PUBLIC

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

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

POST TRIAL REPLY BRIEF OF RESPONDENT MCWANE, INC.

J. Alan Truitt
Thomas W. Thagard III
Maynard Cooper and Gale PC
1901 Sixth Avenue North
2400 Regions Harbert Plaza
Birmingham, AL 35203

Joseph A. Ostoyich
Erik T. Koons
William C. Lavery
Heather Souder Choi
Baker Botts L.L.P.
The Warner
1299 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2420

Attorneys for Respondent McWane, Inc.

Dated: January 25, 2013

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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Respondent McWane, Inc. ("McWane") submits the following Post Trial Reply Brief in support of its Proposed Findings of Fact and Conclusions of Law.

INTRODUCTION

At trial and in its post-trial submissions, Complaint Counsel alleges a complicated and convoluted horizontal conspiracy (the so-called "Tatman Plan") among McWane and its competitors, Sigma and Star, that somehow vaguely affected pricing. At times, Complaint Counsel argued it was "one conspiracy" lasting several years, but its own expert disagreed with that and claimed the conspiracy he opined was much, much shorter. At times, Complaint Counsel suggested there were overt price discussions. But, again, its own expert flatly disagreed. Moreover, during the same time period Complaint Counsel alleges the parties were in agreement with each other, it also conversely accuses McWane of hostile, exclusionary conduct towards the same alleged co-conspirators.

Surprisingly, however, a simple comparison of McWane's and Complaint Counsel's proposed Findings of Fact reveals material agreement on a number of crucial (and, ultimately, dispositive) issues:

- There was no evidence of any agreement in a "smoke filled" meeting among the competitors and, indeed, Complaint Counsel's expert concedes "I have not found anything to suggest" such an agreement;
- 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;
- McWane, Sigma and Star all continued to offer hundreds of job price discounts below published multipliers and rebates and other prices concessions to win specific jobs during the alleged conspiracy period;
- There is no evidence of a parallel change in the amount or level of job pricing;

- The trial record contains dozens of sworn denials of any price agreements from every single McWane, Sigma and Star witness who appeared at trial, including flat denials of any agreement to eliminate or reduce job pricing;

- The trial record contains more than 250 additional sworn denials of any pricing agreements in deposition and investigational hearing testimony;

- Not one witness testified that there were any pricing communications between McWane and either Star or Sigma;

- Complaint Counsel's own expert testified that the only "communications" he identified - - a handful of customer letters and announcements - - did not contain the key tenets of the conspiracy he opined;

- Each member of DIFRA testified that they never discussed Fittings prices or exchanged any sales or pricing information, and flatly denied that the tons-shipped data suggested anything about prices or that it impacted their decisions;

- Complaint Counsel's own expert testified that the DIFRA data could not be used to divine pricing actions;

- Star succeeded in expanding into virtual manufacturing of domestic Fittings in roughly six months between Spring and Fall 2009, and grabbed of the market with over domestic customers in its first year;

- Star doubled its share of domestic Fittings to in 2011, and was on pace to have its best domestic Fittings year yet in 2012;

- Star's customers included the largest waterworks distributors (HD Supply and Ferguson) in the United States as well as dozens of regional and local distributors;

- Complaint Counsel concedes it cannot identify a single distributor - - out of approximately 630 - - that wanted to buy Star's domestic Fittings, but did not because of McWane's rebate policy; and

- McWane did not exclude Sigma from production of domestic Fittings, as Sigma's dire financial situation in 2009 prevented it from taking the concrete steps necessary to expand into domestic Fittings during the brief ARRA period. Indeed, the facts were so flimsy, Complaint Counsel asked its expert to *assume* Sigma would have entered.

Equally telling is what the evidence does NOT show. After nine (9) weeks of trial composed entirely of testimony from government witnesses (with the exception of McWane's single expert witness), Complaint Counsel failed to answer some of the most fundamental

questions presented by each and every conspiracy case. Specifically, Complaint Counsel did not (and cannot) tell us: 1) what the "agreement" was;[1] 2) when it started or ended;[2] 3) how it was reached; [3] or 4) even whether it was implemented or successful (especially since Complaint Counsel and its expert made no effort to quantify the amount of project pricing before, during and after the alleged conspiracy).[4]

In contrast, the McWane executive in charge of the company's Fittings operations, Rick Tatman, presented cogent and consistent explanations for all of McWane's pricing actions - - explanations which demonstrate clear competitive, not collusive, decisions. In the face of a severe economic downturn and in response to dramatic market share losses, McWane decided on a comprehensive competitive approach. Rather than follow large list price increases announced by Sigma and Star, the company elected to *underprice* its competitors in Winter 2008 and

[1] There is no description of any "agreement" beyond a vaguely-defined desire to "curtail" project pricing. There is no description of what would be curtailed, by how much, for what job and when the "curtail[ment]" was going to occur. Complaint Counsel and its expert, however, do concede that the objective of the "Plan" was not to stop project pricing entirely but only to reduce or curtail it in some fashion. The questions left unanswered, however, are how much reduction was to take place (only a specific number of projects not to be project priced? if so, which ones or in what areas? only a limited reduction off published multipliers? if so, how much?). Other than a conclusory statement that the agreement was to "cut back" project pricing, Complaint Counsel has never explained the actual supposed details.

[2] The Complaint unambiguously states, "Beginning in January, 2008 . . . ," but Dr. Schumann suggested both a later date (after the companies' customer letters in late January) and an earlier date (Fall 2007) with no solid factual basis for either. It is even more unclear when the alleged conspiracy ended. Complaint Counsel argued that there was "one conspiracy" lasting until mid-2010, but Dr. Schumann disagreed and opined that the conspiracy was over years earlier (he claimed it "fell apart" in the Fourth Quarter of 2008). The Complaint, in contrast, alleged yet another end date: that ARRA's enactment in February of 2009 "upset the terms of coordination."

[3] Complaint Counsel and its expert admit that it was not reached in a "smoke filled" room at a specific meeting, but rather, only vaguely imply that it was reached as part of unspecified phone calls or "coded" messages. Specifically, Complaint Counsel trumpeted stacks of phone records at trial, which it references repetitively in literally dozens of proposed Findings, but only a small handful actually involved McWane. Yet, the crux of Complaint Counsel's case is the so-called "Tatman Plan" and its alleged use of customer pricing letters to "signal" messages to competitors. The convoluted "Tatman Plan" also involved the alleged creation of a sham trade association (and the hiring and implied duping of antitrust counsel retained in connection with the association) as well as a "coded" customer letter in Spring, 2008 that only made sense to Sigma and Star. What is extremely unclear is why such a complicated "Plan" was necessary if senior executives routinely called one another to discuss pricing.

[4] One would expect that a wide-scale effort to curtail project pricing by the three largest suppliers could be measured in some fashion. Dr. Schumann, however, admittedly made no effort to quantify the alleged reduction in project pricing at all.

indeed, in many instances, to *decrease* its own existing published multipliers. The strategy was aimed at increasing volume, reducing inventory, regaining share and ultimately, keeping McWane's foundries open and operational.

When confronted with another large price increase by his competitors in Spring 2008 (Sigma's "Big Bold Move, Baby"), Mr. Tatman again followed the strategy he had initially advocated and *underpriced* his competitors. Significantly, McWane (as well as Star and Sigma) continued to project price throughout the relevant timeframe, as well as offer a host of other price concessions (including rebates, cash discounts, freight allowances, payment terms and the like).

The evidence was clear that the fittings marketplace was defined by aggressive and fierce price competition, that Mr. Tatman barely knew Sigma and Star's price decision-makers (Sigma's Mr. Rybacki and Star's Mr. McCutcheon) and every single witness testified they never discussed prices with McWane. Moreover, they testified they distrusted each other's public price letters and always made their own assessment of where to price their Fittings.. In sum, McWane consistently competed on price. It undercut Sigma and Star's published prices in Winter and Spring 2008, it lowered its list prices dramatically in Spring 2009, and it always offered job discounts, rebates and other price concessions, as did Sigma and Star. There was simply no hard evidence to the contrary, leaving only Complaint Counsel's unsupported theories.

In addition, the alleged role that DIFRA played, which was central to Complaint Counsel's horizontal conspiracy theory, did not hold up to scrutiny. First, there were no price communications at all at any DIFRA meeting. Second, Complaint's Counsel's amorphous DIFRA theory was flatly rejected by the witnesses: indeed, not a single witness testified that the DIFRA data was utilized to decide to pull their competitive punches or to stop or reduce job

discounting. Rather, they unanimously explained that the DIFRA data was utilized for the legitimate purposes of production planning, inventory management, and general industry data needed by lenders. Finally, the evidence at trial also demonstrated that pricing *declined* during the brief period that DIFRA was operational and that market shares were not stable.[5]

In similar fashion, Complaint Counsel has not and cannot prove its monopoly claims. As with its horizontal case, Complaint Counsel at trial and in its post-trial submissions suggests a complicated and nefarious scheme[6] while McWane provides a simple and economically-rational explanation for its conduct.

By early 2009, the domestic Fittings industry was on its last legs. Traditional long-time domestic foundries had abandoned the market. McWane itself had shut its Tyler foundry, and its last remaining domestic Fittings foundry (Union Foundry) was operating at a fraction of its capacity. A flood of cheap imports from China, Korea, India, Mexico, and Brazil had opened the vast majority of specifications to overseas product and decimated domestic Fittings. Imports were 80-85% of all Fittings bought in the U.S., and domestic Fittings were 15-20% and dropping. When ARRA with its accompanying "Buy American" preference was enacted, McWane modified its voluntary rebate program, commonly known as a competitive price cut, in a weak effort to get customers to support the production volume it needed to stay afloat at its struggling plant by discouraging "cherry-picking" by distributors. The evidence was overwhelming that this short-term (12 week) and voluntary policy was viewed by Star as being

[5] Complaint Counsel's theory about DIFRA's role was also severely undermined by Dr. Schumann's testimony. Dr. Schumann testified that the companies' invoice price data was so dated, incomplete, and riddled with errors as to be completely unusable for determining pricing activity. If Dr. Schumann is correct, it begs the question how the aggregated **volume** data on those very same invoices, which was the basis for the DIFRA reports, could be used for that purpose. Complaint Counsel cannot have it both ways - - either the data is reliable and Dr. Schumann could have analyzed it, or it is not and the DIFRA reports could not have been used as alleged. In any event, the fact witnesses flatly contradicted Dr. Schumann's theorizing.

[6] Importantly, it is also a scheme utterly inconsistent with the horizontal price agreement conspiracy.

"more bark than bite" and that Star successfully and quickly grabbed 100-plus distributors and almost 10% of the market.

Lastly, Complaint Counsel challenges McWane's pro-competitive agreement to sell domestic Fittings to its competitor Sigma. Despite the fact that this arrangement provided volume to McWane's domestic foundry, increased domestic output, improved the efficiency and timeliness of service to distributors who purchased domestic Fittings, provided a domestic option to distributors who did not have a relationship with McWane, and allowed Sigma to sell domestic fittings in the marketplace, Complaint Counsel argues that it somehow excluded Sigma from domestic manufacturing. The evidence was overwhelming to the contrary.

All of Sigma's top three (3) executives testified that Sigma did not have the financial wherewithal for such an undertaking, and their testimony was completely supported by the company's contemporaneous financial documents. Sigma was simply not an actual potential competitor. The rejoinder that somehow Sigma would have found a way to finance such a "very, very risky" project in the extraordinarily short timeframe involved is pure speculation. Significantly, the evidence was so flimsy that Complaint Counsel asked its expert to simply assume that Sigma could have and would have entered (in some vague way). In essence, Complaint Counsel asks this Court to substitute's Complaint Counsel's assumption for the uniform business judgment of Sigma's management.

It is a fundamental axiom of the antitrust laws that they are designed to protect competition, not competitors. Here, McWane's conduct increased competition at every turn. During 2008 McWane consistently undercut its rivals in every dimension of price, negating any inference of collusion. In 2009 McWane agreed to provide a supply of domestic fittings to a rival otherwise incapable of developing an independent source of manufacture, thereby

enhancing competition for customers during ARRA. It offered a voluntary rebate program in an effort stave off Star's cherry-picking and keep Union Foundry afloat (and its people employed). It did not increase domestic Fittings prices in any material way (and, indeed, expressly avoided the very idea that customers would worry it might try to gouge them during the ARRA period). As a result, its domestic Fittings invoice prices were slightly lower than Star's across the country. Moreover, McWane's rebate letter did not deter Star. Star successfully exploded into the manufacture and sale of domestic fittings, catapulting from 0% to 10% market share quickly and effectively. Competition could not have been more robust, despite the theoretical, philosophical, and political desires of Complaint Counsel.

DISCUSSION OF LEGAL ANALYSIS

I. COMPLAINT COUNSEL FAILED TO MEET ITS BURDEN OF PROVING A SEPARATE MARKET FOR DOMESTIC FITTINGS

Complaint Counsel's "monopoly" claims hinge, in part, on the threshold question of whether domestic Fittings constitute their own separate product market - - entirely distinct from imported Fittings. If they do not, and all Fittings are a single market, then the monopoly counts fail. Indeed, the Complaint did not allege that McWane possessed monopoly power over all Fittings, and Dr. Schumann conceded that McWane did not have any such power. (Schumann Tr. 4535-37 ("I do not believe they are a monopolist").)

The record evidence established that all Fittings compete against each other in a single market. Complaint Counsel concedes that imported and domestic Fittings are "commodity products" that are "functionally interchangeable" wherever they are made, (CC's Opp. Br. At 10), and does not challenge the evidence at trial which demonstrated that (1) the ITC unanimously determined in 2003 that a surge of Chinese imports not only competed head to head with domestic Fittings, but had "materially damaged" domestic fittings producers, (2) there has long been vigorous competition to open specifications and, in fact, the vast majority of specifications have been opened to imported Fittings for many years as a result, (3) imports from China, Korea, India, Brazil, and Mexico now constitute the lion's share of all Fittings purchased in the U.S., (4) domestic Fittings have declined from 70% of all Fittings sold in the U.S. to only 15-20% of all Fittings sold in the U.S. in the last decade, and (5) imported Fittings were still the vast majority of all Fittings purchased in the U.S. even during the brief ARRA period. (CC's Op. Br. at 9-14.) Dr. Normann also analyzed the market and concluded, for a number of reasons, that ARRA did not create a domestic-only Fittings market, (*see* McWane Op. Br. at 85-86;

Normann, Tr. 4830, 4832, 4847, 4870), none of which Complaint Counsel disputed in its opening brief.

Complaint Counsel did not present any study of cross-elasticity to establish a domestic-only market, the proper and court-accepted means of determining market definition, as discussed below. Dr. Schumann conceded he did no such study. Instead, Complaint Counsel simply argues - - based on Dr. Schumann's say-so - - that "by definition" only domestic Fittings could satisfy the Buy America requirements of the ARRA, and "imported Fittings are not interchangeable or a reasonable substitute for Domestic Fittings on Domestic-only Specifications." (See CC's Op. Br. at 73.)

The evidence showed - - and Dr. Schumann acknowledged - - that imported Fittings outsold domestic Fittings during ARRA, that ARRA contained a number of statutory waivers permitting assistance-recipients to buy imported product, and that the EPA actually granted multiple blanket nationwide waivers and multiple project-specific waivers. But Dr. Schumann simply turned a blind eye to that evidence. He conceded that he did not study ARRA funding or interview recipients of ARRA funding to determine the extent to which ARRA-funded jobs purchased imported Fittings. (Schumann, Tr. 4569, 4571.) He also ignored evidence in the record showing competition between domestic and imported Fittings for ARRA-funded jobs, including Star's own bid log records. (Schumann, Tr. 4379-4381; McCutcheon, Tr. 2602, 2632-2634; CX 2294.)

Instead of studying the real world elasticities of imported and domestic Fittings, Dr. Schumann just assumed that the Hypothetical Monopolist Test would have shown a separate domestic market ***if*** he had used data to run it (which he did not). Dr. Schumann's speculation about what the test would have shown had he bothered to run it was exacerbated because, as he

acknowledged, it was "controversial" to use the test (which is used for merger analyses) in the context of this non-merger case and he had never done so before in his career. (Schumann, Tr. 4538, 4543 ("It is a more difficult application in nonmerger cases than in merger cases and somewhat more controversial" . . . "I don't recall using it in the sort of nonmerger cases that I recall.").)

Markets are properly defined by elasticity studies, not conjecture. Dr. Schumann's unsupported opinion, based only on his say-so about what he believed a "controversial" test would have shown if he had run it for the first time in his career, should be disregarded and cannot meet Complaint Counsel's burden of "substantial proof" on this critical threshold element. Courts routinely reject such unsupported speculation as inadmissible and insufficient to establish relevant markets and market power as a matter of law. *See, e.g., Lantec, Inc. v. Novell, Inc.*, 306 F.3d 1003, 1025-26 (10th Cir. 2002) (affirming exclusion of expert's opinion as unreliable because expert "did not calculate the cross-elasticity of demand to determine which products were substitutes"); *McLaughlin Equipment Co., Inc. v. Servaas*, No. IP 98-127-C-T/K, 2004 WL 1629603, at *7 (S.D. Ind. Feb. 18, 2004) (excluding expert's testimony as "inadequately supported and insufficient to establish the relevant product market" where the expert "did no statistical analysis of the cross-elasticity of price, demand or supply").[7]

Complaint Counsel's own cases underscore two additional defects in its argument. First, the Supreme Court has held that a relevant product market includes all products that are "reasonably interchangeable by consumers for the same purposes" from a buyer's point of view

[7] *See also Metro Indus., Inc. v. Sammi Corp.*, 82 F.3d 839, 848 (9th Cir. 1996) (holding expert's opinion insufficient to prove relevant market where his "inconclusive opinion was not reasonably based on sound data. There was no detailed examination of market data or any analysis of cost, comparable usage, or comparative features of other competing products. The opinion was based on limited anecdotal evidence"); *Gateway Contr. Servs., LLC v. Sagamore Health Network, Inc.*, 2002 WL 731686, at *26 (S.D. Ind. Mar. 20, 2002) (excluding expert report which was conclusory, based on data or facts gathered from discussions with plaintiff's employees or its counsel, and not based on reliable principles and methods).

at the time it is considering which products to purchase. *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956); *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1435 (9th Cir. 1995). Thus, Complaint Counsel's argument - - that "by definition" someone who has already chosen to purchase domestic is limited to domestic - - improperly defines the market. That is akin to saying that once someone decides to buy Coca-Cola there is sufficient evidence to define the relevant market as Coke, rather than all soft drinks. It is not proper economics, nor permissible under the case law.

Second, it is well-settled that preferences are insufficient as a matter of law to serve as the basis for a separate relevant antitrust market. Complaint Counsel concedes, as it must, that all buyers have a choice of whether to buy domestic or imported Fittings. The fact that some buyers have "preferences" for domestic Fittings (out of patriotism, for example), (CC's Op. Br. 15), does not mean that they must buy domestic Fittings. It simply means that they have chosen to buy domestic rather than imports, much as a Coke fanatic will choose to buy Coke over Pepsi. That some of these buyers may memorialize those preferences into specifications, although Dr. Schumann did not identify who they are and which specifications, does not diminish their mutability - - they easily can and do frequently change these specifications as their preferences change. Indeed, the undisputed evidence in this case shows there is a long history of imported Fittings producers steadily convincing buyers to change their specifications, gaining share and, in recent years, dominating domestic Fittings. *Brokerage Concepts, Inc. v. U.S. Healthcare, Inc.*, 140 F.3d 494, 513 (3rd Cir. 1998) (reversing district court judgment in favor of plaintiffs, holding that "[i]nterchangeability implies that one product is roughly equivalent to another for the use to which it is put; while there might be some degree of preference for the one over the other, either would work effectively") (quotation omitted); *McLaughlin Equip*, 2004 WL

1629603 at *18 (granting summary judgment, holding that "a mere preference for a specific manufacturer's brand bus is not sufficient for purposes of establishing a relevant product market.").[8]

II. COMPLAINT COUNSEL'S CONSPIRACY ARGUMENTS ARE CONTRADICTED BY THE OVERWHELMING FACT RECORD

A. Complaint Counsel Failed To Proffer Any Direct Evidence That McWane Agreed To Fix Published Prices Or To Eliminate Or Reduce Job Discounts

McWane proffered substantial direct evidence at trial that it engaged in independent decision-making and cutthroat competitive pricing at all times in an effort to win back business it had steadily lost to importers for more than a decade. Mr. Tatman testified at length, for example, about his pain-staking state-by-state spreadsheet analyses for determining what imported Fittings multiplier to choose in each state around the country before each of McWane's announcements, and why the company repeatedly decided to ***underprice*** Sigma and Star (and not follow their large increases) in Winter and Spring 2008, all in an effort to win business and gain share. He testified about his decision to dramatically lower McWane's imported list prices 20-25% for all medium and large diameter Fittings in Spring 2009, and his independent decision on McWane's multipliers in Summer 2010. (*E.g.*, Tatman, Tr. 363-64, 882-93, 967 ("I went out and I tried to get volume, I tried to get share"), 978, 1005-06 ("they were done independently"); CX 176 ("our business objective of regaining share"); RX 424 ("make victory all the swe[e]ter"); CX 1664.)

[8] The remaining cases Complaint Counsel cites in its opening brief for its argument are inapposite to the issue. For example, Complaint Counsel cites *FTC v. Swedish Match*, 131 F. Supp. 2d 151, 157 (D.D.C. 2000) for the argument that there are no "widely used substitutes" for Fittings and that the closest purported substitute, PVC fittings, do not generally compete. (CC's Op. Br. at 63.) But this argument does not address the issue of whether imported and domestic Fittings are in the same product market. The facts show that customers can and did substitute imported Fittings in place of domestic Fittings on projects with "Domestic-only Specifications," including those projects subject to Buy America requirements, and imported Fittings make up the lion's share of the Fittings sold in the U.S.

Moreover, Complaint Counsel's selective focus on a single dimension of the interconnected, multi-variable "pricing waterfall" is disingenuous at best. As all of the witnesses testified, price competition in the Fittings market occurs at multiple levels, with the relative emphasis among those dimensions shifting constantly. For example, Mr. Tatman testified that McWane continued to offer a waterfall of job price discounts, rebates and other price concessions throughout this period - - and explained that a contemporaneous spreadsheet containing hundreds of individual job discounts in 2008 was only a portion of the job discounts McWane offered that year. (Tatman, Tr. 924, 1072, 996; RX 396; RDX-001; Tatman, Tr. 550 ("at the end of the day the price that you give is based up about 12 different factors in a price waterfall.").) Indeed, imported Fittings pricing was so competitive that in Fall 2008 - - right smack in the middle of the alleged conspiracy - - Mr. Tatman saw no prospect of any improvement for years to come, and he recommended shutting McWane's foundry in Tyler, Texas, and letting its employees go: "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[.]" (Tatman, Tr. 966-68; RX 616.)

Dr. Normann's state-by-state analyses of McWane's published multipliers confirmed that the majority of McWane's published prices stayed the same or declined during the alleged conspiracy, and were lower than Sigma and Star's published prices in Winter and Spring 2008. Indeed, even Complaint Counsel's expert, Dr. Schumann, conceded that McWane's published prices were below Sigma and Star's across the country, and that lower prices reflect independent decision-making and a competitive effort to win business and gain share:

> "Q. I understand, sir. But just so we're clear on the record, 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.

(Schumann, Tr. 4061-62, 4268-73, 4279-80 ("it is correct that the McWane multipliers were lower than what multipliers were on the Sigma map").) He also acknowledged that McWane's competitive decisions to ***underprice*** Sigma and Star, despite significant raw materials increases, forced them to lower their prices. (Schumann, Tr. 4167-68 ("They did that. Yes.").)

Dr. Normann's analyses of McWane's invoice prices, which reflect its job discounts below published multipliers, confirmed that (1) McWane's prices steadily declined from 2007 to Summer 2010, (2) that McWane's prices moved in the opposite direction from Sigma or Star's invoice prices (McWane's prices declined, while theirs rose), and (3) that McWane's job discounting continued throughout the alleged conspiracy and did not move in parallel with Sigma's or Star's job discounts. (RDX-018.001-003; Normann, Tr. 4821 ("this is inconsistent with parallel movements, you know, in reductions in job pricing. Job pricing is -- or the standard deviation, the variance, the dispersion of price points is all over the place"), 4778-4779 ("But also notice the variability. You know, 28 went down, 8 were unchanged, 14 increased. That to me does not strike a notion of coordinated price increases"), 4746-4749 (concluding that this price variation was consistent with ongoing job price discounting and competitive behavior and flatly inconsistent with the alleged conspiracy: "I literally found no evidence consistent with those allegations.").)

The evidence at trial also demonstrated that Sigma and Star always found out about McWane's published prices after-the-fact (not beforehand) from customers (not McWane) and were routinely surprised, disappointed and upset. (*E.g.*, McCutcheon, Tr. 2532 ("it was a confusing time. The -- right after this I believe the multipliers -- let me think about this for a minute. The multipliers came down . . . We were out of sync at this point and were confused on the market"); RX 24 ("From what?" . . . "Is this up or down? In each state?"); Pais, Tr. 2059-61

("discouraging"); CX 1145; RX 47 ("lack the imitative [sic], creativity, and leadership"); Schumann, Tr. 4267-68.) In fact, Sigma even considered suing McWane for pricing too low. (Rybacki, Tr. 3719 ("predatorily low").) Numerous contemporaneous Sigma and Star documents reported that McWane not only continued offering job discounts throughout 2008, but was "leading markets downward" in large swathes of the country: "We seem to always think McWane quotes the same pricing as their map, but I can assure you, that's not the case." (RX 45; RX 17; RX 37; RX 115; RX 116; *see also* McWane's Op. Br. at 12-20.)

Complaint Counsel's opening brief and proposed findings do not dispute any of these bedrock facts. In fact, Complaint Counsel concedes that McWane consistently ***underpriced*** Sigma and Star's published prices in Winter and Spring 2008 and in Spring 2009, that McWane continued to offer hundreds of job price discounts, rebates and a host of other price concessions below its published prices throughout 2008 (as well as 2009 and 2010), and that every single witness in this case flatly denied hundreds of times that McWane communicated its published or job prices to Sigma or Star or that the companies had any agreements on price. (CC's Br. at 163-64.)

Complaint Counsel's opening brief and proposed findings do not point to any direct evidence of any advance communication of any published price or any specific job discount from McWane to Sigma or Star. On the contrary, as noted in McWane's opening brief, Complaint Counsel conceded in its interrogatory answers that its "lacks" such evidence, and Dr. Schumann confirmed at trial that it does not exist: "as I said, there was no meeting in a smoke filled room." (Schumann, Tr. 4171-3, 4186-87, 4236.) Indeed, he acknowledged that his review of the record in this case did not yield a single piece of direct evidence of any price agreement: "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. That is correct." (Schumann, Tr. 4172-73 (emphasis added).)[9]

In the face of this overwhelming direct evidence refuting any implication of collusion by McWane, Complaint Counsel's failure to present any direct evidence to the contrary - - and Dr. Schumann's concession that he had "not found ***anything*** to suggest" any such agreement - - is fatal. Complaint Counsel simply has not met its burden of "substantial proof" of the alleged conspiracy. Complaint Counsel faces a high burden in overcoming the overwhelming number of sworn denials in this case: "Facing sworn denial of the existence of conspiracy, it [is] up to [Complaint Counsel] to produce ***significant probative evidence by affidavit or deposition*** that [a] conspiracy existed." *City of Moundridge v. Exxon Mobil Corp.*, 429 F. Supp. 2d 117, 130 (D.D.C. 2006) (emphasis added), *aff'd City of Moundridge v. Exxon Mobil Corp.*, 409 F. App'x. 362, 364 (D.C. Cir. 2011); *see also Lamb's Patio Theatre, Inc. v. Universal Film Exchanges, Inc.*, 582 F.2d 1068, 1070 (7th Cir. 1978) (affirming summary judgment because plaintiff had only "its bald allegation of conspiracy to refute the sworn affidavit denying a conspiracy").

In *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. *Moundridge*, 429 F. Supp. at 130. 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. *Moundridge*, 409 F. App'x. at 364.

[9] "Direct evidence in a Section 1 conspiracy must be evidence that is explicit and requires no inferences to establish the proposition or conclusion being asserted." *In re Baby Food Antitrust Litig*, 166 F.3d 112, 118 (3d Cir. 1999) ("*Baby Food*").

The "hallmark" of every conspiracy is an agreement that precedes the defendants' pricing decisions. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007) ("a preceding agreement"); *Baby Food*, 166 F.3d at 117 (3d Cir. 1999) ("an agreement is the hallmark of a Section 1 claim."). "This higher threshold is imposed in antitrust cases to avoid deterring innocent conduct that reflects enhanced, rather than restrained, competition." *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 357 (3d Cir. 2004). In this case there is a complete absence of such evidence of a preceding agreement. The lack of any preceding agreement on published multipliers or project pricing is dispositive here.

B. Complaint Counsel's Claimed Circumstantial Evidence Is Insufficient As A Matter Of Law

Recognizing it has no direct evidence to prove its conspiracy theory, Complaint Counsel focuses its argument around the proposition that conspiracies *may* be "proven through circumstantial evidence." (CC's Op. Br. at 106.) Its claimed circumstantial evidence, however, is insufficient as a matter of law - - particularly in the face of such overwhelming direct evidence of McWane's independent decision-making. In fact, the overwhelming weight of the circumstantial evidence in this case, like the direct evidence, refutes Complaint Counsel's allegations.

Proving a case through circumstantial evidence does not negate Complaint Counsel's requirement to prove a "***preceding agreement***," i.e., "a meeting of minds in an unlawful arrangement," as discussed *infra*. *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)). Further, inferring the existence of a conspiracy from circumstantial evidence is difficult, at best, and requires "evidence that tends to exclude the possibility of independent action." *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 768 (1984). It is well established that "conduct as

consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986); *Gibson v. Greater Park City Co.*, 818 F.2d 722, 725 (10th Cir. 1987) (affirming summary judgment: "All of the evidence presented by the plaintiffs is ambiguous: it can support either a permissible or a conspiratorial motive. There is no evidence that tends to exclude the possibility that the defendants were pursuing independent interests."). Complaint Counsel failed to proffer any evidence to overcome the overwhelming trial record that McWane acted in its own self-interest at all times.

1. Complaint Counsel Failed To Establish The Prerequisite Of Parallel Conduct

The threshold requirement in a circumstantial case is that the defendant's prices were the same as its rivals' prices. *See In re Beef Industry Antitrust Litig.*, 907 F.2d 510, 514 (5th Cir. 1990) (affirming summary judgment because plaintiff offered no evidence that defendants' prices were identical, despite all defendants' use of a daily "Yellow Sheet," which publicly published reports prices of recent beef sales: "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."). But here, Complaint Counsel concedes McWane ***underpriced*** Sigma and Star and did not follow their higher published prices. Moreover, Complaint Counsel presented no evidence that McWane's ongoing job discounts were parallel with Sigma and Star's job discounts in amount, frequency, or any other measure. The lack of any evidence that McWane engaged in parallel pricing - - on the very threshold element necessary for a circumstantial case - - is dispositive. *Id.*; *see also Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan, Inc.*, 176 F.3d 1055, 1072 (8th Cir.

1999) ("The whole premise of the class's case is parallel pricing. Without parallel pricing, their case collapses.").

Complaint Counsel argues that Sigma and Star followed McWane's lower published prices after they found out about them, and that is somehow sufficient to infer that McWane conspired. But, that argument fails for two reasons. First, as a factual matter, Sigma and Star did not price in parallel with McWane. Indeed, Complaint Counsel concedes that Sigma only followed ***some*** of McWane's multipliers in Winter 2008, but disregarded others. (CCPF 966 (Sigma did not follow McWane "where the new multiplier would be below Sigma's current pricing").) Moreover, Complaint Counsel concedes that McWane, Sigma and Star all continued to offer job discounts, rebates and a host of other price concessions below published prices, and proffered no evidence at all that Sigma and Star's job discounts paralleled McWane's job discounts in amount, frequency, location or any other measure. Complaint Counsel's failure to prove actual parallel prices (either published or job discounts) is fatal. *Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287, 1310-11 (11th Cir. 2003) (affirming summary judgment in favor of defendants despite alleged "signals" between defendants, holding that the evidence does not "tend to exclude the possibility that the primary players in the tobacco industry were engaged in rational, lawful, parallel pricing behavior" where "instead of continuing with *wholesale* list price competition, RJR and B&W began competing at the *retail* level."); *Clamp-All Corp. v. Cast Iron Soil Pipe Inst.*, 851 F.2d 478, 484 (1st Cir. 1988) (affirming summary judgment because defendants' discounted price differences "support[ed] the inference that the similarity of price lists reflects *individual* decisions to copy, rather than any more formal pricing agreement.").[10]

[10] Complaint Counsel suggests that it is enough the Dr. Schumann opined that the companies engaged in a similar reduction in job prices. (CC's Op. Br. at 146.) But Dr. Schumann's opinion is not a fact, as this Court made clear

The second reason Complaint Counsel's parallel pricing argument fails is because parallel pricing is "just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market." *Twombly*, 550 U.S. at 557 (allegations of parallel conduct "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"); *Theatre Enter., Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537, 540-41 (1954) (parallel pricing falls short of "conclusively establish[ing] agreement or ... itself constitut[ing] a Sherman Act offense."). As a result, courts routinely uphold "follow-the-leader" pricing as perfectly lawful and normal oligopoly behavior that is consistent with a competitor's self-interest. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993) ("firms in a concentrated market [that] recogniz[e] their shared economic interests and their interdependence with respect to price and output decisions" is "not in itself unlawful"); *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 329-30 (3rd Cir. 2010) ("it is at least equally consistent with unconcerted action."); *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").[11]

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throughout the trial. (Chappell, Tr. 3867 ("I don't expect to see experts cited for facts. They're here for opinions.").) Moreover, Dr. Schumann acknowledged that he did no independent analysis of the parties' job prices and did not quantify any actual reduction in job discounting by McWane, Sigma or Star. Instead, he based his opinion entirely on his interpretation of a single document that Mr. Tatman testified was just him "speculating . . . speculating . . . speculating" based on multiple levels of hearsay his sales force picked up through the grapevine. (McWane's Br. at 36-38.) "Similar" prices are also not parallel prices as a matter of law, as the cases above hold, and, in any event, are consistent with unilateral decision-making. *In re National Association of Music Merchants, Musical Instruments and Equipment Antitrust Litigation*, MDL No. 2121, 2012 WL 3637291 at *4 (S.D. Cal., Aug. 20, 2012) (granting dismissal after discovery: "the only allegation here is that the terms were similar. This could just as easily be attributable to a similar business model or similar business conditions.").

[11] *See also 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*, 851 F.2d at 484 ("One does not need an agreement to bring about this kind of follow-the-leader effect in a concentrated industry"); *In re Citric*

2. Complaint Counsel's "Plus Factors" Are All "Minus Factors" Consistent With McWane's Self-Interest

Even if McWane's pricing paralleled that of its rivals, that alone would not meet Complaint Counsel's burden. To prove its case, Complaint Counsel must also produce "plus factors" that tend to exclude any independent reason for the parallel conduct. *Blomkest*, 176 F.3d at 1072. In this case, however, Complaint Counsel's alleged "plus factors" turn out to be "minus factors." Indeed, in many instances Complaint Counsel offers evidence that contradicts its own concessions. For example, Dr. Schumann concedes that "there was no meeting in a smoke filled room" and "I have not found ***anything*** to suggest" one. (Schumann, Tr. 4171-73 (emphasis added).) Yet Complaint Counsel spends an extraordinary number of pages pointing to a handful of phone calls and other meetings between McWane and Sigma (all of which, as explained below, had legitimate explanations) in an effort to somehow suggest the very meeting Dr. Schumann conceded did not exist. Dr. Schumann himself did not buy into that baloney. (Schumann, Tr. 4250 ("It's not my opinion that calling someone to check on them because they're friends and they have a handicapped child is some sort of conspiracy.").)

Where, as here, a defendant's actions are consistent with its own self-interest, the defendant is entitled to judgment in its favor. *See supra* at II(B). As discussed above, McWane's conduct was perfectly consistent with its self-interest at all times. It consistently priced lower than its competitors to satisfy the entirely rational goal of gaining sales production and volume.

The case law Complaint Counsel relies upon does not support its argument to the contrary. For example, Complaint Counsel relies heavily on the Seventh Circuit's decision in *In re High Fructose Corn Syrup Antitrust Litigation*, 295 F.3d 651, 662 (7th Cir. 2002), and the

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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).

Supreme Court's 1936 decision in *Sugar Inst. v. United States*, 297 U.S. 553, 601 (1936), to support its argument that this Court should find a conspiracy even from a case "constructed out of a tissue of such [ambiguous] statements and other circumstantial evidence." (CC's Op. Br. at 106.) Complaint Counsel's great reliance on both cases is misplaced.

High Fructose Corn Syrup did not involve a judgment at all. The procedural posture of that case was simply whether the evidence was sufficient to avoid summary judgment. The Court thus did not conclude that the facts of that case established a conspiracy. It merely concluded that the evidence was sufficient to present an issue of fact for a jury. *See High Fructose Corn Syrup*, 295 F.3d at 655. Moreover, an explanation of the Seventh Circuit's reasoning actually supports judgment in McWane's favor. Specifically, the Court reaffirmed the long-standing rule that "an agreement involving actual, verbalized communication, must be proved in order for a price-fixing conspiracy to be actionable under the Sherman Act," *id.* at 654, and a plaintiff must prove "that there was an actual, manifest agreement not to compete." *Id*. at 661. Here, Complaint Counsel has not come close to proving an "actual, manifest agreement not to compete." To the contrary, the undisputed testimony of Mr. Tatman and contemporaneous documents demonstrate a commitment to intense and unrelenting competition. (Tatman, Tr. 363-64, 882-93, 967, 978, 1005-06; CX 176; RX 424; CX 1664.) In response, Complaint Counsel merely points to "opportunities" to collude and other circumstantial evidence which collapses under scrutiny, as discussed *infra*.

Complaint Counsel's reliance on *Sugar Institute* is equally misplaced. In *Sugar Institute*, members of the association, which collectively processed nearly all the sugar refined in the United States, met together and collectively agreed - - in an actual, explicit agreement - - to publicly announce prices and conditions of sale in advance, to abolish all price discrimination

between customers, and to strictly adhere to their publicly announced prices. *Sugar Inst.*, 297 U.S. at 573. None of that occurred in this case, as conceded by Complaint Counsel's own expert. *Sugar Institute* is, thus, inapposite. It is not a circumstantial case utilizing plus factors, but a direct evidence case with no relevance here. In contrast, this is a case - - as Dr. Schumann conceded - - in which there was no evidence of meetings or discussions about pricing, and the suppliers never sold off of list prices (and, instead, offered significant job price discounts, rebates and other concessions).[12]

As explained in McWane's opening brief, the First Circuit's decision in *Clamp-All* and the Seventh Circuit's decision in *Citric Acid* are far more instructive than the case law cited by Complaint Counsel. (*See* McWane's Op. Br. at 71.) In *Clamp-All*, the First Circuit affirmed summary judgment for defendants in a case with a concentrated market in which defendants followed each other's list prices, but - - as here - - routinely offered discounts below list. 851 F.2d at 484 (Breyer, J.). In fact, there is even more evidence of price competition in this case - - McWane regularly provided even more price concessions (including hundreds and hundreds of job discounts and also provided numerous rebates and freight absorption, and credit extension) below the allegedly parallel published prices than in *Clamp-All*. Furthermore, the Court in *Clamp-All* noted 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.* That same analysis applies here, where the competitors, including McWane, almost always set prices that deviated from their published

[12] Indeed, even the Commission conceded that the instant situation differs from *Sugar Institute* in its summary decision opinion. *See* McWane, Slip Op. at 30 ("we disagree that the facts in *Sugar Institute* are 'indistinguishable' from those here."). Moreover, the Court's opinion in *Sugar Institute* also favors McWane, as the Court went on to hold that the mere exchange of price and other market information is benign conduct that is "normally an aid to commerce" and only becomes problematic if it results in an agreement. *Sugar Inst.*, 297 U.S. at 598.

prices. Thus, the evidence is entirely consistent with independent and competitive decision-making, and cannot support an inference of a conspiracy as a matter of law. *Id*.

In *Citric Acid*, 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., provided discounts along the pricing waterfall) 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.

Here, there is far less evidence than in *Clamp-All* and *Citric Acid*. The trial record showed there is simply no evidence that anyone from McWane was involved in any conspiracy. Complaint Counsel even conceded 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.) 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.) To the contrary, all of the contemporaneous documents reflect the uncertainty and speculation inherent in normal competition, thus implying the absence of an agreement.

The purported "plus factors" Complaint Counsel specifically points to constitute nothing more than innocuous and routine business behavior common to nearly every company in the

world. Specifically, Complaint Counsel points to the following: (a) a concentrated market, (b) an internal McWane powerpoint presentation that was never communicated to competitors, (c) membership in DIFRA and its dissemination of aggregated volume data, (d) internal Star documents referencing the word "cheating," including for products Complaint Counsel and Dr. Schumann concede were not in the conspiracy (e) internal complaints about prices, and (f) a handful of vague inter-firm communications (i.e., "opportunities" to conspire). Complaint Counsel's "plus factors" either don't exist at all or are plainly insufficient.

a) A Concentrated Market Is Insufficient To Infer A Preceding Agreement On Published Prices Or Job Price Discounts

The mere fact that a market is concentrated is simply a restatement of the proposition that it is an oligopoly in which parallel pricing and follow-the-leader behavior are entirely lawful and expected. *Brooke Group*, 509 U.S. at 227; *see also supra* at Section II(B). Thus, the market concentration here does not qualify as a "plus factor." Courts recognize that as a result of the inherent economic realities of oligopolistic markets, any rational firm must take into account the anticipated reaction of its competitors when making its own pricing decisions. *In re Flat Glass*, 385 F.3d at 360. Thus, Courts require a plaintiff to show "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, 159-160 (3d Cir. 2009) (plaintiff relying on circumstantial evidence must meet heightened burden of proof). The mere fact that McWane operates in a concentrated market, without more, is meaningless.

b) Complaint Counsel And Dr. Schumann's Speculation About CX 627 Is Contradicted By The Evidence

Complaint Counsel makes much of an internal McWane powerpoint which Dr. Schumann dubbed the "Tatman Plan." (CC's Op. Br. at 96.) As set out in McWane's opening

brief, that was Dr. Schumann's own invention: Mr. Tatman testified it was not a plan. Regardless, it was meaningless. Dr. Schumann concedes that neither the powerpoint itself nor its contents were directly communicated to Star or Sigma and, indeed, that the core tenets of his so-called conspiracy were not in any of the customer letters he points to as indirect communications. (*See* McWane's Op. Br. at 30-32; *see also* 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").)

Rather, the undisputed testimony at trial showed that this powerpoint was a brainstorming document which he used to explain to his immediate supervisor, Thomas Walton, a strategy for recapturing market share from Star and Sigma. By late 2007, McWane's raw materials costs were rising rapidly, its Fittings sales volume had declined to its lowest levels in decades, and it continued to lose share to Sigma, Star and other importers. (*See* Tatman, Tr. 269:6-10 (market volume in recent years was "half of what it was in 2006").) Given the enormous spike in raw materials costs, Mr. Tatman was under pressure to try to recoup some of those cost increases. But his "primary" concern was to win volume and gain share. (Tatman, Tr. 1069:24-1071:24 & CX 627.) Mr. Tatman prepared the powerpoint to help him organize his personal thoughts in preparation for a series of "brainstorming sessions" among Mr. Tatman and his supervisors. (Tatman, Tr. 1069:24-1071:24 & CX 627.)

As Mr. Tatman explained in his trial testimony, he believed that the industry-wide escalation of raw materials costs in 2007-2008 had a potential silver lining for McWane. In Fall 2007, Sigma announced both a list price increase and a multiplier increase to its customers in a

pricing letter. (Rybacki, Tr. 3683:14-3684:2, 3684:9-12 & CX 2457.) Star quickly followed suit, announcing the same price increase. While Mr. Tatman could have simply followed the announced price increases, his primary concern was volume. (Tatman, Tr. 347:12-15.) As a result, he believed that McWane should *not* match Sigma's 25% list price increase, but instead keep its published prices much *lower* than Sigma and Star - - even below the levels of the raw materials inflation. (Tatman, Tr. 359:9-21, 360:13-22, 361:2-12, 379:3-18.) Mr. Tatman theorized that McWane might have a cost advantage and, if it underpriced Sigma and Star, it might be able to gain sales volume. He fully recognized this might not happen (there were numerous keys to success that were outside his control), but his "core" idea was to underprice Sigma and Star to win more business. (Tatman, Tr. 1017:23-1019:8.) In short, Mr. Tatman did not follow Sigma's (and Star's) large price increase. Rather, he believed a strategy aimed at increasing volume and share by underpricing them was in McWane's best interests, which he did not communicate to Sigma and Star.

The powerpoint is, thus, nothing more than an internal brainstorming document, which never saw the light of day, about the a potential means of winning volume and gaining share, made difficult by keys to success outside Mr. Tatman's control. It is entirely consistent with McWane's self-interest in underpricing Sigma and Star and gaining share (and, perhaps, recouping some of the large raw material cost increase). There is no evidence to counter this testimony, only the revisionist imagination of Dr. Schumann and Complaint Counsel. Thus, CX 627 does not "tend to exclude the possibility of independent conduct." *Kreuzer v. American Academy of Periodontology*, 735 F.2d 1479, 1488 n.12 (D.C. Cir. 1984) (plaintiff must provide facts demonstrating that the "acts by the defendants [are] in contradiction of their own economic

interests"). If anything, it epitomizes an independent effort to formulate ideas for McWane's benefit.

c) DIFRA's Tons-Shipped Data Does Not Suggest A Preceding Agreement On Published Prices Or Job Price Discounts

Complaint Counsel's argument that DIFRA was a "plus factor" that "facilitated price coordination" likewise fails. Again, DIFRA is a "minus factor." Every witness denied that prices were communicated during DIFRA meetings and that DIFRA facilitated price coordination. Complaint Counsel does not point to a single instance of any price communication from McWane to Sigma or Star (or vice versa) and, instead, concedes that DIFRA meetings were guided and supervised by experienced antitrust counsel, a partner in one of the South's largest and most respected law firms, and an equally respected accounting firm.[13] (Brakefield, Tr. 1229-1230, 1337-1338 & RX 4, 1341, 1358, 1371-1373 & RX 44; JX 654 (Brakefield, Dep. at 13-17, 19); (McCutcheon, Tr. 2561-2562 & CX 52; JX 694.) Moreover, Complaint Counsel concedes that prices declined during the second half of 2008, when DIFRA was briefly operational. (Schumann, Tr. 3837-3843.) Competition was so cutthroat in Fall of 2008, Mr. Tatman recommended closing McWane's Tyler foundry and he saw no prospect of improvement for years to come. Sigma also reported a "quick and sharp erosion in market pricing" - - which it blamed on "McWane leading markets downward" throughout the southeast. (RX 115; RX 116; Pais, Tr. 2129-40; Rybacki, Tr. 3702.)

Complaint Counsel concedes that only aggregated tons-shipped data - - which did not distinguish among the thousands of unique SKUs, domestic or import, which part of the country, or when the sales occurred - - were sent by each company to an independent accounting firm

[13] The retention of a large accounting firm and experienced antitrust counsel are clear "minus factors" demonstrating an intent of compliance with the laws, not unlawful conduct. Complaint Counsel's assertion that the members of DIFRA would go to the effort and expense of engaging well-respected antitrust counsel and outside accountants to ensure compliance with the law, and then engage in illegal conduct while in their presence, simply defies logic.

retained by DIFRA's antitrust counsel. The independent accounting firm further aggregated all of the member firms' tonnage shipped data, and then distributed the aggregated overall figure in a report to all DIFRA members. (JX 679 (Haley, Dep. at 7-8, 10, 13).) No DIFRA member was permitted to review the tonnage shipped data of any other member; only the aggregate figure was made available. (JX 679 (Haley, Dep. at 22).)

To support its argument that DIFRA was a "plus factor," Complaint Counsel cites a memorandum written by Victor Pais in February 2009 to its lender stating that DIFRA "helps maintain the pricing discipline." But at trial Mr. Pais testified that he wrote the memorandum appease Ares Capital, a secondary creditor that loaned tens of millions of dollars to Sigma at extraordinarily high interest rates. (Pais, Tr. 1992-1995.) Mr. Pais further acknowledged that the memorandum was merely his speculative opinion, which he ***never*** discussed with anyone at McWane. (Pais, Tr. 1992-1995.) Thus, Complaint Counsel's argument that DIFRA "facilitated price coordination" fails for lack of support.

It is well established that legitimate trade associations are perfectly legal, as are their efforts to gather aggregated data about the industry. The Supreme Court has repeatedly held that the "exchange of price data and other information among competitors does not invariably have anticompetitive effects; indeed such practices can in certain circumstances increase economic efficiency and render markets more, rather than less, competitive." *United States v. U.S. Gypsum Co.*, 438 US 422, 443 n.16 (1978). In *Citric Acid*, the Ninth Circuit affirmed summary judgment for defendant and held 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 1098 (emphasis added); *Burtch v.*

Milberg Factors, Inc., 662 F.3d 212, 223 (3d Cir. 2011) ("Even if we did assume that price and credit information are indistinct, the exchange of price information still requires showing that the defendants had an agreement.").

Where, as here, the information that the trade association gathers and disseminates is not price information, but rather, aggregated volume information, the inference of conspiracy is even less plausible. *Williamson Oil*, 346 F.3d at 1313 ("It is far less indicative of a *price fixing* conspiracy to exchange information relating to sales as opposed to prices" . . . it is "plainly [] beneficial" for a company "to keep tabs on the commercial activities of its competitors, so the receipt of information concerning their sales does not tend to exclude the possibility of independent action or to establish anticompetitive collusion"); *Baby Foods*, 166 F.3d at 125 (The Third Circuit rejected antitrust liability where there was no "evidence that the exchanges of information had an impact on pricing decisions."). That is particularly true here, where Complaint Counsel concedes prices ***declined*** during the brief DIFRA period in the second half of 2008, where McWane underpriced Sigma and Star's published prices after receiving the first DIFRA report in June 2008, and then dramatically lowered its medium and large diameter list prices in Spring 2009 based in part upon its assessment that those were its competitors' strongest size ranges. Thus, given that case law actually permits the exchange of data, the Court should recognize DIFRA for what it was - - a competitive catalyst - - and reject Complaint Counsel's assertion that membership in DIFRA and the exchange of mere non-price data was a "plus factor." If anything, the evidence showed it was a "minus factor."

d) Internal Star Documents Referencing "Cheating" Show Ongoing Job Pricing And Do Not Suggest That McWane Was Involved In A Preceding Agreement

Complaint Counsel relies heavily on the use of the term "cheating" in certain Star (not McWane) documents as support for the claim that McWane, Sigma and Star reached an agreement to stop or somehow limit job pricing. (CC's Op. Br. at 127-128.) But the only evidence in the record regarding those documents contradicts Complaint Counsel's speculative interpretation and demonstrates that the documents are consistent with ongoing, competitive decision-making by McWane.

First, Complaint Counsel did not offer a single McWane document created during the existence of the alleged conspiracy that used the term "cheating." Instead, the phrase was only used in a few, scattered Star internal documents. None of the authors of any of those documents testified at trial (or were even deposed). Second, the only (and undisputed) Star testimony about the company's use of the term "cheating" made it clear that it was an internal colloquialism for job pricing that was used across Star's various products. This testimony alone is dispositive. (Minamyer, Tr. 3255-56 ("Q: The more cheating, the more competition there is out there; is that correct? A: Yes"), 3269-73, 3238-40.) Third, Dr. Schumann himself conceded that Star personnel used the term "cheating" on *competitive* products (such as large diameter Fittings) that were not involved in the alleged conspiracy. (Schumann, Tr. 3769, 3788, 3792-3793, 4111.) Mr. Minamyer's undisputed testimony and Dr. Schumann's concession necessarily mean that the term is "at least as consistent with independent decision-making" as with a conspiracy, and disproves Complaint Counsel's contention that it can *only* suggest a conspiracy. The phrase thus does not "tend to exclude the possibility" of independent decision-making as a matter of law. The Court should reject Complaint Counsel's effort to substitute its own interpretation of the term for the definition provided by a first hand witness.

e) The Two Sigma Emails Cited By Complaint Counsel Are Consistent With Ongoing Job Discounting And Do Not Suggest An Agreement

Notably, none of ***McWane's*** contemporaneous internal documents, emails, and other communications contain any reference to an alleged understanding or agreement on the Winter or Spring 2008 (or April 2009 or June 2010) published prices or on job discounting.

In the face of the dozens of documents indicating the absence of an agreement, Complaint Counsel cites two internal Sigma emails - - dated March 10, 2008 and August 22, 2008 - - from its OEM account manager, Mitchell Rona, to other Sigma employees. Neither email says anything about published prices. The first email was sent several months after McWane's January 2008 published multiplier announcement, and several months before its June 2008 multipliers. The second email was sent months after McWane underpriced Sigma and Star's multipliers in June 2008, and months before it cut its medium and large diameter list prices 20-25% in April 2009.

The emails, on their face and according to the testimony of Mr. Rona, were generated by him in the course of legitimate, arm's-length buy-sell discussions he had with McWane on two occasions in 2008. At the time of the emails, Mr. Rona was Sigma's OEM business manager, with ***no authority for determining Sigma's prices to its distributor customers*** - - the pricing that is at issue in this action. (Rona, Tr. 1437-1440, 1453-1454, 1627-1628.) Mr. Rona was, thus, not competing with Mr. Tatman, he was Mr. Tatman's customer when his own product ran short or was otherwise unavailable. Moreover, he did not compete against Mr. Tatman in selling Fittings: Mr. Rona sold to Sigma's OEM customers (for example, pipe manufacturers and fabricators), while Mr. Tatman sold to distributors. (Rona, Tr. 1446-1449, 1626, 1628-1629.) Thus, Mr. Rona and Mr. Tatman, who regularly negotiated ordinary, arm's-length buy-sell agreements with each other, had legitimate business reasons to be in regular communication. (Tatman, Tr. 365-366, 639-641 & CX 1434; Rona, Tr. 1446-1449, 1626, 1628-1629.)

Consistent with this reality, Mr. Rona did not attach any significance to Mr. Tatman's alleged comments, and merely passed them on as an "FYI," as he would any other competitive intelligence he received in the ordinary course of his business. (Rona, Tr. 1658-1659; CX 1149.) Mr. Rona also did not receive any response to either email. (Rona, Tr. 1658-1659.) Of the Sigma handful of employees who received Mr. Rona's emails, not a single one of them mentioned or referred in any fashion to the comments Mr. Rona attributed to Mr. Tatman, and Mr. Rona testified they never discussed the emails with anyone. (Rona, Tr. 1454, 1647-1648, 1653-1654; CX 1124, CX 2014, CX 2015.) In fact, Mr. Rona did not even send the March 10 email to Mr. Rybacki. (Rona, Tr. 1641-1642; CX 1124.) Further, he sent the August 22 email to a general email group "M05" that happened to include Mr. Rybacki, but Mr. Rybacki does not recall receiving the email and testified that he never discussed it with Mr. Rona. (Rybacki, Tr. 3715-3717; CX 1149.) Most significantly, Mr. Rybacki, who was in charge of Sigma's pricing to its distributor customers, paid no attention to the email and testified that it had no effect on his pricing decisions. (Rybacki, Tr. 3716-3717; CX 1149.) Indeed, Mr. Rona, Mr. Tatman and Mr. Rybacki all testified they always made their pricing decisions on their own, and each expressly denied discussing or agreeing upon prices at any time. Instead, the emails appear to have passed unnoticed by the Sigma personnel. (Rona, Tr. 1647-1648, 1653-1654; CX 1124, CX 2014, CX 2015.) The evidence is thus undisputed that the two Rona internal emails had no effect on McWane's or Sigma's Fittings prices. (Rybacki, Tr. 3715-3717 & CX 1149; Rona, Tr. 1645, 1647, 1662.)

Finally, a fair reading of the two emails refutes the construction implied by Complaint Counsel. On their face, they are (at most) complaints about ongoing job discounting - - competitive activity that is consistent with independent decision-making and inconsistent with

any conspiracy. On the one hand, had there been a pre-existing agreement in place to limit job pricing back at the beginning of 2008, as Complaint Counsel alleges, one would have expected Mr. Tatman to reference that agreement and complain that Sigma was not living up to its commitment. The emails contain no such reference. On the other hand, if Mr. Tatman had been trying to forge an agreement in March or August 2008, presumably he would have asked Mr. Rona to talk to Mr. Rybacki and seek his agreement going forward to stop discounting to distributors. But neither email says anything of the sort. Once again, the emails simply reflect ongoing job discounting (and thus are entirely consistent with competitive decision-making) and say nothing at all that "tends to exclude the possibility" of independent action. They are "minus factors" that refute an inference of an agreement forged in early 2008.

In any event, it is well-established that competitor communications alone are insufficient evidence of a price-fixing conspiracy. *Baby Food*, 166 F.3d at 133. For example, in *Baby Food*, the Third Circuit affirmed summary judgment in a case where "each defendant independently was able to obtain information concerning its competitors' product pricing and promotions" through "advance price announcements" and its sales representatives met at trade shows. *Id.* The Court held that "the exchanges of information among the defendants' sales representatives amounted to mere 'chit chat' at chance meetings or trade shows among persons with no pricing authority" and "courts generally reject conspiracy claims that 'seek to infer an agreement from ... communications despite a lack of independent evidence tending to show an agreement and in the face of uncontradicted testimony that only informational exchanges took place.'" *Id.* at 132-133 (internal citation omitted). Thus, to prove a violation of the antitrust laws, Complaint Counsel must show that there was an actual exchange of pricing information, and that the exchange made an impact on pricing decisions. *Id.* Complaint Counsel has not done so.

f) A Handful Of Phone Calls And Other "Opportunities To Conspire" Between Sigma and McWane Personnel Were Legitimate And Do Not Suggest A Preceding Agreement on Published Prices Or Job Discounts

(1) The Few, Brief Phone Calls Between Mr. Rybacki And Mr. Tatman (and Mr. Frank) Were Perfectly Legitimate

Dr. Schumann's concession that "I have not found ***anything*** to suggest" that McWane, Sigma and Star met and agreed upon prices, as well as his conclusion that "there was no meeting in a smoke filled room" and the companies "did not meet and hammer out a specific agreement," moots Complaint Counsel's effort to parade out phone records and suggest that somehow, maybe there was a price discussion. (Schumann, Tr. 4172.) Complaint Counsel marked stacks and stacks of phone records - - but only a small handful showed a phone calls between Sigma and McWane (and none showed a call between anyone from McWane and anyone from Star). (*See* CX 1621A *in camera*.)

First, Complaint Counsel identified only [redacted] prior to the formation of the alleged conspiracy in January 2008. (*See* CX 1621A *in camera* and Complaint ¶ 2.) The phone records confirm that each of these calls was of extremely limited duration. (CX 1621A *in camera.*) Mr. Rybacki and Mr. Tatman both testified that they never discussed or agreed upon fittings prices. (Rybacki, Tr. 3626-3628 & CX 1621A *in camera*, 3650, 3682; Tatman, Tr. 367-370.) [redacted] (Rybacki, Tr. 3626-3628 & CX 1621A *in camera*, 3650, 3682; Tatman, Tr. 367-370 & CX 1621A *in camera*.)

(*See* CX 1621A *in camera*.)

It defies common sense to believe that the terms and details of the complex conspiracy alleged by Complaint Counsel (a conspiracy so complex Dr. Schumann cannot define precisely when or how it was formed, who formed it, or what "reduction" in job pricing they agreed to), between two men who did not know each other at all (and companies that had a history of fighting tooth and nail), could be hatched in a matter of minutes. (*See* Rybacki, Tr. 3508.) And that is why Dr. Schumann concluded he did not find anything to suggest such an implausible thing.

Complaint Counsel also points to phone records showing that Mr. Rybacki periodically called his friend and former colleague who was then at McWane, Mr. Tom Frank, to check in on the health of his son. Even Dr. Schumann recognized that was ordinary human kindness, and not suggestive of any conspiracy. (Schumann, Tr. 4250.)

In sum, the phone records disprove Complaint Counsel's case. The calls between Sigma and McWane were few and far between, very short, and their innocuous purposes were fully explained to the best of anyone's recollection years later. Indeed, this Court repeatedly noted that the phone record "evidence" was so vague as to be meaningless: "[t]his record does nothing but indicate a call was made from one phone number to another phone number." (Chappell, Tr. 2475.)

Given the legitimate topics and the timing of the alleged calls, Complaint Counsel's evidence of calls to and from Mr. Rybacki does not "tend to exclude the possibility" that the calls were legitimate business and personal communications having nothing to do with any illicit agreement. *See Matsushita*, 475 U.S. at 588; *Flat Glass*, 385 F.3d at 360. Courts have held that

evidence of "opportunity to conspire" - - such as frequent meetings of CEOs of alleged co-conspirators - - is insufficient to infer an antitrust conspiracy. *Burtch*, 662 F.3d at 217 (affirming dismissal despite exchanges of information "through at least 27 telephone conversations," holding that a violation of the Sherman Act "still requires showing that the defendants had an agreement"); *In re Travel Agent Commission Antitrust Litig.*, 583 F.3d 896, 905 (6th Cir. 2009); *Cosmetic Gallery, Inc. v. Schoeneman Corp.*, 495 F.3d 46, 53 (3d Cir. 2007).

(2) Mr. Pais' Legitimate Discussions With Mr. Page Do Not Suggest An Agreement on Published Prices Or Job Discounts

Complaint Counsel argues that "Pais-Page Discussions" and "other communications" constitute "plus factors" that suggest a conspiracy, but the fact record showed the opposite: that the two men had periodic discussions with legitimate purposes, including arms' length negotiations for Sigma to sell McWane imported Fittings (before McWane had its Tyler Xin Xin foundry), for Sigma to buy domestic Fittings from McWane (because it had none), a potential merger of the companies, and discussions about joint venture opportunities abroad related to pipe (not Fittings).

Mr. Pais testified, for example, that he contacted Mr. Page in 2003 - - years before the alleged conspiracy - - after learning that McWane might be interested in sourcing Fittings from China. (Pais, Tr. 1868-1870.) Mr. Pais introduced Mr. Page to Chinese foundries, including some of his own suppliers, and ultimately sold McWane Chinese Fittings. (Pais, Tr. 1869-1871; JX 642 (Page, Dep. at 28-29, 30-32, 110-111, 123-124, 243-244).)

Significantly, Mr. Page had no day-to-day involvement in McWane's Fittings business throughout this period. As McWane's Corporate President and CEO, he had a number of other, much larger (and even more beleaguered) businesses all reporting to him and, when the housing and financial crises hit in 2006-08, McWane's Fittings business was only a small part of

McWane's overall businesses. (JX 642 (Page, Dep. at 14, 43-45.) Thus, although Complaint Counsel elicited testimony at trial regarding meetings between Mr. Pais and Mr. Page in September and December, 2007, there was no evidence at all the two men discussed Fittings prices. (Pais, Tr. 1881-1886.) On the contrary, Mr. Pais testified that those meetings concerned various global opportunities and only peripherally touched on personnel changes related to Mr. Green's departure from McWane. (Pais, Tr. 1883-1884, 1887.)

Mr. Pais testified that he was very wary of McWane's competitive drive in the Winter of 2008 - - his conversations with Mr. Pais had nothing to do with Fittings prices, and no effect on his "guess" that McWane would price in its own self-interest in order to beat Sigma in the marketplace. (CX 2119 ("*Perhaps*, he has now done a thorough competitive review and has decided that an aggressive offensive strategy is the best form of defense -- which may call for using any and all options they have to strengthen their vulnerable positions including those they hurt us . . . keeping FTG price down during our rise in costs") (emphasis added); Pais, Tr. 2043 ("Q. . . . Perhaps -- why do you say "perhaps"? A. Because I'm just guessing and speculating. . . . Q. . . . Now, what you're speculating is that Mr. Page has done a thorough competitive review and has decided that an aggressive offensive strategy may be the best form of defense; right, sir? A. Sure. That's my guess, yes.").) Both Mr. Pais and Mr. Page deny discussing Fittings prices or market strategy in either meeting, and Complaint Counsel has presented no evidence to the contrary. (Pais, Tr. 1897; JX 642 (Page, Dep. at 80-82).)

Complaint Counsel's plea that this Court to leap to the unwarranted and speculative assumption that the two executives discussed pricing during one of their conversations is not

only contradicted by the witness' testimony, but impermissible as a matter of law.[14] Court after court has held that the mere opportunity to conspire is not sufficient to suggest a conspiracy:

> If Adam Smith is peering down today, he may be surprised to learn that his tongue-in-cheek remark would be authority to force his famous pinmaker to devote financial and human capital to hire lawyers, prepare for depositions, and otherwise fend off allegations of conspiracy; all this just because he belonged to the same trade guild as one of his competitors.

Twombly, 550 U.S. at 567 n. 12 (holding the mere opportunity to conspire insufficient to suggest conspiracy); *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"); *In re Travel Agent*, 583 F.3d at 903 (evidence of "opportunity to conspire" – such as frequent meetings of CEOs of alleged co-conspirators – is insufficient to infer an antitrust conspiracy). Thus, Complaint Counsel has failed to meet its burden of evidence, or "plus factors," which tend to exclude the possibility of independent conduct.

C. Complaint Counsel's April 2009 Evidence Is Consistent With Independent Decision-Making

Complaint Counsel concedes that in April 2009, McWane independently decided to lower its list price dramatically on all medium and large diameter imported Fittings approximately 20-25% in order to win business and gain share. Mr. Tatman testified that

[14] In its opening brief, Complaint Counsel also references alleged discussions between Sigma's Mr. Pais and Star's Mr. McCutcheon, and argues that prices were "surely discussed at some point during these conversations." (CC's Op. Br. at 131.) To be clear, these alleged conversations had nothing to do with McWane. Both Mr. Pais and Mr. McCutcheon testified that they never discussed pricing and, in any event, never discussed the conversations between the two of them with McWane. (Pais, Tr. 2028, 2035, 2045-2048, 2080, 2102, 2130-2131; McCutcheon, Tr. 2524-2525.) Thus, the alleged conversations do not fall within a "co-conspirator" exception to the hearsay rule, as Complaint Counsel has not shown that they were statements in the furtherance of a conspiracy (and certainly not a conspiracy involving McWane). What relevance these alleged conversations could possibly have to the issue of whether *McWane* violated the antitrust laws is not clear from Complaint Counsel's brief. What is clear is that this is yet another example of Complaint Counsel leaping to a conclusion that because two competitors may have had a conversation, pricing was "surely discussed." Complaint Counsel's unsupported conclusion fails as a matter of law.

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.) McWane's new list prices were so low that Sigma thought they were "predator[y]" and considered suing McWane. (Rybacki, Tr. 3719.) Testimony also shows that McWane kept its lower list prices in place throughout the year, which hurt both Sigma and Star. (Rybacki, Tr. 3719 ("Q. Kept that in place throughout the year, those lower prices? A. Yes, they did.").)

It is undisputed that 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.) Complaint Counsel further concedes that the after-the-fact call from Mr. McCutcheon to Mr. Tatman (not the other way around) was not about prices, but simply to verify that McWane's already-announced list price was not going to be rescinded and replaced with something else (it was not), which Mr. McCutcheon wanted to know before incurring the cost of printing out hundreds of price books - - and then finding out that he would have to do it all over again. (McCutcheon, Tr. 2457, 2460-2461, 2529-2530.) Mr. McCutcheon flatly denied discussing any prices (or that he was seeking any agreement) on the call. (McCutcheon, Tr. 2460-2461, 2529-2530.)

Moreover, even if Mr. McCutcheon's call could be construed as Star's effort at "price verification," courts have held that insufficient as a matter of law to prove a conspiracy, and Complaint Counsel cites no case holding that *Star's* call to verify McWane's prices somehow suggests *McWane* conspired. To prove that the alleged call unlawful, Complaint Counsel must show Mr. Tatman and Mr. McCutcheon reached an ***actual agreement*** to set prices during this

call. *Blomkest*, 203 F.3d at 1034 (affirming summary judgment, the Court found "no evidence here that price increases resulted from any price verification or any specific communication of any kind. *Subsequent* price verification evidence on particular sales cannot support a conspiracy.") (italics in original). Mr. Tatman had already made his announcement and Complaint Counsel does not argue that McWane's decision changed, or that its conduct was in any other way affected by the alleged call. In fact, it is undisputed that after the call McWane made no change to its previously announce decision. Courts have uniformly held that a call to simply confirm a competitor's previously announced price does not amount to an illegal agreement. *Id.*; *see also 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).

Finally, Complaint Counsel's own expert, Dr. Schumann, did not believe that this conversation was part of the alleged conspiracy. 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).) Dr. Schumann's concession is significant, as case law makes clear that expert witnesses can bind the government with their statements. *See Glendale Federal Bank, F.S.B. v. United States*, 39 Fed. Cl. 422, 425 (Fed. Cl. 1997). In *Glendale*, the experts retained were on the government's trial witness list, and the Court held that their opinions in the case bound the government as the sponsoring party. *Id.* The Court went on to find that by designating them as experts, the government conferred agency on the experts and were thus bound by their

statements. *Id.* ("By the time the trial begins, we may assume that those experts who have not been withdrawn are those whose testimony reflects the position of the party who retains them."); *see also Collins v. Wayne Corp.*, 621 F.2d 777, 782 (5th Cir. 1980) (court treated that expert's deposition testimony as an admission of the defendant: "district court erred in not allowing the plaintiffs to offer Greene's deposition into evidence as an admission of Wayne."). Thus, because Complaint Counsel designated Dr. Schumann as its expert, it is bound by his statement that the alleged conspiracy ended in 2008.

Complaint Counsel then asks 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 Op. Br. at 40-41.) 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 [sic] in the Northwest." (CX 3027 (emphasis added).)

Complaint Counsel cites no case finding liability where someone is temporarily "highly confident" about his competitors' prices and then, two days later, acknowledges he has no clue what they were going to do. Relying mainly on *Sugar Institute*, Complaint Counsel argues that an agreement to adhere to previously announce prices is unlawful. (CC's Op. Br. at 157-158.) As discussed in Section II(B), *supra*, *Sugar Institute* is completely inapplicable here. Further, there was no agreement to adhere to a previously announced price. At best Complaint Counsel is

left with a call from Star to McWane amounting to "price verification," which has been consistently held not to violate the antitrust laws. *See Blomkest*, 203 F.3d at 1034.

D. McWane's Independent Decision To Issue Its June 2010 Multipliers, And The Independent Decisions by Star and Sigma to Follow McWane's Announcement, Were Lawful Oligopoly Behavior[15]

Mr. Tatman's testimony regarding its June 2010 pricing was clear: McWane independently determined its June 2010 multipliers, raising some, lowering others, and keeping some flat. (Tatman, Tr. 978; 1005-1006.) He testified that McWane made its decisions independently, using a state-by-state analysis for the express purpose of undercutting his competitors, and did not discuss the analysis with any competitors. (Tatman, Tr. 978; 1005-1006; RXD 001 *in camera*.) Star and Sigma witnesses testified that they independently decided to follow. Trial testimony also confirms that McWane, Sigma and Star never discussed the multiplier changes in the customer letters that each issued to its respective customers prior to their publication in June 2010, and each witness consistently denied coming to any agreement. (Tatman, Tr. 978; 1005-1006 & RXD 001 *in camera*; Rybacki, Tr. 3720-3722 & CX 2453; Pais, Tr. 2048; Brakefield, Tr. 1337; CX 2440, CX 2450, CX 2453, CX 1396.)

Complaint Counsel does not appear to have a coherent theory on whether McWane's June 2010 price change was "conspiratorial," or simply involved "signaling," but the facts show neither were present. Complaint Counsel's conspiracy theory fails because it does not dispute that McWane made its own independent decision which Sigma and Star independently decided to follow. Complaint Counsel also presented no direct evidence of any agreement to set 2010

[15] Complaint Counsel did not address the June 2010 allegations in its argument. However, because Complaint Counsel briefly references June 2010 in its statement of facts (*see* CC's Op. Br. at 39), McWane briefly addresses the allegations here. McWane addresses the allegations in more detail in its opening brief, and Response to Complaint Counsel's Proposed Findings of Fact.

Fittings prices, and no circumstantial evidence of any "plus factors" sufficient to suggest any preceding agreement on the June 2010 multipliers.

Complaint Counsel's signaling theory fails because in conclusory fashion, Complaint Counsel merely asserts that "McWane, Sigma, and Star nevertheless continued to engage in improper signaling practices" in June 2010. This hollow assertion, on its face, is insufficient as a matter of law. Notably, Complaint Counsel does not argue anywhere in its brief that McWane, Sigma and Star had a preceding agreement, and even assuming *arguendo* that Sigma and Star followed McWane's plain vanilla price announcement, that fact is consistent with independent and self-interested follow-the-leader behavior that is lawful (and expected) in an oligopoly, and does not suggest an agreement as a matter of law.[16] *See In re Flat Glass*, 385 F.3d at 359; *In re Baby Food*, 166 F.3d at 128; *In re Citric Acid Litigation*, 191 F.3d at 1102-03. Thus, McWane is entitled to judgment in its favor on Complaint Counsel's claims relating the June 2010 pricing actions.

E. Complaint Counsel's Alternate "Invitation To Collude" Via Price Signaling Theory In McWane's January And May 2008 Letters Is Defective As A Matter Of Law

Tacitly recognizing its lack of any actual direct or circumstantial evidence to support its claims of a price fixing conspiracy, Complaint Counsel simply assigns a fictitious meaning to the letters and argues that they are unlawful "invitations to collude," "even if unsuccessful[.]" (CC's Op. Br. at 91.) Complaint Counsel's "invitation to collude" theory is defective as a matter of law and unsupported by the facts.

[16] If plain vanilla customer letters can be dubbed "signaling" and held unlawful under the antitrust laws, nearly every business in the country could be prohibited from announcing price changes to their customers for fear of being sued. Luckily, the antitrust laws do not condemn such conduct. *Williamson Oil*, 346 F.3d 1307 (price increase announced at press conference did not constitute unlawful "invitation"); *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647 (1980) (per curium) ("advance price announcements are perfectly lawful"); *Reserve Supply*, 971 F.2d at 54 (advance announcements of price changes not unlawful, as they "served an important purpose" in the industry).

The overwhelming evidence at trial showed that McWane never discussed its January or May 2008 letters with anyone from Sigma or Star, and always made its decisions independently. (Tatman, Tr. 363-364.) There is no testimony or other evidence of any discussion between McWane and any competitor regarding the January or May 2008 price letters, much less any acknowledgement of an "invitation" between McWane and any competitor with regard to pricing. For example, Mr. Tatman testified that the May 7, 2008 letter was merely a letter sent to McWane's customers "for planning purposes only" in response to the "unusual" "40 percent price increase" issued by Sigma. (Tatman, Tr. 502-503.) Before sending the May 7 letter, Mr. Tatman undertook a painstaking analysis to determine the path that would create the greatest competitive advantage. Sigma and Star witnesses flatly rejected Complaint Counsel's interpretation that McWane's letter was some sort of secret "message" linking a price increase to receipt of DIFRA data, and that the thought never occurred to them. (JX 698 (McCutcheon Dep. at 198:13-199:4 ("Absolutely none. As a matter of fact, the first time that thought - - I've even heard that was today. Of linking that to DIFRA?"); Pais Dep. at 381:4-382: 11 ("It is so farfetched and ridiculous, what can I say? No, no.").)

Complaint Counsel does not point to any evidence at trial to refute the witnesses' explanations, but argues that the letter contained a secret "message for Sigma and Star." (CC's Op. Br. at 32.) However, even Dr. Schumann conceded that McWane's customer letters were plain vanilla pricing letters that did not contain or communicate the key tenets of the conspiracy he opined to Sigma and Star. (Schumann, Tr. 4203 ("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"), 4202 ("I don't say in my report that it was given to Star and Sigma, that's right.").)

Even if this Court finds that the pricing letter contained an implied suggestion of less job pricing, Mr. Tatman testified it was a "head fake," he hoped would lull Star and Sigma into complacency, and allow McWane to beat Star and Sigma with job pricing. That is a perfectly legitimate and competitive tactic. (Tatman, Tr. 386.) There is nothing illegal about attempting to bait your competitor into a more vulnerable position from which you can achieve an advantage. That is called competition. Moreover, witnesses consistently testified that they did not trust the pricing letters sent to customers. (Pais, Tr. 1931 ("As I've said -- and I hope, if nothing else, you'll get a sense of this industry -- this has been a bitterly competitive, mistrustful, even vengeful supply base"), 1995-1996 ("everyone in our industry is mistrustful, vengeful, and looking for any way to react and hurt each other while they're trying to protect themselves"); Rybacki, Tr. 3566 ("Because there's such a mistrust amongst the group as a whole anyway.").) Thus, Complaint Counsels condemns McWane's January and May 2008 letters, but has fallen far short of proving those letters represent an actual "invitation" to do anything.

Further, Complaint Counsel's "invitation to collude" theory fails for legal reasons. Courts have repeatedly upheld the permissibility of customer letters and advance price announcements in industries, like this one, that are cyclical and where projects are bid well in advance. *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647 (1980) (per curium) ("advance price announcements are perfectly lawful"); *Reserve Supply*, 971 F.2d at 54 (advance announcements of price changes "served an 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"). In addition, as set out in

McWane's opening brief, no court has ever held that a one-way "invitation" to collude that did not contain the claimed invitation (and was not understood as an invitation), and was clearly not accepted as such, constitutes an antitrust violation. On the contrary, court after court has rejected antitrust liability when presented with a vague one-way offer. *Williamson Oil*, 346 F.3d 1307 (rejecting argument that a press conference announcing price increases was an unlawful "invitation", the Court held "the allegation of Marlboro Friday as 'invitation to collude' is not supported"); *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"), *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").

The cases Complaint Counsel cites are inapplicable. For example, Complaint Counsel relies heavily on the holding in *United States v. Consol Packaging Corp.*, 575 F.2d 117, 126 (7th Cir. 1978), but that case did ***not*** hold that a mere invitation to collude is actionable even if unsuccessful, as alleged here. To the contrary, the Court held that "[i]t is understood that the essence of conspiracy is agreement" and found that the evidence in that case "established directly and circumstantially a prima facie case that there existed a wide price-fixing conspiracy." *Id.* at 126. That situation does not exist in this case.

Complaint Counsel also makes much of the fact that the Commission has "challenged public invitations to collude" by filing complaints in *In re Valassis Commc'ns, Inc.*, FTC File No. 051-0008, 2006 WL 1367833 (F.T.C. April 19, 2006), and most recently, in *In re U-Haul Int'l Inc.*, FTC File No. 081 0157 (F.T.C. July 14, 2010). (CC's Op. Br. at 94.) But those cases

settled before litigation and thus did not establish any binding rule of law, let alone governing precedent.

Notably, Complaint Counsel fails to cite a single litigated case in which an invitation to collude was judged illegal by any federal court, under Section 5 or otherwise. The fact that the Commission has taken the position - - in the *Valassis* and *U-Haul* settlements - - that amorphous "invitations to collude" are encompassed within Section 5 does not make it so. *E.I. duPont de Nemours & Co. v. FTC*, 729 F.2d 128, 137-38 (2d Cir. 1984) (rejecting the FTC's expansive interpretation of "unfairness" under FTC Act Section 5 when it attempted to penalize competitive conduct based on the "elusive concept" of unfairness which is "often dependent upon the eye of the beholder.").

III. THE TONS-SHIPPED DIFRA DATA DID NOT FACILITATE COLLUSION

To the extent Complaint Counsel contends that dissemination of the tons-shipped data by DIFRA constitutes a free-standing violation of Section 5, that claim fails for the same reasons that McWane's participation in DIFRA failed to constitute a "plus factor," as discussed in Section II(B)(2)(c), *supra*. (*See also* McWane's Op. Br. at 23-26, 77-79.) The overwhelming record evidence shows that DIFRA was a procompetitive trade association that in no way "facilitated coordination" either in theory or in practice. The aggregated volume (not price) data contained in the DIFRA reports helped each member 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.) For example, 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." (Tatman, Tr. 536-540.) In fact, and in direct contradiction of its theory,

Complaint Counsel concedes that the only McWane pricing decisions after DIFRA became operational in mid-2008 were (1) its decision to ***underprice*** its competitors on June 17, 2008 and not follow the "big, bold move" Sigma announced (and Star followed), and (2) McWane's decision to dramatically lower all medium and large diameter list prices in April 2009. Both decisions were designed to win business and gain back share. Moreover, the evidence at trial also showed that McWane continued job discounting throughout this period and that prices sharply deteriorated in the second half of 2008 - - during the time period when the DIFRA data was available. Ironically, the Star and Sigma witnesses blamed this sharp decline on McWane's rampant job pricing. (RX 116; Pais, Tr. 2129-2131; Rybacki, Tr. 3702.)

In any event, each witness testified that the historic tons-shipped DIFRA data did not give McWane or any other DIFRA member any insight into competitor pricing, and that they never discussed pricing at DIFRA meetings (all of which were monitored by antitrust counsel). (Brakefield, Tr. 1352-53,1384-1389; McCutcheon, Tr. 2563.) Every witnesses who knew anything about DIFRA confirmed that the reports did not in any way serve as a vehicle to permit McWane, Sigma or Star to fix and stabilize Fittings prices or otherwise "facilitate" price coordination. (Brakefield, Tr. 1337 ("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.").) 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.

Complaint Counsel tacitly concedes each of these facts, but argues that "[a]n information exchange, although not inherently anticompetitive, is well-recognized as a potential tool for facilitating coordinated behavior." (CC's Op. Br. at 164.) Complaint Counsel then leaps to the conclusion that "McWane's participation in the DIFRA information exchange" should be

condemned because it "represents concerted activity" with the likely effect of facilitating "non-competitive or collusive pricing." (CC's Op. Br. at 164.) This unsupported argument is incorrect as a matter of law, and the dearth of facts Complaint Counsel cites to support its assertion is telling. The case law consistently holds that the pro-competitive use of trade association data is perfectly lawful and should be encouraged. *Monsanto,* 465 U.S. at 767 ("The correct standard is that there must be evidence that tends to exclude the possibility of independent action by the manufacturer and distributor"); *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"). "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. In the absence of a shred of evidence, much less substantial evidence, that the DIFRA data was actually used or capable of use for an improper purpose, the Court must ignore Complaint Counsel's hypothetical speculation.

IV. THE MASTER DISTRIBUTORSHIP AGREEMENT WITH SIGMA WAS PRO-COMPETITIVE AND DID NOT EXCLUDE SIGMA FROM DOMESTIC FITTINGS

Complaint Counsel's argument that Sigma could have (and would have) expanded into the manufacture of domestic Fittings during the ARRA period was contradicted by the evidence at trial that demonstrated Sigma's dire financial straits in 2009. Sigma had already breached its bank loan covenants and was on the verge of doing so again, it had more than $100 million in debt (tens of millions of it at extraordinarily high, double digit interest rates approaching 20%), little or no equity (it had only a few hundred thousand dollars in cash on its books) and plummeting revenue. (Pais, Tr. 2181 ("Q. And what you're telling him is, as we head into this

bank meeting, we're actually in an even worse position than we believed; right? A. Yes.").) Sigma's CEO and Vice President both confirmed Sigma's "grave" situation. (Pais, Tr. 2163-2164 ("Q. And the fact is that Sigma in May of 2009 was in a grave situation. A. Grave, yes"); Rybacki, Tr. 3728 ("there were grave concerns over the costs of getting into domestic fittings.).) In the Summer of 2009, with the ARRA clock ticking away, Sigma's Vice President of Engineering, Mr. Bhattacharji, concluded that after exploring the possibility, virtual manufacturing was "not a viable option." (JX 682 (Bhattacharji Dep. at 121:20-124:8).) As a result, neither Sigma's board nor its banks authorized the company to exceed its capital expense limit imposed by the banks or to move forward with domestic manufacturing. (JX 682 (Bhattacharji Dep. at 83:11-15 ("Q. How could you even get into domestic production with $5 to $10 million of potential capex if you're capped at $2-1/2 million? A. Absolutely. You could not.").)

In 2009 Sigma simply was not in a position financially, commercially or practically to domestically manufacture fittings. It ***could not*** have become a producer of domestic Fittings in time to compete for jobs under ARRA. As a practical matter, it would have taken Sigma at least 18-24 months to develop a full line of fittings, long after the ARRA period was over. (Rona, Tr. 1673; RX-284 ¶¶ 4-15; RX-287 ¶¶ 3-14; RX-286 ¶¶ 5-6; JX 682 (Bhattacharji, Dep. 30-31, 47, 118-119, 121-124.) Sigma's opinion that it could not expand to domestic production in time to compete for jobs under ARRA was further confirmed by the fact that no other domestic foundry, including ones that had previous experience producing domestic fittings, chose to enter domestic production. Tellingly, every current and former domestic Fittings manufacturer, including 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).) Sigma's good judgment in not attempting to get into domestic Fittings was confirmed by Sigma's failed attempt to become a virtual supplier of domestically produced pipe restraints, a product distinct from Fittings which required far less investment (and only a few dozen patterns, as opposed to 700+), that was a (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.)

Given Sigma's financial situation, its expectation that ARRA would only last for a short time, and its failed attempt to enter virtual production of domestic restraints, Sigma made the independent and rational judgment that its only option for a source of domestic Fittings was the MDA with McWane. (Pais, Tr. 2217 ("I have explained very descriptively the various challenges that we had as we went down that path. And we never got to a point of having any viable domestic production capability at all"), 1755 ("we had no clear option. We had no idea about what would really be a feasible option").) Complaint Counsel did not proffer any evidence at trial to the contrary, and instead simply asked its expert, Dr. Schumann, to "assume" that Sigma would have entered, and makes the same assumption that "Sigma was a potential competitor" that "intended to" and was "capable" of entering the purported domestic market in its post trial brief. (Schumann, Tr. 4473 ("I was asked to assume that but for the MDA Sigma would have entered into the domestic fittings market"); CC's Op. Br. at 180-189.) However, wish as they might that it were different, as the holder of the burden of proof Complaint Counsel

cannot ignore the undisputed testimony in this case and substitute its speculative assumptions for evidence. This Court should reject Complaint Counsel's assertions, and not second-guess the judgment of executives running Sigma. [17]

To succeed on its claims relating to the MDA, Complaint Counsel must prove that - - as of September 2009 when the MDA was executed - - Sigma had "an ***intention*** and ***preparedness*** to enter the business." [18] *Gas Utilities Co. of Alabama. v. S. Natural Gas Co.*, 996 F.2d 282, 283 (11th Cir. 1993) (emphasis added). "Without these two showings it cannot fairly be concluded that the antitrust violation was the cause of the failure to expand." *Cable Holdings of Ga., Inc. v. Home Video, Inc.*, 825 F.2d 1559, 1562 (11th Cir. 1987).

As the Court in *Martin v. Phillips Petroleum Company*, 365 F.2d 629, 633-34 (5th Cir. 1966) further explained, a plaintiff must demonstrate four elements to establish "preparedness": (1) "the ability of plaintiff to finance the business and to purchase the necessary facilities and equipment"; (2) "the consummation of contracts by the plaintiff"; (3) "affirmative action by plaintiff to enter the business"; (4) "the background and experience of plaintiff in the prospective business." Complaint Counsel failed to show even one of these requirements, much less all four.

As explained above, Complaint Counsel produced no evidence that Sigma had secured financing or consummated contracts to supply domestic Fittings. *See id.* Again, Mr. Pais testified that, in the spring and summer of 2009, Sigma was in a "grave" financial situation.

[17] Complaint Counsel's argument that because Sigma acquired The Unique Company in the first quarter of 2010 and thus, Sigma had the financial capability to enter domestic production of Fittings, is not supported by the record. First, Sigma did not acquire the entire company. (Pais, Tr. 2212.) Sigma acquired a small portion of The Unique Company, which was an existing company with a small product line and actual revenue stream. (Pais, Tr. 2212.) Second, Sigma's investment in The Unique Company was approximately "four and a quarter million." (Pais, Tr. 2212.) This is far less than the $5-10 million Sigma estimated it would cost to enter domestic production of Fittings. (JX 682 (Bhattacharji, Dep. 83).)

[18] Complaint Counsel tacitly concedes this standard in its pre-trial brief. (CC's Pre-trial Br. at 74.) Citing *Yamaha Motor Co. v. FTC*, 657 F.2d 971, 977-79 (8th Cir. 1981), Complaint Counsel argues that the "evidence at trial will show that Sigma intended and was prepared to enter the Domestic Fittings business, and took affirmative steps to enter the market."

(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").) The mere speculative possibility that Sigma *might* have been able to find financing (at who knows what double-digit interest rate) is inadequate as a matter of law. "The mere possibility of financing being available in the abstract is not enough. Showing that someone somehow could possibly obtain financing is not the same as showing that plaintiffs themselves were able and prepared to." *Hayes v. Solomon*, 597 F.2d 958, 975 (5th Cir. 1979); *Sunbeam Television Corp., v. Nielsen Media Research, Inc*., 763 F. Supp. 2d 1341, 1354 (S.D. Fla. 2011) (a plaintiff claiming exclusion of a potential competitor that is not yet in the market "must prove the excluded firm was willing **and able** to supply it but for the incumbent firm's exclusionary conduct").

Complaint Counsel also failed to meet its burden of showing Sigma - - as a company - - had a corporate intention to enter the market. Corporate decisions requiring millions in capital expenditures are made by votes by boards of directors. But here, Sigma's board took no vote and never authorized the expenditures. Mr. Rona testified (and told his OEM customers) that, by September 2009, Sigma had not taken any concrete steps to supply its own domestic Fittings. (Rona, Tr. 1693-1694 ("at that point we had not invested in or made a decision to invest in any equipment, that's correct"); CX 258 ("To date Sigma has not made any concrete plans to either invest in all the required tooling or not invest at all.").) He conceded that the timetable to enter would have been unworkable, given ARRA's short window of opportunity. (Rona, Tr. 1671.) Further, given the short duration of the MDA and lack of any provision whatsoever preventing Sigma from pursuing domestic production efforts, it would logically follow that if Sigma had *any intention* of developing an alternate source, all while building its market with McWane's

domestic Fittings, it could have done so and then terminated the agreement at any time. Tellingly, it did not.

The cases cited by Complaint Counsel provide them no support. First, *Engine Specialties, Inc. v. Bombardier, Ltd.*, 605 F.2d 1, 11 (1st Cir. 1979), involved a strict agreement not to compete between competitors, which is absent here. Second, the decision in *Bombardier* actually reinforces McWane's position. Consistent with the authorities cited above, and as McWane noted in its opening brief, the Court in *Bombardier* reaffirmed that to prove foreclosure of a potential competitor, Complaint Counsel must prove "that the potential competitor Bombardier had the necessary desire, intent, and capability to enter the market." *Bombardier*, 605 F.2d at 9. Although the Court in *Bombardier* concluded that the potential competitor was viable, the list of circumstances present in that case (and for the particular potential competitor) stand in sharp contrast to Sigma's situation here, in terms of both financial stability and preparedness. Bombardier not only had the financial capability to enter on its own, but also manufacturing facilities and had already "developed a prototype." *Id.* Moreover, Bombardier had "boasted there was 'no part of a motorcycle that we (Bombardier) cannot produce."' *Id.* Obviously, Sigma's ability to enter production of domestic Fittings was **not** "consistent with *Bombardier*," as Complaint Counsel argues. (CC's Op. Br. at 184.) Sigma did not own any domestic foundries and did not have any contracts with existing domestic foundries; it owned only a handful of the 700-800 patterns it would need, but no core boxes, no machining facilities, and no finishing facilities in the United States. (Pais, Tr. 2173-2175.) In late August 2009, Sigma did not have the necessary financing available, and still had not taken any concrete steps towards entering production of domestic Fittings. (Rona, Tr. 1672-73, 1693-1694; CX 258; Pais, Tr. 1799, 2163-2164, 2173-2174, 2317.).

Complaint Counsel's reliance on *Yamaha Motor Co. v. FTC*, is also factually inapposite. 657 F.2d at 977-79. Again, the Court in *Yamaha* upheld the fundamental rule that to prove foreclosure of a potential competitor "it must be shown that the alleged potential entrant had 'available feasible means' for entering the relevant market, and second, 'that those means offer(ed) a ***substantial likelihood*** of ultimately producing deconcentration of that market or other significant procompetitive effects.'" *Id.* at 977 (emphasis added). Similar to *Bombardier*, the Court in *Yamaha* found the alleged potential entrant "had the technology needed to be a viable entrant into the United States market," "was close to possessing a 'complete line' of models with a wide horsepower range suitable for entry into the United States market," and its "management had the requisite experience in the production and marketing of outboard motors." *Id.* at 978. The Court further found "considerable evidence of Yamaha's subjective [corporate] intent to enter the United States," including testimony from top management that it was "about the time we can go into a developed market like the United States." *Id.* 979. Here, Sigma had no such corporate intent. On the contrary, neither its board of directors nor its banks authorized Sigma to move forward with domestic production. Again, Sigma had recently breached its bank covenants and its banks imposed capital expenditures caps that were far below what it needed to get into domestic Fittings.

A. The MDA Was Pro-Competitive And Did Not Harm Competition Or Consumers

As discussed in McWane's opening brief and Section VI, *supra*, the MDA with Sigma was a pro-competitive agreement beneficial to both the competitors, and consumers. (McWane's Op. Br. at 57-60.) Complaint Counsel tacitly concedes that the domestic Fittings business has been dying a slow death for 20 years. Within the last several years, numerous large manufacturers such as U.S. Pipe, Griffin Pipe, and ACIPCO exited production of domestic

Fittings entirely. McWane was forced to close one of its two Fittings foundries, laying off hundreds of workers, and its remaining Union Foundry was operating at partial capacity, struggling for survival. The evidence at trial showed the MDA offered McWane more tons, wider distribution, and was output enhancing for McWane. (*See* McWane's Op. Br. at 58-60.) In short, the MDA allowed McWane to reach customers that it otherwise 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 also had relationships with certain distributors and in certain geographic areas that McWane lacked. (JX 642 (Page, Dep. at 69-73).) Further, the MDA was pro-competitive and beneficial to Sigma's consumers, as it was the only way Sigma could effectively supply domestic Fittings to its customers during ARRA's short time window. (Rona, Tr. 1481, 1671.)

V. MCWANE DID NOT MONOPOLIZE OR ATTEMPT TO MONOPOLIZE THE PURPORTED MARKET FOR DOMESTIC FITTINGS

Complaint Counsel's argument that McWane monopolized a separate domestic Fittings market also fails. First, Complaint Counsel concedes that Fittings are completely "interchangeable" and that there is vigorous competition to open specifications that has resulted in imports constituting the lion's share of all Fittings sold in the U.S. Indeed, the fact witnesses testified - - and Complaint Counsel concedes - - that imported Fittings are roughly 80-85% of all Fittings purchased in the U.S., while domestic Fittings are only 15-20% and declining. (CC's Op. Br. at 9-14.) The trial evidence demonstrated that the EPA granted a number of blanket, nationwide waivers and several individual job-specific waivers permitting imported product to be used on ARRA-funded jobs. Dr. Schumann conceded that imports outsold domestic Fittings

during the ARRA period (and that Star's bid log reported examples of imports competing successfully for ARRA-funded jobs) - - but he turned a blind eye to that evidence and (literally) made no effort to figure out which ARRA-funded jobs purchased domestic and which purchased imported Fittings and why. Nor did he bother to conduct any elasticity study of domestic and imported Fittings - - or, indeed, any data-driven economic analysis pertinent to a relevant market determination. Instead, he simply posited his own say-so opinion that domestic Fittings were their own market (for some undefined customers and some undefined jobs). That "evidence" is non-expert speculation and fails for the reasons set out in Section I, *supra* - - and with it, all of Complaint Counsel's claims that McWane monopolized a "domestic Fittings" market also fail.

Complaint Counsel tacitly concedes that it was never McWane's expectation or intention to profit from ARRA by overcharging its customers. As Mr. Tatman explained at trial, McWane "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." (Tatman, Tr. 981.) This expression of intent is not a recent construct - - it was expressly stated at the time by Leon McCullough, Mr. Tatman's boss. (RX 595 ("It has never been our intent to overcharge because of the Buy America provision"). Nor was this sentiment a product of mere benevolence. As Tatman explained at trial, it flowed from a recognition that any short term price increase would have adverse long term consequences, in the form of customer retaliation once the short term of ARRA expired. In other words, combination of the concentration and buying power within the customer base with the short duration of ARRA deprived McWane of any theoretical market or pricing power. Thus, there is no evidence that McWane had the ability to charge monopoly prices for its domestic Fittings during ARRA "for an extended period," a key requirement for proving monopoly power. *Rebel Oil Co*, 51 F.3d at 1434. On the contrary, the

overwhelming evidence shows that McWane *did not* charge monopoly prices, and that its prices were even lower than Star's in the vast majority of states. (Normann, Tr. 4768.)

McWane's lack of "intent to overcharge because of the Buy America provision" also shows that McWane did not have the specific intent to monopolize. To establish its attempted monopoly claim, Complaint Counsel must prove that McWane 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, 994 (11th Cir. 1993) ("To have a dangerous probability of successfully monopolizing a market the defendant must be close to achieving monopoly power"); *McGahee v. Northern Propane Gas Co.*, 658 F.Supp. 189, 196 (N.D. Ga. 1987) (granting summary judgment finding "no evidence that such a scheme had a dangerous probability of success."). In *McGahee*, a case involving allegations of monopolization and attempted monopolization against a large propane seller, the district court granted summary judgment in a case where, like here, "defendant's market share declined [steadily] during 1981–1983." *Id.* The district court held that "[c]ourts have viewed such declines as evidence that an alleged attempt to monopolize is not dangerously close to success." *Id.* Further, the court held that while "defendant controlled a large segment of the market," "[t]here is no evidence that defendant has ever been able to obtain supracompetitive prices." *Id.*

McWane clearly did not have a "dangerous probability" to obtain a monopoly. Its share has declined steadily over the last decade in the face of a flood of cheap imports, and its domestic foundry is running at a fraction of capacity. In fact, Complaint Counsel concedes that McWane's overall Fittings share has been declining for years while Star and Sigma's shares have

steadily increased. (CC's Op. Br. at 10-11.) Further, there no evidence that McWane has ever charged, or intended to charge, supracompetitive prices in response to ARRA. The facts showed the opposite. (RX 595 ("It has never been our intent to overcharge because of the Buy America provision.").)

Finally, McWane's share of domestic Fittings, ***if*** it is a separate market, was thrust on it by historic accident (i.e., U.S. Pipe, Griffin Pipe, and ACIPCO exiting the market in the wake of cheap imports). Acquiring or maintaining monopoly power through "growth or development as a consequence of a superior product, business acumen, or historic accident" is not a violation of Section 2. *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) ("*Verizon*") (quoting *United States v. Grinnell Corp*., 384 U.S. 563, 570-71 (1966)).

A. McWane Did Not Have Monopoly Power Over All Fittings Or Domestic Fittings

Even if Complaint Counsel had proven a separate domestic Fittings market, and that McWane had a high share of that purported market, that alone does not support a finding of monopoly power here. The definition of 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) (emphasis added). McWane's situation does not meet this definition. The record evidence showed that McWane never attempted to raise prices, in fact, prices were flat and not a single distributor or end customer complained about prices of domestic Fittings at trial. If a defendant is unable to control prices or exclude competitors, then it is not a monopoly, regardless of its market share. *See Metro Mobile CTS, Inc. v. NewVector Commc'ns, Inc.*, 892 F.2d 62, 63 (9th Cir. 1989) (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*") (reversing jury verdict in favor of plaintiff, holding that 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).

Complaint Counsel argues that "McWane's power can be inferred from its high Domestic Fittings market shares and the existence of high entry barriers in that market." (CC's Op. Br. at 208.) However, market share is only the starting point and McWane does not meet the definition, as it did not have the ability to, or even attempt to, raise prices to a supracompetitive level. Further, given Complaint Counsel's failure to meet its burden of proving a separate domestic Fittings market, 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 American Counsel of Certified Pediatric Physicians & Surgeons v. American Board. 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.") Complaint Counsel's own expert, Dr. Schumann, conceded that McWane did not have monopoly power in an all Fittings market.

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. *Moecker v. Honeywell Int'l, Inc.*, 144 F. Supp. 2d 1291, 1308 (M.D. Fla. 2001). 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., Inc. 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).

B. McWane Did Not Exclude Star From Domestic Fittings

Star's successful and dramatic expansion of its sales of domestic Fittings affirmatively disproves the allegation that McWane possessed monopoly power and excluded Star. Complaint Counsel concedes that in its first full year with a domestic product, 2010,

of all domestic Fittings sales, including sales to not only HD Supply and Ferguson, the two largest distributors, but WinWholesale, 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.)

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").) 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.) Tellingly, in April 2010, a Star sales manager reported 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.) Indeed, Star's sales growth was extraordinary: it gained, on average, two new customers per week throughout 2010. (McCutcheon, Tr. 2595).

(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 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.)

Further, 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.)

Normann, Tr. 5041 *in camera*.)

Successful, actual expansion by Star precludes a finding of monopolization against McWane. Given Star's distributor customers, and the fact that HD Supply and Ferguson comprise 50% of the distribution market alone, Complaint Counsel's argument that Star was somehow "substantially foreclosed" from the market falls flat.

Indeed, having lost share so quickly, McWane could not have monopolized anything as a matter of law. *Brooke Group*, 509 U.S. at 226 ("where new entry is easy . . . summary disposition of the case is appropriate"); *Advo, Inc. v. Philadelphia Newspapers, Inc.*, 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., Inc. v. Gilbarco, Inc.*, 127 F.3d 1157, 1164 (9th Cir. 1997), and easy entry conditions "rebut inferences of market power." *Top Mkts., Inc. v. Quality Mkts, Inc.*, 142 F.3d 90, 99 (2d Cir. 1998).

Complaint Counsel also argues that distributors "otherwise willing to purchase Domestic Fittings from Star were deterred from doing so" by McWane's rebate policy, but that argument was not only unsupported by any material testimony at trial - - it was contradicted by Complaint Counsel's own expert. Dr. Schumann conceded he could not identify a single distributor - - out of 630 - - that wanted to buy Star domestic, but was unable to do so because of McWane's rebate letter. (Schumann, Tr. 4440). Dr. Normann, likewise, found none. (Normann, Tr. 4929-4930.) Dr. Normann confirmed this fundamental fact and concluded, as a result, that there was no exclusion. (Normann, Tr. 4929-4930.)

Nonetheless, Complaint Counsel asserts that the two largest waterworks distributors, HD Supply and Ferguson, as well as a number of other regional distributors, did not purchase domestic Fittings from Star because of McWane's rebate policy. (CC's Op. Br. at 228-232.) This is simply untrue. First, HD Supply did purchase domestic from Star following the rebate policy announcement, (Webb, Tr. 2798-2800), and Mr. Webb of HD Supply testified that the rebate policy did not have an impact on HD Supply's purchasing decisions, and McWane never refused to pay HD Supply rebates. (JX 673 (Webb, Dep. at 123-25.) Ferguson likewise

purchased domestic Fittings from Star following the issuance of McWane's September 22 letter, and Bill Thees of Ferguson testified that the rebate policy had no influence on Ferguson's purchasing decisions and McWane never refused to pay Ferguson rebates. (Thees, Tr. 3108-3111.)

Further, each regional distributor identified by Complaint Counsel in its opening brief as being precluded from purchasing from Star by McWane's rebate policy, did in fact purchase domestic Fittings from Star after McWane's rebate policy was announced. For example, Complaint Counsel argued that Groeniger stopped purchasing domestic Fittings from Star because of the rebate policy. (CC's Br. at 231.) But to the contrary, Groeniger did in fact purchase domestic Fittings from Star following the issuance of the rebate policy, and McWane never refused to sell it domestic Fittings or pay a rebate as a result of purchases from Star. (JX 669 (Groeniger, Dep. 99.) Complaint Counsel likewise argued that C.I. Thornburg also declined to purchase from Star in 2010 because of McWane's rebate policy. (CC's Op. Br. at 232; CCPF 2015.) But directly contradicting this bald assertion, Mr. Morrison of C.I. Thornburg expressly testified that McWane's domestic rebate policy did not affect his 2010 purchases. (JX 650 (Morrison, Dep. at 74-44 ("I'd really like to say it was because of this letter, but Star's not – I can't consider them at this point in time").) These are just two examples of the many inconsistencies in Complaint Counsel's arguments. (*See* McWane's Responses to Complaint Counsel's Proposed Findings of Fact and Conclusions of Law.)

As noted above, McWane's rebate policy did not impose a contractual mandate that its customers buy exclusively from McWane, as is typical of true exclusive dealing contracts. However, even if it had, 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). Such 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).

In this case McWane did not have any contracts that required its customers to buy its domestic Fittings exclusively. McWane's customers always could, and many did, purchase from Star. 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 (i.e., a price cut) in exchange. Thus, Star had ample opportunity to compete and did, very successfully. That is all the antitrust laws require. *Race Tires Am. Inc. v. Hoosier Racing Tire Corp.*, 614 F.3d 57, 84 (3d Cir. 2010) (plaintiffs "had the clear opportunity to compete and did compete, sometimes successfully"); *NicSand, Inc. v. 3M Co.*, 507 F.3d 442, 454 (6th Cir. 2007) ("no explanation why it could not compete for these multi-year agreements.").

VI. COMPLAINT COUNSEL FAILED TO PROVE THAT MCWANE OR SIGMA HAD THE REQUISITE "SPECIFIC INTENT" TO MONOPOLIZE DOMESTIC FITTINGS

At trial Complaint Counsel presented no evidence that McWane or Sigma entered the MDA with the "specific intent to monopolize." To the contrary, McWane did not have any intent to monopolize the purported market for domestic Fittings, as evidenced by the fact that it

was far from lucrative - - "break even at best." (JX 638 (McCullough, IHT 219-220.) Further, all other foundries that manufactured fittings domestically discontinued production due to the flood of cheap imported and declining revenues. McWane was the last remaining major manufacturer of domestic Fittings. It was desperate for volume, having closed its Tyler South plant, and operating its Union Foundry at a fraction of capacity. McWane was also worried that Star would "cherry pick" its remaining volume, and it would have to shut down and lay off its remaining employees. Thus, McWane's focus in signing the MDA was getting more tons, wider distribution, and increased output for its domestic Fittings foundry that was operating at only a fraction of its capacity. (See McWane's Op. Br. at 58-60.) The MDA accomplished both companies' goals - - it allowed McWane to reach customers that it otherwise could not, and it enabled Sigma to supply domestic Fittings to its customers that it otherwise would not have. (JX 643 (Tatman, IHT at 176-177); JX 642 (Page, Dep. at 62-63). McWane did not budget for major price increases, and had no intention of gouging its customers. In fact, McWane did not achieve any major price increase and its Fittings prices barely stayed at pace with inflation.

Sigma's focus in signing the MDA was on keeping its own customers happy and providing domestic Fittings to those customers when needed. (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).)

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*, 306 F.3d at 1028. To establish "specific intent," Complaint Counsel must prove that

McWane and Sigma possessed the "specific intent" thrust monopoly power on McWane by predatory or exclusionary conduct; that the defendants 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. *Rule Indus.*, 7 F.3d at 993. 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.*

Here, Complaint Counsel has not established that McWane and Sigma had the specific intent to monopolize the purported market for domestic Fittings. First, it did not prove the existence of a conspiracy between McWane and Sigma. As discussed, each company had its own pro-competitive justifications for entering the MDA. Second, it was *Sigma's* idea to enter the MDA, not McWane's. The argument that *Sigma* had the intent to thrust a monopoly on *McWane*, its primary competitor that it "mistrust[ed]," defies logic.

To support its argument, Complaint Counsel points to a few internal McWane and Sigma documents - - none of which were communicated between the competitors - - and attempts to read into their meaning. Complaint Counsel points to a few buzzwords in the documents such as McWane wanting to "put pressure on Star" and a reference by Sigma to making Star "suffer," but presented no evidence at trial regarding the actual meaning of the statements. Thus, all Complaint Counsel has is a few scattered documents with a few strong statements. However, it is well-settled that "[t]he antitrust statutes do not condemn, without more, such colorful, vigorous hyperbole." *Advo, Inc. v. Philadelphia Newspaper, Inc.*, 51 F.3d 1191, 1199 (3rd Cir. 1995) (internal quotation marks omitted). "The context of this conduct is the highly competitive arena of corporate America. Business competitors use strong language and hyperbole when referring to competitors. Several courts have noted such language." *PPG Industries, Inc. v. Payne*, 2012 WL

1836314 at *9 (E.D. Tenn. 2012). The Seventh Circuit in *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396, 1401–02 (7th Cir. 1989), noted that "[f]irms 'intend' to do all the business they can, to crush their rivals if they can. [I]ntent to harm without more offers too vague a standard in a world where executives may think no further than 'Let's get more business.'" *Id.* What we have here is just that. A few colorful words in a few internal documents, which Complaint Counsel picked out from the literally hundreds of thousands produced in this case, and which were never communicated to competitors. That is plainly insufficient to prove a conspiracy to monopolize.

The truth of the matter is that the MDA was a pro-competitive distribution agreement that allowed McWane to increase its volume and allowed Sigma to supply domestic Fittings to its customers. Complaint Counsel's assertions to the contrary are unsupported by the record. Thus, McWane is entitled to judgment in its favor. *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).

VII. COMPLAINT COUNSEL IS NOT ENTITLED TO ITS PROPOSED REMEDY

For the reasons stated in McWane's opening brief, Complaint Counsel's proposed remedy should be denied. There was no proof at trial of any ongoing actual or threatened injury to competition or consumers. 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, McWane's rebate letter changed long ago, and the Master Distributorship Agreement with Sigma was terminated in 2010.

Here, Complaint Counsel proposes an injunction for a period of ten (10) years. (CC's Op. Br. at 160-61.) However, courts cannot grant injunctions unless a plaintiff shows ongoing or

imminent harm. The Supreme Court has held that a 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"). The mere possibility that past conduct might occur again is insufficient. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008); *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). For the same equitable reasons applicable to the well-settled case law governing injunctions, this Court to deny Complaint Counsel's proposed remedy.

__/s/ Joseph A. Ostoyich____
Joseph A. Ostoyich
Counsel for McWane, Inc.

OF COUNSEL:
Joseph A. Ostoyich
Erik T. Koons
William C. Lavery
Heather Souder Choi
Baker Botts L.L.P.
The Warner
1299 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2420
Phone: 202.639.7700
Fax: 202.639.7890
joseph.ostoyich@bakerbotts.com
erik.koons@bakerbotts.com
william.lavery@bakerbotts.com
heather.choi@bakerbotts.com

J. Alan Truitt
Thomas W. Thagard, III
Julie S. Elmer
Maynard, Cooper & Gale, P.C.
1901 Sixth Avenue North
2400 AmSouth/Harbert Plaza
Birmingham, AL 35203-2608
(205) 254-1000
(205) 254-1999 (facsimile)
atruitt@maynardcooper.com
tthagard@maynardcooper.com
jelmer@maynardcooper.com

CERTIFICATE OF SERVICE

I hereby certify that on January 25, 2013, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-113
Washington, DC 20580

I also certify that I delivered via electronic mail a copy of the foregoing document to:

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-110
Washington, DC 20580
oalj@ftc.gov

I further certify that I delivered via electronic mail a copy of the foregoing document to:

Edward Hassi, Esq.
Geoffrey M. Green, Esq.
Linda Holleran, Esq.
Thomas H. Brock, Esq.
Michael L. Bloom, Esq.
Jeanine K. Balbach, Esq.
J. Alexander Ansaldo, Esq.
Andrew K. Mann, Esq.

By: /s/ William C. Lavery
William C. Lavery
Counsel for McWane, Inc.