PUBLIC

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

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

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RECORD REFERENCES

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

CX - Complaint Counsel Exhibit

RX - Respondent Exhibit

ID - Initial Decision Page

IDF - Initial Decision Finding

CCPF - Complaint Counsel's Post-Trial Findings of Fact and Conclusions of Law*

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

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

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I. INTRODUCTION AND SUMMARY OF THE ARGUMENT

Complaint Counsel appeals from the Administrative Law Judge's Initial Decision finding Respondent McWane, Inc. ("McWane") not liable under Count 1 (price fixing) and Count 2 (anticompetitive information exchange) of the Complaint. These portions of the decision are legally flawed and contrary to the greater weight of the evidence.

The evidence shows a Fittings market that is dominated by three firms: McWane, Sigma Corporation ("Sigma"), and Star Pipe Products, Ltd. ("Star"). In normal times, the Fittings market is characterized by aggressive price competition, competition fueled by a maverick firm (Star) that has successfully grown its market share by offering secret discounts off published prices called Project Pricing.

In 2007, Project Pricing was widespread and the market was highly competitive. But in 2008, the competitors, acting in parallel, curtailed discounting. Four key documents establish this parallel effort at price stabilization and its subsequent demise. In January 2008, McWane announced that it would curtail Project Pricing. IDF645. Almost immediately thereafter, Sigma and Star made similar announcements and acted to curtail Project Pricing. IDF664, 686. But then in November 2008, Star abandoned its experiment with price discipline. Star told its sales staff to resume the battle: "Go get every order!!!!!" IDF893.

The trial centered on this question: Why was there a lessening of price competition in the Fittings industry during 2008? Judge Chappell's answer is that price coordination during 2008 was attributable to recognized interdependence, the ordinary and unavoidable operation of an oligopoly market. This is not credible for three principal reasons. First, the market structure in 2008 was no different from 2007 or 2009. So oligopoly conditions (without more) cannot explain why, in 2008, the competitors altered their pricing strategies in parallel. Second, there is direct evidence of a large volume of inter-competitor communications during 2008, including

admitted communications about prices, discounting, and pricing strategy. When competitors supplement their recognized interdependence with communications that facilitate, stabilize, or strengthen coordination, they cross the line into concerted action.

Third, in addition to the slew of inter-competitor communications, other strong circumstantial evidence tends to exclude independent action and to show a conspiracy. This plus factor evidence includes the following:

in late 2007, McWane developed a written plan for collusive pricing;

McWane admitted that it intentionally communicated elements of the plan to rivals, through a public letter nominally addressed to customers;

Sigma and Star acted in conformity with the plan;

McWane and Star centralized pricing authority and curtailed Project Pricing (per the plan), contrary to their unilateral interests, especially for Star;

McWane privately complained to Sigma when it detected instances of "cheating";

Sigma privately exhorted Star to comply with the common plan;

scores of unexplained telephone calls among the Suppliers' top executives at key junctures in the conspiracy, and there are no legitimate explanations for these calls;

internal company documents evidenced an inter-firm comity (doing "what is best for the industry") and a congruence of thinking (by curtailing discounting we will induce McWane to support higher published prices) that is only explained by the existence of a common plan; and

the competitors launched an information exchange program in mid-2008 to facilitate price coordination, and promptly abandoned the program when price fixing broke down.

The evidence also establishes that the competitors' exchange of sales information through a trade association, viewed separately, is anticompetitive and violates Section 1.

II. STATEMENT OF FACTS

A. Fittings

Ductile iron pipe-fittings are used in waterworks systems to connect pipes, valves, and hydrants, and to change or direct water flow. IDF278. The fittings at issue here – 24" or less in diameter ("Fittings") – are commonly used in underground water distribution networks. IDF291.

Fittings are homogeneous commodities produced to American Water Works Association ("AWWA") specifications. IDF322. Any Fitting that meets an AWWA specification is functionally interchangeable with any other Fitting that meets the same specification. IDF323-324. Fittings generally comprise 5% or less of the total cost of a waterworks project. IDF326. Demand for Fittings is inelastic, *i.e.*, an increase in price does not cause a decrease in demand. IDF328.

B. Market Participants

a) Suppliers

The U.S. Fittings market is a highly concentrated oligopoly. IDF362, 356. There are three main suppliers: McWane, Sigma, and Star (collectively, "Suppliers"). IDF353-355. Together, they accounted for over { }% of U.S. Fittings sales in 2008 and 2009. IDF356. A fringe of small suppliers collectively represented approximately { }% of the Fittings market in 2008 and 2009. IDF161-163, 169-189, 196-199, 356, 358; ID241.

McWane manufactures Fittings at foundries located in the United States and China. IDF15-18. McWane had a { }% share of the U.S. Fittings market in 2008, and a { }% share in 2009. IDF356, *in camera*. From at least 2006 until Star's entry in 2009, McWane was the only significant supplier of Fittings manufactured in the United States. IDF1040.

Sigma imports and sells Fittings made in China, India, and Mexico. IDF51, 56. Sigma had a { }% share of the U.S. Fittings market in 2008, and a { }% share in 2009. IDF356.

Star also sells Fittings imported from China. IDF108, 113. Star had a { }% share of the U.S. Fittings market in 2008, and a { }% share in 2009. IDF356. In 2009, Star began contracting with U.S. foundries to manufacture Fittings domestically. IDF112.

New entrants to the U.S. Fittings market face high barriers to entry. IDF1044-50.

b) Distributors

The Suppliers sell "virtually all" of their Fittings to a relatively unconcentrated group of waterworks distributors ("Distributors"), which then re-sell the Fittings to End Users. IDF11, 367, 373-374. There are two large, nationwide Distributors that account for approximately 50% of Fittings sales in the United States (HD Supply and Ferguson). The remaining Distributors consist of hundreds of small, local companies and a few regional waterworks distributors. IDF222-223, 227-228, 375-377.

c) End Users

Fittings end users are typically municipalities, regional water authorities, and the contractors they hire to construct waterworks projects (collectively, "End Users"). IDF10.

C. Fittings Pricing

Published Fittings prices have two components: a nationwide list (or catalog) price, and a regional "multiplier" that reduces the list price. IDF413. The "published price" for a Fitting is the list price multiplied by the then-applicable state multiplier for the state in which the Fitting is sold. IDF414. For example, if the list price for a Fitting is $1,000, and the Texas multiplier is .28, the "published price" for that Fitting in Texas is $1,000 x .28, or $280. IDF414. The "published price" is generally the highest price at which a fitting can be sold. IDF425.

Published prices for Fittings are highly transparent. Each Supplier publishes list prices for thousands of individual Fittings in price books and on its website, and announces regional

multiplier changes through customer letters to Distributors. IDF560-561. Typically, Suppliers quickly receive copies of their competitors' price letters, sometimes directly. IDF558-559, 574-578; CCPF672-673. When McWane announces an increase in list prices or published multipliers, Sigma and Star nearly always follow with substantially matching price increases. IDF555-556, 679-680. Fittings are a commodity, and price is the single most important factor in selecting a Supplier. IDF341-343. One Supplier cannot sustain a published price increase unless the other Suppliers also increase their prices. IDF557.

Suppliers often offer discounts from their published prices on a transaction-by-transaction basis, a practice known as "Project Pricing" (or "Job Pricing" or "Special Pricing"). IDF428, 430-431. Because Project Pricing is individually negotiated, not published, it is less transparent than published prices. IDF435. Suppliers offer other types of discounts – including volume rebates, discounts off standard freight terms, and incentives for prompt payment – but Project Pricing is the principal form of price competition among Suppliers. IDF442-456.

When one Supplier offers Project Pricing, other Suppliers will seek to match it and/or other Distributors will demand the same discount. IDF457, 668; CCPF669. Thus, Project Pricing often leads to price "instability," and can lower the prevailing transaction prices in a given area. IDF457-460. Conversely, reducing Project Pricing can lead to stable, transparent, and higher transaction prices. IDF461; CCPF559.

McWane prefers not to offer Project Pricing because its sales force is smaller, less adept, and not incented to identify and respond to competitors' discounts. IDF595-596; CCPF857-859. Star, however, used Project Pricing as its primary sales strategy for years. Despite typically following the industry's *published* prices, Star is considered the most aggressive in terms of Project Pricing. IDF568-570; CCPF860-869. According to Sigma's President, "Star has been

singularly unhealthy to our entire industry over the past 20-some years, with their reckless, irresponsible, and undisciplined tactics to resort to whatever it takes to grab some business and grow." CCPF867.

D. The Agreement to Restrain Price Competition

In late 2007, McWane Vice President Rick Tatman devised a collusive scheme by which McWane, Sigma, and Star, acting together, could lessen competition and secure higher Fittings prices (the "Tatman Plan"). IDF617, 620, 626, 638; CCPF907-922. The scheme was "collusive" in that McWane did not advance the strategy solely by price leadership and recognized interdependence. Instead, McWane communicated the Plan to Sigma and Star in private and in "public" customer letters dated January 11, 208 and May 7, 2008. *See* IDF639-645, 809; CCPF740-745. In the January 11 Letter, McWane signaled that it would support higher list prices only if Sigma and Star curtailed their Project Pricing. IDF645; CCPF932-949. Mr. Tatman admitted at trial that this letter was a message to Sigma and Star, and that McWane intended to induce them to change their pricing practices. IDF647; CCPF939.

During 2008, acting pursuant to the Tatman Plan, the Suppliers twice raised published prices, curtailed Project Pricing, centralized pricing authority, and launched an information exchange making it easier for each firm to monitor its rivals and better detect "cheating." *See infra*, Part IV.B. These actions were contrary to their unilateral interests, but made sense as part of a common plan. The Suppliers communicated frequently; McWane complained to Sigma when it identified cheating; and Sigma exhorted Star to comply with the scheme. IDF922, 924; CCPF1035-1037, 1452-1455. In November 2008, Star became dissatisfied with the arrangement and defected from the conspiracy, instructing its sales staff to again compete aggressively: to "go get every order." IDF893; CCPF1456-1461.

E. DIFRA

In early 2008, in furtherance of the scheme, the Suppliers formed a trade association, the Ductile Iron Fittings Research Association ("DIFRA"). IDF723-725.[1] DIFRA had four members: McWane, Sigma, Star, and U.S. Pipe, a company that did not manufacture Fittings. IDF192, 720; CCPF1129.

DIFRA members agreed to a reporting system whereby each member would submit its tons-shipped data for 2006, 2007, and January through April of 2008 to an accounting firm, Sellers, Richardson, Holman & West LLP ("SRHW"), by May 15, 2008. IDF731-734; ID353. SRHW would then aggregate the data and issue a report by the 20th of May showing industry-wide tons shipped. IDF733. Thereafter, members would report their prior months' shipment data by the 15th of each succeeding month. IDF733. The data was organized by Fittings categories (2" to 12", 14" to 24", over 24" in diameter, flanged versus non-flanged). IDF734, 741. The purpose of the information exchange was to enable each Supplier to monitor whether its rivals were adhering to the common plan to curb discounting.

On May 7, 2008, McWane communicated to Sigma and Star that it would announce higher list prices for Fittings only after it received the first DIFRA report. IDF809; CCPF1179, 1181-1182, 1194-1195, 1198. McWane communicated using a letter nominally addressed to Distributors, but containing a veiled message intended for Sigma and Star alone. IDF809; CCPF1182, 1186-1189. Star understood the message. Star submitted its DIFRA data on June 5, 2008, and openly acknowledged the *quid pro quo* agreement by repeating the veiled language in the May 7 invitation to collude letter. IDF834-835; CCPF1223-1225.

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[1] The parties discussed forming DIFRA as early as 2005, but it did not become operational until 2008. IDF710, 721; CCPF1090-1106.

DIFRA issued its first tons-shipped report on June 17, 2008. IDF738. DIFRA continued to issue monthly reports until its final report in January 2009, which covered December 2008 sales data. IDF739.

III. QUESTIONS PRESENTED

A. Whether the evidence, considered as a whole, proves that it is more likely than not that McWane acted in concert with its competitors to curtail price discounting for Fittings?

B. Whether the DIFRA information exchange likely harmed competition without offsetting pro-competitive efficiencies?

IV. ARGUMENT

Agreements among competitors to restrain price competition are *per se* illegal under Section 1 of the Sherman Act. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940). An agreement is established when two or more firms share "a unity of purpose or a common design and understanding," *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771 (1984) (quoting *American Tobacco Co., v. United States*, 328 U.S. 781, 810 (1946)), or a "conscious commitment to a common scheme," *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 768 (1984). The evidence shows a conspiracy to effect two unlawful price agreements: (i) in early 2008, the Suppliers agreed to curtail Project Pricing; and (ii) in mid-2008, McWane agreed to increase its published prices in exchange for Sigma and Star submitting competitively-sensitive data to DIFRA.

The Initial Decision contains several fundamental legal errors, and as a result, fails to advance a credible analysis of the concerted action evidence. We start with a discussion of three legal problems that pervade the decision. We then offer an in-depth assessment of the evidence

supporting McWane's liability for price-fixing and for participating in the DIFRA information exchange.

A. Judge Chappell Employed Incorrect Legal Standards

Judge Chappell made at least three important legal errors when evaluating the evidence.

First, Judge Chappell improperly ignored evidence that Sigma and Star participated in the price-fixing conspiracy. *E.g.*, ID314-315 (reasoning that such evidence does "not implicate" McWane). This was clear error. Evidence that a defendant's competitors conspired is also probative of the defendant's wrong-doing. *E.g.*, *Flat Glass*, 385 F.3d at 363; *In re Currency Conversion Fee Antitrust Litig.*, 773 F. Supp. 2d 351, 370 (S.D.N.Y. 2011). Indeed, it would be economically irrational for Sigma and Star to conspire to fix prices *without* McWane. As Sigma's President recognized, "[Sigma] can take the market price down on our own, we need THEM [McWane] to take it up." CCPF900 (CX 1439); IDF555-559; ID300-301.

Second, the record is replete with evidence of communications between the Suppliers concerning prices, discounting, and pricing strategy. Judge Chappell erred by concluding that these price-related communications are evidence of, or are consistent with, mere recognized interdependence. ID258, 350. What distinguishes concerted action from simple interdependence is the presence (or absence) of inter-competitor communications. When competitors intentionally supplement their recognized interdependence with communications that facilitate, stabilize, or strengthen coordination, they cross the line into concerted action. *See Brown v. Pro Football, Inc.*, 518 U.S. 231, 241-42 (1966); *Interstate Circuit v. United States*, 306 U.S. 208, 222-25 (1939); *Flat Glass*, 385 F.3d at 364, 366, 369; *In re Petroleum Prods. Antitrust Litig.*, 906 F.2d 432, 446-47 (9th Cir. 1990); *Apex Oil Co. v. DiMauro*, 822 F.2d 246, 257 (2d Cir. 1987); *United States v. Foley*, 598 F.2d 1323, 1331-32, 1339 (4th Cir. 1979); *United States v.*

Champion Int'l Corp., No 74-183, 1975 WL 920, at *3 (D. Or. July 16, 1975), *aff'd* 557 F.2d 1270, 1273 (9th Cir. 1977); *United States v. FMC Corp.*, 306 F. Supp. 1106, 1149-50 (E.D. Pa. 1969). Such communications are therefore the antithesis of mere interdependence.

Economic theory teaches that oligopolists may maintain supra-competitive prices by observing market prices and output, and anticipating the likely competitive response of rivals. Price coordination through recognized interdependence, without more, is lawful. "That is not because such pricing is desirable (it is not), but because it is close to impossible to devise a judicially enforceable remedy for 'interdependent' pricing. How does one order a firm to set its prices *without regard* to the likely reactions of its competitors?" *Clamp-All Corp. v. Cast Iron Soil Pipe Inst.*, 851 F.2d 478, 484 (1st Cir. 1988) (italics in original). In contrast, intentional collusion-facilitating conduct falls outside of the domain of recognized interdependence. *See* Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶1436a-b (Supp. 2012) (hereinafter "*Antitrust Law*"); George A. Hay, *The Meaning of "Agreement" Under the Sherman Act*, 16 REV. INDUS. ORG. 113, 128 (2000).

Recognized interdependence alone is often insufficient to achieve noncompetitive outcomes. The conscious parallelism of oligopoly:

> must rely on uncertain and ambiguous signals to achieve concerted action. The signals are subject to misinterpretation and are a blunt and imprecise means of ensuring smooth cooperation, especially in the context of changing or unprecedented market circumstances. This anticompetitive minuet is most difficult to compose and to perform, even for a disciplined oligopoly.

Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 227-28 (1993). Competitive uncertainty "is an oligopoly's greatest enemy." *Id.* at 238. But supplement "ambiguous signals" with actual communication, and uncertainty can be dispelled, mutual trust fostered, and the prospects for effective collusion greatly improved. William H. Page,

Communication and Concerted Action, 38 LOY. U. CHI. L.J. 405, 432-435 (2007). As one judge explained, "successful price coordination requires accurate predictions about what other competitors will do; it is easier to predict what people mean to do if they tell you." *Blomkest Fertilizer, Inc., v. Potash Corp. of Sask.*, 203 F.3d 1028, 1042 (8th Cir. 2000) (Gibson, J., dissenting).

Courts often instruct that the most important evidence of agreement is "evidence implying a traditional conspiracy." *E.g., In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 360-61 (3d Cir. 2004). This means that the fact-finder should look for direct and indirect evidence of inter-firm communications related to the alleged conspiracy, including communications constituting an offer or acceptance. *Antitrust Law* ¶1416 (defining agreement as "an exchange of mutual assurances"); Page, *Communication and Concerted Action*, 38 LOY. U. CHI. L.J. at 434, 446 (concerted action is distinguished from interdependence by the presence of a communication that conveys the intention to act to achieve a common goal and reliance on one's rivals to do the same); *id.* at 434 ("communication is an economically appropriate basis for distinguishing interdependent and concerted action"). Here, Judge Chappell largely accepted the evidence that the communications occurred, but disregarded their role in proving collusion.

Third, Judge Chappell failed to evaluate the plus factor evidence as a whole. He dissected each piece of the evidentiary puzzle, asking whether it alone made collusion more likely than not. When he believed a piece of evidence did not meet the high bar he set for proof of an agreement, he simply discarded it. But a plus factor may be probative even when it is insufficient alone to prove a conspiracy. *E.g., In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 655-56 (7th Cir. 2002). And Judge Chappell failed to consider the entire puzzle. He did not recognize interconnections among the documents; he failed to consider how the

timing and frequency of the communications (explained and unexplained) filled the gaps between the documents; and simply refused to make reasonable inferences from the evidence or to evaluate it as a whole.

B. Properly Evaluated, the Evidence Establishes that McWane Unlawfully Conspired with Sigma and Star to Restrain Price Competition

In his methodical dissection of the individual pieces of evidence, Judge Chappell found no evidence of parallel conduct, and no plus factor evidence. ID321 n. 23. This lacks credibility. The Suppliers, who all used the same published pricing, acted in parallel to curtail Project Pricing, exchange information in DIFRA, and raise prices once DIFRA was established. Documents from the three Suppliers' files fit together seamlessly to prove a conspiracy to stabilize prices. Thirteen separate plus factors show the following: McWane devised a collusive plan, communicated the plan to rivals, and secured their participation in the scheme. Sigma understood that its assigned role was to appease McWane by curtailing discounting. Star also curbed Project Pricing as a part of a collective effort to "help our industry." The Suppliers acted contrary to their unilateral interest. In particular, absent an agreement, Star's conduct (curbing Project Pricing, centralizing pricing authority, sharing sales information) would have been – in Star's own words – irrational and bizarre. Each of these steps was prescribed in the Tatman Plan. Along the way, McWane exhorted Sigma to comply, and in turn Sigma (Mr. Pais) exhorted Star (Mr. McCutcheon) to comply. The Suppliers launched an information exchange to monitor compliance, McWane rewarded their participation with a price increase, and the Suppliers jettisoned the exchange when the price-fixing scheme was abandoned. This evidence establishes that McWane conspired with its competitors.

1. In 2008, the Suppliers Engaged in Parallel Pricing

McWane's collusive scheme envisioned that: (i) McWane would support higher published prices, and (ii) McWane, Sigma, and Star would curtail Project Pricing. Their goal was (iii) to permit the Suppliers to secure higher transaction prices and profits. The Suppliers' actual pricing conduct and financial performance during 2008 was consistent with this strategy.

(i) *The Suppliers All Published Higher Prices.* McWane announced higher multipliers on January 18, 2008, and again raised multipliers on June 17, 2008. IDF645-646, 840. Sigma and Star quickly followed McWane's published prices, with small exceptions. IDF674-675, 707, 843-844.

(ii) *The Suppliers All Curtailed Project Pricing.* On January 11, 2008, McWane announced that it would no longer offer Project Pricing. IDF645. Eleven days later, Star's National Sales Manager, Matt Minamyer, referred to McWane's decision and instructed his division sales managers that the company's new goal was "to take a price increase and to stop Project Pricing," except where it had documentary evidence that a competitor had initiated Project Pricing for a specific job. IDF686, 697, 690 (Star's internal plan "was to stabilize its pricing; that is, to have more consistent pricing at the published multipliers"). Going forward, all Project Pricing required Mr. Minamyer's approval. IDF686. Star informed its customers that it would match McWane's multipliers and would no longer offer Project Pricing. IDF702-709.

Two days after Star's announcement, Sigma's President Victor Pais directed the company's sales team to pull back on Project Pricing. IDF664, 669. In a letter to customers dated January 29, 2008, Sigma largely matched McWane's published prices, and promised greater pricing discipline, *i.e.*, "stick[ing] to published prices." IDF674-675; CCPF966-969.

Judge Chappell refers to this evidence as showing only an "intention" to curtail Project Pricing that may not have resulted in any "corresponding conduct." ID278. But the Sigma and Star communications to their respective sales staff and customers are corporate acts. These acts are direct evidence of a change in pricing policy, and powerful circumstantial evidence of the companies' participation in a common scheme. Specifically, it is reasonable to infer that Mr. Minamyer's sales team abided by the policy that Mr. Minamyer established – a reduction in Project Pricing. As for Sigma, it is likewise reasonable to infer that the company's sales staff heeded the instructions of the company President. Courts often infer actions and effects from intentions. *Bd. of Trade of Chicago v. United States*, 246 U.S. 231, 238 (1918) ("[K]nowledge of intent may help the court to interpret facts and predict consequences.").[2]

The Suppliers' contemporaneous business and financial documents confirm that, during 2008, the Suppliers curtailed Project Pricing. For example, in April 2008, Mr. Tatman reported in his First Quarter Executive Report that Project Pricing "appears to have died down significantly":

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

IDF868. Mr. Tatman's assessment was based on competitive feedback that he received from McWane's sales personnel in the field. IDF869. It is reasonable to infer that McWane's sales

[2] *See also Delodder v. Aerotek Inc.*, 471 Fed. Appx. 804, 806 (9th Cir. 2012) (corporate policies are relevant although not dispositive of what employees actually do); *Lockhart v. Westinghouse Credit Corp.*, 879 F.2d 43, 54 (3d Cir. 1989) ("When a major company executive speaks, 'everybody listens' in the corporate hierarchy . . . .").

staff, which interacts directly with customers, accurately identified price trends. Indeed, the information was sufficiently reliable that Mr. Tatman elected to share it with his superiors.

Additionally, McWane's "price protection log," which began at Mr. Tatman's request in January 2008 to track McWane's instances of and reasons for Project Pricing, showed that there were far fewer instances of Project Pricing to meet competition from Sigma and Star during the conspiracy period as compared to the period after the scheme's collapse. IDF852-860. Specifically, McWane offered Project Pricing to match Sigma or Star :

- In Q2 and Q3 of 2008, an average of { } times per month;
- In Q4 of 2008, an average of { } times per month;
- In Q1 of 2009, an average of { } times per month;

IDF863, *in camera.* Mr. Tatman acknowledged that McWane's log showed less Project Pricing to meet competition in early 2008 as compared to 2009, but he could not explain the phenomenon.[3] CCPF1046.

Star similarly maintained a database to track its price variations, including Project Prices. A report prepared by Star showed that Star's Project Pricing declined from 2007 to 2008, even though Star increased its multipliers twice during 2008 – an action that ordinarily creates a spike in Project Pricing.[4] CCPF1413.

Star's actual reduction of Project Pricing is also confirmed by its November 2008 decision to reverse course. Mr. Minamyer (Star) launched a new and competitive pricing

[3] McWane's began keeping its Price Protection Log during the conspiracy period, and thus it does not contain data for 2007. RX-396, *in camera.*

[4] Sigma did not maintain comparable data or reports tracking Project Pricing.

strategy. He informed his sales staff of the "Pricing Strategy Changes" by email dated November 25, 2008:

> [Star employees] have been extremely diligent in protecting the stability of our market pricing ....
>
> However, some of our competition has not performed as admirably ....
>
> We have lost too much revenue to tolerate it any longer.
>
> Please get with your teams to be sure we are all clear on the following plan.
>
> ***We will take every order we can after exhausting all avenues to document the competitors pricing .... [W]e will no longer tolerate the competition being irresponsible in the market and being undersold as a result .... Do this quietly and selectively and as much under the radar as you can but, if it is necessary, be sure to do it. Go get every order !!!!!***

IDF893. Mr. Minamyer testified that, in November 2008, he instructed his sales force to "take off the gloves," because although Star had been "attempting to hold our pricing . . . it looks like the competition was not, and we're not going to do that anymore. We're going to go out and we're going to take that business back by using pricing." IDF893.

Because Mr. Minamyer was personally responsible for approving Star's Project Pricing during 2008 (IDF129; CCPF151), his contemporaneous affirmation that Star throttled back on price competition during 2008 is entitled to substantial weight.

(iii) *The Suppliers All Realized Higher Prices and Profits.* The Suppliers' financial performance improved during 2008, notwithstanding a deep recession and a fall in demand. This is consistent with a decline in Project Pricing, and the successful implementation of the Tatman Plan.

- Sigma's {

  } CCPF1371, *in camera*; *see also* CCPF1372-1380, *in camera* ({

  }).

- McWane's Fittings profits increased from 2007 to 2008, despite a significant decrease in demand. CCPF1313-1359. In a presentation to his sales force, Tatman attributed the increased 2008 profits to "more discipline." IDF865.[5]

- Star's {

  } CCPF1360-1369, *in camera*.

Judge Chappell observed, and Complaint Counsel agrees, that Project Pricing did not stop entirely. The more relevant point, however, is that acting in parallel during 2008, the Suppliers deliberately, consciously curbed Project Pricing. This is affirmed by Messrs. Minamyer, Tatman, and Pais in their ordinary course business and financial documents. The lessening of competition was sufficient to improve significantly the Suppliers' profits.

The next question is: ***Why*** was there a lessening of price competition during 2008?

2. The Overwhelming 'Plus Factor' Evidence Tends to Exclude the Possibility that McWane Acted Independently

An agreement may be shown through direct or circumstantial evidence, or a combination of the two. Circumstantial evidence that supports an inference of conspiracy – that tends to exclude the possibility of independent action – is referred to by courts as a "plus factor."

[5] Judge Chappell discounted this slide because it "does not indicate what products are included or excluded." This concern is misplaced. In 2008, Tatman's division (TylerUnion) primarily sold Fittings under 24 inches, which is the exact market at issue here. IDF290-292.

Complaint Counsel presented evidence regarding thirteen discrete, but related, plus factors that together prove that McWane and its competitors were acting in concert.

a) Plus Factor One: The Fittings Market was Conducive to Collusion

"[A]n industry structure that facilitates collusion constitutes supporting evidence of collusion." *In re Text Messaging Antitrust Litig.*, 630 F.3d 622, 627-28 (7th Cir. 2010); *accord In re Publication Paper Antitrust Litig.*, 690 F.3d 51, 65 (2d Cir. 2012). Here, the Fittings market was characterized by: high concentration; few sellers; high barriers to entry; homogeneous products; and inelastic demand. CCPF664. Further, one oligopolist (Sigma) boasted of having cultivated a warm, trusting relationship with a second oligopolist (McWane). CCPF828. Structurally, the Fittings market was ripe for collusion.

b) Plus Factor Two: McWane Developed a Plan for Collusive Pricing (December 2007)

During 2007, aggressive price competition among the Suppliers squeezed their profit margins. CCPF842-844. McWane's CEO fired the manager who had followed Star's prices down, installed a new management team led by Vice President Rick Tatman, and tasked him with improving the Fittings division's financial performance. CCPF9, 19, 45, 855.

In December 2007, Mr. Tatman devised a multi-prong plan to restrain Fittings price competition, a strategy that contemplated and required communication with, and the active cooperation of, Sigma and Star. Specifically, McWane would support a series of small multiplier price increases. ("[W]e will support net price increases but will do so in stepped or staged increments."). But McWane would support the next price increase only if Sigma and Star curtailed their Project Pricing and sold predominantly at published prices, such that prices at the prior level remained stable and transparent. ("A prerequisite for supporting the next increment

of price is reasonable stability and transparency at the prior level."). The Suppliers would together move toward greater price transparency. ("[McWane] will encourage/drive both price stability and transparency."). And finally, Sigma and Star would remove pricing authority from local sales personnel in order to bring greater discipline to company pricing. ("Sigma's & Star's mgt pulling price authority away from front line sales and customer service personnel to add discipline to the process."). IDF638; CX0627-004.

Plainly, the Tatman Plan contemplated a fundamental transformation in the dynamics of competition in the Fittings market. How would Sigma and Star learn what was required of them? In particular, how would Sigma and Star learn what they must do in order to induce McWane to "support[] the next increment of [increased] price"? Mr. Tatman explicitly anticipated communicating the Plan's terms to McWane's competitors. Thus, on December 22, Mr. Tatman informed his colleagues at McWane: "I believe we're in a unique position to help drive stability and rational pricing with the ***proper communication*** and actions." IDF617 (emphasis added). Mr. Tatman characterized his Plan as McWane's "**Desired Message to the Market & Competitors**." CX0627-004. The written Plan included two alternative draft letters calculated to communicate his message. CX0627-006, 007.

Because the Tatman Plan document was not itself shared with Sigma or Star, Judge Chappell concluded that it only "outlined unilateral conduct by McWane." ID295-297. This ignores the document's plain language and clear import: it contemplated that McWane would ***communicate*** to competitors its preferred terms of coordination, followed by joint implementation. This is a strategy for a "traditional conspiracy." *See Antitrust Law* ¶1416. Mr. Tatman's written plan is therefore a plus factor. *In re Sulfuric Acid Antitrust Litig.*, 743 F. Supp. 2d 827, 858 (N.D. Ill. 2010) (the "most damaging piece of evidence" for the defendants was a

document laying out a plan to stabilize the market); *In re Linerboard Antitrust Litig.*, 504 F. Supp. 2d 38, 59 (E.D. Pa. 2007).

Further, the Tatman Plan "provides a context for interpreting the events that followed." *In re McWane*, slip op. at 14 (F.T.C. Aug. 9, 2012). And, in fact, what followed was that the Fittings market in 2008 unfolded according to Mr. Tatman's Plan: inter-company communications facilitating coordination, increases in published prices in staged increments, reduced discounting, centralization of pricing authority by Star, and efforts to increase price visibility through a multi-firm information exchange. CCPF907-1571. This was not a coincidence, but instead the concerted implementation of the Tatman Plan.

c) Plus Factor Three: Secret and Unexplained Inter-Firm Communications (Late 2007/Early 2008)

In also cannot be dismissed as mere coincidence that at the same time he was finalizing a plan that included competitor communications as its foundation, Mr. Tatman and his competitors were communicating. Between December 22, 2007 and January 11, 2008, Mr. Tatman (McWane) exchanged four telephone calls with his counterpart at Sigma, Larry Rybacki (Vice President of Sales). IDF609, 611; CCPF923. On January 9, 2008, Mr. Rybacki in turn spoke at length with his counterpart at Star, Dan McCutcheon (Vice President of Sales). IDF641.

Judge Chappell refused to give these calls any weight because the participants conveniently forgot what they discussed. ID300. This misses the point. Neither McWane nor Sigma provided a legitimate explanation for these communications between price-setting executives.[6] And the timing is more than suspicious. These calls occurred at a time when

[6] Rybacki testified that his job responsibilities did not require him to speak to anyone at Star or McWane, and that he spoke to Tatman "once or twice"; one conversation was to welcome Tatman to the waterworks industry. IDF612-613; CCPF716-717. Tatman testified that he

McWane was formulating its "Desired Message to [] Competitors." And soon after the calls, the Suppliers shifted from aggressive competition to conformity with the Tatman Plan. Other evidence (discussed below) shows that the Suppliers were uninhibited in discussing their respective pricing strategies with one another. Thus, these private communications support the inference of an illegal conspiracy. *Mayor & City Council of Baltimore v. Citigroup, Inc.*, 709 F.3d 129, 136 (2d Cir. 2013) (a "high level of inter-firm communications" may serve as a plus factor supporting an inference of conspiracy); *In re EPDM Antitrust Litig.*, 681 F. Supp. 2d 141, 166-67 (same); *In re High Pressure Laminates Antitrust Litig.*, No. 00 MDL 1368, 2006 WL 1317023, at *3 (S.D.N.Y. May 15, 2006) (same).

d) Plus Factor Four: McWane Invited its Rivals to Collude (January 2008)

The Tatman Plan included two draft versions of a letter, nominally addressed to McWane's Distributors, but intended as a communication with Sigma and Star in furtherance of the Plan. CCPF911-923. "McWane knew that its competitors, Sigma and Star, would obtain and review McWane's customer letter and make their decisions about what they each would do, in part, based on the information contained in McWane's customer letter." ID267. McWane revised one version and sent the letter to Distributors on January 11, 2008. IDF645. Sigma and Star secured copies soon thereafter. IDF659.

At trial, Mr. Tatman acknowledged that the purpose of the January 11 Letter was to communicate McWane's new pricing strategy to Sigma and Star, and to induce them to follow. IDF647; CCPF939. This concession is fatal to McWane's claim (and Judge Chappell's conclusion) that the Suppliers were guided by simple interdependence. Recognized

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recalled speaking with Rybacki "two, three, a couple of times." He offered no legitimate purpose for the calls. *Id.*

interdependence involves predicting rivals' likely response to competitive moves. Here, likely responses were not being predicted, McWane deliberately told its rivals what to expect; McWane rigged the competitive game.

The January 11 Letter was not a price announcement to customers; it did not reveal McWane's new prices. Instead, it communicated McWane's new pricing strategy to McWane's rivals. Specifically, McWane would: (i) soon notify Distributors of higher published multipliers,[7] and (ii) cease all Project Pricing.[8] Further, McWane dangled the prospect that, later in the year, McWane would support a second multiplier increase if "conditions" merited.[9] But there was a catch: If competitors utilized Project Pricing, then McWane would respond by lowering its published multipliers.[10]

Thus, McWane's January 11 Letter proposed a common scheme and invited Sigma and Star to participate: McWane would support higher list prices today and perhaps again within six months, in exchange for a common campaign to curtail Project Pricing. On the other hand, if Sigma and Star did not curtail Project Pricing, then McWane would drop its published prices. For McWane, this represented a significant change in strategy. In the past, McWane responded

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[7] IDF645 ("Letters stating the new region specific multipliers will be mailed January 18, 2008.").

[8] IDF645 ("[I]t is our intention going forward to sell all products only off the newly published multipliers.).

[9] IDF645 ("If the current inflationary trends continue as forecast, we anticipate the need to announce another multiplier increase within the next six months. However, we will only do so as conditions require.").

[10] IDF645 ("We will continue to monitor the competitive environment and adjust regional multipliers as required to provide you with competitive pricing."). An earlier version of the January 11 Letter more explicitly conditioned the second price increase on price stability (Tatman's term for a market in which discounting is reduced): "However, we will only do so if both conditions require and the increase can be supported within stability [*sic*] market conditions." CX0627-006.

to competitors' Project Pricing with its own Project Pricing.[11] And as Mr. Tatman was aware: "[McWane's] past attempts to drive price stability haven't been too successful." IDF620. The January 11 communication — effectively an invitation to collude on price — is a plus factor evidencing the alleged conspiracy. *See Interstate Circuit v. United States*, 306 U.S. 208 (1939) (agreement found when the proposed course of conduct was communicated to rivals as well as customers). Furthermore, Sigma's and Star's acquiescence and subsequent efforts to curtail Project Pricing (described below) are consistent with their understanding McWane's message.

The fact that McWane's January 11 Letter was nominally addressed to McWane's Distributors does not exempt the communication from antitrust scrutiny.[12] The Commission has indicated, however, that before treating a "public" communication as collusive activity, it will consider whether there is a legitimate business justification for the conduct. Here, there is no such justification. The letter was, McWane admits, targeted at competitors and intended to induce a price increase. IDF647; CCPF939. McWane is not claiming a legitimate business rationale. Instead, McWane asserts that the letter was a deliberate deception: according to Mr. Tatman, his hope was "that by declaring a purported intent to stop Project Pricing, McWane might lull (or 'head fake,' as Mr. Tatman called it) Star and Sigma into temporarily reducing their Project Pricing, leaving McWane to price however it deemed appropriate, and thereby gain a competitive advantage." IDF647.

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[11] There is no evidence that, prior to 2008, McWane ever responded to Project Pricing by reducing its published prices. IDF442.

[12] Courts recognize that communications supporting an illegal conspiracy "can occur in speeches at industry conferences, announcements of future prices, statements on earnings calls, and in other public ways." *In re Delta/Air Tran Baggage Fee Antitrust Litig.*, 733 F. Supp.2d 1348, 1360 (N.D. Ga. 2010). The Commission has challenged public invitations to collude, most recently in *In re U-Haul Int'l Inc.*, FTC File No. 0810157 (2010).

The claim that McWane intended immediately to defect from coordinated pricing (a head fake) is contrary to the evidence.[13] More importantly, this claim is irrelevant to McWane's liability. A firm that deliberately invites its competitors to collude does not escape antitrust liability by claiming that it secretly harbored an intention not to follow through with the plan. *Antitrust Law* ¶1404 ("[O]bjective manifestations of assent form an ordinary contract notwithstanding any private reservation or intention to perform incompletely or not at all. The same would be true of an agreement for antitrust purposes."); *see also United States v. Giordano*, 261 F.3d 1134 (11th Cir. 2001) (affirming criminal price fixing conviction notwithstanding defendant's claim that he intended only to "play along" and to take advantage of the pricing information collected from rivals).

e) Plus Factor Five: Star Curtailed Project Pricing in Contravention of Its Unilateral Interest (Late January 2008)

In January 2008, Star reformed its strategy and decided to curtail its Project Pricing. IDF686. In a January 22, 2008 email to the company's division managers, Mr. Minamyer instructed: "[o]ur goal is to take a price increase and to stop Project Pricing," except where Star had documentary evidence that a competitor had initiated Project Pricing for a specific job. IDF686. Star's acceptance of McWane's January 11 invitation consummates an illegal Section 1 agreement. *United States v. Singer Mfg., Co.*, 374 U.S. 174, 193 (1963) (conspiracy may be

[13] McWane communicated to its largest Distributors its intent to avoid Project Pricing. IDF650. Moreover, the Tatman Plan (the progenitor of the January 11 Letter) described a stable, long-term strategy, not a one-day price spike. CX627-004 ("the keys to actual success are: [McWane] being consistent with what we say for an extended period (>3 months)").

shown "by acquiescence [in a plan] coupled with assistance in effectuating its purpose"); *Antitrust Law* ¶1419a (performance of requested act can complete a conspiracy).[14]

Star's decision to curtail Project Pricing is a particularly strong plus factor because, in the absence of an agreement, Star's unprecedented and risky strategic shift would be contrary to its unilateral interests. *See Bolt v. Halifax Hosp. Med. Ctr.*, 891 F.2d 810, 826-27 (11th Cir. 1990); *Antitrust Law* ¶1426 ("if rational defendants would not act without mutual assurances of common action, then the act proves that such assurances took place"). As the newest and smallest Supplier, Star had always relied on Project Pricing to be competitively viable. IDF568, 871-872. Star's Vice President of Sales, Dan McCutcheon, characterized Mr. Minamyer's strategic decision to end Project Pricing as "irrational" and "bizarre"; it threatened the company's very existence. IDF698, 703; ID274; CCPF1063-1064. Star knew that it could not stop Project Pricing alone and remain competitive. *See* CCPF975-976, 986, 1065.

For Star to abandon Project Pricing requires a high level of trust in McWane and Sigma that they too would curb discounting. A willingness to place one's firm at risk in this way implies a level of trust among competitors that is more characteristic of traditional conspiracy (involving advance communication and assurances) than of mere interdependence. *See Antitrust Law* ¶1425; Page, *Communication and Concerted Action*, 38 LOY. U. CHI. L.J. at 429-435 (summarizing economic literature and experimental studies supporting the proposition that communication increases trust and cooperation).

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[14] Star's acquiescence completes the Section 1 agreement. The Commission need not resolve whether, assuming no other conspiratorial conduct by Star, Star is potentially liable for damages. *Antitrust Law* ¶1408c ("unwilling" participant in a conspiracy may be allowed an equitable defense in appropriate cases).

Mr. Minamyer explicitly described Star's new trusting, friendly, and cooperative attitude toward its rivals in his email announcing the company's new pricing strategy. IDF686. He explained: "What we are doing is what is right for the industry." "We will not [be] part of damaging the industry due to lack of discipline." "[T]his is what is best for the industry and that we need to be a part of the effort to help our industry." *Id.* Plainly, Mr. Minamyer believed that the parties to this "effort" included Star *and* its competitors. These warm sentiments towards rivals mirror evidence of a price-fixing conspiracy cited and relied upon by Judge Posner: "The president of ADM stated that 'our competitors are our friends. Our customers are the enemy.'" *High Fructose*, 295 F.3d at 662.[15]

f) Plus Factor Six: Sigma Accepted the Tatman Plan by Curtailing Project Pricing (Late January 2008)

Sigma also consummated the conspiracy by accepting the Tatman Plan. On January 24, 2008, Victor Pais, then Sigma's President and CEO, directed the company's management team to follow McWane's smaller than desired multiplier price increase, and to curtail Project Pricing. IDF663-664. Mr. Pais was deliberately signaling to McWane Sigma's commitment to adhere to a new and non-competitive pricing strategy. Mr. Pais wrote:

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

IDF664 (emphasis added).

Sigma's decision to follow McWane's price increase (lest it be retracted by McWane) could perhaps be explained as the product of oligopoly interdependence. But recognized

[15] Sigma documents from the conspiracy period evidence similar sentiments of goodwill toward competitors. *E.g.*, IDF664, 762.

interdependence cannot explain why Mr. Pais thought it was incumbent upon both Sigma and Star to undertake a long-term ("patient" "disciplined" and "stable") program to curry favor with McWane. Star, not McWane, had historically been the maverick firm in need of appeasement. The best explanation for Sigma's new strategy of appeasing McWane is that McWane had successfully communicated to Sigma the Tatman Plan's essential message: that if Sigma and Star curtailed Project Pricing, then McWane would again increase published prices. Indeed, Mr. Rybacki testified that the decision to curtail Project Pricing was to appease McWane. CCPF964 (Project Pricing "was upsetting the gorilla in the room."). Thus, the Pais email is another plus factor offering further evidence of the Suppliers' conscious commitment to a common scheme. *See Petruzzi's IGA Supermarkets v. Darling-Delaware Co.*, 998 F.2d 1224, 1245 (3d Cir. 1993) (competitors' common understanding of terms of coordination evidences prior agreement).

g) Plus Factor Seven: The Suppliers Centralized Pricing Authority in Parallel (December/January 2008)

A common problem faced by cartel members is restraining over-zealous sales representatives and aligning their incentives with those of the cartel. *See* Kovacic et al, *Plus Factors and Agreements in Antitrust Law*, 110 MICH. L. REV. 393, 421-22 (2011); Joseph E. Harrington, *How Do Cartels Operate?*, FOUNDATIONS AND TRENDS IN MICROECONOMICS Vol. 2, No 1 at 69-72 (2006), *available at* http://www.econ2.jhu.edu/People/Harrington/fnt06.pdf. The Suppliers addressed this problem in two ways. Sigma encouraged its sales force to emphasize price over volume. IDF663-673 (internal Sigma email instructing sales managers to minimize Project Pricing); *see also* Robert C. Marshall and Leslie M. Marx, *The Economics of Collusion* at 119 (2012) (colluding firms may implement agreement by modifying employees' incentives to emphasize price over volume). McWane and Star centralized pricing authority so that the sales force could not offer Project Prices without first obtaining clearance from management. IDF35,

656-657; CCPF925-929 (McWane centralized its pricing authority in December 2007/January 2008); IDF686, 690, 696 (Star centralized pricing authority in the hands of Mr. Minamyer on January 22, 2008); *see also* Harrington, *How Do Cartels Operate* at 70-71.

The Supplier's actions were contrary to their unilateral interests absent a common plan. Removing or dampening incentives for sales representatives to offer discounts to win business is a costly strategy if pursued unilaterally, and therefore tends to exclude independent action:

> In an industry where the product made by different firms is largely homogeneous, this kind of shift in the incentives of a sales force could not be justified as a unilateral noncollusive action. If a firm unilaterally acted in this manner, it would likely find itself losing market share to rivals at a remarkable pace. Buyers who resist price increases would shift away from such a firm to other sellers who were still pursuing increases in market share. In an industry where the product made by different firms is largely homogeneous, a shift in the incentives of sales forces across firms in an industry to "price before volume" leads to the strong inference of explicit collusion – namely, it is a **super plus factor**.

Kovacic *et al.*, *Plus Factors*, 110 MICH. L. REV. at 422 (emphasis added). Professor Kovacic identifies this strategy as a "super plus factor," meaning that it "lead[s] to a strong inference of explicit collusion." *Id.* at 397, 422.

The inference that the Suppliers were acting pursuant to a common plan is strengthened by the fact that the communications outlined in the Tatman Plan (the "Desired Message to the Market & Competitors") expressly identified competitors "pulling price authority away from front lines sales" representatives as a "key[] to success." IDF638. Coupled with the evidence of telephone calls among McWane, Sigma, and Star before and during this parallel shift in internal pricing procedures, the inference that the firms privately discussed and agreed to the elements of the Tatman Plan becomes stronger still. *See* IDF620-626, 639-643, 660.

h) Plus Factor Eight: Inter-Firm and Internal Complaints About Low Prices and "Cheating" (Beginning March 2008)

McWane's new prices became effective on February 18, 2008 and Project Pricing would be honored until March 1. IDF649, 678, 686. On March 10, Mr. Tatman (McWane) complained to Mitchell Rona, a member of Sigma's executive management team, about excessive Project Pricing. IDF922 (Tatman "said he hears that some of the new prices in the market are being compromised with deals. He hopes the market will improve and hopes [we] do our part."); *see also* CCPF1035-1036. Again in August, Mr. Tatman complained to Mr. Rona that Sigma *and* Star *both* were offering excessive Project Pricing. IDF924 ("Rick was upset by the numbers in Florida and California based on what he has seen from us and Star").[16]

Mr. Tatman's inter-company complaints about low pricing by Sigma and Star, together with his apparent expectation that Sigma would take remedial action, are plus factors evidencing the underlying price-fixing agreement. *See Foley*, 598 F.2d at 1333-34 (inter-company complaints imply an earlier agreement and support conviction for price fixing); *see also United States v. Beaver*, 515 F.3d 730, 738 (7th Cir. 2008) (inter-company complaints about "cheating" is evidence of conspiracy); *United States v. Giordano*, 261 F.3d 1134, 1139 (11th Cir. 2001) (same). Mr. Tatman offered no alternative explanation for his complaints to Sigma, and although Judge Chappell agreed they could be indicative of a prior agreement, he drew no inference from them. ID313; *see also* CCPF1452.

Additionally, Star's internal documents frequently characterize discounting by McWane and Sigma as "cheating." IDF908, 911-912, 914-917; CCPF1440-1448. For example, in one

[16] It is reasonable to infer that, separate from these two documented communications, there were additional, similar inter-competitor conversations about Project Pricing that were not memorialized in writing. *See Petroleum Prods.*, 906 F.2d at 454 n.18.

internal email, a Star regional sales manager identified discounting by Sigma as "cheating on the fitting deal." CCPF1444. This mindset presupposes a mutual commitment to curb Project Pricing. Thus, the "cheating" documents are also a plus factor. *See McWane*, slip op. at 17 ("These references to 'cheating' and 'agreements' clearly support the possibility of a conspiracy.").

i) Plus Factor Nine: Sigma Exhorted Star to Comply with the Tatman Plan (March 2008)

Star's Vice President of Sales Mr. McCutcheon testified regarding a private dinner conversation he had with Sigma's CEO Mr. Pais, which followed a DIFRA meeting on or about March 27, 2008. ID300-301. This was seventeen days after Mr. Tatman complained to Sigma about market prices, urging Sigma to "do [its] part." IDF922.

Mr. Pais urged Mr. McCutcheon that Sigma and Star should each keep their Fittings prices within two or three multiplier points of McWane's published prices. Mr. Pais insisted that if Sigma and Star were less aggressive in their discounting, then McWane "would behave differently and not be so overbearing towards us. That if we were good, then they would be good – they would treat us better and we could live happily ever after ...." CCPF1036-1037.[17] Mr. Pais exhibited both (i) a proclivity to communicate/conspire with Sigma's rivals, and (ii) a clear understanding of the Tatman Plan: that if Sigma and Star avoided excessive discounting, then McWane would reward them.

Mr. Pais understood well the Tatman Plan. The most reasonable inference is that he learned of the Plan in his communications with McWane. The alternative inference, that Mr.

[17] Mr. Pais denied the statements attributed to him by Mr. McCutcheon. CCPF1037; Pais, Tr. 1957-1959. Mr. McCutcheon's testimony is credible because, *inter alia*, it is against his interest (McCutcheon implicates himself in a conspiracy), and the message attributed to Pais is a restatement of Pais' January email. *See* IDF664.

Pais spoke directly with Star (McCutcheon) but not with McWane, is less plausible – given Mr. Pais' frequent meetings with McWane executives. *See* IDF606; CCPF828-841. Further, this alternative inference would require the illogical premise that Sigma and Star schemed to raise prices without the participation of the market leader, McWane. *See Flat Glass*, 385 F.3d at 363.

j) Plus Factor Ten: The Suppliers Facilitated Collusion By Launching the DIFRA Information Exchange; Star Participated Contrary to Its Unilateral Interest (Spring 2008)

In Spring 2008, the parties launched the DIFRA information exchange to make the Suppliers' transaction prices more visible to one another (what the Tatman Plan referred to as market "transparency"). As discussed in Section IV.D, *infra*, the purpose and likely effect of the DIFRA information exchange was to facilitate collusion among the Suppliers. This conduct therefore constitutes an additional plus factor. *Todd v. Exxon Corp.*, 275 F.3d 191, 198 (2d Cir. 2001) (competitors' use of facilitating practice, including an information exchange, supports an inference of a price-fixing agreement); *Petroleum Prods.*, 906 F.2d at 461-462 (same).

Moreover, Star's decision to participate in DIFRA and the information exchange was a significant departure from its decision to resist the years of pressure from McWane and Sigma to do so. CCPF1107-1108. Star had resisted because it feared that McWane would learn of Star's market share gains and retaliate. IDF712; CCPF1151-1154. Thus, Star's decision in 2008 to reverse course and participate in the information exchange was contrary to the company's own view of its unilateral interest, which supports an inference of conspiracy.

The link between the conspiracy and DIFRA is also supported by Star's decision to stop submitting its data to DIFRA soon after the Suppliers' pricing coordination started to fall apart. Star's last data submission was for December 2008. CCPF1478-1480; IDF739-740. This timing confirms that, for Star, the utility of DIFRA was related to monitoring the Suppliers' collusive

agreement. When the agreement broke down, participating in DIFRA was once again inconsistent with Star's interests.

Sigma, in contrast, was an enthusiastic DIFRA member, viewing its participation as a means to promote pricing discipline and, importantly, as one more tangible signal to McWane:

> This [DIFRA] is a huge step by SIGMA and Star, in being able to demonstrate our willingness and commitment to strengthen our industry and signal our willingness to grow in a responsible manner. Though most of the initial benefit is intangible such as increased trust and respect, it is also the first step f[or] more substantial benefits in the future.

IDF762; CCPF1279. Sigma was willing to participate in DIFRA and to "grow in a responsible manner" in order to curry favor with McWane. IDF762; *see also* CCPF867-868, 1038. Once again, Sigma exhibits perfect insight into Mr. Tatman's strategy, and Sigma's willingness to conform thereto.

k) Plus Factor Eleven: McWane's Second Invitation to Collude Was Communicated, Accepted, and Implemented (May/June 2008)

The commencement of the DIFRA information exchange – and in particular the process by which McWane procured Star's participation – is both a discrete price-fixing episode and a plus factor in the overall conspiracy. The timing and language of McWane's and Star's communications in May and June 2008 evidence a *quid pro quo* offer and acceptance.

By early May 2008, Star had agreed in principle to participate in the DIFRA exchange, but had not yet submitted its data, nor confirmed that it would do so. IDF732-735; CCPF1147-1150. Sigma had announced a multiplier increase that Star planned to match, but McWane opted to withhold its support for a price increase as a way to induce Sigma and Star actually to implement the DIFRA exchange. IDF789-801, 805-807; CCPF1168-1185. In an email to his boss, Mr. Tatman explained that McWane's delay of a price increase announcement until it

received the DIFRA reports would "reinforce the message we've been trying to drill in" to Sigma and Star, the message that McWane was not willing to lose visibility on pricing. IDF829-830; CCPF1228-1232.

Once again, McWane communicated to Star and Sigma through a letter nominally addressed to Distributors. McWane's May 7, 2008 letter communicated that McWane would withhold a price increase until it received the first DIFRA report. CCPB at 100-105; CCPF1179-1182; IDF809. The customer letter did not actually communicate new prices. Indeed, it contained only unusual language that had no useful meaning to McWane's customers. CCPF1186-1191; IDF810, 817, 814, 820. The unusual language, however, sent a message to Star and Sigma linking their participation in the DIFRA information exchange to a price increase:

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

IDF809.

The timing and content of Star's response to McWane's May 7, 2008 letter confirm that Star understood and accepted McWane's *quid pro quo* offer. Within hours of receiving a copy of McWane's letter, Star confirmed to McWane and the other DIFRA members that it would submit its shipment data. IDF816; CCPF1204. And when Star submitted its data to DIFRA weeks later, it brazenly quoted McWane's signaling language, thus confirming the linkage between the DIFRA submission and McWane's letter:

> Good morning Mr. President. I just sent our info in. Sorry it took so long, but we were "carefully analyzing all factors including:

> domestic and global inflation, market and competitive conditions within each region, as well as performance against our own internal metrics." (Does that look familiar?).

IDF835, CCPF1222-1225.

McWane received the first DIFRA report on June 17, 2008, and less than four hours later, issued a price increase letter. IDF838-840, CCPF1242. Although McWane's price increase was not as large as that previously announced (and withdrawn) by Sigma and Star, the two Suppliers quickly matched McWane. IDF843-844; CCPF1246-1250. Judge Chappell erred in failing to recognize that the above-described course of conduct constitutes an invitation to collude by McWane, acceptance by Star and Sigma, and performance of the agreement by all three. ID323-331. This is a *per se* unlawful price restraint.

l) Plus Factor Twelve: Confirmed Price-Related Inter-firm Communications

Mr. Pais' (Sigma) plea to Mr. McCutcheon (Star) to curtail discounting and thus keep Star's Fittings prices close to McWane's and to keep McWane happy was not an isolated event. The record reveals a pattern of improper ***price*** communications among the alleged conspirators – before, during, and after the conspiracy period. On more than one occasion, Mr. McCutcheon (Star) communicated with Mr. Rybacki (Sigma) regarding "mostly list price changes, timing on list price changes and things like that" – immediately prior to announcing list price changes. CCPF708-709. In one such communication, Mr. McCutcheon convinced Mr. Rybacki to announce a list price increase. CCPF709. In documented communications, Mr. Tatman complained to Sigma about Sigma and Star's prices. CCPF1035, 1452-1454.[18]

[18] Inter-firm price communications continued even in 2009 when Star returned to its normal policy of aggressive Project Pricing. In the spring of 2009, Messrs. Pais and Rybacki (Sigma) sought to persuade McWane not to implement an announced price restructuring. The two also

Thus, the evidence shows that the Fittings Suppliers communicated frequently regarding their pricing policies and practices. This pattern supports the inference that the Suppliers' parallel pricing conduct in 2008 was coordinated through their numerous documented and suspiciously timed communications with one another. (Described immediately below, Part IV.B.2.m).

m) Plus Factor Thirteen: Volume and Timing of Inter-firm Communications (2007-2008)

Senior executives of the Suppliers communicated frequently with each other throughout the conspiracy period. IDF609-611, 616, 621-622, 639-641, 660, 790-791, 796, 826, 831; CCPF884, 894-895, 923, 952, 1162-1164, 1206, 1210-1221, 1246. Judge Chappell failed to give appropriate weight to the number and timing of these largely unexplained communications. *See Citigroup*, 709 F.3d at 136 (a "high level of inter-firm communications" may serve as a plus factor supporting an inference of conspiracy).

Sigma, Star, and McWane, and in particular Messrs. Rybacki, McCutcheon, and Tatman, spoke by telephone before almost every key pricing decision in 2007 and 2008. Although Complaint Counsel was able to obtain only a limited sample of the Suppliers' telephone records, this sample shows:

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sought Star's assistance in resisting the change, telling Star that Sigma would not follow McWane's announcement and seeking assurances that Star would do the same. CCPF1508-1524, 1526-1532; IDF1012-1016 (recounting meetings, but crediting denials of price related discussions and omitting Pais email evidence to the contrary). Mr. McCutcheon then called Mr. Tatman to resolve the uncertainty as to whether McWane would follow through with its announced restructuring or instead stay with the old price list, and to communicate that Star would follow McWane. CCPF1539-1540; IDF1017-1018.

} (CCPF884, *in camera*)

- {

} (CCPF894-895, *in camera*)

- {

} (CCPF923, *in camera*)

- {

} (CCPF952, *in camera*)

- {

} (CCPF1162-1164, *in camera*)

- {

}

(CCPF1206, *in camera*)

- {

} (CCPF1210-1221, *in camera*) and

- {

}. (CCPF1246, *in camera*)

McWane had ample opportunity to offer or elicit legitimate explanations for these calls, but it failed to do so. With only insignificant exceptions (IDF612, 614, 644), no executive provided an innocent explanation for these communications. Instead, the witnesses testified that they did not know what was discussed or did not recall the telephone calls. CCPF884, 894, 923, 952, 1040, 1088, 1110, 1164, 1221, 1449, 1532; IDF612, 623, 644, 790-791.

Mr. Rybacki testified, and Judge Chappell found, that his legitimate responsibilities for Sigma in 2008 and 2009 did not require him to communicate with anyone at Star or McWane. IDF613. Yet, the telephone records indicate hundreds of inter-company communications by Mr. Rybacki. IDF715. Tellingly, before they were confronted with telephone records showing a large numbers of calls, Mr. Rybacki (Sigma) and Mr. McCutcheon (Star) testified inaccurately that they had only infrequent telephone contact with one another.[19]

The history of improper price-related communications, the timing of the telephone calls, the overall number of calls, the witnesses' inability to explain the calls, and the witnesses' attempts to conceal the number of calls among executives all support the inference that the Suppliers communicated with each other to coordinate their parallel pricing conduct in 2008. *See Citigroup*, 709 F.3d at 136. By declining to draw such an inference (ID300, 316), Judge

[19] *Compare* CCPF717 (Rybacki testifying that he talked to Tatman "maybe once, once or twice maximum my whole career") *with* CCPF715, *in camera* (showing { } calls between Rybacki and Tatman); *compare* CCPF721 (Rybacki testifying that his past contacts with McCutcheon have been "relatively infrequent, but, you know, once in a great while") *and* CCPF722 (McCutcheon testifying that he spoke to Rybacki three to four times per year) *with* CCPF715, *in camera* (showing { } calls between Mr. Rybacki and Mr. McCutcheon between January 2007 and May 2012).

Chappell allowed the witnesses' self-serving forgetfulness to negate extensive and damning telephone record evidence.

* * *

When the evidentiary puzzle pieces are examined together, and not dissected individually, the picture is clear. It is not a picture of recognized interdependence, but one of collusion.

C. Judge Chappell Erred by Relying On Defendant's Expert "Economic" Proof That the Conspiracy Was Not Effective and Therefore Did Not Exist

Complaint Counsel's expert provided an economic framework for distinguishing between recognized interdependence and coordination resulting from collusion. Dr. Schumann explained that where oligopolists exchange assurances to cooperate in increasing prices, the resulting coordination is the product of collusion, not simple interdependence. Dr. Schumann observed that a variety of communications among the Sellers – accomplished by word and deed – increased the likelihood of coordinated pricing beyond what would result from recognized interdependence alone. CCPF654-655, 657-665.

Judge Chappell criticized Dr. Schumann's testimony because Dr. Schumann did not analyze price movements directly. ID342. Dr. Schumann testified that he would have done so, but the available price data would not permit reliable, probative analysis. Schumann, Tr. 3775-3779; CX 2265-A (Schumann Rebuttal Rep. at 5-6, 9-17); CCPF1424-1435. McWane's expert economist exercised no similar restraint.

Judge Chappell wrongly credited the "data analysis" and associated conclusions offered by McWane's economist. First, he improperly excused numerous substantial methodological flaws in Dr. Normann's work that preclude any reliable conclusions from being drawn from his "analyses." Second, Judge Chappell failed to appreciate that Dr. Normann's "data analysis"

pertained to the wrong time period. Third, even setting aside the flaws in Dr. Normann's methodology, his "data analysis," when applied to the correct period, yielded results that satisfy Dr. Normann's criteria for consistency with collusion.

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

At trial, Dr. Normann agreed with learned treatises describing the basics of sound research methodology, yet he did not adhere to these basics in practice. CCPF1433-1434; Normann, Tr. 5083-5113; CCRRFF189. Judge Chappell wrongly treated each of Dr. Normann's methodological failings as a mere quibble. However, these errors, summarized below, individually and cumulatively undermine the reliability of any conclusions drawn from Dr. Normann's analyses.[20]

Dr. Normann analyzed the wrong data. The state of competition in the Fittings industry at any given time is reflected in the prices being offered *at that time*, *i.e.*, the price formation date. Suppliers often offer special pricing to Distributors to win jobs that might not be invoiced until days, weeks, or many months later, causing unsystematic lags (lags of varying duration) between the price formation date and the invoice date. Therefore, as Dr. Schumann explained and common sense dictates, price as of the invoice date is not a meaningful proxy for price as of the price formation date. CCPF1426. Yet, Dr. Normann based his pricing analyses on the invoice date, and not the price formation date. Dr. Normann acknowledged the variability of lags; that there was no reason to believe the lags were systematic; and that he made no effort to correct his findings to account for these lags. CCRRFF189. He simply asserted, and Judge Chappell accepted, that his "multi-year time series," "capture[d] a rolling average," which

[20] *See* CX 2265-A, and CCRRFF21, 24, 25, 189, 190, 279, 280, 470, 477, 479, 497, 566, 587, and 600, for a fuller discussion of Dr. Normann's analytical errors.

effectively "capture[d]" the lags. ID346. A "rolling average" might "wash out" *systematic* lags, but it cannot "wash out" substantial *nonsystematic* lags. Schumann, Tr. 5804-5805; Normann, Tr. 5091.[21]

Dr. Normann's data were laden with nonsystematic errors. The McWane price data used by Dr. Normann contained many obvious errors. These errors repeatedly overstated prices (and never understated them). Further, the frequency of these overstated prices peaked in January 2008 at 21%, several times the error rate in other months. CCPF1428-1430. As a result, Dr. Normann's findings understate price changes calculated *from* January 2008 (in which prices disproportionately are overstated) to any putative end date of collusion. CCRRFF189.[22] Dr. Normann introduced additional errors into his "data analysis" in several other ways. For example, his poor methodology for classifying which sales to include in his analysis made misclassification inevitable. This error, which was unquantified, further undermined his findings. *See* Complaint Counsel's critique of Dr. Normann's decision rules for generating missing information, CCRRFF189. McWane's invoice data was adequate for McWane's ordinary business purposes, but McWane's invoice data was too inappropriate, incomplete, and

[21] Dr. Normann also did not adjust his data for acknowledged nonsystematic customer mix variations over time, even though customers in different regions pay different prices for the same products. Normann, Tr. 5131. Judge Chappell accepted the excuse that customer mix variations wash out in a multi-year time series. ID346. Because the variations are nonsystematic, they do not.

[22] Judge Chappell dismissed these errors as an unwarranted "extrapolation" from correspondence with McWane's counsel. ID347 n.31. Complaint Counsel had asked McWane's counsel to respond on behalf of McWane to explain a seemingly incorrect subpoena response, *i.e.*, data with invoice prices exceeding the effective list price. Counsel for McWane – McWane's agent – replied after consulting with McWane that, "there was no commercial reason" for a price exceeding list, and that these entries likely reflected order entry errors. CCPF1428. Complaint Counsel accepted this explanation.

error-laden for the far different analytical purposes to which Dr. Normann put it. For purposes of Dr. Normann's analysis, it was garbage in and garbage out.

Dr. Normann's studies were not appropriately controlled. Dr. Schumann testified, and Dr. Normann acknowledged, that many factors substantially affect Fittings prices at any given time and place, *e.g.*, new housing starts, funding availability, *etc.* Schumann, Tr. 3839-3841, 4007; Normann, Tr. 5346-5347. One must assess the impact of these potentially confounding variables in order to draw reliable conclusions about the effects of the experimental variable. CCPF1433. Here, however, Dr. Normann failed to control for even obvious supply and demand shifters,[23] thereby rendering his conclusions unscientific and unreliable.[24]

Dr. Normann's "hypothesis tests" were inadequate. Except in one instance,[25] Dr. Normann failed to assess the statistical significance of his findings, which is a critical feature of hypothesis testing. Without such testing, Dr. Normann cannot empirically conclude that his "no price increase" findings are statistically significantly different from "price increase" findings, given randomness in the distribution of Fittings sales and prices over time and place. CCPF1433-1435; Schumann, Tr. 5794-5795, 5801-5802, 5847-5854; Normann, Tr. 5319-5322. Additionally, Dr. Normann's "hypothesis tests" on which Judge Chappell relied were poorly

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[23] *E.g.*, Dr. Normann did not control for metal/energy costs (Normann, Tr. 5343, 5346); housing starts and macroeconomic conditions (Normann, Tr. 5344-5348); or customer location and mix (Normann, Tr. 5131-5134). *See also* Normann, Tr. 5359-5361 (Normann's purported "control" was ineffective because it was subject to the same supply/demand shifters that Normann intended to control for).

[24] *See* Normann, Tr. 5344-5349; CCFF 1433.

[25] And in that instance, the finding was *not* statistically significant. RX-712A (Normann Rep. at 68, n.158).

conceived or were otherwise inadequate. *See* Complaint Counsel's critique of Dr. Normann's specific "Figures" in CCRRPF189.[26]

Judge Chappell specifically cites Dr. Normann's Figure 4 analysis as demonstrating price dispersion trends inconsistent with parallel curtailment of Project Pricing in 2008. IDF847; ID285. But Dr. Normann reported – he did not analyze – the dispersion of prices for only three Fittings out of hundreds of available Fittings. Normann, Tr. 5368-5375. Dr. Normann's mere report of standard deviations over time for only three products cannot support any reasonable conclusion as to parallel curtailment of Project Pricing in 2008.[27]

Finally, Dr. Normann acknowledged that he did not explore, and his work is not probative of the question, whether prices during a putative conspiracy period were higher than they would have been in a "but-for" world. Normann, Tr. 5349-5350. Dr. Normann purported to find only that prices did not rise; he did not reach any conclusion as to whether they were higher than they would have been expected absent price collusion and the DIFRA agreement. *Id.*

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

Dr. Normann's "data analyses" compared prices for his "basket" of only 24 Fittings before, during, and after the period January 1, 2008 thru February 28, 2009, which he treats as the putative collusion period. Normann, Tr. 4779-4788. He found relative price movements that he concluded were inconsistent with collusion. Normann, Tr. 4788-4789, 4796. But the

[26] *See also* CCRRFF189, discussing methodological flaws relating to Dr. Normann's selection and use of a small non-random sample of 24 Fittings when he had equivalent data for the hundreds of available Fittings.

[27] Judge Chappell mistakenly concluded that Dr. Normann examined "the Suppliers' inventory data" and found no evidence of inventory withholding. ID345. Dr. Normann examined only McWane inventory data, and could not exclude the possibility that, consistent with collusion, the total inventories of imported Fittings held by the Suppliers increased during the relevant time period. Normann, Tr. 5382.

evidentiary record, Dr. Schumann's report, and Complaint Counsel's often-articulated theory of the case reflected a collusive agreement being effected in late January and the breaking down by October-November 2008. CCPF1456-1459. Collusive effects should have been expected in prices for the period February 2008 thru October or November 2008.[28] And that is what Dr. Normann's data analysis, if it is to be credited at all, shows.

Dr. Normann's data show that McWane's prices increased during the conspiracy period by { }%, Sigma's by { }%, and Star's by { }%. IDF943, *in camera*. Further, Dr. Normann's Figure 2B, shows {

} RX-712B (Normann Rep. at 13 fig. 2B), *in camera*.

{

} RX-712B (Normann Rep. at 13 fig. 2B), *in camera*. Accordingly, the pricing evidence presented by Dr. Normann for the period of actual relevance meets all of his criteria for consistency with collusion.

D. Information Sharing Was Unlawful Under the Rule of Reason

The agreement among the Suppliers to exchange Fittings shipment information through DIFRA violates Section 1 because it tends unreasonably to facilitate collusion and thereby to restrain competition. This restraint is unlawful whether or not the Commission finds an agreement among the Suppliers to curtail Project Pricing.

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[28] Judge Chappell wrongly describes this as a "cherry-picked time period." ID349. To the contrary, it is founded in substantial record evidence, including, for example, Fittings supplier documents indicating that there was substantial "cheating" by October/November 2008 and that one or more competitors had decided to take off the proverbial gloves. CCPF1456-1459.

Direct evidence proves the Suppliers' agreement to exchange information through DIFRA. IDF733-735; *United States v. Container Corp. of Am.*, 393 U.S. 333, 334-35 (1969); *Antitrust Law* ¶1406 (exchange of information is concerted action under the Sherman Act). . Under the rule of reason, proof of market power and likely anticompetitive effects establish Complaint Counsel's *prima facie* case. *E.g.*, *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 441 & n.16 (1978); *Realcomp II, Ltd. v. FTC*, 635 F.3d 815, 825 (6th Cir. 2011).[29] "[T]he susceptibility of the industry to collusion and the nature of the information exchanged are the most important factors in determining likely effects." *McWane*, slip op. at 19. Judge Chappell erred in requiring direct evidence of actual price effects and ignoring evidence that the principal tendency of DIFRA was to facilitate collusion.

The Fittings market structure is conducive to collusion. CCPF651-665. While published Fittings prices are generally transparent, Project Pricing is less transparent and introduces a degree of uncertainty about prevailing price levels. IDF428-442, 566-567 (Project Pricing leads McWane to lose visibility of the competitors' price level). Judge Chappell found that Project Pricing destabilized Fittings prices, and that it reflected a lack of pricing discipline. IDF457-461, 582-584; CCPF659. Project Pricing also obscured Sellers' actual pricing behavior, increasing each Seller's uncertainty as to whether the other oligopolists would cooperate or compete. As such, unrestrained Project Pricing impeded tacit collusion. *See Antitrust Law* ¶1407e ("Uncertainty is the most general of the impediments to cartel-like results in oligopoly.").

The DIFRA exchange lessened uncertainty about prevailing price levels, and thereby facilitated the Suppliers' ability to engage in tacit collusion. CCPF1297-1299. The Suppliers

[29] Judge Chappell found that McWane, Sigma and Star, all participants in DIFRA, collectively had market power. ID355.

reported to DIFRA the number of tons shipped for a given time period. This data, when aggregated, allowed participants indirectly to monitor price levels. *See Petroleum Prods.*, 906 F.2d at 461-462 (exchange of production and supply data can be used to facilitate interdependent action). Specifically, the DIFRA exchange allowed each participant to monitor its own market share, and to deduce from monthly changes in that share, its rivals' relative price levels. IDF783 (McWane detecting rivals' discounting from declining DIFRA share in January 2009), 779 (same, in September 2008); CCPF1244-1245 (same, in July 2008).

Improving the ability of oligopoly members to monitor adherence to consensus prices tends to make "cheating" less attractive (because rivals discover cheating faster, rendering cheating less profitable), and tacit collusion more so. CCPF1299; *High Fructose*, 295 F.3d at 656 (the ability to detect cheating "tends to shore up a cartel"). DIFRA members expected the exchange to do exactly this. When Mr. Pais (Sigma) initiated the effort to form DIFRA in or around 2004, he explained to another Fittings supplier that DIFRA would aid the suppliers in dividing the market, maintaining stable market shares, and stabilizing prices. IDF710; CCPF1278 (citing CX 2519 (Saha, Dep. at 72-75)).[30] When the Suppliers actually implemented the DIFRA information exchange in 2008, Mr. Pais similarly described DIFRA as a way to promote pricing discipline and facilitate coordination. IDF768.

[30] The cited deposition testimony of Mr. Saha was admitted subject to a hearsay objection by Respondent, which Judge Chappell did not rule on. *See* CCPF1277-1278. The testimony is admissible under the rationale articulated in Fed. R. Evid. 803(3), as a statement of motive, intent, or plan. Similar statements were also admitted at trial for purposes of impeaching contrary trial testimony of Mr. Pais. Saha, Tr. 1207 ("The reasons were basically – it's the same – he wanted market stability on pricing issues, and he felt that all the sellers of fittings belonging to an organization would give the stability on pricing."); Saha, Tr. 1211-1212 (admission for impeachment purposes).

In February 2009, Mr. Pais again confirmed the role that DIFRA played in facilitating (at least) tacit collusion among the Suppliers during the 2008 collapse in market demand:

> In Fittings, there are effectively 3 – McWane, SIGMA and Star – and all suffer from the same challenges and there seems to be a great desire to improve the pricing and each one has demonstrated thru a reasonable amount of discipline, even being protective of our respective market share. This is where the monthly market size data produced by DIFRA ... helps maintain the pricing discipline, as the market and market share data point to a relatively consistent and stable market pattern. It has helped all of us not to allow the sharp market decline to be mistaken as a 'loss of market share,' which mostly causes price reaction. Our [gross margins] have continued to be strong ... even as the volumes have been weak.

CX0313; IDF768.

Star also used the DIFRA reports to assess whether any decline in Star's Fittings sales was due a market-wide decline or was instead due to sales lost to McWane or Sigma. CCPF1321. McWane, too, believed that DIFRA tended to promote price stability, and to enable the company to coexist with its competitors without lowering its costs or providing better service. Mr. Tatman wrote to his superiors, "[o]ur competitors have both a lower average cost basis and a better service model which limits options for profitabl[e] share growth," and that "***DIFRA will eventually add some increased stability***." CCPF1305 (emphasis added); IDF781, 618 (for McWane, "stability" means increased confidence about prevailing price levels).[31]

Circumstantial evidence also suggests that DIFRA had the likely effect of facilitating tacit collusion, including:

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[31] Judge Chappell erred in finding the record insufficient to determine whether the information in the DIFRA shipment reports was made public. ID361-62. DIFRA never published any "information relating to the ductile iron fitting industry." Brakefield, Tr. 1232-33. Distributors were generally unaware of the existence of DIFRA. *E.g.*, Groeniger, Dep. at 238-39; Prescott, Dep. at 130; Brakefield, Dep. (Vol. 1) at 97 (DIFRA never engaged with purchasers).

the close temporal fit between the exchange and an (at least) parallel effort to curtail Project Pricing among DIFRA members;

the presence of a sham member (US Pipe), apparently to paper over antitrust concerns attendant to a three-firm information exchange (CCPF1117-1130);

the reluctance of Star (the maverick) to join and to timely submit its data (CCPF1151-1154);

McWane's unwillingness to announce any price increase before reviewing the data (CCPF1208-1221); and

Sigma's attempt to re-establish DIFRA to once again induce McWane to support higher prices (CCPF1484-1490).

This evidence points to a close and organic connection between the "effort to help [the] industry" (IDF686) by curtailing secret discounting in 2008 and the short-lived DIFRA exchange.

The evidence of collective market power and the likely anticompetitive effects of the DIFRA collaboration shifts to McWane the burden of demonstrating a countervailing efficiency justification. *Realcomp II*, 635 F.3d at 825. McWane must do more than hypothesize a justification. It must come forward with evidence that the "restraint in fact is necessary to enhance competition and does indeed have a pro-competitive effect." *Graphic Prods. Distribs., Inc. v. Itek Corp.*, 717 F.2d 1560, 1576 (11th Cir. 1983); *see also Flegel v. Christian Hosp. Northeast-Northwest*, 4 F.3d 682, 688 & n.4 (8th Cir. 1993). Judge Chappell posited two such efficiencies: McWane's use of the data to choose among a range of price levels on two occasions in 2008 and 2009, and the use of the data to better understand market trends and manage production and inventory schedules. ID362 n.34.

The first cited efficiency is not an efficiency at all. McWane was using DIFRA data to identify the supra-competitive price that was best for it. In both instances, McWane was using the DIFRA information to increase prices, albeit not to the level or in the product segments its rivals would have preferred. CCPF1240-1245, 1492-1500. The second cited efficiency should

be rejected as pretextual. *See Image Tech. Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1219 (9th Cir. 1997) (court should disregard justification for challenged conduct when "evidence suggests that the proffered business justification played no part in the decision to act"). There are no contemporaneous documents showing that McWane or any Supplier actually used DIFRA data to manage production or to set its inventory level. CCPF1300-1312, 1323, 1328. Finally, even assuming the validity of this efficiency justification, McWane has not proven that the benefit was non-trivial or outweighed the consumer harm. *Cf. McWane*, slip op. at 19 (Under the rule of reason, "the question is whether the anticompetitive effect of the agreement [to exchange competitive information] outweighs its beneficial effects.").

V. CONCLUSION

McWane should be adjudged liable under Count 1 (price fixing) and Count 2 (anticompetitive information exchange). The Commission should therefore enter the attached order enjoining McWane's unlawful activities.

Dated: June 4, 2013

Respectfully submitted,

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UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

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

[PROPOSED] ORDER

I.

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

A. "Commission" means the Federal Trade Commission.

B. "Respondent" means McWane, Inc., its officers, directors, employees, agents, representatives, successors, and assigns; and the U.S.-based subsidiaries, divisions, groups, and affiliates controlled by it, and the respective officers, directors, employees, agents, representatives, successors, and assigns of each.

C. "Communicate" means to transfer or disseminate any information, regardless of the means by which it is accomplished, including without limitation orally, by letter, e-mail, notice, or memorandum. This definition applies to all tenses and forms of the word "communicate," including, but not limited to, "communicating," "communicated" and "communication."

D. "Competitively Sensitive Information" means any information regarding the cost, Price, output, or Customers of or for DIPF marketed by any Competitor, regardless of whether the information is prospective, current or historical, or aggregated or disaggregated.

Provided, however, that "Competitively Sensitive Information" shall *not* include:

1. information that is a list of Prices or other pricing terms that has been widely Communicated by a Competitor to its Customers through a letter, electronic mailing, sales catalog, Web site, or other widely accessible method of posting;

2. information that relates to the terms on which a Competitor will buy DIPF from, or sell DIPF to, the Person to whom the Competitively Sensitive Information is Communicated;

3. information that relates to transactions that occurred at least three (3) years prior to the date of the Communication of such information; or

4. information that must be disclosed pursuant to the Federal Securities Laws.

E. "Competitor" means Respondent and any Person that, for the purpose of sale or resale within the United States: (1) manufactures DIPF or Domestic DIPF; (2) causes DIPF or Domestic DIPF to be manufactured; or (3) imports DIPF.

F. "Customer" means any Person that purchases any DIPF from Respondent

G. "Designated Manager" means the Executive Vice President, General Manager, National Sales Manager, Pricing Coordinator, Regional Manager, or the OEM Manager for sales of DIPF in and into the United States, and any employee performing any job function relating to the setting of Prices (including offering any discounts) for DIPF sold in or into the United States.

H. "Domestic DIPF" means DIPF that is manufactured in the United States of America.

I. "Ductile Iron Pipe Fittings" or "DIPF" means any iron casting produced in conformity with the C153/A21 or C110/A21 standards promulgated by the American Water Works Association, including all revisions and amendments to those standards and any successor standards incorporating the C153/A21 or C110/A21 standards by reference.

J. "Exclusivity" or "Exclusive" means any requirement, whether formal or informal, or direct or indirect, by the Respondent that a Customer purchase all of their Domestic DIPF from Respondent, or any other requirement that a Customer restrain, refrain from, or limit its future purchases of Domestic DIPF from any Competitor.

Provided, however, that the terms "Exclusivity" or "Exclusive" do not:

1. apply to Respondent's sales of non-Domestic DIPF or any product other than Domestic DIPF; and

2. apply to individual bids of Domestic DIPF for specific jobs or refer to the sale by Respondent to a Customer of any specified number of units during any term, without more. For the avoidance of doubt, the fact that a Customer purchases its full requirements of Domestic DIPF from Respondent does not establish that Respondent has engaged in Exclusivity and is not prohibited by this Order unless the Customer does so because Respondent imposes a requirement of Exclusivity.

K. "Federal Securities Laws" means the securities laws as that term is defined in § 3(a)(47) of the Securities Exchange Act of 1934, 15 U.S.C. § 78c(a)(47), and any regulation or order of the Securities and Exchange Commission issued under such laws.

L. "Industry Statistics" means statistics derived from Input Data and Communicated by the Third Party Manager.

M. "Input Data" means the Competitively Sensitive Information Communicated by Competitors to the Third Party Manager.

N. "Information Exchange" means the entity Managed by A Third Party Manager that: (1) Communicates Industry Statistics; and (2) includes Respondent and at least one other Competitor.

O. "Insider" means a consultant, officer, director, employee, agent, or attorney of Respondent. *Provided, however*, that no other Competitor shall be considered to be an "Insider."

P. "Managed by A Third Party Manager" means that a Third Party Manager is solely and exclusively responsible for all activities relating to Communicating, organizing, compiling, aggregating, processing, and analyzing any Competitively Sensitive Information.

Q. "Participate" in an entity or an arrangement means (1) to be a partner, joint venturer, shareholder, owner, member, or employee of such entity or arrangement, or (2) to provide services, agree to provide services, or offer to provide services through such entity or arrangement. This definition applies to all tenses and forms of the word "participate," including, but not limited to, "participating," "participated," and "participation."

R. "Person" means any natural person or artificial person, including, but not limited to, any corporation, unincorporated entity, or government. For the purpose of this Order, any corporation includes the subsidiaries, divisions, groups, and affiliates controlled by it.

S. "Price" means the retail or wholesale price, resale price, purchase price, list price, multiplier price, job price, credit term, freight term, delivery term, service term, or any other monetary term defining, setting forth, or relating to the money, compensation, or service paid by a Customer to Respondent, or received by a Customer in connection with the purchase or sale of DIPF or Domestic DIPF.

T. "Retroactive Incentive" means any flat or lump-sum payment of monies or any other item(s) of pecuniary value based upon a Customer's sales or purchases of Respondent's Domestic DIPF reaching a specified threshold (in units, revenues, or any other measure), or otherwise reducing the Price of one unit of Respondent's Domestic DIPF because of the purchase or sale of an additional unit of that product; provided, however, that Respondent may offer a discount or other item of pecuniary value based upon sales or purchases of Domestic DIPF beyond a specified threshold.

By way of example, Respondent may offer or provide a discount of X% on all purchases of Domestic DIPF in excess of Y units, but it may not offer or provide a discount of X% on all units of Domestic DIPF, including those below Y units, if sales exceed Y units.

U. "Service" means any service, assistance or other support provided by Respondent to a Customer, including without limitation, responsiveness to requests for bids, responsiveness in filling purchase orders, product availability, handling of warranty claims, and handling of returns.

V. "Third Party Manager" means a Person that (1) is not a Competitor, and (2) is responsible for all activities relating to Communicating, organizing, compiling, aggregating, processing, and analyzing any Competitively Sensitive Information Communicated or to be Communicated between or among Respondent and any other Competitor.

II.

IT IS FURTHER ORDERED that in connection with the business of manufacturing, marketing or selling DIPF in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, Respondent shall cease and desist from, either directly or indirectly, or through any corporate or other device:

A. Entering into, adhering to, Participating in, maintaining, organizing, implementing, enforcing, or otherwise facilitating any combination, conspiracy, agreement, or understanding between or among any Competitors:

1. To raise, fix, maintain, or stabilize Prices or Price levels, or engage in any other Price-related action; or

2. To allocate or divide markets, Customers, contracts, transactions, business opportunities, lines of commerce, or territories.

Provided, however, that nothing in Paragraph II.A of this Order prohibits Respondent from entering into an agreement with another Competitor regarding the Price of DIPF if, and only if, that agreement relates exclusively to the terms under which Respondent will buy DIPF from, or sell DIPF to, that other Competitor.

B. Communicating to any Person who is not an Insider, that Respondent is ready or willing:

1. To raise, fix, maintain, or stabilize Price or Price levels conditional upon any other Competitor also raising, fixing, maintaining, or stabilizing Price or Price levels; or

2. To forbear from competing for any Customer, contract, transaction, or business opportunity conditional upon any other Competitor also forbearing from competing for any Customer, contract, transaction, or business opportunity.

C. Entering into, adhering to, Participating in, maintaining, organizing, implementing, enforcing, or otherwise facilitating any combination, conspiracy, agreement, or understanding between or among any Competitors to Communicate or exchange Competitively Sensitive Information.

D. Communicating Competitively Sensitive Information to any other Competitor.

E. Attempting to engage in any of the activities prohibited by Paragraphs II.A, II.B, II.C, or II.D.

PROVIDED, HOWEVER, that it shall not of itself constitute a violation of Paragraph II.B, II.C, or II.D of this Order for Respondent to Communicate:

1. Competitively Sensitive Information to a Competitor where such Communication is reasonably related to a lawful joint venture, license, or potential acquisition, and is reasonably necessary to achieve the procompetitive benefits of such a relationship;

2. To any Person reasonably believed to be an actual or prospective purchaser of DIPF, the Price and terms of a sale of DIPF; or

3. To any Person reasonably believed to be an actual or prospective purchaser of DIPF that Respondent is ready and willing to adjust the terms of a sale of DIPF in response to a Competitor's offer.

PROVIDED FURTHER, that it shall not of itself constitute a violation of Paragraphs II.B, II.C, II.D or II.E of this Order for Respondent to Communicate with or Participate in an Information Exchange that is limited exclusively to the Communication of Input Data or Industry Statistics when:

1. Any Input Data relates solely to transactions that are at least six (6) months old;

2. Any Industry Statistic relates solely to transactions that are at least six (6) months old;

3. Industry Statistics are Communicated no more than one time during any six (6) month period;

4. Any Industry Statistic represents an aggregation or average of Input Data for transactions covering a period of at least six (6) months;

5. Any Industry Statistic represents an aggregation or average of Input Data received from no fewer than five (5) Competitors;

6. Relating to Price, output, or total unit cost, no individual Competitor's Input Data to any Industry Statistic represents more than twenty-five (25) percent of the total reported sales (whether measured on a dollar or unit basis) of the DIPF product from which the Industry Statistic is derived;

7. Relating to Price, output, or total unit cost, the sum of no three Competitors' Input Data to any Industry Statistic represents more than sixty (60) percent of the total reported sales (whether measured on a dollar or unit basis) of the DIPF product from which the Industry Statistic is derived;

8. Any Industry Statistic is sufficiently aggregated or anonymous such that no Competitor that receives that Industry Statistic can, directly or indirectly, identify the Input Data submitted by any other particular Competitor;

9. Respondent does not Communicate with any other Competitor relating to the Information Exchange, other than those Communications (i) occurring at official meetings of the Information Exchange; (ii) relating to topics identified on a written agenda prepared in advance of such meetings; and (iii) occurring in the presence of antitrust counsel;

10. Respondent retains, for submission to a duly authorized representative of the Commission upon reasonable notice, a copy of all Input Data Communicated to the Third Party Manager and all Industry Statistics Communicated by the Third Party Manager to Respondent; and

11. All Industry Statistics are, at the same time they are Communicated to any Competitor, made publicly available.

III.

IT IS FURTHER ORDERED that in connection with the business of manufacturing, marketing or selling Domestic DIPF in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, Respondent shall cease and desist from, either directly or indirectly, or through any corporate or other device:

A. Inviting, entering into, adhering to, maintaining, implementing, enforcing, or attempting thereto any condition, policy, practice, agreement, contract, or understanding that requires Exclusivity with a Customer, including but not limited to:

1. Conditioning the sale or purchase of any product, including Respondent's Domestic DIPF, on a Customer's Exclusivity;

2. Conditioning any term of Price or Service offered or provided by Respondent to a Customer relating to any product, including Respondent's Domestic DIPF, on a Customer's Exclusivity;

3. Conditioning any term of Price or Service offered or provided to a Customer based upon a requirement that the Customer purchase 50% or more of its purchases (in units, revenues, or any other measure) of Domestic DIPF from Respondent over any period of time; and

4. Conditioning any term of Price or Service offered or provided to a Customer relating to any product marketed by Respondent upon that Customer's purchases or sales of Respondent's Domestic DIPF.

B. For ten (10) years from the date this Order becomes final, inviting, entering into, adhering to, maintaining, implementing, enforcing, or attempting thereto any condition,

policy, practice, agreement, contract, or understanding that offers or provides any Retroactive Incentive.

C. Discriminating against, penalizing, or otherwise retaliating against any Customer, for the reason, in whole or in part, that the Customer engages in, or intends to engage in, the distribution, purchase or sale of a Competitor's Domestic DIPF, or otherwise refuses to enter into or continue any condition, agreement, contract, or understanding that requires Exclusivity. Examples of prohibited discrimination or retaliation against a Customer shall include, but not be limited to:

1. Terminating, suspending, or threatening or proposing thereto, sales of any product marketed by the Respondent to the Customer;

2. Auditing the Customer's purchases or sales of Domestic DIPF to determine the extent of purchases or sales of competing Domestic DIPF;

3. Withdrawing or modifying, or threatening or proposing thereto, any terms of Price or Service offered or provided by Respondent to a Customer relating to any product marketed by Respondent; and

4. Refusing to deal with the Customer on terms and conditions generally available to other Customers.

D. After ninety (90) days from the date this Order becomes final, from enforcing any condition, requirement, policy, agreement, contract or understanding that is inconsistent with the terms of the Order.

PROVIDED, HOWEVER, that nothing in paragraphs III A-D of this Order prohibits Respondent from providing discounts, rebates, or other Price or non-Price incentives to purchase Domestic DIPF that are (i) volume-based, above average variable cost, and not Retroactive Incentives as defined herein; or (ii) designed to meet competition, if Respondent determines in good faith that one or more Competitors are offering terms of sale for their Domestic DIPF for which Respondent needs to match in order to win contested business.

PROVIDED, FURTHER, that nothing in Paragraph III.D of this Order prohibits Respondent from honoring or providing discounts, rebates, or other Price or non-Price incentives to purchase its Domestic DIPF that a Customer contracted for prior to the date this Order becomes final even if paid or provided by Respondent subsequent to that date.

IV.

IT IS FURTHER ORDERED that Respondent shall:

A. Within sixty (60) days from the date this Order becomes final distribute by first-class mail, return receipt requested, or by electronic mail with return confirmation, a copy of this Order with the Complaint, to each of its officers, directors, and Designated Managers;

B. Within sixty (60) days from the date this Order becomes final, distribute by first-class mail, return receipt requested, or by electronic mail with return confirmation, a copy of this Order with the Complaint, to each Customer of Respondent that has purchased DIPF or Domestic DIPF at any time since September 1, 2012;

C. For ten (10 years) from the date this Order becomes final distribute by first-class mail, return receipt requested, or by electronic mail with return confirmation, a copy of this Order with the Complaint, within sixty (60) days, to each Person who becomes its officer, director, or Designated Manager and who did not previously receive a copy of this Order and Complaint; and

D. Require each Person to whom a copy of this Order is furnished pursuant to Paragraphs III.A and III.C of this Order to sign and submit to Respondent within sixty (60) days of the receipt thereof a statement that: (1) represents that the undersigned has read and understands the Order; and (2) acknowledges that the undersigned has been advised and understands that non-compliance with the Order may subject Respondent to penalties for violation of the Order.

V.

IT IS FURTHER ORDERED that Respondent shall file verified written reports within ninety (90) days from the date this Order becomes final, annually thereafter for ten (10) years on the anniversary of the date this Order becomes final, and at such other times as the Commission may by written notice require. Each report shall include, among other information that may be necessary:

A. A description of any Information Exchange, including a description of (i) the identity of any Competitors participating in such exchange; (ii) the Competitively Sensitive Information being exchanged; (iii) the identity of the Third Party Manager and a description of how the Competitively Sensitive Information has been and is expected to be Managed by the Third Party Manager; and (iv) the identity of each employee of the Respondent who received information, directly or indirectly, from the Third Party Manager;

B. Copies of the signed return receipts or electronic mail with return confirmations required by Paragraphs IV.A - D of this Order;

C. One copy of each Communication during the relevant reporting period that relates to changes in Respondent's published list price or multiplier discounts for sales of DIPF made in or into the United States when that Communication is to two (2) or more Customers and those changes are simultaneously applicable to two (2) or more Customers; and

D. A detailed description of the manner and form in which Respondent has complied and is complying with this Order.

VI.

IT IS FURTHER ORDERED that Respondent shall notify the Commission:

A. Of any change in its principal address within twenty (20) days of such change in address; and

B. At least thirty (30) days prior to any proposed: (1) dissolution of Respondent; (2) acquisition, merger, or consolidation of Respondent; or (3) any other change in Respondent including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of this Order.

VII.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, Respondent shall permit any duly authorized representative of the Commission:

A. Access, during office hours of Respondent, and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and all other records and documents in the possession, or under the control, of Respondent relating to compliance with this Order, which copying services shall be provided by Respondent at its expense; and

B. Upon fifteen (15) days notice, and in the presence of counsel, and without restraint or interference from it, to interview officers, directors, or employees of Respondent.

VIII.

IT IS FURTHER ORDERED that this Order shall terminate twenty (20) years from the date it becomes final.

ORDERED:

Donald S. Clark
Secretary

Dated:

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

CONFIDENTIAL - REDACTED IN ENTIRETY

CERTIFICATE OF SERVICE

I hereby certify that on June 4, 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
Washington, DC 20580

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

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

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

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Counsel for Respondent McWane, Inc.

CERTIFICATE FOR ELECTRONIC FILING

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

June 4, 2013

By: s/ Thomas H. Brock
Attorney