

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



_____)
In the Matter of)
)
)
McWANE, INC.,)
Respondent.)
_____)

PUBLIC

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**RESPONDENT MCWANE, INC.'S REPLY TO COMPLAINT COUNSEL'S
POST-TRIAL FINDINGS OF FACT
AND CONCLUSIONS OF LAW**

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RECORD REFERENCES

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

CCPFF ¶ x - Complaint Counsel's Proposed Findings of Fact

CCPCL ¶ x - Complaint Counsel's Proposed Conclusions of Law

RPF ¶ x - Respondent's Proposed Findings of Fact

RPCL - Respondent's Proposed Conclusions of Law

JX - Joint Exhibit

CX - Complaint Counsel Exhibit

RX-- Respondent Exhibit

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

(JX 0000 (Witness, Dep. at xx)) - Deposition Testimony

(JX 0000 (Witness, Dep. at xx), *in camera*) - *In camera* Deposition Testimony

(JX 0000 (Witness, IHT at xx)) - Investigational Hearing Testimony

(JX 0000 (Witness, IHT at xx), *in camera*) - *In camera* Investigational Hearing Testimony

Joint Stipulations of Law and Fact, JX 0001 ¶ - Joint Stipulations of Law and Fact

Complaint - Administrative Complaint filed January 4, 2012

RRFA No. x - Respondent's Response to Complaint Counsel's Requests for Admission, dated June 8, 2012

Supp. RRFA No. x - Respondent's Supplemental Response to Complaint Counsel's Requests for Admission, dated July 16, 2012

RROG No. x - Respondent's Response to Complaint Counsel's Interrogatories, dated February 21, 2012

CRFA No. x - Complaint Counsel's Response to Respondent's Requests for Admission

Answer at ¶ - Citation to Respondent's Answer, dated February 2, 2012

Bold - *In Camera* Material

**RESPONDENT'S RESPONSES TO COMPLAINT COUNSEL'S
PROPOSED FINDINGS OF FACT**

General Responses Applicable to All Proposed Findings of Fact

1. Many of Complaint Counsel's proposed findings of fact are not, in actuality, facts, but are instead argument, pure legal conclusions, unsupported assertions, or mischaracterizations of the evidence. In most of not all such instances, Complaint Counsel does not identify any supporting record citations, but merely refers to its other proposed findings or cites nothing at all. Because such proposed findings are not factual in nature, Respondent is not required to provide a factual response to them. To the extent a response is required, Respondent disagrees with all such proposed findings as incorrect, incomplete, inaccurate, or misleading.

2. According to the Complaint, as well as Complaint Counsel's expert, the alleged conspiracy regarding non-domestic Fittings prices, began in January 2008 and ended in the fourth quarter of 2008. (Complaint ¶ 2; RPF ¶¶ 281-282). As a result, all of Complaint Counsel's proposed findings of fact concerning communications taking place before or after the dates of the alleged conspiracy are irrelevant to this action, and therefore require no response from Respondent. To the extent a response is required, Respondent disagrees with Complaint Counsel's implied contention that any such finding could possibly support an inference of conspiracy.

3. Many of Complaint Counsel's proposed findings of fact rely solely on testimony from the Investigational Hearing (IH), a proceeding at which Respondent had no opportunity to cross-examine any of the witnesses. All such testimony should be accorded little or no weight, particularly in instances where the witness appeared at trial and testified differently or where Complaint Counsel chose not to elicit the same testimony from the witness at trial.

4. Many of Complaint Counsel's proposed findings of fact are based solely on communications between Star employees and Sigma employees. All such findings are irrelevant to the claims against Respondent McWane, and therefore require no response from Respondent.

5. Many of Complaint Counsel's proposed findings of fact are based solely on hearsay or on exhibits with no sponsoring witness. These proposed findings should be accorded little or no weight, particularly in light of conflicting testimony to the contrary from trial witnesses.

6. Many of Complaint Counsel's proposed findings of fact rely solely on IH or Deposition testimony from witnesses whom Complaint Counsel could have called at trial, but elected not to call, or could have questioned on certain topics at trial, but elected not to do so. All such testimony should be accorded little or no weight, particularly in instances where other trial testimony contradicts such IH and Deposition testimony.

7. Each of Complaint Counsel's proposed findings referring to an "Exclusive Dealing Policy" is argumentative, misleading, inaccurate, incorrect, and a blatant misstatement of the evidence. As demonstrated fully in Respondent's Proposed Findings of Fact, McWane's September 22, 2009 customer letter was not an "Exclusive Dealing Policy". (RPF 425-427, 463-529; CX 1606)

8. Each of Complaint Counsel's proposed findings referring to an "Information Exchange" is argumentative, misleading, inaccurate, incorrect, and a blatant misstatement of the evidence. As established in Respondent's Proposed Findings of Fact, DIFRA was a legitimate trade association overseen by experienced antitrust counsel, and did not function as an "Information Exchange," shed any light on prices, or facilitate price coordination among members. (RPF 243-265) In fact, it is undisputed that non-domestic fittings prices declined

during DIFRA's brief operation in the second half of 2008. (RPF 266-269) Moreover, DIFRA members used the independent accounting firm's aggregated tons-shipped data for pro-competitive purposes. (RPF 270-280)

9. Complaint Counsel's proposed findings based solely on the testimony or the report of its expert, Dr. Schumann, violate this Court's Order dated November 13, 2012 (p. 3). In any event, such findings are entitled to no weight because Dr. Schumann has conceded that his opinions are not based on testable or verifiable methodology, but solely on his interpretation of a few documents. (RPF 344-371)

10. Many of Complaint Counsel's proposed findings rely on hearsay statements by distributors, and some of these findings refer to a Footnote 11 in Complaint Counsel's Proposed Findings of Fact (CCPF). Complaint Counsel overstates the case law cited in its Footnote 11 by arguing that "[t]he cited out of court statements should be considered for the truth of the matters asserted therein, as statements of motive, intent, or plan under Fed. R. Evid. 803(3)." To the contrary, the case law is clear that "[s]tatements that are considered under the exception to the hearsay rule found at [Rule 803(3)], commonly referred to as the "state of mind" exception, cannot be offered to prove the truth of the underlying facts asserted." *Stelwagon Man. Comp. v. Tarmac Roofing Sys., Inc.*, 63 F.3d 1267, 1274 (3d Cir. 1995). Customer statements of the type cited throughout CCPF can be admitted as evidence of customer motivation, but are not admissible as proof that Star actually lost sales. *Stelwagon*, 63 F.3d at 1274 n.16 ("Although the customer statements at issue in this case clearly were admissible as evidence of why the customers were not purchasing Tarmac MAPs from Stelwagon, i.e. because they thought they could get a better deal elsewhere, the statements were not admissible as proof that Stelwagon's customers did, in fact, purchase MAPs from one of Stelwagon's competitors."); *Callahan v.*

A.E.V., Inc., 182 F.3d 237, 252-252 (3d Cir. 199) (discussing Stelwagon); Municipal Revenue Serv., Inc. v. Xspand, Inc., 700 F.Supp.2d 692, 705 (M.D.Pa. 2010) ("hearsay statements of a customer as to his reasons for not dealing with a supplier may be admissible for the limited purpose of proving customer motive. It is only if the statements are used to prove the fact that the customer stopped buying the product from this supplier, bought the product from someone else instead, or stopped buying the product altogether, that they become inadmissible.") (internal quotations omitted); Discover Fin. Serv. v. Visa U.S.A., Inc., No. 04-CV07844, 2008 WL 4560707, *1 (Oct. 9, 2008) (holding that customer testimony is admissible under the "state of mind" exception only if there is otherwise admissible proof that business was actually lost). Additionally, the "state-of-mind exception does not permit the witness to relate any of the declarant's statements as to why he held the particular state of mind, or what he might have believed that would have induced the state of mind." Air Turbine Tech., Inc. v. Atlas Copco AB, 295 F.Supp.2d 1334, 1345 (S.D.Fla. 2003). Under Stelwagon and the other cases cited above, customer statements regarding their reasons for not purchasing Star domestic fittings is not admissible as proof that those customers did not purchase from Star, that they purchased from McWane, or for the fact that purchasing domestic from Star would result in delayed shipments and loss of rebates from McWane.

11. A large number of Complaint Counsel's proposed findings are duplicative. Given the length of Complaint Counsel's proposed findings, and mindful of judicial resources, Respondent will respond to such proposed findings by referring to this General Response 11. By doing so, Respondent does not concede the accuracy of any proposed finding, but instead preserves all of its responses to the duplicate(s) of the proposed finding appearing elsewhere in these Responses.

1. Executive Summary

- a. McWane is the dominant supplier of ductile iron pipe fittings (“Fittings”¹) in the United States. Its primary competitors are Sigma and Star. Fittings are a small, but necessary part of any waterworks project: they connect pipes, hydrants, and valves and allow water flow to change directions. They are a commodity product sold to end users through Distributors who package them with pipe and other products necessary to complete a waterworks project. (*See infra* § 4).

Response To Finding No. 1a:

See General Response 1. This proposed finding is not a fact, but pure argument unsupported by any citation to the record. As such, it does not require a response from Respondent. To the extent a response may be required, this proposed finding is incorrect, misleading, and overwhelmingly contradicted by the evidence at trial, as demonstrated by Respondent's Proposed Findings of Fact (RPF) and below.

- b. Fittings are a relevant product market. No other product is used as a substitute and other types of fittings do not constrain Fittings prices. Domestically produced Fittings, which are required for certain projects and are sold at substantially higher prices than imported Fittings, represent a separate price-discrimination market. The relevant geographic market is the United States. (*See infra* § 5).

¹ Except where otherwise noted or where the context otherwise requires, the term “Fittings” will refer herein to ductile iron pipe fittings of 24” or less in diameter.

Response To Finding No. 1b:

See General Response 1. This proposed finding is not a fact, but pure argument unsupported by any citation to the record. As such, it does not require a response from Respondent. To the extent a response may be required, this proposed finding is incorrect, misleading, and overwhelmingly contradicted by the evidence at trial, as demonstrated by RPF and below.

- c. The Fittings market is conducive to collusion. The market is concentrated: the three major suppliers – McWane, Sigma and Star – sell over % of all Fittings. And, until 2009, McWane had a monopoly in the market for Domestic Fittings. Fittings are sold using transparent published prices, and Fittings suppliers announce price changes through widely circulated letters well in advance of their effective dates. Key executives from all three suppliers have frequent communications through in-person meetings, telephone calls and emails, and they are not shy about discussing Fittings prices and market conditions. Finally, all three suppliers, and McWane in particular, had compelling motives to conspire. (*See infra* § 6).

Response To Finding No. 1c:

See General Response 1. This proposed finding is not a fact, but pure argument unsupported by any citation to the record. As such, it does not require a response from Respondent. To the extent a response may be required, this proposed finding is incorrect, misleading, and overwhelmingly contradicted by the evidence at trial, as demonstrated by RPF and below.

- d. Prior to 2008, McWane’s competitors, Sigma and Star, used their lower cost structure, and their larger and more nimble sales forces, to compete aggressively with McWane by offering negotiated discounts on individual waterworks projects. This Project Pricing made prices less stable and less transparent. As a result, McWane’s profit margins and market share were slowly shrinking. In late 2007, McWane conceived a plan to “drive stability and rational pricing” in the Fittings market. McWane explained its Plan by sending a tailored “Message to the Market & Competitors.” McWane made known that it would support price increases in stepped or staged increments, but only if Star and Sigma agreed to curtail discounts known as Project Pricing and to maintain prices that were reasonably stable and transparent. The plan, which was communicated by McWane using a customer letter and other means, required the three suppliers to curtail Project

Pricing offered to the distributors of their products. Each of McWane, Sigma and Star made efforts to curtail Project Pricing. Pricing authority was centralized, and distributors were informed that Project Pricing would no longer be available. (*See infra* § 7).

Response To Finding No. 1d:

See General Response 1. This proposed finding is not a fact, but pure argument unsupported by any citation to the record. As such, it does not require a response from Respondent. To the extent a response may be required, this proposed finding is incorrect, misleading, and overwhelmingly contradicted by the evidence at trial, as demonstrated by RPF and below.

- e. McWane, Sigma, and Star also agreed to establish a trade association, the “Ductile Iron Pipe Fittings Association.” Through DIFRA the three Fittings suppliers implemented an ongoing exchange of sales information that allowed each firm to monitor whether any future reductions in its own sales resulted from a declining overall market or from discounting below the consensus published prices, referred to as “cheating,” by the other suppliers. All three suppliers joined DIFRA. Once McWane, Sigma and Star had agreed on a format and schedule to exchange data through DIFRA, Sigma and Star announced Fittings price increases. McWane, announced through a coded letter to the market that it would not be announcing new prices until after the date on which it expected to receive the actual DIFRA report. Sigma and Star received McWane’s message, suspended their price increases, and submitted their data to DIFRA. On the very day DIFRA shared its first report with its members, McWane announced a price increase. Sigma and Star quickly followed suit. (*See infra* § 7).

Response To Finding No. 1e:

See General Response 1. This proposed finding is not a fact, but pure argument unsupported by any citation to the record. As such, it does not require a response from Respondent. To the extent a response may be required, this proposed finding is incorrect, misleading, and overwhelmingly contradicted by the evidence at trial, as demonstrated by RPF and below.

- f. In February 2009, the American Recovery and Reinvestment Act became law. ARRA changed the Fittings market dynamics. It had a “Buy American” provision that required the \$6 billion in funds it allocated to waterworks projects

to be built with American-made goods. As the only Domestic Fittings manufacturer, McWane was in a unique position to reap the benefits. Star and Sigma worried they would be frozen out. They wanted to enter the Domestic market and compete for ARRA-funded projects. They were also concerned that general Buy American sentiment would further hurt their import business. So Star announced a plan to enter the Domestic market at an industry conference in June 2009, and Sigma likewise began to pursue entry. (*See infra* § 8).

Response To Finding No. 1f:

See General Response 1. This proposed finding is not a fact, but pure argument unsupported by any citation to the record. As such, it does not require a response from Respondent. To the extent a response may be required, this proposed finding is incorrect, misleading, and overwhelmingly contradicted by the evidence at trial, as demonstrated by RPF and below.

- g. From at least 2006 until Star’s entry in late 2009, McWane was the only supplier of Domestic Fittings 24” and under. McWane was able to impose less favorable terms on Distributors and charge higher prices for Domestic Fittings than for otherwise identical imported Fittings. With the exception of Star and Sigma, there were no other potential entrants into the Domestic Fittings market. (*See infra* § 9).

Response To Finding No. 1g:

See General Response 1. This proposed finding is not a fact, but pure argument unsupported by any citation to the record. As such, it does not require a response from Respondent. To the extent a response may be required, this proposed finding is incorrect, misleading, and overwhelmingly contradicted by the evidence at trial, as demonstrated by RPF and below.

- h. At a trade show in June 2009, Star announced it was entering the Domestic Fittings market. McWane feared that its higher priced and more profitable Domestic Fittings prices would get “creamed” by Star’s aggressive pricing. So McWane adopted an exclusive dealing policy with the specific intent to eliminate Star as a competitor in the Domestic Fittings market. McWane communicated its all-or-nothing policy to its customers and enforced it by cutting off Hajoca’s domestic supply when Hajoca’s Tulsa branch opted to buy domestic from Star. Many other Distributors – including the largest ones – feared losing access to

McWane's Domestic Fittings, and thus refused to purchase from Star, causing Star to lose sales and preventing it from growing and investing in its Domestic business. (*See infra* § 10).

Response To Finding No. 1h:

See General Response 1. This proposed finding is not a fact, but pure argument unsupported by any citation to the record. As such, it does not require a response from Respondent. To the extent a response may be required, this proposed finding is incorrect, misleading, and overwhelmingly contradicted by the evidence at trial, as demonstrated by RPF and below.

- i. Sigma also announced it would enter the domestic market, but it pursued a two-pronged approach: develop a network of virtual manufacturers, or negotiate a private-label deal with McWane. Sigma's domestic production was "Priority One" and it poured significant resources into developing Domestic Fittings sources. Sigma had the motive, means and ability to enter the Domestic Fittings market. Instead, McWane entered into an anticompetitive agreement with Sigma to keep it out of the business of Domestic Fittings – and to source its supply of Domestic Fittings exclusively from McWane. Among other things, the agreement protected McWane's published prices by largely preventing Sigma from discounting. At the same time, the agreement further hindered Star's entry by requiring Sigma to jointly enforce the exclusive dealing policy that was preventing Distributors from buying Domestic Fittings from Star. (*See infra* § 11).

Response To Finding No. 1i:

See General Response 1. *See* General Response 1. This proposed finding is not a fact, but pure argument unsupported by any citation to the record. As such, it does not require a response from Respondent. To the extent a response may be required, this proposed finding is incorrect, misleading, and overwhelmingly contradicted by the evidence at trial, as demonstrated by RPF and below.

- j. McWane's exclusive dealing policy and its MDA with Sigma allowed it to maintain monopoly power in the Domestic Fittings market. McWane sidelined Sigma and prevented Star from becoming a competitive threat. Having secured its monopoly position, McWane was then able to implement a price increase and reduce the rebates it offers on its Domestic Fittings. (*See infra* § 12).

Response To Finding No. 1j:

See General Response 1. This proposed finding is not a fact, but pure argument unsupported by any citation to the record. As such, it does not require a response from Respondent. To the extent a response may be required, this proposed finding is incorrect, misleading, and overwhelmingly contradicted by the evidence at trial, as demonstrated by RPF and below.

2. Jurisdiction

2. At all times relevant herein, McWane has been, and is now, a corporation as “corporation” is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44. (Joint Stipulations of Law, JX0001 ¶ 1).

Response To Finding No. 2:

Respondent has no specific response.

3. McWane’s acts and practices, including the acts and practices alleged herein, are in or affect commerce in the United States, as “commerce” is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44. (Answer at ¶ 10 (McWane sells Fittings in interstate commerce)).

Response To Finding No. 3:

Respondent has no specific response.

3. Fittings Industry Participants

4. Sigma, McWane, and Star are competitors in the supply of Fittings in the United States. (Rybacki, Tr. 1087, 1098-1099; CX 2531 (Rybacki, Dep. at 278); *infra* § 4.4.1).

Response To Finding No. 4:

Respondent has no specific response.

3.1 McWane, Inc.

3.1.1 Company Basics

5. Respondent McWane, Inc. (“McWane”) is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place

of business located at 2900 Highway 280, Suite 300, Birmingham, Alabama 35223.
(Answer at ¶ 8).

Response To Finding No. 5:

Respondent has no specific response.

6. McWane manufactures, imports, markets, and sells products for the waterworks industry, including Fittings. (Joint Stipulations of Fact, JX 0001 ¶ 1; Answer at ¶ 8).

Response To Finding No. 6:

Respondent has no specific response.

7. Phillip McWane is the owner of McWane. (Tatman, Tr. 218).

Response To Finding No. 7:

Respondent has no specific response to the testimony cited in the proposed finding, but does not concede its accuracy.

8. McWane originally produced Fittings as part of its Tyler Pipe division. In a 2007 corporate reorganization, McWane consolidated its Fittings business into the Tyler/Union division. (Tatman, Tr. 209-213). As used herein, the term “McWane” may refer to McWane’s Tyler/Union division.

Response To Finding No. 8:

Respondent has no specific response.

9. McWane’s 2007 reorganization organized the business along product lines rather than geographic locations, putting all Fittings operations together. Mr. Tatman was made vice president and general manager of McWane’s Tyler/Union division, with responsibility for the Tyler South plant, Union Foundry, and Tyler Xian Xian (“TXX”), including McWane’s Fittings business. (Tatman, Tr. 212-214; CX 2484 (Tatman, Dep. at 10-12)).

Response To Finding No. 9:

Respondent has no specific response.

10. McWane produces Fittings at its domestic foundry, Union Foundry, in Anniston, Alabama, and since at least 2005, at its TXX foundry in China. McWane had also produced Fittings at its Tyler South Plant, in Tyler, Texas, until it closed that foundry in November 2008. (Tatman, Tr. 210-212).

Response To Finding No. 10:

Respondent has no specific response.

11. Since at least 2007 and until Star's entry in 2009, McWane was the sole full-line supplier of Domestic Fittings sized 24" and below. (CX 2480 (Napoli, Dep. at 72); Supp. Response to RFA at ¶¶ 10, 11, 12).

Response To Finding No. 11:

Respondent has no specific response.

12. In 2009, McWane did not manufacture any Domestic Fittings larger than 30" in diameter at Union Foundry. Clow Water, another division of McWane, Inc., made 36" Fittings, and McWane sourced 42"-48" Fittings externally. (Tatman, Tr. 591-592).

Response To Finding No. 12:

Respondent has no specific response.

13. Based on DIFRA data for 2007 and 2008, the Clow Water division of McWane had an average 1.5% market share of United States Fittings sales by volume across all size categories. (CX 0656 at 003; Tatman, Tr. 593).

Response To Finding No. 13:

Respondent has no specific response.

14. Based on DIFRA data for 2007 and 2008, Tyler/Union had an average 51.6% market share of United States Fittings sales by volume across all size categories. (CX 0656 at 003; Tatman, Tr. 593).

Response To Finding No. 14:

Respondent has no specific response.

15. McWane has tried, with varying degrees of success, to focus on plant work (flanged) Fittings. (Tatman, Tr. 228). Serving plant End Users requires a more involved materials-estimating process (referred to as "takeoffs") that McWane is not equipped to do internally. (Tatman, Tr. 228).

Response To Finding No. 15:

Respondent has no specific response.

16. In 2007 and 2008, McWane’s sales force was half the size of the sales forces of Sigma and Star. (Tatman, Tr. 281-282). McWane’s sales force was not as nimble or as effective as the sales forces of Sigma and Star. (Tatman, Tr. 285-286).

Response To Finding No. 16:

Respondent has no specific response.

17. McWane’s gross profit for waterworks was _____ for 2007, _____ for 2008, _____ for 2009, _____ through November 2010, and _____ for the first three months of 2011. (CX 2397 at 019 (2007), *in camera*; CX 2416 at 040 (2008), *in camera*; RX-721 at 0050 (2009), *in camera*; RX-717 at 0038 (through November 2010), *in camera*; RX-720 at 0036 (through March 2011), *in camera*).

Response To Finding No. 17:

Respondent states that McWane’s financial statements speak for themselves, and denies the manner and “methodology” that counsel employed in ¶ 17 as argumentative and conclusory and based on an incomplete analysis of McWane’s financial statements. Respondent further denies any implication that McWane’s financial numbers, as represented in ¶ 17, have any bearing on or relevance to Complaint Counsel’s allegations that McWane, Sigma, and Star colluded to curtail or eliminate Project Pricing.

3.1.2 Key Employees

3.1.2.1 Richard (Rick) Tatman

18. Mr. Tatman joined McWane in May 2006 as the general manager of McWane’s Tyler Pipe division. (Tatman, Tr. 208-209).

Response To Finding No. 18:

Respondent has no specific response.

19. Following a 2007 reorganization of McWane’s Fittings business, Mr. Tatman became vice president and general manager in charge of McWane’s Tyler/Union division. (Tatman, Tr. 212-214).

Response To Finding No. 19:

Respondent has no specific response.

20. Mr. Tatman's office is in Tyler, Texas. His office telephone number is His cell phone number is (Tatman, Tr. 207, 367; *see also* Rybacki, Tr. 3647, *in camera*). Nobody other than Mr. Tatman answers his cell phone; his secretary sometimes answers his office phone. (Tatman, Tr. 208).

Response To Finding No. 20:

Respondent has no specific response.

21. In approximately July or August 2007 when the McWane reorganization was complete, Mr. Tatman reported to Mr. Walton and Mr. McCullough. (CX 2484 (Tatman, Dep. at 10); Tatman, Tr. 216-217, 343). Since Mr. Walton's departure from McWane in 2009, Mr. Tatman has reported directly to Mr. McCullough. (CX 2483 (Tatman, IHT at 10)).

Response To Finding No. 21:

Respondent has no specific response.

22. Since the McWane reorganization, Mr. Tatman has had day-to-day responsibilities for the Fittings division at McWane. (CX 2479 (McCullough, Dep. at 17)).

Response To Finding No. 22:

Respondent has no specific response.

23. In his new role, Mr. Tatman has been responsible for McWane's Fittings pricing strategy. (Tatman, Tr. 253-254). He had previously not had involvement in Fittings pricing. (Tatman, Tr. 272).

Response To Finding No. 23:

Mr. Tatman shared responsibility for pricing and strategy with other McWane employees, including Mr. McCullough (Tatman, Tr. 254) and Mr. Jansen (Tatman, Tr. 218-219, 254, 306).

24. In his new role, Mr. Tatman would ordinarily discuss Fittings prices with Mr. McCullough. (Tatman, Tr. 218-219, 254).

Response To Finding No. 24:

Respondent has no specific response.

25. Because Fittings represent a small portion of McWane's business, Mr. Tatman did not normally discuss Fittings pricing with Mr. Page. (Tatman, Tr. 218-219 (Page has "a lot bigger things to worry about than the fittings business"))).

Response To Finding No. 25:

Respondent has no specific response.

26. During the 2008-2009 time period, Mr. Tatman was responsible for McWane's Fittings pricing strategy. (Tatman, Tr. 253-254). Mr. Tatman has ultimate responsibility for the pricing of Fittings sold through the Fittings division, including the authority to issue new list prices. McWane's pricing letters were drafted and Reviewed by Mr. Tatman and Mr. Jansen. (CX 2479 (McCullough, Dep. at 21, 23) (noting that Mr. Tatman listens to any feedback on pricing from Mr. McCullough); Tatman, Tr. 218-219, 254, 306 (testifying that he ordinarily discusses Fittings pricing decisions with Mr. McCullough and drafts and reviews pricing letters along with Mr. Jansen)).

Response To Finding No. 26:

See Response To Finding 23, *supra*.

27. During the 2008-2009 time period, Mr. Tatman, with input from McWane's national sales manager, Jerry Jansen, also developed the sales strategy at McWane. (CX 2479 (McCullough, Dep. at 18); CX 2477 (Jansen, Dep. at 154-155)).

Response To Finding No. 27:

See Response To Finding 23, *supra*.

3.1.2.2 Leon McCullough

28. Leon McCullough is an executive vice president of McWane in charge of its valve and hydrant group, as well as the waterworks Fittings division. (CX 2479 (McCullough, Dep. at 8, 15-17); Tatman, Tr. 217).

Response To Finding No. 28:

Respondent has no specific response.

29. Mr. McCullough has worked for McWane since 1973, and has been in his current position for 12-15 years. Mr. McCullough acquired responsibility for the Fittings division of McWane in 2007. (CX 2479 (McCullough, Dep. at 8, 16)).

Response To Finding No. 29:

Respondent has no specific response.

30. Mr. McCullough does not have day-to-day responsibilities on the operational side of McWane's Fittings division, but provides strategic direction for the division. (CX 2479 (McCullough, Dep. at 17)).

Response To Finding No. 30:

See Response To Finding 23, *supra*.

31. Mr. Tatman reports to Mr. McCullough, who reports directly to Mr. Page. (CX 2479 (McCullough, Dep. at 18-19)).

Response To Finding No. 31:

Respondent has no specific response.

3.1.2.3 Jerry Jansen

32. Jerry Jansen is the national sales manager for Tyler Union. Mr. Jansen has worked for various McWane subsidiaries since 1979, and has been the national sales manager for Tyler/Union since August 2004. (CX 2477 (Jansen, Dep. at 10-11); Tatman, Tr. 219 (describing Mr. Jansen as having a long history in the Fittings industry)).

Response To Finding No. 32:

Respondent has no specific response.

33. Mr. Jansen reports to Mr. Tatman. (CX 2477 (Jansen, Dep. at 12)).

Response To Finding No. 33:

Respondent has no specific response.

34. Mr. Jansen's responsibilities include managing the Tyler Union's sales team, as well as providing market reports and recommendations for market actions to his superiors. (CX 2477 (Jansen, Dep. at 11)). Mr. Jansen also provides input on any new sales strategy, and is responsible for implementing those policies. (CX 2477 (Jansen, Dep. at 154-155)).

Response To Finding No. 34:

See Response To Finding 23, *supra*.

3.1.2.4 Vincent Napoli

35. Vincent Napoli is a pricing coordinator at McWane. He has held that position since it was first created in January 2008. (CX 2480 (Napoli, Dep. at 9-10, 35)).

Response To Finding No. 35:

See Response To Finding 1042, *infra*.

36. Mr. Napoli has worked for McWane since 1991 in a variety of positions, including as an inside sales manager, a national sales manager, a quality manager, in accounting, and as pricing coordinator. (CX 2480 (Napoli, Dep. at 9-10)).

Response To Finding No. 36:

Respondent has no specific response.

37. As quality manager, Mr. Napoli was responsible for all aspects of quality control, including internal audits, day-to-day quality supervision, inspection, and shipping inspections. Mr. Napoli continues to use his technical expertise in Fittings to answer field personnel questions relating to interpreting specifications, product usage, product applications, and product quality. (CX 2480 (Napoli, Dep. at 32-33, 50-51)).

Response To Finding No. 37:

Respondent has no specific response.

38. Mr. Napoli became the pricing coordinator in January 2008, and continues in that position today. (CX 2480 (Napoli, Dep. at 9-10)).

Response To Finding No. 38:

See Response To Finding 1042, *infra*.

39. As pricing coordinator, Mr. Napoli has responsibility for approving Project Pricing for discounts of up to a couple of percentage points, and keeping track of annual bids and Project Pricing. (CX 2480 (Napoli, Dep. at 44-45, 47, 49-50) (explaining that his financial background allowed him to analyze pricing, and that he would seek approval from Mr. Jansen for any Project Pricing beyond two percentage points)).

Response To Finding No. 39:

See Response To Finding 1042, *infra*.

3.1.2.5 G. Ruffner Page III

40. G. Ruffner Page III is the president and chief executive officer of McWane. (CX 2482 (Page, Dep. at 12-14); Tatman, Tr. 218).

Response To Finding No. 40:

Respondent has no specific response.

41. Mr. Page became the president and chief executive officer of McWane in 1999. (CX 2482 (Page, Dep. at 12-14); Tatman, Tr. 218). Previously, Mr. Page worked for McWane's venture fund and bank, beginning in 1986. (CX 2482 (Page, Dep. at 12-14)).

Response To Finding No. 41:

Respondent has no specific response.

42. Mr. Page's primary responsibilities as the CEO of McWane are to oversee the McWane family's interests, and to provide top-level strategy, such as how to allocate capital, whether to build new plants, or whether to make any acquisitions or diversify any acquisitions. (CX 2482 (Page, Dep. at 14-15)).

Response To Finding No. 42:

Respondent has no specific response.

43. Generally, Mr. Page is not actively involved with in McWane's day-to-day Fittings business and can go weeks without speaking to Mr. McCullough, and "never" talks to Mr. Tatman except for general manager's meetings. (CX 2482 (Page, Dep. at 44-46); Tatman, Tr. 218-219).

Response To Finding No. 43:

Respondent has no specific response.

3.1.2.6 David Green (former employee)

44. Until 2007, Mr. Green was in charge of McWane's Fittings business. Mr. Green was the executive vice president of McWane's soil pipe utility division, with responsibility for the Tyler Pipe, Union, Bibby, and AB&I subsidiaries, along with rubber couplings. (Tatman, Tr. 210-211).

Response To Finding No. 44:

Respondent has no specific response.

45. In 2007, Mr. Page responded to McWane's lagging Fittings performance by firing Mr. Green and restructuring the McWane Fittings business. (Tatman, Tr. 212; CX 2118 at 001; Pais, Tr. 1882-1883, 1892 (describing September 2007 meeting with Page); CX 2528 (Pais, Dep. at 205-210) (Page told Pais that the rationale for the restructuring was that Tyler's volume and profits were down)).

Response To Finding No. 45:

Respondent has no specific response.

3.1.2.7 Charles F. Nowlin

46. Charles F. Nowlin is the senior vice president and chief financial officer of McWane, and has been at the company since 1980. (CX 2481 (Nowlin, Dep. at 7); Tatman, Tr. 215).

Mr. Nowlin oversees all financial reporting for McWane, including “blue books,” income statements, balance sheets, and sales and gross profit analyses. (CX 2481 (Nowlin, Dep. at 8-9, 15)).

Response To Finding No. 46:

Respondent has no specific response.

3.1.2.8 Thomas Walton (former employee)

47. Mr. Walton began working at a division of McWane, Inc. as a management trainee in 1991. Mr. Walton was promoted throughout McWane’s valve and hydrants business until becoming vice president and general manager of McWane’s M&H and Kennedy Valve divisions in 2001. In late 2007, Mr. Walton was promoted to senior vice president, where he gained responsibilities for McWane’s Fittings division for the first time. (CX 2485 (Walton Dep. at 8-9, 17-18)).

Response To Finding No. 47:

Respondent has no specific response.

48. As senior vice president overseeing the Fittings division, Mr. Walton had ultimate responsibility for operations and sales, and participated in strategic decisions. Mr. Walton reported directly to Mr. McCullough, and Mr. Tatman reported to Mr. Walton. (CX 2485 (Walton Dep. at 18-19)).

Response To Finding No. 48:

Respondent has no specific response.

49. McWane asked Mr. Walton to leave the company in April 2010. (CX 2485 (Walton, Dep. at 21-23) (explaining that McWane “was good to me. I learned a lot, and I feel fortunate to have had those opportunities, so no I don’t harbor any resentments against anybody.”)).

Response To Finding No. 49:

Respondent has no specific response.

3.1.2.9 John Springer

50. In the 2008-2009 time period, John Springer was the controller for Tyler Pipe and Tyler/Union, and was responsible for publishing McWane’s “blue books.” (Tatman, Tr. 818).

Response To Finding No. 50:

Respondent has no specific response.

51.

(Tatman, Tr. 844-845, *in camera*, 497-498); *see e.g.*, CX 2416, *in camera*

Response To Finding No. 51:

Respondent has no specific response.

3.1.2.10 Laura Alvey

52. Laura Alvey is an administrative assistant at McWane. (Tatman, Tr. 208).

Response To Finding No. 52:

Respondent has no specific response.

53. Ms. Alvey was in McWane's sales department from 1995 to 2001. In 2001, she was promoted to her current position, administrative assistant for the general manager, Mr. Tatman, and Mr. Jansen. (RX-636 (Alvey, Dep. at 7); CX 2476 (Alvey, Dep. at 7-8)).

Response To Finding No. 53:

Respondent has no specific response.

54. Ms. Alvey's responsibilities include compiling the Tyler Union Monthly Sales Reports, the Weekly Highlight Report, the Weekly Competitive Feedback Report (including the Domestic Activity Report), the DIWF [Fittings] report, and the Nondomestic versus Domestic Report, and the DIWF Nondomestic Pricing by Month for Mr. Tatman or Mr. Jansen. (CX 2476 (Alvey, Dep. at 10-13)).

Response To Finding No. 54:

Respondent has no specific response.

3.2 Sigma

3.2.1 Company Basics

55. Since about 1985, Sigma Corporation (“Sigma”) has imported and sold Fittings and other waterworks products in the United States. (Joint Stipulations of Fact, JX 0001 ¶ 2; Pais, Tr. 1722-1723). Sigma’s headquarters are in Cream Ridge, New Jersey. (Rybacki, Tr. 1090).

Response To Finding No. 55:

Respondent has no specific response.

56. Fittings are Sigma’s main product line, and comprised approximately 40% of Sigma’s business in the 2008-2009 time period. (Rybacki, Tr. 1090-1091; Pais, Tr. 1731 (in 2008 and 2009, Fittings were Sigma’s largest-selling product, accounting for 40-45% of revenues)). Sigma currently sells approximately 3,000 distinct Fittings items (or SKUs). (Pais, Tr. 1723).

Response To Finding No. 56:

Respondent has no specific response.

57. Sigma’s current sales are approximately \$200-210 million annually. (Pais, Tr. 1722). In 2007, 2008 and 2009, Sigma’s net sales were million, respectively. (CX 2026 at 066, *in camera*). Sigma has approximately 250 to 260 employees. (Pais, Tr. 1722).

Response To Finding No. 57:

Respondent has no specific response.

58. On October 10, 2007, the Frontenac Group purchased a 60% ownership interest of Sigma. (Pais, Tr. 1725; Rybacki, Tr. 1084; CX 2523 (Bhattacharji, Dep. at 8)). Walter Florence is a Frontenac managing director and a member of Sigma’s board of directors. (CX 2523 (Bhattacharji, Dep. at 152, 197-198 (also identifying Hancock Financial as an indirect shareholder of Sigma through Frontenac))).

Response To Finding No. 58:

Respondent has no specific response.

59. Sigma imports Fittings from China, India, and Mexico. (CX 2524 (Box, Dep. at 16); Pais, Tr. 1731-1732 (all Fittings Sigma sold in 2008 were manufactured by its “virtual manufacturing” partners in China, India and Mexico))).

Response To Finding No. 59:

Respondent has no specific response.

60. Sigma has used a “virtual manufacturing” model for over twenty years. (CX 2530 (Rona, Dep. at 211-216)). In other words, Sigma is responsible for all the technical know-how that goes into producing its Fittings, but the Fittings are actually made overseas at foundries in China, Mexico and India. Sigma handles administration, engineering, drawings, inspection, testing, quality control, and transportation, and has engineering groups in China and India. (Rybacki, Tr. 1092, 1094; *see also* Pais, Tr. 1732 (“virtual manufacturing” meant that Sigma “did not own any manufacturing facilities ourselves, but then we owned all other responsibilities of design, quality control, supply chain planning, product approval, et cetera”); Rona, Tr. 1466-1467 (“virtual manufacturing” involves “developing relationships with suppliers, partnering, sharing some expense, but not actually owning the foundry on a total basis”)).

Response To Finding No. 60:

Respondent has no specific response.

61. Sigma also sourced a small portion of its Fittings from McWane. (Pais, Tr. 1731).

Response To Finding No. 61:

Respondent has no specific response.

62. Sigma’s “OEM” business involves the sale of products to “original equipment manufacturers” (as opposed to Distributors), including pipe, valve, and hydrant manufacturers and other Fittings suppliers. Sigma’s OEM business sells some products unrelated to waterworks, as well as parts used for assembly of waterworks valves and hydrants, and both industry standard and proprietary Fittings to companies in the waterworks industry, such as U.S. Pipe. (Rona, Tr. 1440-1441; Rybacki, Tr. 1095; Brakefield, Tr. 1215).

Response To Finding No. 62:

Respondent has no specific response.

63. Sigma’s OEM business in 2008 had approximately \$50 million in sales to customers such as McWane, U.S. Pipe, ACIPCO, Griffin, and Star. (Rona, Tr. 1440-1442) (noting OEM customers included valve, hydrant, pump and agriculture suppliers)). Sigma’s OEM business accounted for approximately 10% of its sales of Fittings. (Rona, Tr. 1442; CX 2530 (Rona, Dep. at 24-25)).

Response To Finding No. 63:

Respondent has no specific response.

64. Star and McWane were much smaller customers (in terms of sales) of Sigma's OEM business than ACIPCO and U.S. Pipe. (Rona, Tr. 1444-1445).

Response To Finding No. 64:

Respondent has no specific response.

65. Sigma has approximately 23 territory sales managers across the United States, and approximately 25 inside customer service personnel supporting the sales force. (Rybacki, Tr. 1089-1090).

Response To Finding No. 65:

Respondent has no specific response.

66. Sigma has five regional managers, who manage the outside Fittings sales force: Al Richardson (southwest), Dave Pietryga (midwest), Greg Fox (southeast), Mike Walsh (northeast and Eastern Canada), and Chris King (northwest). (Rybacki, Tr. 1090, 1093).

Response To Finding No. 66:

Respondent has no specific response.

67. Beginning in September 2009, Sigma began selling Domestic Fittings that it sourced from McWane. (CX 0803 at 001). In 2010, Sigma sold over _____ of Domestic Fittings. (CX 2026 at 029, *in camera*).

Response To Finding No. 67:

Respondent has no specific response.

3.2.2 Key Employees

3.2.2.1 Victor Pais

68. Victor Jerome Pais was one of the founders of Sigma in 1985. (Pais, Tr. 1721-1722; Rybacki, Tr. 1085). Mr. Pais worked for Star before founding Sigma. (Rybacki, Tr. 1117-1118; Pais, Tr. 1860-1862).

Response To Finding No. 68:

Respondent has no specific response.

69. Mr. Pais currently owns approximately 6% to 7% of Sigma. (Pais, Tr. 1726; Rybacki, Tr. 1085). In 2008 Mr. Pais's ownership share in Sigma was 1-2 percentage points higher.

(Pais, Tr. 1726). Prior to Frontenac's purchase of Sigma in 2007, Mr. Pais held an 18% share. (CX 2527 (Pais, IHT at 19)).

Response To Finding No. 69:

Respondent has no specific response.

70. Mr. Pais is a current member of Sigma's board, and was also a member in 2008 and 2009. (Pais, Tr. 1725).

Response To Finding No. 70:

Respondent has no specific response.

71. In the 2008-2009 time period, Mr. Pais was the president and CEO of Sigma. (Rybacki, Tr. 1085; Pais, Tr. 1723).

Response To Finding No. 71:

Respondent has no specific response.

72. Mr. Pais was succeeded as CEO by Jim McGivern, who was selected by Frontenac, first joined Sigma in July 2009, and gradually took over aspects of the business. (Pais, Tr. 1723-1724, 1772-1773).

Response To Finding No. 72:

Respondent has no specific response.

73. Mr. Pais stepped down as president and CEO of Sigma in January 2010. (Pais, Tr. 1725). Mr. Pais remains an employee of Sigma. (Pais, Tr. 1721).

Response To Finding No. 73:

Respondent has no specific response.

74. Mr. Pais's responsibilities in 2008 and 2009 included growing Sigma Corporation, monitoring profits and costs, helping the supply chain, and setting strategy relating to growth and profitability, including pricing strategy. (Pais, Tr. 1724-1725; CX 2528 (Pais, Dep. at 192-193)).

Response To Finding No. 74:

Respondent has no specific response.

75. Mr. Pais was actively involved in Sigma's Fittings pricing strategy and would discuss pricing strategy with Mr. Rybacki and others at Sigma. (CX 2528 (Pais, Dep. at 193-

194) (“Q. And one of the ways in which you guided the team to maximize profitability was to discuss price increases with folks like Larry Rybacki; correct? A. Larry and several others on our team.”)).

Response To Finding No. 75:

Respondent has no specific response.

76. Mr. Pais’s role at Sigma was as a “visionary” and “idea factory,” and he was involved in everything, including product procurement, administration and sales. (Rybacki, Tr. 1086). He was viewed as the head of the company. (Rybacki, Tr. 1086-1087).

Response To Finding No. 76:

Respondent has no specific response.

3.2.2.2 Siddarth Bhattacharji

77. Siddarth Bhattacharji worked for Star before founding Sigma. (Rybacki, Tr. 1117-1118; Pais, Tr. 1860-1862).

Response To Finding No. 77:

Respondent has no specific response.

78. Mr. Bhattacharji became executive vice president of Sigma following Frontenac’s acquisition of interest in Sigma in 2007. Mr. Bhattacharji had been vice president of Sigma from its founding in 1985. (CX 2523 (Bhattacharji, Dep. at 8-11)).

Response To Finding No. 78:

Respondent has no specific response.

79. During 2008 and 2009, as executive vice president of Sigma, Mr. Bhattacharji was responsible for engineering and supply chain. (CX 2523 (Bhattacharji, Dep. at 8-9); Rybacki, Tr. 1087 (During the 2008-2009 time period Mr. Bhattacharji was involved in engineering, quality control, product procurement, inventory, and finance)).

Response To Finding No. 79:

Respondent has no specific response.

80. Mr. Bhattacharji is not an engineer himself. (CX 2523 (Bhattacharji, Dep. at 11-12)).

Response To Finding No. 80:

Respondent has no specific response.

81. Mr. Bhattacharji is a shareholder of Sigma, owning less than 10% of the company, and the Secretary of the Sigma board of directors. (CX 2523 (Bhattacharji, Dep. at 9-10, 23)).

Response To Finding No. 81:

Respondent has no specific response.

3.2.2.3 Lawrence (Larry) Rybacki

82. Larry Rybacki is the president of Sigma, and has held that position since approximately August of 2011. (Rybacki, Tr. 1082).

Response To Finding No. 82:

Respondent has no specific response.

83. Mr. Rybacki owns about 3.5% of Sigma's shares. (Rybacki, Tr. 1085).

Response To Finding No. 83:

Respondent has no specific response.

84. Mr. Rybacki's office is in Northborough, Massachusetts. (Rybacki, Tr. 1083).

Response To Finding No. 84:

Respondent has no specific response.

85. Mr. Rybacki's office phone number is [REDACTED]. (Rybacki, Tr. 1083; Rybacki, Tr. 3647, *in camera*); Mr. Rybacki's cell phone number is [REDACTED], and is not ordinarily used by anyone else. (Rybacki, Tr. 1083-1084).

Response To Finding No. 85:

Respondent has no specific response.

86. Prior to becoming president of Sigma, Mr. Rybacki was Sigma's vice president of sales for 21 years. (Rybacki, Tr. 1082).

Response To Finding No. 86:

Respondent has no specific response.

87. In the 2008-2009 time period Mr. Rybacki was vice president of sales for Sigma, responsible for Fittings sales to Distributors (as distinct from OEM customers), all of

Sigma's warehouses, regional managers, and outside salespeople reported to him. (Rybacki, Tr. 1086; Rona, Tr. 1453-1454).

Response To Finding No. 87:

Respondent has no specific response.

88. Mr. Rybacki had authority over Sigma's pricing decisions, with input from Mr. Pais and Mr. Bhattacharji. (Brakefield, Tr. 1332; Rybacki, Tr. 1095-1096; CX 2530 (Rona, Dep. at 198)).

Response To Finding No. 88:

Respondent has no specific response.

89. Mr. Rybacki and Mr. Pais would be responsible for drafting list price and price multiplier change letters to customers, which would be sent to customers by regional managers under Mr. Rybacki's signature. (Rybacki, Tr. 1099-1100).

Response To Finding No. 89:

Respondent has no specific response.

90. It was Mr. Rybacki's practice, before sending out a price increase announcement, to share a draft with Sigma's top 20 managers and get feedback. (Rybacki, Tr. 3489-3491) (discussing sending CX 1413 to M20 email group)).

Response To Finding No. 90:

Respondent has no specific response.

91. Sigma's regional managers sometimes discuss project pricing requests with Mr. Rybacki. (Rybacki, Tr. 3527-3528).

Response To Finding No. 91:

Respondent has no specific response.

92. Evaluating Sigma's Domestic Fittings entry was not Mr. Rybacki's area of expertise. Others at Sigma were involved in the "SDP" Domestic entry effort. (CX 2531 (Rybacki, Dep. at 129-130)).

Response To Finding No. 92:

Respondent has no specific response.

93. Mr. Rybacki was not a member of “Sigma’s Domestic Production” team (SDP). (CX 2530 (Rona, Dep. at 229-230); Rybacki, Tr. 3726).

Response To Finding No. 93:

Respondent has no specific response.

94. Mr. Rybacki testified that he has not had any antitrust training in the last 10 or 15 years. (CX 2531 (Rybacki, Dep. at 294-295) (testifying that it has been “Oh, God, 10, 15 years, maybe”)).

Response To Finding No. 94:

Respondent has no specific response.

95. Mr. Rybacki testified at trial with awareness that Sigma is a defendant in class action litigation in New Jersey arising out of the same facts as those involved in this proceeding, and with the awareness that the outcome in this proceeding could have implications for that litigation. (Rybacki, Tr. 3484-3486).

Response To Finding No. 95:

Respondent submits that this proposed Finding is not relevant to the present allegations.

3.2.2.4 Mitchell Rona

96. Mitchell Rona has worked for Sigma since September 1988. (Rona, Tr. 1438).

Response To Finding No. 96:

Mr. Rona was Sigma’s OEM business manager, with absolutely no involvement in or authority over Sigma’s pricing decisions for Fittings. (Rona, Tr. 1437-1440 (Q: “Who are your OEM customers?” A: “OEM customers would be customers who bought fittings similar to the fittings Sigma produced for the distribution business. Then we sold special proprietary products to some of those same OEM customers who were in the pipe fitting business.”), 1453-1454 (Q: “Are you involved in setting prices for fittings at Sigma?” A: “No.” ... Q: “Do you participate, sir, in the discussions with Mr. Rybacki and perhaps others about pricing at Sigma?” A: “I can't -- I can't recall sitting down and in any session or formal dialogue discussing it with

Mr. Rybacki. No.”), 1627-1628 (Q: “And did you have any authority or responsibility for sales into the distribution channel?” A: “No.”))

97. In July 2011, Mr. Rona was promoted to Sigma’s vice president of operations. (Rona, Tr. 1438). Mr. Rona currently reports to Sigma’s CEO, Jim McGivern. (Rona, Tr. 1439). As vice president of operations, Mr. Rona oversees Sigma’s engineering and IT departments, manages global supplier relationships, controls inventory and supply chain, and runs Sigma’s OEM business. (Rona, Tr. 1438-1439).

Response To Finding No. 97:

Mr. Rona was Sigma’s OEM business manager, with absolutely no involvement in or authority over Sigma’s pricing decisions for Fittings. (Rona, Tr. 1437-1440 (Q: “Who are your OEM customers?” A: “OEM customers would be customers who bought fittings similar to the fittings Sigma produced for the distribution business. Then we sold special proprietary products to some of those same OEM customers who were in the pipe fitting business.”), 1453-1454 (Q: “Are you involved in setting prices for fittings at Sigma?” A: “No.” ... Q: “Do you participate, sir, in the discussions with Mr. Rybacki and perhaps others about pricing at Sigma?” A: “I can’t -- I can’t recall sitting down and in any session or formal dialogue discussing it with Mr. Rybacki. No.”), 1627-1628 (Q: “And did you have any authority or responsibility for sales into the distribution channel?” A: “No.”))

98. From about 1999 through July 2011, Mr. Rona was Sigma’s OEM business manager, reporting to Mr. Pais. (Rona, Tr. 1439-1440).

Response To Finding No. 98:

Respondent has no specific response.

99. Mr. Rona worked on the Sigma Domestic Production (SDP) team, along with Stuart Box, Gopi Ramanathan, Victor Pais and Siddarth Bhattacharji. (CX 2530 (Rona, Dep. at 40-41)). A significant amount of Mr. Rona’s time was absorbed by Sigma’s SDP activities and his negotiation of the MDA with McWane. (Rona, Tr. 1562-1564).

Response To Finding No. 99:

Respondent has no specific response.

100. Mr. Rona was significantly involved in the MDA negotiations between Sigma and McWane as the Sigma contact point for negotiations. His level of involvement diminished somewhat following execution of a letter of intent for the MDA, but he continued to play a liaison role interacting with McWane, even after the MDA was signed and went into the operation phase. (Rona, Tr. 1562-1571; CX 1436 at 001-002 (Tatman email to Rona establishing “rules of play” for day-to-day execution of the MDA)).

Response To Finding No. 100:

Respondent has no specific response.

101. Mr. Rona was a Sigma sales representative and regional manager from 1988 to 1998. (Rona, Tr. 1439). Mr. Rona is also a shareholder of Sigma. (CX 2523 (Bhattacharji, Dep. at 9-10)).

Response To Finding No. 101:

Mr. Rona was Sigma’s OEM business manager, with absolutely no involvement in or authority over Sigma’s pricing decisions for Fittings. (Rona, Tr. 1437-1440 (Q: “Who are your OEM customers?” A: “OEM customers would be customers who bought fittings similar to the fittings Sigma produced for the distribution business. Then we sold special proprietary products to some of those same OEM customers who were in the pipe fitting business.”), 1453-1454 (Q: “Are you involved in setting prices for fittings at Sigma?” A: “No.” ... Q: “Do you participate, sir, in the discussions with Mr. Rybacki and perhaps others about pricing at Sigma?” A: “I can't -- I can't recall sitting down and in any session or formal dialogue discussing it with Mr. Rybacki. No.”), 1627-1628 (Q: “And did you have any authority or responsibility for sales into the distribution channel?” A: “No.”))

3.2.2.5 Jim McGivern

102. Jim McGivern succeeded Mr. Pais as CEO of Sigma. Mr. McGivern was selected by Frontenac, first joined Sigma in July 2009, and gradually took over aspects of the business. (Pais, Tr. 1723-1724, 1772-1773).

Response To Finding No. 102:

Respondent has no specific response.

103. By June 2010, Mr. McGivern was acting as CEO of Sigma. (Rybacki, Tr. 3490-3491).

Response To Finding No. 103:

Respondent has no specific response.

3.2.2.6 Tommy Brakefield

104. Tommy Eugene Brakefield is currently a Fittings consultant for McWane's pipe division under Jeff Otterstedt and Dennis Charko of McWane, and the executive director of the National Association of Pipe Fabricators. (Brakefield, Tr. 1212-1213).

Response To Finding No. 104:

Respondent has no specific response.

105. Mr. Brakefield was the national sales manager at Sigma Corporation from November 2003 through December 2011. (Brakefield, Tr. 1214).

Response To Finding No. 105:

Respondent has no specific response.

106. Although Mr. Brakefield's title never changed, his responsibilities evolved over time. In 2005, Mr. Brakefield's responsibilities shifted predominantly to consulting for Sigma's OEM business rather than dealing with Sigma's distribution business. From about 2005 to 2008, Mr. Brakefield's role at Sigma was as an "OEM consultant" with Mr. Rona, focused on non-Distributor OEM Fittings customers. (Brakefield, Tr. 1214-1216).

Response To Finding No. 106:

Respondent has no specific response.

107. From 2008 to December 2011, Mr. Brakefield took on a "special projects" role for Sigma, reporting to Larry Rybacki, the vice president of sales, and taking on projects for Mr. Rybacki, Mr. Pais, Mr. Bhattacharji, or Mr. McGivern. (Brakefield, Tr. 1214, 1216-1217).

Response To Finding No. 107:

Respondent has no specific response.

108. Mr. Brakefield's background is in pipe, and he was vice president of sales and marketing at U.S. Pipe before his employment at Sigma. (Brakefield, Tr. 1219-1220; CX 2496 (Brakefield, Dep. (Vol. 2) at 9-10)).

Response To Finding No. 108:

Respondent has no specific response.

109. In 2005, Mr. Pais approached Mr. Brakefield and asked him if he knew anything about how to start a trade association. This was Mr. Brakefield's first involvement in conversations about DIFRA. (Brakefield, Tr. 1220).

Response To Finding No. 109:

Although McWane, Sigma, Star, U.S. Pipe and other Fittings manufacturers and suppliers sporadically discussed the possibility of forming a trade association that later became known as DIFRA in 2005, DIFRA was not incorporated until 2007 and was only operational for about six months. (RPF 237-239).

110. Mr. Brakefield then became involved with organizing DIFRA on Sigma's behalf. (Brakefield, Tr. 1220-1221).

Response To Finding No. 110:

Respondent has no specific response.

111. Mr. Brakefield was Sigma's "point person" on DIFRA. (Rybacki, Tr. 3546-3547). He became DIFRA's president in January 2007, and was the first and only president of DIFRA. (Brakefield, Tr. 1221-1222, 1227).

Response To Finding No. 111:

Respondent has no specific response.

3.2.2.7 Stuart Box

112. Stuart Jackson Box was Sigma's OEM operations manager from May 2007, when he started with the company, until July 2011. (CX 2524 (Box, Dep. at 8)). As OEM operations manager, Mr. Box reported to Mitchell Rona and had responsibility for customizing Fittings for Sigma OEM customers. (CX 2524 (Box, Dep. at 11, 12)). Mr. Box was promoted to Sigma's director of engineering in July 2011. (CX 2524 (Box, Dep. at 7-8)).

Response To Finding No. 112:

Respondent has no specific response.

113. Prior to joining Sigma, Mr. Box held positions as plant manager and manufacturing manager at foundries for Mueller Water Company, the parent of U.S. Pipe. (CX 2524 (Box, Dep. at 9-10)).

Response To Finding No. 113:

Respondent has no specific response.

114. Mr. Box was involved in Sigma's decision to explore the feasibility of production of Domestic Fittings, and in carrying out that evaluation through Sigma's "SDP" project. (CX 2524 (Box, Dep. at 20-22)).

Response To Finding No. 114:

Respondent has no specific response.

115. Mr. Box was not involved in negotiating the MDA, but was aware that MDA negotiations were ongoing while he investigated Sigma Domestic Production. (CX 2524 (Box, Dep. at 62-63)).

Response To Finding No. 115:

Respondent has no specific response.

116. Mr. Box was responsible for making sure that Fittings Sigma received from McWane met specification. (CX 2524 (Box, Dep. at 67-68)).

Response To Finding No. 116:

Respondent has no specific response.

3.2.2.8 Other Employees

117. George Liu (Liuguang) is Sigma's production manager for China. (Pais, Tr. 1853). Yin Baohai is the owner of the Sigma's primary Fittings supplier in China, which Sigma refers to as "A1," and Yin Zhenhao is his son. (Pais, Tr. 1881-1882; CX 2118 at 001). Iona Shenoy is an executive secretary at Sigma Corporation. (Rybacki, Tr. 3494).

Response To Finding No. 117:

Respondent has no specific response.

3.2.3 **Sigma Email Distribution Lists**

118. Sigma's M20 e-mail distribution list was a distribution list for Sigma's approximately top 20 managers. (Pais, Tr. 1750; Rybacki, Tr. 3490). Mr. Brakefield was a member of the M20 email distribution list. (Brakefield, Tr. 1218).

Response To Finding No. 118:

Respondent has no specific response.

119. Sigma's RM6 email distribution list included Sigma's regional managers and Mr. Rona. (Brakefield, Tr. 1218-1219).

Response To Finding No. 119:

Respondent has no specific response.

120. Sigma's M11 email distribution group is comprised of approximately 11 or 12 Sigma managers, including regional managers, and senior managers such as Mr. Pais, Mr. Bhattacharji, Mr. McGivern, Mr. Rybacki, and Mr. Brakefield. (Pais, Tr. 1837-1838; Brakefield, Tr. 1219).

Response To Finding No. 120:

Respondent has no specific response.

121. Sigma's M3 e-mail distribution list included Mr. Bhattacharji, Mr. Pais and Mr. Rybacki, and then Mr. McGivern when he joined Sigma. (CX 2527 (Pais, IHT at 14)).

Response To Finding No. 121:

Respondent has no specific response.

122. Sigma's OEM5 email distribution list included Mr. Pais, Mr. Bhattacharji, Mr. Rybacki, Mr. Brakefield, and Mr. Rona. (Rona, Tr. 1491).

Response To Finding No. 122:

Respondent has no specific response.

123. Sigma's SIGALL email distribution list included the entire Sigma team. (Pais, Tr. 1790).

Response To Finding No. 123:

Respondent has no specific response.

3.3 **Star**

3.3.1 **Company Basics**

124. Star Pipe Products Ltd. ("Star") imports and sells Fittings and other waterworks products. (Joint Stipulations of Fact, JX 0001 ¶ 3; Answer at ¶ 11; Minamyer, Tr. 3131-3132 (identifying Star's three divisions to be waterworks, plumbing, and fire protection)).

Response To Finding No. 124:

Respondent has no specific response.

125. Star was founded in 1981, and it has sold Fittings since approximately 1985. (RX-694 (Bhutada, Dep. at 6, 7)). Star's current annual revenues are approximately \$135 million. (McCutcheon, Tr. 2250). Star has approximately 300 employees. (McCutcheon, Tr. 2249).

Response To Finding No. 125:

Respondent has no specific response.

126. In 2007 and 2008, Star's waterworks division sold Fittings, joint restraints, municipal construction castings, nuts and bolts, flanges, flange packs, and accessories. (Minamyer, Tr. 3129-3131; McCutcheon, Tr. 2249 (noting that Star's waterworks division also sells manhole rings and covers, and valve boxes)).

Response To Finding No. 126:

Respondent has no specific response.

127. In 2007 and 2008, Star's main product was Fittings, and accounted for approximately 50% of Star's annual revenues. (Minamyer, Tr. 3132-3133; McCutcheon, Tr. 2250).

Response To Finding No. 127:

Respondent has no specific response.

128. Beginning in 2009, Star has contracted with foundries in the United States to manufacture Domestic Fittings. (Joint Stipulations of Fact, JX 0001 ¶ 4).

Response To Finding No. 128:

Respondent has no specific response.

129. Star has a controlling interest in Chinese foundries that manufacture Fittings for Star, but does not own, in whole or in part, any of the US foundries that produce Fittings on Star's behalf. (McCutcheon, Tr. 2251-2252).

Response To Finding No. 129:

Respondent has no specific response.

130. Prior to 2009, Star did not sell Domestic Fittings, and had not considered selling Domestic Fittings. It sold only imported Fittings. (CX 2533 (Bhargava, Dep. at 11); *see also* McCutcheon, Tr. 2267 (Star's Fittings were not bid on Domestic-only Fittings jobs

before 2009); Minamyer, Tr. 3136 (in 2008, Star could not meet any specification requiring Domestic Fittings)).

Response To Finding No. 130:

Respondent has no specific response.

131. Star does not have any joint ventures with, or ownership interests in, any foundries in the United States. (McCutcheon, Tr. 2251-2252).

Response To Finding No. 131:

Respondent has no specific response.

132. Star imports Fittings manufactured at five foundries in China. (RX-694 (Bhutada, Dep. at 8)). Star does not own the foundries in China. (CX 2539 (McCutcheon, Dep. at 8); RX-694 (Bhutada, Dep. at 8) (explaining that Star operates two of the five foundries as joint ventures)).

Response To Finding No. 132:

Respondent has no specific response.

133. Star is responsible for quality assurance and quality control in Fittings production at both the domestic and foreign foundries from which it obtains Fittings. (Bhargava, Tr. 2924-2926, 2936; CX 2533 (Bhargava, Dep. at 13)). “Quality assurance” involves establishing the production processes at the foundry necessary to assure the quality of the product. (Bhargava, Tr. 2936; CX 2533 (Bhargava, Dep. at 13)). “Quality control” involves conducting routine reviews, after production, to determine that the product meets the specifications. (Bhargava, Tr. 2924; CX 2533 (Bhargava, Dep. at 14)).

Response To Finding No. 133:

Respondent has no specific response.

134. In the 2007 to 2009 time frame, Star’s waterworks division had an outside sales force of approximately 22 sales representatives (territory managers) and approximately six division managers, who supervised the territory managers. (Minamyer, Tr. 3129-3132, 3178; McCutcheon, Tr. 2253).

Response To Finding No. 134:

Respondent has no specific response.

135. In 2008, Star also had an inside sales force of approximately 15 people. (McCutcheon, Tr. 2253-2254; Minamyer, Tr. 3132). Star’s inside sales force oversees customer service,

including checking inventory, fielding inquiries, and arranging shipping. (McCutcheon, Tr. 2253-2254).

Response To Finding No. 135:

Respondent has no specific response.

136. Star has 12 distribution centers throughout the United States where it stocks product in order to provide faster delivery times to its customers. (McCutcheon, Tr. 2264-2265) (Star stocks Fittings at its headquarters in Houston and 13 other locations in North America); CX 2535 (Bhutada, Dep. at 10) (identifying Star's United States distribution centers in Seattle, Washington; Salt Lake City, Utah; Sacramento, California; Corona, California; Phoenix, Arizona; Indianapolis, Indiana; Kansas City, Missouri; Houston, Texas; Atlanta, Georgia; Orlando, Florida; and Richmond, Virginia)).

Response To Finding No. 136:

Respondent has no specific response.

3.3.2 **Key Employees**

137. Star Pipe's management team consists of three key people – Mr. Bhutada, Mr. McCutcheon, and Mr. Bhargava. Most of Star's major decisions are made by consensus of those three people. (Bhargava, Tr. 2926-2927).

Response To Finding No. 137:

Respondent has no specific response.

3.3.2.1 Daniel McCutcheon

138. Daniel Ward McCutcheon has been employed by Star since approximately 1995. (CX 2537 (McCutcheon, IHT (Vol. 1) at 6); McCutcheon, Tr. 2247 (Mr. McCutcheon has been employed by Star for 16 years)).

Response To Finding No. 138:

Respondent has no specific response.

139. Mr. McCutcheon is currently the president of Star, and has held that position since the beginning of 2012. (McCutcheon, Tr. 2246-2247; CX 2539 (McCutcheon, Dep. at 6)).

Response To Finding No. 139:

Respondent has no specific response.

140. Before becoming Star's president, Mr. McCutcheon was the vice president of sales and operations at Star for 14 years, reporting to Mr. Bhutada. (McCutcheon, Tr. 2247; CX 2537 (McCutcheon, IHT (Vol. 1) at 6)). In that position, Mr. McCutcheon was responsible for all sales, marketing, sales strategies, operations, and the distribution center operations. (CX 2537 (McCutcheon, IHT (Vol. 1) at 7)). In that position, Mr. McCutcheon also had responsibility for sales of Fittings. (CX 2537 (McCutcheon, IHT (Vol. 1) at 7)). Mr. McCutcheon managed the sales department and Star's distribution centers. Star's outside and inside sales forces reported up to Mr. McCutcheon. (McCutcheon, Tr. 2254).

Response To Finding No. 140:

Respondent has no specific response.

141. In 2008 and 2009, Mr. McCutcheon and Mr. Bhutada together were responsible for setting Star's pricing strategy. (McCutcheon, Tr. 2252; CX 2538 (McCutcheon, IHT (Vol. 2) at 398)).

Response To Finding No. 141:

Respondent has no specific response.

142. Mr. McCutcheon's email address at Star Pipe Products is danm@starpipelineproducts.com. Mr. McCutcheon, who uses the email address in the normal course of business, is the only person with access to that email address. (CX 2538 (McCutcheon, IHT (Vol. 2) at 216)).

Response To Finding No. 142:

Respondent has no specific response.

143. Mr. McCutcheon's office phone numbers are _____ and _____. His phone is occasionally answered by his assistant Sue Palmer. (McCutcheon, Tr. 2248, 2467, *in camera*). Calls to Mr. McCutcheon also come through Star's toll-free number, 800-999-3009. (McCutcheon, Tr. 2248). That line is answered by Star's receptionist Janet Garey. Mr. McCutcheon's cell phone for business purposes is _____. (McCutcheon, Tr. 2248, 2438, *in camera*). Nobody but Mr. McCutcheon answers his cell phone. (McCutcheon, Tr. 2249).

Response To Finding No. 143:

Respondent has no specific response.

144. _____

(McCutcheon, Tr. 2502-2503, *in camera*).

Response To Finding No. 144:

Respondent has no specific response.

145. In 2003, Mr. McCutcheon testified before the International Trade Commission in a proceeding relating to a McWane “all or nothing” rebate policy in the non-Domestic Fittings market. At the time that the McWane policy at issue in that proceeding came into effect, Star had been supplying Fittings in the United States for about 5 to 10 years. (McCutcheon, Tr. 2579-2580, 2662-2663). *

Response To Finding No. 145:

This finding is misleading, argumentative, and inaccurate. *See* General Response 7. The evidence does not support the argument that the McWane “rebate policy” was “all or nothing” or “exclusive.” (RPF 501-521). In 2003, McWane filed a complaint before the ITC to challenge dumping by fittings importers. (RPF ¶¶ 383-385). In December 2003, the ITC found unanimously in McWane’s favor and determined that Fittings from China were being imported into the United States in such increased quantities or under such conditions as to cause market disruption to domestic Fittings producers. (RPF ¶¶ 384-385). Despite Mr. McCutcheon’s testimony cited above, there is no evidence that the ITC found that McWane had an “all or nothing” rebate policy in the non-domestic Fittings market.

3.3.2.2 **Matthew Minamyler (former employee)**

146. Matthew Patrick Minamyler is currently the national sales manager for the Piping Products Division of Sigma (which includes Sigma’s Fittings business), and he has held that position since July 2009. (Minamyler, Tr. 3127-3128; CX 2525 (Minamyler, IHT at 5)).

Response To Finding No. 146:

Respondent has no specific response.

147. From approximately 2004 until he joined Sigma in July 2009, Mr. Minamyler was Star’s national sales manager, with responsibility for managing Star’s sales force, interfacing with customers, and increasing Star’s sales. (McCutcheon, Tr. 2254; Minamyler, Tr. 3128; CX 2525 (Minamyler, IHT at 5)).

Response To Finding No. 147:

Respondent has no specific response.

148. From approximately 1999 through 2005, Mr. Minamyer was a territory manager (December 1999 through mid-2000) and a division manager (mid-2000 through mid-2004) at Star. (Minamyer, Tr. 3128-3129; CX 2525 (Minamyer, IHT at 6-7); CX 2526 (Minamyer, Dep. at 9-10)).

Response To Finding No. 148:

Respondent has no specific response.

149. As Star's national sales manager in 2007 and 2008, Mr. Minamyer reported to Dan McCutcheon. (Minamyer, Tr. 3130; CX 2526 (Minamyer, Dep. at 11-12)). Mr. McCutcheon's and Mr. Minamyer's offices were close enough that they could speak to one another in the hallway. (McCutcheon, Tr. 2254-2255).

Response To Finding No. 149:

Respondent has no specific response.

150. When Mr. Minamyer was the national sales manager for Star's waterworks division, only the waterworks division sales force reported to him. (Minamyer, Tr. 3131-3132). Mr. Minamyer had six division managers reporting to him, covering five territories within the United States and one in Canada. (Minamyer, Tr. 3130).

Response To Finding No. 150:

Respondent has no specific response.

151. When Mr. Minamyer was national sales manager at Star, Mr. Minamyer and Mr. McCutcheon were in charge of setting and changing Star's list prices and multipliers and approving multiplier letters. (Minamyer, Tr. 3139, 3142; CX 2526 (Minamyer, Dep. at 99-100) (Mr. Minamyer and Mr. McCutcheon shared responsibility for changing list prices or published multipliers). Mr. Minamyer typically had the responsibility for approving individual instances of Project Pricing. (CX 2526 (Minamyer, Dep. at 99) (Mr. Minamyer typically had decision-making authority on pricing, but for list price or multiplier changes)).

Response To Finding No. 151:

Respondent has no specific response.

3.3.2.3 Ramesh Bhutada

152. Ramesh Bhutada was the president and chief executive officer of Star from 1981 until approximately November 2011. Since November 2011, Mr. Bhutada has been chief executive officer of Star. (CX 2534 (Bhutada, IHT at 6); CX 2535 (Bhutada, Dep. at 5)).

Response To Finding No. 152:

Respondent has no specific response.

153. In 2008 and 2009, Mr. Bhutada was responsible, together with Mr. McCutcheon, for setting Star's pricing strategy. (McCutcheon, Tr. 2252; CX 2538 (McCutcheon, IHT (Vol. 2) at 398)).

Response To Finding No. 153:

Respondent has no specific response.

3.3.2.4 Navin Bhargava

154. From 2003 to the present, Navin Bhargava has been a vice president, and later an executive vice president, of Star, with responsibility for sourcing, inventory, engineering, quality control, and new product development. (Bhargava, Tr. 2917-2919, 2921; CX 2533 (Bhargava, Dep. at 7-8)).

Response To Finding No. 154:

Respondent has no specific response.

155. Mr. Bhargava has a Bachelor's degree in Mechanical Engineering and a Master's degree in industrial engineering. (Bhargava, Tr. 2917).

Response To Finding No. 155:

Respondent has no specific response.

156. Mr. Bhargava began at Star as a product manager in 1994, responsible for inventory planning and sourcing foundries for manufacturing. (Bhargava, Tr. 2918).

Response To Finding No. 156:

Respondent has no specific response.

157. Mr. Bhargava was Star's purchasing manager from 1996 to 1998. In this role, Mr. Bhargava was also responsible for sourcing and supervising foundries that manufactured Star's products. (Bhargava, Tr. 2918-2919, 2920).

Response To Finding No. 157:

Respondent has no specific response.

158. Mr. Bhargava was Star's director of manufacturing in 1998 until approximately 2003. His responsibilities in this role related to expanding Star's manufacturing, and Star was manufacturing in South America, Korea, China, and India at that time. (Bhargava, Tr. 2920).

Response To Finding No. 158:

Respondent has no specific response.

159. Mr. Bhargava became a vice president of Star in approximately 2003. (Bhargava, Tr. 2921). He became executive vice president in approximately 2011. (Bhargava, Tr. 2917, 2921).

Response To Finding No. 159:

Respondent has no specific response.

160. Mr. Bhargava's responsibilities included supervision of Star's entry into Domestic Fittings manufacturing. (Bhargava, Tr. 2921). Mr. Bhargava was responsible for locating appropriate domestic third-party foundries for Fittings production, developing tooling for those foundries, setting up quality control procedures, and assessing the manufacturing capacities of domestic foundries. (Bhargava, Tr. 2925-2926).

Response To Finding No. 160:

Respondent has no specific response.

161. Mr. Bhargava's quality control responsibilities involve establishing and conducting testing and reporting at Star's third party foundries. (Bhargava, Tr. 2924).

Response To Finding No. 161:

Respondent has no specific response.

162. Mr. Bhargava has had responsibilities related to Star's foundry operations in China, including aspects of opening a foundry such as: assessing the capabilities of a third-party foundry, establishing manufacturing processes for foundries, developing and approving product patterns, testing, and troubleshooting inventory and customer service. (Bhargava, Tr. 2921-2923).

Response To Finding No. 162:

Respondent has no specific response.

163. One of Mr. Bhargava's email addresses is insomniacn@aol.com. (CX 2533 (Bhargava, Dep. at 8)).

Response To Finding No. 163:

Respondent has no specific response.

3.3.2.5 Leroy H. Leider, Jr.

164. Leroy H. Leider, Jr. is a general sales manager for Star. Mr. Leider has been employed by Star since approximately 2004. (RX-695 (Leider, Dep. at 9-11)).

Response To Finding No. 164:

Respondent has no specific response.

165. Mr. Leider was a territory manager for Star for approximately four years, from 2004 until 2008. (CX 2536 (Leider, Dep. at 11)).

Response To Finding No. 165:

Respondent has no specific response.

166. In 2008 and 2009, Mr. Leider was a division manager for the northwestern United States, including Washington, Oregon, Montana, Idaho, Utah, New Mexico, Colorado, Wyoming, North Dakota, South Dakota, Minnesota, and Wisconsin. (CX 2536 (Leider, Dep. at 11, 13)).

Response To Finding No. 166:

Respondent has no specific response.

167. Mr. Leider became a general sales manager in 2009. (CX 2536 (Leider, Dep. at 13)).

Response To Finding No. 167:

Respondent has no specific response.

168. As general sales manager, Mr. Leider has responsibility for supervising the division managers in much of the eastern United States. (RX-695 (Leider, Dep. at 13, 16)).

Response To Finding No. 168:

Respondent has no specific response.

169. As division manager, Mr. Leider reported to Matt Minamy. (RX-695 (Leider, Dep. at 17)).

Response To Finding No. 169:

Respondent has no specific response.

170. As division manager and as general sales manager, Mr. Leider has not had authority for setting Star's list prices or establishing Star's published multipliers for fittings. (RX-695 (Leider, Dep. at 22)).

Response To Finding No. 170:

Respondent has no specific response.

3.3.2.6 Michael Berry

171. Michael Berry has been a general sales manager for Star since 2009. (CX 2532 (Berry, Dep. at 12)).

Response To Finding No. 171:

Respondent has no specific response.

172. Mr. Berry was first employed as a territory manager by Star in approximately 2004. As a territory manager, Berry was a salesman for Star. (CX 2532 (Berry, Dep. at 10)). From approximately 2005 to 2009, Mr. Berry was a division manager for Star, with responsibility for Star's western division, which included portions of the United States including and west of Arizona and Utah. (CX 2532 (Berry, Dep. at 13-15)). As division manager, Mr. Berry had responsibility for supervising the territory managers in the western United States. (CX 2532 (Berry, Dep. at 14)).

Response To Finding No. 172:

Respondent has no specific response.

173. John Ristine, John Lemoine, and Kris Kadai are territory managers for Star and reported to Mr. Berry in his capacity as division manager. (CX 2532 (Berry, Dep. at 13-14)).

Response To Finding No. 173:

Respondent has no specific response.

174. As division manager, Mr. Berry did not have responsibility for setting price lists or published multipliers for Star. (RX-691 (Berry, Dep. at 18)).

Response To Finding No. 174:

Respondent has no specific response.

175. As division manager, Mr. Berry sometimes exercised authority to approve Project Pricing, but that authority was sometimes exercised directly by either Mr. McCutcheon or Mr. Minamyer. (RX-691 (Berry, Dep. at 22); CX 2532 (Berry, Dep. at 22)).

Response To Finding No. 175:

Respondent has no specific response.

3.3.2.7 Other Employees

176. Pawan Sharda has been a Senior Financial Analyst at Star since 2007. He has worked at Star since 2004. (CX 2540 (Sharda, Dep. at 6-7)).
(McCutcheon, Tr. 2500, *in camera*).

(Bhargava, Tr. 2943, *in camera*). Pam Garey was the inside sales manager at Star in 2008. (Minamyer, Tr. 3159-3160).

Response To Finding No. 176:

Respondent has no specific response.

3.4 **Other Fittings Suppliers and Pipe Suppliers**

3.4.1 **American Cast Iron Pipe Company**

3.4.1.1 Company Basics

177. American Cast Iron Pipe Company (“ACIPCO”) is a domestic manufacturer and seller of ductile iron pipe, fabricated pipe, spiral weld steel pipe, steel pipe, fire hydrants, gate valves and Fittings, with a foundry in Birmingham, Alabama. (CX 2486 (Burns, Dep. at 13)).

Response To Finding No. 177:

Respondent has no specific response.

178. ACIPCO currently manufactures Fittings in the United States ranging from 30” to 64” in diameter. ACIPCO exited the manufacture of Fittings under 30” in diameter in 2006, and most Fittings below 24”. (CX 1897 at 002; CX 2486 (Burns, Dep. at 15, 17, 23-28; CX 2521 (Agarwal, IHT at 19-20) (SIP does not consider ACIPCO an active competitor for Fittings under 36”)).

Response To Finding No. 178:

Respondent has no specific response.

179. ACIPCO sells Fittings as an ancillary product line; ACIPCO has focused its improvements and investments on ductile iron pipe production over the years. (CX 2486 (Burns, Dep. at 41-42, 49-51)).

Response To Finding No. 179:

Respondent has no specific response.

180. In 2009, 2010, and 2011, ACIPCO's Fittings sales accounted for less than 5% of its overall revenue. (CX 2486 (Burns, Dep. at 16-17)).

Response To Finding No. 180:

Respondent has no specific response.

181. As an OEM supplier of pipe systems, ACIPCO purchases Fittings from Sigma to sell as part of its packaged sales of pipes and Fittings. (Pais, Tr. 1980-1981; CX 1092 at 005).

Response To Finding No. 181:

Respondent has no specific response.

3.4.1.2 Key Employees

182. Jerry Neal Burns has been the division sales manager for the ductile iron pipe division of ACIPCO for the last 22 years. His responsibilities include the promotion and sales of ductile iron pipe and spiral weld steel pipe in the United States. (CX 2486 (Burns, Dep. at 6-7)).

Response To Finding No. 182:

Respondent has no specific response.

183. Michael Hays has been the director of supply chain management for ACIPCO for the last six years. (CX 2487 (Hays, Dep. at 7-8)).

Response To Finding No. 183:

Respondent has no specific response.

3.4.2 **Backman Foundry**

3.4.2.1 Company Basics

184. Backman Foundry, located in Provo, Utah, is a foundry that has been in operation since 1938. Backman Foundry employs 32 people. (RX-648 (Backman, Dep. at 9, 12)).

Response To Finding No. 184:

Respondent has no specific response.

185. Backman Foundry primarily manufactures products for “the sulfuric acid business,” which are used in “copper mines literally all over the world.” (CX 2488 (Backman, Dep. at 12-13) (“I would say 60 to 70 percent of what we make is sold to chemical manufacturing facilities for mostly for sulfuric acid.”)).

Response To Finding No. 185:

Respondent has no specific response.

186. Backman also manufactures Fittings, which comprise approximately 20 to 25% of Backman Foundry’s business, or approximately \$3 million in sales annually. (CX 2488 (Backman, Dep. at 14, 18). Specifically, Backman Foundry manufactures customized Fittings, niche products that do not compete with McWane or other large Fittings suppliers who sell “standard off-the-shelf, the bread-and-butter [Fittings].” (CX 2488 (Backman, Dep. at 16-17) (“If you can imagine a pipe fitting that has a hole in it anywhere but standard, that’s what we do.”); CX 2488 (Backman, Dep. at 79-80) (“I can’t compete with McWane Corporation for example, TylerUnion. . . . Good grief. The fittings sitting on the ground in their yard ready to ship cost less than molten metal before I ever put it in a mold.”)).

Response To Finding No. 186:

Respondent has no specific response.

187. Because Backman Foundry specializes in manufacturing custom-made pipe fittings it does not consider Fittings made with automated systems competing products. (CX 2488 (Backman, Dep. at 78) (“Q. Who are your competitors today in the domestic pipe fittings? A. Um, I don’t know that I actually have a competitor. And I qualify that statement by I believe that I am the only facility left in the United States that specializes and manufactures custom pipe fittings.”)).

Response To Finding No. 187:

Respondent has no specific response.

188. Due to the high degree of customization of its Fittings, Backman Foundry produces products on a purchase-order-by-purchase-order basis. (CX 2488 (Backman, Dep. at 33)).

Response To Finding No. 188:

Respondent has no specific response.

3.4.2.2 Key Employees

189. Alan Backman is the president, CEO and primary owner of Backman Foundry. Mr. Backman has had supervisory responsibility for everything that goes on at the foundry for 17 years. (CX 2488 (Backman, Dep. at 11) (“I own 98 percent of the stock of the corporation.”)).

Response To Finding No. 189:

Respondent has no specific response.

190. Mr. Backman’s responsibilities are to “oversee operations of the entire facility on more of a global, . . . long-term basis.” Mr. Backman also deals with customers and keeps “an eye on day-to-day operations to some degree.” (CX 2488 (Backman, Dep. at 48)).

Response To Finding No. 190:

Respondent has no specific response.

3.4.3 **Griffin Pipe**

3.4.3.1 Company Basics

191. Griffin Pipe Products Co. is a domestic manufacturer of ductile iron pipes and has been in operation since the 1960s. Griffin also re-sells Fittings as part of packaged sales of pipes and Fittings. (CX 2508 (Kurhts, Dep. at 9-10, 11) (noting that Metalfit manufactures proprietary restraint joints for Griffin)).

Response To Finding No. 191:

Griffin Pipe ceased domestic production of Fittings because of the flood of cheaper imported fittings eroding the fittings market. (Tatman, Tr. 198 (“Griffin Pipe is a big pipe manufacturer. Griffin Pipe used to make foundry fittings -- fittings in the U.S. at a domestic facility. But it shut down a few years ago because of the flood of cheap imports coming in”); JX 643 (Tatman, IHT at 47)).

192.

[REDACTED]

(CX 2508 (Kurhts, Dep. at 18, 19-20, 48-50, 73-74, *in camera*))

[REDACTED]

).

Response To Finding No. 192:

Griffin Pipe ceased domestic production of Fittings because of the flood of cheaper imported fittings eroding the fittings market. (Tatman, Tr. 198 (“Griffin Pipe is a big pipe manufacturer. Griffin Pipe used to make foundry fittings -- fittings in the U.S. at a domestic facility. But it shut down a few years ago because of the flood of cheap imports coming in”); JX 643 (Tatman, IHT at 47)).

193.

(CX 2508

(Kurhts, Dep. at 42-44, *in camera*)).

Response To Finding No. 193:

Respondent has no specific response.

194.

(CX 2508 (Kurhts, Dep. at 20-21, 24-27), *in camera*)

Response To Finding No. 194:

Respondent has no specific response.

3.4.3.2 Key Employees

195. Douglas Kurhts became the national customer service manager at Griffin Pipe, in Council Bluffs, Iowa in 2012. Before that, Mr. Kurhts was the customer service manager for Griffin’s west region for ten years. In total, Mr. Kurhts has been with Griffin for 12 years. (CX 2508 (Kurhts, Dep. at 6-7)).

Response To Finding No. 195:

Respondent has no specific response.

3.4.4 **Metalfit**

3.4.4.1 Company Basics

196. Metalfit is a foundry in Monterrey, Mexico and a manufacturer of flanged Fittings from 3” to 48” in diameter and mechanical joint Fittings from 4” to 48” in diameter. (CX 2518 (Meyer, Dep. at 16-23)). Metalfit supplies Fittings under the Metalfit brand name, and as private label products for ACIPCO, U.S. Pipe, Griffin, and Sigma. (CX 2518 (Meyer, Dep. at 16-23)).

Response To Finding No. 196:

Respondent has no specific response.

197. In addition to Fittings, Metalfit produces municipal castings for the Mexican market and non-waterworks products including valve bodies, butterfly valves, ball valves, plug valves, and pump parts. (CX 2518 (Meyer, Dep. at 21)).

Response To Finding No. 197:

Respondent has no specific response.

198. Metalfit exports approximately 98% of its Fittings to the United States. (CX 2518 (Meyer, Dep. at 20-21)).

Response To Finding No. 198:

Respondent has no specific response.

199. All of the Fittings sold under the Metalfit brand name are sold through Distributors. (CX 2518 (Meyer, Dep. at 23-24)).

Response To Finding No. 199:

Respondent has no specific response.

200. Metalfit’s total annual sales were [REDACTED] in 2008, [REDACTED] in 2009, [REDACTED] in 2010, and [REDACTED] in 2011. (CX 1777 at 005, *in camera* (Metalfit sales information)).

Response To Finding No. 200:

Respondent has no specific response.

201. In 2011, approximately 70% of Metalfit’s sales were of Fittings. Over the last five years, Fittings sales have generally been less than 70%. (CX 2518 (Meyer, Dep. at 21-22, 108-109)).

Response To Finding No. 201:

Respondent has no specific response.

3.4.4.2 Key Employees

202. Mark L. Meyer has been an owner and vice president of Metalfit, Inc. since 2004. As vice president of Metalfit, Mr. Meyer is responsible for sales, marketing, customer development, new product development, strategic planning, government affairs and all non-manufacturing aspects of the business. (CX 2518 (Meyer, Dep. at 9-12)).

Response To Finding No. 202:

Respondent has no specific response.

203. Mr. Meyer and his partners built Metalfit as a greenfield foundry in 1991 and began operations in 1994. (CX 2518 (Meyer, Dep. at 9-11)). In 2000, Mr. Meyer and his partners sold the foundry to Griffin Pipe Products, but they purchased it back in July 2004, and continue to operate the foundry today. (CX 2518 (Meyer, Dep. at 9-11)).

Response To Finding No. 203:

Respondent has no specific response.

3.4.5 **NAPAC**

204. NAPAC, Inc. is a Fittings supplier with close to a full product line of non-Domestic Fittings. (CX 2500 (Swalley, Dep. at 135); CX 2526 (Minamyler, Dep. at 14); CX 2510 (Groeniger, Dep. at 44)).

Response To Finding No. 204:

Respondent has no specific response.

205. NAPAC has three distribution centers, in Massachusetts, Jacksonville, and California. (CX 2500 (Swalley, Dep. at 137)).

Response To Finding No. 205:

Respondent has no specific response.

206. McWane does not consider NAPAC a primary competitor like Star and Sigma. (CX 2484 (Tatman, Dep. at 24-25)).

Response To Finding No. 206:

Respondent has no specific response.

3.4.6 NACIP

3.4.6.1 Company Basics

207. In 2010, North American Cast Iron Products (“NACIP”) began selling Fittings in the United States that it imports from India and China. (Saha, Tr. 1152-1153, 1173-1176). NACIP’s corporate headquarters are in New Jersey, and its distribution centers are in New Jersey, Norfolk, Virginia, Covington, Georgia, and Houston, Texas. (Saha, Tr. 1153-1154).

Response To Finding No. 207:

Respondent has no specific response.

208. NACIP sells Fittings to Distributors. (Saha, Tr. 1153-1154). NACIP currently sells Fittings to approximately 50 separate Distributor branches, primarily third tier and independent distributors. Mr. Saha estimates that this represents less than 5% of the overall Fittings distribution network in the United States. (Saha, Tr. 1167-1168, 1171).

Response To Finding No. 208:

Respondent has no specific response.

209. The volume of NACIP’s Fittings sales is “[i]nsignificant” in comparison to McWane. (Saha, Tr. 1164; CX 2519 (Saha, Dep. at 26)).

Response To Finding No. 209:

Respondent has no specific response.

210. NACIP Fittings sales are primarily in the eastern and southern parts of the United States. NACIP has no current plans to expand its Fittings sales to other geographical areas. (Saha, Tr. 1163-1164).

Response To Finding No. 210:

Respondent has no specific response.

211. NACIP’s total revenues from Fittings in 2011 were approximately \$500,000. (CX 2519 (Saha, Dep. at 26)).

Response To Finding No. 211:

Respondent has no specific response.

3.4.6.2 Key Employees

212. Suvobrata Saha is the president and part-owner of NACIP, and has worked in the Fittings industry since 1983. (Saha, Tr. 1152-1157). Mr. Saha’s responsibilities at NACIP include sales planning, purchasing, and finance. (Saha, Tr. 1152-1153).

Response To Finding No. 212:

Respondent has no specific response.

213. Mr. Saha is also the joint managing director of Carnation Industries, Limited, a foundry that produces Fittings in China and India for NACIP. (Saha, Tr. 1155-1156).

Response To Finding No. 213:

Respondent has no specific response.

214. Early in his career Mr. Saha worked as an Eastern U.S. regional sales manager for Star. (Saha, Tr. 1157-1158).

Response To Finding No. 214:

Respondent has no specific response.

215. In 1996 Mr. Saha started a waterworks company called Pipeline Components, Inc. (“PCI”), of which he was vice president and part owner. (Saha, Tr. 1158). In 2005, Mr. Saha sold PCI to Sigma, at which time Sigma closed down all three of PCI’s locations. (Saha, Tr. 1161-1162). The agreement by which Sigma purchased PCI included a 3-year non-compete clause binding Mr. Saha. During that time period, Mr. Saha was not permitted to be in the Fittings business. (Saha, Tr. 1161-1162).

Response To Finding No. 215:

Respondent has no specific response.

3.4.7 **SIP**

3.4.7.1 Company Basics

216. [REDACTED] (CX 2522 (Agarwal, Dep. at 6, 22), in camera [REDACTED]).

Response To Finding No. 216:

Respondent has no specific response.

217. SIP began selling Fittings in the United States in 2003 or 2004, and currently sells to approximately (CX 2522 (Agarwal, Dep. at 29, 38, *in camera*)).

(CX 2522 (Agarwal, Dep. at 85), *in camera*).

Response To Finding No. 217:

Respondent has no specific response.

218. SIP offers a full line of Fittings up to 48” in diameter. (RX-681 (Agarwal, Dep. at 30); CX 2521 (Agarwal, IHT at 64-65)).

Response To Finding No. 218:

Respondent has no specific response.

219.

(RX-369, *in camera*).

Response To Finding No. 219:

Respondent has no specific response.

3.4.7.2 Key Employees

220. Bharat Agarwal has been SIP’s vice president for business development since approximately 2007. In that position, Mr. Agarwal is responsible for finding new business opportunities, including new products and markets, and growing sales. (CX 2522 (Agarwal, Dep. at 6-7); RX-681 (Agarwal, Dep. at 9-10)).

Response To Finding No. 220:

Respondent has no specific response.

3.4.8 **U.S. Pipe**

3.4.8.1 Company Basics

221. United States Pipe and Foundry (“U.S. Pipe”), headquartered in Birmingham, Alabama, currently manufactures ductile iron pipe. (Morton, Tr. 2809). In the 2005-2012 time period, U.S. Pipe manufactured ductile iron pipe at two plants in Bessemer, Alabama, and a plant in Union City, California. (Morton, Tr. 2809).

Response To Finding No. 221:

Respondent has no specific response.

222. U.S. Pipe sells complete waterworks systems that include its ductile iron pipe packaged together with related products, including Fittings and accessories. (Morton, Tr. 2809-2812).

Response To Finding No. 222:

Respondent has no specific response.

223. U.S. Pipe's main competitors in the sale of ductile iron pipe systems are Griffin, McWane, and ACIPCO. (Morton, Tr. 2811-2812).

Response To Finding No. 223:

Respondent has no specific response.

224. Until April 2006, U.S. Pipe manufactured Domestic Fittings from 4" to 64" in diameter at its Chattanooga, Tennessee facility. U.S. Pipe stopped manufacturing Fittings in April 2006, and has since sold the Chattanooga facility. (Morton, Tr. 2810).

Response To Finding No. 224:

U.S. Pipe ceased domestic production of Fittings at its Chattanooga, Tennessee manufacturing facility 2006 because it concluded that it could not justify the continued operation of the plant given the low volumes of domestic fittings being sold. (Morton, Tr. 2863-2864 ("Q. I want to shift gears a little bit and talk about -- complaint counsel asked you a little bit about the closure of the Chattanooga facility. I want to talk a little bit in more detail about the closure of that facility. I believe you testified that the Chattanooga facility was closed in June 2006? A. April. Q. April of 2006. Thank you. And as part of the reason for closing the Chattanooga facility, U.S. Pipe did a series of internal analyses of profitability; correct? A. I wasn't involved in doing any of those analyses, but I presume that there was. Q. I'm sorry. I didn't hear the last part. A. I wasn't involved in doing any of the analysis on the Chattanooga facility. Q. But you became aware of the decision and some of the reasons behind the closure of the Chattanooga facility; correct? A. Correct. Q. And you became aware of the fact that U.S. Pipe determined that from a financial point of view, it could not justify keeping the Chattanooga facility open just to

produce fittings; correct? A. I did become aware. That facility produced both fittings and hydrants, but it was not financially viable.”) (objections overruled); JX 701 (Morton, Dep. at 10).

225. U.S. Pipe currently purchases non-Domestic Fittings primarily from Sigma, with Star as a secondary supplier, and Domestic Fittings from McWane and Star. U.S. Pipe sells the Fittings that it purchases as a part of a bundled package of Fittings and ductile iron pipe. (Morton, Tr. 2810, 2819-2820).

Response To Finding No. 225:

Respondent has no specific response.

226. In the Spring of 2009, U.S. Pipe decided not to re-enter the Domestic Fittings market. (Morton, Tr. 2866-2867, 2876).

Response To Finding No. 226:

U.S. Pipe ceased domestic production of Fittings at its Chattanooga, Tennessee manufacturing facility 2006 because it concluded that it could not justify the continued operation of the plant given the low volumes of domestic fittings being sold. (Morton, Tr. 2863-2864 (“Q. I want to shift gears a little bit and talk about -- complaint counsel asked you a little bit about the closure of the Chattanooga facility. I want to talk a little bit in more detail about the closure of that facility. I believe you testified that the Chattanooga facility was closed in June 2006? A. April. Q. April of 2006. Thank you. And as part of the reason for closing the Chattanooga facility, U.S. Pipe did a series of internal analyses of profitability; correct? A. I wasn't involved in doing any of those analyses, but I presume that there was. Q. I'm sorry. I didn't hear the last part. A. I wasn't involved in doing any of the analysis on the Chattanooga facility. Q. But you became aware of the decision and some of the reasons behind the closure of the Chattanooga facility; correct? A. Correct. Q. And you became aware of the fact that U.S. Pipe determined that from a financial point of view, it could not justify keeping the Chattanooga facility open just to produce fittings; correct? A. I did become aware. That facility produced both fittings and hydrants, but it was not financially viable.”) (objections overruled); JX 701 (Morton, Dep. at 10).

227. U.S. Pipe's total annual sales of all products are approximately \$250 million to \$300 million. (Morton, Tr. 2811-2812). U.S. Pipe's total annual sales of Fittings are not significant. (CX 0313 at 004 (Pais writing that U.S. Pipe was "not a producer anymore, but a small player buying almost all their needs from Sigma"); *see infra* ¶¶ 1127-1128 (describing volume of U.S. Pipe's Fittings sales)).

Response To Finding No. 227:

Respondent has no specific response.

3.4.8.2 Key Employees

228. For the seven years between May 2005 and August 14, 2012, Thomas Morton was U.S. Pipe's vice president of purchasing. (Morton, Tr. 2807-2808). As vice president of purchasing, Mr. Morton typically had final authority over all purchasing decisions at U.S. Pipe, including which vendors U.S. Pipe used. (Morton, Tr. 2808).

Response To Finding No. 228:

Respondent has no specific response.

229. Gary Crawford has been U.S. Pipe's sales director since 2010. From 1978 to 1989, Mr. Crawford was a sales representative for various geographic regions in the United States, selling U.S. Pipe products, including Fittings. From 1989 to 1994, Mr. Crawford was the Assistant Eastern Regional Sales manager. From 1994 to December 2003, Mr. Crawford was the Eastern Regional sales manager. From December 2003 through 2010, Mr. Crawford was the vice president of sales. (CX 2541 (Crawford, Dep. at 6-9)).

Response To Finding No. 229:

Respondent has no specific response.

3.4.9 **Electrosteel USA**

3.4.9.1 Company Basics

230. Electrosteel USA entered the U.S. market in 2009, and sells 4" to 24" Fittings that were manufactured in India. (RX-659 (Swalley, Dep. at 8-10, 12-13); CX 2500 (Swalley, Dep. at 13)).

Response To Finding No. 230:

Respondent has no specific response.

231. Electrosteel USA has concentrated its sales efforts in the southeastern United States. (RX-659 (Swalley, Dep. at 27)). Electrosteel USA estimates its own market share in the southeast as 1% after two and a half years. (CX 2500 (Swalley, Dep. at 33, 131)).

Response To Finding No. 231:

Respondent has no specific response.

232. Of approximately 75 Distributor branches in the southeastern United States, Electrosteel USA currently sells to only 7 to 10. Those 7 to 10 branches purchase approximately 10% of their Fittings needs from Electrosteel USA. (CX 2500 (Swalley, Dep. at 152-153)).

Response To Finding No. 232:

Respondent has no specific response.

233. Electrosteel USA estimates its own market share in the southeast as one percent after two and a half years. (CX 2500 (Swalley, Dep. at 33, 131))

Response To Finding No. 233:

Respondent has no specific response.

234. (CX 2500 (Swalley, Dep. at 183-184), *in camera*)

Response To Finding No. 234:

Respondent has no specific response.

235. [REDACTED]
(CX 1553 at 002-012, *in camera*)
; CX 2500 (Swalley, Dep. at 221-232), *in camera*

Response To Finding No. 235:

Respondent has no specific response.

236. [REDACTED]
(CX 2500 (Swalley, Dep. at 185), *in camera*).

Response To Finding No. 236:

Respondent has no specific response.

3.4.9.2 Key Employees

237. Robert Daniel Swalley has been the business development manager at Electrosteel USA since August 2007 when he first began working for Electrosteel USA. (RX-659 (Swalley, Dep. at 5)).

Response To Finding No. 237:

Respondent has no specific response.

3.5 **Domestic Foundries**

3.5.1 **EBAA**

3.5.1.1 Company Basics

238. EBAA is a domestic joint restraint manufacturer with two domestic iron foundries in Texas and one in Georgia. (RX-658 (Keffer, Dep. at 7-8)).

Response To Finding No. 238:

Respondent has no specific response.

239. EBAA Iron does not produce any Fittings. (CX 2499 (Keffer, Dep. at 9)).

Response To Finding No. 239:

Respondent has no specific response.

3.5.1.2 Key Employees

240. Jim Keffer is the sales division president for EBAA Iron, where he has worked for 35 years. (RX-658 (Keffer, Dep. at 4-6)).

Response To Finding No. 240:

Respondent has no specific response.

241. Mr. Keffer assisted Distributors, municipalities, and other market participants to understand the meaning of the Buy American provision in ARRA after it passed. (RX-658 (Keffer, Dep. at 70-72)).

Response To Finding No. 241:

See General Response 6. This finding is misleading. Mr. Keffer testified that he tried to assist others with understanding ARRA, but whether he himself actually understood ARRA or assisted others in doing so has not been established.

3.5.2 EJ

3.5.2.1 Company Basics

242. EJ is the successor company to East Jordan Ironworks, a domestic foundry that began making gray iron municipal products in the 1920s, including: fire hydrants, gate valves, construction castings, municipal manhole frames and covers, and gray iron water main fittings. (RX-657 (Teske, Dep. at 8)).

Response To Finding No. 242:

Respondent has no specific response.

243. EJ does not currently make Fittings, and has never made Fittings. (CX 2498 (Teske, Dep. at 12)).

Response To Finding No. 243:

Respondent has no specific response.

244. However, EJ does currently resell McWane Fittings to a few legacy clients in the Midwest. Those Fittings sales are restricted to Michigan and Northern Illinois, and account for less than 1% of EJ's overall sales. (CX 2498 (Teske, Dep. at 33-34, 39-40)).

Response To Finding No. 244:

Respondent has no specific response.

245. EJ has made no efforts to expand its Fittings sales beyond its legacy clients because Fittings are a resale product for EJ. Mr. Teske believes that Distributors are uninterested in buying a resale product from EJ because Distributors can purchase the same product from Fittings suppliers at a better margin. (CX 2498 (Teske, Dep. at 41-43)).

Response To Finding No. 245:

Respondent has no specific response.

3.5.2.2 Key Employees

246. Thomas Michael Teske has been at East Jordan Ironworks, now EJ, since 1976, and is currently the company's vice president and general manager, responsible for EJ Canada, EJ USA, Inc., and EJ America Latina. (RX-657 (Teske, Dep. at 5-6)).

Response To Finding No. 246:

Respondent has no specific response.

3.5.3 **Frazier & Frazier Industries**

3.5.3.1 Company Basics

247. Frazier & Frazier Industries ("Frazier & Frazier") is a domestic foundry that was founded in 1972. Frazier & Frazier produces castings for Domestic Fittings for suppliers like McWane and Star. (RX-664 (Frazier, Dep. at 6-9, 14, 19-20) (noting broad array of products it produces, including gray iron castings, fire hydrants, barbells and boat anchors)).

Response To Finding No. 247:

Respondent has no specific response.

248. Frazier & Frazier produces unfinished Domestic Fittings; the castings that Frazier & Frazier makes for Fittings still require finishing, such as bolts, fasteners, and paint. (CX 2505 (Frazier, Dep. at 71-72); RX-664 (Frazier, Dep. at 18) (identifying Frazier & Frazier as a castings manufacturer, not a Fittings manufacturer)).

Response To Finding No. 248:

Respondent has no specific response.

249. The largest diameter Fitting that Frazier & Frazier produces is a 10" diameter Fitting. (CX 2505 (Frazier, Dep. at 20, 34)).

Response To Finding No. 249:

Respondent has no specific response.

250. Frazier & Frazier typically produces castings for Domestic Fittings through metal patterns that are sometimes provided to Frazier & Frazier by its customers. (CX 2505 (Frazier, Dep. at 24-25) (noting that Frazier & Frazier may still incur expenses to set up the new pattern, including adapting the pattern to the foundry's flask and sampling)).

Response To Finding No. 250:

Respondent has no specific response.

251. Frazier & Frazier's total castings sales to Star were \$544,349 in 2009, and increased to \$1,235,132 in 2010, with total Fittings sales of \$4,118,869 to date. (RX-706 (Ewing, Dep. at 6-10)).

Response To Finding No. 251:

Respondent has no specific response.

3.5.3.2 Key Employees

252. Charles W. Frazier, Jr. has been Frazier & Frazier's president and chief operating officer since 2000. Mr. Frazier has been involved in the foundry business all of his life. (RX-664 (Frazier, Dep. at 5-6)).

Response To Finding No. 252:

Respondent has no specific response.

253. VJ Gupta is the sales manager at Frazier & Frazier. (RX-665 (Gupta, Dep. at 6)).

Response To Finding No. 253:

Respondent has no specific response.

254. Lee Ann Ewing has been the secretary and treasurer at Frazier & Frazier since approximately 2001, and has been employed by Frazier & Frazier since 1978. Ms. Ewing oversees Frazier & Frazier's accounting functions, including billing, bill payment, and profit and loss statement preparation. (RX-706 (Ewing, Dep. at 4-5)).

Response To Finding No. 254:

Respondent has no specific response.

3.5.4 **Glidewell Foundry**

3.5.4.1 Company Basics

255. Glidewell Foundry ("Glidewell") makes ductile iron castings for a wide variety of industries, including the waterworks industry. (RX-666 (Glidewell, Dep. at 13-14)).

Response To Finding No. 255:

Respondent has no specific response.

256. Approximately 50% of Glidewell's total castings sales are for waterworks industry customers and products, including Star, McWane, ACIPCO, and valve manufacturers. (RX-666 (Glidewell, Dep. at 14-15)).

Response To Finding No. 256:

Respondent has no specific response.

257. Approximately 8% of Glidewell’s waterworks sales in 2011 were Domestic Fittings castings. (RX-666 (Glidewell, Dep. at 16)).

Response To Finding No. 257:

Respondent has no specific response.

258. Glidewell began making Domestic Fittings castings in 2009, and sold Domestic Fittings castings to Star in 2010. Typically, Glidewell realizes a 10% margin on its sales of Domestic Fitting castings. (RX-666 (Glidewell, Dep. at 16, 54; CX 2507 (Glidewell, Dep. at 95-96)).

Response To Finding No. 258:

Respondent has no specific response.

259. Since 2009, Glidewell has cast only large-diameter Domestic Fittings of 30” to 48” in diameter. Glidewell has never had the equipment necessary to efficiently make Domestic Fittings castings smaller than 30”. (CX 2507 (Glidewell, Dep. at 63)).

Response To Finding No. 259:

Respondent has no specific response.

3.5.4.2 Key Employees

260. David Glidewell has worked in the foundry business since 1974, and has been the president and CEO of Glidewell Foundry since 1991. (RX-666 (Glidewell, Dep. at 8-10)). Mr. Glidewell oversees Glidewell’s operations and handles all quoting and estimating for the company, including reviewing all requests for quotes. (RX-666 (Glidewell, Dep. at 11-12)).

Response To Finding No. 260:

Respondent has no specific response.

3.5.5 **Mabry Castings**

3.5.5.1 Company Basics

261. Mabry Castings (“Mabry”) manufactures castings for Domestic Fittings. (RX-676 (Hall, Dep. at 18-19) (noting wide variety of products produced by Mabry)).

Response To Finding No. 261:

Respondent has no specific response.

262. Mabry can cast Domestic Fittings with a 12” and smaller outside diameter on its green sand machine, and Domestic Fittings of a 50” diameter and smaller on its Airset machine. (CX 2517 (Hall, Dep. at 26-27)).

Response To Finding No. 262:

Respondent has no specific response.

263. In 2009, Mabry began producing Domestic Fitting castings for Star. (CX 1581; RX-676 (Hall, Tr. 67-68)). Mabry currently makes mechanical joint bend Domestic Fittings that are 8” and larger for Star. (RX-676 (Hall, Dep. at 19)).

Response To Finding No. 263:

Respondent has no specific response.

3.5.5.2 Key Employees

264. Eddie N. Hall, Jr. is the sales manager at Mabry foundry in Beaumont, Texas, where he has worked for over 29 years. As sales manager, Mr. Hall provides quotes to Domestic Fitting casting customers. Before 2011, Mr. Hall was Mabry’s plant operations manager. (RX-676 (Hall, Dep. at 5, 7-12, 17, 18)).

Response To Finding No. 264:

Respondent has no specific response.

3.6 **Distributors**

3.6.1 **HD Supply**

3.6.1.1 Company Basics

265. HD Supply is the largest waterworks Distributor in terms of sales in the United States. (Joint Stipulations of Fact, JX 0001 ¶ 24). HD Supply sells all waterworks products, including PVC pipe, ductile iron pipe, valves, hydrants, brass items, appurtenances, and Fittings. (Webb, Tr. 2706).

Response To Finding No. 265:

Respondent has no specific response.

266. HD Supply is a national Distributor with 235 branches in major metropolitan areas in 44 states. Each branch stocks Fittings and other products for HD Supply’s customers.

(Webb, Tr. 2698-2699 (identifying branches in every state except Maine, Vermont, New Hampshire, Hawaii, Wyoming, and North Dakota)).

Response To Finding No. 266:

Respondent has no specific response.

3.6.1.2 Key Employees

267. From 2007 through December 2011, Jerry L. Webb was president and CEO of HD Supply's Waterworks Division. (Webb, Tr. 2694-2695).

Response To Finding No. 267:

Respondent has no specific response.

268. Mr. Webb reports to Joe DeAngelo, who is the CEO for all of HD Supply, and also gives monthly updates to the board on performance, long range forecasting, initiatives and sales. (Webb, Tr. 2695-2696).

Response To Finding No. 268:

Respondent has no specific response.

269. Mr. Webb's direct reports are the HD Supply waterworks division's CFO, CIO, the vice president of market development, and the strategic business development director. (Webb, Tr. 2695-2696). Prior to December 2011, HD Supply's six waterworks regional vice presidents (including one vice president of fire protection) reported to Mr. Webb. (Webb, Tr. 2696-2697).

Response To Finding No. 269:

Respondent has no specific response.

270. As CEO of the HD Supply Waterworks division, Mr. Webb is responsible for strategic growth, new markets, market and product initiatives, and vendor relations. (Webb, Tr. 2696-2697; CX 2514 (Webb, Dep. at 9-10)).

Response To Finding No. 270:

Respondent has no specific response.

271. Mr. Webb exerts final authority over which Fittings suppliers HD Supply selects. (Webb, Tr. 2746).

Response To Finding No. 271:

Respondent has no specific response.

272. Before March 2007, Mr. Webb was a Southeast regional vice president of HD Supply. All branch managers in Georgia, Florida, Alabama, Mississippi, and Arkansas reported to Mr. Webb. Mr. Webb had profit and loss responsibility for his region. (Webb, Tr. 2697-2698). Other positions that Mr. Webb has held at HD Supply since he joined the company in 1981 include sales, inside sales, branch management, national sales management. (Webb, Tr. 2698-2699).

Response To Finding No. 272:

Respondent has no specific response.

273. Rob Hixon and Don Taylor were employees of HD Supply in 2008. (CX 2536 (Leider, Dep. at 83)).

Response To Finding No. 273:

Respondent has no specific response.

3.6.2 **Ferguson**

3.6.2.1 Company Basics

274. Ferguson is the second largest waterworks Distributor in terms of sales in the United States. (Joint Stipulations of Fact, JX 0001 ¶ 25). Ferguson serves the water and wastewater industry, supplying primarily pipe, valves and fittings to contractors and municipalities. (CX 2503 (Thees, IHT at 15)). Ferguson has an approximately 25% market share nationwide. (Tatman, Tr. 952-953; Thees, Tr. 3059 (noting that Ferguson has thousands of waterworks customers)).

Response To Finding No. 274:

Respondent has no specific response.

275. Ferguson is a national Distributor with approximately 167 branches throughout the country that distribute waterworks products, including Fittings. (Thees, Tr. 3042, 3045-3046 (identifying branch locations in every state except Kansas, Nebraska, and Iowa)).

Response To Finding No. 275:

Respondent has no specific response.

276. Ferguson employs a sales force of over 300 outside sales people and 250 inside sales people. (Thees, Tr. 3060).

Response To Finding No. 276:

Respondent has no specific response.

277. Ferguson’s executives are involved in Fittings supplier decisions based on the strength of any corporate rebate program with the supplier and the strength of the overall relationship between Ferguson and the supplier. (Thees, Tr. 3083). Ferguson’s branches are more involved in selecting a Fittings supplier when the customer specifies a brand or where the local relationship with the End User is significant. (Thees, Tr. 3083-3084).

Response To Finding No. 277:

Respondent has no specific response.

278. Ferguson and HD are McWane’s two largest Fittings customers. (Tatman, Tr. 953; Thees, Tr. 3042) (noting that McWane also supplies soil pipes to Ferguson’s Plumbing Division in addition to waterworks products, including Fittings)).

Response To Finding No. 278:

Respondent has no specific response.

3.6.2.2 Key Employees

279. Since August 2009, William Taylor Thees, Jr. has been the vice president of waterworks at Ferguson Enterprises, where he has worked for the last 22 years. (Thees, Tr. 3032-3033). Before becoming vice president, Mr. Thees held a series of positions at Ferguson, including branch manager, district manager, and business group owner of Ferguson’s waterworks group, with responsibilities similar to his vice-president responsibilities. (Thees, Tr. 3034-3035).

Response To Finding No. 279:

Respondent has no specific response.

280. As vice president of Ferguson’s waterworks division, Mr. Thees has profit and loss and strategy development responsibilities for the waterworks group. These responsibilities include deciding what initiatives to pursue or ways to grow the waterworks group, and deciding whether to acquire or open new Ferguson branches. (Thees, Tr. 3039).

Response To Finding No. 280:

Respondent has no specific response.

281. Mr. Thees regularly interacts with his district managers, gathering intelligence in order to understand relationships with suppliers, the relative sale volumes of each district, and potential growth areas. (Thees, Tr. 3040-3041).

Response To Finding No. 281:

Respondent has no specific response.

282. Mr. Thees often has the final authority in the selection of waterworks suppliers, including Fittings suppliers, though he discusses waterworks decisions with other Ferguson divisions when the supplier, like McWane, sells non-waterworks products to Ferguson as well. (Thees, Tr. 3041-3042).

Response To Finding No. 282:

Respondent has no specific response.

283. Mr. Thees participates in negotiating rebates with Ferguson's waterworks suppliers. The corporate rebate department takes the lead when it is a corporate rebate, and the local or regional office takes the lead on regional rebates. (Thees, Tr. 3041).

Response To Finding No. 283:

Respondent has no specific response.

3.6.3 **WinWholesale**

3.6.3.1 Company Basics

284. WinWholesale, which does business as WinWater Works ("WinWater"), is the third largest waterworks Distributor in the United States with 43 local companies or branches in 22 states. (CX 2162 at 001; CX 2546 (Gibbs, Dep. at 11, 15-16)). WinWater sells waterworks products, including Fittings, to End Users. (CX 2546 (Gibbs, Dep. at 7-8)).

Response To Finding No. 284:

Respondent has no specific response.

285. In 2008, WinWholesale purchased approximately \$9.5 million in Fittings. (CX 2546 (Gibbs, Dep. at 12)). In 2009, WinWholesale purchased approximately \$8.7 million in Fittings. (CX 2546 (Gibbs, Dep. at 12)). In 2010, WinWholesale purchased approximately \$9.0 million in Fittings. (CX 2546 (Gibbs, Dep. at 12)). In 2011, WinWholesale purchased approximately \$9.0 million in Fittings. (CX 2546 (Gibbs, Dep. at 12)).

Response To Finding No. 285:

Respondent has no specific response.

286. In 2011, WinWholesale's annual revenue was \$1.78 billion. (CX 2546 (Gibbs, Dep. at 11-12)).

Response To Finding No. 286:

Respondent has no specific response.

3.6.3.2 Key Employees

287. Eddie Gibbs has been the vice president of vendor relations for WinWholesale for since 2005. (CX 2546 (Gibbs, Dep. at 7-8)).

Response To Finding No. 287:

Respondent has no specific response.

288. As the vice president of vendor relations, Mr. Gibb's responsibilities include negotiating programs for all of WinWholesale's products, including Fittings, with vendors, gaining access to vendor lines, and dealing with disputes with local companies (branches) and vendors. (CX 2546 (Gibbs, Dep. at 7)).

Response To Finding No. 288:

Respondent has no specific response.

3.6.4 **Hajoca**

3.6.4.1 Company Basics

289. Hajoca Corporation distributes plumbing, heating, and industrial products. (Pitts, Tr. 3291-3292). Hajoca sells waterworks products including flanged pipes and fittings, saddles, valves, and Fittings. (Pitts, Tr. 3297).

Response To Finding No. 289:

Respondent has no specific response.

290. Hajoca has 351 locations, or profit centers. Of those, approximately nine sell waterworks products. Three branches sell waterworks exclusively: Tulsa, Oklahoma; Salt Lake City, Utah; and Olathe, Kansas. Lansdale, Pennsylvania also sells waterworks products. (Pitts, Tr. 3296-3297).

Response To Finding No. 290:

Respondent has no specific response.

291. Compared to Ferguson and HD Supply, Hajoca's presence in the waterworks distribution business – with three dedicated waterworks locations – is very small. (Pitts, Tr. 3299-3300).

Response To Finding No. 291:

Respondent has no specific response.

3.6.4.2 Key Employees

292. Roy Lee Pitts has been the director of vendor relations at Hajoca for the last fifteen years. (Pitts, Tr. 3291-3292). Before Mr. Pitts was the director of vendor relations, he was the manager of Hajoca's Fairfax, Virginia branch. Before that, Mr. Pitts was an outside sales person. (Pitts, Tr. 3293).

Response To Finding No. 292:

Respondent has no specific response.

293. As director of vendor relations, Mr. Pitts negotiates programs with Hajoca's vendors, supervises Hajoca's supplier rebate programs, and represents Hajoca at industry events. Mr. Pitts's responsibilities include waterworks. (Pitts, Tr. 3293-3294).

Response To Finding No. 293:

Respondent has no specific response.

294. Mr. Pitts regularly communicates with waterworks suppliers about Hajoca's waterworks purchasing goals. In Mr. Pitts's prior role as Hajoca Fairfax's manager, he also picked up waterworks products from suppliers if it was necessary for his customers. (Pitts, Tr. 3294).

Response To Finding No. 294:

Respondent has no specific response.

295. Mr. Pitts advises individual Hajoca branches about supplier corporate rebate programs, cash discounts, and shipping terms, and the branch managers of those branches make final decisions on which products to purchase. (Pitts, Tr. 3295-3296).

Response To Finding No. 295:

Respondent has no specific response.

3.6.5 **The Distribution Group (TDG)**

3.6.5.1 Company Basics

296. The Distribution Group, also known as "TDG", is a "group of distributors that pool their buying power together to jointly earn rebates based on group volume, group purchases

from vendors.” (CX 2494 (R. Fairbanks, Dep. at 10); Minamyer, Tr. 3188 (TDG is a group of independent Fittings Distributors that negotiate collectively with vendors)).

Response To Finding No. 296:

Respondent has no specific response.

297. There are 32 independent Distributors that make up the membership of TDG. (CX 2494 (R. Fairbanks, Dep. at 10); Sheley, Tr. 3380 (TDG currently has 32 members)). TDG does not “have any solid written criteria” for membership but looks for “members that have better than \$10 million in annual purchases and that have good [financial] reputation in the industry.” (CX 2494 (R. Fairbanks, Dep. at 12)).

Response To Finding No. 297:

Respondent has no specific response.

298. The purpose of TDG is to increase the negotiating power of individual Distributors who would otherwise not receive terms as favorable to them as the terms that suppliers extend to larger Distributors like HD Supply. (Sheley, Tr. 3394-3395).

Response To Finding No. 298:

Respondent has no specific response.

299. TDG collectively negotiates for freight terms, payment terms, rebate programs, and extended purchasing agreements with 68 suppliers, including Fittings. (Sheley, Tr. 3378-3379; CX 2494 (R. Fairbanks, Dep. at 11) (“Our agreements are really only products that our members buy and resale, so they’re wholesale products. So they’re the same products they sell to their customers.”)).

Response To Finding No. 299:

Respondent has no specific response.

300. [REDACTED] (CX 2494 (R. Fairbanks, Dep. at 21), *in camera*; Sheley, Tr. 3393, *in camera* [REDACTED]).

Response To Finding No. 300:

Respondent has no specific response.

301. [REDACTED] (CX 2494 (R. Fairbanks, Dep. at 21, *in camera*, 57-58); Sheley, Tr. 3379-3380 (TDG distributes TDG supplier rebates to TDG members on a pro-rata basis)).

Response To Finding No. 301:

Respondent has no specific response.

302. TDG’s Vendor Committee reviews proposals from vendors and selects the vendors with whom TDG will have rebate programs. (CX 2494 (R. Fairbanks, Dep. at 12); Sheley, Tr. 3379-3380 (describing process of Vendors submitting proposals to TDG prior to September Vendor Selection Committee meetings)).

Response To Finding No. 302:

Respondent has no specific response.

303. The vendor committee consists of nine members, each with an equal vote. (CX 2494 (R. Fairbanks, Dep. at 12-14)). Members of the vendor committee include, Dennis Sheley, Illinois Meter Company; Curtis Porter, Utility Supply Company; Michael Coryn, Utility Equipment Company; Jenks Hayes, Hayes Pipe & Supply; Peter Prescott, E.J. Prescott Company; Wayne Johnson, Dana Kepner Company; Dennis Johnson, Atlas Utility; Hod Fowler, H.D. Fowler Company; and Jeff Konen, Consolidated Supply Company. (CX 2494 (R. Fairbanks, Dep. at 13)).

Response To Finding No. 303:

Respondent has no specific response.

304. Currently, TDG has contracts with 72 different waterworks suppliers. (Sheley, Tr. 3396-3397). TDG members must purchase certain percentages of their purchases from TDG vendors, but members are not required to purchase products from any specific vendor just because the vendor has a rebate program with TDG. (CX 2494 (R. Fairbanks, Dep. at 33) (“[M]embers can buy from wherever they want.”); Sheley, Tr. 3395-3396).

Response To Finding No. 304:

Respondent has no specific response.

3.6.5.2 Key Employees

305. Richard Frank Fairbanks II is the president of TDG. (CX 2494 (R. Fairbanks, Dep. at 10)). His primary responsibilities are to “manage relationships” between members and vendors or “act as a liaison,” to “facilitate negotiations” between members and vendors, to “manage the numbers of purchases and rebates,” and to “oversee the purchasing goals and commitments.” (CX 2494 (R. Fairbanks, Dep. at 58-59, 61)). Mr. Fairbanks spends 80% of his time managing relationships or acting as a liaison between members and vendors. (CX 2494 (R. Fairbanks, Dep. at 59)).

Response To Finding No. 305:

Respondent has no specific response.

306. Mr. Fairbanks was president of WR White, a distribution company, in the early 1990s. (CX 2494 (R. Fairbanks, Dep. at 50)). Mr. Fairbanks sold WR White in 2000. (CX 2494 (R. Fairbanks, Dep. at 55)). WR White's parent company, Old Castle Precast, is a member of TDG. (CX 2494 (R. Fairbanks, Dep. at 52)).

Response To Finding No. 306:

Respondent has no specific response.

307. Mr. Fairbanks has relationships with Larry Rybacki at Sigma, Dan McCutcheon at Star, and Rick Tatman and Jerry Jansen at Tyler Union. (CX 2494 (R. Fairbanks, Dep. at 65-66)). Previously Mr. Fairbanks had relationships with Victor Pais at Sigma and Matt Minamyers at Star. (CX 2494 (R. Fairbanks, Dep. at 65-66)).

Response To Finding No. 307:

Respondent has no specific response.

3.6.6 **EJ Prescott, Inc.**

3.6.6.1 Company Basics

308. E.J. Prescott, Inc. is a waterworks Distributor headquartered in Gardiner, Maine. (CX 2501 (Prescott, IHT at 7-9)). E.J. Prescott has 27 branches located throughout Maine, New Hampshire, Rhode Island, Vermont, Massachusetts, Connecticut, Indiana, Ohio, and New York. (CX 2502 (Prescott, Dep. at 9); CX 2501 (Prescott, IHT at 8)).

Response To Finding No. 308:

Respondent has no specific response.

309. Right before the passage of ARRA, 20% of E.J. Prescott customers were "[a] hundred percent domestic." (CX 2501 (Prescott, IHT at 41)). E.J. Prescott's fitting inventory in 2012 was 50% domestic and 50% imported. (CX 2502 (Prescott, Dep. at 11)).

Response To Finding No. 309:

Respondent has no specific response.

310. E.J. Prescott purchases ductile iron pipe fittings from Tyler, Sigma, Star, and SIP. (CX 2502 (Prescott, Dep. at 15, 20)).

Response To Finding No. 310:

Respondent has no specific response.

311. E.J. Prescott is a member of TDG. (RX-661 (Prescott, Dep. at 40)).

Response To Finding No. 311:

Respondent has no specific response.

312. E.J. Prescott's revenue in 2009 was approximately \$145 million and its revenue in 2010 was approximately \$140 million. In 2009, E.J. Prescott's revenue from Fittings was "two to three million" and in 2010 it was approximately three to three-and-a-half million dollars. (CX 2502 (Prescott, Dep. at 10)).

Response To Finding No. 312:

Respondent has no specific response.

313. E.J. Prescott competes with Ferguson, Maine Water, HR Prescott & Sons, and TI Sales in Maine. (CX 2502 (Prescott, Dep. at 62)).

Response To Finding No. 313:

Respondent has no specific response.

314. E.J. Prescott's market share in Maine is approximately 50%. (CX 2502 (Prescott, Dep. at 61) ("probably approaching 50, maybe even more")).

Response To Finding No. 314:

Respondent has no specific response.

3.6.6.2 Key Employees

315. Peter Prescott has been the CEO of E.J. Prescott for 10 years. (CX 2502 (Prescott, Dep. at 6-7)). From 1978 until he became CEO, Mr. Prescott was the president of E.J. Prescott. (CX 2502 (Prescott, Dep. at 7)).

Response To Finding No. 315:

Respondent has no specific response.

316. Mr. Prescott started working in the waterworks industry in 1959 in sales, worked his way up to sales manager and then in 1978 purchased E.J. Prescott Company from his father with his two brothers-in-law. (CX 2501 (Prescott, IHT at 6)).

Response To Finding No. 316:

Respondent has no specific response.

3.6.7 Groeniger & Company

3.6.7.1 Company Basics

317. Groeniger & Company (“Groeniger”) was a waterworks Distributor that had 14 branches before it had to close five branches due to the economy. (CX 2509 (Groeniger, IHT at 24)). Ferguson purchased Groeniger in 2011. (CX 2510 (Groeniger, Dep. at 125)).

Response To Finding No. 317:

Respondent has no specific response.

318. Groeniger’s nine California branches serviced the following metropolitan areas: Bakersfield; Fresno; Modesto Stockton; Sacramento; San Francisco Bay area; and Monterey Bay area. Santa Maria branch serviced the southwest coastal area; and the Chico location is now only a stocking yard. (CX 2509 (Groeniger, IHT at 25) (noting that Santa Maria branch services California southwest coastal area, and its Chico location is now only a stocking yard)).

Response To Finding No. 318:

Respondent has no specific response.

319. Groeniger was a member of TDG. (CX 2510 (Groeniger, Dep. at 58-59)).

Response To Finding No. 319:

Respondent has no specific response.

320. Groeniger purchased Fittings from McWane, Sigma, and Star. (CX 2510 (Groeniger, Dep. at 44)).

Response To Finding No. 320:

Respondent has no specific response.

321. Groeniger’s competitors were Ferguson, R&B Supply, Camellia Valley Supply, McGuire & Juvet, Pace Supply, Ed Walsh Company, and Kenko Utility Supply Company. (CX 2510 (Groeniger, Dep. at 49)).

Response To Finding No. 321:

Respondent has no specific response.

322. In 2010, Groeniger’s annual revenue was approximately \$92 million; \$2.9 million was from Fittings. (CX 2509 (Groeniger, IHT at 39-40)).

Response To Finding No. 322:

Respondent has no specific response.

323. In 2010, Groeniger’s market share ranged from 25% to 60% in the markets it served in northern California. (CX 2510 (Groeniger, Dep. at 135) (“Hayward market share was probably in the 40 to 50, 40 to 45%.”); CX 2510 (Groeniger, Dep. at 145) (“So I think our market share in that area [Modesto market] was significant. Probably in the 60s, high 60 percentage points.”); CX 2510 (Groeniger, Dep. at 141) (over 50 percent in the Sacramento market); CX 2510 (Groeniger, Dep. at 148 (35% to 40% in the Chico market); CX 2510 (Groeniger, Dep. at 150) (60% in the Fresno market); CX 2510 (Groeniger, Dep. at 150) (50% in the Bakersfield market); CX 2510 (Groeniger, Dep. at 151) (60% in the Santa Maria market); CX 2510 (Groeniger, Dep. at 152) (25% to 30% in the Santa Paula market)).

Response To Finding No. 323:

Respondent has no specific response.

3.6.7.2 Key Employees

324. Michael Groeniger was the president of Groeniger & Company from 1984 to 2011 when Groeniger & Company was purchased by Ferguson. (CX 2509 (Groeniger, IHT at 7); CX 2510 (Groeniger, Dep. at 125). Mr. Groeniger became the Chairman of the Board in 1988 or 1989. (CX 2509 (Groeniger, IHT at 7)).

Response To Finding No. 324:

Respondent has no specific response.

325. Mr. Groeniger’s responsibilities as president were to oversee the entire company; which he did by visiting his branches to make sure things were running well. (CX 2509 (Groeniger, IHT at 7-8)).

Response To Finding No. 325:

Respondent has no specific response.

326. Historically, Mr. Groeniger developed the “long term relationships” with Groeniger’s manufacturers. (CX 2509 (Groeniger, IHT at 9)).

Response To Finding No. 326:

Respondent has no specific response.

3.6.8 **Illinois Meter**

3.6.8.1 Company Basics

327. Illinois Meter is a Distributor of waterworks, utility, sewer, and gas products, including Fittings. (Sheley, Tr. 3376-3378). Illinois Meter purchases Fittings from McWane and Star. (CX 2516 (Sheley, Dep. at 11, 133)).

Response To Finding No. 327:

Respondent has no specific response.

328. Illinois Meter is a member of The Distribution Group, also known as TDG. (Sheley, Tr. 3378).

Response To Finding No. 328:

Respondent has no specific response.

329. Illinois Meter has five branches, located in Saint Louis, Missouri; Benton, Illinois; Champaign-Urbana, Illinois; Decatur, Illinois; and Springfield, Illinois. (Sheley, Tr. 3382).

Response To Finding No. 329:

Respondent has no specific response.

330. Illinois Meter's competitors include HD Supply, Schulte Supply, Midwest Meter, and Midwest Municipal. (Sheley, Tr. 3381-3382).

Response To Finding No. 330:

Respondent has no specific response.

331. [REDACTED] (Sheley, Tr. 3427, *in camera*).

Response To Finding No. 331:

Respondent has no specific response.

332. [REDACTED] (Sheley, Tr. 3427-3429, *in camera*).

Response To Finding No. 332:

Respondent has no specific response.

333.

3428-3429, *in camera*).

(Sheley, Tr.

Response To Finding No. 333:

Respondent has no specific response.

334.

(Sheley, Tr. 3429-3430, *in camera*).

Response To Finding No. 334:

Respondent has no specific response.

335.

[REDACTED]

(Sheley, Tr. 3430, *in camera*).

Response To Finding No. 335:

Respondent has no specific response.

336.

[REDACTED]

(Sheley, Tr. 3431, *in camera*).

Response To Finding No. 336:

Respondent has no specific response.

337.

[REDACTED]

(Sheley, Tr. 3431-3432, *in camera*).

Response To Finding No. 337:

Respondent has no specific response.

338.

(Sheley, Tr. 3432, *in camera*).

Response To Finding No. 338:

Respondent has no specific response.

339.

Tr. 3432, *in camera*).

(Sheley,

Response To Finding No. 339:

Respondent has no specific response.

340.

(Sheley, Tr. 3433, *in camera*).

Response To Finding No. 340:

Respondent has no specific response.

3.6.8.2 Key Employees

341. Dennis James Sheley is the president and owner of Illinois Meter, and has been the owner of Illinois Meter for the last 28 years. (Sheley, Tr. 3375-3376).

Response To Finding No. 341:

Respondent has no specific response.

342. Mr. Sheley's responsibilities at Illinois Meter include: visiting with customers, overseeing purchasing and sales decisions, and ultimate authority on the selection of waterworks suppliers, including Fittings suppliers. (Sheley, Tr. 3376-3378).

Response To Finding No. 342:

Respondent has no specific response.

343. Mr. Sheley is the chairman of the board of TDG, and one of nine equal voting members of TDG's vendor selection committee. (Sheley, Tr. 3379).

Response To Finding No. 343:

Respondent has no specific response.

3.6.9 C.I. Thornburg Company, Incorporated

3.6.9.1 Company Basics

344. C.I. Thornburg Company, Incorporated (“C.I. Thornburg”) is a waterworks Distributor, and is a member of TDG. (CX 2489 (Morrison, IHT at 6-8)).

Response To Finding No. 344:

Respondent has no specific response.

345. C.I. Thornburg has grown from one branch in 1973 to five branches: two in West Virginia, two in Kentucky and one in Tennessee. (CX 2489 (Morrison, IHT at 19)).

Response To Finding No. 345:

Respondent has no specific response.

346. C.I. Thornburg’s market share in West Virginia is 75-80%. (CX 2489 (Morrison, IHT at 22)). C.I. Thornburg competes for sales to contractors with Ferguson Enterprises, Inc. and HD Supply in West Virginia. Ferguson is primarily winning the rest of the West Virginia business. (CX 2489 (Morrison, IHT at 23-24)).

Response To Finding No. 346:

Respondent has no specific response.

347. In 2010, C.I. Thornburg’s total waterworks revenue was approximately \$50 million and its revenue on Fittings was \$1 to \$2 million. (CX 2489 (Morrison, IHT at 24)).

Response To Finding No. 347:

Respondent has no specific response.

348. C.I. Thornburg purchases 85% of their imported Fittings from Sigma, 10% from Star and 5% from Tyler. (CX 2489 (Morrison, IHT at 60)).

Response To Finding No. 348:

Respondent has no specific response.

349. C.I. Thornburg is a member of TDG. (CX 1362 at 002).

Response To Finding No. 349:

Respondent has no specific response.

3.6.9.2 Key Employees

350. Edward Morrison Jr. is the president of C.I. Thornburg and has been since 1991. (CX 2489 (Morrison, IHT at 6)). Mr. Morrison has worked in the waterworks industry for 39 years. (CX 2489 (Morrison, IHT at 6)).

Response To Finding No. 350:

Respondent has no specific response.

351. Mr. Morrison's role as president includes overseeing administrative functions, serving on various industry boards, vendor relations, helping with pricing and contractor sales, and municipal sales. (CX 2490 (Morrison, Dep. at 15) ("everything that's involved in the day-to-day operation of the business")). Mr. Morrison has personal knowledge of every aspect of the day-to-day operation of running a waterworks distribution business. (CX 2489 (Morrison, IHT at 7)).

Response To Finding No. 351:

Respondent has no specific response.

3.6.10 **Utility Equipment Company**

3.6.10.1 Company Basics

352. Utility Equipment Company ("UECO") is a Distributor that sells all materials related to underground water, sewer, and storm water retention and detention systems. (CX 2544 (Coryn, Dep. at 8)).

Response To Finding No. 352:

Respondent has no specific response.

353. UECO has five Iowa branches located in Bettendorf, Dubuque, Des Moines, Sioux City, and Waterloo; one branch in Omaha, Nebraska; and another branch in Peru, Illinois. (CX 2544 (Coryn, Dep. at 8-9)).

Response To Finding No. 353:

Respondent has no specific response.

354. UECO is a member of TDG. (CX 1362 at 002; RX-703 (Coryn, Dep. at 47)).

Response To Finding No. 354:

Respondent has no specific response.

355. Between 2007 and 2011, UECO’s annual revenues ranged from approximately \$25 million to approximately \$33 million, and its annual Fittings revenues ranged from approximately \$1 million to approximately \$1.5 million. (CX 2544 (Coryn, Dep. at 11-12)).

Response To Finding No. 355:

Respondent has no specific response.

3.6.10.2 Key Employees

356. Michael R. Coryn is the president of UEC, which is a family company, and has been for 17 years. (CX 2544 (Coryn, Dep. at 6)). Mr. Coryn’s responsibilities as president include making all major business decisions and involvement in purchasing and inventory decisions and sales. (CX 2543 (Coryn, IHT at 9); CX 2544 (Coryn, Dep. at 7)).

Response To Finding No. 356:

Respondent has no specific response.

3.6.11 **Dana Kepner Company**

3.6.11.1 Company Basics

357. Dana Kepner Company (“Dana Kepner”) is a Distributor that sells waterworks products, including Fittings, to End Users. (CX 2492 (Johnson, Dep. at 9, 39, 79)).

Response To Finding No. 357:

Respondent has no specific response.

358. Dana Kepner has 15 branches: one in Montana, one in Wyoming, three in Colorado, three in West Texas, six in Arizona, and one in Nevada. (CX 2492 (Johnson, Dep. at 9)).

Response To Finding No. 358:

Respondent has no specific response.

359. Dana Kepner is a member of TDG. (CX 1362 at 001).

Response To Finding No. 359:

Respondent has no specific response.

360. Between 2009 and 2011, Dana Kepner’s annual revenue has ranged from approximately \$73 million to approximately \$78 to \$80 million. (CX 2492 (Johnson, Dep. at 10)).

Response To Finding No. 360:

Respondent has no specific response.

361. From 2009 to 2011, 4.0% to 4.5% of Dana Kepner’s revenue has come from Fittings. (CX 2492 (Johnson, Dep. at 10)).

Response To Finding No. 361:

Respondent has no specific response.

3.6.11.2 Key Employees

362. Wayne Edward Johnson is president and part owner of Dana Kepner. Mr. Johnson has been President since 1994 and has worked for the company since 1991. (CX 2492 (Johnson, Dep. at 6)). Mr. Johnson’s responsibility as president of Dana Kepner is “[t]he overall supervision of the company,” including overseeing the purchasing of Fittings. (CX 2492 (Johnson, Dep. at 7-8)).

Response To Finding No. 362:

Respondent has no specific response.

3.7 **DIFRA**

363. The Ductile Iron Fittings Research Association (“DIFRA”) is an Alabama nonprofit corporation incorporated on January 12, 2007. (CX 1480 at 007; Brakefield, Tr. 1220, 1227).

Response To Finding No. 363:

Respondent has no specific response.

364. DIFRA’s members are McWane; Sigma; Star; and U.S. Pipe. (Joint Stipulations of Fact, JX 0001 ¶ 17 (four members); Brakefield, Tr. 1227-1228 (DIFRA remains in existence today)).

Response To Finding No. 364:

This finding is inaccurate and misleading to the extent it implies that DIFRA is active today. DIFRA was only operational during the second half of 2008. (RPF ¶¶ 237-242) This proposed finding is also inconsistent with Complaint Counsel’s contention, at its CCPFF

¶¶ 1473-1483, *infra*, that DIFRA ceased to function after the aggregated tons-shipped report for December 2008 was published in January 2009.

365. In 2008, Mr. Pais, Mr. Rybacki, and Mr. Brakefield were involved with DIFRA on Sigma’s behalf, Mr. McCutcheon was involved with DIFRA on Star’s behalf, Mr. Tatman was involved with DIFRA on McWane’s behalf, and Mr. Crawford was involved with DIFRA on behalf of U.S. Pipe. (Brakefield, Tr. 1220-1221 (Mr. Bhattacharji’s involvement was “low-key”), 1270-1271; Tatman, Tr. 475; McCutcheon, Tr. 2416; CX 2541 (Crawford, Dep. at 9-10)).

Response To Finding No. 365:

Respondent states that this proposed finding provides an incomplete list of people involved in DIFRA.

3.7.1 Bradley Arant

366. Thad G. Long, K. Wood Herren, and Michael D. McKibben of the Birmingham, Alabama law firm Bradley Arant Rose & White (“Bradley Arant”) served as DIFRA’s attorneys, and helped to structure the information exchange operated by DIFRA. (CX 2497 (Long, Dep. at 8-9) (describing initial involvement in DIFRA formation); CX 1083 at 002 (Thad Long email describing Bradley Arant as counsel to DIFRA); CX 1473 at 001 (first DIFRA meeting minutes); CX 0048 at 001 (third DIFRA meeting minutes); Tatman, Tr. 485).

Response To Finding No. 366:

See General Response 8. This finding is misleading, inaccurate and mischaracterizes the evidence presented at trial. DIFRA did not operate an “information exchange.” (RPF ¶ 253.

See also RPF ¶¶ 251-265)

3.7.2 Sellers Richardson

367. DIFRA engaged the accounting firm of Sellers, Richardson, Watson, Haley & Logan, LLP (now known as Sellers, Richardson, Holman & West LLP) (“SRHW”) of Birmingham, Alabama to compile members’ Fittings shipment data and to report aggregated monthly data to each member. (CX 1333 at 003, 005 (January 2007 engagement letter describing data aggregation function); Brakefield, Tr. 1236 (DIFRA retained the accounting firm in January 2007); CX 0160 at 002 (Long providing members with instructions for reporting data to SRHW in April 2008)).

4. Industry Background

4.1 Fitting Basics

4.1.1 Applications

371. Fittings are used in pressurized water distribution and treatment systems to join pipes, valves and hydrants, and to change, divide or direct the flow of water. (Joint Stipulations of Fact, JX 0001 ¶ 6; Tatman, Tr. 219-220; CX 2494 (R. Fairbanks, Dep. at 79); CX 2502 (Prescott, Dep. at 51); CX 2489 (Morrison, IHT at 40); Thees, Tr. 3052-3053).

Response To Finding No. 371:

Respondent has no specific response.

372. Pressurized pipe applications, which include all potable water lines and some sewer lines, almost always use Fittings. (Webb, Tr. 2710-2711). Pressurized applications are those applications where the flow is not caused by gravity, and include pressurized water, pressurized reclaimed water, pump stations, treatment plants, and pressurized force main sewers. (Thees, Tr. 3053). All water lines are pressurized and some sewer lines are pressurized. (Thees, Tr. 3053).

Response To Finding No. 372:

This proposed Response posits a general practice or theory that, while may be accurate in certain instances, is just a generalized proposed assertion that may or may not be accurate in many or even most circumstances. Respondent therefore responds that the proposed Finding is over-generalized and over-broad, and subject to misinterpretation.

373. Fittings are relatively rarely used in gravity pipe lines; plastic fittings are more prevalent in those applications. (Webb, Tr. 2711-2712; CX 2489 (Morrison, IHT at 40) (Fittings are typically not used if the pipeline is not pressurized, as “[i]t would be overkill”).

Response To Finding No. 373:

This proposed Response posits a general practice or theory that, while may be accurate in certain instances, is just a generalized proposed assertion that may or may not be accurate in many or even most circumstances. Respondent therefore responds that the proposed Finding is over-generalized and over-broad, and subject to misinterpretation.

374. Fittings are used for both “line” (*i.e.*, underground) and “plant” projects. (Webb, Tr. 2710).

Response To Finding No. 374:

Respondent has no specific response.

375. “Plant” work refers to waterworks projects for water treatment plants, pumping stations, or wastewater treatment plants, which process water so that it can be consumed and process sewage so that it is clean when it is dumped. (CX 2502 (Prescott, Dep. at 48-49); Webb, Tr. 2710; Tatman, Tr. 227-228)). Plant work often involves the use of Fittings in systems that are indoors. (CX 2480 (Napoli, Dep. at 19-20)).

Response To Finding No. 375:

Respondent has no specific response.

376. Plant work generally uses the largest size fittings; uses many different, uncommonly used configurations; and has special coating and painting requirements. (Pais, Tr. 1913-1914).

Response To Finding No. 376:

This proposed Response posits a general practice or theory that, while may be accurate in certain instances, is just a generalized proposed assertion that may or may not be accurate in many or even most circumstances. Respondent therefore responds that the proposed Finding is over-generalized and over-broad, and subject to misinterpretation.

377. “Line” work refers to waterworks projects related to pipes that are located under the street in order to move water from water supply facilities to neighborhoods, or from neighborhoods to sewage facilities. (CX 2502 (Prescott, Dep. at 48); Webb, Tr. 2710). In comparison to plant work, “underground” distribution network waterworks projects use more predictable configurations and numbers of Fittings. (Pais, Tr. 1913; CX 2480 (Napoli, Dep. at 19-20) (describing line work as conveying water to and from neighborhoods, and as simpler and more straightforward than plant work)).

Response To Finding No. 377:

Respondent has no specific response.

4.1.2 Shapes, Sizes, and Configurations

378. There are several thousand unique configurations of Fittings in different shapes, sizes and coatings. (Joint Stipulations of Fact, JX 0001 ¶ 8). Each unique configuration has its own identifier and is a unique item or stock-keeping unit (SKU). (Tatman, Tr. 463;

CX 2500 (Swalley, Dep. at 104-105) (explaining that an SKU is a unique item). McWane estimates that it carries approximately 2,000 Fittings SKUs (RX-637 (Jansen, Dep. at 87)).

Response To Finding No. 378:

Respondent has no specific response.

4.1.2.1 Shape and Size

379. Fittings come in several shapes, including elbows, reducers and “T’s.” (Tatman, Tr. 220-221).

Response To Finding No. 379:

Respondent has no specific response.

380. Typically, ductile iron pipe fittings range in size from two or three inches to 48 inches. (CX 2521 (Agarwal, IHT at 64-65); CX 2491 (Johnson, IHT at 19-20) (“[W]hat we sell is basically 3 inch through 48 inch. . . . When you get into huge plants and huge transmission lines, you go up to 108 inches and that type. We don’t really get involved in that.”); CX 2525 (Minamyler, IHT at 95-96) (“three through 60”); CX 2483 (Tatman, IHT at 23) (“[W]ithin Union Foundry, we produced from three inches to 30 inches. . . . We do not manufacture currently any 36 through 48.”)).

Response To Finding No. 380:

This proposed Response posits a general practice or theory that, while may be accurate in certain instances, is just a generalized proposed assertion that may or may not be accurate in many or even most circumstances. Respondent therefore responds that the proposed Finding is over-generalized and over-broad, and subject to misinterpretation.

381. Two to twelve inch Fittings, or “small-diameter” Fittings, are predominately used for housing subdivisions and private contracting work. (Brakefield, Tr. 1279-1280; CX 1479; CX 2477 (Jansen, Dep. at 89) (describing 2” to 12” fittings as small-diameter)).

Response To Finding No. 381:

This proposed Response posits a general practice or theory that, while may be accurate in certain instances, is just a generalized proposed assertion that may or may not be accurate in

many or even most circumstances. Respondent therefore responds that the proposed Finding is over-generalized and over-broad, and subject to misinterpretation.

382. End Users of Fittings in the 14” through 24” range are generally municipalities or plants with long transmission lines funded by State Revolving Fund or EPA money. (Brakefield, Tr. 1281; CX 1479).

Response To Finding No. 382:

This proposed Response posits a general practice or theory that, while may be accurate in certain instances, is just a generalized proposed assertion that may or may not be accurate in many or even most circumstances. Respondent therefore responds that the proposed Finding is over-generalized and over-broad, and subject to misinterpretation.

383. Fittings 24” in diameter and below make up approximately of the overall market for ductile iron pipe fittings. (See CX 1895 at 001, 005, *in camera* (ACIPCO data showing 2008 ACIPCO sales of tons of diameter 24” and below and tons of over 24”); CX 2486 (Burns, Dep. at 159-160) (describing CX 1895); RX-127 at 002 (DIFRA data showing other suppliers’ combined 2008 sales of tons of diameter 24” and below and [REDACTED] tons of over 24”) (using the total tons shipped in calendar year 2008 from these documents, [REDACTED] are of diameter 24” and below); CX 2502 (Prescott, Dep. at 76-77) (85-95% of fittings sales are below 24”); CX 2510 (Groeniger, Dep. at 160-161) (explaining that Fittings below 24” “encompasses almost the whole band of fittings . . . almost a hundred percent”); CX 2492 (Johnson, Dep. at 71) (“The vast majority of them [Fittings] are under 24 [inches].”); CX 2504 (Thees, Dep. at 135) (Fittings below 24” “should cover the vast majority of what we sell”); CX 2538 (McCutcheon, IHT (Vol. 2) at 322) (fittings over 24” in diameter are generally considered to be a large diameter and an unusual size for the industry)).

Response To Finding No. 383:

See General Responses 3 and 6.

384. Historically, the industry has always differentiated Fittings of 3” to 24” in diameter from Fittings of 30” or more in diameter. (CX 2533 (Bhargava, Dep. at 43) (“Q. . . . why does Star divide the utility fittings into the two categories, the three-inch to 24-inch and the 30-inch and up? A. That is industry practice also.”)).

Response To Finding No. 384:

See General Response 6. Respondent also states that this proposed Response posits a general practice or theory that, while may be accurate in certain instances, is just a generalized

proposed assertion that may or may not be accurate in many or even most circumstances.

Respondent therefore responds that the proposed Finding is over-generalized and over-broad, and subject to misinterpretation.

385. Fittings above 24” in diameter, or “large-diameter” fittings, are predominately for public works jobs for large treatment plants or for moving water through large transmission lines. (Brakefield, Tr. 1281; CX 1479; CX 2477 (Jansen, Dep. at 90) (describing fittings over 24” in diameter as large-diameter)).

Response To Finding No. 385:

This proposed Response posits a general practice or theory that, while may be accurate in certain instances, is just a generalized proposed assertion that may or may not be accurate in many or even most circumstances. Respondent therefore responds that the proposed Finding is over-generalized and over-broad, and subject to misinterpretation.

4.1.2.2 End Configuration

386. There are several different types of Fittings “end configurations,” including “flanged,” “mechanical joint,” and “push-on.” (Webb, Tr. 2712-2713; Thees, Tr. 3052-3055)).

Response To Finding No. 386:

Respondent has no specific response.

387. “Flanged” Fittings are flat faced Fittings that connect to a flanged ductile iron pipe with nuts and bolts and a flat gasket sandwiched between the two flanges that provides a sealed joint. (Thees, Tr. 3054; Webb, Tr. 2713 (Flanged Fittings have a flanged end and are joined together with nuts and bolts)). Flanged fittings do not require an external restraint, and bolt directly onto a pipe. (CX 2480 (Napoli, Dep., at 22-23)).

Response To Finding No. 387:

Respondent has no specific response.

388. Flanged Fittings are typically used in above-ground applications, such as plants and lift stations. (Webb, Tr. 2713; Tatman, Tr. 227-228; Thees, Tr. 3054; CX 2502 (Prescott, Dep. at 18); CX 2480 (Napoli, Dep. at 22-23); CX 2477 (Jansen, Dep. at 78, 80) (flanged Fittings are typically used in plants, and are not recommended for below-ground applications)). State laws often forbid using flanged Fittings underground because their construction with nuts and bolts is prone to corrosion when the Fittings are buried. (Brakefield, Tr. 1280-1281).

Response To Finding No. 388:

This proposed Response posits a general practice or theory that, while may be accurate in certain instances, is just a generalized proposed assertion that may or may not be accurate in many or even most circumstances. Respondent therefore responds that the proposed Finding is over-generalized and over-broad, and subject to misinterpretation.

389. “Mechanical joint” (or “MJ”) Fittings do not employ nuts and bolts to connect to the ductile iron pipe, but use a gland that compresses the Fitting gasket against the ductile iron pipe as pressure flows through the system and an external restraint that secures the pipe to the fitting. (Tatman, Tr. 228; Webb, Tr. 2713; Thees, Tr. 3054-3055; CX 2480 (Napoli, Dep. at 22-23)).

Response To Finding No. 389:

Respondent has no specific response.

390. Mechanical joint Fittings are typically used for non-plant, underground applications. (Tatman, Tr. 228; Webb, Tr. 2713; CX 2502 (Prescott, Dep. at 50); CX 2522 (Agarwal, Dep. at 84)).

Response To Finding No. 390:

This proposed Response posits a general practice or theory that, while may be accurate in certain instances, is just a generalized proposed assertion that may or may not be accurate in many or even most circumstances. Respondent therefore responds that the proposed Finding is over-generalized and over-broad, and subject to misinterpretation.

391. “Push-on” Fittings are Fittings that connect only by being pushed on to the pipe. (Webb, Tr. 2713).

Response To Finding No. 391:

Respondent has no specific response.

392. Push-on Fittings are used in underground applications. (Webb, Tr. 2713-2714; CX 2522 (Agarwal, Dep. at 84)).

4.1.2.3 Pressure Rating**Response To Finding No. 392:**

Respondent has no specific response.

393. There are “full-body” and “short body” Fittings (Webb, Tr. 2712). Short-body Fittings are smaller and have thinner walls than Full-body Fittings. Full-body Fittings are used less often than short-body Fittings. (Webb, Tr. 2712-2713; CX 2477 (Jansen, Dep. at 83)).

Response To Finding No. 393:

Respondent has no specific response.

394. Full-body Fittings are commonly referred to as C110 Fittings. (CX 2510 (Groeniger, Dep. at 159-160)). A C110 Fitting is a longer, thicker, and heavier Fitting used in approximately 10% of Fittings jobs. C110 is a type of AWWA specification. (McCutcheon, Tr. 2292; CX 2477 (Jansen, Dep. at 83)).

Response To Finding No. 394:

Respondent has no specific response.

395. Short-body Fittings are commonly referred to as C153 Fittings. A C153 Fitting is thinner and lighter than a C110. C153 is a type of AWWA specification. (McCutcheon, Tr. 2292; CX 2477 (Jansen, Dep. at 83-84)).

Response To Finding No. 395:

Respondent has no specific response.

396. C110 and C153 Fittings are pressure rated up to 350 pounds per square inch, or PSI. (Thees, Tr. 3053).

Response To Finding No. 396:

Respondent has no specific response.

4.1.2.4 Coating and Lining

397. Suppliers generally line flanged Fittings with cement, but can also line them with polyethylene or epoxy to prevent corrosion. (Thees, Tr. 3055); CX 2509 (Groeniger, IHT at 42) (“special districts require epoxy lining”); CX 2491 (Johnson, IHT at 18) (“where they’re running sewer material through it that may be epoxy lined or something like that”).

Response To Finding No. 397:

This proposed Response posits a general practice or theory that, while may be accurate in certain instances, is just a generalized proposed assertion that may or may not be accurate in many or even most circumstances. Respondent therefore responds that the proposed Finding is over-generalized and over-broad, and subject to misinterpretation.

4.1.2.5 “A”, “B”, and “Oddball” Fittings

398. Of the many configurations of Fittings, a small number of Fittings cover a large percentage of the volume of Fittings sold in the market. (Tatman, Tr. 225).

Response To Finding No. 398:

Respondent has no specific response.

399. Approximately 80% of the demand for Fittings may be serviced with approximately 100 or fewer commonly used sizes and configurations of Fittings. These Fittings are commonly referred to in the industry as “A” or “B” Fittings. (Joint Stipulations of Fact, JX 0001 ¶ 9; CX 0120 at 10; Tatman, Tr. 225; Bhargava, Tr. 3010-3011 [REDACTED]; [REDACTED]; CX 2522 (Agarwal, Dep. at 73), *in camera* [REDACTED]).

Response To Finding No. 399:

Respondent has no specific response.

400. A and B items are relatively fast-moving Fittings items [REDACTED] (Bhargava, Tr. 3010-3011, *in camera* [REDACTED]; CX 2477 (Jansen, Dep. at 91) (A-items are frequently sold items); Webb, Tr. 2720-2722 (testifying that Distributors sell A-items quickly, and B-items are sold quickly, although not as fast as A-items); Thees, Tr. 3057 (A-items are the Fittings customers most commonly use; customers use B-items less than A-items); CX 2533 (Bhargava, Dep. at 62); CX 2522 (Agarwal, Dep. at 73), *in camera* (describing A-items as between 4” and 12” in diameter)).

Response To Finding No. 400:

This proposed Response posits a general practice or theory that, while may be accurate in certain instances, is just a generalized proposed assertion that may or may not be accurate in

many or even most circumstances. Respondent therefore responds that the proposed Finding is over-generalized and over-broad, and subject to misinterpretation.

401. “C” and “D” items are very low volume items (*e.g.*, items for which McWane sells fifty or fewer per year), and are relatively expensive to manufacture. (Tatman, Tr. 225-226; *see* McCutcheon, Tr. 2292-2293; CX 2533 (Bhargava, Dep. at 62)).

Response To Finding No. 401:

Respondent has no specific response.

402. “Oddball” Fittings are Fittings that are not routinely used on every project, and that End Users might request once a year or every five years. Distributors prefer not to stock Oddball Fittings. (Webb, Tr. 2721-2722; CX 2513 (Webb, IHT at 160); Thees, Tr. 3057-3058; Thees, Tr. 3057 (oddball Fittings are used only rarely)).

Response To Finding No. 402:

This proposed Response posits a general practice or theory that, while may be accurate in certain instances, is just a generalized proposed assertion that may or may not be accurate in many or even most circumstances. Respondent therefore responds that the proposed Finding is over-generalized and over-broad, and subject to misinterpretation.

4.1.3 Manufacturing

403. Generally, a Fitting is manufactured through the following steps: melting scrap metal in a cupola; transferring the molten metal to a casting area via a transfer ladle; fitting cores into molds so that the molded fitting is hollow; pouring the molten iron; shaking the casting out of the mold; machining off gates and risers, and creating bolt holes; cleaning; preparing for cement lining; painting; packaging; and shipping. (Brakefield, Tr. 1412-1414; Rona, Tr. 1488 (steps that may need to be performed after the casting of a Fitting include machining, cement lining and painting)).

Response To Finding No. 403:

This proposed Response posits a general practice or theory that, while may be accurate in certain instances, is just a generalized proposed assertion that may or may not be accurate in many or even most circumstances. Respondent therefore responds that the proposed Finding is over-generalized and over-broad, and subject to misinterpretation.

404. “Patterns” are made of aluminum, stainless steel, or wood. Manufacturers use patterns to make impressions in sand for pouring molten iron that takes the shape of the pattern. (CX 2522 (Agarwal, Dep. at 74)).

Response To Finding No. 404:

See General Response 6. Otherwise, Respondent has no specific response.

405. Disamatic (or “DISA”) molding lines are automated and represent the most efficient and economical manufacturing process for small-diameter Fittings. (Tatman, Tr. 435; Rona, Tr. 1489).

Response To Finding No. 405:

Respondent has no specific response.

406. McWane’s “DISA” automated molding unit for Fittings castings in Anniston, Alabama cost \$20 million, and can produce fittings up to 8” in diameter. (Tatman, Tr. 435). DISA is a brand of fittings molding equipment. (Tatman, Tr. 447).

Response To Finding No. 406:

Respondent has no specific response.

407. “Cope and drag” is a type of molding process for Fittings production. Cope and drag patterns are molds where the Fitting casting is produced in halves that are put together. (Rona, Tr. 1509-1510). The foundry pours molten iron into the cope and drag pattern to produce a Fitting. A foundry cannot produce a casting that is larger than the heights of the cope and drag put together. (CX 2505 (Frazier, Dep. at 55-56)).

Response To Finding No. 407:

Respondent has no specific response.

408. “Lost foam” is another Fittings production method, and involves placing styrofoam replicas of Fittings in casting sand. Molten metal is then poured into the sand, and the metal replaces the styrofoam. (Rona, Tr. 1510).

Response To Finding No. 408:

Respondent has no specific response.

409. A flask is a steel vessel that holds a Fittings pattern during the manufacture of a Fitting. (Rona, Tr. 1511, 1549-1550; CX 0282 at 008, 011 (showing lost foam flask and two Domestic lost foam Fittings produced by Sigma)).

Response To Finding No. 409:

Respondent has no specific response.

4.1.4 Related Waterworks Products

410. The primary products used in most waterworks projects are ductile iron and PVC pipe. Other waterworks products include the following: high density polyethylene pressurized pipe; drainage pipe; concrete pipe; gate valves; fire hydrants; butterfly valves; service brass; marking tape; water meters; joint restraints; glands; and mechanical joint and flanged Fittings. (Thees, Tr. 3050-3051; *see also* Sheley, Tr. 3386 (primary waterworks products are: pipe, valves, fire hydrants, service material, repair clamps, couplings, and Fittings); CX 2477 (Jansen, Dep. at 63-64) (listing pipes, fittings, valves, glands, meters, restraints, nuts, bolts and accessories as necessary items for waterworks projects)).

Response To Finding No. 410:

This proposed Response posits a general practice or theory that, while may be accurate in certain instances, is just a generalized proposed assertion that may or may not be accurate in many or even most circumstances. Respondent therefore responds that the proposed Finding is over-generalized and over-broad, and subject to misinterpretation.

411. “Glands” are made of ductile iron, and are used to create a seal between a pipe and a mechanical joint Fitting. (Tatman, Tr. 458-461; CX 1653 at 004; CX 2477 (Jansen, Dep. at 67)).

Response To Finding No. 411:

Respondent has no specific response.

412. “Joint restraints,” like glands, are made of ductile iron and also create a seal between a pipe and a fitting. In addition, a joint restraint is bolted on to both the pipe and the fitting in order to keep pipes from blowing out of fittings when the pipe is under pressure. (Tatman, Tr. 460-461; CX 2477 (Jansen, Dep. at 66-67)).

Response To Finding No. 412:

Respondent has no specific response.

413. “Accessories” include various products associated with Fittings, such as bolts, nuts, gaskets, and flanges. (McCutcheon, Tr. 2255). Glands are considered to be a Fitting accessory. (Tatman, Tr. 461). McWane sometimes sells Fittings with accessories. Fittings alone and Fittings with accessories have different price points and SKUs associated with them. (Tatman, Tr. 462-463).

Response To Finding No. 413:

Respondent has no specific response.

414. “Municipal castings” is a category that consists of products such as manhole covers and drainage grates. (CX 2539 (McCutcheon, Dep. at 8); CX 2543 (Coryn, IHT at 21-22)).

Response To Finding No. 414:

Respondent has no specific response.

4.2 Fitting Sales Basics

4.2.1 Fittings Are a Commodity Product Produced Pursuant to Industry Wide Standards

415. Fittings are homogeneous commodity products produced to American Water Works Association (“AWWA”) standards and specifications. (Joint Stipulations of Fact, JX 0001 ¶ 7; Answer at ¶ 27(a); Rybacki, Tr. 1114 (“We’re selling a commodity. Our products are commodity driven.”); CX 2477 (Jansen, Dep. at 18) (referring to Fittings as a commodity product)).

Response To Finding No. 415:

This proposed Response posits a general practice or theory that, while may be accurate in certain instances, is just a generalized proposed assertion that may or may not be accurate in many or even most circumstances. Respondent therefore responds that the proposed Finding is over-generalized and over-broad, and subject to misinterpretation.

416. Any Fitting that meets an AWWA specification is functionally interchangeable with any other Fitting that meets the same specification. (Tatman, Tr. 878-879 (Tatman referring to Domestic versus imported Fittings: “They’re exact one for one. . . . It’s corn. One kernel of corn, another kernel of corn. . . . There’s no difference in how you apply or use the product.”); Pais, Tr. 1922-1923 (“[T]he product is interchangeable. It’s a common product. Yes, we like to believe our quality is better, our service is better, but at the end of the day, that really doesn’t translate into a premium.”); CX 2477 (Jansen, Dep. 141) (Fittings are commodity products); Rybacki, Tr. 3572 (“our products are commodities, pretty much all work the same”)).

Response To Finding No. 416:

Respondent has no specific response.

417. Fittings produced by Sigma, McWane and Star that meet the same AWWA specifications are interchangeable with each other. (CX 2477 (Jansen, Dep. at 86)).

Response To Finding No. 417:

Respondent has no specific response.

418. Imported Fittings are equal in quality to Domestic Fittings. (CX 2535 (Bhutada, Dep. at 13-14) (noting only difference between imported and Domestic Fittings is place of origin)). Specifically, there is no difference in form or functionality of Domestic and imported Fittings. (RX-694 (Bhutada, Dep. at 14); Webb, Tr. 2730-2731 (there is no functional difference between Domestic and imported Fittings)).

Response To Finding No. 418:

Respondent has no specific response.

4.2.2 **Demand Inelasticity**

419. Demand for Fittings is largely driven by housing-related infrastructure construction and by construction of wastewater treatment plants, which in turn are driven by such factors as the rate of housing growth, and the age and condition of existing systems. (Joint Stipulations of Fact (JX 0001) ¶ 11; CX 2480 (Napoli, Dep. at 20-21) (demand for Fittings related to housing demand)).

Response To Finding No. 419:

Respondent has no specific response.

420. Fittings are a small sub-segment of the overall waterworks market, generally comprising 5% or less of the total cost of a typical waterworks project. (Joint Stipulations of Fact, JX 0001 ¶ 10; Tatman, Tr. 220-221); (CX 2538 (McCutcheon, IHT (Vol. 2) at 344) (A 10% increase in price of Fittings would not prompt an End User to forego the purchase of Fittings because the Fittings are a small portion of the total cost of the project to the End User); CX 2477 (Jansen, Dep. at 61) (estimating that Fittings comprise approximately 3% to 5% of materials used in waterworks projects)). Fittings account for only 1.5% to 2% of the cost of the materials in a typical line job. (CX 2538 (McCutcheon, IHT (Vol. 2) at 344-345)).

Response To Finding No. 420:

See General Responses 3 and 6. This proposed Response posits a general practice or theory that, while may be accurate in certain instances, is just a generalized proposed assertion that may or may not be accurate in many or even most circumstances. Respondent therefore responds that the proposed Finding is over-generalized and over-broad, and subject to misinterpretation.

421. Because Fittings represent a small portion of a Distributor’s overall bid for a waterworks project, the price of Fittings is not a major factor in determining whether a Distributor wins the bid. (CX 2489 (Morrison, IHT at 37-38) (“So you’re not going to get away with a big price discrepancy on anything, including fittings, but fittings at the time of the bid is not the driving factor.”)). The price of the pipe (PVC or ductile) is the primary factor when pricing a bundle of goods. (CX 2489 (Morrison, IHT at 37) (“the thing that [contractors] gauge that they’re most interested in is the pipe price. . . . that’s what everybody’s maneuvering and manipulating on the day of the bid”)).

Response To Finding No. 421:

See General Responses 3 and 6. This proposed Response posits a general practice or theory that, while may be accurate in certain instances, is just a generalized proposed assertion that may or may not be accurate in many or even most circumstances. Respondent therefore responds that the proposed Finding is over-generalized and over-broad, and subject to misinterpretation.

422. Demand for Fittings is inelastic; End User demand is not dependent on the price of the Fitting. In other words, a decrease in Fittings prices has not caused an increase in demand, nor has an increase in Fittings prices caused a decrease in demand. (CX 2477 (Jansen, Dep. at 81-82 (testifying that he has not observed the demand of Fittings being affected by the price of Fittings); *see also* Webb, Tr. 2723 (testifying that he has “never seen a correlation with any of our product lines up or down that impacted the demand side.”); Thees, Tr. 3058 (“Q. When the price of fittings go down, do your sales of fittings go up? A. No. Q. And when the price of fittings go up, do your sales of fittings go down? A. No.”); CX 2538 (McCutcheon, IHT (Vol. 2) at 344) (demand for Fittings is inelastic, because there is no natural substitute for Fittings that is within the price range of Fittings)).

Response To Finding No. 422:

See General Responses 3 and 6. The first sentence is an assumption without support and requires no response. Respondent also states that this proposed finding calls for expert analysis that is not supported by the cited authority.

423. Engineers that write specifications for Fittings are usually not concerned about price. (CX 2523 (Bhattacharji, Dep. at 134)).

Response To Finding No. 423:

Respondent states that the cited deposition transcript of Mr. Bhattacharji, a non-customer or engineer, does not support the proposed findinggg. No discovery of any such engineers was conducted and the record evidence does not support this paragraph. Further, this proposed Response posits a general practice or theory that, while may be accurate in certain instances, is just a generalized proposed assertion that may or may not be accurate in many or even most circumstances. Respondent therefore responds that the proposed Finding is over-generalized and over-broad, and subject to misinterpretation.

424. In a September 2008 marketing strategy memorandum, Mr. Pais explained that price elasticity for Fittings is low, and “lower prices don’t necessarily translate into proportionately higher volume.” (CX 1155 at 003 (stressing the need for “a certain amount of discipline and a selectively aggressive sales strategy” because of low demand elasticity)).

Response To Finding No. 424:

See General Responses 4 and 5. Respondent also states that the reference to “low” “elasticity” is that of counsel, and is argumentative, and is not supported by the cited authority.

4.2.3 Bidding Process

425. Some municipalities stock inventory and when they buy inventory they put out a list and buy by line items. (CX 2502 (Prescott, Dep. at 16)).

Response To Finding No. 425:

This proposed Response posits a general practice or theory that, while may be accurate in certain instances, is just a generalized proposed assertion that may or may not be accurate in many or even most circumstances. Respondent therefore responds that the proposed Finding is over-generalized and over-broad, and subject to misinterpretation.

426. Some municipalities put up for bid an annual contract for specific items, for example, Fittings, hydrants, valves, PVC pipe or ductile iron pipe. (CX 2480 (Napoli, Dep. at 37-41) (describing the annual contract bidding process for some municipal governments and municipal water authorities)). Whoever is the low bidder on the contract holds the price

for that item and supplies the item to the municipality for the year. (CX 2509 (Groeniger, IHT at 46)). Most waterworks projects are individual projects subject to a bidding process. (CX 2516 (Sheley, Dep. at 108-109); CX 2504 (Thees, Dep. at 139)).

Response To Finding No. 426:

This proposed Response posits a general practice or theory that, while may be accurate in certain instances, is just a generalized proposed assertion that may or may not be accurate in many or even most circumstances. Respondent therefore responds that the proposed Finding is over-generalized and over-broad, and subject to misinterpretation.

4.2.3.1 Specifications

427. The Fittings bidding process on an individual waterworks project begins with an End User completing a specification and publicly or privately requesting bids from contractors. (Thees, Tr. 3065-3066).

Response To Finding No. 427:

This proposed Response posits a general practice or theory that, while may be accurate in certain instances, is just a generalized proposed assertion that may or may not be accurate in many or even most circumstances. Respondent therefore responds that the proposed Finding is over-generalized and over-broad, and subject to misinterpretation.

428. When a municipality or regional water authority undertakes a waterworks project, it will generally issue specifications for all of the pipes, valves, hydrants, Fittings and related waterworks equipment needed for the project, and seek bids from contractors for its completion. (CX 2546 (Gibbs, Dep. at 61-62) (“A particular project you’re asked to give a bid on includes everything on the project.”); CX 2504 (Thees, Dep. at 138-140) (Once a project is “put on a bid list” the contractor begins “soliciting bids from suppliers for the various components that make up that project.”)).

Response To Finding No. 428:

Respondent has no specific response.

429. Project consulting engineers or municipal water districts (or both) write Fittings specifications. (Minamyer, Tr. 3136).

Response To Finding No. 429:

This proposed Response posits a general practice or theory that, while may be accurate in certain instances, is just a generalized proposed assertion that may or may not be accurate in many or even most circumstances. Respondent therefore responds that the proposed Finding is over-generalized and over-broad, and subject to misinterpretation.

430. To become an approved supplier for a particular water district End User, a supplier may need to call the district, give them a sales pitch and ask them to be included in their specifications. (Minamyer, Tr. 3137).

Response To Finding No. 430:

This proposed Response posits a general practice or theory that, while may be accurate in certain instances, is just a generalized proposed assertion that may or may not be accurate in many or even most circumstances. Respondent therefore responds that the proposed Finding is over-generalized and over-broad, and subject to misinterpretation.

431. If a particular brand of a waterworks item (*e.g.*, hydrants, valves, or meters) is listed in a specification, it is difficult to change the specification. (CX 2502 (Prescott, Dep. at 75) (specification is “very, very hard to break”). A specification for Fittings may, but does not typically, specify a particular brand or supplier of Fittings. (CX 2510 (Groeniger, Dep. at 170) (“Q. So what was the language used to specify a domestic fitting prior to the ARRA period? A. Well, they would use an AWWA standard, not list a manufacturer[.]”); CX 2492 (Johnson, Dep. at 82) (“Q. Do they ever specify a supplier of a fitting? A. Occasionally on very – if it’s a specialized valve or a fire hydrant or something like this, yes. Q. Do you ever see a supplier’s name for the fittings? A. Very seldom if at all.”); Thees, Tr. 3068 (explaining that specifications “state whatever AWWA conforming” standard is required, which determines whether the “fitting is acceptable” on a project)).

Response To Finding No. 431:

This proposed Response posits a general practice or theory that, while may be accurate in certain instances, is just a generalized proposed assertion that may or may not be accurate in many or even most circumstances. Respondent therefore responds that the proposed Finding is over-generalized and over-broad, and subject to misinterpretation.

432. Some End Users are willing to accept Fittings from different suppliers on the same project. (CX 2501 (Prescott, IHT at 69) (explaining that in the New England markets it is “very, very rare” to have an engineer that wants “all of the fittings to be the same name”); CX 2489 (Morrison, IHT at 38) (“Q. Are your customers willing to accept the ductile iron pipe fittings of several different suppliers on a particular project? A. Yes.”); CX 2527 (Pais, IHT at 47) (“As long as they [Fittings] meet the appropriate standards, which in most cases is AWWA, sure. They’re meant as interchangeable standards.”)).

Response To Finding No. 432:

See General Responses 3 and 6. This proposed Response posits a general practice or theory that, while may be accurate in certain instances, is just a generalized proposed assertion that may or may not be accurate in many or even most circumstances. Respondent therefore responds that the proposed Finding is over-generalized and over-broad, and subject to misinterpretation.

433. If a specification allows multiple brands of Fittings, it is the Distributor that decides which Fittings to use for the waterworks project. (CX 2477 (Jansen, Dep. at 139)).

Response To Finding No. 433:

This proposed Response posits a general practice or theory that, while may be accurate in certain instances, is just a generalized proposed assertion that may or may not be accurate in many or even most circumstances. Respondent therefore responds that the proposed Finding is over-generalized and over-broad, and subject to misinterpretation.

434. Once contractors receive the specification, they solicit bids and other assistance from Distributors that can supply the various products for that project. (CX 2504 (Thees, Dep. at 139)).

Response To Finding No. 434:

Respondent has no specific response.

435. Distributors provide the price for each product individually when responding to a project bid. (CX 2502 (Prescott, Dep. at 16)).

Response To Finding No. 435:

Respondent has no specific response.

4.2.3.2 Material Takeoffs

436. A contractor may request a “material takeoff” from a Distributor when the contractor wants to submit a bid for the project. (CX 2502 (Prescott, Dep. at 96 (“we’ll do a takeoff to the material that’s required for that project”))).

Response To Finding No. 436:

Respondent has no specific response.

437. A “material takeoff” is a process whereby a Distributor’s sales personnel look at a project’s blueprints and gather a list of materials that the End User will need to build the project. (Thees, Tr. 3037, 3066). After performing a material takeoff, the Distributor provides the bidding contractor with a quotation for all of the waterworks products needed to complete the project. (Thees, Tr. 3066-3067).

Response To Finding No. 437:

Respondent has no specific response.

438. Distributors typically do not specify the manufacturer of the Fittings when providing a material take off. (Thees, Tr. 3048 (“it’s not out of the realm of possibility that fittings may be specified by brand, but that is not as common as what you would see on . . . valves, hydrants and service brass.”); CX 2502 (Prescott, Dep. at 97-98) (“So we don’t even say that, we just say this is a six by six mechanical joint ductile iron cement line T.”); CX 2492 (Johnson, Dep. at 82) (“Q. Do you ever see a supplier’s name for fittings? A. Very seldom if at all.”)).

Response To Finding No. 438:

This proposed Response posits a general practice or theory that, while may be accurate in certain instances, is just a generalized proposed assertion that may or may not be accurate in many or even most circumstances. Respondent therefore responds that the proposed Finding is over-generalized and over-broad, and subject to misinterpretation.

4.2.3.3 Submittals

439. A “submittal” is a packet of information provided by a Distributor to an End User after the Distributor has been selected that identifies the types of products and brands that are being supplied. The End User will review the submittal to make sure it conforms to the specifications. (Thees, Tr. 3066-3069; CX 2489 (Morrison, IHT at 38) (Distributors provide a submittal after the contractor wins the bid and places a purchase order with the Distributor)). Distributors supply whatever brand was listed on the submittal documents.

(CX 2489 (Morrison, IHT at 38) (providing example of a submittal as stating, “These fittings are going to be from Tyler or SIGMA or Star.”)).

Response To Finding No. 439:

This proposed Response posits a general practice or theory that, while may be accurate in certain instances, is just a generalized proposed assertion that may or may not be accurate in many or even most circumstances. Respondent therefore responds that the proposed Finding is over-generalized and over-broad, and subject to misinterpretation.

4.2.3.4 **Purchase Orders**

440. After a contractor wins its bid, it contacts the Distributor to discuss scheduling, and to submit either a verbal or written purchase order. (Thees, Tr. 3069-3070). After it places the purchase order, the contractor will call to request that the Distributor release product, and the Distributor will supply product to the waterworks project either from its stock, or via a direct purchase order from the Distributor to a supplier who will deliver the product to the project site. (Thees, Tr. 3069-3070).

Response To Finding No. 440:

This proposed Response posits a general practice or theory that, while may be accurate in certain instances, is just a generalized proposed assertion that may or may not be accurate in many or even most circumstances. Respondent therefore responds that the proposed Finding is over-generalized and over-broad, and subject to misinterpretation.

4.2.4 **Lowest Price Fittings Typically Win the Sale**

441. Because Fittings are a commodity, price and relationship are the dispositive factors in making a Fittings sale. (Minamyler, Tr. 3135 (“[W]e were selling a commodity, and pretty much everybody’s fitting was the same, so it was -- they would buy from who had the best price and who they liked the best.”)).

Response To Finding No. 441:

Respondent has no specific response.

442. Fittings suppliers believed that price was increasingly becoming the most important factor when selling Fittings to Distributors. (CX 2477 (Jansen, Dep. at 143)).

Response To Finding No. 442:

Because this proposed finding references a proposed factual scenario that changed over time, but fails to bound the proposed finding within any date parameters, it is inaccurate and misleading.

443. Typically, the Fittings supplier with the lower price wins the job. (CX 2480 (Napoli, Dep. at 60)).

Response To Finding No. 443:

This proposed Response posits a general practice or theory that, while may be accurate in certain instances, is just a generalized proposed assertion that may or may not be accurate in many or even most circumstances. Respondent therefore responds that the proposed Finding is over-generalized and over-broad, and subject to misinterpretation.

444. From 2005 through 2009, Star believed that it needed to be the lowest priced competitor to win Fittings business. (Minamyer, Tr. 3146). If a customer provided Star with a competitor's lower prices, Star would react to that pricing by lowering its own price. (Minamyer, Tr. 3148-3150). The Fittings offered by McWane, Sigma, and Star are basically identical in terms of function or quality and therefore Star could not charge a higher price than that charged by McWane and Sigma except in limited situations in filling certain specific orders. (CX 2525 (Minamyer, IHT at 48)). Star could rarely justify charging a higher price for Fittings on the basis of providing better service than McWane or Sigma. (CX 2525 (Minamyer, IHT at 48)).

Response To Finding No. 444:

Star – like all Fittings suppliers – preferred not to discount below its published multipliers because such discounting reduced its profit margins. (RFPP ¶¶ 155, 160-162). See also response to ¶ 560, *infra*. Star offered project pricing throughout 2008 and after. (RPFF 160-182).

4.2.5 Lag Between Sale and Shipping

445. The amount of time from the initial Fittings bid or order to final delivery is not systematic, but is generally inconsistent and varies from market to market, ranging from immediate delivery to 30, 60, or 90 days. (CX 2502 (Prescott, Dep. at 16) (“from zero to it could be as much as two months. That would be very uncommon, but I – the average

probably two to three weeks”); CX 2504 (Thees, Dep. at 93) (explaining that Fittings can be shipped “next-day air”); CX 2522 (Agarwal, Dep. at 89), *in camera*).

Response To Finding No. 445:

Respondent has no specific response.

446. Fittings invoice data typically reflects Fittings purchases by Distributors that occurred 30-60 days prior to the invoice. (CX 1181 at 003 (“Invoice data reflects market pricing of 30-60 days prior.”)).

Response To Finding No. 446:

See General Response 5. This proposed Response posits a general practice or theory that, while may be accurate in certain instances, is just a generalized proposed assertion that may or may not be accurate in many or even most circumstances. Respondent therefore responds that the proposed Finding is over-generalized and over-broad, and subject to misinterpretation.

4.3 Domestic and Open Specifications

447. End Users writing the specifications determine whether a job requires Fittings that are manufactured in the United States (“Domestic Fittings”).² (Answer at ¶ 19; Webb, Tr. 2732-2733).

Response To Finding No. 447:

Respondent has no specific response.

² Except where otherwise noted or where the context otherwise requires, the term “Domestic Fittings” will refer herein to Domestic Fittings sold into Domestic-only Specifications.

448. A “Domestic” or “Domestic-only” specification or project requires Domestic Fittings to be used for that waterworks project, either because of End User preference or because it is required by municipal, state, or Federal law. (Joint Stipulations of Fact, JX 0001 ¶ 13; Tatman, Tr. 236, 273; McCutcheon, Tr. 2265-2266). Such specifications (“Domestic-only Specifications”) have been increasing for a variety of reasons, including patriotism, a concern for the unemployment rate in the United States, and other reasons. (CX 2537 (McCutcheon, IHT (Vol. 1) at 91)).

Response To Finding No. 448:

See General Response 3. This second sentence of this finding is inaccurate, mischaracterizes the evidence, and conflicts with the overwhelming testimony to the contrary. The overwhelming evidence is that domestic only specifications are on the decline, and have been for years. (RPF 376-424). Moreover, the United States Environmental Protection Agency (EPA) granted a nationwide public interest waiver of ARRA’s Buy American requirements “for de minimis incidental components of eligible water infrastructure projects funded by ARRA.” (RX 195; RX 155).

449. The entire Commonwealth of Pennsylvania, federal government projects, air force bases, and some municipalities around the country require Domestic Fittings, even without the Buy American provisions in ARRA. (McCutcheon, Tr. 2267-2268; CX 2523 (Bhattacharji, Dep. at 127) (Pennsylvania has a Buy American law); CX 2531 (Rybacki, Dep. at 270-272) (discussing CX 1151) (“Pennsylvania is almost all domestic. It’s a Steel Procurement Act, so it’s Tyler’s state. So they have their own multiplier; and, you know, nobody else really participates in Pennsylvania.”); Rona, Tr. 1520-1521; Webb, Tr. 2732-2733 (testifying that some projects had Domestic-only Specifications before ARRA was enacted, and some do today); RX-637 (Jansen, Dep. at 99-100) (attributing Pennsylvania’s Domestic Fittings requirements to the Pennsylvania Steel Act)).

Response To Finding No. 449:

This finding is incomplete and therefore misleading. See response to ¶ 448, *supra*.

450. Projects that do not require that Domestic Fittings be used – *i.e.*, that allow Fittings manufactured anywhere in the world – are referred to as “Open Specification” projects. (Tatman, Tr. 274; McCutcheon, Tr. 2266).

Response To Finding No. 450:

Respondent has no specific response.

451. Domestically manufactured Fittings can be used in Open Specification projects, but imported Fittings cannot be used in Domestic-only projects. (CX 2516 (Sheley, Dep. at 155-156) (“Q. Can you put a domestic in an import job? A. Yes. Q. Can you put an import in a domestic job? A. Domestic only, no.”); CX 2501 (Prescott, IHT at 41) (“you can’t supply foreign for domestic, but you can do vice versa”); Thees, Tr. 3056, 3078 (not aware of any instance where he supplied non-Domestic Fittings to a Domestic-only job); Webb, Tr. 2717-2718 (cannot supply imported Fittings when Domestic Fittings are specified because “[t]hat would not meet the specification.”); Thees, Tr. 3056; CX 2510 (Groeniger, Dep. at 171) (explaining that a wide open specification allows import Fittings to be used)).

Response To Finding No. 451:

See Response to No. 448, *supra*. This finding is incomplete, to the extent that the EPA granted a nationwide public interest waiver of ARRA’s Buy American requirements “for de minimis incidental components of eligible water infrastructure projects funded by ARRA.”

(RPFF ¶ 424; RX 195; RX 155)

452. At various times, McWane has referred to the mix of imported and domestically manufactured Fittings that it supplies to Open Specification projects as “blended” or “non-Domestic” Fittings. (Tatman, Tr. 273-274 (discussing RX-410, 2008 blended and domestic multiplier maps); CX 2440 at 002 (“Non Domestic” multiplier map); Tatman, Tr. 320-321 (discussing CX 2440)).

Response To Finding No. 452:

Respondent has no specific response.

453. Waterworks jobs that require Domestic Fittings also require domestically manufactured restraints, glands, and other accessories. (Tatman, Tr. 463).

Response To Finding No. 453:

See Response to No. 448. Moreover, this proposed Response posits a general practice or theory that, while may be accurate in certain instances, is just a generalized proposed assertion that may or may not be accurate in many or even most circumstances. Respondent therefore responds that the proposed Finding is over-generalized and over-broad, and subject to misinterpretation.

4.4 Market Structure

4.4.1 Suppliers

454. Star, Sigma and McWane all sell Fittings, joint restraints, castings, and accessories. (McCutcheon, Tr. 2254-2255; CX 2528 (Pais, Dep. at 7-8); CX 2442-A at 001; Tatman, Tr. 319, 1009-1010).

Response To Finding No. 454:

Respondent has no specific response.

455. In 2008 and 2009, and “historically for a number of years,” McWane’s primary competitors in the Fittings market were Sigma and Star. (Tatman, Tr. 245; CX 2480 (Napoli, Dep. at 59) (McWane’s two primary competitors are Sigma and Star); CX 2477 (Jansen, Dep. at 70) (considers the other suppliers of Fittings as his competitors); (CX 2480 (Napoli, Dep. at 59-60) (McWane’s primary competitors in the sale of Fittings are Star and Sigma); Pais, Tr. 1904 (in late 2007 Sigma’s primary Fittings competitors were McWane and Star); Pais, Tr. 2006 (McWane, Sigma, and Star are “the three primary suppliers” of Fittings); CX 2536 (Leider, Dep. at 18) (Star’s major competitors in 2008 and 2009 for the sale of Fittings were Sigma and McWane)).

Response To Finding No. 455:

Respondent has no specific response.

456. As a group, McWane, Sigma, and Star, account for more than _____ of Fittings (including both Domestic and imported) sold in the United States. (CX 2260 (Schumann Rep. at 17 - 18 tbl. 1), *in camera* (“McWane, Sigma, and Star’s market shares total _____ of U.S. shipments of ductile iron pipe fitting of 24 inches or less.”); Schumann, Tr. 3795; *see also* Tatman, Tr. 241-242, 559-560 (estimating 2008-2009 combined market share of 90% to 92%, including Fittings above 24” in diameter); Pais, Tr. 1981-1982 (estimating combined market share of 91% or 92%); McCutcheon, Tr. 2256 (estimating combined market share between 90% and 95%); CX 2500 (Swalley, Dep. at 32-33, 134) (Electrosteel USA considers McWane, Star and Sigma the primary Fittings competitors, since they collectively represent 90% of the overall Fittings market share nationwide); CX 1709 at 001, *in camera* (Star estimated its market share for fittings at between _____ and _____ in 2007 and first quarter 2008)).

Response To Finding No. 456:

See General Response 9 with respect to the citation to Dr. Schumann’s report and testimony. Otherwise, Respondent has no specific response.

457. McWane, Sigma, and Star had the following shares of United States Fittings sales, by tonnage, for the years 2007 through 2011:

	2007	2008	2009	2010	2011
McWane					
Sigma					
Star					

(CX 2260 (Schumann Rep. at 18 tbl. 1), *in camera*; see also CX 1163 at 006 (August 4, 2008 Pais email describing McWane, Sigma, and Star as the three suppliers of AWWA fittings, with McWane holding a 45% market share, Sigma holding about 30% and Star holding about 20%)).

Response To Finding No. 457:

See General Responses 5 and 9.

458. McWane and Star had the following shares of United States Domestic Fittings sales, by tonnage, for the years 2010 and 2011:

	2010	2011
McWane	██████	██████
Star	██████	██████

(CX 2260 (Schumann Rep. at 19 tbl. 2), *in camera*)).

Response To Finding No. 458:

See General Response 9. Respondent denies that there is a domestic-only market and denies the accuracy of Dr. Schumann’s analysis.

459. A small group of fringe suppliers (such as Metalfit, SIP, NAPAC, NACIP, Electrosteel and ACIPCO) constitute the balance of the market. (CX 2260-A (Schumann Rep. at 18)

(“A small group of fringe suppliers import Fittings into the United States.”); McCutcheon, Tr. 2255-2256 (estimating combined market share of these companies at 5% to 10% of Fittings sales (in tons))).

Response To Finding No. 459:

See General Response 9. To the extent this finding relies on the trial testimony of a fact witness, Respondent has no specific response. Respondent states that the use of the term “fringe” supplier is vague and ambiguous and subject to multiple interpretations. Respondent also denies that the purported “fringe” players do not exercise price-disciplining control over other Fittings suppliers locally, regionally, or even nationally and Complaint Counsel has introduced no evidence to the contrary.

460. As described in a 2009 McWane budget planning document, McWane’s “primary competitors” in Fittings are Sigma and Star, with SIP and NAPAC as “Second tier” competitors. (RX-618 at 004 (noting that Electrosteel was a potential entrant in 2009)).

Response To Finding No. 460:

See Response To Finding 459, *supra*.

461. Pricing decisions of companies such as ACIPCO, NAPAC, and Metalfit do not affect the ability of Star, McWane, and Sigma to implement a price increase. (CX 2538 (McCutcheon, IHT (Vol. 2) at 394)).

Response To Finding No. 461:

See General Responses 3 and 6. This finding is misleading and inaccurate, because it ignores the evidence that McWane made all of its pricing decisions based on its own independent analysis. (RFPP ¶ 199). *See* Response To Finding 459, *supra*.

462. Sigma and Star have larger shares in the market for large fittings, in which McWane is not as significant a competitor. (Schumann, Tr. at 4111 (“I found in my analysis of the data that only about 5 percent of the large fittings were produced by McWane in 2008”); CX 2531 (Rybacki, Dep. at 198) (large fittings “was [Sigma’s] strong point and Star’s Strong point as well”); (Tatman, Tr. 229 (Sigma and Star are better at plant work than McWane); Pais, Tr. 1915 (McWane “never had a plant work specialty” and “[f]or a long time they did not even produce most of the fittings used in plant work, such as the larger ones”)).

Response To Finding No. 462:

See General Response 9. Respondent states that the term “significant competitor” is vague and ambiguous and subject to multiple interpretations and that this proposed finding is not adequately supported.

4.4.2 Foundries

463. Ductile iron foundries are high-fixed-cost businesses that produce castings pursuant to purchase orders for producers of Fittings and other iron products. (CX 2505 (Frazier, Dep. at 23, 26-27); CX 2507 (Glidewell, Dep. at 21, 138); RX-658 (Keffer, Dep. at 14); RX-657 (Teske, Dep. at 22).

Response To Finding No. 463:

See General Response 6. This proposed Response posits a general practice or theory that, while may be accurate in certain instances, is just a generalized proposed assertion that may or may not be accurate in many or even most circumstances. Respondent therefore responds that the proposed Finding is over-generalized and over-broad, and subject to misinterpretation.

464. Fittings castings are unfinished, and may require the drilling of holes, turning and boring after shipment. (CX 2505 (Frazier, Dep. at 64)).

Response To Finding No. 464:

See General Response 6. Otherwise, Respondent has no specific response.

465. Foundries sell to (or are owned by) Fittings suppliers, not Distributors or End Users. (CX 2505 (Frazier, Dep. at 68-69); CX 2507 (Glidewell, Dep. at 122-123); CX 2517 (Hall, Dep. at 148-150)).

Response To Finding No. 465:

See General Response 6. Otherwise, Respondent has no specific response.

4.4.3 End Users

466. The typical end users of Fittings are municipalities, regional water authorities, and the contractors they engage to construct waterworks projects (collectively, “End Users”). (Joint Stipulations of Fact, JX 0001 ¶ 12; Saha, Tr. 1156; CX 2502 (Prescott, Dep. at 14); CX 2489 (Morrison, IHT at 29); McCutcheon, Tr. 2257 (End Users are generally contractors and municipalities); Sheley, Tr. 3386 (Illinois Meter’s customers include

utility contractors, municipalities, rural water districts, public water supply companies, and water and sewer service plumbers); Rybacki, Tr. 3487 (Fittings End Users are cities, towns, major water authorities, and contractors)).

Response To Finding No. 466:

This proposed Response posits a general practice or theory that, while may be accurate in certain instances, is just a generalized proposed assertion that may or may not be accurate in many or even most circumstances. Respondent therefore responds that the proposed Finding is over-generalized and over-broad, and subject to misinterpretation.

467. Contractors have a specialized set of skills, and typically do either plant work or line work, but not both. (CX 2489 (Morrison, IHT at 30) (“Some [contractors] are good at laying water lines, but they wouldn’t build a water plant if their life depended on it. But then somebody that just does water plant work probably isn’t going to bid a bunch of water line work.”); CX 2489 (Morrison, IHT at 14) (“An underground contractor that is laying water line to the building or to the house, he couldn’t buil[d] the house and the guy in the house couldn’t lay the water line.”)).

Response To Finding No. 467:

See General Responses 3 and 6. This proposed Response posits a general practice or theory that, while may be accurate in certain instances, is just a generalized proposed assertion that may or may not be accurate in many or even most circumstances. Respondent therefore responds that the proposed Finding is over-generalized and over-broad, and subject to misinterpretation.

468. Municipalities typically outsource large waterworks projects to contractors. (CX 2489 (Morrison, IHT at 31) (“Typically a municipality is not going to have enough people on the payroll to be able to do a major project.”)).

Response To Finding No. 468:

See General Responses 3 and 6. This proposed Response posits a general practice or theory that, while may be accurate in certain instances, is just a generalized proposed assertion that may or may not be accurate in many or even most circumstances. Respondent therefore

responds that the proposed Finding is over-generalized and over-broad, and subject to misinterpretation.

469. The relationship between Distributors and contractors is very important, with contractors tending to use specific Distributors more than others. Contractors typically deal with a limited number of waterworks Distributors. (CX 2477 (Jansen, Dep. at 18-19) (describing relationship between contractors and Distributors as a “lifeline” for Distributors); CX 2480 (Napoli, Dep. at 15) (contractors tend to have relationships with specific Distributors, although this has deteriorated due to the economic decline and pricing pressure); CX 2489 (Morrison, IHT at 23) (explaining that 75-80% of C.I. Thornburg’s contractor customers are giving 80-90% of their business to them); CX 2501 (Prescott, IHT at 30, 32 (some contractor customers give all of their business to one Distributor))).

Response To Finding No. 469:

See General Responses 3 and 6. This proposed Response posits a general practice or theory that, while may be accurate in certain instances, is just a generalized proposed assertion that may or may not be accurate in many or even most circumstances. Respondent therefore responds that the proposed Finding is over-generalized and over-broad, and subject to misinterpretation.

470. Contractors typically look to work with Distributors that they are close to geographically and have relationships with. (CX 2489 (Morrison, IHT at 10). CX 2477 (Jansen, Dep. at 18-19) (describing relationship between contractors and Distributors as a “lifeline” for Distributors); CX 2480 (Napoli, Dep. at 13-15) (contractors tend to have relationships with specific Distributors, although this has deteriorated due to the economic decline and pricing pressure))).

Response To Finding No. 470:

Respondent has no specific response. This proposed Response posits a general practice or theory that, while may be accurate in certain instances, is just a generalized proposed assertion that may or may not be accurate in many or even most circumstances. Respondent therefore responds that the proposed Finding is over-generalized and over-broad, and subject to misinterpretation.

471. End Users may shift their business to a different Distributor if a Distributor fails to provide the entire bundle of goods. (CX 2501 (Prescott, IHT at 58) (“The scary part is not losing them just once for the one job we couldn’t supply, why would he come back to us if the other guy took care of him. And the guy has been trying to get his business for whatever, take a number, 20 or 30 years. So the minute you give up on it and let the competition in the door, you could be saying bye-bye for a long period of time.”); CX 2489 (Morrison, IHT at 29) (“as your service level decreased, the contractor would quit doing business with you”); CX 2489 (Morrison, IHT at 74-75) (“[I]f there’s a project going on . . . that requires domestic fittings and I can’t get them fittings, one, I’m going to lose that order, and I’m probably going to lose future orders because they’re going to say: Well, hey, you –and, plus, word amongst contractors is going to be, ‘C.I. Thornburg reneged, failed, couldn’t supply fittings on this project. You better be careful on your project.”); CX 2489 (Morrison, IHT at 75) (It would be “devastating” to a Distributor if it could not supply Fittings on a project: “I’m choosing the word ‘devastating.’ I mean, it would not be good to not be able to supply fittings.”)).

Response To Finding No. 471:

See General Responses 3 and 6. This proposed Response posits a general practice or theory that, while may be accurate in certain instances, is just a generalized proposed assertion that may or may not be accurate in many or even most circumstances. Respondent therefore responds that the proposed Finding is over-generalized and over-broad, and subject to misinterpretation.

4.4.4 Distributors – General

472. Wholesale waterworks distributors (“Distributors”) purchase Fittings from suppliers and resell them to End Users. (Webb, Tr. 2707, 2726-2727; Thees, Tr. 3051, 3082).

Response To Finding No. 472:

Respondent has no specific response.

473. McWane does not sell to all Distributors, and would not be interested in selling Fittings through Distributors that are not historically in the waterworks industry. (CX 2477 (Jansen, Dep. at 151-152) (reasoning that such Distributors would not be committed to the Fittings industry, would be unlikely to have the necessary relationships with contractors to be successful at selling Fittings, and that dealing with such Distributors could cause friction with McWane’s existing distribution relationships)).

Response To Finding No. 473:

Respondent has no specific response

474. Waterworks Distributors typically do not service the plumbing market or sell plumbing materials. (CX 2489 (Morrison, IHT at 13) (explaining that plumbing is a “market we don’t know, understand, have any customer base with.”); *see also* CX 2480 (Napoli, Dep. at 34-35) (explaining that plumbing market is different)).

Response To Finding No. 474:

See General Responses 3 and 6. This proposed Response posits a general practice or theory that, while may be accurate in certain instances, is just a generalized proposed assertion that may or may not be accurate in many or even most circumstances. Respondent therefore responds that the proposed Finding is over-generalized and over-broad, and subject to misinterpretation.

4.4.4.1 Virtually All Fittings Are Sold Through Distributors

475. McWane, Sigma, Star, and others sell Fittings directly to Distributors, which then re-sell the Fittings to End Users. (Joint Stipulations of Fact, JX 0001 ¶ 14; Tatman, Tr. 251-252 (99% of McWane’s sales of ductile iron pipe fittings are through Distributors, rather than direct to contractors); McCutcheon, Tr. 2256-2257 (Star sells Fittings to water and wastewater industry wholesale Distributors); CX 2500 (Swalley, Dep. at 14-15) (Electrosteel USA tries to sell its Fittings exclusively through Distributors)).

Response To Finding No. 475:

Respondent has no specific response.

476. All or virtually all of McWane’s sales of Fittings are to Distributors. (Joint Stipulations of Fact, JX 0001 ¶ 15; Tatman, Tr. 252; CX 2477 (Jansen, Dep. at 17 (“The only customers are distributors. We don’t sell direct or very seldom would.”))).

Response To Finding No. 476:

Respondent has no specific response.

477. Sigma and Star also sell almost all of their Fittings to Distributors. (Rybacki, Tr. 1094-1095 (Sigma only sells Fittings through wholesale Distributors. It does not sell to End Users); CX 2531 (Rybacki, Dep. at 290) (Sigma does not sell direct to contractors); CX 2527 (Pais, IHT at 38-39); CX 2534 (Bhutada, IHT at 9) (direct sales from suppliers to End Users are virtually non-existent); McCutcheon, Tr. 2256-2257, 2260, 2263 (Star generally does not sell directly to End Users, and instead directs them to purchase Star’s Fittings through Distributors); (CX 2537 (McCutcheon, IHT (Vol. 1) at 9) (less than 3% of Star’s sales are direct to municipalities); Minamyer, Tr. 3134 (Star’s primary Fittings

customers in 2007 and 2008 were Distributors); CX 2526 (Minamyer, Dep. at 110) (Star does not sell directly to contractors)).

Response To Finding No. 477:

Respondent has no specific response.

478. The relationship between Fittings suppliers and Distributors is important to success in selling Fittings because Fittings are a commodity product. (CX 2477 (Jansen, Dep. at 18-19); CX 2480 (Napoli, Dep. at 13-15)).

Response To Finding No. 478:

Respondent has no specific response.

479. Distributors are less inclined to do business with a Fittings supplier that sells directly to End Users. (CX 2489 (Morrison, IHT at 56) (“I don’t care what product line or manufacturer you want to talk about, any time a manufacturer wants to sell direct, that doesn’t bode well, it doesn’t sit well with a distributor because we want a hundred percent of things to go through distribution, and no distributor is going to be happy or understand anything that has to go direct.”); *see also* CX 0500 at 001, *in camera*

; CX 2503

(Thees, IHT at 79-80) (describing CX 0500 and noting that McWane direct sale of Fittings to an End User was “an infrequent or unusual occurrence” and Ferguson wasn’t happy to see it happen); CX 2477 (Jansen, Dep. at 148-149 (explaining that one reason not to sell product directly to customers is to avoid competing with Distributors who are also selling McWane’s product))).

Response To Finding No. 479:

See General Responses 3 and 6. This proposed Response posits a general practice or theory that, while may be accurate in certain instances, is just a generalized proposed assertion that may or may not be accurate in many or even most circumstances. Respondent therefore responds that the proposed Finding is over-generalized and over-broad, and subject to misinterpretation.

4.4.4.2 Numbers and Market Share of Distributors

480. McWane, Sigma and Star sell Fittings to over 630 distinct customers (not branches), primarily Distributors. Most of these Distributor customers are small, local companies with just one or a few distribution yards. Then there are a handful of regional waterworks Distributors with multiple branches. Finally, there are two national

waterworks Distributors. Collectively, all of these customers make up thousands of branch locations throughout the United States. (CX 2564 (McWane sales data); CX 2504 (Thees, Dep. at 14-15) (“HD Supplies are the only national competitor we have. And then when you get down below that you’re looking at regional players. Main Line Supply, EJ Prescott in the northeast. Dana Kepner out west, ACT in Texas. . . . [L]et me throw in Winn Wholesale. Then a slew of independents that are either in a state or one or two markets.”); Saha, Tr. 1170 (noting 3,000 to 4,000 branches nationwide); *see also infra* § 4.4.5.5)).

Response To Finding No. 480:

See General Response 6. This finding is incomplete, and therefore inaccurate. Although there are 630 distributors in the United States many of the Distributors are large firms with substantial market power and national reach; Fittings are typically a very small part of a Distributor’s business. (RPF 40-56).

481. HD Supply and Ferguson are the two largest Fittings Distributors, and each has a national presence. (McCutcheon, Tr. 2261; Thees, Tr. 3045 (“We have one national competitor in HD Supply and a host of regional and local competitors of a much smaller scale”)).

Response To Finding No. 481:

Respondent has no specific response.

482. HD Supply’s Fittings distribution market share is approximately 28% to 30%. (McCutcheon, Tr. 2261; Webb, Tr. 2703-2704 (HD Supply estimates that it has an approximately 28% to 30% market share in the distribution of waterworks industry products); CX 2513 (Webb, IHT at 43) (same); *see also* McCutcheon, Tr. 2257; CX 2537 (McCutcheon, IHT (Vol. 1) at 56) (HD Supply is Star’s largest imported Fittings customer)).

Response To Finding No. 482:

Respondent has no specific response.

483. Ferguson’s Fittings distribution market share is about 15% to 25%. (McCutcheon, Tr. 2261-2262 (15% to 20%); Thees, Tr. 3045-3046 (Ferguson estimates that it has a 25% market share in the overall waterworks distribution market, and a similar share in Fittings)).

Response To Finding No. 483:

Respondent has no specific response.

484. There are a number of regional waterworks Distributors with multiple branches that service specific regional areas in the country. For example, EJ Prescott has 27 branches in Maine, Vermont, New Hampshire, Massachusetts, Rhode Island, Connecticut, New York, Ohio, and Indiana. (CX 2502 (Prescott, Dep. at 9)). Between 2005 and 2011, Groeniger & Company has had between 9 and 17 branches, located throughout California. (CX 2510 (Groeniger, Dep. at 9-10, 125)). C.I. Thornburg Company has 5 branches in West Virginia, Kentucky, and Tennessee. (CX 2490 (Morrison, Dep. at 20)). Illinois Meter Company has 5 branches in Illinois and Missouri. (CX 2516 (Sheley, Dep. at 11-12)).

Response To Finding No. 484:

Respondent has no specific response.

485. McWane sells to 250-300 Distributors that have approximately 1200 total branches. (CX 2477 (Jansen, Dep. at 139-140)).

Response To Finding No. 485:

Respondent has no specific response.

4.4.4.3 Relationships with End Users

486. End Users reap various benefits from purchasing waterworks products from Distributors rather than directly from suppliers. Distributors bundle waterworks products together, provide a single point of contact for all products, find alternate supply sources when needed, and have local relationships and local specification knowledge. (Thees, Tr. 3059; CX 2510 (Groeniger, Dep. at 202) (describing the benefits End Users gain by purchasing from Distributors rather than directly from suppliers as “certainly service, knowledge of the local specifications, local inventory to pull the ones and twosies from, credit applications”); CX 2504 (Thees, Dep. at 145-146) (“Well, one is supplying a bundle of products, not just a component of a job. We’ve got many more feet on the street to blanket the local market than any one manufacturer would have. So we can provide bundle. We can provide it timely, and we can provide it in small quantities and have a knowledgeable base about the product and the value. The contractors don’t know what they need. They rely on us to tell them in lot of cases. Two, we provide credit. A lot of times credit that we extend to these guys goes out a lot longer than what a manufacturer would be comfortable extending.”); CX 2537 (McCutcheon, IHT (Vol. 1) at 72-75) (it is a “nationwide norm” for contractors to source all of their waterworks needs for a particular job from a single Distributor because of efficiencies; “the bid almost never is split” among Distributors); CX 2480 (Napoli, Dep. at 30-31 (citing local knowledge of specifications and bids as a benefit of Distributors)).

Response To Finding No. 486:

This proposed Response posits a general practice or theory that, while may be accurate in certain instances, is just a generalized proposed assertion that may or may not be accurate in many or even most circumstances. Respondent therefore responds that the proposed Finding is over-generalized and over-broad, and subject to misinterpretation.

487. End Users typically source all of their waterworks needs as a one-stop shop for a particular project from a single Distributor because doing so allows them to access service, payment and delivery from a single source, rather than duplicating administrative effort with various sources. (Webb, Tr. 2723; Thees, Tr., 3060; CX 2489 (Morrison, IHT at 31-32) (explaining that contractors source all the waterworks products they need for a specific project from a single Distributor because contractors “want to hand you the order . . . and turn all the problems over to you. That way they only have one person they have to go yell at when something’s not going right. . . . it’s just a matter of service and reliability and comfort.”); CX 2501 (Prescott, IHT at 25) (“[H]e only needs to make one phone call to scream when – because all that’s got to be missing is one item and he can’t move.”); Webb, Tr. 2707 (Distributors are convenient for End Users, because End Users can purchase all of their waterworks supplies from a single source, rather than having to negotiate with each individual product manufacturer); Sheley, Tr. 3388 (customers benefit from buying a waterworks bundle because they get a better overall price, and correcting mistakes requires contacting a single company, rather than each supplier); CX 2537 (McCutcheon, IHT (Vol. 1) at 73-74) (it is the “absolute norm” in the industry that all the business of an End User for a project will go to a single Distributor, unless the Distributor cannot provide the contractor all products the Distributor needs for the project); CX 2544 (Coryn, Dep. at 102); CX 2510 (Groeniger, Dep. at 202); CX 2516 (Sheley, Dep. at 127-128); CX 2513 (Webb, IHT at 135-136); CX 2502 (Prescott, Dep. at 81); CX 2480 (Napoli, Dep. at 30) (explaining that Distributors provide end users with a “one-stop shop”)).

Response To Finding No. 487:

This proposed Response posits a general practice or theory that, while may be accurate in certain instances, is just a generalized proposed assertion that may or may not be accurate in many or even most circumstances. Respondent therefore responds that the proposed Finding is over-generalized and over-broad, and subject to misinterpretation.

488. Most waterworks distribution business is conducted on a bid-by-bid basis. Infrequently, Distributors will sometimes enter into contracts for up to one year with a municipality. (Thees, Tr. 3052). These annual contracts require Distributors to supply specific items at

an agreed upon price for a customer, primarily municipalities. (CX 2509 (Groeniger, IHT at 46)).

Response To Finding No. 488:

This proposed Response posits a general practice or theory that, while may be accurate in certain instances, is just a generalized proposed assertion that may or may not be accurate in many or even most circumstances. Respondent therefore responds that the proposed Finding is over-generalized and over-broad, and subject to misinterpretation.

489. Most End Users deal primarily with two or three Distributors, rather than fielding bids from a broader array of Distributors, in order to receive the best service and price. (Webb, Tr. 2725-2726; Sheley, Tr. 3392 (a typical contractor deals with two waterworks Distributors)). For example, the vast majority of Ferguson’s customers are repeat customers. (Thees, Tr. 3064-3065; Webb, Tr. 2726 (approximately 80% of HD Supply’s business was repeat business the last time it generated statistics, in 2005)).

Response To Finding No. 489:

This proposed Response posits a general practice or theory that, while may be accurate in certain instances, is just a generalized proposed assertion that may or may not be accurate in many or even most circumstances. Respondent therefore responds that the proposed Finding is over-generalized and over-broad, and subject to misinterpretation.

490. Distributors compete with each other on the basis of price, service and relationship with the End User. (Sheley, Tr. 3390-3391 (End Users select waterworks Distributors based on service levels, product availability, delivery levels, fill rates, price, and relationships with sales personnel); Thees, Tr., 3062 (testifying that End Users select the lowest cost bid, factoring in price for each individual product, as well as delivery efficiency and accuracy); CX 2502 (Prescott, Dep. at 12-13) (“price gets involved, but if it was just price a small company like this we would have a hard time surviving”); CX 2489 (Morrison, IHT at 37) (along with price, “there’s no doubt service is a factor and your personal relationship”)).

Response To Finding No. 490:

Respondent has no specific response.

491. End Users demand a high level of service. Therefore, for example, Ferguson’s value proposition to its customers includes a high level of service, including timely delivery, trouble-shooting during the job, and competitive pricing. (Thees, Tr. 3061; Webb, Tr.

2723-2726 (Distributor's ability to "provide on time deliveries, 95% order fill rates, zero errors" is the most important factor to End User Fittings customers in selecting a Distributor, followed by price and relationship); CX 2502 (Prescott, Dep. at 12) ("our whole business is service").

Response To Finding No. 491:

Respondent has no specific response.

4.4.4.4 Local Nature of Distribution Business

492. Distributors have multiple branches in order to service specific local geographic areas. (Sheley, Tr. 3382; Webb, Tr. 2700; CX 2489 (Morrison, IHT at 9) ("Well, most of what you sell you have to deliver, so you need to be within two or three hours of your customer just to make the delivery and get back in the same day. So, from a service standpoint, you need to have a location in the market area that you're trying to service."); CX 2502 (Prescott, Dep. at 9) ("Each location has its region . . . so that they can serve the area because of the service that's required today in the industry."); CX 2480 (Napoli, Dep. at 13) (explaining that Distributors sell Fittings to local markets of 20 minutes to an hour in driving distance)).

Response To Finding No. 492:

Respondent has no specific response.

493. A Distributor's service area is generally 50 to 200 miles from its branch location, depending on population, geography and driving patterns. Branch service areas tend to be smaller in more densely populated areas. (CX 2502 (Prescott, Dep. at 58); Webb, Tr. 2701-2702 (an HD Supply branch will service a 50- to 70-mile radius in a state like Florida, and a 150- to 200-mile radius in a Midwestern state); Thees, Tr. 3044 (Ferguson services areas extend from less than 60 miles to over 200 miles, depending on region); Sheley, Tr. 3382 (branch service areas no larger than 90 miles); CX 2501 (Prescott, IHT at 9-10) ("we push between 75 and a hundred and that . . . changes when we get to the midwest . . . that kind of service you've got to be less than 200 miles to give the kind of service that needs to be done."); CX 2489 (Morrison, IHT at 9) (describing the radius of effective service from a branch to be 150 to 200 miles); CX 2509 (Groeniger, IHT at 28-31) (describing the effective radius for its branches to be 50 miles to 300 miles)).

Response To Finding No. 493:

This proposed Response posits a general practice or theory that, while may be accurate in certain instances, is just a generalized proposed assertion that may or may not be accurate in many or even most circumstances. Respondent therefore responds that the proposed Finding is over-generalized and over-broad, and subject to misinterpretation.

494. Distributors primarily service waterworks projects in their own service area. (CX 2489 (Morrison, IHT at 10) (describing the problems servicing projects outside a service area to be “one, you don’t know the customer base because you don’t know any of the [] contractors, and number two would just be distance to deliver to a job site.”)). Distributors, however, will occasionally service loyal customers who are doing a project in an adjacent market. (CX 2502 (Prescott, Dep. at 59); Sheley, Tr. 3383 (over the last five years, a branch has serviced a project outside of its service area about two or three times per year, when the customer has a project outside the service area)).

Response To Finding No. 494:

This proposed Response posits a general practice or theory that, while may be accurate in certain instances, is just a generalized proposed assertion that may or may not be accurate in many or even most circumstances. Respondent therefore responds that the proposed Finding is over-generalized and over-broad, and subject to misinterpretation.

495. Generally speaking, it is difficult for an out-of-area Distributor to compete with the logistics and service of a local branch, local sales people, and locally stocked product. (Webb, Tr. 2700-2701 (HD Supply is unable to compete effectively in areas such as Vermont, where it has no local branch)). Delivery is also more expensive for out-of-area Distributors. Sheley, Tr. 3382 (Illinois Meter has multiple branches to service its customers because delivery is less expensive with local delivery)).

Response To Finding No. 495:

This proposed Response posits a general practice or theory that, while may be accurate in certain instances, is just a generalized proposed assertion that may or may not be accurate in many or even most circumstances. Respondent therefore responds that the proposed Finding is over-generalized and over-broad, and subject to misinterpretation.

4.4.4.5 Distributors Use Multiple Fittings Suppliers, and Benefit from Competition Among Fittings Suppliers

496. Distributors consider price, service, relationship, financial stability, warranty, and product quality when selecting a Fittings supplier. (Thees, Tr. 3082-3084 (Ferguson deals with multiple Fittings suppliers because its relationships with suppliers, and suppliers’ sales and support, vary in different areas of the country); CX 2489 (Morrison, IHT at 61)).

Response To Finding No. 496:

This proposed Response posits a general practice or theory that, while may be accurate in certain instances, is just a generalized proposed assertion that may or may not be accurate in many or even most circumstances. Respondent therefore responds that the proposed Finding is over-generalized and over-broad, and subject to misinterpretation.

497. Fittings Distributors generally purchase Fittings from at least three suppliers. (McCutcheon, Tr. 2258-2259; Webb, Tr. 2746 (HD Supply purchases imported Fittings from McWane, Sigma, and Star); Thees, Tr. 3082 (Ferguson purchases imported Fittings from McWane, Sigma, and Star); Sheley, Tr. 3398 (TDG has rebate programs for Fittings with SIP, McWane, Star, and Sigma); Sheley, Tr. 3406 (Illinois Meter’s purchases of imported Fittings are split about evenly between McWane and Star)).

Response To Finding No. 497:

This proposed Response posits a general practice or theory that, while may be accurate in certain instances, is just a generalized proposed assertion that may or may not be accurate in many or even most circumstances. Respondent therefore responds that the proposed Finding is over-generalized and over-broad, and subject to misinterpretation.

498. Distributors generally can obtain better pricing on Fittings when they have the option of purchasing Fittings from multiple suppliers. (Sheley, Tr. 3444-3445 (“Q. In 2008, Mr. Sheley, were you playing suppliers off one another to try and get a better price? A. Yes.”); CX 2489 (Morrison, IHT at 61-63 (noting that Distributors also have greater access to a full line of imported Fittings buying from multiple Fittings suppliers); CX 2513 (Webb, IHT at 172) (“Q. What about price? Are you able to leverage better price because you have three suppliers rather than two, more options? A. The more options is – is definitely there.”)).

Response To Finding No. 498:

Respondent has no specific response.

499. For Domestic Fittings, Distributors can only purchase Fittings from two manufacturers, Star and McWane, since they are the only Domestic Fittings suppliers. (McCutcheon, Tr. 2259; Webb, Tr. 2748-2749 (HD Supply purchases Domestic Fittings primarily from McWane, and only from Sigma when Sigma was selling McWane Fittings); Thees, Tr. 3118-3119, 3084-3085 (Ferguson currently purchases approximately 95% of its Domestic Fittings from McWane, and a “little bit” from Star, and only purchased McWane-

manufactured Domestic Fittings from Sigma when Sigma was selling McWane Fittings); Sheley, Tr. 3406 (Illinois Meter purchases Domestic Fittings from McWane only)).

Response To Finding No. 499:

This proposed finding is inaccurate. In addition to McWane and Star, and by Complaint Counsel's own admission, there are a number of other domestic Fittings manufacturers, suppliers and re-sellers (CCPFF §§ 3.4.1 (ACIPCO), 3.4.2 (Bachman), 3.4.3 (Griffin), 3.4.8 (U.S. Pipe), and 3.5 (domestic foundries).

500. A Distributor generally will purchase Fittings from its Distributor competitors only as a last resort when it is required to service a customer. Purchasing from competitors is more expensive and not routine. (Webb, Tr. 2726-2727; Thees, Tr. 3065 (Ferguson occasionally purchases Fittings from its competitors to complete a specific order, Ferguson prefers not to purchase Fittings from its competitors because it pays a premium on those Fittings compared to what it would pay a manufacturer)).

Response To Finding No. 500:

Respondent has no specific response.

4.4.4.6 Fittings Suppliers Use Multiple Distributors

501. Fittings suppliers do not generally work with a single Distributor, but instead sell their Fittings to multiple Distributors in a given territory. (Thees, Tr. 3047-3049).

Response To Finding No. 501:

This proposed Response posits a general practice or theory that, while may be accurate in certain instances, is just a generalized proposed assertion that may or may not be accurate in many or even most circumstances. Respondent therefore responds that the proposed Finding is over-generalized and over-broad, and subject to misinterpretation.

502. Greater access to Distributor branches means more potential sales for Fittings suppliers. (Saha, Tr. 1173).

Response To Finding No. 502:

This proposed Response posits a general practice or theory that, while may be accurate in certain instances, is just a generalized proposed assertion that may or may not be accurate in

many or even most circumstances. Respondent therefore responds that the proposed Finding is over-generalized and over-broad, and subject to misinterpretation.

503. McWane sells Fittings through multiple Distributors in the same local area because it increases the likelihood of McWane making the sale. (CX 2477 (Jansen, Dep. at 141-142) (explaining that Distributors' sales force extends the effectiveness of McWane's own sales force, and that dealing with multiple Distributors increases McWane's chances of dealing with the Distributor that has a special relationship with the winning contractor)).

Response To Finding No. 503:

Respondent has no specific response.

504. Star sells to as many Distributors as it can in a given region, since increasing the number of Distributors who carry Star's products increases the overall likelihood that Star will ultimately make a sale. (CX 2537 (McCutcheon, IHT (Vol. 1) at 59, 63) ("It's just math. . . . [F]ewer Distributors . . . cuts down on our ability to get more products - more projects."); McCutcheon, Tr. 2257 (selling to multiple Distributors in a particular geographic area improves Star's chances of selling Fittings)).

Response To Finding No. 504:

Respondent has no specific response.

505. Selling to only one Distributor in a market does not allow a Fittings supplier to reach all End Users in that market. (Saha, Tr. 1165). Selling to more Distributors enables a supplier to reach more End Users. (Saha, Tr. 1166).

Response To Finding No. 505:

This proposed Response posits a general practice or theory that, while may be accurate in certain instances, is just a generalized proposed assertion that may or may not be accurate in many or even most circumstances. Respondent therefore responds that the proposed Finding is over-generalized and over-broad, and subject to misinterpretation.

4.4.4.7 Distributor Pricing

506. Some Distributors may prefer higher market prices for Fittings because changes in Fittings prices can affect the value of their inventory. (Rybacki, Tr. 1110-1111) ("[I]f the marketplace becomes overaggressive and the prices fall, the distributor, the wholesaler, inventory gets devalued, and that's not a help to his or her business and certainly not a help to ours.")).

Response To Finding No. 506:

This proposed Response posits a general practice or theory that, while may be accurate in certain instances, is just a generalized proposed assertion that may or may not be accurate in many or even most circumstances. Respondent therefore responds that the proposed Finding is over-generalized and over-broad, and subject to misinterpretation.

507. A Distributor generally marks up a product by at least 20%, but suppliers like Star estimate that it would cost significantly more than that for a supplier to assume the responsibilities of a Distributor. (CX 2534 (Bhutada, IHT at 22)).

Response To Finding No. 507:

See General Responses 3 and 6. This proposed Response posits a general practice or theory that, while may be accurate in certain instances, is just a generalized proposed assertion that may or may not be accurate in many or even most circumstances. Respondent therefore responds that the proposed Finding is over-generalized and over-broad, and subject to misinterpretation.

508. Distributors pass along increases and reductions in wholesale prices of Fittings to End Users. (CX 2489 (Morrison, IHT at 98-99) (“[I]f prices go up you pass that along and if they go down the market demands that you pass that along.”); CX 2513 (Webb, IHT at 144-145) (explaining that when Fitting prices are high and rising HD Supply “would pass them on” to their customers and conversely when Fitting prices are falling HD Supply would pass them on to their customers as well because “competitive forces dictate”)).

Response To Finding No. 508:

See General Responses 3 and 6. This proposed Response posits a general practice or theory that, while may be accurate in certain instances, is just a generalized proposed assertion that may or may not be accurate in many or even most circumstances. Respondent therefore responds that the proposed Finding is over-generalized and over-broad, and subject to misinterpretation.

509. Distributors make higher profit margins on sales of valves, hydrants and Fittings, than on sales of pipe. (Sheley, Tr. 3387; CX 2503 (Thees, IHT at 22) (“Q. Your margins on

fittings, how do they compare to your margins on ductile iron pipe for example? A. They're higher. . . . Q. Your margins on valves and hydrants are pretty close to your margins on the ductile iron pipe fittings? A. Yes. Q. What do you attribute the difference in your margin on fittings to your margin on ductile iron pipe? A. Well, pipe is a bigger portion of the job. Typically when you look at a job that has ductile iron pipe, that may make up 60 to 70 percent of all the products being sold for the waterworks portion of that construction project; so because it's the product driving the job, it's a lower margin."); CX 2489 (Morrison, IHT at 32) ("typically the pipe is a lot of dollars at low margins").

Response To Finding No. 509:

Respondent has no specific response.

4.4.5 Distributors Provide Important Benefits to Fittings Suppliers and End Users

510. In addition to providing important benefits to End Users, (*see supra* ¶¶ 486-491), Distributors provide important benefits to Fittings suppliers and End Users. (CX 2537 (McCutcheon, IHT (Vol. 1) at 41-46) (listing efficiencies Distributors provide to suppliers and describing the cost to replicate these efficiencies as "astronomical"); CX 2534 (Bhutada, IHT at 9-15), *in camera*

Response To Finding No. 510:

See General Responses 3 and 6, and responses to ¶¶ 486-491, *supra*.

511. McWane recognizes that Distributors provide McWane with the following benefits: Distributors offer better sales coverage than McWane would have with its sales alone; Distributors have more local influence and more local knowledge of projects in their market area; Distributors carry local inventory; Distributors offer one-stop shopping for all needed waterworks products for the end user; Distributors help McWane's products be included in specifications; and Distributors streamline McWane's account receivables by taking the risk of non-payment from contractors. (CX 2477 (Jansen, Dep. at 139-141, 144-145); CX 2480 (Napoli, Dep. at 29-30)).

Response To Finding No. 511:

Respondent has no specific response.

512. McWane views Distributors as being "critical to [its] success." (CX 2477 (Jansen, Dep. at 150) (explaining reasoning because of the benefits provided by Distributors that are listed above); CX 0169 at 003 (January 2010 McWane Sales Managers Conference Call Agenda reflecting consensus that "distribution is critical to our success.")).

Response To Finding No. 512:

Respondent has no specific response.

4.4.5.1 Distributors Bundle Goods and Provide One-Stop Shopping

513. Because Distributors provide End Users with one-stop shopping for the full spectrum of waterworks products required for a particular project (*i.e.*, pipe, valves, Fittings, restraints, castings, *etc.*) (*see supra* ¶¶ 486-487), Fittings suppliers can compete for sales to Distributors without entering all of the adjacent waterworks product markets. (McCutcheon, Tr. 2260-2261; Webb, Tr. 2708-2709 (When HD Supply wins a bid, the contract typically covers a variety of products, including Fittings); Webb, Tr. 2729 (HD Supply provides one-stop shopping to its customers); Thees, Tr. 3051 (Ferguson sells all of the various waterworks products to its customers in bundles); Sheley, Tr. 3386 (Illinois Meter typically sells Fittings as a part of a bundle including pipes, valves, fire hydrants and Fittings); CX 2509 (Groeniger, IHT at 39) (pipe, valves, fire hydrants, Fittings and service material make up the entire bundle of products that Distributors provide to contractors to service a waterworks project); CX 2480 (Napoli, Dep. at 30) (explaining that Distributors provide end users with a “one-stop” shop)).

Response To Finding No. 513:

Respondent has no specific response.

4.4.5.2 Distributors Carry Inventory

514. Suppliers also benefit from Distributors carrying Fittings inventory because this frees up the suppliers’ working capital; and it provides much faster delivery service from the Distributors’ local branches to End Users than a Fittings supplier could achieve by selling directly to End Users. (Webb, Tr. 2728-2730 (HD Supply keeps local inventory of Fittings and other waterworks products such as pipe, valves, hydrants, and service material); Thees, Tr. 3059-3060 (Ferguson positions its product within a trading area to have ready access to deliver it to End Users); CX 2534 (Bhutada, IHT at 10, 19-20) (Distributors carry local inventory of Fittings and other products that are immediately available for delivery to contractors at job sites); CX 2510 (Groeniger, Dep. at 202); CX 2516 (Sheley, Dep. at 127-128); CX 2504 (Thees, Dep. at 145-146); CX 2489 (Morrison, IHT at 29) (“[T]he customer expects you to have [product] available in a reasonable amount of time . . . tomorrow . . . a couple days from now. They’re not looking for it in a week or ten days.”); CX 2494 (R. Fairbanks, Dep. at 95-96) (“Distributors are stocking distributors, and so there’s just a wide variety of fittings that can be on a project. And so the advantage is, is that, one is it could be in stock, and two is it can be almost immediate deliveries due to stock. And also deliveries, because there might be other products going out on the job site.”); CX 2502 (Prescott, Dep. at 11) (explaining stocking inventory provides a “great advantage because . . . the service that’s required today”); CX 2502 (Prescott, Dep. at 80); Sheley, Tr. 3398 (“A manufacturer can’t reasonably service a small municipality or a small contractor. There has to be local inventory, local delivery, a local contact person, if you will. It would be . . . uneconomical for every party involved . . .”); CX 2477 (Jansen, Dep. at 145) (explaining that Distributors house local inventory for McWane)).

Response To Finding No. 514:

Respondent has no specific response.

515. Providing inventory within a close proximity to the waterworks projects that the Distributor is servicing can help prevent expensive work delays if a Fitting is missing or malfunctioning. Distributors therefore typically provide product and services 24 hours a day, seven days a week. (CX 2502 (Prescott, Dep. at 79) (“no matter how big or how small you are, when you got an emergency and the water is running down the street and you got to fix it.”); CX 2489 (Morrison, IHT at 55) (explaining that Distributors provide service capabilities to contractors); CX 2509 (Groeniger, IHT at 27-28) (“[N]o job goes in the way it was laid out. There is always an obstacle in the way or going around the tree or they can’t get the easements so they had to move the pipeline over to here but that usually happens after the job is in progress. So they are stopping and starting and these guys, the crews are very very expensive. The machinery they have out there digging these trenches, there’s big equipment and, you know, it’s costing them thousands and thousands of dollars an hour and so they have to have the material and if they – if it was, you know, in Southern California where they’re working and they call up and say we’re not going to be able to get your material for a day and-a-half or two days, you know, they can just walk in and pick it you off much better. So, you have that ability being local to take care of their needs and they will always have needs and if we do that efficiently, that’s big because in most cases, the people doing the work or the contractor there, foremen, are being paid piece work for their profit there that they’re making on the job. They designed it to put in 400 feet a day and, if he is doing 600 feet a day, he is making a bonus. So, having somebody that keeps that machinery going is very very important and so you really have to have something that’s relatively close by.”)).

Response To Finding No. 515:

Respondent has no specific response.

516. Distributors maintain an inventory and aggregate small orders and shipments from contractors, which typically purchase small numbers of Fittings for individual projects. (CX 2502 (Prescott, Dep. at 81) (“manufacturers ship in quantity and the Distributors ship in pieces”); CX 2489 (Morrison, IHT at 55) (explaining that Distributors have “small trucks”); Sheley, Tr. 3387 (Illinois Meter benefits from bundling of waterworks products because it can make a single direct shipment of all waterworks products for a given project at once); CX 2534 (Bhutada, IHT at 19)).

Response To Finding No. 516:

Respondent has no specific response.

517. Distributors absorb the cost of freight for deliveries from the Distributor’s warehouse to the contractor’s job site. (CX 2534 (Bhutada, IHT at 10)).

Response To Finding No. 517:

See General Responses 3 and 6. Otherwise, Respondent has no specific response.

4.4.5.3 Distributors Provide Credit to End Users

518. Contractors often purchase on credit, and Distributors carry the credit risk of dealing with thousands of End Users. Suppliers avoid these credit costs by dealing through Distributors. (CX 2534 (Bhutada, IHT at 12-13); Webb, Tr. 2729 (HD Supply provides assumption of credit risk); (CX 2502 (Prescott, Dep. at 81) (“I think that’s [assuming credit risk] one of the biggest things, and I have always laughed about that because then the vendor don’t [*sic*] have to have a credit department . . .”); McCutcheon, Tr. 2260 (Distributors also provide suppliers with a credit cushion, by paying themselves, rather than requiring the contractor to do so); CX 2537 (McCutcheon, IHT (Vol. 1) at 41-42) (same); CX 0169 at 003 (January 2010 McWane Sales Managers Conference Call minutes noting benefits of distribution to include Distributors “carry[ing] the paper and inventory and once in a great while do spec work”); CX 2521 (Agarwal, IHT at 81-82), *in camera*)).

Response To Finding No. 518:

Respondent has no specific response.

4.4.5.4 Distributors Expand Supplier Sales and Service Capabilities

519. Distributors employ sales personnel dedicated to identifying business opportunities and servicing End Users, saving suppliers from having to employ their own large, nationwide sales forces. (CX 2480 (Napoli, Dep. at 31) (McWane would “have to have a daily, hourly presence in - in each area in order to - to absorb [the] role” of the Distributor in monitoring potential bid opportunities in the local markets); McCutcheon, Tr. 2260-2261 (Distributors magnify the reach of a supplier’s sales force); Webb, Tr. 2728 (HD Supply provides a sales force in excess of 400 people); CX 2534 (Bhutada, IHT at 12-13, 19-20), *in camera* [REDACTED] CX 2544 (Coryn, Dep. at 103) (identifying the sales force as an efficiency Distributors provide); CX 2546 (Gibbs, Dep. at 65-66) (describing WinWater’s sales force as benefit it provides to the supply chain); CX 2510 (Groeniger, Dep. at 202) (explaining that “normally speaking” Distributors have larger sales forces than suppliers); CX 2502 (Prescott, Dep. at 82) ; CX 2489 (Morrison, IHT at 11) (describing C.I. Thornburg sales force to include 20 outside salespeople and 18 inside salespeople); CX 2501 (Prescott, IHT at 10-11) (explaining that E.J. Prescott’s outside sales force of 60 individuals “[s]ervice the customer with what he is looking for”); CX 2501 (Prescott, IHT at 17) (“national manufacturing in this country would need 5,000 salesman at a minimum and then they would always be on the wrong corner.”); CX 2502 (Prescott, Dep. at 78);

CX 2502 (Prescott, Dep. at 46) (describing E.J. Prescott’s sales force as including 60 outside sales individuals and 75 inside sales individuals); CX 2516 (Sheley, Dep. at 127-128) (including Distributors’ sales forces as one of many efficiencies Distributors provide to the market); CX 2504 (Thees, Dep. at 145-146) (describing the “many more feet on the street” as an efficiency)).

Response To Finding No. 519:

Respondent has no specific response.

520. Distributors support End Users through technical assistance and training regarding waterworks jobs, and by packaging up the discrete waterworks components and making sure that all pieces that the customer needs have the correct characteristics and arrive on time. In addition, End Users pay Distributors directly, rather than paying individual suppliers, and provide a higher level of service than a supplier would, including small-volume deliveries and 24-hour service. (Sheley, Tr. 3399-3401).

Response To Finding No. 520:

Respondent has no specific response.

521. Distributors handle returns of products from the contractor,
(CX 2534 (Bhutada, IHT at 12, 20)
in camera; Webb, Tr. 2729-2730 (HD Supply provides processing of returns)).

Response To Finding No. 521:

See General Responses 3 and 6. Otherwise, Respondent has no specific response.

522. Distributors provide a single point of contact for invoicing and collection, saving suppliers the transaction costs of managing relationships with multiple End Users, and lessening suppliers’ exposure to End User credit risk. (CX 2544 (Coryn, Dep. at 102-103) (explaining that Distributors “daily” assume a credit risk in dealing with the End Users); CX 2510 (Groeniger, Dep. at 202) (“Q. Do distributors handle the billing and collections from their customers? A. Yes, that’s the credit scenario. Some people will allow a looser credit format with their customer than a manufacturer would. And that’s probably one of the main underlying reasons why manufacturers would rather go through distribution because they can guarantee their money quicker than if they were selling to the contractor directly.”); CX 2516 (Sheley, Dep. at 127-128) (including the following in a summary of efficiencies Distributors provide: “assume credit risk, have robust billing, invoice and collection system in place”); CX 2504 (Thees, Dep. at 145-146) (“[W]e provide credit. A lot of times credit that we extend to these guys goes out a lot longer than what a manufacturer would be comfortable extending.”); CX 2494 (R. Fairbanks, Dep. at 96) (“[I]f you’re a distributor it sort of means you’re local and you know the people in your marketplace and you know how to manage credit. It’s very difficult to manage credit from long distance, sometimes, as to what’s going on in the local marketplace. So distributors carry the credit on – with the contractors on these

projects.”); CX 2502 (Prescott, Dep. at 81) (agreeing that Distributors “bill and invoice and collect” from End Users)).

Response To Finding No. 522:

Respondent has no specific response.

523. Distributors have local knowledge of what is required in each specific market they are servicing. (CX 2489 (Morrison, IHT at 55); CX 2480 (Napoli, Dep. at 30 (describing how Distributors can use knowledge of local municipalities to guide contractors)).

Response To Finding No. 523:

Respondent has no specific response.

524. Fittings suppliers are not able to service End Users. (CX 2489 (Morrison, IHT at 55) (“[Suppliers] have no way to service the customer or the job because they’re so far away. I mean, I just can’t imagine a scenario where they could sell a project direct to the contractor because they don’t have the service capabilities to do that.”)).

Response To Finding No. 524:

See General Responses 3 and 6. This proposed Response posits a general practice or theory that, while may be accurate in certain instances, is just a generalized proposed assertion that may or may not be accurate in many or even most circumstances. Respondent therefore responds that the proposed Finding is over-generalized and over-broad, and subject to misinterpretation.

4.4.5.5 **Benefits of National Distributors**

525. Suppliers obtain benefits from dealing through major national Distributors like HD Supply and Ferguson, due to the large number of branch locations operated by these Distributors. They purchase larger volumes, which is inherently more efficient than individual sales to smaller Distributors. (CX 2534 (Bhutada, IHT at 27); Webb, Tr. 2728-2729 (HD Supply’s branch footprint is a benefit to Fittings suppliers)).

Response To Finding No. 525:

The United States Environmental Protection Agency (EPA) granted a nationwide public interest waiver of ARRA’s Buy American requirements “for de minimis incidental components of eligible water infrastructure projects funded by ARRA.” (RX 195; RX 155).

526. Advantages of a Distributor having multiple branches include local market presence, expedient delivery, quick access to a broad array of products, and the ability to bundle different product types together. (Thees, Tr. 3042-3043).

Response To Finding No. 526:

Respondent has no specific response.

527. Sales to larger Distributors like HD Supply and Ferguson also result in “commercial validation,” *i.e.*, recognition by other, smaller Distributors that the products purchased by larger Distributors are technically sound and commercially viable. (CX 2534 (Bhutada, IHT at 27)).

Response To Finding No. 527:

See General Responses 3 and 6. This finding is nothing more than the self-serving opinion of a Star witness, given in a proceeding in which Respondent had no opportunity to cross-examine.

528. Star finds selling to HD Supply and Ferguson advantageous, because they lend credibility to Star’s Fittings. For example, Winwater, another Distributor, indicated to Star that it chose Star Fittings because HD Supply and Ferguson were also purchasing Star’s Fittings. (McCutcheon, Tr. 2262-2263; CX 2537 (McCutcheon, IHT (Vol. 1) at 51)).

Response To Finding No. 528:

With respect to the first sentence of this proposed finding, see General Response 1. The first sentence of this finding is an unsupported assertion and therefore requires no response. The second sentence is based on inadmissible hearsay and is nothing more than the self-serving opinion of a Star witness. See also General Response 10.

529. In any given region, there are likely to be fringe Distributors that may carry some but not all waterworks products or brands, or have less well developed sales and distribution networks and End User relationships. These small fringe players do not provide as much value to suppliers as more established Distributors. (CX 2510 (Groeniger, Dep. at 153) (“Between all three of us [Groeniger, HD Supply and Ferguson] we were the vast majority of the business but there were probably two or three independents that were at the outer fringes of their service capability, but they would enter into it also.”); CX 2504 (Thees, Dep. at 14-15) (describing fringe Distributors as “a slew of independents that are either in a state or one or two markets.”); RX-637 (Jansen, Dep. at 150-151) (explaining

that McWane does not sell to additional Distributors in markets where “we have what we feel is enough existing coverage”).

Response To Finding No. 529:

See General Response 6. This proposed Response posits a general practice or theory that, while may be accurate in certain instances, is just a generalized proposed assertion that may or may not be accurate in many or even most circumstances. Respondent therefore responds that the proposed Finding is over-generalized and over-broad, and subject to misinterpretation.

530. Suppliers with access to only smaller Distributors lack market access, and are inhibited in their ability to grow their business. (Saha, Tr. 1171-1172; CX 2500 (Swalley, Dep. at 263) (to really break into the U.S. Fittings market, Electrosteel USA would need to be able to sell into the 90% of the market that is the big Distributors); CX 2500 (Swalley, Dep. at 131-132) (Electrosteel USA does not expect that its Fittings business will continue to grow unless and until one of the major four Distributors in the Southeast agrees to sell its Fittings products)).

Response To Finding No. 530:

See General Response 6. This finding is based solely on the self-serving testimony of two small Fittings suppliers. See also RPF 255-497.

4.4.6 Barriers to Distributor Entry

531. There are high barriers to entry into the waterworks distribution business. (*Infra* ¶¶ 532-542).

Response To Finding No. 531:

See General Response 1. This finding is a conclusion of law rather than a factual finding and is incorrect. It is incorrect, but it requires no response. See responses to ¶¶ 532-542, *infra*.

4.4.6.1 Start-Up Costs

532. Firms may enter new markets as Distributors by either building a new branch from scratch, referred to as “greenfielding,” or by acquisition of an existing branch. (Webb, Tr. 2704). Acquiring or opening a new branch involves costs associated with inventory, personnel, and licensing. (Webb, Tr. 2705).

Response To Finding No. 532:

This proposed Response posits a general practice or theory that, while may be accurate in certain instances, is just a generalized proposed assertion that may or may not be accurate in many or even most circumstances. Respondent therefore responds that the proposed Finding is over-generalized and over-broad, and subject to misinterpretation.

4.4.6.2 **Access to Full Range of Waterworks Products**

533. In order to service customers, Distributors need access to a full range of product lines, including pipe, Fittings, valves, hydrants, meters, and brass. (CX 2501 (Prescott, IHT at 14)).

Response To Finding No. 533:

See General Responses 3 and 6. This proposed Response posits a general practice or theory that, while may be accurate in certain instances, is just a generalized proposed assertion that may or may not be accurate in many or even most circumstances. Respondent therefore responds that the proposed Finding is over-generalized and over-broad, and subject to misinterpretation.

534. It is not easy for a Distributor looking to establish a new branch to establish all the required products lines to service local requirements. (CX 2489 (Morrison, IHT at 16) (“That’s probably the biggest obstacle is who are you going to buy from.”); CX 2501 (Prescott, IHT at 15) (explaining that Distributors “work for a long time to get the best lines you can get and then the loyalty between both ways is a big factor”)).

Response To Finding No. 534:

See General Responses 3 and 6. This proposed Response posits a general practice or theory that, while may be accurate in certain instances, is just a generalized proposed assertion that may or may not be accurate in many or even most circumstances. Respondent therefore responds that the proposed Finding is over-generalized and over-broad, and subject to misinterpretation.

535. Unlike Fittings suppliers, suppliers of hydrants, valves and meters often enter into exclusive relationships with Distributors in certain service areas. (CX 2489 (Morrison, IHT at 17 (“Valve and hydrant manufacturers tend to just have a single distributor in an area.”); CX 2502 (Prescott, Dep. at 75) (a new entrant’s “biggest problem is the lines. . . . most of the lines are tied up by [other Distributors]”); CX 2501 (Prescott, IHT at 16)).

Response To Finding No. 535:

See General Responses 3 and 6.

4.4.6.3 Establishing Local Personnel and Relationships

536. A major challenge to entering waterworks distribution is the education of personnel on local products and specifications, local market conditions, and the products they are selling. (CX 2502 (Prescott, Dep. at 72)).

Response To Finding No. 536:

See General Response 6.

537. With respect to sales personnel, local hires are better due to their customer relationships and knowledge of local specifications and geography. (Webb, Tr. 2705-2706; CX 2489 (Morrison, IHT at 19) (Distributors need to “have a personal relationship with the people [to whom they are] trying to sell”)).

Response To Finding No. 537:

This proposed Response posits a general practice or theory that, while may be accurate in certain instances, is just a generalized proposed assertion that may or may not be accurate in many or even most circumstances. Respondent therefore responds that the proposed Finding is over-generalized and over-broad, and subject to misinterpretation.

538. It can take years for a new Distributor to develop the right relationships with local contractors to get any sales. (CX 2489 (Morrison, IHT at 20) (“[I]f you send someone that’s not familiar with the contractors . . . you could be five years before you get your first order because they don’t know anybody and they’re not known and it goes both ways.”)).

Response To Finding No. 538:

See General Responses 3 and 6. This proposed Response posits a general practice or theory that, while may be accurate in certain instances, is just a generalized proposed assertion

that may or may not be accurate in many or even most circumstances. Respondent therefore responds that the proposed Finding is over-generalized and over-broad, and subject to misinterpretation.

539. Greenfield entry by a Distributor into a new locality without people that have established local relationships is much slower than entry through acquisition because waterworks is a local, relationship business. (Thees, Tr. 3050 (“[W]e view that as something that will take a significant amount of time in order to develop, thus turn into sales and turn into profits.”)).

Response To Finding No. 539:

This proposed Response posits a general practice or theory that, while may be accurate in certain instances, is just a generalized proposed assertion that may or may not be accurate in many or even most circumstances. Respondent therefore responds that the proposed Finding is over-generalized and over-broad, and subject to misinterpretation.

4.4.6.4 Plumbing Distributors Cannot Easily Enter Waterworks Distribution

540. Waterworks Distributors typically do not regard plumbing distributors as competitors. (CX 2489 (Morrison, IHT at 14-15)).

Response To Finding No. 540:

See General Responses 3 and 6. This finding is the opinion of only one distributor, which McWane did not have the opportunity to cross-examine.

541. Plumbing distributors do not make good waterworks Distributors. (Sheley, Tr. 3384-3385) (explaining that plumbing distributors are “used to selling copper fittings at a half a cent profit or less, and they sell toilets and showers, and we don’t sell any of that,” that “there’s a lot of difference between a fire hydrant and a toilet,” and that plumbing distributors have a “real hard time making money in the waterworks business when they do it out of a plumbing supply house” because plumbers “don’t understand the service levels” or “what it takes to be profitable” in waterworks)).

Response To Finding No. 541:

This proposed Response posits a general practice or theory that, while may be accurate in certain instances, is just a generalized proposed assertion that may or may not be accurate in

many or even most circumstances. Respondent therefore responds that the proposed Finding is over-generalized and over-broad, and subject to misinterpretation. Moreover, this proposed finding is based on the opinion of only one witness who is a distributor.

542. Plumbing distributors lack the industry knowledge, expertise, and relationships to effectively serve waterworks contractors. (CX 2489 (Morrison, IHT at 15-16) (explaining that plumbing distributors do not handle the same materials as waterworks Distributors and they lack the product knowledge needed for waterworks products); CX 2509 (Groeniger, IHT at 14 (waterworks Distributors often deal with unique sets of specifications for each specific project, whereas plumbing distributors typically deal with one set of specifications, “what they call the universal plumbing code.” If plumbing distributors have the materials that comply with that code they can use the material anywhere they want); CX 2509 (Groeniger, IHT at 18) (plumbing distributors do not have relationships with waterworks contractors)).

Response To Finding No. 542:

See General Responses 3 and 6. This finding is the opinion of only two distributors, which McWane did not have the opportunity to cross-examine.

4.5 How Prices Are Set

4.5.1 Published List Prices and Price Multipliers

543. Published Fittings prices have two components: a nationwide list (or catalog) price, and a regional “multiplier” that reduces the list price. The net published price for a given Fittings item in a given state is the list price multiplied by the then-applicable multiplier for that state. For example, if a Fitting has a \$1,000 list price, and the Texas multiplier is .28, the published price for that individual Fitting in Texas will be \$1,000 x .28, or \$280. (Tatman, Tr. 277; Rybacki, Tr. 1096-1097; CX 2535 (Bhutada, Dep. at 102); Webb, Tr. 2770-2771 (Fittings suppliers communicate prices to Distributors like HD Supply through published list prices and multipliers)).

Response To Finding No. 543:

Respondent has no specific response.

544. Multipliers vary from state to state based upon the prevailing competitive environment in each state. (Tatman, Tr. 277; CX 2526 (Minamyer, Dep. at 102) (Star generally had a multiplier for each state but in some instances, for states like Texas, there were two or more trading areas to which Star would assign different published multipliers)).

Response To Finding No. 544:

Respondent has no specific response.

545. This list-price-times-multiplier price is referred to as a Fitting’s “published price” or “standard price.” (Tatman, Tr. 258-259 (list price and published multiplier for a geographic region establish “published pricing”); Rybacki, Tr. 1097, 1103 (“standard price”); Rybacki, Tr. 1126 (referring to “published multipliers”); CX 1018 at 001 (Pais referring to “publishing” of multipliers by sending to customers); Answer ¶ 27(e) (McWane periodically “publishes” price lists and state-by-state multipliers)).

Response To Finding No. 545:

Respondent has no specific response.

546. The published price is generally the highest price at which a Fitting can be sold. (Tatman, Tr. 258 (“[Y]our published list price and your published multipliers, what that establishes is the absolute highest price you could ever sell something for.”)).

Response To Finding No. 546:

This proposed finding is inaccurate and misleading. Mr. Tatman testified to many circumstances where a customer may pay more than published price for Fittings products. (Tatman, Tr. 399, 443-444, 448).

547. The primary factor driving McWane’s pricing decisions is the competitive price level in the marketplace. A secondary factor is that the pricing level must be above a minimum margin that allows McWane to make money. (Tatman, Tr. 289-290).

Response To Finding No. 547:

Respondent has no specific response.

548. McWane typically announces increases in published prices four weeks before the increase goes into effect. (Tatman, Tr. 325). Customers normally want four weeks’ notice, three weeks is “on the verge” of acceptable notice, and two weeks is too little notice. (Tatman, Tr. 519).

Response To Finding No. 548:

Respondent has no specific response.

4.5.2 Project Pricing

549. Fittings suppliers compete with one another by offering Distributors discounts off of published prices called Project Pricing. Day-to-day competition among Fittings suppliers occurs principally through Project Pricing. Project Pricing tends to create Fittings price instability and deterioration, while reductions in Project Pricing can lead to higher and more stable prices. (*Infra* ¶¶ 550-561).

Response To Finding No. 549:

See General Response 1 and responses to ¶¶ 550-561, *infra*. This finding is an unsupported assertion that requires no response.

550. At times, Fittings suppliers will provide Distributors with discounts from their published price on Fittings sales for individual waterworks projects, a practice known as “Project Pricing.” Minamyer, Tr. 3144 (“project price” and “special price” are used interchangeably); Tatman, Tr. 325-326; Rybacki, Tr. 1101 (describing job pricing as “anything that deviates from the standard list price and discount.”); McCutcheon, Tr. 2271-2272 (“special pricing” means a discount off of the published multiplier); Thees, Tr. 3098 (Project Pricing is pricing that is different than the market price, and can be affected by the size and scope of a given project); CX 2535 (Bhutada, Dep. at 105-106 (Project Pricing generally reflects a lower multiplier than the published price); CX 2538 (McCutcheon, IHT (Vol. 2) at 369) (Star sometimes offers a special project price, which is a multiplier lower than the published multiplier); CX 2522 (Agarwal, Dep. at 45-46), *in camera* [REDACTED])).

Response To Finding No. 550:

This finding is incomplete and therefore misleading and inaccurate. In addition to project pricing, fittings suppliers offer numerous other types of discounts, including freight concessions, cash discounts, extended payment term, cash-back, corporate rebates, and branch rebates. (RPF ¶¶ 67, 74-79). Mr. Tatman testified to the “waterfall” of pricing and discounting. (Tatman, Tr. 550, 571, 1009, 1018).

551. Project Pricing, which may be negotiated for an entire project or job, or on a one-time basis for a single order, generally takes the form of a price multiplier that is lower than the published multiplier. (CX 2535 (Bhutada, Dep. at 105-106)).

Response To Finding No. 551:

Respondent has no specific response.

552. Project Pricing does not normally result in Fittings being sold at prices above the published prices (list price times published multiplier). (McCutcheon, Tr. 2270 (published price is generally the highest price that a Distributor in a given geographic area will pay for Fittings); Rybacki, Tr. 1105 (“Q. If you had a preference, would you prefer to sell at a job price or at standard pricing? A. Standard pricing every day.”).

Response To Finding No. 552:

This finding is inaccurate, incomplete, and misleading. *See* Response To Finding 546.

553. Suppliers offer Project Pricing in order to compete, and gain sales volume from competitors. (Tatman, Tr. 326).

Response To Finding No. 553:

This finding, while partially accurate, is incomplete, because suppliers also engage in other forms of discounting, in addition to project pricing, in order to compete. (RPFF ¶¶ 67, 74-79). *See* response to ¶ 550, *supra*.

554. A significant portion of the price competition among suppliers for Fittings business occurs through Project Pricing, as Distributor purchasing decisions typically do not take rebates into account. (Minamyer, Tr. 3143-3144 (price multiplier was the chief aspect of pricing that customers negotiated with Star, since other aspects of pricing such as rebates and payment terms were typically not a job-by-job negotiation); RX-644 (Tatman, Dep. at 27) (describing Project Pricing as a “reaction to the competitive environment”))Webb, Tr. 2774 (“We look at the two differently. I mean, pricing in the field is based on the competitive nature of the project, and rebates are negotiated on an annual basis.”); Tatman, Tr. 1020-1022, *in camera* [REDACTED].

Response To Finding No. 554:

This finding is inaccurate, incomplete, misleading and conflicts with substantial evidence to the contrary. (RPFF ¶¶ 67, 73-79, 141). *See* responses to ¶¶ 550 and 553, *supra*.

555. Project Pricing lowers the prevailing transactional price in a given area, and can lead to price “instability.” This happens when one supplier offers a Project Price and the other suppliers seek to match or beat it; as other Distributors in the region learn of the new price, they demand the same discount in order to be competitive on bids for the same job. (Rybacki, Tr. 1107-1108 (once customers get a taste of a lower number from Project Pricing, they want the lower number); CX 2484 (Tatman, Dep. at 27) (job pricing is a response to customer requests for lower prices on the basis of competitor prices); CX 2480 (Napoli, Dep. at 84-85) (Distributor awareness of suppliers’ prices to other

Distributors drive down supplier prices); CX 0525 (Michael Berry of Star instructs territory managers, “We have to be flexible enough to play this game but not so soft that our customers think that they can get a price at any time.”)).

Response To Finding No. 555:

See response to ¶ 554, *supra*.

556. Project Pricing can cause prices to “deteriorate” market-wide because a supplier’s low prices are usually offered to more than one Distributor. As McWane’s Pricing Coordinator, Vince Napoli, explained:

They’ll go into one distributor and say I’m - we’re selling our products to your competition down the street at a .42. Would you like to buy the -- at the .42 to keep up with your competition? Well, sure they’re going to say yes. Then they go across the street to the other guy and said I was just in, made a sale to your competition down the street at a .42. You’re buying at a .44. Don’t you want to keep up with him? So that’s a method to -- and -- and what happens is their buy price goes down, but their sell price goes down with it. If they were the only ones to have a lower price, they’d be in a good position, but that’s never what happens.

(CX 2480 (Napoli, Dep. at 83-85) (describing how Project Pricing causes prices to deteriorate market wide); CX 2191 (Napoli email characterizing Sigma, Star and HD Supply as “Idiots” for engaging in Project Pricing that reduced prices by 12.5%).

Response To Finding No. 556:

See General Response 6, and response to ¶ 554, *supra*.

557. Mr. Tatman defines pricing “instability” as occurring when Project Pricing in a region results in average invoice prices 10% or more below published pricing (Tatman, Tr. 284, 332-333).

Response To Finding No. 557:

Respondent has no specific response.

558. Project Pricing can bring down the market price because if a supplier offers a special price to one Distributor, then the supplier needs to be prepared to offer it to all Distributors bidding on that project. Those Distributors then expect that lower price in later projects, and the spiral of declining prices can lead to zero gross margin. (CX 2480 (Napoli, Dep. at 46-47)).

Response To Finding No. 558:

See General Response 6, and response to ¶ 554, *supra*. This proposed Response posits a general practice or theory that, while may be accurate in certain instances, is just a generalized proposed assertion that may or may not be accurate in many or even most circumstances. Respondent therefore responds that the proposed Finding is over-generalized and over-broad, and subject to misinterpretation.

559. Reducing Project Pricing can lead to stable, higher prices. Utah, which had a non-domestic published multiplier of .48 in 2008, which is almost double that of its neighboring states, provides an example of the price-increasing effect of a reduction in Project Pricing. (CX 1677 at 003; RX-613 at 001). As Mr. Jansen explained, Utah “is a unique situation where distributors as a whole want a stable market, and that’s . . . what they communicate to us. They’d like to have stable pricing and not a lot of job pricing because they keep inventories, and so yes, so they’d rather keep the market stable and keep the market up.” (CX 2477 (Jansen, Dep. at 220); RX 613 at 001)).

Response To Finding No. 559:

See General Response 6, and response to ¶ 554, *supra*. This proposed Response posits a general practice or theory that, while may be accurate in certain instances, is just a generalized proposed assertion that may or may not be accurate in many or even most circumstances. Respondent therefore responds that the proposed Finding is over-generalized and over-broad, and subject to misinterpretation.

560. McWane admits that it would prefer not to engage in Project Pricing. (CX 2477 (Jansen, Dep. 248-249)).

Response To Finding No. 560:

See General Response 6, and response to ¶ 554, *supra*. This finding is incomplete and misleading, as all businesses prefer not to discount when possible, because it would make more money if it does not price discount. (RPFF ¶ 160-162) Project pricing reduces suppliers’ profit margins. (RPFF ¶ 155)

561. Suppliers view Project Pricing as a drag on their profitability. (Rybacki, Tr. 1105 (“Q. And if you could find a way to put an end to job pricing in the industry, would you? A. Yes.”); Rybacki, Tr. 1107-1108 (“Q. Is job pricing good for Sigma’s long-term health? A. No. Q. Does job pricing create confusion with your customers or competitors? A. It does.”); CX 2531 (Rybacki, Dep. at 221) (“Q. And if you could find a way to have the entire industry rein in project pricing, that would be your preference, wouldn’t it, sir? A. I would say yes.”); CX 2531 (Rybacki, Dep. at 224) (describing Project Pricing as “not good for our -- the long-term health of this company or its shareholders”); *see also* CX 2480 (Napoli, Dep. at 46) (one of the risks of decentralized Project Pricing authority is that the market price can get dragged down); (CX 2485 (Walton, Dep. at 31-34) (observing that sales representatives with pricing authority could produce “instability and lower prices in the market.”); CX 2480 (Napoli, Dep. at 83-85) (discounting results in “price erosion,” or a lower bottom line and cash flow); CX 2191 (Napoli calling Star and others “idiots” for causing price deterioration through discounting)).

Response To Finding No. 561:

See General Response 6, and response to ¶ 560, *supra*.

4.5.3 Rebates and Other Payment Terms

562. At times, McWane, Sigma, and Star have provided additional discounts and price concessions to Distributors in the form of rebates, reductions in freight charges, and/or extensions of credit or payment terms. (Joint Stipulations of Fact (JX 0001) ¶ 16).

Response To Finding No. 562:

See Response To Finding 550 as it pertains to McWane price discounting

4.5.3.1 Rebates

563. A “rebate” is a percentage discount on all purchases by a Distributor from a supplier during a specific time period, typically for a year. (Minamyer, Tr. 3143 (Rebates are typically an annually negotiated percentage discount that Star provided its customers); RX-655 (Brakefield, Dep. (Vol. 2) at 28-29) (describing Sigma periodic rebates to “volume customers”); Tatman, Tr. 297-298 (Rebates are written policies for a set period of time that may cover Fittings alone, or Fittings and other products); CX 2480 (Napoli, Dep. at 102-103) (rebates are corporate wide)).

Response To Finding No. 563:

Respondent has no specific response.

564. [REDACTED] (CX 2535 (Bhutada, Dep. at 107-108), *in camera*).

(CX 2535 (Bhutada, Dep. at 109), *in camera*; Tatman, Tr. 298-299

Response To Finding No. 564:

Respondent has no specific response.

565.

(CX 2535 (Bhutada, Dep. at 110), *in camera*; RX-066 at 001-002 (Minamyer June 2008 email informing Star division managers that Star would exclude sales at Project Prices from rebate calculations)).

Response To Finding No. 565:

See General Responses 4, 5 and 6.

566. Rebates are often important to Distributors because their earnings from Fittings rebates can be greater than the Distributors' net profits from the sale of Fittings. (CX 2534 (Bhutada, IHT at 58)).

Response To Finding No. 566:

See General Responses 3 and 6.

567. Functionally, Distributors look at rebates differently than Project Pricing, because rebates do not apply to a specific job that a Distributor is bidding, and are instead applied on an annual basis. (Webb, Tr. 2774).

Response To Finding No. 567:

This proposed Response posits a general practice or theory that, while may be accurate in certain instances, is just a generalized proposed assertion that may or may not be accurate in many or even most circumstances. Respondent therefore responds that the proposed Finding is over-generalized and over-broad, and subject to misinterpretation.

568. McWane offers one- to three-year corporate rebate agreements to its largest Distributor customers that are based on the Distributors' total purchases of Fittings and other products manufactured by McWane, Inc., such as ductile iron pipes, hydrants and valves. (Tatman, Tr. 297-298).

Response To Finding No. 568:

Respondent has no specific response.

569. Sales data in McWane’s financial reports are reduced to exclude rebates; gross sales have rebates netted out of them. (CX 2481 (Nowlin, Dep. at 22-23)). The actual amount of rebates paid by McWane is not shown in any of McWane’s regularly prepared financial reports. (CX 2481 (Nowlin, Dep. at 112)).

Response To Finding No. 569:

This proposed finding inaccurate and misleaing and not supported by the cited testimony.

4.5.3.2 Freight Terms

570. Each supplier has standard freight terms pursuant to which it will pay for shipping of Fittings to Distributors, and may also negotiate separate agreements with Distributors whereby the supplier will pay for freight outside of the standard terms for a specific project. (Tatman, Tr. 303-304; CX 2531 (Rybacki, Dep. at 24); CX 2535 (Bhutada, Dep. at 110)).

Response To Finding No. 570:

Respondent has no specific response.

571. McWane’s standard freight term is “full freight allowed,” or free shipping, for all purchases of at least 5,000 pounds of McWane products, including Fittings. (Tatman, Tr. 303-304). McWane sometimes offers shipping “discounts” to customers, by providing free shipping for quantities less than 5,000 pounds. (Tatman, Tr. 304).

Response To Finding No. 571:

Respondent has no specific response.

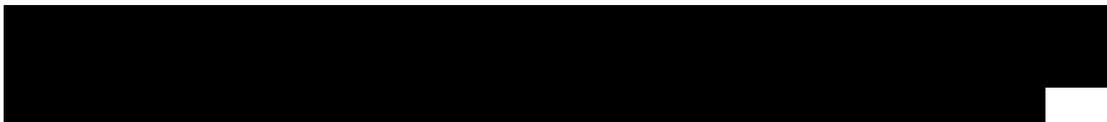
4.5.3.3 Payment Terms

572. Payment terms are discounts that suppliers provide to Distributors for payment within a fixed amount of time. (Minamyer, Tr. 3143; Tatman, Tr. 304-305).

Response To Finding No. 572:

Respondent has no specific response.

- 573.



(CX 2535 (Bhutada, Dep. at 109), *in camera*).

Response To Finding No. 573:

See General Response 6. Otherwise, Respondent has no specific response.

574. The majority of McWane’s customers are subject to McWane’s standard payment terms, which provide a 2% discount for payment by the 15th of the month following the order. (Tatman, Tr. 304-305).

(CX 2535 (Bhutada, Dep. at 109-110), *in camera*).

Response To Finding No. 574:

Respondent has no specific response.

575. Most Distributor customers pay within terms to take advantage of any rebates that would be available to the Distributor for doing so. (CX 2479 (McCullough, Dep. at 174-175)).

Response To Finding No. 575:

This proposed Response posits a general practice or theory that, while may be accurate in certain instances, is just a generalized proposed assertion that may or may not be accurate in many or even most circumstances. Respondent therefore responds that the proposed Finding is over-generalized and over-broad, and subject to misinterpretation. Moreover, this proposed finding purports to generalize regarding all distributors, but cites to only Mr. McCullough’s deposition testimony, who does not speak on behalf of the industry, and is not a distributor.

576. McWane has offered longer payment terms – up to 90 days – to some customers, as well as discounts of up to 6% for on time payments. (Tatman, Tr. 305).

Response To Finding No. 576:

Respondent has no specific response.

5. Relevant Product Markets

5.1 Fittings Is a Relevant Product Market

577. Ductile iron pipe fittings of 24” or less in diameter for use in Open Specification applications, whether manufactured within or outside the United States, for use in projects within the United States constitute a relevant product market (the “Fittings

market”). (CX 2260 (Schumann Rep. at 13-14, 16); Schumann, Tr. 3769-3770, 3788-3789; *infra* ¶¶ 579-616).

Response To Finding No. 577:

See General Responses 1 and 9, and responses to ¶¶ 579-616, *infra*. This proposed finding is not a finding of fact, but a legal conclusion..

5.1.1 No Other Product Is a Substitute

578. Other products are not functional substitutes for Fittings, and prices of other products do not constrain Fittings prices. (*See infra* §§ 5.1.1.1, 5.1.1.2).

Response To Finding No. 578:

See General Response 1. This finding is an unsupported assertion, and therefore requires no response. *See* responses to Sections 5.1.1 and 5.1.2, *infra*. *See also* Response To Finding 577.

5.1.1.1 Other Products Are Not Interchangeable with Fittings

579. There are no widely used substitutes for Fittings. (Answer ¶ 23; Saha, Tr. 1177-1178 (other types of fittings are not interchangeable with ductile iron Fittings)).

Response To Finding No. 579:

This proposed finding is not a proposition of fact, but one of law that requires no response. The proposed finding also calls for expert testimony.

580. The principal potential substitutes for Fittings are polyvinyl chloride (PVC) or high-density polyethylene (HDPE) fittings, but Fittings do not generally compete against PVC or HDPE fittings for use with ductile iron pipe. (CX 2501 (Prescott, IHT at 36) (pressure rated PVC fittings are not used with ductile iron pipe); CX 2538 (McCutcheon, IHT (Vol. 2) at 343) (PVC fittings are rarely used on ductile iron pipe); CX 2480 (Napoli, Dep. at 27 (PVC not a substitute for Fittings))).

Response To Finding No. 580:

See General Responses 3 and 6. *See* Response To Finding 579, *supra*.

581. PVC fittings are not a substitute for Fittings because they are more expensive. (CX 2538 (McCutcheon, IHT (Vol. 2) at 340) (explaining that due to the cost of oil and the cost of resins, PVC fittings are more expensive than ductile iron pipe fittings); Webb, Tr. 2715

(“Historically, I think [the price of PVC fittings has] been high. I don’t know if they’re higher than ductile, but I think all-inclusive with the restraining, the price of the fitting itself, that may be another reason why they’re not widely used.”).

Response To Finding No. 581:

See General Response 3 and Response To Finding 579, *supra*.

582. PVC fittings are not a substitute for Fittings because PVC fittings do not have as high of a pressure rating as Fittings. (CX 2521 (Agarwal, IHT at 54-55) (“[T]hey [PVC fittings] do not hold up the pressure”); CX 2489 (Morrison, IHT at 41) (“The pressure rating on the plastic water fitting is a little less. It’s a 200-pound max rating, whereas a ductile waterworks fitting is 250-pound max. So, depending on the pressure, it’s going to exclude the PVC fitting.”)).

Response To Finding No. 582:

See General Responses 3 and 6 and Response To Finding 579, *supra*.

583. PVC fittings are not a substitute for Fittings because engineers do not like the PVC or HDPE fitting’s susceptibility to fracture. (CX 2480 (Napoli, Dep. 27 (“No one, to my knowledge, has come up with a good plastic substitute for the strength of ductile iron.”); CX 2480 (Napoli, Dep. 28 (testifying that he has not heard of PVC fittings as being “even touted as being equal to or close to” a Fitting)).

Response To Finding No. 583:

See General Response 6 and Response To Finding 579, *supra*.

584. PVC fittings are not a substitute for Fittings because PVC fittings are limited in size to 12” and below. (Webb, Tr. 2714-2715 (PVC fittings are “just not made in the sizes and configurations that mechanical joint fittings are.”); CX 2491 (Johnson, IHT at 45) (“[P]lastic water fittings or pressure fittings are generally limited to 12 inch on down.”); CX 2525 (Minamyer, IHT at 95-96) (“Q. Any substitute for those products [ductile iron pipe fittings], outside that group? A. Not really, no. Q. What about plastic fittings? A. Not particularly. In the size ranges, I don’t -- I haven’t really seen that. Q. When you say in the size ranges, what do you mean? A. In the size range of ductile fittings, three through 60 or something like that, and the plastic fittings don’t do that size range.”); CX 2489 (Morrison, IHT at 42) (PVC pressure-rated fittings are only a potential substitute for small diameter applications: “2-inch, maybe 3-inch, but anything above that, 99 percent would be a ductile iron waterworks fitting over a PVC fitting.”)).

Response To Finding No. 584:

See Response To Finding 579, *supra*.

585. PVC fittings are not a substitute for Fittings because certain markets do not allow PVC fittings to be used. (CX 2501 (Prescott, IHT at 33-34) (explaining that in those areas where ductile iron pipe is favored “there is no substitute for any of those ductile items [including Fittings]”); CX 2515 (Sheley, IHT at 65) (“Q. Any substitutes for those ductile iron pipe fittings? A. Not in this market. There are some markets that allow you to use some PVC product but not anywhere I do business.”)).

Response To Finding No. 585:

See General Responses 3 and 6. *See* Response To Finding 579, *supra*.

586. PVC fittings are not a substitute for Fittings because PVC fittings are harder to restrain and install. (CX 2543 (Coryn, IHT at 53) (“[T]hey’re [PVC fittings] probably harder to install because they’re slippery.”); Webb, Tr. 2715 (PVC fittings “have different restraining requirements than a mechanical joint fitting would.”)).

Response To Finding No. 586:

See Response To Finding 579, *supra*.

587. Even where ductile iron pipe is not used, End Users only rarely specify pressure-rated high-density polyethylene (HDPE) and PVC fittings (rather than Fittings) for pressurized waterworks applications. (Tatman, Tr. 249 (in general, End Users do not use PVC fittings on ductile iron pipes, but End Users can use ductile iron Fittings on PVC pipes); Thees, Tr. 3054-3055; Minamyner, Tr. 3133 (use of plastic fittings is “extremely rare”); CX 2501 (Prescott, IHT at 34) (“HDPE is making some inroads, but not to any extent.”); CX 2502 (Prescott, Dep. at 48) (describing use of PVC fitting business as “[v]ery little”); CX 2480 (Napoli, Dep. at 28-29) (“I don’t recall ever seeing a PVC fitting even attempt to be used by an engineer.”)).

Response To Finding No. 587:

This proposed Response posits a general practice or theory that, while it may be accurate in certain instances, is just a generalized proposed assertion that may or may not be accurate in many or even most circumstances. Respondent therefore responds that the proposed Finding is over-generalized and over-broad, and subject to misinterpretation. *See* Response To Finding 579, *supra*.

588. Other than the limited, rare use of PVC pressure-rated fittings, there are no other products that are substitutes for Fittings in pressurized applications. (CX 2489 (Morrison, IHT at 41-42); CX 2538 (McCutcheon, IHT (Vol. 2) at 342-343) (“Q. Beyond PVC pressure fittings, are there any other products that you can point me to that are substitutes or possible substitutes for ductile iron pipe fittings? A. No, sir.”); CX 2525 (Minamyner, IHT

at 95) (“Q. Within the universe of ductile iron pipe fittings, if we take these different types of fittings and take them as a whole, proprietary joint fittings, flange fittings, push-on fittings, mechanical joint fittings, let’s just talk about that as the universe of ductile iron pipe fittings. Any substitute for those products, outside that group? A. Not really, no. Q. What about plastic fittings? A. Not particularly.”)).

Response To Finding No. 588:

See General Responses 3 and 6. This proposed Response posits a general practice or theory that, while it may be accurate in certain instances, is just a generalized proposed assertion that may or may not be accurate in many or even most circumstances. Respondent therefore responds that the proposed Finding is over-generalized and over-broad, and subject to misinterpretation. See Response To Finding 579, *supra*.

589. Brass Fittings are typically threaded and do not come larger than 2” in diameter. They are not substitutes for Fittings. (Thees, Tr. 3057- 3058; Webb, Tr. 2720 (brass fittings are threaded, and thus not compatible with underground pipes)).

Response To Finding No. 589:

This proposed Response posits a general practice or theory that, while it may be accurate in certain instances, is just a generalized proposed assertion that may or may not be accurate in many or even most circumstances. Respondent therefore responds that the proposed Finding is over-generalized and over-broad, and subject to misinterpretation. See Response To Finding 579, *supra*.

590. Steel Fittings are not used underground because the steel fitting would rust, and are not common substitutes for Fittings. (Thees, Tr. 3057, 3058). Steel pipe fittings are not used underground because the steel fitting would rust. (CX 2538 (McCutcheon, IHT (Vol. 2) at 343)).

Response To Finding No. 590:

This proposed Response posits a general practice or theory that, while it may be accurate in certain instances, is just a generalized proposed assertion that may or may not be accurate in many or even most circumstances. Respondent therefore responds that the proposed Finding is

over-generalized and over-broad, and subject to misinterpretation. *See* Response To Finding 579, *supra*.

591. Cast iron or gray iron fittings are an older fittings technology. Distributors receive only a negligible demand for these products from End Users. (Webb, Tr. 2719; CX 2513 (Webb, IHT at 59-60) (“I haven’t seen cast or grey iron fittings in ten, 15 years.”); CX 2498 (Teske, Dep. at 68-69) (gray iron fittings do not meet specifications); CX 2501 (Prescott, IHT at 37) (Full-body cast iron fittings are rarely used any more: “every once in awhile we find one . . . some old engineer that just won’t change”)).

Response To Finding No. 591:

This proposed Response posits a general practice or theory that, while it may be accurate in certain instances, is just a generalized proposed assertion that may or may not be accurate in many or even most circumstances. Respondent therefore responds that the proposed Finding is over-generalized and over-broad, and subject to misinterpretation. *See* Response To Finding 579, *supra*.

5.1.1.2 **Other Types of Fittings Do Not Constrain Fittings Prices**

592. Fittings suppliers do not track prices of PVC fittings or take them into account when setting prices of Fittings. (Tatman, Tr. 250-251 (when setting the price of Fittings, McWane does not consider the price of PVC fittings); Tatman, Tr. 251 (McWane does not track the prices of PVC fittings); CX 2477 (Jansen, Dep. at 69-70, 77) (testifying that Mr. Jansen has never taken into account the price of PVC fittings when setting Fittings prices); Minamy, Tr. 3134 (does not recall tracking pricing for any Fittings substitutes, including plastic fittings); CX 2538 (McCutcheon, IHT (Vol. 2) at 341) (Star does not track the price of PVC fittings because the prices of ductile iron fittings and the price of PVC pressure fittings do not move together, and because the price of PVC pressure fittings does not have a big influence on the Fittings business); Saha, Tr. 1177 (the price of Fittings is not constrained by the price of PVC fittings); *see also* CX 2477 (Jansen, Dep. at 94) (McWane does not take into account the price of cast iron fittings when setting the price of Fittings)).

Response To Finding No. 592:

This proposed Response posits a general practice or theory that, while it may be accurate in certain instances, is just a generalized proposed assertion that may or may not be accurate in

many or even most circumstances. Respondent therefore responds that the proposed Finding is over-generalized and over-broad, and subject to misinterpretation.

593. Distributors do not seek to use prices of PVC fittings to negotiate prices of Fittings. (Webb, Tr. 2718; CX 2480 (Napoli, Dep. at 28) (does not remember ever being asked by a Distributor to lower the price of McWane's Fittings because of the price of a PVC fitting); Saha, Tr. 1177 (he has never been asked by a customer to lower the price of a ductile iron pipe fitting because of the price of a PVC fitting)).

Response To Finding No. 593:

This proposed Response posits a general practice or theory that, while it may be accurate in certain instances, is just a generalized proposed assertion that may or may not be accurate in many or even most circumstances. Respondent therefore responds that the proposed Finding is over-generalized and over-broad, and subject to misinterpretation.

594. Fittings suppliers do not track the price of cast iron fittings when setting Fittings prices. (CX 2477 (Jansen, Dep. at 94)).

Response To Finding No. 594:

This proposed Response posits a general practice or theory that, while it may be accurate in certain instances, is just a generalized proposed assertion that may or may not be accurate in many or even most circumstances. Respondent therefore responds that the proposed Finding is over-generalized and over-broad, and subject to misinterpretation.

5.1.2 Fittings of 24 Inches or Less in Diameter May Be Treated as a Cluster Market

595. Fittings of 24" or less in diameter may be treated as a cluster market because the market conditions and analysis applicable to this cluster are identical, larger Fittings are subject to different market conditions, and the industry typically groups Fittings by sizes. (*See infra* ¶¶ 596-616).

Response To Finding No. 595:

See General Response 1. This finding calls for a conclusion of law rather than a factual finding, and does not warrant a further response. See responses to ¶¶ 596-616, *infra*.

596. Individual Fittings of differing shapes and sizes are not substitutes for each other, because a Fitting must have a diameter appropriate for the pipe to which it is attached and a shape or design appropriate for its intended function (for example, changing the direction of flow by 90 degrees versus 22.5 degrees). (*See generally* Tatman, Tr. 220-221 (describing how Fittings are used in waterworks projects and identifying different types of Fittings including elbows, Ts, bends, coated Fittings, and reducers)). Each discrete size and shape of Fitting satisfies the requirements of a relevant market. (CX 2260-A (Schumann Rep. at 12)).

Response To Finding No. 596:

See Response To Finding 579, *supra*.

5.1.2.1 Market Analysis for Each Size and Shape of Fitting of 24 Inches or Less Is Identical

597. Fittings of 24” or less in diameter may be treated as a cluster market because the market analysis for each size and shape of Fitting is identical. (*See infra* ¶¶ 598-600).

Response To Finding No. 597:

See General Response 1. This finding calls for a conclusion of law rather than a factual finding, and does not warrant a further response. *See* responses to ¶¶ 598-600, *infra*.

598. It is not necessary to analyze each size and shape of ductile iron pipe fitting in the range of 24” and below as a separate market. (CX 2260-A (Schumann Rep. at 13); Schumann, Tr. 3791-3792).

Response To Finding No. 598:

See General Responses 1 and 9. *See* Response To Finding 579, *supra*.

599. The market analyses of each of these Fittings items would be essentially identical because the primary suppliers, customers, and Distributors are the same and the materials and other inputs used to produce the products are the same. (CX 2260-A (Schumann Rep. at 13); Schumann, Tr. 3791-3792). A determination that McWane’s conduct with respect to the aggregate market is anticompetitive is analytically identical to a determination that the same conduct is anticompetitive as to each Fitting size and type within the cluster. (CX 2260-A (Schumann Rep. at 15); Schumann, Tr. 3790-3791).

Response To Finding No. 599:

See General Response 9. *See* Response To Finding 579, *supra*.

600. Thus, ductile iron pipe fittings with a diameter of 24” or less can be analyzed as if they were part of a single product market. (CX 2260-A (Schumann Rep. at 13)).

Response To Finding No. 600:

See General Responses 1 and 9. See Response To Finding 579, *supra*.

5.1.2.2 **Fittings of 24 Inches or Less in Diameter Are Manufactured and Marketed Together and by Similar Methods**

601. Each size and shape of Fitting of 24” or less in diameter is made of the same material, by the same methods, and sold and marketed together by the same suppliers, through the same distribution channels, to the same customers, for use in the same or similar projects. (See *infra* ¶¶ 602-609).

Response To Finding No. 601:

See General Response 1. This finding calls for a conclusion of law rather than a factual finding, and does not warrant a further response. See responses to ¶¶ 602-609, *infra*. This proposed Response posits a general practice or theory that, while it may be accurate in certain instances, is just a generalized proposed assertion that may or may not be accurate in many or even most circumstances. Respondent therefore responds that the proposed Finding is over-generalized and over-broad, and subject to misinterpretation.

602. Different sizes and shapes of Fittings are made out of the same material and produced by the same methods. (See *supra* § 4.1.3). All Fittings must comply with AWWA standards. (CX 2522 (Agarwal, Dep. at 37); McCutcheon, Tr. 2292 (describing various AWWA specifications that customers use)). Compliance with AWWA specifications determines the interchangeability of Fittings. (CX 2477 (Jansen, Dep. at 86)).

Response To Finding No. 602:

Respondent has no specific response.

603. McWane, Sigma, and Star each supply a full line of Fittings of 24” or less in diameter. (Rybacki, Tr. 3572-3573; Tatman, Tr. 589; JX 0001, ¶¶ 1-3).

Response To Finding No. 603:

This proposed finding is not supported as it pertains to Star.

604. Fittings prices are set as a package, through the announcement of price multipliers and the negotiation of Project Pricing multipliers and other pricing terms that apply across all of the different Fittings included in a given purchase. (CX 2535 (Bhutada, Dep. at 106 (Q. And when a project pricing request is made “is it applicable only to one individual

construction project? A. Typically, yes.”); Tatman, Tr. 258-259, 277 (describing national published list price the standard price component of Fittings pricing); Rybacki, Tr. 1103-1104, 1096-1097 (same); CX 2535 (Bhutada, Dep. at 102) (same); Webb, Tr. 2770-2771 (explaining that HD received price communications from suppliers through national price lists and regional multipliers based on the national price); CX 1147 at 001 (describing the price list culture of the Fittings industry)). Multipliers vary from state to state. (Tatman, Tr. 277 (describing state multipliers as the second component of Fittings pricing)).

Response To Finding No. 604:

This proposed finding is confusing and incomprehensible and not supported by the cited authority.

605. Distributors purchase Fittings from suppliers, and then further incorporate the Fittings into a bundle with other waterworks products for resale to End Users. (CX 2502 (Prescott, Dep. at 15) (“Q. What manufacturers do you buy fittings from right now? A. Tyler, Sigma, Star . . . Those are ductile iron fittings.”); CX 2490 (Morrison, Dep. at 66) (identifying Fittings suppliers that sell to Distributors); CX 2504 (Thees, Dep. at 114) (“We supply bundle of goods to the contractor, and they [End Users] need fittings to put together the pipe.”); CX 2504 (Thees, Dep. at 149) (Fitting suppliers are “selling a component as opposed to a bundle.”); CX 2503 (Thees, IHT at 71) (agreeing that Distributors carry the entire bundle of products used in a waterworks project and a Fittings supplier might not have the other products in the bundle)).

Response To Finding No. 605:

See General Responses 3 and 6. This proposed Response posits a general practice or theory that, while it may be accurate in certain instances, is just a generalized proposed assertion that may or may not be accurate in many or even most circumstances. Respondent therefore responds that the proposed Finding is over-generalized and over-broad, and subject to misinterpretation.

606. Virtually all Fittings are sold through waterworks Distributors. (*See supra* § 4.4.4.1).

Response To Finding No. 606:

Respondent has no specific response.

607. The typical End Users of Fittings are municipalities, regional water authorities, and the contractors they engage to construct waterworks projects. (*See supra* § 4.4.3).

Response To Finding No. 607:

Respondent has no specific response.

608. Functionally, Fittings up to 12” in diameter are typically used for residential work, and 14” to 24” Fittings are typically used by municipalities or plants with long transmission lines. (Brakefield, Tr. 1279-1281; CX 1479 (describing categories in CX 1479, and explaining that 2” to 12” Fittings are predominately used for housing subdivisions and private contracting work); (Brakefield, Tr. 1281; CX 1479) (describing categories in CX 1479 and explaining that End Users of Fittings in the 14” through 24” range are generally municipalities or plants with long transmission lines funded by State Revolving Fund or EPA money).

Response To Finding No. 608:

This proposed Response posits a general practice or theory that, while it may be accurate in certain instances, is just a generalized proposed assertion that may or may not be accurate in many or even most circumstances. Respondent therefore responds that the proposed Finding is over-generalized and over-broad, and subject to misinterpretation.

609. In contrast, Fittings over 24” in diameter are considered to be a large diameter and are a more unusual size for the industry. (CX 2538 (McCutcheon, IHT (Vol. 2) at 322)). They are used for large treatment plants or large transmission lines. (Brakefield, Tr. 1281; CX 1479). (85% to 95% of Fittings sales are Fittings below 24”). (CX 2502 (Prescott, Dep. at 76-77)).

Response To Finding No. 609:

This proposed Response posits a general practice or theory that, while it may be accurate in certain instances, is just a generalized proposed assertion that may or may not be accurate in many or even most circumstances. Respondent therefore responds that the proposed Finding is over-generalized and over-broad, and subject to misinterpretation.

5.1.2.3 Market Conditions for Fittings of 24 Inches or Less in Diameter Are Distinct from Those for Fittings of 30 Inches or Greater in Diameter

610. The market conditions for Fittings of 24” or less in diameter differ from those for Fittings of 30” or greater. (*See infra* ¶¶ 611-614).

Response To Finding No. 610:

See General Response 1. This finding is confusing and incomprehensible. It is also unsupported by the cited authority. See responses to ¶¶ 611-614, *Infra*.

611. Fittings with diameters of 30” and greater (large diameter fittings) are not in the Fittings relevant product market. (CX 2260-A (Schumann Rep. at 14)). The competitive analysis of large fittings differs from that of small and medium fittings (those with diameters of 24” and below), because ACIPCO, a significant producer of large diameter fittings is not a producer of Fittings with diameters of 24” and below. (CX 2260-A (Schumann Rep. at 14); *see supra* § 3.4.1.1).

Response To Finding No. 611:

See General Response 9. This proposed finding is not a proposition of fact, but one of law that requires no response.

612. ACIPCO currently manufactures only Domestic Fittings ranging from 30” to 64” in diameter. ACIPCO exited the manufacture of Fittings under 30” in diameter in 2006. (CX 1897 at 003; CX 2486 (Burns, Dep. at 15, 23-28)). ACIPCO does not have any interest in extending its product scope to include small and medium diameter Fittings. (CX 2486 (Burns, Dep. at 15, 30)).

Response To Finding No. 612:

Respondent has no specific response.

613. For 2008, in the market consisting of ductile iron pipe fittings with diameters greater than 24” (*i.e.*, 30” and above), ACIPCO’s share of United States sales was approximately [REDACTED]. (See CX 1895 at 001, 005, *in camera* (ACIPCO data showing 2008 sales of [REDACTED] tons); CX 2486 (Burns, Dep. at 159-160) (describing CX 1895); RX-127 at 002 (DIFRA data showing the other suppliers’ combined 2008 sales of fittings greater than 24” in diameter to be [REDACTED] tons).

Response To Finding No. 613:

This proposed finding is not a proposition of fact, but one of law that requires no response.

614. In 2009, before Star’s entry into domestic manufacture, ACIPCO was the dominant domestic producer of ductile iron pipe fittings with diameters of 30” and above. (CX 2222 (identifying “only one domestic manufacturer for 30” and larger fittings - American Cast Iron Pipe Company (ACIPCO),” but noting that McWane does make a minimum number of large fittings but not enough to service the market)).

Response To Finding No. 614:

See General Response 5. The term “dominant” manufacturer is a statement of law requiring no response.

5.1.2.4 **Grouping Fittings of 24 Inches or Less in Diameter is Consistent with Industry Practice**

615. Grouping Fittings of 24” or less in diameter is consistent with industry practice. (RX-632 at 028-029 (Tyler Union Waterworks Fittings Financial Statements containing fittings sales and gross profit analysis by three size ranges: 3”-12”, 14”-24”, and 30” and up); CX 1339 at 003 (January 2009 DIFRA report showing shipment analysis by three size ranges: 2”-12”, 14”-24”, and over 24”); CX 0622 at 008-010 (Tyler Union 2009 Sales Meeting presentation, separating out market share by size categories of 3”-12” diameter, 14”-24” diameter, and >24” diameter)).

Response To Finding No. 615:

Respondent has no specific response.

616. Historically, the waterworks industry has differentiated Fittings of 3” to 24” in diameter from Fittings of 30” or greater diameter. (CX 2533 (Bhargava, Dep. at 43) (“Q. . . . why does Star divide the utility fittings into the two categories, the three-inch to 24-inch and the 30-inch and up? A. That is industry practice also.”)).

Response To Finding No. 616:

This proposed Response posits a general practice or theory that, while may be accurate in certain instances, is just a generalized proposed assertion that may or may not be accurate in many or even most circumstances. Respondent therefore responds that the proposed Finding is over-generalized and over-broad, and subject to misinterpretation.

5.2 **Domestic Fittings Is a Relevant Product Market**

617. Ductile iron pipe fittings of 24” or less in diameter for use in projects in the United States that have a Domestic-only Specification constitute a second relevant product market (the “Domestic Fittings market”). (CX 2260-A (Schumann Rep. at 15-16); Schumann, Tr. 3769-3770, 3789-3791; *infra* ¶¶ 618-633).

Response To Finding No. 617:

See General Responses 1, 9 and 12. This finding is incorrect, misleading and ignores the overwhelming testimony of the fact witnesses at trial that Fittings are a commodity product

regardless of where they are made. (RPF 375, 399-424) Respondent’s expert witness, Dr. Parker Normann, testified that domestic and imported Fittings are interchangeable and McWane does not have the ability to charge prices above competitive levels on domestic Fittings because it has faced an ongoing and continuing threat of domestic Fittings being replaced by imported Fittings. (Normann, Tr. 4831). For example, in 2003 domestic Fittings constituted 70% of the overall Fittings market. (Normann, Tr. 4837). By 2008, that number had shrunk to 14%. (Normann, Tr. 4837). During the past 15 to 20 years, domestic Fittings sales in the United States have declined, while non-domestic Fittings sales have increased. (JX 675 (Sheley, Dep. 53-54); JX 646 (Burns, Dep. at 20-21); Normann, Tr. 4837). Further, Dr. Normann testified that there is evidence of “spec flipping” which further undermines Dr. Schumann’s market definition. (Normann, Tr. 4989-4990). Even during the ARRA period, the availability of waivers to the “Buy American” provisions of the statute are one explanation for the relatively insignificant impact ARRA had on demand for domestic Fittings. (Normann, Tr. 5523-5524). As established by the overwhelming evidence at trial, there is no separate “Domestic Fittings Market.” (RPF 372-424).

5.2.1 **Imported Fittings Are Not Substitutes for Domestic Fittings for Domestic-Only Specifications**

618. Imported Fittings are not substitutes for Domestic Fittings for projects with Domestic-only Specifications. (*Infra* 619-627).

Response To Finding No. 618:

See General Responses 1 and 12, and responses to 619-627, *infra*. This finding is not only an unsupported assertion, but also conflicts with the evidence in the record. (RPF 375, 424). Moreover, there is no separate market for Domestic fittings. (RPF 372-424). *See* Response To Finding 617, *supra*.

619. Some municipalities and Federal, State and local government agencies require the use of domestically-manufactured product as a matter of preference and as a matter of law. If a law requires a municipality to use Domestic Fittings, or if a municipality prefers Domestic Fittings, the specification will state that the Fittings need to be “domestic only.” (CX 2537 (McCutcheon, IHT (Vol. 1) at 61, 90); Thees, Tr. 3068; CX 2477 (Jansen, Dep. at 20) (defining a specification for Domestic Fittings as one requiring products manufactured in the United States); *see supra* § 4.3).

Response To Finding No. 619:

See General Responses 1, 3 and 6. *See* Response To Finding 617, *supra.*, and § 4.3, *supra.* Moreover, the United States Environmental Protection Agency (EPA) granted a nationwide public interest waiver of ARRA’s Buy American requirements “for de minimis incidental components of eligible water infrastructure projects funded by ARRA.” (RX 195; RX 155).

620. A Distributor will not purchase an imported Fitting if the End User’s specification calls for a Domestic Fitting, and suppliers do not sell imported Fittings into Domestic-only Specifications. (Webb, Tr. 2716-2718; Thees, Tr. 3056 (“Q. If the final spec says ‘domestic fitting,’ can you substitute an imported fitting? A. Only if it allowed the use of import fitting. If it was domestic only . . . if that was the final spec must be domestic, no.”); (CX 2516 (Sheley, Dep. at 156) (“Q. Can you put an import [Fitting] in a domestic job? A. Domestic only, no.”); McCutcheon, Tr. 2283 (Mr. McCutcheon recalls no instances of Star selling an imported Fitting into a Domestic-only Specification during ARRA); Saha, Tr. 1173-1174 (Saha has never tried to sell imported Fittings into a Domestic-only Specification, either at NACIP or at PCI)).

Response To Finding No. 620:

See Response To Finding 619, *supra.*

5.2.1.1 ARRA-Funded Projects

621. Domestic Fittings were required and used on ARRA-funded projects. (CX 2513 (Webb, IHT at 95) (HD Supply was generally unable to use imported Fittings on ARRA-funded projects); CX 2501 (Prescott, IHT at 66-67) (explaining that domestic fittings were required and “[n]obody had a choice”)).

Response To Finding No. 621:

See General Responses 3 and 6. This finding is incomplete, and therefore misleading.

(RPFF ¶¶ 375, 424). *See* response to ¶ 617, *supra.*

622. Under ARRA, End Users were particularly concerned about purchasing imported Fittings for projects funded by ARRA because of potentially severe penalties for using non-Domestic products. (CX 2537 (McCutcheon, IHT (Vol. 1) at 99)).

Response To Finding No. 622:

See General Responses 3 and 6. This finding is incomplete, and therefore misleading.

(RPF ¶¶ 375, 424). See response to ¶ 617 and 619, *supra*.

623. Immediately after the passage of ARRA, there was some hope among suppliers of non-Domestic Fittings that certain waivers and exemptions under ARRA, or the applicability of NAFTA, would allow them to supply non-Domestic Fittings into ARRA projects. (*See infra* § 8.1.3).

Response To Finding No. 623:

See General Response 1 and response to § 8.1.3, *infra*. See Response To Finding 617, *supra*. The United States Environmental Protection Agency (EPA) granted a nationwide public interest waiver of ARRA’s Buy American requirements “for de minimis incidental components of eligible water infrastructure projects funded by ARRA.” (RX 195; RX 155).

624. However, with few exceptions, such methods of enabling the supply of non-Domestic Fittings into ARRA projects were not successful, and non-Domestic Fittings were not used on ARRA-funded projects. (CX 2501 (Prescott, IHT at 66) (“Q. Did you ever get a waiver or try to get a waiver to allow the use of imported fittings on stimulus projects? A. To my knowledge, no.”); CX 2510 (Groeniger, Dep. at 173) (“Q. So you never used a *de minimis* waiver for fittings? A. Not that I can recall.”); CX 2489 (Morrison, IHT at 51) (there were no waivers or exemptions that allowed the use of imported Fittings on Domestic-only ARRA-funded projects); CX 2489 (Morrison, IHT at 51) (ARRA-funded projects serviced by C.I. Thornburg “were all served with domestic fittings.”); *see also infra* § 8.1.3).

Response To Finding No. 624:

See General Responses 3 and 6, and response to ¶ 617, *supra*. This finding is incomplete, and therefore misleading. (RPF ¶¶ 375, 424). Moreover, the United States Environmental Protection Agency (EPA) granted a nationwide public interest waiver of ARRA’s Buy American requirements “for de minimis incidental components of eligible water infrastructure projects funded by ARRA.” (RX 195; RX 155). Finally, Complaint Counsel offered no evidence to

support this proposed finding and the cited authority here does not sustain the proposed finding as fact based on the limited experiences of three witnesses that Complaint Counsel attempts to use to generalize an entire industry experience.

5.2.1.2 Other Domestic-Only Projects

625. Without regard to ARRA, some government entities, including the State of Pennsylvania, United States military and federal facilities, and some jurisdictions in the northeastern United States require domestic products to be used in any projects they fund. (CX 2537 (McCutcheon, IHT (Vol. 1) at 83-84); *see supra* § 4.3).

Response To Finding No. 625:

See General Responses 3 and 6, and response to § 4.3, *supra*. *See* Response To Finding 617, *supra*.

626. Some municipalities, in states like Pennsylvania, Illinois, and Maryland, show a strong preference for Domestic Fittings despite the pricing differentials because of the influence of labor unions. (CX 2534 (Bhutada, IHT at 31-32)).

Response To Finding No. 626:

See General Responses 3 and 6. Otherwise, Respondent has no specific response. *See* Response To Finding 617, *supra*.

627. End users who specify Domestic Fittings because of preference are aware of, but not sensitive to, the price differential between Domestic Fittings and import Fittings. (CX 2489 (Morrison, IHT at 46) (“Well, they’re aware of [the price differential], but in the overall cost of a project, the cost of your fittings is minimal. Now, they may be twice as much, but if you’re doing a million-dollar project and you’re paying \$10,000 more for the fittings, that’s negligible in some people’s eyes.”); CX 2527 (Pais, IHT at 36-37) (engineers deciding whether to have a Domestic-only specification are not sensitive to prices of Fittings)).

Response To Finding No. 627:

See General Responses 3 and 6. *See* Response To Finding 617, *supra*. This proposed Response posits a general practice or theory that, while may be accurate in certain instances, is just a generalized proposed assertion that may or may not be accurate in many or even most

circumstances. Respondent therefore responds that the proposed Finding is over-generalized and over-broad, and subject to misinterpretation.

5.2.2 Domestic Fittings Are Sold at Substantially Higher Prices Than Those Sold into Open-Specification Jobs

628. Domestic Fittings are sold at substantially higher prices than non-Domestic Fittings. (Answer at ¶ 20 (admitting that McWane’s Domestic Fittings sold into Domestic-only Specifications are generally sold at higher prices than non-Domestic Fittings); CX 2535 (Bhutada, Dep. at 13); Webb, Tr. 2733 (there is a price differential between Domestic and imported Fittings, with Domestic Fittings being higher than imported Fittings); CX 2513 (Webb, IHT at 77) (Domestic Fittings have always been more expensive than imports, both before and after ARRA); Sheley, Tr. 3402-3404 (both before and after passage of ARRA, the price of Domestic Fittings was higher than the price of imported Fittings); Thees, Tr. 3074 (the price of Domestic Fittings is higher than the price of non-Domestic Fittings by approximately 30 to 40 percent); CX 2502 (Prescott, Dep. at 30) (imported Fittings cheaper than Domestic Fittings); CX 2500 (Swalley, Dep. at 65-67) (Domestic Fittings are dramatically more expensive than non-Domestic Fittings though they are of similar quality to non-Domestic Fittings)).

Response To Finding No. 628:

This finding is incomplete and therefore misleading because Domestic fittings prices are higher due to higher domestic production costs. (RPF 382). *See* Response To Finding 617, *supra*. The term “substantially” is subjective and renders the finding inaccurate and misleading.

629. McWane’s February 2008 price multipliers for Domestic Fittings (*i.e.*, domestically manufactured fittings sold into Domestic-only Specifications) were substantially higher than its February 2008 “blended” multipliers (for Fittings sold into Open Specification projects). For example, whereas a given non-Domestic Fitting might sell in Texas for \$280, the corresponding Domestic Fitting would sell for \$440, an approximately 57% higher price. (RX-410 at 0001, 0002 (Domestic and blended multiplier maps)). McWane offers Domestic Fittings at the same (higher) price, whether the Domestic-only Specification in question is a result of legal requirements or End User preference. (*See* RX-410 at 0002 Domestic multiplier map, not distinguishing legally required Domestic-only Specifications from End User preference)). Further examples of the price differences between Domestic and non-Domestic Fittings according to McWane’s February 2008 price multiplier maps include the following:

State	Non-Domestic Multiplier	Domestic Multiplier	Percentage Difference
California	.33	.44	33.3%
Colorado	.33	.49	48.5%
Florida	.25	.49	96.0%
Michigan	.33	.45	36.4%
Minnesota	.28	.45	60.7%
New York	.31	.44	41.9%
Ohio	.25	.45	80.0%
Oregon	.42	.51	21.4%

(RX-410 at 0001, 0002; *see also* CX 2534 (Bhutada IHT at 31) (estimating that before ARRA, there was a price differential of approximately 20% to 30% between domestic and imported Fittings); CX 1562 at 002 (for 2007 and the first half of 2008, the average gross invoice price per ton of McWane's Domestic Fittings exceeded the gross invoice price per ton of McWane's blended Fittings by between 30% and 37%); CX 1564 at 002 (showing delta between domestic and blended fittings for 2007 and first quarter of 2008); McCutcheon, Tr. 2277-2278 (at the time ARRA's enactment in early 2009, prices for Domestic Fittings were higher than the prices for imported Fittings)).

Response To Finding No. 629:

See Response To Finding 628, *supra*.

630. Similarly, in December 2009 McWane's Domestic Fittings multipliers were substantially higher than its blended Fittings multipliers (CX 1852 at 002 (in December 2009 Sigma announced Fittings multipliers of .46, .58, and .70 for Domestic Fittings, and .27 for the same Fittings if imported)).

Response To Finding No. 630:

See Response To Finding 628, *supra*.

631. Due to the price differential between Fittings sold into open and domestic specifications, McWane does not provide quotes for Domestic Fittings to be used for Open Specification. (CX 2477 (Jansen, Dep. at 96)).

Response To Finding No. 631:

This generalization is not supported by the cited authority.

632. The prices of Domestic and non-Domestic Fittings do not move in tandem; when McWane raises prices on Domestic Fittings, it does not necessarily raise the price of non-Domestic Fittings the same amount (if at all), and when McWane raises prices of non-Domestic Fittings it does not necessarily raise prices of Domestic Fittings the same amount (if at all). (*E.g.*, CX 1397 at 002 (McWane June 2010 price letter “implementing a price increase on all Non Domestic [Fittings]” but not “implementing any price action, at this time, for our Domestic products”); CX 1660 (January 5, 2010 McWane email stating “That is correct. Domestic increases. Non-Domestic does not.”)).

Response To Finding No. 632:

The proposed finding is inaccurate and misleading. Complaint Counsel’s broad statement regarding industry pricing of domestic and import fittings cannot be sustained solely by citing generalized notions of McWane’s adjustments to published prices. Moreover, that supplier may alter domestic and import Fittings prices at different times is not sufficient to establish that prices for domestic and imported Fittings bear no correlation and do not act “in tandem.” The evidence cited simply does not support the proffered finding.

633. In 2008, McWane did not typically offer Project Pricing for Domestic Fittings because the less competitive Domestic market did not require it. (Tatman, Tr. 334-335; CX 2199 at 001 (McWane’s Pricing Coordinator email refusing a sales person’s request for Project Pricing for Domestic Fittings because “We are the only one who makes the full line of 24” and down. No need to drop the price unless Star is an issue.”); CX 2480 (Napoli, Dep. at 73) (job pricing is less frequent on Domestic Fittings jobs)).

Response To Finding No. 633:

This finding is incomplete and therefore misleading. The assertion of a “less competitive Domestic market” is a legal conclusion as to (1) the existence of a separate domestic market and (2) relative competitiveness. This finding is a legal conclusion requiring no response and is not supported by the cited evidence.

5.3 The Relevant Geographic Market for Fittings and Domestic Fittings Consists of All Relevant Products Sold for Use in the United States

634. The relevant geographic market for both Fittings and Domestic Fittings consists of all relevant products sold for use in the United States. (CX 2260-A (Schumann Rep. at 17); Schumann, Tr. 3794; *infra* ¶¶ 635-639).

Response To Finding No. 634:

See General Response 9. This is a legal conclusion requiring no response.

635. The relevant geographic market does not extend to products sold for use outside the United States, because Fittings manufactured for use in the United States are measured in inches, and cannot be used outside the United States, where fittings specifications are metric. (Pais, Tr. 1887).

Response To Finding No. 635:

This is a legal conclusion requiring no response.

636. The relevant geographic market extends to the entire United States because Fittings suppliers ship their products nationally from multiple locations. (CX 2260-A (Schumann Rep. at 17); Rybacki, Tr. at 1089-1092 (Sigma has five main warehouses, some satellite warehouses, and distribution centers in Florida, California, Washington, and Arizona); McCutcheon, Tr. at 2264 (Star has 13 distribution centers in North America in order to “stock product closer to [customers] for better delivery times”); RX-637 (Jansen, Dep. at 144-145) (McWane has distribution centers in Texas, Alabama, California, Oregon, and Illinois, enabling one-to-two day delivery to 95 percent of the country)).

Response To Finding No. 636:

This is a legal conclusion requiring no response.

637. From the perspective of a local Distributor, the Fittings of one manufacturer/supplier are interchangeable with those of another manufacturer/supplier located elsewhere in the United States. (CX 2477 (Jansen, Dep. at 86) (Fittings produced by Sigma, McWane and Star that meet the same AWWA specifications are interchangeable with each other); CX 2483 (Tatman, IHT at 87) (“[Fittings] haven’t changed in 20 years. Quite frankly, yours are the same as everybody else’s”)).

Response To Finding No. 637:

Complaint Counsel proffers the testimony of two employees of Fittinggggs suppliers to make an industry-wide pronouncement of the opinions of all distributors and therefore has not supported the proferrd finding.

638. Distributors do not purchase Fittings from manufacturers/suppliers outside of the United States. (Webb, Tr. 2746 (listing McWane, Sigma, and Star as HD Supply’s suppliers of imported ductile iron pipe fittings); Thees, Tr. 3082 (stating that Ferguson buys imported fittings from McWane, Star, and Sigma); Sheley, Tr. 3398 (TDG has programs with four fittings suppliers: SIP-Serampore, Tyler/Union, Star and Sigma)).

Response To Finding No. 638:

This proposed finding is not supported by the cited evidence.

639. There may be smaller, local relevant geographic markets, but a finding of smaller markets does not impact the analysis of the conduct at issue in this case. (Schumann, Tr. 3794-3795).

Response To Finding No. 639:

See General Response 9. This is a legal conclusion requiring no response.

5.4 McWane, Sigma, and Star Collectively Have Market Power in the Fittings Market

640. McWane, Sigma, and Star collectively have market power in the United States Fittings market. (*Infra* ¶¶ 641-650).

Response To Finding No. 640:

See General Response 1. This finding is misleading, incomplete and an inaccurate and unsupported conclusion of law, which requires no response. The evidence is that Distributors have the market power in the United States Fittings market. (RPF 41-56).

5.4.1 Collectively, McWane, Sigma, and Star Account for a Very High Share of the Fittings Market

641. McWane, Sigma, and Star collectively account for more than _____ of Fittings (including both domestic and imported) sold in the United States. (*Supra* ¶ 456).

Response To Finding No. 641:

See General Responses 1 and 11, and response to ¶ 456, *supra*.

5.4.2 There Are High Barriers to Entry into the Fittings Market

642. There are high barriers to entry into the Fittings market. (*Infra* ¶¶ 643-650).

Response To Finding No. 642:

See General Response 1 and 11. This proposed Finding is misleading, incomplete, and an inaccurate and unsupported conclusion of law, which requires no response. See responses to ¶¶ 643-650, *infra*.

643. In a market with barriers to entry, an incumbent does not face the disruption of price caused by an entrant and the enhanced competition that an entrant would provide. (Schumann, Tr. 3948).

Response To Finding No. 643:

See General Responses 1 and 9. This finding is an assertion of economic theory and/or law, rather than a factual finding, and has not been shown to apply to the Fittings market. It is also based solely on the testimony of an expert witness who concedes that his opinions are not based on testable methodology. (RPFF ¶¶ 370-371)

644. Barriers to entry into the Fittings market are high. (Pais, Tr. 2118 (Fittings industry was “very difficult to enter”; “The barrier for entry in our business is very high”); CX 1003 at 004 (Pais memo observing that “one of the reasons Sigma succeeded in this product range is due to the prohibitive barrier to entry with the high cost of tooling etc.”); CX 2525 (Minamy, IHT at 99, 100) (there have been few examples of entry into the market for Fittings)).

Response To Finding No. 644:

This finding is incorrect because it is contradicted by substantial evidence to the contrary, including Star’s quick and successful expansion as a supplier of domestic fittings. (RPFF ¶¶ 425-497). Moreover, this proposed Finding is misleading, incomplete, and an inaccurate and unsupported conclusion of law, which requires no response.

645. Because Fittings are commodity products, Distributors base their purchasing decisions in part on relationships, and so developing relationships with Distributors is an important part of the business of Fittings suppliers. (Minamy, Tr. 3135; CX 2538 (McCutcheon, IHT (Vol. 2) at 348)). A new entrant must overcome existing relationships between existing manufacturers and the Distributors and End Users. (CX 2525 (Minamy, IHT at 99, 102, 103-104)). When SIP began offering Fittings, SIP had existing relationships with waterworks suppliers due to its sale of municipal castings. (RX-681 (Agarwal, Dep. at 77)).

Response To Finding No. 645:

See Response To Finding 644, *supra*.

646. A new entrant must make a significant capital investment to enter the Fittings market. (CX 2530 (Rona, Dep. at 256-257); CX 2500 (Swalley, Dep. at 102-107 (describing costs of obtaining certifications and develop molds)). For example, a new entrant must build

its own foundry or develop a supply chain of foundries that can produce its Fittings. (Saha, Tr. 1166-1167 (to begin selling Fittings, NACIP needed to source foundries that produced Fittings); *see also infra* ¶¶ 1721-1724 (describing Star’s alternatives for using foundries to produce Domestic Fittings)). An entrant must also develop expertise in design engineering. (Rybacki, Tr. 1092, 1094 (even as a “virtual manufacturer,” Sigma’s engineering staff produces the drawings to make Fittings patterns, and Sigma maintains engineering groups in China and India to oversee the production process); *see also supra* ¶ 60 (describing Sigma engineering expertise); *infra* ¶ 1666 (Star’s engineering expertise needed to operate in the imported Fittings business was available to its Domestic Fittings business)).

Response To Finding No. 646:

This finding is incomplete, misleading and inconsistent with Complaint Counsel’s other Proposed Findings of Fact. It also conflicts with the overwhelming evidence of Star’s quick expansion as a domestic fittings supplier (RPF 425-497) and with Complaint Counsel’s factually unsupported argument that Sigma, which lacked the resources for significant capital investment (RPF 534-567), could be a viable domestic supplier. Capital investments, as a matter of law, are not true entry barriers.

647. It takes time to develop a reputation for quality service and quality product as a validated supplier of Fittings. (CX 2525 (Minamy, IHT at 99)). A new entrant must meet the requirements for specification, *i.e.*, the End User’s approval of the supplier’s product for use in individual projects. (CX 2525 (Minamy, IHT at 99, 100)). A market entrant must secure the testing and approval of its Fittings by the municipalities or other End Users. (CX 2538 (McCutcheon, IHT (Vol. 2) at 348)). An End User that has already tested and approved Fittings from established companies has little incentive to expedite the testing and approval process for a new manufacturer. (CX 2538 (McCutcheon, IHT (Vol. 2) at 348); *see also* Saha, Tr. 1166-1167, 1163 (to begin selling Fittings, NACIP needed to obtain warehouses, obtain AWWA Underwriters Laboratories (UL) certification and National Sanitation Foundation (NSF) approvals, acquire patterns or molds, source foundries that produced Fittings, and establish Distributors through which to sell); CX 2522 (Agarwal, Dep. at 77-78) (to sell Fittings, SIP first needed to obtain UL and NSF certification, and FM approval; SIP also received municipality approvals and placement on engineers’ approved lists before supplying Domestic Fittings)).

Response To Finding No. 647:

See General Responses 3 and 6, and response to ¶ 646, *supra*.

648. A new entrant into the Fittings market would need to develop hundreds of patterns and moldings. (CX 2533 (Bhargava, Dep. at 88-89) (describing need to assemble hundreds of

fitting patterns); CX 1395 at 003 (Pais describing work involved in developing a full range of Fittings production); Saha, Tr. 1166-1167 (to begin selling Fittings, NACIP needed to acquire patterns or molds); CX 2500 (Swalley, Dep. at 102-107) (describing costs of obtaining certifications and developing molds)). A new entrant also must incur a significant cost of inventory. (CX 2525 (Minamyer, IHT at 99)).

Response To Finding No. 648:

See response to ¶ 647, *supra*. This proposed Response posits a general practice or theory that, while may be accurate in certain instances, is just a generalized proposed assertion that may or may not be accurate in many or even most circumstances. Respondent therefore responds that the proposed Finding is over-generalized and over-broad, and subject to misinterpretation.

649. A new entrant into the Fittings market would need about three to five years to enter the market. (CX 2538 (McCutcheon, IHT (Vol. 2) at 348)). SIP took approximately three years to offer a full line of 3500 unique Fittings up to 48” in diameter. (RX-681 (Agarwal, Dep. at 30); CX 2521 (Agarwal, IHT at 64-65)).

Response To Finding No. 649:

See General Responses 3 and 6, and responses to ¶¶ 644 and 646, *supra*. . This proposed finding is not supported by the cited authority and is belied by Star’s quick and successful domestic Fittings entry. (RPFF 425-497).

650. In a market with inelastic demand such as the Fittings market, lowering price will not cause the market to expand as much as in a market with elastic demand. Thus, it is difficult for an entrant to take sales away from the market incumbent in a market with inelastic demand. (Schumann, Tr. 3948; *see also supra* § 4.2.2 (demand for Fittings is inelastic)). Inelastic demand for Fittings indicates that the rewards from price cutting are likely to be small and the rewards from collusion are likely to be large. (CX 2260-A (Schumann Rep. at 36)).

Response To Finding No. 650:

See General Responses 1 and 9. This finding calls for a conclusion of law rather than a factual finding, and is unsupported by the testimony of fact witnesses.

6. The Fittings Market Is Conducive to Collusion

6.1 Oligopoly Theory Describes How Firms in a Market Can Obtain Higher Profits Through Coordination and Accommodation

651. The market for the sale of Fittings in the United States is a highly concentrated oligopoly of three firms, McWane, Sigma, and Star. (CX 2260-A (Schumann Rep. at 25); Schumann, Tr. 3795; *supra* ¶¶ 454-461).

Response To Finding No. 651:

See General Responses 1 and 9, and responses to ¶¶ 454-461, *supra*. This proposed finding is a conclusion of law requiring no response.

652. Oligopolies are markets characterized by a few large firms selling all or most of the market's output. Because there are few firms in an oligopoly, each firm's profit maximizing price and output decisions depend on the price, output, and strategic behavior of the other firms in the market. (CX 2260-A at 25)
(CX 2260 (Schumann Rep. at 25), *in camera*; Schumann, Tr. 3796; *infra* ¶¶ 666-669)

Response To Finding No. 652:

See General Responses 1 and 9. This finding is incomplete and misleading with respect to the Fittings Market. The evidence in the record demonstrates that McWane's decisions were based on its own independent analysis. (RPF ¶¶ 99-100, 103, 134, 283-286, 295-296) The pricing decisions of the other fittings suppliers were also made independently. (RPF ¶¶ 198-234). The proposed finding is a statement of legal and economic theory requiring no response.

653. To maximize its profits, an oligopolist must account, in its strategic decision-making, for the likely strategic reactions of other oligopolists. (CX 2260-A (Schumann Rep. at 25)).

Response To Finding No. 653:

See General Responses 1 and 9, and response to ¶ 652, *supra*. This is not a finding of fact, but a general theoretical proposition of law and economics not specific to the relevant market and an unsupported assertion by an expert whose methodology he concedes cannot be tested or verified. (RPF ¶¶ 350-371)

654. By firms in an oligopoly may be able to develop strategies through observations associated with their ongoing interactions in the market that tend to promote cooperative behavior and diminish competitive behavior. (CX 2260 (Schumann Rep. at 25), *in camera*; Schumann, Tr. 3797). This sort of strategic behavior by firms in an oligopoly may allow them to jointly obtain prices and profits that exceed competitive levels. (CX 2260-A (Schumann Rep. at 25); Schumann, Tr. 3799-3800).

Response To Finding No. 654:

See General Responses 1 and 9, and response to ¶ 652, *supra*. This is not a finding of fact, but a general theoretical proposition of law and economics not specific to the relevant market and an unsupported assertion by an expert whose methodology he concedes cannot be tested or verified. (RPF 350-371)

655. Jointly, the firms in a market can obtain higher profits through coordination and accommodation. (CX 2260-A (Schumann Rep. at 26)).

Response To Finding No. 655:

See General Responses 1 and 9, and response to ¶ 652, *supra*. This is not a finding of fact, but a generic assertion of economic theory that has not been shown to apply to the relevant market with admissible factual evidence and is posited solely through a methodology which concededly cannot be tested or verified. (RPF 344-371)

656. Pricing and margin gains can be made through a proactive pricing strategy where there are few players leading and controlling a market niche. Sigma's Mr. Pais recognized this strategy in a September 2008 marketing strategy memorandum where he explained that price elasticity for Fittings is low, and "lower prices don't necessarily translate into proportionately higher volume." (CX 1155 at 003 (stressing the need for "a certain amount of discipline and a selectively aggressive sales strategy" because of low demand elasticity)).

Response To Finding No. 656:

See General Responses 1, 4 and 5, and response to ¶ 652, *supra*. This is not a finding of fact, but a generic assertion of economic theory that has not been shown to apply to the relevant

market with admissible factual evidence and is posited solely through a methodology which concededly cannot be tested or verified. (RPFF ¶¶ 344-371)

657. Reaching and sustaining coordinated interaction requires that several challenges be overcome, including selecting and coordinating the behavior of cartel participants on mutually consistent, collusive strategies; monitoring the behavior of cartel participants to detect and deter defections from these collusive strategies; and preventing entry (or expansion) by non-cartel firms. (CX 2260-A (Schumann Rep. at 26-27)).

Response To Finding No. 657:

See Response To Finding 652, *supra*.

658. The ability to enforce consensus is critical to successful coordination. (CX 2260-A (Schumann Rep. at 28)).

Response To Finding No. 658:

See Response To Finding 652, *supra*.

659. Uncertainty regarding the behavior of rivals can lead to price cutting by encouraging firms to cheat on their rivals before their rivals can cheat on them. (CX 2260-A (Schumann Rep. at 31)). The lack of trust in rivals creates or enhances the uncertainty that each firm in an oligopoly faces with respect to the likelihood that a rival will cheat. (CX 2260-A (Schumann Rep. at 31)). Cheating or secret price cutting by firms in an oligopoly causes market prices to fall. (CX 2260-A (Schumann Rep. at 26-27, 47)). Price transparency is conducive to coordination; transparency is one way of providing a means for rivals to detect cheating on a consensus price, which increases the risk of punishment and thereby creates a disincentive for such cheating in the first instance. (CX 2260-A (Schumann Rep. at 36)).

Response To Finding No. 659:

See Response To Finding 652, *supra*.

660. By promoting trust through personal relationships that casual social interactions and casual communications encourage, informal communication reduces uncertainty with respect to rivals' willingness to secretly cut prices, which acts to maintain high prices and lowers consumer welfare. (CX 2260-A (Schumann Rep. at 31)).

Response To Finding No. 660:

See General Responses 1 and 9, and response to ¶ 652, *supra*. This is not a finding of fact, but a generic assertion of economic theory that has not been shown to apply to the relevant

market with admissible factual evidence. (RPF 344-371). Moreover, this finding conflicts with the evidence that the fittings suppliers deeply mistrusted each other (RPF 109-113, 116).

661. Participation in trade association activities may facilitate coordination, including collusion. (CX 2260-A (Schumann Rep. at 31)). Trade associations may facilitate the exchange of competitively sensitive information and general communications and social interactions between rival executives in an oligopoly. (CX 2260-A (Schumann Rep. at 31)).

Response To Finding No. 661:

See General Responses 1, 8, and 9 and response to ¶ 652, *supra*. This is not a finding of fact, but a generic assertion of economic theory that has not been shown to apply to the relevant market with admissible factual evidence. (RPF 344-371) Moreover, this finding conflicts with the evidence that DIFRA did not facilitate price coordination. (RPF 243-265).

662. If interactions in an oligopoly are altered to reduce the level of uncertainty and promote the detection of cheating, cheating is less likely to take place and cartel agreement is more likely to be sustained. (Schumann, Tr. 3801-3803).

Response To Finding No. 662:

See General Responses 1 and 9, and response to ¶ 652, *supra*. This is not a finding of fact, but a generic assertion of economic theory that has not been shown to apply to the relevant market with admissible factual evidence. (RPF 344-371)

6.2 Factors Indicating That a Market is Highly Susceptible to Collusion Are Present in the Fittings Market

663. Characteristics indicating that a market is likely to be susceptible to coordinated interaction, including collusion, include (1) high concentration; (2) few rivals; (3) product homogeneity; (4) inelastic demand; (5) price transparency; (6) trade association; (7) information exchange; (8) unconcentrated buyers; (9) barriers to entry; and (10) industry social structure. (CX 2260-A (Schumann Rep. at 27-28); Schumann, Tr. 3809-3820). Not all of these characteristics are necessary for successful coordination to occur. (CX 2260 (Schumann Rep. at 28)).

Response To Finding No. 663:

See General Responses 1 and 9, and response to ¶ 652, *supra*. This is not a finding of fact, but a generic assertion of economic theory that has not been shown to apply to the relevant market with admissible factual evidence. (RPFF ¶¶ 344-371)

664. In the 2007-2008 time period, the Fittings market exhibited many of the characteristics that indicate a market is conducive to coordination. (CX 2260-A (Schumann Rep. at 34); Schumann, Tr. 3823-3838). In sum:

Response To Finding No. 664:

See General Responses 1 and 9, and response to ¶ 652, *supra*. This is not a finding of fact, but a generic assertion of economic theory that has not been shown to apply to the relevant market with admissible factual evidence. The overwhelming testimony of the fact witnesses is that McWane, Sigma and Star did not coordinate or collude on prices. (RPFF ¶¶ 80-343).

- a. The Fittings market is characterized by very high concentration. (CX 2260 (Schumann Rep. at 34)). [REDACTED] (CX 2260 (Schumann Rep. at 18 tbl. 1), *in camera*). HHIs are the standard measure of market concentration. (CX 2260-A (Schumann Rep. at 17)). An HHI above 2500 is classified by federal antitrust enforcement agencies as reflecting a highly concentrated market. (US DOJ and FTC Horizontal Merger Guidelines at 18-19).

Response To Finding No. 664a:

See General Responses 1 and 9. The overwhelming testimony of the fact witnesses is that McWane, Sigma and Star did not coordinate or collude on prices. (RPFF ¶¶ 80-343).

- b. The Fittings market is characterized by few rivals: as a group, McWane, Sigma, and Star, account for more than [REDACTED] of the Fittings (including both domestic and imported) sold in the United States. (CX 2260 (Schumann Rep. at 17 & 18 tbl. 1), *in camera*; *supra* ¶ 456).

Response To Finding No. 664b:

See General Responses 1 and 9. The overwhelming testimony of the fact witnesses is that McWane, Sigma and Star did not coordinate or collude on prices. (RPFF ¶¶ 80-343).

- c. Fittings of any particular size or shape are homogeneous commodity products manufactured to meet industry-wide standards. (*Supra* ¶¶ 415-417).

Response To Finding No. 664c:

See General Responses 1 and 9. The overwhelming testimony of the fact witnesses is that McWane, Sigma and Star did not coordinate or collude on prices. (RPF 80-343).

- d. The demand for Fittings is highly inelastic over the range of prices germane to Fittings transactions. (CX 2260-A (Schumann Rep. at 35; Schumann, Tr. 3830); *see also* RX-712A (Normann Rep. at 24) (industry demand for Fittings is likely inelastic); *supra* ¶¶ 419-424 (describing inelastic nature of Fittings market)).

Response To Finding No. 664d:

See General Responses 1 and 9. This proposed finding is an assertion of law and economic theory, requiring no response. Moreover, the overwhelming testimony of the fact witnesses is that McWane, Sigma and Star did not coordinate or collude on prices. (RPF 80-343).

- e. The published pricing structure of the Fittings industry is highly transparent. (*Infra* ¶¶ 670-678) . However, it is difficult to observe project pricing, although the firms do track instances of project pricing by their competitors. (*Infra* ¶¶ 679-683). A key objective of the suppliers’ coordinated conduct over the course of 2008 was to enhance price transparency by curtailing Project Pricing. (*Infra* ¶¶ 914-919 (describing Tatman plan goal of transparency)).

Response To Finding No. 664e:

See General Responses 1 and 9. The overwhelming testimony of the fact witnesses is that McWane, Sigma and Star did not coordinate or collude on prices. (RPF 80-343). The record does not support the allegation of “coordinated conduct” (RPF 80-343) and the proposed finding omits to acknowledge the “waterfall” of pricing and discounts that exist beyond published and project pricing that is wholly non-transparent. (Tatman, Tr. 550, 571, 1009, 1018).

- f. The suppliers’ formation of the DIFRA trade association and exchange sales information in 2007 and 2008 made the Fittings market even more transparent and

susceptible to collusion, in part by providing a mechanism by which suppliers' could monitor competitors' compliance and detect and deter defections from the collusive strategies. (CX 2260-A (Schumann Rep. at 47); *infra* ¶¶ 1261-1337 (describing purpose and use of DIFRA information exchange)).

Response To Finding No. 664f:

See General Responses 1, 8, and 9, and response to ¶664, *supra*. This finding contradicts the testimony of the fact witnesses that DIFRA was a legitimate trade association that did not facilitate price collusion. (PPFF ¶¶ 243-280). The argument that DIFRA increased price transparency finds no support in the record. All witnesses questioned on the matter testified that the historical tons-shipped data gathered by DIFRA's third-party accounting firm under the supervision of experienced antitrust counsel shed no light on Fittings pricing at all. (RPF 254-265).

- g. The buyers of Fittings (Distributors and End Users) are unconcentrated at the national level. (CX 2260-A (Schumann Rep. at 35); Schumann, Tr. 3827-3829); *supra* §§ 4.4.3, 4.4.4).

Response To Finding No. 664g:

See General Responses 1 and 9. This finding is incorrect because the fact witnesses testified that fittings customers are distributors with substantial market power. (RPF 38-56).

- h. There are high barriers to the entry of new suppliers into the Fittings market. (*Supra* ¶¶ 642-650).

Response To Finding No. 664h:

See General Response 1, and response to ¶¶ 642-650, *supra*. This response is a legal conclusion unsupported by a factual citation. It conflicts with the overwhelming evidence of Star's quick entry as a domestic fittings supplier. (RPF 425-497).

- i. The social structure of the Fittings industry is conducive to collusion. There is regular interaction and communication among suppliers' senior executives, and certain senior executives at McWane, Sigma, and Star have known each other for many years. (CX 2260-A (Schumann Rep. at 37-38); *infra* ¶¶ 700-827).

Response To Finding No. 664i:

See General Responses 1 and 9, and responses to ¶¶ 700-827, *infra*. The overwhelming testimony of the fact witnesses is that McWane, Sigma and Star did not coordinate or collude on prices. (RPF 80-343). As demonstrated throughout these proposed findings, the alleged “social structure” and “executive” interaction consists of McWane, Sigma, and Star (and others) communicating in connection with a trade association supervised by antitrust counsel, the consideration of merger discussions, the exploration of business opportunities in India, China, and other non-domestic locations on on-Fittings products like glands, accessories, and other different products, and a host of other legitimate reasons.

665. McWane, Sigma, and Star took advantage of the characteristics of Fittings and the Fittings market to embark on a course of action that allowed them to collude explicitly. (CX 2260-A (Schumann Rep. at 38); *infra* § 7).

Response To Finding No. 665:

See General Responses 1 and 9, and responses to § *infra*, and ¶ 664 and its subparts *supra*. The overwhelming testimony of the fact witnesses is that McWane, Sigma and Star did not collude, explicitly or implicitly, on prices. (RPF 80-343).

6.3 Fittings Market Pricing Dynamics Are Conducive to Collusion**6.3.1 Pricing Interdependence**

666. [REDACTED]
(*Infra* ¶¶ 667-669; CX 2260 (Schumann Rep. at 25), *in camera*).

Response To Finding No. 666:

See General Responses 1 and 9, and responses to ¶ 652, *supra* and ¶¶ 667-669, *infra*. The testimony of the fact witnesses proves that the fittings suppliers acted independently in making decisions regarding price and output. (RPF 99-100, 103, 134, 198-234, 283-286, 295-296)

667. When McWane announces an increase in its list prices or published multipliers, Sigma and Star typically follow the increase with identical published price increases of their

own. McWane is aware of this market practice. (Tatman, Tr. 257, 377-378 (“[W]hat historically happened is McWane will put out a new list price and historically our competitors match our list price”); Pais, Tr. 1920 (“McWane is an industry leader. Most of the time they set pricing and others try and follow as well as we can.”); Pais, Tr. 1923-1924 (“[McWane] call[s] the shots in most of the pricing trends, you know, not on a day-to-day basis but overall in the long term.”); CX 2538 (McCutcheon, IHT (Vol. 2) at 421) (“I’ve followed every increase [McWane has] ever taken.”); CX 2535 (Bhutada, Dep. at 100, 103) (Star usually monitors the list price and multipliers announced by McWane and, when McWane announces a new published price, Star typically announces identical prices); Minamyler, Tr. 3138-3142 (Star’s standard practice, including in 2008, was to match McWane’s and Sigma’s Fittings multipliers in each trading area); CX 2539 (McCutcheon, Dep. at 21) (“we would follow what McWane would publish and we would use the multipliers that they used”); McCutcheon, Tr. 2270 (Star sets its published Fittings multipliers to match McWane’s published Fittings multipliers, for imported Fittings, Domestic Fittings, and for all geographic regions in the United States); McCutcheon, Tr. 2269 (Star’s Fittings list prices are almost identical to McWane’s Fittings list prices); Rybacki, Tr. 1098 (Sigma list prices largely match McWane, and try to match multipliers in a “ballpark” sense); Rybacki, Tr. 3574 (referring to July 2008 McWane price increase: “If they were going up, we needed a price increase at that time, and I wanted to make sure that we were locked step.”); Rybacki, Tr. 3576-3577 (Sigma is “[a]lways trying” to keep Sigma’s multipliers the same as the competition’s); Tatman, Tr. 336-337 (Sigma has historically maintained the same list price as McWane); CX 2500 (Swalley, Dep. at 35) (Electrosteel USA uses the same Fittings price lists as those published by McWane, Star, and Sigma to price its Fittings)).

Response To Finding No. 667:

See responses to ¶¶ 652 and 666, *supra*. This finding is incomplete and therefore misleading. Star and Sigma would, at times, independently follow published list price changes and multiplier changes (whether up or down), because their distributor customers, which have market power and actually prefer higher prices, demand it. (RPFF ¶¶ 38-65). However, each independent firm offers its customers numerous types of non-transparent discounts which are independently determined. (RPFF ¶¶ 67-79). Virtually no customer pays list price for fittings. (RPFF ¶ 61).

668. Suppliers cannot sustain a price increase unless the other suppliers follow suit and increase their prices. (Rybacki, Tr. 1113, 1114 (“Q. Can you go up [in price] if your competitors don’t follow you? A. No.”); Pais, Tr. 1936-1937 (“[U]p to a point we need the market to support a price that we wish to charge,” and any price change that was not followed by the other suppliers “naturally it would not last”); CX 1189 at 002 (Sigma canceling issuance of new price list in January 2008 after McWane did not follow);

CX 0824 (Star putting previously announced price increase on hold following McWane's announcement that it was not raising price); McCutcheon, Tr. 2425 (explaining withdrawal of price increase: "I was unhappy about it, but if -- if you're the highest-priced fitting in a commodity market, you're not going to sell a lot of fittings."); CX 1702 at 001 (email from Rick Tatman explaining the interdependence of supplier pricing: "I don't believe with our silence and Star's push announcement that Sigma will hold to their Jan 2nd effective date so we have some time to get it right.")).

Response To Finding No. 668:

This finding is incomplete and therefore misleading. See response to ¶ 667, *supra*.

669. The Fittings suppliers are aware that their pricing policies are interdependent. If one supplier competes aggressively with Project Pricing, the other suppliers know that they must meet that supplier's price or risk losing business. (*supra* §§ 4.2.4, 4.5.2; Rybacki, Tr. 1113; Pais, Tr. 1931-1932 (explaining that "everyone realizes" that for suppliers to be more profitable that the "only way that can happen is if the market bears as a whole a certain level of pricing."); CX 2528 (Pais, Dep. at 252-253) (if Sigma raises multipliers and McWane does not, Sigma "can sell some product, some volume at the higher prices, but [Sigma's] volume will be lower"); RX-017 at 0001 (Sigma regional sales manager writing that a list price increase "would be a futile exercise unless everybody is on board"); CX 2535 (Bhutada, Dep. at 105-106) (project pricing is necessary to "meet competition for us to get that project"); RX-698 (McCutcheon, Dep. at 23) ("We start with the list price and then the published multiplier, but the project ends up selling at a price that we think we need to sell it to get the order."); CX 2539 (McCutcheon, Dep. at 23) ("Q. Is it your understanding, Mr. McCutcheon, that there are times when a distributor in a given region will say, "Hey, Sigma or Tyler is offering me this price. What are you guys at Star going to do?" Is that a common occurrence? A. Yes, sir."); Tatman, Tr. 1022, *in camera* [REDACTED]; CX 2260 (Schumann Rep. at 25), *in camera*).

Response To Finding No. 669:

See General Response 1, responses to §§ 4.2.4 and 4.5.2, *supra*, and response to ¶ 667, *supra*. This finding is incomplete, and therefore misleading. There are many times when the fittings suppliers' pricing policies diverge. (RPF 80-140, 198-234, 281-299)

6.3.2 Published Prices Are Transparent

670. Published prices for Fittings are transparent. All major suppliers publish their list prices in price books or catalogues that are widely disseminated to all of their customers. Suppliers also post their list prices on their public websites. (Tatman, Tr. 255-256; Rybacki, Tr. 1097, 1099; Minamy, Tr. 3137-3138; CX 2535 (Bhutada, Dep. at 100)).

Response To Finding No. 670:

Respondent has no specific response.

671. Any changes in published multipliers are also widely disseminated through letters that are transmitted via fax or email to Distributors, either on an individual state or region basis, or, in the case of the large national Distributors, via “multiplier maps” that identify local multipliers for each state across the United States. (Tatman, Tr. 262-263, 305, 322; CX 2440; RX-410 (sample McWane multiplier map); Rybacki, Tr. 1100 (changes in multipliers are communicated by letters to customers); McCutcheon, Tr. 2270 (Star communicates its published multipliers to its customers through letters)).

Response To Finding No. 671:

Respondent has no specific response.

672. Fittings suppliers routinely obtain and read copies of their competitors’ list price and multiplier announcements. Suppliers commonly receive a copy of their competitors’ price announcements from their Distributor customers. (CX 2450 at 002 (HD supply faxing McWane price increase letter to Sigma within one day); Tatman, Tr. 306-307 (Tatman receives competitors’ letters from his customers “sometimes ... in a day, [s]ometimes it’s two weeks,” and assumes that McWane’s competitors receive his letters from customers); Rybacki, Tr. 3487 (Sigma obtains and reads competitor price announcements); CX 2526 (Minamyer, Dep. at 125-126) (Star would try to get copies of its competitors’ letters). Copies of each supplier’s price change announcements are found in the other suppliers’ files. (*See infra* ¶¶ 685.a-685.cc)).

Response To Finding No. 672:

This proposed Response posits a general practice or theory that, while may be accurate in certain instances, is just a generalized proposed assertion that may or may not be accurate in many or even most circumstances. Respondent therefore responds that the proposed Finding is over-generalized and over-broad, and subject to misinterpretation.

673. In 2008, Star regularly sent its price announcements directly to Craig Schapiro of Sigma, who was on Star’s price announcement mailing list and received Star price multiplier letters addressed “To Our Valued Customers.” (CX 0893 at 001; Minamyer, Tr. 3194-3195; CX 2252 at 001). Upon receipt, Mr. Schapiro regularly circulated Star price announcements to Sigma’s sales team and to Sigma executives in charge of setting Sigma’s Fittings prices. (*E.g.*, CX 1402 (October 22, 2007); CX 2252 (June 27, 2008: “Looks like STAR is sending their version of the [McWane] letters”); CX 1738 (June 1, 2010)).

Response To Finding No. 673:

See General Responses 4, 5 and 10. This proposed finding ignores the fact that Fittings suppliers bought and sold Fittings on “spot” and other bases. It also ignores that any such price letters would have been received after a price adjustment decisions had been made.

674. Fittings suppliers consider their competitors’ price announcements when making their own pricing decisions. (Tatman, Tr. 287; CX 2483 (Tatman, IHT at 43-44) (Tatman considers the competitive price level when setting prices); Minamy, Tr. 3148-3149 (Star makes a conscious effort to gather and read its competitors’ pricing letters, and bases its sales strategy in part on what it reads in those letters); CX 2526 (Minamy, Dep. at 126-127) (Star would review and discuss competitors’ letters when considering Star’s own pricing decisions); Rybacki, Tr. 1108-1109 (Sigma pays attention to its competitors’ pricing “every day,” including by obtaining, reviewing and considering competitors’ pricing letters); Rybacki, Tr. 3559 (“I use all the information I get my hands on.”); CX 2531 (Rybacki, Dep. 205-206) (he would read competitor letters carefully, looking for information about competitors’ intentions); CX 1018 at 001 (Pais explaining that McWane “publishes” its multipliers by way of customer letters)).

Response To Finding No. 674:

See General Response 11. This finding is incomplete, and therefore misleading. See response to ¶ 667, *supra*. Fittings suppliers make price decisions based on other independent factors. (RPF ¶¶ 80-140, 198-234, 281-299)

675. Mr. Rybacki, who set Sigma’s Fittings prices, considered competitors’ price letters to be reliable. CX 2531 (Rybacki, Dep. at 56-57) (“For the most part I thought they were trustworthy.”); Rybacki, Tr. 1109 (Rybacki would review competitor letters and try to determine if they were serious or not, and found them to be serious for the most part)).

Response To Finding No. 675:

This finding is incorrect and contradicts the overwhelming testimony from McWane, Sigma and Star witnesses that the fittings suppliers did not trust each other or their respective customer letters. (RPF ¶¶ 109-113, 116)

676. The Fittings market’s transparent published pricing structure is conducive to pricing stability and creates an environment that is conducive to collusion. (CX 2260-A (Schumann Rep. at 36-37)).

Response To Finding No. 676:

See General Responses 1, 9 and 11, and response to ¶ 664 and each of its subparts, *supra*.

See also response to ¶ 667, *supra*. This finding is an incorrect conclusion of law completely unsupported by the evidence, and thus requires no response. (RPF ¶¶ 266-269, 587-597)

677. For example, in an October 17, 2008 email addressing pricing in a different product area (municipal construction castings), Mr. Pais explained that introducing “a PRICE LIST/Discount culture to the market [tends] to stabilize, standardize, and improve the overall market pricing and margins.” (CX 1147 at 001).

Response To Finding No. 677:

See General Responses 4 and 5. This finding is incomplete and therefore misleading. In reality, the evidence proves that prices declined and profit margins deteriorated in the latter half of 2008. (RPF ¶¶ 266-269)

678. Similarly, on January 18, 2010, Mr. Pais explained to Sigma’s top managers that Sigma “had long hoped to streamline the FAB pricing along the lines of our success in Fittings where a List/Multiplier format helps to minimize the price fluctuations and it also makes price revisions (increases) easier.” (CX 1104 at 001).

Response To Finding No. 678:

See General Responses 2, 4, and 5, and response to ¶ 677 *Supra*. This finding is also irrelevant because it is outside the period of the alleged conspiracy. (RPF ¶ 348)

6.3.3 Project Prices Are Not Transparent

679. Project Pricing, on the other hand, is not published and is therefore less transparent than the published list prices and multipliers. (Tatman, Tr. 927 (describing responding to Project Pricing as “shooting in the dark”); *see also* Minamy, Tr. 3145 (“Q. If Star was offering a project price for a particular project, would you want your competitors to know what project price you were offering? A. No, sir. Q. Why not? A. For the fear that they would price lower than us to try to take the project.”); RX-698 (McCutcheon, Dep. at 57 (“The stated procedure is to get hard documentation [of project pricing by a competitor]. It almost never happens. It’s verbal.”); Tatman, Tr. 267-268 (explaining that with project pricing McWane “essentially los[es]. . . visibility to where is the true competitive price level.”); CX 1439 at 002 (Pais describing plant work/project pricing: “THIS PRACTICE WREAKED HAVOC”)).

Response To Finding No. 679:

Respondent has no specific response.

680. For a specific project, Distributors commonly seek bids from multiple Fittings suppliers, and the suppliers can lose “visibility” as to the true competitive price level. (Tatman, Tr. 265-268 (“[W]hat we’ve essentially lost in this environment is visibility to where is the true competitive price level.”); Tatman, Tr. 927 (describing McWane as “shooting [in] the dark” on Fittings pricing); (RX-650 (Morrison, Dep. at 68) (“Q. Okay. When you bid out a project, do you get multiple, do you get, do you actively seek different quotes from the different suppliers of waterworks fittings? A. Typically.”); RX-703 (Coryn, Dep. at 36) (describing the Distributor practice of requesting quotations from suppliers)).

Response To Finding No. 680:

Respondent has no specific response.

681. McWane prefers to have price transparency in the Fittings market in order to know what the true competitive prices are. (Tatman, Tr. 332 (“[W]e would like to have greater visibility into where the true competitive market level is. That’s self-serving for us.”); Tatman, Tr. 376 (the terms “transparency” and “visibility” are interchangeable)).

Response To Finding No. 681:

This proposed finding is incomplete, inaccurate and misrepresents the meaning of the cited authority. The cited authority only establishes that Mr. Tatman liked to know what his competitors’ pricing was on a job basis so his sales force could undercut that competition and win business from them. Presumably, every business would feel similarly. This is far different than the argumentative inflammatory statement that “McWane prefers to have price transparency in the Fittings market.”

682. In 2007 and 2008, McWane’s sales force was about half the size of each of Sigma’s and Star’s sales forces, making it even harder for McWane to obtain visibility or otherwise determine the Project Prices being offered by its competitors. (Tatman, Tr. 281-283).

Response To Finding No. 682:

Respondent has no specific response.

683. In 2008, McWane tracked competitive information through narrative market intelligence reports from its sales force that were submitted to, and reviewed by, Mr. Jansen and Mr. Tatman. (Tatman, Tr. 333-334, 915-916, 919-920 (describing market intelligence

reports as being based solely on weekly narratives from each of McWane's eight to ten sales representatives); RX-598 (competitive feedback report); CX 2477 (Jansen, Dep. at 37-39) (describing review of weekly highlight reports from sales personnel and the preparation of the competitive feedback report at Mr. Jansen's direction)).

Response To Finding No. 683:

McWane monitored the market through a number of means, including through written reports from its sales force.

6.3.4 Fittings Suppliers Routinely Receive Each Other's Pricing Letters

684. Fittings suppliers routinely receive each other's pricing letters soon after they are issued. (*Infra* ¶ 685).

Response To Finding No. 684:

See General Response 1. This finding is incomplete and therefore misleading. The evidence is that fittings suppliers received pricing letters after the fact and from their customers. (RPF ¶¶ 193-197) There is no evidence of advance notice of price changes. (RPF ¶¶ 198-234)

685. Examples of list price and multiplier announcements issued and/or received by the suppliers during the relevant time period include the following:

Response To Finding No. 685:

See General Response 1. This is not a factual finding, and therefore requires no response.

- a. On or about October 5, 2007, McWane issued a letter to its customers announcing a Fittings multiplier increase of one or two multiplier points, effective November 5, 2007, and stating that "it is our intention to address future price actions with adjustments to invoice multiplier levels rather than by publishing List Price changes." (RX-401). Star had received a copy of this letter by October 10, 2007. (CX 0833).

Response To Finding No. 685a:

See General Responses 1 and 5. This finding is incomplete and therefore misleading.

The evidence is that fittings suppliers received pricing letters after the fact and from their

customers. (RPF 193-197) There is no evidence of advance notice of price changes. (RPF 198-234)

- b. On or about October 11, 2007, Star announced that it would increase Fittings multipliers by 2 multiplier points, effective November 5, 2007. (CX 0837; RX-402). This letter was faxed to Craig Schapiro of Sigma on October 17, 2007. (CX 1402 at 002).

Response To Finding No. 685b:

See General Responses 1, 4 and 5. This finding is incomplete and therefore misleading.

The evidence is that fittings suppliers received pricing letters after the fact and from their customers. See Response To Finding 673, *supra*. (RPF 193-197) There is no evidence of advance notice of price changes. (RPF 198-234)

- c. On or about October 23, 2007, Sigma issued a letter to its customers announcing a price increase of two to three multiplier points on all Fittings, effective November 5, 2007, and a list price increase to be effective January 2, 2008 of a minimum of 6%. (RX-015). McWane obtained possession of this letter. (CX 2457 (October 19 version of letter); RX-015 (same letter dated October 23 and edited to include accessories)). Star had received Sigma's October 23, 2008 letter by October 26, 2007. (CX 0840 at 001).

Response To Finding No. 685c:

See General Responses 1 and 5. This finding is incomplete and therefore misleading.

The evidence is that fittings suppliers received pricing letters after the fact and from their customers. (RPF 193-197) There is no evidence of advance notice of price changes. (RPF 198-234)

- d. On or about November 30, 2007, Star issued a letter to its customers announcing that it would be publishing new Fittings list prices to be effective January 1, 2008. (CX 0627 at 013; RX-406). As of December 12, 2007, Sigma was aware that Star had announced a new price book (CX 1528 at 001).

Response To Finding No. 685d:

See General Responses 1 and 5. This finding is incomplete and therefore misleading.

The evidence is that fittings suppliers received pricing letters after the fact and from their

customers. (RPF 193-197) There is no evidence of advance notice of price changes. (RPF 198-234)

- e. On or about December 20, 2007, Sigma issued a letter to its customers delaying the implementation of its recently announced new Fittings list prices with respect to Fittings. (CX 0627 at 012).

Response To Finding No. 685e:

See General Responses 1 and 5. This finding is incomplete and therefore misleading.

The evidence is that fittings suppliers received pricing letters after the fact and from their customers. (RPF 193-197) There is no evidence of advance notice of price changes. (RPF 198-234)

- f. On or about December 22, 2007, Star announced that it would be postponing the effective date of its previously announced Fittings list price increase until February 4, 2008. (CX 1702).

Response To Finding No. 685f:

See General Responses 1 and 5. This finding is incomplete and therefore misleading.

The evidence is that fittings suppliers received pricing letters after the fact and from their customers. (RPF 193-197) There is no evidence of advance notice of price changes. (RPF 198-234)

- g. On or about January 11, 2008, McWane issued a letter to its customers announcing that on January 18, 2008 it would announce new Fittings price multipliers, to be effective February 18, 2008, while retaining existing list prices. Blended Fittings multipliers would increase by 10%-12%, Domestic Fittings would increase by 3%-5%, and McWane's intention going forward would be to sell all products only off the newly published multipliers. (CX 2172 at 002). Star and Sigma each had received a copy of McWane's letter by January 14, 2008. (CX 0038 at 001; CX 1291; CX 1114).

Response To Finding No. 685g:

See General Responses 1 and 5. This finding is incomplete and therefore misleading.

The evidence is that fittings suppliers received pricing letters after the fact and from their

customers. (RPF 193-197) There is no evidence of advance notice of price changes. (RPF 198-234)

- h. On or about January 18, 2008, McWane issued letters to its customers specifying the Fittings multiplier increases first announced in its January 11, 2008 letter, effective February 18, 2008. (CX 1672; RX-608). By January 18, 2008, Star's National Sales Manager Mr. Minamyer had received copies of McWane's national price multiplier maps for these increases. (CX 0035). As of January 22, 2008, Mr. Minamyer was alerting his sales force that the McWane letters were "hitting the streets" (CX 0752). Sigma obtained this letter (CX 0896), and by January 24, 2008, Victor Pais was aware of McWane's "NEW multipliers" (CX 1145 at 001).

Response To Finding No. 685h:

See General Responses 1 and 5. This finding is incomplete and therefore misleading.

The evidence is that fittings suppliers received pricing letters after the fact and from their customers. (RPF 193-197) There is no evidence of advance notice of price changes. (RPF 198-234)

- i. On or about January 29, 2008, Sigma issued a letter to its customers rescinding its previously announced new Fittings list prices and "follow[ing] suit" after McWane's multiplier increase, effective February 25, 2008. The letter further stated that "[i]t is our intent to raise prices in 2008" (CX 1189; RX-610 (Letter appears in McWane's files)).

Response To Finding No. 685i:

See General Responses 1 and 5. This finding is incomplete and therefore misleading.

The evidence is that fittings suppliers received pricing letters after the fact from their customers. (RPF 193-197) There is no evidence of advance notice of price changes. (RPF 198-234)

- j. On or about January 31, 2008, Star informed its customers that it would be following McWane's announced Fittings multiplier increases effective February 18, 2008, and that there would be "NO UTILITY PROJECT PRICING NATION WIDE." (CX 1566).

Response To Finding No. 685j:

See General Responses 1 and 5. This finding is incomplete and therefore misleading.

The evidence is that fittings suppliers received pricing letters after the fact and from their customers. (RPF 193-197) There is no evidence of advance notice of price changes. (RPF 198-234)

- k. On or about February 1, 2008, Sigma issued letters to its customers announcing region-specific multipliers pursuant to its January 29 letter. (CX 1401 at 002; CX 0848 at 002). Star received copies of those letters as early as February 7, 2008. (CX 0848 at 001).

Response To Finding No. 685k:

See General Responses 1 and 5. This finding is incomplete and therefore misleading.

The evidence is that fittings suppliers received pricing letters after the fact and from their customers. (RPF 193-197) There is no evidence of advance notice of price changes. (RPF 198-234)

- l. On or about February 6, 2008, Star issued letters to its customers specifying multiplier increases that it would implement effective February 18, 2008. (CX 2336). On February 7, 2008, Craig Schapiro, of Sigma, received such a letter from Star (CX 0893).

Response To Finding No. 685l:

See General Responses 1 and 5. This finding is incomplete and therefore misleading.

The evidence is that fittings suppliers received pricing letters after the fact and from their customers. (RPF 193-197) There is no evidence of advance notice of price changes. (RPF 198-234). *See* Response To Finding 673, *supra*.

- m. On or about April 25, 2008, Sigma announced to its customers that it would be raising Fittings multipliers by up to ten multiplier points effective May 19, 2008. (CX 1858). Star obtained the announcement on the same day (CX 0862), while McWane appeared to possess an earlier draft of the announcement (CX 0176).

Response To Finding No. 685m:

See General Responses 1 and 5. This finding is incomplete and therefore misleading. The evidence is that fittings suppliers received pricing letters after the fact and from their customers. (RPF 193-197) There is no evidence of advance notice of price changes. (RPF 198-234). An examination of the subject exhibits dispels the implication of the proposed finding that Star received the Sigma price announcement through anything but legitimate means or that McWane somehow had advance or special access to Sigma's letter or somehow knew about the Sigma price adjustment before Sigma made independent pricing decisions and disclosed these decisions to customers. With respect to Star, CX 0862, the April 25, 2008 cover email from a Star regional manager states of the attached Sigma letter: "Here is the Sigma fitting increase letter that just hit the streets today. AS soon as the multiplier letter or letters hit my customers, I will get them forward to you and Matt ASAP!!" Thus, Star received the Sigma letter and multiplier map (if ever) piecemeal and from customers. With respect to McWane, CX 0176, Mr. Tatman's email forwarding the Sigma letter internally on April 25, 2008 attaches the Sigma letter which clearly establishes at the top of the price letter that it was faxed to McWane on "4/25/2008" to "Union Foundry." While that Sigma letter is dated April 16, 2008, this is immaterial as McWane received the Sigma letter after Sigma made its pricing decision. Moreover, the April 16, 2008 letter appears to apply solely to the southeast region, whereas the April 25, 2008 letter is a nationwide or non-southeastern region specific letter. Thus, the statement that "McWane appeared to possess an earlier draft of the announcement" is unsupported. The implication that McWane had advance access is belied by the fax transmission information, there is no evidence the April 16, 2008 letter was a "draft" and, regardless, McWane did not possess until April 25, 2008.

- n. On or about May 7, 2008, McWane issued a letter to its customers stating that it expected to issue a further pricing policy announcement by the end of May. McWane anticipated that multipliers would increase in the range of 6% to 16%. (CX 0138). Star received a copy of the letter the same day. (CX 0863 at 001). Sigma had received a copy of McWane's May 7, 2008 letter by May 8, 2008. (CX 1128).

Response To Finding No. 685n:

See General Responses 1 and 5. This finding is incomplete and therefore misleading.

The evidence is that fittings suppliers received pricing letters after the fact and from their customers. (RPF 193-197) There is no evidence of advance notice of price changes. (RPF 198-234)

- o. On or about May 7, 2008, Star issued letters to its customers announcing an increase in Fittings multipliers effective May 19, 2008, (CX 0816; CX 0817; CX 0818; CX 0819; CX 0820; CX 0821; CX 0822; CX 0823), and on May 12, 2008 Star put this increase on hold as a result of McWane's May 7, 2008 letter. (RX-060; CX 0527; McCutcheon, Tr. 2425). McWane had received a copy of the May 7, 2008 letter by May 13, 2008. (CX 0431).

Response To Finding No. 685o:

See General Responses 1 and 5. This finding is incomplete and therefore misleading.

The evidence is that fittings suppliers received pricing letters after the fact and from their customers. (RPF 193-197) There is no evidence of advance notice of price changes. (RPF 198-234)

- p. On or about June 17, 2008, McWane issued a letter to its customers announcing an increase in Fittings multipliers effective July 14, 2008, and stating that the weighted average increase on blended Fittings and accessories would be "approximately 8%," while the increase on Domestic Fittings would be "significantly less." (CX 1576; CX 1191). Star came into possession of this letter (CX 0047 (letter in Star's files)).

Response To Finding No. 685p:

See General Responses 1 and 5. This finding is incomplete and therefore misleading.

The evidence is that fittings suppliers received pricing letters after the fact and from their

customers. (RPF 193-197) There is no evidence of advance notice of price changes. (RPF 198-234)

- q. On or about June 27, 2008, Star issued letters to its customers specifying multiplier increases that it would implement effective July 14, 2008. (CX 1668; CX 2255; CX 2430; CX 2431; CX 2432; CX 2433). Sigma had received a copy of this letter by June 27, 2008 (CX 2252). McWane also obtained a copy (CX 2456 (letter in McWane's files)).

Response To Finding No. 685q:

See General Responses 1 and 5. This finding is incomplete and therefore misleading.

The evidence is that fittings suppliers received pricing letters after the fact and from their customers. (RPF 193-197) There is no evidence of advance notice of price changes. (RPF 198-234)

- r. On or about July 7, 2008, Sigma issued letters to its customers specifying Fittings price multiplier increases that it would implement effective July 14, 2008. (CX 2253). By July 8, Star had received a copy of Sigma's July 7 multiplier increase letter. (CX 0865).

Response To Finding No. 685r:

See General Responses 1 and 5. This finding is incomplete and therefore misleading.

The evidence is that fittings suppliers received pricing letters after the fact from their customers. (RPF 193-197) There is no evidence of advance notice of price changes. (RPF 198-234)

- s. On or about January 19, 2009, Sigma issued letters to its customers announcing Fittings multiplier increases effective February 9, 2009. (CX 0878 at 002). Star was in possession of this letter by January 20, 2009 (CX 0878).

Response To Finding No. 685s:

See General Responses 1 and 5. This finding is incomplete and therefore misleading.

The evidence is that fittings suppliers received pricing letters after the fact and from their

customers. (RPF 193-197) There is no evidence of advance notice of price changes. (RPF 198-234)

- t. On or about January 23, 2009, Star issued letters to its customers announcing Fittings multiplier increases effective February 9, 2009. (CX 2452 at 002). As of January 26, 2009, Sigma had received this announcement. (CX 2452 at 001).

Response To Finding No. 685t:

See General Responses 1, 2, and 5. This finding is incomplete and therefore misleading.

The evidence is that fittings suppliers received pricing letters after the fact and from their customers. (RPF 193-197) There is no evidence of advance notice of price changes. (RPF 198-234)

- u. On or about April 13, 2009, McWane issued a letter to its customers announcing that, effective May 1, 2009, it would begin using a new price list with higher prices for small diameter Fittings and lower prices for medium and large diameter Fittings. (CX 0569; CX 1669).

Response To Finding No. 685u:

See General Responses 1, 2, and 5. This finding is incomplete and therefore misleading.

The evidence is that fittings suppliers received pricing letters after the fact and from their customers. (RPF 193-197) There is no evidence of advance notice of price changes. (RPF 198-234)

- v. On or about April 22, 2009, Star issued an email to its customers announcing that it would be updating its Fittings price list effective May 19, 2009. (CX 2349 (letter in McWane's files)).

Response To Finding No. 685v:

See General Responses 1, 2, and 5. This finding is incomplete and therefore misleading.

The evidence is that fittings suppliers received pricing letters after the fact and from their customers. (RPF 193-197) There is no evidence of advance notice of price changes. (RPF 198-234)

- w. On or about April 27, 2009, Sigma issued a letter to its customers announcing that it planned to continue to use its existing price list for Fittings (CX 0212 at 004; CX 1454). McWane obtained that letter on April 27, 2009 (CX 0575), and Star obtained the letter by April 29, 2009. (CX 0889).

Response To Finding No. 685w:

See General Responses 1, 2, and 5. This finding is incomplete and therefore misleading.

The evidence is that fittings suppliers received pricing letters after the fact and from their customers. (RPF 193-197) There is no evidence of advance notice of price changes. (RPF 198-234)

- x. On or about May 4, 2009, Star issued letters to its customers specifying the Fittings price multiplier changes that it would implement to follow McWane (except with respect to PA), effective May 12, 2009. (RX-620 (letter as produced from McWane's files)).

Response To Finding No. 685x:

See General Responses 1, 2, and 5. This finding is incomplete and therefore misleading.

The evidence is that fittings suppliers received pricing letters after the fact and from their customers. (RPF 193-197) There is no evidence of advance notice of price changes. (RPF 198-234)

- y. On or about May 11, 2009, Sigma sent a letter to its customers announcing adoption by Sigma of McWane's new Fittings list prices and announcing new Fittings price multipliers, effective May 12, 2009. (CX 0965; CX 1060).

Response To Finding No. 685y:

See General Responses 1, 2, and 5. This finding is incomplete and therefore misleading.

The evidence is that fittings suppliers received pricing letters after the fact and from their customers. (RPF 193-197) There is no evidence of advance notice of price changes. (RPF 198-234)

- z. On or about June 10, 2010, Sigma sent a letter to its customers announcing that "[t]he multipliers for non-Domestic Fittings will be revised." (CX 2453 at 002). McWane had received this letter by June 11, 2010. (CX 2438 at 001).

Response To Finding No. 685z:

See General Responses 1, 2, and 5. This finding is incomplete and therefore misleading.

The evidence is that fittings suppliers received pricing letters after the fact and from their customers. (RPF 193-197) There is no evidence of advance notice of price changes. (RPF 198-234)

- aa. On or about June 17, 2010, McWane sent letters to its customers announcing that, effective July 1, 2010, it would raise non-Domestic Fittings multipliers in 45 of 50 States. (CX 2440). Sigma had received this letter by June 18, 2010. (CX 2450).

Response To Finding No. 685aa:

See General Responses 1, 2, and 5. This finding is incomplete and therefore misleading.

The evidence is that fittings suppliers received pricing letters after the fact and from their customers. (RPF 193-197) There is no evidence of advance notice of price changes. (RPF 198-234)

- bb. On or about June 18, 2010, Star sent letters to its customers announcing multiplier price increases matching McWane's. (CX 1406 at 001). Sigma received this letter directly from Star on June 18, 2010. (CX 1406 at 001). McWane had received this letter by June 19, 2010. (CX 2441 at 001).

Response To Finding No. 685bb:

See General Responses 1, 2, and 5. This finding is incomplete and therefore misleading.

The evidence is that fittings suppliers received pricing letters after the fact and from their customers. (RPF 193-197) There is no evidence of advance notice of price changes. (RPF 198-234)

- cc. On or about June 24, 2010, Sigma sent letters to its customers announcing multiplier price increases matching Star's and McWane's. (CX 1396 at 002).

Response To Finding No. 685cc:

See General Responses 1, 2, and 5. This finding is incomplete and therefore misleading.

The evidence is that fittings suppliers received pricing letters after the fact and from their customers. (RPF 193-197) There is no evidence of advance notice of price changes. (RPF 198-234)

6.3.5 Fittings Suppliers Use Pricing Letters to Communicate with Competitors

686. Suppliers know that their competitors receive their price announcement letters. (Tatman, Tr. 377 (“I believe when we put out a letter, they’re going to grab it”); Tatman, Tr. 1067 (“My competitors are going to pick up this letter through normal competitive channels”); CX 2531 (Rybacki, Dep. at 216-217) (following issuance of price increase announcement, “everybody in the market would understand that Sigma needs and would like a price increase”); *supra* ¶ 673 (Star regularly sent its price announcements directly to Craig Schapiro of Sigma).

Response To Finding No. 686:

See General Response 1. This finding is incomplete and therefore misleading. The evidence is that fittings suppliers received pricing letters after the fact and from their customers. (RPF 193-197) There is no evidence of advance notice of price changes. (RPF 198-234)

687. Suppliers include “messages” or “signals” intended for “competitors” or “the market” in their customer letters. (Tatman, Tr. 1065-1067 (so-called “head fake” message in January 11, 2008 customer letter was directed at competitors, not customers); CX 2531 (Rybacki, Dep. at 208) (“Q. Has [Mr. Pais] ever suggested that you send a letter that would be a heads-up to your customers and to the market? A. Two or three times a day.”); (Pais, Tr. 2038 (agreeing that June 2010 pricing letter to customers was also directed at competitors); CX 2525 (Minamy, IHT at 77) (when reading competitors’ pricing letters, the suppliers consider whether the letters contained signals to them)).

Response To Finding No. 687:

This finding is incomplete and therefore misleading. The suppliers did not send or receive any messages about pricing decisions, agreements or strategies by way of customer letters. (RPF 193-234)

688. For example, Mr. Rybacki reads McWane and Star letters carefully to determine their intentions, and he expects his competitors to do the same with Sigma letters. (CX 2531 (Rybacki, Dep. at 205-206)).

Response To Finding No. 688:

This finding is incomplete and therefore misleading. The evidence in the record proves the suppliers did not send or receive any messages about pricing decisions, agreements or strategies by way of customer letters. (RPF 193-234). Mr. Tatman’s testimony regarding a “head fake” established, as that term would imply, that he was sending a false message through his customer letters, not as the proposed Finding and the heading 6.3.5 would imply, that McWane was communicating with competitors to collude. (Tatman, Tr. 1065-1067).

689. This practice of using letters ostensibly addressed to customers to communicate with their competitors began in at least 2008 and continued into at least 2009 and 2010. (*See infra* §§ 6.3.5.1, 6.3.5.2, 6.3.5.3).

Response To Finding No. 689:

See General Responses 1 and 2, and responses to ¶¶ 684 and 687, *Supra*. *See* responses to §§ 6.3.5.1, 6.3.5.2., 6.3.5.3, *infra*. Dr. Schumann, Complaint Counsel’s expert, testified that the alleged conspiracy regarding non-domestic fittings prices ended in 2008. (RPF 281-282)

6.3.5.1 Fittings Suppliers Used Customer Pricing Letters to Signal Messages to Their Competitors in 2008

690. Fittings suppliers used customer pricing letters to signal messages to their competitors in 2008. For example, in Mr. Tatman’s presentation regarding a proposed January 2008 price announcement, he described a “Desired Message to the Market & Competitors” (CX 0627 at 004), and included two different forms of draft customer letter by which that “message” might be delivered. (CX 0627 at 006, 007; *see infra* § 7.2.1).

Response To Finding No. 690:

See General Responses 1 and 11. The first sentence of this finding is not only unsupported by the evidence, but completely contradicted by the evidence – at least with respect to alleged messages regarding price. (RPF 193-234, 367-369). This finding is also incorrect

because Mr. Tatman’s presentation (CX 0627) was never shared with or communicated to anyone outside of McWane. (RPFF ¶ 357). By its own description, the internal draft letters in the referenced presentation were just that, drafts that were never sent and by definition, could not have constituted a “communication” to anyone.

691. Similarly on April 18, 2008, Mr. Pais wrote that Sigma’s April 2008 price increase letter should “include one line to signal SIGMA’s strong commitment to ‘clean up’ our pricing” and that “WE WILL HAVE TO INFLUENCE [MCWANE] THRU OUR SINCERITY AND CLARITY OF OUR PLANS AND ACTIONS!” (CX 1134 at 001-002).

Response To Finding No. 691:

See General Responses 1, 4 and 5, and response to ¶ 690, *supra*. The use of the term “similarly” in the proposed finding to somehow connote a correlation between Mr. Pais’ internal communication that never made it to a letter that was disclosed outside of Sigma with the Tatman internal draft letter that never made it outside of McWane is not supported by the evidence or common sense.

692. And again in July 2008, Steve Goodwyn, a member of Sigma’s sales team, sent an email to Sigma’s management team regarding a proposed letter to customers, which he referred to as a letter to the “industry”: “We plan to send a letter to the industry stating we intend to follow the current published multiplier for all fittings especially on fittings 30” and above. The intent is to send the message to Star and others to do the same. If we are able to increase our average multiplier for 30”+ just a few points, it will prove to increase the bottom line significantly.” (CX 1151 at 001; RX-690 (Rybacki, Dep. at 207-208) (noting that Mr. Goodwyn drafted the letter after a discussion with Mr. Pais)).

Response To Finding No. 692:

See General Responses 1, 4, 5 and 6, and response to ¶ 690, *supra*. And again,” the internal communications do not amount to a communication with any competitor.

693. In an email to HD Supply dated January 30, 2008, which McWane Senior officials receive a copy of, Star communicates that “Star is raising or matching all fitting numbers to match Tyler effective Feb 18th . . . NO UTILITY PROJECT PRICING NATION WIDE.” (CX 0178 (McWane’s copy of the Star email to HD Supply)).

Response To Finding No. 693:

See General Responses 1 and 5, and response to ¶ 690, *supra*.

6.3.5.2 Fittings Suppliers Used Customer Pricing Letters to Signal Messages to Their Competitors in 2009

694. Fittings suppliers used customer pricing letters to signal messages to their competitors in 2009. For example, in discussing Sigma’s response to a McWane April 13, 2009 pricing announcement, Greg Fox of Sigma sent an email to his colleagues Craig Schapiro and Mr. Pais that “it’s imperative for Sigma to circulate (sooner rather than later) our letter and price list on MJ Accessories to the marketplace. [McWane] may receive Sigma’s intentions from the letter and incorporate into their plans.” (CX 0989 at 002).

Response To Finding No. 694:

See General Responses 1, 2, 4, 5 and 11, and responses to ¶¶ 687, 689, and 690, *supra*.

This finding is incorrect, misleading and misconstrues Mr. Fox’s email. (See RPF 193-234, 281-282, 362-369.) The quoted language contains only the author’s speculation about McWane’s reaction, which the email concedes it does not know, and is not a communication between competitors.

695. Mr. Tatman later tried to interpret the message to McWane contained within Sigma’s April 2009 pricing letter: “I may be reading too much into Larry’s [Rybacki] words but his message to [McWane] may be that I’ll control my pricing and I want you [to] pull back your list price restructuring?????” (CX 0651 at 001; Tatman, Tr. 599; CX 0171 at 001 (describing one of the goals of McWane’s price restructuring as putting a list price structure in place that is “easily understood and therefore easily followed by our competitors . . . The code is easy to break.”).

Response To Finding No. 695:

See General Responses 1, 2 and 11, and responses to ¶¶ 687, 689, and 694, *supra*. The finding discloses that Sigma and McWane had not communicated and neither knew what the other was doing or thinking. Complaint Counsel’s insertion of “[McWane]” in the quoted language is a liberty that is inappropriate and not warranted by the record.

6.3.5.3 Fittings Suppliers Used Customer Pricing Letters to Signal Messages to Their Competitors in 2010

696. Fittings suppliers used customer pricing letters to signal messages to their competitors in 2010. For example, in a June 2010 email within Sigma, Mr. Pais, described a pricing letter to customers as “largely a ‘heads up’ to the customers and the market about our intention to follow suit when Star or others take a definitive action on price increases.” (CX 1413; *see also infra* § 7.10 (describing events surrounding “heads-up” letter in more detail)).

Response To Finding No. 696:

See General Responses 1, 2, 4, 5 and 11, and responses to ¶¶ 687, 689, and 694, *supra*.

Moreover, Dr. Schumann testified that there was no alleged conspiracy in 2010. (RPFF 281-282).

697. In response to Sigma’s June 2010 “heads up” letter, Mr. Tatman considered one of McWane’s options to be to “[s]end out communication supporting the need for a price increase, wait for Sigma or Star to publish new multipliers and then follow.” This was a reference to sending out a McWane customer letter “to let Sigma and Star know that McWane supports the need for a price increase.” (CX 2442-A at 001; Tatman, Tr. 311-312; *see also infra* § 7.10).

Response To Finding No. 697:

See General Responses 1, 2 and 11, and responses to ¶¶ 687, 689, and 694, *supra*. Dr.

Schumann concluded there was no alleged conspiracy in 2010. (RPFF 281-282).

698. After receiving the June 2010 “heads up” announcement from Sigma described above, Mr. Tatman wrote an email considering what McWane’s “response” to this “communication from Star and Sigma” should be, and stating that “I believe Sigma is waiting for either a supporting communication from us or an announcement on specific price actions.” (CX 2442-A at 001; Tatman, Tr. 311-312, 316-319; *see also infra* § 7.10).

Response To Finding No. 698:

See General Responses 1, 2, 5 and 11, and responses to ¶¶ 687, 689, and 694, *supra*. Dr.

Schumann concluded there was no alleged conspiracy in 2010. (RPFF 281-282).

6.4 **Fittings Market Social Structure**

699. The three main Fittings suppliers know each other well, and have a history of close relationships and extensive communications. (*Infra* ¶¶ 700-827).

Response To Finding No. 699:

See General Responses 1 and 11, and responses to ¶¶ 700-827, *infra*. Because this finding is an argumentative assertion unsupported by any citation to the record, no response is required.

6.4.1 The Fittings Suppliers Often Met and Spoke with Each Other

700. From 2007 through 2011, senior executives of McWane, Sigma, and Star had regular contact with each other by telephone, by email, or at in-person meetings. (*Infra* ¶¶ 701-827).

Response To Finding No. 700:

See General Response 1 and responses to ¶¶ 701-827, *infra*. Because this finding is an assertion unsupported by any citation to the record, no response is required.

6.4.1.1 History of Competitor Communications

701. The top McWane, Sigma and Star executives have known each other for many years, and over that time have developed a practice of regularly discussing, coordinating, and debating events in the Fittings market. (*Infra* ¶¶ 702-712).

Response To Finding No. 701:

See General Responses 1 and 11, and responses to ¶¶ 702-827, *infra*. Because this finding is an assertion unsupported by any citation to the record, no response is required. This proposed finding is argumentative, inaccurate and misleading. See Response To Finding 664i, *supra*.

702. Mr. McCutcheon and Mr. Pais have a history of price-related communications dating back to the late 1990s and continuing throughout the 2000s and up to at least 2009. (McCutcheon, Tr. 2359-2362³) (explaining that he handled calls with Mr. Pais because Mr. Pais used to berate Star's President, Mr. Bhutada); Pais, Tr. 1960 (admitting to communications "from time to time" with Mr. McCutcheon and on "occasion" with Mr. Bhutada)). Mr. Pais typically called Mr. McCutcheon to complain about the way Star was running its business, and in particular, Star's pricing behavior. (McCutcheon, Tr. 2362, 2367 ("Q. Did [Pais] complain about your behavior that was price-driven? A. Yes, sir.")).

Response To Finding No. 702:

See General Responses 2, 4 5 and 10. Complaint Counsel's characterization of the evidence cited is not supported by the cited authority.

703. Specifically, Mr. Pais complained to Mr. McCutcheon on more than one occasion that Star was offering discounts that were bringing down prices. (McCutcheon, Tr. 2367⁴). As Mr. McCutcheon testified:

Generally, it was a -- he would call, or he would stop me at a trade show and tell me how bad Star Pipe was. And how we're destroying the market and we don't know how to run our company and we're just bad. And Ramesh is bad, and it was generally a very condescending, beatdown conversation. That was his -- that was the reason, I guess, he wanted to talk to us -- talk to me.

³ Mr. McCutcheon's trial testimony regarding Mr. Pais' out of court statement is cited only to prove that Mr. Pais called Star to complain, and not cited to prove the truth of the complaints in the referenced statement. (*See* McCutcheon, Tr. 2360).

⁴ At trial, the cited testimony was admitted for the truth of the matter asserted in Mr. Pais's out of court statements in furtherance of the DIFRA information exchange under the co-conspirator hearsay exception. (*See* McCutcheon, Tr. 2363-2366). The cited testimony regarding the out of court statements of Mr. Pais is also cited to prove the fact of the statements.

(CX 2538 (McCutcheon, IHT (Vol. 2) at 226-227); *see also* CX 2538 (McCutcheon, IHT (Vol. 2) at 229-230 (recounting a breakfast meeting with Mr. Pais at which Mr. Pais claimed that Star was “doing a poor job, that Star Pipe is destroying the market, and we were bad and that was the general purpose of the meeting”))).

Response To Finding No. 703:

See General Responses 2, 4 and 5. . *See* General Responses 8 and 10 with respect to footnote 4. Moreover, contrary to footnote 4, the Court did not allow the questions based on its acceptance of the proffered “co-conspirator” hearsay exception. Rather, the court stated: “Well, I’m going to allow this over objection, but I’ll tell you that when I read this record, I’m going to have to be convinced that this exception applies.” (McCutcheon, Tr. 2365).

704. When Mr. McCutcheon and Mr. Pais spoke, Mr. Pais typically suggested that he had close relations with McWane, and that McWane was on board with whatever plan Mr. Pais was proposing. As Mr. McCutcheon further testified:

[T]hat was a normal comment of [Mr. Pais’s], that he implied that if we [Sigma and Star] do this, he’ll get, you know, he’ll talk to his friends at McWane. He was considered to be very friendly with the people at McWane. I’m not sure who the people were, probably Ruffner Page, but he was working really hard in several different levels to try to be considered part of the Birmingham gang.

(CX 2538 (McCutcheon, IHT (Vol. 2) at 229)).

Response To Finding No. 704:

See General Responses 2, 3, 4, 5 and 6. In addition, the proposed Finding is improper in that it is based on “implied” hearsay (what Mr. McCutcheon understood Mr. Pais to be “imply[ing]” about his relationship with McWane) and lacks foundation (“[Pais] was *considered* to be *very friendly* with the people of McWane. *I’m not sure* who the people were, probably Ruffner Page, . . .”) (emphasis added). **Last, McWane denies that Mr. Page had a “close”, “friendly” or any type of relationship with Mr. Pais other than an appropriate business relationship.**

Q. Describe for me, if you will, your relationship with Mr. Pais.

A. Different. Victor really seems to be a kind of – or seemed to be desirous of being really entrepreneurial and an idea guy, I guess would be a good way to say it. And – and, periodically, off and on it would go in spurts where he would think he would have some good ideas. He would want to get together and discuss those ideas about joint ventures, selling his company to us, us doing business together in the Middle East. Usually, it involved his ideas, McWane money, and him making money on it. So we didn't do any of them.

JX 642 (Page Dep. p. 30). *See* JX 642 (Page Dep. p. 116-17 (“Victor was very repetitive in his – in his focus and requests. Many, many times he would call or e-mail and talk about this. And, then I would say “Well, we’re not interested in that” or “Yeah, give me more information on that”. And he would say, “In response to your feedback, here’s – here’s an opportunity.” So, it was all exploratory. None of these things existed. They were all opportunities in Victor’s mind that once again, with his relationships and – McWane’s business, that there might be something for us to do together that would be successful.” *See also* JX 642 (Page Dep. p. 275 (“[A]s we’ve seen a number of things, Victor lives in LaLa Land. He lives an illusion that he thinks he is running around getting things done, and he just has an oversized pair of pants on.”)).

705. Mr. McCutcheon was motivated to meet with Mr. Pais because he provided Mr. McCutcheon with market share estimates of Fittings tonnage sold by Sigma, Star and McWane. (McCutcheon, Tr. 2356-2358; CX 0046; CX 2538 (McCutcheon, IHT (Vol. 2) at 266) (“[H]e would tell me all kinds of things I didn’t know.”); RX-697 (McCutcheon, IHT (Vol. 2) at 277-278 (describing July 13, 2007 meeting with Mr. Pais where Mr. Pais shared market share estimates of Sigma, Star and McWane)). Based on the information that Mr. Pais provided him, Mr. McCutcheon made estimates of the relative sales of fittings of McWane, Sigma, and Star. (CX 2538 (McCutcheon, IHT (Vol. 2) at 277-278); *see* CX 0532 at 002).

Response To Finding No. 705:

See General Responses 3, 4, 5 and 6.

706. Mr. Pais admitted to price-related conversations with Star, although he testified that it was Star that complained about Sigma (rather than Sigma complaining about Star), that Sigma was “spoiling the market,” “not being responsible,” and using “aggressive tactics.” (Pais, Tr. 1961-1963 (describing Star’s criticisms of Sigma in conversations “[t]hree to four years back”).

Response To Finding No. 706:

See General Responses 4 and 5. The quoted language purportedly supporting this finding, language that is not agreed upon by Messrs. Pais or McCutcheon, are not “price-related” conversations or communications to fix Fittings prices.

707. At the end of 2008, Mr. Pais contacted Mr. McCutcheon of Star regarding the formation of a lobbying organization called WASMA, whose purpose was to effectuate changes in ARRA. (Pais, Tr. 1728).

Response To Finding No. 707:

See General Responses 4 and 5.

708. Mr. McCutcheon also has a history of price-related communications with Mr. Rybacki. On more than one occasion, Mr. McCutcheon has communicated with Mr. Rybacki prior to the announcement of list price changes regarding “mostly list price changes, timing on list price changes and things like that.” (CX 2525 (Minamyler, IHT at 56-58).

Response To Finding No. 708:

See General Responses 3, 4, 5 and 6. The purported communications between Mr. McCutcheon and Mr. Rybacki have no bearing on the allegations against McWane. Further, Mr. Rybacki testified that he never discussed Fittings prices with anyone at McWane, including Mr. Tatman, Mr. Jansen, Mr. Frank, or Mr. Page. (RPFF 203). Mr. McCutcheon specifically testified that he never discussed or agreed upon fittings prices with Mr. Page, Mr. McCullough, Mr. Walton, Mr. Tatman, Mr. Jansen, or anyone else at McWane – at any time. (RPFF 213).

709. Mr. McCutcheon told Mr. Minamyler that he talked to Mr. Rybacki on at least one occasion while Mr. Minamyler was the National Sales Manager at Star. During that conversation, Mr. McCutcheon told Mr. Minamyler that he had convinced Mr. Rybacki to announce a list price increase. (Minamyler, Tr. 3234-3237).

Response To Finding No. 709:

See General Responses 4 and 5. In addition to the Proposed Finding being based on hearsay and having nothing to do with McWane, the witness (Mr. Minamyler) testified that he does not recall when his conversation with Mr. McCutcheon took place, only that it occurred at some point during the 2005-2009 time period he was Star's National Sales Manager (Minamyler, Tr. 3237, 3128). The purported communications between Mr. McCutcheon and Mr. Rybacki have no bearing on the allegations against McWane. Further, Mr. Rybacki testified that he never discussed Fittings prices with anyone at McWane, including Mr. Tatman, Mr. Jansen, Mr. Frank, or Mr. Page. (RPF 203). Mr. McCutcheon specifically testified that he never discussed or agreed upon fittings prices with Mr. Page, Mr. McCullough, Mr. Walton, Mr. Tatman, Mr. Jansen, or anyone else at McWane – at any time. (RPF 213).

710.

[REDACTED]

(Rybacki, Tr. 3608-3609, *in camera*).

Response To Finding No. 710:

See General Response 4.

711. In late 2006, Mr. McCutcheon met with Mr. Page and Mr. Green of McWane. Mr. Page and Mr. Green told Mr. McCutcheon that it had been a mistake for McWane to allow Star to expand its business into the Fittings market. (McCutcheon, Tr. 2351-2356; CX 2538 (McCutcheon, IHT (Vol. 2) at 254-255)).

Response To Finding No. 711:

See General Responses 2 and 5. This proposed Finding concerns a meeting and purported statements in 2006, well before the conspiracy alleged in the Complaint. It is based on hearsay – what Mr. Page and Mr. Green allegedly told Mr. McCutcheon. Assuming it were relevant and not based on hearsay, the alleged statements have nothing to do with price-fixing or any agreement to limit job pricing.

712. Mr. Pais and Mr. Page have a close and “mutually trusting” relationship, and a history of frequent communications relating to competitive dynamics and pricing practices in the fittings market dating back to 2003. (*Infra* § 6.4.2).

Response To Finding No. 712:

See General Responses 1 and 11, and response to § 6.4.2, *infra*. Because this finding is an assertion unsupported by any citation to the record, no response is required. See Response To Finding 704.

6.4.1.2 Telephone Contacts

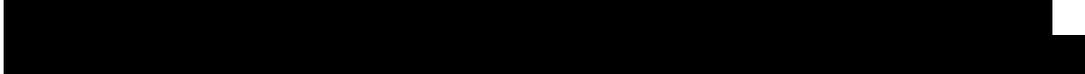
713.

(CX 1618-A, *in camera*; CX 1621-A, *in camera*; CX 1624-A, *in camera*; CX-1625-A, *in camera*; CX 1626-A, *in camera*; CX-1860-A, *in camera*).

Response To Finding No. 713:

McWane has no specific response.

714.

 (See *infra* ¶ 715; CX 1618-A, *in camera*; CX 1621-A, *in camera*; CX 1624-A, *in camera*; CX-1625-A, *in camera*; CX 1626-A, *in camera*; CX-1860-A, *in camera*)).

Response To Finding No. 714:

See General Response 2. This proposed Finding of Fact is misleading. The alleged conspiracy, according to the Complaint and Complaint Counsel’s expert Dr. Schumann, occurred between late 2007 and the Fourth Quarter of 2008. (Complaint ¶ 2; RPF ¶ 281). Calls occurring before and afterward are irrelevant.

Many of the calls lasted for only one or two minutes, suggesting that no discussion occurred but rather suggesting voicemail or an unsuccessful effort to talk. (CX 1621A *in camera*). Discussions among Sigma and Star executives are not relevant to Complaint Counsel’s claims against McWane. (See General Response 4). Finally, the last category of calls that

potentially might be relevant – those involving McWane personnel lasting over a minute or two proximate in time to the alleged conspiracy – were explained at trial. For example, Mr. Rona was Sigma’s OEM business manager and McWane was one of his customers. (RPF 309-312). Mr. Brakefield (Sigma) was president of DIFRA and communicated concerning the scheduling of DIFRA meetings. (See RPF 238, CCPF 111). Mr. Rybacki (Sigma) had a personal friendship with McWane employee Tom Frank, and called him on occasion to visit and inquire about his family. (RPF 304-307). Mr. Pais and Messrs. Page and Tatman communicated regarding non-Fittings (including glands) business opportunities in India and Asia and even potential merger discussions. The very small number of calls about which the witnesses could not specifically recall details were too limited in number, too infrequent and too sporadic to be probative of a conspiracy. (RPF 300-343).

Finally, Complaint Counsel failed to establish that, during any of the phone calls appearing on any witnesses' telephone bill, any person potentially involved in a conversation ever actually spoke about Fittings, let alone the pricing of Fittings, let alone any effort to coordinate regarding the curtailment or elimination of Project Pricing on Fittings. Absent connecting the dots between any alleged calls -- something that Complaint Counsel cannot do given the hundreds of denials from every witness to have allegedly participated in the claimed conspiracy (RPF VI, VII), and the fact that, as demonstrated above, there were perfectly legitimate business reason to explain the alleged calls -- "[t]his record does nothing but indicate a call was made from one phone number to another phone number." Given all of the foregoing, the inference that Complaint Counsel is trying to make regarding alleged price coordination in this proposed Finding, and indeed with respect to any such alleged phone conversation, cannot be sustained.

“Sir, do you see that on January 15 Mr. Rybacki -- a call was made from Mr. Rybacki's cell phone to your cell phone for two minutes? Do you know what you and Mr. Rybacki discussed on January 15, 2008?

MR. OSTOYICH: Well, Your Honor, I'm going to start to object to "discussed" since he hasn't established he actually had a discussion. A lot of these were one-minute phone calls. I don't know if he's laid a foundation for the word "discussed." It could have gone into voice mail. It could have been anything.

MR. HASSI: I can change it to "communicated."

JUDGE CHAPPELL: Right. Because the wording assumes a call was made and a call was received by these two people. This record does nothing but indicate a call was made from one phone number to another phone number. (McCutcheon, Tr. 2475).

* * *

MR. OSTOYICH: Your Honor, could I just ask that he not lead the witness. It's not clear that the witness knows whether he actually spoke to anybody. There's just a phone record. It could have gone to voice mail. It could have been disconnected. Who knows? The question is being posited as if he spoke to someone.

JUDGE CHAPPELL: Well, he has a good point. This document shows that one phone number called another phone number. (Rybacki, Tr. 3611-3612).

Response To Finding No. 715:

This proposed Finding is misleading. See response to ¶ 714, *supra*.

716. Mr. Rybacki's responsibilities in 2008 and 2009 did not require him to communicate with anyone at Star or McWane. (Rybacki, Tr. 1087-1089).

Response To Finding No. 716:

See General Response No. 4 with respect to communications by Star and Sigma employees. This proposed Finding of Fact is misleading. While the testimony is accurately quoted, Mr. Rybacki's responsibilities in 2009 did not prohibit him from calling his personal friend Tom Frank, from calling Mr. Tatman to welcome him to the industry following his promotion, or from calling McWane with respect to DIFRA. (RPF ¶¶ 300-343) See also response to ¶ 714, *supra*.

717. Mr. Rybacki testified at his deposition that he only spoke to Mr. Tatman once or twice in his entire career: "I think I've talked to Rick [Tatman] on the phone maybe once, once or twice maximum my whole career. . . . I think it was when David Green left, and I think Joe might have said that was '06 or '07, '07, so it was probably when he took the job to maybe say hi and welcome him to the job. That might have been the only time. I know I only talked to him once or twice max." (CX 2531 (Rybacki, Dep. at 190-191); Rybacki, Tr. 1088-1089 (repeating claim that Mr. Rybacki had only "probably" spoken with Mr. Tatman twice, with the first occasion being to welcome Mr. Tatman to the waterworks industry after Mr. Tatman replaced David Green at McWane). Mr. Tatman gave similar testimony, stating that "I've talked to Mr. Rybacki two, three, a couple of times. I don't know when and I don't know what the topics were." (Tatman Tr. 364).

Response To Finding No. 717:

This proposed Finding of Fact is misleading. Consistent with both Mr. Rybacki and Mr. Tatman's testimony that they spoke only 2-3 times, phone records reflect an exchange of calls on 12/27/07 and on 1/3 and 1/4/2008 (suggesting a missed call and a return call). These are the only calls between Mr. Rybacki and Mr. Tatman pre-dating or concurrent with the formation of the alleged conspiracy. Either or both of these calls could have been the social "welcome to the waterworks business" call to which Mr. Rybacki testified (Rybacki, Tr. 1088-1089) or calls

relating to DIFRA to which Mr. Rybacki also testified (Rybacki, Tr. 3536-3537). Significantly, both Mr. Tatman and Mr. Rybacki expressly testified that they had never discussed or agreed on Fittings prices. (RPF 301). *See* Response To Finding 714, *supra*.

718.

(Rybacki, Tr. 3610, 3617, *in camera*,

Response To Finding No. 718:

See Response To Finding 714, *supra*.

719. Mr. Rybacki testified that there was “[n]obody” at Star with whom he communicated regularly. (CX 2531 (Rybacki, Dep. at 192)). (“How about at Star, are there people at Star that you communicate with regularly? A. Nobody.”). Mr. Rybacki does not have a social relationship with Mr. McCutcheon. (Rybacki, Tr. 1088).

Response To Finding No. 719:

See General Response 4.

720. Mr. Rybacki testified that over the years he would have occasional calls with Mr. McCutcheon or ██████████ relating to Sigma wanting to acquire Star, or Star wanting to acquire Sigma. (Rybacki, Tr. 1087-1088, 3609, *in camera*).

Response To Finding No. 720:

See General Response 4. *See* Response To Finding 714, *supra*.

721. Mr. Rybacki described the frequency of his past contacts with Mr. McCutcheon as “relatively infrequently, but, you know, once in a great while.” (CX 2531 (Rybacki, Dep. at 192-193)).

Response To Finding No. 721:

See General Responses 4 and 6. *See* Response To Finding 714, *supra*.

722. Mr. McCutcheon testified that he spoke to Mr. Rybacki three to four times per year in the 2008-2009 timeframe. (McCutcheon, Tr. 2379; CX 2539 (McCutcheon, Dep. at 190); CX 2538 (McCutcheon, IHT (Vol. 2) at 221) (“I would speak to Tom Brakefield once a year at a trade show, we would say hello. . . . I would speak to Victor historically one to three times a year. And I would speak to Larry Rybacki two to four times a year”); CX 2538 (McCutcheon, IHT (Vol. 2) at 235-237 (McCutcheon would speak with Rybacki “[p]robably two to four times a year,” and they “would talk about how bad the

market is, how bad the economy is, not price specifically, but we would talk about, in general, how bad it was, or how good it was”).

Response To Finding No. 722:

See General Response 4. See Response To Finding 714, *supra*.

6.4.1.3 Specific Contacts Reflected in Telephone Records

723. Telephone records reflect numerous specific communications between executives at Sigma, McWane, and/or Star. (See, e.g., *infra* ¶¶ 724-786).

Response To Finding No. 723:

See General Responses 14, and 11, and responses to ¶¶ 724-786, *infra*. See Response To Finding 714, *supra*.

724.

(CX 1621-A at 126, *in camera*; Rybacki, Tr. 3606-3607, *in camera*; see also *infra* ¶ 884 (describing context of call)).

Response To Finding No. 724:

See General Response 4. See Response To Finding 714, *supra*.

725.

[REDACTED] (CX 1621-A at 127, *in camera*; Rybacki, Tr. 3606, *in camera*; see also *infra* ¶ 884 (describing context of call)).

Response To Finding No. 725:

See General Response 4. See Response To Finding 714, *supra*.

726.

[REDACTED] (CX 1621-A at 128, *in camera*; Rybacki, Tr. 3608-3609, *in camera*; see also *infra* ¶ 884 (describing context of call)).

Response To Finding No. 726:

See General Response 4. See Response To Finding 714, *supra*.

727.

[REDACTED] (CX 1621-A at 129, *in camera*; Rybacki, Tr. 3611-3612, *in camera*; see also *infra* ¶ 884 (describing context of call)).

Response To Finding No. 727:

See General Response 4. See Response To Finding 714, *supra*.

728.

(CX 1621-A at 130, *in camera*; Rybacki, Tr. 3612, *in camera*; see also *infra* ¶ 884 (describing context of call)).

Response To Finding No. 728:

See General Response 4. See Response To Finding 714, *supra*.

729.

(CX 1621-A at 130, *in camera*; Rybacki, Tr. 3612-3613, *in camera*; see also *infra* ¶ 884 (describing context of call)).

Response To Finding No. 729:

See General Response 4. See Response To Finding 714, *supra*.

730.

(CX 1621-A at 130, *in camera*; Rybacki, Tr. 3612-3613, *in camera*; see also *infra* ¶ 884 (describing context of call)).

Response To Finding No. 730:

See General Response 4. See Response To Finding 714, *supra*.

731.

[REDACTED] (CX 1621-A at 118, *in camera*; Rybacki, Tr. 3613-3614, *in camera*; see also *infra* ¶ 884 (describing context of call)).

Response To Finding No. 731:

See General Response 4. See Response To Finding 714, *supra*.

732.

[REDACTED] (CX 1621-A at 118, *in camera*; Rybacki, Tr. 3613-3614, *in camera*; see also *infra* ¶ 884 (describing context of call)).

Response To Finding No. 732:

See General Response 4. See Response To Finding 714, *supra*.

733.

[REDACTED] (CX 1621-A at 119, *in camera*; Rybacki, Tr. 3614, *in camera*; see also *infra* ¶ 884 (describing context of call)).

Response To Finding No. 733:

See General Response 4. See Response To Finding 714, *supra*.

734.

(CX 1621-A at 123, *in camera*;
McCutcheon, Tr. 2473, *in camera*; Rybacki, Tr. 3614-3616, *in camera*; see also *infra*
¶ 894 (describing context of call)).

Response To Finding No. 734:

See General Response 4. See Response To Finding 714, *supra*.

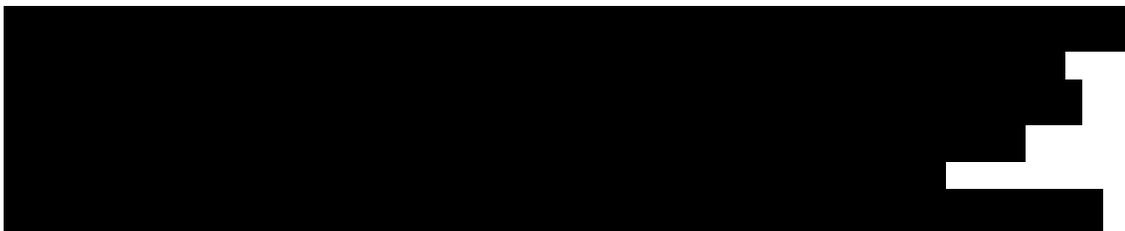
735.

(CX 1621-A at 124, *in camera*; Rybacki,
Tr. 3617, *in camera*; see also *infra* ¶ 895 (describing context of call)).

Response To Finding No. 735:

To the extent this proposed Finding of Fact is an attempt to suggest an opportunity to
conspire, it is misleading. The alleged call was for a duration of 2 minutes (suggesting a
voicemail message as opposed to a conversation), and may have been a personal call by
Mr. Rybacki to his friend Tom Frank. (RPFF ¶¶ 304-307). See Response To Finding 714,
supra.

736.


(CX 1621-A at 124, *in camera*; McCutcheon, Tr. 2474, *in camera*; Rybacki, Tr. 3616-
3618, *in camera*; see also *infra* ¶ 894 (describing context of calls)).

Response To Finding No. 736:

See General Response 4. See Response To Finding 714, *supra*.

737.


(CX 1621-A at 125, *in camera*;
Rybacki, Tr. 3622-3623, *in camera*; see also *infra* ¶ 895 (describing context of call)).

Response To Finding No. 737:

To the extent this proposed Finding of Fact is an attempt to suggest an opportunity to conspire, it is misleading. It was for a short duration, and may have been a personal call by Mr. Rybacki to his friend Tom Frank. (RPF 304-307). See Response To Finding 714, *supra*.

738.

(CX 1621-A at 112, *in camera*;
McCutcheon, Tr. 2476, *in camera*; see also *infra* ¶ 894 (describing context of call)).

Response To Finding No. 738:

See General Response 4. See Response To Finding 714, *supra*.

739.

(CX 1621-A at 113, *in camera*;
Tatman, Tr. 367; Rybacki, Tr. 3624-3626, *in camera*; see also *infra* ¶ 923 (describing context of call)).

Response To Finding No. 739:

See General Response 11, and response to ¶ 717 and 714, *supra*. To the extent this proposed Finding of Fact is an attempt to suggest an opportunity to conspire, it is misleading and contrary to the evidence. (RPF 301-307).

740.

[REDACTED] (CX 1621-A at 113, *in camera*;
Tatman, Tr. 367-368; Rybacki, Tr. 3626, *in camera*; see also *infra* ¶ 923 (describing context of call)).

Response To Finding No. 740:

See General Response 11, and response to ¶ 717 and 714, *supra*. To the extent this proposed finding is an attempt to suggest an opportunity to conspire, it is misleading and contrary to the evidence. (RPF 301-307).

741.

[REDACTED] (CX 1621-A at 114, *in camera*;

Tatman, Tr. 369-370; Rybacki, Tr. 3627, *in camera*; see also *infra* ¶ 923 (describing context of call)).

Response To Finding No. 741:

See General Response 11, and response to ¶ 717 and 714, *supra*. To the extent this proposed finding is an attempt to suggest an opportunity to conspire, it is misleading and contrary to the evidence. (RPF ¶¶ 301-307).

742.

(CX 1621-A at 115, *in camera*;
Tatman, Tr. 370, *in camera*; Rybacki, Tr. 3627-3628, *in camera*; see also *infra* ¶ 923 (describing context of call)).

Response To Finding No. 742:

See General Response 11, and response to ¶ 717 and 714, *supra*. To the extent this proposed finding is an attempt to suggest an opportunity to conspire, it is misleading and contrary to the evidence. (RPF ¶¶ 301-307)

743.

[REDACTED] (CX 1621-A at 116, *in camera*; Rybacki, Tr. 3628, *in camera*).

Response To Finding No. 743:

See General Response 4. Discussions between Mr. Rybacki (Sigma) and Star are not relevant to Complaint Counsel's claims against McWane. As such, McWane has no specific response. See Response To Finding 714, *supra*.

744.

[REDACTED] (CX 1621-A at 116, *in camera*;
Rybacki, Tr. 3628-3629, *in camera*).

Response To Finding No. 744:

See General Response 4. Discussions between Mr. Rybacki (Sigma) and Star are not relevant to Complaint Counsel's claims against McWane. As such, McWane has no specific response. See Response To Finding 714, *supra*.

745.

(CX 1621-A at 117, *in camera*;
McCutcheon, Tr. 2475-2476, *in camera*; Rybacki, Tr. 3629, *in camera*; *see also infra*
¶ 952 (describing context of call)).

Response To Finding No. 745:

See General Response 4. *See* Response To Finding 714, *supra*.

746.

(CX 1621-A at 117, *in camera*;
McCutcheon, Tr. 2475-2476, *in camera*; Rybacki, Tr. 3629-3630, *in camera*; *see also*
infra ¶ 952 (describing context of call)).

Response To Finding No. 746:

See General Response 4. *See* Response To Finding 714, *supra*.

747.

(CX 1621-A at 108, *in camera*; Rybacki,
Tr. 3631-3632, *in camera*; *see also infra* ¶ 952 (describing context of call)).

Response To Finding No. 747:

See General Response 4. *See* Response To Finding 714, *supra*.

748.

[REDACTED] (CX 1621-A at 109, *in camera*; Rybacki,
Tr. 3632, *in camera*; *see also infra* ¶ 1110 (describing context of call)).

Response To Finding No. 748:

See General Response 4. *See* Response To Finding 714, *supra*.

749.

[REDACTED] (CX 1621-A at 109, *in camera*;
Rybacki, Tr. 3632, *in camera*; *see also infra* ¶ 1110 (describing context of call)).

Response To Finding No. 749:

See General Response 4. *See* Response To Finding 714, *supra*.

750.

[REDACTED] (CX 1621-A at 110, *in camera*;
Rybacki, Tr. 3632, *in camera*; *see also infra* ¶ 1110 (describing context of call)).

Response To Finding No. 750:

See General Response 4. See Response To Finding 714, *supra*.

751.

(CX 1621-A at 107, *in camera*;
Rybacki, Tr. 3633-3634, *in camera*; see also *infra* ¶ 1033 (describing context of call)).

Response To Finding No. 751:

See General Response 4. See Response To Finding 714, *supra*.

752.

(CX 1621-A at 096, *in camera*;
Rybacki, Tr. 3634, *in camera*; see also *infra* ¶ 1034 (describing context of call)).

Response To Finding No. 752:

See General Response 6. To the extent this proposed Finding of Fact is an attempt to suggest an opportunity to conspire, it is misleading and contrary to the evidence. (RPF ¶¶ 301-307). The referenced call lasted for only 7 minutes and post-dates the formation of the alleged conspiracy. Moreover, Mr. Jansen in his deposition denied having any price discussions with competitors and testified that all McWane pricing decisions were the result of independent decision-making. (JX 637 (Jansen Dep. at 2655, 271)). Complaint Counsel elected not to call Mr. Jansen as a witness at trial and did not ask him in his deposition about this specific call. See Response To Finding 714, *supra*.

753.

[REDACTED] (CX 1621-A at 097, *in camera*;
Rybacki, Tr. 3634, *in camera*).

Response To Finding No. 753:

See General Response 4. See Response To Finding 714, *supra*.

754.

[REDACTED] (CX 1621-A at 097, *in camera*;
Rybacki, Tr. 3635, *in camera*).

Response To Finding No. 754:

See General Response 4. See Response To Finding 714, *supra*.

755.

(CX 1621-A at 098, *in camera*; McCutcheon, Tr. 2469, *in camera*; Rybacki, Tr. 3635, *in camera*; see also *infra* ¶ 1040 (describing context of call)).

Response To Finding No. 755:

See General Response 4. See Response To Finding 714, *supra*.

756.

(CX 1621-A at 098, *in camera*; McCutcheon, Tr. 2469, *in camera*; Rybacki, Tr. 3635, *in camera*; see also *infra* ¶ 1040 (describing context of call)).

Response To Finding No. 756:

See General Response 4. See Response To Finding 714, *supra*.

757.

[REDACTED] (CX 1621-A at 099, *in camera*; McCutcheon, Tr. 2470, *in camera*; Rybacki, Tr. 3635, *in camera*; see also *infra* ¶ 1040 (describing context of call)).

Response To Finding No. 757:

See General Response 4. See Response To Finding 714, *supra*.

758.

[REDACTED] (CX 1621-A at 099, *in camera*; Rybacki, Tr. 3635-3636, *in camera*; Rybacki, Tr. 3610, 3617, *in camera* [REDACTED]; see also *infra* ¶ 1162 (describing context of call)).

Response To Finding No. 758:

To the extent this proposed Finding of Fact is an attempt to suggest an opportunity to conspire, it is misleading and contrary to the evidence. (RPF ¶¶ 301-307). The call was for a duration of 2 minutes (suggesting a voicemail message as opposed to a conversation), post-dates

the formation of the alleged conspiracy, and may have been a personal call by Mr. Rybacki to his friend Tom Frank. (RPF 304-307). *See* Response To Finding 714, *supra*.

759.

(CX 1621-A at 099, *in camera*; Rybacki, Tr. 3635-3636, *in camera*; Rybacki, Tr. 3610, 3617, *in camera* ; *see also infra* ¶ 1162 (describing context of call)).

Response To Finding No. 759:

To the extent this proposed Finding of Fact is an attempt to suggest an opportunity to conspire, it is misleading and contrary to the evidence. (RPF 301-307). The call post-dates the formation of the alleged conspiracy, and may have been a personal call by Mr. Rybacki to his friend Tom Frank. (RPF 304-307). *See* Response To Finding 714, *supra*.

760.

(CX 1621-A at 100, *in camera*; Rybacki, Tr. 3636, *in camera*; *see also infra* ¶ 1162 (describing context of call)).

Response To Finding No. 760:

See response to ¶ 717, *supra*, and General Response 11. To the extent this proposed Finding of Fact is an attempt to suggest an opportunity to conspire, it is misleading and contrary to the evidence. (RPF 301-307). It post-dates the formation of the alleged conspiracy and is consistent with both men’s testimony that they only spoke a few times. Most significantly, both Mr. Tatman and Mr. Rybacki denied any discussion or agreement regarding Fittings prices. (RPF 301). Otherwise, Respondent has no specific response. *See* Response To Finding 714, *supra*.

761.

[REDACTED] (CX 1621-A at 101, *in camera*; Rybacki, Tr. 3636, *in camera*; *see also infra* ¶ 1163 (describing context of call)).

Response To Finding No. 761:

See General Response 4. *See* Response To Finding 714, *supra*.

762.

(CX 1621-A at 102, *in camera*;
Rybacki, Tr. 3636, *in camera*; *see also infra* ¶ 1163 (describing context of call)).

Response To Finding No. 762:

See General Response 4. *See* Response To Finding 714, *supra*.

763.

(CX 1621-A at 103, *in camera*;
Rybacki, Tr. 3636-3638, *in camera*; *see also infra* ¶ 1163 (describing context of call)).

Response To Finding No. 763:

See General Response 4. *See* Response To Finding 714, *supra*.

764.

(CX 1621-A at 104, *in camera*; Rybacki,
Tr. 3638, *in camera*; Rybacki, Tr. 3610, 3617, *in camera*
; *see also infra* ¶ 1164
(describing context of call)).

Response To Finding No. 764:

See General Response 11. To the extent this proposed Finding of Fact is an attempt to suggest an opportunity to conspire, it is misleading and contrary to the evidence. (RPFF ¶¶ 301-307). It was for a duration of 2 minutes (suggesting a voicemail message as opposed to a conversation), post-dates the formation of the alleged conspiracy, and may have been a personal call by Mr. Rybacki to his friend Tom Frank. (RPFF ¶¶ 304-307). *See* Response To Finding 714, *supra*.

765.

 (CX 1621-A at 105, *in camera*; Rybacki, Tr. 3638, *in camera*; *see also infra* ¶ 1164 (describing context of call)).

Response To Finding No. 765:

See General Response 11. To the extent this proposed Finding of Fact is an attempt to suggest an opportunity to conspire, it is misleading and contrary to the evidence. (RPFF ¶¶ 301-307). It was for a short duration and post-dates the formation of the alleged conspiracy, and may

have been a personal call by Mr. Rybacki to his friend Tom Frank. (RPF 304-307).

Otherwise, Respondent has no specific response. See Response To Finding 714, *supra*.

766.

(CX 1621-A at 090, *in camera*;

Rybacki, Tr. 3638-3639, *in camera*).

Response To Finding No. 766:

See General Response 4. See Response To Finding 714, *supra*.

767.

(CX 1621-A at 091, *in*

camera; Rybacki, Tr. 3639, *in camera*).

Response To Finding No. 767:

See General Response 4. See Response To Finding 714, *supra*.

768.

(CX 1621-A at 092, *in camera*; Rybacki, Tr.

3640, *in camera*).

Response To Finding No. 768:

See General Response 4. See Response To Finding 714, *supra*.

769.

[REDACTED] (CX 1621-A at 092, *in camera*;
Rybacki, Tr. 3640, *in camera*).

Response To Finding No. 769:

See General Response 4. See Response To Finding 714, *supra*.

770.

[REDACTED] (CX 1621-A at 092, *in camera*; Rybacki,
Tr. 3640-3641, *in camera*).

Response To Finding No. 770:

See General Response 4. See Response To Finding 714, *supra*.

771.

[REDACTED] (CX 1621-A at 093, *in camera*; McCutcheon, Tr. 2438, *in*

camera; Rybacki, Tr. 3641, *in camera*; see also *infra* ¶ 1206 (describing context of calls)).

Response To Finding No. 771:

See General Response 4. See Response To Finding 714, *supra*.

772.

(CX 1621-A at 094, *in camera*; McCutcheon, Tr. 2438-2439, *in camera*; Rybacki, Tr. 3641-3642, *in camera*; see also *infra* ¶ 1206 (describing context of calls)).

Response To Finding No. 772:

See General Response 4. See Response To Finding 714, *supra*.

773.

(CX 1621-A at 095, *in camera*; Rybacki, Tr. 3642-3643, *in camera*; Rybacki, Tr. 3610, 3617, *in camera* ; see also *infra* ¶ 1210 (describing context of call)).

Response To Finding No. 773:

See General Response 11. To the extent this proposed Finding of Fact is an attempt to suggest an opportunity to conspire, it is misleading and contrary to the evidence. (RPF ¶¶ 301-307). It was for a short duration, post-dates the formation of the alleged conspiracy, and may have been a personal call by Mr. Rybacki to his friend Tom Frank. (RPF ¶¶ 304-307). See Response To Finding 714, *supra*.

774.

[REDACTED] (CX 1621-A at 084, *in camera*; McCutcheon, Tr. 2439, *in camera*; Rybacki, Tr. 3643-3644, *in camera*; see also *infra* ¶ 1216 (describing context of calls)).

Response To Finding No. 774:

See General Response 4. See Response To Finding 714, *supra*.

775.

(CX 1621-A at 084, *in camera*;
Rybacki, Tr. 3644, *in camera*; Rybacki, Tr. 3610, 3617, *in camera*
; *see also*
infra ¶ 1216 (describing context of call)).

Response To Finding No. 775:

See General Response 11. To the extent this proposed Finding of Fact is an attempt to suggest an opportunity to conspire, it is misleading and contrary to the evidence. (RPFF ¶¶ 301-307). It was for a short duration, post-dates the formation of the alleged conspiracy, and may have been a personal call by Mr. Rybacki to his friend Tom Frank. (RPFF ¶¶ 304-307). *See* Response To Finding 714, *supra*.

776.

(CX 1621-A at 085, *in camera*; McCutcheon, Tr. 2440, *in camera*; Rybacki, Tr. 3644, *in camera*; *see also infra* ¶ 1221 (describing context of calls)).

Response To Finding No. 776:

See General Response 4. *See* Response To Finding 714, *supra*.

777.

[REDACTED] (CX 1621-A at 086, *in camera*;
McCutcheon, Tr. 2441, *in camera*; Rybacki, Tr. 3644-3645, *in camera*; *see also infra*
¶ 1221 (describing context of call)).

Response To Finding No. 777:

See General Response 4. *See* Response To Finding 714, *supra*.

778.

[REDACTED] (CX 1621-A at 086, *in camera*;
McCutcheon, Tr. 2442, *in camera*; Rybacki, Tr. 3644-3645, *in camera*; *see also infra*
¶ 1221 (describing context of call)).

Response To Finding No. 778:

See General Response 4. *See* Response To Finding 714, *supra*.

779.

(CX 1621-A at 087, *in camera*; Rybacki, Tr. 3645, *in camera*; Rybacki, Tr. 3610, 3617, *in camera*)

Response To Finding No. 779:

See General Response 11. To the extent this proposed Finding of Fact is an attempt to suggest an opportunity to conspire, it is misleading and contrary to the evidence. (RPFF ¶¶ 301-307). It was for a short duration, post-dates the formation of the alleged conspiracy, and may have been a personal call by Mr. Rybacki to his friend Tom Frank. (RPFF ¶¶ 304-307).

780.

(CX 1621-A at 087, *in camera*; Rybacki, Tr. 3645, *in camera*; Rybacki, Tr. 3610, 3617, *in camera*)

Response To Finding No. 780:

See General Response 11. To the extent this proposed Finding of Fact is an attempt to suggest an opportunity to conspire, it is misleading and contrary to the evidence. (RPFF ¶¶ 301-307). It was for a duration of one (1) minute (suggesting a voicemail message or attempted call), and may have been a personal from Tom Frank to Mr. Rybacki, who were personal friends. (RPFF ¶¶ 304-307). See Response To Finding 714, *supra*.

781.

[REDACTED] (CX 1621-A at 088, *in camera*; McCutcheon, Tr. 2447, *in camera*; Rybacki, Tr. 3645, *in camera*; see also *infra* ¶ 1246 (describing context of call)).

Response To Finding No. 781:

See General Response 4. See Response To Finding 714, *supra*.

782.

[REDACTED] (CX 1621-A at 089, *in camera*; McCutcheon, Tr. 2447-2448, *in camera*; Rybacki, Tr. 3646, *in camera*; see also *infra* ¶ 1246 (describing context of calls)).

Response To Finding No. 782:

See General Response 4. See Response To Finding 714, *supra*.

783.

(CX 1621-A at 74, *in camera*;
McCutcheon, Tr. 2471-2473, *in camera*; see also *infra* ¶ 1088 (describing context of
call)).

Response To Finding No. 783:

See General Response 4. See Response To Finding 714, *supra*.

784.

(CX 1860-A at 004, 006, *in camera*
(Mr. Rybacki's itemized office telephone records for bill date May 4, 2009); Rybacki, Tr.
3647-3648, *in camera*; see also *infra* ¶ 1504 (describing context of call)).

Response To Finding No. 784:

See General Response 2. To the extent this proposed Finding of Fact is an attempt to
suggest an opportunity to conspire, it is misleading and contrary to the evidence. (RPF 301-
307). The alleged conspiracy, according to the Complaint and Complaint Counsel's expert
Dr. Shumann, occurred between late 2007 and the Fourth Quarter of 2008. (Complaint ¶ 2;
RPF 281-282). A call or attempted call (a call of 1.3 minutes duration suggests voicemail or
an unsuccessful call attempt) occurring on April 19, 2009 is irrelevant. (RPF 290-291). See
Response To Finding 714, *supra*.

785.

[REDACTED] (CX 1621-A at 034, *in camera*; McCutcheon,
Tr. 2467, *in camera*; see also *infra* ¶ 1532 (describing context of call)).

Response To Finding No. 785:

See General Responses 2 and 4. See Response To Finding 714, *supra*.

786.

[REDACTED]

(CX 1621-A at 035, *in camera*; McCutcheon, Tr. 2468, *in camera*; see also *infra* ¶ 1532 (describing context of calls)).

Response To Finding No. 786:

See General Responses 2 and 4. See Response To Finding 714, *supra*.

6.4.1.4 Specific Meetings and Calls Reflected in the Suppliers' Documents

787. Contemporaneous documents in the files of McWane, Sigma and Star reflect numerous specific communications between key executives of McWane, Sigma, and Star. (See, e.g., *infra* ¶¶ 788-806).

Response To Finding No. 787:

See General Response 1, and responses to ¶¶ 788-806, *infra*. See Response To Finding 714, *supra*.

788. On or about August 13, 2007, there was a meeting between Messrs. Pais and Page. (CX 2030 at 001).

Response To Finding No. 788:

See General Responses 2 and 5. This proposed Finding misstates CX 2030. CX 2030 is an entry on the calendar of Ruffner Page that in its entirety states "Victor Pais?". Mr. Page testified in deposition that he or others who have access to his calendar will put potential meetings on his calendar with a question mark. (JX 642 (Page Depo. p. 88)).

Q. So you don't know whether you actually met with Mr. Pais August of 2007?

A. I don't recall, no.

789. On or about September 13, 2007, there was a meeting between Messrs. Pais and Page. (CX 2032 at 001).

Response To Finding No. 789:

See General Responses 2 and 5. This proposed Finding misstates CX 2032. CX 2032 is an e-mail from Mr. Pais to Mr. Page requesting a meeting on September 13, 2007. Mr. Page testified in deposition that he does not recall having this meeting.

Q. Okay. Do you know whether you had this meeting with Mr. Pais?

A. I – I don't remember the specific meeting.

(JX 642 (Page Dep. p. 92). Notwithstanding whether a meeting occurred on this particular date, both Mr. Page and Mr. Pais testified that they met and communicated from time to time to discuss foreign business opportunities, potential mergers and other legitimate business opportunities. *See* McWane Proposed Findings of Fact 326-343. Mr. Pais testified to a meeting in this general timeframe that had nothing to do with Fittings pricing, but concerned an existing buy-sell arrangement. *See* McWane Proposed Finding of Fact 338.

790. On or about December 3, 2007, there was a meeting between Messrs. Pais and Page. (CX 2037; CX 2038; Pais, Tr. 1886-1887; CX 2528 (Pais, Dep. at 222-223)).

Response To Finding No. 790:

See General Responses 2 and 5. This finding is misleading, because Mr. Pais testified that this meeting concerned international opportunities, and both Mr. Pais and Mr. Page testified that they never discussed Fittings prices. (RPF 339-340).

791. On or about February 7, 2008, there was a telephone call between Messrs. Tatman and Rybacki. (CX 0179; CX 1142).

Response To Finding No. 791:

See General Response 5. This proposed Finding is incomplete and thus misleading. While CX179 is an e-mail documenting a call between Mr. Rybacki and Mr. Tatman, it expressly states the subject of the call from Mr. Rybacki was “that Sigma has interest in a trade association for Fittings.” The e-mail goes on to note that Mr. Tatman plans “to touch base with Proctor [McWane General Counsel] in regards to the Do’s and Don’t of having these discussions.” (CX 179).

792. On or about February 19, 2008, there was a meeting between Messrs. Pais and McCutcheon at the Nit Noi Thai restaurant in Houston. (CX 1122 (scheduling meeting); CX 1143 (same); McCutcheon, Tr. 2367-2372; CX 0041 (McCutcheon February 22, 2008 email reporting on information regarding Electrosteel obtained from Pais)).

Response To Finding No. 792:

See General Responses 4 and 5.

793. On or about March 10, 1008 [sic], there was a telephone call between Messrs. Tatman and Rona. (CX 1124 at 002).

Response To Finding No. 793:

See General Responses 5 and 11. To the extent this proposed Finding is an attempt to suggest an opportunity to conspire, it is misleading. Mr. Rona was Sigma's OEM business manager, and Mr. Tatman was his customer. (RPFF ¶¶ 308-325).

794. On or about March 27, 2008, there was a DIFRA organizational meeting among McWane, Star, Sigma, U.S. Pipe executives. (CX 1486 at 001, 002 (agenda to attendees); CX 2272 (planning email to attendees); CX 1084 at 001 (planning email to attendees); Brakefield, Tr. 1270-1271 (listing attendees); CX 1080; CX 2496 (Brakefield, Dep. (Vol. 2) at 136-137)).

Response To Finding No. 794:

This finding, while partially accurate, is incomplete. McWane agrees that DIFRA meeting was held on March 27, 2008. The agenda for the meeting was prepared by antitrust counsel Thad Long; the meeting was held at the law offices of Bradley, Arant, Rose & White; and in addition to member representatives, the meeting was attended by Bradley, Arant attorney Wood Herren. (RPFF ¶¶ 243-245; CX 486 at 001).

795. On or about March 28, 2008, Messrs. Tatman and McCutcheon had a dinner meeting. (CX 2484 (Tatman, Dep. at 105)).

Response To Finding No. 795:

This proposed Finding is misleading. McWane agrees that Messrs. Tatman and McCutcheon had dinner on or about March 27, 2008 following attendance at a DIFRA meeting. Mr. Tatman testified that they discussed "probably life and kids and family" but did not discuss pricing or the Fittings marketplace. (Tatman Tr. 475-476). In conformance with McWane's antitrust guidelines, Mr. Tatman reported the meeting to McWane's legal department. (Tatman,

Tr. 476). Mr. McCutcheon likewise testified that dinner conversation was confined to social topics. (McCutcheon, Tr. 2461) (“The first time that we met, we went to dinner after DIFRA. It was right after he got the job And we made it clear to each other that we would not cross a bridge to anything that was remotely inappropriate.”)).

796. On or about April 25, 2008, there was a DIFRA organizational call among McWane, Star, Sigma executives. (CX 0160 at 001-002).

Response To Finding No. 796:

This finding is misleading because it is incomplete. Although McWane agrees that a DIFRA organizational call occurred on April 25, 2008, the call was chaired by Bradley, Arant attorney Thad Long. In addition to member representatives it appears from the call minutes that Bradley, Arant attorneys Wood Herron and Michael D. McKibben also participated. (They were copied on Mr. Long’s e-mail summarizing the call.) (RPF 238, 243-245; CX160).

797. On or about May 7, 2008, there was a meeting between Messrs. Page and Pais. (CX 1257).

Response To Finding No. 797:

See General Responses 5 and 11. This finding is misleading. While CX 1257 is an e-mail requesting a meeting, CX 1268 is a series of e-mails after the earlier meeting following up on several international opportunities unrelated to Fittings. Moreover, both Mr. Page and Mr. Pais testified that they never discussed Fittings pricing. (RPF 336, 340-343).

798. On or about June 12, 2008, there was a meeting between Messrs. Page and Pais at Mr. Page’s office. (CX 2482 (Page, Dep. 189-190); CX 2066 (email reflecting meeting)).

Response To Finding No. 798:

This proposed Finding is incomplete and misleading. CX 2051 is an additional e-mail dated June 12, 2008 indicating that the subject of the meeting was “global opportunities.”

Moreover, both Mr. Page and Mr. Pais testified that they never discussed Fittings pricing. (RPFF ¶¶ 336, 340-343).

799. On or about August 22, 2008, there was a telephone call between Messrs. Tatman and Rona. (CX 1149).

Response To Finding No. 799:

Respondent has no specific response, except that to the extent this proposed Finding is an attempt to suggest an opportunity to conspire, it is misleading. Mr. Rona was Sigma's OEM business manager, and Mr. Tatman was his customer. (RPFF ¶¶ 308-325).

800. On or about March 17, 2009, there was a meeting between Messrs. Page and Pais. (CX 2061; CX 1269).

Response To Finding No. 800:

See General Response 2. To the extent this proposed Finding of Fact is an attempt to suggest an opportunity to conspire, it is misleading. The alleged conspiracy, according to the Complaint and Complaint Counsel's expert Dr. Schumann, occurred between late 2007 and the Fourth Quarter of 2008. (RPFF ¶ 281). This meeting occurred after the alleged conspiracy ended and is thus not relevant. Mr. Page and Mr. Pais never discussed fittings pricing. (RPFF ¶¶ 336, 340-343). Moreover, Mr. Page had no involvement in Fittings pricing decisions. (RPFF ¶ 327).

801. On or about April 2, 2009, there was a meeting between Messrs. Page and Pais. (CX 2093).

Response To Finding No. 801:

See General Response 2, and response to ¶ 800, *supra*. To the extent this proposed Finding of Fact is an attempt to suggest an opportunity to conspire, it is misleading. The alleged conspiracy, according to the Complaint and Complaint Counsel's expert Dr. Schumann, occurred

between late 2007 and the Fourth Quarter of 2008. (RPF 281). This meeting occurred after the alleged conspiracy ended and is thus not relevant.

802. On or about April 28, 2009, there was a meeting between Messrs. Pais and McCullough. (CX 0728).

Response To Finding No. 802:

See General Response 2, and response to ¶ 800, *supra*. To the extent this proposed Finding of Fact is an attempt to suggest an opportunity to conspire, it is misleading. The alleged conspiracy, according to the Complaint and Complaint Counsel’s expert Dr. Schumann, occurred between late 2007 and the Fourth Quarter of 2008. (RPF 281). This meeting occurred after the alleged conspiracy ended. The topic of this meeting was Mr. Pais’ efforts to convince McWane to sell domestically – manufactured, private-label Fittings to Sigma after ARRA’s enactment. (RPF ¶¶ 341-342).

803. On or about May 1, 2009, there was a meeting between Messrs. Pais, Rybacki and Page. (CX 0214 at 004, CX 0314 at 001, CX 2098; CX 0317 (describing meeting)).

Response To Finding No. 803:

See General Response 2, and response to ¶ 800, *supra*. To the extent this proposed Finding of Fact is an attempt to suggest an opportunity to conspire, it is misleading. The alleged conspiracy, according to the Complaint and Complaint Counsel’s expert Dr. Schumann, occurred between late 2007 and the Fourth Quarter of 2008. (RPF 281). This meeting occurred after the alleged conspiracy ended. The topic of this meeting was Sigma’s continuing efforts to convince McWane to sell domestically-manufactured, private-label Fittings to Sigma after ARRA’s enactment. (RPF ¶¶ 342-343).

804. On or about May 20-21, 2009, there were meetings between Messrs. Page and Pais. (CX 2100; *see also* CX 1271 (scheduling 2-day meeting); CX 1076 at 004 (describing meeting “last week”); CX 2101 (Mr. Page telling Mr. McCullough “I need to report to you about my meeting today when you have a chance”)).

Response To Finding No. 804:

See General Response 2, and responses to ¶¶ 800 and 803, *supra*. To the extent this proposed Finding of Fact is an attempt to suggest an opportunity to conspire, it is misleading. The alleged conspiracy, according to the Complaint and Complaint Counsel's expert Dr. Schumann, occurred between late 2007 and the Fourth Quarter of 2008. (RPF 281). This meeting occurred after the alleged conspiracy ended and is thus not relevant. In Proposed Finding of Fact 871, Complaint Counsel suggests that the topic of this meeting was a potential merger.

805. On or about December 14, 2009, there was a call between Messrs. Tatman and Rona. (CX 1801 at 001).

Response To Finding No. 805:

See General Response 2. To the extent this proposed Finding is an attempt to suggest an opportunity to conspire, it is misleading. The alleged conspiracy, according to the Complaint and Complaint Counsel's expert Dr. Schumann, occurred between late 2007 and the Fourth Quarter of 2008. (RPF 281). This call occurred long after the alleged conspiracy ended and is thus irrelevant. Moreover, Mr. Rona was Sigma's OEM business manager and Mr. Tatman was his customer. (RPF 308-325). *See* Response To Finding 714, *supra*.

806. On or about April 28, 2009, there was a phone call between Messrs. McCutcheon and Tatman. (CX 2538 (McCutcheon, IHT (Vol. 2) at 257-258); CX 1180 at 001).

Response To Finding No. 806:

See General Responses 2, 3 and 6. To the extent this proposed finding is an attempt to suggest an opportunity to conspire, it is misleading. The evidence demonstrates that no substantive price discussions occurred on this call. (RPF 291-292). McWane's April, 2009 List Price restructuring to lower prices for its medium and large diameter fittings was based on Mr. Tatman's independent analysis. (RPF 283-293). Moreover, as Complaint Counsel's

alleged expert conceded, the alleged conspiracy did not extend into 2009. (RPF 282). *See* Response To Finding 714, *supra*.

6.4.1.5 OEM Sales Between Suppliers

807. Fittings suppliers have buy-sell relationships with each other that provide opportunities for communication regarding market conditions. (*Infra* ¶¶ 808-814).

Response To Finding No. 807:

See General Response 1, and responses to ¶¶ 808-814, *infra*. This proposed Finding is not factual (no record cites are provided) but rather is Complaint Counsel’s argument, and thus requires no response.

808. Suppliers on occasion speak with each other about purchasing individual Fittings from each other on a spot basis. (Tatman, Tr. 434).

Response To Finding No. 808:

Arms-length buy/sell arrangements are entirely appropriate. *See* Response To Finding 714, *supra*.

809. “Short sales” of Fittings occur when a supplier who has won a bid does not have all of the Fittings for the project in stock. In those cases, the bid-winning supplier will contact the other suppliers to source the fittings that it lacks. These short sales likely occur on a daily basis. (McCutcheon, Tr. 2268-2269; Rona, Tr. 1446 (Sigma will buy Fittings from McWane and Star usually to fill a gap in an order that Sigma is trying to fill); CX 2524 (Box, Dep. at 68) (from time to time McWane purchases Fittings from Sigma’s inventory)).

Response To Finding No. 809:

Arms-length buy/sell arrangements are entirely appropriate. As such, McWane has no specific response.

810. “Private label” Fittings are manufactured by one company and sold to another company that will supply those Fittings to customers. Private label Fittings are marked with the buying company’s name. (Rona, Tr. 1630).

Response To Finding No. 810:

Arms-length buy/sell arrangements are entirely appropriate. As such, McWane has no specific response.

811.

(Rybacki, Tr. 3646, *in camera*).

Response To Finding No. 811:

Arms-length buy/sell arrangements are entirely appropriate. As such, McWane has no specific response.

812. McWane and Sigma have a long history of buying and selling products from one another. (Rona, Tr. 1626; RX-689 (Rona, Dep. at 22)).

Response To Finding No. 812:

Arms-length buy/sell arrangements are entirely appropriate. As such, McWane has no specific response.

813. Star and McWane's Tyler divisions purchase oddballs and fill-in Fittings from Sigma's OEM business, while McWane's Clow division uses Sigma as a regular supplier. (Rona, Tr. 1447-1448).

Response To Finding No. 813:

Arms-length buy/sell arrangements are entirely appropriate. As such, McWane has no specific response.

814. In approximately 2006, McWane was sourcing greater amounts of Fittings from Sigma's production facilities in China, in amounts of \$13-14 million annually. (Rona, Tr. 1449-1450). In approximately early 2007, McWane ceased these OEM purchases from Sigma. (Rona, Tr. 1450).

Response To Finding No. 814:

McWane has no specific response, other than to note that arms-length buy/sell arrangements are entirely appropriate. In addition, by early 2007, McWane's Chinese foundry (Tyler Xin Xin) was operational. (RPF 8).

6.4.1.6 Merger Discussions

815. Fittings suppliers occasionally engage in merger discussions with each other that provide opportunities for communication regarding market conditions. (*Infra* ¶¶ 816-825).

Response To Finding No. 815:

See General Response 1, and responses to ¶¶ 816-825, *infra*. This proposed Finding is not factual (no record cites are provided) but rather is Complaint Counsel's argument, and thus requires no response.

816. In 2008, McWane and Sigma discussed a potential merger of Sigma with McWane's Tyler/Union Fittings business. The merger talks lasted for three or four months in 2008, and fell through because McWane was uncomfortable with Sigma's debt and with Sigma's request for 50-50 joint ownership of the merged entity. (Pais, Tr. 1864-1865; CX 1076 at 003).

Response To Finding No. 816:

This finding is misleading because the merger discussion was short-lived, as McWane was not interested in combining its business with Sigma. (RPFF ¶¶ 334-335; JX 642 (Page, Depo at 30-32, 123-127)). Moreover, the discussions took place in the second half of 2008, after the formation of the alleged conspiracy. (RPFF ¶¶ 281, 334-335). Fittings prices were not discussed. (RPFF ¶¶ 336, 340-343).

817. In meetings between Sigma and McWane on May 20 and 21 of 2009, Mr. Pais again raised the prospect of a transaction with Mr. Page, proposing that Sigma buy McWane's Fittings business, to which Mr. Page responded, "not now." (CX 1076 at 004; CX 2100; CX 1271; CX 2101).

Response To Finding No. 817:

See General Responses 2, 5 and 11, and responses to ¶¶ 804 and 816, *supra*. To the extent this proposed Finding of Fact is an attempt to suggest an opportunity to conspire, it is misleading. The alleged conspiracy, according to the Complaint and Complaint Counsel's expert Dr. Schumann, occurred between late 2007 and the Fourth Quarter of 2008 and did not extend

into 2009. (Complaint ¶ 2; (RPF ¶¶ 281-282). This meeting occurred after the alleged conspiracy ended and is thus not relevant.

818. Sigma and Star discussed a potential merger between the two companies in 2009. (Pais, Tr. 1860-1862; CX 1076 at 002-003).

Response To Finding No. 818:

See General Responses 2 and 4.

819. On or about December 11, 2008, Star’s Mr. McCutcheon and Mr. Bhutada attended a meeting with Sigma’s Mr. Pais and Mr. Rybacki in Houston at which they began conversations about a potential Sigma-Star merger. (McCutcheon, Tr. 2376-2377; CX 1111; *see also* Pais, Tr. 1729-1730 (Pais communicated with Mr. McCutcheon in late 2008 and early 2009 regarding a possible merger between Sigma and Star)).

Response To Finding No. 819:

See General Response 4

820. On February 17, 2009, Mr. Pais and Mr. McCutcheon met to discuss ARRA “Buy American” issues, and Mr. Pais again initiated discussion of a potential merger between Sigma and Star. (CX 1076 at 002). Mr. Pais later reported to Frontenac in a May 26, 2009 email that Mr. McCutcheon had agreed that the merger would make sense, but that the transaction would be difficult because of cultural and personal issues between the companies. (CX 1076 at 001-002 (Pais May 26, 2009 email to Florence); Pais, Tr. 1860-1861). Mr. Pais expected Star to get back to him on the merger topic, but they did not contact him directly. (Pais, Tr. 1861-1862).

Response To Finding No. 820:

See General Responses 2 and 4.

821. In or about March 2009, Mr. Rybacki invited Star to “take a shot” at making a bid for Sigma, which resulted in an invitation from Star to Mr. Rybacki for a discussion in mid-May 2009. Mr. Pais and Mr. Bhattacharji accepted this invitation. (CX 1076 at 001-003; Pais, Tr. 1861-1862; *see also* Rybacki, Tr. 3596 (discussions about Sigma acquiring Star became more serious in 2009, and Mr. Rybacki traveled to Houston to discuss it in person with Mr. McCutcheon)).

Response To Finding No. 821:

See General Responses 2 and 4.

822. In May 2009, Mr. Pais drafted a letter to Mr. Rybacki to provide guidance to Mr. Rybacki in advance of Mr. Rybacki’s upcoming meetings with Star, which Mr. Pais referred to as

“HTN” (for “Houston”) in the letter. (CX 0915 at 001; Pais, Tr. 1865-1866 (explaining that the purpose of his letter was “to guide [Mr. Rybacki] . . . because he was not involved with our discussion previously”); Rybacki, Tr. 3592-3595).

Response To Finding No. 822:

See General Responses 2 and 4.

823. Sigma believed that a merger or joint venture between Sigma and Star would have helped solve an oversupply problem that “wasn’t healthy” for the Fittings market. (Rybacki, Tr. 3596-3597 (“We always thought . . . there was just an overcapacity that wasn’t healthy and that instead of beating each other’s brains in every day that we should either have a joint venture or one buy the other”).

Response To Finding No. 823:

See General Responses 2 and 4.

824. In or about March or April of 2009, Mr. Rybacki held discussions with Mr. Bhutada and Mr. McCutcheon of Star, and invited them to meet with Frontenac to discuss a “suitable merger.” (CX 1076 at 001-003 (May 26, 2009 Pais email describing Mr. Rybacki’s discussions with Star “a couple of months back”); Pais, Tr. 1861-1862 (discussing CX 1076)).

Response To Finding No. 824:

See General Responses 2 and 4.

825. Mr. McGivern, Sigma’s incoming CEO, and Mr. Florence of Frontenac subsequently had an introductory meeting with Star. (Pais, Tr. 1868).

Response To Finding No. 825:

See General Responses 2 and 4.

6.4.1.7 Policies on Competitor Contacts

826. McWane’s policies and guidelines relating to contacts with competitors called for Mr. Tatman to speak only with Mr. Rona, who, as Sigma’s OEM Manager, handled the buy-sell relationship between McWane and Sigma. (Tatman, Tr. 455-456; *see also, e.g.*, CX 1575 (email between Tatman and Rona regarding sale of glands)). These policies and protocols included a prohibition on any pricing discussions with a competitor. (Tatman, Tr. 456).

Response To Finding No. 826:

This proposed Finding mischaracterizes Mr. Tatman’s testimony and is incorrect.

Mr. Tatman did not testify that McWane’s policy required him “to speak only with Mr. Rona.”

Q. You’ve not supposed to be talking to other people at Sigma under your protocol?

A. It depends on the situation, sir.

Tatman, Tr. 455-456. Mr. Tatman was very clear that McWane’s policy (which was never introduced into evidence) prohibited pricing discussions with a competitor, and Mr. Tatman testified affirmatively that he had not had such discussions. (Tatman, Tr. 456-457). See also CCPFF ¶ 795 and response to ¶ 795, *supra*. (Dinner meeting with Mr. McCutcheon, Star, where no business discussion occurred not prohibited by McWane policy).

827. There is no situation under McWane’s policies and protocols regarding contact with competitors in which it would be appropriate for Mr. Tatman to speak with Mr. Rybacki. (Tatman, Tr. 456 (unaware of any such situation)).

Response To Finding No. 827:

This proposed Finding of Fact mischaracterizes Mr. Tatman’s testimony. See Response ¶ 826, *supra*.

6.4.2 Mr. Page (McWane) and Mr. Pais (Sigma) Have Developed a Close and Trusting Relationship, and Discuss Competitive Dynamics and Pricing Practices in the Fittings Market

828. Mr. Page of McWane and Mr. Pais of Sigma have developed a close and trusting relationship, and often discuss competitive dynamics and pricing practices in the Fittings market. (*Infra* ¶¶ 829-841).

Response To Finding No. 828:

See General Responses 1 and 11, and responses to ¶¶ 829-841, *infra*. This proposed Finding is not factual (no record cites are provided) but rather is Complaint Counsel’s argument. This Proposed Finding is also duplicative of Complaint Counsel’s Proposed Findings of Fact 704 and 712, to which McWane has already responded.

829. Mr. Pais and Mr. Page have built a mutually respectful and trusting relationship over time. (Pais, Tr. 1871-1872) (“mutually respectful” relationship); CX 0317 at 001 (Pais, email May 13, 2009: “close and trusting relationship”); CX 0915 at 004 (Pais writing in 2009 with respect to McWane that “RELATIONSHIP & TRUST are key [for] future ‘co-existence’ and prosperity . . . SIGMA has it”); CX 1164 at 004 (2009 Pais Memo to Sigma Board (describing a “strategic relationship with McWane back in 2003” and a “mutually trusting and mutually respectful relationship with Mr. Page, their CEO”)).

Response To Finding No. 829:

See General Response 11. This Proposed Finding is duplicative of Complaint Counsel’s Proposed Findings of Fact 704 and 712, to which McWane has already responded. McWane denies that Mr. Page had any type of relationship with Mr. Pais other than an appropriate business relationship.

- Q. Describe for me, if you will, your relationship with Mr. Pais.
- A. Different. Victor really seems to be a kind of – or seemed to be desirous of being rally entrepreneurial and an idea guy, I guess would be a good way to say it. And – and, periodically, off and on it would go in spurts where he would think he would have some good ideas. He would want to get together and discuss those ideas about joining ventures, selling his company to us, us doing business together in the Middle East. Usually, it involved his ideas, McWane money, and him making money on it. So we didn’t do any of them.

JX 642 (Page Dep. 30).

See JX 642 (Page Dep. p. 116-17 (“Victor was very repetitive in his – in his focus and requests. Many, many times he would call or e-mail and talk about this. And, then I would say “Well, we’re not interested in that” or “Yeah, give me more information on that”. And he would say, “In response to your feedback, here’s – here’s an opportunity.” So, it was all exploratory. None of these things existed. They were all opportunities in Victor’s mind that once again, with his relationships and – McWane’s business, that there might be something for us to do together that would be successful.” *See* also JX 642 (Page Dep. p. 275 (“[A]s we’ve seen a number of things, Victor lives in LaLa Land. He lives an illusion that he thinks he is running around getting things done, and he just has an oversized pair of pants on.”) *See* also McWane Proposed Findings of Fact 326-343 (Re: Page/Pais relationship and communications).

830. As Mr. Pais explained in an October 4, 2009 email to a member of Sigma’s Boards of Directors (Mr. Fang Gang), Mr. Pais has a “strong personal relationship with

Mr. Page RP values loyal and trusting friendships – and since I have continued our contact over the years without any disruptive or unhealthy practices, we have remained close despite being direct competitors.” (CX 1023 at 005; *see also* CX 2118 at 003 (October 22, 2007 email where Mr. Pais states, “I have a strong personal relationship with Mr. Page as we have helped each other in many ways, as he is a person, who if he trusts someone, will be open for not only discussion but any business opportunity if it is in the interest of both McWane and the industry)).

Response To Finding No. 830:

See General Responses 2 and 11. An e-mail dated October 4, 2009 post-dates the end of the alleged conspiracy by approximately a year. In addition, this proposed Finding is duplicative of Complaint Counsel’s Proposed Findings of Fact 704, 712 and 829, to which McWane has already responded.

831. The genesis of Mr. Pais’s “very trusting relationship” with Mr. Page began in 2003 when Sigma helped McWane establish a manufacturing plant in China in a manner that “discouraged the creation of new capacity.” (CX 1163 at 007; Pais, Tr. 1868-1870 (explaining that his relationship with Mr. Page began in 2003 in the midst of the anti-dumping proceeding for Fittings before the International Trade Commission when Mr. Pais offered to supply McWane with private-label Fittings made in China)).

Response To Finding No. 831:

See General Response 2. McWane disputes Complaint Counsel’s characterization of the evidence. Mr. Pais contacted Mr. Page after learning of McWane’s decision that it had to source non-domestic Fittings from China in order to remain viable. Mr. Pais hoped to supply McWane, as Sigma supplied other historic domestic Fittings manufacturers such as ACIPCo and U.S. Pipe that had exited domestic manufacturing. Mr. Pais traveled to China with Mr. Page to tout the quality of Sigma’s suppliers. (RPFF ¶¶ 329-331).

832. Mr. Pais traveled with Mr. Page to India and China. Mr. Page was interested in building a foundry overseas, and Mr. Pais introduced Mr. Page to his contacts in China who helped McWane to build its foundry in China. (CX 2482 (Page, Dep. at 28-29); Pais, Tr. 1871; CX 2528 (Pais, Dep. at 199)).

Response To Finding No. 832:

See General Responses 2 and 11, and response to ¶ 831, *supra*.

833. Mr. Pais tried to dissuade Mr. Page from creating the additional “unwanted capacity that would hurt the industry in the long term.” (CX 1986 at 002; Pais, Tr. 1875).

Response To Finding No. 833:

See General Response 2. Mr. Pais’ trip to China in 2003 in effort to convince McWane to buy non-domestic Fittings from it is irrelevant to the claims in this case. The exhibit that is quoted, CX 1986, is a *draft* document and it is unclear what final document was actually sent to McWane.

Q. Did you send this memo to Mr. Page?

A. I remember sending him a memo. I don’t know what stage this draft was.

Pais, Tr. 1877-1878.

834. Before McWane’s foundry in China became operational, Sigma supplied private label Fittings made in China to McWane. (Pais, Tr. 1870-1871 (describing meeting with Messrs. Page and Green in China to check Sigma’s supply chain and quality assurance standards)).

Response To Finding No. 834:

See General Response 11, and response to ¶ 814, *supra*. Otherwise, McWane has no specific response.

835. Mr. Pais initiated a “strategic relationship” with Mr. Page in order to help stabilize the Fittings market. For example, in a letter to business partners, Mr. Pais contrasted Sigma’s earlier, competitive relationship with McWane with its more recent, “trusting” phase:

While we were head to head competitors throughout our first 20 years, with hardly any contact at all, I instinctively felt if a relationship could be developed, it would only add to the stability of the industry by removing the mistrust that existed, which was reflected in the unhealthy competitive pricing that prevailed till 2003.

(CX 1163 at 007; *see also* CX 1164 at 004 (2009 Pais memo to Sigma Board describing “strategic” and “mutually trusting and mutually respectful relationship with Mr. Page” because Mr. Pais had “instinctively felt that a positive relationship can only be good for SIG and our industry, to at least have an opportunity to prevent the reactive decisions

which can harm us all”); Pais, Tr. 2024 (being “reactive” is associated with lowering prices)).

Response To Finding No. 835:

See General Response 11. McWane disputes that Mr. Page had any type of relationship with Mr. Pais other than an appropriate business relationship. This proposed Finding is duplicative of Complaint Counsel’s Proposed Findings of Fact 704, 712, and 828-830, to which McWane has already responded.

836. In particular, Mr. Pais wanted to give McWane “confidence” in Sigma’s “commitment for market responsible discipline.” (CX 1069 at 001 (in February 2009, Mr. Pais wrote that in 2004 “we managed to buoy the market after our strategic relationship with McWane, which gave them some confidence about our commitment for a market responsible discipline.”); CX 2528 (Pais, Dep. at 359-361 (“Discipline” means sticking to the list price and published multiplier rather than job pricing)).

Response To Finding No. 836:

See General Responses 2 and 11. McWane disputes that Mr. Page had any type of relationship with Mr. Pais other than an appropriate business relationship. This proposed Finding is duplicative of Complaint Counsel’s Proposed Findings of Fact 704, 712 and 828-830, to which McWane has already responded. Moreover, Mr. Pais’ characterization of events that occurred in 2004, which predates the alleged conspiracy in this case by several years, is irrelevant.

837. As part of this “very trusting relationship,” Mr. Pais and Mr. Page exchanged competitively sensitive and strategic information about their companies. For example, in September 2007, Mr. Pais and Mr. Page had a long meeting at which Mr. Page shared McWane’s market analysis, competitive pricing strategy, and its plans for structural and managerial changes in McWane’s Fittings business. (CX 2118 at 001-002 (recounting meeting with Mr. Page in which Mr. Pais “was surprised to hear from [RP] directly, several major changes that he has initiated to respond to the weak market conditions.”); Pais, Tr. 1882-1883; CX 2528 (Pais, Dep. at 208-210) (describing meeting with Page)).

Response To Finding No. 837:

See General Responses 2 and 11. With respect to the alleged “very trusting relationship,” McWane disputes that Mr. Page had any type of relationship with Mr. Pais other than an appropriate business relationship. This proposed Finding is duplicative of Complaint Counsel’s Proposed Findings of Fact 704, 712 and 828-830, to which McWane has already responded. This proposed Finding is also entirely duplicative of proposed Finding 789, which addresses the same meeting and to which McWane has already responded.

838. At the September 2007 meeting between Mr. Page and Mr. Pais, Mr. Page expressed to Mr. Pais that he was “disappointed in our failure to get a better landscape.” (CX 2119 at 001; Pais, Tr. 1894-1895 (offering no explanation of this remark); Pais, Tr. 1896 (“[Mr. Page] obviously seemed to have been unhappy with the way their business had done or gone”)).

Response To Finding No. 838:

See General Responses 2 and 11. This proposed Finding does not correctly represent the cited exhibit, CX 2119, or Mr. Pais’ trial testimony. The quoted language in the proposed Finding – “disappointed in our failure to get a better landscape” – is from an e-mail Mr. Pais drafted. (It reflects Mr. Pais’ characterization, and is not a statement from Mr. Page as the proposed Finding implies. Moreover, when directly asked at trial what this language meant, Mr. Pais testified that Mr. Page was not referring to the Fittings business:

Q. And you write, “I had sensed this to be coming. Some things have happened over the past two weeks since we last met in September during which he was disappointed in our failure to get a better landscape.”

What did you mean when you wrote that “he was disappointed at our failure to get a better landscape”?

A. You know, I really can't recall what I was referring in specific as to why he was disappointed. I really do not really recall that particular reference.

Q. Could it be a reference to a failure to get a better landscape in the fittings business?

MR. OSTOYICH: Well, objection, Your Honor. He just testified he doesn't remember.

THE WITNESS: No, I don't think it was anything specific, and I'm trying to see, disappointed at –

JUDGE CHAPPELL: He said no.

MR. HASSI: Very well, I'll move on, Your Honor.

(Pais, Tr. 1894-1895).

839. On one occasion on which Mr. Page and Mr. Pais met, one of their agenda topics was to discuss Star, although Mr. Page could not recall what they spoke about in relation to Star. (CX 2091; CX 2482 (Page, Dep. at 240-241) (testifying to meeting in New York City)).

Response To Finding No. 839:

See General Responses 2 and 11. This proposed Finding references CX 2091 out of context. CX 2091 purports to be an e-mail from Ruffner Page to Leon McCullough, but both the "From:" and "Sent" fields are blank. Thus, it is unclear if the e-mail was sent or if so, when. In relevant part, the e-mail states, "We discussed the ADWEA JV [international], his Sindia JV [international], Star and private labeling. Didn't we offer to private label some fittings for them in 2008? I know we quoted them a price" The context makes clear that the meeting occurred after 2008 and thus, post-dates the alleged conspiracy. (RPF 281-282)

840. Over the years, Mr. Pais frequently traveled to Birmingham, Alabama, and would meet there with Mr. Page if there was a specific issue, opportunity, or need for it. (Pais, Tr.

1886; *see also* Pais, Tr. 1727 (in 2008 and 2009, Mr. Pais communicated with David Green and Ruffner Page of McWane)).

Response To Finding No. 840:

See General Response 2. Mr. Green left McWane’s employment in 2007, and thus did not meet or communicate with Mr. Pais in 2008 or 2009 on behalf of McWane. *See* McWane Proposed Finding of Fact 86. Mr. Pais’ travels to Birmingham were not necessarily to meet with Mr. Page. (Pais, Tr. 1886 (“[W]hen I was active, I used to visit Birmingham often to visit several customers.”)). Complaint Counsel offered no evidence that arms-length communication between Mr. Pais and Mr. Page had anything to do with the allegations in the Complaint and both witnesses testified that Mr. Pais contacted Mr. Page from time to time to discuss foreign business opportunities, merger discussions and other business opportunities. (RPFF ¶¶ 326-343).

841. Over time, this “trusting” relationship between Sigma and McWane resulted in having “generated an all round goodwill, which in turn led to tangible benefits such as higher market pricing and profits for all including Sigma.” (CX 1163 at 007; *see also* CX 1986 at 002 (draft letter discussing early development of the relationship between Messrs. Pais and Page and how they “did not press hard to reap substantial short term benefits – rather, we took an amenable view on the commercial issues in order to develop a respectable partnership. We felt it was in our interest as much as yours to work together to make our industry a better place with stable players.”); CX 1225 at 002-003 (final version of memorandum as emailed to Page on August 24)).

Response To Finding No. 841:

See General Responses 5 and 11. With respect to the alleged “trusting” relationship, McWane disputes that Mr. Page had any type of relationship with Mr. Pais other than an appropriate business relationship. This proposed Finding is duplicative of Complaint Counsel’s proposed Findings of Fact 704, 712 and 828-830, to which McWane has already responded.

6.5 Fittings Suppliers Had a Motive to Conspire

842. In late 2007, economic and market conditions, and the competitive dynamics of the Fittings industry, provided each of McWane, Sigma and Star with powerful motives to conspire with the others to reduce competition and stabilize and raise Fittings prices. (*Infra* ¶¶ 843-906).

Response To Finding No. 842:

See General Response 1, and responses to ¶¶ 843-906, *infra*. This finding is an unsupported assertion, to which no response is required.

843. During 2007, as the economic downturn began, the Fittings industry experienced a period of declining demand, declining prices, and increased costs. (CX 2457 (Sigma October 19 letter referring to recent “decline in multipliers in the fittings market”); Rybacki, Tr. 1111 (prices had been falling prior to October 2007); RX-690 (Rybacki, Dep. at 66-67) (the Fittings market had gotten very competitive, and prices eroded); Tatman Tr. 263-265 (Fittings market became more price competitive with more pressure for Project Pricing as the economy began to decline); Tatman, Tr. 268-269 (Fittings market volume declined by 50% between 2006 and 2010); Tatman, Tr. 347 (describing prices “not keeping pace with inflation”); CX 2397 at 019 (McWane financial statements for December 2007 showing year-to-date per-ton costs for Domestic Fittings up 14.1% over 2006, and per-ton costs for non-Domestic Fittings up 10.1% over 2006)).

Response To Finding No. 843:

The record evidence proves that the conditions described in this proposed Finding lead to a more competitive environment, not a conspiracy. (RPF ¶¶ 80-370). As such, Respondent has no specific response.

844. The Fittings market became more price competitive, with more pressure for Project Pricing, as the economy began to decline. (Tatman, Tr. 263-265).

Response To Finding No. 844:

See response to ¶ 843, *supra*. McWane has no specific response, but notes that the cited testimony is describing the historic relationship between distributors and Tyler/Union and is not directly addressed to “more pressure for Project Pricing.” (Tatman, Tr. 264-265.).

6.5.1 McWane’s Motive to Conspire**6.5.1.1 McWane Faced Excess Inventory, Overcapacity, and High Production Costs**

845. In late 2007, McWane faced excess inventory, overcapacity, and high production costs. (*Infra* ¶¶ 846-852).

Response To Finding No. 845:

See General Response 1, and responses to ¶¶ 846-852, *infra*.

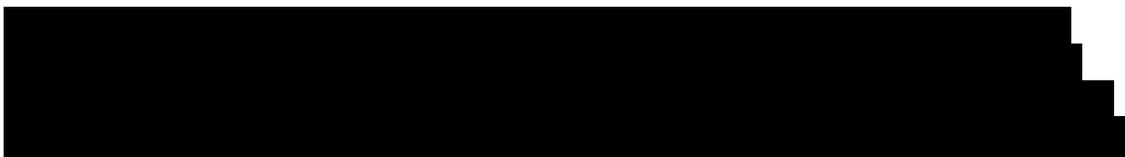
846.

(Tatman, Tr. 1036-1037, 1040, *in camera*).

Response To Finding No. 846:

No timeframe is specified in this proposed Finding of Fact. Assuming it is referring to late 2007-2008, McWane agrees that it had excess capacity in the face of declining demand, and idle plant charges were negatively affecting profitability. McWane disputes Complaint Counsel's characterization of "healthy gross margins." In fact, McWane's CEO Ruffner Page explained that the gross margins were likely an artifact of a write-down in the value of inventory (JX 642 (Page Depo. 226-229) and in any event, that no level of gross margin is a good one "if we're losing money." JX 642 (Page Depo. 227).

847.


(Tatman, Tr. 210-211, 840, 1037, *in camera*; CX 2416 at 015); *see supra* 3.1.2.6 (describing Mr. Green's employment at McWane).

Response To Finding No. 847:

McWane has no specific response, other than to note that Mr. Green left McWane's employment in late 2007. At that time, Mr. Tatman became responsible for all of McWane's Fittings business, including both domestic and non-domestic operations.

848. As a result of the excess domestic inventory, Mr. Tatman began running inventory down in 2007, in part, by substituting U.S.-manufactured Fittings for jobs with Open Specification. Today, lower substitution rates of U.S.-manufactured Fittings for Open Specification jobs are part of what has driven McWane's gross margins up. (Tatman, Tr. 840).

Response To Finding No. 848:

Respondent has no specific response, other than to note that providing domestically-manufactured Fittings for jobs with open specifications was not a desirable circumstance, given the higher production costs for domestic fittings. (RPF 282).

So what we were doing is when we'd get an open spec order, it doesn't have to be domestic only, we would ship a portion of that with import fittings, and because we didn't have enough sales volume to keep our domestic plants running, and we had so much inventory out there, we would substitute domestic product and we would fill that order with partial import product, partial domestic product, and that's where the word "blended" comes from. It's what we filled the order with.

And I will say that every time we ship a domestic fitting we lose money. I'm wrapping a dollar bill around that fitting when I ship it against an import price and I use a domestic fitting.

(Tatman, Tr. 274-275).

849. "Idle plant" costs are the fixed overhead costs associated with running a Fittings manufacturing facility when the plant is not running on all days of the week. McWane reports this cost as a separate line item on its income statements called "idle plant." (Tatman, Tr. 432-433).

Response To Finding No. 849:

Respondent has no specific response.

850. In 2007 and 2008, McWane's Tyler and Union Foundries, together, were contributing approximately \$7 million to the idle plant costs line item. (Tatman, Tr. 433-434).

Response To Finding No. 850:

Respondent has no specific response.

851. In response to reduced demand in 2008, Mr. Tatman first reduced shifts, and ultimately idled McWane's Tyler South Plant in September 2008. (RX-644 (Tatman, Dep. at 52-53)). Running reduced shifts at that plant resulted in substantial "idle plant" costs that brought down McWane's overall profitability until McWane shut down the plant. (Tatman, Tr. 432-434).

Response To Finding No. 851:

Respondent has no specific response.

852. Historically, McWane’s two U.S. plants had a higher cost of production than its Chinese plant and the overseas plants of its competitors. (Tatman, Tr. 431-432 (stating with respect to manufacturing costs that the “manufacturing basis point in China is much lower” than at McWane’s U.S. plants)).

Response To Finding No. 852:

Respondent has no specific response.

6.5.1.2 McWane Was Losing Volume and Market Share Because It Could Not Compete Effectively Against Project Pricing Offered by Sigma and Star

853. In late 2007, McWane was losing volume and market share because it could not compete effectively against the Project Pricing offered by Sigma and Star. (*Infra* ¶¶ 854-859).

Response To Finding No. 853:

See General Response 1, and responses to ¶¶ 854-859, *infra*.

854. In 2007, in an effort to maintain sales volume, Star competed vigorously, expanding its use of Project Pricing, which had previously been reserved primarily for wastewater treatment plant projects. (RX-687 (Pais, Dep. at 79-83) (previously, project pricing was primarily for wastewater treatment plants); *see also* Rybacki, Tr. 1136-1137 (Star’s pricing for most of 2007 was “overly aggressive,” took prices to “a new depressed level, and it was hard to compete with.”)).

Response To Finding No. 854:

This proposed Finding of Fact is incorrect. Star utilized project pricing throughout its history, not just in 2007. JX 685 (Minamyer Depo, p. 26, 115). Further, no Star witness testified that Star’s project pricing was historically confined to wastewater treatment plant projects. Star never stopped project pricing, continuing the practice in 2008 and thereafter. (RPFF ¶¶ 166-167, 170).

855. Mr. Green of McWane responded aggressively to Star’s low pricing with equally low pricing, and McWane’s Fittings profits and volume both fell. (CX 2118 at 002 (Pais recounting Page statements that “In [Fittings], largely due to Star’s low pricing and [David Green’s] decision to respond aggressively with equally low pricing as the import

pricing, Tyler's profits and volume went down."); Pais, Tr. 1882-1883 (describing meeting with Page)).

Response To Finding No. 855:

See General Responses 5 and 6.

856. The price erosion in the Fittings market occurred not in published list prices or multipliers, but in the effective or "actual" multipliers that resulted from the use of Project Pricing. (CX 1138 at 001 (Pais April 2008 email noting that effective Fittings multipliers had declined almost 20% in past two years); Pais, Tr. 2079 (explaining that decline was in "actual multipliers," not "published multipliers"); CX 2477 (Jansen, Dep. at 248-249) (the use of Project Pricing increased in or around August 2006 as the market started to decline)).

Response To Finding No. 856:

See General Response 11. This finding is misleading to the extent it incorrectly implies that project pricing is the only form of discounting the fittings suppliers offered. The evidence is that the fittings suppliers offered a wide range of discounts (RPF 67-77). Otherwise, Respondent has no specific response.

857. Even though McWane was chasing the prices offered by Sigma and Star, it was still losing Fittings market share year over year, because McWane was still "getting beat at the pricing game." (Tatman, Tr. 262). McWane's sales force was not as effective, nimble, or large as the sales teams for Star and Sigma. (Tatman, Tr. 285-286 ("We felt that their – quite frankly, I think the quality of their salespeople was better than ours....I think they had more boots on the ground. I think they had better people at that point in time. And it is my understanding that their people were on an incentive-based, which made them more aggressive probably than our salespeople, who were on fixed salaries.")).

Response To Finding No. 857:

See response to ¶ 856, *supra*. Otherwise, Respondent has no specific response.

858. Mr. Tatman believed that McWane had been losing share in the Fittings market because of increased Project Pricing, and because McWane's relatively small sales force was not able to track changes in competitive price levels as well as those of Sigma and Star. (Tatman, Tr. 285-286).

Response To Finding No. 858:

See response to ¶ 856, *supra*. Otherwise, Respondent has no specific response.

859. Mr. Tatman therefore wanted to increase pricing transparency and stability – *i.e.*, compress the gap in the marketplace between published prices and actual invoice prices that resulted from Project Pricing, thereby giving McWane greater visibility into competitive pricing levels. (Tatman, Tr. 338-339).

Response To Finding No. 859:

See response to ¶ 856, *supra*. Otherwise, Respondent has no specific response.

6.5.2 McWane and Sigma Had a Motive to Conspire with Star, Which Regularly Engaged in Competitive Project Pricing and Which McWane and Sigma Saw as Detrimental to the Industry

860. In late 2007, McWane and Sigma each had a motive to conspire with Star, which regularly engaged in aggressive Project Pricing in the Fittings market. (*Infra* ¶¶ 861-869).

Response To Finding No. 860:

See General Response 1, and responses to ¶¶ 861-869, *infra*. This proposed finding is an unsupported assertion, and thus requires no response.

861. Both before and after the conspiracy, it was widely known in the business “that Star was most aggressive in their pricing under this special pricing or job or whatever it’s called.” (Pais, Tr. 1937).

Response To Finding No. 861:

This finding is incorrect, because there was no conspiracy. (RPF ¶¶ 80-371). McWane agrees that Complaint Counsel has correctly stated Mr. Pais’ quoted testimony found at page 1937 of the Transcript. McWane objects to the characterization of what was “widely known in the business” for lack of foundation.

862. Project Pricing was a significant part of Star’s competitive strategy, because it was the smallest competitor in the market and it needed to Project Price to remain competitively viable. (McCutcheon, Tr. 2387).

Response To Finding No. 862:

Respondent has no specific response, other than to note Star continued to project price throughout 2008 and thereafter. (RPF ¶¶ 166-167, 170). However, it is also true that, all things

being equal, Star would rather have reduced Project pricing, because Project pricing reduced its profit margins. (RPFF ¶¶ 155, 160-162).

863. Star successfully increased its Fittings business in 2007 by implementing a general sales strategy of offering customers Project Pricing. Star used Project Pricing as a way to establish relationships with customers and prove itself with the hope of gaining more business in the future. (Minamyer, Tr. 3145-3146; CX 2526 (Minamyer, Dep. 115-116)).

Response To Finding No. 863:

See General Responses 1 and 11. This proposed Finding is incorrect. Star implemented project pricing prior to 2007. This proposed Finding is duplicative of Complaint Counsel's Proposed Finding of Fact 854, to which McWane has already responded.

864. Mr. Tatman views Star's historical pricing practices as "very aggressive and sometimes irrational." (CX 2483 (Tatman, IHT at 232-234)).

Response To Finding No. 864:

See General Responses 3 and 6.

865. In a February 2009 email, Mr. Pais described Star as "undisciplined about pricing at the present chasing the shrunken market with reckless pricing." (CX 1069 at 001; *see also* Rybacki, Tr. 1106 (describing Star as the most aggressive of his competitors in terms of pricing); CX 2531 (Rybacki, Dep. at 231) (describing Star as most likely to initiate Project Pricing)).

Response To Finding No. 865:

See General Responses 2 and 4. The alleged conspiracy, according to the Complaint and Complaint Counsel's expert Dr. Schumann, occurred between late 2007 and the Fourth Quarter of 2008. (Complaint ¶ 2; RPFF ¶¶ 281-282). Evidence from February, 2009 post-dates the alleged conspiracy and is thus not relevant.

866. In a May 2009 memorandum to the Sigma Board, Mr. Pais described Star's pricing practices as "confusing and disruptive" and "unpredictable and unhealthy." (CX 0214 at 006).

Response To Finding No. 866:

See General Responses 2, and 5 . This proposed Finding of Fact is misleading. The alleged conspiracy, according to the Complaint and Complaint Counsel’s expert Dr. Schumann, occurred between late 2007 and the Fourth Quarter of 2008. Evidence from February, 2009 post-dates the alleged conspiracy and is thus not relevant.

867. In a May 2009 email to Walter Florence, Mr. Pais stated that “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.” (CX 1076 at 003; Pais, Tr. 1862-1863 (Star has “done whatever they could to do hurt us to take business away from us,” both through pricing and other tactics)).

Response To Finding No. 867:

See General Responses 2 and 4. This proposed Finding of Fact is misleading. The alleged conspiracy, according to the Complaint and Complaint Counsel’s expert Dr. Schumann, occurred between late 2007 and the Fourth Quarter of 2008. Evidence from February, 2009 post-dates the alleged conspiracy and is thus not relevant.

868. In an October 2009 letter, Mr. Pais compared Sigma’s and Star’s approaches to pricing: “Sigma has remained responsible and professional – like . . . being responsible in pricing our [Fittings] business etc while Star has been an irresponsible, disruptive and unreliable competitor, constantly attacking McWane’s business with low pricing and other tactics.” (CX 1023 at 005).

Response To Finding No. 868:

See General Responses 2, 4 and 5. This proposed Finding of Fact is misleading. The alleged conspiracy, according to the Complaint and Complaint Counsel’s expert Dr. Schumann, occurred between late 2007 and the Fourth Quarter of 2008. Evidence from October, 2009 post-dates the alleged conspiracy and is thus not relevant.

869. In a 2010 domestic market strategy document, Mr. Tatman stated that “Star has historically shown that they will just continue incremental discounting down to the point when they’re selling near breakeven.” (CX 0105 at 001).

Response To Finding No. 869:

See General Responses 2 and 5. This proposed Finding of Fact is misleading. The alleged conspiracy, according to the Complaint and Complaint Counsel's expert Dr. Schumann, occurred between late 2007 and the Fourth Quarter of 2008. Evidence from 2010 post-dates the alleged conspiracy and is thus not relevant.

6.5.3 Sigma and Star Had a Motive to Conspire Because Inflationary Costs in China Were Rising Faster Than McWane's U.S. Costs

870. In late 2007, Sigma and Star each had a motive to conspire with McWane because inflationary costs in China were rising faster than McWane's U.S. costs. (*Infra* ¶¶ 871-877).

Response To Finding No. 870:

See General Responses 1 and 11, and responses to ¶¶ 871-877, *infra*. This proposed Finding is not factual (no record cites are provided) but rather is Complaint Counsel's argument, and thus requires no response.

871. Sigma's and Star's margins were facing additional pressure from the declining market because their manufacturing costs in China were increasing. (RX-687 (Pais, Dep. at 39-40); McCutcheon, Tr. 2515-2516 (describing cost increases); RX-697 (McCutcheon, IHT (Vol. 2) at 402-404); Tatman, Tr. 870-875 (costs of manufacturing Fittings in China were increasing in early 2008, because of currency exchange rates, rising labor costs, and increases in the cost of pig iron); Pais, Tr. 1896 ("Our costs from China and India had begun to rise from late '07, which everyone was aware, including [Page].")).

Response To Finding No. 871:

This finding is incomplete because, at all relevant times, Fitting importers' production costs have been lower than McWane's. (RPFF ¶ 80). Mr. Tatman believed that the escalation of production costs in China could have a potential silver lining for McWane. (RPFF ¶ 92).

Otherwise, Respondent has no specific response.

872. Specifically, the costs of producing Fittings in China was increasing dramatically due to increases in the cost of scrap iron in China used in the production of Fittings, labor costs to make the Fittings, and freight charges of transporting the Fittings to the United States. (Rybacki, Tr. 1113 ("Raw material prices were going up. Labor was going up, insurance,

ocean freight. It was all going up.”); RX-697 (McCutcheon, IHT (Vol. 2) at 402 (cost increases were “at a very rapid and erratic pace.”)).

Response To Finding No. 872:

See response to ¶ 871, *supra*.

873. McWane’s CFO, Mr. Nowlin, prepared a sensitivity analysis that analyzed costs “heating” up in China. (CX 2481 (Nowlin, Dep. at 107-109); CX 2143). Mr. Nowlin concluded that the rising costs related to China’s strengthening currency, increased Chinese Value Added Tax, and Chinese inflation “hurts [the importers] a lot worse than it hurts us.” (CX 2481 (Nowlin, Dep. at 107-109); CX 2143). Mr. Nowlin shared this sensitivity analysis with Mr. Walton on or about November 29, 2007 for “education” purposes. (CX 2481 (Nowlin, Dep. at 107-109); CX 2143).

Response To Finding No. 873:

See response to ¶ 871, *supra*. Mr. Nowlin testified that he did not recall the underlying assumptions used in the analysis or why he did it. (CX 2481 (Nowlin, Depo. 108 (“We – periodically, people will ask me questions like that, and we’ll model out, well, if you think this is going to happen, here’s the way I think it’s going to impact you.”))).

874. In a December 22, 2007 email to Mr. McCullough and Mr. Walton, Mr. Tatman described “accelerated inflation in China compared to Domestic cost,” (CX 1702 at 001), and in an email three days later to Mr. McCullough, Mr. Jansen, and Mr. Walton, Mr. Tatman again stated that “China inflation [is] out pacing domestic costs.” CX 2327 at 001).

Response To Finding No. 874:

See General Response 5 and response to ¶ 871, *supra*. Otherwise, McWane has no specific response.

875. A presentation prepared by Mr. Tatman in early 2008 likewise noted that “[c]ontinued inflation out of China is increasing pressure.” (CX 0627 at 001).

Response To Finding No. 875:

See General Response 5 and response to ¶ 871, *supra*. Otherwise, McWane has no specific response.

876. Because U.S. costs were not rising as much as overseas prices, McWane's cost of domestic production was not going up at the same rate, giving it a cost advantage. In a January 29, 2008 email, Mr. Page noted that rising costs for Chinese manufacturers made McWane's domestic production competitive with imports. (CX 1183 at 001 ("The Chinese importers in water works fittings are seeking price increases [and] we are now in a position to resist. In fact I have offered to make 'A' items for an importer at the same price they can bring in it in."))).

Response To Finding No. 876:

See General Responses 5 and 6, and response to ¶ 871, *supra*. Complaint Counsel accurately quotes Mr. Page's e-mail to a family member discussing the general economic outlook. Complaint Counsel did not call Mr. Page as a witness at trial and did not ask him about this exhibit (CX 1183) in his deposition, so this proposed Finding is merely Complaint Counsel's characterization or interpretation of what the quoted language means.

877. Sigma was aware of McWane's cost advantage. (Pais, Tr. 1910-1911 (McWane was "beginning to get a cost advantage on a variable cost basis, not total cost basis. And when they have idle capacity, they can leverage that advantage into getting some of the share back"). Mr. Pais expressed concern that perhaps McWane had "now done a thorough competitive review and decided that an aggressive offensive strategy is the best form of defense," and that in seeking to strengthen its position McWane might "keep[] [Fittings] price down during our rise in costs etc." (CX 2119 at 001; Pais, Tr. 1895-1897).

Response To Finding No. 877:

See response to ¶ 871, *supra*. Mr. Pais characterized CX 2119 as "these are all my speculations." (Pais, Tr. 1896.) McWane further notes that keeping Fitting prices lower is pro-competitive and was not consistent with Sigma's late 2007 announced list price increase. See response to ¶ 871, *supra*. Mr. Pais characterized CX 2119 as "these are all my speculations." (Pais, Tr. 1896.) McWane further notes that keeping Fitting prices lower is pro-competitive and was not consistent with Sigma's late 2007 announced list price increase.

Now, what you're speculating is that Mr. Page has done a thorough competitive review and has decided that an aggressive offensive strategy may be the best form of defense; right, sir?

A. Sure, That's my guess, yes.

Q. And you say one of the things that he may be doing – and you're speculating. We understand that – but one of the things he may be doing is deciding to be aggressive on offense by keeping fittings prices down during your rise in costs; right, sir?

A. Oh, sure.

Q. Yea.

And in fact, that's exactly what McWane did; right? You do recall, sir, that Sigma announced a very large list price increase in the fall of '07 which McWane did not follow; right?

A. We tried to introduce, and I remember, yeah, they did not follow, yes.

(Pais, Tr. 2043-2044).

6.5.4 **Sigma and Star Sought to Raise Prices in Late 2007; McWane Did Not Follow**

878. Sigma and Star each had a motive to conspire with McWane because they announced a price increase in late 2007, but McWane did not follow their lead, despite direct and indirect appeals from Sigma to do so. (*Infra* ¶¶ 879-906).

Response To Finding No. 878:

See General Response 1, and responses to ¶¶ 879-906, *infra*. This proposed Finding is not factual (no record cites are provided) but rather is Complaint Counsel's argument. McWane agrees that McWane did not follow large list price increases announced by Sigma and Star in late 2007, but instead charted its own, independent course of action. (RPFF ¶¶ 80-127).

879. On October 5, 2007 McWane had announced a 2% to 3% multiplier increase effective November 5, 2007. Star followed with its own increase on October 11, 2007, and Sigma followed on October 23, 2007. (RX-401 (McWane October 5 letter); RX-402 (Star October 11 letter); RX-015 (Sigma October 23 letter); CX 2457 (Sigma October 19 letter)).

Response To Finding No. 879:

Sigma did not simply raise multipliers, however; it proposed a large list price increase as well. See response to ¶ 881, *infra*. This alleged series of independent price adjustments is outside the scope of the purported January to Fall 2008 conspiracy and is not relevant.

880. Despite this price increase announcement, the market was unstable, and actual prices after Project Pricing in 2007 were not keeping up with cost inflation. (CX 0627 at 001 (“Net pricing in 2007 lagged inflation due to pressure on volume.”); *see also* Tatman, Tr. 346 (in 2007, McWane was unable to raise prices enough to offset inflation because of pressure on volume)).

Response To Finding No. 880:

McWane agrees that the price increase it announced in late 2007 was insufficient to keep up with inflation. McWane further agrees that it had excess inventory and its competitive strategy was aimed primarily at reducing inventory levels. (Tatman, Tr. 340) (“it was not what we were selling it for. We were not selling enough.”) (RPF 86-89). This finding is misleading to the extent it ignores the other forms of pricing discounts offered beyond project pricing.

881. In its October 23, 2007 letter following McWane’s announced price increase, Sigma also announced that it would further increase its list prices by a minimum of 6%, to be effective January 2, 2008. (CX 2457 (version of letter dated October 19); RX-015 (same letter as received by Star, dated October 23 and edited to include accessories); Rybacki, Tr. 1109-1110 (describing letter as conveying that Sigma “need[s] a price increase because of our cost structure has gone up”); CX 2531 (Rybacki, Dep. at 216-217) (letter was telling customers Sigma needed a price increase, and everybody in the market would understand that Sigma needed and wanted a price increase)).

Response To Finding No. 881:

See General Responses 5 and 11. Sigma announced a large list price increase in late 2007 and McWane did not follow because it independently decided it was not in its best interests to do so. (RPF 80-127).

882. On November 30, 2007, Star followed with its own announcement that it would be putting a new price list into effect in January 2008. (RX-406 (“Star Pipe Products will be publishing a new Price List for Utility Fittings, Accessories and Fabricator Products (UPL.08.01) to be effective January 1st, 2008.”); Minamyer, Tr. 3153).

Response To Finding No. 882:

See General Responses 5 and 11. Star followed Sigma’s announcement of a list price increase in late 2007 with its own announcement of a list price change. McWane did not follow because it independently decided it was not in its best interests to do so. (RPF 80-127).

883. Star’s announcement stated that it would issue new list prices in 2008, but the letter did not say whether prices would increase or what the magnitude of any increase would be. (RX-406 (“Star Pipe Products will be publishing a new Price List for Utility Fittings, Accessories and Fabricator Products (UPL.08.01) to be effective January 1st, 2008.”); Minamyer, Tr. 3154).

Response To Finding No. 883:

McWane has no specific response.

884.

[REDACTED]

(Rybacki, Tr. 3606-3614, *in camera* [REDACTED]; (CX 1621-A at 118-119, 126-130, *in camera* [REDACTED]; *supra* ¶¶ 713-733 (detailing telephone records).

Response To Finding No. 884:

See General Responses 4 and 11. Discussions between McWane’s competitors in which McWane did not participate are irrelevant to Complaint Counsel’s claims against McWane. See Response To Finding 714, *supra*.

885. Because of his concern about McWane’s cost advantage, and the importance to Sigma of a successful list price increase, Mr. Pais lobbied Mr. Page for McWane’s support. He actively sought opportunities to stay in contact with Mr. Page. (CX 1163 at 007, 008 (August 2008 Pais email describing the recent decline in Sigma’s cost advantage as “part of my motivation to revive our strategic relationship with RP/McWane and find credible

opportunities to stay engaged with them!"); CX 0317 at 001 (Pais May 13, 2009 email describing relationship with Pais and stating that by using “non-conflicting ‘strategic’ opportunities, I have been able to get [Page’s] attention and agreement on some important market issues.”)).

Response To Finding No. 885:

See General Responses 1, 2, 4, 5 and 11. The first sentence in this proposed finding is an unsupported argument that requires no response. The exhibits that are cited in support of this proposed Finding are dated many months after the alleged formation of the conspiracy. In addition, neither exhibit – CX 1163 or CX 0317 – states that “Mr. Pais lobbied Mr. Page for McWane’s support” for a price increase or ever even discussed pricing with Mr. Page. This proposed Finding is generally repetitive of the numerous prior proposed Findings of Fact in which Complaint Counsel has chronicled sporadic, legitimate meetings between Mr. Page and Mr. Pais and attempted to mischaracterize their relationship, and McWane incorporates herein its responses to those findings. (See responses to ¶¶ 704, 712, 828-830, 835, *supra*). There is no evidence that Mr. Page and Mr. Pais had anything other than an appropriate business relationship or that any communication between them was for any purpose other than appropriate, arms-length business communications.

886. On or about December 3, 2007, Mr. Page and Mr. Pais met in person in Birmingham, Alabama. (Pais, Tr. 1886-1887; CX 2482 (Page, Dep. 107-108) (Mr. Page likely met with Mr. Pais on December 3, 2007, although he does not recall what they spoke about); *see also* CX 2037 (email setting up meeting); CX 2038 (Page calendar entry reflecting meeting between Mr. Page and Mr. Pais on December 3, 2007)).

Response To Finding No. 886:

See General Response 11, and response to ¶ 790, *supra*. Mr. Pais testified that this meeting concerned international opportunities. (RPFF ¶ 339).

887. Later that month, when Mr. Page initially declined a further meeting request from Mr. Pais, (CX 2119 at 001 (Mr. Page informing Mr. Pais that he does not think a meeting between them would be worthwhile or wise); Pais, Tr. 1894), Mr. Pais declared that he would “go[] all out to arrange a meeting with RP before closing down the direct access as

he suggested.” (CX 2120 at 001; Pais, Tr. 1890). Viewing Mr. Page’s refusal as an invitation to meet for a pretextual purpose (a “clue to meet thru transparent grounds”), Mr. Pais prepared a memo to Mr. Page proposing to meet regarding an opportunity for McWane in India, which, he noted, “incidentally is for real as well.” (CX 2120 at 001; Pais, Tr. 1891; *see also* CX 1113 at 001-002 (final version of Pais memo as sent to Page on December 14, 2007)).

Response To Finding No. 887:

See General Responses 4, 5, 6 and 11, and response to ¶ 885, *supra*. This finding is misleading because as, reflected in CX 2119, Mr. Page declined a further meeting without a specific agenda. (“If you have a specific topic to discuss, please share that with me in writing so there is no confusion about the purpose of the meeting.”) . McWane disputes Complaint Counsel’s characterization of CX 2119 as an “invitation to meet for a pretextual purpose” to the extent it understands what this means. Complaint Counsel did not call Mr. Page as a witness at trial, did not question him about CX 2119 in deposition, and thus Mr. Page did not testify that his e-mail declining a further meeting was for a “pretextual purpose.” Mr. Pais continued to contact Mr. Page to request opportunities to discuss international ventures.

888. Mr. Tatman analyzed the new Sigma list prices based on McWane’s product mix and concluded that they represented an approximately 25% weighted average price increase. (Tatman, Tr. 348-349).

Response To Finding No. 888:

McWane has no specific response.

889. Mr. Tatman believed that such a large price increase would lead to increased Project Pricing, greater instability, and less transparency in the Fittings market. (Tatman, Tr. 348-349).

Response To Finding No. 889:

Specifically, Mr. Tatman testified: “I believe that I couldn’t – I believed if I followed a 25 percent price increase that what I would have is I would lose more visibility into whether the competitive environment was. Would I have gotten quite a bit of traction off of that and raised

my prices? Yes. But the end result would be, to me, that I would lose more visibility and I really wouldn't know where the competitive environment was, and I wouldn't be able to meet my volume objectives.” (RPF 99)

890. McWane knew that Sigma was attempting to learn from the market whether McWane intended to follow its January 2008 price increase, and believed that Star was waiting for an announcement from McWane as well. (CX 1702 at 001 (Tatman writing to McCullough and Thomas on December 22, 2007: “Sigma recently posted a new List Price effective Jan 2nd and they’ve been pulsing sources trying to see if [McWane] will follow”); Tatman, Tr. 336-337).

Response To Finding No. 890:

McWane has no specific response. McWane gathered competitive feedback from customers in the market, as did Sigma and Star. (RPF 193-197). Witnesses from all three (3) companies were uniform in their testimony that they did not trust or believe competitors’ pricing letters. (RPF 110-111).

891. McWane also knew that its competitors were likely facing more severe cost pressures than McWane due to inflation in China. (CX 1702 at 001 (“Given . . . the accelerated inflation in China compared to Domestic cost, I believe we’re in a unique position . . .”); Tatman, Tr. 336-337).

Response To Finding No. 891:

See General Response 11. This proposed Finding is duplicative of Complaint Counsel’s Proposed Finding of Facts 871-877, to which McWane has already responded. Mr. Tatman believed that the increased costs in China could be beneficial to McWane. (Tatman, Tr. 346-347 and CX 627 (“Due to Sigma and Star’s.”)).

892. Sigma closely watched the market to see if McWane was giving any indication of following its price increase. On December 18, 2007, regional sales managers reported to Mr. Rybacki, Mr. Pais, and Sigma’s M20 management group that they had seen no evidence of McWane changing its list prices. One manager noted that he had declined to mail the new Sigma price book because “[i]t would be a futile exercise unless everyone is onboard.” (RX-017 at 0001; Rybacki, Tr. 3511-3513).

Response To Finding No. 892:

See General Response 1. McWane has no specific response, other than to note that the cited exhibit and trial testimony have to do with Sigma's delay in its announced list price increase. Neither indicate that "Sigma closely watched the market", and no supporting record citation is provided for this statement.

893. Mr. Rybacki testified that he does not recall whether he spoke to any of his competitors about the price increase between December 18, 2007 and December 20, 2007. (Rybacki, Tr. 3514-3515 ("Q. Between December 18 when you received the e-mails from Mr. Pietryga, Mr. Richardson and Mr. Walsh with information about the price increase and December 20, did you contact anyone to talk about what to do about the price increase? A. I have ongoing conversations with our main customers every day. Q. Did you speak to any of your competitors in that period of time either at Star or at McWane? A. About the price increase? Q. Yes, sir. A. I don't recall.")).

Response To Finding No. 893:

See General Response 11. This proposed Finding is duplicative of Complaint Counsel's Proposed Findings in § 6.4.1, to which McWane has already responded. This proposed finding is contradicted by the evidence that Mr. Rybacki never discussed prices with anyone from McWane (RPF 201-206).

894. [REDACTED] (McCutcheon, Tr. 2473-2474, 2476, *in camera*; Rybacki, Tr. 3616, *in camera*; [REDACTED]; CX 1621-A at 112, 123, 124, *in camera*; [REDACTED]; *supra* ¶¶ 734, 736, 738 (detailing telephone records)).

Response To Finding No. 894:

See General Responses 4 and 11. This proposed Finding is duplicative of Complaint Counsel's Proposed Findings in § 6.4.1, to which McWane has already responded. Mr. Rybacki never discussed prices with anyone from McWane (RPF 201-206). See Response To Finding 714, *supra*.

895.

(CX 1621-A at 124, 125, *in camera* (Rybacki telephone records); Rybacki, Tr. 3617, 3622-3623, *in camera* ; Rybacki, Tr. 3610, *in camera* ; Rybacki, Tr. 3617, *in camera* ; *supra* ¶¶ 735, 737 (detailing telephone records); *see also* Rybacki, Tr. 3622-3623, *in camera*

Response To Finding No. 895:

See General Response 11. This proposed Finding is duplicative of Complaint Counsel's Proposed Findings in § 6.4.1, to which McWane has already responded. This proposed finding is contradicted by the evidence that Mr. Rybacki never discussed prices with anyone from McWane (RPF ¶¶ 201-206). *See* Response To Finding 714, *supra*.

896. McWane did not announce that it would follow its competitors' list price changes. On December 20, 2007, Sigma issued a letter to its customers delaying implementation of Sigma's Fittings list price increase (previously scheduled for Jan 2, 2008), explaining in part:

Unfortunately for you and us one of our competitors in the Fitting Industry has not announced a New List Price increase for 2008 despite the fact that they are subject to the same cost pressures as the rest of us. As a result the New List Price Sheet as it pertains to Fittings only will be delayed for the time being. It is our sincere hope that the delay will be short term and that this Price Increase which is healthy for all of us will be implemented in the very near future.

(CX 2455 at 001 (emphasis in original); Rybacki, Tr. 1114-1116; RX-690 (Rybacki, Dep. at 83) (phrase "one of our competitors" was referring to McWane); Rybacki, Tr. 1114-1115) (same)).

Response To Finding No. 896:

McWane has no specific response.

897. Mr. Tatman received a copy of Sigma's December 20, 2007 letter, which he described as "a strange letter," and as "bashing" McWane. (Tatman, Tr. 351-352; CX 0627 at 001, 012).

Response To Finding No. 897:

This finding is incomplete. Mr. Tatman would have received the letter only after the fact, from a customer. Moreover, Mr. Tatman testified "[t]hat is the colorful language that I used in an internal brainstorming document that was only viewed by the Thomas [Walton], Leon [McCullough] and Jerry [Jansen]." (Tatman, Tr. 352.)

898. Sigma was upset by McWane's failure to follow Sigma's price increase announcement. (Rybacki, Tr. 1115).

Response To Finding No. 898:

McWane has no specific response. Mr. Rybacki further testified that he did not discuss his feelings with anyone at McWane. (Rybacki, Tr. 1115).

899. In late December, Star also issued an updated version of its November 30 list price announcement, postponing the effective date of its new Fittings list prices from January 2, 2008 to February 4, 2008. (CX 0627 at 001, 014; Minamyer, Tr. 3155-3156).

Response To Finding No. 899:

McWane has no specific response.

900. On December 26, 2007, Mr. Pais sent a pricing strategy email to Sigma's management group, in which he stated that he was confident that McWane would eventually follow Sigma's price increase announcement, and explained that McWane was trying to send a message to Sigma and Star regarding discounting (*i.e.*, "net" pricing and "effective" multipliers) in the Fittings market:

As McWane chose not to follow our lead in increasing the PRICE LIST as of 1/2/07, LR's letter to customers advising a 'temporary delay' in the PL-108 is the logical first step. However, despite being very clear LR's letter may be misconstrued as 'rescinding' the 08 PL increase. We should all be aware and alert that it's NOT SO. From all indications, *I am still confident McWane will follow our lead – as they too were trying to make a statement that we, the NMG (the non-McWane Supplier Group), need to get a wake-up call and are prepared to be more responsible and truly committed to raise the overall NET, NET PRICE*; including the

Multiplier + VRs. They are finally trying to leverage their current relative costing/pricing advantage to send a message to the NMG -- that while we can take the market price down on our own, we need THEM to take it up!

...

We have to do all we can to raise the effective Multipliers from the current dismal .22 to .25 range. McWane may be right in their skepticism about our inability to sustain, let alone boost the multipliers and instead try to raise the List to perhaps create additional 'head room' for multiplier slides!

(CX 1439 at 001 (emphasis added); Pais, Tr. 1902-1917).

Response To Finding No. 900:

See General Responses 1 and 4. Complaint Counsel accurately quotes CX 1439. Contrary to the proposed Finding, however, CX 1439 does not say that "McWane was trying to send a message to Sigma and Star regarding discounting." Rather, Mr. Pais writes:

"They are finally trying to leverage their current relative costing/pricing advantage to send a message to the NMG -- that while we can take the market price down on our own, we need THEM to take it up." (CX 1439).

As Mr. Pais explained at trial, that statement is simply "logic" (or an explanation of an oligopoly):

And so, as such, we were beginning to realize now we are losing some of our competitive advantage with the costs that we traditionally had, and now we have to recognize how do we improve our pricing, knowing that, yes, in our product range, which is very fungible, very interchangeable, if we have to sustain our market share and sell at a profitable pricing, the other suppliers also have to realize same -- realize-- I mean, they have to come to the same realization. Otherwise, we will have to lose the market share if we want to keep the prices high. That's just logic.

901. Mr. Pais believed that due to "costs, which were going up a lot more faster overseas as compared to domestic, it is fair to say that they [McWane] had a temporary advantage." (CX 2528 (Pais, Dep. at 255-258) (discussing CX 1439)).

Response To Finding No. 901:

See General Response 4 and, response to ¶ 900, *supra*.

902. When Mr. Pais wrote that, McWane was making a statement that Star and Sigma needed to “be more responsible and truly committed to raise the overall NET, NET PRICE,” Mr. Pais was referring to the need, in the face of declining demand, for the suppliers to start looking for ways to increase prices. (Pais, Tr. 1904-1905 (“[I]n a year, 2007, when the volume clearly had dropped, we had so many different kind of hits to our overall price. There are discounts and discounts on discounts, rebates and cash discount, that we’re all forced to respond to our competition, whether it’s McWane or Star or SIP. . . . I was trying to set the stage that this is the time of the year we have to look at our bottom line, and let’s find ways to be responsible for ourselves, you know, to run a smart business and start looking at price enhancements.”); CX 1439 at 001).

Response To Finding No. 902:

See General Response 4. Complaint Counsel correctly quotes Mr. Pais’ testimony. For completeness, Mr. Pais’ answer begins, “*For us*, Mr. Hassi, the – being responsible was a good business practice.” (Pais, Tr. 1904). Mr. Pais was explaining what he believed Sigma needed to do in the face of significant cost “run-ups” in China, which he described as “raging.” (Pais, Tr. 1906).

903. In response to this perceived message from McWane, Mr. Pais asked his team to be more disciplined about the Fittings discounts that they offered to customers. (Pais, Tr. 1905-1906 (“Q. So being more disciplined about the price – are you asking your team to be more disciplined about the prices they’re offering to your customers? A. Yes.”); CX 1439 at 001).

Response To Finding No. 903:

See General Responses 1 and 4. In the face of declining demand and increased costs, Mr. Pais asked his team to be more disciplined about the Fittings prices (“we had so many hits to our overall price”) offered to customers. The cited testimony does not state, “In response to this perceived message from McWane.” Again, for completeness sake, Mr. Pais answer in full is as follows:

- A. Yes. Our -- I may have – since you quote my previous testimony, Sigma, we have very widespread flexibility given to all our supply -- our sales team, from regional

managers to even territory sales managers. In fact, we had instituted a program called PCA, profit center accounting, about twelve years back so that we focus on profits, and what they do with the pricing, how they manage it from customer to customer, order to order, was left to them.

So I was trying to start a new awareness that these are the headwinds and we need to now be smart about it, more disciplined about it, more responsible about it, whatever, and all these words for us, they're positives internal as a business.

904. Sigma needed McWane to follow Sigma's price increase because of the "practical reality that if we go alone, we can do it, and at times, we've done it, but then we'll lose the volume." (CX 2528 (Pais, Dep. at 258); Rybacki, Tr. 1113-1114 (Sigma cannot raise prices if competitors don't follow because "We're selling a commodity"))).

Response To Finding No. 904:

McWane has no specific response, as this testimony describes a perfectly legitimate oligopolistic market.

905. McWane never increased its list prices in response to Sigma's October 23, 2007 list price increase announcement. (Tatman, Tr. 352).

Response To Finding No. 905:

McWane has no specific response.

906. Sigma's October 23, 2007 list price increase announcement never went into effect, and was eventually withdrawn by Sigma. (Rybacki, Tr. 1115, 1125-1126; CX 1189 (Sigma January 29, 2008 letter to customers superseding previously announced list price increase)).

Response To Finding No. 906:

McWane has no specific response.

7. Price-Fixing Conspiracy in the Fittings Market Among McWane, Sigma, and Star

7.1 The Tatman Plan

7.1.1 Mr. Tatman Developed a Plan for Achieving Stability and Transparency in the Fittings Market

907. In late December 2007 and early January 2008, Mr. Tatman developed a plan to forge an agreement among the Fittings suppliers whereby McWane would only agree to higher

published prices if its competitors committed to curtail their Project Pricing and maintain stable and transparent pricing at published levels. (*Infra* ¶¶ 908-923).

Response To Finding No. 907:

See General Response 1, and response to ¶¶ 908-923, *infra*. This proposed Finding is not factual (no record cites are provided) but rather is Complaint Counsel’s argument.

908. In a December 22, 2007 email, Mr. Tatman informed his boss, Mr. McCullough, that he had a “concept” to take advantage of market conditions that put McWane in a “unique position” to “help drive stability and rational pricing” in the Fittings market. (Tatman, Tr. 340-343; CX 1702; CX 2327; CX 0627). Mr. Tatman defined price stability and rational pricing as within 10% of published multipliers. (Tatman, Tr. 283-285, 338-339).

Response To Finding No. 908:

McWane has no specific response, but notes that Mr. Tatman did not define “price stability” in his December 22, 207 e-mail. See CX 1702. He later explained what the term meant to him. (*See, e.g.*, Tatman, Tr. 283-284.) Mr. Tatman only explained price stability, not “rational pricing.”

909. Specifically, Mr. Tatman wrote in his December 22, 2007 email to his boss, Mr. McCullough, that:

Given both the change in the Tyler/Union leadership structure and the accelerated inflation in China compared to Domestic cost, *I believe we’re in a unique position to help drive stability and rational pricing with the proper communication and actions.* I have a concept that I believe will work if properly executed. . . . I don’t believe with our silence and Star’s push announcement that Sigma will hold to their Jan 2nd effective date so we have some time to get it right.

(CX 1702 at 001 (emphasis added)).

Response To Finding No. 909:

See General Response 11. Complaint Counsel accurately quotes CX 1702. This proposed Finding is duplicative of ¶ 908, *supra*, and Respondent incorporates its response thereto by reference.

910. Three days later, on December 25, 2007, Mr. Tatman echoed these same points in a cover email to Messrs. McCullough, Jansen and Walton that transmitted a draft presentation of McWane's pricing strategy for Fittings, titled "Draft Presentation for 1Q 2008 DIWF LP Review.ppt." In that email, Mr. Tatman wrote:

Our past attempts to *drive stable pricing* haven't been too successful. However, our new leadership structure coupled with China inflation out pacing domestic costs may provide *a unique opportunity for success* provided our strategy and execution is correct.

(CX 2327 at 001 (emphasis added)).

Response To Finding No. 910:

Complaint Counsel accurately quotes CX 2327. However, Mr. Tatman notes: "This is a draft presentation as there's additional analysis required before a final recommendation could be made." See CX 2327. Mr. Tatman was anticipating a brainstorming session with his bosses to develop a strategy. (Tatman, Tr. 345-346).

911. On or about January 6, 2008, Mr. Tatman outlined the specifics of his "concept" for driving "stability and rational pricing" in the Fittings market in a presentation he drafted and provided to Messrs. Walton and McCullough (the "Tatman Plan"). The presentation was intended to help McWane decide how to react to market conditions in the Fittings market. (CX 1702; CX 0627; Tatman, Tr. 345-346; Tatman, Tr. 752 ("[E]verything we do is very methodical and very well thought out.")).

Response To Finding No. 911:

CX 627 was a series of PowerPoint slides that Mr. Tatman prepared for an internal brainstorming session with his bosses. (Tatman, Tr. 345-346). Mr. Tatman testified directly that it was not a "plan" (Tatman, Tr. 355) but rather ideas or concepts for discussion purposes. As such, McWane objects to Complaint Counsel's ongoing characterization of the PowerPoint at the "Tatman Plan." It was kept internal to McWane (Tatman, Tr. 1069-1070) and was never implemented. (Tatman, Tr. 363). ("If you look at the letter we put out, it has none of these four elements in it, not one.)

912. In the presentation, Mr. Tatman first reported on the current competitive environment, including Sigma’s December 20, 2007 letter to customers postponing its list price increase, noting that that letter had “bash[ed]” McWane for not following Sigma’s announced list price increase; and Star’s announced list price increase and subsequent postponement of that price increase’s effective date. (CX 0627 at 001; Tatman, Tr. 349-350, 353).

Response To Finding No. 912:

See General Response 11, and response to ¶ 897, *supra*.

913. Most importantly, the presentation specifically outlined the elements of Tatman Plan in a slide titled, “Desired Message to the Market & Competitors”:

Desired Message to the Market & Competitors

- Tyler/Union will be consistent and follow through with what we’ve formally communicated.
- T/U will encourage/drive both price stability and transparency.
- T/U will adjust multipliers as required to remain competitive within any given market area. (Consistent Job Pricing will be met with general market actions)
- For 2008, we will support net price increases but will do so in stepped or staged increments. A prerequisite for supporting the next increment of price is reasonable stability and transparency at the prior level.

Due to their now more desperate need for price, I believe that Sigma and Star will mimic and verbally follow any program we publish. However the keys to actual success are:

1. T/U being consistent with what we say for an extended period (> 3 months)
2. Sigma & Star’s mgt pulling price authority away from front line sales and customer service personnel to add discipline to the process
3. Support from our major customers to abandon the current process of branches calling multiple suppliers to auction for price. (We’ll need face to face meetings)
4. The Big 3 not allowing 3rd tier suppliers like Serampore to disrupt the process

(CX 0627 at 004).

Response To Finding No. 913:

CX 627 was a series of PowerPoint slides that Mr. Tatman prepared for an internal brainstorming session with his bosses. (Tatman, Tr. 345-346). Mr. Tatman testified directly that it was not a “plan” (Tatman, Tr. 355) but rather ideas or concepts for discussion purposes. As such, McWane objects to Complaint Counsel’s ongoing characterization of the PowerPoint at the

“Tatman Plan.” It was kept internal to McWane (Tatman, Tr. 1069-1070) and was never implemented. (Tatman, Tr. 363). (“If you look at the letter we put out, it has none of these four elements in it, not one.”)

914. Under the Tatman Plan, McWane would communicate to “the Market & Competitors” that McWane would “encourage” and “drive” “both price stability and transparency” in the Fittings market. (CX 0627 at 004).

Response To Finding No. 914:

See General Response 11, and response to ¶ 913, *supra*. This finding is incorrect, as there was no “Tatman Plan.” The testimony in this case is uniform and consistent that McWane never communicated anything concerning price or job pricing to its competitors. (RPF ¶¶ 198-234).

915. Under the Tatman Plan, McWane would communicate to “the Market & Competitors” that McWane would support future Fittings price increases in “stepped or staged increments,” but only if there was “reasonable stability and transparency at the prior level.” (CX 0627 at 004; CX 2484 (Tatman, Dep. at 84-85); CX 0375 (draft letter to customers stating that any subsequent price increases would only be announced if “the increase can be supported by stable market conditions”)).

Response To Finding No. 915:

See General Response 11, and responses to ¶¶ 913-914, *supra*. The testimony in this case is uniform and consistent that McWane never communicated anything concerning price or job pricing to its competitors. (RPF ¶¶ 198-234).

916. The Tatman Plan also called for McWane to communicate to “the Market & Competitors” that any consistent Project Pricing would be met with market-wide action by McWane to lower multipliers for that area. (CX 0627 at 004 (“Consistent Job Pricing will be met with general market actions.”)).

Response To Finding No. 916:

See General Response 11, and responses to ¶¶ 913-915, *supra*. The testimony in this case is uniform and consistent that McWane never communicated anything concerning price or job pricing to its competitors. (RPF ¶¶ 198-234).

917. Mr. Tatman believed that Sigma and Star would verbally follow McWane’s program because of their “desperate need for price increases.” (CX 0627 at 004 (“Due to their now more desperate need for price, I believe that Sigma and Star will mimic and verbally follow any program we publish.”); Tatman, Tr. 361-362).

Response To Finding No. 917:

Complaint Counsel accurately quotes CX 627 at 004. However, Mr. Tatman testified at trial. “I could only control what I do. I can’t control what my competitors do.” Tatman, Tr. 360. With respect to this specific slide in his brainstorming PowerPoint, he explained:

Q. And you understood at this point in time that Sigma and Star had a desperate need for price increases?

A. That’s what I say there in this thing, but I – they’re not publicly traded. I don’t have their financial statements. I don’t know if they’re making money or losing money.

(Tatman, Tr. 361-363)

918. However, Mr. Tatman noted that one of the “keys to [the] actual success” of his Plan would be for Sigma and Star to centralize price authority away from their front line sales representatives in order to “add discipline to the process.” (CX 0627 at 004; Tatman, Tr. 362, 1071 (“[T]he only way that’s going to work is if your competitors stop doing it.”)).

Response To Finding No. 918:

See responses to ¶¶ 913-915, *supra*. Complaint Counsel accurately quotes CX 627 at 004, but Mr. Tatman noted that these slides were “for discussion” and that he had “no control over what Sigma and Star [did]. (Tatman, Tr. 362-363).

919. The Tatman Plan’s objective was to stabilize market pricing by compressing the variance between published pricing and actual pricing, so as to achieve greater market pricing transparency. (Tatman, Tr. 1072 (“Q. And did you try to hold pricing and stabilize market pricing in 2008? A. We tried to compress the variance between where we were published and where we were actually having to go. . . . [W]e’re trying to get visibility to what’s going on out there because we can’t see it.”)).

Response To Finding No. 919:

See response to ¶ 913, *supra*. There is no “Tatman Plan”. (Tatman, Tr. 355 (“I don’t see where we have a plan here.”)). Mr. Tatman’s goal, to which he testified repeatedly at trial, was to increase sales volume to reduce inventory and to keep McWane’s domestic foundries open. (RPFF ¶¶ 86-90). In Mr. Tatman’s words:

“It was designed to put financial pressure on a competitor, which is pro-competitive, so that we could get better visibility into what was going on in the marketplace. It was reducing the wiggle room they had from a financial standpoint so that I could see what was going on. If I can see it, I can shoot it.

(Tatman, Tr. 361).

920. At trial, Mr. Tatman initially explained that his presentation (CX 0627) was for a brainstorming session between Mr. Tatman, Mr. Walton, and Mr. McCullough in order to decide how McWane was going to react to the competitive situation. (Tatman, Tr. 354-358).

Response To Finding No. 920:

Mr. Tatman testified, “We were brainstorming on how to competitively react to what was going on in the marketplace.” (Tatman, Tr. 345-346). The proposed Finding is incorrect in characterizing this testimony as an “initial explan[ation]”.

921. Mr. Tatman attached to the presentation two draft letters to customers that would communicate elements of the Tatman Plan. These letters explained the reason for the price increase as:

We understand the need for this increase and that, in general, higher price levels provide value to the industry. However, we don’t believe the industry’s your [*sic*] best interests are served by publishing increases that are not supported, leading to instability and ultimately erosion of market level pricing.

and

While we acknowledge this increase is significantly lower than what has been communicated by another supplier. We don’t believe your best interests are served by publishing increases that in turn are not supported, leading to instability and ultimately erosion of market level pricing.

(CX 0627 at 006-007).

Response To Finding No. 921:

See responses to ¶¶ 913 and 919, *supra*. Complaint Counsel has accurately quoted portions of CX 627. The proposed Finding is incorrect in that the purpose of the draft letters was to assist Mr. Tatman and his colleagues brainstorm, not to “communicate elements of the Tatman Plan.” The final January 11, 2008 customer letter did not contain any of the 4 numbered paragraphs from CX 627, p.4. Tatman. Tr. 362-363; 1069-1071.

922. McWane’s January 11, 2008 letter to customers was based on those drafts and was the final result of Mr. Tatman’s “brainstorming session” with Messrs. McCullough and Walton. (Tatman, Tr. 371; *see also infra* ¶¶ 935-938).

Response To Finding No. 922:

See General Responses 1 and 11, and responses to ¶¶ 913-919, *supra*, and ¶¶ 935-938, *infra*.

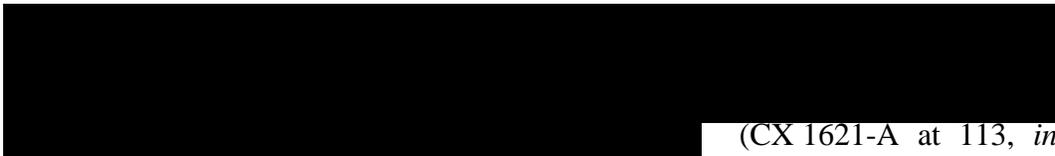
923. Mr. Tatman testified that he spoke with Mr. Rybacki “a couple of times” and he did not know what they discussed. Tatman Tr. 364 (“I testified at deposition that I’ve talked to Mr. Rybacki two, three, a couple of times. I don’t know when and I don’t know what the topics were.”). [REDACTED]

Response To Finding No. 923:

See General Response 11. This Proposed Finding is duplicative of Proposed Findings 717, 723, and 739-743, to which McWane has already responded. Mr. Rybacki testified that he never discussed prices with anyone at McWane (RPF ¶¶ 201-206), and Mr. Tatman testified that he never discussed prices with anyone at Sigma (RPF ¶¶ 198-200). As demonstrated *supra*, McWane disputes that the referenced phone records establish that Mr. Rybacki and Mr. Tatman “spoke four times for a total of 21 minutes.” A call from Mr. Rybacki’s phone was placed to Mr. Tatman’s phone for 3 minutes on December 20, 2007 and subsequently the same

day a call was placed from Mr. Tatman's phone to Mr. Rybacki's phone for 6 minutes. The most likely inference from this evidence is that Mr. Rybacki tried unsuccessfully to reach Mr. Tatman, and Mr. Tatman returned the call later in the day. Similarly, on January 3, 2008, a call was placed for Mr. Rybacki's phone to Mr. Tatman's phone for 3 minutes, and on January 4, 2008, a call was placed from Mr. Tatman's phone to Mr. Rybacki's phone for 9 minutes. Again, the most likely inference to be drawn from this evidence is that Mr. Rybacki unsuccessfully tried to reach Mr. Tatman, and Mr. Tatman returned to call the following day. Although both men testified they did not recall the specifics of these particular calls, they consistently testified that they had spoken a few times – once a “welcome to the industry” call from Mr. Rybacki and on another occasion regarding DIFRA.

a.

 (CX 1621-A at 113, *in camera* (Rybacki telephone records); Tatman, Tr. 367-368; Rybacki, Tr. 3624-3626, *in camera*; *supra* ¶¶ 739-742 (detailing telephone records)).

Response To Finding No. 923a:

See General Response 11. *See* Response To Finding 714, *supra*.

b.

 (CX 1621-A at 114, 115, *in camera* (Rybacki telephone records); Tatman, Tr. 369-370, *in camera*; Rybacki, Tr. 3627-3628, *in camera*).

Response To Finding No. 923b:

See General Response 11. *See* Response To Finding 714, *supra*.

c. Mr. Tatman testified that he was unable to remember those calls, and that he did not know what was discussed. (Tatman, Tr. 367-370 (“Q. But you don’t know what you and Mr. Rybacki might have talked about on December 27? A. I don’t know if he said, ‘Merry Christmas. Welcome to the rat race.’ I have no clue.”)).

Response To Finding No. 923c:

See General Response 11. See Response To Finding 714, *supra*.

d.

(Rybacki, Tr. 3627-3628, *in camera*

; Rybacki, Tr. 1088-1089

Response To Finding No. 923d:

See General Response 11. See Response To Finding 714, *supra*.

7.1.2 McWane Centralized Its Pricing Authority in 2008

924. In January 2008, McWane centralized its Project Pricing approval authority. (*Infra* ¶¶ 925-929).

Response To Finding No. 924:

See General Response 1, and responses to ¶¶ 925-929, *infra*. This proposed Finding is not factual (no record cites are provided) but rather is Complaint Counsel’s argument, and thus requires no response.

925. McWane centralized its pricing authority in January 2008 when it created a new pricing coordinator position for Mr. Napoli, tasking him with gaining control over the contentious and time-consuming process of negotiating Project Pricing with Distributors. (RX-640 (Napoli, Dep. at 35-36, 46-48, 50)).

Response To Finding No. 925:

This proposed Finding misstates the evidence. During Mr. Tatman’s tenure, McWane actually de-centralized pricing authority based on Mr. Tatman’s relative trust in the abilities of the salespersons. Mr. Tatman testified:

“Historically, David Green time period was a little bit tighter, and we flexed that over time. And, we’ve actually changed authority depending on the individual.

We’ve got – you know, its like your kids. You trust some of your kids more than you trust your other kids. We had a certain part of our salespeople we would give more

flexibility with price because we trust them to make a good judgment. We've got other people that we keep it pretty tight because we just don't think they're making good judgment calls."

(Tatman, Tr. 282-283).

Mr. Napoli was hired for a newly-created position in January, 2008 to assist Mr. Jansen. Mr. Napoli's responsibilities included managing product claims ("The product claims is very time-consuming and very contentious, but he [Jansen] just didn't have time to do that and still perform his function.") and keeping track of individual job pricing ("There was so much pricing going on, so many jobs being priced and new jobs sold, annual bids for municipalities, that he couldn't . . . keep knowledge of – of everything that's going on.") (JX 640 (Napoli, Depo at 36)). Mr. Napoli had some authority to approve job pricing "within very narrow limits." (JX 640 (Napoli, Depo at 44.)) However, Mr. Napoli's job was to keep track of what prices are offered to what customers, not to approve or control the pricing.

Q. Would it be fair to say – so once you became the pricing coordinator –

A. Uh-huh (affirmative response).

Q. -- did the local sales agents no longer have the authority to offer those discounts without your approval?

A. They were instructed to run it through me. We designed a couple of forms to do that. Some used it, some didn't, but that was the instructions they were given.

Q. Okay. And did they follow those instructions?

A. Some did, some didn't. The second or third time you find out they didn't, then they started doing it.

Q. Okay.

A. But there's still some that don't do it on a regular basis.

(JX 640 (Napoli, Dep. at 47-48)).

926. McWane centralized pricing authority by requiring local sales agents to obtain approval before offering job pricing to Distributors. (CX 2480 (Napoli, Dep. at 44-47) (sales agents were instructed to run Project Pricing through Mr. Napoli); CX 2485 (Walton, Dep. at 121-122)).

Response To Finding No. 926:

See General Response 11, and response to ¶ 925, *supra*. This finding is misleading and contrary to the evidence. Mr. Walton testified that he could not recall the specifics of Mr. Napoli's responsibilities. ("That's possible that it happened. I don't recall specifically if that happened or if it happened a hundred percent of the time.") (JX 645 (Walton, Dep. at 121)).

927. McWane executives were concerned that sales representatives with pricing authority could produce "instability and lower prices in the market." (CX 2485 (Walton, Dep. at 31-34) (explaining that he was a proponent of making pricing decisions at a centralized location based on what he had observed through the "actions of the competition"); *see also* CX 0111 at 002 (Walton expressing concern in 2009 that "overall pricing in the market place will decline" if McWane were to return pricing authority to the sales field)).

Response To Finding No. 927:

See General Response 2. CX 111 significantly post-dates the end of the alleged conspiracy and is thus not relevant. In addition, Mr. Walton is no longer employed at McWane. He testified that he could not recall specifically what he meant in CX 111 with respect to his comment concerning "Field Sales having limited pricing authority." He speculates:

A. I'm trying to remember what I meant. I think what I meant when I wrote that was that if we have a salesperson in California making a pricing decision, it may not be in our best interest for what – how that affects Texas or Missouri or Florida or New York, and, therefore, I was a proponent of making pricing decisions at a centralized locations where we had a national view of what was going on.

So that's my comment, that, you know, oftentimes when somebody makes a local decision here, it has effects in other places that may or may not be in our best interest.

(JX 640 (Napoli, Dep. at 47-48)).

928. By August 2009, after the price-fixing conspiracy had largely collapsed, Mr. McCullough thought it was "imperative" to McWane's success in the market that McWane give its field sales representatives some latitude to adjust pricing. (CX 2353 at 002; CX 2485 (Walton, Dep. at 38-39)).

Response To Finding No. 928:

See General Responses 1, 2, 5, 6 and 11. CX 2353 comprises Mr. Walton's handwritten notes from an August, 2009 meeting. Mr. Walton testified that he could not recall what Mr. McCullough said or if his notes were accurate. ("I can't recall that. It's possible he said that.") (JX 645 (Walton, Dep. at 39)). Mr. Walton took notes that he thought might be pertinent to himself. (JX 645 (Walton, Dep. at 39)). August 2009 is also after the alleged conspiracy and is not relevant.

929. The change in policy to restore some limited authority to McWane's sales force to offer Project Pricing was based on a determination that pricing in the marketplace "was very volatile," and that McWane needed to restore that authority in order to "keep market share." (CX 2480 (Napoli, Dep. at 53-54, 59) (discussing need for sales force to obtain appropriate verification, such as written proof of a competitor's price, before offering Project Pricing under new rule)).

Response To Finding No. 929:

See responses to ¶¶ 925-928, *supra*. McWane disputes that there was a "change in policy."

7.2 In the First Quarter of 2008, Sigma, Star and McWane Agreed to Match Prices and Cut Back Project Pricing

930. In the first quarter of 2008, Sigma, Star and McWane agreed to match prices and cut back on Project Pricing. (*Infra* ¶¶ 931-1088).

Response To Finding No. 930:

See General Responses 1 and 11, and response to ¶¶ 931-1088, *infra*. This proposed Finding is not factual (no record cites are provided) but rather is Complaint Counsel's argument, and thus requires no response. To the extent a response is required, this finding is incorrect, and contradicted by the overwhelming evidence that no such agreement existed. (RPFF ¶¶ 80-370).

7.2.1 McWane's January 11, 2008 Letter Was an Invitation to Collude

931. McWane's January 11, 2008 customer letter was an invitation to collude directed at Sigma and Star, whereby McWane would agree to staged, industry-wide Fittings price

increases in exchange for Sigma's and Star's agreement to curtail Project Pricing. (*Infra* ¶¶ 932-949).

Response To Finding No. 931:

See General Responses 1 and 11, and responses to ¶¶ 932-949, *infra*. This proposed Finding is not factual (no record cites are provided) but rather is Complaint Counsel's argument, and thus requires no response. To the extent a response is required, this finding is incorrect, and contradicted by the overwhelming evidence that no such agreement existed. (RPFF ¶¶ 80-370).

932. In a January 11, 2008 pricing letter ostensibly addressed to customers, McWane announced that it was keeping its current list prices but would increase its blended Fittings multipliers by 10 to 12 percent, and that it intended to stop Project Pricing by selling products only off the newly published multipliers. (CX 1178). That letter read in pertinent part as follows:

As per our prior letter of October 5, 2007, we will adjust pricing by increasing multipliers while retaining our current List Price, LP-5072. Letters stating the new region specific multipliers will be mailed January 18, 2008. ***The increase will be 10% to 12% above the current prevailing multiplier levels*** on Blended Fittings and Accessories and 3% to 5% on Domestic Fittings effective February 18, 2008.

To help our distribution customers better manage their Inventory valuations and compete on a more level playing field, ***it is our intention going forward to sell all products only off the newly published multipliers***. We will continue to monitor the competitive environment and adjust regional multipliers as required to provide you with competitive pricing.

All annual municipal bid contracts will be honored per the terms of the contract. Jobs quoted prior to this announcement will be honored through March 1, 2008, with acceptable documentation provided to your local Tyler/Union sales representative.

If the current inflationary trends continue as forecasted, we anticipate the need to announce another multiplier increase within the next six months. However, we will only do so as conditions require.

(CX 1178 (emphasis added); CX 2172 at 002; Tatman, Tr. 870).

Response To Finding No. 932:

See General Responses 1 and 11, and response to ¶ 931, *supra*. McWane did not follow Sigma's late 2007 announced 25% list price increase, but instead sent its customers a letter dated January 11, 2008 stating that McWane would adjust its multipliers effective February 18, 2008. Complaint Counsel accurately quotes from the January 11, 2008 customer letter; the letter does not state that McWane "intended to stop Project Pricing" as set forth in the proposed Finding. The customer letter does state that McWane intends to sell all products only off the newly published multipliers. McWane disputes Complaint Counsel's characterization that the January 11, 2008 letter was "ostensibly" addressed to customer.

933. The January 11, 2008 letter did not provide any actual new price multipliers; McWane communicated those new multipliers, effective February 18, 2008, in price increase letters to customers dated January 18, 2008. (*E.g.*, CX 0896 at 001; Tatman, Tr. 411-412; CX 1672 at 001; RX-608; CX 0035 at 001, 003).

Response To Finding No. 933:

See General Response 11, and response to ¶ 931, *supra*. Otherwise, McWane has no specific response.

934. The January 11, 2008 letter, even though ostensibly addressed to customers, was the "Message to Competitors" envisioned by the Tatman Plan. (Tatman, Tr. 371 (January 11, 2008 letter was a result of Tatman's "brainstorming session" with McCullough and Walton for which he prepared the Tatman Plan); Tatman, Tr. 1066-1067 (describing January 2008 letter as a "head fake" to competitors); CX 1178).

Response To Finding No. 934:

See response to ¶ 913, *supra*. This Finding is argumentative and not accurate. At no place in the record is there a reference to a "Tatman Plan", including in the transcript cited provided in this proposed Finding. Likewise Mr. Tatman did not testify that the January 11, 2008 letter was a "Message to Competitors." There was no "Tatman Plan." See Responses to § 7.1, *supra*.

935. Mr. Tatman wrote the January 11, 2008 letter. (CX 2477 (Jansen, Dep. at 254-255); Tatman, Tr. 384-385 (Tatman prepared drafts)).

Response To Finding No. 935:

McWane has no specific response.

936. Mr. Tatman prepared multiple drafts of the January 11, 2008 pricing letter, both as part of the Tatman Plan and subsequently. Three of these drafts were attached to the Tatman Plan. (CX 0627 at 006 (“Stronger Language” draft letter in Tatman Plan acknowledging that higher price levels “provide value to the industry” but that “the industry’s . . . best interests” are not served by increases “at levels that are not supported”); CX 0627 at 006 (alternate “Stronger Language” draft letter in Tatman Plan stating that although the increase is “significantly lower than what has been communicated by another supplier,” McWane does not “believe your best interests are served by publishing increases that in turn are not supported, leading to instability and ultimately erosion of market level pricing”); CX 0627 at 007 (“Softer Language” draft letter in Tatman Plan)).

Response To Finding No. 936:

See General Responses 1 and 11, and responses to ¶¶ 913-919 and 931, *supra*.

Otherwise, Respondent has no specific response.

937. A subsequent draft, circulated by Mr. Tatman to Mr. McCullough and Mr. Walton on January 8, 2008, contained language stating that McWane would only make future price increases “if conditions require *and the increase can be supported by stable market conditions*” and that “[i]t is not our intention to provide job pricing.” (CX 0375 (emphasis added)).

Response To Finding No. 937:

See response to ¶ 936, *supra*. Complaint Counsel accurately quotes excerpts from

CX 375. This draft letter was never sent. (Compare CX 375 to CX 1178). There was no “Tatman Plan.” See Response to § 7.1, *supra*.

938. By using the phrase “it is our intention going forward to sell all products only off the newly published multipliers,” McWane was announcing its intention not to offer Project Pricing. (Tatman, Tr. 387-388 (“Q. McWane announced it was not its intention to offer job pricing; isn’t that what you intended by this communication? A. I would say the way that is written, the answer would be yes.”); see also CX 2172 at 001 (Tatman email to HD Supply: “Distributors are ultimately better served with adherence to published pricing as instability and the corresponding price erosion only reduces your profitability); CX 0375 at 001 (draft of January 11, 2008 letter stating “It is not our intention to provide job pricing.”); CX 2477 (Jansen, Dep. at 250) (testifying that this language meant that

McWane was going to try to reduce the amount of Project Pricing: “Q. Does that mean that Tyler/Union was going to try to reduce the amount of job pricing? . . . THE WITNESS: Yes.”); CX 2538 (McCutcheon, IHT (Vol. 2) at 413-414) (a reasonable interpretation of McWane’s letter by someone with experience in the industry would be that McWane was saying , “I’m done job pricing, if I see my rivals job pricing, I’m going to bring multipliers down in the areas where I observed job pricing.”)).

Response To Finding No. 938:

This proposed Finding is incomplete. While the January 11, 2008 letter announced an intention to eliminate job pricing (“head fake”), Mr. Tatman testified that McWane intended to continue to offer its customers job pricing, as well as favorable payment terms, early payment discounts, cash discounts, freight discounts, discounts for larger shipments, rebates and other price concessions. (RPFF ¶ 101).

939. At trial, Mr. Tatman admitted that McWane’s statement in the January 11, 2008 letter (CX 1178) that it intended to sell products “only off newly published multipliers” was directed at competitors, not customers. (Tatman, Tr. 894-895, 1065-1067 (testifying that it was a “head fake” directed at competitors, not customers)).

Response To Finding No. 939:

This proposed Finding is incomplete and as such a mischaracterization of Mr. Tatman’s testimony. The January 11, 2008 letter was directed to customers. Mr. Tatman was aware, however, that customers routinely provided such letters to Sigma and Star, and he hoped to lull (or “head fake”) them into temporarily reducing their job pricing. (RPFF 101). Meanwhile, McWane intended to continue offering job pricing and other price discounts in an effort to increase volume and address its excess inventory situation. (RPFF ¶¶ 107-108).

940. The 10% - 12% increase in multipliers was “significantly lower” than the approximately 25% average increase previously announced (and put on hold) by Sigma. (Tatman, Tr. 382-384; CX 2172 at 001 (Tatman writing to HD Supply that “[t]he % change is significantly lower than the List Price change Sigma posted on their website which appears to be in the range of ~25% on average”)).

Response To Finding No. 940:

McWane has no specific response.

941. Sigma understood McWane’s announcement of a 10%-12% increase over “prevailing multipliers” (CX 1178) reflected an increase above then-current effective multipliers in the marketplace, which were at that time lower than published multipliers. (Rybacki, Tr. 3518 (“Q. [W]hen you learned that McWane was increasing multipliers by 10 to 12 percent, what did you mean -- 10 to 12 percent above what? A. Above what multipliers were in the marketplace. Q. Were the multipliers in the marketplace at the end of 2007 lower than the -- lower than they were actually published? A. Yes.”)).

Response To Finding No. 941:

This proposed Finding is incomplete. Complaint Counsel has accurately quoted Mr. Rybacki’s testimony, but he also **testified** that he did not trust competitor’s customer pricing letters. (Rybacki, Tr. 1108-1109, 3559-3560 (“I get my information from the customer. I don’t get it from a price of paper written by a competitor. I get it from my customers. If my customers say my competitors are going up, then I believe it; if they don’t, I don’t believe it.”)).

942. The relatively modest size of McWane’s proposed price increase as compared to the increase sought by Sigma reflected the strategy in the Tatman Plan that McWane would only support price increases in “stepped or staged increments.” (CX 0627 at 004).

Response To Finding No. 942:

See General Response 1. This Finding is argumentative and not accurate. At no place in the record is there a reference to a “Tatman Plan”, including in CX 627 cited by Complaint Counsel in support of this Finding. The “relative modest size of McWane’s proposed price increase” was the result of independent decision-making aimed at increasing volume to address its excess inventory situation and to keep its domestic foundries open. *See* Response to ¶ 919, *supra*. There was no “Tatman Plan.” *See* Response to § 7.1, *supra*.

943. The relatively modest size of McWane’s proposed price increase also reflected McWane’s intent to reduce the other suppliers’ ability and incentive to engage in Project Pricing by limiting the headroom between published prices and competitive prices. (CX 2327 (email from Walton to Tatman, stating, “I like your strategy of only giving them half of what they want to try and prevent cheating and fire sales.”); Tatman, Tr. 349 (Sigma’s proposed larger price increase would have given Sigma and Star “more headroom for discounting”); Tatman, Tr. 360-361 (aim of pricing plan was to “get better visibility” and reduce competitors’ “wobble room”); Tatman, Tr. 374-375 (Tatman wanted to narrow the band between published price and competitive level to improve

visibility); Tatman, Tr. 882 (McWane moderated the amount of its price increase so as not to “lose visibility on where the true competitive level was.”)).

Response To Finding No. 943:

McWane has no specific response.

944. McWane’s letter offered to “announce another multiplier increase within the next six months,” but stated it would “only do so as conditions require.” The conditions required for another increase included achieving greater pricing stability and transparency in the Fittings market by curtailing Project Pricing. (CX 178; Tatman, Tr. 388-390 (price stability and transparency was a McWane objective); CX 2484 (Tatman, Dep. at 94-96) (discussing letter); CX 2484 (Tatman, Dep. at 97-98) (McWane’s letter was alerting the market to the possibility of another price increase); CX 2477 (Jansen, Dep. at 250-251) (Tyler/Union intended to reduce job pricing to bring stability, and would “like to go with no job pricing.”); CX 2172 at 001 (Tatman emphasizing need for stability in an email transmitting the January 11, 2008 letter to HD Supply); CX 2485 (Walton, Dep. 113-114 (“stability in pricing” means that the market has less Project Pricing)).

Response To Finding No. 944:

See General Responses 1 and 11, and responses to ¶¶ 913, 919, 931-932, and 934, *supra*.

The letter, which was not an “offer,” actually states:

If the current inflationary trends continues as forecasted, we anticipate the need to announce another multiplier increase within the next six months. However, we will only do so as conditions required.

(CX 1178). The “conditions” necessitating another price increase were set forth in the letter – “if the current inflationary trends continue” The record citations referenced by Complaint Counsel do not support the proposed Finding.

945. CX 1664 is a worksheet created by Mr. Tatman as part of his effort to establish actual Fittings price multipliers in January 2008. (Tatman, Tr. 885). The multipliers Mr. Tatman proposed in CX 1664 were used in the final multiplier map announced by McWane on January 18, 2008, and CX 1664 contains Mr. Tatman’s analysis the financial impact of those multiplier changes. (Tatman, Tr. 1054-1055; *compare* CX 1664 with CX 0035 at 003)).

Response To Finding No. 945:

Mr. Tatman testified that spreadsheets of this type highlighted the level of detail that he went into in making independent pricing decisions, but that this particular spreadsheet was only

the “format”: “What I don’t know is what revision this is and what multipliers we actually published, and so I can’t tell you, looking at this document, if this is what we actually published or this is one of several cuts that I took at that.” Tatman, Tr. 393 (discussing CX 1664).

Moreover, the spreadsheet only reflects invoice data and does not reflect “credits back to a branch, branch-level rebates, changes in terms, anything.” (Tatman, Tr. 394.)

Subject to the above qualifications, CX 1664 and other iterations of it were spreadsheets that Mr. Tatman created to assist him in determining what multipliers should be in January, 2008. Tatman, Tr. 885.

946. In determining how to adjust multipliers in January 2008 and evaluating whether a change was an effective increase or a decrease, Mr. Tatman compared the then-current effective multiplier for each region (based on McWane invoice data from September 1, 2007 to December 1, 2007) with the proposed new multiplier. (Tatman, Tr. 1051-1052; Tatman, Tr. 392-396; CX 1664 (“final regional multipliers” worksheet); *see also* CX 2479 (McCullough, Dep. at 187) (describing draft customer letter (CX 0375) as referring to a planned price increase through the increase of multipliers)).

Response To Finding No. 946:

McWane disagrees with this proposed Finding. CX 1664 contains columns where the effective multiplier from each region can be compared to the proposed new multiplier. However, Mr. Tatman testified that an “apples to apples” comparison would be the “published current” column compared to the “proposed published” multipliers. Tatman, Tr. 887-888.

947. The non-Domestic Fittings multipliers announced in McWane’s January 18, 2008 pricing letters were below the then-current effective prices in only eight states: New Hampshire, New Jersey, Delaware, Maryland, Virginia, Arkansas, South Dakota, and Idaho. (Tatman, Tr. 403-404; CX 1664 (“final regional multipliers” worksheet)).

Response To Finding No. 947:

Based on a comparison of the effective multiplier column in CX 1664 to the proposed new multipliers column, there were decreases in eight (8) states. Mr. Tatman testified, however, that the appropriate comparison is the “published current” column to the “proposed published”

column. Such an “apples to apples” comparison would show a price decrease in 20 states and no change in another 8 states. (RPF 102). *See* Response 946 above.

948. The non-Domestic Fittings multipliers announced in McWane’s January 18, 2008 pricing letters were above the then-current effective prices in at least 40 states or territories: Connecticut (3.6% increase), New York (10.5% increase), Rhode Island (10.7% increase), Massachusetts (20.8% increase), Vermont (19.2% increase), Pennsylvania (8.8% increase), West Virginia (11.9% increase), Ohio (16% increase), Indiana (13.3% increase), Kentucky (3.7% increase), Alabama (7.4% increase), Georgia (15.3% increase), North Carolina (7.7% increase), South Carolina (9.5% increase), Florida (5.5% increase), Tennessee (2.7% increase), Mississippi (6.7% increase), Louisiana (3.0% increase), Oklahoma (16.2% increase), Missouri (7.6% increase), Kansas (13.1% increase), Nebraska (13.4% increase), Michigan (6.5% increase), Minnesota (6.1% increase), North Dakota (11.9% increase), Iowa (5% increase), Illinois (1-80 north) (13.3% increase), Wisconsin (6.9% increase), Arizona (5.8% increase), New Mexico (7.2% increase), Texas (8.2% increase), Utah (33.3% increase), Wyoming (9.9% increase), Colorado (8.6% increase), Montana (8.6% increase), Washington (35.5% increase), Oregon (31% increase), California (10.7% increase), Nevada (9.3% increase); Puerto Rico (12.5% increase). (CX 1664 (“final regional multipliers” worksheet); Tatman, Tr. 405-406 (walking through calculation for 35.5% increase in Washington)).

Response To Finding No. 948:

McWane has no specific response based on a comparison of the effective multiplier column in CX 1664 to the proposed new multiplier column. Mr. Tatman testified, however, that the appropriate comparison is the “published current” column to the “proposed published” column. *See* Response 946-947 above.

949. Overall, the non-Domestic Fittings multipliers announced in McWane’s January 18, 2008 pricing letters resulted in a weighted average price increase of approximately 8% over then-current effective prices. (Tatman, Tr. 359-360, 392-393 (weighted average increase was 8%); RX-409 at 0001 (Tatman January 18, 2008 email to McCullough reporting 8.1% increase); CX 1664 at 002 (“final regional multipliers” worksheet reflecting Mr. Tatman’s detailed calculations to determine that the expected impact of the price changes was a 8.13% price increase)).

Response To Finding No. 949:

See General Response 1, and responses to ¶¶ 951-970, *infra*. Assuming that every customer actually pays the published multiplier and there are no other discounts, this proposed Finding would be accurate. But that assumption is not reality. Tatman, Tr. 397-398.

7.2.2 **Sigma Followed McWane's New Fittings Price Multipliers and Accepted McWane's Invitation to Curtail Project Pricing**

950. Sigma followed McWane's new Fittings price multipliers and accepted McWane's invitation to curtail Project Pricing. (*Infra* ¶¶ 951-970).

Response To Finding No. 950:

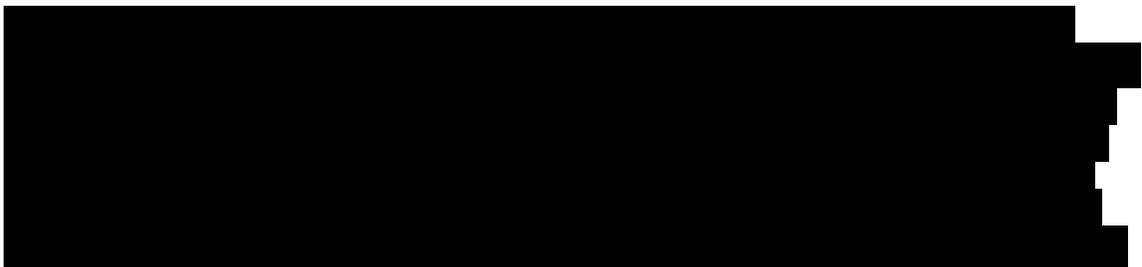
See General Responses 1 and 11, and responses to ¶¶ 951-970, *infra*. This finding is pure unsupported argument with no record citation, and thus requires no response. To the extent a response is required, this finding is incorrect, as it is contradicted by the evidence.

951. On or about Monday, January 14, 2008, Sigma and Star executives received copies of McWane's Friday, January 11, 2008 letter. (CX 0038; McCutcheon, Tr. 2505-2507 (testifying that he received McWane price letter from a customer); Rybacki, Tr. 3516-3517, 3557-3558 (testifying that he received a copy of McWane's January 11, 2008 letter); CX 1178; CX 1291; Minamy, Tr. 3156).

Response To Finding No. 951:

See General Responses 4 and 11, and responses to §6.5.12. This proposed Finding is duplicative of numerous other proposed Findings to which McWane has already responded. However, McWane agrees that Sigma and Star obtained copies of its January 11, 2008 pricing letter after-the-fact and from customers.

952.



(CX 1621-A at 117, *in camera* (Rybacki telephone records); *supra* ¶¶ 745-747 (detailing telephone records); McCutcheon, Tr. 2475-2476, *in camera* [redacted]; Rybacki, Tr. 3629-3630, 3632, *in camera* [redacted])).

Response To Finding No. 952:

See General Responses 4 and 11, and responses to §6.5.12. This proposed Finding is duplicative of numerous other proposed Findings. *See* Response To Finding 714, *supra*.

953. On January 24, 2008, Mr. Pais communicated to Mr. Rybacki that McWane was upset because of the “overcompetitiveness of the marketplace” and the “downward spiral of pricing in the marketplace.” (Rybacki, Tr. 1131-1132; CX 1145). Mr. Pais knew that the downward spiral of prices had occurred through Project Pricing, not through decreases in published list prices and multipliers. (Pais, Tr. 2078-2079 (discussing CX 1138 and explaining that the price decline that occurred over the two years leading up to 2008 had been in “actual multipliers,” not “published multipliers”)).

Response To Finding No. 953:

See General Responses 4, 5 and 11. This proposed Finding is based on Mr. Rybacki’s understanding of an out-of court statement made by Mr. Pais, and thus lacks foundation and is based on hearsay. McWane agrees that the marketplace was competitive and that prices were declining. Prices were declining not only as a result of project pricing but also as a result of a “waterfall” of price concessions including freight concessions, rebates, extension of credit terms, cash discounts, credit backs and the like. Tatman, Tr. 550 (the “price that you give is based on about 12 different factors in a price waterfall”); Tatman, Tr. 225 (“And then price starts eroding from that point [list and multiplier] based on job pricing, rebates, freight terms, cash discounts, credit backs, a whole host of pricing mechanisms.”); Pais, Tr. 1904-1905 (“There are discounts, and discounts on discounts, rebates and cash discounts . . .”); Schumann, Tr. 4290-4291. (“It is correct that there were other terms that were offered.”).

954. Sigma believed that it was important to eliminate Project Pricing, and to communicate Sigma’s intent to do so to the marketplace. (CX 1138; Rybacki, Tr. 3545 (“Mr. Pais always suggested that we . . . firm up or eliminate project pricing.”); Rybacki, Tr. 3545 (“[W]e wanted to do away with project pricing. . . . [W]e wanted to become more consistent with our pricing approach that we always did.”)).

Response To Finding No. 954:

See General Response 4. This proposed Finding is incomplete. Mr. Rybacki testified that he had attempted to curtail project pricing since his hiring in 1990. H explained that “[p]roject pricing is ongoing battle within Sigma, within the industry of – that goes on all the time on special projects, and it – we’ve always tried to curtail project pricing, always have.”

Rybacki, Tr. 3523. While Mr. Rybacki would love to see project pricing go away entirely such that Sigma could sell for the highest prices possible, it never happened. Rybacki, Tr. 3701 (Q. Just a fiction to think that happened? A. Yes. Unfortunately”).

955. Sigma viewed Project Pricing as contrary to consistent and disciplined pricing, and was trying to curtail Project Pricing throughout 2008. (Rybacki, Tr. 3523-3524, 3545 (Sigma wanted to do away with Project Pricing)).

Response To Finding No. 955:

See General Response 4. This proposed Finding is incomplete. See Response 954 above.

Mr. Rybacki testified that project pricing continued throughout 2008. Rybacki, Tr. 3701. See also Rybacki, Tr. 1130 (“I didn’t disagree with the need to pull back [project pricing]. What I disagreed on was the actual ability for us to do that.”).

956. Ten days after receiving a copy of McWane’s January 11, 2008 letter announcing McWane’s intent to stop Project Pricing, on January 24, 2008, Mr. Pais sent an email to Sigma’s regional managers that they should minimize Project Pricing:

I HAVE URGED LARRY [Rybacki] TO INITIATE A NEW COMMITTED AND SERIOUS EFFORT ***TO NORMALIZE ALL PRICING*** FOR FITTINGS – AT SAME LEVELS – PW AS WELL AS OTHER ORDERS, ***TO ELIMINATE THE CONFUSION WE ARE CREATING WITH CUSTOMERS AND COMPETITORS***, LEADING TO LOWER OVERALL PRICING LEVELS.

Though Tyler’s NEW multipliers are discouraging, ***this is both a lesson and an opportunity [for] Sigma and Star to develop a patient and disciplined Marketing approach and demonstrate to [McWane] that we are capable of being part of a stable and profitab[ility] conscious industry.*** This is the ‘leadership capital’ we created when we acquired PCI and reduced the supply base to just 3 -- but, so far, we have NOT been astute enough to derive any returns from this capital!

(CX 1145 at 001 (emphasis added); Rybacki, Tr. 1129, 1133-1134; Pais, Tr. 1920-1925).

Response To Finding No. 956:

See General Response 4. McWane disputes this proposed Finding. McWane's January 11, 2008 does not contain a statement of an "intent to stop Project Pricing." Complaint Counsel has accurately quoted CX 1145, but mischaracterizes it in the proposed Finding. Mr. Pais testified that Sigma had historically priced differently for the PW, or plant work, segment of the business. Over time, this lead to confusion in the market; which Mr. Pais wished to avoid. Pais. Tr. 1913-1915 ("And we were getting calls from the customer saying, Look, we work in the same building, but I've got two different pricing. Which one should I use? Naturally, he would push us to get the lower of the two."). See also Pais, Tr. 1919 ("We never took out the authority or the flexibility from any salesperson to vary the price as he or she felt right, and that continued. At the same time, there were so man variations with terms, etc., and I was urging Larry [Rybacki], let's try and streamline our pricing policy.") Mr. Pais directly testified, in response to questions concerning CX 1145, that he was not encouraging anyone to stop job pricing.

Q. PW is plant work?

A. Plant work.

Q. And those are specialized fittings?

A. Not necessarily. The plant work is something as I explained, this is the treatment plant work as compared to underground subdivision, I mean, housing type of construction.

Q. And that was being priced off a different system that the other types of fittings; right?

A. It – often it is handled differently. Yes.

Q. Right.

(Pais, Tr. 2069-2070).

957. Specifically, Mr. Pais was encouraging his sales force to "not giv[e] into too many requests for discounts." (Pais, Tr. 1922). Mr. Pais recognized that Sigma might not be able to eliminate Project Pricing, but he wanted to minimize it. (Pais, Tr. 2139-2140

("[W]e were not trying to eliminate special pricing, we were trying to minimize it . . . "); Pais, Tr. 1921 ("[E]liminating the practice is wishful thinking. I was just trying to have them minimize it.")).

Response To Finding No. 957:

See General Response 4. This proposed Finding is misleading. Reduction of project pricing and obtaining higher prices if in every competitor's economic self-interest. See Response to Proposed Finding 954. Sigma continued to project price in 2008. (RPFF 150-159).

958. Mr. Pais's instruction to Mr. Rybacki applied to all segments of Sigma's Fittings business. (Pais, Tr. 2068 ("I was trying to prevail on Larry to see how we can reduce the dispersion in the pricing that we just talked about or whether it is through plant work or whether it is through *more aggressive pricing to some customers*, et cetera.") (emphasis added); see also CX 2528 (Pais, Dep. at 263-267) (Sigma sought to turn back the practice of special pricing, which had spread into stocking orders from traditional plant work segment); RX-687 (Pais, Dep. at 82-83) ("the distributors and everyone alike started stocking less and they started showing these so-called lists, RFQs, request for quotation, on anything and everything So I initiated to address the problem. We cannot eliminate, of course entirely, let's minimize it to say, that, look, you don't have to have a special pricing, you have the pricing already, use the same list price because it is the same fitting.")).

Response To Finding No. 958:

See General Response 4. This proposed Finding is misleading. Mr. Pais testified that he wished to eliminate confusion by not differentiating between plant work and other segments of the market. He did not encourage Mr. Rybacki to cease job pricing. See Response to Proposed Findings 954-956.

959. In the same January 24, 2008 email, Mr. Pais stated that:

It's likely that Tyler did wish to make a definite effort to improve the multiplier levels -- but, may have based their choices for the NEW multipliers on the actual documented competitive pricing that they are known to procure proof for, from the customers. Unfortunately, the illogical pricing approach used by Star -- and hence SIGMA -- for 'Plant quotes' with lower 'special' multipliers may have biased [McWane's] decisions in pegging the NEW multipliers at where they are.

(CX 1145 at 001). Mr. Pais’s reference to the “illogical pricing approach used by Star” refers to Star’s pricing as being “overly aggressive in the marketplace, and they had taken project pricing or plant quotes to a new level of -- a new depressed level, and it was hard to compete with.” (Rybacki, Tr. 1136-1137).

Response To Finding No. 959:

See General Responses 4 and 5. McWane has no specific response, other than to note that the proposed Finding is based on Mr. Rybacki’s interpretation of Mr. Pais’ e-mail.

Mr. Rybacki went on to testify that he has conversations with Sigma’s regional managers about project pricing “every day” and that he encouraged them to “make us more profitable because it was getting to the point where we couldn’t make any money at the prices we’re selling at.”

Rybacki, Tr. 1137. Sigma continued to project price in 2008. (RPFF 150-159).

960. Mr. Pais wanted to convey to Sigma’s regional managers that Sigma’s practice of offering Project Pricing was causing its competitors to hold down prices and was hurting both Sigma and its competitors, and that Sigma should therefore minimize its use of Project Pricing. (Pais, Tr. 1920-1921 (“So because we were indulging in this practice which was not smart anymore, not relevant, we felt this was forcing our other competitors to keep the price at a depressed level and hurting us and perhaps themselves, too.”)).

Response To Finding No. 960:

See General Response 4. This proposed Finding is incomplete and therefore misleading.

Mr. Pais’ testimony related to different pricing for plant work. *See* Response to Proposed

Findings 954 to 956. In context, Mr. Pais testified:

Q. Okay. And were you trying to eliminate certain discounts through this plant work procedure that you talked about earlier?

A. Not really. There were no certain discount plant work. I was just – again, we were just trying to streamline our pricing to have a better pricing practice.

Q. In the paragraph above that, you wrote: Unfortunately, the illogical pricing approach used by Star and hence Sigma for plant quotes with lower special multipliers may have biased Tyler’s decision in pegging the new multipliers where they are.

What did you mean by that, sir?

- A. What I was trying to convey to them is, all of a sudden, McWane is an industry leader. Most of the time they set pricing and others try and follow as well as we can. And we detected that because we had a practice of multiple pricing within the same time frame, within the same area, maybe even with the same customers - - our customers are very open with their information, on competitive information. They'll gladly hand over our pricing to Star and vice versa.

So because we were indulging in this practice which was not smart anymore, not relevant, we felt this was forcing our other competitors to keep the price at a depressed level and hurting us and perhaps themselves, too.

So I was trying to explain and educate our team as to the dynamics.

- Q. And in educating them, were you trying to get them to eliminate this particular practice so that Sigma could be more profitable?

- A. Again, eliminating the practice is wishful thinking. I was just trying to have them minimize it.

As I told you, we give a lot of leeway, a lot of discretion too our salespeople, even after, for a fair amount of time during that fast bailout that we gave highly varying prices because we had to get the business.

(Pais, Tr. 1919-1920). Sigma continued to project price in 2008. (RPFF 150-159).

961. Mr. Pais's reference in his January 24, 2008 email to a "stable and profitab[ility] conscious industry" referred to the stability of Fittings pricing, among other things. (CX 1145 at 001; Pais, Tr. 1924 ("as human beings, we all love stability in a lot of ways. . . . And pricing is one, the volume that we get and the predictability of the business . . . we would like to at least expect a certain amount of business from [customers] rather than constantly trying to get every order, every day, every hour.")).

Response To Finding No. 961:

See General Response 4. Sigma continued to project price in 2008. (RPFF 150-159).

962. Mr. Pais's statement in his January 24, 2008 email that "we acquired PCI and reduced the supply base to just 3" referred to Sigma's acquisition of its former competitor PCI, which had reduced the number of primary Fittings suppliers to Sigma, Star, and McWane. (CX 1145 at 001-002; Pais, Tr. 1924-1925).

Response To Finding No. 962:

See General Response 4. See also Rybacki, Tr. 1135-1136 (“[E]ven though we [Sigma] bought PCI and there’s only three players in the industry, we – none of us are making enough money at it. Or, certainly we weren’t.”).

963. Mr. Rybacki understood that Mr. Pais was asking him and the Sigma sales team to pull back on Project Pricing. (Rybacki, Tr. 1129; CX 2531 (Rybacki, Dep. at 227-228) (Mr. Pais’s January 24, 2008 email (CX 1145) reflects a request by Mr. Pais for Sigma to pull back on Project Pricing); see also CX 2531 (Rybacki, Dep. at 224-225) (Sigma sought to reduce the incidence of Project Pricing in 2008 by “hold[ing] the ground” and “hold[ing] it to list and multiplier”)).

Response To Finding No. 963:

See General Responses 4 and 5, and responses to ¶¶ 954-956, *supra*. Mr. Rybacki testified that he always wanted to curtail project pricing, but it never happened. In response to Mr. Pais e-mail request, CX 1145, Mr. Rybacki testified that he “did nothing.” (JX 2531 (Rybacki, Depo. at 228)). Sigma continued to project price in 2008. (RPF 150-159).

964. Mr. Rybacki further testified that Mr. Pais’s reason for pulling back on Project Pricing was that it was “upsetting the gorilla in the room,” McWane:

Because Star’s pricing was ruining the market; and as a result, it was upsetting the gorilla in the room, which was [McWane], because they’re the biggest, McWane’s the biggest, and it was obviously hurting us as well; and that’s the reason why [] he wanted us to normalize or try to standardize on the list and multiplier to create some kind of stability.

(CX 2531 (Rybacki, Dep. at 229)).

Response To Finding No. 964:

This finding is incomplete and therefore misleading. Complaint Counsel failed to complete the quote. The remainder of Mr. Rybacki’s answer is “[B]ut it just doesn’t work that way.” CX 2531 (Rybacki, Dep. at 229). Sigma continued to project price in 2008. (RPF 150-159).

965. On or about January 29, 2008, Sigma issued a letter to its customers that rescinded its previously announced new Fittings list price and followed McWane's multiplier increase, effective February 25, 2008. (CX 1189 at 002; Rybacki, Tr. 1125-1127, 3518-3519; CX 2531 (Rybacki, Dep. at 220) ("Q. So ultimately in January of 2008 . . . you retracted the list price increase and went out with some multiplier increases? A. Correct.")).

Response To Finding No. 965:

See General Response 11. Respondent has no specific response, other than to note this proposed Finding is duplicative of multiple other proposed Findings, to which McWane has already responded. McWane agrees that it did not follow the large list price increase Sigma proposed in late 2007. Rather, after performing a detailed internal analysis and brainstorming over the best approach, McWane published multipliers in early 2008 that in many cases were lower than its existing, published multipliers. Based on its own internal deliberations, Sigma elected to follow some of the new multipliers McWane published but not to follow others.

(Rybacki, Tr. 3695-3696.) Mr. Rybacki testified:

Q. And so when you analyzed McWane's multipliers in the beginning of 2008, you saw that some of them were in fact well below Sigma's multipliers at the time; right, sir?

A. Correct.

Q. Now, you say you're almost – your new multipliers will be in effect for almost every territory, and that's because you did not actually follow all of the multipliers that McWane sent out did you, sir?

A. We did not.

Q. So you selectively followed the ones you thought made sense to Sigma, and you disregarded the ones that you thought did not make sense, sir?

A. That's correct.

966. Sigma's January 29, 2008 letter stated that Sigma would "follow suit" and copy McWane's new published prices that would be effective February 25, 2008, except where the new multiplier would be below Sigma's current pricing. The letter noted that "every manufacturer in the Waterworks Industry needs [a price increase]," and that "[w]e apologize for the confusion and lack of discipline our segment of the Industry has shown as we at SIGMA Corporation are committed to make this a more profitable business for

all.” The letter also stated that “[i]t is our intent to raise prices in 2008.” The full text of the letter read as follows:

Dear Valued Customers,

As you are all aware, SIGMA Corporation was intending to put out a new list price sheet on January 2, 2008 which showed a significant increase in all our products due to the increased cost of raw materials, freight, personnel, etc. When one of our competitors chose not to have a list price increase but rather a multiplier increase, we decided to follow suit and on February 25 your new multipliers will be in effect for almost every territory. The key word is “almost” as a few of territory multipliers are below what you currently receive from us and some are in fact well below.

It is our intent to raise prices in 2008, not because we arbitrarily feel like raising them but because every manufacturer in the Waterworks Industry that has Iron products needs one. Manufacturing needs a price increase, distribution needs a price increase, and with product links such as Ductile Iron Pipe and Valve & Hydrants you’ve already witnessed significant charges.

We think it’s unwise and irresponsible to lower multipliers and devalue your inventory, so your Regional Managers will send you new multipliers in the next few days as long as they exceed your current ones. We apologize for the confusion and lack of discipline our segment of the Industry has shown as we at SIGMA Corporation are committed to make this a more profitable business for all. Thanks for your support and understanding and we wish you success throughout 2008 and beyond.

(CX 1189 at 002; Rybacki, Tr. 1126-1127, 3518-3519).

Response To Finding No. 966:

See General Response 11 and response to ¶ 965, *supra*.

967. Sigma’s January 29, 2008 letter to its customers was a commitment to curtail Project Pricing and to adhere to published pricing levels. In apologizing for Sigma’s “lack of discipline,” Mr. Rybacki was referring to Sigma’s lack of consistency in setting selling prices, and failure to stick to published prices. (Rybacki, Tr. 3520). By sending the letter, Sigma was committing to become more consistent in pricing, including by keeping prices at the published multipliers. (Rybacki, Tr. 3520-3522).

Response To Finding No. 967:

See General Responses 1 and 11. No record citation is provided for the first argumentative statement in this proposed Finding, and McWane disputes its accuracy. The remainder of the proposed Finding is incomplete. Sigma's January 29, 2008 letter apologized for "confusion and lack of discipline." CX 1189. Mr. Rybacki testified that the "confusion" referred to the changing multiplier levels. Rybacki, tr. 3520 ("[O]ne day it's a certain price level. The next day, its down to another price increase - - another price level. It confuses them what we're trying to do, what we're trying to establish."). Consistency, or discipline, in maintaining price levels would reduce confusion. Notwithstanding Mr. Rybacki's desires, however, Sigma did not become more consistent, or disciplined.

A. I joined Sigma in 1990. We tried to do it since 1990, so every month, every week, every year, every day, I try to be consistent and disciplined in pricing, but unfortunately our industry doesn't allow that to happen. But yes, I was trying to become more consistent.

Q. And were you specifically trying to become more consistent and disciplined in 2008?

A. Like I said, every year, every day, to today. Yes.

Sigma continued to project price in 2008. (RPFF 150-159).

968. On or about February 1, 2008, Sigma issued letters to its customers announcing new region-specific multipliers, effective February 18, 2008, pursuant to its January 29, 2008 letter. The letters noted that "All municipal bids will be honored through the length of the contract," and that "[j]obs quoted prior to this announcement will be honored through March 1, 2008." (CX 0848 at 002; Minamy, Tr. 3196).

Response To Finding No. 968:

CX 848 is a Sigma letter dated February 1, 2008 announcing a multiplier adjustment for the State of Florida. Complaint Counsel accurately quotes from CX 848. Sigma continued to project price in 2008. (RPFF 150-159).

969. Sigma communicated to its customers its desire to clean up Project Pricing in 2008. (Rybacki, Tr. 3546).

Response To Finding No. 969:

The proposed Finding is incomplete. Mr. Rybacki testified that he “always” communicated to Sigma’s customers the need to clean up project pricing. It was not limited to 2008. (Rybacki, Tr. 3546). Sigma continued to project price in 2008. (RPFF 150-159).

970. On April 26, 2008, Sigma’s regional managers asked Mr. Rybacki for an update on implementation of the multiplier increase and guidance on Project Pricing in light of the response from competition to Sigma’s curtailment of Project Pricing. (CX 1127 at 002 (proposed agenda items for Sigma regional manager meeting included “Fittings Multiplier & Pricing Strategy - How is implementation of multiplier map progressing? Do we refrain from job pricing? Is competition responding?”)).

Response To Finding No. 970:

This proposed Finding is incomplete. In response to this agenda item, Mr. Rybacki testified that there had been no attempt to refrain from job pricing in 2008.

Q. Then there’s a question here to discuss, “Do we refrain from job pricing?” right, sir?

A. Yes.

Q. So I take it at the end of April of ’08 there had been no effort to refrain from job pricing at –

A. None.

Q. -- had there?

And in fact, again, so we’re clear on the record, job pricing at Sigma continued throughout this period in every region with every salesperson, didn’t it, sir?

A. It did.

(Rybacki, Tr. 3714-3715). Sigma continued to project price in 2008. (RPFF 150-159).

7.2.3 Star Followed McWane’s New Fittings Price Multipliers and Accepted McWane’s Invitation to Curtail Project Pricing

971. Star followed McWane’s January 2008 Fittings price multipliers and accepted McWane’s invitation to curtail Project Pricing. (*Infra* ¶¶ 972-1021).

Response To Finding No. 971:

See General Responses 1 and 11 and responses to proposed Findings ¶¶ 972-1021, *infra*.

The proposed Finding is Complaint Counsel’s argument, not fact. McWane did not invite any competitor to curtail job pricing, McWane did not curtail Project Pricing, and Star did not curtail Project Pricing (RFPP § IV). The assertion that “Star followed McWane’s January 2008 Fittings price multipliers” is incorrect and misleading. Witnessess from McWane and Star all testified that they determined their pricing, including the price adjustments in early 2008, independently. (RFPP § 2). Moreover, McWane’s January 2008 multiplier adjustment resulted in actual reductions of McWane’s published multipliers, vis-a-vis its 2007 bmultipliers, in 28 states and no change to prices in another 8 states. (RPFF ¶ 102). In early February 2008, Star rescinded the list price change that it had proposed in its November 30, 2007 customer letter, and instead independently chose to selectively follow McWane’s adjustments, at least in part. (RPFF ¶ 127).

7.2.3.1 Star Instructed Its Sales Force to Curtail Project Pricing

972. Star instructed its sales force to curtail Project Pricing in response to McWane’s January 2008 invitation to collude. (*Infra* ¶¶ 973-990).

Response To Finding No. 972:

See General Response 1 and responses to ¶ 971 and ¶¶ 973-990, *infra*.

973. Star anticipated that McWane would implement the price increase McWane announced on January 22, 2008, and Star planned to match the increase. (CX 0752; Minamy, Tr. 3242-3243).

Response To Finding No. 973:

This proposed Finding is incomplete, misleading, and incorrect. There is nothing in the cited evidence to support the statement regarding what “Star anticipated.” With respect to McWane’s purported “price increase,” McWane’s January 2008 multiplier adjustment resulted in actual reductions of McWane’s published multipliers, vis-a-vis its 2007 multipliers, in 28 states and no change to prices in another 8 states. (RPF 102). Star witnesses testified that they distrusted McWane’s (and Sigma’s) price adjustment announcements. (RFPP 109-117). Finally, in early February 2008, Star rescinded the higher list price change that it had proposed in its November 30, 2007 customer letter, and instead independently chose to selectively follow McWane’s adjustments, which reduced prices in many states, at least in part. (RPF 127).

974. Mr. McCutcheon of Star understood that McWane’s January 11, 2008 letter (CX 1178) announced McWane’s intention to stop Project Pricing, and he forwarded it to his regional managers so that the Star sales force would have an understanding of what Star’s competitors were doing. (CX 2539 (McCutcheon, Dep. at 154); CX 2538 (McCutcheon, IHT (Vol. 2) at 439)).

Response To Finding No. 974:

See General Response 3. This proposed Finding is incomplete, misleading, and incorrect. Star witnesses, including Mr. McCutcheon, testified that they distrusted McWane’s (and Sigma’s) price adjustment announcements. (RFPP 109-117). Indeed, after seeing McWane’s January 11, 2008 customer letter, Mr. McCutcheon testified at trial that he did not believe “for one second” that McWane was actually going to stop job pricing. (McCutcheon, Tr. 2386-2387 (“Q: But do you read the letter to say that McWane is done job-pricing. A: I read the letter that that’s what they’re saying. You’re mashing the two things together. And I think we’re given the wrong impression. Is this what I thought Jerry Jansen meant in his letter? Yeah, that’s what I thought he meant. Did I believe that that’s what was going to happen? Not for one second. Two very different things.”); CX 1178; McCutcheon, Tr. 2507-08 (Q: “Why do you not necessarily

trust these customer -- these competitor letters when you get them from customers? “ A:
“Because they're competitors, and the fittings market is very competitive, and occasionally in the industry, not just in the fitting industry, this kind of letter is -- is a very regular -- or an increase or a price change letter happens on a regular basis, and I just don't take a whole lot of stock into what the competition puts in a letter.”). The proposed Finding ignores Mr. McCutcheon’s trial testimony, instead citing his investigational hearing and deposition testimony, which likewise does not support the proposed Finding.

975. Mr. Minamyer considered McWane’s January 11, 2008 letter (CX 1178) as a possible communication to Sigma and Star to notify them that McWane intended to end Project Pricing. (CX 2525 (Minamyer, IHT at 71, 76)). At his investigational hearing, Mr. Minamyer testified that he considered whether Mr. Jansen’s January 11, 2008, letter was a signal to Star when he received it. (CX 2525 (Minamyer, IHT at 77)). However, at his later deposition, Mr. Minamyer changed his testimony and testified that he did not consider Mr. Jansen’s January 11, 2008, letter as a possible signal to Star. (CX 2526 (Minamyer, Dep. at 130) (admitting that he was changing the testimony he gave at his investigational hearing)).

Response To Finding No. 975:

See General Response 3 and 4. This proposed finding mischaracterizes Mr. Minamyer’s testimony. During his investigational hearing, Mr. Minamyer testified that he “occasionally” read Tyler letters “such as” CX0892 and “would at least consider whether” portions of the text were a signal to Star. (CX 2525 (Minamyer, IHT at 77-78)). Mr. Minamyer did not state that he in fact considered the specific letter at issue, CX0892, to be a communication to Star. In fact, he stated that he never believed such letters from competitors and that he always received them from customers. (CX 2525 (Minamyer, IHT at 76)). Additionally, other Star witnesses also testified that they did not believe that McWane would actually end project pricing. (RFPP ¶ 110). Further, the proposed finding’s assertion that Mr. Minamyer “admitted” changing his testimony is a mischaracterization of the transcript. Mr. Minamyer stated “I guess you could say

that. I'm not really sure on the legal issue of testimony changing.” (CX 2526 (Minamyler, Dep. at 130)). In fact, McWane never ended Project Pricing. (RFPP ¶¶ 142-149.)

976. Before Star was willing to pull back or stop Project Pricing, it wanted some understanding that Sigma and McWane would not undercut Star with Project Pricing of their own. (CX 2526 (Minamyler, Dep. at 119-120)). McWane's letter gave Star that assurance, and Star proceeded to curtail Project Pricing. (CX 2526 (Minamyler, Dep. at 120) (“And that was your plan in 2008 when you announced to your sales force that you were going to stop project pricing; correct? A. That we were going to try to stop project pricing. Q. And you did that with some understanding that Sigma and McWane would also be stopping project pricing . . . is that true? A. We were hoping they would.”) (objection omitted)).

Response To Finding No. 976:

This proposed Finding is the argument of counsel, misleading, incorrect, and explicitly contradicted by record evidence. Star, Sigma, and McWane witnesses all testified that there was never any “understanding” between any competitor to curtail or stop Project Pricing. (RPF §§ VI-VII). Star witnesses also testified that they distrusted competitors' customer pricing letters. (RPF § 109). And, contrary to Complaint Counsel's assertion that McWane's January 2008 customer price letter gave Star the “assurance” that McWane would curtail or eliminate job pricing, Mr. McCutcheon testified that, after seeing McWane's January 11, 2008 customer letter, he did not believe “for one second” that McWane was actually going to stop job pricing. (RPF § 110.) Indeed, the quoted testimony that Complaint Counsel cites in support of its proposed Finding - that Star was “*hoping*” that if it were to “try to stop project pricing” that others would follow -- confirms that there was no “understanding” or agreement between Star, Sigma, and McWane with respect to pricing. (*See also* RPF § 164 (Minamyler testifying regarding his “hope” that competition would follow Star's pricing actions).

977. In a January 22, 2008 email, Mr. Minamyler instructed Star's division managers to curtail Project Pricing, stating that “[o]ur goal is to take a price increase and to stop project pricing.” (CX 0752 at 001; McCutcheon, Tr. 2388-2389; Minamyler, Tr. 3160 (e-mail was a plan to react to information from McWane)).

Response To Finding No. 977:

While Complaint Counsel accurately quotes a selected portion of the trial record, it mischaracterizes that evidence as supporting its implication of an “understanding” or agreement among Star, Sigma, and McWane to eliminate or curtail job pricing. (RFPP ¶¶ 162; 168-170). Complaint Counsel’s expert, Dr. Schumann, concedes that McWane, Sigma, and Star all continued offering job pricing and other forms of customer discounts throughout all of 2008. (RPFF ¶ 141). The evidence also establishes that, throughout all of 2008, Project Pricing was consistently offered by McWane (RPFF ¶¶ 142-149), Sigma (RPFF ¶¶ 150-159), and Star (RPFF ¶¶ 160-182). Not only did Star not curtail or eliminate Project Pricing in 2008, in fact, Star’s special pricing requests, or SPRs, actually *increased* in 2008. (RPFF ¶ 167); (McCutcheon, Tr. 2402-2403) (“And we’ve been looking at SPRs [special pricing requests] ever since this thing happened. Since we were accused of price fixing, we’ve gone back and looked at our SPRs, and we figured out that during this whole process that we were accused of price-fixing, our SPRs went up, 20 percent. And that’s bizarre to us, that we could be accused of price fixing in a period that SPRs go up 20%.”).

978. Mr. Minamyer also announced to his division managers that Star, like McWane, would honor existing Project Pricing to its customers through March 1, 2008. (CX 0752 at 001; CX 0848; CX 2526 (Minamyer, Dep. at 148); Minamyer, Tr. 3168-3169).

Response To Finding No. 978:

See response to ¶ 977. Proposed finding 978 is relevant only in that it is consistent with the record evidence that Star and McWane (and Sigma) continued to offer pricing discounts in 2008, including in the first half of 2008.

979. Mr. Minamyer’s January 22, 2008 email informed Star’s division managers that he would require written proof of a competitor’s lower price before he would approve a Project Price request. (CX 0752 at 001 (“We will not be project pricing unless we see firm documentation that there is a project price or a buy plan that is off the state multiplier.”); CX 2526 (Minamyer, Dep. at 147); Minamyer, Tr. 3168; *see also* CX 0815 (Minamyer

February 23, 2008 email reiterating that documentation of competition prices would be required for Project Pricing approval)).

Response To Finding No. 979:

Star's Mr. McCutcheon asked Star's national sales manager, Mr. Minamyer, to make sure that the sales force provided proper documentation for special pricing requests: "Q: So you'll continue project pricing. You'd just like to see some documentation; right? A: Yes, sir." (McCutcheon, Tr. 2517) Star's documentation procedures for special pricing requests had been in existence long before January 2008. (RPFF ¶ 169).

In an attempt to minimize the impact of its rising production costs, Star made an independent decision to try to reduce its job pricing - or at least more effectively document the need for job pricing to meet and beat competitors' bids. (RPFF ¶ 162). Star's documentation procedures for special pricing requests had been in existence long before January 2008. (McCutcheon, Tr. 2519 ("Q: And if I understood you yesterday, you said this process of requiring documentation before Star gives a job price was in place actually a year before. A: Yes, sir. Q: And was that a process that was essentially something Star people were always supposed to follow? A: Yes, sir. It was our procedure for at least ten years prior. Q: All right. So this was not a change in your procedure at all, was it? A: The change--it was not a change in the procedure. It was a change in monitoring it and managing it.")). Mr. Minamyer testified that in January 2008, Star's independent "goal" was to take a price increase and to stop project pricing unless there was documentation of competitors offering project pricing or a buy plan that was lower than the published multiplier. (RPFF ¶ 163). Star's independent attempt to reduce its job pricing was not successful, as reflected in the job prices it offered throughout 2008. (RPFF ¶ 166). Star did not cease or curtail job pricing in 2008. (McCutcheon, Tr. 2512). In fact, Star's special pricing requests, or SPRs, actually *increased* in 2008. (RPFF ¶ 167). Star continued

offering job pricing and other price concessions to its customers throughout 2008, 2009, 2010 and up through the present. (RPF 170.)

980. Mr. Minamyers January 22, 2008 email was intended to stabilize Fittings prices, because “this is what is best for the industry and that we need to be part of the effort to help our industry. We will not be damaging the industry due to lack of discipline.” (CX 0752 at 001; Minamyers, Tr. at 3170 (“Q. So was this plan an effort to stabilize prices? A. It was to stabilize our pricing. Q. To stabilize Stars pricing? A. Yes. Q. And where you say -- where you refer to a lack of discipline, is that a reference to pricing discipline? A. Yes, sir. Q. And is controlling project pricing a form of project -- pricing discipline? A. Yes, sir.”)).

Response To Finding No. 980:

See General Responses 1 and 11. The quoted testimony only supports the fact that Star was attempting to independently exert control over “Stars pricing” and not, as Complaint Counsel proposes, to “stabilize Fittings prices” for all Fittings manufacturers. See also Response To Finding No. 979.

981. Mr. Minamyers intent in sending his January 22, 2008 email to Stars division managers was to minimize Project Pricing by Stars sales force. (CX 0752 at 001; McCutcheon, Tr. 2390 (Mr. McCutcheon understood Mr. Minamyers intent was to minimize Project Pricing by Stars sales force); CX 2538 (McCutcheon, IHT (Vol. 2) at 425) (the email “looks to me like it is Matt [Minamyers] attempt to minimize project pricing”)).

Response To Finding No. 981:

See General Response 11 and Responses to Finding Nos. 979-980.

982. Mr. Minamyers January 22, 2008 email to Stars division managers instructing them to curtail Project Pricing was prompted by the statement in McWanes January 11, 2008 letter that “it is our intention going forward to sell all products only off the newly published multipliers.” (CX 1178; CX 0752 at 001; CX 2538 (McCutcheon, IHT (Vol. 2) at 425) (“[M]y guess is that this thought came from reading McWanes letter.”)).

Response To Finding No. 982:

See General Responses 3 and 11 and Responses to Finding Nos. 979-980.

983. On or about January 23, 2008, Mr. Minamyers repeated his instruction in an email to Stars division managers and territory managers, including Mr. Leider and Mr. Berry, and instructed them “to make sure they are telling their customers that . . . we can no longer project price.” (CX 0034 at 002; McCutcheon, Tr. 2399).

Response To Finding No. 983:

See General Response 11 and Responses to Finding Nos. 979-980. At trial, Mr. McCutcheon testified that he had no idea if the salesforce was actually told about Mr. Minamyers instructions. (McCutcheon, Tr. 2399). He also testified that what the email meant was that, because new pricing was being announced, Project Pricing under *old* pricing would expire but that new Project Pricing would be based off of the *new* announced pricing that would need to be negotiated. (McCutcheon, Tr. 2399). Mr. McCutcheon also testified that, despite Mr. Minamyers instructions re “we can no longer project price,” “that’s not what happened” and Star continued to offer price protection and Project Pricing after the new price adjustments. (McCutcheon, Tr. 2399).

984. Mr. Berry, a Star division manager, received a copy of Mr. Minamyers January 22 and 23, 2008, emails instructing Stars division managers that “Our goal is to take a price increase and to stop project pricing,” and forwarded them to his territory managers, instructing them to “Know these procedures.” (RX-691 (Berry, Dep. at 49, 105); RX-027 at 0001-0003).

Response To Finding No. 984:

See General Response 11 and Responses to ¶¶ 979-980, 983.

985. As of June 19, 2008, Mr. Minamyers reiterated his instruction to Stars division and territory managers that “we can no longer project price.” (CX 2254 at 001, 003 (Minamyers email to Stars sales force to prepare sales force for another round of price increases)).

Response To Finding No. 985:

See General Response 11 and Responses to ¶¶ 979-980, 983.

986. Mr. Minamyers believed that all of the Fittings competitors would have to eliminate Project Pricing in order for the industry to stabilize Fittings prices. (Minamyers, Tr. 3174; CX 2526 (Minamyers, Dep. at 141-142)).

Response To Finding No. 986:

This proposed Finding is inaccurate, argumentative, and misleading. When asked about a hypothetical by Complaint Counsel about what would need to happen to stabilize pricing,

Mr. Minamyer testified:

Q. Did you believe at this point in time that Star could stabilize fittings prices on its own?

MR. TRUITT: Same objection, Your Honor. JUDGE CHAPPELL: I'll allow that.

THE WITNESS: I don't recall ever believing that we could do that.

BY MR. HASSI: Q. Did you believe that Star would only be successful in stabilizing fittings prices if Sigma and Tyler also went along?

MR. TRUITT: Your Honor, I'm going to object. I think it's the same -- he's asking for what somebody else would do.

MR. HASSI: I'm asking for his belief.

JUDGE CHAPPELL: I'll allow it, but you're leading. You'll need to rephrase. You can ask what his belief was at the time, but don't lead.

BY MR. HASSI: Q. What was your belief at the time in terms of who would have to participate in an effort to stabilize fittings prices for it to be successful?

A. We believed that all the competitors would have to make an effort to do that.

Q. Was Star successful at reducing project pricing for a period in time?

A. To my recollection, no.

Mr. Minamyer similarly testified that he understood that a price increase would not hold if Star or any of its competitors undercut the price increase with project pricing.

Q. Okay. You understand, again, if you want to take a price increase, you can't then project-price below it and have that price increase stick; correct?

A. That's correct.

Q. Okay. And again, you reiterate, if you document that the competition is not holding, then you need to do the same thing; correct?

A. Correct.

Q. And so, again, you're hoping, you're wishing, you're wanting. You want the competition [to charge published prices and not project price] because you want the higher price, right?

A. Correct.

Q. Okay. But you don't know that's what they're going to do; correct?

A. That's correct.

Q. And if they don't, if the competition doesn't take the higher price, if they project-price, then Star has to as well; right?

A. That's correct. (Minamyer, Tr. 3256-3257).

987. Mr. McCutcheon and Mr. Minamyer were the Star managers with authority to establish Star's new policy regarding Project Pricing. Mr. Minamyer testified that he believed that Mr. McCutcheon, and not himself, set the new policy to curtail Project Pricing. (Minamyer, Tr. 3166-3167; CX 2525 (Minamyer, IHT at 143-144) (Mr. Minamyer believes the idea came from Mr. McCutcheon)).

Response To Finding No. 987:

Star's Project Pricing "policy" was not "new" or, as Complaint Counsel might imply, in any way related to an alleged "understanding" or agreement among Star, Sigma, and McWane to curtail or eliminate Project Pricing. *See* General Response 11 and Responses to Finding Nos. 979-980, 983. Indeed, Star's documentation procedures for special pricing requests had been in existence long before January 2008. (McCutcheon, Tr. 2519 ("Q: And if I understood you yesterday, you said this process of requiring documentation before Star gives a job price was in place actually a year before. A: Yes, sir. Q: And was that a process that was essentially something Star people were always supposed to follow? A: Yes, sir. It was our procedure for at least ten years prior. Q: All right. So this was not a change in your procedure at all, was it? A: The change--it was not a change in the procedure. It was a change in monitoring it and

managing it.”). In any event, Star never curtailed or eliminated Project Pricing, but increased offering such price discounts through 2008.

988. Mr. McCutcheon, however, denied that he ever instructed Mr. Minamyer to stop Project Pricing, (CX 2539 (McCutcheon, Dep. at 152)), or that he ever told Mr. Minamyer to tell Star’s sales force to stop Project Pricing. (CX 2539 (McCutcheon, Dep. at 152); CX 2538 (McCutcheon, IHT (Vol. 2) at 425-426) (that there was “no way” that Mr. McCutcheon would have told Mr. Minamyer to “stop project pricing,” and that he didn’t “know what Matt was thinking, but it did not come from me.”)).

Response To Finding No. 988:

See General Responses 3 and 11. For the reasons set forth in Responses to ¶¶ 979-980, 983, 987, this proposed Finding is inaccurate, misleading and not relevant.

989. Regardless of whose idea it was to adopt a strategy of curtailing Project Pricing, it is undisputed that Mr. McCutcheon took no action to countermand Mr. Minamyer’s clear instructions to curtail Project Pricing in emails to Star’s sales force on January 22, 2008, January 23, 2008, and June 20, 2008. (CX 0752 at 001 (January 22, 2008 email copied to Mr. McCutcheon); CX 0034 at 001 (January 23, 2008 email copied to Mr. McCutcheon); CX 2254 at 001 (June 19, 2008 email copied to McCutcheon)).

Response To Finding No. 989:

See General Response 11 and Responses to Finding Nos. 979-980, 983, 987. This proposed Finding is inaccurate and misleading. Respondent McWane also responds that this proposed Finding is not relevant.

990. In November 2008, Star finally reinstated its practice of aggressively Project Pricing. (CX 0831 (email from Minamyer instructing district managers, “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.”)).

Response To Finding No. 990:

This proposed Finding is inaccurate and misleading because the assertion that Star “reinstated its practice of aggressively Project Pricing” incorrectly assumes that Star stopped Project Pricing at some point prior to November 2008, which Star did not do. See response to ¶ 986. As stated in Responses to Finding Nos. 979-980, 983, and 987, Star’s pricing decisions

and strategies regarding Project Pricing were made independently and Star did not curtail or eliminate Project Pricing in 2008 or after. The evidence establishes that Star continued to offer job pricing at a rate of a couple hundred per month in 2008, (Minamy, Tr. 3251-3252 (Q: “Do you recall getting 10 to 15 pinks a day?” A: “I recall getting a lot of pinks routinely.” Q: “Okay. And that works out on business days to a couple hundred a month. Is that consistent with your recollection?” A: “Yes.”) & CX 815; McCutcheon, Tr. 2512 (Q: “That was not a fact. You did not stop pricing in -- job pricing in 2008, did you, sir?” A: “No, sir.”)), and that Star job-priced whenever it needed to get business in 2008. (Minamy, Tr. 3277-3278) (“Q. And you had a plan that you would try and limit job pricing, but we’ve seen that really didn’t play out either, did it? A. Right . . .Q. Okay. And Star job-priced whenever it needed to job price in 2008 to get business, didn’t it? A. Yes.”).

7.2.3.2 Star Centralized Its Pricing Authority

991. Star centralized its pricing authority in response to McWane’s January 2008 invitation to collude. (*Infra* ¶¶ 992-996).

Response To Finding No. 991:

See General Responses 1 and 11 and Responses to ¶¶ 979-980, 983, and 986-987, *supra*, and 992-996, *infra*. The record evidence clearly establishes that this proposed Finding is premised on false assertions. First, there was no “January 2008 invitation to collude” by McWane to Star (or Sigma). (RPF ¶¶ 99-127, 193-197). Second, every Star witness expressly denied any agreement with McWane (or Sigma) relating to Fittings pricing (RPF ¶¶ 211-222) and, specifically, to centralize Star’s pricing authority to curtail or eliminate Project Pricing:

Q: Now, Mr. McCutcheon, did you call up anyone from McWane or Sigma and say: Hey, this is what I’m doing, I’m asking McCutcheon to get more firsthand involved in this--or Mr. Minamy to get more firsthand involved in this?

A: No, sir. (McCutcheon, Tr. 2519-2520).

992. Prior to McWane’s January 11, 2008 price increase announcement, Star’s national sales manager, Mr. Minamyler, had delegated authority for Project Pricing to his division managers. Starting in January 2008, Mr. McCutcheon asked Mr. Minamyler to be personally involved in the approval of Project Pricing. (McCutcheon, Tr. 2393-2394 (stating that it “was really my idea to have him more involved”); McCutcheon, Tr. 2512 (McCutcheon was pressuring Minamyler “to be more involved with special pricing and to be more diligent in the special pricing process”); CX 2539 (McCutcheon, Dep. at 152) (“I told him that he needed to personally get involved.”); CX 0752 at 001).

Response To Finding No. 992:

This proposed Finding improperly seeks to imply a connection between McWane’s January 11, 2008 customer price letter and Star’s purported efforts to centralize pricing authority as part of some alleged agreement with McWane. Such an assertion is not supported by the authority Complaint Counsel cites and, as set forth in response to proposed Finding 991, incorporated herein, McWane’s January 2008 letter was not an invitation to collude, Star witnesses all testified that Star never agreed to collude with McWane on Fittings pricing, and Star expressly denied any agreement to centralize pricing authority to curtail or eliminate Project Pricing. Star offered Project Pricing throughout 2008 and after (RPFF ¶¶ 160-182).

993. Star centralized pricing authority with Mr. Minamyler, and limited the discretion of its sales force to offer discounts through Project Pricing. In his January 22, 2008 email to Star’s division managers instructing them to curtail Project Pricing, Mr. Minamyler stated that “All project pricing has to go through me This is an effort to do the right thing for the industry.” (CX 0752 at 001; McCutcheon, Tr. 2393-2394). This announcement made Mr. Minamyler the central authority for approving Star’s Project Pricing. (CX 0752 at 001; Minamyler, Tr. 3167-3168).

Response To Finding No. 993:

See General Response 11 and Responses to ¶¶ 991-992. *See also*

994. In a follow up email the next day, January 23, 2008, Mr. Minamyler reiterated the procedure for project pricing: “Any [multiplier] that the [division manager] wants to be lower than the state [multiplier] has to be done with a pink and approved by Matt.” (CX 0034 at 001; McCutcheon, Tr. 2398; Minamyler, Tr. 3177).

Response To Finding No. 994:

See General Response 11 and Responses to ¶¶ 991-993.

995. Mr. Minamyers approval was also required to extend any prior pricing arrangements past the March 1, 2008 expiration date for old pricing that McWane had announced. (CX 0034 at 002 (“The DM’s will prepare their customers to take this material by March 1st or the pricing will expire. Any exceptions have to go through Matt.”); McCutcheon, Tr. 2398; CX 1178 (McWane January 11, 2008 letter stating that “[j]obs quoted prior to this announcement will be honored through March 1, 2008”).

Response To Finding No. 995:

See General Response 11 and Responses to ¶¶ 991-993.

Star’s Mr. McCutcheon asked Star’s national sales manager, Mr. Minamyers, to make sure that the sales force provided proper documentation for special pricing requests: “Q: So you’ll continue project pricing. You’d just like to see some documentation; right? A: Yes, sir.” (McCutcheon, Tr. 2517) Star’s documentation procedures for special pricing requests had been in existence long before January 2008. (RPF ¶ 169).

In an attempt to minimize the impact of its rising production costs, Star made an independent decision to try to reduce its job pricing - or at least more effectively document the need for job pricing to meet and beat competitors’ bids. (RPF ¶ 162). Mr. Minamyers testified that in January 2008, Star’s independent “goal” was to take a price increase and to stop project pricing unless there was documentation of competitors offering project pricing or a buy plan that was lower than the published multiplier. (RPF ¶ 163). Star’s independent attempt to reduce its job pricing was not successful, as reflected in the job prices it offered throughout 2008. (RPF ¶ 166). Star did not cease or curtail job pricing in 2008. (McCutcheon, Tr. 2512). In fact, Star’s special pricing requests, or SPRs, actually increased in 2008. (RPF ¶ 167). Star continued offering job pricing and other price concessions to its customers throughout 2008, 2009, 2010 and up through the present. (RPF ¶ 170.)

996. In an April 29, 2008 presentation to McWane’s General Manager’s Meeting covering the first four months of 2008, Mr. Tatman reported that Star and Sigma removed pricing authority from direct sales personnel. (CX 2047 at 020).

Response To Finding No. 996:

This proposed Finding is inaccurate, quotes only a selected portion of a document, and is misleading. Omitted from the document cited is the fact that Sigma and Star were perceived as “Extending Terms” of credit, “raising cash discount %,” and offering “Branch level credits” to win business away from McWane. (CX 2047-20). The evidence establishes that Sigma and Star (and McWane) never removed pricing authority from frontline personnel to successfully curtail or eliminate Project Pricing. (RPF §IV).

7.2.3.3 **Star Announced to Its Customers That It Would Match McWane’s Multiplier Increase and Curtail Project Pricing**

997. Star announced to its customers that it would match McWane’s January 2008 announced multiplier increase and curtail Project Pricing. (*Infra* ¶¶ 998-1008).

Response To Finding No. 997:

This proposed Finding is argument of counsel and not a proper proposed Fact and not supported by the record. *See* General Responses 1 and 11 and Responses to ¶¶ 998-1008, *infra*.

998. On January 29, 2008, Mr. Minamyler forwarded to Star’s division managers a copy of McWane’s new national blended Fittings multiplier map, effective February 18, 2008. Star’s pricing model was to match McWane’s multipliers. (CX 0035 at 001, 003; Minamyler, Tr. 3184-3185).

Response To Finding No. 998:

Star learned about McWane’s early 2008 multiplier adjustments only after the fact, and from its customers. (McCutcheon, Tr. 2506-07 (“Q. All right. And this is a copy [of Tyler/Union’s price announcement in January 11, 2008] that you at Star obtained from a customer after the fact after it was announced; correct, sir? A. Yes, sir. Q. And at no time did anyone from McWane provide this to your ahead of time; right sure? A. That’s correct.”).).

Mr. Minamyler testified that Star did not receive any advance knowledge of what McWane’s customer letters would say; instead, Star would wait to see what McWane was going

to do and “react” once McWane’s customer letters “hit the streets.” (Minamyer, Tr. 3242 (Q: “All right. I understand, as of January 22, 2008, Mr. Minamyer, that you say Tyler multiplier letters are hitting the streets. Correct?” A: “That’s correct.” Q: “And you don’t have any advanced knowledge of what those letters are going to say, do you?” A: “I don’t remember ever getting any advance knowledge on this.” Q: “In fact I think you say, ‘We need to be able to react quickly:’ correct?” A: “Yes.”) & CX 752).

On January 22, 2008, Mr. Minamyer sent an email to Star’s sales team instructing them how to react to McWane’s new multipliers. (CX 752 (“Once we know what a state or area’s multiplier is, if it goes up, we will change to that number. If it goes down, we will discuss it.”).)

The statement that “Star’s pricing model was to match McWane’s multipliers” is incorrect and misleading. Witnessess from McWane and Star all testified that they determined their pricing, including the price adjustments in early 2008, independently. (RFPP ¶¶ 198-200; 223-224; 211-222; 230-234). Moreover, McWane’s January 2008 multiplier adjustment resulted in actual reductions of McWane’s published multipliers, vis-a-vis its 2007 multipliers, in 28 states and no change to prices in another 8 states. (RPF ¶ 102). In early February 2008, Star rescinded the higher list price change that it had proposed in its November 30, 2007 customer letter, and instead independently chose to selectively follow McWane’s adjustments, at least in part. (RPF ¶ 127).

999. Beginning January 31, 2008, Star informed its major customers that it would be matching McWane’s announced Fittings multiplier increases effective February 18, 2008, and that it would not offer Project Pricing. (*E.g.*, CX 1566 at 001 (January 31, 2008 email to HD Supply); CX 2300 at 001 (February 2, 2008 email to TDG); *see also* CX 2537 (McCutcheon, IHT (Vol. 1) at 56) (HD Supply is Star’s largest customer)).

Response To Finding No. 999:

This proposed Finding is inaccurate and misleading. *See* General Responses 1 and 11 and Response to ¶ 998 (Star’s independent decision making) and ¶¶ 977-980 (Star did not curtail

or eliminate Project Pricing in 2008), *supra*. Star did not match McWane's pricing. See response to ¶ 971 and RPF ¶ 127. Star continued to offer Project Pricing throughout 2008. (RPF ¶¶ 160-182).

1000. In a January 31, 2008 email regarding Fittings pricing to Mr. Hixon and Mr. Taylor, two regional managers for HD Supply, Star division manager Mr. Leider forwarded a copy of McWane's new multiplier maps and stated that Star would be "raising or matching all fitting numbers to match Tyler effective Feb 18th," and that there would be "***NO UTILITY PROJECT PRICING NATION WIDE.***" (CX 1566 at 001 (emphasis added); McCutcheon, Tr. 2409-2410; Minamy, Tr. 3184-3185).

Response To Finding No. 1000:

This proposed Finding is inaccurate and misleading. See General Responses 1 and 11 and Response to ¶ 999. See also RPF ¶ 127.

1001. Mr. Leider's January 31, 2008 email to HD Supply was consistent with Mr. Minamy's instruction to the sales force that Star should tell customers that it would no longer offer Project Pricing. (CX 1566 at 001; CX 2525; Minamy, Tr. 3186-3187 (Leider email was consistent with Minamy instructions)).

Response To Finding No. 1001:

This proposed Finding is inaccurate and misleading. See General Responses 1 and 11 and Response to ¶ 999.

1002. On February 2, 2008, Mr. Minamy sent an email to Rick Fairbanks, the administrative head of the TDG Distributor group, informing TDG and its member Distributors that, as part of its effort to create an "even playing field on up front pricing with our competitors" and "bring stability to the fitting market," Star would be eliminating Project Pricing as of March 1, 2008:

Our plan is to adjust multipliers to be on an even playing field on up front pricing with our competitors. We will adjust various multipliers across the country to be effective on 2-18-08, ship all existing special projects before March 1st, and ***have no more project pricing after March 1st.*** . . . We are working extremely hard to bring ***stability*** to the fitting market."

(CX 2300 at 001 (emphasis added); Minamy, Tr. 3188-3191; McCutcheon, Tr. 2400; CX 2539 (McCutcheon, Dep. at 162); CX 2526 (Minamy, Dep. at 154-156)).

Response To Finding No. 1002:

This proposed finding is inaccurate and misleading. *See* General Responses 1 and 11 and Response to ¶ 999.

1003. “Up-front pricing” in Mr. Minamyers February 2, 2008 email referred to the standard list price as adjusted by the published multiplier. (Minamyers, Tr. 3190).

Response To Finding No. 1003:

No specific response.

1004. When Mr. Minamyers wrote in his February 2, 2008 email that Star was “working extremely hard to bring stability to the fitting market,” he was referring to price stability. (Minamyers, Tr. 3192-3193).

Response To Finding No. 1004:

This proposed Finding is inaccurate and misleading. *See* General Responses 1 and 11 and Response to ¶ 999.

1005. As they had with HD Supply and TDG, Mr. Minamyers and his sales team communicated the message that Star would no longer offer Project Pricing after March 1, 2008 to all of Stars customers. (Minamyers, Tr. 3193; CX 2526 (Minamyers, Dep. at 156)).

Response To Finding No. 1005:

This proposed Finding is inaccurate and misleading. *See* General Responses 1 and 11 and Response to ¶ 999.

1006. Star wanted everybody, including McWane and Sigma, to know that Star was increasing its multipliers and curtailing Project Pricing. (CX 2526 (Minamyers, Dep. at 168-169)). Star understood that curtailing Project Pricing to bring pricing stability to the Fittings market would work only if McWane also curtailed Project Pricing; if McWane did not stop Project Pricing, Star would have to “follow [McWanes] price down.” (CX 2526 (Minamyers, Dep. at 168)).

Response To Finding No. 1006:

This proposed Finding is inaccurate and misleading. The proposed finding ignores Mr. Minamyers testimony during his deposition that Star was primarily concerned about its customers. (CX 2526 (Minamyers, Dep. at 168)). Mr. Minamyers did not testify that curtailing

project pricing would “bring stability to the Fittings market” as indicated in the proposed finding. Mr. Minamyer stated that “If did the same, that would be okay; if they didn’t, then we would have to follow their price down.” (CX 2526 (Minamyer, Dep. at 168)). *See* General Responses 1 and 11 and Response to ¶ 999 (Star’s independent decision making) ¶¶ 977-980 (Star did not curtail or eliminate Project Pricing in 2008), and ¶ 127 (Star rescinded its high price increase announcement in February 2008 and independently determined that it would selectively match certain of McWane’s pricing, which was lower than McWane’s 2007 pricing in many states and lower than both Star and Sigma’s price announcements in early 2008), *supra*.

1007. An exception to Star’s policy curtailing Project Pricing as of March 1, 2008 was any municipal contract, which Star had previously indicated it would honor for a period after March 1, 2008. (CX 2300; Minamyer, Tr. 3191). Municipal contracts (whereby Star would commit to a certain Fittings price to a Distributor for use with a certain municipality) were typically one to three years long. For these contracts, Star used special pricing request forms (“pinks”) to ensure that its internal billing system tracked the appropriate price for the term of that contract. (Minamyer, Tr. 3191).

Response To Finding No. 1007:

This proposed Finding is inaccurate and misleading. *See* General Response 1 and 11. As set forth in Responses to ¶ 999, Star did not curtail or eliminate Project Pricing in 2008 and, therefore any purported “exception” to such a non-existent policy is a fiction. Rather, Star continued to and, in fact, increased its use of Project Pricing in 2008 on all types of projects, including municipal and non-municipal projects, in order to beat the competition and win business away from McWane, Sigma, and others.

1008. On February 6, 2008, Star issued letters to its customers specifying the multiplier increases that it would implement to match McWane’s multiplier increases, effective February 18, 2008. (CX 2336 at 001; CX 0893 at 001; Minamyer, Tr. 3193-3195; McCutcheon, Tr. 2408 (Star’s price announcement in January 2008 matched the prices reflected on McWane’s February 18, 2008 multiplier pricing map, as was circulated to Star’s division managers on January 29, 2008 by Mr. Minamyer)). (CX 0035 at 001, 003).

Response To Finding No. 1008:

This proposed Finding is inaccurate and misleading. *See* General Responses 1 and 11. As set forth in Responses to ¶ 999, the statement that Star “matched” all of McWane’s pricing that was to become effective on February 18, 2008 is inaccurate and misleading, as Star’s pricing decisions were made independently and Star only selectively followed the pricing that McWane announced to its customers, which were lower than Star’s and Sigma’s announced pricing and lower than McWane’s 2007 pricing in many states. (RPFF ¶ 102).

7.2.3.4 **Star Curtailed Its Project Pricing and Sought to Ensure That McWane Noticed**

1009. Star curtailed its Project Pricing, and sought to ensure that McWane noticed that curtailment. (*Infra* ¶¶ 1010-1014).

Response To Finding No. 1009:

This proposed Finding is inaccurate and misleading. *See* General Responses 1 and 11 and Responses to ¶¶ 1010-1014.

1010. At Mr. Minamyers request, Ms. Garey prepared an internal report showing those projects where Star had extended Project Pricing to its customers, and conveyed that information to Mr. Minamyers in January 2008. (CX 0034 at 002; CX 0847 at 001; Minamyers, Tr. 3178-3180).

Response To Finding No. 1010:

This proposed Finding is inaccurate and misleading. *See* General Response 1 and 11. Star did not curtail Project Pricing. (RPFF ¶¶). Star and McWane, in fact, offered different published prices. (RPFF ¶¶). Stars and Sigmas pricing was decided independently. (RPFF ¶¶).

1011. Mr. Minamyers informed Stars sales force that they should use Ms. Gareys January 2008 report to identify which of their customers had previously been offered Project Prices, tell those customers that Star could no longer offer Project Pricing after March 1, 2008, and request that the customers accept shipment by March 1, 2008 for all Fittings for which they had been previously offered Project Prices. (CX 0847 at 001; CX 0034 at 002; Minamyers, Tr. 3179-3180).

Response To Finding No. 1011:

This proposed Finding is inaccurate and misleading. See General response 11. The proposed Finding is inaccurate and misleading. Mr. Minamyers testimony establishes that “we don’t want to” offer Project Pricing, not, as stated in ¶ 1011, that Star could no longer offer Project Pricing. The record evidence establishes that, though Star had hoped to curtail Project Pricing in order to improve its profitability, Star never curtailed or eliminated Project Pricing and, in fact, increased Project Pricing throughout 2008. (RPFF ¶¶ 160-182). Moreover, Mr. McCutcheon testified regarding Star’s willingness to offer Project Pricing vis-à-vis the March 1, 2008 date that, because new pricing was being announced, Project Pricing under *old* pricing would expire but that new Project Pricing would be based off of the *new* announced pricing that would need to be negotiated. (McCutcheon, Tr. 2399). Mr. McCutcheon also testified that, despite Mr. Minamyers instructions re “we can no longer project price,” “that’s not what happened” and Star continued to offer price protection and Project Pricing after the new price adjustments. (McCutcheon, Tr. 2399).

1012. Mr. Minamyers wanted customers to accept shipment of Project Priced products by March 1, 2008, so that McWane could “figure it out” that Star had accepted McWane’s invitation to curtail Project Pricing. (CX 0847 at 001; Minamyers, Tr. 3180-3181).

Response To Finding No. 1012:

This proposed Finding is inaccurate and misleading. See General Response 11. The proposed Finding is inaccurate, misleading, and argumentative. Mr. Minamyers testimony and the cited exhibit do not support or relate in any way to the proffered argument that “Star accepted McWane’s invitation to curtail Project Pricing.” Mr. Minamyers testimony establishes only that Star was concerned that McWane would under-bid Star to win business if McWane thought that Star might be pricing inconsistently, a fact that is inconsistent with an alleged agreement to stop Project Pricing.). Moreover, Mr. McCutcheon testified regarding Star’s willingness to offer

Project Pricing vis-à-vis the March 1, 2008 date that, because new pricing was being announced, Project Pricing under *old* pricing would expire but that new Project Pricing would be based off of the *new* announced pricing that would need to be negotiated. (McCutcheon, Tr. 2399).

Mr. McCutcheon also testified that, despite Mr. Minamyers instructions re “we can no longer project price,” “that’s not what happened” and Star continued to offer price protection and Project Pricing after the new price adjustments. (McCutcheon, Tr. 2399).

1013. Specifically, in a January 23, 2008 email to Star’s division managers, Mr. Minamyers instructed his sales force to “get creative” to get the customers to take material that was subject to preexisting Project Pricing before March 1, 2008, the date through which McWane was honoring prior Project Pricing (CX 1178). Mr. Minamyers wrote, “I know this will be difficult but it is important that we all work together to get it done as if they linger, Tyler won’t be able to figure it out and think we didn’t take the increase.” (CX 0847 at 001; Minamyers, Tr. 3180-3181).

Response To Finding No. 1013:

See General Responses 1 and 11. The proposed Finding is inaccurate, misleading, and argumentative and, as it is duplicative of ¶¶ 1011 and 1012, Respondent incorporates its response to ¶¶ 1011 and 1012 herein.

1014. Throughout 2008 and up until at least November 2008, Star was more disciplined about offering Project Pricing and required documentation of competitors offering Project Pricing before offering their own Project Prices. (CX 2526 (Minamyers, Dep. at 157, 174)).

Response To Finding No. 1014:

Mr. McCutcheon asked Star’s national sales manager, Mr. Minamyers, to make sure that the sales force provided proper documentation for special pricing requests: “Q: So you’ll continue project pricing. You’d just like to see some documentation; right? A: Yes, sir.” (McCutcheon, Tr. 2517). However, Star’s documentation procedures for special pricing requests had been in existence long before January 2008. (McCutcheon, Tr. 2519 (“Q: And if I understood you yesterday, you said this process of requiring documentation before Star gives a

job price was in place actually a year before. A: Yes, sir. Q: And was that a process that was essentially something Star people were always supposed to follow? A: Yes, sir. It was our procedure for at least ten years prior. Q: All right. So this was not a change in your procedure at all, was it? A: The change--it was not a change in the procedure. It was a change in monitoring it and managing it.”).

Star’s independent attempt to reduce its job pricing was not successful, as reflected in the job pricing it offered throughout 2008. (RPF 166). In fact, Star’s special pricing requests, or SPRs, actually *increased* in 2008. (RPF 167). Star continued offering job pricing and other price concessions to its customers throughout 2008, 2009, 2010 and up through the present. (RPF 167, 170).

7.2.3.5 Star Monitored McWane’s and Sigma’s Compliance with the Commitment to Curtail Project Pricing

1015. Star monitored McWane’s and Sigma’s compliance with their commitment to curtail Project Pricing (*Infra* ¶¶ 1016-1021).

Response To Finding No. 1015:

See General Responses 1 and 11 and responses to ¶¶ 1016-1021. The proposed Finding is inaccurate, misleading, and argumentative and not supported by the proposed Findings in ¶¶ 1016-1021 or any record evidence. There was no agreement or “commitment” to curtail Project pricing. See response to § 7.2 and response to ¶¶ 1016-1021.

1016. From January 2008 through November 2008, Mr. Minamyer insisted on documentation that McWane or Sigma had offered a discount before he would approve Project Pricing by Star. (CX 2526 (Minamyer, Dep. at 157)). Mr. Minamyer reminded Star’s sales force “on more than one occasion” that he wanted documentation that McWane or Sigma had offered Project Pricing to a Distributor before he would approve Project Pricing by Star. (CX 2526 (Minamyer, Dep. at 157)). Whenever a Distributor told Star that either McWane or Star had offered Project Pricing, Star representatives were instructed to ask the Distributor for written documentation of the offer by McWane or Sigma. (CX 2526 (Minamyer, Dep. at 175)).

Response To Finding No. 1016:

See General Responses 1 and 11 and response to ¶ 1014.

1017. Mr. Minamyer requested reports from his sales personnel who monitored whether Sigma and McWane were also curtailing Project Pricing. (CX 0856 at 001 (Minamyer writing to his division managers on March 11, 2008: “Due last Friday were any issues we had with Sigma on how they are handling the Mult increases.”); Minamyer, Tr. 3197-3199 (discussing CX 0856); *see also* CX 0525 (Minamyer writing to his division managers on May 6, 2008: “We have to keep our focus on the pricing and continue to be diligent. I see it getting a little looser and am concerned that we won’t hold this increase. Don’t let our competitors practices force us to fail. One competitor is being pretty strong and one is being pretty weak on pricing. Continue to have the talks with your customers at the highest level to try to hold pricing. All Mfg’s are taking increases so it is not an unfamiliar conversation to them.”); McCutcheon, Tr. 2546-2547 (discussing CX 0525)).

Response To Finding No. 1017:

See General Responses 1 and 11. The proposed Finding is inaccurate, misleading, and argumentative. The cited testimony and exhibits establish that Star was continuing to monitor competitor pricing, including but not limited to special pricing and discounting, as it and every other competitor always had and continues to do. The implication that Star was specifically monitoring “Project Pricing” to the exclusion of other pricing action, to suggest that Star was policing an agreement with respect to Project Pricing, is inaccurate and not supported by the evidence cited or any record evidence. The proffered Finding reinforces the fact that Star, like Sigma and McWane, had no advance agreement with pricing, and that Sigma and McWane were unpredictable and inconsistent in the level of pricing that Star perceived that they were offering,

as reported by their customers. All witnesses denied any advance agreement as to Fittings pricing, including Project Pricing. (RFPP §§ VI and VII).

1018. In response to Mr. Minamyers March 11, 2008 email asking for any reports on any issues with Sigma “handling the Mult increases,” Star’s Southwestern division manager, Shaun Smith, responded on March 11, 2008 that “It seems as though they have been pretty discipline[d] in my Division” and “everyone seems to be playing fair.” (CX 0856 at 001). By “playing fair,” Mr. Smith meant “pricing per their published multiplier letters.” (Minamyers, Tr. 3199⁵).

Response To Finding No. 1018:

See General Responses 1, , 10, and 11. The proposed Finding is inaccurate, misleading, argumentative, and premised on hearsay statements of a witness (Mr. Smith and what he “meant”) who not deposed and not called as a witness at trial. Although Complaint Counsel represents that it is not offering the hearsay statements for purported the truth of the matter, absent the truth thereof, the proposed Finding is without support, substance, or worth. To the extent that the proposed Finding can be credited, which it cannot, the proffered Finding reinforces the fact that Star, like Sigma and McWane, had no advance agreement with pricing, and that Star’s competitors were unpredictable and inconsistent in the level of pricing that Star *perceived* but did not know that they were offering, as reported by their customers. All witnesses

⁵ The cited trial testimony regarding the out of court statement of Mr. Smith is a business report from Mr. Smith to his superior and is cited as evidence that Mr. Minamyers received that report and of how he interpreted the report, and not to prove the truth of the matter asserted in the report. (See Minamyers, Tr. 3198-3199).

denied any advance agreement as to Fittings pricing. (RFPP §§ VI and VII). The evidence also establishes that, although Star independently attempted to reduce Project Pricing to offset significant increases in costs and improve revenue (RFPP ¶ 166), Star never curtailed or eliminated Project Pricing, instead increasing price discounting in 2008 and consistently offering price discounts through 2008, 2009, 2010, and up through the present. (RPF ¶¶ 167, 170).

1019. Another of Star's division managers, Ramon Prado, reported to Mr. Minamyer on March 6, 2008 that as of the week ending February 29, 2008, "it doesn't appear that Sigma or Tyler is cheating on the new fitting multipliers." In other words, Mr. Prado did not believe that Sigma and McWane were offering Project Pricing lower than their published multipliers. (CX 1692 at 002; Minamyer, Tr. 3199-3201⁶ ("Q. And if -- would you understand that if they priced below their published letter, that would be cheating? A. That's what we called it. Yes."); CX 2526 (Minamyer, Dep. at 201-202) ("Q. And what he was telling you here is that they were adhering to the published multipliers? A. I believe that is what he meant. Q. They weren't cheating by undercutting them? A. It's still early, but it doesn't appear that they are. Right.")).

Response To Finding No. 1019:

This proposed Finding is inaccurate and misleading. See response to ¶ 1018.

1020. In response to an April 18, 2008 sales activity report, Shaun Smith, a Star division manager, instructed his territory managers to offer Project Pricing only if they could confirm competitor "cheating." "You know the gig, ask them why? If they give you proof the other guys are cheating, then we will match!" (CX 1696 at 001). This reflected

⁶ The cited trial testimony regarding Mr. Prado's out of court statement to his supervisor Mr. Minamyer that Sigma and McWane did not appear to be cheating is cited as evidence that Mr. Prado made such a report, and not to prove the truth of the matter asserted in the report. (See Minamyer, Tr. 3200-3201).

Star's new policy of Project Pricing only if there was "proof that the other guy was cheating." (Minamyer, Tr. 3203-3204).

Response To Finding No. 1020:

This proposed Finding is inaccurate and misleading. See response to ¶ 1018.

1021. On June 30, 2008, Mr. Prado reported to Mr. Minamyer that as of the week ending June 27, 2008, he had "[c]onfirmed that Sigma has been cheating in Florida with fitting multipliers," and was also "pretty certain that Tyler is doing the same." (CX 1693 at 001, 002; Minamyer, Tr. 3218-3219 (confirming that "cheating" referred to "offering prices below their published list times multiplier"))).

Response To Finding No. 1021:

This proposed Finding is inaccurate and misleading. See response to ¶ 1018. This proposed Finding is relevant only to establish the fact that McWane and Sigma, like Star, were still offering Project Pricing in June 2008, six months into the alleged conspiracy to curtail or eliminate Project Pricing. Moreover, the proposed Finding omits from the exhibit cited in support thereof the following:

Major Events / Happenings:....

*Received confirmation that Sigma is selling fittings in Florida below the state number of .25. they have made some verbal agreements to price certain customers 2 points below the state number. Developed plan to strategically lower committed fitting partners to the same level until further notice. (CX 1693-01).

and

Successes or issues from your sales people:....

"offered HD Ocala and Wildwood the same fitting and jr deal that Sigma gave them -- basically 2 points below the market." (CX 1693-02).

7.2.4 The Suppliers' Centralization of Pricing Authority and Curtailment of Project Pricing Was an Abrupt Change from Historical Business Practices

1022. Sigma's, Star's, and McWane's centralization of pricing authority and curtailment of Project Pricing represented an abrupt change from their historical business practices. (*Infra* ¶¶ 1023-1028).

Response To Finding No. 1022:

See General Responses 1 and 11 and responses to ¶¶ 1023-1028. The proposed Finding is inaccurate, misleading, and argumentative and not supported by the proposed Findings contained in ¶¶ 1023-1028 or any other record evidence.

1023. Prior to 2008, Star had always used Project Pricing in selling Fittings. (CX 2539 (McCutcheon, Dep. at 164) (“Being number three, we have to give a value to the customer; and we have chosen for that value to be price. And we have always project priced.”)).

Response To Finding No. 1023:

See General Responses 1 and 11. The proposed Finding is inaccurate, misleading, and argumentative. Star used Project Pricing before, during, and after 2008 and never curtailed or eliminated Project Pricing. (RPF ¶¶ 160-183).

1024. Traditionally, prior to 2008, Star had not used Project Pricing to meet competition in only isolated instances, but instead Project Pricing was central to its overall business strategy in the Fittings Market. (McCutcheon, Tr. 2387 (Project Pricing was “a significant part of Star’s competitive strategy”)).

Response To Finding No. 1024:

See response to ¶ 1023 and RPF ¶¶ 160-183.

1025. In light of its past practices and its position in the industry as the smallest supplier, Star’s own executives viewed its decision to stop project pricing as “unusual” and “bizarre.” (CX 2539 (McCutcheon, Dep. at 153-155) (“unusual”); CX 2538 (McCutcheon, IHT (Vol. 2) at 452) (“bizarre”); CX 2536 (Leider, Dep. at 75) (not recalling any instance in the four years he had previously been with Star that he had been instructed that Star’s goal was “to stop project pricing”); *see also infra* ¶ 1062, 1063).

Response To Finding No. 1025:

See General Responses 1, 3, and 11, response to ¶ 1023 and RPF ¶¶ 160-183.

1026. As Star’s national sales manager from 2004 to June 2009, Mr. Minamyer generally did not exercise the authority to approve Project Pricing. (RX-684 (Minamyer, IHT (Vol. 2) at 107). Instead, Mr. Minamyer generally delegated that authority to Star’s division managers or territory managers throughout his tenure. (CX 2538 (McCutcheon IHT (Vol. 2) at 373-374 (After Mr. Minamyer resigned in June of 2009, “I took over his spot, [and] I started changing the – I started tightening up on the approval process.”))).

Mr. Minamyer delegated the authority to approve Project Pricing to the division managers and territory managers because he had “faith” that they could decide when it was necessary for Star to offer Project Pricing to get the business. (RX-684 (Minamyer, IHT at 29 (“It would more or less be faith in the people working for me that they could make the correct judgment.”))).

Response To Finding No. 1026:

See General Responses 1, 3, and 11, response to ¶ 1023 and RPF ¶¶ 160-183.

1027. At Sigma, Project Pricing had grown in 2007, including non-plant work Fittings jobs. Beginning in January, 2008, Sigma changed course and sought to end that practice when Mr. Pais set off “A NEW COMMITTED AND SERIOUS EFFORT TO NORMALIZE ALL PRICING FOR FITTINGS.” (CX 1145 at 001 (emphasis in original); Rybacki, Tr. 1129, 1133-1134; CX 2528 (Pais, Dep. at 263-267) (Sigma sought to turn back the practice of special pricing, which had spread into stocking orders from traditional plant work segment); RX-687 (Pais, Dep. 82-83) (“[T]he distributors and everyone alike started stocking less and they started showing these so-called lists, RFQs, request for quotation, on anything and everything So I initiated to address the problem. We cannot eliminate, of course entirely, let’s minimize it to say, that, look, you don’t have to have a special pricing, you have the pricing already, use the same list price because it is the same fitting.”); see also CX 1439 at 002 (“We also need to review our [Plant Work] quotations to check and reverse any deep erosion in NET pricing, even as we use multipliers to do so! McWane does NOT have a PW activity and doesn’t understand why and how we can give a lower ‘special job’ price!”); Pais, Tr. 1920-1925 (“eliminating [Project Pricing] is wishful thinking. I was just trying to have them minimize it.”)).

Response To Finding No. 1027:

See General Responses 1 and 11. The proposed Finding is inaccurate, misleading, and argumentative. While Mr. Pais suggested that Sigma should reduce Project Pricing, his proposals were never implemented and Sigma never stopped or reduced Project Pricing in 2008 or in any year. (RPF ¶¶ 150-159).

1028. For McWane as well, centralization of pricing authority and curtailment of project pricing was a change. Fittings suppliers, including McWane, had always project priced. CX 2485 (Walton, Dep. at 114) (“[T]here was job pricing somewhere in the country all the time.”); CX 2483 (Tatman, IHT at 39) (project pricing increasing over the last few years); Jansen, Dep. 61-62 (since late 2006, when Distributors began buying smaller numbers of Fittings for their inventory, project pricing had increased). Before McWane’s 2008 centralization of pricing authority, McWane’s sales representatives had authority to offer Project Pricing up to a couple of percentage points. After January 2008, the sales representatives had to obtain approval from Mr. Napoli, McWane’s new pricing

coordinator, before offering Project Pricing to customers. (CX2480 (Napoli, Dep. at 46-48, 50); *see also supra* §§ 7.1.2, 7.2.1).

Response To Finding No. 1028:

See General Responses 1, 3, and 11 and §§ 7.1.2 and 7.2.1. The proposed Finding is inaccurate, misleading, and argumentative. The record evidence establishes that McWane continued to offer both Project Pricing and a host of other pricing discounts and concessions to customers throughout 2008, 2009, 2010, and to the present, and that McWane never curtailed or eliminated Project Pricing or other discounting. (RPFF ¶¶ 142-149).

7.2.5 McWane, Sigma, and Star Directly Communicated with Each Other to Implement the Agreement, and Complained When They Perceived “Cheating”

1029. McWane, Sigma, and Star communicated directly with each other to implement the agreement, and complained when they perceived each other cheating. (*Infra* ¶¶ 1030-1040; *see also infra* ¶¶ 1439-1450; *supra* ¶ 943).

Response To Finding No. 1029:

See General Responses 1 and 11 and responses to ¶¶ 1030-1040, 1439-1450, and 943.

The proposed Finding is inaccurate, misleading, and argumentative and not supported by the proposed Findings contained in ¶¶ 1030-1040, 1439-1450, and 943, or any other record evidence.

1030.

 (See *supra* ¶¶ 884, 894, 895, 922, 952; *infra* ¶¶ 1033, 1034, 1040, 1088; *supra* § 6.4.1.3 (listing phone calls)).

Response To Finding No. 1030:

See General Responses 1 and 11 and responses to ¶¶ 884, 894, 895, 922, 952; *infra* ¶¶ 1033, 1034, 1040, 1088; *supra* § 6.4.1.3. The proposed Finding is inaccurate, misleading, and argumentative and not supported by the proposed Findings contained in ¶¶ 884, 894, 895, 922, 952; *infra* ¶¶ 1033, 1034, 1040, 1088; *supra* § 6.4.1.3. *See* Response To Finding 714, *supra*.

1031. On March 5, 2008, Jim Stohr, Sigma’s branch manager for the southwest region, complained to his supervisor, Sigma’s southwest regional manager Al Richardson, about an incident of Project Pricing by a “rogue” McWane salesman, and asked for assistance from his superiors:

We have 2 reliable sources in Arkansas with 2 separate HD locations telling us that Shane Dubose with Tyler is giving them a .23 multiplier. . . . The customer in AR even confirmed that our price and Star was the same. We have refused to match pricing at this time but need your assistance to see if we can get this ceased or should we lower ourselves to the rogue Tyler salesman’s tactics. This is a market that should actually be .30 but Tyler has it set at .27 but are obviously not living up to that.

Please give us your thoughts. *Can Larry [Rybacki] make a call and see if this can be stopped.*

(CX 1726 at 001 (emphasis added)). Mr. Richardson forwarded Jim Stohr’s March 5, 2008 email (CX 1726) at 6:21 a.m. on March 6, 2008 to Mr. Rybacki and the Sigma RM6 email group, copying Mr. Pais and Mr. Bhattacharji. (CX 1726 at 001). Mr. Rybacki testified that he does not recall this email, and that he gets many emails like this from the sales force. (Rybacki, Tr. 3528-3529).

Response To Finding No. 1031:

The proposed Finding is inaccurate, misleading, and argumentative. *See* General Responses 1, 3, 5, 11. Complaint Counsel chose not to depose Mr. Stohr or have him testify at trial. Further, Mr. Rybacki was not even a recipient of Mr. Stohr’s original email. When questioned about the document, Mr. Rybacki testified that Mr. Stohr—in asking whether “Larry [could] make a call”—was likely referring to HD Supply, a customer, and not to McWane. (CX 2531 (Rybacki, Dep. at 293-294)).

1032. A Sigma regional manager responded to Mr. Richardson’s email, writing that “Jim should not write that last sentence!” (CX 1726 at 001 (referring to Mr. Stohr’s question of whether Larry Rybacki can call McWane to stop the Project Pricing)).

Response To Finding No. 1032:

The proposed Finding is inaccurate, misleading, and argumentative. *See* General Responses 1, 3, 5, 11. Complaint Counsel chose not to depose Greg Fox, the Sigma regional

manager mentioned above, or have him testify at trial. As such, there is no evidence in the record that Mr. Fox was in fact referring to Mr. Stohr’s question of whether “Larry” could make a call. When questioned about the document, Mr. Rybacki testified that Mr. Stohr—in asking whether “Larry [could] make a call”— was likely referring to HD Supply, a customer, and not to McWane. (CX 2531 (Rybacki, Dep. at 293-294)). There is simply no evidence in the record to support the finding’s assertions that (1) Mr. Stohr was referring to McWane or that (2) Mr. Fox was referring to Mr. Stohr’s request that “Larry” make a call.

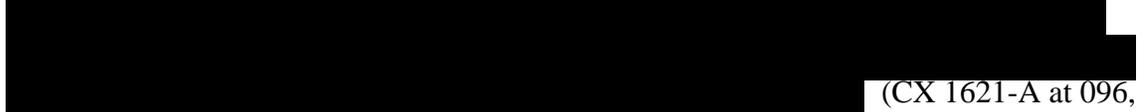
1033.

(CX 1621-A at 107, *in camera* (Rybacki telephone records); *supra* ¶ 751 (detailing telephone records); Rybacki, Tr. 3633, *in camera*).

Response To Finding No. 1033:

See General Responses 1 and 11 and response to ¶ 751. The proposed Finding is inaccurate and misleading. *See* Response To Finding 714, *supra*.

1034.

 (CX 1621-A at 096, *in camera* (Rybacki telephone records); *supra* ¶ 752 (detailing telephone records); Rybacki, Tr. 3634, *in camera*).

Response To Finding No. 1034:

See General Responses 1 and 11 and response to ¶ 752. The proposed Finding is inaccurate and misleading.

1035. On March 8, 2008, Mr. Tatman complained to Mr. Rona of Sigma that Project Pricing was compromising the new Fittings prices. Mr. Tatman made his complaint about Fittings prices in the course of a conversation on a separate topic – regarding McWane’s offer to sell private label Fittings and glands to Sigma. Mr. Rona relayed Mr. Tatman’s message to Mr. Pais: “[Mr. Tatman] said he hears that some of the new prices in the market are being compromised with deals. He hopes the market will improve and hopes [we] do our part.” (CX 1124 at 002; Rona, Tr. 1609-1613; CX 2530 (Rona, Dep. at 137); *see also infra* §§ 7.8.1, 7.8.2 (describing subsequent instances of competitors monitoring each other and complaining about cheating)). Mr. Tatman testified that he has no recollection of such a conversation. CX 2484 (Tatman, Dep. at 106-107; Tatman, Tr. 422).

Response To Finding No. 1035:

See General Responses 1 and 11. The proposed Finding is inaccurate and misleading. (RPFF ¶¶ 308-325). The March 2008 “complaint” by Mr. Tatman does not support the proposed Findings in ¶¶ 1029. At the time of the emails and the calls referenced therein, Mr. Rona was Sigma’s OEM business manager, with absolutely no involvement in or authority over Sigma’s pricing decisions for Fittings. (Rona, Tr. 1437-1440 (Q: “Who are your OEM customers?” A: “OEM customers would be customers who bought fittings similar to the fittings Sigma produced for the distribution business. Then we sold special proprietary products to some of those same OEM customers who were in the pipe fitting business.”), 1453-1454 (Q: “Are you involved in setting prices for fittings at Sigma?” A: “No.” ... Q: “Do you participate, sir, in the discussions with Mr. Rybacki and perhaps others about pricing at Sigma?” A: “I can't -- I can't recall sitting down and in any session or formal dialogue discussing it with Mr. Rybacki. No.”), 1627-1628 (Q: “And did you have any authority or responsibility for sales into the distribution channel?” A: “No.”)).

In the OEM context, Mr. Rona and Mr. Tatman, regularly negotiated arms-length buy-sell agreements with each other and therefore had legitimate business reasons to communicate with one another. (Tatman, Tr. 365-366 (“I do speak to Mitchell Rona. Mitchell Rona is the OEM product manager at Sigma. He is a customer of mine. He buys things from me. He's also a supplier. I buy things from him. In the normal course of business in an arm's length agreement I'd have discussions with Mitchell Rona.”), 639-641 (Q: “And you sent it to Mitchell Rona?” A: “Yeah. He would be my normal -- he's my customer and my supplier.”) & CX 1434; Rona, Tr. 1446-1449, 1626 (Q: “And as part of your job, it's normal for you to e-mail and speak with McWane regarding the negotiation of these buy-sell agreements; correct?” A: “From time to

time, yes.”), 1628-1629 (Q: “Okay. Now, McWane was one of your regular customers with whom you negotiated prices for OEM products; correct?” A: “Correct.”)).

Mr. Rybacki was the person at Sigma with ultimate authority for setting prices of Fittings for sale to Distributors during the time frame at issue in this action. (Rybacki, Tr. 1096 (“All pricing at the end of the day stopped with me, so I had authority over pricing product.”))

Complaint Counsel presented no evidence that the March 8, 2008 email had any impact on Sigma’s pricing of Fittings for sale to Distributors or on Mr. Rybacki, the Sigma executive responsible for Distributor pricing. (Rona, Tr. 1453-1454, 1627; Rybacki, Tr. 1096, 3715-3717). Sigma independently priced its Fittings at all relevant times. (RPF 132, 201-210; 225-229). See Response To Finding 714, *supra*.

1036. At a dinner meeting between Mr. McCutcheon and Mr. Pais, which Mr. McCutcheon testified occurred after a DIFRA meeting, Mr. Pais proposed that Sigma and Star each keep their prices within two multiplier points of McWane’s published pricing, and then all of the suppliers could be less aggressive with pricing. Specifically, Mr. McCutcheon testified at trial that,

Victor had a thought that if we, ‘we’ being Sigma and Star, stayed within two points of McWane, then they would stop being as aggressive and Sigma and Star would stop being as aggressive.

(McCutcheon, Tr. 2373-2376); CX 2538 (McCutcheon, IHT (Vol. 2) at 227) (Pais’s statement occurred at a dinner in Birmingham at a DIFRA meeting); *see also* CX 2538 (McCutcheon, IHT (Vol. 2) at 232) (Mr. McCutcheon had numerous phone calls in which Mr. Pais said that Star “need[ed] to stay within two to three points of McWane.”)).

Response To Finding No. 1036:

See General Responses 1, 3, 4, and 11. The proposed Finding is inaccurate and misleading. The proposed finding omits (1) the fact that Mr. Pais explicitly denied having any discussions with Mr. McCutcheon regarding Fittings pricing (Tr. 1957-1959), (2) that Mr. McCutcheon testified that, regardless of any such purported discussion with Mr. Pais, Mr. McCutcheon’s reaction to Mr. Pais’ conversation “was very impolite” and Mr. McCutcheon

never accepted any alleged invitation to coordinate with Sigma on Fittings pricing (McCutcheon, Tr. 2375-2376), and (3) the hundreds of denials from Sigma and Star, including from Messrs. Pais and McCutcheon, that anyone at Sigma or Star (or McWane) ever discussed or agreed upon Fittings pricing. (RPF § VI-VII). The proposed Finding also ignores (4) Complaint Counsel's (RPF ¶ 191) and (5) Complaint Counsel's own expert's concession that there was never any advanced agreement with respect to Fittings pricing by any alleged co-conspirators, and no "smoke filled rooms" or meetings, like that postulated in this proposed Finding, where Sigma or Star (or McWane) allegedly agreed on Fittings pricing. (RPF ¶ 192) (Schumann, Tr. 3847 "No . . . I don't happen to believe that the parties, as I said in my deposition, they met in some smoke-filled room and hammered out some sort of an agreement on who would charge what for what or who would win what bid."), 4171-4173 ("And as I said, there was no meeting in a smoke-filled room, at least not that I'm aware of. . . . "I have not found anything to suggest that executives at Sigma and Star and McWane met in a specific place and had a meeting to hammer out some sort of agreement."); Schumann, Tr. 4265 ("Q. Dr. Schumann, I'll be very clear about this. There is no document that Mr. Pais wrote in January of 2008 that talks about being of one mind with McWane on further price increases later in 2008, is there, sir? A. I would say literally that is true."). Finally, this proposed Finding relates solely to Sigma and Star and has nothing to do with McWane and, therefore, is not probative of the claims against McWane.

1037. At his investigational hearing, Mr. McCutcheon elaborated further about this dinner meeting, and testified that Mr. Pais told him:

[W]e should agree to stay within to two to three points, discount points, of McWane, and if we did, he felt that they 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. . . . [H]e just said that they would treat us differently and it would firm up the market and that there was a lot of benefit to it.

(CX 2538 (McCutcheon, IHT (Vol. 2) at 227). *But see* Pais, Tr. 1957-1959 (denying that he proposed to Mr. McCutcheon staying within to two to three points of McWane's prices, and claiming that, at their meeting in Birmingham, it was actually Mr. McCutcheon who was "berating" Sigma and "accusing [Sigma] of dropping price.")).

Response To Finding No. 1037:

The proposed Finding is inaccurate and misleading. See response to proposed Finding 1036.

1038. On April 2, 2008, Mr. Minamyer reported to Mr. McCutcheon that Star had lost a bid for a project with Winwater (referred to as the "Tulsa Bid Sleeves" project), because Sigma had offered Project Pricing and Star had not. Mr. Minamyer wrote to Mr. McCutcheon, "They should be very careful if they want to hold this price increase as we will not lose our partners or any more orders because they [Sigma] are not responsible in the market." In calling Sigma "not responsible," Mr. Minamyer was referring to the fact that Sigma was pricing below its published multiplier letters. (Minamyer, Tr. 3204-3207; CX 0044 at 001; RX-697 (McCutcheon, IHT (Vol. 2) at 453-454)).

Response To Finding No. 1038:

See General Responses 1, 3, 4, and 11. The proposed Finding is inaccurate and misleading. Mr. Minamyer's cited testimony established that he was generally unfamiliar with the subject email and not even certain what customer he was referring to in the email. It is also evident from the face of the email and Mr. Minamyer's testimony that the "partners" Mr. Minamyer is discussing are Star's "better customers," and that, as omitted from the very testimony cited in support of the proposed Finding, price competition and Project Pricing was robust in April 2008, four months after the alleged conspiracy was formed, as Mr. Minamyer testified that it appeared from the email that Sigma was "trying to undercut our price to sell to one of our better customers" (Minamyer, Tr. 3206), a situation completely at odds with the alleged pre-existing agreement among competitors to curtail or eliminate Project Pricing. (CX 044-001) (Complaint Counsel omits that "It looks like Sigma did [offer "special pricing"], or at least that is what [the customer] told us. Sigma may be trying to buy some of our business.").

The proposed Finding itself concedes that “*Star had lost a bid for a project ... because Sigma had offered Project Pricing....*” (¶ 1038) (emphasis added).

1039. In response to Mr. Minamyers April 2, 2008 email, Mr. McCutcheon asked for additional information (“Please give me more info. Bid date, value, selling price, etc...”), and Mr. Smith responded that he would provide that information the next day, April 3. (CX 0044 at 001 (“I have a hard copy in my office and will be in on Thursday.”)).

Response To Finding No. 1039:

See General Responses 1, 3, 4, and 11 and response to ¶ 1038. The proposed Finding is inaccurate and misleading. Mr. Minamyers testified that he did not recall whether he provided additional information about Sigma’s successful Project Pricing bid to unseat Star from one of its “better customers,” why Mr. McCutcheon wanted the information, whether there was any request to reach out to Sigma regarding Sigma’s successful offer of Project Pricing, or whether anyone at Star contacted anyone at Sigma regarding same. (Minamyers, Tr. 3207-3208). Complaint Counsel similarly offered no testimony from Mr. McCutcheon (or any other witness or any other documentary evidence) to support the inference attempting to be made here that Mr. McCutcheon had any communications with Sigma regarding this particular job or Fittings pricing in general (McCutcheon, Tr. 2469-2471), and witnesses from Star and Sigma all denied having had any communications or agreements with each other to curtail or eliminate Project Pricing. (RPF §§ VI-VII). The record is completely devoid of any evidence to support the inference that Complaint Counsel is making that there was any communication between Star and Sigma regarding Sigma’s successful offer of Project Pricing, let alone any discussion of pricing, or any discussion approaching any understanding or agreement to curtail or eliminate Project Pricing between Star and Sigma. Of course, any such communication, even if it occurred, the occurrence of which is not supported by the evidence, relates only to Star and Sigma, and has no relation to Respondent.

1040.

(McCutcheon, Tr. 2469-2471, *in camera*; Rybacki, Tr. 3635, *in camera*; CX 1621-A at 098, *in camera* (Rybacki telephone records); *supra* ¶¶ 755-757 (detailing telephone records)).

Response To Finding No. 1040:

See response to ¶ 1039. *See* Response To Finding 714, *supra*.

7.2.6 McWane Monitored Progress of the Tatman Plan, and Considered It a Success through the First Quarter of 2008

1041. McWane monitored the progress of the Tatman Plan, and considered the suppliers' coordinated pricing conduct through the first quarter of 2008 to have been a success. (*Infra* ¶¶ 1042-1054).

Response To Finding No. 1041:

See General Responses 1 and 11 and responses to ¶¶ 1042-1054. The proposed Finding is inaccurate, misleading, and argumentative and not supported by the proposed Findings contained in ¶¶ 1042-1054, or any other record evidence.

CX 627, the purported "Tatman Plan," was a series of PowerPoint slides that Mr. Tatman prepared for an internal brainstorming session with his bosses. (Tatman, Tr. 345-346). Mr. Tatman testified directly that it was not a "plan" (Tatman, Tr. 355), but rather, internal ideas or concepts for discussion purposes that were never communicated to anyone outside of McWane. As such, McWane objects to Complaint Counsel's ongoing characterization of the PowerPoint as the "Tatman Plan." The brainstorming exercise was kept internal to McWane (Tatman, Tr. 1069-1070), no witness and no evidence suggests otherwise, and was never implemented by McWane. (Tatman, Tr. 363). ("If you look at the letter we put out, it has none of these four elements in it, not one. Moreover, McWane consistently offered Project Pricing,

before, during, and after 2008 (RPF 142-149), as did Sigma (RPF 150-159), and Star (RPF 160-182).

1042.

(CX 2480 (Napoli, Dep. at 43-45); Tatman, Tr. 1007, *in camera*; *see supra* ¶¶ 924-929).

Response To Finding No. 1042:

See General Responses 1 and 11 and responses to ¶¶ 924-929. The proposed Finding is inaccurate, misleading, argumentative and based, in part, on the deposition testimony of a witness that was not called as a witness at trial. The statement that McWane created a “new” position for a “pricing coordinator” in order to “centralize” pricing authority is not supported by the cited testimony. Contrary to the inference that this was a “new” position prompted by an alleged agreement to curtail or eliminate Project Pricing, Mr. Tatman’s testimony establishes that Mr. Napoli, a former Union Foundry employee, was hired as McWane’s “Pricing manager” (not “pricing coordinator”), that Mr. Napoli was hired by McWane for that position “when we consolidated Union Foundry and the Tyler Pipe utility division,” and not as a result of the “creating” of a new position or any implied agreement to curtail or eliminate Project Pricing. Moreover, contrary to the allegation that the hiring of Mr. Napoli to fill the position of Pricing Manager resulted in the “removing [of] pricing authority from McWane’s field sales team,” the evidence establishes that McWane did not curtail or eliminate Project Pricing in 2008, or any other year. (RPF 142-149).

1043.

[REDACTED] (Tatman, Tr. 931-933; 1007, 1013, *in camera*; RX-396, *in camera*).

Response To Finding No. 1043:

The proposed Finding is inaccurate and misleading. See response to ¶ 1043.

Mr. Tatman’s testimony establishes that McWane maintained a price protection log in 2008, shortly after both Mr. Tatman and Mr. Napoli were hired to their respective positions, and that Mr. Napoli, as part of his duties as the new Pricing Manager, was responsible, in part, for maintaining the price log. Contrary to the implication, there is no evidence to support the suggestion that the hiring of Mr. Napoli or McWane’s maintenance of pricing data in the “normal course of business” in 2008 (and beyond the alleged conspiracy end date) had anything to do with an alleged agreement to curtail or eliminate Project Pricing, but rather, had everything to do with the fact that both Messrs. Tatman and Napoli were new to their positions at that period of time and started logging pricing data, a practice that continued beyond any alleged conspiracy. (RX 396). Moreover, McWane, Sigma, and Star all continued to offer Project Pricing, as demonstrated with respect to McWane in, *inter alia*, the pricing log, thereby refuting any allegation of an agreement to curtail or eliminate Project Pricing. (RPFF § IV).

1044. [REDACTED]
(Tatman, Tr. 1022-1023, *in camera*; RX-396, *in camera*).
[REDACTED] (Tatman, Tr. 1022-1023, *in camera*; RX-396, *in camera*; see, e.g., RX-396.xls (produced in native format), [REDACTED]
[REDACTED]

Response To Finding No. 1044:

Respondent states that the “comments” column to the subject log contains a non-exhaustive list of jobs where McWane believed, based on feedback from customers, that Project Pricing or other job discounting was being offered.

1045. [REDACTED]

(RX-396, *in camera*;

; Tatman, Tr.

1028-1029, *in camera*

Response To Finding No. 1045:

See General Responses 1 and 11 and response to ¶ 1044. The proposed Finding is inaccurate and misleading. Mr. Tatman testified that the price log was a non-exhaustive list of jobs and price discounting, and that in some instances the comments and notes may or may not accurately capture all of the Project Pricing and other discounting being offered by Sigma and Star. (Tatman, Tr. 1031). The pricing log clearly establishes that McWane, Sigma, and Star offered Project Pricing and other discounting on a regular and systematic basis in 2008. That only some entries reference that this pricing was in response to discounting offered by Sigma and Star is immaterial -- McWane still offered *Project Pricing* to win business *during* an alleged conspiracy to curtail or eliminate *Project Pricing*. Moreover, and as a practical matter, Complaint Counsel merely assumes, based on the flaws noted, that the level of McWane's "matching" was higher in the first three months of the alleged conspiracy than after, but introduced no evidence to support that, even if true, such lower levels of "matching" were attributable to the alleged price coordination, as opposed to a host of other equally or more plausible alternatives -- i.e., the fact that the salesforce was slipshod in reporting instances of project pricing, a secretary failed to accurately transcribe field reports, a different person or group of persons were responsible for reporting and / or transcribing field reports, or any host of other legitimate reasons.

1046.

(Tatman, Tr. 1031, *in camera*).

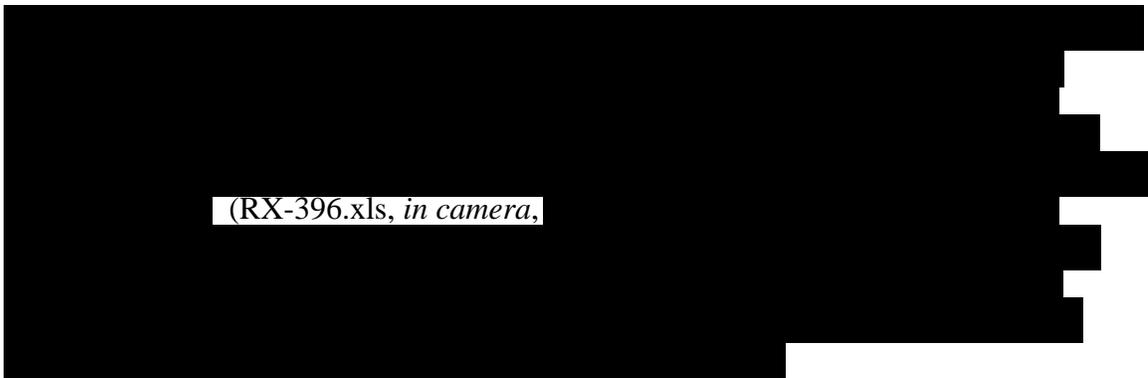
Response To Finding No. 1046:

See response to ¶ 1045. As set forth in response to ¶ 1045, the statement that “there are far more instances of McWane seeking to match the prices of Sigma and Star in 2009 than in 2008” is inaccurate and misleading. Moreover, rather than “having no explanation” regarding any purported distinction between the incidence of Project Pricing in 2008 versus 2009, Mr. Tatman explained:

- Q. Did I hear you to say, sir, that you don't know whether the comments are accurate?
- A. I'm telling you I didn't write the comments, so what I told you is I don't know *did Vince change his thought process on how he was going to input comments from one year to the next year.*
- Q. Do you have any explanation as to why there are more, based on the *appearance* of this document, comments that you were matching -- asking to be matched the prices of Sigma and Star in 2009 than in 2008?
- A. It's Vince's document. I'd only be speculating why it *looks* different.

(Tatman, Tr. 1031) (emphasis added). Complaint Counsel did not call Mr. Napoli as a witness at trial.

1047.



Response To Finding No. 1047:

See General Responses 1 and 11 and response to ¶¶ 1044-1046.

1048. On January 31, 2008, Mr. Tatman received a copy of the Star January 30, 2008 email to HD Supply, in which Mr. Leider of Star informed HD Supply it would match McWane's

pricing and curtail Project Pricing. Mr. Tatman viewed it as a positive development and forwarded the email to Messrs. McCullough and Walton. Mr. Tatman wrote:

Per the e-mail chain below Star is following the [McWane] Multiplier Maps also effective Feb 18th. Also note comment on NO UTILITY PROJECT PRICING NATION WIDE that was sent to HDS regional reps. The proof will be if they actually hold to what they say.

Note that Star has our actual maps, which isn't a bad thing.

We heard a similar announcement is out from Sigma but we've yet to receive a copy.

(CX 0178 at 001; Tatman, Tr. 412-413, 418).

Response To Finding No. 1048:

See General Response 1. The proposed Finding is inaccurate and misleading. The statement that “Mr. Tatman viewed it as a positive development” is inconsistent with his repeated testimony that he did not know what Star would actually do with its pricing and that he did not believe Star’s customer letter (Tatman, Tr. 413-418) (“A. I would read that based on what I've said before. We get competitive information, whether it's letters or something else. The first thing we pick it up says I don't believe this. Am I getting duped? Is this a decoy? What's going on there?”), testimony that is entirely consistent with every witness’ testimony who testified on the issue that nobody trusted any competitor’s pricing letters. (RPF 109-117). Moreover, the face of the document and Mr. Tatman’s testimony clearly indicates the absence of any agreement to curtail or eliminate project pricing, as Mr. Tatman lacks any knowledge regarding what Star would actually do with its pricing, and repeatedly speculates as to what Star will actually do with its pricing.

1049. Three minutes after receiving Mr. Tatman’s email, Mr. McCullough forwarded the email to McWane’s CEO, Mr. Page, writing that “[t]he first tentative baby steps are encouraging but the proof will be in ‘saying no’ to customer requests for special pricing.” (CX 0178 at 001; Tatman, Tr. 417; CX 2479 (McCullough, Dep. at 197-200) (expressing uncertainty about what “baby steps” meant)).

Response To Finding No. 1049:

See response to ¶ 1048.

1050. Twenty minutes later, Mr. Page responded to Mr. McCullough's report of the good news from Star, "Beats a sharp stick in the eye." (CX 0178 at 001; *see also* CX 2482 (Page, Dep. at 146, 151) (explaining that Mr. McCullough's report in CX 0178 that Star was not going to offer Project Pricing on Fittings could be "good news"); CX 2482 (Page, Dep. at 160-161) (unable to explain what he meant by comment, other than anything or almost anything beats a sharp stick in the eye)).

Response To Finding No. 1050:

See response to ¶ 1048.

1051. McWane's sales force reported to Mr. Tatman some instances in which Sigma and Star were continuing to Project Price after March 1, 2008, the date upon which McWane, Sigma and Star had all set as the date to no longer offer Project Pricing. (Tatman, Tr. 421-422; CX 0339).

Response To Finding No. 1051:

See General Response 1. The proposed Finding is inaccurate and misleading. Exhibit CX 0039, cited in support of the proffered Finding, reports that more than three months after the alleged conspiracy to curtail or eliminate Project Pricing was put in place, both Star and Sigma were offering Project Pricing. The reference to "some instances" is inaccurate and belied by the fact that McWane, Sigma, and Star all continued to offer Project Pricing throughout 2008 and through to today. (RPF § IV). The statement that "the date upon which McWane, Sigma and Star had all set as the date to no longer offer Project Pricing" is also misleading and inaccurate.

Mr. Tatman testified:

- Q. Did you mean by that that each of those three companies had said [in public customer letters], 'As of March 1st, we will no longer honor job pricing'?
- A. I believe that's the case. *And I think if you look at historical letters, you will see the -- almost the same language is the normal course of communication when you are adjusting prices. That's nothing unusual.*

(Tatman, Tr. 421) (emphasis added). Thus, Mr. Tatman's testimony refutes the implication in ¶ 1051 that McWane's customer pricing letter is an aberration that could only be explained by the alleged conspiracy but was, rather, "nothing unusual" and "the normal course of communication when you are adjusting prices." (Tatman, Tr. 421). Mr. Tatman elaborated at trial why the language to to customers to get their orders in by a date certain was important, and why that directive did not mean that Project Pricing would be discontinued *on new pricing* thereafter:

- Q. And you say, in your e-mail here, "March 1st was the last published date for Tyler/Union, Sigma and Star to honor job pricing." Can you tell us what you meant by that, sir?
- A. Let me read that again, please. You have to tie that back to the customer letter that we put out. And what it said -- and I don't know what Star and Sigma's customer letter says because I don't have that in front of me. But what ours said is we would honor old job pricing as long as you got your orders in by March 1 because you -- some of that pricing is twelve months old. There's a long time between when you quote it and then the time you actually sell at, so what we were trying to do is get customers on our new pricing and flush out the old pricing that could be twelve months old there. ***So what we said is we've given you any sort of incremental job price in the past, could be 12 months ago, could be 18 months ago. You have until March 1 to enter that order. We'll honor that price. But after March 1, we want to requote that business.*** And that's normal when you see letters like that. And I'm going to assume -- I don't have them in front of me now -- that Star and Sigma had similar language in their letters, but I would have to read those documents again to confirm that.
- Q. Okay. So just so I understand, if a distributor had received a price quote from McWane in March of 2007, you would be willing in February of 2008 to honor that quote, but come March 1 you would no longer honor it; is that what you're saying here?
- A. We are saying is, ***if we've given you old pricing, we'll honor that as long as you get the order in by March 1. After that point, it's our intention to get you on the new pricing. And that's common language in the letter, and then once the letter goes out, the negotiation process starts and there's always leakage on that.*** It's just varying degrees of leakage. We let guys sneak over and honor that because I want the business. You know, I don't know what our competitors do, but that's kind of what we do.

(Tatman, Tr. 419-421). Thus, March 1, 2008 was only a date by which Project Pricing offered on old published pricing *may* be honored (Tatman 419-421) (noting “leackage”) Project Pricing was then offered by McWane to its customers on the new published pricing after march 1, 2008 and throughout 2008. (RPF 142-149).

1052. On March 10, 2008, Mr. Tatman sent an email to Messrs. McCullough and Walton, noting that March 1, 2008 had been “the last published date for [McWane], Sigma and Star to honor any project pricing,” and that “Jerry [Jansen] is getting mixed competitive signals ranging from adherence to published pricing by Sigma and Star to cutting deals and extending terms.” Mr. Tatman stated that he would work on getting qualified competitive information rather than verbal inputs, and “nervously wait for the March data to come in.” (CX 0339; CX 2479 (McCullough, Dep. at 210-212) (explaining CX 0339, that “soft tonnage” means lower sales, and that McWane wasn’t offering new job pricing in February 2008)).

Response To Finding No. 1052:

See response to ¶ 1051.

1053. In April 2008, McWane believed that Sigma and Star had both curtailed Project Pricing, and that they had concentrated pricing authority to individuals above the sales team. (Tatman, Tr. 423-424; CX 1564 at 004).

Response To Finding No. 1053:

This proposed Finding is inaccurate and misleading. Mr. Tatman explicitly testified that his April 16, 2008 Executive Report (CX 1564 at 004) was based solely upon the hearsay statements of his field employees and that the opinions in his report were only his “speculation.” (Tatman, Tr. 427). Moreover, the record evidence establishes that McWane, Sigma, and Star did not pull frontline pricing authority away from their respective sales forces and that McWane, Sigma, and Star all continued to Project Price in 2008 up through today. (RPF § IV).

1054. In his Executive Report for the first quarter of 2008, Mr. Tatman noted the success of the Tatman Plan: higher invoiced prices, reduced discounting, and centralization of pricing authority by rivals:

Based upon our competitive feedback log, *the level of multiplier discounting by both Star and Sigma appears to have died down significantly*. As we understand it, both have removed pricing

authority from the front 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; Tatman, Tr. 423-424; CX 2484 (Tatman, Dep. at 117-118) (Acknowledging that “if I wrote that, I would have had some basis for making that statement,” including, “field sales reports from the guys of what’s going on at the branch level.”); CX 0627 at 004 (Tatman’s January 2008 Presentation (“keys to actual success are... Sigma & Star mgt pulling price authority away from front line sales.”)).

Response To Finding No. 1054:

See General Response 1 and 11. This proposed Finding is inaccurate and misleading.

See response to ¶ 1053. Moreover, there was no “Tatman Plan.” See responses to § 7.1, ¶¶ 907-929, 1041.

7.2.7 Absent Concerted Action, the Abrupt Change of a Long-Standing Business Practice to Curtail a Key Element of Price Competition, Project Pricing, Would Be Against Each Supplier’s Unilateral Business Interest

1055. Absent concerted action, the abrupt curtailment in 2008 by any of McWane, Sigma, or Star of a key element of price competition, Project Pricing, would have been against that supplier’s unilateral business interest. (*Infra* ¶¶ 1056-1071).

Response To Finding No. 1055:

See General Responses 1 and 11 and responses to ¶¶ 1056-1071. The proposed Finding is inaccurate, misleading, and argumentative and not supported by the proposed Findings contained in ¶¶ 1056-1071, or any other record evidence.

1056. McWane’s, Star’s, and Sigma’s actions were more consistent with collusion and coordinated interaction than with unilateral conduct or mere recognition of mutual interdependence. (Schumann, Tr. 3893-3899).

Response To Finding No. 1056:

See General Response 1, 9, 11. This proffered Finding is “supported” solely by Complaint Counsel’s expert witness and devoid of any factual support in the record. Respondent denies the accuracy of the proposed Finding. As the proffered Finding reaches virtually every factual and legal issue in the case, it is not possible to fully rebut the proposed Finding here. The

proposed finding touches on ultimate issues in the case and, on the bases set forth throughout Respondent's opening and reply trial briefs, and in its statement of proffered facts, its reply to Complaint Counsels' proffered facts, and in its proffered statements of law and reply to Complaint Counsel's proposed statements of law, Respondent denies the accuracy of the proffered Finding as unsupported by the evidence and law.

1057. The decision by Sigma, Star and McWane in January 2008 to curtail Project Pricing was an abrupt change from their prior business practices. (*Supra* § 7.2.4).

Response To Finding No. 1057:

See General Responses 1 and 11 and responses to § 7.2.4, *supra*. The proposed Finding is inaccurate, misleading, and argumentative and not supported by the proposed Findings contained in § 7.2.4, or any other record evidence. As repeatedly stated in response to nearly identical proposed Findings, McWane, Sigma, and Star did not "curtail" Project Pricing (RPF § IV) and, therefore, there was no "change," "abrupt" or otherwise, as argued in ¶ 1057.

1058. McWane's communication that it intended going forward to sell all products only off the newly published multipliers was in McWane's best interest only to the extent that McWane had an agreement that its rivals would behave in kind. Otherwise, McWane's announcement that it was going to maintain published pricing and not discount, would cause its rivals to come in and take McWane's business away through discounting, which would be counter to McWane's best interest. (Schumann, Tr. 3883-3884, 3893-3894).

Response To Finding No. 1058:

See General Response 1, 9, 11. This proffered Finding is an argument that is "supported" solely by Complaint Counsel's expert witness and devoid of any factual support in the record. Respondent denies the accuracy of the proposed Finding. As the proffered Finding reaches virtually every factual and legal issue in the case, it is not possible to fully rebut the proposed Finding here. The proposed finding touches on ultimate issues in the case and, on the bases set forth throughout Respondent's opening and reply trial briefs, and in its statement of proffered facts, its reply to Complaint Counsels' proffered facts, and in its proffered statements of law and

reply to Complaint Counsel’s proposed statements of law, Respondent denies the accuracy of the proffered Finding as unsupported by the evidence and law. Moreover, as stated in response to ¶ 1051, Mr. Tatman testified that McWane did not “communicate” that it would not provide Project Pricing or other discounts and the evidence demonstrates that neither McWane, Sigma, or Star in fact curtailed or eliminated job discounting to win business. (RPF § IV).

1059. Mr. Tatman acknowledged from the outset that his plan would only work “with the proper communication and actions.” (CX 1702 at 004 (December 2007 Tatman email regarding list price changes)).

Response To Finding No. 1059:

See General Response 1 and 11. This proposed Finding is inaccurate and misleading.

There was no “Tatman Plan.” See responses to ¶¶ 907-929.

1060. Mr. Pais of Sigma later echoed this, explaining in an April 2008 email regarding Sigma’s curtailment of Project Pricing, that Sigma “will NOT – and can NOT – do this unilaterally.” (CX 1137 at 001; Pais, Tr. 1935-1937).

Response To Finding No. 1060:

See response to ¶ 1059. Sigma did not curtail Project Pricing. (RPF ¶¶150-159). When taken in context, the April 2008 email exchange between Mr. Pais and Mr. Williams of Sigma provides that “R→ Our “Of course, our Single Track’ pricing for PW [project work] included is based on both Star and McWane following this lead. We will NOT -- and can NOT -- do this unilaterally....*if* Star and McWane follow suit, it will be a great move. *I simply don’t think they will.* We seem to always think McWane quotes the same pricing as their map, *but I can assure you that’s not the case.*” (CX 1137 at 001).

1061. Likewise, Star’s National Sales Manager, Mr. Minamy, testified that Star knew that it needed its competitors to participate in any effort to stabilize prices. (CX 2526 (Minamy, Dep. at 141-142) (“Q. In other words, you would need your competitors to participate in an effort to stabilize prices? A. We believe that to be true.”) (objections omitted); Minamy, Tr. 3173 (“Q. Did you believe at this point in time that Star could stabilize fittings prices on its own? A. I don’t recall ever believing that we could do that.”)).

Response To Finding No. 1061:

This proposed Finding is inaccurate, argumentative, and misleading. When asked about a hypothetical by Complaint Counsel about what would need to happen to stabilize pricing,

Mr. Minamyer testified:

Q. Did you believe at this point in time that Star could stabilize fittings prices on its own?

MR. TRUITT: Same objection, Your Honor. JUDGE CHAPPELL: I'll allow that.

THE WITNESS: I don't recall ever believing that we could do that.

BY MR. HASSI: Q. Did you believe that Star would only be successful in stabilizing fittings prices if Sigma and Tyler also went along?

MR. TRUITT: Your Honor, I'm going to object. I think it's the same -- he's asking for what somebody else would do.

MR. HASSI: I'm asking for his belief.

JUDGE CHAPPELL: I'll allow it, but you're leading. You'll need to rephrase. You can ask what his belief was at the time, but don't lead.

BY MR. HASSI: Q. What was your belief at the time in terms of who would have to participate in an effort to stabilize fittings prices for it to be successful?

A. We believed that all the competitors would have to make an effort to do that.

Q. Was Star successful at reducing project pricing for a period in time?

A. To my recollection, no.

Mr. Minamyer similarly testified that he understood that a price increase would not hold if Star or any of its competitors undercut the price increase with project pricing.

Q. Okay. You understand, again, if you want to take a price increase, you can't then project-price below it and have that price increase stick; correct?

A. That's correct.

Q. Okay. And again, you reiterate, if you document that the competition is not holding, then you need to do the same thing; correct?

A. Correct.

Q. And so, again, you've hoping, you're wishing, you're wanting. You want the competition [to charge published prices and not project price] because you want the higher price, right?

A. Correct.

Q. Okay. But you don't know that's what they're going to do; correct?

A. That's correct.

Q. And if they don't, if the competition doesn't take the higher price, if they project-price, then Star has to as well; right?

A. That's correct. (Minamyer, Tr. 3256-3257).

1062. Mr. McCutcheon admitted at trial that Project Pricing had been a core part of Star's pricing strategy. (McCutcheon, Tr. 2387 (Project Pricing was "a significant part of Star's competitive strategy"); CX 2539 (McCutcheon, Dep. at 153-155) ("Q. And you thought it was unusual, to say the least, for Mr. Minamyer to say that Star was going to stop project pricing. Right? A. Yes, sir. Q. In fact, project pricing was a core part of Star's sales strategy at this point in time, was it not? A. Yes, sir. Q. You had grown market share by offering project pricing and undercutting your competitors prior to this time. Am I right? A. Yes, sir.")).

Response To Finding No. 1062:

Respondent acknowledges that Project Pricing was a core part of Star's pricing strategy, but denies the implication that Star successfully altered that strategy, that Star curtailed or eliminated Project Pricing, or that any action by Star relating to its Project Pricing "strategy" had anything to do with an alleged agreement to curtail or eliminate Project Pricing. (RPF 160-182).

1063. Star's President, Mr. McCutcheon, testified that the company's change of course to curtail Project Pricing was contrary to its traditional practice of using Project Pricing to gain market share, and described the decision as "unusual," "irrational," and "bizarre." (CX 2538 (McCutcheon, IHT (Vol. 2) at 452) ("Q. Is it fair to say that telling customers that there is no more project pricing, is that an unusual step for Star? A. It's bizarre . . . it's irrational . . ."); McCutcheon, Tr. 2394 (Star had grown its market share by offering Project Pricing); McCutcheon, Tr. 2510 ("90 to 95 percent of our net realized prices to the customer have some type of discount variable to it. . . . [T]hat is the standard way Star Pipe does business."); McCutcheon, Tr. 2392 ("Q. Would telling Star's sales force that Star's goal was to stop project pricing be unusual? A. Yes, sir.")).

Response To Finding No. 1063:

See General Response 1 and 11. This proposed Finding is inaccurate, argumentative, and misleading. Star did not "change course" to curtail Project Pricing. See response to ¶¶ 976-985, 991-995. Although Mr. McCutcheon asked Star's national sales manager, Mr. Minamy, to make sure that the sales force provided proper documentation for special pricing requests (RPF ¶ 168), Star's documentation procedures for special pricing requests had been in existence long before January 2008. (RPF ¶ 169). Star continued offering job pricing and other price concessions to its customers throughout 2008, 2009, 2010 and up through the present and, thus, the statement that there was a "change of course" in Star's pricing strategy is inaccurate. (RPF ¶ 170, see also ¶¶ 160-182).

1064. Due to its traditional use of Project Pricing, pulling back on Project Pricing in January 2008 was a risky move for Star. As the smallest competitor in the market, Star could not afford to cease Project Pricing and remain competitively viable unless McWane and Sigma took similar steps. (McCutcheon, Tr. 2387; CX 2525 (Minamy, IHT at 48, 127; see also Minamy, Tr. 3147-3148 (Mr. Minamy believes that Star would have lost orders to its lower priced competitors if it had pulled back on Project Pricing but McWane and Sigma had not).

Response To Finding No. 1064:

See response to ¶ 1063.

1065. As Mr. Minamy explained at trial, Star would not have made more money by unilaterally eliminating Project Pricing (*i.e.*, if Sigma and McWane had not also eliminated Project Pricing), because Star would have lost sales. (Minamy, Tr. 3286-3287; see also CX 2539 (McCutcheon, Dep. at 164) ("Q. If your competitors were

willing to discount off of what you refer to internally as MSRP and Star was not, what effect would that have on Star? A. We wouldn't have been successful.”)).

Response To Finding No. 1065:

See response to ¶ 1063.

1066. Star did not reduce its Project Pricing until it had some degree of certainty that Sigma and McWane were both taking similar steps. (CX 2525 (Minamyer, IHT at 49) (“Q. So, is it fair to say, sir, that each and every time you took steps to reduce project pricing, you had some degree of certainty, more or less, that SIGMA and McWane were taking similar steps? A. That “would be fair.”)).

Response To Finding No. 1066:

See response to ¶ 1063. See also General Response 3.

1067. In the January 22, 2008 email to Star's division managers, Mr. Minamyer explained the decision to curtail Project Pricing as being “right for the industry”:

You need to know that we are strong in revenue and profit. We will have no problems weathering any price wars, even if they are prolonged. *What we are doing is what is right for the industry.* So, don't think we need the price increases, as that is not the case. A price increase will be good for us on the short and long term profit situation but are not vital to our strength. The truth is that we would come out of a price war stronger than ever and with a bigger market share, but we don't think the industry needs that right now.”

(CX 0752 at 001 (emphasis added); Minamyer, Tr. 3171-3173; *see also* CX 2254 at 004 (re-circulating the instructions and accompanying statements on June 19, 2008 in connection with the subsequent increase scheduled to go into effect July 14).

Response To Finding No. 1067:

See response to ¶ 1063.

- 1068.

[REDACTED] (McCutcheon, Tr. 2497-2498, *in camera*; CX 1872 at 004, *in camera*; CX 2538 (McCutcheon, IHT (Vol. 2) at 408), *in camera* [REDACTED]

; McCutcheon, Tr. 2497-2499, *in camera*; CX 1872 at 004, *in camera*).

Response To Finding No. 1068:

Respondent states that Star's financial statements speak for themselves, and denies the manner and "methodology" that counsel employed in ¶ 1068 and the resultant characterization that "Star's Fittings business was profitable" as argumentative and conclusory and based on an incomplete analysis of Star's financial statements. Respondent further denies any implication that Star's financial numbers, as represented in ¶ 1068, have any bearing on or relevance to Complaint Counsel's allegations that McWane, Sigma, and Star colluded to curtail or eliminate Project Pricing.

1069.

(McCutcheon, Tr. 2498, *in camera* (2007); CX 1872 at 004, *in camera* (2006)). [REDACTED] (CX 2539 (McCutcheon, Dep. at 147) (2007); CX 1872 at 004, *in camera* (2006)).

Response To Finding No. 1069:

See response to ¶ 1068.

1070. By April 14, 2008, Star's sales of push-on Fittings was declining, by as much as 36 percent. Nevertheless, Star continued its plan to curtail Project Pricing. (CX 2526 (Minamyer, Dep. at 177-178); CX 0861 at 002).

Response To Finding No. 1070:

See response to ¶ 1068. With respect to the statement that "Star continued its plan to curtail Project Pricing," see response to ¶ 1063.

1071. Star district manager Michael Berry received a copy of Mr. Minamyer's January 22 and 23, 2008, emails instructing Star's division managers that "Our goal is to take a price increase and to stop project pricing." (RX-691 (Berry, Dep. at 49)). A pullback in Project Pricing by Star was unprecedented, and Mr. Berry is unaware of any instance, other than the January 22, 2008, email of Mr. Minamyer, in which the stated goal of Star was "to stop project pricing." (CX 2532 (Berry, Dep. at 103-104) ("Q. You had never

seen it before this e-mail came out? A. No. Q. . . . [Y]ou have never seen it since that e-mail came out? A. I do not recall seeing it since it came out.”)).

Response To Finding No. 1071:

This proposed Finding is inconsistent with the record evidence. See Response to ¶ 1063.

7.3 McWane Supported Its Invitation to Collude by Communicating Its Manufacturing Cost Advantage to Sigma

1072. 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. (*Infra* ¶¶ 1073-1088).

Response To Finding No. 1072:

See General Responses 1 and 11 and responses to ¶¶ 1073-1088. The proposed Finding is inaccurate, misleading, and argumentative and not supported by the proposed Findings contained in ¶¶ 1073-1088, or any other record evidence.

1073. The cost of manufacturing Fittings in China was increasing in early 2008 due to high currency exchange rates, rising labor costs, and increases in the cost of pig iron. (Tatman, Tr. 866-875; *see supra* § 6.5.3).

Response To Finding No. 1073:

See responses to ¶ 6.5.3, *supra*.

1074. In conjunction with the Tatman Plan, McWane sought to communicate to Sigma that McWane’s Domestic Fittings costs were now competitive with Sigma’s and Star’s costs of importing Fittings from China. (CX 1565 at 001).

Response To Finding No. 1074:

This proposed Finding is argumentative, inaccurate and misleading. There was no “Tatman Plan.” See responses to § 7.1, ¶ 1041, and ¶ 1054. McWane’s proposal to, and ultimate sale of, domestic Fittings to Sigma was a legitimate buy-sell relationship. (CX 1565-001) (stating that “Potential Advantages” of selling to Sigma include: “The proposed pricing is above our variable costs so the tonnage would absorb a portion of the fixed plant costs making a

positive impact to the bottom line” and “Our inventory on Disa items is very high and were struggling to load the schedule.”).

1075. As Mr. Tatman explained in a January 30, 2008 email to Messrs. McCullough and Walton, “[t]here is a theory that our ability to stabilize the market is tied to our competitor’s perception of our cost structure and our ability to sustain aggressive pricing if our share position is threatened.” (CX 1565 at 001; Tatman, Tr. 439-441).

Response To Finding No. 1075:

See response to ¶ 1074.

1076. To convey McWane’s cost advantage, Mr. Page sent an email directly to Mr. Pais on January 4, 2008, offering to sell Sigma Fittings that McWane produced in the United States. (Tatman, Tr. 429-430; CX 1113 at 001 (“It has occurred to me that with China costs rising and us having excess time available on our DISAS around the plants, we could supply you with small compact fittings at a competitive price.”)).

Response To Finding No. 1076:

There is nothing in the cited trial testimony or exhibit supporting that Mr. Page’s offer to sell Fittings was intended to “convey McWane’s cost advantage.” To the contrary, the testimony and exhibit establish that McWane was interested in selling Fittings because of “having excess time available on our DISAS around the plants.” (CX 1113 at 001).

1077. Before January 2008, McWane had provided Fittings out of inventory to Sigma on a spot, “fitting-by-fitting” basis. These sales were negotiated on behalf of Sigma by Mr. Rona. (Tatman, Tr. 434). In contrast to other buy-sell arrangements between Sigma and McWane that occurred during the ordinary course of business, Mr. Tatman testified at trial that McWane’s offer to Sigma was “more of a head fake than anything.” (Tatman, Tr. 762).

Response To Finding No. 1077:

See General Response 1. The proposed Finding is inaccurate, misleading, and argumentative. Mr. Tatman’s testimony establishes only that, prior to January 2008, McWane’s sales to Sigma “on a spot basis” were “probably” sourced out of McWane’s inventory (Tatman, Tr. 434), and that the specific sale to Sigma, about which Complaint Counsel questioned Mr. Tatman, was, in part, a “head fake.” (Tatman, Tr. 762). Mr. Tatman’s testimony regarding

the “head-fake” related to his testimony that the parties were in the context of a negotiation, that “Mr. Rona” was “posturing” in the context of those negotiations, and that McWane and Sigma were discussing a standard and legitimate, “arm's length buy-sell arrangement between two people.” (Tatman, Tr. 761). Neither the testimony cited nor any other record evidence supports the statement that McWane’s offer to sell Fittings to Sigma, which was not a “spot sale,” was other than in the ordinary course of business.

1078. Mr. Pais responded to Mr. Page’s offer two days later, thanking him for McWane’s offer to sell small size Fittings to Sigma, and asking him to prepare a preliminary quote. (CX 2039).

Response To Finding No. 1078:

Respondent has no specific response.

1079. After internal consultations within McWane (CX 1565 at 001), Mr. Tatman sent an email to Mr. Pais on February 1, 2008, proposing to provide Sigma with 3” - 8” Fittings at \$1,220 per ton. (CX 1117; CX 1570 at 001-002; Tatman, Tr. 435-437).

Response To Finding No. 1079:

Respondent has no specific response.

1080. McWane’s offer was for the sale of domestically-produced Fittings to be re-sold by Sigma on Open Specification jobs only. (Tatman, Tr. 430; CX 2039).

Response To Finding No. 1080:

Mr. Tatman’s testimony establishes that McWane’s offer would permit Sigma to sell “against open or import specs.” (Tatman, Tr. 430).

1081. The price McWane offered to Sigma was below McWane’s total cost of production (but above its variable costs), and calculated to be below what McWane understood Sigma’s landed cost of production to be. (CX 1565 at 001 (estimating McWane’s total cost of production at \$1,249 per ton and Sigma’s landed cost at \$1,252 per ton); Tatman, Tr. 441-442, 458 (offer was below full manufacturing costs but above variable costs); CX 1183 at 001 (Page: “The Chinese importers in water works fittings are seeking price increases are [sic] we are now in a position to resist. In fact I have offered to make ‘A’ items for an importer at the same price they can bring in it in.”)).

Response To Finding No. 1081:

As stated in response to ¶ 1074, McWane was “struggling to load schedules” on the Disa, was desperate for tonnage, and the “proposed pricing [was] above our variable costs” and “absorbed a portion of the fixed plant costs making a positive impact to the bottom line.” Thus, the record does not support the implication that McWane’s sale of domestic fittings to Sigma was a poor business choice or somehow not “positive to the bottom line.”

1082. Mr. Pais responded to Mr. Tatman’s February 1, 2008 offer later that day. He noted that he had discussed the matter with Mr. Page late in 2007, and that he would respond “at the earliest,” adding, “We deeply appreciate and respect our relationship with McWane and look forward to growing our relationship along mutually beneficial lines.” (CX 1570 at 001; Tatman, Tr. 437-438).

Response To Finding No. 1082:

See General Response 1. The proposed Finding is inaccurate, incomplete, misleading, and argumentative. When taken in context, Complaint Counsel’s attempt to suggest something nefarious about Mr. Pais’ use of the term “relationship” is not supported. The document provides -- in the context of Mr. Pais’ email response to McWane’s business proposal / terms to sell Sigma domestic Fittings:

“We deeply appreciate and respect our relationship with McWane and look forward to growing our relationship along mutually beneficial lines. In this spirit, please look for any opportunities for SIGMA to supply McWane any selective items in the Fittings, Accessories, V&H and other product ranges, where the cost and work involved such as machining, coating, etc would make our supply still feasible despite the current from China.”

Moreover, when Complaint Counsel questioned Mr. Tatman regarding his interpretation of Mr. Pais’ reference to a “relationship” with McWane, Mr. Tatman testified:

Q. He goes on to say, "We deeply appreciate and respect our relationship with McWane and look forward to growing our relationship along mutually beneficial lines." Do you know what Mr. Pais meant by that?

A. You just had me look at a document here earlier that looks like Victor in December 14 is talking about being a broker of relationship between their suppliers in India and China for ductile iron pipe to McWane, so I couldn't tell you what he was referring to. Maybe it's that. Don't know.

Q. So you don't know what he's referring to.

A. No.

Q. Did you view McWane and Sigma as having a mutually beneficial relationship?

A. This is what Victor is saying.

Q. And I'm asking you what your view was at the time that Victor said this.

A. I know who the enemy is.

Complaint Counsel did not call Mr. Page as a witness and, although Complaint Counsel called Mr. Pais as a witness, it did not question Mr. Pais regarding CX 1570. Thus, the record evidence supports the position that Mr. Pais' email reference to a "relationship" is perfectly explained as legitimate when read in context.

1083. On February 26, 2008, Mr. Tatman wrote in an email to Mr. Page that he did not expect Sigma to pursue the purchase of Fittings from McWane, but that "supplying that quote should reinforce the point that with the DISA and our TXX facility we're in a very different competitive cost game than what they've been used to with us." (CX 1571 at 001; Tatman, Tr. 452-454).

Response To Finding No. 1083:

The proposed Finding accurately quotes only a selected portion of CX 1571. When read in context, the document does not support the implication in the proposed Finding that McWane' offer to sell domestic fittings to Sigma was a sham. In response to Mr. Page's question to Mr. Tatman asking "I need your follow up on the quotation we gave to Sigma. Are they interested? Volume?", Mr. Tatman explained:

"I don't believe Sigma will pursue the fitting option at this point. Our quote should have been very close to what we believe their current landed costs are. For a cost neutral situation

they probably wouldn't disrupt their current supply base....We are in active discussions in regard to supplying Glands off the DISA and have sent some evaluation samples.”

Indeed, McWane had concluded that selling to Sigma was helpful to McWane's bottom line. See Response to ¶ 1074. The proposed Finding also omits Mr. Tatman's recollection of the meaning of the selectively quoted language respecting the quote:

Q. Can you tell me, give me your best recollection as to what was in your mind?

A. Yeah. That's a -- that's managing perceptions.

Q. I'm sorry. Managing perceptions?

A. Managing perceptions.

Q. Whose perceptions are you managing?

A. My competitors'. You would never want your competitor to feel that you were at a cost disadvantage.

(Tatman, Tr. 453).

1084. On March 10, 2008, Mr. Tatman sent an email to Mitchell Rona forwarding his February 1, 2008 offer email and specifying the list of items that McWane proposed to supply to Sigma pursuant to that offer. (CX 1703 at 001).

Response To Finding No. 1084:

Respondent has no specific response.

1085. As a result of the McWane offer, Sigma understood that McWane was a low cost Fittings producer, had excess capacity, and would be a dangerous rival if Sigma and Star did not play by its rules. (CX 1565 at 001; CX 1571 at 001; CX 1142 at 002 (Pais describing McWane quote as an “interesting and revealing price” that suggests a McWane cost advantage over Sigma); CX 1141 at 001 (“Let's keep the follow up and start some relationship – as we need to build a new relationship with them, for our mutual good, apart from helping ourselves with perhaps the most competitive source for the ‘AA’ items!”)).

Response To Finding No. 1085:

See General Response 1. The proposed Finding is inaccurate, incomplete, misleading, and argumentative. CX 1565 and 1142 are internal McWane emails that do not support the

statement regarding what Sigma purportedly “understood” about McWane’s offer to sell domestic Fittings to Sigma. There is also no mention in the remaining exhibit cited regarding Sigma’s purported “understanding” or the consequences of not “playing by the rules.” this proposed Finding is wholly unsupported.

1086. Sigma eventually did place an order with McWane in June 2008, at which time Mr. Tatman emailed Messrs. Walton and McCullough (who forwarded the email to Mr. Page), reporting receipt of a purchase order of Fittings from Sigma, with the price set at “what we believe the landed costs were for small diameter fittings out of China at that time.” (CX 2067 at 001).

Response To Finding No. 1086:

Respondent has no specific response.

1087. Star became aware of McWane’s offer to sell low-priced Fittings to Sigma, and understood that the point of the buy/sell exercise had been for McWane to demonstrate to Sigma its capacity to compete aggressively if necessary. In an October 17, 2008 email, Mr. McCutcheon told Messrs. Bhargava and Bhutada:

Sigma recently bought 8 [truckloads] from tyler because sigma said “they could buy them for 15% cheaper from tyler than they could get them from china”. After the 8 [truckloads], tyler would not take any more orders. *My guess is tyler took these orders to try to make a point. During the negotiation, tyler stated that they are now the low cost producer and said they could prove it.* I think there is some exaggeration in this statement, but I believe the core point.

(CX 0534 at 001 (emphasis added); McCutcheon, Tr. 2454-2456).

Response To Finding No. 1087:

See General Response 1. The proposed Finding is inaccurate, incomplete, misleading, and argumentative. Mr. McCutcheon’s testimony establishes that Star became aware of the buy-sell arrangement between McWane and Sigma from a “market rumor” passed on by a Star salesperson, not from McWane or Sigma:

- Q. And you say in quotes “they could buy them for 15 percent cheaper from Tyler than they could get them from China.” Why did you put that in quotes?

A. Because that's what someone must have told me.

Q. And do you know who that someone who told you that was?

A. No, sir. I'm real sure it was one of the Star Pipe salespeople. I don't recall which one. But it was a market rumor.

Q. Could Mr. Rybacki have shared this information with you?

A. I definitely did not get this information from Mr. Rybacki.

Q. And why do you say you definitely did not get this information from Mr. Rybacki?

A. Because he wouldn't tell me things like this. (McCutcheon, Tr. 2456).

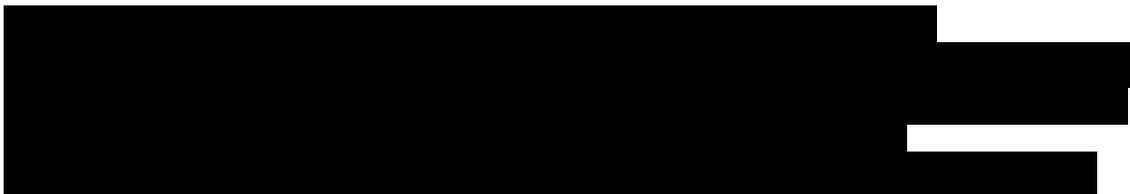
Mr. McCutcheon's testimony also establishes that, aside from basing his opinion on at least the double hearsay of a "market rumor" passed on by a Star salesperson, the opinion that he expressed in CX 0534 was only a "guess" that he "cobbled together the kind of information that came in from the sales department and passed it on to my boss:"

Q. You go on to say: After the eight truckloads, Tyler would not take any more orders. My *guess* is Tyler took these orders to make a point. During the negotiation, Tyler stated they are now the low-cost producer and they could prove it." What did you mean by that?

A. This -- I was *repeating a rumor* that I was told in the market. There was a *pretty strong rumor* in the market that Sigma had purchased eight truckloads of product from McWane, and there was *a buzz in the industry on what it was about*. I had *no firsthand information* -- knowledge of it, and *I cobbled together the kind of information that came in from the sales department and passed it on to my boss*.

(McCutcheon, Tr. 2456-2457). Thus, the statement that "Star ... *understood* that the point of the buy/sell exercise had been for McWane to demonstrate to Sigma its capacity to compete aggressively if necessary" is a vast overstatement that is not supported by the authority cited in the proposed Finding or by any other record evidence.

1088.



(McCutcheon, Tr. 2471-2473, *in camera*; CX 1621-A at 074, *in camera* (Rybacki telephone records); *supra* ¶ 783 (detailing telephone records)).

Response To Finding No. 1088:

See Response To Finding 714, *supra*.

7.4 In Early 2008, McWane, Sigma, and Star Restarted Efforts to Organize the DIFRA Information Exchange to Enhance Competitive Transparency

1089. In early 2008, McWane, Sigma, and Star restarted efforts to organize the DIFRA information exchange in order to enhance competitive transparency in the Fittings market. (*Infra* ¶¶ 1090-1154).

Response To Finding No. 1089:

See General Response 8 regarding Complaint Counsel’s argumentative use of the term “information exchange” and mischaracterization of the historic, tons-shipped data that was collected by DIFRA, under the supervision of experienced antitrust counsel (RPF 243-250), aggregated by a third-party independent accounting firm (RPF 246-249), and disseminated to the DIFRA membership, as an “information exchange” that allegedly facilitated price collusion. *See also* responses to ¶¶ 1090-1154, *infra*.

Complaint Counsel’s proposed finding that the members “organize[d] the DIFRA information exchange in order to enhance competitive transparency in the Fittings market” is refuted by the evidence. Every witness questioned on the issue testified that DIFRA did not facilitate coordination among the members on Fittings pricing, that the historic, aggregated tons-shipped data that DIFRA disseminated to its membership did not provide any member with any insight as to its competitors pricing, what specific Fittings products were being sold (other than in three broad size ranges with literally thousands of SKUs in each range), where geographically any competitor was selling Fittings, whether the Fittings sold were of domestic or foreign origin, or whether they were sold into open or domestic spec jobs. (RPF 251-265). Rather, the evidence establishes that the the DIFRA members used the historic, aggregated tons-shipped data

for pro-competitive purposes, including to better manage production schedules and inventory. (RPF 270-280).

7.4.1 The Suppliers Had Been Working on Organizing DIFRA for Years, but DIFRA Did Not Become Operational Prior to the 2008 Price Fixing Conspiracy

1090. McWane, Sigma, and Star had discussed forming DIFRA since at least as early as 2005. (CX 1473; RX-654 (Brakefield, Dep. (Vol. 1) at 11-12)).

Response To Finding No. 1090:

Although McWane, Sigma, Star, U.S. Pipe and other Fittings manufacturers and suppliers sporadically discussed the possibility of forming a trade association that later became known as DIFRA in 2005, DIFRA was not incorporated until 2007 and was only operational for about six months. (RPF 237-239).

1091. Mr. Pais initiated the effort to form DIFRA, and subsequently handed off responsibility for Sigma’s participation to Mr. Brakefield and Mr. Rybacki. (Pais, Tr. 1966-1967; Brakefield, Tr. 1220-1221; CX 1225 at 004 (Pais writing that “I took the initiative to form an industry association for Fittings”)).

Response To Finding No. 1091:

Respondent has no specific response.

1092. DIFRA was modeled after industry groups formed by manufacturers of ductile iron pipe and cast iron soil pipe, such as DIPRA (the Ductile Iron Pipe Research Association) and CISPI (the Cast Iron Soil Pipe Institute). (Tatman, Tr. 469; Pais, Tr. 1968; CX 2527 (Pais, IHT at 57-58); CX 1088 at 001 (Pais October 2008 memorandum noting influence of DIPRA and CISPI “lead[ing] to mature and disciplined decision making”)).

Response To Finding No. 1092:

DIFRA was created pursuant to the advice and supervision of experienced antitrust counsel who had experience counseling other trade associations, including DIPRA. (RPF 243-250). Respondent has no specific response to the statement that DIFRA was “modeled after” DIPRA or CISPI.

1093. Mr. Pais spoke with ACIPCO, U.S. Pipe, McWane, and Star regarding membership in DIFRA. (Pais, Tr. 1969-1970; McCutcheon, Tr. 2411 (Pais originally invited Star to join

DIFRA)). In or around 2004, Mr. Pais also invited Mr. Saha of PCI, a former Fittings supplier that was ultimately sold to Sigma, to join DIFRA. (Saha, Tr. 1178).

Response To Finding No. 1093:

Respondent has no specific response.

1094. The DIFRA members engaged Thad G. Long of the law firm Bradley Arant Rose & White – the same law firm that had handled the formation and structuring of DIPRA – to assist in setting up DIFRA. CX 1473 at 001 (first DIFRA meeting held at Bradley Arant); CX 0048 at 001 (DIFRA organizational meeting minutes recounting Mr. Long’s advice)).

Response To Finding No. 1094:

In addition to Messrs. McKibben and Herren, attorneys at the law firm Bradley Arant Rose & White, DIFRA was organized and supervised by Thad G. Long of the same law firm. (RPF 243-250).

1095. DIFRA organizational meetings were held in March 2005 (CX 1473), November 2006 (CX 0048), and December 2006 (CX 1476).

Response To Finding No. 1095:

DIFRA did not exist until its antitrust counsel incorporated the trade association in January 2007 and thus could not have had organizational meetings as DIFRA prior to that date. (RPF 239). Sporadic meetings occurred prior to DIFRA’s incorporation, all of which were supervised by antitrust counsel. (RPF 243-250).

1096. The first official DIFRA meeting occurred on March 18, 2005 at the offices of the Bradley Arant law firm, and was attended by Mr. Brakefield for Sigma, Mr. Crawford for U.S. Pipe, and Mr. Green for McWane. (CX 1473 at 001; Brakefield, Tr. 1222-1224).

Response To Finding No. 1096:

See response to ¶ 1095.

1097. Attendees at the initial DIFRA meeting identified potential members of DIFRA, including McWane, Sigma, U.S. Pipe, ACIPCO, Star, and PCI. (CX 1473 at 001; Brakefield, Tr. 1222-1224). These potential members were identified because they were “predominantly the larger players in the industry as far as fittings, and to do the things

that the organization was going to set out to do, you needed to have every -- every large player in it.” (Brakefield, Tr. 1225).

Response To Finding No. 1097:

See response to ¶ 1095. Proposed Finding ¶ 1097 provides an incomplete list of attendees in that it omits, at least, the attendance of antitrust counsel from the Bradley Arant law firm that organized and supervised all aspects of the entity that became DIFRA. (RPF ¶¶ 243-250).

1098. The next known DIFRA meeting took place on November 21, 2006 at the offices of Bradley Arant, and was attended by Mr. Green for McWane, Mr. McCutcheon for Star, Messrs. Pais, Bhattacharji, Rybacki and Brakefield for Sigma, and Mr. Crawford for U.S. Pipe (CX 0048 at 001; Brakefield, Tr. 1226).

Response To Finding No. 1098:

See response to ¶ 1095. Proposed Finding ¶ 1098 provides an incomplete list of attendees in that it omits, at least, the attendance of antitrust counsel from the Bradley Arant law firm that organized and supervised all aspects of the entity that became DIFRA. (RPF ¶¶ 243-250).

1099. Attendees at the November 2006 DIFRA meeting agreed upon requirements for DIFRA voting membership, including a requirement that any voting member must produce and/or sell at least 10,000 tons of Fittings annually. (CX 0048 at 002). According to Mr. Brakefield, the purpose of the requirement was to ensure that members were “committed to the industry” and “enthusiastic about what we were trying to do for the industry.” (Brakefield, Tr. 1226-1227 (discussing meeting minutes); Brakefield, Tr. 1264 (discussing same requirement in DIFRA bylaws, CX 0158 at 010)).

Response To Finding No. 1099:

Exhibit CX 0048-002 states explicitly that DIFRA’s attorneys were just then “preparing the draft of the bylaws,” including the purported membership requirements and thus bylaws, contrary to the suggestion of the proposed Finding had not even been drafted, let alone effective at this time. The bylaws were, in fact, not drafted and finalized until DIFRA was incorporated the next year in 2007 (CX 1480). It is, therefore, misleading to assert what DIFRA’s

membership requirements were. As late as February 2008, the DIFRA members were still debating the membership requirements, including the minimum tons-sold requirement, and debating whether the requirement should be 5,000 tons - or half what is represented as the requirement “agreed” upon in 2006. (CX 1081-01). See also response to ¶ 1095.

1100. Attendees at the November 2006 DIFRA meeting also agreed on a requirement that any voting member must sell 95% of its Fittings to Distributors. (CX 0048 at 002). Mr. Brakefield could not explain any reason for this requirement. (Brakefield, Tr. 1226-1227 (discussing meeting minutes); Brakefield, Tr. 1264 (discussing same requirement in DIFRA bylaws, CX 0158 at 010)).

Response To Finding No. 1100:

This proposed Finding is inaccurate and misleading. See response to ¶ 1095. The purported “agreed on requirement” referenced herein is a misrepresentation for the same reasons stated in response to ¶ 1099.

1101. The minutes for the November 2006 DIFRA meeting reflect a discussion of the potential exchange of Fittings market information through DIFRA, and the advice provided by DIFRA’s lawyer Mr. Long that information exchanges of market information can raise “significant anti-trust issues” when conducted by associations comprised of only a few members:

Mr. Long discussed the anti-trust concerns with associations in which competitors are members and work together on industry matters. *He noted the significant anti-trust issues when an association consists of only two or three competitors*, whereas an association with five, six or more competitors is less problematic.

Mr. Long noted that information gathered by competitors in the market place is permissible and is simply a part of operating a business in a competitive environment. On the other hand, compiling and disseminating information about a market and competitive issues within an association presents anti-trust concerns.

(CX 0048 at 001) (emphasis added).

Response To Finding No. 1101:

See General Response 8 and 11. As is evident from the face of CX 0048, Mr. Long's legal advice regarding possible antitrust concerns that could arise based solely on the number of association members was generalized and not, as stated in ¶ 1101, related specifically to a purported "information exchange." Moreover, ¶ 1101 is inaccurate and misleading in that it purports to represent that Mr. Long advised that antitrust issues could possibly arise when a trade association was "comprised of only a few members." Mr. Long's advice was, in fact, much more specific, stating that there could be possible antitrust issues when an association "consists of only two or three competitors." DIFRA had four members at all times. (RPF ¶ 236; CCPFF ¶ 1121).

1102. The next DIFRA meeting occurred on December 12, 2006 by conference call, and was attended by Mr. Green for McWane, Mr. McCutcheon for Star, Mr. Pais for Sigma, and Mr. Crawford for U.S. Pipe. (CX 1476 (meeting minutes)).

Response To Finding No. 1102:

See response to ¶ 1095. Proposed Finding ¶ 1098 provides an incomplete list of attendees in that it omits, at least, the attendance of antitrust counsel from the Bradley Arant law firm that organized and supervised all aspects of the entity that became DIFRA. (RPF ¶¶ 243-250). There is insufficient evidence to support the statement that a meeting on December 12, 2006 was the "next DIFRA meeting."

1103. DIFRA was incorporated by David Green as an Alabama nonprofit corporation on January 12, 2007. (CX 1480 at 007; Brakefield, Tr. 1227, 1349 (DIFRA was incorporated in Alabama in January 2007)). At that time, DIFRA's initial Board of Directors had seven members, consisting of two individuals each from McWane (Tatman, Leonard), Sigma (Brakefield, Pais), and Star (Bhutada, McCutcheon), and one from U.S. Pipe (Crawford). (CX 1480 at 006; Tatman, Tr. 616-617 (Tatman was a DIFRA board member)).

Response To Finding No. 1103:

Respondent has no specific response.

1104. Mr. Brakefield became DIFRA's president in January 2007, and was the first and only president of DIFRA. (Brakefield, Tr. 1221-1222, 1227).

Response To Finding No. 1104:

Respondent has no specific response.

1105. In January 2007, DIFRA engaged the accounting firm SRHW of Birmingham, Alabama, as the association's auditor. SRHW was also engaged for the purpose of compiling each member's sales data by tons shipped, and aggregating that data into monthly reports to be provided to each DIFRA member. (CX 1333 at 003, 005 (January 8, 2007 engagement letter describing data aggregation function); Brakefield, Tr. 1236-1238 (DIFRA retained accounting firm in January 2007 to aggregate member shipment data)).

Response To Finding No. 1105:

DIFRA's accountant, SRHW, under the supervision of antitrust counsel, was engaged for the purpose of compiling each members historic, tons-shipped data, aggregating same and distributing the aggregated tons-shipped data to the DIFRA members. (RPF ¶¶ 246-250).

DIFRA and SRHW did not collect or disseminate any members "sales data."

1106. Following DIFRA's incorporation, the organization was largely dormant for the balance of 2007. (CX 1083 at 002 (Thad Long February 11, 2008 email describing hiatus and restarting organizational efforts); CX 1330 at 001 (McWane submitted data to DIFRA in early 2007, but other members did not, and Mr. Herren explained to SRHW that the group "seems to be a little disjointed at this point"))).

Response To Finding No. 1106:

DIFRA was operational for approximately six months. (RPF ¶ 237).

7.4.2 In February 2008, McWane and Sigma Agreed to Restart Efforts to Form the DIFRA Information Exchange

1107. Mr. Rybacki spoke to Mr. McCutcheon in early 2008 to again ask Star to join or support DIFRA. (Rybacki, Tr. 3532-3533; CX 2531 (Rybacki, Dep. at 187). Mr. Rybacki and Mr. Pais contacted Mr. McCutcheon about DIFRA so frequently that Mr. McCutcheon felt as if he was being "pushed" by Sigma to join DIFRA. (CX 2538 (McCutcheon, IHT (Vol. 2) at 242-244)).

Response To Finding No. 1107:

See General Response 3 and 11.

1108. Mr. Rybacki asked Mr. McCutcheon to take part in DIFRA because he thought DIFRA was important. (Rybacki, Tr. 3532-3533).

Response To Finding No. 1108:

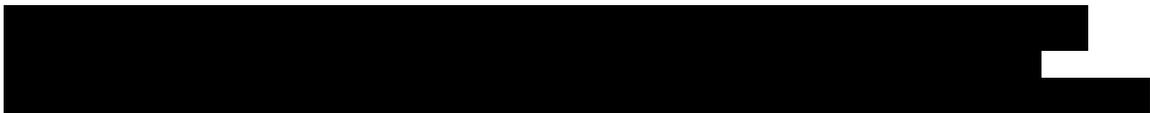
The testimony cited in support of ¶ 1108 supports the fact that Mr. Rybacki testified that he thought DIFRA was important because, if DIFRA ever “got going,” the association would have addressed “threats” of PVC product competition on the fittings market and would have addressed “standardization” issues relating to Fittings linings and coatings. To the extent ¶ 1108 implies that Mr. Rybacki felt that DIFRA was “important” because of the purported “information exchange” or DIFRA’s purported facilitation of a conspiracy, as characterized by Complaint Counsel, there is no evidence to support such an implication and all witnesses to have been questioned on the issue denied that DIFRA facilitated price coordination. (RPF ¶ 251-265).

1109. Mr. Rybacki also contacted ACIPCO and U.S. Pipe to tell them that he thought they should participate in DIFRA. (Rybacki, Tr. 3534).

Response To Finding No. 1109:

Respondent has no specific response.

1110.

 (Rybacki, Tr. 3632-3633, *in camera*; CX 1621-A at 109, 110, *in camera* (Rybacki telephone records); *supra* ¶¶ 748-750 (detailing telephone records)).

Response To Finding No. 1110:

See General Response 4.

1111. On February 7, 2008, Mr. Tatman reported to his superiors that Mr. Rybacki had called him that day to express Sigma’s interest in participating in a trade association for Fittings. (CX 1284 at 001; Rybacki, Tr. 3536). Among other things, Mr. Rybacki told Mr. Tatman that DIFRA should become active, that Sigma would support DIFRA, and that he had discussed DIFRA with Star, and that Star would also consider participating. (CX 1284 at 001; Tatman, Tr. 466-467; Rybacki, Tr. 3536-3538). Mr. Rybacki then suggested that Mr. Tatman contact Mr. Brakefield about restarting DIFRA efforts. (CX 1284 at 001; Rybacki, Tr. 3538).

Response To Finding No. 1111:

Respondent has no specific response.

1112. Mr. Rybacki testified that his February 7, 2008 conversation with Mr. Tatman was one of the two times he had spoken to Mr. Tatman in his career. (Rybacki, Tr. 3537).

Response To Finding No. 1112:

Mr. Rybacki testified:

Q. You testified last time that you believe you spoke to Mr. Tatman twice in your career. Do you recall that?

A. I think so. I don't remember very much -- I hardly ever talk to Rick.

Q. Was this one of the two times?

A. Could have been.

In any event, Messrs. Rybacki and Tatman were discussing the organization of a trade association and there is no evidence that the February 7, 2008 or any other communication between the two had anything to do with anything other than the organization of DIFRA.

1113. Later in the day on February 7, 2008, Mr. Tatman emailed Mr. Brakefield regarding "next steps" toward restarting DIFRA, including suggesting meeting dates for a face-to-face meeting among DIFRA members. (CX 1284 at 001; Tatman, Tr. 466-467, 470-471; CX 1081 at 002-003; Brakefield, Tr. 1257).

Response To Finding No. 1113:

In his email, Mr. Tatman wrote to Mr. Brakefield: "Of course we'll need to make sure we have the appropriate legal representation available for any discussions." (CX 1284-002).

1114. Mr. Tatman's February 7, 2008 e-mail to Mr. Brakefield also addressed DIFRA's membership:

To have a viable association we'd need at a minimum McWane, Sigma and Star to be members. You have a historical perspective from the last attempt, but I would think ACIPCO and U.S. Pipe would bring some value to the association. There's probably going to be some minimum requirement in terms of volume to join. Is 5,000 tons the appropriate level? If so who do you feel would be potential members?

(CX 1081 at 001; Tatman, Tr. 471-472).

Response To Finding No. 1114:

Respondent has no specific response.

1115. Before receiving the email from Mr. Tatman, Mr. Brakefield had not had conversations with anyone about restarting DIFRA efforts. (CX 2496 (Brakefield, Dep. (Vol. 2) at 135-136) (discussing CX 1081); Brakefield, Tr. 1257-1258 (does not recall specific conversations with Messrs. Pais, Rybacki or Bhattacharji)).

Response To Finding No. 1115:

Respondent submits that the cited evidence does not support the proposed Finding because there were ongoing discussions regarding starting what became DIFRA as early as 2005 and the record does not reflect whether Mr. Brakefield had not had any conversations about restarting DIFRA efforts before receiveing the subject email.

1116. On February 11, 2008, Mr. Long sent an email to the DIFRA members seeking to re-start the organizational process: “the organization has been relatively dormant in recent months. We have just been advised by a DIFRA member that it is believed the time might be right to take DIFRA to the operational stage, and we were requested to contact everyone with a potential interest.” (CX 1083 at 002).

Response To Finding No. 1116:

Respondent has no specific response.

7.4.3 McWane, Sigma, and Star Included U.S. Pipe as a DIFRA Member Solely to Mask Antitrust Concerns

1117. McWane, Sigma, and Star included U.S. Pipe as a DIFRA member to mask antitrust concerns, even though U.S. Pipe had stopped manufacturing Fittings years before, it did not satisfy DIFRA membership requirements, and the small number of Fittings that it sold were supplied to it largely by Sigma. (*Infra* ¶¶ 1118-1130).

Response To Finding No. 1117:

See General Response No. 1 and responses to ¶¶ 1118-1130. The statement that McWane, Sigma, and Star “included” U.S. Pipe as a DIFRA member “solely to mask antitrust concerns” is argumentative and wholly unsupported by the record evidence. All of DIFRA’s

activities, including its formation and operation, was overseen by experienced antitrust counsel (RPF 243-250) and its aggregation and dissemination of historic, tons-shipped data was coordinated by an independent, third-party accounting firm also supervised by antitrust counsel. (RPF 246-250). Even if there were any evidence to support the argument that U.S. Pipe was “included” as a DIFRA member solely to “mask antitrust concerns,” and there is not, the fact that U.S. Pipe participated in the submission of historic, tons-shipped data (something it could do as a seller of fittings, regardless of whether it manufactured Fittings) only made the possibility of any DIFRA member divining any price related information of a competitor from the DIFRA reports that much more impossible. Moreover, no U.S. Pipe witness testimony or document supports the argument that its participation in DIFRA was solely to mask antitrust concerns.

1118. Section 2.2 of the DIFRA Bylaws provided that to be a member of DIFRA an organization must meet certain minimum requirements, including selling 95% of their Fittings through distribution and producing or selling at least 10,000 tons of Fittings annually:

- (i) Offer a full ductile iron fittings product line configuration for the United States water works and sewer industry;
- (ii) Maintain a national market presence within the United States in the production or sale of ductile iron fittings;
- (iii) Operate as either a Producer or Seller (as such terms are defined below) of ductile iron fittings;
- (iv) At least ninety-five percent of sales of ductile iron fittings must be to a distributor;
- (v) Be involved in the design and development of technical specifications and standards for ductile iron fittings; and
- (vi) Produce or sell at least ten thousand (10,000) tons of ductile iron fittings on an annual basis.

(CX 0158 at 010 (“final or close to final” draft circulated by Mr. Long on February 12, 2008); *see also* CX 1484 at 007 (same provisions in Bylaws circulated by Mr. Long in March 2008); CX 1083 at 002 (February 11, 2008 Long email explaining that Bylaws

had been largely finalized prior to 2008); Brakefield, Tr. 1260-1264 (no changes were made to the DIFRA Bylaws after February 12, 2008)).

Response To Finding No. 1118:

As reflected in the citations to ¶ 1118, the record established that the DIFRA bylaws cited in support of this paragraph were likely a non-final draft set of bylaws. Regardless, the document speaks for itself. Respondent incorporates its response to ¶ 1117 herein to the extent that Complaint Counsel is implying that U.S. Pipe’s membership in DIFRA was purportedly engineered by McWane, Sigma, and Star solely to mask antitrust concerns.

1119. DIFRA’s bylaws define “Producer” as “an entity that manufactures ductile iron fittings in its own foundry facilities or in foundry facilities owned by an unrelated third-party with respect to which such entity has proprietary control over the engineering design, production processes and quality assurance systems for the production of all of the entity’s requirements for ductile iron fittings.” (CX 0158 at 010).

Response To Finding No. 1119:

See response to ¶ 1118.

1120. DIFRA’s bylaws define “Seller” as “a seller of ductile iron fittings to distributors.” (CX 0158 at 010).

Response To Finding No. 1120:

See response to ¶ 1118.

1121. DIFRA ultimately had four members: McWane; Sigma; Star; and U.S. Pipe. (Joint Stipulations of Fact (JX 0001) ¶ 17; Tatman, Tr. 478; Brakefield, Tr. 1227-1228; Brakefield, Tr. 1259-1260).

Response To Finding No. 1121:

Respondent has no specific response.

1122. McWane, Sigma, and Star understood that DIFRA’s information exchange would need at least four members due to antitrust considerations. (CX 0048 at 001 (DIFRA meeting minutes noting that counsel “discussed the anti-trust concerns with associations in which competitors are members and work together on industry matters. He noted the significant anti-trust issues when an association consists of only two or three competitors, whereas an association with five, six, or more competitors is less problematic.”); CX 2272 (counsel advising “With four, you can just barely justify [the information exchange]”);

CX 0048 at 001 (DIFRA meeting minutes noting counsel’s advice that “compiling and disseminating information about a market and competitive issues within an association presents anti-trust concerns”); CX 2267 at 001 (counsel noting that “[t]his does not mean all antitrust concerns are definitely gone, as you always have some concern with information aggregations when there are relatively few participants”).

Response To Finding No. 1122:

See General Response 8 and response to ¶ 1101.

1123. McWane, Sigma, and Star sought a fourth DIFRA member, ACIPCO, which manufactured large diameter Domestic Fittings. Brakefield, Tr. 1268 (“Q. Mr. Brakefield, did DIFRA seek out a fourth member so that it could avoid antitrust concerns? A. We -- we talked to several other companies. ACIPCO was one. And we tried to get them to have some interest in that, being a part of the group.”).

Response To Finding No. 1123:

DIFRA, with the supervision of its experienced antitrust counsel, sought the participation of a number of Fittings suppliers, some of which declined to participate in DIFRA, including ACIPCO. If ACIPCO had joined DIFRA, it would have been the fifth member of DIFRA, in addition to McWane, Sigma, Star, and U.S. Pipe. (RPF 236; CPFF ¶ 1121).

1124. Mr. Long invited ACIPCO to join DIFRA in February 2008, but ACIPCO declined the offer. In declining to participate in DIFRA, ACIPCO cited as a reason that it did not understand the business reason for a membership requirement in the DIFRA bylaws that all members must sell at least 95% of their Fittings through distribution. ACIPCO did not meet this requirement. (CX 1083 at 001; *see also* CX 1088 at 001 (Pais describing DIFRA membership: “Though we had aimed at enlisting the 5 largest members - McWane/Tyler, Sigma, Star, US Pipe and ACIPCO, the latter chose not to join. No effort was made to invite smaller suppliers”); Pais, Tr. 1974-1975 (ACIPCO declined membership in DIFRA); Brakefield, Tr. 1268 (ACIPCO showed no interest and did not come to any meetings); CX 1991 (ACIPCO did not meet 95% requirement); CX 2486 (Burns, Dep. at 98-99) (same)).

Response To Finding No. 1124:

See response to ¶ 1118.

1125. In 2007, U.S. Pipe also did not meet the DIFRA membership requirement that at least 95% of its sales of Fittings must be to a Distributor. (CX 2541 (Crawford, Dep. at 69, 71-73) (“[T]here’s no way we would have satisfied” requirement for 95% of sales to be through distribution because only approximately 50% of U.S. Pipe’s Fittings sales were to Distributors)).

Response To Finding No. 1125:

See response to ¶ 1118.

1126. In 2007, Sigma, McWane, and Star each satisfied the minimum membership requirement of 10,000 tons of Fittings sold annually. (Brakefield, Tr. 1264-1265; CX 1297 at 003-014 (showing 2007 shipments as reported to DIFRA amounting to 33,855 tons (Sigma), 22,073 tons (Star) and 60,632 tons (McWane)); RX-679 (Haley, Dep. at 30) (explaining these pages of CX 1297, Bates numbered SRHW-00023 through -00034, as copies of the internal work papers on which SRHW compiled the information obtained from the DIFRA members)).

Response To Finding No. 1126:

See response to ¶ 1118.

1127. In 2007, U.S. Pipe's sales of Fittings amounted to approximately 2,393 tons. (CX 1297 at 003-014 (showing 2007 monthly shipments as reported to DIFRA by U.S. Pipe of 254 tons (Jan.), 207 tons (Feb.), 173 tons (Mar.), 204 tons (Apr.), 210 tons (May), 191 tons (June), 160 tons (July), 225 tons (Aug.), 224 tons (Sep.), 154 tons (Oct.), 216 tons (Nov.), and 175 tons (Dec.)); CX 2520 (Haley, Dep. at 30) (explaining these pages of CX 1297, Bates numbered SRHW-00023 through -00034, as copies of the internal work papers on which SRHW compiled the information obtained from the DIFRA members); Brakefield, Tr. 1264-1265 (testifying that he did not know whether U.S. Pipe sold 10,000 tons of Fittings annually and that he did not ask)).

Response To Finding No. 1127:

See response to ¶ 1118.

1128. Sigma, McWane and Star knew that U.S. Pipe had stopped manufacturing Fittings in April 2006, and re-sold Fittings that it largely purchased from Sigma. (Morton, Tr. 2810, 2819, 2866 (Sigma was U.S. Pipe's primary supplier of Fittings after U.S. Pipe ceased production in 2006); Brakefield, Tr. 1268-1269 (U.S. Pipe did not manufacture its own Fittings, and purchased Fittings from Sigma); Tatman, Tr. 473-474 (U.S. Pipe sold Fittings that it bought from others); CX 0313 at 004 (Pais writing that U.S. Pipe was "not a producer anymore, but a small player buying almost all of their needs from Sigma"); CX 2527 (Pais, IHT at 74) (U.S. Pipe sales of Fittings during DIFRA period not significant); (CX 2538 (McCutcheon, IHT (Vol. 2) at 297-298) (by the time DIFRA was formed, U.S. Pipe only purchased Fittings from other producers and resold them)).

Response To Finding No. 1128:

See response to ¶ 1118. as per Complaint Counsel’s proposed Finding ¶ 1126, the draft bylaws spoke in terms of “tons of fittings sold,” not manufactured. Thus, the proposed Finding is not relevant.

1129. U.S. Pipe’s participation in the DIFRA information exchange was so insubstantial that Mr. McCutcheon incorrectly believed that McWane, Star, and Sigma were the only three companies that exchanged data through DIFRA. (CX 2538 (McCutcheon, IHT (Vol. 2) at 298)).

Response To Finding No. 1129:

See General Response 1, 4, and 11.

1130. According to Mr. Rybacki, there was no connection between DIPRA and DIFRA, and DIFRA members had no interest in having DIPRA members participate in DIFRA, except to the extent a DIPRA member also was a manufacturer of Fittings. (Rybacki, Tr. 3539).

Response To Finding No. 1130:

Mr. Rybacki testified:

Q. Did you have an interest in having DIPRA members participate in DIFRA?

A. If they were involved in fittings only -- if they were involved in fittings, so in other words, Griffin wouldn't be, but ACIPCO, U.S. and McWane would be.

As is evident from his actual testimony, Mr. Rybacki was testifying about his own opinion and not, as stated in ¶ 1130, on behalf of all “DIFRA members” and, in any event, he did not purport to be expressing the collective opinions of all DIFRA members.

7.4.4 DIFRA Operational Stage Organizing in 2008

1131. The four DIFRA members held an organizational meeting on March 27, 2008 in the Birmingham, Alabama offices of Bradley Arant to discuss the information exchange reporting procedures and guidelines. (CX 1486 at 001, 002 (agenda); CX 2272 (planning email); CX 1084 at 001 (planning email)).

Response To Finding No. 1131:

See General Response ¶ 8.

1132. In attendance at the March 2008 meeting were representatives of all four DIFRA members: Messrs. Brakefield, Pais, Bhattacharji, and Rybacki of Sigma; Mr. McCutcheon of Star; Mr. Crawford or Mr. Murray of U.S. Pipe; and Mr. Tatman (and possibly Mr. Leonard and Mr. Walton) of McWane. Mr. Long did not attend. (Brakefield, Tr. 1270-1271 (listing attendees); Tatman, Tr. 475 (Mr. Tatman attended); McCutcheon, Tr. 2416 (Mr. McCutcheon attended); CX 1477 at 001 (Mr. Long, DIFRA's lead attorney, did not attend, but sent his colleague Mr. Herren instead)).

Response To Finding No. 1132:

Respondent has no specific response.

1133. The meeting agenda included the following item:

Status of Reporting of production and/or sales data to independent CPA, including (1) reporting form, (2) reporting frequency, (3) identification of CPA, (4) dissemination and form of reports to membership (if any) based on reports input, and (5) proper and improper utilization of the data. To the extent one or more of the four remaining interested members opt out of the Association or out of the reporting aspect, there should be a discussion as to whether a continuation of the reporting program can be legally justified.

(CX 1486 at 002; Brakefield, Tr. 1272).

Response To Finding No. 1133:

The agenda, prepared and sent by DIFRA counsel, included an entire page of agenda topics in addition to the reporting of historic, tons-shipped data set forth in this proposed Finding, including the discussion of committee structures, setting up a DIFRA bank account, technical topics to be discussed, including issues of standardization of fittings, coatings, and a host of other issues. (CX 1486).

1134. After the March 27, 2008 DIFRA meeting, Mr. Tatman had dinner alone with Mr. McCutcheon. (Tatman, Tr. 475; McCutcheon, Tr. 2418; RX-698 (McCutcheon, Dep. at 40)).

Response To Finding No. 1134:

Although Messrs. Tatman and McCutcheon testified to having had dinner in connection with the DIFRA meeting, Mr. Tatman testified that they did not discuss the Fittings market and

did not discuss pricing. Both Messrs. Tatman and McCutcheon have testified that they have never, in connection with the March 2008 dinner or otherwise, reached any agreement regarding their respective companies' Fittings pricing and every McWane, Sigma and Star witness denied any agreement re fittings pricing. (RFPP §§ IV, VI, VII).

1135. Mr. McCutcheon also had dinner alone with Mr. Pais following one of the DIFRA meetings in Birmingham. (McCutcheon, Tr. 2373 (Mr. Pais and Mr. McCutcheon met in Birmingham after a DIFRA meeting); *see also supra* ¶ 1036 (describing dinner meeting between Pais and McCutcheon)).

Response To Finding No. 1135:

See General Response ¶ 4 and response to ¶ 1034. Paragraph 1135 omits to point out that Mr. McCutcheon testified, contrary to the implication of the proposed Finding, that he did not reach any agreement with Mr. Pais regarding Fittings pricing. (McCutcheon, Tr. 2375-2376).

1136. On March 28, 2008, Mr. Tatman reported on the DIFRA meeting to Mr. McCullough as follows:

The DIFRA session was interesting. It would appear the association is a go with a tentative target to report 2006, 2007 and 2008 (Jan-Mar) data around mid April. McWane, Sigma, Star and U.S. Pipe will be the reporting members.

(CX 1560 at 001; Tatman, Tr. 476-477).

Response To Finding No. 1136:

Respondent has no specific response.

1137. On April 2 and 4, 2008, Mr. Tatman sent follow-up emails to Mr. Long and Mr. Herren of Bradley Arant, suggesting input/output formats for the DIFRA reports and proposing a target of April 14, 2008 for the members' initial submittal of data to DIFRA. (CX 1477 at 001, 003; Tatman, Tr. 478-482).

Response To Finding No. 1137:

Respondent has no specific response.

1138. Later on April 4, 2008, Mr. Long sent an email to the four DIFRA members, noting that he had received proposed reporting forms and that:

I find that they are consistent in approach and seem to minimize antitrust concerns. (This does not mean all antitrust concerns are definitely gone, as you always have some concern with information aggregations when there are relatively few participants, but the suggested approach is designed to minimize possible antitrust exposure down to a level which is acceptable.)

(CX 2267 at 001, 002). Mr. Long requested comments from the DIFRA members on the proposed format and related assumptions, and relayed Mr. Tatman's suggestion of a target date of April 14, 2008 for the submission of data. (CX 2267 at 001, 002; Tatman, Tr. 483-484).

Response To Finding No. 1138:

Respondent has no specific response.

1139. On the morning of April 25, 2008, Messrs. Tatman, Pais, Brakefield, and McCutcheon held a conference call on which they finalized and agreed upon the information exchange reporting format. (CX 0160 at 002; Tatman, Tr. 485-486; CX 1479 at 001; McCutcheon, Tr. 2418; Brakefield, Tr. 1276; Brakefield, Tr. 1279 (stating that page 004 of CX 1479 reflects the reporting format that DIFRA adopted)).

Response To Finding No. 1139:

See General Response 8 regarding argumentative and inaccurate use of the term “information exchange.” Paragraph 1139 omits to identify a complete list of persons participating in the telephone conference, specifically DIFRA antitrust counsel Thad Long, and the fact that Gary Crawford has commented to Mr. Long that he was absent because he was “out of the country” but deferred to counsel and the DIFRA members’ decisions regarding reporting format. The reporting format for the submission of historic, aggregated tons-shipped data was not “finalized and agreed upon” between McWane, Sigma, and Star, but rather,, with the advice and consent of at least three experienced antitrust attorneys from the Bradley Arant firm and an independent third-party accounting firm, (¶ 243-250), the reporting forms were submitted to the

independent, third-party accountants, which then aggregated and disseminated the historic, tons-shipped data to the DIFRA members, and no DIFRA member was able to determine any price related information from the DIFRA reports.

1140. On the April 25, 2008 call, the three suppliers agreed that each member would submit data regarding its Fittings sales by tons shipped to the accounting firm SRHW, which would then aggregate the data and provide reports to the DIFRA members reflecting industry-wide sales by the 20th of the month. The three suppliers agreed that they would submit their data by “no later than” May 15, 2008. Going forward, members would report, by the 15th of each month, their prior months’ data. (CX 0160 at 002; Tatman, Tr. 486-487; CX 1479 at 001; Brakefield, Tr. 1276-1277; *see also* CX 1186 (Tatman May 23, 2008 email stating that “Nearly four weeks ago all members agreed on a conference call to report by the 15th.”); Brakefield, Tr. 1281-1282 (describing “consensus” on conference call as to May 15 submission of data); McCutcheon, Tr. 2417).

Response To Finding No. 1140:

See response to ¶ 1139.

1141. According to their April 25, 2008 agreement, DIFRA members would report to SRHW short-tons of Fittings shipped within the United States in the following six categories: 2”-12” Flanged; 2”-12” All Other; 14”-24” Flanged; Greater than 24” Flanged; Greater than 24” All Other. Members’ initial submissions would include annual data for 2006, monthly data for 2007, and monthly data for 2008. (CX 1479 at 001; CX 1329 at 009; CX 0160 at 002; CX 1479 at 001; McCutcheon, Tr. 2417)).

Response To Finding No. 1141:

See response to ¶ 1139. Although ¶ 1141 seems to imply something sordid by referencing McWane, Sigma, and Star’s purported “April 25, 2008 agreement,” what ¶ 1141 is describing is merely a reporting format that was considered, approved, and supervised by antitrust counsel and an independent, third-party accounting firm.

1142. The data collected and reported by SRHW for DIFRA was organized in categories of Fittings (2” through 12”, 14” through 24”, larger than 24”, and flanged versus non-flanged) that McWane used in its blue books, and that are common in the industry. (CX 0052; Tatman, Tr. 535-536).

Response To Finding No. 1142:

Respondent has no specific response.

1143. The shipment tonnage data gathered by SRHW did not distinguish between Domestic Fittings and non-Domestic Fittings and did not indicate whether the tonnage was sold into open preference or domestic preference jobs. (Joint Stipulations of Fact, JX 0001 ¶ 18).

Response To Finding No. 1143:

Respondent does not dispute this proposed Finding.

1144.

(E.g., CX 2334 at 002, *in camera*)

Response To Finding No. 1144:

Paragraph 1144 omits to point out that historic tons-shipped data would report shipments on sales that could have been made many weeks, months, or even a year or more prior to shipment, and that it was common that shipping data would include such historic data. There is simply no way to tell from CX 2344 when the fittings represented therein were sold, or at what price.

1145. U.S. Pipe did not attend the April 25, 2008 call, and agreed to accept whatever decision was made by the others regarding reporting issues. (CX 0160 at 002; CX 1479 at 001).

Response To Finding No. 1145:

U.S. Pipe's representative did not attend the meeting because he was, as reported to DIFRA counsel Thad Long, "out of the country," and deferred to Mr. Long and the DIFRA members regarding how the trade association would structure the reporting format that was the subject of the discussions. See response to ¶ 1139.

1146. McWane expected that the DIFRA members would receive the first aggregated DIFRA report soon after the May 15, 2008 data submission deadline. (Tatman, Tr. 487).

Response To Finding No. 1146:

Mr. Tatman testified that he “assumed” that the DIFRA report would be issued after May 15, 2008. The proposed Finding fails to cite any evidence supporting a May 15, 2008 “deadline.”

1147. On May 5, 2008, Mr. Long asked the DIFRA members to confirm their agreement on the reporting procedures for the DIFRA information exchange. (CX 0160 at 001 (“Having heard no dissent, can we assume everyone concurs with these reporting procedures and parameters, so that reporting can begin by mid-May? Please confirm.”); Tatman, Tr. 487).

Response To Finding No. 1147:

See General Response 8. Complaint Counsel’s reference to the “DIFRA members...agreement” is argumentative and misleading and not supported by the record evidence. As reflected in the authority cited in support of ¶ 1147, DIFRA’s counsel was memorializing that “everyone,” including U.S. Pipe, McWane, Sigma, and Star, “concur[s] with the[] reporting procedures and paramaters” recommended by counsel. To characterize the memberships consent to submit data as recommended by counsel as an “agreement” among the “DIFRA members” is inaccurate.

1148. In response to Mr. Long’s May 5, 2008 email, Mr. Brakefield replied that day that Sigma would send its data “this week.” (CX 0159 at 001; RX-580 at 001, Brakefield, Tr. 1286). Mr. Brakefield also made Mr. Rybacki aware that the DIFRA reporting would begin in May 2008. (Rybacki, Tr. 3549; CX 1089 at 001).

Response To Finding No. 1148:

Respondent has no specific response.

1149. Also on May 5, 2008, Mr. Tatman responded to Mr. Long’s May 5, 2008 email, stating that McWane would send its data “early next week” – ahead of the May 15 deadline. (CX 0160 at 001; Tatman, Tr. 487-488). Mr. Brakefield forwarded Mr. Tatman’s email to Mr. Rybacki. (CX 1089 at 001).

Response To Finding No. 1149:

See response to ¶ 1146. Respondent disputes that Mr. Tatman’s representation that McWane would submit its historic, tons-shipped data prior to the reporting “deadline” is relevant of anything.

1150. Star did not immediately reply to Mr. Long’s April 25, 2008 or May 5, 2008 emails. (RX-580 at 001).

Response To Finding No. 1150:

Respondent disputes the relevance of whether or when Star, McWane, Sigma, or U.S. Pipe responded to the DIFRA attorney’s email.

7.4.5 Star Was a Reluctant Participant in DIFRA

1151. Star was openly reluctant to participate in DIFRA. (CX 1092 at 001 (Pais observing that data was submitted only “after a fair amount of unease by Star”); CX 1187 (Tatman noting that “at least one member is being somewhat drug to the party”)).

Response To Finding No. 1151:

This proposed Finding, purporting to represent Star’s alleged “reluctance” to participate in DIFRA is not supported by the testimony of any Star witness or any Star document.

Respondent submits that Sigma’s Mr. Pais’ speculation about Star and Mr. Tatman’s speculation about an unidentified DIFRA member do not adequately support the proposed Finding.

1152. Star initially refused to join DIFRA. (McCutcheon, Tr. 2411). Star was repeatedly asked by Mr. Pais, Mr. Rybacki, and Mr. Brakefield to join DIFRA, and politely declined the invitations for about one year before finally agreeing to join. (McCutcheon, Tr. 2412-2413; CX 2538 (McCutcheon, IHT (Vol. 2) at 242) (“I fought it, for quite some time, and just politely fought it by just saying, no, politely, no, and they kept pushing it.”)).

Response To Finding No. 1152:

See General Response 3. Mr. McCutcheon’s testimony does not support the proposed Finding as to Star’s opinion of joining DIFRA. Mr. McCutcheon’s testimony only supports the assertion that, initially, Mr. McCutcheon himself was personally reluctant to join DIFRA, but

that other Star employees felt that joining DIFRA was to Star's benefit and convinced him of the benefits of joining DIFRA. (McCutcheon, Tr. 2413-2414). Mr. McCutcheon also testified that, once he was convinced regarding the benefits of joining DIFRA, Star was fully committed to participating in DIFRA. (McCutcheon Tr. 2413 ("When we decided to join, I attended the meetings. I submitted the data. We did what we were supposed to, what we committed to do.")) Mr. McCutcheon testified that joining DIFRA was beneficial to Star, at least in part, because of "the conversations at DIFRA were about collectively doing things to better the industry, writing white papers on pipe fittings, what was best for the industry, what products should be used, be more of a research institute to help the water and sewer industry." (McCutcheon Tr. 2414). The record evidence does not support the implication that Star was somehow forced to join DIFRA against its will.

1153. Mr. McCutcheon thought that joining DIFRA was a bad idea. He did not see a benefit of being in an association with competitors, did not see a real clear goal that would benefit Star, and was uncomfortable trusting his competitors. (McCutcheon, Tr. 2413). He did not think it was a good thing to have an association of competitors, and believed that "[w]e're competitors for a reason, and I'd rather compete." (CX 2539 (McCutcheon, Dep. at 191)).

Response To Finding No. 1153:

See response to ¶ 1152.

1154. Mr. McCutcheon also feared that DIFRA would allow Star's competitors to get information on Star Pipe, and did not think that was healthy. (McCutcheon, Tr. 2414; *see also* CX 2068 (McWane learned from DIFRA data that Star and Sigma had taken more of McWane's share than previously thought)).

Response To Finding No. 1154:

See response to ¶ 1152. Mr. McCutcheon testified only that he was "concerned" with the possibility that a Star competitor might "somehow" "be able to get information on Star Pipe," not, as implied in ¶ 1154, that Star's competitors would know what Star or any other DIFRA's market share would be. Indeed, every witness questioned on the issue testified that the

aggregated historic, tons-shipped data disseminated by DIFRA's accountants did not reveal anything to any member regarding pricing or the specific market share of any competitor-member. (RPF 251-265). Finally, the statement that "McWane learned from DIFRA data that Star and Sigma had taken more of McWane's share than previously thought" is not supported by CX 2068. CX 2068 establishes that McWane had concluded from the tons-shipped data that "our share loss for 2007 and Apr YTD 2008 is actually larger than what I expected," but says nothing about what Sigma or Star or U.S. Pipe shares were, nor could Mr. Tatman determine same from the DIFRA data.

7.5 In May and June 2008 McWane Agreed to a Further Price Increase Conditioned Upon Sigma's and Star's Participation in the DIFRA Information Exchange

1155. In May and June of 2008, McWane agreed to a further price increase in return for Sigma's and Star's participation in the DIFRA information exchange. (*Infra* ¶¶ 1156-1259).

Response To Finding No. 1155:

See General Response 1 and responses to ¶¶ 1156-1259, *infra*.

7.5.1 Sigma Remained Eager for a Further Price Increase, and Sought to Demonstrate to McWane That It Had Complied with the Tatman Plan's Call for the Elimination of Project Pricing

1156. In April 2008, Sigma remained eager for further price increases, and sought to proactively demonstrate to McWane that it had complied with the Tatman Plan's call for the elimination of Project Pricing. (*Infra* ¶¶ 1157-1173).

Response To Finding No. 1156:

See General Response 1 and responses to ¶¶ 1157-1173, *infra* and responses to ¶ 907-929, 1041, and 1054.

7.5.1.1 Sigma Planned a Further, "Big Bold" Price Increase, and Lobbied McWane and Star for Support

1157. In April 2008, Sigma was internally considering whether to raise Fittings price multipliers. (Pais, Tr. 1926; CX 1138 at 001; Rybacki, Tr. 3541-3542).

Response To Finding No. 1157:

Respondent has no specific response.

1158. In an April 11, 2008 email to Sigma's management team, Mr. Pais proposed a two-pronged approach to increasing pricing: Sigma would announce significant multiplier increases (described by Mr. Pais as a "BIG BOLD MOVE"); and Sigma would curtail Project Pricing (described by Mr. Pais as Sigma's "ill-fated 'dual' pricing approach for PW/JOBs"). Mr. Pais wrote as follows:

Keeping with our ongoing effort to boost our Prices and hence GMs as our AIC keep rising due to sharp overseas raw material increases, which have finally caught up with the domestic scrap costs too, please find the proposed MULTIPLIER MAP that LR and I discussed 4/8 when he visited CRM. Though we would have preferred a LIST PRICE increase, as it is generally deemed 'safer', we can also empathize with McWane's trepidation about that route when multiplier have slide last 2 years by almost 20% -- not to speak of VRs which have climbed about 20% too.

In the end, all we care about [is] a NET increase in ASP/MT which will ensure our maintaining -- an[d] even boosting -- our GMs despite the cost increases as we can benefit from Inventory profits as well, as we realized in 04.

Despite the gloomy assessment -- both about the market and competition -- we have a very strong opportunity to lead and be a catalyst in boosting the Multipliers to another level, in ONE SHOT! It's time BIG BOLD MOVES (BBM, baby!) and this M-Map aims at just that...

...

I also think our pricing strategy needs to be a 1-2 punch -- taking this opportunity to also correct the ill-fated 'dual' pricing approach for PW /JOBs. I have also drafted a letter -- which LR can abbreviate as he does so well -- and I think we should launch this 1-2 punch Monday 4/14 and make them effective 5/5/08. This ill-advised 'PW' pricing has been suspiciously perceived by McWane as a way to get around the Market pricing and they will continue to resist any price boosts as they have truly lost market share and they suffer from very high inventory levels and very uncertain future since they also have substantial manufacturing commitments. We need to earn their TRUST and CONFIDENCE in our plan to improve the industry. So, it will take a measure of DISCIPLINE and MATURITY on our part too. It's thru our gutsy example that we can and must draw the other to our cause and make them

follow in a new paradigm that has worked well in other products -- DIP, V&H, Couplings etc.

(CX 1138 at 001-002; Pais, Tr. 1926-1927; Rybacki, Tr. 3541-3546).

Response To Finding No. 1158:

Respondent disagrees with this proposed finding as inaccurate and misleading. The document cited was established at trial as a draft letter created by Mr. Pais for internal discussion purposes and not, as the proposed Finding would imply, a communication that was actually disseminated to Sigma customers. Moreover, Mr. Pais testified immediately after the cited trial testimony that Sigma was not planning and, in fact, did not eliminate “special pricing” that would lower prices beyond the published price adjustments referenced in the draft internal letter. (Pais, Tr. 1929). With respect to the statement in ¶ 1158 that “Sigma would curtail Project Pricing (described by Mr. Pais as Sigma’s “ill-fated ‘dual’ pricing approach for PW/JOBS,” Mr. Pais testified that, despite Complaint Counsel’s effort to equate “curtailing project pricing” with the “ill-fated ‘dual’ pricing approach for PW/JOBS,” the two concepts were, in fact, “separate.” (Pais Tr., 1932-1933).

1159. Mr. Pais attached a draft pricing letter to customers that explicitly stated that Sigma would cease to use any Project Pricing:

As such, we wish to inform our customers that starting **May 5, 2008**, all customer requests for quotations any Plant Work and Special Jobs will be processed using our prevailing national list price and our regional multiplier terms and we will cease to use any varying ‘special’ pricing.

(CX 1138 at 004 (emphasis in original); *see also* Pais, Tr. 1917 (“[W]e tried to tell our customers we’re not going to give a different pricing for plant work and job and special and underground. We’re going to have one, which we would like to use the list price and multiplier, and then depending on the horse trading, we will try to win the business on a case-by-case basis.”); Minamyer, Tr. 3144 (“project price” and “special price” are used interchangeably)).

Response To Finding No. 1159:

See response to ¶ 1158. Again, this proposed Finding is inaccurate and misleading in that it implies that Sigma curtailed or eliminated Project Pricing based on an internal, draft letter that was not communicated to Sigma customers. Mr. Pais testified that Sigma did not curtail or eliminate Project Pricing or special pricing in order to win jobs away from McWane and Star, (Pais, Tr. 1929), and, as reflected in Mr. Pais' testimony cited above, Sigma's position was that it would employ special pricing to "win business." (Pais Tr., 1917) ("We're going to have one, which we would like to use the list price and multiplier, and then depending on the horse trading, we will try to win the business on a case-by-case basis.") The record evidence is abundantly clear that Sigma never eliminated or curtailed Project Pricing. (RPF ¶¶ 150-159; *see also* Pais, Tr. 1933 ("special pricing...continued before, during and after all this discussion.")).

1160. In his cover email, Mr. Pais admitted that his intent behind the customer letter was to earn McWane's "TRUST and CONFIDENCE in our plan to improve the industry." (CX 1138 at 001; *see also* CX 1132 at 002 (subsequent draft of same letter circulated by Mr. Pais on May 6, 2008); Pais, Tr. 1932 (Mr. Pais believed Sigma needed to show McWane that "we don't exist merely to keep inflicting pain on them"))).

Response To Finding No. 1160:

See response to ¶¶ 1158-1159. This proposed finding is inaccurate and misleading in that it implies that Sigma was directly or indirectly communicating with McWane when, in fact, the documentary evidence cited consists of an *internal* email and *draft* letters that were not sent to Sigma customers or McWane. See response to ¶¶ 1158-1159, *see also* ¶ 1160 (stating "subsequent *draft* of same letter."). The statement, then, that "Mr. Pais admitted that his intent behind the customer letter was to earn McWane's "TRUST and CONFIDENCE in our plan to improve the industry" and that, through the *draft* letter, "Mr. Pais believed Sigma needed to show McWane that 'we don't exist merely to keep inflicting pain on them,'" is not supported by the record evidence.

1161. Later on April 11, 2008, Mr. Pais explained to a skeptical Sigma manager that Sigma “will NOT – and can NOT – do this unilaterally,” but that “SIGMA/[McWane] may have to be patient and tolerant [of Star] to a certain extent as long as we maintain our volume.” (CX 1137 at 001; Pais, Tr. 1935-1937). All in all, Mr. Pais concluded, “THE BENEFITS OF THESE SIGNIFICANT BOOST IN PRICING FOR ALL [FITTINGS] ARE TOO GREAT TO IGNORE OR BE SKEPTICAL ABOUT!” (CX 1137 at 002 (emphasis in original); Pais, Tr. 1938).

Response To Finding No. 1161:

Respondent disagrees with this proposed finding as inaccurate and misleading. An examination of all the testimony and evidence surrounding that which is selectively quoted and referenced in the proposed Finding reveals, at best, the irrelevance of the proposed Finding and, in fact, powerful evidence contradicting Complaint Counsel’s allegation of a conspiracy to curtail job discounting by McWane, Star, and Sigma. First, with respect to Mr. Pais’ statement that Sigma could not implement its “Big Bold Move” unilaterally, Mr. Pais testified simply that a substantial, unilateral price increase by Sigma would fail because the competition would simply buy from Sigma’s competitors and / or Sigma’s price increase “would not last.” (“as I’ve said repeatedly, up to a point we need the market to support a price that we wish to charge, so any initiative that we take, if there was no -- somewhat of a following by others and we are in a different ballpark, naturally it would not last, would it?”) As is clear from the record, Sigma did try to unilaterally increase its prices substantially (approximately 25-30 percent) in its “big, bold move” and was forced to rescind that substantial price increase because of McWane’s independent refusal to follow Sigma’s substantial price increase. (RPF ¶¶ 128-138). Second, Complaint Counsel points to no evidence suggesting that Mr. Pais’ reference to not being able to implement Sigma’s price move “unilaterally” had anything to do with a preceding agreement or any prior or expected coordination or collusion to jointly raise prices with McWane or Star. Indeed, the testimony immediately following that cited and quoted by Complaint Counsel

confirms an absence of an agreement -- or any expectation thereof -- to curtail or eliminate Project Pricing -- four months *after* the purported conspiracy was allegedly in place:

- Q. And you say, at the end of this paragraph: Of course, we all have to be realistic that there will be some deviation especially from Star... why did you expect deviation from Star, sir?
- A. Well, it was an open knowledge in the business that Star was most aggressive in their pricing under this special pricing or job or whatever it's called, and so we expected them to continue.

(Pais, Tr. 1937).

1162.

(Rybacki, Tr. 3635-3636, *in camera*; Rybacki, Tr. 3610, 3617, *in camera*, ; CX 1621-A at 099-100, *in camera* (Rybacki telephone records); *supra* ¶¶ 758-760 (detailing telephone records)).

Response To Finding No. 1162:

See Response To Finding 714, *supra*.

1163.

[REDACTED] (Rybacki, Tr. 3635-3636, *in camera*; CX 1621-A at 098, *in camera* (Rybacki telephone records); *supra* ¶¶ 761-763 [REDACTED])

Response To Finding No. 1163:

See General Response 4 and responses to ¶¶ 761-763. Respondent disagrees with this proposed finding as misleading and inaccurate. Despite Complaint Counsel's assertion that "Mr. Rybacki cannot explain the purpose of these phone calls," Mr. Rybacki testified that the phone records indicate some calls for a duration of only one minute and that for any such "call," "We obviously didn't speak." (Rybacki, Tr. 3636). Moreover, Mr. Rybacki testified that he did not recall the subject matter of the purported telephone calls, which occurred over 4 years prior,

and to suggest that he “cannot explain” is inaccurate and implies, without proof, that the calls were improper and should be recalled four years later and “explained.” All witnesses, including Messrs. Rybacki and McCutcheon, denied that they reached any agreement with anyone regarding Fittings pricing. (RPF §§ III, VI, VII). *See* Response To Finding 714, *supra*.

1164.

(Rybacki, Tr. 3638, *in camera*; Rybacki, Tr. 3610, 3617, *in camera*, ; CX 1621-A at 104-105, *in camera* (Rybacki telephone records); *supra* ¶¶ 764-765 (detailing telephone records)).

Response To Finding No. 1164:

See responses to ¶¶ 764-765. *See* Response To Finding 714, *supra*.

1165. Mr. Tatman later noted, in his April 16, 2008 Executive Report for the first quarter of 2008, that Sigma had communicated its desire for a further price increase:

With costs continuing to rise in China, Sigma has recently been putting out feelers on executing another price increase. Their communications appear to be testing our acceptance or resistance to supporting their prior announced then retracted January list price increase.

(CX 1564 at 005; *see also* CX 2484 (Tatman, Dep. at 117-118) (discussing CX 1564)).

Response To Finding No. 1165:

CX 1564 does not support that Sigma had “communicated its desire”. The document on which the paragraph is based is replete with examples of how McWane has no idea what Sigma’s intentions or future actions on pricing will be. (CX 1564-005) (“appear,” “I don’t believe that pricing can be supported,” “I am pretty sure,” and “I suspect they will...”). Respondent disagrees with this proposed finding as misleading and inaccurate. Complaint Counsel has introduced no evidence at trial connecting any of the purported telephone calls, showing only that a call was placed from one number to another number, to any pricing discussions among

competitors or any agreement with respect to Fittings pricing. Similarly, and despite the implication, Complaint Counsel has introduced no evidence connecting any such telephone call with Mr. Tatman's internal April 16, 2008 Executive Report for the first quarter of 2008. The face of that document demonstrates the absence of an agreement or understanding with respect to Fittings pricing, stating only that it "appeared" that Sigma might attempt a price increase. Moreover, every witness questioned on the issue testified that there was no advance discussions among McWane, Sigma, and Star regarding any price adjustments in the summer of 2008, (RPF §§ III, VI, VII), and Mr. Tatman explicitly testified that his April 16, 2008 Executive Report was based solely upon the hearsay statements of his field employees and that the opinions in his report were only his "speculation." (RPF ¶¶).

1166. On April 18, 2008, Mr. Pais told his management team in an email that he believed Star would follow Sigma's price increase, but that McWane was more "skeptical" and "CAUTIOUS," and that therefore "WE WILL HAVE TO INFLUENCE THEM THROUGH OUR SINCERITY AND CLARITY OF OUR PLANS AND ACTIONS." (CX 1134 at 001, 002; Pais Tr. 1942-1943 ("Q. . . . The 'them' in that sentence, that's a reference -- is that a reference to McWane and Star, sir? A. Possibly.")).

Response To Finding No. 1166:

Respondent disagrees with this proposed finding as misleading and inaccurate. Even taking the proposed Finding at face value, it only establishes that Sigma "believed" that Star might follow Sigma's price adjustments and that Sigma was outright skeptical about McWane's likelihood of following any adjustment. But even that interpretation of the proposed Finding incorrectly suggests a higher level of knowledge than Mr. Pais testified to at trial. With respect to Mr. Pais' belief regarding how Star *might* react, Mr. Pais testified that he, in fact, "had no idea what [Star] would do. They are most unpredictable," and that any belief that Star might follow Sigma's *already* publicized price adjustment was based solely on his assumption that, "since they [Star] were facing the same cost pressures, it's only logical that they would also feel the

same way as we did, but then logic is very evasive.” (Pais, Tr. 1941). With respect to McWane, the record clearly establishes that McWane did not follow Sigma’s price increase, instead charting its own course, which caused Sigma and Star to rescind their already announced price adjustments. (RPF 128-140).

1167. Mr. Pais wrote in that email that Sigma’s April 2008 price increase letter should “include one line to signal SIGMA’s strong commitment to ‘clean up’ our pricing.” (CX 1134 at 001; Pais, Tr. 1939-1940 (“clean up our pricing” referred to an effort to “streamline” or “reduce the variations” in Sigma’s pricing)).

Response To Finding No. 1167:

Respondent disagrees with this proposed finding as misleading and inaccurate. Mr. Pais’ testimony establishes that his email reflected only his personal recommendation in the context of an “internal debate” at Sigma regarding a future, unpublished price letter. (Pais, Tr. 2094).

Mr. Pais’ suggestion was intended to convey to “customers” his concept of Sigma’s effort to “clean up” Sigma’s pricing only: “Well, again, ‘clean up’ is -- I think I’ve dealt with it extensively, that we were creating so many different pricing movements within our pricing, it had become so unwieldy to streamline our pricing.” (Pais, Tr. 1939).

7.5.1.2 Sigma Prematurely Announced Its Price Increase After the DIFRA Members Reached Agreement on Reporting Procedures

1168. On or about April 25, 2008, the same day that McWane, Sigma, and Star reached an agreement to exchange information through DIFRA and settled on the corresponding reporting procedures (CX 0160 at 002), Sigma sent out new customer letters announcing that it would institute multiplier increases of up to ten multiplier points, to be effective May 19, 2008. (CX 0862 at 001-002 (Star email, dated April 25, 2008 at 4:18 pm: “Here is the Sigma fitting increase letter that just hit the streets today.”); *see also* CX 0137 at 003 (version faxed to Ferguson on April 27); Tatman, Tr. 493-494; CX 1855 (revised draft emailed by Rybacki to Sigma M20 on April 24); Brakefield, Tr. 1278; RX-052 (Pais email instructing regional managers to send out letter on April 25); Pais, Tr. 1944; CX 1858 (Sigma regional manager forwarding letter on April 25 to be sent out that day); Rybacki, Tr. 3551-3552).

Response To Finding No. 1168:

See General Responses 1, 8, and 11. Respondent disagrees with this proposed finding as misleading and inaccurate. Complaint Counsel attempts to string together independent events and implies a correlation without any corroborating evidence. The statement that “McWane, Sigma, and Star reached an agreement to exchange information through DIFRA and settled on the corresponding reporting procedures” is inaccurate and misleading. Respondent incorporates its response to ¶¶ 1141, 1147. With respect to Sigma’s pricing announcement communicated to its customers, the trial testimony establishes that Sigma’s pricing determinations were made independently of McWane (RPF ¶¶ 130, 132-133, 135), that McWane did not communicate or coordinate with Sigma regarding Sigma’s price adjustments (RPF ¶¶ 132-136), and that Sigma was forced to rescind and lower its published pricing because McWane independently charted its own course regarding its pricing and did not follow Sigma’s published pricing. (RPF ¶ 137)

1169. The effective date for Sigma’s April 25, 2008 price increase announcement was May 19, 2008, which was four days after the first DIFRA data was due to be submitted to SHRW and therefore the approximate date on which the members expected the first DIFRA report. (CX 0862 at 002; Tatman, Tr. 487. (CX 0862 at 001).

Response To Finding No. 1169:

Respondent disagrees with this proposed finding as misleading and inaccurate. Complaint Counsel attempts to string together independent events and implies a correlation without any corroborating evidence. In fact, the uniform record evidence establishes that DIFRA did not facilitate any price coordination among the DIFRA membership and that no DIFRA member could determine anything about a competitors’ pricing from the DIFRA reports of historic, aggregated tons-shipped data. (RPF ¶¶ 260, 265). Moreover, as Sigma had already announced its price adjustment on April 25, 2008, the effective date of the price adjustments and the implication of its purported relationship to the date that the DIFRA report was purportedly

assumed to issued is not relevant. Moreover, Complaint Counsel supports the statement that “The effective date for Sigma’s April 25, 2008 price increase announcement was...therefore the approximate date on which the members expected the first DIFRA report” only with Mr. Tatman’s testimony, speaking on his own behalf, and not on behalf of all the DIFRA “members,” that he “assumed” that he would “expect a report soon” after the members each submitted their historic tons-shipped data to DIFRA’s third-party, independent accounting firm. (Tatman, Tr. 486-487.) The record evidence simply does not support the inferences that Complaint Counsel is trying to make and the argument that Sigma’s price adjustments had anything to do with DIFRA or the DIFRA historic, aggregated tons-shipped reports.

1170. The new, higher multipliers announced by Sigma in its April 25, 2008 price increase letter were intended to apply to all of Sigma’s Fittings sales so that all of Sigma’s Fittings prices would be at one level. (Pais, Tr. 1943; RX-051 at 0001).

Response To Finding No. 1170:

Respondent disagrees with this proposed finding as misleading and inaccurate.

Complaint Counsel cites as support for this proposed Finding only an internal email from Mr. Pais “suggesting” that Mr. Rybacki include in a future unpublished customer price letter language relating to Mr. Pais suggestin for implementing Sigma’s big, bold move on pricing and, specifically about pricing on plant work. There is no evidence connecting Mr. Pais’ internal recommendations regarding plant work pricing with the purported “intent” of Sigma’s April 25, 2008 pricing letter.

1171. In its April 25, 2008 price increase announcement to customers, Sigma specified that “[o]nly orders that are placed before May 19, 2008 with a specific shipping date will be honored and any jobs that are held for release will be subject to the new multipliers.” (CX 0862 at 002 (emphasis in original); CX 0176 at 002 (emphasis in original)).

Response To Finding No. 1171:

Respondent states that ¶ 1171 accurately quotes a selected portion of the subject document but disagrees that the proposed Finding supports either ¶ 1155 or ¶ 1156 or that Sigma's April 25, 2008 customer price letter supports Complaint Counsel's allegation of price coordination by McWane, Sigma, and Star.

1172. McWane received a copy of one of Sigma's multiplier increase letters on April 25, 2008, and thought that the price increase that Sigma was announcing – an estimated 18% to 40% in the region covered by the letter – was too high to “stick.” (CX 0176 at 001; Tatman, Tr. 490-491). Mr. Tatman forwarded the letter to Messrs. McCullough and Walton, calling it “interesting reading,” and noting that “I don't think any of us truly believe that degree of net price will stick.” (CX 0176 at 001; Tatman, Tr. 490-491).

Response To Finding No. 1172:

Respondent states that the record evidence establishes that McWane received Sigma's April 25, 2008 customer price letter from a McWane customer, not Sigma, and that McWane did not follow Sigma's stated price increases, independently charted its own course and introduced lower prices, thereby causing Sigma to rescind the substantial price increases that Sigma had announced. (RPFF ¶¶ 128-140).

1173. On May 7, 2008, Star announced multiplier price increases that matched Sigma's, effective May 19, 2008. (CX 0037 at 001; McCutcheon, Tr. 2419-2420; CX 0819; CX 2538 (McCutcheon, IHT (Vol. 2) at 457-458); Minamyler, Tr. 3209; CX 0816; CX 0817; CX 0818; CX 0819; CX 0820; CX 0821; CX 0822; CX 0823).

Response To Finding No. 1173:

Respondent states that, on May 7, 2008, Star sent a letter to its customers announcing a multiplier increase of similar magnitude to Sigma's April 24, 2008 customer letter, (RPFF ¶ 131), but that Star was forced to rescind that price increase as a result of McWane's independent decision to not follow Sigma or Star with respect to their respective price announcements (RPFF ¶¶ 128-140), and that Star and Sigma were forced to rescind their price increases as a result of McWane's independent pricing action (RPFF ¶¶ 137-138). Respondent also states that the

evidence cited in support of this proposed finding does not support same, including Mr. Minamayer's testimony, which clearly established that, rather than confirming that Star announced a price increase on May 7, 2008, he had no recollection of such an increase and still did not recall such an increase after Complaint Counsel attempted to refresh his recollection with exhibits cited in support of the proposed Finding. (Minamyer, Tr. 3208-3209).

7.5.2 McWane's May 7, 2008 Coded Letter Invited Sigma and Star to Collude by Requiring Participation in DIFRA in Exchange for Fittings Price Increases

1174. McWane's May 7, 2008 customer letter was an invitation to collude directed at Sigma and Star, whereby McWane would agree to Fittings price increases if its competitors participated in DIFRA. (*Infra* ¶¶ 1175-1191).

Response To Finding No. 1174:

See General Response 1 and 11 and responses to ¶¶ 1175-1191, *infra*.

1175. Mr. Tatman studied Sigma's April 2008 price increase announcement and concluded that Sigma's large proposed price increase was undesirable as it would likely lead the industry back to Project Pricing and "instability." (CX 0137 at 001; Tatman, Tr. 495).

Response To Finding No. 1175:

See General Response 1 and 11. Respondent disagrees with this proposed finding as misleading and inaccurate. The cited document and trial testimony does not support the assertion that Mr. Tatman "studied" Sigma's letter or that Mr. Tatman thought Sigma's proposed price increase was "undesirable." The record evidence establishes that McWane obtained Sigma's pricing letters from McWane customers, and not from Sigma. (RPFF ¶ 133). The statement that Sigma's pricing would lead to "industry" "instability" is also not supported by the evidence cited. Rather, Exhibit CX 0137-001 refers only to "instability," a concept that Mr. Tatman testified referred only to *McWane's* pricing and his desire to have more visibility regarding Sigma and Star pricing so that he could underprice them and steal business away from the competition. (RPFF ¶ 105). Mr. Tatman's reference to "instability" and "stability" related to

Mr. Tatman's hope that, by narrowing the range, or "headroom," within which Star and Sigma could maneuver to undercut McWane on price in the field, McWane could gain better visibility of the "competitive level" - the true market price - and therefore compete more effectively on price, even with its smaller sales force. (Tatman, Tr. 346-349 (Q: "And that would be because you wouldn't have that compression between where the prices should be and where the prices are based on published." A: "Yes. If this is a 25 percent price increase, and the end result is real prices go up 15 percent, and we're already 10 percent instability, well, I get 15 percent in my pocket. That's good. But now the gap is 20 percent between where it used to be and now. So to me, all this is going to do, I'm going to get price out of this thing more than likely I could assume, but it's going to create for me a more unstable environment. I'm not going to be able to see where the competitive market is, and it's going to make it more difficult for me to meet my primary objective, which is share and volume." Q: "So it was going to give your competitors more headroom for discounting, in other words." A: "That would be in our perception."), 359-361 (Q: "And that pricing plan was designed to reduce job pricing in the market; is that right, sir?" A: "It was designed to put financial pressure on a competitor, which is procompetitive, so that we could get better visibility into what was going on in the marketplace. It was reducing the wiggle room that they had from a financial standpoint so that I could see what was going on. If I can see it, I can shoot it." Q: "When you say reduce -- better visibility and reduce wiggle room, that's another way of saying reduce their project pricing, their job pricing; is that right, sir?" A: "Or other mechanism. If a customer is making 50 percent profit on something, he's got a lot of things he can do. If he's making 20 percent profit on something, he doesn't have near the amount of flexibility."), 379 (Q: "What do you mean by 'competitive level'? A: "That's where is the actual market selling at. So if I'm offering a published price of \$20, where is the actual net price

in the marketplace? Is it \$15? Is it \$14? Is it \$10. I'm trying to figure out where competitors are taking business away from me, what are they doing with twelve different price mechanisms going on. Job pricing is one of twelve ways to sneak price out of there. I'm just trying to figure out where they're at. And wherever they are at, wherever the customers are truly buying at, I call that the competitive level, sir.”) & CX 627). The proposed Finding’s reference to industry instability is therefore not supported by the record.

1176. In a May 5, 2008 email to Mr. McCullough, Mr. Tatman linked Sigma’s recently announced price increase to the DIFRA data he expected to receive in a few weeks’ time: “Although the Sigma announcement represented an increase range of 20% to 40%, I don’t believe we would follow that lead regardless of the DIFRA data as it would lead to instability.” (CX 0137 at 001).

Response To Finding No. 1176:

See General Response 1 and 11. Respondent disagrees with this proposed finding as misleading and inaccurate. The testimony cited in support of the proposed Finding, rather than “linking” Sigma’s price announcement with the historic, aggregated tons-shipped data in the DIFRA reports, explicitly states that McWane will *not* follow Sigma’s lead in announcing a 20-40% increase “regardless of the DIFRA data.”

1177. Rather than blindly following Sigma’s announced price increase, Mr. Tatman proposed a potential price increase ranging from 8% to 12%, and attached a draft customer letter that “would align with the approach of waiting until the DIFRA data is available before announcing any price actions.” (CX 0137 at 001).

Response To Finding No. 1177:

See General Response 1 and 11. Respondent disagrees with this proposed finding as misleading and inaccurate and argumentative. The reference to “blindly following” Sigma’s price announcement is not supported by the record evidence cited and appears to be lawyer argument -- albeit argument that would seem to disprove an agreement between McWane and Sigma with respect to Fittings pricing.

1178. Mr. Tatman and Mr. McCullough decided to wait “until the DIFRA data is available before announcing any price actions.” (CX 2484 (Tatman, Dep. at 132) (Mr. McCullough wanted to have the DIFRA data before announcing any price action); Tatman, Tr. 494-496; CX 0137 at 001; CX 2484 (Tatman, Dep. at 136) (one of the reasons McWane announced that it was delaying a price action was that it wanted to wait for the DIFRA data, which it did not yet have)).

Response To Finding No. 1178:

See General Response 1 and 11. Respondent disagrees with this proposed finding as misleading and inaccurate. Moreover, Mr. Tatman testified that Mr. McCullough’s interest in the DIFRA tonnage report was driven by the legitimate business need to assess, to the extent possible, McWane’s competitive performance and market share. (RPF 273). The DIFRA aggregated tonnage report helped McWane decide, in June 2008, to chose the low end of a range of multiplier increases he had been considering, because the DIFRA report confirmed his suspicion that McWane was continuing to lose market share. (RPF 271).

1179. The draft customer letter that Mr. Tatman emailed to Mr. McCullough on May 5, 2008 stated that McWane would wait before announcing any price increases until it had “updates” on several unnamed “factors” that would become available at the same time McWane expected to receive the first DIFRA report:

Since several *misperceptions* are starting to circulate, we wanted to send out this general communication to clearly define our intention in regards to any future pricing actions.

Before announcing any price actions we carefully analyze all factors including: Domestic and Global inflation, market & competitive conditions within each region as well as performance against our own internal metrics. *We are currently waiting on updates for several factors but anticipate being able to complete our analysis towards the middle of the month.* At that point we will be sending out specific letters to each region detailing changes, if any, to our current pricing policy.

(CX 0137 at 002 (emphasis added)).

Response To Finding No. 1179:

See General Response 1 and 11. Respondent disagrees with this proposed finding as misleading and inaccurate. While respondent concedes that the proposed Finding selectively quotes a portion of the draft letter titled “Rough Draft Copy C” (CX 0137-002), Respondent states that the letter, as acknowledged, is indeed a draft letter that Mr. Tatman circulated for internal discussion purposes, is probative of nothing and not relevant to Complaint Counsel’s claims, and does not support the argument contained in ¶¶ 1155, 1174.

1180. McWane believed that by announcing a 20% to 40% price increase in advance of receipt of the first DIFRA report, Sigma had acted under the “misperception” that McWane would join a price increase prior to actual receipt of the DIFRA data. (CX 0137 at 001, 002; Tatman, Tr. 492-493 (admitting that he prepared the draft customer letter referring to “misperceptions,” and circulated the letter for discussion internally together with a copy of Sigma’s price announcement)).

Response To Finding No. 1180:

See General Response 1. Respondent disagrees with this proposed finding as misleading, inaccurate, argumentative, and wholly unsupported by the evidence cited. The statement that “Sigma had acted under the ‘misperception’ that McWane would join a price increase prior to actual receipt of the DIFRA data” is wholly unsupported. Despite the suggestion in the proposed Finding that Sigma had some expectation that McWane would “join” Sigma in a “price increase,” and that McWane was conscious of Sigma’s purported expectation, the cited testimony clearly establishes that McWane had no idea of what Sigma’s expectation was and Mr. Tatman denied that his reference to “misperceptions” in his “Rough Draft Copy C” letter (CX 0137-002) had anything to do with Sigma or Sigma’s price increase, much less that Mr. Tatman believed that “Sigma had acted under the ‘misperception’ that McWane would join a price increase prior to actual receipt of the DIFRA data:”

Q. Did you believe Sigma was acting under a misimpression by raising prices at this point in time?

A. I'm sorry.

Q. Did you believe Sigma was acting under some misimpression by raising prices at this point in time?

A. *I can't -- I don't know what's in their mind. I can only speculate*

Q. And you wrote that since -- in your draft, "Since several misperceptions are starting to circulate, we wanted to send out this general communication to clearly define our intention in regards to any future pricing actions"?

A. Sir, which draft are you looking at?

Q. I'm looking at your draft letter, sir.

A. Okay. I just saw the C. I didn't know if there was an A and a B here. That's what I wrote in a draft for discussion.

Q. And when you say "several misperceptions are starting to circulate," that was a reference back to the Sigma letter?

A. *I couldn't tell you exactly.*

(Tatman, Tr. 492-493). Thus, the entire proposed Finding is belied by the record evidence and, specifically, the record evidence cited in support of the proposed finding. McWane independently charted its own course with respect to its fittings pricing in the summer of 2008, obtained Sigma's price announcements from McWane customers, not Sigma, did not follow Sigma or Star announced pricing, and caused Sigma and Star to rescind their substantial price increases. (RPF 128-140).

1181. McWane sent the final version of this letter to its customers on May 7, 2008. (CX 0137 at 002; CX 0138; *see also* CX 2484 (Tatman, Dep. at 136) (letter drafted by Tatman); CX 2477 (Jansen, Dep. at 254-255) (Mr. Tatman wrote the May 7, 2008 letter); CX 2170 at 001; Tatman, Tr. 499-500).

Response To Finding No. 1181:

Respondent states that the evidence cited in support of this proposed statement does not support the conclusion that it was a "final" version of "this" letter.

1182. McWane's May 7, 2008 letter did not communicate any specific change in McWane's prices; instead, it communicated in veiled terms that McWane would not yet follow

Sigma's announced price increase, and that it would support higher prices only after it received the DIFRA report:

We are sending this general communication to our waterworks distribution customers to more clearly define our intention in regards to future pricing actions.

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

For planning purposes only, we expect for regions with a change that multipliers will increase in the range of 6% up to 16% effective June 16th.

(CX 0138 (emphasis added); CX 0526; CX 2170 at 002; Tatman, Tr. 499-502).

Response To Finding No. 1182:

See General Response 1 and 11. Respondent disagrees with this proposed finding as misleading, inaccurate, argumentative, and wholly unsupported by the evidence cited. McWane's May 7, 2008 letter, on its face, clearly communicated specific pricing information and anticipated changes in McWane's Fittings prices, and the specific date by which the new prices would be effective. (CX 0138) ("we expect for regions with a change that multipliers will increase in the range of 6% up to 16% effective June 16th."). Mr. Tatman testified that McWane sent the May 7, 2008 letter to its customers for their planning purposes because there had never before been a proposed price increase of the magnitude announced by Sigma, customers were inquiring of McWane how McWane would react, and Mr. Tatman answered his customers inquiries with the May 7, 2008 planning letter. (Tatman, Tr. 502-506). The statement that the letter "communicated in veiled terms that McWane would not yet follow Sigma's announced price increase, and that it would support higher prices only after it received the DIFRA report" is

also argumentative and wholly unsupported by the record evidence - there is simply no evidence to support the argument that the May 7, 2008 letter communicated in “veiled terms.” Moreover, as the letter never mentions Sigma or DIFRA or any language relating in any way to McWane purportedly “not yet following Sigma’s” price increases until “after [McWane] received the DIFRA report” is simply made up. To the extent the letter has anything to do with McWane pricing vis-a-vis Sigma, it is clear that McWane was anticipating much smaller price increases than Sigma and would not follow Sigma’s large price increases under any circumstances. (compare McWane’s anticipated 6-16% with Sigma’s announced 25% increase). Proposed Finding ¶ 1182 is also belied by proposed Finding ¶ 1195.

1183. Mr. Tatman testified that one “factor “ that he was waiting for before issuing a price increase was McWane’s monthly financial data for April 2008, as set forth in McWane’s monthly financial reports known as “blue books.” Mr. Tatman receives the blue books five days after the close of each month, and knew that McWane’s internal blue book data through April 2008 would be available by the second week of May 2008. (Tatman, Tr. 501, 818-819).

Response To Finding No. 1183:

See General Response 1 and 11. Respondent disagrees with this proposed finding as inaccurate and misleading. Mr. Tatman testified that he receives the “blue books” “five-ish some days after -- five business days roughly after the close of the month” (Tatman, Tr. 818-819), and that he expected to have internal blue book data by the second week in May. (Tatman, Tr. 501).

1184. Mr. Tatman believed that McWane would receive the DIFRA data in time to “complete [its] analysis by the end of May” and make a pricing decision that would be effective June 16, as provided in McWane’s May 7, 2008 letter to customers. (CX 2170 at 002; Tatman, Tr. 500-503).

Response To Finding No. 1184:

Respondent has no specific response.

1185. Mr. Tatman conceded at trial that McWane was waiting for the first DIFRA report before issuing the price increase. (*See infra* ¶¶ 1208-1221).

Response To Finding No. 1185:

See responses to ¶¶ 1208-1221, *infra*.

7.5.2.1 The Coded Language in McWane’s May 2007 Letter Was Meaningless to Its Distributor Customers

1186. McWane’s Distributor customers, to whom the May 7, 2008 letter was ostensibly addressed, consistently testified that McWane’s description of the factors it would consider before raising prices did not help them run their business, even for planning purposes, and was meaningless “fluff.” (CX 2516 (Sheley, Dep. at 153 (“Q. But the previous paragraph has no meaning to you? A. No. In my words, that’s fluff.”); Sheley, Tr. 3424-3425 (the sentence “Before announcing any price actions, we carefully analyze all factors including: domestic and global inflation, market and competitive conditions within each region, as well as performance against our own internal metrics” in Mr. Tatman’s May 7, 2008 letter (CX 0138) had no meaning to Mr. Sheley as a Distributor); CX 2544 (Coryn, Dep. at 125) (“Q. Does Tyler Union telling you what factors they analyze help you run your business? A. No.”); CX 2510 (Groeniger, Dep. at 233-234) (“Q. But as far as the factors that they are analyzing, that doesn’t help you run your business? A. No. I cannot use this letter for any district or any contractor to get relief because they don’t know what it is, what it means and they don’t know the date that they are going to effectively change prices to where, and are they going to allow us to buy fittings until that date at a specific date or after that date, are they going to give us a grace period? This letter could mean to me they are going to give us a grace period, but we don’t know how much it’s going up, so it’s difficult.”); CX 2514 (Webb, Dep. at 105) (“Q. Does Tyler Union telling you what factors they analyze help you in your running of your business as a distributor of Waterworks products? A. I – I don’t see where it helps us.”); CX 2504 (Thees, Dep. at 96) (“Q. Does Jerry Jansen telling you as a distributor what factors they analyze help you run your business? A. No.”) (objections omitted)).

Response To Finding No. 1186:

The proposed finding is inaccurate and misleading. Distributors understood that the purpose of McWane’s May 7, 2008 letter, and the specific language in question, was to justify an announced multiplier increase. (Sheley, Tr. 3441).

1187. The factors McWane claimed it would “analyze” before issuing a price increase were never before, and never after, included in pricing letters. (CX 2516 (Sheley, Dep. at 152-153) (“You normally don’t see this.”); CX 2510 (Groeniger, Dep. at 231, 233-234); CX 2544 (Coryn, Dep. at 124-125); CX 2504 (Thees, Dep. at 96)). Similarly, on a prior occasion on which McWane had declined to follow a Sigma price increase, McWane had not issued a similar letter. At trial, Mr. Tatman was unable to explain why McWane felt the need to issue its May 7, 2008 customer letter announcing that it did not intend to match Sigma’s increase, but had not felt the need to issue a similar letter the last time it had declined to follow a Sigma price increase, in October 2007. (Tatman, Tr. 501-502

(unable to recall “another time where you sent out a letter like this where you announced that you were not increasing prices”).

Response To Finding No. 1187:

See General Responses 1 and 11. Respondent disagrees with this proposed finding as misleading, inaccurate, and argumentative. The statement that Mr. Tatman was unable to explain the May 7, 2008 customer letter is belied by the record and Mr. Tatman fully explained why the May 7, 2008 letter was appropriate given Sigma’s unprecedented 25% price increase announcement, which prompted customer inquiries regarding whether McWane would raise its prices and how much. See Response to ¶ 1182.

1188. The 6% to 16% range for a possible price increase that was provided in McWane’s May 7, 2008 letter was useless to customers for planning purposes. (Sheley, Tr. at 3443-3444 (“Q: And the amount of the price change, that’s information you would need to know; right? If there’s going to be a price change, you want to know what it is. A: In the range of 6 to 16 percent doesn’t do me a lot of good.”)).

Response To Finding No. 1188:

See General Responses 1 and 11 and response to ¶ 1186. This proposed finding is inaccurate, misleading, argumentative. McWane’s letter was useful in that it disclosed on its face that McWane was *not* following Sigma’s substantial price increase but was, instead, independently charting its own course, which caused Sigma and Star to rescind their substantial price increases. (RPFF ¶¶ 128-140). The proposed Finding makes a sweeping statement about what purported “customers’” opinions were but only cites a single customer.

1189. Mr. McCutcheon believed that the explanation contained in the McWane May 7, 2008 letter, *i.e.*, McWane was “carefully analyzing all factors,” etc., would not have been helpful to a Distributor, and that the only thing in the letter that would be of interest to a Distributor was the last sentence of the letter. (CX 0863 at 001 (copy of May 7, 2008 letter); CX 0138 (same); CX 2539 (McCutcheon, Dep. at 178-179, 182); CX 2538 (McCutcheon, IHT (Vol. 2) at 318-320) (third sentence of letter is not helpful to a Distributor, only the last sentence is helpful); McCutcheon, Tr. 2422 (McCutcheon saw the McWane May 2008 letter)).

Response To Finding No. 1189:

See General Responses 1 and 11. Respondent respectfully submits that the opinion of Mr. McCutcheon, an employee of Star, which is not a distributor, regarding what a distributor would or would not find “helpful,” is not relevant and does not support Complaint Counsel’s proffered Findings or claims. Mr. Tatman testified regarding the motivation for the May 7, 2008 letter and McWane’s attempt to respond to customer inquiries regarding McWane’s pricing action, if any, in the face of Sigma’s unprecedented price announced price increases. (RPF ¶ 1182). The record evidence does not support the implication of this proposed Finding that McWane’s letter was a veiled communication to its competitors when, in fact, the McWane letter announced that McWane would *not* follow Sigma’s and Star’s substantial price increases, a fact that caused Sigma and Star to rescind and *lower* their respective prices. (RPF ¶¶ 128-140).

7.5.2.2 **The Other Suppliers Thought It Was Unusual for McWane to Send a Price Letter to Customers That Did Not Actually Announce a New Price**

1190. Mr. Rybacki recognized the language in McWane’s May 7, 2008 letter as out of the ordinary. (Rybacki, Tr. 3569 (“I did remember that part because I thought it was a little quirky for Jerry Jansen.”)).

Response To Finding No. 1190:

The proposed finding is misleading because it mischaracterizes Mr. Rybacki’s testimony. Mr. Rybacki did not testify that the May 7, 2008 letter was “out of the ordinary.” He testified that it was “quirky” only because it did not sound like Mr. Jansen’s style. (Rybacki, Tr. 3569). The finding also ignores Mr. Rybacki’s trial testimony that even though McWane’s May 7, 2008 letter “hinted” at a multiplier increase, Mr. Rybacki was “leery” of the letter because it was from McWane. (Rybacki, Tr. 3571). There is no evidence that Mr. Rybacki considered the May 7 letter a signal or communication from McWane to Sigma. Complaint Counsel has not pointed to

any evidence sufficient to support the inference that McWane's May 7 letter had anything to do with DIFRA.

1191. When Mr. McCutcheon received a copy of McWane's May 7, 2008 letter, he thought that the letter was "odd," "arrogant," and "humorous." Mr. McCutcheon had never seen a price increase letter like that. In other instances in which a supplier chooses to take a price increase "he just announces we're taking an increase." (CX 2539 (McCutcheon, Dep. at 179)).

Response To Finding No. 1191:

The proposed finding is misleading and argumentative. Mr. McCutcheon's testimony that he perceived McWane's May 7, 2008 letter as "arrogant" and "humorous" is not evidence that the letter was a signal or communication to Star. Complaint Counsel has not pointed to any evidence sufficient to support the inference that McWane's May 7 letter had anything to do with DIFRA.

7.5.3 McWane Withheld Its Agreement to a Price Increase Until the DIFRA Information Exchange Was Implemented

7.5.3.1 Sigma and Star Understood the Coded Message in McWane's May 7, 2008 Letter and Delayed Their Announced Price Increase

1192. Sigma and Star understood the coded invitation to collude in McWane's May 7, 2008 letter and delayed their announced price increases in response. (*Infra* ¶¶ 1193-1200).

Response To Finding No. 1192:

See General response 1 and 11 and responses to ¶¶ 1193-1200. The proposed Findings contained in ¶¶ 1193-1200 do not support the argument set forth in this proposed Finding. The proposed Finding also ignores hundreds of denials that anyone at McWane, Sigma, or Star coordinated or colluded regarding the prices of Fittings. (RPF §§ VI, VI).

1193. Only the DIFRA members – including Sigma and Star – were aware that McWane was scheduled to receive DIFRA data "by the end of May." (CX 0138 at 001 (McWane May 7, 2008 coded pricing letter); CX 0160 at 002 (April 25, 2008 DIFRA conference call summary e-mail establishing reporting schedule)).

Response To Finding No. 1193:

See General Responses 1 and 11. Respondent disagrees with this proposed finding as misleading, inaccurate, and argumentative. With respect to the parenthetical describing McWane's May 7, 2008 customer price letter as "coded," see response to ¶¶ 1182, 1187, and 1192. Sigma, McWane, Star, and US Pipe, and DIFRA's antitrust counsel and independent accountants all expected, but did not know, that the DIFRA data would be available at some point following the members' submission of historic, aggregated tons-shipped data to the DIFRA accountants for aggregation and eventual dissemination. Neither CX 0138 or CX 160 support the proposed Finding.

1194. When it issued its May 7, 2008 letter, McWane expected that Sigma and Star would respond to that announcement. (Tatman, Tr. 508-509; CX 0431 (Tatman May 13, 2008 email to McCullough: "Jerry is on a hunt for follow-up letters from Sigma and Star in response to our announcement.")).

Response To Finding No. 1194:

See General Responses 1 and 11. Respondent disagrees with this proposed finding as misleading, inaccurate, and argumentative. Mr. Tatman testified that, as a normal course of business, McWane would try to independently gather competitive intelligence from its customers and that, consistent with this practice, McWane tried to independently determine as best it could whether the competition was reacting to the pricing announcement that McWane sent to its customers. (Tatman, Tr. 508-509). Mr. Tatman's testimony also establishes that McWane was only able to gather sporadic and imperfect competitive feedback. (Tatman, Tr. 508-509). CX 0431 and the quoted language cited regarding the independent "hunt" for competitive information does not support the proposed Finding. Respondent submits that the statement that McWane "expected that Sigma and Star would respond to that announcement" misrepresents Mr. Tatman's testimony and the content of CX 043, is argumentative, and implies through the

use of the term “respond” that Sigma and / or Star was formally or informally communicating with McWane regarding Fittings price, which is not supported by the cited evidence or any record evidence.

1195. Mr. Rybacki received and read a copy of McWane’s May 7, 2008 letter. (Rybacki, Tr. 3568). He noted that the letter provided an indicative range of pricing increases “for planning purposes,” but did not “firmly say that they were going up.” Mr. Rybacki was “leery” of the letter because it was “ambivalent.” (Rybacki, Tr. 3570-3571).

Response To Finding No. 1195:

See General Responses 1 and 11. Respondent disagrees with this proposed finding as misleading, inaccurate, and argumentative. Mr. Rybacki’s testimony is consistent with every witness who testified on the matter that nobody from Sigma, Star, or McWane trusted any of their competitor’s price announcements (RPF 109). Mr. Rybacki’s testimony that he was “leery” of the “ambivalent” letter contradicts Complaint Counsel’s proposed Findings stating that Sigma and Star understood McWane’s May 7, 2008 letter to be a communication, despite lacking any specificity to the effect, that “McWane would not yet follow Sigma’s announced price increase, and that it would support higher prices only after it received the DIFRA report.” (¶ 1182).

1196. Sigma put most of its planned price increase on hold as a result of McWane’s May 7, 2008 letter. (Rybacki, Tr. 3570-3572; CX 1734 at 001 (Greg Fox of Sigma forwarding a copy of McWane’s May 7, 2008 pricing letter within Sigma on May 8, 2008, with the following comments: “I am certain we will delay our announced increases to mirror their dates. In addition, I’m certain we’ll match their multipliers once published.”); RX-076 (June 16, 2008 email from Sigma’s Greg Fox announcing a further delay of a Sigma price increase due to the delay in McWane’s announcement of a price increase because “we are forced to delay our increase until we ascertain the specifics of Union/Tyler’s increase from the market. Our increase will match U/T’s both in amount and implementation date.”)).

Response To Finding No. 1196:

Respondent acknowledges that, as a result of McWane’s independent decision not to follow Sigma’s substantial price increase, Sigma rescinded its “big, bold move” and lowered its prices substantially. (RPF ¶ 137).

1197. Sigma's northeast region, however, was the lone region that decided to implement Sigma's previously announced May 19, 2008 price increase, at least for some time, and Sigma lost business in that region as a result. (Rybacki, Tr. 3571-3572).

Response To Finding No. 1197:

Respondent acknowledges that Mr. Rybacki testified that in June 2008, Sigma's Fittings prices in its Northeast region were higher than McWane's prices. (Rybacki, Tr. 3572 (Q: "Do you recall any of your regions having prices that were higher than McWane's –" A: "Yes. The northeast region, Mike Walsh's region."))).

1198. Star also put its planned price increase on hold as a result of McWane's May 7, 2008 letter. CX 0527 at 001 (Star's Ramon Prado forwarding a Minamyler May 12, 2008 email to territory managers at Star, informing them that Star's "current multiplier changes on fittings have been put on hold for the time being" and that "Tyler is not going up until June 16th and multipliers are yet to be determined," and attaching a copy of McWane's May 7, 2008 pricing letter); RX-060 at 001 (Minamyler May 12, 2008 email); CX 2526 (Minamyler, Dep. at 185-186); Minamyler, 3213-3214; McCutcheon, Tr. 2424-2425; CX 2537 (McCutcheon, IHT (Vol. 2) at 462)).

Response To Finding No. 1198:

Respondent acknowledges that, as a result of McWane's independent decision not to follow Star's substantial price increase, Star rescinded its price increase and lowered its prices substantially. (RPF 137).

1199. In a May 13, 2008 email to Messrs. McCullough and Walton, Mr. Tatman observed that "Sigma and Star are verbally retracting the May 19th date. Nothing written has been uncovered yet. I suspect neither will put any hard copies out until they know what we're doing and then I assume they will follow." (CX 0367 at 001; Tatman, Tr. 509-510).

Response To Finding No. 1199:

Respondent acknowledges that Sigma and Star rescinded their respective substantial price increases as a result of McWane's independent decision not to follow Sigma's and Star's respective pricing decisions. (RPF 128-140). This proposed Finding confirms that McWane was forced to gather, to the extent possible, competitive intelligence regarding the market from its customers, and that McWane's pricing decisions were independent and not the result of direct

or indirect communications with Sigma or Star regarding Fittings prices. (¶ 1199) (“Nothing written has been un-covered yet” “I *suspect* neither will put any hard copies out...and then I *assume* they will follow” McWane’s substantially lower pricing). See also RPF ¶¶ 128-140.

1200. Sigma and Star never fully implemented the May 19, 2008 multiplier price increases that they had announced. (Tatman, Tr. 514 (“I don’t believe that they made those effective.”); CX 2430 at 001 (Star June 27 announcement following a subsequent McWane multiplier increase); CX 2253 at 001-003 (Sigma following same McWane multiplier increase)).

Response To Finding No. 1200:

See General Response 11 and responses to ¶¶ 1196 and 1198.

7.5.3.2 Star Understood the Coded Message in McWane’s May 7, 2008 Letter and Immediately Agreed to Submit Its Sales Data to DIFRA

1201. Star understood the coded invitation to collude in McWane’s May 7, 2008 letter and immediately agreed to submit its sales data to DIFRA. (*Infra* ¶¶ 1202-1207).

Response To Finding No. 1201:

See General Response 1 and 11 and response to ¶¶ 1182, 1192, and 1193, regarding Complaint Counsel’s assertion of a “coded invitation,” and responses to ¶¶ 1202-1207. Proposed Findings ¶¶ 1202 - 1207 do not support the argument of a “coded” or veiled offer to collude as contained in ¶ 1201.

1202. Star received a copy of McWane’s May 7, 2008 letter from HD Supply at 1:06 p.m. on May 7, 2008. (CX 0863 at 001; Minamy, Tr. 3209-3210 (it was Mr. Minamy’s normal practice to read McWane’s letters and share it with Mr. McCutcheon); McCutcheon, Tr. 2422-2423 (admitting that he saw the letter)).

Response To Finding No. 1202:

Mr. Minamy testified that it was his normal practice to read competitor price announcements that he would receive from his customers, not only or specifically McWane’s price letters that McWane sent to McWane customers, and that he would share such letters with his boss. Respondent denies that there is any factual or legal relevance of this Finding.

1203. Mr. Minamyer believed that the language in McWane's May 7, 2008 letter indicating that McWane was "analyz[ing] all factors including: Domestic and global inflation, market and competitive conditions within each region, as well as our performance against our own internal metrics" would not matter to customers, but could have meaning to Sigma and Star. (CX 2525 (Minamyer, IHT at 86-87); CX 0138).

Response To Finding No. 1203:

See General Responses 1, 3, and 11. Respondent respectfully submits that the opinion of Mr. Minamyer, an employee of Star, which is not a distributor customer, regarding whether a distributor customer would or would not believe that a selected portion of McWane's May 7, 2008 letter would "matter to customers" is not relevant and does not support Complaint Counsel's proffered Findings or claims. The selected quote is also an incomplete representation of the witness's testimony. (Minamyer, IHT at 86-87) Mr. Tatman testified regarding the motivation for the May 7, 2008 letter and McWane's attempt to respond to customer inquiries regarding McWane's pricing action, if any, in the face of Sigma's and Star's unprecedented announced price increases. (RPF 1182). The record evidence does not support the implication of this proposed Finding that McWane's letter was a veiled communication to its competitors when, in fact, the McWane letter announced that McWane would *not* follow Sigma's and Star's substantial price increases, a fact that caused Sigma and Star to rescind and *lower* their respective prices. (RPF 128-140).

1204. Star understood that McWane would not agree to increase prices until it had the actual DIFRA data in hand. Within hours of receiving McWane's coded letter, Star's Mr. McCutcheon responded to Mr. Long's April 25, 2008 and May 5, 2008 emails regarding DIFRA reporting procedures, and confirmed to Mr. Long and to the other DIFRA members, including Mr. Tatman, that Star would submit its data to DIFRA. (CX 1085 at 001 (Star confirming it will submit DIFRA data on the afternoon of May 7); McCutcheon, Tr. 2423; Brakefield, Tr. 1287).

Response To Finding No. 1204:

See General Response 1 and 11. Respondent disagrees with this proposed finding as misleading, inaccurate, argumentative, and wholly unsupported by the evidence cited. There is

no record evidence to support the proffered Finding that “Star understood that McWane would not agree to increase prices until it had the actual DIFRA data in hand.” CX 1085 and Messrs. McCutcheon and Mr. Brakefield’s (a Sigma employee) cited testimony does not speak to what Star purportedly “understood.” This proposed Finding is pure unsupported argument.

Respondent also disagrees with the characterization of McWane’s customer price announcement as a “coded letter” as unsupported argument. See Responses to ¶¶ 1182, 1192, 1193, and 1201.

1205. At 4:45 p.m. on May 7, 2008, after responding to the May 5, 2008 email from Thad Long, confirming that Star would submit its data, Mr. McCutcheon forwarded Mr. Long’s April 25, 2008 email to Navin Bhargava (who would assemble Star’s DIFRA data submission), with the subject line “please call me on this.” (CX 0530 at 001; McCutcheon, Tr. 2426).

Response To Finding No. 1205:

Respondent has no response to this proposed Finding.

1206.

[REDACTED]

(McCutcheon, Tr. 2438-2442, *in camera*; Rybacki, Tr. 3642, *in camera*; CX 1621-A at 085, 086, *in camera* (Rybacki telephone records); *supra* ¶¶ 771-772 (detailing telephone records)).

Response To Finding No. 1206:

See General Response No 4. *See* Response To Finding 714, *supra*. The proposed Finding that “Mr. McCutcheon could not provide any business purpose for those calls” is not supported by the record. In fact, while Complaint Counsel asked Mr. McCutcheon whether he had any “business purpose” for the calls, Complaint Counsel withdrew the question after objection by counsel for Respondent and questioning from the Court regarding the utility of the question:

Q. As you sit here today, is there some specific Star business purpose, Star-Sigma business purpose that the two of you may have been talking about during that period that you're aware of?

A. Can you --

JUDGE CHAPPELL: What good does that do you? If he says yes, what are you going to do with that? If he says no -- what's the point of that question?

MR. HASSI: I'm just trying to find out if there's some other reason for these phone calls and what that may be.

JUDGE CHAPPELL: If he doesn't know why he made them, how would he know why he made them? I mean, if he doesn't know why he made them, how would he have a reason for making a call he doesn't know why he made? It's illogical, Counselor.

MR. HASSI: I just want to make sure I'm not going to hear some other reason later in this trial, Your Honor. *I'll withdraw the question.*

JUDGE CHAPPELL: Well, that wouldn't have much weight if the man already said he doesn't know.

MR. HASSI: Okay, Your Honor. (McCutcheon, Tr. 2442-2444) (emphasis added).

1207. On May 19, 2008, Mr. Bhargava sent Star's sales data to Mr. McCutcheon for submission to DIFRA. (CX 0530 at 001; McCutcheon, Tr. 2427).

Response To Finding No. 1207:

Respondent has no specific response.

7.5.3.3 McWane and Sigma Closely Monitored Star's Delay in Submitting Its Sales Data to DIFRA

1208. McWane and Sigma closely monitored Star's delay in submitting its sales data to DIFRA, repeatedly contacting DIFRA and Star to determine the status of Star's submission. (*Infra* ¶¶ 1209-1221).

Response To Finding No. 1208:

See General Response 1 and 11 and responses to ¶¶ 1209-1221. Respondent disagrees with this proposed finding as misleading, inaccurate, argumentative, and wholly unsupported by the evidence. The record evidence does not support the statement that McWane or Sigma "closely monitored" Star's purported "delay" in submitting Star's historic tons-shipped data, nor

does the record support the implication that “McWane and Sigma” acted jointly or in concert in any fashion in purportedly monitoring Star. The record refutes that Star or any other DIFRA member submitted “sales data.” Rather, DIFRA members submitted, under the careful scrutiny of DIFRA antitrust counsel and independent accountants, historic tons-shipped data. (RPF 251-255). The assertion that McWane and Sigma “repeatedly” contacted DIFRA and Star to determine the status of Star’s submission is argumentative and not supported by the record evidence cited.

1209. McWane submitted its DIFRA data to SRHW on May 14, 2008. (CX 1303 at 002).

Response To Finding No. 1209:

Respondent has no specific response.

1210.

[REDACTED] (Rybacki, Tr. 3642, *in camera*; CX 1621-A at 095, *in camera* (Rybacki telephone records); *supra* ¶ 773 (detailing telephone records); (Rybacki, Tr. 3610, 3617, *in camera*, [REDACTED])

Response To Finding No. 1210:

See Response To Finding 714, *supra*.

1211. Later on May 16, 2008, Mr. McCutcheon sent an email to Mr. Brakefield with the subject line “star’s tonnage data,” stating, “Hello Tom, sorry for the delay. The info should be in next week.” Mr. Brakefield forwarded the message to Mr. Pais and Mr. Rybacki. (CX 1129; Rybacki, Tr. 3561-3563).

Response To Finding No. 1211:

Respondent has no specific response.

1212. On May 21, 2008, while Mr. Tatman was in China, Mr. Tatman sent an email to Margaret Powell of SRHW stating that he was “hoping to receive the DIFRA reports since I believe all members have submitted data,” and asked for “an estimated date of when the reports will be available.” (CX 1335; Tatman, Tr. 515-516).

Response To Finding No. 1212:

Respondent has no specific response.

1213. Mr. Tatman also contacted Mr. Brakefield directly, asking why the DIFRA report was late and why it had not been delivered as agreed upon in the conference call. (Brakefield, Tr. 1288 (“I started receiving either e-mails or calls from Mr. Tatman. . . . I think he had also tried to get in touch with the CPA and which I’d tried to warn him against that, that was not the proper way to handle it . . . ”)).

Response To Finding No. 1213:

The evidence cited supports that Mr. Tatman contacted Mr. Brakefield, the president of DIFRA, inquiring as to the status of the DIFRA tons-shipped reports that were to be disseminated by DIFRA’s independent accountants, and that Mr. Tatman sent an email to the DIFRA accountants who collected McWane’s tons-shipped and would be disseminating the DIFRA report inquiring as to the status of same. Respondent submits that the foregoing evidence is not factually or legally relevant to the claims before the Court.

1214. Mr. Brakefield told Mr. Tatman that Mr. Tatman should proceed through DIFRA’s attorneys. (Brakefield, Tr. 1288 (he “tried to get Mr. Tatman to understand that that was not the proper way to do that, we need to proceed with the attorneys in that kind of communication”)).

Response To Finding No. 1214:

Respondent does not dispute that the proposed Finding accurately quotes a selected portion of Mr. Brakefield’s testimony, but disputes Mr. Brakefield’s capacity to counsel DIFRA members as to the appropriate use of legal counsel, disputes the relevance of the proposed Finding to the claims before the Court, and notes that Mr. Tatman did in fact request that DIFRA’s antitrust counsel contact other DIFRA members regarding the reporting of the historic, tons-shipped data. See CCPPF ¶ 1215.

1215. Mr. Tatman asked DIFRA counsel to contact the non-reporting DIFRA members to get their data in. (Tatman, Tr. 518).

Response To Finding No. 1215:

Respondent has no specific response.

1216.

(Rybacki, Tr. 3644-3644, *in camera*; CX 1621-A at 084, *in camera* (Rybacki telephone records); *supra* ¶¶ 774-775 (detailing telephone records); Rybacki, Tr. 3610, 3617, *in camera*,

Response To Finding No. 1216:

See Response To Finding 714, *supra*.

1217. On May 28, 2008, Mr. Herren of Bradley Arant sent an email to the DIFRA members reminding them of the previously agreed deadline for initial submission of data to DIFRA, and requesting, “If you have not already submitted this data for your company, please submit the data to Margaret [Powell at SRHW] at your earliest convenience.” (CX 1090 at 001; Brakefield, Tr. 1289-1291).

Response To Finding No. 1217:

Respondent has no specific response.

1218. Mr. Brakefield kept Messrs. Pais, Rybacki, and Rona updated as to the status of the DIFRA data submissions. (CX 1129; CX 1130; CX 1086; Rybacki, Tr. 3561-3565).

Response To Finding No. 1218:

Respondent concedes that DIFRA kept its members updated as to the status of DIFRA’s activities, including the submission, aggregation, and dissemination of the aggregated, historic, tons-shipped data, and that DIFRA would apprise its membership of same through DIFRA’s president, Mr. Brakefield, as well as DIFRA’s antitrust counsel and independent accountants. (RPFF ¶¶ 243-250).

1219. On May 30, 2008, Mr. Brakefield forwarded Mr. Herren’s May 28, 2008 email to Messrs. Rybacki, Bhattacharji, and Rona, noting “I will follow up on this and advise.” (CX 1090 at 001; CX 1130 at 001 (Brakefield email forwarding to Messrs. Rybacki, Bhattacharji

and Rona the Star May 16, 2008 commitment to submit the DIFRA data and stating that he would “stay on top of this and advise”); Brakefield, Tr. 1291).

Response To Finding No. 1219:

Respondent has no specific response.

1220. Mr. Brakefield spoke with Mr. McCutcheon regarding Star’s late submission of data. (Brakefield, Tr. 1291-1292; McCutcheon, Tr. 2430).

Response To Finding No. 1220:

Respondent has no specific response.

- 1221.

(McCutcheon, Tr. 2438-2442, *in camera*; Rybacki, Tr. 3644-3645, *in camera*; CX 1621-A at 085, 086, *in camera* (Rybacki telephone records); Rybacki, Tr. 3564 (Q. Did you contact Mr. McCutcheon in late May, early June to encourage him to get his DIFRA data in? A. Again, I’m -- I don’t know specifically. Maybe. I don’t know.”); *supra* ¶¶ 776-778 (detailing telephone records)).

Response To Finding No. 1221:

See Response To Finding 714, *supra*.

- 7.5.3.4 Star Submitted Its Data to DIFRA on June 5, 2008 Invoking the Language of McWane’s May 7, 2008 letter

1222. Star submitted its data to DIFRA on June 5, 2008, acknowledging the suppliers’ agreement by invoking the language of McWane’s May 7, 2008 letter. (*Infra* ¶¶ 1223-1226).

Response To Finding No. 1222:

See General Response 1.

1223. Mr. McCutcheon submitted Star’s DIFRA data to SRHW at 12:37 p.m. on June 5, 2008. (CX 0049 at 001; McCutcheon, Tr. 2427; CX 2538 (McCutcheon, IHT (Vol. 2) at 304)). Star’s June 5, 2008, submission to DIFRA contained, *inter alia*, Star’s annual sales data for Fittings for 2006 and its monthly sales data for Fittings for 2007 and for January 2008 through April 2008. (CX 0049 at 001-005).

Response To Finding No. 1223:

The proposed finding is misleading because the “sales data” submitted by Mr. McCutcheon to a third-part accounting firm (SRHW) contained only historical tons-shipped data and no pricing information whatsoever.

1224. Immediately thereafter, at 12:48 p.m. on June 5, 2008, Mr. McCutcheon notified Mr. Brakefield and Mr. Rybacki of Sigma by email that Star had submitted its DIFRA data, and included verbatim language from McWane’s May 7, 2008 letter:

Good morning Mr. President. I just sent our info in. Sorry it took so long, but we were “carefully analyzing all factors including: domestic and global inflation, market and competitive conditions within each region, as well as performance against our own internal metrics.” (Does that look familiar?).

(CX 1091; CX 0138 (May 7, 2008 letter); CX 2538 (McCutcheon, IHT (Vol. 2) at 311-313) (Acknowledging that the verbiage above came from a McWane pricing letter to customers, and that this letter was likely intended to “poke at [Star] for trying to take a price list increase.”); Brakefield, Tr. 1292).

Response To Finding No. 1224:

See General Response 3. The proposed finding is misleading because Mr. Brakefield testified that he did not make any connection between Mr. McCutcheon’s email and McWane’s May 7 letter at the time he received the email. (Brakefield, Tr. 1293-1294). The proposed finding also ignores Mr. McCutcheon’s testimony that, in quoting the language from the May 7 letter, he was “being a smart aleck” and “making fun of one of [his] competitors.” (McCutcheon, Tr. 2431-2433).

1225. Mr. McCutcheon’s repetition of the McWane May 7, 2008 letter in its submission of the Star data to DIFRA reflects Mr. McCutcheon’s then state of mind that the price increase that was the subject of McWane May 7, 2008 was contingent upon Star and Sigma participating in DIFRA information exchange. (CX 1091; *see also* RX-697 (McCutcheon, IHT (Vol. 2) at 315) (after investigation is initiated, Mr. McCutcheon can offer no plausible explanation for his reference to McWane’s May 7, 2008 letter, except to suggest, “the quote was just my attempt at humor.”)).

Response To Finding No. 1225:

See General Response 3. The proposed finding is misleading and inaccurate because it ignores Mr. McCutcheon's testimony that, in quoting the language from the May 7 letter, he was "being a smart aleck" and "making fun of one of [his] competitors." (McCutcheon, Tr. 2431-2433). Despite Complaint Counsel's contention to the contrary, Mr. McCutcheon did in fact offer a plausible explanation for his reference to the McWane May 7 letter. There is no evidence, in this proposed finding or elsewhere, to support the contention that Mr. McCutcheon's email reflects his "then state of mind that the price increase that was the subject of McWane's May 7, 2008 was contingent upon Star and Sigma participating in DIFRA information exchange."

1226. Several hours after receiving Mr. McCutcheon's June 5, 2008 email, Mr. Brakefield reported to Messrs. Rybacki, Pais and Rona that Star had submitted its numbers: "looks like the numbers are in." (CX 1086).

Response To Finding No. 1226:

Respondent has no specific response.

7.5.3.5 McWane Delayed Its Price Announcement Because of Delays in Receiving the First DIFRA Report

1227. In late May and early June, 2008, McWane delayed its price announcement because of delays in receiving the first DIFRA report. (*Infra* ¶¶ 1228-1239).

Response To Finding No. 1227:

This is an unsupported assertion, for which no response is required.

1228. On May 23, 2008, Mr. Tatman informed Messrs. McCullough and Walton that SRHW had not yet received the sales data from all of the DIFRA members, and that he had asked DIFRA's counsel to follow up and contact the DIFRA members. Mr. Tatman suspected that the delay was due to Star and Sigma being "upset over their perception of McWane's lack of support on pricing." (CX 1186; Tatman, Tr. 517-518).

Response To Finding No. 1228:

McWane has no specific response, but notes that Mr. Tatman testified that he was not waiting on DIFRA data because he was confident of what the DIFRA data would reflect with respect to share based on “sales, VMA data, other reference points.” Tatman Tr. 516. (“I already knew the answer.”) However, Mr. McCullough, his superior, wanted to see the DIFRA information and Mr. Tatman deferred to him. Tatman Tr. 515-516; 519.

1229. On May 24, 2008, Mr. McCullough responded to Mr. Tatman’s May 23, 2008 email by stating that McWane should “stand pat” on a new price increase until the DIFRA market share data was available. Mr. Tatman and Mr. Walton agreed. (CX 1186; Tatman, Tr. 518-521; CX 2479 (McCullough, Dep. at 224)).

Response To Finding No. 1229:

McWane has no specific response. See Response 1228 above.

1230. McWane’s decision to “stand pat” on any price increase until it had received the DIFRA market share reports was “somewhat painful to the bottom [line] in the short term, [but it] would re-enforce the message we’ve been trying to drill in which when successful will pay long term dividends.” (CX 1186 at 001; Tatman, Tr. 519-520; *see also* CX 2484 (Tatman, Dep. at 136)).

Response To Finding No. 1230:

Complaint Counsel has accurately quoted the referenced exhibit, but the proposed Finding is incomplete. Mr. Tatman explained at trial the context of his statement and what he meant:

Q. But that’s the meaning, right? That’s the message you were trying to drill in with the members of the DIFRA, that they needed to get their DIFRA data in before you would announce a price increase; right?

A. I clearly don’t see the leap that you’re trying to make there.

Q. Can you explain, sir, what message you were trying to drill in by waiting – by holding your price increase until you had the DIFRA data?

A. Well, let’s go back to our core strategy.

If someone announced a 40 percent price increase and I follow it, I’m going to get a lot of price in the short term. That’s going to be a

significant benefit in the short term to my bottom line. But do I believe that is in my best interest of my longer-term goal, which is gaining volume and gaining share? No.

So if I have a competitor that announces a 40 percent price increase, if I want to put money in my pocket for the next three months or the next six months, I'm going to jump on that.

So that is painful to the bottom line, on a relative basis, that I'm not going to jump on and support a 40 percent price increase because you're going to get some traction off of that. It's not like you're – you might not get 38-39 percent, but you're going to get some traction on that.

And what I'm saying here is consistent with what we said all along, was we were not going to lose visibility of where the competitive marketplace is, and our primary focus at this point in time is volume, share.

Tatman, Tr. 521-522.

1231. Mr. Tatman's statement regarding "painful to the bottom [line]" was a reference to the short term pain to McWane's financial bottom line that would result from delaying the price increase announcement. (CX 1186; Tatman, Tr. 520-521; CX 2484 (Tatman, Dep. at 136)).

Response To Finding No. 1231:

McWane disagrees with this proposed Finding. As Mr. Tatman explained, the "pain" to the bottom line was his decision to adhere to his strategy to underprice his competitors ("I'm not going to jump on and support a 40 percent price increase") in an effort to recapture volume and market share. *See* Response 1230 above.

1232. Mr. Tatman admitted at trial that the "message we've been trying to drill in" was McWane's unwillingness to "lose visibility of where the competitive level in the marketplace is." (CX 1186; Tatman, Tr. 522 (message was that "we are not going to lose visibility of where the competitive level in the marketplace is"))).

Response To Finding No. 1232:

This finding is incomplete. Mr. Tatman further testified that the meaning of the quoted text in the finding is that "[McWane's] primary focus at this point in time is volume, share." (Tatman, Tr. 522). *See* Response 1230-1231 above. (RPF 271).

1233. On May 29, 2008, McWane already had a draft of a price increase letter ready to send to its customers, announcing a weighted average increase on blended Fittings of approximately 8%. (CX 1193 at 001; Tatman, Tr. 517).

Response To Finding No. 1233:

McWane has no specific response, but notes that the 8 percent (on average) price increase was about 1/3 of the increase Star and Sigma had previously announced to their respective customers. (RPF ¶ 136). The DIFRA aggregated tonnage report helped McWane decide, in June 2008, to choose the low end of a range of multiplier increases Mr. Tatman had been considering, because the DIFRA report confirmed his suspicion that McWane was continuing to lose market share. (RPF ¶ 271).

1234. On Mr. McCullough’s instructions, Mr. Tatman waited for the DIFRA data before issuing any price increase. (Tatman, Tr. 494-495 (“[G]etting the DIFRA data was important to my boss Leon.”)).

Response To Finding No. 1234:

Mr. Tatman deferred to Mr. McCullough’s desire. Tatman, Tr. 519. (“On something like this that he wants, I – I’m not going to challenge him on it.”) The DIFRA aggregated tonnage report helped McWane decide, in June 2008, to chose the low end of a range of multiplier increases he had been considering, because the DIFRA report confirmed his suspicion that McWane was continuing to lose market share. (RPF ¶ 271). Mr. Tatman testified that Mr. McCullough’s interest in the DIFRA tonnage report was driven by the legitimate business need to assess, to the extent possible, McWane’s competitive performance and market share. (RPF ¶ 273).

1235. In a series of emails on June 10, 2008, Mr. Tatman pressed Ms. Powell at SRHW for timely turnaround of the aggregated DIFRA report. (CX 1334 at 002 (“[T]he week of the 23rd is going to be difficult to accept.”); Tatman, Tr. 528-529; CX 2520 (Haley, Dep. at 60-61) (Ms. Powell reported that Mr. Tatman was “harassing” her); *see also* CX 1332 at 001 (Ms. Powell writing to Mr. Haley on June 10, 2008: “This same guy [Tatman] that was harassing me a month ago about getting him the reports asap (even though we didn’t have all the members reporting) is calling me again wanting everything completed this week.”); CX 2270 at 001, 002 (June 11, 2008 email from Herren to DIFRA members apologizing for the confusion surrounding initial reporting and asking members to “avoid direct communication between the individual members and [SRHW]”)).

Response To Finding No. 1235:

The proposed Finding is incomplete. Mr. Tatman testified that he “pressed” Ms. Powell to get the Report completed because (1) “we put a letter out prior that said June 16, so all of sudden I’m going to get a lot more chatter out in the marketplace about what’s going on” (Tatman, Tr. 529), and (2) it was important to his boss. Tatman, Tr. 527. (“I usually follow through on things that he thinks are important.”)

1236. Also on June 10, 2008, Mr. Tatman sent an email to Mr. Wood of the Bradley Arant law firm asking if DIFRA could use another accounting firm in order to get the DIFRA data more quickly. (Tatman, Tr. 530; *see also* CX 2269 at 002).

Response To Finding No. 1236:

McWane has no specific response.

1237. Mr. Tatman admitted at trial that the only new information that McWane received before issuing its June 17, 2008 price increase was the DIFRA data. (Tatman, Tr. 544 (“Q. Sir, the only new information that you received on the afternoon of June 17 was the DIFRA data; right? A. Yes. Q. And after -- once you received that information, between yourself and Mr. McCullough, you made a decision on price; is that right, sir? A. We elected to go with the lower number. Yes. Q. You elected to go with a lower number, 8 versus 12; is that what you’re saying? A. Yes.”); *see also supra* ¶ 1183 (the availability of McWane’s internal financial numbers does not explain its delay in issuing a price increase)).

Response To Finding No. 1237:

McWane agrees that Complaint Counsel accurately quotes Mr. Tatman’s testimony.

However, Mr. Tatman testified that he had already considered other reference points: “sales, VMA, other reference points.” *See* Response 1228 above. *See also* Tatman, Tr. 537. (“I said I knew we were losing share. I was correct. But what the DIFRA data showed is that our share loss was larger than I would have thought. And because of that, we had two options discussed earlier in a brainstorming session for price increase, an 8 percent and a 12 percent. Because our share loss was greater than what we thought, we went out with the 8 percent, which is consistent with the strategy I’ve been discussing all day long.”).

7.5.3.6 The First DIFRA Report Was Issued On June 17, 2008

1238. McWane and the other DIFRA members received the first DIFRA report from SRHW at 2:41 p.m. on June 17, 2008. (CX 0052 (email from Bree Holland of SRHW to Messrs. Tatman, Brakefield, Crawford, and McCutcheon attaching DIFRA reports for 2006, 2007, and January through April of 2008); Tatman, Tr. 534-536, 936; Brakefield, Tr. 1297-1298; Pais, Tr. 2121; McCutcheon, Tr. 2444-2445, *in camera*).

Response To Finding No. 1238:

Respondent has no specific response.

1239. The first DIFRA report contained annual data for 2006, monthly data for 2007, and monthly data for the first four months of 2008. (CX 0052 at 003, 005, 007; Tatman, Tr. 535).

Response To Finding No. 1239:

Respondent has no specific response.

7.5.3.7 McWane Issued a Price Increase Within Hours After Receiving the First DIFRA Report

1240. McWane issued a price increase within hours after receiving the first DIFRA report (*Infra* ¶¶ 1241-1245).

Response To Finding No. 1240:

This is an unsupported assertion, for which no response is required. *See* Response To Findings 1241-1245, *infra*.

1241. Rick Tatman’s initial analysis of the first DIFRA report took less than 40 minutes. In that time, he did a quick market share analysis comparing the data with other benchmarks, such as data obtained from another information exchange in a related market, the Valve Manufacturer’s Association (VMA). (CX 0139 at 001; Tatman, Tr. 536-537). Mr. Tatman provided his “initial observations” in an email to McWane’s management:

1. 2006 baseline total DIFRA tonnage tracks very well with what we would have expected based upon walking the 2001 market data from the 421 hearings forward using the change in VMA units
2. Our share loss for 2007 and Apr YTD 2008 is actually larger than what I expected. Note the DIFRA tonnage is not down as much over those period as the VMA unit data
3. The “backed into” non DIFRA tonnage appears to be on the lower end of what we would have expected

4. All points above suggest that data is accurate within reason which was probably the resistance to sending it out before we announced any price.

5. The larger than expected share loss will make the task of getting it back more difficult, but of course will make victory all the more sweeter [*sic*] in terms of the incremental financial benefits.”

(CX 0139 at 001; CX 2068 at 001; Tatman, Tr. 536-537, 949-950).

Response To Finding No. 1241:

See General Response 8. McWane has no specific response, other than to note that Mr. Tatman sent CX 139 to Mr. McCullough and Mr. Walton (his superiors) and to Mr. Janson (Tyler/Union’s sales manager).

1242. Later that same day, at 6:26 p.m. on June 17, 2008, less than four hours after receiving the DIFRA report, McWane issued its price increase letter, announcing an increase in Fittings multipliers effective July 14, 2008, and stating that the weighted average increase on blended Fittings and accessories was “approximately 8%.” (CX 1191 at 001 (letter to Glenn Fielding at HD Supply); CX 1576 at 003 (email to Mr. Doane and Mr. Thees at Ferguson attaching nationwide multiplier map); Tatman, Tr. 538, 544, 952; RX-644 (Tatman, Dep. at 155); CX 0047 (multiplier increase letter to Southeastern states)).

Response To Finding No. 1242:

Respondent has no specific response.

1243. In an email to Mr. Doane and Mr. Thees at Ferguson attaching the pricing letter, Mr. Tatman stated that “[t]he increase is significantly smaller than what I believe others have proposed, but we believe this level is rational given all factors considered.” (CX 1576 at 003; Tatman, Tr. 544; 954-955 (referring to other proposed price increases by Sigma and Star)).

Response To Finding No. 1243:

Respondent has no specific response, other than to note that McWane did not follow the price increases proposed by Sigma and Star, but independently decided to announce a significantly smaller increase. (Tatman, Tr. 955-956).

1244. While Mr. Tatman conceded that he waited until after he had received the first DIFRA report before issuing McWane’s June 17, 2008 price increase letter (*see* ¶¶ 5.5.3.5),

Mr. Tatman offered contradictory explanations at trial for how McWane used the first DIFRA report in issuing its June 17, 2008 price increase:

Response To Finding No. 1244:

McWane disputes this proposed Finding. In particular, McWane disputes that Mr. Tatman provided “contradictory explanations” or ever “conceded” that he did so. Mr. Tatman testified repeatedly that McWane waited to issue a price increase letter because his boss wanted to see the DIFRA data; however, Mr. Tatman believed before receiving it that he knew what it would show. *See* Responses 1228, 1234, 1235 and 1237.

- a. Mr. Tatman initially testified that he used the DIFRA data to determine the magnitude of the price increase that McWane would announce:

[W]e had two options discussed earlier in a brainstorming session for price increase, an 8 percent and a 12 percent. Because our share loss was greater than what we thought [based on DIFRA data], we went out with the 8 percent, which is consistent with the strategy I’ve been discussing all day long.

(Tatman, Tr. 536-538; CX 0139 at 001; Tatman, Tr. 538 (“[W]e had two options, an 8 percent and a 12 percent. The DIFRA data came in. It’s like oh, crap, the share loss is worse than we thought. What are we going to do? Let’s go with the lower number because we obviously must be getting beat on price again”); Tatman, Tr. 544 (“Q. Sir, the only new information that you received on the afternoon of June 17 was the DIFRA data; right? A. Yes. Q. And after -- once you received that information, between yourself and Mr. McCullough, you made a decision on price; is that right, sir? A. We elected to go with the lower number. Yes. Q. You elected to go with a lower number, 8 versus 12; is that what you’re saying? A. Yes.)).

Response To Finding No. 1244a:

Complaint Counsel accurately quotes the referenced testimony.

- b. In later testimony, Mr. Tatman claimed that while McWane was waiting to issue its price increase until it had received the DIFRA market share reports, Mr. Tatman did not need or use the DIFRA data to determine the magnitude of McWane’s pending price increase:

[T]he decision in my mind was already made. . . . I was going with the lower number. And we just waited till the DIFRA data came in because Leon wanted to see that and [do] a quick analysis. I really

didn't need to look that hard at the DIFRA data because I knew the answer already.

(Tatman, Tr. 957-958; CX 1193 at 001 (May 29, 2008 draft price increase letter reflecting 8% increase); Tatman, Tr. 539 (“My draft letter before the DIFRA data is 8 percent. Now that we have the DIFRA data, that confirms it.”)).

Response To Finding No. 1244b:

This finding is inaccurate because there is no inconsistency between Mr. Tatman's testimony in this finding and his testimony cited in Finding No. 1244a.

1245. Mr. Page and Mr. McCullough also examined the DIFRA data, concluding that the market share losses reflected there had been a result of Project Pricing. (CX 2068 (June 18, 2008 email exchange in which McCullough explains that “Sigma and Star were seeking an increase in the 25% range which we will not support as they continue to take share with special pricing,” and Page responds “This just reflects the lack of support and feedback we got from distribution as they wanted us to hold high price levels and buy under neath us.”)).

Response To Finding No. 1245:

This proposed Finding is incomplete. Mr. McCullough states in CX 2068 that “Sigma and Star were seeking an increase in the 25% range, which we will not support as they continue to take share with special pricing on both the backside and front side of projects.” Complaint Counsel did not call either Mr. Page or Mr. McCullough at trial to explain the meaning of “special pricing on both the backside and front side of projects.” Complaint Counsel's characterization of the evidence is not supported in the record.

7.5.3.8 Star and Sigma Quickly Matched McWane's June 17, 2008 Price Increase

1246.

[REDACTED]

(McCutcheon, Tr. 2447-2448, *in camera*; Rybacki, Tr. 3645-3646, *in camera*; CX 1621-A at 088, 089, *in camera* (Rybacki telephone records); *supra* ¶¶ 781-782 (detailing telephone records)).

Response To Finding No. 1246:

See General Response 4. This finding is misleading because Sigma learned about McWane's and Star's pricing decisions only after the fact and from its own customers. (RPF 195). Mr. Rybacki testified that Sigma learns about what its competitors are charging for Fittings "[t]hrough the marketplace, through my salespeople, through my regional managers and through my customers." (RPF 196). Mr. Pais also specifically denied coming to any agreements with McWane regarding the January 2008, June 2008, and June 2010 multipliers. (RPF 209; Pais, Tr. 2045-2048 ("Absolutely not." ... "Never." ... "Not at all." ... "Never.")). Mr. McCutcheon denied any agreement to centralize pricing authority:

Q. Now, Mr. McCutcheon, did you call up anyone from McWane or Sigma and say: Hey, this is what I'm doing, I'm asking McCutcheon to get more firsthand involved in this--or Mr. Minamyer to get more firsthand involved in this?

A: No, sir. (RPF 215; McCutcheon, Tr. 2519-2520).

Dr. Schumann conceded that every single McWane, Sigma, and Star witness affirmatively denied any agreement on the January and June 2008 multipliers and any agreement to eliminate or reduce job price discounts. (RPF 232). See Reply To Finding 714, *supra*.

1247. On or about June 27, 2008, Star announced it would follow McWane's price increase, and issued letters to its customers specifying the multiplier increases that it would implement to match McWane, effective July 14, 2008. (CX 2430 at 001 (Star June 27 announcement for states with .30 multiplier); CX 2255 (Star June 27 announcement for states with .28 multiplier); CX 2252 (Star June 27 announcement for states with .33 multiplier); Minamyer, Tr. 3216-3218; CX 2254 at 001-004 (preparing sales force for another round of multiplier increases and instructing them that they should follow the same procedures as previously announced before offering any Project Prices); Minamyer, Tr. 3216-3217; see also *supra* ¶¶ 972-996 (similar instructions circulated in January 2008); McCutcheon, Tr. 2448, *in camera*).

Response To Finding No. 1247:

Respondent has no specific response other than to note that Mr. Minamyer and Mr. McCutcheon did not testify to price increases. Minamyer, Tr. 3217. ("I would have to

assume it's an increase. It's a change."); McCutcheon, Tr. 2448 ("I would assume so.")

Moreover, McWane's smaller price increase than both Sigma and Star caused Star to rescind its larger increases and independently follow McWane's lower pricing after McWane's lower pricing was in effect. (RPF 128-140).

1248. At least one of Star's June 27, 2008 price increase letters was sent by Star directly to Craig Schapiro of Sigma, who forwarded it within Sigma with the comment "Looks like Star is sending their version of the TYLER letters...." (CX 2252 at 001; Rybacki, Tr. 3573).

Response To Finding No. 1248:

See McWane General Response 4. Moreover, at the time anyone at Sigma received the June 27, 2008 letter, Star's pricing was already announced and, thus Sigma was not aware of any pricing until after Star had independently determined its pricing and disclosed it publicly to its customers.

1249. On or about July 7, 2008, Sigma followed McWane's price increase. (CX 2253 at 001-003 (Sigma regional manager circulating Sigma multiplier increase letters matching McWane's, noting that they would be faxed "to the marketplace" the next day and that "I believe it's a confirmation of what the market already knows."); see also Rybacki, Tr. 3574-3575 ("I wanted to go up as well. I wanted to make sure that we were locked step.")).

Response To Finding No. 1249:

The cited exhibit, CX 2253, is a Sigma price increase letter. It says nothing with respect to "follow[ing] McWane's price increase."

1250. On July 18, 2008, Mr. Tatman observed in the "Sales/Market/Competitive Environment" section of his Second Quarter 2008 Executive Report that "[b]oth Sigma and Star have communicated support of the July 14th price increase." (CX 1562 at 004; Tatman, Tr. 558).

Response To Finding No. 1250:

This Finding is incomplete. Mr. Tatman also explained in CX 1562 his perception that his competitors were making "more creative use of programs," explaining that he believed they

were using other means to give price discounts other than project pricing. Tatman, Tr. 549.

Mr. Tatman also testified that he did not communicate with either competitor, but would have picked up the information concerning Sigma and Star's actions from a customer. Tatman, Tr. 558. This finding is also misleading because Dr. Normann testified that there is no economic evidence that the McWane, Sigma, and Star price changes in January 2008 and June 2008 were coordinated--prices were largely unchanged on average despite significant increases in cost, average prices did not move in parallel, but rather, average prices moved in different directions, and McWane did not follow Sigma's large list price increase in the fall of 2007 (for January 2008) or in Summer 2008, but instead issued lower multipliers for most states effective February 2008 and did not follow Sigma's large multiplier increase announced in April 2008.

7.5.3.9 Mr. Tatman Actively Policed the Prompt Submittal and Turnaround of Monthly DIFRA Reports

1251. After DIFRA issued its first report, Mr. Tatman continued to actively police the timely monthly submittal of data and the prompt turnaround of DIFRA reports (*Infra* ¶¶ 1252-1259).

Response To Finding No. 1251:

This is an unsupported argumentative assertion, for which no response is required. *See* Response To Finding 1252-1259.

1252. The normal DIFRA reporting cycle involved member submission of data to SRHW by the 15th of the month, with the aggregated report sent to members for the 20th of the month, and if the 20th fell on a weekend, the following Monday. (Brakefield, Tr. 1316 (“The normal reporting cycle was to report the previous month by the 15th, and hopefully they would end up sending that back out by the 20th. And if the 20th fell on a weekend, it would be the following Monday.”)).

Response To Finding No. 1252:

Given DIFRA's short, six month existence, and its failure to disseminate the tons-shipped data on a regular date and its re-issuance of reports after discovering numerous data errors, it is an error to characterize a “normal” reporting cycle. (RPF 237, 239, 240, 262).

1253. Mr. Tatman contacted DIFRA's accountants at SRHW directly regarding the timeliness of DIFRA reports. (Brakefield, Tr. 1314-1315; Brakefield, Tr. 1316-1317 ("Mr. Tatman had a lot of concerns because a couple of times . . . the numbers didn't show up exactly when he thought they should, and he was constantly really creating some issues.")).

Response To Finding No. 1253:

See General Response 11. This proposed Finding is duplicative of proposed Findings 1235-1236, to which McWane has already responded.

1254. On several occasions, Mr. Tatman contacted DIFRA members directly – without copying or going through DIFRA's lawyers – regarding the timing of submission of data to DIFRA and receipt of DIFRA reports by members. (CX 2447; CX 2448).

Response To Finding No. 1254:

McWane disputes this proposed Finding. The referenced exhibits, CX 2447 and CX 2448, are an exchange of emails between Mr. Tatman and DIFRA President Tom Brakefield. Contact with the President of DIFRA regarding member reporting was specifically contemplated by DIFRA counsel. CX 2270 at 002.

1255. On August 18, 2008 Mr. Tatman sent an email to Mr. Brakefield asking if the DIFRA reporting cycle was on schedule. (CX 2447; Brakefield, Tr. 1315-1316; Tatman, Tr. 552-554).

Response To Finding No. 1255:

See General Response 11. This proposed Finding is duplicative of proposed Finding 1254, to which McWane has already responded.

1256. At the time of Mr. Tatman's August 18, 2008 email, Sigma had not yet submitted its data to SRHW, and Sigma submitted its July 2008 data to SRHW the very next day. (CX 1318 at 001).

Response To Finding No. 1256:

McWane agrees that Sigma submitted its data to SRHW on August 19, 2008. (CX 1318). *See* General Response 5. Complaint Counsel did not question any Sigma witness at trial concerning CX 1318 or the timing of the submission.

1257. On September 23, 2008, Mr. Tatman sent another email to Mr. Brakefield asking if the DIFRA reporting cycle was on schedule. (CX 2448; CX 2447 (Tatman email to Brakefield: "To your knowledge are we now on a normal reporting cycle for DIFRA? If so all members should have reported by the 15th and the reports should be out by the 20th."); Brakefield, Tr. 1315-1317; Tatman, Tr. 556-557).

Response To Finding No. 1257:

McWane has no specific response, other than to note this proposed Finding is duplicative of proposed Finding 1254, to which McWane has already responded.

1258. As with the prior month, Sigma had not yet submitted its data to SRHW, and it submitted its August 2008 data to SRHW three days later. (CX 1316 at 001).

Response To Finding No. 1258:

McWane agrees that CX 1316 is dated September 26, 2008. *See* General Response 5.

Complaint Counsel did not question any Sigma witness at trial concerning CX 1316 or the timing of the submission.

1259. On several occasions, Mr. Brakefield instructed Mr. Tatman that such direct communications between DIFRA members, and between DIFRA members and SRHW, were inappropriate, and that communications should go through the association's lawyers. (Brakefield, Tr. 1314-1317 ("Did you tell Mr. Tatman that it was inappropriate for him to contact you directly? A. Yes, sir, I did. On several occasions."); Brakefield Tr. 1288 ("I basically tried to get Wood Herren to make that call and then also tried to get Mr. Tatman to understand that that was not the proper way to do that, we need to proceed with the attorneys in that kind of communication.")).

Response To Finding No. 1259:

Complaint Counsel has correctly quoted the testimony, but it is out of context. It appears that Mr. Brakefield's objection was to Mr. Tatman contacting the CPA directly. *See* Brakefield, Tr. 1288 ("I think he had also tried to get in touch with the CPA, and which I'd tried to warn him against that..."); Tr. 1315 ("Well, I just didn't think it was something that a member should discuss the numbers with the CPA who had everybody else's numbers. I just thought that was an opportunity that he did not need to place DIFRA into that other members could say, "Well, he's calling. Why can't I call?"

7.6 **DIFRA Was Intended and Used to Facilitate Price Stability and Transparency Through an Information Exchange**

1260. Notwithstanding the potentially procompetitive purposes set forth in DIFRA's Articles of Incorporation (such as industry standard setting, education, outreach, advocacy, and research), DIFRA's actual objective, and the only activity it meaningfully engaged in, was the operation of an information exchange aimed at monitoring market shares, reducing competition, and stabilizing prices in the Fittings market. (*Infra* ¶¶ 1261-1337).

Response To Finding No. 1260:

This is an unsupported and argumentative assertion finding no support in the record, for which no response is required. *See* Response To Findings 1261-1337.

7.6.1 **Original Purposes of DIFRA**

1261. DIFRA did not meaningfully engage in any of the salutary purposes listed in its Articles of Incorporation. (*Infra* ¶¶ 1262-1274).

Response To Finding No. 1261:

This is an unsupported and argumentative assertion finding no support in the record, for which no response is required. *See* General Response 1.

1262. Article III of the DIFRA Articles of Incorporation sets forth various purposes of the organization:

(i) To promote the interests of the ductile iron fittings industry and to promulgate policies and conduct activities for the betterment of the ductile iron fittings industry, provided that all policies and activities of the Association be consistent with applicable federal, state and local antitrust, trade regulation and other laws and regulations;

(ii) To provide members and others with the opportunity for discussion, education, advancement and improvement of the ductile iron fittings industry through meetings, seminars, publications, and other programs and activities;

(iii) To advocate and publicize the needs, interests and merits of the ductile iron fittings industry to industry, the public; and the government;

(iv) To assist in the development and establishment of standards with respect to the ductile iron fittings industry;

(v) To acquire, prepare, publish and disseminate technical data and information relating to the ductile iron fittings industry;

(vi) To plan and conduct research and test programs for ductile iron fittings and other products of interest to the ductile iron fittings industry; and

(vii) To do those things necessary or desirable for the accomplishment of any of the foregoing purposes and for the interest and benefit of the Association and its members, including the exercise of those powers which are authorized by the Act.

(CX 0158 at 002-003; Tatman, Tr. 576).

Response To Finding No. 1262:

The finding is misleading and inaccurate because, CX 0158-001 specifically states that “the bylaws” were “not yet formally adopted, but believed to be in final or close-to-final condition.” This proposed finding is, therefore, based on a non-final version of the bylaws.

1263. DIFRA did not do anything to “promote the interests of the ductile iron fittings industry,” despite that being a purpose listed in its Articles of Incorporation. (Tatman, Tr. 576-577 (“[T]hey did not do anything to promote the interests of the ductile iron fittings industry”); Brakefield, Tr. 1229-1234 (DIFRA did not actually do anything to pursue this purpose); CX 0158 at 002-003 (listing purpose in DIFRA Articles); CX 1480 at 004-005 (same)).

Response To Finding No. 1263:

This finding is misleading because during the short time DIFRA was functional there was not sufficient time to achieve the goals laid out in its Articles of Incorporation. Mr. Brakefield testified, “And I was answering him that we had not – we had not yet got to that yet. You know, we were just starting out, and that’s something that we had prepared to do. But no, we had not, you know, got to the specification, done the standardization, all the kind of things that we’re talking about.” Brakefield, Tr. 1327. DIFRA was operational for only “[r]oughly six months.” (RPFF ¶ 237). Mr. Brakefield, DIFRA’s former president, testified that DIFRA met a total of

two or three times, and was short-lived in its operation, and DIFRA was incorporated in January 2007, but only functioned from June 2008 through January 2009. (RPFF ¶ 238-239).

1264. DIFRA did not do anything to create “opportunity for discussion, education, advancement and improvement of the ductile iron fittings industry through meetings, seminars, publications or other programs and activities,” despite that being a stated purpose in the articles of incorporation. (Tatman, Tr. 577; Brakefield, Tr. 1230 (DIFRA never provided seminars, never issued publications); CX 0158 at 003 (listing purpose in DIFRA Articles); CX 1480 at 005 (same)).

Response To Finding No. 1264:

This finding is misleading because during the short time DIFRA was functional there was not sufficient time to achieve the goals laid out in its Articles of Incorporation. Mr. Brakefield testified, “And I was answering him that we had not – we had not yet got to that yet. You know, we were just starting out, and that’s something that we had prepared to do. But no, we had not, you know, got to the specification, done the standardization, all the kind of things that we’re talking about.” Brakefield, Tr. 1327. DIFRA was operational for only “[r]oughly six months.” (RPFF ¶ 237). Mr. Brakefield, DIFRA’s former president, testified that DIFRA met a total of two or three times, and was short-lived in its operation, and DIFRA was incorporated in January 2007, but only functioned from June 2008 through January 2009. (RPFF ¶ 238-239). Moreover, the quoted language in the finding is a quote from a non-final, draft of the bylaws.

1265. DIFRA did not do anything to “advocate or publicize the needs, interests and merits of the ductile iron fitting industry to industry, the public and the government,” despite that being a stated purpose in the articles of incorporation. (Tatman, Tr. 577; Brakefield, Tr. 1231 (DIFRA did not engage in any activities to advocate for the interests of the Fittings industry); CX 0158 at 003 (listing purpose in DIFRA Articles); CX 1480 at 005 (same)).

Response To Finding No. 1265:

This finding is misleading because during the short time DIFRA was functional there was not sufficient time to achieve the goals laid out in its Articles of Incorporation. Mr. Brakefield testified, “And I was answering him that we had not – we had not yet got to that yet. You know,

we were just starting out, and that's something that we had prepared to do. But no, we had not, you know, got to the specification, done the standardization, all the kind of things that we're talking about." Brakefield, Tr. 1327. DIFRA was operational for only "[r]oughly six months." (RPF 237). Mr. Brakefield, DIFRA's former president, testified that DIFRA met a total of two or three times, and was short-lived in its operation, and DIFRA was incorporated in January 2007, but only functioned from June 2008 through January 2009. (RPF 238-239). Moreover, the quoted language in the finding is a quote from a non-final, draft of the bylaws.

1266. DIFRA did not do anything to "assist in the development and establishment of standards with respect to the ductile iron fittings industry," despite that being a stated purpose in the articles of incorporation. (Tatman, Tr. 578; Brakefield, Tr. 1231-1232, 1256 (DIFRA did not establish or propose any Fittings standards, did not form a standards committee); Brakefield, Tr. 1328 (from 2005 until the present, DIFRA has never taken action to promote standards for Fittings); CX 0158 at 003 (listing purpose in DIFRA Articles); CX 1480 at 005 (same); CX 2538 (McCutcheon, IHT (Vol. 2) at 246) (DIFRA never did any work on setting industry standards or industry codes); CX 2541 (Crawford, Dep. at 82) (U.S. Pipe representative recalls no DIFRA committees established to discuss industry standards)).

Response To Finding No. 1266:

This finding is misleading because during the short time DIFRA was functional there was not sufficient time to achieve the goals laid out in its Articles of Incorporation. Mr. Brakefield testified, "And I was answering him that we had not – we had not yet got to that yet. You know, we were just starting out, and that's something that we had prepared to do. But no, we had not, you know, got to the specification, done the standardization, all the kind of things that we're talking about." Brakefield, Tr. 1327. DIFRA was operational for only "[r]oughly six months." (RPF 237). Mr. Brakefield, DIFRA's former president, testified that DIFRA met a total of two or three times, and was short-lived in its operation, and DIFRA was incorporated in January 2007, but only functioned from June 2008 through January 2009. (RPF 238-239). Moreover, the quoted language in the finding is a quote from a non-final, draft of the bylaws.

1267. DIFRA did not do anything to “acquire, prepare, publish and disseminate technical data and information relating to the ductile iron fittings industry,” despite that being a stated purpose in the articles of incorporation. (Tatman, Tr. 578; Brakefield, Tr. 1232-1233; CX 0158 at 003 (listing purpose in DIFRA Articles); CX 1480 at 005 (same); CX 2541 (Crawford, Dep. at 83-85 (U.S. Pipe representative recalls no committees established to discuss technical aspects of Fittings))).

Response To Finding No. 1267:

This finding is misleading because during the short time DIFRA was functional there was not sufficient time to achieve the goals laid out in its Articles of Incorporation. Mr. Brakefield testified, “And I was answering him that we had not – we had not yet got to that yet. You know, we were just starting out, and that’s something that we had prepared to do. But no, we had not, you know, got to the specification, done the standardization, all the kind of things that we’re talking about.” Brakefield, Tr. 1327. DIFRA was operational for only “[r]oughly six months.” (RPF 237). Mr. Brakefield, DIFRA’s former president, testified that DIFRA met a total of two or three times, and was short-lived in its operation, and DIFRA was incorporated in January 2007, but only functioned from June 2008 through January 2009. (RPF 238-239). Moreover, the quoted language in the finding is a quote from a non-final, draft of the bylaws.

1268. DIFRA did not do anything to “plan and conduct research and test programs for the ductile iron fittings and other products of interest,” despite that being a stated purpose in the articles of incorporation. (Tatman, Tr. 578; Brakefield, Tr. 1233; CX 0158 at 003 (listing purpose in DIFRA Articles); CX 1480 at 005 (same))).

Response To Finding No. 1268:

This finding is misleading because during the short time DIFRA was functional there was not sufficient time to achieve the goals laid out in its Articles of Incorporation. Mr. Brakefield testified, “And I was answering him that we had not – we had not yet got to that yet. You know, we were just starting out, and that’s something that we had prepared to do. But no, we had not, you know, got to the specification, done the standardization, all the kind of things that we’re talking about.” Brakefield, Tr. 1327. DIFRA was operational for only “[r]oughly six months.”

(RPF ¶ 237). Mr. Brakefield, DIFRA’s former president, testified that DIFRA met a total of two or three times, and was short-lived in its operation, and DIFRA was incorporated in January 2007, but only functioned from June 2008 through January 2009. (RPF ¶ 238-239). Moreover, the quoted language in the finding is a quote from a non-final, draft of the bylaws.

1269. DIFRA never formed any committees. (Brakefield, Tr. 1236, 1256).

Response To Finding No. 1269:

This finding is misleading because during the short time DIFRA was functional there was not sufficient time to achieve the goals laid out in its Articles of Incorporation. Mr. Brakefield testified, “And I was answering him that we had not – we had not yet got to that yet. You know, we were just starting out, and that’s something that we had prepared to do. But no, we had not, you know, got to the specification, done the standardization, all the kind of things that we’re talking about.” Brakefield, Tr. 1327. DIFRA was operational for only “[r]oughly six months.” (RPF ¶ 237). Mr. Brakefield, DIFRA’s former president, testified that DIFRA met a total of two or three times, and was short-lived in its operation, and DIFRA was incorporated in January 2007, but only functioned from June 2008 through January 2009. (RPF ¶ 238-239). Moreover, the quoted language in the finding is a quote from a non-final, draft of the bylaws.

1270. DIFRA never sought input from Fittings Distributors. (Brakefield, Tr. 1330).

Response To Finding No. 1270:

This finding is misleading because during the short time DIFRA was functional there was not sufficient time to achieve the goals laid out in its Articles of Incorporation. Mr. Brakefield testified, “And I was answering him that we had not – we had not yet got to that yet. You know, we were just starting out, and that’s something that we had prepared to do. But no, we had not, you know, got to the specification, done the standardization, all the kind of things that we’re talking about.” Brakefield, Tr. 1327. DIFRA was operational for only “[r]oughly six months.”

(RPF 237). Mr. Brakefield, DIFRA's former president, testified that DIFRA met a total of two or three times, and was short-lived in its operation, and DIFRA was incorporated in January 2007, but only functioned from June 2008 through January 2009. (RPF 238-239). Moreover, the quoted language in the finding is a quote from a non-final, draft of the bylaws.

1271. DIFRA's only operating expenses were payments to the law firm Bradley Arant, which were split evenly by the four members and were inclusive of SRHW's fees. (Brakefield, Tr. 1272-1274; CX 1486 at 002 (meeting agenda item re: operating expenses)).

Response To Finding No. 1271:

Respondent agrees that DIFRA spent all of its operating funds on its lawyers and independent accountants.

1272. DIFRA has never filed tax returns, and DIFRA members have never paid dues to DIFRA. (Brakefield, Tr. 1323-1324).

Response To Finding No. 1272:

DIFRA members were required to submit member fees, which were all used to pay DIFRA's lawyers and accountants. (RPF 246).

1273. Notwithstanding the various stated purposes set forth in the DIFRA Articles of Incorporation, the only thing that DIFRA did was to report aggregated sales data of its members Fittings sales data (by tons shipped). (Tatman, Tr. 577-578 (the only thing that DIFRA did was to aggregate data and send it out to the DIFRA members)).

Response To Finding No. 1273:

This finding is misleading because during the short time DIFRA was functional there was not sufficient time to achieve the goals laid out in its Articles of Incorporation. Mr. Brakefield testified, "And I was answering him that we had not – we had not yet got to that yet. You know, we were just starting out, and that's something that we had prepared to do. But no, we had not, you know, got to the specification, done the standardization, all the kind of things that we're talking about." Brakefield, Tr. 1327. DIFRA was operational for only "[r]oughly six months." (RPF 237). Mr. Brakefield, DIFRA's former president, testified that DIFRA met a total of

two or three times, and was short-lived in its operation, and DIFRA was incorporated in January 2007, but only functioned from June 2008 through January 2009. (RPF 238-239). Moreover, the quoted language in the finding is a quote from a non-final, draft of the bylaws. The DIFRA members did not report “sales” data, that is, any financial or pricing data or any data from which the same could be ascertained. (RPF 251-265).

1274. The DIFRA information exchange (*i.e.*, the DIFRA members’ submission of data to the accounting firm SRHW and SRHW’s subsequent distribution of aggregated reports of that data to the DIFRA members) did not relate to any of the purposes of DIFRA that are identified in the DIFRA Articles of Incorporation. (Brakefield, Tr. 1328).

Response To Finding No. 1274:

See General Response 8. However, this finding is misleading because during the short time DIFRA was functional there was not sufficient time to achieve the goals laid out in its Articles of Incorporation. Mr. Brakefield testified, “And I was answering him that we had not – we had not yet got to that yet. You know, we were just starting out, and that’s something that we had prepared to do. But no, we had not, you know, got to the specification, done the standardization, all the kind of things that we’re talking about.” Brakefield, Tr. 1327. DIFRA was operational for only “[r]oughly six months.” (RPF 237). Mr. Brakefield, DIFRA’s former president, testified that DIFRA met a total of two or three times, and was short-lived in its operation, and DIFRA was incorporated in January 2007, but only functioned from June 2008 through January 2009. (RPF 238-239).

7.6.2 McWane, Sigma and Star Intended DIFRA to Facilitate Their Information Exchange and Stabilize the Fittings Market

1275. For each of McWane, Sigma and Star, the actual intended purpose of DIFRA was to facilitate the exchange of sales information and stabilize the Fittings market. (*Infra* ¶¶ 1276-1296).

Response To Finding No. 1275:

This is an unsupported argumentative assertion without support, for which no response is required.

7.6.2.1 Sigma

1276. At trial, Mr. Rybacki testified that he believed DIFRA to be important because of the threat to the Fittings industry posed by PVC, and because Fittings linings and coating needed to be standardized; however, Mr. Rybacki conceded that DIFRA never took any action on the PVC threat, or standardizing linings or coatings. (Rybacki, Tr. 3533).

Response To Finding No. 1276:

This finding is misleading because during the short time DIFRA was functional there was not sufficient time to achieve the goals laid out in its Articles of Incorporation. DIFRA was operational for only “[r]oughly six months.” (RPF 237). Mr. Brakefield, DIFRA’s former president, testified that DIFRA met a total of two or three times, and was short-lived in its operation, and DIFRA was incorporated in January 2007, but only functioned from June 2008 through January 2009. (RPF 238-239). Mr. Rybacki consistently testified, “DIFRA never really got going.” Rybacki, Tr. 3533.

1277. At trial, Mr. Pais testified to several purposes of DIFRA and Sigma’s reasons for participating in the DIFRA information exchange, including:

- a. Mr. Pais testified that he communicated to potential DIFRA members that visibility into the size of (and changes in the size of) the Fittings market by tonnage would help with inventory management and was one reason to form the organization. (Pais, Tr. 1971-1972, 1975-1976).

Response To Finding No. 1277a:

See General Response 8.

- b. Specifically, Mr. Pais believed that the market and market-share information generated by DIFRA could help Sigma and the other suppliers avoid over- or under-production of Fittings and consequent lost profits for the industry. (Pais, Tr. 1983-1985; CX 1088 at 001-002 (October 13, 2008 Pais email: “[T]he result of erroneous or misunderstood market and market share can lead to unwise and

often costly marketing decisions, as McWane/Tyler themselves found in ‘06 - ‘07, to their detriment and to that of the whole industry!’)).

Response To Finding No. 1277b:

Respondent has no specific response.

- c. Mr. Pais also testified that he communicated to potential DIFRA members that another benefit of DIFRA would be possible standardization of Fittings coatings and linings. (Pais, Tr. 1971-1972).

Response To Finding No. 1277c:

Respondent has no specific response.

- d. Mr. Pais specifically denied that he expected that sharing Fittings sales information the DIFRA members would create a more stable market. (Pais, Tr. 1975 (“Q. Was it your expectation that by sharing this information you could create a more stable market? A. I don’t think that follows from that. And again, for me, “stable” was a very broad term. I was more focused on knowing the size of the market’’)).

Response To Finding No. 1277d:

This finding mischaracterizes the testimony of Mr. Pais. Mr. Pais testified that rather than focusing on market stability he was “more focused on knowing the size of the market because up until that time I was trying very hard to see where the market was growing and how.” (Pais, Tr. 1975). The information that was provided to SRHW, aggregated and subsequently shared did not include pricing information or sales dollars, only volume tonnage. (Pais, Tr. 1975; RPF 251-265).

1278. Mr. Pais’s trial testimony was impeached by Mr. Saha’s trial and deposition testimony:

Response To Finding No. 1278:

A 2004 conversation between Mr. Pais and Mr. Saha is irrelevant to the allegations against McWane in this case, and should be given no weight. DIFRA did not exist in 2004, and how it might operate in the future is pure speculation. Mr. Saha expressly testified that he had no firsthand knowledge concerning DIFRA. Saha, Tr. 1207. The statements in the proposed

findings below, with the exception of Finding No. 1278a, were not admitted or offered for the truth of the matter asserted and instead are merely foundational. To the extent they were offered for the truth, the Court found them to be unreliable:

JUDGE CHAPPELL: Well, we've got on the record Mr. Saha's position on what was said. And then evidently we're going to have Mr. Pais' position of what was said.

So it's in the record, so to the extent I want to go back and look at this and change my mind, I can do that. But at this moment in time, this is hearsay. It's the kind of hearsay that's unreliable. And it doesn't have the indicia of reliability even under the weakest scale anybody could come up with that would make it allowed in a fair trial.

But you can get your question and answer, and we'll see what Mr. Pais has to say later. But the objection is sustained.

To the extent Mr. Saha's testimony was offered to impeach Mr. Pais (who had not yet testified), it was improper. This proposed Finding should therefore be disregarded in its entirety.

- a. In 2004, Mr. Pais invited Mr. Saha, then at the small Fittings supplier, PCI, to join a new organization he wanted to start, DIFRA. (Saha, Tr. 1178-1179).

Response To Finding No. 1278a:

A 2004 conversation between Mr. Pais and Mr. Saha is irrelevant to the allegations against McWane in this case, and should be given no weight. DIFRA did not exist in 2004, and how it might operate in the future is pure speculation. Mr. Saha expressly testified that he had no firsthand knowledge concerning DIFRA. Saha, Tr. 1207.

- b. Mr. Pais told Mr. Saha that DIFRA would be an organization like DIPRA, the Ductile Iron Pipe Research Association, and would require at least three members. (Saha, Tr. 1179-1180, 1182⁷).

Response To Finding No. 1278b:

A 2004 conversation between Mr. Pais and Mr. Saha is irrelevant to the allegations against McWane in this case, and should be given no weight. DIFRA did not exist in 2004, and how it might operate in the future is pure speculation. Mr. Saha expressly testified that he had no firsthand knowledge concerning DIFRA. Saha, Tr. 1207. The statements in the proposed finding were not admitted or offered for the truth of the matter asserted and instead are merely foundational. This proposed finding should therefore be disregarded.

- c. Mr. Pais informed Mr. Saha that DIFRA would operate an information exchange that would have required PCI to provide its Fittings sales information in tonnage and dollars. (Saha, Tr. 1187; CX 2519 (Saha, Dep. at 72-73) (Mr. Pais “explained to me, that . . . if we formed an organization where we turned in -- we had to turn in every quarterly our sales by product group and category and tonnage, and that we will -- we should stay within a range of our existing tonnage.”)).

Response To Finding No. 1278c:

A 2004 conversation between Mr. Pais and Mr. Saha is irrelevant to the allegations against McWane in this case, and should be given no weight. DIFRA did not exist in 2004, and how it might operate in the future is pure speculation. Mr. Saha expressly testified that he had no

⁷ The cited trial testimony regarding the out of court statement of Mr. Pais is not cited for the truth of the matter asserted in the statement. (See Saha, Tr. 1179-1180).

firsthand knowledge concerning DIFRA. Saha, Tr. 1207. The statements in the proposed finding were not admitted or offered for the truth of the matter asserted and instead are merely foundational. This proposed finding should therefore be disregarded.

- d. Mr. Pais explained to Mr. Saha that “it is hurting the business, all of us trying to compete,” and that Mr. Pais was seeking to organize DIFRA in order to “stabilize prices.” (Saha, Tr. 1202⁸; CX 2519 (Saha, Dep. at 72-75)).

Response To Finding No. 1278d:

A 2004 conversation between Mr. Pais and Mr. Saha is irrelevant to the allegations against McWane in this case, and should be given no weight. DIFRA did not exist in 2004, and how it might operate in the future is pure speculation. Mr. Saha expressly testified that he had no firsthand knowledge concerning DIFRA. Saha, Tr. 1207. The statements in the proposed finding were not admitted or offered for the truth of the matter asserted and instead are merely foundational. In addition, the referenced testimony at Tr. 1202 was made as an offer of proof. This proposed finding should therefore be disregarded.

- e. Mr. Pais encouraged Mr. Saha to join DIFRA because having all the Fittings suppliers as DIFRA members would provide market stability on pricing. (Saha,

⁸ At trial, the cited testimony regarding Mr. Pais’s out of court statements was admitted for impeachment purposes. (*See* Saha, Tr. 1211-1212). The cited testimony regarding Mr. Pais’s out of court statements should also be considered for the truth of the matters asserted therein, as statements of motive, intent, or plan under Fed. R. Evid. 803(3).

Tr. 1207⁹ (“The reasons were basically – it’s the same – he wanted market stability on pricing issues, and he felt that all the sellers of fittings belonging to an organization would give the stability on pricing.”)).

Response To Finding No. 1278e:

A 2004 conversation between Mr. Pais and Mr. Saha is irrelevant to the allegations against McWane in this case, and should be given no weight. DIFRA did not exist in 2004, and how it might operate in the future is pure speculation. Mr. Saha expressly testified that he had no firsthand knowledge concerning DIFRA. Saha, Tr. 1207. The statements in the proposed finding were not admitted or offered for the truth of the matter asserted and instead are merely foundational. This proposed finding should therefore be disregarded.

- f. Specifically, Mr. Pais explained to Mr. Saha that PCI would have to maintain its rank among suppliers, rather than growing its Fittings sales. (Saha, Tr. 1187-1188). Mr. Saha believed he would not be allowed to grow his sales tonnage beyond his then current levels at the time DIFRA was formed. (Saha, Tr. 1196, 1199).

Response To Finding No. 1278f:

A 2004 conversation between Mr. Pais and Mr. Saha is irrelevant to the allegations against McWane in this case, and should be given no weight. DIFRA did not exist in 2004, and

⁹ At trial, the cited testimony regarding Mr. Pais’s out of court statements was admitted for impeachment purposes. (*See* Saha, Tr. 1211-1212). The cited testimony regarding Mr. Pais’s out of court statements should also be considered for the truth of the matters asserted therein, as statements of motive, intent, or plan under Fed. R. Evid. 803(3).

how it might operate in the future is pure speculation. Mr. Saha expressly testified that he had no firsthand knowledge concerning DIFRA. Saha, Tr. 1207. The statements in the proposed finding were not admitted or offered for the truth of the matter asserted and instead are merely foundational. This proposed finding should therefore be disregarded.

- g. PCI ultimately did not join DIFRA because Mr. Saha believed doing so would require his company to curtail its growth. (Saha, Tr. 1185-1186, 1194, 1996).

Response To Finding No. 1278g:

A 2004 conversation between Mr. Pais and Mr. Saha is irrelevant to the allegations against McWane in this case, and should be given no weight. DIFRA did not exist in 2004, and how it might operate in the future is pure speculation. Mr. Saha expressly testified that he had no firsthand knowledge concerning DIFRA. Saha, Tr. 1207. The statements in the proposed finding were not admitted or offered for the truth of the matter asserted and instead are merely foundational. This proposed finding should therefore be disregarded.

1279. Mr. Pais's trial testimony on the purpose of DIFRA is contradicted by Mr. Pais's own business documents:

Response To Finding No. 1279:

This finding is misleading because the statements contained herein do not contradict Mr. Pais' trial testimony and are not inconsistent with the statements that were cited in proposed Finding No. 1277.

- a. In a June 19, 2008 email to Sigma's "M20" management group, Mr. Pais described the establishment and benefits of DIFRA:

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

(CX 1092 at 001; Pais, Tr. 1976-1978).

Response To Finding No. 1279a:

Complaint Counsel correctly quotes language from CX 1092. This finding is misleading because the statements contained therein do not contradict Mr. Pais' trial testimony and are not inconsistent with the statements that were cited in proposed Finding No. 1277.

- b. In explaining his June 19, 2008 email, Mr. Pais testified that he was pleased that the DIFRA members had overcome "animosities and cultural differences," and that he considered DIFRA an achievement "because for me, I always believed in the team concept, and . . . to me team means together everyone achieves more." (CX 2528 (Pais, Dep. at 124-125); *see also* Pais, Tr. 1978-1979 (explaining that "more substantial economic benefits" referred to the ability to manage inventory based on the size of the Fittings market and the ability to assess Sigma's relative performance in different Fittings product segments based on size)).

Response To Finding No. 1279b:

Complaint Counsel correctly quotes Mr. Pais' testimony. This finding is misleading because the statements contained therein do not contradict Mr. Pais' trial testimony and are not inconsistent with the statements that were cited in proposed Finding No. 1277.

- c. In an October 2008 email sent to Sigma's M20 group (approximately top 20 managers) and to its two Frontenac board members, Mr. Florence and Mr. Kuehl, Mr. Pais described DIFRA as benefitting Sigma by creating "an opportunity to create trust and respect among fellow suppliers, which can lead to mature and disciplined pricing decision making in an appropriate and legally sound environment." (CX 1088 at 001; Pais, Tr. 1982-1985).

Response To Finding No. 1279c:

Complaint Counsel correctly quotes from CX 1088. This finding is misleading because the statements contained therein do not contradict Mr. Pais' trial testimony and are not inconsistent with the statements that were cited in proposed Finding No. 1277. Mr. Pais further testified the quoted language was "a very broad assessment as I saw it as one of the benefits, an intangible benefit." Pais, Tr. 1983.

- d. In a December 2008 email to Mr. Walsh, Mr. Bhattacharji and Mr. Rybacki, Mr. Pais wrote that DIFRA reassured McWane, Star and Sigma that their sales declines were due to the decline in the market and not due to competition:

[A]ll competitors are shaken by the sever[e] decline in the market volume and thanks to DIFRA data, the 3 [McWane, Star, and Sigma] are somewhat reassured that it's the market weakness that's costing them volume and they are not losing to the competition."

(CX 1077 at 002; Pais, Tr. 2005-2006).

Response To Finding No. 1279d:

Complaint Counsel correctly quotes from CX 1077. This finding is misleading because the statements contained therein do not contradict Mr. Pais' trial testimony and are not inconsistent with the statements that were cited in Finding No. 1277. This proposed Finding is also incomplete. Mr. Pais testified concerning the quoted language:

Q. And are you expressing the view that notwithstanding the fact that it's a down market and therefore you're losing volume, that if Sigma announces price increases, the other – you're confident the other two will follow because they know, based on the DIFRA data, that they're losing volume but not losing it to the competition?

A. I was expressing a hope.

(Pais, Tr. 2006).

- e. In a February 9, 2009 letter from Mr. Pais to Sigma's lender Ares Capital Corporation, Mr. Pais explicitly explained that DIFRA helped stabilize Fittings prices and preserve strong gross margins despite the weak Fittings market in 2008 because it enabled the suppliers to determine whether a loss in sales volume was due to overall market conditions or due to "cheating" by competitors:

In Fittings, there are effectively 3 – McWane, Sigma and Star – and all suffer from the same challenges and there seems to be a great desire to improve the pricing and *each one has demonstrated thru a reasonable amount of discipline, even being protective of our respective market share*. This is where the monthly market size data produced by DIFRA, an industry association that SIGMA helped to form, with 4 supplier members fro [sic] Fittings (one, U.S. Pipe, actually is not a producer anymore, but a small player buying almost all their needs from SIGMA), *helps maintain the*

pricing discipline, as the market and market share data point to a relatively consistent and stable market pattern. It has helped us not to allow the sharp market decline to be mistaken as a ‘loss of market share’, which mostly causes price reaction. Our [Gross Margins] have continued to be strong, throughout the year, even as the volumes have been weak.

(CX 0313 at 004 (emphasis added); Pais, Tr. 1992-1996 (“Q. Sir, and my question is: In providing this information to your lender, Ares Capital, was Sigma intending to be truthful and transparent? A. The answer is yes.”)).

Response To Finding No. 1279e:

Complaint Counsel accurately quotes from CX 313. but the proposed Finding mischaracterizes Mr. Pais’ testimony. Mr. Pais testified that Sigma was in severe financial straits and the purpose of the memo was “to reassure our lenders that we are trying to do all we can to stabilize the business and build from there on.” Pais, Tr. 2159-2160. Mr. Pais described the circumstances under which he had prepared the report to lender Ares Capital: “in certain cases, as I said, we had to walk a fine line. And I wanted to reassure them that we have this organization, it’s helping us over here.” (CX 2528 (Pais, Dep. at 302)). Mr. Pais clearly explained that the memo contained his opinions (not hard facts) and he had no idea how anyone at McWane viewed the DIFRA data. Pais, Tr. 2159-2160. (“I have no clue.”).

1280. Mr. Pais’s trial testimony is also contradicted by his own prior sworn testimony in this matter:

Response To Finding No. 1280:

See General Response 6. This finding is misleading for the reasons set forth below in the responses to Finding Nos. 1280a-c.

- a. Mr. Pais testified that “[t]o Sigma, it really helped to know that our loss of volume and the decline of volume compared to previous, or our targets, was a result of the market,” (CX 2528 (Pais, Dep. at 307-308); see also Rybacki, Tr. 3557 (testifying that Sigma’s motivation for participating in DIFRA was to confirm Sigma’s market share in Fittings)).

Response To Finding No. 1280a:

See General Response 6. Complaint Counsel accurately quotes deposition testimony, but elected not to examine Mr. Pais at trial with respect to his prior testimony. Mr. Pais clearly testified that he had “no clue” if his opinions about DIFRA were shared by anyone at McWane.

See Response 1279e above.

- b. Mr. Pais further testified that without the reassurance provided by DIFRA – i.e., “in a thoroughly competitive almost hostile environment” – the suppliers would have been prone to “mistaken diagnosis” of their declining volumes, making it harder to make the “right decision” on pricing and other competitive decisions. (CX 2527 (Pais, IHT at 86-87)).

Response To Finding No. 1280b:

See General Response 6. Complaint Counsel accurately quotes deposition testimony, but elected not to examine Mr. Pais at trial with respect to his prior testimony. Mr. Pais clearly testified that he had “no clue” if his opinions about DIFRA were shared by anyone at McWane.

See Response 1279e above.

- c. For example, if the DIFRA data showed that “[v]olume was certainly going down, but the market share was holding up” it would help Sigma know that it was not being threatened by McWane or Star. (CX 2527 (Pais, IHT at 80-87)).

Response To Finding No. 1280c:

See General Response 6. Complaint Counsel accurately quotes deposition testimony, but elected not to examine Mr. Pais at trial with respect to his prior testimony. Mr. Pais clearly testified that he had “no clue” if his opinions about DIFRA were shared by anyone at McWane.

See Response 1279e above.

1281. While the DIFRA information exchange was active, Mr. Pais hoped that if Sigma were to announce a price increase, then McWane and Star would follow because of their knowledge from DIFRA data that their reduced volume was due to overall market decline rather than a loss of market share. (Pais, Tr. 2006).

Response To Finding No. 1281:

See General Response 8. McWane has no specific response with respect to Mr. Pais' "hopes" but notes that it did not follow Sigma's proposed price increases in either late 2007 or its Big, Bold Move in Spring, 2008. That Mr. Pais was hoping confirms the absence of an agreement to curtail project pricing.

1282. After DIFRA had largely collapsed, (*see infra* § 7.8.5), Mr. Pais saw reviving DIFRA as instrumental to realizing a Fittings price increase. For example, on or about December 7, 2009, Mr. Pais identified a "Top 10 goals" for Sigma's top five managers for 2010 to include: "Exercise Pricing Leadership to **realize a net increase of 5% in ASP, thru reviving DIFRA** and attempting other Industry Associations." (CX 1074 at 001 (emphasis added)).

Response To Finding No. 1282:

No record cite is provided for the first statement in the proposed Finding. Complaint Counsel accurately quotes CX 1074, but it does not support the initial statement. See also General Response 5. CX 1074 was not used at trial. Moreover, as the alleged conspiracy ended in late 2008, events in 2009 are irrelevant.

1283. Mr. Rybacki believed that if that if the principal members did not submit their tonnage data to DIFRA, there was a distinct possibility that the association would fall apart. (Rybacki, Tr. 3564-3566 ("[I]f you don't participate in the agreed-upon conditions, then I was afraid it might disband.")).

Response To Finding No. 1283:

McWane has no specific response.

7.6.2.2 Star

1284. Star's motivation for joining DIFRA was to obtain the market share data that it would be able to obtain through the association. (McCutcheon, Tr. 2413 (testifying that he was persuaded to join DIFRA because "it would be nice to know what our market share was"); CX 2538 (McCutcheon, IHT (Vol. 2) at 241-243, 245)).

Response To Finding No. 1284:

See General Response 6. DIFRA reported only historic, tons-shipped data, not market shares or any way to ascertain any competitor's specific market share or any price data. (RPFF 251-265). The proposed Finding is also incomplete. Mr. McCutcheon's full explanation was:

Q. Why did Star eventually agree to join DIFRA?

A. Because my two business partners, for lack of a better phrase, Navin and Ramesh, finally convinced me we should do it because it would be nice to know what our market share was and couldn't come up with any negative impact, and I eventually caved to Ramesh. He finally convinced me to do it.

McCutcheon, Tr. 2413. Mr. Bhutada, who convinced Mr. McCutcheon to join DIFRA, explained the benefits he saw:

A. It offered a fair amount of benefits. It gave us an idea of our market share, which helped us to plan our business strategy, whether we are on the right track or not. It also helped for presentations to the bank. And ultimately, it helped us to make a decision about going into domestics in 2009.

(Bhutada, Dep. at 20.)

1285. At the first DIFRA meeting he attended, Mr. McCutcheon asked the group what the purpose of the association was. In response, "nobody said anything about market share," and Mr. Brakefield gave an answer "about doing things to help the industry, standards, codes, helping the, you know, the customer." (CX 2538 (McCutcheon, IHT (Vol. 2) at 245-246)).

Response To Finding No. 1285:

See General Response 6. Mr. McCutcheon explained the purposes of DIFRA at trial, and Complaint Counsel elected not to examine him about his prior testimony. *See* McCutcheon, Tr. 2413-2417. As stated in response to ¶ 1284, DIFRA did not report any competitor's market share.

1286. Mr. McCutcheon did not believe that the purposes given by Mr. Brakefield were the real purposes of DIFRA. (CX 2538 (McCutcheon, IHT (Vol. 2) at 246) (“Q. Did you think that was the real purpose of DIFRA? A. Never did.”); CX 2538 (McCutcheon, IHT (Vol. 2) at 294-295) (McCutcheon never thought the purpose of DIFRA was to pursue standards or certifications; he thought the purpose of DIFRA was “for my competitors to get information”)).

Response To Finding No. 1286:

See General Response 6. As set forth in the Response To Finding 1152, Mr. McCutcheon was initially reluctant to participate but was convinced by other Star employees regarding the virtues of participation and testified himself to the benefits of DIFRA membership.

Moreover, Mr. McCutcheon explained the purposes of DIFRA at trial, and Complaint Counsel elected not to examine him about his prior testimony. *See* McCutcheon, Tr. 2413-2417. This finding is also misleading because DIFRA never collected from, or disseminated any revenue or pricing information to, any DIFRA member. (RPF 251). The reporting format used by DIFRA’s accountants referred only to historic tons-shipped data that would then be aggregated before being disseminated by the independent accountants to the DIFRA membership. (RPF 252). Mr. McCutcheon testified that the parties did not facilitate the “exchange” of information between the DIFRA membership: “Well, my problem is with you using the word “exchange.” (RPF 253). DIFRA’s accountants did not receive any sales or pricing data from DIFRA members, and included no such data in any report. (RPF 255) It would have been impossible for a DIFRA member to determine from any DIFRA report containing the tons-shipped data what any other member’s pricing was for any Fittings product. (RPF 257) Of the DIFRA report, Mr. Rybacki testified: “the only thing it helps for was planning purposes for, you know, your inventory, and so forth, and we already knew where we were anyway, so to me it had zero effect.” (RPF 261).

1287. While DIFRA discussed doing things that would collectively benefit the Fittings industry, Mr. McCutcheon believed that the only purpose of DIFRA was to facilitate the exchange

of Fittings sales information among the competing suppliers. (CX 2538 (McCutcheon, IHT (Vol. 2) at 246) (“[O]ddly enough, . . . as soon as McWane got the information that they wanted, this is my opinion, as soon as they got what they wanted to get, there was never another conversation about having a meeting.”)).

Response To Finding No. 1287:

See Response To Finding 1286.

7.6.2.3 McWane

1288. In the “Competitive Environment” portion of his April 29, 2008 presentation at McWane’s General Manager’s Meeting, Mr. Tatman reported on the upcoming availability of DIFRA data and his expectation that that data would help McWane track its market share and plan pricing strategy, stating that “DIFRA will start reporting after April,” and that the “Objective is to Regain 1Q Share Loss While Continuing to Lead Upward Stable Pricing.” (CX 2047 at 020).

Response To Finding No. 1288:

Complaint Counsel accurately quotes from page 20 of CX 2047, but the quoted language does not support the proposed Finding. Moreover, Mr. Tatman was not questioned at trial by Complaint Counsel with respect to this portion of the exhibit. This finding is misleading because DIFRA never collected from, or disseminated any revenue or pricing information to, any DIFRA member. (RPF ¶ 251). (

1289. The only activity that DIFRA ever engaged in was the exchange of sales data. (CX 2537 (McCutcheon, IHT (Vol. 2) at 246); Tatman, Tr. 577-578; *supra* § 7.6.1). After the DIFRA members began to exchange sales data, McWane never asked for, and there never was, another meeting of the members of DIFRA. (CX 2537 (McCutcheon, IHT (Vol. 2) at 247)).

Response To Finding No. 1289:

See General Responses 6, 8 and 11. This proposed Finding is duplicative of Section 7.6.1, to which McWane has already responded. DIFRA did not “exchange. . .sales data.” It collected, aggregated, and disseminated historic, tons-shipped data through independent accounts and under the guidance and supervisiion of antitrust counsel. (RPF § VIII).

7.6.2.4 Initial Inclusion of Dollar Amounts

1290. DIFRA members initially planned to include dollar values of sales in addition to tonnage shipped, which would have allowed each firm to determine how their average price per ton compared with the industry average. (CX 2495 (Brakefield, Dep. (Vol. 1) at 109) (McWane proposed exchanging sales dollars information); CX 1333 at 007 (draft reporting form attached to January 2007 SRHW engagement letter showed dollar value of net sales); CX 1467 at 004 (draft Sigma submission from January 2007 showing dollars)).

Response To Finding No. 1290:

DIFRA members never planned to include dollar values of sales. A draft of a reporting format document from January 2007, a year and a half before the first DIFRA report (CX 1467-004), contained a blank column where dollars could be reported had DIFRA's counsel and members approved the form, which they never did. (Brakefield, Tr. 1251). Mr. Brakefield testified that CX 1467 was an internal document of Sigma's that their CFO had prepared. The dollar information column was unsolicited and Mr. Brakefield told Sigma's CFO to delete it. (Brakefield, Tr. 1251). Exhibit CX 1333 was a draft reporting form prepared before any data was submitted that was disapproved by DIFRA counsel and never used by DIFRA. (Brakefield, Tr. 1240-1241).

Moreover, this finding is also misleading because it would have been impossible for a DIFRA member to determine from any DIFRA report containing the tons-shipped data what any other member's pricing was for any Fittings product. (RPF ¶ 258) Mr. Brakefield testified that no pricing information was disseminated to DIFRA members in any report:

Q. You had testified earlier on this very document that the attachment here, this spreadsheet or the Excel -- that Excel spreadsheet on page 7, was in fact a draft; correct?

A. That's correct.

Q. And if you look at the bottom of page 0007, it's zeroed out, but there is a reference to, very last line, net net sales in dollars. Do you see that?

A. Yes, sir. Q. That was never incorporated in any reporting form that was submitted to DIFRA, to your knowledge, by any member; correct?

A. That's correct.

Q. And it was also never -- net net sales or any other sales information was never on any report that was disseminated by DIFRA, the CPAs, to any DIFRA member, to your knowledge.

A. That's correct. (RPF 258).

1291. McWane in particular wanted the DIFRA information exchange to include dollar amounts of sales. (Brakefield, Tr. 1242).

Response To Finding No. 1291:

Over a year and a half before any DIFRA member ever submitted any data to DIFRA's accountants, the DIFRA membership, including McWane, considered and, with the advice of counsel, quickly rejected the reporting format. (Brakefield, Tr. 1240-1241). No sales information in dollars was ever provided to SRHW or reported to DIFRA members. (RPF 251-265). See Response 1292 below.

1292. McWane submitted DIFRA data to SRHW in 2007 that included its Fittings sales in dollars. (CX 1331 (McWane February 16, 2007 submission to SRHW showing dollar amounts of sales)).

Response To Finding No. 1292:

See Response To Findings 1290-1291. No McWane witness was examined concerning CX 1331. Mr. Brakefield was questioned, and he stated that it was a "dry run" and not an "official report." Brakefield, Tr. 1427. This finding is also misleading because Mr. Haley testified that the DIFRA accountants were never provided sales information or dollar pricing. (RPF 255; JX 679 (Haley, Dep. at 19 ("Q. And likewise, I note in paragraph 1 of Mr. Long's e-mail, that the information will be provided on shipment tonnage rather than on date of sale. Do you see that? A. Yes. Q. To your knowledge, is that consistent with how information was

reported to you? A. Yes. Q. And that was because the date of shipment could be some lengthy period of time after date of sale? A. They just wanted shipment, so I don't -- you know, we just did shipment. There was no discussions about sales. Q. And you were never provided any sales information, no dollar pricing? A. No. Q. Only tonnage shipped? A. Only tonnage shipped.”)
(objections omitted.)

1293. Sigma was prepared to provide sales information to DIFRA in dollars. (Brakefield, Tr. 1244-1253); CX 1467 at 004 (draft Sigma submission from January 2007 showing dollars)).

Response To Finding No. 1293:

This finding is misleading. See Response To Findings 1290-1291. No matter whether Sigma was “prepared,” sales information in dollars were never provided to SRHW. Mr. Haley testified that the DIFRA accountants were never provided sales information or dollar pricing. (RPFF ¶ 255; JX 679 (Haley, Dep. at 19 (“Q. And likewise, I note in paragraph 1 of Mr. Long's e-mail, that the information will be provided on shipment tonnage rather than on date of sale. Do you see that? A. Yes. Q. To your knowledge, is that consistent with how information was reported to you? A. Yes. Q. And that was because the date of shipment could be some lengthy period of time after date of sale? A. They just wanted shipment, so I don't -- you know, we just did shipment. There was no discussions about sales. Q. And you were never provided any sales information, no dollar pricing? A. No. Q. Only tonnage shipped? A. Only tonnage shipped.”)
(objections omitted.)

1294. The DIFRA format that included dollars allowed DIFRA members to determine average price per ton of Fittings sales. (Brakefield, Tr. 1251).

Response To Finding No. 1294:

This finding is misleading because such a format was never implemented and there for never “allowed DIFRA members to determine average price per ton.” DIFRA never collected

from, or disseminated any revenue or pricing information to, any DIFRA member. (RPF 251-265). DIFRA’s accountants did not receive any sales or pricing data from DIFRA members, and included no such data in any report. (RPF 255).

1295. As late as March 19, 2008, Mr. Long circulated to the DIFRA members a draft data reporting form that included dollar amounts of Fittings sales. (CX 1843 at 001, 006; Brakefield, Tr. 1253-1255).

Response To Finding No. 1295:

See Response To Findings 1290-1291, 1294, *infra*. This finding is misleading because DIFRA never collected from, or disseminated any revenue or pricing information to, any DIFRA member. (RPF 251). The attorneys from Bradley Arant specifically counseled DIFRA not to use the form of reporting referenced in ¶ 1295. (Brakefield, Tr. 1240-1241). DIFRA’s accountants did not receive any sales or pricing data from DIFRA members, and included no such data in any report. (RPF 255). DIFRA’s lead accountant, Mr. Haley, testified that his staff understood and acted in accordance with the directive of DIFRA’s counsel to be “very conservative” about sharing data with DIFRA members. (RPF 257).

1296. Ultimately, however, the DIFRA reports aggregated Fittings sales in tonnage shipped only, and not in dollars. (See *supra* ¶¶ 1140-1141 (describing agreed reporting format)).

Response To Finding No. 1296:

See Response To Findings 1140-1141.

7.6.3 McWane, Sigma and Star Used the DIFRA Data to Monitor Their Market Shares, Detect Cheating and Inform Their Pricing Decisions

1297. From the second half of 2008 and into 2009, McWane, Sigma and Star used the DIFRA data to monitor their market shares, detect cheating and inform their Fittings pricing decisions. (*Infra* ¶¶ 1298-1337).

Response To Finding No. 1297:

This is an unsupported assertion, for which no response is required. See Responses To Findings 1298-1337.

1298. The DIFRA data was collected, analyzed, and used by the DIFRA members for the purpose of determining and monitoring the members' respective market shares in the Fittings market. (*E.g.*, Tatman, Tr. 558-559 (McWane would analyze the data received from DIFRA each month to determine market share); CX 1712 at 001, *in camera* ; McCutcheon, Tr. 2477-2478, *in camera* ; CX 1088 at 003 (October 13, 2008, Pais email within Sigma reviewing DIFRA data and analyzing Sigma's market shares and the assumed market shares of competitors based on DIFRA data)).

Response To Finding No. 1298:

Members could determine only their own market share and were not capable of determining any information regarding another members' market share, any pricing or other data--only historic, aggregated tons-shipped data. (RPF 249-265).. In addition, monitoring market share was only one use of the data and not the sole purpose. *See e.g.*, Response 1284.

1299. DIFRA helped McWane, Sigma, and Star overcome an impediment to reaching and sustaining collusive agreements: the need to adequately monitor the behavior of cartel participants and to detect and deter defections from the collusive strategies. (CX 2260 (Schumann Rep. at 47, 49)).

Response To Finding No. 1299:

See General Responses 1 and 9. This proposed Finding is not factual, but instead argument and disputed expert testimony. This finding is misleading because DIFRA did not serve as a vehicle to permit Sigma, Star, and McWane to fix and stabilize prices for Fittings. (RPF § VIII). In fact, DIFRA failed to breed trust among its members, including McWane, Sigma, and Star, who all remained wary of and fiercely competitive with each other. (RPF ¶ 264). DIFRA never collected from, or disseminated any revenue or pricing information to, any DIFRA member, the reporting format used by DIFRA's accountants referred only to historic tons-shipped data that would then be aggregated before being disseminated by the independent accountants to the DIFRA membership. (RPF ¶¶ 251-252). No DIFRA member was permitted to review the tonnage shipped data of any other member; only the aggregate figure was made available. (RPF ¶ 250). DIFRA's lead accountant, Richard Haley, testified that his staff

understood and acted in accordance with the directive of DIFRA's counsel to be "very conservative" about sharing data with DIFRA members. (RPF 257). It would have been impossible for a DIFRA member to determine from any DIFRA report containing the tons-shipped data what any other member's pricing was for any Fittings product. (RPF 258). The DIFRA aggregated tons-shipped reports were not sufficiently detailed to enable a DIFRA member to determine the respective market shares of the any other DIFRA member, whether the data represented domestic or non-domestic fittings shipped, or the timing, geographic location, or dollar amount of any sales. (RPF 259). DIFRA members used the historic, tons-shipped data for pro and not anticompetitive purposes. (RPF 270-280).

7.6.3.1 McWane Use of DIFRA Data

1300. Internal McWane reports tracking market share trends relied on DIFRA data, including Mr. Tatman's July 18, 2008 Executive Report for the second quarter of 2008. (CX 1562 at 001 (Tatman email noting that report had been updated based on DIFRA data that had come in that morning); Tatman, Tr. 546).

Response To Finding No. 1300:

The DIFRA data did not disclose any other competitors' market share (or pricing or any other particularized data). (RPF 250-265).

1301. Within a day of having received the first DIFRA report (with data through April 2008), Mr. McCullough emailed the market share findings to McWane's CEO Ruffner Page, with an accompanying analysis of the implications for Fittings pricing strategy: continue to withhold full support for price increases until Project Pricing declines and McWane regains market share:

I believe that until they feel prolonged profit margin pressures they will continue their historical practice of undisciplined market pricing. Until we see at least minor market share improvement I am in favor of no price increase support in the utility fittings market.

(CX 0139 at 001; CX 2479 (McCullough, Dep. at 230-231) (explaining that in the above passage of CX 0139 "they" referred to Sigma and Star, and perhaps other importers, and that "undisciplined market pricing" may be a reference to Project Pricing)).

Response To Finding No. 1301:

Complaint Counsel has accurately quoted from CX 139, which Mr. McCullough sent to Mr. Page. Mr. McCullough, whom Complaint Counsel did not call as a witness at trial, is describing the same pricing strategy that Mr. Tatman explained at length – to pursue volume rather than price. McWane Proposed Finding of Fact 89.

1302. The DIFRA market share and market share trend data gave the Fittings suppliers insight into their relative pricing levels. McWane was able to use the DIFRA sales report to determine that McWane was losing market share because Distributors were purchasing Fittings at discounted prices below McWane's. (CX 2068 (Page email responding to Mr. Tatman's market share analysis of the first DIFRA report: "This just reflects the lack of support and feedback we got from distribution as they wanted us to hold high price levels and buy underneath us."); CX 2482 (Page, Dep. at 207- 209) (testifying that he interpreted McWane's lost market share as being presumably caused by discounting)).

Response To Finding No. 1302:

McWane does not agree with this Finding. The DIFRA Reports provided DIFRA members with information from which they could determine their own individual market share; the DIFRA reports provided no information with respect to any other members' shares or pricing. *See* McWane Proposed Findings 251-265.

1303. McWane then relied on the DIFRA data to determine the magnitude of its Fittings price increases; because the DIFRA data indicated McWane's share loss was larger than McWane had believed, McWane only announced an 8 percent price increase, rather than the 12 percent increase that it had also contemplated. (Tatman, Tr. 537; *see also* CX 1576; Tatman, Tr. 544).

Response To Finding No. 1303:

McWane relied on the DIFRA data among other references and to state that DIFRA was relied upon alone to determine pricing is not supported by the cited evidence or any record evidence. *See* Response 1237.

1304. In addition, Mr. Tatman used the DIFRA data to evaluate the success of the Tatman Plan and the compliance of the other suppliers with the January 2008 agreement to curtail Project Pricing. By early September of 2008, he had used the DIFRA data to conclude that the Tatman Plan was not working. Mr. Tatman wrote in a presentation that he

emailed to Mr. McCullough and Mr. Walton on September 9, 2008 that McWane's attempt to compress prices and lead price stability had been detrimental to its market share. (RX-616 at 0005 (observing, based on DIFRA data that "Leading price stability has been detrimental to share"); CX 1188 at 005 (same observation in a subsequent draft); Tatman, Tr. 972 (explaining his conclusion in that document that "[i]t was a plan, didn't work")).

Response To Finding No. 1304:

Mr. Tatman expressly testified that there was no "plan." (Tatman, Tr. 355). *See*

Responses to § 7.1. McWane agrees that Mr. Tatman's goal of increasing share by not following its competitors' price increases and continuing to offer job pricing and other price concessions was not successful, resulting in the shut down of the Tyler South plant. Tatman, Tr. 964-968.

1305. Still, in that same document, Mr. Tatman held out hope that the DIFRA information exchange would enable McWane to coexist with its competitors without lowering its costs or providing better service, writing that "[o]ur competitors have both a lower average cost basis and a better service model which limits options for profitabl[e] share growth," but that "DIFRA will eventually add some increased stability." (RX-616 at 0012; CX 1188 at 012).

Response To Finding No. 1305:

See General Response 8. Complaint Counsel accurately quotes RX-616, but the proposed Finding mischaracterizes the message Mr. Tatman was conveying. RX 616 states, "I don't believe the market or competitive conditions over the next three to five years will provide a reasonable opportunity to generate acceptable income or normalize inventory levels with the current structure." Mr. Tatman explained at trial:

A. Like I said, at this point in time I'm feeling pretty beat up. You know, I had ahold of that business late in 2007, kind of came into 2008 with let's change the game plan, let's get more competitive, let's find a way to compete on a different level, let's go get some volume, let's go get some share. And I had great intentions, and basically I got beat up all year long.

And so I'm looking forward. I don't see any indications in the marketplace that housing is going to recover or the economy is going to recover. If you talk to economists or people that were talking about the industry, nobody is talking about a near-term recovery here or any strong recovery.

From a competitive environment, I went out and tried to get volume, I tried to get share, and I tried to change my tactics to get that, and basically I got hammered again, I got beat up and I lost share.

So this is a little bit of a cold dose of reality, is our situation is not going to get any better in the foreseeable future. We can't keep having two plants limp along, spending idle plant. I don't see the world converting back to domestic specs. I don't see a reason why McWane would ever need 70,000 tons of domestic manufacturing capacity in two facilities.

And as painful as it sounds, you know, the decision here, what I'm recommending, is to have a bunch of good people lose their jobs because I can't give them the business to support it.

Tatman, Tr. 967-968

1306. On December 17, 2008, Mr. Tatman forwarded to Messrs. McCullough, Walton, and Jansen a detailed month-by-month market share analysis based on DIFRA data. (CX 0362).

Response To Finding No. 1306:

See General Response 5. The referenced exhibit was not used at trial and the characterization of the exhibit is solely that of Complaint Counsel. CX 362 is Mr. Tatman's email forwarding the November, 2008 DIFRA report with an analysis prepared by "Jim," not Mr. Tatman. Mr. Tatman notes in CX 362, "There's some pretty aggressive pricing going on out there....".

1307. On January 21, 2009, Mr. Tatman sent an email to Messrs. Walton, McCullough, and Jansen forwarding and summarizing a spreadsheet entitled “McWane, Inc. DIFRA Market Share Analysis” covering DIFRA data through December 2008. In his cover email Mr. Tatman drew conclusions regarding McWane’s Fittings market share performance based on the DIFRA data: “December was clearly our worst share performance for the year!” and that “Our share performance for the Sept-Dec. period is noticeably off from the May-Aug. period.” (CX 0656; Tatman, Tr. 560-564).

Response To Finding No. 1307:

Complaint Counsel accurately quotes CX 656, which is Mr. Tatman’s email forwarding the December, 2008 DIFRA report. Of note, during the period of time in which McWane was allegedly engaged in a conspiracy, its share declined.

1308. Mr. Tatman used the DIFRA data to draw conclusions regarding levels of competitor Project Pricing, and to plan McWane’s future pricing moves. In his January 21, 2009 email forwarding the DIFRA Market Share Analysis, he stated:

As we’ve historically seen, as the market volume tightens up our import competitors tend to be less and less disciplined with pricing and more and more creative with making and hiding deals.

It’s still too early in the year to determine whether the new fiscal year will bring a change in behavior, but with the Jan MTD order trend and competitive feedback data my gut tells me I’m going have some tough pricing decisions to make during the 1st quarter.

(CX 0656; Tatman, Tr. 560-562).

Response To Finding No. 1308:

Complaint Counsel accurately quotes CX 656, but McWane disputes Complaint Counsel’s characterization in the proposed Finding. Mr. Tatman is commenting on competitor discounting, not simply project pricing: competitors “are more and more creative with making and hiding deals.”

1309. In a January 23, 2009, email to Mr. McCullough, Mr. Page responded to the December 2008 DIFRA data, which had shown a McWane loss of market share: “Trying to not be emotional about it. But these numbers are infuriating. We have serviced our customers I assume and have the product they need, we are just being discounted against?” (CX 1226 at 001).

Response To Finding No. 1309:

Complaint Counsel accurately quotes CX 1226, an email from Ruffner Page. Mr. Page testified that he was inquiring of Mr. McCullough why McWane was losing market share (Page, Dep. at 238):

Q. And what was the question you were posing?

A. Are – Is Leon, Rick and our salespeople not keeping our customers competitive and – or do we not have the right product? Why are we losing market share? The question is, are we overpriced? Do we have the wrong mix of products? We don't have what people need? But I'm upset with our people for not the managing their business.

1310. Mr. Page then sent an email to McWane owner C. Phillip McWane, informing him that Sigma and Star had announced price increases in the “<10% range,” and that Mr. Page and Mr. McCullough had decided that McWane would not follow those increases “since we continue to lose market share to somebody.” (CX 2089 at 001).

Response To Finding No. 1310:

See General Response 5. CX 2089 as not used at trial nor was either Mr. Page or Mr. McWane called as a witness.

1311. Mr. Tatman formulated his recommendations for McWane's April 2009 Fittings list price restructuring using DIFRA data. (Tatman, Tr. 279-280).

Response To Finding No. 1311:

Mr. Tatman's testimony establishes that the DIFRA data was one of many data points that he considered.

1312. Mr. McCullough also viewed the DIFRA data as a way to measure price stability and market share when making pricing decisions. In a January 21, 2009 response to Mr. Tatman's January 21, 2009 email, he wrote:

My inclination is to “not” send [out] a revised multiplier notice and “not” send a letter of explanation but simply let our customers know that price instability has led to Tyler/Union market erosion and that we cannot support higher pricing until there is pricing stability and market share maintenance.

(CX 2458 at 001; Tatman, Tr. 566-569).

Response To Finding No. 1312:

This proposed finding is inaccurate and argumentative. Although Complaint Counsel accurately quotes CX 2458, as Mr. Tatman pointed out at trial, “We can read what Mr. McCullough said, and then we’d have to speculate what was in his mind.” (Tatman, Tr. 566.) Mr. McCullough was not called to testify at trial. McWane disputes Complaint Counsel characterization in this proposed Finding.

1313. Mr. McCullough expressed a concern to Mr. Tatman that the DIFRA reports may be inaccurate due to underreporting:

[B]eing pessimistic on this I will take a ‘wait and see’ attitude. Please get the data circulated promptly so we can analyze and reach a decision on pending price increase letter. I know we must have some confidence that our competitors are reporting accurately but it is entirely possible they will under report their sales. . . .

(CX 1187).

Response To Finding No. 1313:

See General Response 5. The DIFRA reports were riddled with inaccuracies. (RPFF 262).

1314. Nonetheless, while Mr. Tatman acknowledged the possibility of underreporting, especially because Star was a reluctant participant in the DIFRA information exchange, Mr. Tatman felt confident that any gross under-reporting could be discovered fairly quickly:

I would agree that since at least one member is being somewhat drug to the party . . . there is certainly a risk of under reporting. . . . Slight under reporting by a few thousand tons would be hard to find without an audit, but we flush out any gross under reporting fairly quickly.

(CX 1187; Tatman, Tr. 528 (Mr. Tatman admitting that he is referring to Star)).

Response To Finding No. 1314:

This finding misstates the testimony of Mr. Tatman. When Mr. Tatman was asked whether he was referring to Star he responded “I couldn’t tell you writing this.” (Tatman, Tr. 528

(“Q. And that was a reference to Star; isn't that right? A. I couldn't tell you writing this. Q. You don't know which member of DIFRA was being drug to the party? A. Again, I got four years ago. I've got something on print. I can't tell you what was in my mind when I wrote that.”).

7.6.3.2 Star Use of DIFRA Data

1315. On or about June 17, 2008, Star received the DIFRA report compiling the data from McWane, Sigma, and Star for 2006, 2007, and January 2008 through April 2008. (CX 0052 at 001-007; *see* CX 2538 (McCutcheon, IHT (Vol. 2) at 321)).

Response To Finding No. 1315:

Respondent has no specific response.

1316. (McCutcheon, Tr. 2445, *in camera*).

Response To Finding No. 1316:

This finding mischaracterizes the testimony from Mr. McCutcheon. Mr. McCutcheon testified that [REDACTED] (McCutcheon, Tr. 2445, *in camera*). In fact, [REDACTED]. *See* Proposed Finding 1317 below.

1317. [REDACTED] (McCutcheon, Tr. 2445-2446, *in camera*; CX 1712 at 001, 004, *in camera*); [REDACTED]; CX 1707 at 001, 006, *in camera*; [REDACTED]; CX 1711 at 001, 002, 004, 006, *in camera* [REDACTED]

Response To Finding No. 1317:

McWane disagrees with the proposed Finding, as stated.

McCutcheon, Tr. 2479, *in camera*.

1318.

McCutcheon, Tr. 2477-2481, *in camera* ;
McCutcheon, Tr. 2491-2492, *in camera* ; McCutcheon,
Tr. 2492-2496, *in camera* ; CX 2525 (Minamy, IHT
at 21) (Star broke down the DIFRA data to estimate its market share and the market share
of McWane and Sigma in each state in the country)).

Response To Finding No. 1318:

McWane has no specific response.

1319.

(McCutcheon, Tr. 2482, *in camera*; see also
CX 2525 (Minamy, IHT at 22)) [REDACTED]

Response To Finding No. 1319:

See General Responses 6 and 11. This proposed Finding is duplicative of proposed
Finding 270, to which McWane has already responded.

1320.

[REDACTED]
[REDACTED] (CX 2334 at 001, *in camera*).

Response To Finding No. 1320:

See General Response 5. The referenced exhibit was not used at trial, Mr. Bhutada was
not called as a witness at trial, nor was he even questioned about the exhibit in his deposition.

1321. The DIFRA reports enabled Star to assess whether any decline of Star's sales of Fittings
was due to the decline of the economy or due to a decline in performance in comparison
to McWane or Sigma. (CX 2538 (McCutcheon, IHT (Vol. 2) at 330)). Star would have

had “definitely more uncertainty” as to how it was doing in the Fittings market without the DIFRA data. (CX 2538 (McCutcheon, IHT (Vol. 2) at 334, 336)).

Response To Finding No. 1321:

See General Response 6. The cited sources do not support this proposed finding.

1322.

(CX 1706, *in camera*),

(RX-143, *in camera*).

Response To Finding No. 1322:

This finding is misleading because the document cited by Complaint Counsel that

(CX 1706, *in camera*). The document that

(RX-143, *in*

camera). If finding is accurate it [REDACTED]

1323.

[REDACTED] (CX 2538
(McCutcheon, IHT (Vol. 2) at 336)
[REDACTED]; McCutcheon, Tr. 2446, *in camera*).

Response To Finding No. 1323:

This finding misstates the testimony from Mr. McCutcheon because he testified that [REDACTED]

[REDACTED] (McCutcheon, Tr. 2446, *in camera*).

Furthermore, this finding is misleading because the cited IHT testimony does not state that [REDACTED]

[REDACTED] Star CEO Ramesh Bhutada testified that Star in fact used

DIFRA data to help plan production schedules. (Bhutada, Dep. at 21). Star used the DIFRA tons-shipped data for pro-competitive purposes. (RPFF 270, 278-280).

7.6.3.3 Sigma Use of DIFRA Data

1324. Sigma used the DIFRA data to measure its market share and to help formulate its pricing and marketing strategy:

Q. But in October of '08, is that typically the time where you're doing the planning for 2009, including whether you're going to announce a price increase at the beginning of the year?

A. That is correct.

Q. And you would have used the DIFRA data – would you have used the DIFRA data as a guide to those discussions?

A. Yeah. We would have certainly used it as some guide.

...

Q. At this point, in December of 2008, are you – you're planning pricing strategy for 2009?

A. Certainly. As it is the norm in every December.

Q. When Sigma was doing that pricing strategy planning, were you using the DIFRA data?

A. Certainly.

(Pais, Tr. 1986, 2002-2003).

Response To Finding No. 1324:

Sigma used the DIFRA data for purely pro-competitive purposes. (RPFF 270, 274-277).

1325. On June 19, 2008, two days after receiving the initial DIFRA report, Mr. Pais sent to Sigma's top 20 managers an analysis he created based on the DIFRA data that set forth Sigma's Fittings market share (referred to as "SMS") in each of the Fittings categories that were delineated in DIFRA data. (CX 1092 at 001, 004, 005; Brakefield, Tr. 1299; Pais, Tr. 1980-1981).

Response To Finding No. 1325:

Mr. Pais did not testify that he created the analysis. *See* Response To Finding 1324.

1326. Sigma analyzed the DIFRA data both with and without Sigma's OEM sales to ACIPCO in order to assess (by excluding ACIPCO) its market share in the segment of the Fittings market sold to Distributors. (Pais, Tr. 1980-1981).

Response To Finding No. 1326:

McWane has no specific response.

1327. On October 1, 2008, Mr. Pais directed Raju Kakani, Sigma's IT Director, to prepare monthly reports of Sigma's market share using DIFRA data. Mr. Kakani prepared such reports monthly under Mr. Brakefield's supervision. (Brakefield, Tr. 1299, 1304-1305; CX 1848 at 001).

Response To Finding No. 1327:

McWane has no specific response.

1328. Mr. Bhattacharji, who was responsible for sourcing Fittings and managing Sigma's supply chain, rarely looked at the monthly DIFRA reports. (CX 2523 (Bhattacharji, Dep. at 259)).

Response To Finding No. 1328:

This proposed Finding mischaracterizes Mr. Bhattacharji's testimony. Mr. Bhattacharji testified that he did not frequently review the monthly reports, but that the annual data was important to him. He used the information to manage purchasing and inventory. CX 2523. (Bhattacharji, Dep. at 260-264). *See* Response To Finding 1324, *supra*.

1329. Aside from the generation of Sigma market share reports, Mr. Brakefield was unable to identify any specific use of the DIFRA data by Sigma in its business. (Brakefield, Tr. 1308-1309; CX 2496 (Brakefield, Dep. (Vol. 2) at 154-155)).

Response To Finding No. 1329:

This finding mischaracterizes the testimony of Mr. Brakefield because he testified that Sigma used the DIFRA tonnage report to help it determine market trends, and therefore better manage its inventory. (RPFF ¶ 274; Brakefield, Tr. 1305-1306 (Q. Were there any specific decisions that you made using either the DIFRA reports or Raju's analysis of those reports? A. That I would make personally or that I would suggest something or what -- what do you mean?

Q. Were there any specific suggestions that you made based on the reports? A. We would look at that and look at the size ratio or whether or not the trend is small diameter or large diameter or intermediate diameter, and we would basically not order as much large diameter if that trend was going down or order more small diameter. That would be the context that I would make suggestions from.”), 1308 (“Q. When did you specifically recommend to a regional manager that they change their ordering based on DIFRA data? A. I would just have to go back and look. I mean, I couldn't give you a specific, but that would be one of the contexts as I used it. It could be anywhere from the time we started getting numbers to October, the date of this. Q. So is there a -- can you give me an example of a specific use of the DIFRA data? A. It just basically helped us in establishing a much better flow of product. If you have what the customer is looking for and the trends in the marketplace, and you have that product and it's available and not having to wait and then see the availability, get an order and then get it shipped from China or India, which obviously it's a long time, we can do a little better forecasting to have what the customer is looking for when he needs it and we had it. And a lot of times that was the basis of a sale, availability.”), 1369-1370 (“Q. And the issue of standardization and elimination of SKUs, as you just referenced, that would have lowered costs of manufacturing? A. No question.”), 1389-1391 (“Q. What did you mean by the DIFRA data helped Sigma determine trends? A. Well, if the projects are small or large diameter or midrange diameter, that's a trend towards size. If it's plant work versus subdivision work, that's a trend toward flanged, if it's plant work or public work rather than underground, which would be a subdivision. So as we've experienced lately in the housing industry, we've seen a reduction into the smaller sizes. For example, there's a -- one sort of item that people sort of gear with housing. It's called an eight-by-six hydrant valve tee. And that's a tee that's used to set fire hydrants, and you can't set a fire hydrant without that tee. Every

fire hydrant in this country you have a tee just exactly like that. And if you want to look at when you say, hey, what the trend is going to be, when you see that small diameter starts going down, you need to start reducing all of those because your subdivision work is not producing -- not giving you the kind of trend as far as you've got to ship a thousand eight-by-six hydrant tees. You just -- you have to use that and understand that. Housing starts have a relationship with certain items, too, because they -- they're used in subdivisions. And so you have some ratios that you develop, so when you see the trend of small diameter going down, you have to make that reduction in those key items. If housing is off 15, 20, 30, 40 percent, whatever it is -- it's pretty substantial now -- you want to take those key items that tie to housing and reduce those the same amount. So there's some interpolation -- interpretation there that you can use and get pretty good information out of ordering the right fitting at the right time. Q. Do you know, sir, then whether or not the DIFRA data permitted Sigma to manage its inventory? A. I think that's probably the best way to put it, is that it helps you literally see sizes, configurations, and whether or not it's public work, private work, that would be flanged or other. It's difficult with the other, you know, but with flanged it gives you a pretty good -- a really pretty good test there.”), 1429-1430 (“Q. And you discussed that the DIFRA information exchange showed trends relating to the demand for fittings, and you specifically mentioned a single item that was -- that's used for fire hydrants. What item was that? A. That was an eight-by-six hydrant tee, hydrant valve anchoring tee. Q. And the DIFRA data helped you understand the demand for that specific item? A. In that the small diameter, which is basically private work, subdivision work, you could utilize that in a way to where that item, that unique item, geared to fire hydrants could help you with that. Q. Why couldn't Sigma use its own sales of that unique item to project the trend? A. It could. It could. But nationally, when you look at the whole marketplace, it gives you a much better picture.

Sigma wasn't every place in the country, so Sigma's numbers could be up in this area, down in that area, so it was hard to really utilize that, although you could do some of that. You could test it and say here's what the DIFRA numbers are, here's what our numbers are, and see if there's a correlation.”).).

1330. On October 13, 2008, Mr. Pais drafted a lengthy email to Sigma’s top 20 managers analyzing the DIFRA data and Sigma market shares indicated by that data, and urging his managers to “discuss this important data as a source to guide our Pricing and marketing strategy in 09, with a clear goal to achieve an overall gain of at least 2%.” (CX 1088 at 001, 004; Pais, Tr. 1986-1987). Mr. Pais added that “At this rather small level, it does not automatically mean we need to be disruptive or reckless with our pricing!” (CX 1088 at 004; Pais, Tr. 1987-1988).

Response To Finding No. 1330:

McWane has no specific response.

1331. In May 2009, Mr. Pais sent an email to Sigma’s M20 group using DIFRA 2008 data to analyze market shares and to determine who had taken McWane’s “alleged loss of 4-5%” market share. (CX 0319 at 001). The email set forth detailed market share trend analysis based on the DIFRA data. (CX 0319 at 007; Pais, Tr. 1998-1999).

Response To Finding No. 1331:

CX 319 is dated May 10, 2009, six months or more after the alleged conspiracy ended according to Dr. Schumann. The reference to McWane is incomplete. In full, it states, “In 08, Tyler is said to have lost their Market Share over 07, by a significant amount of 4-5% points.” CX 319 (emphasis added). This is clearly hearsay, and Mr. Pais was not asked about this statement at trial.

1332. Sigma used the DIFRA data to track its Fittings market share and reassure itself that it was maintaining its share of the market even though it was losing volume in a declining market. As Mr. Pais told Sigma’s top managers, Sigma “kept up our DIFRA membership thru 08 and had used the monthly data in an useful manner to keep track of both the total market size and our SMS (Sigma Market Share),” and as overall volume continued to decline in 2008, Sigma was “able to stay reassured that we were holding on to our [market share] . . . or close to it!” (CX 0319 at 002 (May 4, 2009 email from Mr. Pais to Sigma’s M20)).

Response To Finding No. 1332:

Sigma used the DIFRA tons-shipped data for pro-competitive purposes. *See* Response To Findings 1324-1329, *supra*.

1333. Sigma carefully considered the DIFRA data to determine its market share and whether it needed to lower its prices to regain a loss of market share. Had the DIFRA data pointed to a substantial loss of market share by Sigma, then Sigma would have lowered prices to gain share. (CX 2527 (Pais, IHT at 85-86) (“If the DIFRA data pointed to that we were really losing market share, then we would have used price to get it back.”)).

Response To Finding No. 1333:

See General Response 3. Mr. Pais testified at trial that lost market share was not necessarily an indication that Sigma needed to be more aggressive with price. Pais, Tr. 1987.

7.6.3.4 **Sigma Correction of DIFRA Data**

1334. A Sigma audit detected errors in the data initially submitted to DIFRA, and Sigma voluntarily corrected these errors by resubmitting data on June 30, 2008. (RX-086 at 0002; Brakefield, Tr. 1318).

Response To Finding No. 1334:

The DIFRA tons-shipped data was plagued with errors. (RPFF 262).

1335. The August 19, 2008 DIFRA report, reflecting data through July 2008, reflects the corrected Sigma data, whereas the original June 17, 2008 DIFRA report reflects the original, incorrect Sigma data. (Brakefield, Tr. 1318-1320 (discussing CX 1340 (corrected report) and CX 0052 (report with errors))).

Response To Finding No. 1335:

The DIFRA tons-shipped data was plagued with errors. (RPFF 262).

1336. Sigma’s corrected sales figures represented an error of approximately .25% to 2% from Sigma’s previously reported sales data, and did not cause Mr. Brakefield to reevaluate any of the opinions he had previously formed based on the original DIFRA reports. (Brakefield, Tr. 1319-1321).

Response To Finding No. 1336:

The DIFRA tons-shipped data was plagued with errors. (RPFF 262).

1337. No DIFRA member ever formally requested an audit of data submitted by other members to DIFRA, and no such audit of a member's submissions to DIFRA has been performed. (Brakefield, Tr. 1322-1323).

Response To Finding No. 1337:

Respondent has no specific response.

7.7 The Agreements Among McWane, Sigma, and Star Were Successful Through Most of 2008 Before Trust Began to Break Down in the Fall of 2008

1338. The conspiracy among McWane, Sigma, and Star was largely effective through most of 2008, resulting in reductions in Project Pricing, higher and more stable prices, and improved financial performance by the suppliers. (*Infra* ¶¶ 1339-1435).

Response To Finding No. 1338:

See General Response 1 and Response To Findings 1339-1435, *supra*. No conspiracy existed. This proposed Finding is argument and contains no record cites.

7.7.1 The Suppliers Observed Reduced Project Pricing and Stabilized and Increasing Prices

1339. Under the "Sales/Market/Competitive Environment" section of Mr. Tatman's 2008 Second Quarter Executive Committee Report, Mr. Tatman concluded that Project Pricing had "slowed" in May and June and that Sigma and Star had "communicated support" for McWane's June 17, 2008 announced price increase (that was to be effective July 14, 2008):

We continue to track the level of confirmed discounting and job pricing within our competitive action file. *The level of activity appears to have slowed over the past several months* probably driven by a combination of rising costs putting more pressure on price and more creative use of programs.

Both Sigma & Star have communicated support of the July 14th price increase although Sigma's method has been much less public or open from what they have historically done. The sales team is picking up spotted branch inputs, mostly in the Southeast, of still being able to place orders at the old multipliers, but it will be mid-August until we can make an accurate assessment of the adherence level to published pricing.

(CX 1562 at 004; Tatman, Tr. 549-551, 558, 1061-1065; *see also supra* ¶ 1047 (describing the low level of Project Pricing observed in McWane's pricing protection logs for the first nine months of 2008)).

Response To Finding No. 1339:

This proposed Finding accurately quotes CX 1562, but is incomplete. Mr. Tatman testified that he used the word “appears” because he is speculating. Tatman, Tr. 550-551. Mr. Tatman testified that the language in both his quarterly executive reports were based on speculation. *See* Response Findings 1053, 1250, *supra*. Moreover, McWane, Sigma, and Star offered project pricing throughout 2008. (RPFF §IV). This finding is also misleading because McWane made an independent pricing decision on McWane’s June 2008 multiplier. McWane’s Vice President and General Manager, Rick Tatman, testified at trial that he priced independently at all times, and did not discuss his January or June 2008 multipliers (or his April 2009 list prices or his June 2010 multipliers) with anyone from Star or Sigma. (RPFF ¶ 198; Tatman, Tr. 978). Instead, McWane decided those prices independently and internally and issued them on its own. (RPFF ¶ 198; Tatman, Tr. 363-364 (“Q. You never spoke to your competitors? A. I've never had a pricing discussion with a competitor. Q. You've never once talked a competitor about their prices or your prices in the marketplace; is that your testimony? A. I said I've never had a pricing discussion with a competitor.”).) Mr. Tatman testified that he never had any advance price discussions with anyone at Sigma or Star and that McWane never entered into any agreement with Sigma or Star to fix prices. (RPFF ¶ 199; Tatman, Tr. 924 (“No.”), 1005-1006 (“Q: Mr. Tatman, did you -- at all times, 2008, 2009, 2010, did you make independent decisions on your list price? A: Always. Q: Published multipliers, sir? A: Always independent. Q: So you had independent decisions on your list price you said? A: Yes. Q: Multipliers? A: Yes. Q: Job price discounts, sir? A: Yes. Q: Freight concessions? A: Yes. Q: Other price concessions? A: There's a big bucket there. Yes. Q: All right. Rebates? A: Yes. Q: And at any time did you discuss and agree with anyone from Sigma and Star -- A: No. Q: -- that you

would stop doing any of this? A: No.”), 978 (Q: “All right. And do you take that, the fruits of your labor, and did you give it to Star and Sigma in advance?” A: “No.” Q: “Made an independent decision, sir?” A: “Independent decision.”). Mr. Tatman testified that he “always” made “independent decisions” on list prices, multipliers, rebates, job pricing, other price concessions, and “never” discussed prices with his competitors. (RPF ¶ 200; Tatman, Tr. 978, 1005-1006.)

1340. Star believed that the suppliers had been successful in their efforts to reduce Project Pricing. (CX 0814 (Minamyer email dated August 25, 2008) (“I know we have been very careful on special pricing and it seems to be working pretty good.”); McCutcheon, Tr. 2570-2571 (Mr. Minamyer provided this assessment to Mr. McCutcheon and to Star’s division managers in August 2008); *see also infra* § 7.7.5.4 (describing reduced levels of Project Pricing reflected in Star’s special project pricing reports)).

Response To Finding No. 1340:

McWane disputes this Finding. Star witnesses consistently testified that project pricing remained in full effect in 2008. Moreover, McWane, Sigma, and Star offered project pricing throughout 2008. (RPF §IV). Star observed that its competitors were routinely offering job pricing and offering other concessions to win business from McWane and Sigma. (RPF ¶ 176; Minamyer, Tr. 3275 (Q. And so in this e-mail [CX 831], if you continue in the second paragraph, you indicate that you’ve documented the competition selling under our multipliers in almost every market with varying strategies; correct? A. Yes . . . Q. Would the varying strategies refer to things other than job prices? A. Yeah. That would include the terms and loss leaders and whatever other tricky things they could come up with.”); Minamyer, Tr. 3255 (Q: “Okay. And this is receiving pinks without justification; correct?” A: “That’s what I’m talking about here. Yes.”)). By late November 2008, it was clear to Mr. Minamyer that the market was not accepting Star’s desired price increases and that Star’s competitors had continued to project price below the published multipliers. (RPF ¶ 177; Minamyer, Tr. 3274 (Q: “Okay. And you had

told us I guess back in January that your plan was to stop project pricing unless you had documentation. How did the plan work out?” A: “Well, reading different e-mails, I come out it looks like it was working on our part but maybe not in the market. The market wasn't really accepting the increase.”) & CX 831). Mr. Minamyer testified that the Fittings market “was always very competitive. We – we had to fight pretty hard for every order.” (RPF 178; Minamyer, Tr. 3277-3278). Star’s CEO, Mr. Bhutada, testified that job pricing was always the norm in the Fittings market, including in 2008. (RPF 179; JX 694 (Bhutada, Dep. at 18-19)). Mr. McCutcheon testified that, during 2008, Fittings prices were falling, and “Every project required special pricing it seemed. It seemed like it was a -- projects were all auctioned, all the fitting manufacturers were bidding them, and there was just no consistency to our pricing.”). (RPF 180; McCutcheon, Tr. 2568).

1341. Sigma also noted the success – and prospect for further success – of the suppliers’ collaboration. On December 7, 2008, Mr. Pais emailed the Sigma management team, including Mr. Florence and Mr. Kuehl of Frontenac, with an assessment of the DIFRA data through October 2008:

All in all, we can infer from the DIFRA data over the past about 6 months that the 3 primary suppliers -- McWane, Sigma and Star -- may be at a *relatively steady market share level*, without any significant swings from one to the other. This in turn should bode well for a more *mature and responsible pricing strategy* for 09 *which focuses on realizing higher prices* and hence better GMs to offset the loss of volume, which is inevitable for most of 09.

(CX 1174 at 001 (emphasis added); Pais, Tr. 2000-2004 (“We were just hoping for a price increase, period, whether it came from some revelation or some opportunity or oursalesmanship because that was -- at that point we were desperate for the revenue”)).

Response To Finding No. 1341:

See General Response 1. McWane disputes this finding because McWane, Sigma, and Star offered project pricing throughout 2008. (RPF §IV). Mr. Pais testified that Sigma was “at liberty” to price however it chose: “So we have sold at higher prices than our competition, and

we have sold at lower prices than our competition. There was no one size fits all. Prices in our product range and our business is very dynamic, and as I said last time, it's like stock prices on Nasdaq. They varied day to day and order to order, especially in the last four, five years.”

(RPF ¶ 120; Pais, Tr. 1907; Pais, Tr. 2045 (“Q: All right. So we've got one, two, three decisions on published pricing by McWane, all to keep their prices, published prices, lower than Sigma's; correct, sir? A: Yes.”), 2044 (Q: “You do recall, sir, that Sigma announced a very large list price increase in the fall of '07 which McWane did not follow; right?” A: “We tried to introduce, and I remember, yeah, they did not follow, yes.”), 2055-2056 (Q: “And in fact they did not follow; correct?” A: “Sadly so.”), 2080-2081 (Q: “All right. Now, were you hoping that my client and other companies would follow it?” A: “I certainly hoped.” Q: “But they didn't, did they, sir?” A: “No, they didn't.” Q: “All right. In fact, my client didn't follow this at all; right?” A: “Not at all.”)). Sigma considered McWane's announced multipliers to be “discouraging” and lower than even Sigma's existing discounted job prices in some areas.

(RPF ¶ 121; CX 1145; Pais, Tr. 2059-2061 (“Q. So you say: When we compare apples to apples, Tyler's new multipliers do not provide much of an improvement in many territories, with reasonable improvement in just--one, two, three, four, five, six, seven and parts of Texas--seven states and parts of Texas; is that right, sir? A. Yes. Q. But only marginal or no improvement in many territories, like Ohio, Arizona, Florida; right, sir? A. Yes. Q. And even a lower in some, like Maryland and Idaho? A. That's correct.”), 2061 (“Q. The last paragraph on that first page, you found these multipliers by Tyler discouraging; right, sir? A. Yes.”)). Mr. Rybacki testified that Sigma followed some of McWane's early 2008 multiplier adjustments, but not the ones that resulted in a net drop below Sigma's existing published multipliers. (RPF ¶ 122; Rybacki, Tr. 1126-1127 (Q: “So do I understand correctly that you followed them up, the McWane multipliers

up but not down?” A: “We could not afford to follow them down.” Q: “And down would be lower than your –“ A: “Published multipliers.”), 3694-3697 (Q: “And so when you analyzed McWane's multipliers in the beginning of 2008, you saw that some of them were in fact well below Sigma's multipliers at the time; right, sir?” A: “Correct.” Q: “Now, you say you're almost -- your new multipliers will be in effect for almost every territory, and that's because you did not actually follow all of the multipliers that McWane sent out, did you, sir?” A: “We did not.” Q: “So you selectively followed the ones you thought made sense to Sigma, and you disregarded the ones that you thought did not make sense, sir?” A: “That's correct.” Q. And you made those decisions internally at Sigma? A. Right. Q. And you never talked to anybody about--McWane about any of those decisions, did you, sir? A. None, no.”), 3690 (“Q. All right. And did you discuss--by the way when you got that letter, did you--at Sigma did somebody evaluate that letter? Trying to figure out what Tyler was doing with its multipliers? A. Yes”); 3692-3693 (“Q. Once you got that, did you and Mr. Fox and the others discuss let’s analyze that an figure out what Tyler is doing with its multipliers? A. Yes”); 3695 (“Q. The multipliers were much lower than the list price that you’d sent out. A. Yes.”).)

1342. Mr. Pais’s May 4, 2009 market share graphs based on DIFRA data showed that Sigma’s Fittings market share stabilized shortly after the DIFRA information exchange began, and remained relatively stable (within .2 percentage points) for the balance of 2008. (CX 0319 at 007; Pais. Tr. 1998-1999).

Response To Finding No. 1342:

The alleged conspiracy began in January, 2008, not after DIFRA reporting began in June, 2008. Complaint, ¶2. Mr. Pais testified at trial, based on CX 319, that Sigma “gained slightly in the second quarter – or, rather, the first quarter, also in the second quarter and on we lost a fair amount and then seems to have settled onto a lower level.” Pais, Tr. 1999.

7.7.2 McWane's Fittings Prices and Financial Performance Improved

1343. McWane's Fittings prices increased and its financial performance improved as a result of the conspiracy. Its 2008 profits were better than its 2007 or 2009 profits, and the improvement was driven by improved pricing. (*Infra* ¶¶ 1344-1359).

Response To Finding No. 1343:

This is an unsupported assertion, for which no response is required. *See* Response To Findings 1344-1359, *supra*.

1344. Mr. Tatman's presentation to McWane's CEO and others at McWane's April 29, 2008 General Manager's Meeting reported a 50% increase in profit on a 14% decline in sales for the Fittings business through the first four months of 2008. (CX 2047 at 004).

Response To Finding No. 1344:

This finding is misleading because McWane's gross profits on non-domestic Fittings fell by nearly a in 2008 (in part because of job pricing) and because McWane's margins on non-domestic Fittings also declined in 2008. (RPFF ¶¶ 146, 187). *See also* Response to Proposed Finding 846.

1345. Mr. Tatman's 2008 Second Quarter Executive Committee Report also reflects increased level of aggregate blended Fittings invoice prices through the first half of 2008. The average invoice price for 2007 was \$2322 per ton, and the average invoice price for the first quarter of 2008 was \$2576 per ton; April 2008 was \$2712 per ton; May 2008 was \$2632 per ton; and June 2008 was \$2769 per ton. (Tatman, Tr. 546-548; CX 1562 at 002).

Response To Finding No. 1345:

This finding is misleading because McWane's prices for non-domestic Fittings did not keep pace with inflation in 2008. ((RPFF ¶ 23; (Tatman, Tr. 879-881 (Q: "All right, sir. Now, this 10 to 12 percent that you have here, was this keeping pace with inflation, sir?" A: "No." Q: "You mean your price -- your price was not keeping pace with your raw material cost increases you were seeing?" A: "No."), 971 (Q: "And you say you're lagging inflation due to competitive

actions, and what did you mean by that?” A: “Pricing. We couldn't get enough price out there in what we were selling things for to cover our rising cost.”).).

This finding is misleading because McWane’s average blended Fittings price (the price of imported or domestic Fittings sold for open source jobs) declined relative to inflation throughout 2008, 2009, and 2010. (RPFF ¶ 24; Normann, Tr. 4791-4797 (“So roughly, if you look at it kind of from the mid-2007, beginning of 2008, the price decline is in the double digits percentage-wise into 2009.”; “You notice that these input costs have been going up essentially continuously from 2007 through 2010, which is the time period captured in the figure, but what is most noteworthy is really this dramatic increase in 2008 where these input costs have gone up, you know, 40-50 percent in 2008 and again I think it's 70 or 80 percent from earlier in 2007.”); RDX-016).)

This finding is misleading because Average net prices for non-domestic Fittings were lower during the latter half of 2008 than during the first half of 2008. (RPFF ¶ 25; Tatman, Tr. 971-972 (Q: “Okay. Mr. Tatman, did the business improve after September of '08 for the rest of the year?” A: “No.” Q: “Did pricing get worse, sir?” A: “Worse.”); Pais, Tr. 2129-2131 (Q: “All right. So here you are in the second half of '08 and you say that prices -- there's been an equally quick and sharp erosion in market pricing, and you say it's an alarming double whammy. What did you mean by that, sir?” A: “Well, as I preface there with the volume dropping down and the prices falling, that is certainly a one-two punch.”) & RX 116, 2134-2135 (Q: “So a little while after DIFRA actually becomes operational, we see you say there's been this equally quick and sharp erosion in market pricing, the double whammy, and you say it's been especially severe in the southeast and especially in Florida; right, sir?” A: “Yes.”) & RX 115, 2137-2140, 2151 (Q: “All right. And when you said ‘pricing pressures,’ you're referring to that sharp erosion in prices

in the second half of 2008 after DIFRA was operational?” A: “Yes.”) & CX 1744; Rybacki, Tr. 3660-3661 (Q: “Did prices -- did your average prices go down in the second half of '08, sir?” A: “Our volumes went down. I don't know -- I don't think our average pricing -- you know, we tried to hold the line because volume was going down, but -- but our volume definitely took a hit from August through September of '08.”), 3717-3719 (Q: “And in fact, Mr. Rybacki, pricing got worse in the second half of '08. We already saw that; right?” A: “Pricing got worse.”)).

This finding is misleading because McWane's non-domestic Fittings prices for 2008 declined relative to inflation, because its non-domestic production costs rose by roughly (RPF 183, 185).

This finding is misleading because McWane's prices declined for a multiple year period. (RPF 189; Normann, Tr. 4789) Dr. Normann testified: “And what we see is we see a general trend--I mean, there's a little bouncing around here and there, but McWane's prices decline for essentially a multiple-year period, which is happening before and after and also during the alleged conspiracy period, and that to me is inconsistent, as a factual matter, with the allegations.”).

This finding is misleading because, during the second half of 2008, McWane's net prices for non-domestic Fittings prices declined. (RPF 266; Tatman, Tr. 971-972 (“Q. All right. And that's what we just saw where your price change in January of '08 was far below the inflation level? A. Yes. Q. Your price change in June of '08 was far below the inflation level? A. Yes. Q. All right. And you say your share -- I guess your share is down at this point in 2008? A. And that's eight points, so that's a -- that's a lot of percent movement. Q. All right. And so that's down from, what, somewhere in the upper 40s to low 40s? A. Yeah. Q. So about a 20 percent actual decline in share? A. Yeah. Q. All right. There's an asterisk here. It says, "Leading price stability

has been detrimental to share." Can you tell us what that is? A. Well, you know, we tried to change the game by compressing prices and holding down prices there and trying a little head fake on that and job-price when it's appropriate, but, you know, it didn't want work. It was a plan, didn't work. Q. Okay. Mr. Tatman, did the business improve after September of '08 for the rest of the year? A. No. Q. Did pricing get worse, sir? A. Worse.”).

1346. McWane’s year-to-date Fittings profits through June 2008 increased \$5.209 million over the prior year, despite a 24% reduction in volume, in part because Fittings were sold at a higher price in 2008 compared to 2007. (CX 2145 at 006 (July 8, 2008 McWane budget variance report); CX 2481 (Nowlin, Dep. at 133-134)).

Response To Finding No. 1346:

This proposed Finding is incomplete. Mr. Tatman explained these numbers in detail at trial. *See* Response 1347 below. This finding is also misleading because McWane’s prices for non-domestic Fittings did not keep pace with inflation in 2008. ((RPFF ¶ 23; (Tatman, Tr. 879-881 (Q: “All right, sir. Now, this 10 to 12 percent that you have here, was this keeping pace with inflation, sir?” A: “No.” Q: “You mean your price -- your price was not keeping pace with your raw material cost increases you were seeing?” A: “No.”), 971 (Q: “And you say you're lagging inflation due to competitive actions, and what did you mean by that?” A: “Pricing. We couldn't get enough price out there in what we were selling things for to cover our rising cost.”))).

This finding is misleading because McWane’s average blended Fittings price (the price of imported or domestic Fittings sold for open source jobs) declined relative to inflation throughout 2008, 2009, and 2010. (RPFF ¶ 24; Normann, Tr. 4791-4797 (“So roughly, if you look at it kind of from the mid-2007, beginning of 2008, the price decline is in the double digits percentage-wise into 2009.”; “You notice that these input costs have been going up essentially continuously from 2007 through 2010, which is the time period captured in the figure, but what is most noteworthy is really this dramatic increase in 2008 where these input costs have gone up, you

know, 40-50 percent in 2008 and again I think it's 70 or 80 percent from earlier in 2007."); RDX-016.)

This finding is misleading because Average net prices for non-domestic Fittings were lower during the latter half of 2008 than during the first half of 2008. (RPFF ¶ 25; Tatman, Tr. 971-972 (Q: "Okay. Mr. Tatman, did the business improve after September of '08 for the rest of the year?" A: "No." Q: "Did pricing get worse, sir?" A: "Worse."); Pais, Tr. 2129-2131 (Q: "All right. So here you are in the second half of '08 and you say that prices -- there's been an equally quick and sharp erosion in market pricing, and you say it's an alarming double whammy. What did you mean by that, sir?" A: "Well, as I preface there with the volume dropping down and the prices falling, that is certainly a one-two punch.") & RX 116, 2134-2135 (Q: "So a little while after DIFRA actually becomes operational, we see you say there's been this equally quick and sharp erosion in market pricing, the double whammy, and you say it's been especially severe in the southeast and especially in Florida; right, sir?" A: "Yes.") & RX 115, 2137-2140, 2151 (Q: "All right. And when you said 'pricing pressures,' you're referring to that sharp erosion in prices in the second half of 2008 after DIFRA was operational?" A: "Yes.") & CX 1744; Rybacki, Tr. 3660-3661 (Q: "Did prices -- did your average prices go down in the second half of '08, sir?" A: "Our volumes went down. I don't know -- I don't think our average pricing -- you know, we tried to hold the line because volume was going down, but -- but our volume definitely took a hit from August through September of '08."), 3717-3719 (Q: "And in fact, Mr. Rybacki, pricing got worse in the second half of '08. We already saw that; right?" A: "Pricing got worse.")).

This finding is misleading because McWane's gross profits on non-domestic Fittings fell by nearly a ██████ in 2008 (in part because of job pricing) and because McWane's margins on non-domestic Fittings also declined in 2008. (RPFF ¶¶ 146, 187).

This finding is misleading because McWane's non-domestic Fittings prices for 2008 declined relative to inflation, because its non-domestic production costs rose by roughly (RPFF ¶¶ 183, 185).

This finding is misleading because McWane's prices declined for a multiple year period. (RPFF ¶ 189; Normann, Tr. 4789) Dr. Normann testified: "And what we see is we see a general trend--I mean, there's a little bouncing around here and there, but McWane's prices decline for essentially a multiple-year period, which is happening before and after and also during the alleged conspiracy period, and that to me is inconsistent, as a factual matter, with the allegations.").

This finding is misleading because, during the second half of 2008, McWane's net prices for non-domestic Fittings prices declined. (RPFF ¶ 266; Tatman, Tr. 971-972 ("Q. All right. And that's what we just saw where your price change in January of '08 was far below the inflation level? A. Yes. Q. Your price change in June of '08 was far below the inflation level? A. Yes. Q. All right. And you say your share -- I guess your share is down at this point in 2008? A. And that's eight points, so that's a -- that's a lot of percent movement. Q. All right. And so that's down from, what, somewhere in the upper 40s to low 40s? A. Yeah. Q. So about a 20 percent actual decline in share? A. Yeah. Q. All right. There's an asterisk here. It says, "Leading price stability has been detrimental to share." Can you tell us what that is? A. Well, you know, we tried to change the game by compressing prices and holding down prices there and trying a little head fake on that and job-price when it's appropriate, but, you know, it didn't want work. It was a plan, didn't work. Q. Okay. Mr. Tatman, did the business improve after September of '08 for the rest of the year? A. No. Q. Did pricing get worse, sir? A. Worse.")).

1347. McWane's year-to-date Fittings profits through July 2008 were up over \$5.4 million over the prior year based on over \$11.4 million in pricing gains, even as volumes fell 24%.

(CX 1569 at 005 (August 13, 2008 McWane budget variance analysis); Tatman, Tr. 831-834). Non-Domestic Fittings prices rose between July 2007 and July 2008 from \$1,730 to \$1,981 per ton. (CX 1569 at 003; Tatman, Tr. 823, 826-831).

Response To Finding No. 1347:

This proposed Finding is incomplete. Mr. Tatman explained in detail at trial why CX 1569 would reflect a price increase on a per ton basis. The analysis does not reflect cash discounts, freight allowances or rebates. Tatman, Tr. 827-828. The referenced \$5.4 million also excludes idle plant. Tatman, Tr. 832. Specifically:

Q. So volume is down, but gross profits are up in utility fittings at this point in time in 2008; correct, sir?

A. Let's take a look at why.

Q. And is that a yes?

A. That's what it says here, but I'm trying to -- like I always do -- I'm the inquisitive child -- it's why.

Q. And --

A. Pricing gains on domestic product. And then you see the inflation on both, increased product costs on both domestic and nondomestic, so what we talked about that they were both inflating, not just the China one. And then there's another half a million dollars in idle plant versus the prior year have eroded profits by \$6.8 million, so what you eat at the end of the day is your profit, not your gross margin.

Q. And he goes on to say, "Although overall volume is down, increased sales of the more profitable nondomestic product have contributed an additional \$1.198 million of profits over and above the profits lost from the 48 percent drop in domestic volume." That's what the controller said on August 13, 2008; is that right, sir?

A. Yeah. And that's -- I can actually easily explain that. If you go -- you don't want the explanation, do you.

Q. I'm sorry?

A. You don't want the explanation, do you?

Q. No.

A. Okay.

Q. Thank you. I want to try and get you out of here today.

A. No. I mean, if you actually go to our sales and gross files for that time period --

JUDGE CHAPPELL: So you're going to get that explanation anyway.

MR. HASSI: Apparently. I don't have a question pending, but I --

THE WITNESS: Sir, what he's taking into account here -- he's taking the simpleton view.

If you go look at the sales and gross file, you will see -- you're making the assumption that we're making more money on domestic fittings. If you look at the sales and gross file, you will see gross profit on domestic fittings, the way we're counting them here, around 10 percent, and you'll see higher profits on import because you're not taking into account the substitution that we say that we do on domestic. So, again, you just can't take things out of context and draw inferences to them. You have to know what's going on.

Tatman, Tr. 832-834.

This finding is also misleading because McWane's prices for non-domestic Fittings did not keep pace with inflation in 2008. ((RPFF ¶ 23; (Tatman, Tr. 879-881 (Q: "All right, sir. Now, this 10 to 12 percent that you have here, was this keeping pace with inflation, sir?" A: "No." Q: "You mean your price -- your price was not keeping pace with your raw material cost increases you were seeing?" A: "No."), 971 (Q: "And you say you're lagging inflation due to

competitive actions, and what did you mean by that?” A: “Pricing. We couldn't get enough price out there in what we were selling things for to cover our rising cost.”).).

This finding is misleading because McWane’s average blended Fittings price (the price of imported or domestic Fittings sold for open source jobs) declined relative to inflation throughout 2008, 2009, and 2010. (RPFF ¶ 24; Normann, Tr. 4791-4797 (“So roughly, if you look at it kind of from the mid-2007, beginning of 2008, the price decline is in the double digits percentage-wise into 2009.”; “You notice that these input costs have been going up essentially continuously from 2007 through 2010, which is the time period captured in the figure, but what is most noteworthy is really this dramatic increase in 2008 where these input costs have gone up, you know, 40-50 percent in 2008 and again I think it's 70 or 80 percent from earlier in 2007.”); RDX-016).)

This finding is misleading because Average net prices for non-domestic Fittings were lower during the latter half of 2008 than during the first half of 2008. (RPFF ¶ 25; Tatman, Tr. 971-972 (Q: “Okay. Mr. Tatman, did the business improve after September of '08 for the rest of the year?” A: “No.” Q: “Did pricing get worse, sir?” A: “Worse.”); Pais, Tr. 2129-2131 (Q: “All right. So here you are in the second half of '08 and you say that prices -- there's been an equally quick and sharp erosion in market pricing, and you say it's an alarming double whammy. What did you mean by that, sir?” A: “Well, as I preface there with the volume dropping down and the prices falling, that is certainly a one-two punch.”) & RX 116, 2134-2135 (Q: “So a little while after DIFRA actually becomes operational, we see you say there's been this equally quick and sharp erosion in market pricing, the double whammy, and you say it's been especially severe in the southeast and especially in Florida; right, sir?” A: “Yes.”) & RX 115, 2137-2140, 2151 (Q: “All right. And when you said ‘pricing pressures,’ you're referring to that sharp erosion in prices

in the second half of 2008 after DIFRA was operational?” A: “Yes.”) & CX 1744; Rybacki, Tr. 3660-3661 (Q: “Did prices -- did your average prices go down in the second half of '08, sir?” A: “Our volumes went down. I don't know -- I don't think our average pricing -- you know, we tried to hold the line because volume was going down, but -- but our volume definitely took a hit from August through September of '08.”), 3717-3719 (Q: “And in fact, Mr. Rybacki, pricing got worse in the second half of '08. We already saw that; right?” A: “Pricing got worse.”)).

This finding is misleading because McWane’s gross profits on non-domestic Fittings fell by nearly a in 2008 (in part because of job pricing) and because McWane’s margins on non-domestic Fittings also declined in 2008. (RPF 146, 187).

This finding is misleading because McWane’s non-domestic Fittings prices for 2008 declined relative to inflation, because its non-domestic production costs rose by roughly (RPF 183, 185).

This finding is misleading because McWane’s prices declined for a multiple year period. (RPF 189; Normann, Tr. 4789) Dr. Normann testified: “And what we see is we see a general trend--I mean, there’s a little bouncing around here and there, but McWane’s prices decline for essentially a multiple-year period, which is happening before and after and also during the alleged conspiracy period, and that to me is inconsistent, as a factual matter, with the allegations.”).

This finding is misleading because, during the second half of 2008, McWane’s net prices for non-domestic Fittings prices declined. (RPF 266; Tatman, Tr. 971-972 (“Q. All right. And that's what we just saw where your price change in January of '08 was far below the inflation level? A. Yes. Q. Your price change in June of '08 was far below the inflation level? A. Yes. Q. All right. And you say your share -- I guess your share is down at this point in 2008? A. And

that's eight points, so that's a -- that's a lot of percent movement. Q. All right. And so that's down from, what, somewhere in the upper 40s to low 40s? A. Yeah. Q. So about a 20 percent actual decline in share? A. Yeah. Q. All right. There's an asterisk here. It says, "Leading price stability has been detrimental to share." Can you tell us what that is? A. Well, you know, we tried to change the game by compressing prices and holding down prices there and trying a little head fake on that and job-price when it's appropriate, but, you know, it didn't want work. It was a plan, didn't work. Q. Okay. Mr. Tatman, did the business improve after September of '08 for the rest of the year? A. No. Q. Did pricing get worse, sir? A. Worse.”).

1348. McWane’s year-to-date Fittings profits through August 2008 were up \$5.852 million over the prior year notwithstanding a 25% reduction in volume, in part because Fittings were sold at a higher price in 2008. (CX 2123 (September 8, 2008 McWane budget variance report); CX 2481 (Nowlin, Dep. at 130-132)).

Response To Finding No. 1348:

This proposed Finding is incomplete. Mr. Tatman explained these numbers in detail at trial. *See* Response 1347 above. This finding is also misleading because McWane’s prices for non-domestic Fittings did not keep pace with inflation in 2008. ((RPFF ¶ 23; (Tatman, Tr. 879-881 (Q: “All right, sir. Now, this 10 to 12 percent that you have here, was this keeping pace with inflation, sir?” A: “No.” Q: “You mean your price -- your price was not keeping pace with your raw material cost increases you were seeing?” A: “No.”), 971 (Q: “And you say you're lagging inflation due to competitive actions, and what did you mean by that?” A: “Pricing. We couldn't get enough price out there in what we were selling things for to cover our rising cost.”))).

This finding is misleading because McWane’s average blended Fittings price (the price of imported or domestic Fittings sold for open source jobs) declined relative to inflation throughout 2008, 2009, and 2010. (RPFF ¶ 24; Normann, Tr. 4791-4797 (“So roughly, if you look at it kind of from the mid-2007, beginning of 2008, the price decline is in the double digits percentage-

wise into 2009.”; “You notice that these input costs have been going up essentially continuously from 2007 through 2010, which is the time period captured in the figure, but what is most noteworthy is really this dramatic increase in 2008 where these input costs have gone up, you know, 40-50 percent in 2008 and again I think it's 70 or 80 percent from earlier in 2007.”); RDX-016.)

This finding is misleading because Average net prices for non-domestic Fittings were lower during the latter half of 2008 than during the first half of 2008. (RPFF ¶ 25; Tatman, Tr. 971-972 (Q: “Okay. Mr. Tatman, did the business improve after September of '08 for the rest of the year?” A: “No.” Q: “Did pricing get worse, sir?” A: “Worse.”); Pais, Tr. 2129-2131 (Q: “All right. So here you are in the second half of '08 and you say that prices -- there's been an equally quick and sharp erosion in market pricing, and you say it's an alarming double whammy. What did you mean by that, sir?” A: “Well, as I preface there with the volume dropping down and the prices falling, that is certainly a one-two punch.”) & RX 116, 2134-2135 (Q: “So a little while after DIFRA actually becomes operational, we see you say there's been this equally quick and sharp erosion in market pricing, the double whammy, and you say it's been especially severe in the southeast and especially in Florida; right, sir?” A: “Yes.”) & RX 115, 2137-2140, 2151 (Q: “All right. And when you said ‘pricing pressures,’ you're referring to that sharp erosion in prices in the second half of 2008 after DIFRA was operational?” A: “Yes.”) & CX 1744; Rybacki, Tr. 3660-3661 (Q: “Did prices -- did your average prices go down in the second half of '08, sir?” A: “Our volumes went down. I don't know -- I don't think our average pricing -- you know, we tried to hold the line because volume was going down, but -- but our volume definitely took a hit from August through September of '08.”), 3717-3719 (Q: “And in fact, Mr. Rybacki, pricing got worse in the second half of '08. We already saw that; right?” A: “Pricing got worse.”)).

This finding is misleading because McWane's gross profits on non-domestic Fittings fell by nearly a in 2008 (in part because of job pricing) and because McWane's margins on non-domestic Fittings also declined in 2008. (RPFF ¶¶ 146, 187).

This finding is misleading because McWane's non-domestic Fittings prices for 2008 declined relative to inflation, because its non-domestic production costs rose by roughly (RPFF ¶¶ 183, 185).

This finding is misleading because McWane's prices declined for a multiple year period. (RPFF ¶ 189; Normann, Tr. 4789) Dr. Normann testified: "And what we see is we see a general trend--I mean, there's a little bouncing around here and there, but McWane's prices decline for essentially a multiple-year period, which is happening before and after and also during the alleged conspiracy period, and that to me is inconsistent, as a factual matter, with the allegations.").

This finding is misleading because, during the second half of 2008, McWane's net prices for non-domestic Fittings prices declined. (RPFF ¶ 266; Tatman, Tr. 971-972 ("Q. All right. And that's what we just saw where your price change in January of '08 was far below the inflation level? A. Yes. Q. Your price change in June of '08 was far below the inflation level? A. Yes. Q. All right. And you say your share -- I guess your share is down at this point in 2008? A. And that's eight points, so that's a -- that's a lot of percent movement. Q. All right. And so that's down from, what, somewhere in the upper 40s to low 40s? A. Yeah. Q. So about a 20 percent actual decline in share? A. Yeah. Q. All right. There's an asterisk here. It says, "Leading price stability has been detrimental to share." Can you tell us what that is? A. Well, you know, we tried to change the game by compressing prices and holding down prices there and trying a little head fake on that and job-price when it's appropriate, but, you know, it didn't want work. It was a

plan, didn't work. Q. Okay. Mr. Tatman, did the business improve after September of '08 for the rest of the year? A. No. Q. Did pricing get worse, sir? A. Worse.”).

1349. McWane’s year-to-date Fittings’ profits through September 2008 were up \$5.595 million over the prior year notwithstanding a 24% reduction in volume, in part because Fittings were sold at a higher price in 2008. (CX 2124 (October 7, 2008 McWane budget variance report); CX 2481 (Nowlin, Dep. at 129-130)).

Response To Finding No. 1349:

This finding is misleading because McWane’s prices for non-domestic Fittings did not keep pace with inflation in 2008. ((RPFF ¶ 23; (Tatman, Tr. 879-881 (Q: “All right, sir. Now, this 10 to 12 percent that you have here, was this keeping pace with inflation, sir?” A: “No.” Q: “You mean your price -- your price was not keeping pace with your raw material cost increases you were seeing?” A: “No.”), 971 (Q: “And you say you're lagging inflation due to competitive actions, and what did you mean by that?” A: “Pricing. We couldn't get enough price out there in what we were selling things for to cover our rising cost.”))).).

This finding is misleading because McWane’s average blended Fittings price (the price of imported or domestic Fittings sold for open source jobs) declined relative to inflation throughout 2008, 2009, and 2010. (RPFF ¶ 24; Normann, Tr. 4791-4797 (“So roughly, if you look at it kind of from the mid-2007, beginning of 2008, the price decline is in the double digits percentage-wise into 2009.”; “You notice that these input costs have been going up essentially continuously from 2007 through 2010, which is the time period captured in the figure, but what is most noteworthy is really this dramatic increase in 2008 where these input costs have gone up, you know, 40-50 percent in 2008 and again I think it's 70 or 80 percent from earlier in 2007.”); RDX-016).)

This finding is misleading because Average net prices for non-domestic Fittings were lower during the latter half of 2008 than during the first half of 2008. (RPFF ¶ 25; Tatman, Tr.

971-972 (Q: “Okay. Mr. Tatman, did the business improve after September of '08 for the rest of the year?” A: “No.” Q: “Did pricing get worse, sir?” A: “Worse.”); Pais, Tr. 2129-2131 (Q: “All right. So here you are in the second half of '08 and you say that prices -- there's been an equally quick and sharp erosion in market pricing, and you say it's an alarming double whammy. What did you mean by that, sir?” A: “Well, as I preface there with the volume dropping down and the prices falling, that is certainly a one-two punch.”) & RX 116, 2134-2135 (Q: “So a little while after DIFRA actually becomes operational, we see you say there's been this equally quick and sharp erosion in market pricing, the double whammy, and you say it's been especially severe in the southeast and especially in Florida; right, sir?” A: “Yes.”) & RX 115, 2137-2140, 2151 (Q: “All right. And when you said ‘pricing pressures,’ you're referring to that sharp erosion in prices in the second half of 2008 after DIFRA was operational?” A: “Yes.”) & CX 1744; Rybacki, Tr. 3660-3661 (Q: “Did prices -- did your average prices go down in the second half of '08, sir?” A: “Our volumes went down. I don't know -- I don't think our average pricing -- you know, we tried to hold the line because volume was going down, but -- but our volume definitely took a hit from August through September of '08.”), 3717-3719 (Q: “And in fact, Mr. Rybacki, pricing got worse in the second half of '08. We already saw that; right?” A: “Pricing got worse.”)).

This finding is misleading because McWane’s gross profits on non-domestic Fittings fell by nearly a ██████ in 2008 (in part because of job pricing) and because McWane’s margins on non-domestic Fittings also declined in 2008. (RPF 146, 187).

This finding is misleading because McWane’s non-domestic Fittings prices for 2008 declined relative to inflation, because its non-domestic production costs rose by roughly ██████ ██████ (RPF 183, 185).

This finding is misleading because McWane's prices declined for a multiple year period. (RPFF ¶ 189; Normann, Tr. 4789) Dr. Normann testified: "And what we see is we see a general trend--I mean, there's a little bouncing around here and there, but McWane's prices decline for essentially a multiple-year period, which is happening before and after and also during the alleged conspiracy period, and that to me is inconsistent, as a factual matter, with the allegations.").

This finding is misleading because, during the second half of 2008, McWane's net prices for non-domestic Fittings prices declined. (RPFF ¶ 266; Tatman, Tr. 971-972 ("Q. All right. And that's what we just saw where your price change in January of '08 was far below the inflation level? A. Yes. Q. Your price change in June of '08 was far below the inflation level? A. Yes. Q. All right. And you say your share -- I guess your share is down at this point in 2008? A. And that's eight points, so that's a -- that's a lot of percent movement. Q. All right. And so that's down from, what, somewhere in the upper 40s to low 40s? A. Yeah. Q. So about a 20 percent actual decline in share? A. Yeah. Q. All right. There's an asterisk here. It says, "Leading price stability has been detrimental to share." Can you tell us what that is? A. Well, you know, we tried to change the game by compressing prices and holding down prices there and trying a little head fake on that and job-price when it's appropriate, but, you know, it didn't want work. It was a plan, didn't work. Q. Okay. Mr. Tatman, did the business improve after September of '08 for the rest of the year? A. No. Q. Did pricing get worse, sir? A. Worse.")).

1350. Although the U.S. was in a recession and the Fittings business was hit hard by rising costs and decreasing volumes, the gross profitability of McWane's Fittings business on a percentage basis for the first nine months of 2008 was higher than that for every full year from 1999 through 2007. (CX 0120 at 006; Tatman, Tr. 840-841).

Response To Finding No. 1350:

This proposed Finding is incomplete, in that it omits Mr. Tatman's explanation.

Specifically:

THE WITNESS: Okay. If you go through here -- and remember, when I show up, I have history -- why is gross profit negative in 2001, 2002, even 2003, because what did we have there, we had only domestic production. We are trying to fight import prices with only domestic production. What happens when you do that, you have poor profitability. Starting in about 2004 I believe is when we start sourcing product from overseas, started bringing in product. Sigma helped us out with that, so we had the ability now, rather than using a hundred percent domestic product to serve both the domestic-only spec market and the import market, we started having the ability to source product just like our competitors and sell that lower-cost Chinese product into open specs. David Green starts overproducing the plant, so you get an impact that helps you there. He's running up the plants in 2005-2006. He's overproducing compared to what demand is. Inventory levels go up. But when you do that, your gross margins get better because your manufacturing costs go down. I show up in 2007. We got an inventory problem. What does Charlie Nowlin do? He says, Son, it's David Green's problem for a couple years; it's your problem. In 2007 we had heavy substitution of domestic product in blended sales. Getting the inventory down, being able to run the plants, that's going to drive your gross margin down. In the first nine months of 2008, I suspect if you look at the records and I think if you go through my analysis of the thing, I'll bet you our substitution rate for the first nine thousand -- first nine months of 2008 substituting domestic product against

import specs is at a lower rate than it was in 2008, and that's what drives your gross margin up.

Tatman, Tr. 839-840.

This finding is also misleading because McWane's gross profits on non-domestic Fittings fell by nearly a [REDACTED] in 2008 (in part because of job pricing) and because McWane's margins on non-domestic Fittings also declined in 2008. (RPF 146, 187).

1351. According to a profitability history analysis prepared by Mr. Tatman in October 2008 and based on data pulled from McWane's official financial records, McWane's Fittings business gross profit margin for the first nine months of 2008 was 22%, as compared to 15.4% for 2007, 19.6% for 2006, 20.6% for 2005, 14.9% for 2004, 0.0% for 2003, -0.4% for 2002, -4.2% for 2001, 7.5% for 2000, and 16.1% for 1999. (CX 0120 at 006; Tatman, Tr. 837-838, 840-842).

Response To Finding No. 1351:

This proposed Finding is incomplete because it omits Mr. Tatman's explanation. See Responses 1347 and 1350 above. This finding is also misleading because McWane's gross profits on non-domestic Fittings fell by nearly a [REDACTED] in 2008 (in part because of job pricing) and because McWane's margins on non-domestic Fittings also declined in 2008. (RPF 146, 187).

1352. In October 2008, Mr. Tatman's forecasts for the full year 2008 showed that, while sales were expected to decline by approximately 24% from 2007 to 2008 (from 59,659 tons to an estimated 46,079 tons), gross margins were expected to increase from 15.4% to 20.5%, and gross profit was expected to increase from \$20.3 million to an estimated \$23.5 million. (CX 0120 at 006; Tatman, Tr. 836-837).

Response To Finding No. 1352:

This proposed Finding is incomplete because it omits Mr. Tatman's explanation. See Responses 1347 and 1350 above. This finding is also misleading because McWane's gross profits on non-domestic Fittings fell by nearly a [REDACTED] in 2008 (in part because of job pricing)

and because McWane's margins on non-domestic Fittings also declined in 2008. (RPF 146, 187).

1353. McWane's Fittings profits for the year 2008 were up more than \$4.3 million from the prior year, in part based on over \$16.2 million in pricing gains, even as volumes fell 26%. (CX 2126 at 006 (January 14, 2009 McWane budget variance analysis); Tatman, Tr. 834).

Response To Finding No. 1353:

This proposed Finding is incomplete because it omits Mr. Tatman's explanation. See Responses 1347 and 1350 above. This finding is also misleading because McWane's gross profits on non-domestic Fittings fell by nearly a in 2008 (in part because of job pricing) and because McWane's margins on non-domestic Fittings also declined in 2008. (RPF 146, 187).

1354. The January 14, 2009 McWane budget variance analysis reflects a year over year increase in non-Domestic Fittings prices between 2007 and 2008 from \$1,994 to \$2,098 per ton. (CX 2126 at 004; Tatman, Tr. 834).

Response To Finding No. 1354:

This proposed Finding is incomplete because it omits Mr. Tatman's explanation. See Responses 1347 and 1350 above. This finding is also misleading because McWane's prices for non-domestic Fittings did not keep pace with inflation in 2008. ((RPF 23; (Tatman, Tr. 879-881 (Q: "All right, sir. Now, this 10 to 12 percent that you have here, was this keeping pace with inflation, sir?" A: "No." Q: "You mean your price -- your price was not keeping pace with your raw material cost increases you were seeing?" A: "No."), 971 (Q: "And you say you're lagging inflation due to competitive actions, and what did you mean by that?" A: "Pricing. We couldn't get enough price out there in what we were selling things for to cover our rising cost."))).).

This finding is misleading because McWane's average blended Fittings price (the price of imported or domestic Fittings sold for open source jobs) declined relative to inflation throughout

2008, 2009, and 2010. (RPF 24; Normann, Tr. 4791-4797 (“So roughly, if you look at it kind of from the mid-2007, beginning of 2008, the price decline is in the double digits percentage-wise into 2009.”); “You notice that these input costs have been going up essentially continuously from 2007 through 2010, which is the time period captured in the figure, but what is most noteworthy is really this dramatic increase in 2008 where these input costs have gone up, you know, 40-50 percent in 2008 and again I think it's 70 or 80 percent from earlier in 2007.”); RDX-016.)

This finding is misleading because Average net prices for non-domestic Fittings were lower during the latter half of 2008 than during the first half of 2008. (RPF 25; Tatman, Tr. 971-972 (Q: “Okay. Mr. Tatman, did the business improve after September of '08 for the rest of the year?” A: “No.” Q: “Did pricing get worse, sir?” A: “Worse.”); Pais, Tr. 2129-2131 (Q: “All right. So here you are in the second half of '08 and you say that prices -- there's been an equally quick and sharp erosion in market pricing, and you say it's an alarming double whammy. What did you mean by that, sir?” A: “Well, as I preface there with the volume dropping down and the prices falling, that is certainly a one-two punch.”) & RX 116, 2134-2135 (Q: “So a little while after DIFRA actually becomes operational, we see you say there's been this equally quick and sharp erosion in market pricing, the double whammy, and you say it's been especially severe in the southeast and especially in Florida; right, sir?” A: “Yes.”) & RX 115, 2137-2140, 2151 (Q: “All right. And when you said ‘pricing pressures,’ you're referring to that sharp erosion in prices in the second half of 2008 after DIFRA was operational?” A: “Yes.”) & CX 1744; Rybacki, Tr. 3660-3661 (Q: “Did prices -- did your average prices go down in the second half of '08, sir?” A: “Our volumes went down. I don't know -- I don't think our average pricing -- you know, we tried to hold the line because volume was going down, but -- but our volume definitely took a hit from

August through September of '08.”), 3717-3719 (Q: “And in fact, Mr. Rybacki, pricing got worse in the second half of '08. We already saw that; right?” A: “Pricing got worse.”)).).

This finding is misleading because McWane’s non-domestic Fittings prices for 2008 declined relative to inflation, because its non-domestic production costs rose by roughly (RPF 183, 185).

This finding is misleading because McWane’s prices declined for a multiple year period. (RPF 189; Normann, Tr. 4789) Dr. Normann testified: “And what we see is we see a general trend--I mean, there’s a little bouncing around here and there, but McWane’s prices decline for essentially a multiple-year period, which is happening before and after and also during the alleged conspiracy period, and that to me is inconsistent, as a factual matter, with the allegations.”).

This finding is misleading because, during the second half of 2008, McWane’s net prices for non-domestic Fittings prices declined. (RPF 266; Tatman, Tr. 971-972 (“Q. All right. And that's what we just saw where your price change in January of '08 was far below the inflation level? A. Yes. Q. Your price change in June of '08 was far below the inflation level? A. Yes. Q. All right. And you say your share -- I guess your share is down at this point in 2008? A. And that's eight points, so that's a -- that's a lot of percent movement. Q. All right. And so that's down from, what, somewhere in the upper 40s to low 40s? A. Yeah. Q. So about a 20 percent actual decline in share? A. Yeah. Q. All right. There's an asterisk here. It says, "Leading price stability has been detrimental to share." Can you tell us what that is? A. Well, you know, we tried to change the game by compressing prices and holding down prices there and trying a little head fake on that and job-price when it's appropriate, but, you know, it didn't want work. It was a

plan, didn't work. Q. Okay. Mr. Tatman, did the business improve after September of '08 for the rest of the year? A. No. Q. Did pricing get worse, sir? A. Worse.”).).

1355. McWane’s year-to-date Fittings’ profits through October 2009 were down \$7.36 million compared to the same period in 2008, with approximately \$1.18 million of the drop being attributable to Fittings were sold at lower prices in 2009 than in 2008. (CX 2153 at 006 (November 6, 2009 McWane budget variance report)).

Response To Finding No. 1355:

See General Response 5. This exhibit was not used at trial. However, Mr. Tatman explained in detail how to interpret such variance reports. *See* Response 1347 above. This finding is misleading because McWane’s prices for non-domestic Fittings did not keep pace with inflation in 2008. ((RPF ¶ 23; (Tatman, Tr. 879-881 (Q: “All right, sir. Now, this 10 to 12 percent that you have here, was this keeping pace with inflation, sir?” A: “No.” Q: “You mean your price -- your price was not keeping pace with your raw material cost increases you were seeing?” A: “No.”), 971 (Q: “And you say you're lagging inflation due to competitive actions, and what did you mean by that?” A: “Pricing. We couldn't get enough price out there in what we were selling things for to cover our rising cost.”))).).

This finding is misleading because McWane’s average blended Fittings price (the price of imported or domestic Fittings sold for open source jobs) declined relative to inflation throughout 2008, 2009, and 2010. (RPF ¶ 24; Normann, Tr. 4791-4797 (“So roughly, if you look at it kind of from the mid-2007, beginning of 2008, the price decline is in the double digits percentage-wise into 2009.”; “You notice that these input costs have been going up essentially continuously from 2007 through 2010, which is the time period captured in the figure, but what is most noteworthy is really this dramatic increase in 2008 where these input costs have gone up, you know, 40-50 percent in 2008 and again I think it's 70 or 80 percent from earlier in 2007.”); RDX-016.)

This finding is misleading because McWane's gross profits on non-domestic Fittings fell by nearly a [REDACTED] in 2008 (in part because of job pricing) and because McWane's margins on non-domestic Fittings also declined in 2008. (RPFF ¶¶ 146, 187).

This finding is misleading because McWane's non-domestic Fittings prices for 2008 declined relative to inflation, because its non-domestic production costs rose by roughly [REDACTED] (RPFF ¶¶ 183, 185).

This finding is misleading because McWane's prices declined for a multiple year period. (RPFF ¶ 189; Normann, Tr. 4789) Dr. Normann testified: "And what we see is we see a general trend--I mean, there's a little bouncing around here and there, but McWane's prices decline for essentially a multiple-year period, which is happening before and after and also during the alleged conspiracy period, and that to me is inconsistent, as a factual matter, with the allegations.").

1356.

[REDACTED] (CX 2416 at 043, *in camera* [REDACTED]; Tatman, Tr. 849).

Response To Finding No. 1356:

This proposed Finding is incomplete because it omits Mr. Tatman's explanation. *See* Responses 1347 and 1350 above. This finding is also because McWane's prices for non-domestic Fittings did not keep pace with inflation in 2008. ((RPFF ¶ 23; (Tatman, Tr. 879-881 (Q: "All right, sir. Now, this 10 to 12 percent that you have here, was this keeping pace with inflation, sir?" A: "No." Q: "You mean your price -- your price was not keeping pace with your raw material cost increases you were seeing?" A: "No."), 971 (Q: "And you say you're lagging inflation due to competitive actions, and what did you mean by that?" A: "Pricing. We couldn't get enough price out there in what we were selling things for to cover our rising cost."))).

This finding is misleading because McWane's average blended Fittings price (the price of imported or domestic Fittings sold for open source jobs) declined relative to inflation throughout 2008, 2009, and 2010. (RPF 24; Normann, Tr. 4791-4797 ("So roughly, if you look at it kind of from the mid-2007, beginning of 2008, the price decline is in the double digits percentage-wise into 2009."); "You notice that these input costs have been going up essentially continuously from 2007 through 2010, which is the time period captured in the figure, but what is most noteworthy is really this dramatic increase in 2008 where these input costs have gone up, you know, 40-50 percent in 2008 and again I think it's 70 or 80 percent from earlier in 2007."); RDX-016.)

This finding is misleading because Average net prices for non-domestic Fittings were lower during the latter half of 2008 than during the first half of 2008. (RPF 25; Tatman, Tr. 971-972 (Q: "Okay. Mr. Tatman, did the business improve after September of '08 for the rest of the year?" A: "No." Q: "Did pricing get worse, sir?" A: "Worse."); Pais, Tr. 2129-2131 (Q: "All right. So here you are in the second half of '08 and you say that prices -- there's been an equally quick and sharp erosion in market pricing, and you say it's an alarming double whammy. What did you mean by that, sir?" A: "Well, as I preface there with the volume dropping down and the prices falling, that is certainly a one-two punch.") & RX 116, 2134-2135 (Q: "So a little while after DIFRA actually becomes operational, we see you say there's been this equally quick and sharp erosion in market pricing, the double whammy, and you say it's been especially severe in the southeast and especially in Florida; right, sir?" A: "Yes.") & RX 115, 2137-2140, 2151 (Q: "All right. And when you said 'pricing pressures,' you're referring to that sharp erosion in prices in the second half of 2008 after DIFRA was operational?" A: "Yes.") & CX 1744; Rybacki, Tr. 3660-3661 (Q: "Did prices -- did your average prices go down in the second half of '08, sir?" A:

“Our volumes went down. I don't know -- I don't think our average pricing -- you know, we tried to hold the line because volume was going down, but -- but our volume definitely took a hit from August through September of '08.”), 3717-3719 (Q: “And in fact, Mr. Rybacki, pricing got worse in the second half of '08. We already saw that; right?” A: “Pricing got worse.”)).

This finding is misleading because McWane's non-domestic Fittings prices for 2008 declined relative to inflation, because its non-domestic production costs rose by roughly (RPF 183, 185).

This finding is misleading because McWane's prices declined for a multiple year period. (RPF 189; Normann, Tr. 4789) Dr. Normann testified: “And what we see is we see a general trend--I mean, there's a little bouncing around here and there, but McWane's prices decline for essentially a multiple-year period, which is happening before and after and also during the alleged conspiracy period, and that to me is inconsistent, as a factual matter, with the allegations.”).

This finding is misleading because, during the second half of 2008, McWane's net prices for non-domestic Fittings prices declined. (RPF 266; Tatman, Tr. 971-972 (“Q. All right. And that's what we just saw where your price change in January of '08 was far below the inflation level? A. Yes. Q. Your price change in June of '08 was far below the inflation level? A. Yes. Q. All right. And you say your share -- I guess your share is down at this point in 2008? A. And that's eight points, so that's a -- that's a lot of percent movement. Q. All right. And so that's down from, what, somewhere in the upper 40s to low 40s? A. Yeah. Q. So about a 20 percent actual decline in share? A. Yeah. Q. All right. There's an asterisk here. It says, "Leading price stability has been detrimental to share." Can you tell us what that is? A. Well, you know, we tried to change the game by compressing prices and holding down prices there and trying a little head

fake on that and job-price when it's appropriate, but, you know, it didn't want work. It was a plan, didn't work. Q. Okay. Mr. Tatman, did the business improve after September of '08 for the rest of the year? A. No. Q. Did pricing get worse, sir? A. Worse.”).).

1357.

(CX 2416 at 043, *in camera*
; Tatman, Tr. 846-847, *in camera*).

Response To Finding No. 1357:

This proposed Finding is incomplete because it omits Mr. Tatman’s explanation. *See* Responses 1347 and 1350 above. This finding is also misleading because McWane’s prices for non-domestic Fittings did not keep pace with inflation in 2008. ((RPFF ¶ 23; (Tatman, Tr. 879-881 (Q: “All right, sir. Now, this 10 to 12 percent that you have here, was this keeping pace with inflation, sir?” A: “No.” Q: “You mean your price -- your price was not keeping pace with your raw material cost increases you were seeing?” A: “No.”), 971 (Q: “And you say you're lagging inflation due to competitive actions, and what did you mean by that?” A: “Pricing. We couldn't get enough price out there in what we were selling things for to cover our rising cost.”))).).

This finding is misleading because McWane’s average blended Fittings price (the price of imported or domestic Fittings sold for open source jobs) declined relative to inflation throughout 2008, 2009, and 2010. (RPFF ¶ 24; Normann, Tr. 4791-4797 (“So roughly, if you look at it kind of from the mid-2007, beginning of 2008, the price decline is in the double digits percentage-wise into 2009.”; “You notice that these input costs have been going up essentially continuously from 2007 through 2010, which is the time period captured in the figure, but what is most noteworthy is really this dramatic increase in 2008 where these input costs have gone up, you

know, 40-50 percent in 2008 and again I think it's 70 or 80 percent from earlier in 2007."); RDX-016.)

This finding is misleading because Average net prices for non-domestic Fittings were lower during the latter half of 2008 than during the first half of 2008. (RPF 25; Tatman, Tr. 971-972 (Q: "Okay. Mr. Tatman, did the business improve after September of '08 for the rest of the year?" A: "No." Q: "Did pricing get worse, sir?" A: "Worse."); Pais, Tr. 2129-2131 (Q: "All right. So here you are in the second half of '08 and you say that prices -- there's been an equally quick and sharp erosion in market pricing, and you say it's an alarming double whammy. What did you mean by that, sir?" A: "Well, as I preface there with the volume dropping down and the prices falling, that is certainly a one-two punch.") & RX 116, 2134-2135 (Q: "So a little while after DIFRA actually becomes operational, we see you say there's been this equally quick and sharp erosion in market pricing, the double whammy, and you say it's been especially severe in the southeast and especially in Florida; right, sir?" A: "Yes.") & RX 115, 2137-2140, 2151 (Q: "All right. And when you said 'pricing pressures,' you're referring to that sharp erosion in prices in the second half of 2008 after DIFRA was operational?" A: "Yes.") & CX 1744; Rybacki, Tr. 3660-3661 (Q: "Did prices -- did your average prices go down in the second half of '08, sir?" A: "Our volumes went down. I don't know -- I don't think our average pricing -- you know, we tried to hold the line because volume was going down, but -- but our volume definitely took a hit from August through September of '08."), 3717-3719 (Q: "And in fact, Mr. Rybacki, pricing got worse in the second half of '08. We already saw that; right?" A: "Pricing got worse.")).

This finding is misleading because McWane's non-domestic Fittings prices for 2008 declined relative to inflation, because its non-domestic production costs rose by roughly [REDACTED] [REDACTED] (RPF 183, 185).

This finding is misleading because McWane's prices declined for a multiple year period. (RPFF ¶ 189; Normann, Tr. 4789) Dr. Normann testified: "And what we see is we see a general trend--I mean, there's a little bouncing around here and there, but McWane's prices decline for essentially a multiple-year period, which is happening before and after and also during the alleged conspiracy period, and that to me is inconsistent, as a factual matter, with the allegations.").

This finding is misleading because, during the second half of 2008, McWane's net prices for non-domestic Fittings prices declined. (RPFF ¶ 266; Tatman, Tr. 971-972 ("Q. All right. And that's what we just saw where your price change in January of '08 was far below the inflation level? A. Yes. Q. Your price change in June of '08 was far below the inflation level? A. Yes. Q. All right. And you say your share -- I guess your share is down at this point in 2008? A. And that's eight points, so that's a -- that's a lot of percent movement. Q. All right. And so that's down from, what, somewhere in the upper 40s to low 40s? A. Yeah. Q. So about a 20 percent actual decline in share? A. Yeah. Q. All right. There's an asterisk here. It says, "Leading price stability has been detrimental to share." Can you tell us what that is? A. Well, you know, we tried to change the game by compressing prices and holding down prices there and trying a little head fake on that and job-price when it's appropriate, but, you know, it didn't want work. It was a plan, didn't work. Q. Okay. Mr. Tatman, did the business improve after September of '08 for the rest of the year? A. No. Q. Did pricing get worse, sir? A. Worse.")).

1358.

[REDACTED] (CX 0622 at 003, 005).
[REDACTED] (CX 0622 at 005 (Tatman January 19, 2009 sales presentation); Tatman, Tr. 853, *in camera* [REDACTED])

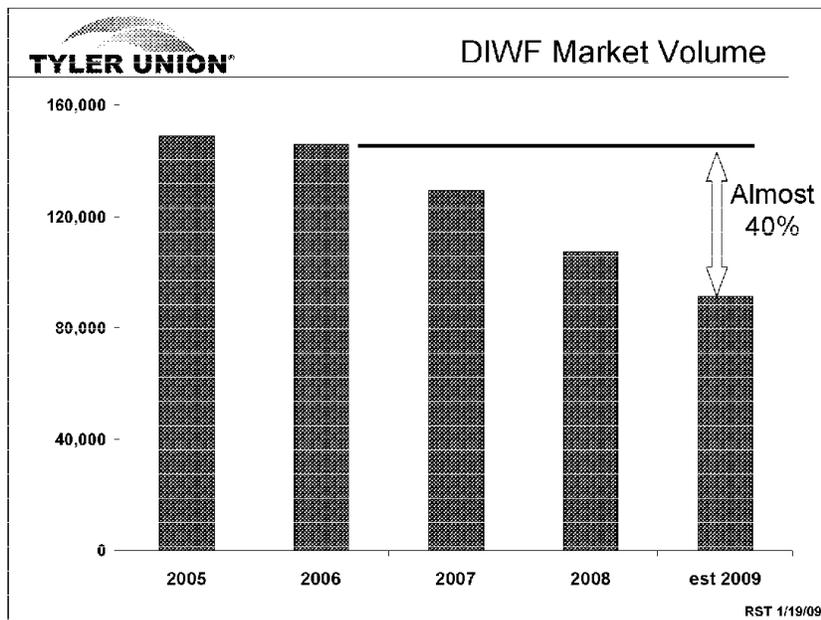
Response To Finding No. 1358:

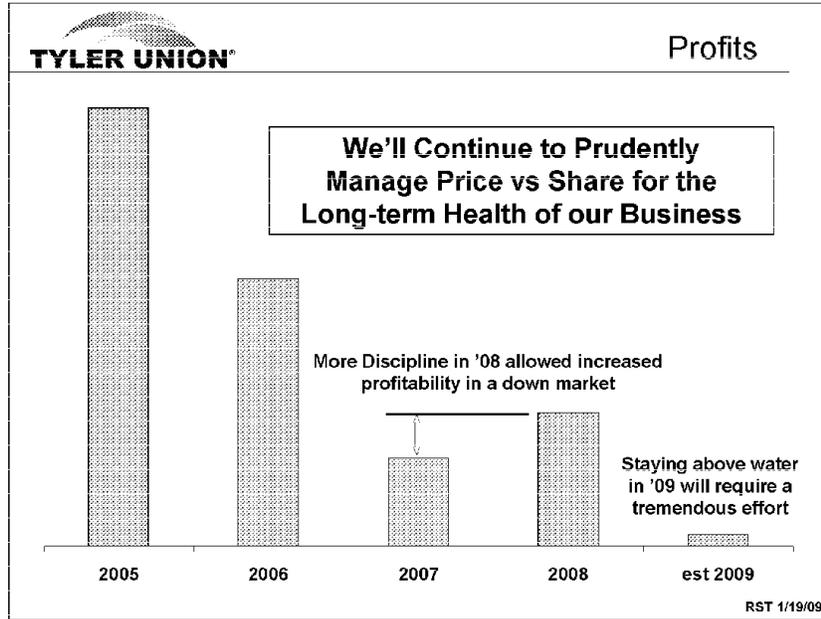
This proposed Finding is incomplete. Mr. Tatman testified that the

. Tatman,

Tr. 852, *in camera*. He explained what the referenced slide depicts. Tatman, Tr. 854-855, *in camera*. See Response 1359 below. This finding is also misleading because McWane’s gross profits on non-domestic Fittings fell by nearly a in 2008 (in part because of job pricing) and because McWane’s margins on non-domestic Fittings also declined in 2008. (RPFF ¶¶ 146, 187).

1359. Specifically, Mr. Tatman’s presentation slides illustrate the decrease in volume accompanied by an increase in profit due to “more discipline”:





(CX 0622 at 003, 005) (profitability was up even though volume was down, attributed to “More Discipline”).

Response To Finding No. 1359:

This finding is incomplete and misleading because Mr. Tatman explained what he meant by the term “more discipline” and the reasons for relatively lower profitability in 2007 as compared to 2008. [REDACTED]

[REDACTED] (Tatman, Tr.

853-855, *in camera*; CX 0622 at 005, *in camera*).

This finding is incomplete and misleading because Dr. Schumann testified that he does not know whether CX 622 is a draft or a final document. (RPFF ¶ 597: Schumann, Tr. 4128-4129 (Q. As I understand your PowerPoint, this is the slide in this document that you quote in the PowerPoint. Is that right, sir? A. I believe so. I don't have the PowerPoint in front of me, but I think that's correct. Unless it was a reference to page 4. But I think it was page 5. They're both pretty much based on the same argument. Q. Well, it's not argument. It's just a slide in a PowerPoint; right? A. Well -- I'm sorry. I didn't mean argument in the sense of controversy or

arguing as much as I guess in I think in sort of a mathematical way that they're basically stating the same idea. Q. So you quote -- we have at the top of the screen, Dr. Schumann, you quote "more discipline in '08," and then that comes right off -- Q. You quote on your PowerPoint up at the top of the screen from CX 622 "more discipline," and then that comes straight off that page 5 from that document; right, sir? A. Yes, that is correct. Q. And you don't know sitting here today if the document is a draft or a final; correct? A. Pardon me? Q. You don't know if that's a draft or a final document; right? A. I can't say for certain.") (objections omitted); CX 622).

7.7.3 Star's Fittings Prices and Financial Performance Improved

1360. Star's Fittings pricing increased and its financial performance improved as a result of the conspiracy. (*Infra* ¶¶ 1361-1369).

Response To Finding No. 1360:

This is an unsupported assertion, for which no response is required.

1361. [REDACTED] (McCutcheon, Tr. 2497, *in camera*; CX 1872 at 001, *in camera*).

Response To Finding No. 1361:

McWane has no specific response.

1362. [REDACTED] (McCutcheon, Tr. 2500-2501, *in camera*; CX 0042, *in camera*).

Response To Finding No. 1362:

The proposed finding's conclusions regarding financial performance contain an incomplete analysis, picking and choosing a few figures from complex financial reporting documents and are incomplete, inaccurate, and misleading. McWane notes that CX 2470 is

Star's 2008 P&L statement and provides more complete information for the entire year, including net as opposed to gross numbers.

1363.

(McCutcheon, Tr. 2501-2502, *in camera*; CX 0528 at 003, *in camera*).

Response To Finding No. 1363:

The proposed finding's conclusions regarding financial performance contain an incomplete analysis, picking and choosing a few figures from complex financial reporting documents and are incomplete, inaccurate, and misleading. McWane notes that CX 2470 is Star's 2008 P&L statement and provides more complete information for the entire year, including net as opposed to gross numbers.

1364.

[REDACTED] (McCutcheon, Tr. 2653, *in camera*; CX 2470 at 002, *in camera*).

Response To Finding No. 1364:

The proposed finding's conclusions regarding financial performance contain an incomplete analysis, picking and choosing a few figures from complex financial reporting documents and are incomplete, inaccurate, and misleading. McWane notes that CX 2470 is Star's 2008 P&L statement and provides more complete information for the entire year, including net as opposed to gross numbers.

1365.

[REDACTED] (McCutcheon, Tr. 2653, *in camera*; CX 2470 at 002, *in camera*).

Response To Finding No. 1365:

The proposed finding's conclusions regarding financial performance contain an incomplete analysis, picking and choosing a few figures from complex financial reporting documents and are incomplete, inaccurate, and misleading.

1366.

(McCutcheon,

Tr. 2656, *in camera*; CX 2470 at 004, *in camera*).

Response To Finding No. 1366:

The proposed finding's conclusions regarding financial performance contain an incomplete analysis, picking and choosing a few figures from complex financial reporting documents and are incomplete, inaccurate, and misleading.

1367.

[REDACTED]

(McCutcheon, Tr. 2656-2657, *in camera*; CX 2470 at 004, *in camera*).

Response To Finding No. 1367:

The proposed finding's conclusions regarding financial performance contain an incomplete analysis, picking and choosing a few figures from complex financial reporting documents and are incomplete, inaccurate, and misleading.

1368.

[REDACTED]

(McCutcheon, Tr. 2656-2658, *in camera*; CX 2470 at 004, *in camera*).

Response To Finding No. 1368:

The proposed finding's conclusions regarding financial performance contain an incomplete analysis, picking and choosing a few figures from complex financial reporting documents and are incomplete, inaccurate, and misleading.

1369.

(McCutcheon, Tr. 2657-2658, *in camera*; CX 2470 at 004, *in camera*).

Response To Finding No. 1369:

The proposed finding's conclusions regarding financial performance contain an incomplete analysis, picking and choosing a few figures from complex financial reporting documents and are incomplete, inaccurate, and misleading.

7.7.4 Sigma's Fittings Prices and Financial Performance Improved

1370. Star's Fittings pricing increased and its financial performance improved as a result of the conspiracy. (*Infra* ¶¶ 1371-1383).

Response To Finding No. 1370:

This finding is incorrect because ¶¶ 1371-1383 do not discuss "Star" and discuss Sigma.

In addition, This is an unsupported assertion, for which no response is required.

1371. Sigma's average selling price (per metric ton) for Fittings rose 21% from 2007 into 2008, from \$2,675 for 2007 to \$3,236 for 2008 through July. By December 2008 the year-to-date price had fallen approximately 3% from its height in July 2008 to \$3,144 per metric ton. (CX 0974 at 003, 009 (detailed analysis of pricing trends prepared by Mr. Bhattacharji in January of 2009 for an outside appraiser hired by Sigma's lenders); Pais, Tr. 2006-2008; *see also* Pais, Tr. 2122-2123 (bank appraiser used CX 0974 in making an assessment of Sigma's orderly liquidation value)).

Response To Finding No. 1371:

Complaint Counsel accurately quotes CX 974. However, it does not contain the official financial records of the company. Pais, Tr. 2123. Rather, it was used by an appraiser to make a

“broad estimate” for an advancement of working capital. Pais, Tr. 2123. This finding is misleading because, during the second half of 2008, Sigma’s Fittings prices declined. (RPF 267; Pais, Tr. 2129-2131 (“Q. This is an e-mail, sir, that you sent to Mr. Rybacki and others in the sales organization on November 24, 2008, so this is a few months after DIFRA started. A. Yes. Q. Okay. Now, you refer here, in the very first sentence, "Dear Larry, "With the severe contraction in market volume over the recent few weeks, the equally quick and sharp erosion in market pricing" -- had market prices been declining at Sigma, your prices had been declining since DIFRA was founded? A. Absolutely. Q. When you say "absolutely," sir, tell us what you're referring to here. A. Because in the second half the volume kept on dropping, and as you know, by September, there was a cataclysmic decline, and the prices were in a pretty steep decline because all suppliers were trying to grab whatever business there was. Q. All right. So here you are in the second half of '08 and you say that prices -- there's been an equally quick and sharp erosion in market pricing, and you say it's an alarming double whammy. What did you mean by that, sir? A. Well, as I preface there with the volume dropping down and the prices falling, that is certainly a one-two punch. Q. Okay. Now, when you saw this double whammy, did you call up anyone at McWane and say, "Hey, guys, let's all raise the price together"? A. No. Q. Okay. Let's scroll down if we can. You say, in the second sentence, "I suggest we do all we can to reverse it," and were you proposing to your team at Sigma that you announce an increase to see if you could reverse that? A. Well, either announce an increase or try and see where we were in the actual pricing and then try to hold the line towards high pricing, through multipliers. Q. And was that something you were internally discussing at Sigma at the time? A. Yes. Q. Did you call up anyone at any competitor and discuss that with them? A. None. Q. Let's go to RX 115, and again, before we put it on the screen I'm going to ask the witness a few questions about

it. Oh, I'm sorry. Can we go back for a second to RX 116. Can we highlight -- yeah. There's that third paragraph: "I suggest we do all we can to reverse it." Then in the next sentence, you say, "Though I am not sure if the trend is similar at other parts, too, it seems to be most severe in the southeast, especially in Florida." Is that what you said, sir? A. Yes. Q. Yeah. So was the price erosion, the sharp erosion, really severe in the fall of 2008, especially -- in the southeast but especially in Florida? A. It was."), RX 116; 2134-2135 ("Q. So a little while after DIFRA actually becomes operational, we see you say there's been this equally quick and sharp erosion in market pricing, the double whammy, and you say it's been especially severe in the southeast and especially in Florida; right, sir? A. Yes.") & RX 115, 2137-2140 ("Q. So Mr. Fox reports to you and the others that he believes, based on whatever information he has, that my client was actually lowering prices, leading to this sharp erosion in price in the southeast; correct? A. Yes. That's what he's trying to convey. Q. And then he says at the bottom of -- Then he says, at the bottom of that paragraph in the last sentence, "Interestingly, we have found Union/Tyler" -- and again, that's McWane; right, sir? A. Yes. Q. All right. Interestingly, we have found McWane leading markets downward in Tennessee and Alabama and the Carolinas. And that's the report you got from the guy in charge of Sigma of selling in those territories; right? A. Yes. Q. And all of these are reports you got about three and a half months after DIFRA actually started up; is that fair? A. That's correct. Q. All right. Now, if we go to the bottom of the second page -- well, I'm sorry. Let's go to the -- let's go to the first page. Down at the bottom. Now, here's an e-mail. It's quite a long e-mail, but we'll start here. This is an e-mail which you read and respond to your southeast territory manager, regional manager, Mr. Fox; right, sir? A. Yes. Q. And if we scroll over and then go on to the next page, if we look at number 4 there, you say, "I am sure that Tyler is as guilty of starting the price decline as any of the other two of us." And that's what your view was;

you thought Tyler might very well have started that price decline. A. Sure. Q. Right. Two sentences after that, you say, "Here, the culprit again may be the plant work or job pricing which is still priced as in a different manner and this dual pricing practice could be continuing to harm our overall pricing as it has over the past three to four years." Do you mean, sir, that here at the end of 2008 you had urged Mr. Rybacki and urged and urged him to change that plant work pricing, and he just had never done it, had he? A. Yes. Yeah. It sure seems that -- whether he did it or not I'm not sure, but it was not effective. And it also points to the fact that we were not trying to eliminate a special pricing, we were trying to minimize it, and apparently it has continued to be so, continued to be available to the salespeople.") (objections omitted), 2151 ("Q. All right. And when you said "pricing pressures," you're referring to that sharp erosion in prices in the second half of 2008 after DIFRA was operational? A. Yes.") & CX 1744); (Rybacki, Tr. 3660-3661 ("Q. Go ahead. Did prices -- did your average prices go down in the second half of '08, sir? A. Our volumes went down. I don't know -- I don't think our average pricing -- you know, we tried to hold the line because volume was going down, but -- but our volume definitely took a hit from August through September of '08. Q. Yeah. And if we look at some of your regions -- first of all, your price in the second half of '08 is different in every region; right? A. Yes. Q. And if we look at -- let's pick Alex City, the eighth month, so that's August, and if we can highlight that line. So in August, the average price for group A -- and group A is just your top-selling fittings of all sizes? Is that what that is? A. Correct. Q. All right. Your average price was a .28, but then it declined down to a .24 by the end of the year; right, sir, Alex City? A. Yeah, that's correct. Q. And then if we look down at the Chicago area, it was .27, .28 in the middle of the year, declined down to .26 by the end of the year; right, sir? A. Correct.

Q. Mr. Rybacki, was there any time during 2008 when you discussed your job pricing with anyone at McWane and agreed upon let's reduce job pricing? A. Never.”), 3717-3719).).

This finding is misleading because Sigma’s financial condition in the second half of 2008 was very poor. (RPF 536; JX 687 (Pais, Dep. at 153-154 (“Q. How was the company's profitability at the time in 2008? A. Good question. 2008 was a tale of two halves, if you will. The first half was respectable. And the second half was very poor, because most of the problems we faced from the poor market and the increasing costs and the reduced lower prices, all coalesced into the second half, and especially the last quarter. So the year as a whole was off, compared to plan and compared to '07. Q. When you say the year as a whole was off, what do you mean by the year was off compared to plan and compared to '07? A. In terms of the profitability.”).)

This finding is misleading because Sigma had a loss of million in 2008. RPF 537; (Pais, Tr. 2193 in camera (“Q. You had a loss of million in 2008? A. Yes. After all the interest expenses.”).).

1372. Until mid-to-late August 2008, Sigma’s sales were tracking ahead of the same period for 2007. (CX 2531 (Rybacki, Dep. at 157-158)). Sigma had approximately \$8.8 million in Fittings sales in July 2007, and approximately \$9.2 million in Fittings sales in July 2008. (CX 0974 at 009; Pais, Tr. 2010).

Response To Finding No. 1372:

Complaint Counsel accurately quotes the referenced portion of CX 2531. However, the proposed Finding is incomplete. During the second half of the year, when DIFRA was operational, Sigma’s average price went down. Pais, Tr. 2125-2126. This finding is misleading because Sigma had a loss of million in 2008. RPF 537; (Pais, Tr. 2193 in camera (“Q. You had a loss of million in 2008? A. Yes. After all the interest expenses.”).).

1373.

(Rybacki, Tr. 3599-3601, *in camera*; CX 1002 at 004, *in camera*).

Response To Finding No. 1373:

CX 1002 reflects . Rybacki, Tr. 3656, *in camera*.

Rybacki, Tr. 3656, *in camera*.

Rybacki, Tr. 3657, *in*

camera.

Rybacki, Tr. 3658, *in camera*.

1374.

(Rybacki, Tr. 3652, 3737, *in camera*; CX 1002 at 004, *in camera*).

Response To Finding No. 1374:

Respondent has no specific response, other than to note that CX 1002 reflects [REDACTED]

[REDACTED]. Rybacki, Tr. 3656, *in camera*. [REDACTED]

[REDACTED]

[REDACTED] Rybacki, Tr.

3656, *in camera*. [REDACTED]

[REDACTED] Rybacki, Tr. 3657, *in camera*. [REDACTED]

[REDACTED]

Rybacki, Tr. 3658, *in camera*.

1375. [REDACTED]

[REDACTED] (CX 1002 at 004, *in camera*; Rybacki, Tr. 3601, *in camera*).

Response To Finding No. 1375:

Respondent has no specific response, other than to note that CX 1002 reflects

. Rybacki, Tr. 3656, *in camera*.

Rybacki, Tr.

3656, *in camera*.

Rybacki, Tr. 3657, *in camera*.

Rybacki, Tr. 3658, *in camera*.

1376.

(CX 1002 at 004, *in camera*; Rybacki, Tr. 3737, *in camera*).

Response To Finding No. 1376:

Respondent has no specific response, other than to note that CX 1002 reflects [REDACTED]

[REDACTED]. Rybacki, Tr. 3656, *in camera*. [REDACTED]

[REDACTED]

[REDACTED] Rybacki, Tr.

3656, *in camera*. [REDACTED]

[REDACTED] Rybacki, Tr. 3657, *in camera*. [REDACTED]

[REDACTED]

Rybacki, Tr. 3658, *in camera*.

1377.

[REDACTED] (CX 1002 at 004, *in camera*;
Rybacki, Tr. 3602, *in camera*).

Response To Finding No. 1377:

Respondent has no specific response, other than to note that CX 1002 reflects

. Rybacki, Tr. 3656, *in camera*.

Rybacki, Tr.

3656, *in camera*.

Rybacki, Tr. 3657, *in camera*.

Rybacki, Tr. 3658, *in camera*.

1378.

(CX 1002 at 004, *in camera*; Rybacki, Tr. 3738, *in camera*).

Response To Finding No. 1378:

Respondent has no specific response, other than to note that CX 1002 reflects [REDACTED]

[REDACTED]. Rybacki, Tr. 3656, *in camera*. [REDACTED]

[REDACTED]

[REDACTED] Rybacki, Tr.

3656, *in camera*. [REDACTED]

[REDACTED] Rybacki, Tr. 3657, *in camera*. [REDACTED]

[REDACTED]

Rybacki, Tr. 3658, *in camera*.

1379. [REDACTED]

[REDACTED] (CX 1002 at 004, *in camera*; Rybacki, Tr. 3602-3603, *in camera*).

Response To Finding No. 1379:

Respondent has no specific response, other than to note that CX 1002 reflects

. Rybacki, Tr. 3656, *in camera*.

Rybacki, Tr.

3656, *in camera*.

Rybacki, Tr. 3657, *in camera*.

Rybacki, Tr. 3658, *in camera*.

1380.

(CX 1002 at

004, *in camera*; Rybacki, Tr. 3739, *in camera*).

Response To Finding No. 1380:

Respondent has no specific response, other than to note that CX 1002 reflects [REDACTED]

[REDACTED]. Rybacki, Tr. 3656, *in camera*. [REDACTED]

[REDACTED]

[REDACTED] Rybacki, Tr.

3656, *in camera*. [REDACTED]

[REDACTED] Rybacki, Tr. 3657, *in camera*. [REDACTED]

[REDACTED]

Rybacki, Tr. 3658, *in camera*.

1381. [REDACTED] (Rybacki, Tr. 3734, *in camera*).

Response To Finding No. 1381:

This finding is incorrect because Mr. Rybacki was uncertain

Rybacki, Tr. 3734, in camera).

1382.

(Rybacki, Tr. 3735-3737, in camera).

Response To Finding No. 1382:

Mr. Rybacki testified that

is Complaint Counsel's characterization. See

Response 1373.

1383.

(Rybacki, Tr. 3739-3741, in camera).

Response To Finding No. 1383:

Respondent has no specific response.

7.7.5 Star's "Special Project Pricing Reports" and Star's "RX-557.xls Pinks-final" Are Not Probative of a Failure on Star's Part to Curtail Project Pricing in 2008

1384. Star's Special Project Pricing Reports and its Project Pricing spreadsheet entitled "RX-557.xls Pinks-final" are not probative of a failure on Star's part to curtail Project Pricing during the conspiracy in 2008. (*Infra* ¶¶ 1385-1393).

Response To Finding No. 1384:

This is an unsupported assertion, for which no response is required.

1385. Star's approval process for Project Pricing (which it often refers to as "special pricing") has varied over the years. (McCutcheon, Tr. 2272).

Response To Finding No. 1385:

This finding is misleading because Star's documentation procedures for special pricing requests had been in existence long before January 2008 and have not changed. (RPPF ¶ 169;

McCutcheon, Tr. 2519 (“Q: And if I understood you yesterday, you said this process of requiring documentation before Star gives a job price was in place actually a year before. A: Yes, sir. Q: And was that a process that was essentially something Star people were always supposed to follow? A: Yes, sir. It was our procedure for at least ten years prior. Q: All right. So this was not a change in your procedure at all, was it? A: The change--it was not a change in the procedure. It was a change in monitoring it and managing it.”).).

1386. In 2007 and 2008, Star had an internal process in place for approving Project Pricing charged for Fittings or other products. Generally, Star sales staff and the Distributor tentatively negotiated a multiplier different than the Star’s published multiplier, (CX 2535 (Bhutada, Dep. at 103-106)), and submitted the proposed multiplier to Star’s management for approval. (McCutcheon, Tr. 2272; Minamyer, Tr. 3144-3145).

Response To Finding No. 1386:

This finding is misleading because Star’s documentation procedures for special pricing requests had been in existence long before January 2008 and have not changed. (RPPF ¶ 169; McCutcheon, Tr. 2519 (“Q: And if I understood you yesterday, you said this process of requiring documentation before Star gives a job price was in place actually a year before. A: Yes, sir. Q: And was that a process that was essentially something Star people were always supposed to follow? A: Yes, sir. It was our procedure for at least ten years prior. Q: All right. So this was not a change in your procedure at all, was it? A: The change--it was not a change in the procedure. It was a change in monitoring it and managing it.”).).

1387. While Mr. Minamyer was the national sales manager, Mr. Minamyer or Mr. McCutcheon approved Project Pricing, except to the extent that they delegated that authority to their division managers. (Minamyer, Tr. 3147).

Response To Finding No. 1387:

Respondent has no specific response.

1388. If approved, Star and the Distributor calculated the price Star charged for the product by multiplying the catalog price times the negotiated (Project Price) multiplier rather than Star’s published multiplier. (Minamyer, Tr. 3143 (“Q. And when you negotiated that

project with them, what were the terms that you were negotiating?” A. “Multiplier -- usually it was multiplier, was the big one, because a lot of the other terms of our deals were already set up, things like payment terms and rebates and that kind of stuff.”); Minamyer, Tr. 3144 (“Q. Now, the multiplier that you would negotiate for a particular job, would that be different than the published multiplier? A. Yes. Q. And did you refer to that as a project price or a special price? A. Yes, sir.”)).

Response To Finding No. 1388:

Respondent has no specific response.

1389. To obtain approval of a proposed Project Pricing multiplier, the Star sales person had to submit a form requesting approval to a supervisor. If the supervisor approved the form, Mr. Minamyer would then receive the request for approval. (McCutcheon, Tr. 2273; Minamyer, Tr. 3145).

Response To Finding No. 1389:

No time frame is specified in this proposed Finding. This finding is misleading, assuming it refers to 2008, because most of the several hundred requests per month were without documentation, but Mr. Minamyer approved them anyway. (RPPF ¶ 175; Minamyer, Tr. 3255).).

1390. Generally, Star’s employees referred to this form as a “Special Pricing Request” (“SPR”), or a “Pink,” reflecting the color of the paper on which an SPR was submitted. (McCutcheon, Tr. 2273; CX 2539 (McCutcheon, Dep. 23); Minamyer, Tr. 3191 (A “pink” is a document that Star used to set up and track Project Pricing for its customers)). Star’s term “special pricing request,” or “pink,” refers to all special pricing requests regardless of whether Star ultimately approves those requests. (McCutcheon, Tr. 2690-2691).

Response To Finding No. 1390:

Respondent has no specific response.

1391. Star periodically issued a “Special Project Pricing Report” (“SPPR”) that listed all pending bids for which a special price for its products had been approved. CX 2532 (Berry, Dep. at 37-39) (Special Project Pricing Reports were issued by Star periodically, and included those open projects for which Star had submitted bids at prices that differed from the published multiplier)).

Response To Finding No. 1391:

This finding misconstrues the testimony of Mr. Berry. Mr. Berry testified that he did not know if the particular Special Project Pricing Report shown him during his deposition was a list of project pricing for his “projects” or for all of Star and he also testified that it was prepared by Mr. Minamyer and forwarded to him. (Berry, Dep. at 37-40) In addition, Mr. Berry did not say that the particular Special Project Pricing Report shown him during his deposition included those open projects for which bids had been submitted at prices that differed from the published multiplier.

1392. The SPPRs included a cover memo and an attached Excel spreadsheet. (*E.g.*, RX-444, RX-444.xls (utility spreadsheet, December 2008); RX-548, RX-548.xls (utility spreadsheet, November 2008); RX-446, RX-446.xls (utility spreadsheet, September 2008); RX-448, RX-448.xls (utility spreadsheet, August 2008); RX-449, RX-449.xls (utility spreadsheet, May 2008); RX-558, RX-558.xls (utility spreadsheet, March 2008); *see* RX-695 (Leider, Dep. at 36)).

Response To Finding No. 1392:

Respondent has no specific response.

1393. In the course of the FTC’s investigation, and at Mr. McCutcheon’s request, Star produced a spreadsheet dated July 23, 2011. Star produced the spreadsheet with a cover memo, (RX-557), and an attached Excel spreadsheet that was denominated “2008_Pinks-final.xls” (“RX-557.xls Pinks-final”). This spreadsheet purportedly identifies instances in which Star engaged in Project Pricing in 2008. (McCutcheon, Tr. 2550-2551). Star’s RX-557.xls Pinks-final was based on the same data Star used to generate the Special Project Pricing Reports. (McCutcheon, Tr. 2673).

Response To Finding No. 1393:

RX 557 is a record of Star’s 2008 job prices. McCutcheon, Tr. 2552. McWane objects to the characterization of what the spreadsheet “purportedly” is. Moreover, Complaint Counsel’s expert, Dr. Schumann, testified that he did not consider RX-557 in forming his opinions on this case. (Schumann, Tr. 2673).

7.7.5.1 The SPPRs and RX-557.xls Pinks-final Are Internally Inconsistent, Contradictory, or Otherwise Unreliable Evidence of Whether Star Engaged in Project Pricing to Meet Competition in the Sale of Fittings During the Conspiracy

1394. The SPPRs and RX-557.xls Pinks-final are unreliable as evidence of Star's continued Project Pricing in the sale of Fittings during the conspiracy. (*Infra* ¶¶ 1395-1401).

Response To Finding No. 1394:

This is an unsupported assertion, for which no response is required. See Response To Findings 1395-140)

1395. Star's SPPRs and Star's RX-557.xls Pinks-final did not set forth the amount of the discount Star extended to a particular Distributor for a particular purchase or purchases. (*E.g.*, RX-557.xls; RX-558.xls).

Response To Finding No. 1395:

This proposed Finding is argumentative. Whether it sets forth an amount is also irrelevant to whether Project Pricing was offered. This finding is irrelevant because Complaint Counsel's expert, Dr. Schumann, concedes that McWane, Sigma, and Star all continued offering job pricing and other forms of customer discounts throughout all of 2008. (RPPF ¶ 141; Schumann, Tr. 4290-4291 ("So if we look at this waterfall of discounts, job pricing in the third line there, all three companies were offering job pricing throughout 2008; right? A: There was some job pricing offered throughout 2008. Q: All three companies were offering freight concessions, and that's another form of a discount; right, sir? A: I don't recall if all of them were or not. I know McWane was offering freight concessions to certain customers, not to others. Q: And that's a form of a discount; right? A: It can be. Yes. Q: And all three companies were offering rebates to purchasers of imported fittings; right? A: That's the standard. Yes. Q: That's another form of discount; right? A: Pardon me? Yes. Q: Another form of discount? A: Another form of discount. Q: And all three were offering other concessions, extension of credit terms,

cash discounts, credit backs, and so forth; right? A: It is correct that there were other terms that were offered.”.)

This finding is irrelevant because Dr. Schumann admitted that McWane, Sigma and Star all offered job price discounts and other price concessions, including rebates, freight absorption, and credit extension, throughout 2008. (RPPF ¶ 182; Schumann, Tr. 4287:21-4288:1 (“yes, there was job pricing during 2008”), 4288:23-4289:1 (“I believe they did offer job pricing throughout 2008”), 4290:3-13.) He also admitted that he ignored McWane and Star spreadsheets and other documents recording each company’s job discounts. (Schumann, Tr. 4082:3-11, 4084:16-4086:6 (“Well, I meant I didn’t consider it”), 4086:21-4087:3 (“No, I did not”), 4090:3-9, 4091:9-23 (“No, I did not discuss this”).).

This finding is irrelevant because Star’s independent attempt to reduce its job pricing was not successful, as reflected in the job prices it offered throughout 2008. (RPPF ¶ 166; McCutcheon, Tr. 2689-2690, 2540-2541 (Q: “And it sounded like from your testimony yesterday that the company continued to offer a lot of job price discounts in 2008.” A: “Yes, sir.”); 2547-2548 (Q: “All right. Now, you had said yesterday that the company provided lots and lots of job prices during 2008; is that right?” A: “Yes, sir.”) & RX 557, 2550-2551 (Q: “All right. So the report you requested in July of 2011, and it contains a report of the pinks from 2008 final; right, sir?” A: “Yes, sir.”), 2553-2554 (Q: “All right. So am I right, Mr. McCutcheon, did I understand your testimony correctly yesterday that the company had job pricing and special prices throughout 2008; right?” A: “Yes, sir.”); Minamyler, Tr. 3174-3175 (Q: “Was Star successful at reducing project pricing for a period in time?” A: “To my recollection, no.”), 3274-3275 (Q: “And you were matching lowering prices below the published multiplier frequently; correct?” A: “I believe so.”), 3277-3278 (Q: “Okay. And I know you don’t -- this has been some years ago

and you don't have specific recollection, but what were the competitive conditions in 2008? What do you remember about that time frame?" A: "I remember that everything -- the market was always very competitive. We -- we had to fight pretty hard for every order.")).

This finding is irrelevant because Star did not cease or curtail job pricing in 2008. (RPPF ¶ 167; McCutcheon, Tr. 2512). In fact, Star's special pricing requests, or SPRs, actually increased in 2008. (RPPF ¶ 167; McCutcheon, Tr. 2402-2403) ("And we've been looking at SPRs [special pricing requests] ever since this thing happened. Since we were accused of price fixing, we've gone back and looked at our SPRs, and we figured out that during this whole process that we were accused of price-fixing, our SPRs went up, 20 percent. And that's bizarre to us, that we could be accused of price fixing in a period that SPRs go up 20%.")).

This finding is irrelevant because Star continued offering job pricing and other price concessions to its customers throughout 2008, 2009, 2010 and up through the present. (RPPF ¶ 170; McCutcheon, Tr. 2553-54 ("Q: "Do you see where I am, sir? January '08 267, February of '08 300, and so forth, down to the year end 2,669?" A: "Yes, sir." Q: "Is that data that you saw in summary form?" A: "Yes, sir. I believe I got four years running with that information that's in the far right-hand column, that exact information in totals." Q: "All right. So am I right, Mr. McCutcheon, did I understand your testimony correctly yesterday that the company had job pricing and special prices throughout 2008; right?" A: "Yes, sir." Q: "And throughout 2009; right?" A: "Yes, sir." Q: "And continuing to 2010?" A: "Yes, sir." Q: "And continuing to today?" A: "Yes, sir."); Minamy, Tr. 3265 (Q: "So again, in May of 2008, Star would continue to project-price under the right circumstances, and that would be to meet competition; correct?" A: "That's correct."), 3275 (Q: "And you were matching lowering prices below the published multiplier frequently; correct?" A: "I believe so.)).

This finding is irrelevant because Star continued to offer job pricing at a rate of a couple hundred per month in 2008. (RPPF ¶ 172; Minamyer, Tr. 3251-3252 (Q: “Do you recall getting 10 to 15 pinks a day?” A: “I recall getting a lot of pinks routinely.” Q: “Okay. And that works out on business days to a couple hundred a month. Is that consistent with your recollection?” A: “Yes.”) & CX 815; McCutcheon, Tr. 2512 (Q: “That was not a fact. You did not stop pricing in - job pricing in 2008, did you, sir?” A: “No, sir.”)).

This finding is irrelevant because Star priced job-priced whenever it needed to get business in 2008. (RPPF ¶ 173; Minamyer, Tr. 3277-3278) (“Q. And you had a plan that you would try and limit job pricing, but we’ve seen that really didn’t play out either, did it? A. Right . . . Q. Okay. And Star job-priced whenever it needed to job price in 2008 to get business, didn’t it? A. Yes.”).

1396. Star’s SPPRs are facially unreliable in estimating Star’s actual use of Project Pricing in the sale of Fittings in the United States during the conspiracy because they provide inconsistent information regarding the product, location, Distributor, and the date of a transaction. For example,

Response To Finding No. 1396:

See General Response 1. This proposed Finding is argumentative. The occurrence of inconsistencies does not render the document wholly unreliable. The proposed finding, including all subparts, is not supported by a single evidentiary citation and is, therefore, the naked assertions and argument of Complaint Counsel. This finding is irrelevant because Complaint Counsel’s expert, Dr. Schumann, concedes that McWane, Sigma, and Star all continued offering job pricing and other forms of customer discounts throughout all of 2008. (RPPF ¶ 141; Schumann, Tr. 4290-4291 (“So if we look at this waterfall of discounts, job pricing in the third line there, all three companies were offering job pricing throughout 2008; right? A: There was some job pricing offered throughout 2008. Q: All three companies were offering

freight concessions, and that's another form of a discount; right, sir? A: I don't recall if all of them were or not. I know McWane was offering freight concessions to certain customers, not to others. Q: And that's a form of a discount; right? A: It can be. Yes. Q: And all three companies were offering rebates to purchasers of imported fittings; right? A: That's the standard. Yes. Q: That's another form of discount; right? A: Pardon me? Yes. Q: Another form of discount? A: Another form of discount. Q: And all three were offering other concessions, extension of credit terms, cash discounts, credit backs, and so forth; right? A: It is correct that there were other terms that were offered.”.)

This finding is irrelevant because Dr. Schumann admitted that McWane, Sigma and Star all offered job price discounts and other price concessions, including rebates, freight absorption, and credit extension, throughout 2008. (RPPF ¶ 182; Schumann, Tr. 4287:21-4288:1 (“yes, there was job pricing during 2008”), 4288:23-4289:1 (“I believe they did offer job pricing throughout 2008”), 4290:3-13.) He also admitted that he ignored McWane and Star spreadsheets and other documents recording each company’s job discounts. (Schumann, Tr. 4082:3-11, 4084:16-4086:6 (“Well, I meant I didn’t consider it”), 4086:21-4087:3 (“No, I did not”), 4090:3-9, 4091:9-23 (“No, I did not discuss this”).)).

This finding is irrelevant because Star’s independent attempt to reduce its job pricing was not successful, as reflected in the job prices it offered throughout 2008. (RPPF ¶ 166; McCutcheon, Tr. 2689-2690, 2540-2541 (Q: “And it sounded like from your testimony yesterday that the company continued to offer a lot of job price discounts in 2008.” A: “Yes, sir.”); 2547-2548 (Q: “All right. Now, you had said yesterday that the company provided lots and lots of job prices during 2008; is that right?” A: “Yes, sir.”) & RX 557, 2550-2551 (Q: “All right. So the report you requested in July of 2011, and it contains a report of the pinks from 2008 final; right,

sir?” A: “Yes, sir.”), 2553-2554 (Q: “All right. So am I right, Mr. McCutcheon, did I understand your testimony correctly yesterday that the company had job pricing and special prices throughout 2008; right?” A: “Yes, sir.”); Minamyer, Tr. 3174-3175 (Q: “Was Star successful at reducing project pricing for a period in time?” A: “To my recollection, no.”), 3274-3275 (Q: “And you were matching lowering prices below the published multiplier frequently; correct?” A: “I believe so.”), 3277-3278 (Q: “Okay. And I know you don't -- this has been some years ago and you don't have specific recollection, but what were the competitive conditions in 2008? What do you remember about that time frame?” A: “I remember that everything -- the market was always very competitive. We -- we had to fight pretty hard for every order.”)).

This finding is irrelevant because Star did not cease or curtail job pricing in 2008. (RPPF ¶ 167; McCutcheon, Tr. 2512). In fact, Star's special pricing requests, or SPRs, actually increased in 2008. (RPPF ¶ 167; McCutcheon, Tr. 2402-2403) (“And we've been looking at SPRs [special pricing requests] ever since this thing happened. Since we were accused of price fixing, we've gone back and looked at our SPRs, and we figured out that during this whole process that we were accused of price-fixing, our SPRs went up, 20 percent. And that's bizarre to us, that we could be accused of price fixing in a period that SPRs go up 20%.”)).

This finding is irrelevant because Star continued offering job pricing and other price concessions to its customers throughout 2008, 2009, 2010 and up through the present. (RPPF ¶ 170; McCutcheon, Tr. 2553-54 (“Q: “Do you see where I am, sir? January '08 267, February of '08 300, and so forth, down to the year end 2,669?” A: “Yes, sir.” Q: “Is that data that you saw in summary form?” A: “Yes, sir. I believe I got four years running with that information that's in the far right-hand column, that exact information in totals.” Q: “All right. So am I right, Mr. McCutcheon, did I understand your testimony correctly yesterday that the company had job

pricing and special prices throughout 2008; right?" A: "Yes, sir." Q: "And throughout 2009; right?" A: "Yes, sir." Q: "And continuing to 2010?" A: "Yes, sir." Q: "And continuing to today?" A: "Yes, sir."); Minamy, Tr. 3265 (Q: "So again, in May of 2008, Star would continue to project-price under the right circumstances, and that would be to meet competition; correct?" A: "That's correct."), 3275 (Q: "And you were matching lowering prices below the published multiplier frequently; correct?" A: "I believe so.)).).

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- a. The Special Project Pricing Reports are unreliable because they contain contradictory information regarding Star's sales. For example, RX-548.xls and RX-445.xls both purport to provide information regarding projects outstanding in November 2008. Although both spreadsheets list the projects in the same order, they identify different Distributors and locations for each project. Thus, in RX-548 and RX-548.xls, which purports to be a SPPR for November 2008, the first entry identifies a bid for "St. Joe's Hospital," which is listed as Star's bid to HD Supply for a project in Alabama. In contrast, in RX-445.xls, which also purports to be the SPPR for November 2008, the first entry is for "St. Joe's Hospital" and is listed as Star's bid to Emco for a project in Ontario, Canada.

Response To Finding No. 1396a:

See General Response 1. Complaint Counsel was free to ask Star witnesses if it believed there were errors in the spreadsheet. To the extent they did not do so, they cannot argue now. This finding is irrelevant because Complaint Counsel's expert, Dr. Schumann, concedes that McWane, Sigma, and Star all continued offering job pricing and other forms of customer discounts throughout all of 2008. (RPPF ¶ 141; Schumann, Tr. 4290-4291 ("So if we look at this waterfall of discounts, job pricing in the third line there, all three companies were offering job pricing throughout 2008; right? A: There was some job pricing offered throughout 2008. Q: All three companies were offering freight concessions, and that's another form of a discount; right, sir? A: I don't recall if all of them were or not. I know McWane was offering freight concessions to certain customers, not to others. Q: And that's a form of a discount; right? A: It can be. Yes. Q: And all three companies were offering rebates to purchasers of imported fittings; right? A: That's the standard. Yes. Q: That's another form of discount; right? A: Pardon me? Yes. Q: Another form of discount? A: Another form of discount. Q: And all three were offering other concessions, extension of credit terms, cash discounts, credit backs, and so forth; right? A: It is correct that there were other terms that were offered.").)

This finding is irrelevant because Dr. Schumann admitted that McWane, Sigma and Star all offered job price discounts and other price concessions, including rebates, freight absorption, and credit extension, throughout 2008. (RPPF ¶ 182; Schumann, Tr. 4287:21-4288:1 ("yes, there was job pricing during 2008"), 4288:23-4289:1 ("I believe they did offer job pricing throughout 2008"), 4290:3-13.) He also admitted that he ignored McWane and Star spreadsheets and other documents recording each company's job discounts. (Schumann, Tr. 4082:3-11,

4084:16-4086:6 (“Well, I meant I didn’t consider it”), 4086:21-4087:3 (“No, I did not”), 4090:3-9, 4091:9-23 (“No, I did not discuss this”).).

This finding is irrelevant because Star’s independent attempt to reduce its job pricing was not successful, as reflected in the job prices it offered throughout 2008. (RPPF ¶ 166; McCutcheon, Tr. 2689-2690, 2540-2541 (Q: “And it sounded like from your testimony yesterday that the company continued to offer a lot of job price discounts in 2008.” A: “Yes, sir.”); 2547-2548 (Q: “All right. Now, you had said yesterday that the company provided lots and lots of job prices during 2008; is that right?” A: “Yes, sir.”) & RX 557, 2550-2551 (Q: “All right. So the report you requested in July of 2011, and it contains a report of the pinks from 2008 final; right, sir?” A: “Yes, sir.”), 2553-2554 (Q: “All right. So am I right, Mr. McCutcheon, did I understand your testimony correctly yesterday that the company had job pricing and special prices throughout 2008; right?” A: “Yes, sir.”); Minamyer, Tr. 3174-3175 (Q: “Was Star successful at reducing project pricing for a period in time?” A: “To my recollection, no.”), 3274-3275 (Q: “And you were matching lowering prices below the published multiplier frequently; correct?” A: “I believe so.”), 3277-3278 (Q: “Okay. And I know you don’t -- this has been some years ago and you don’t have specific recollection, but what were the competitive conditions in 2008? What do you remember about that time frame?” A: “I remember that everything -- the market was always very competitive. We -- we had to fight pretty hard for every order.”)).).

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process that we were accused of price-fixing, our SPRs went up, 20 percent. And that's bizarre to us, that we could be accused of price fixing in a period that SPRs go up 20%.').).

This finding is irrelevant because Star continued offering job pricing and other price concessions to its customers throughout 2008, 2009, 2010 and up through the present. (RPPF ¶ 170; McCutcheon, Tr. 2553-54 ("Q: "Do you see where I am, sir? January '08 267, February of '08 300, and so forth, down to the year end 2,669?" A: "Yes, sir." Q: "Is that data that you saw in summary form?" A: "Yes, sir. I believe I got four years running with that information that's in the far right-hand column, that exact information in totals." Q: "All right. So am I right, Mr. McCutcheon, did I understand your testimony correctly yesterday that the company had job pricing and special prices throughout 2008; right?" A: "Yes, sir." Q: "And throughout 2009; right?" A: "Yes, sir." Q: "And continuing to 2010?" A: "Yes, sir." Q: "And continuing to today?" A: "Yes, sir."); Minamyler, Tr. 3265 (Q: "So again, in May of 2008, Star would continue to project-price under the right circumstances, and that would be to meet competition; correct?" A: "That's correct."), 3275 (Q: "And you were matching lowering prices below the published multiplier frequently; correct?" A: "I believe so.)).).

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This finding is irrelevant because Star priced job-priced whenever it needed to get business in 2008. (RPPF ¶ 173; Minamyler, Tr. 3277-3278) ("Q. And you had a plan that you

would try and limit job pricing, but we've seen that really didn't play out either, did it? A. Right . . . Q. Okay. And Star job-priced whenever it needed to job price in 2008 to get business, didn't it? A. Yes.”).

- b. The Special Project Pricing Reports are unreliable because they contain inconsistent information regarding the location of the Distributor in the United States, which is the geographic market in which the conspiracy took place. For example, Entries 15 and 16 of RX-548.xls have two bids for the “Farmington Station” project. Entry 15 identifies the Distributor as Wolseley in British Columbia, but Entry 16 identifies the Distributor as Ferguson in California. In RX-445.xls, these same projects are attributed to a branch of HD Supply in Utah

Response To Finding No. 1396b:

The proposed finding, including all subparts, is not supported by a single evidentiary citation and is, therefore, the naked assertions and argument of Complaint Counsel. Complaint Counsel was free to ask Star witnesses if it believed there were errors in the spreadsheet. To the extent they did not do so, they cannot argue now. This finding is irrelevant because Complaint Counsel's expert, Dr. Schumann, concedes that McWane, Sigma, and Star all continued offering job pricing and other forms of customer discounts throughout all of 2008. (RPPF ¶ 141; Schumann, Tr. 4290-4291 (“So if we look at this waterfall of discounts, job pricing in the third line there, all three companies were offering job pricing throughout 2008; right? A: There was some job pricing offered throughout 2008. Q: All three companies were offering freight concessions, and that's another form of a discount; right, sir? A: I don't recall if all of them were or not. I know McWane was offering freight concessions to certain customers, not to others. Q: And that's a form of a discount; right? A: It can be. Yes. Q: And all three companies were offering rebates to purchasers of imported fittings; right? A: That's the standard. Yes. Q: That's another form of discount; right? A: Pardon me? Yes. Q: Another form of discount? A: Another form of discount. Q: And all three were offering other concessions, extension of credit terms,

cash discounts, credit backs, and so forth; right? A: It is correct that there were other terms that were offered.”.)

This finding is irrelevant because Dr. Schumann admitted that McWane, Sigma and Star all offered job price discounts and other price concessions, including rebates, freight absorption, and credit extension, throughout 2008. (RPPF ¶ 182; Schumann, Tr. 4287:21-4288:1 (“yes, there was job pricing during 2008”), 4288:23-4289:1 (“I believe they did offer job pricing throughout 2008”), 4290:3-13.) He also admitted that he ignored McWane and Star spreadsheets and other documents recording each company’s job discounts. (Schumann, Tr. 4082:3-11, 4084:16-4086:6 (“Well, I meant I didn’t consider it”), 4086:21-4087:3 (“No, I did not”), 4090:3-9, 4091:9-23 (“No, I did not discuss this”).).

This finding is irrelevant because Star’s independent attempt to reduce its job pricing was not successful, as reflected in the job prices it offered throughout 2008. (RPPF ¶ 166; McCutcheon, Tr. 2689-2690, 2540-2541 (Q: “And it sounded like from your testimony yesterday that the company continued to offer a lot of job price discounts in 2008.” A: “Yes, sir.”); 2547-2548 (Q: “All right. Now, you had said yesterday that the company provided lots and lots of job prices during 2008; is that right?” A: “Yes, sir.”) & RX 557, 2550-2551 (Q: “All right. So the report you requested in July of 2011, and it contains a report of the pinks from 2008 final; right, sir?” A: “Yes, sir.”), 2553-2554 (Q: “All right. So am I right, Mr. McCutcheon, did I understand your testimony correctly yesterday that the company had job pricing and special prices throughout 2008; right?” A: “Yes, sir.”); Minamyler, Tr. 3174-3175 (Q: “Was Star successful at reducing project pricing for a period in time?” A: “To my recollection, no.”), 3274-3275 (Q: “And you were matching lowering prices below the published multiplier frequently; correct?” A: “I believe so.”), 3277-3278 (Q: “Okay. And I know you don’t -- this has been some years ago

and you don't have specific recollection, but what were the competitive conditions in 2008? What do you remember about that time frame?" A: "I remember that everything -- the market was always very competitive. We -- we had to fight pretty hard for every order.")).

This finding is irrelevant because Star did not cease or curtail job pricing in 2008. (RPPF ¶ 167; McCutcheon, Tr. 2512). In fact, Star's special pricing requests, or SPRs, actually increased in 2008. (RPPF ¶ 167; McCutcheon, Tr. 2402-2403) ("And we've been looking at SPRs [special pricing requests] ever since this thing happened. Since we were accused of price fixing, we've gone back and looked at our SPRs, and we figured out that during this whole process that we were accused of price-fixing, our SPRs went up, 20 percent. And that's bizarre to us, that we could be accused of price fixing in a period that SPRs go up 20%.")).

This finding is irrelevant because Star continued offering job pricing and other price concessions to its customers throughout 2008, 2009, 2010 and up through the present. (RPPF ¶ 170; McCutcheon, Tr. 2553-54 ("Q: "Do you see where I am, sir? January '08 267, February of '08 300, and so forth, down to the year end 2,669?" A: "Yes, sir." Q: "Is that data that you saw in summary form?" A: "Yes, sir. I believe I got four years running with that information that's in the far right-hand column, that exact information in totals." Q: "All right. So am I right, Mr. McCutcheon, did I understand your testimony correctly yesterday that the company had job pricing and special prices throughout 2008; right?" A: "Yes, sir." Q: "And throughout 2009; right?" A: "Yes, sir." Q: "And continuing to 2010?" A: "Yes, sir." Q: "And continuing to today?" A: "Yes, sir."); Minamy, Tr. 3265 (Q: "So again, in May of 2008, Star would continue to project-price under the right circumstances, and that would be to meet competition; correct?" A: "That's correct."), 3275 (Q: "And you were matching lowering prices below the published multiplier frequently; correct?" A: "I believe so.)).

This finding is irrelevant because Star continued to offer job pricing at a rate of a couple hundred per month in 2008. (RPPF ¶ 172; Minamyer, Tr. 3251-3252 (Q: “Do you recall getting 10 to 15 pinks a day?” A: “I recall getting a lot of pinks routinely.” Q: “Okay. And that works out on business days to a couple hundred a month. Is that consistent with your recollection?” A: “Yes.”) & CX 815; McCutcheon, Tr. 2512 (Q: “That was not a fact. You did not stop pricing in - - job pricing in 2008, did you, sir?” A: “No, sir.”)).

This finding is irrelevant because Star priced job-priced whenever it needed to get business in 2008. (RPPF ¶ 173; Minamyer, Tr. 3277-3278) (“Q. And you had a plan that you would try and limit job pricing, but we’ve seen that really didn’t play out either, did it? A. Right . . . Q. Okay. And Star job-priced whenever it needed to job price in 2008 to get business, didn’t it? A. Yes.”).

- c. The Special Project Pricing Reports are unreliable because they contain contradictory information regarding the date of the sale in the recorded transaction, and it is not possible to determine whether the sale occurred during the conspiracy. In Entry 15 of RX-548.xls for the Farmington Station project, the expiration date is listed as 12/31/07 in Column B, but the expiration date is listed as 12/31/08 in Column H.

Response To Finding No. 1396c:

The proposed finding, including all subparts, is not supported by a single evidentiary citation and is, therefore, the naked assertions and argument of Complaint Counsel. Complaint Counsel was free to ask Star witnesses if it believed there were errors in the spreadsheet. To the extent they did not do so, they cannot argue now. This finding is irrelevant because Complaint Counsel’s expert, Dr. Schumann, concedes that McWane, Sigma, and Star all continued offering job pricing and other forms of customer discounts throughout all of 2008. (RPPF ¶ 141; Schumann, Tr. 4290-4291 (“So if we look at this waterfall of discounts, job pricing in the third line there, all three companies were offering job pricing throughout 2008; right? A: There was

some job pricing offered throughout 2008. Q: All three companies were offering freight concessions, and that's another form of a discount; right, sir? A: I don't recall if all of them were or not. I know McWane was offering freight concessions to certain customers, not to others. Q: And that's a form of a discount; right? A: It can be. Yes. Q: And all three companies were offering rebates to purchasers of imported fittings; right? A: That's the standard. Yes. Q: That's another form of discount; right? A: Pardon me? Yes. Q: Another form of discount? A: Another form of discount. Q: And all three were offering other concessions, extension of credit terms, cash discounts, credit backs, and so forth; right? A: It is correct that there were other terms that were offered.”.)

This finding is irrelevant because Dr. Schumann admitted that McWane, Sigma and Star all offered job price discounts and other price concessions, including rebates, freight absorption, and credit extension, throughout 2008. (RPPF ¶ 182; Schumann, Tr. 4287:21-4288:1 (“yes, there was job pricing during 2008”), 4288:23-4289:1 (“I believe they did offer job pricing throughout 2008”), 4290:3-13.) He also admitted that he ignored McWane and Star spreadsheets and other documents recording each company’s job discounts. (Schumann, Tr. 4082:3-11, 4084:16-4086:6 (“Well, I meant I didn’t consider it”), 4086:21-4087:3 (“No, I did not”), 4090:3-9, 4091:9-23 (“No, I did not discuss this”).)).

This finding is irrelevant because Star’s independent attempt to reduce its job pricing was not successful, as reflected in the job prices it offered throughout 2008. (RPPF ¶ 166; McCutcheon, Tr. 2689-2690, 2540-2541 (Q: “And it sounded like from your testimony yesterday that the company continued to offer a lot of job price discounts in 2008.” A: “Yes, sir.”); 2547-2548 (Q: “All right. Now, you had said yesterday that the company provided lots and lots of job prices during 2008; is that right?” A: “Yes, sir.”) & RX 557, 2550-2551 (Q: “All right. So the

report you requested in July of 2011, and it contains a report of the pinks from 2008 final; right, sir?" A: "Yes, sir."), 2553-2554 (Q: "All right. So am I right, Mr. McCutcheon, did I understand your testimony correctly yesterday that the company had job pricing and special prices throughout 2008; right?" A: "Yes, sir."); Minamyer, Tr. 3174-3175 (Q: "Was Star successful at reducing project pricing for a period in time?" A: "To my recollection, no."), 3274-3275 (Q: "And you were matching lowering prices below the published multiplier frequently; correct?" A: "I believe so."), 3277-3278 (Q: "Okay. And I know you don't -- this has been some years ago and you don't have specific recollection, but what were the competitive conditions in 2008? What do you remember about that time frame?" A: "I remember that everything -- the market was always very competitive. We -- we had to fight pretty hard for every order.")).

This finding is irrelevant because Star did not cease or curtail job pricing in 2008. (RPPF ¶ 167; McCutcheon, Tr. 2512). In fact, Star's special pricing requests, or SPRs, actually increased in 2008. (RPPF ¶ 167; McCutcheon, Tr. 2402-2403) ("And we've been looking at SPRs [special pricing requests] ever since this thing happened. Since we were accused of price fixing, we've gone back and looked at our SPRs, and we figured out that during this whole process that we were accused of price-fixing, our SPRs went up, 20 percent. And that's bizarre to us, that we could be accused of price fixing in a period that SPRs go up 20%.").

This finding is irrelevant because Star continued offering job pricing and other price concessions to its customers throughout 2008, 2009, 2010 and up through the present. (RPPF ¶ 170; McCutcheon, Tr. 2553-54 ("Q: "Do you see where I am, sir? January '08 267, February of '08 300, and so forth, down to the year end 2,669?" A: "Yes, sir." Q: "Is that data that you saw in summary form?" A: "Yes, sir. I believe I got four years running with that information that's in the far right-hand column, that exact information in totals." Q: "All right. So am I right,

Mr. McCutcheon, did I understand your testimony correctly yesterday that the company had job pricing and special prices throughout 2008; right?" A: "Yes, sir." Q: "And throughout 2009; right?" A: "Yes, sir." Q: "And continuing to 2010?" A: "Yes, sir." Q: "And continuing to today?" A: "Yes, sir."); Minamy, Tr. 3265 (Q: "So again, in May of 2008, Star would continue to project-price under the right circumstances, and that would be to meet competition; correct?" A: "That's correct."), 3275 (Q: "And you were matching lowering prices below the published multiplier frequently; correct?" A: "I believe so.)).).

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This finding is irrelevant because Star job-priced whenever it needed to get business in 2008. (RPPF ¶ 173; Minamy, Tr. 3277-3278) ("Q. And you had a plan that you would try and limit job pricing, but we've seen that really didn't play out either, did it? A. Right . . . Q. Okay. And Star job-priced whenever it needed to job price in 2008 to get business, didn't it? A. Yes.)).).

- d. The Special Project Pricing Reports are unreliable because they contain information regarding projects that is internally inconsistent. For example, Entry 290 in RX-548.xls is a project for the City of Quebec, but is listed as being in Oregon.

Response To Finding No. 1396d:

The proposed finding, including all subparts, is not supported by a single evidentiary citation and is, therefore, the naked assertions and argument of Complaint Counsel. Complaint

Counsel was free to ask Star witnesses if it believed there were errors in the spreadsheet. To the extent they did not do so, they cannot argue now. This finding is irrelevant because Complaint Counsel's expert, Dr. Schumann, concedes that McWane, Sigma, and Star all continued offering job pricing and other forms of customer discounts throughout all of 2008. (RPPF ¶ 141; Schumann, Tr. 4290-4291 ("So if we look at this waterfall of discounts, job pricing in the third line there, all three companies were offering job pricing throughout 2008; right? A: There was some job pricing offered throughout 2008. Q: All three companies were offering freight concessions, and that's another form of a discount; right, sir? A: I don't recall if all of them were or not. I know McWane was offering freight concessions to certain customers, not to others. Q: And that's a form of a discount; right? A: It can be. Yes. Q: And all three companies were offering rebates to purchasers of imported fittings; right? A: That's the standard. Yes. Q: That's another form of discount; right? A: Pardon me? Yes. Q: Another form of discount? A: Another form of discount. Q: And all three were offering other concessions, extension of credit terms, cash discounts, credit backs, and so forth; right? A: It is correct that there were other terms that were offered."))

This finding is irrelevant because Dr. Schumann admitted that McWane, Sigma and Star all offered job price discounts and other price concessions, including rebates, freight absorption, and credit extension, throughout 2008. (RPPF ¶ 182; Schumann, Tr. 4287:21-4288:1 ("yes, there was job pricing during 2008"), 4288:23-4289:1 ("I believe they did offer job pricing throughout 2008"), 4290:3-13.) He also admitted that he ignored McWane and Star spreadsheets and other documents recording each company's job discounts. (Schumann, Tr. 4082:3-11, 4084:16-4086:6 ("Well, I meant I didn't consider it"), 4086:21-4087:3 ("No, I did not"), 4090:3-9, 4091:9-23 ("No, I did not discuss this").)).

This finding is irrelevant because Star's independent attempt to reduce its job pricing was not successful, as reflected in the job prices it offered throughout 2008. (RPPF ¶ 166; McCutcheon, Tr. 2689-2690, 2540-2541 (Q: "And it sounded like from your testimony yesterday that the company continued to offer a lot of job price discounts in 2008." A: "Yes, sir."); 2547-2548 (Q: "All right. Now, you had said yesterday that the company provided lots and lots of job prices during 2008; is that right?" A: "Yes, sir.") & RX 557, 2550-2551 (Q: "All right. So the report you requested in July of 2011, and it contains a report of the pinks from 2008 final; right, sir?" A: "Yes, sir."), 2553-2554 (Q: "All right. So am I right, Mr. McCutcheon, did I understand your testimony correctly yesterday that the company had job pricing and special prices throughout 2008; right?" A: "Yes, sir."); Minamyler, Tr. 3174-3175 (Q: "Was Star successful at reducing project pricing for a period in time?" A: "To my recollection, no."), 3274-3275 (Q: "And you were matching lowering prices below the published multiplier frequently; correct?" A: "I believe so."), 3277-3278 (Q: "Okay. And I know you don't -- this has been some years ago and you don't have specific recollection, but what were the competitive conditions in 2008? What do you remember about that time frame?" A: "I remember that everything -- the market was always very competitive. We -- we had to fight pretty hard for every order.")).).

This finding is irrelevant because Star did not cease or curtail job pricing in 2008. (RPPF ¶ 167; McCutcheon, Tr. 2512). In fact, Star's special pricing requests, or SPRs, actually increased in 2008. (RPPF ¶ 167; McCutcheon, Tr. 2402-2403) ("And we've been looking at SPRs [special pricing requests] ever since this thing happened. Since we were accused of price fixing, we've gone back and looked at our SPRs, and we figured out that during this whole process that we were accused of price-fixing, our SPRs went up, 20 percent. And that's bizarre to us, that we could be accused of price fixing in a period that SPRs go up 20%.").).

This finding is irrelevant because Star continued offering job pricing and other price concessions to its customers throughout 2008, 2009, 2010 and up through the present. (RPPF ¶ 170; McCutcheon, Tr. 2553-54 (“Q: “Do you see where I am, sir? January '08 267, February of '08 300, and so forth, down to the year end 2,669?” A: “Yes, sir.” Q: “Is that data that you saw in summary form?” A: “Yes, sir. I believe I got four years running with that information that's in the far right-hand column, that exact information in totals.” Q: “All right. So am I right, Mr. McCutcheon, did I understand your testimony correctly yesterday that the company had job pricing and special prices throughout 2008; right?” A: “Yes, sir.” Q: “And throughout 2009; right?” A: “Yes, sir.” Q: “And continuing to 2010?” A: “Yes, sir.” Q: “And continuing to today?” A: “Yes, sir.”); Minamy, Tr. 3265 (Q: “So again, in May of 2008, Star would continue to project-price under the right circumstances, and that would be to meet competition; correct?” A: “That's correct.”), 3275 (Q: “And you were matching lowering prices below the published multiplier frequently; correct?” A: “I believe so.)).).

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This finding is irrelevant because Star priced job-priced whenever it needed to get business in 2008. (RPPF ¶ 173; Minamy, Tr. 3277-3278) (“Q. And you had a plan that you would try and limit job pricing, but we've seen that really didn't play out either, did it? A. Right

...Q. Okay. And Star job-priced whenever it needed to job price in 2008 to get business, didn't it? A. Yes.").

1397. Star's SPPRs are facially unreliable in estimating Star's actual use of Project Pricing in the sale of Fittings during the conspiracy because they list the same project multiple times. For example, Star's bid for a sale to HD Supply Waterworks for a project in Ohio is separately listed in at least six different SPPRs. (RX-558.xls, Row 28 (March 2008); RX-449.xls, Row 84 (May 2008); RX-448.xls, Row 153 (August 2008); RX-446.xls, Row 173 (September 2008); RX-445.xls, Row 222 (November 2008); RX-444.xls, Row 244 (December 2008)).

Response To Finding No. 1397:

See General Response 1. Complaint Counsel was free to ask Star witnesses if it believed there were errors in the spreadsheet. To the extent they did not do so, they cannot argue now. This finding is irrelevant because Complaint Counsel's expert, Dr. Schumann, concedes that McWane, Sigma, and Star all continued offering job pricing and other forms of customer discounts throughout all of 2008. (RPPF ¶ 141; Schumann, Tr. 4290-4291 ("So if we look at this waterfall of discounts, job pricing in the third line there, all three companies were offering job pricing throughout 2008; right? A: There was some job pricing offered throughout 2008. Q: All three companies were offering freight concessions, and that's another form of a discount; right, sir? A: I don't recall if all of them were or not. I know McWane was offering freight concessions to certain customers, not to others. Q: And that's a form of a discount; right? A: It can be. Yes. Q: And all three companies were offering rebates to purchasers of imported fittings; right? A: That's the standard. Yes. Q: That's another form of discount; right? A: Pardon me? Yes. Q: Another form of discount? A: Another form of discount. Q: And all three were offering other concessions, extension of credit terms, cash discounts, credit backs, and so forth; right? A: It is correct that there were other terms that were offered.").

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and credit extension, throughout 2008. (RPPF ¶ 182; Schumann, Tr. 4287:21-4288:1 (“yes, there was job pricing during 2008”), 4288:23-4289:1 (“I believe they did offer job pricing throughout 2008”), 4290:3-13.) He also admitted that he ignored McWane and Star spreadsheets and other documents recording each company’s job discounts. (Schumann, Tr. 4082:3-11, 4084:16-4086:6 (“Well, I meant I didn’t consider it”), 4086:21-4087:3 (“No, I did not”), 4090:3-9, 4091:9-23 (“No, I did not discuss this”).)).

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This finding is irrelevant because Star continued offering job pricing and other price concessions to its customers throughout 2008, 2009, 2010 and up through the present. (RPPF ¶ 170; McCutcheon, Tr. 2553-54 ("Q: "Do you see where I am, sir? January '08 267, February of '08 300, and so forth, down to the year end 2,669?" A: "Yes, sir." Q: "Is that data that you saw in summary form?" A: "Yes, sir. I believe I got four years running with that information that's in the far right-hand column, that exact information in totals." Q: "All right. So am I right, Mr. McCutcheon, did I understand your testimony correctly yesterday that the company had job pricing and special prices throughout 2008; right?" A: "Yes, sir." Q: "And throughout 2009; right?" A: "Yes, sir." Q: "And continuing to 2010?" A: "Yes, sir." Q: "And continuing to today?" A: "Yes, sir."); Minamy, Tr. 3265 (Q: "So again, in May of 2008, Star would continue to project-price under the right circumstances, and that would be to meet competition; correct?" A: "That's correct."), 3275 (Q: "And you were matching lowering prices below the published multiplier frequently; correct?" A: "I believe so.)).

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out on business days to a couple hundred a month. Is that consistent with your recollection?" A: "Yes.") & CX 815; McCutcheon, Tr. 2512 (Q: "That was not a fact. You did not stop pricing in - job pricing in 2008, did you, sir?" A: "No, sir.")).

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1398. Star's SPPRs are facially unreliable in estimating Star's actual use of Project Pricing in the sale of Fittings during the conspiracy because they list projects for which the bids had expired before the parties had implemented their conspiracy. For example, the SPPRs for March 2008 through December 2008 list a bid Star had submitted to Groeniger even though that bid had expired on February 19, 2008, before the parties had implemented their conspiracy. (*Compare* RX-558.xls, Row 72 (March report includes Groeniger bid that had expired in February), *with* RX-444.xls, Row 288 (December report includes Groeniger bid that had expired in February)).

Response To Finding No. 1398:

McWane disputes the existence of a conspiracy. *See* General Response 1. Complaint Counsel was free to ask Star witnesses if it believed there were errors in the spreadsheet. To the extent they did not do so, they cannot argue now. This finding is irrelevant because Complaint Counsel's expert, Dr. Schumann, concedes that McWane, Sigma, and Star all continued offering job pricing and other forms of customer discounts throughout all of 2008. (RPPF ¶ 141; Schumann, Tr. 4290-4291 ("So if we look at this waterfall of discounts, job pricing in the third line there, all three companies were offering job pricing throughout 2008; right? A: There was some job pricing offered throughout 2008. Q: All three companies were offering freight concessions, and that's another form of a discount; right, sir? A: I don't recall if all of them were or not. I know McWane was offering freight concessions to certain customers, not to others. Q:

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This finding is irrelevant because Star did not cease or curtail job pricing in 2008. (RPPF ¶ 167; McCutcheon, Tr. 2512). In fact, Star's special pricing requests, or SPRs, actually increased in 2008. (RPPF ¶ 167; McCutcheon, Tr. 2402-2403) ("And we've been looking at SPRs [special pricing requests] ever since this thing happened. Since we were accused of price fixing, we've gone back and looked at our SPRs, and we figured out that during this whole process that we were accused of price-fixing, our SPRs went up, 20 percent. And that's bizarre to us, that we could be accused of price fixing in a period that SPRs go up 20%.").

This finding is irrelevant because Star continued offering job pricing and other price concessions to its customers throughout 2008, 2009, 2010 and up through the present. (RPPF ¶ 170; McCutcheon, Tr. 2553-54 ("Q: "Do you see where I am, sir? January '08 267, February of '08 300, and so forth, down to the year end 2,669?" A: "Yes, sir." Q: "Is that data that you saw in summary form?" A: "Yes, sir. I believe I got four years running with that information that's in the far right-hand column, that exact information in totals." Q: "All right. So am I right, Mr. McCutcheon, did I understand your testimony correctly yesterday that the company had job pricing and special prices throughout 2008; right?" A: "Yes, sir." Q: "And throughout 2009; right?" A: "Yes, sir." Q: "And continuing to 2010?" A: "Yes, sir." Q: "And continuing to

today?” A: “Yes, sir.”); Minamy, Tr. 3265 (Q: “So again, in May of 2008, Star would continue to project-price under the right circumstances, and that would be to meet competition; correct?” A: “That’s correct.”), 3275 (Q: “And you were matching lowering prices below the published multiplier frequently; correct?” A: “I believe so.”)).

This finding is irrelevant because Star continued to offer job pricing at a rate of a couple hundred per month in 2008. (RPPF ¶ 172; Minamy, Tr. 3251-3252 (Q: “Do you recall getting 10 to 15 pinks a day?” A: “I recall getting a lot of pinks routinely.” Q: “Okay. And that works out on business days to a couple hundred a month. Is that consistent with your recollection?” A: “Yes.”) & CX 815; McCutcheon, Tr. 2512 (Q: “That was not a fact. You did not stop pricing in - - job pricing in 2008, did you, sir?” A: “No, sir.”)).

This finding is irrelevant because Star job-priced whenever it needed to get business in 2008. (RPPF ¶ 173; Minamy, Tr. 3277-3278) (“Q. And you had a plan that you would try and limit job pricing, but we’ve seen that really didn’t play out either, did it? A. Right . . . Q. Okay. And Star job-priced whenever it needed to job price in 2008 to get business, didn’t it? A. Yes.”)).

1399. Star’s SPPRs and Star’s RX-557.xls Pinks-final are facially unreliable in estimating Star’s actual use of Project Pricing in the sale of Fittings during the conspiracy because they include entries to extend the expiration date for an existing discount that had been previously approved, rather than a new bid in which Star sought to meet competition with either McWane or Sigma on a bid for a particular project. (McCutcheon, Tr. 2681 (“[I]f we knew there was going to be a price change in mid-July, this customer service person may have tied it to that even to resubmit an SPR. That’s very possible.”)).

Response To Finding No. 1399:

See General Response 1. Complaint Counsel was free to ask Star witnesses if it believed there were errors in the spreadsheet. To the extent they did not do so, they cannot argue now. This finding is irrelevant because Complaint Counsel’s expert, Dr. Schumann, concedes that McWane, Sigma, and Star all continued offering job pricing and other forms of customer

discounts throughout all of 2008. (RPPF ¶ 141; Schumann, Tr. 4290-4291 (“So if we look at this waterfall of discounts, job pricing in the third line there, all three companies were offering job pricing throughout 2008; right? A: There was some job pricing offered throughout 2008. Q: All three companies were offering freight concessions, and that's another form of a discount; right, sir? A: I don't recall if all of them were or not. I know McWane was offering freight concessions to certain customers, not to others. Q: And that's a form of a discount; right? A: It can be. Yes. Q: And all three companies were offering rebates to purchasers of imported fittings; right? A: That's the standard. Yes. Q: That's another form of discount; right? A: Pardon me? Yes. Q: Another form of discount? A: Another form of discount. Q: And all three were offering other concessions, extension of credit terms, cash discounts, credit backs, and so forth; right? A: It is correct that there were other terms that were offered.”).)

This finding is irrelevant because Dr. Schumann admitted that McWane, Sigma and Star all offered job price discounts and other price concessions, including rebates, freight absorption, and credit extension, throughout 2008. (RPPF ¶ 182; Schumann, Tr. 4287:21-4288:1 (“yes, there was job pricing during 2008”), 4288:23-4289:1 (“I believe they did offer job pricing throughout 2008”), 4290:3-13.) He also admitted that he ignored McWane and Star spreadsheets and other documents recording each company's job discounts. (Schumann, Tr. 4082:3-11, 4084:16-4086:6 (“Well, I meant I didn't consider it”), 4086:21-4087:3 (“No, I did not”), 4090:3-9, 4091:9-23 (“No, I did not discuss this”).)).

This finding is irrelevant because Star's independent attempt to reduce its job pricing was not successful, as reflected in the job prices it offered throughout 2008. (RPPF ¶ 166; McCutcheon, Tr. 2689-2690, 2540-2541 (Q: “And it sounded like from your testimony yesterday that the company continued to offer a lot of job price discounts in 2008.” A: “Yes, sir.”); 2547-

2548 (Q: “All right. Now, you had said yesterday that the company provided lots and lots of job prices during 2008; is that right?” A: “Yes, sir.”) & RX 557, 2550-2551 (Q: “All right. So the report you requested in July of 2011, and it contains a report of the pinks from 2008 final; right, sir?” A: “Yes, sir.”), 2553-2554 (Q: “All right. So am I right, Mr. McCutcheon, did I understand your testimony correctly yesterday that the company had job pricing and special prices throughout 2008; right?” A: “Yes, sir.”); Minamyer, Tr. 3174-3175 (Q: “Was Star successful at reducing project pricing for a period in time?” A: “To my recollection, no.”), 3274-3275 (Q: “And you were matching lowering prices below the published multiplier frequently; correct?” A: “I believe so.”), 3277-3278 (Q: “Okay. And I know you don't -- this has been some years ago and you don't have specific recollection, but what were the competitive conditions in 2008? What do you remember about that time frame?” A: “I remember that everything -- the market was always very competitive. We -- we had to fight pretty hard for every order.”)).

This finding is irrelevant because Star did not cease or curtail job pricing in 2008. (RPPF ¶ 167; McCutcheon, Tr. 2512). In fact, Star's special pricing requests, or SPRs, actually increased in 2008. (RPPF ¶ 167; McCutcheon, Tr. 2402-2403) (“And we've been looking at SPRs [special pricing requests] ever since this thing happened. Since we were accused of price fixing, we've gone back and looked at our SPRs, and we figured out that during this whole process that we were accused of price-fixing, our SPRs went up, 20 percent. And that's bizarre to us, that we could be accused of price fixing in a period that SPRs go up 20%.”)).

This finding is irrelevant because Star continued offering job pricing and other price concessions to its customers throughout 2008, 2009, 2010 and up through the present. (RPPF ¶ 170; McCutcheon, Tr. 2553-54 (“Q: “Do you see where I am, sir? January '08 267, February of '08 300, and so forth, down to the year end 2,669?” A: “Yes, sir.” Q: “Is that data that you saw in

summary form?” A: “Yes, sir. I believe I got four years running with that information that's in the far right-hand column, that exact information in totals.” Q: “All right. So am I right, Mr. McCutcheon, did I understand your testimony correctly yesterday that the company had job pricing and special prices throughout 2008; right?” A: “Yes, sir.” Q: “And throughout 2009; right?” A: “Yes, sir.” Q: “And continuing to 2010?” A: “Yes, sir.” Q: “And continuing to today?” A: “Yes, sir.”); Minamyers, Tr. 3265 (Q: “So again, in May of 2008, Star would continue to project-price under the right circumstances, and that would be to meet competition; correct?” A: “That's correct.”), 3275 (Q: “And you were matching lowering prices below the published multiplier frequently; correct?” A: “I believe so.”)).

This finding is irrelevant because Star continued to offer job pricing at a rate of a couple hundred per month in 2008. (RPPF ¶ 172; Minamyers, Tr. 3251-3252 (Q: “Do you recall getting 10 to 15 pinks a day?” A: “I recall getting a lot of pinks routinely.” Q: “Okay. And that works out on business days to a couple hundred a month. Is that consistent with your recollection?” A: “Yes.”) & CX 815; McCutcheon, Tr. 2512 (Q: “That was not a fact. You did not stop pricing in - - job pricing in 2008, did you, sir?” A: “No, sir.”)).

This finding is irrelevant because Star priced job-priced whenever it needed to get business in 2008. (RPPF ¶ 173; Minamyers, Tr. 3277-3278) (“Q. And you had a plan that you would try and limit job pricing, but we’ve seen that really didn’t play out either, did it? A. Right . . . Q. Okay. And Star job-priced whenever it needed to job price in 2008 to get business, didn’t it? A. Yes.”)).

1400. Star’s SPPRs and Star’s RX-557.xls Pinks-final are facially unreliable in estimating Star’s actual use of Project Pricing in the sale of Fittings during the conspiracy because they include entries to extend a discount to a new branch of a Distributor with which Star had previously negotiated a discount, rather than meeting competition with either McWane or Sigma on a bid for a particular project. (McCutcheon, Tr. 2682).

Response To Finding No. 1400:

See General Response 1. Complaint Counsel was free to ask Star witnesses if it believed there were errors in the spreadsheet. To the extent they did not do so, they cannot argue now. This finding is irrelevant because Complaint Counsel's expert, Dr. Schumann, concedes that McWane, Sigma, and Star all continued offering job pricing and other forms of customer discounts throughout all of 2008. (RPPF ¶ 141; Schumann, Tr. 4290-4291 ("So if we look at this waterfall of discounts, job pricing in the third line there, all three companies were offering job pricing throughout 2008; right? A: There was some job pricing offered throughout 2008. Q: All three companies were offering freight concessions, and that's another form of a discount; right, sir? A: I don't recall if all of them were or not. I know McWane was offering freight concessions to certain customers, not to others. Q: And that's a form of a discount; right? A: It can be. Yes. Q: And all three companies were offering rebates to purchasers of imported fittings; right? A: That's the standard. Yes. Q: That's another form of discount; right? A: Pardon me? Yes. Q: Another form of discount? A: Another form of discount. Q: And all three were offering other concessions, extension of credit terms, cash discounts, credit backs, and so forth; right? A: It is correct that there were other terms that were offered.").)

This finding is irrelevant because Dr. Schumann admitted that McWane, Sigma and Star all offered job price discounts and other price concessions, including rebates, freight absorption, and credit extension, throughout 2008. (RPPF ¶ 182; Schumann, Tr. 4287:21-4288:1 ("yes, there was job pricing during 2008"), 4288:23-4289:1 ("I believe they did offer job pricing throughout 2008"), 4290:3-13.) He also admitted that he ignored McWane and Star spreadsheets and other documents recording each company's job discounts. (Schumann, Tr. 4082:3-11,

4084:16-4086:6 (“Well, I meant I didn’t consider it”), 4086:21-4087:3 (“No, I did not”), 4090:3-9, 4091:9-23 (“No, I did not discuss this”).).

This finding is irrelevant because Star’s independent attempt to reduce its job pricing was not successful, as reflected in the job prices it offered throughout 2008. (RPPF ¶ 166; McCutcheon, Tr. 2689-2690, 2540-2541 (Q: “And it sounded like from your testimony yesterday that the company continued to offer a lot of job price discounts in 2008.” A: “Yes, sir.”); 2547-2548 (Q: “All right. Now, you had said yesterday that the company provided lots and lots of job prices during 2008; is that right?” A: “Yes, sir.”) & RX 557, 2550-2551 (Q: “All right. So the report you requested in July of 2011, and it contains a report of the pinks from 2008 final; right, sir?” A: “Yes, sir.”), 2553-2554 (Q: “All right. So am I right, Mr. McCutcheon, did I understand your testimony correctly yesterday that the company had job pricing and special prices throughout 2008; right?” A: “Yes, sir.”); Minamyer, Tr. 3174-3175 (Q: “Was Star successful at reducing project pricing for a period in time?” A: “To my recollection, no.”), 3274-3275 (Q: “And you were matching lowering prices below the published multiplier frequently; correct?” A: “I believe so.”), 3277-3278 (Q: “Okay. And I know you don’t -- this has been some years ago and you don’t have specific recollection, but what were the competitive conditions in 2008? What do you remember about that time frame?” A: “I remember that everything -- the market was always very competitive. We -- we had to fight pretty hard for every order.”)).).

This finding is irrelevant because Star did not cease or curtail job pricing in 2008. (RPPF ¶ 167; McCutcheon, Tr. 2512). In fact, Star’s special pricing requests, or SPRs, actually increased in 2008. (RPPF ¶ 167; McCutcheon, Tr. 2402-2403) (“And we’ve been looking at SPRs [special pricing requests] ever since this thing happened. Since we were accused of price fixing, we’ve gone back and looked at our SPRs, and we figured out that during this whole

process that we were accused of price-fixing, our SPRs went up, 20 percent. And that's bizarre to us, that we could be accused of price fixing in a period that SPRs go up 20%.').).

This finding is irrelevant because Star continued offering job pricing and other price concessions to its customers throughout 2008, 2009, 2010 and up through the present. (RPPF ¶ 170; McCutcheon, Tr. 2553-54 ("Q: "Do you see where I am, sir? January '08 267, February of '08 300, and so forth, down to the year end 2,669?" A: "Yes, sir." Q: "Is that data that you saw in summary form?" A: "Yes, sir. I believe I got four years running with that information that's in the far right-hand column, that exact information in totals." Q: "All right. So am I right, Mr. McCutcheon, did I understand your testimony correctly yesterday that the company had job pricing and special prices throughout 2008; right?" A: "Yes, sir." Q: "And throughout 2009; right?" A: "Yes, sir." Q: "And continuing to 2010?" A: "Yes, sir." Q: "And continuing to today?" A: "Yes, sir."); Minamyler, Tr. 3265 (Q: "So again, in May of 2008, Star would continue to project-price under the right circumstances, and that would be to meet competition; correct?" A: "That's correct."), 3275 (Q: "And you were matching lowering prices below the published multiplier frequently; correct?" A: "I believe so.)).).

This finding is irrelevant because Star continued to offer job pricing at a rate of a couple hundred per month in 2008. (RPPF ¶ 172; Minamyler, Tr. 3251-3252 (Q: "Do you recall getting 10 to 15 pinks a day?" A: "I recall getting a lot of pinks routinely." Q: "Okay. And that works out on business days to a couple hundred a month. Is that consistent with your recollection?" A: "Yes.") & CX 815; McCutcheon, Tr. 2512 (Q: "That was not a fact. You did not stop pricing in - - job pricing in 2008, did you, sir?" A: "No, sir.))).).

This finding is irrelevant because Star priced job-priced whenever it needed to get business in 2008. (RPPF ¶ 173; Minamyler, Tr. 3277-3278) ("Q. And you had a plan that you

would try and limit job pricing, but we've seen that really didn't play out either, did it? A. Right . . . Q. Okay. And Star job-priced whenever it needed to job price in 2008 to get business, didn't it? A. Yes.”).

1401. Mr. McCutcheon did not recognize and could not explain the basis for or reasons that Star extended any of discounts that are listed Star's RX-557.xls Pinks-final under the tab labeled “rogue.” (McCutcheon, Tr. 2682-2683).

Response To Finding No. 1401:

See General Response 1. Complaint Counsel was free to ask Star witnesses if it believed there were errors in the spreadsheet. To the extent they did not do so, they cannot argue now. This finding is irrelevant because Complaint Counsel's expert, Dr. Schumann, concedes that McWane, Sigma, and Star all continued offering job pricing and other forms of customer discounts throughout all of 2008. (RPPF ¶ 141; Schumann, Tr. 4290-4291 (“So if we look at this waterfall of discounts, job pricing in the third line there, all three companies were offering job pricing throughout 2008; right? A: There was some job pricing offered throughout 2008. Q: All three companies were offering freight concessions, and that's another form of a discount; right, sir? A: I don't recall if all of them were or not. I know McWane was offering freight concessions to certain customers, not to others. Q: And that's a form of a discount; right? A: It can be. Yes. Q: And all three companies were offering rebates to purchasers of imported fittings; right? A: That's the standard. Yes. Q: That's another form of discount; right? A: Pardon me? Yes. Q: Another form of discount? A: Another form of discount. Q: And all three were offering other concessions, extension of credit terms, cash discounts, credit backs, and so forth; right? A: It is correct that there were other terms that were offered.”).)

This finding is irrelevant because Dr. Schumann admitted that McWane, Sigma and Star all offered job price discounts and other price concessions, including rebates, freight absorption, and credit extension, throughout 2008. (RPPF ¶ 182; Schumann, Tr. 4287:21-4288:1 (“yes,

there was job pricing during 2008”), 4288:23-4289:1 (“I believe they did offer job pricing throughout 2008”), 4290:3-13.) He also admitted that he ignored McWane and Star spreadsheets and other documents recording each company’s job discounts. (Schumann, Tr. 4082:3-11, 4084:16-4086:6 (“Well, I meant I didn’t consider it”), 4086:21-4087:3 (“No, I did not”), 4090:3-9, 4091:9-23 (“No, I did not discuss this”).).

This finding is irrelevant because Star’s independent attempt to reduce its job pricing was not successful, as reflected in the job prices it offered throughout 2008. (RPPF ¶ 166; McCutcheon, Tr. 2689-2690, 2540-2541 (Q: “And it sounded like from your testimony yesterday that the company continued to offer a lot of job price discounts in 2008.” A: “Yes, sir.”); 2547-2548 (Q: “All right. Now, you had said yesterday that the company provided lots and lots of job prices during 2008; is that right?” A: “Yes, sir.”) & RX 557, 2550-2551 (Q: “All right. So the report you requested in July of 2011, and it contains a report of the pinks from 2008 final; right, sir?” A: “Yes, sir.”), 2553-2554 (Q: “All right. So am I right, Mr. McCutcheon, did I understand your testimony correctly yesterday that the company had job pricing and special prices throughout 2008; right?” A: “Yes, sir.”); Minamyer, Tr. 3174-3175 (Q: “Was Star successful at reducing project pricing for a period in time?” A: “To my recollection, no.”), 3274-3275 (Q: “And you were matching lowering prices below the published multiplier frequently; correct?” A: “I believe so.”), 3277-3278 (Q: “Okay. And I know you don't -- this has been some years ago and you don't have specific recollection, but what were the competitive conditions in 2008? What do you remember about that time frame?” A: “I remember that everything -- the market was always very competitive. We -- we had to fight pretty hard for every order.”)).).

This finding is irrelevant because Star did not cease or curtail job pricing in 2008. (RPPF ¶ 167; McCutcheon, Tr. 2512). In fact, Star’s special pricing requests, or SPRs, actually

increased in 2008. (RPPF ¶ 167; McCutcheon, Tr. 2402-2403) (“And we’ve been looking at SPRs [special pricing requests] ever since this thing happened. Since we were accused of price fixing, we’ve gone back and looked at our SPRs, and we figured out that during this whole process that we were accused of price-fixing, our SPRs went up, 20 percent. And that’s bizarre to us, that we could be accused of price fixing in a period that SPRs go up 20%.”).).

This finding is irrelevant because Star continued offering job pricing and other price concessions to its customers throughout 2008, 2009, 2010 and up through the present. (RPPF ¶ 170; McCutcheon, Tr. 2553-54 (“Q: “Do you see where I am, sir? January '08 267, February of '08 300, and so forth, down to the year end 2,669?” A: “Yes, sir.” Q: “Is that data that you saw in summary form?” A: “Yes, sir. I believe I got four years running with that information that's in the far right-hand column, that exact information in totals.” Q: “All right. So am I right, Mr. McCutcheon, did I understand your testimony correctly yesterday that the company had job pricing and special prices throughout 2008; right?” A: “Yes, sir.” Q: “And throughout 2009; right?” A: “Yes, sir.” Q: “And continuing to 2010?” A: “Yes, sir.” Q: “And continuing to today?” A: “Yes, sir.”); Minamyer, Tr. 3265 (Q: “So again, in May of 2008, Star would continue to project-price under the right circumstances, and that would be to meet competition; correct?” A: “That's correct.”), 3275 (Q: “And you were matching lowering prices below the published multiplier frequently; correct?” A: “I believe so.)).).

This finding is irrelevant because Star continued to offer job pricing at a rate of a couple hundred per month in 2008. (RPPF ¶ 172; Minamyer, Tr. 3251-3252 (Q: “Do you recall getting 10 to 15 pinks a day?” A: “I recall getting a lot of pinks routinely.” Q: “Okay. And that works out on business days to a couple hundred a month. Is that consistent with your recollection?” A:

“Yes.”) & CX 815; McCutcheon, Tr. 2512 (Q: “That was not a fact. You did not stop pricing in -
- job pricing in 2008, did you, sir?” A: “No, sir.”)).

This finding is irrelevant because Star priced job-priced whenever it needed to get
business in 2008. (RPPF ¶ 173; Minamyer, Tr. 3277-3278) (“Q. And you had a plan that you
would try and limit job pricing, but we’ve seen that really didn’t play out either, did it? A. Right
. . . Q. Okay. And Star job-priced whenever it needed to job price in 2008 to get business, didn’t
it? A. Yes.”)).

7.7.5.2 The SPPRs and Star’s RX-557.xls Pinks-final Included Numerous Transactions in
Products Other Than Fittings and in Locations Outside the United States

1402. The SPPRs and Star’s RX-557.xls Pinks-final included numerous transactions in products
other than Fittings and in locations outside the United States. (*Infra* ¶¶ 1403-1405).

Response To Finding No. 1402:

See General Response 1 and Response To Findings 1403-1405, *infra*. This is an
unsupported assertion, for which no response is required.

1403. Star’s SPPRs include sales to Canadian customers. (McCutcheon, Tr. 2405; *E.g.*, RX-
446.xls, Row 106 (sale to Howie Bird for project in New Brunswick); RX-446.xls, Row
10 (sale to Wolseley for project in Quebec); RX-446.xls, Row 104 (sale to Marcel Baril
for project in Quebec); RX-446.xls, Row 150 (sale to Tempispal Val Dor for project in
Quebec); RX-446.xls, Row 56 (sale to Real Huot for project in Quebec)).

Response To Finding No. 1403:

See General Response 1. Complaint Counsel was free to ask Star witnesses if it believed
there were errors in the spreadsheet. To the extent they did not do so, they cannot argue now.
This finding is irrelevant because Complaint Counsel’s expert, Dr. Schumann, concedes that
McWane, Sigma, and Star all continued offering job pricing and other forms of customer
discounts throughout all of 2008. (RPPF ¶ 141; Schumann, Tr. 4290-4291 (“So if we look at this
waterfall of discounts, job pricing in the third line there, all three companies were offering job
pricing throughout 2008; right? A: There was some job pricing offered throughout 2008. Q:

All three companies were offering freight concessions, and that's another form of a discount; right, sir? A: I don't recall if all of them were or not. I know McWane was offering freight concessions to certain customers, not to others. Q: And that's a form of a discount; right? A: It can be. Yes. Q: And all three companies were offering rebates to purchasers of imported fittings; right? A: That's the standard. Yes. Q: That's another form of discount; right? A: Pardon me? Yes. Q: Another form of discount? A: Another form of discount. Q: And all three were offering other concessions, extension of credit terms, cash discounts, credit backs, and so forth; right? A: It is correct that there were other terms that were offered.”.)

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This finding is irrelevant because Star’s independent attempt to reduce its job pricing was not successful, as reflected in the job prices it offered throughout 2008. (RPPF ¶ 166; McCutcheon, Tr. 2689-2690, 2540-2541 (Q: “And it sounded like from your testimony yesterday that the company continued to offer a lot of job price discounts in 2008.” A: “Yes, sir.”); 2547-2548 (Q: “All right. Now, you had said yesterday that the company provided lots and lots of job prices during 2008; is that right?” A: “Yes, sir.”) & RX 557, 2550-2551 (Q: “All right. So the report you requested in July of 2011, and it contains a report of the pinks from 2008 final; right,

sir?" A: "Yes, sir."), 2553-2554 (Q: "All right. So am I right, Mr. McCutcheon, did I understand your testimony correctly yesterday that the company had job pricing and special prices throughout 2008; right?" A: "Yes, sir."); Minamyer, Tr. 3174-3175 (Q: "Was Star successful at reducing project pricing for a period in time?" A: "To my recollection, no."), 3274-3275 (Q: "And you were matching lowering prices below the published multiplier frequently; correct?" A: "I believe so."), 3277-3278 (Q: "Okay. And I know you don't -- this has been some years ago and you don't have specific recollection, but what were the competitive conditions in 2008? What do you remember about that time frame?" A: "I remember that everything -- the market was always very competitive. We -- we had to fight pretty hard for every order.")).

This finding is irrelevant because Star did not cease or curtail job pricing in 2008. (RPPF ¶ 167; McCutcheon, Tr. 2512). In fact, Star's special pricing requests, or SPRs, actually increased in 2008. (RPPF ¶ 167; McCutcheon, Tr. 2402-2403) ("And we've been looking at SPRs [special pricing requests] ever since this thing happened. Since we were accused of price fixing, we've gone back and looked at our SPRs, and we figured out that during this whole process that we were accused of price-fixing, our SPRs went up, 20 percent. And that's bizarre to us, that we could be accused of price fixing in a period that SPRs go up 20%.").

This finding is irrelevant because Star continued offering job pricing and other price concessions to its customers throughout 2008, 2009, 2010 and up through the present. (RPPF ¶ 170; McCutcheon, Tr. 2553-54 ("Q: "Do you see where I am, sir? January '08 267, February of '08 300, and so forth, down to the year end 2,669?" A: "Yes, sir." Q: "Is that data that you saw in summary form?" A: "Yes, sir. I believe I got four years running with that information that's in the far right-hand column, that exact information in totals." Q: "All right. So am I right, Mr. McCutcheon, did I understand your testimony correctly yesterday that the company had job

pricing and special prices throughout 2008; right?” A: “Yes, sir.” Q: “And throughout 2009; right?” A: “Yes, sir.” Q: “And continuing to 2010?” A: “Yes, sir.” Q: “And continuing to today?” A: “Yes, sir.”); Minamy, Tr. 3265 (Q: “So again, in May of 2008, Star would continue to project-price under the right circumstances, and that would be to meet competition; correct?” A: “That’s correct.”), 3275 (Q: “And you were matching lowering prices below the published multiplier frequently; correct?” A: “I believe so.”)).

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This finding is irrelevant because Star priced job-priced whenever it needed to get business in 2008. (RPPF ¶ 173; Minamy, Tr. 3277-3278) (“Q. And you had a plan that you would try and limit job pricing, but we’ve seen that really didn’t play out either, did it? A. Right . . . Q. Okay. And Star job-priced whenever it needed to job price in 2008 to get business, didn’t it? A. Yes.”)).

1404. Star’s RX-557.xls Pinks-final includes sales to Canadian companies. (E.g., RX-557.xls, Row 191 (Howie Bird); RX-557.xls, Row 31 (Wolseley); RX-557.xls, Row 617 (Canada Pipe); RX-557.xls, Row 744 (Tempisal Val Dor); RX-557.xls, Row 634 (Real Huot)).

Response To Finding No. 1404:

See General Response 1 and Response To Findings 1407-1409, *infra*. Complaint Counsel was free to ask Star witnesses if it believed there were errors in the spreadsheet. To the extent they did not do so, they cannot argue now. This finding is irrelevant because Complaint Counsel’s expert, Dr. Schumann, concedes that McWane, Sigma, and Star all continued offering

job pricing and other forms of customer discounts throughout all of 2008. (RPPF ¶ 141; Schumann, Tr. 4290-4291 (“So if we look at this waterfall of discounts, job pricing in the third line there, all three companies were offering job pricing throughout 2008; right? A: There was some job pricing offered throughout 2008. Q: All three companies were offering freight concessions, and that's another form of a discount; right, sir? A: I don't recall if all of them were or not. I know McWane was offering freight concessions to certain customers, not to others. Q: And that's a form of a discount; right? A: It can be. Yes. Q: And all three companies were offering rebates to purchasers of imported fittings; right? A: That's the standard. Yes. Q: That's another form of discount; right? A: Pardon me? Yes. Q: Another form of discount? A: Another form of discount. Q: And all three were offering other concessions, extension of credit terms, cash discounts, credit backs, and so forth; right? A: It is correct that there were other terms that were offered.”).)

This finding is irrelevant because Dr. Schumann admitted that McWane, Sigma and Star all offered job price discounts and other price concessions, including rebates, freight absorption, and credit extension, throughout 2008. (RPPF ¶ 182; Schumann, Tr. 4287:21-4288:1 (“yes, there was job pricing during 2008”), 4288:23-4289:1 (“I believe they did offer job pricing throughout 2008”), 4290:3-13.) He also admitted that he ignored McWane and Star spreadsheets and other documents recording each company’s job discounts. (Schumann, Tr. 4082:3-11, 4084:16-4086:6 (“Well, I meant I didn’t consider it”), 4086:21-4087:3 (“No, I did not”), 4090:3-9, 4091:9-23 (“No, I did not discuss this”).)).

This finding is irrelevant because Star’s independent attempt to reduce its job pricing was not successful, as reflected in the job prices it offered throughout 2008. (RPPF ¶ 166; McCutcheon, Tr. 2689-2690, 2540-2541 (Q: “And it sounded like from your testimony yesterday

that the company continued to offer a lot of job price discounts in 2008.” A: “Yes, sir.”); 2547-2548 (Q: “All right. Now, you had said yesterday that the company provided lots and lots of job prices during 2008; is that right?” A: “Yes, sir.”) & RX 557, 2550-2551 (Q: “All right. So the report you requested in July of 2011, and it contains a report of the pinks from 2008 final; right, sir?” A: “Yes, sir.”), 2553-2554 (Q: “All right. So am I right, Mr. McCutcheon, did I understand your testimony correctly yesterday that the company had job pricing and special prices throughout 2008; right?” A: “Yes, sir.”); Minamyer, Tr. 3174-3175 (Q: “Was Star successful at reducing project pricing for a period in time?” A: “To my recollection, no.”), 3274-3275 (Q: “And you were matching lowering prices below the published multiplier frequently; correct?” A: “I believe so.”), 3277-3278 (Q: “Okay. And I know you don’t -- this has been some years ago and you don’t have specific recollection, but what were the competitive conditions in 2008? What do you remember about that time frame?” A: “I remember that everything -- the market was always very competitive. We -- we had to fight pretty hard for every order.”)).

This finding is irrelevant because Star did not cease or curtail job pricing in 2008. (RPPF ¶ 167; McCutcheon, Tr. 2512). In fact, Star’s special pricing requests, or SPRs, actually increased in 2008. (RPPF ¶ 167; McCutcheon, Tr. 2402-2403) (“And we’ve been looking at SPRs [special pricing requests] ever since this thing happened. Since we were accused of price fixing, we’ve gone back and looked at our SPRs, and we figured out that during this whole process that we were accused of price-fixing, our SPRs went up, 20 percent. And that’s bizarre to us, that we could be accused of price fixing in a period that SPRs go up 20%.”)).

This finding is irrelevant because Star continued offering job pricing and other price concessions to its customers throughout 2008, 2009, 2010 and up through the present. (RPPF ¶ 170; McCutcheon, Tr. 2553-54 (“Q: “Do you see where I am, sir? January '08 267, February of

'08 300, and so forth, down to the year end 2,669?" A: "Yes, sir." Q: "Is that data that you saw in summary form?" A: "Yes, sir. I believe I got four years running with that information that's in the far right-hand column, that exact information in totals." Q: "All right. So am I right, Mr. McCutcheon, did I understand your testimony correctly yesterday that the company had job pricing and special prices throughout 2008; right?" A: "Yes, sir." Q: "And throughout 2009; right?" A: "Yes, sir." Q: "And continuing to 2010?" A: "Yes, sir." Q: "And continuing to today?" A: "Yes, sir."); Minamyer, Tr. 3265 (Q: "So again, in May of 2008, Star would continue to project-price under the right circumstances, and that would be to meet competition; correct?" A: "That's correct."), 3275 (Q: "And you were matching lowering prices below the published multiplier frequently; correct?" A: "I believe so.)).).

This finding is irrelevant because Star continued to offer job pricing at a rate of a couple hundred per month in 2008. (RPPF ¶ 172; Minamyer, Tr. 3251-3252 (Q: "Do you recall getting 10 to 15 pinks a day?" A: "I recall getting a lot of pinks routinely." Q: "Okay. And that works out on business days to a couple hundred a month. Is that consistent with your recollection?" A: "Yes.") & CX 815; McCutcheon, Tr. 2512 (Q: "That was not a fact. You did not stop pricing in - - job pricing in 2008, did you, sir?" A: "No, sir.))).).

This finding is irrelevant because Star priced job-priced whenever it needed to get business in 2008. (RPPF ¶ 173; Minamyer, Tr. 3277-3278) ("Q. And you had a plan that you would try and limit job pricing, but we've seen that really didn't play out either, did it? A. Right . . . Q. Okay. And Star job-priced whenever it needed to job price in 2008 to get business, didn't it? A. Yes.)).).

1405. Star's SPPRs, including RX-557.xls Pinks-final, included entries for Project Prices offered to Distributors that involved other products and not Fittings, such as plumbing products, joint restraints, bolts and accessories, castings, and valve boxes. (McCutcheon, Tr. 2673-2676; RX-557.xls at Row 567 (plumbing products); CX 3033 at 002 (showing

project receiving special pricing reflected in RX-557.xls at Row 567 referred to plumbing products); RX-558.xls at Row 69-71 (joint restraints); RX-558.xls at Row 2-3 (bolts and accessories); RX-558.xls at Row 33 (castings); RX-557.xls at Row 1452 (valve boxes); CX 3041 at 001 (showing project receiving special pricing reflected in RX-557.xls at Row 1452 referred to valve boxes).

Response To Finding No. 1405:

See General Response 1. Complaint Counsel was free to ask Star witnesses if it believed there were errors in the spreadsheet. To the extent they did not do so, they cannot argue now. This finding is irrelevant because Complaint Counsel's expert, Dr. Schumann, concedes that McWane, Sigma, and Star all continued offering job pricing and other forms of customer discounts throughout all of 2008. (RPPF ¶ 141; Schumann, Tr. 4290-4291 ("So if we look at this waterfall of discounts, job pricing in the third line there, all three companies were offering job pricing throughout 2008; right? A: There was some job pricing offered throughout 2008. Q: All three companies were offering freight concessions, and that's another form of a discount; right, sir? A: I don't recall if all of them were or not. I know McWane was offering freight concessions to certain customers, not to others. Q: And that's a form of a discount; right? A: It can be. Yes. Q: And all three companies were offering rebates to purchasers of imported fittings; right? A: That's the standard. Yes. Q: That's another form of discount; right? A: Pardon me? Yes. Q: Another form of discount? A: Another form of discount. Q: And all three were offering other concessions, extension of credit terms, cash discounts, credit backs, and so forth; right? A: It is correct that there were other terms that were offered."))

This finding is irrelevant because Dr. Schumann admitted that McWane, Sigma and Star all offered job price discounts and other price concessions, including rebates, freight absorption, and credit extension, throughout 2008. (RPPF ¶ 182; Schumann, Tr. 4287:21-4288:1 ("yes, there was job pricing during 2008"), 4288:23-4289:1 ("I believe they did offer job pricing throughout 2008"), 4290:3-13.) He also admitted that he ignored McWane and Star spreadsheets

and other documents recording each company's job discounts. (Schumann, Tr. 4082:3-11, 4084:16-4086:6 ("Well, I meant I didn't consider it"), 4086:21-4087:3 ("No, I did not"), 4090:3-9, 4091:9-23 ("No, I did not discuss this").)).

This finding is irrelevant because Star's independent attempt to reduce its job pricing was not successful, as reflected in the job prices it offered throughout 2008. (RPPF ¶ 166; McCutcheon, Tr. 2689-2690, 2540-2541 (Q: "And it sounded like from your testimony yesterday that the company continued to offer a lot of job price discounts in 2008." A: "Yes, sir."); 2547-2548 (Q: "All right. Now, you had said yesterday that the company provided lots and lots of job prices during 2008; is that right?" A: "Yes, sir.") & RX 557, 2550-2551 (Q: "All right. So the report you requested in July of 2011, and it contains a report of the pinks from 2008 final; right, sir?" A: "Yes, sir."), 2553-2554 (Q: "All right. So am I right, Mr. McCutcheon, did I understand your testimony correctly yesterday that the company had job pricing and special prices throughout 2008; right?" A: "Yes, sir."); Minamyler, Tr. 3174-3175 (Q: "Was Star successful at reducing project pricing for a period in time?" A: "To my recollection, no."), 3274-3275 (Q: "And you were matching lowering prices below the published multiplier frequently; correct?" A: "I believe so."), 3277-3278 (Q: "Okay. And I know you don't -- this has been some years ago and you don't have specific recollection, but what were the competitive conditions in 2008? What do you remember about that time frame?" A: "I remember that everything -- the market was always very competitive. We -- we had to fight pretty hard for every order.")).

This finding is irrelevant because Star did not cease or curtail job pricing in 2008. (RPPF ¶ 167; McCutcheon, Tr. 2512). In fact, Star's special pricing requests, or SPRs, actually increased in 2008. (RPPF ¶ 167; McCutcheon, Tr. 2402-2403) ("And we've been looking at SPRs [special pricing requests] ever since this thing happened. Since we were accused of price

fixing, we've gone back and looked at our SPRs, and we figured out that during this whole process that we were accused of price-fixing, our SPRs went up, 20 percent. And that's bizarre to us, that we could be accused of price fixing in a period that SPRs go up 20%.').).

This finding is irrelevant because Star continued offering job pricing and other price concessions to its customers throughout 2008, 2009, 2010 and up through the present. (RPPF ¶ 170; McCutcheon, Tr. 2553-54 ("Q: "Do you see where I am, sir? January '08 267, February of '08 300, and so forth, down to the year end 2,669?" A: "Yes, sir." Q: "Is that data that you saw in summary form?" A: "Yes, sir. I believe I got four years running with that information that's in the far right-hand column, that exact information in totals." Q: "All right. So am I right, Mr. McCutcheon, did I understand your testimony correctly yesterday that the company had job pricing and special prices throughout 2008; right?" A: "Yes, sir." Q: "And throughout 2009; right?" A: "Yes, sir." Q: "And continuing to 2010?" A: "Yes, sir." Q: "And continuing to today?" A: "Yes, sir."); Minamy, Tr. 3265 (Q: "So again, in May of 2008, Star would continue to project-price under the right circumstances, and that would be to meet competition; correct?" A: "That's correct."), 3275 (Q: "And you were matching lowering prices below the published multiplier frequently; correct?" A: "I believe so.)).).

This finding is irrelevant because Star continued to offer job pricing at a rate of a couple hundred per month in 2008. (RPPF ¶ 172; Minamy, Tr. 3251-3252 (Q: "Do you recall getting 10 to 15 pinks a day?" A: "I recall getting a lot of pinks routinely." Q: "Okay. And that works out on business days to a couple hundred a month. Is that consistent with your recollection?" A: "Yes.") & CX 815; McCutcheon, Tr. 2512 (Q: "That was not a fact. You did not stop pricing in - job pricing in 2008, did you, sir?" A: "No, sir.)).).

This finding is irrelevant because Star priced job-priced whenever it needed to get business in 2008. (RPPF ¶ 173; Minamyer, Tr. 3277-3278) (“Q. And you had a plan that you would try and limit job pricing, but we’ve seen that really didn’t play out either, did it? A. Right . . . Q. Okay. And Star job-priced whenever it needed to job price in 2008 to get business, didn’t it? A. Yes.”).

7.7.5.3 The SPPRs and Star’s RX-557.xls Pinks-final Included Numerous Transactions That Occurred Before the Conspiracy Was Implemented or After It Broke Down

1406. The SPPRs and Star’s RX-557.xls Pinks-final included numerous transactions that occurred before the conspiracy was implemented or after it broke down. (*Infra* ¶¶ 1407-1409).

Response To Finding No. 1406:

See General Response 1. This is an unsupported assertion, for which no response is required.

1407. Star’s SPPRs, including RX-557.xls Pinks-final, included entries for Project Pricing that had a start date prior to March 1, 2008, the date when Star (and McWane) announced to its customers that it would no longer offer Project Pricing. (*E.g.*, RX-558.xls, Rows 49-558 (Star’s March 2008 SPPR); RX-557.xls, Rows 1-566 (Star’s Pinks-final)).

Response To Finding No. 1407:

See General Response 1. The Complaint alleges that the conspiracy began in January, 2008. In addition, Complaint Counsel was free to ask Star witnesses if it believed there were errors in the spreadsheet. To the extent they did not do so, they cannot argue now. This finding is irrelevant because Complaint Counsel’s expert, Dr. Schumann, concedes that McWane, Sigma, and Star all continued offering job pricing and other forms of customer discounts throughout all of 2008. (RPPF ¶ 141; Schumann, Tr. 4290-4291 (“So if we look at this waterfall of discounts, job pricing in the third line there, all three companies were offering job pricing throughout 2008; right? A: There was some job pricing offered throughout 2008. Q: All three companies were offering freight concessions, and that's another form of a discount; right, sir? A:

I don't recall if all of them were or not. I know McWane was offering freight concessions to certain customers, not to others. Q: And that's a form of a discount; right? A: It can be. Yes. Q: And all three companies were offering rebates to purchasers of imported fittings; right? A: That's the standard. Yes. Q: That's another form of discount; right? A: Pardon me? Yes. Q: Another form of discount? A: Another form of discount. Q: And all three were offering other concessions, extension of credit terms, cash discounts, credit backs, and so forth; right? A: It is correct that there were other terms that were offered.”.)

This finding is irrelevant because Dr. Schumann admitted that McWane, Sigma and Star all offered job price discounts and other price concessions, including rebates, freight absorption, and credit extension, throughout 2008. (RPPF ¶ 182; Schumann, Tr. 4287:21-4288:1 (“yes, there was job pricing during 2008”), 4288:23-4289:1 (“I believe they did offer job pricing throughout 2008”), 4290:3-13.) He also admitted that he ignored McWane and Star spreadsheets and other documents recording each company’s job discounts. (Schumann, Tr. 4082:3-11, 4084:16-4086:6 (“Well, I meant I didn’t consider it”), 4086:21-4087:3 (“No, I did not”), 4090:3-9, 4091:9-23 (“No, I did not discuss this”).).

This finding is irrelevant because Star’s independent attempt to reduce its job pricing was not successful, as reflected in the job prices it offered throughout 2008. (RPPF ¶ 166; McCutcheon, Tr. 2689-2690, 2540-2541 (Q: “And it sounded like from your testimony yesterday that the company continued to offer a lot of job price discounts in 2008.” A: “Yes, sir.”); 2547-2548 (Q: “All right. Now, you had said yesterday that the company provided lots and lots of job prices during 2008; is that right?” A: “Yes, sir.”) & RX 557, 2550-2551 (Q: “All right. So the report you requested in July of 2011, and it contains a report of the pinks from 2008 final; right, sir?” A: “Yes, sir.”), 2553-2554 (Q: “All right. So am I right, Mr. McCutcheon, did I understand

your testimony correctly yesterday that the company had job pricing and special prices throughout 2008; right?" A: "Yes, sir."); Minamyer, Tr. 3174-3175 (Q: "Was Star successful at reducing project pricing for a period in time?" A: "To my recollection, no."), 3274-3275 (Q: "And you were matching lowering prices below the published multiplier frequently; correct?" A: "I believe so."), 3277-3278 (Q: "Okay. And I know you don't -- this has been some years ago and you don't have specific recollection, but what were the competitive conditions in 2008? What do you remember about that time frame?" A: "I remember that everything -- the market was always very competitive. We -- we had to fight pretty hard for every order.")).

This finding is irrelevant because Star did not cease or curtail job pricing in 2008. (RPPF ¶ 167; McCutcheon, Tr. 2512). In fact, Star's special pricing requests, or SPRs, actually increased in 2008. (RPPF ¶ 167; McCutcheon, Tr. 2402-2403) ("And we've been looking at SPRs [special pricing requests] ever since this thing happened. Since we were accused of price fixing, we've gone back and looked at our SPRs, and we figured out that during this whole process that we were accused of price-fixing, our SPRs went up, 20 percent. And that's bizarre to us, that we could be accused of price fixing in a period that SPRs go up 20%.").

This finding is irrelevant because Star continued offering job pricing and other price concessions to its customers throughout 2008, 2009, 2010 and up through the present. (RPPF ¶ 170; McCutcheon, Tr. 2553-54 ("Q: "Do you see where I am, sir? January '08 267, February of '08 300, and so forth, down to the year end 2,669?" A: "Yes, sir." Q: "Is that data that you saw in summary form?" A: "Yes, sir. I believe I got four years running with that information that's in the far right-hand column, that exact information in totals." Q: "All right. So am I right, Mr. McCutcheon, did I understand your testimony correctly yesterday that the company had job pricing and special prices throughout 2008; right?" A: "Yes, sir." Q: "And throughout 2009;

right?" A: "Yes, sir." Q: "And continuing to 2010?" A: "Yes, sir." Q: "And continuing to today?" A: "Yes, sir."); Minamyers, Tr. 3265 (Q: "So again, in May of 2008, Star would continue to project-price under the right circumstances, and that would be to meet competition; correct?" A: "That's correct."), 3275 (Q: "And you were matching lowering prices below the published multiplier frequently; correct?" A: "I believe so.)).).

This finding is irrelevant because Star continued to offer job pricing at a rate of a couple hundred per month in 2008. (RPPF ¶ 172; Minamyers, Tr. 3251-3252 (Q: "Do you recall getting 10 to 15 pinks a day?" A: "I recall getting a lot of pinks routinely." Q: "Okay. And that works out on business days to a couple hundred a month. Is that consistent with your recollection?" A: "Yes.") & CX 815; McCutcheon, Tr. 2512 (Q: "That was not a fact. You did not stop pricing in - - job pricing in 2008, did you, sir?" A: "No, sir.))).).

This finding is irrelevant because Star priced job-priced whenever it needed to get business in 2008. (RPPF ¶ 173; Minamyers, Tr. 3277-3278) ("Q. And you had a plan that you would try and limit job pricing, but we've seen that really didn't play out either, did it? A. Right . . . Q. Okay. And Star job-priced whenever it needed to job price in 2008 to get business, didn't it? A. Yes.)).).

1408. Star's SPPRs and Star's RX-557.xls Pinks-final include numerous instances of special pricing with effective dates within a month after March 1, 2008, which were likely approved by Star sometime before McWane, Sigma, and Star implemented their conspiracy to curtail Project Pricing. (E.g., RX-558.xls, Rows 7-48 (March 2008 SPPR); RX-557.xls, Rows 567-770). The "Start Date" for special pricing, as reflected on the SPPR, was as much as a month after Star's management approved the special pricing. (RX-691 (Berry, Dep. at 41)).

Response To Finding No. 1408:

See General Response 1. The Complaint alleges that the conspiracy began in January, 2008. In addition, Complaint Counsel was free to ask Star witnesses if it believed there were errors in the spreadsheet. To the extent they did not do so, they cannot argue now. This finding

is irrelevant because Complaint Counsel's expert, Dr. Schumann, concedes that McWane, Sigma, and Star all continued offering job pricing and other forms of customer discounts throughout all of 2008. (RPPF ¶ 141; Schumann, Tr. 4290-4291 ("So if we look at this waterfall of discounts, job pricing in the third line there, all three companies were offering job pricing throughout 2008; right? A: There was some job pricing offered throughout 2008. Q: All three companies were offering freight concessions, and that's another form of a discount; right, sir? A: I don't recall if all of them were or not. I know McWane was offering freight concessions to certain customers, not to others. Q: And that's a form of a discount; right? A: It can be. Yes. Q: And all three companies were offering rebates to purchasers of imported fittings; right? A: That's the standard. Yes. Q: That's another form of discount; right? A: Pardon me? Yes. Q: Another form of discount? A: Another form of discount. Q: And all three were offering other concessions, extension of credit terms, cash discounts, credit backs, and so forth; right? A: It is correct that there were other terms that were offered."))

This finding is irrelevant because Dr. Schumann admitted that McWane, Sigma and Star all offered job price discounts and other price concessions, including rebates, freight absorption, and credit extension, throughout 2008. (RPPF ¶ 182; Schumann, Tr. 4287:21-4288:1 ("yes, there was job pricing during 2008"), 4288:23-4289:1 ("I believe they did offer job pricing throughout 2008"), 4290:3-13.) He also admitted that he ignored McWane and Star spreadsheets and other documents recording each company's job discounts. (Schumann, Tr. 4082:3-11, 4084:16-4086:6 ("Well, I meant I didn't consider it"), 4086:21-4087:3 ("No, I did not"), 4090:3-9, 4091:9-23 ("No, I did not discuss this").)).

This finding is irrelevant because Star's independent attempt to reduce its job pricing was not successful, as reflected in the job prices it offered throughout 2008. (RPPF ¶ 166;

McCutcheon, Tr. 2689-2690, 2540-2541 (Q: “And it sounded like from your testimony yesterday that the company continued to offer a lot of job price discounts in 2008.” A: “Yes, sir.”); 2547-2548 (Q: “All right. Now, you had said yesterday that the company provided lots and lots of job prices during 2008; is that right?” A: “Yes, sir.”) & RX 557, 2550-2551 (Q: “All right. So the report you requested in July of 2011, and it contains a report of the pinks from 2008 final; right, sir?” A: “Yes, sir.”), 2553-2554 (Q: “All right. So am I right, Mr. McCutcheon, did I understand your testimony correctly yesterday that the company had job pricing and special prices throughout 2008; right?” A: “Yes, sir.”); Minamyer, Tr. 3174-3175 (Q: “Was Star successful at reducing project pricing for a period in time?” A: “To my recollection, no.”), 3274-3275 (Q: “And you were matching lowering prices below the published multiplier frequently; correct?” A: “I believe so.”), 3277-3278 (Q: “Okay. And I know you don't -- this has been some years ago and you don't have specific recollection, but what were the competitive conditions in 2008? What do you remember about that time frame?” A: “I remember that everything -- the market was always very competitive. We -- we had to fight pretty hard for every order.”)).

This finding is irrelevant because Star did not cease or curtail job pricing in 2008. (RPPF ¶ 167; McCutcheon, Tr. 2512). In fact, Star's special pricing requests, or SPRs, actually increased in 2008. (RPPF ¶ 167; McCutcheon, Tr. 2402-2403) (“And we've been looking at SPRs [special pricing requests] ever since this thing happened. Since we were accused of price fixing, we've gone back and looked at our SPRs, and we figured out that during this whole process that we were accused of price-fixing, our SPRs went up, 20 percent. And that's bizarre to us, that we could be accused of price fixing in a period that SPRs go up 20%.”)).

This finding is irrelevant because Star continued offering job pricing and other price concessions to its customers throughout 2008, 2009, 2010 and up through the present. (RPPF

¶ 170; McCutcheon, Tr. 2553-54 (“Q: “Do you see where I am, sir? January '08 267, February of '08 300, and so forth, down to the year end 2,669?” A: “Yes, sir.” Q: “Is that data that you saw in summary form?” A: “Yes, sir. I believe I got four years running with that information that's in the far right-hand column, that exact information in totals.” Q: “All right. So am I right, Mr. McCutcheon, did I understand your testimony correctly yesterday that the company had job pricing and special prices throughout 2008; right?” A: “Yes, sir.” Q: “And throughout 2009; right?” A: “Yes, sir.” Q: “And continuing to 2010?” A: “Yes, sir.” Q: “And continuing to today?” A: “Yes, sir.”); Minamy, Tr. 3265 (Q: “So again, in May of 2008, Star would continue to project-price under the right circumstances, and that would be to meet competition; correct?” A: “That's correct.”), 3275 (Q: “And you were matching lowering prices below the published multiplier frequently; correct?” A: “I believe so.”)).

This finding is irrelevant because Star continued to offer job pricing at a rate of a couple hundred per month in 2008. (RPPF ¶ 172; Minamy, Tr. 3251-3252 (Q: “Do you recall getting 10 to 15 pinks a day?” A: “I recall getting a lot of pinks routinely.” Q: “Okay. And that works out on business days to a couple hundred a month. Is that consistent with your recollection?” A: “Yes.”) & CX 815; McCutcheon, Tr. 2512 (Q: “That was not a fact. You did not stop pricing in - - job pricing in 2008, did you, sir?” A: “No, sir.”)).

This finding is irrelevant because Star priced job-priced whenever it needed to get business in 2008. (RPPF ¶ 173; Minamy, Tr. 3277-3278) (“Q. And you had a plan that you would try and limit job pricing, but we've seen that really didn't play out either, did it? A. Right . . . Q. Okay. And Star job-priced whenever it needed to job price in 2008 to get business, didn't it? A. Yes.”).

1409. Star's SPPRs, including Star's RX-557.xls Pinks-final, include numerous instances of special pricing that were approved after Mr. Minamy had sent his November 25, 2008

email, (CX 0831), instructing Star's sales force to once again engage in Project Pricing. (E.g., RX-444.xls, Rows 1-26 (December 2008 SPPR); RX-557.xls, Rows 2430 - 2670); *see infra* ¶¶ 1456-1457 (discussing Star re-engaging in Project Pricing).

Response To Finding No. 1409:

See General Response 1. Ironically, Complaint Counsel argues that the alleged collusive behavior continued into 2009 and even 2010. *See* §§ 7.9 and 7.10 of Complaint Counsel's Proposed Findings of Fact. In addition, *See* General Response 1. The Complaint alleges that the conspiracy began in January, 2008. In addition, Complaint Counsel was free to ask Star witnesses if it believed there were errors in the spreadsheet. To the extent they did not do so, they cannot argue now. This finding is irrelevant because Complaint Counsel's expert, Dr. Schumann, concedes that McWane, Sigma, and Star all continued offering job pricing and other forms of customer discounts throughout all of 2008. (RPPF ¶ 141; Schumann, Tr. 4290-4291 ("So if we look at this waterfall of discounts, job pricing in the third line there, all three companies were offering job pricing throughout 2008; right? A: There was some job pricing offered throughout 2008. Q: All three companies were offering freight concessions, and that's another form of a discount; right, sir? A: I don't recall if all of them were or not. I know McWane was offering freight concessions to certain customers, not to others. Q: And that's a form of a discount; right? A: It can be. Yes. Q: And all three companies were offering rebates to purchasers of imported fittings; right? A: That's the standard. Yes. Q: That's another form of discount; right? A: Pardon me? Yes. Q: Another form of discount? A: Another form of discount. Q: And all three were offering other concessions, extension of credit terms, cash discounts, credit backs, and so forth; right? A: It is correct that there were other terms that were offered."))

This finding is irrelevant because Dr. Schumann admitted that McWane, Sigma and Star all offered job price discounts and other price concessions, including rebates, freight absorption,

and credit extension, throughout 2008. (RPPF ¶ 182; Schumann, Tr. 4287:21-4288:1 (“yes, there was job pricing during 2008”), 4288:23-4289:1 (“I believe they did offer job pricing throughout 2008”), 4290:3-13.) He also admitted that he ignored McWane and Star spreadsheets and other documents recording each company’s job discounts. (Schumann, Tr. 4082:3-11, 4084:16-4086:6 (“Well, I meant I didn’t consider it”), 4086:21-4087:3 (“No, I did not”), 4090:3-9, 4091:9-23 (“No, I did not discuss this”).)).

This finding is irrelevant because Star’s independent attempt to reduce its job pricing was not successful, as reflected in the job prices it offered throughout 2008. (RPPF ¶ 166; McCutcheon, Tr. 2689-2690, 2540-2541 (Q: “And it sounded like from your testimony yesterday that the company continued to offer a lot of job price discounts in 2008.” A: “Yes, sir.”); 2547-2548 (Q: “All right. Now, you had said yesterday that the company provided lots and lots of job prices during 2008; is that right?” A: “Yes, sir.”) & RX 557, 2550-2551 (Q: “All right. So the report you requested in July of 2011, and it contains a report of the pinks from 2008 final; right, sir?” A: “Yes, sir.”), 2553-2554 (Q: “All right. So am I right, Mr. McCutcheon, did I understand your testimony correctly yesterday that the company had job pricing and special prices throughout 2008; right?” A: “Yes, sir.”); Minamyer, Tr. 3174-3175 (Q: “Was Star successful at reducing project pricing for a period in time?” A: “To my recollection, no.”), 3274-3275 (Q: “And you were matching lowering prices below the published multiplier frequently; correct?” A: “I believe so.”), 3277-3278 (Q: “Okay. And I know you don't -- this has been some years ago and you don't have specific recollection, but what were the competitive conditions in 2008? What do you remember about that time frame?” A: “I remember that everything -- the market was always very competitive. We -- we had to fight pretty hard for every order.”)).

This finding is irrelevant because Star did not cease or curtail job pricing in 2008. (RPPF ¶ 167; McCutcheon, Tr. 2512). In fact, Star's special pricing requests, or SPRs, actually increased in 2008. (RPPF ¶ 167; McCutcheon, Tr. 2402-2403) ("And we've been looking at SPRs [special pricing requests] ever since this thing happened. Since we were accused of price fixing, we've gone back and looked at our SPRs, and we figured out that during this whole process that we were accused of price-fixing, our SPRs went up, 20 percent. And that's bizarre to us, that we could be accused of price fixing in a period that SPRs go up 20%.").

This finding is irrelevant because Star continued offering job pricing and other price concessions to its customers throughout 2008, 2009, 2010 and up through the present. (RPPF ¶ 170; McCutcheon, Tr. 2553-54 ("Q: "Do you see where I am, sir? January '08 267, February of '08 300, and so forth, down to the year end 2,669?" A: "Yes, sir." Q: "Is that data that you saw in summary form?" A: "Yes, sir. I believe I got four years running with that information that's in the far right-hand column, that exact information in totals." Q: "All right. So am I right, Mr. McCutcheon, did I understand your testimony correctly yesterday that the company had job pricing and special prices throughout 2008; right?" A: "Yes, sir." Q: "And throughout 2009; right?" A: "Yes, sir." Q: "And continuing to 2010?" A: "Yes, sir." Q: "And continuing to today?" A: "Yes, sir."); Minamy, Tr. 3265 (Q: "So again, in May of 2008, Star would continue to project-price under the right circumstances, and that would be to meet competition; correct?" A: "That's correct."), 3275 (Q: "And you were matching lowering prices below the published multiplier frequently; correct?" A: "I believe so.)).

This finding is irrelevant because Star continued to offer job pricing at a rate of a couple hundred per month in 2008. (RPPF ¶ 172; Minamy, Tr. 3251-3252 (Q: "Do you recall getting 10 to 15 pinks a day?" A: "I recall getting a lot of pinks routinely." Q: "Okay. And that works

out on business days to a couple hundred a month. Is that consistent with your recollection?” A: “Yes.”) & CX 815; McCutcheon, Tr. 2512 (Q: “That was not a fact. You did not stop pricing in - job pricing in 2008, did you, sir?” A: “No, sir.”)).

This finding is irrelevant because Star priced job-priced whenever it needed to get business in 2008. (RPPF ¶ 173; Minamyer, Tr. 3277-3278) (“Q. And you had a plan that you would try and limit job pricing, but we’ve seen that really didn’t play out either, did it? A. Right . . . Q. Okay. And Star job-priced whenever it needed to job price in 2008 to get business, didn’t it? A. Yes.”).

7.7.5.4 To the Extent the SPPRs Constitute Probative Evidence at All, They Show That Star Extended Fewer Project Pricing Discounts During the Conspiracy Period Than It Extended in Corresponding Periods in 2007

1410. The SPPRs indicate that Star extended fewer Project Pricing discounts during the conspiracy period than it extended in corresponding periods in 2007. (*Infra* ¶¶ 1411-1423).

Response To Finding No. 1410:

See General Response 1 and Response To Findings 1411-1423, *infra*. This is an unsupported assertion, for which no response is required. This finding is internally inconsistent because Complaint Counsel’s findings (*Infra* ¶¶ 1411-1423) are based on Star’s SPPR’s which Complaint Counsel claims are: (1) “unreliable as evidence;” (2) “included numerous transactions in products other than Fittings and in locations outside the United States;” and, (3) included “entries for Project Pricing that had a start date prior to March 1, 2008,” “numerous instances of special pricing with effective dates within a month after March 1, 2008” and “numerous instances of special pricing that were approved after . . . November 25, 2008.” (*Infra* ¶¶ 1394-1409).

This finding is incomplete, and therefore misleading because Complaint Counsel’s expert, Dr. Schumann, concedes that McWane, Sigma, and Star all continued offering job pricing

and other forms of customer discounts throughout all of 2008. (RPPF ¶ 141; Schumann, Tr. 4290-4291 (“So if we look at this waterfall of discounts, job pricing in the third line there, all three companies were offering job pricing throughout 2008; right? A: There was some job pricing offered throughout 2008. Q: All three companies were offering freight concessions, and that's another form of a discount; right, sir? A: I don't recall if all of them were or not. I know McWane was offering freight concessions to certain customers, not to others. Q: And that's a form of a discount; right? A: It can be. Yes. Q: And all three companies were offering rebates to purchasers of imported fittings; right? A: That's the standard. Yes. Q: That's another form of discount; right? A: Pardon me? Yes. Q: Another form of discount? A: Another form of discount. Q: And all three were offering other concessions, extension of credit terms, cash discounts, credit backs, and so forth; right? A: It is correct that there were other terms that were offered.”).)

This finding is incomplete, and therefore misleading because Dr. Schumann admitted that McWane, Sigma and Star all offered job price discounts and other price concessions, including rebates, freight absorption, and credit extension, throughout 2008. (RPPF ¶ 182; Schumann, Tr. 4287:21-4288:1 (“yes, there was job pricing during 2008”), 4288:23-4289:1 (“I believe they did offer job pricing throughout 2008”), 4290:3-13.) He also admitted that he ignored McWane and Star spreadsheets and other documents recording each company's job discounts. (Schumann, Tr. 4082:3-11, 4084:16-4086:6 (“Well, I meant I didn't consider it”), 4086:21-4087:3 (“No, I did not”), 4090:3-9, 4091:9-23 (“No, I did not discuss this”).)).

This finding is incomplete, and therefore misleading because Star's independent attempt to reduce its job pricing was not successful, as reflected in the job prices it offered throughout 2008. (RPPF ¶ 166; McCutcheon, Tr. 2689-2690, 2540-2541 (Q: “And it sounded like from

your testimony yesterday that the company continued to offer a lot of job price discounts in 2008.” A: “Yes, sir.”); 2547-2548 (Q: “All right. Now, you had said yesterday that the company provided lots and lots of job prices during 2008; is that right?” A: “Yes, sir.”) & RX 557, 2550-2551 (Q: “All right. So the report you requested in July of 2011, and it contains a report of the pinks from 2008 final; right, sir?” A: “Yes, sir.”), 2553-2554 (Q: “All right. So am I right, Mr. McCutcheon, did I understand your testimony correctly yesterday that the company had job pricing and special prices throughout 2008; right?” A: “Yes, sir.”); Minamyer, Tr. 3174-3175 (Q: “Was Star successful at reducing project pricing for a period in time?” A: “To my recollection, no.”), 3274-3275 (Q: “And you were matching lowering prices below the published multiplier frequently; correct?” A: “I believe so.”), 3277-3278 (Q: “Okay. And I know you don't -- this has been some years ago and you don't have specific recollection, but what were the competitive conditions in 2008? What do you remember about that time frame?” A: “I remember that everything -- the market was always very competitive. We -- we had to fight pretty hard for every order.”)).).

This finding is incomplete, and therefore misleading because Star did not cease or curtail job pricing in 2008. (RPPF ¶ 167; McCutcheon, Tr. 2512). In fact, Star's special pricing requests, or SPRs, actually increased in 2008. (RPPF ¶ 167; McCutcheon, Tr. 2402-2403) (“And we've been looking at SPRs [special pricing requests] ever since this thing happened. Since we were accused of price fixing, we've gone back and looked at our SPRs, and we figured out that during this whole process that we were accused of price-fixing, our SPRs went up, 20 percent. And that's bizarre to us, that we could be accused of price fixing in a period that SPRs go up 20%.”)).).

This finding is incomplete, and therefore misleading because Star continued offering job pricing and other price concessions to its customers throughout 2008, 2009, 2010 and up through the present. (RPPF ¶ 170; McCutcheon, Tr. 2553-54 (“Q: “Do you see where I am, sir? January '08 267, February of '08 300, and so forth, down to the year end 2,669?” A: “Yes, sir.” Q: “Is that data that you saw in summary form?” A: “Yes, sir. I believe I got four years running with that information that's in the far right-hand column, that exact information in totals.” Q: “All right. So am I right, Mr. McCutcheon, did I understand your testimony correctly yesterday that the company had job pricing and special prices throughout 2008; right?” A: “Yes, sir.” Q: “And throughout 2009; right?” A: “Yes, sir.” Q: “And continuing to 2010?” A: “Yes, sir.” Q: “And continuing to today?” A: “Yes, sir.”); Minamy, Tr. 3265 (Q: “So again, in May of 2008, Star would continue to project-price under the right circumstances, and that would be to meet competition; correct?” A: “That's correct.”), 3275 (Q: “And you were matching lowering prices below the published multiplier frequently; correct?” A: “I believe so.”)).

This finding is incomplete, and therefore misleading because Star did not enter into any agreement with Sigma or McWane to stop offering price concessions to its customers. (RPPF ¶ 171; McCutcheon, Tr. 2554 (Q: “And did you at any time have any agreement to stop doing any of those things, any of those price concessions?” A: “No, sir.”)).

1411. The number of instances in which Star engaged in Project Pricing on all products (not just Fittings) dropped from 3,226 instances in 2007 to 2,669 in 2008. (CX 2570 at 001; *see* McCutcheon, Tr. 2685).

Response To Finding No. 1411:

Complaint Counsel was free to ask Star witnesses if it believed there were errors in the spreadsheet. To the extent they did not do so, they cannot argue now. This finding is incomplete, and therefore misleading because Star continued to offer job pricing at a rate of a couple hundred per month in 2008. (RPPF ¶ 172; Minamy, Tr. 3251-3252 (Q: “Do you recall

getting 10 to 15 pinks a day?” A: “I recall getting a lot of pinks routinely.” Q: “Okay. And that works out on business days to a couple hundred a month. Is that consistent with your recollection?” A: “Yes.”) & CX 815; McCutcheon, Tr. 2512 (Q: “That was not a fact. You did not stop pricing in -- job pricing in 2008, did you, sir?” A: “No, sir.”)).).

This finding is incomplete, and therefore misleading because Star priced job-priced whenever it needed to get business in 2008. (RPPF ¶ 173; Minamy, Tr. 3277-3278) (“Q. And you had a plan that you would try and limit job pricing, but we’ve seen that really didn’t play out either, did it? A. Right . . .Q.Okay. And Star job-priced whenever it needed to job price in 2008 to get business, didn’t it? A. Yes.”)). Star’s CEO, Mr. Bhutada, testified that job pricing was always the norm in the Fittings market, including in 2008. (RPPF ¶ 179; JX 694 (Bhutada, Dep. at 18-19)). Mr. McCutcheon testified that, during 2008, Fittings prices were falling, and “Every project required special pricing it seemed. It seemed like it was a -- projects were all auctioned, all the fitting manufacturers were bidding them, and there was just no consistency to our pricing.”). (RPPF ¶ 180; McCutcheon, Tr. 2568).

This finding is incomplete, and therefore misleading because Star’s alleged decreases in Job Pricing in 2008 can be explained by the known economic downturn that occurred in 2008, particularly in the second half of 2008. Complaint Counsel concedes that market conditions worsened “in August 2008 and thereafter.” (*Infra* ¶¶ 1436-1437). The collapse of the housing market in 2007-2008 triggered an economic recession that had a particularly adverse impact on the waterworks industry, which depends on new housing starts to drive demand. (RPPF ¶ 13; Tatman, Tr. 269 (“So, again, when you have a marketplace that has plummeted, I think, if you look at 2006 and then you look at 2010, the market volume is half of what it was in 2006. It was decimated. That changes a lot of behavior. It changes a lot of competitive dynamics”), 271-272

(Q: “The testimony that you just gave about the change in the market moving towards from more of a relationship, I’m going to call McWane because that’s my supplier -- that changed as a result of the downturn that began in 2006; is that right?” A: “My understanding, yes.” Q: “And it hastened in 2007 as the market got worse?” A: “The market was worse in '7 than '6. It was in '8 than '7. It was worse in '9 than '8. And it was worse in '10 than '9”); McCutcheon, Tr. 2654 (Q: “Do you recall the global financial crisis really going in --really hitting full steam in about September of 2008?” A: “Yes, sir, I recall that.” Q: “Okay. Did your business suffer to some -- suffer a drop-off as well in the fourth quarter of 2008?” A: “Yes, sir.”).) Average net prices for non-domestic Fittings were lower during the latter half of 2008 than during the first half of 2008. (RPPF ¶ 25; Tatman, Tr. 971-972 (Q: “Okay. Mr. Tatman, did the business improve after September of '08 for the rest of the year?” A: “No.” Q: “Did pricing get worse, sir?” A: “Worse.”); Pais, Tr. 2129-2131 (Q: “All right. So here you are in the second half of '08 and you say that prices -- there’s been an equally quick and sharp erosion in market pricing, and you say it’s an alarming double whammy. What did you mean by that, sir?” A: “Well, as I preface there with the volume dropping down and the prices falling, that is certainly a one-two punch.”) & RX 116, 2134-2135 (Q: “So a little while after DIFRA actually becomes operational, we see you say there’s been this equally quick and sharp erosion in market pricing, the double whammy, and you say it’s been especially severe in the southeast and especially in Florida; right, sir?” A: “Yes.”) & RX 115, 2137-2140, 2151 (Q: “All right. And when you said ‘pricing pressures,’ you’re referring to that sharp erosion in prices in the second half of 2008 after DIFRA was operational?” A: “Yes.”) & CX 1744; Rybacki, Tr. 3660-3661 (Q: “Did prices -- did your average prices go down in the second half of '08, sir?” A: “Our volumes went down. I don’t know -- I don’t think our average pricing -- you know, we tried to hold the line because volume was going down, but -

- but our volume definitely took a hit from August through September of '08.”), 3717-3719 (Q: “And in fact, Mr. Rybacki, pricing got worse in the second half of '08. We already saw that; right?” A: “Pricing got worse.”)).) Mr. Rybacki testified that, from a market perspective, “The second half of '08 turned gloomy.” (RPPF ¶ 26; Rybacki, Tr. 3702). During the second half of 2008, Sigma’s Fittings prices declined. (RPPF ¶ 267; Pais, Tr. 2129-2131 (“Q. This is an e-mail, sir, that you sent to Mr. Rybacki and others in the sales organization on November 24, 2008, so this is a few months after DIFRA started. A. Yes. Q. Okay. Now, you refer here, in the very first sentence, "Dear Larry, "With the severe contraction in market volume over the recent few weeks, the equally quick and sharp erosion in market pricing" -- had market prices been declining at Sigma, your prices had been declining since DIFRA was founded? A. Absolutely. Q. When you say "absolutely," sir, tell us what you're referring to here. A. Because in the second half the volume kept on dropping, and as you know, by September, there was a cataclysmic decline, and the prices were in a pretty steep decline because all suppliers were trying to grab whatever business there was. Q. All right. So here you are in the second half of '08 and you say that prices -- there's been an equally quick and sharp erosion in market pricing, and you say it's an alarming double whammy. What did you mean by that, sir? A. Well, as I preface there with the volume dropping down and the prices falling, that is certainly a one-two punch. Q. Okay. Now, when you saw this double whammy, did you call up anyone at McWane and say, "Hey, guys, let's all raise the price together"? A. No. Q. Okay. Let's scroll down if we can. You say, in the second sentence, "I suggest we do all we can to reverse it," and were you proposing to your team at Sigma that you announce an increase to see if you could reverse that? A. Well, either announce an increase or try and see where we were in the actual pricing and then try to hold the line towards high pricing, through multipliers. Q. And was that something you

were internally discussing at Sigma at the time? A. Yes. Q. Did you call up anyone at any competitor and discuss that with them? A. None. Q. Let's go to RX 115, and again, before we put it on the screen I'm going to ask the witness a few questions about it. Oh, I'm sorry. Can we go back for a second to RX 116. Can we highlight -- yeah. There's that third paragraph: "I suggest we do all we can to reverse it." Then in the next sentence, you say, "Though I am not sure if the trend is similar at other parts, too, it seems to be most severe in the southeast, especially in Florida." Is that what you said, sir? A. Yes. Q. Yeah. So was the price erosion, the sharp erosion, really severe in the fall of 2008, especially -- in the southeast but especially in Florida? A. It was."), RX 116; 2134-2135 ("Q. So a little while after DIFRA actually becomes operational, we see you say there's been this equally quick and sharp erosion in market pricing, the double whammy, and you say it's been especially severe in the southeast and especially in Florida; right, sir? A. Yes.") & RX 115, 2137-2140 ("Q. So Mr. Fox reports to you and the others that he believes, based on whatever information he has, that my client was actually lowering prices, leading to this sharp erosion in price in the southeast; correct? A. Yes. That's what he's trying to convey. Q. And then he says at the bottom of -- Then he says, at the bottom of that paragraph in the last sentence, "Interestingly, we have found Union/Tyler" -- and again, that's McWane; right, sir? A. Yes. Q. All right. Interestingly, we have found McWane leading markets downward in Tennessee and Alabama and the Carolinas. And that's the report you got from the guy in charge of Sigma of selling in those territories; right? A. Yes. Q. And all of these are reports you got about three and a half months after DIFRA actually started up; is that fair? A. That's correct. Q. All right. Now, if we go to the bottom of the second page -- well, I'm sorry. Let's go to the -- let's go to the first page. Down at the bottom. Now, here's an e-mail. It's quite a long e-mail, but we'll start here. This is an e-mail which you read and respond to your southeast

territory manager, regional manager, Mr. Fox; right, sir? A. Yes. Q. And if we scroll over and then go on to the next page, if we look at number 4 there, you say, "I am sure that Tyler is as guilty of starting the price decline as any of the other two of us." And that's what your view was; you thought Tyler might very well have started that price decline. A. Sure. Q. Right. Two sentences after that, you say, "Here, the culprit again may be the plant work or job pricing which is still priced as in a different manner and this dual pricing practice could be continuing to harm our overall pricing as it has over the past three to four years." Do you mean, sir, that here at the end of 2008 you had urged Mr. Rybacki and urged and urged him to change that plant work pricing, and he just had never done it, had he? A. Yes. Yeah. It sure seems that -- whether he did it or not I'm not sure, but it was not effective. And it also points to the fact that we were not trying to eliminate a special pricing, we were trying to minimize it, and apparently it has continued to be so, continued to be available to the salespeople.") (objections omitted), 2151 ("Q. All right. And when you said "pricing pressures," you're referring to that sharp erosion in prices in the second half of 2008 after DIFRA was operational? A. Yes.") & CX 1744); (Rybacki, Tr. 3660-3661 ("Q. Go ahead. Did prices -- did your average prices go down in the second half of '08, sir? A. Our volumes went down. I don't know -- I don't think our average pricing -- you know, we tried to hold the line because volume was going down, but -- but our volume definitely took a hit from August through September of '08. Q. Yeah. And if we look at some of your regions -- first of all, your price in the second half of '08 is different in every region; right? A. Yes. Q. And if we look at -- let's pick Alex City, the eighth month, so that's August, and if we can highlight that line. So in August, the average price for group A -- and group A is just your top-selling fittings of all sizes? Is that what that is? A. Correct. Q. All right. Your average price was a .28, but then it declined down to a .24 by the end of the year; right, sir,

Alex City? A. Yeah, that's correct. Q. And then if we look down at the Chicago area, it was .27, .28 in the middle of the year, declined down to .26 by the end of the year; right, sir? A. Correct.

Q. Mr. Rybacki, was there any time during 2008 when you discussed your job pricing with anyone at McWane and agreed upon let's reduce job pricing? A. Never.”), 3717-3719).)

1412. Star engaged in fewer instances of Project Pricing in 2008 than it had in 2007, even though there was a surge in Project Pricing in the February and March 2008 time period just prior to the effective date of the newly announced multiplier increases. (McCutcheon, Tr. 2403-2404; CX 2336 (Star price increase letter effective February 18, 2008); CX 0752 (Minamyer email indicating that Star’s prior pricing would remain effective through March 1, 2008)).

Response To Finding No. 1412:

See General Response 1. This finding is irrelevant because the comparison of the instances of Project Pricing in 2007 as compared to 2008 includes products that are beyond the scope of this case (i.e. “not just Fittings”). (*Infra* ¶ 1411).

This finding is internally inconsistent because Complaint Counsel’s findings (*Infra* ¶¶ 1411-1423) are based on Star’s SPPR’s which Complaint Counsel claims are: (1) “unreliable as evidence;” (2) “included numerous transactions in products other than Fittings and in locations outside the United States;” and, (3) included “entries for Project Pricing that had a start date prior to March 1, 2008,” “numerous instances of special pricing with effective dates within a month after March 1, 2008” and “numerous instances of special pricing that were approved after...November 25, 2008.” (*Infra* ¶¶ 1394-1409).

This finding is incomplete, and therefore misleading because Complaint Counsel’s expert, Dr. Schumann, concedes that McWane, Sigma, and Star all continued offering job pricing and other forms of customer discounts throughout all of 2008. (RPPF ¶ 141; Schumann, Tr. 4290-4291 (“So if we look at this waterfall of discounts, job pricing in the third line there, all three companies were offering job pricing throughout 2008; right? A: There was some job

pricing offered throughout 2008. Q: All three companies were offering freight concessions, and that's another form of a discount; right? A: I don't recall if all of them were or not. I know McWane was offering freight concessions to certain customers, not to others. Q: And that's a form of a discount; right? A: It can be. Yes. Q: And all three companies were offering rebates to purchasers of imported fittings; right? A: That's the standard. Yes. Q: That's another form of discount; right? A: Pardon me? Yes. Q: Another form of discount? A: Another form of discount. Q: And all three were offering other concessions, extension of credit terms, cash discounts, credit backs, and so forth; right? A: It is correct that there were other terms that were offered.”.)

This finding is incomplete, and therefore misleading because Dr. Schumann admitted that McWane, Sigma and Star all offered job price discounts and other price concessions, including rebates, freight absorption, and credit extension, throughout 2008. (RPPF ¶ 182; Schumann, Tr. 4287:21-4288:1 (“yes, there was job pricing during 2008”), 4288:23-4289:1 (“I believe they did offer job pricing throughout 2008”), 4290:3-13.) He also admitted that he ignored McWane and Star spreadsheets and other documents recording each company’s job discounts. (Schumann, Tr. 4082:3-11, 4084:16-4086:6 (“Well, I meant I didn’t consider it”), 4086:21-4087:3 (“No, I did not”), 4090:3-9, 4091:9-23 (“No, I did not discuss this”).)).

This finding is incomplete, and therefore misleading because Star’s independent attempt to reduce its job pricing was not successful, as reflected in the job prices it offered throughout 2008. (RPPF ¶ 166; McCutcheon, Tr. 2689-2690, 2540-2541 (Q: “And it sounded like from your testimony yesterday that the company continued to offer a lot of job price discounts in 2008.” A: “Yes, sir.”); 2547-2548 (Q: “All right. Now, you had said yesterday that the company provided lots and lots of job prices during 2008; is that right?” A: “Yes, sir.”) & RX 557, 2550-

2551 (Q: “All right. So the report you requested in July of 2011, and it contains a report of the pinks from 2008 final; right, sir?” A: “Yes, sir.”), 2553-2554 (Q: “All right. So am I right, Mr. McCutcheon, did I understand your testimony correctly yesterday that the company had job pricing and special prices throughout 2008; right?” A: “Yes, sir.”); Minamyer, Tr. 3174-3175 (Q: “Was Star successful at reducing project pricing for a period in time?” A: “To my recollection, no.”), 3274-3275 (Q: “And you were matching lowering prices below the published multiplier frequently; correct?” A: “I believe so.”), 3277-3278 (Q: “Okay. And I know you don't -- this has been some years ago and you don't have specific recollection, but what were the competitive conditions in 2008? What do you remember about that time frame?” A: “I remember that everything -- the market was always very competitive. We -- we had to fight pretty hard for every order.”)).).

This finding is incomplete, and therefore misleading because Star did not cease or curtail job pricing in 2008. (RPPF ¶ 167; McCutcheon, Tr. 2512). In fact, Star's special pricing requests, or SPRs, actually increased in 2008. (RPPF ¶ 167; McCutcheon, Tr. 2402-2403) (“And we've been looking at SPRs [special pricing requests] ever since this thing happened. Since we were accused of price fixing, we've gone back and looked at our SPRs, and we figured out that during this whole process that we were accused of price-fixing, our SPRs went up, 20 percent. And that's bizarre to us, that we could be accused of price fixing in a period that SPRs go up 20%.”)).).

This finding is incomplete, and therefore misleading because Star continued offering job pricing and other price concessions to its customers throughout 2008, 2009, 2010 and up through the present. (RPPF ¶ 170; McCutcheon, Tr. 2553-54 (“Q: “Do you see where I am, sir? January '08 267, February of '08 300, and so forth, down to the year end 2,669?” A: “Yes, sir.” Q: “Is that

data that you saw in summary form?” A: “Yes, sir. I believe I got four years running with that information that's in the far right-hand column, that exact information in totals.” Q: “All right. So am I right, Mr. McCutcheon, did I understand your testimony correctly yesterday that the company had job pricing and special prices throughout 2008; right?” A: “Yes, sir.” Q: “And throughout 2009; right?” A: “Yes, sir.” Q: “And continuing to 2010?” A: “Yes, sir.” Q: “And continuing to today?” A: “Yes, sir.”); Minamyers, Tr. 3265 (Q: “So again, in May of 2008, Star would continue to project-price under the right circumstances, and that would be to meet competition; correct?” A: “That's correct.”), 3275 (Q: “And you were matching lowering prices below the published multiplier frequently; correct?” A: “I believe so.”)).

This finding is incomplete, and therefore misleading because Star did not enter into any agreement with Sigma or McWane to stop offering price concessions to its customers. (RPPF ¶ 171; McCutcheon, Tr. 2554 (Q: “And did you at any time have any agreement to stop doing any of those things, any of those price concessions?” A: “No, sir.”)).)

This finding is incomplete, and therefore misleading because Star continued to offer job pricing at a rate of a couple hundred per month in 2008. (RPPF ¶ 172; Minamyers, Tr. 3251-3252 (Q: “Do you recall getting 10 to 15 pinks a day?” A: “I recall getting a lot of pinks routinely.” Q: “Okay. And that works out on business days to a couple hundred a month. Is that consistent with your recollection?” A: “Yes.”) & CX 815; McCutcheon, Tr. 2512 (Q: “That was not a fact. You did not stop pricing in -- job pricing in 2008, did you, sir?” A: “No, sir.”)).)

This finding is incomplete, and therefore misleading because Star priced job-priced whenever it needed to get business in 2008. (RPPF ¶ 173; Minamyers, Tr. 3277-3278) (“Q. And you had a plan that you would try and limit job pricing, but we've seen that really didn't play out either, did it? A. Right . . . Q. Okay. And Star job-priced whenever it needed to job price in 2008

to get business, didn't it? A. Yes.”). Star's CEO, Mr. Bhutada, testified that job pricing was always the norm in the Fittings market, including in 2008. (RPPF ¶ 179; JX 694 (Bhutada, Dep. at 18-19)). Mr. McCutcheon testified that, during 2008, Fittings prices were falling, and “Every project required special pricing it seemed. It seemed like it was a -- projects were all auctioned, all the fitting manufacturers were bidding them, and there was just no consistency to our pricing.”). (RPPF ¶ 180; McCutcheon, Tr. 2568).

This finding is incomplete, and therefore misleading because Star's alleged decreases in Job Pricing in 2008 can be explained by the known economic downturn that occurred in 2008, particularly in the second half of 2008. Complaint Counsel concedes that market conditions worsened “in August 2008 and thereafter.” (*Infra* ¶¶ 1436-1437). The collapse of the housing market in 2007-2008 triggered an economic recession that had a particularly adverse impact on the waterworks industry, which depends on new housing starts to drive demand. (RPPF ¶ 13; Tatman, Tr. 269 (“So, again, when you have a marketplace that has plummeted, I think, if you look at 2006 and then you look at 2010, the market volume is half of what it was in 2006. It was decimated. That changes a lot of behavior. It changes a lot of competitive dynamics”), 271-272 (Q: “The testimony that you just gave about the change in the market moving towards from more of a relationship, I'm going to call McWane because that's my supplier -- that changed as a result of the downturn that began in 2006; is that right?” A: “My understanding, yes.” Q: “And it hastened in 2007 as the market got worse?” A: “The market was worse in '7 than '6. It was in '8 than '7. It was worse in '9 than '8. And it was worse in '10 than '9”); McCutcheon, Tr. 2654 (Q: “Do you recall the global financial crisis really going in --really hitting full steam in about September of 2008?” A: “Yes, sir, I recall that.” Q: “Okay. Did your business suffer to some -- suffer a drop-off as well in the fourth quarter of 2008?” A: “Yes, sir.”)).) Average net prices for

non-domestic Fittings were lower during the latter half of 2008 than during the first half of 2008. (RPPF ¶ 25; Tatman, Tr. 971-972 (Q: “Okay. Mr. Tatman, did the business improve after September of '08 for the rest of the year?” A: “No.” Q: “Did pricing get worse, sir?” A: “Worse.”); Pais, Tr. 2129-2131 (Q: “All right. So here you are in the second half of '08 and you say that prices -- there's been an equally quick and sharp erosion in market pricing, and you say it's an alarming double whammy. What did you mean by that, sir?” A: “Well, as I preface there with the volume dropping down and the prices falling, that is certainly a one-two punch.”) & RX 116, 2134-2135 (Q: “So a little while after DIFRA actually becomes operational, we see you say there's been this equally quick and sharp erosion in market pricing, the double whammy, and you say it's been especially severe in the southeast and especially in Florida; right, sir?” A: “Yes.”) & RX 115, 2137-2140, 2151 (Q: “All right. And when you said ‘pricing pressures,’ you're referring to that sharp erosion in prices in the second half of 2008 after DIFRA was operational?” A: “Yes.”) & CX 1744; Rybacki, Tr. 3660-3661 (Q: “Did prices -- did your average prices go down in the second half of '08, sir?” A: “Our volumes went down. I don't know -- I don't think our average pricing -- you know, we tried to hold the line because volume was going down, but - - but our volume definitely took a hit from August through September of '08.”), 3717-3719 (Q: “And in fact, Mr. Rybacki, pricing got worse in the second half of '08. We already saw that; right?” A: “Pricing got worse.”).) Mr. Rybacki testified that, from a market perspective, “The second half of '08 turned gloomy.” (RPPF ¶ 26; Rybacki, Tr. 3702). During the second half of 2008, Sigma’s Fittings prices declined. (RPPF ¶ 267; Pais, Tr. 2129-2131 (“Q. This is an e-mail, sir, that you sent to Mr. Rybacki and others in the sales organization on November 24, 2008, so this is a few months after DIFRA started. A. Yes. Q. Okay. Now, you refer here, in the very first sentence, "Dear Larry, "With the severe contraction in market volume over the recent few

weeks, the equally quick and sharp erosion in market pricing" -- had market prices been declining at Sigma, your prices had been declining since DIFRA was founded? A. Absolutely.

Q. When you say "absolutely," sir, tell us what you're referring to here. A. Because in the second half the volume kept on dropping, and as you know, by September, there was a cataclysmic decline, and the prices were in a pretty steep decline because all suppliers were trying to grab whatever business there was. Q. All right. So here you are in the second half of '08 and you say that prices -- there's been an equally quick and sharp erosion in market pricing, and you say it's an alarming double whammy. What did you mean by that, sir? A. Well, as I preface there with the volume dropping down and the prices falling, that is certainly a one-two punch. Q. Okay. Now, when you saw this double whammy, did you call up anyone at McWane and say, "Hey, guys, let's all raise the price together"? A. No. Q. Okay. Let's scroll down if we can. You say, in the second sentence, "I suggest we do all we can to reverse it," and were you proposing to your team at Sigma that you announce an increase to see if you could reverse that? A. Well, either announce an increase or try and see where we were in the actual pricing and then try to hold the line towards high pricing, through multipliers. Q. And was that something you were internally discussing at Sigma at the time? A. Yes. Q. Did you call up anyone at any competitor and discuss that with them? A. None. Q. Let's go to RX 115, and again, before we put it on the screen I'm going to ask the witness a few questions about it. Oh, I'm sorry. Can we go back for a second to RX 116. Can we highlight -- yeah. There's that third paragraph: "I suggest we do all we can to reverse it." Then in the next sentence, you say, "Though I am not sure if the trend is similar at other parts, too, it seems to be most severe in the southeast, especially in Florida." Is that what you said, sir? A. Yes. Q. Yeah. So was the price erosion, the sharp erosion, really severe in the fall of 2008, especially -- in the southeast but especially in

Florida? A. It was.”), RX 116; 2134-2135 (“Q. So a little while after DIFRA actually becomes operational, we see you say there's been this equally quick and sharp erosion in market pricing, the double whammy, and you say it's been especially severe in the southeast and especially in Florida; right, sir? A. Yes.”) & RX 115, 2137-2140 (“Q. So Mr. Fox reports to you and the others that he believes, based on whatever information he has, that my client was actually lowering prices, leading to this sharp erosion in price in the southeast; correct? A. Yes. That's what he's trying to convey. Q. And then he says at the bottom of -- Then he says, at the bottom of that paragraph in the last sentence, "Interestingly, we have found Union/Tyler" -- and again, that's McWane; right, sir? A. Yes. Q. All right. Interestingly, we have found McWane leading markets downward in Tennessee and Alabama and the Carolinas. And that's the report you got from the guy in charge of Sigma of selling in those territories; right? A. Yes. Q. And all of these are reports you got about three and a half months after DIFRA actually started up; is that fair? A. That's correct. Q. All right. Now, if we go to the bottom of the second page -- well, I'm sorry. Let's go to the -- let's go to the first page. Down at the bottom. Now, here's an e-mail. It's quite a long e-mail, but we'll start here. This is an e-mail which you read and respond to your southeast territory manager, regional manager, Mr. Fox; right, sir? A. Yes. Q. And if we scroll over and then go on to the next page, if we look at number 4 there, you say, "I am sure that Tyler is as guilty of starting the price decline as any of the other two of us." And that's what your view was; you thought Tyler might very well have started that price decline. A. Sure. Q. Right. Two sentences after that, you say, "Here, the culprit again may be the plant work or job pricing which is still priced as in a different manner and this dual pricing practice could be continuing to harm our overall pricing as it has over the past three to four years." Do you mean, sir, that here at the end of 2008 you had urged Mr. Rybacki and urged and urged him to change that plant work

pricing, and he just had never done it, had he? A. Yes. Yeah. It sure seems that -- whether he did it or not I'm not sure, but it was not effective. And it also points to the fact that we were not trying to eliminate a special pricing, we were trying to minimize it, and apparently it has continued to be so, continued to be available to the salespeople.”) (objections omitted), 2151 (“Q. All right. And when you said "pricing pressures," you're referring to that sharp erosion in prices in the second half of 2008 after DIFRA was operational? A. Yes.”) & CX 1744); (Rybacki, Tr. 3660-3661 (“Q. Go ahead. Did prices -- did your average prices go down in the second half of '08, sir? A. Our volumes went down. I don't know -- I don't think our average pricing -- you know, we tried to hold the line because volume was going down, but -- but our volume definitely took a hit from August through September of '08. Q. Yeah. And if we look at some of your regions -- first of all, your price in the second half of '08 is different in every region; right? A. Yes. Q. And if we look at -- let's pick Alex City, the eighth month, so that's August, and if we can highlight that line. So in August, the average price for group A -- and group A is just your top-selling fittings of all sizes? Is that what that is? A. Correct. Q. All right. Your average price was a .28, but then it declined down to a .24 by the end of the year; right, sir, Alex City? A. Yeah, that's correct. Q. And then if we look down at the Chicago area, it was .27, .28 in the middle of the year, declined down to .26 by the end of the year; right, sir? A. Correct. Q. Mr. Rybacki, was there any time during 2008 when you discussed your job pricing with anyone at McWane and agreed upon let's reduce job pricing? A. Never.”), 3717-3719).)

1413. The decrease in Star’s Project Pricing from 2007 to 2008 occurred despite the fact that Star enacted multiplier increases twice during 2008 – an action that ordinarily has the effect of creating a spike in Project Pricing as the new prices are implemented. (McCutcheon, Tr. 2403-3404, 2406; *see also*, CX1566 (Star’s January 2009 increase letter to HD); CX2430 (Star’s June 2008 multiplier increase letter to customers with a 0.30 multiplier).

Response To Finding No. 1413:

See General Response 1. This finding is irrelevant because the comparison of the instances of Project Pricing in 2007 as compared to 2008 includes products that are beyond the scope of this case (i.e. “not just Fittings”). (*Infra* ¶ 1411).

This finding is internally inconsistent because Complaint Counsel’s findings *Infra* ¶¶ 1411-1423 are based on Star’s SPPR’s which Complaint Counsel claims are: (1) “unreliable as evidence;” (2) “included numerous transactions in products other than Fittings and in locations outside the United States;” and, (3) included “entries for Project Pricing that had a start date prior to March 1, 2008,” “numerous instances of special pricing with effective dates within a month after March 1, 2008” and “numerous instances of special pricing that were approved after...November 25, 2008.” (*Infra* ¶¶ 1394-1409).

This finding is incomplete, and therefore misleading because Complaint Counsel’s expert, Dr. Schumann, concedes that McWane, Sigma, and Star all continued offering job pricing and other forms of customer discounts throughout all of 2008. (RPPF ¶ 141; Schumann, Tr. 4290-4291 (“So if we look at this waterfall of discounts, job pricing in the third line there, all three companies were offering job pricing throughout 2008; right? A: There was some job pricing offered throughout 2008. Q: All three companies were offering freight concessions, and that's another form of a discount; right, sir? A: I don't recall if all of them were or not. I know McWane was offering freight concessions to certain customers, not to others. Q: And that's a form of a discount; right? A: It can be. Yes. Q: And all three companies were offering rebates to purchasers of imported fittings; right? A: That's the standard. Yes. Q: That's another form of discount; right? A: Pardon me? Yes. Q: Another form of discount? A: Another form of discount. Q: And all three were offering other concessions, extension of credit terms, cash

discounts, credit backs, and so forth; right? A: It is correct that there were other terms that were offered.”.)

This finding is incomplete, and therefore misleading because Dr. Schumann admitted that McWane, Sigma and Star all offered job price discounts and other price concessions, including rebates, freight absorption, and credit extension, throughout 2008. (RPPF ¶ 182; Schumann, Tr. 4287:21-4288:1 (“yes, there was job pricing during 2008”), 4288:23-4289:1 (“I believe they did offer job pricing throughout 2008”), 4290:3-13.) He also admitted that he ignored McWane and Star spreadsheets and other documents recording each company’s job discounts. (Schumann, Tr. 4082:3-11, 4084:16-4086:6 (“Well, I meant I didn’t consider it”), 4086:21-4087:3 (“No, I did not”), 4090:3-9, 4091:9-23 (“No, I did not discuss this”).).

This finding is incomplete, and therefore misleading because Star’s independent attempt to reduce its job pricing was not successful, as reflected in the job prices it offered throughout 2008. (RPPF ¶ 166; McCutcheon, Tr. 2689-2690, 2540-2541 (Q: “And it sounded like from your testimony yesterday that the company continued to offer a lot of job price discounts in 2008.” A: “Yes, sir.”); 2547-2548 (Q: “All right. Now, you had said yesterday that the company provided lots and lots of job prices during 2008; is that right?” A: “Yes, sir.”) & RX 557, 2550-2551 (Q: “All right. So the report you requested in July of 2011, and it contains a report of the pinks from 2008 final; right, sir?” A: “Yes, sir.”), 2553-2554 (Q: “All right. So am I right, Mr. McCutcheon, did I understand your testimony correctly yesterday that the company had job pricing and special prices throughout 2008; right?” A: “Yes, sir.”); Minamy, Tr. 3174-3175 (Q: “Was Star successful at reducing project pricing for a period in time?” A: “To my recollection, no.”), 3274-3275 (Q: “And you were matching lowering prices below the published multiplier frequently; correct?” A: “I believe so.”), 3277-3278 (Q: “Okay. And I know you don’t

-- this has been some years ago and you don't have specific recollection, but what were the competitive conditions in 2008? What do you remember about that time frame?" A: "I remember that everything -- the market was always very competitive. We -- we had to fight pretty hard for every order.")).).

This finding is incomplete, and therefore misleading because Star did not cease or curtail job pricing in 2008. (RPPF ¶ 167; McCutcheon, Tr. 2512). In fact, Star's special pricing requests, or SPRs, actually increased in 2008. (RPPF ¶ 167; McCutcheon, Tr. 2402-2403) ("And we've been looking at SPRs [special pricing requests] ever since this thing happened. Since we were accused of price fixing, we've gone back and looked at our SPRs, and we figured out that during this whole process that we were accused of price-fixing, our SPRs went up, 20 percent. And that's bizarre to us, that we could be accused of price fixing in a period that SPRs go up 20%.").).

This finding is incomplete, and therefore misleading because Star continued offering job pricing and other price concessions to its customers throughout 2008, 2009, 2010 and up through the present. (RPPF ¶ 170; McCutcheon, Tr. 2553-54 ("Q: "Do you see where I am, sir? January '08 267, February of '08 300, and so forth, down to the year end 2,669?" A: "Yes, sir." Q: "Is that data that you saw in summary form?" A: "Yes, sir. I believe I got four years running with that information that's in the far right-hand column, that exact information in totals." Q: "All right. So am I right, Mr. McCutcheon, did I understand your testimony correctly yesterday that the company had job pricing and special prices throughout 2008; right?" A: "Yes, sir." Q: "And throughout 2009; right?" A: "Yes, sir." Q: "And continuing to 2010?" A: "Yes, sir." Q: "And continuing to today?" A: "Yes, sir."); Minamy, Tr. 3265 (Q: "So again, in May of 2008, Star would continue to project-price under the right circumstances, and that would be to meet

competition; correct?” A: “That's correct.”), 3275 (Q: “And you were matching lowering prices below the published multiplier frequently; correct?” A: “I believe so.”).).

This finding is incomplete, and therefore misleading because Star did not enter into any agreement with Sigma or McWane to stop offering price concessions to its customers. (RPPF ¶ 171; McCutcheon, Tr. 2554 (Q: “And did you at any time have any agreement to stop doing any of those things, any of those price concessions?” A: “No, sir.”).).

This finding is incomplete, and therefore misleading because Star continued to offer job pricing at a rate of a couple hundred per month in 2008. (RPPF ¶ 172; Minamyler, Tr. 3251-3252 (Q: “Do you recall getting 10 to 15 pinks a day?” A: “I recall getting a lot of pinks routinely.” Q: “Okay. And that works out on business days to a couple hundred a month. Is that consistent with your recollection?” A: “Yes.”) & CX 815; McCutcheon, Tr. 2512 (Q: “That was not a fact. You did not stop pricing in -- job pricing in 2008, did you, sir?” A: “No, sir.”).).

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with the volume dropping down and the prices falling, that is certainly a one-two punch.”) & RX 116, 2134-2135 (Q: “So a little while after DIFRA actually becomes operational, we see you say there's been this equally quick and sharp erosion in market pricing, the double whammy, and you say it's been especially severe in the southeast and especially in Florida; right, sir?” A: “Yes.”) & RX 115, 2137-2140, 2151 (Q: “All right. And when you said ‘pricing pressures,’ you're referring to that sharp erosion in prices in the second half of 2008 after DIFRA was operational?” A: “Yes.”) & CX 1744; Rybacki, Tr. 3660-3661 (Q: “Did prices -- did your average prices go down in the second half of '08, sir?” A: “Our volumes went down. I don't know -- I don't think our average pricing -- you know, we tried to hold the line because volume was going down, but - - but our volume definitely took a hit from August through September of '08.”), 3717-3719 (Q: “And in fact, Mr. Rybacki, pricing got worse in the second half of '08. We already saw that; right?” A: “Pricing got worse.”).) Mr. Rybacki testified that, from a market perspective, “The second half of '08 turned gloomy.” (RPPF ¶ 26; Rybacki, Tr. 3702). During the second half of 2008, Sigma’s Fittings prices declined. (RPPF ¶ 267; Pais, Tr. 2129-2131 (“Q. This is an e-mail, sir, that you sent to Mr. Rybacki and others in the sales organization on November 24, 2008, so this is a few months after DIFRA started. A. Yes. Q. Okay. Now, you refer here, in the very first sentence, "Dear Larry, "With the severe contraction in market volume over the recent few weeks, the equally quick and sharp erosion in market pricing" -- had market prices been declining at Sigma, your prices had been declining since DIFRA was founded? A. Absolutely. Q. When you say "absolutely," sir, tell us what you're referring to here. A. Because in the second half the volume kept on dropping, and as you know, by September, there was a cataclysmic decline, and the prices were in a pretty steep decline because all suppliers were trying to grab whatever business there was. Q. All right. So here you are in the second half of

'08 and you say that prices -- there's been an equally quick and sharp erosion in market pricing, and you say it's an alarming double whammy. What did you mean by that, sir? A. Well, as I preface there with the volume dropping down and the prices falling, that is certainly a one-two punch. Q. Okay. Now, when you saw this double whammy, did you call up anyone at McWane and say, "Hey, guys, let's all raise the price together"? A. No. Q. Okay. Let's scroll down if we can. You say, in the second sentence, "I suggest we do all we can to reverse it," and were you proposing to your team at Sigma that you announce an increase to see if you could reverse that? A. Well, either announce an increase or try and see where we were in the actual pricing and then try to hold the line towards high pricing, through multipliers. Q. And was that something you were internally discussing at Sigma at the time? A. Yes. Q. Did you call up anyone at any competitor and discuss that with them? A. None. Q. Let's go to RX 115, and again, before we put it on the screen I'm going to ask the witness a few questions about it. Oh, I'm sorry. Can we go back for a second to RX 116. Can we highlight -- yeah. There's that third paragraph: "I suggest we do all we can to reverse it." Then in the next sentence, you say, "Though I am not sure if the trend is similar at other parts, too, it seems to be most severe in the southeast, especially in Florida." Is that what you said, sir? A. Yes. Q. Yeah. So was the price erosion, the sharp erosion, really severe in the fall of 2008, especially -- in the southeast but especially in Florida? A. It was."), RX 116; 2134-2135 ("Q. So a little while after DIFRA actually becomes operational, we see you say there's been this equally quick and sharp erosion in market pricing, the double whammy, and you say it's been especially severe in the southeast and especially in Florida; right, sir? A. Yes.") & RX 115, 2137-2140 ("Q. So Mr. Fox reports to you and the others that he believes, based on whatever information he has, that my client was actually lowering prices, leading to this sharp erosion in price in the southeast; correct? A. Yes. That's

what he's trying to convey. Q. And then he says at the bottom of -- Then he says, at the bottom of that paragraph in the last sentence, "Interestingly, we have found Union/Tyler" -- and again, that's McWane; right, sir? A. Yes. Q. All right. Interestingly, we have found McWane leading markets downward in Tennessee and Alabama and the Carolinas. And that's the report you got from the guy in charge of Sigma of selling in those territories; right? A. Yes. Q. And all of these are reports you got about three and a half months after DIFRA actually started up; is that fair? A. That's correct. Q. All right. Now, if we go to the bottom of the second page -- well, I'm sorry. Let's go to the -- let's go to the first page. Down at the bottom. Now, here's an e-mail. It's quite a long e-mail, but we'll start here. This is an e-mail which you read and respond to your southeast territory manager, regional manager, Mr. Fox; right, sir? A. Yes. Q. And if we scroll over and then go on to the next page, if we look at number 4 there, you say, "I am sure that Tyler is as guilty of starting the price decline as any of the other two of us." And that's what your view was; you thought Tyler might very well have started that price decline. A. Sure. Q. Right. Two sentences after that, you say, "Here, the culprit again may be the plant work or job pricing which is still priced as in a different manner and this dual pricing practice could be continuing to harm our overall pricing as it has over the past three to four years." Do you mean, sir, that here at the end of 2008 you had urged Mr. Rybacki and urged and urged him to change that plant work pricing, and he just had never done it, had he? A. Yes. Yeah. It sure seems that -- whether he did it or not I'm not sure, but it was not effective. And it also points to the fact that we were not trying to eliminate a special pricing, we were trying to minimize it, and apparently it has continued to be so, continued to be available to the salespeople.") (objections omitted), 2151 ("Q. All right. And when you said "pricing pressures," you're referring to that sharp erosion in prices in the second half of 2008 after DIFRA was operational? A. Yes.") & CX 1744);

(Rybacki, Tr. 3660-3661 (“Q. Go ahead. Did prices -- did your average prices go down in the second half of '08, sir? A. Our volumes went down. I don't know -- I don't think our average pricing -- you know, we tried to hold the line because volume was going down, but -- but our volume definitely took a hit from August through September of '08. Q. Yeah. And if we look at some of your regions -- first of all, your price in the second half of '08 is different in every region; right? A. Yes. Q. And if we look at -- let's pick Alex City, the eighth month, so that's August, and if we can highlight that line. So in August, the average price for group A -- and group A is just your top-selling fittings of all sizes? Is that what that is? A. Correct. Q. All right. Your average price was a .28, but then it declined down to a .24 by the end of the year; right, sir, Alex City? A. Yeah, that's correct. Q. And then if we look down at the Chicago area, it was .27, .28 in the middle of the year, declined down to .26 by the end of the year; right, sir? A. Correct. Q. Mr. Rybacki, was there any time during 2008 when you discussed your job pricing with anyone at McWane and agreed upon let's reduce job pricing? A. Never.”), 3717-3719).)

1414. When Star announces a price increase, whether through an increase in the list price or the published multiplier, there is generally a significant increase in special pricing requests before the new price takes effect. The requests for special pricing will then taper off soon after the new price takes effect. (CX 2538 (McCutcheon, IHT (Vol. 2) at 378-379) (“Special pricing requests . . . stay really high after the date that it’s suppose[d] to start and then it kind of tapers off, and it – that happens on a very regular basis.”)).

Response To Finding No. 1414:

See General Response 1.

1415. Assuming the accuracy of the SPPRs and counting all entries as if they were unique instances of Project Prices and related to Fittings, Star offered Project Pricing in 242 instances in March 2007, but only 204 instances in March 2008. (CX 2570 at 001; see McCutcheon, Tr. 2685).

Response To Finding No. 1415:

See General Response 1. This finding is internally inconsistent because Complaint Counsel’s findings (*Infra* ¶¶ 1411-1423) are based on Star’s SPPR’s which Complaint Counsel

claims are: (1) “unreliable as evidence;” (2) “included numerous transactions in products other than Fittings and in locations outside the United States;” and, (3) included “entries for Project Pricing that had a start date prior to March 1, 2008,” “numerous instances of special pricing with effective dates within a month after March 1, 2008” and “numerous instances of special pricing that were approved after...November 25, 2008.” (*Infra* ¶¶ 1394-1409)

This finding is incomplete, and therefore misleading because Star’s alleged decreases in Job Pricing in 2008 can be explained by the known economic downturn that occurred in 2008, particularly in the second half of 2008. Complaint Counsel concedes that market conditions worsened “in August 2008 and thereafter.” (*Infra* ¶¶ 1436-1437). The collapse of the housing market in 2007-2008 triggered an economic recession that had a particularly adverse impact on the waterworks industry, which depends on new housing starts to drive demand. (RPPF ¶ 13; Tatman, Tr. 269 (“So, again, when you have a marketplace that has plummeted, I think, if you look at 2006 and then you look at 2010, the market volume is half of what it was in 2006. It was decimated. That changes a lot of behavior. It changes a lot of competitive dynamics”), 271-272 (Q: “The testimony that you just gave about the change in the market moving towards from more of a relationship, I’m going to call McWane because that’s my supplier -- that changed as a result of the downturn that began in 2006; is that right?” A: “My understanding, yes.” Q: “And it hastened in 2007 as the market got worse?” A: “The market was worse in '7 than '6. It was in '8 than '7. It was worse in '9 than '8. And it was worse in '10 than '9”); McCutcheon, Tr. 2654 (Q: “Do you recall the global financial crisis really going in --really hitting full steam in about September of 2008?” A: “Yes, sir, I recall that.” Q: “Okay. Did your business suffer to some -- suffer a drop-off as well in the fourth quarter of 2008?” A: “Yes, sir.”)).) Average net prices for non-domestic Fittings were lower during the latter half of 2008 than during the first half of 2008.

(RPPF ¶ 25; Tatman, Tr. 971-972 (Q: “Okay. Mr. Tatman, did the business improve after September of '08 for the rest of the year?” A: “No.” Q: “Did pricing get worse, sir?” A: “Worse.”); Pais, Tr. 2129-2131 (Q: “All right. So here you are in the second half of '08 and you say that prices -- there's been an equally quick and sharp erosion in market pricing, and you say it's an alarming double whammy. What did you mean by that, sir?” A: “Well, as I preface there with the volume dropping down and the prices falling, that is certainly a one-two punch.”) & RX 116, 2134-2135 (Q: “So a little while after DIFRA actually becomes operational, we see you say there's been this equally quick and sharp erosion in market pricing, the double whammy, and you say it's been especially severe in the southeast and especially in Florida; right, sir?” A: “Yes.”) & RX 115, 2137-2140, 2151 (Q: “All right. And when you said ‘pricing pressures,’ you're referring to that sharp erosion in prices in the second half of 2008 after DIFRA was operational?” A: “Yes.”) & CX 1744; Rybacki, Tr. 3660-3661 (Q: “Did prices -- did your average prices go down in the second half of '08, sir?” A: “Our volumes went down. I don't know -- I don't think our average pricing -- you know, we tried to hold the line because volume was going down, but - - but our volume definitely took a hit from August through September of '08.”), 3717-3719 (Q: “And in fact, Mr. Rybacki, pricing got worse in the second half of '08. We already saw that; right?” A: “Pricing got worse.”).) Mr. Rybacki testified that, from a market perspective, “The second half of '08 turned gloomy.” (RPPF ¶ 26; Rybacki, Tr. 3702). During the second half of 2008, Sigma’s Fittings prices declined. (RPPF ¶ 267; Pais, Tr. 2129-2131 (“Q. This is an e-mail, sir, that you sent to Mr. Rybacki and others in the sales organization on November 24, 2008, so this is a few months after DIFRA started. A. Yes. Q. Okay. Now, you refer here, in the very first sentence, "Dear Larry, "With the severe contraction in market volume over the recent few weeks, the equally quick and sharp erosion in market pricing" -- had market prices been

declining at Sigma, your prices had been declining since DIFRA was founded? A. Absolutely.

Q. When you say "absolutely," sir, tell us what you're referring to here. A. Because in the

second half the volume kept on dropping, and as you know, by September, there was a cataclysmic decline, and the prices were in a pretty steep decline because all suppliers were

trying to grab whatever business there was. Q. All right. So here you are in the second half of '08 and you say that prices -- there's been an equally quick and sharp erosion in market pricing,

and you say it's an alarming double whammy. What did you mean by that, sir? A. Well, as I preface there with the volume dropping down and the prices falling, that is certainly a one-two

punch. Q. Okay. Now, when you saw this double whammy, did you call up anyone at McWane

and say, "Hey, guys, let's all raise the price together"? A. No. Q. Okay. Let's scroll down if we

can. You say, in the second sentence, "I suggest we do all we can to reverse it," and were you proposing to your team at Sigma that you announce an increase to see if you could reverse that?

A. Well, either announce an increase or try and see where we were in the actual pricing and then try to hold the line towards high pricing, through multipliers. Q. And was that something you

were internally discussing at Sigma at the time? A. Yes. Q. Did you call up anyone at any

competitor and discuss that with them? A. None. Q. Let's go to RX 115, and again, before we put it on the screen I'm going to ask the witness a few questions about it. Oh, I'm sorry. Can we

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sure if the trend is similar at other parts, too, it seems to be most severe in the southeast,

especially in Florida." Is that what you said, sir? A. Yes. Q. Yeah. So was the price erosion,

the sharp erosion, really severe in the fall of 2008, especially -- in the southeast but especially in

Florida? A. It was."), RX 116; 2134-2135 ("Q. So a little while after DIFRA actually becomes

operational, we see you say there's been this equally quick and sharp erosion in market pricing, the double whammy, and you say it's been especially severe in the southeast and especially in Florida; right, sir? A. Yes.”) & RX 115, 2137-2140 (“Q. So Mr. Fox reports to you and the others that he believes, based on whatever information he has, that my client was actually lowering prices, leading to this sharp erosion in price in the southeast; correct? A. Yes. That's what he's trying to convey. Q. And then he says at the bottom of -- Then he says, at the bottom of that paragraph in the last sentence, "Interestingly, we have found Union/Tyler" -- and again, that's McWane; right, sir? A. Yes. Q. All right. Interestingly, we have found McWane leading markets downward in Tennessee and Alabama and the Carolinas. And that's the report you got from the guy in charge of Sigma of selling in those territories; right? A. Yes. Q. And all of these are reports you got about three and a half months after DIFRA actually started up; is that fair? A. That's correct. Q. All right. Now, if we go to the bottom of the second page -- well, I'm sorry. Let's go to the -- let's go to the first page. Down at the bottom. Now, here's an e-mail. It's quite a long e-mail, but we'll start here. This is an e-mail which you read and respond to your southeast territory manager, regional manager, Mr. Fox; right, sir? A. Yes. Q. And if we scroll over and then go on to the next page, if we look at number 4 there, you say, "I am sure that Tyler is as guilty of starting the price decline as any of the other two of us." And that's what your view was; you thought Tyler might very well have started that price decline. A. Sure. Q. Right. Two sentences after that, you say, "Here, the culprit again may be the plant work or job pricing which is still priced as in a different manner and this dual pricing practice could be continuing to harm our overall pricing as it has over the past three to four years." Do you mean, sir, that here at the end of 2008 you had urged Mr. Rybacki and urged and urged him to change that plant work pricing, and he just had never done it, had he? A. Yes. Yeah. It sure seems that -- whether he did

it or not I'm not sure, but it was not effective. And it also points to the fact that we were not trying to eliminate a special pricing, we were trying to minimize it, and apparently it has continued to be so, continued to be available to the salespeople.”) (objections omitted), 2151 (“Q. All right. And when you said "pricing pressures," you're referring to that sharp erosion in prices in the second half of 2008 after DIFRA was operational? A. Yes.”) & CX 1744); (Rybacki, Tr. 3660-3661 (“Q. Go ahead. Did prices -- did your average prices go down in the second half of '08, sir? A. Our volumes went down. I don't know -- I don't think our average pricing -- you know, we tried to hold the line because volume was going down, but -- but our volume definitely took a hit from August through September of '08. Q. Yeah. And if we look at some of your regions -- first of all, your price in the second half of '08 is different in every region; right? A. Yes. Q. And if we look at -- let's pick Alex City, the eighth month, so that's August, and if we can highlight that line. So in August, the average price for group A -- and group A is just your top-selling fittings of all sizes? Is that what that is? A. Correct. Q. All right. Your average price was a .28, but then it declined down to a .24 by the end of the year; right, sir, Alex City? A. Yeah, that's correct. Q. And then if we look down at the Chicago area, it was .27, .28 in the middle of the year, declined down to .26 by the end of the year; right, sir? A. Correct. Q. Mr. Rybacki, was there any time during 2008 when you discussed your job pricing with anyone at McWane and agreed upon let's reduce job pricing? A. Never.”), 3717-3719).)

1416. Assuming the accuracy of the SPPRs and counting all entries as if they were unique instances of Project Prices and related to Fittings, Star offered Project Pricing in 265 instances in May 2007, but only 229 instances in May 2008. (CX 2570 at 001; *see* McCutcheon, Tr. 2686).

Response To Finding No. 1416:

See General Response 1. This finding is internally inconsistent because Complaint Counsel’s findings (*Infra ¶¶ 1411-1423*) are based on Star’s SPPR’s which Complaint Counsel

claims are: (1) “unreliable as evidence;” (2) “included numerous transactions in products other than Fittings and in locations outside the United States;” and, (3) included “entries for Project Pricing that had a start date prior to March 1, 2008,” “numerous instances of special pricing with effective dates within a month after March 1, 2008” and “numerous instances of special pricing that were approved after...November 25, 2008.” (*Infra* ¶¶ 1394-1409)

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(RPPF ¶ 25; Tatman, Tr. 971-972 (Q: “Okay. Mr. Tatman, did the business improve after September of '08 for the rest of the year?” A: “No.” Q: “Did pricing get worse, sir?” A: “Worse.”); Pais, Tr. 2129-2131 (Q: “All right. So here you are in the second half of '08 and you say that prices -- there's been an equally quick and sharp erosion in market pricing, and you say it's an alarming double whammy. What did you mean by that, sir?” A: “Well, as I preface there with the volume dropping down and the prices falling, that is certainly a one-two punch.”) & RX 116, 2134-2135 (Q: “So a little while after DIFRA actually becomes operational, we see you say there's been this equally quick and sharp erosion in market pricing, the double whammy, and you say it's been especially severe in the southeast and especially in Florida; right, sir?” A: “Yes.”) & RX 115, 2137-2140, 2151 (Q: “All right. And when you said ‘pricing pressures,’ you're referring to that sharp erosion in prices in the second half of 2008 after DIFRA was operational?” A: “Yes.”) & CX 1744; Rybacki, Tr. 3660-3661 (Q: “Did prices -- did your average prices go down in the second half of '08, sir?” A: “Our volumes went down. I don't know -- I don't think our average pricing -- you know, we tried to hold the line because volume was going down, but - - but our volume definitely took a hit from August through September of '08.”), 3717-3719 (Q: “And in fact, Mr. Rybacki, pricing got worse in the second half of '08. We already saw that; right?” A: “Pricing got worse.”).) Mr. Rybacki testified that, from a market perspective, “The second half of '08 turned gloomy.” (RPPF ¶ 26; Rybacki, Tr. 3702). During the second half of 2008, Sigma’s Fittings prices declined. (RPPF ¶ 267; Pais, Tr. 2129-2131 (“Q. This is an e-mail, sir, that you sent to Mr. Rybacki and others in the sales organization on November 24, 2008, so this is a few months after DIFRA started. A. Yes. Q. Okay. Now, you refer here, in the very first sentence, "Dear Larry, "With the severe contraction in market volume over the recent few weeks, the equally quick and sharp erosion in market pricing" -- had market prices been

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1417. Assuming the accuracy of the SPPRs and counting all entries as if they were unique instances of Project Prices and related to Fittings, Star offered Project Pricing in 246 instances in June 2007, but only 199 instances in June 2008. (CX 2570 at 001; *see* McCutcheon, Tr. 2686).

Response To Finding No. 1417:

See General Response 1. This finding is internally inconsistent because Complaint Counsel’s findings (*Infra ¶¶ 1411-1423*) are based on Star’s SPPR’s which Complaint Counsel

claims are: (1) “unreliable as evidence;” (2) “included numerous transactions in products other than Fittings and in locations outside the United States;” and, (3) included “entries for Project Pricing that had a start date prior to March 1, 2008,” “numerous instances of special pricing with effective dates within a month after March 1, 2008” and “numerous instances of special pricing that were approved after...November 25, 2008.” (*Infra* ¶¶ 1394-1409)

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Florida? A. It was."), RX 116; 2134-2135 ("Q. So a little while after DIFRA actually becomes

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it or not I'm not sure, but it was not effective. And it also points to the fact that we were not trying to eliminate a special pricing, we were trying to minimize it, and apparently it has continued to be so, continued to be available to the salespeople.”) (objections omitted), 2151 (“Q. All right. And when you said "pricing pressures," you're referring to that sharp erosion in prices in the second half of 2008 after DIFRA was operational? A. Yes.”) & CX 1744); (Rybacki, Tr. 3660-3661 (“Q. Go ahead. Did prices -- did your average prices go down in the second half of '08, sir? A. Our volumes went down. I don't know -- I don't think our average pricing -- you know, we tried to hold the line because volume was going down, but -- but our volume definitely took a hit from August through September of '08. Q. Yeah. And if we look at some of your regions -- first of all, your price in the second half of '08 is different in every region; right? A. Yes. Q. And if we look at -- let's pick Alex City, the eighth month, so that's August, and if we can highlight that line. So in August, the average price for group A -- and group A is just your top-selling fittings of all sizes? Is that what that is? A. Correct. Q. All right. Your average price was a .28, but then it declined down to a .24 by the end of the year; right, sir, Alex City? A. Yeah, that's correct. Q. And then if we look down at the Chicago area, it was .27, .28 in the middle of the year, declined down to .26 by the end of the year; right, sir? A. Correct. Q. Mr. Rybacki, was there any time during 2008 when you discussed your job pricing with anyone at McWane and agreed upon let's reduce job pricing? A. Never.”), 3717-3719).)

1418. Assuming the accuracy of the SPPRs and counting all entries as if they were unique instances of Project Prices and related to Fittings, Star offered Project Pricing in 355 instances in July 2007, but only 280 instances in July 2008. (CX 2570 at 001; *see* McCutcheon, Tr. 2686).

Response To Finding No. 1418:

See General Response 1. This finding is internally inconsistent because Complaint Counsel’s findings (*Infra ¶¶ 1411-1423*) are based on Star’s SPPR’s which Complaint Counsel

claims are: (1) “unreliable as evidence;” (2) “included numerous transactions in products other than Fittings and in locations outside the United States;” and, (3) included “entries for Project Pricing that had a start date prior to March 1, 2008,” “numerous instances of special pricing with effective dates within a month after March 1, 2008” and “numerous instances of special pricing that were approved after...November 25, 2008.” (*Infra* ¶¶ 1394-1409)

This finding is incomplete, and therefore misleading because Star’s alleged decreases in Job Pricing in 2008 can be explained by the known economic downturn that occurred in 2008, particularly in the second half of 2008. Complaint Counsel concedes that market conditions worsened “in August 2008 and thereafter.” (*Infra* ¶¶ 1436-1437). The collapse of the housing market in 2007-2008 triggered an economic recession that had a particularly adverse impact on the waterworks industry, which depends on new housing starts to drive demand. (RPPF ¶ 13; Tatman, Tr. 269 (“So, again, when you have a marketplace that has plummeted, I think, if you look at 2006 and then you look at 2010, the market volume is half of what it was in 2006. It was decimated. That changes a lot of behavior. It changes a lot of competitive dynamics”), 271-272 (Q: “The testimony that you just gave about the change in the market moving towards from more of a relationship, I’m going to call McWane because that’s my supplier -- that changed as a result of the downturn that began in 2006; is that right?” A: “My understanding, yes.” Q: “And it hastened in 2007 as the market got worse?” A: “The market was worse in '7 than '6. It was in '8 than '7. It was worse in '9 than '8. And it was worse in '10 than '9”); McCutcheon, Tr. 2654 (Q: “Do you recall the global financial crisis really going in --really hitting full steam in about September of 2008?” A: “Yes, sir, I recall that.” Q: “Okay. Did your business suffer to some -- suffer a drop-off as well in the fourth quarter of 2008?” A: “Yes, sir.”)).) Average net prices for non-domestic Fittings were lower during the latter half of 2008 than during the first half of 2008.

(RPPF ¶ 25; Tatman, Tr. 971-972 (Q: “Okay. Mr. Tatman, did the business improve after September of '08 for the rest of the year?” A: “No.” Q: “Did pricing get worse, sir?” A: “Worse.”); Pais, Tr. 2129-2131 (Q: “All right. So here you are in the second half of '08 and you say that prices -- there's been an equally quick and sharp erosion in market pricing, and you say it's an alarming double whammy. What did you mean by that, sir?” A: “Well, as I preface there with the volume dropping down and the prices falling, that is certainly a one-two punch.”) & RX 116, 2134-2135 (Q: “So a little while after DIFRA actually becomes operational, we see you say there's been this equally quick and sharp erosion in market pricing, the double whammy, and you say it's been especially severe in the southeast and especially in Florida; right, sir?” A: “Yes.”) & RX 115, 2137-2140, 2151 (Q: “All right. And when you said ‘pricing pressures,’ you're referring to that sharp erosion in prices in the second half of 2008 after DIFRA was operational?” A: “Yes.”) & CX 1744; Rybacki, Tr. 3660-3661 (Q: “Did prices -- did your average prices go down in the second half of '08, sir?” A: “Our volumes went down. I don't know -- I don't think our average pricing -- you know, we tried to hold the line because volume was going down, but - - but our volume definitely took a hit from August through September of '08.”), 3717-3719 (Q: “And in fact, Mr. Rybacki, pricing got worse in the second half of '08. We already saw that; right?” A: “Pricing got worse.”).) Mr. Rybacki testified that, from a market perspective, “The second half of '08 turned gloomy.” (RPPF ¶ 26; Rybacki, Tr. 3702). During the second half of 2008, Sigma’s Fittings prices declined. (RPPF ¶ 267; Pais, Tr. 2129-2131 (“Q. This is an e-mail, sir, that you sent to Mr. Rybacki and others in the sales organization on November 24, 2008, so this is a few months after DIFRA started. A. Yes. Q. Okay. Now, you refer here, in the very first sentence, "Dear Larry, "With the severe contraction in market volume over the recent few weeks, the equally quick and sharp erosion in market pricing" -- had market prices been

declining at Sigma, your prices had been declining since DIFRA was founded? A. Absolutely.

Q. When you say "absolutely," sir, tell us what you're referring to here. A. Because in the

second half the volume kept on dropping, and as you know, by September, there was a cataclysmic decline, and the prices were in a pretty steep decline because all suppliers were

trying to grab whatever business there was. Q. All right. So here you are in the second half of '08 and you say that prices -- there's been an equally quick and sharp erosion in market pricing,

and you say it's an alarming double whammy. What did you mean by that, sir? A. Well, as I preface there with the volume dropping down and the prices falling, that is certainly a one-two

punch. Q. Okay. Now, when you saw this double whammy, did you call up anyone at McWane

and say, "Hey, guys, let's all raise the price together"? A. No. Q. Okay. Let's scroll down if we

can. You say, in the second sentence, "I suggest we do all we can to reverse it," and were you proposing to your team at Sigma that you announce an increase to see if you could reverse that?

A. Well, either announce an increase or try and see where we were in the actual pricing and then try to hold the line towards high pricing, through multipliers. Q. And was that something you

were internally discussing at Sigma at the time? A. Yes. Q. Did you call up anyone at any

competitor and discuss that with them? A. None. Q. Let's go to RX 115, and again, before we

put it on the screen I'm going to ask the witness a few questions about it. Oh, I'm sorry. Can we

go back for a second to RX 116. Can we highlight -- yeah. There's that third paragraph: "I

suggest we do all we can to reverse it." Then in the next sentence, you say, "Though I am not

sure if the trend is similar at other parts, too, it seems to be most severe in the southeast,

especially in Florida." Is that what you said, sir? A. Yes. Q. Yeah. So was the price erosion,

the sharp erosion, really severe in the fall of 2008, especially -- in the southeast but especially in

Florida? A. It was."), RX 116; 2134-2135 ("Q. So a little while after DIFRA actually becomes

operational, we see you say there's been this equally quick and sharp erosion in market pricing, the double whammy, and you say it's been especially severe in the southeast and especially in Florida; right, sir? A. Yes.”) & RX 115, 2137-2140 (“Q. So Mr. Fox reports to you and the others that he believes, based on whatever information he has, that my client was actually lowering prices, leading to this sharp erosion in price in the southeast; correct? A. Yes. That's what he's trying to convey. Q. And then he says at the bottom of -- Then he says, at the bottom of that paragraph in the last sentence, "Interestingly, we have found Union/Tyler" -- and again, that's McWane; right, sir? A. Yes. Q. All right. Interestingly, we have found McWane leading markets downward in Tennessee and Alabama and the Carolinas. And that's the report you got from the guy in charge of Sigma of selling in those territories; right? A. Yes. Q. And all of these are reports you got about three and a half months after DIFRA actually started up; is that fair? A. That's correct. Q. All right. Now, if we go to the bottom of the second page -- well, I'm sorry. Let's go to the -- let's go to the first page. Down at the bottom. Now, here's an e-mail. It's quite a long e-mail, but we'll start here. This is an e-mail which you read and respond to your southeast territory manager, regional manager, Mr. Fox; right, sir? A. Yes. Q. And if we scroll over and then go on to the next page, if we look at number 4 there, you say, "I am sure that Tyler is as guilty of starting the price decline as any of the other two of us." And that's what your view was; you thought Tyler might very well have started that price decline. A. Sure. Q. Right. Two sentences after that, you say, "Here, the culprit again may be the plant work or job pricing which is still priced as in a different manner and this dual pricing practice could be continuing to harm our overall pricing as it has over the past three to four years." Do you mean, sir, that here at the end of 2008 you had urged Mr. Rybacki and urged and urged him to change that plant work pricing, and he just had never done it, had he? A. Yes. Yeah. It sure seems that -- whether he did

it or not I'm not sure, but it was not effective. And it also points to the fact that we were not trying to eliminate a special pricing, we were trying to minimize it, and apparently it has continued to be so, continued to be available to the salespeople.”) (objections omitted), 2151 (“Q. All right. And when you said "pricing pressures," you're referring to that sharp erosion in prices in the second half of 2008 after DIFRA was operational? A. Yes.”) & CX 1744); (Rybacki, Tr. 3660-3661 (“Q. Go ahead. Did prices -- did your average prices go down in the second half of '08, sir? A. Our volumes went down. I don't know -- I don't think our average pricing -- you know, we tried to hold the line because volume was going down, but -- but our volume definitely took a hit from August through September of '08. Q. Yeah. And if we look at some of your regions -- first of all, your price in the second half of '08 is different in every region; right? A. Yes. Q. And if we look at -- let's pick Alex City, the eighth month, so that's August, and if we can highlight that line. So in August, the average price for group A -- and group A is just your top-selling fittings of all sizes? Is that what that is? A. Correct. Q. All right. Your average price was a .28, but then it declined down to a .24 by the end of the year; right, sir, Alex City? A. Yeah, that's correct. Q. And then if we look down at the Chicago area, it was .27, .28 in the middle of the year, declined down to .26 by the end of the year; right, sir? A. Correct. Q. Mr. Rybacki, was there any time during 2008 when you discussed your job pricing with anyone at McWane and agreed upon let's reduce job pricing? A. Never.”), 3717-3719).)

1419. Assuming the accuracy of the SPPRs and counting all entries as if they were unique instances of Project Prices and related to Fittings, Star offered Project Pricing in 309 instances in August 2007, but only 198 instances in August 2008. (CX 2570 at 001; *see* McCutcheon, Tr. 2686).

Response To Finding No. 1419:

See General Response 1. This finding is internally inconsistent because Complaint Counsel’s findings (*Infra ¶¶ 1411-1423*) are based on Star’s SPPR’s which Complaint Counsel

claims are: (1) “unreliable as evidence;” (2) “included numerous transactions in products other than Fittings and in locations outside the United States;” and, (3) included “entries for Project Pricing that had a start date prior to March 1, 2008,” “numerous instances of special pricing with effective dates within a month after March 1, 2008” and “numerous instances of special pricing that were approved after...November 25, 2008.” (*Infra* ¶¶ 1394-1409)

This finding is incomplete, and therefore misleading because Star’s alleged decreases in Job Pricing in 2008 can be explained by the known economic downturn that occurred in 2008, particularly in the second half of 2008. Complaint Counsel concedes that market conditions worsened “in August 2008 and thereafter.” (*Infra* ¶¶ 1436-1437). The collapse of the housing market in 2007-2008 triggered an economic recession that had a particularly adverse impact on the waterworks industry, which depends on new housing starts to drive demand. (RPPF ¶ 13; Tatman, Tr. 269 (“So, again, when you have a marketplace that has plummeted, I think, if you look at 2006 and then you look at 2010, the market volume is half of what it was in 2006. It was decimated. That changes a lot of behavior. It changes a lot of competitive dynamics”), 271-272 (Q: “The testimony that you just gave about the change in the market moving towards from more of a relationship, I’m going to call McWane because that’s my supplier -- that changed as a result of the downturn that began in 2006; is that right?” A: “My understanding, yes.” Q: “And it hastened in 2007 as the market got worse?” A: “The market was worse in '7 than '6. It was in '8 than '7. It was worse in '9 than '8. And it was worse in '10 than '9”); McCutcheon, Tr. 2654 (Q: “Do you recall the global financial crisis really going in --really hitting full steam in about September of 2008?” A: “Yes, sir, I recall that.” Q: “Okay. Did your business suffer to some -- suffer a drop-off as well in the fourth quarter of 2008?” A: “Yes, sir.”)).) Average net prices for non-domestic Fittings were lower during the latter half of 2008 than during the first half of 2008.

(RPPF ¶ 25; Tatman, Tr. 971-972 (Q: “Okay. Mr. Tatman, did the business improve after September of '08 for the rest of the year?” A: “No.” Q: “Did pricing get worse, sir?” A: “Worse.”); Pais, Tr. 2129-2131 (Q: “All right. So here you are in the second half of '08 and you say that prices -- there's been an equally quick and sharp erosion in market pricing, and you say it's an alarming double whammy. What did you mean by that, sir?” A: “Well, as I preface there with the volume dropping down and the prices falling, that is certainly a one-two punch.”) & RX 116, 2134-2135 (Q: “So a little while after DIFRA actually becomes operational, we see you say there's been this equally quick and sharp erosion in market pricing, the double whammy, and you say it's been especially severe in the southeast and especially in Florida; right, sir?” A: “Yes.”) & RX 115, 2137-2140, 2151 (Q: “All right. And when you said ‘pricing pressures,’ you're referring to that sharp erosion in prices in the second half of 2008 after DIFRA was operational?” A: “Yes.”) & CX 1744; Rybacki, Tr. 3660-3661 (Q: “Did prices -- did your average prices go down in the second half of '08, sir?” A: “Our volumes went down. I don't know -- I don't think our average pricing -- you know, we tried to hold the line because volume was going down, but - - but our volume definitely took a hit from August through September of '08.”), 3717-3719 (Q: “And in fact, Mr. Rybacki, pricing got worse in the second half of '08. We already saw that; right?” A: “Pricing got worse.”).) Mr. Rybacki testified that, from a market perspective, “The second half of '08 turned gloomy.” (RPPF ¶ 26; Rybacki, Tr. 3702). During the second half of 2008, Sigma’s Fittings prices declined. (RPPF ¶ 267; Pais, Tr. 2129-2131 (“Q. This is an e-mail, sir, that you sent to Mr. Rybacki and others in the sales organization on November 24, 2008, so this is a few months after DIFRA started. A. Yes. Q. Okay. Now, you refer here, in the very first sentence, "Dear Larry, "With the severe contraction in market volume over the recent few weeks, the equally quick and sharp erosion in market pricing" -- had market prices been

declining at Sigma, your prices had been declining since DIFRA was founded? A. Absolutely.

Q. When you say "absolutely," sir, tell us what you're referring to here. A. Because in the

second half the volume kept on dropping, and as you know, by September, there was a

cataclysmic decline, and the prices were in a pretty steep decline because all suppliers were

trying to grab whatever business there was. Q. All right. So here you are in the second half of

'08 and you say that prices -- there's been an equally quick and sharp erosion in market pricing,

and you say it's an alarming double whammy. What did you mean by that, sir? A. Well, as I

preface there with the volume dropping down and the prices falling, that is certainly a one-two

punch. Q. Okay. Now, when you saw this double whammy, did you call up anyone at McWane

and say, "Hey, guys, let's all raise the price together"? A. No. Q. Okay. Let's scroll down if we

can. You say, in the second sentence, "I suggest we do all we can to reverse it," and were you

proposing to your team at Sigma that you announce an increase to see if you could reverse that?

A. Well, either announce an increase or try and see where we were in the actual pricing and then

try to hold the line towards high pricing, through multipliers. Q. And was that something you

were internally discussing at Sigma at the time? A. Yes. Q. Did you call up anyone at any

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go back for a second to RX 116. Can we highlight -- yeah. There's that third paragraph: "I

suggest we do all we can to reverse it." Then in the next sentence, you say, "Though I am not

sure if the trend is similar at other parts, too, it seems to be most severe in the southeast,

especially in Florida." Is that what you said, sir? A. Yes. Q. Yeah. So was the price erosion,

the sharp erosion, really severe in the fall of 2008, especially -- in the southeast but especially in

Florida? A. It was."), RX 116; 2134-2135 ("Q. So a little while after DIFRA actually becomes

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1420. Assuming the accuracy of the SPPRs and counting all entries as if they were unique instances of Project Prices and related to Fittings, Star offered Project Pricing in 282 instances in September 2007, but only 151 instances in September 2008. (CX 2570 at 001; *see* McCutcheon, Tr. 2686).

Response To Finding No. 1420:

See General Response 1. This finding is internally inconsistent because Complaint Counsel's findings (*Infra ¶¶ 1411-1423*) are based on Star's SPPR's which Complaint Counsel

claims are: (1) “unreliable as evidence;” (2) “included numerous transactions in products other than Fittings and in locations outside the United States;” and, (3) included “entries for Project Pricing that had a start date prior to March 1, 2008,” “numerous instances of special pricing with effective dates within a month after March 1, 2008” and “numerous instances of special pricing that were approved after...November 25, 2008.” (*Infra* ¶¶ 1394-1409)

This finding is incomplete, and therefore misleading because Star’s alleged decreases in Job Pricing in 2008 can be explained by the known economic downturn that occurred in 2008, particularly in the second half of 2008. Complaint Counsel concedes that market conditions worsened “in August 2008 and thereafter.” (*Infra* ¶¶ 1436-1437). The collapse of the housing market in 2007-2008 triggered an economic recession that had a particularly adverse impact on the waterworks industry, which depends on new housing starts to drive demand. (RPPF ¶ 13; Tatman, Tr. 269 (“So, again, when you have a marketplace that has plummeted, I think, if you look at 2006 and then you look at 2010, the market volume is half of what it was in 2006. It was decimated. That changes a lot of behavior. It changes a lot of competitive dynamics”), 271-272 (Q: “The testimony that you just gave about the change in the market moving towards from more of a relationship, I’m going to call McWane because that’s my supplier -- that changed as a result of the downturn that began in 2006; is that right?” A: “My understanding, yes.” Q: “And it hastened in 2007 as the market got worse?” A: “The market was worse in '7 than '6. It was in '8 than '7. It was worse in '9 than '8. And it was worse in '10 than '9”); McCutcheon, Tr. 2654 (Q: “Do you recall the global financial crisis really going in --really hitting full steam in about September of 2008?” A: “Yes, sir, I recall that.” Q: “Okay. Did your business suffer to some -- suffer a drop-off as well in the fourth quarter of 2008?” A: “Yes, sir.”)).) Average net prices for non-domestic Fittings were lower during the latter half of 2008 than during the first half of 2008.

(RPPF ¶ 25; Tatman, Tr. 971-972 (Q: “Okay. Mr. Tatman, did the business improve after September of '08 for the rest of the year?” A: “No.” Q: “Did pricing get worse, sir?” A: “Worse.”); Pais, Tr. 2129-2131 (Q: “All right. So here you are in the second half of '08 and you say that prices -- there's been an equally quick and sharp erosion in market pricing, and you say it's an alarming double whammy. What did you mean by that, sir?” A: “Well, as I preface there with the volume dropping down and the prices falling, that is certainly a one-two punch.”) & RX 116, 2134-2135 (Q: “So a little while after DIFRA actually becomes operational, we see you say there's been this equally quick and sharp erosion in market pricing, the double whammy, and you say it's been especially severe in the southeast and especially in Florida; right, sir?” A: “Yes.”) & RX 115, 2137-2140, 2151 (Q: “All right. And when you said ‘pricing pressures,’ you're referring to that sharp erosion in prices in the second half of 2008 after DIFRA was operational?” A: “Yes.”) & CX 1744; Rybacki, Tr. 3660-3661 (Q: “Did prices -- did your average prices go down in the second half of '08, sir?” A: “Our volumes went down. I don't know -- I don't think our average pricing -- you know, we tried to hold the line because volume was going down, but - - but our volume definitely took a hit from August through September of '08.”), 3717-3719 (Q: “And in fact, Mr. Rybacki, pricing got worse in the second half of '08. We already saw that; right?” A: “Pricing got worse.”).) Mr. Rybacki testified that, from a market perspective, “The second half of '08 turned gloomy.” (RPPF ¶ 26; Rybacki, Tr. 3702). During the second half of 2008, Sigma’s Fittings prices declined. (RPPF ¶ 267; Pais, Tr. 2129-2131 (“Q. This is an e-mail, sir, that you sent to Mr. Rybacki and others in the sales organization on November 24, 2008, so this is a few months after DIFRA started. A. Yes. Q. Okay. Now, you refer here, in the very first sentence, "Dear Larry, "With the severe contraction in market volume over the recent few weeks, the equally quick and sharp erosion in market pricing" -- had market prices been

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Q. When you say "absolutely," sir, tell us what you're referring to here. A. Because in the

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and say, "Hey, guys, let's all raise the price together"? A. No. Q. Okay. Let's scroll down if we

can. You say, in the second sentence, "I suggest we do all we can to reverse it," and were you

proposing to your team at Sigma that you announce an increase to see if you could reverse that?

A. Well, either announce an increase or try and see where we were in the actual pricing and then

try to hold the line towards high pricing, through multipliers. Q. And was that something you

were internally discussing at Sigma at the time? A. Yes. Q. Did you call up anyone at any

competitor and discuss that with them? A. None. Q. Let's go to RX 115, and again, before we

put it on the screen I'm going to ask the witness a few questions about it. Oh, I'm sorry. Can we

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suggest we do all we can to reverse it." Then in the next sentence, you say, "Though I am not

sure if the trend is similar at other parts, too, it seems to be most severe in the southeast,

especially in Florida." Is that what you said, sir? A. Yes. Q. Yeah. So was the price erosion,

the sharp erosion, really severe in the fall of 2008, especially -- in the southeast but especially in

Florida? A. It was."), RX 116; 2134-2135 ("Q. So a little while after DIFRA actually becomes

operational, we see you say there's been this equally quick and sharp erosion in market pricing, the double whammy, and you say it's been especially severe in the southeast and especially in Florida; right, sir? A. Yes.”) & RX 115, 2137-2140 (“Q. So Mr. Fox reports to you and the others that he believes, based on whatever information he has, that my client was actually lowering prices, leading to this sharp erosion in price in the southeast; correct? A. Yes. That's what he's trying to convey. Q. And then he says at the bottom of -- Then he says, at the bottom of that paragraph in the last sentence, "Interestingly, we have found Union/Tyler" -- and again, that's McWane; right, sir? A. Yes. Q. All right. Interestingly, we have found McWane leading markets downward in Tennessee and Alabama and the Carolinas. And that's the report you got from the guy in charge of Sigma of selling in those territories; right? A. Yes. Q. And all of these are reports you got about three and a half months after DIFRA actually started up; is that fair? A. That's correct. Q. All right. Now, if we go to the bottom of the second page -- well, I'm sorry. Let's go to the -- let's go to the first page. Down at the bottom. Now, here's an e-mail. It's quite a long e-mail, but we'll start here. This is an e-mail which you read and respond to your southeast territory manager, regional manager, Mr. Fox; right, sir? A. Yes. Q. And if we scroll over and then go on to the next page, if we look at number 4 there, you say, "I am sure that Tyler is as guilty of starting the price decline as any of the other two of us." And that's what your view was; you thought Tyler might very well have started that price decline. A. Sure. Q. Right. Two sentences after that, you say, "Here, the culprit again may be the plant work or job pricing which is still priced as in a different manner and this dual pricing practice could be continuing to harm our overall pricing as it has over the past three to four years." Do you mean, sir, that here at the end of 2008 you had urged Mr. Rybacki and urged and urged him to change that plant work pricing, and he just had never done it, had he? A. Yes. Yeah. It sure seems that -- whether he did

it or not I'm not sure, but it was not effective. And it also points to the fact that we were not trying to eliminate a special pricing, we were trying to minimize it, and apparently it has continued to be so, continued to be available to the salespeople.”) (objections omitted), 2151 (“Q. All right. And when you said "pricing pressures," you're referring to that sharp erosion in prices in the second half of 2008 after DIFRA was operational? A. Yes.”) & CX 1744); (Rybacki, Tr. 3660-3661 (“Q. Go ahead. Did prices -- did your average prices go down in the second half of '08, sir? A. Our volumes went down. I don't know -- I don't think our average pricing -- you know, we tried to hold the line because volume was going down, but -- but our volume definitely took a hit from August through September of '08. Q. Yeah. And if we look at some of your regions -- first of all, your price in the second half of '08 is different in every region; right? A. Yes. Q. And if we look at -- let's pick Alex City, the eighth month, so that's August, and if we can highlight that line. So in August, the average price for group A -- and group A is just your top-selling fittings of all sizes? Is that what that is? A. Correct. Q. All right. Your average price was a .28, but then it declined down to a .24 by the end of the year; right, sir, Alex City? A. Yeah, that's correct. Q. And then if we look down at the Chicago area, it was .27, .28 in the middle of the year, declined down to .26 by the end of the year; right, sir? A. Correct. Q. Mr. Rybacki, was there any time during 2008 when you discussed your job pricing with anyone at McWane and agreed upon let's reduce job pricing? A. Never.”), 3717-3719).)

1421. Assuming the accuracy of the SPPRs and counting all entries as if they were unique instances of Project Prices and related to Fittings, Star offered Project Pricing in 342 instances in October 2007, but only 194 instances in October 2008. (CX 2570 at 001; McCutcheon, Tr. 2686).

Response To Finding No. 1421:

See General Response 1. This finding is internally inconsistent because Complaint Counsel’s findings (*Infra ¶¶ 1411-1423*) are based on Star’s SPPR’s which Complaint Counsel

claims are: (1) “unreliable as evidence;” (2) “included numerous transactions in products other than Fittings and in locations outside the United States;” and, (3) included “entries for Project Pricing that had a start date prior to March 1, 2008,” “numerous instances of special pricing with effective dates within a month after March 1, 2008” and “numerous instances of special pricing that were approved after...November 25, 2008.” (*Infra* ¶¶ 1394-1409)

This finding is incomplete, and therefore misleading because Star’s alleged decreases in Job Pricing in 2008 can be explained by the known economic downturn that occurred in 2008, particularly in the second half of 2008. Complaint Counsel concedes that market conditions worsened “in August 2008 and thereafter.” (*Infra* ¶¶ 1436-1437). The collapse of the housing market in 2007-2008 triggered an economic recession that had a particularly adverse impact on the waterworks industry, which depends on new housing starts to drive demand. (RPPF ¶ 13; Tatman, Tr. 269 (“So, again, when you have a marketplace that has plummeted, I think, if you look at 2006 and then you look at 2010, the market volume is half of what it was in 2006. It was decimated. That changes a lot of behavior. It changes a lot of competitive dynamics”), 271-272 (Q: “The testimony that you just gave about the change in the market moving towards from more of a relationship, I’m going to call McWane because that’s my supplier -- that changed as a result of the downturn that began in 2006; is that right?” A: “My understanding, yes.” Q: “And it hastened in 2007 as the market got worse?” A: “The market was worse in '7 than '6. It was in '8 than '7. It was worse in '9 than '8. And it was worse in '10 than '9”); McCutcheon, Tr. 2654 (Q: “Do you recall the global financial crisis really going in --really hitting full steam in about September of 2008?” A: “Yes, sir, I recall that.” Q: “Okay. Did your business suffer to some -- suffer a drop-off as well in the fourth quarter of 2008?” A: “Yes, sir.”)).) Average net prices for non-domestic Fittings were lower during the latter half of 2008 than during the first half of 2008.

(RPPF ¶ 25; Tatman, Tr. 971-972 (Q: “Okay. Mr. Tatman, did the business improve after September of '08 for the rest of the year?” A: “No.” Q: “Did pricing get worse, sir?” A: “Worse.”); Pais, Tr. 2129-2131 (Q: “All right. So here you are in the second half of '08 and you say that prices -- there's been an equally quick and sharp erosion in market pricing, and you say it's an alarming double whammy. What did you mean by that, sir?” A: “Well, as I preface there with the volume dropping down and the prices falling, that is certainly a one-two punch.”) & RX 116, 2134-2135 (Q: “So a little while after DIFRA actually becomes operational, we see you say there's been this equally quick and sharp erosion in market pricing, the double whammy, and you say it's been especially severe in the southeast and especially in Florida; right, sir?” A: “Yes.”) & RX 115, 2137-2140, 2151 (Q: “All right. And when you said ‘pricing pressures,’ you're referring to that sharp erosion in prices in the second half of 2008 after DIFRA was operational?” A: “Yes.”) & CX 1744; Rybacki, Tr. 3660-3661 (Q: “Did prices -- did your average prices go down in the second half of '08, sir?” A: “Our volumes went down. I don't know -- I don't think our average pricing -- you know, we tried to hold the line because volume was going down, but - - but our volume definitely took a hit from August through September of '08.”), 3717-3719 (Q: “And in fact, Mr. Rybacki, pricing got worse in the second half of '08. We already saw that; right?” A: “Pricing got worse.”).) Mr. Rybacki testified that, from a market perspective, “The second half of '08 turned gloomy.” (RPPF ¶ 26; Rybacki, Tr. 3702). During the second half of 2008, Sigma’s Fittings prices declined. (RPPF ¶ 267; Pais, Tr. 2129-2131 (“Q. This is an e-mail, sir, that you sent to Mr. Rybacki and others in the sales organization on November 24, 2008, so this is a few months after DIFRA started. A. Yes. Q. Okay. Now, you refer here, in the very first sentence, "Dear Larry, "With the severe contraction in market volume over the recent few weeks, the equally quick and sharp erosion in market pricing" -- had market prices been

declining at Sigma, your prices had been declining since DIFRA was founded? A. Absolutely.

Q. When you say "absolutely," sir, tell us what you're referring to here. A. Because in the

second half the volume kept on dropping, and as you know, by September, there was a cataclysmic decline, and the prices were in a pretty steep decline because all suppliers were

trying to grab whatever business there was. Q. All right. So here you are in the second half of '08 and you say that prices -- there's been an equally quick and sharp erosion in market pricing,

and you say it's an alarming double whammy. What did you mean by that, sir? A. Well, as I preface there with the volume dropping down and the prices falling, that is certainly a one-two

punch. Q. Okay. Now, when you saw this double whammy, did you call up anyone at McWane

and say, "Hey, guys, let's all raise the price together"? A. No. Q. Okay. Let's scroll down if we

can. You say, in the second sentence, "I suggest we do all we can to reverse it," and were you proposing to your team at Sigma that you announce an increase to see if you could reverse that?

A. Well, either announce an increase or try and see where we were in the actual pricing and then try to hold the line towards high pricing, through multipliers. Q. And was that something you

were internally discussing at Sigma at the time? A. Yes. Q. Did you call up anyone at any

competitor and discuss that with them? A. None. Q. Let's go to RX 115, and again, before we

put it on the screen I'm going to ask the witness a few questions about it. Oh, I'm sorry. Can we

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suggest we do all we can to reverse it." Then in the next sentence, you say, "Though I am not

sure if the trend is similar at other parts, too, it seems to be most severe in the southeast,

especially in Florida." Is that what you said, sir? A. Yes. Q. Yeah. So was the price erosion,

the sharp erosion, really severe in the fall of 2008, especially -- in the southeast but especially in

Florida? A. It was."), RX 116; 2134-2135 ("Q. So a little while after DIFRA actually becomes

operational, we see you say there's been this equally quick and sharp erosion in market pricing, the double whammy, and you say it's been especially severe in the southeast and especially in Florida; right, sir? A. Yes.”) & RX 115, 2137-2140 (“Q. So Mr. Fox reports to you and the others that he believes, based on whatever information he has, that my client was actually lowering prices, leading to this sharp erosion in price in the southeast; correct? A. Yes. That's what he's trying to convey. Q. And then he says at the bottom of -- Then he says, at the bottom of that paragraph in the last sentence, "Interestingly, we have found Union/Tyler" -- and again, that's McWane; right, sir? A. Yes. Q. All right. Interestingly, we have found McWane leading markets downward in Tennessee and Alabama and the Carolinas. And that's the report you got from the guy in charge of Sigma of selling in those territories; right? A. Yes. Q. And all of these are reports you got about three and a half months after DIFRA actually started up; is that fair? A. That's correct. Q. All right. Now, if we go to the bottom of the second page -- well, I'm sorry. Let's go to the -- let's go to the first page. Down at the bottom. Now, here's an e-mail. It's quite a long e-mail, but we'll start here. This is an e-mail which you read and respond to your southeast territory manager, regional manager, Mr. Fox; right, sir? A. Yes. Q. And if we scroll over and then go on to the next page, if we look at number 4 there, you say, "I am sure that Tyler is as guilty of starting the price decline as any of the other two of us." And that's what your view was; you thought Tyler might very well have started that price decline. A. Sure. Q. Right. Two sentences after that, you say, "Here, the culprit again may be the plant work or job pricing which is still priced as in a different manner and this dual pricing practice could be continuing to harm our overall pricing as it has over the past three to four years." Do you mean, sir, that here at the end of 2008 you had urged Mr. Rybacki and urged and urged him to change that plant work pricing, and he just had never done it, had he? A. Yes. Yeah. It sure seems that -- whether he did

it or not I'm not sure, but it was not effective. And it also points to the fact that we were not trying to eliminate a special pricing, we were trying to minimize it, and apparently it has continued to be so, continued to be available to the salespeople.”) (objections omitted), 2151 (“Q. All right. And when you said "pricing pressures," you're referring to that sharp erosion in prices in the second half of 2008 after DIFRA was operational? A. Yes.”) & CX 1744); (Rybacki, Tr. 3660-3661 (“Q. Go ahead. Did prices -- did your average prices go down in the second half of '08, sir? A. Our volumes went down. I don't know -- I don't think our average pricing -- you know, we tried to hold the line because volume was going down, but -- but our volume definitely took a hit from August through September of '08. Q. Yeah. And if we look at some of your regions -- first of all, your price in the second half of '08 is different in every region; right? A. Yes. Q. And if we look at -- let's pick Alex City, the eighth month, so that's August, and if we can highlight that line. So in August, the average price for group A -- and group A is just your top-selling fittings of all sizes? Is that what that is? A. Correct. Q. All right. Your average price was a .28, but then it declined down to a .24 by the end of the year; right, sir, Alex City? A. Yeah, that's correct. Q. And then if we look down at the Chicago area, it was .27, .28 in the middle of the year, declined down to .26 by the end of the year; right, sir? A. Correct. Q. Mr. Rybacki, was there any time during 2008 when you discussed your job pricing with anyone at McWane and agreed upon let's reduce job pricing? A. Never.”), 3717-3719).)

1422. Assuming the accuracy of the SPPRs and counting all entries as if they were unique instances of Project Prices and related to Fittings, Star offered Project Pricing in 305 instances in November 2007, but only 159 instances in November 2008. (CX 2570 at 001; *see* McCutcheon, Tr. 2686).

Response To Finding No. 1422:

This finding is internally inconsistent because Complaint Counsel’s findings (*Infra* ¶¶ 1411-1423) are based on Star’s SPPR’s which Complaint Counsel claims are: (1) “unreliable

as evidence;” (2) “included numerous transactions in products other than Fittings and in locations outside the United States;” and, (3) included “entries for Project Pricing that had a start date prior to March 1, 2008,” “numerous instances of special pricing with effective dates within a month after March 1, 2008” and “numerous instances of special pricing that were approved after...November 25, 2008.” (*Infra* ¶¶ 1394-1409)

This finding is incomplete, and therefore misleading because Star’s alleged decreases in Job Pricing in 2008 can be explained by the known economic downturn that occurred in 2008, particularly in the second half of 2008. Complaint Counsel concedes that market conditions worsened “in August 2008 and thereafter.” (*Infra* ¶¶ 1436-1437). The collapse of the housing market in 2007-2008 triggered an economic recession that had a particularly adverse impact on the waterworks industry, which depends on new housing starts to drive demand. (RPPF ¶ 13; Tatman, Tr. 269 (“So, again, when you have a marketplace that has plummeted, I think, if you look at 2006 and then you look at 2010, the market volume is half of what it was in 2006. It was decimated. That changes a lot of behavior. It changes a lot of competitive dynamics”), 271-272 (Q: “The testimony that you just gave about the change in the market moving towards from more of a relationship, I’m going to call McWane because that’s my supplier -- that changed as a result of the downturn that began in 2006; is that right?” A: “My understanding, yes.” Q: “And it hastened in 2007 as the market got worse?” A: “The market was worse in '7 than '6. It was in '8 than '7. It was worse in '9 than '8. And it was worse in '10 than '9”); McCutcheon, Tr. 2654 (Q: “Do you recall the global financial crisis really going in --really hitting full steam in about September of 2008?” A: “Yes, sir, I recall that.” Q: “Okay. Did your business suffer to some -- suffer a drop-off as well in the fourth quarter of 2008?” A: “Yes, sir.”)).) Average net prices for non-domestic Fittings were lower during the latter half of 2008 than during the first half of 2008.

(RPPF ¶ 25; Tatman, Tr. 971-972 (Q: “Okay. Mr. Tatman, did the business improve after September of '08 for the rest of the year?” A: “No.” Q: “Did pricing get worse, sir?” A: “Worse.”); Pais, Tr. 2129-2131 (Q: “All right. So here you are in the second half of '08 and you say that prices -- there's been an equally quick and sharp erosion in market pricing, and you say it's an alarming double whammy. What did you mean by that, sir?” A: “Well, as I preface there with the volume dropping down and the prices falling, that is certainly a one-two punch.”) & RX 116, 2134-2135 (Q: “So a little while after DIFRA actually becomes operational, we see you say there's been this equally quick and sharp erosion in market pricing, the double whammy, and you say it's been especially severe in the southeast and especially in Florida; right, sir?” A: “Yes.”) & RX 115, 2137-2140, 2151 (Q: “All right. And when you said ‘pricing pressures,’ you're referring to that sharp erosion in prices in the second half of 2008 after DIFRA was operational?” A: “Yes.”) & CX 1744; Rybacki, Tr. 3660-3661 (Q: “Did prices -- did your average prices go down in the second half of '08, sir?” A: “Our volumes went down. I don't know -- I don't think our average pricing -- you know, we tried to hold the line because volume was going down, but - - but our volume definitely took a hit from August through September of '08.”), 3717-3719 (Q: “And in fact, Mr. Rybacki, pricing got worse in the second half of '08. We already saw that; right?” A: “Pricing got worse.”).) Mr. Rybacki testified that, from a market perspective, “The second half of '08 turned gloomy.” (RPPF ¶ 26; Rybacki, Tr. 3702). During the second half of 2008, Sigma’s Fittings prices declined. (RPPF ¶ 267; Pais, Tr. 2129-2131 (“Q. This is an e-mail, sir, that you sent to Mr. Rybacki and others in the sales organization on November 24, 2008, so this is a few months after DIFRA started. A. Yes. Q. Okay. Now, you refer here, in the very first sentence, "Dear Larry, "With the severe contraction in market volume over the recent few weeks, the equally quick and sharp erosion in market pricing" -- had market prices been

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Q. When you say "absolutely," sir, tell us what you're referring to here. A. Because in the

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trying to grab whatever business there was. Q. All right. So here you are in the second half of '08 and you say that prices -- there's been an equally quick and sharp erosion in market pricing,

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A. Well, either announce an increase or try and see where we were in the actual pricing and then try to hold the line towards high pricing, through multipliers. Q. And was that something you

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especially in Florida." Is that what you said, sir? A. Yes. Q. Yeah. So was the price erosion,

the sharp erosion, really severe in the fall of 2008, especially -- in the southeast but especially in

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it or not I'm not sure, but it was not effective. And it also points to the fact that we were not trying to eliminate a special pricing, we were trying to minimize it, and apparently it has continued to be so, continued to be available to the salespeople.”) (objections omitted), 2151 (“Q. All right. And when you said "pricing pressures," you're referring to that sharp erosion in prices in the second half of 2008 after DIFRA was operational? A. Yes.”) & CX 1744); (Rybacki, Tr. 3660-3661 (“Q. Go ahead. Did prices -- did your average prices go down in the second half of '08, sir? A. Our volumes went down. I don't know -- I don't think our average pricing -- you know, we tried to hold the line because volume was going down, but -- but our volume definitely took a hit from August through September of '08. Q. Yeah. And if we look at some of your regions -- first of all, your price in the second half of '08 is different in every region; right? A. Yes. Q. And if we look at -- let's pick Alex City, the eighth month, so that's August, and if we can highlight that line. So in August, the average price for group A -- and group A is just your top-selling fittings of all sizes? Is that what that is? A. Correct. Q. All right. Your average price was a .28, but then it declined down to a .24 by the end of the year; right, sir, Alex City? A. Yeah, that's correct. Q. And then if we look down at the Chicago area, it was .27, .28 in the middle of the year, declined down to .26 by the end of the year; right, sir? A. Correct. Q. Mr. Rybacki, was there any time during 2008 when you discussed your job pricing with anyone at McWane and agreed upon let's reduce job pricing? A. Never.”), 3717-3719).)

1423. Assuming the accuracy of the SPPRs and counting all entries as if they were unique instances of Project Prices and related to Fittings, Star offered Project Pricing in 151 instances in December 2007. In December 2008, after Mr. Minamyler had sent his November 25, 2008, email instructing his sales force that Star would once again engage in Project Pricing, (CX 0831), Star extended discounts in 217 instances. (CX 2570 at 001).

Response To Finding No. 1423:

This finding is internally inconsistent because Complaint Counsel's findings (*Infra* ¶¶ 1411-1423) are based on Star's SPPR's which Complaint Counsel claims are: (1) "unreliable as evidence;" (2) "included numerous transactions in products other than Fittings and in locations outside the United States;" and, (3) included "entries for Project Pricing that had a start date prior to March 1, 2008," "numerous instances of special pricing with effective dates within a month after March 1, 2008" and "numerous instances of special pricing that were approved after...November 25, 2008." (*Infra* ¶¶ 1394-1409).

This finding is incomplete, and therefore misleading because Star's alleged decreases in Job Pricing in 2008 can be explained by the known economic downturn that occurred in 2008, particularly in the second half of 2008. Complaint Counsel concedes that market conditions worsened "in August 2008 and thereafter." (*Infra* ¶¶ 1436-1437). The collapse of the housing market in 2007-2008 triggered an economic recession that had a particularly adverse impact on the waterworks industry, which depends on new housing starts to drive demand. (RPPF ¶ 13; Tatman, Tr. 269 ("So, again, when you have a marketplace that has plummeted, I think, if you look at 2006 and then you look at 2010, the market volume is half of what it was in 2006. It was decimated. That changes a lot of behavior. It changes a lot of competitive dynamics"), 271-272 (Q: "The testimony that you just gave about the change in the market moving towards from more of a relationship, I'm going to call McWane because that's my supplier -- that changed as a result of the downturn that began in 2006; is that right?" A: "My understanding, yes." Q: "And it hastened in 2007 as the market got worse?" A: "The market was worse in '7 than '6. It was in '8 than '7. It was worse in '9 than '8. And it was worse in '10 than '9"); McCutcheon, Tr. 2654 (Q: "Do you recall the global financial crisis really going in --really hitting full steam in about

September of 2008?" A: "Yes, sir, I recall that." Q: "Okay. Did your business suffer to some -- suffer a drop-off as well in the fourth quarter of 2008?" A: "Yes, sir.")) Average net prices for non-domestic Fittings were lower during the latter half of 2008 than during the first half of 2008. (RPPF ¶ 25; Tatman, Tr. 971-972 (Q: "Okay. Mr. Tatman, did the business improve after September of '08 for the rest of the year?" A: "No." Q: "Did pricing get worse, sir?" A: "Worse."); Pais, Tr. 2129-2131 (Q: "All right. So here you are in the second half of '08 and you say that prices -- there's been an equally quick and sharp erosion in market pricing, and you say it's an alarming double whammy. What did you mean by that, sir?" A: "Well, as I preface there with the volume dropping down and the prices falling, that is certainly a one-two punch.") & RX 116, 2134-2135 (Q: "So a little while after DIFRA actually becomes operational, we see you say there's been this equally quick and sharp erosion in market pricing, the double whammy, and you say it's been especially severe in the southeast and especially in Florida; right, sir?" A: "Yes.") & RX 115, 2137-2140, 2151 (Q: "All right. And when you said 'pricing pressures,' you're referring to that sharp erosion in prices in the second half of 2008 after DIFRA was operational?" A: "Yes.") & CX 1744; Rybacki, Tr. 3660-3661 (Q: "Did prices -- did your average prices go down in the second half of '08, sir?" A: "Our volumes went down. I don't know -- I don't think our average pricing -- you know, we tried to hold the line because volume was going down, but - - but our volume definitely took a hit from August through September of '08."), 3717-3719 (Q: "And in fact, Mr. Rybacki, pricing got worse in the second half of '08. We already saw that; right?" A: "Pricing got worse.")) Mr. Rybacki testified that, from a market perspective, "The second half of '08 turned gloomy." (RPPF ¶ 26; Rybacki, Tr. 3702). During the second half of 2008, Sigma's Fittings prices declined. (RPPF ¶ 267; Pais, Tr. 2129-2131 ("Q. This is an e-mail, sir, that you sent to Mr. Rybacki and others in the sales organization on November 24, 2008, so

this is a few months after DIFRA started. A. Yes. Q. Okay. Now, you refer here, in the very first sentence, "Dear Larry, "With the severe contraction in market volume over the recent few weeks, the equally quick and sharp erosion in market pricing" -- had market prices been declining at Sigma, your prices had been declining since DIFRA was founded? A. Absolutely.

Q. When you say "absolutely," sir, tell us what you're referring to here. A. Because in the second half the volume kept on dropping, and as you know, by September, there was a

cataclysmic decline, and the prices were in a pretty steep decline because all suppliers were trying to grab whatever business there was. Q. All right. So here you are in the second half of

'08 and you say that prices -- there's been an equally quick and sharp erosion in market pricing, and you say it's an alarming double whammy. What did you mean by that, sir? A. Well, as I

preface there with the volume dropping down and the prices falling, that is certainly a one-two punch. Q. Okay. Now, when you saw this double whammy, did you call up anyone at McWane

and say, "Hey, guys, let's all raise the price together"? A. No. Q. Okay. Let's scroll down if we can. You say, in the second sentence, "I suggest we do all we can to reverse it," and were you proposing to your team at Sigma that you announce an increase to see if you could reverse that?

A. Well, either announce an increase or try and see where we were in the actual pricing and then try to hold the line towards high pricing, through multipliers. Q. And was that something you

were internally discussing at Sigma at the time? A. Yes. Q. Did you call up anyone at any competitor and discuss that with them? A. None. Q. Let's go to RX 115, and again, before we

put it on the screen I'm going to ask the witness a few questions about it. Oh, I'm sorry. Can we go back for a second to RX 116. Can we highlight -- yeah. There's that third paragraph: "I

suggest we do all we can to reverse it." Then in the next sentence, you say, "Though I am not sure if the trend is similar at other parts, too, it seems to be most severe in the southeast,

especially in Florida." Is that what you said, sir? A. Yes. Q. Yeah. So was the price erosion, the sharp erosion, really severe in the fall of 2008, especially -- in the southeast but especially in Florida? A. It was."), RX 116; 2134-2135 ("Q. So a little while after DIFRA actually becomes operational, we see you say there's been this equally quick and sharp erosion in market pricing, the double whammy, and you say it's been especially severe in the southeast and especially in Florida; right, sir? A. Yes.") & RX 115, 2137-2140 ("Q. So Mr. Fox reports to you and the others that he believes, based on whatever information he has, that my client was actually lowering prices, leading to this sharp erosion in price in the southeast; correct? A. Yes. That's what he's trying to convey. Q. And then he says at the bottom of -- Then he says, at the bottom of that paragraph in the last sentence, "Interestingly, we have found Union/Tyler" -- and again, that's McWane; right, sir? A. Yes. Q. All right. Interestingly, we have found McWane leading markets downward in Tennessee and Alabama and the Carolinas. And that's the report you got from the guy in charge of Sigma of selling in those territories; right? A. Yes. Q. And all of these are reports you got about three and a half months after DIFRA actually started up; is that fair? A. That's correct. Q. All right. Now, if we go to the bottom of the second page -- well, I'm sorry. Let's go to the -- let's go to the first page. Down at the bottom. Now, here's an e-mail. It's quite a long e-mail, but we'll start here. This is an e-mail which you read and respond to your southeast territory manager, regional manager, Mr. Fox; right, sir? A. Yes. Q. And if we scroll over and then go on to the next page, if we look at number 4 there, you say, "I am sure that Tyler is as guilty of starting the price decline as any of the other two of us." And that's what your view was; you thought Tyler might very well have started that price decline. A. Sure. Q. Right. Two sentences after that, you say, "Here, the culprit again may be the plant work or job pricing which is still priced as in a different manner and this dual pricing practice could be continuing to harm

our overall pricing as it has over the past three to four years." Do you mean, sir, that here at the end of 2008 you had urged Mr. Rybacki and urged and urged him to change that plant work pricing, and he just had never done it, had he? A. Yes. Yeah. It sure seems that -- whether he did it or not I'm not sure, but it was not effective. And it also points to the fact that we were not trying to eliminate a special pricing, we were trying to minimize it, and apparently it has continued to be so, continued to be available to the salespeople.") (objections omitted), 2151 ("Q. All right. And when you said "pricing pressures," you're referring to that sharp erosion in prices in the second half of 2008 after DIFRA was operational? A. Yes.") & CX 1744); (Rybacki, Tr. 3660-3661 ("Q. Go ahead. Did prices -- did your average prices go down in the second half of '08, sir? A. Our volumes went down. I don't know -- I don't think our average pricing -- you know, we tried to hold the line because volume was going down, but -- but our volume definitely took a hit from August through September of '08. Q. Yeah. And if we look at some of your regions -- first of all, your price in the second half of '08 is different in every region; right? A. Yes. Q. And if we look at -- let's pick Alex City, the eighth month, so that's August, and if we can highlight that line. So in August, the average price for group A -- and group A is just your top-selling fittings of all sizes? Is that what that is? A. Correct. Q. All right. Your average price was a .28, but then it declined down to a .24 by the end of the year; right, sir, Alex City? A. Yeah, that's correct. Q. And then if we look down at the Chicago area, it was .27, .28 in the middle of the year, declined down to .26 by the end of the year; right, sir? A. Correct. Q. Mr. Rybacki, was there any time during 2008 when you discussed your job pricing with anyone at McWane and agreed upon let's reduce job pricing? A. Never."), 3717-3719).)

7.7.6 The Fittings Pricing Analysis of McWane's Expert Is Flawed

1424. The Fittings pricing analysis of McWane's Expert Dr. Parker Normann is flawed and unreliable. (*Infra* ¶¶ 1425-1435).

Response To Finding No. 1424:

See General Response 1 and responses to ¶¶ 1425-1435, *infra*. This is an unsupported assertion, to which no response is required. See Response To Finding 1425-1435.

1425. Dr. Normann's analysis of Fittings prices is flawed because it is based on meaningless and flawed data. (CX 2265 (Schumann Rebuttal Rep. at 3, 9-17); Schumann, Tr. 5792). The data do not reflect actual transaction prices or the actual prices paid by customers for the Fittings they purchase. (CX 2265 (Schumann Rebuttal Rep. at 10); Schumann, Tr. 5805-5806). The data do not reflect discounts below multiplier discounts, freight charges paid by customers or waived by the supplier, rebates to customers, extended terms, and cash discounts. (CX 2265 (Schumann Rebuttal Rep. at 10-11); Schumann, Tr. 5806).

Response To Finding No. 1425:

See General Responses 1 and 9. This finding is incorrect, because it is based solely on the testimony and report of Complaint Counsel's expert, all of which is based on insufficient data and inadequate, untestable methodology. (RPF ¶¶ 344-371) This finding is also directly contradicted by the testimony of Dr. Normann that he relied on invoice data from McWane, Sigma, and Star used in the normal course of their respective businesses. (Normann, Tr. 4740-4741). The invoice data shows the actual price charged to the customer, including both the published multiplier and discounts off of the published multiplier. (Normann, Tr. 4740-4741). The finding is correct in that the invoice prices do not include freight terms, cash discounts, or rebates. (Normann, Tr. 4741). The finding is nevertheless misleading and incorrect because the Administrative Complaint does not contain any allegations that McWane colluded with Sigma and Star regarding freight terms, cash discounts, or rebates. (Normann, Tr. 4741 ("So, fortunately, the invoice data in this case is exactly what we need to test the allegations because the allegations talk about really substantively two things or entirely two things, changes in the published multipliers that were in McWane's case effective in February of 2008 and July of 2008. Changes in the published multiplier, that's exactly what's captured in the invoice data.")).

1426. Dr. Normann's analysis of Fittings prices is also flawed because of known, but non-systematic lags between agreement on price terms and actual shipment and invoicing. (CX 2265 (Schumann Rebuttal Rep. at 5); Schumann, Tr. 5802-5805). Such lags between the time that prices are negotiated and the actual shipment date undermine any effort to associate an invoiced price with an event such as a change in list prices or multipliers or communication among parties. (CX 2265 (Schumann Rebuttal Rep. at 5)).

Response To Finding No. 1426:

See General Responses 1 and 9. This finding is incorrect, because it is based solely on the testimony and report of Complaint Counsel's expert, all of which is based on insufficient data and inadequate, untestable methodology. (RPF 344-371) The finding is also misleading and inaccurate because it ignores Dr. Normann's testimony that he did not see any evidence that the so-called "lags" changed over time. (Normann, Tr. 5139-5140). Further, Dr. Normann's time series effectively captures the lag between price formation and the invoice. (Normann, Tr. 5144). *See* Response To Finding 1425, *supra*.

1427. Dr. Normann does not control for customer mix issues in his data analyses. (CX 2265 (Schumann Rebuttal Rep. at 11); Schumann, Tr. 5806-5807). Customers in different regions of the country or customers of different sizes receive different actual prices. (CX 2265 (Schumann Rebuttal Rep. at 12); Schumann, Tr. 5807). Accordingly, changes in the regional locations and relative sizes of customers from month to month will alter average transactions prices. (CX 2265 (Schumann Rebuttal Rep. at 12)). Without controlling for differences in customer mix, comparing prices from month to month or over longer periods of time is not meaningful. (CX 2265 (Schumann Rebuttal Rep. at 12)).

Response To Finding No. 1427:

See General Responses 1 and 9. This finding is incorrect, because it is based solely on the testimony and report of Complaint Counsel's expert, all of which is based on insufficient data and inadequate, untestable methodology. (RPF 344-371) *See* Response To Finding 1425, *supra*.

1428. Dr. Normann's analysis of fitting prices is also flawed because the data has errors. (CX 2265 (Schumann Rebuttal Rep. at 9); Schumann Tr. 5805). One type of error occurs when the actual multiplier from a given transaction is larger than the list multiplier. (CX 2265 (Schumann Rebuttal Rep. at 13); Schumann, Tr. 5814-5815). McWane's

counsel acknowledged these circumstances were “most likely an order entry error” because “there is no commercial reason” for such a situation to exist. (CX 2552 at 001 (June 5, 2012 email from McWane Counsel to Complaint Counsel); Schumann, Tr. 5810-5811, 5821-5822). This error rate is measured by the fraction of transactions in which the reported (or implied) transaction multiplier exceeds the list multiplier. (CX 2265 (Schumann Rebuttal Rep. at 13)).

Response To Finding No. 1428:

See General Responses 1 and 9. This finding is incorrect, because it is based on the testimony and report of Complaint Counsel’s expert, all of which is based on insufficient data and inadequate, untestable methodology. (RPF 344-371) *See* Response To Finding 1425, *supra*. The finding ignores Dr. Normann’s testimony regarding his investigation of the so-called “errors” described by Complaint Counsel. (Normann, Tr. 5163-5166). This finding also relies on an email from Respondent’s counsel (CX 2552) rather than on evidence from a fact witness in the case.

1429. In 2008, the known error rate was 4.27 %, representing the instances of non-domestically produced Fittings (those marked with ND in their product code) in which the actual multiplier exceeded the list multiplier. (CX 2265 (Schumann Rebuttal Rep. at 13); Schumann, Tr. 5808-5809 (error rate a little over 4 percent)). In 2009, the known error rate was 10.75 %. (CX 2265 (Schumann Rebuttal Rep. at 13); Schumann, Tr. 5818 (nearly 11 percent)).

Response To Finding No. 1429:

See General Responses 1 and 9. This finding is incorrect, because it is based solely on the testimony and report of Complaint Counsel’s expert, all of which is based on insufficient data and inadequate, untestable methodology. (RPF 344-371) *See* Response To Findings 1425 and 1428, *supra*.

1430. In January 2008, the known error rate for non-domestically produced Fittings was 21 % error rate, representing the instances of non-domestically produced Fittings (those marked with ND in their product code) in which the actual multiplier exceeded the list multiplier. (CX 2265 (Schumann Rebuttal Rep. at 14-15); Schumann, Tr. 5809-5810). These errors create an upward bias in the January 2008 price data. (CX 2265 (Schumann Rebuttal Rep. at 15); Schumann, Tr. 5810). These errors impact and call into question Dr. Normann’s conclusion that non-domestic prices fell from January 2008 to February

2009, and the errors also impact his Figures 2A and 2B. (CX 2265 (Schumann Rebuttal Rep. at 16); Schumann, Tr. 5847-5849).

Response To Finding No. 1430:

See General Responses 1 and 9. This finding is incorrect, because it is based solely on the testimony and report of Complaint Counsel's expert, all of which is based on insufficient data and inadequate, untestable methodology. (RPF 344-371) *See* Response To Findings 1425 and 1428, *supra*.

1431. There is no way to unambiguously identify domestically made Fittings sold at Domestic Fittings prices versus domestically made Fittings sold at the Open Specification prices. (CX 2265 (Schumann Rebuttal Rep. at 13); Schumann, Tr. 5825). Thus, there are errors in the classification of sales data between Domestic spec and Open Specification sales. If product is incorrectly classified, it introduces uncertainty and randomness in the data that would then require statistical hypothesis testing for analysis of the data. (Schumann, Tr. 5825-26).

Response To Finding No. 1431:

See General Responses 1 and 9. This finding is incorrect, because it is based solely on the testimony and report of Complaint Counsel's expert, all of which is based on insufficient data and inadequate, untestable methodology. (RPF 344-371) *See* Response To Finding 1425, *supra*.

1432. There are also errors in the multipliers in the data set of domestically produced Fittings. (CX 2265 (Schumann Rebuttal Rep. at 13-14); Schumann, Tr. 5823, 5824-5825). In 2008, the error rate was 9.10 %, representing the percentage of the actual transaction multipliers for domestically produced Fittings that exceed the list multipliers for domestic. (CX 2265 (Schumann Rebuttal Rep. at 14); Schumann, Tr. 5824). For 2009, this error rate was 6.40 %. (CX 2265 (Schumann Rebuttal Rep. at 14); Schumann, Tr. 5824).

Response To Finding No. 1432:

See General Responses 1 and 9. This finding is incorrect, because it is based solely on the testimony and report of Complaint Counsel's expert, all of which is based on insufficient data

and inadequate, untestable methodology. (RPF 344-371) *See* Response To Finding 1425, *supra*.

1433. Dr. Normann's analysis of Fittings prices does not control for the many other factors that directly and substantially impact price. (CX 2265 (Schumann Rebuttal Rep. at 18); Schumann, Tr. 5832-5834). To estimate the effect of any specific economic event on price, one must control for all other factors that might affect price besides the event of interest. (CX 2265 (Schumann Rebuttal Rep. at 18); Schumann, Tr. 5833, 5837-5838). Dr. Normann's failure to control for the other factors that shift supply and demand curves, and thus impact prices, renders his analysis and conclusions of no value in understanding the markets at issue. (CX 2265 (Schumann Rebuttal Rep. at 18-19); Schumann, Tr. 5834-5838).

Response To Finding No. 1433:

See General Responses 1 and 9. This finding is incorrect, because it is based solely on the testimony and report of Complaint Counsel's expert, all of which is based on insufficient data and inadequate, untestable methodology. (RPF 344-371) *See* Response To Finding 1425, *supra*.

1434. Dr. Normann fails to follow standard and long accepted practices when performing statistical analysis and hypothesis testing. (CX 2265 (Schumann Rebuttal Rep. at 3, 62); Schumann, Tr. 5794-5795). He fails to report standard errors or confidence intervals of slopes for his hypothesis tests. (CX 2265 (Schumann Rebuttal Rep. at 25); Schumann, Tr. 5801-5802, 5849, 5863, 5871). Dr. Normann does not report tests for robustness of his data analysis. (CX 2265 (Schumann Rebuttal Rep. at 23, 29, 48); Schumann, Tr. 5831-5832).

Response To Finding No. 1434:

See General Responses 1 and 9. This finding is incorrect, because it is based solely on the testimony and report of Complaint Counsel's expert, all of which is based on insufficient data and inadequate, untestable methodology. (RPF 344-371)

1435. Because of the meaningless and error ridden data and because of his failure to follow standard econometric practices, Dr. Normann's figures are unreliable and are not relevant to or useful for economic analysis. (CX 2265 (Schumann Rebuttal Rep. at 62)).

Response To Finding No. 1435:

See General Responses 1 and 9. This finding is incorrect, because it is based solely on the testimony and report of Complaint Counsel's expert, all of which is based on insufficient data and inadequate, untestable methodology. (RPF 344-371) This finding also misstates Dr. Schumann's conclusions because he does not state that Dr. Normann's figures "are not relevant to or useful for economic analysis."

7.8 As Market Conditions Worsened, the Fittings Suppliers Continued to Monitor Each Other's Pricing Actions, and Communicated Regarding Perceived "Cheating"

1436. As market conditions worsened in August 2008 and thereafter, the Fittings suppliers continued to monitor each other's pricing actions, complained about perceived "cheating," eventually resumed Project Pricing and stopped participating in DIFRA. (*Infra* 1437-1490).

Response To Finding No. 1436:

See General Response 1 and responses to 1437-1490, *infra*. This is an incorrect, unsupported assertion which requires no response.

1437. In August 2008, the housing market declined precipitously, creating additional pricing pressure. (Rybacki, Tr. 1105, 3578 (testifying that "[a]fter the third week of August of 2008, I alerted my team that the demand was starting to weaken" and that is when the "demand for all waterworks products started to get soft"); CX 1651 at 026, *in camera* [REDACTED] (CX 2531 (Rybacki, Dep. at 134-135, 157-158 ("That's when housing had just stopped and the economy had taken -- in August of 2008, the market, somebody just shut the faucet off."; "[W]e had a big July. I remember we had a big July and good first half of August, and that's when it started to go down. It started to go down mid to late August 2008"))).

Response To Finding No. 1437:

Respondent has no specific response.

1438. The softening of demand caused the Fittings market to become more competitive. (Rybacki, Tr. 3578-3579).

Response To Finding No. 1438:

Respondent has no specific response.

7.8.1 The Suppliers Monitored the Marketplace for “Cheating”

1439. Star continued to monitor whether its competitors were offering Project Pricing as the market became more competitive in August 2008. (CX 0814 (Minamyer August 25 email to Star division managers: “I have noticed that recently we have been seeing more pricing pressure”); McCutcheon, Tr. 2452-2453).

Response To Finding No. 1439:

The evidence cited supports the fact that Star “monitored” the competitive information it could independently gather from customers regarding competitive pricing the best that it could, and does not support the inference that Star’s “monitoring” was any different than at any time period or in any way related to or part of any alleged conspiracy.

1440. Star had limited its Project Pricing to situations where there was proof that competitors were “cheating.” (CX 1694 at 001 (September 4, 2008 email (“We have seen Sigma cheat on larger projects in other parts of the country and have responded accordingly when we see something.”); Minamyer, Tr. 3221).

Response To Finding No. 1440:

See General Responses 1 and 4. This finding grossly misstates the cited testimony since Mr. Minamyer did not testify that Star “had limited its Project Pricing to situations where there was proof that competitors were ‘cheating.’” This finding is inaccurate because Dr. Schumann admitted that McWane, Sigma and Star all offered job price discounts and other price concessions, including rebates, freight absorption, and credit extension, throughout 2008. (RPF ¶ 182; Schumann, Tr. 4287:21-4288:1 (“yes, there was job pricing during 2008”), 4288:23-4289:1 (“I believe they did offer job pricing throughout 2008”), 4290:3-13.) He also admitted that he ignored McWane and Star spreadsheets and other documents recording each company’s job discounts. (Schumann, Tr. 4082:3-11, 4084:16-4086:6 (“Well, I meant I didn’t consider it”), 4086:21-4087:3 (“No, I did not”), 4090:3-9, 4091:9-23 (“No, I did not discuss this”).)).

This finding is inaccurate because, when Star announced a price increase, Mr. Minamyer “hoped” his competitors would stop job pricing. (RPF ¶ 164; Minamyer, Tr. 3162, 3253-3254

(Q: “And then I think you testified that you -- earlier that you hoped your competitors would follow and not price below published multipliers; correct?” A: “That's correct.”)).

This finding is inaccurate because Mr. Minamyer understood that a price increase would not hold if Star or any of its competitors undercut the price increase with project pricing.

Q. Okay. You understand, again, if you want to take a price increase, you can't then project-price below it and have that price increase stick; correct?

A. That's correct.

Q. Okay. And again, you reiterate, if you document that the competition is not holding, then you need to do the same thing; correct?

A. Correct.

Q. And so, again, you're hoping, you're wishing, you're wanting. You want the competition [to charge published prices and not project price] because you want the higher price, right?

A. Correct.

Q. Okay. But you don't know that's what they're going to do; correct?

A. That's correct.

Q. And if they don't, if the competition doesn't take the higher price, if they project-price, then Star has to as well; right?

A. That's correct. (RPPF ¶165; Minamyer, Tr. 3256-3257).).

This finding is inaccurate because Star did not cease or curtail job pricing in 2008. (RPPF ¶ 167; McCutcheon, Tr. 2512). In fact, Star's special pricing requests, or SPRs, actually increased in 2008. (RPPF ¶ 167; McCutcheon, Tr. 2402-2403) (“And we've been looking at SPRs [special pricing requests] ever since this thing happened. Since we were accused of price fixing, we've gone back and looked at our SPRs, and we figured out that during this whole

process that we were accused of price-fixing, our SPRs went up, 20 percent. And that's bizarre to us, that we could be accused of price fixing in a period that SPRs go up 20%.").).

This finding is inaccurate because Star continued offering job pricing and other price concessions to its customers throughout 2008, 2009, 2010 and up through the present. (RPPF ¶ 170; McCutcheon, Tr. 2553-54 ("Q: "Do you see where I am, sir? January '08 267, February of '08 300, and so forth, down to the year end 2,669?" A: "Yes, sir." Q: "Is that data that you saw in summary form?" A: "Yes, sir. I believe I got four years running with that information that's in the far right-hand column, that exact information in totals." Q: "All right. So am I right, Mr. McCutcheon, did I understand your testimony correctly yesterday that the company had job pricing and special prices throughout 2008; right?" A: "Yes, sir." Q: "And throughout 2009; right?" A: "Yes, sir." Q: "And continuing to 2010?" A: "Yes, sir." Q: "And continuing to today?" A: "Yes, sir."); Minamy, Tr. 3265 (Q: "So again, in May of 2008, Star would continue to project-price under the right circumstances, and that would be to meet competition; correct?" A: "That's correct."), 3275 (Q: "And you were matching lowering prices below the published multiplier frequently; correct?" A: "I believe so.)).).

This finding is inaccurate because Star priced job-priced whenever it needed to get business in 2008. (RPPF ¶ 173; Minamy, Tr. 3277-3278) ("Q. And you had a plan that you would try and limit job pricing, but we've seen that really didn't play out either, did it? A. Right . . . Q. Okay. And Star job-priced whenever it needed to job price in 2008 to get business, didn't it? A. Yes.)). Star's CEO, Mr. Bhutada, testified that job pricing was always the norm in the Fittings market, including in 2008. (RPPF ¶ 179; JX 694 (Bhutada, Dep. at 18-19)). Mr. McCutcheon testified that, during 2008, Fittings prices were falling, and "Every project required special pricing it seemed. It seemed like it was a -- projects were all auctioned, all the

fitting manufacturers were bidding them, and there was just no consistency to our pricing.”)).

(RPPF ¶ 180; McCutcheon, Tr. 2568).

1441. When Star division manager Mr. Shaun Smith received reports of Project Pricing by McWane, he reminded his sales force on August 18, 2008:

We need to stay on the high road, but with our relationships, we should be able to react when necessary. I know it sometimes becomes a difficult discussion, but because of how manufactures/distributors/contractors have acted over the years with (I need a better price!) it created this spiraling price erosion that needed to stop. It doesn't help that the market is soft, but let's be as diligent as we can gathering the proper data needed if the other suspects are cheating. We will react, just need to make sure it is real.

(CX 1695 at 001; Minamyer, Tr. 3219-3221).

Response To Finding No. 1441:

See General Responses 4 and 5. See response to ¶ 1440, *supra*. This finding is incomplete, and therefore misleading because Mr. Minamyer testified that the “proper data” Star was gathering came from a customer and not from McWane or Sigma. (Minamyer, Tr. 3220 (“Q. He goes on to write: ...let's be diligent as we can gathering the proper data needed if the other suspects are cheating. Proper data, is that documentation of price, project pricing? A. It would be documentation of whatever pricing that the competitor has offered our customer.”)).

1442. Although Star believed that efforts to reduce Project Pricing had been successful, and that the results were positive, in August 2008, Mr. Minamyer asked his team to compile evidence of “Sigma’s Antics.” (CX 0814 (Minamyer August 25, 2008 email (“I know we have been very careful on special pricing and it seems to be working pretty good. But the competitors are starting to get weak and we can't sit back and let them play games and lose our market share.”))).

Response To Finding No. 1442:

See General Response 4, and response to ¶ 1440, *supra*. This finding is misleading because Star's independent attempt to reduce its job pricing was not successful, as reflected in the job prices it offered throughout 2008. (RPPF ¶ 166; McCutcheon, Tr. 2689-2690, 2540-2541

(Q: “And it sounded like from your testimony yesterday that the company continued to offer a lot of job price discounts in 2008.” A: “Yes, sir.”); 2547-2548 (Q: “All right. Now, you had said yesterday that the company provided lots and lots of job prices during 2008; is that right?” A: “Yes, sir.”) & RX 557, 2550-2551 (Q: “All right. So the report you requested in July of 2011, and it contains a report of the pinks from 2008 final; right, sir?” A: “Yes, sir.”), 2553-2554 (Q: “All right. So am I right, Mr. McCutcheon, did I understand your testimony correctly yesterday that the company had job pricing and special prices throughout 2008; right?” A: “Yes, sir.”); Minamyer, Tr. 3174-3175 (Q: “Was Star successful at reducing project pricing for a period in time?” A: “To my recollection, no.”), 3274-3275 (Q: “And you were matching lowering prices below the published multiplier frequently; correct?” A: “I believe so.”), 3277-3278 (Q: “Okay. And I know you don't -- this has been some years ago and you don't have specific recollection, but what were the competitive conditions in 2008? What do you remember about that time frame?” A: “I remember that everything -- the market was always very competitive. We -- we had to fight pretty hard for every order.”)). See RPF 160-182.

This finding is inaccurate because the cited exhibit provides “guidance” to the six recipients of the August 25, 2008 email to “[c]ontinue to report what’s going on” and does not ask them “to compile evidence of ‘Sigma’s Antics.’” (CX 0814).

1443. Mr. Minamyer continued to receive reports about Sigma and McWane cheating. For example, on September 9, 2009, Mr. Minamyer received the following report from a Star sales representative:

I know we would like to keep the market up but Tyler and Sigma keep cheating and costing our partners in a baddddd [*sic*] market where they are down substantially already. . . . We are going to loose [*sic*] market share by continuing the tough stance. Tyler got where they are by being staunch and arrogant. I don't want to be looking back a year from now with a 2% [price] increase and 25% less biz.

(CX 1697; Minamyer, Tr. 3222-3226 (“keep the market up” referred to prices, and “tough stance” refers to Star’s effort to not offer Project Prices)).

Response To Finding No. 1443:

See General Response 4, and response to ¶ 1440, *supra*. This finding is misleading because Star's independent attempt to reduce its job pricing was not successful, as reflected in the job prices it offered throughout 2008. (RPF 166; McCutcheon, Tr. 2689-2690, 2540-2541 (Q: "And it sounded like from your testimony yesterday that the company continued to offer a lot of job price discounts in 2008." A: "Yes, sir."); 2547-2548 (Q: "All right. Now, you had said yesterday that the company provided lots and lots of job prices during 2008; is that right?" A: "Yes, sir.") & RX 557, 2550-2551 (Q: "All right. So the report you requested in July of 2011, and it contains a report of the pinks from 2008 final; right, sir?" A: "Yes, sir."), 2553-2554 (Q: "All right. So am I right, Mr. McCutcheon, did I understand your testimony correctly yesterday that the company had job pricing and special prices throughout 2008; right?" A: "Yes, sir."); Minamy, Tr. 3174-3175 (Q: "Was Star successful at reducing project pricing for a period in time?" A: "To my recollection, no."), 3274-3275 (Q: "And you were matching lowering prices below the published multiplier frequently; correct?" A: "I believe so."), 3277-3278 (Q: "Okay. And I know you don't -- this has been some years ago and you don't have specific recollection, but what were the competitive conditions in 2008? What do you remember about that time frame?" A: "I remember that everything -- the market was always very competitive. We -- we had to fight pretty hard for every order.")).

1444. In a September 19, 2008 email to Mr. Minamy, Star regional sales manager Ramon Prado referred to Sigma's conduct as "cheating on the fitting deal." (CX 1691 ("I think we are doing better since figuring out that Sigma was cheating on the fitting deal."); Minamy, Tr. 3221-3222).

Response To Finding No. 1444:

See General Response 4, and response to ¶ 1440, *supra*. Complaint Counsel never conducted an investigational hearing, or deposition of Mr. Prado, nor did they call him as a

witness at trial. This finding is incomplete and therefore misleading. Mr. Minamyler testified that the quotation “I think we are doing better since figuring out that Sigma was cheating on the fitting deal.” was merely a reference to Sigma offering project pricing “[o]r offering pricing below their published multipliers.” (Minamyler, Tr. 3221-3222). The implication that the reference to a “deal” (by a person never called as a witness) has any correlation to the alleged collusion is belied by the record evidence.

1445. By October 2008, Star was “catching Sigma cheating more and more.” (CX 1698 at 001 (October 22); *see also* CX 1699 (October 28 weekly activity report (“As reported, we are seeing cheating all over from Sigma”))).

Response To Finding No. 1445:

See General Responses 4 and 5. This finding is misleading because, as Complaint Counsel’s own expert testified, the author of CX 1698 (Mr. Shaun Smith, a Star Regional Sales Manager, Tatman Tr., 913) was not deposed in this case and there was no testimony from the author of the document on what was meant by the term “cheating.” (Schumann Tr. 4305-4306) CX 1699 was also written by Mr. Smith so that there was no testimony from the author of the document on what was meant by the term “cheating.” This finding is misleading because, as Dr. Schumann testified, CX 1698 “references fittings 30 inches and above” and those fittings “are not in the relevant antitrust market that I analyzed.” (Schumann Tr. 4309)

1446. On October 22, 2008, Mr. Minamyler wrote that “Sigma is silently bringing markets down and acting as if they are being good stewards.” (CX 0827).

Response To Finding No. 1446:

See General Responses 4 and 5.

1447. At the end of October 2008, Mr. Minamyler asked his division managers for “the top five things Sigma does or has done in your division that is out of market pricing or any weird stuff.” (CX 0871 at 001).

Response To Finding No. 1447:

See General Responses 4 and 5.

1448. On November 20, 2008, Mr. McCutcheon received a report from Mr. Prado of more Sigma cheating in Florida (selling fittings at a .25 multiplier), and responded “Too bad they keep doing this.” (CX 0750 at 001).

Response To Finding No. 1448:

See General Responses 4 and 5. Complaint Counsel did not conduct an IH or deposition of Mr. Prado and never called him as a trial witness to examine him on the subject exhibit.

1449. Sigma made sure its disciplined reduction in job pricing did not cause it to lose share. Sigma used the monthly DIFRA reports to ensure that it was not losing market share to Star and McWane. (CX 0319 at 002 (May 4, 2009 email from Mr. Pais to Sigma’s M20 (Sigma “kept up our DIFRA membership thru 08 and had used the monthly data in an useful manner to keep track of both the total market size and our SMS (Sigma Market Share),” and as overall volume continued to decline in 2008, Sigma was “able to stay reassured that we were holding on to our [market share] . . . or close to it!”); see *supra* § 7.6.3.3 (Sigma use of DIFRA Data.)) Mr. Rybacki also had numerous phone conversations with Mr. McCutcheon, although he does not remember what was discussed on those calls. (See *supra* § 6.4.1.2).

Response To Finding No. 1449:

See General Responses 1, 4, 5 and 11, and responses to §§ 7.6.3.3 and 6.4.1.2, *supra*.

This finding is inaccurate because the cited exhibit does not support the allegation that Sigma had a “disciplined reduction in job pricing.” In fact, the cited language states nothing about job pricing. This finding is directly contradicted by and inconsistent with CCPFF ¶ 720, *supra*. This finding is inaccurate because Sigma did not have a “disciplined reduction in job pricing.” Sigma never stopped or reduced job pricing. (RPF ¶ 150-159; Rybacki, Tr. 1107 (Q: “Was there a special effort that you made in 2008 to reduce job pricing, in other words, job pricing below?” A: “No.”), 3715).). Mr. Pais testified that in 2008, Sigma had never stopped or reduced job pricing. (RPF ¶ 151; Pais, Tr. 2192 (Q: “All right. So you've got job price discounts throughout 2008, sir, that Sigma was offering?” A: “Sure.”), 1918 (“pricing was all over the map

so - and figures and analysis bears that out.”), 2075 (Pricing “varied every day with every customer in every territory.”)). Mr. Rybacki testified that job pricing has continued unabated in the Fittings market for at least 20 years. (RPF 154; Rybacki, Tr. 3522-3524 (“I joined Sigma in 1990. We tried to do it since 1990, so every month, every week, every year, every day, I try to be consistent and disciplined in pricing, but unfortunately our industry doesn't allow that to happen.”), 3658-3659 (“We've failed at this for my twenty years. We've not been able to do this.”), 3706-3707 & CX 1002 *in camera*, 3743). Mr. Rybacki testified that Sigma has been trying unsuccessfully to reduce job pricing for over 20 years, because job pricing reduces Sigma's profit margins, but it has never had any success in doing so. (RPF 155; Rybacki, Tr. 3522-3524, 3658-3659, 3701 & CX 1002 *in camera*), 3522-3524 (Q: “What efforts, if any, did Sigma make in 2008 to reduce project pricing?” A: “Project pricing is an ongoing battle within Sigma, within the industry of -- that goes on all the time on special projects, and it -- we're always trying to curtail project pricing, always have.”)). With regard to Sigma's job pricing in 2008, Mr. Rybacki testified: “Q. Well, that's a lot of different prices. Well, this is a summary of all of your '08 prices for the year; is that right? A. Correct. Q. Well, did all these salespeople have some authority to price within a certain area within certain ranges however they needed to get the jobs? A. The regional manager controls the salesmen, but the salesmen all have some latitude, a little, just a little latitude, but they have to prove it by their regional manager, and if it's really off the charts, then the regional manager will call me and I'll say yea or nay. Q. But, Mr. Rybacki, I thought you guys had reined in all the special job pricing. I thought your goal always was to rein it in. Isn't that right, sir? A. That's the goal. Q. But this doesn't look like you're reining it in very well, does it, sir? A. No. We've failed at this for my twenty years. We've not been able to do this. Correct.” (RPF 156; Rybacki, Tr. 3658-3659). Throughout 2008,

Sigma's salespeople retained pricing authority and offered job pricing all over the map. (RPF 158; Rybacki, Tr. 3697 (Q: "No. And in fact, we just saw a big spreadsheet in camera -- and don't discuss the details, but we just saw a spreadsheet that shows that at the end of the year, all of your salespeople in every region still had a lot of pricing authority and were pricing all over the map, didn't we, sir?" A: "Correct.") & CX 1189 & CX 1002-4 in camera).

1450. McWane's sales representatives were tasked with identifying and logging instances of Project Pricing being offered in their territories. (Tatman, Tr. 333-334, 915-916, 919-920 (describing competitive feedback reports as being based solely on weekly narratives from each of McWane's eight to ten sales representatives); RX-598 (a competitive feedback report); Tatman, Tr. 931-933; 1007, 1013, *in camera* ; RX-396.xls, *in camera* ; see also *supra* ¶¶ 1043-1047 (describing McWane's initiation of market monitoring efforts in 2008)). Mr. Tatman used the competitive feedback log to conclude that Project Pricing, *i.e.*, cheating, had died down in his Quarterly Executive Report. (*See supra* ¶ 1054).

Response To Finding No. 1450:

See General Responses 1 and 11, and response to ¶ 1054, *supra*. This finding is incorrect because job pricing had not "died down" in the first quarter of 2008. To the contrary, the overwhelming evidence is that all of the fittings suppliers continued to aggressively offer job pricing and other price concessions throughout 2008. (RPF ¶¶ 141-190) McWane continued to aggressively job price after issuing its January 11, 2008 customer letter and throughout 2008. (RPF ¶ 142; Tatman, Tr. 924, 893-894 ("And what you see here is it's our intention in going forward to sell products only off newly published multipliers. Well, we all knew internally that we would have -- to meet our objectives, we would have to job-price. But it is self-serving for us, based on what we were doing, is to do a head fake that we were not going to and then do as we see or was as appropriate, and you will see in our records we job-priced continually.") & CX 1178, 930-931 (Q: "Did you -- at Tyler/Union did you continue to job-price throughout 2008 as these reports were coming in?" A: "You -- look at a file from us. We've job-priced continually every month."), 934 & RX 396).) During 2008 alone, McWane approximately 500

different job prices to its customers. (RPF ¶ 145; RX 396 (McWane 2008 price protection log); JX 644 (Tatman, Dep. at 109)). Sigma never stopped or reduced job pricing. (RPF ¶ 150; Rybacki, Tr. 1107 (Q: “Was there a special effort that you made in 2008 to reduce job pricing, in other words, job pricing below?” A: “No.”), 3715).).

7.8.2 The Suppliers Complained About Cheating

1451. When Mr. Tatman heard about instances of other suppliers not adhering to published pricing, he contacted them to complain. For example, in March 2008 Mr. Tatman complained to Mr. Rona at Sigma about ongoing Project Pricing. (*See supra* ¶ 1035).

Response To Finding No. 1451:

See General Responses 1 and 11, and response to ¶ 1035, *supra*. This is an unsupported assertion to which no response is required.

1452. In another example, on August 22, 2008, Mr. Rona of Sigma forwarded Mr. Tatman’s complaints about Sigma’s and Star’s prices in Florida and California to Sigma’s OEM5 email group of top managers (including Mr. Pais, Mr. Bhattacharji, Mr. Rybacki, and Mr. Brakefield):

Guys, Rick [Tatman] was upset by the numbers in Florida and California based on what he has seen from us and Star. He said the .26 and .30 were available from us both without any second thought.

(CX 1149; Rona, Tr. 1613-1618; CX 2530 (Rona, Dep. at 147, 148, 194, 197-198) (Mr. Tatman complained to Mr. Rona that Sigma and Star were too quick to offer to discounted Fittings price multipliers down to .26 and .30 in Florida and California)). (CX 1149; Rona, Tr. 1613-1618; CX 2530 (Rona, Dep. at 147-149, 194-198) (Mr. Tatman complained to Mr. Rona that Sigma and Star were too quick to offer to discounted Fittings price multipliers down to .26 and .30 in Florida and California)). Mr. Tatman testified that he has no recollection of this conversation with Mr. Rona. (CX 2484 (Tatman, Dep. at 113) (“Q. Do you recall having any conversations about the prices available from Sigma or Star with Mr. Rona in August of 2008? A. Not that time frame, no.”); Tatman, Tr. 364 (“I do not remember the call.”)). Mr. Tatman did recall, however, that he and Mr. Rona discussed prices on another occasion, on which Mr. Tatman had taken the opportunity to complain about Project Pricing. (CX 2484 (Tatman, Dep. at 114) (“I believe at some point in time Mitchell asked me, you know, do you think the marketplace will support a price increase or something, and I give my same sarcastic answer . . . [w]hich is . . . I don’t think the marketplace will support a price increase . . . when the current prices aren’t valid.”)).

Response To Finding No. 1452:

See General Responses 1 and 11. This finding is incomplete, and therefore misleading because, at the time of the August 22, 2008 email, Mr. Rona was Sigma's OEM business manager, with absolutely no involvement in or authority over Sigma's pricing decisions for Fittings. (RPF ¶ 309; Rona, Tr. 1437-1440 (Q: "Who are your OEM customers?" A: "OEM customers would be customers who bought fittings similar to the fittings Sigma produced for the distribution business. Then we sold special proprietary products to some of those same OEM customers who were in the pipe fitting business."), 1453-1454 (Q: "Are you involved in setting prices for fittings at Sigma?" A: "No." ... Q: "Do you participate, sir, in the discussions with Mr. Rybacki and perhaps others about pricing at Sigma?" A: "I can't -- I can't recall sitting down and in any session or formal dialogue discussing it with Mr. Rybacki. No."), 1627-1628 (Q: "And did you have any authority or responsibility for sales into the distribution channel?" A: "No."))).

This finding is incomplete, and therefore misleading because, in the OEM business, McWane and Sigma were not competitors, but customers of each other.

Okay. Now, McWane was one of your regular customers with whom you negotiated prices for OEM products; correct?

A: Correct.

Q: And Mr. Tatman was one of your customers; correct?

A: Correct.

Q: And you were a customer of Mr. Tatman's; correct?

A: Correct."

Q: And you did not compete with Mr. Tatman on OEM sales; correct?

A: Correct.

Q: Okay. And it was normal for you and Mr. Tatman to have e-mail and phone conversations about these kind of sales; correct?

A: Correct.

(RPF ¶ 311; Rona, Tr. 1628-1629, see also 1446-1449, 1626; Tatman, Tr. 365-366 (“I do speak to Mitchell Rona. Mitchell Rona is the OEM product manager at Sigma. He is a customer of mine. He buys things from me. He's also a supplier. I buy things from him. In the normal course of business in an arm's length agreement I'd have discussions with Mitchell Rona.”)).

This finding is incomplete, and therefore misleading because, in the OEM context, Mr. Rona and Mr. Tatman, regularly negotiated arms-length buy-sell agreements with each other and therefore had legitimate business reasons to communicate with one another. (RPF ¶ 312; Tatman, Tr. 365-366 (“I do speak to Mitchell Rona. Mitchell Rona is the OEM product manager at Sigma. He is a customer of mine. He buys things from me. He's also a supplier. I buy things from him. In the normal course of business in an arm's length agreement I'd have discussions with Mitchell Rona.”), 639-641 (Q: “And you sent it to Mitchell Rona?” A: “Yeah. He would be my normal -- he's my customer and my supplier.”) & CX 1434; Rona, Tr. 1446-1449, 1626 (Q: “And as part of your job, it's normal for you to e-mail and speak with McWane regarding the negotiation of these buy-sell agreements; correct?” A: “From time to time, yes.”), 1628-1629 (Q: “Okay. Now, McWane was one of your regular customers with whom you negotiated prices for OEM products; correct?” A: “Correct.”)).

This finding is incomplete, and therefore misleading because Mr. Rybacki was the person at Sigma with ultimate authority for setting prices of Fittings for sale to Distributors during the time frame at issue in this action. (RPF ¶ 313; Rybacki, Tr. 1096 (“All pricing at the end of the day stopped with me, so I had authority over pricing product.”))).

This finding is incomplete, and therefore misleading because Complaint Counsel presented no evidence that the two Rona emails had any impact on Sigma's pricing of Fittings for sale to Distributors or on Mr. Rybacki, the Sigma executive responsible for Distributor pricing. (RPF 314; Rona, Tr. 1453-1454, 1627; Rybacki, Tr. 1096, 3715-3717).).

This finding is incomplete, and therefore misleading because Mr. Rona sent the August 22, 2008 email to a general email group "OEM5" that happened to include Mr. Rybacki, but Mr. Rybacki does not recall receiving the email and testified that he never discussed it with Mr. Rona. (RPF 316; Rybacki, Tr. 3715-3717 (Q: "It says 'To: OEM5.' Do you have any recollection at all of this e-mail?" A: "I don't -- you know, I -- I don't remember seeing it. Maybe I did, but I don't remember seeing it." ... Q: "And did you call Mr. Rona up and say, 'Hey, Mr. Rona, go call Tatman up and tell him we'll stop our job pricing'?" A: "Never told him that.") & CX 1149).).

This finding is incomplete, and therefore misleading because Mr. Rona testified that he never had a discussion with Mr. Rybacki or anyone else at Sigma about setting Fittings prices for distribution channel sales. (RPF 317; Rona, Tr. 1454 (Q: "Do you participate, sir, in the discussions with Mr. Rybacki and perhaps others about pricing at Sigma?" A: "I can't -- I can't recall sitting down and in any session or formal dialogue discussing it with Mr. Rybacki. No.")).).

This finding is incomplete, and therefore misleading because Mr. Rybacki never spoke with anyone at McWane about stopping or reducing job pricing and never asked Mr. Rona to do so. (RPF 318; Rybacki, Tr. 3716-3717 (Q: "Did you call Mr. Tatman or anyone at McWane when you got this and say, 'Hey, let's all stop job pricing'?" A: "No." Q: "And did you call

Mr. Rona up and say, 'Hey, Mr. Rona, go call Tatman up and tell him we'll stop our job pricing'?" A: "Never told him that.") & CX 1149).

This finding is incomplete, and therefore misleading because Fittings prices continued downward after Mr. Rona's August 2008 email. (RPFF ¶ 320; Rybacki, Tr. 3577-3579 (Q: "[w]hat happened in the third week in August of 2008 in the fittings market?" A: "It's not specifically the third week of August. August 2008 the market started to deteriorate -- the demand for our products in the waterworks industry started to deteriorate. The market was getting -- started to get soft. The demand for all waterworks products started to get soft." Q: "And what effect did the soft demand in August of 2008 have on your pricing?" A: "It makes you more competitive, makes you lower pricing because there's less -- less demand for it.)& CX 1149; Tatman, Tr. 971-972 (Q: "Okay. Mr. Tatman, did the business improve after September of '08 for the rest of the year?" A: "No." Q: "Did pricing get worse, sir?" A: "Worse."); (Rybacki, Tr. 3717-3719 (Q: "And in fact, pricing specifically got worse in Florida and California and some other states, didn't it?" A: "It did."); CX 1687, CX 1149).

This finding is incomplete, and therefore misleading because Mr. Rona testified that he did not attach any significance to Mr. Tatman's comments, and merely passed them on "FYI" as he would any other competitive intelligence he received in the ordinary course of his business. (RPFF ¶ 321; Rona, Tr. 1658-1659 (Q: "So according to your e-mail, you just forwarded this entire discussion along to the OEM5 e-mail group as information; correct?" A: "That's what I did, yes.") & CX 1149).

This finding is incomplete, and therefore misleading because Mr. Rona testified that he does not recall receiving any response to his August 22 email. (RPff ¶ 322; Rona, Tr. 1658-1659 (Q: "And in fact, to your knowledge, no one at Sigma ever even responded to your e-mail, did

they?” A: “I don't recall ever -- I don't recall seeing a response to the e-mail. No.”) & CX 1149).).

1453. Mr. Rybacki understood from Mr. Rona's August 22, 2008 email that Mr. Tatman was upset about the Fittings multipliers that Sigma and Star were quoting in California and Florida. (Rybacki, Tr. 3577; CX 1149). Mr. Rybacki testified that at the time he “already knew that,” and that he told Mr. Rona that, “Mr. Tatman needs to look in the mirror because pricing from McWane was a little inconsistent as well.” (Rybacki, Tr. 3577-3578).

Response To Finding No. 1453:

See General Responses 1 and 11, and response to ¶ 1452, *supra*.

1454. Mr. Rona's August 22, 2008 email does not convey any purpose for Mr. Rona's conversation with Mr. Tatman other than the price communication, and Mr. Rona does not recall any other purpose. (CX 1149; RX-689 (Rona, Dep. at 197); Rona, Tr. 1718 (nothing in the e-mail that suggests a legitimate business discussion between Mr. Rona and Mr. Tatman)).

Response To Finding No. 1454:

See General Responses 1 and 11, and response to ¶ 1452, *supra*.

1455. In a November 24, 2008 email, Mr. Pais sent an ‘URGENT’ email to Mr. Rybacki to “stabilize market pricing” in the Southeast where Sigma had been viewed as pulling prices down. This email was apparently prompted by communications from Sigma's competitors complaining about Sigma's cheating:

With the severe contraction in market volume over the recent few weeks, the equally quick and sharp erosion in market pricing is an alarming ‘double whammy’! What's even more disturbing is our two main competitors in Fittings seem to see SIGMA as ‘leading’ this recent price decline

(RX-698 at 001).

Response To Finding No. 1455:

See General Responses 1, 4, 5 and 11. This finding is inaccurate because the cited exhibit does not support this finding. The cited exhibit , RX-698, is a copy of the transcript of Mr. McCutcheon's deposition and “RX-698 at 001” contains merely a partial list of exhibits

introduced during Mr. McCutcheon's deposition and none of them are the November 24, 2008 email. The correct citation for this email is RX-116.

With respect to RX-116 and this finding, the finding is incomplete and therefore misleading because Sigma's Fittings prices declined during the second half of 2008. (RPF ¶ 267; Pais, Tr. 2129-2131 ("Q. This is an e-mail, sir, that you sent to Mr. Rybacki and others in the sales organization on November 24, 2008, so this is a few months after DIFRA started. A. Yes. Q. Okay. Now, you refer here, in the very first sentence, "Dear Larry, "With the severe contraction in market volume over the recent few weeks, the equally quick and sharp erosion in market pricing" -- had market prices been declining at Sigma, your prices had been declining since DIFRA was founded? A. Absolutely. Q. When you say "absolutely," sir, tell us what you're referring to here. A. Because in the second half the volume kept on dropping, and as you know, by September, there was a cataclysmic decline, and the prices were in a pretty steep decline because all suppliers were trying to grab whatever business there was. Q. All right. So here you are in the second half of '08 and you say that prices -- there's been an equally quick and sharp erosion in market pricing, and you say it's an alarming double whammy. What did you mean by that, sir? A. Well, as I preface there with the volume dropping down and the prices falling, that is certainly a one-two punch. Q. Okay. Now, when you saw this double whammy, did you call up anyone at McWane and say, "Hey, guys, let's all raise the price together"? A. No. Q. Okay. Let's scroll down if we can. You say, in the second sentence, "I suggest we do all we can to reverse it," and were you proposing to your team at Sigma that you announce an increase to see if you could reverse that? A. Well, either announce an increase or try and see where we were in the actual pricing and then try to hold the line towards high pricing, through multipliers. Q. And was that something you were internally discussing at Sigma at the time? A. Yes. Q. Did

you call up anyone at any competitor and discuss that with them? A. None. Q. Let's go to RX 115, and again, before we put it on the screen I'm going to ask the witness a few questions about it. Oh, I'm sorry. Can we go back for a second to RX 116. Can we highlight -- yeah. There's that third paragraph: "I suggest we do all we can to reverse it." Then in the next sentence, you say, "Though I am not sure if the trend is similar at other parts, too, it seems to be most severe in the southeast, especially in Florida." Is that what you said, sir? A. Yes. Q. Yeah. So was the price erosion, the sharp erosion, really severe in the fall of 2008, especially -- in the southeast but especially in Florida? A. It was."), RX 116; 2134-2135 ("Q. So a little while after DIFRA actually becomes operational, we see you say there's been this equally quick and sharp erosion in market pricing, the double whammy, and you say it's been especially severe in the southeast and especially in Florida; right, sir? A. Yes.") & RX 115, 2137-2140 ("Q. So Mr. Fox reports to you and the others that he believes, based on whatever information he has, that my client was actually lowering prices, leading to this sharp erosion in price in the southeast; correct? A. Yes. That's what he's trying to convey. Q. And then he says at the bottom of -- Then he says, at the bottom of that paragraph in the last sentence, "Interestingly, we have found Union/Tyler" -- and again, that's McWane; right, sir? A. Yes. Q. All right. Interestingly, we have found McWane leading markets downward in Tennessee and Alabama and the Carolinas. And that's the report you got from the guy in charge of Sigma of selling in those territories; right? A. Yes. Q. And all of these are reports you got about three and a half months after DIFRA actually started up; is that fair? A. That's correct. Q. All right. Now, if we go to the bottom of the second page -- well, I'm sorry. Let's go to the -- let's go to the first page. Down at the bottom. Now, here's an e-mail. It's quite a long e-mail, but we'll start here. This is an e-mail which you read and respond to your southeast territory manager, regional manager, Mr. Fox; right, sir? A. Yes. Q. And if we scroll over and

then go on to the next page, if we look at number 4 there, you say, "I am sure that Tyler is as guilty of starting the price decline as any of the other two of us." And that's what your view was; you thought Tyler might very well have started that price decline. A. Sure. Q. Right. Two sentences after that, you say, "Here, the culprit again may be the plant work or job pricing which is still priced as in a different manner and this dual pricing practice could be continuing to harm our overall pricing as it has over the past three to four years." Do you mean, sir, that here at the end of 2008 you had urged Mr. Rybacki and urged and urged him to change that plant work pricing, and he just had never done it, had he? A. Yes. Yeah. It sure seems that -- whether he did it or not I'm not sure, but it was not effective. And it also points to the fact that we were not trying to eliminate a special pricing, we were trying to minimize it, and apparently it has continued to be so, continued to be available to the salespeople.") (objections omitted), 2151 ("Q. All right. And when you said "pricing pressures," you're referring to that sharp erosion in prices in the second half of 2008 after DIFRA was operational? A. Yes.") & CX 1744); (Rybacki, Tr. 3660-3661 ("Q. Go ahead. Did prices -- did your average prices go down in the second half of '08, sir? A. Our volumes went down. I don't know -- I don't think our average pricing -- you know, we tried to hold the line because volume was going down, but -- but our volume definitely took a hit from August through September of '08. Q. Yeah. And if we look at some of your regions -- first of all, your price in the second half of '08 is different in every region; right? A. Yes. Q. And if we look at -- let's pick Alex City, the eighth month, so that's August, and if we can highlight that line. So in August, the average price for group A -- and group A is just your top-selling fittings of all sizes? Is that what that is? A. Correct. Q. All right. Your average price was a .28, but then it declined down to a .24 by the end of the year; right, sir, Alex City? A. Yeah, that's correct. Q. And then if we look down at the Chicago area, it was .27,

.28 in the middle of the year, declined down to .26 by the end of the year; right, sir? A. Correct.

Q. Mr. Rybacki, was there any time during 2008 when you discussed your job pricing with anyone at McWane and agreed upon let's reduce job pricing? A. Never.”), 3717-3719).))

7.8.3 The Suppliers Resumed Project Pricing

1456. Star eventually decided to resume Project Pricing to quietly gain share. At 8:26 a.m. on November 25, 2008, after Mr. McCutcheon was informed by Mr. Prado, one of Star’s division managers, that he had discovered that Sigma had extended a discount to an End User, Mr. McCutcheon responded to Mr. Prado and Mr. Minamy, “Nice work, now let’s drop some responsible, coordinated, napalm.” (CX 0829 at 001; CX 2539 (McCutcheon, Dep. at 218-219) (“I was tired of asking Matt to do what they needed to do in the southeast, and this is me jokingly lashing out, telling the guys in the southeast to get it in gear.”)).

Response To Finding No. 1456:

See General Responses 1, 4, 5 and 11. This finding is incorrect because Star did not “resume” Project Pricing, as it had never stopped Project Pricing. (RPF 141-190)

Dr. Schumann admitted that McWane, Sigma and Star all offered job price discounts and other price concessions, including rebates, freight absorption, and credit extension, throughout 2008. (RPF 182; Schumann, Tr. 4287:21-4288:1 (“yes, there was job pricing during 2008”), 4288:23-4289:1 (“I believe they did offer job pricing throughout 2008”), 4290:3-13.) He also admitted that he ignored McWane and Star spreadsheets and other documents recording each company’s job discounts. (Schumann, Tr. 4082:3-11, 4084:16-4086:6 (“Well, I meant I didn’t consider it”), 4086:21-4087:3 (“No, I did not”), 4090:3-9, 4091:9-23 (“No, I did not discuss this”).) Star’s independent attempt to reduce its job pricing was not successful, as reflected in the job prices it offered throughout 2008. (RPF 166; McCutcheon, Tr. 2689-2690, 2540-2541 (Q: “And it sounded like from your testimony yesterday that the company continued to offer a lot of job price discounts in 2008.” A: “Yes, sir.”); 2547-2548 (Q: “All right. Now, you had said yesterday that the company provided lots and lots of job prices during 2008; is that right?” A:

“Yes, sir.”) & RX 557, 2550-2551 (Q: “All right. So the report you requested in July of 2011, and it contains a report of the pinks from 2008 final; right, sir?” A: “Yes, sir.”), 2553-2554 (Q: “All right. So am I right, Mr. McCutcheon, did I understand your testimony correctly yesterday that the company had job pricing and special prices throughout 2008; right?” A: “Yes, sir.”); Minamyer, Tr. 3174-3175 (Q: “Was Star successful at reducing project pricing for a period in time?” A: “To my recollection, no.”), 3274-3275 (Q: “And you were matching lowering prices below the published multiplier frequently; correct?” A: “I believe so.”), 3277-3278 (Q: “Okay. And I know you don't -- this has been some years ago and you don't have specific recollection, but what were the competitive conditions in 2008? What do you remember about that time frame?” A: “I remember that everything -- the market was always very competitive. We -- we had to fight pretty hard for every order.”).) Star continued offering job pricing and other price concessions to its customers throughout 2008, 2009, 2010 and up through the present. (RPPF ¶ 170; McCutcheon, Tr. 2553-54 (“Q: “Do you see where I am, sir? January '08 267, February of '08 300, and so forth, down to the year end 2,669?” A: “Yes, sir.” Q: “Is that data that you saw in summary form?” A: “Yes, sir. I believe I got four years running with that information that's in the far right-hand column, that exact information in totals.” Q: “All right. So am I right, Mr. McCutcheon, did I understand your testimony correctly yesterday that the company had job pricing and special prices throughout 2008; right?” A: “Yes, sir.” Q: “And throughout 2009; right?” A: “Yes, sir.” Q: “And continuing to 2010?” A: “Yes, sir.” Q: “And continuing to today?” A: “Yes, sir.”); Minamyer, Tr. 3265 (Q: “So again, in May of 2008, Star would continue to project-price under the right circumstances, and that would be to meet competition; correct?” A: “That's correct.”), 3275 (Q: “And you were matching lowering prices below the published multiplier frequently; correct?” A: “I believe so.”). Star continued to offer job pricing

at a rate of a couple hundred per month in 2008. (RPPF ¶ 172; Minamyler, Tr. 3251-3252 (Q: “Do you recall getting 10 to 15 pinks a day?” A: “I recall getting a lot of pinks routinely.” Q: “Okay. And that works out on business days to a couple hundred a month. Is that consistent with your recollection?” A: “Yes.”) & CX 815; McCutcheon, Tr. 2512 (Q: “That was not a fact. You did not stop pricing in -- job pricing in 2008, did you, sir?” A: “No, sir.”)). Star priced job-priced whenever it needed to get business in 2008. (RPPF ¶ 173; Minamyler, Tr. 3277-3278) (“Q. And you had a plan that you would try and limit job pricing, but we’ve seen that really didn’t play out either, did it? A. Right . . .Q. Okay. And Star job-priced whenever it needed to job price in 2008 to get business, didn’t it? A. Yes.”).). By February 2008, Mr. Minamyler reported that he was receiving 10 to 15 requests per day for pricing below the published multipliers from his sales team (internally referred to at Star as “pinks”).). (CX 815; Minamyler, Tr. 3252 (Q: “Do you recall getting 10 to 15 pinks a day?” A: “I recall getting a lot of pinks routinely.” Q: “Okay. And that works out on business days to a couple hundred a month. Is that consistent with your recollection?” A: “Yes.”)). Star’s CEO, Mr. Bhutada, testified that job pricing was always the norm in the Fittings market, including in 2008. (RPPF ¶ 179; JX 694 (Bhutada, Dep. at 18-19)). Mr. McCutcheon testified that, during 2008, Fittings prices were falling, and “Every project required special pricing it seemed. It seemed like it was a -- projects were all auctioned, all the fitting manufacturers were bidding them, and there was just no consistency to our pricing.”). (RPPF ¶ 180; McCutcheon, Tr. 2568).

1457. Later in day on November 25, 2008, Mr. Minamyler told his sales team that “[w]e have all been extremely diligent in protecting the stability of our market pricing,” but that Star was losing revenues and that they should become more aggressive to recapture the lost share, but to do it “under the radar”:

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. The reason is that we have documented so much under market pricing that we have to react to protect our partners' [*i.e.*, Distributors] and our own market shares.... ***Do this quietly and selectively and as much under the radar as you can*** but, if it is necessary, be sure to do it. Go get every order!!!!

(CX 0831 (emphasis added); Minamyer, Tr. 3226 (describing email as “asking them to get more aggressive on pricing to get more orders.”); *see also* CX 2526 (Minamyer, Dep. at 69-71, 72-73) (“I’m telling them to take off the gloves and looks like we lost a market share and my patience had run out with that and we were going to go take it back.”; “Q. So what are you directing your sales folks to do? You said take off the gloves; what does that mean? A. It means we were attempting to hold our pricing and it looks like the competition was not, and we’re not going to do that anymore. We’re going to go out and we’re going to take that business back by using pricing.”)).

Response To Finding No. 1457:

See General Responses 1, 4, 5 and 11, and response to ¶ 1456, *supra*. This finding is misleading because the overwhelming evidence is that none of the fittings suppliers ever stopped project pricing in 2008. (RPF ¶¶ 141-190)

1458. In his November 25, 2008 email to Star’s Division Managers, Mr. Minamyer questioned the sincerity of Sigma’s original commitment to the suppliers’ common plan:

We have all been extremely diligent in protecting the stability of our market pricing. So much so that we have earned the reputation at being the best at protecting the market pricing and at times, to the extent that some think us inflexible in that area. You have all done a great job and deserve credit for the effort and results.

However, some of our competition has not performed as admirably nor are we now certain that it was ever part of their strategy 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.

(CX 0831 at 001 (emphasis added); Minamyer, Tr. 3227-3230 (discussing email, and noting that reference to Sigma being “irresponsible” is to Sigma selling below published multipliers)).

Response To Finding No. 1458:

See General Responses 1, 4, 5 and 11, and responses to ¶¶ 1456-1457, *supra*. This finding is incorrect because the record evidence proves that there was no “common plan” among Sigma and McWane or Star relating to Fittings pricing. (RPF 80-370)

1459. Mr. Minamyer instructed his sales team to re-start its aggressive Project Pricing “quietly and selectively and as much under the radar as you can,” in order to keep McWane and Sigma from realizing that Star was cheating for as long as possible. (CX 0831; Minamyer, Tr. 3231 (“[T]he less your competition knows what you’re actually doing, the better off you are.”)).

Response To Finding No. 1459:

See General Responses 1, 4, 5 and 11, and responses to ¶ 1456, *supra*. This finding is inaccurate because Mr. Minamyer asked his sales to “take every order we can” through “a combination of buy plans, short term buys, and project pricing.” Accordingly, Mr. Minamyer saw project pricing as part of a “combination” of tools to win back customers. (CX 0831; Minamyer Tr. 3231 and 3275).

This finding is inaccurate because Star did not “re-start” Project Pricing since it did not stop Project Pricing. Dr. Schumann admitted that McWane, Sigma and Star all offered job price discounts and other price concessions, including rebates, freight absorption, and credit extension, throughout 2008. (RPF 182; Schumann, Tr. 4287:21-4288:1 (“yes, there was job pricing during 2008”), 4288:23-4289:1 (“I believe they did offer job pricing throughout 2008”), 4290:3-13.) He also admitted that he ignored McWane and Star spreadsheets and other documents recording each company’s job discounts. (Schumann, Tr. 4082:3-11, 4084:16-4086:6 (“Well, I meant I didn’t consider it”), 4086:21-4087:3 (“No, I did not”), 4090:3-9, 4091:9-23 (“No, I did not discuss this”).)

This finding is inaccurate because Star did not “re-start” Project Pricing since it did not stop Project Pricing. Star’s independent attempt to reduce its job pricing was not successful, as

reflected in the job prices it offered throughout 2008. (RPPF ¶166; McCutcheon, Tr. 2689-2690, 2540-2541 (Q: “And it sounded like from your testimony yesterday that the company continued to offer a lot of job price discounts in 2008.” A: “Yes, sir.”); 2547-2548 (Q: “All right. Now, you had said yesterday that the company provided lots and lots of job prices during 2008; is that right?” A: “Yes, sir.”) & RX 557, 2550-2551 (Q: “All right. So the report you requested in July of 2011, and it contains a report of the pinks from 2008 final; right, sir?” A: “Yes, sir.”), 2553-2554 (Q: “All right. So am I right, Mr. McCutcheon, did I understand your testimony correctly yesterday that the company had job pricing and special prices throughout 2008; right?” A: “Yes, sir.”); Minamyer, Tr. 3174-3175 (Q: “Was Star successful at reducing project pricing for a period in time?” A: “To my recollection, no.”), 3274-3275 (Q: “And you were matching lowering prices below the published multiplier frequently; correct?” A: “I believe so.”), 3277-3278 (Q: “Okay. And I know you don't -- this has been some years ago and you don't have specific recollection, but what were the competitive conditions in 2008? What do you remember about that time frame?” A: “I remember that everything -- the market was always very competitive. We -- we had to fight pretty hard for every order.”)).)

This finding is inaccurate because Star did not “re-start” Project Pricing since it did not stop Project Pricing. Star continued offering job pricing and other price concessions to its customers throughout 2008, 2009, 2010 and up through the present. (RPPF ¶ 170; McCutcheon, Tr. 2553-54 (“Q: “Do you see where I am, sir? January '08 267, February of '08 300, and so forth, down to the year end 2,669?” A: “Yes, sir.” Q: “Is that data that you saw in summary form?” A: “Yes, sir. I believe I got four years running with that information that's in the far right-hand column, that exact information in totals.” Q: “All right. So am I right, Mr. McCutcheon, did I understand your testimony correctly yesterday that the company had job pricing and special

prices throughout 2008; right?" A: "Yes, sir." Q: "And throughout 2009; right?" A: "Yes, sir." Q: "And continuing to 2010?" A: "Yes, sir." Q: "And continuing to today?" A: "Yes, sir."); Minamyer, Tr. 3265 (Q: "So again, in May of 2008, Star would continue to project-price under the right circumstances, and that would be to meet competition; correct?" A: "That's correct."), 3275 (Q: "And you were matching lowering prices below the published multiplier frequently; correct?" A: "I believe so.)).

This finding is inaccurate because Star did not "re-start" Project Pricing since it did not stop Project Pricing. Star continued to offer job pricing at a rate of a couple hundred per month in 2008. (RPPF ¶ 172; Minamyer, Tr. 3251-3252 (Q: "Do you recall getting 10 to 15 pinks a day?" A: "I recall getting a lot of pinks routinely." Q: "Okay. And that works out on business days to a couple hundred a month. Is that consistent with your recollection?" A: "Yes.") & CX 815; McCutcheon, Tr. 2512 (Q: "That was not a fact. You did not stop pricing in -- job pricing in 2008, did you, sir?" A: "No, sir.)).

This finding is inaccurate because Star did not "re-start" Project Pricing since it did not stop Project Pricing. Star priced job-priced whenever it needed to get business in 2008. (RPPF ¶ 173; Minamyer, Tr. 3277-3278) ("Q. And you had a plan that you would try and limit job pricing, but we've seen that really didn't play out either, did it? A. Right . . . Q. Okay. And Star job-priced whenever it needed to job price in 2008 to get business, didn't it? A. Yes.)).

This finding is inaccurate because Star did not "re-start" Project Pricing since it did not stop Project Pricing. By February 2008, Mr. Minamyer reported that he was receiving 10 to 15 requests per day for pricing below the published multipliers from his sales team (internally referred to at Star as "pinks").). (CX 815; Minamyer, Tr. 3252 (Q: "Do you recall getting 10 to 15 pinks a day?" A: "I recall getting a lot of pinks routinely." Q: "Okay. And that works out

on business days to a couple hundred a month. Is that consistent with your recollection?” A: “Yes.”).

This finding is inaccurate because Star did not “re-start” Project Pricing since it did not stop Project Pricing. Star’s CEO, Mr. Bhutada, testified that job pricing was always the norm in the Fittings market, including in 2008. (RPPF ¶ 179; JX 694 (Bhutada, Dep. at 18-19)).

This finding is inaccurate because Star did not “re-start” Project Pricing since it did not stop Project Pricing. Mr. McCutcheon testified that, during 2008, Fittings prices were falling, and “Every project required special pricing it seemed. It seemed like it was a -- projects were all auctioned, all the fitting manufacturers were bidding them, and there was just no consistency to our pricing.”). (RPPF ¶ 180; McCutcheon, Tr. 2568).

1460. After having centralized Project Pricing authority in himself in January 2008, Mr. Minamyer gave back that authority to his division managers in February 2009, informing them that they would be able to approve pinks, or SPRs, within certain limits. (CX 0884; Minamyer, Tr. 3232-3233).

Response To Finding No. 1460:

See General Responses 4 and 11, and responses to ¶¶ 1456 and 1459, *supra*.

1461. Mr. Minamyer’s instruction to his sales team to resume Project Pricing is inconsistent with the testimony of Star witnesses such as Mr. McCutcheon that Star had been actively engaged in Project Pricing prior to November 25, 2008. (*Compare* CX 2539 (McCutcheon, Dep. at 213-214) *with* CX 0831). Mr. McCutcheon could not offer any explanation as to why Mr. Minamyer sent his November 25, 2008 email to Star’s sales force to again engage in project pricing, or why Mr. Minamyer told them to do so “quietly,” “selectively” and “under the radar.” (CX 2539 (McCutcheon, Dep. at 214)).

Response To Finding No. 1461:

See General Responses 1, 4 and 11, and responses to ¶¶ 1456 and 1459, *supra*. This finding is incomplete and therefore inaccurate because Mr. Minamyer asked his sales to “take every order we can” through “a combination of buy plans, short term buys, and project pricing.” Accordingly, Mr. Minamyer saw project pricing as part of a “combination” of tools to win

customers. (CX 0831; Minamyer Tr., 3231 and 3275). This finding is irrelevant because Mr. McCutcheon was not the author of the document and it stands to reason that he would not know what Mr. Minamyer meant by certain terms in his email. In addition, Mr. Minamyer provided testimony concerning CX 0831. (Mr. Minamyer Tr., 3226-3232 and 3273-3276)..

1462. On December 17, 2008, Mr. Tatman told Mr. McCullough, Mr. Walton, and Mr. Jansen that “There’s some pretty aggressive pricing going on out there that we’re only participating in on a select basis.” (CX 0362 at 001).

Response To Finding No. 1462:

Respondent has no specific response.

1463. In late 2008, Sigma’s commitment to the conspiracy weakened and instances of its project pricing increased. (CX 1694 at 001 (September 4, 2008, Star email noting “We have seen Sigma cheat on larger projects in other parts of the country and have responded accordingly when we see something.”); CX 0871 (Star effort to compile list of “Sigma antics”); CX 1697 (“Tyler and Sigma keep cheating”); CX 1454 (Sigma April, 27, 2009 letter noting “While none of us like to see lower pricing, . . . [w]e at Sigma are just as much at fault as any of our competitors,” and promising to “USE FIRM NEW MULTIPLIERS OFF THIS PRICE LIST, TO BRING STABILITY BACK TO OUR BUSINESS”); CX 0651 at 001 (McWane reading April, 27, 2009 Sigma letter as “Admission of guilt for driving prices down and a renewed commitment [to] firm multipliers and stability.”)).

Response To Finding No. 1463:

See General Responses 1, 4, 5 and 11. This finding is incorrect and purely argumentative, because the overwhelming record evidence proves that no conspiracy existed among Sigma and McWane or Star relating to Fittings pricing. (RPF 80-370)

1464. McWane was late to abandon the suppliers’ collapsing agreement on Project Pricing. In a February 9, 2009 email to Mr. Tatman summarizing past and present pricing actions, Mr. Jansen reported that McWane had “stayed firm on pricing” for the better part of 2008, and had started to give out job pricing in a few territories in late 2008, well after prices had started to move. Mr. Jansen reported as follows:

Stayed Firm on Pricing = for better part of 2008 held pricing to try to stabilize market pricing.

- Consequence = Lost market share due to competitors playing pricing games and having distributors keep it quiet either on the front and/or backside.
- Customer Reaction = Customers had large scale reduction in inventory which is what we were getting and were relying more on regional distribution yards to supply jobs and support inventory.

Job Pricing = Gave out pricing on jobs in few territories late 2008.

- Consequences = started to get some support from customers that wondered where we had been. Too little too late since the jobs were few and far between.
- Customer Reaction = Numbers are dropping rapidly and they had been long before we started to move. They know it's ugly but they are in survival mode and have very little loyalty. They would like to work with us but need to know we will support them.

(CX 1223 at 002 (emphasis in original); Tatman, Tr. 1074-1076).

Response To Finding No. 1464:

See General Responses 1 and 11, and response to ¶ 1463, *supra*. This finding is incorrect purely argumentative, because the overwhelming record evidence proves that the fittings suppliers had no agreement on project pricing, or any other pricing. (RPF ¶¶ 80-370)

1465. Sometime in 2010, McWane's local sales agents gained the authority to extend Project Pricing up to one percent, provided they supplied evidence that the Project Pricing was in response to competitor prices. (CX 2480 (Napoli, Dep. at 52-54)).

Response To Finding No. 1465:

See General Responses 3, 6 and 11. This finding is inaccurate because Mr. Napoli testified that he did not know the when local sales agents were given limited "pricing authority." (CX 2480 (Napoli, Dep. at 53 ("I don't know if 2010 -- you know, I don't know a - a date.")).).

This finding is inaccurate because Mr. Napoli never testified that the local agents were given pricing authority to extend Project Pricing up to one percent. Mr. Napoli testified that “they were given pricing authority...within limitations, and I don’t recall what those were, but they couldn’t go down to a 1.0 or something like -- something ridiculous.” (CX 2480 (Napoli, Dep. at 53)).

1466. In May 2009, in the context of a discussion about supplying Sigma with Domestic Fittings, Mr. Tatman explained to Mr. Page that he had “a general trust issue based upon recent experience that they [Sigma] don’t seem to consistently stay within the Spirit of agreements.” (CX 0456 at 001 (May 2009 email from Tatman to Page, McCullough, and Walton)).

Response To Finding No. 1466:

See General Responses 1, 5, 6 and 11. This finding is inaccurate to the extent it implies any agreement regarding prices. The cited exhibit does not refer to any such agreement, and the record evidence proves that no such agreement existed. (RPFF ¶¶ 80-370). Rather, the “agreement” referenced in the document clearly relates to a legitimate buy-sell agreement that is conveniently omitted from the quoted text. A complete examination of the document reveals:

“From my perspective there’s a general trust issue based upon recent experiences that don’t seem to consistently stay within the spirit of agreements.

On the non-Domestic side we need more competitive and consistent pricing on items we elect to source through Sigma and un-circumvented access to expand our business relationships with other supply options.

On the Domestic side, we could continue to creatively explore whether or not there could be healthy relationship structure established between McWane, Sigma, and ACIPCO. We have stopped branding DISA product for them since it was showing up on Domestic jobs but we still sell Tyler/Union branded domestic product into their OEM division headed by Mitchell Rona.” (CX 0456-001).

Thus, the “agreement” referenced that Sigma was not honoring is the McWane-Sigma agreement whereby McWane would sell Sigma domestic product so long as Sigma would not try to use that product to then compete against McWane. (CX 0456-001).

7.8.4 **Sigma Attempted a Further Price Increase in January 2009**

1467. On January 19, 2009, Sigma sent letters to its customers announcing multiplier increases. (E.g., CX 0878 at 002 (Sigma letter in Star's files); CX 2451 (Sigma regional manager informing sales force letter would be sent evening of January 19)).

Response To Finding No. 1467:

See General Responses 2 and 11. Otherwise, Respondent has no specific response.

1468. On January 20, 2009, in response to Sigma's price increase announcement, Mr. Minamyer wrote to Mr. McCutcheon and Ramon Prado: "What do you think about announcing and then backing off quietly like they did to us? If you all disagree it may take some convincing because I want to hurt them." (CX 0878 at 001).

Response To Finding No. 1468:

See General Responses 2, 4, 5 and 11. Otherwise, Respondent has no specific response.

1469. Star followed Sigma's price announcement on January 23, 2009, announcing a multiplier increase effective February 9, 2009. (CX 2452 at 001, 002 (Star letter in Sigma's files, with Sigma sales representative Kevin Pennington writing "SEE BELOW FOR A COPY OF STAR'S INCREASE LETTER. . . . LOOK'S THE SAME AS OURS")).

Response To Finding No. 1469:

See General Responses 2, 4, 5 and 11. Otherwise, Respondent has no specific response.

1470. On January 27, 2009, Mr. Pais sent an email to Sigma's management team describing plans to improve pricing and recent increase announcements made by Sigma and followed by Star. (CX 1002 at 001, *in camera* [REDACTED])

Response To Finding No. 1470:

See General Responses 2, 4, 5 and 11. Otherwise, Respondent has no specific response.

1471. On January 23, 2009, Mr. Page sent an email to McWane owner C. Phillip McWane, informing him that Sigma and Star had announced price increases in the "<10% range," and that Mr. Page and Mr. McCullough had decided that McWane would not follow those increases based on their analysis of the DIFRA data "since we continue to lose market share to somebody." (CX 2089 at 001; CX 1226 at 001 (Page January 23, 2009

email responding to December 2008 DIFRA report that had shown a McWane loss of market share: “Trying to not be emotional about it. But these numbers are infuriating. We have serviced our customers I assume and have the product they need, we are just being discounted against?”).

Response To Finding No. 1471:

See General Responses 2, 4, 5 and 11. Otherwise, Respondent has no specific response.

1472. On January 30, 2009, Star withdrew the multiplier increases it had announced. (CX 0882 (“All multiplier increase [*sic*] in the US are on hold.... Do you think we need to call or send a notice? I would think a retraction E-mail, maybe? We can have Sigma write it!”)). Sigma also ultimately withdrew its increase and followed McWane. (*Infra* ¶ 1552).

Response To Finding No. 1472:

See General Responses 1, 2, 4, 5 and 11, and response to ¶ 1552, *infra*. This finding is misleading to the extent it implies that Star and Sigma did not act independently from McWane.

The record evidence proves that they did act independently. (RPF ¶¶ 281-292)

7.8.5 DIFRA Collapsed in Early 2009

1473. DIFRA collapsed in early 2009 when first Sigma and Star, and then McWane, stopped submitting their sales data. (*Infra* ¶¶ 1474-1483).

Response To Finding No. 1473:

See General Responses 1 and 11, and responses to ¶¶ 1474-1483, *infra*. The evidence establishes that first Star and then McWane stopped submitting tons-shipped data to DIFRA.

(Brakefield, Tr. 1419-1420; CX 1325).

1474. The last DIFRA report, covering the period through December 2008, came out in January 2009. (Pais, Tr. 2121; Brakefield, Tr. 1400 (there was no DIFRA report issued after the January 2009 report covering shipments through December 2008); CX 1339 at 001 (DIFRA report e-mail dated January 20, 2009, incorporating December 2008 data)).

Response To Finding No. 1474:

Respondent has no specific response.

1475. In February 2009, Star and Sigma stopped submitting data to the DIFRA information exchange. (CX 1278 at 001; CX 0319 at 001 (Pais noting that Sigma and Star had chosen “to withhold providing our respective monthly Sales (MT) reporting requirements”).

Response To Finding No. 1475:

See General Responses 1, 8 and 11. DIFRA was not an “Information Exchange.” (RPFF ¶¶ 236-280). This finding is directly contradicted by Complaint Counsel's Proposed Finding of Fact No. 1489. Sigma submitted data to DIFRA’s outside accountants on May 11, 2009. (CX 2329 at 004). Star stopped submitting tons-shipped data in December 2008 and McWane stopped after January 2009. (Brakefield, Tr. 1419-1420, CX 1325).

1476. On February 19, Mr. Tatman reported to Mr. Walton and Mr. McCullough that Sigma and Star had failed to submit their January 2009 data to DIFRA: “Two of the DIFRA members haven’t yet reported January data. I know one is Sigma and most likely the other is Star.” (CX 1278 at 001; Tatman, Tr. 571-573).

Response To Finding No. 1476:

See Response to Findings 1474 and 1476.

1477. Mr. Tatman reported that “Per [Mr.] Brakefield, he suspects there may be some hard feelings over the [ARRA] Buy American provision.” (CX 1278 at 001; Tatman, Tr. 571-573).

Response To Finding No. 1477:

Respondent has no specific response.

1478. In a later email, Mr. Pais explained that Mr. Rybacki had determined that Sigma would withdraw from DIFRA participation in February 2009 because of a perception that the threat to Sigma posed by the Buy American provisions in ARRA had been an initiative of McWane. (CX 0985 at 001; CX 0319 at 002-003).

Response To Finding No. 1478:

This finding is inaccurate because both cited exhibits state that the threat to Sigma posed by the Buy American provisions in ARRA “wasn’t an initiative from McWane.” (CX 0985 at 001; CX 0319 at 002).

1479. Star submitted no further data to DIFRA after its January 2009 submission of data through December 2008. (CX 1325 at 002 (as of May 2009, SRHW had no Star data for January 2009 through April 2009)).

Response To Finding No. 1479:

Respondent has no specific response.

1480. Upon learning that Star and Sigma had stopped submitting data, McWane too stopped submitting data to DIFRA. (CX 1325 at 002 (as of May 2009, SRHW had no McWane data for February 2009 through April 2009)).

Response To Finding No. 1480:

This finding is inaccurate because the cited exhibit does not state that McWane stopped submitting tonnage data to DIFRA “upon learning that Star and Sigma had stopped submitting data.” See Response to Findings 1474 and 1476. The cited page of the exhibit is a May 12, 2009 email from Mr. Holland to Mr. Brakefield which, in pertinent part, merely states that “[i]t look like we are missing February 2009 through April 2009 [tonnage data] from McWane.” (CX 1325 at 002).

1481. U.S. Pipe, which had not participated in the conspiracy or the breakdown in trust, continued to submit DIFRA data after January 2009, and until at least the summer of 2010. (CX 2232 at 001, 006 (March 4, 2010 internal U.S. Pipe email reflecting February 2010 U.S. Pipe data for submission to DIFRA); CX 1343 (July 8, 2010 email from U.S. Pipe submitting Fittings data to DIFRA)).

Response To Finding No. 1481:

See General Response 1. This finding is a blatant argument, not a finding of fact, and is contradicted by the overwhelming record evidence that no alleged “conspiracy” existed. (RPF 80-370).

1482. With the exception of Sigma’s May 2009 attempt to revive DIFRA activity, (*see infra* § 7.8.6), the last time that DIFRA was active as an association was with the January 2009 reporting of data for December 2008. (Brakefield, Tr. 1228).

Response To Finding No. 1482:

See response to § 7.8.6, *infra*.

1483. DIFRA continues to today to be a corporation in good standing with the State of Alabama. However, there was never another meeting of DIFRA or any effort to accomplish any of the stated purposes of DIFRA. (*See supra* ¶ 1260).

Response To Finding No. 1483:

See General Responses 1 and 11, and response to ¶260, *supra*. This is an unsupported assertion to which no response is required.

7.8.6 Sigma Tried to Restart DIFRA in May 2009 to Restore Trust

1484. In the spring of 2009, following a conflict among the suppliers over McWane’s list price restructuring (*infra* § 7.9), Sigma attempted to re-start DIFRA to restore trust and pricing discipline among Fittings suppliers. (*Infra* ¶¶ 1485-1490).

Response To Finding No. 1484:

See General Responses 1 and 2, response to § 7.9, *infra*, and responses to ¶¶ 1485-1490, *infra*. This proposed finding is an unsupported assertion, to which no response is required.

1485. Sigma and Star issued multiplier increases in January 2009, which McWane did not follow. Instead, McWane issued a restructured price list that raised prices on small diameter Fittings, but lowered prices on larger Fittings, in which Sigma and Star held more market share. (*See supra* § 7.8.4; *infra* ¶ 1492).

Response To Finding No. 1485:

See General Responses 1, 2, and 11, response to § 7.8.4, *supra*, and response to ¶ 1492, *infra*. this proposed finding is not only duplicative, but an unsupported assertion to which no response is required.

1486. In an effort to convince McWane to retract its new price list, Sigma tried to restart the DIFRA Information Exchange. Sigma tried unsuccessfully to revive DIFRA in May 2009 to “control the damage” and “restore the badly dented competitive confidence” and to demonstrate that Sigma’s “efforts to commit to a new pricing discipline would succeed.” (CX 0319 at 003).

Response To Finding No. 1486:

See General Responses 2 and 8. This finding is incorrect, because DIFRA was not an “Information Exchange,” but a legitimate trade association (RPF ¶¶ 243-280). This finding is

inaccurate because the cited exhibit does not support the conclusion that Sigma was trying to restart DIFRA or that it was doing so in an effort to convince McWane to retract its April 2009 List Price change. CX 0319 does state that Sigma intended to report its “YTD data to DIFRA ASAP to restore the badly dented competitive confidence” and that Sigma was “unclear as to if and how our bold stand to defy Tyler’s pricing revision and our own efforts to commit to a new pricing discipline would succeed” -- a clear indication that Sigma was performing its own independent analysis and was not going to make similar list price changes. (CX 0319 at 003). Moreover, CX0319 is an internal Sigma email that was not sent to McWane . Finally, this proposed finding is irrelevant because the alleged conspiracy ended in late 2008. (Complaint ¶ 2; RPF ¶¶ 281-282)

1487. Mr. Pais communicated his intent to restart DIFRA to Mr. Page in a personal meeting on May 1, 2009. (CX 0214 at 005).

Response To Finding No. 1487:

See General Responses 2 and 5. This finding is inaccurate and therefore misleading.

Although Mr. Pais wrote in a memo to Sigma’s board that he had communicated to Mr. Page a desire to revive DIFRA, there is no proof that this communication actually occurred. (CX 214).

1488. On May 11, 2009, Mr. Brakefield submitted Sigma’s data for the first four months of 2009 to Bree Holland at SRHW. (CX 1336 at 001).

Response To Finding No. 1488:

See General Responses 2 and 5.

1489. Following Sigma’s May 11, 2009 submittal of late data to DIFRA, Mr. Brakefield worked with Wood Herren to try to set up a DIFRA annual meeting; Mr. Pais emailed Mr. Brakefield telling him to wait until Star submitted its data before arranging the meeting, and also told him that McWane needed “to endorse the validity of a meeting, before we galvanize others, as I am not sure of their mindset given their recent market moves.” (CX 2329 at 001).

Response To Finding No. 1489:

See General Responses 2 and 5.

1490. The efforts of Messrs. Pais and Brakefield to revive the DIFRA Information Exchange were unsuccessful, as neither McWane nor Star submitted data again and no DIFRA meeting was held. (CX 1324 (June 25, 2009 Wood Herren email to Bree Holland noting “We have been trying to get the members to schedule an annual meeting and it has not been held yet. . . . hold tight for now as far as the reports go until we can get this organization back on course.”); *see also supra* § 7.8.5).

Response To Finding No. 1490:

See General Responses 2, 5 and 8. This finding is incorrect because DIFRA was never an “Information Exchange,” but a legitimate trade association (RPF 243-280). This finding is also misleading because the exhibit cited does not state that efforts to revive DIFRA were unsuccessful, that neither McWane nor Star submitted data again to DIFRA, or that no DIFRA meeting was held (CX 1324)

7.9 In the Spring of 2009, McWane Restructured Its List Prices and Exchanged Pricing Assurances with Star

1491. In the spring of 2009, Sigma openly sought to persuade McWane, Star, and SIP not to follow through with McWane’s announced list price restructuring, and Star and McWane exchanged assurances regarding their decision to proceed with the price restructuring. (*Infra* ¶¶ 1492-1500).

Response To Finding No. 1491:

See General Responses 1, 2 and 11 and response to ¶¶ 1492-1500, *infra*. This proposed finding is an unsupported assertion to which no response is required.

7.9.1 McWane Announced a Price Restructuring

1492. On April 13, 2009, McWane announced that it would begin using a new price list, to be effective May 1, 2009, that would increase prices for small diameter fittings (where McWane’s share was highest), and would lower prices for medium and large diameter Fittings (where McWane had little or no share and Sigma and Star were stronger). The “net effect” across all Fittings size ranges was “near zero.” (CX 0569 at 001; CX 1669; CX 1563; Tatman, Tr. 595, 597).

Response To Finding No. 1492:

See General Response 2. Otherwise, Respondent has no specific response.

1493. McWane designed its new price list to be revenue neutral across all Fittings size ranges. McWane restructured its price list to (1) realign its prices among different Fittings size ranges in order to better align McWane's prices with its production costs; (2) squeeze margins and give less room for Project Pricing on larger diameter Fittings, where Star and Sigma had significantly larger shares; and (3) attempt to achieve greater price transparency. (CX 0171 at 001, 002 (goal "to promote stability and 'reduce' the wiggle room for profitable job pricing"); Tatman, Tr. 595 (restructuring was "close to being revenue neutral" and was aimed at "compressing" published and actual Fittings prices and "getting greater visibility"))).

Response To Finding No. 1493:

See General Response 2. Otherwise Respondent has no specific response except to state that McWane's price restructuring is the essence of competition. (RPF 284, 287; Tatman Tr. 972-976).

1494. The DIFRA data through December 2008 showed that McWane's market share was strongest in the 3"-12" Fittings segment, and weaker in the 14-24" and over 24" segments. McWane's restructured prices went up 3% to 4% in the 3-12" segment and down in the others. (Tatman, Tr. 594; CX 0656).

Response To Finding No. 1494:

Respondent has no specific response.

1495. Mr. Tatman's conclusion that the overall effect (across all size ranges) of the McWane list price restructuring was neutral was based on McWane's product mix, though he recognized that McWane's price restructuring could have had a non-neutral impact on a supplier with a different mix of Fittings. (Tatman, Tr. 598-599).

Response To Finding No. 1495:

Respondent has no specific response.

1496. According to a pricing strategy presentation dated April 8, 2009, Mr. Tatman had proposed a 4% price increase for 3-12" Fittings, an 18% decrease for 14-24" Fittings, and a 33% decrease 30-48" Fittings. The presentation noted that "[c]ompressing the \$/lb range in theory makes it more difficult for Importers to heavily undercut published levels on larger diameter jobs," and that "[c]ompressing Gross Margins across the product line might help stabilize pricing in the (3"-12") stocking segment." (CX 1181 at 004; *see also*

CX 1563 (restructuring will “help stabilize prices” and “help us obtain more accurate feedback on competitive levels”).

Response To Finding No. 1496:

See General Response 2. This finding is incomplete, and therefore misleading because Mr. Tatman makes it clear in his May 1, 2009 email that McWane’s 2009 list price restructuring was based on an independent analysis. (CX 1563 (“[w]ith the housing sector down, the current market has shifted towards larger diameters. Against our 1" quarter sales mix, the weighted average change in List Piice for the entire (3"-48") product range ·would have been down 3%. However, if you measure against the 2006 total market mix per DIFRA data, the weighted average change in List Price would have been a slight increase as 76% of the industry tonnage was within the (3"-12") segment.”)). The stated pricing “strategy” was never implemented. See also response to ¶ 1493, *supra*.

1497. Echoing the Tatman Plan, Mr. Tatman’s April 2009 pricing strategy presentation again explained the behavior that McWane was seeking to encourage in its competitors and customers in pursuit of “Stable Markets.” Among other things, for “pure” market stability to occur, Mr. Tatman wrote that competitors would have to centralize their pricing authority, resist Project Pricing, and cut back on incentive rebates and other terms, while Distributors would have to stop demanding Project Pricing, focus their own selling efforts on relationships and service rather than price, and believe that if they “play by the rules” all their competitors will also. (*Compare* CX 1181 at 007 *with* CX 0627 (calling for price authority centralization and an end to Distributor price “auctions”); *supra* § 7.1 (Tatman Plan); *see also* CX 2477 (Jansen, Dep. at 257) (testifying that he did not disagree with CX 1181 at 007)).

Response To Finding No. 1497:

See General Response 1, 2, 5, 6, and 11 and response to § 7.1, *supra*. The exhibits cited do not support the assertion set forth in this proposed finding. As demonstrated elsewhere in these responses, there was no “Tatman Plan.” (See Response To § 7.1) Mr. Tatman’s brainstorming ideas were neither fully implemented nor communicated to any other fittings supplier. This finding is incomplete, and therefore inaccurate because McWane’s April 2009

List Price change was based on Mr. Tatman's independent product weight analysis and the purpose of McWane's 2009 list price restructuring was to try to win back market share that it had been losing to Star and Sigma and to compete in the segments of the market where Sigma and Star were strongest. (RPF ¶ ¶ 284, 287; and Tatman, Tr. 972-976),

1498. The list price change as announced resulted in average Fittings list price changes as follows:

(3" - 12") fittings up 7.5%

(14" - 24") fittings down 16.6%

(30" - 48") fittings down 31.4%

(CX 1563; Tatman, Tr. 279-280); Pais, Tr. 2011 (in the spring of 2009 McWane restructured its price list such that prices went up on the smaller size fittings and down fairly significantly on the larger size fittings)).

Response To Finding No. 1498:

Respondent has no specific response.

1499. On April 22, 2009, Star announced that it would also change its price list, effective May 19, 2009, but did not specify whether it would match McWane. (CX 2349).

Response To Finding No. 1499:

See General Responses 2 and 5. This finding is misleading because it implies Star was acting in concert with McWane when, in fact, Star independently chose to follow McWane's April 2009 List Price change. (RPF ¶ ¶ 293; McCutcheon, Tr. 2462) ("As soon as the McWane announcement came out, we internally chose to follow it, because that was our standard operating procedure, and I believe the process had already begun to follow McWane's price change.") . Otherwise, Respondent has no specific response.

1500. Mr. Tatman had received the Star April 22, 2009 announcement by April 23, 2009, and forwarded it to Mr. Walton, noting that "[w]e assume they are following us but we should know for sure by the end of next week." (CX 2349; Tatman, Tr. 598).

Response To Finding No. 1500:

See General Responses 2 and 5. This finding is misleading to the extent it implies Star was acting in concert with McWane. In fact, Star independently chose to follow McWane's April 2009 List Price change because that was Star's standard operating procedure. (RPFF ¶ 293; McCutcheon, Tr. 2462) ("As soon as the McWane announcement came out, we internally chose to follow it, because that was our standard operating procedure, and I believe the process had already begun to follow McWane's price change.")

7.9.2 Sigma Opposed McWane's Price Restructuring and Attempted to Persuade McWane to Rescind or Delay Its Price Restructuring

1501. In April and May 2009, Sigma opposed McWane's price restructuring and attempted to persuade McWane to rescind or delay the restructuring. (*Infra* ¶¶ 1502-1524).

Response To Finding No. 1501:

See General Responses 1 and 2, and response to ¶¶ 1502-1524, *infra*. This proposed finding is an unsupported assertion to which no response is required.

1502. Sigma received word of McWane's price restructuring on or about April 15, 2009. (CX 0989 at 005 (HD Supply email informing Sigma of McWane "price increase" notice and asking whether Sigma will follow); CX 0989 at 003 (Pais April 15, 2009 email observing that McWane appeared to have "revamped" its price list, including a decrease in large-diameter fitting list prices); Rybacki, Tr. 3581-3583).

Response To Finding No. 1502:

This finding is inaccurate because the HD Supply email merely asks, "[i]s Sigma doing the same." (CX 0989 at 005)

1503. Sigma analyzed the impact that McWane's price restructuring would have on Sigma's business, and determined that it would have a "fairly drastic" negative impact, resulting in a \$4 million to \$5 million annual hit to Sigma's bottom line. (Pais, Tr. 2011-2012; CX 0211 at 001; *see also* Pais, Tr. 2142 (McWane restructuring was "not at all" a good thing for Sigma); Pais, Tr. 2171 (Sigma price restructuring was "potentially a knockout punch" for a struggling Sigma); Rybacki, Tr. 3580 (April 2009 McWane Fittings list price revision considerably reduced large-diameter Fittings prices)).

Response To Finding No. 1503:

This finding is incomplete, and therefore misleading because Sigma's grave financial situation in the spring and summer of 2009 was brought about by a variety of factors – not just McWane's April 2009 List Price change. (RPF 533-551)

1504.

3647-3648, *in camera*

006, *in camera*

supra ¶ 784 (detailing telephone records)).

(Rybacki, Tr.

; CX 1860-A at 004,

(Rybacki, Tr. 2467-2468, *in camera*; CX 1621-A at 034-035, *in camera*; *supra* ¶¶ 785-786 (detailing telephone records)).

Response To Finding No. 1504:

See General Responses 2 and 11 and Response To Finding 714. This proposed finding is irrelevant because the alleged phone call occurred after the alleged conspiracy had ended.

(Complaint ¶ 2; RPF 281-282) *See* also responses to ¶¶ 785-786, *supra*. Moreover this finding is misleading. Mr. Tatman and Mr. Rybacki testified that they never discussed or agreed upon Fittings prices. (RPF 300, 301)

1505. Sigma was upset about the price restructuring. Mr. Rybacki “tried to let the whole world know that we weren't happy,” and discussed with Mr. McCutcheon the possibility of suing McWane for predatory pricing. (Rybacki, Tr. 3580-3581).

Response To Finding No. 1505:

See General Responses 2 and 4.

1506. Sigma took affront at McWane's price restructuring because Sigma had been trying to be more consistent in its pricing. (Rybacki, Tr. 3590-3591 (“that's why we took affront to this [McWane price list] because we were always trying to be . . . consistent in our pricing, in our policies.”)).

Response To Finding No. 1506:

The proposed finding and the implication of an agreement is not supported by the cited evidence.

1507. Sigma believed that McWane's price cut in larger Fittings was designed to hit Sigma and Star in products where they performed strongly. (CX 2531 (Rybacki, Dep. at 197-198); CX 0985 (Pais May 4, 2009 email noting that Sigma's cessation of DIFRA data submissions "seems to have precipitated the strong and drastic reaction from Tyler by way of the unfavorable revision of the entire Price List.")).

Response To Finding No. 1507:

Respondent has no specific response, except to note that this is the essence of competition.

1508. Sigma decided to "protest" the price restructuring and attempt to maintain the prior prices. (Pais, Tr. 2012; *see also* Rybacki, Tr. 3584-3585 (Sigma reacted "not favorably" to McWane's April 2009 list price changes, and sent a letter to its customers)).

Response To Finding No. 1508:

See General Response 2. This finding is misleading to the extent it implies that Sigma's independent decision to maintain its prices was an act of rebellion against McWane rather than Sigma's own independent decision (See Pais, Tr. 2012).

1509. In an April 23, 2009 email, Mr. Pais described his plan to ask Mr. McCullough of McWane for help on the price list issue:

1 meet LM 4/28 and 1 will go all out to get the MOST from this rare mtg. Pvt Label is just 1 part. He needs to hear our version of a grand strategy and 1 may layout the P2 potential to grab his interest and that *there is an end game in helping us with the P/L [Price List]*.

(CX 0209 at 001 (emphasis added)).

Response To Finding No. 1509:

See General Responses 2 and 5. This proposed finding is misleading because there is no evidence that the abbreviation "P/L" in Mr. Pais's internal memo actually referred to "Price

List,” as opposed to – for example – “Private Label.” This finding is misleading because Mr. Pais testified that he never had any pricing discussions with Mr. McCullough or anyone else from McWane. (RPF 208, 225); (Pais, Tr. 2028 (“No, I did not.”), 2035 (“No, we didn’t.”), 2080 (“No. Never.”), 2102 (“Not at all.”), 2130-2131 (“No.” ... “None.”); (Pais, IHT 68 (“Not at all.”), 109 (“at no time”), 104 (“No”), 110 (“No, there was no discussion about that”)). This finding is also misleading because the purpose of Mr. Pais’s April 2009 meetings with Mr. Page and Mr. McCullough was to discuss legitimate business topics, such as Sigma’s purchase of private label fittings from McWane, rather than pricing or market strategy. (RPF 342, 343); (Pais, Tr. 1744-1745 (Q: “Sir, in 2009, did you approach McWane about selling you domestic fittings under a private label arrangement?” A: “Yes, I did.”), 1756-1757 (Q: “After McWane turned down your private label request for the first time, did you go back and meet with McWane executives and make an effort to get them to change course again and offer private label fittings to Sigma?” A: “Yes.” Q: “And who did you -- which executives did you meet with?” A: “I met with both Mr. Leon McCullough once and Mr. Page again.”); JX 639 (McCullough, Dep. at 61-64); JX 687 (Pais, Dep. at 188-189)); (Pais, Tr. 1897, 2035 (Q: “And during that meeting with Mr. Page, did you talk about McWane's list price restructuring and your reaction to it?” A: “No, we didn't.”), 2045-2048 (Q: “Mr. Pais, did you ever discuss and agree upon the price of any fittings sale by Sigma or McWane with Mr. Page?” A: “Absolutely not.” Q: “And Mr. Hassi asked you about a discussion you had with Mr. McCullough at McWane in the spring of '09. And just so we're clear, this was in April of '09, after McWane had announced a very drastic decrease in its medium and large-diameter fittings; right?” A: “Yes.” Q: “And he asked you did you have a discussion with him, and I think you said the answer was not about prices; is that right?” A: “Absolutely.”); JX 642 (Page, Dep. at 117-124); Pais, Tr. 2028 (Q: “Did you discuss McWane's

new pricing move with Mr. McCullough when the two of you met on April 28, 2009?” A: “No, I did not.”))

1510. Several days later, on April 26, 2009, Mr. Pais further spelled out his plan to raise the price list issue directly with Mr. McCullough of McWane, and to seek a “stay of execution” on the price restructuring, in exchange for Sigma’s agreement to implement pricing discipline. On April 26, Mr. Pais wrote to Mr. Bhattacharji regarding an upcoming April 28, 2009 meeting between Mr. Pais and Mr. McCullough:

I have a full plate with LM . . . Pvt Label is one issue and their new Pricing move is even bigger! Our team was confused and was resigned to blindly follow the leader -- but, I felt once done, it would spell a PBT hit of about \$4M - \$5M, not only for 09 for even 2010 ... I asked RK2 to do a very thorough impact review and my fears pan out -- a little bump in S range, but a big hit in M/L range ... SO, thru a long and heated RM-call 4/24, *we decided to try Option 3* (#1 -- follow Tyler ... #2 -- start a rebel action for the 4 non-dom suppliers to follow a different/ old PL) *being somehow seek a one mth’s hold to implement our new pricing discipline* -- Old PL + FIRM MULT ! You may have seen letr draft. I hv coached LR to blitz the G3 to support our move by NOT pandering/pressuring for LOWER prices etc...

(CX 0211 at 001 (emphasis added); Pais, Tr. 2027-2034).

Response To Finding No. 1510:

See General Responses 2 and 5, and response to ¶ 1509, *supra*. This finding is misleading because, regardless of what this internal Sigma document says, Mr. Pais never actually had any pricing discussions with Mr. McCullough or anyone else from McWane. (RPF ¶¶ 208, 225; Pais, Tr. 2028,, 2035, 2080,, 2102, 2130-2131; Pais, IHT 68, 109, 104, 110)).

This finding is also misleading because Mr. Pais met with Mr. Page and Mr. McCullough in April 2009 to discuss legitimate business topics such as private label fittings, and not pricing or market strategy. (RPF ¶¶ 342, 343; Pais, Tr. 1744-1745 , 1756-1757; JX 639 (McCullough, Dep. at 61-64); JX 687 (Pais, Dep. at 188-189)); (Pais, Tr. 1897, 2035,, 2045-2048; JX 642 (Page, Dep. at 117-124); Pais, Tr. 2028)

1511. Before communicating its opposition directly, Sigma used its customer letters to deliver its message to McWane. (CX 0211 at 001 (“we decided to . . . seek a one mth’s hold to implement our new pricing discipline -- Old PL + FIRM MULT ! You may have seen letr draft”)).

Response To Finding No. 1511:

See General Responses 1, 2, 5 and 11, and response to ¶ 1510, *supra*. This finding is inaccurate because the cited exhibit does not state that Sigma used its customer letters to deliver a message to McWane. To the contrary, the record evidence is that fittings suppliers received customer letters after the fact, from their own customers.

1512. On April 27, 2009, Sigma issued a letter to its customers announcing that it planned to continue to use the existing price list for Fittings but would use “firm” multipliers to bring “stability” to the market. (Pais, Tr. 2022-2023). The letter, which was an attempt to restore the pricing agreement the suppliers had arrived at the prior year, and to send a message that Sigma would control its pricing if McWane would pull back its list price restructuring, stated in part:

The problem of over supply and a cataclysmic drop in demand has created a market that doesn’t seem to have a bottom. While none of us like to see lower pricing, we’ve all had a hand in it either directly or indirectly, and any semblance of responsibility and market discipline seems to have disappeared. We at Sigma are just as much at fault as any of our competitors.

In response to this turbulent patch, our industry leader has recently announced a highly re-structured pricing plan that you are aware of, with severe drops in the list prices. While we respect their rationale, whatever it may be, we disagree with their approach . . . We believe this action will hurt our industry, both in the short and the long term . . .

At the same time, we also sense the need to reverse the unhealthy pricing spiral thru a mature, prudent and disciplined pricing approach. . . .

THEREFORE, WE PLAN TO CONTINUE THE EXISTING PRICE LIST FOR THE FITTINGS AND ACCESSORIES . . . AND USE FIRM NEW MULTIPLIERS OFF THIS PRICE LIST, TO BRING STABILITY BACK TO OUR BUSINESS.

...

We hope you understand our sincere efforts to reverse the unhelpful course of the past and support our efforts to be a responsible supplier for now and for the future, given the challenging times we all face together as one industry. We also hope this effort will stabilize the value of your own inventories as well.

(CX 1454 at 001 (emphasis in original); Pais, Tr. 2021-2024; CX 0575 at 002; CX 0651 at 001-002).

Response To Finding No. 1512:

See General Responses 1, 2, 5 and 11. The second sentence of this finding is a mischaracterization of the letter unsupported by the evidence. This finding is internally inconsistent with Complaint Counsel’s other proposed findings, because the cited testimony and exhibits demonstrate that Sigma did not follow McWane’s April 2009 List Price change and, therefore, there was no pricing agreement between Sigma and McWane. In addition, Sigma has denied having any advance price discussions or agreements with McWane. (RPF 201, 203, 204, 228 and 229; Rybacki, Tr. 3649-3651, 3659, 3682-3683, 1115-1116; 3683-3684 3716-3722, 3693, 3708; (JX 690 (Rybacki, Dep. 91; 192).; (JX 688 (Rona IHT Tr. 203)

1513. Sigma’s letter of April 27, 2009 was an attempt to restore the pricing agreement the suppliers had arrived at the prior year, and to send a message that Sigma would control its pricing if McWane would pull back its list price restructuring. (See CX 1454 (noting Sigma’s disagreement with McWane’s restructuring, and Sigma’s own “sincere efforts to reverse the unhelpful course of the past” and “to be a responsible supplier for now and for the future”)).

Response To Finding No. 1513:

See General Responses 1, 2, 5 and 11. This proposed finding is a mischaracterization of the letter, unsupported by the evidence. This proposed finding is Complaint Counsel’s argument, and not a proposed fact, and thus requires no response. See Response to Finding 1512, *supra*.

1514. To Sigma, the phrase “BRING STABILITY BACK TO OUR BUSINESS” in its letter referred to the drop in sales volume and “nosedive” in prices that had occurred in late 2008 and early 2009. (Pais, Tr. 2023; CX 1454). Sigma was taking “a very firm stand that we wanted to stay with the previous price listing” and making a “renewed effort” to

offer responsible multipliers and curtail Project Pricing. (Pais, Tr. 2023-2024 (“[W]e wanted to stay with. . .[a] price list that we thought was rational and we were making a renewed effort to make sure that we will offer, you know, responsible multipliers and, as we discussed yesterday, without too much of a variation for the various jobs.”)).

Response To Finding No. 1514:

See General Responses 1, 2, and 11. This finding is inaccurate because the cited testimony does not state that Sigma wanted to curtail job pricing. (Pais, Tr. 2023-2024).

1515. Sigma’s April 27, 2009 customer letter was an attempt by Sigma to send a message to McWane, indirectly through its customers. (Rybacki, Tr. 3590; CX 1454 at 001).

Response To Finding No. 1515:

See General Responses 1, 2, and 11. This proposed finding is incorrect because, as demonstrated elsewhere in these responses, the suppliers did not send pricing signals to each other via customer letter. (Pais Tr., 2024) Indeed, Mr. Rybacki testified that he did not know how Sigma was going to “convince McWane to go with the old price list.” (Rybacki, Tr. 3589 (“Q. Do you know whether Sigma took any efforts to cause McWane to have a change of heart? A. I personally did not. I don't know how we -- you know, if Victor or -- I imagine -- I don't know if he tried to or not. I mean, I'm speculating because I did not.”); 3590 (“Q. Did Mr. -- did Mr. Pais tell you that he was going to try to convince McWane to go with the old price list? A. We were going to try to send a message to McWane. Q. Do you know how he was going to try to send that message to McWane? A. I do not.”).)

1516. Mr. Rybacki describes Sigma’s customer communications in response to McWane’s April 2009 price restructuring as expressing that “this was going to hurt us deeply and we did not want this to take place,” and that “[w]e also didn’t think it was good for the industry, not good for anybody to have prices decrease.” (Rybacki, Tr. 3587-3588 (“I was trying to stop it any way I could.”); Pais, Tr. 2024 (explaining April 27, 2009 letter as expressing a hope that the McWane price restructuring could be reversed)).

Response To Finding No. 1516:

See General Responses 1, 2, and 11, and response to ¶ 1515, *supra*. This finding is incomplete, and therefore inaccurate because Mr. Pais testified that Sigma was not trying to send a message to McWane through its April 27, 2009 letter to customers. (Pais, Tr. 2024 (“Q. Was Sigma through this letter trying to send a message that Sigma would control its pricing if Tyler pulled back its list price restructuring? A. We were not trying to send any message as much as a hope because the -- the massive reduction in the price list was so stunning and unexpected, so we felt that it was a kind of a correction to the market pricing, and we were hoping that -- and we believed in our hearts that -- and a lot of our customers that the new price list was just not acceptable, and so we were certainly expressing a hope that it could be reversed.”))

1517. Mr. Pais explained the approach to the Sigma management team as being intended:

to induce Tyler to hold off the New LP/Mult decision for now -- with our resolve to ‘clean up’ the marketing price slide, on our own Privately, using market forces and customer channels, we are hoping to influence Tyler to hold off for ONE month, during which we have to demonstrate our sincerity, our resolve and our commitment to a disciplined and responsible market pricing behavior!

(CX 0212 at 001). Mr. Pais told his managers to ask customers to “support the Sigma Plan and . . . lean on Tyler to grant the ONE month reprieve for their new LP . . .” (CX 0212 at 001; Pais, Tr. 2014).

Response To Finding No. 1517:

See General Responses 1, 2, and 11, and responses to ¶¶ 1515-1516, *supra*. This finding is misleading because Sigma employees never had any advance pricing discussions or agreements with anyone from McWane. (RPF ¶¶ 191-229)

1518. Mr. Tatman received Sigma’s customer letter the day it was sent – April 27, 2009 – and forwarded it to Mr. McCullough and Mr. Walton. Mr. Tatman correctly interpreted Sigma’s message to McWane as being that Sigma would control its pricing if it pulled back on the new price list:

This is an interesting read.... Admission of guilt for driving prices down and a renewed commitment [to] firm multipliers and stability.

Note that they are going to stay with the current list price. I may be reading too much into Larry's words but his message to Tyler/Union [McWane] may be that I'll control my pricing and I want you pull back your list price restructuring????

The "severe drops in list prices" Larry references is on the larger diameter items (14" - 48") where Sigma's share position is much stronger than ours. As you know we actually raised 'list prices' on the (3"-12") segment by over 7%

...

Note that Star announced late last week that they would have a new List Price effective May 19th. It will be interesting to see what they do in light of Sigma's announcement.

(CX 0651 at 001; Tatman, Tr. 599-605).

Response To Finding No. 1518:

See General Responses 1, 2 and 11, and responses to ¶¶ 1515-1517, *supra*. This finding is misleading because Mr. Tatman testified that he never had any advance price discussions with anyone at Sigma or Star and that McWane never entered into any agreement with Sigma or Star regarding prices. (RPF ¶¶ 191-234) To the contrary, McWane made its own independent decision regarding its 2009 list pricing, and kept that decision in place, regardless of Sigma's customer letter. (RPF ¶¶ 283-289).

1519. On May 1, 2009, in response to Sigma's characterization of McWane's restructuring as involving "severe drops" in list prices, and in response to "*a lot of chatter and false perceptions*," Mr. Tatman sent an email to Mr. McCullough and Mr. Walton explaining the rationale for the restructuring, and stating that the restructuring would "help stabilize prices" and "help us obtain more accurate feedback on competitive levels." (CX 1563 (emphasis added)).

Response To Finding No. 1519:

See General Responses 1, 2, 5 and 11, and response to ¶ 1518, *supra*. This finding is incomplete, and therefore misleading because the purpose of McWane's 2009 list price restructuring was to try to win back market share that it had been losing to Star and Sigma and to compete in the segments of the market where Sigma and Star were strongest. (RPFF ¶¶ 284, 287)

1520. As set forth in his plan (*supra* ¶ 1510), Mr. Pais met with Mr. McCullough near the airport in Des Moines, Iowa on April 28, 2009. (Pais, Tr. 2018-2019, 2025-2026; CX 0209 at 001, 004 (Pais email regarding upcoming meeting with McCullough); CX 0728 (email between Pais and McCullough planning meeting)).

Response To Finding No. 1520:

See General Responses 1, 2, 5 and 11, and response to ¶ 1510, *supra*. This finding is misleading because Mr. Pais never had any pricing discussions with Mr. McCullough or anyone else from McWane. (RPFF ¶¶ 208, 225) The purpose of the April 2009 meeting was to convince McWane to sell private-label, domestically-manufactured Fittings to Sigma following ARRA's enactment. (RPFF ¶ 342 and ¶ 343)

1521. On April 29, 2009, Mr. Pais sought a meeting with Mr. Page to discuss pricing.

I need to meet you in person ASAP, to review a host of issues all related. So, please make some time to see me either Thursday evening, even if I have to trouble you for a working dinner or Friday morning. It's important Ruffner -- else, I wouldn't have bothered you, knowing how busy you must be these days. We need to have a frank and open talk -- we are at cross roads.

(CX 0213 at 002).

Response To Finding No. 1521:

See General Responses 1, 2, 5 and 11, and responses to ¶¶ 1510, 1520, *supra*. This finding is incorrect because CX 213 does not support this conclusion. This finding is misleading because Mr. Pais and Mr. Page have both testified that they never discussed Fittings prices.

(RPF ¶ 340; (Pais, Tr. 1897 (Q: “Sir, during your meeting with Mr. Page in September of 2007, did the two of you discuss Star's low pricing in the fittings market?” A: “No.” Q: “Did you discuss Mr. Green's decision to respond aggressively with equally low pricing?” A: “No. We didn't -- I didn't discuss it with him.”); JX 642 (Page, Dep. at 80-82)).)

1522. Mr. Pais met with Mr. Page in Birmingham on May 1, 2009 at 9:00 a.m. and, among other things, expressed Sigma’s displeasure with McWane’s price restructuring. (CX 2531 (Rybacki, Dep. at 199) (Mr. Rybacki believes Mr. Pais also communicated that “Sigma was not happy” with McWane’s restructuring directly to Mr. Page); *but see* Pais, Tr. 2035 (admitting to meeting, but denying that he discussed McWane’s restructured prices at the meeting); CX 0314 (Pais April 30, 2009: “I will be away on a quick visit to Birmingham Friday 5/1/09”); CX 0213 at 001; CX 0317 at 001 (Pais May 13, 2009 email describing meeting)).

Response To Finding No. 1522:

See General Responses 1, 2, 5 and 11, and responses to ¶¶ 1510, 1518, 1520, *supra*.

1523. Mr. Pais sought the meeting with Mr. Page for the purpose of making his case against McWane’s price restructuring. In a May 4, 2009 memo to the Sigma Board, Mr. Pais described the meeting as follows:

As we also faced another major challenge from Tyler, as addressed below [“Major Price Restructuring”], Larry and I sought and met Ruffner Page, CEO of the McWane Inc last week, for a major review of industry trends . . .

(CX 0214 at 004). The phrase “another major challenge from Tyler, as addressed below” referred to McWane’s price restructuring. (CX 0214 at 004).

Response To Finding No. 1523:

See General Responses 1, 2, 5 and 11. This finding is incorrect because the cited exhibit does not support it. To the contrary, the witnesses testified that the purpose of the meeting was not to discuss prices. (RPF ¶¶ 340, 343 (Pais, Tr. 1897, 2035 (Q: “And during that meeting with Mr. Page, did you talk about McWane's list price restructuring and your reaction to it?” A: “No, we didn't.”), 2045-2048 (Q: “Mr. Pais, did you ever discuss and agree upon the price of any fittings sale by Sigma or McWane with Mr. Page?” A: “Absolutely not.” Q: “And Mr. Hassi

asked you about a discussion you had with Mr. McCullough at McWane in the spring of '09. And just so we're clear, this was in April of '09, after McWane had announced a very drastic decrease in its medium and large-diameter fittings; right?" A: "Yes." Q: "And he asked you did you have a discussion with him, and I think you said the answer was not about prices; is that right?" A: "Absolutely."); JX 642 (Page, Dep. at 117-124); Pais, Tr. 2028 (Q: "Did you discuss McWane's new pricing move with Mr. McCullough when the two of you met on April 28, 2009?" A: "No, I did not.")). McWane maintained its 2009 list price in place. (RPFF 283-289).

1524. Although Mr. Pais did not succeed in convincing Mr. McCullough or Mr. Page to reverse or postpone McWane's price restructuring, he noted afterward that the meetings had at least provided him the opportunity to "convey [Sigma's] intentions to revive the DIFRA activity" and to communicate Sigma's assurances regarding its "commitment to a stable and rewarding industry." (CX 0214 at 007 ("Our meetings last week are likely to at least give them some assurance of our intentions and commitment to a stable and rewarding industry.")).

Response To Finding No. 1524:

See General Responses 1, 2, 5, 8 and 11. This proposed finding is a concession that McWane's pricing decision was independent, and that McWane and Sigma did not collude on pricing. The proposed finding explicitly concedes that "Mr. Pais did not succeed in convincing [McWane] to reverse or postpone" its 2009 list price adjustment.

7.9.3 Sigma Attempted to Persuade Star and SIP to Join in Resisting McWane's Price Restructuring

1525. In April 2009, Sigma attempted to persuade Star and SIP to resist McWane's price restructuring. (*Infra* ¶¶ 1526-1532).

Response To Finding No. 1525:

See General Responses 1 and 2, and responses to ¶¶ 1526-1532, *infra*. This finding is an unsupported assertion to which no response is required.

1526. Mr. Pais contacted SIP and Star and proposed to them that the three companies should resist McWane's changes and adhere to the old price list. (McCutcheon, Tr. 2458; CX 2538 (McCutcheon, IHT (Vol. 2) at 224) ("SIGMA didn't want to follow the price

list change that McWane dropped their prices significantly and Victor [Pais] was very upset about it. I definitely talked to Victor about it.”); CX 2538 (McCutcheon, IHT (Vol. 2) at 257-258 (“Victor told me that they absolutely were not going to do the price list”); *see also* CX 2539 (McCutcheon, Dep. at 227-228) (Mr. McCutcheon discussed the McWane price restructuring with Mr. Tatman and Mr. Rybacki); CX 2528 (Pais, Dep. at 329-332)).

Response To Finding No. 1526:

See General Responses 2, 3, 4 and 6.

1527. On April 26, 2009, Mr. Pais had also indicated that he had reached out to Star regarding the issue, and would continue to do so to ensure that Star “complied” with his plan.

I will then seek [from McWane] a special ‘*stay of execution*’ of 1 month... HTN promises to comply -- I am prepared to then visit HTN to ensure they do... You have already seen my ‘personal olive branch’ to RB...”

(CX 0211 at 001 (emphasis added)).

Response To Finding No. 1527:

See General Responses 2, 4 and 5.

1528. The initials “HTN” in Mr. Pais’s April 26, 2009 email were a reference to Star. At trial, Mr. Pais testified that “HTN” in his April 26, 2009 email referred to Sigma’s regional manager, Al Richardson. (Pais, Tr. 2032-2033). In previous documents, however, Mr. Pais referred to Mr. Richardson by his initials, AR1, and referred to Star as “HTN” for its Houston headquarters. (Pais, Tr. 2032-2033 (Al Richardson is AR1); Pais, Tr. 1865-1866 (“HTN” (Houston) in CX 0915 stands for Star). Mr. Pais admitted that the reference in the April 26, 2009 email to “RB” was to Ramesh Bhutada, Star’s president. Pais, Tr. 2033-2034 (“RB” is Ramesh Bhutada, Star’s President)).

Response To Finding No. 1528:

See General Responses 2, 4 and 5.

1529. In late April or early May 2009, Mr. Pais and Mr. McCutcheon had a telephone conversation before Star formally announced that it would issue a price list like that issued by McWane. (CX 2539 (McCutcheon, Dep. at 229)). Mr. McCutcheon told Mr. Pais that Star was following McWane’s announced price list. (CX 2539 (McCutcheon, Dep. at 229)).

Response To Finding No. 1529:

See General Responses 2, 5 and 6. This finding is inaccurate because Mr. McCutcheon testified that he did not know whether the call he had with Mr. Pais was before Star formally announced lowering its prices, but that it was after he had already decided to do so. (CX 2539 (McCutcheon, Dep. at 229)).

1530. Mr. Pais told Mr. McCutcheon that he was angry about McWane's revised price list, particularly because of the drop of about 40% on Fittings of 14" and greater diameter. Mr. Pais attempted to convince Mr. McCutcheon that that if Star were to not follow McWane, and instead send a letter to the market announcing that it was staying with its old price list on those Fittings, that Mr. Pais could possibly convince McWane to reverse its list price change. (McCutcheon, Tr. 2457-2458).

Response To Finding No. 1530:

See General Responses 2 and 4.

1531. Specifically, Mr. Pais told Mr. McCutcheon,

Mr. Pais told me that he was very confident that he was going to change McWane's mind. And he told me that he had -- I believe in that phone conversation he told me he had spoken to SIP-Serampore, and that I think he had insinuated he had already spoken to McWane and that he felt that they weren't going to make that change. And he was encouraging me to join them to give strength to there not being a change in the price list to McWane.

CX 2539 (McCutcheon, Dep. at 231)).

Response To Finding No. 1531:

See General Responses 2 and 4.

1532. Between April 22, 2009, the date on which Star first announced that it would also change its price list effective May 19, 2009, (CX 2349), and May 1, 2009, the effective date of McWane's new list price and the date on which Star announced its internal plan to match McWane's pricing, (CX 0569 at 001; CX 0890; McCutcheon, Tr. 2464),

[REDACTED] (McCutcheon, Tr. 2467-2468, *in camera*; CX 1621-A at 034, 035, *in camera* (Rybacki telephone records); *supra* ¶¶ 785-786 (detailing telephone records)).

Response To Finding No. 1532:

See General Responses 2 and 4.

7.9.4 McWane Exchanged Assurances with Star Regarding Setting List Prices

1533. In late April 2009, McWane exchanged assurances with Star regarding the two suppliers' intent to implement the restructured price list. (*Infra* ¶¶ 1534-1553).

Response To Finding No. 1533:

See General Responses 1 and 2, and responses to ¶¶ 1534-1533, *infra*. This finding is an unsupported assertion, to which no response is required.

1534. The events surrounding McWane's price restructuring in the spring of 2009 and Sigma's opposition created uncertainty among McWane and Star about each other's intentions. (*Infra* ¶¶ 1535-1538).

Response To Finding No. 1534:

See General Responses 1 and 2 and responses to ¶¶ 1535-1538, *infra*. This finding is an unsupported assertion, to which no response is required.

1535. As of April 27, 2009, Mr. Tatman did not know what Fittings price action Star might take in response to Sigma's April 27, 2009 letter. (CX 0651 at 001 (Tatman, April 27, 2009: "Note that Star announced late last week that they would have a new List Price effective May 19th. It will be interesting to see what they do in light of Sigma's announcement."); Tatman, Tr. 604-605).

Response To Finding No. 1535:

See General Response 2. Otherwise, Respondent has no specific response.

1536. As of April 27, 2009 when Sigma announced that it would stick to its old price list, there "was uncertainty about what everybody would do" regarding pricing. (CX 2485 (Walton, Dep. at 157)).

Response To Finding No. 1536:

See General Responses 2 and 6. Otherwise, Respondent has no specific response.

1537. Mr. Tatman wondered whether Star would follow McWane, and in an email sent to Mr. Walton at 11:26 a.m. on April 28, 2009 referred to Star as "The Wild card." (CX 1180 at 002 ("The Wild card right now is Star . . . [T]here is now some probability that Star may change direction and retract their list price change."); Tatman, Tr. 605-606

(“I did not know what they were doing, so I could only speculate. . . . I can only get the letters and read the tea leaves. . . . Don’t have any information that tells me what they’re going to do.”); Tatman, Tr. 607 (“Q. And so at this point in time you were uncertain as to whether Star would follow McWane’s new list price; correct, sir? A. That’s fairly clear from what I wrote.”)).

Response To Finding No. 1537:

See General Response 2. Otherwise, Respondent has no specific response.

1538. After his conversation with Mr. Pais, Mr. McCutcheon was uncertain as to whether McWane would actually follow through with its announced list price restructuring. (CX 2539 (McCutcheon, Dep. at 235-236); McCutcheon, Tr. 2459-2460).

Response To Finding No. 1538:

See General Responses 2, 4 and 11.

1539. To eliminate the uncertainty, Mr. McCutcheon called Mr. Tatman to ask whether McWane would follow through with its announcement or stay with the old price list. (CX 2539 (McCutcheon, Dep. at 227-228) (“I did have a doubt in the back of my mind – I wanted to make sure before we moved ahead and printed all these price lists, so I called Rick just to make sure.”)).

Response To Finding No. 1539:

See General Responses 2, 6 and 11. This finding is incomplete because the evidence is that Mr. McCutcheon and Mr. Tatman did not discuss prices or the nature of McWane’s list price change. (RPF 291-292). Otherwise, Respondent has no specific response.

1540. Mr. McCutcheon described the conversation as follows:

It cost[s] us about \$25,000 to print a new price list. So, I picked up the phone and I called Rick Tatman. And I said, I’m only going to ask you one question, are you guys going to come out with a new price list, because I’m getting ready to approve it and spend \$25,000 to do it. And he said, we absolutely are, and he says, I’m so sure that I’ll pay the \$25,000 if we don’t. And I said, I appreciate that, nice talking to you, and hung up the phone.

(CX 2538 (McCutcheon, IHT (Vol. 2) at 258); *see also* McCutcheon, Tr. 2460 (“I asked Mr. Tatman if they were going to continue with their price list change. And he said yes.”); CX 2538 (McCutcheon, IHT (Vol. 2) at 257-258); RX-698 (McCutcheon, Dep. at 233)).

Response To Finding No. 1540:

See General Responses 2 and 11, and response to ¶ 1539, *supra*. Otherwise, Respondent has no specific response.

1541. At his investigational hearing, Mr. McCutcheon did not suggest that Mr. Tatman's response was joking or otherwise suggest that Mr. Tatman was not serious. (CX 2538 (McCutcheon, IHT (Vol. 2) at 258)). At his deposition, however, after the lawsuit was filed, Mr. McCutcheon for the first time described Mr. Tatman's response as "a laughing matter," and "joking." (RX-698 (McCutcheon, Dep. at 233)).

Response To Finding No. 1541:

See General Responses 2, 3 and 11, and response to ¶ 1539, *supra*. This finding is argumentative rather than fact. Moreover, Respondent did not have the opportunity to cross-examine Mr. McCutcheon in his IHT. As such, the IHT is entitled to less weight.

1542. Mr. Tatman testified that he has no recollection of the telephone call with Mr. McCutcheon. (CX 2484 (Tatman, Dep. at 179-180); Tatman, Tr. 610).

Response To Finding No. 1542:

See General Response 2. Otherwise, Respondent has no specific response.

1543. At 5:25 p.m. on the afternoon of April 28, 2009, six hours after Mr. Tatman sent the email in which he described Star as a "Wild card" with "some probability" of "chang[ing] their direction and retract[ing] their list price change," Mr. Tatman emailed Mr. McCullough to report that he was "now highly confident that Star will follow our List Price." (CX 1180 at 001 (emphasis added)).

Response To Finding No. 1543:

See General Responses 2, 5 and 11. This finding is inaccurate because it is not supported by the cited exhibit.

1544. At his deposition, Mr. Tatman testified that he had no explanation for how he became "highly confident" about Star's plans. (Tatman, Tr. 610).

Response To Finding No. 1544:

See General Responses 2 and 11. This finding is argumentative, rather than factual, because Mr. Tatman explained, at trial, that he had had his recollection refreshed since his

deposition. ((Tatman, Tr. 610 (“Q. Sure. "QUESTION: Okay. Do you recall what made you between 11:26 a.m. and 5:25 p.m. highly confident that Star was going to follow your list price? "ANSWER: No, I don't." Was that your testimony at that time, sir? A. Yes. And it was truthful at the time. Q. Okay. A. You were putting me in a high-nervous situation asking me about something that happened four years ago, and I didn't remember. I have looked at documents to make sure I have the facts straight in this case so that I can give you the most truthful testimony, and in doing that, I have refreshed my memory because I've seen other things, and now I can see the connection. It's in black and white.”))

1545. At trial, however, Mr. Tatman initially testified that he had reviewed documents since his deposition and that, “I know why I said it.” (Tatman, Tr. 608-609). Mr. Tatman explained that he had become “highly confident” about Star’s plans on April 28, 2009 based on a telephone conversation with Glenn Fielding of HD Supply that he had seen referenced in an email. (Tatman, Tr. 608).

Response To Finding No. 1545:

See General Response 2. *See* Response to Finding 1544.

1546. Upon further examination at trial, Mr. Tatman conceded that the Glenn Fielding email he was referencing was CX 3027, an email dated April 30, 2009, in which Mr. Tatman refers to a conversation “yesterday” with Mr. Fielding, *i.e.* April 29, 2009. (CX 3027 at 001 (Tatman email to Jansen dated April 30, 2009: “Glenn Fielding said yesterday that Star was using our List.”); Tatman, Tr. 816-817).

Response To Finding No. 1546:

See General Response 2. *See* Response to Finding 1544.

1547. Mr. Tatman then admitted that his conversation with Mr. Fielding does not explain how Mr. Tatman became “highly confident” about Star’s plans on April 28, 2009, the day before he spoke with Mr. Fielding on April 29, 2009. (CX 1180 at 001; Tatman, Tr. 816-817).

Response To Finding No. 1547:

See General Response 2. *See* Response to Finding 1544. This finding misconstrues the testimony of Mr. Tatman since he did not testify that that his conversation with Mr. Fielding

does not explain how Mr. Tatman became “highly confident” about Star’s plans on April 28, 2009. (Tatman, Tr. 817 (“Q. And based on your review of this e-mail, you recall that on April 29 you had a conversation with Mr. Glenn Fielding during which he told you that Star was going to use McWane's list? A. I said I had a conversation with Glenn Fielding about that -- I said I remember seeing a document. I didn't say I remembered the discussion. I said I remember seeing a document in the review process that said I had a conversation with Glenn Fielding.”).)

1548. On April 29, 2009, Mr. Minamyler sent an email to Star’s division managers (copying Mr. McCutcheon) stating that, “We are in receipt of Sigma’s price increase letter and will let you know shortly what our plan is.” (CX 0889; McCutcheon, Tr. 2462).

Response To Finding No. 1548:

See General Responses 2 and 4.

1549. Star’s National Sales Manager, Mr. Minamyler, telephoned Greg Adams of McWane on May 1, 2009 and was also assured about McWane’s plans to move forward with the new list price. (CX 2352 (“Matt Minamyler just called me to ask if we went ahead with our list price today. I told him yes and that is all I told him made me pretty uncomfortable but I thought you guys should know.”)).

Response To Finding No. 1549:

See General Responses 2 and 5. This finding is inaccurate because Mr. Minamyler denied having advance price discussions or agreements with anyone at McWane. (RPFF ¶¶ 216, 219, 231).

1550. On May 1, 2009, Mr. Minamyler sent an email to Star’s division managers (copying Mr. McCutcheon), setting out a implementation plan for Star to match McWane’s new prices. (CX 0890; McCutcheon, Tr. 2464).

Response To Finding No. 1550:

See General Response 2. Otherwise, Respondent has no specific response, except to note that this describes typical legal behavior in a classic oligopoly market.

1551. On May 4, 2009, Star followed McWane and adopted substantially identical Fittings list prices and multipliers. (RX-620 (letter as produced from McWane’s files) (May 4, 2011 multiplier announcement); *compare* CX 2358, *with* CX 2359 (list prices)).

Response To Finding No. 1551:

See General Response 2. This finding is incomplete, to the extent it ignores the evidence that Star independently chose to follow McWane's announcement lowering its prices. (RPFF ¶ 293; (McCutcheon, Tr. 2462 ("As soon as the McWane announcement came out, we internally chose to follow it, because that was our standard operating procedure, and I believe the process had already begun to follow McWane's price change.")))

1552. On May 11, 2009, the same day that Sigma submitted four months of overdue data to DIFRA in an attempt to "control the damage," (CX 0319 at 003; CX 2329 at 001), Sigma sent letters to its customers announcing that it would adopt McWane's restructured list prices and multipliers, (CX 1060 at 001, 002; Rybacki, Tr. 3591 (Sigma ultimately adopted the McWane price list); Rybacki, Tr. 3588 ("[F]irst we tried to keep it. I know we were going to try to keep our old pricing and hope McWane had a change of heart, but when we realized that wasn't going to happen, we ended up going along with it. The bottom line is we ended up going along with it."))).

Response To Finding No. 1552:

See General Responses 1, 2, 5 and 11. This proposed finding shows that McWane's decision to lower its prices was independently made, and that McWane did not collude with Sigma to raise or stabilize prices.

1553.  (Rybacki, Tr. 3665, *in camera*)).

Response To Finding No. 1553:

Respondent has no specific response.

7.10 McWane, Sigma, and Star Have Continued Their Pattern of Improper Pricing Communication and Coordination

1554. A pattern of improper pricing communications and coordination among McWane, Sigma, and Star continued into 2010. (*Infra* ¶¶ 1555-1571).

Response To Finding No. 1554:

See General Responses 1 and 2, and responses to ¶¶ 1555-1571, *infra*. This unsupported assertion is not only incorrect (see RPF ¶¶ 281-282), but also requires no response.

1555. In early 2010, Sigma raised its published Fittings multipliers to 0.27. At that time, Mr. Rybacki believed that if the sales force was disciplined in pricing and the published multiplier “stuck” and “took hold,” then there would be another increase in June. (CX 1378; Rybacki, Tr. 3506-3509).

Response To Finding No. 1555:

This finding is incomplete, and therefore misleading because Mr. Rybacki testified that he was “hopeful” there would be another price increase in June 2010. (Rybacki, Tr. 3508 (“Q. And at the time that you took that multiplier increase, did you have a feeling that if it was successful, you would have another one in June? A. I was hopeful. Q. And what caused you to be hopeful about that? A. Well, if the multipliers -- the pricing had gone in the toilet so severe, and when the price increase went to a 27, I didn't think that was enough, so I was convinced that there was no -- that nobody trusted anybody in the industry, that prices were every -- everybody has different prices, different rebates, different terms, so I just -- I thought that if finally everybody just said we can't survive unless we increase our pricing that if -- if the -- if the price increase took hold, the little one in the early part of 2010, that the next one would hold.”).)

1556. On June 8, 2010, in response to a communication from Star, Sigma drafted and distributed a letter announcing that Sigma was raising prices on certain products and signaling to the marketplace that Sigma was prepared to follow a Fittings price increase. In an internal email discussing the price increase letter, Mr. Pais described the letter as a “heads up” to the customers and the market, in response to the pricing actions that had been “signaled” by Star:

Since our price increase letter at this point is largely a ‘*heads up*’ to the customers *and the market* about our intention to follow suit when Star or others take a definitive action on price increases, I thought the attached revised letter would be more effective. As you can see, it captures the 2 specific actions signaled by Star while adding a few ‘wishful thoughts’ of our own thrown in, hopefully to create some momentum and traction...

(CX 1413 at 001(emphasis added); Pais, Tr. 2036-2038; Rybacki, Tr. 3498-3499; CX 2531 (Rybacki, Dep. at 210-213) (discussing CX 1413 and stating, “Now, it is a message to everybody in the waterworks industry, foes, customers, everybody, that we are going up and we want a price increase and we need one.”)).

Response To Finding No. 1556:

This finding is incomplete, and therefore inaccurate because, in June 2010, Sigma distributed a price increase letter to its customers which did not specify whether it was a list or multiplier change. (RPF ¶ 294; (CX 1413; JX 687 (Pais, Dep. at 372-377); (JX 690 (Rybacki, Dep. at 210-213)).)

1557. The Sigma price increase letter was sent out on June 10, 2010. (CX 2453 at 001 (email from Iona Shenoy transmitting final version of customer letter to sales force for forwarding to customers); Rybacki, Tr. 3489-3499 (discussing CX 1413 and CX 2531)).

Response To Finding No. 1557:

This finding is incomplete, and therefore inaccurate because, in June 2010, Sigma distributed a price increase letter to its customers which did not specify whether it was a list or multiplier change. (RPF ¶ 294; (CX 1413; JX 687 (Pais, Dep. at 372-377); (JX 690 (Rybacki, Dep. at 210-213)).)

1558. The final June 10, 2010 letter stated that effective July 1, 2010 the price of some waterworks products was increasing, but did not specify how Fittings multipliers would change. The final price language was identical to that proposed by Mr. Pais to deliver a “heads up”:

The following is a summary of these changes:

1. The List Prices of all of our Restrained Joint Products will be increased by about 12%.
2. The List Prices of our Protecto 401 Lined products will be increased by about 12%.
3. The Net Prices of our Municipal Castings including Valve Boxes and Meter Boxes will be increased on a regional basis.
4. The multipliers for Domestic and non-Domestic Restraints will be revised.

5. The *multipliers for non-Domestic Fittings will be revised.*

CX 2453 at 002 (emphasis added); *compare* CX 2453 at 002 with CX 1413 at 004; *see also* Rybacki, Tr. 3495-3497).

Response To Finding No. 1558:

This finding is incomplete, and therefore inaccurate because, in June 2010, Sigma distributed a price increase letter to its customers which did not specify whether it was a list or multiplier change. (RPF ¶ 294; (CX 1413; JX 687 (Pais, Dep. at 372-377); (JX 690 (Rybacki, Dep. at 210-213)).)

1559. The Sigma price increase letter that was sent out on June 10, 2010 said only that Sigma's Fittings multipliers would be "revised." It did not indicate whether Fittings prices would be going up or down, or by how much. (CX 2453 at 002; Rybacki, Tr. 3496-3497).

Response To Finding No. 1559:

This finding is incomplete, and therefore inaccurate because, in June 2010, Sigma distributed a price increase letter to its customers which did not specify whether it was a list or multiplier change. (RPF ¶ 294; (CX 1413; JX 687 (Pais, Dep. at 372-377); (JX 690 (Rybacki, Dep. at 210-213)).)

1560. At the time the Sigma price increase letter was sent out on June 10, 2010, Sigma did not yet know by how much it would change its Fittings prices, or which Fittings prices it would change. (CX 2453 at 001 (Mike Walsh June 10, 2010 cover email transmitting final letter: "There will be a multiplier change on fittings. I am not exactly sure what fittings nor what multiplier we are moving to"); Rybacki, Tr. 3496-3497).

Response To Finding No. 1560:

This finding is incomplete, and therefore inaccurate because, in June 2010, Sigma distributed a price increase letter to its customers which did not specify whether it was a list or multiplier change. (RPF ¶ 294; (CX 1413; JX 687 (Pais, Dep. at 372-377); (JX 690 (Rybacki, Dep. at 210-213)).)

1561. Sigma's June 10, 2010 pricing letter was intended to signal Sigma's willingness to increase prices to its competitors. (Rybacki, Tr. 3498-3499 (Sigma wanted a price

increase, and viewed sending its June 10, 2010 price increase letter as a way to express that desire to the market and trigger a price increase); CX 1413 (“[O]ur price increase letter at this point is largely a ‘heads up’ to the customers and the market about our intention to follow suit when Star or others take a definitive action on price increases”); CX 2531 (Rybacki, Dep. at 212) (“I think this was basically sending a message to the customer base that we’re going up, that we needed these prices increased. Now, it is a message to everybody in the waterworks industry, foes, customers, everybody, that we are going up and we want a price increase and we need one.”); CX 2531 (Rybacki, Dep. at 216) (“Q. He says ‘Since our price increase letter at this point is largely a ‘heads up’ to the customers and the market,’ do you see that? A. It’s to everybody, everybody that’s in the market. Q. Okay, and that would include your competitors; right? A. Correct.”)).

Response To Finding No. 1561:

This finding is incomplete, and therefore inaccurate because, in June 2010, Sigma distributed a price increase letter to its customers which did not specify whether it was a list or multiplier change. (RPF 294; (CX 1413; JX 687 (Pais, Dep. at 372-377); (JX 690 (Rybacki, Dep. at 210-213))).)

1562. One of the messages that Sigma intended to convey to its customers and to the market in its June 10, 2010 price increase letter was that if Star or somebody else took a definitive action on a price increase, Sigma would follow that increase:

Q. So just to be clear, if there was an increase by Star or McWane on fittings prices, what you were saying in this letter is Sigma is prepared to follow that increase?

A. Yes.

(Pais, Tr. 2036-2037).

Response To Finding No. 1562:

This finding is incomplete, and therefore misleading because McWane independently decided its June 2010 multipliers and because McWane, Sigma, and Star did not discuss or agree upon any multiplier adjustments or other pricing in 2010. On June 17, 2010, McWane made its June 2010 pricing decision to adjust Fittings multipliers independently and did not communicate with anyone at Sigma or Star regarding the multiplier adjustments. (RPF 295; (Tatman, Tr.

978 (“Q. All right. And do you take that, the fruits of your labor, and did you give it to Star and Sigma in advance? A. No. Q. Made an independent decision, sir? A. Independent decision.”); 1005-1006 (“Q. Mr. Tatman, did you -- at all times, 2008, 2009, 2010, did you make independent decisions on your list price? A. Always. Q. Published multipliers, sir? A. Always independent. Q. All right. Can we call up as a demonstrative aid RXD 001. Let's look at this. So you had independent decisions on your list price you said? A. Yes.”); RXD 001 in camera; Rybacki, Tr. 3720-3722; CX 2453; Pais, Tr. 2048 (“Q. Now, did you discuss and agree with anyone at McWane your multipliers in June 2010; sir? A. No. Not at all.”); Brakefield, Tr. 1337 (“Q. I would like to ask then the last question that I had just finished with before the objection, that in June of 2010, as part of the alleged conspiracy, did you communicate with anyone at McWane and agree upon the prices that Sigma and McWane would charge customers? A. No, sir. Q. At any time did you discuss in advance with anyone from McWane any multiplier that Sigma was about to issue? A. No, sir.”); CX 2440; CX 2450; CX 2453; CX 1396). McWane, Sigma, and Star did not discuss or agree upon any multiplier adjustments or other pricing in 2010. RPF ¶ 299; (Tatman, Tr. 978 (“Q. All right. And do you take that, the fruits of your labor, and did you give it to Star and Sigma in advance? A. No. Q. Made an independent decision, sir? A. Independent decision.”); 1005-1006 (“Q. Mr. Tatman, did you -- at all times, 2008, 2009, 2010, did you make independent decisions on your list price? A. Always. Q. Published multipliers, sir? A. Always independent. Q. All right. Can we call up as a demonstrative aid RXD 001. Let's look at this. So you had independent decisions on your list price you said? A. Yes.”); RXD 001 in camera; Rybacki, Tr. 3720-3722; CX 2453; Pais, Tr. 2048 (“Q. Now, did you discuss and agree with anyone at McWane your multipliers in June 2010; sir? A. No. Not at all.”); Brakefield, Tr. 1337 (“Q. I would like to ask then the last

question that I had just finished with before the objection, that in June of 2010, as part of the alleged conspiracy, did you communicate with anyone at McWane and agree upon the prices that Sigma and McWane would charge customers? A. No, sir. Q. At any time did you discuss in advance with anyone from McWane any multiplier that Sigma was about to issue? A. No, sir.”); CX 2440; CX 2450; CX 2453; CX 1396.)

1563. Sigma intended its June 10, 2010 letter to be a message for its competitors as well as its customers:

Q. And so when you said this is a heads up to the customers and the market, was Sigma sending a heads-up to its competitors as well?

A. It’s an expression of hope that they could also if the same circumstances apply to them. Yes.

(Pais, Tr. 2038).

Response To Finding No. 1563:

This finding is incomplete, and therefore misleading because McWane independently decided its June 2010 multipliers and because McWane, Sigma, and Star did not discuss or agree upon any multiplier adjustments or other pricing in 2010. On June 17, 2010, McWane made its June 2010 pricing decision to adjust Fittings multipliers independently and did not communicate with anyone at Sigma or Star regarding the multiplier adjustments. (RPF ¶ 295; (Tatman, Tr. 978 (“Q. All right. And do you take that, the fruits of your labor, and did you give it to Star and Sigma in advance? A. No. Q. Made an independent decision, sir? A. Independent decision.”)); 1005-1006 (“Q. Mr. Tatman, did you -- at all times, 2008, 2009, 2010, did you make independent decisions on your list price? A. Always. Q. Published multipliers, sir? A. Always independent. Q. All right. Can we call up as a demonstrative aid RXD 001. Let's look at this. So you had independent decisions on your list price you said? A. Yes.”); RXD 001 in camera; Rybacki, Tr. 3720-3722; CX 2453; Pais, Tr. 2048 (“Q. Now, did you discuss and agree with

anyone at McWane your multipliers in June 2010; sir? A. No. Not at all.”); Brakefield, Tr. 1337 (“Q. I would like to ask then the last question that I had just finished with before the objection, that in June of 2010, as part of the alleged conspiracy, did you communicate with anyone at McWane and agree upon the prices that Sigma and McWane would charge customers? A. No, sir. Q. At any time did you discuss in advance with anyone from McWane any multiplier that Sigma was about to issue? A. No, sir.”); CX 2440; CX 2450; CX 2453; CX 1396). McWane, Sigma, and Star did not discuss or agree upon any multiplier adjustments or other pricing in 2010. RPF ¶ 299; (Tatman, Tr. 978 (“Q. All right. And do you take that, the fruits of your labor, and did you give it to Star and Sigma in advance? A. No. Q. Made an independent decision, sir? A. Independent decision.”); 1005-1006 (“Q. Mr. Tatman, did you -- at all times, 2008, 2009, 2010, did you make independent decisions on your list price? A. Always. Q. Published multipliers, sir? A. Always independent. Q. All right. Can we call up as a demonstrative aid RXD 001. Let's look at this. So you had independent decisions on your list price you said? A. Yes.”); RXD 001 in camera; Rybacki, Tr. 3720-3722; CX 2453; Pais, Tr. 2048 (“Q. Now, did you discuss and agree with anyone at McWane your multipliers in June 2010; sir? A. No. Not at all.”); Brakefield, Tr. 1337 (“Q. I would like to ask then the last question that I had just finished with before the objection, that in June of 2010, as part of the alleged conspiracy, did you communicate with anyone at McWane and agree upon the prices that Sigma and McWane would charge customers? A. No, sir. Q. At any time did you discuss in advance with anyone from McWane any multiplier that Sigma was about to issue? A. No, sir.”); CX 2440; CX 2450; CX 2453; CX 1396.)

1564. By June 11, 2010, McWane had received a copy of Sigma’s “heads up” letter and noted that it “follows on the heels [*sic*] of the prior Star communication.” (CX 2438 at 001).

Response To Finding No. 1564:

The cited evidence does not support the argumentative proposed finding.

1565. On June 16, 2010, Mr. Tatman wrote to Mr. McCullough and Mr. Jansen regarding the “recent communication from Star and Sigma”:

In regards to recent communication from Star and Sigma, I believe our response will be to support a price increase on non domestic fittings, glands and accessories, but not to provide any supporting communication on restraints or other products.

I believe Sigma is waiting for either a supporting communication from us or an announcement on specific price actions.

At this stage we really have two approach options:

1. Send out an “it’s coming” communication prior to any further announcements from either Sigma or Star and then quickly decide on what multipliers we want to publish and send out that announcement by week’s end to which *most likely the others will follow*.
2. Send out communication supporting the need for a price increase, wait for Sigma or Star to publish new multipliers and then follow.

(CX 2442-A at 001; *see also* Tatman, Tr. 319).

Response To Finding No. 1565:

This finding is incomplete, and therefore misleading because McWane independently decided its June 2010 multipliers. On June 17, 2010, McWane made its June 2010 pricing decision to adjust Fittings multipliers independently and did not communicate with anyone at Sigma or Star regarding the multiplier adjustments. (RPFF ¶ 295; (Tatman, Tr. 978 (“Q. All right. And do you take that, the fruits of your labor, and did you give it to Star and Sigma in advance? A. No. Q. Made an independent decision, sir? A. Independent decision.”); 1005-1006 (“Q. Mr. Tatman, did you -- at all times, 2008, 2009, 2010, did you make independent decisions on your list price? A. Always. Q. Published multipliers, sir? A. Always independent. Q. All

right. Can we call up as a demonstrative aid RXD 001. Let's look at this. So you had independent decisions on your list price you said? A. Yes.”); RXD 001 in camera; Rybacki, Tr. 3720-3722; CX 2453; Pais, Tr. 2048 (“Q. Now, did you discuss and agree with anyone at McWane your multipliers in June 2010; sir? A. No. Not at all.”); Brakefield, Tr. 1337 (“Q. I would like to ask then the last question that I had just finished with before the objection, that in June of 2010, as part of the alleged conspiracy, did you communicate with anyone at McWane and agree upon the prices that Sigma and McWane would charge customers? A. No, sir. Q. At any time did you discuss in advance with anyone from McWane any multiplier that Sigma was about to issue? A. No, sir.”); CX 2440; CX 2450; CX 2453; CX 1396). Mr. Tatman performed complex internal analyses with respect to McWane’s June 2010 pricing decisions. RPF 296; (Tatman, Tr. 978 (“Q. And did you do the same kind of state-by-state analysis internally? A. Yes, I would have. Q. All right. And do you take that, the fruits of your labor, and did you give it to Star and Sigma in advance? A. No. Q. Made an independent decision, sir? A. Independent decision. Q. All right. All these price moves that we saw, January '08, June '08 multipliers, April '09 list price, June 2010 multipliers, did you make these decisions independently on your own, sir? A. They were done independently.”).). McWane, Sigma, and Star did not discuss or agree upon any multiplier adjustments or other pricing in 2010. RPF 299; (Tatman, Tr. 978 (“Q. All right. And do you take that, the fruits of your labor, and did you give it to Star and Sigma in advance? A. No. Q. Made an independent decision, sir? A. Independent decision.”); 1005-1006 (“Q. Mr. Tatman, did you -- at all times, 2008, 2009, 2010, did you make independent decisions on your list price? A. Always. Q. Published multipliers, sir? A. Always independent. Q. All right. Can we call up as a demonstrative aid RXD 001. Let's look at this. So you had independent decisions on your list price you said? A. Yes.”); RXD 001 in camera; Rybacki, Tr. 3720-3722; CX 2453; Pais, Tr.

2048 (“Q. Now, did you discuss and agree with anyone at McWane your multipliers in June 2010; sir? A. No. Not at all.”); Brakefield, Tr. 1337 (“Q. I would like to ask then the last question that I had just finished with before the objection, that in June of 2010, as part of the alleged conspiracy, did you communicate with anyone at McWane and agree upon the prices that Sigma and McWane would charge customers? A. No, sir. Q. At any time did you discuss in advance with anyone from McWane any multiplier that Sigma was about to issue? A. No, sir.”); CX 2440; CX 2450; CX 2453; CX 1396.)

1566. McWane chose to follow the first option outlined in Mr. Tatman’s June 16, 2010 email, and announced a blended Fittings multiplier increase in 45 of 50 states on June 17, 2010, to be effective July 1, 2010. The McWane letter’s effective date was July 1, 2010, the same as the effective date suggested in Sigma’s “heads up” letter of June 10, 2010. (CX 2440 at 001; Tatman, Tr. 320-324; CX 1384 at 002 (Sigma emails discussing McWane announcement)).

Response To Finding No. 1566:

This finding is incomplete, and therefore misleading because McWane independently decided its June 2010 multipliers and because McWane, Sigma, and Star did not discuss or agree upon any multiplier adjustments or other pricing in 2010. On June 17, 2010, McWane made its June 2010 pricing decision to adjust Fittings multipliers independently and did not communicate with anyone at Sigma or Star regarding the multiplier adjustments. (RPFF ¶ 295; (Tatman, Tr. 978 (“Q. All right. And do you take that, the fruits of your labor, and did you give it to Star and Sigma in advance? A. No. Q. Made an independent decision, sir? A. Independent decision.”); 1005-1006 (“Q. Mr. Tatman, did you -- at all times, 2008, 2009, 2010, did you make independent decisions on your list price? A. Always. Q. Published multipliers, sir? A. Always independent. Q. All right. Can we call up as a demonstrative aid RXD 001. Let's look at this. So you had independent decisions on your list price you said? A. Yes.”); RXD 001 in camera; Rybacki, Tr. 3720-3722; CX 2453; Pais, Tr. 2048 (“Q. Now, did you discuss and agree with

anyone at McWane your multipliers in June 2010; sir? A. No. Not at all.”); Brakefield, Tr. 1337 (“Q. I would like to ask then the last question that I had just finished with before the objection, that in June of 2010, as part of the alleged conspiracy, did you communicate with anyone at McWane and agree upon the prices that Sigma and McWane would charge customers? A. No, sir. Q. At any time did you discuss in advance with anyone from McWane any multiplier that Sigma was about to issue? A. No, sir.”); CX 2440; CX 2450; CX 2453; CX 1396). Mr. Tatman performed complex internal analyses with respect to McWane’s June 2010 pricing decisions. RPF ¶ 296; (Tatman, Tr. 978 (“Q. And did you do the same kind of state-by-state analysis internally? A. Yes, I would have. Q. All right. And do you take that, the fruits of your labor, and did you give it to Star and Sigma in advance? A. No. Q. Made an independent decision, sir? A. Independent decision. Q. All right. All these price moves that we saw, January '08, June '08 multipliers, April '09 list price, June 2010 multipliers, did you make these decisions independently on your own, sir? A. They were done independently.”).)

1567. Star announced its matching increase on June 18, 2008. (CX 1406; CX 2441 at 001).

Response To Finding No. 1567:

This finding is incorrect because Star announced a multiplier change on June 18, 2010. (RPF ¶ 296.)

This finding is inaccurate because the cited exhibits do not support the statement that Star announced a “matching increase.”

1568. By June 18, 2010, Mr. Rybacki had received McWane’s June 17 price letter and Star’s June 18, 2010 letter matching McWane’s price increase. (CX 2450 at 002 (forwarding McWane pricing letter from Mr. Webb of HD Supply); CX 1406 at 001-002 (Mr. Schapiro forwarding a copy Star’s price increase letter); Rybacki, Tr. 3501-3503, 3499-3501).

Response To Finding No. 1568:

Respondent has no specific response.

1569. Sigma distributed its matching price increase letter on June 24, 2010. On that date, Mr. Rybacki signed a letter announcing Sigma's non-Domestic Fittings multiplier increase to 0.29, effective July 1, 2010. Mr. Rybacki forwarded this letter to his team for distribution to customers. (CX 1396 at 001; Rybacki, Tr. 3503-3504).

Response To Finding No. 1569:

Respondent has no specific response.

1570. Upon learning of McWane's price increase announcement, Sigma regional manager Mike Walsh sent an email to his sales team (copying Mr. Rybacki, Mr. McGivern, and Mr. Brakefield) with the subject line "price increase from Tyler?!", in which he wrote, "if this is true then it is a huge victory in [the] war we have been fighting." (CX 1378; Rybacki, Tr. 3509-3511).

Response To Finding No. 1570:

This finding is incomplete, and therefore misleading because McWane, Sigma, and Star did not discuss or agree upon any multiplier adjustments or other pricing in 2010. (RPF ¶ 299; (Tatman, Tr. 978 ("Q. All right. And do you take that, the fruits of your labor, and did you give it to Star and Sigma in advance? A. No. Q. Made an independent decision, sir? A. Independent decision."); 1005-1006 ("Q. Mr. Tatman, did you -- at all times, 2008, 2009, 2010, did you make independent decisions on your list price? A. Always. Q. Published multipliers, sir? A. Always independent. Q. All right. Can we call up as a demonstrative aid RXD 001. Let's look at this. So you had independent decisions on your list price you said? A. Yes."); RXD 001 in camera; Rybacki, Tr. 3720-3722; CX 2453; Pais, Tr. 2048 ("Q. Now, did you discuss and agree with anyone at McWane your multipliers in June 2010; sir? A. No. Not at all."); Brakefield, Tr. 1337 ("Q. I would like to ask then the last question that I had just finished with before the objection, that in June of 2010, as part of the alleged conspiracy, did you communicate with anyone at McWane and agree upon the prices that Sigma and McWane would charge customers? A. No, sir. Q. At any time did you discuss in advance with anyone from McWane any multiplier that Sigma was about to issue? A. No, sir."); CX 2440; CX 2450; CX 2453; CX 1396).)

1571. Regarding the two successive Fittings price increases in 2010, and Sigma’s “success in getting the pricing up,” Mr. Walsh wrote: “We had a game plan. We stuck to it. It has worked. And now it has turned into a big victory.” (CX 1378; Rybacki, Tr. 3509-3511).

Response To Finding No. 1571:

See General Responses 1, 2 and 11, and response to ¶ 1555, *supra*. This finding is contradicted by the evidence that McWane independently decided its June 2010 multipliers and that McWane, Sigma, and Star did not discuss or agree upon any multiplier adjustments or other pricing in 2010. (RPF ¶¶ 294-299)

8. ARRA Changed the Competitive Landscape in the Fittings Market

1572. In February 2009, Congress enacted the American Recovery and Reinvestment Act of 2009, known as “ARRA.” (Joint Stipulations of Fact (JX 0001) ¶ 19; Tatman, Tr. 610-611 (ARRA was signed into law by the President in early 2009, and included stimulus funds for waterworks projects); Pais, Tr. 1732-1733; Thees, Tr. 3075).

Response To Finding No. 1572:

Respondent has no specific response.

1573. ARRA allocated more than \$6 billion to water infrastructure products. (Joint Stipulations of Fact, JX 0001 ¶ 20).

Response To Finding No. 1573:

Respondent has no specific response.

1574. Waterworks projects receiving ARRA funds were required to be “under contract or construction within 12 months of the date of enactment of this Act.” (American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (codified as amended in scattered sections of 6, 19, 26, 42, and 47 U.S.C. (2006 Supp. III))).

Response To Finding No. 1574:

Respondent has no specific response.

8.1 ARRA Had a Buy American Requirement

1575. ARRA contained certain Buy-American provisions applicable to Fittings. (Joint Stipulations of Fact, JX 0001 ¶ 21).

Response To Finding No. 1575:

Respondent has no specific response.

1576. ARRA’s Buy-American provisions required that all ARRA-funded projects use Fittings (and other products) made in the United States (the “Buy American” requirement). (Brakefield, Tr. 1401 (“[T]he ARRA basically had several paragraphs, particularly paragraph 1605, that stated that the items were to be made in the United States of America, and that would be part of the specifications on product -- on projects that would be funded by ARRA.”); Sheley, Tr. 3402 (ARRA required that all products on ARRA-funded jobs be domestically certified products); Morton, Tr. 2816 (“I believe that we were required to provide domestic products if the customer was being funded by the ARRA funds.”); CX 1991 at 002 (Sigma white paper describing ARRA’s Buy American requirement); CX 1996 (Sigma February 11, 2009 email noting need to prepare for Buy American “fall out”); CX 1003 (Pais February 20, 2009 memorandum reviewing Buy American issue); CX 2500 (Swalley, Dep. at 61-62) (Electrosteel was not allowed to bid Fittings for ARRA jobs because of the Domestic-only requirement)).

Response To Finding No. 1576:

This finding calls for a conclusion of law rather than a factual finding, and does not warrant a further response. That said, The United States Environmental Protection Agency (EPA) granted a nationwide public interest waiver of ARRA’s Buy American requirements “for de minimis incidental components of eligible water infrastructure projects funded by ARRA.” (RX 195; RX 155).

1577. Raw materials for a Fitting could be sourced from a foreign country so long as the Fitting itself was manufactured in the United States. (Pais, Tr. 1785-1786).

Response To Finding No. 1577:

This finding calls for a conclusion of law rather than a factual finding, and does not warrant a further response.

8.1.1 Sigma and Star Unsuccessfully Lobbied Against the Buy American Requirement

1578. Sigma and Star unsuccessfully lobbied against the ARRA Buy American requirement and its application to Fittings. (*Infra* ¶¶ 1579-1582).

Response To Finding No. 1578:

See General Response 1, and responses to ¶¶ 1579-1582, *infra*. This is an unsupported assertion, which requires no response.

1579. Sigma lobbied against the Buy American provision being included in ARRA. (Pais, Tr. 1733 (“Initially, we tried to enlist some help to even stop that [Buy American provision] from being included in the law prior to it becoming a law.”); Pais, Tr. 1735 (“[O]vernight the government, you know, dealt a huge blow by diverting that business to just one manufacturer, and that’s what we objected to.”); CX 1994 (February 4, 2009 Bhattacharji email regarding a proposed customer petition opposing application of ARRA’s Buy American requirement to Fittings)).

Response To Finding No. 1579:

Respondent has no specific response.

1580. Star lobbied on ARRA, supporting exceptions to the Buy American provisions of ARRA that would allow the use of fittings produced in places like Korea. (RX-694 (Bhutada, Dep. at 35-36)).

Response To Finding No. 1580:

Respondent has no specific response.

1581. Sigma and other Fittings suppliers also lobbied for a national “single-supplier” exception to the Buy American requirement, which would have meant that ARRA’s Buy American requirement would not have applied to Fittings because McWane was the sole supplier of Domestic Fittings at that time. (CX 0101 at 002; CX 1991 at 002 (February 6, 2009 Sigma White Paper arguing for an exception to ARRA’s Buy American requirement when there was only a single domestic supplier of the product in question); Pais, Tr. 1435, 1738-1740 (also lobbying for NAFTA products to be included within Buy American requirement)).

Response To Finding No. 1581:

The citation to Pais, Tr. 1435 does not support this finding since that page is a partial list of appearances for September 12, 2012.

1582. Sigma’s efforts to obtain a single-supplier waiver were unsuccessful. (Pais, Tr. 1735, 1740). In a May 4, 2009 memorandum to the Sigma Board, Mr. Pais reported that the EPA had declined to provide a nationwide “sole domestic supplier” Buy-American waiver for Fittings, despite Sigma’s lobbying efforts. (CX 0214 at 003; *see also* CX 1998 at 003 (minutes of April 14, 2009 Sigma board meeting indicating that Sigma was studying potential for waivers from EPA)).

Response To Finding No. 1582:

This finding is incomplete, and therefore inaccurate because, while the EPA “was not leaning towards any ‘general waiver,’” the May 4, 2009 memorandum states that the EPA “seemed to be comfortable with their historical practice and record of giving waivers on a case by case basis depending on realities on the ground, during the execution of the actual construction activity.” (CX 0214 at 003).

8.1.2 Fittings Produced in Mexico or South Korea Did Not Satisfy ARRA’s Buy American Requirement

1583. Sigma and Star could not satisfy the ARRA Buy American requirement by using Fittings produced in Mexico or South Korea. (*Infra* ¶¶ 1584-1588).

Response To Finding No. 1583:

See General Response 1, and responses to ¶¶ 1584-1588, *infra*. This proposed finding is an unsupported assertion, which requires no response.

1584. McWane understood that Fittings produced under NAFTA, *e.g.*, in Mexico or Canada, would not qualify under the ARRA Buy American requirement, and sent out a letter to that effect to customers. (CX 2477 (Jansen, Dep. at 110) (testifying that he attended a meeting in San Diego where an EPA representative explained that NAFTA did not qualify for ARRA, in response to a question from Metalfit, a Mexican Fittings supplier); CX 1886 (April 8, 2009 McWane letter to customers stating that they “may NOT use Mexican or Canadian products” on certain federal contracts); CX 2498 (Teske, Dep. at 57) (discussing CX 1886)).

Response To Finding No. 1584:

This finding is incomplete, and therefore misleading because McWane’s April 8, 2009 letter to customers did not categorically say that Mexican or Canadian products would not qualify under ARRA. (CX 1886 (“federal contracts valued at less than \$8.8 million, and state, municipal or other non-federal projects may NOT use Mexican or Canadian products” and that the “stimulus Act does contain an exception allowing a project to use foreign products *only* if the

use of products produced in the United States will increase the cost of the ‘*overall project*’ by more than 25%.’).

1585. McWane cannot identify any sale of any Mexican- or Canadian-produced Fitting for use in an ARRA-funded waterworks project. (Supp. Response to RFA at ¶ 6 (“McWane admits it has no first-hand knowledge of any sales of Imported Relevant Product Manufactured in Mexico or Canada for use in any ARRA Waterworks Project.”)).

Response To Finding No. 1585:

This finding is incomplete, and therefore misleading because McWane noted that third parties had sold non-domestic Fittings for use in ARRA Waterworks Projects. (Supp. Response to RFA at ¶ 6 (“McWane admits it has no first-hand knowledge of any sales of Imported Relevant Product Manufactured in Mexico or Canada for use in any ARRA Waterworks Project because it does not manufacture Imported Relevant Product in Mexico or Canada and, accordingly, did not attempt to sell any Mexican or Canadian Imported Relevant Product to any ARRA Waterworks Project. After reasonable inquiry, McWane lacks sufficient information at this time to admit or deny whether any third parties sold Imported Relevant Product that was Manufactured in Mexico or Canada for use in any ARRA Waterworks Project and avers that Mark Meyer of Metalfit, Inc., a Mexican fittings foundry, testified that he himself could not determine whether his stocking distributors had sold Metalfit fittings in to an ARRA project. *See, e.g.,* Meyer Dep. at 167:25 -168:3 (‘Q. If your stocking distributors had sold your Mexican-produced fittings into an ARRA project, would you expect that they would have told you about that? A. No’). Further, a number of third parties stated that they sold non-domestic fittings for use in ARRA Waterworks Projects, and the record is unclear regarding the country of origin. Groeniger Dep. at 75:16-79:2 (‘Q. Doyou see testimony at the top of page, the question that was posed to you in your prior testimony in this case, "Did you observe any end users relying on those waivers to allow the use of imported fittings?" Did I read that correctly? A. Yes. Q. And

your answer was, "Yes." Did I read that correctly? A. Yes. Q. Did Groeniger ever supply imported fittings? To an ARRA job? I'm sorry. A. We could have. Q. Do you know as you sit here today if you did? A. I would assume that we probably could have."); Brakefield Dep. Vol. II at 79:10-81:5 ('Q. Okay. And did that affect your perception -- the company's perception of whether you would be able to sell imported fittings under ARRA? A. It gave us -- instead of us being so focused on it, it gave us a little bit of a hope that there was some ways that we could sell something. Q. Okay. And, in fact, did the company continue to sell imported fittings in 2009 into 2010? A. We sure did, yes. . . . we found that some of these loopholes, some of the things, that they were rarely -- we could, in fact, use them in some ways.');

Thees Dep. at 22:10-13 ('Q Do you know for a fact whether any contractors or municipalities applied for de minimus waivers on fittings? A I recall a job I believe it was in Oklahoma where -- and this was third party -- that was done. But not for a fact.');

Rybacki Dep. at 31:23-32:3 ("Q. At least in some circumstances, you were able to satisfy ARRA with imported fittings under an exemption or waiver, is -- A. Yes, we were.').")

Moreover, the burden of proof is not on McWane, and conversely, neither Complaint Counsel nor its expert established any evidence to support the contention that Mexican or Canadian produced Fittings could not be, or were not used, in ARRA-funded waterworks projects.

1586. Star looked into the possibility of whether Star could satisfy the ARRA Buy American requirement with Fittings produced in Mexico or Korea, but concluded in early 2009 that Fittings produced in Mexico or Korea would not satisfy ARRA's Buy American requirement. (McCutcheon, Tr. 2277, 2279; Bhargava, Tr. 2927-2928 (before deciding to produce Fittings in the United States, Star determined that producing Fittings in a WTO country like South Korea, or a NAFTA country like Mexico, would not have satisfied the Domestic specification for all jobs); RX-694 (Bhutada, Dep. at 39); CX 2537 (McCutcheon, IHT (Vol. 1) at 102-103) (Star explored the possibility of using products purchased from Mexico under NAFTA or from South Korea under WTO, but decided that neither approach was practical for it to meet the demands of the Distributors)).

Response To Finding No. 1586:

Respondent has no specific response.

1587. Sigma also considered the possibility that Fittings manufactured in Korea or Mexico may satisfy the Buy American requirement of ARRA, but concluded that such Fittings would not be ARRA-compliant. (CX 0214 at 004 (Sigma Memo to Board considering possible WTO exemption to ARRA); CX 1998 at 003 (minutes of April 14, 2009 Sigma Board meeting indicating that Sigma was studying potential for NAFTA exemptions); Pais, Tr. 1738-1739 (Fittings produced in Korea or in Mexico did not qualify as a domestic supply source under the Buy American provision of ARRA); CX 2528 (Pais, Dep. at 184-185) (noting that Mexico and Korea production options “turned out to be dead ends”); RX-153 at 001 (concluding that NAFTA-produced Fittings would not qualify for ARRA-funded waterworks projects); CX 0083 at 002 (draft memo from Mr. Bhattacharji to Sigma Board concluding that foreign-made Fittings could not be used for ARRA-funded projects)).

Response To Finding No. 1587:

This finding is incomplete, and therefore misleading because Sigma understood that Fittings from Mexico could be used under ARRA on certain federal projects worth more than \$8.8 million. (CX 0083 at 002).

1588. SIP also believed that NAFTA countries did not qualify as domestic supply sources under the Buy American provision of ARRA. (CX 2522 (Agarwal, Dep. at 91)).

Response To Finding No. 1588:

Respondent has no specific response.

8.1.3 There Was Insignificant Use of Waivers of the Buy American Requirement for Fittings Used in ARRA-Funded Waterworks Projects

1589. The use of waivers for the Buy American provision of ARRA was insignificant and had no meaningful impact on the Domestic Fittings market. (*Infra* ¶¶ 1590-1615).

Response To Finding No. 1589:

See General Response 1, and responses to ¶¶ 1590-1615, *infra*. This is an unsupported assertion, which requires no response.

8.1.3.1 The EPA Had Authority to Grant Certain Waivers of the Buy American Requirement for ARRA-Funded Waterworks Projects

1590. The United States Environmental Protection Agency (“EPA”) was the sole authority for granting or approving waivers of ARRA’s Buy American requirement for any ARRA-funded waterworks project, though the *de minimis* exception did not require applications for each job. (Supp. Response to RFA at ¶ 2)

Response To Finding No. 1590:

Respondent has no specific response.

1591. In the statute itself, there are three types of waivers or exceptions to the Buy American requirement for ARRA-funded waterworks projects (also referred to by the EPA as “Regional Project Waivers” or “Regional Waivers”): public interest; insufficient and not reasonably available quantities; and cost. (American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5 §1605(b), 123 Stat. 115 (codified as amended in scattered sections of 6, 19, 26, 42, and 47 U.S.C. (2006 Supp. III))). There is also a *de minimis* waiver as set out in separate Federal Register Notices. (RX-155 (original *de minimis* waiver); RX-195 (revised *de minimis* waiver)).

Response To Finding No. 1591:

This proposed Finding is a legal conclusion that requires no response.

1592. The EPA will grant a waiver if it finds that “(1) applying [the Buy American Requirement] would be inconsistent with the public interest; (2) iron, steel, and the relevant manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality; or (3) inclusion of iron, steel, and manufactured goods produced in the United States will increase the cost of the overall project by more than 25 percent.” (American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5 §1605(b), 123 Stat. 115 (codified as amended in scattered sections of 6, 19, 26, 42, and 47 U.S.C. (2006 Supp. III))). Also, replace (Pub. L. No. 111-5 §1605(b) and (c), 123 Stat. 115 (2009)). with (American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5 §1605(b) and (c), 123 Stat. 115 (codified as amended in scattered sections of 6, 19, 26, 42, and 47 U.S.C. (2006 Supp. III))).

Response To Finding No. 1592:

This proposed Finding is a legal conclusion that requires no response.

1593. On August 10, 2009, the EPA granted a revised *de minimis* waiver from the requirements of ARRA Section 1605(a) for any incidental components that comprise in total no more than 5 percent of the total cost of the materials used in and incorporated into a project. (RX-195). Those using this waiver did not have to apply for the waiver and be granted such a waiver, but they were required to retain documentation as to these incidental items in their project files, and to “summarize in reports to the State the types and/or categories

of items to which this waiver is applied, the total cost of incidental components covered by the waiver for each type or category, and the calculations by which they determined the total cost of materials used in and incorporated into the project.” (RX-195). The Federal Register Notice setting out the revised de minimis waiver described incidental goods as ““nuts and bolts’-type components whose origins cannot readily be identified prior to procurement.” (RX-195 at 0002).

Response To Finding No. 1593:

Respondent has no specific response.

1594. McWane informed its customers in an April 8, 2009 letter that an exception from ARRA’s Buy American requirements related to the cost impact of a project would only be available if domestic sourcing would increase the cost of an entire project (as opposed to the cost of a given component) by at least 25%: “[T]he exception does not apply if the cost of the pipe or valves for a project will be 25% greater than foreign products; rather the use of U.S. made pipe or valves must increase the cost of the *entire project* by more than 25%.” (CX 1886 (emphasis in original); CX 2498 (Teske, Dep. at 57) (discussing CX 1886)).

Response To Finding No. 1594:

Respondent has no specific response.

1595. The cost waiver allowing the use of imported products if the cost of the overall project increased by more than 25 percent from the inclusion of domestic products could not be used for Fittings because “Fittings typically comprise five (5) percent or less of the total cost of a typical waterworks project.” (Joint Stipulations of Fact, JX 0001 ¶ 10). The EPA did not issue any Regional waivers for Fittings under the authority of Section 1605(b)(3), which allows for waivers due to overall cost increases of more than 25 percent. (Clean Water and Drinking Water State Revolving Funds: ARRA Implementation, http://water.epa.gov/grants_funding/eparecovery/index.cfm (listing waivers)).

Response To Finding No. 1595:

Respondent has no specific response.

8.1.3.2 **The EPA Granted Only Three Public Interest Waivers During the Entire ARRA Period**

1596. The EPA granted a total of three public interest waivers of ARRA’s Buy American provision for Fittings, which allowed three local municipalities to purchase a total of 35 imported Fittings for use on ARRA-funded waterworks projects. (CX 1592 (waiver for City of Lewiston, ME and the Auburn, Maine Water District for purchase of 33 imported Fittings); CX 1590 (waiver for Lowell, MA for purchase of an imported 30” diameter pipe tee fitting); CX 1591 (waiver for Richland, WA for purchase of an imported 42” by 24” AWWA C153 cement lined mechanical joint reducer tee fitting)).

Response To Finding No. 1596:

The evidence establishes only that there were at least three public interest waivers granted.

1597. McWane is unable to identify any imported Fitting that was sold for use in an ARRA-funded waterworks project under a public interest waiver other than the three identified in *supra* ¶ 1596. (Supp. Response to RFA at ¶ 3 (McWane unable to identify any other public interest waivers); CX 2477 (Jansen, Dep. at 112-114) (same)).

Response To Finding No. 1597:

This finding is incomplete, and therefore misleading because McWane noted that third parties had sold non-domestic Fittings for use in ARRA Waterworks Projects. (Supp. Response to RFA at ¶ 3 (“McWane has no first hand knowledge of a sale pursuant to a Public Interest Waiver because it has not attempted to sell any of its non-domestic fittings for use in an ARRA Waterworks Project pursuant to a Public Interest Waiver. McWane accordingly admits that it possesses no documentation of a grant of a Public Interest Waiver other than the three Public Interest Waivers set forth in Exhibit A but after reasonable inquiry, lacks sufficient information at this time to admit or deny this Request with respect to third parties. A number of third parties stated that they sold non-domestic fittings for use in ARRA Waterworks Projects and the record is unclear whether some or all of those sales were pursuant to the Public Interest Waiver or to some other waiver or exemption. See, e.g., Groeniger Dep. at 75:16-79:2 (‘Q. Do you see testimony at the top of page, the question that was posed to you in your prior testimony in this case, "Did you observe any end users relying on those waivers to allow the use of imported fittings?" Did I read that correctly? A. Yes. Q. And your answer was, "Yes." Did I read that correctly? A. Yes. Q. Did Groeniger ever supply imported fittings? To an ARRA job? I'm sorry. A. We could have. Q. Do you know as you sit here today if you did? A. I would assume that we probably could have’); Brakefield Dep. Vol. II at 79:10-81:5 (“Q. Okay. And did that

affect your perception -- the company's perception of whether you would be able to sell imported fittings under ARRA? A. It gave us -- instead of us being so focused on it, it gave us a little bit of a hope that there was some ways that we could sell something. Q. Okay. And, in fact, did the company continue to sell imported fittings in 2009 into 2010? A. We sure did, yes. . . . we found that some of these loopholes, some of the things, that they were rarely -- we could, in fact, use them in some ways.');

Thees Dep. at 22:10-13 ('Q Do you know for a fact whether any contractors or municipalities applied for de minimus waivers on fittings? A I recall a job I believe it was in Oklahoma where -- and this was third party -- that was done. But not for a fact.');

Rybacki Dep. at 31:23-32:3 ('Q. At least in some circumstances, you were able to satisfy ARRA with imported fittings under an exemption or waiver, is -- A. Yes, we were.').

1598. The limited use of the public interest waiver may have been caused by the actual or perceived difficulty involved in applying for waivers of ARRA's Buy American requirement. (CX 2518 (Meyer, Dep. at 67) (Metalfit believed that the onerous process of applying for a waiver prevented End Users from seeking waivers from the Buy American provision); CX 1918 at 002 CX 2486 (Burns, Dep. at 181-182) (ACIPCO believed that waivers of the Buy American requirement would be limited and require advanced publication in the Federal Register)).

Response To Finding No. 1598:

This proposed Finding reflects the speculation of Complaint Counsel and is not an appropriate proposed Finding of fact based on the evidence.

1599. 
(CX 2522 (Agarwal, Dep. at 92-93), *in camera*).

Response To Finding No. 1599:

The cited evidence does not support this proposed Finding or the proposed Finding in ¶ 1598 referenced herein.

8.1.3.3 The *De Minimis* Waiver of the Buy American Requirement for ARRA-Funded Waterworks Projects Had Limited, if Any, Use for Fittings

1600. Industry participants -- including Distributors and Suppliers -- consistently testified that they did not believe that the *de minimis* waiver of ARRA's Buy American requirement applied to Fittings. (*See infra* ¶¶ 1601-1604).

Response To Finding No. 1600:

See General Response 1 and responses to ¶¶ 1601-1604, *infra*. This is an unsupported assertion that does not require a response.

1601. For example, Mr. Thees of Ferguson testified that he did not believe that the *de minimis* waiver applied to Fittings because the waiver only applied to products where the country of origin for such products was not readily identifiable, such as nuts and bolts, not Fittings. (Thees, Tr. 3078-3080) (Fitting's country of origin is readily identifiable because suppliers stamp this information on the side of the Fitting).

Response To Finding No. 1601:

This proposed Finding, which begins, "For example," is apparently intended to be supportive of the prior finding at ¶ 1600. However, the evidence cited in this Finding (¶ 1601), does not establish the sweeping and argumentative factual proposition contained in ¶ 1600.

1602. Mr. Webb of HD Supply also testified to his understanding that the EPA's *de minimis* waiver did not apply to Fittings based on information he had gathered from End Users. (Webb, Tr. 2740-2742).

Response To Finding No. 1602:

This finding is incomplete, and therefore misleading because Mr. Webb testified that he had heard of competitors using the EPA's *de minimis* waiver. (Webb, Tr. 2743 ("Q. So do you have any personal knowledge of any of your competitors using the *de minimis* waiver to put an imported fitting on a ARRA job? A. At that period of time I was aware of a lot of market chatter of our competitors doing it, quoting managers, purchasing people.")). *See also* response to ¶ 1601.

1603. Likewise, Mr. Sheley of Illinois Meter and others also understood that ARRA's *de minimis* waiver did not apply to Fittings. (Sheley, Tr. 3404-3405 (testifying that he

believed that firms could use imported mechanical joint gaskets on ARRA-funded waterworks projects because the only suppliers of mechanical joint gaskets were in Costa Rica); *see also* CX 2510 (Groeniger, Dep. at 172) (“It was never fittings, it was bolts, gaskets, small things, accessories to fittings, the accessory packs for the fittings, never the fittings.”); CX 1885 at 001; CX 2499 (Keffer, Dep. at 89-92) (August 2009 EPA guidance provided that components such as Fittings “that are described in detail via project specific technical specifications are not applicable to this [de minimis] waiver”).

Response To Finding No. 1603:

See response to ¶ 1601.

1604. McWane also did not believe that Fittings qualified for the EPA’s *de minimis* waiver of the ARRA Buy American requirement, and sent this message to its Distributor customers. (CX 2477 (Jansen, Dep. at 111-112) (admitting that McWane’s sales people sent this message to customers); CX 1886).

Response To Finding No. 1604:

This finding is incomplete, and therefore inaccurate because McWane’s April 8, 2009 letter to customers did not state that Fittings did not qualify for the EPA’s *de minimis* waiver of the ARRA Buy American requirement. (CX 1886 (“the “stimulus Act does contain an exception allowing a project to use foreign products *only* if the use of products produced in the United States will increase the cost of the ‘*overall project*’ by more than 25%.”)). See response to ¶ 1601.

1605. Industry participants also consistently testified that they were unaware of any widespread use of the *de minimis* waiver for Fittings, and that they were often unaware of any instance in which an imported Fitting was sold for use in an ARRA-funded waterworks project under the *de minimis* waiver. (*See infra* ¶¶ 1606-1615).

Response To Finding No. 1605:

See General Response 1 and responses to ¶¶ 1606-1615, *infra*. This is an unsupported assertion that does not require a response. The term “widespread” is also ambiguous and subject to multiple interpretations and is not supported by the cited paragraphs.

1606. McWane did not sell any imported Fittings for use in any ARRA-funded waterworks projects, and cannot identify any sale of any imported Fitting that was used in an ARRA-funded Waterworks project pursuant to the *de minimis* waiver. (Supp. Response to RFA

at ¶ 5 (admitting that McWane possesses no first-hand knowledge of the use of an imported Fitting in an ARRA-funded waterworks project under a *de minimis* waiver)).

Response To Finding No. 1606:

This finding is incomplete, and therefore misleading because McWane was aware that “a number of third parties testified that they sold non-domestic fittings for use in ARRA Waterworks Projects.” (Supp. Response to RFA at ¶ 5 (“Groeniger Dep. at 75:16-79:2 (‘Q. Do you see testimony at the top of page, the question that was posed to you in your prior testimony in this case, "Did you observe any end users relying on those waivers to allow the use of imported fittings?" Did I read that correctly? A. Yes. Q. And your answer was, "Yes." Did I read that correctly? A. Yes. Q. Did Groeniger ever supply imported fittings? To an ARRA job? I'm sorry. A. We could have. Q. Do you know as you sit here today if you did? A. I would assume that we probably could have’); Brakefield Dep. Vol. II at 79:10-81:5 (“Q. Okay. And did that affect your perception -- the company's perception of whether you would be able to sell imported fittings under ARRA? A. It gave us -- instead of us being so focused on it, it gave us a little bit of a hope that there was some ways that we could sell something. Q. Okay. And, in fact, did the company continue to sell imported fittings in 2009 into 2010? A. We sure did, yes. . . . we found that some of these loopholes, some of the things, that they were rarely -- we could, in fact, use them in some ways.’); Thees Dep. at 22:10-13 (‘Q Do you know for a fact whether any contractors or municipalities applied for deminimus waivers on fittings? A I recall a job I believe it was in Oklahoma where -- and this was third party -- that was done. But not for a fact.’); Rybacki Dep. at 31:23-32:3 (‘Q. At least in some circumstances, you were able to satisfy ARRA with imported fittings under an exemption or waiver, is -- A. Yes, we were.’); SIG-4417-4419 (Oct. 9, 2009 email from EPA (“our categorical waivers are designed to stand on their own and for assistance recipients to decide which physical components of their project would be

appropriately covered by the waiver. . . . In my opinion, your client is planning to appropriately apply the De Minimis waiver”); see also Meyer Dep. Ex. 16, Sept. 24, 2009 email from Philips Metzger (EPA) to Ted Muntz (“‘Incidental’ in the revised de minimis waiver is broad but not entirely open-ended term . . . If the iron fittings you’re asking about are ‘low cost, individually and (in total) as typically procured in bulk’, they could be covered by the waiver in a particular project if it works for that project within the 5% limit”) (see also June 22, 2012 Email Stipulation Regarding Authenticity Between Bloom and Thagard); FTC-METALFIT-000029; FTCMETALFIT-000065-66; FTC-METALFIT-00063-64; FTC-METALFIT-000061-62; “Tracking the De Minimis Waiver”, available at <http://dec.alaska.gov/water/muniloan/pdfs/De%20Minimis%20waiver%20tracking%20and%20example.pdf>, (last accessed June 28, 2012).”).

1607. Star did not sell any imported Fittings for use in any ARRA-funded waterworks projects under either a public interest waiver or a *de minimis* waiver. (CX 2535 (Bhutada, Dep. at 43-44)).

Response To Finding No. 1607:

This finding misconstrues the testimony of Mr. Bhutada because he was not certain if Star had sold any imported Fittings for use in any ARRA-funded waterworks projects under either a public interest waiver or a *de minimis* waiver. (CX 2535 (Bhutada, Dep. at 43) (“Q. Do you know if Star was successful in selling any imported fittings under the *de minimis* exception? A. I don't think so.”).)

1608. To the extent that Sigma’s imported Fittings were used on any ARRA-funded waterworks project, the quantities were few and the circumstances limited. (Pais, Tr. 1742-1744; CX 2523 (Bhattacharji, Dep. at 222-223) (*de minimis* waivers on ARRA projects were “few and far between”)).

Response To Finding No. 1608:

The evidence establishes that Sigma sold imported fittings into ARRA-funded jobs.

1609.

(CX 2522 (Agarwal, Dep. at 92), *in*

camera).

Response To Finding No. 1609:

Respondent has no specific response.

1610. HD Supply never sold an imported Fitting to any customer for use on an ARRA-funded waterworks project, and its President is unaware of any instance where any Distributor supplied imported Fittings into an ARRA-funded waterworks project under any circumstances. (Webb, Tr. 2742-2744; CX 2514 (Webb, Dep. at 66-67)).

Response To Finding No. 1610:

This finding is incomplete, and therefore misleading because Mr. Webb of HD Supply testified that AARA's impact on the demand for domestic Fittings was minimal. Mr. Webb testified that ARRA's impact on demand for domestic Fittings was "mild, at best." RPF ¶ 410; (JX 673 (Webb, Dep. at 29); Webb, Tr. 2731-2732 ("I'm not entirely certain how long it lasted. The effect of it for us was very minimal and mostly played out in 2009 and 2010.")). Mr. Webb explained that, while HD Supply experienced some pickup in business due to ARRA, the pickup was not very robust for the waterworks infrastructure side of its business. RPF ¶ 411; (JX 673 (Webb, Dep. at 28)).

1611. Mr. Thees of Ferguson does not know of any instance in which Ferguson used the *de minimis* waiver to use an imported Fitting in a domestic-only waterworks project. (Thees, Tr. 3081).

Response To Finding No. 1611:

This finding misconstrues the testimony of Mr. Thees because he only stated that he was "not aware of" Ferguson using the *de minimis* waiver to use an imported Fitting in a domestic-only waterworks project. (Thees, Tr. 3078).

This finding is incomplete, and therefore misleading because, aside from Ferguson's potential use of the waiver, Mr. Thees also testified that he "heard of one instance in a third-party

situation that a domestic -- or import products were used on a Buy American project.” (Thees, Tr. 3081).

1612. Mr. Sheley of Illinois Meter is unaware of anyone using imported Fittings as a substitute for Domestic Fittings on any ARRA-funded waterworks projects. (Sheley, Tr. 3405-3406).

Response To Finding No. 1612:

This finding is incomplete, and therefore misleading because Mr. Sheley, President and Owner of Illinois Meter, testified that AARA’s impact on the demand for domestic Fittings was minimal. (RPF 412, 413; (Mr. Sheley testified that ARRA “had a small effect” on sales of Fittings, (Sheley, Tr. 3446 (Q: “And so at the end of the day, ARRA didn't really affect your sales during that time period, did it?” A: “It had a small effect.”))), and that “in reality, I don’t believe that’s [ARRA’s] impacted our business at all.” (JX 674 (Sheley, IHT at 74-75)); (Sheley, Tr. 3402 (Q: “When did you see those jobs stop coming through?” A: “Mid to late 2010”), 3446-3447 (Q: “When was the last ARRA job? What was your testimony when you recall the last ARRA job? In your market area.” A: “I believe in mid to late 2010 -- ... -- second, third quarter of 2010.”)). Mr. Sheley testified that less than 5% of municipalities in Illinois Meter’s service area have domestic-only specifications today, (Sheley, Tr. 3447 (Q: “And today, only a handful of municipalities in your service area have a domestic specification; right?” A: “That's correct.” Q: “5 percent?” A: “Probably less than that.”))), and that with regard to domestic-only specifications: “That’s gone. Yeah, that ship’s sunk,” (JX 674 (Sheley, IHT at 71)), and that, in the absence of a strong union and municipal push for domestic-only specifications, “It’s over.” (JX 674 (Sheley, IHT at 71-72)).)

1613. Metalfit’s Mr. Meyer is unaware of any project for which Metalfit, a Mexican manufacturer, provided imported Fittings for use on an ARRA-funded waterworks project. (CX 2518 (Meyer, Dep. at 66, 71-72, 133-134) (Metalfit was neither asked to provide, nor did provide, any quotes for ARRA-funded projects)).

Response To Finding No. 1613:

Respondent has no specific response.

1614. As Mr. Meyer explained, because “enforcement by the EPA was -- was so thorough, [customers] were reluctant to use the *de minimis* waiver for anything but the smallest incidental components” and risk the substantial penalties that might attach if it were later determined that they improperly had used non-Domestic Fittings in an ARRA-funded job. (CX 2518 (Meyer, Dep. at 67, 152-153)).

Response To Finding No. 1614:

Respondent has no specific response.

1615. Mr. Swalley of Electrosteel does not know of any instance in which a customer used an imported Fitting for an ARRA-funded waterworks project, or any instance in which a customer received a waiver of ARRA’s Buy American requirement for a Fittings purchase. (CX 2500 (Swalley, Dep. at 62-63, 159)).

Response To Finding No. 1615:

This finding is incomplete, and therefore misleading because Mr. Swalley testified that ARRA’s impact on the demand for domestic Fittings was short-lived. Mr. Swalley, of pipe and Fittings importer Electrosteel, testified that by the third quarter of 2010, bidding on ARRA jobs had ceased. (RPF 415; (JX 659 (Swalley, Dep. at 158)).)

8.2 Sigma and Star Only Sold Imported Fittings, and Were Threatened by ARRA’s Buy American Provision

1616. Sigma and Star, each of which sold only imported Fittings, believed that their businesses were threatened by the ARRA Buy American requirement. (*Infra* ¶¶ 1617-1646).

Response To Finding No. 1616:

See General Response 1 and response to ¶¶ 1617-1646, *infra*. This is an unsupported assertion that does not require a response.

1617. [REDACTED] (CX 1997 at 007, *in camera* (also noting that [REDACTED]))

Response To Finding No. 1617:

See General Response 5. Respondent has no specific response as to the nature of Mr. Pais' personal beliefs.

8.2.1 Fittings Suppliers Projected That the Domestic Fittings Market Would Grow – at the Expense of the Import Market – After ARRA Became Law

1618. After ARRA became law, Fittings suppliers projected that the Domestic Fittings market would grow, as some projects that would otherwise have been Open Specification would now be Domestic-only. (*Infra* ¶¶ 1619-1627).

Response To Finding No. 1618:

See General Response 1 and response to ¶¶ 1619-1627, *infra*. This is an unsupported assertion that does not require a response.

1619. Prior to the passage of ARRA, Domestic-only Fittings projects comprised approximately 15% to 20% of the overall Fittings market. (Tatman, Tr. 236 (15% to 18%); McCutcheon, Tr. 2279-2280 (Star estimated 15% to 20%); CX 2535 (Bhutada, Dep. at 11), *in camera* (approximately); CX 2501 (Prescott, IHT at 41) (20% of customers were “a hundred percent domestic”); CX 2509 (Groeniger, IHT at 41) (“Q. Do you have a sense of what your split in terms of revenue for domestic and imported fittings was before the ARRA? A. 75/25 foreign. Q. . . . 75% foreign, 25% domestic? A. Yes.”); Webb, Tr. 2732 (Before ARRA, about 20% of HD Supply’s Fittings sales were of Domestic Fittings)).

Response To Finding No. 1619:

This finding is misleading, because domestic only fittings still comprise approximately 15 to 20% of the overall fittings market, even after ARRA. (RPFF ¶¶ 399-423). ARRA’s impact on the demand for domestic fittings was minimal and short-lived. (RPFF ¶¶ 399-423).

The overall trend in the fittings market has been the same after ARRA as before ARRA:

“domestic-only specs have done nothing but erode over time.” (Tatman, Tr. 280-281).

1620. At the time that ARRA was signed into law, McWane believed that the Domestic Fittings market would expand as a result of the Buy American provisions in the Act. (Tatman, Tr. 613-614; CX 2479 (McCullough, Dep. at 95) (McWane anticipated that there could be a greater demand for Domestic Fittings after the passage of ARRA); Tatman, Tr. 629 (Mr. Tatman expected the Domestic market to “go from a traditional domestic market to a lot of domestic opportunities”)).

Response To Finding No. 1620:

See response to ¶ 1619, *supra*. This finding is misleading because, regardless of what McWane employees may have believed at one time, the evidence proves that the actual impact of ARRA on demand for domestic fittings was minimal. (McWane’s Mr. Tatman testified that “ARRA was a blip in the map. Demand went up for about a six-month period, and then it evaporated as soon as it came and that “[w]e didn’t really understand the impact of the ARRA but we all knew that it was a short-term event.” (RPFF ¶ 401; Tatman, Tr. 281, 981).). McWane did not see any effects at all from ARRA until February of 2010. (RPFF ¶ 402) Although the peak year for ARRA funding was 2010, McWane saw only a percent increase in domestic Fittings sales in 2010. (RPFF ¶ 403) Mr. Tatman testified that the overall trend in the Fittings market has been the same after ARRA as it was before ARRA. (RPFF ¶ 406)).

1621. Mr. Tatman did not know whether the increase of Domestic-only jobs as a result of ARRA would be 10% or 50%, but he knew it would not be zero. (Tatman, Tr. 614; CX 1209 at 001).

Response To Finding No. 1621:

See responses to ¶¶ 1619-1620, *supra*. This finding is inaccurate because Mr. Tatman thought there would be no positive benefit to McWane in 2009 based on ARRA. (Tatman, Tr. 614 (“Q. You knew it was going to be up, but you didn't know whether it was a 10 percent factor or a 50 percent factor? A. Actually I think if you go back to my business planning files that I do formally and you look at what I'm saying when I'm projecting the budget for 2009, I've got no indication of any positive benefit for our business in 2009 based on ARRA. There's a narrative in my budget that I would have given in the October time frame.”)).

1622. Sigma projected that the Domestic Fittings market would grow to 25-30% of the overall Fittings market following ARRA. (CX 0214 at 005 (May 2009 Sigma Memorandum to the Board discussing ARRA’s impact on the market); Pais, Tr. 1752-1753 (25-30% was Pais’s “best estimate”); CX 0081 at 004 (similarly projecting Domestic Fittings market to grow from 10-12% of the overall Fittings market to 25-30%)).

Response To Finding No. 1622:

See response to ¶¶ 1619-1620, *infra*. This finding is misleading because Sigma employees testified that they knew ARRA's impact on the demand for domestic Fittings was going to be short-lived. Mr. Rona testified that, "[f]or domestic fittings specifically associated with ARRA, we knew that it was not forever"... Q: "It was a very short time window." A: "Short time, correct." (RPF ¶ 407, Rona, Tr. 1671). Mr. Pais testified that "[b]y the definition of that law and the scope, we knew it was going to be a short-term impact." (RPF ¶ 408, Pais, Tr. 1738). Mr. Pais also testified that ARRA was a short term stimulus program. since "[i]t was intended as a shovel-ready stimulus. So there was a lot of emphasis on now. In fact, rightly speaking, we should have had that [domestic] capability on day one for us to have any capacity to supply the projects. So we were already behind the eight ball on day one, because it was just a ball from the blue." (RPF ¶ 534, JX 687 (Pais, Dep. at 182)).

1623. Sigma knew that some projects that would have been open-specification in the absence of ARRA would become Domestic-only. (Rona, Tr. 1458 ("a percentage of fittings which . . . would have previously been accepted as foreign would be converted to required as domestic.")).

Response To Finding No. 1623:

See response to ¶ 1622, *supra*. This finding is misleading because Mr. Rona testified that he did not know whether ARRA would create greater interest in Domestic-only specifications. . . (Rona, Tr. 1458 ("Q. And beyond, did you expect the ARRA to create greater interest in domestic specs beyond just the ARRA funds, in other words? A. I would say that we had no way of really knowing what would be the effect of that.")).

1624. Sigma was concerned that ARRA's Buy American requirement would cause its import business to suffer by diverting demand from imported Fittings to Domestic Fittings. (Pais, Tr. 1735, 1737 (noting that Sigma did not have a supply source for Domestic Fittings); CX 2523 (Bhattacharji, Dep. at 188-189) (viewed the Buy American market growing to 25-20% as "something to be concerned about in terms of future planning.")).

Response To Finding No. 1624:

See responses to ¶¶ 1619-1623, *supra*. This finding is misleading because Mr. Pais testified that Sigma could not estimate what percent of the market might shift from imported Fittings to Domestic Fittings and that he knew that ARRA would have a “short-term impact.” (Pais, Tr. 1735 (“Q. Did Sigma make any estimate of what the Buy American provision -- what percent of the market might shift to domestic as a result of the Buy American provision? A. No. We could not. There was no direction or data or any help available. Q. In early 2009 did you have a time horizon on how long this threat might last? A. What might last? Q. The ARRA. A. Oh. Q. And the Buy American provision. A. Yes. By the definition of that law and the scope, we knew it was going to be a short-term impact.”)).

1625. Star also believed that the market for Domestic Fittings would increase in size. Star based its belief on its own observed increase in Domestic-only Specifications in the market and on recent strong Domestic requirements in government appropriations. (McCutcheon, Tr. 2282-2283).

Response To Finding No. 1625:

See response to ¶¶ 1619-1620, *supra*. This finding is misleading because, regardless of what Star employees may have believed, the evidence is that ARRA’s actual impact on the demand for domestic fittings was short term and minimal. (RPF ¶¶ 399-423).

1626.

[REDACTED]
CX 2534 (Bhutada, IHT at 80-82), *in camera*
[REDACTED]

Response To Finding No. 1626:

See General Response 11, and response to ¶ 1625, *supra*.

1627.

[REDACTED]
[REDACTED] (CX 2537 (McCutcheon, IHT (Vol. 1) at 92), *in camera*;
McCutcheon, Tr. 2280-2281).

Response To Finding No. 1627:

See General Response 11, and response to ¶ 1625, *supra*.

8.2.2 Fittings Suppliers Expected That Buy-American Sentiment Would Extend Beyond ARRA

1628. There was also a threat to Sigma and Star that the growth in demand for Domestic Fittings would outlast and extend beyond the effect of ARRA. (CX 2530 (Rona, Dep. at 220-221); *infra* ¶¶ 1629-1638).

Response To Finding No. 1628:

See response to ¶¶ 1629-1638, *infra*. This finding is incorrect because, regardless of what Star or Sigma may have believed, the overwhelming evidence is that ARRA's impact on demand for domestic fittings was short-lived and minimal. (RPF 399-423). ARRA did not reinvigorate "Buy American" sentiment as a more general matter. (RPF 405). The overall trend in the Fittings market has been the same after ARRA as it was before ARRA: "domestic-only specs have done nothing but erode over time" (RPF 406, (Tatman, Tr. 280-281)).

1629. Sigma feared that ARRA was part of a larger groundswell of Buy-American sentiment in the United States that would spread beyond ARRA-funded projects and outlast the federal bill. (Pais, Tr. 1737-1738 ("Q. Was Sigma concerned that the Buy American sentiment might outlast the ARRA? A. Yes."); CX 1984 at 001 (Bhattacharji June 15, 2009 report from AWWA conference to Sigma lobbyists and Buy America team: "[Distributors] see a growth in customers demanding a domestic product because of the law, but more important, the sentiment was in favor of buying domestic."); CX 0231 at 001 (Bhattacharji June 16, 2009 report from AWWA conference outlining next steps for Sigma Domestic Production: "[T]he sentiment in favor of domestic production is growing and though the BA restrictions may eventually be struck down, there could be domestic only specs that could stay on longer."); Rona, Tr. 1502 (discussing CX 0231); CX 2523 (Bhattacharji, Dep. at 187-188) ("Q. Was it Sigma's belief in June of 2009 that [Buy American] sentiment was gaining traction? A. As far as Sigma believed, it was a fear.")).

Response To Finding No. 1629:

See General Response 11, and response to ¶ 1628, *supra*. This finding is incorrect, because ARRA in fact did not reinvigorate "Buy American" sentiment as a more general matter, and demand for domestic fittings remains low. (RPF 401, 405).

1630. As Mr. Pais explained in a May, 14, 2009 internal email, “Buy American” sentiment was “slowly spreading and becoming a part of American life and business,” especially in the waterworks industry:

As for Fittings, the current DIFRA market size of about 100,000 ST may include about 10%-12% using the ‘DA’ [domestic spec] option, on the strength of the few specific markets like PA, NJ etc which are still ‘domestic’ [T]he ‘DA’ segment may swell to about 25% - 30% of the entire market due to the ARRA/BA and other BA [Buy American] drivers.

(CX 0081 at 003-004).

Response To Finding No. 1630:

See General Response 11, and response to ¶ 1629, *supra*. This finding is inaccurate because, regardless of Mr. Pais’s personal beliefs or fears, the evidence proved him wrong. (RPF 399-423).

1631. Sigma anticipated that McWane would mount a campaign in some states for the adoption of Buy American requirements similar to those in ARRA. (CX 1996 at 001 (February 11, 2009 email of Mr. Bhattacharji)).

Response To Finding No. 1631:

1632. Mr. Rona believed that Domestic-only Fittings specifications would continue for three to five years after ARRA. In a May 21, 2009 email, he described the impact of Buy American beyond ARRA-funded projects:

We knew that the government stimulus money would have a “buy American” preference but we are also seeing much more domestic requests and specifications that we expect will stay with our industry for several years if not for the next 3-5 years or even longer. To the customers if there is confusion about whether a job can be foreign or domestic they will take the easiest route and be forced to offer domestic. Making the wrong choice will cost [them] considerable problems and money loss.

(CX 0219 at 001; Rona, Tr. 1463-1464; *see also* CX 2530 (Rona, Dep. at 70-71) (“I particular[ly] felt that post ARRA . . . there absolutely would be a carryover sentiment in domestic fittings that would be a level greater than the domestic percentage leading up to ARRA.”)).

Response To Finding No. 1632:

See General Response 11, and response to ¶ 1629, *supra*. This finding is inaccurate because, regardless of Mr. Rona’s personal beliefs, the evidence proved him wrong. (RPFF ¶¶ 399-423).

1633.

(CX 1997 at 007, *in camera*).

Response To Finding No. 1633:

See General Response 11, and response to ¶ 1629, *supra*. This finding is inaccurate because, regardless of Mr. Pais’s personal beliefs, the evidence proved him wrong. (RPFF ¶¶ 399-423).

1634. Star had seen a movement toward Domestic-only Specifications since ARRA because of the “sentiment in our country towards jobs,” and Star expected that trend to continue. (McCutcheon, Tr. 2282).

Response To Finding No. 1634:

See General Response 11, and response to ¶ 1629, *supra*. This finding is inaccurate because, regardless of Mr. McCutcheon’s personal beliefs, the evidence proved him wrong. (RPFF ¶¶ 399-423). This finding is incomplete, and therefore inaccurate because ARRA did not reinvigorate “Buy American” sentiment as a more general matter, and – as Mr. Tatman testified – the overall trend in the Fittings market has been the same after ARRA as it was before ARRA: “domestic-only specs have done nothing but erode over time.” (RPFF ¶¶ 405-406).

1635. Mr. McCutcheon believes that future legislation containing Buy American requirements similar to ARRA's will further cause the Fittings business to have more Domestic-only Specifications. (McCutcheon, Tr. 2282-2283).

Response To Finding No. 1635:

See General Response 11, and response to ¶ 1629, *supra*. This finding is inaccurate because, regardless of Mr. McCutcheon's personal beliefs, the evidence proved him wrong. (RPF ¶¶ 399-423). This finding is incomplete, and therefore inaccurate because ARRA did not reinvigorate "Buy American" sentiment as a more general matter and the overall trend in the Fittings market has been the same after ARRA as it was before ARRA: "domestic-only specs have done nothing but erode over time." (RPF ¶¶ 405-406)

1636. Some municipalities that allowed import fittings prior to ARRA changed to Domestic Fittings requirements during the ARRA period and stayed with the Domestic Fittings requirement after the ARRA period ended. (CX 2489 (Morrison, IHT at 26-27)).

Response To Finding No. 1636:

See General Responses 3, 6 and 11. This finding is misleading because Mr. Morrison testified at trial that domestic-only specifications now comprise only a small percentage of the Fittings market in the United States. (RPF ¶ 381; Morrison, Tr. 2864-2866 (Q: "And are you aware, sir, of the -- I think complaint counsel asked you some questions based on the document where I believe you forecasted that the domestic compared to import fittings market was 18 percent domestic and then the balance was import. Do you remember that testimony and that document?" A: "I believe it was 12 percent and 88 percent."); Schumann, Tr. 4634-4635 ("Q. In other words, even under ARRA in 2010, domestic fittings were not close to being the majority of the fittings sold in the U.S., were they, sir? A. They were not. We discussed that. They were to 20 percent or so."); (JX 643 (Tatman, IHT at 47-48); JX 667 (Kuhrts, Dep. at 30). JX 672 (Webb, IHT at 70-71, 74)).).

Other witnesses confirmed that few municipalities have domestic-only specifications. (RPFF ¶413; Mr. Sheley testified that less than 5% of municipalities in Illinois Meter’s service area have domestic-only specifications today, (Sheley, Tr. 3447 (Q: “And today, only a handful of municipalities in your service area have a domestic specification; right?” A: “That’s correct.” Q: “5 percent?” A: “Probably less than that.”)), and that with regard to domestic-only specifications: “That’s gone. Yeah, that ship’s sunk,” (JX 674 (Sheley, IHT at 71)), and that, in the absence of a strong union and municipal push for domestic-only specifications, “It’s over.” (JX 674 (Sheley, IHT at 71-72)). (RPFF ¶414; Mr. Webb of HD Supply testified that, over time, fewer and fewer municipalities call for domestic Fittings in job specifications. (JX 673 (Webb, Dep. at 23))).

1637. Because of ARRA and the residual demand for Domestic Fittings, there has been an increase in demand for Domestic Fittings. (CX 2531 (Rybacki, Dep. at 16)). In 2009, Sigma was concerned that ARRA would have a carry-on effect in the domestic market, and it did. (CX 2531 (Rybacki, Dep. at 160); *see also infra* ¶¶ 1647-1654 (describing increased post-ARRA Domestic Fittings demand)).

Response To Finding No. 1637:

See General Response 11, response to ¶¶ 1647-1654, *infra*, and responses to ¶¶ 1619-1636, *supra*. This finding is incorrect because it is contradicted by the overwhelming evidence to the contrary. (RPFF ¶¶ 376-423)

1638. There is an ongoing concern on the part of suppliers that there could be legislation in the future that would also require the use of domestic fittings in projects. (CX 2535 (Bhutada, Dep. at 39) (noting potential for future stimulus)).

Response To Finding No. 1638:

See General Response 11, response to ¶¶ 1647-1654, *infra*, and responses to ¶¶ 1619-1636, *supra*. This finding is incorrect because it is contradicted by the overwhelming evidence to the contrary. (RPFF ¶¶ 376-423)

8.2.3 **Sigma and Star Were Concerned That ARRA’s Requirement for Domestic Fittings Would Also Result in the Loss of Non-Domestic Fittings Business**

1639. McWane’s competitors were also concerned that Distributors might shift their imported Fittings business to McWane because of McWane’s position in the Domestic market. (CX 0083 at 002 (Bhattacharji April 2009 draft memo to Board: “[W]e may lose a portion of the market that is not restricted to domestic simply because McWane will demand a larger share of the business.”); CX 1998 at 003 (minutes of April 14, 2009 Sigma board meeting noting that “SIGMA has to be watchful that McWane is not able to leverage its domestic product into an unfair gain in market share”); *see also* CX 2522 (Agarwal, Dep. at 94), *in camera*)

Response To Finding No. 1639:

See General Response 11, response to ¶¶ 1647-1654, *infra*, and responses to ¶¶ 1619-1636, *supra*. This finding is incorrect because it is contradicted by the overwhelming evidence to the contrary. (RPFF ¶¶ 376-423)

1640. Specifically, Sigma was concerned that its inability to supply Domestic Fittings would negatively impact its sales of imported Fittings. If its customers were required to turn to McWane for Domestic Fittings for ARRA projects, they might also shift their purchases of imported Fittings to McWane. (Rona, Tr. 1459-1460; CX 2530 (Rona, Dep. at 119); *see also* CX 2523 (Bhattacharji, Dep. at 136-138) (Sigma feared that ARRA would cause it to lose sales to import jobs in addition to domestic sales)).

Response To Finding No. 1640:

See General Response 11, response to ¶¶ 1647-1654, *infra*, and responses to ¶¶ 1619-1636, *supra*. This finding is incorrect because it is contradicted by the overwhelming evidence to the contrary. (RPFF ¶¶ 376-423).

1641. Distributors risked losing project sales if they were unable to sell Domestic Fittings during the ARRA period. (CX 2489 (Morrison, IHT at 35-36) (“If I was not a distributor for Tyler Union and they’re the only person making domestic pipe fittings and there’s a job that requires domestic pipe fittings, the chances of me getting an order on that project would be remote because the contractor’s going to give the order to somebody that can supply him the proper fittings and he’s not going to be interested in buying the fittings from X and giving the rest of the business to Y.”); CX 2501 (Prescott, IHT at 28) (explaining that if domestic fittings were unavailable “we would have to go against Buy America”)).

Response To Finding No. 1641:

See General Responses 3 and 6. This finding is irrelevant because it is the opinion of only two distributors given in a proceeding in which McWane was not allowed to cross-examine. The overwhelming evidence is that ARRA's impact on distributors was short-lived and minimal. (RPFF ¶¶ 399-423)

1642. Sigma viewed entry into the Domestic Fittings market in part as a “defensive move to protect our market share in the area of current sales.” (CX 1172 at 001 (March 6, 2009 email of Mr. Bhattacharji); CX 2523 (Bhattacharji, Dep. at 135-137) (Sigma feared that the ARRA Buy American requirement would lock it out of ARRA jobs as well as non-ARRA work)).

Response To Finding No. 1642:

See response to ¶¶ 1629-1638, *supra*. This finding is incorrect because, regardless of what Sigma may have believed, the overwhelming evidence is that ARRA's impact on demand for domestic fittings was short-lived and minimal. (RPFF ¶¶ 399-423). ARRA did not reinvigorate “Buy American” sentiment as a more general matter. (RPFF ¶405). The overall trend in the Fittings market has been the same after ARRA as it was before ARRA: “domestic-only specs have done nothing but erode over time” (RPFF ¶406, (Tatman, Tr. 280-281)).

1643. In an April 4, 2009 draft memorandum to the Sigma Board of Directors, Mr. Bhattacharji depicted the Buy-American provisions of ARRA as a “serious and unexpected handicap” to Sigma, and as threatening Sigma even in the “portion of the market that is not restricted to Domestic.” (CX 0083 at 002).

Response To Finding No. 1643:

See response to ¶¶ 1629-1638, *supra*.

1644. In May 2009, Mr. Rona echoed this concern regarding the threat that ARRA posed to Sigma's non-Domestic Fittings business, and noted that Sigma was coming under pressure to find a Domestic solution:

The total domestic requirements may only raise from the present maybe 10-12% to maybe 20% to 25% but even if we concede this volume to McWane there is likely more that will also go due to McWane putting pressure on the distributor to give the foreign

business to them as well. They see this as a major chance to reclaim the market share they have seen slip away the last 20 years.

It is quite clear now that we need a credible plan to offer our customers, our sales people, and the industry as a whole. Many key industry people are asking how we plan to combat this extremely real threat.

(CX 0219 at 001; Rona, Tr. 1464-1467).

Response To Finding No. 1644:

See response to ¶¶ 1629-1638, *supra*.

1645. Star also viewed Domestic entry as essential to defend against the likelihood that McWane would use its Domestic position to lead Distributors to deal more with McWane for its imported Fittings. (CX 2537 (McCutcheon, IHT (Vol. 1) at 104-105) (Star was in “panic mode” and thought ARRA was “the beginning of the end of Star Pipe” and would be a “death blow,” because McWane’s monopoly in Domestic would spill over into Star’s core business of imported Fittings)).

Response To Finding No. 1645:

See General Responses 3, 6 and 11. (RPF ¶¶ 376-423)

1646. Sigma’s and Star’s concerns were not unfounded. On February 23, 2009, Mr. McCullough emailed Mr. Tatman to suggest that McWane should leverage its position in Domestic Fittings to increase its non-Domestic Fittings business: “We need to leverage our domestic position while not driving a wedge between ourselves and our customers as this Buy American requirement will not last forever.” (CX 1209 at 001).

Response To Finding No. 1646:

See General Responses 1, 5 and 11. The first sentence of this proposed finding is an incorrect and unsupported assertion. The concerns expressed by Mr. McCutcheon turned out to be unfounded, as the overwhelming evidence demonstrates. (RPF ¶¶ 376-423)

8.3 ARRA Increased the Number of Domestic Fittings Projects

1647. ARRA increased the number of Domestic Fittings projects, both during and after the period in which ARRA-funded projects were being supplied. (Joint Stipulations of Fact, JX 0001 ¶ 22 (“The total number of waterworks projects that were built, repaired, or otherwise commissioned in the United States increased during the period that ARRA funding was available.”); *infra* ¶¶ 1648-1654).

Response To Finding No. 1647:

See General Response 1. This proposed finding is a mischaracterization of JX 0001 ¶ 22. In fact, ARRA's impact had ended by the third quarter of 2010. (RPF 412, 415) During its short period of effectiveness ARRA's impact on demand for domestic fittings was minimal, as many distributors confirmed (RPF 399-423)

1648. Distributors' sales of Domestic Fittings increased during the ARRA period. (CX 2502 (Prescott, Dep. at 89); RX 663 (Thees, Dep. at 54-55); CX 2492 (Johnson, Dep. at 73-75)).

Response To Finding No. 1648:

See General Responses 6 and 11. This finding is misleading because any purported increase in domestic fitting sales was short-lived and minimal. (RPF 399-423) Mr. Webb of HD Supply testified that ARRA's impact on demand for domestic Fittings was "mild, at best." (RPF 410)). Mr. Sheley, President and Owner of Illinois Meter, testified that ARRA "had a small effect" on sales of Fittings. (RPF 412)). Mr. Johnson, an owner of distributor customer Dana Kepner, testified that ARRA's impact was "minimal." (RPF 418)). Mr. Gibbs of distributor Winwater testified that ARRA did not have much impact on Fittings sales. (RPF 419)). Mr. Coryn of Utility Equipment testified that ARRA did not have much impact on business. (RPF 419)).

1649. Market participants felt the majority of the impact of ARRA and its resulting increase in the number of Domestic Fittings sales in 2010. (Sheley, Tr. 3402 ("Q. Are you still bidding on ARRA jobs today? A. No. Q. When did you see those jobs stop coming through? A. Mid to late 2010."); CX 2477 (Jansen, Dep. at 104) (testifying that he did not see any major impact in the number of domestic jobs from ARRA during 2009); CX 2502 (Prescott, Dep. at 90) ("Basically for 2010. There was a little hang over and a little start before, but I would say that . . . [for] our company the majority of that was 2010.")).

Response To Finding No. 1649:

This finding is misleading because the overwhelming testimony, from both suppliers and distributors, is that ARRA's impact on the demand for domestic Fittings was short-lived and minimal. (RPF 399-423)

1650. While ARRA-funded jobs were primarily serviced during the 2010 calendar year, they continued into 2011, and even as late as May 2012. (McCutcheon, Tr. 2614 (“We continued to ship jobs late into 2010 and [into] the first quarter of 2011 . . . And actually we shipped some this year.”); CX 2477 (Jansen, Dep. 107-108) (McWane still providing Domestic Fittings to some ARRA-funded jobs as late as May 2012); Supp. Response to RFA at ¶ 8 (McWane competed for sales of Domestic Fittings for use in ARRA projects after February 2010); CX 2500 (Swalley, Dep. at 60-61) (While ARRA expired in February 2010, there are still ongoing, unfinished projects that are using ARRA funds)).

Response To Finding No. 1650:

This finding is misleading because although a smattering of ARRA projects may have been bid or shipped after the third quarter of 2010, the overwhelming testimony - from fittings suppliers and distributors alike – was that ARRA's impact on the demand for domestic Fittings was short-lived and minimal. (RPF 399-423) Although the peak year for ARRA funding was 2010, McWane saw only a [REDACTED] percent increase in domestic Fittings sales in 2010. (RPF 403) Mr. Tatman testified that “ARRA was a blip in the map. Demand went up for about a six-month period, and then it evaporated as soon as it it came.” (RPF 401; Tatman, Tr. 281. Both before ARRA and to this day, “[d]omestic-only specs have done nothing but erode over time.” (RPF 406; Tatman, Tr. 280-281)

1651. Suppliers continued to bid on ARRA-funded jobs after February 2010. (CX 2477 (Jansen, Dep. at 107-108)).

Response To Finding No. 1651:

See General Responses 6 and 11, and response to ¶ 1650, *supra*.

1652. Prior to the passage of ARRA, Domestic-only Fittings projects comprised approximately 15% to 20% of the overall Fittings market. (*Supra* ¶ 1619).

Response To Finding No. 1652:

See General Responses 1 and 11, and response to ¶ 1619, *supra*.

1653.

(CX 2535 (Bhutada, Dep. at 12, 31), *in camera*)).

Response To Finding No. 1653:

See General Responses 6 and 11, and responses to ¶¶ 1619-1652, *supra*. This finding is misleading because, both in the years immediately preceding the adoption of ARRA and following the expiration of ARRA, domestic Fittings have comprised approximately 12 to 20 percent of the overall Fittings market. (RPF ¶ 399; Tatman, Tr. 235-236 (“And we've said that the overall market of everything that's out there, that about 15 to 18 percent of it is domestic”), 280-281 (“I think I said 15 to 18 percent. That's my perception”), 879 (“We've used the estimate of 15 to 18 percent of the total market”); McCutcheon, Tr. 2279-2280 (Q. “Did Star estimate the size of the domestic market before the ARRA was enacted?” “A. Yes, sir.” Q. “And what was Star's estimate of the market at that point in time?” A. “We believed it was 15 to 20 percent.”), 2282 (Q. “Does Star have an estimate of the size of the domestic market today?” A: “Yes, sir. ... Today we believe it's 20 percent.”); Webb, Tr. 2732 (Q: “Prior to the ARRA, what percentage of your sales were domestic fittings?” A: “When we discussed this before, the -- well, both prior to the ARRA and currently I would say it's 80 percent import and 20 percent domestic.”); Morton, Tr. 2864-2866 (Q: “And are you aware, sir, of the -- I think complaint counsel asked you some questions based on the document where I believe you forecasted that the domestic compared to import fittings market was 18 percent domestic and then the balance was import. Do you remember that testimony and that document?” A: “I believe it was 12 percent and 88 percent.”)). In fact, Complaint Counsel’s own expert testified that, during ARRA, domestic

Fittings comprised 15 to 20 percent of the overall Fittings market in the United States. (RPFF ¶ 400; Schumann, Tr. 4634-4635) (“Q. And you know that imported fittings were three or four times the number of domestic fittings sold in the United States in 2010; right? A. I believe somewhere around that multiple. I just don't remember. Q. In other words, even under ARRA in 2010, domestic fittings were not close to being the majority of the fittings sold in the U.S., were they, sir? A. They were not. We discussed that. They were 15 to 20 percent or so.”)).

1654. Today, Domestic Fittings account for approximately 20% to 25% of the overall Fittings market. (RX-698 (McCutcheon, Dep. at 142); McCutcheon, Tr. 2282; *see also* CX 2535 (Bhutada, Dep. at 12), *in camera* ; CX 2500 (Swalley, Dep. at 67-68) (currently, approximately 25% of the demand for Fittings is Domestic-only); Thees, Tr. 3076 (today, after ARRA, projects continue to require Domestic Fittings, and approximately 35% of Ferguson’s Fittings sales are Domestic)).

Response To Finding No. 1654:

See General Responses 6 and 11, and responses to ¶¶ 1619-1652, *supra*. This finding is misleading because, both in the years immediately preceding the adoption of ARRA and following the expiration of ARRA, domestic Fittings have comprised approximately 12 to 20 percent of the overall Fittings market. (RPFF ¶ 399; Tatman, Tr. 235-236 (“And we've said that the overall market of everything that's out there, that about 15 to 18 percent of it is domestic”), 280-281 (“I think I said 15 to 18 percent. That's my perception”), 879 (“We've used the estimate of 15 to 18 percent of the total market”); McCutcheon, Tr. 2279-2280 (Q. “Did Star estimate the size of the domestic market before the ARRA was enacted?” “A. Yes, sir.” Q. “And what was Star's estimate of the market at that point in time?” A. “We believed it was 15 to 20 percent.”), 2282 (Q. “Does Star have an estimate of the size of the domestic market today?” A: “Yes, sir. ... Today we believe it's 20 percent.”); Webb, Tr. 2732 (Q: “Prior to the ARRA, what percentage of your sales were domestic fittings?” A: “When we discussed this before, the -- well, both prior to the ARRA and currently I would say it's 80 percent import and 20 percent domestic.”); Morton,

Tr. 2864-2866 (Q: “And are you aware, sir, of the -- I think complaint counsel asked you some questions based on the document where I believe you forecasted that the domestic compared to import fittings market was 18 percent domestic and then the balance was import. Do you remember that testimony and that document?” A: “I believe it was 12 percent and 88 percent.”)). In fact, Complaint Counsel’s own expert testified that, during ARRA, domestic Fittings comprised 15 to 20 percent of the overall Fittings market in the United States. (RPF ¶ 400; Schumann, Tr. 4634-4635) (“Q. And you know that imported fittings were three or four times the number of domestic fittings sold in the United States in 2010; right? A. I believe somewhere around that multiple. I just don't remember. Q. In other words, even under ARRA in 2010, domestic fittings were not close to being the majority of the fittings sold in the U.S., were they, sir? A. They were not. We discussed that. They were 15 to 20 percent or so.”)).

9. McWane Has Monopoly Power or a Dangerous Probability of Achieving Monopoly Power in the Domestic Fittings Market

1655. McWane has monopoly power in the Domestic Fittings market. (Schumann, Tr. 3770, 3948; CX 2260-A (Schumann Rep. at 8, 57); *infra* ¶¶ 1658-1711).

Response To Finding No. 1655:

See General Responses 1, 9 and 12, and responses to ¶¶ 1658-1711, *infra*. This proposed Finding is in fact a legal conclusion that requires no response. To the extent required, this finding is incorrect because the relevant market consists of imported and domestic fittings (Fittings) and the Fittings market is an oligopolistic market.

1656. Market power or monopoly power is the ability to raise price above marginal cost. Having market power implies a firm has the power to control prices or exclude competitors. (Schumann, Tr. 3948).

Response To Finding No. 1656:

See General Responses 1, 9, and 12. This proposed Finding is in fact a legal conclusion that requires no response. To the extent required, this is a generic statement of economic theory

that has not been proven to apply to McWane or to the relevant market. Thus this finding is incorrect.

1657. McWane could not have imposed its Exclusive Dealing Policy without exercising its monopoly power. (CX 2260-A (Schumann Rep. at 75, 78)).

Response To Finding No. 1657:

See General Responses 1, 7, 9, and 12, and responses to ¶¶ 1655-1656, *supra*. This finding is incorrect for the reasons set forth in the cited responses. See General Response 7 regarding Complaint Counsel’s argumentative and inaccurate use of the term “exclusive dealing policy.”

9.1 McWane Has a Dominant Market Share in the Domestic Fittings Market

1658. McWane has a dominant market share in the Domestic Fittings market. (*Infra* ¶¶ 1659-1663).

Response To Finding No. 1658:

See General Responses 1 and 12, and responses to ¶¶ 1659-1663, *infra*. This proposed Finding is in fact a legal conclusion that requires no response. To the extent required, the evidence cited does not support the conclusion asserted.

1659. From at least 2006 and until Star entered the Domestic Fittings market in late 2009, McWane was the only source of Domestic Fittings. (Answer at ¶ 40 (“McWane admits, on information and belief, that it was the only remaining domestic manufacturer of [Fittings] in sizes below 30” in 2009 until Star expanded its [Fittings] product offerings and sales to include domestic [Fittings] in 2009”); Tatman, Tr. 1047 (describing McWane as the “last man” in Domestic Fittings after U.S. Pipe, Griffin and ACIPCO had exited the market); CX 2513 (Webb, IHT at 98) (McWane was the only manufacturer of Domestic Fittings during ARRA); Thees, Tr. 3078 (when ARRA was enacted, McWane was the only supplier of Domestic Fittings in the 3” to 24” diameter range); Sheley, Tr. 3401-3402 (when ARRA was enacted in 2009, only McWane sold Domestic Fittings, with the exception of Backman Foundry in Utah, which only sold specialty “oddball” Fittings); Brakefield, Tr. 1408 (in evaluating entering the Domestic Fittings production market, Sigma concluded that “even though it was a small part of the market, it could become much bigger, and there would be only one source, and that would be Tyler/Union.”); Pais, Tr. 1733 (describing ARRA’s Buy American requirement: “[O]vernight the government, you know, dealt a huge blow by diverting that [Domestic Fittings] business to just one manufacturer [McWane]...”); McCutcheon, Tr. 2298 (to his

knowledge, over the two years prior to Star's entry in 2009 "there was not another manufacturer of 24" and down domestically manufactured pipe fittings" other than McWane); Morton, Tr. 2817-2818 (after U.S. Pipe closed its Chattanooga, Tennessee plant in April of 2006, McWane was the only producer of Domestic Fittings); Morton, Tr. 2823 (in April 2009, McWane was the sole supplier of Domestic Fittings 24" and under; ACIPCO was the sole supplier for Domestic Fittings 30" and over); CX 2223 at 002 (same); CX 2222 at 001 (U.S. Pipe June 3, 2009 email to EPA: "There is only one domestic manufacturer for 4" though 24" fittings – McWane, Inc."); CX 2523 (Bhattacharji, Dep. at 140-142) (the ARRA domestic Buy-American requirement meant that Distributors were left to deal with only one Fittings supplier); CX 0551 (May 12, 2009 email from Mr. Fielding of HD supply: "Unfortunately, since they [McWane] are the only domestic mfg. of fittings, they have the upper hand this time.")).

Response To Finding No. 1659:

See General Responses 3, 6 and 12. This finding is inaccurate. Complaint Counsel's own proposed Findings establish that there has always been domestic Fittings manufacturers, suppliers, and resellers other than McWane. (CCPFF §§ 3.4.1;; 3.4.3; 3.4.8; 3.5 (articulating incomplete list of domestic suppliers). The Proposed Finding is also inaccurate because the quoted testimony that "[O]vernight the government, you know, dealt a huge blow by diverting that [Domestic Fittings] business to just one manufacturer [McWane]..." is not on page 1733. (Pais, Tr. 1733). This finding is inaccurate because Mr. McCutcheon testified that it is "possible that American Cast Iron Pipe sold some of the fittings at the upper end of that 24"and down range" over the two years prior to Star's entry in 2009. (McCutcheon, Tr. 2298).

1660. Distributors have described McWane as "the absolute gorilla." (CX 2501 (Prescott, IHT at 93) ("They are the largest by far in the industry. Their fangs are out into almost every business you can imagine. . . . they are the one that wrote the letter in the first place and a [leopard] doesn't change its spots."); CX 2489 (Morrison, IHT at 74) ("You know, they're the 2,000-pound gorilla in the room no matter how you slice it.")).

Response To Finding No. 1660:

See General Responses 3 and 6. This finding is irrelevant because it consists of the un-cross-examined and ambiguous opinions of two distributors. In fact, many distributors are larger

than McWane and exert the market power in the fittings market; the distributors have the power to “punish” fittings suppliers. (RPF 38-56).

1661. The only firms that currently manufacture a full-line of Domestic Fittings are McWane and Star. (Supp. Response to RFA at ¶ 10; CX 2488 (Backman, Dep. at 16) (Backman Foundry “survives in a niche market of custom pipe fittings. We don’t compete with McWane and other large fitting manufacturers for the standard off-the-shelf, the bread-and-butter sort of things.”); Tatman, Tr. 238-240 (admitting that Backman foundry only produces a relatively small number of Domestic Fittings 24” and below); CX 2490 (Morrison, Dep. at 66) (“Backman Foundry . . . They just make fittings, special fittings to order.”)).

Response To Finding No. 1661:

Respondent has no specific response.

1662. In 2010, after Star had entered the Domestic Fittings market, McWane’s approximate share of the Domestic Fittings market was %. Star’s approximate share of the Domestic Fittings market was %. (CX 2260 (Schumann Rep. at 19 tbl. 2), *in camera* (basing market share calculations on supplier sales data); Tatman, Tr. 240-241 (estimating that McWane’s share of the Domestic Fittings market in early 2009 was “around 90 percent”)).

Response To Finding No. 1662:

See General Responses 9 and 12. This finding is misleading because there is no separate domestic fittings market; the relevant market is comprised of all fittings, both domestic and non-domestic. In addition, this finding is incomplete. McWane’s share of the overall Fittings market in the United States has steadily declined from approximately 70-80% in 2003 to approximately 41% in 2009. (RPF ¶ 34; Tatman, Tr. 240-242 (Q. “Early 2009, sir, what would your estimate be of McWane's share of the 2" to 24" domestic fittings market?” ... A: “It's tough for me to factor in Metalfit because that's the unknown for me, but let's agree that it's around 90 percent.” Q: “And so in the overall fittings market, as of early 2009, you estimated that Tyler/Union had 41 percent of that market?” A: “That's the estimate I have for whatever data point I used at this time.”); JX 642 (Page, Dep. at 23-24); McCutcheon, Tr. 2638-2639 (Q: “Just so we're clear on the record, that refreshes your memory that you told the ITC under oath in 2003 that McWane

had 70 percent or more of all the U.S. fittings sales; right?" A. "Yes, sir."), 2585 (Q: "And you believe today McWane's share of the overall fittings has declined further still to somewhere in the 40 percent range; right, sir?" A. "Yes, sir, I believe so.")). McWane's Fittings market share has been steadily declining relative to Star's since 2003. (RPF 35; McCutcheon, Tr. 2584-2585 (Q: "Now, in fact, McWane's share of the fittings market, by your own estimation, has been declining ever since 2003; right, sir?" A. "By our estimation, that's correct." Q: "And at the same time Star's share has been steadily increasing; right, sir?" A. "Yes, sir.") & CX 532, 2638-2639 (Q: "Just so we're clear on the record, that refreshes your memory that you told the ITC under oath in 2003 that McWane had 70 percent or more of all the U.S. fittings sales; right?" A. "Yes, sir." Q: "A number that's been in steady decline since then, in your estimation; correct, sir?" A. "In my estimation, that's correct.")). McWane, Star, and Sigma account for at least 90 percent of the Fittings sold in the United States. (RPF 36; Tatman, Tr. 241-242 ("Q. And so in the overall fittings market, as of early 2009, you estimated that Tyler/Union had 41 percent of that market? A: That's the estimate I have for whatever data point I used at this time. Q: And Star you estimated had 23 percent? A: That's what I'm estimating. Q: And you estimated that Sigma had 26 percent? A: That's what I'm estimating. Q: And so the three together, Sigma, Star and McWane or Tyler/Union, had greater than 90 percent share of the fittings market as of early 2009? A: You're probably faster adding those three numbers up. What does it say? It's a test. Q: So I did it by subtracting the other ones. I've 3, 3, 2, 2. A: Okay. That's 6 and 4. That's 90 percent"); McCutcheon, Tr. 2256 (Q: "Do you have an estimate of the share of the market that McWane, Sigma and Star covered in the fittings market in the 2008 time frame?" A: "I have an educated guess." Q: "And what would that be?" A: "It would be 90 to 95 percent.")).

1663. In 2011, McWane’s approximate share of the Domestic Fittings market was %; Star’s approximate share of the Domestic Fittings market was %. (CX 2260 (Schumann Rep. at 19 tbl. 2), *in camera*).

Response To Finding No. 1663:

See General Responses 9 and 12, and response to ¶ 1662, *supra*.

9.2 There Are High Barriers to Entry into the Supply of Domestic Fittings

1664. Barriers to entry into the Fittings market are high. (*See supra* § 5.4.2).

Response To Finding No. 1664:

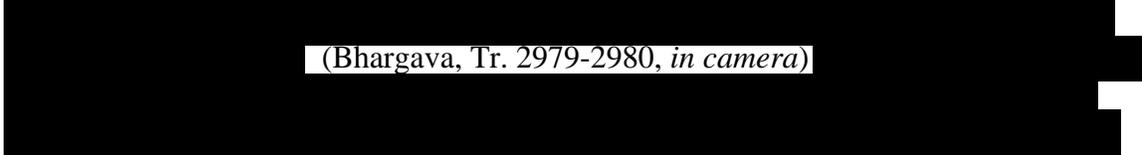
See General Responses 1, 11, and 12, and response to § 5.4.2, *supra*. This proposed Finding is in fact a legal conclusion that requires no response. To the extent required, the finding is unsupported by the cited authority.

9.3 Star Did Not Face the Same Entry Barriers as a *De Novo* Entrant

1665. In seeking to enter the Domestic Market, Star did not face the most significant barriers to entry that would be faced by a new entrant that had never produced any Fittings or other waterworks products. (*Infra* ¶¶ 1666-1668, 1758-1765).

Response To Finding No. 1665:

See General Responses 1 and 12, and responses to ¶¶ 1666-1668, 1758-1765, *infra*. This finding is an unsupported assertion that requires no response. This proposed Finding is also a statement of law that requires no response.

1666.  (Bhargava, Tr. 2979-2980, *in camera*)

Response To Finding No. 1666:

This finding is misleading because Star in fact has never owned or operated its own foundry, foreign or domestic. (RPF 390)

1667. Star had well-established relationships with the major Distributors who would purchase Domestic Fittings. (McCutcheon, Tr. 2287).

Response To Finding No. 1667:

Although Star did have well-established relationships with many distributors, this finding is incomplete, inaccurate, and overreaching because some Distributors were cautious about purchasing domestic Fittings from Star in 2009 and early 2010 because of prior problems they had experienced with Star, and delivery and inventory issues unique to Star's domestic production efforts. (RPF 480; Bhargava, Tr. 3003 ("Q. Okay. And some of those delays were filling orders to customers; right? A. In the beginning. Q. Okay. Well, in the beginning and into 2010; right? A. Early part of 2010."); McCutcheon, Tr. 2634 ("Q. 130. I apologize. Now, Mr. McCutcheon, there are lots and lots of other reasons in here completely unrelated to the rebates; correct, sir? A. That's correct, yes, sir. Q. And many of them -- I don't want to go through the whole thing, but many of them are related to can't meet delivery times, delay in delivery; correct, sir? A. Yes, sir, that's correct. Q. And in fact, that happened quite a bit in fall of 2009; right? A. Yes, sir, it did."); Sheley, Tr. 3448-3451 ("Q. When Star first entered the market -- I'm sorry. When Star first started offering domestic fittings for sale in early 2010, you weren't willing to buy from Star because of a bad experience you had with them in another product line at that time; isn't that right? A. That's correct. Q. Okay. You had a -- had a negative experience when Star first entered the joint restraint business; right? A. That's correct. . . . Q. Okay. And so when Star decided to sell domestic fittings, you didn't want to repeat that experience; right? A. That's correct. Q. Okay. And so you weren't willing to give Star any domestic fittings orders until they had demonstrated they had a sufficient inventory to meet your needs; right? A. That's correct. Q. And you made that determination around late summer of 2010; right? A. To the best of my recollection.."); Thees, Tr. 3102-3104 ("Q. And I believe you also testified earlier that when Star started supplying domestic fittings, you had a variety of

concerns about purchasing domestic fittings from Star; is that right, sir? A. That is correct. Q. When Star began supplying domestic fittings, they didn't own any of their foundries, did they, sir? A. That is correct. . . . Q. And also it wasn't just using -- strike that. Star wasn't just using one central foundry to cast its fittings, it was using a number of them; right, sir? A. That is correct. Q. And was that also concerning to you? A. That is correct. . . . Q. And one of your concerns was that any one of these foundries could abandon Star, leaving Star unable to supply Ferguson with domestic fittings; is that right, sir? A. That is correct. . . . Q. And also depth and breadth of inventory was a concern for you; right, sir? A. Yes, it was.”, 3107-3108 (“Q. So at the time, you didn't trust Star as a supplier; is that right, sir? A. That is correct. . . . Q. And in January 2010, this is shortly after Star started selling domestic fittings; is that right, sir? A. That's correct. . . . Q. And this strain made Star -- strike that. This strain made Ferguson not want to grow its business with Star at this time; is that right, sir? A. That was a leading component. Yes.); Webb, Tr. 2788-2789 (“Q. Was it Home Depot's -- was it HD Supply's -- I'm going to ask you was it yours, based upon your history. Was it your position and understanding that Star was not in a position to provide all of the domestic fittings that HD Supply would need to service its domestic fittings in June of 2009? A. Based on my understanding of Star's entry into the domestic manufacturing at that point in time I did not believe they had the capacity to service our company. . . . Q. And it's true, is it not, that HD Supply would be hesitant to buy only a few A items from Star for a particular job and then buy only the oddball items from McWane? A. That's largely correct. Yes.”), 2792 (“Q. Okay. Was there a question in your mind during the relevant time period as to whether Star as a new -- starting this new venture would be able to provide product and delivery times that were required by HD Supply? A. Domestic.”); JX 705 (Gibbs, Dep. at 25-28 (“Q. And in your previous testimony you indicated that you had some

large concerns about buying domestic fittings from Star; is that right? A. Yes. Q. What were those concerns? A. In January of 2010? Q. Yes. A. They had no history of being in the product. They were making the product in seven different foundries. They had presented no test results, no quality inspections, nothing to indicate to us that they were a credible source for domestic. Q. You just mentioned one of your concerns was that they sourced from seven different foundries? A. Yes. Q. Why is that a concern? A. Consistency of product, consistency of manufacture, consistency of testing, and those seven different foundries that they spoke of were not related to any --1 certainly not related to WinWholesale. So, we had no idea who they were, where they were, and what kind of fittings they were producing. Q. Did you have concerns that that would affect the quality of the fittings that you would be getting from Star? A. Yes. Q. And you also said a concern was no test results and no quality inspections. Why are those important? A. Again, they didn't present anything to us other than a program and the fact that they were getting into the domestic business. As it relates to the quality of these foundries and the products they had produced and test results that they had from the various people that had -- they had produced fittings for -- well, products for before they got in the fittings business and, quite frankly, these guys may have been in the fitting business, but there was nothing that Star related to WinWholesale that gave us any level of comfort that their products were of the standard that we were buying from other domestic sources or even Star. . . .Q. You testified in your previous deposition that you had grave concerns about Star regardless of anything McWane was doing, right? A. That is correct. Q. So, these concerns that you just described to me today -- these concerns had nothing to do with McWane, right? A. Nothing to do with McWane, that is correct.”) (objections omitted), 85 (“Q. Because of that concern, isn't it true that WinWholesale listed Star as a not approved vendor for domestic fittings? A. I would not put it that way. In fact,

the McWane rebate probably had less to do with the reason that Star in 2010 was listed as not approved than the fact that, as I've already stated in my testimony, we had no -- we had no background on Star, where they were making the products. . . . I was more concerned about the vendor itself. Didn't have anything to do with the rebate.”) (objections omitted), 87-88 (“Q. Did the policy -- did the Tyler/Union policy as laid out in the September 22nd, 2009, letter play any role in WinWholesale listing Star as a not approved vendor for domestic fittings? A. I think I've already stated, the issue with us in 2010 for Star domestic fittings had nothing to do with the rebate, had all about the fact are they committed to the business, do they have the capacity, do they have the quality, can they ship the product, do they have the consistency. It had nothing to do -- if Tyler/Union had never written this letter, I would still have the same issues that I've stated.”) (objections omitted)).

This finding is incomplete, and therefore misleading because Illinois Meter was not willing to buy domestic Fittings from Star in early 2010 because it had had a negative experience with Star's reliability as a supplier when Star first entered the joint restraint business, and was not willing to give Star any domestic fittings orders until Star had demonstrated it had sufficient inventory to meet Illinois Meter's needs. (RPFF ¶ 481)

This finding is incomplete, and therefore misleading because WinWholesale was concerned about Star's reliability as a domestic Fittings supplier regardless of McWane's Rebate Policy. (RPFF ¶ 484; JX 705 (Gibbs, Dep. at 93-94 (“Q. Did Star compensate you for taking the risk to do business with them on their domestic fittings? A. No. Q. Did the Tyler/Union September 2009 policy impact your willingness to deal with Star on their domestic fittings? A. As I previously stated, regardless of what the September 22nd, 2009, Tyler/Union letter said, that

was not our concern. Our concerns were Star entering a business that they had never been in.”)
(objections omitted).)

This finding is incomplete, and therefore misleading because Ferguson had concerns about purchasing domestic Fittings from Star because Star did not disclose which foundries it was using to source Fittings. (RPF 486; Thees, Tr. 3102-3103 (Q. And I believe you also testified earlier that when Star started supplying domestic fittings, you had a variety of concerns about purchasing domestic fittings from Star; is that right, sir? A. That is correct. Q. When Star began supplying domestic fittings, they didn't own any of their foundries, did they, sir? A. That is correct. Q. Star was using jobber foundries with extra capacity to produce fittings for them; is that right? A. That is correct. Q. Did Star disclose which foundries it was using to you, sir? A. They did not. Q. And that also concerned you; right, sir? A. Yes, it did. Q. And also it wasn't just using -- strike that. Star wasn't just using one central foundry to cast its fittings, it was using a number of them; right, sir? A. That is correct. Q. And was that also concerning to you? A. That is correct. Q. Because Star was not controlling the manufacturing process of domestic fittings; right, sir? A. Yes. Q. And also because you didn't know the relationship between Star and these foundries that Star was using; correct, sir? A. That was a concern. Yes.”).)

This finding is incomplete, and therefore misleading because Ferguson's Mr. Thees testified that, at least in early 2010, Star did not have the depth and breadth of inventory required to supply Ferguson with domestic Fittings. (RPF 487; Thees, Tr. 3104 (“Q. And at the time, Star didn't have the depth and breadth of inventory to supply Ferguson with domestic fittings; is that correct, sir? A. That is correct.”).)

This finding is incomplete, and therefore misleading because An earlier “breach of trust” between Star and Ferguson regarding restraints and Fittings had put a strain on the relationship

between the two companies, and was a “leading component” in Ferguson’s reluctance to buy domestic Fittings from Star in early 2010. (RPF 488; Thees, Tr. 3105-3107 (“Q. Now, the second e-mail down on the page is an e-mail that you received from Dan McCutcheon on January 21, 2010; right, sir? A. Yes. Q. And you received that in the ordinary course of your business? A. Yes. Q. On the first line, Mr. McCutcheon wrote, “It is obvious we dropped the ball the last couple of years;” right, sir? A. Yes. Q. And do you recall what Mr. McCutcheon was referring to in this e-mail? A. Yes, I do. Q. What was that, sir? A. Well, we had a multitude of issues around the country that really we felt like were a breach of trust, and a lot of it was around the combination of fittings and restraints. Historically, we had sold -- one product we keep in the DC are restraints because it's something you can use all throughout the country, and we had both Star and Sigma in there. And I point to an instance in Texas where we felt as if Star, because they had our captive restraint business, had -- was giving a -- one of our primary competitors a better price for fittings and restraints because they knew we were buying our fittings from one place, being a competitor of theirs, and our restraints from them, because we were a captive audience it being in the DC. Q. And you refer to this as a breach of trust; right? A. Yes. Q. So at the time, you didn't trust Star as a supplier; is that right, sir? A. That is correct. Q. And did this put a strain on the overall relationship between the two companies? A. Yes. Q. And in January 2010, this is shortly after Star started selling domestic fittings; is that right, sir? A. That's correct. Q. So around that time, the relationship was strained between the two companies; is that fair? A. That's fair. Q. And Ferguson's decisions regarding whether to purchase from a company can be affected by a strain on a relationship; right, sir? A. Yes. Q. And is it fair to say that Ferguson doesn't want to do business with a company it doesn't trust? A. That is correct. Q. And this strain made Star -- strike that. This strain made Ferguson not want to

grow its business with Star at this time; is that right, sir? A. That was a leading component. Yes.”); RX 255).)

1668. Star’s entry into Domestic Fittings also did not require any changes to Star’s existing sales team, regional distribution centers, or back office support. (McCutcheon, Tr. 2287-2288; CX 2534 (Bhutada, IHT at 55)).

Response To Finding No. 1668:

Respondent has no specific response.

1669. Star did face one significant barrier to entry into the Domestic Fittings market – McWane’s Exclusive Dealing Policy. Exclusionary conduct is recognized as a barrier to entry. (CX 2260-A (Schumann Rep. at 65) (explaining that preventing a Fittings supplier from the using the services of Distributors “would face an absolute, long-term ‘economic barrier to entry.’”)).

Response To Finding No. 1669:

See General Responses 1, 7, 9 and 12. This finding is incorrect because McWane’s September 22, 2009 letter was not an “Exclusive Dealing Policy,” did not exclude Star, and was not enforced (RPF 425-529) This finding is incomplete, and therefore inaccurate because Dr. Schumann was unable to identify a single distributor that wanted to purchase domestic fittings from Star but was unable to because of McWane’s Rebate Policy. (RPF 524; Schumann, Tr. 4400 . Dr. Normann concluded that there were no Distributors who wanted to buy Star domestic Fittings but were unable to do so because of the Rebate Policy. (RPF 525; Normann, Tr. 4929-4930

1670. A business practice that delays an entrant’s efficient entry into a market (*e.g.*, delays an entrant’s ability to achieve minimum efficient scale) creates an antitrust barrier to entry that may result in harm to consumers. (CX 2260-A (Schumann Rep. at 62)). Antitrust barriers to entry harm consumers by delaying entry that expands output, increases competition, and lowers prices. (CX 2260-A (Schumann Rep. at 62-63)).

Response To Finding No. 1670:

See General Responses 1, 9 and 12. This is a generic statement of economic theory that has not been shown to apply to McWane or to the relevant market, and thus requires no response.

This proposed Finding is in fact a legal conclusion that requires no response. See also response to ¶ 1669, *supra*.

9.4 Domestic Foundries, Pipe Manufacturers, and Other Suppliers of Imported Fittings Are Not Potential Entrants into the Domestic Fittings Market

1671. There are no potential entrants into the Domestic Fittings market. (*See infra* ¶¶ 1672-1693).

Response To Finding No. 1671:

See General Responses 1 and 12, and responses to ¶¶ 1672-1693, *infra*. This is an unsupported legal argument that requires no response.

1672. McWane is unaware of any person that has plans to begin manufacturing Domestic Fittings in the next two years. (Supp. Response to RFA at ¶ 11).

Response To Finding No. 1672:

Respondent has no specific response.

9.4.1 Domestic Foundries Are Not Potential Entrants into the Domestic Fittings Market

1673. Domestic foundries are not potential entrants into the Domestic Fittings market. (*Infra* ¶¶ 1674-1682).

Response To Finding No. 1673:

See General Responses 1 and 12, and responses to ¶¶ 1674-1682, *infra*. This is an unsupported legal argument that requires no response.

1674. Frazier & Frazier, Glidewell, EBAA, and East Jordan, which are all domestic foundries that have produced unfinished Domestic Fittings or castings, have each testified that they have no plans to enter the market for selling finished Domestic Fittings. (CX 2505 (Frazier, Dep. at 69-70); CX 2507 (Glidewell, Dep. at 127); CX 2499 (Keffer, Dep. at 13-14); CX 2498 (Teske, Dep. at 33-34)).

Response To Finding No. 1674:

See General Responses 6 and 12. This finding is inaccurate because Mr. Frazier testified that, “if you could find a way to get it financed and there is a profit, we might [consider the possibility of making Fittings].” (CX 2505 (Frazier, Dep. at 69)).

1675. Currently, Frazier & Frazier, Glidewell, and Mabry are each producing Domestic Fitting castings, or unfinished Fittings, for suppliers like Star. (CX 2505 (Frazier, Dep. at 68-69); CX 2507 (Glidewell, Dep. at 122-123); RX-676 (Hall, Dep. at 16-20)).

Response To Finding No. 1675:

Respondent has no specific response.

1676. Frazier & Frazier, Glidewell, and Mabry do not sell Domestic Fittings or Domestic Fittings castings to any End User. (CX 2505 (Frazier, Dep. at 68-69); CX 2507 (Glidewell, Dep. at 122-123); CX 2517 (Hall, Dep. at 148-150)).

Response To Finding No. 1676:

Respondent has no specific response.

1677. Backman Foundry “never even considered” producing large quantities of Domestic Fittings in response to the demand created by ARRA because of the “many million dollars” it would cost to “make the expansion to be able to get into the market.” (RX-648 (Backman, Dep. at 109-110) (“I never even considered it. It wasn’t an option. Sorry, I didn’t mean to beat on the table.”)).

Response To Finding No. 1677:

This finding is incomplete and misconstrues the testimony of Mr. Backman.

Mr. Backman testified that Backman Foundry never considered expanding its production from specialty domestic Fittings to a fuller line of domestic Fittings as a result of ARRA “when anybody and their dog can see that this market is going to end at some point.” (RPF 422).

1678. While EBAA and East Jordan produce waterworks products, neither foundry currently produce Domestic Fitting castings. (RX-658 (Keffer, Dep. at 8-9); CX 2498 (Teske, Dep. at 112)).

Response To Finding No. 1678:

See General Response 6. This finding is incorrect because there is no page 112 in CX 2498.

1679. To enter the manufacture of Domestic Fittings would require major equipment additions and an economic investment at EBAA Iron, including: molding machines; equipment for producing cored or hollow castings; and new furnaces. (CX 2499 (Keffer, Dep. at 13-14)).

Response To Finding No. 1679:

See General Response 6.

1680. EBAA considered expanding into Domestic Fitting production three or four years ago, and estimated that the required expansion would cost at least \$10 to \$12 million, and take two years to realize. (CX 2499 (Keffer, Dep. at 49-51)).

Response To Finding No. 1680:

See General Response 6.

1681. Manufacturing Domestic Fittings at East Jordan would require an extremely expensive capital investment including: a major conversion of EJ's East Jordan, Michigan melt facility, core-making equipment, and an investment in Domestic Fitting tooling. (CX 2498 (Teske, Dep. at 31-34)).

Response To Finding No. 1681:

See General Response 6.

1682. To manufacture finished Domestic Fittings, a domestic foundry already making Domestic Fitting castings would have to design and develop a Domestic Fittings product line, invest in a Domestic Fitting sales force, identify customers, and invest in the equipment and expertise required to finish Domestic Fittings. (CX 2505 (Frazier, Dep. at 69-72); CX 2507 (Glidewell, Dep. at 125-126)).

Response To Finding No. 1682:

See General Response 6.

9.4.2 Pipe Manufacturers Are Not Potential Entrants into the Domestic Fittings Market

1683. Pipe manufacturers are not potential entrants into the Domestic Fittings market. (*Infra* ¶¶ 1684-1688).

Response To Finding No. 1683:

See General Response 1, and responses to ¶¶ 1684-1688, *infra*. This is an unsupported legal argument and factual assertion that requires no response.

1684. [REDACTED] (CX 2508 (Kuhrts, Dep. at 19-20, 49, *in camera*); CX 2486 (Burns, Dep. at 70-71, 123-124); CX 2542 (Morton, Dep. at 56)).

Response To Finding No. 1684:

Respondent has no specific response, except to note that one of the reasons for this is that ARRA's impact on demand for domestic fittings was short-lived and minimal. (RPF 397-423) Former domestic fittings manufacturers did not believe ARRA – with its limited time window- made it worthwhile to expand or return to domestic fittings production. (RPF 421)

1685. ACIPCO has not considered re-entering the manufacture of Domestic Fittings under 24” in diameter, despite a 7% to 8% market price increase after ACIPCO stopped making these sizes. (CX 2486 (Burns, Dep. at 36, 70-71, 123-124)).

Response To Finding No. 1685:

See response to ¶ 1684, *supra*.

1686. ACIPCO presently lacks the equipment necessary for producing Domestic Fittings of less than 30” in diameter. (CX 2486 (Burns, Dep. at 84)).

Response To Finding No. 1686:

Respondent has no specific response.

1687. U.S. Pipe evaluated re-entering domestic production in 2009 and chose not to re-enter because it was cost prohibitive. (RX-701 (Morton, Dep. at 47-49, 56-57)).

Response To Finding No. 1687:

See response to ¶ 1684, *supra*.

1688. [REDACTED] (CX 2508 (Kuhrt, Dep. at 19-20, 49, *in camera*)).

Response To Finding No. 1688:

Respondent has no specific response.

9.4.3 Other Suppliers of Imported Fittings Are Not Potential Entrants into the Domestic Fittings Market

1689. Other suppliers of imported Fittings are not potential entrants into the Domestic Fittings market. (*Infra* ¶¶ 1690-1693).

Response To Finding No. 1689:

See General Responses 1 and 12, and responses to ¶¶ 1690-1693, *infra*. This is an unsupported legal argument and factual assertion that requires no response.

1690. Metalfit stated that it has no plans to begin manufacturing Domestic Fittings under 24” in diameter. (CX 2518 (Meyer, Dep. at 184-185)).

Response To Finding No. 1690:

Respondent has no specific response.

1691. Metalfit, a Mexican Fittings producer and supplier to the US market, has indicated that even a 10% increase in the price of Domestic Fittings would not induce the company to invest in entering the Domestic Fittings market. (CX 2518 (Meyer, Dep. at 184-185)).

Response To Finding No. 1691:

See General Response 12. This finding is inaccurate because Mr. Meyer was responding to whether “the price of domestic fittings increased an additional 10 percent relative to [Metalfit’s] Mexican fittings” would change his interest in manufacturing Domestic Fittings. (CX 2518 (Meyer, Dep. at 185)). The main reason more potential suppliers did not decide to invest in domestic fittings production is that ARRA’s impact on demand for domestic fittings was short-lived and minimal. (RPF ¶¶ 397-423)

1692. SIP, a supplier of imported Fittings, has no plans to enter the Domestic Fittings market given McWane’s Exclusive Dealing Policy. (*See infra* § 10.8).

Response To Finding No. 1692:

See General Responses 1, 7, 11 and 12, and response to § 10.8, *infra*. This finding is an incorrect unsupported legal argument and factual assertion that requires no response.

1693. [REDACTED] (CX 2500 (Swalley, Dep. at 184-185), *in camera*) [REDACTED] (CX 2500 (Swalley, Dep. at 178)).

Response To Finding No. 1693:

See General Response 12. This finding is misleading because Electrosteel saw that, by the third quarter of 2010, bidding on ARRA jobs had ceased. (RPF ¶ 415) Otherwise, Respondent has no specific response.

9.5 McWane Was Able to Control Prices, Impose Unfavorable Terms on Customers, and Exclude Competitors in the Domestic Fittings Market

9.5.1 McWane Charged Higher Prices and Earned Higher Margins for Domestic Fittings Than for Non-Domestic Fittings, and Its Pricing Was Not Constrained by Competitor Efforts to “Flip” Domestic Specifications to Open Specifications

1694. In 2008, 2009, and 2010, McWane was able to charge higher prices, offer less discounting, and earn higher margins for Domestic Fittings than for otherwise identical non-Domestic Fittings, and its Domestic Fittings prices were not constrained by competitor efforts to “flip” Domestic Specifications to Open Specifications. (*Infra* ¶¶ 1674-1682).

Response To Finding No. 1694:

See General Response 1, and responses to ¶¶ 1674-1682, *infra*. This is an unsupported assertion that requires no response.

1695. The price of a Domestic Fitting was “twice as much as an imported fitting” during the ARRA period, notwithstanding the functional interchangeability of imported and Domestic Fittings. (CX 2489 (Morrison, IHT at 45) (“As we sit here today, without question a domestic fitting is twice as much as an imported fitting, and that’s primarily because of the stimulus situation.”); *see also supra* §§ 4.2.1, 5.2.2).

Response To Finding No. 1695:

See General Responses 3 and 6, and responses to § 4.2.1 and 5.2.2, *supra*. This finding is misleading because the reason the price of a domestic fitting is higher than the price of a non-domestic fitting is because domestic production costs are higher than production costs in countries such as China, India, Korea and Mexico. (RPF ¶ 382)

1696. In 2008, McWane did not typically offer Project Pricing for Domestic Fittings because the less competitive Domestic market did not require it. (Tatman, Tr. 334-335; CX 2199 at 001 (McWane’s Pricing Coordinator’s email refusing a sales person’s request for Project Pricing for Domestic Fittings because “We are the only one who makes the full

line of 24” and down. No need to drop the price unless Star is an issue.”); CX 2480 (Napoli, Dep. at 73 (stating that McWane often was not asked to offer Project Pricing for Domestic Fittings)).

Response To Finding No. 1696:

See General Responses 1 and 12. See response to ¶ 1695, *supra*. This finding is inaccurate because the cited testimony does not support the statement that McWane “did not typically” offer job pricing or that those times they may not have offered job pricing McWane did so “because the less competitive domestic Fittings market did not require it.”

1697. McWane was not willing to negotiate the price of Domestic Fittings after the passage of ARRA. (CX 2489 (Morrison, IHT at 45) (“[U]ntil the stimulus project came around, everything was negotiable. When the stimulus project came around the price became firm on the domestic fitting. There has been little if any that I’m aware of negotiation on what you’re going to pay for the domestic fitting and the spread widened.”); Sheley, Tr. 3420-3421 (Illinois Meter sometimes receives Project Pricing for specific imported Fittings orders, but does not receive Project Pricing for Domestic Fittings); CX 2515 (Sheley, IHT at 28) (“Well, on that import product you can negotiate prices. Domestic product, there’s a price and that’s what you pay.”); CX 2513 (Webb, IHT at 99-100) (explaining that after ARRA was passed McWane “changed and reduced” the rebate on domestic fittings which is “effectively” an increase in price for domestic fittings)).

Response To Finding No. 1697:

See General Responses 3 and 6. This finding is misleading because it consists only of the un-cross-examined opinions of a few distributors. In fact, McWane’s domestic fittings prices were essentially flat, including during ARRA. (RPF 600) Indeed, McWane’s prices were lower than Star’s, as Star was a less efficient competitor. (RPF ¶¶ 602-604)

1698. Based on Electrosteel USA’s analysis regarding the production of Domestic Fittings, Mr. Swalley sees no cost-based reason for the price differential between Domestic Fittings and non-Domestic Fittings. (CX 2500 (Swalley, Dep. at 160-161)).

Response To Finding No. 1698:

See General Response 6. This finding is irrelevant because it is based on the opinion of a person who is not involved in domestic fittings production. In fact, the evidence is that Non-domestic Fittings manufactured in countries such as China, India, Korea and Mexico are less

expensive, by approximately 25%, than Fittings produced in the United States, because production costs in those countries are lower. (RPF 382)

1699.

(Tatman, Tr. 1042, *in camera*); CX 2537 (McCutcheon, IHT at 87-91) (describing the significant price differential between Domestic and non-Domestic prices, and the persistence of Domestic Only specifications – even before ARRA – despite the differential)).

Response To Finding No. 1699:

See General Responses 3, 6 and 11, and response to ¶ 1697, *supra*. This finding is incorrect, as it is contradicted by overwhelming evidence to the contrary. (RPF ¶¶ 602-604)

The reason for the higher prices of domestic fittings was higher domestic production costs for those fittings. (RPF ¶ 382).

1700. In 2003, Buy America preference provisions applied to 10% to 20% of all ductile iron fittings shipments in the United States. (RXD-012 at 033 (admitted into evidence at trial, Tr. 4637) (U.S. International Trade Commission report on Certain Ductile Iron Waterworks Fittings From China, Dec. 2003; ITC’s finding based on testimony of McWane (the petitioner in the ITC matter, *see* RDX-012 at 009) and Sigma)). Prior to the passage of ARRA in 2009, Domestic-only Fittings projects still comprised approximately 15% to 20% of the overall Fittings market. (Tatman, Tr. 236 (15% to 18%); McCutcheon, Tr. 2279-2280 (Star estimated 15% to 20%); CX 2535 (Bhutada, Dep. at 11), *in camera* [REDACTED]; CX 2501 (Prescott, IHT at 41) (20% of customers were “a hundred percent domestic”); CX 2509 (Groeniger, IHT at 41) (“Q. Do you have a sense of what your split in terms of revenue for domestic and imported fittings was before the ARRA? A. 75/25 foreign. Q. Uh-huh, 75% foreign, 25% domestic? A. Yes, uh-huh.”); Webb, Tr. 2732 (Before ARRA, about 20% of HD Supply’s Fittings sales were of Domestic Fittings)).

Response To Finding No. 1700:

See General Responses 3, 6 and 11. This finding is misleading to the extent it implies that domestic-only specifications have increased. After a small increase at the height of ARRA, which may or may not have been attributable to ARRA, domestic-only specifications have continued to do nothing but “erode over time.” (RPF ¶¶ 376-423)

1701. Sigma does not try to change statutes that require the use of Domestic Fittings. (CX 2523 (Bhattacharji, Dep. at 127-128) (Sigma has “never attempted in any concentrated fashion

to work at state level to change the law, a Buy America law. Like in Pennsylvania, we have not gone to the state level to make changes. New Jersey is another state which is Buy America, but we haven't gone. So all of our efforts have been in those geographical areas where the state doesn't have a mandated Buy America law, and townships and water companies have something on a spec which doesn't allow an imported product to be used. . . . We are businessmen, and talking to politicians and people like that is a waste of time.”)).

Response To Finding No. 1701:

See General Response 6. Respondent has no specific response, except that this finding conflicts with some of Complaint Counsel's other proposed findings regarding Sigma's lobbying and education efforts around the time ARRA was enacted.

1702.

0043, in camera (RX-721 at 0041,

see also CX 2416 at 043, in camera

Response To Finding No. 1702:

See General Responses 1 and 11, and response to ¶ 1699, *supra*.

9.5.2 McWane Was Able to Impose Unfavorable Terms on Distributor Customers

1703. McWane was able to impose more onerous terms on Distributors for Domestic Fittings than for otherwise identical imported Fittings. (*Infra* ¶¶ 1704-1708).

Response To Finding No. 1703:

See General Responses 1 and 11, and responses to ¶¶ 1704-1708, *infra*. This is an unsupported assertion that requires no response.

1704. In a January 28, 2010 Domestic Fittings program and policy review document, Mr. Tatman observed that “[w]hile most distributors understand the reasons behind the

[Exclusive Dealing] policy, it has created negative goodwill among many of them.” (CX 0118 at 003).

Response To Finding No. 1704:

See General Responses 1, 5 and 7. This finding is misleading because Mr. Tatman did not refer to an “Exclusive Dealing Policy.” This finding demonstrates that the distributors had market power and the ability to “punish” fittings suppliers such as McWane if they were unhappy. (RPFF ¶¶ 38-56)

1705. Under the Exclusive Dealing Policy announced by McWane on September 22, 2009, McWane would withhold rebates and cut off the supply of Domestic Fittings from Distributors who chose to buy Domestic Fittings from Star. (See *infra* §§ 10.3.1, 10.3.2).

Response To Finding No. 1705:

See General Responses 1 and 7, and responses to §§ 10.3.1 and 10.3.2, *infra*. This is an incorrect, unsupported legal argument and factual assertion that requires no response.

1706. McWane imposed its Exclusive Dealing Policy on an all-or-nothing basis against customers with multiple branches. (CX 0024 at 001 (“[I]f any Hajoca location chooses to buy another domestic fittings supplier[’s] product Hajoca *will not* have direct access to the McWane ductile iron water main fittings for a period of time as well as loss of any accrued rebate to date.” (emphasis added))). Hajoca opposed this policy and asked McWane to modify it and have the policy apply branch by branch, but McWane refused. (CX 0022 at 002; Pitts, Tr. 3306-3308; see also *infra* § 10.4).

Response To Finding No. 1706:

See General Responses 1, 5, 7 and 11. This response is incorrect, and is contradicted by the overwhelming evidence that McWane’s September 22, 2009 rebate letter was not an exclusive dealing policy, was not enforced, was not “all or nothing,” and did not preclude Star from selling domestic fittings to many distributors, including McWane’s customers. (RPFF ¶¶ 425-529)

1707. TDG was opposed to McWane’s Exclusive Dealing Policy and its terms, and thus did not accept McWane’s September 2009 Domestic Fittings rebate proposal. (See *infra* § 10.5.6). TDG objected, in part, because the new policy required TDG to police its members’ Domestic Fittings purchases to ensure that all locations for all TDG

Distributors purchase all of their Domestic Fittings from McWane. (Sheley, Tr. 3408-3409; CX 2494 (R. Fairbanks, Dep. at 114) (because McWane proposal involved policing of individual member companies, it “[d]idn’t fit our model”).

Response To Finding No. 1707:

See General Responses 1 and 7, and response to § 10.5.6, *infra*. This finding misconstrues the testimony, but Respondent does not dispute that Star – not McWane – was selected as the preferred domestic Fittings supplier for TDG in 2010. (RPF 469) This demonstrates that Star was not excluded from domestic fittings.

1708. End Users that use Open Specification also enjoy better price, quality, product range, and service from import manufacturers than they receive from McWane on Domestic Fittings. (CX 2523 (Bhattacharji, Dep. at 131-134)).

Response To Finding No. 1708:

See General Response 6. This finding misconstrues the testimony of Mr. Bhattacharji because he was discussing what sales pitches Sigma made to end users in order to get them to buy imported Fittings. (CX 2523 (Bhattacharji, Dep. at 131-132) (“Q. When Sigma would work with engineers to change their specifications, what arguments would Sigma make about why an engineer should open its specification to allow imports?...A. We taught our people to present the Sigma arguments, which is what we went to a new customer with all the same, PQRS; price, quality, range, service. That was our mantra. And we built our business on the basis of price, quality, range, service.”)).

9.5.3 McWane Was Able to Exclude Competitors from the Domestic Fittings Market

1709. McWane was able to exclude competitors from the Domestic Fittings market. (*See infra* ¶¶ 1710-1711).

Response To Finding No. 1709:

See General Responses 1, 11 and 12, and responses to ¶¶ 1710-1711, *infra*. This is an incorrect, unsupported assumption that requires no response.

1710. McWane's Exclusive Dealing Policy had the effect of excluding Star from the Domestic Fittings Market. McWane's Exclusive Dealing Policy caused Star to lose sales, prevented Star from investing in its Domestic business, and made Star unable to effectively compete with McWane in Domestic Fittings. (*See infra* § 10.9)

Response To Finding No. 1710:

See General Responses 1, 7, 11 and 12, and response to § 10.9, *infra*. This is an incorrect, unsupported assertion that requires no response. It is also completely contradicted by the record evidence. (RPF 425-529)

1711. SIP abandoned its plans to enter the Domestic Fittings market after McWane adopted the Exclusive Dealing Policy. (*See infra* § 10.8).

Response To Finding No. 1711:

See General Responses 1, 7, 11 and 12, and response to § 10.8, *infra*. This is an incorrect, unsupported legal argument and factual assertion that requires no response.

10. McWane Implemented an Exclusive Dealing Policy in the Domestic Fittings Market

10.1 Star Entered the Domestic Fittings Market

1712. Prior to 2009, all the Fittings sold by Star were generally imported from China, Korea, Brazil or Venezuela. (RX-692 (Bhargava, Dep. at 9-10)).

Response To Finding No. 1712:

Respondent has no specific response.

10.1.1 Star Announced Its Entry into the Domestic Fittings Market in June 2009

1713. At a June 2009 AWWA industry conference, Star publicly announced that it would begin selling Domestic Fittings in September 2009. (Joint Stipulations of Fact, JX 0001 ¶ 23; Brakefield, Tr. 1401-1402; CX 2533 (Bhargava, Dep. at 47-48); CX 2489 (Morrison, IHT at 68) (“Star surprised everyone at the convention by unveiling their new line of domestic fittings.”); McCutcheon. Tr. 2295-2296 (announcing entry into Domestic Fittings market through AWWA show announcement, handouts, email “blast[s]” to customer base, and its website); Tatman, Tr. 645 (noting that Star also announced its Domestic entry on its website)).

Response To Finding No. 1713:

Respondent has no specific response.

1714. On or about June 15, 2009, Star sent a letter to customers stating, “Look for our . . . Fitting inventories to start arriving in September.” (CX 1674 at 002).

Response To Finding No. 1714:

Respondent has no specific response.

1715. On or about June 24, 2009, Star issued letters to its customers announcing the multipliers for its “American Made” Domestic Fittings. (CX 2330; CX 2331; CX 2332; CX 2333).

Response To Finding No. 1715:

Respondent has no specific response.

10.1.2 Star Planned to Quickly Enter the Domestic Fittings Market While It Built Its Inventory and Sales to Become a Full-Line Supplier with Its Own Domestic Foundry

1716. In 2009, Star planned to quickly enter the Domestic Fittings market with a partial line manufactured by independent foundries, and to build up the inventory and sales base required to become a full-line supplier with its own domestic foundry. (*Infra* ¶¶ 1717-1732).

Response To Finding No. 1716:

See General Responses 1, 11 and 12, and responses to ¶¶ 1717-1732, *infra*. This is an unsupported assertion that requires no response.

1717. Star began to seriously consider entering the Domestic Fittings market after ARRA was enacted. (Bhargava, Tr. 2926-2928 (Star first considered Domestic entry around March or April of 2009, in response to ARRA’s Buy American provision and after eliminating Korea and Mexico as potential solutions); RX-698 (McCutcheon, Dep. at 132) (around April 2009); McCutcheon, Tr. 2277-2278 (2009); RX-694 (Bhutada, Dep. at 48) (March or April 2009); CX 2533 (Bhargava, Dep. at 11) (Star first considered producing fittings domestically in 2009 after the passage of ARRA, because projects funded by ARRA had to be made in the United States)).

Response To Finding No. 1717:

See General Response 12.

1718. Star believed that there would be sufficient demand in the Domestic Fittings market to support two suppliers. (McCutcheon, Tr. 2285).

Response To Finding No. 1718:

See General Response 12. This finding is incomplete in that, regardless of what Star hoped or believed, the actual impact of ARRA on the demand for domestic fittings was short-lived and minimal. (RPF 397-423).

1719. Upon the enactment of ARRA, Star estimated that the demand for Domestic Fittings could double and that it would be foreclosed from the domestic market. (CX 2535 (Bhutada, IHT at 31) (demand for Domestic Fittings could increase from 20% to 40% of total demand for fittings); see *supra* § 8.2 (describing threat posed by ARRA)).

Response To Finding No. 1719:

See General Responses 3, 6 and 12, and response to § 8.2, *supra*. Regardless of what Star hoped or believed, the actual impact of ARRA on the demand for domestic fittings was short-lived and minimal. (RPF 397-423).

10.1.2.1 Star Decided to Initially Enter the Domestic Fittings Market by Contracting with Independent Domestic Foundries in Order to Bring Its Domestic Fittings to Market More Quickly

1720. To bring its Domestic Fittings to market more quickly, Star initially entered the Domestic Fittings market by contracting with independent domestic foundries.. (*Infra* 1721-1725).

Response To Finding No. 1720:

See General Responses 1, 11 and 12, and responses to 1721-1725, *infra*. This is an unsupported assertion that requires no response.

1721. In 2009, Star considered three alternatives for producing Domestic Fittings in the United States: (1) building a new foundry; (2) purchasing an existing foundry; or (3) contracting with existing independent foundries to manufacture castings (unfinished Domestic Fittings). (McCutcheon, Tr. 2284; Bhargava, Tr. 2928-2929 (“[W]e could set up our own foundry from ground zero[,] . . . we could buy an existing foundry . . . or we could go to contract manufacturing . . .”)); see also CX 2533 (Bhargava, Dep. at 19-22), *in camera*

[REDACTED]
CX 2534 (Bhutada, Dep. at 46), *in camera*
[REDACTED]

Response To Finding No. 1721:

Respondent has no specific response.

1722.

(Bhargava, Tr. 2930, 2990, *in camera*

; McCutcheon, Tr. 2284-2285 (also supporting initially entering Domestic Fittings market by contracting with third party foundries because Star was uncertain if it would have sufficient sales to sustain its own foundry); CX 2537 (McCutcheon, IHT (Vol. 1) at 109, *in camera*)

Response To Finding No. 1722:

Respondent has no specific response.

1723.

(Bhargava, Tr. 2930-2031, *in camera* [REDACTED])

Response To Finding No. 1723:

Respondent has no specific response.

1724.

[REDACTED]
[REDACTED] (Bhargava, Tr. 2945-2946, *in camera*).

Response To Finding No. 1724:

Respondent has no specific response.

1725.

[REDACTED]
(CX 2535 (Bhutada, Dep. at 118-119), *in camera*); McCutcheon, Tr. 2284; Bhargava, Tr. 2931, *in camera* [REDACTED]
[REDACTED]; CX 2533 (Bhargava, Dep. at 26-27), *in camera*).

Response To Finding No. 1725:

Respondent has no specific response.

10.1.2.2 Star Decided to Enter the Domestic Market by First Supplying the Most Common Fittings as It Built Its Inventory to Become a Full-Line Supplier

1726. Star planned to enter the Domestic Fittings market by offering the most popular Fittings items first. Star developed a priority for the patterns it constructed by identifying the best-selling Fittings, which require approximately 150 to 200 patterns but account for approximately 80% of Fittings sales. (CX 2535 (Bhutada, Dep. at 52-53)).

Response To Finding No. 1726:

See General Response 12.

1727. Star planned to offer a relatively full line of the more commonly used C153 Domestic Fittings, and a more limited line of C110 fittings, for which Star would stock "A" items and otherwise produce on a per-project basis. (McCutcheon, Tr. 2292-2293; CX 2537 (McCutcheon, IHT (Vol. 1) at 133) (Star was anticipating having a lot of patterns, but not all, by the end of 2009)).

Response To Finding No. 1727:

Respondent has no specific response.

1728. The contracting and incremental approach to entering the Domestic Fittings market adopted by Star is the same approach that others had taken when entering the imported Fittings market. (CX 2527 (Pais, IHT at 155) (import entry); Pais, Tr. 1723 (Sigma first entered Fittings market with about 50 items); CX 2522 (Agarwal, Dep. at 75-76), *in camera* [REDACTED]; CX 2522 (Agarwal, Dep. at 97-98), *in camera* [REDACTED] [REDACTED])

Response To Finding No. 1728:

See General Response 12.

10.1.2.3 Star Planned to Buy or Build Its Own Foundry in Order to Recognize Manufacturing Cost Efficiencies After It Had Sufficient Sales to Justify the Additional Investment

1729. [REDACTED] (Bhargava, Tr. 2946; CX 2537 (McCutcheon, IHT (Vol. 1) at 108-109), *in camera* [REDACTED])

Response To Finding No. 1729:

See General Response 12. This finding is incomplete, and therefore misleading because Star never operated its own Fittings foundry, whether inside or outside of the United States, yet has managed for years to be a viable competitor. (RPF 439; JX 694 (Bhutada, Dep. at 72-73 (“Q. I’m sorry, Mr. Bhutada. I was starting to ask a question about whether Star ever contemplated its own domestic foundry. A. Yes, sir. Right early on. Q. When you say early on, when would that have been? A. That is back in May, June of 2009. Q. May or June of 2009? A. Yes, sir. Q. What led to that consideration? A. We knew that to be viable competitor we had to have our own foundry where we could manufacture the substantial line of product and finish them at the same place. Q. Star has never operated a foundry before in its history. Correct? A. That is correct. Q. Was Star a viable competitor in the import market? A. Yes, sir. Q. So it became a viable competitor by sourcing from a number of different foundries. Correct? A. That is correct.”).)) This finding is misleading to the extent it is based on self-serving speculation on Star’s part, and is not supported by any independent analysis. Even Dr. Schumann admitted that this is pure speculation. (RPF 605-608)

1730.

[REDACTED]
 (Bhargava, Tr. 2963, *in camera*

[REDACTED]; CX 2535

(Bhutada, Dep. at 127), *in camera*

[REDACTED]; *see infra* § 10.9.2.1)).

Response To Finding No. 1730:

See General Response 11. This finding is misleading to the extent it is based on self-serving speculation on Star’s part, and is not supported by any independent analysis. Even Dr. Schumann admitted that this is pure speculation. (RPF 605-608)

1731.

[REDACTED] (Bhargava, Tr. 2961, *in*

camera).

(Bhargava, Tr. 2962, *in camera*).

Response To Finding No. 1731:

See General Response 11. This finding is misleading to the extent it is based on self-serving speculation on Star's part, and is not supported by any independent analysis. Even Dr. Schumann admitted that this is pure speculation. (RPFF ¶¶ 605-608)

1732.

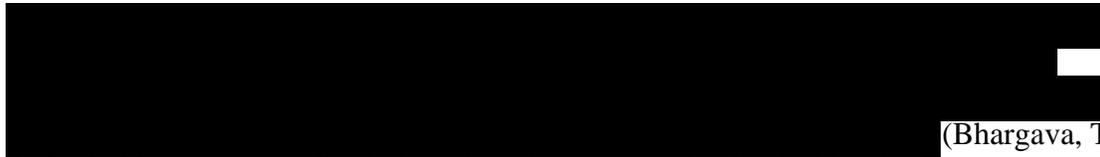
(Bhargava, Tr. 2955-2956, *in camera*).

Response To Finding No. 1732:

See General Response 11. This finding is misleading to the extent it is based on self-serving speculation on Star's part, and is not supported by any independent analysis. Even Dr. Schumann admitted that this is pure speculation. (RPFF ¶¶ 605-608)

10.1.3 Star Took the Steps Necessary to Enter the Domestic Fittings Market in 2009

1733.

 (Bhargava, Tr. 2936-2938, *in camera*; CX 2535 (Bhutada, Dep. at 50); CX 2533 (Bhargava, Dep. at 30, *in camera*); *infra* ¶¶ 1734-1757).

Response To Finding No. 1733:

Respondent has no specific response. Star was not a full-line domestic Fittings producer in 2009 or 2010, and even today, and, therefore, did not take the necessary steps, in the necessary amount of time. (Morton, Tr. 2901)

10.1.3.1 Star Identified and Contracted with Independent, Third-Party Foundries to Produce Domestic Fittings for Star

1734. In 2009, Star identified and contracted with independent, third party foundries to produce Domestic Fittings for Star. (*Infra* ¶¶ 1735-1747).

Response To Finding No. 1734:

See General Response 1 and responses to ¶¶ 1735-1747, *infra*.

1735.

(Bhargava, Tr. 2931-2932, *in camera*;
CX 2535 (Bhutada, Dep. at 56), *in camera*).

Response To Finding No. 1735:

Respondent has no specific response.

1736.

(CX 2535 (Bhutada, Dep. at 57, 118-119), *in camera*).

Response To Finding No. 1736:

Respondent has no specific response.

1737.

[REDACTED] (CX 2535 (Bhutada,
Dep. at 119), *in camera*; CX 2533 (Bhargava, Dep. at 93), *in camera*).

Response To Finding No. 1737:

Respondent has no specific response.

1738.

[REDACTED]
[REDACTED] (Bhargava, Tr. 2937-2938, *in*
camera; CX 2535 (Bhutada, Dep. at 57-59), *in camera*).

Response To Finding No. 1738:

Respondent has no specific response.

1739.

[REDACTED]
[REDACTED] (CX 2533 (Bhutada, Dep. at 30, *in camera*).

Response To Finding No. 1739:

Respondent has no specific response.

1740.

(Bhargava, Tr. 2933, *in camera*; CX 2535 (Bhutada, Dep. at 60), *in camera*).
(CX 2535
(Bhutada, Dep. at 61), *in camera*).

Response To Finding No. 1740:

Respondent has no specific response.

1741. Star and Frazier & Frazier, a domestic foundry, signed a confidentiality agreement on June 2, 2009, and a supply chain agreement on June 12, 2009. (RX-665 (Gupta, Dep. at 16, 20, 43-44).

Response To Finding No. 1741:

Respondent has no specific response.

1742. On July 2, 2009, Star submitted a purchase order to Frazier & Frazier for \$328,599 worth of Domestic Fitting castings. (RX-665 (Gupta, Dep. at 48, 49)). Frazier & Frazier sold its first Domestic Fitting casting to Star in approximately August 2009. (RX-665 (Gupta, Dep. at 57-58)).

Response To Finding No. 1742:

Respondent has no specific response.

1743. Frazier & Frazier produced 70 to 80 patterns of Domestic Fitting castings for Star by the end of 2009, which increased to approximately 300 unique patterns with a 9” or smaller diameter by 2012. (CX 2506 (Gupta, Dep. at 75-76, 89-90)).

Response To Finding No. 1743:

Respondent has no specific response.

1744. Star first contacted Glidewell about making Domestic Fitting castings at the end of 2009 or early in 2010, and Glidewell began producing Domestic Fittings casting for Star less than one month later. (RX-666 (Glidewell, Dep. at 29-30, 58)).

Response To Finding No. 1744:

Respondent has no specific response.

1745. In 2010, Glidewell sold \$635,439 in products, and 34 different types of Fittings castings to Star in 2010. (RX-666 (Glidewell, Dep. 54); CX 1417 at 007). In 2011, Glidewell sold \$590,773 in products, and 46 different types of Fittings castings to Star. (RX-666 (Glidewell, Dep. at 56-57); DX 1418 at 008). And from January 1, 2012 through March 23, 2012, Glidewell sold \$83,878 in products. (RX-666 (Glidewell, Dep. at 58); CX 1419 at 002).

Response To Finding No. 1745:

Respondent has no specific response.

1746. Star and Mabry entered into a confidentiality agreement for the production of Domestic Fittings castings on November 2, 2009, and Mabry began producing at least three types of Domestic Fittings castings for Star by the end of 2009. RX-676 (Hall, Dep. at 32-33, 37-38, 67-68)).

Response To Finding No. 1746:

Respondent has no specific response.

1747. In 2010, Mabry produced at least 135 types of Domestic Fitting castings for Star. (CX 1581; RX-676 (Hall, Dep. at 69)). To date, Mabry has produced at least 177 types of Domestic Fitting castings for Star, resulting in approximately \$2.9 million in invoices from Mabry to Star. (CX 1581; RX-676 (Hall, Dep. at 69-70)).

Response To Finding No. 1747:

Respondent has no specific response.

10.1.3.2 Star Acquired Patterns for Producing Domestic Fittings

1748. To enter the Domestic market, Star acquired patterns in China that could be used at foundries in the United States for the construction of a full line of C153 Fittings. (CX 2537 (McCutcheon, IHT (Vol. 1) at 112-113); RX-694 (Bhutada, Dep. at 51); *infra* ¶¶ 1749-1754).

Response To Finding No. 1748:

See General Response 1. This finding is incomplete and therefore misleading because no single foundry in the United States was capable of manufacturing a full line of C153 Fittings, forcing Star to utilize multiple foundries in a variety of locations. (RPFF 443 (Bhargava, Tr. 3000, 2932)). Additionally, none of the contract foundries producing domestic Fittings for Star were capable of the finishing operations necessary to transition a raw casting into a finished

Fitting. As a result, Star set up a facility in Houston, Texas to perform finishing operations. (RPF 445 (Bharvaga, Tr. 2999-3000; JX 696; McCutcheon, IHT at 40-42; McCutcheon, Tr. 2618-2620; RX 572)). (RPF 447 (Bhargava, Tr. 2940)). Star's use of multiple foundries and separate finishing locations resulted in increased costs and inefficiencies. (RPF 450 (Bhargava, Tr. 2991)).

1749. Star invested approximately \$3.5 million to secure the patterns necessary for producing Domestic Fittings. (RX-694 (Bhutada, Dep. at 62)).

Response To Finding No. 1749:

See General Response 6.

1750. By September 2009, Star had obtained in China the patterns for the most popular Fittings that it had identified for inclusion in its initial Domestic Fittings offering, and these patterns were either available in the United States or were in transit to the United States. (CX 2535 (Bhutada, Dep. at 55)).

Response To Finding No. 1750:

See General Response 6. This finding is incomplete and therefore misleading because as early as March or April 2009, Star recognized the inefficiencies and costs associated with the use of multiple domestic foundries. (RPF 448 (Bhargava, Tr. 2990-2991)). Star recognized that it would have have a a full range of domestic Fittings available on day one, and that a ramp-up period would be required. (RPF 491 (McCutcheon, Tr. 2606)). It was not until mid-year 2010 that Star had patterns available domestically that were equivalent to McWane's in-stock items. (RPF 458 (Bhargava, Tr. 3012)). In fact, Distributors were concerned about Star's lack of a full-line of domestic Fittings. (RPF 490 (JX 652 (Johnson, Dep. at 106)); RPF 494 (Morton, Tr. 2892-2894); RPF 480 (Thees, Tr. 3102-3104; Webb, Tr. 2788-2789); RPF 481 (Sheley, Tr. 3448-3451); RPF 487 (Thees, Tr. 3104); RPF 494).

1751. By the end of 2009, Star had patterns for more than 325 C153 Fittings. (CX 2533 (Bhargava, Dep. at 61)). [REDACTED]

Dep. at 65-66), *in camera*).

(CX 2533 (Bhargava,

Response To Finding No. 1751:

See Response To Finding 1750, *supra*.

1752.

(CX 2533 (Bhargava, Dep. at 66), *in camera*).

Response To Finding No. 1752:

See Response To Finding 1750, *supra*.

1753.

(Bhargava, Tr. 3013, *in camera*). Star was capable of offering a full line of C153 Fittings comparable to the line of Domestic Fittings offered by McWane. (CX 2537 (McCutcheon, IHT (Vol. 1) at 115-116); *see also* Bhargava, Tr. 3011-3012, *in camera*

camera ; CX 2533 (Bhargava, Dep. at 65-66), *in camera*

Response To Finding No. 1753:

See Response To Finding 1750, *supra*.

1754. Star did not immediately acquire patterns for the less commonly used C110 Fittings, except when a Distributor placed an order for a particular C110 Fitting. (CX 2537 (McCutcheon, IHT (Vol. 1) at 113-114)). When it received an order for a C110 Fitting, Star would place an order for the appropriate pattern. By using this approach, it was able to compete in the smaller, less active market for domestic C110 Fittings. (CX 2537 (McCutcheon, IHT (Vol. 1) at 113-114)).

Response To Finding No. 1754:

See Response To Finding 1750, *supra*. Additionally, this finding is incomplete and therefore misleading because Star experienced significant delays in fulfilling orders for domestic Fittings in late 2009 and early 2010 that impacted its competitiveness. (RPF 492 (Bhargava, Tr. 3003 (“Q. Okay. And some of those delays were filling orders to customers; right? A. In the beginning. Q. Okay. Well, in the beginning and into 2010; right? A. Early part of 2010.”)); McCutcheon, Tr. 2634 (“Q. 130. I apologize. Now, Mr. McCutcheon, there are lots and lots of

other reasons in here completely unrelated to the rebates; correct, sir? A. That's correct, yes, sir. Q. And many of them -- I don't want to go through the whole thing, but many of them are related to can't meet delivery times, delay in delivery; correct, sir? A. Yes, sir, that's correct. Q. And in fact, that happened quite a bit in fall of 2009; right? A. Yes, sir, it did.”); RPF 493 (McCutcheon, Tr. 2634); RPF 495 (McCutcheon, Tr. 2632-2634)). Complaint Counsel’s expert, Dr. Laurence Schumann, conceded that Star did not have sufficient product available in Fall 2009 as it ramped up its production -- and even well into 2010 as ARRA wound down --and, thus, lost business for reasons entirely unrelated to McWane. (RPF 496 (Schumann, Tr. 4379; CX 2294)).

10.1.3.3 Star Expanded Its Finishing Facilities for Domestic Fittings

1755.

(McCutcheon, Tr. 2288-2289; Bhargava, Tr. 2937-2939, *in camera*; RX-694 (Bhutada, Dep. at 62)).

Response To Finding No. 1755:

This finding is incomplete and therefore misleading because Star set-up its domestic finishing facility in Houston because none of the contract foundries producing domestic Fittings for Star were capable of the finishing operations necessary to transition a raw casting into a finished Fitting. (RPF 443 (Bhargava, Tr. 3000); RPF 445 (Bhargava, Tr. 2999-3000; JX 696; McCutcheon, IHT at 40-42; McCutcheon, Tr. 2618-2620; RX 572)). (RPF 447 (Bhargava, Tr. 2940)). Star’s use of multiple foundries and separate finishing locations resulted in increased costs and inefficiencies. (RPF 450 (Bhargava, Tr. 2991)). Rather than shipping finished goods directly to a customer or distribution yard, Star’s process necessitated raw castings from six locations across the country [REDACTED]

[REDACTED] to be

shipped to the Houston finishing facility. (RPF 451 (Bhargava, Tr. 2991, 2998-3000, *in camera*)).

1756.

(Bhargava, Tr. 2940, *in camera*)

Response To Finding No. 1756:

See Response To Finding 1755, *supra*.

1757.

(Bhargava, Tr. 2939, *in camera*).

Response To Finding No. 1757:

See Response To Finding 1755, *supra*.

10.1.4 Star's Imported Fittings Business Provided It with the Expertise and Distributor Relationships Necessary for Manufacturing and Selling Domestic Fittings

1758. Star's existing imported fittings business provided it with the expertise and Distributor relationships necessary for manufacturing and selling Domestic Fittings. (*Infra* ¶¶ 1759-1765).

Response To Finding No. 1758:

See General Response 1.

1759.

(Bhargava, Tr. 2979-2980, *in camera*)

Response To Finding No. 1759:

This finding is incomplete and therefore misleading because Star did not even consider purchasing a foundry until September or October 2009. (RPF 436 (Bhargava, Tr. 2956)). In March/April 2009, Star determined that contracting with existing U.S. foundries to produce domestic Fittings would be the quickest path to entering the domestic segment of the Fittings

market. (RPF 434 (Bhargava, Tr. 2930-2931, 2989-2990; (JSLF ¶ 4)). Despite Star's "preference" for owning a foundry, Star made the deliberate decision to use contract foundries instead. (RPF 435 (Bhargava, Tr. 2930)).

1760. As an existing supplier of non-Domestic Fittings, Star already had in place the network of Distributor customers required to enter and compete effectively in the Domestic Fittings market. (Answer at ¶ 25 ("[A]ll suppliers of [Fittings] have distribution relationships or other abilities within the United States sufficient to enable them to compete effectively throughout the country.")).

Response To Finding No. 1760:

See Response To Finding 1759, *supra*.

1761. Star's entry into the Domestic Fittings market did not require any changes to Star's sales team. (McCutcheon, Tr. 2287).

Response To Finding No. 1761:

While McWane does not concede the accuracy of this proposed finding or the supporting citations, McWane believes the proposed finding is irrelevant, and therefore, given the length of the FTC's proposed findings, McWane provides no specific response.

1762. Star's entry into the Domestic Fittings market did not require any changes to Star's relationships with its existing Distributor customers, who would also be its customers for Domestic Fittings. (McCutcheon, Tr. 2287).

Response To Finding No. 1762:

This finding is incomplete and therefore misleading because in late 2009 and early 2010, many distributors had concerns regarding Star's reputation and its ability to provide domestic Fittings. Bill Thees from Ferguson testified that he was concerned that Star didn't own any of its own foundries and that Star did not have the depth and breadth of inventory to meet his company's needs. (RPF 480 (Thees, Tr. 3102-3104)). Jerry Webb from HD Supply testified that he was concerned that Star would not be able to provide the products and delivery times required by its customers. (RPF 480 (Webb, Tr. 2788-2789)). Eddie Gibbs from

WinWholesale testified that he had concerns regarding the quality of Star's domestic Fittings. (RPF 480 (JX 705 (Gibbs, Dep. at 25-28))). Dennis Sheley from Illinois Meter testified that he was not willing to purchase from Star in early 2010 because of a prior negative experience with joint restraints. (RPF 481 (Sheley, Tr. 3448-3451)). Finally, Tom Morton, from U.S. Pipe, testified that he had concerns about Star's ability to provide a full line of domestic Fittings. (RPF 494 (Morton, Tr. 2892-2894)).

1763. Star's entry into the Domestic Fittings market did not require any changes to Star's existing regional distribution centers, which Star would also use for Domestic Fittings. (McCutcheon, Tr. 2287).

Response To Finding No. 1763:

While McWane does not concede the accuracy of this proposed finding or the supporting citations, McWane believes the proposed finding is irrelevant, and therefore, given the length of the FTC's proposed findings, McWane provides no specific response.

1764. In 2009, Star already had in place the back office support needed to sell a line of Domestic Fittings. (McCutcheon, Tr. 2288).

Response To Finding No. 1764:

While McWane does not concede the accuracy of this proposed finding or the supporting citations, McWane believes the proposed finding is irrelevant, and therefore, given the length of the FTC's proposed findings, McWane provides no specific response.

1765. Star did not encounter any problems with municipalities accepting its Domestic Fittings under Domestic specifications. (McCutcheon, Tr. 2294-2295).

Response To Finding No. 1765:

While McWane does not concede the accuracy of this proposed finding or the supporting citations, McWane believes the proposed finding is irrelevant, and therefore, given the length of the FTC's proposed findings, McWane provides no specific response.

10.1.5 Star Had the Overwhelming Support of Its Customer Base

1766. After ARRA was enacted, Star's customers were concerned about their access to Domestic Fittings and were "begging for someone to solve their problem." (CX 2537 (McCutcheon, IHT (Vol. 1) at 132) ("[O]ur phone was ringing off the hook, what are you guys going to do, I got – you know, we're going to need you.")).

Response To Finding No. 1766:

See General Response 3. This finding is misleading because in late 2009 and early 2010, many distributors had concerns regarding Star's reputation and its ability to provide domestic Fittings. Bill Thees from Ferguson testified that he was concerned that Star didn't own any of its own foundries and that Star did not have the depth and breadth of inventory to meet his company's needs. (RPF 480 (Thees, Tr. 3102-3104)). Mr. Thees also testified that an earlier "breach of trust" between the two companies and was a "leading component" in Ferguson's reluctance to buy domestic Fittings from Star. (RPF 488 (Thees, Tr. 3105-3107)). Jerry Webb from HD Supply testified that he was concerned that Star would not be able to provide the products and delivery times required by its customers. (RPF 480 (Webb, Tr. 2788-2789)). Eddie Gibbs from WinWholesale testified that he had concerns regarding the quality of Star's domestic Fittings. (RPF 480 (JX 705 (Gibbs, Dep. at 25-28))). Dennis Sheley from Illinois Meter testified that he was not will to purchase from Star in early 2010 because of a prior negative experience with joint restraints. (RPF 481 (Sheley, Tr. 3448-3451)). Finally, Tom Morton, from U.S. Pipe, testified that he had concerns about Star's ability to provide a full line of domestic Fittings. (RPF 494 (Morton, Tr. 2892-2894)).

1767. Distributors welcomed another Domestic Fittings supplier in the market. (CX 2489 (Morrison, IHT at 69) ("[I]n June of '09 is when Star announced theirs and that sort of rocked the world from a waterworks distribution standpoint of: Hey, here's going to be another source."); CX 2546 (Gibbs, Dep. at 92) ("It was the talk of the show if you were in the ductile iron fitting business."); CX 2513 (Webb, IHT at 179-180) (describing his response to Star's entry as "positive" and stating that "becoming domestic in nature is in general a positive for the country"))).

Response To Finding No. 1767:

See Response To Finding 1766, *supra*.

1768. Star believed that its announcement of its Domestic entry was favorably received by its Distributor customers. At the AWWA show in June 2009, Mr. McCutcheon discussed Star's entry with as many as 100 different Distributors, including HD Supply, Ferguson, TDG, Groeniger and the WinWater Group, and they uniformly told him they were pleased that Star was entering. (McCutcheon, Tr. 2296¹⁰ ("The general reaction was that the customer base was happy to have another option, to have some competition in the domestic fitting arena, and it was extremely well-received"); CX 2537 (McCutcheon, IHT (Vol. 1) at 125, 127, 130, 133) (Star was "the hit of the show . . . the talk of the town"))).

Response To Finding No. 1768:

See Response To Finding 1766, *supra*. This finding is a misleading and self-serving statement from Star that is contradicted by the distributor testimony referenced above.

1769. All of the Distributors that came to Star's booth at the AWWA show gave Star some form of soft commitment of support, such as "this is excellent," "outstanding," "I am glad you guys are doing it," or "I will definitely buy from you guys." (CX 2537 (McCutcheon, IHT (Vol. 1) at 132-133)).

¹⁰ The cited trial testimony regarding out of court statements of the Distributors is cited for its effect on Mr. McCutcheon and Star, not to prove the truth of the matters asserted in the statements. (*See* McCutcheon, Tr. 2296).

Response To Finding No. 1769:

See General Response 3 and Response To Finding 1766, *supra*. This finding is a misleading and self-serving statement from Star that is contradicted by the distributor testimony referenced above.

1770. None of Star's customers expressed a negative reaction to Star's entry into Domestic Fittings. (McCutcheon, Tr. 2300).

Response To Finding No. 1770:

See Response To Finding 1766, *supra*. This finding is a misleading and self-serving statement from Star that is contradicted by the distributor testimony referenced above.

1771. Distributors explained to Star that they supported Star's entry because they believed that having a second supplier of Domestic Fittings would provide balance to the market, improving both price and service and enabling Distributors to better serve End Users. (CX 2537 (McCutcheon, IHT (Vol. 1) at 126-128)).

Response To Finding No. 1771:

See General Response 3 and Response To Finding 1766, *supra*. This finding is a misleading and self-serving statement from Star that is contradicted by the distributor testimony referenced above.

10.1.6 Star Began Producing Domestic Fittings

1772. As planned, Star began producing, selling and shipping Domestic Fittings in late 2009. (*Infra* ¶¶ 1773-1781).

Response To Finding No. 1772:

See General Response 1. Star began selling domestic Fittings in September 2009. (Bhargava, Tr. 3002; Morton, Tr. 2749).

1773. [REDACTED] (Bhargava, Tr. 3002, *in camera*).

Response To Finding No. 1773:

Respondent has no specific response.

1774. (CX 2535
(Bhutada, Dep. at 60), *in camera*).

Response To Finding No. 1774:

See General Response 6.

1775. Distributors requested a significant number of quotes for Domestic Fittings from Star between June 2009, when Star announced its entry into the Domestic Fittings market, and September 2009. (McCutcheon, Tr. 2300; CX 2535 (Bhutada, Dep. at 66)).

Response To Finding No. 1775:

See Response To Finding 1766, *supra*. The term “significant number” is ambiguous and susceptible to multiple interpretations and is not supported by the cited evidence.

1776. An August 25, 2009 roll-out schedule for Star’s Domestic Fittings promised availability of 80% of compact and flange Fittings between September 15, 2009 and November 15, 2009, and availability of 95% of such Fittings between December 1, 2009 and February 15, 2010. (CX 2215 at 002-003 (schedule as sent to U.S. Pipe on September 3, 2009); *see also* RX-207 at 001-002 (as sent to Ferguson on September 4, 2009)).

Response To Finding No. 1776:

This finding is incomplete and therefore misleading because Star anticipated a “ramp-up” period before it would be able to supply a full-line of domestic Fittings. (RPFF 491 (McCutcheon, Tr. 2606)). As expected, Star experienced numerous delays in filling orders for domestic fittings in late 2009 and early 2010. (RPFF 492 (Bhargava, Tr. 3003)). Failure to meet scheduled delivery times resulted in lost business numerous occasions. (RPFF 493 (McCutcheon, Tr. 2634 (“Q. 130. I apologize. Now, Mr. McCutcheon, there are lots and lots of other reasons in here completely unrelated to the rebates; correct, sir? A. That's correct, yes, sir. Q. And many of them -- I don't want to go through the whole thing, but many of them are related to can't meet delivery times, delay in delivery; correct, sir? A. Yes, sir, that's correct. Q. And in fact, that happened quite a bit in fall of 2009; right? A. Yes, sir, it did.”)); RPFF 495 (McCutcheon, Tr. 2632-2634 (Star’s domestic bid log shows that Star repeatedly lost bids due to

delays))). Complaint Counsel's expert conceded that Star did not have sufficient inventory in the Fall of 2009 and well into 2010 and lost business as a result. (RPF 496 (Schumann, Tr. 4379; CX 2294)).

1777. Star met its planned production dates for bringing its Domestic Fittings production online and rolling out its Domestic Fittings line. (McCutcheon, Tr. 2294).

Response To Finding No. 1777:

See Response To Finding 1776, *supra*.

1778. By September or October of 2009, Star was building its inventory of Domestic Fittings. (McCutcheon, Tr. 2300; RX-692 (Bhargava, Dep. at 113)).

Response To Finding No. 1778:

This finding is incomplete and therefore misleading because Star did not have domestically available patterns equivalent to McWane's in-stock items until roughly mid-year 2010. (RPF 458 (Bhargava, Tr. 3012)).

1779. Star charged a price for Domestic Fittings that was competitive with McWane's price, if not slightly cheaper. (CX 2535 (Bhutada, Dep. at 82-83)).

Response To Finding No. 1779:

See General Response 6. Star knew that its decision to contract with domestic foundries would result in inefficiencies and higher costs. (RPF 448 (Bhargava, Tr. 2990-2991)). The contract foundries manufacturing domestic Fittings for Star built a profit margin into the prices they charged Star. (RPF 449 (Bhargava, Tr. 2991)). Using multiple foundries and a separate finishing facility also resulted in additional freight charges and materials handling inefficiencies. (RPF 450 (Bhargava, Tr. 2991)). Additionally, Star took on the risk that any one of the six different foundries it contracted with might later raise prices or elect not to do business with Star at all. (RPF 452 (Bhargava, Tr. 2991-2992)). Finally, Respondent's expert, Dr. Parker

Normann, testified that Star's prices for domestic Fittings were actually higher than McWane's. (Normann, Tr. 4964-4966, 4970).

1780. There were a limited number of instances in which Star had to delay delivery of Domestic Fittings to Distributor. Star hardly lost any sales because of delays in deliveries. (CX 2535 (Bhutada, Dep. at 123-124); RX-696 (McCutcheon, IHT (Vol. 1) at 202-203) (Star did not lose any customers because of problems it faced by acquiring Domestic Fittings from contracting foundries); CX 2535 (Bhutada, Dep. at 82) (No supplier regularly can immediately provide 100% of the Domestic Fittings demanded by Distributors)).

Response To Finding No. 1780:

This finding is misleading and inaccurate because Star experienced numerous delays in filling orders for domestic fittings in late 2009 and early 2010. (RPF 492 (Bhargava, Tr. 3003)). Following Star's announcement that it was entering the domestic segment of the Fittings market, Distributors had serious concerns regarding Star's ability to provide a full-line of domestic Fittings in a timely manner. Bill Thees from Ferguson testified that he was concerned that Star didn't own any of its own foundries and that Star did not have the depth and breadth of inventory to meet his company's needs. (RPF 480 (Thees, Tr. 3102-3104)). Jerry Webb from HD Supply testified that he was concerned that Star would not be able to provide the products and delivery times required by its customers. (RPF 480 (Webb, Tr. 2788-2789)). Eddie Gibbs from WinWholesale testified that he had concerns regarding the quality of Star's domestic Fittings. (RPF 480 (JX 705 (Gibbs, Dep. at 25-28))). Finally, Tom Morton, from U.S. Pipe, testified that he had concerns about Star's ability to provide a full line of domestic Fittings. (RPF 494 (Morton, Tr. 2892-2894)).

Star's failure to meet scheduled delivery times resulted in lost business numerous occasions. (RPF 493 (McCutcheon, Tr. 2634 ("Q. 130. I apologize. Now, Mr. McCutcheon, there are lots and lots of other reasons in here completely unrelated to the rebates; correct, sir? A. That's correct, yes, sir. Q. And many of them -- I don't want to go through the whole thing,

but many of them are related to can't meet delivery times, delay in delivery; correct, sir? A. Yes, sir, that's correct. Q. And in fact, that happened quite a bit in fall of 2009; right? A. Yes, sir, it did.”); RPF 495 (McCutcheon, Tr. 2632-2634 (Star’s domestic bid log shows that Star repeatedly lost bids due to delays))). Complaint Counsel’s expert conceded that Star did not have sufficient inventory in the Fall of 2009 and well into 2010 and lost business as a result. (RPF 496 (Schumann, Tr. 4379; CX 2294)). U.S. Pipe’s Thomas Morton testified that Star did not have fittings available by the end of 2009 that it committed to have available by year-end 2009. (Morton, Tr. 2900).

1781.

(CX 2508 (Kurhts, Dep. at 54-55, *in camera*)).

Response To Finding No. 1781:

See General Response 6. This finding is incomplete and therefore misleading because other distributors had concerns regarding Star’s ability to provide a full-line of fittings in a timely manner. Bill Thees from Ferguson testified that he was concerned that Star didn’t own any of its own foundries and that Star did not have the depth and breadth of inventory to meet his company’s needs. (RPF 480 (Thees, Tr. 3102-3104)). Mr. Thees also testified that an earlier “breach of trust” between the two companies and was a “leading component” in Ferguson’s reluctance to buy domestic Fittings from Star. (RPF 488 (Thees, Tr. 3105-3107)). Jerry Webb from HD Supply testified that he was concerned that Star would not be able to provide the products and delivery times required by its customers. (RPF 480 (Webb, Tr. 2788-2789)). Eddie Gibbs from WinWholesale testified that he had concerns regarding the quality of Star’s domestic Fittings. (RPF 480 (JX 705 (Gibbs, Dep. at 25-28))). Dennis Sheley from Illinois Meter testified that he was not will to purchase from Star in early 2010 because of a prior negative experience with joint restraints. (RPF 481 (Sheley, Tr. 3448-3451)). Finally, Tom

Morton, from U.S. Pipe, testified that he had concerns about Star's ability to provide a full line of domestic Fittings. (RPF 494 (Morton, Tr. 2892-2894)).

10.2 **McWane Adopted an Exclusive Dealing Policy with the Specific Intent to Eliminate Star as a Competitor in the Domestic Fittings Market**

1782. McWane developed, adopted, and implemented an Exclusive Dealing Policy (*see infra* ¶ 1824) with the specific intent of eliminating Star as a competitor in the Domestic Fittings market. (*Infra* ¶¶ 1783-1822).

Response To Finding No. 1782:

See General Responses 1 and 7.

1783. McWane was "caught blindsided" by Star's announcement at the June 2009 AWWA show that it would be entering the Domestic Fittings market. This was the first time that Mr. Tatman had learned that Star was entering the Domestic Fittings market. (Tatman, Tr. 644).

Response To Finding No. 1783:

While McWane does not concede the accuracy of this proposed finding or the supporting citations, McWane believes the proposed finding is irrelevant, and therefore, given the length of the FTC's proposed findings, McWane provides no specific response.

1784. On June 15, 2009, Mr. Tatman forwarded Star's domestic entry announcement to Mr. McCullough and Mr. Walton, and reported that "[w]e're trying to get confirmation on the breath [*sic*]of the available fittings available and the locations of the foundries they are working with. One distributor believes they are working with multiple domestic foundries but that has not been substantiated." (CX 1674 at 001).

Response To Finding No. 1784:

This finding is incomplete and therefore misleading because Mr. Tatman testified that McWane was concerned that Star would choose to manufacture only the highest-selling, fastest-moving Fittings. (RPF 499 (JX 643 (Tatman, IHT at 152-153))). The purpose of McWane's September 2009 letter was to persuade McWane's customers to support McWane's full line of domestic Fittings, prevent "cherry picking" and generate enough sales volume to sustain

McWane's last remaining domestic foundry. (RPF 498 (JX 638 (McCullough, IHT at 34-36); JX 643 (Tatman, IHT at 151))).

1785. McWane also tried to find out which foundries were working with Star in its domestic production because McWane did not want any foundry that it was working with to also work with Star. (CX 2479 (McCullough, Dep. at 161-162); CX 0354 at 001).

Response To Finding No. 1785:

See General Response 6. This finding is incomplete and therefore misleading because the cited document also states that McWane was concerned that foundries producing for both Star and McWane would weaken McWane's brand recognition. (CX 0354).

1786. In addition to its exclusive dealing policy, McWane's sales force also actively tried to prevent Star from being listed with municipalities as an eligible supplier of Domestic Fittings. (CX 2477 (Jansen, Dep. at 195-198); CX 1605)).

Response To Finding No. 1786:

See General Responses 6 and 7. The cited evidence does not support the proposed Finding.

10.2.1 McWane Feared That Star's Entry Would "Cream" Prices in the Domestic Fittings Market

1787. McWane feared that Star's entry into Domestic Fittings would cause prices in the Domestic Fittings market to erode. (*Infra* ¶¶ 1788-1797).

Response To Finding No. 1787:

See General Response 1 and responses to ¶¶ 1788-1797.

1788. Upon hearing an update that Star apparently was entering as a full-line supplier, Mr. McCullough wrote, "Star is a determined competitor that just keeps making a bad industry worse." (CX 0423). Mr. McCullough explained that he was expressing a concern that Star would change what was "basically a break-even [Fittings] business," to one where McWane was "going to lose more money." (CX 2479 (McCullough, Dep. at 165)).

Response To Finding No. 1788:

See General Response 6.

1789. On June 24, 2009, Mr. McCullough sent an email to Mr. Tatman, cc'ing Mr. Walton, requesting information about Star's domestic entry and Sigma's potential entry.

Specifically, Mr. McCullough raised questions regarding McWane's "position short term/long term on sharing distribution of our domestic fitting line. ***Just because we share our blended fittings does not require us to share our domestic***, especially if the competition is a short line domestic supplier." (CX 0074 at 002 (emphasis added); Tatman, Tr. 646-647).

Response To Finding No. 1789:

This finding is incomplete and therefore misleading because, following the closure of McWane's Tyler South plant, McWane was concerned that Star would choose to manufacture only the highest-selling, fastest-moving Fittings. (Tatman, Tr. 647-648; RPF 499 (JX 643 (Tatman, IHT at 152-153))). The purpose of McWane's September 2009 letter was to persuade McWane's customers to support McWane's full line of domestic Fittings, prevent "cherry picking" and generate enough sales volume to sustain McWane's last remaining domestic foundry. (RPF 498 (JX 638 (McCullough, IHT at 34-36); JX 643 (Tatman, IHT at 151))).

1790. In a June 24, 2009 email, Mr. Walton responded to Mr. McCullough's email and expressed his concern that :

Whether we end up with Star as a complete or incomplete domestic supplier ***my chief concern is that the domestic market gets creamed from a pricing standpoint just like the non-domestic market has been driven down in the past. That would dramatically effect our profit potential.*** Further, I have a sense there is a slim to none possibility that we would ever be able to sell Star domestic product at this point, one I do not think they would ever trust us and, two they seem to be so far down the road that I do not think they will be willing to turn back. I do agree whole heartedly that we need to evaluate our options and plot a comprehensive strategy going forward.

(CX 0074 at 001 (emphasis added); CX 2485 (Walton, Dep. at 91-92) (email accurately reflected Mr. Walton's "chief concern" regarding Star's entry at the time); Tatman, Tr. 647).

Response To Finding No. 1790:

This finding is incomplete and therefore misleading based on Mr. Tatman's testimony that Mr. Walton did not have a background in sales and that McWane was operating based on incomplete information, speculation, and rumors. (Tatman, Tr. 647-648).

1791. Mr. Tatman's initial response to Mr. McCullough's and Mr. Walton's emails was to agree that there were "slim" chances for "profitable cohabitation" of the Domestic Fittings market with Star, and that McWane needed to ensure that Star didn't "reach any critical market mass that will allow them to continue to invest and receive a profitable return:"

I agree that at this stage the chance for profitable cohabitation with Star owning a pc of the Domestic market is slim. Their actions in soil pipe are a good indication. . . . If their claims are ahead of their actual capabilities *we need to make sure that they don't reach any critical market mass that will allow them to continue to invest and receive a profitable return* I don't sense that Sigma is yet fully committed and they will be watching our response very closely to assess their strategy and probability of financial success."

(CX 0074 at 001 (emphasis added); Tatman, Tr. 649-652).

Response To Finding No. 1791:

This finding is incomplete and therefore misleading because Mr. Tatman also testified that his statements in the cited document were based on speculation, rumor, and his prior experience in an entirely different product line (soil pipe). (Tatman, Tr. 647-648).

1792. On or about June 29, 2009, Mr. Tatman drafted and sent a PowerPoint presentation to Messrs. McCullough and Walton that expressed his concern that Star might "drive profitability out of business," and assumed that Star "would not be a responsible competitor [in the Domestic market] as long as incremental sales generate incremental margins for their business." (CX 0076 at 009, 006, 001; Tatman, Tr. 653-656).

Response To Finding No. 1792:

This finding is inaccurate and misleading because Mr. Tatman testified that the cited document was only a brainstorming document based on a series of assumptions intended to spark discussion and not a statement of facts. (Tatman, Tr. 654-656).

1793. McWane’s concern was rooted in its perception of Star as historically being an “aggressive” competitor that obtains business by offering Project Pricing and lower prices than McWane. (CX 2480 (Napoli, Dep. at 66) (“yeah, obviously, [Project Pricing] is one of their tactics”); CX 0105 at 001 (Tatman post-September 22, 2009 strategy notes) (“Star has historically shown that they will just continue incremental discounting down to the point when they’re selling near breakeven.”); CX 2483 (Tatman, IHT at 183-184) (Star “would normally be very, very, very aggressive with pricing”); CX 2483 (Tatman, IHT at 232-234) (“Star historically has been a very aggressive and sometimes irrational—it’s always irrational to you, because you don’t know what they’re doing on that....So we have a perception, whether it’s true or not, that they’re a little bit irrational for what they do, and they just like to shake things up.”)).

Response To Finding No. 1793:

This statement is incomplete and misleading based on testimony that McWane was concerned that Star would choose to manufacture only the highest-selling, fastest-moving Fittings. (RPF 499 (JX 643 (Tatman, IHT at 152-153))). The purpose of McWane’s September 2009 letter was to persuade McWane’s customers to support McWane’s full line of domestic Fittings, prevent “cherry picking” and generate enough sales volume to sustain McWane’s last remaining domestic foundry. (RPF 498 (JX 638 (McCullough, IHT at 34-36); JX 643 (Tatman, IHT at 151))).

1794. When Star offers Project Pricing to Distributors, it requires McWane also to lower its price if it wants to win that business. (CX 2480 (Napoli, Dep. at 69, 71) (describing Project Pricing as “irresponsible” when a supplier cuts its prices more steeply than necessary to win the job, and that Star cuts its prices “more than they need to”)).

Response To Finding No. 1794:

See General Response 6. This proposed Finding is confusing and incomprehensible. This finding is misleading to the extent it implies that project pricing was not a routine practice in the Fittings industry and instead a unique reaction by McWane to Star’s pricing. (RPF 67-69). Additionally, Respondent’s expert, Dr. Parker Normann, testified that Star’s prices for domestic Fittings were actually higher than McWane’s. (Normann, Tr. 4964-4966, 4970).

1795. McWane believes that Star has “absolutely ruined pricing nationwide” because they only know how to sell their products through discounting, and that this has “totally devastated

the Southeast” pricewise. (CX 1611 at 001; CX 2480 (Napoli, Dep. at 77-79) (stating that CX 1611 accurately reflected market facts)).

Response To Finding No. 1795:

See General Response 6. This finding is misleading because, as Dr. Normann testified, Star’s prices for domestic Fittings were actually higher than McWane’s.

1796. Accordingly, in the narrative for McWane’s 2010 budget, Mr. Tatman listed the biggest risk factor for McWane’s Fittings business in 2010 as the “Erosion of domestic pricing if Star emerges as a legitimate competitor.” (CX 0102 at 002 (narrative accompanying Tyler/Union’s 2010 budget); CX 0102 at 002).

Response To Finding No. 1796:

This finding is misleading and therefore inaccurate to the extent it suggests that “Erosion of domestic pricing if Star emerges as a legitimate competitor” was the single biggest threat to McWane’s 2010 budget. In reality, the narrative lists several risks, including “Raw material inflation that is not recovered in net price.” (CX 0102).

1797. McWane knew that the mere threat of low prices from Star could bring down prices in the market. (CX 1609 at 001 (explaining that exclusive dealing policy “keeps the market stable”); CX 2477 (Jansen, Dep. at 219-220) (explaining CX 1609 and that if a Distributor were to take Star up on its Domestic Fittings offer, “the whole market will go to hell” because prices would decrease in the stable Utah market)).

Response To Finding No. 1797:

See General Response 6. This finding is inaccurate and misleading because the cited document, CX 1609, and quoted text does not support the inference that “McWane new that the mere threat of low prices from Star would bring down prices in the market.” Additionally, as Dr. Normann testified, Star’s prices for domestic Fittings were actually higher than McWane’s. (Normann, Tr. 4964-4966, 4970).

10.2.2 McWane Wanted to Prevent Star from Gaining a “Toehold” in the Domestic Fittings Market

1798. McWane wanted to prevent Star from gaining a toehold in the Domestic Fittings market. (*Infra* ¶¶ 1799-1803).

Response To Finding No. 1798:

See General Response 1 and responses to ¶¶ 1799-1803.

1799. McWane wanted to prevent Star from gaining a toehold with Distributors in the sale of Domestic Fittings because McWane was concerned Star would then lower market prices. For example, McWane executives were concerned that Distributors not aligned with McWane would cause McWane's loyal Distributors to pressure McWane for lower prices so that they could compete against the Distributors supporting Star:

It's the take-a-hit now vs take-a-hit-for-decades argument as in 1984-1990. We chose not to react then and know the result. We may not be losing business now but I am concerned about the future. Those dist. not aligned with us or Sigma will be aggressive with Star backing them against our people... When that happens our distributors will continually pressure us to 'do something' (lower prices). If they stay in the business we will always see downward pressure in the future.

(CX 2192; CX 2480 (Napoli, Dep. at 90-95) (discussing CX 2192 and that, in order to avoid the loss of business and lower prices that occurred when imported Fittings first entered the U.S. market, McWane should lower their Domestic Fittings prices so that Star will become convinced that the Domestic Fittings business is unprofitable and exit the market)).

Response To Finding No. 1799:

See General Response 6. The finding is misleading because the cited document and quoted text does not support the statement that "McWane wanted to prevent Star from gaining a toehold with Distributors in the sale of Domestic Fittings. . ." Further, the finding's focus on prices ignores testimony regarding McWane's actual concerns regarding Star's entry into the domestic segment. McWane was concerned that Star would choose to manufacture only the highest-selling, fastest-moving Fittings. (RPF 499 (JX 643 (Tatman, IHT at 152-153))). The purpose of McWane's September 2009 letter was to persuade McWane's customers to support McWane's full line of domestic Fittings, prevent "cherry picking" and generate enough sales volume to sustain McWane's last remaining domestic foundry. (RPF 498 (JX 638 (McCullough, IHT at 34-36); JX 643 (Tatman, IHT at 151))). Finally, as Dr. Normann testified,

Star's prices for domestic Fittings were actually higher than McWane's. (Normann, Tr. 4964-4966, 4970).

1800. McWane understood that there would be no need for McWane to match Star's prices if nobody was willing to buy Domestic Fittings from Star; in such cases, Star's price would be "mute" [*sic*] or not "real." (CX 0108; CX 2477 (Jansen, Dep. at 178-181) (explaining that sales representatives should use this response when Distributors express concern that one of their Distributor competitors could underbid them using Star's low Domestic Fittings prices)).

Response To Finding No. 1800:

See General Response 6. This finding is misleading because the cited document and quoted text do not support the inference that "McWane understood that there would be no need for McWane to match Star's prices. . ." Finally, as Dr. Normann testified, Star's prices for domestic Fittings were actually higher than McWane's. (Normann, Tr. 4964-4966, 4970).

1801. McWane's National Sales Manager, Mr. Jansen, wrote to his sales representatives, "We don't want the market tumbling and if we keep everyone on board we shouldn't have to drop prices." (CX 0107; CX 2477 (Jansen, Dep. at 228-229) (explaining that "market tumbling" means prices falling; and "keep everyone on board" refers to Distributors being loyal to McWane under the exclusive dealing program)).

Response To Finding No. 1801:

See General Response 6. Further, the finding's focus on prices ignores testimony regarding McWane's actual concerns regarding Star's entry into the domestic segment. McWane was concerned that Star would choose to manufacture only the highest-selling, fastest-moving Fittings. (RPF 499 (JX 643 (Tatman, IHT at 152-153))). The purpose of McWane's September 2009 letter was to persuade McWane's customers to support McWane's full line of domestic Fittings, prevent "cherry picking" and generate enough sales volume to sustain McWane's last remaining domestic foundry. (RPF 498 (JX 638 (McCullough, IHT at 34-36); JX 643 (Tatman, IHT at 151))). Finally, as Dr. Normann testified, Star's prices for domestic Fittings were actually higher than McWane's. (Normann, Tr. 4964-4966, 4970).

1802. McWane also wanted to prevent Star from gaining a toehold with local Distributors because that would help Star gain legitimacy as a supplier of Domestic Fittings. (CX 2261 at 002 (Jansen email, “We need to make sure we are getting into the smaller players up there and keep them from Star. That’s how a cancer starts is by letting them get in with one, two, then three, and it crumbles from there.”)).

Response To Finding No. 1802:

This finding is misleading because the cited document and quoted text do not support the inference that “McWane also wanted to prevent Star from gaining a toehold with local Distributors. . .” See Response To Finding 1801.

1803. As Mr. Napoli explained,

Like any -- any competitive situation in any industry, I mean, they’ll start with the small ones. They won’t go after the big fish first. They’ll go to the small ones and build their -- build their reputation. You know, a competitor is not going to go to -- a new competitor in something is not going to go to Walmart from day one. They’ll go to somebody smaller. Maybe that’s not a good analogy, but they’ll go to somebody smaller and build reputation and build a -- you know, a base and then go from there to bigger ones, makes them a little more legitimate, let’s say, if they have a history or a track record.

(CX 2480 (Napoli, Dep. at 105-107) (explaining CX 2261); (CX 0100 at 001) (November 2009 Tatman email) (“What I’m more concerned with at this point is Hajoca supporting Star’s domestic program and the potential price ripple effect that could have in the market.”)).

Response To Finding No. 1803:

See General Response 6. McWane does not dispute that the proposed finding correctly quotes the cited exhibit.

10.2.3 McWane Developed Its Exclusive Dealing Policy Specifically to “Block” Star

1804. Between May and August of 2009, McWane developed an Exclusive Dealing Policy for Domestic Fittings for the specific purpose of “blocking” Star from entering the Domestic Fittings market. (*Infra* ¶¶ 1805-1814).

Response To Finding No. 1804:

See General Responses 1 and 7 and responses to ¶¶ 1805-1814.

1805. In a May 26, 2009 presentation discussing McWane's possible strategic responses to potential competitive entry into the Domestic Fittings market and whether to sell Domestic Fittings to Sigma, Mr. Tatman observed that "any competitor" seeking to enter the Domestic market could face "*significant blocking issues*" if they are not a "full line" domestic supplier. (CX 0067 at 002 (emphasis added) (noting that approximately 500 patterns are required to cover 95% of Fittings items); Tatman, Tr. 620-621; *see also* CX 2529 (Rona, IHT at 195-196 ("Q. Do you think McWane's policy that we're discussing here, this exclusivity with respect to distributors, is something that could erect a roadblock to a new entrant coming into the market with less than a full line? A. There's – there's no question for any entrant that requiring exclusivity on those parts would be inherently more difficult than without it."))).

Response To Finding No. 1805:

This finding is inaccurate and misleading because Mr. Tatman testified that the cited document was a brainstorming document used to spark discussion. (Tatman, Tr. 618-619 ("I'm jotting down notes to spark a discussion. You can argue this left and you can argue it right.")). The cited document does not contain statements of fact. (Tatman, Tr. 622 ("You're phrasing this as these are hard beliefs, and I've said this three times, I'm phrasing this for what I said it was, notes over the weekend that I thought I'd share to spark some thoughts or other questions.")).

The finding is incomplete and therefore misleading because distributors were concerned that Star would not be able to provide a full-line of domestic fittings. Bill Thees from Ferguson testified that he was concerned that Star didn't own any of its own foundries and that Star did not have the depth and breadth of inventory to meet his company's needs. (RPFF 480 (Thees, Tr. 3102-3104)). Mr. Thees also testified that an earlier "breach of trust" between the two companies and was a "leading component" in Ferguson's reluctance to buy domestic Fittings from Star. (RPFF 488 (Thees, Tr. 3105-3107)). Jerry Webb from HD Supply testified that he was concerned that Star would not be able to provide the products and delivery times required by its customers. (RPFF 480 (Webb, Tr. 2788-2789)). Eddie Gibbs from WinWholesale testified that he had concerns regarding the quality of Star's domestic Fittings. (RPFF 480 (JX 705 (Gibbs, Dep. at 25-28))). Dennis Sheley from Illinois Meter testified that he was not will to

purchase from Star in early 2010 because of a prior negative experience with joint restraints. (RPFF 481 (Sheley, Tr. 3448-3451)). Finally, Tom Morton, from U.S. Pipe, testified that he had concerns about Star's ability to provide a full line of domestic Fittings. (RPFF 494 (Morton, Tr. 2892-2894)).

1806. After Star had announced its planned entry into the Domestic Fittings market, Mr. Tatman considered how to "block Star" from entering the Domestic Fittings market. (CX 0076 at 008 (emphasis added)).

Response To Finding No. 1806:

This finding is inaccurate and misleading because Mr. Tatman testified that the cited document was only a brainstorming document based on a series of assumptions intended to spark discussion and not a statement of facts. (Tatman, Tr. 654-656).

1807. In a cover email transmitting his June 29, 2009 presentation, Mr. Tatman concluded that if McWane could keep Sigma from establishing an independent source for Domestic Fittings, leaving Star as the only Domestic entrant, then "the appropriate response to distribution is probably fairly hard line approach like a full line or no line approach." (CX 0076 at 001; Tatman, Tr. 653-655).

Response To Finding No. 1807:

See Response To Finding 1806.

1808. Mr. Tatman's June 29, 2009 presentation described three potential options for McWane's response to Star's entry: employ a "Wait and See approach," "Handle on a Job by Job basis," or "Force Distribution to Pick their Horse." (CX 0076 at 009; Tatman, Tr. 658).

Response To Finding No. 1808:

See Response To Finding 1806.

a. A disadvantage (indicated by a "minus" sign) of the "Wait and See" approach identified by Mr. Tatman in the presentation was that it would give Star "time to continue building their business model." (CX 0076 at 009).

Response To Finding No. 1808 a:

See Response To Finding 1806.

- b. A disadvantage of the “Job by Job” approach identified by Mr. Tatman in the presentation was that it would allow Star to “drive profitability out of the business.” (CX 0076 at 009; Tatman, Tr. 658).

Response To Finding No. 1808 b:

See Response To Finding 1806.

- c. The advantages (indicated by a “plus” sign) listed by Mr. Tatman for the “Pick their Horse” option included:

- It “[a]voids the job by job auction scenario within a particular distributor”
- It [p]otentially raises the level of supply concern among contractors” and
- It “[f]orces Star/Sigma to absorb the costs associated with having a more full line before they can secure major distribution”

(CX 0076 at 009; Tatman, Tr. 658-666; *see also* CX 2483 (Tatman, IHT at 242-243)

(explaining, in the context of this language, that it is quicker to build business through

large national Distributors such as HD Supply and Ferguson); Tatman, Tr. 676-679

(Tatman does not recall the intent behind the discussion point “Forces Star/Sigma to

absorb the costs associated with having a more full line before they can secure major

distribution”); Tatman, Tr. 679-680 (Tatman does not recall whether he considered

“major distribution” to be major national Distributors)).

Response To Finding No. 1808 c:

See Response To Finding 1806.

1809. Mr. Tatman further elaborated on the “Pick their Horse” option, describing a “Soft Approach” whereby a Domestic rebate would require exclusivity, and a “Hard Approach – Full Line or No Line,” under which access to Domestic product line would “require[] exclusivity for Domestic fitting items we manufacture” – *i.e.*, if a customer did not support McWane’s full Domestic Fittings line, McWane would not sell to them. (CX 0076 at 010; Tatman, Tr. 672-674).

Response To Finding No. 1809:

See Response To Finding 1806.

1810. Either approach under the “Pick their Horse” option would be applied to Distributors on a corporate basis (*i.e.*, across all branches of the Distributor), rather than “branch by branch.” (CX 0076 at 010; Tatman, Tr. 675)).

Response To Finding No. 1810:

See Response To Finding 1806.

1811. Mr. Tatman wrote that an added consideration was that successful exclusion of Star could help deter Sigma from following through on its own plan to enter the Domestic Fittings market. (CX 0076 at 008 (“[T]he only reason for [Sigma] not to pursue [Domestic entry] is if they feel McWane’s response will make Star’s or their programs un-successful which may cause them to hold off making any heavy investments”)).

Response To Finding No. 1811:

See Response To Finding 1806. The term “successful exclusion” is Complaint Counsel’s and is not supported by the evidence cited.

1812. On July 2, 2009, when pressed by Mr. Walton for a recommended course of action with respect to Domestic Fittings, Mr. Tatman responded that the “Full Line or No Line approach would be the preferred approach and certainly the best option against Star.” (CX 0329 at 001).

Response To Finding No. 1812:

This finding is misleading because Mr. Tatman testified that, at the time of the cited document, he was “floundering in the dark” and that the information in the document was based on speculation. (Tatman, Tr. 750). Regarding Star’s entry into the domestic segment, Mr. Tatman testified “There’s never been a hard game plan.” (Tatman, Tr. 750).

1813. On August 5, 2009, Mr. McCullough suggested that McWane should establish exclusive relationships in its Domestic supply chain to hinder Sigma’s and Star’s efforts at entry:

As we establish or continue existing casting sourcing relationships we need to emphasize with our casting suppliers that we are not interested in sharing their foundry production with Star/Sigma as we feel it will weaken the “McWane” brand recognition in the market place.

(CX 0354 at 001).

Response To Finding No. 1813:

This finding is misleading because the cited document and quoted text does not support the inference that McWane’s intent was to “hinder Sigma’s and Star’s efforts at entry” or “that McWane should establish exclusive relationships.”

1814. On August 24, 2009, Mr. Tatman sent an email to Dennis Charko, head of Clow Water (a subsidiary of McWane that sells a limited number of Fittings (*see supra* ¶¶ 12-13), seeking Mr. Charko’s support with respect to implementing the Distributor exclusivity program “as a McWane policy inclusive of the Clow brand.” (CX 0113 at 001). In that email Mr. Tatman described the policy as follows:

Star, has announced a Domestic line of waterworks fittings and restraints. . . .

To protect our domestic brands and market position we are going to adopt a distributor exclusivity program for 2010 wherein we won’t provide domestic product to distributors who are not fully supporting our domestic product lines.”

(CX 0113 at 001; Tatman, Tr. 686-687).

Response To Finding No. 1814:

See General Response 7.

10.2.4 McWane’s Specific Intent to Exclude Star Is Also Reflected in McWane’s 2009 Revisions to Its Corporate Rebate Program

1815. McWane’s specific intent to exclude Star from the Domestic Fittings market is reflected in McWane’s 2009 revisions to its corporate rebate program. (*Infra* ¶¶ 1816-1822).

Response To Finding No. 1815:

See General Response 1 and ¶¶ 1816-1822. This is a legal conclusion that does not require a response.

1816. McWane’s major customers, including WinWholesale, Ferguson, Hajoca, HD Supply and Mainline, have participated in McWane’s corporate rebate program during the relevant period. (CX 2479 (McCullough, Dep. at 28, 33-34) (McWane offers a 2% rebate on customer purchases across multiple divisions of McWane, including Fittings); Tatman, Tr. 709-711). TDG has a separately negotiated rebate program. (Tatman, Tr. 709-711; *see also* ¶¶ 4.5.3.1 (describing rebates)).

Response To Finding No. 1816:

While McWane does not concede the accuracy of this proposed finding or the supporting citations, McWane believes the proposed finding is irrelevant, and therefore, given the length of the FTC's proposed findings, McWane provides no specific response.

1817. The Corporate Rebate Program has specific requirements that participating Distributors must meet in order to earn the 2% rebate. If a Distributor fails to comply with a requirement, Mr. McCullough speaks to that Distributor and asks it to correct its non-complying conduct. (CX 2479 (McCullough, Dep. at 45-47)).

Response To Finding No. 1817:

The proposed Finding is not supported by the cited authority

1818. McWane understood that Distributors participating in its Corporate Rebate Program did not want to risk non-compliance with the program and potentially lose their 2% rebate on all of their applicable purchases across product lines from McWane. (CX 2479 (McCullough, Dep. at 54-55; CX 0051 at 001)).

Response To Finding No. 1818:

See General Response 6. The finding is misleading and therefore inaccurate because the cited document, CX 0051, is a discussion regarding rebates for the Plumbing Group and not Fittings. The document is an email discussion from July 2008, over a year prior to McWane's September 22, 2009 customer letter at issue in this case. Based on this fact alone, the document is irrelevant. Additionally, in the document, Mr. McCullough notes that "**some** customers don't want to push the envelope and risk losing the 2% rebate on everything." The finding incorrectly implies that *all* distributors would not want to risk non-compliance and that McWane "understood" same.

1819. On or about November 19, 2009, Mr. Tatman proposed modifying one of the requirements that participating Distributors have to meet in order to earn their 2% corporate rebate from McWane. Specifically, Mr. Tatman proposed revising the final Corporate Rebate Program for 2010-2012 for HD Supply and others to state that HD Supply may lose its 2% corporate rebate, which is based on all of HD Supply's purchases of Fittings, soil pipe, iron pipe, and valve and hydrants from McWane, if HD Supply

purchased Domestic Fittings from Star. (CX 0131 at 001, 002; CX 2479 (McCullough, Dep. at 155-156)).

Response To Finding No. 1819:

See General Response 6. This finding is misleading and therefore inaccurate because the cited document, CX 0131, is an email from Michael Lowe and not Mr. Tatman. In fact, Mr. Tatman is not even listed as a recipient of the document. (CX 0131). Additionally, the cited deposition testimony does not support the proposed finding as there is no mention of Mr. Tatman or of “revising the final Corporate Rebate Program for 2010-2012 for HDS supply and others to state that HD Supply may lose its 2% corporate rebate. . . .” (CX 2479 (McCullough, Dep. at 155-156)).

1820. According to Mr. Tatman, his proposed modification to McWane’s corporate rebate program was to “essentially eliminate Star as a supplier of domestic fittings.” (CX 0100 at 001).

Response To Finding No. 1820:

The finding is misleading and inaccurate because Mr. Tatman testified at trial that CX 0100 is a draft corporate rebate policy for Hajcoa, and not the final. (Tatman, Tr. 742). Complaint Counsel has offered no evidence that CX 0100 is the final corporate rebate program offered to Hajoca, as such, the proposed finding is irrelevant. Mr. Tatman also testified that Hajoca continued to purchase domestic Fittings from Star despite McWane’s corporate rebate program. (Tatman, Tr. 245).

1821. On or about December 8, 2009, Mr. McCullough proposed extending the duration of McWane’s corporate rebate program from one year to three years in part because he wanted “to remove the opportunity for Star to introduce their domestic made fittings” to McWane’s large Distributor customers that participated in their Corporate Rebate Program. (CX 0126 at 001; CX 2479 (McCullough, Dep. 146-148)).

Response To Finding No. 1821:

See General Response 6. This finding is misleading and therefore inaccurate based on the deposition testimony cited by Complaint Counsel. Mr. McCullough testified that there were multiple reasons for extending the duration of the corporate rebate program unrelated to Star. (CX 2479 (McCullough, Dep. 146-148) (“One of the concerns was some of the customers had voiced the opinion that do we really need to do this on an annual basis, because when we would meet with the customers to talk about the rebate programs for the following year, or the upcoming year, you know, we would get six, seven, eight, ten people, go to Newpork News, Virginia, or Dayton, Ohio, or somewhere, and they would in turn have to circle the wagons and bring in eight or ten people, also. So, the demand on people was pretty high and the cost of travel was pretty expensive, also. So, there was some interest on the customers’ part to not do this on an annual basis, also.”)). In any event, the program was not extended.

1822. Both of these proposed modifications, *i.e.*, extending the duration of the corporate rebate program and having Distributors risk their rebate if they purchased Domestic Fittings from Star, appeared in documents described as “Final Rebate Program 2010-2012.” (CX 0131 at 001, 002 (email describing HD Supply program as “final” and attaching it); CX 2479 (McCullough, Dep. at 156) (supporting veracity and competence of Mr. Lowe, who transmitted CX 0131 to him)).

Response To Finding No. 1822:

See General Response 6. The proposed finding is misleading and inaccurate and does not support an inference that CX 0131 was in fact, a “final” corporate rebate program submitted to customers. Mr. McCullough testified that “To me they look like the others that I couldn’t have told you that they are final.” (CX 2479 (McCullough, Dep. at 156)). When asked whether he had any reason to doubt Mr. Lowe’s characterization of the document as final, Mr. McCullough responded only that “Michael is a very straightforward person, I have no other reason to think that he is anything other than that.” (CX 2479 (McCullough, Dep. at 156)).

10.3 McWane Implemented a “Hard Line” Exclusive Dealing Policy

1823. McWane implemented a “hard line” Exclusive Dealing Policy under which it would cut off its supply of Domestic Fittings to any Distributor that did not source Domestic Fittings exclusively from McWane. (*Infra* ¶¶ 1824-1828).

Response To Finding No. 1823:

See General Responses 1 and 7 and responses to ¶¶ 1824-1828.

10.3.1 McWane Published Its Exclusive Dealing Policy on September 22, 2009

1824. McWane formally announced its exclusivity policy for its Domestic Fittings business (the “Exclusive Dealing Policy”) in a September 22, 2009 letter to Distributors. (CX 0010 at 001; CX 1606 at 002; Tatman, Tr. 659, 687-689; CX 2477 (Jansen, Dep. 158-159) (September 22, 2009 letter reflected a new policy)).

Response To Finding No. 1824:

See General Response 7.

1825. Like the Tatman Plan, the Exclusive Dealing Policy was the carefully thought out result of a methodical strategic process within McWane. (Tatman, Tr. 752 (“[E]verything we do is very methodical and very well thought out.”)).

Response To Finding No. 1825:

See General Response 7. This finding is misleading and inaccurate because Mr. Tatman testified directly that there was no “Tatman plan” (Tatman, Tr. 355, 363, 1069-1070); see also response to § 7.1).

1826. McWane’s September 22, 2009 letter notified Distributors that they would face penalties if they purchased Domestic Fittings from anyone other than McWane:

[E]ffective October 1, 2009, McWane will adopt a program whereby our domestic fittings and accessories will be available to customers who elect to *fully support* McWane branded products for their domestic fitting and accessory requirements. . . .

Exceptions are where Tyler Union or Clow Water products are not readily available within normal lead times or where domestic fittings and accessories are purchase from another domestic pipe and fitting manufacturer along with that manufacture’s [*sic*] ductile iron pipe.

Customers who elect not to support this program may forgo participation in any unpaid rebates for domestic fitting and accessories or shipment of their domestic fittings and accessory orders of Tyler Union or Clow Water products for up to 12 weeks.

(CX 0010 at 001 (emphasis added); CX 1606 at 002; Tatman, Tr. 659, 687-688; CX 0559 at 002; CX 1190).

Response To Finding No. 1826:

The proposed finding is misleading and inaccurate because, McWane recognized that it had little or no ability to dictate terms to distributors. (RPFF 503 (Tatman, Tr. 660)). In drafting the September 22 letter, Mr. Tatman purposefully included the soft language “may” and “or” -- and the statement that distributors “would face penalties” is not supported. (RPFF 502 (Tatman, Tr. 687-689)). Following the September 22 letter, McWane’s customers were always free to purchase domestic Fittings from other suppliers, including Star. (RPFF 504 (JX 643 (Tatman, IHT at 157-160))).

1827. Of the three options (“Wait and See,” “Job by Job basis,” or “Pick their Horse”) that Mr. Tatman had presented in his June 29, 2009 presentation, (*see supra* ¶ 1808-1809), McWane’s Exclusive Dealing Policy as reflected in its September 22, 2009 letter most closely aligned with the “Pick their Horse” option. (CX 2483 (Tatman, IHT at 246-247) (“The letter of September 22 would more closely align with the option 3”)).

Response To Finding No. 1827:

See General Response 7. This finding is inaccurate and misleading because Mr. Tatman testified that the June 29, 2009 presentation was only a brainstorming document based on a series of assumptions intended to spark discussion and not a statement of facts. (Tatman, Tr. 654-656). The finding also ignores Mr. Tatman’s testimony at trial regarding the September 22 letter. (Tatman, Tr. 660 (“Q. Sir. of these three options on this page, would you agree with me that the September 22 policy most closely aligns with option number 3 even if it is not an exact one-for-one case? A. It’s like saying if I got a bird, a frog and a horse, which is the elephant closer to?

The elephant is probably closer to the horse. Q. So it aligns most closely with option number 3, force distribution to pick their horse; correct, sir? A. I'm saying it doesn't align to it. You're talking matters of degrees. Let's both agree that they're both mammals.'')).

1828. Mr. Tatman referred to the Exclusive Dealing Policy as an "exclusivity" policy both before and after the policy was announced on September 22, 2009. (CX 0340 (referring to "pending policy on supply exclusivity" on September 8, 2009); Tatman, Tr. 692 (same); CX 1246 (referring to "exclusivity policy" on September 23, 2009); Tatman, Tr. 697 (same)).

Response To Finding No. 1828:

See General Response 7.

10.3.2 McWane Implemented the Exclusive Dealing Policy by Communicating a Harder Line Policy to Distributors Than Was Explicit in Its September 22, 2009 Letter

1829. McWane purposefully, consistently, and systematically communicated the Exclusive Dealing Policy to the marketplace and implemented Exclusive Dealing Policy in a manner even more "hard line" manner than was explicit in its September 22, 2009 Letter. (*Infra* ¶¶ 1830-1849).

Response To Finding No. 1829:

See General Responses 1 and 7 and responses to ¶¶ 1830-1849.

1830. In conversations with its Distributor customers, McWane communicated a more stringent policy than was explicitly written in its September 22, 2009 letter to Distributors. (Sheley, Tr. 3456-3458 (the September 22, 2009 letter that McWane sent to TDG regarding its Exclusive Dealing Policy does not accurately reflect the policy as communicated to Illinois Meter in conversations that Mr. Sheley had with Mr. Jansen and Mr. Tatman); (CX 2489 (Morrison, IHT at 71-73) ("Well, the message was clear, both written and verbally, that if you buy a project from Star, you're going to go on our, I'm picking the term 'bad list.'"); CX 2511 (Pitts, IHT at 78) ("Q. So, even though this letter, as written, suggests that you may or may not be penalized and that if you are penalized, it could be for – it could be one or the other – A. Yeah, um-hum. Q. – or essentially both – A. Selective enforcement, yeah. Q. – the – the message that Hajoca received, and specifically that Mr. Tatman and Mr. Jansen relayed to you, was that it would be – both would be implemented against Hajoca – A. Correct. Q. and it would happen indefinitely – A. Correct. Q. – if – if – A. That's right. Q. – you started purchasing from Star. A. Correct.'))).

Response To Finding No. 1830:

See General Responses 1 and 7. This finding is misleading and therefore inaccurate because it ignores the fact that McWane had little or no ability to dictate terms to distributors. (RPFF 503 (Tatman, Tr. 660)). For example, Ferguson, the second-largest distributor in the industry, understood that McWane's announced Rebate Policy could be negotiated. (RPFF 507 (Thees, Tr. 3109-3111)). Because Fittings, specifically domestic Fittings, are such a small part of a Distributor's business, a Distributor could take a hard line against McWane in other product areas if McWane refused to negotiate the Rebate Policy. (RPFF 508 (Thees, Tr. 3111)). In drafting the September 22 letter, Mr. Tatman purposefully included the soft language "may" and "or." (RPFF 502 (Tatman, Tr. 687-689)). Following the September 22 letter, McWane's customers were always free to purchase domestic Fittings from other suppliers, including Star. (RPFF 504 (JX 643 (Tatman, IHT at 157-160))).

The proposed finding is also inaccurate because it ignores the fact that McWane customers purchased domestic Fittings from Star despite the September 22 letter. (RPFF 506 (McCutcheon, Tr. 2591-2594)). McWane did not enforce the terms of the September 22 letter against Distributors who purchased from Star (RPFF 509), including Ferguson (RPFF 520), Hajoca (RPFF 511-513), Illinois Meter (RPFF 514), Groeniger (RPFF 515), Dana Kepner (RPFF 516), WinWholesale (RPFF 514), HD Supply (RPFF 518), and U.S. Pipe (RPFF 521). Finally, Complaint Counsel's expert, Dr. Schumann, could not identify a single customer who wanted to purchase domestic Fittings from Star but was unable to because of McWane's Rebate Policy. (RPFF 524).

1831. Despite the "may/or" language of the written Exclusive Dealing Policy – *i.e.*, "Customers who elect not to support this program **may** forgo participation in any unpaid rebates for domestic fittings and accessories **or** shipment of their domestic fitting and accessory orders of Tyler Union or Clow Water products for up to 12 weeks," (CX 1606 at 002

(emphasis added) – McWane’s sales team told Distributors that if they purchased Domestic Fittings from Star that they would lose both access to McWane’s Domestic Fittings *and* their accrued rebates on Domestic Fittings. (CX 2511 (Pitts, IHT at 76-79, 137-139) (Stating ‘It wasn’t an either/or. It was both.’ Mr. Pitts also said that “[W]e were told right away that our Lansdale location would be cut off. They couldn’t buy the fittings anymore.’ Mr. Pitts further acknowledged that to him, “may” meant “would”, and “or” meant “and.”); CX 2515 (Sheley, IHT at 85-87, *in camera*)

Response To Finding No. 1831:

See Response To Finding 1830, *supra*.

1832. In preparation for the rollout of the Exclusive Dealing Policy, McWane’s National Sales Manager, Mr. Jansen, led an internal conference call with the McWane sales force on August 28, 2009, where he explained to his sales force the “new policy on Star Domestic” as follows:

- What are we going to do if a customer buys Star domestic? We are not going to sell them our domestic
 - This means the customer will no longer have access to our domestic. They can still buy [non-Domestic] from us.
 - ***Once they use Star, they can’t EVER buy domestic from us. . . .***
 - For companies with multiple branches (HD, Ferguson, Winwater, Hajoca, etc) - if one branch uses Star, every branch is cut off.
- . . .
- Make sure you are discussing our stance with all customers, every day.

(CX 0710 at 001, 002 (emphasis added) (summarizing sales conference call); *see also* CX 2477 (Jansen, Dep. at 164-169) (confirming that CX 0710 accurately reflects Mr. Jansen’s statements during conference call); Tatman, Tr. 698-702 (discussing call)).

Response To Finding No. 1832:

See Response To Finding 1830, *supra*.

1833. Mr. Tatman attended at least a portion of Mr. Jansen’s internal conference call with the McWane sales force on August 28, 2009, and he does not recall needing to correct anything he heard Mr. Jansen say. (Tatman, Tr. 699, 702).

Response To Finding No. 1833:

See Response To Finding 1830, *supra*. This finding is misleading and inaccurate because it completely ignores Mr. Tatman's testimony that he was not on the conference call when Mr. Jansen allegedly stated that "Once they use Star, they can't ever buy domestic from us." (Tatman, Tr. 699 ("Q. . . .The question is, were you--do you recall Mr. Jansen saying to the sales force that "Once they use Star, they can't ever buy domestic from us" in his explanation of the exclusivity policy? A. No, I do not. And that is not consistent with the notes that I put out."))).

1834. Mr. Jansen's August 28, 2009 instruction to his sales force is consistent with the "Q&A" that Mr. Tatman prepared and distributed to his sales force on September 22, 2009. In the internal Q&A, Mr. Tatman explained that the result of a Distributor's disloyalty would be that McWane "won't sell" any Domestic Fittings to that Distributor, not that it "may not sell to that Distributor" (CX 0695 at 004; (CX 2477 (Jansen, Dep. at 198-201) (explaining that CX 0695, an internal Q&A for McWane sales force explaining McWane's Exclusive Dealing Policy, was written by Mr. Tatman))).

Response To Finding No. 1834:

See Response To Finding 1830, *supra*. See General Response 6. Further, the finding is inaccurate and misleading because it mischaracterizes the contents of CX 0695. The document does not say that McWane "won't sell" any domestic Fittings to a distributors who purchase domestic Fittings from other suppliers. (CX 0695). The phrase "won't sell" only appears in one of the hypothetical questions, and not in any of the answers. (CX 0695).

1835. In a February 13, 2010 email to Mr. Jansen, McWane territory manager Dan Todd recalled McWane's implementation of a policy that was stricter than the written letter:

I know that the fax stated that we could and or cut people off but we were told to tell them more than one time that if you support Star then we will not sell to you. Choose Star or Tyler for your Domestic products. Doug Allen rode around with me and we stated this and you even rode around with me when we told our loyal customers this.

(CX 0172; CX 2477 (Jansen, Dep. at 238-241) (discussing CX 0172: "He's going by what our conference call said. We will cut them off."))).

Response To Finding No. 1835:

See Response To Finding 1830, *supra*. See General Response 6.

1836. McWane further communicated to customers that the Exclusive Dealing Policy would be applied on a company-wide basis, such that if one branch purchased Domestic Fittings from Star, all branches would be cut off. (CX 0108 at 001; CX 2477 (Jansen, Dep. at 177-178); CX 2501 (Prescott, IHT at 50)).

Response To Finding No. 1836:

See Response To Finding 1830, *supra*. See General Responses 6-7.

1837. For example, Mr. Jansen wrote to his sales force on November 3, 2009:

Team, I think we have made it very clear in the market regarding our stance on supporting the McWane domestic brand of fittings whether purchased through Tyler/Union, Clow or Sigma. If one branch buys from someone other than this, then the whole company will be affected, not just that branch.

(CX 0108 at 001; CX 2477 (Jansen, Dep. at 177-178) (explaining that he wanted to make sure that the sales people expressed this “one clear message” to the market); *see also* CX 1599; CX 2477 (Jansen, Dep. at 173-176) (two regional vice presidents of HD Supply expressed concern to McWane’s National Sales Manager, Mr. Jansen, that they did not want to be “punished” under the McWane policy if another HD Supply branch bought Star Domestic Fittings)).

Response To Finding No. 1837:

See Response To Finding 1830, *supra*. See General Responses 6-7.

1838. A McWane sales representative wrote to Mr. Jansen on February 13, 2010, in relation to whether McWane should cut off Groeniger, a Distributor, because Groeniger bought Domestic Fittings from Star:

I know that the fax stated that we could and or cut people off but we were told to tell them more than one time that if you support Star then we will not sell to you. Choose Star or Tyler for your domestic products. Doug Allen rode around with me and we stated this and you even rode around with me when we told our loyal customers this.

(CX 172; CX 2477 (Jansen, Dep. at 238-241) (explaining that he believed that Groeniger bought Star Domestic Fittings as part of a package sale from Griffin Pipe, which was an exception to McWane’s Exclusive Dealing Policy)).

Response To Finding No. 1838:

See Response To Finding 1830, *supra*. See General Responses 6-7. The finding is misleading and inaccurate because McWane never enforced the Rebate Policy against Groeniger, even though it purchased domestic Fittings from Star. (RPFF 515 (JX 669 (Groeniger, Dep. at 99 (“Q. In the 2009 time frame after receiving this letter, Mr. Groeniger, did Tyler ever refuse to sell you something because you had a relationship with Star? A. Not to my knowledge. Q. In the 2009 time frame after receiving Exhibit 2 and later, did Tyler ever not pay you a rebate that you were due because you had a relationship with Star? A. I don't think so.”); JX 643 (Tatman, IHT at 197-198 (“Then, you know, you go beyond that. The next situation that came up was Groeniger's out there. They were using Star product. We talked to Mike the owner -- nice guy -- at a trade show, and Mike basically said, Look, we're going to do what we have to do, and you guys do what you have to do. And we left it that way. We never -- we wanted them to support us. We made a little bit of rumbling to have them support us, but in the end, we kept selling Groeniger material.”))).

1839. The McWane sales force was tasked with compiling logs to document their communications of this all-or-nothing message to Distributors. (CX 2477 (Jansen, Dep. at 179); CX 1600, CX 1601, CX 1602 (sales force logs of communications with Distributors explaining Exclusive Dealing Policy)).

Response To Finding No. 1839:

See Response To Finding 1830, *supra*. See General Responses 6-7.

1840. McWane was unwilling to negotiate the terms of its Exclusive Dealing Policy with Distributors. (CX 2501 (Prescott, IHT at 50-51) (“If you bought one fitting in one of our 26 places, we’re out [meaning ‘not having access to McWane’s domestic fittings’], simple. I belong to an organization [TDG] that tried to negotiate. Other people tried to negotiate. . . . They said it’s all or nothing”); *see also* Sheley, Tr. 3411-3412 (describing heated conversation with Mr. Jansen in January 2010 in which Mr. Jansen threatened Illinois Meter with loss of access to McWane’s Domestic Fittings and loss of its rebates for both Domestic Fittings and imported Fittings)).

Response To Finding No. 1840:

See Response To Finding 1830, *supra*. See General Response 7. The proposed Finding is not supported by the cited evidence.

1841. Distributors understood that McWane’s Exclusive Dealing Policy meant “You better not buy anything from Star.” (CX 2489 (Morrison, IHT at 72) (“Q. What did you think the letter meant as a practical matter? A. Well, I knew what it meant was: You better not buy anything from Star. ... [McWane’s] message was clear, both written and verbally that if you buy a project from Star, you’re going to go on our, I’m picking the term ‘bad list.’”); CX 2515 (Sheley, IHT at 77-78) (“Rick [Tatman] made the statement that he expected a hundred percent support for domestic product . . . if we bought any domestic from Star, they would not sell us anything. And the statement I made to Rick . . . I asked the question, ‘So you’re telling us all or none?’ And he said, ‘That’s correct.’”); CX 2501 (Prescott, IHT at 50) (“The understanding is in writing. If you bought one [Domestic] fitting [from Star] in one of our 26 places, we’re out, simple. . . . They [McWane] said it’s all or nothing.”)).

Response To Finding No. 1841:

See Response To Finding 1830, *supra*. See General Responses 6-7.

1842. Distributors believed the hard-line message McWane communicated to them regarding the policy. (CX 2489 (Morrison, IHT at 73-74) (“I had no reason to think they were bluffing. And, having been in this business for 30-plus years and knowing the attitude of McWane as a whole . . . there is an arrogance at McWane that I wouldn’t consider it a bluff. I would consider it to be that they’re serious about what they say they’re going to do to you.”); Sheley, Tr. 3412 (“There was no doubt in my mind they were serious.”)).

Response To Finding No. 1842:

See Response To Finding 1830, *supra*. See General Response 7. The generalized statement that “distributors believed” is not supported by the evidence.

1843. McWane also communicated to Distributors that if they purchased Domestic Fittings from Star for a project, the Distributor’s rebate program for Domestic Fittings would be “voided.” (CX 2489 (Morrison, IHT at 72-73) (“If we have a program with you, it would be voided, you know, because you bought something from Star.”); (CX 2544 (Coryn, Dep. at 113-114) (“Q. And was it your understanding that if you did purchase [Star Domestic Fittings] that you would lose your rebate dollars? A. Yes. Q. The policy on its face states that they may forego participation in any unpaid rebates. Was it your understanding, though, that you would forego them and that it wasn’t a ‘may forego’? THE WITNESS. Well, I took this as that we were going to lose it.”) (objection omitted); CX 2546 (Gibbs, Dep. at 82) (“Q. Were you concerned that the WinWater local companies would lose their rebate if a WinWater local company purchased Star domestic

fittings from Star? A. If they did it on an ongoing basis, yes.”); CX 2515 (Sheley, IHT at 85, *in camera*)

; CX 2514 (Webb, Dep. at 90) (“My understanding is that we would lose the rebate on the domestic fittings . . .”).

Response To Finding No. 1843:

See Response To Finding 1830, *supra*. *See* General Response 7.

1844. In a presentation prepared by Mr. Tatman after implementation of the Exclusive Dealing Policy, with the file name “Sigma MDA Review 2.15.2010 Attorney Client Privileged Communication.ppt,” Mr. Tatman stated that the market had understood McWane’s Exclusive Dealing Policy to mean that McWane “will” – not “may” – cut them off. (CX 0119 at 002).

Response To Finding No. 1844:

See Response To Finding 1830, *supra*. *See* General Response 7. The finding is also misleading and inaccurate based on Mr. Tatman’s testimony that he does not know whether the document CX 0119 was prepared after the implementation of McWane’s Rebate Policy.

(Tatman, Tr. 704-707, 725).

1845. Specifically, Mr. Tatman described McWane’s implementation of the Exclusive Dealing Policy as follows:

Although the words “may” and “or” were specifically used [in the September 22, 2009 announcement], the market has interpreted the communication in the more hard line “will” sense.

...

Access to McWane domestic product either through McWane or Sigma requires distributors to exclusively support McWane where products are available within normal lead times. Violation will result in: Loss of access, loss of accrued rebates.

(CX 0119 at 002, 004; Tatman, Tr. 722-723).

Response To Finding No. 1845:

See Response To Finding 1830, *supra*. *See* General Response 7. The finding is misleading and inaccurate based on Mr. Tatman’s testimony that he does not know whether the

document CX 0119 was prepared after the implementation of McWane's Rebate Policy.

(Tatman, Tr. 704-707, 725). Respondent has been unable to confirm the date of the document based on the metadata.

1846. McWane policed Distributors' compliance with McWane's Exclusive Dealing Policy by using its sales force to monitor Distributors for any Domestic Fittings purchases from Star. (CX 2480 (Napoli, Dep. at 75)).

Response To Finding No. 1846:

See Response To Finding 1830, *supra*. *See* General Responses 6-7.

1847. Sigma also understood that McWane's Exclusive Dealing Policy was a "stern 'all or nothing' message and 'take it or leave it' approach," and Mr. Pais observed that Distributors purchasing from Star "risk total exclusion from [Buy American] service from [McWane]." (CX 0948 at 001 (September 8, 2009 email); Pais, Tr. 1813-1815).

Response To Finding No. 1847:

See Response To Finding 1830, *supra*. *See* General Response 7.

1848. Sigma believed that under McWane's Exclusive Dealing Policy that customers like Ferguson would lose access to McWane's Domestic Fittings if they purchased from Star. (Pais, Tr. 1809-1813; CX 0948 at 001 ("What intrigues me is how customers like Ferguson would even toy with Star when they can risk total exclusion from BA service from Tyler on the strength of their passionate commitment to the 1(c) clause -- Exclusivity.")).

Response To Finding No. 1848:

See Response To Finding 1830, *supra*. *See* General Response 7. This finding is misleading and inaccurate because Sigma's "belief" regarding the terms of the September 22 letter is irrelevant to McWane's actions or intent.

1849. In a September 8, 2009 email to Sigma's OEM5 management group, Mr. Pais wrote, that when re-selling McWane's Domestic Fittings, he "disguised" McWane's exclusivity requirement as an "issue of 'fairness'":

What intrigues me is how customers like Ferguson would even toy with Star when they can risk total exclusion from BA service from Tyler on the strength of their passionate commitment to the '1C' clause -- Exclusivity! SO, actually, it may generate a steady loyalty to MCW/SIG if it is thoughtfully and effectively introduced and

promoted! *Sensing the pivotal importance of this clause, I have disguised it as an issue of 'fairness' -- helping SIG/McW thru their loyalty in return of our service of them thru delivery of the ENTIRE job!*

(CX 0948 at 001) (emphasis added)).

Response To Finding No. 1849:

See Response To Finding 1830, *supra*. See General Response 7. This finding is misleading and inaccurate because Sigma's "belief" regarding the terms of the September 22 letter is irrelevant to McWane's actions or intent or the legal issues implicated.

10.4 McWane Enforced Its Exclusive Dealing Policy Against Hajoca

1850. McWane enforced the penalty provision of its Exclusive Dealing Policy by cutting off all Hajoca branches and by voiding Hajoca's Domestic Fittings rebates after Hajoca's Tulsa branch bought domestic fittings from Star. (*Infra* ¶¶ 1851-1859).

Response To Finding No. 1850:

See General Responses 1 and 7 and ¶¶ 1851-1859.

1851. Each of Hajoca's branches makes its own vendor selection decisions, including those regarding Domestic Fittings purchases. (Pitts, Tr. 3306-3307). Due to this structure, Mr. Tatman acknowledged to Mr. Pitts on September 22, 2009 that McWane's Exclusive Dealing Policy would present Hajoca with "a few more challenges to manage compared to other nationals." (CX 0021 at 001).

Response To Finding No. 1851:

See General Response 7. The finding is incomplete and therefore misleading because the cited document, CX 0021, also indicates that Mr. Pitts and and Mr. Tatman met to discuss McWane's September 22 customer letter. (CX 0021) Despite McWane's September 22 letter, McWane continued making shipments of domestic Fittings to Hajoca from November 2009 and into 2010. (RPF 509 (Tatman, Tr. 714-718)). Mr. Tatman testified that "[Hajoca] kept buying from Star, and we kept selling them product. . . .And regardless of what we said with Hajoca, we continued to ship them product. They continued to buy from Star." (RPF 509 (Tatman, Tr.

714-718)). McWane's Rebate Policy did not prevent the Hajoca branches that preferred buying domestic Fittings from Star from doing so. (RPFF 511 (Pitts, Tr. 337)). McWane permitted Hajoca's Lansdale branch to pre-order domestic Fittings to meet its customers' needs while McWane and Hajocal negotiated the terms and effect of the Rebate Policy going forward. (RPFF 513 (Pitts, Tr. 3355-3356)). McWane also continued to pay rebates to Hajoca even though its Tulsa branch purchased Star domestic Fittings while its Lansdale branch purchased McWane domestic Fittings. (RPFF 512 (Pitts, Tr. 3366)). Since September 2009, Hajoca's domestic Fittings purchases have been split 50/50 between McWane and Star. (RPFF 510 (Pitts, Tr. 337)).

1852. On September 22, 2009, Mr. Pitts sent an email to his waterworks regional manager, Sean Kelly, attaching McWane's September 22, 2009 Exclusive Dealing Policy letter, and communicating the consequences to Hajoca of that policy. (CX 0021-A at 001).

Response To Finding No. 1852:

See Response To Finding 1851.

1853. The week before McWane issued its September 22, 2009 Exclusive Dealing Policy, McWane's National Sales Manager, Mr. Jansen, informed Mr. Pitts that McWane would be taking a "hard stance" regarding Star's entry into the Domestic Fittings market, and that if any Hajoca branch purchased Star Domestic Fittings, all Hajoca branches "would" (not "may") lose access to McWane Domestic Fittings, and would possibly lose rebates as well:

I had heard from Jerry Jansen last week that [McWane] would be taking a hard stance regarding domestic fittings manufactured for McWane. . . . Jerry had told me last week that if any [profit center or branch] in the US purchases domestic fittings from Star, all PCs would lose access to McWane's fittings and possibly lose rebates.

(CX 0021-A at 001 (Pitts September 22, 2009 email); Pitts, Tr. 3296, 3304-3305).

Response To Finding No. 1853:

See Response To Finding 1851.

1854. Based on McWane's September 22, 2009 letter and his conversation with Mr. Jansen, Mr. Pitts understood that if any branch of Hajoca purchased Domestic Fittings from Star

that the consequences would include loss of rebates from McWane and an interruption of Domestic Fittings shipments from McWane to Hajoca. (Pitts, Tr. 3300-3303; CX 0021-A at 001).

Response To Finding No. 1854:

See Response To Finding 1851.

1855. Mr. Pitts also had conversations with Mr. Tatman about the Exclusive Dealing Policy, both before and after its September 22, 2009 announcement, and Mr. Tatman reinforced the nationwide all-or-nothing nature of the policy – that if one Hajoca branch purchased Star, all branches would suffer the consequences. (Pitts, Tr. 3305-3306).

Response To Finding No. 1855:

See Response To Finding 1851.

1856. On September 30, 2009, Mr. Pitts asked Mr. Tatman to modify its Exclusive Dealing Policy so that McWane would not hold all Hajoca branches responsible if a single branch purchased Domestic Fittings from Star. McWane explained that it applies the policy at the corporate level because “that’s where the [rebate] check is sent,” and did not agree to alter McWane’s policy. Hajoca also offered to change its rebate model so that checks would be sent to the individual branches, but McWane did not agree to relax the policy. (CX 0022 at 002; Pitts, Tr. 3306-3308).

Response To Finding No. 1856:

See Response To Finding 1851.

1857. In a November 3, 2009 email to Mr. Kelly and Mr. Pitts of Hajoca, Mr. Jansen reiterated the mandatory and all-or-nothing nature of McWane’s Exclusive Dealing Policy:

[I]f any Hajoca location chooses to buy another domestic fittings supplier[‘s] product Hajoca *will not* have direct access to the McWane ductile iron water main fittings for a period of time as well as loss of any accrued rebate to date.

(CX 0024 at 001 (emphasis added); Pitts, Tr. 3311-3313 (CX 0024 accurately reflects the mandatory nature of the Exclusive Dealing Policy as described to Mr. Pitts by Mr. Tatman and Mr. Jansen in multiple conversations)).

Response To Finding No. 1857:

See Response To Finding 1851.

1858. Mr. Tatman also informed Mr. Pitts that HD Supply and Ferguson intended to comply with McWane's Exclusive Dealing Policy. (Pitts, Tr. 3305-3306).

Response To Finding No. 1858:

See Response To Finding 1851. *See* General Response 7.

1859. At the time of the implementation of McWane's Exclusive Dealing Policy, almost all of Hajoca's purchases of Domestic Fittings were made by Hajoca's Tulsa (Oklahoma) and Lansdale (Pennsylvania) branches. (CX 0023 at 001).

Response To Finding No. 1859:

See Response To Finding 1851. *See* General Response 7.

10.4.1 Hajoca's Tulsa Branch Purchased Domestic Fittings from Star

1860. By November 3, 2009, Hajoca's Tulsa branch had purchased some Domestic Fittings from Star. (Pitts, Tr. 3308-3310; CX 0024 at 001).

Response To Finding No. 1860:

See Response To Finding 1851.

1861. In an email exchange between Mr. Jansen and Mr. Kelly of Hajoca between November 3, 2009 and November 7, 2009, Mr. Jansen reiterated the company-wide application of the Exclusive Dealing Policy, and acknowledged that Hajoca would have to make a decision as to whether to purchase exclusively from McWane. (CX 0024 at 001; Pitts, Tr. 3308-3310).

Response To Finding No. 1861:

See Response To Finding 1851. *See* General Response 7.

1862. Hajoca's Lansdale, Pennsylvania location purchased a higher volume of Domestic Fittings and anticipated losing business if it lost access to McWane's Domestic Fittings. (Pitts, Tr. 3314).

Response To Finding No. 1862:

See Response To Finding 1851. *See* General Response 7.

1863. Hajoca chose to continue allowing its branches to make its own Domestic Fittings vendor selections. (Pitts, Tr. 3313 ("Our decision was to stand by our [business model] and let the manager of that [Tulsa] location purchase those fittings if he chose to.")).

Response To Finding No. 1863:

See Response To Finding 1851. *See* General Response 7.

1864. On November 16, 2009, Mr. Kelly informed Mr. Jansen that Hajoca “will not be changing our current business practice that allows our managers in the field to determine where or whom they buy their product,” and “cannot in good conscience support a program where the actions of one manager somewhere in the country could undermine an entire rebate program for the balance of the business.” (CX 0731 at 001).

Response To Finding No. 1864:

See Response To Finding 1851. *See* General Response 7.

1865. The next day, November 17, 2009, Greg Dill of Hajoca’s Tulsa branch contacted Susan Schepps of Star and informed her that he would be placing a Domestic Fittings stock order the following day. (CX 0731 at 001).

Response To Finding No. 1865:

See Response To Finding 1851.

10.4.2 McWane Cut Off All Hajoca Branches

1866. As a result of Hajoca’s decision to continue allowing its branches to make its own Domestic Fittings vendor selections, all of Hajoca’s branches, including Hajoca’s Lansdale, Pennsylvania location, lost access to McWane’s Domestic Fittings. (Pitts, Tr. 3313-3314; Tatman, Tr. 730 (“Q. And you were enacting this policy [Exclusive Dealing policy] here by telling Hajoca, you’re cut off; right? A. At this moment in time, that’s what we did.”); *see also* CX 0173 at 001 (Jansen January 19, 2010 email to a customer of Hajoca’s Lansdale branch explaining McWane’s cutoff of Hajoca: “We don’t like the situation either but feel we can’t support someone who is helping our competition build a line against us.”); CX 2477 (Jansen, Dep. at 223-225) (explaining CX 0173 at 001)).

Response To Finding No. 1866:

See Response To Finding 1851.

1867. On November 23, 2009, Mr. McCullough informed Sean Kelly of Hajoca that McWane would “discontinue selling Hajoca domestic fittings since they are supporting Star’s domestic line.” (CX 1800; Tatman, Tr. 729; *see also* CX 0100 at 001 (November 17, 2009 internal McWane email) (“What I’m more concerned with at this point is Hajoca supporting Star’s domestic program and the potential price ripple effect that could have in the market.”)).

Response To Finding No. 1867:

See Response To Finding 1851.

1868. Based on his discussion with Sean Kelly, Mr. McCullough reported that Sean Kelly understood “[that] Lansdale will also be cut off on domestic. They had hoped to be able to buy Tyler/Union at a higher price, but I advised this was not an option.” (CX 1800; CX 2479 (McCullough, Dep. at 142) (CX 1800 accurately describes Mr. McCullough’s conversation with Sean Kelly of Hajoca)).

Response To Finding No. 1868:

See Response To Finding 1851. *See* General Responses 6-7.

1869. Mr. McCullough further reported to McWane’s soil pipe division that Hajoca had elected to opt out of the McWane corporate rebate program unless the Exclusive Dealing Policy for Domestic Fittings could be regionalized. (CX 0398; CX 2479 (McCullough, Dep. at 155)).

Response To Finding No. 1869:

See Response To Finding 1851. *See* General Response 6-7.

1870. Mr. Tatman emailed Mr. McCullough and Mr. Walton on November 23, 2009, to confirm that all Hajoca orders had been placed on hold, that Sigma had been advised to do the same per the terms of the Master Distribution Agreement, and that Jeff Otterstedt and Scott Frank of Clow Water had also been advised. (CX 1800; Tatman, Tr. 729-730).

Response To Finding No. 1870:

See Response To Finding 1851.

1871. The next day, Mr. Jansen confirmed to a member of the McWane sales team that the Hajoca decision was the “[f]inal word unless they change direction corporately.” (CX 0702 at 001).

Response To Finding No. 1871:

See Response To Finding 1851.

1872. On November 26, 2009, Mr. Tatman sent an email to Mr. Pitts and Mr. Kelly of Hajoca, stating “I appreciate the candid dialog from your recent calls.” Mr. Tatman invited Hajoca to submit orders for “in process domestic jobs that require near term shipments before December 4” (but “excluding Tulsa”), and stated that “[w]hile you certainly don’t agree with our stance, I hope that at least you will consider the broader market view under which we have to make these decisions.” (RX-237; Tatman, Tr. 730-731; Pitts, Tr.

3314-3316 (McWane allowed it to place orders to cover existing commitments but after that, it cut off all of Hajoca's access to McWane's Domestic Fittings)).

Response To Finding No. 1872:

See Response To Finding 1851.

1873. Hajoca's Tulsa branch was excluded from the allowance for final Domestic Fittings orders because it was the Hajoca location that had purchased Domestic Fittings from Star. (Pitts, Tr. 3316 (testifying that McWane never mentioned any allegations that the Tulsa branch had ground off the country of origin on an imported Fitting as the reason why Tulsa could no longer purchase Domestic Fittings from McWane)).

Response To Finding No. 1873:

See Response To Finding 1851.

1874. On December 14, 2009, Mr. Tatman informed Sigma that it could not supply Hajoca per the terms of the Master Distribution Agreement because Hajoca's Tulsa branch "elected to support another brand for some of their Domestic fitting needs," and that McWane therefore had "elected not to supply any of the Hajoca branches with our domestic product." Mr. Rona of Sigma confirmed that Sigma was "clear about Hajoca." (CX 1801 at 001; CX 1802 at 001, 002; Tatman, Tr. 720, 739-740; *see also* Tatman, Tr. 729-730 (When McWane cut off Hajoca, Mr. Tatman, as a matter of policy, told Sigma not to sell to Hajoca); Rona, Tr. 1606, 1608 (Rona forwarded to Sigma's distribution group the instruction not to sell McWane-produced domestic fittings to any Hajoca branch)).

Response To Finding No. 1874:

See Response To Finding 1851.

1875. On December 15, 2009, Mr. Tatman also instructed Clow Water not to accept any Hajoca orders. (CX 0477 at 001; Tatman, Tr. 721; *see also* Tatman, Tr. 730 (When McWane cut off Hajoca, Mr. Tatman, as a matter of policy, told Clow Water not to sell to Hajoca)).

Response To Finding No. 1875:

See Response To Finding 1851.

1876. Scott Frank of Clow Water responded to Mr. Tatman that "All of Clow is aware to NO QUOTE and REFUSE all Hajoca orders." (CX 1802; Tatman, Tr. 738).

Response To Finding No. 1876:

See Response To Finding 1851.

1877. Between December 4, 2009 and April 13, 2010, all of Hajoca, including its Lansdale, Pennsylvania branch, was unable to place Domestic Fittings orders with McWane because of McWane's Exclusive Dealing Policy. (Pitts, Tr. 3326-3327, 3363).

Response To Finding No. 1877:

See Response To Finding 1851. *See* General Response 7.

1878. Between December 4, 2009 and April 13, 2010, Hajoca's Lansdale, Pennsylvania branch had wanted to place a Domestic Fittings order to fulfill a municipal contract but could not do so because of McWane's Exclusive Dealing Policy and McWane's decision to cut off Hajoca's access to McWane's Domestic Fittings. (Pitts, Tr. 3316-3320; CX 0027 at 001 (March 9, 2010) ("I can no longer purchase from [McWane] and have an immediate need for a large quantity of flanged fittings that must be Tyler Union.")).

Response To Finding No. 1878:

See Response To Finding 1851. *See* General Response 7.

1879. Domestic Fittings received by Hajoca from McWane between December 4, 2009 and April 13, 2010, if any, were likely in response to orders placed prior to the December 4, 2009 cut-off date. (Pitts, Tr. 3320-3321; RX-289 at 004).

Response To Finding No. 1879:

See Response To Finding 1851. *See* General Response 7.

10.4.3 After McWane Became Aware of the FTC Investigation, McWane Negotiated with Hajoca to Give All Non-Tulsa Branches Access to McWane's Domestic Fittings

1880. After McWane learned of the FTC investigation into its Exclusive Dealing Policy, McWane negotiated with Hajoca and ultimately gave all non-Tulsa branches access to McWane's Domestic Fittings. (*Infra* ¶¶ 1881-1888).

Response To Finding No. 1880:

See General Responses 1 and 7 and ¶¶ 1881-1888.

1881. On March 27, 2010, prior to McWane executives meeting with Hajoca executives to discuss McWane's enforcement of the Exclusive Dealing policy against Hajoca, Mr. McCullough sent an internal email to find out "[h]ow our potential FTC action might effect how we do business with them [Hajoca]." (RX-628 at 001).

Response To Finding No. 1881:

See Response To Finding 1851. *See* General Response 7. The finding is misleading and inaccurate because McWane continued making shipments to Hajoca (despite Hajoca’s purchases of domestic Fittings from Star) prior to learning about the FTC investigation. (RPF 509 (Tatman, Tr. 714-718)).

1882. Mr. Kelly of Hajoca met with Mr. Tatman in early March 2010, and reported to his colleagues that McWane appeared to be “seriously considering softening their stance.” (CX 0027 at 001; CX 2479 (McCullough, Dep. at 155) (noting that Hajoca’s sister company, EMCO, is McWane’s single largest customer in Canada)).

Response To Finding No. 1882:

See Response To Finding 1851. *See* General Response 7. The finding is misleading and inaccurate because McWane continue making shipments to Hajoca (despite Hajoca’s purchases of domestic Fittings from Star) prior to learning about the FTC investigation. (RPF 509 (Tatman, Tr. 714-718)).

1883. After a number of attempts by Hajoca to regain access to McWane’s Domestic Fittings, McWane eventually began selling Domestic Fittings to Hajoca following discussions at the March 2010 ASA meeting that included McWane’s Leon McCullough. (Pitts, Tr. 3323-3324 (noting that neither Mr. Tatman nor Mr. Jansen were in attendance at meeting)).

Response To Finding No. 1883:

See Response To Finding 1851. The finding is misleading and inaccurate because McWane continue making shipments to Hajoca (despite Hajoca’s purchases of domestic Fittings from Star) prior to learning about the FTC investigation. (RPF 509 (Tatman, Tr. 714-718)).

1884. On April 1, 2010, Mr. Kelly reported within Hajoca that he had met with Mr. McCullough and others at McWane, and that Hajoca’s Lansdale, PA branch “will be reinstated as a full stocking distributor of [McWane] fittings.” (CX 0028 at 001; CX 2479 (McCullough, Dep. at 153-154) (testifying that he did not know the date upon which the “hold” on orders from the Hajoca Lansdale branch was lifted)).

Response To Finding No. 1884:

See Response To Finding 1851. *See* General Response 7. The finding is misleading and inaccurate because McWane continue making shipments to Hajoca (despite Hajoca's purchases of domestic Fittings from Star) prior to learning about the FTC investigation. (RPF 509 (Tatman, Tr. 714-718)).

1885. On April 13, 2010, Mr. Kelly reported within Hajoca that he had spoken with Mr. Tatman, and that "we will be moving forward with Tyler/Union in Landsdale and perhaps some other waterworks locations depending on how the local relationships fare." (CX 0030 at 001; Pitts, Tr. 3324-3325).

Response To Finding No. 1885:

See Response To Finding 1851. *See* General Response 7. The finding is misleading and inaccurate because McWane continue making shipments to Hajoca (despite Hajoca's purchases of domestic Fittings from Star) prior to learning about the FTC investigation. (RPF 509 (Tatman, Tr. 714-718)).

1886. Shortly after April 13, 2010, McWane reinstated Domestic Fittings service to Hajoca's Landsdale, Pennsylvania branch. (Pitts, Tr. 3325).

Response To Finding No. 1886:

See Response To Finding 1851. The finding is misleading and inaccurate because McWane continue making shipments to Hajoca (despite Hajoca's purchases of domestic Fittings from Star) prior to learning about the FTC investigation. (RPF 509 (Tatman, Tr. 714-718)).

1887. McWane did not reinstate Domestic Fittings service to Hajoca's Tulsa, Oklahoma branch, the Hajoca branch that was purchasing Star's Domestic Fittings. (CX 0030 at 001 ("Tulsa is excluded from the deal and will not have access to Tyler Union."); Pitts, Tr. 3325-3326).

Response To Finding No. 1887:

See Response To Finding 1851. The finding is misleading and inaccurate because McWane continue making shipments to Hajoca (despite Hajoca's purchases of domestic Fittings from Star) prior to learning about the FTC investigation. (RPF 509 (Tatman, Tr. 714-718)).

1888. McWane has never told Hajoca that its Tulsa, Oklahoma branch had access to McWane's Domestic Fittings. (CX 0030; Pitts, Tr. 3326).

Response To Finding No. 1888:

See Response To Finding 1851. *See* General Response 7. The finding is misleading and inaccurate because McWane continue making shipments to Hajoca (despite Hajoca's purchases of domestic Fittings from Star) prior to learning about the FTC investigation. (RPF 509 (Tatman, Tr. 714-718)).

10.4.4 McWane Withheld Hajoca's Domestic Fittings Rebate

1889. Although McWane ultimately reinstated the individual Hajoca branches that did not buy Domestic Fittings from Star, Hajoca Corporate still lost its rebate on Domestic Fittings. (Pitts, Tr. 3320-3323).

Response To Finding No. 1889:

This finding is misleading and therefore inaccurate because McWane continued to pay rebates to Hajoca even though its Tulsa branch purchased Star domestic Fittings while its Lansdale branch purchased McWane domestic Fittings. (RPF 512 (Pitts, Tr. 3366)).

1890. Specifically, McWane withheld Hajoca's rebate in the fourth quarter of 2009 because that was the quarter when Hajoca violated McWane's Exclusive Dealing Policy. (Pitts, Tr. 3320-3323).

Response To Finding No. 1890:

See Response To Finding No. 1889.

1891. In a February 4, 2010 email to Roy Pitts of Hajoca, Mr. Tatman confirmed that McWane had withheld Hajoca's fourth quarter 2009 Domestic Fittings rebate as a result of Hajoca's decision to sell Star products in Tulsa. (CX 1803 at 001; Tatman, Tr. 740; Pitts, Tr. 3322-3323).

Response To Finding No. 1891:

See Response To Finding No. 1889. This finding is incomplete and misleading because it fails to note that Mr. Tatman testified that Hajoca's fourth quarter rebate for domestic Fittings was only approximately .

1892. While the amount of the Domestic Fittings rebate lost may have been relatively small compared to the size of the entire Hajoca corporation, Hajoca allocates rebates back to the branch that earns the rebate, and a rebate can be significant to an individual branch. (Pitts. Tr. 3323).

Response To Finding No. 1892:

See Response To Finding No. 1889. This finding is incomplete and misleading because it fails to note that Mr. Tatman testified that Hajoca's fourth quarter rebate for domestic Fittings was only approximately .

10.5 McWane's Exclusive Dealing Policy Worked: Distributors Did Not Purchase Domestic Fittings from Star

1893. McWane's Exclusive Dealing Policy worked as intended by McWane: It caused Distributors to refuse to purchase Domestic Fittings from Star, or to purchase Domestic Fittings from Star only in those limited circumstances under which they believed that McWane would not find out about it. (*Infra* ¶¶ 1894-2031).

Response To Finding No. 1893:

See General Responses 1 and 7 and responses to ¶¶ 1894-2031.

10.5.1 McWane's Exclusive Dealing Policy Was Viewed by Distributors as Presenting an Intolerable Risk That McWane Would Cut Them Off if They Purchased Domestic Fittings from Star

1894. Distributors viewed McWane's Exclusive Dealing Policy as presenting an intolerable risk that McWane would cut them off if they purchased Domestic Fittings from Star. (*Infra* ¶¶ 1895-1902).

Response To Finding No. 1894:

See General Responses 1 and 7 and responses of ¶¶ 1895-1902.

1895. Distributors viewed the McWane Exclusive Dealing Policy as a threat by McWane that if they purchased any Domestic Fittings from Star, McWane would not sell any Domestic

Fittings to them. (Sheley, Tr. 3411 (“The implied threat that if we bought anybody else’s fittings, they [McWane] wouldn’t do business with us in any way, shape or form. We could buy no domestic fittings at all.”); CX 2490 (Morrison, Dep. at 79-80) (“When I read the letter that they [McWane] sent out . . . I interpreted that as a threat.”); CX 2510 (Groeniger, Dep. at 92) (“We were informed that they [McWane] were going to pull everything away from us, a threat.”); CX 2543 (Coryn, IHT at 126) (“There was . . . that veiled threat out there that if you – if they [McWane] found out you were buying from them [Star], something would happen.”); CX 2489 (Morrison, IHT at 85) (“because of the letter, I mean because of the threats”)).

Response To Finding No. 1895:

See General Response 7. This finding is inaccurate and misleading because Star sold domestic Fittings to over Distributors despite McWane’s September 22, 2009 letter, including

. (RPFF 425 (McCutcheon, Tr. 2590-2594); RPFF 469; RPFF 478 (Normann, Tr. 5044 *in camera*)). Mr. McCutcheon’s initial reaction to McWane’s September 22 letter was that the Rebate Policy would be a benefit to Star. (RPFF 427 (McCutcheon, Tr. 2588-2590); CX 0009). As early as April 2010, Star recognized that McWane’s Rebate Policy was “all bark and no bite.” (RPFF 426 (McCutcheon, Tr. 2617 2617)). McWane did not enforce the terms of the September 22 letter against Distributors who purchased from Star (RPFF 509), including Ferguson (RPFF 520), Hajoca (RPFF 511-513), Illinois Meter (RPFF 514), Groeniger (RPFF 515), Dana Kepner (RPFF 516), WinWholesale (RPFF 514), HD Supply (RPFF 518), and U.S. Pipe (RPFF 521). Complaint Counsel’s expert could not identify a single customer who wanted to purchase domestic Fittings from Star but was unable to because of McWane’s Rebate Policy. (RPFF 524).

Multiple distributors, including Illinois Meter (RPFF 481-483 (Sheley, Tr. 3448-3451); JX 675 (Sheley, Dep. at 162-163); JX 674 (Sheley, IHT at 90)), Win Wholesale (RPFF 484 (JX 705 (Gibbs, Dep. at 93-94))), and the two largest Distributors --Ferguson (RPFF 489 (Thees, Tr.

3108-3109; CX 506)) and HD Supply (RPF 485 (JX 673 (Webb, Dep. at 123-25)); RPF 480 (Webb, Tr. 2788-2789))--tesified that McWane’s Rebate Policy did not affect their decision whether or not to purchase domestic Fittings from Star.

Since its entry into the domestic segment in Fall 2009,

(RPF 463 (Bhargava, Tr. 3027)). Star’s sales of domestic Fittings increased from 2009 to 2010 amd were “better than. . .expected.” (RPF 464-465 (McCutcheon, Tr. 2590; RX 231)). Star’s success continued into the first and second quarters of 2010, the peak of the ARRA period. (RPF 467 (McCutcheon, Tr. 2613-2614)). In 2010, Star bid on an average of domestic jobs per day and acquired an average of new customers per week. (RPF 471-472 (McCutcheon, Tr. 2595, 2602); CX 2294). In some States, Star’s share of the domestic Fittings segment was 20-30%. (RPF 470 (Normann, Tr. 4930-31)).

[REDACTED]

[REDACTED]

(RPF 474-475 (Bhargava, Tr. 3027-3028)).

1896. Distributors expected that McWane would cut off their access to Domestic Fittings if they purchased domestic fittings from Star. (CX 2516 (Sheley, Dep. at 141) (“Q. Going back to Star’s entry into the domestic production of fittings, what was your understanding of McWane’s likely response if you purchased fittings for a project from Star? . . . [A]: That I would lose the line. I would lose access to their product line.”); CX 2504 (Thees, Dep. at 31-32) (“there was some concern over reaction from McWane if we were to utilize Star as a domestic source”); CX 2502 (Prescott, Dep. at 114) (explaining that E.J. Prescott did not want to “turn up any apple carts” by purchasing Domestic Fittings from Star); CX 2489 (Morrison, IHT at 67) (“Well, if there was a project that Tyler Union was interested in and I decided to buy it from Star, that would get their attention. I mean they’d be very upset. That would not be good.”)).

Response To Finding No. 1896:

See Response To Finding 1895, *supra*.

1897. Distributors were concerned about losing their rebate for Domestic Fittings from McWane if they purchased any Domestic Fittings from Star. (Webb, Tr. 2762-2763; CX 2544 (Coryn, Dep. at 113) (“My big concern was loss of the rebate dollars.”); CX 2489 (Morrison, IHT at 74) (“[Y]our rebate percentage is in the teens, so you’re talking about a significant amount of money that you would lose.”); CX 2546 (Gibbs,

Dep. at 82) (“Q. Were you concerned that the WinWater local companies would lose their rebate if a WinWater local company purchased Star domestic fittings from Star? A. If they did it on an ongoing basis, yes.”)).

Response To Finding No. 1897:

See Response To Finding 1895, *supra*.

1898. Distributors were more concerned about losing access to Domestic Fittings from McWane than they were about losing their rebates if they purchased any Domestic Fittings from Star. (Webb, Tr. 2762-2763; CX 2514 (Webb, Dep. at 93) (“[T]here’s no question not having access to the product is – is more penalizing than losing the rebate.”); Sheley, Tr. 3412 (Losing access to McWane’s Domestic Fittings was a more serious consequence to Illinois Meter than losing McWane’s rebates because Illinois Meter needs to have access to a full line of Domestic Fittings in certain locations and McWane carries a complete line.); CX 2489 (Morrison, IHT at 74) (“More importantly is the problems you’re going to have going forward in buying product from them [McWane].”); CX 2491 (Johnson, IHT at 84) (“Well, that [the rebate] was not the significant part of the paragraph that concerned me. It was the rest of the paragraph [access to Domestic Fittings]. I mean we would have lost some money, but it wouldn’t have been significant compared to the consequences of the latter part of the paragraph.”))

Response To Finding No. 1898:

See Response To Finding 1895, *supra*.

1899. Twelve weeks is a long period of time for a Distributor, and as a practical matter McWane’s threat of suspending access to Domestic Fittings for 12 weeks had the same effect as a threat of cutting off access to Domestic Fittings altogether. (CX 2502 (Prescott, Dep. at 121) (“Well, we took the – the – we took the 12 weeks that 12 weeks would wipe us out, so we took it as forever. I mean that -- that doesn’t make us right, but I mean 12 weeks in the season is – you would be out of business . . .”); CX 2489 (Morrison, IHT at 75) (“Oh, that’s an eternity. To say you can’t get something for 12 weeks, you might as well go out of business. I mean that’s – 12-week lead time would be devastating to a distributor.”); CX 2491 (Johnson, IHT at 25) (“Q. So following that logic out, if you had to tell your customers it’s going to be 12 weeks before we can – A. We wouldn’t have any business.”)).

Response To Finding No. 1899:

See Response To Finding 1895, *supra*.

1900. Distributors risk losing a project if they are unable to sell one of the required products in the bundle for a waterworks project. (CX 2501 (Prescott, IHT at 28)). McWane’s Exclusive Dealing Policy created this risk for Distributors during the ARRA period, because a Distributor that could not sell Domestic Fittings would not be able to win bids on projects funded under the ARRA. (CX 2489 (Morrison, IHT at 35-36) (“If I was not a

distributor for Tyler Union and they're the only person making domestic pipe fittings and there's a job that requires domestic pipe fittings, the chances of me getting an order on that project would be remote because the contractor's going to give the order to somebody that can supply him the proper fittings and he's not going to be interested in buying the fittings from X and giving the rest of the business to Y."); CX 2501 (Prescott, IHT at 28) (explaining that if domestic fittings were unavailable "we would have to go against Buy America"))).

Response To Finding No. 1900:

See General Responses 6-7.

1901. Distributors also risked longer-term, and broader, damage to their relationships with customers, including loss of business in related product lines, if their Domestic Fittings supply were disrupted by McWane's enforcement of its Exclusive Dealing Policy. (CX 2537 (McCutcheon, IHT (Vol. 1) at 147-148) ("Q. . . . Are we just talking about sales of domestic fitting in these subsequent round of bidding, or am I losing the opportunity to sell not only fittings but ductile iron pipe and valves and hydrants and any other product that's part of the typical normal bundle for a waterworks project? A. All products, the relationship -- it would affect the relationship for all products. Q. And did your distributors voice some or all of these concerns to you when they received the threats from McWane that we've been talking about? A. They did.")).

Response To Finding No. 1901:

See General Responses 6-7.

1902. Based on McWane's Exclusive Dealing Policy, Distributors generally were not willing to take the risk of purchasing Domestic Fittings from Star, even if McWane had not been aggressively enforcing its Exclusive Dealing Policy. As Star's Regional Sales Manager explained in his deposition:

Every distributor -- every customer distributor that we talked to or that I talked to after this letter came out, wanted to talk about it. And they all wanted to know what I had seen in other parts of the

countries or if any distributors were purchasing our domestic. And if so, had Tyler punished them. And -- and I had not seen anywhere or heard from anybody that -- that there was any repercussions for people buying our fittings anywhere from anybody. But the fear that something could happen in -- in areas that actually buy domestic fittings, customers are afraid. They don't want to take the chance of the what-if.

(CX 2532 (Berry, Dep. at 144)).¹¹

Response To Finding No. 1902:

See Response To Finding 1895, *supra.*. See General Response 10.

10.5.2 At McWane's Urging, HD Supply Issued a Mandate Letter Directing Its Branches Not to Purchase Star's Domestic Fittings

1903. At McWane's urging, HD Supply issued an internal mandate letter directing its branches not to purchase Star's Domestic Fittings. (*Infra* ¶¶ 1904-1936).

Response To Finding No. 1903:

See General Response 1 and responses to ¶¶ 1904-1936.

¹¹ The cited out of court statements should be considered for the truth of the matters asserted therein, as statements of motive, intent, or plan under Fed. R. Evid. 803(3). Hearsay introduced to prove a buyer's reason or motivation for refusing to do business with a seller is admissible under the "state of mind" exception to the hearsay rule set forth in Federal Rule of Evidence 803(3). See *Calahan v. A.E.V.*, 182 F.3d 237, 251 (3d. Cir. 1999); see *Mun. Revenue Serv., Inc. v. Xspand, Inc.*, 700 F.Supp.2d 692, 705 (M.D. Pa. 2010) (hearsay regarding the buyer's motives are admissible to establish that seller's marketing strategy caused buyers not to do business with competitor); *Discover Fin. Servs. v. Visa U.S.A. Inc.*, 2008 U.S. Dist. LEXIS 80801 at 4 (S.D.N.Y. 2008) ("testimony concerning the motivation of customers for ceasing to deal with a business is admissible under the 'state of mind' exception to the hearsay rule"). This testimony is admissible even in instances in which the witness did not identify the declarant/customer who made the statement. *Calahan*, 182 F.3d at 252 n.1.

10.5.2.1 McWane Requested That HD Supply Issue an Internal Letter Mandating Adherence to McWane's Exclusive Dealing Policy

1904. Before issuing its Exclusive Dealing Policy, McWane met with HD Supply and Ferguson to discuss the policy. (Tatman, Tr. 689).

Response To Finding No. 1904:

See General Response 7.

1905. On or about September 8, 2009, Mr. Tatman informed Mr. McCullough that Mr. Jansen had been discussing McWane's "pending policy on supply exclusivity" for Domestic Fittings with Distributors, and that he was "starting to pick up some negative reaction from the HD Supply Region, District, and Branch managers." (CX 0340; Tatman, Tr. 689-693).

Response To Finding No. 1905:

The finding is incomplete and misleading because, at trial, Mr. Tatman testified that the "negative reaction" at HD Supply was not universal and depended upon "what level at HD Supply you would talk to." (Tatman, Tr. 689-690). The finding is also incomplete and misleading because, following McWane's September 22 letter, HD Supply, the largest distributor in the industry, purchased domestic Fittings from Star. (RPF 466 (Webb, Tr. 2798-2800)). HD Supply purchased domestic Fittings from Star in September of 2009 and continues to do so today. (RPF 466 (Webb, Tr. 2798-2800)). Mr. Webb testified that McWane was a known, full-line Fittings supplier with a good track record and that HD Supply would not have purchased more domestic Fittings from Star than it did, even without the Rebate Policy. (RPF 485 (JX 673 (Webb, Dep. at 123-25))). McWane has never refused to sell domestic Fittings to HD Supply or refused to pay rebates to HD Supply as a result of HD Supply's purchases of domestic Fittings from Star. (RPF 518 (JX 673 (Webb, Dep. at 46-47))).

1906. In light of concerns expressed by HD Supply's Region, District, and Branch managers regarding McWane's pending Exclusive Dealing Policy, Mr. Tatman suggested to Mr. McCullough that HD Supply's CEO, Jerry Webb, should send an internal communication that HD Supply had elected to use McWane Domestic Fittings as its sole

supply source through 2010. Mr. Tatman provided Mr. McCullough with draft language for an email to Mr. Webb. (CX 0340; Tatman, Tr. 693-694).

Response To Finding No. 1906:

See Response To Finding 1905, *supra*. *See* General Response 7.

1907. On September 22, 2009, Glenn Fielding, HD Supply's Director of Sourcing and Price Management, sent an email to Jerry Webb, CEO, and Darrin Anderson, Vice President of Sourcing and Operations, forwarding the text of the McWane September 22, 2009 letter and recounting a conversation with Mr. Tatman in which Mr. Tatman informed him that the policy "must be adhered to by entire company -- if one branch buys domestic from someone else it affects the whole companies program." (CX 2173 at 001; Webb, Tr. 2750-2753).

Response To Finding No. 1907:

Although Respondent does not dispute the fact that Mr. Fielding sent an email to Mr. Webb and Mr. Anderson, the finding is incomplete and therefore misleading because following McWane's September 22 letter, HD Supply, the largest distributor in the industry, purchased domestic Fittings from Star. (RPF 466 (Webb, Tr. 2798-2800)). HD Supply purchased domestic Fittings from Star in September of 2009, the first month Star offered domestic fittings, and continues to do so today. (RPF 466 (Webb, Tr. 2798-2800)). Mr. Webb testified that McWane was a known, full-line Fittings supplier with a good track record and that HD Supply would not have purchased more domestic Fittings from Star than it did, even without the Rebate Policy. (RPF 485 (JX 673 (Webb, Dep. at 123-25))). ***McWane has never refused to sell domestic Fittings to HD Supply or refused to pay rebates to HD Supply as a result of HD Supply's purchases of domestic Fittings from Star.*** (RPF 518 (JX 673 (Webb, Dep. at 46-47))).

1908. HD Supply was concerned about a reduction in rebate dollars as a result of McWane's September 2009 Domestic Fittings policy. However, HD Supply was more concerned about the impact to customer satisfaction in the event that McWane cut off HD Supply's access to its Domestic Fittings. (Webb, Tr. 2762-2763; CX 2173 at 003).

Response To Finding No. 1908:

This finding is incomplete and therefore misleading because following McWane's September 22 letter, HD Supply, the largest distributor in the industry, purchased domestic Fittings from Star. (RPFF 466 (Webb, Tr. 2798-2800)). HD Supply purchased domestic Fittings from Star in September of 2009 and continues to do so today. (RPFF 466 (Webb, Tr. 2798-2800)). Mr. Webb testified that McWane was a known, full-line Fittings supplier with a good track record and that HD Supply would not have purchased more domestic Fittings from Star than it did, even without the Rebate Policy. (RPFF 485 (JX 673 (Webb, Dep. at 123-25))).

McWane has never refused to sell domestic Fittings to HD Supply or refused to pay rebates to HD Supply as a result of HD Supply's purchases of domestic Fittings from Star. (RPFF 518 (JX 673 (Webb, Dep. at 46-47))).

1909. On the morning of September 23, 2009, Mr. Tatman sent an email to Mr. McCullough and Mr. Walton relaying a report he had received from Mr. Jansen. Mr. Jansen had met with Jack Shaller of HD Supply, who told Mr. Jansen that HD Supply had held a manager's meeting "and the McWane exclusivity policy for domestic fittings was discussed at length," and that "nobody from Jerry [Webb] on down was happy about it." (CX 1246). Tatman noted that "I suspect Jerry [Webb] sold this as a 'We have to do' rather than a 'In the big picture this is best for our business.'" (CX 1246; Tatman, Tr. 696-697).

Response To Finding No. 1909:

See Response To Finding 1908, *supra*. See General Response 7.

10.5.2.2 HD Supply Issued the Requested Mandate Letter

1910. On or about September 23, 2009, in response to McWane's Exclusive Dealing Policy, HD Supply's CEO, Jerry Webb, sent a letter to HD's branch managers, district managers, and operations managers stating that they needed "to adhere to this mandate and purchase all of our American made fittings through [McWane] or Sigma." (CX 0552 at 001; Webb, Tr. 2763-2765 (explaining that the "mandate" was McWane's Exclusive Dealing Policy)).

Response To Finding No. 1910:

See Response To Finding 1908, *supra*. See General Response 7.

1911. Without McWane's September 22, 2009 letter, Mr. Webb would not have issued his September 23, 2009 company-wide policy requiring HD Supply managers to only purchase Domestic Fittings from McWane (or Sigma). (Webb, Tr. 2804).

Response To Finding No. 1911:

This finding is incomplete and misleading because Mr. Webb testified that McWane was a known, full-line Fittings supplier with good track record and that HD Supply would not have purchased more domestic Fittings from Star than it did, even without the Rebate Policy. (RPF 485 (JX 673 (Webb, Dep. at 123-25))). See Response To Finding 1908, *supra*.

1912. Mr. Webb's September 23, 2009 letter to HD Supply Managers reflected HD Supply's understanding of McWane's Exclusive Dealing Policy as a "mandate" requiring HD Supply to purchase all of its Domestic Fittings from McWane, or risk repercussions. (CX 0552 at 001; Webb, Tr. 2764-2765).

Response To Finding No. 1912:

See General Response 7. This finding is incomplete and misleading because Mr. Webb testified that McWane was a known, full-line Fittings supplier with good track record and that HD Supply would not have purchased more domestic Fittings from Star than it did, even without the Rebate Policy. (RPF 485 (JX 673 (Webb, Dep. at 123-25))). See Response To Finding 1908, *supra*.

1913. HD Supply understood McWane's Exclusive Dealing Policy to require HD Supply to purchase "all" of its Domestic Fittings from McWane, except where McWane was unable to supply the Domestic Fittings in question. (Webb, Tr. 2768-2770 ("Q. And was this an all-or-nothing support? A. This was all to the extent other than the exceptions where they had a service or inability to fill an order.")).

Response To Finding No. 1913:

See General Response 7. See Response To Finding 1908, *supra*.

1914. HD Supply also understood McWane's Exclusive Dealing Policy to mean that if HD Supply purchased Domestic Fittings from Star that HD Supply "would lose the rebate on the domestic fittings and potentially lose access to the domestic line. . . . [I]t could be a significant event." (CX 2514 (Webb, Dep. at 90-91); Webb, Tr. 2760-2761 ("Q. How did you interpret this policy from Tyler/Union? A. That if their domestic line was not

fully supported, there could be implication to your rebate and access to domestic fittings.”); CX 2173 at 001).

Response To Finding No. 1914:

See General Response 7. *See* Response To Finding 1908, *supra*.

1915. McWane’s Exclusive Dealing Policy made HD Supply less willing to do business with any other provider of Domestic Fittings, including Star. (Webb, Tr. 2766-2768 (“This policy defined where we would need to get our domestic fittings from.”); CX 2514 (Webb, Dep. at 95) (Exclusive Dealing Policy impacted HD Supply’s willingness to deal with Star for Domestic Fittings in September 2009); CX 2513 (Webb, IHT at 196) (Exclusive Dealing Policy made HD Supply less willing to do business with Star on Domestic Fittings)).

Response To Finding No. 1915:

See General Response 7. This finding is inaccurate and misleading because Mr. Webb testified that McWane was a known, full-line Fittings supplier with good track record and that HD Supply would not have purchased more domestic Fittings from Star than it did, even without the Rebate Policy. (RPF 485 (JX 673 (Webb, Dep. at 123-25))). *See* Response To Finding 1908, *supra*.

1916. McWane’s Exclusive Dealing Policy increased the risk involved for Distributors like HD Supply to source Domestic Fittings from Star. (Webb, Tr. 2766-2768).

Response To Finding No. 1916:

See General Response 7. *See* Response To Finding 1908, *supra*.

1917. Because he could not risk noncompliance with ARRA Buy American requirements, Mr. Webb believed it was imperative to inform his district managers, branch managers, and operation managers of McWane’s Exclusive Dealing Policy before the October 1, 2009 effective date of the policy. (Webb, Tr. 2765-2766; CX 0552 at 001).

Response To Finding No. 1917:

This finding is inaccurate and misleading because Mr. Webb testified that McWane was a known, full-line Fittings supplier with good track record and that HD Supply would not have purchased more domestic Fittings from Star than it did, even without the Rebate Policy. (RPF 485 (JX 673 (Webb, Dep. at 123-25))).

485 (JX 673 (Webb, Dep. at 123-25))). *See* Response To Finding 1908, *supra*. *See* General Response 7.

1918. It is unusual, and may be unprecedented, for Mr. Webb to issue a directive to the district managers, operations managers, and branch managers laying out a policy for all of HD Supply's Waterworks Division. (CX 2514 (Webb, Dep. at 89) ("Q. How often do you issue these types of memos to district managers, branch managers, and operations managers? A. Rare."); Webb, Tr. 2765-2766).

Response To Finding No. 1918:

This finding is inaccurate and misleading because Mr. Webb testified that McWane was a known, full-line Fittings supplier with good track record and that HD Supply would not have purchased more domestic Fittings from Star than it did, even without the Rebate Policy. (RPFF 485 (JX 673 (Webb, Dep. at 123-25))). *See* Response To Finding 1908, *supra*. *See* General Response 7. Moreover, whereas Mr. Webb testified that a practice was "rare," the proposed Finding tries to transform that statement into "may be unprecedented."

1919. On September 26, 2009, Mr. McCullough forwarded to Mr. Page the September 23, 2009 HD Supply internal "mandate letter" from Jerry Webb, and noted, "This is perhaps the first time that Jerry has given written direction on the course HDS is to pursue, which is pretty big." (CX 1270; Tatman, Tr. 694-695).

Response To Finding No. 1919:

This finding is inaccurate and misleading because Mr. Webb testified that McWane was a known, full-line Fittings supplier with good track record and that HD Supply would not have purchased more domestic Fittings from Star than it did, even without the Rebate Policy. (RPFF 485 (JX 673 (Webb, Dep. at 123-25))). *See* Response To Finding 1908, *supra*. *See* General Response 7.

10.5.2.3 HD Supply Refused to Purchase Domestic Fittings from Star

1920. As a result of McWane's Exclusive Dealing Policy, HD Supply refused to purchase Domestic Fittings from Star. (*Infra* ¶¶ 1921-1936).

Response To Finding No. 1920:

See General Responses 1 and 7 and responses to ¶¶ 1921-1936.

1921. Up until September 22, 2009, Star was a vendor to HD Supply for both imported and Domestic Fittings. (CX 2539 (McCutcheon, Dep. at 247)).

Response To Finding No. 1921:

See Response To Finding 1908, *supra*.

1922. Star has developed an excellent business relationship with HD Supply through the personal relationships that Star's personnel have developed both with their corporate officers and with HD's second tier of purchasing agents. (CX 2537 (McCutcheon, IHT (Vol. 1) at 56-57); CX 2513 (Webb, IHT at 182-183) (Star is "a good company, they're well run. Dan [McCutcheon]'s a – he's a genuinely – a person of his word.")).

Response To Finding No. 1922:

While McWane does not concede the accuracy of this proposed finding or the supporting citations, McWane believes the proposed finding is irrelevant, and therefore, given the length of the FTC's proposed findings, McWane provides no specific response.

1923. On September 22, 2009, Star's Southeast division manager Ramon Prado forwarded to Mr. McCutcheon a copy of McWane's September 22, 2009 letter announcing the Exclusive Dealing Policy. Mr. Prado warned Mr. McCutcheon that he would be receiving a call from Mr. Webb of HD Supply. (CX 0559 at 001; McCutcheon, Tr. 2305).

Response To Finding No. 1923:

See General Response 7. See Response To Finding 1908, *supra*.

1924. After Mr. Webb issued the September 23, 2009 letter, HD Supply's branches complied with the instructions in that letter, and in McWane's Exclusive Dealing Policy. (Webb, Tr. 2803).

Response To Finding No. 1924:

See General Response 7. See Response To Finding 1908, *supra*.

1925. On September 24, 2009, Star's Atlanta territory manager, Chuck Carrigan, forwarded to Mr. McCutcheon Mr. Webb's September 23, 2009 internal HD Supply "mandate letter" which directed HD's branch managers, district managers, and operations managers to follow the McWane policy and purchase Domestic Fittings only through McWane or

through Sigma (which was selling Domestic Fittings made by McWane). (CX 0014; McCutcheon, Tr. 2306-2307).

Response To Finding No. 1925:

See General Response 7. *See* Response To Finding 1908, *supra*.

1926. After September 22, 2009, Mr. McCutcheon and Mr. Webb of HD Supply had conversations in which Mr. Webb informed Mr. McCutcheon that HD Supply could not buy Star's Domestic Fittings, and asked Mr. McCutcheon "to not quote his branches any longer." (CX 2539 (McCutcheon, Dep. at 248-249); *see also* McCutcheon, Tr. 2302-2303¹² (Mr. Webb of HD Supply told him that because of McWane's Exclusive Dealing Policy, he "was sad to report that they would not be able to purchase domestic fittings from our company"); *see also* RX-601 (McCutcheon description of cutoff by HD Supply)).

Response To Finding No. 1926:

See General Response 7. *See* Response To Finding 1908, *supra*. As to footnote 12, the effect on Star of the hearsay statement is not at issue and, therefore, the hearsay exception invoked here is not applicable. The hearsay should be disregarded.

1927. Mr. Webb of HD Supply informed Mr. McCutcheon that HD Supply could not purchase Domestic Fittings from Star because of McWane's Exclusive Dealing Policy. (CX 2539 (McCutcheon, Dep. at 248)). Mr. Webb explained to Mr. McCutcheon that HD Supply would buy 100% of its Domestic Fittings requirements from McWane due to McWane's Exclusive Dealing Policy. (CX 2539 (McCutcheon, Dep. at 249); CX 2537 (McCutcheon, IHT (Vol. 1) at 170, 171-172) (HD Supply informed Star that it would not

¹² The cited trial testimony regarding the out of court statement of Mr. Webb is cited for the effect on Mr. McCutcheon and Star, and not to prove the truth of the matter asserted in the statement. (*See* McCutcheon, Tr. 2303).

entertain bids from Star for Domestic Fittings because of McWane's Exclusive Dealing Policy)).¹³

Response To Finding No. 1927:

See General Response 7. *See* Response To Finding 1908, *supra*. As to footnote 13, the effect on Star of the hearsay statement is not at issue and, therefore, the hearsay exception invoked here is not applicable. The hearsay should be disregarded.

1928. HD Supply's president, Mr. Webb, instructed Star not to bid on 3" through 12" Domestic Fittings jobs. (CX 2537 (McCutcheon, IHT at 170); *see* CX 2539 (McCutcheon, Dep. at 248-249)).

Response To Finding No. 1928:

See Response To Finding 1908, *supra*. This proposed Finding is confusing and unintelligible. Star, as a supplier, would typically not be bidding on any jobs and Star's customers would, presumably, not be in a position to dictate what jobs Star could bid on even if Star were bidding such jobs.

1929. With the exception of items that McWane did not have available or that had been committed to prior to September 22, 2009, HD Supply's then-pending Domestic Fittings orders with Star were canceled. (McCutcheon, Tr. 2310-2311; CX 2539 (McCutcheon, Dep. at 248-249) (“[Webb] asked me for a list of the outstanding quotes that we had with his company. So we put together the list of projects that we had worked with his company and sent it to him. And to my knowledge, all of those were canceled.”));

¹³ The cited testimony regarding out of court statements of Mr. Webb is cited for its effect on Mr. McCutcheon and Star, not to prove the truth of the matters asserted in the statements.

CX 2539 (McCutcheon, Dep. at 250); *see also* CX 2537 (McCutcheon, IHT (Vol. 1) at 172); CX 0013 at 001-004)).

Response To Finding No. 1929:

See Response To Finding 1908, *supra*. This proposed Finding is inconsistent with the fact that Dr. Schumann was unable to identify a single distributor that wanted to purchase domestic fittings from Star but was unable to because of McWane's Rebate Policy. (Schumann, Tr. 4400 ("Q. And sitting here today you can't point to a single month when their share actually didn't increase, can you, sir? A. I didn't memorize their sales by month. Q. That's not my question. My question is, sitting here today, you can't point to a single month after the letter came out that their share was not increasing, can you? A. I cannot as I sit here today. Q. And sitting here today you can't point to a single customer that didn't buy any Star domestic Fittings that wanted to, can you? A. I can't recall the name or names.")).

Similarly, Dr. Normann concluded that there were no Distributors who wanted to buy Star domestic Fittings but were unable to do so because of the Rebate Policy. (Normann, Tr. 4929-4930 ("Q. Dr. Schumann was unable to identify any distributor that wanted to buy Star domestic but was unable to. Were you able to find one? A. Any distributor who wanted to buy but was unable to buy? Q. Who wanted to buy Star domestic but was unable to. A. No. . . .").).

1930. On September 28, 2009, in response to a request from Mr. Webb, Mr. McCutcheon sent Mr. Webb a list of orders and inquiries that HD Supply had pending with Star Pipe,

noting that “I have instructed our people not to pursue these because of the recent events.” (CX 0013 at 001; McCutcheon, Tr. 2307-2309, 2311-2312). Mr. McCutcheon instructed his sales team not to pursue the listed items, based on his conversation with Mr. Webb regarding McWane’s Exclusive Dealing Policy. (McCutcheon, Tr. 2312; CX 2539 (McCutcheon, Dep. at 250)).¹⁴

Response To Finding No. 1930:

See Response ¶¶ 1908 and 1930, *supra*. See General Response 10. As to footnote 14, the effect on Star of the hearsay statement is not at issue and, therefore, the hearsay exception invoked here is not applicable. The hearsay should be disregarded.

1931. Two HD Supply Regional Vice Presidents (Ms. Bland and Mr. Anderson) and two HD Supply District or Branch Managers (Mr. Ellingsworth and Mr. Brock) each informed Mr. Berry that they could not purchase Domestic Fittings from Star because of McWane’s Exclusive Dealing Policy and that they did not have the discretion to do so under the HD Supply corporate policy. (CX 2532 (Berry, Dep. at 138-141) (Yvonne Bland is HD Supply’s Regional Vice President with responsibility over western and southwestern US; Deron Anderson is HD Supply’s Regional Vice President for HD Supply with responsibility over southeastern United States; Bruce Ellingsworth, a district manager, and Larry Brock, a branch manager, for HD Supply have responsibility for portions of Texas, including Fort Worth and Dallas)).¹⁵

Response To Finding No. 1931:

See General Responses 7 and 10. See Response ¶¶ 1908 and 1930, *supra*.

¹⁴ The cited out of court statements should be considered for the truth of the matters asserted therein, as statements of motive, intent, or plan under Fed. R. Evid. 803(3). See *supra* n.11.

¹⁵ The cited out of court statements should be considered for the truth of the matters asserted therein, as statements of motive, intent, or plan under Fed. R. Evid. 803(3). See *supra* n.11.

1932. Specifically, Mr. Anderson informed Mr. Berry that he could not purchase Domestic Fittings from Star for a project in Arkansas because he could not be the reason that HD Supply lost its rebate for purchases from McWane. (CX 2532 (Berry, Dep. at 138-139)).¹⁶

Response To Finding No. 1932:

See General Response 10. *See* Response ¶¶ 1908 and 1930, *supra*.

1933. HD Supply refused to purchase Domestic Fittings from Star for other projects such as the Hughson Modesto WWTP because of the HD Supply corporate policy. (CX 2532 (Berry, Dep. at 170)).¹⁷

Response To Finding No. 1933:

See General Responses 6, 7 and 10. *See* Response ¶¶ 1908 and 1930, *supra*.

1934. Star maintained and used a “Domestic Quote Log” to track won and lost Domestic Fittings bids. (McCutcheon, Tr. 2312; CX 2294). Pam Garey of Star compiled the log on a regular basis at Mr. McCutcheon’s request, and used information provided by Star’s sales department. (McCutcheon, Tr. 2315).

Response To Finding No. 1934:

See Response To Finding 1908, *supra*. This finding is misleading and therefore inaccurate because the “Domestic Bid Log” also indicates that Star repeatedly lost bids due to delays and not due to McWane’s September 22 letter. The delays began in the Fall of 2009 and

¹⁶ The cited out of court statement should be considered for the truth of the matter asserted therein, as a statement of motive, intent, or plan under Fed. R. Evid. 803(3). *See supra* n.11.

¹⁷ The cited out of court statement should be considered for the truth of the matter asserted therein, as a statement of motive, intent, or plan under Fed. R. Evid. 803(3). *See supra* n.11.

continued into the peak of the ARRA period in the first and second quarters of 2010. (RPF 495 (McCutcheon, Tr. 2632-2634); RPF 493 (McCutcheon, Tr. 2634)).

1935. Between September 22, 2009 and February 22, 2010, Star lost at least 25 Domestic Fittings jobs for which it submitted a quote to HD Supply, but where HD Supply purchased from McWane or Sigma rather than Star because of the McWane Exclusive Dealing Policy. (CX 2294 at 010-011, 013, 015, 017-019 (listing 25 lost jobs for which the loss was expressly attributed to “HD mandate letter,” “mandate letter,” “letter directing fitting purchases,” “Tyler-Sigma announcement,” or “HD will not buy from Star”); McCutcheon, Tr. 2313 (explaining that “lost due to mandate letter” on the log refers to the fact that Star lost an HD order due to McWane Exclusive Dealing Policy)).

Response To Finding No. 1935:

See Response To Finding 1908, *supra*. This finding is misleading and therefore inaccurate because the “Domestic Bid Log” also indicates that Star repeatedly lost bids due to delays and not due to McWane’s September 22 letter. The delays began in the Fall of 2009 and continued into the peak of the ARRA period in the first and second quarters of 2010. (RPF 495 (McCutcheon, Tr. 2632-2634); RPF 493 (McCutcheon, Tr. 2634)).

This proposed Finding is inconsistent with the fact that Dr. Schumann was unable to identify a single distributor that wanted to purchase domestic fittings from Star but was unable to because of McWane’s Rebate Policy. (Schumann, Tr. 4400 (“Q. And sitting here today you can't point to a single month when their share actually didn't increase, can you, sir? A. I didn't memorize their sales by month. Q. That's not my question. My question is, sitting here today, you can't point to a single month after the letter came out that their share was not increasing, can you? A. I cannot as I sit here today. Q. And sitting here today you can't point to a single customer that didn't buy any Star domestic Fittings that wanted to, can you? A. I can't recall the name or names.”)).

Similarly, Dr. Normann concluded that there were no Distributors who wanted to buy Star domestic Fittings but were unable to do so because of the Rebate Policy. (Normann, Tr.

4929-4930 (“Q. Dr. Schumann was unable to identify any distributor that wanted to buy Star domestic but was unable to. Were you able to find one? A. Any distributor who wanted to buy but was unable to buy? Q. Who wanted to buy Star domestic but was unable to. A. No. . . .”).
1936.

Tr. 2651-2652, *in camera*).

(McCutcheon,

Response To Finding No. 1936:

This proposed Finding is inconsistent with the fact that Dr. Schumann was unable to identify a single distributor that wanted to purchase domestic fittings from Star but was unable to because of McWane’s Rebate Policy. (Schumann, Tr. 4400 (“Q. And sitting here today you can't point to a single month when their share actually didn't increase, can you, sir? A. I didn't memorize their sales by month. Q. That's not my question. My question is, sitting here today, you can't point to a single month after the letter came out that their share was not increasing, can you? A. I cannot as I sit here today. Q. And sitting here today you can't point to a single customer that didn't buy any Star domestic Fittings that wanted to, can you? A. I can't recall the name or names.”).).

Similarly, Dr. Normann concluded that there were no Distributors who wanted to buy Star domestic Fittings but were unable to do so because of the Rebate Policy. (Normann, Tr. 4929-4930 (“Q. Dr. Schumann was unable to identify any distributor that wanted to buy Star domestic but was unable to. Were you able to find one? A. Any distributor who wanted to buy but was unable to buy? Q. Who wanted to buy Star domestic but was unable to. A. No. . . .”).).

10.5.3 After Receiving McWane’s Exclusive Dealing Policy, Ferguson Ensured Compliance with the Policy Company-Wide

1937. After receiving McWane’s Exclusive Dealing Policy, Ferguson sought to ensure company-wide compliance by Ferguson with the policy. (*Infra* ¶¶ 1938-1952).

Response To Finding No. 1937:

This proposed Finding is inconsistent with the fact that Dr. Schumann was unable to identify a single distributor that wanted to purchase domestic fittings from Star but was unable to because of McWane's Rebate Policy. (Schumann, Tr. 4400 ("Q. And sitting here today you can't point to a single month when their share actually didn't increase, can you, sir? A. I didn't memorize their sales by month. Q. That's not my question. My question is, sitting here today, you can't point to a single month after the letter came out that their share was not increasing, can you? A. I cannot as I sit here today. Q. And sitting here today you can't point to a single customer that didn't buy any Star domestic Fittings that wanted to, can you? A. I can't recall the name or names.")).

Similarly, Dr. Normann concluded that there were no Distributors who wanted to buy Star domestic Fittings but were unable to do so because of the Rebate Policy. (Normann, Tr. 4929-4930 ("Q. Dr. Schumann was unable to identify any distributor that wanted to buy Star domestic but was unable to. Were you able to find one? A. Any distributor who wanted to buy but was unable to buy? Q. Who wanted to buy Star domestic but was unable to. A. No. . . .")).

10.5.3.1 Ferguson Informed All of Its District Managers of the Policy

1938. Mr. Tatman emailed the September 22, 2009 letter to Mr. Doane of Ferguson early in the afternoon of September 22, 2009. Mr. Doane forwarded the letter on to Mr. Thees and others within Ferguson. (CX 0506 at 001).

Response To Finding No. 1938:

This proposed Finding is inconsistent with the fact that Dr. Schumann was unable to identify a single distributor that wanted to purchase domestic fittings from Star but was unable to because of McWane's Rebate Policy. (Schumann, Tr. 4400 ("Q. And sitting here today you can't point to a single month when their share actually didn't increase, can you, sir? A. I didn't memorize their sales by month. Q. That's not my question. My question is, sitting here today,

you can't point to a single month after the letter came out that their share was not increasing, can you? A. I cannot as I sit here today. Q. And sitting here today you can't point to a single customer that didn't buy any Star domestic Fittings that wanted to, can you? A. I can't recall the name or names.”).

Similarly, Dr. Normann concluded that there were no Distributors who wanted to buy Star domestic Fittings but were unable to do so because of the Rebate Policy. (Normann, Tr. 4929-4930 (“Q. Dr. Schumann was unable to identify any distributor that wanted to buy Star domestic but was unable to. Were you able to find one? A. Any distributor who wanted to buy but was unable to buy? Q. Who wanted to buy Star domestic but was unable to. A. No. . . .”).).

1939. Mr. Thees’s primary concern about purchasing Domestic Fittings from Star was that Star was an unknown entity in the Domestic Fittings market. (Thees, Tr. 3096).

Response To Finding No. 1939:

This finding is incomplete and misleading because Ferguson had additional concerns, independent of McWane’s September 22 letter, regarding whether Star had the depth and breadth of inventory required to service Ferguson’s customers. (RPF 487 (Thees, Tr. 3104)).

Additionally, an earlier “breach of trust” between Star and Ferguson regarding joint restraints put a strain on the relationship between the two companies. (RPF 488 (Thees, Tr. 3105-3107)).

1940. Nevertheless, McWane’s Exclusive Dealing Policy affected Ferguson’s willingness to purchase Domestic Fittings from Star because purchasing from Star could cause Ferguson to lose rebates and access to McWane’s Domestic Fittings supply. (CX 0506; Thees, Tr. 3086-3089; CX 2503 (Thees, IHT at 159)). Lack of access to supply could keep Ferguson from being able to ship to its customers on time. (CX 0506; Thees, Tr. 3086-3089; CX 2503 (Thees, IHT at 159)).

Response To Finding No. 1940:

This proposed Finding is inconsistent with the fact that Dr. Schumann was unable to identify a single distributor that wanted to purchase domestic fittings from Star but was unable to because of McWane’s Rebate Policy. (Schumann, Tr. 4400 (“Q. And sitting here today you

can't point to a single month when their share actually didn't increase, can you, sir? A. I didn't memorize their sales by month. Q. That's not my question. My question is, sitting here today, you can't point to a single month after the letter came out that their share was not increasing, can you? A. I cannot as I sit here today. Q. And sitting here today you can't point to a single customer that didn't buy any Star domestic Fittings that wanted to, can you? A. I can't recall the name or names.”).

Similarly, Dr. Normann concluded that there were no Distributors who wanted to buy Star domestic Fittings but were unable to do so because of the Rebate Policy. (Normann, Tr. 4929-4930 (“Q. Dr. Schumann was unable to identify any distributor that wanted to buy Star domestic but was unable to. Were you able to find one? A. Any distributor who wanted to buy but was unable to buy? Q. Who wanted to buy Star domestic but was unable to. A. No. . . .”)).

1941. Ferguson ordinarily permits its branch managers and district managers to make sourcing decisions for waterworks products, including Fittings. (RX-633 (Thees, Dep. 42) (“We allow general managers, district managers to make decisions regarding purchasing. Ultimately, through consensus, if it comes down to making the final decision that would fall to me, and that would not be over ridden.”)). At the time the Exclusive Dealing Policy was in place, there were Ferguson branches that had strong relationships with Star that would have likely purchased Domestic Fittings from Star had McWane’s Exclusive Dealing Policy not been in place. (CX 2503 (Thees, IHT at 162-163) (“[W]here the relationship was strong with a Star associate and a Ferguson branch, in all likelihood given they had a quality inventory position, [Star] would reap the benefits of increased business”)).

Response To Finding No. 1941:

See General Response 7. *See* Response To Finding 1940.

1942. To ensure that Ferguson complied with McWane’s policy, Mr. Thees called the district managers reporting to him and reiterated that they needed to support McWane’s products. This meant forgoing purchases of Domestic Fittings from Star. Mr. Thees expected his district managers to follow these instructions, and believes that they did. (Thees, Tr. 3091-3095; CX 2504 (Thees, Dep. at 77) (“Q. After this policy was received by Ferguson what steps did Ferguson take to ensure compliance of this policy? A. I would have called the DMs and informed them that we were going to continue to support Tyler/Union with this process and to make sure to communicate that through the branches.”)).

Response To Finding No. 1942:

See Response To Finding 1940.

1943. Mr. Thees was never told by anyone from McWane that Ferguson was not in compliance with McWane's Exclusive Dealing Policy. (Thees, Tr. 3113, 3117-3118).

Response To Finding No. 1943:

See General Response 7 and response To Finding 1940.

10.5.3.2 Ferguson Refused to Purchase Domestic Fittings from Star

1944. As a result of McWane's Exclusive Dealing Policy, Ferguson refused to purchase Domestic Fittings from Star. (*Infra* ¶¶ 1945-1952).

Response To Finding No. 1944:

See General Response 7 and response To Finding 1940.

1945. After McWane issued its September 22, 2009 letter announcing its Exclusive Dealing Policy, Mr. Berry had negotiations with Darryl Case and Phil Selby, who are Ferguson district managers, and Dan Warner, who is a Ferguson general manager, for the sale of Star's Domestic Fittings to Ferguson. (CX 2532 (Berry, Dep. at 131-133)).

Response To Finding No. 1945:

See General Response 6 and 7. *See* Response To Finding 1940.

1946. Messrs. Case, Selby and Warner each informed Mr. Berry that there was a corporate edict that no Ferguson employees purchase Star Domestic Fittings unless McWane did not have the Domestic Fitting. (CX 2532 (Berry, Dep. at 133)).¹⁸

¹⁸ The cited out of court statements should be considered for the truth of the matters asserted therein, as statements of motive, intent, or plan under Fed. R. Evid. 803(3). *See supra* n.11.

Response To Finding No. 1946:

See General Responses 6 and 10. *See* Response To Finding 1940.

This proposed Finding is inconsistent with the fact that Dr. Schumann was unable to identify a single distributor that wanted to purchase domestic fittings from Star but was unable to because of McWane's Rebate Policy. (Schumann, Tr. 4400 ("Q. And sitting here today you can't point to a single month when their share actually didn't increase, can you, sir? A. I didn't memorize their sales by month. Q. That's not my question. My question is, sitting here today, you can't point to a single month after the letter came out that their share was not increasing, can you? A. I cannot as I sit here today. Q. And sitting here today you can't point to a single customer that didn't buy any Star domestic Fittings that wanted to, can you? A. I can't recall the name or names.")).

Similarly, Dr. Normann concluded that there were no Distributors who wanted to buy Star domestic Fittings but were unable to do so because of the Rebate Policy. (Normann, Tr. 4929-4930 ("Q. Dr. Schumann was unable to identify any distributor that wanted to buy Star domestic but was unable to. Were you able to find one? A. Any distributor who wanted to buy but was unable to buy? Q. Who wanted to buy Star domestic but was unable to. A. No. . . .")).

This proposed Finding is inconsistent with the fact that Dr. Schumann was unable to identify a single distributor that wanted to purchase domestic fittings from Star but was unable to because of McWane's Rebate Policy. (Schumann, Tr. 4400 ("Q. And sitting here today you can't point to a single month when their share actually didn't increase, can you, sir? A. I didn't memorize their sales by month. Q. That's not my question. My question is, sitting here today, you can't point to a single month after the letter came out that their share was not increasing, can you? A. I cannot as I sit here today. Q. And sitting here today you can't point to a single

customer that didn't buy any Star domestic Fittings that wanted to, can you? A. I can't recall the name or names.”).).

Similarly, Dr. Normann concluded that there were no Distributors who wanted to buy Star domestic Fittings but were unable to do so because of the Rebate Policy. (Normann, Tr. 4929-4930 (“Q. Dr. Schumann was unable to identify any distributor that wanted to buy Star domestic but was unable to. Were you able to find one? A. Any distributor who wanted to buy but was unable to buy? Q. Who wanted to buy Star domestic but was unable to. A. No. . . .”).).

1947. Before McWane announced its Exclusive Dealing Policy, Star was awarded a job to supply Domestic Fittings for a project for Live Oaks WWTP. Ferguson cancelled the job after McWane issued its September 22, 2009, letter. (CX 2532 (Berry, Dep. at 164-65)). The job was cancelled after Ferguson issued its corporate policy notifying its employees that they should not purchase Star Domestic Fittings. (CX 2532 (Berry, Dep. at 164-165; CX 2288)).

Response To Finding No. 1947:

See General Responses 6 and 10. *See* Response To Finding 1940.

This proposed Finding is inconsistent with the fact that Dr. Schumann was unable to identify a single distributor that wanted to purchase domestic fittings from Star but was unable to because of McWane’s Rebate Policy. (Schumann, Tr. 4400 (“Q. And sitting here today you can't point to a single month when their share actually didn't increase, can you, sir? A. I didn't memorize their sales by month. Q. That's not my question. My question is, sitting here today, you can't point to a single month after the letter came out that their share was not increasing, can you? A. I cannot as I sit here today. Q. And sitting here today you can't point to a single customer that didn't buy any Star domestic Fittings that wanted to, can you? A. I can't recall the name or names.”).).

Similarly, Dr. Normann concluded that there were no Distributors who wanted to buy Star domestic Fittings but were unable to do so because of the Rebate Policy. (Normann, Tr.

4929-4930 (“Q. Dr. Schumann was unable to identify any distributor that wanted to buy Star domestic but was unable to. Were you able to find one? A. Any distributor who wanted to buy but was unable to buy? Q. Who wanted to buy Star domestic but was unable to. A. No. . . .”). This proposed Finding is inconsistent with the fact that Dr. Schumann was unable to identify a single distributor that wanted to purchase domestic fittings from Star but was unable to because of McWane’s Rebate Policy. (Schumann, Tr. 4400 (“Q. And sitting here today you can't point to a single month when their share actually didn't increase, can you, sir? A. I didn't memorize their sales by month. Q. That's not my question. My question is, sitting here today, you can't point to a single month after the letter came out that their share was not increasing, can you? A. I cannot as I sit here today. Q. And sitting here today you can't point to a single customer that didn't buy any Star domestic Fittings that wanted to, can you? A. I can't recall the name or names.”)).

Similarly, Dr. Normann concluded that there were no Distributors who wanted to buy Star domestic Fittings but were unable to do so because of the Rebate Policy. (Normann, Tr. 4929-4930 (“Q. Dr. Schumann was unable to identify any distributor that wanted to buy Star domestic but was unable to. Were you able to find one? A. Any distributor who wanted to buy but was unable to buy? Q. Who wanted to buy Star domestic but was unable to. A. No. . . .”).

1948. Ferguson refused to purchase Domestic Fittings from Star for other projects, including the Sunol Valley project and the North South project. (CX 2532 (Berry, Dep. at 170-171)).

Response To Finding No. 1948:

See General Responses 6 and 10. *See* Response To Finding 1940.

This proposed Finding is inconsistent with the fact that Dr. Schumann was unable to identify a single distributor that wanted to purchase domestic fittings from Star but was unable to because of McWane’s Rebate Policy. (Schumann, Tr. 4400 (“Q. And sitting here today you

can't point to a single month when their share actually didn't increase, can you, sir? A. I didn't memorize their sales by month. Q. That's not my question. My question is, sitting here today, you can't point to a single month after the letter came out that their share was not increasing, can you? A. I cannot as I sit here today. Q. And sitting here today you can't point to a single customer that didn't buy any Star domestic Fittings that wanted to, can you? A. I can't recall the name or names.”).

Similarly, Dr. Normann concluded that there were no Distributors who wanted to buy Star domestic Fittings but were unable to do so because of the Rebate Policy. (Normann, Tr. 4929-4930 (“Q. Dr. Schumann was unable to identify any distributor that wanted to buy Star domestic but was unable to. Were you able to find one? A. Any distributor who wanted to buy but was unable to buy? Q. Who wanted to buy Star domestic but was unable to. A. No. . . .”).). This proposed Finding is inconsistent with the fact that Dr. Schumann was unable to identify a single distributor that wanted to purchase domestic fittings from Star but was unable to because of McWane’s Rebate Policy. (Schumann, Tr. 4400 (“Q. And sitting here today you can't point to a single month when their share actually didn't increase, can you, sir? A. I didn't memorize their sales by month. Q. That's not my question. My question is, sitting here today, you can't point to a single month after the letter came out that their share was not increasing, can you? A. I cannot as I sit here today. Q. And sitting here today you can't point to a single customer that didn't buy any Star domestic Fittings that wanted to, can you? A. I can't recall the name or names.”).

Similarly, Dr. Normann concluded that there were no Distributors who wanted to buy Star domestic Fittings but were unable to do so because of the Rebate Policy. (Normann, Tr. 4929-4930 (“Q. Dr. Schumann was unable to identify any distributor that wanted to buy Star

domestic but was unable to. Were you able to find one? A. Any distributor who wanted to buy but was unable to buy? Q. Who wanted to buy Star domestic but was unable to. A. No. . . .”).).

1949. On numerous occasions Ferguson rejected a Star bid because of McWane’s September 22, 2009 Exclusive Dealing Policy. (CX 2294 at 017-018 (Ferguson using McWane for West Hartford and Horn Pond jobs because of “letter threatening to cut off if they use Star domestic”); CX 2294 at 013 (Schantz Spring and Oakdale Pipe projects) (“Ferguson will not buy domestic from Star currently”); CX 2294 at 014 (North Laredo Water Treatment Plant) (“Ferguson won Star loss”); CX 2294 at 012-013 (listing 16 lost Star bids with the notation “All Ferguson are lost-they only get quotes from us for reference.”)).

Response To Finding No. 1949:

See General Response 7 and response To Finding 1940.

1950.

(McCutcheon, Tr. 2652, *in camera*).

Response To Finding No. 1950:

While McWane does not concede the accuracy of this proposed finding or the supporting citations, McWane believes the proposed finding is an irrelevant and self-serving internal assessment by Star, and therefore, given the length of the FTC’s proposed findings, McWane provides no specific response.

1951.

[REDACTED] (CX 0502, *in camera*; CX 2503 (Thees, IHT at 146-147) (discussing CX 0502)).

Response To Finding No. 1951:

The finding is misleading and inaccurate because Ferguson’s decisions regarding whether or not to purchase domestic Fittings from Star was not influenced by the Rebate Policy. (RPFF 489 (Thees, Tr. 3108-3109)). Ferguson had its own concerns, independent of Rebate’s Policy, regarding whether Star had the depth and breadth of inventory required to service Ferguson’s

customers. (RPF 487 (Thees, Tr. 3104)). Additionally, an earlier “breach of trust” between Star and Ferguson regarding joint restraints put a strain on the relationship between the two companies. (RPF 488 (Thees, Tr. 3105-3107)). Ferguson purchased hundreds of thousands of dollars worth of domestic Fittings from Star, but McWane has never cut Ferguson off from McWane’s domestic supply or refused to pay Ferguson a rebate. (RPF 520 (Thees, Tr. 3112-3113)).

1952. Ferguson has historically increased its purchases of McWane’s Fittings (and other products) in order to maximize its rebate under McWane’s rebate programs. (CX 2503 (Thees, IHT at 139-141) (“Q. Is . . . this the rebate structure that you’re pointing to as preferable to the programs offered by Sigma or Star? A. Yes. Q. The share tier, the 50-percent share and 55-percent share, do those incentives shape your purchasing activity in any meaningful way? A. Yes. Q. Do you on occasion direct the branches to maximize their purchases and fittings from Tyler in order to qualify for the next tier? A. Yes.”)).

Response To Finding No. 1952:

While McWane does not concede the accuracy of this proposed finding or the supporting citations, McWane believes the proposed finding is irrelevant, and therefore, given the length of the FTC’s proposed findings, McWane provides no specific response.

10.5.4 After Receiving McWane’s Exclusive Dealing Policy, WinWholesale Put Star Domestic Fittings on Its “Not Approved” Vendor List

1953. After receiving McWane’s Exclusive Dealing Policy, WinWholesale formally accepted the policy, and, as a result of the policy, put Star Domestic Fittings on its “not approved” vendor list, and refused to purchase Domestic Fittings from Star. (*Infra* ¶¶ 1954-1964).

Response To Finding No. 1953:

See General Responses 1 and 7. This proposed Finding is inconsistent with the fact that Dr. Schumann was unable to identify a single distributor that wanted to purchase domestic fittings from Star but was unable to because of McWane’s Rebate Policy. (Schumann, Tr. 4400 (“Q. And sitting here today you can't point to a single month when their share actually didn't increase, can you, sir? A. I didn't memorize their sales by month. Q. That's not my question. My

question is, sitting here today, you can't point to a single month after the letter came out that their share was not increasing, can you? A. I cannot as I sit here today. Q. And sitting here today you can't point to a single customer that didn't buy any Star domestic Fittings that wanted to, can you? A. I can't recall the name or names.”).

Similarly, Dr. Normann concluded that there were no Distributors who wanted to buy Star domestic Fittings but were unable to do so because of the Rebate Policy. (Normann, Tr. 4929-4930 (“Q. Dr. Schumann was unable to identify any distributor that wanted to buy Star domestic but was unable to. Were you able to find one? A. Any distributor who wanted to buy but was unable to buy? Q. Who wanted to buy Star domestic but was unable to. A. No. . . .”).).

10.5.4.1 Prior to McWane Issuing Its Exclusive Dealing Policy, WinWholesale was Interested in Purchasing Domestic Fittings from Star

1954. On September 10, 2009, Mr. Gibbs visited Star’s Houston facility to access “how fast they were ramping up production, when product would be able to be shipped.” (CX 2545 (Gibbs, IHT at 41-42) (“I wanted to see them.”)).

Response To Finding No. 1954:

WinWholesale had concerns about Star’s reliability as a domestic Fittings supplier that were independent of McWane’s Rebate Policy. (RPF 484 (JX 705 (Gibbs, Dep. at 93-94))). Nevertheless, WinWholesale purchased domestic Fittings from Star following McWane’s September 22 letter. (RPF 425 (McCutcheon, Tr. 2590-2594)). Despite these purchases, McWane never cut off, threatened, or refused to pay rebates to WinWholesale. (RPF 517 (JX 705 (Gibbs, Dep. at 35-39))).

1955. When WinWholesale made its visit in early September 2009, Win was interested in purchasing Domestic Fittings from Star. (CX 2545 (Gibbs, IHT at 41) (“Q. Is it fair to say at this point of time you were at least potentially interested in doing business with Star on the domestic side? A. Sure.”)).

Response To Finding No. 1955:

See Response To Finding 1954, *supra*.

10.5.4.2 WinWholesale Put Star Domestic Fittings on Its “Not Approved” List

1956. On September 22, 2009, Mr. Gibbs received McWane’s Exclusive Dealing Policy from Mr. Tatman. (CX 2167 at 001).

Response To Finding No. 1956:

See General Response 7. McWane does not dispute that Mr. Gibbs received a copy of McWane’s September 22 letter from Mr. Tatman. *See* Response To Finding 1954, *supra*.

1957. On September 24, 2009, Mr. Gibbs emailed all the WinWater local companies (branches), Regional Vice Presidents, Area Coordinators and Area Leaders to inform them that Star was placed on WinWholesale’s “Not Approved” list for Domestic Fittings and restraints and to explain how McWane would enforce the policy against WinWholesale. (CX 2166 at 001-002; CX 2546 (Gibbs, Dep. at 72)).

Response To Finding No. 1957:

See Response To Finding 1954, *supra*. This proposed Finding is inconsistent with the fact that Dr. Schumann was unable to identify a single distributor that wanted to purchase domestic fittings from Star but was unable to because of McWane’s Rebate Policy. (Schumann, Tr. 4400 (“Q. And sitting here today you can't point to a single month when their share actually didn't increase, can you, sir? A. I didn't memorize their sales by month. Q. That's not my question. My question is, sitting here today, you can't point to a single month after the letter came out that their share was not increasing, can you? A. I cannot as I sit here today. Q. And sitting here today you can't point to a single customer that didn't buy any Star domestic Fittings that wanted to, can you? A. I can't recall the name or names.”).).

Similarly, Dr. Normann concluded that there were no Distributors who wanted to buy Star domestic Fittings but were unable to do so because of the Rebate Policy. (Normann, Tr. 4929-4930 (“Q. Dr. Schumann was unable to identify any distributor that wanted to buy Star domestic but was unable to. Were you able to find one? A. Any distributor who wanted to buy but was unable to buy? Q. Who wanted to buy Star domestic but was unable to. A. No. . . .”).).

1958. At WinWholesale, any “vendor that receives not approved status means that the local companies are not to buy from them under any circumstances unless they seek board approval.” (CX 2546 (Gibbs, Dep. at 73)).

Response To Finding No. 1958:

See Response To Finding 1954, *supra*.

1959. Despite Star being on the “Not Approved” vendor list for Domestic Fittings, WinWater companies could purchase Domestic Fittings from Star “if, because of Tyler’s inability to perform, they have to buy domestic fittings from Star;” which is the exception in McWane’s Exclusive Dealing Policy. (CX 2166 at 002; CX 2167 at 002).

Response To Finding No. 1959:

See Response To Finding 1954, *supra*. This proposed Finding is inconsistent with the fact that Dr. Schumann was unable to identify a single distributor that wanted to purchase domestic fittings from Star but was unable to because of McWane’s Rebate Policy. (Schumann, Tr. 4400 (“Q. And sitting here today you can't point to a single month when their share actually didn't increase, can you, sir? A. I didn't memorize their sales by month. Q. That's not my question. My question is, sitting here today, you can't point to a single month after the letter came out that their share was not increasing, can you? A. I cannot as I sit here today. Q. And sitting here today you can't point to a single customer that didn't buy any Star domestic Fittings that wanted to, can you? A. I can't recall the name or names.”).).

Similarly, Dr. Normann concluded that there were no Distributors who wanted to buy Star domestic Fittings but were unable to do so because of the Rebate Policy. (Normann, Tr. 4929-4930 (“Q. Dr. Schumann was unable to identify any distributor that wanted to buy Star domestic but was unable to. Were you able to find one? A. Any distributor who wanted to buy but was unable to buy? Q. Who wanted to buy Star domestic but was unable to. A. No. . . .”).).

1960. WinWholesale was concerned that if the WinWater local companies, “on an ongoing basis,” purchased Domestic Fittings from Star, they would lose their rebate and “be placed at the back of the line when [they] place [their] Tyler/Union orders.” (CX 2546 (Gibbs, Dep. at 82-83) (“Q. Were you concerned that the WinWater local companies

would lose their rebate if a WinWater local company purchased Star domestic fittings from Star? A. If they did it on an ongoing basis, yes. Q. Were you concerned about the lead times for Tyler/Union's domestic ductile iron pipe fittings if a WinWater local company purchased domestic fittings from Star? THE WITNESS: I wasn't concerned about the overall WinWater locations being able to get product from Tyler/Union, but there certainly was concern that if you head down that path, individual company, you may have – you may be placed at the back of the line when you place your Tyler/Union orders. I was not concerned for WinWholesale.”)).

Response To Finding No. 1960:

See Response To Finding 1954, *supra*. This proposed Finding is inconsistent with the fact that Dr. Schumann was unable to identify a single distributor that wanted to purchase domestic fittings from Star but was unable to because of McWane's Rebate Policy. (Schumann, Tr. 4400 (“Q. And sitting here today you can't point to a single month when their share actually didn't increase, can you, sir? A. I didn't memorize their sales by month. Q. That's not my question. My question is, sitting here today, you can't point to a single month after the letter came out that their share was not increasing, can you? A. I cannot as I sit here today. Q. And sitting here today you can't point to a single customer that didn't buy any Star domestic Fittings that wanted to, can you? A. I can't recall the name or names.”)).

Similarly, Dr. Normann concluded that there were no Distributors who wanted to buy Star domestic Fittings but were unable to do so because of the Rebate Policy. (Normann, Tr. 4929-4930 (“Q. Dr. Schumann was unable to identify any distributor that wanted to buy Star domestic but was unable to. Were you able to find one? A. Any distributor who wanted to buy but was unable to buy? Q. Who wanted to buy Star domestic but was unable to. A. No. . . .”)).

1961. On November 2, 2009, Mr. Gibbs officially accepted McWane's Exclusive Dealing Policy. (CX 2167 at 001).

Response To Finding No. 1961:

See General Response 7. See Response To Finding 1954, *supra*. This proposed Finding is inconsistent with the fact that Dr. Schumann was unable to identify a single distributor that

wanted to purchase domestic fittings from Star but was unable to because of McWane's Rebate Policy. (Schumann, Tr. 4400 ("Q. And sitting here today you can't point to a single month when their share actually didn't increase, can you, sir? A. I didn't memorize their sales by month. Q. That's not my question. My question is, sitting here today, you can't point to a single month after the letter came out that their share was not increasing, can you? A. I cannot as I sit here today. Q. And sitting here today you can't point to a single customer that didn't buy any Star domestic Fittings that wanted to, can you? A. I can't recall the name or names.")).

Similarly, Dr. Normann concluded that there were no Distributors who wanted to buy Star domestic Fittings but were unable to do so because of the Rebate Policy. (Normann, Tr. 4929-4930 ("Q. Dr. Schumann was unable to identify any distributor that wanted to buy Star domestic but was unable to. Were you able to find one? A. Any distributor who wanted to buy but was unable to buy? Q. Who wanted to buy Star domestic but was unable to. A. No. . . .").).

1962. Star was verbally informed in early December 2009, and in writing on February 5, 2010, that WinWholesale placed Star on its "Not Approved" vendor list for Domestic Fittings and restraints. (CX 2166 at 001; RX-601 at 001 (McCutcheon description of cutoff by WinWholesale)).¹⁹

¹⁹ The cited out of court statement should be considered for the truth of the matter asserted therein, as a statement of motive, intent, or plan under Fed. R. Evid. 803(3). *See supra* n.11.

Response To Finding No. 1962:

See General Response 10. *See* Response To Finding 1954, *supra*. This proposed Finding is inconsistent with the fact that Dr. Schumann was unable to identify a single distributor that wanted to purchase domestic fittings from Star but was unable to because of McWane's Rebate Policy. (Schumann, Tr. 4400 ("Q. And sitting here today you can't point to a single month when their share actually didn't increase, can you, sir? A. I didn't memorize their sales by month. Q. That's not my question. My question is, sitting here today, you can't point to a single month after the letter came out that their share was not increasing, can you? A. I cannot as I sit here today. Q. And sitting here today you can't point to a single customer that didn't buy any Star domestic Fittings that wanted to, can you? A. I can't recall the name or names.")).

Similarly, Dr. Normann concluded that there were no Distributors who wanted to buy Star domestic Fittings but were unable to do so because of the Rebate Policy. (Normann, Tr. 4929-4930 ("Q. Dr. Schumann was unable to identify any distributor that wanted to buy Star domestic but was unable to. Were you able to find one? A. Any distributor who wanted to buy but was unable to buy? Q. Who wanted to buy Star domestic but was unable to. A. No. . . .").).

1963. On April 14, 2010, Mr. Gibbs reiterated in an internal email to all WinWater local companies, Regional Vice Presidents, Area Coordinators and Area Leaders that Star was on WinWholesale's "Not Approved" vendor list for Domestic Fittings and restraints. (CX 2166 at 001).

Response To Finding No. 1963:

See General Response 10. *See* Response To Finding 1954, *supra*. This proposed Finding is inconsistent with the fact that Dr. Schumann was unable to identify a single distributor that wanted to purchase domestic fittings from Star but was unable to because of McWane's Rebate Policy. (Schumann, Tr. 4400 ("Q. And sitting here today you can't point to a single month when their share actually didn't increase, can you, sir? A. I didn't memorize their sales by

month. Q. That's not my question. My question is, sitting here today, you can't point to a single month after the letter came out that their share was not increasing, can you? A. I cannot as I sit here today. Q. And sitting here today you can't point to a single customer that didn't buy any Star domestic Fittings that wanted to, can you? A. I can't recall the name or names.”).).

Similarly, Dr. Normann concluded that there were no Distributors who wanted to buy Star domestic Fittings but were unable to do so because of the Rebate Policy. (Normann, Tr. 4929-4930 (“Q. Dr. Schumann was unable to identify any distributor that wanted to buy Star domestic but was unable to. Were you able to find one? A. Any distributor who wanted to buy but was unable to buy? Q. Who wanted to buy Star domestic but was unable to. A. No. . . .”).).

1964. After discussing the Exclusive Dealing Policy with McWane, Mr. Gibbs pointed out that, although the policy dealt only with Domestic Fittings, it “may be an opportunity to consolidate down to two ductile fitting lines on import.” (CX 2166 at 002).

Response To Finding No. 1964:

See General Response 7. See Response To Finding 1954, *supra*. This proposed Finding is inconsistent with the fact that Dr. Schumann was unable to identify a single distributor that wanted to purchase domestic fittings from Star but was unable to because of McWane’s Rebate Policy. (Schumann, Tr. 4400 (“Q. And sitting here today you can't point to a single month when their share actually didn't increase, can you, sir? A. I didn't memorize their sales by month. Q. That's not my question. My question is, sitting here today, you can't point to a single month after the letter came out that their share was not increasing, can you? A. I cannot as I sit here today. Q. And sitting here today you can't point to a single customer that didn't buy any Star domestic Fittings that wanted to, can you? A. I can't recall the name or names.”).).

Similarly, Dr. Normann concluded that there were no Distributors who wanted to buy Star domestic Fittings but were unable to do so because of the Rebate Policy. (Normann, Tr. 4929-4930 (“Q. Dr. Schumann was unable to identify any distributor that wanted to buy Star

domestic but was unable to. Were you able to find one? A. Any distributor who wanted to buy but was unable to buy? Q. Who wanted to buy Star domestic but was unable to. A. No. . . .”).).

10.5.5 McWane’s Exclusive Dealing Policy Caused Groeniger to Stop Purchasing Domestic Fittings Directly from Star

1965. Groeniger wanted to purchase Domestic Fittings from Star, and began to purchase Domestic Fittings from Star, but stopped as a result of McWane’s Exclusive Dealing Policy. (*Infra* ¶¶ 1966-1992).

Response To Finding No. 1965:

See General Responses 1 and 7 and responses to ¶¶ 1966-1992. McWane never enforced the Rebate Policy against Groeniger, even though it bought domestic Fittings from Star. (JX 669 (Groeniger, Dep. at 99 (“Q. In the 2009 time frame after receiving this letter, Mr. Groeniger, did Tyler ever refuse to sell you something because you had a relationship with Star? A. Not to my knowledge. Q. In the 2009 time frame after receiving Exhibit 2 and later, did Tyler ever not pay you a rebate that you were due because you had a relationship with Star? A. I don't think so.”); JX 643 (Tatman, IHT at 197-198 (“Then, you know, you go beyond that. The next situation that came up was Groeniger's out there. They were using Star product. We talked to Mike the owner -- nice guy -- at a trade show, and Mike basically said, Look, we're going to do what we have to do, and you guys do what you have to do. And we left it that way. We never -- we wanted them to support us. We made a little bit of rumbling to have them support us, but in the end, we kept selling Groeniger material.”).).).

This proposed Finding is inconsistent with the fact that Dr. Schumann was unable to identify a single distributor that wanted to purchase domestic fittings from Star but was unable to because of McWane’s Rebate Policy. (Schumann, Tr. 4400 (“Q. And sitting here today you can't point to a single month when their share actually didn't increase, can you, sir? A. I didn't memorize their sales by month. Q. That's not my question. My question is, sitting here today,

you can't point to a single month after the letter came out that their share was not increasing, can you? A. I cannot as I sit here today. Q. And sitting here today you can't point to a single customer that didn't buy any Star domestic Fittings that wanted to, can you? A. I can't recall the name or names.”).

Similarly, Dr. Normann concluded that there were no Distributors who wanted to buy Star domestic Fittings but were unable to do so because of the Rebate Policy. (Normann, Tr. 4929-4930 (“Q. Dr. Schumann was unable to identify any distributor that wanted to buy Star domestic but was unable to. Were you able to find one? A. Any distributor who wanted to buy but was unable to buy? Q. Who wanted to buy Star domestic but was unable to. A. No. . . .”).).

10.5.5.1 Groeniger Awarded Star Domestic Fitting Business Prior to McWane Issuing Its Exclusive Dealing Policy

1966. In 2009, prior to McWane issuing the Exclusive Dealing Policy in September 2009, Groeniger gave Star the Domestic Fittings business on “two sizeable projects” to “test[] to find out if Star could produce the domestic fittings.” (CX 2509 (Groeniger, IHT at 110); CX 2510 (Groeniger, Dep. at 213-214) (“that happened actually before this letter came out, the job was bid and submitted on and organized far before this letter came out”).).

Response To Finding No. 1966:

See General Responses 6-7 and response to ¶ 1965.

1967. Groeniger awarded the two projects to Star for Domestic Fittings “[b]ecause they were more competitive.” (CX 2509 (Groeniger, IHT at 111) (“They [Star] were more aggressive [going] after the job.”)).

Response To Finding No. 1967:

See General Responses 6-7.

1968. The two projects “were difficult jobs,” but Star performed to Groeniger’s satisfaction. (CX 2509 (Groeniger, IHT at 110) (“Q. The two projects that you gave Star to perform, did they perform it to your satisfaction? A. Yeah.”); CX 2510 (Groeniger, Dep. at 224-225) (“Q. How did Star do in responding to the two projects that you gave to them? A. Excellent. Q. Did you have any issues of quality? A. No.”)).

Response To Finding No. 1968:

See General Responses 6-7.

1969. Groeniger wanted to “give these guys [Star] a chance because the best thing would be for us [Groeniger] to have another domestic [supplier].” (CX 2509 (Groeniger, IHT at 112)).

Response To Finding No. 1969:

See General Responses 6-7.

1970. Groeniger wanted another supplier of Domestic Fittings for “competitive pricing” and “better availability” and “better service.” (CX 2509 (Groeniger, IHT at 112) (“Q. What would have an alternative [domestic supplier] meant as a practical matter? A. Just say competitive pricing. Q. So, possibly lower pricing? A. And better availability and better service and Tyler has the worse service of any of them. So, you have to deal with that. That means you have to inventory more because you can’t rely on them getting material to you in time. All those things change.”)).

Response To Finding No. 1970:

See General Responses 3, 6-7.

10.5.5.2 **McWane Punished Groeniger for Purchasing Domestic Fittings from Star**

1971. McWane punished Groeniger for buying Domestic Fittings from Star by taking the unusual step of raising its prices to Groeniger mid-contract on a contract that had already been awarded to Groeniger and for which Groeniger was sourcing Fittings from McWane. (*Infra* ¶¶ 1972-1977).

Response To Finding No. 1971:

See General Response 1 and response to ¶ 1965.

1972. McWane found out that Groeniger gave Star the Domestic Fittings business on these two projects and “put us [Groeniger] through the coals for it.” (CX 2509 (Groeniger, IHT at 110)).

Response To Finding No. 1972:

xxxSee General Responses 3 and 6. Groeniger purchased domestic Fittings from Star following the issuance of McWane’s Rebate Policy. (RPF 506 (McCutcheon, Tr. 2591-2594)). Despite Groeniger’s purchases from Star, McWane never refused to sell domestic Fittings to Groeniger and never refused to pay a rebate to Groeniger. (RPF 515 (JX 669 (Groeniger, Dep.

at 99)). The finding is irrelevant and untrustworthy because it is based on the self-serving IH testimony of a witness that was not cross-examined and did not testify at trial. There is no additional evidence linking the claimed price increase to Groeniger's purchase of domestic Fittings from Star.

1973. In 2010, after Groeniger gave Star the two Domestic Fittings jobs, McWane "raised the price arbitrarily" with "no rhyme nor reason" on a contract with the San Jose water district that Groeniger had been "buying previously" from McWane. (CX 2509 (Groeniger, IHT at 143) ("We were awarded half the contract and, suddenly, they raised the price."); CX 2510 (Groeniger, Dep. at 216) ("They had a price increase sometime after the first of the year and they just upped our prices arbitrarily. And so we couldn't up our process with the contractors and maintain a relationship with them.")).

Response To Finding No. 1973:

See General Responses 3 and 6. Groeniger purchased domestic Fittings from Star following the issuance of McWane's Rebate Policy. (RPF 506 (McCutcheon, Tr. 2591-2594)). Despite Groeniger's purchases from Star, McWane never refused to sell domestic Fittings to Groeniger and never refused to pay a rebate to Groeniger. (RPF 515 (JX 669 (Groeniger, Dep. at 99)).). The finding is irrelevant and untrustworthy because it is based on the self-serving testimony of a witness that did not testify at trial. There is no additional evidence linking the claimed price increase to Groeniger's purchase of domestic Fittings from Star.

1974. When Groeniger challenged McWane for raising the price, McWane responded, "They say tough. That's the way it is." (CX 2509 (Groeniger, IHT at 143)).

Response To Finding No. 1974:

See Response To Finding No. 1972, *supra*.

1975. Groeniger was forced to buy Domestic Fittings from McWane at the higher price and sell them to their customer at the contract price, which resulted in Groeniger losing money. (CX 2510 (Groeniger, Dep. at 216) ("[W]e were buying Tyler at the higher price and selling it to them at the contract price, which means we were losing money.")).

Response To Finding No. 1975:

See Response To Finding No. 1973, *supra*.

1976. Throughout 2010, Groeniger worked continuously to get McWane to recognize that Groeniger had the contract with the San Jose Water Company. (CX 2510 (Groeniger, Dep. at 216-217) (“And continuously fighting with Tyler trying to get them to acknowledge the fact that they had quoted us on the project and having the contractor talk to their regional guy when he went to the contractor’s office and say we are supplying the contractor through Groeniger, they gave us the price and we have the annual contract from the district and so forth. That didn’t work.”)).

Response To Finding No. 1976:

See General Response 6. While McWane does not concede the accuracy of this proposed finding or the supporting citations, McWane believes the proposed finding is irrelevant, and therefore, given the length of the FTC’s proposed findings, McWane provides no specific response.

1977. Groeniger had to go to the customer, San Jose Water Company, and get them to write a letter to McWane stating that they did in fact have the contract to supply the material including Domestic Fittings. (CX 2510 (Groeniger, Dep. at 217) (“So they wrote a letter from San Jose Water Company to McWane saying that Groeniger & Company is part of the San Jose contract for this year.”)).

Response To Finding No. 1977:

See General Response 6. While McWane does not concede the accuracy of this proposed finding or the supporting citations, McWane believes the proposed finding is irrelevant, and therefore, given the length of the FTC’s proposed findings, McWane provides no specific response.

10.5.5.3 Groeniger Stopped Purchasing Domestic Fittings from Star Out of Fear of Retaliation from McWane

1978. As a result of McWane’s Exclusive Dealing Policy and its past history of enforcing such policies by cutting off Groeniger, Groeniger stopped purchasing Domestic Fittings from Star. (*Infra* ¶¶ 1979-1992).

Response To Finding No. 1978:

See General Responses 1 and 7.

1979. After Groeniger awarded Star two projects, Groeniger stopped purchasing Domestic Fittings from Star “[b]ecause of the inherent threats of retaliation” from McWane. (CX 2510 (Groeniger, Dep. at 207) (“Q. Have you considered purchasing more [ductile] iron pipe fittings from Star on the domestic side? A. Yes. Q. And did you purchase more domestic [ductile] iron pipe fittings from Star? A. Probably not. Q. Why not? A. Because of the inherent threats of retaliation. Q. Who was threatening you? A. Tyler.”); CX 2509 (Groeniger, IHT at 116-118) (“Q. Sir, you testified just now I asked you why you haven’t purchased any more domestic fittings from Star and you responded, well, because of the potential retribution. Do you recall that? A. Yes. Q. Did you mean because of the potential retribution from Tyler? A. Yes.”)).

Response To Finding No. 1979:

See General Response 6. The finding is misleading and therefore inaccurate because Groeniger purchased domestic Fittings from Star following the issuance of McWane’s Rebate Policy. (RPF 506 (McCutcheon, Tr. 2591-2594)). Despite Groeniger’s purchases from Star, McWane never refused to sell domestic Fittings to Groeniger and never refused to pay a rebate to Groeniger. (RPF 515 (JX 669 (Groeniger, Dep. at 99))).

1980. Groeniger’s experience with McWane regarding the San Jose Water Company (explained above) and the concern that Tyler might raise the prices again adversely affected Groeniger’s willingness to continue purchasing domestic fittings from Star. (CX 2509 (Groeniger, IHT at 144)).

Response To Finding No. 1980:

See Response To Finding 1979, *supra*.

1981. Groeniger was concerned about “[b]eing shut out” from McWane if it purchased Domestic Fittings from Star. (CX 2509 (Groeniger, IHT at 119) (“What’s your understanding of the possible consequences of purchasing domestic fittings from Star in terms of what Tyler might do? A. Being shut out.”)).

Response To Finding No. 1981:

See Response To Finding 1979, *supra*.

1982. McWane had previously cut-off Groeniger from access to its supply of Fittings in the 1980s. (CX 2510 (Groeniger, Dep. at 102-104)).

Response To Finding No. 1982:

See General Response 6. The finding is completely irrelevant as there are no allegations in the Administrative Complaint regarding any actions by McWane in the 1980s.

1983. In the 1980s, McWane “came in and said all or nothing” for Fittings. (CX 2510 (Groeniger, Dep. at 104)).

Response To Finding No. 1983:

See Response To Finding 1982, *supra*.

1984. Groeniger elected to not give McWane all of its Fitting business in the 80s and was subsequently cut-off for up to three years. (CX 2510 (Groeniger, Dep. at 106) (describing being cut off for a “[y]ear, two years. Maybe three.”)).

Response To Finding No. 1984:

See Response To Finding 1982, *supra*.

1985. In 2009, Groeniger needed access to McWane Domestic Fittings in order to service customers with McWane-only Domestic Fitting requirements. (CX 2510 (Groeniger, Dep. at 214-215) (“There are one or two districts that are big . . . [that have] Tyler requirement, they didn’t approve Star, domestic they wouldn’t approve them. . . . So the realization is if we were going to be in that ballgame during that period of time when that was the biggest entity of anything going on in the Hayward region, and to support two of our major contractors in the area that were bidding work down there, we had to have Tyler. And Tyler knew that, it was pretty obvious.”)).

Response To Finding No. 1985:

See Response To Finding 1979, *supra*.

1986. Mr. Groeniger refused to purchase Domestic Fittings from Star for other projects because he was concerned that Groeniger would lose rebates from McWane to which it was otherwise entitled if Groeniger did so. (CX 2532 (Berry, Dep. at 163-164; CX 2288)).²⁰

Response To Finding No. 1986:

See Response To Finding 1979, *supra*. *See* General Response 10.

10.5.5.4 Groeniger Still Wanted to Purchase Domestic Fittings from Star

1987. In 2010, Groeniger would have given Star 50% of its Domestic Fittings business if McWane had not issued the September 2009 Exclusive Dealing Policy. (CX 2510 (Groeniger, Dep. at 219) (“Q. So had Tyler not issued this letter in September 2009, you would have purchased 50 percent of your domestic fittings needs from Star? . . . THE WITNESS: I would think we would have. Knowing personalities involved, knowing the history involved and the sales people that Star had currently in effect in the Central Valley coming out of Sacramento who were very astute to our needs and our capabilities, I think so, yeah.”)).

Response To Finding No. 1987:

See Response To Finding 1979, *supra*.

1988. Groeniger described the Exclusive Dealing Policy as “the hammer” that “could effect [*sic*] you price-wise and availability-wise” and could put Groeniger “theoretically out of business.” (CX 2509 (Groeniger, IHT at 142-143) (“They could tie you up so bad you could not function.”)).

Response To Finding No. 1988:

See Response To Finding 1979, *supra*.

²⁰ The cited out of court statement should be considered for the truth of the matter asserted therein, as a statement of motive, intent, or plan under Fed. R. Evid. 803(3). *See supra* n.11.

1989. After McWane issued its September 22, 2009 letter announcing its Exclusive Dealing Policy, Mr. Berry had at least three conversations with representatives of Groeniger, including Mike Groeniger, Dick Alexander and Jim Wunschel. (CX 2532 (Berry, Dep. at 111-113)).

Response To Finding No. 1989:

See Response To Finding 1979, *supra*.

1990. Mr. Groeniger expressed his concern to Star that if Groeniger purchased any Domestic Fittings from Star, McWane would cut off any sales of Domestic Fittings to Groeniger. (CX 2532 (Berry, Dep. at 110, 113)).²¹

Response To Finding No. 1990:

See Response To Finding 1979, *supra*. *See* General Response 10.

10.5.5.5 Groeniger Purchased Star Domestic Fittings Indirectly Through Griffin Pipe

1991. Mr. Groeniger expressed a preference in October 2009 for purchasing Star's Domestic Fittings through Griffin Pipe Products Co. for the Walton project, rather than directly from Star, in order to avoid the repercussions under McWane's Exclusive Dealing Policy. (CX 2532 (Berry, Dep. at 114); RX-224).²²

Response To Finding No. 1991:

See Response To Finding 1979, *supra*. *See* General Response 10.

²¹ The cited out of court statement should be considered for the truth of the matter asserted therein, as a statement of motive, intent, or plan under Fed. R. Evid. 803(3). *See supra* n.11.

²² The cited out of court statement should be considered for the truth of the matter asserted therein, as a statement of motive, intent, or plan under Fed. R. Evid. 803(3). *See supra* n.11.

1992. In October 2009, Groeniger and Star negotiated the sale through Griffin Pipe Products Co. of Star Domestic Fittings for the Walton transmission project. (CX 2532 (Berry, Dep. at 114-115)).

Response To Finding No. 1992:

See Response To Finding 1979, *supra*.

10.5.6 McWane Enforced Its Exclusive Dealing Policy Against Members of The Distribution Group (TDG)

1993. McWane sought to enforce its Exclusive Dealing Policy against TDG at the buying group level, causing TDG to forgo McWane rebates on Domestic Fittings. McWane ultimately enforced its Exclusive Dealing Policy against TDG members at the individual member level. (*Infra* ¶¶ 1994-2025).

Response To Finding No. 1993:

See General Responses 1 and 7.

10.5.6.1 TDG Vendor Committee Negotiations

1994. [REDACTED] (CX 2494 (R. Fairbanks, Dep. at 107-108), *in camera*; CX 1361 at 004, 018, 034, *in camera*).

Response To Finding No. 1994:

See General Response 6.

1995. [REDACTED] (CX 2494 (R. Fairbanks, Dep. at 107-108), *in camera*; CX 1366 at 002 (“The following product categories do not carry a rebate. Domestic ductile iron waterworks Fittings.”)).

Response To Finding No. 1995:

See General Response 6.

1996. The TDG vendor committee “certainly wanted to have a proposal on domestic ductile iron fittings.” (CX 2494 (R. Fairbanks, Dep. at 107)).

Response To Finding No. 1996:

See General Response 6.

1997. In mid-September 2009, at the annual TDG Vendor Committee Negotiations, McWane explained that its new rebate program for TDG required TDG to police its members’

Domestic Fittings purchases to ensure that all locations for all TDG Distributors purchase all of their Domestic Fittings from McWane. Unless all TDG members purchased their Domestic Fittings solely from McWane, McWane would cut off all TDG members' access to McWane's Domestic Fittings. (Sheley, Tr. 3408-3409; *see also* CX 1364 at 002 (McWane proposed Domestic Fittings rebate program)).

Response To Finding No. 1997:

This finding is incomplete and misleading because despite McWane's September 22 letter, Star—and not McWane—was selected as the preferred domestic Fittings supplier for TDG in 2010. (RPF 469 (JX 694 (Bhutada, Dep. at 155)), JX 652 (Johnson, Dep. at 35-36), JX 675 (Sheley, Dep. at 68)). Further, McWane did not refuse to sell domestic Fittings or refuse to pay rebates to its customers who purchased domestic Fittings from Star. (RPF 509).

1998. McWane wanted TDG to adhere to its Exclusive Dealing Policy as a whole and to commit to exclusivity on Domestic Fittings for every TDG member across the country. (Sheley, Tr. 3408-3409; CX 2501 (Prescott, IHT at 56); *see also* CX 1364 at 002 (McWane proposed Domestic Fittings rebate program)).

Response To Finding No. 1998:

See Response To Finding 1997.

1999. On September 22, 2009, Mr. Tatman forwarded McWane's "Q&A" document regarding its Exclusive Dealing Policy and its MDA with Sigma to Rick Fairbanks of the TDG Group, who forwarded it to the TDG members. (CX 1356 at 001).

Response To Finding No. 1999:

See Response To Finding 1997.

2000. TDG did not accept McWane's September 2009 Domestic Fittings rebate proposal, in part because TDG refused to police its members' Domestic Fittings purchases. (Sheley, Tr. 3409; CX 2494 (R. Fairbanks, Dep. at 114) (because McWane proposal involved policing of individual member companies, it "[d]idn't fit our model")).

Response To Finding No. 2000:

See Response To Finding 1997.

2001. Although the McWane Exclusive Dealing Policy was not ultimately enforced against TDG as a group, it has been enforced against the individual TDG members. (*See infra* ¶¶ 2002-2025).

Response To Finding No. 2001:

See General Responses 1 and 7.

10.5.6.2 Illinois Meter Refused to Purchase Star Domestic Fittings Because of McWane's Exclusive Dealing Policy

2002. As a result of McWane's Exclusive Dealing Policy, Illinois Meter refused to purchase Domestic Fittings from Star. (*Infra* ¶¶ 2003-2014).

Response To Finding No. 2002:

See General Response 7. This Proposed Finding of Fact is argumentative and misleading and not supported by the evidence. There were many reasons that Illinois Meter would not buy Star domestic fittings, including the fact that Star did not offer a full line of fittings until the latter part of 2010 (After the bidding on ARRA work was completed) and the fact that Illinois Meter had had a bad experience with Star on a previous transaction. See McWane Proposed Finding of Fact 480-483 (Sheley, Tr. 3448-3451 (“Q. When Star first entered the market -- I'm sorry. When Star first started offering domestic fittings for sale in early 2010, you weren't willing to buy from Star because of a bad experience you had with them in another product line at that time; isn't that right? A. That's correct. Q. Okay. You had a -- had a negative experience when Star first entered the joint restraint business; right? A. That's correct. . . . Q. Okay. And so when Star decided to sell domestic fittings, you didn't want to repeat that experience; right? A. That's correct. Q. Okay. And so you weren't willing to give Star any domestic fittings orders until they had demonstrated they had a sufficient inventory to meet your needs; right? A. That's correct. Q. And you made that determination around late summer of 2010; right? A. To the best of my recollection..”). Furthermore, the Rebate Policy did not effect Illinois Meter's decision not to buy domestic Fittings from Star in 2009. (JX 675 (Sheley, Dep. at 162-163 (“Q. (By Mr. Lavery) But you also said that unequivocally you would not be purchasing Star's domestic? A. In 2009, that's correct. Q. So McWane's -- or Tyler's rebate policy had no effect whatsoever

on your decision? A. At that point when they first come out with it, no, it did not.”) (objections omitted).). Finally, Illinois Meter still would have purchased 90-plus percent of its domestic Fittings from McWane, whether the Rebate Policy existed or not. (JX 674 (Sheley, IHT at 90) (“Q: Had McWane not implemented this policy, would you have purchased domestic Fittings from Star? A: Probably not. I’d probably still be buying 90-plus percent of all my stuff from Tyler.”)).

2003. Mr. Jansen and Jennifer Heys of McWane informed Mr. Sheley that Illinois Meter, independently of TDG, is subject to McWane’s Exclusive Dealing Policy. (Sheley, Tr. 3410-3411).

Response To Finding No. 2003:

See General Response 7. While McWane does not concede the accuracy of this proposed finding or the supporting citations, McWane believes the proposed finding is irrelevant, and therefore, given the length of the FTC’s proposed findings, McWane provides no specific response.

2004. Mr. Tatman and Mr. Jansen told Mr. Sheley that if Illinois Meter purchased Domestic Fittings from anyone but McWane, it “would lose the right to buy [McWane’s Domestic Fittings] completely” and would also lose its Domestic Fittings rebate. Mr. Tatman and Mr. Jansen told Mr. Sheley this in September 2009 at a TDG meeting, and Jerry Jansen reiterated the message in January of 2010 at the TDG meeting in Dallas. (Sheley, Tr. 3407-3408).

Response To Finding No. 2004:

This Proposed Finding of Fact is argumentative and misleading. The TDG Group actually rejected McWane’s proposal related to domestic fittings and listed Star (and not McWane) as a TDG Preferred Provider. Thus, McWane’s proposal/policy had no effect whatsoever on TDG. *See* Sheley, Tr. 3408-3409).

2005. Mr. Jansen and Mr. Sheley had a heated conversation in January 2010 in which Mr. Jansen communicated to Mr. Sheley that if Illinois Meter purchased Domestic Fittings from anyone but McWane, Illinois Meter would lose access to McWane’s Domestic Fittings and would lose its rebates for Domestic Fittings. (Sheley, Tr. 3411-

3412 (“There was no doubt in my mind they were serious.”)). McWane did not limit the threatened loss of access to Domestic Fittings to any time period. (Sheley, Tr. 3412-3413).

Response To Finding No. 2005:

This proposed finding of fact is argumentative and misleading. Sheley testified that no period of time was ever communicated. (Sheley, Tr. 3413). The time frame related to McWane’s rebate policy was set forth in its letter of September 22, 2009.

2006. Losing access to McWane’s Domestic Fittings was a more serious consequence to Illinois Meter than losing McWane’s rebates because Illinois Meter needs to have access to a full line of Domestic Fittings in certain locations and McWane carries a complete line. (Sheley, Tr. 3412).

Response To Finding No. 2006:

McWane has no specific response.

2007. Illinois Meter purchases Domestic Fittings from McWane only. (Sheley, Tr. 3406).

Response To Finding No. 2007:

This Proposed Finding of Fact is misleading in suggesting that Illinois Meter only purchases from McWane due to the rebate policy. See McWane’s Proposed Finding of Fact 514. McWane paid rebates and shipped domestic Fittings to distributor Illinois Meter in 2010 and 2011, despite the fact that Illinois Meter bought domestic Fittings from Star. (Sheley, Tr. 3462-3463 (“Q. Tyler/Union paid you your rebate in 2010, sir, didn't they? A. That's correct. Q. And they didn't cut you off, did they? A. That's correct. Q. And Tyler/Union paid you your rebate in 2011, didn't they? A. That's correct. Q. Tyler/Union didn't cut you off in 2011, did they, sir? A. That's correct. Q. And you bought product from Tyler/Union this year; correct? A. Yes, sir. Q. And they've never cut you off. A. No.”); (JX 675 (Sheley, Dep. at 160 (“Q. And earlier you said that you purchase Star domestic product also now. Right? A. Occasionally. Yes, we are. Q. And you purchase Tyler's domestic product? A. Yes. Q. Has Tyler ever refused to tell sell you

domestic product? A. I don't think they know we're buying Star. Q. I'll repeat the question. Has Tyler ever refused to sell you domestic product? A. No. They have not. Q. Even though you do purchase from Star? A. Yes.”).).).

2008. Illinois Meter has been unwilling to stock or ship Star’s Domestic Fittings because it does not want to lose the ability to buy McWane’s Domestic Fittings. (Sheley, Tr. 3407).

Response To Finding No. 2008:

This Proposed Finding of Fact is misleading. See Responses to ¶¶ 2002-2007, *supra.*.

2009. Specifically, McWane’s Exclusive Dealing Policy made Illinois Meter less willing to purchase Domestic Fittings from Star because Star could not supply Illinois Meter a complete line, and Illinois Meter was not willing to risk coming up short on a project because it did business with Star. (Sheley, Tr. 3413).

Response To Finding No. 2009:

See General Response 7. This Proposed Finding of Fact is misleading. See responses to ¶¶ 2002-2007, *supra.*

2010. Illinois Meter has a very good relationship with Star, and would have liked to have given them Domestic Fittings business. (Sheley, Tr. 3414). For example, Illinois Meter was interested in purchasing Domestic Fittings from Star for an ARRA-funded water treatment plant in Winchester, Illinois, and for a Domestic specification job in Macomb, Illinois. Both projects required smaller-diameter Domestic Fittings that Illinois Meter believed Star could provide. (Sheley, Tr. 3417-3418).

Response To Finding No. 2010:

This Proposed Finding of Fact is misleading insofar as it suggests that Illinois Meter did not use Star domestic on the referenced projects due to McWane's rebate policy. Both referenced projects bid before Illinois Meter was willing to purchase from Star due to Star's lack of inventory. (Sheley, Tr. 3459; see Responses to ¶¶ 2002 - 2007, *supra*).

2011.

(CX 2537 (McCutcheon, IHT (Vol.

1) at 163), *in camera*)).

Response To Finding No. 2011:

See General Responses 3, 6 and 7. The cited testimony is admittedly hearsay not cited for the truth of the matter asserted. Therefore, it is inadmissible for the Proposed Finding of Fact which it is cited to support. Moreover, it is misleading. See Responses to Nos. 2002 and 2007 above. In addition, it references testimony from an Investigation Hearing at which McWane was not present to cross-examine.

2012. Mr. Sheley believes that McWane's Exclusive Dealing Policy remains in place as to Illinois Meter. As a result, Illinois Meter still does not purchase Star Domestic Fittings for customer projects, despite their very good quality. (Sheley, Tr. 3419-3420 ("We're not buying any of them to speak of. We bought a few to look at them, but we are not buying them and supplying them on projects.")).

²³ The cited testimony regarding out of court statements of the Illinois Meter is cited for its effect on Mr. McCutcheon and Star, not to prove the truth of the matters asserted in the statements.

Response To Finding No. 2012:

See General Response 7. The Proposed Finding of Fact is misleading. See McWane Proposed Finding of Fact 514.

2013.

(Sheley, Tr. 3433-3434, *in camera*).

camera).

(Sheley, Tr. 3434, *in*

(Sheley, Tr. 3434, *in camera*).

Response To Finding No. 2013:

The relevance of this Proposed Finding of Fact is questionable since Illinois Meter did not believe that Star was in a position to provide a full line of fittings until late 2010. See also Response to 2002 above.

2014.

(Sheley, Tr. 3434-3435, *in camera* [REDACTED])

Response To Finding No. 2014:

See General Response 7. This Proposed Finding of Fact is argumentative and speculative. What Illinois Meter “wanted” to do is not connected up with any specific job or sale and there are other reasons that Illinois Meter did not purchase domestic from Star. See response to ¶ 2002, *supra*.

10.5.6.3 Other TDG Distributor Members Wanted to Purchase Domestic Fittings from Star but Did Not Because of McWane’s Exclusive Dealing Policy

2015. But for McWane’s Exclusive Dealing Policy, C.I. Thornburg would have purchased Domestic Fittings from Star during the entire 2010 calendar year. (CX 2489 (Morrison, IHT at 87) (“Oh, I’d say all of 2010.”)).

Response To Finding No. 2015:

See General Responses 3, 6 and 7. This citation from an IH (at which McWane was not present to cross-examine) is inaccurate and misleading. Upon cross-examination at deposition, C. I. Thornburg testified that Star was not in a position to provide domestic product or service in the first half of 2010 and did not solicit orders from C.I. Thornburg in the second half of 2010. (JX 650 (Morrison, Dep. at 74-44 (“Well, so in January of 2010, Star’s probably not even ready to be considered. So when we’re quoting projects in the first quarter of 2010, we’re using Tyler Union because, not because of this [Domestic Rebate Policy] letter. I’d really like to say it was because of this [Domestic Rebate Policy] letter, but Star’s not – I can’t consider them at this point in time....Q: The first half of 2010 the [Rebate] letter didn’t affect your purchases from Star because Star wasn’t ready? Answer: Correct...Q: So, Star never came to you in 2010 and said, hey, we’re ready to service your project? No.”)). So contrary to this proposed finding of fact, C.I. Thornburg expressly testified that the McWane Domestic Rebate Policy letter did not affect his 2010 purchases.

2016. In 2010, C.I. Thornburg purchased 95-98% of its Domestic Fittings from Tyler Union or Sigma, which sold Tyler Union Domestic Fittings. (CX 2489 (Morrison, IHT at 64) (“When I say Tyler Union, either through SIGMA or through Tyler Union.”)).

Response To Finding No. 2016:

See General Responses 3 and 6. McWane has no specific response, other than C. I. Thornburg testified that it purchased product from Sigma as a result of personal preference and personal relationships. (JX 650 (Morrison, Dep. at 43-44)).

2017. In 2010, C.I. Thornburg sold \$339,781.80 in Domestic Fittings. (RX-650 (Morrison, Dep. at 37)). C.I. Thornburg started purchasing Star domestic fittings in 2010 “towards the end of the year.” (CX 2489 (Morrison, IHT at 66)).

Response To Finding No. 2017:

See General Responses 3 and 6. This Proposed Finding of Fact is misleading. C. I. Thornburg expressly testified that it did not buy domestic fittings from Star in 2010 for reasons other than McWane’s rebate letter. *See* Response to ¶ 2015, *supra*.

2018. C.I. Thornburg would have been interested in purchasing A item Fittings from Star and then purchasing odd ball Fittings from Tyler. (CX 2489 (Morrison, IHT at 83-84) (“Q. Would you have been interested in purchasing the A item fittings that Star might have had during this time period and then purchasing your B through D items or your oddball fittings from Tyler as necessary? A. Oh, without question.”)).

Response To Finding No. 2018:

See General Responses 3 and 6. This Proposed Finding of Fact is misleading. C.I. Thornburg testified that Star was “not ready” to provide domestic fittings in the first half of 2010. (JX 650 (Morrison, Dep. at 75-76) (“Question: When you say Star’s not ready, what would you have needed to see during that time period for them to be ready? Answer: When you talk about the size ranges and various configurations, I mean you’re not looking for them to be a hundred percent, quote, okay, I have every size, every configuration, I have sixty-day supply, you know, sitting in Houston, Texas, ready to ship. That’s not what you are looking for. You’re just looking for a sense from them, meaning Star, that they are ready to service a job.”)).

2019. C.I. Thornburg would have given a third to a half of all its domestic business to Star but for the McWane Exclusive Dealing policy. (CX 2489 (Morrison, IHT at 85-86) (“Q. Any idea of how much business you would have given to Star in that world we’re describing, the world where the threat’s not in effect? . . . A. Oh, a third, easily, maybe half, but you would certainly start giving them [Star] some business for sure.”)).

Response To Finding No. 2019:

See General Responses 3, 6 and 7. This Proposed Finding of Fact is misleading. It is pure speculation and not tied to any job or contract. Moreover, as shown in Response to 2015 above, C.I. Thornburg did not purchase Star domestic in 2010 for reasons other than McWane’s rebate policy. In 2011, C.I. Thornburg’s total domestic fitting sales were only _____, and

thus, Star's alleged lost profit on these speculative lost sales would have been de minimis at best. (JX 650 (Morrison, Dep. at 39)).

2020. After McWane issued its Exclusive Dealing Policy, Mr. Berry had negotiations with Jim McDowell, a sales manager and now part owner of Western Waterworks, for the sale of Star's Domestic Fittings to Western Waterworks. (CX 2532 (Berry, Dep. at 121-122)).

Response To Finding No. 2020:

See General Responses 6 and 7.

2021. Due to McWane's Exclusive Dealing Policy, Mr. McDowell informed Mr. Berry in the course of their negotiations that Western Waterworks was willing to purchase Domestic Fittings from Star only if the transaction could "fly under the radar," *i.e.*, that McWane would not find out about the sales. (CX 0011; CX 2532 (Berry, Dep. at 124); CX 2537 (McCutcheon, IHT (Vol. 1) at 142)).²⁴

Response To Finding No. 2021:

See General Responses 3, 5, 6 and 7. The cited testimony is not only incomplete and misleading, it is clearly inadmissible hearsay. The FTC posits that it is offered for motive, intent or plan. But it is actually being offered to show that Star did not make sales and it is not admissible for that purpose. It does not relate to any motive, intent or plan of the third party distributor and should be stricken. Moreover, it is misleading because Mr. Berry admitted that Western Waterworks purchased domestic product from Star and in fact, wanted to purchase all

²⁴ The cited out of court statement should be considered for the truth of the matter asserted therein, as a statement of motive, intent, or plan under Fed. R. Evid. 803(3). *See supra* n.11.

of their domestic fittings from Star if Star could meet their needs. (JX 691 (Berry, Dep. at 80-82, 125-127)). Finally, the FTC is relying on hearsay testimony from the deposition of a Star salesman who was subpoenaed to trial but who the FTC decided not call as a live witness.

2022. In January 2010, after McWane announced its Exclusive Dealing Policy, Mr. Berry had negotiations with Todd Fowler, Brian Nelson, and David Kirker of the Distributor HD Fowler Company (a member of the TDG group), for the sale of Star's imported and Domestic Fittings to HD Fowler. (CX 2532 (Berry, Dep. at 134)).

Response To Finding No. 2022:

See General Responses 6 and 7.

2023. Mr. Fowler, Mr. Nelson, and Mr. Kirker informed Mr. Berry that their company would not allow them to purchase Star's Domestic Fittings because they were afraid that McWane would not sell Domestic Fittings to HD Fowler if it purchased Domestic Fittings from Star. (CX 2532 (Berry, Dep. at 134)).²⁵

Response To Finding No. 2023:

See General Response 5 and 6. The cited testimony is not only incomplete and misleading, it is clearly inadmissible hearsay. The FTC posits that it is offered for motive, intent or plan. But it is actually being offered to show that Star did not make sales and it is not admissible for that purpose. It does not relate to any motive, intent or plan of the third party distributor and should be stricken. Moreover, it is misleading because Mr. Berry admitted that

²⁵ The cited out of court statements should be considered for the truth of the matters asserted therein, as statements of motive, intent, or plan under Fed. R. Evid. 803(3). *See supra* n.11.

HD Fowler purchased domestic fittings from Star. (JX 691 (Berry, Dep. at 184)). Finally, the FTC is relying on hearsay testimony from the deposition of a Star salesman who was subpoenaed to trial but who the FTC decided not call as a live witness.

2024. Star submitted bids for Domestic Fittings to HD Fowler for a project called “Shelton WWTP.” HD Fowler purchased large Domestic Fittings from Star for this project because, at the time, Star could deliver the product more quickly than McWane. (CX 2532 (Berry, Dep. at 168)). However, for the same project, HD Fowler was unable to purchase smaller Domestic Fittings from Star because McWane had supply of the product. (CX 2532 (Berry, Dep. at 167-169 (also testifying that HD Fowler did not purchase Domestic Fittings from Star for its Coeur d’Alene, Idaho WWTP project; its Pendleton, Oregon WWTP project, or its HD Valley-Brownsville project); CX 2288)).²⁶

Response To Finding No. 2024:

See General Responses 5 and 6. The cited testimony is not only incomplete and misleading, it is clearly inadmissible hearsay. The FTC posits that it is offered for motive, intent or plan. But it is actually being offered to show that Star did not make sales and it is not admissible for that purpose. It does not relate to any motive, intent or plan of the third party distributor and should be stricken. Moreover, it is misleading because Mr. Berry admitted that HD Fowler purchased domestic fittings from Star. (JX 691 (Berry, Dep. at 184)). Finally, the FTC is relying on hearsay testimony from the deposition of a Star salesman who was subpoenaed to trial but who the FTC decided not call as a live witness.

²⁶ The cited out of court statements should be considered for the truth of the matters asserted therein, as statements of motive, intent, or plan under Fed. R. Evid. 803(3). See *supra* n.11.

2025.

(CX 2537 (McCutcheon, IHT (Vol. 1) at 163), *in camera*).

Response To Finding No. 2025:

See General Responses 3, 5, 6 and 7. This Proposed Finding of Fact, on its face, is inadmissible hearsay for which an exception is not even proffered. In fact, the cited testimony is triple hearsay. Mr. McCutcheon testifies in his IH (at which McWane was not allowed to cross-examine) that some unidentified person at Hayes Pipe made this statement, not to McCutcheon, but to one of McCutcheon's salesmen who later told McCutcheon. As such, it should be stricken and not considered by the Court.

10.5.7 Customers Purchased Domestic Fittings from Star in Limited Circumstances where McWane's Exclusive Dealing Policy Did Not Pose a Threat

2026. Many of Star's Domestic Fittings sales were minor purchases, orders that McWane itself was unable to fill, or purchases that occurred after the customer learned of the FTC's investigation in this matter, or other limited circumstances when McWane's Exclusive Dealing Policy did not pose a threat. (*Infra* ¶¶ 2027-2031).

Response To Finding No. 2026:

See General Responses 1 and 7, and responses to ¶¶ 2027-2031, *infra*. This Proposed Finding of Fact is speculative and appears to be based on anecdotal evidence for which no specific citation is provided. It is also contradicted by the comprehensive evidence of the impressive breadth and extent of Star's domestic sales. (RPFF ¶¶ 425-427, 457, 463-479).

2027. Some Distributors only purchased domestic fittings from Star "under the radar," or in other words, without McWane knowing.(McCutcheon, Tr. 2668-2669); CX 2489 (Morrison, IHT at 67) ("Now, what we've bought from Star has been under the radar. When I say under the radar, just nothing that it would get anybody's attention. I don't mean it was sneaky or was, you know, hidden from them [Tyler Union]. It was so minor that nobody would care because it wasn't a project or something that was going on that Tyler Union was looking at or aware of or anything else."); (CX 2516 (Sheley, Dep. at 63) ("Q. Do you purchase any domestic fittings from Star? A. We haven't until – in the last 12 months we bought a few. I think that's in that deposition also. We bought a few to see what they looked like. Q. Have you bought any for jobs? A. No."); *see also* ¶ 1888).

Response To Finding No. 2027:

See response to ¶ 2026, *supra*. This finding is misleading and inaccurate, because it ignores the evidence that McWane’s Rebate Policy was not enforced. (RPF 498-529).

2028. Some Distributors were willing to purchase Domestic Fittings from Star once they learned of the FTC’s investigation into McWane’s Exclusive Dealing Policy. (CX 2489 (Morrison, IHT at 78, 79) (“Q. So you think that right now the prospect of FTC scrutiny might be keeping Tyler from retaliating against distributors that purchase from Star? A. Yes.”)).

Response To Finding No. 2028:

See General Responses 3, 6 and 7, and responses to ¶¶ 2026-2027, *supra*. This Proposed Finding of Fact is incomplete, inaccurate, speculative, lacks foundation, is unsupported by the evidence and only cites to the speculative testimony of one distributor as to what he “thinks” other distributors might “think.” In fact, McWane’s Rebate Policy was not enforced. (RPF 498-529). Moreover, this finding is contradicted by the comprehensive evidence of the impressive breadth and extent of Star’s domestic sales. (RPF 425-427, 457, 463-479).

2029. U.S. Pipe was also willing to purchase Domestic Fittings from Star once it learned of the FTC’s investigation. (Morton, Tr. 2857-2858 (after FTC investigation opened U.S. Pipe decided that, if it bought Domestic Fittings from Star, the risk that McWane would stop Domestic Fittings sales to U.S. Pipe was “significantly less”); CX 2542 (Morton, Dep. at 154-155) (“Q. And why are you not concerned today? A. We believe, I believe, that they would not follow through on the -- I don’t want to use the word threat, on the message that Rick Tatman gave me back in 2009 as a result of all of the publicity and this investigation. I mean, so we felt that the threat of – the risk of not being able to get fittings, which you told you before was not my priority, was not an issue. Q. And when you say this investigation, do you mean the FTC’s investigation of McWane? A. That’s right.”)).

Response To Finding No. 2029:

See responses to ¶¶ 2026-2028, *supra*. This Proposed Finding of Fact is incomplete and misleading, because it only cites to the testimony of one purchaser’s speculation of the effect of the FTC investigation. In actuality, McWane never enforced its Rebate Policy, as set forth in its

September 22, 2009 letter, against U.S. Pipe, despite the fact that U.S. Pipe has bought domestic fittings from Star since September 2009. (RPPF ¶ 521).

2030. Some of Star’s actual sales of Domestic Fittings were made in circumstances in which McWane could not provide Domestic Fittings in a timely fashion (*e.g.*, large-diameter Fittings), or where the End User needed a special coating such as “Protecto 401” that Star specialized in. (McCutcheon, Tr. 2666-2667).

Response To Finding No. 2030:

See responses to ¶¶ 2026-2028, *supra*. This Proposed Finding of Fact is irrelevant.

Comprehensive evidence of the impressive breadth and extent of Star’s domestic sales is offered in McWane’s Proposed Findings of Fact at Nos. 425-427, 457, 463-479.

2031. Star made a significant number of sales of Domestic Fittings to the Distributor Ramsco. After those sales, Ramsco was acquired by HD Supply. Those sales therefore appear in Star’s records as sales to HD Supply even though they were made to Ramsco, not HD Supply. (McCutcheon, Tr. 2669-2670).

Response To Finding No. 2031:

While McWane does not concede the accuracy of this proposed finding or the supporting citations, McWane believes the proposed finding is irrelevant, and therefore, given the length of the FTC’s proposed findings, McWane provides no specific response.

10.6 McWane Employed Its Exclusive Dealing Policy to Prevent U.S. Pipe from Purchasing Domestic Fittings from Star

2032. McWane enforced its Exclusive Dealing Policy with respect to U.S. Pipe, and as a result of McWane’s policy, U.S. Pipe refused to purchase Domestic Fittings from Star. (*Infra* ¶¶ 2033-2063).

Response To Finding No. 2032:

See General Responses 1 and 7, and response to ¶¶ 2033-2063, *infra*. Because this finding is an assertion unsupported by any citation to the record, no response is required.

10.6.1 **U.S. Pipe Purchased and Re-sold Sigma, Star, and McWane Fittings**

2033. U.S. Pipe manufactured its own Domestic Fittings for sale in its waterworks systems packages until 2006, and has since purchased and resold Sigma's, Star's, and McWane's Fittings. (*Supra* § 3.4.8.1; *infra* ¶¶ 2034-2039).

Response To Finding No. 2033:

See General Response 1 and responses to § 3.4.8.1, *supra* and ¶¶ 2034-2039, *infra*.

2034. U.S. Pipe sells Fittings as part of its package sales of pipes and Fittings. (*Supra* ¶ 222)

Response To Finding No. 2034:

See General Response 1 and response to ¶ 222, *supra*.

2035. After U.S. Pipe stopped manufacturing Fittings in April 2006, Sigma was U.S. Pipe's main supplier of non-Domestic Fittings, and Star was its secondary source. (Morton, Tr. 2819).

Response To Finding No. 2035:

Respondent has no specific response.

2036. Today, Star and Sigma continue to be U.S. Pipe's source for non-Domestic Fittings, but Star is now the primary supplier and Sigma is the secondary supplier. (Morton, Tr. 2819-2820).

Response To Finding No. 2036:

Respondent has no specific response.

2037. After U.S. Pipe stopped manufacturing Fittings in April 2006, U.S. Pipe's sole source for Domestic Fittings (and the only supplier of Domestic Fittings) was McWane. (Morton, Tr. 2810).

Response To Finding No. 2037:

This proposed finding is incomplete and therefore inaccurate. Mr. Morton testified that in the 2007-2008 timeframe, McWane was its supplier of domestic small and medium fittings, and ACIPCO was its supplier of large domestic fittings. Mr. Morton also testified that U.S. Pipe now buys domestic fittings from Star. (Morton, Tr. 2819-2820)

2038. U.S. Pipe now also buys Domestic Fittings from Star. (Morton, Tr. 2820).

Response To Finding No. 2038:

Respondent has no specific response.

2039. U.S. Pipe never had a Fittings rebate program in place with McWane. (Morton, Tr. 2849, 2862).

Response To Finding No. 2039:

Respondent has no specific response.

10.6.2 U.S. Pipe Pursued the Purchase of Domestic Fittings from Star and Star Offered Competitive Prices

2040. When Star entered the Domestic Fittings market, U.S. Pipe pursued the purchase of Domestic Fittings from Star, and Star offered competitive prices. (*Infra* ¶¶ 2041-2049).

Response To Finding No. 2040:

See General Response 1, and responses to ¶¶ 2041-2049, *infra* and ¶ 617, *supra*. There is no separate “Domestic Fittings Market.” (RPF ¶¶ 372-424).

2041. Following the passage of ARRA, U.S. Pipe needed to ensure that it had sources for Domestic Fittings. (Morton, Tr. 2826).

Response To Finding No. 2041:

Respondent has no specific response.

2042. U.S. Pipe believed that it would benefit from having more than one supplier for Domestic Fittings because it wanted to, among other reasons, ensure supply and enjoy the benefits of competition. (Morton, Tr. 2826-2827).

Response To Finding No. 2042:

Respondent has no specific response.

2043. U.S. Pipe therefore began investigating small and medium Domestic Fittings sources other than McWane in early 2009. (Morton, Tr. 2825).

Response To Finding No. 2043:

Respondent has no specific response.

2044. U.S. Pipe initially considered manufacturing its own Domestic Fittings in response to ARRA. The main reason that U.S. Pipe stopped investigating that option was that Sigma

contacted it in June of 2009 and committed to produce Domestic Fittings. (Morton, Tr. 2876-2877).

Response To Finding No. 2044:

This proposed finding is contradicted by Complaint Counsel's own contention that U.S. Pipe decided not to re-enter the "Domestic Fittings Market" in the Spring of 2009. (CCPFF ¶ 226; Morton, Tr. 2866-2867, 2876). In addition, Sigma's Mitchell Rona told U.S. Pipe in August of 2009 that Sigma had no concrete plans to begin Domestic Fittings production. (Rona, Tr. 1693-1694). This proposed finding is also incomplete and inaccurate, because U.S. Pipe had other reasons for ending its investigation of the option of manufacturing its own Domestic Fittings: namely, the "cost-prohibitiveness" of that option and ARRA's "limited window." (Morton, Tr. 2867-2877, 2888 & RX 141, RX 142).

2045. In early September 2009, U.S. Pipe and Star discussed the potential purchase by U.S. Pipe of Domestic Fittings from Star. (Morton, Tr. 2834-2835; CX 2215 at 001).

Response To Finding No. 2045:

Respondent has no specific response.

2046. On September 3, 2009, Mr. McCutcheon sent an email to Mr. Morton and others at U.S. Pipe, thanking them for meeting the day before, and setting forth a schedule for the availability of Star's Domestic Fittings. (CX 2215 at 002-003; *see also* RX-207 (same schedule as sent to Ferguson in more legible form)).

Response To Finding No. 2046:

Respondent has no specific response.

2047. On September 15, 2009, Mr. Morton wrote an email to Susan Schepps of Star's sales group stating, "We are definitely interested in pursuing the purchasing of our domestic requirements from Star and are looking forward to receiving the list of configurations that will be available." (Morton, Tr. 2834-2835).

Response To Finding No. 2047:

Respondent has no specific response.

2048. On September 28, 2009, Mr. Morton met with Ms. Schepps in Birmingham, Alabama regarding U.S. Pipe's interest in purchasing Domestic Fittings from Star. (Morton, Tr. 2835-2837; CX 1936 at 001). Ms. Schepps provided a detailed list of Domestic Fittings products that Star was committed to having available by the end of 2009. (Morton, Tr. 2835-2837; CX 1936 at 001, 002).

Response To Finding No. 2048:

Respondent has no specific response.

2049. Star initially proposed to U.S. Pipe pricing for 3" to 12" Domestic Fittings that matched McWane's Domestic Fittings multipliers. In response to U.S. Pipe's statement that Star needed to incentivize U.S. Pipe to leave McWane, Ms. Schepps further committed to U.S. Pipe that Star would offer Domestic Fittings pricing significantly below McWane's in exchange for a major portion of U.S. Pipe's volume. (CX 1936 at 001; Morton, Tr. 2837-2838).

Response To Finding No. 2049:

Respondent has no specific response.

10.6.3 Mr. Tatman Conveyed McWane's Exclusive Dealing Policy to U.S. Pipe as a Strict, All-or-Nothing Policy

2050. Mr. Tatman conveyed McWane's Exclusive Dealing Policy to U.S. Pipe as a strict, all-or-nothing policy under which U.S. Pipe risked losing all access to McWane's Domestic Fittings. (*Infra* ¶¶ 2051-2056).

Response To Finding No. 2050:

See General Responses 1 and 7. *See* responses to ¶¶ 2051-2056, *infra*.

2051. After U.S. Pipe received a copy of McWane's September 22, 2009 Exclusive Dealing Policy, Stephen Gables of U.S. Pipe's sales group forwarded the letter to Mr. Crawford, Mr. Morton, and U.S. Pipe's president Ray Torok noting as follows:

There was a lot of buzz last week about [McWane] preparing to "cut off" certain wholesale distributors if they were found to have purchased any STAR domestic product. These letters make that buzz more like the sound of a 757.

(CX 2205 at 001; Morton, Tr. 2849).

Response To Finding No. 2051:

See General Responses 1 and 7. Respondent has no specific response regarding the quote from Mr. Gables' email.

2052. On October 13, 2009, Mr. Morton met with Mr. Tatman in Birmingham, Alabama regarding McWane's Exclusive Dealing Policy. (Morton, Tr. 2840-2844).

Response To Finding No. 2052:

See General Responses 1 and 7. This finding mischaracterizes the nature of the meeting between Mr. Morton and Mr. Tatman. (Morton, Tr. 2840-2844). Mr. Morton testified that he did not receive "a, as you call it, policy or anything." (Morton, Tr. 2840).

2053. Mr. Tatman told Mr. Morton that McWane expected U.S. Pipe to purchase all of its Domestic Fittings needs from McWane, not from Star. (CX 2203 at 002 (Morton meeting notes indicating "Tatman - expect customers including USP to be loyal and purchase 100 percent of their requirements from [McWane]"); Morton, Tr. 2844-2845).

Response To Finding No. 2053:

See General Response 5. This finding mischaracterizes the evidence. Mr. Morton testified that Mr. Tatman made such a statement (Morton, Tr. 2842). However, in actuality, McWane never enforced its September 22, 2009 letter against U.S. Pipe, despite the fact that U.S. Pipe has bought domestic fittings from Star since September 2009. (RFPP ¶ 521).

2054. Mr. Tatman told Mr. Morton that U.S. Pipe would be required going forward to purchase 100% of its Domestic Fittings requirements from McWane. U.S. Pipe could not "cherry pick" A- or B-items, or high volume Domestic Fittings from Star and expect McWane to supply the balance. (CX 2203 at 002; Morton, Tr. 2845-2846).

Response To Finding No. 2054:

See General Response 5, and response to ¶ 2053, *supra*. This finding mischaracterizes the evidence. Mr. Morton testified that Mr. Tatman made such a statement. (Morton, Tr. 2845-2846).

2055. Mr. Tatman warned Mr. Morton that if U.S. Pipe were to purchase any Domestic Fittings from Star, it should not expect McWane to sell any Domestic Fittings to U.S. Pipe. (CX 2203 at 002).

Response To Finding No. 2055:

See General Response 5, and response to ¶ 2053, *supra*.

2056. Under its MDA with Sigma, McWane had also forbidden Sigma from selling even McWane branded Domestic Fittings to U.S. Pipe. (*See infra* § 11.8.5).

Response To Finding No. 2056:

See General Response 1 and response to § 11.8.5, *infra*. This proposed finding is an unsupported assertion that requires no response.

10.6.4 U.S. Pipe Declined to Purchase Domestic Fittings from Star Because of McWane’s Exclusive Dealing Policy

2057. Because U.S. Pipe needed access to a full line of Domestic Fittings, not just the “A” and “B” items initially being offered by Star, McWane’s Exclusive Dealing Policy prevented U.S. Pipe from buying any Domestic Fittings from Star. (Morton, Tr. 2846, 2848).

Response To Finding No. 2057:

See General Response 7, and response to ¶ 2053, *supra*. This finding mischaracterizes the evidence. (Morton, Tr. 2846-2848) U.S. Pipe bought Star domestic fittings after McWane sent its September 22, 2009 letter. (Morton, Tr. 2860-2862, 2867)

2058. In response to McWane’s Exclusive Dealing Policy as communicated by Mr. Tatman, Mr. Morton recommended to his boss, Mr. Torok, that U.S. Pipe continue purchasing 100% of its Domestic Fittings from McWane unless U.S. Pipe identified a source that could supply U.S. Pipe all of its Domestic Fittings instead. (Morton, Tr. 2848 (“In order to sell pipe, you have to have access to all types of fittings that are used in systems, and if you didn’t have the capability to buy all of your requirements, then you couldn’t compete and bid on projects for many systems.”)).

Response To Finding No. 2058:

See General Responses 5 and 7, and response to ¶ 2053, *supra*. Respondent has no specific response with respect to the content of Mr. Morton’s communications to Mr. Torok.

2059. U.S. Pipe complied with McWane's Exclusive Dealing Policy, and Mr. Morton instructed his purchasing manager not to purchase Domestic Fittings from Star unless McWane could not provide the needed Domestic Fittings. (Morton, Tr. 2915-2916 ("My instructions to my purchasing manager were to only purchase if Union-Tyler couldn't provide, so if we were buying a very minor number of fittings from January of 2010 through September when we really did make a change, it was as a result of one of those exceptions where we couldn't receive product.")).

Response To Finding No. 2059:

See General Response 7, and response to ¶ 2053, *supra*. This finding is incomplete and therefore misleading. Although Respondent has no specific response with regard to Mr. Morton's testimony about his instructions, see response to ¶ 2057 above.

2060. On November 12 or 13, 2009, Mr. Morton and Stephen Gables of U.S. Pipe met with Mr. McCutcheon and Ms. Schepps of Star. At that meeting, U.S. Pipe conveyed to Star the message from McWane that if U.S. Pipe purchased any of its Domestic Fittings requirements from anyone other than McWane, then McWane would not sell U.S. Pipe any Domestic Fittings. (CX 2217 at 002; Morton, Tr. 2853-2854; *see also* RX-601 (McCutcheon description of cutoff by U.S. Pipe)).²⁷

Response To Finding No. 2060:

See General Responses 5, 6 and 10. This finding is incomplete and therefore misleading. Mr. Morton also testified that prior to the end of 2009, Star was not manufacturing many of the fittings that U.S. Pipe required. (Morton, Tr. 2860). See response to ¶ 2053, *supra*.

²⁷ The cited out of court statements should be considered for the truth of the matters asserted therein, as statements of motive, intent, or plan under Fed. R. Evid. 803(3). *See supra* n.11.

2061. U.S. Pipe further conveyed to Star that “We must have 100% confidence in Star’s ability to deliver all of our domestic requirements” before moving away from McWane. (CX 2217 at 002; Morton, Tr. 2854-2855).

Response To Finding No. 2061:

See General Response 5. This finding is incomplete and therefore misleading.

Mr. Morton also testified that prior to the end of 2009, Star was not manufacturing many of the fittings that U.S. Pipe required. (Morton, Tr. 2860). *See* response to ¶ 2053, *supra*.

2062. With the exception of minor purchases falling within the limited exceptions to McWane’s Exclusive Dealing Policy (*e.g.*, where McWane’s lead time to supply the requested Fitting was too long, or if McWane didn’t make a particular Fitting configuration), U.S. Pipe did not purchase significant amounts of Domestic Fittings from Star until September of 2010. (Morton, Tr. 2856-2858, 2859).

Response To Finding No. 2062:

See General Response 7, and response to ¶ 2053, *supra*. This finding is incomplete and therefore misleading. Mr. Morton also testified that prior to the end of 2009, Star was not manufacturing many of the fittings that U.S. Pipe required. (Morton, Tr. 2060-2062, 2067)

2063. In September 2010, U.S. Pipe became willing to purchase Domestic Fittings from Star because it believed the FTC investigation significantly reduced the risk of McWane refusing to sell it Domestic Fittings under the Exclusive Dealing Policy. (Morton, Tr. 2856-2858; CX 2210 at 001 (“We also believe that with the current FTC investigation that it is unlikely that McWane will deny selling domestic fittings to USP.”)).

Response To Finding No. 2063:

See General Response 7, and response to ¶ 2053, *supra*. This finding is incomplete and therefore inaccurate. In addition, Star was not manufacturing many of the fittings that U.S. Pipe required in 2009. (Morton, Tr. 2860)

10.7 McWane Never Publicly Withdrew Its Exclusive Dealing Policy

2064. McWane never modified the Exclusive Dealing Policy by any subsequent letter. (Tatman, Tr. 707, 709 (asserting that the program was modified after Sept. 22, 2009, but that he never sent out a letter to his customers to the effect that “[t]he policy we announced on September 22, 2009 is no longer in effect.”); *infra* ¶¶ 2065-2067).

Response To Finding No. 2064:

See General Response 7. This Proposed Finding of Fact is misleading. The cited testimony from Tatman indicates that McWane’s January 2010 modification to the domestic rebate program McWane was not put out in another letter “similar to the September 22, 2009 letter.” However, Tatman immediately explains that program modifications may have been sent in individual letters to the distributors rather than a “one-size-fits-all” letter. He also explains that the modifications to the program might have been explained to the distributors in direct discussions. He explained that it was not McWane’s practice to send a letter rescinding any old rebate policy. McWane’s practice was rather to simply announce its “new” rebate policy each year. (Tatman, Tr. 707-709). In any event, McWane did not enforce its September 22, 2009 letter. (RPF 498-529).

2065. Distributors and others in the market are not aware of McWane ever rescinding its Exclusive Dealing Policy. (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.”); Morton, Tr. 2908-2909, 2911 (No one from McWane communicated to U.S. Pipe any revisions to the Exclusive Dealing Policy); Thees, Tr. 3118 (As far as Mr. Thees of Ferguson is aware, McWane never rescinded the Exclusive Dealing Policy or indicated that it was no longer in force); Pitts, Tr. 3364-3365 (As far as Mr. Pitts of Hajoca is aware, McWane never withdrew the Exclusive Dealing Policy)).

Response To Finding No. 2065:

See General Response 7. This Proposed Finding of Fact is misleading. The distributors cited were aware that McWane was not enforcing its domestic rebate policy. Mr. Sheley testified that he purchased Star domestic fittings in 2010 and 2011 and that McWane never refused to sell product or withheld its rebate. (Sheley, Tr. 3462-3463). U.S. Pipe purchased domestic fittings from Star and others and McWane never refused to sell product to U.S. Pipe. (U.S. Pipe never had a rebate program with McWane). (Morton, Tr. 2860-2862). Mr. Thees

testified that, despite the fact that Ferguson had purchased hundreds of thousands of dollars of domestic fittings from Star, McWane had never refused to sell Ferguson product nor refused to pay its rebate. (Thees, Tr. 3111-3113). Mr. Pitts testified that McWane, after negotiating its domestic rebate policy with Hajoca in April 2010 and despite knowing that Hajoca was making substantial purchases of domestic fittings from Star, never refused to sell Hajoca domestic fittings and never refused to pay Hajoca its rebate on domestic fittings. (Pitts, Tr. 3365-3366). In any event, McWane did not enforce its September 22, 2009 letter. (RPF 498-529).

2066. McWane was still actively enforcing its Exclusive Dealing Policy in July 2010. For example, Mr. Jansen warned the president of the third largest waterworks Distributor, WinWholesale, that one of its branches had purchased a “small order of Domestic from Star that was quoted last fall,” so that WinWholesale could “avoid a situation.” (CX 1603; CX 2477 (Jansen, Dep. at 189-191) (testifying that he was unaware of any WinWholesale branches buying any Domestic Fittings after that warning)).

Response To Finding No. 2066:

See General Response 7. This Proposed Finding of Fact and the cited testimony of Mr. Jansen is misleading. The actual testimony reflects that Mr. Gibbs of WinWholesale requested that Mr. Jansen make him aware of any Star purchases and Mr. Jansen was merely complying with that request. (CX 2477 (Jansen, Dep. at 190)). The overwhelming evidence is that McWane never enforced its September 22, 2009 letter. (RPF 498-529).

2067. McWane continues to have a form of its Exclusive Dealing Policy in place with respect to HD Supply today, whereby HD Supply could lose the benefit of McWane’s Domestic Fittings rebate program if it fails to fully support McWane’s Domestic line of Fittings. (CX 2514 (Webb, Dep. at 100) (describing policy as of May 2012); Webb, Tr. 2770 (Webb believes a similar policy remains in place); *see also* CX 2193 (July 2010 internal McWane email from Mr. Jansen to Mr. Napoli that a Distributor would lose their “backside program” or no rebates if it purchased Domestic Fittings from Star); CX 2480 (Napoli, Dep. at 101-103); CX 2479 (McCullough, Dep. at 173-174) (“Backside pricing” generally refers to providing discounts with a rebate, although it may sometimes refer to extending payment terms)).

Response To Finding No. 2067:

See General Response 7. This Proposed Finding of Fact and the cited testimony is misleading. Mr. Webb of HD Supply was aware that McWane was not enforcing its domestic rebate policy. Mr. Webb testified that HD Supply had purchased hundreds of thousands of dollars of domestic fittings from Star since 2009 and that McWane had never refused to sell product to HD Supply nor refused to pay a domestic rebate. (Webb, Tr. 2798-2800). CX 2480 and the cited Napoli testimony is unclear as to what is being discussed or to which distributor it refers. It certainly does not clearly support the FOF contention asserted here. The overwhelming evidence is that McWane never enforced its September 22, 2009 letter. (RPF ¶¶ 498-529).

10.8 SIP Was Deterred by McWane's Exclusive Dealing Policy from Entering the Domestic Fittings Market

2068. SIP considered entering the Domestic Fittings market in 2009, but decided not to enter because of McWane's Exclusive Dealing Policy. (*Infra* ¶¶ 2069-2088).

Response To Finding No. 2068:

See General Response 7, and responses to ¶¶ 2069-2088, *infra*. This Proposed Finding of Fact is inaccurate and misleading. SIP testified that there were numerous business reasons (risks, costs and uncertainties) that made SIP decide not to enter the domestic fittings market, including the fact that ARRA presented a very short time window, that SIP believed it needed to offer a full-line of fittings to be considered a viable supplier, that it had taken SIP a full three years to develop a full line of imported fittings, the uncertainties of success, the high cost of developing patterns for a full line of fittings, the fact that there was not one single foundry available to make all the fittings, the vagaries of long term supply given the changing capacity of jobber foundries, the \$5-10 million cost estimated to develop the line, the need/cost to develop drilling and machining capabilities, the uncertainties of the ARRA demand, the uncertainties about the post-

ARRA domestic demand. (Agarwal, Dep. 54-68 (designated portions only)). In fact, SIP's corporate representative felt compelled to clarify that his IH testimony on this point, as elicited by FTC counsel, incorrectly suggested that the September 22, 2009 rebate letter was the only reason SIP had decided not to enter domestic production. In fact, the September letter was just one of many business reasons for this decision. (Agarwal, Dep. at 68 ("I would like to clarify something at this point. I think in my previous testimony there has been a place where I mentioned that this letter was the reason why we stopped exploring domestic production. I'd like to further clarify: This letter wasn't the only cause. All of these other reasons which we just went through in this deposition all added up and summed up to that.")). Finally, it is undisputed that SIP had never made a final decision to enter the domestic fittings market but was rather, just investigating that option. (Agarwal, Dep. at 64).

10.8.1 **SIP Considered Entering the Domestic Market in 2009**

2069. [REDACTED] (CX 2522 (Agarwal, Dep. at 93-94), *in camera*; CX 2521 (Agarwal, IHT at 158-159), *in camera*).

Response To Finding No. 2069:

See General Responses 3 and 6.

2070. [REDACTED] (CX 2521 (Agarwal, IHT at 158-159, *in camera*))

Response To Finding No. 2070:

See General Responses 3 and 6. What one small supplier believed is irrelevant, and thus requires no response.

2071. [REDACTED] (CX 2522 (Agarwal, Dep. at 56, 107, *in camera*)) [REDACTED]

Response To Finding No. 2071:

See General Response 6. This finding is misleading, to the extent it relies on the opinion of just one relatively minor Fittings supplier. The overwhelming record evidence is that other former and potential suppliers who considered becoming domestic fittings suppliers in the wake of ARRA declined to do so, because ARRA's impact on demand for domestic fittings was short-lived and minimal. (RPFF ¶¶ 397-424). As Mr. Backman of Backman Foundry testified, "anybody and their dog can see that this market is going to end at some point." (RPFF ¶ 422). Moreover, no separate Domestic Fittings market existed. (RPFF ¶¶ 397-424).

10.8.1.1 SIP Discussed Its Domestic Entry with Customers

2072.

(RX-681 (Agarwal, Dep. at 56-57), *in camera*).

Response To Finding No. 2072:

See General Response 6, and responses to ¶¶ 2070-2071, *supra*. This finding is irrelevant, incomplete, and misleading.

2073. Customers, including HD Supply, informed SIP that they wanted another source of Domestic Fittings, because McWane was currently the only source, and it was better to have multiple choices. (CX 2522 (Agarwal, Dep. at 111, 112); *see also* CX 2521 (Agarwal, IHT at 170), *in camera* [REDACTED])

Response To Finding No. 2073:

See General Responses 5, 6, and 10, and response to ¶ 2071, *supra*. This finding is irrelevant, incomplete, and misleading.

2074.

[REDACTED] (CX 2521 (Agarwal, IHT at 171), *in camera*) [REDACTED]

Response To Finding No. 2074:

See General Responses 5, 6, and 10, and response to ¶ 2071, *supra*. This finding is irrelevant, incomplete, and misleading.

10.8.1.2 SIP Identified a Cost-Effective Domestic Foundry to Produce Domestic Fittings for SIP
2075.

(CX 2522 (Agarwal, Dep. at 101-102), *in camera*).

Response To Finding No. 2075:

See General Response 6, and response to ¶ 2071, *supra*. This finding is irrelevant, incomplete, and misleading.

2076.

(CX 2522 (Agarwal, Dep. at 102-103), *in camera*).

Response To Finding No. 2076:

See General Response 6, and response to ¶ 2071, *supra*. This finding is irrelevant, incomplete, and misleading. [REDACTED]

[REDACTED], there is no evidence that it actually ever did so. It certainly had not done so as of September, 2009.

(Agrawal, Dep. at 63, *in camera*) Additionally, [REDACTED]

[REDACTED] to produce fittings. (Agarwal, Dep. at 63, *in camera*).

2077.

[REDACTED]
[REDACTED] (CX 2522 (Agarwal, Dep. at 103), *in camera*; see also CX 0004 at 001, *in camera*) [REDACTED]

Response To Finding No. 2077:

See General Response 6, and response to ¶ 2071, *supra*. This finding is irrelevant, incomplete, and misleading.

10.8.1.3 SIP Had Sufficient Capital to Finance Domestic Entry

2078.

(CX 2522 (Agarwal, Dep. at 60), *in camera*).

Response To Finding No. 2078:

See General Response 6, and responses to ¶¶ 2070-2071, *supra*. This finding is irrelevant, incomplete, and misleading.

2079.

(CX 2522 (Agarwal, Dep. at 95-96), *in camera*).

Response To Finding No. 2079:

See General Response 6, and responses to ¶¶ 2070-2071, *supra*. This finding is irrelevant, incomplete, and misleading.

2080.

[REDACTED] (CX 2522 (Agarwal, Dep. at 96), *in camera*).

Response To Finding No. 2080:

See General Response 6, and responses to ¶¶ 2070-2071, *supra*. This finding is irrelevant, incomplete, and misleading.

2081.

[REDACTED] (CX 2522 (Agarwal, Dep. at 100-102), *in camera*).

Response To Finding No. 2081:

See General Response 6, and responses to ¶¶ 2070-2071, *supra*. This finding is irrelevant, incomplete, and misleading.

10.8.1.4 SIP Had Patterns Available for Domestic Fittings Manufacturing

2082.

[REDACTED] (CX 2521 (Agarwal, IHT at 153-154), *in camera*).

Response To Finding No. 2082:

See General Responses 3 and 6 , and response to ¶ 2071, *supra*. This finding is irrelevant, incomplete, and misleading.

(CX 2572 (Agarwal, Dep. at 97, *in camera*)).

2083.

(CX 2521

(Agarwal, IHT at 153-154), *in camera*).

Response To Finding No. 2083:

See General Responses 3 and 6, and responses to ¶¶ 2071 and 2082, *supra*. This finding is irrelevant, incomplete, and misleading. [REDACTED]

[REDACTED]

[REDACTED] (CX 2522 (Agarwal, Dep. at 97, *in camera*)).

10.8.2 [REDACTED] **Because of McWane's Exclusive Dealing Policy**

2084. Because McWane announced its Exclusive Dealing Policy in late September 2009, [REDACTED] [REDACTED] (CX 2522 (Agarwal, Dep. at 110-111), *in camera*; *infra* ¶¶ 2085-2088).

Response To Finding No. 2084:

See General Responses 6 and 7, and responses to ¶¶ 2068 and 2071, *supra*. This Proposed Finding of Fact is inaccurate and misleading. See responses to ¶¶ 2085-2088, *infra*.

2085.

[REDACTED] (CX 2521 (Agarwal, IHT at 199-200), *in camera*)

Response To Finding No. 2085:

See General Responses 3, 6 and 7, and responses to ¶¶ 2068 and 2071, *supra*. This Proposed Finding of Fact is incomplete and misleading.

2086.

in camera (CX 2521 (Agarwal, IHT at 200-201),

Response To Finding No. 2086:

See General Responses 3, 6 and 7, and responses to ¶¶ 2068 and 2071, *supra*. This Proposed Finding of Fact is incomplete and misleading.

2087. McWane's Exclusive Dealing Policy meant that [REDACTED] (CX 2521 (Agarwal, IHT at 200-201), *in camera*).

Response To Finding No. 2087:

See General Responses 3, 6 and 7, and responses to ¶¶ 2068 and 2071, *supra*. This Proposed Finding of Fact is incomplete and misleading.

2088. While it was not the only reason, McWane's Exclusive Dealing Policy was a decisive reason why [REDACTED] (CX 2522 (Agarwal, Dep. at 67), *in camera* [REDACTED])

Response To Finding No. 2088:

See General Responses 3, 6 and 7, and responses to ¶¶ 2068 and 2071, *supra*. This Proposed Finding of Fact is incomplete and misleading. Compared to the other reasons discussed by Mr. Agarwal, the McWane September 22, 2009 Rebate Letter was only a "straw."

Moreover, as the evidence in the record demonstrates, no separate “Domestic Fittings Market” existed. (RPF 372-424).

10.9 McWane’s Exclusive Dealing Policy Had an Immediate Negative Impact on Star’s Business in the Market for Domestic Fittings

2089. McWane’s Exclusive Dealing Policy had an immediate negative impact on Star’s business in the market for Domestic Fittings. (McCutcheon, Tr. 2303; *infra* ¶¶ 2090-2166).

Response To Finding No. 2089:

See General Response 7. This Proposed Finding of Fact is argumentative and supported only with self-serving testimony of Star. Comprehensive evidence of the impressive breadth and extent of Star’s domestic sales is offered in McWane’s Proposed Findings of Fact at Nos. 425-427, 457, 463-479.

2090.

[REDACTED] (CX 2535 [REDACTED] (Bhutada, Dep. at 84-85), *in camera*; *see also supra* ¶¶ 1893-2067²⁸ [REDACTED]

²⁸ The cited out of court statements should be considered for the truth of the matters asserted therein, as statements of motive, intent, or plan under Fed. R. Evid. 803(3). *See supra* n.11.

Response To Finding No. 2090:

See General Response 7. This Proposed Finding of Fact is inaccurate and misleading and supported only with self-serving testimony of Star. Comprehensive evidence of the impressive breadth and extent of Star's domestic sales is offered in McWane's Proposed Findings of Fact at Nos. 425-427, 457, 463-479. Star had analyzed various methods of entry into the domestic market prior to McWane's domestic rebate letter and had made the deliberate decision for timing reasons to move forward with virtual manufacturing, despite being aware of the economic inefficiencies of that decision. A comprehensive analysis of the economics of Star's decision making process is set forth in McWane's Proposed Findings of Fact at Nos. 428-453.

10.9.1 Star's Domestic Fittings Business Lost Sales and Was Unprofitable Due to McWane's Exclusive Dealing Policy**10.9.1.1 Star's Domestic Fittings Business Lost Sales Due to McWane's Exclusive Dealing Policy**

2091. McWane's Exclusive Dealing Policy caused Distributors to refuse to purchase Domestic Fittings from Star, or to purchase Domestic Fittings from Star only in those limited circumstances under which they believed that McWane would not find out about it. (*See supra* § 10.5, *infra* ¶¶ 2092-2100).

Response To Finding No. 2091:

See General Responses 1 and 7, and responses to § 10.5, *supra* and ¶¶ 2092-2100, *infra*.

This Proposed Finding of Fact is an unsupported assertion, and therefore requires no response.

2092. McWane's Exclusive Dealing Policy presented Distributors who wanted to buy Domestic Fittings from Star with an all-or-nothing decision, whereby purchasing any Domestic Fittings from Star would risk potentially disastrous retaliation by McWane. (*See supra* § 10.5.1 (describing risks to Distributors presented by McWane's Exclusive Dealing Policy)).

Response To Finding No. 2092:

See General Responses 1 and 7, and responses to § 10.5.1, *supra* and ¶¶ 2093-2100, *infra*. This Proposed Finding of Fact is an unsupported assertion, and therefore requires no response.

2093. Distributors wanted to purchase Domestic Fittings from Star. (CX 2489 (Morrison, IHT at 85) (“I know the Star folks very well, I want to support them, glad to see them in the domestic business, let me give you some orders, and what you can’t supply I’ll go get from Tyler Union. Yeah, I would have loved to have just not had anything floating around in the background about what might happen if I do that.”); CX 2489 (Morrison, IHT at 84) (“If there wasn’t a concern, whether it be from the letter or whatever other method of communication you want to talk about, if it was just a completely free market, buy whatever you want to, we’re happy to sell you anything, you know, we’re here to service you, and you could go give this order to Star and I’m going to have some advantage, whether it’s a rebate from Star, a point or two price difference, whatever the case may be, just another option, but knowing that if they don’t have something I’m going to turn around and buy it from Tyler Union and they’re just going to be happy to sell it to me, sure, I mean there’s no question you would have split the business.”); CX 2501 (Prescott, IHT at 47) (“Q. Were you interested in purchasing domestic fittings from Star? A. Oh, yeah, if everything was on level playing field, we were, sure, because we buy stuff from Star. . . . Q. When you say everything on a level playing field, what do you mean by that, sir? A. Well, because originally if you bought one fitting from anybody else, you would lose the -- you know, that’s in writing, so I didn’t do that. Q. This is a policy of McWane that you’re describing? A. Yes.”)).

Response To Finding No. 2093:

See General Responses 3 and 6. This Proposed Finding of Fact is incomplete, misleading, anecdotal and unsupported by the evidence. For example, the citations to the Morrison IHT above were later contradicted at deposition when C. I. Thornburg testified that Star was not in a position to provide domestic product or service in the first half of 2010 and did not solicit orders from C.I. Thornburg in the second half of 2010. (CX 2490 (Morrison, Dep. at 74-44 (“Well, so in January of 2010, Star’s probably not even ready to be considered. So when we’re quoting projects in the first quarter of 2010, we’re using Tyler Union because, not because of this [Rebate] letter. I’d really like to say it was because of this [Rebate] letter, but Star’s not – I can’t consider them at this point in time....Q: The first half of 2010 the [Rebate] letter didn’t

affect your purchases from Star because Star wasn't ready? Answer: Correct...Q: So, Star never came to you in 2010 and said, hey, we're ready to service your project? No.”)). So contrary to this proposed finding of fact, C.I. Thornburg expressly testified that the McWane Rebate letter did not affect his 2010 purchases. In fact, the evidence demonstrates that a huge number of distributors actually purchased Star domestic at the outset and have continued doing so since that time. (RPFF ¶¶ 425, 464-479, 497).

2094.

(Bhargava, Tr. 2965-2969, *in camera*)

Response To Finding No. 2094:

Respondent has no specific response to the first sentence of this proposed finding. The second sentence is inaccurate and misleading, because Star had heightened areas of concern and complaints with regard to its domestic production. (RPFF ¶¶ 480-496).

2095. Despite their relationships with Star, the quality of Star's Domestic Fittings, and Star's expertise and service (*see supra* ¶¶ 1666-1668, 1758-1765), Distributors could not risk being cut off by McWane and having to purchase all of their needs from the new entrant with an untested supply chain and an incomplete product line. (RX-704 (Gibbs, IHT at 72) (Star was an unproven domestic supplier and did not have adequate breadth of line); CX 2491 (Johnson, IHT at 62) (Star needed to prove itself before Dana Kepner would move all of its business to Star); RX-662 (Thees, IHT at 154, 171-173) (describing risks of giving all of Ferguson's business to Star, including the need for breadth and depth of inventory); CX 2501 (Prescott, IHT at 86-87) (McWane's policy increased the risk [of purchasing Domestic Fittings from Star] from a Distributor's perspective)).

Response To Finding No. 2095:

See General Responses 3 and 6. This Proposed Finding of Fact is argumentative and draws conclusions unsupported by the evidence. As cited, the evidence does support the fact that Star's domestic entry presented the significant risks of an untested supply chain and an incomplete product line, all of which were significant deterrents to purchase by distributors.

Moreover, there were a variety of other reasons and factors militating against purchase from Star as well. See McWane Proposed Findings of Fact at Nos. 480-496.

2096. Star has been unable to compensate Distributors for the open-ended risk of buying Domestic Fittings from Star created by McWane's Exclusive Dealing Policy. (CX 2513 (Webb, IHT at 204-205) ("not enough money . . . that could be offered" to compensate HD Supply for assuming risk of dealing with Star under the terms of McWane's Exclusive Dealing policy); CX 2515 (Sheley, IHT at 93-94) ("Q. [W]here's the price tag to compensate you for that risk? A. Half a million."); CX 2491 (Johnson, IHT at 66-67) ("Q. [I]s there any way that Star could have compensated you for taking that risk on before July of 2010? A. I don't think so. I mean you can have all the guaranties from a money standpoint, but you're still not servicing your customer. And the long-term fallout form that could have been much more than a million dollars."); *see also* CX 2534 (Bhutada IHT at 73-74); CX 2537 (McCutcheon, IHT (Vol. 1) at 196) (Star's cost structure would not allow it to cut prices further); CX 2537 (McCutcheon, IHT (Vol. 1) at 156-157) (Star could not compensate a Distributor for purchasing any Domestic Fittings from Star by charging the Distributor a lower price, because a Distributor would not accept the risk of losing access to any supply from McWane)).

Response To Finding No. 2096:

See General Responses 3, 6 and 7. This Proposed Finding of Fact is argumentative and draws conclusions unsupported by the evidence. First, as noted in Response to Proposed Finding of Fact No. 2095 above, the evidence does not demonstrate that the various risks presented by Star's entry were "created" by McWane. Rather, they were created by a host of factors including an untested supply chain and an incomplete product line among others. Moreover, the cited evidence does not support the conclusion. For example, Mr. Webb of HD Supply testified that the Rebate Policy did not change HD Supply's purchasing decisions in any discernable manner. (JX 673 (Webb, Dep. at 123-125)). As such, whether Star could have compensated HD Supply is really irrelevant. For HD Supply, factors such as a long servicing history with McWane, a steady reliable source of supply and a full line of product were dispositive. (Webb, Tr. 2785-2796). The risks presented by Star's new domestic line, exclusive of McWane's Rebate Policy, rendered it a second tier supplier for domestic product. (Webb, Tr. 2796). As to Star's cost structure, that was the result of deliberate and knowing decisions on the part of Star to attempt to

get into the domestic market in a timely manner. See McWane Proposed Findings of Fact Nos. 428-453. Finally, the cited testimony from Mr. McCutcheon is self-serving.

2097. Even where Star was in a position to supply Domestic Fittings for an entire project, McWane's Exclusive Dealing Policy impacted Distributors' decisions to purchase Domestic Fittings from Star. (CX 2489 (Morrison, IHT at 76) ("I'm positive that it [McWane's Exclusive Dealing Policy] influenced our decision-making as time went along in 2010."); CX 2489 (Morrison, IHT at 84-85) ("The first half of the year we didn't have to make the decision -- well, we made our decisions based on the fact that we knew this was the case, you know, the letter was the threat.")).

Response To Finding No. 2097:

See General Responses 3, 6, and 7. This Proposed Finding of Fact is directly contradicted by the evidence. For example, the citations to the Morrison IHT were contradicted at deposition when C. I. Thornburg testified that Star was not in a position to provide domestic product or service in the first half of 2010 and did not solicit orders from C.I. Thornburg in the second half of 2010. (CX 2490 (Morrison, Dep. at 74-44 ("Well, so in January of 2010, Star's probably not even ready to be considered. So when we're quoting projects in the first quarter of 2010, we're using Tyler Union because, not because of this [Rebate] letter. I'd really like to say it was because of this [Rebate] letter, but Star's not -- I can't consider them at this point in time....Q: The first half of 2010 the [Rebate] letter didn't affect your purchases from Star because Star wasn't ready? Answer: Correct...Q: So, Star never came to you in 2010 and said, hey, we're ready to service your project? No.")). So contrary to this proposed finding of fact, C.I. Thornburg expressly testified that the McWane Rebate letter did not affect his 2010 purchases.

2098. But for McWane's Exclusive Dealing Policy, Distributors, including two of the largest national chains and many of Star's largest imported Fittings customers, would have purchased more Domestic Fittings from Star. (See *supra* ¶¶ 1904-2063 (describing Star loss of sales as a result of Exclusive Dealing Policy); Bhargava, Tr. 2975, *in camera*

[REDACTED]); CX 2513

(Webb, IHT at 198-199) (HD Supply would probably purchase more from Star); CX 2515 (Sheley, IHT at 96-97, 142) (Distributor would shift the majority of its business to Star); Thees, IHT at 160, 162-163 (Ferguson would allow local branches discretion to buy domestic from Star, and some of those local branches would likely have made purchases); CX 2545 (Gibbs, IHT at 55-57) (same, for WinWholesale); CX 2509 (Groeniger, IHT at 116-117, 118) (Testifying that Groeniger did not purchase more fittings from Star because of the “retribution policy” from Tyler); CX 2501 (Prescott, IHT at 54-60) (If not for the distribution policy, EJP was interested in purchasing A items from both Star and McWane); CX 2491 (Johnson, IHT at 57-59) (In a world with the Tyler distribution policy, “[W]e would have only bought the Tyler products if Star didn’t have them.”); *see also supra* ¶¶ 2032-2063 (describing Star’s loss of sales to U.S. Pipe as a result of Exclusive Dealing Policy)).

Response To Finding No. 2098:

See General Responses 3, 6, and 7. This Proposed Finding of Fact is directly contradicted by the evidence. For example, despite Mr. Bharghava’s self-serving testimony, HD Supply repeatedly testified that McWane’s Rebate Policy did not discernibly effect HD Supply’s domestic purchasing decisions. *See* McWane Proposed Finding of Fact No. 485. Similarly, Ferguson’s decision to purchase all of its domestic fittings from McWane was based on factors other than the Rebate Policy. *See* McWane’s Proposed Findings of Fact Nos. 486-489. As to the various other distributors reasons for not purchasing Star domestic fittings, *see* McWane Proposed Findings of Fact Nos. 480-496.

2099. If Star had been free to win business from the major national Distributors, these accounts would have offered Star a quick and efficient way to win large volumes of business as well as a measure of commercial validation. (CX 2534 (Bhutada, IHT at 18, 27-29); CX 2537 (McCutcheon, IHT (Vol. 1) at 50-53); CX 2483 (Tatman, IHT at 242-244)).

Response To Finding No. 2099:

See General Responses 3, 6, and 7. This Proposed Finding of Fact is argumentative and reaches conclusions not supported by the evidence. It assumes that the McWane Rebate Policy prohibited Star from winning business from the major national distributors, which is inaccurate for two reasons. First, Star did win business from the major national distributors. *See, e.g.,* McWane Proposed Findings of Fact Nos. 425, 464-479 and 497. Second, the assumption ignores

all the other reasons and factors, unrelated to McWane's Rebate Policy, that negatively affected Star's domestic sales. See Responses to 2093 to 2098 above. Furthermore, it is based solely on IH testimony at which McWane was not present to cross-examine. Additionally, the testimony from the Star witnesses is self-serving.

2100. Star's sales force believed that McWane's Exclusive Dealing Policy would completely shut Star out of the Domestic Fittings market. (McCutcheon, Tr. 2607 (“[T]hey thought at the time that . . . we would be completely foreclosed from domestic fittings.”)).

Response To Finding No. 2100:

See General Responses 3, 6, and 7. This Proposed Finding of Fact is simply argumentative. What Star's own sales force *believed* might happen is self-serving and irrelevant and incompetent evidence of what did actually happen with Star's domestic sales. (See RPF 425, 464-479, 497). In fact, Star's sales force soon realized that McWane's September 22, 2009 letter was “all bark and no bite.” (RPF 426)

10.9.1.2 Star Failed to Meet Its Domestic Fittings Sales Targets and Its Domestic Fittings Business Was Unprofitable

2101. As a result of McWane's Exclusive Dealing Policy, Star failed to meet its Domestic Fittings sales targets and Star's Domestic Fittings business was unprofitable. (*Infra* 2102-2108).

Response To Finding No. 2101:

See General Responses 1 and 7, and responses to 2102-2108, *infra*. This proposed finding is an unsupported assertion that requires no response.

2102. [REDACTED]
[REDACTED] (CX 2537 (McCutcheon, IHT (Vol. 1) at 110), *in camera*; CX 2535 (Bhutada, Dep. at 79), *in camera* [REDACTED]; McCutcheon, Tr. 2351, *in camera* [REDACTED])

Response To Finding No. 2102:

See General Responses 3, 6 and 7. This finding is misleading because it ignores the substantial evidence in the record that other factors – not McWane’s unenforced September 22, 2009 rebate letter – precluded some customers from purchasing more Star Domestic Fittings than they did. (RPFF ¶¶ 480-497, 501-525).

2103.

(CX 2535 (Bhutada, Dep. at 79), *in camera*).

(CX 2535 (Bhutada, Dep. at 80, 87), *in camera*).

Response To Finding No. 2103:

See General Responses 3, 6 and 7, and response to ¶ 2102, *supra*.

2104.

(CX 1801-A at 002, *in camera*; CX 2535 (Bhutada, Dep. at 68), *in camera*; (RX-698 (McCutcheon, Dep. at 136)).

Response To Finding No. 2104:

See General Response 6. Respondent does not have a specific response regarding Star’s 2010 sales figures. (Bhargava, Tr. 3027).

2105.

[REDACTED]
(CX 1801-A at 003, *in camera*; CX 2535 (Bhutada, Dep. at 68), *in camera*; (McCutcheon, Tr. 2351, *in camera*; (RX-698 (McCutcheon, Dep. at 137)).

Response To Finding No. 2105:

See General Response 6. Respondent does not have a specific response regarding Star’s 2011 sales figures. (Bhargava, Tr. 3027).

2106.

[REDACTED]
(CX 1801-A at 004, *in camera*; CX 2535 (Bhutada, Dep. at 68-69), *in camera*).

Response To Finding No. 2106:

See General Response 6.

2107.

(Bhargava, Tr. 2970-1972, *in camera*

; CX 1801-A at

002, *in camera*

; CX 1801-A at 003, *in camera*

Response To Finding No. 2107:

Respondent has no specific response.

2108.

(McCutcheon, Tr. 2653, *in camera*; see also *supra* ¶ 458 (showing Star Domestic Fittings shares by volume of)).

Response To Finding No. 2108:

Respondent has no specific response, except that - as demonstrated above – there is no separate Domestic Fittings market.

10.9.2 McWane’s Exclusive Dealing Policy Prevented Star from Investing in Its Business

2109. McWane’s Exclusive Dealing Policy prevented Star from investing in its business. With Distributors reluctant to take the risk imposed by McWane’s Exclusive Dealing Policy, (see *supra* § 10.9.1), [REDACTED] (CX 2537 (McCutcheon, IHT (Vol. 1) at 117-121, 179-181, *in camera*); see *infra* §§ 10.9.2.1, 10.9.2.2, 10.9.2.3)).

Response To Finding No. 2109:

See General Responses 1, 3, 6, and 7, and responses to §10.9.1, §§ 10.9.2.1, 10.9.2.2, and 10.9.2.3, *supra* and *infra*. See also response to ¶ 2102, *supra*.

10.9.2.1 Disadvantages of Working with Independent Jobbing Foundries

2110. The independent (or “jobbing”) foundries from which Star purchased Domestic Fittings are less efficient and reliable than a dedicated foundry operated exclusively for the production of Fittings. (See *infra* ¶¶ 2111-2125).

Response To Finding No. 2110:

See General Response 1 and responses to ¶¶ 2111-2125, *infra*. This proposed finding is an unsupported assertion, which requires no response.

2111. Star's initial costs of producing Domestic Fittings through independent third-party foundries were higher than they would have been if Star operated its own foundry. (McCutcheon, Tr. 2343).

Response To Finding No. 2111:

Respondent has no specific response.

- 2112.

(Bhargava, Tr. 2946-2949, *in camera*; Bhargava, Tr. 2974, *in camera* ;
CX 2535 (Bhutada, Dep. at 74, 126-127), *in camera* (CX 2534 (Bhutada, IHT at 83-92),
in camera [REDACTED])

Response To Finding No. 2112:

See General Responses 3, 6 and 7, and response to ¶ 2102, *supra*.

- 2113.

[REDACTED]
(Bhargava, Tr. 2937-2940, *in camera*).

Response To Finding No. 2113:

Respondent has no specific response.

- 2114.

[REDACTED]
(CX 2534 (Bhutada, IHT at 91), *in camera*).

Response To Finding No. 2114:

See General Responses 3 and 6.

2115.

Response To Finding No. 2115:

See General Response 6.

2116.

(Bhargava, Tr. 2950, 2954, *in camera* ; CX 2535 (Bhutada, Dep. at 74, 91, 128, 131), *in camera*)).

Response To Finding No. 2116:

Respondent has no specific response.

2117.

(E.g.,
CX 2375 at 001, 002, *in camera* [REDACTED])

Response To Finding No. 2117:

See General Responses 3, 5 and 6.

2118.

[REDACTED] (Bhargava, Tr. 2933, *in camera*).

Response To Finding No. 2118:

Respondent has no specific response.

2119.

[REDACTED] (CX 2533 (Bhargava, Dep. at 47), *in camera*).

Response To Finding No. 2119:

See General Response 6.

2120.

(Bhargava, Tr. 2935-2936, *in camera*;
CX 2533 (Bhargava, Dep. at 55), *in camera*).

Response To Finding No. 2120:

Respondent has no specific response.

2121.

(Bhargava, Tr. 2933, 2954-2955, *in camera*).

Response To Finding No. 2121:

Respondent has no specific response.

2122.

(Bhargava, Tr. 2941-2942, *in camera*; (e.g.,
CX 2375 at 001, 002, *in camera* [REDACTED])

Response To Finding No. 2122:

Respondent has no specific response.

2123.

[REDACTED]
(Bhargava, Tr. 2942-2945, *in camera* [REDACTED]
[REDACTED]; CX 2375 at 001,
in camera).

Response To Finding No. 2123:

Respondent has no specific response.

2124.

[REDACTED]
(Bhargava, Tr. 2963, 2995, *in camera*); *see also* CX 2535 (Bhutada, Dep. at 127), *in camera* [REDACTED]
[REDACTED]

Response To Finding No. 2124:

See General Response 6. This finding is misleading. Star's self-serving *estimate* is that . (Bhargava, Tr. 2963, 2999, *in camera*).

2125.

(Bhargava, Tr. 2963, 2995, *in camera*)).

Response To Finding No. 2125:

See response to ¶ 2124, *supra*. This finding is misleading because the cited transcript pages do not support it.

10.9.2.2 Star Planned to Obtain a Dedicated Foundry for Its Domestic Fittings Production

2126. When Star entered the Domestic Fittings market, it planned to purchase a dedicated foundry for its Domestic Fittings production, and it pursued acquisition of such a foundry. (*Infra* ¶¶ 2127-2140).

Response To Finding No. 2126:

See General Response 1 and responses to ¶¶ 2127-2140, *infra*.

2127.

[REDACTED] (CX 2533 (Bhargava, Dep. at 26), *in camera*).

Response To Finding No. 2127:

See General Response 6.

2128.

[REDACTED] (CX 2534 (Bhutada, IHT at 45-46), *in camera*).

Response To Finding No. 2128:

See General Responses 3 and 6.

2129.

[REDACTED] (CX 2535 (Bhutada, Dep. at 83-84), *in camera*).

Response To Finding No. 2129:

See General Response 6.

2130.

(Bhargava, Tr. 2956, *in camera*; CX 2535 (Bhutada, Dep. at 137), *in camera*; CX 2533 (Bhargava, Dep. at 67), *in camera*).

Response To Finding No. 2130:

Respondent has no specific response.

2131.

(Bhargava, Tr. 2956, *in camera*).

Response To Finding No. 2131:

Respondent has no specific response.

2132.

[REDACTED]
[REDACTED] (CX 2535 (Bhutada, Dep. at 138), *in camera*).

Response To Finding No. 2132:

See General Response 6.

2133.

[REDACTED]
[REDACTED] (CX 2535 (Bhutada, Dep. at 138), *in camera*).

Response To Finding No. 2133:

See General Response 6.

2134.

[REDACTED]
[REDACTED] (Bhargava, Tr. 3015-3017, *in camera*).

Response To Finding No. 2134:

The second phrase of this proposed finding is not accurate. (Bhargava, Tr. 3015-3017, *in camera*).

2135.

(CX 2535 (Bhutada, Dep. at 137-138), *in camera*; CX 2389 at 001, *in camera*)

Response To Finding No. 2135:

See General Responses 5 and 6. This self-serving testimony from Star is not accurate because it consists only of estimates. See response to ¶ 2102, *supra*.

2136.

(Bhargava, Tr. 3018, *in camera*);

(Bhargava, Tr. 3021, *in camera*)

Response To Finding No. 2136:

Respondent has no specific response.

2137.

(CX 2535 (Bhutada, Dep. at 138-139), *in camera*).

Response To Finding No. 2137:

See General Response 6. This self-serving testimony from Star is not accurate because it consists only of estimates. See response to ¶ 2102, *supra*.

2138.

(CX 2535 (Bhutada, Dep. at 138-139), *in camera*).

Response To Finding No. 2138:

See General Response 6. This self-serving testimony from Star is purely speculative.

See response to ¶ 2102, *supra*.

2139.

(McCutcheon, Tr. 2285, 2342; CX 2537 (McCutcheon, IHT (Vol. 1) at 110, *in camera*); CX 2534 (Bhutada, IHT at 45-46), *in camera*; CX 2535 (Bhutada, Dep. at 84-85), *in camera*

; Bhargava, Tr. 2960-2961, *in camera*

RX-694 (Bhutada, Dep. at 85)).

Response To Finding No. 2139:

See General Responses 3 and 6. This self-serving testimony from Star is not accurate because it consists only of Star's own speculative estimates. See response to ¶ 2102, *supra*.

2140.

[REDACTED] (Bhargava, Tr. 2962, *in camera*; CX 2535 (Bhutada, Dep. at 91-93, 140-142), *in camera*) [REDACTED]; CX 1801-A at 005, *in camera* [REDACTED]

Response To Finding No. 2140:

See General Responses 5 and 6, and response to ¶ 2139, *supra*.

10.9.2.3 Star Did Not Purchase a Dedicated Foundry for Its Domestic Fittings Production Because of McWane's Exclusive Dealing Policy

2141. As a result of McWane's Exclusive Dealing Policy, Star did not purchase a dedicated foundry for Domestic Fittings production. (*Infra* ¶¶ 2142-2159).

Response To Finding No. 2141:

See General Responses 1 and 7, response to ¶ 2139, *supra*, and responses to ¶¶ 2142-2159, *infra*. This finding is an unsupported assertion that requires no response.

2142.

(CX 2534 (Bhutada, IHT at 47-48), *in camera*).

Response To Finding No. 2142:

See General Responses 3, 6 and 7, and responses to ¶¶ 2102 and 2139, *supra*.

2143.

(Bhargava, Tr. 2959, *in camera*).

Response To Finding No. 2143:

Respondent has no specific response.

2144.

(Bhargava, Tr. 2956-2957, *in camera*).

Response To Finding No. 2144:

See General Response 7.

2145. Star learned of McWane's Exclusive Dealing Policy immediately after McWane sent the letter announcing the policy to the market. (McCutcheon, Tr. 2300-2301; CX 0010).

Response To Finding No. 2145:

See General Response 7.

2146.

(Bhargava, Tr. 2958-2960, *in camera*).

(Bhargava, Tr. 2960, *in camera*).

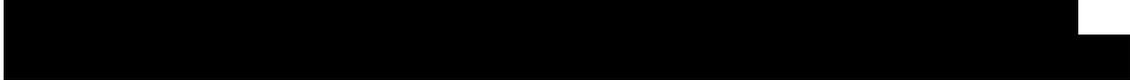
Response To Finding No. 2146:

See General Responses 7 and 10, and response to ¶ 2102, *supra*.

2147. Star believed that HD Supply would not buy Domestic Fittings from Star because of McWane's Exclusive Dealing Policy. (McCutcheon, Tr. 2329-2330²⁹) (testifying that when Joe Antico, a branch manager at HD Supply, tried to give a Domestic Fittings job to Star, Darrin Anderson told Mr. McCutcheon and Mr. Antico that HD Supply could not buy Domestic Fittings from Star because of McWane's Exclusive Dealing Policy and HD Supply's corporate position); *see also* CX 2537 (McCutcheon, IHT (Vol. 1) at 168); *see also* Bhargava, Tr. 2976-2977,³⁰ *in camera*

Response To Finding No. 2147:

See General Responses 3, 6, 7 and 10. Star's self-serving beliefs are irrelevant and contradicted by overwhelming evidence to the contrary. In fact, HD Supply bought a large number of domestic fittings from Star. (RPF ¶¶ 425, 466).

2148. 

²⁹ The cited trial testimony regarding the out of court statement of Mr. Anderson is cited to prove its effect on Mr. McCutcheon and Star, and is not cited to prove the truth of the matter asserted in the statement. (*See* McCutcheon, Tr. 2323).

³⁰ The cited trial testimony regarding the out of court statement of _____ is cited to prove its effect on Star, not to prove the truth of the matter asserted in the statement. (*See* Bhargava, Tr. 2976).

(McCutcheon, Tr. 2326-2327³¹; CX 2537 (McCutcheon, IHT (Vol.1) at 166-167, 171, *in camera*

in camera) ; *see also* (Bhargava, Tr. 2976-2977, *in camera*)

Response To Finding No. 2148:

See General Responses 3, 6, 7 and 10. Star's self-serving beliefs are irrelevant and contradicted by overwhelming evidence to the contrary. In fact, Ferguson bought a large number of domestic fittings from Star. (RPFF ¶¶ 425, 466).

2149.

(McCutcheon, Tr. 2321-2324

(McCutcheon, IHT at 160-161), *in camera*

; *see also* CX 2537

³¹ The cited trial testimony regarding the out of court statements of _____ is cited to prove their effect on Mr. McCutcheon and Star, not to prove the truth of the matters asserted in the statements. (*See* McCutcheon, Tr. 2323).

³² The cited trial testimony regarding the out of court statement of _____ is cited to prove its effect on Mr. McCutcheon and Star, not to prove the truth of the matter asserted in the statement. (*See* McCutcheon, Tr. 2322).

Response To Finding No. 2149:

See General Responses 3, 6, 7 and 10. Star's self-serving beliefs are irrelevant and contradicted by overwhelming evidence to the contrary. (RPF 425-497).

2150.

(McCutcheon, Tr. 2324-2326

; see also CX 2537 (McCutcheon, IHT at 161), *in camera*).

Response To Finding No. 2150:

See General Responses 3, 6, 7 and 10, and response to ¶ 2149, *supra*. This finding is contradicted by the evidence that Dana Kepner in fact bought domestic fittings from Star. (RPF 425, 468).

2151.

(McCutcheon, Tr. 2326 [REDACTED]; see also CX 2537 (McCutcheon, IHT at 162), *in camera*).

³³ The cited trial testimony regarding the out of court statement of [REDACTED] is cited to prove its effect on Mr. McCutcheon and Star, not to prove the truth of the matter asserted in the statement. (See McCutcheon, Tr. 2323).

³⁴ The cited trial testimony regarding the out of court statement of [REDACTED] is cited to prove its effect on Mr. McCutcheon and Star, not to prove the truth of the matter asserted in the statement. (See McCutcheon, Tr. 2323).

Response To Finding No. 2151:

See General Responses 3, 6, 7 and 10, and response to ¶ 2149, *supra*. This finding is contradicted by the evidence that in fact bought domestic fittings from Star. (RPF 425).

2152.

(McCutcheon, Tr. 2327-2328

; *see*

also CX 2537 (McCutcheon, IHT at 163, 166), *in camera*).

Response To Finding No. 2152:

See General Responses 3, 5, 6, 7 and 10, and response to ¶ 2149, *supra*. This finding is contradicted by the evidence. (RPF 425).

2153. Star believed that Distributor WinWater would not buy Domestic Fittings from Star because of McWane's Exclusive Dealing Policy. (McCutcheon, Tr. 2329³⁶ (Eddie Gibbs, an employee at Distributor WinWater, told Mr. McCutcheon that WinWater could not buy Domestic Fittings from Star because of McWane's Exclusive Dealing Policy, and that he had instructed his employees not to purchase Domestic Fittings from Star)).

³⁵ The cited trial testimony regarding the out of court statements of [REDACTED] is cited to prove their effect on Mr. McCutcheon and Star, not to prove the truth of the matters asserted in the statements. (*See* McCutcheon, Tr. 2322).

³⁶ The cited trial testimony regarding the out of court statement of Mr. Gibbs is cited to prove its effect on Mr. McCutcheon and Star, not to prove the truth of the matter asserted in the statement. (*See* McCutcheon, Tr. 2323).

Response To Finding No. 2153:

See General Responses 5, 7 and 10, and response to ¶ 2149, *supra*. This finding is contradicted by the evidence. (RPF ¶ 425),

2154. Star believed that Distributors Western Water Works and Wells Supply would not purchase Domestic Fittings from Star because of McWane's Exclusive Dealing Policy. (McCutcheon, Tr. 2330-2333 (Star Territory Manager John Ristine reported to his superiors that Distributor Western Water Works reported that if it purchased Star's Domestic Fittings, McWane would cut them off, and that Distributor Wells Supply reported that if it purchased Star's Domestic Fittings either double the price to Wells for shorts or cut them off altogether); CX 0011).³⁷

Response To Finding No. 2154:

See General Responses 5, 7 and 10, and responses to ¶ 2149 and ¶ 2153, *supra*.

2155.

(McCutcheon, Tr. 2648-2650, *in camera*).

³⁷ The cited trial testimony and exhibit regarding the out of court statements of the Distributors are cited to prove the effect if the statements on Mr. McCutcheon and Star, not to prove the truth of the matters asserted in the statements. (See McCutcheon, Tr. 2336-2337).

³⁸ The cited trial testimony regarding the out of court statements of _____ is cited to prove their effect on Mr. McCutcheon and Star, not to prove the truth of the matters asserted in the statements. (See McCutcheon, Tr. 2649).

Response To Finding No. 2155:

See General Responses 5, 7 and 10, and response to ¶ 2149, *supra*. In fact, in 2010, Star – not McWane – was selected as the preferred domestic fittings supplier for TDG. (RPF ¶ 469).

2156. Based on information received from customers and reflected in Star’s Domestic Quote Log, Star believed that McWane’s Exclusive Dealing Policy foreclosed Star from selling to both HD Supply and to Ferguson, cutting its potential sales of Domestic Fittings in half. (McCutcheon, Tr. 2315-2317; CX 2294). Because it perceived a diminished opportunity for sales of Domestic Fittings, Star did not believe that purchasing a Domestic Fittings foundry made sense. (McCutcheon, Tr. 2317; Bhargava, Tr. 2977, *in camera*)

Response To Finding No. 2156:

See General Responses 5, 7 and 10, and responses to ¶¶ 2147-2148, *supra*.

2157.

[REDACTED] (CX 2535 (Bhutada, Dep. at 137), *in camera*);
Bhargava, Tr. 2957, *in camera*;
[REDACTED]; Bhargava, Tr. 2958, *in camera*;
[REDACTED]; Bhargava, Tr. 3020, *in camera*;
[REDACTED]

Response To Finding No. 2157:

See General Responses 6 and 7, and response to ¶ 2102, *supra*.

2158.

[REDACTED] (Bhargava, Tr. 2964-2965, 3022,
in camera)
[REDACTED]

Response To Finding No. 2158:

Respondent has no specific response.

2159.

(Bhargava, Tr. 2964-2965, *in camera*)

Response To Finding No. 2159:

This finding is misleading because it incorrectly presumes that there is a separate Domestic fittings market (which there is not) and because it ignores the fact that ARRA has ended, creating uncertainty for all potential and actual domestic suppliers. (RPFF ¶¶ 397-424).

10.9.3 McWane's Exclusive Dealing Policy Made Star Unable to Effectively Compete with McWane in Domestic Fittings

2160. As a result of McWane's Exclusive Dealing Policy, Star was unable to lower its prices enough to effectively constrain McWane's monopoly prices in the Domestic Fittings market. (*Infra* ¶¶ 2161-2166).

Response To Finding No. 2160:

See General Responses 1 and 7, and responses to ¶¶ 2161-2166, *infra*. This finding is an unsupported assertion, which requires no response.

2161. McWane's policy kept Star from driving down prices of Domestic Fittings. [REDACTED] (McCutcheon, Tr. 2343, 2348-2350; Bhargava, Tr. 2963-2964, *in camera* [REDACTED]; CX 2480 (Napoli, Dep. at 71-72) (explaining that he is not concerned about Star driving down the prices of Domestic Fittings); *see also supra* §§ 10.1.2.3, 10.9.2.1 (Star would have had lower cost of production at its own plant)).

Response To Finding No. 2161:

See General Responses 1, 6 and 7, and responses to §§ 10.1.2.3 and 10.9.2.1, *supra*. The first sentence of this proposed finding is pure argument, and an assertion unsupported by any

evidence. The evidence was that Star's expansion as a domestic fittings supplier was actually remarkable, given ARRA's short time window and minimal impact on demand for Domestic fittings. (RPFF ¶¶ 397-497).

2162. In the few instances in which Star was able to obtain Domestic Fittings business, it had to reduce its prices significantly in an effort to compensate customers for the risks they confronted in McWane's Exclusive Dealing Policy. For one project (Walton Road), Mr. McCutcheon approved additional discounts to Groeniger below Star's Domestic Fittings multipliers by 3% (24" and below) and by 10% (30" - 36") to compensate Groeniger for taking risk by buying Star. (CX 2328 at 001 ("Discounts necessary to take risk buying Star. Negotiated with Mike Groeniger.")).

Response To Finding No. 2162:

See General Responses 5, 7 and 10. *See also* response to ¶ 2161, *supra*.

2163. In 2009 and 2010, about half of Star's Domestic Fittings sales were at lower prices than McWane's sales, by an average of 5%. (CX 2537 (McCutcheon, IHT (Vol. 1) at 195-196) ("I would say the pricing is approximately 5 percent better."); McCutcheon, Tr. 2339-2342 (noting that Star offers special prices, cash discounts, terms and freight).

Response To Finding No. 2163:

See General Responses 3, 6 and 10. This finding conflicts with CCPFF ¶ 2161, *supra*.

This finding is incomplete and therefore misleading, because it ignores the evidence that McWane's Domestic fittings prices were essentially flat, even during ARRA. (RFPP ¶¶ 598-601).

2164. Despite Star's presence in the market, Star did not observe McWane responding to Star's discounted prices for Domestic Fittings in 2009 and 2010. (CX 2537 (McCutcheon, IHT (Vol. 1) at 196)).

Response To Finding No. 2164:

See General Responses 3 and 6. This finding conflicts with CCPFF § 2161, *supra*.

2165. Distributors were unable to use the availability of Star Domestic Fittings to negotiate lower prices of Domestic Fittings with McWane. (CX 2489 (Morrison, IHT at 82) ("They have shown no willingness to deviate from the multiplier price under any circumstances, not that I've seen.")).

Response To Finding No. 2165:

See General Responses 3, 6 and 10. This finding conflicts with CCPFF § 2161, *supra*. It also conflicts with the evidence that Star was a less efficient domestic producer than McWane. (RPF ¶¶ 602-608).

2166. With Star's Domestic Fittings cost structure – outsourcing its Domestic Fittings manufacturing to independent foundries – it could not lower its Domestic Fittings prices further. (McCutcheon, Tr. 2344; CX 2537 (McCutcheon, IHT (Vol. 1) at 145)).

Response To Finding No. 2166:

Respondent has no specific response, except that the implication that Star could have lowered its domestic fittings prices if it had purchased a domestic foundry is pure, untested and unproven speculation. (RPF ¶¶ 605-608).

11. McWane Entered the MDA with Sigma to Further Secure Its Monopoly Position in the Domestic Fittings Market

2167. McWane entered into the MDA with Sigma in order to reduce competition in the Domestic Fittings and Fittings markets by averting Sigma's independent entry into the Domestic Fittings market and further hindering Star's attempt at entry. (*Infra* ¶¶ 2168-2465).

Response To Finding No. 2167:

See General Response 1, and responses to ¶¶ 2168-2465, *infra*. This Proposed Finding of Fact is argumentative, containing unsupported assertions and mischaracterizations of the evidence. The overwhelming evidence demonstrated that McWane entered the MDA to generate sufficient volume to keep McWane's last domestic plant open (RPF ¶ 498) and for other pro-competitive reasons (RPF ¶¶ 572-584). The evidence is similarly overwhelming that Sigma was not in a position to enter the domestic fittings segment independently (RPF ¶¶ 534-566) and that the MDA did not hinder Star's expansion as a domestic fittings supplier (RPF ¶¶ 425, 464-479 and 497).

2168. On September 17, 2009, McWane entered into an OEM Distribution Agreement (commonly referred to as the “Master Distribution Agreement,” or “MDA”) for the supply of Domestic Fittings by McWane to Sigma. (CX 1194 (signed MDA)).

Response To Finding No. 2168:

McWane has no specific response.

2169. Among other things, McWane and Sigma agreed that Sigma would source its Domestic Fittings exclusively from McWane and that Sigma would enforce McWane’s Exclusive Dealing Policy. (CX 1194 at 001-002 §§ 1(b), 1(c); *see also infra* ¶¶ 2372-2440 (describing MDA terms and implementation)).

Response To Finding No. 2169:

See General Response 7, and responses to ¶¶ 2372-2440, *infra*. This Proposed Finding of Fact is incomplete and therefore, misleading and inaccurate. While the MDA speaks for itself, there are several examples of why this is inaccurate. First, Sigma was not required to purchase 30” to 48” domestic fittings from McWane and was welcome to develop its own sources for those fittings or develop its own patterns for those fittings. (Tatman, Tr. 793-794). Second, Sigma was free to spend the next months developing their own patterns and sources for 3” through 24” fittings, developing a full line of domestic product, developing its own relationships, and building inventory of domestic fittings. (Tatman, Tr. 793-794). Therefore, as soon as Sigma decided to terminate the agreement, it would be in a position to begin marketing its own domestic fittings, which position it was not close to being in as of September, 2009. (Rona, Tr. 1673 (testifying that it would have taken Sigma between 18-24 months to develop a full line of domestic fittings)).

2170. Sigma and McWane publicly announced the MDA on September 22, 2009. (CX 1606 at 002).

Response To Finding No. 2170:

McWane has no specific response.

11.1 Sigma Considered Two Options for Meeting Its Number One Priority: Domestic Fittings Sourcing

2171. After ARRA was enacted, staying on the sidelines of the Domestic Fittings market was not an option for Sigma because it felt it needed to defend its market share by offering Domestic Fittings. (CX 2524 (Box, Dep. at 22); *see also* CX 2524 (Box, Dep. at 61, 82) (Sigma needed to do something to supply its customers with Domestic Fittings in all size ranges); CX 2530 (Rona, Dep. at 39-40) (Sigma felt ARRA would shut it out of a portion of the Fittings business); CX 2530 (Rona, Dep. at 240) (“Q. And I understand that you believe that Sigma needed to be in this [Domestic Fittings] market one way or the other; correct? A. Correct.”); Rona, Tr. 1457 (Sigma believed demand for Domestic Fittings would increase as a result of ARRA and that Sigma therefore “needed to explore the option of being in a position to produce fittings for ourself [*sic*]”); CX 0219 at 001 (Rona writing in May 2009 that the ARRA Buy American requirement was an “extremely real threat” and that “[i]t is quite clear now that we need a credible plan”); *see supra* § 8.2).

Response To Finding No. 2171:

See General Response 6. McWane has no specific response, although it is important note that it is undisputed that the cited testimony of Box and Rona express their personal opinions and that neither of them was testifying as a corporate representative on behalf of Sigma in rendering these opinions. Moreover, the evidence in the record proves that ARRA’s effect on the demand for Domestic Fittings was actually short-lived and minimal. (RPF 397-424).

2172. Sigma considered two potential avenues for entering the Domestic Fittings market: (1) purchasing “private label” Domestic Fittings from McWane (*i.e.*, Fittings manufactured by McWane for Sigma and branded as Sigma); or (2) producing Domestic Fittings using the same “virtual manufacturing” model that it used for imported Fittings (*i.e.*, contracting with independent, domestic foundries). (Pais, Tr. 1752; CX 2528 (Pais, Dep. at 184-185) (discussing “two viable options: one is to produce under our own tutelage and our own funding, and, secondly, to develop access to McWane’s, because they are the only ones”) (referring to the first option as “virtual manufacturing”); Rona, Tr. 1630 (explaining meaning of “private label”)).

Response To Finding No. 2172:

This finding is misleading to the extent that no separate Domestic Fittings market existed. (RPF 372-424). Otherwise, McWane has no specific response, although it will note that Sigma also had several other potential avenues that it pursued under various ARRA exemptions.

2173. Sigma pursued both private label and virtual manufacturing options for entering the Domestic Fittings market simultaneously because “the conditions were just so urgent.” (Pais, Tr. 1758; CX 0231; CX 2530 (Rona, Dep. at 211-212) (describing parallel paths pursued by Sigma)).

Response To Finding No. 2173:

See responses to ¶¶ 2171-2172, *supra*.

2174. Sigma pursued the virtual manufacturing option for Domestic entry by forming a SIGMA Domestic Production (“SDP”) plan and assembling a team of executives responsible for investigating and exploring the possibility of Sigma producing Fittings domestically. (Rona, Tr. 1457; Rona, Tr. 1470 (defining “SDP”)).

Response To Finding No. 2174:

See response to ¶ 2172, *supra*. Otherwise, Respondent has no specific response.

2175. In a May 4, 2009 memorandum to the Sigma Board, Mr. Pais described the ARRA “Buy-American” threat and declared that “it behooves SIGMA to review the feasibility of producing a line of ‘domestic’ Fittings, to meet this growing need, in order to reassure our customer base and retain their loyalty and their business at the current levels.” (CX 0214 at 005; Pais, Tr. 1751-1752).

Response To Finding No. 2175:

See responses to ¶¶ 2171-2172, *supra*. Respondent has no specific response with respect to the accuracy of the quote from the memo.

2176. By May 26, 2009, according to Mr. Florence, Sigma’s majority shareholder Frontenac, Domestic Fittings sourcing was Sigma’s “#1a priority.” (CX 1076 at 001; Pais, Tr. 1856-1857).

Response To Finding No. 2176:

See responses to ¶¶ 2171-2172, *supra*. This proposed finding is misleading insofar as suggesting that Mr. Florence was deeply involved in this issue or process. Sigma’s President and CEO described Mr. Florence’s support of domestic production as nothing “specific at that point. They wanted to support us whatever the most pragmatic and feasible option was.” (Pais, Tr. 1754).

11.2 McWane Rejected Sigma's Initial Request for "Private Label" Domestic Fittings

2177. Mr. Pais made a series of personal pleas to McWane's CEO Mr. Page for McWane to supply Sigma with "private label" Domestic Fittings. (CX 1986 at 002, 003 (Pais draft letter to Page describing request and four meetings); CX 1225 at 003, 004 (same in final version of letter); Tatman, Tr. 615 (sometime after ARRA was signed into law and before McWane became aware of Star's Domestic Fittings program, Sigma approached McWane seeking private label Domestic Fittings.); Pais, Tr. 1744-1745 (in the first half of 2009, Mr. Pais approached Mr. Page about a private label arrangement)).

Response To Finding No. 2177:

While McWane does not concede this accuracy of this proposed finding or the supporting citations, McWane believes the finding is irrelevant and therefore, given the length of the FTC's proposed findings, McWane provides no specific response. McWane specifically disputes that all of the cited meetings took place and that they all related to the proposed buy/sell agreement on domestic fittings. The cited documents do not support the proposed finding in this regard.

2178. For example, on March 17, 2009, Mr. Page and Mr. Pais had a lunch meeting at Morimoto restaurant in New York City where they discussed the possibility of McWane providing "private label" Domestic Fittings to Sigma. (CX 2061; CX 1269; Pais, Tr. 1745, 1756-1757).

Response To Finding No. 2178:

See General Response 11. While McWane does not concede this accuracy of this proposed finding or the supporting citations, McWane believes the finding is irrelevant and therefore, given the length of the FTC's proposed findings, McWane provides no specific response.

2179. On April 2, 2009, Mr. Page and Mr. Pais met again in person, (CX 2093), and on April 6, 2009, Mr. Pais sent an email to Mr. Page asking to speak later that afternoon. (CX 2094).

Response To Finding No. 2179:

See General Response 11. While McWane does not concede this accuracy of this proposed finding or the supporting citations, McWane believes the finding is irrelevant and therefore, given the length of the FTC's proposed findings, McWane provides no specific

response. McWane does note that the cited exhibits do not support a finding that the referenced meetings and calls ever actually took place. They only reference possible future meetings and calls.

2180. As of April 25, 2009, McWane had decided not to sell Domestic Fittings to Sigma. (CX 1289; CX 2479 (McCullough, Dep. at 76)).

Response To Finding No. 2180:

While McWane does not concede this accuracy of this proposed finding or the supporting citations, McWane believes the finding is irrelevant and therefore, given the length of the FTC's proposed findings, McWane provides no specific response.

2181. In a May 4, 2009 memorandum to the Sigma Board, Mr. Pais reported that Sigma had initially received agreement of McWane's top management to a "private label" Domestic Fittings supply agreement, but that the McWane operational/sales team persuaded McWane's management not to do this. (CX 0214 at 004; *see also* Pais, Tr. 1744-1745 (Mr. Page was initially receptive to Sigma's private label request, but ultimately decided not to sell Domestic Fittings to Sigma); CX 0908 (April 9, 2009 email from Page to Pais stating that "after significant internal discussion," McWane's Fittings team had "decided not to sell Sigma private label product from our domestic foundries"); Rona, Tr. 1481 (McWane turned down Sigma's request to produce private label Domestic Fittings)).

Response To Finding No. 2181:

While McWane does not concede this accuracy of this proposed finding or the supporting citations, McWane believes the finding is irrelevant and therefore, given the length of the FTC's proposed findings, McWane provides no specific response.

11.3 In Response to Sigma's Continued Pursuit of Private Label Fittings, McWane Made an Offer That Sigma Could Not Accept: McWane Branded Fittings for Only 5% off Published Prices

11.3.1 Sigma Continued to Appeal to McWane for Private Label Domestic Fittings

2182. [REDACTED] (CX 1997 at 008, *in camera* [REDACTED]; Rona, Tr. 1489 (after McWane turned down Sigma's initial request to produce private label fittings for Sigma in April 2009, Sigma renewed that request in the spring of 2009)).

Response To Finding No. 2182:

While McWane does not concede this accuracy of this proposed finding or the supporting citations, McWane believes the finding is irrelevant and therefore, given the length of the FTC's proposed findings, McWane provides no specific response.

2183. After being initially turned down, Sigma's Mr. Pais traveled to two separate meetings with top McWane executives in an effort to convince them to offer private label Fittings to Sigma. Mr. Pais spoke with Mr. McCullough in Iowa on April 28, 2009, and then after Mr. McCullough denied his request, with Mr. Page in Birmingham, Alabama. (Pais, Tr. 1756-1757, 2035 (McCullough declined to entertain request for private label); CX 0209 at 001, 004 (Pais email regarding upcoming meeting with McCullough); CX 0728 (email between Pais and McCullough planning meeting); CX 0314 (Pais email referring to May 1, 2009 meeting among Pais, Rybacki and Page)).

Response To Finding No. 2183:

While McWane does not concede this accuracy of this proposed finding or the supporting citations, McWane believes the finding is irrelevant and therefore, given the length of the FTC's proposed findings, McWane provides no specific response.

2184. In his May 4, 2009 memorandum to the Sigma Board reporting on his meeting with Mr. McCullough, Mr. Pais reported that he had revealed to Mr. McCullough Sigma's plan to develop a Korean ARRA-compliant manufacturing capability. (CX 0214 at 004).

Response To Finding No. 2184:

While McWane does not concede this accuracy of this proposed finding or the supporting citations, McWane believes the finding is irrelevant and therefore, given the length of the FTC's proposed findings, McWane provides no specific response.

2185. Despite Mr. Pais's continued efforts, Mr. Page and Mr. McCullough continued to refuse to provide Sigma with private label Domestic Fittings. (Pais, Tr. 1757).

Response To Finding No. 2185:

While McWane does not concede this accuracy of this proposed finding or the supporting citations, McWane believes the finding is irrelevant and therefore, given the length of the FTC's proposed findings, McWane provides no specific response.

11.3.2 McWane Considered Whether to Provide Domestic Fittings to Sigma

2186. In May 2009, Mr. Tatman opposed selling private label Domestic Fittings to Sigma in part because he believed based on recent experience that Sigma did not live up to its agreements:

A healthy and constructive relationship with Sigma could be beneficial [*sic*] to both parties and the industry in general .. [but that] *there's a general trust issue based upon recent experience that they don't seem too consistently stay within the Spirit of agreements.*

(CX 0456 at 001 (May 18, 2009 email from Mr. Tatman to Messrs. Page, McCullough and Walton)).

Response To Finding No. 2186:

A plain reading of the exhibit and quotation cited does not support the finding proposed by the FTC.

2187. Mr. Tatman nevertheless suggested that continued exploration of a limited Domestic Fittings supply arrangement with Sigma may be worthwhile, informing Mr. Page directly in a May 18, 2009 email that “we could still continue to creatively explore whether or not there could be a healthy relationship structure established between McWane, ACIPCO, and Sigma.” (CX 0456 at 001).

Response To Finding No. 2187:

While McWane does not concede this accuracy of this proposed finding or the supporting citations, McWane believes the finding is irrelevant and therefore, given the length of the FTC's proposed findings, McWane provides no specific response.

2188. At Mr. Pais's request, Mr. Page and Mr. Pais had two days of meetings on May 20 and 21, 2009. (CX 2100; CX 1271; CX 1076 at 004; CX 2101).

Response To Finding No. 2188:

The cited exhibits do not support a finding that “two days of meetings” actually occurred. Instead, the referenced future May 20 meeting was only scheduled for approximately an hour. It is unclear what May 21 meeting Mr. Page is referencing. Moreover, there is no support that

Mr. Pais and Mr. Page discussed any domestic fitting buy/sell agreement. The cited memo from Mr. Pais indicates that they discussed Sigma purchasing Tyler/Union.

2189. Messrs. McCullough, Walton, and Tatman scheduled a meeting on May 26, 2009 to discuss “supplying Domestic product to our competitors.” (CX 0067 at 001).

Response To Finding No. 2189:

McWane has no specific response.

2190. In preparation for that meeting, on or about May 26, 2009, Mr. Tatman circulated a PowerPoint presentation setting forth discussion points that weighed the advantages and disadvantages of supplying Domestic Fittings to Sigma. (CX 0067 at 003; Tatman, Tr. 621, 623).

Response To Finding No. 2190:

McWane has no specific response.

2191. Specifically, in his May 26, 2009 presentation, Mr. Tatman explained that if McWane choose *not* to sell Domestic Fittings to Sigma, it would “Retain the full margin for Domestic product within McWane.” However, if McWane agreed to supply Sigma, then it would “Eliminate the probability they will secure another domestic source option.” (CX 0067 at 003; Tatman, Tr. 621, 623).

Response To Finding No. 2191:

While McWane notes that the cited document references only discussion points and makes other points as well, McWane has no specific response.

2192. In his May 26, 2009 presentation, Mr. Tatman estimated that Sigma would need a 20% discount from McWane’s published prices to be “viable,” *i.e.*, to be able to resell the Fittings profitably. (CX 0067 at 004 (“I suspect to be viable on their end they’ll need at least 20% off published and will probably want 25%-30%. On our end . . . [i]n rough numbers our “simple” break even point is around 12% off published.”); Tatman, Tr. 624-626 (referring to the calculations as “back of the envelope”)).

Response To Finding No. 2192:

McWane does not concede the accuracy of the characterization of this proposed finding or the supporting citations and notes that these are expressly based on “assumptions” and not facts.

2193. The 20% minimum discount required by Sigma that Mr. Tatman estimated in his May 26, 2009 presentation included matching McWane's 8% rebate, 2% payment terms, and 4% on freight, to arrive at 14% with zero absorption of any operating expenses. (CX 0067 at 004; Tatman, Tr. 632; *see also* CX 0069 at 001 ("15% probably overstates the breakeven point for Sigma.")).

Response To Finding No. 2193:

McWane does not concede the accuracy of the characterization of this proposed finding or the supporting citations and notes that these are expressly based on "assumptions" and not facts.

2194. In his May 26, 2009 presentation, Mr. Tatman also estimated that the "break even" point for McWane selling Domestic Fittings to Sigma would be a 12% discount from published prices, *i.e.*, McWane would earn the same profits selling Domestic Fittings to Sigma at a 12% discount as it would from selling at full price to Distributors in light of freight and Distributor rebate savings. (CX 0067 at 004; Tatman, Tr. 624-626, 634-636 (referring to the calculations as "back of the envelope"); *see also* CX 0069 at 001 (concluding McWane's breakeven point was 13% discount from published prices and that, "From our perspective anything more than about 13% is transfer of margin from our business to Sigma.")).

Response To Finding No. 2194:

McWane does not concede the accuracy of this characterization of this proposed finding or the supporting citations and notes that these are expressly based on "assumptions" and not facts.

2195. Mr. Tatman concluded his May 26, 2009 presentation with a statement that, "plumbing factors aside," *i.e.*, putting aside the possibility that Star would retaliate against a McWane/Sigma Fittings alliance by cutting prices as they had in the separate plumbing/soil pipe market, "this probably comes down to two factors:

1. How legitimate of a risk is there with a competitor successfully introducing a Domestic product line?
2. Do we believe that in the bigger picture, supporting competitors with Domestic product would result in a healthier industry on the non-Domestic side of the business?"

(CX 0067 at 004, 002; Tatman, Tr. 627-629).

Response To Finding No. 2195:

Noting that the cited memo only contains discussion points “jotted down over the weekend,” McWane has no specific response.

2196. McWane made two “core assumptions” in its decision to sell Domestic Fittings to Sigma: “Tyler/Union would remain the only truly viable source for domestically produced [Fittings]...” and neither Sigma nor McWane “would be significantly underselling the other.” (CX 0070 at 001).

Response To Finding No. 2196:

The proposed finding is misleading and is not supported by the cited evidence. The email cited simply discusses a list of reasons “not to sell” and is not evidence of any actual decision made by McWane or actual assumptions on which any later decision was actually based. The email is dated almost 4 months before the MDA was entered.

2197. Mr. McCullough always “took for granted” that any arrangement with Sigma would involve McWane being the exclusive supplier of Domestic Fittings for Sigma. (CX 2479 (McCullough, Dep. at 107-108, 110-111) (discussing CX 0070)).

Response To Finding No. 2197:

While McWane does not concede this accuracy of the characterization of this proposed finding or the supporting citations, McWane believes the finding is irrelevant and therefore, given the length of the FTC’s proposed findings, McWane provides no specific response.

2198. Mr. McCullough then tasked Mr. Tatman to prepare a list of “all the potential reasons to not sell domestic product to Sigma.” (CX 0070 (emphasis in original); Tatman, Tr. 634).

Response To Finding No. 2198:

While McWane does not concede this accuracy of this proposed finding or the supporting citations, McWane believes the finding is irrelevant and therefore, given the length of the FTC’s proposed findings, McWane provides no specific response.

2199. McWane’s main reason for not selling Domestic Fittings to Sigma was because doing so would require McWane to share its Domestic Fittings profit margin with Sigma. In other words, any incremental margin gained by Sigma on the sale of Domestic Fittings would

be incremental loss of margin for McWane. (CX 0067 at 003; CX 0070 at 001; CX 2479 (McCullough, Dep. at 87-88, 94-95)).

Response To Finding No. 2199:

This proposed finding is inaccurate and misleading and is not supported by the evidence.

McWane decided to sell product to Sigma and there was never a decision made not to sell.

Therefore, there could be no “main reason for not selling.” Moreover, the exhibits cited are

discussion points and do not reflect any actual decision and in fact, pre-date the entry of the

MDA by almost four months. The deposition testimony cited does not support any conclusion

regarding any “main reason” not the sell.

2200. Subject to McWane’s two core assumptions (*see supra* ¶ 2196), the reasons identified by Mr. Tatman for McWane to not sell to Sigma included:

- a. Loss of margin because “any incremental margin \$ retained by Sigma would be incremental margin \$ lost by McWane;”
- b. Loss of business growth opportunities as ARRA and Domestic Fittings sales could be a “foot in the door” to regain former customers;
- c. Upsetting McWane’s most loyal customers, particularly if they lost an ARRA-funded job to a competitor who obtained Domestic Product from Sigma;
- d. The possible erosion of blended Fittings sales as Distributors placed import Fittings orders to fill the truck for a Domestic Fittings order with Sigma; and
- e. Losing the ability to leverage its position in Domestic Fittings to benefit its other business lines, including non-Domestic Fittings.

(CX 0070 at 001-002 (also noting other lesser reasons, such as losing McWane’s identity as “the Domestic supplier,” and placement of Domestic Fittings in regional yards could backfire if McWane has less responsive service); Tatman, Tr. 635-637; CX 2479 (McCullough, Dep. at 98-99); CX 1209 (McCullough February 2009 email suggesting need to “leverage our domestic position” to require Distributors to acquire non-Domestic Fittings from McWane)).

Response To Finding No. 2200:

While McWane notes that the cited document is only reflective of ongoing discussions internal to McWane and is not reflective of any actual decision or decision making (the MDA was entered almost 4 months later) and that the cite memo and makes other points as well, McWane has no specific response. Additionally, the reference to “lesser reasons” is not supported by the cited exhibit.

2201. According to Mr. McCullough:

ultimately the decision [of whether to sell Domestic Fittings to SIGMA] was SIGMA has the ability to get into domestic made manufacturing of waterworks fittings, just as Star did. If we had the choice between their not [*sic*] being in it and us selling them, or them being in it and us not selling them, that ultimately, we made the decision it’s under our best interest to sell them.

CX 2479 (McCullough, Dep. at 104-105); *see also* CX 0076 at 008 (“The decision on Sigma is probably the same as before... If they are truly committed to make the investment level required to be a viable competitor regardless of our actions, then producing for them is probably of greater financial benefit to our business than having them source elsewhere.”)).

Response To Finding No. 2201:

While noting that this deposition testimony and exhibits are part of a larger context involving many other considerations, McWane has no specific response.

2202. One reason for McWane to sell Domestic Fittings to Sigma was to “eliminate the probability” that Sigma would secure another domestic source option. (CX 0067 at 003; CX 2479 (McCullough, Dep. at 86-87); *see also* CX 2479 (McCullough, Dep. at 81-82 (explaining that CX 0067 is a presentation created by Rick Tatman that discusses the pro’s and con’s of selling Domestic Fittings to Sigma))).

Response To Finding No. 2202:

Noting that the cited exhibit and testimony relate to “brain storming” discussions held almost 4 months before the MDA was entered and are not reflective of any actual final decision or summary of the same, McWane has no specific response.

11.3.3 **McWane Offered McWane Branded Domestic Fittings to Sigma at 5% Discount off of Published Pricing**

2203. On June 5, 2009, Mr. Tatman sent Mr. Rona an email attaching an offer from McWane to sell Domestic Fittings to Sigma at 5% off its published prices. (CX 1434 at 001; CX 0225 at 003; Rona, Tr. 1490; Pais, Tr. 1760-1761).

Response To Finding No. 2203:

McWane has no specific response.

2204. At the time of McWane's June 5, 2009 offer to Sigma of a Domestic Fittings at a 5% discount, Mr. Tatman believed that Sigma would need a 12% or 13% discount to break even. (Tatman, Tr. 642, CX 0067; CX 0069 at 001).

Response To Finding No. 2204:

McWane has no specific response.

2205. On June 8, 2009, Mr. Rona responded to Mr. Tatman's June 5, 2009 offer, "Is this really the final deal?????" (CX 1243; Tatman, Tr. 643; Rona, Tr. 1490).

Response To Finding No. 2205:

McWane has no specific response.

2206. Sigma was not satisfied with McWane's offer, and considered the offer to be an insult as it would not allow enough margin to cover operating costs. (CX 0909 (Rybacki July 17, 2009 letter to Page describing "McWane's decision to ignore the spirit of co-operation between the companies and insult us with a private labeling offer of Customer Multiplier less 5%"); CX 2531 (Rybacki, Dep. at 307-308) ("[I]t was an insult to me, the 5 percent.") (discussing CX 0909); CX 2531 (Rybacki, Dep. at 149-150) ("5 percent wouldn't even cover the freight, let alone handling; and not only would we not make money, we would lose money; and we couldn't afford to lose money for two years on a deal. It was a terrible deal."); CX 0225 at 001 (Pais referring to offer as "little more than a patronizing accommodation"); Pais, Tr. 1760-1761 (describing offer as "nominal" because it did not provide Sigma the opportunity to make any margin off the resale of Domestic Fittings); Rona, Tr. 1492; Rona, Tr. 1489-1490 (Sigma was not satisfied with McWane's offer); CX 2523 (Bhattacharji, Dep. at 182-184) (McWane's offer did not afford Sigma enough margin to cover its costs; Sigma would have "absolutely" lost money); CX 2531 (Rybacki, Dep. at 175) ("I was insulted by that offer.")).

Response To Finding No. 2206:

McWane has no specific response.

2207. Sigma did not accept McWane's offer. (Pais, Tr. 1761).

Response To Finding No. 2207:

McWane has no specific response.

2208.

(CX 1997 at 008, *in camera*).

Response To Finding No. 2208:

McWane has no specific response.

2209.

(CX 1997 at 008, *in camera*).

Response To Finding No. 2209:

McWane has no specific response.

11.4 Sigma Developed and Implemented Its Own Domestic Production Plan

11.4.1 Sigma Was a Potential Entrant into the Domestic Fittings Market Until It Signed the MDA with McWane

2210. In 2009, before Sigma and McWane signed the MDA, Sigma devoted substantial time and resources to developing and carrying out a comprehensive plan for entry into Domestic Fittings production, and took numerous substantial and concrete steps toward entry. (*Infra* ¶¶ 2211-2281).

Response To Finding No. 2210:

See General Response 1, and responses to ¶¶ 2211-2281, *infra*. This proposed finding is argumentative and draws conclusions and implications unsupported by the evidence. While Sigma did investigate the possibility of virtually manufacturing its own domestic fittings, Sigma was not in a commercial or financial position to actually enter the market and never took concrete steps or made concrete decisions to enter. (RPF 534-566). In fact, Mr. Rona told

one of Sigma's largest customers in August of 2009 that Sigma had not made any concrete plans to enter. (Rona, Tr. 1693-1694).

11.4.1.1 Sigma Formed a Team of Top Executives to Move Forward with Its Plan to Enter the Domestic Fittings Market by Producing Fittings Through Independent, Domestic Foundries

2211. In early 2009, Sigma formed a team of top executives to move forward with its plan to enter the Domestic Fittings market by producing fittings through independent, domestic foundries. (*Infra* ¶¶ 2212-2220).

Response To Finding No. 2211:

See General Response 1, and responses to ¶¶ 2212-2220, *infra*. This finding is misleading and is not supported by the evidence. The SDP team investigated the possibility of domestic manufacture of fittings, but there was never a concrete decision to “move forward” with any plan. (RPF ¶¶ 534-566). For example, other than 2 disposable LFM patters, none of the other estimated 430 patterns were obtained by Sigma, No core boxes were obtained. No contracts were entered with foundries. (RPF ¶¶ 534-566). Sigma had no machining facilities or finishing facilities. (RPF ¶¶ 552-558).

2212. Sigma had key personnel who would be needed to supervise a virtual manufacturing operation for Domestic Fittings. For example, Stuart Box had extensive experience in U.S. foundry work and Fittings manufacturing before joining Sigma, and Gopi Ramanathan also had extensive foundry experience. (CX 2530 (Rona, Dep. at 213-214); Rona, Tr. 1469-1470).

Response To Finding No. 2212:

While McWane does not concede this accuracy of this proposed finding or the supporting citations, McWane believes the finding is irrelevant and therefore, given the length of the FTC's proposed findings, McWane provides no specific response.

2213. Sigma formed an “SDP” team consisting of Messrs. Pais, Bhattacharji, Rona, Box, and Ramanathan. (Rona, Tr. 1462, 1468 (Messrs. Rybacki and Brakefield were not involved in the efforts of Sigma's SDP team); Brakefield, Tr. 1408-1409; Pais, Tr. 1751-1752).

Response To Finding No. 2213:

While McWane does not concede this accuracy of this proposed finding or the supporting citations, McWane believes the finding is irrelevant and therefore, given the length of the FTC's proposed findings, McWane provides no specific response.

2214. Mr. Box's role on the Sigma SDP team was primarily to identify independent domestic foundries and manufacturing strategies that would allow Sigma to produce Domestic Fittings. (Rona, Tr. 1474-1475).

Response To Finding No. 2214:

While McWane does not concede this accuracy of this proposed finding or the supporting citations, McWane believes the finding is irrelevant and therefore, given the length of the FTC's proposed findings, McWane provides no specific response.

2215. Mr. Ramanathan's role on the Sigma SDP team was to provide leads for potential foundries and to collect the information required for a capital investment and tooling budget. (CX 2530 (Rona, Dep. at 213-214)).

Response To Finding No. 2215:

While McWane does not concede this accuracy of this proposed finding or the supporting citations, McWane believes the finding is irrelevant and therefore, given the length of the FTC's proposed findings, McWane provides no specific response.

2216. The purpose of the SDP team's efforts was to determine the costs, foundry capabilities, and time it would take for Sigma to produce Domestic Fittings in response to ARRA. (Rona, Tr. 1462-1463).

Response To Finding No. 2216:

While McWane does not concede this accuracy of this proposed finding or the supporting citations, McWane believes the finding is irrelevant and therefore, given the length of the FTC's proposed findings, McWane provides no specific response.

2217. Sigma's SDP plan was to use factories and independent foundries to produce Domestic Fittings based on Sigma's drawings and tooling, similar to Sigma's existing methods of

producing Fittings overseas. Sigma planned to do the finishing, or lining and painting, of its Domestic Fittings itself. (Rona, Tr. 1469-1470; CX 2524 (Box, Dep. at 41)).

Response To Finding No. 2217:

While McWane does not concede this accuracy of this proposed finding or the supporting citations, McWane believes the finding is irrelevant and therefore, given the length of the FTC's proposed findings, McWane provides no specific response.

2218. From February to May 2009, Sigma's SDP team engaged in strategic planning for producing Domestic Fittings. (CX 0282 (Box September 2009 presentation recounting history of Sigma SDP efforts); CX 2530 (Rona, Dep. at 228) (Box presentation is a fair representation of what occurred)).

Response To Finding No. 2218:

See response to ¶ 2211, *supra*. While McWane does not concede this accuracy of this proposed finding or the supporting citations, McWane believes the finding is irrelevant and therefore, given the length of the FTC's proposed findings, McWane provides no specific response.

2219. By May 20 2009, Mr. Pais had asked the SDP team to prepare a project plan, including economical, logistical and financial plans, including the cost of production. (Pais, Tr. 1759; CX 0307 at 001 ("I have now advised [Mr. Box] to prepare a complete Project Plan – with economical, logistical and financial parts outlined in some detail, so we can evaluate the cost/benefit aspects of the investment plan"))).

Response To Finding No. 2219:

While McWane does not concede this accuracy of this proposed finding or the supporting citations, McWane believes the finding is irrelevant and therefore, given the length of the FTC's proposed findings, McWane provides no specific response.

2220. Sigma's SDP team held meetings, circulated and carried out action plans, visited foundries, secured offers to produce Domestic Fittings, and conducted a series of production trials. (*See infra* ¶¶ 2231-2248).

Response To Finding No. 2220:

See General Response 1, and responses to ¶¶ 2231-2448, *infra*, and responses to ¶¶ 2210-2211, *supra*. This proposed finding is conclusory and unsupported by specific citations, and thus requires no response.

11.4.1.2 **Sigma Developed a Viable Plan for Domestic Entry**

2221. Sigma's plan for entry into the Domestic Fittings market was viable and would have allowed it to begin shipping Domestic Fittings by February 2010. (*Infra* ¶¶ 2222-2228).

Response To Finding No. 2221:

See General Response 1, and responses to ¶¶ 2222-2228, *infra*, and responses to ¶¶ 2210-2211, *supra*. This proposed finding of fact is flatly incorrect and contradicted by the overwhelming evidence to the contrary. Sigma

. (RPF 534-566). In fact, Mr. Rona told one of Sigma's largest customers in August of 2009 that Sigma had no concrete plans to begin Domestic Fittings production. (Rona, Tr. 1693-1694). Even if Sigma theoretically had begun production in September of 2009 (at which time it still had no patterns, core boxes, foundry contracts, or finishing facilities), it may have been able to ship only one or two fittings sometime in the Spring of 2010, assuming that there were no problems. (Rona, Tr. 1676-1677). As a practical matter, it would have taken Sigma much longer - at least 18-24 months - to develop a full line of Domestic Fittings. (Rona, Tr. 1673).

2222. Sigma planned to enter Domestic Fittings production incrementally, increasing the number of Fittings available each month. (Rona, Tr. 1555-1556).

Response To Finding No. 2222:

See response to ¶ 2221, *supra*. Sigma was investigating this possibility but was never in a position to actually enter into domestic production. (RPF 534-566).

2223. Sigma's initial intention was the first Domestic Fittings would become available in early 2010, and that additional items would become available every month over the course of 2010. (RX-689 (Rona, Dep. at 60-61)).

Response To Finding No. 2223:

See response to ¶ 2221, *supra*. Sigma was investigating this possibility but was never in a position to actually enter into domestic production. (RPF 534-566).

2224. Sigma anticipated McWane's "all or nothing" policy, and believed that it would need to offer a "critical mass" of Domestic Fittings to combat that policy. (Rona, Tr. 1505-1507 (Rona developed a model that suggested Sigma should offer about 700 types of fittings); Rona, Tr. 1672 (approximately 730 items needed); CX 0231 (Bhattacharji, June 16: "I feel we will need a good range of domestic, otherwise we will fall hostage when the distributor says he cannot give just the large size because McWane wants all or nothing.")).

Response To Finding No. 2224:

See General Response 7. The evidence does not support the FTC's proposed conclusions regarding an anticipated competitive response from McWane. Rather, the cited testimony merely reflects to practical commercial reality that, as a general rule, distributors prefer to quote and buy all of their fittings for a particular job from a single source. According to Mr. Rona, a manufacturer needs a full line to be a viable competitor. (Rona, Dep. at 57-59). McWane agrees that Rona suggested that Sigma would need to offer approximately 730 different types of fittings, and notes that, as of September 2009, Sigma had almost no patterns to make any of those 730 fittings. (RPF 554).

2225. For any particular Domestic Fitting, Sigma could have Fittings available for sale four to five months from first commissioning the tooling for that Fitting. (Rona, Tr. 1676 ("From the day you would issue a tooling order to a tooling supplier, it could take 60 to 90 days to get the tooling here. And then it would take 60 days to set it up, produce it, qualify it, get it ready, finish it.")).

Response To Finding No. 2225:

See responses to ¶¶ 2210-2211, 2221, *supra*. This finding of fact is misleading and is not supported by the evidence. Sigma [REDACTED]

. (RPF 534-566). If Sigma had begun production in September of 2009 (at which time it still had no patterns, core boxes, foundry contracts, machining or finishing facilities), Sigma may have been able to ship one or two fittings sometime in the Spring of 2010, assuming that there were no problems. (Rona, Tr. 1676-1677). In fact, as a practical matter, it would have taken Sigma at least 18-24 months to develop a full line of fittings. (Rona, Tr. 1673).

2226. If Sigma had begun ordering patterns in September 2009, it could have begun shipping completed Fittings by as early as February 2010. (Rona, Tr. 1676).

Response To Finding No. 2226:

See General Response 11 and responses to ¶¶ 2210-2211, 2221-2225, *supra*. This finding of fact is misleading and is not supported by the evidence.

2227. Sigma expected to have completed its roll out of all of the approximately 700 Fittings needed to offer a full line of Domestic Fittings within 18 to 24 months. (Rona, Tr. 1673-1674 (noting that it would take approximately 400 patterns to produce 730 Fittings)).

Response To Finding No. 2227:

See General Response 11 and responses to ¶¶ 2210-2211, 2221-2225, *supra*. This finding of fact is speculative and misleading and is not supported by the evidence.

2228. Sigma could have sold Domestic Fittings “as they came off the line.” (CX 2523 (Bhattacharji, Dep. at 247)). Sigma would have had a “wide range of produced Fittings in” in stocking inventory within 18-24 months. (CX 2523 (Bhattacharji, Dep. at 57, 247)).

Response To Finding No. 2228:

See General Response 11 and responses to ¶¶ 2210-2211, 2221-2225, *supra*. This finding of fact is speculative and misleading and is not supported by the evidence.

11.4.1.3 **Sigma Invested Significant Resources and Took Concrete Steps in Pursuit of Domestic Production**

2229. Sigma invested substantial time and resources in pursuing Domestic Fittings production, including investigating the patterns and machinery necessary for Domestic Fittings

production, identifying, interviewing, and visiting domestic foundries, and performing production tests. (*Infra* ¶¶ 2230-2248).

Response To Finding No. 2229:

See General Responses 1 and 11, and responses to ¶¶ 2230-2248, *infra*, and responses to ¶¶ 2210-2211, 2221-2225, *supra*. This finding of fact is misleading and is not supported by the evidence. While McWane notes that Sigma did investigate patterns and machinery and did interview domestic foundries and perform limited production tests, Sigma was never in a commercial, financial or practical position to actually enter the market and never took concrete steps or made concrete decisions to enter. (RFPP ¶¶ 534-566). In fact, Mr. Rona told one of Sigma's largest customers in August of 2009 that Sigma had not made any concrete plans to enter. (Rona, Tr. 1693-1694).

2230. Sigma invested significant resources in pursuing Domestic Production. (CX 2523 (Bhattacharji, Dep. at 30)).

Response To Finding No. 2230:

See General Responses 1 and 11, and responses to ¶¶ 2210-2211, 2221-2225, *supra*. This finding of fact is misleading and is not supported by the evidence. While McWane notes that Sigma did investigate patterns and machinery and did interview domestic foundries and perform limited production tests, Sigma was never in a commercial, financial or practical position to actually enter the market and never took concrete steps or made concrete decisions to enter. (RFPP ¶¶ 534-566). In fact, Mr. Rona told one of Sigma's largest customers in August of 2009 that Sigma had not made any concrete plans to enter. (Rona, Tr. 1693-1694).

2231. Sigma investigated all aspects of the processing steps necessary to make Fittings, from beginning to end: casting, machining, transportation and finishing. (CX 2524 (Box, Dep. at 28) (describing how Sigma "looked at all aspects of the processing steps necessary from the beginning to the end; casting, machining, transportation, finishing.")).

Response To Finding No. 2231:

See General Responses 1 and 11, and responses to ¶¶ 2210-2211, 2221-2225, *supra*. This finding of fact is misleading and is not supported by the evidence. While McWane notes that Sigma did investigate patterns and machinery and did interview domestic foundries and perform limited production tests, Sigma was never in a commercial, financial or practical position to actually enter the market and never took concrete steps or made concrete decisions to enter. (RFPP ¶¶ 534-566). In fact, Mr. Rona told one of Sigma's largest customers in August of 2009 that Sigma had not made any concrete plans to enter. (Rona, Tr. 1693-1694).

2232. For example, on or about June 5, 2009, Mr. Box summarized the results of SDP planning meetings held on June 3 and 4, 2009, which included detailed action plans for identification of top Fittings, foundries, molding machines, cost modeling, testing of lost foam production technology, and visits to potential foundry partners. (CX 0963 at 001; Rona, Tr. 1482-1486 (Sigma identified top Fittings for production, identified and visited foundries, identified machinery, prepared to produce a sample Fitting for the AWWA show, and purchased equipment)).

Response To Finding No. 2232:

See General Responses 1 and 11, and responses to ¶¶ 2210-2211, 2221-2225, *supra*. This finding of fact is misleading and is not supported by the evidence. While McWane notes that Sigma did investigate patterns and machinery and did interview domestic foundries and perform limited production tests, Sigma was never in a commercial, financial or practical position to actually enter the market and never took concrete steps or made concrete decisions to enter. (RFPP ¶¶ 534-566). In fact, Mr. Rona told one of Sigma's largest customers in August of 2009 that Sigma had not made any concrete plans to enter. (Rona, Tr. 1693-1694).

2233. As of June 5, 2009, Sigma was identifying the top Fittings that it needed to produce in order to supply the market. (Rona, Tr. 1483-1484; CX 0963 at 001).

Response To Finding No. 2233:

See General Responses 1 and 11, and responses to ¶¶ 2210-2211, 2221-2225, *supra*. This finding of fact is misleading and is not supported by the evidence. While McWane notes that Sigma did investigate patterns and machinery and did interview domestic foundries and perform limited production tests, Sigma was never in a commercial, financial or practical position to actually enter the market and never took concrete steps or made concrete decisions to enter. (RFPP ¶¶ 534-566). In fact, Mr. Rona told one of Sigma's largest customers in August of 2009 that Sigma had not made any concrete plans to enter. (Rona, Tr. 1693-1694).

2234. As of June 5, 2009, Sigma was identifying "DISA" molding machines in the Southern and Southeastern United States. (Rona, Tr. 1484-1485; CX 0963 at 001).

Response To Finding No. 2234:

See General Responses 1 and 11, and responses to ¶¶ 2210-2211, 2221-2225, *supra*. This finding of fact is misleading and is not supported by the evidence. While McWane notes that Sigma did investigate patterns and machinery and did interview domestic foundries and perform limited production tests, Sigma was never in a commercial, financial or practical position to actually enter the market and never took concrete steps or made concrete decisions to enter. (RFPP ¶¶ 534-566). In fact, Mr. Rona told one of Sigma's largest customers in August of 2009 that Sigma had not made any concrete plans to enter. (Rona, Tr. 1693-1694).

2235. As of June 5, 2009, Sigma identified over 50 potential foundries in the United States as potential sources of domestic production capacity. (Rona, Tr. 1484; CX 0963 at 001); CX 2524 (Box, Dep. at 27-28) (Sigma investigated over 50 foundries); CX 0964 at 001) (detailing Stuart Box's efforts as of May 15, 2009, to identify domestic production capacity and noting that Eureka foundry has capacity and interest)).

Response To Finding No. 2235:

See General Responses 1 and 11, and responses to ¶¶ 2210-2211, 2221-2225, *supra*. This finding of fact is misleading and is not supported by the evidence. While McWane notes that

Sigma did investigate patterns and machinery and did interview domestic foundries and perform limited production tests, Sigma was never in a commercial, financial or practical position to actually enter the market and never took concrete steps or made concrete decisions to enter.

(RFPP ¶¶ 534-566). In fact, Mr. Rona told one of Sigma's largest customers in August of 2009 that Sigma had not made any concrete plans to enter. (Rona, Tr. 1693-1694).

2236. For example, Sigma met with Glidewell foundry regarding producing Domestic Fitting castings, or unfinished Fittings, for Sigma. Mr. Pais and Mr. Hendrix met with Glidewell Foundry's president once or twice about whether Glidewell could produce Domestic Fitting castings for Sigma, and subsequently, Mr. Glidewell provided Sigma with quotes for Domestic Fitting castings. (CX 2507 (Glidewell, Dep. at 131-132, 134-135); CX 1451).

Response To Finding No. 2236:

See General Responses 1 and 11, and responses to ¶¶ 2210-2211, 2221-2225, *supra*. This finding of fact is misleading and is not supported by the evidence. While McWane notes that Sigma did investigate patterns and machinery and did interview domestic foundries and perform limited production tests, Sigma was never in a commercial, financial or practical position to actually enter the market and never took concrete steps or made concrete decisions to enter. (RFPP ¶¶ 534-566). In fact, Mr. Rona told one of Sigma's largest customers in August of 2009 that Sigma had not made any concrete plans to enter. (Rona, Tr. 1693-1694).

2237. By June 18, 2009, Sigma's SDP team was working on obtaining patterns for producing Domestic Fittings from Metalfit, and had placed orders for foam patterns and other equipment, such as cope and drag patterns, flasks and vibration tables, to be used in Domestic Fittings production. (Rona, Tr. 1507-1511; CX 0978 at 002).

Response To Finding No. 2237:

See General Responses 1 and 11, and responses to ¶¶ 2210-2211, 2221-2225, *supra*. This finding of fact is misleading and is not supported by the evidence. While McWane notes that Sigma did investigate patterns and machinery and did interview domestic foundries and perform limited production tests, Sigma was never in a commercial, financial or practical position to

actually enter the market and never took concrete steps or made concrete decisions to enter.

(RFPP ¶¶ 534-566). In fact, Mr. Rona told one of Sigma's largest customers in August of 2009

that Sigma had not made any concrete plans to enter. (Rona, Tr. 1693-1694).

2238. By June 18, 2009, Sigma's SDP team had identified at least two possibilities for the machining work required for their Domestic Fittings – Metalfit or Davis Machine. (Rona, Tr. 1488-1489, 1513-1514 (ultimately choosing Metalfit to machine Sigma's Domestic Fittings); CX 0978 at 002).

Response To Finding No. 2238:

See General Responses 1 and 11, and responses to ¶¶ 2210-2211, 2221-2225, *supra*. This finding of fact is misleading and is not supported by the evidence. While McWane notes that Sigma did investigate patterns and machinery and did interview domestic foundries and perform limited production tests, Sigma was never in a commercial, financial or practical position to actually enter the market and never took concrete steps or made concrete decisions to enter.

(RFPP ¶¶ 534-566). In fact, Mr. Rona told one of Sigma's largest customers in August of 2009

that Sigma had not made any concrete plans to enter. (Rona, Tr. 1693-1694).

2239. By June 18, 2009, Sigma was taking the next steps in identifying domestic foundries by arranging foundry site visits by Mr. Rona. (Rona, Tr. 1508, 1511-1512 (also considering potential advantages of sourcing Domestic Fittings through a foundry affiliated with Sigma's OEM customer, ACIPCO); CX 0978 at 002 (summarizing June 17, 2009 SDP meeting).

Response To Finding No. 2239:

See General Responses 1 and 11, and responses to ¶¶ 2210-2211, 2221-2225, *supra*. This finding of fact is misleading and is not supported by the evidence. While McWane notes that Sigma did investigate patterns and machinery and did interview domestic foundries and perform limited production tests, Sigma was never in a commercial, financial or practical position to actually enter the market and never took concrete steps or made concrete decisions to enter.

(RFPP ¶¶ 534-566). In fact, Mr. Rona told one of Sigma's largest customers in August of 2009 that Sigma had not made any concrete plans to enter. (Rona, Tr. 1693-1694).

2240. Mr. Rona visited at least five different domestic foundries as a part of Sigma's investigation of the production of Domestic Fittings: Pryor Foundry, Quality Foundry, Eureka Foundry, and two foundries in Eastern Pennsylvania. (Rona, Tr. 1508-1509; *see also* CX 2530 (Rona, Dep. at 81-82) (estimating that SDP work took up 10% to 30% of his time from April to August of 2009, and that others at Sigma also were spending a considerable amount of their time on the project)).

Response To Finding No. 2240:

See General Responses 1 and 11, and responses to ¶¶ 2210-2211, 2221-2225, *supra*. This finding of fact is misleading and is not supported by the evidence. While McWane notes that Sigma did investigate patterns and machinery and did interview domestic foundries and perform limited production tests, Sigma was never in a commercial, financial or practical position to actually enter the market and never took concrete steps or made concrete decisions to enter.

(RFPP ¶¶ 534-566). In fact, Mr. Rona told one of Sigma's largest customers in August of 2009 that Sigma had not made any concrete plans to enter. (Rona, Tr. 1693-1694).

2241. Stuart Box also provided to Sigma's SDP team reports on his detailed site visits to potential domestic production partners Mueller in Albertville, Alabama (CX 0090 at 002) and American Castings in Pryor, Oklahoma. (CX 1536 at 001).

Response To Finding No. 2241:

See General Responses 1 and 11, and responses to ¶¶ 2210-2211, 2221-2225, *supra*. This finding of fact is misleading and is not supported by the evidence. While McWane notes that Sigma did investigate patterns and machinery and did interview domestic foundries and perform limited production tests, Sigma was never in a commercial, financial or practical position to actually enter the market and never took concrete steps or made concrete decisions to enter.

(RFPP ¶¶ 534-566). In fact, Mr. Rona told one of Sigma's largest customers in August of 2009 that Sigma had not made any concrete plans to enter. (Rona, Tr. 1693-1694).

2242. Sigma visited American Castings foundry in Pryor, Oklahoma, which offered Sigma attractive pricing for the production of domestic mechanical and flanged Fittings from 14” to 24”. Mr. Box reported that “The American team is very eager to help us in as many ways as possible,” and that they had been encouraged by ACIPCO to work with Sigma. (Rona, Tr. 1532-1533; CX 1536 at 001; CX 2486 (Burns, Dep. at 15) (ACIPCO casts products at its American Castings foundry in Tulsa)).

Response To Finding No. 2242:

See General Responses 1 and 11, and responses to ¶¶ 2210-2211, 2221-2225, *supra*. This finding of fact is misleading and is not supported by the evidence. While McWane notes that Sigma did investigate patterns and machinery and did interview domestic foundries and perform limited production tests, Sigma was never in a commercial, financial or practical position to actually enter the market and never took concrete steps or made concrete decisions to enter. (RFPP ¶¶ 534-566). In fact, Mr. Rona told one of Sigma’s largest customers in August of 2009 that Sigma had not made any concrete plans to enter. (Rona, Tr. 1693-1694).

2243. Sigma also evaluated the Mueller Albertville foundry favorably when testing the production of ductile iron at their sister company, Anvil, for the production of Sigma’s Domestic Fittings. (Rona, Tr. 1533-1534; CX 0090).

Response To Finding No. 2243:

See General Responses 1 and 11, and responses to ¶¶ 2210-2211, 2221-2225, *supra*. This finding of fact is misleading and is not supported by the evidence. While McWane notes that Sigma did investigate patterns and machinery and did interview domestic foundries and perform limited production tests, Sigma was never in a commercial, financial or practical position to actually enter the market and never took concrete steps or made concrete decisions to enter. (RFPP ¶¶ 534-566). In fact, Mr. Rona told one of Sigma’s largest customers in August of 2009 that Sigma had not made any concrete plans to enter. (Rona, Tr. 1693-1694).

2244. Sigma also visited Eureka Foundry, which was “very willing” to work with Sigma. (Rona, Tr. 1485-1486; CX 0963 at 001). Sigma performed lost foam trials for the production of 30” to 48” Domestic Fittings at Eureka foundry. (Rona, Tr. 1529-1531

(considering proportion of Domestic Fittings produced via lost foam versus cope and drag process for most efficient production); CX 0237 at 002-003).

Response To Finding No. 2244:

See General Responses 1 and 11, and responses to ¶¶ 2210-2211, 2221-2225, *supra*. This finding of fact is misleading and is not supported by the evidence. While McWane notes that Sigma did investigate patterns and machinery and did interview domestic foundries and perform limited production tests, Sigma was never in a commercial, financial or practical position to actually enter the market and never took concrete steps or made concrete decisions to enter. (RFPP ¶¶ 534-566). In fact, Mr. Rona told one of Sigma's largest customers in August of 2009 that Sigma had not made any concrete plans to enter. (Rona, Tr. 1693-1694).

2245. Sigma was capable of cement-lining and coating Fittings itself. (Rona, Tr. 1488-1489; CX 0963 at 001; Brakefield, Tr. 1419 (Sigma had domestic facilities that could coat and cement-line Fittings); Rona, Tr. 1495-1496 (Sigma's Alexander City, Alabama warehouse had the ability to cement-line and coat Domestic Fittings in 2009)).

Response To Finding No. 2245:

See General Responses 1 and 11, and responses to ¶¶ 2210-2211, 2221-2225, *supra*. This finding of fact is misleading and is not supported by the evidence. While McWane notes that Sigma did investigate patterns and machinery and did interview domestic foundries and perform limited production tests, Sigma was never in a commercial, financial or practical position to actually enter the market and never took concrete steps or made concrete decisions to enter. (RFPP ¶¶ 534-566). In fact, Mr. Rona told one of Sigma's largest customers in August of 2009 that Sigma had not made any concrete plans to enter. (Rona, Tr. 1693-1694).

2246. The "lost foam" production method tested by Sigma, which involves using styrofoam replicas of Fittings that are placed in casting sand, would have allowed Sigma flexibility to produce a wide array of Fittings items more quickly and less expensively than the traditional pattern methods. (Rona, Tr. 1510, 1513; CX 0978 at 002 (describing foam plans as a "more complete product offering plan")).

Response To Finding No. 2246:

See General Responses 1 and 11, and responses to ¶¶ 2210-2211, 2221-2225, *supra*. This finding of fact is misleading and is not supported by the evidence. While McWane notes that Sigma did investigate patterns and machinery and did interview domestic foundries and perform limited production tests, Sigma was never in a commercial, financial or practical position to actually enter the market and never took concrete steps or made concrete decisions to enter. (RFPP ¶¶ 534-566). In fact, Mr. Rona told one of Sigma's largest customers in August of 2009 that Sigma had not made any concrete plans to enter. (Rona, Tr. 1693-1694).

2247. Sigma purchased two large flasks for large Domestic Fittings production trials. (Rona, Tr. 1485-1486; CX 0963 at 001).

Response To Finding No. 2247:

See General Responses 1 and 11, and responses to ¶¶ 2210-2211, 2221-2225, *supra*. While McWane notes that Sigma did investigate patterns and machinery and did interview domestic foundries and perform limited production tests, Sigma was never in a commercial, financial or practical position to actually enter the market and never took concrete steps or made concrete decisions to enter. (RFPP ¶¶ 534-566).

2248. Sigma spent between \$50,000 and \$75,000 investigating domestic production options. (CX 2529 (Rona, IHT at 142-143); CX 0958 at 001 (request to establish accounting mechanism for Sigma's SDP expenses)).

Response To Finding No. 2248:

See General Responses 1 and 11, and responses to ¶¶ 2210-2211, 2221-2225, *supra*.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

(RFPP ¶¶ 534-566).

11.4.1.4 Sigma Had Domestic Fittings Samples Ready for Display at the June 2009 AWWA Show

2249. By the time of the June 2009 AWWA conference, Sigma had produced two or three sample Domestic Fittings at the Eureka Foundry in Tennessee, using patterns supplied by Metalfit. Sigma was very happy with the quality of the Domestic Fittings. (CX 0282 at 006 (Box September 2009 presentation); CX 2530 (Rona, Dep. at 228) (Box presentation is a fair representation of what occurred); CX 1993 at 001-002 (SDP team emails describing process of finishing sample Fittings for AWWA show); *see also* Rona, Tr. 1480, 1485; CX 0963 at 001 (noting, in item 1(f), preparation of sample Fitting for “AWWA show”).

Response To Finding No. 2249:

See General Responses 1 and 11, and responses to ¶¶ 2210-2211, 2221-2225, *supra*.

While McWane notes that Sigma did investigate patterns and machinery and did interview domestic foundries and perform limited production tests, Sigma was never in a commercial, financial or practical position to actually enter the market and never took concrete steps or made concrete decisions to enter. (RFPP ¶¶ 534-566).

2250. Sigma considered bringing the sample Fittings to the June 2009 AWWA in order to reassure customers that Sigma was “determined to have an option for them for their domestic fittings.” (Pais, Tr. 1765-1766).

Response To Finding No. 2250:

See General Responses 1 and 11, and responses to ¶¶ 2210-2211, 2221-2225, *supra*. In reality, Sigma was never in a commercial, financial or practical position to actually enter the market and never took concrete steps or made concrete decisions to enter. (RFPP ¶¶ 534-566).

In fact, Mr. Rona told one of Sigma’s largest customers in August of 2009 that Sigma had not made any concrete plans to enter. (Rona, Tr. 1693-1694).

2251. Ultimately, Sigma decided not to display its sample Domestic Fittings at the AWWA show due to concerns about McWane’s reaction. (Pais, Tr. 1765-1766; CX 0228 at 001-003 (Pais email discussing several strategic implications of displaying Domestic Fittings samples at AWWA, and recommending not doing so); Pais, Tr. 1901)).

Response To Finding No. 2251:

Respondent has no specific response.

2252. Three of the Domestic Fittings Sigma made as part of its plans for Domestic Production were sold for use in waterworks projects. (CX 2524 (Box, Dep. at 15-16)).

Response To Finding No. 2252:

See General Responses 1 and 11, and responses to ¶¶ 2230-2248, *infra*, and responses to ¶¶ 2210-2211, 2221-2225, *supra*. This finding of fact is misleading and is not supported by the evidence. While McWane notes that Sigma did investigate patterns and machinery and did interview domestic foundries and perform limited production tests, Sigma was never in a commercial, financial or practical position to actually enter the market and never took concrete steps or made concrete decisions to enter. (RFPP ¶¶ 534-566).

11.4.1.5 Sigma Redoubled Its Domestic Production Efforts in Early June 2009

2253. In early June, Sigma redoubled its domestic production efforts. (*See supra* ¶¶ 2232-2239 (describing intensive SDP efforts); CX 0225 at 001 (Pais: “[I]t’s time we seriously went ahead with our SDP plans. . . . Let’s re-group and get serious to develop a thorough and detailed ‘SDP’ plan.”); CX 2531 (Rybacki, Dep. at 307-308) (discussing SDP Plan)).

Response To Finding No. 2253:

See General Responses 1 and 11, and responses to ¶¶ 2210-2211, 2221-2225, *supra*. This finding of fact is misleading and is not supported by the evidence. While McWane notes that Sigma did investigate patterns and machinery and did interview domestic foundries and perform limited production tests, Sigma was never in a commercial, financial or practical position to actually enter the market and never took concrete steps or made concrete decisions to enter. (RFPP ¶¶ 534-566). In fact, Mr. Rona told one of Sigma’s largest customers in August of 2009 that Sigma had not made any concrete plans to enter. (Rona, Tr. 1693-1694).

2254. After Star announced its entry into the Domestic Fittings market at the June 2009 AWWA show, Mr. Rona admitted that he “was fixated on [the fact] that Sigma had to

have an answer because I felt there was some percentage of longevity and damage that could go to our existing business.” (CX 2530 (Rona, Dep. at 231)).

Response To Finding No. 2254:

See General Responses 1 and 11, and responses to ¶¶ 2230-2248, *infra*, and responses to ¶¶ 2210-2211, 2221-2225, *supra*. Regardless of what Mr. Rona believed, in reality, Sigma was never in a commercial, financial or practical position to actually enter the market and never took concrete steps or made concrete decisions to enter. (RFPP ¶¶ 534-566). In fact, Mr. Rona told one of Sigma’s largest customers in August of 2009 that Sigma had not made any concrete plans to enter. (Rona, Tr. 1693-1694).

2255. Sigma’s SDP efforts also became more urgent after the “insulting” June 5, 2009 McWane offer (*supra* ¶ 2206), because it became apparent that McWane was unwilling to accommodate Sigma’s requests for Domestic Fittings supply. (CX 2523 (Bhattacharji, Dep. at 183-184) (after McWane’s unsatisfactory offer to Sigma in June 2009 of Domestic Fittings at 5% below published prices Sigma “went back to speeding up our review of how to make Fittings in the country”); Pais, Tr. 1761-1762 (“[S]omething like this made us even more to put somewhat more urgency if at all possible because it looked like they just were not keen to accommodate us at that point.”); CX 1993 at 002 (June 5, 2009 Bhattacharji email “I am glad the uncertainty is over and we can hit the untraveled road - once again!”); CX 2523 (Bhattacharji, Dep. at 171-172) (Sigma began looking “very seriously” at domestic production when it found out Mexico and Korea would not qualify and McWane offered it only a 5% discount off published prices)).

Response To Finding No. 2255:

See General Responses 1 and 11, and responses to ¶¶ 2230-2248, *infra*, and responses to ¶¶ 2210-2211, 2221-2225, *supra*. While Sigma may have felt more “urgent”, it was never in a commercial, financial or practical position to actually enter the market and never took concrete steps or made concrete decisions to enter. (RFPP ¶¶ 534-566). In fact, Mr. Rona told one of Sigma’s largest customers in August of 2009 that Sigma had not made any concrete plans to enter. (Rona, Tr. 1693-1694).

11.4.1.6 Sigma Actively Pursued Domestic Fittings Production Throughout the Summer of 2009 and Until It Signed the MDA with McWane

2256. Sigma actively pursued Domestic Fittings production throughout the summer of 2009 and until it signed the MDA with McWane (*Infra* ¶¶ 2257-2268).

Response To Finding No. 2256:

See General Responses 1 and 11, and responses to ¶¶ 2257-2268, *infra*, and responses to ¶¶ 2210-2211, 2221-2225, 2230-2248, *supra*. While Sigma may have continued investigating domestic production, it was never in a commercial, financial or practical position to actually enter the market and never took concrete steps or made concrete decisions to enter. (RFPP ¶¶ 534-566). In fact, Mr. Rona told one of Sigma’s largest customers in August of 2009 that Sigma had not made any concrete plans to enter. (Rona, Tr. 1693-1694).

2257. As of July 11, 2009, Sigma was still actively pursuing its “SDP” plan to produce Domestic Fittings, although it was proceeding more “deliberately and thoughtfully” as Sigma had renewed “meaningful” negotiations with McWane for Domestic supply by this point in time. (Rona, Tr. 1538; CX 0240 (Rona emailing model); *see also* Pais, Tr. 1780 (Sigma had not slowed its SDP plans as of July 16, 2009); CX 1505 at 001 (July 16, 2009 Pais email to Sigma’s top managers that, “[O]ur SDP plans are also proceeding – however more deliberately and thoughtfully – even as we also are negotiating for a meaningful buy-sell for the FTGs with Tyler.”)

Response To Finding No. 2257:

See General Responses 1 and 11, and responses to ¶¶ 2257-2268, *infra*, and responses to ¶¶ 2210-2211, 2221-2225, 2230-2248, *supra*. While Sigma may have continued investigating domestic production, it was never in a commercial, financial or practical position to actually enter the market and never took concrete steps or made concrete decisions to enter. (RFPP ¶¶ 534-566). In fact, Mr. Rona told one of Sigma’s largest customers in August of 2009 that Sigma had not made any concrete plans to enter. (Rona, Tr. 1693-1694). For example, this finding is misleading because Sigma [REDACTED]

[REDACTED]. (RPF ¶ 551; Pais, Tr. 2210)

In addition, Mr. Pais testified that, in the summer of 2009, “There were no really good options. The SDP [Sigma Domestic Production] plans were a not very discrete or quantifiable effort. It was – we were at the early stages.” (RPF 552).

2258. On August 11, 2009, Sigma received a quote from Metalfit for the production of tooling to be used in Sigma’s Domestic Fittings production. (CX 0257 at 001; Rona, Tr. 1593-1594).

Response To Finding No. 2258:

See General Responses 1 and 11, and responses to ¶¶ 2257-2268, *infra*, and responses to ¶¶ 2210-2211, 2221-2225, 2230-2248, *supra*. While Sigma may have continued investigating domestic production, it was never in a commercial, financial or practical position to actually enter the market and never took concrete steps or made concrete decisions to enter. (RFP 534-566). For example, **this finding is misleading because** although Sigma required a minimum of 450 core patterns to produce 730 types of Fittings, very few of those patterns were even physically present in the United States, as of September 2009. (Rona, Tr. 1673- 1675 (“Q. Okay. And would the manufacture of 730 different types of domestic fittings require approximately 730 different types of patterns? A. As I -- as I testified earlier or -- that's a very broad question. It could take 730 and it could be done in part modular, part lost foam, and I would be speculating that it could be done with 457 core patterns, core patterns and a lot of adaptation and modular patterns and lost foam, or it could be done as 720 individual or 30

patterns. . . . Q. And in September of 2009 you did not have any contracts with any pattern shops to build these patterns, did you? A. No. Q. And you have to have a fitting pattern before you can pour a fitting, don't you? A. You have to have -- in a broad response, you have to have some type of pattern equipment to make a fitting. That's correct. Q. And in September of 2009, how many different patterns did Sigma have in the United States? It didn't have any, did it? A. You need to specify for which products. Q. Okay. Well, you might have had a couple of lost foam patterns; correct? A. For AWWA fittings we had not brought in any patterns for making fittings here at that time. Q. So in September of 2009 you didn't have any AWWA patterns in the United States; correct? A. Correct.”); Brakefield, Tr. 1417-1418 (“Q. Thank you. Do you know, sir, had -- did Sigma have any manufacturing facilities of its own? If you know. A. At one time they had some in Mexico, but they gave that up, but no, they did not. They were -- they were like a broker. They -- if they owned anything, they owned the patterns and maybe a small equity position because of the patterns. Q. I'm sorry. The small equity position because of the -- A. Yeah. In other words, the patterns -- in other words, let's say they had all these thousands of SKUs and patterns. Well, they would own that, and that would be their equity position in the facility. Overseas. Q. Did they -- did Sigma have any patterns in the United States for -- A. No, they did not.”).).

2259. Mr. Box forwarded the Metalfit quote to members of Sigma’s SDP team, indicating that Metalfit could produce all of the tooling for Fittings in the 14” - 24” range for approximately \$500,000, and noting that “[t]his number from [Metalfit] looks much better than I expected.” (CX 0257 at 001). Mr. Box suggested that someone in Sigma’s headquarters might further analyze the quotation “if we see that the MDA is not going to happen.” (CX 0257 at 001; Rona, Tr. 1595-1596).

Response To Finding No. 2259:

This finding is misleading because Sigma did not make any investment into tooling. Mr. Rona testified that that Sigma did not “actually develop tooling,” and that they had only “discussed with Metalfit relocating some of their pattern equipment to be used by us, but we

didn't actually do that." (Rona, Tr. at 1485). See also General Responses 1 and 11, and RFPP ¶¶ 534-566.

2260. As of August 17, 2009, Sigma was still actively pursuing entry into the Domestic Fittings market by production of its own Domestic Fittings. (Rona, Tr. 1705-1706). In an email to Sigma's OEM customer U.S. Pipe, Mr. Rona wrote that Sigma "still ha[s] not finalized" its decision on whether to invest in its own Domestic production, and would "continue to try every option to make sure no stone is unturned" in pursuit of offering Domestic Fittings to its customers. (CX 0258 at 003; Rona, Tr. 1540-1542).

Response To Finding No. 2260:

This finding is misleading because as of mid-2009, Sigma had no domestic foundries, no contracts with existing domestic foundries, no core boxes, no machining facilities, and no finishing facilities for domestic Fittings (RPF 557), and by August 2009, Sigma had not taken any concrete steps to supply its own domestic Fittings. (RPF 558; Rona, Tr. 1693-1694 ("Q. I'd like to pull up the first -- expand the first paragraph, please. No. The second paragraph. I'm sorry. And you write, "To date Sigma has not made any concrete plans to either invest in all the required tooling or not invest at all." So I just want to confirm what Mr. Hassi asked you yesterday. As of August 17, you told Mr. Morton that Sigma had not made any concrete plans to invest in the toolings and patterns necessary for domestic production; correct? A. If the question -- if the question is at the point where this e-mail had been written, that at that point we had not invested in or made a decision to invest in any equipment, that's correct. Q. And as of August 17, Sigma had not made any formal decision to go ahead with domestic manufacturing because obviously you would need the tooling and patterns to do that; correct? A. That's correct.") (objections omitted); CX 258; RX 200.0002 ("To date Sigma has not made any concrete plans to either invest in all the required tooling or not invest at all."). See also General Responses 1 and 11, and RFPP ¶¶ 534-566.

2261. By September 7, 2009, Sigma continued to pursue its Domestic Fittings production plan, but that plan had become a "backup plan" to McWane's alternate approach of sourcing

Domestic Fittings through McWane. (CX 0899 at 001 (Rona email regarding Sigma's need to decide whether it is still pursuing Domestic production "as a long term backup plan for our MDA with McWane"); Rona, Tr. 1545-1547).

Response To Finding No. 2261:

This finding is misleading because obtaining domestic fittings from McWane was one way Sigma could effectively supply domestic Fittings to its customers during ARRA's short time window. (RPFF ¶ 559) Mr. Pais testified that it was Sigma's only viable option to service its customers. (RPFF ¶ 560) Mr. Rybacki believed that it was inadvisable for Sigma to attempt to become a domestic Fittings supplier in 2009, because [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Rybacki, Tr. 3682 ("Q. Tell us what you considered

for your NAPPCO experience in 2009 when you were at Sigma. A. I just let everybody know that it -- it cost a lot more money than I was -- than we were prepared to spend, it cost a lot more money than we budgeted and that getting into domestic fittings was -- was dangerous and expensive. Q. You didn't think it was a good idea? A. For us to get into it? No.".). See also General Responses 1 and 11, and RFPP ¶¶ 534-566.

2262. Mr. Box continued pursuing Sigma's production of Domestic Fittings, including production of large-diameter Domestic Fittings, until Sigma management decided to abandon the project in Fall of 2009. (CX 2524 (Box, Dep. at 47-48, 87)).

Response To Finding No. 2262:

This finding is misleading because Mr. Rona testified that by summer 2009 domestic production was firmly considered a “backup plan.” (Rona, Tr. at 1545-1546) Mr. Pais testified that the MDA did not hinder Sigma’s domestic production plans because Sigma didn’t “really have -- the feasibility and economics and operation for the domestic production through our own.” (RPFF ¶ 562) Moreover, Sigma

. (RPFF ¶ 551) See also General Responses 1 and 11, and RFPP ¶¶ 534-566.

2263. Mr. Box had substantially completed his investigation of domestic production by September 2009. (CX 2524 (Box, Dep. at 86)).

Response To Finding No. 2263:

This finding is misleading because at the close of Sigma’s “investigation,” Sigma had not taken any concrete steps to supply its own domestic Fittings. (RPFF ¶ 558) Mr. Rona testified that, even if Sigma made the decision to begin domestic production, it would have taken “six to eight months” before the first fitting was delivered, and “18 to 24 months to get to completion.” (RPFF ¶ 555). See also General Responses 1 and 11, and RFPP ¶¶ 534-566.

2264. By September 21, 2009, Sigma had successfully completed a series of trials casting large-diameter Domestic Fittings using the “lost foam” method, and had actually cast several fittings in the United States using this method. (CX 0282 at 006-018; CX 2530 (Rona, Dep. at 228) (Box presentation is a fair representation of what occurred); Rona, Tr. 1475-1477 (Sigma successfully cast Domestic Fittings using the lost foam method)).

Response To Finding No. 2264:

This proposed finding is misleading, because although Sigma had experimented with lost foam patterns and had cast possibly 2-3 sample fittings, the foam patterns are burned up in the casting process (Rona, Tr. 1510). More significantly, because although Sigma required a minimum of 450 core patterns to produce 730 types of Fittings, very few of those patterns were

even physically present in the United States, as of September 2009. (Rona, Tr. 1673- 1675 (“Q. Okay. And would the manufacture of 730 different types of domestic fittings require approximately 730 different types of patterns? A. As I -- as I testified earlier or -- that's a very broad question. It could take 730 and it could be done in part modular, part lost foam, and I would be speculating that it could be done with 457 core patterns, core patterns and a lot of adaptation and modular patterns and lost foam, or it could be done as 720 individual or 30 patterns. . . . Q. And in September of 2009 you did not have any contracts with any pattern shops to build these patterns, did you? A. No. Q. And you have to have a fitting pattern before you can pour a fitting, don't you? A. You have to have -- in a broad response, you have to have some type of pattern equipment to make a fitting. That's correct. Q. And in September of 2009, how many different patterns did Sigma have in the United States? It didn't have any, did it? A. You need to specify for which products. Q. Okay. Well, you might have had a couple of lost foam patterns; correct? A. For AWWA fittings we had not brought in any patterns for making fittings here at that time. Q. So in September of 2009 you didn't have any AWWA patterns in the United States; correct? A. Correct.”); Brakefield, Tr. 1417-1418 (“Q. Thank you. Do you know, sir, had -- did Sigma have any manufacturing facilities of its own? If you know. A. At one time they had some in Mexico, but they gave that up, but no, they did not. They were -- they were like a broker. They -- if they owned anything, they owned the patterns and maybe a small equity position because of the patterns. Q. I'm sorry. The small equity position because of the -- A. Yeah. In other words, the patterns -- in other words, let's say they had all these thousands of SKUs and patterns. Well, they would own that, and that would be their equity position in the facility. Overseas. Q. Did they -- did Sigma have any patterns in the United States for -- A. No, they did not.”).).

2265. Sigma was ready to enter domestic production “once the switch was flipped.” (CX 2523 (Bhattacharji, Dep. at 54); CX 0282 at 001 (September 21, 2009 email from Box to Rona

attaching a report on the trials and asked, “Do we proceed with LF regular production?”)).

Response To Finding No. 2265:

The finding is completely misleading. See responses to ¶¶ 2257-2268, *infra*, and responses to ¶¶ 2210-2211, 2221-2225, 2230-2248, *supra*. Sigma was simply never in a commercial, financial or practical position to actually enter the market and never took concrete steps or made concrete decisions to enter. (RFPP ¶¶ 534-566). For example, Mr. Pais testified that Sigma had no viable domestic production option in early September 2009. (RPF ¶ 535) Further, Dr. Normann testified that based on his review of Sigma’s finances and efforts to date, Sigma was not positioned to enter the domestic market in a timely manner during the ARRA period. (RPF ¶ 565)

2266. Mr. Pais testified under oath that, absent an agreement with McWane, Sigma would have entered the domestic market. (CX 2527 (Pais, IHT at 179-180) (“[I]f [McWane] stuck with that initial offer [of a 5% discount] . . . then we certainly would have gone another – to Plan B, which is our [domestic] production.”)).

Response To Finding No. 2266:

The proposed finding is misleading. See responses to ¶¶ 2257-2268, *infra*, and responses to ¶¶ 2210-2211, 2221-2225, 2230-2248, *supra*. Sigma was simply never in a commercial, financial or practical position to actually enter the market and never took concrete steps or made concrete decisions to enter. (RFPP ¶¶ 534-566). Furthermore, this finding relies on testimony from the Investigational Hearing for Mr. Pais, at which McWane was unable to question the witness or raise objections. In fact, Mr. Pais clarified at trial that Sigma was not prepared to offer domestically produced Fittings at the time of the MDA as Sigma did not have “the feasibility and economics and operations for the domestic production through our own...” (RPF ¶ 562)

2267. Mr. Pais’s sworn testimony that Sigma would have entered the Domestic Fittings market absent the MDA is confirmed by contemporaneous documents. In a letter announcing the MDA to its customers, Sigma stated, “[a]s a leading supplier of AWWA Fittings over the last 25 years, *Sigma has adequate engineering and production expertise and the needed resources* to develop and manufacture a competitive range of AWWA Fittings using a few quality foundries in USA,” and stated that although Sigma was “confident of the above [SDP] option.” (CX 0803 at 001 (emphasis added); Pais, Tr. 1820).

Response To Finding No. 2267:

The proposed finding is misleading. See responses to ¶¶ 2257-2268, *infra*, and responses to ¶¶ 2210-2211, 2221-2225, 2230-2248, *supra*. Sigma was simply never in a commercial, financial or practical position to actually enter the market and never took concrete steps or made concrete decisions to enter. (RFPP ¶¶ 534-566). For example, Mr. Pais testified at trial that Sigma was not prepared to offer domestically produced Fittings at the time of the MDA as Sigma did not have “the feasibility and economics and operations for the domestic production through our own....” (RPF ¶ 562). Mr. Pais further testified that as of early September 2009, Sigma did not have a viable SDP or Sigma domestic plan option. (Pais, Tr. 1799). All that Sigma possessed was “some wishful thinking type scenarios that we could have struggled through, but that is all.” (Pais, Tr. 1801).

2268. The MDA is what caused Sigma to stop its pursuit of Domestic Production. (*See infra* § 11.8.1).

Response To Finding No. 2268:

See General Responses 1 and 11 and responses to sec. 11.8.1, *supra*. The proposed finding is misleading. See responses to ¶¶ 2257-2268, *infra*, and responses to ¶¶ 2210-2211, 2221-2225, 2230-2248, *supra*. Sigma was simply never in a commercial, financial or practical position to actually enter the market and never took concrete steps or made concrete decisions to enter. (RFPP ¶¶ 534-566). For example, Mr. Pais testified at trial that the MDA did not hamper any domestic production effort of Sigma. (RPF ¶ 562) Dr. Normann reached the conclusion

that Sigma was not positioned to enter the domestic market in a timely manner during the ARRA period. (RPFF ¶ 566).

11.4.2 **Sigma’s Customers Supported Its Entry into the Domestic Fittings Market, and Sigma Provided Assurances to Customers**

2269. Sigma’s customers supported its entry into the Domestic Fittings market, and Sigma Provided assurances to its customers that it would provide them with a viable Domestic Fittings solution. (*Infra* ¶¶ 2270-2274).

Response To Finding No. 2269:

See General Responses 1 and 11, and responses to ¶¶ 2270-2274, *infra*, and responses to ¶¶ 2210-2211, 2221-2225, 2230-2248, 2256-2268, *supra*. This proposed finding is misleading because while Sigma may have continued discussions with its customers, it was never in a commercial, financial or practical position to actually enter the market and never took concrete steps or made concrete decisions to enter. (RFPP ¶¶ 534-566). For example, Sigma informed one of its very largest customers, U.S. Pipe, in August of 2009 that Sigma had not taken any concrete steps to supply its own domestic Fittings. (Rona, Tr. 1693-1694 (“Q. I’d like to pull up the first -- expand the first paragraph, please. No. The second paragraph. I’m sorry. And you write, "To date Sigma has not made any concrete plans to either invest in all the required tooling or not invest at all." So I just want to confirm what Mr. Hassi asked you yesterday. As of August 17, you told Mr. Morton that Sigma had not made any concrete plans to invest in the toolings and patterns necessary for domestic production; correct? A. If the question -- if the question is at the point where this e-mail had been written, that at that point we had not invested in or made a decision to invest in any equipment, that's correct. Q. And as of August 17, Sigma had not made any formal decision to go ahead with domestic manufacturing because obviously you would need the tooling and patterns to do that; correct? A. That's correct.”) (objections omitted);

CX 258; RX 200.0002 (“To date Sigma has not made any concrete plans to either invest in all the required tooling or not invest at all.”). (RFPP ¶¶ 558).

2270. Sigma’s Distributor customers were demanding Domestic Fittings, and Sigma assured its customers that it would have Domestic Fittings available. (CX 2524 (Box, Dep. at 61-62)).

Response To Finding No. 2270:

This proposed finding is misleading and incomplete and is not supported by the cited deposition testimony. While Sigma may have continued discussions with its customers, it was never in a commercial, financial or practical position to actually enter the market and never took concrete steps or made concrete decisions to enter. (RFPP ¶¶ 534-566). For example, Sigma informed one of its very largest customers, U.S. Pipe, in August of 2009 that Sigma had not taken any concrete steps to supply its own domestic Fittings. (Rona, Tr. 1693-1694 (“Q. I’d like to pull up the first -- expand the first paragraph, please. No. The second paragraph. I’m sorry. And you write, "To date Sigma has not made any concrete plans to either invest in all the required tooling or not invest at all." So I just want to confirm what Mr. Hassi asked you yesterday. As of August 17, you told Mr. Morton that Sigma had not made any concrete plans to invest in the toolings and patterns necessary for domestic production; correct? A. If the question -- if the question is at the point where this e-mail had been written, that at that point we had not invested in or made a decision to invest in any equipment, that's correct. Q. And as of August 17, Sigma had not made any formal decision to go ahead with domestic manufacturing because obviously you would need the tooling and patterns to do that; correct? A. That's correct.”) (objections omitted); CX 258; RX 200.0002 (“To date Sigma has not made any concrete plans to either invest in all the required tooling or not invest at all.”). (RFPP ¶¶ 558).

2271. Sigma’s OEM customers were supportive of Sigma entry plans. In a May 4, 2009 memorandum to the Sigma Board, Mr. Pais reported on Sigma’s review of the feasibility of Domestic Fittings production, and stated that Sigma had the “fullest support” from

OEM partners ACIPCO and U.S. Pipe, and that Sigma was using its close relationship with Metalfit. (CX 0214 at 005).

Response To Finding No. 2271:

This finding is misleading because in the same memorandum Mr. Pais laid out the number one and “easiest” domestic option as having McWane private label for Sigma. (CX 0214 at 004) Mr. Pais noted that Sigma approached McWane regarding this manufacturing for Sigma after the announcement of the ARRA, and “followed up with a visit to Iowa last week [t]o meet Leon McCullough” the week prior to the memo. (*Id.*) While Sigma may have had ongoing discussions with its customers regarding the possibility of domestic production, it was never in a commercial, financial or practical position to actually enter the market and never took concrete steps or made concrete decisions to enter. (RFPP ¶¶ 534-566). For example, Sigma informed one of its very largest customers, U.S. Pipe, in August of 2009 that Sigma had not taken any concrete steps to supply its own domestic Fittings. (Rona, Tr. 1693-1694 (“Q. I'd like to pull up the first -- expand the first paragraph, please. No. The second paragraph. I'm sorry. And you write, "To date Sigma has not made any concrete plans to either invest in all the required tooling or not invest at all." So I just want to confirm what Mr. Hassi asked you yesterday. As of August 17, you told Mr. Morton that Sigma had not made any concrete plans to invest in the toolings and patterns necessary for domestic production; correct? A. If the question -- if the question is at the point where this e-mail had been written, that at that point we had not invested in or made a decision to invest in any equipment, that's correct. Q. And as of August 17, Sigma had not made any formal decision to go ahead with domestic manufacturing because obviously you would need the tooling and patterns to do that; correct? A. That's correct.”) (objections omitted); CX 258; RX 200.0002 (“To date Sigma has not made any concrete plans to either invest in all the required tooling or not invest at all.”). (RFPP ¶¶ 558).

2272. Mr. Rona also believed that ACIPCO would lend support to Sigma's Domestic entry efforts by encouraging their affiliated foundries to "be expedient, be fair, work with us well" when they were approached by Sigma to produce Domestic Fittings. (Rona, Tr. 1511-1512; CX 0978 at 002 (noting the "ACIPCO factor")).

Response To Finding No. 2272:

See General Responses 1 and 11, and responses to ¶¶ 2257-2268, *infra*, and responses to ¶¶ 2210-2211, 2221-2225, 2230-2248, *supra*. While Sigma may have continued investigating domestic production, it was never in a commercial, financial or practical position to actually enter the market and never took concrete steps or made concrete decisions to enter. (RFPP ¶¶ 534-566).

2273. U.S. Pipe and ACIPCO were two important OEM customers that owned foundries and had expertise casting fittings domestically, and were working cooperatively with Sigma as part of its effort to set up domestic production. (CX 2527 (Pais, IHT at 140)).

Response To Finding No. 2273:

See General Responses 1 and 11, and responses to ¶¶ 2257-2268, *infra*, and responses to ¶¶ 2210-2211, 2221-2225, 2230-2248, *supra*. Sigma was never in a commercial, financial or practical position to actually enter the market and never took concrete steps or made concrete decisions to enter. (RFPP ¶¶ 534-566). This finding is misleading because as of mid-2009, Sigma had no domestic foundries, no contracts with existing domestic foundries, no core boxes, no machining facilities, and no finishing facilities for domestic Fittings, and by September 2009, Sigma had not taken any concrete steps to supply its own domestic Fittings. (RPFF ¶¶ 558-559).

2274. Sigma wanted to retain the loyalty of its customers, and reassured them, including its large OEM customers ACIPCO and U.S. Pipe, that it was "looking at different options" for Domestic Fittings supply and would "come up with a viable option." (Pais, Tr. 1754-1756; CX 2527 (Pais, IHT at 144) ("We would keep telling them, look, we will have an answer"); CX 2527 (Pais, IHT at 145) ("Q. But you were testifying, sir, that you were assuring or telling your customers no matter what -- A. We'll have a solution."); CX 0511 at 001 (notes taken by Mr. Thees of Ferguson of a June 2009 meeting with Rybacki in which Rybacki told him Sigma was looking to produce Domestic Fittings by spring of 2010); CX 2503 (Thees, IHT at 209-211) (discussing CX 0511)).

Response To Finding No. 2274:

This finding mischaracterizes the testimony of Mr. Pais, who said in the same passage that “[w]e were just trying to reassure them inasmuch as this was sudden and we had no clear option. We had no idea what would really be a feasible option. We were just assuring them that we were looking at different options.” (Pais, Tr. 1755) The McWane MDA provided Sigma’s only viable option to service its customers. (RPF 560) While Sigma may have had ongoing discussions with its customers regarding the possibility of domestic production, it was never in a commercial, financial or practical position to actually enter the market and never took concrete steps or made concrete decisions to enter. (RFPP ¶¶ 534-566). For example, Sigma informed one of its very largest customers, U.S. Pipe, in August of 2009 that Sigma had not taken any concrete steps to supply its own domestic Fittings. (Rona, Tr. 1693-1694 (“Q. I’d like to pull up the first -- expand the first paragraph, please. No. The second paragraph. I’m sorry. And you write, "To date Sigma has not made any concrete plans to either invest in all the required tooling or not invest at all." So I just want to confirm what Mr. Hassi asked you yesterday. As of August 17, you told Mr. Morton that Sigma had not made any concrete plans to invest in the toolings and patterns necessary for domestic production; correct? A. If the question -- if the question is at the point where this e-mail had been written, that at that point we had not invested in or made a decision to invest in any equipment, that's correct. Q. And as of August 17, Sigma had not made any formal decision to go ahead with domestic manufacturing because obviously you would need the tooling and patterns to do that; correct? A. That's correct.”) (objections omitted); CX 258; RX 200.0002 (“To date Sigma has not made any concrete plans to either invest in all the required tooling or not invest at all.”). (RFPP ¶¶ 558).

11.4.3 **The SDP Team Modeled Costs of Domestic Fittings Production and Determined That Sigma Could Earn Sufficient Profit Margins**

2275. Sigma’s SDP team modeled costs of production and determined that Sigma could earn sufficient profit margins in the Domestic Fittings market. (*Infra* ¶¶ 2276-2281).

Response To Finding No. 2275:

See General Responses 1 and 11, and responses to ¶¶ 2276-2281, *infra*, and responses to ¶¶ 2210-2211, 2221-2225, 2230-2248, 2256-2274, *supra*. This proposed finding is misleading because while Sigma may have continued discussions with its customers,

. (RFPP ¶¶ 534-566).

2276. The SDP team modeled the costs of producing Domestic Fittings using estimates of key variables, including the size of the Domestic-only market, production costs (based on quotes from numerous domestic foundries), and market prices, and arrived at estimated gross margins for the various size categories of Fittings. (CX 2529 (Rona, IHT at 22-23); Rona, Tr. 1522-1523, 1533-1534, 1535-1537; CX 0237 at 001, 002 (estimating margins); CX 0090 at 001 (discussing cost inputs for model); CX 0240 at 001, 003 (Rona transmitting July 11, 2009 version of model, listing estimated supplier costs)).

Response To Finding No. 2276:

See and responses to ¶¶ 2210-2211, 2221-2225, 2230-2248, 2256-2274, *supra*. This proposed finding is misleading because [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. (RFPP ¶¶ 534-566). For example, Mr. Pais testified that that Sigma didn’t “really have - the feasibility and economics and operations for the domestic production through our own....”

(RPFF¶ 562)

2277. Sigma developed a budget estimating the cost of tooling for Domestic Fittings production. Tooling costs represented the bulk of all capital expenditure associated with Sigma’s entry into Domestic Fittings, and Sigma estimated that it could develop the tooling required for the full line of approximately 700 Domestic Fittings items for approximately \$3 to \$5 million. (Rona, Tr. 1517; CX 2530 (Rona, Dep. at 214-215))

(“[T]he bulk of all the capital expenditure would be in actual tooling, so the budget of three to five million likely covered just tooling and equipment related to manufacturing the fittings and foundries.”)).

Response To Finding No. 2277:

This proposed finding is misleading and inaccurate. For example, Mr. Rona wrote to one of his primary customers in August of 2009 that “To date Sigma has not made any concrete plans to invest in all the required tooling....Our estimates for conventional tooling would run in excess of 6M even when considering making some of the tooling modular....The tooling investment is steep and the margins for error can be quite large.” (CX 258-002). Sigma’s President, Larry Rybacki testified that the domestic production effort would have costed between \$10-12 million. (Rybacki, Dep. at 138-39). Similarly, Mr. Bhattacharji testified that it would take between \$5-10 million to put together a domestic supply chain. (Bhattacharji, Dep. at 63-64)

(RPF 536-551; Pais, Tr. 2210 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED] See also responses to ¶¶ 2210-2211, 2221-2225, 2230-2248, 2256-2274, *supra*.

This proposed finding is misleading and inaccurate because while [REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]. (RFPP ¶¶ 534-566).

2278. As of July 3, 2009, Sigma concluded that it would be able to earn a 15-18% margin in the domestic production of small diameter Domestic Fittings, and that the Mueller Albertville foundry (a U.S. Pipe affiliate) would be a “strong and reliable” partner that “can be counted on” even when the industry volumes increase. (CX 0237 at 001 (email from Mr. Rona to SDP team updating on status of SDP activities following SDP meeting); Rona, Tr. 1522-1525).

Response To Finding No. 2278:

This finding is misleading because the exhibit cited references the estimated margins as “maximums.” (CX 0237 (“...the total cost of casting and finishing...will leave us a margin of about 15-18% max...)). Moreover, these are only preliminary estimates at best. Even as of August the costs of manufacturing had not been finally fleshed out and the remaining margins for error were quite large. (Rona, Tr. 1695-1696; CX 0258). As of mid-2009, Sigma had no domestic foundries, no contracts with existing domestic foundries, no core boxes, no machining facilities, and no finishing facilities for domestic Fittings, and by September 2009, Sigma had not taken any concrete steps to supply its own domestic Fittings. (RPFF ¶¶ 558-559). This proposed finding is misleading and inaccurate because [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. (RFPP ¶¶ 534-566).

2279. As of July 3, 2009, Sigma had concluded that it would be able to earn a 55% margin on the domestic production of medium diameter Domestic Fittings, and that American [ACIPCO] would be an “extremely willing” partner that can be “a very stable piece of the puzzle.” (CX 0237 at 002; Rona, Tr. 1526, 1528).

Response To Finding No. 2279:

This finding is misleading because the exhibit cited references only preliminary estimates at best. Even as of August the costs of manufacturing had not been finally fleshed out and the remaining margins for error were quite large. (Rona, Tr. 1695-1696; CX 0258). The remainder of the exhibits references the many unknowns and uncertainties. Indeed, as of mid-2009, Sigma

had no domestic foundries, no contracts with existing domestic foundries, no core boxes, no machining facilities, and no finishing facilities for domestic Fittings, and by September 2009, Sigma had not taken any concrete steps to supply its own domestic Fittings. (RPF 558-559).

This proposed finding is misleading and inaccurate because

. (RFPP 534-566).

2280. As of July 3, 2009, Sigma had concluded that it would be able to achieve “good margins” on large diameter Domestic Fittings, regardless of whether Sigma produced them through the lost foam or the cope and drag method. (CX 0237 at 003; Rona, Tr. 1529-1530).

Response To Finding No. 2280:

This finding is misleading and incomplete because the exhibit cited references only preliminary estimates at best. Even as of August the costs of manufacturing had not been finally fleshed out (e.g., a potential \$250-500 thousand vacuum and handling device for lost foam production) and the remaining margins for error were quite large. (Rona, Tr. 1695-1696; CX 0258). The remainder of the exhibit itself references the many unknowns and uncertainties. Specifically, Indeed, as of mid-2009, Sigma had no domestic foundries, no contracts with existing domestic foundries, no core boxes, no machining facilities, and no finishing facilities for domestic Fittings, and by September 2009, Sigma had not taken any concrete steps to supply its own domestic Fittings. (RPF 558-559). This proposed finding is misleading and inaccurate because

[REDACTED]

[REDACTED]

[REDACTED]. (RFPP 534-566).

2281. Sigma recognized the risk that producing Domestic Fittings through independent foundries could subject Sigma to increased prices when the foundries became busier in the future. However, Sigma believed that its strong existing relationship with ACIPCO

and the Mueller Albertville foundries would mitigate this risk. (Rona, Tr. 1525-1527 (ACIPCO would be “the same with Mueller Albertville . . . [t]hey would treat us fairly”); CX 0237 at 001-002 (asserting that ACIPCO would be a reliable partner because their corporate directive was “to roll out the red carpet to make the project work”)).

Response To Finding No. 2281:

This finding is misleading because as of mid-2009, Sigma had no domestic foundries, no contracts with existing domestic foundries, no core boxes, no machining facilities, and no finishing facilities for domestic Fittings, and by September 2009, Sigma had not taken any concrete steps to supply its own domestic Fittings. (RPF 558-559). This proposed finding is also misleading because

. (RFPP

534-566).

11.4.4 Sigma Had the Financial Resources to Enter Domestic Fittings Production

2282. Sigma had access to sufficient financial resources to enable it to enter the production of Domestic Fittings. (*Infra* 2283-2297).

Response To Finding No. 2282:

See General Responses 1 and 11, and responses to 2283-2297, *infra*, and responses to 2210-2211, 2221-2225, 2230-2248, 2256-2281, *supra*. This proposed finding is misleading because

. See detailed evaluation of Sigma finances during relevant time frame at RPF 534-551.

2283. In the 2009 time period, Ares Capital was the second lien holder of Sigma’s debt. (CX 2523 (Bhattacharji, Dep. at 198)). Ares Capital attended Sigma’s quarterly BOD meetings. (CX 2523 (Bhattacharji, Dep. at 200)).

Response To Finding No. 2283:

This finding mischaracterizes the nature of Ares' relationship with Sigma. Ares was an unsecured lender who,

. (RPF 538, [REDACTED])

[REDACTED]

[REDACTED] The financial situation for Sigma [REDACTED]

[REDACTED]

[REDACTED]. (RPF 550). This proposed finding is misleading because Sigma was never in a financial position to actually enter the market and never took concrete steps or made concrete decisions to enter. See detailed evaluation of Sigma finances during relevant time frame at RPF 534-551.

2284. Sigma was well positioned to finance its Domestic Fittings sourcing initiative. (CX 0313 at 004 (Pais February 9, 2009 letter to Ares Capital: "Our [Gross Margins] have continued to be strong, throughout the year, even as the volumes have been weak."); Pais, Tr. 2230)).

Response To Finding No. 2284:

This finding is misleading because Sigma was [REDACTED]

[REDACTED] (Rybacki,

Tr. 3672 in camera

(RPF 544). This proposed finding is misleading because

. See detailed evaluation of Sigma finances during relevant time frame at RPF 534-551.

2285. [REDACTED] (Pais, Tr. 2206-2207, in camera; CX 1749 at 005, in camera).

Response To Finding No. 2285:

This finding is misleading because, in the same testimony referenced above, Mr. Pais testified [REDACTED]

[REDACTED]” (Pais, Tr. 2207, in camera) In fact, Mr. Pais testified that [REDACTED]

[REDACTED] (Pais, Tr. 2208-2209, in camera). This proposed finding is misleading because [REDACTED]

[REDACTED]. See detailed evaluation of Sigma finances during relevant time frame at RPF 534-551.

2286.

(Pais, Tr. 2211, *in camera*; CX 1749 at 014, *in camera*).

Response To Finding No. 2286:

This finding misconstrues the testimony of Mr. Pais because Mr. Pais specifically noted that

(Pais, Tr. 2211, *in camera*). This proposed finding is misleading because Sigma was never in a financial position to actually enter the market and never took concrete steps or made concrete decisions to enter. See detailed evaluation of Sigma finances during relevant time frame at RPF 534-551.

2287.

(Rybacki, Tr. 3730-3731, *in camera* [redacted]; Pais, Tr. 2212-2213, *in camera* [redacted]; CX 2523 (Bhattacharji, Dep. at 258-259, 163) (Sigma was aware of its debt covenants and that it may have issues meeting them in January 2009 when it began planning domestic production)).

Response To Finding No. 2287:

This finding is misleading because Mr. Pais testified that Sigma's lenders never authorized it to invest in becoming a domestic Fittings supplier, and Sigma lacked sufficient funds to invest in such an operation on its own. (RPF 542) Further, Mr. Rybacki testified that

[redacted]

(RPF 547) Mr. Rybacki also testified to fact that due to the [redacted]

[redacted]

[redacted] (RPF 549).

This proposed finding is misleading because [redacted]

See detailed evaluation of Sigma finances during relevant time frame at RPF 534-551.

2288.

(Pais, Tr. 2211, *in camera*; CX 1749 at 015, *in camera*; CX 2523 (Bhattacharji, Dep. at 169-171); CX 1998 at 002 (Sigma April 2009 board minutes)).

Response To Finding No. 2288:

This finding is misleading because the financial situation for Sigma

. (RPF ¶ 550) Mr. Pais testified that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. This proposed finding is misleading because [REDACTED]

[REDACTED]

[REDACTED]. See detailed evaluation of Sigma finances during relevant time frame at RPF ¶ 534-551.

2289. In April 2009, Mr. Bhattacharji suggested that Sigma consider acquiring Neenah Foundry despite his knowledge of Sigma's debt covenant status. (CX 2523 (Bhattacharji, Dep. at 172-173)).

Response To Finding No. 2289:

This finding is misleading because the financial situation for Sigma [REDACTED]

[REDACTED]

[REDACTED]. (RPF ¶ 550) Mr. Pais testified that [REDACTED]

[REDACTED]

[REDACTED]

This proposed finding is misleading because

. See detailed evaluation of Sigma finances during relevant time frame at RPF 534-551.

2290. In the summer of 2009 Sigma began discussions with Ares Capital about buying back debt; Sigma investors and Frontenac bought back debt from Ares in 2010. (CX 2523 (Bhattacharji, Dep. at 200); RX-682 (Bhattacharji, Dep. at 255-256).

Response To Finding No. 2290:

This finding is misleading because Mr. Pais testified that in July 2009 he discovered that Sigma's financial position was worse than initially thought, and he exchanged emails with other shareholders expressing greater concerns about Sigma finances, including a \$2 million variance in EBITDA and \$1 million in additional rebates that were not contained in the last update. (Pais, Tr. 2179-2183). This proposed finding is misleading because [REDACTED]

[REDACTED]

[REDACTED]. See detailed evaluation of Sigma finances during relevant time frame at RPF 534-551.

2291. [REDACTED] (Pais, Tr. 2185, *in camera*).

Response To Finding No. 2291:

This proposed finding is misleading in that Sigma's entry into the domestic production of pipe restraints was a much simpler, smaller and less expensive venture which a much small range of product. (Pais, Tr. 1781-82, 2184-86). Moreover, even the production of pipe restraints was a manufacturing and commercial disaster Sigma and certainly does not support the FTC's requested inference that Sigma was financially capable of entering domestic production of pipe fittings generally. (Pais, Tr. 1768-1769, 2184-86).

2292.

camera).

(Pais, Tr. 2212, *in*

Response To Finding No. 2292:

This proposed finding is misleading because

See detailed evaluation of Sigma finances during relevant time frame at RPF 534-

551.

2293. At the same time it was pursuing its SDP plans in 2009, Sigma also entered into more serious discussions about acquiring Star. Acquiring Star would have been much more expensive than implementing Sigma's SDP plan, but Sigma's financial situation did not prevent Sigma from pursuing that possibility. (Rybacki, Tr. 3596-3597 (Sigma discussed a merger or acquisition transaction between Sigma and Star with its equity investor, Frontenac around the end of 2008 or during 2009)).

Response To Finding No. 2293:

This proposed finding is misleading because purchasing an ongoing concern is a completely different concept and financial venture from developing a domestic supply chain from scratch. Moreover, Sigma's discussion of acquiring Star is no different from its investigation of domestic manufacturing. [REDACTED]

[REDACTED]. See detailed evaluation of Sigma finances during relevant time frame at RPF 534-

551.

2294. If debt financing were not available to execute the SDP plan, Sigma's shareholders would have provided the necessary equity financing. (CX 2527 (Pais, IHT at 180-181) (Frontenac and Mr. Pais himself would have provided the financing -- "I believe in Sigma so I would definitely invest"; "If we did not have any alternative to the McWane route, we certainly would have, as I said, stumbled along with domestic production. We would have brought in the finances"); Pais, Tr. 1782-1785; *see also* Pais, Tr. 2221, *in camera*).

Response To Finding No. 2294:

The proposed finding misconstrues the testimony of Mr. Pais.

. (RPF

¶ 551; Pais, Tr. 2210

of example, Mr. Pais
Tr. 2204)

By way
(Pais,

(Pais, Tr. 2213, 2215)

See

detailed evaluation of Sigma finances during relevant time frame at RPF ¶¶ 534-551.

2295. On July 27, 2009, following the July 15, 2009 Sigma board meeting, Walter Florence sent an email to Sigma management regarding strategy for upcoming lender meetings. In this email, he noted that Sigma's liquidity was fine, that it had recently received an injection of capital from investors and shareholders, and that these investors and shareholders – which included Mr. Pais himself – were prepared to invest \$7.5 million more to fund the SDP program and other initiatives:

Investors and rollover shareholders invested \$5.5m in March 2009 to help with liquidity. This time, liquidity is fine. Investors and rollover shareholders are prepared to invest up to \$7.5m in equity but not to pay down debt and add to liquidity but rather to fund domestic sourcing initiative and to fund the strategic Business additions which will enhance credit quality and help Sigma grow and build equity value.

(CX 0099 at 007; Pais, Tr. 1783-1785 (“[T]here was general consensus from all shareholders to try and help the business any way we could.”)).

Response To Finding No. 2295:

This finding is misleading because it was made in context of a multifaceted and theoretical discussions of bank and financing issues and states general propositions and does not support a finding that any one or more of the “investors” or “shareholders” actually committed to invest personal cash into a “very, very risky” domestic production initiative. In fact, there is no evidence that any such definitive commitments were made. Mr. Pais later testified

(RPF 551; Pais, Tr. 2210 [REDACTED])

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] See

detailed evaluation of Sigma finances during relevant time frame at RPF 534-551.

2296. Sigma investors were prepared to invest \$7.5 million in equity into Sigma to ease capital concerns. The investors preferred that Sigma use that capital to grow Sigma – such as through the production of Domestic Fittings – rather than to pay off debt. (Pais, Tr. 1782-1785; CX 0099 at 007; CX 2528 (Pais, Dep. at 387-390)).

Response To Finding No. 2296:

This finding is misleading because it was made in context of a multifaceted and theoretical discussions of bank and financing issues and states general propositions and does not support a finding that any one or more of the “investors” or “shareholders” actually committed to invest personal cash into a “very, very risky” domestic production initiative. In fact, there is no

evidence that any such definitive commitments were made. Mr. Rybacki testified that he told Jim McGivern in July that the proposed investors were not in favor of domestic production.

(Rybacki, Tr. 3729) Mr. Pais later testified

See detailed evaluation of Sigma finances during relevant time frame at RPF 534-551.

2297. The reason that Sigma’s investors preferred Sigma to invest equity into growth projects like the production of Domestic Fittings was that production of Domestic Fittings, unlike paying down debt, was a growth opportunity for Sigma. (Pais, Tr. 1786-1787; CX 0099).

Response To Finding No. 2297:

This finding is misleading because it was made in context of a multifaceted and theoretical discussions of bank and financing issues and states general propositions and does not support a finding that any one or more of the “investors” or “shareholders” actually committed to invest personal cash into a “very, very risky” domestic production initiative. In fact, there is no evidence that any such definitive commitments were made. Mr. Rybacki testified that he told Jim McGivern in July that the proposed investors were not in favor of domestic production. (Rybacki, Tr. 3729) “Investor preferences” are irrelevant absent a commitment. Mr. Pais later testified [REDACTED]

(RPF 551; Pais, Tr. 2210)

See detailed evaluation of Sigma finances during relevant time frame at RPF 534-551.

11.4.5 Sigma’s Domestic Production Plan Had the Support of Sigma’s Board, Investors, and Lenders

2298. Sigma’s Board, investors, and lenders supported its plan to enter Domestic Fittings production. (*Infra* 2299-2311).

Response To Finding No. 2298:

This finding is misleading, inaccurate and contrary to the evidence. See detailed discussion of Sigma’s finances as they related to the “very, very risky” domestic production option at RPF 534-551. See also General Responses 1 and 11, and responses to 2299-2311, *infra*, and responses to 2210-2211, 2221-2225, 2230-2248, 2256-2297, *supra*. For example, Mr. Rybacki testified that he told Jim McGivern in July that the proposed investors were not in favor of domestic production. (Rybacki, Tr. 3729) This proposed finding is misleading because [REDACTED]

[REDACTED] (RPF 534-551).

2299. Sigma knew of the challenges involved in domestic production as early as May 2009, and continued to pursue it. (CX 2523 (Bhattacharji, Dep. at 101-102)).

Response To Finding No. 2299:

While McWane does not concede this accuracy of this general and vague proposed finding or the supporting citations, McWane believes the finding is irrelevant and therefore, given the length of the FTC's proposed findings, McWane provides no specific response.

2300. Sigma's new ownership and board approved of Sigma's "SDP" plan and were "highly supportive and . . . motivated by the strategic value – of targeting the 'domestic' segment." (CX 0978 at 001).

Response To Finding No. 2300:

This finding is highly incomplete and misleading. The citation does not support the finding. The referenced exhibit speaks in extremely general terms, is expressly based upon a barely begun investigation into the viability of domestic production and expressly notes that no one has yet determined the CAPEX required for such a program. (CX 0978 at 001). To conclude that "new ownership and board approved" a plan for which a CAPEX had not even been determined is grossly misleading. In fact, the exhibit itself expressly notes that board approval of such a plan would be required in the future. See detailed discussion of Sigma's finances as they related to the "very, very risky" domestic production option at RPF 534-551.

2301. For example, on May 16, 2009, Walter Florence of Sigma's shareholder Frontenac wrote of Sigma's SDP plan: "As an investor, I am all for your approach." (CX 0308 at 001; Pais, Tr. 1753-1754 ("They wanted to support us whatever the most pragmatic and feasible option was."); CX 2528 (Pais, Dep. at 342) (noting that Sigma never sought board approval of the SDP plan because it signed the MDA)).

Response To Finding No. 2301:

This finding is contradicted by Mr. Pais' testimony that [REDACTED] [REDACTED] (RPF 551). The finding is misleading because it cites an email that was written before there were any specifics relating to a domestic production plan. The referenced exhibit also speaks in generalities. Moreover, Mr. Pais expressly testified

that Mr. Florence was not familiar with the specifics. Finally, the cited testimony is misleading insofar as suggesting that Mr. Florence was deeply involved in this issue or process. Sigma's President and CEO described Mr. Florence's support of domestic production as nothing "specific at that point. They wanted to support us whatever the most pragmatic and feasible option was." (Pais, Tr. 1754). See detailed discussion of Sigma's finances as they related to the "very, very risky" domestic production option at RPF 534-551.

2302. As Sigma worked on developing its SDP plan in May 2009, there were no discussions about any upper or lower investment limits from Sigma's shareholders. Sigma was "just desperately looking at whatever options that we could have and tried to shape them up." (Pais, Tr. 1759-1760; CX 2527 (Pais, IHT at 135) (neither the Sigma board nor Frontenac set an upper limit on the amount of permissible capital investment for Domestic entry)).

Response To Finding No. 2302:

This finding is misleading because Mr. Rybacki testified that

(RPF 547; Rybacki, Tr. 3670 *in*

camera [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Further, Mr. Pais testified that [REDACTED]

[REDACTED]

[REDACTED] (Pais, Tr. 2204, *in camera*). Mr. Pais also testified that

[REDACTED]

[REDACTED] (RPF 551; Pais, Tr. 2210 [REDACTED])

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

See detailed discussion of Sigma's finances as they related to the "very, very risky" domestic production option at RPF 534-551.

2303. In May 2009, Sigma updated the Board of Directors with information about the time and expenditure that would be involved in entering domestic production, and the Board was still supportive of the SDP plans. (CX 2527 (Pais, IHT at 132) ("Well, they certainly endorse whatever is our recommendation, the best option. At this point really we were updating them as to various efforts of different level, six to seven levels, some sequential, how to meet this threat, the Buy America threat, and at that point in May, it looked like going to produce some domestic line was our only option, and so we were updating them that it would require a fair amount of capital expenditure and the time, et cetera.")).

Response To Finding No. 2303:

The finding is misleading because it speaks in generalities and relates to a time frame where investigation into the specifics of domestic production was just getting off the ground and no CAPEX was known. Moreover, Mr. Pais expressly testified that Mr. Florence was not familiar with the specifics. Sigma's President and CEO described Mr. Florence's support of domestic production as nothing "specific at that point. They wanted to support us whatever the most pragmatic and feasible option was." (Pais. Tr. 1754). Finally, the finding is supported only by IHT testimony at which cross-examination was not allowed. Given that this was contradicted and clarified by subsequent deposition and trial testimony, this IHT should be given little or no weight. See detailed discussion of Sigma's finances as they related to the "very, very risky" domestic production option at RPF 534-551.

2304. Sigma's board and its SDP team were aware of Sigma's financial position throughout the summer of 2009 as Sigma pursued its plan for production of Domestic Fittings. (Pais, Tr. 1760).

Response To Finding No. 2304:

This finding is misleading because Mr. Pais testified that in summer 2009, “[t]here were no really good options.” (RPF 552). For example, Further, Mr. Pais testified that

(Pais, Tr. 2204, *in camera*). This

proposed finding is misleading because

(RPF 534-551).

2305.

(CX 1997 at 008, *in camera*; CX 2523 (Bhattacharji, Dep. at 194) (\$5 million for SDP was “a placeholder for the board.”)).

Response To Finding No. 2305:

This proposed finding is misleading. For example, Mr. Rona wrote to one of his primary customers in August of 2009 that “To date Sigma has not made any concrete plans to invest in all the required tooling....Our estimates for conventional tooling would run in excess of 6M even when considering making some of the tooling modular....The tooling investment is steep and the margins for error can be quite large.” (CX 258-002). Sigma’s President, Larry Rybacki testified that the domestic production effort would have costed between \$10-12 million. (Rybacki, Dep. at 138-39). Similarly, Mr. Bhattacharji testified that it would take between \$5-10 million to put together a domestic supply chain. (Bhattacharji, Dep. at 63-64). Indeed, as noted in FTC’s cited exhibit above, as of June 18, the CAPEX required for such a program had not yet been determined. (CX 0978 at 001). This proposed finding is misleading because [REDACTED]

[REDACTED]

[REDACTED] (RPF 534-551).

2306. In July 2009, Sigma “came to the conclusion that it [Sigma Domestic production] would be a tough investment but something that we had to make if this is the only option that we would go ahead with.” (CX 2527 (Pais, IHT at 158); CX 0240 (July 11, 2009 SDP Domestic Fittings budget); CX 0246 (July 20, 2009 SDP Domestic Fittings budget); Pais, Tr. 1762-1765 (discussing CX 0240)).

Response To Finding No. 2306:

This finding is misleading and incomplete because the cited testimony does not necessarily support the inference the FTC wishes the Court to draw. Mr. Pais testified that “the domestic option for us an unknown, uncertain, a desperate option....So it was not really a conclusion or a choice because they were both at this point two uncertain options which really didn’t provide for any so-called conclusions. (Pais, Tr. 1765). Mr. Pais also testified that in the summer of 2009, “There were no really good options. The SDP [Sigma Domestic Production] plans were a not very discrete or quantifiable effort. It was – we were at the early stages.”

(RPFF ¶ 552). This proposed finding is misleading because [REDACTED]

[REDACTED]

[REDACTED] (RPFF ¶¶ 534-551).

2307. The SDP team was not given a budget, and was never told to stop its efforts because the project would be too expensive. (CX 2530 (Rona, Dep. at 217-218)). Frontenac never asked Sigma to stop its SDP plans or activities due to the expense involved. (CX 2530 (Rona, Dep. at 330); Rybacki, Tr. 3728 (Frontenac was kept apprised of Sigma’s SDP efforts, and never said “we shouldn’t go forward with this”)).

Response To Finding No. 2307:

This proposed finding is misleading because [REDACTED]

[REDACTED]

[REDACTED] (RPFF ¶¶ 534-551). The cited Rybackci testimony is not supportive of this finding and discusses the fact that the board discussed the “grave concerns over the costs” and the fact that the proposed investors did not support it. (Rybacki, Tr. 3728-29). Indeed, the proposed finding that Frontenac, which was only an investor and did not run or operate Sigma. did not instruct

anyone to “stop” is not evidence that Frontenac wished for them to go forward or really relevant in any way. Sigma

(RPFF ¶ 551) Mr. Pais testified that

(RPFF ¶ 551; Pais, Tr. 2210

This proposed finding is misleading

because

[REDACTED]

(RPFF ¶¶ 534-551).

2308. On July 13, 2009, Mr. Pais sent an internal email responding to a customer’s inquiry regarding Sigma’s ARRA compliance:

We are intensely pursuing our SDP plans for both FTGs and [restraints]. But, it’s a lot of work and Capex\$ too! In fact, we plan to present a brief outline during our BOD meeting 7/15.

(CX 0241 at 001; Pais, Tr. 1768-1769).

Response To Finding No. 2308:

This finding is misleading because Mr. Pais testified that “the domestic option for us was an unknown, uncertain, a desperate option.” (Pais, Tr. 1765) Mr. Pais was also circumspect on Sigma’s expectations for the SDP program, “inasmuch as this was sudden and we had no clear option. We had no idea about what would really be a feasible option. We were just assuring

[customers] that we were looking at different options.” (Pais, Tr. 1755) This proposed finding is misleading because

(RPF 534-551).

2309. Mr. Bhattacharji discussed Sigma’s “SDP” plan at the Sigma Board of Directors meeting on July 15, 2009. (CX 2006 at 002 (draft minutes); CX 2523 (Bhattacharji, Dep. at 196-197)). Representatives from Ares Capital, Sigma’s secondary lender, attended that meeting. (CX 2523 (Bhattacharji, Dep. at 197-199)).

Response To Finding No. 2309:

This finding is misleading and incomplete. Mr. Rybackci testified that the board also discussed the “grave concerns over the costs” associated with domestic production and later he and Jim McGivern discussed the fact that the proposed investors did not support it. (Rybackci, Tr. 3728-29). Mr. Pais testified that, in the summer of 2009, “There were no really good options. The SDP [Sigma Domestic Production] plans were a not very discrete or quantifiable effort. It was – we were at the early stages.” (RPF 552) This proposed finding is misleading because

[REDACTED]

[REDACTED]

(RPF 534-551).

2310. Mr. Pais does not recall Sigma’s secondary lender Ares Capital or its senior lenders ever advising Sigma that it would not approve Sigma’s investment in the production of Domestic Fittings. (Pais, Tr. 1774-1778; CX 0957 (July 24, 2009 email from McGivern to Pais advising Pais to inform lenders that Sigma would need to invest \$2.5 million to \$4 million in Domestic production)).

Response To Finding No. 2310:

This finding is misleading, inaccurate and is not supported by the evidence. The cited testimony does not affirmatively support this point. Mr. Pais just testifies that he does not remember talking to Ares about that issue. Moreover, CX 957 is totally miscited. That is an email from June, not July. The capital amounts discussed do not affirmatively state anything, but rather “amt tbd [amount to be determined] but \$2.5-4m??.” Furthermore, it is a stretch to

characterize a lack of guidance from Ares as tacit approval of Sigma's proceeding with their SDP plan. Only a month prior to the facts above the financial situation for Sigma

(RPF 550, *in camera*). Mr. Pais testified that

(*Id.*) This proposed finding is misleading because

(RPF 534-551).

2311.

(CX 1745 at 017, *in camera*).

Response To Finding No. 2311:

This finding is inaccurate because the presentation cited in CX 1745 focuses on Sigma's strategies for "small" acquisitions, contains only a passing reference to the SDP plan in a section that is grayed out, and does not discuss the specifics of such a plan or whether it is feasible for Sigma to execute such a plan. (CX 1745 at 017-034)

11.5 McWane Decided to Sell Domestic Fittings to Sigma as an Alternative to Sigma Entering the Domestic Fittings Market

11.5.1 Sigma Communicated Its SDP Plans for Independent Entry to McWane

2312. In Spring 2009, Mr. Pais told Mr. McCullough and Mr. Page that Sigma would pursue its own Domestic Production if McWane did not supply it with Domestic Fittings. (CX 2527 (Pais, IHT at 105-106)).

Response To Finding No. 2312:

McWane believes this proposed finding is irrelevant and therefore, given the length of the FTC's proposed findings, McWane provides no specific response.

2313. Mr. McCullough met with Mr. Pais in April 2009. After that meeting, Mr. McCullough believed that Sigma had the ability to enter the Domestic Fittings market. Specifically, Mr. 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.” (CX 2479 (McCullough, Dep. at 76-78); *see also supra* ¶ 1520 (describing April 28, 2009 meeting between McCullough and Pais)).

Response To Finding No. 2313:

McWane believes this proposed finding is irrelevant and therefore, given the length of the FTC’s proposed findings, McWane provides no specific response.

2314. In mid-July 2009, Mr. Pais reported that he had directly informed Mr. Page of Sigma’s plans to develop its own Domestic Fittings capability. (CX 1018 at 001) (July 13, 2009 email from Mr. Pais to Mr. McGivern explaining that Mr. Pais’s negotiations included “My own with the CEO announcing our ‘SDP’ plans...”).

Response To Finding No. 2314:

McWane believes this proposed finding is irrelevant and therefore, given the length of the FTC’s proposed findings, McWane provides no specific response.

2315. Mr. Rona also communicated directly to McWane that Sigma was prepared to enter the Domestic Market absent an agreement, telling Mr. Tatman in mid-July that “Sigma’s preference is to work something out with McWane but we are committed and have the financial backing to move forward either way.” (CX 0568 at 003 (Tatman presentation recounting Rona statements); Tatman, Tr. 760-761; CX 2530 (Rona, Dep. at 218-220) (“I’m sure I made it clear to McWane”)).

Response To Finding No. 2315:

This finding misconstrues the testimony of Mr. Tatman. Mr. Tatman testified the presentation Complaint Counsel relies on “doesn’t mean that the updates came from a conversation with Mitchell Rona,” and that Mr. Tatman viewed Sigma’s statement about moving forward with domestic production absent the MDA was “probably posturing.” (Tatman, Tr. 760-761).

11.5.2 McWane Entered into the MDA with Sigma Because McWane Believed That Otherwise Sigma Would Independently Enter the Domestic Fittings Market

2316. McWane entered into the MDA with Sigma because McWane believed that Sigma would otherwise enter the Domestic Fittings market independently. (*Infra* ¶¶ 2317-2335).

Response To Finding No. 2316:

See General Responses 1 and 11, and responses to ¶¶ 2317-2335, *infra*. This proposed finding is misleading because McWane believed the MDA would have pro-competitive effects because it would expand the customer base for McWane because Sigma was able to reach and service customers that McWane could not. (RPF 572) Sigma had relationships with certain distributors and in certain geographic areas that McWane lacked. (RPF 573). See also RPF 572-584.

2317. Even before Star’s announced entry into the Domestic Fittings market, McWane viewed Sigma as being in a “much better position” to enter the Domestic Fittings market than Star, in part because of its existing OEM relationships (with ACIPCO and U.S. Pipe) and its access to financial backing. (CX 0067 at 003 (May 2009 McWane presentation on McWane’s potential strategic reactions to potential new entry in the Domestic Fittings market); Tatman, Tr. 618-619).

Response To Finding No. 2317:

This finding misconstrues the testimony of Mr. Tatman. Mr. Tatman, on repeated occasions during the testimony in question, testified that the presentation Complaint Counsel relies upon was crafted by Mr. Tatman to “spark a discussion,” and did not necessarily reflect his beliefs at the time. (Tatman, Tr. 618-623).

2318. McWane viewed Sigma’s entry into the Domestic Fittings market to be more likely after Star announced its entry at the June 15, 2009 AWWA conference. (CX 0076 at 008 (“Sigma is now in a position where they will feel the need to react. . . . Rybacki said at AWWA their program would announce[] in 4 weeks”); CX 2479 (McCullough, Dep. at 103-104) (explaining that McWane believed Sigma would announce entry plans within four weeks of AWWA)).

Response To Finding No. 2318:

While not conceding that Sigma could have actually entered the market or that McWane actually believed that Sigma was in a commercial or financial position to enter the market, McWane believes the cited evidence is entirely speculative in nature does not support the conclusions the FTC seeks to draw in no. 2316 above.

2319. After Star announced its intended entry into Domestic Fittings, McWane believed that Sigma would either enter on its own as Star had done, or push to be set up as a master distributor of McWane's Domestic Fittings. (CX 2479 (McCullough, Dep. at 100)).

Response To Finding No. 2319:

While not conceding that Sigma could have actually entered the market or that McWane actually believed that Sigma was in a commercial or financial position to enter the market, McWane believes the cited evidence is entirely speculative in nature does not support the conclusions the FTC seeks to draw in no. 2316 above.

2320. McWane believed that Sigma wanted to enter the Domestic Fittings market. (Response to RFA at ¶ 34 (McWane "believed Sigma wished to obtain access to domestically-manufactured fittings after ARRA's enactment, either by manufacturing, through sourcing, or pursuant to a purchasing arrangement with McWane"); (CX 1179 at 002 (Tatman October 2009 Q&A document circulated to McWane's sales force: "in the absence of the MDA with TylerUnion, Sigma was going to develop their own domestic sourcing options to the extent they could"); Tatman, Tr. at 810 (confirming that he communicated Sigma's imminent entry to his sales staff)).

Response To Finding No. 2320:

While not conceding that Sigma could have actually entered the market or that McWane actually believed that Sigma was in a commercial or financial position to enter the market, McWane believes the cited evidence is entirely speculative in nature does not support the conclusions the FTC seeks to draw in no. 2316 above.

2321. The likelihood of Sigma entering the Domestic Fittings market was part of the discussion within McWane as it considered whether to sell Domestic Fittings to Sigma. (CX 2485 (Walton, Dep. at 72); CX 0329 at 001 (McWane email stating that Mr. Tatman's main intent in discussion with Mr. Rona of Sigma was "to flush out where SIGMA is in their

process of securing domestic production sources.”); Response to RFA at ¶ 35 (in deciding whether to sell Domestic Fittings to Sigma, McWane considered the possibility of Sigma entering the Domestic Fittings market by manufacturing its own Domestic Fittings or sourcing them from a third-party foundry)).

Response To Finding No. 2321:

While not conceding that Sigma could have actually entered the market or that McWane actually believed that Sigma was in a commercial or financial position to enter the market, McWane believes the cited evidence is entirely speculative in nature does not support the conclusions the FTC seeks to draw in no. 2316 above.

2322. Mr. Walton, McWane’s former senior vice president, admitted that there “probably were” discussions within McWane that Sigma was more likely to enter the Domestic Fittings market after Star announced its entry. (CX 2485 (Walton, Dep. 60-61) (explaining that Star’s announcement “stimulated discussions” regarding selling Domestic Fittings to Star); CX 0074 at 002 (June 24, 2009 email from Mr. McCullough to Mr. Tatman and Mr. Walton seeking Mr. Tatman’s thoughts on “Sigma’s reaction to [Star’s entry] and their future positioning, develop their own line as Star does? Align with McWane? Establish buy/sell relationship with Star that is better than our last offer?”)).

Response To Finding No. 2322:

While not conceding that Sigma could have actually entered the market or that McWane actually believed that Sigma was in a commercial or financial position to enter the market, McWane believes the cited evidence is entirely speculative in nature does not support the conclusions the FTC seeks to draw in no. 2316 above.

2323. For example, in a June 24, 2009 email, Mr. McCullough asked for Mr. Tatman’s opinion on Sigma’s likely reaction to Star’s announced entry into the Domestic Fittings market:

Sigma’s reaction to [Star’s entry] and their future positioning,
develop their own line as Star does? Align with McWane?
Establish buy/sell relationship with Star that is better than our last
offer?

(CX 0074 at 002).

Response To Finding No. 2323:

This finding is misleading because there is no indication that McWane was doing anything other than monitoring Sigma's position. Mr. Tatman replies in a later email that "I don't sense that Sigma is yet fully committed...." (CX 0074 at 001).

2324. Mr. Tatman believed that there was a "probability" that Sigma would enter the Domestic Fittings market because Sigma communicated that intention to McWane. (CX 2483 (Tatman, IHT at 175) ("[Y]ou've got SIGMA coming in saying that they're going to do something, and it's a little bit of chest-beating. I think SIGMA even sent us some information about it's not good for the Industry with over capacity if that happens. They say that they're coming in. We don't know if they're really doing it. So it's a probability. Is what they're saying true? Are they going to execute on that? Yes or no, I don't know.")).

Response To Finding No. 2324:

While not conceding that Sigma could have actually entered the market or that McWane actually believed that Sigma was in a commercial or financial position to enter the market, McWane believes the cited evidence is entirely speculative in nature does not support the conclusions the FTC seeks to draw in no. 2316 above. McWane does point out that the quoted testimony is completely inconclusive in nature.

2325. Mr. Tatman observed that McWane selling Domestic Fittings to Sigma would "[e]liminate the probability they will secure another domestic source option." (CX 0067 at 003 (Tatman May 26, 2009 strategy presentation also noting that McWane would "[r]etain the full margin for Domestic product within McWane" if McWane chose not to supply Sigma).

Response To Finding No. 2325:

This finding is misleading because Mr. Tatman testified that the presentation Complaint Counsel relies upon was crafted by Mr. Tatman to "spark a discussion," and did not necessarily reflect his beliefs at the time. (Tatman, Tr. 618-623).

2326. Mr. Tatman further believed that McWane selling Domestic Fittings to Sigma was a “greater financial benefit” than allowing Sigma to independently enter the Domestic Fittings market:

[if Sigma is] truly committed to make the investment level required to be a viable competitor regardless of our actions, then producing for [Sigma] is probably of greater financial benefit to our business then having them source elsewhere.

(CX 0076 at 008 (Tatman June 29, 2009 strategy presentation)).

Response To Finding No. 2326:

This finding is misleading because Mr. Tatman testified that the presentation Complaint Counsel relies upon was crafted by Mr. Tatman as “brainstorming slides” that were meant to “spark a discussion.” (Tatman, Tr. 654). Moreover, the cited testimony does not, on its face, support the strong conclusion in the proposed finding of fact.

2327. Mr. Tatman noted on July 27, 2009, “the correct decision really depends on whether on their own Sigma truly does have the resolve and financial backing to make a long term strategic commitment to being a supplier of domestic products.” (CX 0465 at 010).

Response To Finding No. 2327:

While not conceding that Sigma could have actually entered the market or that McWane actually believed that Sigma was in a commercial or financial position to enter the market, McWane believes the cited evidence is entirely speculative in nature does not support the conclusions the FTC seeks to draw in no. 2316 above.

2328. After MDA negotiations were restarted in July 2009, Mr. Pais had observed that McWane’s “assessment that Star and hence SIGMA may indeed succeed with domestic production, after all, may be prompting them to relent and work with us.” (CX 0241 at 001 (Pais email, July 13, 2009)).

Response To Finding No. 2328:

While not conceding that Sigma could have actually entered the market or that McWane actually believed that Sigma was in a commercial or financial position to enter the market,

McWane believes the cited evidence is entirely speculative in nature does not support the conclusions the FTC seeks to draw in no. 2316 above.

2329. Mr. Pais believed that McWane was more amenable to offering Sigma a buy-sell agreement in part because McWane knew that Sigma had brought a Domestic Fitting to the June 2009 AWWA show in San Diego, and because Star had announced its Domestic Fittings plans at the show as well. (Pais, Tr. 1770-1771; CX 0241 at 001).

Response To Finding No. 2329:

This finding misconstrues Mr. Pais’ testimony. Mr. Pais testified that “it was just my speculation that McWane could consider that...” (Pais, Tr. 1771).

2330. On July 13, 2009, Mr. Pais informed Mr. McGivern that he believed McWane would be motivated to enter an agreement with Sigma to avoid having Sigma add new capacity to the Domestic Fittings market:

[T]he high profile publicity by Star as to their domestic plans and our own (low key) plans may have finally convinced [McWane] that addition of new capacity isn’t good for them or the industry It’s wait and see . . . one step at a time, chess play”

(CX 1018 at 001; Pais, Tr. 1774 (“[I]t was just my assessment that all these factors would finally sort of persuade them to come up with an agreement to accommodate us.”)).

Response To Finding No. 2330:

While not conceding that Sigma could have actually entered the market or that McWane actually believed that Sigma was in a commercial or financial position to enter the market, McWane believes the cited evidence is entirely speculative in nature does not support the conclusions the FTC seeks to draw in no. 2316 above.

2331. On July 16, 2009, in response to an update of Star’s progress in entering the Domestic Fittings market, Mr. Pais wrote to Sigma’s M20 team that Star’s very public entry strategy “may induce McWane to think that they may have long term competition even in the BA segment and may create some unique market realignment and hence opportunities for us.” (CX 1505 at 001; Pais, Tr. 1779-1780).

Response To Finding No. 2331:

While not conceding that Sigma could have actually entered the market or that McWane actually believed that Sigma was in a commercial or financial position to enter the market, McWane believes the cited evidence is entirely speculative in nature does not support the conclusions the FTC seeks to draw in no. 2316 above.

2332. Both Mr. Tatman and Mr. McCullough viewed the MDA as an “insurance policy” against potential Sigma entry, and it was on this basis that Mr. McCullough approved McWane’s proposed MDA terms. (CX 1184 at 001 (Tatman August 18 email); CX 2353 at 004 (McCullough statements at August 20 meeting); CX 2484 (Tatman, Dep. at 211) (admitting that he communicated that the MDA was an “insurance policy” against Sigma’s domestic entry)).

Response To Finding No. 2332:

The proposed finding is misleading and not supported by the evidence cited. CX 1184 expressly indicates that Tatman does not believe that Sigma has a “strong alternate path” of independent domestic production available to it as a practical matter and therefore, the exhibit indicates on its face, that issue is not the one driving the MDA and is not worth “throwing too much \$” at. CX 2353 does not support a finding of Mr. McCullough’s basis for supporting and approving the MDA. At trial, Mr. Tatman testified that his use of the term “insurance policy” was “colorful language” he used to argue in favor of a short term period for the MDA and was one reason for the MDA in addition to other reasons. (Tatman, Tr. 783-788).

2333. As Mr. Tatman had observed in his May 26, 2009 presentation, one of the two key factors in considering whether to sell to Sigma was “[h]ow legitimate of a risk is there” of Sigma “successfully introducing a Domestic product line.” (CX 0067 at 004, 002; Tatman, Tr. 627-629; *supra* ¶ 2195).

Response To Finding No. 2333:

This finding is misleading because Mr. Tatman testified that the presentation Complaint Counsel relies upon was crafted by Mr. Tatman to “spark a discussion,” and did not necessarily

reflect his beliefs at the time. (Tatman, Tr. 618-623). This finding is also inaccurate because the cited testimony of Mr. Tatman above does not support the proposed finding.

2334. By August 2009, Mr. Tatman had some reservations about the likelihood of Sigma entering the Domestic Fittings market, but Mr. McCullough believed “what Star is able to do, Sigma is able to do, also.” (CX 2479 (McCullough, Dep. 131-132); CX 1184).

Response To Finding No. 2334:

The proposed finding is misleading, incomplete and completely unsupported by the evidence cited in suggesting that Mr. McCullough believed that Sigma’s entrance was likely. Mr. McCullough’s cited testimony actually states that he was neutral on the subject: “If Rick’s [Tatman’s] position was that he thought that it [Sigma’s entry into the market] was highly unlikely, I was probably more neutral, simply because, again, what Star is able to do, Sigma is able to do, also.” (CX 2479 (McCullough Dep. 131-132)).

2335. In October 2009, after reaching agreement with Sigma on the MDA, Mr. Tatman admitted in a Q&A document circulated to his sales force that “the reality of the situation is that in the absence of the MDA with [McWane], Sigma was going to develop their own domestic sourcing options to the extent they could.” (CX 1179 at 002; Tatman, Tr. 807, 810).

Response To Finding No. 2335:

This finding mischaracterizes the testimony of Mr. Tatman because Mr. Tatman testified that he was giving a “politically correct communication” to his sales force that did not “explain to them the higher business reasons why you do something.” (Tatman, Tr. 808-810).

11.6 Sigma and McWane Negotiated the MDA to Supplant Sigma’s Independent Entry

2336. In late June and early July 2009, after Star announced its entry into the Domestic Fittings market, McWane and Sigma resumed discussions regarding a Domestic Fittings supply agreement. (Tatman, Tr. 747-749).

Response To Finding No. 2336:

This finding is misleading because Mr. Rona testified that he approached Mr. Walton of McWane with the idea of resuming discussions regarding Sigma's desire to be supplied with domestically produced Fittings -- it was not an agenda McWane actively pursued. (RPF ¶ 561)

2337. Between June 30 and July 2, 2009, Mr. Tatman suggested to Mr. Rona that he make a counterproposal to McWane's June 5, 2009 Domestic Fittings supply offer. Mr. Tatman also communicated that McWane would require two conditions: First, McWane would have to be Sigma's exclusive supplier of Domestic Fittings; and second, the Domestic Fittings would have to be branded Tyler/Union, not Sigma (*i.e.*, it would not be a private-label arrangement). (CX 0329 at 001 (Tatman email to McCullough and Walton reporting on conversation); Tatman, Tr. 747-748).

Response To Finding No. 2337:

This finding is misleading because Mr. Tatman testified that the purpose of the email was not a business negotiation but "[w]ith the purpose of flushing out where Sigma was in their process of securing domestic sources." (Tatman, Tr. 748). Based on the response from Mr. Rona, Mr. Tatman concluded that Sigma did "not have a strong hand to play." (*Id.*)

2338. On July 2, 2009, Mr. Tatman reported to Mr. McCullough and Mr. Walton regarding his conversation with Mr. Rona of Sigma:

Mitchell Rona called and we had a fairly lengthy discussion. I can fill in the details if needed but the takeaway is that Mitchell/Sigma will come back to us with a counter proposal under the conditions that we would be their exclusive supplier of Domestic fittings and the product would be branded Tyler/Union not Sigma. My main intent was to flush out where Sigma is in their process of securing Domestic production sources and I was somewhat surprised by his non-resistance to those two conditions. If Sigma's counter does comply with those two conditions it would be pretty good indication that at present they don't have a very strong hand to play.

(CX 0329 at 001; Tatman, Tr. 747).

Response To Finding No. 2338:

This finding is misleading because Mr. Tatman testified that the purpose of the email was not business negotiation but “[w]ith the purpose of flushing out where Sigma was in their process of securing domestic sources.” (Tatman, Tr. 748). Based on the response from Mr. Rona, Mr. Tatman concluded that Sigma did “not have a strong hand to play.” (*Id.*)

2339. On July 14, 2009, Mr. Rona transmitted Sigma’s counterproposal to Mr. Walton and Mr. Tatman, and noted, “As promised please find a simple but straight forward proposal from Sigma for master distribution of your domestic fittings. I hope McWane will find this offer favorable and respond with further discussions about how we can move this forward.” (CX 0243 at 001; Rona, Tr. 1560-1561).

Response To Finding No. 2339:

McWane has no response to this finding.

2340. Sigma’s counterproposal consisted of a one-page term sheet titled “Master Distributor Agreement for AWWA domestic pipe fittings” and described an agreement under which “Sigma would have access to Tyler, Union, and Clow branded domestically produced fittings for a minimum of 3 years beginning August 1st 2009.” (CX 0243 at 002; Rona, Tr. 1560-1561). The counterproposal specified price multipliers at which McWane would sell the Domestic Fittings to Sigma, and included an exclusivity provision that provided as follows:

Sigma in turn *will not seek any other sources either directly or through 3rd party for the production or distribution of domestic fittings* with the following exceptions -- Sigma shall have the right to produce or purchase fittings which are outside the McWane domestic range or which cannot be provided by McWane within a reasonable and customary time frame.

(CX 0243 at 002 (emphasis added); Rona, Tr. 1560-1561).

Response To Finding No. 2340:

While McWane concedes that the referenced document contains these statements, McWane disputes that the document referenced an “exclusivity provision” or that the described restriction was included in the MDA.

2341. In a July 21, 2009 email to McWane’s CFO Mr. Nowlin, Mr. Tatman described the ongoing discussions with Sigma as a “choice of evils”:

We are having some discussions with Sigma as to providing them with Domestic fittings as an alternative to them securing their own source option such as Star has done.

This is certainly a choice of evils as having more Domestic suppliers doesn't really increase the size of the pie. Our ultimate decision will be based upon:

- If we say No, would Sigma really spend the \$ required to execute a domestic product option
- Would providing Sigma with access to Tyler/Union domestic [product] help us either better protect our brand/share against Star or promote more stable market prices

(CX 0729 at 001 (emphasis added); Tatman, Tr. 754-756; CX 2481 (Nowlin, Dep. at 138-139) (calling the idea of having more domestic suppliers does not really increase the size of the pie “a fairly obvious statement.”)).

Response To Finding No. 2341:

While McWane concedes that the language from the referenced exhibits is accurately quoted, McWane states that the fact that the “size of the pie” is not increased does not mean that McWane would not make more sales of domestic fittings as a result of the MDA and keep it volume up to save its plants. McWane entered the MDA believing it would have pro-competitive effects because it would expand the customer base for McWane because Sigma was able to reach and service customers that McWane could not. (RPFF ¶ 572) Sigma had relationships with certain distributors and in certain geographic areas that McWane lacked. (RPFF ¶ 573) The referenced exhibits also contradicts Complaint Counsel’s many proposed findings of fact above to the effect that McWane was certain that Sigma might actually enter the Domestic segment.

2342. In the July 27, 2009 draft presentation sent to Messrs. McCullough and Walton, Mr. Tatman summarized “Recent Sigma updates,” which included, among others, the fact that Sigma recognizes the market issues that can occur from over capacity in the market:

Sigma recognizes the market issues that can result from over capacity.

Sigma's preference is to work something out with McWane but we are committed and have the financial backing to move forward either way.

(CX 0568 at 001, 003; Tatman, Tr. 759-761).

Response To Finding No. 2342:

This proposed finding is admittedly quoting from a "draft" document and misconstrues the testimony of Mr. Tatman. Mr. Tatman testified he didn't "know how recent" the updates from Sigma were in the draft presentation on which Complaint Counsel relies, and that Mr. Tatman viewed Sigma's statement about moving forward with domestic production absent the MDA was "probably posturing." (Tatman, Tr. 760-761). There are multiple other topics included in the referenced exhibit as well.

2343. In the July 27, 2009 draft presentation, Mr. Tatman also listed "other inputs," including the fact that Sigma was now aware of McWane's intent to require Sigma to enforce its pending Exclusive Dealing Policy through the MDA:

Mitchell [Rona] now understands that we will most likely require "all" distributor customers to be exclusive to the Tyler/Union brand for Domestic fittings. That seemed to catch him by surprise. He said he understood and would discuss internally.

...

My sense is they don't yet have a cost-competitive option for the below 24". The DISA product quote from last year is probably a concern for them as to our cost position.

(CX 0568 at 003; Tatman, Tr. 761-762).

Response To Finding No. 2343:

This proposed findings is misleading as the cited exhibit and testimony does not support Complaint Counsel's argumentative leap regarding "McWane's intent to require Sigma to enforce its pending Exclusive Dealing Policy."

2344. In an updated presentation emailed to Mr. McCullough and Mr. Walton and titled "Sigma Domestic Review Session - 7/28/09," Mr. Tatman recommended selling McWane's

Domestic Fittings to Sigma on an exclusive basis at a 20% discount off published multipliers. (CX 0170 at 010; CX 0122 at 001 (draft McWane counterproposal to supply Sigma at a 20% discount off published multipliers, with Sigma to procure exclusively from McWane and only sell to customers that are in an exclusive supply relationship with McWane Domestic Fittings)).

Response To Finding No. 2344:

McWane notes some of the referenced exhibits are clearly drafts and there is no cited testimony indicating that the other is not a draft. Moreover, McWane notes that the MDA itself is the best and only relevant source for what McWane and Sigma agreed to and not some draft presentation, email or draft letter. Otherwise, the documents speak for themselves, and McWane has no specific response.

2345. On July 29, 2009, McWane formally responded to Sigma's July 14, 2009 counterproposal for the sale of McWane's Domestic Fittings to Sigma. McWane's offer letter:

- Offered to sell Domestic Fittings to Sigma at a 20% discount off published multipliers, rather than its initial offer of 5%;
- Included an exclusivity requirement and the prohibition on sales to Distributors who are not in an exclusive supply relationship with McWane;
- Required Sigma to agree to sell at McWane's suggested published price levels; and
- Had a term of three years unless earlier terminated by agreement or for cause.

(CX 1805 at 002; CX 0565 at 001, 002).

Response To Finding No. 2345:

McWane notes that the MDA itself is the best and only relevant source for what McWane and Sigma agreed to and not some offer letter. McWane notes that some of the terms referenced above (e.g., the three year term) were not incorporated into the final MDA and or were substantially different than as written above (e.g., suggested published price levels). Otherwise, the documents speak for themselves.

2346. On August 4, 2009, Mr. Rona responded to Mr. Tatman's July 29, 2009 offer letter by proposing a price compromise and objecting to the provision that required Sigma to enforce McWane domestic exclusivity on Distributors because it was "vague and worrisome!" (CX 0461 at 001, 002)).

Response To Finding No. 2346:

McWane notes that the MDA itself is the best and only relevant source for what McWane and Sigma agreed to and not some offer letter. McWane notes that the exhibit referenced above is only a draft for discussion purposes and does not reflect any actual discussion or agreement. The points referenced therein were not necessarily incorporated into the final MDA and or were substantially different than as written. Otherwise, the documents speak for themselves.

2347. In mid-July 2009, Sigma and McWane had considered a three year term for the MDA. (CX 0566 at 001-002 ("SIGMA would have access to Tyler, Union, and Clow branded domestically produced fittings for a minimum of three years beginning August 1st, 2009"); CX 0122 at 001 (draft letter identifying McWane's core terms to include 3 year term of agreement); CX 2479 (McCullough, Dep. at 113, 124-125)).

Response To Finding No. 2347:

While McWane admits that a possible three year term was discussed among McWane and Sigma, McWane notes that the MDA itself is the best and only relevant source for what McWane and Sigma agreed to and not some offer email, letter or discussion. The three year terms was in fact rejected, and the parties agreed that the MDA could be terminated at any time with 180 days notice. (Rona, Tr. 1700) Finally, the MDA was ultimately in effect for less than a year. (Rona, Tr. 1704).

2348. By August 17, 2009, however, Mr. Tatman recommended "not firmly locking ourselves into a long term agreement," and only pursuing a one year term. (CX 2479 (McCullough, Dep. at 133-134); CX 1184 at 002).

Response To Finding No. 2348:

McWane notes that the MDA itself is the best and only relevant source for what McWane and Sigma agreed to and not some other earlier discussion or email. The three year terms was in

fact rejected, and the parties agreed that the MDA could be terminated at any time with 180 days notice. (Rona, Tr. 1700) Finally, the MDA was ultimately in effect for less than a year. (Rona, Tr. 1704).

2349. On August 18, 2009, Mr. Tatman sent an email to Mr. McCullough and Mr. Walton with an attached presentation that provided an update on the status of negotiations with Sigma. Mr. Tatman was “leaning towards not throwing too much money” at what he referred to as an “insurance policy” against Sigma’s entry, noting that he is “not picking up any strong sense that they have a strong alternate path at this point that they’d be willing to invest significant \$ into.” (CX 1184 at 001; Tatman, Tr. 771-772, 783-785).

Response To Finding No. 2349:

This finding is misleading because Mr. Tatman testified that his use of the term “insurance policy” was merely him being “colorful with my language,” and that he didn’t “really think we ought to do a three-year firm agreement on here. There’s too many unknowns at this point in time. We don’t really know what’s going on. Let’s do something shorter, and we decided on an agreement that had a six-month termination clause in it.” (Tatman, Tr. 784-785). The memo also contradicts Complaint Counsel’s earlier proposed findings to the effect that McWane was certain Sigma would enter the domestic segment.

2350. In his August 18, 2009 cover email to his presentation, Mr. Tatman reported that he and Mr. Rona were near final agreement, with the discount percentage and duration of the agreement being the final issues. (CX 1184 at 001-002; Tatman, Tr. 771-772).

Response To Finding No. 2350:

McWane notes that the MDA itself is the best and only relevant source for what McWane and Sigma agreed to and not some earlier document discussing negotiations. Otherwise, McWane objects to Complaint Counsel’s characterization of the exhibits and notes that the referenced exhibits speaks for itself.

2351. In Mr. Tatman’s August 18, 2009 presentation, Mr. Tatman reported on a “pro forma” analysis that had concluded that McWane would lose approximately 5% of gross profit margin by selling Domestic Fittings to Sigma under the MDA. (CX 1184 at 003; Tatman, Tr. 778).

Response To Finding No. 2351:

This proposed finding is misleading and inaccurate. Mr. Tatman testified at trial that the pro forma was simplistic and did not include provision for idle plant costs, inventory reduction or “anything else.” (Tatman, Tr. 778).

2352. Mr. Tatman’s August 18, 2009 presentation also provided an update on two conversations Mr. Tatman had with Mr. Rona after Sigma received McWane’s July 29, 2009 offer letter:

- Sigma has now agreed in principle to our requirement for Distributor exclusivity . . .
- Sigma has agreed in principle to selling at Published pricing . . .
- Sigma has agreed to be exclusive to [McWane] for all sales to Distributors . . .
- I sense our distributor exclusivity requirement might have rocked them back a bit on what would be required to enter this market on their own

(CX 1184 at 004; Tatman, Tr. 778-783).

Response To Finding No. 2352:

McWane notes that the MDA itself is the best and only relevant source for what McWane and Sigma agreed to and not some earlier document discussing negotiations. Otherwise, McWane objects to Complaint Counsel’s characterization of the exhibits, notes that other clarifying information in the document is not quote here and notes that the referenced exhibit speaks for itself.

2353. Mr. Tatman’s August 18, 2009 presentation also made the following recommendations to Sigma’s August 3, 2009 proposal:

- Counter Sigma’s Aug 3rd response to our July 29th proposal with the following general elements:
 - Master Distributor relationship for McWane branded products

- Retain 20% discount across the entire product line (3”-48”);
- Retain Brand exclusivity requirement for any of Sigma’s distribution customers;
- Exclusive supply for all (3”-48”) items sold into “non OEM customers,” defined as a foundry manufacture of pipe and/or pipe and fittings;
- State that the recommended annual rebate is 8%; and
- 1-year term with automatic 1-year extensions unless notification provided within 120 days of expiration date.

(CX 1184 at 002).

Response To Finding No. 2353:

McWane notes that the MDA itself is the best and only relevant source for what McWane and Sigma agreed to and not some earlier document discussing negotiations. Otherwise, McWane objects to Complaint Counsel’s characterization of the exhibits, notes that other clarifying information in the document is not quote here and notes that the referenced exhibit speaks for itself.

2354. At an August 20, 2009 meeting attended by Messrs. McCullough, Walton, Tatman, and Jansen, Mr. McCullough decided that McWane should sell Domestic Fittings to Sigma as an “insurance policy” against another Domestic Fittings entrant and “to continue to put pressure on Star.” Mr. McCullough then approved Mr. Tatman’s recommended response. (CX 2353 at 001, 004 (Walton meeting notes recording McCullough statements and approval); CX 2485 (Walton, Dep. at 37-43) (reviewing notes)).

Response To Finding No. 2354:

This proposed finding is misleading, overstated and is not supported by the cited evidence. Furthermore, the findings draws unsupported conclusions. More crucially, in the cited testimony, Mr. Walton specifically states that he does not believe the notes are a completely accurate description of the meeting conversation. (Walton, Dep. at 40-41).

2355. The next day, on August 21, 2009, Mr. Tatman sent Mr. McCullough a modified “recommendation” slide at Mr. McCullough’s request for forwarding to Mr. Page. (CX 0117 at 001). The modified recommendation slide contained an additional proposed term – that Sigma’s resale market pricing should be within 98% of published pricing on a weighted average basis – and contained a recommendation that McWane “remain very firm” on the proposed terms unless “we uncover new evidence as to Sigma truly having an executable competitive option.” (CX 0117 at 002).

Response To Finding No. 2355:

McWane notes that the MDA itself is the best and only relevant source for what McWane and Sigma agreed to and not some earlier document discussing negotiations. Otherwise, McWane objects to Complaint Counsel’s characterization of the exhibits (e.g., “an additional proposed term”) and notes that the referenced exhibits speaks for itself. McWane also notes that the referenced exhibits contradicts Complaint Counsel’s earlier proposed findings to the effect that McWane was certain the Sigma was going to enter the domestic segment.

2356. On August 24, 2009, Mr. Tatman sent an MDA letter of intent to Mr. Rona. (Rona, Tr. 1571-1572; CX 1806 at 001; Pais, Tr. 1787 (confirming that Sigma had an agreement in principle with McWane based on the letter of intent)). McWane’s letter of intent followed most of McWane’s July 29, 2009 proposal, and had the following “core agreement elements:”

- “McWane shall be Sigma’s exclusive source of supply;”
- Sigma may only sell McWane’s Domestic Fittings to Distributors that are “in an exclusive relationship with McWane branded Product for all of their domestic requirements where McWane branded Products are available;”
- McWane will sell its Domestic Fittings to Sigma at an effective 20% discount from McWane’s published pricing;
- Disputes will be handled through non-binding dispute resolution process; and
- The agreement will have a 1 year term, with automatic 1 year extension, unless either party provides 90 days notice prior to the anniversary date or McWane has cause.

(CX 1806 at 002).

Response To Finding No. 2356:

McWane notes that the MDA itself is the best and only relevant source for what McWane and Sigma agreed to and not some earlier document discussing negotiations. Otherwise, McWane objects to Complaint Counsel's characterization of the exhibits (e.g., "letter of intent") and negotiations and notes that the referenced exhibit speaks for itself. McWane specifically notes that the exhibit specifically contradicts Complaint Counsel's proposed findings to the effect that the parties' agreement prohibited Sigma from continuing to develop an independent source of domestic supply.

2357. Additionally, in order to for Sigma to "maintain its Master Distributorship," McWane's August 24, 2009 letter of intent stated that Sigma was "expected" to:

- Support any pending or existing Buy American legislation;
- "Independently adhere" to McWane's published pricing, and maintain prices at or above 98% of McWane's published pricing on a weighted average basis;
- Provide significant Sigma customers with an appropriate rebate program, with the "expectation is an 8% annual rebate for customers with annual purchases of greater than \$100,000;" and
- "Not introduce your own domestic product while the Master Distributorship is active."

(CX 1806 at 003 (also adding payment terms, minimum order requirements, and other general agreement terms)).

Response To Finding No. 2357:

McWane notes that the MDA itself is the best and only relevant source for what McWane and Sigma agreed to and not some earlier document discussing negotiations. Otherwise, McWane objects to Complaint Counsel's characterization of the exhibit and negotiations and notes that the referenced exhibit speaks for itself. McWane specifically notes that the exhibit specifically contradicts Complaint Counsel's proposed findings to the effect that the parties'

agreement prohibited Sigma from continuing to develop an independent source of domestic supply.

2358. Later on August 24, 2009, Mr. Rona expressed his concern to Mr. Tatman regarding the short duration of the MDA and the 20% pricing term. Because Mr. Tatman did not perceive Sigma as currently having viable alternative source of supply, Mr. Tatman did not see any “reason for any further concessions.” (CX 2354; CX 2485 (Walton, Dep. at 86-87) (discussing CX 2354)).

Response To Finding No. 2358:

McWane notes that the MDA itself is the best and only relevant source for what McWane and Sigma agreed to and not some earlier document discussing negotiations. Otherwise, McWane objects to Complaint Counsel’s characterization of the exhibit and negotiations and notes that the referenced exhibit speaks for itself. McWane specifically notes that the exhibit specifically contradicts Complaint Counsel’s proposed findings to the effect that McWane was certain that Sigma was going to enter the domestic segment. (CX 2354).

2359. The August 24, 2009 letter of intent represented an agreement in principle that the parties then had to finalize and document in a formal agreement. (Pais, Tr. 1788; CX 1806).

Response To Finding No. 2359:

This proposed finding is misleading insofar as it suggests that the parties negotiations on primary terms was complete. McWane notes that the MDA itself is the best and only relevant source for what McWane and Sigma agreed to and not some earlier document discussing negotiations. Otherwise, McWane objects to Complaint Counsel’s characterization of the exhibit and negotiations and notes that the referenced exhibit speaks for itself. McWane specifically notes that the exhibit specifically contradicts Complaint Counsel’s proposed findings to the effect that the parties’ agreement prohibited Sigma from continuing to develop an independent source of domestic supply.

2360. By August 27, 2009, Mr. Pais believed that Sigma and McWane were close to an agreement. (Pais, Tr. 1792-1793; CX 0923 at 002 (draft internal Sigma update on the

negotiations). On August 28, 2009, Mr. Pais transmitted comments on the letter of intent to Mr. McCullough, who forwarded them to Mr. Tatman. (CX 0486 at 001).

Response To Finding No. 2360:

McWane notes that the MDA itself is the best and only relevant source for what McWane and Sigma agreed to and not some earlier document discussing negotiations. Otherwise, McWane objects to Complaint Counsel's characterization of the exhibit and negotiations and notes that the referenced exhibits speak for themselves. McWane specifically notes that the exhibit specifically contradicts Complaint Counsel's earlier proposed findings to the effect that the primary negotiations were already concluded and that McWane notes that the MDA itself is the best and only relevant source for what McWane and Sigma agreed to and not some earlier document discussing negotiations. Otherwise, McWane objects to Complaint Counsel's characterization of the exhibit and negotiations and notes that the referenced exhibit speaks for itself. McWane specifically notes that the exhibit specifically contradicts Complaint Counsel's proposed findings to the effect that the parties' agreement prohibited Sigma from continuing to develop an independent source of domestic supply.the parties' agreement prohibited Sigma from continuing to develop an independent source of domestic supply.

2361. Mr. Rona and Mr. Tatman continued to negotiate the MDA terms, and by August 31, 2009, they had exchanged comments on the terms outlined in the August 24 letter of intent. (CX 1046 at 001-002 (noting "core agreement elements" including (a)"McWane shall be Sigma's exclusive source of supply," (b) "Sigma may only sell McWane Product to [Distributors] that are in an exclusive relationship with McWane"))).

Response To Finding No. 2361:

McWane notes that the MDA itself is the best and only relevant source for what McWane and Sigma agreed to and not some earlier document discussing negotiations. Otherwise, McWane objects to Complaint Counsel's characterization of the exhibit and negotiations and notes that the referenced exhibit speaks for itself. McWane specifically notes that the exhibit

specifically contradicts Complaint Counsel's proposed findings to the effect that the parties' agreement prohibited Sigma from continuing to develop an independent source of domestic supply.

2362. As of August 31, 2009, a formal MDA contract was drafted and near completion. (CX 1046 at 001).

Response To Finding No. 2362:

The cited exhibit does not support the proposed finding that a "formal MDA contract" was "near completion" or that it resembled the final MDA or that it was complete in the next few days. The formal MDA continued to be negotiated and was not signed until mid-September.

2363. Sigma proceeded with the MDA despite its view that McWane was taking an unduly aggressive negotiating position. After reviewing the draft agreement, Mr. Bhattacharji wrote on September 1, 2009, "I am deeply disturbed by some of the clauses which seem such an over reach and written by people who are showing total disinterest in helping us and themselves to improve the market thru this move." (CX 2005 at 001; CX 2523 (Bhattacharji, Dep. at 228-230) ("I had a concern, and I met with my lawyer, he gave me advice.") (witness instructed not to answer further)).

Response To Finding No. 2363:

McWane notes that the MDA itself is the best and only relevant source for what McWane and Sigma agreed to and not some earlier document discussing negotiations. Otherwise, McWane objects to Complaint Counsel's characterization of the exhibit and negotiations and notes that the referenced exhibit speaks for itself. Moreover, it is completely unclear which "clauses" Mr. Bhattacharji refers to, and Mr. Bhattacharji's meditations on the agreement are completely irrelevant in any event.

2364. Sigma also proceeded with the MDA in the face of concerns regarding the legality of certain terms regarding the maintenance of prices at 98% of published rates and the joint implementation of McWane's Exclusive Dealing Policy, which Sigma understood would be enforcing a "blacklist" of any Distributors that did business with Star. (CX 1045 at 001; CX 2523 (Bhattacharji, Dep. at 232-237) (basing his understanding of McWane's Exclusive Dealing Policy and its enforcement of a "blacklist" on Sigma's MDA negotiations with McWane)).

Response To Finding No. 2364:

The proposed finding, as characterized by Complaint Counsel, is not supported by the cited evidence. Additionally, there is no reference to an “Exclusive Dealing Policy” in the cited document. McWane notes that the MDA itself is the best and only relevant source for what McWane and Sigma agreed to and not some earlier document discussing negotiations.

Otherwise, McWane objects to Complaint Counsel’s characterization of the exhibit and negotiations and notes that the referenced exhibit speaks for itself.

2365. As of September 7, 2009, Mr. Pais expected the MDA to be finalized by the end of that week – September 11, 2009. (Pais, Tr. 1794-1795; CX 0269 at 003 (“We should be able to fully launch this MDA plan to the market/SST by week’s end . . . by 9/11/09 -- of course, a historic day!”)).

Response To Finding No. 2365:

McWane has no specific response to Mr. Pais’ predictions and expectations.

2366. Mr. McCullough made the final decision on behalf of McWane to enter into the MDA with Sigma. (CX 2482 (Page, Dep. at 61, 64) (testifying that Mr. Page was in favor of signing the MDA in part to address the concern that McWane was “the only available source for domestic fittings at that point in time.”)).

Response To Finding No. 2366:

McWane notes that the cited testimony indicates that it was ultimately Mr. McCullough’s decision to sell to Sigma but also notes that Mr. Page testified that the reasons for doing so were because “We needed the business. We needed the tons in the plant.” (CX 2482 (Page, Dep. at 61)). This cited testimony contradicts Complaint Counsel’s multiple proposed findings that McWane entered the MDA to exclude Sigma from the market.

11.7 McWane Would Have Earned Higher Margins Selling to Distributors Itself

2367. The MDA transferred profits from McWane to Sigma, because McWane would have earned higher margins selling Domestic Fittings to Distributors than it earned selling them to Sigma. (*Infra* ¶¶ 2368-2371).

Response To Finding No. 2367:

See General Responses 1 and 11, and responses to ¶¶ 2368-2371, *infra*. This proposed finding is misleading and entirely theoretical and speculative. For example, McWane believed the MDA would have pro-competitive effects because it would expand the customer base for McWane because Sigma was able to reach and service customers that McWane could not. (RPF 572) Sigma had relationships with certain distributors and in certain geographic areas that McWane lacked. (RPF 573). See also RPF ¶¶ 572-584. Thus, the MDA may have increased McWane's profits, and Complaint Counsel has offered no evidence to the contrary.

2368. McWane always considered that supplying Sigma with Domestic Fittings would transfer profit margin from McWane to Sigma. (CX 0067 at 003 (May 26, 2009 presentation noting that if McWane choose *not* to sell Domestic Fittings to Sigma, it would "Retain the full margin for Domestic product within McWane."); Tatman, Tr. 621, 623; *see also supra* ¶¶ 2191-2194).

Response To Finding No. 2368:

This response mischaracterizes Mr. Tatman's testimony because Mr. Tatman said that the presentation relied upon in the finding contained "notes to spark a discussion," and that Mr. Tatman was "teeing up bullet points to have a discussion to debate the pros and cons of why we would or would not [sell to Sigma]." (Tatman, Tr. 619, 621) Mr. Tatman further testified that the quoted language in the finding was "a topic for discussion." (*Id.*, 623). This proposed finding is also misleading and entirely theoretical and speculative. For example, McWane believed the MDA would have pro-competitive effects because it would expand the customer base for McWane because Sigma was able to reach and service customers that McWane could not. (RPF 572) Sigma had relationships with certain distributors and in certain geographic areas that McWane lacked. (RPF 573). See also RPF ¶¶ 572-584. Thus, the MDA may have increased McWane's profits, and Complaint Counsel has offered no evidence to the contrary.

2369. In an August 14, 2009 email to Mr. McCullough, Mr. Walton estimated that the Sigma MDA as then contemplated would result in \$1.68 million annual loss of gross profit for McWane. (CX 0111 at 001-002). Mr. Walton summarized the then-current state of the potential MDA as follows:

As I understand where we are at now we are going to give SIGMA a 20% discount off of our current published domestic multipliers. Since we would not pay them a 10% rebate on this sale, as we would our regular distribution customers, then we are only giving them 10% of our current gross margin for domestic fittings we sell that we will lose to them when they sell those domestic tons. So for every 1000 tons of domestic fitting that they sell, that WWF [McWane's Water Works Fittings business] would have sold, WWF will lose approximately \$350,000 in gross margin, this was calculated from WWF sales and gross July 09. It is probably a fair assumption that we will lose some nondomestic tons as well as domestic when SIGMA tries to package deals, etc. So if we assume that for every 1000 domestic tons they sell they will sell an additional 500 tons of non-domestic that would have been WWF's that would translate into a loss of approximately \$210,000 in gross margin for a combined total of approximately \$560,000 lost in gross margin. If I remember from one of our conference calls it was estimated that Sigma might sell around 3000 domestic tons per year, if so this would produce a gross profit loss for WWF of approximately \$1,680,000 per year from the current numbers.

(CX 0111 at 002; Tatman, Tr. 767-769).

Response To Finding No. 2369:

This finding is misleading and entirely theoretical and speculative. Mr. Tatman testified that Mr. Walton was “leaving out a few items,” including “Cash discounts, external freight,” and that would “reduce the margin because we got to pay cash discounts and freight on that stuff that gets sold.” (Tatman, Tr. 768). Mr. Tatman further testified that Mr. Walton was operating “under the assumption that Sigma wouldn't provide any other incremental benefit to us.” (*Id.*) The MDA had pro-competitive effects because Sigma was able to reach and service customers that McWane could not, and Sigma had relationships with certain distributors and in certain geographic areas that McWane lacked. (RPFF ¶¶ 572-573). See also RPFF ¶¶ 572-584. Thus,

the MDA may have increased McWane's profits, and Complaint Counsel has offered no evidence to the contrary.

2370. According to a September 25, 2009 margin analysis of the MDA prepared by Mr. Tatman, assuming no erosion of published prices, McWane would earn approximately 29.5% margins on its sales to Sigma, and Sigma would earn approximately 5.7% margins on its sales of Fittings procured from McWane, with McWane earning an 82% share of the overall margin. (CX 0631 at 003).

Response To Finding No. 2370:

While noting that the cited exhibit was not offered at trial, the proposed finding is also misleading, theoretical and speculative. The document on its face excludes idle plant costs and the assumptions included therein are not self-evident. Additionally, Complaint Counsel chose not to have Mr. Tatman explain the document or its purpose or function at trial. Additionally, McWane believed the MDA would have pro-competitive effects because it would expand the customer base for McWane because Sigma was able to reach and service customers that McWane could not. (RPFF ¶ 572) Sigma had relationships with certain distributors and in certain geographic areas that McWane lacked. (RPFF ¶ 573). See also RPFF ¶¶ 572-584. Thus, the MDA may have increased McWane's profits, and Complaint Counsel has offered no evidence to the contrary.

2371. Mr. Jansen and Mr. Tatman received a report from Mark Willett that two customers in the Northeast had switched to Sigma from McWane, and noting the loss of \$300-\$350 per ton in margin for everything sold through Sigma. (CX 0572 at 001).

Response To Finding No. 2371:

This proposed finding is also misleading and speculative. The email does not include context or explanation. It is unknown whether the referenced numbers include the appropriate accounting variables. It is unknown whether the MDA increased incremental sales to the referenced customers. The cited exhibits does support McWane's explanation that certain distributor customers had preferences for purchasing from Sigma. McWane also believed the

MDA would have pro-competitive effects because it would expand the customer base for McWane because Sigma was able to reach and service customers that McWane could not. (RPF 572) Sigma had relationships with certain distributors and in certain geographic areas that McWane lacked. (RPF 573). See also RPF 572-584.

11.8 **The Terms of the MDA Severely Restricted Competition in the Domestic Fittings Market**

2372. The MDA's terms and implementation prevented Sigma from independently entering the Domestic Fittings market, enlisted Sigma in McWane's efforts to exclude Star from the market, and eliminated price competition between Sigma and McWane. (*Infra* 2373-2448).

Response To Finding No. 2372:

See General Responses 1 and 11, and responses to 2373-2448, *infra*. This proposed finding is misleading and entirely theoretical and speculative. For example, McWane believed the MDA would have pro-competitive effects because it would expand the customer base for McWane because Sigma was able to reach and service customers that McWane could not. (RPF 572) Sigma had relationships with certain distributors and in certain geographic areas that McWane lacked. (RPF 573). See also RPF 572-584. Thus, the MDA may have increased McWane's profits, and Complaint Counsel has offered no evidence to the contrary.

2373. On or about September 17, 2009, Mr. Tatman on behalf of McWane and Mr. Pais on behalf of Sigma signed the MDA. (CX 1194 at 001, 013, 014; Tatman, Tr. 791; Pais, Tr. 1807-1808; CX 0278 at 001, 015 (Pais transmitting to Tatman copy of MDA with Sigma signature); CX 0950 at 001 (Tatman informing Pais he will sign on September 17, 2009, and Pais informing Tatman that he has signed and original should arrive at McWane on the September 17, 2009)).

Response To Finding No. 2373:

McWane has no specific response to this proposed finding of fact, although it does not concede the accuracy of the supporting citations.

2374. McWane publicly announced the MDA on September 22, 2009, in the same letter that articulated McWane's new Exclusive Dealing Policy. (CX 1606 at 002).

Response To Finding No. 2374:

McWane has no specific response to this proposed finding, although it notes that there was no use of the terminology “Exclusive Dealing Policy.”

2375. Sigma also announced the MDA on September 22, 2009 (CX 0803 at 002; Pais, Tr. 1821).

Response To Finding No. 2375:

McWane has no specific response to this proposed finding.

2376. Before Sigma’s announcement, Mr. Pais invited Mr. Tatman to comment on Sigma’s customer letter, (CX 0950 at 001), and Mr. Tatman requested that Sigma not portray the MDA as having been initially proposed by McWane. (CX 0951 at 001 (Tatman email to Pais attaching redline of Sigma draft customer letter)).

Response To Finding No. 2376:

This finding is misleading because, in fact, the MDA was originally proposed by Sigma. Mr. Tatman testified that, following the passage of the ARRA, Sigma made the initial approach to McWane about a Domestically supplied fittings deal. (RPFF ¶ 561) Mr. Rona testified that it was Sigma that reinitiated talks in July 2009. (*Id.*)

2377. On September 24, 2009, subsequent to signing the MDA, McWane provided Sigma with “rules of play” for day-to-day execution that would “capture both the language within the MDA and the spirit and intent under which it was constructed.” (CX 1436; Rona, Tr. 1568-1571).

Response To Finding No. 2377:

This finding mischaracterizes Mr. Rona’s testimony because he testified that his only memory of the document was that it would “operationalize” the MDA, and that they “didn’t ever take this as we need to scan over this with a highlighter and read through it and object to this or that.” (Rona, Tr. 1569-1571) Otherwise, McWane objects to any characterization of the document and states that the document speaks for itself.

2378. Unlike an ordinary buy-sell transaction, the MDA contained detailed conditions relating to Sigma’s conduct in the Domestic Fittings market. (CX 2530 (Rona, Dep. at 235-237))

(Rona noted “some of the conditions which became part of the agreement . . . versus just hey, we’ll sell it to you and you can do whatever you want to do” with the Fittings)).

Response To Finding No. 2378:

This finding is argumentative and misleading because the cited testimony does not support the proposition that the MDA “contained detailed conditions relating to Sigma’s conduct in the Domestic Fittings market.” Mr. Rona testified that there were “conditions which became part of the agreement [that] were because it was a master distribution agreement,” but never specified what those conditions were and what conduct (if any) they regulated or how it was different from an undefined “ordinary buy-sell transaction.” (CX 2350 (Rona, Dep. at 236-237)). McWane objects to Complaint Counsel’s characterizations of the documents and testimony and states that the MDA speaks for itself.

11.8.1 Sigma Was Required to Source Domestic Fittings Only from McWane, and Abandoned Its Domestic Production Initiative

11.8.1.1 The MDA Required Sigma to Source Domestic Fittings Exclusively from McWane

2379. The MDA expressly precluded Sigma from entering the Domestic Fittings market in competition with McWane, requiring that, with limited exceptions, “McWane shall be Sigma’s sole and exclusive source for Domestic Fittings.” (CX 1194 at 001 § 1(b); Tatman, Tr. 793 (“Sigma needs to purchase their products from us, with exceptions.”)).

Response To Finding No. 2379:

This finding is inaccurate and misleading because the MDA permitted Sigma to purchase domestic Fittings from a source other than McWane if McWane could not provide delivery within a reasonable and customary period of time. (RPF 571; JX 689 (Rona, Dep. at 248 (“Q. Okay. And you left your door open to get your domestic fittings from someone other than McWane, if McWane couldn't provide delivery within a reasonable and customary period of time; right? A. Right.”)).). Mr. Tatman also testified that under the “sole and exclusive source” provision Sigma was “welcome to go off and develop patterns on their own” for 30”-48”

diameter Fittings and sell them, and that “there is nothing there that hampers Sigma from going off and developing their other sources of supply for 3” through 24”.” (Tatman, Tr. 793-794). See also CX 1046 at 003 (stating only that Sigma would not introduce its own domestic product for 3” through 24” “while the Master Distributorship is active.”). Therefore, Sigma was free to develop its own sources of domestic product during the term of the MDA, cultivate customers, terminate the MDA and immediately begin selling its own domestically manufactured fittings. (Tatman, Tr. 793 (“But Sigma could have taken this Agreement, spent the next 12 months developing a full line of product, set up all sorts of relationships with manufacturers, picked up the phone, and said ok, thanks, we’re terminating, six-month clause. So this is fairly liberal from an exclusivity standpoint.”)).

2380. The only three exceptions to this “sole source” provision were the following: (1) Sigma was permitted to source Domestic Fittings in the 30”-48” diameter range from other manufacturers under certain circumstances; (2) Sigma was permitted to source a Fitting from an alternative source so long as McWane did not own patterns for such Fitting; (3) Sigma was permitted to source Domestic Fittings from alternative sources on an order by order basis if McWane was unable to make timely delivery. (CX 1194 at 001 § 1(b)).

Response To Finding No. 2380:

This finding is misleading. For example, Mr. Tatman testified that under the “sole and exclusive source” provision Sigma was “welcome to go off and develop patterns on their own” for 30”-48” diameter Fittings and sell those, and that “there is nothing there that hampers Sigma from going off and developing their other sources of supply for 3” through 24”.” (Tatman, Tr. 793-794). See also CX 1046 at 003 (stating only that Sigma would not introduce its own domestic product for 3” through 24” “while the Master Distributorship is active.”). Therefore, Sigma was free to develop its own sources of domestic product during the term of the MDA, cultivate customers, terminate the MDA and immediately begin selling its own domestically manufactured fittings. (Tatman, Tr. 793 (“But Sigma could have taken this Agreement, spent

the next 12 months developing a full line of product, set up all sorts of relationships with manufacturers, picked up the phone, and said ok, thanks, we're terminating, six-month clause. So this is fairly liberal from an exclusivity standpoint.”)). McWane objects to Complaint Counsel's characterization of the MDA and states that the MDA speaks for itself.

2381. Sigma understood that McWane would not enter the MDA without such assurances. (CX 2523 (Bhattacharji, Dep. at 238) (Sigma understood that McWane would only enter into the MDA if Sigma provided assurances that it would not source Domestic Fittings from anywhere else); CX 2530 (Rona, Dep. at 242-251) (discussing Sigma's July 14, 2009 MDA proposal (CX 0243), Rona stated that “Sigma felt in order to try to get the [MDA] deal that we wanted, that there were things that we would have to agree to do, and we felt this condition was one that they [McWane] would review as understanding that we weren't going to be able to buy from them as a distributor and then leave every option open to do other things”))).

Response To Finding No. 2381:

This finding mischaracterizes the testimony and the terms of the MDA. For example, Mr. Rona testified as above that “Sigma felt in order to try to get the deal that we wanted, that there were things we would have to agree to do,” but at this point they had no knowledge that McWane would not enter the MDA without such assurances. (Rona, Dep. 245). Mr. Rona went on to testify that “[a]t that point it was an internal Sigma discussion. *It was not any discussion with McWane.*” (Rona, Dep. 249, *emphasis added*). McWane notes that the MDA itself is the best and only relevant source for what McWane and Sigma agreed to and not what some particular person “understood” it to mean. As such, McWane objects to Complaint Counsel's characterization of the exhibit and negotiations and notes that the MDA speaks for itself.

2382. The exclusivity provision of the MDA read in its entirety as follows:

Exclusivity. Sigma agrees that McWane shall be Sigma's sole and exclusive source for Domestic Fittings, with the exception that: (1) Sigma may purchase Domestic Fittings in the 30”- 48” diameter size range from other manufacturers so long as Sigma is the sole owner of the patterns for such Domestic Fittings, but only for resale to other domestic foundry manufacturers of ductile iron pipe and fittings; (2) If McWane does not own patterns for a particular

Domestic Fitting, Sigma may purchase that Domestic Fitting from an alternative source, but only until such time as McWane acquires the pattern for that Domestic Fitting; and (3) Sigma may purchase Domestic Fittings from alternative sources on an order by order basis only if McWane cannot deliver McWane Domestic Fittings to the designated delivery point by the time specified in the order or within 30 days after the order has been received and processed by McWane, whichever occurs later.

(CX 1194 at 001 § 1(b)).

Response To Finding No. 2382:

McWane states that the MDA speaks for itself.

2383. The MDA’s exclusivity provision is consistent with the letter of intent (CX 1806), which stated that, to maintain its “Master Distributorship,” Sigma was “expected . . . [to] Not introduce your own domestic product while the Master Distributor Agreement is active.” (CX 1806 at 003; CX 1194 at 001 § 1(b) (final MDA: “Sigma agrees that McWane shall be Sigma’s sole and exclusive source for Domestic Fittings”); Pais, Tr. 1789 (discussing letter of intent)).

Response To Finding No. 2383:

This finding is misleading because Mr. Tatman testified that under the “sole and exclusive source” provision Sigma was “welcome to go off and develop patterns on their own” for 30”-48” diameter Fittings, and that “there is nothing there that hampers Sigma from going off and developing their other sources of supply for 3” through 24”.” (Tatman, Tr. 793-794).

McWane notes that the MDA itself is the best and only relevant source for what McWane and Sigma agreed to and not what some prior correspondence said or did not say. As such, McWane objects to Complaint Counsel’s characterization of the exhibits and negotiations and notes that the MDA speaks for itself.

2384. Sigma understood that the MDA prevented Sigma from producing its own Domestic Fittings. (CX 2529 (Rona, IHT at 173-175) (“As part of our agreement with McWane for the MDA, we agreed that we wouldn’t produce – it’s in the agreement that we wouldn’t produce other small-diameter fittings -- again, I think it’s 24” and down.”); CX 0278 at 002 (“Sigma agrees that McWane shall be Sigma’s sole and exclusive source for Domestic Fittings”)).

Response To Finding No. 2384:

This finding is misleading and incomplete. The MDA itself is the best and only relevant source for what McWane and Sigma agree to and what Mr. Rona “understood” (he was not testifying as a corporate representative of Sigma) it to mean is irrelevant. Moreover, Mr. Rona specifically testified that between what the MDA says and what he understood, the wording of the MDA would be controlling. (Rona, Tr. 1699 (“So my question to you is: Sigma’s obligations under the MDA are set out in the MDA itself; correct? A: Correct. Q: And as between your personal recollection of the MDA’s requirements and the MDA itself, the MDA would be the best source of what Sigma could or could not do under the MDA; correct? A: That’s correct.”)). As such, McWane objects to Complaint Counsel’s characterization of the understanding of the parties and notes that the MDA speaks for itself. Additionally, for example, Mr. Tatman testified that under the “sole and exclusive source” provision Sigma was “welcome to go off and develop patterns on their own” for 30”-48” diameter Fittings, and that “there is nothing there that hampers Sigma from going off and developing their other sources of supply for 3” through 24”.” (Tatman, Tr. 793-794). Therefore, Sigma was free to develop its own sources of domestic product during the term of the MDA, cultivate customers, terminate the MDA and immediately begin selling its own domestically manufactured fittings. (Tatman, Tr. 793 (“But Sigma could have taken this Agreement, spent the next 12 months developing a full line of product, set up all sorts of relationships with manufacturers, picked up the phone, and said ok, thanks, we’re terminating, six-month clause. So this is fairly liberal from an exclusivity standpoint.”)).

2385. As Mr. Rona explained at trial, pursuing its own domestic production would be a breach of the MDA agreement:

[O]nce the MDA was signed, we did not pursue [Sigma’s SDP efforts] at that point to go ahead. And we knew that, again, understanding the agreement as it was written, if we decided to

continue to go ahead, we technically could go ahead and could, but we would then be in breach of the contract.

(Rona, Tr. 1581-1582; CX 0278-002 (“Sigma agrees that McWane shall be Sigma’s sole and exclusive source for Domestic Fittings”)).

Response To Finding No. 2385:

This finding is misleading and incomplete. The MDA itself is the best and only relevant source for what McWane and Sigma agree to and what Mr. Rona “understood” (he was not testifying as a corporate representative of Sigma) it to mean is irrelevant. Moreover, Mr. Rona specifically testified that between what the MDA says and what he understood, the wording of the MDA would be controlling. (Rona, Tr. 1699 (“So my question to you is: Sigma’s obligations under the MDA are set out in the MDA itself; correct? A: Correct. Q: And as between your personal recollection of the MDA’s requirements and the MDA itself, the MDA could be the best source of what Sigma could or could not do under the MDA; correct? A: That’s correct.”)). As such, McWane objects to Complaint Counsel’s characterization of the understanding of the parties and notes that the MDA speaks for itself. Additionally, for example, Mr. Tatman testified that under the “sole and exclusive source” provision Sigma was “welcome to go off and develop patterns on their own” for 30”-48” diameter Fittings, and that “there is nothing there that hampers Sigma from going off and developing their other sources of supply for 3” through 24”.” (Tatman, Tr. 793-794). Therefore, Sigma was free to develop its own sources of domestic product during the term of the MDA, cultivate customers, terminate the MDA and immediately begin selling its own domestically manufactured fittings. (Tatman, Tr. 793 (“But Sigma could have taken this Agreement, spent the next 12 months developing a full line of product, set up all sorts of relationships with manufacturers, picked up the phone, and said ok, thanks, we’re terminating, six-month clause. So this is fairly liberal from an exclusivity standpoint.”)).

11.8.1.2 Sigma Abandoned Its Domestic Production Initiative as a Result of the MDA

2386. Sigma abandoned its Domestic Fittings production initiative as a result of the MDA. (*Infra* ¶¶ 2387-2393).

Response To Finding No. 2386:

See General Responses 1 and 11, and responses to ¶¶ 2387-2393, *infra*. This proposed finding is misleading, inaccurate and incomplete. After entry of the MDA secured Sigma a ready source of domestic fittings to sell to its customers, Sigma made a reasonable business decision to reduce/narrow the pace of development of domestically manufactured fittings due to its risks, complexity, tremendous expense, manpower needs and difficulty (among other things). (Rona, Tr. 1546-48; Pais, Tr. 1854-55 (“domestic production ... that is not hampered by the MDA ... we found the [feasibility, economic and operational] problems [with domestic production] to be so overwhelming. That is why we had to sort of reduce the pace at which it was being looked at....the efforts were very anemic. We could not make that go. But I remember keeping the effort going to focus on some of the larger size fittings....”)). Sigma proceeded to try to develop the much smaller, less expensive and less expansive domestic joint restraints which ultimately turned out to be a failure. (Pais, Tr. 1546, 1768, 2184-86). The MDA certainly did not require Sigma to abandon domestic production of fittings. Specifically, Mr. Tatman testified that under the “sole and exclusive source” provision Sigma was “welcome to go off and develop patterns on their own” for 30”-48” diameter Fittings, and that “there is nothing there that hampers Sigma from going off and developing their other sources of supply for 3” through 24”.” (Tatman, Tr. 793-794). Therefore, Sigma was free to develop its own sources of domestic product during the term of the MDA, cultivate customers, terminate the MDA and immediately begin selling its own domestically manufactured fittings. (Tatman, Tr. 793 (“But Sigma could have taken this Agreement, spent the next 12 months developing a full

line of product, set up all sorts of relationships with manufacturers, picked up the phone, and said ok, thanks, we're terminating, six-month clause. So this is fairly liberal from an exclusivity standpoint.”)).

2387. Sourcing Domestic Fittings through McWane replaced Sigma's "SDP" effort to develop its own Domestic Fittings production capability. (CX 1018 at 001 (Pais writing to Mr. McGivern on July 13, 2009, "If we get a wholesome agreement [with McWane], yes, it will replace our SDP plans – and save huge Capex\$!"); Pais, Tr. 1773; CX 2524 (Box, Dep. at 81) (Mr. Box recommended that Sigma not go forward with domestic production of small Fittings in light of the availability of Fittings from McWane via the MDA); CX 2527 (Pais, IHT at 154-155)).

Response To Finding No. 2387:

This finding is misleading and incomplete. Mr. Pais testified that the MDA did not hamper any domestic production effort of Sigma. (RPF ¶ 562; Pais, Tr. 1854-1855 (“Q. Was one of the -- was the reason that fittings were languishing because you at this point had a master distribution agreement with McWane? A. No. One doesn't really have -- the feasibility and economics and operations for the domestic production through our own had -- has no -- that is not hampered by the MDA. It had just -- we had found these problems to be so overwhelming. That is why we had to sort of reduce the pace at which it was being looked at.”)). Specifically, after entry of the MDA secured Sigma a ready source of domestic fittings to sell to its customers, Sigma made a reasonable business decision to reduce/narrow the pace of development of domestically manufactured fittings due to its risks, complexity, tremendous expense, manpower needs and difficulty (among other things). (Rona, Tr. 1546-48; Pais, Tr. 1854-55 (“domestic production ... that is not hampered by the MDA ... we found the [feasibility, economic and operational] problems [with domestic production] to be so overwhelming. That is why we had to sort of reduce the pace at which it was being looked at...the efforts were very anemic. We could not make that go. But I remember keeping the effort going to focus on some of the larger size fittings....”)). Sigma proceeded to try to develop the much smaller, less expensive and less

expansive domestic joint restraints which ultimately turned out to be a failure. (Pais, Tr. 1546, 1768, 2184-86). The MDA certainly did not require Sigma to abandon domestic production of fittings. Specifically, Mr. Tatman testified that under the “sole and exclusive source” provision Sigma was “welcome to go off and develop patterns on their own” for 30”-48” diameter Fittings, and that “there is nothing there that hampers Sigma from going off and developing their other sources of supply for 3” through 24”.” (Tatman, Tr. 793-794). Therefore, Sigma was free to develop its own sources of domestic product during the term of the MDA, cultivate customers, terminate the MDA and immediately begin selling its own domestically manufactured fittings. (Tatman, Tr. 793 (“But Sigma could have taken this Agreement, spent the next 12 months developing a full line of product, set up all sorts of relationships with manufacturers, picked up the phone, and said ok, thanks, we’re terminating, six-month clause. So this is fairly liberal from an exclusivity standpoint.”)).

2388. In late August and early September 2009, before the MDA was finalized, Sigma continued to work on its SDP efforts. (Rona, Tr. 1580-1581; *supra* ¶¶ 2256-2267).

Response To Finding No. 2388:

While Sigma did continue investigation into domestic production, this statement is misleading to the extent it infers that Sigma was ready or even committed to the concept of domestic production. As of August 2009, Sigma had not taken any concrete steps to supply its own domestic Fittings. (RPFF ¶ 558; Rona, Tr. 1693-1694 (“Q. I'd like to pull up the first -- expand the first paragraph, please. No. The second paragraph. I'm sorry. And you write, "To date Sigma has not made any concrete plans to either invest in all the required tooling or not invest at all." So I just want to confirm what Mr. Hassi asked you yesterday. As of August 17, you told Mr. Morton that Sigma had not made any concrete plans to invest in the toolings and patterns necessary for domestic production; correct? A. If the question -- if the question is at the point

where this e-mail had been written, that at that point we had not invested in or made a decision to invest in any equipment, that's correct. Q. And as of August 17, Sigma had not made any formal decision to go ahead with domestic manufacturing because obviously you would need the tooling and patterns to do that; correct? A. That's correct.”) (objections omitted); CX 258; RX 200.0002 (“To date Sigma has not made any concrete plans to either invest in all the required tooling or not invest at all.”).

2389. Sigma continued to investigate manufacturing Domestic Fittings until immediately before signing the MDA, and ceased its Domestic development efforts only after it knew it had an agreement on the MDA. (Rybacki, Tr. 3729 (Sigma continued to investigate domestic production until shortly before it signed the MDA, and backed away from the investigation of Domestic Fittings manufacturing once it knew it would have the MDA); Rona, Tr. 1548 (“Q. And once you reached an agreement on the MDA, did your domestic plans take a backseat to the MDA? A. Yes. With the exception that we had stayed developing and still develop and make domestic pipe restraints, but on fittings we did not continue.”); CX 2523 (Bhattacharji, Dep. at 221-222) (Sigma stopped pursuing SDP when it signed the MDA); CX 2530 (Rona, Dep. at 296-297) (“[O]nce we had the MDA, we were satisfied we were satisfied that we had a source of domestic fittings for ARRA, period.”)).

Response To Finding No. 2389:

This proposed finding is misleading, inaccurate and incomplete. After entry of the MDA secured Sigma a ready source of domestic fittings to sell to its customers, Sigma made a reasonable business decision to reduce/narrow the pace of development of domestically manufactured fittings due to its risks, complexity, tremendous expense, manpower needs and difficulty (among other things). (Rona, Tr. 1546-48; Pais, Tr. 1854-55 (“domestic production ... that is not hampered by the MDA ... we found the [feasibility, economic and operational] problems [with domestic production] to be so overwhelming. That is why we had to sort of reduce the pace at which it was being looked at....the efforts were very anemic. We could not make that go. But I remember keeping the effort going to focus on some of the larger size fittings....”)). Sigma proceeded to try to develop the much smaller, less expensive and less

expansive domestic joint restraints which ultimately turned out to be a failure. (Pais, Tr. 1546, 1768, 2184-86). The MDA certainly did not require Sigma to abandon domestic production of fittings. Specifically, Mr. Tatman testified that under the “sole and exclusive source” provision Sigma was “welcome to go off and develop patterns on their own” for 30”-48” diameter Fittings, and that “there is nothing there that hampers Sigma from going off and developing their other sources of supply for 3” through 24”.” (Tatman, Tr. 793-794). Therefore, Sigma was free to develop its own sources of domestic product during the term of the MDA, cultivate customers, terminate the MDA and immediately begin selling its own domestically manufactured fittings. (Tatman, Tr. 793 (“But Sigma could have taken this Agreement, spent the next 12 months developing a full line of product, set up all sorts of relationships with manufacturers, picked up the phone, and said ok, thanks, we’re terminating, six-month clause. So this is fairly liberal from an exclusivity standpoint.”)).

2390. On October 3, 2009, Mr. Bhattacharji informed Sigma’s China production manager that Sigma’s “development plans for domestic fittings are taking a back seat for the moment. This is because we have an MDA (Master Distributor Agrmt) deal with McWane for the fittings.” (CX 0934 at 001; Pais, Tr. 1853-1856).

Response To Finding No. 2390:

This proposed finding is misleading, inaccurate and incomplete. After entry of the MDA secured Sigma a ready source of domestic fittings to sell to its customers, Sigma made a reasonable business decision to reduce/narrow the pace of development of domestically manufactured fittings due to its risks, complexity, tremendous expense, manpower needs and difficulty (among other things). (Rona, Tr. 1546-48; Pais, Tr. 1854-55 (“domestic production ... that is not hampered by the MDA ... we found the [feasibility, economic and operational] problems [with domestic production] to be so overwhelming. That is why we had to sort of reduce the pace at which it was being looked at....the efforts were very anemic. We could not

make that go. But I remember keeping the effort going to focus on some of the larger size fittings....”). Sigma proceeded to try to develop the much smaller, less expensive and less expansive domestic joint restraints which ultimately turned out to be a failure. (Pais, Tr. 1546, 1768, 2184-86). The MDA certainly did not require Sigma to abandon domestic production of fittings. Specifically, Mr. Tatman testified that under the “sole and exclusive source” provision Sigma was “welcome to go off and develop patterns on their own” for 30”-48” diameter Fittings, and that “there is nothing there that hampers Sigma from going off and developing their other sources of supply for 3” through 24”.” (Tatman, Tr. 793-794). Therefore, Sigma was free to develop its own sources of domestic product during the term of the MDA, cultivate customers, terminate the MDA and immediately begin selling its own domestically manufactured fittings. (Tatman, Tr. 793 (“But Sigma could have taken this Agreement, spent the next 12 months developing a full line of product, set up all sorts of relationships with manufacturers, picked up the phone, and said ok, thanks, we’re terminating, six-month clause. So this is fairly liberal from an exclusivity standpoint.”)). Mr. Pais also testified that “we retained the capability and the option [for domestic production], but however, as I’ve been telling you, that whole capability was at such early stages, so there was nothing to formally shut it down or there had to be any decision to continue it.” (Pais, Tr. 1804).

2391. On September 28, 2009, Stuart Box wrote to Frank Ross of Penn-Mar Castings, explaining that Sigma’s Domestic Fittings production plan had been replaced by the MDA: “We have also decided to not pursue the domestic fitting production in lieu of another option that materialized at the last hour.” (CX 1532 at 001).

Response To Finding No. 2391:

While the quote is accurate, the cited email does not state that “Sigma’s SDP had been replaced by the MDA,” Moreover, this proposed finding is misleading and incomplete. After entry of the MDA secured Sigma a ready source of domestic fittings to sell to its customers,

Sigma made a reasonable business decision to reduce/narrow the pace of development of domestically manufactured fittings due to its risks, complexity, tremendous expense, manpower needs and difficulty (among other things). (Rona, Tr. 1546-48; Pais, Tr. 1854-55 (“domestic production ... that is not hampered by the MDA ... we found the [feasibility, economic and operational] problems [with domestic production] to be so overwhelming. That is why we had to sort of reduce the pace at which it was being looked at....the efforts were very anemic. We could not make that go. But I remember keeping the effort going to focus on some of the larger size fittings....”). Sigma proceeded to try to develop the much smaller, less expensive and less expansive domestic joint restraints which ultimately turned out to be a failure. (Pais, Tr. 1546, 1768, 2184-86). The MDA certainly did not require Sigma to abandon domestic production of fittings. Specifically, Mr. Tatman testified that under the “sole and exclusive source” provision Sigma was “welcome to go off and develop patterns on their own” for 30”-48” diameter Fittings, and that “there is nothing there that hampers Sigma from going off and developing their other sources of supply for 3” through 24”.” (Tatman, Tr. 793-794). Therefore, Sigma was free to develop its own sources of domestic product during the term of the MDA, cultivate customers, terminate the MDA and immediately begin selling its own domestically manufactured fittings. (Tatman, Tr. 793 (“But Sigma could have taken this Agreement, spent the next 12 months developing a full line of product, set up all sorts of relationships with manufacturers, picked up the phone, and said ok, thanks, we’re terminating, six-month clause. So this is fairly liberal from an exclusivity standpoint.”)).

2392. Sigma continued to develop domestic products that were not prevented under the terms of the MDA. For example, after signing the MDA, Sigma continued its development of domestic restraints, and today, Sigma makes and sells domestic restraints. (Rona, Tr. 1548).

Response To Finding No. 2392:

This finding is misleading and incomplete. Although Sigma began production of domestic restraints around the time of the adoption of the ARRA, restraints are a product distinct from Fittings which required less initial investment. (RPFF ¶ 563) Furthermore, Mr. Rybacki testified that Sigma's domestic restraint project was

(RPFF ¶ 564) Mr. Rybacki believed that it was inadvisable for Sigma to attempt to become a domestic Fittings supplier in 2009, because

(RPFF ¶ 565)

2393. Additionally, after signing the MDA, Sigma continued its development of larger-sized Domestic Fittings because McWane did not provide larger-sized Domestic Fittings. (Pais, Tr. 1804; CX 1166; CX 1194 at 001 § 1(b) (excepting from exclusive source position Fittings for which McWane does not have the patterns)).

Response To Finding No. 2393:

McWane has not specific response to this proposed finding.

11.8.2 Sigma Was Required to Enforce McWane's Exclusive Dealing Policy**11.8.2.1 The MDA Required Sigma to Enforce McWane's Exclusive Dealing Policy**

2394. The MDA required Sigma to enforce McWane's Exclusive Dealing Policy. With the exception of ACIPCO, to which Sigma would be permitted to resell McWane's Domestic Fittings without restriction, Sigma was only permitted to resell McWane Domestic Fittings to Distributors that had "agreed to purchase McWane Domestic Fittings as their sole source of Domestic Fittings when McWane Domestic Fittings are available at the time of order." (CX 1194 at 001 § 1(c); Tatman, Tr. 797-798).

Response To Finding No. 2394:

This finding is misleading and incomplete because the McWane Rebate Policy was crafted to include soft language (RPFF ¶ 502) that recognized that McWane had little to no ability to dictate terms to distributors, who held significant market power over it. (RPFF ¶ 503). Furthermore, McWane did not in fact enforce the Rebate Policy in any meaningful way (and there is no evidence that Sigma did either) and customers covered under the policy purchased

from other domestic Fittings providers during the short period that the policy was in effect.

(RPF 505, 506). McWane notes that the MDA itself is the best and only relevant source for what McWane and Sigma agreed to. As such, McWane objects to Complaint Counsel's characterization of the exhibits and notes that the MDA speaks for itself. Furthermore, there is no reference in the MDA to an "Exclusive Dealing Policy." (See also RPF 498-529)

2395. Sigma agreed not to sell McWane Domestic Fittings to any customer identified by McWane as having "purchased Domestic Fittings from a source other than McWane at any time during the previous 60 days." (CX 1194 at 001-002 § 1(c); Tatman, Tr. 798; Pais, Tr. 1816-1819).

Response To Finding No. 2395:

This finding is misleading and incomplete because the McWane Rebate Policy was crafted to include soft language (RPF 502) that recognized that McWane had little to no ability to dictate terms to distributors, who held significant market power over it. (RPF 503).

Furthermore, McWane did not in fact enforce the Rebate Policy in any meaningful way (and there is no evidence that Sigma did either) and customers covered under the policy purchased from other domestic Fittings providers during the short period that the policy was in effect.

(RPF 505, 506). McWane notes that the MDA itself is the best and only relevant source for what McWane and Sigma agreed to. As such, McWane objects to Complaint Counsel's characterization of the exhibits and notes that the MDA speaks for itself. Furthermore, there is no reference in the MDA to an "Exclusive Dealing Policy." (See also RPF 498-529)

2396. This provision of the MDA read in its entirety as follows:

Markets. Sigma may only resell McWane Domestic Fittings to: (1) American Cast Iron Pipe Company; and (2) Other customers, including distributors, contractors and fabricators, but excluding manufacturers of ductile iron pipe that have agreed to purchase McWane Domestic Fittings as their sole source of Domestic Fittings when McWane Domestic Fittings are available at the time of order. McWane shall from time to time provide Sigma with a list of customers who have not agreed to source their Domestic

Fittings solely from McWane. Sigma agrees not to sell McWane Domestic Fittings to any customer so listed by McWane, or to any other customer who Sigma actually knows has purchased Domestic Fittings from a source other than McWane at any time during the previous 60 days. McWane reserves the unconditional right in its sole discretion to (i) call upon and sell McWane Domestic Fittings directly to any prospective customers or existing customers, (ii) investigate and resolve customer complaints, (iii) distribute sales and advertising information and (vii) perform other services. McWane reserves the right in its sole discretion to appoint or designate other distributors or representatives other than Sigma to sell McWane Domestic Fittings.

(CX 1194 at 001-002 § 1(c)).

Response To Finding No. 2396:

McWane has no specific response to this proposed finding.

2397. The MDA further provided that Sigma would assist McWane in the enforcement of McWane's Exclusive Dealing Policy:

Sigma shall . . . take reasonable efforts to monitor its customer's sources of supply of Domestic Fittings, and shall notify McWane as soon as possible if Sigma becomes aware of any purchases of non-McWane Domestic Fittings by any such customer.

(CX 1194 at 004 § 3(c)(v); *see also* (CX 2479 (McCullough, Dep. 108-109) ((McWane required Sigma through the MDA to not sell Domestic Fittings to Distributors that were not exclusive to the Tyler/Union brand))).

Response To Finding No. 2397:

This finding is misleading and incomplete because the McWane Rebate Policy was crafted to include soft language (RPF 502) that recognized that McWane had little to no ability to dictate terms to distributors, who held significant market power over it. (RPF 503). Furthermore, McWane did not in fact enforce the Rebate Policy in any meaningful way (and there is no evidence that Sigma did either) and customers covered under the policy purchased from other domestic Fittings providers during the short period that the policy was in effect. (RPF 505, 506). McWane notes that the MDA itself is the best and only relevant source for

what McWane and Sigma agreed to. As such, McWane objects to Complaint Counsel's characterization of the exhibits and notes that the MDA speaks for itself. Furthermore, there is no reference in the MDA to an "Exclusive Dealing Policy." (See also RPF 498-529)

2398. Mr. Pais testified that he understood that under McWane's Exclusive Dealing Policy, as implemented under the MDA, a Distributor that chose to purchase any Domestic Fittings from Star would need to buy all of its Domestic Fittings from Star. (Pais, Tr. 1817-1819) ("McWane's policy was to give the customer a choice. . . . [T]hey would require a customer, once they make a choice, to follow their choice for all their needs for domestic fittings.").

Response To Finding No. 2398:

This finding is misleading and incomplete because the McWane Rebate Policy was crafted to include soft language (RPF 502) that recognized that McWane had little to no ability to dictate terms to distributors, who held significant market power over it. (RPF 503). Furthermore, McWane did not in fact enforce the Rebate Policy in any meaningful way (and there is no evidence that Sigma did either) and customers covered under the policy purchased from other domestic Fittings providers during the short period that the policy was in effect. (RPF 505, 506). McWane notes that the Rebate Policy itself is the best and only relevant source for what McWane's policy was. As such, McWane objects to Complaint Counsel's characterization of the exhibits and notes that the policy speaks for itself. Furthermore, there is no reference in the MDA to an "Exclusive Dealing Policy." (See also RPF 498-529)

2399. McWane informed its major Distributor customers that Sigma would be enforcing McWane's Exclusive Dealing Policy. (CX 0725 (McCullough September 2, 2009 letter to Mr. Webb of HD Supply); CX 2479 (McCullough, Dep. at 142) (CX 0725 accurately describes the Sigma MDA as it pertained to Sigma not being able to sell to Distributors who also bought from Star); CX 2479 (McCullough, Dep. 142-144) (testifying that he "probably" delivered the same message to the Distributors Ferguson, Groeniger, and WinWater); CX 2477 (Jansen, Dep. 179-180) (testifying to his understanding that Sigma could not sell Domestic Fittings to Distributors that bought any Domestic Fittings from Star); CX 0108).

Response To Finding No. 2399:

This finding is misleading because McWane did not have an “Exclusive Dealing Policy,” but rather a Rebate Policy that went into effect concurrently with the Sigma MDA. (RPF 498, 526). The McWane Rebate Policy purposefully included soft language because McWane recognized that it had little or no ability to dictate terms to the distributors, who held significant market power over it. (RPF 502-503). McWane’s customers were always free to purchase domestic Fittings from other suppliers. (RPF 504) As to what the various distributors understood to be the effect of the policy see RPF 498-525).

11.8.2.2 **Sigma Implemented and Enforced McWane’s Exclusive Dealing Policy**

2400. Sigma implemented and enforced McWane’s Exclusive Dealing Policy. (*Infra* 2401-2409).

Response To Finding No. 2400:

See General Responses 1 and 11, and responses to 2401-2409, *infra*. This proposed finding is misleading, inaccurate and incomplete. First, McWane did not have an “Exclusive Dealing Policy,” but rather a Rebate Policy that went into effect concurrently with the Sigma MDA. (RPF 498, 526). Second, the McWane Rebate Policy was crafted to include soft language (RPF 502) that recognized that McWane had little to no ability to dictate terms to distributors, who held significant market power over it. (RPF 503). Furthermore, McWane did not in fact enforce the Rebate Policy in any meaningful way (and there is no evidence that Sigma did either) and customers covered under the policy purchased from other domestic Fittings providers during the short period that the policy was in effect. (RPF 505, 506, 509-521).

2401. Sigma was concerned about “how customers would take” McWane’s requirement in the MDA that Sigma would enforce McWane’s Exclusive Dealing Policy because, “[i]n Sigma, we sold everybody anything they wanted.” (CX 2523 (Bhattacharji, Dep. at 228-230)).

Response To Finding No. 2401:

This finding is misleading because McWane did not have an “Exclusive Dealing Policy,” but rather a Rebate Policy that went into effect concurrently with the Sigma MDA. (RPF ¶¶ 498, 526). The McWane Rebate Policy purposefully included soft language because McWane recognized that it had little or no ability to dictate terms to the distributors, who held significant market power over it. (RPF ¶¶ 502-503). McWane’s customers were always free to purchase domestic Fittings from other suppliers. (RPF ¶ 504).

2402. Sigma has a significant investment in its own broad line of imported Fittings, but does not have a rule against Distributors “cherry-picking” by buying some but not all of their Fittings from Sigma. (CX 2530 (Rona, Dep. at 255-258)).

Response To Finding No. 2402:

This proposed finding of fact is misleading in that Sigma were not similarly situated. Sigma, unlike McWane, was not operating a manufacturing facility and was not desperately trying to keep open its very last domestic foundry (and avoid laying off more employees) by maintaining sufficient plant volume. (Tatman, Tr. 569-570).

2403. In Sigma’s September 22, 2009 announcement to its customers, Sigma informed its customers that it would be enforcing the McWane Exclusive Dealing Policy:

As per this MDA, we are now Master Distributors of [McWane] domestic Fittings. As such, we will follow [McWane’s] distribution and pricing policies as they are announced from time to time. As mentioned in their own letter from [McWane] to their customers, which you too may have received, we wish to supply the [McWane] domestic Fittings to any customers who elect to commit to fully support [McWane] branded Fittings for their requirements of domestic Fittings, purchased thru [McWane] or SIGMA. We appeal to you to accept this requirement of exclusive choice, as a fair and reasonable one, in light of the considerable investment by [McWane] to provide this range of domestic production, which is now being expanded to offer domestic Fittings up to 48”. Please note that customers who elect not to fully support this program may forgo any unpaid volume incentive rebates applicable to only the domestic Fittings and delivery of domestic Fittings up to 12 weeks.

(CX 0803 at 002; Pais, Tr. 1821).

Response To Finding No. 2403:

While McWane does not challenge the accuracy of the quote, this proposed finding is misleading and incomplete. First, McWane did not have an “Exclusive Dealing Policy,” but rather a Rebate Policy that went into effect concurrently with the Sigma MDA. (RPF 498, 526). Second, the McWane Rebate Policy was crafted to include soft language (RPF 502) that recognized that McWane had little to no ability to dictate terms to distributors, who held significant market power over it. (RPF 503). Furthermore, McWane did not in fact enforce the Rebate Policy in any meaningful way (and there is no evidence that Sigma did either) and customers covered under the policy purchased from other domestic Fittings providers during the short period that the policy was in effect. (RPF 505, 506, 509-521).

2404. In the Q & A document that he prepared and circulated to the McWane sales force after execution of the MDA, Mr. Tatman described Sigma’s participation in McWane’s Exclusive Dealing Policy in response to a hypothetical customer question:

Question: Can I utilize another domestic fitting and accessory brand other than Tyler Union or Clow Water products and then still purchase Tyler Union or Clow Water products through Sigma?

Answer: No, Sigma will be adhering to the same distribution program and policies as the Tyler Union and Clow Water divisions of McWane.

(CX 1179 at 004; Tatman, Tr. 807).

Response To Finding No. 2404:

While McWane does not challenge the accuracy of the quote, this proposed finding is misleading and incomplete. First, McWane did not have an “Exclusive Dealing Policy,” but rather a Rebate Policy that went into effect concurrently with the Sigma MDA. (RPF 498, 526). Second, the McWane Rebate Policy was crafted to include soft language (RPF 502) that recognized that McWane had little to no ability to dictate terms to distributors, who held

significant market power over it. (RPF 503). Furthermore, McWane did not in fact enforce the Rebate Policy in any meaningful way (and there is no evidence that Sigma did either) and customers covered under the policy purchased from other domestic Fittings providers during the short period that the policy was in effect. (RPF 505, 506, 509-521).

2405. On September 25, 2009, Sigma regional sales manager Mike Walsh emailed Mr. Rona asking for clarification of – and expressing concern about – the McWane exclusivity policy to be implemented by Sigma:

MR1 ... Just for clarification ... can you check with your Tyler contact and find out exactly what it means to be on death row, or probation, or on double secret probation with Tyler? I did not think it was possible to ‘not sell’ a customer unless it was a credit issue. I thought they separated the good customer from the bad customers by the volume rebate. Are there actual customers that Tyler will not sell to at all? This topic is only an issue because of the other Tyler and Sigma customers that are demanding that we do not sell any customers that Tyler has cut off. We need to know what does ‘cut off’ mean because I don’t think we can legally tell a customer we will not sell them. Any info is appreciated. MW

(CX 1471; Rona, Tr. 1604).³⁹

³⁹ Mr. Walsh’s out of court statements are cited for their effect on Mr. Rona and not to prove the truth of the matters asserted in the statements. (*See* Rona, Tr. 1605).

Response To Finding No. 2405:

This finding is misleading because Mr. Rona testified that in response to this letter he “sought clarification and was told very clearly that there are no exclusions, you can sell anybody, there’s no exclusions, period.” (Rona, Tr. 1606).

2406. On August 17, 2010, Sigma regional sales manager Mike Walsh emailed Ken Stephenson of Sigma reminding him about the Exclusive Dealing Policy: “Remember . . . if customers are buying from Star . . . we cannot sell them domestic any more.” (CX 1746).

Response To Finding No. 2406:

Although neither the admissibility nor the relevance of this hearsay is clear, the proposed finding is misleading. McWane notes that the Rebate Policy itself is the best and only relevant source for what McWane’s policy was and not a Sigma salesman’s out of court opinion. As such, McWane objects to Complaint Counsel’s attempted characterization of the policy and notes that the policy speaks for itself.

2407. On December 14, 2009, McWane informed Sigma that it was cutting off Hajoca under its Exclusive Dealing Policy and that Sigma must do the same. Mr. Tatman told Mr. Rona: “Per the terms of our MDA I need you to acknowledge that Sigma will also not supply *any* Hajoca branch with *Domestic fittings or accessories* until further notice.” (CX 1801 at 001 (emphasis added)).

Response To Finding No. 2407:

This finding is misleading and incomplete because McWane did not have an “Exclusive Dealing Policy,” but rather a Rebate Policy that went into effect concurrently with the Sigma MDA. (RPF 498, 526). Mr. Rona expressly testified that he had no personal knowledge as to whether McWane or Sigma continued selling domestic product to Sigma or not. (Rona, Tr. 1702-1703). (See also RPF 510-513; Tatman, Tr. 714-718 (“Q. Going into that discussion, did you have an understanding that Hajoca still believed it could not place orders with McWane because of the September 22, 2009 policy? A. I don't recall that, but the financials records said we shipped Hajoca November, December, January, February, March. We continued shipping

Hajoca product all the way through 2009, all the way through 2010. Q. Well, sir, in 2009, you told Hajoca that they could no longer place orders as a result of this policy; correct, sir? A. You're going to have an e-mail from me November 23 that says we weren't going to honor orders. You're going to have an e-mail from me December 26, after I had a conversation with Sean Ray and Roy Pitts, very cordial, and I said, Look, guys -- I'm paraphrasing here, but I'm sure you got the document-- we're honoring the orders you have in-house, and if you have any incremental requirements, new requirements, send us the orders, and we'll honor those, too. So November 26 I'm saying, if you got anything in-house, I'll ship it. If you have any new requirements that you want, just get the orders in-house by -- and I gave a date -- and we'll ship those. Like I said, our records will show shipments to Hajoca October, November, December, January, February, March, April, May, June, July. It never stopped. And to our knowledge, they kept buying from Star, and we kept selling them product. . . . I am not personally aware of any circumstances in the month of November or December where we negatively impacted Hajoca's ability to service their customers. And regardless of what we said with Hajoca, we continued to ship them product. They continued to buy from Star.”).

2408. Mr. Rona forwarded the email to Sigma’s CEO, who responded that Sigma had “no choice but to agree to abide by the rules of the MDA.” (CX 0940; Rona, Tr. 1606, 1608 (Rona forwarded to Sigma’s distribution group the instruction not to sell McWane-produced domestic fittings to any Hajoca branch); CX 2530 (Rona, Dep. at 258) (McWane told Sigma that it could not sell to Hajoca)).

Response To Finding No. 2408:

This finding is misleading and incomplete because McWane did not have an “Exclusive Dealing Policy,” but rather a Rebate Policy that went into effect concurrently with the Sigma MDA. (RPF 498, 526). Mr. Rona expressly testified that he had no personal knowledge as to whether McWane or Sigma continued selling domestic product to Sigma or not. (Rona, Tr. 1702-1703). (See also RPF 510-513; Tatman, Tr. 714-718 (“Q. Going into that discussion,

did you have an understanding that Hajoca still believed it could not place orders with McWane because of the September 22, 2009 policy? A. I don't recall that, but the financials records said we shipped Hajoca November, December, January, February, March. We continued shipping Hajoca product all the way through 2009, all the way through 2010. Q. Well, sir, in 2009, you told Hajoca that they could no longer place orders as a result of this policy; correct, sir? A. You're going to have an e-mail from me November 23 that says we weren't going to honor orders. You're going to have an e-mail from me December 26, after I had a conversation with Sean Ray and Roy Pitts, very cordial, and I said, Look, guys -- I'm paraphrasing here, but I'm sure you got the document-- we're honoring the orders you have in-house, and if you have any incremental requirements, new requirements, send us the orders, and we'll honor those, too. So November 26 I'm saying, if you got anything in-house, I'll ship it. If you have any new requirements that you want, just get the orders in-house by -- and I gave a date -- and we'll ship those. Like I said, our records will show shipments to Hajoca October, November, December, January, February, March, April, May, June, July. It never stopped. And to our knowledge, they kept buying from Star, and we kept selling them product. . . . I am not personally aware of any circumstances in the month of November or December where we negatively impacted Hajoca's ability to service their customers. And regardless of what we said with Hajoca, we continued to ship them product. They continued to buy from Star.”).

2409. As requested by McWane, on December 15, 2009, Mr. Rona confirmed to McWane that Sigma was “clear about Hajoca” and would not sell Domestic Fittings to any branch. (CX 1801 at 001 (“Sigma confirms we are clear about Hajoca.”); Rona, Tr. 1606; *see also supra* ¶¶ 1850-1892 (describing McWane cut-off of Hajoca)).

Response To Finding No. 2409:

This finding is misleading and incomplete because McWane did not have an “Exclusive Dealing Policy,” but rather a Rebate Policy that went into effect concurrently with the Sigma

MDA. (RPF 498, 526). Mr. Rona expressly testified that he had no personal knowledge as to whether McWane or Sigma continued selling domestic product to Sigma or not. (Rona, Tr. 1702-1703). (See also RPF 510-513; Tatman, Tr. 714-718 (“Q. Going into that discussion, did you have an understanding that Hajoca still believed it could not place orders with McWane because of the September 22, 2009 policy? A. I don't recall that, but the financials records said we shipped Hajoca November, December, January, February, March. We continued shipping Hajoca product all the way through 2009, all the way through 2010. Q. Well, sir, in 2009, you told Hajoca that they could no longer place orders as a result of this policy; correct, sir? A. You're going to have an e-mail from me November 23 that says we weren't going to honor orders. You're going to have an e-mail from me December 26, after I had a conversation with Sean Ray and Roy Pitts, very cordial, and I said, Look, guys -- I'm paraphrasing here, but I'm sure you got the document-- we're honoring the orders you have in-house, and if you have any incremental requirements, new requirements, send us the orders, and we'll honor those, too. So November 26 I'm saying, if you got anything in-house, I'll ship it. If you have any new requirements that you want, just get the orders in-house by -- and I gave a date -- and we'll ship those. Like I said, our records will show shipments to Hajoca October, November, December, January, February, March, April, May, June, July. It never stopped. And to our knowledge, they kept buying from Star, and we kept selling them product. . . . I am not personally aware of any circumstances in the month of November or December where we negatively impacted Hajoca's ability to service their customers. And regardless of what we said with Hajoca, we continued to ship them product. They continued to buy from Star.”).

11.8.3 McWane and Sigma Agreed on Domestic Fittings Prices Under the MDA

2410. Through the MDA's terms and implementation, McWane and Sigma agreed to, and did, charge substantially identical prices for Domestic Fittings. (*Infra* 2411-2434).

Response To Finding No. 2410:

See General Responses 1 and 11, and responses to ¶¶ 2411-2434, *infra*. This proposed finding is misleading, inaccurate and incomplete. McWane objects to this characterization of the terms of the MDA by Complaint Counsel. The MDA speaks for itself as to what the parties agreed to, but Tatman explained that under the MDA, “All this says is that over a quarter period, for the 5000 line items you’re going to sell, that on a weighted average, the suggestion is for that to be within 98% of published. You could decide to sell on job at 20% off, but of all the thousands of jobs you have, it should come up to 98%. The other element that’s critical here is this only has to do with published pricing. Sigma is allowed to give any rebate they want. They’re allowed to give any cash discounts they want. They’re allowed to give any freight terms they want or any payment terms they want. So they may elect to go to a customer and say, “I’m going to give you 5 percent off there, but I’m going to ship you free freight and I’m going to give you a 15% rebate program. They have that flexibility in how they price this.... [U]nder that 98%, on any job they can do whatever they want to, and that only affects how they price against published. It has no restrictions on the complete liberty they have in terms to freight terms, cash discount terms, rebate terms or whatever money they want to give back to these guys. (Tatman, Tr. 801-802). There is no evidence that McWane and Sigma charged “substantially identical prices.” It is not clear what this term means, and Complaint does not cite to any empirical evidence to support the conclusion.

11.8.3.1 The MDA Expressly Limited the Prices at Which Sigma Could Sell Domestic Fittings

2411. The MDA provided that McWane would sell McWane Domestic Fittings to Sigma at a discount of 20% off McWane’s published pricing. (CX 1194 at 002 § 1(d); CX 2479 (McCullough, Dep. at 121) (McWane agreed to sell Domestic Fittings to Sigma under the MDA at a 20% discount off McWane’s published multiplier terms for truckload shipments)).

Response To Finding No. 2411:

While McWane states that the MDA speaks for itself as to what price McWane would sell to Sigman, McWane notes that this proposed finding does not support 11.8.3.1 above.

2412. The MDA required that Sigma resell McWane Domestic Fittings at a weighted average of no less than 98% of McWane's published prices during any given quarterly period, before rebates, freight and prompt payment discounts (the "Suggested Resale Price"). (Tatman, Tr. 798-803; Pais, Tr. 1829-1830; (CX 1194 at 002§ 1(d)). The 98% restriction was at McWane's behest. (CX 2530 (Rona, Dep. at 262)).

Response To Finding No. 2412:

This proposed finding is misleading, inaccurate and incomplete. McWane objects to this characterization of the terms of the MDA by Complaint Counsel. The MDA speaks for itself as to what the parties agreed to. Tatman explained that under the MDA, "All this says is that over a quarter period, for the 5000 line items you're going to sell, that on a weighted average, the suggestion is for that to be within 98% of published. You could decide to sell on job at 20% off, but of all the thousands of jobs you have, it should come up to 98%. The other element that's critical here is this only has to do with published pricing. Sigma is allowed to give any rebate they want. They're allowed to give any cash discounts they want. They're allowed to give any freight terms they want or any payment terms they want. So they may elect to go to a customer and say, "I'm going to give you 5 percent off there, but I'm going to ship you free freight and I'm going to give you a 15% rebate program. They have that flexibility in how they price this.... [U]nder that 98%, on any job they can do whatever they want to, and that only affects how they price against published. It has no restrictions on the complete liberty they have in terms to freight terms, cash discount terms, rebate terms or whatever money they want to give back to these guys. (Tatman, Tr. 801-802). There is no evidence that McWane and Sigma charged "substantially identical prices." It is not clear what this term means, and Complaint does not cite to any empirical evidence to support the conclusion.

2413. Sigma's failure to resell at the Suggested Resale Price would result in immediate termination of the MDA without notice. (CX 1194 at 002 § 1(d); Tatman, Tr. 802-803).

Response To Finding No. 2413:

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2414. The MDA also required Sigma to offer an 8% or greater volume rebate program for customers purchasing more than \$200,000 annually of McWane Domestic Fittings. (CX 1194 at 002 § 1(d); Tatman, Tr. 803).

Response To Finding No. 2414:

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2415. This provision of the MDA read in its entirety as follows:

Pricing. McWane will sell McWane Domestic Fittings to Sigma at a discount of twenty percent (20%) off McWane's published distributor pricing in effect at the time the order is received by McWane. While Sigma may resell McWane Domestic Fittings at any price it deems appropriate, it is the unilateral policy of McWane not to appoint or continue any OEM distributor who resells McWane Domestic Fittings at a price less than 98% of McWane's published pricing on a weighted average basis for all customers and items sold during any given quarterly period, before rebates, freight and prompt payment discounts (the "Suggested Resale Price"), or who fails to establish a rebate program of 8% or greater for customers, excluding manufacturers of ductile iron pipe, who purchase more that [sic] \$200,000 annually of McWane Domestic Fittings or who stock McWane Domestic Fittings in the normal course of business. The determination of whether an OEM distributor has met these requirements shall be made in accordance with the formulas and method set forth in the attached Exhibit A. This agreement shall terminate immediately and without notice in the event that Sigma resells McWane Domestic Fittings at a price below the Suggested Resale Price, or fails to implement and maintain the Suggested Rebate for eligible customers; provided, however, that the Suggested Rebate shall not apply to customers who are domestic manufacturers of ductile iron pipe. McWane reserves the right to audit Sigma's compliance with this paragraph at any time through a third party chosen by auditor chosen by McWane.

(CX 1194 at 002 § 1(d)).

Response To Finding No. 2415:

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2416. As described by Mr. Pais, “with the pricing, we are obliged to be as close to the published multiplier as possible. Our hands are not tied - but we cannot sell below, because it will undermine McWane’s own sales.” (CX 0997 at 004 (September 22, 2009 message dictated by Pais)).

Response To Finding No. 2416:

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2417. Sigma would have preferred to have pricing discretion under the MDA. (CX 2530 (Rona, Dep. at 263-264); CX 2527 (Pais, IHT at 196)).

Response To Finding No. 2417:

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11.8.3.2 Sigma and McWane Both Agreed to sell Domestic Fittings at or Above 98% of Published Multipliers and Raise Published Prices

2418. McWane and Sigma each understood that both parties’ Domestic Fittings pricing was subject to the pricing restrictions set forth in the MDA, and they set their Domestic Fittings prices accordingly. (*Infra* ¶¶ 2418-2434).

Response To Finding No. 2418:

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2419. Under the MDA, Sigma had to sell McWane Domestic Fittings at or above 98% weighted average of McWane’s published prices. (CX 2523 (Bhattacharji, Dep. at 236-237)).

Response To Finding No. 2419:

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2420. Under the MDA, McWane was able to change its prices and rebate terms – and impose those terms on Sigma – at any time. (Pais Tr. 1828-1829; CX 0953 (“Please be very careful in NOT offering any VR [volume rebate] plans for 2010 for DOM [Domestic] Fittings – as Tyler may reduce the VR% for 2010. As you know, they have been trying to improve this area of the market pricing for a while.”); *see also* CX 0089 at 003 (Pais noting that Sigma was “obliged to offer the same [as McWane] VR incentive of 8% for all customers who would purchase over \$200,000/per year of domestic Fittings”)).

Response To Finding No. 2420:

McWane objects to this characterization of the terms of the MDA by Complaint Counsel. The MDA speaks for itself as to what the parties agreed to. To the extent the citations above incorrectly suggest that Sigma was limited in what rebate it could offer, the proposed finding is inaccurate and misleading. Mr. Tatman explained, “But what I do understand, the things that are easier for me to understand, the simple things is a rebate program – that’s just a minimum. [Sigma] can offer 20% [rebate on domestic fittings] if they want to. They could offer zero if they want to. And that’s only – they only have to offer at least an 8% rebate if you do more than \$200,000 worth of business. Most accounts don’t do \$200,000 of business for them, so that doesn’t apply. They could offer no rebate to somebody. They could offer 10 – if the guys is doing a quarter million dollars with them, it just says they have to give him 8. They could give him 20 if they want to. And again, no restrictions of freight terms, cash discount terms, length of payment terms. Buy this domestic fitting from me at published pricing, and I’ll give you 30% of my import product. Complete flexibility here with what they do. (Tatman, Tr. 803).

2421. A Sigma salesman was hesitant to discount even imported Fittings “due to the trust agreement we have with [McWane].” (CX 1514).

Response To Finding No. 2421:

The basis for admissibility of this clearly hearsay document is uncertain, but from the face of the exhibit, it is unclear what product is being discussed and what “trust agreement” is being referred to. In any event, the exhibit is completely irrelevant since what some Sigma salesman thought or understood to be the effect of the MDA is to prove the MDA’s terms. The MDA is the best and only source of evidence as to what the parties agreed to.

2422. On December 21, 2009, McWane announced multiplier increases for Domestic Fittings effective January 22, 2010. (CX 1544 at 002).

Response To Finding No. 2422:

While the cited exhibit discussed price changes, it is misleading. Complaint Counsel has not offered evidence to show that the change was a “multiplier increase” across the board or to show that the price changes even kept up with inflation.

2423. Mr. Tatman forwarded McWane’s December 21, 2009 price increase announcement to Mr. Rona: “Per our Master Distribution Agreement this will impact Sigma orders as of the effective date.” (CX 1662 at 001; *see also* Rona, Tr. 1602-1604 (discussing CX 1662)).

Response To Finding No. 2423:

This finding misconstrues and is misleading and incomplete. The testimony of Mr. Rona as Mr. Rona testified that “I don’t recall that we raised the price.” Moreover, Sigma was buying domestic fittings from McWane at 20% off of the published price. (Rona, Tr. 1603-1604).

Complaint Counsel has not offered evidence to show that the change was a “multiplier increase” across the board or to show that the price changes even kept up with inflation.

2424. Greg Fox of Sigma forwarded the McWane December 21, 2009 price increase announcement within Sigma, noting,

Under the terms and agreements of our Master Distribution Agreement with [McWane], we will mirror the multiplier and implementation dates of this letter. We have no latitude for exceptions.

(CX 1519 at 002; *see also* CX 1544 at 001 (Rona forwarding McWane price announcement within Sigma); CX 2530 (Rona, Dep. at 300)).

Response To Finding No. 2424:

This finding misconstrues and is misleading and incomplete. The testimony of Mr. Rona as Mr. Rona testified that “I don’t recall that we raised the price.” Moreover, Sigma was buying domestic fittings from McWane at 20% off of the published price. (Rona, Tr. 1603-1604).

Complaint Counsel has not offered evidence to show that the change was a “multiplier increase” across the board or to show that the price changes even kept up with inflation.

2425. Sigma enacted the same price increase, effective January 22, 2010. (CX 1519 at 001 (Pais email December 29: “I am glad to comply” with McWane price increase); CX 1852 at 001-002 (Pais December 30 email attaching “our version of the Customer Letter to announce the price increase”); CX 0786 (same letter as produced from Star’s files)).

Response To Finding No. 2425:

This finding is misleading and incomplete. Sigma was buying domestic fittings from McWane at 20% off of the published price. (Rona, Tr. 1603-1604). Complaint Counsel has not offered evidence to show that the change was a “multiplier increase” across the board or to show that the price changes even kept up with inflation.

2426. In the October 2009 MDA Q&A document that Mr. Tatman circulated to his sales force, Mr. Tatman expressed the expectation that the MDA would make the market “more stable.” (CX 1179 at 002; Tatman, Tr. 807-808).

Response To Finding No. 2426:

This proposed finding is misleading and incomplete. While Mr. Tatman did use that words in his memo, the cited testimony by Mr. Tatman explains that he was making a “policitcally correct communication to an audience of lower level field people” and that it is not an a full explanation of any strategic decision by McWane. (Tatman, Tr. 807-810).

2427. Although the pricing provision of the MDA by its terms only regulated the prices to be charged by Sigma for Domestic Fittings, in the course of negotiating the MDA, Sigma asked McWane to follow the same 98% rule. (CX 0271 (noting Sigma request to McWane that McWane follow “the same rules on pricing . . . that they are imposing on [Sigma]”); Pais, Tr. 1796 (not recalling CX 0271 or Sigma’s request); CX 2523 (Bhattacharji, Dep. at 241-242) (Sigma’s CEO Jim McGivern brought up the point that McWane should also have to charge its customers at least 98% of its published prices for Domestic Fittings); CX 0098 at 003 (draft MDA agreement reflecting requirement that McWane be required to follow the MDA’s “policy on suggested retail pricing and rebates”); CX 0272 at 001-002 (cover email)).

Response To Finding No. 2427:

This proposed finding is misleading and inaccurate. First, this does not take into account that Sigma was buying from McWane at the published prices and would expect the get the same price McWane was charging others. Second. there is no evidence cited that any such agreement

was ever reached. The MDA is the best and sole evidence of what the parties agreed to and not discussions or negotiations related to the same. McWane objects to Complaint Counsel's characterizations and states that the MDA speaks to itself. Third, the cited evidence does not even clearly support the proposed finding. CX 271 is not clear what is being "requested."

Mr. Pais testified that he was unaware whether any such request was ever made. (Pais, Tr. 1796-1797). It is not clear that the highlighted points in CX 0098 were ever communicated to McWane. CX 0272 is unclear as to what redline was attached and the redline is not included. The cited Bhattacharji testimony is far from clear that this issue was even discussed with McWane and in fact, indicates that it was not even a concern for most of the key Sigma personnel.

2428. Mr. Pais and Mr. Tatman discussed the MDA on September 14, 2009, and the next day Mr. Pais emailed a signed copy of the agreement to Mr. Tatman, noting in the cover email, "I agree completely with your observation that in the end, it's the right spirit and sensible reason rather than just the legal document that will determine the outcome of this initiative." (CX 0278 at 001; Pais, Tr. 1806-1807).

Response To Finding No. 2428:

This finding is misleading because Mr. Pais testified that there were no agreements beyond what was written within the MDA. (Pais, Tr. 1807). Moreover, the MDA speaks for itself as to what the parties agreed to and did not agree to.

2429. McWane and Sigma agreed that they would both price Domestic Fittings at no lower than 98% of McWane's published multipliers. (CX 2531 (Rybacki, Dep. at 165-166) (when the MDA was in place, Rybacki's understanding was that Sigma had to sell McWane's Domestic Fittings at 98% of published pricing and that McWane had to sell at a similar price)).

Response To Finding No. 2429:

This proposed finding is inaccurate and misleading. First, this does not take into account that Sigma was buying from McWane at the published prices and would expect to get the same price McWane was charging others. Second, there is no evidence cited that any such alleged

agreement was ever reached. The MDA is the best and sole evidence of what the parties agreed to and Mr. Rybacki's "understanding" is not. Moreover, the cited testimony is unclear and does not support the finding conclusion that an agreement was reached. For instance, Complaint Counsel proposed a finding above that McWane could change its pricing at any time under the MDA. See Proposed Finding no. 2420 above which is entirely inconsistent with this proposed finding. McWane objects to this characterization of the terms of the MDA by Complaint Counsel. The MDA speaks for itself as to what the parties agreed to. Tatman explained that under the MDA, "All this says is that over a quarter period, for the 5000 line items you're going to sell, that on a weighted average, the suggestion is for that to be within 98% of published. You could decide to sell on job at 20% off, but of all the thousands of jobs you have, it should come up to 98%. The other element that's critical here is this only has to do with published pricing. Sigma is allowed to give any rebate they want. They're allowed to give any cash discounts they want. They're allowed to give any freight terms they want or any payment terms they want. So they may elect to go to a customer and say, "I'm going to give you 5 percent off there, but I'm going to ship you free freight and I'm going to give you a 15% rebate program. They have that flexibility in how they price this.... [U]nder that 98%, on any job they can do whatever they want to, and that only affects how they price against published. It has no restrictions on the complete liberty they have in terms to freight terms, cash discount terms, rebate terms or whatever money th

McWane objects to this characterization of the terms of the MDA by Complaint Counsel. The MDA speaks for itself as to what the parties agreed to. Tatman explained that under the MDA, "All this says is that over a quarter period, for the 5000 line items you're going to sell, that on a weighted average, the suggestion is for that to be within 98% of published. You could decide to sell on job at 20% off, but of all the thousands of jobs you have,

it should come up to 98%. The other element that's critical here is this only has to do with published pricing. Sigma is allowed to give any rebate they want. They're allowed to give any cash discounts they want. They're allowed to give any freight terms they want or any payment terms they want. So they may elect to go to a customer and say, "I'm going to give you 5 percent off there, but I'm going to ship you free freight and I'm going to give you a 15% rebate program. They have that flexibility in how they price this.... [U]nder that 98%, on any job they can do whatever they want to, and that only affects how they price against published. It has no restrictions on the complete liberty they have in terms to freight terms, cash discount terms, rebate terms or whatever money they want to give back to these guys. (Tatman, Tr. 801-802).

Complaint Counsel offers no empirical evidence to support this proposed finding as to what price these fittings were actually sold at they want to give back to these guys. (Tatman, Tr. 801-802).

Complaint Counsel offers no empirical evidence to support this proposed finding as to what price these fittings were actually sold at. Thus, the evidence overwhelmingly demonstrates that there were no actual restraints on pricing affecting either McWane or Sigma.

2430. Mr. Tatman's business understanding of the agreement between Sigma and McWane was that McWane – and not just Sigma – also had to sell within 98% of McWane's published prices. In a December 13, 2009 email to Mr. McCullough and Mr. Walton, Mr. Tatman described the MDA pricing requirement as follows:

Per our MDA with Sigma . . . Sigma (and in theory [McWane]) is supposed to sell within 98% of the published levels.

(CX 0347 at 001; Tatman, Tr. 806-807).

Response To Finding No. 2430:

This finding is misleading and it mischaracterizes the testimony of Mr. Tatman because Mr. Tatman testified that "I don't really understand how that thing works in practice." (Tatman, Tr. 806, referring to the quoted language above). First, this does not take into account that Sigma was buying from McWane at the published prices and would expect to get the same price

McWane was charging others. Second, there is no evidence cited that any such alleged agreement was ever reached. The MDA is the best and sole evidence of what the parties agreed to and not discussions or negotiations related to the same. The cited exhibit only references the MDA and does not support a finding of some separate agreement. As to the MDA, it speaks for itself, and McWane objects to Complaint Counsel's characterization of it. Third, both parties were affected by McWane's published pricing in that McWane was publishing the price and Sigma was buying from McWane at a discount off that price. Fourth, Complaint Counsel proposed a finding above that McWane could change its pricing at any time under the MDA. See Proposed Finding no. 2420 above which is entirely inconsistent with this proposed finding. Finally, there is no evidence of any actual limitation on prices to distribution. Tatman explained that under the MDA, "All this says is that over a quarter period, for the 5000 line items you're going to sell, that on a weighted average, the suggestion is for that to be within 98% of published. You could decide to sell on job at 20% off, but of all the thousands of jobs you have, it should come up to 98%. The other element that's critical here is this only has to do with published pricing. Sigma is allowed to give any rebate they want. They're allowed to give any cash discounts they want. They're allowed to give any freight terms they want or any payment terms they want. So they may elect to go to a customer and say, "I'm going to give you 5 percent off there, but I'm going to ship you free freight and I'm going to give you a 15% rebate program. They have that flexibility in how they price this.... [U]nder that 98%, on any job they can do whatever they want to, and that only affects how they price against published. It has no restrictions on the complete liberty they have in terms to freight terms, cash discount terms, rebate terms or whatever money thMcWane objects to this characterization of the terms of the MDA by Complaint Counsel. The MDA speaks for itself as to what the parties agreed to.

Tatman explained that under the MDA, “All this says is that over a quarter period, for the 5000 line items you’re going to sell, that on a weighted average, the suggestion is for that to be within 98% of published. You could decide to sell on job at 20% off, but of all the thousands of jobs you have, it should come up to 98%. The other element that’s critical here is this only has to do with published pricing. Sigma is allowed to give any rebate they want. They’re allowed to give any cash discounts they want. They’re allowed to give any freight terms they want or any payment terms they want. So they may elect to go to a customer and say, “I’m going to give you 5 percent off there, but I’m going to ship you free freight and I’m going to give you a 15% rebate program. They have that flexibility in how they price this.... [U]nder that 98%, on any job they can do whatever they want to, and that only affects how they price against published. It has no restrictions on the complete liberty they have in terms to freight terms, cash discount terms, rebate terms or whatever money they want to give back to these guys. (Tatman, Tr. 801-802). Complaint Counsel offers no empirical evidence to support this proposed finding as to what price these fittings were actually sold at they want to give back to these guys. (Tatman, Tr. 801-802). Complaint Counsel offers no empirical evidence to support this proposed finding as to what price these fittings were actually sold at. Thus, the evidence overwhelmingly demonstrates that there were no actual restraints on pricing affecting either McWane or Sigma or any agreement to do the same.

2431. After the signing of the MDA, McWane understood that it could not offer Distributors lower “domestic numbers with our MDA with Sigma. We need to stay stable” (CX 0110 at 001 (Jansen October 4, 2009 email to regional managers); *see also* CX 0106 at 002 (Jansen: “[W]e need to make sure all domestic is right down the line since Sigma is involved”); CX 0107 at 001 (Jansen: “[W]e won’t move the numbers on the package due to the Sigma deal.”)).

Response To Finding No. 2431:

This finding is misleading. First, this does not take into account that Sigma was buying from McWane at the published prices and would expect to get the same price McWane was charging others. Second, there is no evidence cited that any such alleged agreement was ever reached. The MDA is the best and sole evidence of what the parties agreed to and not “understandings” related to the same. The cited exhibit only references the MDA and does not support a finding of some separate agreement. As to the MDA, it speaks for itself, and McWane objects to Complaint Counsel’s characterization of it. Third, both parties were affected by McWane’s published pricing in that McWane was publishing the price and Sigma was buying from McWane at a discount off that price. Fourth, Complaint Counsel proposed a finding above that McWane could change its pricing at any time under the MDA. See Proposed Finding no. 2420 above which is entirely inconsistent with this proposed finding. Finally, there is no evidence of any actual limitation on prices to distribution. Tatman explained that under the MDA, “All this says is that over a quarter period, for the 5000 line items you’re going to sell, that on a weighted average, the suggestion is for that to be within 98% of published. You could decide to sell on job at 20% off, but of all the thousands of jobs you have, it should come up to 98%. The other element that’s critical here is this only has to do with published pricing. Sigma is allowed to give any rebate they want. They’re allowed to give any cash discounts they want. They’re allowed to give any freight terms they want or any payment terms they want. So they may elect to go to a customer and say, “I’m going to give you 5 percent off there, but I’m going to ship you free freight and I’m going to give you a 15% rebate program. They have that flexibility in how they price this.... [U]nder that 98%, on any job they can do whatever they want to, and that only affects how they price against published. It has no restrictions on the

complete liberty they have in terms to freight terms, cash discount terms, rebate terms or whatever money thMcWane objects to this characterization of the terms of the MDA by Complaint Counsel. The MDA speaks for itself as to what the parties agreed to. Tatman explained that under the MDA, “All this says is that over a quarter period, for the 5000 line items you’re going to sell, that on a weighted average, the suggestion is for that to be within 98% of published. You could decide to sell on job at 20% off, but of all the thousands of jobs you have, it should come up to 98%. The other element that’s critical here is this only has to do with published pricing. Sigma is allowed to give any rebate they want. They’re allowed to give any cash discounts they want. They’re allowed to give any freight terms they want or any payment terms they want. So they may elect to go to a customer and say, “I’m going to give you 5 percent off there, but I’m going to ship you free freight and I’m going to give you a 15% rebate program. They have that flexibility in how they price this.... [U]nder that 98%, on any job they can do whatever they want to, and that only affects how they price against published. It has no restrictions on the complete liberty they have in terms to freight terms, cash discount terms, rebate terms or whatever money they want to give back to these guys. (Tatman, Tr. 801-802). Complaint Counsel offers no empirical evidence to support this proposed finding as to what price these fittings were actually sold at they want to give back to these guys. (Tatman, Tr. 801-802). Complaint Counsel offers no empirical evidence to support this proposed finding as to what price these fittings were actually sold at. Thus, the evidence overwhelmingly demonstrates that there were no actual restraints on pricing affecting either McWane or Sigma or any agreement to do the same.

2432. Mr. Jansen testified that his understanding was that there was a provision in the MDA that limited Sigma’s and McWane’s ability to discount on Domestic Fittings. (CX 2477 (Jansen, Dep. at 172-173)).

Response To Finding No. 2432:

This finding is misleading and mischaracterizes the testimony of Mr. Jansen because Mr. Jansen testified that “I was told there was [such a provision] but don’t know for sure.” First, this does not take into account that Sigma was buying from McWane at the published prices and would expect to get the same price McWane was charging others. Second, there is no evidence cited that any such alleged agreement was ever reached. The MDA is the best and sole evidence of what the parties agreed to and not “understandings” related to the same. The cited exhibit only references the MDA and does not support a finding of some separate agreement. As to the MDA, it speaks for itself, and McWane objects to Complaint Counsel’s characterization of it. Third, both parties were affected by McWane’s published pricing in that McWane was publishing the price and Sigma was buying from McWane at a discount off that price. Fourth, Complaint Counsel proposed a finding above that McWane could change its pricing at any time under the MDA. See Proposed Finding no. 2420 above which is entirely inconsistent with this proposed finding. Finally, there is no evidence of any actual limitation on prices to distribution. Tatman explained that under the MDA, “All this says is that over a quarter period, for the 5000 line items you’re going to sell, that on a weighted average, the suggestion is for that to be within 98% of published. You could decide to sell on job at 20% off, but of all the thousands of jobs you have, it should come up to 98%. The other element that’s critical here is this only has to do with published pricing. Sigma is allowed to give any rebate they want. They’re allowed to give any cash discounts they want. They’re allowed to give any freight terms they want or any payment terms they want. So they may elect to go to a customer and say, “I’m going to give you 5 percent off there, but I’m going to ship you free freight and I’m going to give you a 15% rebate program. They have that flexibility in how they price this.... [U]nder that 98%, on any job they

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Tatman explained that under the MDA, “All this says is that over a quarter period, for the 5000 line items you’re going to sell, that on a weighted average, the suggestion is for that to be within 98% of published. You could decide to sell on job at 20% off, but of all the thousands of jobs you have, it should come up to 98%. The other element that’s critical here is this only has to do with published pricing. Sigma is allowed to give any rebate they want. They’re allowed to give any cash discounts they want. They’re allowed to give any freight terms they want or any payment terms they want. So they may elect to go to a customer and say, “I’m going to give you 5 percent off there, but I’m going to ship you free freight and I’m going to give you a 15% rebate program. They have that flexibility in how they price this.... [U]nder that 98%, on any job they can do whatever they want to, and that only affects how they price against published. It has no restrictions on the complete liberty they have in terms to freight terms, cash discount terms, rebate terms or whatever money they want to give back to these guys. (Tatman, Tr. 801-802).

Complaint Counsel offers no empirical evidence to support this proposed finding as to what price these fittings were actually sold at they want to give back to these guys. (Tatman, Tr. 801-802).

Complaint Counsel offers no empirical evidence to support this proposed finding as to what price these fittings were actually sold at. Thus, the evidence overwhelmingly demonstrates that there were no actual restraints on pricing affecting either McWane or Sigma or any agreement to do the same.

2433. At one point, Mr. Rona contacted McWane when he heard that McWane had deviated below the agreed upon price for Domestic Fittings:

I believe I had one conversation with Tyler. We were under the -- as bound by the MDA, we were to understand that they were supposed to sell at the same price, meaning that was my understanding from the agreement.

(CX 2529 (Rona, IHT at 212-214); *see also* CX 2529 (Rona, IHT at 214-216) (further describing call to Tatman regarding McWane's Domestic Fittings pricing)).

Response To Finding No. 2433:

This finding is misleading and mischaracterizes the testimony of Mr. Rona who later clarified that this was just an “understanding,” that he did not know “why” he had that understanding and that it may have only been an “assumption” on his part. (Rona, IHT at 214). First, this does not take into account that Sigma was buying from McWane at the published prices and would expect to get the same price McWane was charging others. Second, there is no evidence cited that any such alleged agreement was ever reached. The MDA is the best and sole evidence of what the parties agreed to and not “understandings” related to the same. The cited exhibit only references the MDA and does not support a finding of some separate agreement. As to the MDA, it speaks for itself, and McWane objects to Complaint Counsel's characterization of it. Third, both parties were affected by McWane's published pricing in that McWane was publishing the price and Sigma was buying from McWane at a discount off that price. Fourth, Complaint Counsel proposed a finding above that McWane could change its pricing at any time under the MDA. See Proposed Finding no. 2420 above which is entirely inconsistent with this proposed finding. Finally, there is no evidence of any actual limitation on prices to distribution. Tatman explained that under the MDA, “All this says is that over a quarter period, for the 5000 line items you're going to sell, that on a weighted average, the suggestion is for that to be within 98% of published. You could decide to sell on job at 20% off, but of all the

thousands of jobs you have, it should come up to 98%. The other element that's critical here is this only has to do with published pricing. Sigma is allowed to give any rebate they want. They're allowed to give any cash discounts they want. They're allowed to give any freight terms they want or any payment terms they want. So they may elect to go to a customer and say, "I'm going to give you 5 percent off there, but I'm going to ship you free freight and I'm going to give you a 15% rebate program. They have that flexibility in how they price this.... [U]nder that 98%, on any job they can do whatever they want to, and that only affects how they price against published. It has no restrictions on the complete liberty they have in terms to freight terms, cash discount terms, rebate terms or whatever money thMcWane objects to this characterization of the terms of the MDA by Complaint Counsel. The MDA speaks for itself as to what the parties agreed to. Tatman explained that under the MDA, "All this says is that over a quarter period, for the 5000 line items you're going to sell, that on a weighted average, the suggestion is for that to be within 98% of published. You could decide to sell on job at 20% off, but of all the thousands of jobs you have, it should come up to 98%. The other element that's critical here is this only has to do with published pricing. Sigma is allowed to give any rebate they want. They're allowed to give any cash discounts they want. They're allowed to give any freight terms they want or any payment terms they want. So they may elect to go to a customer and say, "I'm going to give you 5 percent off there, but I'm going to ship you free freight and I'm going to give you a 15% rebate program. They have that flexibility in how they price this.... [U]nder that 98%, on any job they can do whatever they want to, and that only affects how they price against published. It has no restrictions on the complete liberty they have in terms to freight terms, cash discount terms, rebate terms or whatever money they want to give back to these guys. (Tatman, Tr. 801-802). Complaint Counsel offers no empirical evidence to support this proposed finding

as to what price these fittings were actually sold at they want to give back to these guys. (Tatman, Tr. 801-802). Complaint Counsel offers no empirical evidence to support this proposed finding as to what price these fittings were actually sold at. Thus, the evidence overwhelmingly demonstrates that there were no actual restraints on pricing affecting either McWane or Sigma or any agreement to do the same.

2434. On November 3, 2009, Mr. Schapiro emailed Mr. Rybacki reporting that he had recently noticed some items with “VERY poor GMs” based on McWane list prices, and had “pointed them out to the right people, and they have been changed by McWane.” (CX 1024 at 001).

Response To Finding No. 2434:

This finding is misleading and inaccurate as the exhibit itself discusses only some price book inaccuracies that were corrected by McWane. This has no relevance and is not evidence of any agreement.

11.8.4 Sigma Agreed Not to Oppose Buy American Legislation

2435. McWane was aware that Sigma and Star had lobbied against the Buy American provision of ARRA. (Tatman, Tr. 614).

Response To Finding No. 2435:

McWane has no specific response to this proposed finding.

2436. The MDA required Sigma to stop lobbying against Buy American laws. (CX 1194 at 004 § 3(c)(iv); Pais, Tr. 1788-1789).

Response To Finding No. 2436:

This finding is misleading and mischaracterizes the testimony of Mr. Pais and the MDA. Mr. Pais testified that “I don’t recall particularly what our position was on that.” (Pais, Tr. 1788-1789). It also does not take into account that Sigma had undertaken its own domestic manufacture of pipe restraints and therefore, had other specific reasons, unrelated to the MDA, to not oppose Buy American legislation. (CX 1000). The MDA is the best source of what the

parties agreed to, and McWane objects to Complaint Counsel's characterization of it. McWane objects to this proposed finding as overly broad and unduly vague and as inconsistent with the evidence. "Buy American laws" is broad and ambiguous as is "stopped."

2437. This provision of the MDA provided as follows:

Sigma . . . shall not oppose the inclusion of Buy American and other similar domestic content requirements that could affect sales of waterworks fittings in pending or existing legislation or regulations. Sigma will also not take any action designed to encourage the revocation or reduction of domestic content requirements in any existing laws, regulations, or specifications adopted by any federal, state or local governmental entity or any subdivision or affiliate thereof.

(CX 1194 at 004 § 3(c)(iv)).

Response To Finding No. 2437:

The MDA speaks for itself, and McWane has no specific response to this proposed finding.

2438. Sigma stopped lobbying against Buy American laws as a result of the MDA. (CX 2523 (Bhattacharji, Dep. 243-246) ("Q. But at the bigger level of government Buy America provisions, you no longer tried to change those rules? A. That's what we had signed, so no.")).

Response To Finding No. 2438:

This proposed finding mischaracterizes the testimony of Mr. Bhattacharji who testified that: "In fact, the whole focus on that was that we would not do anything to upset the ARRA. And in any case, to me, it was a moot point. It did not stop us from going and changing the specification at an engineering level or at a township level. Something that we had been doing for years, we continued doing....Yeah, but the Buy American laws related to the ARRA issues. It had no impact on our day-to-day going and changing specifications. So we draw a distinction between those two levels of Buy America application. (Bhattacharji, Dep. at 243-245).

2439. In early November of 2009, the U.S. Chamber of Commerce planned a conference call with its “resident Buy America Policy Expert,” and invited Mr. Florence of Frontenac, who forwarded the invitation along to Mr. Pais, Mr. McGivern, and Mr. Bhattacharji of Sigma. (CX 0935 at 002). Mr. McGivern cautioned that participating in lobbying activities directed against Buy American legislation:

I would suggest that if they are looking for quotes it should come under the Frontenac name and not Sigma in order to protect the MDA. I could be introduced as a Frontenac investor as well as Sigma Chairman.

(CX 0935 at 001). Mr. Bhattacharji was even more concerned:

Adding to VP’s caution, please be very careful while talking to US COC. Even if we are ‘technically’ not violating the MDA by speaking as investors and not SIG, we cannot afford to antagonize [McWane] who can pull the MDA off the table using some other excuse if they feel strongly about our attempts to beat back the BA laws related to pipe fittings.

(CX 0935 at 001). Mr. Florence responded that he would attend alone, and that “I knew there was some sensitivity but was not clear.” (CX 0935 at 001; Pais, Tr. 1831-1833 (testifying that he was unaware of any such “sensitivity”)).

Response To Finding No. 2439:

While McWane notes that the quotes above are accurate transcriptions, the finding is misleading insofar as it implies that the MDA was the only reason Sigma was concerned about lobbying against Buy American. It does not take into account that Sigma had undertaken its own domestic manufacture of pipe restraints and therefore, had other specific reasons, unrelated to the MDA, to not oppose Buy American legislation. (CX 1000). Moreover, Sigma’s CEO was “happy to join” the U.S. Chamber call and only thought that any opposition to Buy American should be stated under the name of Sigma’s largest investor instead of Sigma directly. This is hardly a limitation or restriction on lobbying.

2440. On January 19, 2010, Mr. Bhattacharji of Sigma terminated Sigma's retention of SDA, the public relations firm it had previously engaged to lobby against "Buy American" legislation, writing that,

In light of our decision to become a master distributor for Tyler Fittings and the decision to start our domestic manufacturing of pipe restraints, we are handicapped in terms of taking a vocal and visible position against the Buy American rules that have or are being enacted in the Congress."

(CX 1000; Pais, Tr. 1834-1837; *see also* CX 2523 (Bhattacharji, Dep. at 244-246 (the MDA required Sigma to stop its opposition to Buy American laws, and Sigma did so)).

Response To Finding No. 2440:

This proposed finding is completely inaccurate. The cited exhibit only changes Sigma's retainer fee agreement to a "fee based plan." Although McWane does not that it expressly states that Sigma's domestic manufacture of pipe restraints handicaps its opposition to Buy American.

11.8.5 Sigma Was Not Permitted to Sell to U.S. Pipe

2441. The MDA precluded Sigma from selling McWane's Domestic Fittings to U.S. Pipe. (CX 2203 at 001; Morton, Tr. 2850-2851).

Response To Finding No. 2441:

Respondent has no specific response.

2442. McWane agreed to permit Sigma to re-sell McWane Domestic Fittings to one non-Distributor customer, ACIPCO, but not to U.S. Pipe. As Mitchell Rona explained in the course of the MDA negotiations:

McWane will not amend to formally include U.S. Pipe. [Tatman] is firm that they will not share their profit here too and feel they already did so with Acipco who is formally in the agreement now.

(CX 1046 at 001; Rona, Tr. 1587-1590).

Response To Finding No. 2442:

Respondent has no specific response.

2443. U.S. Pipe ceased investigating its own potential manufacturing of Domestic Fittings as a result of assurances from Sigma in June 2009 that Sigma would produce Domestic Fittings. (Morton, Tr. 2876-2877).

Response To Finding No. 2443:

See General Response 11. This finding conflicts with Complaint Counsel's contention that U.S. Pipe evaluated re-entering domestic production in 2009 and chose not to re-enter because it was cost prohibitive. (CCPFF ¶ 1687); JX 701 (Morton, Dep. at 47-49, 56-57)). This finding is incorrect because U.S. Pipe decided not to manufacture Domestic Fittings in 2009 because of cost, particularly in light of ARRA's limited impact. (RPF ¶¶ 397-423; Responses to ¶ 1684, 1687, *supra*).

2444. At his October 13, 2009 meeting in Birmingham, Alabama with Mr. Morton of U.S. Pipe, Mr. Tatman conveyed to Mr. Morton that under the MDA between McWane and Sigma, U.S. Pipe would not be able to source its Domestic Fittings through Sigma, but would instead have to purchase directly from McWane. (Morton, Tr. 2842; CX 2203 at 001 ("Tatman informed me that Sigma was forbidden from selling to USP as per the Master Distribution Agreement signed between Union and Sigma.")).

Response To Finding No. 2444:

This finding is incomplete, to the extent that U.S. Pipe could also purchase Domestic Fittings from Star. (RPF ¶¶ 425-529). Otherwise, Respondent has no specific response.

2445. Mr. Morton previously met with Sigma about procuring Domestic Fittings, and understood that Sigma expected to be able to provide U.S. Pipe with Domestic Fittings pursuant to the MDA. (Morton, Tr. 2852-2853).

Response To Finding No. 2445:

Respondent has no specific response.

2446. At their October 13 meeting, Mr. Tatman quoted Domestic Fittings price multipliers of .43 (4" - 12") and .53 (14" - 24"). (Morton, Tr. 2851; CX 2203 at 001).

Response To Finding No. 2446:

This finding misconstrues the testimony of Mr. Morton because Mr. Morton testified that he did not recall anything beyond what it is contained in the document. (Morton, Tr. 2851).

2447. Sigma had previously offered lower Domestic Fittings price multipliers to U.S. Pipe, offering .38 (4" - 12") and .48 (14" - 24"). (Morton, Tr. 2852; CX 2203 at 001).

Response To Finding No. 2447:

Respondent has no specific response, except that Sigma was not in a position to become a viable Domestic Fittings supplier in 2009. (RPF 534-567).

2448. Mr. Morton mentioned the prior Sigma quote to Mr. Tatman, and told Mr. Tatman that U.S. Pipe needed the same multiplier in order to be competitive with ACIPCO. Mr. Tatman responded that the multipliers Sigma had quoted were from earlier in the MDA negotiation, and that U.S. Pipe would be competitive with ACIPCO at the higher multipliers. (CX 2203 at 001).

Response To Finding No. 2448:

See General Response 5. This proposed Finding is hearsay.

11.9 The MDA Did Not Increase Output or Expand the Market for Domestic Fittings

2449. The MDA did not increase output or expand the size of the market for Domestic Fittings. (*Infra* ¶¶ 2450-2453).

Response To Finding No. 2449:

This is an unsupported assertion, for which no response is required.

2450. McWane had not expected that entry by Sigma – through the MDA or independently – would increase the size of the Domestic Fittings market. (CX 0729 at 001 (Tatman July 21, 2009 email: “having more Domestic suppliers doesn’t really increase the size of the pie”); CX 2481 (Nowlin, Dep. at 138-139) (calling the idea having more domestic suppliers does not really increase the size of the pie “a fairly obvious statement.”)).

Response To Finding No. 2450:

See General Response 12. There is no separate Domestic Fittings market. McWane disputes this finding because when asked about the quoted language from CX 729, Mr. Tatman specifically testified:

This is a snapshot of a point in time. You’re going to see other documents from us when we talk about if people would get into the domestics game, support it and

are manufacturing that we could grow the size of the pie, so when I'm referencing it here, I don't say that, but I'm referencing a short period of time.

Tatman, Tr. 755. McWane's CEO, Ruffner Page, testified that he was in favor of the MDA because it provided "tons in the plant," i.e. increased Union Foundry's level of production. (Page, Dep. at 61-62). Moreover, McWane believed the MDA would have pro-competitive effects because it would expand the customer base for McWane because Sigma was able to reach and service customers that McWane could not. (RPFF ¶ 572) Sigma also had relationships with certain distributors and in certain geographic areas that McWane lacked. (RPFF ¶ 573)

2451. In a June 2009 presentation, Mr. Tatman noted that having multiple domestic suppliers would not significantly increase the overall Domestic Fittings market size and that a net tonnage gain scenario for McWane was unlikely. (CX 0076 at 006; Tatman, Tr. 656).

Response To Finding No. 2451:

This proposed Finding is duplicative of proposed Finding 2450, to which McWane has already responded. In addition, this finding misconstrues the testimony of Mr. Tatman. Mr. Tatman testified that the bullet point in the presentation cited in the finding was "a discussion point with a lot of assumptions," and that it was "a discussion topic," and "not a statement of fact." (Tatman, Tr. 656).

2452. Mr. Walton advocated against the MDA because he viewed every sale that Sigma made as a lost sale for McWane, and could also lead to the loss of business on non-Domestic Fittings. (CX 0111; CX 2485 (Walton, Dep. at 34-35 (explaining that he made this recommendation to Mr. McCullough))).

Response To Finding No. 2452:

See General Responses 5 and 6. McWane disputes this proposed Finding. Mr. Walton testified in deposition that by the time he drafted CX 111 in August, 2009, he was no longer actively involved in decision-making in the Fittings business. CX 2485 (Walton, Dep. at 27). Mr. Walton makes clear in CX 111 that it is a "what if analysis", are his "thoughts" that he is

offering, and that they involve speculation. *See, e.g.*, CX 111 at 3 (“It is probably a fair assumption that we will lose some non-domestic tons as well as domestic when Sigma tries to package deals, etc.”) (emphasis added). Mr. Walton’s lack of knowledge was confirmed by Mr. Tatman, who was involved in day-to-day decision-making. Mr. Tatman testified that Mr. Walton’s observations were incorrect. Tatman, Tr. 768-769. (Walton “under the assumption that Sigma wouldn’t provide any other incremental benefit to us, and we’ve said before that there is some mechanisms that they could provide incremental benefit to us.”); Tr. 770 (“I don’t think this calculation is correct.”)

2453. The MDA did not, in fact, increase the size of the Domestic Fittings market. (CX 2527 (Pais, IHT at 232-233) (McWane’s sales would have been the same without the MDA: “Q. But by and large, you think the vast majority of customers would have purchase[d] those domestic fittings [that Sigma sold under the MDA] from McWane? A. Yes.”); CX 2531 (Rybacki, Dep. at 160-161) (“The fact that Sigma had access to McWane fittings under the MDA, that didn’t cause there to be more domestic jobs; is that right? A. Correct.” “Q. . . . By having access to those fittings, you didn’t expand the size of the pie, if you will, you expanded Sigma’s ability to service a piece of that pie, is that fair? A. Yes.”)).

Response To Finding No. 2453:

See General Responses 1 and 12. There is no “Domestic Fittings market.” This proposed Finding is duplicative of proposed Finding 2450, to which McWane has already responded. In addition, the proposed Finding is unsupported by the record cites provided.

11.10 McWane and Sigma Entered into the MDA with Specific Intent to Monopolize the Domestic Fittings Market

2454. McWane and Sigma entered into the MDA with specific intent to monopolize the Domestic Fittings market. (*Infra* ¶¶ 2455-2465).

Response To Finding No. 2454:

This is an unsupported assertion, for which no response is required.

2455. McWane’s Exclusive Dealing Policy, as implemented through the MDA, was calculated to put financial pressure on Star and to prevent it from gaining credibility with customers. (CX 0997 at 003).

Response To Finding No. 2455:

See General Response 7. McWane disputes this proposed Finding. It is based on CX 997, which is a draft transcription of a voicemail that Mr. Pais dictated. Pais, Tr. 1843. Mr. Pais testified that he did not know if it saw “the light of day.” Pais, Tr. 1843. Moreover, Mr. Pais’ comments concerning Sigma and Star are not relevant to claims against McWane. Last, the proposed Finding is contrary to Mr. Pais’ explanation at trial:

Q. Sir, when you wrote “it might isolate Star and make them suffer with their investment even more, because they may not be able to gain credibility,” were you talking about Star hurting Sigma or Sigma hurting Star?

A. It was my reaction to their constant efforts to hurt Sigma; and hence, we were trying to be protective of us in that context.

Q. Were you trying to prevent Star from gaining credibility in the domestic market?

A. I was not. That is not my concern. That is up to them.

Pais, Tr. 1849.

McWane further disputes that it has an exclusive dealing policy. The McWane Rebate Policy included soft language that recognized that McWane had little to no ability to dictate terms to the distributors, who held significant market power over it. (RPFF ¶¶ 502-503).

Mr. McCutcheon testified that many distributors, including customers of McWane, purchased domestic Fittings from Star after the Rebate Policy was adopted. (RPFF ¶ 506) McWane did not refuse to sell domestic Fittings or refuse to pay rebates to its customers who bought domestic Fittings from Star. (RPFF ¶ 509).

2456. As early as February 20, 2009, in assessing Sigma’s option for private label supply of Domestic Fittings from McWane, Mr. Pais informed Walter Florence, a Sigma Board Member, that Sigma may be able to use its “relationship with McWane” to enter into a supply relationship that would “marginalize Star.” (CX 1003 at 004).

Response To Finding No. 2456:

See General Response 5. CX 1003 was not used at trial, and as such this proposed Finding is Complaint Counsel's characterization of one (1) sentence from a 6-page single-spaced document. Also, the statement that is the basis of the proposed Finding is speculative – "it is conceivable", "once we establish ourselves", "they may", and "this may marginalize Star." Finally, Mr. Pais' speculation provides no insight into McWane's intent with respect to the MDA, which was not entered until September, 2009 (some 7 months after Mr. Pais prepared CX 1003).

2457. Messrs. McCullough, Tatman, Willett, Jansen, Brown and Walton had a meeting on or about August 20, 2009 at which they discussed, among other things, the decision to sell Domestic Fittings to Sigma through the MDA. (CX 2353 (Mr. Walton's handwritten notes from that meeting); (CX 2485 (Walton, Dep. at 37-38)).

Response To Finding No. 2457:

McWane has no specific response as to whether the meeting occurred.

2458. At the August 20, 2009 meeting, Mr. McCullough made the following points about selling Domestic Fittings to Sigma through the MDA:

** LM want to sell SIGMA to put pressure on Star. LM hopefully to drive Star out of business. Would rather have competition other than Star.*

LM thinks that we should sell SIGMA as an insurance policy and to continue to put pressure on Star.... LM approved Rick's recommendation page of his PowerPoint presentation on selling SIGMA."

(CX 2353 at 004 (emphasis added) (Mr. Walton handwritten notes of August 20, 2009 meeting); (CX 2485 (Walton, Dep. 42-43 ("I wrote down that Leon said that . . . I remember it more as comments that Leon made towards the end of the meeting."))).

Response To Finding No. 2458:

See General Responses 5 and 6. CX 2485 was not used at trial, nor was Mr. McCullough (the speaker) or Mr. Walton (the listener) called as a witness.

2459. In evaluating the decision to sell Domestic Fittings to Sigma, Mr. Tatman wrote that he did not think that Sigma would be “willing to generate little to no incremental margin \$ just to help us block Star.” (CX 0076 at 008; CX 2485 (Walton, Dep. at 67-69) (Mr. Walton had asked Mr. Tatman to state his recommendations for responding to the potential Star and Sigma entry)).

Response To Finding No. 2459:

This finding is misleading because Mr. Tatman testified that this presentation consisted of “brainstorming slides,” prepared for the purpose of “teeing up discussion topics with [Mr. McCullough].” (Tatman, Tr. 653-654). Mr. Tatman wished to discuss these issues with his superiors.

2460. In a July 27, 2009 presentation titled “Sigma - Domestic Review Session,” Mr. Tatman concluded that having Sigma sell McWane branded product should (1) “reduce Star’s ability to grow share,” (2) “keep[] additional overcapacity from being added to the industry,” and (3) “help drive some additional level of price stability.” (CX 0465 at 010; *see also* CX 0170 at 009 (subsequent version of same presentation sent to McCullough and Walton)).

Response To Finding No. 2460:

See General Response 5. Neither CX 465 or 170 were used at trial. McWane disputes that proposed Finding because it states that Mr. Tatman “concludes.” He testified repeatedly that PowerPoint presentations such as this one were to “brainstorm” for the purpose of spurring discussion and contain only speculation.

2461.  (CX 1022 at 003, *in camera*).

Response To Finding No. 2461:

See General Response 5. CX 1022 was not used at trial. CX 1022 is not a report to the Sigma Board. Rather it is an email to Gopi Ramanathan, who appears to be a Sigma employee, forwarding an “update” that Mr. Pais previously provided to the Board . Mr. Pais, however, notes that he has “edited” the attached update for Mr. Ramanathan’s purpose. Since Mr. Pais

was not asked about this document at trial and it is unknown what has been “edited,” this proposed Finding is disputed. In addition, there is no indication whatsoever that it was ever provided to McWane or represents anyone’s views other than those of Mr. Pais.

2462. As Mr. Pais explained in a September 22, 2009 dictated message: “[I]f we do our job right, it might isolate Star and make them suffer with their investment even more, because they may not be able to gain credibility We need to develop an exclusive agreement arrangement with each customer . . . or we will end up strengthening Star.” (CX 0997 at 003-004; Pais, Tr. 1842-1846).

Response To Finding No. 2462:

This proposed Finding is duplicative of proposed Finding 2455, to which McWane has already responded. Amongst the pro-competitive benefits of the MDA was that Sigma was able to reach and service customers that McWane could not, and that they had relationships with certain distributors and in certain geographic areas that McWane lacked. (RPFF ¶¶ 572-573).

2463. Mr. Rona also recognized that the McWane Exclusive Dealing Policy in which Sigma agreed to participate under the MDA would make Star’s entry more difficult. (CX 2529 (Rona, IHT at 195-196 (“[T]here’s no question for any entrant that requiring exclusivity on those parts would be inherently more difficult than without it”))).

Response To Finding No. 2463:

See General Responses 3 and 6. Mr. Rona testified at trial, but was not examined on this topic. Since Sigma elected not to pursue domestic “virtual manufacturing,” it is unclear that Mr. Rona has any basis to know what would make entry “inherently more difficult.” As such, there is no foundation for this proposed Finding.

2464. Mr. Tatman’s budget for 2010, prepared after the MDA was signed and the Exclusive Dealing Policy was announced, noted that Domestic pricing would erode if Star emerged as a legitimate competitor, but assumed that the competitive threat from Star had been neutralized. (CX 0102 at 001 (2010 Budget narrative, assuming that Domestic Fittings pricing would remain flat, and that there would be no loss of Domestic Fittings market share to Star); CX 0102 at 002 (noting risk of “erosion of domestic pricing if Star emerges as a legitimate competitor”); Tatman, Tr. 982-988, 1046; see also CX 0454 (Tatman emailing budget narrative to Walton and McCullough on October 30, 2009, and noting that “Star’s impact is still unknown, but they do represent some risk in market pricing if they indeed are able to become a viable competitor for domestic fittings.”))).

Response To Finding No. 2464:

This finding is misleading because Mr. Tatman testified that it was “unknown at this point in time” what effect the MDA would have on Star sales, and that he “thought they would be there,” and that “they would grow,” but he “didn’t know the level of significance yet.” (Tatman, Tr. 986-987). The MDA was of limited scope and had no pro-competitive benefits. (RFPP ¶¶ 568-584).

2465. In addition to marginalizing Star, Sigma also believed that the MDA could benefit Sigma by improving pricing in the non-Domestic Fittings market. Sigma thought that “a healthy business relationship between us [Sigma] buying from them [McWane] and meeting the spirit of the [MDA] agreement,” could lead to “an increase in the price in the market, then the market would come to a better price” for imported Fittings. (CX 2529; Rona, IHT at 200-202) (discussing CX 0266 at 003); CX 0266 at 003 (Rona August 31, 2009 internal MDA negotiation comments noting possibility that a healthy relationship with McWane could lead to higher blended Fittings multipliers: “We have a better chance the a healthy relationship leads to a X =.30 on the blended”); CX 0278 at 001 (Mr. Pais email referring to the “spirit of the agreement”); CX 0997 at 003 (Mr. Pais expressing the hope that the MDA would “stabilize the market”)).

Response To Finding No. 2465:

See General Responses 3 and 6. While Complaint accurately quotes from the referenced exhibits, Mr. Pais testified that his comment regarding the “spirit of the agreement” was simply a general statement and that there were no commitments or agreements with McWane outside the four corners of the MDA. Pais, Tr. 1806-1807. This proposed Finding also relies on the same exhibit, CX 997, as does proposed Finding 2455, to which McWane has already responded. The MDA was of limited scope and had pro-competitive benefits. (RPFF ¶¶ 568-184).

12. As a Result of Its Excusive Dealing Policy and the MDA, McWane Was Able to Maintain Its Monopoly Power in the Domestic Fittings Market

2466. As a result of its Excusive Dealing Policy and the MDA, McWane was able to maintain its monopoly power in the Domestic Fittings market. (*Infra* ¶¶ 2467-2472).

Response To Finding No. 2466:

This is an unsupported assertion, for which no response is required.

2467. If Sigma had independently entered the market for domestically manufactured Fittings, competition would have been enhanced and consumer welfare increased, resulting in lower prices. (CX 2260-A (Schumann Rep. at 80, 82-83)).

Response To Finding No. 2467:

See General Responses 1 and 9. This finding is disputed. Mr. Pais testified that, in the summer of 2009, “There were no really good options. The SDP [Sigma Domestic Production] plans were a not very discrete or quantifiable effort. It was – we were at the early stages.” (RPFF ¶ 552) As of September 2009 Sigma had no contracts with domestic foundries, (RPFF ¶ 553), and very few of the 450 core patterns necessary to produce the full line of 730 types of Fittings were even physically present in the United States. (RPFF ¶ 554). In addition, Sigma was not a viable domestic supplier because it was in dire financial straits. (RPFF ¶¶ 534-566). Moreover, Dr. Schumann did not make an independent determination that Sigma could have become a viable supplier of domestic Fittings; rather, he was asked by Complaint Counsel to make the unsupported assumption. (RPFF ¶ 567). Next, Dr. Normann testified that Sigma was not in a position to enter the domestic market in a timely manner during the ARRA period. (RFOF ¶ 566). Last, Complaint Counsel has not established consumer injury. (RPFF ¶¶ 585-608).

2468. McWane’s Exclusive Dealing Policy lowered the degree of competition that otherwise would have existed between McWane and Star, resulting in lower consumer welfare and higher prices. (CX 2260-A (Schumann Rep. at 78-79); Schumann, Tr. 3770).

Response To Finding No. 2468:

See General Responses 1 and 9. This finding is disputed. McWane did not have an exclusive dealing policy, and did not exclude Star. (RPFF ¶ 497). McWane’s Rebate Policy protected its remaining domestic Fittings foundry and was not enforced. (RPFF ¶¶ 498-500). Distributors were free to buy domestic Fittings from the supplier of their choice. Mr. Tatman testified that he drafted the McWane Rebate Policy using soft language that would allow

McWane highly selective enforcement of the provision. (RPF 502). Indeed, McWane considered the policy “weak” because it knew that the distributors held the real power in the market. (RPF 503) McWane’s customers were always free to purchase domestic Fittings from other suppliers. (RPF 504, 529). Last, Complaint Counsel has not established consumer injury. (RPF 585-608).

2469. McWane’s Exclusive Dealing Policy eliminated the competition in the Domestic Fittings market for day-to-day bids and erected a barrier to entry that impeded Star’s growth and its ability to efficiently manufacture Domestic Fittings in the long run. (CX 2260-A (Schumann Rep. at 78-79).

Response To Finding No. 2469:

See General Responses 1, 9 and 11. This finding is disputed. McWane did not have an exclusive dealing policy, and did not exclude Star. (RPF 497). The McWane Rebate Policy included soft language that recognized that McWane had little to no ability to dictate terms to the distributors, who held significant market power over it. (RPF 502-503). Mr. McCutcheon testified that many distributors, including customers of McWane, purchased domestic Fittings from Star after the Rebate Policy was adopted. (RPF 506) McWane did not refuse to sell domestic Fittings or refuse to pay rebates to its customers who bought domestic Fittings from Star. (RPF 509). Dr. Schumann’s opinion that Star’s growth or efficiency was impeded is pure speculation. (RPF 605-608).

2470. By using its market power to impede Star’s growth, McWane managed to maintain a level of monopoly power that Star otherwise would have diminished. (CX 2260-A (Schumann Rep. at 78).

Response To Finding No. 2470:

See General Responses 1, 9 and 11. This finding is disputed. McWane did not have an exclusive dealing policy, and did not exclude Star. (RPF 497). Dr. Schumann was unable to identify a single distributor that wanted to purchase domestic fittings from Star but was unable to

because of McWane's Rebate Policy. (RPFF ¶ 524) Dr. Normann concluded that there were no Distributors who wanted to buy Star domestic Fittings but were unable to do so because of the Rebate Policy. (RPFF ¶ 525) Regardless of the Rebate Policy, McWane's customers remained free to buy domestic Fittings from the supplier of their choice. (RPFF ¶ 529).

2471. By denying Star the services of Distributors that represented such a large share of the U.S. market, McWane through its full support policy erected a barrier to entry that impeded Star's growth and its ability to most efficiently manufacture Domestic Fittings. (CX 2260-A (Schumann Rep. at 78)).

Response To Finding No. 2471:

See General Responses 1, 9 and 11. This finding is disputed. McWane did not have an exclusive dealing policy, and did not exclude Star. (RPFF ¶ 497). Dr. Schumann was unable to identify a single distributor that wanted to purchase domestic fittings from Star but was unable to because of McWane's Rebate Policy. (RPFF ¶ 524) Dr. Normann concluded that there were no Distributors who wanted to buy Star domestic Fittings but were unable to do so because of the Rebate Policy. (RPFF ¶ 525) Regardless of the Rebate Policy, McWane's customers remained free to buy domestic Fittings from the supplier of their choice. (RPFF ¶ 529).

2472. By unilaterally imposing an exclusive dealing form of vertical restraint on waterworks Distributors, McWane acted to maintain its monopoly position and monopoly power whenever local, state, or federal regulations required that waterworks projects use only domestically manufactured Fittings and when customers otherwise exhibited a strong preference for domestically produced Fittings. (CX 2260-A (Schumann Rep. at 57)).

Response To Finding No. 2472:

See General Responses 1, 9 and 11. This finding is disputed. McWane did not have an exclusive dealing policy, and did not exclude Star. (RPFF ¶ 497). Dr. Schumann was unable to identify a single distributor that wanted to purchase domestic fittings from Star but was unable to because of McWane's Rebate Policy. (RPFF ¶ 524) Dr. Normann concluded that there were no Distributors who wanted to buy Star domestic Fittings but were unable to do so because of the

Rebate Policy. (RPF 525) Regardless of the Rebate Policy, McWane's customers remained free to buy domestic Fittings from the supplier of their choice. (RPF 529).

12.1 McWane Was Able to Maintain Its Dominant Share of Domestic Fittings in 2010

2473. Despite Star's entry, McWane maintained a dominant market position in Domestic Fittings, with a market share of _____ in 2010 and _____ in 2011. (CX 2260 at 021 (Schumann Rep. at 19 tbl. 2), *in camera*).

Response To Finding No. 2473:

See General Responses 1 and 9. Other than market share, this proposed Finding is expert opinion and Complaint Counsel's characterization. McWane agrees that Star captured 5% share in 2010, doubled it in 2011 and was on pace in 2012 to have its best year ever.

2474. Distributors can purchase Domestic Fittings from only two manufacturers, Star and McWane, since they are the only Domestic Fittings suppliers. (McCutcheon, Tr. 2259; Webb, Tr. 2748-2749 (HD Supply purchases Domestic Fittings primarily from McWane, and only from Sigma when Sigma was selling McWane Fittings); Thees, Tr. 3118-3119, 3084-3085 (Ferguson currently purchases approximately 95 percent of its Domestic Fittings from McWane, and a "little bit" from Star, and only purchased McWane-manufactured Domestic Fittings from Sigma when Sigma was selling McWane Fittings); Sheley, Tr. 3406 (Illinois Meter purchases Domestic Fittings from McWane only)).

Response To Finding No. 2474:

McWane agrees that McWane and Star are currently the only suppliers of a full-line of domestically-manufactured Fittings, since ACIPCo, U.S. Pipe and Griffin ceased production.

12.2 McWane Was Able to Increase Prices of Domestic Fittings in 2010

2475. As a result of its Exclusive Dealing Policy and the MDA, McWane was able to increase prices of Domestic Fittings in 2010. (*Infra* ¶¶ 2476-2484).

Response To Finding No. 2475:

This is an unsupported assertion, for which no response is required.

2476. In a November 3, 2009 email, Mr. Jansen instructed the McWane sales team to use the Exclusive Dealing Policy to protect the price of Domestic Fittings: "when you have someone say that we need to match pricing due to the other guys we need to take a firm stance and ask who is going to use them. **There can be a price out there but if no one uses it then it becomes a mute [sic] point.**" (CX 0108 at 001 (emphasis in original)).

Response To Finding No. 2476:

See General Response 5. CX 108 was not used at trial, nor was Mr. Jansen called as a witness. This proposed Finding is also incomplete because Mr. Jansen testified in deposition what he intended by the quoted language. (Jansen, Dep. at 181-184).

2477. McWane was able to refuse to offer Project Pricing for Domestic Fittings in a local market “unless Star is an issue.” (CX 2199 (rejecting request for Project Pricing in August 2010); CX 2480 (Napoli, Dep. 87-88)).

Response To Finding No. 2477:

See General Response 5. CX 2199 was not used at trial, nor was Mr. Napoli called as a witness. McWane disputes that a single event involving one distributor in North Carolina can be extrapolated to every “local market.” Mr. Napoli was not asked such a question.

2478. For example, in response to an HD Supply request for a volume pricing quote for Domestic Fittings, Mr. Napoli declined to lower the price: “No. We are the only one who makes the full line of 24” and down. No need to drop the price unless Star is an issue.” (CX 2199 at 001; CX 2480 (Napoli, Dep. at 87-88)).

Response To Finding No. 2478:

See General Responses 5 and 11. This proposed Finding is duplicative of proposed Finding 2477, to which McWane has already responded.

2479. Distributors believe that if Sigma had entered the Domestic Fittings market Domestic Fittings prices would have been lower. (CX 2489 (Morrison, IHT at 92-93) (“Now, if there’s three players in the domestic market, there’s no reason to think that the same situation wouldn’t be occurring, that there’d be people wanting to deviate from the so-called standard cost to get an order.”); CX 2515 (Sheley, IHT at 144-145) (“I think – with three players in the market, I believe Tyler’s position would have folded immediately. . . . It would have put a negotiable position in the marketplace. . . . If Sigma would have made the same move [entered the Domestic Fittings market], I think there would have been a very minimal price increase at best.”)).

Response To Finding No. 2479:

See General Response 3. The two distributors identified in proposed Finding 2479 were either not called at trial (Morrison) or not asked this question (Sheley), which clearly calls for

improper speculation. Dr. Schumann provided no testimony or opinion evidence addressing this contention, as he merely assumed it. (RPFF ¶ 567).

2480. Mr. Tatman has specifically refused to lower Domestic Fittings prices in response to competition from Star unless McWane saw evidence that it was starting to lose business. (CX 2192; CX 2480 (Napoli, Dep. 88-90)).

Response To Finding No. 2480:

See General Response 5. Neither CX 2192 nor 2480 were used at trial, nor was Mr. Napoli called as a witness. The proposed Finding describes competition. Moreover, it is incomplete. Mr. Tatman wrote in CX 2192 that, “Regardless of what we do, [Star] is going to be in the business for the long time.”

2481. McWane was able to increase its prices for Domestic Fittings following the passage of ARRA. (CX 2544 (Coryn, Dep. at 88-89); Webb, Tr. 2736-2738 (prices for McWane’s Domestic Fittings increased during the ARRA period)).

Response To Finding No. 2481:

McWane has no specific response, other than to note that this proposed Finding does not address McWane’s costs during the same timeframe.

2482. On December 21, 2009, Mr. Tatman sent out customer letters announcing multiplier increases for Domestic Fittings (amounting to a 7% net increase across all sizes), effective January 22, 2010. (CX 1663 at 001-002; see also CX 1656 at 001-003; CX 1657 at 001-003; Tatman, Tr. 811).

Response To Finding No. 2482:

McWane has no specific response, other than to note that this proposed Finding does not address McWane’s costs during the same timeframe.

2483.

[REDACTED]

(RX-632 at 027, *in camera*; Tatman, Tr. 1004, *in camera*).

Response To Finding No. 2483:

This finding mischaracterizes the nature of McWane's revenues. Although the peak year for ARRA funding was 2010, (Tatman, Tr. 1003 (Q: "Now, if we look at -- 2010 is sort of the peak year of the ARRA money; right, sir?" A. "It was -- yes.")), McWane saw only a percent increase in domestic Fittings sales in 2010. (Tatman, Tr. 1004 in camera (Q: "And if we look down at the bottom, it says "Total Utility Fittings - Domestic," and then we go across and it's got sales, and if I'm reading it right, it says you had a percent price increase for the entire year of 2010, sir, for your -" A. "That's Correct.")) (RPF 403)

2484. McWane has reduced the rebates it offers for Domestic Fittings. (E.g., CX 2513 (Webb, IHT at 98-100)).

Response To Finding No. 2484:

See General Response 3. No timeframe is identified in this proposed Finding.

12.3 There Were Delays and Quality Shortfalls in McWane's Supply of Domestic Fittings to Sigma Under the MDA

2485. There were delays and quality shortfalls in McWane's supply of Domestic Fittings to Sigma under the MDA. (*Infra* ¶¶ 2486-2491).

Response To Finding No. 2485:

This is an unsupported assertion, for which no response is required. Moreover, this proposed Finding is irrelevant to the issues in this case.

2486. Having implemented its plan to keep Sigma and Star out of the Domestic Fittings market, McWane was unable to keep up with demand for Domestic Fittings. (CX 1521 at 001 (during the MDA, McWane was "backed up in EVERYTHING including 4"-24" A items"); Rona, Tr. 1565-1566 (describing McWane "backlog" and "ramp up" issues, and other "teething pains" in implementing the MDA); CX 2529 (Rona, IHT at 222-223) (noting McWane's "manufacturing problems as a result of the added volume"); CX 2530 (Rona, Dep. at 304-306); CX 2527 (Pais, IHT at 201); *see also* CX 1853 at 001 (Mr. Pais writes to the M20 management group "I am aware of the various – yours and others – concerns about [McWane's] deliveries."); CX 1460 at 002 (Sigma's "customers are becoming very impatient with [Sigma] on the flow of information and material from [McWane]."))).

Response To Finding No. 2486:

See General Responses 1 and 12. McWane disputes this proposed Finding. There is no “Domestic Fittings Market,” and McWane did not implement a plan to keep Sigma and Star out of any such hypothetical Domestic Fittings Market.

2487. Sigma received “constant complaints” about the McWane Domestic Fittings it sold, even before the execution of the MDA. (CX 2524 (Box, Dep. at 93-94)).

Response To Finding No. 2487:

See General Response 6. Mr. Box was not called as a witness at trial. This proposed Finding mischaracterizes Mr. Box’s deposition testimony. He testified that he did not have an accurate measurement of the quality of McWane’s fittings after it entered the MDA and that Sigma does not track the complaints that Sigma received concerning McWane fittings in any event. CX 2524. (Box, Dep. at 94).

2488. Sigma received complaints from its OEM customers about the quality of the McWane Fittings it sold. (CX 2524 (Box, Dep. at 88)). Sigma received Domestic Fittings through the MDA that were not up to Sigma’s quality standards, and Sigma had to repair those Fittings. (CX 2524 (Box, Dep. at 89)).

Response To Finding No. 2488:

See General Response 6. The proposed Finding does not define what Sigma’s quality standards are, how McWane’s Fittings failed to comply, the frequency with which there was non-compliance or provide any other foundation. It is also irrelevant to the issues in this case.

2489. McWane refused to change its internal quality control measures in order to meet Sigma’s standards. (CX 1537 at 001 (Box writing on September 29, 2009 that Tatman was “making sure we understood they would not change their internal acceptance criteria as a result of the MDA”)).

Response To Finding No. 2489:

See General Response 6. This proposed Finding correctly quotes CX 1537, but is incomplete. Mr. Box testified concerning CX 1537 as follows:

Q. After SIGMA and McWane entered into the MDA, did McWane change the quality of the fittings they provided to SIGMA?

MR. LAVERY: Objection.

A. I don't have an accurate measurement of that.

CX 2524 (Box, Dep. at 94). This proposed Finding is also irrelevant to the issues in this case.

2490. Sigma sometimes had to return bad Fittings to McWane, which could double the lead time from 4 weeks to 8 weeks, causing serious delays on the projects. (CX 2524 (Box, Dep. at 90-91)).

Response To Finding No. 2490:

See General Response 6. "Bad Fittings" is undefined and Mr. Box refused to apply that term. CX 2524. (Box, Dep. at 89). ("Bad is not the right word.")). This proposed Finding is irrelevant to the issues in this case.

2491. McWane did not improve their attention to quality after they signed the MDA with Sigma. (CX 2524 (Box, Dep. at 95-96)).

Response To Finding No. 2491:

See General Response 6. This proposed Finding is duplicative of proposed Finding 2489, to which McWane has already responded.

12.4 McWane Terminated the MDA After It Received Notice of the FTC Investigation, but Has Continued to Sell Domestic Fittings to Sigma

2492. McWane terminated the MDA after it received notice of the FTC investigation, but has continued to sell Domestic Fittings to Sigma. (*Infra* ¶¶ 2493-2496).

Response To Finding No. 2492:

This is an unsupported assertion, for which no response is required.

2493. The MDA was in effect from approximately September 2009 through August 2010. (Rona, Tr. 1704; CX 1435 at 002; Pais, Tr. 1826 (Sigma received a notice of termination of the MDA from McWane in early 2010)).

Response To Finding No. 2493:

Respondent has no specific response.

2494. On February 17, 2010, Mr. Tatman delivered to Mr. Pais a notice of termination under the MDA, to be effective 180 days thereafter. (CX 1435 at 001-002).

Response To Finding No. 2494:

Respondent has no specific response.

2495. The Federal Trade Commission notified McWane of its antitrust concerns about McWane's Exclusive Dealing Policy in January 2010. (Letter dated January 22, 2010, from Christopher G. Renner, Attorney, Federal Trade Commission, to G. Ruffner Page, Jr., President, McWane, Inc. (Attachment B)⁴⁰).

Response To Finding No. 2495:

Respondent has no specific response, other than there is no evidence in support of Complaint Counsel's unstated implication that McWane terminated the MDA as a result of the FTC investigation.

2496. After McWane terminated the MDA, it supplied Sigma with Domestic Fittings throughout 2010 and continues to do so today. (CX 2530 (Rona, Dep. at 298-299); CX 1472 (February 16, 2011 Rona email stating "I received a call from Tyler related to our agreement for domestic fittings"); CX 1747 at 003 (showing Sigma Domestic Fitting sales in each month of 2010); *see also* CX 2026 at 029, *in camera*)).

Response To Finding No. 2496:

There is nothing improper concerning an arms-length buy-sell arrangement, so McWane has no specific response to this proposed Finding. This proposed Finding is irrelevant to the issues in this case.

⁴⁰ *See* Fed. R. Evid. 201(c)-(d).

COMPLAINT COUNSEL'S PROPOSED CONCLUSIONS OF LAW**A. GENERAL**

1. The Federal Trade Commission ("FTC") has jurisdiction over the subject matter of this proceeding and over Respondent, McWane, Inc. ("McWane").

Response to Conclusion of Law No. 1:

Respondent has no specific response to this conclusion of law.

2. McWane is, and at all relevant times has been, a corporation as "corporation" is defined by Section 4 of the FTC Act, 15 U.S.C. § 44, as amended.

Response to Conclusion of Law No. 2:

Respondent has no specific response to this conclusion of law.

3. McWane's acts and practices with respect to Fittings are in or affect commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

Response to Conclusion of Law No. 3:

Respondent has no specific response to this conclusion of law.

4. Section 5 of the FTC Act prohibits "unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a)(1) (2008).

Response to Conclusion of Law No. 4:

Respondent has no specific response to this conclusion of law.

5. Conduct that violates Section 1 or 2 of the Sherman Act is deemed to constitute an unfair method of competition and hence a violation of Section 5 of the FTC Act as well. *FTC v. Cement Inst.*, 333 U.S. 683, 694 (1948); *Fashion Originators' Guild v. FTC*, 312 U.S. 457, 463-64 (1941).

Response to Conclusion of Law No. 5:

Respondent agrees that violations of FTC Act Section 5 require the same proof as violations of Sherman Act Sections 1 and 2. *See, e.g., FTC v. Cement Inst.*, 333 U.S. 683, 691-92 (1948) ("soon after its creation the Commission began to interpret the prohibitions of s 5 as including those restraints of trade which also were outlawed by the Sherman Act, and that this Court has consistently approved that interpretation of the Act"); *Fashion Originators' Guild v. FTC*, 312 U.S. 457, 463-64 (1941) ("If the purpose and practice of the combination of garment

manufacturers and their affiliates runs counter to the public policy declared in the Sherman and Clayton Acts, the Federal Trade Commission has the power to suppress it as an unfair method of competition.). However, courts have struck down the FTC's expansive interpretation of "unfairness" under FTC Act Section 5 when, as here, it attempts to penalize competitive conduct based on the "elusive concept" of unfairness which is "often dependent upon the eye of the beholder." *E.I. duPont de Nemours & Co. v. FTC*, 729 F.2d 128, 137-38 (2d Cir. 1984).

B. MARKET DEFINITION

6. The standards for defining a relevant antitrust market under the Sherman Act are the same as those developed for the analysis of mergers under the Clayton Act. *United States v. Grinnell Corp.*, 384 U.S. 563, 572-73 (1966); *Image Tech. Servs. v. Eastman Kodak Co.*, 125 F.3d 1195, 1204 n.3 (9th Cir. 1997).

Response to Conclusion of Law No. 6:

Respondent has no specific response to this conclusion of law.

7. A well-defined antitrust market consists of "any grouping of sales whose sellers, if unified by a hypothetical cartel or merger, could profitably raise prices significantly above the competitive level." *Coastal Fuels Inc. v. Caribbean Petroleum Corp.*, 79 F.3d 182, 197 (1st Cir. 1996), *cert. denied*, 519 U.S. 927 (1996); *Brown Shoe Co., v. United States*, 370 U.S. 294, 325-26 (1962); 2010 Horizontal Merger Guidelines at § 4.1.1. A relevant market is comprised of a relevant product market and a relevant geographic market. *Brown Shoe*, 370 U.S. at 325-26 (1962).

Response to Conclusion of Law No. 7:

This conclusion of law is misleading, as it suggests that a hypothetical cartel or merger alone constitutes a separate relevant market. Respondent agrees that a relevant market is comprised of a relevant product market and a relevant geographic market. *Brown Shoe Co., v. United States*, 370 U.S. 294, 325-26 (1962)

8. A relevant product market includes all products or services that are reasonable substitutes for the same purpose or use from a buyer's point of view. *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 394-95 (1956); *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1435 (9th Cir. 1995); *see also In re R.R. Donnelley & Sons Co.*, 120 F.T.C. 36, 153 (1995).

Response to Conclusion of Law No. 8:

Respondent has no specific response to this conclusion of law.

9. The key factors in identifying the bounds of a relevant product market are "(1) the reasonable interchangeability of use" by consumers and "(2) the cross-elasticity of

demand between the product itself and substitutes for it.” *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 119 (D.D.C. 2004) (quoting *Brown Shoe*, 370 U.S. at 325); *FTC v. Swedish Match*, 131 F. Supp. 2d 151, 157 (D.D.C. 2000); *FTC v. Staples*, 970 F. Supp. 1066, 1074 (D.D.C. 1997).

Response to Conclusion of Law No. 9:

Respondent has no specific response to this conclusion of law.

10. The relevant geographic market is “the ‘area of effective competition ... in which the seller operates, and to which the purchaser can practicably turn for supplies.’” *United States v. Philadelphia Nat ‘l Bank*, 374 U.S. 321, 359 (quoting *Tampa Elec. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961)); *Morgenstern v. Wilson*, 29 F.3d 1291, 1296 (8th Cir. 1994); 2010 Horizontal Merger Guidelines at § 4.2.2; *In re Polypore*, 2010 FTC LEXIS 17, at *492.

Response to Conclusion of Law No. 10:

Respondent does not have a specific response to this conclusion of law.

11. The supply of ductile iron pipe fittings 24” or less in diameter (“Fittings”) for use on waterworks projects with Open Specifications in the United States is a relevant market (the “Fittings market”).

Response to Conclusion of Law No. 11:

This conclusion of law is false and unsupported by the record. Regardless of specification, domestic and imported Fittings are routinely sold to the same distributors, sold for the same end use, and both are sold in every state in the country. Physically, they are perfectly interchangeable regardless of whether manufactured inside or outside the United States. The record evidence shows that “all-Fittings” is the proper market definition.

12. The supply of Domestic Fittings for use on waterworks projects with Domestic-only specifications in the United States is a relevant market (“the Domestic Fittings market”).

Response to Conclusion of Law No. 12:

This conclusion of law is incorrect and unsupported by the record. The conclusion that domestic fittings sold into “Domestic-only Specifications” comprise a separate market does not comport with the case law cited by Complaint Counsel above holding that a relevant product market includes all products or services that are reasonable substitutes for the same purpose or use from a buyer’s point of view, given the frequency which customers substituted imported Fittings. *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 394-95 (1956). This conclusion of law is further contradicted by the evidence that customers who “preferred” to purchase domestic Fittings were largely purchasing for reasons

such as patriotism and the desire to keep domestic foundry-workers employed, and it is well-settled that preferences alone are insufficient as a matter of law to serve as the basis for a finding a separate relevant antitrust market, particularly given the long history of imported Fittings steadily gaining share and, in recent years, dominating domestic Fittings. *Brokerage Concepts, Inc. v. U.S. Healthcare, Inc.*, 140 F.3d 494, 513 (3rd Cir. 1998) (reversing district court judgment in favor of plaintiffs, holding that “[i]nterchangeability implies that one product is roughly equivalent to another for the use to which it is put; while there might be some degree of preference for the one over the other, either would work effectively.”) (quotation omitted); *McLaughlin Equip. Co., Inc. v. Servaas*, 2004 WL 1629603 at *18 (S.D. Ind. 2004) (granting summary judgment, holding that “a mere preference for a specific manufacturer’s brand bus is not sufficient for purposes of establishing a relevant product market.”).

C. MONOPOLY AND MARKET POWER

13. Monopoly power is “the power to control prices or exclude competition.” *E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956); *accord Eastman Kodak Co. v. Image Tech. Servs.*, 504 U.S. 451, 481 (1992).

Response to Conclusion of Law No. 13:

Respondent has no specific response to this conclusion of law.

14. Market shares in excess of 90% are sufficient to establish the presumption of monopoly power and market power in markets characterized by high barriers to entry. *Jacobs v. Tempur-Pedic Int’l, Inc.*, 626 F.3d 1327, 1339-1340 (11th Cir. 2010); *see also Eastman Kodak Co. v. Image Tech. Servs.*, 504 U.S. 451, 481 (1992); *E.I. DuPont de Nemours & Co.*, 351 U.S. 377, 379, 391 (1956); *Grinnell Corp.*, 384 U.S. at 567; *United States v. Microsoft Corp.*, 253 F.3d 34, 51-56; *Graphic Prods. Distribs. v. Itek Corp.*, 717 F.2d 1560, 1570 (11th Cir. 1983); *Staples*, 970 F. Supp. at 1081-82, 1086.

Response to Conclusion of Law No. 14:

This conclusion of law is false. The definition of monopoly power is “the ability (1) price substantially above the competitive level *and* (2) to persist in doing so *for a significant period without erosion by new entry or expansion.*” *AD/SAT v. Associated Press*, 181 F.3d 216, 226-27 (2d Cir. 1999) (italics in original). If a defendant is unable to control prices or exclude competitors, then it is not a monopoly, regardless of its market share. *See Metro Mobile CTS, Inc. v. NewVector Commc’ns, Inc.*, 892 F.2d 62, 63 (9th Cir. 1989) (a defendant’s possession of even 100% market share does not necessarily establish defendant has power to charge monopoly prices or control output); *Oahu Gas Serv., Inc. v. Pacific Res., Inc.*, 838 F.2d 360, 366 (9th Cir. 1988) (“*Oahu Gas*”) (a high market share will not raise an inference of monopoly power in a market with low entry barriers or other evidence of a defendant’s inability to control prices or exclude

competitors). “[M]arket share is only a starting point for determining whether monopoly power exists, and the inference of monopoly power does not automatically follow from the possession of a commanding market share.” *Physicians & Surgeons v. Am. Bd. of Podiatric Surgery, Inc.*, 185 F.3d 606, 623 (6th Cir. 1999).

15. Market shares sufficient to support a monopolization claim are also sufficient to support attempted monopolization. *See, e.g., Defiance Hosp. v. Fauster-Cameron, Inc.*, 344 F. Supp. 2d 1097, 1112-13 (N.D. Ohio 2004); *see also McGahee v. N Propane Gas Co.*, 858 F.2d 1487, 1506 (11th Cir. 1988); *Arthur S Langendeller, Inc. v. SE. Johnson Co.*, 917 F.2d 1413, 1443 (6th Cir. 1990).

Response to Conclusion of Law No. 15:

This conclusion of law is false for the same reasons stated in Respondent’s Response to Conclusion of Law No. 14. First, if a defendant is unable to control prices or exclude competitors, then it is not a monopoly, regardless of its market share. *See Metro Mobile CTS, Inc. v. NewVector Commc’ns, Inc.*, 892 F.2d 62, 63 (9th Cir. 1989). To prove attempted monopolization, Complaint Counsel must prove that McWane possessed the “specific intent” to achieve monopoly power by predatory or exclusionary conduct; that the defendant in fact engaged in such anticompetitive conduct; and that a “dangerous probability” existed that the defendant might have succeeded in its attempt to achieve monopoly power. *U.S. Anchor Mfg. Inc. v. Rule Indus., Inc.*, 7 F.3d 986, 994 (11th Cir. 1993) (“To have a dangerous probability of successfully monopolizing a market the defendant must be close to achieving monopoly power”); *McGahee v. Northern Propane Gas Co.*, 658 F.Supp. 189, 196 (N.D. Ga. 1987) (granting summary judgment finding “no evidence that such a scheme had a dangerous probability of success.”).

16. Market power is the collective “ability [of firms] to significantly affect prices and other outcomes in the [] market.” *Cal. ex rel. Harris v. Safeway, Inc.*, 651 F.3d 1118, 1154 (9th Cir. 2011). Collective market shares sufficient to establish monopoly power under Section 2 are sufficient to establish market power under Section 1. *Id.* at 1154n.7.

Response to Conclusion of Law No. 16:

This conclusion of law is false for the same reasons stated in Respondent’s Responses to Conclusions of Law 14 and 15. If a defendant is unable to control prices or exclude competitors, then it is not a monopoly, regardless of its market share. *See Metro Mobile CTS, Inc. v. NewVector Commc’ns, Inc.*, 892 F.2d 62, 63 (9th Cir. 1989).

17. McWane has, and at all relevant times has had, monopoly power or the dangerous probability of achieving monopoly power in the Domestic Fittings market.

Response to Conclusion of Law No. 17:

This conclusion of law is false and unsupported by the record. First, as stated in McWane's Response to Conclusions of Law Nos. 11-12, "domestic Fittings" is not a properly defined relevant market. Even if this Court were to find a separate market for domestic Fittings, and that McWane had a high share of it, that alone does not suggest the company possessed monopoly power. *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966) (distinguishing monopolies obtained through business acumen and historic accident from monopolies obtained by predatory conduct). Rather, the ability to maintain prices above a competitive level "for an extended period" is a required to prove monopoly power. *Rebel Oil Co., Inc. v. Atl. Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995) ("*Rebel Oil*"). But here, there is no evidence McWane ever charged monopoly prices for its domestic Fittings, nor could it. On the contrary, the overwhelming evidence shows that McWane *did not* charge monopoly prices, and that its prices were even lower than Star's in the vast majority of states. (Normann, Tr. 4768.).

18. McWane, Sigma and Star collectively have, and at all relevant times have had, market power in the relevant Fittings market.

Response to Conclusion of Law No. 18:

This conclusion of law is false and unsupported by the record for the reasons stated in Respondent's Responses to Conclusions of Law Nos. 14-16. The definition of monopoly power is "the ability to (1) price substantially above the competitive level *and* (2) to persist in doing so *for a significant period without erosion by new entry or expansion.*" *AD/SAT v. Associated Press*, 181 F.3d 216, 226-27 (2d Cir. 1999) (italics in original). Here, the record evidence does not support the conclusion that McWane, Sigma and Star have, or ever did have, market power. On the contrary, the record evidence showing that McWane's published multipliers, as well as invoice prices, have steadily declined in the majority of states, despite a sharp spike in McWane's raw materials costs is

hardly an indication of market power, at least on McWane's part.⁴¹ (Normann, Tr. 4777-4779.) Further, competition in the Fittings market was cutthroat. McWane, Star and Sigma each competed vigorously at all times, and thus could not price above competitive levels. This alone cuts against any inference of market power. (Pais, Tr. 1931 ("As I've said -- and I hope, if nothing else, you'll get a sense of this industry -- this has been a bitterly competitive, mistrustful, even vengeful supply base"), 1995-1996 ("everyone in our industry is mistrustful, vengeful, and looking for any way to react and hurt each other while they're trying to protect themselves"); Rybacki, Tr. 3566 ("Because there's such a mistrust amongst the group as a whole anyway.")).

D. COUNT ONE: MCWANE ORCHESTRATED A CONSPIRACY WITH ITS COMPETITORS TO RESTRAIN PRICE COMPETITION BY LIMITING PROJECT PRICING

19. Agreements among horizontal competitors to raise, lower, stabilize, or otherwise restrain price competition are per se illegal under Section 1 of the Sherman Act and Section 5 of the FTC Act. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940); *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 648 n. 10 (1980) (per curiam); *United States v. Gen. Motors Corp.*, 384 U.S. 127, 148 (1966).

Response to Conclusion of Law No. 19:

This conclusion of law is misleading. "Per se" illegality is reserved for those agreements that meet the strict characterization of Section 1 of the Sherman Act and require no further inquiry. However, courts hold that "[w]e have recognized, for example, that 'there is often no bright line separating *per se* from Rule of Reason analysis,' since 'considerable inquiry into market conditions' may be required before the application of any so-called '*per se*' condemnation is justified." *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 779 (1999) (internal quotations omitted). The essential inquiry remains whether defendants agreed

⁴¹ Sigma also reported a "quick and sharp erosion in market pricing" - - which it blamed on "McWane leading markets downward." (RX 115; RX 116; Pais, Tr. 2129-40; Rybacki, Tr. 3702.)

upon “a unity of purpose or common design and understanding, or a meeting of minds in an unlawful arrangement.” *Am. Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946).

20. An antitrust agreement is established when two or more firms share “a unity of purpose or a common design and understanding, or a meeting of the minds,” or in other words, share a “conscious commitment to a common scheme designed to achieve an unlawful object.” *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771 (1984); *Monsanto Co. v. Spray-Rite Servo Corp.*, 465 U.S. 752, 768 (1984).

Response to Conclusion of Law No. 20:

Respondent has no specific response to this conclusion of law.

21. An antitrust agreement is established by evidence of the conspirators’ parallel pricing conduct along with various “plus” factors that tend to exclude the possibility that the alleged conspirators acted independently. *See In re Travel Agent Comm’n Antitrust Litig.*, 583 F.3d 896, 907 (6th Cir. 2009); *Cason–Merenda V. Detroit Med. Ctr.*, 2012-1 Trade Cas. (CCH) ¶ 77,893 (E.D. Mich. Mar. 22, 2012).

Response to Conclusion of Law No. 21:

This conclusion of law is potentially misleading. To prove a conspiracy through circumstantial evidence, Complaint Counsel is required to show both “parallel pricing” and “plus factors,” i.e., conduct contrary to self-interest. *Matsushita*, 475 U.S. at 588; *Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan, Inc.*, 176 F.3d 1055, 1072 (8th Cir. 1999) (“The whole premise of the class’s case is parallel pricing. Without parallel pricing, their case collapses.”). Neither standing alone will suffice. *Id.*

22. An antitrust agreement may also be established by evidence of a *quid pro quo* arrangement or mutual assurances regarding price, which can be communicated verbally or via conduct alone. *Sugar Inst. v. United States*, 297 U.S. 553, 601 (1936); *Gen. Motors Corp.*, 384 U.S. at 142-43; *see also Isaksen V. Vt. Castings, Inc.*, 825 F.2d 1158, 1164 (7th Cir. 1987); Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶¶ 1404, 1410c (Supp. 2012).

Response to Conclusion of Law No. 22:

This conclusion of law is vague and misleading. An agreement in violation of the antitrust laws requires proof of a “preceding agreement” on price. “The existence of an agreement is the hallmark” of a conspiracy claim. *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 117 (3d Cir. 1999); *see Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771 (1984) (conspiracy requires proof of “unity of purpose or a common design and understanding or a meeting of the minds in an unlawful arrangement”). That requires proof that defendants discussed and

agreed upon “a unity of purpose or common design and understanding, or a meeting of minds in an unlawful arrangement.” *American Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946); *see also Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1966 (2007) (“when allegations of parallel conduct are set out in order to make a § 1 claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action”). Complaint Counsel’s vague assertions regarding “*quid pro quo*” arrangements or “mutual assurances” are insufficient as a matter of law.

23. McWane, Sigma and Star agreed to stabilize and increase Fittings prices by curtailing Project Pricing and increasing price transparency.

Response to Conclusion of Law No. 23:

This conclusion of law is false and unsupported by the record. McWane showed substantial direct evidence at trial that it engaged in independent decision-making and cutthroat competitive pricing at all times in an effort to win back business it had steadily lost to importers for more than a decade. Complaint Counsel’s brief and proposed findings do not point to any direct evidence of any advance communication of any published price or any specific job discount from McWane to Sigma or Star. On the contrary, as noted in McWane’s opening brief, Complaint Counsel conceded in its interrogatory answers that its “lacks” such evidence, and Dr. Schumann confirmed at trial that it does not exist: “as I said, there was no meeting in a smoke filled room.” (Schumann, Tr. 4171-3, 4186-87, 4236.) Indeed, Dr. Schumann acknowledged that his investigation of the record in this case did not yield a single piece of direct evidence of any price agreement: “I have not found anything to suggest that any executives at Sigma and Star and McWane met in a specific place and had a meeting to hammer out some sort of agreement. That is correct.” (Schumann, Tr. 4172-73 (emphasis added).)

Complaint Counsel further concedes McWane underpriced Sigma and Star and did not follow their higher published prices. Moreover, Complaint Counsel presented no evidence that McWane’s ongoing job discounts were parallel with Sigma and Star’s job discounts in amount, frequency, or any other measure. The lack of any evidence that McWane engaged in parallel pricing alone - - on the very threshold element necessary for a circumstantial case - - is dispositive. *See In re Beef Industry Antitrust Litig.*, 907 F.2d 510, 514 (5th Cir. 1990). Even if McWane’s pricing paralleled that of its rivals, that alone would not meet Complaint Counsel’s burden. To prove its case, Complaint Counsel must also produce “plus factors” that tend to exclude any legitimate reason for the parallel conduct. *Blomkest*, 176 F.3d at 1072. In this case, however, Complaint Counsel’s did not do so.

E. COUNT TWO: MCWANE AND ITS COMPETITORS PARTICIPATED IN AN ILLEGAL INFORMATION EXCHANGE

24. The elements of a Section 1 violation are: (1) the existence of a contract, combination, or conspiracy among two or more separate entities (*i.e.*, concerted action), that (2) unreasonably restrains trade. *E.g.*, *Law v. NCAA*, 134 F.3d 1010, 1016 (10th Cir. 1998).

Response to Conclusion of Law No. 24:

Respondent has no specific response to this conclusion of law.

25. The reciprocal exchange of information among competitors constitutes concerted action under Section 1. *Container Corp.*, 393 U.S. 333, 335 (1969); *see also Todd v. Exxon Corp.*, 275 F.3d 191, 196 (2d Cir. 2001); *Areeda & Hovenkamp*, Antitrust Law ¶ 1409a; *see also In re N. Tex. Specialty Physicians*, 140 F.T.C. 715, 738 (2005).

Response to Conclusion of Law No. 25:

This conclusion of law is incorrect. “The Supreme Court has made clear that ‘the dissemination of price information is not itself a *per se* violation of the Sherman Act’” and may, in fact, be pro-competitive. *Burtch*, 662 F.3d at 223 (quoting *United States v. Citizens & So. Nat’l Bank*, 422 U.S. 86, 113 (1975)). The mere exchange of price and other market information is benign conduct that is “normally an aid to commerce” and only becomes problematic if it results in an agreement. *Sugar Inst.*, 297 U.S. at 598. To prove concerted action, “there must be evidence that the exchanges of information had an impact on pricing decisions.” *Baby Foods*, 166 F.3d at 125.

26. A *prima facie* case that an information exchange will likely harm competition is satisfied by showing that the structure of the market is susceptible to coordination, and that the nature of the information exchanged has the potential or tendency to facilitate coordination. *See McWane*, slip op. at 21; *Gypsum*, 438 U.S. at 441 n. 16; *Todd v. Exxon*, 275 F.3d at 207-08.

Response to Conclusion of Law No. 26:

This conclusion of law is incorrect. The mere fact that a market is susceptible to coordination or that the nature of the information exchanged has the potential or tendency to facilitate coordination does not make a *prima facie* case. As stated in Respondent’s Response to Conclusion of Law 25, participation in trade associations that disseminate market information is perfectly legal. *Burtch*, 662 F.3d at 223; *Citizens & So. Nat’l Bank*, 422 U.S. at 113. The mere exchange of price and other market information is benign conduct that is “normally an aid to commerce” and only becomes problematic if it results in an agreement. *Sugar Inst.*, 297 U.S. at 598. “[T]here [also] must be evidence that the exchanges of information had an impact on pricing decisions.” *Baby Foods*, 166 F.3d at 125.

Further, Courts recognize that as a result of the inherent economic realities of oligopolistic markets, any rational firm must take into account the anticipated reaction of its competitors when making its own pricing decisions. *Flat Glass*, 385 F.3d at 359. Thus, Courts require a plaintiff to meet a heightened standard of proof of showing “an actual agreement – instead of the ‘unilateral, independent conduct of competitors.’” *Id.* (citing *Baby Food*, 166 F.3d at 122); *see also InterVest*, 340 F.3d at 159-60 (plaintiff relying on circumstantial evidence must meet heightened burden of proof).

27. Complaint Counsel has established a *prima facie* case that the DIFRA Information Exchange caused competitive harm because the structure of the Fittings market is susceptible to coordination and the nature of the DIFRA Information Exchange has the potential and tendency to facilitate coordination.

Response to Conclusion of Law No. 27:

This conclusion of law is false and unsupported by the record in this proceeding. The record evidence shows that DIFRA was a procompetitive trade association that in no way “facilitated coordination.” The aggregated volume (not price) data contained in the DIFRA reports improved the abilities of each member to assess overall market trends and estimate its own market share, and thereby better manage production schedules and inventory. Moreover, each witness testified that the historic tons-shipped DIFRA data did not give McWane or any other DIFRA member any insight into competitor pricing or sales, and that they never discussed pricing at DIFRA meetings (all of which were monitored by antitrust counsel). (Brakefield, Tr. 1352-53, 1384-1389; McCutcheon, Tr. 2563.) Witnesses confirmed that the reports did not in any way serve as a vehicle to permit McWane, Sigma or Star to fix and stabilize Fittings prices or otherwise “facilitate” price coordination. (Brakefield, Tr. 1337 (“Q. Did DIFRA serve as a vehicle to permit Sigma, Star and McWane to fix and stabilize prices for ductile iron fittings? A. No, sir.”).) Complaint Counsel’s suggestion that an illicit inference should be drawn from this perfectly legitimate business purpose is contrary to both the evidence and well-established legal authority.

It is well established that legitimate trade associations are perfectly legal, as are their efforts to gather aggregated data about the industry. The Supreme Court has repeatedly held that the “exchange of price data and other information among competitors does not invariably have anticompetitive effects; indeed such practices can in certain circumstances increase economic efficiency and render markets more, rather than less, competitive.” *United States v. U.S. Gypsum Co.*, 438 US 422, 441 n.16 (1978). Where, as here, the information that the trade association gathers and disseminates is not price information, but rather, aggregated volume information, the inference of conspiracy is even less plausible. *Williamson Oil*, 346 F.3d at 1313 (“It is far less indicative of a price *fixing* conspiracy to exchange information relating to sales as opposed to prices” . . . it is “plainly beneficial” for a company “to keep tabs on the commercial activities of its competitors, so the receipt of information concerning their sales does not tend

to exclude the possibility of independent action or to establish anticompetitive collusion”); *Baby Foods*, 166 F.3d at 125 (The Third Circuit rejected antitrust liability where there was no “evidence that exchanges of information had an impact on pricing decisions.”).

28. To rebut a *prima facie* case of competitive harm, horizontal restraints must be (1) reasonably necessary to achieve a procompetitive efficiency that is (2) legitimate (*i.e.*, “cognizable” and “plausible”) and (3) supplied by evidence in the record. *In re Realcomp*, slip op. at 16 (Nov. 2, 2009); *see also Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1 (1979); *FTC v. Indiana Fed’n of Dentists*, 476 U.S. 447 (1986); *In re Polygram Holding, Inc.*, 136 FTC. 310 (2003); Areeda & Hovenkamp, *Antitrust Law*, ¶1505.

Response to Conclusion of Law No. 28:

This conclusion of law is potentially misleading. Complaint Counsel bears the burden of proving competitive harm, which it has not for the reasons stated in Respondent’s Responses to Conclusions of Law Nos. 19-27. Respondent has no specific response to the remaining conclusions.

29. McWane has not shown that the DIFRA Information Exchange is reasonably necessary to achieve any cognizable, plausible and valid efficiency justification.

Response to Conclusion of Law No. 29:

This conclusion of law is false and misleading. Complaint Counsel has not shown that DIFRA facilitated price coordination or was in any way anticompetitive. Thus, McWane has no duty to prove a competitive justification for its participation in DIFRA. McWane, however, did show overwhelming evidence that DIFRA was a pro-competitive trade organization, guided and supervised by experienced antitrust counsel, a partner in one of the South’s largest and most respected law firms, and an equally respected accounting firm. For example, the aggregated volume (not price) data contained in the DIFRA reports helped each member to assess overall market trends and estimate its own market share, and thereby better manage production schedules and inventory. (JX 694 (Bhutada, Dep. at 20-21); JX 654 (Brakefield, Dep. at 77-78); Rybacki, Tr. 3539-3541.) McWane used the tons-shipped data to finalize its independent decision in June 2008 to keep its published multipliers lower than the large price increases that Sigma announced in its “Big Bold Move” (Tatman, Tr. 536-540.) Moreover, the evidence at trial also showed that prices sharply deteriorated for all three suppliers in the second half of 2008 - - during the time period when the DIFRA data was available.

It is also well established that legitimate trade associations are perfectly legal, as are their efforts to gather aggregated data about the industry. *Citric Acid*, 191 F.3d at 1098 (“Gathering information about pricing and competition in the industry is standard fare for trade associations. If we allowed conspiracy to be

inferred from such activities alone, we would have to allow an inference of conspiracy whenever a trade association took almost any action.”).

F. COUNT THREE: MCWANE INVITED ITS COMPETITORS TO JOIN A PER SE UNLAWFUL CONSPIRACY

30. An invitation to collude on price constitutes an unfair method of competition in violation of Section 5 of the FTC Act. *McWane*, slip op. at 20-22. *See also Liu v. Amerco*, 677 F.3d 489 (1st Cir. 2012); *Areeda & Hovenkamp*, *Antitrust Law* ¶ 1419; Stephen Calkins, *Counterpoint: The Legal Foundation of the Commission’s Use of Section 5 to Challenge Invitations to Collude is Secure*, ANTITRUST 69 (2000).

Response to Conclusion of Law No. 30:

This conclusion of law is incorrect. No court has ever found an antitrust violation based upon a one-way “invitation” or “offer” or “attempt” or “signal” to collude that was unconsummated. On the contrary, court after court has rejected antitrust liability when presented with a one-way offer. *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647 (1980) (per curiam) (“advance price announcements are perfectly lawful”); *see also Baby Foods*, 166 F.3d at 125 (“to survive summary judgment, there must be evidence that the exchanges of information had an impact on pricing decisions”); *Reserve Supply Corp. v. Owens-Corning Fiberglas Corp.*, 971 F.2d 37, 54 (7th Cir. 1992) (advance announcements of price changes “served important purpose” in construction industry because customers “bid on building contracts well in advance of starting construction and, therefore, required sixty days’ or more advance notice of price increases”); *United States v. American Airlines, Inc.* 570 F. Supp. 654, 657 (N.D. Tex. 1983) (Sherman Act’s prohibition of conspiracies “does not reach attempts”), *rev’d on other grounds*, 743 F. 2d 1114, 1119 (5th Cir. 1984) (“our decision that the government has stated a claim [under Sherman Act Section 2] does not add attempt to violations of Section 1 of the Sherman Act”).

Complaint Counsel may cite consent orders the Commission entered on administrative complaints about signaling or invitations to collude. But a consent cannot create new law (and, indeed, does not even constitute an admission that any law was violated). That is the province of the federal courts, *FTC v. Texaco, Inc.*, 393 U.S. 223, 226 (1968) (“ultimate responsibility for the construction of this statute rests with the courts”), and the courts have roundly rejected the theory, as discussed above. Indeed, courts have struck down the FTC’s expansive interpretation of “unfairness” under FTC Act Section 5 when, as here, it attempts to penalize competitive conduct based on the “elusive concept” of unfairness which is “often dependent upon the eye of the beholder.” *E.I. duPont de Nemours & Co. v. FTC*, 729 F.2d 128, 137-38 (2d Cir. 1984).

31. Invitations to collude need not be private communications and “can occur in speeches at industry conferences, announcements of future prices, statements on

earnings calls, and in other public ways.” *In re Delta/AirTran Baggage Fee Antitrust Litig.*, 733 F. Supp. 2d 1348, 1360 (N.D. Ga. 2010) (citing complaint in *In re Valassis Commc’ns, Inc.*, 2006 FTC LEXIS 25 (April 19,2006)); *see also In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 906 F.2d 432, 445-47 (9th Cir. 1990); *Standard Iron Works v. ArcelorMittal USA, Inc.*, 639 F. Supp. 2d 877, 892-95 (N.D. Ill. 2009); *In re Travel Agency Comm’n Antitrust Litig.*, 898 F. Supp. 685, 690 (D. Minn. 1995); *In re U-Haul Int’l Inc.*, FTC File No. 081 0157 (2010).

Response to Conclusion of Law No. 31:

This conclusion of law is incorrect for the same reasons stated in Respondent’s Response to Conclusion of Law No. 30. No court has ever found an antitrust violation based upon a one-way “invitation” or “offer” or “attempt” or “signal” to collude that was unconsummated. On the contrary, court after court has rejected antitrust liability when presented with a one-way offer. *Catalano, Inc. v. Target Sales*, 446 U.S. 643, 647 (1980) (per curium) (“advance price announcements are perfectly lawful”); *Baby Foods*, 166 F.3d at 125 (“to survive summary judgment, there must be evidence that the exchanges of information had an impact on pricing decisions”); *Reserve Supply Corp. v. Owens-Corning Fiberglas Corp.*, 971 F.2d 37, 54 (7th Cir. 1992) (advance announcements of price changes “served important purpose” in construction industry because customers “bid on building contracts well in advance of starting construction and, therefore, required sixty days’ or more advance notice of price increases”); *United States v. American Airlines, Inc.*, 570 F. Supp. 654, 657 (N.D. Tex. 1983) (Sherman Act’s prohibition of conspiracies “does not reach attempts”), *rev’d on other grounds*, 743 F. 2d 1114, 1119 (5th Cir. 1984) (“our decision that the government has stated a claim [under Sherman Act Section 2] does not add attempt to violations of Section 1 of the Sherman Act”).

Complaint Counsel may cite consent orders the Commission entered on administrative complaints about signaling or invitations to collude. But a consent cannot create new law (and, indeed, does not even constitute an admission that any law was violated). That is the province of the federal courts, *FTC v. Texaco, Inc.*, 393 U.S. 23, 226 (1968) (“ultimate responsibility for the construction of this statute rests with the courts”), and the courts have roundly rejected the theory, as discussed above. Indeed, courts have struck down the FTC’s expansive interpretation of “unfairness” under FTC Act Section 5 when, as here, it attempts to penalize competitive conduct based on the “elusive concept” of unfairness which is “often dependent upon the eye of the beholder.” *E.I. duPont de Nemours & Co. v. FTC*, 729 F.2d 128, 137-38 (2d Cir. 1984).

G. COUNT FOUR: MCWANE ENLISTED ITS COMPETITOR SIGMA AS A MASTER DISTRIBUTOR TO PREVENT COMPETITION IN THE DOMESTIC FITTINGS MARKET

32. Under Section 1 of the Sherman Act “concerted action may be amply demonstrated by an express agreement.” *See, e.g., United States v. Delta Dental*, 943 F. Supp. 172, 174-174 (D.R.I. 1996).

Response to Conclusion of Law No. 32:

Respondent has no specific response to this conclusion of law.

33. The Master Distribution Agreement (“MDA”) between McWane and Sigma constitutes concerted action under Section 1 of the Sherman Act.

Response to Conclusion of Law No. 33:

This conclusion of law is false and unsupported by the record. The MDA was a pro-competitive distribution agreement that allowed McWane to increase its volume at a time when its last remaining foundry was running at less than half-capacity, and allowed Sigma to supply domestic Fittings to its customers during the ARRA period. McWane was the last remaining major manufacturer of domestic Fittings, desperate for volume having closed its Tyler South plant. Thus, McWane’s focus in signing the MDA was getting more tons, wider distribution, and increased output for its domestic Fittings foundry. Sigma’s focus in signing the MDA was on keeping its own customers happy and providing domestic Fittings to those customers when needed. To prove “concerted action” Complaint Counsel was required prove that McWane and Sigma possessed the “specific intent” thrust monopoly power on McWane by predatory or exclusionary conduct; that the defendant in fact engaged in such anticompetitive conduct. *See Belfiore v. The New York Times Co.*, 826 F.2d 177,183 (2nd Cir. 1987) (no conspiracy where plaintiff failed to prove that alleged co-conspirator shared intent to make primary conspirator a monopoly). Here, Complaint Counsel has not established that McWane and Sigma had the specific intent to thrust a monopoly on McWane in the purported market for domestic Fittings. As discussed, each company had its own pro-competitive justifications for entering the MDA, and the argument that *Sigma* had the intent to thrust a monopoly on *McWane*, its primary competitor, defies logic.

34. For purposes of Section 1 analysis, a firm is considered a potential competitor “if there is evidence that entry by the firm is reasonably probable in the absence of the relevant agreement.” *McWane*, slip op. at 22 n.18 (citing *Yamaha Motor Co. v. FTC*, 657 F.2d 971, 977-79 (8th Cir. 1981); *United States v. Siemens Corp.*, 621 F.2d 499, 506-07 (2d Cir. 1980); *Engine Specialties, Inc. v. Bombardier) Ltd.*, 605 F.2d 1 (1st Cir. 1979); *DOJ/FTC Guidelines*, § 1.1 n.6 (2000).

Response to Conclusion of Law No. 34:

This conclusion of law is incorrect, as it misstates the applicable standard. Case law makes clear that a party is not a “potential competitor” unless it has taken “some affirmative steps to enter the business[,]” had an “intention” and “preparedness” to do so. *Gas Utils. Co. of Alabama, Inc. v. S. Natural Gas Co.*, 996 F.2d 282, 283 (11th Cir. 1993) (“Inquiry into procedures is insufficient to establish preparedness . . . party must take some affirmative step to enter”); *Cable Holdings of Ga., Inc. v. Home Video, Inc.*, 825 F.2d 1559, 1562 (11th Cir. 1987) (requiring “an intention to enter the business” and a “showing of preparedness”); *Sunbeam Television Corp., v. Nielsen Media Research, Inc.*, 2011 WL 113855 at *11-12 (S.D. Fla. Jan. 13, 2011) (“a would-be purchaser suing an incumbent monopolist for excluding a potential competitor . . . must prove the excluded firm was willing and able to supply it but for the incumbent firm’s exclusionary conduct”). “Without these two showings [intention and preparedness] it cannot fairly be concluded that the antitrust violation was the cause of the failure to expand.” *Cable Holdings of Ga., Inc. v. Home Video, Inc.*, 825 F.2d 1559, 1562 (11th Cir. 1987).

35. Sigma was a potential competitor in the Domestic Fittings market prior to signing the MDA with McWane.

Response to Conclusion of Law No. 35:

This conclusion of law is false and unsupported by the record. Complaint Counsel’s assertion that Sigma could have (and would have) expanded into domestic Fittings during the ARRA period was contradicted by substantial evidence at trial establishing that the company was in dire financial straits in 2009, had already breached its bank loan covenants and was on the verge of doing so again, had more than \$100 million in debt (tens of millions of it at extraordinarily high, double digit interest rates approaching 20%), little or no equity (it had only a few hundred thousand dollars in cash on its books) and plummeting revenue. (Pais, Tr. 2181 (“Q. And what you’re telling him is, as we head into this bank meeting, we’re actually in an even worse position than we believed; right? A. Yes.”).) Sigma’s CEO and VP both confirmed its “grave” situation, as did its VP of Engineering. (Pais, Tr. 2163-2164 (“Q. And the fact is that Sigma in May of 2009 was in a grave situation. A. Grave, yes”); Rybacki, Tr. 3728 (“there were grave concerns over the costs of getting into domestic fittings.”).) In the Summer of 2009 Sigma’s VP of Engineering, Mr. Bhattacharji, concluded that after exploring the possibility, virtual manufacturing was “not a viable option.” (JX 682 (Bhattacharji Dep. at 121:20-124:8).) Sigma’s board and its banks also did not authorize it to exceed its capital expense budget or to move forward with domestic manufacturing. (JX 682 (Bhattacharji Dep. at 83:11-15 (“Q. How could you even get into domestic production with \$5 to \$10 million of potential capex if you’re capped at \$2-1/2 million? A. Absolutely. You could not.”).)

In 2009 Sigma simply was not in a position financially, commercially or practically to domestically manufacture fittings. It *could not* have become a producer of domestic Fittings in time to compete for jobs under ARRA. (Pais, Tr. 2217 (“I have explained very descriptively the various challenges that we had as we went down that path. And we never got to a point of having any viable domestic production capability at all”) 1755 (“we had no clear option. We had no idea about what would really be a feasible option”).) In fact, as a practical matter, it would have taken Sigma at least 18-24 months to develop a full line of fittings, long after the ARRA period was over. (Rona, Tr. 1673; RX-284 ¶¶ 4-15; RX-287 ¶¶ 3-14; RX-286 ¶¶ 5-6; JX 682 (Bhattacharji, Dep. 30-31, 47, 118-119, 121-124.)

36. Agreements among actual and potential competitors to allocate markets unreasonably restrain trade and are per se unlawful. *See, e.g., Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46 (1990) (per curiam); *United States v. Topco Assocs.*, 405 U.S. 596,608,612 (1972); *Blue Cross & Blue Shield United. Marshfield Clinic*, 65 F.3d 1406 (7th Cir. 1995); *Engine Specialties, Inc. v. Bombardier, Ltd.*, 605 F.2d 1 (1st Cir. 1979); *Eli Lilly & Co. v. Zenith Goldline Pharm., Inc.*, 172 F. Supp. 2d 1060 (S.D. Ind. 2001).

Response to Conclusion of Law No. 36:

Respondent has no specific response to this conclusion of law.

37. The MDA between McWane and Sigma is analogous to an agreement to allocate the Domestic Fittings market to McWane and is per se unlawful under Section 1 of the Sherman Act.

Response to Conclusion of Law No. 37:

This conclusion of law is false and unsupported by the record. The MDA had no provisions, express or implied, that allocated markets in any way. Notably, Complaint Counsel has not shown any support whatsoever for this assertion, and in fact, the record evidence proves the opposition. The MDA was a pro-competitive distribution agreement that offered McWane more tons, wider distribution, and was output enhancing for McWane. (*See* McWane’s Op. Br. at 58-60.) The MDA allowed McWane to reach customers that it otherwise could not. (JX 643 (Tatman, IHT at 176-177); JX 642 (Page, Dep. at 62-63).) Sigma, with its network of regional distribution yards and larger field sales force, was better able than McWane to provide certain servicing benefits, such as faster delivery, to purchasers of domestic Fittings. (JX 689 (Rona Dep. at 123-124, 133-134); JX 643 (Tatman, IHT at 176-177); JX 688 (Rona, IHT at 177-178).) Sigma also had relationships with certain distributors and in certain geographic areas that McWane lacked. (JX 642 (Page, Dep. at 69-73).) The MDA was also pro-competitive and beneficial to Sigma’s consumers, as it was the only way Sigma could effectively supply domestic Fittings to its customers during ARRA’s short time window. (Rona, Tr. 1481, 1671.)

38. Alternatively, Complaint Counsel has established a *prima facie* case that the MDA unreasonably restrained trade in Domestic Fittings in two separate ways: (i) the inherently suspect nature of the restraint has been shown; (ii) the anticompetitive nature of the restraint has been shown together with evidence of McWane and Sigma's market power. *See, e.g., Realcomp II, Ltd. v. FTC*, 635 F.3d 815, 825-826 (6th Cir. 2011); *In re Polygram Holding, Inc.*, 136 FTC. 310 (2003); *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351 (5th Cir. 1980).

Response to Conclusion of Law No. 38:

This conclusion of law is false and unsupported by the record. Complaint Counsel failed to establish a *prima facie* case that the MDA unreasonably restrained trade for the same reasons stated in Respondent's Response to Conclusion of Law Nos. 32, 33, 35 and 37. The MDA was a pro-competitive and output-enhancing distribution agreement that offered McWane more tons and wider distribution. (*See* McWane's Op. Br. at 58-60.) The MDA was also pro-competitive and beneficial to Sigma's consumers, because given Sigma's precarious financial situation, as of September 2009 it simply had no viable way to supply its customers with domestic Fittings other than to enter into the MDA with McWane. (Pais, Tr. 1799-1804, 1854-1855, 2173-2175, 2184, 2210, 2217-2218, 2222.)

39. McWane has not shown that the MDA is reasonably necessary to achieve any cognizable, plausible and valid efficiency justification. *Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1 (1979); *In re Polygram Holding, Inc.*, 136 FTC. 310 (2003); Areeda & Hovenkamp, *Antitrust Law*, ¶ 1505.

Response to Conclusion of Law No. 39:

This conclusion of law is misleading and unsupported by the record. First, this conclusion of law assumed that McWane bears the burden of showing pro-competitive justifications for the MDA. It does not. Complaint Counsel bore at all times the burden of proving by "substantial evidence" that sigma was a "potential competitor" and the MDA foreclosed it from entering production of domestic Fittings. *Gas Utils. Co. of Alabama, Inc. 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, 1562 (11th Cir. 1987). However, Complaint Counsel failed to meet this burden. Further, McWane did show pro-competitive justifications for entering MDA, as stated in Respondent's Responses to Conclusions of Law Nos. 32-38.

H. COUNT FIVE: MCWANE AND SIGMA CONSPIRED TO MONOPOLIZE THE DOMESTIC FITTINGS MARKET BY EXCLUDING STAR

40. The elements of a conspiracy to monopolize claim under Section 2 of the Sherman Act are (1) concerted action, with (2) the specific intent to monopolize, and (3) an overt act in furtherance of the conspiracy. *Levine v. Cent. Fla. Med.*

Affiliates, 72 F.3d 1538, 1556 (11th Cir. 1996); *Thompson v. Metro. Multi-List, Inc.*, 934 F.2d 1566, 1582 (11th Cir. 1991).

Response to Conclusion of Law No. 40:

This conclusion of law is incomplete. To establish conspiracy to monopolize Complaint Counsel must prove: (i) the existence of a conspiracy to monopolize; (ii) overt acts done in furtherance of the conspiracy; (3) an effect upon an appreciable amount of interstate commerce; and (4) a specific intent to monopolize. *Lantec, Inc. v. Novell, Inc.*, 306 F.3d 1003, 1028 (10th Cir. 2002). To establish “specific intent,” Complaint Counsel must prove that McWane possessed the “specific intent” to achieve monopoly power by predatory or exclusionary conduct; that the defendant in fact engaged in such anticompetitive conduct; and that a “dangerous probability” existed that the defendant might have succeeded in its attempt to achieve monopoly power. *U.S. Anchor Mfg., Inc. v. Rule Indus., Inc.*, 7 F.3d 986, 993 (11th Cir. 1993). Proof that McWane and Sigma shared an intent to prevail over rivals or to improve market position is insufficient; the shared intent must have been to make McWane a monopolist. *Id.*.

41. The MDA agreement, executed by McWane and Sigma, satisfies the concerted action element of a conspiracy to monopolize claim. *See e.g., Fraser v. Major League Soccer*, 284 F.3d at 68; *Futurevision Cable Sys. of Wiggins, Inc. v. Multivision Cable TV Corp.*, 789 F. Supp. 760, 766 (S.D. Miss. 1992); *Howard Hess Dental Labs. Inc. v. Dental Labs. Inc. v. Dentsply Int’l, Inc.*, 602 F.3d 237, 254 n.7 (3d Cir. 2010); *U.S. Anchor Mfg., Inc. v. Rule Indus., Inc.*, 7 F.3d 986, 1001-1002 (11th Cir. 1993).

Response to Conclusion of Law No. 41:

This conclusion of law is false and unsupported by the record. To prove a conspiracy to monopolize Complaint Counsel still has to show an agreement, i.e., “a unity of purpose or a common design and understanding, or a meeting of the minds,” or in other words, share a “conscious commitment to a common scheme designed to achieve an unlawful object.” *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771 (1984); *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 768 (1984). Complaint Counsel did not show this. Complaint Counsel failed to prove any agreement or overt acts McWane and Sigma, let alone that they had the specific intent to monopolize the purported market for domestic Fittings. As discussed in McWane’s opening and reply briefs, each company had its own pro-competitive justifications for entering the MDA. Second, it was *Sigma’s* idea to enter the MDA, not McWane’s. The argument that *Sigma* had the intent to thrust a monopoly on *McWane*, its primary competitor, defies logic. The truth of the matter is that the MDA was a pro-competitive distribution agreement that allowed McWane to increase its volume at a time when its foundry was running at less than half-capacity, and allowed Sigma to supply domestic Fittings

to its customers during the ARRA period. Complaint Counsel's assertions to the contrary are false.

42. The standard for proving specific intent under a conspiracy to monopolize claim is the same as it is for attempted monopolization: the intent to exclude competition or control prices. *Am. Tobacco Co.*, 328 U.S. at 788-789; *United States v. Consolo Laundries Corp.*, 291 F.2d 563, 573 (2d Cir. 1961); *Robert's Waikiki U-Drive, Inc. v. Budget Rent-A-Car Systems*, 491 F. Supp. 1199, 1223 (D. Haw. 1980).

Response to Conclusion of Law No. 42:

This conclusion of law is potentially misleading. To establish its attempted monopoly claim, Complaint Counsel must prove that McWane possessed the "specific intent" to achieve monopoly power by predatory or exclusionary conduct; that the defendant in fact engaged in such anticompetitive conduct; and that a "dangerous probability" existed that the defendant might have succeeded in its attempt to achieve monopoly power. *U.S. Anchor Mfg. Inc. v. Rule Indus., Inc.*, 7 F.3d 986, 993 (11th Cir. 1993). Specific intent to monopolize entails "a specific intent to destroy competition or build monopoly." *Times-Picayune Publ'g Co. v. United States*, 345 U.S. 594, 626 (1953). The desire to maintain or increase one's market share is not in itself establish specific intent, and is not an antitrust violation. *Oahu Gas*, 838 F.2d at 368; *Spectrum Sports*, 506 U.S. at 459; *see also* Areeda & Hovenkamp, *supra* note 14, ¶ 805b1, at 340 ("There is at least one kind of intent that the proscribed 'specific intent' clearly cannot include: the mere intention to prevail over one's rivals. To declare that intention unlawful would defeat the antitrust goal of encouraging competition . . . which is heavily motivated by such an intent.").

43. Specific intent may be established by direct evidence or inferred from "conduct that has no legitimate business justification but to destroy or damage competition." *GTE New Media Servs., Inc. v. Ameritech Corp.*, 21 F. Supp. 2d 27,45 (D.D.C. 1998) (citing *Ass'n for Intercollegiate Athletics for Women v. NCAA*, 735 F.2d 577, 585 (D.C. Cir. 1984)); *see also Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 318 (3d Cir. 2007).

Response to Conclusion of Law No. 43:

This conclusion of law is misleading for the same reasons stated in Respondent's Responses to Conclusions of Law Nos. 41-42. Specific intent requires proof of "a specific intent to destroy competition or build monopoly." *Times-Picayune Publ'g Co. v. United States*, 345 U.S. 594, 626 (1953). Further, courts have found that "[i]ntent does not help to separate competition from attempted monopolization and invites juries to penalize hard competition. . . . Stripping intent away brings the real economic questions to the fore at the same time as it streamlines antitrust litigation." *See, e.g., A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396, 1402 (7th Cir. 1989) (Easterbrook, J.). Thus, courts

are wary of finding that conduct “has no legitimate business justification,” as such findings have the potential to chill the very conduct the antitrust laws were designed to protect. *Matsushita*, 475 U.S. at 597. “[A] court must remember that often a fine line separates unlawful concerted action from legitimate business practices.” *Petruzzi’s IGA Supermarkets v. Darling-Delaware Co.*, 998 F.2d 1224, 1230 (3d Cir. 1993). “Therefore, care must be taken to ensure that inferences of unlawful activity drawn from ambiguous evidence do not infringe upon the defendants’ freedom.” *Id.*

44. “Specific intent in the antitrust context may be inferred from a defendant’s unlawful conduct.” *Howard Hess Dental Labs. Inc. v. Dentsply Int’l, Inc.*, 602 F.3d 237, 257 (3d Cir. 2010).

Response to Conclusion of Law No. 44:

This conclusion of law is vague and potentially misleading. As stated in Respondent’s Responses to Conclusions of Law Nos. 41-43, specific intent to monopolize entails “a specific intent to destroy competition or build monopoly.” *Times-Picayune Publ’g Co. v. United States*, 345 U.S. 594, 626 (1953). “[A] court must remember that often a fine line separates unlawful concerted action from legitimate business practices.” *Petruzzi’s IGA Supermarkets v. Darling-Delaware Co.*, 998 F.2d 1224, 1230 (3d Cir. 1993). “Therefore, care must be taken to ensure that inferences of unlawful activity drawn from ambiguous evidence do not infringe upon the defendants’ freedom.” *Id.*

45. McWane and Sigma entered into the MDA with the specific intent to monopolize the Domestic Fittings market.

Response to Conclusion of Law No. 45:

This conclusion of law is false and unsupported by the record for the reasons stated in Respondent’s Responses to Conclusions of Law Nos. 41-44. Further, as discussed in McWane’s opening and reply briefs, evidence showed that McWane did not have any intent to monopolize the purported market for domestic Fittings, as evidenced by the fact that it was far from lucrative - - “break even at best.” (JX 638 (McCullough, IHT 219-220.)) McWane was desperate for volume, and its focus in signing the MDA was getting more tons, wider distribution, and increased output for its domestic Fittings foundry that was operating at only a fraction of its capacity. (See McWane’s Op. Br. at 58-60.) Sigma’s focus in signing the MDA was on keeping its own customers happy and providing domestic Fittings to those customers when needed. (JX 689 (Rona, Dep. at 231); JX 688 (Rona, IHT at 218-220).)

To establish “specific intent,” Complaint Counsel must prove that McWane and Sigma possessed the “specific intent” thrust monopoly power on McWane by predatory or exclusionary conduct; that the defendants in fact engaged in such anticompetitive conduct; and that a “dangerous probability” existed that the

defendant might have succeeded in its attempt to achieve monopoly power. *Rule Indus.*, 7 F.3d at 993. Proof that McWane and Sigma shared an intent to prevail over rivals or to improve market position is insufficient; the shared intent must have been to make McWane a monopolist. *Id.*

Here, Complaint Counsel has not established that McWane and Sigma had the specific intent to thrust a monopoly on McWane in the purported market for domestic Fittings. As discussed, each company had its own pro-competitive justifications for entering the MDA. Second, it was *Sigma's* idea to enter the MDA, and the argument that *Sigma* had the intent to thrust a monopoly on *McWane*, its primary competitor, defies logic.

46. McWane and Sigma took overt acts in furtherance of their conspiracy to monopolize the Domestic Fittings market. *See Fraser v. Major League Soccer*, 284 F.3d at 68; *United States v. Hickok*, 77 F.3d at 1005-1006.

Response to Conclusion of Law No. 46:

This conclusion of law is false and unsupported by the record for the reasons stated in Respondent's Responses to Conclusions of Law Nos. 41-45.

I. COUNTS SIX AND SEVEN: McWANE MONOPOLIZED OR ATTEMPTED TO MONOPOLIZE, THE MARKET FOR DOMESTIC FITTINGS

47. The offense of monopolization has two elements: "the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of superior product, business acumen or historic accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).

Response to Conclusion of Law No. 47:

Respondent has no specific response to this conclusion of law.

48. Attempted monopolization requires proof "(1) that the defendant has engaged in predatory or anticompetitive conduct, with a (2) specific intent to monopolize, and (3) a dangerous probability of achieving monopoly power." *Spectrum Sports v. McQuillan*, 506 U.S. 447, 456 (1993); *Lorain Journal Co. v. United States*, 342 U.S. 143, 148-152 (1951).

Response to Conclusion of Law No. 48:

Respondent has no specific response to this conclusion of law.

49. The respondent's "specific intent to destroy competition or build monopoly," may be proven by direct evidence, or inferred from conduct alone where the defendant's conduct is sufficiently egregious. *See Times-Picayune Publ'g Co. v.*

United States, 345 U.S. 594, 626 (1953); accord *Spectrum Sports v. McQuillan*, 506 U.S. 447, 454-456 (1993).

Response to Conclusion of Law No. 49:

This conclusion of law is vague, misleading, and duplicative of Conclusion of Law Nos. 42-43. First, Complaint Counsel’s use of “The respondent” implies a conclusion that Complaint Counsel has proven McWane had a “specific intent to destroy competition or build monopoly.” Complaint Counsel has not. Second, “sufficiently egregious” is undefined and subject to interpretation. Respondent does not disagree that specific intent to monopolize entails “a specific intent to destroy competition or build monopoly.” *Times-Picayune Publ'g Co. v. United States*, 345 U.S. 594, 626 (1953). Finally, the desire to maintain or increase one’s market share is not in itself establish specific intent, and is not an antitrust violation. *Oahu Gas*, 838 F.2d at 368; *Spectrum Sports*, 506 U.S. at 459; see also *Areeda & Hovenkamp*, supra note 14, ¶ 805b1, at 340 (“There is at least one kind of intent that the proscribed ‘specific intent’ clearly cannot include: the mere intention to prevail over one’s rivals. To declare that intention unlawful would defeat the antitrust goal of encouraging competition . . . which is heavily motivated by such an intent.”).

50. Under Section 2, a *prima facie* case that exclusive dealing likely harms competition can be established with a showing that (1) there is a significant degree of market foreclosure, and (2) the ability of one or more significant rivals to compete is thereby impaired. *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 2012 U.S. App. LEXIS 20342, at *28 (3d Cir. 2012); *United States v. Dentsply*, 399 F.3d 181 (3d Cir. 2005); *Microsoft*, 253 F.3d 34; *McWane*, slip op. at 25.

Response to Conclusion of Law No. 50:

This conclusion of law is incomplete and potentially misleading. To prove a *prima facie* case that an alleged exclusive dealing arrangement harms competition “the plaintiff bears the initial burden of showing that the [alleged] agreement produced an adverse, anticompetitive effect within the relevant geographic market.” *Burtch v. Milberg Factors, Inc.*, 662 F.3d 212, 222 (3d Cir. 2011) (quotations marks and citation omitted). To determine whether it is “probable that performance of the contract will foreclose competition in a substantial share of the line of commerce affected” *Tampa Electric Co.*, 365 U.S. at 327, a plaintiff first must establish the share of the market, expressed in a percentage, in which the exclusive dealing arrangement forecloses competition. “[I]t is clear that in all cases the plaintiff must both define the relevant market and prove the degree of foreclosure.” *United States v. Microsoft Corp.*, 253 F.3d 34, 69 (D.C. Cir. 2001). The plaintiff also bears the burden of showing “extent of foreclosure resulting from the ... contract.” *Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield of R.I.*, 373 F.3d 57, 66 (1st Cir. 2004). Thus, a “plaintiff makes out a *prima facie* case of substantial foreclosure by demonstrating first that a significant percentage of the relevant market is foreclosed by the provision challenged.” *R.J. Reynolds*

Tobacco Co. v. Philip Morris Inc., 199 F.Supp.2d 362, 388 (M.D.N.C. 2002), *aff'd*, 67 F.App'x 810 (4th Cir. 2003)).

Further, “[c]onduct that merely harms competitors ... while not harming the competitive process itself, is not anticompetitive.” *Broadcom*, 501 F.3d at 308; *see also Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993) (The Sherman Act “directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself.”). To determine whether a practice is anticompetitive the court must consider “whether the challenged practices bar a substantial number of rivals or severely restrict the market's ambit.” *Dentsply*, 399 F.3d at 191. Thus, conduct “may be deemed anticompetitive” only if it “impairs the opportunities of rivals and either does not further competition on the merits or does so in an unnecessarily restrictive way.” *W. Penn Allegheny Health Sys.*, 627 F.3d at 108 (emphasis added).

51. Complaint Counsel has established that McWane’s Exclusive Dealing Policy caused a significant degree of market foreclosure, thereby impairing the ability of one or more significant rivals to compete.

Response to Conclusion of Law No. 51:

This conclusion of law is false and unsupported by the record. First, McWane’s rebate policy was not exclusive. Its customers always could, and often did, purchase domestic Fittings from anyone, including both Star and Sigma. Further, even true exclusive dealing contracts (which McWane’s rebate policy was not) are only problematic if they are multi-year in length and “foreclose competition in a substantial share of the line of commerce affected.” *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961). To foreclose competition in a substantial share of the affected line of commerce, the exclusive deals must “foreclose so large a percentage of the available . . . outlets that entry into the concentrated market is unreasonably restricted.” *E. Food Servs., Inc. v. Pontifical Catholic Univ. Servs. Ass’n, Inc.* 357 F.3d 1, 8, (1st Cir. 2004), and significant sellers are “frozen out of a market by the exclusive deal.” *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 45 (1984) (O’Connor, J., concurring).

In this case McWane did not have such contracts that required its customers to buy its domestic Fittings exclusively. Many of McWane’s purchased from Star the entire time McWane’s rebate policy was in place. Further, Star sold to over 130 customers in its first year selling domestic Fittings. In contrast, McWane sold to only 187. This is hardly an indication of “substantial foreclosure.” McWane simply issued a letter asking customers to support its last domestic foundry - - which was operating at a fraction of its capacity and teetering on the edge of extinction because of the flood of cheap imports over the years - - fully and offering a rebate (i.e., a price cut) in exchange. Thus, Star had ample opportunity to compete and did, very successfully. That is all the antitrust laws require. *Race Tires*, 614 F.3d at 84 (plaintiffs “had the clear opportunity to

compete and did compete, sometimes successfully”); *NicSand, Inc. v. 3M Co.*, 507 F.3d 442, 451–52, 458 (6th Cir. 2007) (“no explanation why it could not compete for these multi-year agreements.”).

52. McWane has not rebutted Complaint Counsel’s *prima facie* case of competitive harm because McWane’s Exclusive Dealing Policy is not a form of competition on the merits and does not involve greater efficiency or enhanced consumer appeal.

Response to Conclusion of Law No. 52:

This conclusion of law is false and unsupported by the record, and is also misleading, as it incorrectly assumes that Complaint Counsel has shown competitive harm. Complaint Counsel did not. Further, McWane showed substantial evidence at trial that its September 2009 rebate policy had a pro-competitive effect: it allowed Union Foundry to avoid the fate of every other domestic fittings foundry and being cherry-picked into oblivion.

This conclusion of law is also misleading, as courts have found arrangements much more restrictive than McWane’s rebate letter to be perfectly legal. *See, e.g., Peacehealth*, 515 F.3d at 903; *Concord Boat*, 207 F.3d at 1062-63; *St. Francis Med. Ctr. v. C.R. Bard, Inc.*, 657 F. Supp. 2d 1069 (E.D. Mo. 2009); *Indiana Telcom Corp., Inc.*, No. IP 97-1532-C-HG, 2001 WL 1168169 (S.D. Ind. Sept. 25, 2001); *J.B.D.L. Corp. v. Wyeth-Ayerst Labs., Inc.*, No 1:01-CV-704, 1:03-CV-781, 2005 WL 1396940, *16-17 (S.D. Ohio June 13, 2005); *Bepco, Inc. v. Allied-Signal, Inc.*, 106 F. Supp. 2d 814, 827-28 (M.D.N.C. 2000); *see also* (Appendix of Vertical Cases.) For example, the rebate letter is much less restrictive than the exclusive contracts deemed legal in *Indeck*, 250 F.3d at 977-78. In *Indeck*, for example, the Sixth Circuit held that a utility’s exclusive contracts with 17 large power consumers did not violate federal antitrust laws, despite the fact that those contracts preempted 87% of the relevant co-generation market. 250 F.3d at 977-78. The Sixth Circuit found that: (i) no evidence existed that the alternative provider allegedly excluded from the co-generation market actually could have served as a lower-cost alternative to the defendant; (ii) the discounted rates the defendant offered to customers under its exclusive agreements were pro-competitive; (iii) the defendant’s exclusive agreements were of limited duration, leaving the customers free to seek other power generators upon expiration. *Id.* This case is analogous to *Indeck* because: (i) the evidence was clear 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. Complaint Counsel presented no evidence that Star was a more efficient, lower-cost alternative supplier of domestic Fittings than McWane; (ii) the rebates that McWane offered to its customers under the Rebate Policy were discounts, i.e. lower prices; and (iii) the rebate policy was not only not a contract, but was enforced weakly – if at all –for a period of 12 weeks at the most.

J. CONCLUSION

53. The Order entered herein is necessary and appropriate to remedy and prevent the violations of law found to exist. *FTC v. Nat'l Lead Co.*, 352 U.S. 419 (1957); *FTC v. Ruberoid Co.*, 343 U.S. 470 (1952); *Jacob Siegal & Co. v. FTC*, 327 U.S. 608 (1946); *In re Polygram Holding, Inc.*, 136 F.T.C. 310 (2003).

Response to Conclusion of Law No. 53:

This conclusion of law is false and unsupported by the record. Complaint Counsel proposes an injunction for a period of ten (10) years. But courts cannot grant injunctions unless a plaintiff shows ongoing or imminent harm. The Supreme Court has held that a plaintiff “must show that he is under threat of suffering ‘injury in fact’ that is *concrete and particularized*” and “the threat must be actual and imminent, not conjectural or hypothetical[.]” *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009). A plaintiff, like Complaint Counsel here, that fails to meet these requirements is not entitled to injunctive relief. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2559-60 (2011) (“plaintiffs no longer employed [by Wal-Mart] lack standing to seek injunctive and declaratory relief against its employment practices”). The mere possibility that past conduct might occur again is insufficient. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008); *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006).

Here, there was no proof at trial of any ongoing actual or threatened injury to competition or consumers. For the same equitable reasons applicable to the well-settled case law governing injunctions, Complaint Counsel’s proposed remedy is invalid.

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CERTIFICATE OF SERVICE

I hereby certify that on January 25, 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 a copy of the foregoing document to:

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

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