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

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

COMPLAINT COUNSEL'S POST-TRIAL REPLY BRIEF

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I. INTRODUCTION

The parties' post-trial briefs present a stark contrast. Citing contemporaneous documents, witness admissions and testimony, Complaint Counsel's Post-Trial Brief ("CCPB") laid out in explicit detail the evidence and law establishing McWane's liability for each of the Complaint's seven counts. That evidence demonstrates how McWane, Sigma and Star went from cutthroat competition to a period of cooperative collusion during which they abandoned their individual economic interests and did "what is right for the industry." That is, what was most profitable for the suppliers collectively. Like many cartels, McWane, Sigma and Star had an incentive to cheat. When an unprecedented decline in the economy caused the market to shrink further in late 2008, the temptation to cheat became too great and their coordination largely fell apart – although the co-conspirators continued to engage in improper pricing discussions in 2009 and 2010.

When Congress passed the American Recovery and Reinvestment Act in February 2009 to address the failing economy, they allocated $6 billion to domestically-produced waterworks projects. This incentivized Sigma and Star, and they announced their plan to enter the Domestic Fittings market, which up until then had been McWane's private domain. McWane responded with a two-pronged plan to exclude Star and co-opt Sigma, and thereby maintain its monopoly. McWane's business planning documents reveal its intent to "block" Star's entry when it implemented an all-or-nothing Exclusive Dealing Policy. McWane calculated that its Policy would avoid a price war with the historically aggressive Star, and would prevent its higher and more profitable Domestic Fittings prices from getting "creamed" from a pricing standpoint. McWane then used the MDA as an "insurance policy" against Sigma's entry and as a tool to further block Star. McWane knew that the MDA would not "increase the size of the pie," and projected that it would lose margin on Domestic Fittings sales to Sigma. Yet, McWane

calculated that the MDA would still "be of greater financial benefit to [McWane's] business than having them source elsewhere."

McWane relies almost entirely on self-serving testimony and conclusory denials without ever addressing the substantial record evidence introduced by Complaint Counsel at trial. The few bits and pieces of evidence that McWane deigns to address, it misconstrues or denigrates. For example, Mr. Tatman's Plan to stabilize prices is "only brainstorming;" unexplained calls between Mr. Tatman and Mr. Rybacki during the time that Mr. Tatman was developing his Plan and its "Message to the Market & Competitors" become "small" and "innocuous;" letters with intended messages for Star and Sigma are "plain vanilla" announcements; emails memorializing Mr. Tatman's complaints about Sigma's and Star's cheating on the agreement to curtail Project Pricing are disregarded because Mr. Tatman testified he never discussed pricing with his rivals; and the business records showing that Fittings prices and per-pound realization for all three Suppliers increased over the course of 2008 is supplanted by an index pegged to a "basket of Fittings" arbitrarily selected by McWane's expert.

But McWane cannot so easily sweep the mountain of evidence under the rug. The repeated claim that "McWane charted its own course," rings hollow in the face of evidence that McWane charted the course for the entire industry – and the industry acquiesced. Mr. Rybacki admitted that his "innocuous" calls with Mr. Tatman (and others) had no legitimate business purpose. Mr. Tatman admitted that McWane's January 11, 2008 letter contained a message to McWane's rivals and thus cannot be described as a "plain vanilla" announcement. And Messrs. Tatman's and Rona's denials should be weighed against their claims that they do not recall the documented conversations in which – on more than one occasion – they clearly discussed Fittings prices. McWane has offered no explanation for these complaints to rivals about their discounting. But the simplest and only rational inference is that Mr. Tatman complained when

he learned his rivals were cheating on the agreed upon Plan. And when McWane's expert was asked to use the correct collusion period, his index showed that Fittings prices rose, not fell.

McWane's defense of its efforts to monopolize the Domestic Fittings market follows a similar pattern. McWane begins by denying that a market for Domestic Fittings exists, arguing that, "the vast majority of specifications are open to imports and domestic Fittings," But McWane disregards the 15-20% of specifications that are not open, but where, by preference or by law, require only Domestic Fittings.

Assuming there is a market, McWane then argues: McWane's Exclusive Dealing policy had no effect; Star's entry was successful; and Sigma was too poor to enter anyway. Here too McWane simply ignores the evidence, preferring instead to attack Complaint Counsel's expert.

In a pair of arguments that contradict each other, McWane touts Star's "success" as the antidote to its Exclusive Dealing Policy, and then blames the victim of that Policy, Star, for its failure to succeed in the Domestic Market. McWane simply ignores the Distributors' testimony that McWane's Policy caused Distributors large and small to change their mind about buying (or permitting their branches to buy) from Star. Even if the Court concludes that McWane was not ultimately successful in implementing its plan to foreclose Star from the Domestic Market, McWane is still liable for attempted monopolization and conspiracy to monopolize.

McWane, however, cannot avoid liability by clouding the issues. As laid out in its Post-Trial Brief and in the pages that follow, Complaint Counsel has met its burden on each of the Complaint's seven counts. McWane's misdirection strategy is insufficient to defeat liability in the face of the extensive factual record establishing McWane's unlawful conduct.

II. LEGAL ANALYSIS

As discussed below, McWane's Post-Trial Brief fails to rebut the substantial record evidence establishing McWane's liability on each of the seven counts of the Complaint. Section A discusses the appropriate legal standard in this unfair competition action, and why the "substantial consumer injury" standard advocated by McWane only applies to consumer protection cases. Section B discusses the price fixing claim and rebuts McWane's argument, among others, that there is no evidence of "plus" factors to support an inference of conspiracy. Section C discusses the invitation to collude claim, and rebuts McWane's argument that the January and May 2008 letters were "plain vanilla" price announcements. Section D discusses the DIFRA-related claim (independent of the price-fixing conspiracy), and rebuts McWane's argument that information exchanges based on sales volumes cannot be anticompetitive. Sections E and F explain why there is a separate relevant Domestic Fittings market, and how McWane has monopoly power in that market. Sections G, H, and I discuss why McWane's all-or-nothing Exclusive Dealing Policy, more than being a mere "Rebate Policy," represented an unlawful monopolization, attempted monopolization, and conspiracy to monopolize the Domestic Fittings market. Section J discusses the MDA-related claim, and rebuts McWane's argument, among others, that Sigma was not a potential competitor in the Domestic Fittings market. Finally, Sections K and L discuss how Complaint Counsel need not show actual harm to competition as part of its burden of proof, and why the proposed Order is an appropriate remedy in this matter.[1]

[1] Complaint Counsel has endeavored to comply with this Court's Order that reply briefs respond to arguments in the order in which they appear in the opposing post trial brief. McWane's Post-Trial Brief, however, raises factual arguments in the first half of its brief that are not addressed in its legal discussion, and it has split up individual claims, discussing some claims in multiple sections of its legal discussion (*e.g.*, placing discussion of alleged efficiencies for its Exclusive Dealing Policy almost 20 pages after its monopolization discussion of that Policy). To be coherent, Complaint Counsel has addressed all

A. Standard For Finding an Unfair Method of Competition in Violation of Section 5 of the FTC Act

Although the Commission does not enforce the Sherman Act directly, conduct that violates the Sherman Act is generally considered to be an unfair method of competition in violation of Section 5 of the FTC Act, "and principles of antitrust law developed under the Sherman Act apply to cases alleging unfair competition." *In re Polypore*, 2010 F.T.C. Lexis 17, at *623-24 (citing *Fashion Originators' Guild, Inc*., 312 U.S. 457, 463-64 (1941); *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 451-52 (1986); *Rambus Inc. v. FTC*, 522 F.3d 456, 462 (D.C. Cir. 2008); *Cal. Dental Ass'n*, 121 F.T.C. 190, 292 n.5 (1996)). Notably, the FTC Act is broader than the Sherman Act and can reach certain conduct not reached by the Sherman Act, such as invitations to collude. *See FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 239 (1972) (Section 5 "does empower the Commission to define and proscribe an unfair competitive practice, even though the practice does not infringe either the letter or the spirit of the antitrust laws").

Citing Section 5(n) of the FTC Act, 15 U.S.C. § 45(n), McWane incorrectly argues that Complaint Counsel must meet the consumer protection standard for finding unfair acts or practices, a standard that does not apply to unfair methods of competition, *i.e.*, antitrust cases. *See* RPB at 64; *see also* RPB at 60-63 (arguing Complaint Counsel's failure to prove "substantial injury" to consumers). The Commission originally articulated the Section 5(n) standard in a 1980 policy statement, which was drafted in response to a Congressional inquiry regarding limits of the Commission's consumer protection authority. The 1980 policy statement explicitly stated that it did not address the Commission's "competition or antitrust mission," which is guided by

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arguments related to a single claim at the same time, and has discussed each claim in the order in which it appears in McWane's legal discussion.

"a considerable body of antitrust case law." Federal Trade Commission Statement of Policy on the Scope of Consumer Unfairness Jurisdiction (December 17, 1980) at n.4, *reprinted in In re International Harvester Co.*, 1984 FTC LEXIS 2, at *304 & n.3. The 1980 policy statement was later codified as Section 5(n) of the FTC Act, 15 U.S.C. § 45(n), and consistent with its applicability to the Commission's consumer protection jurisdiction, § 45 has the heading "Definition of unfair acts or practices." *See* Pub. L. No. 103-312, 108 Stat. 1695 (codified at 15 U.S.C. § 45(n)); *see also In re Rambus, Inc.*, 2006 FTC LEXIS 102, at *35 (Commissioner Leibowitz, concurring) (Section 5(n) of the FTC Act codified the FTC's 1980 consumer unfairness statement). That standard has never been applied to a competition matter.

Because none of the claims in this case is brought under the Commission's "unfair acts or practices" authority, Section 5(n) does not apply. Moreover, employing Section 5(n)'s "substantial injury to consumers" standard as proposed by Respondent would distort longstanding antitrust standards for establishing harm to ***competition***, from which consumer harm naturally flows. There is no support – in either case law or academic literature – for applying this consumer protection standard of "substantial injury" to antitrust claims. *Cf.* CCPB at 54-58 (describing analytical continuum for assessing harm to competition under antitrust laws).

B. McWane, Sigma, and Star Conspired to Restrain Price Competition by Curtailing Project Pricing and Increasing Transparency

The evidence highlighted in Complaint Counsel's Post-Trial Brief establishes that, during 2008 and 2009, McWane and its rivals conspired to restrain price competition. *See* CCPB 90-163; CCPF 907-1571. Complaint Counsel has proven three distinct episodes of illegal price fixing. Any single episode is alone sufficient to establish a *per se* violation of Section 1 of the Sherman Act. *See Turner v. United States*, 396 U.S. 398, 420 (1970) ("[W]hen a jury returns a

guilty verdict charging several acts in the conjunctive, . . . the verdict stands if the evidence is sufficient with respect to any one of the acts charged.").

McWane's brief does not offer meaningful exculpatory evidence; instead, it traffics in indignant denials and vague themes. McWane's first response is that Complaint Counsel failed to offer direct evidence that McWane, Sigma, and Star met together in a "smoke-filled room," and there hammered out an agreement to charge specific prices. Of course, this made-for-television story is not the case alleged in the Complaint; this was not the case presented at trial by Complaint Counsel; and hence McWane's efforts to disprove it are irrelevant to the issues to be decided by this Court. At trial, Complaint Counsel offered direct and circumstantial evidence proving that McWane designed and implemented a Plan whereby, with proper communications among competitors, McWane could "drive both price stability and transparency" in the Fittings market, and then achieve "net price increases" "in stepped or staged increments." *See* CCPB at 118 (discussing the Tatman Plan); CCPF 907-929. Sigma and Star knowingly joined in McWane's Plan by curtailing Project Pricing, participating in the DIFRA information exchange, and raising prices in stepped and staged increments. CCPF 930-1071, 1155-1259. Self-serving denials of the smoke-filled room story by various Fittings executives do not disprove, or even address, the actual violation.

McWane next seeks to sidestep the reality that McWane, Sigma and Star acted in parallel throughout 2008. *See* RPB at 11-20, 61-67. McWane's dodge centers on the three companies' advance announcements relating to published prices. In January and May 2008, the companies initially made dissimilar announcements: Sigma preferred somewhat higher published prices; McWane preferred somewhat lower published prices. McWane's preference prevailed across the industry. CCPF 965-967 (January 2008); CCPF 1192-1200 (May/June 2008). This process of bid and response is a common oligopoly game. *See In re Petroleum Products Antitrust Litig.*,

906 F.2d 432, 446 n.11 (9th Cir. 1990) (advance price announcements allow "the price leader to communicate its intention and to receive reactions without having to incur substantial risk"). But set aside these tentative price announcements and focus on actual prices. The bottom line is that throughout 2008, McWane, Sigma, and Star had identical or nearly-identical published prices, and the companies' published prices moved in parallel, with industry-wide increases taking effect on February 18, 2008 and again on July 14, 2008. CCPF 933, 968, 999, 1242, 1247, 1339. More importantly, the three companies also acted in parallel by curtailing Project Pricing. The defense chant that "McWane charted its own course" cannot alter the fact that all three companies acted in parallel during 2008.

Third, McWane seeks to elevate Complaint Counsel's burden well above the established legal standard. Complaint Counsel is not obliged to prove beyond a reasonable doubt that McWane, Sigma, and Star conspired. "Requiring a plaintiff to 'exclude' or 'dispel' the possibility of independent action places too heavy a burden on the plaintiff." *In re Publ'n Paper Antitrust Litig.*, 690 F.3d 51, 63 (2d Cir. 2012); *see also Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig.*, 681 F. Supp. 2d 141, 167 (D. Conn. 2009) ("tends to exclude" does not mean "excludes"). The issue for this Court is whether, when the evidence is considered as a whole, it appears (i) more likely that McWane and its rivals agreed to restrain price competition, or (ii) more likely that the companies acted independently. *See Publ'n Paper*, 690 F.3d at 63; *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 663 (7th Cir. 2002) ("[I]n a civil case price fixing need be proven only by a preponderance of the evidence."). As discussed below, this evidence compels the conclusion that McWane orchestrated a conspiracy to stabilize and increase Fittings prices by curtailing Project Pricing and increasing price transparency. CCPB at 114-143 (discussing plus factors).

Finally, McWane demands that Complaint Counsel offer direct evidence of McWane's participation in the price-fixing conspiracy. This ignores the fact that most antitrust conspiracies are proven through circumstantial evidence. Courts distinguish between oligopoly interdependence and agreement by evaluating the evidence of "plus factors" – circumstantial evidence that tends to exclude the possibility of independent action. *In re McWane, Inc.*, FTC Docket No. 9351, 2012 FTC LEXIS 155, at *21 (Sept. 14, 2012). Plus factors "serve as proxies for direct evidence of an agreement." *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 360 (3d. Cir. 2004). The ample plus factor evidence described in Complaint Counsel's opening brief and reviewed below compels the conclusion that McWane orchestrated a conspiracy to raise Fittings prices above the competitive level.

In Section 1, we review the relevant plus factors and respond to McWane's explanations – where any have been advanced. Where McWane has offered no rebuttal, we point this out as well. We show that the better, more persuasive explanation for the marked transformation in the nature of competition in the Fittings industry beginning in 2008 is that McWane, Sigma, and Star agreed to restrain their rivalry. In Section 2, we address the evidence that, according to McWane, is probative of unrestrained competition among McWane, Sigma, and Star (what McWane terms "minus factors"). We show that McWane's minus factors are insubstantial. In Sections 3-6, we address the expert testimony and the summary judgment cases cited by McWane.

1. The Plus Factor Evidence of a Price-Fixing Conspiracy Is Compelling

The evidence of an illegal price agreement among the Fittings competitors is extensive and varied – and largely unrebutted by McWane. Reviewing the plus factor evidence below in the context of the timeline of events persuasively shows that a price-fixing agreement between

McWane, Sigma and Star is the best explanation for the marked changes to the nature of price competition in the Fittings industry in 2008 and beyond.

a) The Structure of the Fittings Market Facilitates Collusion[2]

The Fittings industry is a close-knit oligopoly that is conducive to price collusion. *See* CCPB at 83-90; CCPF 651-844. McWane agrees that the Fittings market is an oligopoly, RPF 36-37, and it does not dispute that the market is conducive to collusion. Project Pricing historically frustrated tacit oligopoly coordination among McWane, Sigma and Star. *See* CCPF 670-683; CCPB at 87-88.

b) Late 2007: McWane, Sigma and Star Each Had a Motive to Conspire[3]

During 2007, aggressive price competition among McWane, Sigma, and Star squeezed the profit margins of all the Fittings suppliers. CCPF 842-844. Late in the year, McWane fired the manager who had aggressively followed Star's prices down (*i.e.*, competed), installed a new management team headed by vice president and general manager Rick Tatman, and tasked that management team with improving the company's performance. CCPF 9, 19, 45 (McWane's reorganization involved Mr. Page firing Mr. Green due to McWane's lagging performance in the fittings industry); CCPF 853 (McWane losing market share and volume in late 2007 due to project pricing from Star and Sigma). With large inflationary cost increases in China, Mr. Tatman recognized that its import rivals were also "desperate" for higher prices. CCPF 870-877, 917.

McWane's Proposed Conclusions of Law include the factual contention that McWane did not have a motive to conspire because fixing prices would "lock-in" McWane at an

[2] *In re Text Messaging Antitrust Litig.*, 630 F.3d 622, 627-628 (7th Cir. 2010) ("an industry structure that facilitates collusion constitutes supporting evidence of collusion"); *see also* CCPB at 83-90, 114-116; CCPF 651-841.

[3] *Flat Glass*, 385 F.3d at 360 (motive to conspire is a plus factor); *see also* CCPB at 114-116; CCPF 842-906.

unsustainably low market share. *See* Resp. Proposed Conclusions of Law at ¶¶ 31, 34; RPB at 73-74 (claiming independent action). This argument, raised for the first time post trial, is contrary to the weight of evidence. The evidence establishes that McWane had been losing share since 2003 and through 2007. Mr. Tatman attributed this share loss to McWane's smaller and less nimble sales force (compared to its imported rivals, Star and Sigma), and McWane's corresponding inability to identify and quickly respond to its competitors' Project Pricing. CCPF 853-859. A price-fixing conspiracy designed to curtail Project Pricing would target the very area in which McWane was not equipped to compete effectively, and had the potential to stabilize the downward spiral of McWane's market share and profitability. *See* CCPF 842-869. McWane believed that if it were no longer disadvantaged through Project Pricing, it would win more business with Distributors. Tatman, Tr. 361 ("If I can see it, I can shoot it."); Tatman, Tr. 1066 ("We certainly wanted greater visibility…. And as soon as I could see where I need to be and what I need to do, I can aim and I can shoot."). Thus, McWane had a particularly strong motive to conspire.

c) December 2007/January 2008: McWane Develops the Tatman Plan[4]

In December 2007, Mr. Tatman devised a multi-prong plan to improve the profitability of McWane's Fittings business by reducing price competition, a plan that required the active cooperation of its competitors Sigma and Star. CCPF 907-923 (discussing Tatman Plan). Specifically, McWane would support a series of small increases in multiplier prices. CX 0627 at 004 ("We will support net price increases but will do so in stepped or staged increments."); *see also* CCPF 908-923 (discussing Tatman Plan). But McWane would support the next price

[4] *In re Sulfuric Acid Antitrust Litig*., 743 F. Supp. 2d 827, 858 (N.D. Ill. 2010) (defendant's written plan for inducing its competitors to reduce output was the "most damaging" evidence "tending to exclude the possibility of independent action"); *In re Linerboard Antitrust Litig*., 504 F. Supp. 2d 38, 59 (E.D. Pa. 2007); *see also* CCPB at 21-22; CCPF 907-923.

increase only if Sigma and Star curtailed their use of Project Pricing. CX 0627 at 004 ("A prerequisite for supporting the next increment of price is reasonable stability and transparency at the prior level."); *see also* CCPF 908-923. The suppliers would move toward greater transparency in their pricing actions. CX 0627 at 004 ("[McWane] will encourage/drive both price stability and transparency."); *see also* CCPF 908-923. And finally, Mr. Tatman recognized that a "key" to the success of his Plan would be for Sigma and Star to remove pricing authority from local sales personnel in order to bring discipline to company pricing. CX 0627 at 004 ("Sigma's and Star's mgt pulling pricing authority away front line sales and customer service personnel to add discipline to the process."); *see also* CCPF 908-923.

How would Sigma and Star learn what was required of them so as to induce McWane to "support[] the next increment of [increased] price"? CX 0627 at 004; *see also* CCPF 908-923. Mr. Tatman understood that McWane would need to communicate the terms of the Plan to McWane's competitors. Thus, Mr. Tatman informed his colleagues at McWane: "I believe that we're in a unique position to help drive stability and rational pricing with the **proper communication** and actions." CX 1702 at 001 (emphasis added). The Tatman Plan was characterized by Mr. Tatman as McWane's "**Desired Message to the Market & Competitors**." CX 0627 at 004 (emphasis added).

McWane's Post-Trial Brief offers a two-part rebuttal. First, McWane characterizes the Tatman Plan as a "brainstorming document," suggesting that Mr. Tatman's strategy is unusual, bold, and unorthodox. *See* RPB at 31. The Fittings market had long been characterized by aggressive competition, in part because Project Pricing was a central component of Star's business strategy. *See* CCPF 867 ("Star has been singularly unhealthy to our entire industry over the past 20-some years, with their reckless, irresponsible and undisciplined tactics to resort to whatever it takes to grab some business and grow."); CCPF 868 ("Star has been an irresponsible,

disruptive and unreliable competitor, constantly attacking McWane's business with low prices and other tactics."). Thus, it is correct to say that Mr. Tatman was scheming to take the industry in a new direction. CCPF 908-923 (discussing Tatman Plan).

Second, McWane characterizes the Tatman Plan, with its references to the need to communicate with rivals, as only a brainstorming document. The claim is that Mr. Tatman discussed the Plan internally with his bosses at McWane, but never implemented it. This is an unconvincing response for two reasons. First, Mr. Tatman admitted that McWane's January 11, 2008 letter, which invited McWane's rivals to curtail Project Pricing in exchange for future price increases, was the result of this "brainstorming" session. CCPF 934, *see also* CCPB at 23-29. Second, the Fittings market then unfolded in precisely the manner charted by Mr. Tatman in late 2007: inter-company communications, increases in published prices in staged increments, reduced discounting, centralization of pricing authority, and an industry-wide effort to increase price visibility through an information exchange. How is it that a mere (discarded) brainstorming document foretells with clarity and precision the subsequent development of the Fittings industry? The logical answer is that the Tatman Plan was not abandoned; instead, it was successfully implemented by McWane, Sigma, and Star. *See* CCPF 934 (Mr. Tatman admitted that McWane's January 11, 2008 letter, which invited McWane's competitors to collude by curtailing Project Pricing in exchange for future price increases, was the result of his "brainstorming" session with his superiors.); CCPB at 23-29. McWane offers no alternative explanation for the realization of each of the elements of the Tatman Plan.

As the Commission has concluded: "[T]he strategy laid out in Mr. Tatman's presentation is both suggestive of possible collusion and provides a context for interpreting the events that followed." *McWane*, 2012 FTC LEXIS 155, at *33-34. Here is what followed.

d) Late 20907/Early 2008: High Level of Unexplained Inter-Firm Communications[5]

In late 2007, Ruffner Page, McWane's President and CEO, met privately and communicated frequently with Victor Pais, Sigma's President and CEO. CCPF 837-838, 886-887. Between December 22, 2007 and January 11, 2008, Mr. Tatman (McWane) spoke four times with his counterpart at Sigma, Larry Rybacki (vice president of sales). CCPF 923 (describing two of the phone calls as lasting 6 and 9 minutes). On January 9, 2008, Mr. Rybacki in turn spoke at length with his counterpart at Star, Dan McCutcheon (vice president of sales). CCPF 744.

McWane correctly notes that the Court cannot know with certainty the content of these conversations. *See* RPB at 76-77. But their timing is more than suspicious. These communications occur at an inflection point in the Fittings industry, the moment when the industry shifts from aggressive competition to implementation of the Tatman Plan. Mr. Rybacki suggested that one call to Mr. Tatman may have been to "welcome" him to the industry. But he "had no idea" how he knew Mr. Tatman's cell phone number, and he admitted that he had no legitimate business purpose for calling Mr. Tatman. Rybacki Tr. 3626, 1088. Otherwise, all of the witnesses claim that they cannot recall what they discussed. *See*, *e.g.*, CCPF 923c, 1033, 1449, 1452, 1504. McWane has not provided a legitimate explanation, indeed any explanation, for these high-level communications. These communications support the inference of an illegal conspiracy.

[5] *EPDM Antitrust Litig.*, 681 F. Supp. 2d at 166-67 (high level of inter-competitor communications is a plus factor); *In re High Pressure Laminates Antitrust Litig.*, No. 00 MDL 1368 (CLB), 2006 WL 1317023, at *3 (S.D.N.Y. May 15, 2008) (same); *see also* CCPB at 132-143; CCPF 700-841.

e) January 2008: McWane Issues an Invitation to Collude[6]

On January 11, 2008, McWane communicated to Sigma and Star, through a letter nominally addressed to Distributors, that McWane would announce a multiplier increase later in the year *if* its rivals first joined with McWane in curtailing Project Pricing. *See* CX 2172 at 002; CCPB at 90-105; CCPF 930-949 (discussing the January 11 letter). This is the central plank of the Tatman Plan. Whether or not McWane also communicated the Plan privately, *see* Part B.1(d) above, here it is being communicated (or perhaps re-communicated) through a public vehicle. McWane labels the January 11 letter a "plain vanilla price announcement." RPB at 75. But McWane has failed to identify a single similar pricing letter in its decades as a Fittings supplier, and McWane has offered no alternative interpretation of the unusual language in the January 11 letter, nor any explanation of why McWane would send a letter with such language to Distributors. McWane's denials are particularly hollow in light of Mr. Tatman's trial testimony, in which he admitted that he purposefully used the January 11 letter to induce Sigma and Star to curtail Project Pricing. Tatman, Tr. 1066-1067; *see also* CCPF 935-944.

f) Late January: Against its Unilateral Interest, Star Agrees to the Tatman Plan and Curtails Project Pricing (Parallel Conduct)[7]

In late January 2008, Star launched a new sales strategy that accepted and implemented the essential elements of the Tatman Plan. *See* CCPB at 111-114; CCPF 971-1014 (discussing

[6] *Petroleum Prods.*, 906 F.2d at 446-47 (public communication of prices for purpose of facilitating an agreement supports inference of conspiracy); *Antitrust Law* ¶ 1419a (solicitation to engage in illegal collaboration is evidence of a conspiracy); *see also* CCPB at 90-105; CCPF 930-949.

[7] *United States v. Singer Mfg. Co.*, 374 U.S. 174, 193 (1963) (conspiracy may be achieved "by acquiescence [in a plan] coupled with assistance in effectuating its purpose"); *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707, 723 (1944) (same); *Sulfuric Acid Antitrust Litig.*, 743 F. Supp. 2d at 858 ("Evidence pointing to compliance with" one defendant's collusive plan on the part of other defendants "only strengthens the inference of collusive activity"); *Antitrust Law* ¶ 1419a (performance of requested act can complete a conspiracy); *Cosmetic Gallery, Inc. v. Schoeneman Corp.*, 495 F.3d 46, 54 (3d Cir. 2007) (parallel conduct can be circumstantial evidence of a conspiracy); *Apex Oil Co. v. Di Mauro*, 822 F.2d 246, 253 (2d Cir. 1987) ("Parallel conduct can be probative evidence bearing on the issue of whether there is an antitrust conspiracy."); *see also* CCPB at 111-114; CCPF 971-1014 (discussing Star following McWane's January 2008 Fittings price multipliers and accepting McWane's invitation to curtail Project Pricing).

Star following McWane's January 2008 Fittings price multipliers and accepting McWane's invitation to curtail Project Pricing). The company's new goal was "to take a price increase and to stop project pricing," except where it had documentary evidence that a competitor had initiated Project Pricing for a specific job. CX 0034 at 003; CX 0752 at 001. Matt Minamyer, National Sales Manager for Star, instructed his sales staff that in the future, "[a]ll project pricing has to go through me." CCPF 993; CX 0034 at 003. In other words, Star moved both to curtail discounting and to centralize pricing authority, just as McWane (Mr. Tatman) desired. CCPF 991-996; CX 0627 at 004; CCPF 916-919. In 2007, Star had been the industry maverick, acting to benefit itself without regard to the interests of its competitors. CCPF 860-864. Star now pulled back from price competition and embraced a more collaborative ethos. According to Mr. Minamyer: "What we are doing is right for the industry;" "[W]e will not be the ones to drag the market down;" "[T]his is what is best for the industry and we need to be part of the effort to help our industry." CX 0034 at 003. Mr. Minamyer admitted at trial that Star's new direction was a reaction to information from McWane. Minamyer, Tr. 3160; CCPF 977.

For many years, Star had successfully used Project Pricing to increase its market share at the expense of McWane and Sigma. *See* CCPF 867 ("Star has been singularly unhealthy to our entire industry over the past 20-some years, with their reckless, irresponsible and undisciplined tactics to resort to whatever it takes to grab some business and grow."); CCPF 868 ("Star has been an irresponsible, disruptive and unreliable competitor, constantly attacking McWane's business with low prices and other tactics."). Why then in January 2008 does Star suddenly see its interests as aligned with the success of its rivals? And why does Mr. Minamyer expect that curbing discounting will benefit Star, as opposed to resulting in a loss of market share? McWane admits that without Project Pricing, Star was surrendering its competitive advantage over McWane. RPF 83. Star's then vice president of sales, Mr. McCutcheon, acknowledged that this

change in pricing strategy at Star was "irrational" and "bizarre," and ordinarily would threaten the company's competitive viability. CCPF 1063. Star's acting against its unilateral interest by adopting this "bizarre" strategy can be explained only by the fact that Star expected it competitors to behave in a similar, non-competitive manner.[8] Star was relying on cease-fire assurances communicated by McWane and Sigma.

McWane has no alternative explanation for Star's strategic reversal. Instead, McWane claims that Star did not curtail Project Pricing during 2008. *See* RPB at 19. Which is to say, McWane simply ignores Mr. Minamyer's new pricing strategy, and the empirical evidence showing that Star offered far fewer Project Prices in 2008 as compared to 2007. CCPF 1041-1054, 1338-1383, 1410-1423. The Star executives' self-serving denials that they curtailed Project Pricing, as cited by McWane, are far less reliable than Star's contemporaneous, internal documents. And those internal documents unmistakably evidence a new, less competitive pricing policy at Star following immediately upon the Tatman Plan (*see* Part B.1(c)), and the December 2007/January 2008 communications (Part B.1(d-e)).

g) *Late January: Against Its Unilateral Interest, Sigma Also Agreed to the Tatman Plan and Curtailed Project Pricing (Parallel Conduct)*[9]

In late January 2008, Sigma also implemented a new pricing program that signaled its acceptance of the essential terms of the Tatman Plan. *See* CCPB at 116-122; CCPF 951-970. Victor Pais, President and CEO of Sigma, determined that the company would follow McWane's

[8] *City of Tuscaloosa v. Harcros Chems., Inc.*, 158 F.3d 548, 572 (11th Cir. 1998) (action against interest is a plus factor); *Merck-Medco Managed Care, LLC v. Rite Aid Corp*., No. 98-2847, 1999 U.S. App. LEXIS 21487, at *26 (4th Cir. 1999) (same); *see also* CCPB at 122-126 (discussing Star's abandonment of Project Pricing against its unilateral interest).

[9] *Singer Mfg. Co.*, 374 U.S. at 193 (conspiracy may be achieved "by acquiescence [in a plan] coupled with assistance in effectuating its purpose"); *Bausch & Lomb*, 321 U.S. at 723 (same); *Sulfuric Acid*, 743 F. Supp. 2dat 858 ("Evidence pointing to compliance with" one defendant's collusive plan on the part of other defendants "only strengthens the inference of collusive activity"); *Antitrust Law* ¶ 1419a (performance of requested act can complete a conspiracy); *see also* CCPB at 111-114; CCPF 950-970.

smaller than desired multiplier price increase, and would curtail Project Pricing. CX 1145 at 001. By curtailing Project Pricing, Sigma acted against its unilateral interest and surrendered its competitive advantage over McWane. RPF 83.[10] Sigma chose this strategy because this is what McWane desired. Rybacki, Tr. 1131; *see also* CCPF 963-964 (Project Pricing "was upsetting the gorilla in the room, which was [McWane]"). Sigma knowingly and deliberately was demonstrating to McWane Sigma's commitment to adhere to a new and non-competitive pricing strategy. Mr. Pais wrote:

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

CCPF 956 (emphasis added). Thus, Sigma understood the essential message of the Tatman Plan: that if Sigma and Star followed McWane's initial, small price lead, and eschewed excessive discounting, then further McWane price increases would follow. CCPF 951, 953-955, 965-967. By changing its pricing strategy, Sigma knowingly "demonstrated" to McWane its acceptance of and conformity with the Tatman Plan.

McWane has no alternative explanation for this new pricing policy at Sigma. Instead, McWane claims that Sigma did not curtail Project Pricing during 2008. *See* RPB at 17. Which is to say, McWane simply ignores Mr. Pais's new pricing strategy. The self-serving denials by Sigma executives, cited by McWane, are much less reliable than the contemporaneous, internal Sigma documents. And these internal documents unmistakably evidence a new, less competitive pricing policy at Sigma, and a deliberate signal of agreement to McWane, following immediately

[10] *See Harcros Chems*., 158 F.3d at 572 (action against interest is a plus factor); *Merck-Medco Managed Care, LLC v. Rite Aid Corp*., 1999 U.S. App. LEXIS 21487, at *26 (same).

upon the Tatman Plan (Part B.1(c)), and the December 2007/January 2008 communications (Part B.1(d-e)), and coinciding with Star's acceptance of the Plan as well (Part B.1(f)).

h) Early 2008: Sigma Pushes for Sigma and Star to Comply with the Tatman Plan (Acceptance by Sigma)[11]

Sigma was not confident that Star was fully committed to the Tatman Plan. In early 2008, Mr. Pais (President and CEO of Sigma) dined alone with Star's Mr. McCutcheon (vice president of sales). CCPF 1036-1037. At this meeting, Mr. Pais urged Mr. McCutcheon that Sigma and Star should each keep their Fittings prices within two to three multiplier points of McWane's published prices. CCPF 1036-1037. Mr. Pais explained that if Sigma and Star were less aggressive in their discounting, then McWane "would behave differently and not be so overbearing towards us. That if we were good, then they would be good – they would treat us better and we could live happily ever after . . . ." CCPF 1037. Here again Sigma is displaying its precise understanding of the Tatman Plan: that if Sigma and Star avoid excessive discounting, then further McWane price increases will follow.

It is not reasonable to think that Sigma and Star were scheming to raise prices without the involvement of McWane.[12] Sigma knew that without support from McWane, the largest seller in the Fittings industry, the strategy would fail. CCPF 900 (CX 1439 ("[W]e [Sigma] can take the market price down on our own, we need THEM [McWane] to take it up.")). Moreover, the only reasonable explanation for Sigma's precise understanding of the Tatman Plan is that McWane and Sigma discussed this strategy. Sigma therefore joined the conspiracy by (i) acting in accord

[11] *Singer Mfg.*, 374 U.S. at 193 (conspiracy may be achieved "by acquiescence [in a plan] coupled with assistance in effectuating its purpose"); *Bausch & Lomb*, 321 U.S. at 723 (same); *Sulfuric Acid*, 743 F. Supp. 2d at 858 ("Evidence pointing to compliance with" one defendant's collusive plan on the part of other defendants "only strengthens the inference of collusive activity"); *Antitrust Law* ¶ 1419a (performance of requested act can complete a conspiracy); *see also* CCPB at 134-135; CCPF 1029-1040.

[12] *Flat Glass*, 385 F.3d at 363 ("If six firms act in parallel fashion and there is evidence that five of the firms entered into an agreement . . . it is reasonable to infer that the sixth firm acted consistent with the other five firms' actions because it was also a party to the agreement.").

with McWane's proposal (curbing Project Pricing), and by (ii) actively recruiting Star to adhere to the Tatman Plan as well. Mr. McCutcheon's testimony about his dinner with Mr. Pais is direct and compelling evidence of collusion, and evidence that has not been addressed by McWane.[13]

Mr. McCutcheon's testimony also shows why any witness testimony asserting that Project Pricing continued during 2008 is not meaningful. The goal of the conspiracy, as understood by Sigma and communicated to Star, was to keep transaction prices for Fittings close to published prices (within two to three multiplier points). CCPF 1036-1037. The parties did not intend to abolish all Project Pricing.

i) February 2008: McWane Communicates Its Cost Advantage to Sigma (Price-Related Communications)[14]

In late 2007 and early 2008, McWane engaged Sigma in a buy/sell transaction for Fittings designed by McWane to communicate to Sigma, in a credible fashion, that McWane was now the low-cost Fittings producer, and a dangerous rival if collusion broke down. *See* CCPF 1073-1088 (McWane communicated its manufacturing cost advantage to Sigma in early 2008 to create the perception that it would be able to sustain aggressive pricing if its share position were threatened, and to encourage Sigma and Star to collude on pricing). Importantly, Star also received (and believed) this message. CCPF 1087-1088. McWane has not addressed this transaction.

[13] *See In re Baby Food Antitrust Litig.*, 166 F.3d 112, 118 (3d Cir. 1999) ("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").

[14] *In re Plywood Antitrust Litig.*, 655 F.2d 627, 634 (5th Cir. 1981) (inter-firm communication on the subject of the alleged conspiracy is a plus factor); *see also* CCPB at 138-140; CCPF 1079-1088.

j) April 2008: McWane Concludes that Its Co-conspirators Curtailed Project Pricing (Parallel Conduct)[15]

McWane's internal Executive Report for the first quarter of 2008 reported significant success in industry-wide implementation of most of the elements of the Tatman Plan: higher published prices, reduced discounting, and centralization of pricing authority by rivals.

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

CX 1564 at 004. A range of other internal company documents confirm that there was an industry-wide reduction in Project Pricing during 2008. These documents include McWane's competitive feedback log (referred to as a "Price Protection Log") and the analogue document at Star, which shows a significant reduction in the incidence of Project Pricing from 2007 to 2008. *See* CCPF 1043-1047 (examining McWane's Price Protection Logs); 1410-1423 (examining Star's Special Project Pricing Reports).

McWane claims that these business documents evidencing a reduction in Project Pricing represent mere "speculation." RPB at 37. But McWane offers no concrete reason to disbelieve the documentary record. The Federal Rules of Evidence and Commission practice presume that business records are "exceptionally reliable." *United States v. Emenogha*, 1 F.3d 473, 483 (7th Cir. 1993); Fed. R. Evid. 803(6) advisory committee's note ("The element of unusual reliability of business records is said variously to be supplied by systematic checking, by regularity and continuity which produce habits of precision, by actual experience of business in relying upon them, or by a duty to make an accurate record as part of a continuing job or occupation."). Even

[15] *Cosmetic Gallery*, 495 F.3d at 54 (parallel conduct can be circumstantial evidence of a conspiracy); *Apex Oil*, 822 F.2d at 253 ("Parallel conduct can be probative evidence bearing on the issue of whether there is an antitrust conspiracy."); *see also* CCPB at 111-114; CCPF 1041-1054

Mr. Tatman ultimately acknowledged the **{**

} CCPF 1045-1046.

k) Throughout 2008, the Co-Conspirators Complain About Cheating (Price-Related Communications)[16]

Throughout 2008, McWane, Sigma and Star monitored the market for incidents of Project Pricing or "cheating," *i.e.* pricing below published prices. *See* CCPB at 129-132; CCPF 1041, 1044-1045, 1048-1053 (McWane); CCPF 1015-1021 (Star); CCPF 970 (Sigma). Here, there is direct evidence that McWane communicated with Sigma about prices and complained about Sigma's discounting.

In March 2008, Mr. Tatman complained to Mr. Rona of Sigma that Sigma sales representatives were offering Project Pricing. CCPF 1035 ("He said he hears that some of the new prices in the market are being compromised with deals. He hopes the market will improve and hopes [we] do our part."). And again in August 2008, Mr. Tatman contacted Mr. Rona to complain that Sigma and Star were offering Project Pricing in California and Florida. CCPF 1452. It is reasonable to infer that, separate from these two documented communications, there were additional, similar inter-company conversations about Project Pricing that are not memorialized in writing.[17]

Mr. Tatman's apparent expectation that Sigma would be chastened to be caught discounting, and that Sigma would take remedial action, is evidence of the underlying price agreement. McWane asserts that Sigma did not change its pricing in response to McWane's complaints. RPB at 77 at n.6. But whether or not Sigma adhered more closely to the price

[16] *United States v. Beaver*, 515 F.3d 730, 738 (7th Cir. 2008) (inter-company complaints about "cheating" is evidence of conspiracy); *United States v. Giordano*, 261 F. 3d 1134, 1139 (11th Cir. 2001) (same); *see also Plywood Antitrust Litig.*, 655 F.2d at 634 (inter-firm communications on the subject of the alleged conspiracy is a plus factor); *see also* CCPB at 129-132; CCPF 1029-10410, 1451-1455.

[17] *See Petroleum Prods.*, 906 F.2d at 454 n.18 (evidence of direct competitor contacts permits inference of other similar contacts).

agreement after being caught cheating is a side issue. The main event is that these documents conclusively show inter-company communications on prices, as well as an illegal agreement. See CCPB at 129-132. McWane has offered the Court no alternative explanation of these episodes. Mr. Tatman and Mr. Rona claim not to recall them at all. *See* CCPB at 129-132; CCPF 1451-1455, 1035.

Additionally, Star's internal documents frequently reference "cheating" by McWane and Sigma. CCPF 1041, 1044-1045, 1048-1053. In one internal email, a Star regional sales manager identified discounting by Sigma as "cheating on the fitting deal." CCPF 1444. This language, this mindset, presupposes a mutual commitment to curb Project Pricing. Only the existence of a hidden agreement can convert rivalry into "cheating." Thus, company employees were aware that there was a price agreement. McWane offers no benign explanation for the repeated use of terminology that plainly indicates a price agreement among McWane, Sigma, and Star.[18]

l) Spring 2008: the Co-Conspirators Revive Efforts to Form the DIFRA Information Exchange (Facilitating Practice/Action Against Unilateral Interest)[19]

In the Spring of 2008, one element of the Tatman Plan remained to be implemented: making each company's transaction prices more visible to the other competitors (what the Tatman Plan refers to as market "transparency"). CX 0627 at 004; *see also* CCPB at 164-180; CCPF 1260-1337. Over several years, Star had been pressured to participate in an exchange of sales information, using the trade association DIFRA as a vehicle. CCPF 1151-1153, 1107-1108. Star resisted these entreaties, fearing that McWane would use this proprietary information to injure Star. CCPF 1154. In the spring of 2008, Star reluctantly agreed to participate in the

[18] *See McWane*, 2006 U.S. Dist. LEXIS 75873, at *42 ("'the use of the word "cheating" denotes the breach of an agreement or convention, not independent action'") (quoting *Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan*, 203 F.3d 1028, 1050 (Gibbons, J., dissenting)).
[19] *Harcros Chems*., 158 F.3d at 572 (action against interest is a plus factor); *Merck-Medco Managed Care*, 1999 U.S. App. LEXIS 21487, at *26 (same); *see also* CCPB at 122-127.

information exchange. CX 1187 (Star "is being somewhat drug to the party"); *see also* CCFP 1151. Star is again acting contrary to the company's own view of its unilateral interest.

Sigma, on the other hand, was a more enthusiastic member of the DIFRA information exchange, viewing its participation in DIFRA as a means to promote pricing discipline and, importantly, as one more tangible signal to McWane.

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

CCPF 1279(a). Sigma was willing to participate in DIFRA and to "grow in a responsible manner" in order to curry favor with McWane. CCPF 1279(a). So once again, Sigma exhibits its perfect insight into the strategy developed by Mr. Tatman/McWane, and its willingness to conform thereto.

McWane argues – without a shred of evidence – that DIFRA was pro-competitive. Yet, DIFRA engaged in no activities other than the information exchange, and went dormant when excessive cheating on the price-fixing agreement led Star to increase to Project Pricing.

m) May/June 2008: McWane Issues Another Invitation to Collude[20]

On May 7, 2008, McWane communicated to Star and Sigma, through a letter nominally addressed to Distributors, that McWane would support higher published prices for Fittings only after it received the DIFRA reports. CCPB at 100-105; CCPF 1179-1182. Like the January letter, McWane labels this communication a "plain vanilla" price announcement. *See* RPB at 75. But McWane has identified no similar pricing letter in its decades as a Fittings supplier, has

[20] This event is not only a plus factor for the overall conspiracy, but also represents the second episode of the price-fixing conspiracy. *See Petroleum Prods.*, 906 F.2d at 446-47 (public communication of prices for purpose of facilitating an agreement supports inference of conspiracy); *Antitrust Law* ¶ 1419a (solicitation to engage in illegal collaboration is evidence of a conspiracy); *see also* CCPB at 100-105, 148-157; CCPF 1179-1182.

offered no alternative interpretation of the unusual language in the May 7 letter, and has offered no explanation for why it would send such a letter to Distributors. Moreover, no customer testimony supports McWane's contention that this was an ordinary letter. *See* CCPF 1186-1189 (McWane's May 2007 letter was meaningless to its Distributor customers).

Most importantly, Mr. Tatman's trial testimony contradicts this claim. At trial, Mr. Tatman admitted that McWane was delaying a price increase until it received the DIFRA reports because it wanted to "drill in the message" to Sigma and Star that McWane was not willing to lose visibility on pricing. CCPF 1232. McWane does not address this evidence.

n) May/June 2008: McWane's Second Invitation to Collude is Accepted[21]

Star understood the May 7 communiqué from McWane as offering higher prices in return for submission of DIFRA data. CCPF 1192-1207. Star moved quickly to provide its shipment date to DIFRA, and expressly communicated to Sigma that it was acting to satisfy McWane. CCPF 1222-1226. McWane ignores this episode.

o) November 2008: Terms of Coordination Largely Fall Apart and Provide Further Evidence of Parallel Pricing[22]

In the Fall of 2008, a severe contraction in market demand for Fittings triggered an erosion in pricing. RX-116 at 001. Star was disappointed by the perceived failure of McWane and Sigma to avoid discounting; such behavior was unexpected, and in Star's view "irresponsible." CX 0831; CCPF 1457. On November 25, 2008, Star's National Sales Manager Matt Minamyer responded by launching a new pricing strategy:

> [Star employees] have been extremely diligent in protecting the stability of our market pricing . . . .

[21] *Singer Mfg. Co.*, 374 U.S. at 193 (conspiracy may be achieved "by acquiescence [in a plan] coupled with assistance in effectuating its purpose"); *Bausch & Lomb*, 321 U.S. at 723 (same); *Antitrust Law* ¶ 1419a (performance of requested act can complete a conspiracy); *see also* CCPB at 111-114, 148-157.
[22] *Apex Oil*, 822 F.2d at 253 ("Parallel conduct can be probative evidence bearing on the issue of whether there is an antitrust conspiracy."); *see also* CCPB at 111-114.

> However, some of our competitors have not performed as admirably . . . .
>
> We have many instances where we have documented the competition being irresponsible (Mostly Sigma) and selling under our multipliers in almost every market with varying strategies. We have lost too much revenue to tolerate it any longer.
>
> Please get with your teams to be sure we are all clear on the following plan.
>
> ***We will take every order we can after exhausting all avenues to document the competitors pricing . . . . [W]e will no longer tolerate the competition being irresponsible in the market and being undersold as a result . . . . Do this quietly and selectively and as much under the radar as you can but, <u>if it is necessary</u>, be sure to do it. Go get every order !!!!!***

CX 0831 (emphasis in original); CCPF 1457. McWane denies that Star curbed Project Pricing during 2008. This internal memo, and Star's own records, (CCPF 1410-1423) prove conclusively that Star had throttled back on price competition during 2008, consistent with the Tatman Plan.

p) December 2008/January 2009: Sigma and Star Stop Submitting Their DIFRA Data, Providing Further Evidence that Participation in DIFRA Was Against Their Unilateral Interest[23]

Soon after the coordination started to fall apart, Sigma and Star stopped submitting their shipment data to DIFRA. *See* CCPF 1479. Their last data submission was in December 2008. After January 2009, the DIFRA information exchange ceased to operate. *See* CCPF 1473-1483 (cessation of information exchange). This sequence confirms that, absent price collusion, participation in DIFRA was against Star's and Sigma's unilateral interest. McWane has not addressed this evidence.

[23] *Harcros Chems*., 158 F.3d at 572 (action against interest is a plus factor); *Merck-Medco Managed Care*, 1999 U.S. App. LEXIS 21487, at *26 (same); *see also* CCPB at 122-127.

q) Throughout 2008: There Is a High Level of Inter-firm Communications[24]

The senior executives of McWane, Sigma, and Star were in continual communication with one another during the conspiracy period. For example, the CEOs of McWane (Mr. Page) and of Sigma (Mr. Pais) conferred in-person eight or more times between August 2007 and May 2009. CCPF 788-790, 797-798, 800-801, 804. Senior executives of McWane, Sigma, and Star, chiefly executives with pricing authority, exchanged over 414 telephone calls between January 2007 and May 2012. CCPF 713-786. McWane represents that these companies regarded one another as "archrivals." RPB at 11. But the frequency of communications indicates instead that the firms were partners in a common venture.

What was the common venture? The relevant witnesses could not explain these extensive contacts. If there were a legitimate explanation for these communications, McWane had every incentive to disclose it to the Court. But McWane also has not explained these communications.

There is therefore every reason to infer that some or all of these unexplained telephone communications were in furtherance of a price-fixing conspiracy. This would explain the abrupt change in pricing strategy at McWane, Sigma, and Star. This would explain Sigma's precise understanding of the Tatman Plan. This would explain the otherwise inexplicable realization of Mr. Tatman's "brainstorming" strategy. And this would explain why no one can account for hundreds of telephone calls between competitors.

r) April 2009: Direct Evidence of Price-Fixing Agreement and Inter-Firm Communications About Price[25]

[24] *Flat Glass*, 385 F.3d at 361 (high level of communications is a plus factor); *see also* CCPB at 132-144.

[25] Respondent's Post-Trial Brief rehashes the twice-settled issue of the admissibility of 2009 and 2010 evidence by making numerous false claims regarding Complaint Counsel's pleadings and evidence. *See* RPB at 8-11. As this Court and the Commission have previously held, evidence demonstrating that McWane exchanged assurances with Star in April 2009 as part of its unlawful agreement on price, and that McWane's and other Fittings suppliers' continued improper signaling to one another in June 2010 is admissible. *See* FTC Rules of Practice, 16 C.F.R. §§ 3.11(b)(2), 3.43(b); *McWane*, 2012 FTC LEXIS

In April 2009, McWane announced a new price list that, if implemented, would be costly to Sigma's bottom line. CCPF 1502-1503. Sigma's Mr. Pais met with representatives of McWane and Star in an unsuccessful effort to achieve consensus on a different pricing structure, one more favorable to Sigma. *See* CCPB at 157-163; CCPF 1504-1510, 1520-1524 (Sigma discussions with McWane); CCPF 1525-1532 (Sigma discussions with Star). McWane and Star meanwhile exchanged assurances about following McWane's April 2009 announced list price. CCPF 1533-1553. McWane has informed this Court that McWane "never discussed prices" with Sigma or Star. RPB at 64. McWane's contention is inaccurate.[26]

Specifically, on April 28, 2009, during the period that Sigma was trying to convince McWane and Star not to implement a new list price, McWane and Star discussed with one another what they would do. Mr. Tatman started the day uncertain as to how Star will price its Fittings: in an internal email about the contemplated price increase, he referred to Star as the

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155, at *72-75 (ruling that Complaint Counsel properly notified Respondent of its allegations that McWane's exchange of price assurances with Star in April 2009 constituted a *per se* unlawful act under Section One of the Sherman Act, and that Respondent had actual notice of April 2009 allegations through discovery and had not been deprived of procedural due process); *In re McWane, Inc.*, FTC Docket No. 9351, 2012 FTC LEXIS 151, at *7-8 (Sept. 7, 2012) (rejecting McWane's argument that Complaint Counsel raised "new-found" allegations because the evidence related to the single, well-pled claim regarding a single conspiracy, and as such, is admissible).

Contrary to McWane's claims, Complaint Counsel's response to Interrogatory No. 16 specifically identified that McWane had engaged in improper pricing behavior in 2009 and 2010, and Complaint Counsel incorporated the 2009 and 2010 evidence by reference in response to Interrogatory Nos. 5, 6, 7, 8, 9 and 17. *See* RX-711 at 007-011, 018 (Complaint Counsel's Supplemental Response and Objections to Respondent McWane Inc.'s First Set of Interrogatories ("June 21, 2012 Interrogatory Responses")). McWane's claim that Dr. Schumann "repeatedly opined that any conspiracy ended by the Fall of 2008 at the latest" is wrong. RPB at 10-11. While counsel for McWane repeatedly asked Dr. Schumann whether "the conspiracy is falling apart and ending," Dr. Schumann repeatedly refused to draw conclusions regarding an end point for the conspiracy. *See* Schumann, Tr. at 4200-4201, 4298 (Dr. Schumann repeatedly asserted that the conspiracy "started to collapse" at the end of 2008 but posited no actual end point). In fact, Dr. Schumann recognized the 2009 events in his description of the price fixing agreement in his expert report. CX 2260 at 054-055 (Schumann Rep. at ¶¶ 112-116).

Complaint Counsel therefore requests that this Court once again reject Respondent's arguments.

[26] This episode is not only a plus factor of the overall conspiracy, but represents the third episode of the conspiracy. *See* CCPB at 157-163; CCPF 1504-1522, 1533-1553; *see also In re Baby Food Antitrust Litig.*, 166 F.3d 112, 118 (3d Cir. 1999) ("Direct evidence of a Section 1 conspiracy must be evidence that is explicit and requires no inferences to establish the proposition or conclusion being asserted."); *Sugar Inst. v. United States*, 297 U.S. 553 (1936).

"wild card." CCPF 1543. Then Mr. Tatman (Vice President, McWane) had a telephone conversation with Mr. McCutcheon (Vice President, Star) concerning McWane's newly announced price list for Fittings. CCPF 1539-1542. According to Mr. McCutcheon, he asked Mr. Tatman whether McWane would be following through with its announced price revisions, or would instead stay with the old price list (as Sigma preferred). Mr. Tatman assured Mr. McCutcheon that McWane would follow through with the new price list. CCPF 1539-1541. Mr. McCutcheon's testimony regarding this conversation was clear, consistent over time, against his interests, and therefore highly credible.

In contrast, Mr. Tatman testified that he has no recollection of the telephone call with Mr. McCutcheon. CCPF 1542. Internal McWane documents show that although Mr. Tatman began the day wondering what Star, the "wild card," would do, by day's end Mr. Tatman was "now highly confident that Star will follow our Price List." CX 1180 at 001; CCPF 1543. This episode again illustrates the readiness of McWane and Star executives to discuss the companies' future pricing.

More importantly, this episode demonstrates Mr. Tatman's propensity to disclaim or remove from memory his competition-related conversations with rivals. *E.g.* CCPF 923, 1452, 1542 (not recalling substance of phone calls); CCPF 1545 (not recalling meaning of document); CCPF 1808 (same). This is one more reason why the Court cannot credit Mr. Tatman's assertion that the Tatman Plan was merely filed away and forgotten. The actions and cooperation prescribed by the Tatman Plan – and then brought to life – do not arise spontaneously, including: stepped increases in published prices, a reduction in Project Pricing, rivals understanding that McWane's support for a future increase in published pricing requires that rivals curb Project Pricing, and Star abandoning its reluctance to participate in an industry information exchange. And McWane's suggestion that these very significant developments in the Fittings industry

represent lawful "follow-the-leader" pricing is equally implausible. These events require a conscious commitment to a common scheme. These events bespeak "agreement."

Complaint Counsel's Post-Trial Brief explains that McWane's private assurance to Star in the Spring of 2009 that it would adhere to a previously announced price list constitutes illegal price fixing under *Sugar Inst. v. United States*, 297 U.S. 553 (1936). McWane responds that Star had already decided to follow McWane's prices, so there was no agreement on price. This is incorrect as a matter of law. Responding to a rival's inquiry with private price assurances on future prices makes out an unlawful agreement under *Sugar Institute*. It is not Complaint Counsel's burden to establish whether or how Star's prices would be different absent the agreement. *See Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647 (1980); *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397-98 (1927).[27]

[27] McWane asserts that Star was justified in seeking an assurance regarding McWane's future prices in order potentially to avoid the high cost of printing a new price list (if Star learned that McWane was not going to change its prices). RPB at 80. As price-fixing is a *per se* violation, no efficiency defense is recognized. Even under the rule of reason, a trivial printing cost savings to a company from avoiding the need to respond to a rival's unforeseen price move is not an acceptable defense. *Cf. Antitrust Law* ¶ 1907c:

> [O]ne class of cost reductions is ignored – namely the costs of operating the competitive market system itself . . . . Our entire market system is built on the premise that these costs are worth their price in the great majority of circumstances. Further, a rule that permitted judicial consideration of claimed cost reductions would be often asserted, extremely expensive to administer, and prone to the production of many errors; and it would free only a small number of defendants from liability.

The cases cited by McWane do not exonerate the communication at issue here. The inter-competitor communications in *Blomkest Fertilizer* "only concerned charges on completed sales, not future market prices." 203 F.3d at 1034. In contrast, Messrs. Tatman and McCutheon discussed a price list applicable to future transactions. The court in *Baby Food* characterized the inter-company communications in that case as "chit chat" at chance meetings or trade shows among persons with no pricing authority. 166 F.3d at 133. In contrast, the purpose and effect of the Tatman/McCutcheon telephone call was to determine whether Star would issue a new price list. Messrs. Tatman and McCutcheon had pricing authority in their respective companies.

s) June 2010: More Improper Price Signaling[28]

In June 2010, Star communicated that it was ready for a Fittings price increase. Sigma then sent a letter to Distributors that was intended by Sigma as a signal to McWane and Star that Sigma would follow a price increase. McWane responded to the communications by announcing a price increase, and Sigma and Star quickly followed. Sigma then crowed about its success. *See* CCPF 1555-1571 (discussing the pattern of improper pricing communications and coordination among McWane, Sigma, and Star continuing into 2010).

McWane asserts that it raised prices independently and not in response to the Sigma letter. The documents clearly demonstrate otherwise. CCPF 1555-1571. But even if one credits McWane's denial, this evidence unambiguously proves that competitors in the Fittings industry use public letters nominally addressed to Distributors to communicate with one another. *See supra* Part B.1.e, B.1.m.

2. McWane's Claimed Evidence of Independent Action is Illusory

The extensive evidence of plus factors reviewed above is more than sufficient to establish a rebuttable presumption of conspiracy. *See Baby Food*, 166 F.3d at 122. We turn now to McWane's asserted "minus factors." McWane's arguments are illusory.

a) McWane Did Not "Chart[] Its Own Course" in Fitting Pricing

The centerpiece of McWane's defense is its claim that during 2008, the company acted independently ("charted its own course") on published prices because McWane announced price increases that were smaller than price increases that had been previously announced by Sigma. *See* RPB at 12-16, 64-70. Recall that published prices for Fittings are comprised of a national list (or catalogue) price multiplied by the then-applicable multiplier for a specific geographic area (*e.g.*, $1000 list price x .28 local multiplier = $280 published price). The actual transaction

[28] *Petroleum Products Antitrust Litig.*, 906 F.2d 432, 445-48 (9th Cir. 1990) (publicly signaling prices to competitor is a plus factor).

price paid by the Distributor depends in significant part upon whether a supplier offered a Project Price, a discount off the published price.

McWane asks the Court to focus upon the published price, insisting that in this arena, it acted without prior consultation with Sigma and Star. *See* RPB at 12-16, 64-70. In 2008, Sigma twice announced future published price increases, and Star signaled a willingness to follow. McWane subsequently announced smaller future published price increases. Sigma and Star, whose announced prices never went into effect, then followed McWane's lead on prices. McWane contends that this sequence shows that McWane's strategy was not to conspire, but to underprice its rivals. As detailed below, this argument does not hold water.

First, Complaint Counsel does not simply allege an agreement among McWane, Sigma and Star to fix published prices. Thus, McWane's oft-repeated discussion of published prices is immaterial and an apparent effort to mislead the Court by attacking a contention that Complaint Counsel has not asserted.

Second, there is no legal or economic inconsistency between independent decision-making on published prices and a conspiracy to restrain discounting from published prices. Complaint Counsel is not required to show a conspiracy on both elements of price. An agreement to limit discounts, by itself, is *per se* illegal. *E.g.*, *United States v. Am. Radiator & Standard Sanitary Corp.*, 433 F.2d 174, 185-88 (3d Cir. 1970); *United States v. Stop & Shop Cos.*, No. B 84-51, 1984 WL 3196, at *1 (D. Conn. Nov. 9, 1984); *United States v. United Liquors Corp.*, 149 F. Supp. 609 (W.D. Tenn. 1956), *aff'd per curiam*, 352 U.S. 991 (1957); *cf. Catalano*, 446 U.S. at 648 ("[A]n agreement to eliminate discounts . . . falls squarely within the traditional *per se* rule against price fixing.").

Third, the course charted by McWane with regard to published prices was not procompetitive, but an integral part of Mr. Tatman's Plan to achieve a collusive increase in

transaction prices. McWane's Plan was to dole out small increases in published prices "in stepped or staged increments," CX 0627 at 004 (Tatman Plan); *see also* CCPF 908-923 (describing the Tatman Plan), thereby giving competitors only "half of what they want to prevent cheating and fire sales." CX 2327; *see also* Tatman, Tr. 348-349 (explaining that when the published price for Fittings is too far above the competitive level, McWane's rivals' incentives to engage in secret discounting becomes so great as to undermine McWane's objective of achieving stable prices). "A prerequisite for supporting the next increment of price is reasonable stability and transparency at the prior level." CX 0627 at 004. Thus, McWane was using the smaller increases in published prices to induce and reward discipline among its co-conspirators when it came to reduced discounting. More precisely, McWane was using these increases in published prices to secure collusion on ultimate transaction prices. Star and Sigma understood this strategy, and each responded by curbing Project Pricing in full accord with the Tatman Plan. CCPB 107-108.

Fourth, the claim that McWane was attempting to "underprice" its rivals is simply untrue and makes little sense. Fittings are a commodity product and as such, suppliers tend to publish identical prices to avoid losing sales. CCPF 415-418; CCPF 441-444; CCPF 666-678. McWane was issuing advance price announcements, with the expectation and understanding that Sigma and Star would substantially match these published prices before the prices became effective. CCPF 917 (CX 0627 (Tatman Plan acknowledges precisely this in the Tatman Plan document, writing: "I believe that Sigma and Star will mimic and verbally follow any program we publish."); CX 1178 (January 11, 2008 price announcement effective February 18, 2008); CX 1191 (June 17, 2008 price announcement effective July 14, 2008). Its rivals could and did copy McWane's published prices before they went into effect. RPF 137-138. If McWane were interested in underpricing its rivals to gain volume, it could have announced a price reduction

that was effective immediately, thereby obtaining at least a short-term sales advantage before its rivals could respond. McWane did not pursue this strategy.

Fifth, McWane asserts (without citation to the record), that "it consistently kept its published prices *lower* than Sigma and Star." RPB at 11. This is not accurate. The published prices of the three competitors were substantially identical throughout 2008. *See* CCPF 666-669, 685 (Star and Sigma follow McWane's October 2007 price increase), 966-968 (Sigma following McWane's January 2008 price increase), 997-1008 (Star following McWane's January 2008 price increase), 1247-1250 (Star and Sigma following McWane's June 2008 price increases).

Sixth and finally, the practice of using advance price announcements to "negotiate" a consensus price is a textbook strategy for oligopolists. In an oligopoly, advance price announcements serve as a trial balloon, a method for one firm to signal competitors. Professor Areeda explains:

> Advance announcements of a particular price increase to become effective on a specified future date makes price leadership especially safe. The initiator thereby tests rivals' reactions. If a sufficient number of competing sellers fail to follow with similar announcements, the initiator can retract the scheduled price increase without having lost any sales . . . or having to win back defecting customers.

Antitrust Law ¶ 1435d; *see also* Louis Kaplow, *An Economic Approach to Price Fixing*, 77 ANTITRUST L.J. 343, 389-90 (2011) ("[A]dvance price announcements, which may be followed by rivals' responsive announcements and further modifications by the initiator, in as many rounds as necessary, may reduce risks attendant with changing prices, thereby facilitating oligopoly pricing."). So on two occasions, Sigma publicly floated its proposal for a large increase in published prices; McWane signaled its preference for a smaller price increase; and the industry reached consensus at the lower price level preferred by McWane. McWane's participation in this minuet is not evidence of competitive ardor, and McWane was not "charting

its own course." Instead, McWane was asserting its status as the industry "price leader." McWane believed that somewhat lower published prices would be more conducive to stable collusion.

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

b) The Co-conspirator Denials Are Insufficient to Disprove the Existence of the Conspiracy

McWane's next "minus" factor is that executives of McWane, Sigma and Star repeatedly denied the existence of the conspiracy. This is a thin reed and is not credible. Indeed, McWane cannot explain over 400 phone calls between high level executives of allegedly "arch rivals." It is well established that an antitrust conspiracy may be proven through circumstantial evidence alone. *Petroleum Prods.*, 906 F.2d at 439; *accord In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 662 (7th Cir. 2002); *Harcros*, 158 F.3d at 569; *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co*., 998 F.2d 1224, 1242 (3d Cir. 1993); *McWane*, 2012 FTC LEXIS 155, at *17. This means that liability may be established without a confession from any of the alleged conspirators. *See High Fructose Corn Syrup*, 295 F.3d at 662; *Antitrust Law* ¶ 1410c (an illegal agreement "can exist without . . . any admission by the participants"). As the Commission observed in *SKF Industries*: "The courts have not hesitated to infer an agreement on the basis of [circumstantial] evidence . . . notwithstanding exculpatory, self-serving testimony." *In re SKF Industries, Inc.*, 94 F.T.C. 6, 95 (1979).

Perhaps company executives who denied the existence of a conspiracy sincerely believe that if competitors avoid explicitly agreeing to fix published prices in a smoke-filled room, then the competitors are on the right side of the law. If so, then the witnesses do not understand antitrust law.

c) The Fact That the Co-conspirators Continued Some Level of Project Pricing is Consistent with the Conspiracy Allegation and Does Not Disprove the Conspiracy

McWane claims that the Fittings competitors continued to offer Project Pricing during 2008, and therefore did not engage in parallel pricing. As discussed more fully in Complaint Counsel's Post-Trial Brief, there are three reasons why this argument is unavailing. First, the evidence amply proves that McWane, Sigma and Star did in fact curtail Project Pricing. CCPB at 114-179; CCPF 1041-1054, 1338-1383, 1410-1423. Second, Complaint Counsel does not argue that McWane and its rivals intended to or would cease all Project Pricing. "Accordingly, that at least some job pricing continued is not inconsistent with the conspiracy allegations." *McWane*, 2012 FTC LEXIS 155,at *44 n.14; *see also* CCPB at 158. Third, an agreement to restrain price competition is *per se* illegal even if (contrary to the evidence) the agreement was ineffective and cheating was rampant. CCPB at 144 (discussing case law). As the Commission explained in denying McWane's Summary Judgment Motion:

> [E]vidence that job pricing continued, at least to some degree, in 2008 does not preclude a finding of conspiracy. In evaluating a claim of price fixing, one must distinguish "between the existence of a conspiracy and its efficacy." *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 656. The fact that not all of the claimed conspirators complied fully with the conspiracy does not mean there was no conspiracy.

McWane at *43.

There is a fourth defect with McWane's argument as well. As a matter of law, "there is no inflexible requirement that plaintiffs must produce evidence of parallel conduct in order to establish a conspiracy through circumstantial evidence." *Cason-Merenda v. Detroit Medical Center*, 862 F. Supp. 2d 603, 625-28 (E.D. Mich. 2012). *Accord Re/Max International, Inc. v. Realty One, Inc.*, 173 F.3d 995, 1009 (6th Cir. 1999) (uniformity of actions is only one of several important factors); *InterVest, Inc. v. Bloomberg, L.P.*, 340 F.3d 144, 163-65 (3d Cir. 2003)

(concerted action may be inferred from communications even absent parallel conduct); *Fleischman v. Albany Medical Center*, 728 F. Supp.2d 130, 158 (N.D.N.Y. 2010) ("[p]arallel pricing is merely one such form of circumstantial evidence" upon which a plaintiff may permissibly rely to establish concerted action).

d) McWane's Preference for Higher Prices and Reduced Discounting Does Not Disprove the Conspiracy

McWane asserts that it "is entitled to judgment in its favor" because its actions "are consistent with its own self-interest." RPB at 74. This contention is legally and logically incorrect. We have previously explained that McWane's preference for "lower" published prices was part and parcel of its strategy to secure higher (supracompetitive) and collusive transaction prices. *See supra*, Part B.2.a. McWane's contention that lower published prices and/or reduced discounting served the company's economic self-interest does not alter the analysis.

Participation in a successful price-fixing conspiracy is often in a defendant's economic self-interest. *See Harcros Chems.*, 158 F.3d at 571 n.33. That a defendant prefers higher prices (reduced discounting) is not alone sufficient to prove a conspiracy (*see Baby Food*, 166 F.3d at 134-35); but neither is it a basis for dismissing a price-fixing claim. For McWane to establish that its pricing decisions served the company's self-interest is *not* itself exculpatory. *See Flat Glass*, 385 F.3d at 358 ("[A]n agreement among oligopolists to fix prices at a supracompetitive level . . . makes perfect economic sense.").

Burtch v. Milberg Factors, Inc., 662 F.3d 212 (3d Cir. 2011), cited by McWane, presents a very different fact pattern. In *Burtch*, various lenders declined to extend credit to the plaintiff, a financially struggling garment retailer. *Id.* at 217. The plaintiff alleged that the lenders' parallel action was the result of a conspiracy. *Id.* The Third Circuit affirmed the dismissal of the complaint. *Id.* at 217, 230. Among the factors considered by the court was that the utility to any

one lender of a decision to withhold credit from a risky borrower is not dependent upon the actions of its rivals. *Id.* at 228; *cf. Antitrust Law* ¶ 1411 ("[T]he wisdom of denying credit to a bankrupt purchaser seems presumptively independent of a rival seller's choice."). In that context, where the defendants' parallel conduct is "non-interdependent" (Professor Areeda's terminology), the parallel action by rivals is not even a plus factor. *Id.* at ¶ 1415a ("When behavior serves self-interest regardless of rivals' acts, the actor has an independent reason for its behavior and has no incentive to coordinate with rivals even if agreements with them were perfectly legal.").

Burtch has no bearing on the present case. The value to McWane of any given pricing strategy depends upon the pricing strategy of its rivals. Mr. Tatman acknowledged this. Tatman, Tr. 1071 ("[O]ur competitors are going to keep job-pricing and we're going to have to keep job-pricing."). Mr. Rybacki likewise acknowledged that Sigma's strategy with regard to Project Pricing was dependent upon its rivals' decisions. Rybacki, Tr. 3522-3524, 3658-3659, *in camera*. Indeed, in any oligopoly market, pricing decisions are "interdependent" (profitability depends upon the actions of rivals). Professor Areeda explains: "Some acts, or failures to act, cannot be profitably continued unless rivals behave in parallel. For example, one cannot profitably increase its price above that charged by rivals unless they follow the price-raiser's lead." *Antitrust Law* ¶ 1415c.

Yes, McWane acted in its self-interest. This is unexceptional: "a firm may be presumed always to further its self-interest." *Antitrust Law* ¶ 1415a. This is not a rationale for dismissing the price-fixing claim.

e) Lack of Trust Among Co-Conspirators Is Common and Does Not Disprove the Conspiracy

At trial, McWane sought to show that McWane, Sigma, and Star do not trust one another. Even if that is true (*see* CCPF 699-841 (detailing extensive contacts and close relationships among suppliers)), it is unsurprising. The Supreme Court has observed that an attitude of "suspicion, wariness and self-preservation" is common among co-conspirators. *Singer Mfg. Co.*, 374 U.S. at 193. As a matter of law, this distrust does not demonstrate the absence of concerted action. *Id.*

3. McWane's Critique of Dr. Schumann's Testimony is "Junk" Legal Analysis - Dr. Schumann's Testimony Supports a Finding of Liability

Based upon a review of the evidence that was both thorough and informed by oligopoly theory, Complaint Counsel's economic expert Dr. Laurence Schumann opined that during 2008, communications among McWane, Sigma and Star had the purpose and effect of reducing discounting, and stabilizing and increasing Fittings prices. *See generally* CX 2260 (Expert Report of Laurence Schumann, Ph.D.). McWane argues both (i) that Dr. Schumann's methodology is unreliable, and (ii) that the Court should credit any testimony by Dr. Schumann that may be favorable to McWane. McWane's inconsistency is patent.

With regard to McWane's claim that Dr. Schumann is misreading the evidence: Complaint Counsel offered Dr. Schumann's testimony in order to provide the Court with an economic framework for evaluating the evidence. The Court will of course conduct its own review of the documents and testimony, which review may properly be informed by Dr. Schumann's economic insights.[29]

The "concessions" that McWane detects in Dr. Schumann's testimony fall into two categories. The first group of "concessions" is irrelevant and may be disregarded by the Court.

[29] Dr. Schumann is not a fact witness. The Court may find liability on the price-fixing claim whether or not it agrees in full with Dr. Schumann's assessment of the evidence.

McWane elicited from Dr. Schumann testimony that the alleged conspirators denied the existence of a conspiracy; that the evidence does not directly establish a meeting of executives in a smoke-filled room; and that McWane did not follow Sigma's advance announcements on published prices. *See* RPB at 19-20. All of these alleged "concessions" are immaterial to the allegations in the Complaint. As detailed above, the witness denials are outweighed by the documentary and other evidence of conspiracy, *see supra* Parts B.1, B.2.b; circumstantial evidence is sufficient to establish an agreement, *see supra* Part B.2.b; and McWane's conduct with regard to published prices was designed to promote its collusive scheme, *see supra* Part B.2.a.

A second group of "concessions" arises from McWane's document-by-document cross-examination of Dr. Schumann. McWane elicited testimony that certain documents that evidence illicit communications were internal to one company; that certain documents that evidence price fixing were composed after the conspiracy had commenced; that the public letters invite collusion implicitly rather than explicitly; and that no single document proves the entirety of the conspiracy. *See* RPB at 30-36. This document-by-document critique cannot disprove the agreement among Fittings suppliers to fix prices.

The documents from the three separate companies fit together seamlessly to expose a price-fixing conspiracy. This evidence of conspiracy should be viewed "as a whole . . . . without tightly compartmentalizing the various components and wiping the slate clean after scrutiny of each." *Sanitary Milk Producers v. Bergjans Farm Dairy, Inc.*, 368 F.2d 679, 691 (8th Cir. 1966) (internal quotation marks omitted); *accord Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962) (emphasizing that "the character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but [rather] by looking at it as a whole"); *Intervest, Inc. v. Bloomberg, L.P.*, 340 F.3d 144, 160 (3d Cir. 2003); *Petruzzi's*

IGA, 998 F.2d at 1230. Common sense dictates that one would not expect to find a single document formally memorializing an illegal agreement. The Court may conclude that there is a conspiracy even "if no single item of evidence presented by the plaintiff points unequivocally to conspiracy." *High Fructose Corn Syrup*, 295 F.3d at 655. "[E]vidence can be susceptible of different interpretations," and still be probative of an alleged conspiracy. *Id*.

Most importantly, the Court should attend to interconnections among the documents; one document may be used to interpret and understand other documents. *See In re Linerboard Antitrust Litig.*, 504 F. Supp. 2d 38, 59 (E.D. Pa. 2007) (indicating that all of the evidence supporting allegations of conspiracy was "contextualized within" a document discussing a strategy to encourage competitors to reduce inventory). The Commission did just this in its Summary Judgment Decision, recognizing that: "[T]he strategy laid out in Mr. Tatman's presentation is both suggestive of possible collusion and provides a context for interpreting the events that followed." *McWane*, 2012 FTC LEXIS 155, at *33-34.

In sum, McWane's claim that no single document evidences the full conspiracy is not a meaningful criticism of Dr. Schumann's work. Dr. Schumann's methodology is the methodology required of this Court: interpret the record as a whole, bringing to bear common sense, practical judgment, and economic understanding.

4. The Data Analysis Performed by Dr. Normann Is Unreliable

Respondent's economic witness, Dr. Parker Normann, analyzed various data received from the Fittings suppliers, and concluded that the alleged Fittings conspiracy was not successful in eliminating Project Pricing. Dr. Normann's analysis is unreliable and deficient for the reasons detailed in Dr. Schumann's trial testimony and in his Rebuttal Report. In brief:

- Dr. Normann relies on severely flawed price data that does not reflect the actual transaction prices paid by Fittings customers (CCPF 1425);

- Dr. Normann's analyses failed to control for the factors that affect supply, demand, and prices (CCPF 1426-1433); and

- Dr. Normann failed to follow accepted practices when performing statistical analysis (CCPF 1434-1435).

Assuming, *arguendo*, that one were inclined to set aside the problems with the data set, the following conclusions are supported by the data and Dr. Norman's calculations:

- Fittings prices charged by McWane, Sigma and Star { } (February 2008 through October 2008); Normann, Tr. 5776-5782, *in camera* (as corrected by Order of Judge Chappell); *see generally* CCPF 1338-1435 (examining the successes of the antitrust conspiracy between McWane, Sigma, and Star).

- Specifically, McWane's Fittings prices during the relevant period { } Normann, Tr. 5776-5782, *in camera* (as corrected by Nov. 7, 2012 Joint Stipulation Regarding Trial Transcript Errata); *see generally* CCPF 1338-1435 (examining the successes of the antitrust conspiracy between McWane, Sigma, and Star).

- Fittings prices plunged after October 2008, consistent with Complaint Counsel's contention that the conspiracy was losing traction at that time. CCPF 1456-1466.

Finally, as discussed in Complaint Counsel's Post-Trial Brief, an agreement to fix prices is *per se* unlawful, and does not require a finding that the conspiracy was successful in causing substantial injury to consumers. *See Flat Glass*, 385 F.3d at 363 ("[A] horizontal agreement to fix prices need not succeed for sellers to be liable under the Sherman Act; it is the attempt that the Sherman Act proscribes."). Moreover, the conspiracy did not need to be entirely successful (*i.e.*, eliminate Project Pricing completely) in order to have an anticompetitive effect. *See supra* Part B.2.c.

5. The Cases Relied on by McWane Are Distinguishable

McWane's Post-Trial Brief cites a line of decisions dismissing a plaintiff's price-fixing claim where the summary judgment record showed only interdependent pricing with no plus factors evidencing collusion. The cases are in no way analogous to the present litigation. Thus, in *Blomkest Fertilizer, Inc. v. Potash Corp.*, 203 F.3d 1028, 1034 (8th Cir. 2000), the court was

not persuaded by the plaintiff's evidence that there were "sporadic" communications, over a seven-year period, in which one manufacturer of fertilizer disclosed to another its price on a specific completed transaction ("not future market prices"). In *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 135 (3d Cir. 1999), the court was unimpressed with the plaintiff's evidence that sales representatives with no pricing authority engaging in price-related "chit-chat" at trade shows. In *Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287 (11th Cir. 2003), the court determined that the alleged signaling activity by tobacco manufacturers either served a "legitimate" business purpose (*id*. at 1306), or did not in fact signal "any particular future course of conduct" (*id*. at 1308). In *City of Moundridge v. Exxon Mobil Corp.*, 429 F. Supp. 2d 117, 133 (D.D.C. 2006), the plaintiff asserted as a plus factor that high prices for natural gas existed at a time of oversupply. However, the evidence did not support this allegation.

In each of these cases, the evidence of conspiracy was far weaker than in the present case. (Which explains why the Fittings conspiracy has already survived Respondent's motion for summary judgment.) These thumbnail descriptions do not capture the full complexity of these cases. The important point is that none of the decisions cited by McWane bears any resemblance to the present litigation.

6. McWane's Criticism of the One Overarching Conspiracy Theory Is Unimportant

The three episodes of price fixing may be viewed as chapters in a single, overarching conspiracy because there is an overlap of participants (McWane, Sigma, and Star), methods (restraining price competition), and goals (elevating the market price for Fittings). *See, e.g.*, *United States v. Bill Harbert Int'l Construction, Inc.*, 608 F.3d 871, 899-900 (D.C. Cir. 2010). McWane contends that these may be viewed as three distinct conspiracies. RPB at 8-11. This issue has no apparent legal significance in this proceeding. If a statute of limitations defense

were asserted in this case, or if there were a claim for damages, then it would perhaps be necessary to determine when a given conspiracy began and ended. Neither issue is at play in this case. Moreover, the fact that the conspirators participation ebbed and flowed does not mean the conspiracy ended when the economic activity ebbed. From a legal standpoint, McWane's participation in the conspiracy continues until it took affirmative steps to disavow it. *See Mortons Market, Inc. v. Gustafsons Dairy, Inc.*, 198 F.3d 823, 838 (11th Cir. 1999) (Withdrawal from an antitrust conspiracy requires more than cessation of the activity; a participant must renounce the conspiracy and take affirmative steps, inconsistent with objects of the conspiracy, to disavow or to defeat the conspiratorial objectives).

Dr. Schumann opined that the Fittings conspiracy was "starting to collapse" by October/November 2008. Schumann, Tr. 4304. This is correct. The collapse, however, was not complete: none of the conspirators renounced its participation, and McWane and Star agreed again to fix prices in April 2009. CCPF 1491-1500. The Commission has concluded that the April 2009 event is within the scope of the Complaint. *McWane*, 2012 FTC LEXIS 155, at *73-74. This decision cannot be undone by McWane even if the April 2009 agreement represents a separate conspiracy.

C. McWane Invited Sigma and Star to Collude in Violation of Section 5 of the FTC Act

Complaint Counsel's Post-Trial Brief demonstrates that McWane twice used letters, nominally addressed to Distributors, to communicate to competitors an invitation to participate in a price-fixing agreement. *See* CCPB at 90-106. McWane seemingly misunderstands this claim, so we start with a clarification. Complaint Counsel does not contend that it is illegal for McWane to announce its prices in advance, or that it is illegal for competitors to obtain from customers copies of bona fide price announcements. But, McWane went much further,

deliberately signaling its rivals the actions that they needed to undertake in order to induce McWane to raise its prices in the future. In January 2008, McWane offered to support a later price increase if Sigma and Star joined with McWane in curbing Project Pricing. In May 2008, McWane offered to support a later price increase if Star submitted confidential shipment data to DIFRA, the industry information exchange. *See* CCPB at 93-105; CCPF 1155-1259.

Even if its rivals never accepted these solicitations, McWane's attempt to secure a *per se* illegal price fixing agreement is unlawful under Section 5 of the FTC Act. *See, e.g., In re McWane, Inc.*, 2012 F.T.C. LEXIS 155, at *52-53 (quoting *Liu v. Amerco*, 677 F.3d 489, 493-94 (1st Cir. 2012)). McWane's conduct should be condemned as *per se* unlawful, or in the alternative, judged to be anticompetitive under the rule of reason (supported by findings that the Fittings market is conducive to collusion, and that the parties to the communication collectively possess market power). *See* CCPB at 98 (*citing In re U-Haul, Int'l, Inc.*, Analysis of Agreement Containing Consent Order to Aid Public Comment).

McWane challenges the Commission's right to bring invitation to collude claims generally, and asserts that the challenged letters did not invite its rivals to collude. Both arguments are unavailing.

McWane first contends that an unconsummated invitation to collude is lawful conduct, recycling its unsuccessful arguments from the summary decision proceeding. RPB at 79. The cases cited by McWane correctly stand for the proposition that unilateral conduct does not violate Section 1 of the Sherman Act. *See, e.g., United States v. American Airlines*, 743 F.2d 1114, 1119 (5th Cir. 1984) ("agreement is a necessary element"). These Sherman Act decisions, however, do not control the present claim which is brought under the broader authority of the FTC Act. *See FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 239 (1972) (Section 5 "does empower the Commission to define and proscribe an unfair competitive practice, even though

the practice does not infringe either the letter or the spirit of the antitrust laws."). The Commission has held that an attempt to fix prices is an unfair method of competition that contravenes Section 5 of the FTC Act. *In re McWane, Inc.*, 2012 F.T.C. LEXIS 155, at *52-53; *see also Liu v. Amerco*, 677 F.3d 489, 494 (1st Cir. 2012) (observing that an invitation to collude is actionable under Section 5).

Turning to the evidence, McWane argues that the challenged communications were "plain vanilla price announcements." RPB at 75. To bolster this claim, McWane cites only a few lines of self-serving testimony from McWane's Vice President, Rick Tatman. Mr. Tatman's testimony is contrary to the great weight of evidence establishing that the challenged letters intentionally proposed a *per se* illegal price-fixing agreement to McWane's rivals. *See* CCPB at 93-105. For example, the January 2008 letter was the result of an internal McWane presentation that discussed McWane's "Desired Message to the Market & Competitors," and Mr. Tatman admitted at trial that he wanted the January 2008 letter to induce his competitors to curtail Project Pricing. *See* CCPB at 93-99; CCPF 918-922. Likewise, the May 2008 letter contained a message that was only meaningful to McWane's competitors (*i.e.*, to submit their sales data to DIFRA and McWane will support another price increase) and was meaningless "fluff" to its Distributor customers. *See* CCPB at 100-105; CCPF 1186, 1193-1200. Neither letter was a "plain vanilla price announcement," and indeed, in both cases McWane issued a bona fide price announcements not long after inviting its rivals to collude. (CX 0896, CX 1576).

In light of this evidence, Mr. Tatman's self-serving testimony is insufficient to defeat liability. Because McWane did not adduce significant evidence that supports its interpretation of the letters inviting its rivals to collude. McWane has failed to substantiate its rebuttal.

The *Ethyl* case illustrates the standard that McWane must satisfy. *In re Ethyl Corp.*, 101 F.T.C. 425 (1983), *vacated sub nom. E.I. Du Pont de Nemours & Co. v. FTC*, 729 F.2d 128 (2d

Cir. 1984). In *Ethyl*, the Commission alleged that manufacturers of lead gasoline additives facilitated collusion and violated Section 5 by, *inter alia*, routinely notifying customers of proposed price increases more than 30 days in advance of the effective date. The Second Circuit rejected this claim, explaining: "[T]he evidence is overwhelming and undisputed, as the ALJ found, that each petitioner independently adopted its practices for legitimate business reasons." 729 F.2d at 140. Significantly, the *Ethyl* respondents relied on more than just their employees self-serving testimony to establish their asserted business justifications. The record included testimony from customers (operators of oil refineries) explaining precisely why and how the advance price announcements helped them to run their businesses. *In re Ethyl*, 1983 F.T.C. LEXIS, at *11 (initial decision); 101 F.T.C. at 486 (dissenting statement of Chairman Miller); *see also Reserve Supply Corp. v. Owens-Corning Fiberglas Corp.*, 971 F.2d 37, 54 (7th Cir. 1992) (citing customer testimony regarding the benefits of advance price announcements).

The polar opposite of *Ethyl* is *In re Petroleum Products Antitrust Litig.*, 906 F.2d 432, 449-50 (9th Cir. 1990), where defendant oil companies claimed that they posted "unusually detailed" pricing information in public not as a signal to competitors, but for the customers' benefit. No customer testimony supported their claim, leading the court to infer that the defendants' true purpose was to communicate with competitors, in order to facilitate either coordinated pricing or price fixing. *Id.*

Here, McWane claims that the challenged communications are routine pricing letters intended to communicate only with customers (as in *Ethyl* and *Reserve Supply*). This claim is subject to verification (as in *Ethyl* and *Reserve Supply*), but McWane failed to offer any evidence to substantiate its claims. For example, McWane introduced no evidence that other pricing letters disseminated by Fittings suppliers contained similar language, or that other pricing letters, like the May 2008 letter, do not actually announce a change in the supplier's prices. The

evidence was to the contrary: the letters issued by McWane in 2008 were unique. CCPF 1187. Likewise, McWane offered no evidence that Distributors viewed the 2008 McWane letters as containing useful information that assisted Distributors in running their businesses efficiently. Again, the evidence was to the contrary: for the Distributor customers, McWane's communications were meaningless "fluff." CCPF 1186. Moreover neither the January 11 letter, nor the May 7 letter gave McWane's customers advance notice of the Fittings prices. McWane sent the actual advance notices out on January 18 and June 17. McWane failed to address why its customers needed advance notice that they would be receiving advance notice of price changes at some future date. Futher, McWane admitted that the January 2008 letter was not intended by McWane to communicate only with customers. Mr. Tatman testified that the January 2008 letter was intended to induce (or "head fake") Sigma and Star to curtail Project Pricing. CCPB at 24, 104; CCPF 687, 934, 939, 1077; RPF 107. In all these ways, McWane has failed to substantiate its contention that the challenged communications are routine pricing letters.

In sum, Complaint Counsel has developed an extensive evidentiary record demonstrating that the McWane letters were designed to propose to competitors an illegal restraint on price competition. As McWane has offered no meaningful rebuttal, the Court should judge McWane's conduct to be a violation of Section 5 of the FTC Act.

D. McWane Violated Section 1 by Participating in an Anticompetitive Information Exchange

As discussed more fully in Complaint Counsel's Post-Trial Brief, the record evidence establishes that (i) McWane's participation in the DIFRA information exchange represents concerted action, (ii) the Fittings market is highly susceptible to coordinated interaction, (iii) the DIFRA members collectively have the power to increase prices above the competitive level, (iv)

the nature of the information exchanged has the tendency to facilitate coordination, and (v) there is no offsetting, procompetitive justification. *See* CCPB at 164-180; *see also* CCPF 1275-1342. This is sufficient to establish an antitrust violation under the full rule of reason.

Contrary to McWane's suggestion, Complaint Counsel does not claim that all trade association activity is illegal, or that all information exchange programs are anticompetitive. Rather, the Complaint alleges, and the record evidence establishes, that the DIFRA information exchange illegally facilitates price coordination among competing Fittings suppliers. *See* CCPB at 164-180; CCPF 1275-1296; *see also In re McWane, Inc.*, 2012 F.T.C. LEXIS 155, at *39. McWane's insistence that lawyers supervised the information exchange is no defense. *In re Lorazepam & Clorazepate Antitrust Litig.*, 2005 U.S. Dist. LEXIS 47418, at *18-19 (D.D.C. 2005); *United States v. Stevens*, 771 F. Supp. 2d 556, 560 (D. Md. 2011) (explaining that advice of counsel defense is only available for specific intent claims "because such reliance demonstrates a defendant's lack of the requisite intent to violate the law"); *United States v. Cross*, 113 F. Supp. 2d 1253, 1260 (S.D. Ind. 2000) (same); *United States v. Soares*, 998 F.2d 671, 673-674 (9th Cir. 1993) (same).

McWane denies that the DIFRA information exchange is *prima facie* anticompetitive, asserting that the sales volume data offered no "insight into competitor pricing or sales" and had no impact on McWane's pricing decisions. RPB at 24, 78-79. But McWane does not rebut or even address the substantial record evidence to the contrary. For example, Sigma's documents explicitly admit that the DIFRA data was used by sellers to determine whether a decline in volume was attributable to discounting (cheating) by competitors, or instead attributable to poor economic conditions. *See* CCPB at 30, n.130; CCPF 1279(d) and (e). Moreover, McWane's claim is disproven by Mr. Tatman's own testimony:

> The DIFRA data came in [in June 2008]. It's like . . . the [market] share loss is worse than we thought. What are we going to do? Let's go with the [smaller price increase] because we obviously must be getting beat on price again . . .

CCPF 1244 (Tatman, Tr. 538-540); *see also* CCPF 1245 (McWane's CEO and Executive Vice President using the DIFRA data to determine that McWane had lost market share due to Project Pricing). Thus, the evidence establishes that McWane used the DIFRA data to infer that competitors' prices were lower than McWane's prices, and then to help determine McWane's prices going forward.[30]

McWane asserts that even if the DIFRA information exchange facilitated price coordination, it also served legitimate, procompetitive functions. McWane has the burden of proof on this defense. *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 771 (1999); *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 459 (1986); *In re Realcomp II*, 2009 F.T.C. LEXIS 250, at *48, *74. It is not sufficient for McWane simply to assert an efficiency claim; the defense must be substantiated with evidence:

> The participants [in a competitor collaboration] must substantiate efficiency claims so that the Agencies can verify by reasonable means the likelihood and magnitude of each asserted efficiency; how and when each would be achieved; any costs of doing so; how each would enhance the collaboration's or its participants' ability and incentive to compete; and why the relevant agreement is reasonably necessary to achieve the claimed efficiencies. Efficiency claims are not considered if they are vague or speculative or otherwise cannot be verified by reasonable means.

U.S. Dep't of Justice and the Federal Trade Commission Antitrust Guidelines for Collaborations Among Competitors, § 3.36(a) (April 2000). The standard for evaluating claimed efficiencies associated with a competitor collaboration is essentially identical to the efficiencies defense

[30] As described in Part B.2.a) above, McWane's decision to support an increase in published prices smaller than favored by Sigma was not procompetitive. For McWane, a small increase in published prices was a component of the Tatman Plan for securing higher and collusive transaction prices. *See* CCPB at 129-130; *see also* CCPF 913.

under the Horizontal Merger Guidelines, with which this Court is familiar.[31] Judged under this demanding standard, McWane's defense is insufficient.

Specifically, McWane claims that the DIFRA data enabled McWane and Sigma "to better manage inventory, production, and order schedules . . . and, consequently, to lower their costs." RPB at 26. As a preliminary matter, there is no contemporaneous evidence supporting the notion that Fitting suppliers ever used the DIFRA data to help manage their inventory or production schedules. As such, this *post hoc* justification should not be given any weight. *See* CCPB at 178-179; *see also Image Tech Servs. v. Eastman Kodak Co.*, 125 F.3d 1195, 1219 (9th Cir. 1997) (allowing court to disregard justification for challenged conduct when "evidence suggests that the proffered business justification played no part in the decision to act").

Even if this defense is considered, the substantial weight of evidence contradicts it. McWane itself undercuts the claim that the DIFRA information is useful for legitimate planning purposes, stating that a company could not determine "which of the thousands of different casting diameters, configurations, or finishes contained within any of the major size groupings were being reported." RPB at 24. In light of this lack of detail, McWane does not explain how the DIFRA data could help McWane manage inventory or make production decisions at all.

While some witnesses, principally employees of McWane, endorsed McWane's efficiency theory, their self-serving testimony was wholly conclusory. No witness offered an actual example of an inventory, production, or scheduling decision that was impacted by the

[31] U.S. Dep't of Justice and the Federal Trade Commission Horizontal Merger Guidelines Section 10 (Aug. 19, 2010):

> [I]t is incumbent upon the merging firms to substantiate efficiency claims so that he Agencies can verify by reasonable means the likelihood and magnitude of each asserted efficiency, how and when each would be achieved (and the costs of doing so), how each would enhance the merged firm's ability and incentive to compete, and why each would be merger-specific.
> Efficiency claims will not be considered if they are vague, speculative, or otherwise cannot be verified by reasonable means.

availability of DIFRA data. No witness quantified – in even general terms – any efficiency gain to any company. No witness explained whether or why DIFRA data was superior to other readily available information when making inventory, production, or scheduling decisions. Indeed, the President of Sigma, Larry Rybacki, flatly denied the proposition that DIFRA provided economic benefits to Sigma:

> Q. Would the [DIFRA] information exchange lead to economic benefits?
>
> A. Not really. The information exchange, as I stated in my earlier testimony, was pretty much what I expected . . . . [W]e already knew where we were anyway, so to me it had zero effect.

Rybacki, Tr. 3539-3541. On this record, the Court cannot verify or quantify the asserted efficiencies, and hence McWane's defense carries no weight.

Finally, the fact that the Fittings suppliers commenced their information exchange when the companies were coordinating (or fixing) prices, and terminated DIFRA when price coordination broke down, "raises doubt about whether the exchange of data served any procompetitive objective." *In re McWane, Inc.*, 2012 F.T.C. LEXIS 155, at *49.

We are aware of no antitrust case upholding an information exchange operating in a three-firm oligopoly. The DIFRA information exchange is *prima facie* anticompetitive, and McWane's has not substantiated its efficiency defense. Therefore, the DIFRA information exchange should be judged unlawful.

E. There is a Market for Fittings, and a Separate Market for Domestic Fittings

The record evidence establishes an overall Fittings market. *See* CCPB 62-71; CCPF 577-616. McWane's Post-Trial Brief does not dispute this. *See* RPB 39-40 (referring to overall Fittings market, and only contesting a domestic-only market).

The record also establishes a second relevant product market for Domestic Fittings sold for use in all waterworks projects that specify the use of Fittings manufactured in the United

States, ("Domestic-only Specifications").[32] CCPB at 72-83; *see also* CCPF 617-633. As discussed more fully in Complaint Counsel's Post-Trial Brief, imported Fittings, while functionally equivalent to Domestic Fittings, are not a substitute and do not constrain Domestic Fittings prices. This is evidenced by the following: Domestic Fittings prices are substantially higher than the price of Fittings sold into Open-Specification projects; prices for Domestic Fittings and Fittings sold into Open Specifications do not move in parallel; and McWane's internal strategy documents recognize a separate Domestic Fittings market. *See* CCPB 72-83; *see also* CCPF 617-633. McWane carps about Dr. Schumann's testimony, but it does not dispute this core evidence supporting a Domestic Fittings market.

Because a hypothetical monopolist seller of Domestic Fittings may profitably raise prices above the competitive level – and because an actual monopolist has, in fact, raised prices – antitrust case law and the principles of the Horizontal Merger Guidelines require a finding that this is a discrete antitrust market. Reliance upon the Horizontal Merger Guidelines and the hypothetical monopolist test to define a market in a non-merger case is not, as McWane contends, "controversial;" it is the well-accepted practice. *E.g.*, *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 375 F.3d 1341, 1364 (Fed. Cir. 2004) (relying on Merger Guidelines in defining market in monopolization claim), *rev'd on other grounds*, 546 U.S. 394 (2006); *In re Live Concert Antitrust Litig.*, 863 F. Supp. 2d 966, 987 (C.D. Cal. 2012) ("As a general matter, the Court assumes that the SSNIP methodology [in the 2010 Merger Guidelines] may, under appropriate circumstances, provide an acceptable framework with which to define a relevant product market for purposes of antitrust analysis under Section 2 of the Sherman Act."); *Park W. Radiology v. CareCore Nat'l LLC*, 675 F. Supp. 2d 314, 327-28 (S.D.N.Y. 2009) (finding

[32] Unless otherwise noted, the term "Domestic Fittings" refers to Fittings produced in the United States for use in Domestic-only Specifications.

expert's market power analysis sufficiently reliable because of expert's reliance on the Merger Guidelines, which "have been recognized by this Court in antitrust cases as a tool used to define a relevant market and to assess market power") (internal quotation marks and citations omitted); *Babyage.com, Inc. v. Toys "R" Us, Inc.*, No. 05-6792, 2008 WL 2746302, at *1-2 (E.D. Pa. July 15, 2008) (holding that plaintiffs must define the market "with reference to 'reasonable interchangeability' and the 'cross-elasticity of demand'" and that "these requirements are encapsulated by 1992 Department of Justice Merger Guidelines . . . .").

McWane denies that there is a separate market for Domestic Fittings, spending most of its time arguing that there is no ARRA-specific domestic market. *See* RPB at 84-86 (criticizing "Dr. Schumann's assumption that ARRA created a separate domestic Fittings market"). These arguments are without merit because neither Complaint Counsel nor Dr. Schumann contends that ARRA "created" a separate Domestic Fittings market. *See* CCPB at 72-83 (discussing market definition); CCPF 617-633(same). Laws requiring End Users to use Domestic Fittings in waterworks projects existed before, during, and after the relevant ARRA time period; ARRA merely expanded the size of the Domestic Fittings market. *See* CCPB at 42-45; CCPF 1648-1654. McWane cites no evidence that these laws can be changed, that any possible waivers to these laws are commercially significant, that imported Fittings are a substitute for these projects, or that McWane is in any way impeded from raising its Domestic Fittings prices for these projects. Indeed, McWane's expert acknowledges that these laws cannot easily be changed. *See* CCPB at 72-73, 77-78; *see also* RX-712A (Normann Rep. at 28) ("It is unlikely that state laws could be easily changed based on short-term fluctuations in relative prices."). At a minimum, therefore, there is a separate market to sell Domestic Fittings for projects that are legally required to purchase Domestic Fittings.

McWane's remaining arguments address only the size of the Domestic Fittings market and whether it should include the supply of Domestic Fittings for Domestic-only Specifications based on end user preference. *See* RPB at 86-87. As detailed below, McWane's argument that a market cannot be based on end user preference is contrary to well-established antitrust precedent, and its argument that imported Fittings previously eroded the size of the Domestic Fittings market is factually and legally incorrect.

1. McWane's Market Definition Analysis is Without Merit

McWane admits that some end users prefer Domestic Fittings and require them in their Fittings specifications. RPB at 86 ("To be sure, there are municipal engineers and other customers who *prefer* to by domestic Fittings for a range of reasons, including patriotism and the desire to keep domestic foundry-workers employed.") (emphasis in original). McWane nevertheless denies that these jobs should be included in the Domestic Fittings market because of the theoretical possibility of "flipping specifications" to allow imported Fittings. RPB at 83-87.

McWane's argument that customer preference for Domestic Fittings is not a sufficient basis for finding a separate market is contrary to well established antitrust precedent. RPB at 86-87 (note that McWane does not indicate what factors, other than consumer preference, the Court should consult). Consumer preference is at the core of market definition: "After all, market definition focuses on what products are *reasonably* substitutable; what is reasonable must ultimately be determined by settled consumer preference." *FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1039 (D.C. Cir. 2008) (emphasis in original) (internal quotation marks omitted).

The cases cited by McWane illustrate the critical importance of consumer preference in defining markets. In *Jacobs v. Tempur-Pedic Int'l, Inc.*, 626 F.3d 1327 (11th Cir. 2010), *cited in* RPB at 86-87, the Eleventh Circuit did not, as McWane states, dismiss plaintiff's antitrust complaint "based on allegations that preferences created a separate product market." RPB at 86.

Rather, the court held that consumer preferences are "crucial to understanding whether a separate market exists," 626 F.3d at 1338, and rejected plaintiff's allegation of a separate submarket for foam mattresses because plaintiff failed to allege facts concerning consumer preferences:

> ***Consumer preferences for visco-elastic foam mattresses versus traditional innerspring mattresses***, and the costs associated with their sale, ***may vary widely, may vary little, or may not vary at all. Jacobs's complaint, however, gives no indication of which of these is the case***. The allegations that visco-elastic foam mattresses are more expensive than traditional innerspring mattresses and that visco-elastic foam mattresses have "unique attributes" are similarly of little help. ***They do not indicate the degree to which consumers prefer visco-elastic foam mattresses to traditional mattresses*** because of these unique attributes and differences in price. ***Would, for example, a consumer whose innerspring mattress was due for replacement be more likely to purchase another innerspring mattress or substitute a visco-elastic foam model for it?*** Are visco-elastic foam mattresses put to different uses (as luxury goods, such as in fine hotels and within higher income brackets) than are traditional mattresses? ***These types of questions, which our precedent makes clear are crucial to understanding whether a separate market exists, go unanswered in the complaint***.

Id. at 1338 (emphasis added); *see also Buehler AG v. Ocrim S.p.A*, 836 F. Supp. 1305, 1326 (N.D. Tex. 1993) (defining relevant market to consist of both American and European roller mills, rather than a European-only market, because consumers "typically consider both types before purchase"), *cited in* RPB at 87.[33]

Desai v. Impacta, S.A., 1990 WL 132709 (D.N.J. 1990), cited by McWane, also shows that failure to account for consumer preferences is fatal to a proposed market definition. In *Desai*, plaintiffs attempted to distinguish the Brazilian import submarket from the general,

[33] McWane cites a different portion of *Buehler* that does not discuss consumer preferences. In that section, the court held that, even if the market were defined more narrowly to include only European-made roller mills, the counterclaimant would still fail to show monopoly power in light of its 60% market share and other market facts showing decreasing power in the market. *See Buehler*, 836 F. Supp. at 1326, *cited in* RPB at 87. This discussion is inapplicable to the Domestic Fittings market here, as McWane enjoys a market share of over **{ }** in the Domestic Fittings market. CCPF 1662-1663.

primary market for flexible aluminum tubes and aerosol cans based solely on differences in price and marketing services. *Id.* at *9. The court rejected these allegations as insufficient to distinguish the Brazilian import submarket as a relevant product market; the real question was whether consumers chose to use other products interchangeably with the products in the alleged product market. *See id.* at *8 ("In essence, the Court's determination of a relevant market seeks to discover what products may be reasonably substituted for each other by the parties who consume them."). The court found plaintiffs' product market allegations particularly insufficient because plaintiffs "acknowledge[d] that other, similar flexible tubes are available to and used by consumers for the same purposes." *Id.* at *9. Thus, plaintiffs' failure to consider consumer preferences and the availability of other products to be substituted by consumers was fatal to plaintiffs' proposed market definition.[34]

In sum, the cases cited by McWane confirm that consumer preference is "crucial to understanding whether a separate market exists." *Jacobs v. Tempur-Pedic Int'l, Inc.*, 626 F.3d 1327, 1338 (11th Cir. 2010).[35]

[34] Here, by contrast, there are no alternatives available to or used by consumers for projects that require Domestic Fittings. Only Domestic Fittings – and *not* imported Fittings – satisfy the Buy American requirements for Domestic-only specifications, rendering a separate Domestic Fittings market appropriate. *See* CCPB at 15-16; CCPF 618-627, 1575-1577.

[35] It is unclear why McWane cites *Agnew v. Nat'l Collegiate Athletic Ass'n* to support its consumer preference argument. 683 F.3d 328, 332 (7th Cir. 2012), *cited in* RPB at 86. In *Agnew*, the Seventh Circuit found plaintiffs' product market allegations insufficient because plaintiffs either "believed a relevant market need not be identified or they attempted to hedge their bets by keeping their market allegations vague." *Id.* at 345-46; *see also id.* at 347 ("Plaintiffs appear to have made the strategic decision to forgo identifying a specific relevant market."). Here, Complaint Counsel has clearly identified a separate relevant market, the Domestic Fittings market, with specific factual bases supporting this market definition – and McWane has not argued otherwise. *See* CCPB at 15-16, 72-80; *see also* CCPF 618-639.

2. McWane's Arguments that Imported Fittings Eroded the Domestic Fittings Market Are Factually and Legally Incorrect

McWane's contention that the size of the Domestic Fittings market decreased over time is factually inaccurate and contrary to McWane's own proposed findings. Even assuming, *arguendo*, that domestic and imported Fittings may have once competed in a broader market, that is insufficient as a matter of law to disprove the existence of a separate market today for Domestic Fittings for use in Domestic-only Specifications.

a) McWane's Contention That the Domestic Fittings Market Decreased Is Factually Incorrect

McWane erroneously claims that the Domestic Fittings market has decreased in size. *See, e.g.*, RCPF 378 ("During the past 15 to 20 years, domestic Fittings sales in the United States have declined, while non-domestic Fittings sales have increased."). This statement conflates two issues: (1) the number of Domestic Fittings sold; and (2) the number of waterworks projects *requiring* the use of Domestic Fittings (Domestic-only Specifications). The Domestic Fittings market is concerned with only the second – projects *requiring* Domestic Fittings, by law or by End User preference. *See* CCPB at 72; CCPF 619, 625-627. With this clarification, the number of Domestic-only Specifications as a percentage of the overall Fittings market has remained reasonably constant over time. The exception is the ARRA period, when the number of waterworks projects with Domestic-only Specifications actually increased. *See* CCPB at 75-76; CCPF 1647-1649, 1652-1654, 1700.[36]

McWane cites a December 2003 U.S. International Trade Commission report ("ITC Report"), which analyzed the effect of Fittings imported from China on overall U.S. domestic

[36] McWane concedes that, during the ARRA period, sales of fittings for Domestic-only Specifications increased. *See* RCPF 401 (under ARRA, "[d]emand went up for about a six-month period . . . ."); RCPF 403 (under ARRA, McWane saw a "**{ }** percent increase in domestic Fittings sales in 2010"); RCPF 411 ("HD Supply experienced some pickup in business due to ARRA . . . ."); RPB at 44 ("Star's success increased in the first and second quarters of 2010, the peak of the ARRA period, and throughout 2010.").

Fittings production. *See* RPB at 39-42. McWane uses Mr. McCutcheon's testimony before the ITC to show that McWane had a 70% share of the overall Fittings market in 2003. *See* RFOF 34, 35. But that figure says nothing about the size of the Domestic Fittings Market. The same ITC report, however, based primarily on a representation from McWane, noted that the 2003 "Buy American" preference provisions applied to 10% to 20% of all ductile iron fittings shipments in the United States. *See* CCPF 1700. Prior to the passage of ARRA in 2009, Domestic-only Specification projects still comprised approximately 15% to 20% of the overall Fittings market. *Id.* Today, Domestic-only Specifications represent approximately 20% to 25% of the overall Fittings market. *See* CCPF 1654. Accordingly, the record simply does not support McWane's contention that imported Fittings have eroded Domestic-only Specifications over time.

b) Assuming, Arguendo, that Imported and Domestic Fittings Once Competed in a Broader Fittings Market, the Evidence Shows the Existence Today of a Distinct Submarket for Domestic-only Specifications

Finally, McWane argues that Domestic and imported Fittings occupy the same product market because at one time, they competed for certain customers in a broader Fittings market. *See* RPB at 39 ("Beginning in the mid-1980s, importers began to successfully convert end users' specifications for domestically produced Fittings to so-called 'open' specifications, which permitted the use of both domestic and non-domestic Fittings."). Such evidence points only to the existence of a broader Fittings market, which is undisputed. The evidence shows that domestic producers "compete for core consumers within a [Domestic-only Specifications] market, even if they also compete on individual products for marginal consumers in the broader market." *FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1037 (D.C. Cir. 2008); *see also id.* at

1039 (holding that a "core group" of dedicated, "distinct customers" paying "distinct prices" may constitute a recognizable submarket).

In *Whole Foods*, the Commission challenged a merger between Whole Foods and Wild Oats, the two largest operators of premium, natural, and organic supermarkets in the United States. *Id.* at 1032. The district court concluded that organic supermarkets and conventional supermarkets were in the same product market, observing that when a Whole Foods enters a geographic area, it steals consumers away from conventional supermarkets. *Id.* at 1048 (Tatel, J., concurring) (summarizing district court opinion). According to the district court, this led to the "inevitable conclusion" that organic and conventional supermarkets competed directly with each other and thus were in the same product market. *Id.*

The D.C. Circuit reversed, finding that there was "evidence that strongly suggested that Whole Foods and Wild Oats compete for core consumers within [the organic] market, even if they also compete . . . for marginal consumers in a broader market." *Id.* at 1037 (Brown, J., majority op.). The court held that:

> a core group of particularly dedicated, "distinct customers," paying "distinct prices," may constitute a recognizable submarket, whether they are dedicated because they need a complete "cluster of products," because their particular circumstances dictate that a product "is the only realistic choice," or because they find a particular product "uniquely attractive"

Id. at 1039 (internal citations omitted).

McWane repeats the analytical error committed by the district court in *Whole Foods*. The fact that manufacturers of imported Fittings may have attracted some consumers away from Domestic Fittings "tells us nothing about whether [Domestic and imported Fittings] should be treated as operating in the same market . . . ." *Whole Foods*, 548 F.3d at 1048 (Tatel, J.,

concurring) (noting that "courts have often found that sufficiently innovative retailers can constitute a distinct product market even when they take customers from existing retailers").

End Users of Domestic-only Specification projects constitute a core group of dedicated customers, similar to *Whole Foods.* When statutory provisions require the use of Domestic-only Specifications, Domestic Fittings are "the only realistic choice." *See id.* at 1039. When End Users simply *prefer* to use Domestic Fittings over imported fittings (due to "patriotism" or "the desire to keep domestic foundry-workers employed," RPB at 86), they will find Domestic Fittings "uniquely attractive." *See Whole Foods*, 548 F.3d at 1039. In either case, this core group of "distinct customers" paying "distinct prices" for Domestic Fittings constitutes a recognizable market. *Id.*

F. McWane Possesses Monopoly Power in the Domestic Fittings Market

As discussed more fully in Complaint Counsel's Post-Trial Brief, the record evidence establishes that: (i) at all relevant times, McWane's share of the Domestic Fittings market was over 90 percent; (ii) barriers to entry are substantial; (iii) McWane charges supra-competitive prices on waterworks projects with Domestic-only specifications; and (iv) McWane's Exclusive Dealing Policy excluded Star from becoming an efficient rival. *See* CCPB at 207-246; *see also* CCPF 1658-1663, *in camera* (Domestic Fittings share over **{ }**); CCPF 1664, 642-650 (substantial barriers to entry); CCPF 628-633 (McWane's higher prices on Domestic-only specification jobs); CCPF 1893-2031 (McWane's exclusive dealing policy worked). This evidence is more than sufficient to establish that McWane possesses monopoly power in the Domestic Fittings market. *See Microsoft*, 253 F.3d at 51 ("monopoly power may be inferred from a firm's possession of a dominant share of a relevant market that is protected by entry barriers," or shown directly with evidence of a firm's ability "to control prices or exclude competitors").

McWane concedes its market share is at the monopoly level. And McWane says nothing of substance about the myriad of factors that make *de novo* entry into supplying Domestic Fittings expensive, difficult, and time consuming, including: the significant capital investment required to develop a supply chain for producing Fittings; the significant time and capital investment required to secure the patterns needed to produce a full line of Fittings; the need to have products tested and certified; the need to develop expertise in design engineering; and the need to develop a sales force and relationship with Distributors. *See* CCPF 642-650, 1664-1670; *see also* CCPB at 81-82.

McWane nevertheless argues that it does not have monopoly power because (i) Star's market entry in 2009, and (ii) the existence of excess capacity among domestic foundries, establishes that entry barriers into the Domestic Fittings market are low.[37] *See* RPB at 87-90. Both arguments are seriously flawed.

Evidence of Star's entry into the Domestic Fittings market in late 2009 is relevant to the question of entry barriers, but it does not resolve the inquiry. *Rebel Oil Co. v. Atlantic Richfield, Co.*, 51 F.3d 1421, 1440-41 (9th Cir. 1995) ("The fact that entry has occurred does not necessarily preclude the existence of 'significant' entry barriers."). New entry is only relevant if the "magnitude, character and scope" of entry is timely, likely, and sufficient enough to

[37] Citing *United States v. Grinnell Corp.*, McWane also appears to argue that it does not have monopoly power because it became the dominant Domestic Fittings manufacturer by historic accident, *i.e.*, it was the last dedicated Domestic Fittings foundry after others exited the market. RPB at 88 ("A high share, under those circumstances, does not amount to monopoly power."). *Grinnell*, however, stands for no such thing. Rather, the Supreme Court distinguished between a firm being a monopolist, which may have occurred through superior business acumen or historic accident and is therefore permissible under the antitrust laws, and the act of monopolization, which is exclusionary conduct that a dominant firm uses to unlawfully achieve or maintain monopoly power. *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966) ("[T]he willful acquisition or maintenance of that power [is] distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."). It is not McWane's status as the dominant Domestic Fittings manufacturer that Complaint Counsel challenges, but the Exclusive Dealing Policy that McWane used to unlawfully achieve or maintain its monopoly power in the Domestic Fittings market.

challenge the monopolist's power. *Horizontal Merger Guidelines* (August 19, 2010), at 28; *Rebel Oil*, 51 F.3d at 1440-41 (citing 1992 *Merger Guidelines* with approval in attempted monopolization claim). If the new entrant cannot meaningfully constrain the monopolist's exercise of monopoly power, then such entry does not preclude a finding of monopoly power. *ARCO*, 51 F.3d at 1440-41; *Oahu Gas*, 838 F.2d at 367 (entry of two rivals did not preclude jury's finding that defendant had monopolized the market); *Reazin v. Blue Cross & Blue Shield of Kansas, Inc.*, 899 F.2d 951, 971-72 (10th Cir. 1990) (upholding jury's finding of monopoly power despite existence of "some 200" insurance companies operating in same area as Blue Cross because "no other entrant remotely approached Blue Cross' domination of the market").

It is undoubtedly easier for an imported Fittings supplier to enter the Domestic Fittings market than for a firm to enter *de novo*. *See* CCPB at 82-83. As exemplified by Star's entry into the Domestic Fittings market, import suppliers are likely to have the expertise, regional distribution systems, sales support, and well-established Distributor relationships that are necessary for domestic entry. *See id.* However, McWane's Exclusive Dealing Policy served as a significant barrier to entry that prevented Star from achieving sufficient scale to constrain McWane's monopoly prices in the Domestic Fittings market. *See id.* An exclusive dealing policy is a well-recognized barrier to entry because it can prevent a new entrant from being able to compete effectively against the incumbent firm. *E.g.*, *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181, 189 (3d Cir. 2005).

That is precisely what happened here. As discussed more fully in Complaint Counsel's Post-Trial Brief, McWane's Exclusive Dealing Policy impeded Star's sales – keeping it to a mere **{ }** million per year in 2010 and 2011 – and that made it unprofitable for Star to purchase its own domestic foundry. CCPB at 237-238; CCPF 2112-2114. **{**

}. CCPB at 237-239; CCPF 2112-2116, 2125, 2161. Although Star had earned a reputation as an aggressive discounter in the overall Fittings market, **{**

} CCPB at 238-239; CCPF 2160-2166. McWane acknowledges that "Star was a less efficient supplier of domestic Fittings than McWane because its use of jobber foundries was higher cost and, thus, its Domestic Fittings prices were higher than McWane's." RPB at 101. Because Star's entry was not of a sufficient scale to constrain McWane's monopoly prices in the Domestic Fittings market, an inference of monopoly power based on McWane's **{ }** market shares and high barriers to entry is appropriate.

McWane's second argument – that it does not have monopoly power because there are domestic foundries with excess production capacity – is equally flawed. This argument is based on a misunderstanding of basic antitrust principles. Excess capacity can be a factor disproving monopoly power when, notwithstanding significant barriers to new entry, firms already in the market have sufficient excess capacity to produce more products and thereby defeat the monopolist's attempt to charge supracompetitive prices. *Rebel Oil*, 51 F.3d at 1440-41.

The fact that general-purpose domestic foundries had excess capacity in 2009, however, says nothing about McWane's ability to exercise monopoly power: domestic foundries do not participate in the Domestic Fittings market. *See* CCPF 1673-1682; *cf.* CCPB at 10-12 (describing a limited group of market participants which exclude domestic foundries). And due to the significant entry barriers for *de novo* firms discussed above, these firms have no plans to enter the Domestic Fittings market. CCPF 1671-1682. To the extent that the domestic

foundries' excess capacity was available to Star, it proved insufficient to overcome the entry barrier imposed by McWane's Exclusive Dealing Policy. Star's entry into the Domestic Fittings market did not constrain McWane's exercise of monopoly power – not because it could not *make* Domestic Fittings, but because McWane's Policy blocked Star from *selling* Domestic Fittings at a sufficient scale to be an effective competitor.

Proof that McWane's Exclusive Dealing Policy acted as an effective barrier to entry is reflected in McWane's ability to charge higher prices for Domestic Fittings for an extended period of time – up to **{ }** for functionally equivalent Domestic Fittings compared to imported Fittings, thereby earning{ **}** higher gross profits on its Domestic Fittings than imported Fittings sales – and by McWane's ability to impose a price increase *after* Star's entry.[38] CCPB at 209-210; CCPF 1693-1702; *see also* CCPF 628-633 (higher prices); CCPF 2481-2482 (price increase after Star entered). This direct evidence of McWane's ability to control prices – even after Star entered – is strong evidence of McWane's monopoly power. *See AD/SAT v. Associated Press,* 181 F.3d 216, 226-27 (2d Cir. 1999) (quoting Areeda & Hovenkamp). McWane's ability to effectively exclude Star is further evidence of its monopoly power in the

[38] Respondent argues in its Post-Trial Brief that McWane lacked monopoly power because there is no evidence that McWane charged monopoly prices for its Domestic Fittings during ARRA and that McWane's domestic prices were lower than Star's in the vast majority of states. RPB at 88-89 (citing Dr. Normann's testimony "in the majority of states McWane actually lowered their published multipliers, they reduced them."). The cited testimony by Dr. Normann, however, is referring to McWane's own *open-spe*c Fittings prices *in 2008* – not Domestic Fittings prices during ARRA. (*See* Normann, Tr. 4768 ("The February multipliers compared to July… They're not increases. I mean, they are -- systematically, the *February 2008*, they are lower. There's a handful of states where they're higher, but in the majority of states McWane actually lowered their published multipliers, they reduced them, *compared to 2007* or maintained the same level of pricing. They did not increase them.") (emphases added). Figure 31 of Dr. Normann's Expert Report compares **{ }**, *see* RX-712B (Normann Rep. at 75), *in camera*, **{ }** *See* CCPF 1424-1435; *see also* CCRF 189 for a discussion of the problems created by Dr. Normann's selection of a fixed basket of Fittings for use in his prices analyses.)

Domestic Fittings market. *See Dentsply*, 399 F.3d at 188-190 (ability to exclude competitors is direct evidence of monopoly power).

G. McWane's Exclusive Dealing Policy Unlawfully Monopolized the Domestic Fittings Market in Violation of Section 2 of the Sherman Act

The evidence highlighted in Complaint Counsel's Post-Trial Brief establishes that: (i) McWane exercised monopoly power during 2009 and thereafter; (ii) McWane adopted its Exclusive Dealing Policy in order to impede market entry by Star, thereby delaying the emergence of an efficient and aggressive rival; (iii) the Exclusive Dealing Policy caused substantial market foreclosure by deterring Distributors from purchasing Domestic Fittings from Star; (iv) as a result of McWane's Policy, Star's sales growth has been slowed, which in turn has thwarted Star's plan to acquire a domestic foundry; (v) without a domestic foundry, Star is a higher-cost, less efficient rival to McWane; which predictably results in (vi) higher prices to consumers; and (vii) McWane's all-or-nothing policy did nothing to promote efficiency or to benefit consumers. *See* CCPB at 210-246; CCPF 1655-1711, 1782-1849, 1894-2031, 2089-2166. This evidence establishes that McWane unlawfully monopolized the Domestic Fittings market. *See, e.g.*, *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 281 (3d Cir. 2012); *United States v. Dentsply*, 399 F.3d 181, 191 (3d Cir. 2005); *United States v. Microsoft Corp.*, 253 F.3d 34,69 (D.C. Cir. 2001).

McWane's arguments are not organized in a coherent legal framework, but it advances three primary arguments against liability. First, McWane denies that it implemented an exclusive dealing policy at all, referring to the challenged conduct as merely a "rebate policy." *See, e.g.*, RPB at 41 (describing without explanation the September 22, 2009 letter as a "rebate letter"). Second, McWane claims that its Exclusive Dealing Policy did not harm competition because there was no substantial market foreclosure. *See* RPB at 88-93. Third, McWane asserts

that its Policy was justified because it was designed to protect production levels at McWane's domestic foundry.[39] As discussed below, McWane's arguments are contrary to well-established antitrust principles and unsupported by the weight of record evidence.

1. McWane's Exclusive Dealing Policy Was Not a Mere Rebate Policy

As discussed at length in Complaint Counsel's Post-Trial Brief, beginning in September 2009, McWane implemented an Exclusive Dealing Policy whereby it threatened to deny access to its Domestic Fittings line to any Distributor that purchased Domestic Fittings from a competing supplier, unless those purchases fell into two narrow exceptions: they were part of a bundled sale with pipes; or McWane did not have the Domestic Fitting available for timely delivery. *See* CCPB at 210-211; CCPF 1826, 1913, 2062. It is true that McWane also threatened to revoke the Distributor's accrued Domestic Fittings rebate under existing rebate agreements for violating the Policy, but to Distributors and to McWane, the Policy's primary threat involved terminating a Distributor's access to McWane's Domestic Fittings. *See* CCPF 1898-1902.

Extensive evidence – including contemporaneous documents from the Exclusive Dealing Policy's formation; McWane's admissions that it was communicated as a unilaterally imposed all-or-nothing Policy to Distributors; McWane's communication and application of the Policy to U.S. Pipe, which did not participate in any McWane rebate program; and McWane's termination of Hajoca as a Distributor when it purchased Domestic Fittings from Star – confirms that McWane adopted and implemented an all-or-nothing Exclusive Dealing Policy. *See* CCPB at 210-218; CCPF 1824-2063.

[39] McWane also denies that there is a separate Domestic Fittings market or that it has monopoly power in such a market. *See* RPB at 81-86. As previously discussed, *supra* Parts E, F, McWane has monopoly power in a properly defined Domestic Fittings market. *See also* CCPB at 207-209.

McWane points to the fact that some Distributors purchased some Domestic Fittings from Star without being terminated by McWane as evidence that it never implemented, or at least never enforced, an exclusive dealing policy. This argument is wrong for three reasons.

First, Distributors testified that their purchases of Star Domestic Fittings fell into the Policy's two limited exceptions (*i.e.*, bundled pipe-Fitting sale, or McWane could not timely deliver the needed Domestic Fitting), and therefore did not trigger the Policy's penalties. CCPF 2030, 2062 (U.S. Pipe), 1929 (HD Supply), 1959 (WinWholesale). Moreover, Dr. Normann, who created the list of "**{ }** Distributors" that purportedly purchased Fittings from Star in 2010 and 2011, admitted that he could not say if all **{ }** were in fact Distributors, and if a customer purchased even one sample Fitting, he included them on his list of **{ }**. Indeed, Dr. Normann's analysis that 130 customers, including the largest Fittings Distributors, purchased Domestic Fittings from Star and yet Star's market share was only **{ }**, supports the testimony that purchases from Star were small and sporadic. *Cf* CCPF 2473 **{ }**. McWane did not introduce any contrary evidence. Thus, McWane's non-termination of these Distributors says nothing about the nature or effectiveness of its Policy.

Second, the evidence shows that when McWane knew a Distributor violated the Policy, as in the case of Hajoca, McWane terminated that Distributor. *See* CCPB at 216-218; CCPF 1866-1879. McWane has not introduced any evidence that it was aware of, but opted not to terminate, other Distributors that violated its Exclusive Dealing Policy. For example, McWane knew of Groeniger's small purchases of Star's Domestic Fittings, but believed (correctly) that those purchases were part of pipe-Fittings bundled sales, which were excepted from its Policy. CCPB at 231; CCPF 1978-1992. Evidence from Star's files showing it sold Domestic Fittings to some number of Distributors tells us nothing about McWane's enforcement of the Policy, or

even if it knew of those sales. McWane cannot dispute the evidence that it actively enforced the Policy, as in the case with Hajoca, without presenting contrary evidence that McWane knowingly ignored Fittings purchases that violated its Policy.

Third, McWane's enforcement (or alleged lack thereof) must be put in context: McWane became aware of the Commission's investigation into its Exclusive Dealing Policy in January 2010, and was able to shape its conduct to try to "improve [its] litigating position." *See Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1384 (7th Cir. 1986). McWane had complete control over whether or not it would selectively enforce its Policy or temporarily abandon its harshest penalties. *See* CCPB at 259-261. Indeed, McWane has argued in this litigation that it abandoned its Policy in 2010, but admits that it never communicated that message to the industry. CCPB at 260; CCPF 2064-2067. McWane's termination and partial re-instatement of Hajoca is a prime example of this flexible strategy. CCPB at 216-218; CCPF 1880-1888.

In November 2009 – two months *before* McWane became aware of the Commission investigation – McWane terminated Hajoca's corporate-wide access to McWane's Domestic Fittings line upon learning that one Hajoca branch in Tulsa, OK purchased Star's Domestic Fittings.[40] Eighteen weeks later (notably, longer than the 12 weeks stated in the September 22, 2009 letter), and *after* McWane became aware of the FTC investigation, McWane reinstated Hajoca's Lansdale, PA branch, which was willing to be exclusive to McWane. CCPF 1884-1888 (noting that the Tulsa branch was still denied access to McWane's Domestic Fittings, and that sales to Hajoca during the termination period were pursuant to orders placed prior to the termination date). McWane's documents show that it reinstated Hajoca in response to the FTC

[40] Hajoca had been able to resist the coercive impact of McWane's Exclusive Dealing Policy because it is a large distributor with over 350 branches, but the majority of Fittings purchases were from two single locations. CCPF 289-290; CX 1859; CX 0023 (almost all Fittings sales are through Tulsa, Oklahoma and Lansdale, Pennsylvania branches). McWane's Policy therefore had a far smaller impact on Hajoca's overall business than it did on waterworks-only Distributors.

investigation. CCPF 1881-1883. Thus, the probative value of McWane's reinstatement of Hajoca is "extremely limited" and "is entitled to little or no weight." *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1384 (Events after the fact are "subject to manipulation . . . [and] entitled to little or no weight."); *United States v. Gen. Dynamics Corp.*, 415 U.S. 486, 504-05 (1974) (finding that violators should not be able to "stave off" government enforcement actions "merely by refraining from aggressive or anticompetitive behavior when such a suit was threatened or pending").

Pointing to Mr. Tatman's self-serving testimony, McWane also argues that the company replaced its Exclusive Dealing Policy with a "rebate policy" in 2010. RPB at 109. McWane admits, however, that it never publicly rescinded its Exclusive Dealing Policy. CCPF 2064-2067. Most telling, McWane has never identified any final (*i.e.*, not draft) rebate letter that was issued to any customer to replace or supersede McWane's Exclusive Dealing Policy.[41] Indeed, Mr. Sheley, owner of Illinois Meter, testified at trial that he still does not purchase Domestic Fittings from Star because he believes McWane's Policy continues to be in effect. CCPF 2065 (Sheley, Tr. 3419 ("Q. Does this policy still have an effect on your willingness to deal with Star for domestic fittings today? A. Yes, it does. Q. And what effect is that? A. We're not buying any of them [Star Domestic Fittings] to speak of. We bought a few to look at them, but we are not buying them and supplying them on projects.")).

Thus, McWane's Policy is not a mere rebate or discount that Distributors can walk away from at any time. *Cf. Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1062-63 (8th Cir. 2000) ("[Defendant's] discount programs were not exclusive dealing contracts . . . [because

[41] McWane's Post-Trial Brief points to CX 0118, but this is an internal presentation by Mr. Tatman where he discusses possible amendments to McWane's Exclusive Dealing Policy. CX 0118 at 004. This presentation shows McWane's continued intent to cut off access to hundreds of Distributors that were not exclusive to McWane's Domestic Fittings. *Id.* In any event, there is absolutely no evidence in the record that this document or its recommendations were ever acted upon.

customers] were free to walk away from [Defendant's] discounts at any time."). Instead, McWane's Policy threatened Distributors' access to a product they needed to be able to compete and to service their customers (while also threatening to void already-accrued rebates on Domestic Fittings). Accordingly, there is no basis in law for analyzing this Policy under a price-cost test. RPB at 95-96 (advocating that McWane's "rebate policy" did not involve predatory pricing and therefore should be legal under *Brooke Group's* price-cost test). A price-cost test is applied only when "pricing itself operate[s] as the exclusionary tool." *ZF Meritor*, 696 F.3d at 275. When pricing is "not the clearly predominant mechanism of exclusion, the price-cost test cases are inapposite, and the rule of reason is the proper framework within which to evaluate Plaintiffs' claims." *Id.* at 277. Here, McWane's exclusionary tool is not low pricing, but the threat to terminate a Distributor that purchases Domestic Fittings from Star. McWane's inclusion of a price penalty does not limit antitrust challenges to its Exclusive Dealing Policy to only predatory pricing claims. *See, e.g.*, *Microsoft*, 253 F.3d at 67-69 (treating predatory pricing claims separately and finding liability for related exclusionary conduct).

2. McWane's Exclusive Dealing Policy Likely Harmed Competition

Exclusive dealing harms competition when a firm with monopoly power (or a dangerous probability of monopoly power) implements a policy that causes substantial foreclosure of the relevant market, thereby impairing the ability of rivals to compete effectively. *See, e.g.*, *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 271 (3d Cir. 2012). Evidence of a monopolist's anticompetitive intent, substantial market foreclosure, the foreclosed rival's inability to achieve economies of scale, and the absence of an efficiency justification are persuasive evidence that a monopolist's conduct is exclusionary and likely to harm competition. *See Microsoft*, 253 F.3d at 68-71; *Dentsply*, 399 F.3d at 191-97; *ZF Meritor*, 696 F3d at 281-89; *see also Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 & n.32 (1985) (exclusionary conduct "tends

to impair the opportunities of rivals" but "either does not further competition on the merits or does so in an unnecessarily restrictive way") (citations omitted). All these factors are present here.

Foreclosure occurs when, pursuant to the exclusive dealing, "the opportunities for other traders to enter into or remain in that market [are] significantly limited." (internal quotations omitted) *Microsoft*, 253 F.3d at 69. Foreclosure analysis is a tool used by courts to screen out conduct that is unlikely to cause significant harm:

> The share of the market foreclosed is important because, for the contract to have an adverse effect upon competition, "the opportunities for other traders to enter into or remain in that market must be significantly limited." . . . . . Because an exclusive deal affecting a small fraction of a market clearly cannot have the requisite harmful effect upon competition, the requirement of a significant degree of foreclosure serves a useful screening function.

Microsoft, 253 F.3d at 69; *see also Xerox Corp. v. Media Scis. Int'l, Inc.*, 511 F. Supp. 2d 372, 389 (S.D.N.Y. 2007) (stating that the foreclosure analysis is a "threshold" inquiry).

Importantly, "[t]he test is not total foreclosure, but whether the challenged practices bar a substantial number of rivals or severely restrict the market's ambit." *Dentsply*, 399 F.3d at 191; *Microsoft*, 253 F.3d at 68-71 (condemning exclusive agreements because they prevented rivals from "pos[ing] a real threat to Microsoft's monopoly"); *Rome Ambulatory Surgical Ctr. v. Rome Mem'l Hosp., Inc.*, 349 F. Supp. 2d 389, 405 (N.D.N.Y. 2004) ("Foreclosing competition on the merits is conduct the antitrust laws seek to prevent."); *see also Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 328 (1961) (finding exclusive dealing need not cover 100% of the buyer's needs, but only that the challenged conduct forecloses a "substantial share of the relevant market"). In other words, foreclosure does not mean that the rival was prevented from making any sales to a particular customer. *E.g.*, *ZF Meritor*, 696 F.3d at 265, 283-84 (condemning

exclusive dealing arrangements even though monopolist permitted customers to purchase up to 20 percent of their requirements from the rival).

As discussed more fully in Complaint Counsel's Post-Trial Brief, the evidence establishes that McWane's Exclusive Dealing Policy foreclosed Star from a substantial share – 50% or more – of the distribution market. *See* CCPB at 237; CCPF 2156-2159; *see also Microsoft* 253 F.3d at 70-71 (40% to 50% foreclosure may be sufficient in an exclusive dealing case). In *Microsoft*, the D.C. Circuit found that foreclosure percentages of less than 40% can be significant when implemented by a monopolist. *Microsoft* 253 F.3d at 70-71. The court reasoned that Microsoft's agreements had restricted Netscape's access to the most efficient distribution channels, and therefore "clearly have a significant effect in preserving its monopoly; they help keep usage of Navigator below the critical level necessary for Navigator or any other rival to pose a real threat to Microsoft's monopoly." *Id.*

Here, the foreclosure achieved by McWane is competitively significant because it caused Star's Domestic Fittings sales to be limited to a mere **{ }** million in 2010 and 2011, thereby making it uneconomical for Star to purchase its own Domestic Fittings foundry. CCPF 2104-2108. By producing Domestic Fittings through more costly and less efficient independent foundries, Star's production costs increased by approximately **{ }** (as compared to producing Domestic Fittings at its own dedicated foundry), and caused its prices to be approximately **{ }** higher than they otherwise would have been. CCPF 1730, 2116. Thus, McWane's Policy hindered Star's ability to compete effectively and to constrain McWane's monopoly prices. *See* CCPF 2141, 2125, 2161; *see also Microsoft*, 253 F.3d at 68-71 (condemning exclusive agreements because they prevented rivals from "pos[ing] a real threat to Microsoft's monopoly.").

The conclusion that McWane's Exclusive Dealing Policy likely harmed competition is also supported by the extensive evidence of McWane's specific intent to exclude Star when it adopted the Policy, and by McWane's lack of a cognizable procompetitive justification for its Policy. *See* CCPB at 218-222 (discussing specific intent evidence), 243-246 (discussing McWane's lack of procompetitive efficiencies); CCPF 1815-1822; *Aspen Skiing Co.*, 472 U.S. at 602 ("evidence of intent is merely relevant to the question whether the challenged conduct is fairly characterized as 'exclusionary' or 'anticompetitive'"); 608-11 (finding conduct exclusionary where defendant failed "to offer any efficiency justification for its pattern of conduct"); *Microsoft*, 253 F.3d at 59 (intent evidence relevant when it "helps us understand the likely effect of the monopolist's conduct"); *In re Polypore*, 2010 FTC LEXIS 17, at *635-36 (lack of efficiency justification is persuasive evidence of exclusionary nature of conduct).

McWane's two arguments in rebuttal are unpersuasive. First, McWane argues that its Policy could not substantially foreclose the Domestic Fittings market because (i) Star successfully entered the Domestic Fittings market by selling Domestic Fittings to **{ }**, and (ii) its Policy did not manifest itself in long-term exclusive contracts. Inconsistently, McWane next argues that its Policy did not cause Star's failure to succeed in the Domestic market, but instead Star's own product and reputational issues were the reason it failed. RPB at 40-54, 90-98.[42]

a) Star's Limited Sales to Distributors Do Not Preclude a Finding of Substantial Foreclosure and Harm to Competition

McWane repeatedly touts the fact that Star sold Domestic Fittings to **{ }** as proof that its Exclusive Dealing Policy did not harm competition in the Domestic Fittings market. RPB at 90. As a preliminary matter, McWane misstates the factual

[42] McWane also disputes that there is a relevant Domestic Fittings market, or that it has monopoly power in such a market. These arguments are addressed at *supra*, Parts E, F.

record. Beyond that, McWane's arguments that Star's "successful" entry into the Domestic Fittings market, or the lack of actual exclusive agreements, evidences a lack of competitive harm are contrary to well-established antitrust principles.

(1) McWane Mischaracterizes the Factual Record

McWane's discussion of Star's sales to **{ }** is misleading and omits key details that put the record evidence into context.[43] For example, McWane's count of **{ }** Distributors treats Distributors that vary widely in size and scope of market penetration as equal. Many of these Distributors are small and contribute little to Star's effort to achieve economies of scale. McWane also counts each Distributor that may have purchased only a single Domestic Fitting from Star, or whose purchases fell into one of the limited exceptions to McWane's Exclusive Dealing Policy. Normann, Tr. 5626-5627, 5630-5634 (admitting that he counted any Distributor that purchased even a single Domestic Fitting from Star, regardless of whether that purchase was for resale or pursuant to an exception in McWane's Policy). The number of customers, without more information on the nature and extent of their purchases, is meaningless. *See Insignia Sys., Inc. v. News Am. Mktg. In-Store, Inc.*, 661 F. Supp. 2d 1039, 1049, 1064-65 (D. Minn. 2009) (condemning exclusive dealing even though plaintiff sold its services to over 60 customers).

Regardless of how McWane slices and dices the numbers, it is undisputed that Star's Domestic Fittings sales represent only a small portion of the relevant market. Specifically, McWane's Policy limited Star's sales, in total, to a mere **{ }** million in 2010 and 2011, or a **{ }** market share for that time period. CCPF 2104-2108, 2140. By preventing Star from

[43] McWane's repeated claim that Star has **{ }** Domestic Fittings customers is simply false. RPB at 90. Star does not have any exclusive arrangements with any Distributors. Rather, McWane is referring to the uneventful fact that { }Distributors purchased Domestic Fittings from Star, but not McWane, which means only that these { }Distributors had never participated in the Domestic Fittings market before ARRA.

reaching an efficient scale, the Policy's foreclosure was competitively meaningful because it hindered Star's ability to compete effectively and to "pose a real threat" to McWane's monopoly. *See* CCPB at 225; *see also Microsoft*, 253 F.3d at 68-71 (condemning exclusive agreements because they prevented rivals from "pos[ing] a real threat to Microsoft's monopoly.").

Additionally, McWane's description of Distributors' purchases from Star ignores the key point that these Distributors reduced their Domestic Fittings purchases from Star because of McWane's Policy. For example, executives from the three largest Distributors, HD Supply, Ferguson and WinWater, each communicated to their branches that they could not purchase Domestic Fittings from Star unless it fit into one of the Policy's two limited exceptions, and they believe that their branches followed these directives. CCPF 1904-1936; CX 0552 at 001 (HD Supply mandate letter); CCPF 1944-1952 (Ferguson instructed employees not to purchase Star Domestic Fittings); CCPF 1956-1964 (WinWholesale listing Star on "Not Approved" vendor list for Domestic Fittings).

Finally, McWane's suggestion that its Policy did not substantially foreclose the relevant market because, *inter alia*, Star won the TDG Buying Group's contract over McWane is misleading. *See* RPB at 91. First, Star's "winning" rebate program did not ensure that Star would sell a single Domestic Fitting; TDG only negotiates rebate programs with suppliers on behalf of its Distributor members, it does not purchase any products; and TDG members are not required to purchase any individual products through TDG. CCPF 299-304 (selection based on product/vendor quality and rebate level). Second, Star's selection as a TDG vendor partner does not mean that it won a competitive battle against McWane. Multiple suppliers can have participating rebate programs for the same product, as is the case for imported Fittings where Star, Sigma and McWane are all TDG vendor partners. CCPF 497. And finally, and most importantly for this foreclosure analysis, although McWane did not enforce its Exclusive

Dealing Policy through its proposed rebate program with TDG, it proceeded to enforce its Policy directly against TDG's individual members. CCPF 2002-2025. Thus, for example, Dennis Sheley, President of TDG and an individual Distributor member, testified that he did not take advantage of any rebates on Star's Domestic Fittings available through TDG because he feared McWane would terminate his access to Domestic Fittings under its Exclusive Dealing Policy. CCPF 2012, 2014. Star's participation as a TDG vendor partner for Domestic Fittings, therefore, speaks more to the quality of its product and pricing than to the effectiveness of McWane's Policy.

(2) Exclusive Dealing Policies Are Condemned Even When They Do Not Result in Total Foreclosure

Star's Domestic Fittings sales to **{ }** fail to exonerate McWane's Exclusive Dealing Policy. Courts have consistently condemned exclusive dealing policies even when they do not result in total foreclosure. *See, e.g., ZF Meritor*, 696 F.3d at 265 (foreclosed customers were permitted by monopolist to purchase up to 20 percent of requirements from the targeted rival); *E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 637 F.3d 435, 452 (4th Cir. 2011) (foreclosed customers permitted by monopolist to purchase up to 15 percent of requirements from rivals).

For example, in *ZF Meritor*, the Third Circuit condemned Eaton's exclusive dealing arrangements that, among other exclusionary provisions, conditioned rebates on tiered percentages of its customers' purchase requirements. *ZF Meritor*, 696 F.3d at 265. The arrangements did not require the customers to purchase anything from Eaton, and even "permitted the [customer] to purchase transmissions from another supplier if that supplier offered the [customer] a lower price or a better product" and Eaton could not match the price or quality. *Id* at 266. The exclusive dealing arrangements left approximately 20% of the market available to

the monopolist's competitors. *Id* at 265. In condemning the arrangements, the court explained that, "[a]lthough no agreement was completely exclusive, the foreclosure that resulted was no different than it would be in a market with many customers where a dominant supplier enters into complete exclusive dealing arrangements with 90% of the customer base." *Id.* at 284*; see also Insignia Sys., Inc.*, 661 F. Supp. 2d at 1064-65 (rejecting argument that exclusive dealing did not harm competition because plaintiff could take advantage of "carve-out" provisions in defendant's exclusive contracts).

Thus, the fact that Star entered the Domestic Fittings market and has grown to a **{ }** share of Domestic Fittings sales (or any other arbitrary threshold), will not alone negate the finding of competitive harm. *See, e.g. Conwood Co., L.P. v. U.S. Tobacco Co.*, 290 F.3d 768, 774, 782 (6th Cir. 2002) (upholding monopolization verdict for plaintiff that enjoyed a 13.5% market share because, in a "world of unimpeded competition, consumers and [the plaintiff competitor] would have done substantially better") (internal quotations omitted). More probative than market share is whether Star succeeded in achieving economies of scale. *See Microsoft*, 253 F.3d at 70-71 (defendant's exclusionary conduct kept Navigator "below the critical level necessary for Navigator or any other rival to pose a real threat to Microsoft's monopoly"); *Dentsply*, 399 F.3d at 190-91 (competitive harm established when defendant's excluded rivals failed to achieve "the critical level necessary for any rival to pose a real [competitive] threat"). On this issue, there is no dispute. Complaint Counsel and McWane agree that Star is "a less efficient supplier of [D]omestic Fittings than McWane because of its use of multiple jobber factories, rather than its own, dedicated foundry, like McWane." RPB at 62.

The Federal Circuit's unpublished decision in *Digene*, cited by McWane at 95 in its Post-Trial Brief, does not require a different result. *Digene Corp. v. Third Wave Techs., Inc.*, 2009 WL 886301 (Fed. Cir. 2009) (unpublished decision). *Digene* did not hold that "true exclusive

contracts that are not strictly enforced are permissible." RPB at 95. Rather, the Federal Circuit concluded that the defendant's contracts did not have an anticompetitive effect primarily because the plaintiff was already in the market and could have competed for those contracts. *Id*. at *7 (explaining that "[t]he existence of competition for the contract . . . demonstrates a lack of anticompetitive effect"). Here, by contrast, McWane unilaterally imposed its Exclusive Dealing Policy in September 2009, when it still retained leverage as the sole Domestic Fittings supplier. CCPF 1659. Thus, McWane's Exclusive Dealing Policy cannot be inoculated from liability on the ground that McWane faced "competition for the contract" from established rivals. To the extent that McWane contends that antitrust liability cannot attach unless its enforcement was "strict," that contention finds no support in the case law. *See, e.g.*, *ZF Meritor*, 696 F.3d at 282-83 (concluding that defendant's agreements with customers were unlawful because, "despite the fact that [the defendant] did not actually terminate the agreements on the rare occasion when [a customer] failed to meet its [market-penetration] target, the [customers] believed that it might").

(3) Unilateral Exclusive Dealing Policies Violate Section Two Even Without a Written Agreement

While an agreement between supplier and customer is necessary to challenge exclusive dealing under Section 1 of the Sherman Act, which prohibits unreasonable *agreements* in restraint of trade, there is no such requirement under Section 2, which proscribes unilateral exclusionary conduct by a monopolist. *E.g.*, *Lorain Journal Co. v. United States*, 342 U.S. 143, 148-52 (1951) (condemning exclusive dealing without evidence of agreement); *Dentsply*, 399 F.3d at 186-187, 188-190 (same). Courts recognize that exclusive dealing policies unilaterally implemented by a monopolist can have the same enduring anticompetitive effects as long-term contracts because, inherent in the firm's monopoly power, its customers are not free to walk away from the exclusionary policy.

For example, in *Lorain Journal*, the Supreme Court held that a newspaper publisher's practice of "refusing to accept local . . . advertising from parties using [a local radio station] for local advertising" constituted an unlawful attempt to monopolize interstate commerce. 342 U.S. at 149. The court rejected the publisher's argument that its conduct did not violate the antitrust laws because it had implemented its exclusive dealing policy through unilateral conduct rather than through contractual provisions. *Id.* at 155. The Court reasoned that the publisher's monopoly power meant advertisers were not free to walk away. Instead, "[b]ecause of the Journal's complete daily newspaper monopoly of local advertising in Lorain and its practically indispensable coverage of 99% of the Lorain families, [the publisher's] practice forced numerous advertisers to refrain from using [the radio station] for local advertising." *Id.* at 149-50.

Likewise, in *Dentsply*, the Third Circuit condemned the defendant's exclusive dealing policy of terminating any dealer that carried its competitor's products (artificial teeth) even though "Dentsply operates on a purchase order basis with its distributors and, therefore, the relationship is essentially terminable at will." *Dentsply*, 399 F.3d at 185. The court found the policy exclusionary because "the economic elements involved – the large share of the market held by Dentsply and its conduct excluding competing manufacturers – realistically ma[de] the arrangements . . . as effective as those in written contracts." *Id.* at 193-94 ("[I]n spite of the legal ease with which the relationship [could] be terminated, the dealers [had] a strong economic incentive to continue carrying Dentsply's teeth."); *see also ZF Merritor*, 696 F.3d at 278 (condemning rebate policy as *de facto* exclusive dealing because "even if [a customer] decided to forgo the rebates and purchase a significant portion of its requirements from another supplier, there would still have been a significant demand from truck buyers for [the defendant's] products. Therefore, losing [the defendant] as a supplier was not an option.").

Here, on or about September 22, 2009, McWane unilaterally imposed its Exclusive Dealing Policy on Distributors as a cost of doing business; there was no competition to become the exclusive supplier, and McWane did not offer any additional discount, rebate or other consideration to Distributors in exchange for exclusivity. CCPF 1826; CX 0010 at 001 (exclusive dealing policy); CCPF 1830-1831 (hard line message communicated to Distributors). Indeed, McWane threatened to revoke accrued rebates under preexisting rebate agreements with Distributors who dared to violate the Policy. Distributors viewed McWane's Exclusive Dealing Policy as a threat, and one that they took seriously because of the significant negative impact that losing access to McWane's Domestic Fittings would have on their business. CCPF 1895 (CX 2490 (Morrison, Dep. at 79-80) ("When I read the letter that [McWane] sent out . . . I interpreted that as a threat")); CCPF 1896-1898 (Sheley, Tr. 3412 (losing access to McWane's Domestic Fittings was a serious consequence to Illinois Meter because it needed access to a full line of Domestic Fittings in certain locations and McWane carries a complete line); CCPF 1703-1708 (McWane internal documents conceding that Distributors did not like its Policy and that it had lost good will among them). Thus, Distributors complied with McWane's Policy because they determined that they could not afford to switch to a competing Domestic Fittings supplier on an all-or-nothing basis – the risk to their business was simply too large. *See Dentsply*, 399 F.3d at 195 (holding similar "all or nothing" ultimatum to be exclusionary when it "created a strong economic incentive for dealers to reject competing lines in favor of Dentsply's teeth").

Accordingly, McWane's Exclusive Dealing Policy – even absent an agreement – significantly foreclosed the Domestic Fittings market.

b) The Relevant Inquiry Is Properly Focused on the Impact of McWane's Exclusive Dealing Policy, Not Any Claims that Star Was an Imperfect Competitor

Arguing in the alternative, McWane seeks to blame the victim, claiming that Star's efforts to grow were hampered by its own problems, including a lack of inventory and reputational issues. RPB at 97-98. Whatever Star's shortcomings, they do not exonerate McWane's exclusionary conduct. Exclusive dealing claims do not require excluded rivals to be perfect competitors that necessarily would have won the foreclosed business but for the exclusive dealing policy. The appropriate standard is not "but for" McWane's exclusive deals, Star would have been able to compete efficiently, but instead, was McWane's conduct a "substantial" or "material" cause of Star's foreclosure from the Domestic Fittings market. *E.g.*, *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 114 n.9 (1969) (plaintiff is required to show that the conduct is a "material cause" of the injury); *Continental Ore Co. v. Union Carbide & Carbon Corp*., 370 U.S. 690, 702 (1962) (same); *Gulf States Reorganization Group, Inc. v Nicor Corp.*, 466 F.3d 961, 965 (11th Cir. 2006) ("Antitrust law does not require that the defendant be the exclusive cause of the plaintiff's injury but only a material one"); *Conwood Co.*, 290 F.3d at 791 (plaintiff is not required to show that the conduct is the "sole proximate cause" of the harm); *Tele Atlas N.V. v. NAVTEQ Corp.*, 2008 U.S. Dist. LEXIS 111866, at *71 (N.D. Cal. 2008) (plaintiff must demonstrate that conduct is "material" or "substantial" cause of injury); *Rome Ambulatory Surgical Ctr..*, 349 F. Supp. 2d at 403 ("The burden is met if the alleged conduct would prevent RASC from competing in the ambulatory surgery market, not just keep RASC from winning in it. Foreclosing competition on the merits is conduct the antitrust laws seek to prevent.").

Courts have routinely declined to blame the plaintiff for its own foreclosure where the monopolist initiated an exclusive dealing arrangement that was intended to foreclose the plaintiff

from a substantial portion of the relevant market. *See Dentsply Int'l., Inc.*, 399 F.3d at189, 196; *LePage's, Inc. v. 3M*, 324 F.3d 141, 158-59 (3d Cir. 2003); *ZF Meritor*, 696 F.3d at 285-86; *Rome Ambulatory Surgical Ctr..*, 349 F. Supp. 2d at 403; *Tele Atlas N.V. v. NAVTEQ Corp.*, No. C-05-01673, 2008 U.S. Dist. LEXIS 111866, at *71 (N.D. Cal. Oct. 28, 2008).

For example, in *ZF Meritor*, the Third Circuit condemned the defendant's exclusive dealing arrangements notwithstanding evidence that the plaintiff's products required frequent repairs and had incurred millions of dollars in warranty claims during the relevant time period. *ZF Meritor*, 696 F.3d at 266. The plaintiff, ZF Meritor, itself acknowledged "poor product quality image" as one reason for its failures; that it had lost deals due to "lack of product availability;" and that it had refused to lower prices despite requests from customers. *Id.* at 308-09, 334-35 (Greenberg, J., dissenting) ("ZFM did not even engage in the type of competitive conduct that potentially could have lured away Eaton's customers. Thus, we cannot say that it is not realistic to think that if it had engaged in that competition conduct ZFM could have been successful."). Yet, the Third Circuit kept the focus squarely on the defendant's (Eaton's) efforts to exclude ZF Meritor from the relevant market, and found that there was substantial foreclosure despite evidence that ZF Meritor could have competed more effectively. *Id.* at 285-286; *see also Rome Ambulatory Surgical Ctr.*, 349 F. Supp. 2d at 403 (refusing to grant summary judgment on exclusive dealing claim despite evidence of plaintiff's incompetence because there was evidence that the defendant had "acted to foreclose competition altogether through improper exclusive dealing" rather than "continuing to compete for patients by simply lowering its rates or offering a better facility."); *Dentsply*, 399 F.3d at 189, 196 (refusing to deny liability based on rivals' allegedly bad decisions because "[t]he apparent lack of aggressiveness by competitors is not a matter of apathy, but a reflection of the effectiveness of Dentsply's exclusionary policy").

Here, as in *Denstply*, *ZF Meritor*, and *Rome Ambulatory*, McWane's attempt to shift the blame to Star is of no legal force. Perhaps Star made mistakes, and in an action for damages a complicated accounting may be necessary. Here, the key issue is that McWane's Exclusive Dealing policy materially contributed to Star's inability to become an efficiently-sized competitor. This is sufficient to find that McWane's Exclusive Dealing Policy harmed competition in the Domestic Fittings market.

3. McWane's Desire To Increase Volumes at Its Domestic Foundries Does Not Justify Its Exclusive Dealing Policy

Finally, McWane tries to justify its Exclusive Dealing Policy as an "effort to keep enough volume to keep Union Foundry alive" and to prevent Star from "grabbing the lion's share of the highest volume Fittings" without investing in a foundry or a full line of Domestic Fittings. RPB at 107.[44] This, however, is not a cognizable efficiency recognized by the antitrust laws and therefore does justify McWane's Exclusive Dealing Policy.

Cognizable justifications advance the goals of the antitrust laws by promoting competition, *e.g.*, decreasing costs, increasing output, or improving quality. *See In re Polygram Holding, Inc.*, 136 F.T.C. 310, 345-46 (2003). The analysis of an asserted justification must focus on any benefits provided to consumers, and not those advantages that benefit only McWane. *See Microsoft*, 253 F.3d at 71 (stating that a benefit to defendant is not a procompetitive justification for an exclusive dealing contract).

As described more fully in Complaint Counsel's Post-Trial Brief, McWane's efficiency justification fails because its desire to increase sales from McWane's foundry is a laudable business objective, but it is not a valid efficiency justification for exclusionary conduct. *See* CCPB at 203-206. As explained by the D.C. Circuit in *Microsoft* when it rejected a similar

[44] McWane apparently has abandoned its earlier (and mistaken) arguments that its Exclusive Dealing Policy was necessary to prevent free-riding from Star.

defense, the desire to increase sales "is not an unlawful end, but neither is it a procompetitive justification." *Id.* at 71-72 (characterizing the objective as a "competitively neutral goal"). McWane has proffered no explanation as to how its Policy benefits consumers rather than merely itself.

Because there is no efficiency justification that outweighs the Policy's harm to competition, this Court should condemn McWane's Exclusive Dealing Policy.

H. McWane Attempted to Monopolize the Market for Domestic Fittings

Even if the Court accepts McWane's contention that McWane did not have monopoly power, the Court should still conclude that McWane's Exclusive Dealing strategy constitutes attempted monopolization. The charge of attempted monopolization "is properly directed against a course of exclusionary conduct other than competition on the merits which, *if continued or successfully consummated*, would probably produce" a substantial degree of market power. Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 804 (emphasis added).

Complaint Counsel's Post-Trial Brief establishes that: (i) McWane's Exclusive Dealing policy was calculated to deter Distributors from purchasing Domestic Fittings from Star while serving no legitimate, pro-competitive purpose; (ii) McWane's specific intent was to impede Star's entry into the Domestic Fittings market; and (iii) there was a dangerous probability that McWane would thereby achieve monopoly power. *See* CCPB at 210-222; *see also* CCPF 1655-1711, 1783-1822. This showing establishes McWane's liability for attempted monopolization under Section 2. *See Spectrum Sports Inc. v. McQuillan*, 506 U.S. 447, 456 (1993); CCPB at 206-207.

In a single conclusory paragraph, McWane denies that it had the specific intent to monopolize the Domestic Fittings market. RPB at 105-106. Yet, the evidence of

anticompetitive intent is quite clear. And the absence of an efficiency justification is likewise clear.

As discussed more fully in Complaint Counsel's Post-Trial Brief, McWane threatened sanctions against Distributors in order to deter them from purchasing Domestic Fittings from Star. McWane intended to "block" Star from the Domestic Fittings market and to "make sure that [Star does not] reach any critical market mass that will allow them to continue to invest and receive a profitable return." CCPF 1791; *see also* CCPB at 218-222. McWane adopted its Exclusive Dealing Policy because it feared that prices in the Domestic Fittings market would be "creamed" by Star's entry. CCPF 1790; *see also* CCPB at 220; RPB at 41 ("Star had been a major player in the destruction of the domestic Fittings industry" when it entered with imports). McWane simply disregards this evidence.

Specific intent can also be inferred from exclusionary conduct, *i.e.*, conduct that tends to exclude competitors "on some basis other than efficiency," such as by tending to "impair the opportunities of rivals." *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 n.32 (citations omitted) (1985); *Am. Tobacco Co. v. United States*, 328 U.S. 781, 788-89 (1946) (evidence of intent to exclude competitors supports conclusion that defendants had specific intent to monopolize). Here, McWane did not respond to Star's entry by lowering prices or by offering better service. Instead, it adopted an all-or-nothing Exclusive Dealing Policy designed to foreclose Star from access to the key distribution channel necessary for effective competition. *See* CCPB at 218-222; *see also* CCPF 1782-1822. McWane's all-or-nothing policy made it more risky for Distributors to deal with Star; the policy did not make McWane a more efficient supplier.

The final issue is whether there was a dangerous probability that McWane's anticompetitive strategy would successfully exclude Star. When evaluating the element of

dangerous probability of success, courts "do not rely on hindsight but examine the probability of success at the time the acts occur." *United States v. Am. Airlines*, 743 F.2d 1114, 1118 (5th Cir. 1984); *see also General Indus. Corp. v. Hartz Mountain Corp.*, 810 F.2d 795, 807 (8th Cir. 1987). The most common litmus test of dangerous probability is whether the defendant has a sufficiently high share of a properly defined market. McWane's **{ }** market share in a market characterized by high entry barriers is more than sufficient to meet this element. *See McGahee v. Northern Propane Gas Co.*, 858 F.2d 1487, 1506 (11th Cir. 1988) (60-65% market share sufficient); *Arthur S. Langenderfer, Inc. v. S.E. Johnson Co.*, 917 F.2d 1413, 1443 (6th Cir. 1990) (58% share sufficient); *see also* CCPB at 207-210; CCPF 1658-1664. McWane's intent to implement its anticompetitive strategy, along with the dangerous probability of success, is sufficient to satisfy this element even if McWane's market share declined. *Am. Airlines*, 743 F.2d at 1118-19; *see also Lockheed Martin Corp. v. Boeing Co.*, 390 F. Supp. 2d 1073, 1079-80 (M.D. Fla. 2005) (a decline in the defendant's market share will not defeat a claim of attempted monopolization).

I. McWane Conspired with Sigma to Monopolize the Domestic Fittings Market

Complaint Counsel's Post-Trial Brief explains that: (i) McWane and Sigma collectively possess monopoly power in the Domestic Fittings market; (ii) McWane and Sigma agreed to implement the Exclusive Dealing policy; (iii) McWane and Sigma each acted with a specific intent to monopolize; and (iv) the parties took overt acts in furtherance of the conspiracy, including publicizing and enforcing the Exclusive Dealing policy. *See* CCPB at 207-208, 246-249, 250-258; *see also* CCPF 2394-2409, 2454-2465. This is sufficient to establish that McWane has unlawfully conspired to monopolize the Domestic Fittings market in violation of

Section 2. *See Northeastern Tel. Co. v. AT&T Co.*, 651 F.2d 76, 85 (2d Cir. 1981); *see also* CCPB at 246-258.[45]

According to McWane, there is "no evidence" that McWane or Sigma had the requisite "specific intent" to monopolize the Domestic Fittings market. RPB at 105-106. McWane's conclusory statements cannot overcome the extensive evidence of both parties' specific intent.

The standard for proving specific intent is the same under a conspiracy to monopolize claim as it is for an attempted monopolization claim: the intent to exclude competition or control prices. *Northeastern Tel. Co.*, 651 F.2d at 85 ("crucial" question is whether parties "specifically intended to vanquish their opposition by unfair or unreasonable means."); *see also Waikiki U-Drive, Inc. v. Budget Rent-A-Car Sys.*, 491 F. Supp. 1199, 1223 (D. Haw. 1980) (same standard for attempted monopolization and conspiracy claims).

As discussed more fully in Complaint Counsel's Post-Trial Brief, McWane adopted its Exclusive Dealing Policy with the specific intent to monopolize the Domestic Fittings market, and specifically intended for the MDA to further "reduce Star's ability to grow share" and to

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[45] Citing a requirement that occurs only in the Tenth Circuit, McWane cites an additional element of a conspiracy to monopolize claim: "effect upon an appreciable amount of interstate commerce." *See* RPB at 105 (citing *Lantec, Inc. v. Novell, Inc.*, 306 F.3d 1003, 1028 (10th Cir. 2002)). While several Circuits require some showing that the conspiracy had at least a minimal impact on interstate commerce, most Circuits require no showing or have been quiet on this issue. *Compare Lantec*, 306 F.3d at 1028 (conspiracy impacting "appreciable amount of interstate commerce"); *J.T. Gibbons, Inc. v. Crawford Fitting Co.*, 704 F.2d 787, 796 (5th Cir. 1983) (an "effect upon a substantial amount of interstate commerce") *with Int'l Distrib. Ctrs., Inc. v. Walsh Trucking Co.*, 812 F.2d 786, 795 (2d Cir. 1987) (elements of a conspiracy to monopolize are (1) concerted action, (2) specific intent to achieve an unlawful monopoly, and (3) an overt act in furtherance of the conspiracy); *Baxley-DeLamar Monuments, Inc. v. Am. Cemetery Ass'n*, 843 F.2d 1154, 1157 (8th Cir. 1988) (same); *Levine v. Cent. Fla. Med. Affiliates, Inc*, 72 F.3d 1538, 1556 (11th Cir. 1996) (same).

Even if the "appreciable effects" element is applied here, Complaint Counsel has satisfied this element because thousands of tons of Domestic Fittings, worth millions of dollars, were sold throughout the United States under the MDA. *See United States v. Yellow Cab Co.*, 332 U.S. 218, 225-26 (1947) (observing that "interstate purchases of replacements of some 5,000 licensed taxicabs in four cities . . . is an appreciable amount of commerce under any standard"); *see also* CCPF 2493 (MDA was in effect for nearly a year from September 2009 through August 2010). Notably, McWane does not dispute this element. *See* RPB at 105-106 (only discussing specific intent element).

"help drive some additional level of price stability." CCPF 2460; CCPB at 250. Indeed, the McWane executive who ultimately decided to enter into the MDA, Leon McCullough, stated that he wanted "to sell Sigma to put pressure on Star. [Leon McCullough] hopefully to drive Star out of business. Would rather have competition other than Star." CCPF 2366, 2458. McWane does not address or contest this evidence.

Sigma also had the specific intent to monopolize the Domestic Fittings market. Sigma understood that the MDA would exclude Star from the Domestic Fittings market, thus enabling Sigma to secure a greater volume of sales and to share in McWane's higher monopoly prices. *See* CCPB at 255-256; *see also* CCPF 2454-2465; CX 1022 at 003, *in camera* **{ }**. McWane points to evidence that Sigma was motivated to enter the Domestic Fittings market because it wanted to service its customers and to protect its market share. *See* RPB at 105-106. But this is only part of the story. McWane ignores evidence that Sigma entered into the MDA specifically because it thought the MDA was **{ }**, that through the MDA, McWane and Sigma "might isolate Star and make them suffer with their investment," and because it believed that the MDA could lead to "an increase in the price in the market [and] then the market would come to a better price" for Fittings. CCPF 2460-2465 (emphasis added); *see also* CCPB at 253-255. This direct evidence of Sigma's intent to use the MDA to exclude competitors and to control prices is more than sufficient to show that Sigma had the requisite intent to monopolize the Domestic Fittings market.

J. McWane's Master Distribution Agreement with Sigma Unreasonably Restrained Competition in the Domestic Fittings Market

Complaint Counsel's Post-Trial Brief explains that: (i) Sigma was a potential competitor in the Domestic Fittings market in 2009 because its entry into that market was "reasonably

probable;" (ii) the Master Distribution Agreement ("MDA") between Sigma and McWane aborted Sigma's independent entry; and (iii) the MDA harmed competition by eliminating competition and solidifying McWane's monopoly power in the Domestic Fittings market. *See* CCPB at 180-206; CCPF 2210-2366, 2379-2393, 2466-2484. This evidence shows that the MDA was a naked agreement to eliminate Sigma as a potential competitor from the Domestic Fittings market and should therefore be condemned as a *per se* illegal market allocation agreement. *See Engine Specialties, Inc. v. Bombardier Ltd.*, 605 F.2d 1, 9 (1st Cir. 1979); *In re SKF Indus. Inc.*, 94 F.T.C. 6, 63 (1979). Alternatively, because McWane and Sigma collectively have market power and there are no procompetitive efficiencies, the MDA can also be condemned under an abbreviated or full rule of reason analysis. *See* CCPB at 201-206 (discussing why MDA fails the rule of reason analysis).[46]

McWane's principal argument against liability is that Sigma was not a potential competitor in the Domestic Fittings market because Sigma did not have the financial wherewithal to enter and had not taken sufficient concrete steps toward entry. *See* RPB at 101-103.[47] McWane applies the wrong legal standard and misreads the evidence. McWane's

[46] In *In re Sulfuric Acid Antitrust Litigation*, 2012 U.S. App. LEXIS 26434 (7th Cir. Dec. 27, 2012), the Seventh Circuit found that a "novel" exclusive distributor agreement that required the distributor to abandon its own competing product was not sufficiently analogous to a *per se* illegal price-fixing agreement, and that the agreement should therefore be judged under an abbreviated rule of reason. *Id.* at *15-25. The court noted that even under an abbreviated rule of reason analysis, that "probably all that this would have meant in a case such as this is that the defendants would have had greater latitude for offering justifications . . . ." *Id.* at *4. Notably, the court did not consider whether the "novel" agreement should be viewed as an unlawful market allocation agreement. *Cf. Bombardier*, 605 F.2d at 9; *SKF*, 94 F.T.C. at 63.

[47] McWane also appears to suggest that the MDA did not abort Sigma's Domestic Fittings entry because Sigma could not have entered the market during the ARRA time period, and because Sigma did not independently enter the Domestic Fittings market before or after the MDA. *See* RPB at 104. These arguments are unavailing. As discussed more fully in Complaint Counsel's Post-Trial Brief, the ARRA gave Sigma the incentive to enter the Domestic Fittings market, and it continues to purchase Domestic Fittings from McWane under similar terms to the MDA even after its termination. CCPB at 184-189; CCPF 2216 (ARRA provided incentive); CCPF 2492-2496 (McWane continues to Domestic Fittings to Sigma) There is also no evidence that Sigma could not have entered the Domestic Fittings market during

proffered justifications for the MDA similarly do not withstand scrutiny. As discussed below, Sigma was a potential competitor in the Domestic Fittings market, even under McWane's erroneous legal standard. And assuming the Court considers McWane's proffered justifications, they fail because they are *post hoc* justifications that do not promote the interests of competition.

1. Sigma Was a Potential Competitor in the Domestic Fittings Market

For purposes of a Section 1 claim by a Government plaintiff seeking injunctive relief, a firm is considered to be a potential competitor if entry by that firm is "reasonably probable" in the absence of the relevant agreement, as evidenced by the firm's intent and ability to enter the relevant market. *See, e.g.*, *McWane*, FTC Docket No. 9351, 2012 FTC LEXIS 155, at *55 n.18 (Sept. 14, 2012); *Yamaha*, 657 F.2d at 977-79; *Bombardier*, 605 F.2d at 9; FTC & DOJ, *Antitrust Guidelines for Collaborations Among Competitors*, at § 1.1 n.6 (2000); *see also* CCPB at 182-83.

As discussed more fully in Complaint Counsel's Post-Trial Brief, contemporaneous documents and testimony show that Sigma intended to enter the Domestic Fittings market – and that doing so was its "#1a priority" – up until the moment that it signed the MDA. *See* CCPB at 183; CCPF 2176. McWane admits that Sigma had the requisite intent to enter the Domestic Fittings market. *See* CCPF 2320-2321.

The evidence also shows that Sigma was capable of entering the Domestic Fittings market by securing supply from U.S. foundries. *See* CCPB at 189-190; CCPF 2172-2173, 2229-2252. Sigma had successfully used its expertise in this same "virtual manufacturing" model to enter and grow in the imported Fittings business. *See* CCPB at 189-192; CCPF 60, 2172-2174.

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the ARRA period, only that it may not have a complete line of Fittings during that period. *See* CCPB at 211-212; CCPF 2227-2228; *McWane*, 2012 FTC LEXIS 155, at *56 (questioning the claim that it would have been impossible for Sigma to enter during the ARRA period in light of Star's actual entry during that time frame). Moreover, Sigma executives consistently testified that they abandoned their domestic entry efforts because of the MDA. *See* CCPB at 195-198; CCPF 2301, 2378, 2386-2393.

This is why top Sigma executives invested significant time and resources into the company's entry effort. CCPF 2171-2176. Notably, in 2009, McWane believed that Sigma was capable of entering the market independently. CCPB at 193-195; CCPF 2313 (McCullough believed that "Sigma did have access to the needed capital, but they also had the contacts and the talent and they've been importing for a very long time").

McWane proposes an alternative "preparedness" test for determining whether Sigma was a potential competitor: that Sigma had the intent to enter the market (which it admits); and that Sigma "had taken the necessary concrete steps" for entry by the time the MDA had been signed. RPB at 102. McWane not only relies on the wrong line of cases, but it misreads them.

McWane relies on a pair of Section 2 monopolization cases (not Section 1 cases) in which a private plaintiff (not a Government plaintiff) is seeking damages (not an injunction against future misconduct) for allegedly being excluded from entering a relevant market by the defendant's conduct. *Gas Utils. Co. of Ala. v. S. Natural Gas Co.*, 996 F.2d 282, 283 (11th Cir. 1993); *Cable Holdings of Ga., Inc. v. Home Video, Inc.*, 825 F.2d 1559, 1560-61 (11th Cir. 1987). In this context, the wrongfully excluded private plaintiff must establish both an "intention and preparedness to enter the business . . . ." *Gas Utils. Co. of Ala.*, 996 F.2d at 283. The rationale for the "preparedness" standard is described by the district court in *Gas Utils. Co. v. Southern Natural Gas Co.*:

> Courts continue to be vexed by the plaintiff who claims he would have gone into business had the defendant's antitrust violation not kept him out . . . . [M]any exclusion claims seem tenuous at best, and most new businesses in the United States fail, most of them for reasons that have nothing to do with antitrust policy.
>
> Aware of this policy dilemma, the courts have entertained claims of precluded entry, but not too readily.

825 F. Supp. 1551, 1571-72 (N.D. Ala. 1992) (quoting Areeda & Hovenkamp, *Antitrust Law* ¶ 340.2.j (1991)). This rationale is not applicable here. The Complaint does not allege that McWane *excluded* Sigma, but that McWane and Sigma *agreed* that Sigma would cede the Domestic Fittings market to McWane. Accordingly, McWane relies on the wrong line of cases and the wrong legal standard.

McWane also misinterprets the Section 2 "preparedness" standard, which simply requires that, based on a review of numerous factors, the plaintiff show that it was capable of entering the market and that entry was not speculative. *Cf. Gas Utils. Co*, 825 F. Supp. at 1572 (finding insufficient plaintiff's "preparation," which included $1000 in start-up funds, no offices, no employees, no credit, and no operational history, because plaintiff's efforts were "best [] styled as an idea coupled with a hope, plus some minimal investigation to explore potential, and some indication of interest from potential customers"). The district court in *Gas Utils. Co.* explained the relevant inquiry as follows:

> Courts have evaluated the following factors in assessing a company's preparedness. These include: the ability of the plaintiff to finance the business and to purchase the necessary facilities and equipment; the consummation of contracts by the plaintiff; affirmative actions by the plaintiff to enter the business and the background and experience of plaintiff in the prospective business.

Gas Utils. Co, 825 F. Supp. at 1569 (internal quotation omitted).[48]

Thus, even under McWane's "preparedness" standard, Complaint Counsel is not required to show that Sigma had "secured financing and consummated contracts to supply [Domestic Fittings]." RPB at 102. {

}; thus, this is hardly a necessary step

[48] The Eleventh Circuit affirmed on appeal, noting that the "comprehensive opinion of the district court, which answers almost every question that is repeated on this appeal, makes it unnecessary to set forth in detail the reasons why summary judgment for defendants was properly entered in this case." *Gas Utils. Co.*, 996 F.2d at 283.

for entry. CCPF 2119-2121. McWane cites *Gas Utils. Co.* for the proposition that Sigma must have "secured financing," rather than simply be prepared to obtain it, but that Court said no such thing. The Court held that evidence that "plaintiffs themselves were able and prepared to" obtain financing – not that they had already secured it – would have been sufficient to show preparedness to enter the market. 996 F.2d at 283.

Likewise, the Section 2 "preparedness" standard does not require Complaint Counsel to show that Sigma "had taken" *all* the necessary steps to enter the market by the time Sigma signed the MDA. RPB at 102. Courts have specifically rejected the requirement that an excluded plaintiff show that its entry was imminent. For example, in *Sunbeam TV Corp. v. Nielsen Media Research, Inc.*, also cited by McWane, the court explained that

> [t]he 'willing and able' standard does not require that a firm be on the brink of competition with a monopolist. A successful illegal monopolist maintains its position by thwarting competition. Sometimes, that point occurs immediately prior to market entry, while in other cases, competition is neutralized sooner. Obviously, a monopolist should not be rewarded for eliminating competition in its incipiency.

763 F. Supp. 2d 1341, 1356 (S.D. Fla. 2011).

As discussed below, the evidence shows that Sigma is a potential competitor even under McWane's erroneous "preparedness" standard.

a) Sigma Had Sufficient Financial Resources to Enter the Domestic Fittings Market

Engaging in a bit of revisionist history, McWane argues that Sigma could not have entered the Domestic Fittings market because Sigma was in a "grave" financial position during 2009. RPB at 101. While Sigma (together with scores of other companies during what was a significant recession) was facing financial challenges, there is no contemporaneous evidence that those challenges would have prevented Sigma's market entry. At Sigma, entering the Domestic

Fittings market was viewed as part of the solution to the company's problems. CCPF 2297, 2300, 2302, 2306.

As discussed more fully in Complaint Counsel's Post-Trial Brief, there is no contemporaneous evidence that financial considerations impeded Sigma from pursuing Domestic entry. Sigma was aware that the Fittings industry was trending downward and that this impacted its debt covenants, and yet the company still actively pursued its plan for independent entry. CCPB at 191-192; CCPF 2287-2289. As of July 2009, Sigma's investors were prepared to invest up to $7.5 million to fund the company's domestic sourcing initiative for Fittings "which [would] enhance credit quality and help Sigma grow and build equity value." CCPF 2295.

McWane's rebuttal relies heavily on the testimony of Mr. Rybacki. However, Mr. Rybacki was not a member of Sigma's Domestic Production team. CCPF 2213. As the vice president of sales, Mr. Rybacki was not responsible for overseeing supply chain management, engineering, or product sourcing. The testimony of Sigma witnesses that actually led and executed Sigma's plan for domestic entry (Messrs. Pais, Rona, Bhattacharji and Box) contradicts and is more probative than the personal opinion of Mr. Rybacki.

Perhaps the most compelling evidence of Sigma's financial capability is the other expenditures that Sigma made or considered at this time. In addition to paying down a significant portion of its debt, Sigma acquired a portion of **{**

} which was approximately the same as the cost of entry projected by Sigma's Domestic Production team; and elevated discussions about acquiring Star, which would have been orders of magnitude more expensive than domestic entry. CCPF 2292, 2293, 2305. Thus, the contemporaneous evidence is clear: financing did not prevent Sigma from implementing its plan for domestic entry. Instead, the MDA aborted Sigma's entry

b) Sigma Took Concrete Steps Toward Entry

McWane's Post-Trial Brief recites the steps toward entry that were not yet implemented by Sigma when the MDA was signed, and asserts that, as of "September 2009, Sigma had not taken any concrete steps to supply its own domestic Fittings." RPB at 102. This is false. After engaging in strategic planning for domestic entry from February 2009 to May 2009, Sigma had completed the following concrete steps prior to signing the MDA:

- identified a "critical mass" of roughly 700 configurations of Domestic Fittings it would need to produce, which could be produced with 400 different patterns;
- announced its anticipated entry to its customers;
- created a detailed cost analysis for producing these Fittings;
- identified, visited, and received price quotes from foundries capable of producing castings for Domestic Fittings for Sigma;
- purchased equipment necessary to manufacture the Domestic Fittings; and
- produced several sample or prototype Domestic Fittings.

CCPF 2218, 2224, 2227, 2232, 2235-2236, 2277. While additional steps were required before Sigma could fully enter the Domestic Fittings market, Complaint Counsel is not required to show that its entry was imminent or costless or simple or certain, even under McWane's erroneous "preparedness" test. *See Sunbeam Television Corp.*, 763 F. Supp. 2d at 1536.

At his deposition in response to a question from counsel for McWane, Sigma's executive vice president, Mr. Bhattacharji, summed up Sigma's domestic entry efforts stating that Sigma was prepared to enter the Domestic Fittings market once a final decision was made, that is, once the "switch was flipped:"

> Q. What I'm trying to get a sense of, Mr. Bhattacharji, is how far down the path were you? In other words, were you sitting here in the U.S. with 700 or 800 patterns, you had contracts with

> foundries, and if somebody said, flick a switch, you could make the patterns, have them ready in a month, or were you really in the beginning process of this sort of brainstorming and saying, this is going to be so complicated and so difficult and so expensive, it's just not worth pursuing at this point?
>
> A. We were more than brainstorming. We had identified the items. We had actual production drawings made for all of the items. We had given them out to pattern shops to quote. We had got back quotations from the pattern shops, what it would cost, how long it would take. We had seen what the pattern shops would cost in China -- not in China, in India, and I believe domestically, I can't recall for sure, but I think we had gone out. So we were to a point where we knew if somebody flicked a switch, where to send the drawings, where to send out the purchase orders, what the purchase orders would cost us and a time frame. ***So we had that part done…So in answer to your question, we were ready with what was needed once the switch was flipped***. And we were also, at the same point in time, trying to formulate our thinking on the lost foam by actually test manufacturing.

CX 2523 (Bhattacharji, Dep. at 54-55) (emphasis added); *see also* CCPF 2265.

This evidence establishes that Sigma was a potential competitor to McWane in the Domestic Fittings market. Sigma was prepared to enter, even as required by the erroneous legal standard advocated by McWane, and Sigma had the intent and ability to enter, as required by courts adjudicating Section 1 cases. *See McWane*, 2012 FTC LEXIS 155, at *55 n.18 (citing *Yamaha*, 657 F.2d at 977-79 and *United States v. Siemens Corp.*, 621 F.2d 499, 506-07 (2d Cir. 1980)); *see also* FTC & DOJ, *Antitrust Guidelines for Collaborations Among Competitors*, at § 1.1 n.6 (2000); *Bombardier*, 605 F.2d at 9.

2. McWane Has Not Established a Valid Efficiency Defense

The MDA converted Sigma from the dominant firm's likely competitor to an ally. This sufficiently establishes a *prima facie* case of competitive harm under the rule of reason. The burden then shifts to McWane to identify and substantiate an offsetting efficiency defense.

McWane asserts two related efficiency justifications for the MDA. First, it asserts that the MDA was justified by McWane's desire to increase the sales volume at its domestic foundry. RPB at 107. As described above, *supra* at Part G.3, this is not a cognizable justification because shifting Fittings volume from a foundry operated by Sigma (or its contractor) to a foundry operated by McWane benefits no one but McWane; it does not benefit consumers or competition. Second, McWane claims that the MDA improved quality because Sigma had better service and distribution capabilities that were preferred by certain customers. RPB at 107-108. This argument should be rejected because it is a *post hoc* rationalization and because it does not represent a valid efficiency justification.

There is no contemporaneous evidence – and McWane does not point to any – that McWane believed entering into the MDA would "increase demand for domestic Fittings." RPB at 107. To the contrary, McWane knew that "having more Domestic suppliers doesn't really increase the size of the pie," and it viewed the fact that Sigma may win Domestic Fittings jobs as a reason *against* entering into the MDA. CCPF 2341, 2458, 2332, 2349, 2354; *see also* 2451 (Mr. Tatman noting that having multiple domestic suppliers would not increase the overall Domestic Fittings market, and that a net tonnage gain for McWane was unlikely). For that reason, McWane initially rejected selling Domestic Fittings to Sigma when the idea was first raised. Numerous contemporaneous documents show that McWane entered into the MDA only as an "insurance policy" against Sigma's likely Domestic Fittings entry because it would be better financially for McWane to lose some of its monopoly margins to Sigma as a distributor than to compete with Sigma as a Domestic Fittings supplier. CCPF 2332, 2349, 2354, 2351, 2370 (calculating McWane's lost profits from estimated sales made by Sigma instead of McWane). When McWane modeled sharing the Domestic "pie" with Sigma, it did not assume

the Domestic Fittings market would grow, it assumed a static market size whether it sold to Sigma or not. *E.g.*, CCPF 2370.

The fact that McWane's service defense is a pretext is evidenced by McWane's conduct in the marketplace. For example, McWane was unresponsive to U.S. Pipe's clearly expressed desire to buy Domestic Fittings from Sigma rather than from McWane. Instead of facilitating superior service to U.S. Pipe as they should if service was the goal, McWane allocated this customer to itself and forbade Sigma from selling it Domestic Fittings. CCPF 2441-2448. Most telling, after the MDA was signed, Mr. Tatman justified his unpopular decision to share the Domestic Fittings market with Sigma by explaining that the alternative risk was Sigma's independent entry; he did not make the claim that McWane now offers, that the MDA gave it access to new sales volume and better distribution. CCPF 2320-2321, 2325-2327. Accordingly, this justification is a *post hoc* rationalization and should be given no weight. *See United States v. Dentsply Int'l, Inc.*, 399 F.3d 181, 197 (3d Cir. 2005); *Image Tech. Servs. v. Eastman Kodak Co.*, 125 F.3d 1195, 1219 (9th Cir. 1997).

This justification should also be rejected because it fails to show any procompetitive benefits from the challenged restraint ***relative to*** the marketplace that would exist but-for that restraint. *See In re Polygram, Inc.*, 136 F.T.C. 310, 347 (2003) (as part of efficiency defense, defendant must articulate the specific link between the challenged restraint and the benefit to consumers). Absent the MDA, Distributors would have been free to purchase non-McWane Fittings from Sigma at competitive prices and receive the benefits of Sigma's allegedly superior service. The MDA offers no advantage that offsets the loss of competition.

The Commission rejected a similar argument in *SKF*. *In re SKF Indus., Inc.*, 94 F.T.C. 6 (1979). In *SKF*, Federal-Mogul Corp. ("FM") and SKF Industries, Inc. ("SKF") were two vertically integrated competitors of ball bearings and other products that each had their own

manufacturing operations and distribution facilities. *Id.* at 89-92. At issue was an agreement whereby FM agreed to exit the manufacturing market and become the exclusive distributor of SKF products, and SKF's agreed exit of the distribution market (and selling its distribution accounts to FM). *Id.* at 91. SKF had argued that this agreement was little more than an "embellished vertical supply contract," and that it should be analyzed under a rule of reason analysis. *Id.* at 77. Under that analysis, SKF argued that the agreement yielded significant efficiencies since SKF was most profitable at manufacturing and FM was most profitable at distribution. *Id.* at 94.

After rejecting SKF's characterization of the agreement as a "vertical supply contract" and finding it "most closely analogous to a market division and customer allocation" practice that was "plainly anticompetitive," the Commission addressed the defendant's arguments that the arrangement was efficient because FM was a better distributor than SKF had been. *Id.* at 98-102. The Commission rejected SKF's efficiency justification because those efficiencies were likely to be achieved without the challenged distributor's agreement:

> Some efficiencies may, of course, result from almost any market allocation scheme as the courts have recognized in uniformly rejecting this proffered justification for horizontal market or customer allocations. Geographic market division can eliminate cross hauling and thus save expenses. Product market allocation may allow each competitor to concentrate on the specialized production at which it is most efficient. ***But these are efficiencies that a competitive market is likely to force upon a firm in the long run in any event.*** More importantly, the means of achieving these efficiencies in this case -- agreement between horizontal competitors -- is competitively dangerous.

SKF, 94 F.T.C. at 103 (emphasis added). Likewise, here, McWane's claimed efficiency amounts to nothing more than a description of its own operational shortcomings and cannot serve as a justification for eliminating rivalry between McWane and Sigma.

Finally, all of McWane's claimed efficiencies could have been achieved via a simple (and less restrictive) buy-sell agreement between McWane and Sigma. An efficiency defense is valid only if the challenged conduct is reasonably necessary in order to achieve the legitimate objection identified by the respondent. *Realcomp*, 2009 F.T.C. LEXIS 250 at *39-40. *Accord Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1, 19-21 (1979) (blanket license was "an obvious necessity" for achieving integrative efficiencies, and joint setting of price was "necessary" for the blanket license). *See In re Polygram Holding, Inc.*, 136 F.T.C. 310, 483 n.26 (2003) (Initial Decision) ("An efficiency justification should be rejected as invalid where . . . the argument sweeps too broadly . . . ."); *see also Nat'l Soc'y of Prof'l Engineers v. United States*, 435 U.S. 679, 696 (1978) (rejecting asserted justification for complete ban on competitive bidding as "simply too broad"). McWane has not even attempted to explain how its claimed efficiencies are related to Sigma's promise not to enter the Domestic Market, Sigma's promise to enforce McWane's Exclusive Dealing Policy, or Sigma's promise not to discount McWane's Fittings. *See generally* CCPB at 195-198 (discussing MDA restrictive terms); CCPF 2372-2393. Without these restrictive terms in the MDA, Sigma would have been free to sell to any customers it chose (without a blacklist dictated by McWane), and at prices determined by Sigma (not McWane).

McWane has simply failed to demonstrate that the market with the MDA was better than a market in which Sigma and McWane engage in unfettered competition. The MDA was anticompetitive, and contravenes Section 1.

K. McWane Mistakenly Asserts that Complaint Counsel Bears the Burden of Proving Actual Anticompetitive Effects

McWane mistakenly asserts that Complaint Counsel bears the burden of proving through quantitative analysis, that McWane's challenged conduct resulted in higher prices. *See* RPB at 108. Contrary to McWane's claim, *per se* violations require no independent showing of

anticompetitive effects. *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958) (*per se* offenses are deemed illegal "without elaborate inquiry as to the precise harm they have caused"). The price fixing claim is a *per se* violation.

For Section 1 claims analyzed under the Rule of Reason (DIFRA, MDA), the nature of the challenged conduct and the proffered justifications may dictate that "no elaborate industry analysis is required" to demonstrate its anticompetitive character. *In re Realcomp II, Ltd.*, FTC Docket No. 9320, 2007 WL 6936319, at *18 (Oct. 30, 2009) (quoting *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 459 (1986)).

In the monopolization context, anticompetitive effects may be inferred from market power, foreclosure, and impeding the efficiency of rivals. *See* CCPB at 56-57, 224. Where, as here, there is overwhelming evidence of market power, and of the anticompetitive intent and nature of the challenged conduct (*e.g.*, the Exclusive Dealing Policy was intended to exclude Star, caused Distributors to refuse to purchase from Star, and caused Star to be unable to invest in its business and better compete with McWane), direct price effects need not be shown. *See United States v. Microsoft Corp.*, 253 F.3d 34, 60-62 (D.C. Cir. 2001); *Realcomp*, 2007 WL 6936319, at *19 (Oct. 30, 2009) ("[I]f the tribunal finds that the defendants had market power and that their conduct tended to reduce competition, it is unnecessary to demonstrate directly that their practices had adverse effects on competition."). Even direct proof of adverse effects can be established in numerous ways, and does not necessarily need to involve elaborate economic proof as suggested by McWane. *See Indiana Fed'n of Dentists*, 476 U.S. at 460 (actual effects proven by evidence that insurers were "actually unable to obtain compliance with their requests for submission of x-rays"); *In re Realcomp II*, 2007 WL 6936319, at *19.

The cases cited by McWane are not to the contrary. Both *Cal. Dental Ass'n v. FTC* and *St. Francis Med. Ctr. v. C.R. Bard, Inc.* establish that a direct and quantified showing of price

effects is one way to prove anticompetitive effect, but they do not establish or even suggest that it is the only way, or a required way. *See Cal. Dental Ass'n v. FTC*, 224 F.3d 942, 957-58 (9th Cir. 2000) (Respondent's four well-supported procompetitive justifications outweighed the Commission's showing that similar conduct had anticompetitive impacts in other, dissimilar markets); *St. Francis Med. Ctr. v. C.R. Bard, Inc.*, 657 F. Supp. 2d 1069, 1102-03 (E.D. Mo. 2009) (noting the absence of any price effects in addition to the absence of other anticompetitive characteristics) (citing *LePage's, Inc. v. 3M*, 324 F.3d 141, 159 (3d Cir. 2003)). As discussed in its Post-Trial Brief under each Count, Complaint Counsel has met the requisite showing of likely competitive effects.

L. The Government is Entitled to a Remedy Enjoining Respondent from Engaging in Illegal Anticompetitive Conduct

Finally, McWane insists that a remedy is inappropriate here and that this action is moot because it has stopped engaging in the alleged illegal conduct. RPB at 109. This argument violates the explicit terms of the FTC Act, common sense, and well established Commission precedent. The cases cited by McWane demonstrate the fallacy of its argument.

Even assuming, *arguendo*, that McWane had ceased engaging in the challenged conduct, Section 5(b) of the FTC Act expressly authorizes the Commission to issue an administrative complaint whenever it has reason to believe that a person "***has been or is*** using any unfair method of competition . . ." 15 U.S.C. § 45(b) (emphasis added). Consistent with this statutory authority, the Commission has ruled that a remedy is appropriate even when a respondent no longer engages in the illegal conduct: "[t]o hold otherwise would mean that a Commission law enforcement action could be brought to a halt at any time . . . by an abandonment, even a temporary one, of the challenged conduct. Voluntary cessation of unlawful activity is not a basis for halting a law enforcement action." *In re The Coca-Cola Company*, 117 F.T.C. Lexis 795, at

*199 (1994) (quoting *In re Warner Communications, Inc.*, 105 F.T.C. 342, at *2 (1985) (lifting stay of Part 3 proceedings that had been stayed after parties had abandoned acquisition)).

Further, McWane has not met its "formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Envtl Servs. (TOC), Inc*., 528 U. S. 167, 190 (2000). There is no evidence that McWane has completely abandoned the challenged conduct. Complaint Counsel is unaware of any evidence that any co-conspirator publicly renounced its participation in the price-fixing conspiracy. *Mortons Market, Inc. v. Gustafsons Dairy, Inc.*, 198 F.3d 823, 838 (11th Cir. 1999) (Withdrawal from an antitrust conspiracy requires more than cessation of the activity. A conspirator is presumed, as a matter of law, to remain a member of the conspiracy unless and until it undertakes "affirmative steps, inconsistent with objects of the conspiracy, to disavow or to defeat the conspiratorial objectives"). While Complaint Counsel concedes that the terms of coordination largely broke down in Fall 2008, the Fittings market is still highly concentrated and conducive to price-fixing. *See* CCPB at 83-90; CCPF 663-664. Indeed, McWane, Sigma and Star continued to communicate and coordinate their prices at least through 2009 and 2010 – even *after* they became aware of the Commission's investigation. *See* CCPF 1533-1571, 2495. While the DIFRA information exchange has stopped, DIFRA remains a corporation in good standing and could potentially resume its information exchange. *See* CCPF 364. McWane *voluntarily* terminated the MDA with Sigma after it learned of the Commission's investigation, but continues to sell Domestic Fittings to Sigma under essentially the same terms today. *See* CCPF 2492-2496. And, McWane has never publicly withdrawn its Exclusive Dealing Policy; instead, the Policy continues to prevent Distributors from purchasing Domestic Fittings from Star today. *See* CCPF 2064-2067.

The *Uniroyal* case cited by McWane demonstrates the error of its position. *See* RPB at 110. In *United States v. Uniroyal, Inc.,* the Department of Justice challenged 38 discrete incidents of resale price maintenance, some of which had occurred as much as eleven years earlier. 300 F. Supp. 84, 96-97, n.11 (S.D.N.Y. 1969) (case arising under Section 1 of the Sherman Act, 15 U.S.C. § 1). The district court declined to issue an injunction for three reasons. First, it found that the long-past "isolated pricing practices" of a few rogue salesmen had acted contrary to Uniroyal's "unequivocal instructions." *Uniroyal*, 300 F. Supp. at 93. The court explained that its conclusion would have been different if individuals at "higher levels of the defendant's organization" had implemented the challenged practices. *Id.* Second, the *Uniroyal* court reasoned that an injunction was unnecessary because the rogue salesmen responsible for the illegal conduct either had left the company or at least were no longer in sales positions. *Id.* at 97, n.12. And finally, the defendant presented evidence to show that the illegal action could not happen again due to a variety of extraneous events. These changes in the marketplace, rather than any actions under the control of the defendant, made it impossible for Uniroyal to again engage in resale price maintenance. *Id.* at 98, 101.

Here, unlike *Uniroyal*, executives at the highest level of McWane's organization – Messrs. Page, McCullough, Walton, Tatman, and Jansen conceived of, developed, and implemented McWane's illegal activities. *See* CCPB at 105-164; CCPF 907-929, 1823-1849. All but Mr. Walton continue to run McWane today. *See* CCPF 18-43, 47-49. Most importantly, McWane has not met its burden by presenting evidence proving that extraneous factors now prevent it from engaging in the illegal conduct again. As discussed above, there is precious little evidence that McWane has *stopped* most of the challenged conduct, and Complaint Counsel is unaware of any changes in market conditions that would make it impossible for McWane to resume its illicit activities.

The other cases cited by McWane are inapposite and do not speak to this issue. For example, in *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 22 (2008), the Supreme Court defined how a private plaintiff may prove irreparable injury when seeking a preliminary injunction under Rule 65 of the Federal Rules of Civil Procedure. In *Summers v. Earth Island Inst*., 555 U.S. 488, 492-93 (2009), and *Los Angeles v. Lyons*, 461 U.S. 95, 97-100 (1983), the Supreme Court simply addressed the type of injury a private plaintiff must suffer to have standing under Article III. In *Wal-Mart Stores, Inc. v. Dukes*, 2011 U.S. Lexis 4567, at *7 (2011), the Court examined the disparities in the types of damages private parties may suffer and yet still be certified as a class under Fed. R. Civ. P. 23(b)(2). And, in *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 390 (2006), the Court held that a private plaintiff in a lawsuit under the Patent Act had to meet the equitable standards in a case that is subject to Rule 65 of the Federal Rules. All these cases are irrelevant in defining the circumstances under which the Commission can obtain an injunction under 15 U.S.C. § 45(b), and they certainly do not suggest that the Commission cannot obtain injunctive relief because a respondent makes a tactical decision in the middle of an investigation to stop violating the law.

III. CONCLUSION

Because Complaint Counsel has established that McWane violated each of the seven counts in the Complaint, the proposed order is an appropriate remedy to stop McWane's unlawful activities.

Dated: January 28, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 28, 2013, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

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

The Honorable D. Michael Chappell
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CERTIFICATE FOR ELECTRONIC FILING

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

January 28, 2013

By: s/ Thomas H. Brock
Attorney