

[828] CCPF 2135, *in camera*

[829] CCPF 2138, *in camera*; CCPF 2136, *in camera*.

[830] CCPF 2144, *in camera*; CCPF 2146.

buy Domestic Fittings from Star because of McWane's Exclusive Dealing Policy.[831] In particular, Star concluded that McWane's Exclusive Dealing Policy foreclosed Star from selling Domestic Fittings to both HD Supply and to Ferguson – which, combined, account for approximately 50 percent of all Distributors' sales[832] – and would cut its potential Domestic Fittings sales in half.[833] Based on these withdrawn orders, Star **{**

}[834] As such, Star terminated its negotiations for the purchase **{**

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[831] CCPF 2147-2155, *in camera*.

[832] CCPF 482; CCPF 483.

[833] CCPF 2156.

[834] CCPF 2142, *in camera*.

[835] CCPF 2156, *in camera*; CCPF 2157, *in camera*.

[836] CCPF 2104-2108; CCPS 2140, *in camera*.

[837] CCPF 2139, *in camera*. **{**

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By thwarting Star's plans to acquire a domestic foundry, McWane's Exclusive Dealing Policy has increased Star's costs of production by **{ }** percent (when comparing the costs of Domestic Fittings production at independent foundries to the costs of production at its own foundry).[839] **{**

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[838] CCPF 2158; CCPF 2159, *in camera*.

[839] CCPF 1730, *in camera*.

[840] CCPF 2112, *in camera*.

[841] CCPF 2112-2114, *in camera*.

}[842] **{**

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}[844] Thus, McWane need not respond to Star's limited presence in the market.[845] **{**

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When, as here, a monopolist prevents its rival from lowering costs, consumers suffer because the rivals are unable to engage in meaningful price competition. Salop & Romaine, *Preserving Monopoly- Economic Analysis, Legal Standards, and Microsoft*, 7 *Geo. Mason L. Rev*. 617, 627 (1999) ("If the monopolist can reduce the sales of a competitor through the use of exclusive contracts, bundling, or other means, the rival may suffer higher costs that make it a less formidable competitor in selling to other customers.").

Raising rivals' costs is a recognized mechanism for harming competition in monopolization cases. *See*, *e.g.* Thomas G. Krattenmaker & Steven C. Salop, *Raising Rivals'*

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[842] CCPF 2117, 2121, 2129; CCPF 2128, *in camera*.

[843] CCPF 2116.

[844] CCPF 2141.

[845] CCPF 2164; CCPF 2165.

[846] CCPF 2125, *in camera*; CCPF 2161, *in camera*.

Costs To Achieve Power over Price, 96 *Yale L.J.* 209, 225 n.60 (1986); Salop & Romaine, *Preserving Monopoly- Economic Analysis, Legal Standards, and Microsoft*, 7 *Geo. Mason L. Rev*. 617, 627 (1999) (describing use of exclusives to keep WEOL below "minimum viable scale" in *Lorain Journal*, 342 U.S. 209 (1951)); Elizabeth Granitz & Benjamin Klein, *Monopolization by "Raising Rivals' Costs": The Standard Oil Case*, 39 *J. Law & Econ*. 1 (1996) (forcing high transportation costs on entrants); *cf.* Herbert J. Hovenkamp, *Quasi Exclusive Dealing* p. 2-3 (September 2011), *available at* at SSRN: http://ssrn.com/abstract=1793126 or http://dx.doi.org/10.2139/ssrn.1793126 (describing Microsoft's all or nothing license as imposing incremental costs for use of rival software).

Here, McWane's Exclusive Dealing Policy is a textbook example of the reasons exclusive dealing arrangements are condemned.

4. McWane's Free-Riding Defense is Invalid

Because the evidence establishes a *prima facie* case of competitive injury, the burden shifts to McWane to proffer a procompetitive justification for its Exclusive Dealing Policy. *Eastman Kodak*, 504 U.S. at 483; *Microsoft*, 253 F.3d at 59 (defendant must show that "its conduct is indeed a form of competition on the merits because it involves, for example, greater efficiency or enhanced consumer appeal."). The analysis must focus upon the benefits, if any, that consumers receive from exclusive dealing, and not on those advantages that inure to McWane alone. *Microsoft*, 253 F.3d at 71. If McWane advances a plausible and cognizable efficiency justification, "then the burden shifts back to [Complaint Counsel] to rebut that claim." *Id.* at 59.

McWane and its economic expert Dr. Parker Normann advance two efficiency arguments, each denominated as a "free-riding defense." Both of McWane's free-riding arguments are fundamentally flawed.

Before addressing McWane's contentions, we offer three preliminary points. First, the Court must be careful to distinguish between an effort to control free-riding, and an attempt to eliminate a legitimate form of competition. *See Eastman Kodak*, 504 U.S. at 485 (rejecting free-riding defense); *Polygram Holding, Inc. v. Fed. Trade Comm'n*, 416 F.3d 29, 37-38 (D.C. Cir. 2005) (same); *United States v. Dentsply*, 399 F.3d at 185, 197 (same).

Second, Complaint Counsel acknowledges that situations exist in which exclusive dealing may remedy a *bona fide* free-riding problem. *See Ryko Mfg. Co. v. Eden Servs.*, 823 F.2d 1215, 1234 n. 17 (8th Cir. 1987); Richard M. Steuer, *Exclusive Dealing in Distribution*, 69 Cornell L. Rev. 101, 127 *et seq*. (1983).[847] For example, when a supplier invests in strengthening or improving its independent distributors, and the distributor represents several competing brands, then the benefits of one supplier's investment may be appropriated by a rival supplier. This diminishes the supplier's incentive to make such investments. Exclusive dealing may incentivize the supplier to assist distributors in their marketing efforts because rival brands are prevented from taking a free-ride on the supplier's investment. Richard M. Steuer, *Exclusive Dealing in Distribution*, 69 Cornell L. Rev. 101, 127-28 (1983).

Third, exclusive dealing is ***not*** the norm in the waterworks industry. Waterworks suppliers ordinarily do not make significant investments in particular distributors, and distributors purchase and re-sell imported Fittings from multiple suppliers. The industry apparently finds this arrangement to be efficient and investment in exclusive distributors unnecessary.

[847] *See also* CX 2260-A (Schumann Rep. at 126).

a) McWane's Lobbying Campaign Does Not Justify Exclusive Dealing

McWane first claims that Star should not be allowed to free-ride on McWane's investments in lobbying Congress to pass the Buy American requirement for ARRA-funded waterworks projects.[848] According to McWane, when Star sells Domestic Fittings for ARRA-funded projects, it is indirectly benefitting from McWane's lobbying expenditures; McWane's Exclusive Dealing Policy therefore shifts sales from Star (the alleged free-rider) to McWane (the worthy investor).

This argument distorts the free-riding concept in antitrust law. McWane did not invest in strengthening the capabilities of its waterworks distributors – particular distributors that it now claims as its own. Instead, McWane's political investment arguably expanded the demand for Domestic Fittings.[849] As a matter of law, this expenditure does not secure for McWane the right to exclude from distribution all competing sellers of this product. The Commission rejected a very similar free-riding claim in the *In re Polygram Holding* case:

> The sort of behavior that Respondents disparage as "free-riding" – *i.e.*, taking advantage of the interest in competing products that promotional efforts for one product may induce – is an essential part of the process of competition that occurs daily throughout the economy. For example, when General Motors ("GM") creates a new sport utility vehicle ("SUV") and promotes it, through price discounts, advertising, or both, other SUVs can "free ride" on the fact that GM's promotion inevitably stimulates consumer interest, not just in GM's SUV, but in the SUV category itself. Our antitrust laws exist to protect this response, because it is in reality the competition that drives a market economy to benefit consumers. 136 F.T.C. 310, at *361-62.

[848] RX-712A (Normann Rep. at 54).

[849] Of course, McWane could have instructed its lobbyists to seek legislation designating McWane as the sole lawful vendor of Domestic Fittings. ARRA requires that contractors Buy American, and does not require that contractors buy from McWane.

McWane's lobbying campaign is functionally identical to GM's effort to promote consumer demand for SUVs through advertising. In neither case is the firm entitled to an exclusive right to sell within the category: GM must compete with rival automobile manufacturers, and McWane must compete on the merits with Star and others.

In sum, Star's efforts to secure sales from Distributors to serve ARRA-funded projects is legitimate competition favored by the antitrust laws, not a form of free-riding.

b) McWane's Full-Line Strategy Does Not Justify Exclusive Dealing

McWane's second free-riding argument is also flawed. McWane claims that it is a full-line manufacturer, producing thousands of different Domestic Fittings. Star, when it first entered the Domestic Fittings market, produced only the common Domestic Fittings that allegedly had lower manufacturing costs. According to McWane: "If customers were able to source from multiple manufacturers, they would buy the common fittings from the limited supplier [Star] and only turn to the full-line supplier for the less common products. This practice could lead to the collapse of the full-line seller."[850] Thus, McWane's claim is that its Exclusive Dealing Policy is necessary and appropriate in order to ensure the survival of McWane's domestic foundry and the company's strategy of manufacturing a broad range of Domestic Fittings.

There are multiple flaws in McWane's argument. First, there is no evidence that competition from Star would force McWane to close its domestic foundry. This alone mandates rejection of McWane's proffered defense. *See United States v. Dentsply Int'l, Inc.*, 399 F.3d at 185, 197 (rejecting efficiency defense where there was no evidence to support defendant's free-riding argument). Second, antitrust law affords McWane and its chosen strategy no inherent

[850] RX-712A (Normann Rep. at 54).

right to competitive success. If McWane is an inefficient, high-cost producer of most Domestic Fittings (and this is McWane's contention),[851] then McWane's decline and even its exit may represent the competitive market outcome. *See Union Leader Corp. v. Newspapers of New England, Inc.*, 284 F.2d 582, 584 n. 4 (1st Cir. 1960) (the public benefits from free competition "even though that competition be an elimination bout").

McWane further argues that the exit of the only full-line producer, McWane, may mean that there is (for a time) no domestic manufacturer of rare or "oddball" Fittings. Even if true, this does not justify McWane's efforts to exclude Star. If the value to consumers of domestically-made oddball Fittings exceeds the cost of production, then McWane, Star, or another firm in the free market economy will produce them. *See Freeman v. San Diego Ass'n of* Realtors, 322 F.3d 1133, 1152 (9th Cir. 2003) ("Antitrust law presumes that competitive markets offer sufficient incentives and resources for innovation….").

If, on the other hand, the cost of producing certain oddball Fittings exceeds what consumers are willing to pay, then the product may disappear from the market.[852] Again, this is the competitive process that the Sherman Act is designed to promote. If a product can succeed in the marketplace only if it is shielded from competitive forces "then it is likely no loss to consumers if it is not introduced." *In re: Polygram Holding*, 136 F.T.C. 310, at *364; *accord NCAA v. Board of Regents*, 468 U.S. 85, 116-117 (1984) (rejecting cartel's justification for restrictions on television broadcasts of college football games as necessary to protect live

[851] *See* RX-712A (Normann Rep. at 54).

[852] The ARRA provides that contractors may use an imported Fitting if a particular size Domestic Fitting is unavailable. CCPF 1589-1593.

attendance at games).[853] McWane's contention that its full-line strategy should be insulated from competition is "nothing less than a frontal assault on the basic policy of the Sherman Act." *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 695 (1978).

Most importantly, Star's efforts to compete with McWane by selling a limited line of Domestic Fittings is a legitimate form of competition, and is not a form of free-riding that has been recognized by any antitrust court. As Judge Richard Posner explains, "[p]iecemeal entry is the norm in most industries" because entering with a full line of products is often more risky, more difficult, and more time-consuming. Richard A. Posner, *Antitrust Law* 251-53 (2d ed. 2001).

Piecemeal entry is a quicker route to eliminating monopoly pricing. Thus, it follows that strategies employed by monopolists "that forestall new entry by compelling prospective entrants to enter on a full-line basis" are appropriately condemned under the Sherman Act, absent some offsetting efficiency benefit. *Id*. at 252 ("The point is not that the new entrant would have to invest more capital but that it would have to embark on a riskier enterprise, that of creating not a single successful product but a whole line of such products. It's as if one couldn't make commercial aircraft without making military aircraft as well."). Put simply, labeling piecemeal entry as an illegitimate form of free-riding – as McWane does here -- turns antitrust policy on its head.

[853] In the present case, McWane posits that oddball Domestic Fittings cannot survive in a free market. McWane proposes to keep the product alive by excluding competition in the sale of common Fittings, charging a supracompetitive price for common Fittings, and using these profits to sell oddball Fittings at below cost. As in *NCAA*, this artificial manipulation of the market (here, by a monopolist rather than a cartel) is inconsistent with the basic policy of the Sherman Act.

For example, in *Eastman Kodak Co.*, the Supreme Court rejected the argument that a firm that elects to sell a more limited line of products than its rival is somehow engaged in unlawful free-riding. 504 U.S. at 485. Plaintiffs charged that Kodak violated Section 2 by forcing consumers of Kodak photocopying equipment and replacement parts to purchase repair services from Kodak as well. *Id.* at 464. Kodak defended by claiming that the ISOs – by offering service without equipment or parts – were engaged in free-riding. *Id.* at 483. The Court rejected this free-riding defense, explaining:

> This understanding of free-riding has no support in our case law. To the contrary, as the Court of Appeals noted, one of the evils proscribed by the antitrust laws is the creation of entry barriers to potential competitors by requiring them to enter two markets simultaneously." *Id.* at485.

Like the rivals in the *Eastman Kodak* case, Star is not free-rider. It simply has a different business strategy, suitable for a new entrant. Star does not benefit in any fashion from McWane's investment in manufacturing oddball Domestic Fittings. McWane benefits from exclusive dealing only to the extent that it prevents Star from making sales in any manner (through shared distributors and otherwise).

For all of these reasons, McWane's Exclusive Dealing Policy does not remedy a *bona fide* free-riding problem and is not procompetitive. Because there is no efficiency to offset its likely anticompetitive effects, McWane's Exclusive Dealing Policy should be condemned as an unlawful act of monopolization and attempted monopolization of the Domestic Fittings market in violation of Section 2 of the Sherman Act.

H. McWane and Sigma Unlawfully Conspired to Monopolize the Domestic Fittings Market (Count Five)

Count Five of the Complaint charges that McWane violated Section 2 of the Sherman Act by conspiring with Sigma to monopolize the Domestic Fittings market. Specifically, McWane

and Sigma agreed through the MDA to implement and enforce McWane's Exclusive Dealing Policy with the specific intent to exclude competitors and to maintain supracompetitive prices in the Domestic Fittings market.[854] McWane and Sigma together together have monopoly power, and the agreement between McWane (monopolist) and Sigma (potential rival) enhances that power.

The "essence" of a conspiracy to monopolize claim is "an agreement entered into with the specific intent of achieving monopoly[.]" *Northeastern Tel. Co. v. AT&T Co.*, 651 F.2d 76, 85 (2d Cir. 1981); *Williams v. 5300 Columbia Pike Corp.*, 891 F. Supp. 1169, 1175 (E.D. Va. 1995) ("A 'conspiracy to monopolize' means a conspiracy to acquire or maintain the power to exclude competitors from some portion of commerce."). The specific elements of a conspiracy to monopolize claim are (1) concerted action, with (2) the specific intent to monopolize, and (3) an overt act in furtherance of the conspiracy. *See Levine v. Cent. Fla. Med. Affiliates*, 72 F.3d 1538, 1556 (11th Cir. 1996); *Thompson v. Metro. Multi-List, Inc.*, 934 F.2d 1566, 1582 (11th Cir. 1991).

In addition to these elements, the Courts of Appeals are divided as to whether a plaintiff is required to prove market definition and market power.[855] Complaint Counsel has met the

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[854] For this claim, it is not necessary for the Court to determine whether Sigma was a potential entrant into the Domestic Fittings market because "traders oriented vertically to each other can be found in violation of section 2 by conspiring to monopolize one horizontal market intersecting the vertical arrangement." *Perington Wholesale, Inc. v. Burger King Corp.*, 631 F.2d 1369, 1377 (10th Cir. 1979) ("The fact that [the defendant's] coconspirators competed in markets different from [the defendant's] market does not preclude finding a conspiracy to monopolize [the defendant's] market.").

[855] *Compare Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47, 68 (1st Cir. 2002) (market definition and market power required for conspiracy to monopolize claim), *and Dickson v. Microsoft Corp.*, 309 F.3d 193, 211 (4th Cir. 2002) (same), *with Levine*, 72 F.3d at 1156 ("A claim for conspiracy to monopolize . . . does not require a showing of monopoly power.");

higher standard. As previously discussed, McWane has monopoly power in a properly defined Domestic Fittings market. *See supra* Part V.A.3 (defining Domestic Fittings market); Part V.G.1 (McWane has monopoly power in the Domestic Fittings market). One monopolist is enough; it is not necessary that the conspirators share in the resultant monopoly. *See, e.g.*, *Dickson v. Microsoft Corp.*, 309 F.3d 193 (4th Cir. 2002) (one alleged monopolist); *Int'l Distrib. Ctrs., Inc. v. Walsh Trucking Co.*, 812 F.2d 786 (2d Cir. 1987) (same); *Perington Wholesale, Inc. v. Burger King Corp.*, 631 F.2d 1369 (10th Cir. 1979) (same).

Finally, unlike other Section 2 claims, there is no requirement to make a separate showing of competitive injury where, as here, there is no efficiency justification. As the Second Circuit has explained, "Congress outlawed the conspiracy itself," not only successful conspiracies. *Int'l Distrib. Ctrs.*, 812 F.2d at 796 n.8 (explaining rationale of conspiracy to monopolize offense and noting that "proof of success or impending success is irrelevant"); *see also Am. Tobacco Co. v. United States*, 328 U.S. 781, 789 (1946) ("It long has been settled, however, that a conspiracy to commit a crime is a different offense from the crime that is the object of the conspiracy. Petitioners, for example, might have been convicted here of a conspiracy to monopolize without ever having acquired the power to carry out the object of the conspiracy….") (internal quotation marks and citation omitted); *Perington Wholesale*, 631 F.2d at 1377 ("Conspiring to monopolize is a separate offense under section 2, requiring less in the way of proof than the other section 2 offenses.").

Baxley-Delamar Monuments, Inc. v. Am. Cemetery Ass'n, 843 F.2d 1154, 1157 (8th Cir. 1988) (conspiracy to monopolize claim did not require allegations of market power); *Salco Corp. v. Gen. Motors Corp., Buick Motor Div.*, 517 F.2d 567, 576 (10th Cir. 1975) (for conspiracy to monopolize claim, "a plaintiff is not required to prove what is the 'relevant market'").

Here, McWane and Sigma agreed to the MDA with the specific intent to exclude competitors and to maintain supracompetitive prices, and took overt acts in furtherance of that conspiracy.

1. The Executed MDA Constitutes Concerted Action

The MDA satisfies the concerted action element for a conspiracy to monopolize claim, which has the same standard for proving an agreement as Section 1. *See, e.g.*, *Howard Hess Dental Labs. Inc. v. Dentsply Int'l, Inc.*, 602 F.3d 237, 254 n.7 (3d Cir. 2010) (agreement standard same for Section 1 and Section 2); *U.S. Anchor Mfg., Inc. v. Rule Indus., Inc.*, 7 F.3d 986, 1001-1002 (11th Cir. 1993) (same); *see also supra* Part V.D (discussing standard for proving agreement under Section 1).

On or about September 17, 2009, executives of McWane and Sigma signed the MDA agreement, in which Sigma agreed, *inter alia*, to enforce McWane's Exclusive Dealing Policy. Specifically, Section 1(c) of the MDA provides:

> McWane shall from time to time provide Sigma with a list of customers who have not agreed to source their Domestic Fittings solely from McWane. ***Sigma agrees not to sell McWane Domestic Fittings to any customer so listed by McWane, or to any other customer who Sigma actually knows has purchased Domestic Fittings from a source other than McWane*** at any time during the previous 60 days.[856]

Thus, similar to exclusive dealing or other anticompetitive agreements, this fully executed, written agreement satisfies the concerted action prong of a conspiracy to monopolize claim. *See, e.g.*, *Fraser v. Major League Soccer*, 284 F.3d at 68 (exclusive contracts support agreement element); *Futurevision Cable Sys. of Wiggins, Inc. v. Multivision Cable TV Corp.*, 789 F. Supp. 760, 766 (S.D. Miss. 1992) (same); *see also Baxley-Delamar Monuments*, 843 F.2d at 1156

[856] CCPF 2396; CX 1194 at 001-002 § 1(c) (emphasis added).

(tying arrangement satisfies agreement element); *Full Draw Prods. v. Easton Sports, Inc.*, 182 F.3d 745, 756 (10th Cir. 1999) (group boycott satisfies agreement element for conspiracy to monopolize claim).

2. McWane and Sigma Had the Specific Intent to Monopolize the Domestic Fittings Market

McWane and Sigma entered into the MDA with the specific intent to monopolize the Domestic Fittings market. The standard for proving specific intent is the same under a conspiracy to monopolize claim as it is for attempted monopolization: the intent to exclude competition or control prices. *Am. Tobacco Co.*, 328 U.S. at 788-789 (evidence of intent to exclude competitors supported conclusion that defendants had specific intent to monopolize); *United States v. Consol. Laundries Corp.*, 291 F.2d 563, 573 (2d Cir. 1961) (same); *Robert's Waikiki U-Drive, Inc. v. Budget Rent-A-Car Systems*, 491 F. Supp. 1199, 1223 (D. Haw. 1980) (standard same for attempted monopolization and conspiracy claims).

The "crucial" question, therefore, in evaluating this element, is whether McWane and Sigma "specifically intended to vanquish their opposition by unfair or unreasonable means." *Northeastern Tel. Co.*, 651 F.2d at 85. Specific intent may be established by direct evidence or inferred from "conduct that has no legitimate business justification but to destroy or damage competition." *GTE New Media Servs., Inc. v. Ameritech Corp.*, 21 F. Supp. 2d 27, 45 (D.D.C. 1998) (citing *Ass'n for Intercollegiate Athletics for Women v. NCAA*, 735 F.2d 577, 585 (D.C. Cir. 1984)).

Here, McWane and Sigma had the specific intent to exercise market power and the power to exclude – not simply to win the competitive game against Star and others, but to forestall that competition. Their specific intent is established by direct evidence from the parties'

contemporaneous documents and statements, and can be inferred from the Exclusive Dealing Policy's harm to competition and lack of an efficiency justification.

a) Contemporaneous Documents and Statements Establish Direct Evidence of McWane and Sigma's Specific Intent to Monopolize the Domestic Fittings Market

There is abundant evidence that directly shows McWane and Sigma's intent to monopolize the Domestic Fittings market. Specifically, contemporaneous statements, documents and business plans show that McWane and Sigma had the specific intent when they entered the MDA, that it would: (1) prevent Star from becoming a viable competitor in the Domestic Fittings market; and (2) enable McWane and Sigma to charge supracompetitive prices for Domestic Fittings. *See generally Int'l Distrib. Ctrs.*, 812 F.2d at 794 (contemporaneous documents and statements are direct evidence of specific intent); *Confederated Tribes of Siletz Indians of Or. v. Weyerhaeuser Co.*, 411 F.3d 1030, 1042 (9th Cir. 2005) (same), *rev'd on other grounds, sub nom. Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312 (2007).

As previously discussed, McWane implemented its Exclusive Dealing Policy because it feared that Star's entry into the Domestic Fittings market would cause the prices of Domestic Fittings to get "creamed."[857] *See also supra* Part V.G.2.d (discussing McWane's specific intent for implementing its Exclusive Dealing Policy). The exclusive dealing section of the MDA (Section 1(c)) was an extension of McWane's Exclusive Dealing Policy; and it was intended to apply further financial pressure on Star and to prevent it from gaining credibility with customers.[858]

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[857] CCPF 1790; CX 0074 at 001 ("Whether we end up with Star as a complete or incomplete domestic supplier ***my chief concern is that the domestic market gets creamed from a pricing standpoint"*** (emphasis added)).

[858] CCPF 2398-2399; CCPF 2454-2465.

For example, as early as June 29, 2009, Mr. Tatman considered the potential MDA agreement to be a tool for blocking Star.[859] Specifically, in the context of discussing McWane's possible selling price to Sigma under a potential MDA agreement, Mr. Tatman noted that he did not think that Sigma would be "willing to generate little to no incremental margin $ just to help us block Star."[860] Later, in a July 27, 2009 presentation titled "Sigma – Domestic Review Session," Mr. Tatman discussed "What's in it for McWane," and explained that the MDA would benefit McWane by reducing Star's ability to grow and by adding additional price stability:

> Although not accurately quantifiable, having Sigma sell McWane branded product
> - Should reduce Star's ability to grow share
> - Keeps additional overcapacity from being added to the industry
>
> …. [and]
> - Should help drive some additional level of price stability.[861]

Finally, and perhaps most persuasively, notes from an August 20, 2009 internal meeting among McWane executives reflect McWane's specific intent shortly before entering into the MDA. Specifically, Mr. McCullough, who made the ultimate decision to enter into the MDA,[862] is noted as stating that he hoped that the MDA would "drive Star out of business:"

> - ***LM [Mr. McCullough] want to sell SIGMA to put pressure on Star. LM hopefully to drive Star out of business. Would rather have competition other than Star.***
>
> LM thinks that we should sell SIGMA as an insurance policy and to continue to put pressure on Star… LM approved Rick's

[859] CCPF 2459; CX 0076.

[860] CCPF 2459.

[861] CCPF 2460; CX 0465 at 010.

[862] CCPF 2366.

> recommendation page of his PowerPoint presentation on selling SIGMA.[863]

Thus, even though McWane calculated that it would lose margin on every ton of Domestic Fittings that it sold to Sigma (and that it may also lose sales of imported Fittings),[864] McWane concluded that it should enter into the MDA as an "insurance policy" against SIGMA's independent entry and to put "pressure on Star."[865]

Sigma also entered into the MDA with the specific intent to exclude competitors. For example, in February 2009, Sigma saw a benefit of a potential Domestic Fittings supply agreement with McWane because it could be a means to "marginalize Star."[866] Additionally, in a September 9, 2009, report to Sigma's Board, Mr. Pais described the **{**

}[867] And finally, Sigma's intent is perhaps most explicitly explained in a message dictated by Mr. Pais on September 22, 2009, the date Sigma announced the MDA to the market. In his message, Mr. Pais explained that the MDA, if Sigma does its "job right," it could make Star "suffer":

> If we do our job right, ***it might isolate Star and make them suffer with their investment even more, because they may not be able to gain credibility***… We need to develop an exclusive agreement

[863] CCPF 2458.

[864] CCPF 2368-2369; CX 0111 at 002 ("if we assume that for every 1000 domestic tons they sell they will sell an additional 500 tons of non-domestic that would have been" McWane's).

[865] CCPF 2458.

[866] CCPF 2456.

[867] CCPF 2461, *in camera*.

> arrangement with each customer … or we will end up strengthening Star.[868]

Thus, while McWane initiated the Exclusive Dealing Policy, including its insertion into the MDA, Sigma entered into the MDA with the specific intent to use the MDA as a means to "marginalize" Star.

McWane and Sigma's intent is distinct from the typical (and laudable) motive of firms in the competitive marketplace that want to beat their rivals. Here, McWane did not intend to offer a better product or a better price, but rather to "block[]" or to "marginalize" Star from competing.

In addition to the Exclusive Dealing Policy, the MDA promoted McWane and Sigma's specific intent to raise or stabilize prices. For example, Mr. Tatman wrote that a benefit of the MDA would be to "help drive some additional level of price stability."[869] This sentiment was shared by Sigma, which thought that the MDA could lead to "an increase in the price in the market, [and] then the market would come to a better price" for all Fittings, not just Domestic Fittings.[870] The MDA accomplished this by "marginalizing" Star, a historically aggressive competitor, and by essentially eliminating price competition between McWane and Sigma. Under the MDA, Sigma agreed not to engage in price competition with McWane, but rather to

[868] CCPF 2462 (emphasis added). At trial, McWane suggested that because Mr. Pais's dictated message may have been a draft, it was therefore meaningless. While in certain situations a final document, such as an executed contract, may have greater relevance than drafts of that document, here the message Mr. Pais dictated on the day Sigma announced the MDA to its employees and customers provides a direct window into Sigma's CEO's strategic intent in entering into the agreement with McWane.

[869] CCPF 2460; CX 0465 at 010.

[870] CCPF 2465.

sell at 98% of McWane's published prices.[871] These efforts appear successful; the evidence shows that after McWane and Sigma entered into the MDA, McWane and Sigma increased the price for Domestic Fittings.[872] *See also supra* Part V.F.

b) McWane and Sigma's Specific Intent to Monopolize Can Also Be Inferred From the Lack of a Valid Efficiency Justification and Its Competitive Effects

In addition to this extensive direct specific intent evidence, McWane and Sigma's specific intent to monopolize the Domestic Fittings market can also be inferred from the competitive effects of the Exclusive Dealing Policy, including the absence of any efficiency justification.

"Specific intent in the antitrust context may be inferred from a defendant's unlawful conduct." *Howard Hess Dental Labs.*, 602 F.3d at 257; *see also Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 603 & n.28 ("[N]o monopolist monopolizes unconscious of what he is doing.") (quoting *United States v. Aluminum Co. of America*, 148 F.2d 416, 432 (2d Cir. 1945)); *Fleer Corp. v. Topps Chewing Gum, Inc.*, 658 F.2d 139, 153-154 (3d Cir. 1981) ("Specific intent to monopolize the relevant market is a necessary element of conspiracy to monopolize. Such intent may be inferred, however, from the proof of actual monopoly power.") (internal citation omitted). Here, as discussed more fully in Part V.G.3, McWane's Exclusive Dealing Policy effectively forestalled Star's meaningful entry into the market, thus preventing

[871] CCPF 2412; CCPF 2196; CX 0070 at 001 (McWane's "core assumptions" regarding the MDA were that "Tyler/Union would remain the only truly viable source for domestically produced [Fittings]…" and neither Sigma nor McWane "would be significantly underselling the other.").

[872] CCPF 2422-2425; CCPF 2481-2483.

Star from lowering the prices of Deomstic Fittings and allowing McWane and Sigma to continue charging monopoly prices for Domestic Fittings.

"Evidence that business conduct is 'not related to any apparent efficiency' may [also] constitute proof of specific intent to monopolize." *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 318 (3d Cir. 2007); *Aspen Skiing*, 472 U.S. at 608 n.39 (observing that the absence of an efficiency justification is probative of respondent's specific intent to monopolize). Here, the MDA itself does not lower prices, increase output, or otherwise improve quality. *See supra* Part V.F. The MDA's Exclusive Dealing Provision also does not have an efficiency justification. As discussed more fully in Part V.G.4, McWane's attempted justification of the Exclusive Dealing Policy as being necessary to generate volume for its foundry[873] is not a cognizable or plausible justification. There is no evidence that competition from Star would fource McWane to close its domestic foundry, and antitrust law affords McWane and its chosen strategy, under which it prices "oddball" or rare Fittings, no inherent right to competitive success.

The Exclusive Dealing Policy's successful exclusionary effect as agreed to and implemented by McWane and Sigma, as well as the lack of an efficient justification for the MDA or for the Exclusive Dealing Policy, support the specific intent element of conspiracy to monopolize offense. *See Broadcom*, 501 F.3d at 318; *Aspen Skiing*, 472 U.S. at 608 n.39.

3. McWane and Sigma Took Overt Acts in Furtherance of Their Conspiracy

The final element of a conspiracy to monopolize claim is that the conspirators take overt acts in furtherance of their conspiracy. *See Levine*, 72 F.3d at 1556. The transactions that take place pursuant to an exclusive dealing policy are sufficient to establish the overt act requirement

[873] RX-712A (Normann Rep. at 3, 53-54); Normann, Tr. 4902-4906; Respondent Pre-trial Brief at 60.

of a conspiracy to monopolize. *Fraser v. Major League Soccer*, 284 F.3d at 68; *see also United States v. Hickok*, 77 F.3d 992, 1005-1006 (7th Cir. 1996) ("Under the general conspiracy statute [18 U.S.C. § 371], an overt act is defined as '*any* act to effect the object of the conspiracy.'") (emphasis added in original); *Black's Law Dictionary* (9th ed. 2009) (defining "overt act" as "[a]n outward act, however innocent in itself, done in furtherance of a conspiracy, treason, or criminal attempt."). Here, McWane and Sigma worked in concert and took overt acts in furtherance of their agreement to control prices and exclude rivals, including Star.

First, McWane and Sigma collaborated to make distributors aware of the MDA and that Sigma would be enforcing the Exclusive Dealing Policy.[874] Specifically, in a September 22, 2009, letter to distributors approved by McWane, Sigma announced:

> As per this MDA, we are now Master Distributors of [McWane] domestic Fittings. As such, we will follow [McWane's] distribution and pricing policies as they are announced from time to time. As mentioned in their own letter from [McWane] to their customers, which you too may have received, ***we wish to supply the [McWane] domestic Fittings to any customers who elect to commit to fully support [McWane] branded Fittings for their requirements of domestic Fittings,*** purchased thru [McWane] or SIGMA. We appeal to you to accept ***this requirement of exclusive choice***, as a fair and reasonable one, in light of the considerable investment by [McWane] to provide this range of domestic production, which is now being expanded to offer domestic Fittings up to 48". ***Please note that customers who elect not to fully support this program may forgo any unpaid volume incentive rebates applicable to only the domestic Fittings and delivery of domestic Fittings up to 12 weeks***.[875]

Sigma also actively enforced McWane's Exclusive Dealing Policy on at least one occasion. On or about December 14, 2009, after the Tulsa branch of Hajoca purchased Domestic

[874] CCPF 2373-2376.

[875] CCPF 2403.

Fittings from Star, Mr. Tatman notified Mr. Rona of Sigma that Sigma could no longer sell Domestic Fittings to any Hajoca branch "per the terms of our MDA."[876] To ensure that there was no confusion, Mr. Tatman required Sigma to provide a written confirmation "to acknowledge that Sigma will also not supply any Hajoca branch with Domestic fittings or accessories until further notice."[877] After forwarding this instruction to the relevant personnel within Sigma, Mr. Rona responded to Mr. Tatman: "Sigma confirms we are clear about Hajoca."[878] Even after the formal termination of the MDA, Sigma continued to source Domestic Fittings from McWane, and a Sigma Regional Manager instructed his salesman that "if customers are buying from Star…we cannot sell them domestic any more [sic]."[879]

These actions constitute overt acts in support of McWane and Sigma's conspiracy to monopolize the Domestic Fittings market. *See Fraser v. Major League Soccer*, 284 F.3d at 68; *United States v. Hickok*, 77 F.3d at 1005-1006. Thus, McWane engaged in an unlawful conspiracy to monopolize the Domestic Fittings market.

VI. REMEDY

Upon finding a violation of Section 5 of the FTC Act, the Court can develop a remedy necessary to prevent the Respondent from again engaging in the prohibited conduct. "[A]ll doubts as to the remedy are to be resolved in [Complaint Counsel's] favor." *See United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 334 (1961). The Court has "wide discretion" in

[876] CCPF 2407-2408; CX 1801 at 001.

[877] CCPF 2407-2408.

[878] CCPF 2409. Mr. Rona forwarded to Sigma's distribution group the instruction not to sell McWane-produced domestic fittings to any Hajoca branch. (CX 0940; Rona, Tr. 1606, 1608).

[879] CX 1746 (ellipses in original).

its choice of a remedy so long as the remedy has "a reasonable relation to the unlawful practices found to exist." *Jacob Siegal Co. v. FTC*, 327 U.S. 608, 611-613 (1946). Further, the Court is not limited to prohibiting the illegal practices in the precise form in which it finds they existed in the past. Instead, the Court "must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity." *In re Polygram Holding, Inc.*, 136 F.T.C. 310, 379 (2003) (quoting *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952)).

In developing a remedy, special consideration should be given to two aspects of McWane's conduct during the past five years. First, McWane participated in a price fixing conspiracy from at least January 2008 through to at least April 2009, and continues to sell Fittings in a market that is highly conducive to collusion. *See supra* Parts V.B & D. These market conditions would allow McWane to repeat its anticompetitive conduct in the future. Indeed, McWane continued to have improper pricing communications with its competitors in June 2010, six months *after* McWane learned of the Commission's investigation into its activities.[880] This evidence demonstrates that there is a high likelihood that McWane will again engage in future unlawful combinations in the Fittings market, and that there is a special need for an order that closes all roads to McWane's prohibited goal.

Second, in developing a remedy for the monopolization claims, little weight, if any, should be given to any evidence introduced by McWane to show that its Exclusive Dealing Policy and other conduct was somehow ineffective. Once McWane became aware of the Commission's investigation in January 2010 -- only four months after McWane had announced its Exclusive Dealing Policy -- McWane could easily "manipulate[e]" its administration of its

[880] *See* Attachment B (Letter dated January 22, 2010, from Christopher G. Renner, Attorney, Federal Trade Commission, to G. Ruffner Page, Jr., President, McWane, Inc.).

Exclusive Dealing Policy and other conduct so as to "improve [its] litigating position." *Hosp. Corp. of Am. v. Fed. Trade Comm'n.*, 807 F.2d 1381, 1384 (7th Cir. 1986). Indeed, less than one month after learning of the Commission's investigation, and only six months into its initial one year term, McWane gave Sigma notice of termination of the MDA.[881]

Evidence that "is subject to manipulation by the party seeking to use it is entitled to little or no weight" in an antitrust case. *Hosp. Corp. of Am.*, 807 F.2d at 1384. In particular, the probative value of a defendant's evidence is "extremely limited" when the defendant itself can controls events; otherwise, violators could "stave off" the government's enforcement efforts "merely by refraining from aggressive or anticompetitive behavior when such a suit was threatened or pending." *United States v. Gen. Dynamics Corp*., 415 U.S. 486, 504-505 (1974). Here, McWane had complete discretion to selectively impose penalties on Distributors that purchased Domestic Fittings from Star – or to temporarily abandon its Exclusive Dealing Policy altogether. Indeed, while McWane has argued to this Court that it no longer enforces its original Exclusive Dealing Policy, it has never publicly announced to the industry that it has retracted its policy.[882] Therefore, the Court should not permit McWane to stave off an effective remedy on

[881] CCPF 2494 (Mr. Pais received a notice of termination of the MDA on February 17, 2010); *see also* CX 1435 at 002 (notice of termination); CCPF 2495 (Attachment B (January 22, 2010 letter from the Federal Trade Commission notifying McWane about its antitrust concerns)); Rona, Tr. 1704 (MDA agreement began around September 2009); Pais, Tr. 1826 (same).

[882] CCPF 2064 (McWane has never sent a letter to customers indicating that "[t]he [Exclusive Dealing] policy we announced on September 22, 2009 is no longer in effect"); CCPF 2065 (other market participants are not aware that the Exclusive Dealing Policy is no longer in effect); CCPF 2066 (McWane was still enforcing the exclusive dealing policy in July 2010); CCPF 2067 (McWane still has a type of Exclusive Dealing Policy related to Domestic Fittings in effect with HD supply).

the theory that its efforts did not prevent Star, at least until now, from competing in the Domestic Fittings market.

With these factors in mind, an appropriate order should establish the pragmatic but effective restrictions on McWane that are necessitated by its illegal conduct.

First, an order must stop McWane from engaging or attempting to engage in combinations in restraint of trade, including conspiring to fix prices, exchanging competitively sensitive information with competitors, inviting competitors to collude, and entering into agreements, such as the Master Distribution Agreement, to allocate or divide markets, customers, transactions, lines of commerce, or business opportunities. Specifically, Complaint Counsel respectfully requests an order that, together with the standard provisions of a final order, prohibits McWane from engaging in, or attempting thereto, the following conduct:

(1) Price fixing, or participating or facilitating any combination between or among any competitors (i) to raise, fix, maintain, or stabilize prices or price levels, or (ii) to allocate or divide markets or customers;

(2) Communicating or attempting to communicate to competitors or other third parties that McWane is ready or willing to (i) raise, fix, maintain, or stabilize prices or price levels conditional upon any other competitor also raising, fixing, maintaining, or stabilizing prices or price levels; or (ii) forbear from competing for any customer or business opportunity on the condition that any other competitor also forbear from competing for any customer or business opportunity, except under certain conditions outlined in the order;

(3) Communicating or attempting to communicate competitively sensitive information to any competitor, except under certain conditions outlined in the order; and

(4) Participating in any information exchanges with its competitors that facilitate price fixing, except under certain conditions outlined in the order.

Second, an order must preclude McWane from directly or indirectly monopolizing, or attempting or conspiring to monopolize the market for Domestic Fittings. The order should also ensure that McWane does not financially induce its customers to deal exclusively with McWane even in the absence of a formally-announced Exclusive Dealing Policy. Accordingly, Complaint Counsel respectfully requests an order that, together with the standard provisions of a final order, prohibits McWane from engaging in, or attempting thereto, the following conduct:

(1) Imposing, either directly or indirectly, a requirement that a customer purchase Domestic Fittings exclusively from McWane as a condition of McWane's sale of any product, including Domestic Fittings, or conditioning the price it charges or the services it offers based on the customer's purchase or sale of Domestic Fittings from McWane;

(2) Instituting, for a period of 10 years, a rebate program in which the rebate a customer receives for a Domestic Fitting in a completed sale is increased retroactively if the customer's total purchases in a designated period meet a specified threshold, except under certain conditions outlined in the order; and

(3) Discriminating or retaliating against a customer that purchases or sells a competitor's Domestic Fittings, except under certain conditions outlined in the order. Prohibited types of retaliation should include (i) terminating or threatening to terminate the sale to a customer of any product marketed by McWane; (ii) auditing the customer's Domestic Fittings to determine its purchase of competing Domestic Fittings; (iii)

changing the price or services McWane furnishes to the customer; or (iv) refusing to deal with the customer on terms generally available to other customers.

Finally, an order should also prohibit McWane from enforcing any condition, requirement, policy, agreement, contract or understanding that is inconsistent with the terms of the order. A proposed order is attached.

VII. CONCLUSION

Because the evidence overwhelming establishes McWane's liability on all Seven Counts of the Complaint, this Court should enter the proposed Order to ensure that McWane cannot continue to engage in anticompetitive conduct in the Fittings and Domestic Fittings markets.

VIII. PROPOSED ORDER

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of	)	
McWANE, INC.,	)	DOCKET NO. 9351
Respondent.	)	

(Proposed) ORDER

I.

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

A. "Commission" means the Federal Trade Commission.

B. "Respondent" means McWane, Inc., its officers, directors, employees, agents, representatives, successors, and assigns; and the U.S.-based subsidiaries, divisions, groups, and affiliates controlled by it, and the respective officers, directors, employees, agents, representatives, successors, and assigns of each.

C. "Communicate" means to transfer or disseminate any information, regardless of the means by which it is accomplished, including without limitation orally, by letter, e-mail, notice, or memorandum. This definition applies to all tenses and forms of the word "communicate," including, but not limited to, "communicating," "communicated" and "communication."

D. "Competitively Sensitive Information" means any information regarding the cost, Price, output, or Customers of or for DIPF marketed by any Competitor, regardless of whether the information is prospective, current or historical, or aggregated or disaggregated.

Provided, however, that "Competitively Sensitive Information" shall *not* include:

1. information that is a list of Prices or other pricing terms that has been widely Communicated by a Competitor to its Customers through a letter, electronic mailing, sales catalog, Web site, or other widely accessible method of posting;

2. information that relates to the terms on which a Competitor will buy DIPF from, or sell DIPF to, the Person to whom the Competitively Sensitive Information is Communicated;

3. information that relates to transactions that occurred at least three (3) years prior to the date of the Communication of such information; or

4. information that must be disclosed pursuant to the Federal Securities Laws.

E. "Competitor" means Respondent and any Person that, for the purpose of sale or resale within the United States: (1) manufactures DIPF or Domestic DIPF; (2) causes DIPF or Domestic DIPF to be manufactured; or (3) imports DIPF.

F. "Customer" means any Person that purchases any DIPF from Respondent

G. "Designated Manager" means the Executive Vice President, General Manager, National Sales Manager, Pricing Coordinator, Regional Manager, or the OEM Manager for sales of DIPF in and into the United States, and any employee performing any job function relating to the setting of Prices (including offering any discounts) for DIPF sold in or into the United States.

H. "Domestic DIPF" means DIPF that is manufactured in the United States of America.

I. "Ductile Iron Pipe Fittings" or "DIPF" means any iron casting produced in conformity with the C153/A21 or C110/A21 standards promulgated by the American Water Works Association, including all revisions and amendments to those standards and any successor standards incorporating the C153/A21 or C110/A21 standards by reference.

J. "Exclusivity" or "Exclusive" means any requirement, whether formal or informal, or direct or indirect, by the Respondent that a Customer purchase all of their Domestic DIPF from Respondent, or any other requirement that a Customer restrain, refrain from, or limit its future purchases of Domestic DIPF from any Competitor.

Provided, however, that the terms "Exclusivity" or "Exclusive" do not:

1. apply to Respondent's sales of non-Domestic DIPF or any product other than Domestic DIPF; and

2. apply to individual bids of Domestic DIPF for specific jobs or refer to the sale by Respondent to a Customer of any specified number of units during any term, without more. For the avoidance of doubt, the fact that a Customer purchases its full requirements of Domestic DIPF from Respondent does not establish that Respondent has engaged in Exclusivity and is not prohibited by this Order unless the Customer does so because Respondent imposes a requirement of Exclusivity.

K. "Federal Securities Laws" means the securities laws as that term is defined in § 3(a)(47) of the Securities Exchange Act of 1934, 15 U.S.C. § 78c(a)(47), and any regulation or order of the Securities and Exchange Commission issued under such laws.

L. "Industry Statistics" means statistics derived from Input Data and Communicated by the Third Party Manager.

M. "Input Data" means the Competitively Sensitive Information Communicated by Competitors to the Third Party Manager.

N. "Information Exchange" means the entity Managed by A Third Party Manager that: (1) Communicates Industry Statistics; and (2) includes Respondent and at least one other Competitor.

O. "Insider" means a consultant, officer, director, employee, agent, or attorney of Respondent. *Provided, however*, that no other Competitor shall be considered to be an "Insider."

P. "Managed by A Third Party Manager" means that a Third Party Manager is solely and exclusively responsible for all activities relating to Communicating, organizing, compiling, aggregating, processing, and analyzing any Competitively Sensitive Information.

Q. "Participate" in an entity or an arrangement means (1) to be a partner, joint venturer, shareholder, owner, member, or employee of such entity or arrangement, or (2) to provide services, agree to provide services, or offer to provide services through such entity or arrangement. This definition applies to all tenses and forms of the word "participate," including, but not limited to, "participating," "participated," and "participation."

R. "Person" means any natural person or artificial person, including, but not limited to, any corporation, unincorporated entity, or government. For the purpose of this Order, any corporation includes the subsidiaries, divisions, groups, and affiliates controlled by it.

S. "Price" means the retail or wholesale price, resale price, purchase price, list price, multiplier price, job price, credit term, freight term, delivery term, service term, or any other monetary term defining, setting forth, or relating to the money, compensation, or service paid by a Customer to Respondent, or received by a Customer in connection with the purchase or sale of DIPF or Domestic DIPF.

T. "Retroactive Incentive" means any flat or lump-sum payment of monies or any other item(s) of pecuniary value based upon a Customer's sales or purchases of Respondent's Domestic DIPF reaching a specified threshold (in units, revenues, or any other measure), or otherwise reducing the Price of one unit of Respondent's Domestic DIPF because of the purchase or sale of an additional unit of that product; provided, however, that Respondent may offer a discount or other item of pecuniary value based upon sales or purchases of Domestic DIPF beyond a specified threshold.

By way of example, Respondent may offer or provide a discount of X% on all purchases of Domestic DIPF in excess of Y units, but it may not offer or provide a discount of X% on all units of Domestic DIPF, including those below Y units, if sales exceed Y units.

U. "Service" means any service, assistance or other support provided by Respondent to a Customer, including without limitation, responsiveness to requests for bids,

responsiveness in filling purchase orders, product availability, handling of warranty claims, and handling of returns.

V. "Third Party Manager" means a Person that (1) is not a Competitor, and (2) is responsible for all activities relating to Communicating, organizing, compiling, aggregating, processing, and analyzing any Competitively Sensitive Information Communicated or to be Communicated between or among Respondent and any other Competitor.

II.

IT IS FURTHER ORDERED that in connection with the business of manufacturing, marketing or selling DIPF in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, Respondent shall cease and desist from, either directly or indirectly, or through any corporate or other device:

A. Entering into, adhering to, Participating in, maintaining, organizing, implementing, enforcing, or otherwise facilitating any combination, conspiracy, agreement, or understanding between or among any Competitors:

1. To raise, fix, maintain, or stabilize Prices or Price levels, or engage in any other Price-related action; or

2. To allocate or divide markets, Customers, contracts, transactions, business opportunities, lines of commerce, or territories.

Provided, however, that nothing in Paragraph II.A of this Order prohibits Respondent from entering into an agreement with another Competitor regarding the Price of DIPF if, and only if, that agreement relates exclusively to the terms under which Respondent will buy DIPF from, or sell DIPF to, that other Competitor.

B. Communicating to any Person who is not an Insider, that Respondent is ready or willing:

1. To raise, fix, maintain, or stabilize Price or Price levels conditional upon any other Competitor also raising, fixing, maintaining, or stabilizing Price or Price levels; or

2. To forbear from competing for any Customer, contract, transaction, or business opportunity conditional upon any other Competitor also forbearing from competing for any Customer, contract, transaction, or business opportunity.

C. Entering into, adhering to, Participating in, maintaining, organizing, implementing, enforcing, or otherwise facilitating any combination, conspiracy, agreement, or understanding between or among any Competitors to Communicate or exchange Competitively Sensitive Information.

D. Communicating Competitively Sensitive Information to any other Competitor.

E. Attempting to engage in any of the activities prohibited by Paragraphs II.A, II.B, II.C, or II.D.

PROVIDED, HOWEVER, that it shall not of itself constitute a violation of Paragraph II.B, II.C, or II.D of this Order for Respondent to Communicate:

1. Competitively Sensitive Information to a Competitor where such Communication is reasonably related to a lawful joint venture, license, or potential acquisition, and is reasonably necessary to achieve the procompetitive benefits of such a relationship;

2. To any Person reasonably believed to be an actual or prospective purchaser of DIPF, the Price and terms of a sale of DIPF; or

3. To any Person reasonably believed to be an actual or prospective purchaser of DIPF that Respondent is ready and willing to adjust the terms of a sale of DIPF in response to a Competitor's offer.

PROVIDED FURTHER, that it shall not of itself constitute a violation of Paragraphs II.B, II.C, II.D or II.E of this Order for Respondent to Communicate with or Participate in an Information Exchange that is limited exclusively to the Communication of Input Data or Industry Statistics when:

1. Any Input Data relates solely to transactions that are at least six (6) months old;

2. Any Industry Statistic relates solely to transactions that are at least six (6) months old;

3. Industry Statistics are Communicated no more than one time during any six (6) month period;

4. Any Industry Statistic represents an aggregation or average of Input Data for transactions covering a period of at least six (6) months;

5. Any Industry Statistic represents an aggregation or average of Input Data received from no fewer than five (5) Competitors;

6. Relating to Price, output, or total unit cost, no individual Competitor's Input Data to any Industry Statistic represents more than twenty-five (25) percent of the total reported sales (whether measured on a dollar or unit basis) of the DIPF product from which the Industry Statistic is derived;

7. Relating to Price, output, or total unit cost, the sum of no three Competitors' Input Data to any Industry Statistic represents more than sixty (60) percent of the total reported sales (whether measured on a dollar or unit basis) of the DIPF product from which the Industry Statistic is derived;

8. Any Industry Statistic is sufficiently aggregated or anonymous such that no Competitor that receives that Industry Statistic can, directly or indirectly, identify the Input Data submitted by any other particular Competitor;

9. Respondent does not Communicate with any other Competitor relating to the Information Exchange, other than those Communications (i) occurring at official meetings of the Information Exchange; (ii) relating to topics identified on a written agenda prepared in advance of such meetings; and (iii) occurring in the presence of antitrust counsel;

10. Respondent retains, for submission to a duly authorized representative of the Commission upon reasonable notice, a copy of all Input Data Communicated to the Third Party Manager and all Industry Statistics Communicated by the Third Party Manager to Respondent; and

11. All Industry Statistics are, at the same time they are Communicated to any Competitor, made publicly available.

III.

IT IS FURTHER ORDERED that in connection with the business of manufacturing, marketing or selling Domestic DIPF in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, Respondent shall cease and desist from, either directly or indirectly, or through any corporate or other device:

A. Inviting, entering into, adhering to, maintaining, implementing, enforcing, or attempting thereto any condition, policy, practice, agreement, contract, or understanding that requires Exclusivity with a Customer, including but not limited to:

1. Conditioning the sale or purchase of any product, including Respondent's Domestic DIPF, on a Customer's Exclusivity;

2. Conditioning any term of Price or Service offered or provided by Respondent to a Customer relating to any product, including Respondent's Domestic DIPF, on a Customer's Exclusivity;

3. Conditioning any term of Price or Service offered or provided to a Customer based upon a requirement that the Customer purchase 50% or more of its purchases (in units, revenues, or any other measure) of Domestic DIPF from Respondent over any period of time; and

4. Conditioning any term of Price or Service offered or provided to a Customer relating to any product marketed by Respondent upon that Customer's purchases or sales of Respondent's Domestic DIPF.

B. For ten (10) years from the date this Order becomes final, inviting, entering into, adhering to, maintaining, implementing, enforcing, or attempting thereto any condition,

policy, practice, agreement, contract, or understanding that offers or provides any Retroactive Incentive.

C. Discriminating against, penalizing, or otherwise retaliating against any Customer, for the reason, in whole or in part, that the Customer engages in, or intends to engage in, the distribution, purchase or sale of a Competitor's Domestic DIPF, or otherwise refuses to enter into or continue any condition, agreement, contract, or understanding that requires Exclusivity. Examples of prohibited discrimination or retaliation against a Customer shall include, but not be limited to:

1. Terminating, suspending, or threatening or proposing thereto, sales of any product marketed by the Respondent to the Customer;

2. Auditing the Customer's purchases or sales of Domestic DIPF to determine the extent of purchases or sales of competing Domestic DIPF;

3. Withdrawing or modifying, or threatening or proposing thereto, any terms of Price or Service offered or provided by Respondent to a Customer relating to any product marketed by Respondent; and

4. Refusing to deal with the Customer on terms and conditions generally available to other Customers.

D. After ninety (90) days from the date this Order becomes final, from enforcing any condition, requirement, policy, agreement, contract or understanding that is inconsistent with the terms of the Order.

PROVIDED, HOWEVER, that nothing in paragraphs III A-D of this Order prohibits Respondent from providing discounts, rebates, or other Price or non-Price incentives to purchase Domestic DIPF that are (i) volume-based, above average variable cost, and not Retroactive Incentives as defined herein; or (ii) designed to meet competition, if Respondent determines in good faith that one or more Competitors are offering terms of sale for their Domestic DIPF for which Respondent needs to match in order to win contested business.

PROVIDED, FURTHER, that nothing in Paragraph III.D of this Order prohibits Respondent from honoring or providing discounts, rebates, or other Price or non-Price incentives to purchase its Domestic DIPF that a Customer contracted for prior to the date this Order becomes final even if paid or provided by Respondent subsequent to that date.

IV.

IT IS FURTHER ORDERED that Respondent shall:

A. Within sixty (60) days from the date this Order becomes final distribute by first-class mail, return receipt requested, or by electronic mail with return confirmation, a copy of this Order with the Complaint, to each of its officers, directors, and Designated Managers;

B. Within sixty (60) days from the date this Order becomes final, distribute by first-class mail, return receipt requested, or by electronic mail with return confirmation, a copy of this Order with the Complaint, to each Customer of Respondent that has purchased DIPF or Domestic DIPF at any time since September 1, 2012;

C. For ten (10 years) from the date this Order becomes final distribute by first-class mail, return receipt requested, or by electronic mail with return confirmation, a copy of this Order with the Complaint, within sixty (60) days, to each Person who becomes its officer, director, or Designated Manager and who did not previously receive a copy of this Order and Complaint; and

D. Require each Person to whom a copy of this Order is furnished pursuant to Paragraphs III.A and III.C of this Order to sign and submit to Respondent within sixty (60) days of the receipt thereof a statement that: (1) represents that the undersigned has read and understands the Order; and (2) acknowledges that the undersigned has been advised and understands that non-compliance with the Order may subject Respondent to penalties for violation of the Order.

V.

IT IS FURTHER ORDERED that Respondent shall file verified written reports within ninety (90) days from the date this Order becomes final, annually thereafter for ten (10) years on the anniversary of the date this Order becomes final, and at such other times as the Commission may by written notice require. Each report shall include, among other information that may be necessary:

A. A description of any Information Exchange, including a description of (i) the identity of any Competitors participating in such exchange; (ii) the Competitively Sensitive Information being exchanged; (iii) the identity of the Third Party Manager and a description of how the Competitively Sensitive Information has been and is expected to be Managed by the Third Party Manager; and (iv) the identity of each employee of the Respondent who received information, directly or indirectly, from the Third Party Manager;

B. Copies of the signed return receipts or electronic mail with return confirmations required by Paragraphs IV.A - D of this Order;

C. One copy of each Communication during the relevant reporting period that relates to changes in Respondent's published list price or multiplier discounts for sales of DIPF made in or into the United States when that Communication is to two (2) or more Customers and those changes are simultaneously applicable to two (2) or more Customers; and

D. A detailed description of the manner and form in which Respondent has complied and is complying with this Order.

VI.

IT IS FURTHER ORDERED that Respondent shall notify the Commission:

A. Of any change in its principal address within twenty (20) days of such change in address; and

B. At least thirty (30) days prior to any proposed: (1) dissolution of Respondent; (2) acquisition, merger, or consolidation of Respondent; or (3) any other change in Respondent including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of this Order.

VII.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, Respondent shall permit any duly authorized representative of the Commission:

A. Access, during office hours of Respondent, and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and all other records and documents in the possession, or under the control, of Respondent relating to compliance with this Order, which copying services shall be provided by Respondent at its expense; and

B. Upon fifteen (15) days notice, and in the presence of counsel, and without restraint or interference from it, to interview officers, directors, or employees of Respondent.

VIII.

IT IS FURTHER ORDERED that this Order shall terminate twenty (20) years from the date it becomes final.

ORDERED: _____+

D. Michael Chappell
Administrative Law Judge

Dated:

Dated: December 19, 2012

Respectfully submitted,

s/ Linda M. Holleran
Edward D. Hassi, Esq.
Linda M. Holleran, Esq.
J. Alexander Ansaldo, Esq.
Joseph R. Baker, Esq.
Thomas H. Brock, Esq.
Monica M. Castillo, Esq.
Mika Ikeda, Esq.
Andrew K. Mann, Esq.
Federal Trade Commission
Bureau of Competition
600 Pennsylvania Ave., N.W.
Washington, DC 20580
Telephone: (202) 326-2470
Facsimile: (202) 326-3496
Electronic Mail: ehassi@ftc.gov

CERTIFICATE OF SERVICE

I hereby certify that on December 19, 2012, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW
Washington, DC 20580

I also certify that I delivered via electronic mail a copy of the foregoing document to:

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-110
Washington, DC 20580

I further certify that I delivered via electronic mail a copy of the foregoing document to:

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Counsel for Respondent McWane, Inc.

CERTIFICATE FOR ELECTRONIC FILING

I certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and the adjudicator.

December 19, 2012

By: s/ Thomas H. Brock
Attorney