PUBLIC
ORIGINAL

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of	)	
	)	**PUBLIC**
MCWANE, INC.,	)	
a corporation, and	)	
STAR PIPE PRODUCTS, LTD.,	)	
a limited partnership.	)	**DOCKET NO. 9351**
	)	

POST-TRIAL BRIEF OF RESPONDENT MCWANE, INC.

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Dated: December 21, 2012

RECORD REFERENCES

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

JX# – Joint Exhibit

CX# – Complaint Counsel Exhibit

RX# – Respondent Exhibit

Name of Witness, Tr. xx – Trial Testimony

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

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

JSLF ¶ x – Joint Stipulations of Law and Fact

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

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

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

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

{ bold } - In Camera Material

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EXECUTIVE SUMMARY

Overwhelming evidence at trial demonstrated that McWane made its pricing decisions independently at all times and did not agree with Sigma or Star on its January or June 2008 imported fittings multipliers, its April 2009 list prices, or its June 2010 multipliers. Mr. Tatman testified extensively that ***McWane independently decided to issue lower published prices on its imported fittings than Sigma and Star throughout this period and did not follow their higher list and published multipliers in an effort to win business and gain share for a fittings business that had been decimated by cheap imports***. The evidence demonstrated that ***McWane also offered hundreds and hundreds of job price discounts*** to win specific jobs in 2008, and offered additional rebates as well as a host of other price concessions during the alleged conspiracy period.

Every Sigma and Star witness confirmed that they found out McWane underpriced them from customers (not McWane) and that they independently decided to follow McWane's prices down (at least when it was in their interest). Star and Sigma's testimony and contemporaneous documents confirmed that they received regular reports that McWane was offering job discounts, rebates, and other concessions and that they, too, regularly provided job discounts, rebates, and other concessions. The effect of all these price concessions is that McWane's prices deteriorated throughout this period, and its share continued to decline.

The Court heard dozens of sworn denials of any price agreements from Mr. Tatman and every single live Sigma and Star witness at trial, including flat denials of any agreement to eliminate or reduce job pricing, and the trial record contains more than 250 additional sworn denials in deposition and investigational hearing testimony. The Court heard evidence that DIFRA had pro-competitive purposes and did not serve as a vehicle for even a single price

discussion, nor otherwise "facilitate coordination." In fact, the record is clear that ***prices declined more in the second half of 2008***, during DIFRA's brief operational period. Indeed, Mr. Tatman concluded in late Summer 2008 that the prospects for his fittings business looked bleak for the next three to five years. (Tatman, Tr. 96-68). The direct evidence of McWane's independent and pro-competitive pricing was thus overwhelming.

In the face of all this direct evidence of McWane's independent and pro-competitive decisions to underprice its competitors, Complaint Counsel put on a strictly circumstantial case. But a circumstantial case fails in the first instance because the evidence was overwhelming that McWane did not engage in parallel pricing (which is a required element of any circumstantial case) and, instead, repeatedly undercut Sigma and Star's large list and multiplier increases. Complaint Counsel's circumstantial case also fails because it was based on the imaginative re-interpretation a handful of scattered documents by its expert, Dr. Schumann. On cross-examination, Dr. Schumann conceded that he found no evidence of any advance price communications or agreements and that the few customer letters he pointed to as "conspiracy" communications simply did not contain any reference to any agreement to follow McWane's lower published prices, to centralize pricing authority, or to eliminate or reduce job pricing. Indeed, Dr. Schumann acknowledged he did not measure or quantify any actual reduction in the level or amount of job discounts offered by McWane or Star or Sigma. Finally, the "conspiracy" case fails because overwhelming evidence established that McWane acted in its self-interest - - it lowered its prices to win business from its rivals - - and nothing in the trial record suggests that it acted contrary to its self-interest.

Complaint Counsel is thus left with, at most, a very, very weak circumstantial case in which McWane led published prices down and its competitors followed its published prices

down (when it suited their interests) - - and all three companies continued to offer their customers a myriad of job price discounts, rebates, and a host of other price concessions. That is called "competition." Judgment on Counts 1-3 should thus be granted in McWane's favor.

Judgment should also be granted for McWane on Counts 4-7 which allege that McWane monopolized domestic Fittings. The overwhelming evidence at trial demonstrated that imported and domestic Fittings are entirely interchangeable and, indeed, a flood of cheap imports from China, India, Korea, Mexico and Brazil surged into the U.S. over the last decade and drove the once-thriving domestic industry to the brink of extinction. The Court heard that the International Trade Commission unanimously determined only a few years ago that cheap imports from China had "materially damaged" the domestic Fittings industry - - and they have steadily grown their share since then and now constitute the lion's share of all Fittings sold in the U.S., as both Complaint Counsel and its expert concede. Other domestic foundries have exited production in the face of this onslaught of cheap imports and McWane itself was forced to shut down its Tyler South plant in late 2008. The "Buy America" act did not change any of that. As every fact witness testified, it had little or no effect on demand for domestic Fittings during its short life. There is, thus, no separate domestic Fittings market and McWane did not monopolize anything.

Nor did McWane somehow exclude Star or Sigma from expanding into domestic Fittings. On the contrary, Star succeeded in expanding into virtual manufacturing of domestic Fittings quickly and effectively in roughly six months between Spring and Fall 2009. [redacted] Star touted its domestic Fittings success on its first-year anniversary and noted that it was "very proud of what we have been able to achieve in such a short period." (RX 572.) It sold to the two largest

national distributors (HD Supply and Ferguson) and dozens and dozens and dozens of regional and local distributors, including Dana Kepner, Mainline, Cohen, Atlantic Supply and many more. In 2011, as Dr. Schumann concedes, ***Star doubled its share of domestic Fittings*** to 10%. In 2012, Star's top executives conceded at trial it is on pace to have its best domestic Fittings year yet. All of that growth was accomplished after McWane's September 2009 rebate letter - - which Star's own witnesses testified was "more bark than bite." (McCutcheon, Tr. 2615-2617; RX 280.) Indeed, Complaint Counsel's expert conceded that he was unable to identify even a single distributor - - out of 630 - - which wanted to buy Star domestic, but did not because of McWane's rebate letter. Star's quick and successful entry - - its [redacted] customers in its first full year with product and its doubling of its share in its second year - - precludes a finding that McWane is a monopolist or that it somehow "foreclosed" Star. What Complaint Counsel is left with is, again, competitive conduct: a McWane rebate letter that very weakly tried to prevent Star from cherry-picking high-volume Fittings sales in order to preserve the survival of the last dedicated Fittings foundry in the U.S. which - - Dr. Schumann concedes - - is more efficient than Star's use of six or seven higher-cost jobber foundries.

The overwhelming evidence at trial also conclusively showed that McWane did not exclude Sigma from domestic Fittings. Rather, Sigma excluded Sigma. The company's dire financial situation in 2009 meant that it never took the concrete steps necessary to expand into domestic Fittings. It owned no foundries in the U.S. and had no contracts with third-party foundries. [redacted] (including tens of millions at extraordinarily high interest rates) and plummeting revenue, the company was hamstrung. It breached its bank covenants and its banks imposed capital expenditures caps that were far below what it needed to

get into domestic Fittings. Neither its board of directors nor its banks authorized the company to exceed its capital expense limits. As a result, it was never an actual potential competitor in the alleged domestic fittings market. On the contrary, the overwhelming evidence at trial showed that Sigma had no viable option in mid-2009 for getting into domestic Fittings during the brief Buy-America period, and its decision not to enter domestic production had nothing to do with McWane. The Master Distributorship Agreement with McWane was the only viable way for Sigma to sell domestic Fittings on the timetable required to take advantage of ARRA's "shovel-ready" projects. It offered tangible pro-competitive benefits for both McWane (increased tonnage for its ailing foundry and greater reach) and Sigma (additional supply for its customers).

In sum, the evidence overwhelmingly confirms that McWane acted legally and competitively at all times. None of McWane's actions harmed competition or consumers and, indeed, the Court heard precious little at trial from the huge distributor base - - and not a single complaint about prices - - and nothing at all from any municipal engineer, contractor, and project owner. Complaint Counsel failed to prove its case by the "substantial evidence" required to meet its burden under federal law. *FTC v. Cement Inst.*, 333 U.S. 683, 705 (1948); *Cal. Dental Ass'n v. FTC*, 224 F.3d 942, 957 (9th Cir. 2000); *Cinderella Career & Finishing Sch., Inc. v. FTC*, 425 F.2d 583, (D.C. Cir. 1970); *Rayex Corp. v. F. T. C.*, 317 F.2d 290, 292 (2nd Cir. 1963). Judgment should be granted in favor of McWane on all Counts.

RESPONDENT

Respondent McWane, Inc. ("McWane") is a privately-held, family-run company that manufactures products integral to the water distribution and plumbing infrastructure in the United States. For plumbing applications, McWane makes cast iron drain, waste, and vent pipe, Fittings, and couplings. For clean waterworks systems, McWane makes ductile iron pipe; valves

and fire hydrants; and, ductile iron waterworks Fittings (hereinafter, "DIWF" or "Fittings"). (JSLF ¶ 1.) Fittings are used in water distribution and treatment systems to join pipe, valves and hydrants in straight lines, and to change, divide or direct the flow of water. (JSLF ¶ 6.) This case concerns only McWane's Fittings business.

McWane historically manufactured Fittings at two domestic foundries, its Tyler Pipe & Foundry Co. South Plant in Tyler, Texas and its Union Foundry Company in Anniston, Alabama. (Tatman, Tr. 209, 212-214.) At one time, it was only one of many domestic Fittings foundries , including U.S. Pipe, Griffin Pipe, and American Cast Iron Pipe Company. (Tatman, Tr. 1046-1047). Over the past several decades, however, all of the other domestic foundries either dramatically reduced or exited domestic Fittings production in the face of the flood of cheap imports from China, Korea, India, Mexico, and Brazil. (Tatman, Tr. 275; Schumann, Tr. 4638-4639; RX 730; JX 646 (Burns, Dep. at 25-28); JX 643 (Tatman, IHT at 47-51); JX 701 (Morton, Dep. at 10).) These importers, including both Sigma and Star, describe themselves as "virtual manufacturers" because they do not own foundries or manufacture the Fittings they sell. (JX 689 (Rona, Dep. at 212).) Rather they outsource the actual manufacture of Fittings from various foundries in China, India, and elsewhere. (JX 694 (Bhutada, Dep. at 7-9, 72-73).) Because of lax or nonexistent environmental, worker safety, and labor and wage requirements, foundries in those countries have historically enjoyed significant cost advantages that allowed them to significantly underprice domestic manufacturers. (Tatman, Tr. 275; JX 642 (Page, Dep. at 112, 132); JX 694 (Bhutada, Dep. at 13-14); JX 669 (Groeniger, Dep. at 40-41); JX 661 (Prescott, Dep. at 29-30); JX 646 (Burns, Dep. at 17); JX 658 (Keffer, Dep. at 58) (domestic suppliers must meet regulatory standards that importers do not have in their own countries).)

The International Trade Commission unanimously determined in 2003 that cheap Chinese imports had surged "into the United States in such increased quantities or under such conditions as to cause market disruption to the domestic producers[,]" , but then-President Bush declined to impose the recommended tariffs. (RX 730.009.); JX 642 (Page, Dep. at 18-19).) Imported Fittings have increased their share significantly since then, while the domestic industry has suffered. Indeed, McWane's share of all Fittings has steadily declined from roughly 70% in 2003 to the low 40% at the time of trial. (McCutcheon, Tr. 2579, 2585, 2638-39.) In contrast, Star, and Sigma, in particular, have steadily grown their share. (McCutcheon, Tr. 2579, 2585, 2638-39.) McWane itself was forced to shut its Tyler facility in the Fall of 2008 and open a foundry in China, Tyler Xin Xin. (Tatman, Tr. 963-964, 966-968; RX 616; JX 643 (Tatman, IHT at 47-51).) McWane consolidated internal management of all of its Fittings operations, both domestically and in China, into a single division, "Tyler/Union". (Tatman, Tr. 209, 212-214.)

THE ALLEGATIONS

Counts 1 and 2 of the Administrative Complaint ("Complaint") allege that McWane, Sigma, and Star "conspired," in violation of Federal Trade Commission Act Section 5, to increase their multipliers for small (3"-12") and medium (14"-24") diameter imported Fittings in January and June 2008 and to limit the job price discounting each company offered in 2008. (Complaint ¶¶ 32, 34.) The Complaint also alleges that the companies' participation in a trade association, the Ductile Iron Fittings Research Association ("DIFRA"), "facilitated" the alleged price coordination for a six-month period after June 2008. (Complaint ¶¶ 2, 35-38.) The Complaint does not allege that prices were ever discussed or agreed upon at any DIFRA meeting, however, and acknowledges that DIFRA was only in "operation between June 2008 and January

2009[.]" (Complaint ¶ 36.) Count 3 alleges that McWane "invited" Star and Sigma to collude, in violation of Section 5, by some or all of the same conduct.

Counts 4-7 allege that McWane monopolized, attempted, and conspired to monopolize a market for domestic Fittings, in violation of FTC Act Section 5, by "excluding" its alleged co-conspirators, Sigma and Star, from sourcing and re-selling domestic Fittings. Counts 4 and 5 allege that McWane "excluded" Sigma by agreeing to sell it domestic Fittings under a one-year sales agreement signed in September 2009. Counts 6 and 7 allege that McWane "excluded" Star by issuing a domestic rebate letter to its customers in September 2009. (Complaint, ¶¶ 1, 46.) McWane's Answer denied that it participated in any unlawful conduct. (Answer ¶¶ 2-7, 35-70.) As explained herein, McWane is entitled to judgment in its favor on all counts contained in the Complaint.

* * *

After the close of fact discovery, Complaint Counsel raised new allegations for the first time. It argued in its summary judgment brief that Star's after-the-fact decision to follow McWane's dramatically *lower* list prices in April 2009 somehow amounted to a price fixing conspiracy by McWane. The Complaint does not contain any allegations about a conspiracy in April 2009 or any allegations about a conspiracy to affect list prices. In its pre-trial brief, Complaint Counsel raised yet another new allegation and argued that McWane, Star, and Sigma engaged in "signaling practices" in June 2010. (Complaint Counsel's Pre-Trial Brief and Exhibits, filed August 23, 2012, p. 35.) Again, the Complaint contains no allegations about June 2010 conduct. Notably, the actual Complaint alleged "price coordination" only "between June 2008 and January 2009[,]" and that the passage of the ARRA Buy-America statute in February 2009 "upset the terms of coordination." (Complaint ¶¶ 3, 36.) The Commission's January 4,

2012 press release further confirmed that the Commission was alleging a conspiracy which "disbanded in early 2009[.]" (January 4, 2012 Statement by Federal Trade Commission, http://www.ftc.gov/opa/2012/01/mcwane.shtm.) The Commission had the "evidence" Complaint Counsel relies upon during the investigative phase of this matter, but chose not to include the allegations in its Complaint - - strongly suggesting that it understood just how weak any claims would be.

Moreover, Complaint Counsel flatly objected and refused to answer McWane's interrogatories seeking all bases for its Complaint during the discovery period. (*See* Complaint Counsel's Responses to McWane's Interrogatories, filed March 16, 2012.) And, when it finally supplemented its responses several weeks after the close of discovery, it *did not identify any facts* related to April 2009 or June 2010 in response to McWane's interrogatories specifically asking for all bases for Complaint Counsel's contention that "consumers were substantially injured or likely to be injured as a result of McWane's anticompetitive or unfair conduct, including but not limited to McWane's 2008-09 DIWF prices," that "McWane's alleged conduct raised prices to supra-competitive levels, artificially decreased output, or otherwise harmed consumers or the competitive process, or was contrary to McWane's own self-interest," that "McWane directly communicated its list prices, multipliers, specific job bids, or any other information related to the pricing of its DIWF products to any other manufacturers or supplier of Domestic or Non-Domestic Fittings," that "there was parallel pricing relating to Domestic or Non-Domestic Fittings by McWane or any other DIWF manufacturer or supplier," that "any decision by McWane to change its DIWF pricing in 2008-09 was not made independently," that "any of the allegedly anticompetitive or unfair conduct by any Respondent is ongoing at present," and "each and every alleged anticompetitive or unfair conduct of each Respondent or other third party

regarding the prices of Non-domestic Fittings." (Complaint Counsel's Responses to McWane's Interrogatories, filed June 21, 2012.)

At the final pre-trial conference, Complaint Counsel nonetheless for the first time argued that its new-found allegations were part of the same conspiracy alleged in the Complaint:

> JUDGE CHAPPELL: Who, whoa, whoa. Let's get down to the bottom line. Are you saying that April, 2009 and June, 2010 are different conspiracies?
>
> MR. HASSI: No, Your Honor.
>
> JUDGE CHAPPELL: How many conspiracies are there?
>
> MR. HASSI: Your Honor, there's one conspiracy between the three companies. There are different events that happen along the way. We didn't list every event in the Complaint.

(Final Prehearing Conference, August 30, 2012, Tr., p. 158.)

The April 2009 and June 2010 allegations were tried over McWane's objection, and McWane expressly reiterates its objection here for the reasons previously set out in its Pre-Trial Brief, its Motion to Exclude Evidence relating to the April 2009 and June 2010 allegations, and its Summary Decision opposition. (*See, e.g.,* Aug. 24, 2012, Pre-Trial Brief; *see* McWane Motion to Exclude Evidence, Or In The Alternative, Motion For Continuance; *see* McWane Opposition to Complaint Counsel's Motion for Summary Decision.)

At trial, Complaint Counsel's own expert, Dr. Schumann, who studied the record "full-time" for the ten months from January 2012 until the trial, flatly disagreed that there was a single conspiracy that dragged on until 2009 or 2010. Instead, he repeatedly opined that any conspiracy ended by the Fall of 2008 at the latest. (Schumann, Tr. 4298 ("I believe that by the end of 2008, that last quarter, the conspiracy was collapsing."); 4304 ("Q. October 23, 2008, so right around

the time you say the conspiracy is falling apart and ending; correct? A. This is around the time - Q. Yeah. A. -- it seemed to be really starting to collapse."); Schumann, Tr. 4200-4201).[1]

THE FACT RECORD

I. McWane Priced Independently At All Times

In 2007-8, the domestic waterworks industry faced difficult times. The housing market had crashed and municipal spending had plummeted. The key raw materials of the industry (pig iron, scrap, coke, energy and labor) were spiking. Cheap imports had grabbed the lion's share of the market. Long-time domestic manufacturers had shut down or reduced production. McWane's share declined by nearly fifty percent since 2003, while its archrival importers, Star and Sigma, steadily increased. McWane was forced to close its Tyler, Texas foundry and Union Foundry was operating at a fraction of its capacity.

In the face of these difficulties, McWane reacted competitively: it consistently kept its published prices *lower* than Sigma and Star and continued to offer substantial job discounts, rebates, and other price concessions - - all in an effort to gain back volume and share. It did not succeed. Its prices declined further - - despite the spike in raw materials - - and it continued to lose share. By Fall 2008, it concluded that the tough market and competitive conditions made it unlikely its Fittings business would achieve reasonable profitability for years to come, and it made the decision to shut its Tyler Pipe foundry. (Tatman, Tr. 963-64, 966-68; RX 616; JX 643 (Tatman, IHT at 47-51).) In Spring 2009, McWane continued its efforts to win volume and gain share by dramatically lowering its list prices for all medium and large diameter imported Fittings. It tried to hit Star and Sigma in their core product sizes. But Star and Sigma again

[1] For the reasons discussed *infra*, however, Dr. Schumann's opinion that there was even a short-lived "conspiracy" that ended in Fall 2008 was so unreliable it is entitled to no weight.

followed McWane's prices down. Job price discounts and other concessions remained rampant. And, the simple fact is that McWane's Fittings business has been break-even, at best, for years.

A. Substantial Evidence At Trial Established McWane's Independent And Pro-Competitive Price Decisions

McWane's Vice President and General Manager, Rick Tatman, testified at trial that he "always" made pricing decisions independently at all times, and "never" discussed McWane's January or June 2008 multipliers (or his April 2009 list prices or his June 2010 multipliers) with anyone from Star or Sigma. (Tatman, Tr. 363-364 ("Q. You never spoke to your competitors? A. I've never had a pricing discussion with a competitor. Q. You've never once talked a competitor about their prices or your prices in the marketplace; is that your testimony? A. I said I've never had a pricing discussion with a competitor."), 978 ("Q. . . . All these price moves that we saw, January '08, June '08 multipliers, April '09 list price, June 2010 multipliers, did you make these decisions independently on your own, sir? ***A. They were done independently***") (emphasis added); 1005-1006.)

B. McWane Charted Its Own Course In Winter 2008 With Lower Published Multipliers Than Sigma And Star

In October 2007, in the face of escalating pig iron and other raw material costs, Sigma announced in a letter to its customers that it intended to raise both its list price and published multipliers by a substantial amount effective January 2008. (Rybacki, Tr. 3661-3662, 3683-3684.) A month later, Star followed suit. (Minamyer, Tr. 3152-3153; RX 406.)

McWane did not. Instead, Mr. Tatman found out about Sigma's announcement after-the-fact and analyzed it. He determined that it was, in effect, a 25% list price increase and he concluded that it was not in McWane's self-interest to follow that increase. Instead, McWane charted its own course. Mr. Tatman prepared multiple iterations of a complex state-by-state

analysis of McWane's existing published multipliers, what it believed was the much lower true invoice price that resulted from job pricing, and where he believed McWane should set its new published multipliers. (Tatman, Tr. 887.) As a result of his analyses, McWane kept its list prices from mid-2007 in place and, on January 11, 2008, announced new multipliers that were not only *much lower* than Sigma's huge list price increase, but in many states lower than McWane's prior multipliers and even, in some states, its invoice prices. (Tatman, Tr. 882, 884-885; 892-893; CX 1178; CX 1664; RX 591.)[2] Mr. Tatman did this is order to win business and gain share. (Tatman, Tr. 967 ("From a competitive environment, I went out and I tried to get volume, I tried to get share, and I tried to change my tactics to get that, and basically I got hammered again, I got beat up and I lost share.").) There is no testimony or other evidence in the record of any discussion between McWane and any competitor regarding the January 2008 price move, much less any agreement between McWane and any competitor with regard to pricing.

Instead, the testimony and contemporaneous documents are clear: Star and Sigma's respective sales teams learned of McWane's letter and multiplier changes after-the-fact from their customers, not from McWane. Mr. Pais testified that Sigma learned of McWane's January 2008 multipliers from its customers, as was "pretty customary," and did not receive the January 11 letter from McWane. (Pais, Tr. 2059 ("Q. All right. But did anyone at McWane send it directly to you, sir? A. Oh, no. No.").) After analyzing McWane's announcement, Sigma discovered that McWane's newly-announced 2008 multipliers were not only "***much lower***" than Sigma's Winter 2008 list and multipliers, but also lower in many states than Sigma's actual discounted invoice prices, *i.e.*, its job prices. (Rybacki, Tr. 3690 ("Q. All right. And did you discuss -- by the way, when you got that letter, did you -- at Sigma did somebody evaluate that

[2] McWane's January 2008 multiplier adjustment resulted in actual reductions of McWane's published multipliers, vis-à-vis its 2007 multipliers, in 28 states, while 8 states stayed the same and 14 states increased. (Tatman, Tr. 885; CX 1664; Normann, Tr. 4778.)

letter? Trying to figure out what Tyler was doing with its multipliers? A. Yes"); 3692-3693 ("Q. Once you got that, did you and Mr. Fox and the others discuss let's analyze that and figure out what Tyler is doing with its multipliers? A. Yes"); 3695 ("Q. The multipliers were much lower than the list price that you'd sent out. A. Yes".) Sigma had no advance knowledge of what McWane was doing with its multipliers prior to receiving McWane's letter from his customers. (Rybacki, Tr. 3693 ("Q. . . . Did you ever call anyone at McWane and discuss that with them? A. No. Q. All right. And I take it you didn't have any advanced knowledge since you're all wondering what they're doing, let's analyze it; right, sir? A. Correct.").) Indeed, Sigma considered the new McWane published multipliers "discouraging" when it determined that they were the same or lower in "many territories," despite the extraordinary spike in raw materials costs. (CX 1145; Pais. Tr. 2059-2061 ("Q. So you say: When we compare apples to apples, Tyler's new multipliers do not provide much of an improvement in many territories, with reasonable improvement in just -- one, two, three, four, five, six, seven and parts of Texas -- seven states and parts of Texas; is that right, sir? A. Yes. Q. But only marginal or no improvement in many territories, like Ohio, Arizona, Florida; right, sir? A. Yes. Q. And even a lowering in some, like Maryland and Idaho? A. That's correct."); 2061 ("Q. The last paragraph on that first page, you found these multipliers by Tyler discouraging; right, sir? A. Yes.").)

Based on internal deliberations among its regional sales managers and executives - - and not any discussion with anyone at McWane - - Sigma independently decided to follow some of the multipliers McWane published and not to follow others. (Pais, Tr. 2060 ("Q. And that's because, again, you never discussed with anyone at McWane the multipliers it was going to issue; correct, sir? A. No. Never"); Rybacki, Tr. 3695-3696 ("Q. And so when you analyzed McWane's multipliers in the beginning of 2008, you saw that some of them were in fact well

below Sigma's multipliers at the time; right, sir? A. Correct. Q. Now, you say you're almost -- your new multipliers will be in effect for almost every territory, and that's because you did not actually follow all of the multipliers that McWane sent out, did you, sir? A. We did not. Q. So you selectively followed the ones you thought made sense to Sigma, and you disregarded the ones that you thought did not make sense, sir? A. That's correct. Q. And you made those decisions internally at Sigma? A. Right. Q. And you never talked to anybody about -- McWane about any of those decisions, did you, sir? A. None, no.").)

Star likewise obtained McWane's January, 2008 price letter after-the-fact from its customers. (McCutcheon, Tr. 2506-07.) Having prior experience with such letters, its executives testified that they "didn't really trust anything [McWane] put out" having to do with multipliers. (Minamyer, Tr. 3241 ("Q. Okay. You didn't believe letters having to do with multipliers? A. No. Q. Okay. Was that because you had found them in the past while you were national sales manager not to be accurate at times? A. That's correct. Q. And in fact, you'd go so far as to say that a competitor would lie in a pricing letter about a multiplier, wouldn't you? A. I didn't really trust anything they put out referring to multipliers.").) Rather, they preferred to rely on feedback from their customers for true market intelligence and considered it to be more credible. (Minamyer, Tr. 3241-3242 ("Q. Okay. You believed on feedback from your customers about what was happening in the market; correct? A. That's what we based our decisions on.").) Star's National Sales Manager, Mr. Minamyer, explained that it was Star's typical practice to follow McWane's published pricing moves. (Minamyer, Tr. 3140-3141.) For example, in a January 22, 2008 e-mail providing instructions to his sales team with respect to how to "react" to McWane's new multipliers, Mr. Minamyer described Star's plan: "Once we know what a state or

area's multiplier is, if it goes up, we will change to that number. If it goes down, we will discuss it." (CX 752.)

C. McWane Again Charted Its Own Course With Lower Multipliers In Spring 2008 In Order To Win Business And Gain Share

In April 2008, Sigma independently decided to announce a very large multiplier increase because of the continued raw materials increases. (RX 47; Pais, Tr. 2079 (describing declining multipliers and rebate increases as a "double whammy").) Mr. Pais characterized this effort as "BIG BOLD MOVES (BBM, baby!)." (RX 47.) At trial, Mr. Pais confirmed that ne never discussed the "Big Bold Move" with anyone at McWane. (Pais, Tr. 2080 ("Q. Now, did you call anyone at McWane and say, "Hey, I got a plan, big bold move. I'm going to increase prices. You guys do it, too"? A. No. Never.").) In a letter dated April 24, 2008, Mr. Rybacki notified the company's customers of the upcoming increases. (CX 1858; Rybacki, Tr. 3710.) Star again quickly followed Sigma. (CX 819; Minamyer, Tr. 3209.)

McWane did not. Instead, Mr. Tatman obtained Sigma's April 2008 letter announcing Sigma's large multiplier increase from a customer (not Sigma) after the fact (not in advance). (Tatman, Tr. 488:17-489:1; CX 176.) He forwarded it to his superiors and noted that Sigma's large 18% to 40% price increase presented McWane with an opportunity to win back business and could be "great for helping us achieve our business objective of regaining share." (CX 176.) Mr. Tatman analyzed the letter, using his same state-by-state spreadsheet analysis, and independently determined McWane's preliminary pricing strategy. (Tatman, Tr. 955:15-956:16.) He again came to the conclusion that while McWane also faced continued raw materials cost increases, it would be more beneficial for McWane to keep its published multipliers ***substantially below*** Sigma and Star and ***not to follow*** the big, bold move, which was consistent with his longer-term goal of gaining volume and share. (Tatman, Tr. 520-522; 958.)

As a result, he issued multipliers that were substantially below Sigma and Star in virtually every state across the country which, he hoped, would allow McWane to back share and "make victory all the swe[e]ter." (RX 424; Schumann, Tr. 4284-86.)

D. McWane, Star, And Sigma Provided Job Price Discounts And Other Price Concessions Throughout 2008 And Every Witness Denied Any Agreement to Stop Or Curtail Them

The trial evidence establishes that McWane continued to offer hundreds and hundreds of job price discounts and a host of and other price concessions throughout 2008 and beyond, as did Sigma and Star. Every single witness denied having any agreement to eliminate or reduce job pricing. (Tatman, Tr. 924; Rybacki, Tr. 3659; Minamyer, Tr. 3278; McCutcheon, Tr. 2554, 2689-2690.)

Mr. Tatman testified, and Star and Sigma confirmed, that McWane continued to aggressively offer job pricing and a host of other price concessions to its customers throughout 2008 (and, indeed, throughout 2009, 2010 and into the present). (Tatman, Tr. 924, 1072 ("Q. Is that a yes, you continued to job-price or a no, you tried to stop job pricing? A. We continued to job-price every stinking month and we've never stopped."); Rybacki, Tr. 3659; Minamyer, Tr. 3278; McCutcheon, Tr. 2554, 2689-2690.) [redacted]; JX 644 (Tatman Dep. at 109.).)

Sigma and Star witnesses confirmed that their sales forces continued to hear from customers that McWane was engaged in aggressive job pricing throughout 2008. (Pais, Tr.

2052-55 & RX 17 ("examples of where Tyler has in writing current pricing good through June"), 2071-74 & RX 37 ("for what it is worth, I was told by HDSW [HD Supply] . . . that Tyler and SIP were at a .26 and only us and Star are holding the .28"), 2086-87 & RX 45 ("We seem to always think McWane quotes the same pricing as their map, but I can assume you, that's not the case"). Indeed, they blamed McWane's aggressive job discounting for leading to the "sharp erosion in market pricing" in Fall 2008: "from my vantage point it appears that McWane was the first of the three fittings manufacturers to move to a .25 from .28." (Pais, Tr. 2129-39 & RX 116.)

McWane's sales force reported back to Mr. Tatman that Sigma and Star were regularly offering job pricing to customers and win business away from McWane.[3] (RX 399; Tatman, Tr. 905-907 ("Q. Now, if we page through this document, it sounds like you're getting a lot of reports of different competitors, Star, Sigma, and so forth, at times being aggressive and pricing below published multipliers; is that what we have here? A. Yes"); JX 642 (Page, Dep. 156-157) (job pricing has "always been around and always will be around").)

Sigma also never stopped or reduced job pricing. (Pais, Tr. 2192; Rybacki, Tr. 3701, 3715.) Mr. Rybacki also testified that Sigma's regional sales managers frequently forwarded reports to him reporting that both McWane and Star were aggressively job pricing. (CX 1726; Rybacki, Tr. 3698-3699; 3700-3701.) In turn, Sigma's sales force exercised its independent pricing authority and priced all over the map. (Rybacki, Tr. 3697.) In Mr. Pais' words, pricing during the alleged conspiracy "varied every day with every customer in every territory." (Pais, Tr. 2075.) Mr. Rybacki testified that [redacted]

[3] As it said during trial, Respondent offers these documents to demonstrate that McWane's sales force regularly reported to Mr. Tatman that customers told them that Sigma and Star were offering job discounts, and not for the truth of each report.

[redacted] (Rybacki, Tr. 3522-24, 3658-3659 *in camera*, 3701; CX 1002; Minamyer, Tr. 3277-3278 ("the market was always very competitive. We – we had to fight pretty hard for every order"); Rybacki, Tr. 3701 (Sigma had "[n]o choice but to" offer job discounting throughout 2008).)

Likewise, Star never stopped or reduced job pricing during the alleged conspiracy. (McCutcheon, Tr. 2540-2541; 2547-2548; RX 557, 2550-2551, 2553-2554; Minamyer, Tr. 3174-3175, 3274-3275, 3277-3278.) Mr. Minamyer and Mr. McCutcheon both testified that Star continued to offer job pricing in 2008 at a rate of a couple hundred a month. (Minamyer, Tr. 3251-52, CX 815; McCutcheon, Tr. 2512.) Most of the several hundred requests per month were without documentation, but Mr. Minamyer approved them anyway. (Minamyer, Tr. 3255.) In fact, Mr. McCutcheon testified that the amount of job pricing actually ***increased*** during 2008:

> And we've been looking at SPRs [special pricing requests] ever since this thing happened. Since we were accused of price fixing, we've gone back and looked at our SPRs, and we figured out that during this whole process that we were accused of price-fixing, our SPRs went up, 20 percent. And that's bizarre to us, that we could be accused of price fixing in a period that SPRs go up 20%.

(McCutcheon, Tr. 2402-03.) Mr. Minamyer testified that throughout 2008, as always, Star job priced whenever it needed to do so in order to win business. (Minamyer, Tr. 3278.)

E. Complaint Counsel And Their Expert Conceded They Lacked Evidence Of Any Advance Price Discussions Or Agreements

Complaint Counsel conceded in their sworn responses to McWane's Requests for Admission that they "***lacked sufficient information*** to admit or deny" "that there is no evidence that McWane directly communicated its prices to any other Fittings manufacturer or supplier in advance of communicating them to its customers or potential customers." (CRFA, No. 19; *see*

also CRFA 20 (Complaint Counsel "lacks sufficient information to admit or deny" that "there is no evidence that any other Fittings manufacturer or supplier learned of McWane's prices in advance of McWane informing its customers").)

Complaint Counsel's expert, Dr. Schumann, conceded that his review of the record showed no evidence of any advance communication of multipliers (or any other price) and no evidence of any actual price fixing meeting: "***I have not found anything to suggest that any executives at Sigma and Star and McWane met in a specific place and had a meeting to hammer our some sort of agreement. That is correct.***" (Schumann, Tr. 4172-4173.) *See also* Schumann, Tr. 4171 ("as I said, there was no meeting in a smoke filled room"), 4186-4187 ("No"), 4236 ("It is my opinion that they did not meet and hammer out a specific agreement, if that is what the question is").

Tellingly, after nearly three-years of investigation, litigation, and trial, Complaint Counsel has no evidence that McWane communicated and agreed with Sigma or Star upon its January or June 2008 imported Fittings multipliers (or its April 2009 list or June 2010 multipliers), or to eliminate or reduce its job price discounts, or any other price concession.

II. The Record Contains Hundreds Of Sworn Denials Of Any Discussions Or Agreements On Pricing

A. Every Single Witness Flatly Denied Any Pricing Discussions Or Agreements

Every single witness from Sigma and Star corroborated Mr. Tatman and testified that they found out about McWane's published prices after-the-fact from customers (not McWane), that they made their pricing decisions independently. They flatly denied discussing or agreeing on their published prices with McWane. Mr. Pais testified repeatedly that he "absolutely" "never" had any pricing discussions with anyone from McWane. (Pais, Tr. 2028 ("No, I did not."), 2035 ("No, we didn't."), 2080 ("No. Never."), 2102 ("Not at all."), 2130-2131 ("No." ...

"None.").) He also specifically denied coming to any agreements with McWane regarding the January 2008, June 2008, and June 2010 multipliers. (Pais, Tr. 2045-2048 ("Absolutely not." … "Never." … "Not at all." … "Never.").) Mr. Rybacki likewise testified that he "never" discussed Fittings prices or reached an agreement of any kind with anyone at McWane, including Mr. Tatman, Mr. Jansen, Mr. Frank, or Mr. Page. (Rybacki, Tr. 3649-3651 ("Never." … "Never." … "No." … "No."), 3659 "No, I did not."), 3682-3683 ("Never." … "No." … "No." "No." … "No."),1115-1116 (Q: Did you speak to anybody at McWane about that?" A: "No.").)

Each Star witness also flatly denied any discussions on price or agreements with McWane. Mr. McCutcheon testified that he never called anyone at McWane about agreeing to raise prices. (McCutcheon, Tr. 2516 ("Q: . . . did you call anyone at McWane and say, "Hey, guys, let's all agree to raise prices together"? A: No, sir.). Mr. McCutcheon specifically testified that he never discussed or agreed upon Fittings prices with Mr. Page, Mr. McCullough, Mr. Walton, Mr. Tatman, Mr. Jansen, or anyone else at McWane – at any time. (McCutcheon, Tr. 2524-25). Mr. McCutcheon also denied any agreement to centralize pricing authority. (McCutcheon, Tr. 2519-2520 "No, sir.") Mr. Minamyer similarly had no conversations with anyone at McWane concerning Star's proposed 2007 list price or multiplier changes. (Minamyer, Tr. 3238-3239 ("No, sir." … "No, sir."). Mr. Minamyer testified that he had no conversations with anyone at McWane concerning Star's Spring, 2008 proposed multiplier increase. (Minamyer, Tr. 3239 ("No, sir.")). Mr. Minamyer also testified that he never discussed job pricing with anyone at McWane or had any agreements concerning job pricing. (Minamyer, Tr. 3239 ("No, sir."); 3240 ("No, sir." … "No, sir." … "No.")).

B. The Deposition And Investigative Hearing Testimony Contains More Than 250 Additional Sworn Denials Of Any Price Agreements With McWane

Mr. Tatman and other McWane witnesses testified that they made their pricing decisions independently at all times. (JX 644 (Tatman, Dep. at 138-139) ("independent decision"); JX 643 (Tatman, IHT at 108-109. ("an independent decision")). Jerry Jansen, McWane's National Sales Manager, likewise testified that McWane has always made pricing decisions independently. (JX 637 (Jansen Dep. at 271).)

Star witnesses also testified uniformly that they made their own, independent price decisions and flatly denied any agreement with McWane on price. Mr. McCutcheon testified that he and McWane employees never discussed prices, market share, or any other competitive factors. (JX 698 (McCutcheon Dep. at 31 (Q. . . . never agreed with him on a price for ductile iron pipe fittings . . . ? A. That's correct."); 32. ("No, sir."); 34. ("No, sir.").) Mr. Minamyer likewise testified that he never discussed pricing or marketing strategy with McWane personnel. (JX 685 (Minamyer, Dep. at 14 ("Q. Okay. During the time that you were national sales manager at Star, did you have any communications with anyone at McWane about pricing or market strategy? A. No.") (objections omitted), 15-16 ("Q. Okay. Did you personally every have any communications with any competitor while you were with Star about pricing? A. No.").)

Sigma's witnesses also denied any price communications or agreements with McWane. Mr. Pais testified that he never had discussions with McWane regarding price. (JX 686 (Pais, IHT at 68 ("Not at all."), 109 ("at no time"), 104 ("No"), 110 ("No, there was no discussion about that").) Mr. Rybacki similarly testified that he never had any discussions with McWane regarding price. (JX 690 (Rybacki, Dep. at 91 ("No"); 192 ("Never.").) Sigma's OEM Business Manager, Mitchell Rona, denied the same. (JX 688 (Rona IHT Tr. at 203 ("Q. Did you discuss import pricing at any point with Mr. Tatman during - - A. No. Q. – these discussions? A. No").)

III. DIFRA Did Not "Facilitate Price Coordination"

Complaint Counsel introduced no evidence at trial that Fittings prices were ever discussed at any of the few DIFRA meetings that took place during its short operation in 2008, no evidence that DIFRA ever collected or disseminated pricing data from any DIFRA member, and no evidence that any DIFRA member used the historic, aggregated tons-shipped data to eliminate or curtail job pricing.

DIFRA's initial organizational meeting was held in 2005, three years before the alleged conspiracy, at the law offices of Bradley, Arant, Rose & White, LLP ("Bradley Arant"). (CX 1473.) Bradley Arant lawyers, including experienced antitrust counsel, attended that meeting and each of the few subsequent DIFRA meetings, and advised the DIFRA members on all aspects of the organization and operation of the trade association. (JX 687 (Pais, Dep. 31); RX 442; Brakefield, Tr. 1347-1349) ("Q. Antitrust discussions with Mr. Long and the other attorneys from Bradley Arant were a common discussion at meetings and phone calls, were they not? A. Yes, sir, they really were.") For example, Mr. Thad Long and other Bradley Arant attorneys counseled DIFRA regarding a careful process for DIFRA to gather and aggregate historic tons-shipped data from each DIFRA member. (Brakefield, Tr. 1371-1372 ("Q. And Mr. Long writes, "I have received proposed reporting forms from two of the four DIFRA participants, and I find that they are fairly consistent in approach and seem to minimize antitrust concerns." Do you see that? A. Yes, sir. Q. That was his advice to DIFRA at that point? A. Yes, sir.").)

At the suggestion of counsel, DIFRA retained an independent, third-party accounting firm, Sellers Richardson Homan & West LLP ("SRHW"), to gather only historic tons-shipped data from each DIFRA member. (Brakefield, Tr. 1236-1237.) SRHW collected and aggregated tons-shipped data across broad product size ranges containing literally thousands of different SKUs -- all with unique physical attributes and pricing points -- that mirrored major size

groupings of pipe (3-12," 14-24," and 24" and above) and disseminate the data to DIFRA members. (RX 113; Brakefield, Tr. 1396-1397.) No pricing data was ever collected by DIFRA or disseminated to any DIFRA member. (Brakefield, Tr. 1352-1353 ("Q. And it was also never -- net sales or any other sales information was never on any report that was disseminated by DIFRA, the CPAs, to any DIFRA member, to your knowledge. A. That's correct"); McCutcheon, Tr. 2416-2417 ("Well, my problem is with you using the word "exchange." We didn't exchange anything. We provided data to a third party. The third party mashed it together, gave us our percentage. We never one time exchanged any data or information.").)

Mr. Tatman and every other witness testified that the historic tons-shipped data disseminated by DIFRA's accountants did not give McWane or any other association member any insight into competitor pricing or sales, and witnesses testified that the tons-shipped reports did not serve as a vehicle to permit McWane, Sigma, or Star to fix and stabilize DIPF prices or otherwise "facilitate" price coordination. (Brakefield, Tr. 1337 ("...in June of 2010, as part of the alleged conspiracy, did you communicate with anyone at McWane and agree upon the prices that Sigma and McWane would charge customers? A. No, sir . . . Q. Did DIFRA serve as a vehicle to permit Sigma, Star and McWane to fix and stabilize prices for ductile iron fittings? A. No, sir.") Indeed, McWane, Sigma, Star, and U.S. Pipe witnesses all testified that they could not determine from the historic tons-shipped reports any information regarding: (i) where in the United States any of the tons reported were sold; (ii) which of the thousands of different casting diameters, configurations, or finishes contained within any of the major size groupings were being reported; (iii) when precisely any Fittings would have been sold; (iv) how much of the tons-shipped was attributable to other DIFRA members; (v) whether the Fittings shipped were of imported or domestic origin; (vi) whether the DIPF was sold into "open spec" or domestic only

jobs; and, critically (vii) at what price any fitting was actually sold. (Brakefield, Tr. 1352-53,1384-1389; JSLF ¶ 18; JX 694 (Bhutada Dep. at 28, 111-112); McCutcheon, Tr. 2563.)

The DIFRA members used the DIFRA data for pro-competitive purposes. McWane's Mr. Tatman testified, for example, that McWane used the tons-shipped data to finalize its independent decision in June 2008 to keep its published multipliers lower than the large price increases that Sigma announced in its "Big Bold Move" (*see infra*; Tatman, Tr. 536-540), and, he testified, job pricing continued before, during, and after DIFRA and appeared to get more vicious later in the year *after* DIFRA was operational. Star and Sigma witness confirmed that there was a "sharp erosion" of prices in the second half of 2008 - - which they blamed on McWane's rampant job pricing. (RX 116; Pais, Tr. 2129-2131 ("Q. All right. So here you are in the second half of '08 and you say that prices -- there's been an equally quick and sharp erosion in market pricing, and you say it's an alarming double whammy. What did you mean by that, sir? A. Well, as I preface there with the volume dropping down and the prices falling, that is certainly a one-two punch"), 2134-40 & RX 115 ("McWane leading markets downward in Tennessee and Alabama and the Carolinas"), 2151; Rybacki, Tr. 3702 ("The second half of '08 turned gloomy"); Tatman, Tr. 971-972 ("Worse.").)

By Fall 2008, a few months after DIFRA began its tons-shipped reports, Mr. Tatman concluded that that market was so bad and competition was so fierce that the next few years looked bleak:

> I don't believe the market or competitive conditions over the next three to five years will provide a reasonable opportunity to generate acceptable income or normalize inventory levels with the current structure.

(Tatman, Tr.. 966-68; RX 616.) Using the DIFRA tons-shipped data, he determined that McWane was particularly weak (and Star and Sigma particularly strong) in sales of medium and

large diameter Fittings and he set out analyzing how to target them and win back business. Ultimately, that resulted in McWane's announcement of a 20-25% reduction in medium and large diameter Fittings list prices in Spring 2009. (Tatman, Tr. 594-595, 972-973; CX 569.)

McWane and Sigma witnesses also testified that the DIFRA tons-shipped data allowed them to better manage inventory, production, and order schedules in the face of dramatically declining demand and, consequently, to lower their costs. (Tatman, Tr. 594-595; 972-973; Brakefield, Tr. 1305-1306; 1306-1306; 1308; 1369-1370 ("Q. . . . that would have lowered costs of manufacturing? A. No question."); Brakefield, Tr. 1389-1391 ("Q. Do you know, sir, then whether or not the DIFRA data permitted Sigma to manage its inventory? A. I think that's probably the best way to put it…").)

IV. The Evidence - - And Even Dr. Schumann - - Disprove The After-The-Fact "One Conspiracy" Contention

A. McWane's Dramatically Dropped Its Medium and Large Diameter Imported Fittings List Prices In Spring 2009 In Order To Gain Share

In April 2009, McWane dramatically lowered its list prices on all medium and large diameter imported Fittings some 25-25% in order to win business and gain share. Mr. Tatman testified that beginning in the summer of 2008, McWane spent six to eight months internally determining how to restructure its list prices to make it more competitive against the imported Fittings of Star and Sigma, which had both done particularly well in medium (14"-24") and large diameter (30" and above) size ranges. (Tatman, Tr. 586-587, 594-595.) The result was a restructured price list, issued by the company on April 14, 2009, which dramatically ***lowered*** McWane's prices on all sizes above 14" and contained only a modest increase on 2" -12" Fittings. (Tatman, Tr. 594, 597; CX 569; Pais, Tr. 2142.) Indeed, McWane's new list prices were so low that Sigma considered them "predator[y]" and considered suing McWane.

(Rybacki, Tr. 3719 ("Q. In fact, Mr. Rybacki, you were so -- so upset, you thought they were predatorily low, those prices; right? A. Yes. I wanted to sue. Q. You thought about actually suing the company for pricing too low in the marketplace. A. I did.").) Star learned about McWane's list price decrease from customers after the fact and internally decided - - on its own - - to follow McWane's lower price lists. (McCutcheon, Tr. 2526-2527.)

At trial, Complaint Counsel asked questions only about a single, brief telephone call Mr. McCutcheon placed to Mr. Tatman - - ***after*** McWane had announced its dramatic ***list price drop*** and ***after*** Mr. McCutcheon testified Star had already independently decided to follow McWane's prices ***down***. Mr. McCutcheon flatly denied discussing prices or reaching any agreement with Mr. Tatman on the call. (McCutcheon, Tr. 2460-2461, 2525, 2529-2530.) Instead, he was did not want to incur the substantial cost of printing his new price list if McWane was going to rescind or otherwise change its newly-announced price drop, a rumor he had heard from Mr. Pais. (McCutcheon, Tr. 2529-2530.) There is no evidence McWane ever considered doing so, and it did not. It simply stuck with its plan to drop its list prices 20-25% in order to win business from Star and Sigma in their medium and large diameter strongholds. For the rest of the year, prices thus continued their downslide. (Rybacki, Tr. 3719.)

Complaint Counsel will apparently ask this Court to infer that McWane is somehow liable because of a single email, created on April 28 - - ***after*** McWane announced its lower prices and ***after*** Star's decision to follow them down - - in which Tatman says he is "highly confident" that Star will follow McWane's list price. (CC's Pre-Trial Br. at 34.)

But additional subsequent documents demonstrate that Mr. Tatman did ***not*** know what Star was doing and whether it was likely to follow McWane's dramatic price drop. For example, on April 30, 2009 - - two days after Mr. McCutcheon called him - - Mr. Tatman expressed a lack

of knowledge and complete uncertainty about what Star would do. He internally opined to his National Sales Manager, Jerry Jansen, that "***I think*** *it will be mid-next week until the dust settles.* ***If*** *they stick with the old List* and a 0.32/0.35 the[n] we should sell allot in the Northwest." (CX 3027 (emphasis added).) Again, reflecting his hopes that McWane's lower prices would allow it to win business and gain share.

B. McWane Independently Decided Its June 2010 Multipliers

Mr. Tatman testified that he made McWane's June 2010 pricing decisions independently and expressly denied communicating with Sigma or Star regarding the June 2010 multiplier change. (Tatman, Tr. 978 ("Q. . . . All these price moves . . . June 2010 multipliers, did you make these decisions independently on your own, sir? A. They were done independently").) Again, he performed his state-by-state analysis and his customer letter raised some states, kept some the same, and lowered others. Every Sigma and Star witness questioned at trial about the June 2010 price changes corroborated Mr. Tatman and confirmed they did not discuss multipliers with anyone from McWane. (Rybacki, Tr. 3720: 23-3721:4 ("Never discussed it with McWane").)

Complaint Counsel failed to come forth with any actual evidence at trial supporting the claim that McWane engaged in "signaling practices" regarding its multiplier changes in June 2010. The only evidence in the record merely showed that in June 2010, *Sigma* sent its customers a vaguely worded price increase letter (which did not even specify if it was a list price change or a multiplier change). (CX 1413; JX 687 (Pais Dep. at 372-377); JX 690 (Rybacki Dep. at 210-213).) McWane's customers gave it the letter after-the-fact, but realized it said nothing at all about prices and decided to announce its multiplier changes based on Mr. Tatman's state-by-state analysis. Star and Sigma subsequently announced a multiplier changes a few

weeks later. (CX 1406, CX 2441, CX 1396.) Complaint Counsel did not come forward with any evidence. Thus, the sum total of the evidence of McWane conduct is that McWane independently determined its own prices after legitimately obtaining a competitor's letter from a customer.

V. Dr. Schumann's Conspiracy Opinion Is Junk Science

Complaint Counsel's expert, Dr. Schumann, conceded that his review of the record showed no evidence of any advance communication of multipliers (or any other price) and no evidence of any meeting to raise multipliers or curtail job discounting: "I have not found anything to suggest that any executives at Sigma and Star and McWane met in a specific place and had a meeting to hammer out some sort of agreement." (Schumann, Tr. 4172:18-4173:1, 4171:11-25 ("there was no meeting in a smoke filled room"), 4186:23-4187:3 ("No"), 4236:10-17 ("they did not meet and hammer out a specific agreement"). He conceded that every single McWane, Sigma, and Star witness affirmatively denied any agreement on the January and June 2008 multipliers and any agreement to eliminate or reduce job price discounts. (Schumann, Tr. 4236-4237).)

Dr. Schumann acknowledged that McWane independently decided to keep its published prices across the country lower than Sigma's and Star's prices and did not follow its rivals' large list prices in Winter 2008 or their large multiplier increases in Spring 2008:

> Q. I understand, sir. But just so we're clear, those list prices, when McWane did not follow, that's competitive, that's an independent decision, isn't it, sir?
>
> A. That - - yes, it is.
>
> * * *
>
> Q. And my client, McWane, did not follow that big multiplier increase; did it, sir?
>
> A. No, they did not.

Dr. Schumann agreed that McWane's decision to undercut Star and Sigma was entirely consistent with independent and pro-competitive conduct and Mr. Tatman's goal of winning back market share:

> Q. Dr. Schumann, I didn't ask you if they implemented it. I asked, one way to get back your share is to announce multipliers that are lower than your competitors have in the market; right, sir?
>
> A. One way to get back share would be to have prices – negotiate prices that are lower than your competitors' prices.

(Schumann, Tr. 4061-4062,4167-4169, 4268, 4286, 4269-4273 (McWane's Spring 2008 multipliers were lower than Sigma's across the country), 4279-4280 ("it is correct that the McWane multipliers were lower than what multipliers were on the Sigma map").)

In the face of overwhelming testimony and contemporaneous documents that McWane made its own, independent price decisions - - and the hundreds of sworn denials of any price agreements - - Dr. Schumann nonetheless opined that he could *infer* a conspiracy from a small handful of documents. But cross-examination demonstrated that Dr. Schumann's opinion was only his own, untestable say-so - - which he simply made up.

A. Dr. Schumann's "Conspiracy" Opinion Was Based On His Re-Imagination Of A Small Handful of Mostly Internal Documents

Dr. Schumann conceded that a conspiracy requires an actual communication of an offer from one company to another and a return communication accepting that offer. (Schumann, Tr. 4173:2-8 (Yes. I very much believe that").) But none of the documents he relied upon was an actual communication between McWane, Star, and Sigma about small and medium diameter imported Fittings multipliers or reflected any agreement on job pricing.

Instead, most of Dr. Schumann's "conspiracy" documents were entirely *internal* to one company or another and were *not communicated* outside that company. (Schumann, Tr. 4174-

4175, 4175-4176, 4176, 4177, 4178-4179 ("Nothing on the document indicates it was sent to Sigma or Star"), 4179 ("I don't show anything that indicates it was provided to Sigma or Star, that is correct"), 4201-4202 ("I am not saying that those rough drafts caused the conspiracy, that's correct. . . . I don't say in my report that it was given to Star and Sigma, that's right"), 4211-4212, 4223, 4225, 4227, 4229-4230, 4232).[4]

Dr. Schumann's interpretation of CX 627 is indicative of his re-imagining of the facts to support his conspiracy opinion - - an opinion he formed six months before the Complaint was filed. (Schumann, Tr. 4050 ("I didn't think it was necessarily just a horrible case"), 4051, 4053 ("That - - that was about six months, yes, it was").) Mr. Tatman testified that CX 627 was a "brainstorming document" he prepared for the first of several internal discussions with his management in Winter 2008 about whether or not to follow the 25% list price increase Sigma had announced in Fall 2007 (and Star had followed).[5] Given the housing crash and the steep drop-off in municipal waterworks projects, McWane's long-term loss of market share to Sigma, Star, and other importers, and the steep increase in 2007 in the cost of pig iron, scrap, and other raw materials, Mr. Tatman acknowledged that one option was simply to follow his rivals' large price increases. He did not believe that strategy would allow McWane to win back volume, however. "Would I have gotten quite a bit of traction off of that and raised my prices? Yes. But the end result would be that it would be, to me, that I would lose more visibility and I really wouldn't know where the competitive environment was and I wouldn't be able to meet my volume objectives." (Tatman, Tr. 348-349.)

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[4] Dr. Schumann conceded on cross-examination that several of his "conspiracy" documents were not created until *after* January 2008, and could not have contributed to the formation of the conspiracy he opined, and, thus, he recanted his reliance on them. (Schumann, Tr. 4182- 4184 ("I'm absolutely not saying that"), 4185 ("This document did not - - had - - did not affect the multipliers, the list multipliers that Sigma sent out at the time"), 4212 ("Q. And it's dated on its face April 2009, correct? A. That is correct."). :, can you, sir? A. I cannot. ").

[5] (Tatman, Tr. 345-346 "brainstorming session"), 354 ("It sets up topics to discuss in a brainstorming document"), 1069-1071 ("This is a brainstorming document that was used for a discussion").)

Mr. Tatman testified that, as a result, the "core" of his brainstorm was his belief that it would be better for McWane to keep its published prices *lower* than Sigma's and Star's prices, so that it could to win back business and "gain share", and to continue to adjust them downward "as required to remain competitive within any given market area. . . . That's the core of where my thought process was." (Tatman, Tr. 357; 967 ("I tried to get share"); 988 ("I'm obviously trying to grow share"); 1070 ("bullet number 3 is clearly the strategy that we went through, clearly the strategy that we built on").) His brainstorm was "talking about driving prices down. This is a discussion about lower prices than what was being offered by a competitor, so stability is not raising prices here. Stability is lowering prices." (Tatman, Tr. 358). He hoped that keeping published prices lower would "put financial pressure on a competitor, which is procompetitive, so that we could get better visibility into what was going on in the marketplace. It was reducing the wiggle room that they had from a financial standpoint so that I could see what was going on. If I can see it, I can shoot it." (Tatman, Tr. 361). "This is an action clearly gained at driving volume and driving share because I'm not even recovering inflation with what I actually did." (Tatman, Tr. 356).) He also knew that McWane would continue to offer job price discounts below its published prices because that would be necessary to win business - - and he fully expected Sigma and Star to continue job pricing. (Tatman, Tr. 1071 ("our competitors are going to keep job-pricing and we're going to have to keep job-pricing").)

In fact, as set above, McWane ultimately did decide to announce lower published prices than the large list price increases Sigma announced for Winter 2008 (and Star followed) and the big, bold multiplier increases Sigma announced for Spring 2008 (and Star followed). McWane also "continued to job-price every stinking month and we've never stopped." (Tatman, Tr. 1072). CX 627 was thus not a "plan" to do anything, let alone conspire with Sigma and Star to

raise prices. (Tatman, Tr. 355 ("I don't see where we have a plan here").) Rather, it was Mr. Tatman's own brainstorm about the potential to beat Sigma and Star and gain share by *under pricing* them and winning back business - - and it was ***internal*** to McWane and thus ***not*** communicated to Sigma or Star or contained in any McWane customer letter. (Tatman, Tr. 363-364 ("Never did that"), 362 -363 ("Actually, no. . . . If you look at our letter that we put out, it has none of these four elements in it, not one").)

Dr. Schumann simply ignored all of that testimony. In his mind, CX 627 was something very different. During his direct examination, he repeatedly referred to CX 627 as Mr. Tatman's "plan" to tell Sigma and Star to raise multipliers, centralize pricing authority, and end job pricing, which he suggested was communicated to them in McWane's January 11, 2008 customer letter in a way that, he claimed, made it "clear: McWane's rivals must cooperate or the prices will not increase further." (Schumann, Tr. 3887-3888 ("If you look at the PowerPoint that Mr. Tatman wrote that describes his plan . . . he had two drafts of this letter in that presentation"), 3892-3893 ("Mr. Tatman's plan . . . they were events that seemed to follow what was outlined in Mr. Tatman's plan").)

On cross-examination, however, Dr. Schumann recanted his story. He acknowledged that CX 627 was never given to Sigma or Star. "I don't say in my report that it was given to Star and Sigma, that's right." And he acknowledged that McWane's January 11, 2008 customer letter contained none of the so-called "clear" language he imagined:

> Q. Let's actually look at the letter. Can we call up RX 591. Now, Dr. Schumann, you say this letter is clear McWane's rivals must cooperate or prices will not increase further, but the word 'rivals' is not in this at all, is it, sir?
>
> A. That is correct.
>
> Q. And the words "Star and Sigma" aren't in it at all, are they, sir?
>
> A. That is correct.

Q And the words 'must cooperate' aren't in this at all, right?

A. That's also correct.

Q. And it doesn't say you must cooperate or prices will not increase further, does it, sir?

A. That is correct.

(Schumann, Tr. 4203).

Dr. Schumann also acknowledged that the January 11 letter said nothing at all about another core tenet of his conspiracy:

> Q. Right. Now, can we go back to RX 591. This letter doesn't say anything about centralizing project pricing, does it, sir?
>
> A. It does not.

(Schumann, Tr. 4204-4205.) Finally, he admitted that there was no evidence to support his opinion that anyone at Star or Sigma believed the letter was "clear" on any of those points: "I did not cite anything that said that. . . . Oh, right. There's no - - nothing cited at the end of that paragraph." (Schumann, Tr. 4204.)

Dr. Schumann similarly conceded that the one Sigma customer letter and two Star customer letters he claimed "accepted" McWane's "clear" offer actually did nothing of the sort. Admitting that Sigma's January 29, 2008 customer letter contained none of the tenets of his conspiracy, Dr. Schumann testified:

> Q. Now, this letter does not say Sigma is matching all of McWane's multipliers, does it, sir?
>
> A. No, it does not.
>
> Q. It says they're going to pick and choose, they're going to match the ones they want to match and they're going to not follow the ones they don't want to follow, right?
>
> A. That is what it says.
>
> Q. This letter does not say anything about centralizing pricing authority, does it, sir?
>
> A. No, it does not.

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

A. No, it does not.

(Schumann, Tr. 4221.) Dr. Schumann agreed that Star's customer letter and email contained none of the key terms of his conspiracy:

Q. And if we scroll down a little bit, Andrew, and we blow up the text, nothing on this document says that Star is going to centralize pricing authority; correct, sir?

A. Nothing on that document that I see says Star is going to centralize pricing, project pricing.

Q. Nothing on this document says they're going to match all of McWane's prices, multiplier prices; correct, sir?

A. That is correct.

Q. Nothing on this document says that Star is going to reduce job pricing; right, sir?

A. That is correct.

(Schumann, Tr. 4230.) Moreover, he conceded that McWane obtained Star's letter from its customers (not Star) - - and was entirely uncertain about Star's intentions and did not consider it to "accept" any conspiratorial offer:

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

A No, it doesn't.

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

A. Yes.

* * *

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

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

(Schumann, Tr. 4234-4235.)

B. Dr. Schumann's Opinion That Job Pricing Was Reduced Is Pure Speculation

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

Dr. Schumann did not measure project pricing in any way, let alone conduct any independent analysis quantifying a decline in project pricing during 2008:

> Q. You did not do any independent measurement of any curtailment of project pricing in forming your opinions in this case, did you, sir?
>
> A. No, I did not.
>
> Q. And you didn't present any numbers to the court in your testimony; correct, sir?
>
> A. That is correct.
>
> Q. In fact, you didn't measure anywhere, in any of the work you did in this case, any actual amount of job pricing in any particular year; correct?
>
> A. That is correct.
>
> * * *
>
> Q. And you haven't quantified, in preparing your opinion in this case, any actual reduction in the number of job prices, the incidences of job prices, have you, sir?
>
> A. No, I have not.
>
> Q. You haven't quantified in any fashion, in preparing your opinion in this case, that the average amount of the job price discount changed in 2008, have you, sir?
>
> A. I've not calculated the average.

> Q. In fact, you haven't measured job pricing, quantified it in any fashion for any year for any company; right?
>
> A. I have not counted - - I have not done a quantification of the number of job pricing that went on in 2008.

(Schumann, Tr. 4070, 4292); *see also* Schumann, Tr. 4076-4077, 4142-4143.) Nor did he create a but-for world and show that the level or amount of job discounting would have been higher if the parties did not send out their customer letters. (Schumann, Tr. 4153 ("So I did not do it").)

Instead, Dr. Schumann's opinion that job pricing declined was pure speculation. He relied upon a document Mr. Tatman repeatedly testified was his *speculation* based on *hearsay* his sales force heard from customers that discounting by Sigma and Star "appears" to have died down. (Tatman, Tr. 550; Schumann, Tr. 4077 ("I heard him say that"), 4080-4081.) Dr. Schumann ignored Mr. Tatman's speculation (and the hearsay it was based on):

> Q. Let's highlight lines 11 through 24, which is Mr. Tatman's testimony that you sat through about this document and this language. Here's what he said. He says: 'ANSWER: I'm giving a relative level of activity appears because I don't know.' So that's one he doesn't know; right, sir? Right, Dr. Schumann?
>
> A. Yes.
>
> Q. Then he says in the next paragraph he's speculating; right, sir?
>
> A. That's what that sentence says, yes.
>
> Q. And in the next paragraph to that he says two or three more times speculating, speculating, speculating; right, sir?
>
> A. Yes.

(Schumann, Tr. 4078). Instead of performing his own analyses to determine whether the speculation and hearsay were reliable or not, Dr. Schumann ignored them, *edited out the word "appears,"* and - - presto! - - he opined that job pricing, in fact, declined:

> Q. Now, that's not the actual quote in the document, is it, sir?
>
> A. I had thought it was. I - - I - -

* * *

Q. You left the word, out of your quote, *appears* to have died down significantly; right, sir?

A. Yes.

(Schumann, Tr. 4071, 4073.) (emphasis added)

C. Dr. Schumann Conceded That His Opinion Was Not Based On Any Peer-Accepted, Testable Methodology

Dr. Schumann did not perform any peer-accepted economic test of any issue in this case. Instead, he reviewed some documents and some testimony and simply offered his interpretation of them - - a role reserved for this Court and an exercise that did not require any economic expertise. He conceded on cross-examination that his opinion was simply his say-so and could not be independently verified or tested:

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

A. That's certainly true of my opinion as it's true of anyone's opinion.

(Schumann, Tr. 4158); *see also* Schumann, 4155-4156 ("ultimately, Judge Chappell is the trier of fact"), 4158-4159 ("I don't have a hypothesis that is testable . . . There's no statistical test that I know of that can distinguish simply between one person's opinion and another's").)

Dr. Schumann also conceded that he ignored virtually all of the most relevant record evidence, including trial testimony from Mr. McCutcheon, Mr. Pais, Mr. Minamyer, and Mr. Bhargava, contemporaneous spreadsheets of McWane's job discounts and Star's job discounts, and McWane's "blue book" financial statements, that flatly contradicted his strained and untestable opinion. (Schumann, Tr. 4084-4091, 4142-4145, 4149, 4263-4264, 4345-4346, 4367, 4371, 4379-4381.) Instead, he stuck with the opinion he formed six months before the litigation began. (Schumann, Tr. 4050, 4053 ("That - - that was about six months, yes, it was"), 4082,

4085-4086 ("Well, I meant I didn't consider it"), 4086-4087 ("No, I did not"), 4088, 4089-4091, 4264 ("I did not get through it, that's correct. . . . Actually, I think I did not. I - - I - - I know I - - I believe I did not. That - - I did not"), 4367 ("I did not report the blue books. That's correct"), 4371).)

VI. Cheap Imports Dominate The U.S. Fittings Market

As has been the case with much of the heavy manufacturing sector in the United States, the Fittings industry has changed dramatically over the last 30 years. According to the U.S. International Trade Commission, sales of non-domestic Fittings into the United States increased by 47.2% between 2000 and 2007. At one time, most Fittings used in waterworks projects in the United States were manufactured in the United States; in addition to McWane, full-line domestic manufacturers included U.S. Pipe and Foundry Company ("U.S. Pipe"), Griffin Pipe ("Griffin"), and, American Cast Iron Pipe Company ("ACIPCO"). (Tatman, Tr. 1046-1047; JX 644 (Tatman, Dep. 191).)

Beginning in the mid-1980s, importers began to successfully convert end users' specifications for domestically produced Fittings to so-called "open" specifications, which permitted the use of both domestic and non-domestic Fittings. (JX 644 (Tatman, Dep. 192-93); JX 694 (Bhutada, Dep. 12-13).) This process accelerated during the 1990s and 2000s, with non-domestic Fittings comprising the vast majority of the Fittings market by 2005. (Tatman, Tr. 879; JX 654 (Brakefield, Dep. at 92 ("Q. A fitting of choice meaning the majority of them? A. I would say, yes, sir.").) Fittings manufactured in foreign countries such as China are far less expensive because labor and wages are dirt cheap and environmental, health, and safety protocols are lax or non-existent compared to the United States. (Tatman, Tr. 275; JX 642 (Page, Dep. at 112, 132); JX 694 (Bhutada, Dep. 13-14).) However, regardless of where they are made,

in form and functionality non-domestic and domestic Fittings that meet AWWA standards are completely interchangeable. (Tatman, Tr. 878-879; Webb, Tr. 2730-2731.) It is thus an undisputed fact that Fittings are commodity products. (JSLP ¶ 12.)

Sales of domestic Fittings declined year-over-year-over year in the face of this import surge. (McCutcheon, Tr. 2579, 2585, 2638-39.) As Mr. Tatman testified: "domestic-only specs have done nothing but erode over time." (Tatman, Tr. 280-281.)In response to this flood of cheap imports, McWane filed a complaint before the International Trade Commission (ITC) to challenge the surge in imports. (RX 730.) In December, 2003, the ITC determined that Fittings from China were being imported into the United States in such increased quantities or under such conditions as to cause market disruption to domestic Fittings producers. (Schumann, Tr. 4639.) Feeling it had no alternative after failing to achieve any relief through the ITC proceeding, McWane made the decision to build its own foundry in China, recognizing that it could not remain competitively viable with only its U.S. manufacturing operations.

Other domestic manufacturers simply exited the market. (JX 643 (Tatman, IHT at 47); JX 701 (Morton, Dep. at 10); JX 646 (Burns, Dep. at 25-28).) However, McWane tried to preserve its domestic manufacturing operations and the jobs that they provide, and by 2005 McWane was "the last guy standing producing fittings domestically" in the under 30-inch diameter segment of the Fittings market. (JX 643 (Tatman, IHT at 47).) Despite its best efforts, between 2003 and 2009, McWane's estimated share of the overall Fittings market dropped from approximately 70% to approximately 40%. (Tatman, Tr. 241-242, 971; JX 642 (Page, Dep. at 23-24); McCutcheon, Tr. 2638-2639; JX 646 (Burns, Dep. 20-21).) By the 2007-2010 time frame relevant to this action - - both before and after ARRA - - domestic Fittings made up only approximately 15 to 20 percent of the overall fittings market. (Tatman, Tr. 235-236, 280-281.)

VII. Star Quickly and Successfully Expanded Into Domestic Fittings

In February 2009, Congress passed the American Recovery and Reinvestment Act ("ARRA") to stimulate the domestic economy. In an effort to support domestic manufacturers, like McWane, and their employees, ARRA included a "Buy American" provision that provided a preference for domestic-made products in certain waterworks infrastructure projects. Although Star had been a major player in the destruction of the domestic Fittings industry, it decided to try to take advantage of ARRA by expanding its product lines to include domestic Fittings. (Bhargava, Tr. 2927; McCutcheon, Tr. 2603-2604.) [redacted] [redacted] (Bhargava, Tr. 3011 *in camera*; RX 234; McCutcheon, Tr. 2605-2606.) Star announced its new, domestic product line to the industry at an AWWA trade show in June 2009, just four months after the passage of ARRA. (JSLF ¶ 23; McCutcheon, Tr. 2603-2604 ("Q: Okay. Fair enough. So you had the idea in the spring, and by June of 2009 you'd announced at the AWWA meeting that you were going to sell domestic fittings; right? A: Yes, sir.").) On September 22, 2009, McWane issued a rebate letter asking its customers to elect to support its domestic Fittings products fully and informing them that if they chose not to fully support McWane they "may" forego unpaid rebates or access to product "for up to 12 weeks." (CX 506.)

In the very same month, [redacted] (Bhargava, Tr. 3002 *in camera*; McCutcheon, Tr. 2590, 2600). Star was not concerned about McWane's September 22, 2009 customer letter and announced rebate policy. The day after McWane announced the rebate policy, Mr. McCutcheon emailed his "immediate comments" to his division managers:

> Tyler tried this 'loyalty' program before and we beat them down with better service, flexibility, price etc. . . .
> Every customer I talked to is pissed, this will benefit us greatly. . . .
> [T]he battle lines are very clear, let's go kick some butt.

(McCutcheon, Tr. 2588-2589; CX 0009.)

Star's confidence stemmed from its success in "beat[ing] down" other "monopolistic" McWane rebate policies in the recent past. In 2003, Mr. McCutcheon and his Star colleagues complained to the ITC that McWane had a rebate policy that allowed it monopolize the Fittings market. (McCutcheon, Tr. 2584-2585.) But the ITC unanimously concluded the story was not right. Instead, it concluded that surging Chinese imports were the real problem - - not McWane or its rebates - - and were causing material damage to the U.S. domestic producers. The ITC thus disregarded Star's story about McWane's rebates - - and history proved it right. Cheap imports have continued to surge into the U.S., Star's share has continued to increase steadily, and the domestic industry - - and McWane's share - - have continued their downslide. (McCutcheon, Tr. 2584-2585; CX 532.) Indeed, Mr. McCutcheon estimated that McWane's market share was almost cut in half over the last few years, declining from 70% in 2003, to 57% in 2006, and down to 40% today. (McCutcheon, Tr. 2584-2585; CX 532; McCutcheon, Tr. 2638-2639.) In contrast, Star's market share increased throughout. (McCutcheon, Tr. 2584-2585, 2587).

Star's successes led it to conclude that the rebate policy would be ineffective and that it would be able to continue beating McWane. They were right. Almost immediately after McWane's September 22 rebate policy announcement, Star began "picking off" branch locations of the industry's two largest distributors, HD Supply and Ferguson:

> Q. After Star had product available, domestic product available, which was sometime in the fall of 2009; right, sir?
> A. Yes, sir.

Q. And after Tyler's rebate policy was issued; right, sir?
A. Yes, sir.

Q. You sold to HD Supply. We saw that yesterday.
A. Yes, sir.

Q. In fact, you sold to HD Supply the very same month the rebate policy came out, September; right, sir?
A. Yes, sir.

Q. After the policy came out, you sold to Ferguson? They purchased your domestic fittings?
A. Yes, sir.

(McCutcheon, Tr. 2591-2592, 2607-2608; CX 1973.) Mr. McCutcheon and other Star executives acknowledged that Star grew its domestic Fittings sales month after month after month throughout Fall 2009, all of 2010, and 2011. (McCutcheon, Tr. 2590, 2597, 2300; Bhargava, Tr. 3027; JX 696 (McCutcheon, IHT at 40-41)). Star's "Domestic Bid Log" indicates that between September 2009 and June 2010, Star actively competed for ARRA jobs, submitting roughly four bids per day. (McCutcheon, Tr. 2602; CX 2294.)

Star sold domestic Fittings to more than 130 national, regional and local distributors including not only HD Supply and Ferguson, the two largest, but Win Water, Ramsco, Dana Kepner, Hajoca, Mainline Supply, Minnesota Pipe, Michigan Pipe & Supply, Utility Supply in Tulsa, Oklahoma, H.D. Fowler, C.I. Thornburg, Western Water, Groeniger, and Cohen. (McCutcheon, Tr. 2591-2594.) In December 2009, Star announced plans to build a 30,000 square foot finishing facility in Houston, Texas to further support its domestic Fittings program. (McCutcheon, Tr. 2618-2620; RX 572.) The finishing facility represented an investment of hundreds of thousands of dollars by Star. (McCutcheon, Tr. 2618-2620; RX 572.)

Star's success increased in the first and second quarters of 2010, the peak of the ARRA period, and throughout 2010. (McCutcheon, Tr. 2613-2614.) In February 2010, for example, Mr. McCutcheon enthusiastically responded to news that Star had won all of the domestic Fittings business of Dana Kepner, large regional distributor: "***Yahoooooo!!***" (McCutcheon, Tr. 2612-2613, 2595; CX 0585.) In April 2010, a Star sales manager reported that Mainline, a regional distributor, was urging its managers to "use Star Pipe Products as much as possible," and expressly underscored that "Their [sic] have been no repercussions from Tyler to Mainline for buying Star Pipe Products domestic fittings." (McCutcheon, Tr. 2615-2617; JX 695 (Leider, Dep. at 176-181); RX 280.) He concluded that "The Tyler program seems to be ***all bark and no bite***." (McCutcheon, Tr. 2615-2617; JX 695 (Leider, Dep. at 176-181); RX 280.) In 2010, Star - - not McWane - - was selected as the preferred domestic Fittings supplier for a large buying cooperative, The Distribution Group ("TDG"), with more than two dozen regional distributor members around the country. (JX 694 (Bhutada, Dep. at 155); JX 652 (Johnson, Dep. at 35-36); JX 675 (Sheley, Dep. at 68)). Indeed, Star's sales growth was extraordinary: it gained, on average, two new customers per week throughout 2010. (McCutcheon, Tr. 2595).

[redacted] (McCutcheon, Tr. 2594; Normann, Tr. 5043 *in camera*; Statement of Commissioner Rosch (August 9, 2012) at 4). [redacted] (Bhargava, Tr. 3027 *in camera*; McCutcheon, Tr. 2595; Schumann, Tr. 4423.);(RX 572.)

By the end of 2011, Star had doubled its share of the domestic Fittings segment of the market to almost 10% of domestic sales, with sales again approaching $6.5 million. (Bhargava, Tr. 3027-3028; JX 694 (Bhutada, Dep. at 71); McCutcheon, Tr. 2595; Schumann, Tr. 4423). And in 2012, as a Star executive testified, the company is on pace to have its best year of domestic Fittings sales yet. (Bhargava, Tr. 3028.)

Unlike Dr. Schumann, Dr. Normann analyzed Star sales records and found that, in some states, Star's share of the domestic segment was 20-30% of the total domestic Fittings sales (and, in a few, even higher). (Normann, Tr. 4930-4931.) Even Dr. Schumann had to agree that Star grew its overall share from 0% to 5% to nearly 10% of all domestic Fittings sales between Fall 2009 and 2011. (Normann, Tr. 4930-4931).

[redacted] (Normann, Tr. 5041 *in camera*). Consistent with this lack of exclusion, Dr. Schumann conceded that he was unable to identify even a single distributor - - out of the 630 total Fittings distributors - - who wanted to purchase Star domestic Fittings but could not because of McWane's rebate policy:

> Q. And sitting here today you can't point to a single customer that didn't buy any Star domestic fittings that wanted to, can you?
> A. I can't recall the name or names.

(Schumann, Tr. 4440). Dr. Normann, likewise, found none. (Normann, Tr. 4929-4930.)

VIII. The Legitimate Business Purpose of McWane's Rebate Policy (Which Was Not Enforced) Was To Protect The Last Remaining Domestic Foundry Dedicated To Fittings

In November 2008, faced with high inventory levels and insufficient demand for domestic Fittings, McWane closed its Tyler South plant. (Tatman, Tr. 968, 960 ("I've got high inventory levels and I don't have enough demand, domestic only, to keep up with production. And if I start substituting domestic product with my import sales, I have wrap a dollar bill around it. And if I did that, then I don't know what to do with the plant I just opened in China that's got to produce tons and has to sell something there also.").) Mr. Tatman did not "see any indications in the marketplace that housing is going to recover or the economy is going to recover." (Tatman, Tr. 967). Prior to closing Tyler South, both of McWane's U.S. plants were "throttled down as low as you could throttle them. . . . we can't keep two plants limping along, not meeting our inventory objectives and bleeding millions of dollars a year in idle plant." (Tatman, Tr. 964-965; RX 616). Roughly two hundred employees lost their jobs as a result of the Tyler South plant closure. (Tatman, Tr. 968). Even after closing Tyler South, Mr. Tatman's budget projections for 2010 forecasted a loss of $2.8 million. (Tatman, Tr. 986). By early 2009, McWane owned the last remaining dedicated foundry making domestic Fittings sized 2"-24." (Tatman, Tr. 241 ("My understanding was that [ACIPCO] had abandoned their foundry production, as had U.S. Pipe abandoned their foundry production, as had Griffin Pipe abandoned their foundry production. We were the last guy either pigheaded enough or stubborn enough to stay in the domestic foundry production. And what ACIPCO had left was 30" and above, to my knowledge.")).

The simple fact was that cheap imports had decimated the domestic Fittings industry and there was insufficient demand for domestic Fittings to keep McWane's Union Foundry at

operating at full capacity. (Tatman, Tr. 1046-1047; JX 643 (Tatman, IHT at 47-51)). ARRA did not change the prognosis. (Tatman, Tr. 280-281, 981, 1003-1004 *in camera*; Schumann, Tr. 4634-4635). As Mr. Tatman testified, the overall trend in the Fittings market has been the same after ARRA as it was before ARRA: "domestic-only specs have done nothing but erode over time." (Tatman, Tr. 280-281).

Confronted with Star's announcement in June 2009 that it planned to offer domestically-manufactured Fittings, McWane was deeply concerned about the viability of its sole remaining domestic Fittings plant, Union Foundry. (JX 643 (Tatman, IHT at 151)). Mr. Tatman testified:

> Why? It all kind of comes down to this volume thing. This is 2009. ARRA is out, but we don't see it. We're not feeling it. . . . I've got a plant that's running 135 days a year. I'm losing skilled employees. I'm budgeting to lose $5 million pre-tax for 2010. . . . I'm not in a real good position to give up volume. The problem is the pie is so small. The pie is not big enough to feed--I've got an idle foundry. I've got another along that's capable of producing 40,000, and I am going to put 12 in it. I have to take into consideration with protection of volume.

(JX 643 (Tatman, IHT at 151)).

Mr. Tatman was concerned that Star would choose to manufacture only the highest-selling, fastest-moving items. (JX 643 (Tatman, IHT at 152-153 ("The worst case scenario for me is that Sigma or Star comes into the domestic segment of the waterworks Fittings market with a cherry-picking strategy. They bring in 50 patterns or 100 patterns, and they get those A items, and they go after those, and I lose volume on those items that I need for my plant. . . .").) McWane needed to incentivize customers not to "cherry pick" those items from Star while relegating to McWane only the slower-moving, infrequently-needed and higher-cost "C" and "D" items. (Morton, Tr. 2845-2846; JX 638 (McCullough, IHT at 34-36).) It is expensive to run a foundry and McWane's Union Foundry simply could not run with only a low-volume products. At the same time, McWane recognized that it had little or no ability to dictate terms to the

distributors, who held significant market power over it. (Tatman, Tr. 660 ("This is a weak -- a weak stance in this letter because I know when I write this letter that I'm a Chihuahua barking at Rottweiler and I know who has the power here.").) It was never McWane's expectation or intention to profit from ARRA by overcharging its customers. (RX 595 ("It has never been our intent to overcharge because of the Buy America provision"); Tatman, Tr. 981 ("we didn't want to overcharge in the short term, make a large business profit off the situation and set ourselves up for the long term where people felt that we took advantage of the situation.").) McWane's September 22, 2009 customer letter merely states:

> [E]ffective October 1, 2009 McWane will adopt a program whereby our domestic fittings and accessories will be available to customers who elect to fully support McWane branded products for their domestic fitting and accessory requirements. . . . Customers who elect not to support this program *may* forgo participation in any unpaid rebates for domestic fittings and accessories or shipment of their domestic fitting and accessory orders of Tyler Union or Clow Water products *for up to 12 weeks*.

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

Mr. Tatman testified that, "This letter is a very weak letter. It was specifically written with the words "may" or "or" because I knew what was going to happen when we put this out." (Tatman, Tr. 660.) The September 22 letter also stated that the newly announced program applied to products purchased through Tyler Union, Clow Water, or Sigma. (CX 1606.) Finally, the letter stated that "Exceptions are where Tyler Union or Clow Water products are not readily available within normal lead times or where domestic Fittings and accessories are purchased from another domestic pipe and fitting manufacturer along with that manufacturer's ductile iron pipe." (CX 1606.) McWane's customers were, of course, free to purchase domestic Fittings from other suppliers—and dozens of them did so, as did dozens of distributors who were not

McWane domestic customers. (JX 643 (Tatman, IHT at 157-160); McCutcheon, Tr. 2588-2590.)

As Star's salesmen quickly realized, the letter was "all bark and no bite." McWane did not refuse to sell domestic Fittings to the dozens and dozens of customers who purchased domestic Fittings from Star. (Tatman, Tr. 714-718, 720, 725-726, 731-732; JX 638 (McCullough, IHT at 18-21, 157, 173); Webb, Tr. 2798-2800; Thees Tr. 3111-3113; Morton, Tr. 2860-2862.) Indeed, out of a total of 630 waterworks distributors nationwide that Dr. Schumann found, he identified only Hajoca, and only one of its branches (Lansdale, Pennsylvania) as a purported "victim" of McWane's rebate letter. (Schumann, Tr. 4440, 4432-4435.) Even that impact, if there was any at all, was limited to a 12-week period in early 2010, and Roy Pitts from Hajoca testified that McWane permitted Hajoca's Lansdale branch to pre-order domestic Fittings to meet is needs during that period. Moreover, by April 2010, McWane permitted the Lansdale branch to purchase domestic Fittings from both Star and McWane, and it did so for the rest of that year and into 2011. (Pitts, Tr. 3337, 3355-3356.) McWane's rebate policy did not prevent the Hajoca branches that preferred to purchase Star domestic Fittings from doing so. (Pitts, Tr. 3337; 3366). Mr. Tatman testified that he was "not aware of any circumstances where we impacted Hajoca's ability to service their customers. I see sales data November, December, January, February, March, April. We continued to sell to them, for whatever reason, they continued to buy from Star." (Tatman, Tr. 720.)

Multiple other distributors - - Groeniger, Dana Kepner, Win Wholesale, HD Supply, Utility Equipment, Illinois Meter, Ferguson, and (non-distributor) U.S. Pipe - - testified that McWane paid the rebates and sold them domestic Fittings despite the fact that each also purchase domestic Fittings from Star. (Sheley, Tr. 3462-3463; JX 669 (Groeniger, Dep. at 80,

99); JX 643 (Tatman, IHT at 197-198); JX 652 (Johnson, Dep. at 17-19); JX 705 (Gibbs, Dep. at 35-39); JX 673 (Webb, Dep. at 46-47); JX 703 (Coryn, Dep. at 134-135); Thees, Tr. 3111-3113; Webb, Tr. 2798-2800; Morton, Tr. 2834-2835, 2839, 2856-2857, 2860, 2867; CX 2215; CX 1936.) By early 2010, McWane had modified its rebate policy so that "there was no hint that regardless of what customers did that there would be any reduction in access to our product. It was only if--what level of rebate they were going to earn." (Tatman, Tr. 708; CX 0118.)

IX. Star's Sales of Domestic Fittings Were Hampered Only by Star's Internal Delays and Reputational Issues

Star witnesses testified, and Dr. Schumann conceded, that Star was unable to capture more business for reasons entirely unrelated to McWane. For example, in Fall 2009 - - and even well into 2010 as ARRA wound down - - Star's sales efforts were hindered by its own lack of available product as it ramped up production. As Dr. Schumann acknowledged:

> Q. All right. Now, this document reflects a lot of domestic bids that Star submitted that they didn't win.
> A. Uh-huh.
>
> Q. Because they had delays and couldn't fill the orders in time in the second half of 2009, the fall of 2009 and into early 2010.
> A. Well, that was when they were first getting -- trying to get started

(Schumann, Tr. 4379; CX 2294.)

[redacted] (McCutcheon, Tr. 2604-2606; Bhargava, Tr. 3003 *in camera*). In October 2009, Star thus lost business (24" Fittings) from Groeniger, a regional distributor, because it was unable to meet the necessary

delivery dates. (McCutcheon, Tr. 2625-2626; RX 224). A month later, in November 2009, Star was still uncertain as to when it would have a full line of domestic Fittings available. As Star salesman Todd Karren reported, Tyler's rebate policy was actually driving customers away from McWane and creating an opportunity for Star to increase sales - - if and when it had product available:

> More and more customers are voicing their displeasure regarding Tyler's handling of Star's domestic enterprise. . . . We are being told we will get a lot of business *once we are ready*. (My response as to when we know we will be ready is to paraphrase Justice Potter Stewart's answer as to what defines obscenity: we don't have a precise definition as to when it will happen or what it will require but we'll know it when we get there).

(McCutcheon, Tr. 2627-2629; RX 232 (emphasis added)).

Star continued to stumble in its efforts to take advantage of the opportunity McWane's policy created, however. Its "Domestic Bid Log" record that Star repeatedly lost bids due to delays throughout the Fall of 2009 and continuing into the peak of ARRA during the first and second quarters of 2010:

> Q. And then we look at row 34. What we see is lost to Tyler because Western couldn't wait for quoted lead times, and that's because they couldn't wait for Star Pipe because you were in ramp mode; right?
> A. Appears so. Yes, sir.
>
> Q. All right. And if we look a little below that, row 40, same thing, lost to Tyler, Wells couldn't wait for quoted lead times; right, sir?
> A. Yes, sir.
>
> Q. And if we look at row 49, we see another one, lost due to lead time; right, sir?
> A. Yes, sir.
> . . . .
> Q. Gotcha.
> If we look at row 53, lost due to delay; right?
> A. Yes, sir. It probably stands for delivery requirement, but the same thing.

. . . .
Q. 130. I apologize.
Now, Mr. McCutcheon, there are lots and lots of other reasons in here completely unrelated to the rebates; correct, sir?
A. That's correct, yes, sir.

Q. And many of them -- I don't want to go through the whole thing, but many of them are related to can't meet delivery times, delay in delivery; correct, sir?
A. Yes, sir, that's correct.

(McCutcheon, Tr. 2632-2634; CX 2294).

Bill Thees, Vice President of Ferguson, the second-largest waterworks distributor nationwide, testified that in early 2010, Star still did not have the depth and breadth of inventory required to supply Ferguson with domestic Fittings. (Thees, Tr. 3104.) Similarly, Tom Morton of U.S. Pipe testified that he had concerns about Star's ability to provide a full line of domestic Fittings. (Morton, Tr. 2892-2894, 2899-2901; CX 1936; RX 213.)

[redacted] (RX 277; Bhargava, Tr. 3008-3010 *in camera*.) [redacted] (Bhargava, Tr. 3011-3012 *in camera*.) By the time Star solved its product problem, the peak of ARRA was nearly over. (McCutcheon, Tr. 2613-2614) ("Q: And the peak of the sales occurred in first quarter, second quarter of 2010; right, sir? A: 2010. Yes, sir."); Schumann, Tr. 4568). Dr. Schumann concedes that he did not even consider Star's Domestic Bid Log or the numerous examples of lost bids or cancelled orders because Star did not have product available. (Schumann, Tr. 4379-4381; CX 2294).

Further, many distributors were cautious about purchasing domestic Fittings from Star in 2009 and early 2010 because of Star's reputation among the distributors and a general lack of confidence based on prior experience. (Bhargava, Tr. 3003; McCutcheon, Tr. 2634; Sheley, Tr. 3448-3451; Thees, Tr. 3102-3104, 3107-3108; Webb, Tr. 2788-2789, 2792; JX 705 (Gibbs, Dep. at 25-28, 30, 85, 87-88)). For example, Mr. Thees testified that he had concerns about purchasing domestic Fittings from Star because Star did not disclose the foundries it was using to source the product. (Thees, Tr. 3102-3103.) Mr. Thees also testified that a "breach of trust" between Star and Ferguson related to the sale of restraints and Fittings put a strain on the relationship between the two companies and was a "leading component" in Ferguson's reluctance to purchase domestic Fittings from Star in early 2010. (Thees, Tr. 3105-3107; RX 255.)

HD Supply bought some domestic Fittings from Star, and still received its rebates from McWane. (JX 672 (Webb, IHT at 199 "we have purchased some Star domestic fittings").) It continued to buy the majority of its domestic Fittings from McWane, however, because McWane was a known, stable full-line Fittings supplier with a good track record. The head of HD Supply's waterworks business thus testified that the letter had little or no impact on its decision to buy from McWane and the company would most likely not have purchased much from Star regardless. (JX 673 (Webb, Dep. at 123-25 ("probably not discernibly.")); JX 672 (Webb, IHT at 201) ("I don't think it would have demonstrably changed our purchase habits"). Indeed, he was unsure whether HD's branches "would have even considered" buying more from Star, regardless of McWane's rebate letter. (JX 672 (Webb, IHT at 199).)

McWane, in contrast, was a known quantity to HD Supply, the nation's largest distributor. It appreciated McWane's long and proven track record as a supplier of a full-line of

domestic Fittings. (Webb, Tr. 2796; JX 673 (Webb, Dep. at 123-125); JX 672 (Webb, IHT at 201).) Eddie Gibbs of Win Wholesale testified that he was concerned about Star's reliability as a domestic Fittings supplier "regardless of what the September 22, 2009 letter said." (JX 705 (Gibbs, Dep. at 93-94).) Dennis Sheley of Illinois Meter testified that his company was not willing to buy domestic Fittings from Star in early 2010 because of a negative experience with Star's reliability as a supplier when Star first entered the joint restraints business. (Sheley, Tr. 3448-3450.) As a result, Illinois Meter was not willing to give Star any domestic Fittings orders until Star had demonstrated it had sufficient inventory to meet Illinois Meter's needs and that McWane's rebate policy *had no effect* on Illinois Meter's decision whether to purchase domestic Fittings from Star. (Sheley, Tr. 3450-3451; JX 675 (Sheley, Dep. at 162-163).)

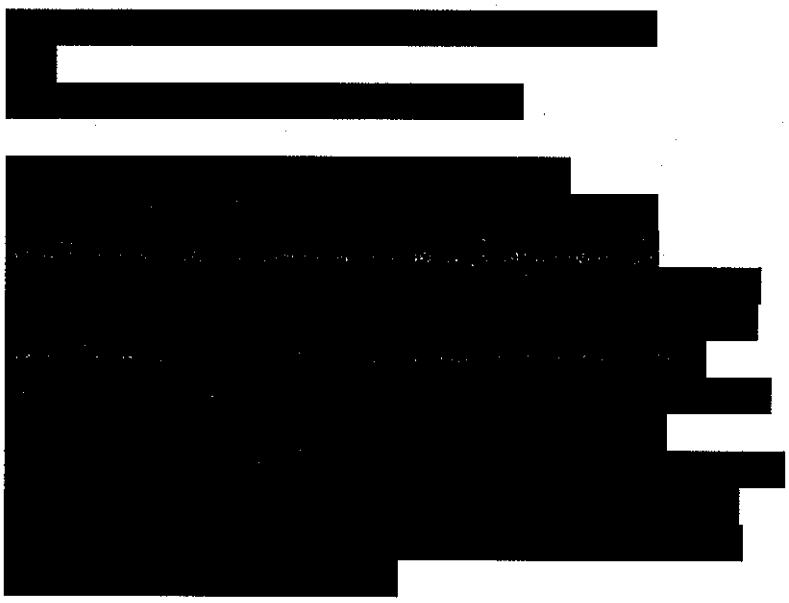
X. Sigma Was In Dire Financial Straits and Was Not Prepared to Make The Investment Needed to Become a Domestic Fittings Supplier in Time to Compete for ARRA Jobs

A. Sigma's Financial Condition In 2009 Was Critical

[redacted] (Rybacki, Tr. 3670-3671 *in camera*; Pais, Tr. 1799, 2163-2164.) Mr. Rybacki described 2009 as a [redacted] (Rybacki, Tr. 3663-3664; RX 242 *in camera*.) [redacted] (Pais, Tr. 1725, 1760, 1776, 2149-2150, 2190-2191 *in camera*; RX 383 *in camera*; (JX 687 (Pais, Dep. at 143-154 *in camera* [redacted]

[redacted]; Pais, Tr. 2193 *in camera*; Rybacki, Tr. 3672 *in camera*).

By the end of 2008, Sigma had over $100 million in debt. (Pais, Tr. 2193-2195 in camera). When Congress enacted ARRA in early 2009, Sigma's situation was dire. [redacted] (Rybacki, Tr. 3672 & RX 242.0003 *in camera*). [redacted] (Rybacki, Tr. 3670-3671 *in camera*). Mr. Pais testified that throughout 2009 Sigma was in a "precarious position overall in financial terms." (Pais, Tr. 1760.) Mr. Rybacki testified that [redacted]



(Rybacki, Tr. 3672 *in camera*).

[redacted] (Pais, Tr. 2195-2196 *in camera*; Rybacki, Tr. 3730). In response, Sigma's lenders imposed restrictive limits on Sigma's

capital expenditures - - far below the amounts it estimated would be necessary to begin virtual manufacturing of domestic Fittings. [redacted] (Pais, Tr. 2178; Rybacki, Tr. 3671 *in camera*.) Mr. Pais testified that by the Spring and Summer of 2009, months after ARRA's enactment, Sigma was in a "grave" financial situation. (Pais, Tr. 2163-2164.) [redacted] (Pais, Tr. 2165, 2167-2168; CX 214; Rybacki, Tr. 3664-3665 *in camera*.) McWane's list price decrease alone drove Sigma's revenue down by a substantial amount. (Rybacki, Tr. 3665 *in camera*.)

[redacted]

(Rybacki, Tr. 3665 *in camera*.)

[redacted] (Rybacki, 3665-3666 *in camera*). Mr. Pais, testified:

> Q. Did the banks ever authorize Sigma to exceed its capital expenditure limits - -
> A. No. Never.
> Q. -- to get into domestic production?

A. No, they did not.
Q. Did the board ever authorize the company to take money and put additional money into virtual domestic manufacturing beyond what had been incurred?
A. No, they did not.
Q. Did you have sufficient funds at the time to do that, sir, given the amount of debt the company had at the time?
A. I wish we did. No.

(Pais, Tr. 2184.)

B. The MDA Was Sigma's Only Viable Option To Provide Domestic Fittings To Its Customers In Time For ARRA Jobs

Although Sigma's poor financial condition was the primary barrier to its ability to expand into domestic Fittings, members of its management team also doubted their ability to mobilize a manufacturing operation in time to compete for ARRA jobs. (Pais, Tr. 1761-1762, 1799; Rybacki, Tr. 3670-71, 3677-3678; RX 682 (Bhattacharji, Dep. at 118-119).) Sigma's leadership believed that the opportunity to provide Fittings for jobs under ARRA, a "shovel-ready stimulus," would be very short. (JX 687 (Pais, Dep. at 182).) Sigma needed at least 18 to 24 months lead time to begin production of a full range of Fittings, and approximately 6 months to produce even one Fitting. (Rona, Tr. 1673, 1676-1677.) Mr. Rona testified that this 18-24 month timetable would have been unworkable given ARRA's short window of opportunity. (Rona, Tr. 1671, 1673.)

Sigma simply did not have the management time or expertise to successfully start domestic Fittings production in the short window of opportunity ARRA provided. (Rona, Tr. 1671, 1673; Rybacki, Tr. 3672-3673, 3677-3678 *in camera*.) To become a viable domestic supplier, Mr. Rona estimate that Sigma would need the capability to produce a range of approximately 730 different types of Fittings. To meet this goal, Sigma would have had to contract with at least three different domestic foundries. (Rona, Tr. 1672-73.) Mr. Pais testified

that this would have been difficult because was "already behind the eight ball on day one." (JX 687 (Pais, Dep. 182).) ARRA was already several months old and set to expire within a year. In Sigma's view, its effects were thus uncertain and short-term. As of mid-2009, Sigma did not own any domestic foundries, did not have any contracts with existing domestic foundries, only a handful of the hundreds of patterns it would need, no core boxes, no machining facilities, and no finishing facilities in the United States. (Pais, Tr. 2173-2175.) In late August 2009, Sigma still had not taken any concrete steps towards supplying its own domestic Fittings. (Rona, Tr. 1672-73, 1693-1694; CX 258; Brakefield, Tr. 1417-1418; Pais, Tr. 1799, 2163-2164, 2173-2174, 2317.)

Sigma's top executives, Messrs. Pais, Rybacki, and Bhattacharji, all concluded that domestic "virtual manufacturing" during the short ARRA period was not a viable option for the company. (Pais, Tr. 1761-62, 1799; Rybacki, Tr. 3677-78; RX 682 (Bhattacharji Dep. at 118-10).) The MDA was the only realistic way Sigma could satisfy its customers' demand for domestic Fittings during the ARRA period. (Pais, Tr. 1800-1801; Rona, Tr. 1481, 1671.) Mr. Pais testified:

> [W]e finally found a recourse by going to our competitor because we through that was the only option that was viable because the service of the customer was imminent. We were getting orders and requests, et cetera. There was no other option that we could—this was not a premeditated three or four-year plan that we had to enter a new product.

(Pais, Tr. 1800-1801.)

C. The MDA Had Significant Procompetitive Benefits

Without a viable alternative, and fearful that an inability to supply domestic Fittings might jeopardize its core import Fittings business, Sigma approached McWane and asked to buy

McWane's domestic Fittings for resale (Tatman, Tr. 615; JX 689 (Rona, Dep. at 118-19); JX 688 (Rona, IHT at 184-188); JX 643 (Tatman, IHT at 149-150).)

McWane could have said no and, if it had monopoly power, preserved its monopoly. But it did not. McWane recognized that there were compelling pro-competitive reasons to consider selling to Sigma. From McWane's perspective, the MDA provided much-needed volume for its last remaining domestic foundry - - a foundry operating at a fraction of its capacity and desperate for tonnage. Moreover, with its larger sales force, Sigma might be able to reach customers that McWane could not and also to generate new demand for domestic Fittings. (Tatman, Tr. 788; JX 644 (Tatman, IHT at 176-177); JX 642 (Page, Dep. at 61-63).) Sigma also had relationships with certain distributors and in certain geographic areas that McWane lacked. (Tatman, Tr. 788; JX 642 (Page, Dep. at 69-73).) For example, ACIPCO preferred to purchase domestic Fittings from Sigma rather than McWane because Sigma provided additional specialty services, including coatings, linings, taps and other add-ons, that ACIPCO felt McWane could not provide as effectively. (Tatman, Tr. 797; JX 688 (Rona, IHT at 95-96); JX 689 (Rona, Dep. at 136).) Jerry Burns of ACIPCO testified that his company benefitted logistically by purchasing McWane domestic Fittings from Sigma, rather than McWane, and found the pricing to be competitive. (JX 646 (Burns, Dep. at 139-140, 175).) Mr. Tatman testified regarding Sigma's established relationship with ACIPCO and fabricators such as Custom Fab:

> Well, if you look at this in practice, Sigma had a relationship with ACIPCO, American Case Iron Pip. I did not. We did not want to get into the middle of that relationship. That was theirs. . . So they can resell our fittings to [ACIPCO], their customer, go, and other customers, including distributors. . . . And they can sell to fabricators. Fabricators are people like Custom Fab or other people that buy pipe and specialize and do special things to it. They can sell to there.

(Tatman, Tr. 797-798.)

Michael Groeniger testified that his company preferred buying domestic Fittings from Sigma, because he preferred Sigma's service to both Star and McWane. (JX 669 (Groeniger, Dep. at 87-88).) Peter Prescott from Everett J. Prescott testified that his company preferred to purchase domestic Fittings from Sigma when it was concurrently ordering non-domestic Fittings because Sigma was its preferred non-domestic Fittings supplier. (JX 661 (Prescott, Dep. at 35-36, 122-123).) Finally, Consolidated Pipe preferred to purchase from Sigma and likely would not have purchased domestic Fittings from McWane. (JX 659 (Swalley, Dep. 275-276).) Further, Sigma had a network of regional distribution yards and a larger sales force, thus offering the possibility of additional sales, servicing benefits, and faster delivery. (JX 689 (Rona, Dep. 120-124, 133-134); JX 643 (Tatman, IHT at 176-177): JX 688 (Rona, IHT at 176-178).) Sigma's unsolicited request ultimately led to a negotiated Master Distributorship Agreement that provided Sigma access to TylerUnion's full domestic product line. (Tatman, Tr. 615; JX 688 (Rona, IHT at 184-85); JX 643 (Tatman, IHT at 149-50).)

XI. Complaint Counsel Did Not Prove That Any Of McWane's Actions Caused "Substantial Injury" To Consumers

The trial record contained substantial evidence that McWane underpriced Sigma and Star's high published prices and continued to offer job discounts, rebates, and other concessions. Dr. Schumann conceded those facts.

Dr. Normann analyzed McWane's published multipliers and found they declined in the majority of states. He also analyzed McWane's invoice prices and found that they, too, declined, despite a sharp spike in McWane's raw materials costs. He found that McWane's invoice prices did not move in parallel with Sigma's and Star's invoice prices. Indeed, they moved in opposite directions: McWane's invoice prices decreased, while Star's and Sigma's increased. (Normann, Tr. 4777-4779 ("This to me is consistent with independent decision-making.").) His analysis of

the three companies' invoice prices also found substantial variation in prices for contemporaneous sales of the same Fittings. He concluded that this price variation was consistent with ongoing job price discounting and competitive behavior, and inconsistent with any agreement to eliminate or reduce job pricing. (Normann, Tr. 4746-4749) ("I literally found no evidence consistent with those allegations.").)

Dr. Normann's analyses of the Fittings market concluded that there was one relevant antitrust product market for all Fittings (not separate domestic and import markets) and that McWane did not have monopoly power and did not exclude Sigma or Star. The undisputed fact that Star was able to quickly enter into the domestic Fitting segment, [redacted] (Normann, Tr. 5042-43.). Dr. Normann noted that Star might have done even better if its domestic Fittings invoice prices were as low as McWane's, but they were not. In the vast majority of states, they were higher.

Dr. Normann concluded that Sigma's financial situation, not McWane, prevented it from being an actual potential competitor. (Normann, Tr. 4757-4759.).) He also found clear "pro-competitive" reasons for the MDA for both McWane and Sigma. ("I think there's clear procompetitive reasons for the MDA.") and concluded it did not exclude Sigma, but rather helped Sigma gain sales during the brief ARRA window (and, thus, benefited Sigma's customers. (Normann, Tr. 4758-4759 ("Sigma was in the situation where they clearly wanted to be a participant in domestic sales and potentially the ARRA money because they didn't know how big of an effect ARRA would have.").) The MDA also allowed McWane to reach a larger number of customers, which was economically rational. (Normann, Tr. 4757-4759.)

Complaint Counsel failed put forth any evidence at trial showing "substantial injury" to consumers as a result of McWane's conduct as alleged in the Complaint. Complaint Counsel's expert, Dr. Schumann, testified that he did not even attempt to do a statistical analysis of the Fittings market during the alleged conspiracy period, or during McWane's alleged monopolistic behavior. (Schumann, Tr. 4153 ("So I did not do it").) Instead, he reviewed some documents and some testimony and simply offered his interpretation of them. (Schumann, Tr. 4158-4159 ("I don't have a hypothesis that is testable . . . There's no statistical test that I know of that can distinguish simply between one person's opinion and another's"). His opinion that job price discounting declined was based on speculation. Complaint Counsel did not call any other witnesses to quantify, or even support, its allegation that McWane's conduct resulted in higher prices.

Dr. Schumann's opinions regarding domestic Fittings were equally flawed. His finding of a separate domestic Fittings market was based on his, admittedly, "controversial" view that the government's test for market definition in mergers applied to this non-merger case - - even though he conceded he had never used the test in that "controversial" context before. He acknowledged that he did not study ARRA funding, nor make any effort to determine the full extent to which imported Fittings were sold for use on ARRA-funded projects, despite the fact that nationwide and de minimis and other waivers were, in fact, granted and, in fact, imports were sold into ARRA jobs.

Dr. Schumann conceded that Star quickly entered and grew its share of domestic Fittings. He acknowledged that it was a less efficient supplier of domestic Fittings than McWane because of its use of multiple jobber foundries, rather than its own, dedicated foundry, like McWane. He also conceded that he did not quantify any costs Star incurred as a result of McWane's rebate

letter. As for Sigma, well, he was asked by Complaint Counsel to just *assume* that Sigma would have expanded into domestic Fittings.

DISCUSSION OF LEGAL AUTHORITIES

Complaint Counsel must prove its case under FTC Act Section 5 by "substantial evidence." *FTC v. Cement Inst.*, 333 U.S. 683, 705 (1948); *Cal. Dental Ass'n v. FTC*, 224 F.3d 942, 957 (9th Cir. 2000); *Cinderella Career & Finishing Sch., Inc. v. FTC*, 425 F.2d 583, 592 n.2 (D.C. Cir. 1970) ("reliable, probative and substantial evidence"); *Rayex Corp. v. FTC*, 317 F.2d 290, 292 (2d Cir. 1963) ("substantial"). "Substantial evidence is more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established." *Id.* Here, Section 5 requires "substantial evidence" of: (1) an unfair method of competition, (2) that causes substantial injury, (3) to consumers, (4) is not reasonably avoidable by the consumers, and (5) is not outweighed by countervailing benefits to consumers or competition. (15 U.S.C. § 45(n).) Sherman Act Sections 1 and 2 case law provides a guide in evaluating whether Complaint Counsel has met its "substantial evidence" burden under Section 5. *See., e.g. Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 762 n.3 (1999) ("The FTC Act's prohibition of unfair competition and deceptive acts or practices, 15 U.S.C. § 45(a)(1), overlaps the scope of § 1 of the Sherman Act, 15 U.S.C. § 1, aimed at prohibiting restraint of trade"); *Cement Inst.*, 333 U.S. at 691-92.

Not only did Complaint Counsel fail to meet its "substantial evidence" burden on all Counts, the overwhelming weight of the evidence demonstrates that: McWane made its own price decisions at all times and never discussed prices or came to an agreement with Sigma or Star, and (2) McWane did not monopolize the purported market for domestic Fittings and did not exclude Star or Sigma.

I. McWane Independently Decided Its Prices

Counts 1 and 2 of the Complaint borrow the language of Sherman Act Section 1 and allege a conspiracy in violation of FTC Act Section 5. Sherman Act Section 1 prohibits

contracts, combinations and conspiracies that unreasonably restrain trade. (15 U.S.C. § 1.) The existence of a preceding agreement is the "hallmark" and the "very essence" of a Section 1 claim. *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 356 (3d Cir. 2004) (citations omitted) ("*Flat Glass*") (The existence of an agreement is 'the very essence of a section 1 claim'"); *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 117 (3d Cir. 1999) ("*Baby Food*") ("The existence of an agreement is the hallmark of a Section 1 claim."). To prove its conspiracy claims Complaint Counsel was required to show proof of "a unity of purpose or common design and understanding, or a meeting of minds in an unlawful arrangement." *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771 (1984) (citing *Am. Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946)). This requires more than a mere opportunity to conspire and speculation that the parties did so. *Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 1013 (3d Cir. 1994) (affirming summary judgment where the "evidence tends to show only an opportunity to conspire, not an agreement to do so"); *Venzie Corp. v. U.S. Mineral Prods. Co.*, 521 F.2d 1309, 1313-14 (3d Cir. 1975) ("an opportunity is significant only if other evidence permits an inference that agreement did in fact exist."). Even conspiracy claims based on alleged parallel pricing requires substantial proof that a parallel price resulted from a "preceding agreement." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 553 (2007) ("when allegations of parallel conduct are set out in order to make a § 1 claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action").

To prove its conspiracy claims, Complaint Counsel was also required demonstrate that the alleged preceding agreement had the purpose or effect of "raising, depressing, fixing, pegging or stabilizing" the price of a product. *United States v. Socony-Vacuum Oil Co.*, 310 U.S.

150, 223-24 (1940). At a minimum, this element requires "a 'unity of purpose or a common design and understanding or meeting of minds' or 'conscious commitment to a common scheme." *Flat Glass,* 385 F.3d at 357 (citations omitted). "Unilateral action, regardless of the motivation, is not a violation of Section 1." *Burtch v. Milberg Factors, Inc.,* 662 F.3d 212, 221 (3d Cir. 2011) ("*Burtch*"). Complaint Counsel did not establish ***any*** of the required elements to prove its conspiracy claims at trial.

A. Overwhelming Direct Evidence Established That McWane Independently Decided To Chart Its Own Course With Lower Published Prices And Continued Job Price Discounts And Other Price Concessions

"Direct evidence in a Section 1 conspiracy must be evidence that is explicit and requires no inferences to establish the proposition or conclusion being asserted." *Baby Food,* 166 F.3d at 118; *see also In re Citric Acid Litig.,* 191 F.3d 1090, 1093-94 (9th Cir. 1999) ("*Citric Acid*") (evidence does not qualify as "direct" if it "could be construed in a benign light."). Examples of such evidence include testimony about meetings to fix prices or pre-announcement solicitations of price agreements. In this case there is a complete absence of such evidence. In fact, after nearly three years of investigation, litigation, and trial the record is crystal clear: McWane priced independently at all times and ***every single witness in this case flatly denied any price agreement with anyone from McWane at any time.*** (Tatman, Tr. 363-364; Rybacki, Tr. 1115-1116; Bhargava, Tr. 3027; Pais, Tr. 2028, 2035, 2045-2048, 2080, 2102, 2130-2131; McCutcheon, Tr. 2524-2525; Minamyer, Tr. 3238-3240.)

A plaintiff confronted with not only evidence of independent decision-making, but literally dozens of sworn denials, faces an extremely high burden to overcome them: "Facing the sworn denial of the existence of conspiracy, it [is] up to plaintiff to produce ***significant probative evidence***" that a conspiracy existed, even to avoid summary judgment, let alone judgment after a

full-blown trial. *City of Moundridge v. Exxon Mobil Corp.*, 429 F. Supp. 2d 117, 130 (D.D.C. 2006) (emphasis added) (citation omitted). In *City of Moundridge*, the defendants testified, as each McWane, Sigma and Star witness did here, that they made their pricing decisions independently. In the face of this testimony, the plaintiffs proffered evidence that defendants' had an opportunity to conspire (during a series of industry meetings) and pointed to internal documents that they argued suggested a conspiracy. The D.C. Circuit affirmed the district court's grant of summary judgment and held that the plaintiffs' "few scattered communications" and other evidence "falls far short" of overcoming defendants' sworn denials. *City of Moundridge v. Exxon Mobil Corp.*, 409 F. App'x. 362, 364 (D.C. Cir. 2011).

In *Baby Food*, the Third Circuit found direct evidence lacking to overcome defendants' sworn denials even though there was evidence that defendants notified each other of price increases before announcing them to customers, regularly exchanged sales information, and referred to a "truce" amongst them. *Baby Food*, 166 F.3d at 118-121. Unlike *Baby Food*, the evidence in this case conclusively showed that McWane ***never*** provided Star or Sigma with proprietary pricing information before issuing any pricing decisions, nor did Star or Sigma provide such information to McWane.

In *Williamson Oil Co. v. Philip Morris USA*, the Eleventh Circuit likewise affirmed judgment in favor of defendants despite 11 consecutive parallel price increases by defendants, numerous alleged price "signals" between the defendants suggesting a desire to end a price war, regular sharing of detailed sales information, and an expert's opinion that it all amounted to a conspiracy. 346 F.3d 1287 (11th Cir. 2003). The Court found that the plaintiffs' evidence was insufficient to overcome defendants' sworn denials and it would be improper "to engage in speculation" in the face of those denials. *Id.* at 1310. ("None of the actions . . . tend to exclude

the possibility that the primary players in the tobacco industry were engaged in rational, lawful, parallel pricing behavior.").

The Eighth Circuit reached the same conclusion in *Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan*, 203 F.3d 1028 (8th Cir. 2000). The Court found the evidence insufficient to overcome defendants' denials despite evidence that defendants engaged in "a high level of interfirm communications," including what plaintiffs characterized as evidence that the defendants "signaled pricing intentions to each other through advance price announcements." *Id.* at 1033, 1037.

Here, there is far less evidence than in *Moundridge*, *Baby Food*, *Williamson Oil*, and *Blomkest*. The trial record showed there is simply ***no direct evidence*** that anyone from McWane was involved in any conspiracy. Complaint Counsel has conceded this point, acknowledging that it lacked evidence "that McWane directly communicated its prices to any other Fittings manufacturer or supplier in advance of communicating them to its customers or potential customers" (*see* CRFA No. 19) and their expert, Dr. Schumann, conceded that there was no express agreements or meetings "in a smoke-filled room." (Schumann, Tr. 3847, 4171-4173.) Similarly, no document exists which demonstrates the existence of a price agreement, (Schumann, Tr. 4236-4238) and Complaint Counsel has not presented a single price-related communication among the Competitors referencing any "agreement," not a single document reflecting any advance price communication between McWane and either of its competitors, and not a single document suggesting an agreed-upon commitment to common prices. (Schumann, Tr. 4236-4238.)

The trial record is equally clear that there is no direct evidence that McWane ever entered an agreement with Star or Sigma to reduce job pricing. (Tatman, Tr. 924; Rybacki, Tr. 3659;

Minamyer, Tr. 3278; McCutcheon, Tr. 2554, 2689-2690.) On the contrary, the only testimony about McWane's intent came from Rick Tatman, who cogently explained that his primary goal during 2008 was to regain market share, a goal he planned to achieve by undercutting the prices of his competitors through both lower multipliers and continued job pricing. Consistent with that intent, the both the objective statistical evidence and the contemporaneous internal documents establish that McWane continued to offer both job pricing and a host of other price concessions to its customers throughout 2008, 2009, 2010 and into the present. (Tatman, Tr. 387, 904-905, 907, 909-910, 914-915; RX 399, 921, 930-931; RX 598, 933-934, 995-998; RX 396, 1071-1072.) Similarly, and contrary to any implication of an agreement otherwise, Sigma never stopped or reduced its job pricing, (Rybacki, Tr. 107, 3715; Pais, Tr. 2192) and made no effort to centralize pricing authority or remove pricing authority from its salespeople. (Rybacki, Tr. 3696-3697; CX 1189.) Sigma's salespeople always retained pricing authority and offered job pricing all over the map. (Rybacki, Tr. 3697; CX 1189.)

Likewise, Star never stopped or reduced its job pricing. In fact, Star's pricing continued at a rate of a several hundred per month throughout 2008. (Minamyer, Tr. 3251-3252; CX 815; McCutcheon, Tr. 2512.) Star witnesses testified that Star always job priced ***whenever it needed to do so in order to win business***. (Minamyer, Tr. 3278.) Matt Minamyer, Star's National Sales Manager, does not recall ever refusing a salesman's request for job price approval during 2008. (JX 685 (Minamyer Dep. at 83, 172).)

Complaint Counsel's only alleged "evidence" of reduced job pricing was the bald, conclusory assertion of its expert, Dr. Schumann. Amazingly, Dr. Schumann came to this conclusion despite his admission that he did not analyze any of the Competitors' actual invoice prices, study the job prices charged by the Competitors in 2008, or otherwise quantify any

alleged curtailment of job pricing in 2008. (Schumann, Tr. 4070, 4076-4077, 4142-4145.) McWane, Sigma and Star's actual pricing data reflects the reality that, in the fiercely competitive Fittings market, it was not possible to eliminate or reduce job pricing. (Minamyer, Tr. 3277-3278 ("the market was always very competitive. We – we had to fight pretty hard for every order"); Rybacki, Tr. 3701 (Sigma had "[n]o choice but to" offer job discounting throughout 2008).)

B. McWane's Non-Parallel Pricing And Ongoing Discounting Were Consistent With Its Self-Interest And Disprove Any Inference Of Conspiracy

To prove a case with circumstantial evidence, the Supreme Court has held that a plaintiff must not only produce evidence that reasonably tends to prove parallel conduct, it must also prove that this conduct was contrary to self interest. *Matsushita*, 475 U.S. at 588; *In re Beef Industry Antitrust Litig.*, 907 F.2d 510, 514 (5th Cir. 1990) (affirming summary judgment because defendants' prices were not identical: "When an antitrust plaintiff relies on circumstantial evidence of conscious parallelism to prove a § 1 claim, he must first demonstrate that the defendants' actions were parallel. . . . . The cattlemen have not done this"). Here, Complaint Counsel failed to meet the minimum threshold requirement of showing parallel conduct, and for that reason alone McWane is entitled to judgment in its favor.

Even if Complaint Counsel was able show parallel behavior - - which they did not - - "follow-the-leader" pricing is normal oligopoly behavior and is perfectly lawful. *Blomkest Fertilizer*, 203 F.3d at 1032-33 (affirming summary judgment because "[e]vidence that a business consciously met the pricing of its competitors does not prove a violation of the antitrust laws"); *Reserve Supply Corp. v. Owens-Corning Fiberglas Corp.*, 971 F.2d 37, 50 (7th Cir. 1992) ("the mere existence of an oligopolistic market structure in which a small group of manufacturers engage in consciously parallel pricing of an identical product does not violate the

antitrust laws"); *Clamp-All Corp. v. Cast Iron Soil Pipe Inst.*, 851 F.2d 478, 484 (1st Cir. 1988) ("One does not need an agreement to bring about this kind of follow-the-leader effect in a concentrated industry"); *Citric Acid Litigation*, 191 F.3d at 1102 ("A section 1 violation cannot, however, be inferred from parallel pricing alone, nor from an industry's follow-the-leader pricing strategy") (internal citations omitted).

In *Clamp-All*, the First Circuit affirmed summary judgment for defendants in a case which defendants in a concentrated market followed each other's list prices, but - - as here - - routinely offered discounts off list. 851 F.2d at 484. In fact, here the evidence shows even more competition below the allegedly parallel prices than in *Clamp-All*, as McWane provided a number of other discounts such as rebates and freight discounts. Nonetheless, the Court in *Clamp-All* held that the fact that suppliers "often set prices that deviated from their price list helps support the inference that the similarity of price lists reflect *individual* decisions to copy, rather than any more formal pricing agreement." *Id.* The Court made clear that such "follow-the-leader" pricing behavior was not sufficient to support an inference of a conspiracy. *Id.* at 484.

In *Citric Acid*, another factually analogous case, the plaintiff alleged the fact that defendant Cargill's list prices mirrored those of its competitors was evidence of a conspiracy. *Citric Acid*, 191 F.3d at 1102. Emphasizing that a price-fixing conspiracy cannot be inferred from parallel pricing alone, "nor from an industry's follow-the-leader pricing strategy" the court noted that Cargill, despite its identical list prices, priced aggressively in "actual contracts" (i.e., job priced) and concluded that the plaintiff's evidence "does not tend to exclude the possibility that Cargill acted legally in its pricing decisions." *Id.* at 1103. Other Circuits agree. *See, e.g., Baby Foods*, 166 F.3d at 128 ("In an oligopoly . . . there is pricing structure in which each

company is likely aware of the pricing of its competitors"). Independent, but parallel actions are lawful even if - - unlike here - - they result in ***higher*** prices. *White v. R.M. Packer Co.*, 635 F.3d 571, 575 (1st Cir. 2011) ("*White*") ("Each producer may independently decide that it can maximize its profits by matching one or more other producers' price, on the hope that the market will be able to maintain high prices if the producers do not undercut one another.").

Here, of course, the undisputed evidence shows that McWane's conduct in Winter and Spring 2008 was ***not parallel*** with Star or Sigma's. McWane charted its own course in January 2008, after Sigma, in a October 2007 letter to its customers, announced plans to dramatically increase its list prices and multipliers for Fittings, effective January 2008. (Tatman, Tr. 346-347; CX 627; Rybacki, Tr. 3661-3662, 3683-3684; CX 2457.) As explained above, it would have been perfectly legal for McWane to match Sigma's proposed price increase. *Baby Food,* 166 F.3d at 128 (conspiracy "will not be inferred merely because the evidence tends to show that a defendant may have followed a competitor's price increase."). But McWane ***did not follow*** Sigma's proposed price increase. Instead, and consistent with Tatman's plan to recapture market share, reduce his inventory, and increase production, McWane kept its list price in place and issued new (and in many states, lower) multipliers. (Tatman, Tr. 346-347; CX 627.)

Although Sigma and Star ultimately chose to follow McWane's lower multipliers, at least in part, rather than maintain the higher price increases they had originally proposed, such behavior is not evidence of a conspiracy, but healthy competition on the merits. As one Circuit Court has explained:

> Sellers do need to cooperate to raise or stabilize prices at a supra-competitive level because otherwise a hold-out seller could undercut and defeat an increase. But to *lower* prices, sellers have no reason to agree; each can implement a decrease independently and the objective is normally to *undersell* the competitor's undiscounted price and win the customer. Of course, a competing

> seller will in the future likely be forced to met the lower price – which is why RPM and Houston each made such reductions in the same time frame – and a seller who will not compete (like Augusta) will lose business. But this is not an agreement to restrain trade; it is just competition at work.

Augusta News Co. v. Hudson News Co., 269 F.3d 41, 47-48 (1st Cir. 2001).

McWane charted its own course again in the spring of 2008 when Sigma made an independent internal decision to issue a large multiplier adjustment amounting to a price increase in the range of 25 to 30 percent. (Rybacki, Tr. 3708, 3710-3711; CX 1858; Pais, Tr. 2080-2081; CX 1138, 2100-2102; CX 1858.) Sigma did not discuss its decision with anyone at McWane. (Rybacki, Tr. 3708, 3710-3711.) After analyzing Sigma's proposed price increase, McWane, independently determined that its goal of gaining share and increasing volume would be better served by keeping prices significantly below those announced by Sigma. (Tatman, Tr. 489-491; CX 176, 538-540; CX 1576.) As a result, in June 2008 McWane announced a ***much smaller*** multiplier increase of approximately eight percent on average, about one third of the price increase Sigma and Star had announced. (Tatman, Tr. 538-540, 544; CX 1576, 958.) In fact, McWane's price increases in 2008 were so modest that they did not keep up with inflation, resulting in a net decline in its non-domestic Fittings prices, relative to inflation. (Tatman, Tr. 856, 859, 860-862; CX 2416.)

1. Complaint Counsel Failed To Prove Any Of The Necessary "Plus Factors" To Overcome The Overwhelming Evidence Of Independent Decision-Making

Even if parallel behavior occurred in this case, which it did not, such conduct alone is not sufficient to infer a conspiracy. As a result of the inherent economic realities of oligopolistic markets, courts require a plaintiff relying on evidence of conscious parallelism to prove something more - - that certain "plus factors" also exist. *Flat Glass*, 385 F.3d at 360-61 ("plus factors are important to a court's analysis, because their existence tends to eliminate the

possibility of mistaking the workings of a competitive market-where firms might increase price when, for example, demand increases-with interdependent, supracompetitive pricing . . . since these factors often restate interdependence."). Requiring plaintiffs to meet these additional elements "tends to ensure that courts punish 'concerted action' – an actual agreement – instead of the 'unilateral, independent conduct of competitors.'" *Id.* (citing *Baby Food*, 166 F.3d at 122); *see also Intervest Inc. v. Bloomberg*, L.P., 340 F.3d 144, 159-60 (3d Cir. 2003) (plaintiff relying on circumstantial evidence must meet heightened burden of proof). Thus, to distinguish between legitimate parallel conduct and an illegal price-fixing scheme, an Complaint Counsel was required to present evidence that "tends to exclude the possibility" that McWane acted independently of its competitors. *Matsushita Elec. Indus. Co.*, 475 U.S. 574, 588 (1986).

Complaint Counsel failed to meet its burden. To the contrary, the evidence in this case proves exactly the opposite: McWane has demonstrated the existence of "minus factors," which tend to exclude the possibility that the conduct in question resulted from any illicit agreement among the competitors. McWane charted its own independent course of issuing ***lower*** prices than Sigma and Star to further its goal of gaining share and increasing its volume, which would lower its manufacturing costs. (Tatman, Tr. 215-216; 340; 345-349, 357-361, 379, 1069-1071; CX 627.) McWane's business justifications were completely consistent with its own legitimate, economic self-interest: namely, to increase sales volume, reduce excess inventory, keep its foundries operational, and ultimately increase profits. *See Burtch*, 662 F.3d at 229 (citing *Baby Food*, 166 F.3d at 137) (all businesses have a "legitimate understandable motive to increase profits" and such motive is not evidence of a "plus factor").

Where a defendant's actions are consistent with its own self-interest, the defendant is entitled to judgment in its favor. *See Burtch,* 662 F.3d at 228 ("failed to sufficiently allege facts

for the second theory and the complaint's allegations that the defendant's actions were independently motivated"); *see also In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 329-30 (3rd Cir. 2010) ("it is at least equally consistent with unconcerted action."). In this case, McWane's actions - - keeping its prices lower than its competitors' in an attempt to gain share, informing its customers via plain vanilla price announcements, and continuing to offer job discounts - - are much *more* consistent with independent and pro-competitive conduct than with the conspiracy alleged by the government. (*See* Tatman, Tr. 978, 1005-1006.)

C. The Government's Small Handful Of Documents, As Re-Imagined By Dr. Schumann, Fails As A Matter of Law

Having failed to prove the existence of parallel pricing, much less direct evidence of a preceding agreement, Complaint Counsel and Dr. Schumann attempt to infer a vague "understanding" among the competitors, relying upon a small handful of documents and a few scattered and innocuous communications. (Schumann, Tr. 4191.) This paltry evidence, most of which consists of internal communications that were never shared with competitors, falls far short of establishing any agreement. Indeed, even Dr. Schumann conceded that the documents were not direct evidence of an agreement, but something he opined was "much more subtle." (Schumann, Tr. 4236-4238.)

For example, Complaint Counsel contends that two McWane customer pricing letters are the communications which form the basis of the alleged conspiracy to reduce job pricing. (*See* CX 1178, CX 1576, CX 47.) This contention fails for several reasons. First, the mere fact that the competitors acquired copies of each other's customer pricing letters does not support an inference of a conspiracy. *See Baby Food,* 166 F.3d at 126. In fact, courts have recognized that it is perfectly legitimate for a firm to receive its competitors' pricing information from customers. *Citric Acid,* 191 F.3d at 1103. "The Supreme Court has [also] made clear that 'the

dissemination of price information is not itself a per se violation of the Sherman Act." *Burtch*, 662 F.3d at 223 (quoting *United States v. Citizens & So. Nat'l Bank*, 422 U.S. 86, 113 (1975)). Second, there is no evidence that McWane, Star and Sigma consulted each other before making their pricing decisions. Each competitor learned about the others' pricing changes only after the fact, and from their own customers. (Tatman, Tr. 306; Rybacki, Tr. 3559-3560; Minamyer, Tr. 3148; Pais, Tr. 2049-2050.) Third, the letters on their face do not say anything about the alleged terms of Dr. Schumann's conspiracy: they contain no mention of reductions of job pricing, centralization of pricing authority or the other terms. Short of mental telepathy, Dr. Schumann has yet to identify how those terms were communicated among the competitors, much less agreed upon. Finally, and perhaps most importantly, McWane's letters on their face actually demonstrate a lack of agreement. They were issued after announcements by Sigma and Star of much larger price increases. McWane's letters refused to go along with such a move, and instead announced a much lower price, all in furtherance of Tatman's desire to underprice Sigma and Star and recapture market share. (CX 1178, CX 47.)

Complaint Counsel may argue that a small number of phone calls between Mr. Rybacki and McWane personnel, and a meeting between Victor Pais and Ruffner Page (before the alleged conspiracy period), support an inference of a price-fixing conspiracy. But those innocuous facts also fail as a matter of law in the face of undisputed evidence of McWane's independent decisions to underprice Star and Sigma, and the many, many sworn denials. Complaint Counsel identified only four brief phone calls between Larry Rybacki and Rick Tatman, who both denied discussing prices, and a handful of calls between Mr. Rybacki and his personal friend and former colleague, Tom Frank, who at the time was working at McWane. (*See* CX 1621A *in camera* and Complaint ¶ 2.) Dr. Schumann acknowledged those social calls did not suggest a conspiracy to

him. (Schumann, Tr. 4249-4250 ("I haven't testified to that.").) Complaint Counsel did not identify any specific meeting between Mr. Pais and Mr. Page at which an agreement was purportedly reached, or point to any particular letter or email reflecting such an agreement. Regardless, all witnesses testified that they never discussed or agreed upon Fittings prices, and Complaint Counsel did not show any evidence to the contrary. ((Pais, Tr. 1897; JX 642 (Page, Dep. at 80-82); Rybacki, Tr. 3626-3628, 3682-3683; Tatman, Tr. 367-370.)

It is well established that the mere opportunity to conspiracy is insufficient evidence of a price-fixing conspiracy. *White,* 635 F.3d at 583-84; *Baby Food,* 166 F.3d at 133. The few scattered calls and meetings identified by Complaint Counsel, which the evidence showed were legitimate business and personal communications, do not support a finding of agreement or conspiracy. *See Baby Food,* 166 F.3d at 125 (evidence of "sporadic exchanges of shop talk among field sales representatives who lack pricing authority" is not evidence of conspiracy); *see also Matsushita*, 475 U.S. at 588; *Flat Glass*, 385 F.3d at 360; *Burtch*, 662 F.3d at 228 ("frequent meetings between the alleged conspirators . . . will not sustain a plaintiff's burden absent evidence which would permit the inference that those close ties led to an illegal agreement.").[6] Thus, Complaint Counsel has failed to meet its substantial burden.

II. There Was No Invitation To Collude And The Tons-Shipped DIFRA Data Did Not Facilitate Price Coordination

[6] Complaint Counsel may argue that two emails - - dated March 10, 2008 and August 22, 2008, respectively - - from Mr. Rona to other Sigma employees, mentioning two complaints Mr. Tatman allegedly made about job pricing, suggest a conspiracy. (CX 1124, CX 1149.) But there is no evidence that either email had any effect on Sigma's or McWane's published multipliers, nor either company's willingness to job price. On the contrary, the evidence showed that job pricing not only continued, but got worse in the Fall of 2008 - - after the two emails. Moreover, Mr. Rona had absolutely no involvement in the pricing decisions at issue in this action - - namely, the pricing of Fittings for sale to distributors. (Rona, Tr. 1437-1440, 1453-1454, 1627-1628.) Mr. Rybacki, who was in charge of Sigma's pricing to distributors, did not even get one email and said the other had no bearing on his decisions. No one else at Sigma took any note of the emails. Mr. Rona, Mr. Rybacki, and Mr. Tatman all expressly denied reaching or discussing any agreement related to distribution prices at any time. (Tatman, Tr. 456-457; Rona, Tr. 1643-1644, 1647-1648, 1653-1654, 1656-1659.)

Count 3 of the Complaint alleges that during DIFRA's short-lived existence in the latter half of 2008, the tonnage shipped data each of its members provided to an independent accounting firm enabled the Competitors to monitor compliance with an alleged agreement to reduce job pricing. (Complaint, ¶¶ 35-38.) This contention is nothing more than rank speculation completely unsupported by the evidence. Every witness flatly denied that the tons-shipped data suggested anything about prices or that it impacted their decisions. (McCutcheon, Tr. 2561-2562; CX 52; JX 694; Brakefield, Tr. 1337.) The members of DIFRA also testified that they never discussed Fittings prices or exchanged any information - - including sales or pricing information - - with each other. (McCutcheon, Tr. 2561-2562; Brakefield, Tr. 1337.)

Further, DIFRA was procompetitive. The DIFRA report improved the abilities of each Competitor to assess overall market trends and estimate its own market share, and thereby better manage production schedules and inventory. (JX 694 (Bhutada, Dep. at 20-21); JX 654 (Brakefield, Dep. at 77-78); Rybacki, Tr. 3539-3541.) McWane was also interested in the data to assess, to the extent possible, its competitive performance and market share and thereby determine whether its strategy for increasing McWane's sales volume had been effective. (Tatman, Tr. 536-537; CX 139; CX 627.) Mr. Tatman testified that his business objective was regaining share, and came to the conclusion that keeping McWane's published multipliers substantially below Sigma and Star's would be consistent with McWane's primary business objective (Tatman, Tr. 520-522, 958), and if McWane was successful it would "make victory all the swe[e]ter." (RX 424.) Complaint Counsel's suggestion that an illicit inference should be drawn from this perfectly legitimate business purpose is contrary to both the evidence and well-established legal authority.

It is well established that legitimate trade associations are perfectly legal. *Citric Acid,* 191 F.3d at 1097-98. Courts have also rejected any antitrust liability premised upon the theory that a company's decision to participate in a trade association that gathers and disseminates aggregated tons-shipped data somehow "facilitated" price collusion. *Williamson Oil*, 346 F.3d at 1313 ("exchange [of] information relating to sales . . . does not tend to exclude the possibility of independent action or to establish anticompetitive collusion"). Even if DIFRA had gathered pricing information (which it did not), it is well-settled that "[g]athering information about pricing and competition in the industry is standard fare for trade associations. If we allowed conspiracy to be inferred from such activities alone, we would have to allow an inference of conspiracy whenever a trade association took almost any action." *Citric Acid,* 191 F.3d at 1097-98.

The "invitation to collude" Count also fails because no court has ever found an antitrust violation based upon a one-way "invitation" to collude that was unconsummated. On the contrary, court after court has rejected antitrust liability when presented with a one-way offer. *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647 (1980) (per curium) ("advance price announcements are perfectly lawful"); *Baby Foods*, 166 F.3d at 125 ("to survive summary judgment, there must be evidence that the exchanges of information had an impact on pricing decisions"), *Reserve Supply*, 971 F.2d at 54 (advance announcements of price changes "served important purpose" in construction industry because customers "bid on building contracts well in advance of starting construction and, therefore, required sixty days' or more advance notice of price increases"); *United States v. Am. Airlines, Inc.*, 570 F. Supp. 654, 657 (N.D. Tex. 1983) (Sherman Act's prohibition of conspiracies "does not reach attempts"), *rev'd on other grounds*, 743 F. 2d 1114, 1119 (5th Cir. 1984) ("our decision that the government has stated a claim

[under Sherman Act Section 2] does not add attempt to violations of Section 1 of the Sherman Act").

A. Complaint Counsel's Contention that the Alleged Conspiracy Continued Into 2009 and Beyond

1. Mr. McCutcheon's Spring 2009 Call To Mr. Tatman Does Not Support An Inference of Conspiracy

In April 2009, McWane independently restructured its list price to raise the prices of its small diameter Fittings by a small amount, and reduce the prices on its medium and large diameter Fittings by about 12 to 15 percent in an effort to win back market share in segments where Sigma and Star were strongest. (Tatman, Tr. 594-596; CX 656, 972-973; CX 569.) McWane did not consult with Star or Sigma before making this price change. (Tatman, Tr. 978, 1005-1006.)

After learning about McWane's list price announcement in the spring of 2009, Mr. McCutcheon testified that he called Mr. Tatman on one occasion and simply asked whether McWane was indeed planning to move forward with its previously and publically announced list price change. (McCutcheon, Tr. 2457, 2460-2461, 2529-2530.) The two men did not discuss prices or the nature of McWane's announced list price change. (McCutcheon, Tr. 2460-2461, 2529-2530.) Given the high cost of printing new price lists, (Tatman, Tr. 257; JX 644 (Tatman, Dep. at 43-46); Rybacki, Tr. 3542) Mr. McCutcheon was simply seeking confirmation before Star incurred the substantial cost of printing a new list – a perfectly legitimate purpose. (McCutcheon, Tr. 2529-2530.)

There is no evidence whatsoever that Mr. Tatman and Mr. McCutcheon reached any agreement to set prices during this call. Tatman had already made his announcement and Complaint Counsel does not even allege, that McWane's decision changed or that its conduct

was in any other way affected by the alleged call. Courts have uniformly upheld after-the-fact communications as lawful. *Blomkest*, 203 F.3d at 1034 (affirming summary judgment, the Court found "*[s]ubsequent* price verification evidence on particular sales cannot support a conspiracy"); *see Baby Food,* 166 F.3d at 128 (decisions to follow an industry leader's price increases are perfectly legitimate, especially where, as here, the same behavior occurred before, during and after the alleged conspiracy). In *Baby Food*, the Court found evidence lacking even though there was evidence that defendants notified each other of price increases *before* announcing them to customers and regularly exchanged sales information. *Id.* at 117. Unlike *Baby Food*, here it is undisputed that: (1) that McWane's April 14th list price announcement lowered its list prices on all Fittings above 12-inches, (2) that Star independently decided to follow the lower prices, and (3) the alleged phone call was after McWane's announcement and after Star's decision to follow. It is also undisputed that after the alleged call McWane made no change to its previously announce decision and kept its dramatically lower medium and large diameter Fittings list prices in effect. (Rybacki, Tr. 3719: 12-14.) The fact record simply does not support Complaint Counsel's allegations.

2. The Independent Decisions by Star and Sigma to Follow McWane's June 2010 Multiplier Announcement were Lawful Oligopoly Behavior

Complaint Counsel has not produced any evidence to support the claim (alleged for the first time in their August 23, 2012 Pre-Trial Brief) that McWane, Star, and Sigma engaged in "signaling practices" regarding multiplier changes in June 2010. None of the Competitors discussed these changes with each other before their respective announcements. (Tatman, Tr. 978; 1005-1006; Rybacki, Tr. 3720-3722; CX 2453; Pais, Tr. 2048; Brakefield, Tr. 1337; CX 2440, CX 2450, CX 2453, CX 1396.) Rather, in June 2010, Sigma merely distributed a price increase letter (which did not even specify if it was a list price change or a multiplier change) to

its customers. (CX 1413; JX 687 (Pais Dep. at 372-377); JX 690 (Rybacki Dep. at 210-213).) McWane announced its own multiplier change on June 17, 2010, which Mr. Tatman testified was a result of his own independent decision-making. Importantly, that change ***did not match*** Sigma's announcement, which had no prices at all, but raised some states, lowered some, and kept others the same. (CX 2440.) Star subsequently followed McWane's multiplier change later in June (CX 1406, CX 2441), and Sigma followed at the end of June. (CX 1396.)

This sequence demonstrates an absence of collusion rather than its presence. McWane ***did not match*** Sigma. The fact that the Sigma and Star learned about McWane's lower prices from customers after-the-fact and subsequently ***lowered*** their multipliers was a rational response to the real threat that McWane's lower price would likely shift volume to McWane, which was precisely what Tatman intended. If McWane's goal had been to collude on pricing it would have agreed to the ***higher*** price. It simply stands antitrust policy on it head to argue that, because a competitor refuses to raise prices because it wants to be more competitive, and another competitor lowers its price to avoid the loss of sales that would result from *the* ***price cut***, that the two have illegally colluded to fix prices. The evidence demonstrates nothing more than classic, legitimate oligopolistic behavior, which is perfectly legal under the antitrust laws. *See In re Flat Glass*, 385 F.3d at 359; *In re Baby Food,* 166 F.3d at 128; *Citric Acid*, 191 F.3d at 1102-03. Complaint Counsel did not prove that McWane, Star, and Sigma had an actual advance agreement to fix the price of Fittings, much less the "unity of purpose" or "meeting of minds" required under the antitrust laws. *Twombly*, 550 U.S. at 557 ("preceding agreement"); *Copperweld Corp.*, 467 U.S. at 771 (requires proof of "unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement").

III. Overwhelming Evidence Established That McWane Did Not Monopolize Domestic Fittings

The Commission alleged in Counts 4-7 that McWane monopolized, attempted to monopolize, and conspired to monopolize a "domestic Fittings" market in violation of FTC Act Section 5. The Commission's Section 5 case is guided by Sherman Act Section 2 case law *Cement Inst.*, 333 U.S. at 691-92; 15 U.S.C. § 2.

A. There Is No Separate Market For Domestic Fittings And McWane Did Not Have Monopoly Power Over All Fittings

The Court heard overwhelming evidence - - including testimony from Dr. Schumann - - that imports and domestic Fittings that meet AWWA standards are entirely interchangeable commodities that are metallurgically and functionally the same. (Schumann, Tr. 4535-36; Tatman, Tr. 878-79; JX 646 (Burns, Dep. 147); JX 701 (Morton, Dep. 13-14); JX 694 (Bhutada, Dep. 14).) In addition, the vast majority of specifications are open to imports and domestic Fittings, and cheap imports from China, Korea, India, Brazil, and Mexico have steadily grown over the last decade and now constitute the lion's share of all Fittings purchased in the U.S. today. (Schumann, Tr. 4535-36 ("well over a majority").) In contrast, long-time U.S. foundries have exited domestic production (U.S. Pipe and Griffin), cut way back (ACIPCO), and like McWane's Tyler South plant, closed. McWane's share has steadily declined from roughly 70% in 2003, all of which was domestic, to only 40-45% in recent years. (Tatman, Tr. 241-242; McCutcheon, Tr. 2584-2585 and CX 532, McCutcheon Tr. 2638-2639; JX 642 (Page, Dep. at 23-24).)

Dr. Schumann nonetheless opined that there was a separate relevant market for domestic Fittings. He conceded on cross examination, however, that he did no analyses of Fittings prices to determine the cross-elasticity of demand between imported and domestic Fittings and that his market definition was, instead, premised on his "controversial" application of a theoretical model

he borrowed from merger-analysis and applied - - for the first time in his career - - to the non-merger case here:

> Q. Now, have you ever before this case applied this hypothetical monopolist test in the controversial application of a nonmerger case?
>
> A. I'm not - - let me think. I've been on a few nonmerger cases. I - - in those that - - it wasn't relevant. I believe not.

(Schumann, Tr. 4542.) He did so because he believed that ARRA required the use of domestic Fittings on projects using ARRA-funding. But he admitted that ARRA had numerous waivers available that permitted the use of imported product on ARRA-funded jobs in certain circumstances, including several nationwide waivers for shovel-ready projects financed in the months before February 2009 and de minimis waivers granted for specific ARRA projects, and, thus, that it did not require the use of domestic on all ARRA-jobs. He also admitted that he did not gather any information from the project owners who actually received ARRA assistance, did not study Star's bid logs or any other information to determine the extent to which domestic and imported Fittings competed for ARRA jobs, and did not study ARRA-funding records to determine the extent to which, in fact, imported Fittings actually won ARRA jobs. (Schumann, Tr. 4569, 4571.) In short, he simply assumed that if a domestic Fitting was sold during the ARRA period it must fall within a separate relevant antitrust product market.

In making that assumption, Dr. Schumann simply ignored substantial evidence that ARRA had little or no impact on domestic Fittings during its short lifespan. (Tatman, Tr. 280-281 ("ARRA was a blip in the map. Demand went up for about a six-month period, and then it evaporated as soon as it came."); Rona, Tr. 1671 (ARRA was a very short time window); Pais, Tr. 1738 (Sigma knew ARRA and the Buy American provision "was going to be a short-term impact"); Morton, Tr. 2888 (ARRA "had a limited life"); Sheley, Tr. 3446 (ARRA "had a small

effect"); JX 658 (Keffer, Dep. at 11-12) (ARRA impact did not last long); JX 648 (Backman, Dep. at 109-110) (ARRA funded only "a finite amount of jobs"); JX 652 (Johnson, Dep. at 30) (ARRA's impact was "minimal"); JX 705 (Gibbs, Dep. at 23, 106) (ARRA did not have much impact on Fittings sales); JX 703 (Coryn, Dep. at 24) (ARRA did not have much impact on business).)

Indeed, the impact of ARRA was so minimal that current and former domestic Fittings manufacturers, like Griffin Pipe, U.S. Pipe, and Backman Foundry concluded it was not worthwhile to expand or return to domestic Fittings production. (Morton, Tr. 2875; JX 646 (Burns, Dep. at 30-31, 35-36, 176-177); JX 667 (Kuhrts, Dep. at 38, 49-50, 74).) Mr. Backman of Backman Foundry testified that his firm did not even consider expanding its production of domestic Fittings as a result of ARRA because "anybody and their dog can see that this market is going to end at some point." (*See* JX 648 (Backman, Dep. at 109-110).)

McWane did not see any effects from ARRA until February of 2010 and by the third quarter of 2010, its effects were over. (JX 643 (Tatman, IHT at 92-94); Sheley, Tr. 3402; JX 659 (Swalley, Dep. at 158).) As Mr. Webb of HD Supply, the largest distributor in the United States and McWane's largest customer, testified, ARRA's effect was "very minimal and mostly played out in 2009 and 2010." (Webb, Tr. 2731-2732.) Nor did ARRA reinvigorate "Buy American" sentiment as a more general matter. (JX 642 (Page, Dep. at 175-176).) As Mr. Tatman testified, the overall trend in the Fittings market is the same after ARRA as it was before ARRA: "domestic-only specs have done nothing but erode over time." (Tatman, Tr. 280-281; *See also* JX 648 (Backman, Dep. at 109-110); Sheley, Tr. 3447 (today less than 5% of municipalities in Illinois Meter's service area have domestic-only specifications); JX 673 (Webb, Dep. at 23) (over time, fewer and fewer municipalities call for domestic Fittings in job specifications).)

Dr. Schumann's assumption that ARRA created a separate domestic Fittings market is insufficient to meet Complaint Counsel's "substantial evidence" burden, particularly given the substantial evidence that ARRA had limited impact on domestic Fittings and his own acknowledged failure to study the impact of the many ARRA waivers.

Dr. Normann's conclusions, in contrast, were consistent with the facts. He found substantial evidence that domestic and imported Fittings were entirely interchangeable before ARRA and that ARRA had insufficient impact to change that. (Normann, Tr. 4830, 4870 ("not really a dramatic change in the marketplace as a result of ARRA.).)

He concluded, as a result, that there was no separate domestic Fittings market and that McWane did not possess monopoly power in the overall Fittings market. (Normann, Tr. 4832 ("Where I guess we disagree is Dr. Schumann then implies that once the spec is determined, now domestic product is a separate market. And that doesn't make sense to me"); 4847 ("inconsistent with them being able to price-discriminate or have monopoly power or market power.").)

To be sure, there are municipal engineers and other customers who *prefer* to buy domestic Fittings for a range of reasons, including patriotism and the desire to keep domestic foundry-workers employed. Preferences alone, however, are insufficient as a matter of law to serve as the basis for a finding that domestic Fittings constitute a separate relevant antitrust market, particularly given the long history of imported Fittings steadily gaining share and, in recent years, dominating domestic Fittings. *E.g., Agnew v. Nat'l Collegiate Athletic Ass'n*, 683 F.3d 328, 332 (7th Cir. 2012) (affirming motion to dismiss where "plaintiffs failed to allege a relevant market on which the NCAA's Bylaws had an anticompetitive effect . . . an obvious necessity for Sherman Act violations"); *Jacobs v. Tempur-Pedic Int'l*, 626 F.3d 1327, 1337-38 (11th Cir. 2010) (dismissing complaint based on allegations that preferences created a separate

product market: "Consumer preferences for visco-elastic foam mattresses versus traditional innerspring mattresses . . . may vary[.] The allegations that visco-elastic foam mattresses are more expensive than traditional innerspring mattresses and have 'unique attributes' are similarly of little help"); *Buehler A.G. v. Ocrim S.P.A.*, 836 F. Supp. 1305, 1326 (N.D. Tex. 1993) (judgment for counter-defendant in part because fact that European roller mills "have been able to enter the market in this country and build a market share of over 10% among non-American companies since the 1980s belies any monopolization. . . The trend clearly shows increased entries to the market and a weakening of Plaintiffs' relative strength"); *see also Desai v. Impact, S.A.*, No. 89-4817, 1990 WL 132709 at * 5 (I.E. Sept. 7, 1990) ("The first step in determining whether a violation has occurred is to define the 'relevant market'.").

Complaint Counsel has failed to meet its burden of proving a separate domestic Fittings market with "substantial evidence." That alone compels judgment in McWane's favor on Counts 4-7 because - - as Dr. Schumann acknowledged - - McWane does not have monopoly power over all Fittings. Schumann, Tr. 4535-37 ("I do not believe they are a monopolist"). McWane's 40-45% share of overall Fittings does not rise to the level of "monopoly power." *See Barr Labs., Inc. v. Abbott Labs.*, 978 F.2d 98, 112-13 (3d Cir. 1992) (market share of 50% did not establish monopoly power); *see Physicians & Surgeons v. Am. Bd. of Podiatric Surgery, Inc.*, 185 F.3d 606, 623 (6th Cir. 1999) ("market share is only a starting point for determining whether monopoly power exists, and the inference of monopoly power does not automatically follow from the possession of a commanding market share"); *Defiance Hosp. v. Fauster-Cameron, Inc.*, 344 F. Supp. 2d 1097, 1113 (N.D. Ohio 2004) ("market share is only a starting point for determining whether monopoly power exists.").

B. McWane Did Not Have Monopoly Power Over Domestic Fittings

If the Court finds a separate domestic Fittings market, and that McWane had a high share of it, that alone does not suggest the company possessed monopoly power. Rather, the overwhelming evidence at trial was that McWane's Union Foundry was simply the last dedicated Fittings foundry standing in an industry decimated by cheap imports. A high share, under those circumstances, does not amount to monopoly power. *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966) (distinguishing monopolies obtained through business acumen and historic accident from monopolies obtained by predatory conduct).

Instead, monopoly power is "the ability to (1) price substantially above the competitive level *and* (2) to persist in doing so ***for a significant period without erosion by new entry or expansion.***" *AD/SAT v. Associated Press,* 181 F.3d 216, 226-27 (2d Cir. 1999) (italics in original, bold supplied). If a defendant with large market share is unable to control prices or exclude competitors, then it is not a monopoly. *Tops Mkts., Inc. v. Quality Mkts., Inc.,* 142 F.3d 90, 99 (2d Cir. 1998); *see also Metro Mobile CTS, Inc. v. NewVector Commc'ns., Inc.,* 892 F.2d 62, 63 (9th Cir. 1989) ("*Metro Mobile*") (a defendant's possession of even 100% market share does not necessarily establish defendant has power to charge monopoly prices or control output); *Oahu Gas Serv., Inc. v. Pacific Res., Inc.*, 838 F.2d 360, 366 (9th Cir. 1988) ("*Oahu Gas*") (a high market share will not raise an inference of monopoly power in a market with low entry barriers or other evidence of a defendant's inability to control prices or exclude competitors).

The ability to maintain prices above a competitive level "for an extended period" is a key element of monopoly power. *Rebel Oil Co., Inc. v. Atl. Richfield* Co., 51 F.3d 1421, 1434 (9th Cir. 1995) ("*Rebel Oil*"). But here, there is no evidence McWane charged monopoly prices for its domestic Fittings during ARRA. On the contrary, Dr. Normann analyzed its prices and found they were lower than Star's in the vast majority of states. (Normann, Tr. 4768 ("in the majority

of states McWane actually lowered their published multipliers, they reduced them").) Dr. Schumann did no analyses of prices at all, but did not disagree.

Moreover, where, as here, barriers to entry into a market are low, a defendant's market power is often much less than its market share would seem to indicate. *Moeckler v. Honeywell Int'l, Inc.,* 144 F.Supp.2d 1291, 1308 (M.D.Fla. 2001).[7] As one court has explained, "[m]arket share reflects current sales, but today's sales do not always indicate power over sales and price tomorrow." *Ball Mem'l Hosp. v. Mut. Hosp. Ins., Inc.*, 784 F.2d 1325, 1336 (7th Cir. 1986); *see also Oahu Gas*, 838 F.2d at 366 (a firm with a high market share may be able to exert market power in the short run, but substantial market power can persist only if there are significant and continuing barriers to entry). The evidence overwhelmingly demonstrates that entry barriers were not high and that McWane lacked monopoly power.

In 2009, an abundance of excess foundry capacity existed in the United States. (Bhargava, Tr. 5-8; JX 658 (Keffer, Dep. at 10-11).) An existence of excess capacity indicates low barriers to market entry. *Rebel Oil,* 51 F.3d at 1441. For proof that the barriers to domestic entry were indeed low, the Court need look no farther than Star's success in quickly grabbing 5 percent of domestic Fittings sales in 2010, and then double its share to 10 percent in 2011. (JX 694 (Bhutada, Dep. at 71).) Thus, even if ARRA had created a temporary, separate domestic market, McWane's inability to control prices or exclude competition over time precluded a finding of monopoly power in that market. *See Metro Mobile,* 892 F.2d at 63 (where a firm's

[7] Barriers to entry are additional long-run costs that must be incurred by new entrants but not by incumbent competitors, or "factors in the market that deter entry while permitting incumbent firms to earn monopoly returns." *Rebel Oil*, 51 F.3d at 1439. Entry barriers are typically legal licensing requirements, control of an essential or superior resource, entrenched buyer preferences for established brands, capital market evaluations which impose higher capital costs on new entrants, and economies of scale. *Id.* To support a finding of monopoly power, entry barriers must be high enough to constrain the normal operation of the market to the extent that natural market forces cannot self-correct the market. *Id.*

predominant market share is the result of regulation, the court should focus on the firm's ability to control prices or exclude competition, rather than its market share).

C. McWane Did Not Exclude Star From Domestic Fittings

Even if there is a separate domestic Fittings market and the Court finds that McWane possessed *monopoly* power, McWane's short term rebate letter had no anticompetitve effect as demonstrated by Star's rapid and effective entry. As a result, the Court should grant judgment in McWane's favor on Counts 4-7.

1. Star Successfully Expanded Into Domestic Fittings

[redacted] Such a successful level of entry in so short a time frame and in such a complex industrial setting is extraordinary. Indeed, Respondent has been unable to find a single case in the history of the federal antitrust laws in which a supplier with more than 130 customers in its first year in a market segment, including many *exclusive* customers, and a track record of doubling its market share (from 5% to 10%) in its second year, was considered excluded.

[redacted] (Bhargava, Tr. 3002, 3027; McCutcheon, Tr. 2300; JX 696 (McCutcheon, IHT at 40-41).) In 2009, plenty of excess domestic foundry capacity existed to meet Star's domestic production needs. (Bhargava, Tr. 2931; JX 643 (Tatman, IHT at 63); JX 638 (McCullough, IHT at 41).) Star's domestic Fittings sales rose throughout the last quarter of 2009, all of 2010 and to the

present. (McCutcheon, Tr. 2590.) As early as November 2009, Star's domestic performance had exceeded the expectations of its CEO. (*See* RX 231 (Mr. Bhutada's November 10, 2009, congratulatory email to Star's sales team states that "our domestic quote log is very impressive. . .lot better than I expected at this stage. . . congratulations").) Star's customers included many of McWane's largest customers, such as HD Supply and Ferguson. (McCutcheon, Tr. 2590-2592; Webb, Tr. 2798-2800; Thees, Tr. 3084, 3111-3112; Morton, Tr. 2860, 2867; JX 652 (Johnson, Dep. at 17-18).) In fact, Star - - not McWane - - was selected as the preferred domestic Fittings supplier for The Distribution Group in 2010. (JX 694 (Bhutada, Dep. at 155); JX 652 (Johnson, Dep. at 35-36).) [redacted] (Bhargava, Tr. 3027-3028; JX 694 (Bhutada, Dep. at 68-69); McCutcheon, Tr. 2595, 2597.)

Star's successful and dramatic expansion of its sales of domestic Fittings affirmatively disproves the allegation that McWane possessed monopoloy power. A company, like McWane, that lost share so quickly could not have monopolized anything as a matter of law. *Brooke Group Ltd v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 226 (1993) ("where new entry is easy . . . summary disposition of the case is appropriate"); *Advo, Inc. v. Philadelphia Newspapers*, 51 F.3d 1191, 1202 (3d Cir. 1995). Successful, actual expansion by an existing competitor (like entry by a new competitor) "precludes a finding that exclusive dealing is an entry barrier of significance," *Omega Envtl. v. Gilbarco, Inc.*, 127 F.3d 1157, 1164 (9th Cir. 1997), and easy entry conditions "rebut inferences of market power." *Top Mkts.*, 142 F.3d at 99; *Sterling Merch., Inc.*, 656 F.3d 112, 126 (1st Cir. 2011) (attempted monopolization claim "presumptively implausible where, as is the case here, the challenged conduct has been in place

for at least two years and the remaining market remains robustly competitive as evidenced by ongoing entry, profitability of rivals, and stability of their aggregate market share.")

The Court should also grant judgment for McWane, even if it finds that McWane had monopoly power over domestic Fittings, is because the mere possession of monopoly power is not unlawful. The United States Supreme Court has long made it clear that the antitrust laws encourage - - rather than prohibit - - the "mere possession of monopoly power," particularly monopoly power obtained under those circumstances. *Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) ("*Verizon*"); *U.S. v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966); *see also United States v. Microsoft Corp.*, 253 F.3d 34, 51 (D.C. Cir. 2001) ("merely possessing monopoly power is not itself an antitrust violation"). Instead, the Court has made it clear that "to safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct." *Trinko*, 540 U.S. at 407.

But what is the conduct here? McWane did not have any contracts that required its customers to buy its domestic Fittings exclusively. Even true exclusive dealing contracts have "well-recognized economic benefits." *Allied Orthopedic Appliances Inc. v. Tyco Health Care Group LP*, 592, F.3d 991, 996 (9th Cir. 2010). As a result, competition to become an exclusive supplier "should actually be encouraged." *Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, 614 F.3d 57, 83 (3d Cir. 2010).

Instead, exclusive dealing contracts are only problematic if they are multi-year in length and "foreclose competition in a substantial share of the line of commerce affected." *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961). To foreclose competition in a substantial share of the affected line of commerce, the exclusive deals must "foreclose so large a percentage

of the available . . . outlets that entry into the concentrated market is unreasonably restricted." *E. Food Servs., Inc. v. Pontifical Catholic Univ. Servs. Ass'n, Inc.* 357 F.3d 1, 8, (1st Cir. 2004), and significant sellers are "frozen out of a market by the exclusive deal." *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 45 (1984) (O'Connor, J., concurring).

McWane simply issued a letter asking customers to support its last domestic foundry - - which was operating at a fraction of its capacity and teetering on the edge of extinction because of the flood of cheap imports over the years - - fully and offering a rebate in exchange. The letter made it clear that customers were free to choose another supplier, and simply noted that if they did so, they "may" forego any unpaid rebates for domestic Fittings or shipments for a short period of time ("up to 12 weeks"). (CX 1606.) Star saw the letter, concluded it was "more bark than bite" and that it could beat McWane in the market, and quickly grabbed 130-plus customers, including dozens of exclusive customers. When a customer is free to walk away from even a monopolist's discounts at any time, no violation of the antitrust laws exists. *Concord Boat v. Brunswick Corp.*, 207 F.3d 1039, 1062-63 (8th Cir. 2000) ("*Concord Boat*"). Star had ample opportunity to compete and did, very successfully. That is all the antitrust laws require. *Race Tires*, 614 F.3d at 84 (plaintiffs "had the clear opportunity to compete and did compete, sometimes successfully"); *NicSand, Inc. v. 3M Co.*, 507 F.3d 442, 451–52, 458 (6th Cir. 2007) ("no explanation why it could not compete for these multi-year agreements.").

Dr. Schumann suggested that customers might have been buying McWane domestic Fittings out of concern that if they bought domestic Fittings from Star, McWane would not supply them for up to 12 weeks. But the trial record contains almost no such concern. Indeed, only a handful of distributors testified at trial and all of them purchased some domestic Fittings from Star. Moreover, Dr. Schumann conceded that 130-plus customers bought Star domestic in

2010, its first full year with product, with no apparent ramification at all. Indeed, he was unable to identify a single distributor (out of hundreds) which wanted to buy Star domestic, but was cowed from doing so. Complaint Counsel may point to Hajoca, but Hajoca epitomizes exactly how weak McWane's letter was. It saw McWane's letter, decided to buy domestic from Star anyway, and did so. (Pitts, Tr. 3337, 3355-56, 3366; Tatman, Tr. 251-52, 687-89; CX 1606.) Indeed, Hajoca shows that Star was right - - McWane's letter had no bite at all - - and there is no evidence that it forceclosed Star from a substantial number of distributors.

The overwhelming evidence shows that the rebate letter had about as much force as the piece of paper on which it was written. (Tatman, Tr. 251-252, 687-689; CX 1606.) Mr. Sheley testified that McWane paid rebates and shipped domestic Fittings to distributor Illinois Meter in 2010 and 2011, despite the fact that Illinois Meter bought domestic Fittings from Star. Sheley, Tr. 3462-3463. Mr. Groeniger testified that McWane never enforced the Rebate Policy against Groeniger, even though it bought domestic Fittings from Star. (JX 669 (Groeniger, Dep. at 80, 99). *See also* JX 643 (Tatman, IHT at 197-198).) Mr. Johnson testified that McWane never refused to pay rebates to or sell domestic Fittings to Dana Kepner, even though Dana Kepner has purchased domestic Fittings from Star since 2010. (JX 652 (Johnson, Dep. at 17-19).) Mr. Gibbs confirmed that McWane never cut off, threatened, or refused to pay rebates to WinWholesale, even though WinWholesale bought domestic Fittings from Star. (JX 705 (Gibbs, Dep. at 35-39).) Mr. Webb testified that McWane never refused to sell, cut off or refused to pay rebates to HD Supply, despite the fact that HD Supply has bought and continues to buy domestic Fittings from Star. (JX 673 (Webb, Dep. at 46-47).) Mr. Coryn testified that the rebate letter had no effect on Utility Equipment's willingness to buy domestic Fittings from Star. (JX 703 (Coryn, Dep. at 134-135).)

It is well settled that even true exclusive contracts that are not strictly enforced are entirely permissible. *See Digene Corp. v. Third Wave Techs., Inc.,* 323 F. App'x 902, 912 (Fed. Cir. 2009); (*See also* Appendix of Vertical Cases.) In this case, the overwhelming evidence is that the short-lived, unenforced Rebate Policy posed no barrier to entering the domestic Fittings market, assuming such a separate market ever even existed.

It is unclear whether Complaint Counsel will argue - - despite Star's success - - that the *rebates* were somehow exclusionary. But, rebates are simply price concessions and, since there was no proof at trial that McWane's prices were below-cost, the rebates are presumptively lawful and cannot cause antitrust injury. *Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc.*, 555 U.S. 438, 452 (2009) (plaintiff challenging a defendant's pricing practices must prove that "the prices complained of are below an appropriate measure of [the defendant's] costs"); *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 340 (1990) ("When prices are not predatory, any losses stemming from them cannot be said to stem from an anticompetitive aspect of the defendant's conduct"). Because discounts are beneficial to consumers, "price cutting is a practice the antitrust laws aim to promote." *Cascade Health Solutions v. Peacehealth*, 515 F.3d 883, 896 (9th Cir. 2008); *see Nicsand*, 507 F.3d at 452 ("[c]utting prices in order to increase business often is the very essence of competition"). Discounted prices that remain above a firm's average variable cost are presumptively legal, because a firm's ability to offer above cost discounts represents competition on the merits. *Concord Boat*, 207 F.3d at 1061. Too much judicial oversight of discounting creates "intolerable risks of chilling legitimate price cutting." *Id.* at 1061 (quoting *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.,* 509 U.S. 209, 223 (1993)). *See also Se. Missouri Hosp. v. C.R. Bard, Inc.*, 642 F. 3d 608, 623 (8th Cir. 2011)

(plaintiff must overcome a strong presumption of legality where defendant's discounted prices are above its average variable cost).

Complaint Counsel has not submitted a shred of evidence that McWane's rebates were below its average variable cost or any other appropriate measure of cost. *See Safeway, Inc. v. Abbott Labs.*, 761 F.Supp.2d 874, 898 (N.D. Cal. 2011) (granting summary judgment for defendant on predatory pricing monopoly and attempted monopoly claims, where plaintiff failed to present evidence that defendant priced below cost). In fact, McWane's competitor [redacted] [redacted] (JX 694 (Bhutada, Dep. at 65); McCutcheon, Tr. 2635-2636, 2646-2647; RX 601 *in camera.*)

A defendant's above-cost customer discounts are presumed legal even if those discounts are offered under an exclusive agreement. *See, e.g., Peacehealth*, 515 F.3d at 903; *Concord Boat*, 207 F.3d at 1061; *Nicsand,* 507 F.3d at 451-52, 457. This presumption of legality even applies where the defendant has a super-majority share of the relevant market, provided the exclusive agreement is terminable at will and on short notice. *Epicenter Recognition, Inc. v. Jostens, Inc.*, 81 F. App'x. 910, 911-12 (9th Cir. 2003).

Complaint Counsel may argue that Star believed the rebate letter made it harder for them to sell their domestic Fittings or that McWane's rebate letter somehow increased Star's costs. But Star's subjective beliefs are irrelevant, and Dr. Schumann was uanble to identify any increased costs Star incurred. (Schumann Tr., 4512-14.) The antitrust laws are designed to protect *competition*, not competitors. *Bacchus Indus., Inc. v. Arvin Indus., Inc.*, 939 F.2d 887, 894 (10th Cir. 1991), citing *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488, 97

S.Ct. 690, 697, 50 L.Ed.2d 701 (1977) ("Whether or not a practice violates the antitrust laws is determined by its effect on competition and not its effect on an individual competitor.").

The purpose of the antitrust laws "is not to protect businesses from the workings of the market; it is to protect the public from the failure of the market. The law directs itself not against conduct which is competitive, ***even severely so***, but against conduct which unfairly tends to destroy competition itself." *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993) (emphasis supplied). As one circuit court put it: "cutthroat competition is a term of praise rather than condemnation. . . consumers gain when firms try to 'kill' the competition and take as much business as they can." *R.J. Reynolds Tobacco Co. v. Cigarettes Cheaper*, 462 F.3d 690, 696 (7th Cir. 2006) (citations omitted). Because "[i]t is sometimes difficult to distinguish robust competition from conduct with long-term anticompetitive effects," courts must be careful to avoid construing that antitrust laws in a way that would chill, rather than foster, competition. *Spectrum Sports*, 506 U.S. at 458-59. Here, Star had the opportunity to compete and did so, quite successfully.

Of course, factors other than McWane's rebate letter explain why Star may not have increased domestic Fittings sales as much as it would have liked, including Star's own reputation, distributors' lack of confidence in Star, and Star's own delivery and inventory issues. (Bhargava, Tr. 3003; McCutcheon, Tr. 2634; Sheley, Tr. 3448-3451; Thees, Tr. 3101-3104, 3107-3108; Webb, Tr. 2788-2789, 2792; JX 705 (Gibbs, Dep. at 25-28, 30, 85, 87-88).) For example, distributor WinWholesale was concerned about Star's reliability as a domestic Fittings supplier "regardless of what the September 22nd, 2009 letter said." (JX 705 (Gibbs, Dep. at 93-94).) That McWane had a proven track record with domestic Fittings, and perhaps a better

reputation than Star, was not anticompetitive, but instead "the essence of competition." *Omega Envtl..,* 127 F.3d at 1164.

2. McWane's Rebate Letter Was Short-Term And Presumptively Lawful

McWane's rebate policy was not a contract and did not require any customer to buy domestic Fittings from McWane. Because it was not a legally enforceable contract or agreement, it was not only terminable at will and on short notice, it was terminable ***at any time***. (CX 1606.) Even its potential ramifications - - loss of unpaid rebates or access to product - - were only "for up to 12 weeks." In any event, it ended in early 2010. (Tatman, Tr. 708; CX 0118.)

Short term exclusive agreements, particularly those which leave the customer free to walk away, are presumptively legal because they cannot harm competition. *See Ticketmaster Corp., v. Tickets.com, Inc.* 127 F. App'x. 346, 347-48 (9th Cir. 2005) (attempted monopolization claim failed because a certain percentage of defendant's exclusive contracts came up for renewal each year, permitting competitors to bid); *Indeck Energy Servs., Inc., v. Consumers Energy Co.,* 250 F.3d 972, 977-78 (6th Cir. 2000) (no monopolization because customers free to investigate alternate suppliers upon expiration of short-term supply agreements); *Paddock Publ., Inc. v. Chicago Tribune Co.,* 103 F.3d 42 (7th Cir. 1996); *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 394 (exclusive dealing contracts are presumptively legal if one year or less); *CDC Technologies, Inc. v. IDEXX Labs., Inc.,* 7 F. Supp. 2d 119 (D. Conn. 1998) aff'd, 186 F.3d 74 (2d Cir. 1999) ("*CDC Technologies*") (one year agreement with 60 day terminability clause was not anticompetitive); *Commercial Data Servers, Inc. v. Int'l Bus. Machines Corp.,* 262 F. Supp. 2d 50, 75 (S.D.N.Y. 2003) (among other reasons, exclusive distributorship agreement not

anticompetitive because it was terminable by either party without cause on three months written notice).

The rebate letter was analogous to the market share discounts at issue in *Concord Boat*. In that case, a boat engine supplier with 75% of the market share offered discounts of varying levels to boat builders. The more engines a builder bought from the alleged predator, the greater its discount, creating what the plaintiff contended was "golden handcuffs" tying the builder to the predator. The Eighth Circuit rejected this argument, finding that the defendant's market share discounts amounted to legitimate competition on the merits. *Concord Boat*, 207 F.3d at 1062-63. *See also Western Parcel Express v. United Parcel Serv.*, 190 F.3d 974, 976 (9th Cir. 1999) (easily terminated volume discount contracts are pro-competitive).

The rebate letter was far less restrictive than most of the exclusive agreements and arrangements found to be perfectly legal by the courts. (*See* Appendix of Vertical Cases.) It is well settled that even true exclusive contracts can have legitimate economic benefits, and must therefore be evaluated in accordance with the rule of reason. *Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield*, 373 F.3d 57, 65-66 (1st Cir. 2004); *Omega Envtl.*, 127 F.3d at 1162; *Roland Mach.*, 749 F.2d at 395. Under the rule of reason, Complaint Counsel must prove that the rebate letter caused anti-competitive consequences that outweigh its pro-competitive benefits. *Stop & Shop*, 373 F.3d at 65-66. Anti-competitive consequences would be a reduction in domestic Fittings output or a supracompetitive rise in domestic Fittings prices. *See CDC Techs.*, 186 F.3d at 80-81. Evidence that a competitor such as Star may have been harmed is insufficient. *See United States v. Dentsply Int'l, Inc.*, 399 F.3d 181, 187 (3d Cir. 2005); *Stop & Shop*, 373 F.3d at 65-66; *see also* (Appendix of Vertical Cases.)

Complaint Counsel presented no evidence that the rebate letter caused domestic Fittings output to fall. To the contrary, the evidence is that domestic Fittings output increased after September 22, 2009. (Tatman, Tr. 1001-1003 & RX 632 *in camera*.) Similarly, Complaint Counsel presented no evidence that the rebate letter caused the price of domestic Fittings to rise to supracompetitive levels. To the contrary, the evidence is that domestic Fittings prices barely kept place with inflation in 2009-2010. (Tatman, Tr. 979-981, 988-989; RX 595.) McWane's domestic Fittings prices increased a mere 3.1 percent in 2010, the peak of ARRA'S effect. (Tatman, Tr. 1001-1005; RX 632 *in camera*.) Star's domestic Fittings prices were higher than McWane's in the majority of states during this time period. (Tatman, Tr. 1001-1005; RX 632 *in camera*; Normann, Tr. 4970 ("this shows that Star's pricing was generally higher than McWane's pricing.") Further, McWane never expressed any intention to profit from ARRA by overcharging its customers. (RX 595 ("It has never been our intent to overcharge because of the Buy America provision"); Tatman, Tr. 981 ("we didn't want to overcharge in the short term . . . and set ourselves up for the long term where people felt that we took advantage of the situation.").)

Courts have found arrangements much more restrictive than the rebate letter to be perfectly legal. *See, e.g., Peacehealth*, 515 F.3d at 903; *Concord Boat*, 207 F.3d at 1062-63; *St. Francis Med. Ctr. v. C.R. Bard, Inc.*, 657 F. Supp. 2d 1069 (E.D. Mo. 2009); *Indiana Telcom Corp., Inc.*, No. IP 97-1532-C-HG, 2001 WL 1168169 (S.D. Ind. Sept. 25, 2001); *J.B.D.L. Corp. v. Wyeth-Ayerst Labs., Inc.*, No 1:01-CV-704, 1:03-CV-781, 2005 WL 1396940, *16-17 (S.D. Ohio June 13, 2005); *Bepco, Inc. v. Allied-Signal, Inc.*, 106 F. Supp. 2d 814, 827-28 (M.D.N.C. 2000); *see also* (Appendix of Vertical Cases.) For example, the rebate letter is much less restrictive than the exclusive contracts deemed legal in *Indeck*, 250 F.3d at 977-78. In *Indeck*,

the Sixth Circuit held that a utility's exclusive contracts with 17 large power consumers did not violate federal antitrust laws, despite the fact that those contracts preempted 87% of the relevant co-generation market. 250 F.3d at 977-78. The Sixth Circuit found that: (i) no evidence existed that the alternative provider allegedly excluded from the co-generation market actually could have served as a lower-cost alternative to the defendant; (ii) the discounted rates the defendant offered to customers under its exclusive agreements were pro-competitive; (iii) the defendant's exclusive agreements were of limited duration, leaving the customers free to seek other power generators upon expiration. *Id.* This case is analogous to *Indeck* because: (i) the evidence was clear that Star was a less efficient supplier of domestic Fittings than McWane because its use of jobber foundries was higher cost and, thus, its domestic Fittings prices were higher than McWane's. Complaint Counsel presented no evidence that Star was a more efficient, lower-cost alternative supplier of domestic Fittings than McWane; (ii) the rebates that McWane offered to its customers under the Rebate Policy were discounts, i.e. lower prices; and (iii) the Rebate Policy was not only not a contract, but was enforced weakly – if at all – at one customer (Hajoca) for a period of 12 weeks at the most.

Even where a vertical agreement, such a rebate policy between a supplier and a distributor, results in increased prices and decreased customer choice, it does not necessarily follow that competition has been harmed. *Brantley v. NBC Universal, Inc.*, 675 F.3d 1192, 1198, 1202 (9th Cir. 2012). "Both effects are fully consistent with a free competitive market." *Id.* at 1202. The facts of this case certainly do not support any inference that the Rebate Policy harmed competition. (*See* Appendix of Vertical Cases.)

D. McWane Did Not Exclude Sigma From Domestic Fittings

McWane did not exclude Sigma from domestic Fittings. Sigma did. To succeed on its claims relating to the MDA, Complaint Counsel must prove that – as of September 2009 when the MDA was executed - Sigma intended to expand into domestic Fittings and had taken the necessary concrete steps to do so. *See Gas Utilities Co. of Alabama, Inc. v. So. Natural Gas Co.,* 99 6 F.2d 282, 283 (11th Cir. 1993) ("Inquiry into procedures is insufficient to establish preparedness . . . party must take some affirmative step to enter"). To meet this burden, Complaint Counsel must prove that Sigma had secured financing and consummated contracts to supply domestic Fittings. *See id.* Evidence that Sigma may have had access to financing in the abstract is not sufficient. *Id.*; *see also Cable Holdings of Ga., Inc. v. Home Video, Inc.*, 825 F.2d 1559, 1562 (11th Cir. 1987) (requiring "an intention to enter the business" and a "showing of preparedness"); *Sunbeam Television Corp., v. Nielsen Media Research, Inc.*, 763 F. Supp. 2d 1341, 1354 (S.D. Fla. 2011) ("a would-be purchaser suing an incumbent monopolist for excluding a potential competitor . . . must prove the excluded firm was willing and able to supply it but for the incumbent firm's exclusionary conduct"). Here, of course, Sigma was already saddled with enormous debt at sky-high interest rates.

Complaint Counsel has not come close to meeting its burden. Mr. Pais testified that, in the spring and summer of 2009, Sigma was in a "grave" financial situation. (Pais, Tr. 2163-2165, 2167-2168; CX 214, 2186-2187, RX 163 *in camera*; 2199-2203; *see also* Pais, Tr. 1760 (Sigma was in a "precarious position overall in financial terms").) Mr. Rona testified that, by September 2009, Sigma had not taken any concrete steps to supply its own domestic Fittings. (Rona, Tr. 1693-1694; CX 258.) Although Sigma would have had to contract with at least three different domestic foundries to produce the range of approximately 730 different types of domestic Fittings it needed in order to become a viable domestic supplier, it had no contracts

with domestic foundries as of September 2009. (Rona, Tr. 1672-1673.) Although Sigma required a minimum of 450 core patterns to produce those 730 types of Fittings, very few of those patterns were even physically present in the United States, as of September 2009. (Rona, Tr. 1673- 1675.) Mr. Rona testified that Sigma would have required at least 18 to 24 months lead time to begin production of a full range of Fittings, and approximately 6 months to produce even one fitting. (Rona, Tr. 1673, 1676-1677.) He conceded that this timetable would have been unworkable, given ARRA's short window of opportunity. (Rona, Tr. 1671.)

Given Sigma's precarious financial situation, as of September 2009, it simply had no viable domestic supply or production option – other than to enter into the MDA with McWane. (Pais, Tr. 1799-1804, 1854-1855, 2173-2175, 2184, 2210, 2217-2218, 2222.) Unquestionably, Sigma lacked the financial wherewithal to become a domestic Fittings supplier at that time. [redacted] (Rybacki, Tr. 3663-3664 & RX 242 *in camera*.) [redacted] (Rybacki, Tr. 3672 *in camera*.) A significant portion of Sigma's substantial debt was unsecured and carried double-digit interest rates. (Rybacki, Tr. 3672 *in camera*.) [redacted] (Rybacki, Tr. 3670 *in camera*.) [redacted] (Rybacki, Tr. 3670 *in camera*.) [redacted] (Rybacki, Tr. 3670-3671 *in camera*.)

[redacted]

(Rybacki, Tr. 3672-3673 *in camera.*) [redacted] (Rybacki, Tr. 3672-3673 *in camera.*) Thus, it is hardly surprising that Mr. Rybacki believed that it was inadvisable for Sigma to attempt to become a domestic Fittings supplier in 2009, when its financial situation was so precarious. (Rybacki, Tr. 3677-3678; 3682.)

It is noteworthy in this regard that Sigma did not get into virtual manufacturing of domestic Fittings before the MDA, nor after. That also demonstrates that something other than the MDA caused it to refrain from expanding into domestic Fittings. Indeed, the MDA was a one-year agreement, easily terminable by either party with 180 days notice. (Rona, Tr. 1699-1700; CX 1194.) McWane provided notice in early 2010, so it was in effect for less than a year, from September 2009 to August 2010. (JX 689 (Rona, Dep. at 303-304).) Yet Sigma has not expanded into domestic Fittings for reasons of its own that are unrelated to the long-ago terminated MDA.

Because the MDA was the best, quickest, and only available way for Sigma to serve its customers who desired domestic Fittings for ARRA projects, McWane is entitled to judgment in its favor on Counts Four and Five of the Complaint, and on Counts Six and Seven to the extent they relate to the MDA.

IV. McWane Is Entitled to Judgment in Its Favor on the Attempted And Conspiracy to Monopolize Claims

For all of the reasons Complaint Counsel's monopoly claims fail, as set forth above, its attempted monopoly and conspiracy to monopolize claims also fail. These two claims also fail for the independent reasons set forth below.

A. There Is No Evidence That McWane Had The Requisite "Specific Intent," Nor That It Had A Dangerous Probability Of Monopolizing Anything

To establish an attempted monopoly claim, a plaintiff must prove that the defendant possessed the specific intent to achieve monopoly power by predatory or exclusionary conduct; that the defendant in fact engaged in such anticompetitive conduct; and that a dangerous probability existed that the defendant might have succeeded in its attempt to achieve monopoly power. *U.S. Anchor Mfg. Inc. v. Rule Indus., Inc.*, 7 F.3d 986, 993 (11th Cir. 1993). With regard to the specific intent element, the desire to maintain or increase one's market share is not in itself an antitrust violation. *Oahu Gas*, 838 F.2d at 368. For a claim of attempted monopolization, even "[d]irect evidence of intent to vanquish a rival in an honest competitive struggle cannot help to establish an antitrust violation. It must also be shown that the defendant sought victory through unfair or predatory means." *William Inglis & Sons Baking Co. v. ITT Cont'l Baking Co., Inc.*, 668 F.2d 1014, 1028 (9th Cir. 1981). Because Complaint Counsel has failed to establish that McWane engaged in unfair or predatory conduct as set forth above, McWane is entitled to judgment in its favor on Count Seven of the Complaint.

B. There Is No Evidence That McWane Or Sigma Had The Requisite "Specific Intent" To Conspire To Monopolize

To establish conspiracy to monopolize, a plaintiff must prove: (i) the existence of a conspiracy to monopolize; (ii) overt acts done in furtherance of the conspiracy; (3) an effect upon an appreciable amount of interstate commerce; and (4) a specific intent to monopolize. *Lantec, Inc. v. Novell, Inc.*, 306 F.3d 1003, 1028 (10th Cir. 2002). Proof that McWane and Sigma shared an intent to prevail over rivals or to improve market position is insufficient; the shared intent must have been to make McWane a monopolist. *Id.* Complaint Counsel presented no evidence that McWane or Sigma entered the MDA with such intent. To the contrary, Sigma's

focus in signing the MDA was on keeping its own customers happy and providing domestic Fittings to those customers when needed, not on Star. (JX 689 (Rona, Dep. at 231); JX 688 (Rona, IHT at 218-220).) Sigma perceived that if it was unable to supply domestic Fittings to its customers, it might also lose some portion of its non-domestic business with those customers. (JX 689 (Rona, Dep. at 118-119); JX 688 (Rona, IHT at 187-188, 218-220).) Thus, McWane is entitled to judgment in its favor on Count Five of the Complaint *See Belfiore v. The New York Times Co.*, 826 F.2d 177,183 (2nd Cir. 1987) (no conspiracy where plaintiff failed to prove that alleged co-conspirator shared intent to make primary conspirator a monopoly).

V. Overwhelming Evidence Established That McWane's Conduct Was Pro-Competitive And Did Not Harm Competition Or Consumers

The Court heard overwhelming evidence that McWane was willing to - - and did - - compete with lower prices, discounts, rebates, and other price concessions. And, as a result, that its imported and its domestic Fittings prices did not even keep pace with inflation. Complaint Counsel did not present a single municipal engineer, contractor, or distributor at trial who complained that McWane's prices were too high.

A. McWane's Lower Published Prices And Continued Job Price Discounts And Other Price Concessions Benefited Consumers

Overwhelming evidence established that McWane kept its published prices below Sigma and Star in Winter and Spring 2008, and did not follow their high list and multiplier increases, and that it dramatically lowered its list prices for all medium and large diameter imported Fittings by roughly 20-25% in April 2009. Overwhelming evidence also established that McWane continued to offer hundreds of additional job price discounts and continued to offer rebates and a host of other price concessions in 2008 (and subsequent years).

That is pro-competitive and beneficial to consumers. Lower prices are exactly what the antitrust laws are designed to encourage. They cannot cause antitrust injury as a matter of law. *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 127 S. Ct. 1069, 1074 (2007) ("Low

prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition") (quoting *Atl. Richfield*, 495 U.S. at 340); *Matsushita*, 475 U.S. at 594 ("cutting prices in order to increase business often is the very essence of competition").

B. The Rebate Letter And The MDA Had Legitimate Pro-Competitive Benefits

The rebate letter and the MDA were both efforts to keep Union Foundry alive. Demand for domestic Fittings had plummeted in recent years as cheap imports flooded into the U.S. Long-term domestic Fittings manufacturers like Griffin Pipe, U.S. Pipe, and ACIPCO can shut-down or scaled back. McWane itself was forced to shutter its Tyler South plant in Fall 2008 and lay off its employees. Its last domestic Fittings foundry, Union Foundry, was operating at a fraction of its capacity. (Tatman, Tr. 960 ("about 30 percent of what they could do.").)

The rebate letter was an effort to keep enough volume to keep Union Foundry alive. The Court heard no evidence that McWane was trying to monopolize domestic Fittings or charge supracompetitive prices. McWane was very concerned that Star would free ride on its efforts to keep by simply buying a few dozen patterns - - without investing in a foundry or a full line of Fittings - - and grabbing the lion's share of the highest volume Fittings. That risk of being "cherry picked" would have left Union Foundry with only low-volume "oddball" Fittings and insufficient tonnage to justify remaining in business. (*E.g.*, Normann, Tr. 5055; JX 638 (McCullough, IHT at 34-36). McWane entered into the MDA with Sigma for the same fundamental reason: volume. Sigma was willing to buy Fittings that Union Foundry needed to sell and it offered the opportunity to increase demand for domestic Fittings by selling to its distributor customers with its larger sales force. (Pais, Tr. 1800-1801; Rona, Tr. 1481, 1671; JX 689 (Rona, Dep. at 118-119); JX 688 (Rona, IHT at 218-220.)

The MDA – which was Sigma's idea (JX 643 (Tatman, IHT at 149-150) - - was the only way Sigma could effectively supply domestic Fittings to its customers during ARRA's short time window. (Rona, Tr. 1481, 1671.) Sigma was also able to reach and service customers that McWane could not. (JX 643 (Tatman, IHT at 176-177); JX 642 (Page, Dep. at 62-63).) Sigma,

with its network of regional distribution yards and larger field sales force, was better able than McWane to provide certain servicing benefits, such as faster delivery, to purchasers of domestic Fittings. (JX 689 (Rona Dep. at 123-124, 133-134); JX 643 (Tatman, IHT at 176-177); JX 688 (Rona, IHT at 177-178).) Sigma's distribution centers were more strategically located for more efficient customer delivery than McWane's. (JX 689 (Rona, Dep. at 311-313).) Sigma also had relationships with certain distributors and in certain geographic areas that McWane lacked. (JX 642 (Page, Dep. at 69-73).) For example, Mr. Rona of Sigma testified that ACIPCO preferred to buy domestic Fittings from Sigma rather than McWane, because Sigma provided additional specialty services, including coatings, linings, taps and other add-ons, that ACIPCO felt McWane could not provide as effectively. (JX 688 (Rona, IHT 95-96); JX 689 (Rona, Dep. 136).) In addition, Mr. Burns of ACIPCO testified that ACIPCO benefitted logistically from buying McWane domestic Fittings from Sigma, rather than McWane, and found the pricing to be competitive. (JX 646 (Burns, Dep. 139-140, 175).) Mr. Groeniger testified that his firm preferred buying domestic Fittings from Sigma, because he preferred Sigma's service to both Star and McWane. (JX 669 (Groeniger, Dep. 87-88).) Mr. Prescott testified that distributor Everett J. Prescott preferred to buy domestic Fittings from Sigma when it was concurrently ordering non-domestic Fittings, because Sigma was its preferred non-domestic supplier and it could efficiently round out blended orders. (JX 661 (Prescott, Dep. 35-36, 122-123).)

C. Complaint Counsel Has Not Shown Any Anticompetitive Effect

Complaint Counsel has not met its burden of proving any anticompetitive effect, let alone a "substantial" effect by "substantial evidence." *Cement Inst.*, 333 U.S. at 705 (1948); *Cal. Dental*, 224 F.3d at 957. Dr. Schumann did not quantify or otherwise provide any economic analyses demonstrating that imported Fittings prices would have been lower but-for the alleged conduct in 2008, nor that domestic Fittings prices would have been lower but-for the rebate letter or the MDA. *St. Francis Med.*, 657 F. Supp. 2d at 1102-03 (E.D. Mo. 2009) (a manufacturer's rebate policy was not anticompetitive where there was no evidence that it led to higher prices or that customers who bought products in various categories under the policy did so unwillingly).

His opinion was nothing more than assumption and speculation. That is not enough. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 579-80 (1993) (untestable say-so is not reliable evidence at trial); *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1977) ("Nothing . . . requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert"); *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 242 (1993) ("when indisputable record facts contradict or otherwise render the opinion unreasonable, it cannot support a jury's verdict.").

VI. The Government Is Not Entitled To Any Remedy

Complaint Counsel is not entitled to its proposed remedy because judgment should be granted in favor of McWane on all Counts. In addition, however, the proposed remedy should be denied because there was no proof at trial of any ongoing actual or threatened injury to competition or consumers. On the contrary, the conduct at issue all ended years ago. Even Dr. Schumann conceded that his "conspiracy" ended in Fall 2008 and that DIFRA stopped operating at the end of that year. ARRA expired in 2010 and with it the conditions that supposedly gave McWane monopoly power over domestic Fittings. Star successfully entered and has grown steadily. McWane's rebate letter changed long ago and the Master Distributorship Agreement with Sigma was terminated in 2010. (Tatman, Tr. 707-709, 752; Pais, Tr. 1826 ("Early 2010.").)

Federal judicial power is limited by Article III of the Constitution to live "Cases" or "Controversies." That means courts cannot grant injunctions unless a plaintiff shows ongoing or imminent harm. The Supreme Court has repeatedly denied injunctive relief to plaintiffs, like Complaint Counsel here, who cannot meet that proof. The plaintiff "must show that he is under threat of suffering 'injury in fact' that is *concrete and particularized*" and "the threat must be actual and imminent, not conjectural or hypothetical[.]" *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009). A plaintiff, like Complaint Counsel here, that fails to meet these requirements is not entitled to injunctive relief. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2559-60 (2011) ("plaintiffs no longer employed [by Wal-Mart] lack standing to seek injunctive and

declaratory relief against its employment practices"); *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983) (past injury at hands of police did not entitle plaintiff to enjoin future police practices). The mere possibility that past conduct might occur again is insufficient. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) (plaintiff seeking injunctive relief required to show likelihood of harm); *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). Respondent recognizes that this case involves the government as the plaintiff and an administrative agency as the tribunal, but believes the same equitable reasons apply and should lead this Court to deny Complaint Counsel's proposed remedy. *U.S. v. Uniroyal, Inc.*, 300 F.Supp. 84, 88 (D.C.N.Y. 1969) (where "the activity of the kind complained of by the Government has ceased" and "no substantial basis has been established by credible evidence that there is any danger of recurrent violation . . . there is no warrant for injunctive relief.").

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CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2012, I filed the foregoing document electronically using the FTC's E-Filing System. I also certify that I delivered via electronic mail a copy of the foregoing document to:

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