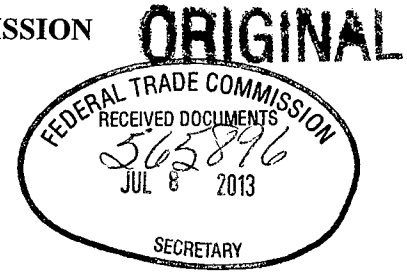
PUBLIC

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION



COMMISSIONERS: Edith Ramirez, Chairwoman
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In the Matter of	)	PUBLIC
MCWANE, INC., a corporation, and STAR PIPE PRODUCTS, LTD., a limited partnership.	)	DOCKET NO. 9351

RESPONDENT McWANE, INC.'S ANSWERING BRIEF TO COMPLAINT COUNSEL'S APPEAL BRIEF

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Dated: July 8, 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

Complaint ¶ x –Complaint filed January 4, 2012

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

Initial Dec. # - Administrative Law Judge's May 1, 2013 Initial Decision

F. # - Administrative Law Judge's Findings of Fact

RB # - Respondent's Post Trial Brief

RFF ¶ - Respondent's Post Trial Proposed Findings of Fact

CCB # - Complaint Counsel's Post Trial Brief

CCFF ¶ - Complaint Counsel's Post Trial Proposed Findings of Fact

CCRFF ¶ - Complaint Counsel's Reply To Respondent's Proposed Findings of Fact

CCAB # - Complaint Counsel's Appeal Brief

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INTRODUCTION

Administrative Law Judge Chappell squarely rejected Counts 1-3 (respectively alleging FTC Act Section 5 conspiracies to increase Fittings prices and exchange competitively sensitive sales information, and a Section 5 "price signaling" claim). He found "substantial evidence," including "substantial, probative economic evidence," that McWane independently decided to ***underprice*** the published prices of Sigma and Star in Winter and Spring 2008, during the alleged conspiracy period, and did so "in order to beat prices being offered by its competitors, which is a pro-competitive purpose." Initial Dec. 292; F. 959. He found that McWane determined its published prices internally in a detailed state-by-state analyses and, as a result, that its published prices "changed in different directions and by different amounts on a state-by-state basis"—variation that was "consistent with competitive independent decision-making by McWane" and "inconsistent with the Complaint's allegation" of price coordination. F. 936. He found that McWane's repeated decisions to underprice Sigma and Star were "designed to put financial pressure on its competitors" and "serve its goal of increasing volume and gaining market share." F. 633, 636.

Judge Chappell found that McWane's Project Pricing was also independent and pro-competitive. Indeed, McWane was "extremely aggressive" in offering discounts below its published prices in 2008 and offered its customers more than [redacted] Project Pricing discounts to win specific jobs that year. F. 850-51, 861-62. Expert economic analyses demonstrated that McWane's invoice prices were often far below its published prices and that its price variation was "generally higher" during 2008 than in other years. The Judge thus concluded that the facts "contradict a parallel curtailment of Project Pricing." F. 846-47. As a result of its rampant Project Pricing, McWane's average Fittings prices "declined over the course of a multi-year period from January 2007 through November 2010, including before, during, and after the January 2008

to February 2009" alleged conspiracy period. F. 940, 965. Indeed, Judge Chappell found that "McWane's average Fittings prices decreased by [redacted]%," despite significant [redacted]% increases in scrap iron and other raw materials costs, while Sigma's and Star's increased by modest amounts. This "price decline by McWane during the same period as price increases by Sigma and Star is inconsistent with a conspiracy to raise prices involving McWane." F. 942, 961-62.

Judge Chappell concluded that McWane offered "ample credible and probative evidence," including "reliable and persuasive expert opinion," of its independent and pro-competitive conduct which included underpricing Sigma and Star's published prices, hundreds of job discounts, cash discounts, quarterly and annual rebates, absorption of freight terms, and credit extensions. Initial Dec. 320, 321 n. 23.

In contrast, Judge Chappell found that Complaint Counsel "did not offer any expert opinion that there was economic evidence indicating a conspiracy to raise and stabilize Fittings prices." Initial Dec. 338. Instead, Complaint Counsel offered only "indirect and inferential" speculation drawn from "a complex web" of "noneconomic, circumstantial evidence" that was "weak," "unverified," "unpersuasive," "not probative," "strained," "unsupported," "pure speculation" that "overreaches" and required "numerous assertions, assumptions, and inferences that are not sufficiently grounded in evidence." Initial Dec. 279, 300, 322 n.25, 338, 342, 350.

Complaint Counsel's assumptions and inferences were often "against the greater weight of the evidence," "without merit," and "inconsistent" with the alleged conspiracy. Initial Dec. 300, 304 n. 14, 306, 307, 322 n. 25, 325, 330, 333, 334, 339, 342, 350. The Judge found "no evidence" to support Complaint Counsel's request that he draw a "nefarious inference" from facially legitimate documents and rejected "the numerous pleas by the government" to "assist the government in winning its case" by drawing inferences "where proof [was] lacking" and by

"fill[ing] in the blanks" in Complaint Counsel's evidence. *Id.* at 351. In sum, "Complaint Counsel's daisy chain of assumptions fails to support or justify an evidentiary inference of any unlawful agreement involving McWane, and the multilayered inference is rejected." Initial Dec. at 305-07.

Judge Chappell concluded, as a result, that Complaint Counsel failed to prove its alleged Count 1 conspiracy claims. "When fairly and objectively scrutinized and weighed, the evidence fails to prove that McWane conspired with Sigma and Star to raise and stabilize prices in the Fittings market, as alleged in the Complaint." Initial Dec. 350-51. "The totality of the evidence, given due weight and viewed as a whole, fails to demonstrate that McWane, together with Sigma and Star, had an agreement" or "engaged in parallel conduct by curtailing Project Pricing, as claimed by Complaint Counsel," and was thus "not consistent with the alleged conspiracy." Initial Dec. 317-18, 350.

Judge Chappell, likewise, rejected Count 2 because Complaint Counsel "fails persuasively to explain, how historic, aggregated, tons-shipped data" that "did not include or reveal any sales prices, or report any dollar figures" and "did not reveal the tons shipped or market shares of the individual Suppliers," could possibly "facilitate" a conspiracy. He therefore held "the evidence fails to prove that the DIFRA tons-shipped data reporting system has the nature and tendency to facilitate price coordination, as argued by Complaint Counsel." Initial Dec. 302-03, 362.

The Judge concluded that Count 3 failed because McWane's "vague, highly ambiguous" Customer Letters did "not set forth the alleged offer[s]" that Complaint Counsel alleged was price signaling. Initial Dec. 368; *see* Areeda, ¶ 1419e4 at 147. The Judge held that the letters

were thus "hardly [] naked invitation[s] to fix prices" and the "greater weight of the evidence" did not support Complaint Counsel's strained reading. Initial Dec. 366, 368.

Judge Chappell's rejection of Counts 1-3—occupying more than 350 pages of his 464-page decision—was based on his detailed assessment of the credibility of the 16 live witnesses (15 called by Complaint Counsel) he saw and heard over the course of a 6-week trial. The trial transcript alone is more than 6,045 pages and the trial record Judge Chappell reviewed in rendering his Initial Decision includes an additional 73 days of deposition or investigative hearing testimony. Nearly 2,000 exhibits were admitted into the record. The parties' proposed post-trial findings of fact and law topped 3,000 pages.

Incredibly, Complaint Counsel's appeal of the dismissal of Counts 1 and 2 centers on the proposition that Judge Chappell simply got it all wrong, that his extensive review and "methodical dissection" of the evidence, CCAB at 12, "did not recognize," "improperly ignored," "failed to evaluate," "failed to consider," and "fails to advance a credible analysis" of the government's non-economic assumptions and speculation, and "simply refused to make reasonable inferences." CCAB 1, 11, 12.[1] According to Complaint Counsel, Judge Chappell's thorough and well-documented Initial Decision is "not credible," "lacks credibility," "misses the point," and "failed to appreciate" the government's evidence. CCAB 1, 12, 20, 38. Complaint Counsel argues that the decision "improperly" and "wrongly credited" evidence that favored McWane (even though virtually all of it was elicited during the government's case in chief). CCAB 38, 43 n. 28.

The Commission should reject Complaint Counsel's appeal for what it is: a poorly-disguised (and highly biased) disagreement with the Court's interpretation of the evidence and the law. The Commission rules entrust these factual and legal determinations to Judge Chappell

[1] Complaint Counsel does not appeal Judge Chappell's dismissal of the Count 3 price signaling claim and thus concedes its factual and legal propriety.

and not to Complaint Counsel—and for good reason. Judge Chappell's view of the witnesses' credibility, his understanding of the evidentiary record, his application of the facts he found to the law, and his dismissal of Counts 1 and 2 should be affirmed in their entirety.

* * *

This "conspiracy" case was, in the end, a fishing expedition in uncharted waters. Because Section 5 is unlimited by any clear policy statement, the case was blown in different directions at different times depending on Complaint Counsel's whim. The Complaint alleged a conspiracy to increase published multipliers, and to eliminate discounts below multipliers, between January 2008 and "early 2009" when the enactment of the American Recovery and Reinvestment Act supposedly "upset the terms of coordination" and the Ductile Iron Fittings Research Association "disbanded." Complaint ¶ 3, 28-38; January 4, 2012 FTC News Release, http://www.ftc.gov/opa/2012/01/mcwane.shtm.[2]

After the close of fact discovery, however, Complaint Counsel blew this one-year alleged "conspiracy" into a full-force gale, arguing for the first time in its summary judgment brief that the "conspiracy" lasted well into 2009 and included an agreement to lower (not raise) list prices (not multipliers).[3] Then, in its pre-trial brief, Complaint Counsel blew the case into a hurricane

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[2] The Commission's Settlement Complaint with Sigma plainly alleges an end to the purported conspiracy in early 2009: "Beginning in January 2008 and continuing through January 2009." Sigma Complaint ¶ 2. The Commission's statements in aid of the Sigma and Star consent orders also note that alleged conspiracy existed only between "early 2008 . . . and January 2009." January 4, 2012 FTC News Release.

[3] Judge Chappell rejected Complaint Counsel's allegations regarding McWane's April 2009 list price announcement. He found that "on April 13, 2009, McWane, unilaterally and for its own competitive reasons, announced that it would begin using a new price list" and "did not consult with Star or Sigma in connection with the restructuring." Initial Dec. 334. He determined that Complaint Counsel failed to demonstrate "that the date of the telephone conversation between Mr. Tatman and Mr. McCutcheon was, in fact, April 28, 2009[,]" and even if it was, "at best, the substance of the telephone conversation . . . is more akin to an after-the-fact 'verification' of a previous price, than to an 'agreement to adhere' to prices." Initial Dec. 337.

and alleged that the "conspiracy" continued through 2010 (and led to raised multipliers in the middle of that year).[4] Complaint Counsel tried to blow the case farther and farther off course at the pre-trial conference, telling the Judge that its after-the-fact allegations were all part of one big conspiracy (albeit one that was not alleged at all in the Complaint):

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

Final Prehearing Conference, August 30, 2012, Tr. 158.

In the end, though, it was all hot air. At trial, Complaint Counsel's own expert, Dr. Schumann, flatly contradicted the lawyer-generated windstorm. Instead, he testified that there was not a multi-year conspiracy stretching into 2009 or 2010, Schumann, Tr. 4066 ("Q. And therefore, Dr. Schumann, you did not find one big, long conspiracy that lasted into 2010 -- A. Right. Q. -- correct? A. Yes, that's correct"). Instead, he testified there was no conspiracy at all, let alone a multi-year conspiracy stretching into 2010. Moreover, he acknowledged, that the terms of the supposed conspiracy between the Fittings suppliers were not discussed or communicated in any fashion. Dr. Schumann literally made up a claim that McWane's January 11, 2008 customer "contained language clearly intended as a message to Sigma and Star signaling"

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[4] Judge Chappell likewise rejected Complaint Counsel's allegations regarding "improper signaling" continuing into June 2010, holding that "[a]s with conduct allegedly occurring in April 2009, this June 2010 evidence is not probative of a conspiracy ending in 2008. Complaint Counsel fails to persuasively articulate why or how conduct occurring in 2010 makes the alleged 2008 conspiracy more likely than not." Initial Dec. 334 n.28

that "McWane's rivals must cooperate or prices [would] not increase further." CX 2260A (Schumann Report), at 43-44. On cross examination, he acknowledged that none of those words or anything like them were actually in the letter.[5] Schumann, Tr. 4203. Instead, they were a figment of his imagination. Dr. Schumann acknowledged that no McWane customer letter said anything about "centralizing" Project Pricing authority and that he performed no pricing analyses at all—none. Schumann, Tr. 4171-72, 4203, 4230, 4236. He conceded that every single witness affirmatively denied any agreement on multipliers and any agreement to eliminate or reduce job price discounts. Schumann, Tr. 4236-4237. Judge Chappell therefore correctly refused to allow Complaint Counsel "to distance itself from the record opinion of its own expert." Initial Dec. 333.

During closing argument, Complaint Counsel not only rescinded its multi-year "one" conspiracy claim—it rescinded its claim that McWane conspired to fix published multipliers in 2008: "We don't allege that they agreed on those multipliers at all. . . . I thought we've been very clear about that. I certainly hope the court understands it." Closing, Tr. 230. As Judge Chappell charitably noted, "Complaint Counsel's conspiracy theory has evolved from the time of the Complaint." Initial Dec. 277. McWane submits that the Commission should affirm Judge Chappell's dismissal of Counts 1 and 2, and reject Complaint Counsel's allegations as nothing more than hot air.

[5] Judge Chappell likewise found that McWane's letter "did *not* include" any such language. Initial Dec. 297.

STATEMENT OF FACTS

I. THE JUDGE CONCLUDED THAT "SUBSTANTIAL" EVIDENCE DEMONSTRATED THAT MCWANE PRICED INDEPENDENTLY AND PRO-COMPETITIVELY AT ALL TIMES

Judge Chappell found "substantial, probative economic evidence" that McWane priced independently and pro-competitively at all times. He found that McWane ***underpriced*** Sigma and Star's published prices in Winter 2008, ***underpriced*** Sigma and Star again in Spring 2008, and "substantially" underpriced Sigma and Star for medium and large diameter Fittings in Spring 2009. Initial Dec. 334; F. 645, 650, 655 ("McWane's January 2008 multiplier adjustment, *vis a vis* the previous published multipliers, resulted in reductions in 28 states"), 840-42 (June 17, 2008 letter implemented an increase which was "significantly smaller" than Sigma or Star), 1001. He found that McWane continued to offer hundreds and hundreds of job price discounts and a host of other price concessions throughout 2008 (and in 2009 and 2010). F. 850 ("McWane continued to offer its customers Project Pricing as well as other price concessions to its customers throughout 2008, 2009, 2010 and into the present").

Judge Chappell found that McWane's average invoice prices ***declined*** in 2008 (while Sigma and Star's increased), its job price discounts did not move in parallel with Sigma's and Star's, and that its published and invoice prices did not come close to keeping up with spiking raw materials costs. Initial Dec. 280 ("the evidence fails to demonstrate that the Suppliers had parallel intentions or took parallel steps or made parallel efforts to curtail Project Pricing"); F. 961 ("McWane's prices for non-domestic Fittings in 2008 did not keep pace with the level of inflation in McWane's costs.").

A. The Judge Found That McWane Charted Its Own Course In Winter 2008 With Lower Published Multipliers Than Sigma And Star

Judge Chappell found that McWane substantially underpriced Sigma and Star's published

prices in Winter 2008 and that its published and invoice prices did not come close to keeping up with significant increases in scrap iron and other raw material costs affecting the entire water-works industry (and foundries worldwide). In late 2007 and early 2008, demand plummeted due to the complete "collapse of the housing market." F. 580. At the same time, raw materials (pig iron, scrap iron, and coke), energy and labor costs were spiking dramatically. Initial Dec. 263-264; F. 579, 581-582, 586.

In the face of this double whammy, Sigma announced a 25% increase in its published list and multiplier prices in Fall 2007. F. 602. Star quickly followed Sigma's lead. F. 603. McWane, on the other hand, did not. Instead, in January 2008, McWane announced published prices ***substantially below*** Sigma and Star which "resulted in reductions in 28 states and no change in another 8 states." Initial Dec. at 266; F. 625-631, 633, 636, 645-46, 655. All of McWane's new multipliers were based on Mr. Tatman's internal state-by-state analysis of economic trends, the company's own production costs, and other factors, as set forth in CX 1664. F. 652. Mr. Tatman did not share any of these individually-determined prices in advance with Sigma or Star.

Judge Chappell found that McWane's pricing strategy "was designed to put financial pressure on its competitors" and "serve its goal of increasing volume and gaining market share." F. 633, 636. He found that "McWane would thereby be in a better position to detect and beat Sigma's and Star's pricing in the marketplace, and, hopefully, gain sales volume and market share." Initial Dec. at 267; F. 566-567, 592-594, 630-636. The Judge concluded that McWane's strategy was independent and pro-competitive. Initial Dec. 296 ("This is competitive, not unlawful, conduct by McWane.").

Sigma and Star each subsequently learned about McWane's prices after-the-fact from

their customers (not McWane). F. 662 ("Sigma did not receive McWane's January 11, 2008 Customer Letter from anyone at McWane"); F. 681 ("Star received a copy of McWane's January 11, 2008 Customer Letter from one of Star's customers"); Pais, Tr. 2058-2059; McCutcheon, Tr. 2506-2507). Sigma and Star executives internally expressed surprise and anger at McWane's significantly lower prices. F. 1010; Rybacki, Tr. 3580-3581, 3719. Nonetheless, each company subsequently withdrew its substantially higher prices and followed McWane's lower prices (at least, when it was in its self-interest to do so). F. 674, 677, 678, 702, 704; CX 1189; Rybacki, Tr. 1126-1127, 3694-3697; McCutcheon Dep. at 182:23-183:4.

B. The Judge Found That McWane Again Charted Its Own Course With Lower Multipliers In Spring 2008

The waterworks industry continued to feel the pressure of the spiking scrap iron and other raw material costs in early 2008. Sigma's management decided to make a "big, bold move" to raise Fittings prices to cover those ongoing cost increases. F. 789. On April 24, 2008, Sigma notified its customers that it would publish a multiplier increase of "up to 10 multiplier points" to take place on May 19, 2008. F. 797. This multiplier increase "was equal to a price increase for Sigma of approximately 25 to 30 percent, depending on geographic region." F. 798. Star quickly followed. F. 808. But again, McWane did not. F. 804-05, 809.

Instead, McWane charted its own course and did not follow Sigma's "large price increase." Initial Dec. 323; F. 804-05. Again, McWane issued published multipliers that significantly ***underpriced*** Sigma and Star because McWane believed that was the best way to regain share which, in the end, would "make victory all the more swe[e]ter." Initial Dec. at 121, 323; F. 805, 807, 832, 839; CX 0139. And again, Star and Sigma learned of McWane's lower prices after-the-fact from customers (not McWane) and each subsequently rescinded its higher prices and followed McWane down. F. 843-844.

C. The Judge Found That McWane Continued To Provide Hundreds of Job Price Discounts And A Host Of Other Price Concessions

"It is undisputed that Project Pricing did not 'stop' in 2008." Initial Dec. 280. Judge Chappell found the record replete with evidence that McWane did not curtail job pricing in 2008, but instead continued to provide hundreds of job price discounts along with numerous other price concessions throughout 2008. F. 850. McWane provided approximately [redacted] different job prices in 2008. F. 861; Tatman, Tr. 387, 904-905, 907, 909-910, 914-915, 921, 930-931, 933-934, 995-998, 1071-1072 ("We continued to job-price every stinking month and we've never stopped"); RX 396; RX 399; RX 598. Customers, such as Dennis Sheley from Illinois Meter, testified that McWane was "extremely aggressive" regarding price and priced below published multiplier in order to win business. Sheley, Tr. 3445.

Due to its published prices and its Project Pricing and other concessions, McWane's non-domestic Fittings prices for 2008 ***declined*** relative to inflation: its non-domestic production costs rose by roughly [redacted] and McWane's gross margin declined [redacted] percent. Tatman, Tr. 860-862, 992-994 (Q: "Is part of the reason your profitability, your gross profit on nondomestics declined because of job pricing?" A: "Yes."); RX 631. In fact, McWane's Fittings competitors internally blamed McWane for "starting the price decline" in 2008. F. 900.

Judge Chappell also found that "[t]here was no special effort made in 2008 at Sigma to reduce Project Pricing" and Sigma did *not* announce to its customers in 2008 any intention to curtail project pricing. Initial Dec. 279; F. 674, 897, 898. Likewise, Star offered a total of 2,669 special prices, including job prices, "buy" programs, and "one-time-only" prices to its customers in 2008. F. 878-81. As Mr. Minamyer testified, "[Star] had to fight pretty hard for every order." Minamyer, Tr. 3278. Star required its sales staff to provide documentation to justify job pricing,

but never stopped or even reduced job pricing. RX 33 ("go get it and you can have your pricing.").

Judge Chappell found that the economic analysis of Respondent's expert, Dr. Parker Normann, constituted "substantial, probative, economic evidence" that was inconsistent with any agreement on published prices and that flatly "contradict[ed] a parallel curtailment of Project Pricing" by McWane, Sigma, and Star. F. 845-47, 959. Dr. Normann, who holds a Ph.D. in Economics from George Mason University and was the lead economist on Global Competition Review's "2012 Matter of the Year," performed substantial analysis of "the actual invoice prices charged by McWane, Sigma, and Star, over a multi-year period, including January 2008 through February 2009, as well as cost data and output data, and determined that the evidence is not consistent with the alleged conspiracy." Initial Dec. 342; F. 934. Dr. Normann demonstrated that "pricing was far from stable during this period," and that invoice price variation (which reflected job discounting) in 2008 was "generally higher" than at any other time from 2007 to 2010, contradicting a conclusion that the companies agreed to reduce job pricing. Initial Dec. 349; F. 846. Further, McWane's average invoice price (i.e., its job price) ***declined*** over the course of a multi-year period from January 2007 through November 2010—including "before, during, and after" the alleged conspiracy period—and did not move in parallel with Sigma and Star. Initial Dec. 342; F. 940. Moreover, "McWane's average price-per-ton for non-domestic Fittings for the year 2008 declined relative to inflation," because its non-domestic metal and energy costs increased by 40% to 50% during 2008 and increased 70% to 80% compared to 2007. F. 951, 962. Dr. Normann also evaluated inventory data to determine whether there was evidence of withholding—an indicator of a conspiracy to raise prices. F. 958. Dr. Normann found "no evidence of

withholding, and instead found an increase in output[,]" a finding inconsistent with a conspiracy. F. 958.

Judge Chappell determined that "[i]n comparison to Complaint Counsel's indirect and inferential economic evidence," Respondent's economic expert, Dr. Normann, "offered credible and persuasive expert opinion, based on actual prices as recorded by the Suppliers' invoice documents, kept in the ordinary course of business," and that his conclusions were "reliable and probative, and outweigh Complaint Counsel's proffered economic evidence." Initial Dec. 339-340, 342.

II. THE JUDGE REJECTED THE GOVERNMENT'S CIRCUMSTANTIAL CASE AS A "DAISY CHAIN" OF "WEAK," "UNPERSUASIVE," "UNSUPPORTED SPECULATION"

A. The Judge Found That The Government Offered No Economic Evidence Suggesting Parallel Conduct

In contrast with the "substantial, probative economic evidence" that McWane offered (F. 959), Complaint Counsel did not present *any* evidence regarding the number of Project Prices offered by McWane before 2008, and no evidence exists to support a determination that McWane "curtailed" such pricing in 2008. Initial Dec. 281. "Complaint Counsel did not offer any expert opinion that there was economic evidence indicating a conspiracy to raise and stabilize Fittings prices. Rather than offer its own expert testimony analyzing economic data, Complaint Counsel chose an 'attack-the-other-expert' strategy." Initial Dec. 338. Complaint Counsel also did not offer any economic evidence of a "curtailment" of Project Pricing by McWane, let alone any expert analysis of pricing data showing that McWane, Sigma and Star engaged in a parallel curtailment of Project Pricing. Initial Dec. at 277-278. Instead, Complaint Counsel's expert, Dr. Schumann, relied only on his review of documents and not an economic analysis of the available data. Dr. Schumann admitted that McWane, Sigma and Star all offered job price

discounts and other price concessions, including rebates, freight absorption, and credit extension, throughout 2008. Schumann, Tr. 4287-4290. He also admitted that he literally ignored McWane and Star spreadsheets and other documents recording each company's job discounts. Schumann, Tr. 4082, 4084-4091 ("I didn't consider it"). Instead, Dr. Schumann conceded that he relied on Mr. Tatman's early 2008 *speculation,* based on second or third-hand *hearsay* his sales force heard from customers, that discounting by Sigma and Star "appears" to have died down. CX 1177; Tatman, Tr. 550; Schumann, Tr. 4077, 4080-4081. Dr. Schumann took this "speculation" and edited out the key word "appears"—and simply asserted that, in fact, Project Pricing declined. On cross-examination, he recanted his opinion and acknowledged he simply made it up. Schumann, Tr. 4071, 4073 ("Q. Now, that's not the actual quote in the document, is it, sir? A. I had thought it was. I - - I - - Q. You left the word, out of your quote, *appears* to have died down significantly; right, sir? A. Yes."). Dr. Schumann also conceded that he ignored virtually all of the most relevant record evidence, including trial testimony from Mr. McCutcheon, Mr. Pais, Mr. Minamyer, and Mr. Bhargava, contemporaneous spreadsheets of McWane's job discounts and Star's job discounts, and McWane's "blue book" financial statements that flatly contradicted his made-up and untestable opinion. Schumann, Tr. 4084-4091, 4142-4145, 4149, 4263-4264, 4345-4346, 4367, 4371, 4379-4381. As a result, Judge concluded that "the evidence upon which Complaint Counsel relies to show that Project Pricing was curtailed in 2008 is hardly persuasive." Initial Dec. 339.

B. The Judge Correctly Rejected Complaint Counsel's "Numerous Pleas" To Accept Suggested Inferences That Were "Lacking" As "Weak" "Speculation"

Judge Chappell found that Complaint Counsel failed to offer any direct evidence of any advance price communication by anyone at McWane and any competitor—and, in fact, Dr. Schumann conceded the lack of any advance communication about prices. Schumann, Tr. 4171-

73, 4186-87, 4236-37. Instead, Complaint Counsel's case was entirely "indirect and inferential," "weak," "unpersuasive" and "unsupported." Initial Dec. 279, 286, 297, 306, 342. Complaint Counsel nonetheless argues that Judge Chappell should have "inferred" a conspiracy. Initial Dec. 281. But Complaint Counsel's argument hinges upon a complex 13-part "daisy chain of assumptions" and "numerous pleas" by Complaint Counsel inviting the Judge to speculate and accept inferences that simply do not exist. Initial Dec. 313, 351. The Judge found that "much of the circumstantial 'plus' factor evidence upon which Complaint Counsel relies requires that the underlying agreement first be presumed in order for the evidence to be probative of an agreement, which does not satisfy Complaint Counsel's burden of proof," and that "[f]urther weighing against a finding of an agreement" was "sworn testimony from the Suppliers that they made pricing decisions independently and did not discuss and agree to stop or curtail Project Pricing." Initial Dec. 319-20. The ALJ thus concluded that the "greater weight of the evidence" reflected "only pricing interdependence in the Fittings market, which is not illegal." *Id.*

Judge Chappell heard significant live testimony from Complaint Counsel's key witnesses. He conducted a "careful review" of Complaint Counsel's circumstantial case, including the bases for the 13 purported "plus factors" (CCAB 18-38) Complaint Counsel raises in its appeal, and he rejected each of them individually. He also rejected them *in toto* and concluded that the "totality of the evidence, given due weight and viewed as a whole, fails to demonstrate that McWane, together with Sigma and Star, had an agreement to curtail Project Pricing in the Fittings market." Initial Dec. 317. Thus, the Judge concluded that Complaint Counsel:

- failed to show that the Fittings market was sufficiently "conducive to collusion" that it amounted to a "plus factor." Instead, Judge Chappell concluded that this argument "adds little, if anything, to the inquiry into whether the totality of the evidence proves an unlawful conspiracy" **(purported plus factor one)**;