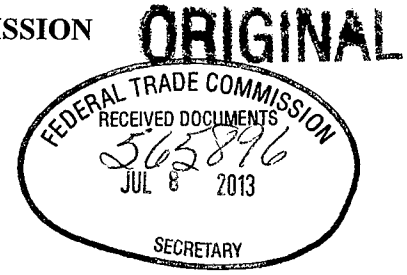
PUBLIC

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION



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

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

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Dated: July 8, 2013

RECORD REFERENCES

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

JX# – Joint Exhibit

CX# – Complaint Counsel Exhibit

RX# – Respondent Exhibit

Name of Witness, Tr. xx – Trial Testimony

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

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

Complaint ¶ x –Complaint filed January 4, 2012

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

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

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

RB # - Respondent's Post Trial Brief

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

CCB # - Complaint Counsel's Post Trial Brief

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

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

CCAB # - Complaint Counsel's Appeal Brief

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INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

* * *

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

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

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

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

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

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

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

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

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

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

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

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

STATEMENT OF FACTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- "fail[ed] to prove" that Mr. Tatman's internal PowerPoint Presentation was a "plan" for a "conspiracy." Instead, he concluded it was evidence of "an independently formed pricing strategy" **(purported plus factor two)**;

- "fail[ed] to prove" that the few contacts between McWane and Sigma constituted anything more than "mere opportunities to conspire," which was legally insufficient to give rise to any inference of conspiracy **(purported plus factors three, nine, twelve, thirteen)**;

- failed to prove "that McWane 'communicated' its pricing strategy to Sigma and Star, including through 'offers' in the January 11, 2008 and May 7, 2008 Customer Letters" or that the alleged "offer" was ever "accepted" **(purported plus factors four, eleven)**. Indeed, Complaint Counsel does not even appeal the Judge's rejection of the Count 3 price signaling claim;

- "fail[ed] to prove Project Pricing was curtailed, or that prices were increased or stabilized or coordinated in the Fittings market" **(purported plus factors five, six, seven)**;

- "fail[ed] to prove that McWane, Sigma, and Star were 'monitoring' the market for 'cheating' on the alleged price fixing agreement" or that Star's (not McWane's) internal references to "cheating," which Star witnesses testified was simply short-hand for ongoing job discounting and not indicative of any agreement with Sigma or McWane, raised any inference of conspiracy, let alone an inference that McWane "conspired" **(purported plus factor eight)**; and

- failed to prove that "participating in DIFRA reflected an 'understanding' with McWane of future price increases, or 'acceptance' of an 'offer' from McWane . . . as opposed to independent conduct or lawful conscious parallelism," or "that the DIFRA tons-shipped data reporting system was part of a conspiratorial 'plan' to 'enforce' compliance with the alleged price fixing agreement" **(purported plus factor ten)**.

Initial Dec. 290, 350-51.

1. The Judge Found Mr. Tatman's Internal PowerPoint Was Consistent With McWane's Unilateral Self-Interest In Gaining Share From Sigma And Star

After "evaluat[ing] the document in its entirety, in the context of all the surrounding circumstances," Judge Chappell found that the evidence failed to support Complaint Counsel's inference that the internal PowerPoint, which was never communicated to Sigma or Star, amounted

to a "plus factor." Initial Dec. 294. On the contrary, the Judge found that "Mr. Tatman testified, credibly and at length, regarding . . . the meaning of the language in the document," and he concluded that the document was "an internal McWane discussion document that was not shared with Sigma or Star and, at best, represented an internal plan for McWane's own competitive pricing strategy" in a "competitive" effort to gain share. Initial Dec. 294-95. The Judge further found that on its face the document "refers only to unilateral conduct by McWane" and "Complaint Counsel's argument [to the contrary] is based only on unsupported inferences and overreaches." Initial Dec. 295-96, 300, 366-67 ("In essence, Complaint Counsel would have Respondent held liable for communicating an 'invitation to collude' based upon what McWane may have internally considered"); F. 620, 625-629, 638.

2. The Judge Found That McWane's January and May 2008 Customer Letters Were Not "Offers" Or "Invitations" And Were Not "Accepted" By Sigma Or Star

Judge Chappell also rejected Complaint Counsel's assertion that certain actions of McWane, Sigma, and Star beginning in January 2008 were taken to "comport" or "comply" with McWane's "plan." First, he noted that McWane's January 11, 2008 Customer Letter did not contain any "message" to competitors "that McWane would support future increases in prices only if Sigma and Star curtailed Project Pricing." Initial Dec. 297, 366 (holding that "[t]o be sure, the letter is hardly a naked invitation to fix prices"); F. 638, 646. The Judge found Complaint Counsel's interpretation of the letter was "unsupported by the greater weight of the evidence," and the "vague and ambiguous paragraph . . . upon which Complaint Counsel relies" "did *not* include any language indicating that McWane would support future increases in prices only if Sigma and Star curtailed Project Pricing," and "also did not include any language concerning Sigma's and Star's 'pulling price authority away from front line sales.'" Initial Dec. 297; F. 645. Complaint Counsel's expert, Dr. Schumann, also conceded on cross-examination

that the letter contained no such terms. Schumann, Tr. 4203.

The Judge also rejected Complaint Counsel's plea to infer that the "factors" language in McWane's May 7, 2008 Customer Letter constituted an offer to trade a price increase in exchange for Sigma and Star submitting their tons-shipped DIFRA data as "against the greater weight of the evidence." Initial Dec. 325, 368 ("the relevant language of the May 7, 2008 Customer Letter, upon which Complaint Counsel relies, is vague, highly ambiguous, and on its face does not set forth the alleged 'offer' of a price increase . . . The language is also far from 'a naked invitation' to fix prices."). The Judge held that "Complaint Counsel fails to persuasively explain how the message [in the May 7 Customer Letter] that McWane was waiting for the DIFRA report to finalize its price decision, even if conveyed to Sigma and Star, warrants the further inference of an offer of a "quid pro quo" of a price increase." Initial Dec. 325-326. Moreover, the "evidence also fails to show that Sigma understood McWane's May 7, 2008 Customer Letter to communicate anything with regard to DIFRA, much less an offer of a price increase contingent on submission of DIFRA data." Initial Dec. 327. Key Sigma and Star witnesses also flatly denied that the letter contained the terms of the purported conspiracy. JX 698 (McCutcheon Dep. at 198:13-199:4 ("Absolutely none. As a matter of fact, the first time that thought - - I've even heard that was today. Of linking that to DIFRA?"); Pais Dep. at 381:4-382: 11 ("It is so farfetched and ridiculous, what can I say? No, no.").

Judge Chappell likewise rejected Complaint Counsel's plea that he should construe McWane's June 17, 2008 Customer Letter as a "reward" to Sigma and Star for submitting their DIFRA data. Initial Dec. 330. Instead, he concluded that McWane's letter substantially ***underpriced*** the "big bold" 40 percent increase announced by Sigma and followed by Star. Initial Dec. 329-30. "The strained inferences required to accept this argument are rejected" because they

were "not logical or persuasive." Initial Dec. 330.

Thus, the Judge concluded that "McWane's acting consistently with its own price strategy does not imply an agreement with Sigma and Star," and Complaint Counsel's argument that participation in DIFRA, or McWane's May and June 2008 Customer Letters, supported the inference of a conspiracy, had "been thoroughly reviewed and rejected as unsupported by the greater weight of the evidence." Initial Dec. 331.

3. The Very Few, Very Brief Contacts Between McWane And Sigma Do Not Suggest A Conspiracy

Judge Chappell noted that Complaint Counsel relies upon four (4) brief telephone calls "placed between a cell phone issued to Mr. Tatman and a cell phone issued to Mr. Rybacki" in December 2007 and January 2008: (1) "a three minute call from the Rybacki cell phone to the Tatman cell phone . . . on December 27, 2007," (2) a "six minute call from the Tatman cell phone to the Rybacki cell phone" a few minutes later on the same day, (3) "a three minute call from the Rybacki cell phone to the Tatman cell phone . . . on January 3, 2008," and (4) "a nine minute call from the Tatman cell phone" the following day, on January 4, 2008. Initial Dec. 300.

The Judge rejected Complaint Counsel's inferences because the evidence amounted to only a handful of very short phone calls from almost five years ago, and Complaint Counsel utterly failed to prove what, "if anything," was said on the calls. Initial Dec. 316. Judge Chappell concluded that it "strains credulity to suggest that mere proof of a meeting, together with evidence that pricing was ***not*** discussed," equates to proof of a conspiracy. Initial Dec. 300, 315 (emphasis added). The Judge therefore "rejected" Complaint Counsel's "inference[s] that these communications constitute evidence" of a conspiracy, holding that they were "unwarranted," "unjustified" and "unsupported speculation." Initial Dec. 300, 315, 317

Complaint Counsel argues that "Judge Chappell refused to give these calls any weight

because the participants conveniently forgot what they discussed." CCAB 20. However, the witnesses did not "conveniently" forget what was said on their four brief phone calls (CCAB 20)—Mr. Rybacki testified, for example, that he called Mr. Tatman once "around the holidays, to "welcome [him] to the waterworks industry," and another time to see if Mr. Tatman was available to schedule a meeting of DIFRA, of which both Sigma and McWane were members. F. 612; Rybacki, Tr. 3626-3628 & CX 1621A *in camera*, 3650, 3682; Tatman, Tr. 367-370 & CX 1621A *in camera*. Both Mr. Rybacki and Mr. Tatman also flatly denied ever discussing or agreeing on prices at any time. Initial Dec. 300; F. 623-624, 639-640, 793.

The Judge thus held that "it will not be assumed that Mr. Rybacki and Mr. Tatman discussed Fittings pricing, Project Pricing, or an agreement to curtail Project Pricing" from the simple fact that Complaint Counsel showed four brief calls between Mr. Rybacki and Mr. Tatman. Initial Dec. 316; F. 623-624, 639- 640. Moreover, the "short duration of two of the [four] foregoing calls indicates that the inference that a brief voice mail message was left is just as likely as the inference that an actual conversation took place" and it would therefore "be pure speculation on this record to simply assume that Mr. Tatman and Mr. Rybacki discussed McWane's pricing 'plan.'" Initial Dec. 300.

Judge Chappell criticized Complaint Counsel during closing arguments for playing "fast and loose with assigning communications with respondent that were actually between Star and Sigma" (Closing, Tr. 15), and noted that, "regardless of what the foregoing communications may imply about the conduct of Sigma and/or Star, [those communications] do not implicate McWane, the Respondent in this case, in the alleged agreement to curtail Project Pricing." Initial Dec. 314-15. Indeed, "none of the foregoing indicates any discussion about Fittings prices, Project Pricing, or an agreement to curtail Project Pricing." Initial Dec. 315.

4. McWane's Participation In DIFRA Is Not A Plus Factor

The Ductile Iron Fittings Research Association ("DIFRA") was only operational for approximately six months in the second half of 2008, and its few meetings were guided and supervised by experienced antitrust counsel. F. 713, 719, 738-739. Moreover, Complaint Counsel concedes that prices declined during DIFRA's brief existence. Schumann, Tr. 3837-3843. Complaint Counsel also concedes, and the Judge found, that the aggregated "tons-shipped data" disseminated by DIFRA "did not reveal the tons shipped or market shares of the individual Suppliers," and did not distinguish among the thousands of unique SKUs, domestic or import, which part of the country, or when the sales occurred—all of which affected price. Initial Dec. 302-03; F. 748-749, 756, 758. "No DIFRA member was permitted to review the tons-shipped data of any other member" and "[n]either DIFRA nor its accountants . . . collected sales price data." F. 745. "The DIFRA reports" therefore "did not [and could not] include or reveal any sales prices, or report any dollar figures." F. 746-747. Judge Chappell thus found that Complaint Counsel "fail[ed] persuasively to explain," as it could not, "how historic, aggregated, tons-shipped data reports would disclose the pricing of the Suppliers in such a way as to enable them to 'detect cheating' on the presumed agreement to curtail Project Pricing, even if the Suppliers could glean their own individual market share from the data." Initial Dec. 302.

Because the DIFRA data did not and could not shed any light on competitors' pricing, Judge Chappell held that Complaint Counsel's evidence was "inconsistent with the conclusion that the purpose of the data reporting was to police the alleged conspiracy" and "fail[ed] to support Complaint Counsel's assertion that participation in the DIFRA tons-shipped data reporting system is probative of an agreement to curtail Project Pricing." Initial Dec. 303-04. The Judge further noted that for participation in DIFRA "to be material under Complaint Counsel's argument, it must first be assumed that there was, in fact, an agreement to curtail Project Pricing, and

that McWane was a party to it," but declined such an inference. Initial Dec. 301.

5. The Handful Of Star Internal References To "Cheating" Fail To Constitute A "Plus Factor" Against McWane

Complaint Counsel failed to show how Star's internal use of the term "cheating" in characterizing Sigma behavior amounted to an "admission of Star of an agreement to curtail Project Pricing." Initial Dec. 305; F. 902. Complaint Counsel did not call the authors of the few Star emails using the term to explain their use of the term at trial. The only witness it offered (a recipient of emails using the term) testified that "'cheating' is an internal Star term used to refer to any pricing that was below the published multiplier, including among other things, Project Pricing." Initial Dec. 306-07; F. 903. Moreover, there was "no evidence that the term had any particular usage for Fittings;" instead, the evidence showed that Star used the term "cheating" with regard to a range of its products, including large diameter fittings, which Complaint Counsel's own expert conceded were competitive and not part of the alleged conspiracy. Initial Dec. 306-07; Schumann, Tr. 3769, 3788, 3792-3793, 4111.

In any event, the Judge found that a few references to "cheating" in internal Star documents had nothing to do with McWane. Initial Dec. 305, 308-311 ("regardless of what the evidence may imply as to the conduct of ***Sigma and Star***," Complaint Counsel's inferences regarding "***McWane***, who is the Respondent in this case," were "unproven.") (emphasis added). Thus, the Judge rejected Complaint Counsel's "multilayered inference" that such evidence should constitute a "plus" factor evincing an agreement involving McWane, and held that "Complaint Counsel's daisy chain of assumptions fails to support or justify an evidentiary inference of any unlawful agreement." Initial Dec. 305-07.

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

Notably, no documents, emails, and other communications contain any reference to an alleged understanding or agreement between McWane and Sigma or Star in the Winter or Spring 2008 (or April 2009 or June 2010) on published prices or on job discounting. Complaint Counsel relies primarily on two internal Sigma (not McWane) emails, which it contends constitute "plus factors." CCAB 29. However, the emails, on their face and according to the testimony of Mr. Rona, were generated by Mr. Rona in the course of legitimate, arm's-length ***buy-sell*** discussions he had with McWane on two occasions in 2008. At the time of the emails, Mr. Rona was Sigma's OEM business manager, with no authority for determining Sigma's prices to distributors. Rona, Tr. 1437-1440, 1453-1454, 1627-1628. Mr. Rona sold to Sigma's OEM customers (for example, pipe manufacturers and fabricators), while Mr. Tatman sold to distributors. Rona, Tr. 1446-1449, 1626, 1628-1629. Critically, Mr. Rona was not competing with Mr. Tatman; to the contrary he was Mr. Tatman's customer and thus had legitimate business reasons to be in communication. Moreover, he did not compete against Mr. Tatman in selling Fittings because Mr. Tatman and McWane sold almost entirely to distributors. Rona, Tr. 1446-1449, 1626, 1628-1629.

Mr. Rona also did not send the March 10 email to Mr. Rybacki, who had pricing authority for distribution customers. Rona, Tr. 1641-1642; CX 1124. He sent the August 22 email to a general email group "M05" that happened to include Mr. Rybacki, but Mr. Rybacki does not recall receiving the email and testified that he never discussed it with Mr. Rona. Initial Dec. 313; Rybacki, Tr. 3715-3717; CX 1149. Most significantly, Mr. Rybacki paid no attention to the email and testified that it had no effect on his pricing decisions. Initial Dec. 313; Rybacki, Tr. 3716-3717. The evidence is clear that the two Rona internal emails had no effect on McWane's

or Sigma's Fittings prices. Rybacki, Tr. 3715-3717; Rona, Tr. 1645, 1647, 1662. In fact, job pricing never stopped and McWane's Fittings prices continued downward following the emails. Initial Dec. 342; F. 940-942.

Further, neither email says anything about McWane's published prices and both are chronologically disconnected from McWane's two published price moves in 2008: the first email was sent several months after McWane's January 2008 published multiplier announcement, and several months before its June 2008 multipliers. The second email was sent months after McWane underpriced Sigma and Star's multipliers in June 2008.

Judge Chappell found that the March 10, 2008 internal Rona email was "vague and ambiguous, and far from compelling evidence of McWane 'complaining' of a breached 'agreement.'" Initial Dec. 312. The Judge likewise found the August 22, 2008 internal Rona email, while suggesting a communication between Rona and Tatman, nonetheless indicated on its face "that Sigma and Star, in offering the stated prices 'without a second thought,' did not perceive any restricted freedom of action with regard to their Project Pricing or perceive any commitment to McWane, or to each other, to refrain from Project Pricing, which is inconsistent with an agreement among McWane, Sigma, and Star, to curtail Project Pricing." Initial Dec. 313. Judge Chappell therefore concluded that "[b]ecause Complaint Counsel has not demonstrated that either [of] the Rona emails . . . constitute 'complaints' between McWane and its competitors about 'cheating' on an agreement to curtail Project Pricing, Complaint Counsel has failed to prove this 'plus' factor." Initial Dec. 314.

COMMISSION STANDARD OF REVIEW

The Commission's standard of review is *de novo*. But it is well established that the Commission should exercise caution before overturning the factual findings of the Administrative Law Judge who observed the sixteen live witnesses over the six-week trial and reviewed

over 2000 exhibits admitted into evidence. FTC Rule 3.54(a); *In re TransUnion Corp.*, No. 9255, 2000 FTC LEXIS 23 (Feb. 10, 2000). The Commission's caution is particularly warranted when, as here, the Judge's Initial Decision and Findings are supported by the preponderance of "substantial," "reliable and probative" evidence. *Universal Camera v. NLRB*, 340 U.S. 474, 496 (1951) (an administrative agency's fact-finding "may be less substantial when an impartial, experienced [ALJ] who has observed the witnesses and lived with the case has drawn conclusions different from the [agency's]"); *In re Chi. Bridge & Iron Co.*, No. 9300, 2005 FTC LEXIS 215, at *3 n.4 (Jan. 6, 2005); FTC Rule 3.51(c)(I); 5 U.S.C. §556 (d) (2011); *see Schering-Plough Corp. v. FTC*, 402 F.3d 1056, 1062 (11th Cir. 2005) (appellate courts review the FTC's findings of fact "more closely where they differ from those of the ALJ"); *Litton Industries, Inc. v. FTC*, 676 F.2d 364, 369 (9th Cir. 1982) (same); *American Cyanamid Co. v. FTC*, 363 F.2d 757, 772 (6th Cir. 1966) ("Where the Commission overturns findings of fact of [an ALJ], this conflict in fact findings is to be considered by a reviewing court.").

ARGUMENT

I. THE JUDGE CORRECTLY FOUND THAT MCWANE PRICED INDEPENDENTLY AND DID NOT CONSPIRE WITH SIGMA OR STAR

Judge Chappell correctly applied well-settled case law regarding horizontal conspiracies to the facts. As the Judge found, Counts 1 and 2 of the Complaint borrow the language of Sherman Act Section 1 and allege a conspiracy in violation of FTC Act Section 5. The Sherman Act Section 1 prohibits contracts, combinations and conspiracies that unreasonably restrain trade. 15 U.S.C. § 1. The existence of a preceding agreement is the "hallmark" and the "very essence" of any conspiracy claim. *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 356 (3d Cir. 2004) (citations omitted) ("The existence of an agreement is 'the very essence of a section 1 claim'"); *In re*

Baby Food Antitrust Litig., 166 F.3d 112, 117 (3d Cir. 1999) ("The existence of an agreement is the hallmark of a Section 1 claim.").

To prove its conspiracy claims, Complaint Counsel was required to show proof of "a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement." *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771 (1984) (citing *Am. Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946)). This requires more than a mere opportunity to conspire and speculation that the parties did so. *Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 1013 (3d Cir. 1994) (affirming summary judgment where "evidence tends to show only an opportunity to conspire, not an agreement to do so"); *Venzie Corp. v. U.S. Mineral Prods. Co.*, 521 F.2d 1309, 1313-14 (3d Cir. 1975) ("an opportunity is significant only if other evidence permits an inference that an agreement did in fact exist."). Even circumstantial conspiracy claims inferred from alleged parallel pricing and 'plus factors' require proof suggesting that the parallel price resulted from a "preceding agreement." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007) ("when allegations of parallel conduct are set out in order to make a § 1 claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action.").

Judge Chappell found that Complaint Counsel utterly failed to prove its conspiracy theory:

> ***Despite the numerous pleas by the government for inferences to be made where proof is lacking***, the fact that a conspiracy may be difficult to prove does not mean that it is fair or appropriate to fill in the blanks where evidence is missing to assist the government in winning its case. When fairly and objectively scrutinized and weighed, ***the evidence fails to prove that McWane conspired with Sigma and Star to raise and stabilize prices in the Fittings market***, as alleged in the Complaint. At best, the evidence shows interdependent or consciously parallel conduct, unaided by any agreement, which is not illegal.

Initial Dec. 351 (emphasis added). Thus, the Judge correctly concluded that Complaint Counsel failed to meet its evidentiary burden, and the overwhelming "weight of the evidence" demonstrated that Complaint Counsel's allegations were nothing more than "unsupported speculation." Initial Dec. 300, 325, 351.

A. McWane Substantially Underpriced Sigma And Star's Published Prices And Its Non-Parallel Pricing Is Fatal To Complaint Counsel's Circumstantial Case

An antitrust plaintiff must "present direct or circumstantial evidence that reasonably tends to prove that the . . . [defendants] 'had a conscious commitment to a common scheme designed to achieve an unlawful objective.'" *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 764 (1984). "Direct evidence in a Section 1 conspiracy must be evidence that is explicit and requires no inferences to establish the proposition or conclusion being asserted." *Baby Food,* 166 F.3d at 118; *see also In re Citric Acid Litig.,* 191 F.3d 1090, 1104 (9th Cir. 1999) (evidence does not qualify as "direct" if it "could be construed in a benign light."). In this case, Judge Chappell found substantial direct evidence of McWane's independent and pro-competitive decision-making and a complete absence of any direct evidence of a conspiracy. Initial Dec. 292 ("In fact, contrary to the government's position, there is substantial evidence demonstrating that McWane's pricing strategy was designed to further its own legitimate business interests of increasing volume and market share in the Fittings market"); Initial Dec. 338 ("There is no direct evidence to support, and no *a priori* reason to believe, that the hypothesis of a conspiracy to raise and stabilize prices in the Fittings market is more likely than the hypothesis of independent conduct or oligopolistic conscious parallelism unaided by an agreement."). The Judge determined that the purpose of McWane's independently-determined sales strategy was to create greater

visibility into the actual market price in order to better compete with—and win business from—Sigma and Star, "which is a procompetitive purpose." *Id.*

Complaint Counsel's conspiracy claims were based on indirect and circumstantial evidence. Initial Dec. 275; Schumann, Tr. 3847, 4171-4173 (Acknowledging that there was no direct evidence "that McWane directly communicated its prices to any other Fittings manufacturer or supplier in advance of communicating them to its customers or potential customers" and that there were no express agreements or meetings "in a smoke-filled room."). To prove a case with circumstantial evidence, the Supreme Court has held that a plaintiff must not only produce evidence that reasonably tends to prove parallel conduct, it must also prove that this conduct was contrary to self-interest. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986); *In re Beef Industry Antitrust Litig.*, 907 F.2d 510, 514 (5th Cir. 1990) ("When an antitrust plaintiff relies on circumstantial evidence of conscious parallelism to prove a § 1 claim, he must first demonstrate that the defendants' actions were parallel."). Here, as the Judge found, Complaint Counsel failed to meet the minimum threshold requirement of showing parallel conduct, and for that reason alone his finding in favor of McWane should be upheld.

The ALJ determined that McWane ***underpriced*** Sigma and Star's published prices in Winter and Spring 2008 (and again in Spring 2009) and did not price in parallel with them. Initial Dec. 265-66, 277 ("[Complaint Counsel's evidence] fail[s] to show that the Suppliers engaged in parallel conduct. . . ."). As Mr. Tatman testified, the purpose of McWane's independent pricing strategy was to increase sales and gain market share. Initial Dec. 266-67. The ALJ determined that, in late 2007, McWane undertook a detailed and independent analysis of its published multipliers in every state as well as Sigma's proposed new list prices. Initial Dec. 265. As a result of this analysis, Mr. Tatman recommended that McWane ***not follow*** Sigma's pro-

posed 25% list price increase. Initial Dec. 266. Instead, McWane kept its list price in place and issued new (and in many states, lower) multipliers. Initial Dec. 266; F. 625-631, 633, 636, 655. Judge Chappell also determined that McWane independently determined, regardless of what the DIFRA data showed, ***not to follow*** Sigma's "big, bold" price increase. Initial Dec. 331. In June 2008 McWane announced a much smaller multiplier increase of approximately eight percent on average, about one third of the price increase Sigma and Star had announced. Initial Dec. 323; F. 805, 807, 832. The fact that Sigma and Star independently chose to follow McWane's lower published prices—at least when it suited their economic interests—is not proof of a preceding agreement. Initial Dec. 319 ("The conduct of Sigma and Star . . . is at least as consistent with oligopolistic, 'follow the leader' behavior, which is not illegal, as it is with an unlawful agreement.").

The Judge also correctly found that even if Sigma and Star followed some of McWane's published prices down, such "follow-the-leader" pricing is normal oligopoly behavior and perfectly lawful—and hardly gives rise to an inference that the leader conspired. Initial Dec. 319; *see also Blomkest Fertilizer Inc. v. Potash Corp. of Saskatchewan*, 203 F.3d 1028, 1032-33 (8th Cir. 2000) (affirming summary judgment because "[e]vidence that a business consciously met the pricing of its competitors does not prove a violation of the antitrust laws"); *Reserve Supply Corp. v. Owens-Corning Fiberglas Corp.*, 971 F.2d 37, 50 (7th Cir. 1992) ("the mere existence of an oligopolistic market structure in which a small group of manufacturers engage in consciously parallel pricing of an identical product does not violate the antitrust laws"); *Clamp-All Corp. v. Cast Iron Soil Pipe Inst.*, 851 F.2d 478, 484 (1st Cir. 1988) ("One does not need an agreement to bring about this kind of follow-the-leader effect in a concentrated industry.").

In *Citric Acid*, for example, the plaintiff alleged that the fact that defendant's list prices mirrored those of its competitors was evidence of a conspiracy. *Citric Acid*, 191 F.3d at 1102. Emphasizing that a price-fixing conspiracy cannot be inferred from parallel pricing alone, "nor from an industry's follow-the-leader pricing strategy," the court noted that defendant priced aggressively in "actual contracts" and concluded that the plaintiff's evidence "does not tend to exclude the possibility that Cargill acted legally in its pricing decisions." *Id.* at 1102-03; *see also, Baby Foods*, 166 F.3d at 128 ("In an oligopoly . . . there is pricing structure in which each company is likely aware of the pricing of its competitors"). In *Clamp-All*, the First Circuit affirmed summary judgment for defendants in a case which defendants in a concentrated market followed each other's list prices, but—as here—routinely offered discounts off list. 851 F.2d at 484. In fact, here the Judge determined that there was even more competition below the allegedly parallel prices than in *Clamp-All*, as McWane provided a number of other discounts such as rebates and freight discounts. F. 850. The Court in *Clamp-All* held that the fact that suppliers "often set prices that deviated from their price list helps support the inference that the similarity of price lists reflect *individual* decisions to copy, rather than any more formal pricing agreement." *Id.*

Moreover, it is well-settled that in an oligopoly, it is common-place and, often, pro-competitive for each company to gather market intelligence from its customers on its competitors' price moves. *See Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287, 1305 (11th Cir. 2003) (affirming summary judgment noting with approval lower court's finding that "in competitive markets, particularly oligopolies, companies will monitor each other's communications with the market in order to make their own strategic decisions"). Thus, to distinguish between legitimate parallel conduct and an illegal price-fixing scheme, Complaint Counsel was required—but failed—to present evidence that "tends to exclude the possibility" that McWane acted independ-

ently of its competitors. *Matsushita*, 475 U.S. at 588. Complaint Counsel failed to meet its burden.

McWane's price decisions were completely consistent with its own legitimate, economic self-interest. As the Judge found, McWane's pricing decisions were designed to win business from Sigma and Star by increasing its sales volume and reducing excess inventory, and to keep its foundries operating as efficiently as possible given the massive market decline. Because McWane's actions were consistent with its own self-interest, Complaint Counsel's case fails. *See Baby Food*, 166 F.3d at 134-35 (to be probative of an agreement, parallel conduct "must be so unusual that in the absence of an advance agreement, no reasonable firm would have engaged in it.").

B. McWane Continued To Offer Job Price Discounts, Rebates, And A Host Of Other Price Concessions, And Did Not Conspire with Sigma or Star

The substantial direct evidence that McWane continued to offer job price discounts, rebates, and other price concessions throughout the alleged conspiracy period is fatal to Complaint Counsel's claims that McWane conspired to curtail project pricing. *In re Beef*, 907 F.2d at 514; *Aviation Specialties, Inc. v. United Techn. Corp.*, 568 F.2d 1186, 1192 (5th Cir. 1978) (affirming summary judgment because plaintiff "brought forth no evidence of parallel behavior suggesting an unlawful agreement"). Complaint Counsel failed to prove there was ***any*** "curtailment" of project pricing—let alone curtailment in parallel that was contrary to McWane's self-interest. As the Judge determined, "[i]t is undisputed that Project Pricing did not 'stop' in 2008" and McWane continued to offer project pricing, freight discounts, cash discounts, rebates, and additional price concession to its customers throughout 2008 and beyond. Initial Dec. 280; F. 850. Judge Chappell, after a careful evaluation of the witnesses and the evidence, credited Mr. Tatman's testimony that McWane's pricing strategy in 2008 was designed to increase sales volume

and grow market share. Initial Dec. 269. McWane's strategy included continued project pricing. Initial Dec. 269, F. 647. McWane's January 2008 customer letter was a "head fake" that might allow McWane to gain a competitive advantage over Sigma and Star. Initial Dec. 269; F. 647. Similarly, McWane's price protection log does not support Complaint Counsel's contention that McWane curtailed project pricing. To the contrary, the log shows that McWane provided approximately [redacted] different job prices in 2008. F. 852-61. Partly as a result of Project Pricing, "McWane's gross profit margin on non-domestically produced fillings fell," as did its average blended Fittings price (the price of imported or domestic Fittings sold for open source jobs) for its 24 most commonly sold Fittings products, throughout 2008, 2009, and 2010. F. 964-965. McWane's continued job pricing and other discounting was pro-competitive, beneficial to consumers, and not evidence of a conspiracy. *See Nicsand, Inc. v. 3M Co.*, 507 F.3d 442, 452 (6th Cir. 2007) ("[c]utting prices in order to increase business often is the very essence of competition"); *Cascade Health Solutions v. Peacehealth*, 515 F.3d 883, 896 (9th Cir. 2008) ("price cutting is a practice the antitrust laws aim to promote.").

Judge Chappell found that Dr. Normann's conclusions further disproved Complaint Counsel's argument that McWane reduced job pricing in parallel with Sigma and Star. Dr. Normann determined that price variation—an indicator that Fittings are being sold under special Project Pricing—was higher in 2008 than at any other time from 2007 to 2010. F. 845-46. McWane's average Fittings prices—based on invoice prices reflecting continued job pricing—decreased by [redacted]% from January 2008 through February 2009. F. 942. During that same period, Sigma's average Fittings prices increased by [redacted]%, and Star's average Fitting's prices increased by [redacted]%. *Id.* Dr. Normann concluded that a price decline by McWane during the

same period as price increases by Sigma and Star is inconsistent with a conspiracy to raise prices involving McWane." *Id.*

Moreover, McWane's continued job pricing throughout 2008 in furtherance of Mr. Tatman's stated goals of increasing sales and improving market share is entirely consistent with McWane's self-interest and contradicts any inference of a conspiracy. *See Flat Glass*, 385 F.3d at 360-61 (defining actions contrary to interest as "conduct that would be irrational assuming that the defendant operated in a competitive market"); *City of Tuscaloosa v. Harcros Chemicals, Inc.*, 158 F.3d 548, 572 (11th Cir. 1998) ("consciously parallel behavior permits a court to infer the existence of a conspiracy only in the presence of 'plus factors,' such as the implausibility that the defendants would have acted as they did had they not been unlawfully conspiring in restraint of trade."). Ongoing, and intensifying, job pricing during the latter half of 2008 is entirely consistent with McWane's unilateral interest given the economic downturn and decreased demand for new housing beginning in the summer of 2008. F. 930. The Judge determined that in August 2008 the crash of the mortgage-backed financial markets created pressure to lower prices—and that is exactly what McWane did. F. 931. In response to the changing economic reality, McWane led prices even further downward during the second half of 2008. F. 933.

C. The Judge Correctly Found Complaint Counsel's "Daisy Chain" Of Inferences To Be "Weak" And "Unsupported Speculation" Insufficient To Overcome The "Substantial Evidence" Of McWane's Independent and Pro-Competitive Pricing

Judge Chappell determined that, in order to find a conspiracy, Complaint Counsel's circumstantial evidence required "multiple, unsupported inferences," and that the so-called "plus factors" required the finder of fact to improperly *presume* a conspiracy. Initial Dec. 319. As a result of the inherent economic realities of oligopolistic markets, courts require a plaintiff relying on evidence of conscious parallelism to prove something more—that certain "plus factors" also

exist. *Flat Glass*, 385 F.3d at 360-61 ("plus factors are important to a court's analysis, because their existence tends to eliminate the possibility of mistaking the workings of a competitive market-where firms might increase price when, for example, demand increases-with interdependent, supracompetitive pricing . . . since these factors often restate interdependence."). Requiring plaintiffs to meet these additional elements "tends to ensure that courts punish 'concerted action'—an actual agreement—instead of the 'unilateral, independent conduct of competitors.'" *Id.* (citing *Baby Food*, 166 F.3d at 122); *see also Intervest Inc. v. Bloomberg*, L.P., 340 F.3d 144, 159-60 (3d Cir. 2003) (plaintiff relying on circumstantial evidence must meet heightened burden of proof). Complaint Counsel's tenuous chain of inferences is insufficient to meet its burden to present evidence that "tends to exclude the possibility" that McWane acted independently of its competitors. *Matsushita*, 475 U.S. at 588.

Complaint Counsel chose not to appeal the Judge's Initial Decision regarding Count 3—rejecting Complaint Counsel's allegations that McWane's January 11, 2008 and May 7, 2008 customer letters were an "invitation to collude." Initial Dec. 369. However, in its Appeal Brief, Complaint Counsel explicitly argues that these exact same letters constitute price signaling and that the Commission should consider them a "plus factor." CCAB 21, 32. Complaint Counsel cannot concede the Judge's determination that the January and May 2008 letters were not, as a factual and legal matter, an invitation to collude and then argue the exact oppose in their Appeal Brief. Complaint Counsel's rebranding of its unsupported invitation to collude claim does not pass muster under the law of the case doctrine. *See Pepper v. United States*, 131 S. Ct. 1229, 1250 (2011) ("when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case"); *Clark v. State Farm Mut. Auto. Ins. Co.*, 590 F.3d 1134, 1140 (10th Cir. 2009) ("Under the law of the case doctrine, [a] legal decision

made at one stage of litigation, unchallenged in a subsequent appeal when the opportunity to do so existed, becomes the law of the case for future stages of the same litigation, and the parties are deemed to have waived the right to challenge that decision at a later time") (internal quotations omitted); *United States v. Pilati*, 627 F.3d 1360, 1364 (11th Cir. 2010) (same); *Litton*, 676 F.2d at 369 (holding that Litton waived its contentions on the merits by failing to raise them on appeal to the FTC).

Judge Chappell correctly determined that McWane's January 2008 customer letter was "hardly a naked invitation to fix prices." Initial Dec. 366. In fact, the plain language of both letters flatly contradicts Complaint Counsel's strained interpretation. The Judge determined that McWane's January 11, 2008 customer letter "did *not* include any language indicating that McWane would support future increases in prices only if Sigma and Star curtailed Project Pricing. . . ." Initial Dec. 297. Instead, "[t]he greater weight of the evidence does not support an inference that the letter 'offered' to raise prices in the future in exchange for Sigma and Star curtailing their Project Pricing." Initial Dec. 367. Similarly, the Judge determined that the "plain language of the May 7, 2008 Customer Letter does not show [an] 'offer' regarding a price increase for DIFRA data." Initial Dec. 324. As a result, "the evidence fails to prove that McWane's May 7, 2008 Customer Letter constituted an 'invitation to collude.'" Initial Dec. 369. Complaint Counsel should not be permitted to make an end-run around the law of the case doctrine by simply recasting its invitation to collude claim (Count 3) as a plus factor.

Complaint Counsel's reliance on an alleged "curtailment" of job pricing by both Sigma and Star is similarly unpersuasive and insufficient as a matter of law. To prove its circumstantial case, Complaint Counsel was required to produce evidence of parallel conduct and that it was contrary to self-interest. *Matsushita*, 475 U.S. at 588; *In re Beef*, 907 F.2d at 514. Complaint

Counsel proved neither, and its conspiracy claims fail. Initial Dec. 283-84. Indeed, Judge Chappell found that Complaint Counsel entirely failed to proffer any economic analyses of prices.

Judge Chappell also rejected Complaint Counsel's reliance on phone calls between McWane, Sigma, and Star as "plus factors" supporting an inference of a conspiracy. Initial Dec. 300, 316 ("It would be pure speculation on this record to simply assume that Mr. Tatman and Mr. Rybacki discussed McWane's pricing "plan."). It is well established that the mere opportunity to conspire is insufficient evidence of a price-fixing conspiracy. *White v. R.M. Packer Co.*, 635 F.3d 571, 583-84 (1st Cir. 2011); *Baby Food,* 166 F.3d at 133; *Blomkest Fertilizer*, 203 F.3d at 1036 (holding that an opportunity to conspire is not necessarily probative evidence of a conspiracy); *Baby Food*, 166 F.3d at 126 ("communications between competitors do not permit an inference of an agreement to fix prices unless 'those communications rise to the level of an agreement, tacit or otherwise"); *see also Matsushita*, 475 U.S. at 588; *Flat Glass*, 385 F.3d at 360; *Burtch v. Milberg Factors, Inc.*, 662 F.3d 212, 228 (3d Cir. 2011) ("frequent meetings between the alleged conspirators . . . will not sustain a plaintiff's burden absent evidence which would permit the inference that those close ties led to an illegal agreement."). In support of its claims, Complaint Counsel identified four brief phone calls between Larry Rybacki and Rick Tatman, who both denied discussing prices, and a handful of calls between Mr. Rybacki and his personal friend and former colleague, Tom Frank, who at the time was working at McWane. CCAB 20; F. 632-34, 639-40. Even Complaint Counsel's expert, Dr. Schumann, acknowledged those social calls did not suggest a conspiracy to him. Schumann, Tr. 4249-4250 ("I haven't testified to that."). It strains common sense to infer that McWane communicated a plan to curtail job pricing, and received agreement from Sigma and Star, via a handful of telephone conversations each lasting only a few minutes. *See Baby Food,* 166 F.3d at 125 (evidence of "sporadic

exchanges of shop talk among field sales representatives who lack pricing authority" is not evidence of conspiracy); *see also Matsushita*, 475 U.S. at 588; *Flat Glass*, 385 F.3d at 360.

Complaint Counsel's reliance on DIFRA as a plus factor is baseless speculation which Judge Chappell properly rejected. As the Judge noted, DIFRA could only constitute a plus factor if he "improperly assumed" an agreement to curtail project pricing, which he properly declined to do. Initial Dec. 301; *Blomkest Fertilizer*, 203 F.3d at 1033 ("[A] litigant may not proceed by first assuming a conspiracy and then explaining the evidence accordingly."). It is well established that legitimate trade associations are perfectly legal. *Citric Acid,* 191 F.3d at 1097-98. Pursuant to the legal advice of the Bradley Arant law firm, the DIFRA members submitted monthly tons-shipped data to a third party accounting firm, Sellers Richardson. F. 713, 718-19. No DIFRA data was exchanged directly between members. F. 751. Neither DIFRA nor Sellers Richardson ever collected sales price data. F. 745. Additionally, the DIFRA reports issued by Sellers Richardson did not report any sales prices or dollar figures. F. 746-47. Every witness flatly denied that the tons-shipped data suggested anything about prices or that it impacted their decisions. McCutcheon, Tr. 2561-2562; CX 52; JX 694; Brakefield, Tr. 1337. Courts have rejected any antitrust liability premised upon the theory that a company's decision to participate in a trade association that gathers and disseminates aggregated tons-shipped data (and no price data at all) somehow "facilitated" price collusion. *Williamson Oil*, 346 F.3d at 1313 ("exchange [of] information relating to sales . . . does not tend to exclude the possibility of independent action or to establish anticompetitive collusion.").[6]

[6] Complaint Counsel also argues that when DIFRA was operational, Mr. Pais described it as a way to "promote pricing discipline and facilitate coordination" in a letter to its lender. CCAB 45. However, at trial Mr. Pais testified that he wrote the memorandum to appease Ares Capital, a secondary creditor that loaned tens of millions of dollars to Sigma at extraordinarily high interest rates. Pais, Tr. 1992-1995. Mr. Pais further testified that the memorandum was merely his

Complaint Counsel's reliance on a few Star internal documents purportedly complaining about "cheating" by Sigma is similarly unpersuasive. Internal Star documents describing discounting by Sigma as "cheating"—where the author was not called as a witness at trial, deposition, or investigational hearing—are not evidence of an agreement with McWane to curtail job pricing, particularly since Complaint Counsel chose not to call the authors at trial (or even depose them) and the only Star witness on the term testified it was Star short-hand for ongoing job pricing (and not a reference to any agreement). Initial Dec. 304-307; F. 903; Initial Dec. 306-07; Schumann, Tr. 3769, 3788, 3792-3793, 4111. The Judge determined that Complaint Counsel failed to show how the term "cheating" itself amounted to an "admission of Star of an agreement to curtail Project Pricing." Initial Dec. 305; F. 902. The cases relied upon by Complaint Counsel are easily distinguishable because, in each case, there was independent proof of the underlying agreement. *See United States v. Giordano*, 261 F.3d 1134, 1139-40 (11th Cir. 2001); *United States v. Beaver*, 515 F.3d 730, 734 (7th Cir. 2008). Unlike *Giordano* and *Beaver*, here there is no direct evidence of a conspiracy.

The only documents cited by Complaint Counsel actually referring to McWane—neither of which mention "cheating"—are two internal Sigma emails dated March 10, 2008 and August 22, 2008, from Sigma's OEM account manager, Mitchell Rona, to other Sigma employees. CCAB 29. The emails, on their face and according to the testimony of Mr. Rona, were generated by him in the course of legitimate, arm's-length buy-sell discussions he had with McWane on two occasions in 2008. Mr. Rona was Mr. Tatman's customer (not his competitor) and had no authority of sales or pricing to distributors. Sigma's Rybacki, who did have such authority, did

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speculative opinion, which he ***never*** discussed with anyone at McWane. Pais, Tr. 1992-1995. Thus, the Judge properly concluded that "the evidence fails to show that Mr. Pais was referring to any ability to coordinate with others on price, or to anything other than Sigma's own independent decision-making as to its own pricing conduct." Initial Dec. 360-61.

not respond to the emails or take any action at all following them. As discussed above, project pricing continued and prices severely eroded (even in the precise markets mentioned in the August 2008 email) throughout 2008, negating Complaint Counsel's claim that the emails suggest either a previously consummated agreement that they led to a subsequent agreement. Initial Dec. 342; F. 940-942.

The Judge properly rejected Complaint Counsel's "multilayered inference" that such evidence "should constitute a "plus' factor evincing an agreement involving McWane, and held that "Complaint Counsel's daisy chain of assumptions fails to support or justify an evidentiary inference of any unlawful agreement." Initial Dec. 305-07.

II. THE JUDGE CORRECTLY FOUND THAT DIFRA WAS PRO-COMPETITIVE AND DID NOT FACILITATE PRICE COORDINATION

Complaint Counsel presented no evidence of any mechanism by which DIFRA data could possibly have facilitated price collusion. F. 745-749, 752; CCAB 43-48. Aggregated tons-shipped data—which did not distinguish among the thousands of unique SKUs, domestic or import, which part of the country, or when the sales occurred—were sent by each company to an independent accounting firm retained by DIFRA's antitrust counsel. The independent accounting firm further aggregated all of the member firms' tonnage shipped data, and then distributed the aggregated overall figure in a report to all DIFRA members. JX 679 (Haley, Dep. at 7-8, 10, 13). DIFRA reports "did not disclose the market share or prices of any member, but disclosed only aggregated, tons-shipped data." Initial Dec. 324, 357; F. 733-734, 745-749, 752, 756, 758. The DIFRA reports were prepared and distributed by independent accountants and no data was exchanged directly among DIFRA members. F. 713, 718-719, 741-743, 746, 751. No DIFRA member was permitted to review the tons-shipped data of any other member and "neither DIFRA nor its accountants ever collected sales price data." Initial Dec. 302, 358; F. 745, 748. Thus, the

DIFRA reports did not contain or reveal any sales prices or dollar figures. F. 746-747. Moreover, every witness flatly denied that the tons-shipped data suggested anything about prices or that it impacted their decisions. F. 741-744, 748-749, 811, 818, 822. The members of DIFRA also testified that they never discussed Fittings prices or exchanged any information—including sales or pricing information—with each other. Initial Dec. 319-320; Tatman, Tr. 1005-1006, in camera; Rybacki, Tr. 3661; Pais, Tr. 2130-2131; McCutcheon, Tr. 2524-2525, 2554, 2689-2690.

During the latter half of 2008, the only months for which DIFRA reports were circulated (F. 738-739), net Fittings prices also declined sharply. F. 899-900, 930-931, 933, 1026. To the extent that a DIFRA member interpreted a perceived reduction in its own market share as being the result of price competition from other Suppliers, DIFRA had the effect of keeping Fittings prices lower than they would otherwise have been. F. 777. This is precisely what occurred in June 2008, when McWane decided to implement a lower multiplier increase, in spite of its skyrocketing production costs, based on its perceived loss of market share to other suppliers. Initial Dec. 331; F. 777, 805, 807, 829-830, 832, 839. In fact, McWane's non-domestic Fittings prices did not even keep pace with inflation during the DIFRA time period. F. 961-962. Thus, not only were the DIFRA reports incapable of facilitating price collusion, but they had a net procompetitive effect during the few months of their existence. *See Omnicare, Inc. v. UnitedHealth Group, Inc.* 629 F.3d 697, 720 (7th Cir. 2011) (even exchanges of "generalized and averaged high-level pricing data, policed by outside counsel" has been held to be "more consistent with independent than collusive action."). It is well established that even direct exchanges of pricing information among competitors (which this was not) "can enhance competition by making competitors more sensitive to each other's price changes, enhancing rivalry among them." *Todd v. Exxon Corp.*, 275 F.3d 191, 214 (2d Cir. 2001).

The Supreme Court has upheld even price exchanges (which this was not) as potentially pro-competitive, and noted that the "exchange of price data and other information among competitors does not invariably have anticompetitive effects; indeed, such practices can in certain circumstances increase economic efficiency and render markets more, rather than less, competitive." *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 443 n.16 (1978); *Citric Acid*, 191 F.3d at 1097-98 ("Gathering information about pricing and competition in the industry is standard fare for trade associations. If we allowed conspiracy to be inferred from such activities alone, we would have to allow an inference of conspiracy whenever a trade association took almost any action"). Volume exchanges, like DIFRA, are even less likely to have any anticompetitive effect. *Williamson Oil*, 346 F.3d at 1313 (11th Cir. 2003) (it is "plainly beneficial" "to keep tabs on the commercial activities of its competitors, so the receipt of information concerning their sales does not tend to exclude the possibility of independent action or to establish anticompetitive collusion" . . . "it is far less indicative of a *price fixing* conspiracy to exchange information relating to sales as opposed to prices"); To run afoul of the antitrust laws, "there must be evidence that the exchanges of information had an impact on pricing decisions." *Baby Foods*, 166 F.3d at 125. Because the tons-shipped DIFRA data did not (and could not) have any impact on pricing decisions, the Judge correctly determined that Complaint Counsel had failed to present any evidence that the DIFRA reporting system unreasonably restrained competition. Initial Dec. 354. Complaint Counsel nonetheless contends that aggregated past tons-shipped reports prepared by an independent accounting firm for DIFRA, a short-lived trade association in which the Suppliers briefly participated, tended to unreasonably facilitate price collusion and thereby restrain competition. CCAB 43. The evidence simply does not support this contention. F. 745-749, 752.

Whether DIFRA unreasonably restrained competition must be assessed under the rule of reason. *Todd*, 275 at 198. In its opening brief, Complaint Counsel argues that the DIFRA aggregated tons-shipped reports "lessened uncertainty about prevailing price levels, and thereby facilitated the Suppliers' ability to engage in tacit collusion." CCAB 44. However, Complaint Counsel presented no evidence or expert testimony to support this assertion. CCAB 44-48; Initial Dec. 338 ("given that Complaint Counsel bears the burden of persuasion, it was incumbent upon Complaint Counsel to present economic evidence to bolster the claim of conspiracy," but "Complaint Counsel did not offer any expert opinion that there was economic evidence indicating a conspiracy to raise and stabilize Fittings prices.").

The aggregated data contained in the DIFRA reports is completely different from the type of data contained in the potentially actionable information exchanges discussed in Complaint Counsel's cited cases, *Todd*, 275 F.3d at 196-197, 211-213, and *Cason-Merenda v. Detroit Med. Ctr.*, 862 F. Supp. 2d 603, 631-37 (E.D. Mich. 2012). The backward-looking, aggregated DIFRA reports, which contain no dollar figures, contrast sharply with the forward-looking, individualized salary information shared among the competing employers in *Todd* and *Cason-Merenda*. *See* Initial Dec. at 357, 361; F. 749, 752; *see also Todd*, F.3d at 211 (competitors' exchange of past pricing data generally not problematic from an antitrust standpoint). The DIFRA reports lacked transactional specificity to such an extent that they did not even break down aggregated tons of Fittings shipped on a state by state basis, distinguish between domestic and non-domestic Fittings, or disclose whether shipped tonnage was sold into open or domestic-only jobs. F. 743-744. Thus, the ALJ correctly concluded that the DIFRA reports were not problematic from an antitrust perspective. Initial Dec. 358.

Complaint Counsel further asserts in its brief that the aggregated tons-shipped data in the DIFRA reports "allowed participants to indirectly monitor price levels." CCAB 44-45. However, Complaint Counsel again failed to explain the means or method by which an aggregated, past tons-shipped report, containing no dollar figures, could possibly enable any type of price monitoring. Complaint Counsel cites *In re Petroleum Products Antitrust Litig.*, 906 F.2d 432, 461-62 (9th Cir. 1990), and argues that the exchange of production and supply data could be used to facilitate interdependent action. CCAB 45. However, the data exchanged in *Petroleum Products* is vastly different from the aggregated DIFRA reports; the *Petroleum Products* defendants disseminated price and discounting information--not aggregated volume data. 902 F.2d 447-449. Additionally, there was independent evidence that the defendants reduced offered discounts--or increased prices--*in parallel* following dissemination of the data. *Id.* at 441. Here, the DIFRA reports contained only aggregated past shipment data, not pricing or discounting data. F. 745-749, 752. Moreover, unlike in *Petroleum Products*, the Suppliers did not price in parallel. The ALJ determined that McWane underpriced Sigma and Star's published prices in Winter and Spring 2008 (and again in Spring 2009) and did not price in parallel with them. Initial Dec. 265-66, 277. Complaint Counsel also did not offer any economic evidence of a "curtailment" of Project Pricing by McWane, let alone any expert analysis of pricing data showing that McWane, Sigma and Star engaged in a parallel curtailment of Project Pricing. Initial Dec. at 277-278.

Complaint Counsel then argues in its Brief that the DIFRA reports helped each Supplier "to monitor its own market share, and to deduce from monthly changes in that share, its rivals' relative price levels." CCAB 45. However, the Judge correctly found that the DIFRA reports at

most enabled a Supplier to determine, to the extent the data in the reports was even accurate,[7] the total size of the Fittings market during the prior reporting period. F. 756. A Supplier could then independently compare the aggregated data to its own internal sales information and estimate its own market share for the previous time period; it could also estimate changes in its own market share over the recent past. Initial Dec. 358; F. 757, 774-776, 778, 839. As DIFRA members testified, however, the aggregated DIFRA reports were simply not detailed enough to enable any DIFRA member to determine the market share of any other DIFRA member, or the timing or dollar amount of that member's sales. F. 758.

In light of the foregoing, the distribution of the aggregated DIFRA reports is at least as consistent with innocuous action as with Complaint Counsel's allegations of conspiracy. *See Omnicare*, 629 F.3d at 710. Therefore, Judge Chappell's conclusion that the aggregated tons-shipped DIFRA reports are lawful under the rule of reason is clearly correct.

CONCLUSION

For the reasons stated herein, the Judge's recommended findings with respect to Counts 1-2 of the Administrative Complaint should be upheld.

[7] The evidence at trial showed that some of the data submitted by the Suppliers to DIFRA contained errors, which undermined the accuracy of the DIFRA reports. F. 754-755.

Dated: July 8, 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	)	
	)	**PUBLIC**
MCWANE, INC.,	)	
a corporation, and	)	
STAR PIPE PRODUCTS, LTD.,	)	
a limited partnership.	)	**DOCKET NO. 9351**
	)	

PROPOSED ORDER

Upon consideration of the briefs submitted by Respondent and Complaint Counsel, the arguments of counsel for the parties before this Commission in Open Session, and the record in this matter, THE COMMISSION FINDS:

1. The Administrative Law Judge's Findings of Fact and Initial Decision with respect to Counts 1, 2 and 3 of the Administrative Complaint were supported by substantial evidence.

THEREFORE, IT IS HEREBY ORDERED that the Complaint in *In the Matter of McWane, Inc.*, Docket No. 9351, is DISMISSED WITH PREJUDICE.

ORDERED:

_____
The Commission

_____, 2013

CERTIFICATE OF SERVICE

I hereby certify that on July 8, 2013, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

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

I also certify that I delivered via 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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