PUBLIC

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Edith Ramirez, Chairwoman**
Julie Brill
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Joshua D. Wright

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

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

ID - Initial Decision Page

IDF - Initial Decision Finding

CCAB - Complaint Counsel's Appeal Brief

CCPB - Complaint Counsel's Post-Trial Brief

CCPF - Complaint Counsel's Post-Trial Proposed Findings of Fact

CCRRFF - Complaint Counsel's Post-Trial Reply Findings of Fact and Conclusions of Law

ROB - Respondent's Answering Brief in Opposition to Complaint Counsel's Appeal

Tr. 0000 - Citations to Trial Testimony (Witness, Tr. 1234).

I. INTRODUCTION

The evidence in this case largely takes two contradictory forms: (i) contemporaneous business documents and telephone records evidencing an agreement among McWane, Sigma, and Star to raise and stabilize Fittings prices by curtailing Project Pricing, and (ii) testimony by the alleged co-conspirators recalling little, and denying all. Importantly, while the co-conspirators denied entering into a price-fixing conspiracy, they provided ***no*** alternative, benign explanation for their documents. The co-conspirators routinely could not remember and/or could not explain documents that they authored or received. CCPB163 (describing over 500 "I don't know" or "I don't remember" responses to Complaint Counsel questions). They likewise failed to remember the substance of (or provide legitimate reasons for) their numerous and suspiciously timed telephone calls with one another.

This convenient forgetfulness should not whitewash the ample evidence of conspiracy. The probative value and credibility of contemporaneous documents have the "highest validity,"[1] and are superior to the co-conspirators' blanket denials and self-serving testimony. *Cf. United States v. Apple Inc.*, No. 12 Civ. 3394, slip op. at 102 (S.D.N.Y. July 10, 2013) ("While many of the trial's fact witnesses who are employed by Apple and the Publisher Defendants were less than forthcoming, the contemporaneous documentary record was replete with admissions about their scheme.").[2] Allowing McWane's know-nothing/remember-nothing litigation strategy to succeed here would set a dangerous precedent for future antitrust cases. The Commission's *de novo* review of the Initial Decision is not only permitted but is required by law. *De novo* review

[1] *United States v. General Electric Co.*, 82 F. Supp. 753, 844 (D.N.J. 1949).

[2] *See also id.* at 43-44 n.19 ("[R]egrettably, [the witness] was not credible. The documentary record and the commercial context of the negotiations leave room for no other conclusion."); *id.* at 71-72 n.38 (crediting contemporaneous documents and prior testimony over subsequent self-serving trial testimony).

is especially appropriate here because the Commission is fully capable of reading and evaluating business documents that prove the conspiracy and for which McWane offers no explanation.[3]

II. LEGAL ANALYSIS

A. McWane Unlawfully Conspired With Sigma and Star to Restrain Price Competition

1. Standard for Proving a Conspiracy

Price-fixing conspiracies may be established through evidence of parallel conduct together with circumstantial evidence that tends to exclude unilateral action ("plus factors"). Circumstantial evidence, by definition, requires the fact-finder to make reasonable inferences from arguably ambiguous evidence. *E.g.*, *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 662 (7th Cir. 2002).

Judge Chappell failed to make reasonable inferences (the fact-finder's responsibility when assessing a circumstantial case) and instead demanded direct proof of an agreement before any inference could be made. *E.g.*, ID301, 312, 319 (characterizing inferential reasoning as impermissibly requiring the court to first presume that a price-fixing agreement existed). This curious circular reasoning led Judge Chappell to dismiss all proposed inferences as impermissible "speculation." Permissible inferences in litigation "do not differ significantly from inferences that rational beings reach daily in informally accepting a probability or arriving at a conclusion when presented with some hard, or basic evidence." *Edward J. Sweeney & Sons*,

[3] *In re Realcomp II*, 2007 WL 6936319, at *7 (Oct. 13, 2009) (*de novo* review); *see also United States v. United States Gypsum Co.*, 333 U.S. 364, 395-96 (1948) (reversing trial court fact findings as clearly erroneous because trial testimony had "little weight" when it conflicted with contemporaneous documents); *Montgomery Coca-Cola Bottling Co. v. United States*, 615 F.2d 1318, 1322 (Ct. Cl. 1980) ("With documentary evidence the trial judge is in no special position to rule on the credibility or applicability of such evidence; as such, our review of findings based on documentary evidence may be more severe.").

Inc. v. Texaco, 637 F.2d 105, 116 (3d Cir. 1980); *see also Golf City, Inc. v. Wilson Sporting Goods Co.*, 555 F.2d 426 (5th Cir. 1977) ("Ultimate facts generally are derived from subsidiary facts through a cause-effect reasoning process. That is, when subsidiary facts *A*, *B*, and *C* are shown to exist, then, because of the fact-finder's knowledge of the way the world works, he is able to conclude that, more likely than not, ultimate fact *X* also exists.").

A refusal to make reasonable inferences places too high a burden on Complaint Counsel, unreasonably handicaps the Commission's enforcement efforts, indulges conspirators, and is contrary to the case law. The Second Circuit recently explained:

> Requiring a plaintiff to "exclude" or "dispel" the possibility of independent action places too heavy a burden on the plaintiff. Rather, if a plaintiff relies on ambiguous evidence to prove its claim, the existence of a conspiracy must be a reasonable inference that the jury could draw from that evidence; it need not be the *sole* inference.

In re Publ'n Paper Antitrust Litig., 690 F.3d 51, 63 (2d Cir. 2012); *see also High Fructose*, 295 F.3d at 662 (Statements are "not to be disregarded because of their ambiguity; most cases are constructed out of a tissue of such statements and other circumstantial evidence.").

For example, Judge Chappell found no probative value in the hundreds of telephone calls between high-level executives (with pricing authority), many occurring at competitively sensitive times. ID314-316 (Complaint Counsel cannot prove what was discussed because co-conspirators claimed not to remember the substance of their calls); *see* CCPF1030 (describing calls). The co-conspirators offered no innocent or legitimate business explanations for the bulk of these calls. Courts recognize that a high volume of inter-competitor communications supports a finding of conspiracy, particularly where, as here, the parties have a history of price-related communications. *See In re Plywood Antitrust Litig.*, 655 F.2d 627, 633-34 (5th Cir. 1981); *see also Apple*, slip op. at 119 n.59 ("Apple has contended that the existence of any conversations

among the Publisher Defendants CEOs during their negotiations with Apple is neither unusual nor incriminating…. [T]he Publisher Defendants' denials at trial that they discussed the Apple Agreement with one another in those communications, or that those conversations occurred at all, in the face of overwhelming evidence to the contrary, strongly supports a finding of consciousness of guilt.").

Judge Chappell even refused to infer anything from documents proving that McWane complained to Sigma about Sigma's (***and*** Star's) discounting. ID312-314 (describing emails as "suspicious" but not probative of conspiracy). As previously recognized by the Commission, this evidence "lends further support to an inference of a conspiracy." *In re McWane, Inc.*, 2012 FTC LEXIS 155, at *38 n.11 (Sept. 14, 2012).

Whether a particular piece of evidence is itself sufficient to prove a conspiracy is unimportant. The appropriate analytical framework is to evaluate the evidence as a whole. *High Fructose*, 295 F.3d at 655. As discussed below, the evidence – when properly evaluated as a whole – compels a finding of concerted action.

2. Reliable Ordinary Course Business Documents Establish Parallel Curtailment of Project Pricing

McWane asserts that there is "no economic evidence" of parallel pricing. ROB13. McWane misunderstands what constitutes probative, economic evidence. Statistical regressions are unnecessary to prove a price conspiracy (and statistical analysis of unreliable data adds nothing).

The Suppliers' ordinary course business documents are economic evidence, and show that, during 2008, each of the Suppliers curtailed its use of Project Pricing (thus choosing to forgo profitable transactions):

- McWane announced to customers and competitors its intention to curtail Project Pricing (IDF645);

- McWane's strategy was to "be consistent and follow through" with this formal communication (IDF638); until the end of 2008, McWane practiced "price discipline" and "stayed firm on pricing" (IDF864-867);

- Star instructed its sales team to curtail Project Pricing (IDF686);

- Star informed its customers it would no longer offer Project Pricing (IDF702-709);

- Star centralized pricing authority in the hands of Mr. Minamyer to assure price discipline (IDF686);

- Sigma instructed its sales team to curtail Project Pricing (IDF664, 674);

- McWane's Q1 2008 Executive Report observed that Project Pricing by Sigma and Star "appears to have died down significantly" (IDF868);

- McWane's Q2 Executive Report observed that Project Pricing by Sigma and Star had continued to slow (IDF870);

- McWane's "price protection log" shows very few instances of Project Pricing to match Sigma or Star during Q2 and Q3 2008, the height of the conspiracy (IDF863; CCPF1047, 1450);

- Star's database (for all waterworks products) shows a decline in Project Pricing from 2007 to 2008 (IDF887, 890, 892);

- The Suppliers' strong financial performance during 2008 is consistent with a decline in Project Pricing (IDF865, 963, 969-970, CCPF1344-1359 (McWane); IDF977-984, CCPF1361-1369 (Star); IDF985-993, CCPF1371-1383 (Sigma));

- In November 2008, Mr. Minamyer called a halt to Star's policy of curtailing Project Pricing, telling his staff to "Go get every order!!!!!" (IDF893) (thus, Star's documents bookend its period of curtailed discounting from January to November);

- In late 2008, McWane also increased its Project Pricing; customers took note, "wonder[ing] where [McWane] had been" (IDF867);[4] and

- In late 2008 and Q1 2009, Project Pricing by McWane to match Sigma and Star jumped substantially (CCPF1047).

[4] McWane asserts that "customers such as Dennis Sheley from Illinois Meter" testified that McWane priced aggressively during 2008. Actually, Sheley was the only customer to so testify. IDF862.

This evidence of parallel, non-competitive, interdependent pricing is more reliable and more probative than the evidence cited by McWane (discussed below).[5]

3. McWane's Evidence of Competitive Pricing Is Insubstantial

As is appropriate, McWane mined the Suppliers' ordinary course business documents for counter-evidence to support its contention that McWane and its rivals pursued competitive, independent pricing strategies during 2008. The two shards of evidence cited by McWane are unpersuasive.

First, McWane repeatedly touts that it offered more than **{ }** Project Pricing discounts during 2008.[6] But absent some frame of reference (and McWane offers none) this number is meaningless. Is **{ }** discounts of unspecified magnitude over twelve months a lot or a little?

McWane's number proves nothing. The Suppliers did not seek to eliminate Project Pricing. According to Mr. Tatman, McWane's objective was to "compress" the gap between transaction prices and published prices; he forecast that a reduction in Project Pricing would result in price stability even if some Project Pricing continued. CCPF859; Tatman, Tr. 378. Sigma's CEO Mr. Pais explained that "[Sigma was] not trying to eliminate special pricing, we were trying to minimize it." CCPF957. Mr. Pais urged Sigma and Star to keep their prices within two or three percentage points of McWane's published prices. CCPF1036-1037. McWane's strategy in the Domestic Fittings market is telling. In the 2009 MDA, McWane and

[5] Curtailing Project Pricing is an interdependent (not independent) pricing strategy. "To say that a firm's decision is interdependent with those of its rivals means that the profitability of that decision depends upon rivals' reactions…." Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶1434c (supp. 2012) (hereinafter, "*Areeda*"). In general, an oligopolist cannot profitably raise prices (or refuse to reduce its price) unless rivals do the same. *Id.*

[6] This number includes January and December 2008, months outside of the period of effective collusion. IDF681. For the most part, McWane's Project Pricing during the collusion period was self-initiated, as opposed to being a competitive response to a discount price offered by Sigma or Star. IDF859, 863.

Sigma agreed to sell Domestic Fittings at a weighted average price of 98% of McWane's published prices. CCPF2412, 2427. This evidence indicates that although the Suppliers sought to minimize the size and frequency of Project Pricing, they considered some volume of Project Pricing to be unavoidable.

McWane's assertion that these instances of Project Pricing during 2008 evidence the company's aggressive effort to gain market share at the expense of its rivals is contradicted by the company's internal documents. McWane's documents show its 2008 Fittings strategy was to "lead[] price stability," to "stay[] firm on pricing," and to exercise "more discipline" in pricing. IDF864-867. No McWane document references an attempt to gain market share through aggressive pricing. This mantra was invented for litigation. McWane apparently considered some volume of Project Pricing to be consistent with its strategy to lead price stability. IDF864-867.

In sum, the Suppliers sought to reduce the magnitude and frequency of Project Pricing, not to stop it.[7] "Accordingly, that at least some job pricing continued is not inconsistent with the conspiracy allegations." *McWane*, 2012 FTC LEXIS 155, at *43 n.14.

Second, McWane asserts that two emails memorializing complaints Mr. Tatman (McWane) registered with Mr. Rona (Sigma) about "ongoing job discounting" are inconsistent with the challenged conspiracy. ROB23-24, 28-29. In March 2008, Mr. Tatman complained to Mr. Rona that "some of the new prices in the market are being compromised with deals." IDF922. In August 2008, Mr. Tatman complained that in Florida and California, excessive discounts were available from both Sigma and Star. IDF924.

[7] This is less precise than a conspiracy to charge specific price X. But lack of precision is not a defense to antitrust liability. *See In re Publ'n Paper*, 690 F.3d at 65 (agreement to implement a price increase "to the fullest extent possible," if proven, is *per se* illegal).

Yes, these documents evidence instances of excessive discounting. But they are also evidence of an agreement not to discount. And Mr. Tatman's complaints about Sigma's and Star's prices indicate that excessive discounting was the exception and not the norm. (If prices were "compromised" in Florida and California, then in forty-eight states collusive pricing was holding firm.) Overall, Mr. Tatman was satisfied with the level of pricing discipline exhibited by Sigma and Star. In his Executive Report for the first quarter of 2008, Mr. Tatman wrote:

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

IDF868. Mr. Tatman's Executive Report for the second quarter identified continuing improvement: "the level of confirmed discounting and job pricing" by competitors "appears to have slowed over the past several months." IDF870. Mr. Tatman's strategy was to support a published price increase only if McWane's rivals curtailed Project Pricing (IDF638); McWane supported a published price increase in June 2008 (IDF840). Despite Mr. Tatman's occasional complaints, McWane's decision to lead a price increase signals McWane's satisfaction that its rivals had sufficiently curtailed Project Pricing.

Finally, in assessing a conspiracy claim, it is important to distinguish "between the existence of a conspiracy and its efficacy." *High Fructose*, 295 F.3d at 656. Evidence that a Supplier cheated on the agreement by offering excessive Project Pricing does not prove that there was no agreement in the first place. *United States v. Beaver*, 515 F.3d 730, 739 (7th Cir. 2008) ("It is not uncommon for members of a price-fixing conspiracy to cheat on one another occasionally, and evidence of cheating does not, by itself, prevent the government from proving a conspiracy."); *accord McWane*, 2012 FTC LEXIS 155, at *43. An agreement to restrain price

competition is *per se* illegal even if (contrary to the evidence here) the agreement was ineffective and cheating was rampant. *United States v. Socony-Vacuum*, 310 U.S. 150, 218-219 (1940); *United States v. Andreas*, 216 F.3d 645, 669, 679 (7th Cir. 2000) (cheating by cartel members did not disprove conspiracy claim); *United States v. SKW Metals & Alloys, Inc*., 195 F.3d 83, 86 (2d Cir. 1999) (same); *Areeda* ¶1404.

Cheating by McWane or the other Suppliers does not disprove a conspiracy, and is not a defense to price fixing.

4. Overwhelming Plus Factor Evidence Establishes Concerted Action

Acting in parallel, McWane, Sigma, and Star curtailed Project Pricing during 2008. Their conduct was contrary to each firm's independent (or unilateral) interest. *See* Donald S. Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655, 662 (1962) ("The decision of an individual seller to forgo immediate additional sales by lowering his price makes sense only if his competitors likewise abstain."); *Areeda* ¶1415c. McWane misunderstands this concept. The relevant question is not whether McWane's pricing actions were contrary to its self-interest, but whether such actions "would contravene self-interest in the absence of similar behavior by rivals." *Areeda* ¶1415a.

The Suppliers' broad pattern of non-competitive behavior (curbing discounting, centralizing pricing authority, sharing confidential business data) is particularly anomalous with regard to Star, historically the industry maverick. More than just anomalous, more than contrary to unilateral interest, Star's conduct reaches the level of "irrational" and "bizarre" (IDF698-703) – unless Star had confidence that rivals would likewise forbear from competing (CCPF976). Why in 2008 did Star expect and trust its rivals to forbear? What explains the curtailment of Project Pricing that arises in early 2008 and expires before year-end?

The Commission's task is to determine whether we are observing pure conscious parallelism, or instead concerted action. The distinguishing feature of concerted action is inter-firm communication (verbal or non-verbal) that facilitates coordination. Turner, *Definition of Agreement*, 75 HARV. L. REV. at 664-65; *see also* CCAB9-11 (citing cases and authorities). Complaint Counsel's Appeal Brief discusses thirteen categories of evidence that tend to exclude the possibility of simple interdependence, and that collectively prove concerted action by McWane. McWane's response is without substance.

The numbering system for plus factors used here is the same as used in Complaint Counsel's Appeal Brief.

1. Without explanation, McWane denies that the Fittings market is conducive to collusion. ROB15. The market facts that make the Fittings market conducive to collusion are not in dispute (*e.g.*, high concentration of suppliers (IDF355), product homogeneity (IDF322-324), high barriers to entry (IDF1044-1050), few product substitutes (IDF481-492), inelastic demand (IDF325-328)).

2. The Tatman Plan outlines McWane's pricing strategy for 2008. IDF638. McWane's claim that the document contemplates only "unilateral conduct" by McWane (ROB17) is inscrutable.

The Tatman Plan identifies Sigma and Star by name and lays out a multi-firm, collusive pricing strategy predicated on McWane communicating a specific message to its rivals. IDF637-638. Specifically, McWane will support higher published prices only if Sigma and Star curtail discounting. IDF638. The document plainly states that competitor cooperation is necessary for success, including the requirement that: "The Big 3 not allow[] 3rd tier suppliers like Serampore to disrupt the process." IDF638. McWane's intention to communicate the Plan to rivals is also

explicit: the strategy is headed "Desired Message to the Market and Competitors." IDF638. This is unmistakably a collusive scheme predicated on inter-firm communication.

The Suppliers later implemented the specific actions described in the Tatman Plan, including step-wise increases in published prices, a reduction in Project Pricing, centralization of pricing authority, and greater price transparency (through DIFRA). CCPF907-1571.

McWane avers that the physical document was never shared with Sigma and Star. ROB17. McWane's error here is presuming that a copy of the McWane Plan must be discovered in the files of Star and Sigma to prove the challenged conspiracy. Instead, the proof lies in the communication of the Plan, and in Star's and Sigma's actions in conformity with it. In December 2007, the Plan was hatched; inter-firm communications – public letters and private telephone calls – follow.

3. Thus, in late 2007, Mr. Tatman was a man with a "Desired Message to … Competitors." Telephone records indicate that between the time Mr. Tatman hatched the Plan in December 2007 and McWane's January 11, 2008 Letter launching the Plan, Mr. Tatman communicated four times with the executive responsible for setting Sigma's Fittings prices, Larry Rybacki. IDF609, 611; CCPF923. After exchanging pleasantries (Mr. Rybacki says that once he welcomed Mr. Tatman to the industry[8]), what was discussed?

The executives had no legitimate business to discuss. IDF613. This leaves illegitimate business and in particular Mr. Tatman's Plan to stabilize Fittings prices. This inference (not speculation) is reasonable because: (i) the calls coincided with Mr. Tatman's professed intent to communicate the Plan to his competitors; (ii) McWane offered no alternative explanation for the

[8] McWane states that one of the four December/January calls was to schedule a DIFRA meeting. ROB20. This misstates the evidence. *See* CCPF1111.

telephone calls (the executives profess not to recall (IDF612, 623, 624, 644; CCPF 923)); (iii) later in the year, Mr. Tatman complained to Sigma about certain Project Pricing – evidencing Mr. Tatman's proclivity to discuss pricing with competitors, as well as his belief that Sigma was breaching a prior agreement (IDF922-924); (iv) in April 2009, Mr. Tatman provided assurances to Star concerning McWane's published prices, establishing a pattern of improper price communications with competitors (IDF1018); and (v) Mr. Tatman testified that he had no recollection of the April 2009 telephone call, demonstrating his propensity to disclaim or remove from memory his competition-related conversations with rivals (IDF1019).

While these secret communications between rivals in December 2007 and January 2008 may be insufficient alone to prove a conspiracy, these calls are a *bona fide* plus factor.

4. According to McWane, the company's January 11, 2008 Letter, viewed in pristine isolation, is "ambiguous." ROB17. The Commission should of course read McWane's Letter in context: It was an integral component of McWane's Plan for collusive pricing (CCPF921-922, 936-938), and Mr. Tatman has conceded that the Letter was directed to Sigma and Star and intended to induce them to curtail their Project Pricing (IDF647, CCPF934, 939).

In this context, the January 11 Letter conveys a clear message: McWane is communicating that it will curtail Project Pricing and support higher published prices, conditional upon Sigma and Star also curtailing Project Pricing. This is the intended message (*see* 2, above, Tatman Plan); this is how the Letter was understood by Sigma and Star (*see* 5 & 6, below); and McWane offers no alternative explanation.

McWane affirmatively proposed terms of coordination to its rivals; it invited collusion.

5 & 6. Upon receiving the January 11 Letter, both Sigma and Star curtailed Project Pricing, exactly as proposed by McWane. IDF664, 674, 686. Star, the erstwhile maverick,

viewed its response as "doing … what is right for the industry." IDF686. Sigma described its non-competitive strategy as a deliberate message to McWane. *See* IDF664; CCPF964.

For both Sigma and Star, acceptance of McWane's January 11 invitation to curtail discounting is contrary to the company's independent interests, evidences a new-found trust in competitors, and consummates the illegal agreement. McWane offers no rebuttal.

7. In December/January 2008, the Suppliers in parallel instructed sales staff to emphasize price over volume and/or centralized pricing authority (as specified in the Tatman Plan). IDF664, 674, 686. This, as Professor Kovacic explains, is a "super plus factor," strongly indicating explicit collusion. William E. Kovacic, *et al.*, *Plus Factors and Agreements in Antitrust Law*, 110 MICH. L. REV. 393, 422 (2011). McWane offers no rebuttal.

8. As discussed above, on at least two occasions Mr. Tatman complained to Mr. Rona (Sigma) about excessive Project Pricing. McWane answers that Mr. Tatman had a legitimate reason to talk to Mr. Rona about buying Fittings from McWane. ROB23. But Mr. Rona admitted the second call had no legitimate purpose (IDF926), and Mr. Tatman proffered no recollection of the calls (IDF923-925). More importantly, Mr. Tatman had ***no*** legitimate reason to talk to Mr. Rona ***about*** Sigma's prices to Distributors, and had ***no*** legitimate reason to talk to Mr. Rona ***about*** Star's prices to anyone. The message to Sigma in these communications is: McWane has caught you cheating on our deal; McWane remains committed; but Sigma must take corrective action ("do [its] part"). IDF922.

McWane claims that the emails are "vague and ambiguous." ROB24. Upon review, the Commission will see for itself that the documents are eminently clear, and evidence wholly improper inter-competitor communications. *See Areeda* ¶1419a (When a competitor "complains to its rival about the latter's 'low price' … the 'objective' meaning of such statement to the

reasonable observer seems clear: the only business rationale for complaining is to induce a higher price.").

9. The testimony of Mr. McCutcheon, Star's Vice President of Sales, regarding his dinner conversation with Mr. Pais (Sigma) is another smoking gun. Just days after McWane (the ringleader) complained to Sigma (its willing lieutenant) about discounting (urging Sigma to "do [its] part"), Sigma's CEO brings this message to Star: If Sigma and Star keep their Fittings prices within two or three multiplier points of published prices, then McWane will "treat us better." CCPF1036-1037. This *quid pro quo* is the essence of the Tatman Plan. Sigma must have learned of the Plan from McWane. When Sigma ferries this message to Star, a price conspiracy between McWane and Sigma is (again) consummated.

McWane asks the Commission to conclude that Sigma and Star (but not McWane) conspired to curtail Project Pricing. *See* ROB22. This is Hamlet without the Prince – feeble and bereft of meaning. McWane generated the Tatman Plan, disseminated the January 11 Letter, communicated regularly with Sigma, cajoled Sigma to do its part, and complained when it failed to do so. McWane was the market leader and therefore essential to the success of any scheme to stabilize Fittings prices; McWane's suggestion that Sigma and Star omitted McWane from their conspiracy makes no sense. *See* CCPF900 (Sigma's President writing with reference to McWane, "while we can take the market price down on our own, we need THEM to take it up!"); CCPF964 (McWane was the "gorilla in the room.").

10. The DIFRA information exchange, Sigma documents acknowledge, was part of the broader industry effort to stabilize prices. IDF768; CCPF1279. Star viewed DIFRA in the same way, entering reluctantly and withdrawing when the price-fixing scheme fell away. DIFRA is discussed in greater detail in Part II.B, *infra*.

11. McWane asserts that the May 7 Letter, viewed in isolation, is ambiguous. ROB18. However, the evidence, viewed in its entirety, shows a second *quid pro quo*: McWane agreed to raise published prices in exchange for Sigma and Star participating in DIFRA. CCPF1155-1245.

12 & 13. Telephone records show that the Suppliers' senior sales executives communicated frequently with one another throughout the conspiracy period. CCPF713-786, 1030. (Calls between Mr. Rybacki and his friend Tom Frank are a small fraction of the total. CCPF715.[9]) McWane's assertion that these executives never discussed Project Pricing should be rejected, given that: (i) several executives initially attempted to deny the existence of the calls (CCPF717-722); (ii) the executives often had no legitimate business reason for talking to one another (CCPF716-719); (iii) the Suppliers were generally uninhibited in discussing prices and pricing strategy (*e.g.*, CCPF701-712); (iv) the Suppliers' actions against interest indicate substantial trust in one another (CCPF1056-1071, 829-841), indicative of prior communications; (v) Sigma exhibits a precise understanding of the terms of the Tatman Plan, again indicating prior communications (IDF664, CCPF1036-1037); and (vi) the witnesses offer no alternative explanation, instead professing no recollection of the conversations (IDF612, 623, 624, 644; CCPF717, 884, 894, 923, 952, 1040, 1088, 1110, 1164, 1221, 1452, 1449, 1532). McWane disputes none of these considerations.

These calls are a plus factor, one of thirteen components of an evidentiary record that is most persuasively read as proving conspiracy rather than simple interdependence.

[9] McWane asserts (without support) that Mr. Rybacki's calls to McWane were limited to four calls to Mr. Tatman and calls to his "personal friend" Tom Frank. ROB36. There were eight calls totaling 47 minutes between Mr. Rybacki and Mr. Tatman's cell phone. CCPF715. In addition, there were 15 calls totaling 61 minutes to a McWane number in Tyler Texas. *Id*. McWane has no basis to limit these calls to Mr. Rybacki calling his "friend."

5. McWane's Waiver Argument Is Without Merit

According to McWane, the "law of the case" doctrine dictates that Complaint Counsel has "concede[d]" that Judge Chappell's interpretation of McWane's January 11, 2008 and May 7, 2008 letters is correct. ROB34 (citing the law of the case). This is frivolous.

The law of the case doctrine simply does not bind a reviewing tribunal considering the timely appeal of a lower court's rulings. *Marseilles Hydro Power LLC v. Marseilles Land & Water Co*., 481 F.3d 1002, 1004 (7th Cir. 2007) (doctrine "has no application to the review of rulings by a higher court"). McWane cites no case – and Complaint Counsel can find none – in which failure to argue a claim on appeal precludes the timely, concurrent appeal of related factual findings in connection with a separate, freestanding claim.

6. McWane's Published Price Announcements Were in Furtherance of the Conspiracy to Curtail Project Pricing

The centerpiece of McWane's defense is its claim that during 2008, the company acted independently ("charted its own course") on published prices. On two occasions, Sigma announced future published price increases, and Star signaled a willingness to follow. McWane subsequently announced smaller future published price increases. Sigma and Star then followed McWane's lead on prices.

McWane contends that this sequence shows that McWane's strategy was not to conspire on Project Pricing, but to underprice its rivals. McWane's argument is defective for four reasons.

1. There is no legal or economic inconsistency between independent decision-making on published prices (as McWane asserts) and a conspiracy to refrain from offering discounts off the independently established published prices (as alleged in the Complaint). Complaint Counsel is not required to show a conspiracy on both the base price and discounting.

An agreement to limit discounts, by itself, is *per se* illegal. *E.g.*, *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 648 (1980).

2. The practice of using advance price announcements to "negotiate" a consensus on published prices is a textbook and non-competitive strategy for oligopolists. Louis Kaplow, *An Economic Approach to Price Fixing*, 77 ANTITRUST L.J. 343, 389-90 (2011) ("[A]dvance price announcements, which may be followed by rivals' responsive announcements and further modifications by the initiator, in as many rounds as necessary, may reduce risks attendant with changing prices, thereby facilitating oligopoly pricing."); *see also Areeda* ¶1435d. McWane's participation in this minuet is not evidence of competitive ardor. Sigma floated (and later withdrew) its proposal for a large increase in published prices, but the industry ultimately reached a consensus at the lower price level preferred by McWane. McWane was asserting its status as the industry "price leader."

3. The course charted by McWane with regard to published prices was not pro-competitive, but rather an integral part of its strategy to achieve a collusive increase in transaction prices. As set forth in the Tatman Plan, McWane was doling out small published price increases "in stepped and staged increments" in order to induce and reward discipline among its co-conspirators when it came to reduced discounting. IDF638 ("For 2008, we [McWane] will support net price increases but will do so in stepped or staged increments. A prerequisite for supporting the next increment of price is reasonable stability and transparency at the prior level."). Sigma and Star received McWane's message, understood the strategy, and responded by curbing Project Pricing – in full accord with the Tatman Plan.

McWane believed that somewhat smaller published price increases reduced the incentive to cheat and thus were more conducive to stable collusion and higher transaction prices. This was not a pro-competitive strategy.

4. McWane's claim that it "underpriced" its rivals is simply untrue. McWane was issuing ***advance*** price announcements,[10] with the expectation and understanding that Sigma and Star would substantially match these announced prices ***before*** they became effective. Mr. Tatman acknowledged precisely this in the Tatman Plan. IDF638 ("I believe Sigma and Star will mimic and verbally follow any program we publish."). McWane's rivals matched McWane's announced prices before they went into effect. IDF615, 674, 702, 834-844. If McWane were interested in underpricing its rivals to gain volume, it could have announced a price reduction that was effective immediately, thereby gaining at least a short-term advantage before its rivals could respond. McWane did not pursue this strategy.

In sum, McWane's advance price announcements were a part of its collusive scheme to restrain Project Pricing; they were not an effort to underprice its rivals or to gain market share.

B. The DIFRA Information Exchange Is Unlawful Under the Rule of Reason

McWane concedes (as it must) that the DIFRA information exchange was concerted action, that collectively the participants in the DIFRA exchange (the Suppliers) had market power in the Fittings market, and that the Fittings market was structurally conducive to collusion. McWane makes its stand on the issue of actual or likely anticompetitive effects, arguing that there is no evidence that an exchange of aggregated, historical output information can facilitate collusion. ROB39-44. McWane is incorrect. Economic theory explains how the DIFRA

[10] IDF645 (January 11, 2008 price announcement effective February 18, 2008); IDF840 (June 17, 2008 price announcement effective July 14, 2008).

exchange can facilitate tacit or express collusion, and the contemporaneous, ordinary course business documents of the DIFRA participants, including McWane, explain that DIFRA did in fact facilitate collusion.

Collusion (tacit or express) requires that firms reach consensus on the prices to be charged and monitor adherence to those prices. *See* George J. Stigler, *A Theory of Oligopoly*, 72 J. POL. ECON. 44, 45-46 (1964). Effective monitoring deters deviation from consensus pricing. *Id.* Economic theory explains that the exchange of aggregated, historical sales data can facilitate the monitoring of adherence to consensus price levels. *See* Massimo Motta, COMPETITION POLICY: THEORY AND PRACTICE 150-151 (2004). In the absence of such an information exchange, and in a market such as Fittings where many transaction prices are non-public, each market participant knows with confidence only its own sales volume. A decline in sales volume might mean that rivals are secretly deviating from consensus prices; it might also mean that demand is soft market wide. Left unresolved, this uncertainty puts a downward bias on price. The exchange of sales volumes resolves this uncertainty by allowing participants to calculate their own market share and to use changes in that share to detect cheating by rivals. *Id.* By facilitating monitoring of rivals' adherence to published prices, exchanges of sales data can give firms confidence to experiment with higher prices. *Id.*; *see also* George A. Hay, *Oligopoly, Shared Monopoly, and Antitrust Law*, 67 CORNELL L. REV. 439, 463-65 (1982).

This is exactly how the Suppliers used the DIFRA information exchange. The record is replete with instances of McWane using the DIFRA data to monitor rivals' price levels. IDF783, 779; CCPF1244-1245; Tatman Tr. 538 (share loss as revealed in DIFRA data informed McWane that "we obviously must be getting beat on price again"). In fact, McWane now admits that it used the DIFRA data to detect discounting. ROB40 (In June 2008, McWane "interpreted a

perceived reduction in its own market share as being the result of price competition from other Suppliers."). Similarly, Sigma's President explained how DIFRA "helped maintain the pricing discipline" by allowing each firm to resolve uncertainty posed by sharply declining sales – exactly as predicted by the economic literature. IDF768-772. This evidence flatly refutes McWane's claim that the DIFRA exchange was "incapable of facilitating price collusion" and "did not (and could not) have any impact on pricing decisions." ROB40-41.

Understandably reluctant to engage with this evidence of how DIFRA facilitated collusion ***in fact***, McWane claims instead that the aggregated and retrospective nature of the information exchanged makes such an outcome unlikely ***in theory***. ROB42. McWane's argument is flawed. Courts recognize that the exchange of such data among a limited number of firms can facilitate price coordination by enabling firms to monitor rivals' adherence to consensus price levels. *See Todd v. Exxon*, 275 F. 3d 191, 212 (2d Cir. 1991) (aggregated, retrospective data reducible to subsets consisting of three competitors (the "Job Family Survey") allegedly used to monitor rivals' adherence to announced pricing actions was capable of facilitating collusion); *Jung v. Ass'n of Am. Med. Colleges*, 300 F. Supp. 2d 119, 166-68 (D.D.C. 2004) (same conclusion for subset of five competitors). The efficacy of the type of data exchanged must be considered in light of the collusive problem to be solved by the information exchange. Hay, *Oligopoly*, 67 CORNELL L. REV. at 463. If cartel formation is at issue, then prospective information would be useful. If monitoring collusion (tacit or express) is the goal, as here, then retrospective data is essential.

McWane advances one efficiency rationale for DIFRA: it claims to have used DIFRA data to sharpen competition in 2008 when it took a price ***increase*** after detecting discounting by its rivals. ROB40. McWane is confusing two very different concepts: detecting rivals'

discounting in order to better pursue collusion (an anticompetitive effect), and detecting rivals' discounting in order to conform one's own price to the prevailing market price (an efficiency justification). McWane's use of the DIFRA data in June 2008 falls into the first category. McWane believed that the large published price increase sought by Sigma and Star was counter-productive in light of the prevailing level of discounting, refused to support that increase, and proposed a smaller one conducive to higher, collusive, and more stable transaction prices. IDF804-805. This is a textbook example of using an information exchange to facilitate stable collusion. *See* CCPF1305 (McWane believed that "DIFRA will eventually add some increased stability" to the Fittings market.). If McWane had been making an efficient, output expanding use of the DIFRA data (detecting discounting in order to conform to market price), McWane would have *lowered* its price to conform to the market price rather than taken a price increase.

Although an information exchange can certainly serve legitimate purposes, McWane has failed to identify any efficiency applicable to DIFRA. The fact that the exchange arose during a period of (at least) tacit collusion, and was disbanded when Star began to compete more aggressively in November 2008, confirms that there was no procompetitive rationale. *McWane*, 2012 FTC LEXIS 155, at *49.

C. Dr. Normann's "Data Analysis" Was Grossly Flawed

McWane recites and relies upon the testimony of its economic expert, Dr. Normann. Complaint Counsel's Appeal Brief (and Dr. Schumann's rebuttal expert report) established that Dr. Normann; (i) analyzed invoice data without taking into account the price formation date; (ii) relied on data that was laden with other nonsystematic errors; (iii) failed to control for relevant market factors; and (iv) failed to assess the statistical significance of his findings. For all these reasons, the conclusions are unscientific and unreliable. *See Apple*, slip op. at 122 n.61 (rejecting

expert opinion not supported by scientifically sound analysis). McWane does not dispute, rebut, or comment upon any of the foregoing.

To illustrate these errors, below we address in greater detail Dr. Normann's conclusion that McWane's "price variation" was higher during 2008 than in other years.

1. Dr. Normann's Price Variation Analysis Is Meaningless and Does Not Disprove the Existence of Parallel Conduct

McWane argues that Dr. Normann's Figure 4 analysis of the standard deviations in the prices for only three products (of hundreds sold) supports a finding that McWane did not reduce job pricing in parallel with Sigma and Star. ROB32-33. In measuring standard deviations, Dr. Normann was "capturing … the dispersion of prices." Normann, Tr. 5368. Dr. Normann hypothesized that, "a reduction in job pricing and selling more at the published multiplier would result in a reduction in sort of price variance or dispersion of prices." Normann, Tr. 5367-5368. But standard deviation of price is not a meaningful measure of Project Pricing. Dr. Normann agreed that a change in standard deviation over time is a function of both a change in uniformity of product price (or the level of Project Pricing) and a change in product price itself. Normann, Tr. 5375-5376. Dr. Normann's Figure 4 analysis is meaningless because a change in mean price alone – quite apart from changes in dispersion around the mean – can affect measures of standard deviation. And Dr. Normann did not report any information as to the relative significance of changes in price itself to the standard deviations he graphed in Figure 4. Normann, Tr. 5376.

Dr. Normann's Figure 4 analysis is also deficient and unreliable for the reasons (summarized above) that all of his data analyses are unreliable – his data is laden with errors and he does not use proper statistical methodologies. Specifically he reported information pertaining to dispersion of prices for only the top three Fittings. Normann, Tr. 5367-5368. He admitted that he did not know if there were weeks in which one of the Sellers did not sell one of these

products, resulting in missing data. Normann, Tr. 5372-5375. He also did not know if there were data entries where the multipliers for McWane were incorrect or missing. Normann, Tr. 5371-5372; *see also* CCPF1424-1432; CCRRFF189 (detailing problems with incorrect and missing multipliers). Dr. Normann also did not report or testify about what percentage of Fittings these top three products represent.

In addition, Dr. Normann's Figure 4 analysis is meaningless because his statistical methodologies are unreliable. He did not report any measure of mean standard deviation or the coefficient of variation (or any other measure that indicates the extent of variation relative to the mean of the population) for any product for any period. Normann, Tr. 5368-5370. He did not report whether the mean coefficients of variation for different time-periods differed systematically, and he did not report any hypothesis testing or confidence intervals. Normann, Tr. 5370-5375. Without these measures and these tests, one cannot conclude that the standard deviations are statistically different from one period to the next, thus rendering the analysis meaningless.

2. Dr. Normann's Data Analysis When Applied to the Correct Period Is Consistent with Collusion

If taken at face value and applied to the correct time period (February through October 2008), Dr. Normann's analysis ***shows a price increase*** during the conspiracy period. Dr. Norman's analysis shows that McWane's prices increased during the conspiracy period by **{ }**%, Sigma's by **{ }**%, and Star's by **{ }**%. IDF943.

Dr. Normann's analysis was limited to his calculations using the flawed data; he never spoke with anyone at McWane and he ignored McWane's contemporaneous business records. He conveniently ignored McWane's own financial records demonstrating increasing prices in 2008, and contemporaneous Star and Sigma business records demonstrating increasing "per-

pound realization" and price increases, respectively. Normann, Tr. 5767-5776; CCRRFF189. These contemporaneous, ordinary course of business documents, contrary to Dr. Normann's opinion, establish that **{**

}. CCPF1356-1357; *see also* CCPF1343-1359 (McWane's gross profits also increased in 2008 over 2007, despite reduced volume).

III. CONCLUSION

McWane should be adjudged liable under Count I (price fixing) and Count II (anticompetitive information exchange).

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Respectfully submitted,

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CERTIFICATE OF SERVICE

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

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I certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and the adjudicator.

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