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

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

COMPLAINT COUNSEL'S POST-TRIAL REPLY FINDINGS OF FACT AND CONCLUSIONS OF LAW

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Dated: January 28, 2013

RECORD REFERENCES

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

JX - Joint Exhibit

CX - Complaint Counsel Exhibit (CX 1234 at 001).

RX-- Respondent Exhibit (RX-123 at 0001).

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

(CX 0000 (Witness, Dep. at xx)) - Citations to Deposition Testimony

(CX 0000 (Witness, Dep. at xx), *in camera*) - Citations to *in camera* Deposition Testimony

(CX 0000 (Witness, IHT at xx)) - Citations to Investigational Hearing Testimony

(CX 0000 (Witness, IHT at xx), *in camera*) - Citations to *in camera* Investigational Hearing Testimony

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

Commission Complaint - Administrative Complaint filed January 4, 2012

Response to RFA at ¶ - Citation to Respondent's Response to Complaint Counsel's Requests for Admission, dated June 8, 2012

Supp. Response to RFA at ¶ - Citation to Respondent's Supplemental Response to Complaint Counsel's Requests for Admission, dated July 16, 2012

Response to IROG at ¶ - Citation to Respondent's Response to Complaint Counsel's Interrogatories, dated February 21, 2012

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

CCPB at xx – Complaint Counsel's Post-Trial Brief

RPB at xx – Respondent's Post-Trial Brief

CCPF xxxx – Complaint Counsel's Post-Trial Findings of Fact

RPF xxxx – Respondent's Post-Trial Findings of Fact

CCRB at xx – Complaint Counsel's Reply Brief

CCRF xxxx – Complaint Counsel's Reply Findings of Fact

Notes:

- Capitalized terms used in Complaint Counsel's Reply to Respondent's Proposed Findings of Fact have the meanings assigned thereto in Complaint Counsel's Proposed Findings of Fact and Conclusions of Law, filed December 14, 2012.
- Complaint Counsel has added *in camera* notations and brackets to certain of Respondent's proposed findings. Such additions are indicated by the symbol "†."

COMPLAINT COUNSEL'S RESPONSES TO McWANE INC.'S INDEX OF EXHIBITS

Complaint Counsel's Responses to McWane's Index of Exhibits	
Complaint Counsel has the following responses to McWane's Index of Exhibits. For any exhibit not specifically mentioned below, Complaint Counsel has no specific response.	
RX #	**Response**
RX-1	Not Admitted Into Evidence
RX-3	Not Admitted Into Evidence
RX-9	Duplicate; Replaced with CX 0532
RX-20	Duplicate; Replaced with CX 2039
RX-21	Duplicate; Replaced with CX 0038
RX-22	Not Admitted Into Evidence
RX-23	Not Admitted Into Evidence
RX-25	Duplicate; Replaced with CX 0752
RX-26	Duplicate; Replaced with CX 1145
RX-28	Not Admitted Into Evidence
RX-30	Duplicate; Replaced with CX 1570
RX-31	Duplicate; Replaced with CX 0179
RX-32	Not Admitted Into Evidence
RX-33	Duplicate; Replaced with CX 0815
RX-34	Not Admitted Into Evidence
RX-41	Duplicate; Replaced with CX 0514
RX-42	Duplicate; Replaced with CX 0515
RX-44	Not Admitted Into Evidence
RX-49	Not Admitted Into Evidence
RX-50	Duplicate; Replaced with CX 1134
RX-57	Duplicate; Replaced with CX 0525
RX-58	Duplicate; Replaced with CX 0525
RX-59	Duplicate; Replaced with CX 0037
RX-63	Duplicate; Replaced with CX 1329
RX-65	Duplicate; Replaced with CX 0516
RX-67	Duplicate; Replaced with RX-066
RX-70	Not Admitted Into Evidence
RX-71	Duplicate; Replaced with CX 0049
RX-72	Duplicate; Replaced with CX 1091
RX-77	Duplicate; Replaced with CX 0052
RX-78	Not Admitted Into Evidence
RX-85	Not Admitted Into Evidence
RX-88	Duplicate; Replaced with CX 1297
RX-89	Duplicate; Replaced with CX 1298
RX-92	Duplicate; Replaced with CX 1151

RX-104	Duplicate; Replaced with CX 1313
RX-106	Duplicate; Replaced with CX 1350
RX-117	Duplicate; Replaced with CX 0831
RX-122	Not Admitted Into Evidence
RX-126	Not Admitted Into Evidence
RX-128	Not Admitted Into Evidence
RX-133	Not Admitted Into Evidence
RX-137	Not Admitted Into Evidence
RX-139	Not Admitted Into Evidence
RX-140	Not Admitted Into Evidence
RX-144	Duplicate; Replaced with CX 0968
RX-145	Not Admitted Into Evidence
RX-148	Not Admitted Into Evidence
RX-149	Not Admitted Into Evidence
RX-151	Duplicate; Replaced with CX 2329
RX-152	Not Admitted Into Evidence
RX-156	Duplicate; Replaced with RX-155
RX-158	Not Admitted Into Evidence
RX-159	Duplicate; Replaced with CX 0963
RX-160	Not Admitted Into Evidence
RX-161	Not Admitted Into Evidence
RX-162	Not Admitted Into Evidence
RX-164	Duplicate; Replaced with RX-155
RX-165	Not Admitted Into Evidence
RX-168	Not Admitted Into Evidence
RX-169	Not Admitted Into Evidence
RX-175	Not Admitted Into Evidence
RX-177	Not Admitted Into Evidence
RX-185	Not Admitted Into Evidence
RX-191	Not Admitted Into Evidence
RX-192	Not Admitted Into Evidence
RX-196	Not Admitted Into Evidence
RX-197	Not Admitted Into Evidence
RX-201	Not Admitted Into Evidence
RX-202	Duplicate; Replaced with CX 1288
RX-203	Not Admitted Into Evidence
RX-204	Not Admitted Into Evidence
RX-209	Duplicate; Replaced with CX 1194
RX-210	Duplicate; Replaced with CX 1194
RX-212	Duplicate; Replaced with CX 0010
RX-215	Not Admitted Into Evidence
RX-220	Duplicate; Replaced with CX 1364
RX-221	Not Admitted Into Evidence
RX-222	Not Admitted Into Evidence
RX-225	Not Admitted Into Evidence

RX-228	Not Admitted Into Evidence
RX-229	Duplicate; Replaced with CX 0024
RX-230	Duplicate; Replaced with CX 0024
RX-231	Not Admitted Into Evidence
RX-235	Not Admitted Into Evidence
RX-238	Not Admitted Into Evidence
RX-246	Duplicate; Replaced with CX 1777
RX-251	Not Admitted Into Evidence
RX-272	Not Admitted Into Evidence
RX-274	Duplicate; Replaced with CX 0027
RX-276	Not Admitted Into Evidence
RX-278	Not Admitted Into Evidence
RX-284	Not Admitted Into Evidence
RX-285	Duplicate; Replaced with CX 1592
RX-286	Not Admitted Into Evidence
RX-287	Not Admitted Into Evidence
RX-299	Duplicate; Replaced with CX 1417
RX-300	Duplicate; Replaced with CX 1777
RX-310	Not Admitted Into Evidence
RX-311	Not Admitted Into Evidence
RX-314	Duplicate; Replaced with CX 1418
RX-315	Duplicate; Replaced with CX 1777
RX-352	Duplicate; Replaced with CX 1581
RX-353	Not Admitted Into Evidence
RX-354	Not Admitted Into Evidence
RX-355	Not Admitted Into Evidence
RX-356	Not Admitted Into Evidence
RX-357	Not Admitted Into Evidence
RX-358	Not Admitted Into Evidence
RX-359	Not Admitted Into Evidence
RX-360	Not Admitted Into Evidence
RX-362	Duplicate; Replaced with CX 1419
RX-372	Not Admitted Into Evidence
RX-377	Duplicate; Replaced with CX 2258
RX-385	Not Admitted Into Evidence
RX-386	Not Admitted Into Evidence
RX-387	Not Admitted Into Evidence
RX-388	Not Admitted Into Evidence
RX-389	Not Admitted Into Evidence
RX-390	Not Admitted Into Evidence
RX-391	Not Admitted Into Evidence
RX-392	Not Admitted Into Evidence
RX-393	Not Admitted Into Evidence
RX-394	Not Admitted Into Evidence
RX-395	Not Admitted Into Evidence

RX-400	Duplicate; Replaced with CX 1266
RX-403	Duplicate; Replaced with CX 2457
RX-405	Duplicate; Replaced with RX-015
RX-407	Duplicate; Replaced with CX 2455
RX-415	Not Admitted Into Evidence
RX-417	Duplicate; Replaced with CX 0176
RX-418	Duplicate; Replaced with CX 2047
RX-419	Duplicate; Replaced with CX 0137
RX-421	Duplicate; Replaced with CX 0367
RX-424	Duplicate; Replaced with CX 0139
RX-441	Duplicate; Replaced with CX 0559
RX-529	Not Admitted Into Evidence
RX-563	Not Admitted Into Evidence
RX-565	Not Admitted Into Evidence
RX-566	Not Admitted Into Evidence
RX-573	Duplicate; Replaced with CX 0243
RX-574	Duplicate; Replaced with CX 1435
RX-575	Duplicate; Replaced with CX 2293
RX-579	Duplicate; Replaced with CX 0515
RX-584	Duplicate; Replaced with CX 0566
RX-585	Duplicate; Replaced with CX 1709
RX-587	Not Admitted Into Evidence
RX-591	Duplicate; Replaced with CX 1178
RX-592	Duplicate; Replaced with CX 0138
RX-593	Duplicate; Replaced with CX 0047
RX-596	Duplicate; Replaced with CX 1181
RX-597	Duplicate; Replaced with CX 1196
RX-599	Duplicate; Replaced with CX 0034
RX-602	Not Admitted Into Evidence
RX-606	Duplicate; Replaced with CX 0375
RX-612	Duplicate; Replaced with CX 1560
RX-614	Duplicate; Replaced with CX 1576
RX-621	Duplicate; Replaced with CX 0566
RX-623	Duplicate; Replaced with CX 0102
RX-624	Not Admitted Into Evidence
RX-625	Duplicate; Replaced with CX 0423
RX-630	Duplicate; Replaced with CX 2416
RX-634	Not Admitted Into Evidence
RX-724	Not Admitted Into Evidence; Introduced as Demonstrative, RDX-6
RX-725	Not Admitted Into Evidence; Introduced as Demonstrative, RDX-7
RX-726	Not Admitted Into Evidence; Introduced as Demonstrative, RDX-8
RX-727	Not Admitted Into Evidence; Introduced as Demonstrative, RDX-9
RX-728	Not Admitted Into Evidence; Introduced as Demonstrative, RDX-10
RX-729	Not Admitted Into Evidence; Introduced as Demonstrative, RDX-11
RX-730	Not Admitted Into Evidence; Introduced as Demonstrative, RDX-12

RDX-001	Not Admitted Into Evidence (Demonstrative Only)
RDX-002	Not Admitted Into Evidence (Demonstrative Only)
RDX-003	Not Admitted Into Evidence (Demonstrative Only)
RDX-004	Not Admitted Into Evidence (Demonstrative Only)
RDX-005	Not Admitted Into Evidence (Demonstrative Only)
RDX-013	Not Admitted Into Evidence (Demonstrative Only)
RDX-067	Not Admitted Into Evidence (Demonstrative Only)
RDX-068	Not Admitted Into Evidence (Demonstrative Only)
RDX-069	Not Admitted Into Evidence (Demonstrative Only)
RDX-070	Not Admitted Into Evidence (Demonstrative Only)
RDX-071	Not Admitted Into Evidence (Demonstrative Only)
RDX-072	Not Admitted Into Evidence (Demonstrative Only)
RDX-073	Not Admitted Into Evidence (Demonstrative Only)
RDX-074	Not Admitted Into Evidence (Demonstrative Only)
RDX-075	Not Admitted Into Evidence (Demonstrative Only)
RDX-076	Not Admitted Into Evidence (Demonstrative Only)
RDX-077	Not Admitted Into Evidence (Demonstrative Only)
RDX-078	Not Admitted Into Evidence (Demonstrative Only)
RDX-079	Not Admitted Into Evidence (Demonstrative Only)
RDX-080	Not Admitted Into Evidence (Demonstrative Only)
RDX-081	Not Admitted Into Evidence (Demonstrative Only)

COMPLAINT COUNSEL'S REPLY TO RESPONDENT McWANE INC.'S PROPOSED FINDINGS OF FACT

I. Fittings Industry History and Background

A. McWane, Inc.

1. Respondent McWane, Inc. ("McWane") is a privately-held, family run company that manufactures, markets, and sells products for the waterworks industry, including ductile iron pipe Fittings that are 3" to 24" in diameter. (JSLF ¶ 1).

Response to Proposed Finding No. 1

Complaint Counsel notes that there is no exhibit denominated "JSLF." To the extent that Respondent refers to JX 0001, Complaint Counsel has no specific response. (*See also* CCPF 5, 7).

2. Dr. Schumann testified that the scope of the alleged conspiracy is limited to Fittings of 24" in diameter and smaller. (Schumann, Tr. 3769 ("And these are markets for ductile iron pipe fittings of 24 inches and below"), 3788--3793 "…so to simplify and condense all these different but identical analyses, I treated then all as one cluster market, and that's why the market is 24 inches and less"), 4111 ("I found in my analysis of the data that only about 5 percent of large fittings were produced by McWane in 2008, it was very small, so my presumption was their influence on that would have been proportionally very small.").

Response to Proposed Finding No. 2

The proposed finding is inaccurate because it mischaracterizes Dr. Schumann's testimony. Dr. Schumann did not testify that the conspiracy is limited to small and medium diameter Fittings. Rather, he testified that his *relevant market* consisted of small and medium diameter Fittings. (Schumann, Tr. 3769 ("I concluded that there were two relevant markets, one that we've heard discussed before, the open spec market where country of origin doesn't matter, and one the domestic spec market. And these are markets for ductile iron pipe fittings of 24 inches and below."); Schumann, Tr. 4111 ("Q: Now, that Nondomestic Utility Fittings column there, the one you relied on, that includes large-diameter fittings; correct, sir? A. It does. Q.

And those are not part of the conspiracy you found; correct, sir? A. I did not include those in my *market definition*.") (emphasis added)).

3. McWane manufactured Fittings at its Union Foundry facility in Anniston, Alabama and at its Tyler Pipe & Foundry Co. facility in Tyler, Texas. (Tatman, Tr. 209 ("The south plant was a ductile iron plant, and it produced the fittings of which you described here…"), 212-214 (Q: "McWane reorganized the fittings business to be together?" A: "Yes, they did … I took the Tyler south plant. I picked up Union Foundry in Anniston, Alabama. Sometimes I'll refer to that as Union. sometimes I'll refer to it as Anniston. I mean the same thing.").

Response to Proposed Finding No. 3

The proposed finding is inaccurate and misleading insofar as it inaccurately quotes the referenced testimony, and misleadingly suggests that McWane only produces Fittings in the United States. Complaint Counsel agrees that McWane manufactured Fittings at the two facilities referenced in the proposed finding, although McWane stopped producing Fittings at the Tyler South Plant in November 2008, and has also produced Fittings at its TXX, Tyler Xian Xian foundry in China since at least 2005. (CCPF 10). In addition, McWane's Clow division produces 36" diameter Fittings. (CCPF 12).

4. The Fittings division of McWane is known as "Tyler/Union." (Tatman, Tr. 213 ("I was the vice president and general manager of what we call now Tyler/Union".)).

Response to Proposed Finding No. 4

Complaint Counsel has no specific response. (*See also* CCPF 8).

5. Fittings are a small segment of McWane's business, representing only about 5% of McWane's overall business. (Tatman, Tr. 218-219 ("If you look at McWane, Inc., the fittings business is a gnat. Certainly it's a gnat in terms of profitability. It's a gnat in terms of sales with that."); JX 642 (Page, Dep. at 42)).

Response to Proposed Finding No. 5

Complaint Counsel has no specific response, other than to note that there is no exhibit denominated "JX 642."

6. Tyler/Union is at best a break-even business for McWane. (JX 642 (Page, Dep. at 64); JX 638 (McCullough, IHT at 92)).

Response to Proposed Finding No. 6

The proposed finding is contradicted by the weight of the evidence. Complaint Counsel notes that there is no exhibit denominated "JX 642" or "JX 638." The record evidence establishes that **{**

} (*See* CCPF 1358). McWane's internal documents show that McWane has realized Fittings profits since the conspiracy period began. (*See* CCPF 1359; CX 0622 at 005). **{**

} (*See* CCPF 17). McWane increased its Fittings profits in 2008 compared to the prior year by over $5 million, and McWane's Fittings business gross profit margin was between 15 and 20 percent between 2005 and 2008. (*See* CCPF 1347-1351). **{**

} (*See* CCPF 1702; RX-721, *in camera* (**{** **}**); RX-632, *in camera* (**{** **}**)).

7. Mr. Page testified that since the early 2000's "this [Fittings] business has been a thorn in our side and a millstone around our neck. If I could figure out a way to get out of it without making all of my customers angry, I'd have done it. But I can't. And so my goal is just not to have it hurt." (JX 642 (Page, Dep. at 132)).

Response to Proposed Finding No. 7

Complaint Counsel notes that there is no exhibit denominated "JX 642." The proposed finding is contradicted by the weight of the evidence. Complaint Counsel does not disagree that Mr. Page made the statement attributed to him, but the weight of the evidence contradicts the proposed finding insofar as the proposed finding suggests that the Fittings business was a liability for McWane. The Fittings business has been consistently profitable for McWane. (*See* CCPF 17, 1347-1351, 1359; CX 0622 at 005; CCPF 1702; RX-721, *in camera* (**{**

}); RX-632, *in camera* (**{** **}**); *supra* Response to Proposed Finding No. 6).

8. McWane manufactures approximately 4,000 individual ductile iron pipe Fittings in a wide range of diameters, configurations, joints, coatings, and finishes at its last remaining foundry in the U.S., the Union Foundry, and at its foundry in China, Tyler Xin Xin. (JX 643 (Tatman IHT at 14, 23-27); *see also* http://www.tylerunion.com).

Response to Proposed Finding No. 8

Complaint Counsel notes that there is no exhibit denominated "JX 643." The proposed finding is unsupported. Additionally, the website at http://www.tylerunion.com is not in evidence, and McWane has proffered no legal basis for introducing it into evidence now that the record is closed. The proposed finding that McWane manufactures 4,000 individual Fittings is unsupported. Mr. Tatman's cited testimony does not state that McWane manufactures 4,000 individual Fittings, and other evidence suggests that McWane produces approximately 2,000 unique Fittings. (*See* CCPF 378; *see also* CCPF 10-11).

9. Approximately 80 percent of the demand for Fittings may be serviced with only 100 or fewer commonly used sizes and configurations of Fittings. These Fittings are commonly referred to in the industry as "A" or "B" Fittings. (JSLF ¶ 9).

Response to Proposed Finding No. 9

Complaint Counsel notes that there is no exhibit denominated "JSLF." To the extent that Respondent refers to JX 0001, Complaint Counsel has no specific response. (*See also* CCPF 399).

10. Fittings typically comprise five (5) percent or less of the total cost of a typical waterworks project. (JSLF ¶ 10).

Response to Proposed Finding No. 10

Complaint Counsel notes that there is no exhibit denominated "JSLF." To the extent that Respondent refers to JX 0001, Complaint Counsel has no specific response. (*See also* CCPF 420).

11. 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. (JSLF ¶ 11).

Response to Proposed Finding No. 11

Complaint Counsel notes that there is no exhibit denominated "JSLF." To the extent that Respondent refers to JX 0001, Complaint Counsel has no specific response. (*See also* CCPF 419).

B. Macroeconomic Backdrop

12. The Fittings market includes several thousand unique configurations of Fittings in different sizes, shapes and coatings. (JSLF ¶ 8).

Response to Proposed Finding No. 12

Complaint Counsel notes that there is no exhibit denominated "JSLF." To the extent that Respondent refers to JX 0001, Complaint Counsel has no specific response. (*See also* CCPF 378).

13. 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. (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, *in camera*† († { }).

Response to Proposed Finding No. 13

Complaint Counsel has no specific response. (*See also* CCPF 842-906 (describing Fittings suppliers' motives to conspire)).

14. Mr. Sheley, of distributor Illinois Meter, testified that the 2008 housing decline reduced overall demand for Fittings by 35 to 55 percent. (JX 675 (Sheley, Dep. at 58)).

Response to Proposed Finding No. 14

Complaint Counsel notes that there is no exhibit denominated "JX 675." The proposed finding is misleading insofar as it suggests that Mr. Sheley has personal knowledge of the overall housing demand in 2008 outside of the markets in which Illinois Meter operates. Complaint Counsel does not disagree that Mr. Sheley testified that he believed the impact of the 2008 housing decline was "[a]nywhere from a 35 to a 55 percent reduction in volumes for everybody," however, Mr. Sheley does not have personal knowledge of "everybody'[s]" volumes. (RX-675 (Sheley, Dep. at 58)).

15. Mr. Rybacki of Sigma testified that, in 2009, residential construction rates were the lowest they had been in 70 years. (Rybacki, Tr. 3664, *in camera*† (†**{** **}**†) & RX-242, *in camera*.

Response to Proposed Finding No. 15

Complaint Counsel has no specific response.

16. In late 2007 and 2008, a variety of macroeconomic factors in China resulted in a substantial increase in production costs for importers of non-domestic Fittings. (Rybacki, Tr. 3661-3662, *in camera*† (†**{** **}** ; JX 687 (Pais, Dep. at 39-41); JX 639 (McCullough, Dep. at 182-184); JX 638 (McCutcheon, IHT at 401-402, 418-19)).

Response to Proposed Finding No. 16

Complaint Counsel has no specific response other than to note that there is no exhibit denominated "JX 687," "JX 639," or "JX 638."

17. Unprecedented increases in scrap iron prices were having a "tremendous negative effect" on Sigma's business in early 2008. (Rybacki, Tr. 3711 (Q: "All right. And you say, in

the second paragraph, that you'd been hit with unprecedented price increases, unprecedented increases in scrap iron prices, which have increased sevenfold in just a few short years; is that right, sir?" A: "That's correct." Q: "And what effect was that having on your business at Sigma in early 2008?" A: "Negative effect, tremendous negative effect.")).

Response to Proposed Finding No. 17

Complaint Counsel has no specific response.

18. Prices for scrap iron and other raw materials increased for all Fittings suppliers between 2008 and 2010. (JX 675 (Sheley, Dep. at 58-59)). At the same time, shipping costs contributed to a slightly disproportionately higher increase for imported Fittings. (JX 675 (Sheley, Dep. at 59)).

Response to Proposed Finding No. 18

Complaint Counsel notes that there is no exhibit denominated "JX 675." Complaint Counsel has no specific response, other than to note that in 2007 and 2008 costs in China were rising faster than McWane's United States costs. (*See* CCPF 870-877).

19. Mr. Sheley testified that "the offset in wage rates in China rising has narrowed the spread between domestic and offshore production costs dramatically in the last five years." (JX 675 (Sheley, Dep. at 59)).

Response to Proposed Finding No. 19

Complaint Counsel has no specific response, other than to note that there is no exhibit denominated "JX 675."

20. Mr. Tatman testified that in 2007 and early 2008, "I think we saw about a $300 per ton effective cost increase based on raw material costs, pig iron, coke, and the effective exchange rate of those when we -- we have to pay in RMB currency and convert that into U.S. dollars." (Tatman, Tr. 871).

Response to Proposed Finding No. 20

The proposed finding is misleading insofar as it suggests that Mr. Tatman's testimony related to cost increases for all Fittings produced by McWane. Mr. Tatman's testimony referred to cost increases specifically for the production of Fittings in China and not for McWane's production of Fittings in the United States. (*See also* CCPF 852, 871, 1073).

21. †**{** **}** (Expert Rpt. of Parker Normann ¶30 Fig. 2B, *in camera*) .

Response to Proposed Finding No. 21

The proposed finding is misleading insofar as it suggests that any meaningful measurement of McWane's costs increased by **{ }**. Figure 2B of Dr. Normann's report, a **{ }**, does not identify which costs are included in this index, but its name **{ }** suggests that **{ }**. (*See* RX-712B (Normann Rep. at 16), *in camera*). Without full cost information, one cannot conclude that McWane's total or variable costs increased, or if so, to what extent. Further, the proposed finding is vague and therefore unreliable, as it does not distinguish between cost increases McWane experienced for overseas production as compared to cost increases for production in the United States.

22. McWane's costs for non-domestic Fittings † **{** **}** (Tatman, Tr. 860 *in camera* (**{** **}**).

Response to Proposed Finding No. 22

The proposed finding is misleading, irrelevant, and contradicted by the weight of the evidence. Complaint Counsel agrees that McWane's 2008 Blue Book financials (CX 2416 at 035), *in camera*, to which the cited testimony relates, reflect that **{ }**. The proposed finding, however, is misleading and irrelevant because the figures it cites do not reflect all of McWane's sales in the (Open Specification) Fittings market, but rather omit Open Specification sales of certain Fittings manufactured in the United States,

where McWane enjoyed a relative cost advantage in 2008. (*See infra* Response to Finding No. 146 (2008 Blue Book does not split out Domestic Fittings sold into Open Specification projects); CCPF 870-877 (costs in China were rising faster than McWane's U.S. costs); *see also* CCPF 842-877 (suppliers' motives to conspire)). McWane's sales of Domestic Fittings into both Open Specification and Domestic-only Specification projects were significantly larger than its non-Domestic sales and its sales of domestically produced Fittings were up **{**

}. (CX 2416 at 035, *in camera*). The proposed finding is also misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests that **{** **}**. (*See infra* Response to Proposed Finding No. 146 (**{**

}); CCPF 1343-1359 (same)).

23. McWane's prices for non-domestic Fittings did not keep pace with inflation in 2008. (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.")).

Response to Proposed Finding No. 23

The proposed finding is misleading, irrelevant, and contradicted by the weight of the evidence for the reasons set forth above in response to Proposed Finding No. 22. (*See also infra* Response to Proposed Finding No. 103 (evidence does not support finding that McWane believed in January 2008 that its multiplier increase would not allow it to keep up with inflation)).

24. 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. (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).

Response to Proposed Finding No. 24

The proposed finding is unsupported and misleading. The finding is unsupported by any actual analysis from McWane's files or testimony by McWane executives and relies only on estimates prepared by Dr. Normann (who did not speak with any McWane executives) and whose estimations of McWane's average blended Fittings prices are unreliable. His estimations are based on meaningless and flawed data that do not reflect actual transaction prices or the actual prices paid by customers for the Fittings they purchase; the data is also flawed because of known, but non-systematic lags between agreement on price terms and actual shipment and invoicing. (*See* CCPF 1424-1435). The proposed finding is also misleading because Dr. Normann did not report measures of inflation or total costs. He only reported in Figure 2B of his report a **{** **}**, which is based upon **{**

}. (*See* RX-712B (Normann Rep. at 16), *in camera*). Dr. Normann does not report what costs are included in this index, but its name **{** **}** suggests that **{**

}. Thus, without full cost information, one cannot conclude that McWane's costs increased or what was the rate of inflation.

25. Average net prices for non-domestic Fittings were lower during the latter half of 2008 than during the first half of 2008. (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, *in camera*† (†**{**

}), 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.")).

Response to Proposed Finding No. 25

The proposed finding is inaccurate and contradicted by the weight of the evidence, including McWane's own contemporaneous business records and contemporaneous Star and Sigma business records. Contrary to the proposed finding, McWane's contemporaneous business records establish that **{**

}

(CX 2416 at 043, *in camera* (**{** **}**); Tatman, Tr. 846-847, *in camera*); CCPF 1356-1357; *see also* CCPF 1343-1359 (McWane's gross profits also increased in 2008 over 2007, despite reduced volume). **{**

} *See* CCPF 1367 (citing CX 2470 at 004, *in camera*) (**{**

}); CCPF 1370-1383 (citing CX 1002 at 004, *in camera*) (**{**

}). **{**

}. (Normann, Tr. 5776-5782, *in camera* (as corrected by Nov. 7, 2012 Joint Stipulation Regarding Trial Transcript Errata) (**{**

}); *see also infra* Response to Proposed Finding No. 189).

The proposed finding is also vague, unsupported, and misleading as to time. The vague and broad time period of the proposed finding is not supported by the testimony offered in support. Mr. Tatman's testimony that "pricing [got] worse" after September 2008 (Tatman, Tr. 971-972) and Mr. Rybacki's testimony that "pricing got worse" (at an unspecified time) in the second half of 2008 (Rybacki, Tr. 3717-3719) do not support the proposed finding that "[a]verage net prices for non-Domestic Fittings were lower during the latter half of 2008 than during the first half of 2008." Mr. Pais's cited testimony related to a "quick" erosion in pricing that had occurred "over the recent few weeks" as of November 24, 2008, consistent with the suppliers' resumption of Project Pricing after the market downturn in August 2008. (*See* RX-116 at 0002; CCPF 1436-1438, 1455-1464).

Finally, the cited testimony of Mr. Tatman and Mr. Rybacki that prices "got worse" is vague, and insufficient to support a finding regarding the relative "average net prices" between the first and second halves of 2008.

26. Mr. Rybacki testified that, from a market perspective, "The second half of '08 turned gloomy." (Rybacki, Tr. 3702).

Response to Proposed Finding No. 26

Complaint Counsel has no specific response, other than to note that although the global recession worsened considerably in the second half of 2008, **{**

}. (*See* CX 1002 at 004, *in camera*). (*See supra* Response to Proposed Finding No. 25).

27. From 2008 to 2010, McWane's share of the overall Fittings market declined, while its competitors' share increased. (Expert Rpt. of Parker Normann ¶¶82, 88).

Response to Proposed Finding No. 27

The proposed finding is incorrect because **{**

} (*See* CX 2260 (Schumann Rep. at 20 tbl. 1), *in camera* (Table 1 shows that McWane's share of the overall Fittings market **{** **}**)).

28. In 2008, McWane's share of the overall Fittings market fell about eight percentage points, from the upper 40s to low 40s. (Tatman, Tr. 971 (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.") & RX 616).

Response to Proposed Finding No. 28

The proposed finding is misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests that the loss of market share occurred in 2008, and in particular that, as of September 9, 2008 (the date of the cited document RX-616), McWane had lost eight points of Fittings market share in 2008. The cited document actually states that McWane's share was "Down ~8pts *from 2006*." (RX-616 at 0005 (emphasis added) (noting also that "[l]eading price stability has been detrimental to share"). That decline of market share from the 2006 level had already occurred by the beginning of 2008, and McWane's market share did

not decline further during 2008 until the resumption of Project Pricing after the market downturn in August 2008. (*See infra* Response to Proposed Finding No. 184 (comparing McWane's share over the last four months of 2007 with its share over the first nine months of 2008)).

29. Throughout 2008, McWane's two domestic foundries – its Tyler South Plant and its Union Foundry – were operating at only about one-third capacity. (Tatman, Tr. 960 (Q: "Roughly, how much could the Tyler south plant produce in terms of tons of fittings?" A: "If you're running it like you should, about 36,000 tons a year." Q: "All right. And roughly how much was it producing back then in 2008?" A: "I think we had it scaled all the way back down to around 13,000 tons." Q: "All right. So you're saying it was operating somewhere around 30 percent capacity?" A: "Yes." Q: "What about Union Foundry? What's its rated capacity?" A: "In the mid-30s also." Q: "And roughly what's Union operating at in the 2008 period, 2009 period?" A: "I'd have to look at the blue books for sure but again still in that kind of mid to low teen range or, you know, about 30 percent of what they could do.")).

Response to Proposed Finding No. 29

Complaint Counsel has no specific response. (*See also* CCPF 845-852 (describing McWane's motive to conspire)).

30. On November 8, 2008, McWane closed its Tyler South foundry, because the Fittings business was so poor. (Tatman, Tr. 958-960 (Q: "We heard that you shut down Tyler, and I forget. Is it Tyler south or Tyler north?" A: "The Tyler south plant in November of 2008. I think it's the 8th of November."), 960 ("I've got high inventory levels and I don't have enough demand, domestic only, to keep up with production. And if I start substituting domestic product with my import sales, I have wrap a dollar bill around it. And if I did that, then I don't know what to do with the plant I just opened in China that's got to produce tons and has to sell something there also.")). Mr. Tatman did not "see any indications in the marketplace that housing is going to recover or the economy is going to recover.") (Tatman, Tr. 967). Prior to closing Tyler South, both of McWane's U.S. plants were "throttled down as low as you could throttle them. . . . we can't keep two plants limping along, not meeting our inventory objectives and bleeding millions of dollars a year in idle plant."

Response to Proposed Finding No. 30

The proposed finding is misleading and unsupported insofar as the cited authority does not support the final sentence. The finding is misleading insofar as it suggests that McWane closed the Tyler South plant because the Fittings business was poor. Mr. Tatman explained in his testimony that closing Tyler South resulted in an improvement McWane's "fully burdened cost" because it eliminated $7 million in idle plant costs. (Tatman, Tr. 432-434). Moreover, the

weight of the evidence demonstrates that the Fittings business thrived even throughout the recession. (*See* CCPF 17, 1347-1351, 1359; CX 0622 at 005; CCPF 1702; RX-72, *in camera* (**{** **}**); RX-632, *in camera* (**{** **}**)).

31. Throughout 2008, the Fittings market remained extremely competitive. (Minamyer, Tr. 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."); McCutcheon, Tr. 2275 ("It's a very chaotic pricing strategy because pricing is not consistent, and so there's buy programs, there's project buy programs, there's one-time buy programs, there's good-till-Friday buy programs. It's an extremely competitive industry. And the buying of pipe fittings, the pricing, changes daily.")).

Response to Proposed Finding No. 31

The proposed finding and the vague trial testimony on which it relies is contradicted by the weight of the evidence, including contemporaneous documents, which establishes, *inter alia*, (1) close, trusting relationships and numerous direct contacts between the Fittings suppliers (*see* CCPF 699-841), (2) the successful, coordinated reduction of Project Pricing by McWane, Sigma, and Star during 2008 (*see* CCPF 931-1071, 1339-1383, 1410-1423), and (3) the suppliers' agreement to implement the DIFRA information exchange for the purpose of monitoring pricing and market share stability, and as a precondition to McWane's agreement to price increases (*see* CCPF 1155-1337). (*See also infra* Responses to Proposed Finding Nos. 32, 143).

32. Mr. Tatman testified that pricing wars have continued from the time he first took over the management of McWane's Fittings unit through the present. (Tatman, Tr. 974-975 ("Q: All right. So were you in fact seeing a pricing war from your perspective in the spring of 2009? A: Yes. Q: And when had that started, that pricing war, from your perspective? A: I don't think it ever ended. I mean, I walked into the fight and the fight kept going. I've never seen it end.").).

Response to Proposed Finding No. 32

The proposed finding and the vague trial testimony on which it relies is contradicted by the weight of the evidence, including contemporaneous documents, which establishes, *inter alia*, (1) close, trusting relationships and numerous direct contacts between the Fittings suppliers (*see* CCPF 699-841), (2) the successful, coordinated reduction of Project Pricing by McWane, Sigma, and Star during 2008 (*see* CCPF 931-1071, 1339-1383, 1410-1423), and (3) the suppliers' agreement to implement the DIFRA information exchange for the purpose of monitoring pricing and market share stability, and as a precondition to McWane's agreement to price increases (*see* CCPF 1155-1337). (*See also infra* Responses to Proposed Finding No. 143). In addition, the weight of the evidence demonstrates that McWane and Star were not at war over prices in the Spring of 2009. Rather, McWane and Star were cooperating on price, and exchanged assurances regarding mutual adherence to a price list restructuring for Fittings. (*See* CCPF 1533-1552). At the same time, Sigma announced its intention to adhere to list price, rather than competing through Project Pricing, and communicated its desire for stable pricing to McWane. (*See* CCPF 1510-1517, 1524). Finally, the weight of the evidence demonstrates that improper communication and cooperation on pricing has continued at least through 2010. (*See* CCPF 1554-1571).

33. Mr. McCullough testified that the Fittings business "is a nasty business. It's one of those businesses that like you can see, for us it's a break even business." (JX 638 (McCullough, IHT at 219-220).

Response to Proposed Finding No. 33

Complaint Counsel notes that there is no exhibit denominated "JX 638." Complaint Counsel does not disagree that Mr. McCullough testified as cited in the proposed finding, but the cited testimony is contradicted by the weight of the evidence, which establishes that the Fittings business has been consistently profitable for McWane. (*See* CCPF 17, 1347-1351, 1359; CX

0622 at 005; CCPF 1702; RX-721, *in camera*; RX-632, *in camera*; *supra* Response to Proposed Finding No. 6).

C. McWane's Share of the Fittings Market Has Steadily Declined

34. 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. (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.").

Response to Proposed Finding No. 34

Complaint Counsel notes that there is no exhibit denominated "JX 642." The proposed finding is unsupported, inaccurate, and misleading because (1) it is based on Mr. Tatman's admitted "estimates" which are contradicted and outweighed by the empirical analysis conducted by Dr. Schumann, (2) it is not tailored to the 24" and under Fittings market at issue in this case, and (3) although McWane's share of the overall Fittings market may have declined between 2003 and 2007. McWane's share of the overall Fittings market **{**

}. (*See* CX 2260 (Schumann Rep. at 20 tbl. 1), *in camera*); *see also supra* Response to Finding No. 27).

35. McWane's Fittings market share has been steadily declining relative to Star's since 2003. (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.").).

Response to Proposed Finding No. 35

The finding is unsupported. inaccurate, and misleading for the reasons set forth above in Response to Proposed Finding No. 34. McWane's share of the overall Fittings market **{ }**. (*See* CX 2260 (Schumann Rep. at 18 tbl. 1), *in camera*; *see also supra* Response to Finding Nos. 27, 34)

D. The Fittings Market is an Oligopoly

36. McWane, Star, and Sigma account for at least 90 percent of the Fittings sold in the United States. (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.")).

Response to Proposed Finding No. 36

Complaint Counsel has no specific response, other than to note that the evidence establishes that McWane, Sigma, and Star account for more than **{ }** of Fittings sold in the States, including Domestic and imported. (*See* CCPF 456-458).

37. The Fittings market is an oligopolistic market. (Opinion of The Commission on Cross-Motions for Summary Decision at 9).

Response to Proposed Finding No. 37

Complaint Counsel has no specific response, other than to note that non-transparent Project Pricing frustrates coordination among the firms. (*See* CCPF 651-662, 664a-b).

E. Fittings Customers are Distributors with Substantial Market Power

38. McWane, Sigma, Star, and other suppliers sell Fittings directly to Distributors, which then re-sell the Fittings to End Users. (JSLF ¶ 14).

Response to Proposed Finding No. 38

Complaint Counsel notes that there is no exhibit denominated "JSLF." To the extent that Respondent refers to JX 0001, Complaint Counsel has no specific response.

39. All or virtually all of McWane, Sigma, and Star Fittings sales are to Distributors. (JSLF ¶ 15; Tatman, Tr. 251-252 (Q: "McWane sells all or virtually all its fittings through distributors; is that right, sir?" A: "And that would be virtually all. We do sell a little bit direct, but that's -- I think we went through that in deposition -- that's a very small percentage of what we do"); McCutcheon, Tr. 2256-57 (Q: "When you're selling fittings, who are your customers?" A: "Oh. We sell to the water and wastewater wholesaler community." Q: "Are those entities also referred to as distributors?" A: "Yes, sir."); Rybacki, Tr. 1094-1095 (Q: "And the fittings that you have virtually manufactured, who do you sell them to?" A: "We sell our fittings through a distribution network throughout the United States through wholesalers only.")).

Response to Proposed Finding No. 39

Complaint Counsel has no specific response, other than to note that there is no exhibit denominated "JSLF."

40. There are at least 630 separate waterworks Distributors in the United States. (Schumann, Tr. 4432-3 (Q: "Now, Dr. Schumann, your report says there are 630 total distributors of waterworks fittings in the country; is that right?" A: "That's what we -- my -- the people who were working with the data for me calculated at my request the total number of unique distributors they could find in the data.")).

Response to Proposed Finding No. 40

The proposed finding is incomplete and misleading insofar as it suggests that each Distributor is of equal size and importance. Most 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. (CCPF 480; *see also infra* Response to Proposed Finding No. 466).

41. Distributors sell pipe, valves, hydrants, and other waterworks products, appurtenances, and accessories, in addition to Fittings. (Webb, Tr. 2706 ("For the underground construction market that we call the waterworks market, it's primarily pipe, which would be PVC and ductile iron pipe, valves, hydrants, fittings, brass items and appurtenances."); Thees, Tr. 3050-3051 ("There's pipe … You've got gate valves. You've got fire hydrants. You've got butterfly valves. You've got mechanical joint and flanged fittings. You've got service brass. Marking tape. Water meters.") ; JX 705 (Gibbs, Dep. at 10-13); JX 675 (Sheley, Dep. at 11); JX 650 (Morrison, Dep. at 18-19); JX 661 (Prescott, Dep. at 8-9).

Response to Proposed Finding No. 41

Complaint Counsel has no specific response, other than to note that there is no exhibit denominated "JX 705," "JX 675," "JX 650," or "JX 661."

42. Fittings typically comprise a relatively small portion of a Distributor's business. (Thees, Tr. 3111 (Q: "And I believe you also testified that domestic fittings actually make up a very small percentage of your business?" A: "Of our overall waterworks business, yes."); JX 705 (Gibbs, Dep. at 12-13); JX 672 (Webb, IHT at 42); JX 652 (Johnson, Dep. at 9-10); JX 661 (Prescott, Dep. at 10-11); JX 703 (Coryn, Dep. at 11-12); JX 669 (Groeniger, Dep. at 13)).

Response to Proposed Finding No. 42

Complaint Counsel notes that there is no exhibit denominated "JX 705," "JX 672," "JX 652," "JX 661," "JX 703," or "JX 669." Complaint Counsel has no specific response, other than to note that, while Fittings may account for a small portion of dollars spent, they are an essential product to which Distributors must have timely access in order to service their customers. (*See* CCPF 579-591).

43. McWane's domestic Fittings line was "not a big portion" of the products sold to HD Supply. (JX 672 (Webb, IHT at 82-83)).

Response to Proposed Finding No. 43

Complaint Counsel notes that there is no exhibit denominated "JX 672." Complaint Counsel has no specific response, other than to note that, while Domestic Fittings may not be a "big portion" of dollars spent, they are an essential product to which HD Supply and other Distributors must have timely access in order to service their customers. (*See* CCPF 579-591).

44. Many Distributors are large firms, and some are much larger than the [*sic*] McWane, Sigma, or Star. (Thees, Tr. 3042 (Q: "How many branches does Ferguson have?" A: "Approximately 1300." Q: "And how many waterworks branches are there within Ferguson Waterworks?" A: "167 as of yesterday."); McCutcheon, Tr. 2261-2262 ("Q. Who are the largest distributors? A. The top two would be HD Supply and Ferguson Supply. Q. And what's your estimate of their share of the fittings distribution market? A. I would estimate HD to be somewhere between 30 and 35 percent. I would estimate Ferguson to be somewhere between 15 and 20 percent."); JX 672 (Webb, IHT at 42-43); JX 663 (Thees, Dep. at 11-14); JX 705 (Gibbs, Dep. at 11-12); JX 675 (Sheley, Dep. at 12-13); JX 652 (Johnson, Dep. at 9-10); JX 661 (Prescott, Dep. at 9-11); JX 650 (Morrison, Dep. at 24-25).

Response to Proposed Finding No. 44

Complaint Counsel notes that there is no exhibit denominated "JX 672," "JX 663," "JX 705," "JX 675," "JX 652," "JX 661," or "JX 650." The proposed finding is inaccurate, misleading, and unsupported by the cited testimony. McWane's statement that "[m]any Distributors are large firms" is vague and it is unclear what McWane is using to measure the size of Distributors, McWane, Sigma, and Star; which is required to do any apples-to-apples comparison to determine that "some [Distributors] are much larger than the McWane, Sigma, or Star."

The cited testimony establishes the number of branch locations specific Distributors own; the market shares of various Distributors in the Distribution market; and the gross revenues of individual Distributors, which includes, but is not limited to, gross revenue for ductile iron pipe, PVC pipe, valves, hydrants, Fittings, municipal castings, and accessories.

Two (not "many") Distributors are considered large Distributors based on the number of branch locations they own: HD Supply and Ferguson with 235 and 167 branches, respectively. (CCPF 265-266, 274-275). After the two national Distributors, there are a handful of regional waterworks Distributors with multiple branches. (CCPF 480). Most Distributors are small, local companies with just one or a few distribution yards. (CCPF 480). It is unclear how the number of branch locations makes a Distributor "much larger" than a supplier.

McWane, Sigma, and Star compete in the supply of Fittings, while Distributors competed in the wholesale distribution market. The amount of market share a Distributor has in the Distribution market does not necessarily make the Distributor larger or "much larger" than McWane, Sigma or Star. Indeed, McWane's Fitting division, which had approximately **{ }** in annual sales in 2008 (CX 2416 at 040, *in camera*), which is only 5% of McWane's overall business. (Respondent's Proposed Finding No. 5 ("If you look at McWane, Inc., the fittings business is a gnat . . ." (Tatman, Tr. 218-219))).

45. HD Supply is the largest waterworks Distributor in terms of sales in the United States, (JSLF ¶ 24), with revenue in 2010 of $1.6 billion and in 2011 "right at 1.8 billion" dollars. (JX 673 (Webb, Dep. at 13-14)).

Response to Proposed Finding No. 45

Complaint Counsel has no specific response, other than to note that there is no exhibit denominated "JSLF" or "JX 673."

46. HD Supply carries as much as $174,000,000 in inventory at any given time. (JX 673 (Webb, Dep. at 48)). Fittings sales represent about 12 per cent of HD Supply's waterworks revenue. (JX 672 (Webb, IHT at 42)).

Response to Proposed Finding No. 46

Complaint Counsel has no specific response, other than to note that there is no exhibit denominated "JX 673" or "JX 672."

47. HD Supply's share of the Fittings distribution business in the United States is approximately 28 to 30 per cent, (JX 672 (Webb, IHT at 43), and "garner[s] a certain amount of buying power" because of its large size. (JX 673 (Webb, Dep. at 45-46)).

Response to Proposed Finding No. 47

Complaint Counsel has no specific response, other than to note that there is no exhibit denominated "JX 672" or "JX 673."

48. Ferguson is the second largest waterworks Distributor in terms of sales in the United States, (JSLF ¶ 25), with share of the overall waterworks distribution market of "[c]lose to 25 percent." (JX 663 (Thees, Dep. at 15)).

Response to Proposed Finding No. 48

Complaint Counsel has no specific response, other than to note that there is no exhibit denominated "JSLF" or "JX 663."

49. Mr. Webb, of HD Supply, testified that, in the Fittings segment of the waterworks distribution market, Ferguson is roughly the same size as HD Supply. (JX 672 (Webb, IHT at 44-45)).

Response to Proposed Finding No. 49

Complaint Counsel has no specific response, other than to note that there is no exhibit denominated "JX 672."

50. Distributor Dana Kepner carries about $11 million in inventory at any given time. (JX 652 (Johnson, Dep. at 11)). Fittings represent about 4.5 per cent of Dana Kepner's annual revenue. (JX 652 (Johnson, Dep. at 9-10)).

Response to Proposed Finding No. 50

Complaint Counsel has no specific response, other than to note that there is no exhibit denominated "JX 652."

51. Distributors generally obtain quotes for specific projects from more than one Fittings supplier, in order to negotiate lower net prices. (JX 643 (Tatman, IHT at 77-78)).

Response to Proposed Finding No. 51

Complaint Counsel has no specific response, other than to note that there is no exhibit denominated "JX 643."

52. Mr. Sheley testified that, in 2008, Illinois Meter played Fittings suppliers off one another in order to try and negotiate better prices. (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.")).

Response to Proposed Finding No. 52

Complaint Counsel has no specific response.

53. Distributors generally prefer higher fittings prices, because they sell to end users at a mark-up; the same percentage mark-up on a higher priced item will result in greater revenues for the Distributor. (Minamyer, Tr. 3245-3247 (Q: "And why would a customer want its price to be higher?" A: "There's a couple reasons. One is, if you buy something and you mark it up a percentage, the more it costs, the more that that dollar markup becomes."); Tatman, Tr. 567-68

("Q. And why don't you give us your best understanding of what Mr. McCullough meant by "until there is pricing stability and market share maintenance." A. Well, what I can tell you that I believe that he means is it's normal in the industry to send out a price increase in January, normal. It happens almost every year. What he is saying here is that he's not going to do it. And quite frankly, our customers want us to send out a price increase notice every year. All things being created equal, raising published prices is good for distribution because to them it sets an expectation with their customers over where price is going to be. So when I raise prices 5 or 6 percent in January, they use that with their contractors to say, "Look, I got to raise my prices. Market prices are going up 5 percent." So distributors actually don't like it when you don't send out a price increase notice."); JX 638 (McCullough, IHT at 88); JX 672 (Webb, IHT at 144-146)).

Response to Proposed Finding No. 53

Complaint Counsel notes that there is no exhibit denominated "JX 638" or "JX 672." The proposed finding is inaccurate, misleading, and contradicted by the weight of the evidence. Testimony from Mr. Minamyer of Star and Messrs. Tatman and McCullough from McWane lacks the proper foundation to support a finding about what "Distributors generally prefer." The only Distributor whose testimony is cited in support of the proposed finding is Mr. Webb of HD Supply. Based on the cited testimony, it is unclear whether Mr. Webb prefers higher or lower prices:

> Q. All else being equal, do you prefer to – that wholesale prices, the prices you purchase at are higher or lower?
>
> A. Yes. As a general rule, inflationary price increases, particularly in the commodities sector, helps us from a revenue standpoint. It doesn't always help us from a margin standpoint. But again, higher dollars for the higher prices can be advantageous.

(CX 2513 (Webb IHT at 145-146)). The only thing the cited testimony establishes is that "inflationary price increases" "can be advantageous" "from a revenue standpoint." Mr. Webb, however, testified that price increases do not "always help us from a margin standpoint." (CX 2513 (Webb IHT at 145-146)).

The weight of the evidence contradicts the proposed finding that Distributors generally prefer higher Fittings prices. Mr. Sheley, a Distributor, testified at trial that he has never asked a

Fittings supplier for a price increase. (Sheley, Tr. at 3421 ("Q. Have you ever asked a fittings supplier for a price increase? A. No. Q. Are you aware of anyone at Illinois Meter asking a fittings supplier for a price increase? A. No.")). Distributors want their own transaction prices to be low, and for their competitor's transaction prices to be higher, and are subject to normal market forces in their dealings with End Users. (*See* CCPF 508).

54. Distributors generally prefer higher fittings prices, because declining Fittings prices reduce the value of existing inventory carried by the Distributors. (Minamyer, Tr. 3246 ("And another reason would be that they have existing inventory, and if they buy more material cheaper than they bought that inventory, it devalues that inventory.")).

Response to Proposed Finding No. 54

The proposed finding is misleading and unsupported. Testimony from Mr. Minamyer of Star lacks the proper foundation to support a proposed finding about what "Distributors generally prefer." Some Distributors may prefer higher market prices for Fittings because changes in Fittings prices can affect the value of their inventory. (CCPF 506). Moreover, there is an important distinction between declining prices, which may affect the value of existing inventory, and prices remaining unchanged, which would not have an effect.

55. Star's Distributor customers were "constantly" telling Mr. Minamyer and his sales team that they wanted price increases. (Minamyer, Tr. 3245-3246 (Q: "Had [Distributor] senior management encouraged you to try and take a price increase?" A: "Constantly.")).

Response to Proposed Finding No. 55

The proposed finding is misleading and inaccurate. Mr. Minamyer testified that senior managers at some, not all, of Star's customers asked for price increases, but that the "branch-level people" wanted "[b]etter pricing." (Minamyer, Tr. at 3246-3247 ("Q. Okay. And is there some conflict between the senior management of a customer and some of the branch-level people? A. Constantly . . . Q. And senior management is constantly telling you to take a price increase; correct? A. That's correct. Q. So there's pressure here from your customers as well;

right, to take this price increase? A. From some of them, yes.")). Furthermore, Mr. Sheley, President and Owner of Illinois Meter (a senior manager) testified at trial that he has never asked a Fittings supplier for a price increase. (Sheley, Tr. at 3421 ("Q. Have you ever asked a fittings supplier for a price increase? A. No. Q. Are you aware of anyone at Illinois Meter asking a fittings supplier for a price increase? A. No.")). Distributors want their own transaction prices to be low, and for their competitor's transaction prices to be higher, and are subject to normal market forces in their dealings with End Users. (*See* CCPF 508).

56. Distributors have the ability to "punish" the Fittings suppliers. (Tatman, Tr. 251-252 ("It would be better for us if we sold direct. However, the distributors have the power in this marketplace. And quite frankly, if I sold direct to a contractor, they would punish me, take the business away from us. So there's no distributors in the room, but, you know, it's a little bit of an extortion business.")).

Response to Proposed Finding No. 56

The proposed finding is incorrect, misleading, and contradicted by the weight of the evidence. Other than the trial testimony of Mr. Tatman, Complaint Counsel is aware of no record evidence of Distributors having the ability to "punish" Fittings suppliers. The weight of the evidence establishes that Distributors need access to Fittings and Domestic Fittings to service their End User customers (CCPF 486-487), that, prior to Star's entry into the Domestic Fittings market, McWane was the only supplier of Domestic Fittings (CCPF 1659), that McWane understood it had market power in the Domestic Fittings market (CCPF 1694-1711), and that Distributors have described McWane as "the absolute gorilla" (CCPF 1660).

F. Fittings Pricing

1. List Prices and Multipliers

57. McWane publishes its list price for its Fittings on the Tyler/Union web site. (JX 644 (Tatman, Dep. at 15)).

Response to Proposed Finding No. 57

Complaint Counsel has no specific response, other than to note that there is no exhibit denominated "JX 644." (*See also* CCPF 670).

58. Historically, Fittings suppliers have published list price increases once per year, or once every couple of years. (Tatman, Tr. 256-257 (Q: "And you didn't do that very often, changed that list price?" A: "No. We did one in 2007. We did one in 2009, which was a very large restructuring of how we were going to price in 209. And then I've done one in 2011.")).

Response to Proposed Finding No. 58

Complaint Counsel has no specific response.

59. List price changes usually occur during the first quarter of a calendar year. (Sheley, Tr. 3422 ("A list price change typically comes in the first quarter in the form of new price sheets for your catalog."), 3436-3437 (Q: "Okay. And either a new list will be published, which you said is generally around the first of the year?" A:" Yes.").

Response to Proposed Finding No. 59

The proposed finding is misleading insofar as it suggests that list price changes do not occur except in the first quarter of the year. The suppliers announced list price changes in April and May of 2009. (*See* CCPF 685, 1492-1500, 1533-1553).

60. McWane publishes different multipliers, in every region and state, for its domestic and non-domestic ("blended") Fittings. (Tatman, Tr. 258-259 ("Q. And so McWane's customers don't pay list price; they typically pay a multiplier? A. Nobody pays list price. I mean, if you look at it, your published list price and your published multipliers, what that establishes is the absolute highest price you could ever sell something for. You're never going to be able to sell lower than that. That's the absolute highest you could ever sell it for. And then the discounting starts from there and starts going way down. Q. You refer, sir, to the list times multiplier as the published price; is that right? A. I would say that if you take our list price and a published multiplier for a geographic region, that would establish published pricing. So to just give an example of that, you have a list price and you have the state of North Carolina has a published multiplier of .25. Then we would say that what the customer would do is he would take the list price, multiply every list price by .25, and he would say that is your published pricing."); Tatman, Tr. 262-263 ("Q. McWane publishes a map with its multipliers? A. We do not publish a map of our multipliers. We have an internal map of our multipliers. And our larger national customers ask us to send that to them because it's easier for them to put the pieces together than have to look at every individual state. We do not send out publicly a national map. We send out a letter to each individual region or regions that have common pricing. But as you've seen through my documents, a picture of the country, all the states and a multiplier for every state, that's an internal document, internal document only. It will get into the hands of large customers that are

nationals because they ask for it.") & RX 410; CX 0165; CX 1181; CX 1655; CX 1665; (JX 643 (Tatman, IHT at 32-34); JX 637 (Jansen, Dep. at 265-267)).

Response to Proposed Finding No. 60

Complaint Counsel notes that there is no exhibit denominated "JX 637" or "JX 643," and that page 265 of Mr. Jansen's deposition testimony is not in evidence. The proposed finding is misleading insofar as it suggests, by using the word "different," that no two regions or states have the same multiplier. (*See* RX-410 (sample McWane multiplier map showing multiple states with the same multiplier)).

61. Virtually no Fittings customer pays list price for Fittings. (JX 639 (McCullough, Dep. at 170); McCutcheon, Tr. 2269 (Q: "Does Star's customers pay list price?" A: "No, sir."); Rybacki, Tr. 1096-1097 ("List price" means you set a price for a product that customers will put in a – you know, we have a book. We have a price book with the list prices for everybody to have a standard price to look at, and then we offer a multiplier or a discount off of the list price. A list price is just a gauge to go by.")

Response to Proposed Finding No. 61

Complaint Counsel has no specific response, other than to note that there is no exhibit denominated "JX 639." (*See also* CCPF 543-548).

62. Multipliers are published discounts off a Fittings supplier's published list price. (JX 639 (McCullough, Dep. at 170-171); JX 644 (Tatman, Dep. at 15)).

Response to Proposed Finding No. 62

Complaint Counsel has no specific response, other than to note that there is no exhibit denominated "JX 639" or "JX 644." (*See also* CCPF 543-545).

63. A multiplier is "one way to discount off of the published list price." (McCutcheon, Tr. 2269 (Q: "And can you explain what a multiplier is?" A: "Yes, sir. It's -- a multiplier is a -- one way to discount off of the published list price.")

Response to Proposed Finding No. 63

The proposed finding is misleading insofar as it creates confusion between "published" multipliers on the one hand and Project Pricing "discounting" on the other. Unlike Project Pricing (which is commonly offered in the form of a multiplier lower than the published

multiplier), multipliers are a transparent component of the "published price" or "standard price" that Fittings suppliers extend to their customers based on the customer's geographic region. (*See* CCPF 544-545 (defining multipliers), 670-678 (transparency)). Project Pricing discounts, on the other hand, are not widely-published or transparent. (*See* CCPF 679-683). Project Pricing is discounting offered by Fittings suppliers to specific Distributors in response to specific competitive activity, and is a discount below the published price. (*See* CCPF 549-554).

64. Multiplier changes are cheaper to implement than list price changes, because the cost of printing and distributing new list pricing booklets to customers can cost tens of thousands of dollars. (Tatman, Tr. 255-257 (Q: "And there's a cost associated with publishing a new catalog and sending it out to your customers?" A: "There is. And you know, you've got the cost of developing it internally. You've got the cost of printing it. Then you have the cost of mailing it." Q: "And you previously estimated those costs at about $30,000 for the cost of printing and mailing?" A: "I've said -- well, I think when I say 25 or 30 thousand dollars, that's total cost, including the internal burden of doing that, the cost of printing and cost of mailing, and that's an estimate. I don't have an exact number on that. But it's not -- it's not -- let's agree it's not $2,000. It's something of significance."); JX 644 (Tatman, Dep. at 43-46); Rybacki, Tr. 3542 ("The list prices are expensive to do and if -- a multiplier increase is easier, but way less effective.")).

Response to Proposed Finding No. 64

Complaint Counsel has no specific response, other than to note that there is no exhibit denominated "JX 644."

65. Distributors prefer that Fittings suppliers like McWane, Sigma, and Star have identical list prices because it is easier for Distributors to compare the suppliers' multipliers and discounts to determine net prices when their published list prices are the same. (Tatman, Tr. 258 ("Customers like things easy, and so customers, all things being equal, would prefer that there's one list price so when someone is quoting a job and they're just quoting a multiplier, it's a published 25, I'll give you 21, the other guy comes in and says, I'll give you 20, he knows what the price differential is there. If everybody had different list prices, he'd have to throw everything in a spreadsheet and figure out who had the better price."); McCutcheon, Tr. 2527-2528 (Q: "And tell us why, in your view, customers expected you to have the same published prices as McWane." A: "The -- for the most part, every project order is a negotiation, an auction, between the fitting manufacturers. And the customers wanted to be able to get a discount or a multiplier from the manufacturers that they could apply to the same published list and published multiplier so they would know where they were on the same starting point, so they didn't have to independently analyze each manufacturer's bid."), 2271 ("The customer requires that we give them a similar list price, if not the same, similar published multiplier, if not the same, so they can more quickly analyze the net transactional prices and discounts that we give the distributor/wholesaler."); JX 694 (Bhutada, Dep. at 101-102)). (Tatman, Tr. 257-258 (Q: "And

your customers want it that way as well?" A: "Customers like things easy, and so customers, all things being equal, would prefer that there's one list price so when someone is quoting a job and they're just quoting a multiplier, it's a published 25, I'll give you 21, the other guy comes in and says, I'll give you 20, he knows what the price differential is there. If everybody had different list prices, he'd have to throw everything in a spreadsheet and figure out who had the better price."); McCutcheon, Tr. 2271 ("The customer requires that we give them a similar list price, if not the same, similar published multiplier, if not the same, so they can more quickly analyze the net transactional prices and discounts that we give the distributor/wholesaler."), 2527-2528 (Q: "And tell us why, in your view, customers expected you to have the same published prices as McWane." A: "The -- for the most part, every project order is a negotiation, an auction, between the fitting manufacturers. And the customers wanted to be able to get a discount or a multiplier from the manufacturers that they could apply to the same published list and published multiplier so they would know where they were on the same starting point, so they didn't have to independently analyze each manufacturer's bid."); JX 694 (Bhutada, Dep. at 101-102)).

Response to Proposed Finding No. 65

Complaint Counsel has no specific response, other than to note that there is no exhibit denominated "JX 694."

66. Fittings suppliers typically announce multiplier changes to their customers by letter. (Sheley, Tr. 3437 (Q: "Or a multiplier change letter will go out; correct?" A: "That's correct.")).

Response to Proposed Finding No. 66

Complaint Counsel has no specific response.

2. Job Pricing and Other Price Concessions

67. In addition to its published multipliers, McWane has historically offered its customers a variety of further price reductions for Fittings, including special, project or job-pricing discounts off the published multipliers, freight concessions, cash discounts, extended payment terms, cash-backs, corporate rebates, and branch rebates. (Tatman, Tr. 257-260 (Q: "But you sell some of your fittings at published prices, don't you, sir?" A: "We do. But then you also have to understand, when we sell at the published price, we turn around and give a rebate to that customer. We turn around and give them discounts for paying on time. We give them the freight allowances going on there. We've got all other sort of incentives, so I'm not netting in price. Even if I sell at the published price, that's not what I put in our coffers. I put something significantly lower than that in there."); JX 644 (Tatman, Dep. at 15-17)).

Response to Proposed Finding No. 67

Complaint Counsel notes that there is no exhibit denominated "JX 644," and that page 17 of Mr. Tatman's deposition is not in evidence. The proposed finding is misleading insofar as it

suggests that published multipliers, Project Pricing, and other pricing terms are interchangeable aspects of Fittings pricing and of equal or comparable competitive significance. Unlike Project Pricing discounts, published multipliers are a component of the "published price" or "standard price" that Fittings suppliers extend to their customers based on the customer's geographic region and the region's prevailing competitive environment. (*See* CCPF 544-545). Project Pricing is discounting offered by Fittings suppliers to Distributors in response to specific competitive activity, and is a further discount below the published price. (*See* CCPF 549-554). Rebates, payment, and freight terms are additional price terms that suppliers extend to Distributors. (*See* CCPF 562-576). Such secondary price terms are less significant than Project Pricing in day-to-day competition for Fittings business, and a reduction in Project Pricing in and of itself tends to lead to higher and more stable prices. (*See* CCPF 549-561; *see also infra* Response to Finding Nos. 103, 108).

68. "Job prices," "special prices," or "project prices" are further discounts off the published multiplier. (JX 643 (Tatman, IHT at 37-38) ("A job price is just a discount off published. If it's the State of Texas the published multiplier is a .29 and the customer calls up and says, Look, I need a .25; I need a .23, if we give that to him, that's going to be a job price.").

Response to Proposed Finding No. 68

Complaint Counsel has no specific response, other than to note that there is no exhibit denominated "JX 643."

69. Job-pricing is a standard practice in the Fittings market. (JX 639 (McCullough, Dep. at 189-190)). As Mr. McCullough testified, "Everything is bought off of a job price." (JX 638 (McCullough, IHT at 220); Rybacki, Tr. 1101-1108 (Q: "Who has -- who has the authority at Sigma to approve a job price?" A: "Our regional managers to some extent, and ultimately it lies with me."); (McCutcheon, Tr. 2271-72 (Q: "Does Star offer discounts off its published multipliers?" A: "Yes." Q: "And is there a term you use for offering a multiplier discount off the published multiplier?" … A. " A. Special Price.")).

Response to Proposed Finding No. 69

Complaint Counsel notes that there is no exhibit denominated "JX 638" or "JX 639." The proposed finding is incorrect, unsupported and misleading. Complaint Counsel agrees that Project Pricing was a regular practice in the Fittings market prior to the suppliers' 2008 agreement to curtail Project Pricing in exchange for McWane's agreement to "stepped and staged" price increases, and that this agreement was an abrupt change from historical business practices. (*See* CCPF 915; CX 0627 at 004 (Tatman Plan describing "stepped or staged" increases in exchange for market stability); CCPF 1022-1028 (Project Pricing curtailment was an abrupt change)). However, the proposed finding is incorrect, unsupported, and misleading insofar as it suggests that *all* Fittings are sold pursuant to Project Pricing under ordinary circumstances (*See, e.g.*, CCPF 560-561 (suppliers prefer not to Project Price because it is a drag on profitability); CCPF 559 (suppliers generally sell Fittings in Utah with "not a lot of job pricing")), or that the suppliers did not successfully curtail Project Pricing in 2008. (*See* CCPF 931-1088 (supplier agreement to curtail project pricing resulted in fewer instances of Project Pricing in the Fittings market); CCPF 1339-1342 (internal documents from McWane, Sigma, and Star acknowledging price stabilization in 2008)).

70. A salesman often will convey a job price verbally to a customer, and then provide the customer with a copy of a written proposal or quotation. (Sheley, Tr. 3437 (Q: "And for example, job prices, someone would tell you about that verbally; right?" A: "They would tell us verbally, and we would get a copy of the proposal or of a quotation.")).

Response to Proposed Finding No. 70

Complaint Counsel has no specific response. (*See also* CCPF 679-681).

71. Star offers customers discounts off its published multipliers; at Star, such a discount is often referred to as a "special price." (McCutcheon, Tr. 2271-72 (Q: "Does Star offer discounts off its published multipliers?" A: "Yes." Q: "And is there a term you use for offering a multiplier discount off the published multiplier?" … A. " A. Special Price.")).

Response to Proposed Finding No. 71

Complaint Counsel has no specific response. (*See also* CCPF 549-550).

72. Mr. McCutcheon testified that Star's internal processes for approving a special price for a customer are called a special pricing request - "SPR" - or a "a pink, like the color." (McCutcheon, Tr. 2273 (Q: "And is there a name for the form that's used -- that was used in 2007 and 2008 within Star for this approval process?" A: "Yes, sir. There's a couple of names. One of them is an SPR, a special pricing request. And the other one, internally we call it a pink, like the color.")).

Response to Proposed Finding No. 72

Complaint Counsel has no specific response. (*See also* CCPF 1386-1390).

73. Mr. McCutcheon testified that Star also offers a discount called a "buy plan," which is "a negotiated price with a distributor/wholesaler that's their everyday purchase price. It's not necessarily attached to a project." (McCutcheon, Tr. 2274).

Response to Proposed Finding No. 73

Complaint Counsel has no specific response.

74. List prices, multipliers, and job pricing repr sent only three of many points of price competition. (Tatman, Tr. 1017-1019, *in camera*† (†**{**

}); Minamyer, Tr. 3266-3267 ("Q: Okay. Were there other components of price other than the list and the multiplier and special pricing? A: There are other components of the whole deal. Q: I'm sorry? A: There are other components of the entire deal that we had with a customer, yes. Q: Did sometimes while you were national sales manager would you adjust payment terms on occasion? A: Yes. Q: How about freight allowances? A: Yes. Q: Are you familiar with branch rebates? A: Yes. Q: Okay. Would those be sometimes adjusted? A: Yes. Q: All right. Rebates to corporate. A: That was all part of the total deal. Q: And those were all different price terms that could be adjusted all to arrive at a final bottom transactional price? A: That's correct."); McCutcheon, Tr. 2509-2510 ("Q: And does that include lowering prices when you think it's necessary to win the business at times? A: Yes, sir. Q: Does that include pricing below your published multipliers at times? A: Yes, sir. Q: Does that include offering rebates at times? A: Yes, sir. Q: Does that include offering to absorb freight expenses at times? A: Yes, sir. Q: Does that include other types of price concessions, extension of credit terms, for example? A: Yes, sir. Q: Cash discounts at times? A: Yes, sir.").).

Response to Proposed Finding No. 74

The proposed finding is incorrect, unsupported, and misleading insofar as it suggests that Fittings suppliers compete on price through their published list prices and multipliers. Fittings suppliers typically offer substantially the same published list prices and multipliers (*see* CCPF 666-669), and price competition occurs primarily through Project Pricing (*see* CCPF 549-561).

The proposed finding is incorrect, unsupported, and misleading insofar as it suggests that Fittings suppliers use price terms such as rebates, freight terms, and payment terms to gain business on every sale, or that such price terms are comparable to Project Pricing in terms of competitive significance. The weight of the evidence establishes that these secondary price terms are less significant than Project Pricing in day-to-day competition for Fittings business, and a reduction in Project Pricing in and of itself tends to lead to higher and more stable prices. (*See* CCPF 549-561; *see also infra* Response to Finding Nos. 103, 108).

75. McWane, Sigma, and Star provide additional discounts and price concessions to Distributors in the form of rebates, reductions in freight charges, and/or extensions of credit or payment terms. (JSLF ¶ 16).

Response to Proposed Finding No. 75

Complaint Counsel notes that there is no exhibit denominated "JSLF." The proposed finding is misleading insofar as it suggests that McWane, Sigma, and Star *always* provide listed discounts and price concessions to Distributors, rather than that they have provided the additional discounts and price concessions "at times," as stated in JX 0001. (*See also* JX 0001 ¶ 16; CCPF 562; *see also* CCPF 562-576; *infra* Response to Finding Nos. 103, 108 (establishing relative competitive significance of Project Pricing)).

76. Fittings suppliers try to outbid one another by offering customers more favorable payment terms, early payment discounts, cash discounts, freight discounts, discounts for larger shipments, rebates, and other concessions. (Tatman, Tr. 1017-1019, *in camera* † (†**{**

});
Minamyer, Tr. 3266-3269 (Q: "And those were all different price terms that could be adjusted all to arrive at a final bottom transactional price?" A: "That's correct." Q: "Okay. And in fact, those are price components that you did adjust on occasion in the 2007-2008 time frame; correct?" A: "Yes.") & RX 79; McCutcheon, Tr. 2509-2510 ("The -- and I'll speak for the fitting industry as opposed to the waterworks industry. But in the fittings industry, it's very competitive. It's driven on project and daily pricing. And there may be attempts by people to change price lists, multipliers, et cetera, but the reality of it is we -- well, I can only speak for Star. We do what we think we need to do every day to try to take the order.")).

Response to Proposed Finding No. 76

The proposed finding is improper to the extent that it relies upon testimony of Mr. Minamyer regarding reports of competitive activity that were not offered at trial for the truth of the matter asserted. (*See* Minamyer, Tr. 3267-3268). The proposed finding is incorrect, unsupported, and misleading insofar as it suggests that Fittings suppliers use price terms such as rebates, freight terms, and payment terms to gain business on every sale, or that such price terms are comparable to Project Pricing in terms of competitive significance. The weight of the evidence – including the cited testimony of Mr. McCutcheon (McCutcheon, Tr. 2509 ("[I]n the fittings industry, it's very competitive. *It's driven on project and daily pricing*") (emphasis added)), establishes that these secondary price terms are less significant than Project Pricing in day-to-day competition for Fittings business, and a reduction in Project Pricing in itself tends to lead to higher and more stable prices. (*See* CCPF 549-561; *see also infra* Response to Finding Nos. 103, 108).

77. Mr. McCutcheon testified that "90 to 95% of our [Star's] net realized prices to the customer have some type of discount variable to it." (McCutcheon, Tr. 2509-2510 (Q: "And did you continue at Star to provide all those different types of price concessions throughout your tenure with the company?" A: "Yes, sir. I think -- just to try to ball it up, I think 90 to 95 percent of our net realized prices to the customer have some type of discount variable to it. The reason I bring that up is to make the point that it is -- that is the standard way Star Pipe does business.")).

Response to Proposed Finding No. 77

Complaint Counsel has no specific response.

78. Mr. Bhutada testified that, when the various forms of price concessions are taken into account, a Fittings supplier's "net price is all over the map," (JX 694 (Bhutada, Dep. at 17-18)), and that † { } (JX 694 (Bhutada, Dep. at 111), *in camera*).

Response to Proposed Finding No. 78

Complaint Counsel notes that there is no exhibit denominated "JX 694." While Complaint Counsel does not disagree that Mr. Bhutada made the statement attributed to him, the proposed finding is misleading insofar as it suggests that the variability of Fittings pricing is not predominantly a result of Project Pricing. Mr. Bhutada included Project Pricing and "one-time pricing" (a form of Project Pricing) among the factors that he describes as creating price variability (RX-694 (Bhutada, Dep. at 17-18)). The proposed finding is also incorrect, unsupported, and misleading insofar as it suggests that Fittings suppliers use price terms such as rebates, freight terms, and payment terms to gain business on every sale, or that such price terms are comparable to Project Pricing in terms of competitive significance. The weight of the evidence establishes that these secondary price terms are less significant than Project Pricing in day-to-day competition for Fittings business, and a reduction in Project Pricing in itself tends to lead to higher and more stable prices. (*See* CCPF 549-561; *see also infra* Response to Finding Nos. 103, 108).

79. Mr. Tatman testified that it is difficult to assess the bottom line impact of an adjustment of one pricing variable without also assessing changes in other variables in what he refers to as the pricing "waterfall." (Tatman, Tr. 571 (Q: "So to the extent that you lost market share, it was because of pricing?" A: "That's one element and we talked about pricing. There's a price waterfall, but there's twelve different steps of pricing, so I don't know for sure.")).

Response to Proposed Finding No. 79

The proposed finding is incorrect and misleading insofar as it suggests that Fittings suppliers have no ability to assess the impact of Project Pricing on market share. Mr. Tatman's own testimony and documents contradict the proposed finding. Despite the alleged "waterfall,"

Mr. Tatman testified conclusively that he believed that McWane was losing share in the Fittings market due to a single variable – competitor Project Pricing. (*See* CCPF 858; *see also* CCPF 1450 (McWane tasked its sales force with logging instances of Project Pricing in their respective territories); CCPF 855 (Mr. Page told Mr. Pais that McWane had lost share because of Star's low pricing); CCPF 1245 (Mr. Page and Mr. McCullough concluded that market share losses reflected in DIFRA data had resulted from Project Pricing)). The proposed finding is also incorrect, unsupported, and misleading insofar as it suggests that Fittings suppliers use price terms such as rebates, freight terms, and payment terms to gain business on every sale, or that such price terms are comparable to Project Pricing in terms of competitive significance. The weight of the evidence establishes that these secondary price terms are less significant than Project Pricing in day-to-day competition for Fittings business, and a reduction in Project Pricing in itself tends to lead to higher and more stable prices. (*See* CCPF 549-561; *see also infra* Response to Finding Nos. 103, 108).

II. McWane Charted Its Own Course in Winter 2008 and Did Not Follow SIGMA and Star

80. At all relevant times, Fittings importers' production costs have been lower than McWane's. (JX 642 (Page, Dep. at 112)).

Response to Proposed Finding No. 80

Complaint Counsel notes that there is no exhibit denominated "JX 642." The proposed finding is incorrect and unsupported by the weight of the evidence. Internal communications by McWane executives demonstrate that "China inflation was outpacing domestic costs" in late 2007. (CX 2327 at 001; *see* CCPF 870-875, 891, 901). McWane communicated this cost advantage to Sigma and to Star. (*See* CCPF 876-877; CCPF 1076; Tatman, Tr. 429-430; CX 1113 at 001; CCPF 1087; CX 0534 at 001 ("My Guess is tyler took these orders to try to make a point. During the negotiations, tyler stated that they are now the low-cost producer and said they

could prove it. . . I believe the core point."); McCutcheon, Tr. at 2454-2456). This cost advantage provided McWane with leverage to persuade its competitors to conspire with it to "drive stability and rational pricing" in the Fittings market. (*See* CCPF 909; CX 1702 at 001 ("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."); CCPF 910; CX 2327 at 001).

81. By late 2007, Sigma and Star each had Fittings sales forces that were approximately twice as large as McWane's sales force of 8-10 persons. (Tatman, Tr. 269-270 ("I mean, we have a sales force. And what we talk about is our sales force at this time was half the size of our competitors. We had half the number of boots on the ground than what Star had and what Sigma had."), 281-282 (Q: "And I think you mentioned earlier that McWane's sales force was about half the size of its competitors; is that right? A: "Yes. Roughly." Q: "And you're not combining your competitors here. In other words, Star had a sales force that was twice the size of McWane's?" A: "Yes." Q: "And Sigma had a sales force that was twice the size of McWane's?" A: "Yes."), 1025, *in camera* † (†**{** **}**).

Response to Proposed Finding No. 81

Complaint Counsel has no specific response. (*See also* CCPF 16, 682, 857-858).

82. McWane's smaller sales force inhibited its ability to detect and respond to project-specific price competition in the field. (Tatman, Tr. 281-283 ("It was harder for us to get visibility into where the true competitive level was."), 285-286 (Q: "And so you have a hard -- McWane has a hard time competing in that market when you don't know where to aim, where to shoot?" A: "A. That was our perception, and we'd obviously been getting beat for several years."), 342 (Q: "And when you say you didn't know where to shoot, that's because the prices weren't stable?" A: "Small sales force, not able to pick up information there, didn't have a good feel for really where the competitive market was, shooting in the dark.")).

Response to Proposed Finding No. 82

Complaint Counsel has no specific response. (*See also* CCPF 16, 679-682 857-858).

83. Sigma's and Star's larger sales forces gave them a competitive advantage over McWane, because they were better able to offer additional discounts off published multipliers to customers on a job-by-job basis. (Tatman, Tr. 281-283 (Q: "And I think you indicated that as a result of having, as you put it, less boots on the ground, it was harder to work in a market where the prices weren't stable?" A: "It was harder for us to get visibility into where the true competitive level was."), 285-286 (Q: "And one of the ways you were getting beat at the game was through this evolution into job pricing; is that right?" A: "Job pricing would raise the spread

naturally between what's published and where the actual floor is. And when that spread gets bigger, I lose track of what's going on because I have a lot less data points than my competitors do because I have a smaller field sales force covering larger territories. And it's the old rule. I don't know where to aim if I can't see it. I don't know where to shoot."), 342 ("Historically, we had lost share year over year. We had made the assumption, based on the information that we had available to us, our own internal data, that we were losing share because we were getting beat at the pricing game, because we didn't know where to shoot.")).

Response to Proposed Finding No. 83

Complaint Counsel has no specific response. (*See also* CCPF 16, 679-682,857-858).

84. Beginning in 2007, demand for Fittings was falling because of the economic downturn and decreased demand for new housing. (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 9 in 2006. It was decimated. That changes a lot of behavior. It changes a lot of competitive dynamics.'), 271-272 (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, *in camera*† (†**{**

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Response to Proposed Finding No. 84

Complaint Counsel has no specific response. (*See also* CCPF 842-859; CCPF 1350).

85. Rather than scaling back production and reducing inventory in the face of declining demand, the then-manager of McWane's Fittings business, David Green, increased production to spread fixed costs over a higher production volume, thereby creating the appearance of reducing manufacturing costs in the short term. (JX 642 (Page, Dep. at 165-167)).

Response to Proposed Finding No. 85

Complaint Counsel has no specific response, other than to note that there is no exhibit denominated "JX 642." (*See also* CCPF 842-859; CCPF 1350).

86. When Mr. Tatman assumed responsibility for the management of McWane's Fittings business unit after Mr. Green's departure at the end of 2007, McWane had "runaway inventory levels" in the face of declining demand. (Tatman, Tr. 214-215 (Q: "And what issues did you inherit from Mr. Green?" A: " I think one of the -- my perception -- again, I wasn't privy to the exact reasons David was let go, but the perception I had was that one of the main reasons he got let go was runaway inventory levels;" Tatman, Tr. 214-215 ("When I took over that facility or those operations, we had inventory levels that were three times normal. Every yard was full of fittings as far as the eyes could see. We had fittings sitting out in grass yards. We had just had more inventory than we could handle, and the marketplace was going down.").

Response to Proposed Finding No. 86

Complaint Counsel has no specific response. (*See also* CCPF 842-859 (McWane motive to conspire); CCPF 1350).

87. McWane's chief financial officer advised Mr. Tatman that he should address the excess inventory problem before it became "his problem" rather than his predecessor's. (Tatman, Tr. 215 ("I also distinctly remember Charlie Nowlin, is our CFO corporate. Charlie is a good guy. And his advice to me was -- and this is a kind of good old boy's advice, and he said, Rick, just let me tell you something. He said, For the first couple years that inventory was David's problem. After that, it's your problem.")).

Response to Proposed Finding No. 87

Complaint Counsel has no specific response. (*See also* CCPF 847).

88. Mr. Tatman's main concern in late 2007 was to increase McWane's sales volume in order to reduce excess inventory. (Tatman, Tr. 215-216 ("So I was very fixated on getting that inventory down."), 340 ("That will be a by-product, but my primary concern at this point in time, given the threefold inventory situation, given what I inherited, given my CFO's advice to me, was I got a volume problem, and my financial problem, if you look at our records, was clearly tied towards volume. It was not what we were selling it for. We were not selling enough.").

Response to Proposed Finding No. 88

The proposed finding is misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests that McWane sought to compete or to gain volume in 2008 through Project Pricing. The weight of the evidence demonstrates that Mr. Tatman's sales volume problems were inextricably tied to its historic over-capacity and inability to compete against Sigma and Star due to their larger and more nimble sales forces that used Project Pricing to their strategic advantage. (*See* CCPF 853-859). Rather than competing through Project Pricing to gain volume, McWane sent a "message" to its competitors that it would only agree to price increases in "stepped or staged increments," with "stability and transparency at the prior level" (*i.e.*, curtailed Project Pricing) as a "prerequisite" for subsequent increases. (CX 0627 at 004; CCPF 913-915).

The documentary evidence establishes that McWane was seeking to reduce price competition so that it would stop losing volume and market share to the non-transparent Project Pricing and better service offered by its competitors. (*See* CX 0627 at 005 (Taman noting that if McWane followed Sigma's list price increase, Project Pricing would continue and it would lose share: "we anticipate Sigma would continue the pattern of being 2-3pts below Tyler/Union while offering more flexible terms to secure volume")).

McWane's actual pricing conduct following its January 2008 price increase further demonstrates that it was not seeking to gain volume by underpricing its rivals. In the six months following that price increase, McWane engaged in an unusually low volume of Project Pricing, (*see* CCPF 1043-1047), and, after a period of relative price stability, McWane announced a further multiplier increase in June 2008, (*see* CCPF 1051-1054, 1242-1243).

89. Mr. Tatman was more concerned about volume than price, because increased volume was needed to justify keeping McWane's foundries open. (Tatman, Tr. 215 ("Also because, if you look at 2007, we've got two manufacturing facilities. They're running three days a week of production, so there's no work for the other two days of the week. They're running single shifts. And I think in 2007 we booked $7 million of idle plant. When we don't run our facilities, we consider that idle plant, so it doesn't affect what we show as our manufacturing cost in our financials. It goes on a separate line in the income statement as idle plant. But essentially we burned $7 million that year, 2007, not operating our facilities, at the same time we're swimming in inventory."), 340 (Q: "You were looking to improve the profitability of McWane's fittings business at this point in time?" A: "If you look at this point in time, I'm really looking for volume.", 347 (Q: "And when you say 'pressure on volume,' can you explain what that means." A: "Well, the marketplace is tanking. We went through that yesterday. And I need volume. My competitors need volume. Everybody needs volume. So essentially our -- what bullet number 1 says, inflation is going up and prices are not keeping pace with inflation because we're all grabbing -- we're all more concerned about volume than price. Or I shouldn't say -- at least I'm more concerned about volume than price, but that's a general statement for me.")).

Response to Proposed Finding No. 89

The proposed finding is misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests that McWane sought to compete or to gain volume in 2008 through Project Pricing, for the reasons set forth in Response to Proposed Finding No. 88.

The proposed finding is further contradicted by the fact that instead of grabbing market share by keeping prices low when it had a relative cost advantage, McWane *raised* prices in January 2008 by 10-12% and again in June 2008 by approximately 8%. (CCPF 932, 1242).

90. Mr. Tatman did not believe it was possible for McWane to increase sales volume while at the same time increase its prices, as desired by Mr. Tatman's boss, Mr. Walton--a philosophical disagreement that led to a series of internal "brainstorming sessions" during December 2007 among Messrs. Tatman and Walton, and McWane's executive vice president over the Fittings business, Mr. Leon McCullough. (Tatman, Tr. 345-346 ("We were brainstorming on how to competitively react to what was going on in the marketplace."), 1069-1071 ("What I'm saying down below that Mr. McCullough will understand is that you are still going to have to job-price, because if you only go to bullet 3, which Thomas would want, it isn't going to work because, number one, you're going to have to sit there, it's your published multipliers for at least three months while your competitors pick you clean job-pricing and it will be at least three months or more until you know where you're at, number one. Number two is, the only way that's going to work is if your competitors stop doing it. And you have no control over that, sir. I can't do that. Number three is, you would need your customers to change their complete behavior from what they're doing and stop asking you for a better price, and you'd have to meet with them face to face. And do you think Mr. McCullough, who runs the valve and hydrant business with these customers and has a long history of sales, would think that's a great idea, Rick, let's run around to our 250 customers, let's sit down and have a face-to-face meeting with them and let's tell them they should never ask us for another better price. Fourth, you've got three primary people here and then you've got four, five, six other ones. It's like herding cats. So if you look at that bottom portion and you look at the audience and you look what I'm trying to say, it's bullet 3. That's the primary strategy I want, but, Mr. Walton, if you think that's the only thing we're going to be able to do, you're crazy because our competitors are going to keep job-pricing and we're going to have to keep job-pricing, so I hope that solves the mystery.") & CX 627).

Response to Proposed Finding No. 90

The proposed finding is misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests that McWane sought to compete or to gain volume in 2008 through Project Pricing, for the reasons set forth in Response to Proposed Finding No. 88.

The proposed finding is also misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests that Mr. Tatman's ideas, as contained in the Tatman Plan (CX 0627) were mere brainstorming. Mr. Tatman admitted that he implemented the Plan by sending out letters to customers communicating its intent to stop Project Pricing. (*See* CCPF

921-922; Tatman, Tr. 371; CCPF 935-938). McWane then curtailed its Project Pricing and centralized its pricing authority, steps that only made sense if Star and Sigma followed suit. (*See* CCPF 918; Tatman, Tr. 362, 1071 ("[T]he only way that's going to work is if your competitors stop doing it."); CCPF 924-929).

91. In late 2007, Mr. Tatman prepared a series of PowerPoint slides (CX 627) for an internal "brainstorming" session with his bosses. (Tatman, Tr. 345-346, 355 ("I don't see where we have a plan here"), 362-363 ("Actually, no. . . .If you look at our letter that we put out, it has none of these four elements in it, not one"), 1069-1071 & CX 627).

Response to Proposed Finding No. 91

The proposed finding is incorrect, misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests that Mr. Tatman's ideas, as contained in the Tatman Plan (CX 0627) were mere brainstorming, for the reasons set forth above in Response to Proposed Finding No. 90.

92. Mr. Tatman believed that the escalation of raw material, labor, and shipping costs in China could have a potential silver lining for McWane. (Tatman, Tr. 346-347 & CX 627 ("Due to Domestic Mfg our average [domestic[inflation is well below Sigma and Star's")).

Response to Proposed Finding No. 92

Complaint Counsel has no specific response. (*See also* CCPF 1072-1088).

93. Mr. Tatman's PowerPoint slides (CX 627) contain his own independent internal analysis and recommendations for improving McWane's competitive position. (Tatman, Tr. 357-358 ("That's the core of where my thought process was"); CX 627; JX 644 (Tatman, Dep. at 70-72)).

Response to Proposed Finding No. 93

Complaint Counsel notes that there is no exhibit denominated "JX 644," and page 72 of Mr. Tatman's deposition is not in evidence.

The proposed finding is inaccurate and misleading insofar as it suggests (1) that Mr. Tatman did not **{** **}** during the time period in which Mr. Tatman was developing the Tatman Plan (CX 0627), and (2) that the Tatman Plan did

not contemplate anticompetitive communication, agreement, and pricing coordination on the part of McWane, Sigma, and Star. (*See* CCPF 923 (**{**

}); CCPF 907-922 (describing Tatman Plan objective of communicating with competitors to achieve a coordinated curtailment of Project Pricing, market stability, and pricing transparency in exchange for staged price increases)). Complaint Counsel agrees that Mr. Tatman authored the Tatman Plan (CX 0627) and presented it to Mr. McCullough and Mr. Walton. (CCPF 911, 920).

94. Mr. Tatman's internal brainstorming analysis (CX 627) was kept internal and was never shared with anyone at Sigma or Star. (Tatman, Tr. 1069-1070 ("This is a brainstorming document that was used for a discussion, and the two audience members were [McWane employees] Leon McCullough and Thomas Walton.").)

Response to Proposed Finding No. 94

The proposed finding is unsupported and misleading because the single citation provided refers to a portion of trial testimony in which neither the question asked of Mr. Tatman nor the (unresponsive) answer given addresses whether the Tatman Plan was ever "shared with anyone at Sigma or Star." The proposed finding is also misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests that the "message to competitors" contemplated by the Tatman Plan was not communicated to Sigma and Star through, *inter alia*, McWane's January 11, 2008 customer letter, as well as possible telephonic or other communications. (*See* CCPF 921-922, 931-949 (describing McWane's January 11, 2008 invitation to collude); CCPF 923 (**{**

})).

95. Mr. Tatman's internal brainstorming analysis was never implemented by McWane. (Tatman, Tr. 363 ("If you look at the letter that we put out, it has none of these four elements in it, not one.")

Response to Proposed Finding No. 95

The proposed finding is unsupported, incorrect and misleading. The proposed finding is unsupported because the cited testimony of Mr. Tatman relates to whether McWane's January 11, 2008 letter set forth the four "keys to success" contained at the bottom of page four of the Tatman Plan (CX 0627), not whether the Plan itself (including the "message to competitors" set forth on the top half of page 004 of CX 0627) was implemented. The proposed finding is incorrect and misleading because, even if the cited testimony amounts to a denial that the Tatman Plan was implemented, that testimony is outweighed by Mr. Tatman's admission at trial that McWane's January 2008 letter was a message to his competitors to try to induce them to stop Project Pricing. (*See* CCPF 921-922, 934 (describing draft letters in Tatman Plan and Mr. Tatman's admission that the January 11, 2008 letter was sent out as a result of the Tatman Plan "brainstorming session" with Mr. McCullough and Mr. Walton)). The cited testimony is also outweighed by the fact that McWane, as contemplated by the Tatman Plan, proceeded in the first half of 2008 to support price increases "in stepped or staged increments" in exchange for "reasonable stability and transparency" (*i.e.*, reduced Project Pricing). (CX 0627 at 004 (Tatman Plan); *see* CCPF 931-1071 (describing phase one implementation of the Tatman Plan); CCPF 1090-1455 (describing phase two implementation of the Tatman Plan)).

96. In response to escalating input costs in China, Sigma announced, in an October 23, 2007 letter its customers, that it intended to raise both its list price and published multipliers for its Fittings in January 2008. (Rybacki, Tr. 3661-3662, *in camera*†, 3683-3684 (Q: "Now, as I understood your testimony, Mr. Rybacki, this is a letter that you sent to your customers in the fall of 2007, announcing both a multiplier increase and also a list price increase; is that right, sir?" A: " Yes." Q: "And you sent that because of increased costs in raw materials, freight and personnel, et cetera; right?" A: "Yeah. All our costs were going up. Correct." Q: "So that was a decision that you made at Sigma with others at Sigma?" A; "Yes." Q: "Did you talk to anybody at McWane about that?" A: "No.") & CX 2457; Tatman, Tr. 346-347 & CX 627).

Response to Proposed Finding No. 96

The proposed finding is incorrect. The multiplier increase Sigma announced on October 23, 2007 was to be effective on November 5, 2007, not in January 2008. (CCPF 685). Increasing costs were not the sole reason for Sigma's announcement, which mirrored previously announced increases of similar magnitude by McWane and Star. (CCPF 685).

97. Mr. Rybacki testified that Sigma did not communicate with anyone at McWane before announcing its 25 percent price increase in December 2007. (Rybacki, Tr. 3684 (Q: "Did you talk to anybody at McWane about that?" A: "No.") & CX 2457).

Response to Proposed Finding No. 97

The proposed finding is inaccurate and misleading. Complaint Counsel does not dispute that Mr. Rybacki testified that he personally did not talk to anyone at McWane prior to announcing Sigma's price increase. However, Mr. Rybacki did not testify that "Sigma did not communicate with anyone at McWane before announcing its 25 percent price increase in December 2007." The proposed finding is also vague and ambiguous as to date. On October 23, 2007, Sigma announced that new multipliers would be effective November 5, 2007, and that a new price list would be effective January 2, 2008. (CX 2457). It is not clear whether the proposed finding is referring to a different announcement in December, 2007 or a different event that was to be effective December 2007.

The weight of the evidence establishes that Mr. Pais and Mr. Page communicated regularly, including in person meetings during this timeframe, and that Mr. Page expressed to Mr. Pais that he was "disappointed in [Sigma's] failure to get a better landscape." (CCPF 838).

The proposed finding is also misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests that Sigma (and Mr. Rybacki in particular) did not speak with anyone at McWane during the time period prior to Sigma settling on the Sigma pricing policy that actually went into effect in early 2008. **{**

} (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* CCPF 735, 737 (detailing telephone records); *see also* Rybacki, Tr. 3622-3623, *in camera* **{** **}**. Following these communications, and following McWane's development of the Tatman Plan (CCPF 907-929) and circulation of McWane's January 11, 2008 letter (CCPF 932-938), Sigma ultimately retracted its announced 25% list price increase on January 29, 2008, announcing that it would be matching McWane's announced price increase. (CCPF 965-967).

98. Star sent a letter dated November 30, 2007, to its customers stating that "Star Pipe Products will be publishing a new Price List" for its Fittings "to be effective January 1, 2008." (Minamyer, Tr. 3152-3153 & RX 406).

Response to Proposed Finding No. 98

Complaint Counsel has no specific response.

99. Mr. Tatman recommended internally to his bosses that McWane not follow what was Sigma's proposed 25 percent list price increase, but instead publish a much lower average multiplier increase of approximately 8 percent – less than the amount of inflation. (Tatman, Tr. 215-216, 340, 345-349 (Q: "So what you did pay attention to is you pulled their list price off their Web site and did some calculations based on what those list price represents in terms of changes?" A. What I did, I believe, is I pulled their list price down. I put it in a spreadsheet. I took a look at what I thought our mix of volume would be. That's all I have. I only know what I'm selling. I don't know what they're selling. And on a weighted average, I said it was a 25 percent increase change, and I'm showing that on the next slide. There's part of an analysis there

that I did. Q: And you believed the 25 percent increase would be too high at this point in time?" A: 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 where 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 that it 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."), 357-361 (Q: Lowering prices against what you were actually charging in the market; is that what you're saying, sir? A: This is -- if you look at what we actually did -- okay -- so you look at the letter we put out in mid-January and what was the action, I think the net result of that price increase on a weighted average basis was 8 percent. We have a competitor that announced a 25 percent increase with a list price change. What we decided to do is come out with changing multipliers by region as we would normally do. Our effective price increase for us, the way we sell and the mix we sell, was 8 percent. That is less than inflation. We're not recovering inflation with that move. And it is certainly less than a 25 percent increase. So this action that we took -- the action that we took in January came out of this initial discussion and other discussions that followed, and the end result of that is, compared to where a competitor's price was, we lowered it and we didn't recover inflation. Q: But compared to your then existing prices, you raised prices by 8 percent; is that right, sir? A: If we -- we have to look at the multiplier map that we have there. I'm going from memory. I think our weighted average increase was 8 percent. But on a relative basis, we were offering significantly lower prices than what our competitors were offering"), 379 & CX 627, 882-884 ("I believe at that point in time -- oh, I think Sigma had announced a list price change that when we analyzed it was about a 25 percent increase. So Sigma had announced a 25 percent increase with a change in published, and we put that -- actually they announced a letter that said around 6 percent or up to 16 percent, and when we analyzed it, we viewed it as 25 percent. And in the face of a competitor taking their list prices up 20 percent, we've elected to change multipliers, maintain our list, and we're giving a target of 8 to 10, and I think -- or 10 to 12, and I think we actually came out with 8.")

Response to Proposed Finding No. 99

The proposed finding is inaccurate and misleading insofar as it suggests that McWane believed in January 2008 that its multiplier increase was less than the amount of its cost inflation. In the Tatman Plan (CX 0627), Mr. Tatman noted that Chinese production costs (which had risen faster than McWane's U.S. costs (*see* CCPF 870-877), had risen by 15% in 2007 and that Fittings suppliers had realized a 6%-8% price increase from a prior July 2007 price increase. (CX 0627 at 005). On top of that 6%-8% increase, the Tatman Plan proposed an additional 8%-12% increase. (CX 0627 at 006). The proposed finding is also misleading insofar as it suggests that the lower price increase implemented by McWane was not consistent with the Tatman Plan, pursuant to which McWane agreed with Sigma and Star to coordinated price increases "in

stepped or staged increments" in exchange for "reasonable stability and transparency" (*i.e.*, reduced Project Pricing). (CX 0627 at 004 (Tatman Plan); CCPF 931-1071 (describing phase one implementation of the Tatman Plan)).

100. McWane did not follow Sigma's proposed 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. (Tatman, Tr. 882, 884, 892-893; CX 1178/RX 591; Pais, Tr. 2055-2056 (Q: "And in fact they did not follow; correct?" A: "Sadly so."); Rybacki, Tr. 1114-1115 (Q: "What are you conveying to your customers in this letter?" A: "That one of our competitors did not increase their list prices, and as a result, we will not increase ours." Q: "And do you remember which one of your competitors did not increase their list prices at this point in time?" A: "I believe it was McWane."), 1126-1127 (Q: "So you say in this letter, on that point, the key word -- well, let me read a sentence before that. "When one of our competitors chose not to have a list price increase but rather have a multiplier increase" -- is that a reference to the McWane – what McWane did and what we saw in your prior letter?" A: "Yes."), 3623-3624 (Q: "And in this letter in the second paragraph, you say, "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 us." Is that a reference to McWane not following the list price increase?" A: "Yes.")).

Response to Proposed Finding No. 100

Complaint Counsel notes that there is no exhibit denominated "RX-591." The proposed finding is misleading insofar as it suggests that McWane's decision not to follow Sigma's price increase was not consistent with the Tatman Plan, pursuant to which McWane agreed with Sigma and Star to coordinated price increases "in stepped or staged increments" in exchange for "reasonable stability and transparency" (*i.e.*, reduced Project Pricing). (CX 0627 at 004 (Tatman Plan); CCPF 931-1071 (describing phase one implementation of the Tatman Plan)).

101. Mr. Tatman recommended that McWane announce in its January 11, 2008 customer letter an intention to reduce job pricing, but in fact continue to offer its customers job pricing, favorable payment terms, early payment discounts, cash discounts, freight discounts, discounts for larger shipments, rebates, and other price concessions. (Tatman, Tr. 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 ever stop job-pricing?" A: "No."), 934-935 (Q: "And so that means there are others out there that are not recorded here?" A: "This obviously doesn't include anything like discounted freight terms,

discounted cash rebates. It doesn't account for branch-level rebates. It doesn't account for changes in your other corporate-level rebate programs."), 1017-1019, *in camera*† (†**{**

}) & RX 396).

Response to Proposed Finding No. 101

The proposed finding is unsupported, inaccurate and misleading. None of the cited testimony or documents addresses what Mr. Tatman "recommended," which is the subject of the proposed finding. The cited testimony and documents, and the weight of the evidence contemporaneous with the events at issue, also do not support the proposition that McWane intended to continue Project Pricing at prior levels at the time of its January 11, 2008 letter. Mr. Tatman's trial testimony that "we all knew . . . we would have to job-price" is not inconsistent with McWane's intention to curtail Project Pricing, and any suggestion that McWane did not curtail Project Pricing is contradicted by **{**

}. (*See* CCPF 1043-1047; CX 2477 (Jansen, Dep. at 250-251) ("we'd like to go with no job pricing")). Moreover, it is immaterial whether McWane intended to, or did, continue to offer payment terms, freight terms, and rebate programs, as such secondary price terms are less significant than Project Pricing in day-to-day competition for Fittings business, and a reduction in Project Pricing in itself tends to lead to higher and more stable prices. (*See* CCPF 549-561; *see also infra* Response to Proposed Finding No. 108). Finally, it is immaterial whether, at the time it reached agreement with Sigma and Star to increase prices in staged increments in exchange for

curtailment of Project Pricing, McWane actually intended to carry out the terms of the agreement. (*See* CCPB at 104).

102. McWane's January 2008 multiplier adjustment resulted in actual reductions of McWane's published multipliers, vis-à-vis its 2007 multipliers, in 28 states and no change to prices in another 8 states. (Tatman, Tr. 885 & CX 1664; *see also* Normann, Tr. 4778 ("It gives -- so what this shows is July 2007 to the first multiplier, new multiplier map of 2008, and you'll see -- I think I touched on some of this already -- but, for example, that first time period when the allegations are of price increases, 28 states, McWane lowered the multiplier in 28 states, and 8 states it was unchanged, so, again, very inconsistent with allegations of price increases.").

Response to Proposed Finding No. 102

The proposed finding is misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests that McWane's January 2008 price letter, which increased actual prices by approximately 8%, was intended to or did reduce actual prices. The evidence establishes that the non-Domestic Fittings multipliers announced in McWane's January 18, 2008 pricing letters were designed by Mr. Tatman to be above the then-current effective prices in at least 40 states or territories. (CCPF 948; *see also* CCPF 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); CX 2265-A (Schumann Rebuttal Rep. at 22 fig. 2) (analysis of McWane's January 2008 multipliers)). Mr. Tatman analyzed McWane's prices using the spreadsheet CX 1664, comparing the proposed new multipliers to 2007 effective multipliers, when establishing actual Fittings price multipliers in January 2008. (*See* CCPF 945-946). At trial, Mr. Tatman testified that the price increase issued by McWane in early 2008 "ended up being 8 percent." (Tatman, Tr. 382; *see also* CCPF 949 (CX 1664 at 002 shows for all states a cumulative 8.13% increase in revenue; *see also* CCPF 932 (McWane's January 11, 2008 price letter announcing a 10 to 12 percent increase)).

103. Mr. Tatman believed that, although adopting a lower multiplier increase rather than following Sigma's lead would not help McWane to recoup as much of its own rising production costs or keep up with inflation, it was nevertheless in McWane's best economic

interest and would increase McWane's sales volumes and reduce inventory. (Tatman, Tr. 346-349 ("I believed if I followed a 25 percent price increase that what I would have is I would lose more visibility into where 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 that it 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."), 359-361 ("I could only control what I do. I can't control what my competitors do. I -- it's procompetitive for me to not let prices run away so that I can't see where the competitive environment is, so I'm going to take actions that are procompetitive for myself. And if you look at doing this, it was not the smartest move to gain short-term price, if that was my primary directive. This is an action clearly gained at driving volume and driving share because I'm not even recovering inflation with what I actually did."), 379 & CX 627).

Response to Proposed Finding No. 103

The proposed finding is inaccurate and misleading. The cited testimony of Mr. Tatman that McWane's January 2008 pricing actions were "procompetitive," and aimed at increasing McWane's sales volume, are contradicted by the weight of the evidence, including contemporaneous documents, which establishes that McWane was seeking to *reduce* price competition so that it would stop losing volume to the non-transparent Project Pricing and better service offered by its competitors. (*See* CX 0627 at 005 (Taman noting that if McWane followed Sigma's list price increase, Project Pricing would continue and it would lose share: "we anticipate Sigma would continue the pattern of being 2-3pts below Tyler/Union while offering more flexible terms to secure volume")). Rather than competing through Project Pricing, McWane sent a "message" to its competitors that it would only agree to price increases in "stepped or staged increments," with "stability and transparency at the prior level" (*i.e.*, curtailed Project Pricing) as a "prerequisite" for subsequent increases. (CX 0627 at 004; CCPF 913-915).

The evidence also does not support a finding that McWane believed in January 2008 that its lower multiplier increase would not allow it to fully "recoup its own rising production costs or keep up with inflation," for the reasons set forth above in Response to Proposed Finding No. 99.

Finally, McWane's actual pricing conduct following its January 2008 price increase demonstrates that the price increase was not calculated to enable McWane to better compete, using Project Pricing, to gain volume. Rather, in the six months following effectiveness of that price increase, McWane engaged in an unusually low volume of Project Pricing, (*see* CCPF 1043-1047), and, after a period of relative price stability, McWane announced a further multiplier increase in June 2008, (*see* CCPF 1051-1054, 1242-1243).

104. Mr. Tatman believed that if Star and Sigma chose not to follow McWane's lower multiplier increase, McWane would be able to immediately increase sales volume with its price advantage, (Tatman, Tr. 346-349, 359-361, 379 & CX 627), and if Star and Sigma decided to follow McWane's smaller price increase, they would have less "headroom" to undercut McWane with job pricing, given their rising input costs. (Tatman, Tr. 346-349, 356 ("This is an action clearly gained at driving volume and driving share because I'm not even recovering inflation with what I actually did."), 359-361, 379 & CX 627).

Response to Proposed Finding No. 104

The first half of the proposed finding is unsupported, inaccurate and misleading. Neither the cited testimony nor any other record evidence of which Complaint Counsel is aware supports the suggestion that McWane believed that it could gain volume because Star and Sigma would still implement their list price increases announced in late 2007 even if McWane did not follow those increases. Published Fittings pricing is highly transparent and interdependent, (*see* CCPF 666-678), and Mr. Tatman knew that none of the three major suppliers could maintain a published price increase without the support of the others, (*see*, *e.g.*, CX 1702 at 001 (December 22, 2007 email from Rick Tatman stating that "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.")). Indeed, in his Plan, Mr. Tatman acknowledged that Sigma had "[d]elayed their [list price increase's] effective date while bashing Tyler/Union for not following" and Star had not even announced how its prices would change. (CX 0627 at 001). McWane knew that McWane, Sigma, and Star would end up with the same published pricing levels, and that Sigma and Star

would be more likely to agree to curtail Project Pricing if McWane only agreed to smaller price increases, in "stepped or staged increments," with "stability and transparency at the prior level" as a "prerequisite" for subsequent increases. (CX 0627 at 004; CCPF 913-915). Complaint Counsel has no specific response to the second half of the proposed finding (that McWane believed that if Star and Sigma decided to follow McWane's smaller price increase, they would have less "headroom" to undercut McWane with job pricing), other than to note that it is in tension with the proffered explanation in Proposed Finding No. 101 above that McWane planned to continue Project Pricing to gain volume.

105. Mr. Tatman's hope was 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).

Response to Proposed Finding No. 105

The proposed finding is misleading to the extent it suggests that the Tatman Plan intended to allow McWane to compete more effectively on price by underpricing Sigma and Star. By reducing pricing "headroom" and improving transparency ("visibility"), McWane hoped to reduce the incidence of Project Pricing as a form of competition so that it would not need to compete on price or service in order to retain its market share. (CX 2327 (email from Mr. 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."); *see also* CCPF 942-944). By communicating to competitors its willingness to agree to increased published prices only in exchange for pricing stability (*i.e.*, curtailed Project Pricing), McWane hoped to enable the suppliers to subsequently increase prices in "stepped or staged increments" without giving rise to a resumption of price competition through Project Pricing. (*See* CCPF 913-915; *supra* Responses to Finding Nos. 103, 104).

106. Because McWane's January 11, 2008 multiplier increase was not large enough to cover inflation and increased production costs, Mr. Tatman's hope was that the range within which Star and Sigma could profitably job price in the field would narrow, improving McWane's ability to compete for projects with its smaller and less nimble sales force. (Tatman, Tr. 345-349 ("So if you're looking there, we did not recover, we, did not recover inflation in 2007 because we gave up more in price than what inflation was or we didn't recover enough in price to offset inflation because of pressure on volume."), 357-361 ("Basically what we're trying -- we've gotten beat for years. We're just trying to change, play on a different playing field, hide our weaknesses, play to our strengths, get greater visibility to what's going on there because we feel we can't see it."), 379, 1069-1071 ("…you would need your customers to change their complete behavior from what they're doing and stop asking you for a better price, and you'd have to meet with them face to face.") & CX 627, CX 1178).

Response to Proposed Finding No. 106

The proposed finding is unsupported and misleading insofar as it suggests that McWane believed in January 2008 that the Fittings multiplier increases it announced on January 11, 2008, taken together with prior increases enacted during 2007, would be insufficient to keep up with

increases in production costs. The cited testimony regarding prices not keeping up with inflation relates to prior pricing increases that had occurred in in 2007, not pricing in 2008. (*See* Tatman, Tr. 345-346 (discussing Tatman Plan statement that "[n]et pricing in 2007 lagged inflation due to pressure on volume," and stating that McWane "did not recover inflation *in 2007*" (emphasis added)); *see also supra* Response to Finding Nos. 99, 103; CX 0627 at 005). Complaint Counsel agrees that McWane's January 11, 2008, multiplier increase amounts were calculated to narrow (in comparison to the list prices that Sigma had proposed) the range within which Star and Sigma could profitably Project Price.

The proposed finding is also inaccurate and misleading insofar as it suggests that the Tatman Plan was intended to allow McWane to compete more effectively on price by underpricing Sigma and Star. By reducing pricing "headroom" and improving transparency ("visibility"), McWane hoped to reduce the incidence of Project Pricing as a form of competition so that it would not need to compete on price or service in order to retain its market share. By communicating to competitors its willingness to agree to increased published prices only in exchange for pricing stability (*i.e.*, curtailed Project Pricing), McWane hoped to enable the suppliers to subsequently increase prices in "stepped or staged increments" without giving rise to a resumption of price competition through Project Pricing. (*See* CCPF 913-915; *supra* Responses to Finding Nos. 103-105).

107. Mr. Tatman hoped that McWane, by announcing in its January 11, 2008 customer letter a purported intent to eliminate job pricing, might lull (or "head fake") Star and Sigma into temporarily reducing their job pricing; meanwhile, he intended for McWane to continue job pricing, recapture lost market share, and ultimately solve its acute inventory problem. (Tatman, Tr. 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; (Tatman, Tr. 386 ("Well, if you go back to what we really wanted to do, you go back to all the documents, we talked

about I think ad nauseam about how we wanted to compress pricing, okay, so we could get better visibility. That's all very clear. And then the other thing we wanted to do is we wanted to create quite frankly, the perception that that's the only way we were going to compete. That's a head fake. So that we'd like to compress that and if we got it compressed and we need to offer job pricing to get volume growth, I'll go in and offer job pricing.").).

Response to Proposed Finding No. 107

The proposed finding is unsupported and misleading insofar as the cited testimony and documents, and the weight of the evidence contemporaneous with the events at issue, do not support the proposition that McWane intended to continue Project Pricing at prior levels at the time of its January 11, 2008, letter. Mr. Tatman's testimony at trial that "we all knew . . . we would have to job-price" is not inconsistent with an intention to curtail Project Pricing, and any suggestion that McWane did not curtail Project Pricing is contradicted by **{**

}. (*See* CCPF 1043-1047). Complaint Counsel agrees that McWane's January 2008 letter was a communication to competitors designed to induce them to curtail project pricing, but Complaint Counsel is unaware of any contemporaneous document or statement by Mr. Tatman that his strategy was a "head fake." (*See* Tatman, Tr. 1068-1071 (failing to provide any explanation when asked, "Why didn't you mention this head fake in CX 627"); CX 0627 at 004 (not mentioning any intention to "head fake" competitors, and instead emphasizing need to establish that McWane "will be consistent and follow through with what we've formally communicated"); 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). Moreover, it is immaterial whether McWane's commitment to curtail Project Pricing was a "head fake" – *i.e.*, whether, at the time it reached agreement with Sigma and Star to

increase prices in staged increments in exchange for curtailment of Project Pricing, McWane actually intended to carry out the terms of the agreement. (*See* CCPB at 104). Additionally, the claim that McWane intended to gain volume by Project Pricing after the January 11, 2008, letter is in tension with McWane's claim that its announced multipliers would make Project Pricing *more* difficult. (*See supra* Proposed Finding No 104-106 (McWane's January multipliers left less "headroom" for Project Pricing)).

McWane's actual intention, which it communicated through its January 11, 2008 letter and otherwise, was that, after "compress[ing] pricing" and getting "better visibility," (Tatman, Tr. 386), it would lead further price increases in "stepped or staged increments," so long as its competitors continued to display pricing discipline (*i.e.*, with "stability and transparency at the prior level" serving as a "prerequisite" for subsequent increases). (CX 0627 at 004; CX 1178; CCPF 913-915 (Tatman Plan), 931-949 (January 11, 2008 letter)).

108. McWane intended to continue to offer discounts to its customers at other, less visible levels of pricing within what he [*sic*] described as the "pricing waterfall." (Tatman, Tr. 1017-1019, *in camera*† (†**{**

}†")).

Response to Proposed Finding No. 108

The proposed finding is misleading because it is immaterial whether McWane intended to, or did, continue to offer payment terms, freight terms, and rebate programs, as such secondary price terms are less significant than Project Pricing in day-to-day competition for Fittings business, and a reduction in Project Pricing in itself tends to lead to higher and more stable

prices. (*See* CCPF 549-561). In the competitive pricing log being discussed by Mr. Tatman in the cited testimony, McWane did not collect or track information relating to competitors' rebates, freight terms, or payment terms. (Tatman, Tr. 1017-1019, *in camera* (**{**

}). The fact that McWane did not even track these secondary pricing terms as part of its competitive monitoring reinforces their relative lack of significance in day-to-day competition for jobs among Fittings suppliers. Shortly after the passage cited in support of the proposed finding, Mr. Tatman emphasized this point in response to questioning from the Court:

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(Tatman, Tr. 1021-1022, *in camera*).

109. Witnesses from McWane, Sigma, and Star all testified that they mistrusted each other's customer pricing letters. (Tatman, Tr. 306-307 (Q: "And do you use that as an input into your pricing decisions?" A: "I look at those letters, and I read them, and I, quite frankly, don't believe what it says."), 415-416 ("So what I'm saying is, I don't believe it. Wait and see. It would be a typical response when we receive any of this type of information."), 899-901 ("So, you know, like I said, all these time we have competitive inputs that come in from our customers. We take them. We digest them, step back a little bit and try and figure out is it real, can we get confirmation of that, what actually happens."); Rybacki, Tr. 1108-1109 (Q: "When you get them, what do you do with them?" A: "I review it and think about it and try to determine whether they're serious or not serious." Q: "Do you find them to be serious for the most part?: A: "For the most part, not all."), 3559-3560 ("I get my information from the customer. I don't get it from a piece 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."); Minamyer, Tr. 3240-3242 (Q: "Did you believe pricing letters that you obtained from customers about your competitors' pricing?" A: "I believed only list price change letters." Q: "Okay. You didn't believe letters having to do with multipliers?" A: "No." Q: "Okay. Was that because you had found them in the past while you were national sales manager not to be accurate at times?" A: "That's correct." Q: "And in fact, you'd go so far as to say that a competitor would lie in a pricing letter about a multiplier, wouldn't you?" A: "I didn't really trust anything they put out referring to multipliers."), 3241 ("Q. Okay. You didn't believe letters having to do with multipliers? A. No. Q. Okay. Was that because you had found them in the past while you were national sales manager not to be accurate at times? A. That's correct. Q. And in fact, you'd go so far as to say that a competitor would lie in a pricing letter about a multiplier, wouldn't you? A. I didn't really trust anything they put out referring to multipliers."); McCutcheon, Tr. 2507-2509 (Q: "And you don't necessarily trust what's being conveyed on a letter like this, do you, sir?" A: "No, sir. That's correct.")).

Response to Proposed Finding No. 109

Complaint Counsel does not disagree that certain witnesses testified at trial as set forth in the citations to the proposed finding, but the statements are contradicted by the weight of the contemporary evidence insofar as they suggest that McWane, Sigma, and Star actually mistrusted each other's customer pricing letters. The weight of the contemporary evidence, as well as Proposed Finding Nos. 114 and 115 below, establishes that McWane, Sigma, and Star each intentionally and routinely obtained their competitors' nominal pricing letters, read them carefully, and used them in forming their own pricing strategy and communications. (CCPF 670-675, 686-688 (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 56-57) ("For the most part I thought they were trustworthy.")). The evidence also establishes that Sigma used pricing letters to send a "heads up" to its competitors, and that McWane considered pricing letters to be a "communication" from Sigma and Star. (CCPF 1556, 1565). Complaint Counsel also notes that the proposed finding is in tension with Proposed Finding No. 101, stating that the January 11, 2008 letter was a "head fake:" it makes little sense for McWane to lie to its customers about stopping Project Pricing if the intent was to fool its competitors and McWane allegedly knew that its competitors do not trust the letters.

110. After seeing McWane's January 11, 2008 customer letter, Mr. McCutcheon testified 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.").).

Response to Proposed Finding No. 110

The proposed finding is misleading and incomplete. Complaint Counsel does not disagree that Mr. McCutcheon made the statement attributed to him. However, Mr. McCutcheon had previously testified that he did not remember McWane's January 11, 2008, letter and, therefore, his testimony represents only his interpretation of the letter as of the time of trial, rather than his contemporaneous understanding of the letter in January 2008. (CX 2539 (McCutcheon Dep. at 154-157)). Further, at the time Mr. McCutcheon received McWane's January 11, 2008, letter, he concluded that the letter was sufficiently important and credible to distribute it to other executives of Star and Star's sales force. (CX 0038). Additionally,

McCutcheon's national sales manager, Mr. Minamyer, acted on McWane's invitation and 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" even though Star "would come out of a price war stronger than ever and with a bigger market share." (CX 0752 at 001; *see also* CCPF 975-985).

111. Mr. McCutcheon testified that it was "the norm" for a competitor to announce one thing in a customer pricing letter, but actually do something quite different. (McCutcheon, Tr. 2509 (Q: "Have you -- in your experience, Mr. McCutcheon, have you seen examples where one competitor or another has announced something in a letter and then you hear through the grapevine from customers they're actually doing something quite different?" A: "Yes, sir. That's the norm.")).

Response to Proposed Finding No. 111

Complaint Counsel does not disagree that Mr. McCutcheon made the statement attributed to him. The statement is contradicted by the weight of the contemporaneous evidence, however, insofar as the statement suggests that McWane, Sigma, and Star did not intentionally and routinely obtain each other's pricing letters, read them carefully, and use them in forming their own pricing strategy and communications. (*See supra* Response to Proposed Finding No. 109).

112. Mr. Rybacki testified: "I get my information from the customer. I don't get it from a piece 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." (Rybacki, Tr. 3559); Rybacki, Tr. 3508 ("nobody trusted anybody in the industry.")

Response to Proposed Finding No. 112

Complaint Counsel does not disagree that Mr. Rybacki made the statement attributed to him. The statement is contradicted by the weight of the contemporaneous evidence, however, insofar as the statement suggests that McWane, Sigma, and Star did not intentionally and routinely obtain each other's pricing letters, read them carefully, and use them in forming their own pricing strategy and communications. (*See supra* Response to Proposed Finding No. 109).

113. Mr. Rybacki testified that "it was always a tremendous case of mistrust between Victor, Siddharth and Ramesh always." (Rybacki, Tr. 3566 ("Because there's such a mistrust amongst the group as a whole anyway"), 3595-3596 (Q: "And at what point in those discussions

did you and Mr. McCutcheon decide that you would be the point of contact for Sigma?" A: "He just told me one time -- I can't -- I have no specific -- he just said that Victor and Ramesh were oil and water and nothing was ever going to get done." Q: "And do you remember what year that decision took place in?" A: "No. I don't specifically recall when that -- but it was always -- it was always a tremendous case of mistrust between Victor, Siddharth and Ramesh always.")).

Response to Proposed Finding No. 113

Complaint Counsel does not disagree that Mr. Rybacki made the statement attributed to him. The proposed finding is misleading and contradicted by the weight of the evidence, however, insofar as the proposed finding suggests that McWane, Sigma, and Star (and Sigma and Star in particular) did not have close and trusting relationships and numerous direct contacts with each other, (*see* CCPF 699-825), including **{**

}. (CCPF 715). (*See also* CCPF 828-841 (describing close and trusting relationship between Sigma and McWane).

114. Matt Minamyer, Star's national sales manager, instructed his sales team to obtain competitors' pricing letters when possible. (Minamyer, Tr. 3240 (Q: "Okay. Now, I think you said you -- you instructed your sales team to try and gather pricing letters when they were available; is that correct?" A: "Yes.")).

Response to Proposed Finding No. 114

Complaint Counsel has no specific response.

115. Star considered competitors' customer pricing letters as marketplace information, along with many other competitive inputs. (Minamyer, Tr. 3240 (Q: "Okay. And that was a competitive input that you considered?" A: "Yes." Q: "And that was one input among lots of inputs that you considered; correct?" A: "That's correct.")).

Response to Proposed Finding No. 115

Complaint Counsel has no specific response.

116. Mr. Minamyer testified that "I didn't really trust anything they [Star's competitors] put out referring to multipliers." (Minamyer, Tr. 3241).

Response to Proposed Finding No. 116

Complaint Counsel does not disagree that Mr. Minamyer made the statement attributed to him. The proposed finding is misleading, however, insofar as it suggests that McWane, Sigma,

and Star did not receive each other's pricing letters, read them carefully, and use them in forming their own pricing strategy and communications. (*See supra* Response to Proposed Finding No. 109). Complaint Counsel also notes that the proposed finding is in tension with Proposed Finding Nos. 114 and 115, in which Mr. Minamyer testified that Star actively sought his competitors' customer pricing letters and that Mr. Minamyer used those letters as marketplace information.

117. Mr. Minamyer testified that Star based its pricing on feedback it received from customers with respect to what was happening in the market. (Minamyer, Tr. 3241-3242 (Q.: "Okay. You believed on feedback from your customers about what was happening in the market; correct?" A: "That's what we based our decisions on.")).

Response to Proposed Finding No. 117

Complaint Counsel does not disagree that Mr. Minamyer made the self-interested statement attributed to him. The proposed finding is misleading, however, insofar as it suggests that the "feedback it received from customers with respect to what was happening in the market" was the only factor on which Star based its prices, or that McWane, Sigma, and Star did not receive each other's pricing letters, read them carefully, and use them in forming their own pricing strategy and communications. (*See supra* Response to Proposed Finding No. 109).

118. Witnesses for Sigma and Star testified that McWane did not discuss its early 2008 multiplier changes with either Competitor before implementing it. (Rybacki, Tr. 3693 (Q: "Did you ever call anyone at McWane and discuss that with them?" A: "No."), 3693 ("Q. All right. And I take it you didn't have any advanced knowledge since you're all wondering what they're doing, let's analyze it; right, sir? A. Correct."); & RX 23; Pais, Tr. 2058-2059 (Q: "All right. But did anyone at McWane send it directly to you, sir?" A: "Oh, no. No.") & CX 1145, 2060 (Q: "And that's because, again, you never discussed with anyone at McWane the multipliers it was going to issue; correct, sir?" A: "No. Never."); Minamyer, Tr. 3242 (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.") & CX 752; McCutcheon, Tr. 2506-2507 (Q: "And at no time did anyone from McWane provide this to you ahead of time; right, sir?" A: "That's correct.") & CX 38).

Response to Proposed Finding No. 118

Complaint Counsel notes that there is no exhibit denominated "RX 23." Complaint Counsel does not disagree that certain witnesses made the self-interested statements set forth in the citations. However, the proposed finding is misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests that McWane did not discuss its early 2008 multiplier changes with Sigma or Star before implementing it, or that McWane did not otherwise communicate the message of the Tatman Plan to Sigma and Star. The weight of the evidence establishes numerous unexplained communications between and among McWane, Sigma, and Star prior to McWane's January 11, 2008 pricing letter. (*See, e.g.*, CCPF 700-827). Additionally, the Tatman Plan involved communicating McWane's terms to Sigma and Star. (CCPF 907-929; *see also supra* Response to Finding Nos. 93, 94; *infra* Response to Proposed Finding No. 300).

119. On January 29, 2008, Sigma rescinded the list price increase it had proposed in its October 23, 2007 customer letter, and instead independently chose to selectively follow McWane's January 2008 multiplier adjustments, to the extent those adjustments exceeded its then prevailing multipliers. (Rybacki, Tr. 1114-1115 (Q: "What are you conveying to your customers in this letter?" A: "That one of our competitors did not increase their list prices, and as a result, we will not increase ours."), 1124-1127 (Q: "So you say in this letter, on that point, the key word -- well, let me read a sentence before that. 'When one of our competitors chose not to have a list price increase but rather have a multiplier increase' -- is that a reference to the McWane -- what McWane did and what we saw in your prior letter?" A: "Yes." Q: "And you go -- you say 'we decided to follow suit.' Are you following McWane there?" A: "They're the leader and we follow the leader." 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.") & CX 1189, CX 2455).

Response to Proposed Finding No. 119

Use of the term "independently" in the proposed finding is unsupported, inaccurate and misleading. None of the cited testimony uses the term "independently," and it is contrary to weight of the evidence, which establishes that Sigma's decision was directly in response to the January 11, 2008 McWane letter. (*See* CCPF 931-970; *see also* CCPF 700-827 (documenting

direct communications between competitors)). The use of the word "selectively" in the proposed finding is also misleading insofar as it suggests that Sigma did not substantially match McWane's multipliers. Sigma matched the vast majority of McWane's announced multipliers, which were higher than Sigma's prices. (CX 1145 at 010 (showing lower multipliers for only four out of twenty-three territories)).

120. 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." (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.")).

Response to Proposed Finding No. 120

Complaint Counsel does not disagree that Mr. Pais made the statements set forth in the citations. The proposed finding is incorrect and misleading insofar as it suggests that Sigma or any of the suppliers would be able to sustain a Fittings price increase without the assent of the others. The weight of the evidence establishes that Fittings pricing is highly interdependent and that McWane, Sigma, and Star each knew it could not sustain a price increase without the assent of the others. (CCPF 666-669 (price and output interdependence)). The proposed finding is also misleading and irrelevant insofar as it suggests that McWane, Sigma, and Star did not agree to curtail Project Pricing in 2008; the fact that Sigma was "at liberty" to break the agreement, or to continue Project Pricing on a reduced and more selective basis, does not negate the existence of the agreement.

121. Sigma considered McWane's announced multipliers to be "discouraging" and lower than even Sigma's existing discounted job prices in some areas. (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.").)

Response to Proposed Finding No. 121

The proposed finding is incomplete and misleading. The cited trial testimony merely reflects Mr. Pais's assent that Counsel for Respondent correctly read limited sections of CX 1145, which is a Sigma document comparing McWane's January 2008 newly announced multipliers with Sigma's transactional multipliers for the month of December, 2007, which have not been established as representative of overall average prices throughout 2007.

The proposed finding is incomplete and misleading because CX 1145 shows that McWane's announced multipliers were higher than Sigma's December 2007 actual effective multiplier in the vast majority of locations. (CX 1145 at 010 (showing lower multipliers for only four out of twenty-three territories)). Mr. Pais believed McWane's announcement was "a definite effort to improve the multiplier levels" and, consistent with the Tatman Plan, responded by "urg[ing]" Mr. Rybacki to "normalize" Fittings pricing (*i.e.*, curtail Project Pricing). (CX 1145 at 001). McWane's new multipliers, signaled in the same letter that announced its cessation of Project Pricing, reflect implementation of the Tatman Plan, whereby McWane would support price increases in "stepped or staged increments" in exchange for a demonstration of pricing discipline by its competitors. (CX 0627 at 004). Whether or not Mr. Pais was "discourage[ed]" by McWane's willingness to proceed with price increases only in "stepped or staged increments," Sigma followed McWane's new Fittings price multipliers and accepted its invitation to curtail Project Pricing. (CCPF 950-970).

122. 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. (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.").)

Response to Proposed Finding No. 122

The use of the word "some" in the proposed finding is misleading insofar as it suggests that Sigma did not substantially match McWane's multipliers. Sigma matched the vast majority of McWane's announced multipliers, which were higher than Sigma's actual effective prices. (CX 1145 at 010 (showing lower multipliers for only four out of twenty-three territories)).

123. 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, 2088] 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.").).

Response to Proposed Finding No. 123

The proposed finding is misleading insofar as it suggests that Star had knowledge of McWane's multiplier adjustments only "after the fact." The weight of the evidence establishes that (1) Star knew about McWane's early 2008 multiplier increases (and its invitation to collude through the curtailment of Project Pricing) at least as early as its receipt of McWane's January

11, 2008 letter, more than one month in advance of the February 18, 2008 effective date of the multiplier increase, (CCPF 932), and (2) Star knew that McWane would be announcing specific multiplier increases in the 10-12% range and curtailing Project Pricing at least as early as its receipt of McWane's January 11, 2008 letter, approximately one week in advance of McWane's actual announcement of its specific multiplier increases on January 18, 2008, (CCPF 933). Moreover the weight of the evidence, in particular **{**

}, suggests, contrary to Mr. McCutcheon's self-serving denial, that Star may have learned of the Tatman Plan and McWane's January 11, 2008 letter in advance of its receipt of the January 11, 2008 letter. (CCPF 736-744, 923, 1030 (**{** **}**)).

124. Mr. Minamyer 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).

Response to Proposed Finding No. 124

The proposed finding is misleading for the reasons described above in Response to Proposed Finding No. 123.

125. 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.").)

Response to Proposed Finding No. 125

Complaint Counsel has no specific response.

126. Mr. Bhargava testified that Star did not always match McWane's multipliers. (Bhargava, Tr. 1098 (Q: "And in general do your multipliers match those for McWane and

Star?" a: "It doesn't work out that way. No. I mean, you know, you're trying to get ballpark, but it doesn't work out that way.)).

Response to Proposed Finding No. 126

The proposed finding is incorrect and misleading because it attributes trial testimony of Mr. Rybacki of Sigma to Mr. Bhargava of Star. Complaint Counsel does not dispute that Mr. Rybacki made the statements set forth in the citation to the proposed finding, but the proposed finding (even if corrected to refer to Mr. Rybacki) is misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests (1) that Sigma did not always try to maintain essentially the same published list prices and multipliers as McWane's, or (2) that Sigma and Star do not typically follow McWane published list price increases with identical published price increases of their own. (*See* CCPF 667-669).

127. In early February 2008, Star rescinded the list price change it had proposed in its November 30, 2007 customer letter, and instead independently chose to selectively follow McWane's adjustments, at least in part. (Minamyer, Tr. 3155-3158, 3190 (Q: "And you write, 'Our plan is to adjust multipliers to be on an even playing field on up-front pricing with our competitors.' 'Evening playing field,' that's a reference to your multipliers?" A: "Yes, sir." Q: "And was 'up-front pricing' a reference to the standard list times published multiplier?" A: "Yes, sir.") & CX 2300).

Response to Proposed Finding No. 127

The proposed finding is misleading. First, Star's decision to follow McWane's adjustments to the multipliers was not "independent." (CCPF 971-990). Second, Star did not "selectively" follow McWane's adjustments but instead matched McWane's multipliers. (CCPF 1008). Finally, while Star had issued a letter dated November 20, 2007, announcing changes to its list prices to become effective on February 4, 2008 (CCPF 899), those changes never became effective. Instead, in late January and early February 2008, Star announced a multiplier change, matching McWane's announced multipliers that superseded the list price changes it had announced in November but which had never taken effect. (CCPF 997-1008).

III. McWane Charted Its Own Course In Spring 2008 With Lower Published Multipliers Than SIGMA and Star

128. Sigma attempted a large price increase in April 2008. (RX 47). Mr. Pais characterized this effort as "BIG BOLD MOVES (BBM, baby!)." (RX 47; *see also* Pais, Tr. 2044-2045, 2080 (Q: "All right. You say it's time for big bold moves, baby -- "BBM, baby," is that your phrase for your proposal at Sigma to increase multipliers?" A: "Yes.") & CX 1138).

Response to Proposed Finding No. 128

Complaint Counsel has no specific response. (*See also* CCPF 1158-1160).

129. Sigma sent its customers a letter dated April 24, 2008, announcing a significant price increase for its Fittings. (Pais, Tr. 1963 (Q: "Sir, is CX 1858 the letter Sigma sent out to its customers on April 24, 2008 announcing its price increase?" A: "It surely seems that way.") & CX 1858; Rybacki, Tr. 3571 (Q: "And you had a price increase that we saw earlier that was effective May 19. Did you keep that effective date of May 19 in light of the fact that Tyler wasn't going to go up until June 16 at the earliest?" A: "Our regions have flexibility, and when they saw that Tyler was not following, I believe that the regional managers just kept pricing at the old -- old levels."), 3710-3711 (Q: "Now, Mr. Rybacki, you were asked some questions about this, and if I understand your testimony, if we go to the next page, this is a letter that you sent to customers, and it's got your signature down at the bottom on April 24, 2008, announcing a multiplier increase by Sigma; correct, sir?" A: "Yes.") & CX 1858).

Response to Proposed Finding No. 129

The proposed finding is incomplete and therefore misleading. Although the letter was nominally addressed to Sigma's customers, Sigma sent the letter with the intent of gaining McWane's "trust and confidence." (CCPF 1158-1160). Also, the weight of the evidence establishes that the letter, although dated April 24, 2008, was not sent prior to April 25, 2008. (CCPF 1168).

130. Sigma's April 24, 2008 customer letter proposed a multiplier increase of up to ten points, equal to a price increase of approximately 25 to 30 percent, depending on the geographic region. (Rybacki, Tr. 3710-3711 (Q: "All right. And the big bold move, as we see in this second paragraph, is a multiplier increase up to ten multiplier points, depending on your region; right, sir?" A: "Correct." Q: "And ten multiplier points is a fairly large increase that's somewhere in the range of a 30 percent increase; right?" A: "25 to 30, correct.") & CX 1858).

Response to Proposed Finding No. 130

Complaint Counsel has no specific response.

131. On May 7, 2008, Star sent a letter to its customers announcing a multiplier increase of a similar magnitude to Sigma's April 24, 2008 customer letter. (Minamyer, Tr. 3209 & CX 819).

Response to Proposed Finding No. 131

Complaint Counsel has no specific response.

132. Sigma did not discuss its April 24, 2008 price increase with anyone at McWane. (Rybacki, Tr. 3708 (Q: "Did you discuss it with anybody at McWane, sir?" A: "Never"), 3710-3711 (Q: "And the reason -- you were not doing this because of any discussion and agreement with anyone at McWane, were you, sir?" A: "No, I was not."); Pais, Tr. 2080-2081 (Q: "Now, did you call anyone at McWane and say, 'Hey, I got a plan, big bold move. I'm going to increase prices. You guys do it, too'?" A: "No. Never"), 2101-2102 (Q. "And again, just so we're clear on the record, at no time did you ever talk to anybody about McWane -- at McWane about those prices; correct?" A: "Not at all.")).

Response to Proposed Finding No. 132

The proposed finding and the self-serving denials it relies upon are contradicted by evidence that, both before and after Sigma's April 25, 2008 release of its customer letter,

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} (CCPF 1162-1164, 1206, 1210, 1216, 1221).

The proposed finding is also incorrect and misleading insofar as it suggests that McWane, Sigma, and Star did not agree in any manner (whether or not through "discussion") on the pricing adjustments they ultimately announced in June 2008. The proposed finding concerns whether the competitors "discussed" prices or "discussed and agreed" on prices, and does not address, and is substantially outweighed by, the documents and testimony in the record indicating that the suppliers actively communicated with each other through their customer letters (and other means), and reached an agreement on increasing prices in exchange for curtailing Project Pricing and, again, for participating in DIFRA. (*See* CCPF 1155-1259).

133. McWane obtained Sigma's April 2008 letter after the fact from a customer. (Tatman, Tr. 488-489; CX 176.)

Response to Proposed Finding No. 133

The proposed finding is misleading and vague insofar as it suggests that McWane received Sigma's April 2008 letter after the price increase announced in that letter went into effect. McWane received Sigma's April 25 price announcement on April 25, 2008. (*See* CCPF 1172). Sigma's letter proposed a price increase that would go into effect on May 19, 2008. (*See* CCPF 1169). McWane responded to Sigma's price increase letter on May 7, 2008, weeks before Sigma's proposed increase was to take effect, with its own letter indicating its intention to hold off on any price increase announcement until the end of May. (*See* CCPF 1181-1182). In response, Sigma delayed the price increase it had announced on April 25. (*See* CCPF 1196).

134. McWane did not follow Sigma's April 24, 2008 price increase. (Pais, Tr. 2080-2081 (Q: "All right. Now, were you hoping that my client [McWane] and other companies would follow it?" A: "I certainly hoped." Q: "But they didn't, did they, sir?" A: "No, they didn't."); Tatman, Tr. 520-522, 958, 954-958 (Q. "All right. So you said Sigma had put out an announcement, and you said you think it was in what percentage, 20 to 40 percent range?" A: "I think when we analyzed it, depending on the product, 20 to 40 or 18 to 40. There's, you know, got to be a spreadsheet from me someplace." Q: "And so yours is significantly smaller, and how much smaller was it, sir?" A: "I think this is around another 8 percent again.") & CX 1576).

Response to Proposed Finding No. 134

The proposed finding is misleading insofar as it suggests that Sigma's proposed price increase, announced on April 25, 2008, ever went into effect. After receiving McWane's May 7, 2008 letter, Sigma understood McWane's invitation to collude and responded by waiting to institute a price increase until after receiving the DIFRA data at the end of May 2008. (*See* CCPF 1192-1200). Further, the proposed finding is misleading insofar as it suggests that McWane did not implement a price increase in this timeframe: McWane announced a price increase hours after receiving the first DIFRA report. (CCPF 1238-1239 (DIFRA sent its first report); CCPF 1240-1245 (McWane announced a price increase on the same day it received the DIFRA report); CCPF 1249 (Sigma matched McWane's announced price increase)).

135. Mr. Tatman made an independent decision, in light of McWane's steadily declining market share, that McWane should issue a much smaller published multiplier increase than that set forth in Sigma's April 24, 2008 customer letter. (Tatman, Tr. 955-956, 489-491 ("Just as we always do, we get competitive information. We look at it. We speculate what's going on. We make our own internal decisions on what we're going to do, and we act in our own best interest.") & CX 176, 538-540, 954-958 (Q. "All right. So you said Sigma had put out an announcement, and you said you think it was in what percentage, 20 to 40 percent range?" A: "I think when we analyzed it, depending on the product, 20 to 40 or 18 to 40. There's, you know, got to be a spreadsheet from me someplace." Q: "And so yours is significantly smaller, and how much smaller was it, sir?" A: "I think this is around another 8 percent again") & CX 1576).

Response to Proposed Finding No. 135

The proposed finding is inaccurate and misleading. The use of the word "independent" is inaccurate, misleading, and contradicted by the weight of the evidence because (1) McWane's subsequent June 17, 2008 price increase announcement was part of the coordinated scheme envisioned by the Tatman Plan (CX 0627 at 004), whereby McWane would agree to price increases in "stepped or staged increments" in exchange for its competitors' curtailment of Project Pricing and maintenance of price transparency and stability, and/or (2) McWane's June 17, 2008 price increase was further conditioned upon its competitors submitting their sales data to the DIFRA information exchange. (*See* CCPF 907-922 (describing Tatman Plan objective of communicating with competitors to achieve a coordinated curtailment of Project Pricing, market stability, and pricing transparency in exchange for staged price increases); CCPF 1174-1245 (describing McWane's May 7, 2008 letter and subsequent withholding of its June 17, 2008 price increase announcement until Sigma and Star had submitted DIFRA data)).

136. On or about June 17, 2008, McWane announced a smaller multiplier increase of approximately 8 percent on average, about one-third of the increase Sigma and Star had previously announced to their respective customers. (Tatman, Tr. 538-540 ("And if you look at what we had done prior, we 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, and so that action actually ends up on a relative basis lowering prices in the industry."), 544 (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.", 954-958 (Q. "All right. So you said Sigma had put out an announcement, and you said you think it was in

what percentage, 20 to 40 percent range?" A: "I think when we analyzed it, depending on the product, 20 to 40 or 18 to 40. There's, you know, got to be a spreadsheet from me someplace." Q: "And so yours is significantly smaller, and how much smaller was it, sir?" A: "I think this is around another 8 percent again.") & CX 1576); (Schumann, Tr. 4284-4287) ("Q. Okay. Let's go to RX 424. If we go down to that bottom e-mail, Andrew, maybe we can pull that out. This is Mr. Tatman's June 17 quick and dirty analysis of that first DIFRA report; right, sir?... Q. Well, Dr. Schumann, let's start with the multiplier maps. What they did after they got this DIFRA data was send out a multiplier map. We just looked at it. It was lower in every state than Sigma's big bold move which Star had followed; correct? A. The multiplier map that -- it is correct that the multiplier map that McWane began circulating in -- on June 17 had state multipliers that were lower than the multipliers that Sigma had on a map that was never effective as their published multipliers. Q. Now, Dr. Schumann, Mr. Tatman says right here that he believes it will be difficult to get back their share, but he's hoping that with the lower multipliers they're sending out that that will make it possible and make victory all the more sweeter; right? That's what he says right here. A. That's what he says right there.")*On or about June 17, 2008, McWane announced a smaller multiplier increase of approximately 8 percent on average, about one-third of the increase Sigma and Star had previously announced to their respective customers. (Tatman, Tr. 538-540 ("And if you look at what we had done prior, we 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, and so that action actually ends up on a relative basis lowering prices in the industry."), 544 (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.", 954-958 (Q. "All right. So you said Sigma had put out an announcement, and you said you think it was in what percentage, 20 to 40 percent range?" A: "I think when we analyzed it, depending on the product, 20 to 40 or 18 to 40. There's, you know, got to be a spreadsheet from me someplace." Q: "And so yours is significantly smaller, and how much smaller was it, sir?" A: "I think this is around another 8 percent again.") & CX 1576).*

Response to Proposed Finding No. 136

The proposed finding is misleading insofar as it suggests that the previously announced Star and Sigma multiplier increases had been implemented at the time of McWane's June 17, 2008 announcement; as McWane acknowledged, Star and Sigma withdrew their proposed increases after they received McWane's May 7, 2008 letter. (*See* CCPF 1196-1200).

137. Sigma rescinded the price increase it had proposed in its April 24, 2008 customer letter, because McWane did not follow it. (Rybacki, Tr. 3571, 3712-3713 (Q: "My client [McWane] did not increase its multipliers, and Sigma decided to pull back and go back to its prior multipliers from January; right, sir?" A: "Yes, we did. We had to") & RX 76).

Response to Proposed Finding No. 137

The proposed finding is misleading insofar as it suggests that Sigma actually implemented a price increase predicated on its April 25, 2008 letter. That price increase was never implemented by Sigma; it was withdrawn in response to McWane's May 7, 2008 letter. (*See supra* Response to Proposed Finding No. 134).

138. Star rescinded its May 2008 price increase in a letter to its customers dated June 27, 2008, following McWane's smaller multiplier increase. (McCutcheon, Tr. 2424 (Q: "Do you recall that Star put its recently announced -- do you recall whether Star put its recently announced fittings multiplier increase on hold in May of 2008?" A: "I don't recall this specific period, but I do know in the suspect period or subject period there was a time that we were taking a fitting -- attempted to take a fitting increase and we rescinded it. This is probably it. I just don't recall specifically the dates."), 2448, *in camera*† (†**{**

}†) & CX 2430; Minamyer, Tr. 3217-3218 (Q: "Do you know if these multipliers were the same as the ones McWane was using at that point in time?" A: "I don't know that." Q: "Would that have been your practice?" A: "Yes.") & CX 2430).

Response to Proposed Finding No. 138

The proposed finding is misleading insofar as it suggests that Star actually implemented a price increase predicated on its May 7, 2008 letter. On May 12, 2008, Star indefinitely suspended the changes to its multipliers that it had announced on May 7, 2008 in response to McWane's May 7, 2008 letter. Star never implemented those changes. (*See* CCPF 1198). After McWane announced its price increase on June 17, 2008 (CCPF 1240-1245), Star issued letters on June 27, 2008, notifying its customers that it would match McWane's price increases. (CCPF 1247).

139. 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.")).

Response to Proposed Finding No. 139

The proposed finding is incomplete and misleading. Sigma's Northeast region was the lone region that implemented Sigma's April 24, 2008 price increase, and Sigma lost business in that region as a result. (CCPF 1196-1197).

140. Dr. Schumann acknowledged that McWane decided not to follow Sigma and Star's large list prices in Winter 2008 or their large multiplier increases in Spring 2008. (Schumann, Tr. 4061-4062 ("Q. I understand, sir. But just so we're clear, those list prices, when McWane did not follow, that's competitive, that's an independent decision, isn't it, sir? A. That--yes, it is. . . .Q. And my client, McWane, did not follow that big multiplier increase; did it, sir? A. No, they did not."), 4268, 4286, 4167-4169, 4269-4273, 4279-4280).

Response to Proposed Finding No. 140

Complaint Counsel notes that, contrary to this Court's Order, Respondent is improperly citing the testimony of an expert for a proposition of fact. Complaint Counsel does not dispute that Dr. Schumann so testified. However, the proposed finding is misleading insofar as it suggests that McWane did not increase multipliers in Winter 2008 or Spring 2008, or that Sigma and Star's announced increases in Winter 2007-2008 and Spring 2008 ever went into effect. (*See* CCPF 965; CCPF 685(e), (d), and (f) (Star's Nov. 2007 announcement did not include amount of price increase); CCPF 1168; CCPF 1196; CCPF 1173; and CCPF 1198). McWane followed Sigma's and Star's price increase announcements with its own price increases. (*See* CCPF 940 and CCPF 1242). McWane's increases were smaller than those proposed by Star and Sigma, consistent with the Tatman Plan's approach of agreeing to price increases in "stepped or staged increments" in exchange for Sigma's and Star's curtailment of Project Pricing and maintenance of price stability. (*See* CCPF 907-922 (describing Tatman Plan objective of communicating with competitors to achieve a coordinated curtailment of Project Pricing, market stability, and pricing transparency in exchange for staged price increases)). Sigma and Star then followed McWane's increases. (CCPF 965-966; CCPF 997-1000; CCPF 1008; CCPF 1247-1249).

IV. McWane, SIGMA, and Star Continued to Provide Job Pricing and Other Price Concessions Throughout 2008

141. 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. (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.").)

Response to Proposed Finding No. 141

Complaint Counsel notes that, contrary to this Court's Order, Respondent is improperly citing the testimony of an expert for a proposition of fact. Complaint Counsel does not dispute that Dr. Schumann so testified, however the proposed finding is misleading insofar as it incorrectly suggests that continuation of "some" reduced amount of Project Pricing is inconsistent with the suppliers conspiring to curtail, and actually curtailing, Project Pricing during 2008. Any suggestion that the suppliers did not curtail Project Pricing is contradicted by the weight of the evidence, including **{**

}. (*See* CCPF 1043-1047). McWane, Sigma, and Star all observed that the three had successfully reduced Project Pricing. (*E.g.*, 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."); *see also* CCPF 1339-1342). Star's Special Project Pricing Reports show a lower incidence of Project Pricing in 2008 than in 2007. (CCPF 1410-1423). Cite check

The proposed finding is also misleading because it is immaterial whether McWane intended to, or did, continue to offer payment terms, freight terms, and rebate programs, as such secondary price terms are much less significant than Project Pricing in day-to-day competition for Fittings business. A reduction in Project Pricing in itself tends to lead to higher and more stable prices. (*See* CCPF 549-561; *see also infra* Response to Proposed Finding No. 108).

A. McWane continued aggressively offering price concessions

142. McWane continued to aggressively job price after issuing its January 11, 2008 customer letter and throughout 2008. (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, *in camera*†).

Response to Proposed Finding No. 142

The proposed finding is unsupported, inaccurate, and misleading. It is supported only by citation to an exhibit, RX-396, that actually tends to *disprove* the proposed finding, and by citation to Mr. Tatman's trial testimony regarding McWane's *intent* to continue Project Pricing, which is irrelevant and contradicted by the weight of the evidence contemporaneous with the events at issue. As described below, McWane's contemporaneous records as reflected in RX-396 show that **{**

}.

(*See infra* Response to Proposed Finding No. 145; CCPF 1043-1047). Moreover, there are no contemporaneous documents or statements that McWane did not intend to curtail Project Pricing; and in fact, McWane's National Sales Manager, Mr. Jansen (who signed McWane's January 11, 2008 letter), testified that McWane, in fact, wanted to curtail Project Pricing. 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 that McWane's "adherence to published pricing" and corresponding price stability benefits distributors in an email transmitting the January 11, 2008 letter to HD Supply)). The proposed finding is also misleading because it is immaterial whether, at the time it reached agreement with Sigma and Star to increase prices in staged increments in exchange for curtailment of Project Pricing, McWane actually intended to carry out the terms of the agreement. (*See supra* Response to Proposed Finding No. 107; CCPB at 104).

143. Throughout 2008, McWane was engaged in war of survival in a "vicious marketplace." (Tatman Tr. 974-975 (Q: "Tell us what you -- well, first of all, what's a pricing war, sir?" A: "That's just the competitors in the marketplace slugging it out every day. There's not enough volume and too many people chasing it." Q: "All right. So were you in fact seeing a pricing war from your perspective in the spring of 2009?" A: "Yes." Q: "And when had that started, that pricing war, from your perspective?" A: "I don't think it ever ended. I mean, I walked into the fight and the fight kept going. I've never seen it end." A: "So you're saying it started when you joined Tyler/Union in 2006?" A: "I saw it from the time I came -- David -- David was controlling the pricing at that point in time, but ever since I had any exposure to it, it's just -- it's a vicious marketplace with competitors beating each other up.")& CX 569).

Response to Proposed Finding No. 143

The proposed finding is unsupported, incorrect, and misleading. The phrase "[t]hroughout 2008" is supported only by citation to Mr. Tatman's trial testimony that the "pricing wars" to which he refers in CX 0569 had extended back to 2006. (*See* CX 0569 (April 2009 Tatman email that post-dated the resumption of Project Pricing by the Fittings suppliers)). That proposition is contradicted by the numerous contemporaneous documents establishing, *inter alia*, (1) close, trusting relationships and numerous direct contacts between the Fittings suppliers (*see* CCPF 699-841), (2) the successful, coordinated reduction of Project Pricing by McWane, Sigma, and Star during 2008 (*see* CCPF 931-1071, 1339-1383, 1410-1423), and (3) the suppliers' agreement to implement the DIFRA information exchange for the purpose of

monitoring pricing and market share stability, and as a precondition to McWane's agreement to price increases (*see* CCPF 1155-1337).

144. McWane continued to offer both job pricing and a host of other price concessions to its customers throughout 2008, 2009, 2010 and into the present. (Tatman, Tr. 387, 904-905, 907, 909-910, 914-915 & RX 399, 921, 930-931 (Q: "Are you -- are you job-pricing in response to some of these do you think?" A: "She just said that she did, I gave them a 23, so she's job pricing.") & RX 598, 933-934, 995-998, *in camera*† & RX 396, *in camera* †1071-1072, *in camera*† (†**{**

}; Sheley, Tr. 3445 (Q: "In 2008, was Tyler extremely aggressive in going after jobs?" A: "Yes." Q: "And they did that by offering better pricing, didn't they?" A: "Yes." Q: "They priced below their published multiplier to Illinois Meter?" A: "Yes.")).

Response to Proposed Finding No. 144

The proposed finding is misleading insofar as it suggests that McWane did not curtail Project Pricing during 2008. Any such suggestion is contradicted by **{**

}. (*See* CCPF 1043-1047; *infra* Response to Proposed Finding No. 145). Moreover, it is immaterial whether McWane intended to, or did, continue to offer payment terms, freight terms, and rebate programs during the alleged conspiracy period, as such secondary price terms are much less significant than Project Pricing in day-to-day competition for Fittings business, and a reduction in Project Pricing in itself tends to lead to higher and more stable prices. (*See* CCPF 549-561; *see also supra* Response to Proposed Finding No. 108).

145. †**{**

} (RX 396, *in camera* (McWane 2008 price protection log); JX 644 (Tatman, Dep. at 109)).

Response to Proposed Finding No. 145

Complaint Counsel notes that there is no exhibit denominated "JX 644." The proposed finding is incorrect and misleading because it does not take into account Mr. Tatman's testimony at trial that **{**

}. (Tatman, Tr. 1009-1012, *in camera*).

The proposed finding is also misleading insofar as it suggests that McWane did not curtail Project Pricing during 2008, because it does not seek to isolate in any manner those price protection log entries that reflect competitive Project Pricing, or to compare the number of such entries during the alleged period of reduced Project Pricing to the number that occurred outside that period. (*See* Tatman, Tr. 1028-1029, *in camera* (**{**

}); *see also* CCPF 1043-1047 (describing the price protection log and showing that **{**

})).

146. McWane's gross profits on non-domestic Fittings fell by nearly a **{ }** in 2008, in part because of job pricing. (Tatman, Tr. 991-994, *in camera*† (†**{**

}) & CX 2416, *in camera*).

Response to Proposed Finding No. 146

The proposed finding is misleading because it characterizes a profit margin decline of **{** **}** as **{** **}** The proposed finding is also misleading because **{**

} (*Compare* CX 2416 at 035, *in camera* (**{**

}) *with* RX-721 at 0041-0042, *in camera* (**{**

})). **{**

} (*See* CCPF 870-877 (costs in China were rising faster than McWane's U.S. costs)).

{

}. (CX 2416 at 035, *in camera*; *see also* CCPF 1343-1359 (**{**

})).

The proposed finding is also misleading insofar as it attributes the decline in gross profit margins for non-domestically produced Fittings in part to Project Pricing, because (1) it relies solely on Mr. Tatman's testimony at trial to establish that "job pricing" was "part of the reason" for the decline, (2) it does not separately account for the period of 2008 following the suppliers' resumption of Project Pricing after the market downturn in August 2008 (*see* CCPF 1436-1438, 1456-1464), and (3) it is contradicted by contemporaneous McWane internal reports that **{** **}** (CCPF 1344-1359), and that show **{**

} (*see* CCPF 1043-1047, *supra* Response to Proposed Finding No. 145).

147. Mr. Page, McWane's president, testified that job pricing has "always been around and always will be around" in a "commodity business" like Fittings. (JX 642 (Page, Dep. at 156-157).

Response to Proposed Finding No. 147

Complaint Counsel notes that there is no exhibit denominated "JX 642." The proposed finding is incomplete and misleading. Complaint Counsel does not dispute that Mr. Page testified at his deposition as set forth in the proposed finding, but the proposed finding is incomplete and misleading insofar as it suggests that Fittings suppliers did not curtail Project Pricing in 2008. Mr. Page disclaimed active involvement in McWane's day-to-day Fittings business. (CCPF 43). Further, Mr. Page acknowledged later in the cited passage of his deposition that Mr. Tatman was seeking to curtail Project Pricing, (RX-642 (Page, Dep. at 157) ("[H]e may think that that's a goal worth pursuing. I think he's wasting his time.")). Mr. Page's testimony thus is consistent with the weight of the evidence indicating that (1) McWane was seeking to curtail Project Pricing industry-wide in 2008, and (2) this was a deviation from McWane's regular business practice. (*See* CCFP 907-1028).

148. Mr. Sheley of Illinois Meter testified that in 2008, McWane was extremely aggressive in offering better pricing to go after jobs, (Sheley, Tr. 3445 (Q: "In 2008, was Tyler extremely aggressive in going after jobs?" A: "Yes"), and that McWane priced below its published multiplier on jobs for Illinois Meter. (Sheley, Tr. 3445 ((Q: "They priced below their published multiplier to Illinois Meter?" A: "Yes.")))

Response to Proposed Finding No. 148

The proposed finding is vague, misleading, and contradicted by the weight of the evidence. Complaint Counsel does not dispute that Mr. Sheley (whose market area is limited Illinois and Missouri (CCPF 329)) testified as set forth in the citations. The proposed finding and the supporting testimony are vague as to what time period within 2008 they refer to, and the proposed finding is therefore misleading insofar as it suggests that McWane was aggressively Project Pricing throughout 2008 across the country. Insofar as the proposed finding suggests that McWane was aggressively Project Pricing in the second or third quarters of 2008, it is contradicted by the weight of the evidence, including **{**

}.

(*See* CCPF 1043-1047; *supra* Response to Proposed Finding No. 145).

149. Mr. Sheley testified that throughout 2008, Illinois Meter was playing Fittings suppliers off one another to try and get a better price. (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.")).

Response to Proposed Finding No. 149

The proposed finding is misleading and contradicted by the weight of the evidence. Complaint Counsel does not dispute that Mr. Sheley (whose market area is limited Illinois and Missouri (CCPF 329)) testified as set forth in the citations. The proposed finding is misleading because its use of the word "throughout" mischaracterizes the testimony, which is vague as to what time period within 2008 it refers to. Also, insofar as the proposed finding is intended to suggest that suppliers were aggressively Project Pricing throughout the country in the second or

third quarters of 2008, it is contradicted by the weight of the evidence, including **{**

}. (*See* CCPF 1043-1047; *supra* Response to Proposed Finding No. 145).

B. Sigma continued aggressively offering price concessions

150. Sigma never stopped or reduced job pricing. (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).

Response to Proposed Finding No. 150

The proposed finding is inaccurate, misleading, and unsupported by the weight of the evidence. The cited testimony only references whether there was a "special effort" by Sigma to reduce Project Pricing and says nothing about whether Project Pricing was actually curtailed. Mr. Rybacki testified that after Mr. Pais' January 24, 2008 email asking him to make a "committed and serious effort to normalize prices" (CX 1145), he had conversations with his regional managers about Project Pricing, urging them to help make the company more profitable. (Rybacki, Tr. 1137). The proposed finding is also contradicted by the weight of the evidence which shows, *inter alia*, that **{**

} (CCPF 1370-1383), and that McWane observed a reduction in Project Pricing by Sigma (CCPF 1054, 1339).

151. Mr. Pais testified that in 2008, Sigma had never stopped or reduced job pricing. (Pais, Tr. 2192, *in camera*† (†**{**

} †), 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.").)

Response to Proposed Finding No. 151

Complaint Counsel does not dispute that Mr. Pais testified as set forth in the citations. The proposed finding is inaccurate, misleading, and contradicted by the weight of the evidence insofar as the proposed finding suggests that Sigma never curtailed Project Pricing in 2008. The cited testimony only references that Project Pricing continued, but does not address whether it was curtailed or reduced. The proposed finding is also contradicted by the weight of the evidence which shows, *inter alia*, that **{**

} (CCPF 1370-1383), and that McWane observed a reduction in Project Pricing by Sigma (CCPF 1054, 1339).

152. Mr. Rybacki testified that Sigma had "[n]o choice but to" offer job discounting throughout 2008. (Rybacki, Tr. 3701 (Q: "And did Sigma continue to offer job discounting throughout 2008, sir?" A: "No choice but to do it.").)

Response to Proposed Finding No. 152

Complaint Counsel does not dispute that Mr. Rybacki testified as set forth in the citation. The proposed finding is inaccurate, misleading, and unsupported by the weight of the evidence. The cited testimony only states that Project Pricing continued, but does not address whether it was curtailed. The proposed finding is also contradicted by the weight of the evidence which shows, *inter alia*, that **{**

}. (CCPF 1370-1383), and that McWane observed a reduction in Project Pricing by Sigma (CCPF 1054, 1339).

153. Mr. Rybacki received reports from Sigma's regional sales managers reporting that both McWane and Star were job pricing aggressively. (Rybacki, Tr. 3698-3699, 3700-3701; CX 1726.)

Response to Proposed Finding No. 153

The proposed finding cites testimony that was not admitted for the truth of the matter asserted therein, *i.e.*, whether McWane and Star were engaging in Project Pricing. (*See* Rybacki,

Tr. 3699, 3700). The proposed finding is also unsupported by the cited testimony and contradicted by the weight of the evidence. Mr. Rybacki testified only that he received reports that McWane and Star offered special prices, but did not testify as to the frequency of those reports, to the magnitude of reported special prices, or whether the Project Pricing was "aggressive." The record evidence establishes that McWane, Sigma, and Star monitored market conditions, observed reduced Project Pricing in the market, and each experienced increased prices and financial performance as a result of their agreement in the Spring of 2008. (*See* CCPF 1041-1071, 1338-1435, 1439-1450). Complaint Counsel further notes that, insofar as it has been admitted into evidence (*i.e.*, for the fact that Mr. Rybacki received reports from his sales force on competitive project pricing, including the accompanying request in that Mr. Rybacki "make a call and see if this can be stopped" (CX 1726 at 001)), the cited evidence establishes that the parties were monitoring each other's compliance with their 2008 agreement to curtail Project Pricing, and complaining to each other when cheating was detected. (*See* CCPF 1041-1071, 1339-1342, 1439-1450, 1451-1455).

154. Mr. Rybacki testified that job pricing has continued unabated in the Fittings market for at least 20 years. (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, *in camera*† ("†**{** **}**†), 3706-3707 & CX 1002 in camera, 3743, *in camera*).

Response to Proposed Finding No. 154

Complaint Counsel does not dispute that Mr. Rybacki testified as set forth in the citations. However, the proposed finding mischaracterizes the cited testimony insofar as it states that Mr. Rybacki testified that Project Pricing has "continued unabated," which he did not. The proposed finding is also contradicted by the weight of the evidence. The evidence establishes that the practice of Project Pricing had increased in 2007, primarily led by Star, (*E.g.*, CCPF 854-

855, 958, 1027), and that the Fittings suppliers agreed to curtail Project Pricing (and actually did curtail Project Pricing) in 2008. (CCPF 930-1071, 1338-1435, 1439-1450, 1451-1455).

155. 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. (Rybacki, Tr. 3522-3524, 3658-3659, *in camera*†, 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.")).

Response to Proposed Finding No. 155

Complaint Counsel does not dispute that Mr. Rybacki testified as set forth in the citations. However, the proposed finding is contradicted by the weight of the evidence insofar as the proposed finding suggests that Sigma has continuously sought to reduce Project Pricing, or that it has "never" had "any" success in reducing Project Pricing. Although Mr. Rybacki's testimony reflects the generic preference of any seller to charge higher prices, the evidence establishes that Sigma used Project Pricing in 2007 to compete for jobs and thereby contributed to erosion of Fittings prices. Additionally, the weight of the evidence establishes that the Fittings suppliers coordinated a successful effort to curtail Project Pricing in 2008. For example, in early 2008 Sigma responded to McWane's January 2008 invitation to collude by launching a "NEW COMMITTED AND SERIOUS EFFORT TO NORMALIZE ALL PRICING FOR FITTINGS." (CCPF 1027 (emphasis added); CCPF 700-841 (chronicling competitor communications); *see also* CCPF 930-1071, 1338-1435, 1439-1450, 1451-1455).

156. With regard to Sigma's job pricing in 2008, Mr. Rybacki testified: †**{**

} (Rybacki, Tr. 3658-3659, *in camera*).

Response to Proposed Finding No. 156

Complaint Counsel does not dispute that Mr. Rybacki testified as set forth in the proposed finding regarding CX 1002. However, CX 1002 demonstrates that, through the course of 2008, Sigma's transactional Fittings prices **{**

} (CCPF 1373-1380). Moreover, the cited testimony confirms that Sigma had the goal of reining in Project Pricing.

157. Sigma did not take any steps to centralize pricing authority or remove pricing authority away from its salespeople in 2008. (Rybacki, Tr. 3696-3697 (Q: "Well, does it say anywhere in here that you're going to centralize pricing authority at Sigma and take away pricing authority from line personnel or salespeople at Sigma?" A: "No.") & CX 1189; JX 687 (Pais, Dep. at 55-56)).

Response to Proposed Finding No. 157

Complaint Counsel notes that there is no exhibit denominated "JX 687." The proposed finding is unsupported and misleading because Mr. Rybacki's testimony merely describes what a single letter to customers says (or doesn't say), and does not support the broad conclusion asserted in the proposed finding. The cited trial testimony of Mr. Pais should be given little weight because Mr. Pais lacks foundation. In the cited passage, Mr. Pais disclaimed knowledge of how much Project Pricing authority was held by the member of Sigma's sales being discussed. (RX-687 (Pais, Dep. at 55-56) ("Q. Did he have authority to grant all of these different multipliers? . . . A. I couldn't answer that because I never really worked with Bruce. . . . the culture in our organization was to give a lot of responsibility, a lot of flexibility to every salesperson, but also to consult others, the regional manager that he reported to and in some cases, the ultimate authority, who was Larry.")).

158. Throughout 2008, Sigma's salespeople retained pricing authority and offered job pricing all over the map. (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).

Response to Proposed Finding No. 158

The proposed finding is incorrect and contradicted by the weight of the evidence. Mr. Rybacki testified that, rather than **{**

} (Rybacki, Tr. 3658-3659). Additionally, the document referenced in the cited testimony establishes that, through the course of 2008, **{**

} (CX 1002, *in camera*; CCPF 1373-1380), and the evidence establishes that the suppliers observed reduced project pricing and stabilized and increasing prices during the conspiracy period in 2008 (CCPF 1041-1054, 1339-1342).

159. As Mr. Rybacki testified: "Q. 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. 3715).

Response to Proposed Finding No. 159

Complaint Counsel does not dispute that Mr. Rybacki testified at trial as set forth in proposed finding. However, the proposed finding is misleading insofar as it suggests that there was no reduction in Project Pricing. Mr. Rybacki testified only that Project Pricing continued; he did not testify as to the frequency or magnitude of Project Pricing. The evidence contemporaneous with the events at issue establishes that Sigma reduced Project Pricing in 2008 and that through the course of 2008, Sigma's transactional Fittings prices **{**

} (CX 1002 at 004, *in*

camera; CCPF 1373-1380; *See also* CCPF 1041-1054, 1339-1342 (suppliers observed reduced Project Pricing and stabilized and increasing prices during the conspiracy period in 2008)).

C. Star continued aggressively offering price concessions

160. Star in 2008 was facing rising production costs in China. (McCutcheon, Tr. 2516-2518 (Q: "Were you seeing a material cost increase at the time or a trivial cost increase?" A: "A material.")).

Response to Proposed Finding No. 160

Complaint Counsel has no specific response.

161. If Star could limit job pricing, it would make more money. (Minamyer, Tr. 3246-3247 (Q: "And you believed that taking a price increase and attempting to limit project pricing was in Star's best interest, didn't you?" A: "If it worked, we would make more money, so yes.")).

Response to Proposed Finding No. 161

The proposed finding is incomplete and therefore misleading. Mr. Minamyer testified Star would "make more money" by limiting or stopping Project Pricing, but he qualified his testimony by also stating that Star would make more money only if McWane and Sigma also eliminated Project Pricing. (CCPF 986, 1064-1067). Additionally, the proposed finding is misleading insofar as it suggests Star was acting in its independent best interest or that its' historic business model was not to Project Price. To the contrary, prior to 2008 Star had grown share through aggressive use of Project Pricing (CCPF 1023-1026) and, in January 2008, Mr. Minamyer reported that, "What we are doing is right for the industry" and that Star "would come out of a price war stronger than ever and with a bigger market share." (CCPF 1067).

162. 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. (McCutcheon, Tr. 2516-2520, 2522-2523).

Response to Proposed Finding No. 162

The proposed finding is incorrect, misleading and contradicted by the weight of the evidence. First, Star's decision to curtail Project Pricing was not "independent." (CCPF 971-990). Second, Star had an incentive to conspire because production costs in China, where Star obtained Fittings, were increasing, and McWane recognized the cost increases that Star (and Sigma) confronted. (CCPF 870-877). In late 2007, Star had announced that it would revise its price list (CCPF 882-883), but later changed course to follow McWane's approach of raising multipliers in staged increments while reducing Project Pricing. (CCPF 971-1021) Finally, Star recognized that it could not independently reduce its Project Pricing but instead could curtail Project Pricing only if McWane and Sigma curtailed Project Pricing, too. (CCPF 986, 1064-1067).

163. 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. (CX 752; Minamyer, Tr. 3242-3244 (Q: "Why would you typically take a price increase? Was margin erosion be one of the reasons, do you recall?" A: "At Star specifically, we took price increases when we followed Tyler." Q: " Okay. You followed Tyler, and that was Star's history while you were national sales manager?" A: "That's correct." Q: "Okay. And so your plan was not to stop entirely, it was to stop unless you had correct documentation; correct?" A: "That -- that was the plan, yes." Q: "And correct documentation would be, I think you testified, some indication that a competitor was pricing below a published price; correct?" A: "Yes. We would like to get it in writing.")).

Response to Proposed Finding No. 163

The proposed finding is misleading, unsupported, and contradicted by the weight of the evidence. Complaint Counsel does not dispute that Mr. Minamyer made the quoted statements. However, the proposed finding mischaracterizes Mr. Minamyer's testimony because Mr. Minamyer did not use the word "independent" or any similar word to describe Star's "goal" of stopping Project Pricing, either in the exhibit or the segment of the record cited by Respondent to support the proposed finding. (*See* CX 0752; Minamyer, Tr. 3242-3244). Indeed, Mr.

Minamyer described the motivation for stopping Project Pricing, stating: "What we are doing is right for the industry." (CCPF 1067). Also, the trial testimony of Mr. Minamyer – that Star's "plan was not to stop [Project Pricing] entirely, it was to stop unless you had correct documentation" – is directly contradicted by the contemporaneous documents authored by Mr. Minamyer, in which he instructed Star's sales force that "*Our goal is to take a price increase and to stop project pricing.*" (CX 0752 (emphasis in original)). In any event, Star's decision to curtail Project Pricing was not "independent." (CCPF 971-990).

164. When Star announced a price increase, Mr. Minamyer "hoped" his competitors would stop job pricing. (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.")).

Response to Proposed Finding No. 164

Complaint Counsel has no specific response.

165. 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'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).

Response to Proposed Finding No. 165

Complaint Counsel has no specific response, other than to note that the quoted testimony does not appear at the cited transcript location.

166. Star's independent attempt to reduce its job pricing was not successful, as reflected in the job prices it offered throughout 2008. (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.")).

Response to Proposed Finding No. 166

The proposed finding is inaccurate, unsupported, and contradicted by the weight of the evidence. Star's attempt to curtail Project Pricing was not "independent." (CCPF 971-990). The trial testimony cited by McWane is inconsistent with Star's contemporaneous business records in which Star's executives expressly stated that Star, McWane and Sigma had been successful in curtailing Project Pricing through the third quarter of 2008. (CCPF 1340). The cited exhibits do not support Respondent's proposed finding that Star was unsuccessful in reducing Project Pricing in the relevant markets in 2008 because, *inter alia*, (i) Star's records,

including RX-557, contain a significant number of entries that have contradictory information; (ii) Star's records, including RX-557, include entries for sales of a wide variety of products other than Fittings; (iii) Star's records, including RX-557, include numerous entries for transactions outside the relevant geographic market; and (iv) Star's records, including RX-557, contain numerous entries for transactions that occurred either before or after the conspiracy. (CCPF 1384-1423). Further, to the extent Star's records can be relied upon, Star's records indicate that it engaged in Project Pricing less frequently in 2008 than it did in 2007. (CCPF 1415-1423). (*See also* CCPF 1054, 1339 (McWane observed reduced Project Pricing in the marketplace).

167. 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. (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%.").

Response to Proposed Finding No. 167

The proposed finding is inaccurate, unsupported, and contradicted by the weight of the evidence. The cited testimony at trial is inconsistent with Star's contemporaneous business records in which Star's executives concluded that, through at least the third quarter of 2008, Star, as well as McWane and Sigma, had been successful in curtailing Project Pricing. (CCPF 1340). The exhibits on which Respondent relies, including RX-557, are inherently unreliable as support for the proposed finding because, *inter alia*, (i) Star's records, including RX-557, contain a significant number of entries that have contradictory information; (ii) Star's records, including RX-557, include entries for sales of a wide variety of products other than Fittings; (iii) Star's records, including RX-557, include numerous entries for transactions outside the relevant geographic market; and (iv) Star's records, including RX-557, contain numerous entries for transactions that occurred either before or after the conspiracy. (CCPF 1384-1423). Further, to

the extent Star's records can be relied upon, Star's records indicate that it engaged in Project Pricing less frequently in 2008 than it did in 2007. (CCPF 1415-1423). (*See also* CCPF 1054, 1339 (McWane observed reduced Project Pricing in the marketplace).

168. 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)

Response to Proposed Finding No. 168

The proposed finding is misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests that Star did not instruct its sales force to stop Project Pricing. Star's contemporaneous business documents demonstrate that Mr. Minamyer instructed Star's sales force to end Project Pricing (CCPF 972-990); that Star notified its customers that it was ending Project Pricing (CCPF 997-1008); and Mr. McCutcheon took no action to countermand Mr. Minamyer's instruction to Star's sales force to stop Project Pricing. (CCPF 989).

169. 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.").).

Response to Proposed Finding No. 169

The proposed finding is incomplete and therefore misleading. Prior to January 2008, Mr. Minamyer had delegated the authority to approve special Project Pricing to the division managers but in January 2008, Mr. Minamyer assumed responsibility for approving all Project Pricing himself. (CCPF 991-995).

170. Star continued offering job pricing and other price concessions to its customers throughout 2008, 2009, 2010 and up through the present. (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.).).

Response to Proposed Finding No. 170

The proposed finding is misleading and contradicted by the weight of the evidence. The cited trial testimony is inconsistent with Star's contemporaneous business records, in which Star's executives concluded that, through at least the third quarter of 2008, Star, as well as McWane and Sigma, had been successful in curtailing Project Pricing. (CCPF 1340). The exhibits to which Mr. McCutcheon referred, including RX-557, are inherently unreliable as support for the proposed finding because, *inter alia*, (i) Star's records, including RX-557, contain a significant number of entries that have contradictory information; (ii) Star's records, including RX-557, include entries for sales of a wide variety of products other than Fittings; (iii) Star's records, including RX-557, include numerous entries for transactions outside the relevant geographic market; and (iv) Star's records, including RX-557, contain numerous entries for transactions that occurred either before or after the conspiracy. (CCPF 1384-1423). Further, to the extent Star's records can be relied upon, Star's records indicate that it engaged in Project Pricing less frequently in 2008 than it did in 2007. (CCPF 1415-1423; *See also* CCPF 1054, 1339 (McWane observed reduced Project Pricing in the marketplace)).

171. Star did not enter into any agreement with Sigma or McWane to stop offering price concessions to its customers. (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.")).

Response to Proposed Finding No. 171

Complaint Counsel notes that the proposed finding and quoted material is not supported by any citation to the record. The proposed finding and cited testimony are contradicted by the weight of the evidence, which establishes that Star entered into an agreement with Sigma and McWane to curtail Project Pricing. (*See* CCPF 971-1021).

172. Star continued to offer job pricing at a rate of a couple hundred per month in 2008. (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.")).

Response to Proposed Finding No. 172

The proposed finding is misleading and inaccurate. Mr. Minamyer instructed his sales staff that Star would stop Project Pricing after March 1, 2008 (CCPF 1002), while the cited testimony of Mr. Minamyer relates to an email dated February 23, 2008, which was before the effective date of Mr. Minamyer's instruction to stop offering Project Pricing. Further, the cited testimony of Mr. McCutcheon relates to any discounts or "pinks" anytime in 2008, which included, *inter alia*, (i) discounts in sales of a wide variety of products other than Fittings; (ii) discounts in transactions outside the relevant geographic market; and (iii) discounts in transactions that occurred either before or after the conspiracy. (CCPF 1384-1423; s*ee also* CCPF 1054, 1339 (McWane observed reduced Project Pricing in the marketplace)). Star's empirical analysis of all its pinks demonstrates that Star reduced Project Pricing in 2008. (CCPF 1410-1423).

173. Star priced job-priced whenever it needed to get business in 2008. (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.").

Response to Proposed Finding No. 173

The proposed finding is inaccurate and contradicted by the weight of the evidence. Contrary to Mr. Minamyer's trial testimony, the weight of the evidence, including contemporaneous documents authored by Mr. Minamyer, establishes that Star curtailed Project Pricing during 2008. (CCPF 972-1021). Further, Mr. Minamyer concluded as late as August 2008 that Star had successfully avoided Project Pricing, except in those instances in which it believed either McWane or Sigma were "cheating." (CCPF 1439-1450; *see also* CCPF 1054, 1339 (McWane observed reduced Project Pricing in the marketplace)).

174. 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.")).

Response to Proposed Finding No. 174

The proposed finding is immaterial and misleading. Mr. Minamyer had instructed his sales staff that Star would end Project Pricing after March 1, 2008 (CCPF 1002, 1008), but the testimony of Mr. Minamyer's cited in the proposed finding relates to an email, CX 0815, dated February 23, 2008, the week before Mr. Minamyer had instructed his sales staff that Project Pricing was to end.

175. Most of the several hundred requests per month were without documentation, but Mr. Minamyer approved them anyway. (Minamyer, Tr. 3255).

Response to Proposed Finding No. 175

The proposed finding is contradicted by the weight of the evidence. In contemporaneous emails, Mr. Minamyer concluded that the effort to be "very careful" on Project Pricing had been "pretty good." (CCPF 1340). Further, Star's sales force submitted requests for special pricing, and Mr. Minamyer approved the requests, for a wide variety of reasons other than Project Pricing

to meet or beat competition with either McWane or Sigma in the relevant markets. (CCPF 1384-1423).

176. Star observed that its competitors were routinely offering job pricing and offering other concessions to win business from McWane and Sigma. 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.")).

Response to Proposed Finding No. 176

The proposed finding is misleading and is contradicted by the weight of the evidence. CX 831 is dated November 25, 2008, the time at which the agreement to curtail Project Pricing was falling apart. In it Mr. Minamyer finally concluded that McWane and Sigma had begun to engage in Project Pricing again, and that Star should begin to do so again, too. (CCPF 1457-1459). Through August 2008, however, Star had closely monitored the pricing conduct of both McWane and Sigma and had determined that McWane and Sigma, like Star, had curtailed Project Pricing. (CCPF 1340). Star started to gather evidence showing that McWane and Sigma were cheating only in the late Summer or early Fall, 2008, and this new information led Mr. Minamyer to reach the conclusion in November 2008 that McWane and Sigma had begun to engage in Project Pricing. (CCPF 1439-1448).

177. 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. (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).

Response to Proposed Finding No. 177

The proposed finding is misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests that Star's competitors had "continued" to Project Price throughout 2008. The proposed finding references testimony regarding an email dated November 25, 2008, CX 0831, in which Mr. Minamyer concluded that McWane and Sigma had increased Project Pricing and that Star should "take the gloves off" and reinstitute Project Pricing as a strategy. (CCPF 1457-1459). Through August 2008, however, Star had closely monitored the pricing conduct of both McWane and Sigma and had determined that McWane and Sigma, like Star, had generally been successful in limiting Project Pricing. (CCPF 1340). Star started to gather evidence that McWane and Sigma were Project Pricing and offering other concessions only later, in the late Summer or early Fall of 2008 (CCPF 1439-1448), which led Mr. Minamyer in November, 2008 to resume competition using Project Pricing set forth in the proposed finding.

178. Mr. Minamyer testified that the Fittings market "was always very competitive. We – we had to fight pretty hard for every order." (Minamyer, Tr. 3277-3278)

Response to Proposed Finding No. 178

The proposed finding is misleading and contradicted by the weight of the evidence. Complaint Counsel does not dispute that Mr. Minamyer made the statement attributed to him. However, the cited testimony does not purport to address whether McWane, Sigma, or Star engaged in Project Pricing or the specific time periods that Mr. Minamyer was addressing. Further, evidence in the record shows that McWane, Sigma, and Star agreed to curtail Project Pricing in 2008. (*See* CCPF 971-1021).

179. Star's CEO, Mr. Bhutada, testified that job pricing was always the norm in the Fittings market, including in 2008. (JX 694 (Bhutada, Dep. at 18-19)).

Response to Proposed Finding No. 179

Complaint Counsel notes that there is no exhibit denominated "JX 694." The proposed finding and cited testimony are contradicted by the weight of the evidence. While Mr. Bhutada testified at his deposition that, "to his knowledge" project pricing was "the norm," including in 2008, contemporaneous documents from 2008 demonstrate that Mr. Minamyer concluded Star's efforts to curtail Project Pricing in 2008 were successful (CCPF 1340), and the amount of Project Pricing by Star in 2008 was actually less than in 2007. (CCPF 1410-1423).

180. 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.")). (McCutcheon, Tr. 2568).

Response to Proposed Finding No. 180

The proposed finding and cited testimony are contradicted by the weight of the evidence. Complaint Counsel does not dispute that Mr. McCutcheon made the statement attributed to him. However, the evidence shows that Star's efforts to curtail Project Pricing in 2008 were successful (CCPF 1340), the amount of Project Pricing by Star in 2008 was actually less than in 2007 (CCPF 1410-1423), and Star's "per pound Realization" as used in its contemporaneous reports shows Star achieved increasing prices as 2008 progressed, reaching a high in August 2008 (CCPF 1367).

181. Mr. McCutcheon described Fittings pricing in the second half of 2008 as "chaotic." (McCutcheon, Tr. 2568 (Q: "And I think I heard you testify yesterday that pricing was chaotic at this point. Did I get that right?" A: "Yes, sir.")).

Response to Proposed Finding No. 181

The proposed finding and cited testimony are contradicted by the weight of the evidence. Complaint Counsel does not dispute that Mr. McCutcheon made the statement attributed to him. However, the evidence shows that Star's efforts to curtail Project Pricing in 2008 were

successful (CCPF 1340), and the amount of Project Pricing by Star in 2008 was actually less than in 2007. (CCPF 1410-1423).

182. Dr. Schumann admitted that McWane, Sigma and Star all offered job price discounts and other price concessions, including rebates, freight absorption, and credit extension, throughout 2008. (Schumann, Tr. 4287:21-4288:1 ("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").)

Response to Proposed Finding No. 182

Complaint Counsel notes that, contrary to this Court's Order, Respondent is improperly citing the testimony of an expert for a proposition of fact. Complaint Counsel does not dispute that Dr. Schumann made the statements quoted in the citations, but the proposed finding is misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests that the suppliers did not curtail Project pricing during 2008. (*See* CCPF 1043-1047; CCPF 1054, 1339).

The proposed finding is also misleading insofar as it suggests that Dr. Schumann ignored all spreadsheets relating to pricing and discounting. Dr. Schumann testified that he reviewed Star's analysis that showed that the number of requests for project pricing was substantially lower in 2008 than it was in 2007. (*See* Schumann, Tr. 3844: "Q. Are you also familiar with a Star analysis of the number of requests for project pricing in 2007 versus 2008? A. Yes, I am. Q. Could you tell us about that briefly. A. Just that the number of requests for project pricing in 2008 was substantially below -- or it was below the levels of 2007."). Dr. Schumann also testified that he "looked at a lot of spreadsheets and a lot of things like this." (Schumann, Tr. 4085). Dr. Schumann also noted in his testimony that many documents he saw were produced multiple times with different Bates numbers on them and that he may have reviewed the

spreadsheets that Respondent's Counsel was asking him about under a different Bates stamp. (Schumann, Tr. 4085-4086).

D. McWane's Actual Invoice Prices for Non-domestic Fittings Declined Relative to Inflation in 2008

183. McWane's non-domestic Fittings prices for 2008 declined relative to inflation, because its non-domestic production costs rose by roughly **{ }** (Tatman, Tr. 860-862, *in camera*† (†**{**

} **)** , 856, *in camera*, 859, *in camera* (**{**

}†)-861, *in camera*† (†**{**

}), CX 2416, *in camera*).)

Response to Proposed Finding No. 183

The proposed finding is misleading and irrelevant. Complaint Counsel does not dispute that McWane's 2008 Blue Book financials (CX 2416 at 035, *in camera*) reflect that **{**

}. The proposed finding is misleading insofar as it suggests that **{** **}**. (*See* CX 2416 at 043, *in camera* (**{** **}**); *supra* Response to Proposed Finding No. 25). The proposed finding is also misleading and irrelevant because the figures it cites do not reflect all of McWane's sales in the (Open Specification) Fittings market, but rather omit Open Specification sales of domestically manufactured Fittings. (*See supra* Response to Proposed Finding No. 146).

184. During 2008, McWane's Fittings unit continued to lose market share, failed to solve its excessive inventory problem, was forced to shut down its Tyler South Plant, and ultimately suffered a poor financial year. (Tatman, Tr. 562-563 ("And if you read this, 2008 was not a good year for me. I started with hope and intention of being able to change the game and make myself more competitive and to get my volume back, and it looks like I failed miserably."), 967-968 ("From a competitive environment, I went out and I 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." … Q: "Okay. And what does that mean in practical terms? Did you have to shut down the facility after this?" A: "Yeah." Q: "And roughly how many people had to lose their jobs, sir?" A: "Sorry. A couple hundred.")

Response to Proposed Finding No. 184

The proposed finding is unsupported and misleading insofar as it suggests that McWane lost Fittings market share throughout 2008. According to the DIFRA market share data (CX 0656 at 003, discussed at trial in the first passage cited in the proposed finding), McWane's overall Fittings market share among DIFRA members had already declined to approximately 46% by the end of 2007 (averaging 46.4% over the last four months of 2007), and it remained at or above that level for most of 2008, until Project Pricing increased and the terms of collusion largely fell apart after the market downturn in August 2008 (averaging 46.5% over the first nine months of 2008). (CX 0656 at 003).

The proposed finding is misleading insofar as it suggests that McWane closed the Tyler South plant because the Fittings business was poor. Mr. Tatman explained in his testimony that closing Tyler South resulted in an improvement to McWane's "fully burdened cost" because it eliminated $7 million in idle plant costs. (Tatman, Tr. 432-434).

The proposed finding is also incorrect, misleading, and contradicted by the weight of the evidence insofar as it states that McWane "suffered a poor financial year" in 2008. The weight

of the evidence establishes that the Fittings business was profitable even throughout the recession. **{**

} (CX 2416 at 035, *in camera*; *see also* CCPF 17, 1343-1353 (describing McWane's increased Fittings profits on reduced volume during 2008); CX 0622 at 005; CCPF 1702; RX-721 (2009 Waterworks Fittings Financial Statements); RX-632 (2010 Waterworks Fittings Financial Statements)).

185. In 2008, McWane's non-domestic Fittings prices fell relative to inflation, due to spiking raw materials costs. (Tatman, Tr. 970-971 (Q: "All right. And then price, it looks like although you had just tried to keep pace with inflation, you're actually lagging inflation; is that right?" A: "Yes. We went through the blue book yesterday on that.")& RX 616).

Response to Proposed Finding No. 185

The proposed finding is misleading and irrelevant for the reasons set forth above in Response to Proposed Finding No. 183.

186. In 2008, McWane's Fittings unit lost market share to its competitors. (Tatman, Tr. 971 (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.") & RX 616; JX 644 (Tatman, Dep. at 19-20)).

Response to Proposed Finding No. 186

Complaint Counsel notes that there is no exhibit denominated "JX 644." The proposed finding is unsupported, incorrect and contradicted by the weight of the evidence insofar as the proposed finding suggests that McWane's loss of market share occurred in 2008, and in particular that, as of September 9, 2008 (the date of the cited document RX-616), McWane had lost eight points of Fittings market share in 2008. The cited document actually states that McWane's share was "Down ~8pts *from 2006*." (RX-616 at 0005) (emphasis added). That decline of market share from the 2006 level had already occurred by the beginning of 2008, and McWane's market share did not decline further during 2008 until Project Pricing increased 2008

and the terms of collusion largely fell apart after the market downturn in August. (*See supra* Response to Proposed Finding No. 184 (comparing McWane's share over the last four months of 2007 with its share over the first nine months of 2008)).

187. McWane's margins and gross profits on non-domestic Fittings declined in 2008. (Tatman, Tr. 992-994, *in camera*† († **{**

}); RX 631).

Response to Proposed Finding No. 187

The proposed finding is contradicted by the weight of the evidence, which establishes that **{**

}, and that **{**

}. (CX 2416 at 035, *in camera*; *see also* CCPF 1343-1353 (describing McWane's increased Fittings profits on reduced volume during 2008)).

The proposed finding is also misleading because the cited evidence does not support the conclusion that McWane's margins for non-Domestic Fittings (*i.e.*, Open Specification sales) declined. **{**

} (Compare CX 2416 at 035, *in camera* (**{**

}) with RX-721 at 0041-0042, *in camera* (**{**

})). Because the figures cited in the proposed finding do not take into account domestically manufactured Fittings, they do not reflect the true profit margins of McWane's entire non-Domestic (*i.e.*, Open

Specification) Fittings business, or the relative cost advantage that McWane enjoyed in 2008 on certain domestically produced Fittings because costs in China were rising faster than costs in the U.S. (*See* CCPF 870-877 (costs in China were rising faster than McWane's U.S. costs)).

188. McWane closed its Tyler South Plant and laid off hundreds of workers in November 2008. (Tatman, Tr. 967-968 (Q: "Okay. And what does that mean in practical terms? Did you have to shut down the facility after this?" A: "Yeah." Q: "And roughly how many people had to lose their jobs, sir?" A: "Sorry. A couple hundred.") & RX 616).

Response to Proposed Finding No. 188

Complaint Counsel has no specific response. (*See also* CCPF 10, 851; *supra* Response to Proposed Finding No. 184).

189. 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." (Normann, Tr. 4789)

Response to Finding No. 189:

Complaint Counsel does not dispute that Dr. Normann made the statement attributed to him, but the proposed finding and the statement of Dr. Normann cited in support are unreliable, misleading, and contradicted by the weight of the evidence.

First, the proposed finding and Dr. Normann's cited statement are unsupported and unreliable, because Dr. Normann's analysis (a) is based on flawed and insufficient data, (b) is confounded by widely varied and nonsystematic lags between time of price formation and invoicing, and (c) does not reflect sound hypothesis testing, which includes assessments of the precision of parameter (here, price) estimates. (*See* CCPF 1424-1435).

Second, the proposed finding is unsupported, misleading, and contradicted by the weight of the evidence insofar as the proposed finding suggests that McWane's Fittings prices declined "during the alleged conspiracy period." Dr. Normann's claim is contradicted by Figure 2B in his

own report (about which Dr. Normann was testifying when he made the cited statement), and by the weight of the contemporaneous documentary evidence, both of which establish that **{**

} (Normann, Tr. 5776-5782, *in camera* (as corrected by Nov. 7, 2012 Joint Stipulation Regarding Trial Transcript Errata) (**{**

} ; (*see* CCPF 1338-1383).

The balance of this Response explains why Dr. Normann's pricing analysis is unreliable, and demonstrates that, even taken as true, that analysis contradicts the proposed finding and in fact supports Complaint Counsel's allegations of conspiracy.

Dr. Normann's data were flawed, insufficient, and unreliable. Figures 2A and 2B of Dr. Normann's report purport to show **{**

} (RX-712B (Normann Rep. at 12-13), *in camera*). These figures (as well as Figures 3, 4, 9, 10, 17, 27, 28, 29, 30, and 31 of Dr. Normann's report) rely critically on McWane-provided invoice data, both to allocate McWane's sales of domestically-produced Fittings between Open Specification and Domestic-only Specification "buckets," and to estimate McWane's prices for Fittings. (*See, e.g.*, Normann, Tr. 5117-5118, 5355, 5370, 5487-5488, 5495, 5530, 5593, 5601, 5718, 5619). The data contains numerous errors, including billing errors later acknowledged and corrected by McWane, but not accounted for by Dr. Normann, such as where a transaction multiplier exceeds the applicable published multiplier. (*See* CX 2552 at 001 (Respondent admission that there is no reason other than error for a transaction multiplier to exceed the applicable published multiplier); Normann, Tr. 5205-5210). The McWane-provided invoice data also has omissions and inconsistencies (*e.g.*, missing entries,

zeros in calculated or recorded transaction prices), which Dr. Normann did not systematically investigate, clarify, correct, or otherwise take into account, failing even to ask McWane to explain or address the inconsistencies. (Normann, Tr. 5151-5177, 5216, 5294-5295; CCPF 1428-1430). Instead, Dr. Normann simply dismissed the errors. (*See* Normann, Tr. 5174). Moreover, the large number of *known* errors in McWane's data suggests that there are many other errors in Dr. Normann's data that could not be readily observed. (*See* CX 2265-A (Schumann Rebuttal Rep. at 15)).

These omissions and inconsistencies could have a profound impact on Dr. Normann's conclusions. For example, the data Dr. Normann relied on indicated that for 2008, 4.27% of McWane's sales of non-domestically produced Fittings were erroneously recorded at prices above applicable published multipliers. (*See* CCPF 1429). But in January of 2008, the data indicated that 21% of McWane's sales of non-domestically produced Fittings were erroneously recorded at prices above applicable published multipliers. (*See* CCPF 1430). As Dr. Schumann testified, this January 2008 error bulge systematically and substantially biased Dr. Normann's findings in Figures 2A and 2B (and other Figures) – inflating his purported January 2008 prices relative to subsequent prices and thereby biasing his findings as to the 2008 price trend in favor of price reduction over time. (*See* CCPF 1430).

With respect to these invoicing errors, which were acknowledged and later corrected by McWane (CX 2552 at 001), Dr. Normann conceded that McWane may have issued incorrect invoices in one year and corrections in another year; that he did not match invoices and corrections or otherwise adjust his price series to account for these situations; that the frequency and magnitude of these incidents may vary across time periods; and that to the extent that there were errors in one time period and corrections in another, that too would have introduced

randomness and error into his price series. (Normann, Tr. 5145-5150). The flaws in the McWane data, and Dr. Normann's failure to account for those flaws, render his opinions unreliable.

Dr. Normann's classification of sales as Open Specification or Domestic-only Specification was inaccurate. Dr. Normann introduced yet more randomness and error into his price series (and other analyses) by assigning McWane Fittings sales to either Open Specification (open spec) or Domestic-only Specification (domestic spec) "buckets." Because the McWane-provided invoice data for domestically-produced Fittings did not specify whether these sales were used in Open Specification or Domestic-only Specification projects, Dr. Normann came up with his own decision rules for "bucketing" McWane's sales based on the prices at which those sales were reported. (Normann, Tr. 5118, 5197-5199, 5245-5250). As Dr. Normann agreed, it was important that this bucketing be accurate: the greater the number of bucketing errors, the greater the potential for error and bias in Dr. Normann's Figures. (Normann, Tr. 5118-5119).

Dr. Normann used different decision rules for non-domestically produced (ND-designated) and domestically produced (non-ND designated) Fittings sales. For non-domestically produced Fittings, Dr. Normann simply treated the sale as an Open Specification sale (although, as noted above, he included sales even where the calculated or recorded transaction multiplier was clearly in error because it was equal to or greater than one). (Normann, Tr. 5200-5204; CX 2552).

Dr. Normann's decision rules for bucketing domestically produced Fittings sales were more complicated, and even less reliable. (*See* RX-712A (Normann Rep. App. B). For transactions reflecting a multiplier greater than zero and less than one, he assigned the sale to

Open Specification or Domestic-only based on the relationship of the transaction multiplier to the published Open Specification and Domestic-only multipliers. (*See* RX-712A at 094-095 (Normann Rep. App. B). Even as to this relatively straightforward aspect of his decision rules, Dr. Normann acknowledged the possibility of bucketing error. For example, some discounted Domestic-only sales might have been miscategorized as Open Specification sales (Normann, Tr. 5253), and some premium priced Open Specification sales might have been miscategorized as Domestic-only sales. (Normann, Tr. 5230-5258, 5262-5263).

Further, **{**

} (*See* Normann, Tr. 5266, 5745-5746, *in camera*). Extensive trial testimony (beginning at Normann, Tr. 5198) revealed that Dr. Normann himself lacked a clear understanding as to how he carried out this "bucketing" exercise. As described at trial, Dr. Normann began by calculating the midpoint between the weighted average transaction prices per ton of Open Specification and Domestic-only sales (excluding the unassignable transactions). (Normann, Tr. 5283-5285). If an unassignable transaction had a price at or above the midpoint of its size range for the month of sale, Dr. Normann assigned it to the Domestic-only Specification category; if it was below, he assigned it to the Open Specification category. (Normann, Tr. 5283). This procedure is different from the procedure described in Appendix B to Dr. Normann's report, which he initially had testified was accurate and complete (Normann, Tr. 5198-5199). Dr. Normann conceded at trial that the explanation in his report was in places at odds with what he did in fact, and that the different methods would produce different results. (Normann, Tr. 5282-5286).

Dr. Normann also acknowledged at trial that the application of his decision rules (as described at trial) was a probabilistic exercise with the potential for error, and he agreed that he

would have greater confidence in his bucketings the farther the reported transaction prices departed in either direction from the calculated midpoints. (Normann, Tr. 5288-5291). Dr. Normann did not report the number of unassignable transactions subject to this confusion of methods and potential for error. (Normann, Tr. 5288).

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} (Normann, Tr. 5748-5750, *in camera*). **{**

} (Normann, Tr. 5749-5753, *in camera*). **{**

} (Normann, Tr. 5752-5757, *in camera*).

Dr. Normann did not ask McWane to spot-check the results of his procedures for characterizing sales as Open Specification or Domestic-only Specification sales; he did not do any check on his bucketing using documents outside of his McWane-provided data set; and he did not estimate error rates or otherwise statistically test of the reliability or validity of his bucketing methods. (Normann, Tr. 5250, 5251-5222, 5239-5240, 5254-5258, 5292-5294, 5265).

Dr. Normann improperly imputed sale prices for Fittings that had not been sold in a given month. Not every type of Fitting was sold during any given month by any given supplier. (Normann, Tr. 5178). In those months, there would have been no price recorded for the Fitting

in the invoice data to use in calculating an average price. To account for this, Dr. Normann used a technique referred to as "Last Order Carried Forward" ("LOCF") to impute invoice prices in months in which a supplier had no sale of a given Fitting, including Fittings in his "fixed basket." (Normann, Tr. 5186- 5187). He did so despite his knowledge that use of LOCF underestimates variability and can lead to biased results. (Normann, Tr. 5188-5190). Dr. Normann did not consider dropping from his calculations the Fittings in which a supplier had no sale for one or a specified number of months, nor did he consider use of interpolation or trend lines to impute prices in those months or the use of "offer" rather than invoice data. (Normann, Tr. 5178-5187).

Dr. Normann's data set was unsuitable for his purpose. Some sources of error – the previously discussed miscategorization of Open Specification and Domestic-only Specification sales, for example – were unique to Dr. Normann's McWane-provided data. (*See* Normann, Tr. 5117). Other data limitations affected Sigma- and Star-provided data as well. Dr. Normann's market-wide data set (the Sigma- and Star-provided invoice data as well as the McWane-provided invoice data) was unsuitable for Dr. Normann's purpose in several key respects. First, the invoice data did not include off-invoice price elements, and so the data set did not provide net price information. (*See* CCPF 1425 (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)). Rebates were one item not included in the invoice data (*see* CCPF 1425), and Dr. Normann acknowledged at trial that rebates were not uniform and affected different customers' true purchase prices differently. (Normann, Tr. 5130-5131).

Second, the data set conflated sales that were otherwise unlike and failed to identify what was being priced in a consistent way. (Normann, Tr. 5121-5123). For example, relying on

supplier-provided invoice data, Dr. Normann treated a sale in which the invoiced price was a delivered price the same as a different sale in which the invoiced price was for the Fitting only (and for which the customer incurred a separate delivery charge). (Normann, Tr. 5121-5123). As a result of this insensitivity to variations in definitions and terms, Dr. Normann's price measures for any given SKU may measure different things at different times, introducing still more randomness and error into his price series. (Normann, Tr. 5123-5128).

Finally, Dr. Normann's invoice data does not measure what it is supposed to, *i.e.*, it is not a "valid measuring instrument." (*See* Normann, Tr. 5088 (Dr. Normann agreed that a valid measuring instrument "measures what we think it is measuring"). Dr. Normann's price series looks at price as a function of date of invoice. (Normann, Tr. 5140). But a meaningful "event study" to assess the effect of McWane's, Sigma's, and Star's conduct on price instead would look at price as a function of the date of price formation. (*See* CX 2265-A (Schumann Rebuttal Rep. at 10); Schumann, Tr. 3776, 3779, 4099). The two measures are not the same, nor is there evidence that they are correlated. (Normann, Tr. 5145 (Dr. Normann did not seek to measure the correlation between Fittings prices at the time of price formation and at time of shipment/invoicing)). Dr. Normann acknowledges that lags between price formation and shipment and invoicing of Fittings vary from days to months. (Normann, Tr. 5138-5139). Dr. Normann did not study the distribution of lags, and does not know whether lag times are similar for a given supplier over time or across suppliers at a given time. (*See* Normann, Tr. 5137-5144). As a result, as Dr. Schumann explained, Dr. Normann's price series cannot help one understand the effect on prices of McWane's, Sigma's, and Star's conduct even if it were assumed that Dr. Normann's data and methodologies were otherwise reliable and sound. (CX 2265-A (Schumann Rebuttal Rep. at 5, 23, 45 n.62); *see also* CCPF 1426).

Dr. Normann's sampling methodology was unsound. In Figures 2A and 2B, Dr. Normann claimed to track, separately, McWane's, Sigma's, and Star's prices over time for "a fixed basket of Fittings," numbering only 24 in total. (Normann, Tr. 5295). This sample of Fittings, which Dr. Normann repeatedly used (*e.g.*, in his Figures 2, 3, 17, 27, 29, 30, and 31), consisted of too few observations to yield findings in which one can have confidence. (*See* CX 2265-A (Schumann Rebuttal Rep. at 24-26); Schumann, Tr. 5855, 5862-5863; Normann, Tr. 5117-5118, 5355, 5370, 5487-5488, 5495, 5530, 5593, 5601, 5718, 5619).

Dr. Normann acknowledged that "[i]nferences from the part to the whole are justified only when the sample is representative." (Normann, Tr. 5085). But he also acknowledged that he did not use any of the available statistical tests that might have enabled him to understand the confidence with which he can draw conclusions from a sample and apply them more broadly. (Normann, Tr. 5302, 5319). Instead, Dr. Normann, who does not hold himself out as expert in statistical sampling (Normann, Tr. 5302), limited his tests to a non-random, non-representative, and potentially biased sample of 18 small-sized Fittings and six medium-sized Fittings. (Normann, Tr. 5297). Dr. Normann's sampling methodology, his rationale, and Complaint Counsel's implicit critique can be found at Normann, Tr. 5295-5319 and Normann, Tr. 5727-5728, *in camera*. Dr. Normann limited his tests to this "sample" despite the fact that he had comparable data for the thousands of Fittings sold by McWane, Sigma, and Star. (Normann, Tr. 5296-5304).

Dr. Normann's sample size and composition was the result of his choices, some of which appear rather severe, arbitrary, and potentially biasing. For example, Dr. Normann selected a greater number of small Fittings than medium Fittings, and testified that Fittings sold for plant work may more often be discounted than Fittings sold for line work, and that medium-sized

Fittings are more likely to be sold for plant work than small-sized Fittings. (Normann, Tr. 5362). Dr. Normann did not know whether any reduction in Project Pricing would have been more apparent had he sampled medium-sized Fittings more completely. (Normann, Tr. 5362-5363).

Another example is the fact that Dr. Normann limited his sample to Fittings (a) for which Star had Domestic Fittings sales of more than ten tons during the period 2009 to 2011, and (b) that he could match to corresponding McWane and Sigma Fittings. (Normann, Tr. 4921, 5303). Dr. Normann explained that he imposed the Star Domestic-sales screen so that he would not be hindered in his analysis of Domestic Fittings sales by the inclusion of Fittings that Star had not sold or had sold only in small quantities. (Normann, Tr. 5305). Even as to his Domestic Fittings analysis, the screen distorts, rather than improves, Dr. Normann's analysis. As he acknowledged, because he limited his sample to Fittings for which Star had domestic sales of more than ten tons during the period 2009 to 2011, he reduced the chance that Star domestically-produced Fittings introduced later in time would make it into his basket. (Normann, Tr. 5303-5304). With respect to Figures 2A and 2B, which do not include any analysis of Domestic-only Specification sales (Normann, Tr. 5305), the "Star domestic sales" screen serves no purpose. Had Dr. Normann made the modest additional effort necessary to create a distinct price series for open spec sales, he could have expanded his analysis to sales of hundreds of small- and medium-sized Fittings, which Dr. Normann agrees would have "tend[ed] to lead to greater precision" of his price estimates. (Normann, Tr. 5304-5309).

Even if the above described methodological choices were appropriate, Dr. Normann sample size was made unnecessarily small as a result of his lack of diligence in applying it to the products sold by McWane, Sigma, and Star. For example, **{**

} (RX-712B (Normann Rep. at 65), *in camera*), **{**

}

(Normann, Tr. 5313-5314, *in camera*). **{**

} (*See* Normann, Tr. 5734-5737, 5739-5743, *in camera*). {

} (*See* Normann, Tr. 5734-5737, 5739-5743, *in camera*). **{**

} (Normann, Tr. 5744, *in camera*). Dr. Normann could have contacted someone at McWane for matching assistance, but did not do that, despite acknowledging the importance of finding matches to avoid needlessly excluding products from his sample. (Normann, Tr. 5310, 5311). Had he been more diligent in his matching, Dr. Normann could have roughly doubled his sample size while adhering to the methodological choices he had made.

Dr. Normann failed to control or adjust for the effect on price of confounding variables. In addition to the unreliability of Dr. Normann's data and the inappropriateness of his "fixed basket of fittings" as basis for Figures 2A and 2B (and other Figures, as previously indicated), Dr. Normann's findings are subject to the influence of potentially confounding variables. (*See* CCPF 1433). For example, Dr. Normann did not control for changes in McWane's (or other suppliers') customer mix over time, despite his awareness that customers in different regions pay

different prices for the same products, or for size of purchases from McWane (or other suppliers) over time. (Normann, Tr. 5131).

One price-influencing factor that Dr. Normann did consider in his opinion is the cost of material inputs to the Fittings production process, but he did so in an unreliable, incomplete, and misleading way. He superimposed a metal and energy costs index on his price indices in Figure 2B, (Normann, Tr. 5343), but he did not conduct any statistical exercise to determine the actual extent to which metal and energy costs would have been expected to influence prices. (Normann, Tr. 5343). Metals and energy account for about 30% of the costs of producing Fittings. (Normann, Tr. 5531). Dr. Normann did not index the remaining 70% of costs of producing Fittings in Figure 2B (or elsewhere), nor even indicate their direction of change. (Normann, Tr. 5343-5344). Moreover, other factors might also have affected the demand for/price of Fittings at any given time – housing starts, which plummeted during the relevant period and which Dr. Normann knew to be substantially correlated with Fittings demand; macroeconomic conditions, which included a recession during the period of interest to him; and numerous other demand shifters. (Normann, Tr. 5344-5346). But Dr. Normann did not control for these or any supply and demand shifters. (Normann, Tr. 5346; *see also* CCPF 1433). He does not know whether the downward pressure from these conditions more than offset increases in metals and energy costs. (Normann, Tr. 5344-5349). As a result, Dr. Normann had to and did acknowledge at trial that his Report *does not address the ultimate question*, "holding all supply and demand factors constant except for the presence or absence of collusion, [observed] price[s are] consistent with collusion or inconsistent with collusion." (Normann, Tr. 5348).

Dr. Normann failed to report any robustness-testing of his data. Dr. Normann's Report did not describe any robustness-testing of his data, procedures, or findings. (*See* CCPF 1434).

At trial, Dr. Normann insisted that the compatibility of his Figures demonstrated the robustness of all. (Normann, 5256-5257). That compatibility is not surprising given that Dr. Normann did not vary his data source, his assumptions, or his procedures as he went from "test" to "test." (Normann, Tr. 5261 (Dr. Normann used the same database for all of his alternative scenarios); *see generally* CCPF 1424-1435; Schumann, Tr. 5831-5832). **{**

} (*See* Normann, Tr. 5776-5782, *in camera* (as corrected by Nov. 7, 2012 Joint Stipulation Regarding Trial Transcript Errata)).

Dr. Normann failed to test his findings for statistical significance or to calculate surrounding confidence intervals. Dr. Normann acknowledged that his figure 2A is only an *estimate* of the true values of McWane's prices over time for the Fittings in his basket. (Normann, Tr. 5318-5319). Nevertheless, Dr. Normann failed to measure the precision of his estimates by calculating confidence intervals or otherwise testing the statistical significance of his findings. (Normann, Tr. 5322, 5331; *see also* CCPF 1434).

Dr. Normann claimed that he did not need to create confidence intervals or otherwise test for statistical significance because his data showed prices went down, not up as the Complaint suggested. (Normann, Tr. 5331-5333). He seeks to explain his claim by asking the Court to consider a hypothetical test of the proposition that people in New York weigh more than people in California. The discussion extends from Normann, Tr. 5333-5341, and confirms that one must examine confidence intervals or other measures of statistical significance to assess findings like Dr. Normann's. Authoritative economists and econometricians insist "that every serious

estimate deserves a reliable assessment of precision." (Normann, Tr. 5112-5113). With such an estimate, one would be able to assess whether an estimate showing that (to use the example Dr. Normann discussed at trial) Californians on average outweigh New Yorkers was so precise as to exclude the possibility that in fact New Yorkers outweighed Californians. Without it, all one has is an estimate, and doubts about its precision based on randomness of underlying data and methodology. The same is true of Dr. Normann's Figures 2A and 2B (and others). Because Dr. Normann did not make a reliable assessment of the precision of his estimates, they cannot exclude the possibility that the true values are greatly different. (Normann, Tr. 5105 and 5107-5108; *see also* CX-2265-A (Schumann Rebuttal Rep. at 25)).

Dr. Normann failed to test his findings for statistical significance or to calculate surrounding confidence intervals, despite agreeing with Dr. Schumann and the authors of numerous authoritative articles, portions of which were admitted into evidence, that:

> "[a]n analysis is only as good as the data on which it rests," which should be found reliable and suitable "before implementing any empirical test," (Normann, Tr. 5083-5085, 5105-5107);
>
> "[t]he inferences that may be drawn from a study depend on the quality of the data and the design of the study. . . . [t]he data might not address the issue of interest, might be systematically in error, or might be difficult to interpret due to confounding," (Normann, Tr. 5083-5084, 5089-5090);
>
> "[r]eliability is necessary, but not sufficient, to ensure accuracy. In addition . . . 'validity' is needed. A valid measuring instrument measures what it is supposed to," (Normann, Tr. 5083-5084, 5087-5088);
>
> "[s]tatistical data is subject to sampling errors, biases, and changing definitions which have to be understood," (Normann, Tr. 5105, 5107 (where "bias" is "a systematic tendency for an estimate to be too high or too low" Normann, Tr. 5102));
>
> "[w]hen a sample is used to estimate a numerical characteristic of the population, the estimate is likely to differ from the population

> value because the sample is not a perfect microcosm of the whole," (Normann, Tr. 5083-5084, 5101);
>
> in the "use of sample data to characterize a population . . . [i]nferences from the part to the whole are justified only when the sample is representative," (Normann, Tr. 5083-5084, 5085 (where "population" means "the items that you're interested in learning about" Normann, Tr. 5100-5101));
>
> correlation studies can be confounded by insufficient or inaccurately measured data or a model that "is specified wrongly because of the omission of a variable or variables that are related to the variable of interest," (Normann, Tr. 5083, 5104-5105);
>
> "[w]hen assessing the impact of random error, a statistician might consider the following topics: Estimation . . . . How good is this estimate? Precision can be expressed using the 'standard error' or a confidence interval," (Normann, Tr. 5096) and that "[i]t is a basic principle of sound econometrics that every serious estimate deserves a reliable assessment of precision," (Normann, Tr. 5113); and
>
> "supposing that a significance test fails to reject the null hypothesis, [t]he confidence interval may prevent the mistake of thinking" that alternative hypotheses have been disproved," (Normann, Tr. 5083-5084, 5098), because "[t]he confidence interval can be considered as simply the set of acceptable hypotheses. It reflects one's confidence in the estimation process of the population's value. Therefore, any hypothesis that lies outside the confidence interval may be judged implausible." (Normann, Tr. 5105, 5107-5108; *see generally* Normann, Tr. 5083-5108).

Dr. Normann agrees with these statements and propositions, and yet his "hypothesis testing" ignores and at times flouts each of these basic and generally accepted precepts of sound economic research and analysis. (*See* CCPF 1433-1434).

Dr. Normann's Figure 2B actually shows that prices went up during the conspiracy period. Even setting aside all of the disqualifying flaws in Dr. Normann's price series, the proposed finding is unsupported, misleading, and contradicted by the weight of the evidence because, among other things, **{**

} (Normann, Tr. 5765-5782, *in camera* (as corrected by Nov. 7, 2012 Joint Stipulation Regarding Trial Transcript Errata)). This directly contradicts Dr. Normann's testimony as quoted in the proposed finding.

Dr. Normann claimed at trial that **{**

} (Normann, Tr. 5766, *in camera*). **{**

} (Normann, Tr. 5763, *in camera*). **{** **}** (Normann, Tr. 5766, *in camera*). **{**

} (Normann, Tr. 5761-5762, *in camera*). Based on the numbers reflected in his Figure 2B, Dr. Normann concluded that the pricing evidence he had adduced was inconsistent with conspiracy. (Normann, Tr. 4747-4748). He expressed the view that price increases and increasing price parallelism during the conspiracy period, followed by a decline in prices in the post-conspiracy period, would have been consistent with conspiracy. (Normann, Tr. 4747-4748).

{

} (Normann, Tr. 5767-5771, 5775-5776, *in camera*).

{

} (Normann, Tr. 5769-5770, *in camera* (emphasis added)). **{**

}

(Normann, Tr. 5770-5771, *in camera*), **{**

} (Normann, Tr. 5771, *in camera*). **{**

} (Normann, Tr. 5775-5776, *in camera*).

{

} (Normann, Tr. 5763-5764, *in camera*). Dr. Normann was aware that the 2008 agreement among McWane, Sigma, and Star was alleged to have been initiated in January and February of 2008 and to have been falling apart by October and November of that same year. (Normann, Tr. 5351; *see also* Schumann, Tr. 4068). Moreover, Dr. Normann acknowledged that if an agreement had been entered into in January, one would not have expected to see a January ("immediate") price effect in his Figure. (Normann, Tr. 5352). Dr. Normann's failure to report price changes for the actual period during which price effects of the conspiracy might have been expected to be manifest, February 2008 to October 2008, is inexplicable and renders his opinion and the proposed finding based thereon further unreliable and misleading.

{

} (*see* Normann, Tr. 5765-5767, *in camera*), **{**

} (*See* Normann, Tr. 5765-5782, *in camera* (as corrected by Nov. 7, 2012 Joint Stipulation Regarding Trial Transcript Errata)). **{**

} (Normann, Tr. 5776-5782, *in camera* (as corrected by Nov. 7, 2012 Joint Stipulation Regarding Trial Transcript Errata)).

Further, Dr. Normann's Figure 2B, shows **{**

} (RX-712B (Normann Rep. at 13 fig. 2B), *in camera*), satisfying the second of Dr. Normann's stated characteristics of pricing behavior that is consistent with conspiracy. (*See* Normann, Tr. 4737). **{**

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

190. Dr. Normann testified †**{**

} (Normann, Tr. 5021 in camera)

Response to Proposed Finding No. 190

The proposed finding is misleading. Complaint Counsel does not dispute that Dr. Normann made the quoted statement, but Dr. Normann lacked a reasonable basis for the

statement, which is unreliable and misleading. The proposed finding is misleading insofar as Dr. Normann relies on Figure 3 of his report to make this statement. (*See* Normann, Tr. 5019-5021, *in camera*). **{**

} (RX-712B (Normann Rep. at 14-15), *in camera*; *see supra* Response to Proposed Finding No. 189 **{**

}). **{**

} To do this, Dr. Normann created decision rules, which are described in Appendix B of his report, were modified by him in practice, and inject substantial uncertainty and unreliability into his conclusions. (Normann, Tr. 5335-5356; *see supra* Response to Proposed Finding No. 189 (**{**

})).

Figure 3 is also unreliable because it did not control for any differences in supply or demand for Open Specification and Domestic Fittings. (Normann, Tr. 5360). Dr. Normann simply assumed that the Open Specification market and the Domestic Fittings market are subject to similar underlying forces. (Normann, Tr. 5360-5361). In effect, Dr. Normann uses Domestic Fittings prices "as a control for a host of variables that would otherwise confound [his] study of

open spec prices." (Normann, Tr. 5339-5360). However, Dr. Normann acknowledged that the relative demand for Open Specification and Domestic Fittings has changed over time. (Normann, Tr. 5360).

Figure 3 is also unreliable because it uses only about a dozen observations in each of his three time periods. Dr. Normann claimed to be familiar with the research literature on how many observations one needs to draw valid conclusions from data, and acknowledged that his number of observations was low: "certainly – it would be considered a small sample size." (Normann, Tr. 5363-5364).

Finally, Figure 3 is unreliable because Dr. Normann did not control for the impact on prices of potential confounding variables, such as differential impacts of cost changes. (Normann, Tr. 5365-5366). **{**

} (Normann, Tr. 5366, 5667-5668, *in camera*). **{**

} (Normann, Tr. 5668, *in camera*). Dr. Normann did not calculate slopes for any other periods. (Normann, Tr. 5365). In fact, his "slopes" do not reflect coherent price movements, but rather are a sort of averaging out of a variety of slopes within each time period. (Normann, Tr. 5366-5367).

To the extent Figure 3 is reliable, it supports the allegations in the Complaint. Dr. Normann concluded in his Report that if the allegations of the Complaint were true, he would expect in Figure 3 to see a downward slope to his ratio of open spec to domestic prices *following* the putative collusion period. **{**

} (Normann, Tr. 5361, 5664-5667, *in camera*). For small Fittings, there is a downward slope as well. (Normann, Tr. 5364 (acknowledging that the

price of imported Fittings fell relative to domestic in the post-conspiracy period); *see also* RX-712B (Normann Rep. at 15), *in camera* ({

}}).

V. There Is No Evidence of Advance Price Discussions or Agreements

A. Complaint Counsel and Dr. Schumann Concede That There is No Direct Evidence of Advance Price Discussions or Agreements

191. Complaint Counsel concedes that it lacks evidence "that McWane directly communicated its prices to any other DIWF manufacturer or supplier in advance of communicating them to its customers or potential customers." (See CRFA No. 19).

Response to Proposed Finding No. 191

The proposed finding is unsupported, vague, and misleading. As noted in Complaint Counsel's specific objection to the cited RFA, the terms "directly communicated," "prices" and "in advance of" as vague and ambiguous. The proposed finding is misleading and immaterial because direct communication of specific prices is not necessary for McWane to have agreed to raise multipliers in exchange for Sigma and Star's curtailment of Project Pricing and submission of DIFRA data. The proposed finding is also misleading because McWane communicated its pricing actions to the industry, including its competitors, before the effective date of the pricing actions, and in some cases before it even announced its pricing actions. (*See*, *e.g.*, CCPF 548, 932, 1182; Tatman, Tr. 325).

The proposed finding is also misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests that Sigma, Star, and McWane did not communicate with each other from 2007 to 2011, or that Star did not convince Sigma to take a list price increase. (*See* CCPF 700-827, 1029-1040). The evidence also demonstrates that, at times, Fittings suppliers transmit price announcements directly to their competitors at the same time as transmitting those announcements to their customers. (*See* CCPF 673).

192. Complaint Counsel's expert, Dr. Laurence Schumann, conceded that there were no express agreements or meetings between McWane, Sigma, and Star to fix prices. (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.").

Response to Proposed Finding No. 192

The proposed finding is incorrect, incomplete, and misleading insofar as it suggests that Dr. Schumann conceded that there was no agreement between McWane, Sigma, and Star to fix prices. In citing Dr. Schumann, the proposed finding omits the further testimony of Dr. Schumann on page 3847 of the transcript: "But I do think they put into place practices and that would facilitate coming to an agreement, coming to a mutual understanding that would result in higher prices." (Schumann, Tr. 3847). Dr. Schumann also testified repeatedly that in his opinion the Fittings market was susceptible to collusion and that McWane, Sigma, and Star took advantage of these market factors and communicated so as to facilitate an increase in prices. (CX 2260-A (Schumann Rep. at 7-8, 38, 55-56); Schumann, Tr. 3770, 3842; *See also* CCPF 651-665). Dr. Schumann also testified specifically about how direct and indirect communication supports reaching a mutual understanding. (Schumann, Tr. 3805-3808).

B. Star and Sigma learned about McWane's 2008 multiplier adjustments from their own customers after the fact

193. Sigma and Star learned about McWane's pricing changes only after the fact, and from their own customers. (Rybacki, Tr. 3559-3560 ("I get my information from the customer. I don't get it from a piece of paper written by a competitor. I get it from my customers."); Minamyer, Tr. 3148 (Q: "When you were at Star, when you were the national sales manager, how would you learn if one of your competitors had changed its pricing?" A: "We would ask the customers."); Pais, Tr. 2049-2050 (Q: "All right. Now -- and I think I heard you, but you tell me, sir, that you typically would find out the prices of what another company had announced in the market from customers after they were announced; is that right, sir?" A: "Always."), 2058-2060

(Q: "And did somebody send them directly to you, sir?" A: "It's pretty customary, whenever a competitor sends a letter, the customers would provide a copy to us and then someone would send it to a team through electronic --")).

Response to Proposed Finding No. 193

The proposed finding is inaccurate, vague, and misleading. The cited testimony describes various ways in which Sigma and Star gathered competitive intelligence, which included reading pricing letters of their competitors. (*See also* CCPF 670-678, 684-685, 686-698). The cited testimony does not support the proposed finding that Sigma and Star learned about McWane pricing changes "only after the fact." Sigma and Star had numerous unexplained communications between themselves and with McWane prior to McWane's price announcements in January 2008 and June 2008. (*See, e.g.*, CCPF 700-841, 1030). The proposed finding is also misleading and vague insofar as "after the fact" suggests that Sigma and Star learned about McWane's 2008 price increases only after they went into effect. (*See supra* Response to Proposed Finding No. 123).

194. Star did not receive any advance notice of McWane's multiplier changes. (McCutcheon, Tr. 2511 (Q: "And that's because Star Pipe had no advanced knowledge of what those prices were, did it, sir?" A: "No, sir.").).

Response to Proposed Finding No. 194

The proposed finding is misleading and contradicted by the weight of the evidence. The proposed finding is misleading insofar as it suggests that Star did not learn about McWane's price increases prior to their effective date. For example, upon receiving McWane's January 11, 2008, letter, Star knew that (i) McWane would announce new multipliers in the near future, (ii) the increase would be 10% to 12% above the current prevailing multiplier levels, (iii) McWane would sell only at the published multiplier, and (iv) the new multiplier would be effective February 18, 2008. (CCPF 932). Therefore, Star understood that the January 11, 2008 letter was an invitation, which Star accepted, to increase its multiplier by the amount that McWane

announced in exchange for curtailing Project Pricing. (CCPF 971-996). Upon receiving McWane's January 18, 2008, letters, Star knew what price increases McWane would put into effect on February 18, 2008, and Star matched those price increases on February 6, 2008, in advance of their effective date. (CCPF 1008).

The proposed finding is also misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests that McWane, Sigma, and Star did not communicate about pricing changes in advance of the announcement of such changes. Sigma and Star had numerous unexplained communications between themselves and with McWane prior to McWane's price announcements in January 2008 and June 2008. (*See, e.g.*, CCPF 700-841, 1030).

195. Sigma learned about McWane's and Star's pricing decisions only after the fact, and from its own customers. Pais, Tr. 2049-2050 (Q. All right. Now – and I think I heard you, but you tell me, sir, that you typically would find out the prices of what another company had announced in the market from customers after they were announced; is that right, sir? A. Always.").)

Response to Proposed Finding No. 195

The proposed finding is vague, misleading, and contradicted by the weight of the evidence. It is not clear whether the proposed finding and cited testimony refer to list prices, published multipliers, or Project Prices. The cited testimony also merely affirms that *one way* Sigma gained competitive intelligence was from its customers and does not exclude the possibility of other communications. The proposed finding is misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests that McWane, Sigma, and Star did not communicate about pricing changes in advance of the announcement of such changes. Sigma and Star had numerous unexplained communications between themselves and with McWane prior to McWane's price announcements in January 2008 and June 2008. (*See, e.g.*, CCPF 700-841, 1030). The proposed finding is also misleading insofar as "after the fact"

suggests that Sigma and Star learned about McWane's 2008 price increases after the adjustments went into effect. (*See supra* Response to Proposed Finding No. 123).

196. 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." (Rybacki, Tr. 1108).

Response to Proposed Finding No. 196

The proposed finding is misleading, vague, and immaterial. It is not clear whether the cited testimony refers to list prices, published multipliers, or Project Prices. The cited testimony also merely affirms *some* of the ways in which Sigma gained competitive intelligence and does not exclude the possibility of other communications. The proposed finding is misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests that McWane, Sigma, and Star did not communicate about pricing changes in advance of the announcement of such changes. Sigma and Star had numerous unexplained communications between themselves and with McWane prior to McWane's price announcements in January 2008 and June 2008. (*See, e.g.*, CCPF 700-841, 1030). The proposed finding is also misleading insofar as it suggests that Sigma and Star learned about McWane's 2008 price increases after the adjustments went into effect. (*See supra* Response to Proposed Finding No. 123).

197. McWane learned about Sigma's and Star's pricing decisions only after the fact, and from its own customers. (Tatman, Tr. 306 (Q: "From time to time, sir, when your competitors announce a price action through a letter, do you get copies of those letters?" A: "We do. And it usually comes through a customer. And sometimes we pick them up in a day. Sometimes it's two weeks till we know what's going on.")).

Response to Proposed Finding No. 197

The proposed finding is misleading, vague, and contradicted by the weight of the evidence. It is not clear whether the proposed finding and cited testimony, in using the terms "pricing decisions" and "price action," refer to list (catalog) prices, published multipliers, or Project Prices. The proposed finding is incorrect and misleading insofar as it suggests that

McWane learned about Star's and Sigma's pricing decisions only after those pricing decisions became effective. The weight of the evidence establishes that Fittings suppliers generally announced price increases in advance of their effective date, typically four weeks in advance (*see*, *e.g.*, CCPF 548; Tatman, Tr. 325), and that the competing Fittings suppliers routinely received each other's price increase letters well before the announced price decisions became effective. (*See* CCPF 670-675). Moreover, the evidence establishes that the Fittings suppliers depended on one another to actually implement and sustain price increases. (*See* CCPF 668).

The proposed finding is also misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests that McWane, Sigma, and Star did not communicate about pricing changes in advance of the announcement of such changes. Sigma and Star had numerous unexplained communications between themselves and with McWane prior to McWane's price announcements in January 2008 and June 2008. (*See*, *e.g.*, CCPF 700-841, 1030).

VI. The Trial Record Contains Dozens of Sworn Denials of Any Advance Price Discussions or Agreements

A. McWane Denied Advance Price Discussions or Agreements

198. 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. (Tatman, Tr. 978). Instead, McWane decided those prices independently and internally and issued them on its own. (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.").)

Response to Proposed Finding No. 198

Complaint Counsel does not dispute that at trial Mr. Tatman made the self-serving denials attributed to him. However, the proposed finding and cited testimony are contradicted by the weight of the evidence contemporaneous with the events at issue insofar as the proposed

finding and cited testimony suggest that McWane priced its Fittings independently at all times, and did not communicate regarding the January 2008 multiplier announcements, June 2008 multiplier announcements, April 2009 list prices, or June 2010 price increases with anyone from Star or Sigma.

Consistent with testimony from Star and Sigma, Mr. Tatman testified that McWane considers competitor price announcements when setting its own prices. (*See* CCPF 674; Tatman, Tr. 287-290; CX 2483 (Tatman, IHT at 43-44)). Phone records demonstrate that **{ }**. (*See* CCPF 715 (**{ }**), 739-742, 760, 784). Mr. Tatman admitted at trial that there is no situation under which this would have been an appropriate contact with competitors under McWane's policies and protocols. (*See* CCPF 826-827).

More broadly, the weight of the evidence establishes that there were extensive communications among the Fittings suppliers from 2007 through 2011. (*See* CCPF 700-827). In particular, the evidence establishes that the suppliers agreed, coordinated, and communicated with one another through customer letters and/or direct communications regarding each of the price announcements listed in the proposed finding. (*See* CCPF 931-1021 (January 2008); CCPF 1156-1259 (June 2008); CCPF 1491-1553 (April 2009); CCPF 1554-1571 (June 2010)).

199. 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. (Tatman, Tr. 924 ("No."), 1005-1006, *in camera*† (†**{ }**), 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.").).

Response to Proposed Finding No. 199

Complaint Counsel does not dispute that at trial Mr. Tatman made the self-serving denials attributed to him. However, the proposed finding and cited testimony are contradicted by the weight of the evidence contemporaneous with the events at issue insofar as the proposed finding and cited testimony suggest that Mr. Tatman never had any pricing discussions with anyone at Sigma. Also, the proposed finding and cited testimony are contradicted by the weight of the evidence insofar as they suggest that McWane never entered into any agreement regarding price. (*See* CCPF 907-1071). The weight of the evidence establishes that there were extensive communications among the Fittings suppliers at key pricing decision points from 2007 through 2011. (*See* CCPF 1030, 700-827). In particular, the evidence establishes that the suppliers agreed, coordinated, and communicated with one another through customer letters and/or direct communications in advance of and regarding implementation of pricing changes in at least January 2008, June 2008, April 2009, and June 2010. (*See* CCPF 931-1021 (January 2008); CCPF 1156-1259 (June 2008); CCPF 1491-1553 (April 2009); CCPF 1554-1571 (June 2010)).

200. 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. (Tatman, Tr. 978, 1005-1006.)

Response to Proposed Finding No. 200

Complaint Counsel notes that Mr. Tatman did not use the word "never," as attributed to him in the proposed finding, on any of the cited pages. Otherwise, Complaint Counsel does not dispute that at trial Mr. Tatman made the self-serving denials attributed to him. However, the proposed finding and cited testimony are contradicted by the weight of the evidence contemporaneous with the events at issue insofar as the proposed finding and cited testimony suggest that McWane always made independent pricing decisions and never discussed pricing with its competitors. The weight of the evidence establishes that there were extensive

communications among the Fittings suppliers at key pricing decision points from 2007 through 2011. (*See* CCPF 1030, 700-827). In particular, the evidence establishes that the suppliers agreed, coordinated, and communicated with one another through customer letters and/or direct communications in advance of and regarding implementation of pricing changes in at least January 2008, June 2008, April 2009, and June 2010. (*See* CCPF 931-1021 (January 2008); CCPF 1156-1259 (June 2008); CCPF 1491-1553 (April 2009); CCPF 1554-1571 (June 2010)).

B. Sigma Denied Advance Price Discussions or Agreements

201. Sigma's Vice President of Sales, Larry Rybacki, likewise testified that he "never" discussed Fittings prices or reached an agreement of any kind with anyone at McWane, including Mr. Tatman, Mr. Jansen, Mr. Frank, or Mr. Page. (Rybacki, Tr. 3649-3651, *in camera*† (†**{** **}**†), 3659 "No, I did not."), 3682-3683 ("Never." … "No." … "No." "No." … "No."),1115-1116 (Q: Did you speak to anybody at McWane about that?" A: "No.").)

Response to Proposed Finding No. 201

Complaint Counsel does not dispute that at trial Mr. Rybacki made the self-serving denials attributed to him, but the proposed finding and cited testimony are misleading and contradicted by the weight of the evidence contemporaneous with the events at issue insofar as the proposed finding and cited testimony suggest that Mr. Rybacki never discussed Fittings prices or reached an agreement of any kind with anyone at McWane. The weight of the evidence establishes that there were extensive communications among the Fittings suppliers at key pricing decision points from 2007 through 2011. (*See* CCPF 1030, 700-827). In particular, the evidence establishes that the suppliers agreed, coordinated, and communicated with one another through customer letters and/or direct communications in advance of and regarding implementation of pricing changes in at least January 2008, June 2008, April 2009, and June 2010. (*See* CCPF 931-1021 (January 2008); CCPF 1156-1259 (June 2008); CCPF 1491-1553 (April 2009); CCPF 1554-1571 (June 2010)).

202. Mr. Rybacki denied entering into any agreement with McWane to stop or reduce job pricing. (Rybacki, Tr. 3661, *in camera*† (†**{ }**†)).

Response to Proposed Finding No. 202

Complaint Counsel does not dispute that at trial Mr. Rybacki made the self-serving denial attributed to him. However, the proposed finding and cited testimony are contradicted by the weight of the evidence, including contemporaneous documents, which establishes that McWane, Sigma, and Star communicated with one another through customer letters and/or direct communications pursuant to which McWane agreed, as contemplated by the Tatman Plan, to raise published Fittings prices in "stepped or staged" increments in exchange for Sigma's and Star's agreement to curtail Project Pricing. (CCPF 930-1071).

203. Mr. Rybacki testified that he never discussed Fittings prices with anyone at McWane, inclu ing Mr. Tatman, Mr. Jansen, Mr. Frank or Mr. Page. (Rybacki, Tr. 3649-3651, *in camera*† (†**{ }**†), 3659 "No, I did not."), 3682-3683 ("Never." … "No." … "No." "No." … "No.").

Response to Proposed Finding No. 203

Complaint Counsel does not dispute that at trial Mr. Rybacki made the self-serving denials attributed to him. However, the proposed finding and cited testimony are contradicted by the weight of the evidence, including contemporaneous documents, which establishes that there were extensive communications among the Fittings suppliers at key pricing decision points from 2007 through 2011. (*See* CCPF 1030, 700-827). In particular, phone records demonstrate that **{ }**. (*See* CCPF 715 (**{ }**), 739-742, 760, 784).

204. Mr. Rybacki of Sigma had no price related discussions with McWane before making any of the price decisions for Sigma. (Rybacki, Tr. 3683-3684 ("Q: And did you ever discuss and agree upon fittings prices with Mr. Page? A: "No. Q: And what about Jerry Jansen? Did you discuss and agree upon fittings prices with Mr. Jansen? A: No. Q: "But at no time did you call anyone at McWane and say, 'Hey, we're going to stop job pricing in Florida or California or anywhere else,' did you, sir? A: Never did.… Q: Mr. Rybacki, at some point in here did you call up someone at McWane and say, 'Hey, guys, let's call the dogs off, let's

just all stop all this kind of crazy job pricing and let's raise prices together?' A: Never.…Q: Did you -- sometime around June 10, 2010, did you ever discuss this letter or Sigma's idea with anyone at McWane, sir? A: Never discussed it with McWane. Q: Did you have any communications at all with anyone at McWane in June of 2010 about pricing? A: Absolutely not."); (Rybacki, Tr. 3716-3722, 3693 (Q: "Did you ever call anyone at McWane and discuss that with them?" A: "No."), 3708 (Q: "Did you discuss it with anybody at McWane, sir? A: "Never.").).

Response to Proposed Finding No. 204

The proposed finding is misleading and contradicted by the weight of the evidence. The weight of the evidence establishes that there were extensive communications among the Fittings suppliers at key pricing decision points from 2007 through 2011. (*See* CCPF 1030, 700-827). In particular, phone records demonstrate that **{**

}. (*See* CCPF 715 (**{**

}), 739-742, 760, 784).

205. Mr. Rybacki denied receiving any advance knowledge regarding McWane's prices. (Rybacki, Tr. 3683 (Q: "Now, the fact is, Mr. Rybacki, that you did not have advanced knowledge of any decision that McWane was making with regard to its prices, did you, sir?" A: "No.").)

Response to Proposed Finding No. 205

Complaint Counsel does not dispute that at trial Mr. Rybacki made the self-serving denial attributed to him. However, the proposed finding and cited testimony are misleading and contradicted by the weight of the evidence insofar as the proposed finding and cited testimony suggest that Mr. Rybacki did not receive advance knowledge regarding McWane's prices. The weight of the evidence, including contemporaneous documents, establishes that there were extensive communications among the Fittings suppliers at key pricing decision points from 2007 through 2011. (*See* CCPF 1030, 700-827). In particular, phone records demonstrate that **{**

}. (*See* CCPF 715 (**{**

}), 739-742, 760, 784).

The proposed finding is also misleading insofar as it suggests that McWane learned about Star's and Sigma's pricing decisions only after those pricing decisions became effective. The weight of the evidence establishes that Fittings suppliers generally announced price increases in advance of their effective date, typically four weeks in advance (*see*, *e.g.*, CCPF 548; Tatman, Tr. 325), and that the competing Fittings suppliers routinely received each other's price increase letters well before the announced price decisions became effective. (*See* CCPF 670-675). Moreover, the evidence establishes that the Fittings suppliers depended on one another to actually implement and sustain price increases. (*See* CCPF 668).

Further, the proposed finding is misleading insofar as it suggests that McWane, Sigma, and Star needed advance knowledge of specific prices to have agreed, coordinated, and communicated with one another through customer letters and/or direct communications in advance of and regarding implementation of pricing changes in at least January 2008, June 2008, April 2009, and June 2010. (*See* CCPF 931-1021 (January 2008), CCPF 1156-1259 (June 2008), CCPF 1491-1553 (April 2009); CCPF 1554-1571 (June 2010)).

206. Mr. Rybacki testified that Sigma's prices and McWane's prices "are never really the same" because of all of the pricing variables that exist, including rebates. (Rybacki, Tr. 3576 (Q: "Was it Sigma's intent to also go up the same amount?" A: "That's a hard question because our prices are not the same. I mean, their rebates are different than ours. Their terms are different than ours. So when you say "the same," our prices are really never the same. But I wanted to go up and I wanted to be consistent.")).

Response to Proposed Finding No. 206

Complaint Counsel does not dispute that at trial Mr. Rybacki made the self-serving statements attributed to him. However, the proposed finding and cited testimony are misleading and contradicted by the weight of the evidence contemporaneous with the events at issue insofar as proposed finding and cited testimony suggest that Fittings suppliers do not follow each other's published prices, or that Project Pricing and other pricing terms are interchangeable aspects of

Fittings pricing and of equal or comparable competitive significance. Fittings suppliers routinely match each other's published prices, without regard to rebates and other payment terms. (CCPF 667-668). Secondary price terms such as rebates, payment terms, and freight terms are less significant than Project Pricing in day-to-day competition for Fittings business, and a reduction in Project Pricing in and of itself tends to lead to higher and more stable prices. (*See* CCPF 549-561; *see also supra* Response to Finding Nos. 103, 108).

207. Mr. Brakefield denied entering into any agreement with McWane to fix prices. (Brakefield, Tr. 1333-1334 ("No, sir."), 1337 ("No, sir." … "No, sir.").).

Response to Proposed Finding No. 207

Complaint Counsel does not dispute that at trial Mr. Brakefield made the self-serving denials attributed to him. However, the proposed finding and cited testimony are misleading and contradicted by the weight of the evidence insofar as the proposed finding and cited testimony suggest that Sigma never discussed Fittings prices or reached an agreement of any kind with anyone at McWane or Star. The weight of the evidence, including contemporaneous documents, establishes that there were extensive communications among the Fittings suppliers at key pricing decision points from 2007 through 2011. (*See* CCPF 1030, 700-827). In particular, the evidence establishes that the suppliers agreed, coordinated, and communicated with one another through customer letters and/or direct communications in advance of and regarding implementation of pricing changes in at least January 2008, June 2008, April 2009, and June 2010. (*See* CCPF 931-1021 (January 2008), CCPF 1156-1259 (June 2008), CCPF 1491-1553 (April 2009), CCPF 1554-1571 (June 2010)).

208. Victor Pais, Sigma's President and CEO, testified repeatedly that he "absolutely" "never" had any pricing discussions with anyone from McWane. (Pais, Tr. 2028 ("No, I did not."), 2035 ("No, we didn't."), 2080 ("No. Never."), 2102 ("Not at all."), 2130-2131 ("No." … "None.").)

Response to Proposed Finding No. 208

The proposed finding is vague, misleading, and contradicted by the weight of the evidence. The term "pricing discussions" is vague and overbroad. Mr. Pais had numerous conversations and meetings with Mr. Page, McWane's CEO, and traveled to meet with Mr. McCullough and Mr. Page in April and May of 2009 when Sigma was attempting to resist McWane's restructured price list. (*See* CCPF 828-841, 1510, 1520-1524). Meetings between Mr. Pais and Mr. Page occurred at points in time at which McWane was making key pricing policy decisions, including on December 3, 2007 (as Sigma awaited McWane's response to Sigma's announced list price increase) (CCPF 886-887); May 7, 2008 (as Sigma again awaited McWane's response to Sigma's "big bold move" price increase announcement) (CCPF 797, 1157-1167); June 12, 2008 (as Sigma continued to await McWane's price announcement, which was being deferred pending receipt of DIFRA data) (CCPF 798, 1229-1230); and May 1, 2009 (as Sigma was desperately seeking a "stay of execution" with respect to McWane's announced Fittings price restructuring) (CCPF 803, 1510, 1522). In addition, Sigma documents and testimony confirm that the Fittings market and Fittings pricing were topics of discussion between Mr. Pais and Mr. Page. (*See, e.g.*, CCPF 837-838 (describing Pais email recounting September 2007 discussion with Mr. Page regarding Fittings market conditions), 1510, 1521-1524 (describing May 1, 2009 meeting between Messrs. Pais and Page at which Mr. Pais sought a "stay of execution" of McWane's price restructuring and sought to give McWane "some assurance of our intentions and commitment to a stable and rewarding industry")).

209. Mr. Pais also specifically denied coming to any agreements with McWane regarding the January 2008, June 2008, and June 2010 multipliers. (Pais, Tr. 2045-2048 ("Absolutely not." … "Never." … "Not at all." … "Never.").)

Response to Proposed Finding No. 209

Complaint Counsel does not dispute that at trial Mr. Pais made the self-serving denials attributed to him. However, the proposed finding and cited testimony are misleading and contradicted by the weight of the evidence insofar as they suggest that Sigma never discussed Fittings prices or reached an agreement of any kind with anyone at McWane or Star. The weight of the evidence, including contemporaneous documents, establishes that there were extensive communications among the Fittings suppliers at key pricing decision points from 2007 through 2011. (*See* CCPF 1030, 700-827). In particular, the evidence establishes that the suppliers agreed, coordinated, and communicated with one another through customer letters and/or direct communications in advance of and regarding implementation of pricing changes in at least January 2008, June 2008, April 2009, and June 2010. (*See* CCPF 931-1021 (January 2008), CCPF 1156-1259 (June 2008), CCPF 1491-1553 (April 2009), CCPF 1554-1571 (June 2010); *see also supra* Response to Proposed Finding No. 208).

210. Mr. Pais denied having any advance knowledge of McWane's pricing decisions. (Pais, Tr: 2060 (Q: "Did you know in advance what those multipliers were going to be?" A: "No.")).

Response to Proposed Finding No. 210

Complaint Counsel does not dispute that at trial Mr. Pais made the self-serving denial attributed to him, but the proposed finding and cited testimony are misleading and contradicted by the weight of the evidence insofar as they suggest that Mr. Pais did not have any advance knowledge of McWane's pricing decisions. The weight of the evidence, including contemporaneous documents, establishes that there were extensive communications among the Fittings suppliers at key pricing decision points from 2007 through 2011. (*See* CCPF 1030, 700-827). In particular, phone records demonstrate that **{**

}, (*See* CCPF 715 (**{**

}), 739-742, 760, 784), and meetings between Mr. Pais and Mr. Page occurred at points in time at which McWane and Sigma were making key pricing policy decisions (*see supra* Response to Proposed Finding No. 208).

The proposed finding is also incorrect and misleading insofar as it suggests that McWane learned about Star's and Sigma's pricing decisions only after those pricing decisions became effective. The weight of the evidence establishes that Fittings suppliers generally announced price increases in advance of their effective date, typically four weeks in advance (*see, e.g.*, CCPF 548; Tatman, Tr. 325), and that the competing Fittings suppliers routinely received each other's price increase letters well before the announced price decisions became effective. (*See* CCPF 670-675). Moreover, the evidence establishes that the Fittings suppliers depended on one another to actually implement and sustain price increases. (*See* CCPF 668).

Further, the proposed finding is misleading insofar as it suggests advance knowledge of specific prices is necessary for McWane, Sigma, and Star to have agreed, coordinated, and communicated with one another through customer letters and/or direct communications in advance of and regarding implementation of pricing changes in at least January 2008, June 2008, April 2009, and June 2010. (*See* CCPF 931-1021 (January 2008), CCPF 1156-1259 (June 2008), CCPF 1491-1553 (April 2009), CCPF 1554-1571 (June 2010)).

C. Star Denied Advance Price Discussions or Agreements

211. Mr. McCutcheon denied entering into any agreement with McWane to fix prices. (McCutcheon, Tr. 2524-2525 ("No, sir." … "No, sir." …"No, sir." …"No, sir." …"No, sir." …"No, sir." …).

Response to Proposed Finding No. 211

Complaint Counsel does not dispute that at trial Mr. McCutcheon made the self-serving statements attributed to him. However, the proposed finding and cited testimony are misleading and contradicted by the weight of the evidence insofar as they suggest that Sigma did not enter

into any agreement with McWane to fix prices. The weight of the evidence, including contemporaneous documents, establishes that the suppliers agreed, coordinated, and communicated with one another through customer letters and/or direct communications regarding implementation of pricing changes in at least January 2008, June 2008, April 2009, and June 2010. (*See* CCPF 931-1021 (January 2008), CCPF 1156-1259 (June 2008), CCPF 1491-1553 (April 2009), CCPF 1554-1571 (June 2010)).

212. Dan McCutcheon testified that he never called anyone at McWane about agreeing to raise prices. (McCutcheon, Tr. 2516 ("Q: . . . did you call anyone at McWane and say, "Hey, guys, let's all agree to raise prices together"? A: No, sir.).

Response to Proposed Finding No. 212

The proposed finding is misleading and contradicted by the weight of the evidence. Complaint Counsel does not dispute that at trial Mr. McCutcheon made the self-serving denial attributed to him. However, at trial, Mr. McCutcheon simply testified that he never called anyone at McWane and made the statement, "Hey, guys, let's all agree to raise prices together." Further, the proposed finding is misleading insofar as it suggests that "call[ing] anyone at McWane about agreeing to raise prices" was necessary for Star to reach agreement with McWane on pricing.

The weight of the evidence, including contemporaneous documents, establishes that there were extensive communications among the Fittings suppliers – **{**

} – at key pricing decision points from 2007 through 2011 (*see* CCPF 1030, 700-827), and that the suppliers agreed, coordinated, and communicated with one another through customer letters and/or direct communications regarding implementation of pricing changes in at least January 2008, June 2008, April 2009, and June 2010. (*See* CCPF 931-1021 (January 2008), CCPF 1156-1259 (June 2008), CCPF 1491-1553 (April 2009), CCPF 1554-1571 (June 2010)).

213. 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. (McCutcheon, Tr. 2524-25).

Response to Proposed Finding No. 213

The proposed finding is misleading and contradicted by the weight of the evidence. The proposed finding is misleading insofar as it suggests that discussing and agreeing upon specific Fittings prices was necessary to allow the suppliers to reach pricing agreements. Complaint Counsel does not dispute that at trial Mr. McCutcheon made the self-serving denials attributed to him. However, the weight of the evidence, including contemporaneous documents, establishes that there were extensive communications among the Fittings suppliers – **{ }** – at key pricing decision points from 2007 through 2011 (*see* CCPF 1030, 700-827), and that the suppliers agreed, coordinated, and communicated with one another through customer letters and/or direct communications regarding implementation of pricing changes in at least January 2008, June 2008, April 2009, and June 2010. (*See* CCPF 931-1021 (January 2008), CCPF 1156-1259 (June 2008), CCPF 1491-1553 (April 2009), CCPF 1554-1571 (June 2010)).

214. Mr. McCutcheon denied entering into any agreement with McWane to stop or reduce job pricing. (McCutcheon, Tr. 2554 ("No, sir."), 2689-2690 ("No, sir.")).

Response to Proposed Finding No. 214

The proposed finding is contradicted by the weight of the evidence. Complaint Counsel does not dispute that Mr. McCutcheon made the self-serving denials attributed to him. However, the weight of the evidence, including contemporaneous documents, establishes that McWane, Sigma, and Star communicated with one another through customer letters and/or direct communications pursuant to which McWane agreed, as contemplated by the Tatman Plan, to

raise published Fittings prices in "stepped or staged" increments in exchange for Sigma's and Star's agreement to curtail Project Pricing. (CCPF 930-1071).

215. 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. (McCutcheon, Tr. 2519-2520).

Response to Proposed Finding No. 215

The proposed finding is misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests that Star did not centralize pricing authority in accordance with the Tatman Plan's "keys" to success. (*See* CCPF 991-996.) Complaint Counsel does not dispute that Mr. McCutcheon made the self-serving denial attributed to him. However, the weight of the evidence, including contemporaneous documents, establishes that McWane, Sigma, and Star communicated with one another through customer letters and/or direct communications pursuant to which McWane agreed, as contemplated by the Tatman Plan, to raise published Fittings prices in "stepped or staged" increments in exchange for Sigma's and Star's agreement to curtail Project Pricing. (CCPF 930-1071).

216. Mr. Minamyer denied entering into any agreement with McWane to fix prices or reduce job pricing. (Minamyer, Tr. 3238-3240 ("No, sir." … "No, sir." …"No, sir." …"No, sir." …"No, sir." …"No, sir." … "Never." …"No, sir." … "No, sir " … "No."), 3278 (Q: "And you didn't have any agreements with Tyler/Union; correct?" A: "That's correct" Q: "On any prices; correct?" A: "Correct." Q: "On any job pricing; correct?" A: "Correct." Q: "On anything you did?" A: "I had no agreements with Tyler.").).

Response to Proposed Finding No. 216

The proposed finding is misleading and not supported by the weight of the evidence. Complaint Counsel does not dispute that Mr. Minamyer made the self-serving denials attributed

to him. However, the weight of the evidence, including contemporaneous documents, establishes that Star entered an agreement with McWane and Sigma to fix prices and reduce Project Pricing, and to participate in DIFRA in exchange for McWane's agreement to a price increase. (CCPF 971-990, 1192-1259, 1284-1287, 1315-1323, 1439-1455, 1533-1552, 1554-1571).

217. Matt Minamyer from Star similarly had no conversations with anyone at McWane concerning Star's proposed 2007 list price or multiplier changes. (Minamyer, Tr. 3238-3239 ("No, sir." … "No, sir.").

Response to Proposed Finding No. 217

The proposed finding is misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests that Star did not reach an agreement to curtail Project Pricing in exchange for McWane's agreement to "stepped or staged" price increases. The weight of the evidence establishes that McWane, Sigma, and Star communicated with one another through customer letters and/or direct communications pursuant to which McWane agreed, as contemplated by the Tatman Plan, to raise published Fittings prices in "stepped or staged" increments in exchange for Sigma's and Star's agreement to curtail Project Pricing. (CCPF 930-1071).

218. Mr. Minamyer also testified that he had no conversations with anyone at McWane concerning Star's Spring, 2008 proposed multiplier increase. (Minamyer, Tr. 3239 ("No, sir.")).

Response to Proposed Finding No. 218

The proposed finding is misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests that Star did not reach an agreement to curtail Project Pricing and participate in the DIFRA information exchange in exchange for McWane's agreement to "stepped or staged" price increases. Complaint Counsel does not dispute that Mr. Minamyer made the self-serving denial attributed to him. However, the weight of the evidence,

including contemporaneous documents, establishes that McWane, Sigma, and Star communicated with one another through customer letters and/or direct communications pursuant to which McWane agreed, as contemplated by the Tatman Plan, to raise published Fittings prices in "stepped or staged" increments in exchange for Sigma's and Star's agreement to curtail Project Pricing and, with respect to the June 2008 increase, in exchange for Sigma's and Star's participation in DIFRA. (CCPF 930-1071, 1155-1259).

219. Mr. Minamyer denied having any advance knowledge of McWane's pricing decisions. (Minamyer, Tr. 3253-3254 (Q: "Did you have any knowledge as to what they were going to do? Did you know what they were going to do with certainty?" A: "No. The only thing we knew what they said they would do is by their letters.").).

Response to Proposed Finding No. 219

The proposed finding is misleading insofar as it suggests that Star did not have any advance knowledge of McWane's pricing decisions. Complaint Counsel does not dispute that Mr. Minamyer made the self-serving denial attributed to him. However, the weight of the evidence, including contemporaneous documents, establishes that there were extensive communications among the Fittings suppliers at key pricing decision points from 2007 through 2011. (*See* CCPF 1030, 700-827).

The proposed finding is also misleading insofar as it suggests that McWane learned about Star's and Sigma's pricing decisions only after those pricing decisions became effective. The weight of the evidence establishes that Fittings suppliers generally announced price increases in advance of their effective date, typically four weeks in advance (*see*, *e.g.*, CCPF 548; Tatman, Tr. 325), and that the competing Fittings suppliers routinely received each other's price increase letters well before the announced price decisions became effective. (*See* CCPF 670-675). Moreover, the evidence establishes that the Fittings suppliers depended on one another to actually implement and sustain price increases. (*See* CCPF 668).

220. Mr. Minamyer never discussed job pricing with anyone at McWane or had any agreements concerning job pricing. (Minamyer, Tr. 3239 ("No, sir."); *see also* Minamyer, Tr. 3240 (not aware of anyone else at Star having conversations or agreement with anyone at McWane regarding list or multiplier changes or job pricing ("No, sir." … "No, sir." … "No.")).

Response to Proposed Finding No. 220

The proposed finding is misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests that Star did not reach an agreement to curtail Project Pricing in exchange for McWane's agreement to "stepped or staged" price increases. The weight of the evidence establishes that McWane, Sigma, and Star communicated with one another through customer letters and/or direct communications pursuant to which McWane agreed, as contemplated by the Tatman Plan, to raise published Fittings prices in "stepped or staged" increments in exchange for Sigma's and Star's agreement to curtail Project Pricing and, with respect to the June 2008 increase, in exchange for Sigma's and Star's participation in DIFRA. (CCPF 930-1071, 1155-1259).

221. Mr. Minamyer had no conversations with anyone at McWane concerning Star's Spring, 2008 proposed multiplier increase. (Minamyer, Tr. 3239 ("No, sir.")).

Response to Proposed Finding No. 221

The proposed finding is misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests that Star did not reach an agreement to curtail Project Pricing and participate in the DIFRA information exchange in exchange for McWane's agreement to "stepped or staged" price increases. The weight of the evidence establishes that McWane, Sigma, and Star communicated with one another through customer letters and/or direct communications pursuant to which McWane agreed, as contemplated by the Tatman Plan, to raise published Fittings prices in "stepped or staged" increments in exchange for Sigma's and Star's agreement to curtail Project Pricing and, with respect to the June 2008 increase, in exchange for Sigma's and Star's participation in DIFRA. (CCPF 930-1071, 1155-1259).

222. Mr. Bhargava denied discussing prices with anyone at McWane. (Bhargava, Tr: 3027, *in camera*† († { }).).

Response to Proposed Finding No. 222

The proposed finding is contradicted by the weight of the evidence. Complaint Counsel does not dispute that Mr. Bhargava made the self-serving denial attributed to him. However, the weight of the evidence, including contemporaneous documents, establishes that Star entered an agreement with McWane and Sigma to fix prices and to reduce Project Pricing and to participate in DIFRA in exchange for McWane's agreement to a price increase. (CCPF 971-990, 1192-1259, 1284-1287, 1315-1323, 1439-1455, 1533-1552, 1554-1571).

VII. The Deposition and Investigational Hearings Testimony Contains Hundreds of Sworn Denials of Any Advance Price Discussions or Agreements

A. McWane Denied Advance Price Discussions or Agreements

223. Rick Tatman testified at length that McWane made its pricing decisions independently at all times. (Tatman, Tr. 978; JX 644 (Tatman, Dep. at 138-139) ("independent decision"); JX 643 (Tatman, IHT at 108-109. ("an independent decision")).

Response to Proposed Finding No. 223

Complaint Counsel notes that there is no exhibit denominated "JX 643" or "JX 644." Complaint Counsel does not dispute that Mr. Tatman made the self-serving statements attributed to him. However, the proposed finding and cited testimony are misleading and contradicted by the weight of the evidence, including contemporaneous documents, which establishes that there were extensive communications among the Fittings suppliers at key pricing decision points from 2007 through 2011 (*see* CCPF 1030, 700-827), and that the suppliers agreed, coordinated, and communicated with one another through customer letters and/or direct communications in advance of and regarding implementation of pricing changes in at least January 2008, June 2008, April 2009, and June 2010. (*See* CCPF 931-1021 (January 2008), CCPF 1156-1259 (June 2008),

CCPF 1491-1553 (April 2009), CCPF 1554-1571 (June 2010)). (*See also supra* Responses to Proposed Finding Nos. 198-200).

224. Jerry Jansen, McWane's National Sales Manager, likewise testified that McWane has always made pricing decisions independently. (JX 637 (Jansen Dep. at 271)).

Response to Proposed Finding No. 224

Complaint Counsel notes that there is no exhibit denominated "JX 637." Complaint Counsel does not dispute that Mr. Jansen made the self-serving statement attributed to him. However, the proposed finding and cited testimony are misleading and contradicted by the weight of the evidence, including contemporaneous documents, which establishes that there were extensive communications among the Fittings suppliers at key pricing decision points from 2007 through 2011 (*see* CCPF 1030, 700-827), and that the suppliers agreed, coordinated, and communicated with one another through customer letters and/or direct communications in advance of and regarding implementation of pricing changes in at least January 2008, June 2008, April 2009, and June 2010. (*See* CCPF 931-1021 (January 2008), CCPF 1156-1259 (June 2008), CCPF 1491-1553 (April 2009), CCPF 1554-1571 (June 2010); *See also supra* Responses to Proposed Finding Nos. 198-200).

B. Sigma Denied Advance Price Discussions or Agreements

225. Mr. Pais, testified that he never had discussions with McWane regarding price. (Pais, IHT 68 ("Not at all."), 109 ("at no time"), 104 ("No"), 110 ("No, there was no discussion about that")).

Response to Proposed Finding No. 225

Complaint Counsel notes that the citation to "Pais, IHT" has no exhibit number. Complaint Counsel does not dispute that Mr. Pais made the self-serving denials attributed to him. However, the proposed finding and cited testimony are misleading and contradicted by the weight of the evidence insofar as they suggest that Sigma never discussed Fittings prices or

reached an agreement with McWane. The weight of the evidence, including contemporaneous documents, establishes that there were extensive communications among the Fittings suppliers at key pricing decision points from 2007 through 2011. (*See* CCPF 1030, 700-827). In particular, the evidence establishes that the suppliers agreed, coordinated, and communicated with one another through customer letters and/or direct communications in advance of and regarding implementation of pricing changes in at least January 2008, June 2008, April 2009, and June 2010. (*See* CCPF 931-1021 (January 2008); CCPF 1156-1259 (June 2008), CCPF 1491-1553 (April 2009), CCPF 1554-1571 (June 2010); *see also supra* Response to Proposed Finding Nos. 201-210).

226. Mr. Pais testified that he never discussed his spring 2008 idea of a large price increase he referred to internally at Sigma as a "big bold move" with anyone at McWane. (JX 687 (Pais, Dep. at 76)).

Response to Proposed Finding No. 226

Complaint Counsel notes that there is no exhibit denominated "JX 687." Complaint Counsel does not dispute that Mr. Pais made the self-serving denial attributed to him. However, the proposed finding and cited testimony are incorrect, misleading, and contradicted by the weight of the evidence insofar as they suggest that Sigma did not discuss Fittings prices or reach an agreement with McWane or Star in the Spring of 2008. The weight of the evidence, including contemporaneous documents, establishes that there were extensive communications among the Fittings suppliers at key pricing decision points from 2007 through 2011 (*see* CCPF 1030, 700-827), including **{**

} (*see* CCPF 758-760, 764-765, 1162, 1164-1165). The evidence establishes that the

suppliers agreed, coordinated, and communicated with one another through customer letters and/or direct communications in advance of and regarding implementation of pricing changes in at least January 2008, June 2008, April 2009, and June 2010. (*See* CCPF 931-1021 (January 2008), CCPF 1156-1259 (June 2008), CCPF 1491-1553 (April 2009), CCPF 1554-1571 (June 2010); *see also supra* Response to Proposed Finding Nos. 201-210).

227. Mr. Pais testified that he had no assurance that McWane or Star would follow a large non-domestic Fittings price increase in the spring of 2008, because he did not discuss it with either Competitor. (JX 687 (Pais, Dep. at 92-93)).

Response to Proposed Finding No. 227

Complaint Counsel notes that there is no exhibit denominated "JX 687." Complaint Counsel does not dispute that Mr. Pais made the self-serving denial attributed to him. However, the proposed finding and cited testimony are misleading and contradicted by the weight of the evidence insofar as they suggest that Sigma did not discuss Fittings prices or reach an agreement with McWane or Star in the Spring of 2008. The weight of the evidence, including contemporaneous documents, establishes that there were extensive communications among the Fittings suppliers at key pricing decision points from 2007 through 2011 (*see* CCPF 1030, 700-827), including **{**

} (*see* CCPF 758-760, 764-765, 1162, 1164-1165). The evidence establishes that the suppliers agreed, coordinated, and communicated with one another through customer letters and/or direct communications in advance of and regarding implementation of pricing changes in at least January 2008, June 2008, April 2009, and June 2010. (*See* CCPF 931-1021 (January

2008), CCPF 1156-1259 (June 2008), CCPF 1491-1553 (April 2009), CCPF 1554-1571 (June 2010); *see also supra* Response to Proposed Finding Nos. 201-210).

228. Mr. Rybacki testified that he never had any discussions with McWane regarding price. (JX 690 (Rybacki, Dep. 91 ("No"); 192 ("Never.")).

Response to Proposed Finding No. 228

Complaint Counsel notes that there is no exhibit denominated "JX 690." Complaint Counsel does not dispute that Mr. Rybacki made the self-serving denials attributed to him. However, the proposed finding and cited testimony are misleading and contradicted by the weight of the evidence insofar as they suggest that Sigma and Mr. Rybacki in particular never discussed Fittings prices or reach an agreement with anyone at McWane or Star. The weight of the evidence, including contemporaneous documents, establishes that there were extensive communications among the Fittings suppliers, many involving Mr. Rybacki in particular, at key pricing decision points from 2007 through 2011. (*See* CCPF 1030, 700-827). In particular, the evidence establishes that the suppliers agreed, coordinated, and communicated with one another through customer letters and/or direct communications in advance of and regarding implementation of pricing changes in at least January 2008, June 2008, April 2009, and June 2010. (*See* CCPF 931-1021 (January 2008), CCPF 1156-1259 (June 2008), CCPF 1491-1553 (April 2009), CCPF 1554-1571 (June 2010)).

229. Mitchell Rona denied any discussions with McWane regarding pricing. (JX 688 (Rona IHT Tr. 203 ("Q. Did you discuss import pricing at any point with Mr. Tatman during - - A. No. Q. – these discussions? A. No")).

Response to Proposed Finding No. 229

Complaint Counsel notes that there is no exhibit denominated "JX 688." Complaint Counsel does not dispute that Mr. Rona made the self-serving denials attributed to him. However, the proposed finding and cited testimony are misleading and contradicted by the

weight of the evidence insofar as they suggest that Sigma, and Mr. Rona in particular, did not discuss Fittings prices or reach an agreement with McWane or Star. The weight of the evidence, including contemporaneous documents, establishes that there were extensive communications among the Fittings suppliers at key pricing decision points from 2007 through 2011 (*see* CCPF 1030, 700-827), including at least two occasions on which Mr. Tatman conveyed to Mr. Rona his dissatisfaction with instances of Sigma Project Pricing, and Mr. Rona conveyed that message to others within Sigma. (CCPF 1035; CCPF 1452). Mr. Rona also acknowledged calling Mr. Tatman when he believed McWane wasn't upholding its end of the agreement to maintain high prices for Domestic Fittings. (CCPF 2433). The evidence establishes that the suppliers agreed, coordinated, and communicated with one another through customer letters and/or direct communications in advance of and regarding implementation of pricing changes in at least January 2008, June 2008, April 2009, and June 2010. (*See* CCPF 931-1021 (January 2008), CCPF 1156-1259 (June 2008), CCPF 1491-1553 (April 2009), CCPF 1554-1571 (June 2010); *see also supra* Response to Proposed Finding Nos. 201-210).

C. Star Denied Advance Price Discussions or Agreements

230. Mr. McCutcheon testified that he and McWane employees never discussed prices, market share, or any other competitive factors. (JX 698 (McCutcheon Dep. at 31 (Q. . . . never agreed with him on a price for ductile iron pipe fittings . . . ? A. That's correct."); 32 ("No, sir."); 34. ("No, sir.")).

Response to Proposed Finding No. 230

Complaint Counsel notes that there is no exhibit denominated "JX 698." Complaint Counsel does not dispute that Mr. McCutcheon made the self-serving denials attributed to him. However, the proposed finding and cited testimony are misleading and contradicted by the weight of the evidence insofar as they suggest that Star, and Mr. McCutcheon in particular, did not discuss Fittings prices or reach an agreement with McWane or Sigma. The weight of the

evidence, including contemporaneous documents, establishes that there were extensive communications among the Fittings suppliers – **{ }** – at key pricing decision points from 2007 through 2011 (*see* CCPF 1030, 700-827), and that the suppliers agreed, coordinated, and communicated with one another through customer letters and/or direct communications regarding implementation of pricing changes in at least January 2008, June 2008, April 2009, and June 2010. (*See* CCPF 931-1021 (January 2008), CCPF 1156-1259 (June 2008), CCPF 1491-1553 (April 2009), CCPF 1554-1571 (June 2010)).

231. Matt Minamyer testified that he never discussed pricing or marketing strategy with McWane personnel. (JX 685 (Minamyer, Dep. 14 ("Q. Okay. During the time that you were national sales manager at Star, did you have any communications with anyone at McWane about pricing or market strategy? A. No.") (objections omitted), 15-16 ("Q. Okay. Did you personally every have any communications with any competitor while you were with Star about pricing? A. No.")).

Response to Proposed Finding No. 231

Complaint Counsel notes that there is no exhibit denominated "JX 685." Complaint Counsel does not dispute that Mr. Minamyer made the self-serving denials attributed to him. However, the proposed finding and cited testimony are misleading and contradicted by the weight of the evidence insofar as they suggest that Star did not discuss Fittings prices or reach an agreement with McWane or Star. The weight of the evidence, including contemporaneous documents, establishes that there were extensive communications among the Fittings suppliers at key pricing decision points from 2007 through 2011 (*see* CCPF 1030, 700-827), and that the suppliers agreed, coordinated, and communicated with one another through customer letters and/or direct communications regarding implementation of pricing changes in at least January 2008, June 2008, April 2009, and June 2010. (*See* CCPF 931-1021 (January 2008), CCPF 1156-1259 (June 2008), CCPF 1491-1553 (April 2009), CCPF 1554-1571 (June 2010)).

232. 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. (Schumann, Tr. 4236-4237.)

Response to Proposed Finding No. 232

Complaint Counsel does not dispute that Dr. Schumann agreed in his testimony at trial that representatives of McWane, Sigma, and Star denied reaching an agreement on the January and the June 2008 multipliers and an agreement to eliminate or reduce job price discounts. However, the proposed finding is misleading insofar as it suggests that Dr. Schumann conceded that there was no agreement between McWane, Sigma, and Star to eliminate or reduce Project Pricing. Instead, Dr. Schumann testified: "But they did come to an understanding through direct and indirect methods of communication that they were going to reduce project pricing. They -- I mean, what they view as an agreement isn't necessarily what I would view as an agreement. And they denied that they had the sort of agreement that I would admit that they didn't have. They didn't have an agreement that was sort of a hammered-out contract of sorts, anything like that. It was much more subtle, in my opinion." (Schumann, Tr. 4237-4238; *see also supra* Response to Proposed Finding No. 192).

233. Dr. Normann observed that McWane, Sigma, and Star priced independently in 2008:

> So I found, for example, that for Star, Sigma and McWane, during the time period of 2008…but over roughly that 2008 time period, McWane's prices were trending downward from the end of 2007 into 2009. Star's prices, Sigma's prices, they rose modestly, but not by a significant degree….But what we see is not parallel movements in price that are going up and going up by significantly more than cost increases. What we in fact see are prices moving independently of one another and, you know, declining for some and modest increases for others, so that's fundamentally inconsistent with a conspiracy. (Normann, Tr. 4747-48)

Response to Proposed Finding No. 233

Complaint Counsel does not dispute that Dr. Normann made the statements attributed to him. The proposed finding is misleading insofar as it suggests that McWane's prices were declining in 2008, that Star's and Sigma's price rose by an insignificant degree, that prices moved independently of one another, and how price increases related to cost increases. There is no basis for the proposed finding in Dr. Normann's report nor in his testimony. The Fittings pricing analysis of Dr. Normann is flawed. (*See* CCPF 1424-1435; *See also supra* Response to Proposed Finding No. 189).

234. After analyzing 2008 non-domestic Fittings prices, Dr. Normann concluded:

†**{**

}

(Normann, Tr. 5014 in camera)

Response to Proposed Finding No. 234

Complaint Counsel does not dispute that Dr. Normann made the statements attributed to him. The proposed finding is incomplete and misleading insofar as it suggests that 2008 non-Domestic Fittings prices were inconsistent with conspiracy, because the Fittings pricing analysis of Dr. Normann is flawed. (*See* CCPF 1424-1435; *see also supra* Response to Proposed Finding No. 189). Even if one accepts the pricing data despite its errors, Dr. Normann agreed on cross examination that **{**

} (Normann, Tr. 5776-5782, *in camera* (as corrected by Nov. 7, 2012 Joint Stipulation Regarding Trial Transcript Errata)), which is consistent with the alleged collusion.

235.

Response to Proposed Finding No. 235

The proposed finding is blank in the original.

VIII. DIFRA did Not Facilitate Price Coordination Among McWane, Sigma, and Star

236. The Ductile Iron Fittings Research Association ("DIFRA") had four members: McWane, Sigma, Star, and U.S. Pipe. (JSLF ¶ 17; Brakefield, Tr. 1227-1228 ("Q. Who were the members of DIFRA? A. The members of DIFRA was Star, Sigma, U.S. Pipe and McWane or Tyler/Union. Q. Those were the four members? A. Yes, sir."), 1259-1260 ("Q. Mr. Brakefield, in 2008, who were the members of DIFRA? A. In 2008? Q. At this time in February of 2008. A. It was U.S. Pipe, Star, Sigma and Tyler/Union/McWane. Q. And those were the only four members? A. Yes, sir.").).

Response to Proposed Finding No. 236

Complaint Counsel notes that there is no exhibit denominated "JSLF." Complaint Counsel has no specific response, other than to note that the evidence establishes that U.S. Pipe was included in the information exchange solely to mask antitrust concerns (CCPF 1117-1130), and did not attend the April 25, 2008 DIFRA call, during which McWane, Sigma, and Star agreed to the information exchange reporting format. (CCPF 1145).

237. DIFRA was operational for "[r]oughly six months." (Tatman, Tr. 935 ("Q. All right. We'll have to look at the details of that in camera, so let's move on to something else. Now, you mentioned yesterday and complaint counsel asked you about DIFRA, sir. And as I understand it, DIFRA was operational for roughly six months at the end of 2008; is that fair? A. Roughly six months, correct.").).

Response to Proposed Finding No. 237

The proposed finding and supporting testimony are vague and therefore misleading. The term "operational" is vague. DIFRA members engaged in organizational activities, including meetings and test-run data submissions, from at least 2005 through early 2007. (CCPF 1090-1106). By February 2008, there was renewed interest in establishing an information exchange among the DIFRA members. (CCPF 1107-1116). DIFRA had meetings and conference calls related to the information exchange through the spring of 2008, which culminated in issuance of the first DIFRA report – reporting data that covered a 28-month period from January 2006

through April 2008 – on June 17, 2008. (CCPF 1131-1150). Although the last DIFRA report was issued in January 2009, Sigma tried to restart the information exchange in May 2009. (CCPF 1474; CCPF 1484-1490). U.S. Pipe continued submitting data to the information exchange until the summer of 2010. (CCPF 1481).

In contrast to this information exchange activity, DIFRA never had any meetings or conference calls, and never established any committees to promote standards or the other named objectives of DIFRA. (CCPF 1261-1274).

238. Mr. Brakefield, DIFRA's former president, testified that DIFRA met a total of two or three times, and was short-lived in its operation. (Brakefield, Tr. 1359 ("Q. And so is it fair to say that as of February 7, 2008, DIFRA was not functioning? A. That's correct."), 1422 ("Q. And the last DIFRA meeting was in March of 2008; is that correct? A. March of -- yes, sir. Q. And the last DIFRA conference call was in April of 2008; is that correct? A. That's correct, yes, sir. Q. So there have been no meetings since April of 2008 at which DIFRA members discussed standards or other activities? A. None that I know of. Q. And in total, DIFRA had approximately four meetings; is that correct? A. Yes, sir. I think you're correct.").).

Response to Proposed Finding No. 238

The proposed finding is inaccurate, vague, draws an overbroad conclusion, and is therefore misleading. The cited testimony merely reflects the witness's recollection of specific DIFRA meetings. The cited testimony says nothing about the duration of DIFRA's information exchange and does not say that DIFRA was "short lived." The record establishes that DIFRA members engaged in organizational activities, including meetings and test-run data submissions, from at least 2005 through early 2007; that DIFRA members participated in the agreed upon information exchange from June 2008 through January 2009; that Sigma tried to restart the information exchange in May 2009; and that U.S. Pipe continued submitting data to the information exchange until the summer of 2010. DIFRA is still a corporation in good standing today. (CX 1345; CX 1326; CX 1351; CX 1340; CX 0152; CX 1350; CX 1349; CX 1348; CX 1339; CCPF 1090-1106, 1474, 1481, 1484-1490).

239. DIFRA was incorporated in January 2007, but only functioned from June 2008 through January 2009. (Brakefield, Tr. 1227-1228 ("Q. Okay. And then let's turn to -- well, actually in -- you can put that one aside. In January of 2007, is that when DIFRA was incorporated? A. Yes, sir. Q. Is that also when you became president of DIFRA? A. I think so, sir, yes, sir. Q. Who were the members of DIFRA? A. The members of DIFRA was Star, Sigma, U.S. Pipe and McWane or Tyler/Union. Q. Those were the four members? A. Yes, sir. Q. And just to kind of put bookends on things, when were the -- when was the last time DIFRA was active? A. I would say the last time that I would recall that it was active would probably be mid-January of '09, and that was with the reporting of the December '08 numbers."), 1359 ("("Q. And so is it fair to say that as of February 7, 2008, DIFRA was not functioning? A. That's correct."), 1383 ("Q. And that's the June 17, 2008 DIFRA report; correct? A. That's correct. Q. This is the first report that was issued by the CPAs to the DIFRA members? A. That's correct."), 1400 ("Q. This is the January -- it's dated January 15, 2009. It's the last -- is this the last DIFRA report issued by Sellers Richardson? A. Yes, sir, I think it was.") & RX 127; CX 1480-001-07; CX 52).

Response to Proposed Finding No. 239

The proposed finding is misleading insofar as it suggests that DIFRA was only operational from June 2008 until January 2009. The record establishes that DIFRA members engaged in organizational activities from at least 2005 through early 2007; that DIFRA members participated in the agreed upon information exchange from June 2008 through January 2009; that Sigma tried to restart the information exchange in May 2009; and that U.S. Pipe continued submitting data to the information exchange until the summer of 2010. DIFRA is still a corporation in good standing today. (CX 1345; CX 1326; CX 1351; CX 1340; CX 0152; CX 1350; CX 1349; CX 1348; CX 1339; CCPF 1090-1106, 1474, 1481, 1484-1490).

240. The first DIFRA tonnage report was circulated in mid-June 2008. (Brakefield, Tr. 1395 ("Q. So is it fair to say then if the first report was in June and there was a July report that it took three months of reporting before the first accurate report was issued by DIFRA? A. That's correct, yes."); JX 679 (Haley, Dep. at 24 ("Q. But as of -- at least, assuming this e-mail that's in Exhibit 11 is correct, June 17th was the date of the first report that Sellers was -- A. June 17th would have been when we received -- yes, June 17th is when we would have submitted the first reports.")).).

Response to Proposed Finding No. 240

Complaint Counsel has no specific response, other than to note that there is no exhibit denominated "JX 679."

241. The last DIFRA tonnage report was circulated in January 2009, for the month of December 2008. (Brakefield, Tr. 1228 ("Q. And just to kind of put bookends on things, when were the -- when was the last time DIFRA was active? A. I would say the last time that I would recall that it was active would probably be mid-January of '09, and that was with the reporting of the December '08 numbers."), 1400 ("Q. This is the January -- it's dated January 15, 2009. It's the last -- is this the last DIFRA report issued by Sellers Richardson? A. Yes, sir, I think it was.") & RX 127).

Response to Proposed Finding No. 241

Complaint Counsel has no specific response.

242. McWane and Star did not submit tonnage shipped data to DIFRA's accountants after January 2009 and December 2008, respectively. (Brakefield, Tr. 1419-1420 ("Q. And that's CX 1325 . . . A. Okay, sir. Q. And you remember that I had asked you a few minutes ago whether or not following the January 2009 DIFRA report whether or not any of the other members continued to submit their tonnage data to DIFRA? A. Yes, sir, I remember that. Q. If you look at the second page of this document, sir -- A. Bree Holland sent me that. Yes. Q. And she says that -- and this is May 12 of 2009. Do you see that? A. Yes, sir. Q. She says, "It looks like we are missing February 2009 through April 2009 for McWane and January 2009 through April 2009 for Star Pipe." Do you see that? A. Yes, sir. Q. So it was the case that after January, McWane did not submit any of its tonnage data at least through April; am I correct? A. That's correct. Q. And the same for Star, they did not submit any tonnage data from January till April; correct? A. That's correct.") & CX 1325).

Response to Proposed Finding No. 242

Complaint Counsel has no specific response.

A. DIFRA's Activities were Monitored by Antitrust Counsel

243. Mr. Brakefield, DIFRA's former president, testified that DIFRA was a trade association created, organized, supervised, and monitored by experienced antitrust counsel. (Brakefield, Tr. 1229-1230 ("Q. Article III is the purposes of DIFRA. Do you see that? A. Yes. Q. It's at the bottom of the page? A. Yes, sir, I see that. Q. The first purpose that's listed is "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." Do you see that? A. Yes, sir. Q. What activities did DIFRA take to fulfill this purpose? A. I think the first thing we did was select an attorney that was recommended with antitrust credentials from Bradley Arant, and we tried to follow every guideline that he gave us to make sure that we were in compliance with what an organization like this should be."), 1236-1237 ("Q. When DIFRA was incorporated in January 2007, did DIFRA retain an accounting firm? A. Yes, they did. Q. What was the purpose of retaining the accounting firm? A. That was recommended to us by Wood Herren and the Bradley Arant people, that they suggested an accounting firm to take the numbers that were submitted by the members. Q. So what were the -- can you explain that to me more? What were the -- what was

the purpose of the recommendation? A. They advised us through -- counsel advised us that this was a benefit that we could have under establishment of a trade organization, that we could actually submit shipments, and they would be billable shipments in a certain geographic area which basically was discussed and agreed upon, and that those numbers could be submitted. And there was a lot of discussion about how we would present those numbers and what those numbers represented and how they had to be in terms of aggregate, not small, unique numbers but basically an aggregate or a large bucket, the way I like to describe it, to where you submitted those large buckets of tons, the way we looked at it, short tons, to an independent CPA firm who published back to the individual members an aggregate total of the market size."), 1244-1245 ("Q. Mr. Brakefield, as Sigma's representative to DIFRA, did you know why Sigma did not want to submit its sales dollars information to DIFRA? A…. the attorneys steered us in directions that said this is risky and we shouldn't do, and so we went away from that. But I don't know if I ever heard Victor or anybody from Sigma say that we would not do that. We just wanted to know could we extract that information from our IT department, and probably there's some documentation that actually shows we did a similar template to this in response to this suggestion by McWane."), 1337-1338 ("Q. Were you involved in the retention of Bradley Arant to advise DIFRA? A. Yes, sir. Q. And why did you want to hire Bradley Arant? A. I asked a longtime friend, Joe Spransy, who was U.S. Pipe's corporate attorney for 25-plus years, who would be someone that he would recommend. He said he had worked with Thad for many years, and he recommended he and Bradley Arant and Mike McKibben and -- and I didn't know Wood Herren at the time but had a lot of positive things to give me direction to make that call."), 1341 ("Q. And both Michael McKibben and Herren Wood were both lawyers who worked at Bradley Arant? A. That is correct. Q. And they would from time to time give advice, legal advice, to DIFRA? A. Yes, sir. Q. So the -- were there -- and then there's three lawyers who were advising DIFRA. Were there any others besides Mr. Long, Mr. Herren and Mr. McKibben? A. Correct. Q. There were only three? A. There were only three, correct."), 1343 ("Q. And the meetings that you just referred to, they were always supervised by outside counsel? A. Yes, sir."), 1346-1347 ("Q. This was -- these are minutes of the meeting that Mr. Long was trying to organize in the previous e-mail that we just saw; correct? A. That's correct….Q. All right. And if you look at the top again, it confirms, doesn't it, that the meeting was held at the offices of Bradley, Arant, Rose & White; correct? A. That's correct. Q. To discuss the organization of a new trade association? A. Yes. Q. And it then lists the attendees, of which you are one; correct? A. Yes, sir. Q. And then it looks like below that, the last sentence of the first paragraph, there were three lawyers from Bradley Arant, Thad Long, Mike McKibben and K. Wood Herren of Bradley, Arant, Rose & White LLP, involved in this meeting; correct? A. Correct. Q. Do you remember those three lawyers being present at the meeting? A. Yes, sir."), 1350-1351 ("Q. And if you actually would start -- this is actually a document that complaint counsel I believe went over with you. If you would start at the second e-mail on the first page, this again is another e-mail from lawyers for DIFRA; correct? A. That's correct. Q. K. Wood Herren? A. Yes. Q. And he sent it to, amongst others, yourself? A. Yes, sir. Q. TB2, that's you; right? A. Yes, sir. Q. And in this e-mail, your lawyer or DIFRA's lawyer attached a copy of an engagement letter that you had signed; correct? A. That's correct. Q. And that was an engagement letter to retain independent outside CPA services to assist in the future DIFRA; correct? A. Yes."), 1358 ("Q. Did you have telephone meetings with DIFRA members? A. We had telephone conference calls for various things. Q. And those were always presided over by Bradley Arant lawyers? A. Wood Herren usually conducted that."), 1371-1373 ("Q. If you would turn to RX 044. . . And Mr. Long writes,

"I have received proposed reporting forms from two of the four DIFRA participants, and I find that they are fairly consistent in approach and seem to minimize antitrust concerns." Do you see that? A. Yes, sir. Q. That was his advice to DIFRA at that point? A. Yes, sir. Q. And then Mr. Long continues, in parens, "This does not mean all antitrust concerns are definitely gone, as you always have some concerns 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." Do you see that? A. Yes, sir. Q. And that was Mr. Long's advice -- A. That's correct.") (objections omitted); RX 40, RX 44; RX 11; CX 1333-001-010; CX 1473-001-03; CX-048-001-02; CX-1480-001-07; CX-0158-001-020; CX 1486-001-02; CX 1479-001-005; CX-1090-001-08; CX 0052-001-07; CX 1081-001-03; JX 654 (Brakefield, Dep. at 13-17, 19)).

Response to Proposed Finding No. 243

Complaint Counsel notes that there is no exhibit denominated "JX 654," and that RX-44 and RX-11 are not in evidence. The proposed finding is incorrect, misleading, and immaterial. The proposed finding is incorrect because DIFRA was created and organized by its members: McWane, Sigma, and Star. Sigma's Mr. Pais initiated the effort to form DIFRA. (CCPF 1091). DIFRA was incorporated by McWane's David Green as an Alabama nonprofit corporation on January 12, 2007. (CX 1480 at 007). McWane, Sigma, and Star retained as their attorney Thad G. Long of the law firm Bradley Arant Rose & White to provide legal services and assist in setting up DIFRA. (CCPF 1094).

The proposed finding is misleading insofar as it suggests that communications between the DIFRA members were always supervised by counsel. The record establishes numerous direct communications between DIFRA members that were not supervised or monitored by any counsel for the organization. For example, Mr. Tatman directly contacted Mr. Brakefield despite Mr. Brakefield's repeated admonishment that it was inappropriate to have such communications. (*E.g.*, CCPF 1259; CCPF 1113 (Mr. Tatman email to Brakefield); *see also* CCPF 1107-1112 (other direct contacts without inclusion of legal counsel); CCPF 1030, 700-827 (listing unsupervised communications among the DIFRA members at key pricing decision points from 2007 through 2011).

Further, the proposed finding is immaterial. McWane has not advanced an advice-of-counsel defense and the members' retention of counsel has no bearing on (1) McWane's offer of a price increase in exchange for Sigma and Star joining the information exchange, or (2) members' use of the data to facilitate price coordination.

244. Antitrust counsel attended each of the few DIFRA meetings and telephone conferences that were convened. (JX 687 (Pais, Dep. at 31 ("1 Q. When you attended a meeting of DIFRA, however many meetings there were, were there lawyers present, sir? A. Absolutely. It was held in a lawyer's office with two or three members of the law firm. Q. I'm sorry, you said two or three members of the law firm were there? A. Yeah, yeah. The partners or associates, yes.").).

Response to Proposed Finding No. 244

Complaint Counsel notes that there is no exhibit denominated "JX 687." The proposed finding is misleading insofar as it suggests that DIFRA counsel monitored all of the members' communications. (*See supra* Response to Proposed Finding No. 243). Complaint Counsel does not dispute that counsel attended each of the formal DIFRA meetings.

The proposed finding is immaterial. Respondent has not advanced an advice of counsel defense and the presence of counsel at DIFRA's formally convened meetings has no bearing on (1) McWane's offer of a price increase in exchange for Sigma and Star joining the information exchange or, (2) the DIFRA members' use of the data to facilitate price coordination.

245. DIFRA's attorneys frequently counseled the membership on antitrust issues. (Brakefield, Tr. 1347-1349 ("Q. And then it looks like below that, the last sentence of the first paragraph, there were three lawyers from Bradley Arant, Thad Long, Mike McKibben and K. Wood Herren of Bradley, Arant, Rose & White LLP, involved in this meeting; correct? A. Correct. Q. Do you remember those three lawyers being present at the meeting? A. Yes, sir . . . Q. And then if you would look at the fifth paragraph, it says that Mr. Long discussed the antitrust concerns with associations in which competitors are members and work together on industry matters. Do you see that? A. Yes, sir. Q. And then in the paragraph below that there is also a discussion that Mr. Long discussed with the membership or the potential membership of this association antitrust dos and don'ts? A. Yes, sir. Q. Antitrust discussions with Mr. Long and the other attorneys from Bradley Arant were a common discussion at meetings and phone calls, were they not? A. Yes, sir, they really were."), 1371-1373 (("Q. If you would turn to RX 044 . . .[a]nd Mr. Long writes, "I have received proposed reporting forms from two of the four DIFRA participants, and I find that they are fairly consistent in approach and seem to minimize antitrust

concerns." Do you see that? A. Yes, sir. Q. That was his advice to DIFRA at that point? A. Yes, sir. Q. And then Mr. Long continues, in parens, "This does not mean all antitrust concerns are definitely gone, as you always have some concerns 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." Do you see that? A. Yes, sir. Q. And that was Mr. Long's advice -- A. That's correct. Q. And then following that, Mr. Long writes -- there's three numbered paragraphs, and he says, as the intro to that, "There are some assumptions which accompany this form, and it is contemplated all participants would uniformly apply these assumptions in their reporting." Do you see that? A. Yes, sir. Q. And then he says that the geographic scope -- that the geographic extent of the reporting would be the United States and Puerto Rico? A. That's correct.") (objections omitted); RX 442, RX 44).

Response to Proposed Finding No. 245

Complaint Counsel notes that RX-442 and RX-44 are not in evidence. Use of the term "frequently" in the proposed finding is vague and therefore misleading. Complaint Counsel does not dispute that on several occasions McWane, Sigma, and Star were advised and aware of the antitrust risks associated with the information exchange. Indeed, it was this awareness that caused DIFRA members to seek out U.S. Pipe as a sham fourth participant in the information exchange. (CCPF 1117-1130). Moreover, the proposed finding is immaterial. Respondent has not advanced an advice of counsel defense and the consultation of counsel has no bearing on (1) McWane's offer of a price increase in exchange for Sigma and Star joining the information exchange or, (2) the DIFRA members' use of the data to facilitate price coordination.

246. All of the membership fees associated with the organization of DIFRA were used to pay antitrust counsel fees and fees charged by the independent accounting firm hired by DIFRA at the advice of counsel to collect, aggregate, and disseminate historic tons-shipped data of DIFRA members. (Brakefield, Tr. 1272-1274 ("Q. And then for item F, was a fee structure for funding the operations of DIFRA set up at this meeting? A. Yes, it was. Q. What was that fee structure? A. That fee structure was to continue to split it one-fourth per member company, and there was a lot of things discussed, but that was what was eventually agreed to. Q. And what do you refer to when you say "split it"? A. In other words, if it was a dollar, everybody paid 25 cents. Q. And what was the dollar being used for? A. If the expenses were a dollar, everybody paid 25 cents of that dollar. Q. And what expenses did DIFRA have at this point? A. Mostly attorney's fees. And the attorney, Bradley Arant, would -- for example, the CPA had quoted us certain things. That was going to go through Bradley Arant, so we would get a bill from Bradley Arant split in one-fourths, and it would be sent to the member companies. That was the fee. That was the structure. Q. In addition to the attorney's fees were there any other fees? A. I don't recall any. JUDGE CHAPPELL: Didn't he just tell you the CPA had fees that he ran through the

law firm? MR. ANSALDO: I understood those to be included in the legal fees, Your Honor. I may have misunderstood the testimony. JUDGE CHAPPELL: I want to make sure you're not -- I want to make sure you're not confused on this. There was a CPA fee involved. THE WITNESS: We had not at that time had a CPA fee, but it was the understanding that when we got it, since we didn't have a checking account, that all of that would go through Bradley Arant until we got a checking account established, and then we would -- Bradley would pay the CPA, and then we would split it one-fourth, one-fourth, one-fourth, one-fourth. JUDGE CHAPPELL: So that CPA fee would appear on the law firm bill. THE WITNESS: Eventually would appear, yes. Because at that time we had not submitted anything to them other than just the trial and error-type templates that we had submitted, can you do that.").

Response to Proposed Finding No. 246

The proposed finding is inaccurate because DIFRA members never paid any dues or membership fees to DIFRA, so membership fees were not "used to pay" counsel as the proposed finding asserts. (CCPF 1271-1272). Rather, as the cited testimony indicates, McWane, Sigma, and Star each paid their respective share of the legal fees directly to Bradley Arant. The proposed finding is also unsupported by evidence and misleading insofar as it suggests that legal fees were solely, or even primarily, for the purpose of antitrust counsel as opposed to the other legal services provided by Bradley Arant, such as drafting articles of incorporation, filing papers with Alabama, drafting bylaws, and drafting and circulating meeting minutes.

247. Mr. Haley, DIFRA's independent lead accountant, testified that each DIFRA member sent a discrete category of data, limited to tonnage of Fittings shipped, to Sellers Richardson, a third party accounting firm retained by DIFRA's antitrust counsel. (JX 679 (Haley, Dep. at 8-9 ("Q. Have you or your firm performed work for the Ductile Iron Fittings Research Association -- A. Yes. Q. -- or DIFRA? A. Yes. Q. We're going to spend some time talking about that here today, but can you just generally tell us what types of work you've performed for DIFRA? A. We did agreed-upon procedures, basically taking information we received directly from each member, compiled that data together, and issued a report of the total information. The information we received was -- I'll have to look -- it was either footage or tonnage of fittings shipped."), 11 ("Q. If you recall, who first contacted you concerning DIFRA? A. I believe it was Wood Herren. Q. Who is Mr. Herren? A. The attorney at Bradley, Arant. I believe he was the attorney for DIFRA at that time. Q. And he contacted you rather than a member of DIFRA? A. He contacted us directly, correct."), 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).).

Response to Proposed Finding No. 247

Complaint Counsel notes that there is no exhibit denominated "JX 679." The proposed finding is inaccurate and vague, and therefore misleading. Sellers Richardson was retained by DIFRA, not DIFRA's counsel. (CX 1333 at 006 (letter of engagement signed by Richard Haley on behalf of Sellers Richardson and Tommy Brakefield on behalf of DIFRA)). Additionally, the term "independent" is vague and therefore misleading insofar as the proposed finding suggests that Sellers Richardson did not perform "agreed-upon procedures" on behalf of DIFRA members. (RX-679 (Haley, Dep. at 11-12, 14)).

248. The accounting firm retained by DIFRA, Sellers Richardson, Holman & West, was overseen by the Bradley Arant law firm and was not "controlled" by DIFRA or any of its members. (Pais, Tr. 2109-10 ("Q. So in April, late April 2008, Mr. Brakefield asked you for a conference call to discuss DIFRA; is that right? . . . Did the DIFRA information that the members sent to the accounting firm -- did that include any dollar information, sir? A. None whatsoever. Q. Was any pricing information ever exchanged? A. Not at all. Q. And just so we're clear, this was an outside accounting firm; is that right? A. Yes. Q. You didn't control the accounting firm? A. No, we didn't. Q. And it was set up by a law firm? A. A law firm, yes. Q. Now, there's a reference here to Tad and Wood, and that's a reference to two of the three or so lawyers who were working for DIFRA at the time? A. That's right. Q. And that's Mr. Long, Thad Long, and Wood Herren? A. Yes.").).

Response to Proposed Finding No. 248

The proposed finding is inaccurate, vague, and misleading insofar as it suggests that Sellers Richardson did not perform "agreed-upon procedures" on behalf of DIFRA members. Although DIFRA did not control the accounting firm, the accounting firm performed services that DIFRA members requested, pursuant to agreement by the DIFRA members. (RX-679 (Haley, Dep. at 11-12, 14)).

Further, the proposed finding is immaterial because it is uncontroverted that McWane, Sigma, and Star agreed to the form of the information exchange and agreed to participate in that

exchange. (*E.g.*, CCPF 1147-1149, 1202-1205 (Star agreed to participate in the information exchange after receiving McWane's May 7, 2008 letter)). The proposed finding is also immaterial because Respondent has not advanced an advice of counsel defense, and the role of counsel has no bearing on (1) McWane's offer of a price increase in exchange for Sigma and Star joining the information exchange or, (2) the DIFRA members' use of the data to facilitate price coordination.

249. Sellers Richardson Holman & West aggregated all of the member firms' tonnage shipped data and then distributed the aggregate figure in a report to all DIFRA members. (JX 679 (Haley, Dep. at 8-9 ("Q. Have you or your firm performed work for the Ductile Iron Fittings Research Association -- A. Yes. Q. -- or DIFRA? A. Yes. Q. We're going to spend some time talking about that here today, but can you just generally tell us what types of work you've performed for DIFRA? A. We did agreed-upon procedures, basically taking information we received directly from each member, compiled that data together, and issued a report of the total information. The information we received was -- I'll have to look -- it was either footage or tonnage of fittings shipped."), 11 ("Q. If you recall, who first contacted you concerning DIFRA? A. I believe it was Wood Herren. Q. Who is Mr. Herren? A. The attorney at Bradley, Arant. I believe he was the attorney for DIFRA at that time. Q. And he contacted you rather than a member of DIFRA? A. He contacted us directly, correct."), 23 ("Q. Again, how would that work in practice logistically? What happened? A. The four member firms, whoever was responsible at that entity, would send an Excel spreadsheet via e-mail to either Margaret or Bree. So once we got all four spreadsheets, then we would just compile the information into another Excel spreadsheet. Q. And was the member information that you received from the four entities, was that individual information ever shared with a larger group, or was it always aggregated? A. No, huh-uh. Q. It was aggregated? A. Correct. We were the only one that had that information, and the report we issued was all four of them in total.").).

Response to Proposed Finding No. 249

Complaint Counsel has no specific response, other than to note that there is no exhibit denominated "JX 679."

250. No DIFRA member was permitted to review the tonnage shipped data of any other member; only the aggregate figure was made available. (JX 679 (Haley, Dep. at 23 ("Q. Again, how would that work in practice logistically? What happened? A. The four member firms, whoever was responsible at that entity, would send an Excel spreadsheet via e-mail to either Margaret or Bree. So once we got all four spreadsheets, then we would just compile the information into another Excel spreadsheet. Q. And was the member information that you received from the four entities, was that individual information ever shared with a larger group, or was it always aggregated? A. No, huh-uh. Q. It was aggregated? A. Correct. We were the only one that had that information, and the report we issued was all four of them in total."), 36

("Q. I may have gotten my pages confused there. Thank you. We've talked about that only aggregated information was provided back to the members, correct? A. Correct. Q. Were you ever told why that was the case or why that was important? Alternatively, were you just told, "This is the way we want it done," and you complied? A. Well, we knew that it had to be the strictest of confidence so that none of the members knew any of the information of the other members. Q. That was the intent? A. That was the intent. Q. That was the whole reason for hiring your firm, correct? A. Exactly."),).

Response to Proposed Finding No. 250

Complaint Counsel notes that there is no exhibit denominated "JX 679." Complaint Counsel has no specific response, other than to note that the inability of DIFRA members to review the tonnage shipped data of other individual members did not prevent the DIFRA members from using the aggregate data to monitor their market shares, detect cheating, and inform their Fittings pricing decisions. (CCPF 1297-1333).

B. DIFRA Members Exchanged No Pricing Information

251. DIFRA never collected from, or disseminated any revenue or pricing information to, any DIFRA member. (McCutcheon, Tr. 2561-2562 (Q. All right. Now, let's look at the actual DIFRA report, CX 52, which Mr. Hassi asked you some questions about yesterday. This is -- I think you said yesterday this is the first DIFRA tons shipped report that you received at Star Pipe; right, sir? A. Yes, sir. Q. And if we look in -- let's pick page 6. This is the independent accountant's report on applying the agreed-upon procedures, and those are the procedures that Mr. Long and the other lawyers had outlined and the members had agreed to; right? A. Yes, sir. Q. And there's a reference here -- the third line of the first sentence, there's a reference to trade tons shipped. And what we're talking about with the DIFRA data was not pricing data, was it, sir? A. No, sir, no pricing data. Q. It was not revenue data or dollar figures of any kind, was it, sir? A. No, sir. Q. And in fact, Mr. McCutcheon, there was never any discussion of prices at any DIFRA meeting; right? A. That's correct."), CX 52; JX 694 (Bhutada, Dep. at 26 ("Q. Mr. Bhutada, I'm handing you what I've marked as Exhibit 5 to your deposition, for the purpose of just having an example of a report from DIFRA. If you would, take a moment to look over that. If I'm correct, I think this shows that Mr. McCutcheon on October 1 of 2008 forwarded the report from DIFRA to your attention? A. Yes, sir. Q. Do you know the mechanics of how Star provided information to DIFRA and received information in return worked and practiced? A. Broadly, yes. Q. If you can, broadly explain that, please. A. When the request would come to Dan, he would send it to procurement group, which will do the analysis based on what DIFRA needed the data for as far as sales and shipments go. And that data will come back to Dan after they compute it, and then Dan would send it to the third party at DIFRA. Q. Is my understanding that no information was exchanged directly between suppliers correct? A. That is correct.").); Pais, Tr. 2109-2110 ("("Q. So in April, late April 2008, Mr. Brakefield asked you for a conference call to discuss DIFRA; is that right? A. That's -- that's right. Q. All right. Up at the top, Mr. Brakefield says a little bit about the conference call. So he says, if we can highlight this,

right in the middle, "Tons by month and 2006, 2007. No dollars." Did the DIFRA information that the members sent to the accounting firm -- did that include any dollar information, sir? A. None whatsoever. Q. Was any pricing information ever exchanged? A. Not at all. Q. And just so we're clear, this was an outside accounting firm; is that right? A. Yes. Q. You didn't control the accounting firm? A. No, we didn't. Q. And it was set up by a law firm? A. A law firm, yes. Q. Now, there's a reference here to Tad and Wood, and that's a reference to two of the three or so lawyers who were working for DIFRA at the time? A. That's right. Q. And that's Mr. Long, Thad Long, and Wood Herren? A. Yes. Q. All right. So DIFRA had no dollars, no price; right? A. No. Nothing at all.").); Brakefield, Tr. 1240-1241 (Q. Mr. Brakefield, what is the attachment that's reflected on page 9 of this document? A. On page 9? Q. Yes, sir. A. On CX 1333-009? Q. Yes, sir. A. Okay. That is a -- that is a suggested or a template that we were thinking -- you know, basically trying to come to an agreement as to what would be acceptable, could the accounting firm handle all of these additions, all of the uniqueness of these items. And eventually this was changed and was not what we eventually approved and used to report numbers. This was too detailed. It explained too much as far as uniqueness of manufacturing by members that would expose them to basically certain items that they only made, no one else made. And eventually Mr. Herren and Thad Long and Mr. McKibben made us come to the realization that we could not use this form. This was simply something that was sent to them as to this may be the way we do this, can you handle adding all of this up. And if you will look at 007, you see all the arrows and everything that was going to have to be performed by the CPA, and all of this basically didn't fly. And we had several members that presented this, and to try to get everybody on the same page we basically -- until Mr. Herren and Mr. Long said you're running a risk here by reporting this kind of template or using this kind of template to report, you need to reconsider that. And this basically was a mere suggestion sent to the CPA to see if they could handle all of this. And obviously they did not want to do that, and we corrected that and came up with another form."), 1244-1245 ("Q. Mr. Brakefield, as Sigma's representative to DIFRA, did you know why Sigma did not want to submit its sales dollars information to DIFRA? A. I don't believe Sigma -- in fact, we actually had templates -- Sigma actually tried to do that themselves. And there's templates that show that Sigma had a very similar form to this but with less buckets in it to where we felt could we extract that data. I don't think we had any objection to that. I never heard any objections to that. We had actually been prepared to do that, and then it was -- it was changed. So to say that we did not want to do that, we just basically were trying to get something -- or I was trying to get something, here again speaking for DIFRA, trying to get everybody on the page to where we could agree on something. And if that was X, it was X; if it was Y, it was Y. And the attorneys steered us in directions that said this is risky and we shouldn't do, and so we went away from that. But I don't know if I ever heard Victor or anybody from Sigma say that we would not do that. We just wanted to know could we extract that information from our IT department, and probably there's some documentation that actually shows we did a similar template to this in response to this suggestion by McWane."); Brakefield, Tr. 1352-1353 ("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.").).

Response to Proposed Finding No. 251

Complaint Counsel notes that there is no exhibit denominated "JX 694," and that page 26 of Mr. Bhutada's deposition is not in evidence. The proposed finding is inaccurate. The DIFRA reporting format initially included dollars figures, which had been proposed by McWane. (CCPF 1290-1291). On February 16, 2007, McWane submitted information to Sellers Richardson that included not only tons-shipped, but also sales dollars information. (CCPF 1292). Complaint Counsel does not dispute that Sellers Richardson never distributed dollars figures to DIFRA members.

252. 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. (CX 1479-001-005).

Response to Proposed Finding No. 252

The proposed finding is incomplete, vague, and misleading because the term "historic" is vague, and because the proposed finding omits the facts that each month DIFRA members submitted Fittings shipment data for the prior month, and that in some instances the DIFRA reported data was only a few weeks old. (*See* CCPF 1144).

253. 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." (McCutcheon, Tr. 2416-2417 ("Q. Sir, you mentioned that the reason that you joined -- that Star joined DIFRA was to find out the market share information. How did you expect to do that without a data or information exchange? A. Well, my problem is with you using the word "exchange." We didn't exchange anything. We provided data to a third party. The third party mashed it together, gave us our percentage. We never one time exchanged any data or information. Q. I think -- A. And it was never discussed.").).

Response to Proposed Finding No. 253

The proposed finding is immaterial, although Complaint Counsel does not dispute that Mr. McCutcheon so testified.

C. The Aggregated DIFRA Tonnage Report Shed No Light on Prices

254. DIFRA's accountants collected and aggregated tons-shipped data across broad product size ranges containing literally thousands of different SKUs--all with unique physical attributes and pricing points--that mirrored major size groupings of pipe and disseminated the data to DIFRA members. (RX 113; Brakefield, Tr. 1396-1397.)

Response to Proposed Finding No. 254

Complaint Counsel has no specific response.

255. DIFRA's accountants did not receive any sales or pricing data from DIFRA members, and included no such data in any report. (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).); McCutcheon, Tr. 2561-2562 (Q. All right. Now, let's look at the actual DIFRA report, CX 52, which Mr. Hassi asked you some questions about yesterday. This is -- I think you said yesterday this is the first DIFRA tons shipped report that you received at Star Pipe; right, sir? A. Yes, sir. Q. And if we look in -- let's pick page 6. This is the independent accountant's report on applying the agreed-upon procedures, and those are the procedures that Mr. Long and the other lawyers had outlined and the members had agreed to; right? A. Yes, sir. Q. And there's a reference here -- the third line of the first sentence, there's a reference to trade tons shipped. And what we're talking about with the DIFRA data was not pricing data, was it, sir? A. No, sir, no pricing data. Q. It was not revenue data or dollar figures of any kind, was it, sir? A. No, sir. Q. And in fact, Mr. McCutcheon, there was never any discussion of prices at any DIFRA meeting; right? A. That's correct."), CX 52; Pais, Tr. 2109-2110 ("("Q. So in April, late April 2008, Mr. Brakefield asked you for a conference call to discuss DIFRA; is that right? A. That's -- that's right. Q. All right. Up at the top, Mr. Brakefield says a little bit about the conference call. So he says, if we can highlight this, right in the middle, "Tons by month and 2006, 2007. No dollars." Did the DIFRA information that the members sent to the accounting firm -- did that include any dollar information, sir? A. None whatsoever. Q. Was any pricing information ever exchanged? A. Not at all. Q. And just so we're clear, this was an outside accounting firm; is that right? A. Yes. Q. You didn't control the accounting firm? A. No, we didn't. Q. And it was set up by a law firm? A. A law firm, yes. Q. Now, there's a reference here to Tad and Wood, and that's a reference to two of the three or so lawyers who were working for DIFRA at the time? A. That's right. Q. And that's Mr. Long, Thad Long, and Wood Herren? A. Yes. Q. All right. So DIFRA had no dollars, no price; right? A. No. Nothing at all.").).

Response to Proposed Finding No. 255

Complaint Counsel notes that there is no exhibit denominated "JX 679," and that portions of the cited passage from Mr. Haley's deposition are not in evidence. The proposed finding is inaccurate. The DIFRA reporting format initially included dollars figures, which had been proposed by McWane. (CCPF 1290-1291). On February 16, 2007 McWane submitted information to Sellers Richardson that included not only tons-shipped, but also sales dollars information. (CCPF 1292). Complaint Counsel does not dispute that Sellers Richardson never distributed dollars figures to DIFRA members.

256. The DIFRA accountants' report did not break down the tonnage shipped data by state. (JX 694 (Bhutada, Dep. at 111-112 ("Q. The next area that I wanted to touch on was regarding DIFRA. And I believe you testified that DIFRA helped Star make its decision to enter the domestic market. Is that correct? A. Yes, sir. Q. With the DIFRA reports that you received, did you receive specific breakdown of the sales among the participating companies between their domestic sales and their imported sales? A. No, sir. Q. And so the DIFRA data didn't provide you any information as to the total sales of domestic product versus imported product? A. No, sir. Q. And the DIFRA data wasn't -- let me rephrase that. DIFRA didn't provide data that identified the aggregate sales by the participating members of DIFRA in individual states? A. No, sir. Q. Star generated reports after it received the DIFRA report for the month that calculated the total sales of fittings in each state, didn't it? A. No, sir. That had no correlation with DIFRA.").).

Response to Proposed Finding No. 256

Complaint Counsel has no specific response, other than to note that there is no exhibit denominated "JX 694," and that portions of the cited passage from Mr. Bhutada's deposition are not in evidence.

257. 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. (JX 679 (Haley, Dep. at 36-37 ("Q. I may have gotten my pages confused there. Thank you. We've talked about that only aggregated information was provided back to the members, correct? A. Correct. Q. Were you ever told why that was the case or why that was important? Alternatively, were you just told, "This is the way we want it done," and you complied? A. Well, we knew that it had to be the strictest of confidence so that none of the members knew any of the information of the other members. Q. That was the intent? A. That was the intent. Q. That was the whole reason for hiring your firm, correct? A. Exactly. Q. They could have -- A. Somebody different could have done it. It was just a compilation of

information that they hired us to keep the confidence and the integrity of the data separate. I think that's one reason it was sent directly to us and not to DIFRA, and then from DIFRA to us."), 73-74 ("Q. Mr. Haley, you testified earlier that Sellers, Richardson kept the individual's submissions of different data in the strictest confidence; is that correct? A. Correct. Q. Could you explain for me why Sellers, Richardson kept the different individual submissions in the strictest of confidence? A. The entity did not want the individual members knowing the amount of shipments by each individual company. Q. Did you have discussions about that requirement with Wood Herren? A. Yes. Q. What is your understanding of why DIFRA does not want the members knowing individual shipment data? A. They didn't want any issues dealing with collusion between members. Q. What is your understanding of why the individual shipment data would be related to collusion between members? A. I mean, my perception was that they were being very conservative, and they didn't want anybody knowing any information.").).

Response to Proposed Finding No. 257

Complaint Counsel has no specific response, other than to note that there is no exhibit denominated "JX 679," and that portions of the cited passage from Mr. Haley's deposition are not in evidence.

258. 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. (Brakefield, Tr. 1352-1353 ("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. Q. And if you would look, sir, then above on that same page, I think you had made reference to this -- passing reference to this before when you were asked by counsel about this document. There's a number of arrows and circles and whatnot on the left-hand side of that Excel spreadsheet; correct? A. Yes, sir. Q. And what that is, sir, isn't it, that counsel was saying that these different categories consistent with the arrows would need to be compressed into larger -- I think the word you used was "buckets"; right? A. That's correct. That was the recommendation that we ended up with, yes."); JX 654.

Response to Proposed Finding No. 258

Complaint Counsel notes that there is no exhibit denominated "JX 654." The proposed finding is incorrect and unsupported by the cited testimony, which merely describes the reporting format of the information exchange. The evidence establishes that DIFRA members were able to

use the DIFRA reports to monitor their market share and determine whether their competitors were taking share by offering Project Pricing. (CCPF 1297-1333).

259. The tons-shipped information that was disseminated by DIFRA's accountants contained historic tons-shipped data that represented sales that were weeks, months, even up to a year old. (JX 654-655 (Brakefield, Dep. at 109-111 ("Q. And you also discussed with Mr. Ostoyich the selection of shipments in tons, and you referred to sometimes delivery can be a long time after the sale; is that correct? A. That's correct. Q. And how often does that happen? A. In any public job, it happens pretty much every time. A. Well, public work that had public funds had certain parameters or processes that you had to go through before you received a notice to proceed on the project; that normally took a period of time. It could vary, 60 days to 120 days. And then after that, once that had been decreed, you could start this job. Purchase orders were issued and all the documentation to make sure that the orders were placed occurred at that time. Sometimes they were placed in advance because they had items that were maybe 30-week delivery. So you were trying to get the jump on that so you could make it in a timely manner to get the schedule of the job. Okay. So most -- and I would say 99.9 percent of the public work, it was at least a 60 to 120-day period before you got an order, and then usually 8 to 10 weeks after that that you would ship that order. Private work was all over the map.") (objections omitted), 134-136 ("Q. Is there -- in the industry, is there a typical lag time between when the sale takes place and when the fitting is shipped leaving aside the public works? A. No. Again, like I stated, if you took the public out, you would just have private, and private is all over the map. It is like a shotgun effect. It could be a day; you could ship something that day; you could ship it in, you know, 30 days; you could ship it in 30 weeks. It's -- that's a very difficult assessment to say that there is a rule of thumb. No, I don't know of one. Q. So it's not the case that most fittings are shipped within a month of when they're are sold? A. You know, I would say that depending upon the configuration and the fitting itself, it's hard to say there's a rule like that. Each category, restraints, grooved, flanged, mechanical, push-on, all of those would have some different applications in different jobs, and it can be random. Q. What percentage of fitting sales -- strike that. What percentage of fittings are shipped within one month of the date of invoice sale? A. Here, again, I would say, you know, it's 70/30, 60/40, within a timeframe. It's just -- it's just like a Willow tree, it will blow. It's very difficult to pin that down in a manner that you say, hey, this is so repeatable, here is the rule.") (objections omitted); McCutcheon, Tr. 2563 ("Q. And you say not the days you actually received a purchase order. What do you mean by that? A. It's very possible to, for an example, receive an order, a purchase order, in January, but the project may not require it for six, eight months, sometimes up to a year. Q. Am I right then, sir, that there's a lag time between when you actually clinch the sale and what the price is going to be on the sale and when it actually ships out the door from Star Pipe? A. On some orders, yes, sir. Q. A big utility plant, for example, water treatment plant, might take -- A. Yeah. Q. -- quite a while? A. Yes, sir.").).

Response to Proposed Finding No. 259

Complaint Counsel notes that there is no exhibit denominated "JX 654" or "JX 655."

The proposed finding is misleading insofar as it suggests that the DIFRA reports for each month

did not reflect shipments that had been made up through the prior month. (CCPF 1144 ({

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260. 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. (JX 694 (Bhutada, Dep. at 28 ("Q. By looking at the data that's on the page that's Bates labeled 17016, could Star determine the volume that any of the other suppliers were selling, or only your own market share? A. Only our own market share.")); JX 654 (Brakefield, Dep. at 82-83 ("Q. Now, how many of those tons could you tell are Star Pipe tons versus SIGMA tons versus -- A. You cannot. Q. How many were domestic products made in the USA versus made outside the USA? A. You can't tell. Q. Can you tell -- are domestic fittings, are they typically the same price as imported fittings, do you know? A. The domestics fittings would be higher than imported fittings. Q. Where in the country -- can you tell which region in the country the 1,139 tons were sold in January of 2008? A. No, sir. Q. Are prices the same across the country or are there different prices in different regions? A. No, sir, different prices for different regions. Q. Can you tell anything about what sort of coating or configuration or lining this 1,139 tons in January of 2008 were? A. No, sir. Q. Can you tell, Mr. Brakefield, when the products were actually sold? A. No, sir. Q. Just so we're clear on the record, the tons that are shipped in January of 2008 -- A. Yes. Q. -- is there any way to determine at what point in time they were sold? A. No, sir.")); JX 638 (McCullough, IHT at 209 ("Q. Can you use the data either reported through DIFRA on the fittings side or VMA on the valve and hydrant side to track your market share? A. You can track your market share and you can track the size of the industry, but you can't track the market share of the other members."); (JSLF ¶ 18)).

Response to Proposed Finding No. 260

Complaint Counsel has no specific response, other than to note that there are no exhibits denominated "JX 694," "JX 654," "JX 638," or "JSLF."

261. 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." (Rybacki, Tr. 3540-3541).

Response to Proposed Finding No. 261

The proposed finding and cited testimony are misleading and contradicted by the weight of the evidence. Complaint Counsel does not dispute that at trial Mr. Rybacki made the statements attributed to him, or that DIFRA did not help Sigma plan its inventory. However, the

substance of Mr. Rybacki's statement is contradicted by the weight of the evidence, including contemporaneous documents, which establishes that DIFRA members used the DIFRA reports to monitor their market share and determine whether their competitors were taking share by cutting prices. (CCPF 1297-1337). There is no contemporaneous evidence that Sigma used the DIFRA reports for inventory "planning purposes." Further, as vice president of sales at the time, Mr. Rybacki was not involved in inventory planning. (*See* CCPF 82-95). 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); *see also infra* Response to Proposed Finding No. 270).

262. Most of the DIFRA tonnage reports contained errors--of the eight (June 2008-January 2009) reports issued by DIFRA, five contained incorrect data (June-October). (Brakefield, Tr. 1318 ("Q. Mr. Brakefield, did DIFRA members ever submit data that had errors? A. Yes, they did. Q. Would you turn to RX 86. This one will be in the very back. A. Yes, sir. Q. Does this document reflect Sigma correcting one of its errors? A. That's correct. Q. And so the reports prior to June 30 contained erroneous data? A. That's correct. Q. And reports after June 30 contained corrected data? A. That's correct. Q. Were those reporting errors corrected voluntarily? A. Yes, sir. We notified and corrected and reissued our numbers."), RX 86,; 1391-1394 ("Q. If you would turn to RX 86, 086, please. Do you see this document, sir? A. Yes. Q. And if you could turn your attention to the second page. It's an e-mail from yourself to Bree Holland, dated June 30, 2008. Do you see that? A. Yes, sir. Q. And you write, "During a routine audit, the above corrections to the DIFRA numbers submitted early were found by Sigma. We regret this and apologize for any inconvenience." Do you see that? A. Yes, sir. Q. And is this the instance of the erroneous data that you had testified to earlier? A. That's correct. Q. And after you brought this information to the attention of the accounting firm, it was then -- you then sent that information to Mr. Herren and Thad Long; correct? A. I notified them, yes, I did, and then basically said that we would resubmit it. Q. And if then you look at the top e-mail from Margaret Powell, she's from Sellers Richardson; right? A. Correct. Q. She writes, on the last sentence of the first paragraph, "However, looking at these differences reported by Sigma" -- and by "differences" she meant errors; correct? A. Correct. Q. -- "it looks like every month that was reported was incorrect." A. Correct. Q. "I am not really sure the best way to handle it." Do you see that? A. Yes, sir. Q. And that "every month" again referred to all of '06, all of '07 and the first three months of '08? A. Yeah. I think it would be -- since '06 was only an aggregate only and not months, it would be '07 and '08. Q. If you would turn to RX 090? A. RX-what now? Q. 090. A. Yes, sir. Q. That's a July 17 -- well, I'm looking at the second e-mail down -- July 17, 2008 e-mail from Mr. Herren? A. Yes, sir. Q. To yourself, copying Mr. Long and Mr. McKibben again; correct? A. That's correct. Q. And he's also e-mailing the other members of DIFRA at this point. A. That's correct. Q. And he's disclosing on July 17 the error that Sigma

discovered and brought to the attention of the accountants and the lawyers? A. Yes, sir. Q. Now, your earlier e-mail was a June 30 e-mail that disclosed the errors; correct? A. That's correct. Q. And it wasn't until almost three weeks later, two and a half weeks later that the lawyers then told the membership about the error; correct? A. Yeah. I think they wanted to have everything in place with the new numbers or something of that -- or maybe this is when Thad was on vacation for a couple of weeks. I forgot. But there was a reason why it didn't happen just right at that time. I forgot what it is."), 1396-1397 ("Q. And he says that the tonnage data was underreported, McWane's tonnage data was underreported; correct? A. Let's see. Yes, sir. It sure was. Q. And then if you look at the page before, at page 3? A. Yes, sir. Q. And you have an e-mail at the top that's responding to Bree Holland's e-mail below saying what should we do; correct? A. That's correct. Q. And you say, "My suggestion" -- and I'm looking at -- one, two -- the fifth or sixth line down in your e-mail. You say, "My suggestion is to restate the reports from May 2008 to October 2008, just like we did when Sigma found an error." Do you see that? A. Yes, sir. Q. And so you felt that as of November 17, 2008 that all of the DIFRA reports from June through October were actually containing errors; correct? A. That's correct."); RX 113.

Response to Proposed Finding No. 262

The proposed finding is misleading and immaterial. The proposed finding is misleading because any errors in the DIFRA reports were detected and corrected voluntarily by DIFRA members, and were so small that no DIFRA member ever requested an audit of the other members' submissions. (CCPF 1334-1337). The proposed finding is immaterial because it has no bearing on (1) McWane's offer of a price increase in exchange for Sigma and Star participating in the information exchange, or (2) the DIFRA members' use of the data to facilitate price coordination.

263. Star's May 6, 2008 multiplier change had nothing to do with DIFRA. (McCutcheon, Tr. 2554-55 ("Q. All right. Mr. McCutcheon, I want to switch gears. You were asked some questions about DIFRA yesterday, and let me see if we can clarify a few things. First, if we can pull up CX 37. This is a Star Pipe letter regarding a multiplier change May 6, 2008 you were asked some questions about yesterday. Do you see that, sir? A. Yes, sir. Q. At Star Pipe did you decide to send this letter out because DIFRA was up and running? A. No, sir. Q. Did this letter have anything to do with DIFRA? A. No, sir.").).

Response to Proposed Finding No. 263

The proposed finding is contradicted by the weight of the evidence. Star's May 6, 2008, pricing letter coincided with the price increase announcement initiated by Sigma on the day that McWane, Sigma, and Star had finalized the plans to form DIFRA. (CCPF 1168). Sigma timed

the announced price increase to coincide with the suppliers' anticipated exchange of data through DIFRA. (CCPF 1168-1173).

264. DIFRA failed to breed trust among its members, including McWane, Sigma, and Star, who all remained wary of and fiercely competitive with each other. (Rybacki, Tr. 3566-3567 ("Q. And you mentioned a moment ago that you wanted Star to get its -- you wanted Star to get its data in because DIFRA might be in danger of disbanding. Why would it be in danger of disbanding? A. Well, if you don't participate in the agreed-upon conditions, then I was afraid it might disband. Q. And what were the agreed-upon conditions at that point in time? A. Well, that the principal parties would submit data, tonnage data, was one of the things we talked about. Q. And were you concerned that if the principal parties didn't submit their tonnage data, all of DIFRA might fall apart? A. Yeah. I thought that was a distinct possibility. Q. And why did you think that? 4 A. Because there's such a mistrust amongst the group as a whole anyway. Q. Did participating in DIFRA help build trust in the group? A: Again, I'd be guessing. I would say not really. Q. From your perspective, did it build any trust? A. Not really.") (objections omitted or overruled?).).

Response to Proposed Finding No. 264

The proposed finding is inaccurate, misleading, and contradicted by the weight of the evidence. The cited trial testimony does not use the term used the term "fiercely competitive," and does not support the broad proposition advanced by the proposed finding. The proposed finding is contradicted by the weight of the evidence contemporaneous with the events at issue, including contemporaneous Sigma documents, which establishes that during the course of its operation, the DIFRA information exchange enhanced trust among its members. (*See* CCPF 1279 (Pais June 19, 2008 memo describing benefit of DIFRA being "increased trust and respect between members"); *see also* CCPF 828-841 (describing preexisting trusting relationship between Sigma and McWane)). The evidence also establishes that DIFRA reduced competition and enhanced trust because its members used the DIFRA reports to monitor their market share and determine whether a loss of volume resulted from overall market decline or from their competitors taking share by Project Pricing. (CCPF 1297-1333). This in turn led to greater confidence in maintaining higher prices in the face of declining demand.

265. DIFRA did not serve as a vehicle to permit Sigma, Star, and McWane to fix and stabilize prices for Fittings. (Brakefield, Tr. 1333-1334 ("Q. And just to be clear, in January of 2008, did you, Mr. Brakefield, communicate with anyone at McWane and agree upon multipliers for Mr. Rybacki's business with anyone at McWane? A. No, sir. Q. In June 2008, did you, Mr. Brakefield, communicate with anybody from McWane and agree upon multipliers that Sigma and McWane would charge customers? A. No, sir. Q. In June 2010, did you communicate with anyone at McWane and agree upon the prices that Sigma and McWane would charge customers? A. No, sir."), 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. 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."), 1384-1389 ("Q. Is it consistent with your understanding that Sigma at least submitted unaudited data to DIFRA -- or -- excuse me -- to the CPAs? A. Say that again. Am I? Q. The information that was submitted by Sigma to the CPAs referenced here was unaudited data? A. That's correct, yes. Q. And if you would turn to the next page, please, this is a spreadsheet that shows trade tons, aggregated trade tons shipped for the year ended December 31, 2007; correct? A. That's correct. Q. And if you look under the diameter -- the heading Diameter, it says 2" to 12" Flanged and All Other. Do you see where I'm referring? A. Yes, sir. Q. Could you tell me how much of -- and then to the right of that there is units, which is the number of fittings that were shipped in January and then for the corresponding months; correct? A. Yes, sir. Q. Could you tell me under 2" to 12" flanged how many of the 1258 fittings that are referenced were McWane fittings? A. No, sir. Q. Could you tell me how many of the fittings were Star fittings? A. Could not. Q. And if you look actually at the next -- excuse me -- two pages in, it's the 2008 report. Do you see that? A. Yes, sir. Q. And that has the same heading Diameter 2" to 12" Flanged and All Other? A. Yes, sir. Q. Could you tell me in that category how much of these fittings that are represented are domestic fittings? A. Cannot. Q. Can you tell me how many are imported fittings? A. Cannot. Q. Can you tell me in this spreadsheet now, whether it's the 2" to 12", 14" to 24", or over 24", at what price did any of the products ship out at? A. Could not tell you at all. Q. Can you tell me where in the country or in Puerto Rico were any of these products sold? A. No, sir, I could not. Q. Now, going back specifically to the 2" to 12" flanged reference, how many different -- do you know what a SKU is? A. Yes, sir. Q. What do you understand a SKU to be? A. A SKU is just an individual item that you manufacture or sell. It's an item -- it's part of an item list that you produce. You keep up with it electronically. I don't know what the "SKU" stands for, but something unit I guess. I'm sorry. Q. Could you tell me how many different SKUs are represented in the 2" to 12" flanged category? A. Oh, wow. Just regular A items there would probably be hundred. And then if you basically start with the B and C items, which are the way you use the terminology in terms of the configurations of the fitting as far as the A items are the most commonly used, B are the less used, C are the less and D are the less, you could have 600-700 items, SKUs there for flanged. Q. And then -- A. 2 through 12. Q. 2 through 12, six or -- I'm sorry -- 600 or -- A. Six to seven hundred. Q. And then in the "all other" you would have hundreds or thousands of other SKUs? A. Yes, sir. As it goes up with the more reduction of tees and crosses and bends and stuff like that, you get -- because you have more sizes, it exponentially goes up. And also under the other, so then every time you have a restrained joint, every time you have a push-on joint, every time you have a mechanical joint

that's pictured over there, it's just that many more configurations (indicating). So if you've got 600 in flanged, so mechanical would be another -- in, say, 14 through 24 it would -- in 2 through 12 it will be the same, six, seven hundred, but if you go 14 through 24 it could be 2000. If you go 30 and up -- or 24 and up, rather, it could be -- it could be another 2700. Q. I was just want to make sure I get this straight. So 2" to 12" inch flanged is six or --: Q. 2" to 12" flanged six to seven hundred? A. Correct. Q. 2" to 12" all other would be several thousand? A. I would say that when you add each of the configurations, mechanical joint, restraints, push-on joint, and grooved, which was included in the "all other," you would multiply that times four. Q. And then under 14" to 24" flanged how many different SKUs are we talking? A. And I'd say the six to seven hundred items that we talked about for flanged, that could be 1000 to 1200, and then you would multiply that times four. Q. Okay. And then the 14" to 24" all other? A. Well, that would be multiplied by four. Q. That's the -- okay. A. Yeah. Q. And then over 24" flanged? A. Over 24" flanged you could have that 1000 to 1200 go to 1400 to 1500 and then multiplied by four for all other. Q. Okay. And can you tell me, based on this spreadsheet, when any of the fittings that are represented here were actually sold? A. No, sir.") (objections omitted).).

Response to Proposed Finding No. 265

Complaint Counsel notes that a portion of the cited and excerpted testimony was ordered "disregarded" by the Court. (*See* Brakefield, Tr. 1336). The proposed finding is vague, misleading, and contradicted by the weight of the evidence insofar as the proposed finding suggests that DIFRA did not facilitate price coordination or the pricing agreement among McWane, Sigma, and Star. The weight of the evidence establishes that DIFRA reduced competition and enhanced trust because its members used the DIFRA reports to monitor their market share and determine whether a loss of volume resulted from overall market decline or from their competitors taking share by Project Pricing. (CCPF 1297-1333). This in turn led to greater confidence in maintaining higher prices in the face of declining demand.

D. Non-domestic Fittings Prices Declined During DIFRA's Brief Operation in the Second Half of 2008

266. During the second half of 2008, McWane's net prices for non-domestic Fittings prices [*sic*] declined. (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.").).

Response to Proposed Finding No. 266

The proposed finding is incorrect and is contradicted by the weight of the evidence, including McWane's own contemporaneous business records, as set forth in Response to Proposed Finding No. 25.

267. During the second half of 2008, Sigma's Fittings prices declined. (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 (†**{**

}), 3717-3719, *in camera*).

Response to Proposed Finding No. 267

The proposed finding is misleading and contradicted by the weight of the evidence, which establishes that McWane, Sigma, and Star successfully curtailed Project Pricing through most of 2008 (CCPF 1338-1423), and in particular, that Sigma's actual transaction multipliers generally increased across most regions and for most product sizes and size ranges (CCPF 1370-

1383). The proposed finding is also contradicted by Mr. Rybacki's cited testimony that **{**

} (Rybacki, Tr. 3660, *in camera*). Mr. Pais's cited testimony related to a "quick" erosion in pricing in Florida and Georgia that had occurred "over the recent few weeks" as of November 24, 2008, consistent with the suppliers' increase of Project Pricing when the terms of collusion largely fell apart after the market downturn in August 2008. (*See* RX-116 at 0001-0002 ("I am not sure if this trend is similar at other parts too"); CCPF 1436-1438, 1456-1464; Rybacki, Tr. 3717).

268. Star's gross and net profits for Fittings declined during the second half of 2008 (McCutcheon, Tr. 2573 ("Q. All right. And am I right then that in fact Star's gross and net profits for fittings did decline during the DIFRA period in the second half of 2008? A. Yes, sir, you are correct.").).

Response to Proposed Finding No. 268

The proposed finding is contradicted by the weight of the evidence. The evidence shows that **{**

} (CCPF 1370-1383). The global financial crisis hit Star "full steam" in about September 2008 and Star's business suffered a serious decline only in the fourth quarter of 2008. (CCPF 1365).

269. Star's net margins were declining in the second half of 2008. (McCutcheon, Tr. 2571 ("Q. And if I understood you yesterday, your gross margins were declining in the second half of 2008 as the year went on; is that right? A. I recall the nets declining, yes, sir, net margin.").).

Response to Proposed Finding No. 269

The proposed finding is contradicted by the weight of the evidence. The evidence shows that **{**

} (CCPF 1370-1383). The global financial

crisis hit Star "full steam" in about September 2008 and Star's business, including its net profits, declined only in the fourth quarter of 2008. (CCPF 1365).

E. DIFRA Members Used the Aggregated DIFRA Tons-Shipped Data for Pro-Competitive Purposes

270. DIFRA members used the tons-shipped reports to better manage production schedules and inventory. (JX 694 (Bhutada, Dep. at 20-21 ("Q. What benefits did DIFRA offer that made you decide that Star would like to be a member? 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. Q. Correct me if I'm wrong. Knowing your market share, I think you told me, just helped you to plan your business strategy -- correct? -- as one of the reasons? A. That is correct. Q. How does knowing your market share help you plan your business strategy? A. Whatever sales strategy or business strategy we are using, if market share is going down, then you know that you're on the wrong path. If it is stable or going up, then you know that you're on the right path. Q. Did different types of jobs use different types of fittings sizes? A. That is correct. Q. So for example, would plant work use, typically, a different size of fitting than subdivision work? A. Usually. Q. Could knowing your market share help you plan production schedules? A. That is correct. Q. I think you also told me that knowing your market share would help with presentations to the bank? A. That is correct.").); JX 654 (Brakefield, Dep. at 77-78 ("Q. Does this data, does it give you an indication of whether different parts of the economy are moving in different ways? A. Exactly. It identifies segments of the market that leads you to understand the product you need to be making and the size range you need to be dwelling on and having inventory to meet customers' needs, yes, sir. Q. And why was that of interest to the DIFRA member? A. Again, operation efficiencies, cost efficiencies, and able to service customers in a timely manner.") (objections omitted).); Rybacki, Tr. 3539-3541 ("Q. You can take that down, Brian. Did you believe Sigma's participation in DIFRA was a great step in its effort to strengthen the industry? A. I had hopes for it. Q. Did you believe that Sigma's participating in DIFRA would lead to economic benefits? A. The economic benefits if we standardize linings and coatings alone would be a tremendous economic benefit. Q. Would the information exchange lead to economic benefits? A. Not really. The information exchange, as I stated in my earlier testimony, was pretty much what I expected. All we got was our numbers, what our percentage of the market was, and I was pretty much right on the number anyway. Q. Did Sigma make an effort to analyze those numbers? A. You analyze all information you receive. Of course. Q. And how did Sigma use that -- how did Sigma use that analysis? Q. Do you need the question again? A. No. I did not analyze any of this information. That was done by our people in Cream Ridge, New Jersey, our IT people, and obviously Tom and Victor mostly. And I think to me, to me, it didn't do anything because, like I said, stated before, I got pretty strong market -- I got a pretty strong market feel, and my feel was correct. So, therefore, I kind of knew where we were, and it didn't make a -- 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.").).

Response to Proposed Finding No. 270

Complaint Counsel notes that there is no exhibit denominated "JX 694" or "JX 654." The proposed finding is incorrect, unsupported by the cited testimony, and contradicted by the weight of the evidence. The only evidence of which Complaint Counsel is aware in the record regarding use of DIFRA data to manage production or supply chain is hypothetical speculation by self-interested witnesses. For example, in the cited testimony, Mr. Bhutada stated that the DIFRA data helped Star know its market share and make strategic decisions, and, in response to a leading question by Respondent's counsel, he stated that the DIFRA data "could" help with planning production schedules. Likewise, Mr. Rybacki in the cited testimony stated that DIFRA had "zero effect." (Rybacki, Tr. 3541). There is no contemporaneous evidence of any actual decision or change to production or supply chain that was made using the DIFRA information exchange. To the contrary, numerous witnesses admitted that they were unaware of any specific decision that was made, or, in the case of Sigma's executive vice president responsible for production and supply chain, testified that they did not use the monthly reports at all. (*E.g.* CCPF 1328).

271. The DIFRA aggregated tonnage report helped McWane decide, in June 2008, to chose [*sic*] the low end of a range of multiplier increases he [*sic*] had been considering, because the DIFRA report confirmed his [*sic*] suspicion that McWane was continuing to lose market share. (Tatman, Tr. 536-540 ("Q. And when you received this report, you analyzed it; is that right, sir? A. I believe so. And you probably got a spreadsheet from me. Q. Well, let's look at CX 0139. And so you received it at 2:41, and you circulated a copy of the report with some analysis at 3:20; is that right, sir? A. That appears to be the timestamps. Q. And you, as you put it, threw together a simple summary and comparison in Excel? A. Yes. I'm pretty good with that. Q. And you and Mr. McCullough used that to make a decision on the price increase; is that right, sir? A. I'd have to look at the date when we actually sent out the letter, but I've said that Mr. McCullough was waiting for this, and so this would have came into our consideration. Q. And what you did in the intervening time to when you received it to when you circulated the analysis was a quick market share analysis; is that right? A. I would have done that. Q. And you compared that to other benchmarks you'd been using that you've mentioned, for example, the VMA data? A. Yes. And what -- what the initial -- and again, DIPRA -- DIFRA then sent out revised data because this was erroneous here. But I took the initial snapshot of data and analyzed it. And I told you before that I didn't think that I needed this because I thought I knew where we

were. 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. Q. Do you know whether Mr. McCullough sent that on to the -- your brief analysis on to Mr. Page, the CEO of McWane? A. There's a timestamp there. Q. Okay. Let's go to CX 1576. A. You've switched books on me again. I have that. Because I'm old and my memory is poor, was the dates on the prior e-mails that we discussed June 14? Q. No. They were June 17, sir. A. They were June 17. Okay. Q. So in other words, McWane announced a price increase the same day it received the DIFRA data; right? A. If those dates align, that would be correct. Q. So you got the data at 2:41 and by 6:26 you were announcing a price increase to your big customers; right? A. Yes. And if you look at what we had done prior, we 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, and so that action actually ends up on a relative basis lowering prices in the industry. Q. So the DIFRA data helped you determine that you were getting beat on pricing; is that right, sir? A. The DIFRA data let me understand that my loss was larger than I thought. Now I have to speculate of why. Q. And you deduced from the share loss being larger than you thought, based on the DIFRA data, that that was because you were getting beat on pricing; is that right, sir? A. We -- we made a decision because our share loss was greater than what we thought that we were going to go out with a smaller price increase. Q. And you made that decision based on the DIFRA data; right, sir? A. That DIFRA data reaffirmed the decision we made. If you will notice, if we go back, when I had a draft letter, before receiving the DIFRA data, my draft was 8 percent. The brainstorming discussion with Mr. McCullough was 8 to 12 percent. As I told you before, in my heart I knew the answer. I knew we were losing share. My draft letter before the DIFRA data is 8 percent. Now that we have the DIFRA data, that confirms it. It's 8 percent when we have competitors asking for 20 to 40 percent. Q. Sir, when you prepared your drafts that we looked at earlier, you had an 8 percent and a 12 percent; right? A. There's -- there's two bits of data we looked at. We have a brainstorming discussion about what do we do, and there's an option for an 8 percent, there's an option for 12 percent. You also had me look at a draft price increase letter that I put together, and it says "draft." And that didn't say 12 percent; that said 8 percent. And if we could go back to the timestamp on that, I do not have the DIFRA data at the time I wrote that draft. But I'm telling you I know what the answer was going to be, that we were losing share, because I had reported that throughout other documents there. All the DIFRA data did to me -- again, I said it's important to Leon. I knew the answer -- it just reconfirmed what I already knew, that I was losing share, and it reinforced that the situation was worse than I thought, so we pulled out the lower price option, 8 percent, and initiated it."), 958 ("Q. And so then you had pretty much decided on the 8 percent. You got the -- which the draft which counsel showed you. You got the DIFRA data, and then you did something in what range, sir? A. We -- then the 8 percent is a weighted average aggregate. Everything changes by state. Q. So if I understand, what that means is your change in price in June of 2008 after seeing the DIFRA data was roughly only a third of the price that the other guys had out there? A. Yes.") & CX 139, CX 1576) ; (Schumann, Tr. 4284-4287) ("Q. Okay. Let's go to RX 424. If we go down to that bottom e-mail, Andrew, maybe we can pull that out. This is Mr. Tatman's June 17 quick and dirty analysis of that first DIFRA report; right, sir?... Q. Well, Dr. Schumann, let's start with the multiplier maps.

What they did after they got this DIFRA data was send out a multiplier map. We just looked at it. It was lower in every state than Sigma's big bold move which Star had followed; correct? A. The multiplier map that -- it is correct that the multiplier map that McWane began circulating in -- on June 17 had state multipliers that were lower than the multipliers that Sigma had on a map that was never effective as their published multipliers. Q. Now, Dr. Schumann, Mr. Tatman says right here that he believes it will be difficult to get back their share, but he's hoping that with the lower multipliers they're sending out that that will make it possible and make victory all the more sweeter; right? That's what he says right here. A. That's what he says right there."). 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. (Tatman, Tr. 536-540 ("Q. And when you received this report, you analyzed it; is that right, sir? A. I believe so. And you probably got a spreadsheet from me. Q. Well, let's look at CX 0139. And so you received it at 2:41, and you circulated a copy of the report with some analysis at 3:20; is that right, sir? A. That appears to be the timestamps. Q. And you, as you put it, threw together a simple summary and comparison in Excel? A. Yes. I'm pretty good with that. Q. And you and Mr. McCullough used that to make a decision on the price increase; is that right, sir? A. I'd have to look at the date when we actually sent out the letter, but I've said that Mr. McCullough was waiting for this, and so this would have came into our consideration. Q. And what you did in the intervening time to when you received it to when you circulated the analysis was a quick market share analysis; is that right? A. I would have done that. Q. And you compared that to other benchmarks you'd been using that you've mentioned, for example, the VMA data? A. Yes. And what -- what the initial -- and again, DIPRA -- DIFRA then sent out revised data because this was erroneous here. But I took the initial snapshot of data and analyzed it. And I told you before that I didn't think that I needed this because I thought I knew where we were. 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. Q. Do you know whether Mr. McCullough sent that on to the -- your brief analysis on to Mr. Page, the CEO of McWane? A. There's a timestamp there. Q. Okay. Let's go to CX 1576. 1 A. You've switched books on me again. I have that. Because I'm old and my memory is poor, was the dates on the prior e-mails that we discussed June 14? Q. No. They were June 17, sir. A. They were June 17. Okay. Q. So in other words, McWane announced a price increase the same day it received the DIFRA data; right? A. If those dates align, that would be correct. Q. So you got the data at 2:41 and by 6:26 you were announcing a price increase to your big customers; right? A. Yes. And if you look at what we had done prior, we 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, and so that action actually ends up on a relative basis lowering prices in the industry. Q. So the DIFRA data helped you determine that you were getting beat on pricing; is that right, sir? A. The DIFRA data let me understand that my loss was larger than I thought. Now I have to speculate of why. Q. And you deduced from the share loss being larger than you thought, based on the DIFRA data, that that was because you were getting beat on pricing; is that right, sir? A. We -- we made a decision because our share loss was greater than what we thought that we were going to go out with a

smaller price increase. Q. And you made that decision based on the DIFRA data; right, sir? A. That DIFRA data reaffirmed the decision we made. If you will notice, if we go back, when I had a draft letter, before receiving the DIFRA data, my draft was 8 percent. The brainstorming discussion with Mr. McCullough was 8 to 12 percent. As I told you before, in my heart I knew the answer. I knew we were losing share. My draft letter before the DIFRA data is 8 percent. Now that we have the DIFRA data, that confirms it. It's 8 percent when we have competitors asking for 20 to 40 percent. Q. Sir, when you prepared your drafts that we looked at earlier, you had an 8 percent and a 12 percent; right? A. There's -- there's two bits of data we looked at. We have a brainstorming discussion about what do we do, and there's an option for an 8 percent, there's an option for 12 percent. You also had me look at a draft price increase letter that I put together, and it says "draft." And that didn't say 12 percent; that said 8 percent. And if we could go back to the timestamp on that, I do not have the DIFRA data at the time I wrote that draft. But I'm telling you I know what the answer was going to be, that we were losing share, because I had reported that throughout other documents there. All the DIFRA data did to me -- again, I said it's important to Leon. I knew the answer -- it just reconfirmed what I already knew, that I was losing share, and it reinforced that the situation was worse than I thought, so we pulled out the lower price option, 8 percent, and initiated it."), 958 ("Q. And so then you had pretty much decided on the 8 percent. You got the -- which the draft which counsel showed you. You got the DIFRA data, and then you did something in what range, sir? A. We -- then the 8 percent is a weighted average aggregate. Everything changes by state. Q. So if I understand, what that means is your change in price in June of 2008 after seeing the DIFRA data was roughly only a third of the price that the other guys had out there? A. Yes.") & CX 139, CX 1576).

Response to Proposed Finding No. 271

The proposed finding is misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests that McWane waited for the DIFRA report before issuing its June 17, 2008 price increase letter because it needed the DIFRA data in order to "help" it decide how much to increase prices. The weight of the evidence, including the testimony of Mr. Tatman cited in the proposed finding, contradicts any suggestion that McWane needed the DIFRA data in order to make a pricing determination. (Tatman, Tr. 539-540 ("That DIFRA data *reaffirmed* the decision we made. . . . [I]n my heart I knew the answer. . . . I'm telling you I know what the answer was going to be, that we were losing share, because I had reported that throughout other documents there. . . . *I knew the answer* -- it just reconfirmed *what I already knew*.") (emphasis added)). McWane waited for the DIFRA report before issuing its June 17, 2008 price increase announcement because it wanted to "drill in [the message]" that

McWane would not lose visibility of market pricing and because it was extracting Sigma's and Star's agreement to participate in the DIFRA information exchange in exchange for its agreement to a further price increase. (*See* CCPF 1174-1245).

272. The DIFRA tons-shipped data helped McWane in its internal analysis of its pricing for DIPF in order to lower McWane's list price for medium and large diameter Fittings in early 2009. (Tatman, Tr. 594-595 ("Q. Now, going back to the 2009 price restructuring, you went up in the 3" to 12" segment? A. I'd have to take a look what we actually published. I could tell you the analysis on the spreadsheet and roughly what it did. You probably have a copy of that. But I think we went up 3 to 4 percent 3 through 12, down 11-ish, 12-ish percent 14 through 24, and down maybe 15-some percent from the large diameter. And I did that from information that I learned from DIFRA data. That DIFRA data gave me knowledge that allowed me to make that decision. Q. And what the DIFRA data told you is that McWane was the strongest in the 3" to 12" segment; right? A. Yes. And I did -- Q. So in that segment you went up; right? A. We went up 3-4 percent. Q. And McWane was weaker in the other two segments where you went down; correct? A. Yes. And that came from looking at DIFRA data. Q. And the DIFRA data told you that Sigma and Star were stronger than McWane in the two segments where you went down; right? A. Remember, I only know what I do. I have to take a look at the other folks, and it doesn't say where that share of volume is coming from."), 972-973 ("Q. Can we go to -- complaint counsel marked yesterday CX 569. Now, here you are in the spring of '09 and you're talking about your list price change, and this is a document that you remember from yesterday, sir? A. Yeah. Yes. Q. All right. And as I understand your testimony yesterday, you restructured your list price in the spring of '09? A. We did. Q. And I think you said that you raised the small diameter 3" to 12" prices a small amount? A. Yeah. Like 5 -- 4 -- 3, 4, 5 percent depending on which time I did it. Q. And then you lowered the 14" to 24" medium diameter list prices? A. Double-digit down. Q. And you lowered the 30" and above large diameter prices? A. Even farther than the 14 through 24. Q. And you did that it sounds like partly to try to get share back from Sigma and Star? A. Yeah. Some of our competitive inputs were that competitors were line item pricing, which means not even giving a multiplier but just giving a fixed price on there, harder to track. We also -- when I looked at the DIFRA data, that's the first time that I actually saw two things, which is what was -- I always had a reference to what my share was in total. Now, I was wrong, it was worsethan I thought, but at least I had a reference. But I never had a reference of how my share was segmented by those sizes or how my share was segmented between flanged and nonflanged.")& CX 569).

Response to Proposed Finding No. 272

Complaint Counsel has no specific response, other than to note that McWane *raised* prices for low-diameter Fittings in its 2009 price restructuring (CCPF 1492-1500), and that the suppliers' 2008 agreed curtailment of Project Pricing had largely broken down by the spring of 2009. (CCPF 1456-1464).

273. 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. (Tatman, Tr. 536-537 (Q. And you and Mr. McCullough used that to make a decision on the price increase; is that right, sir? A. I'd have to look at the date when we actually sent out the letter, but I've said that Mr. McCullough was waiting for this, and so this would have came into our consideration. Q. And what you did in the intervening time to when you received it to when you circulated the analysis was a quick market share analysis; is that right? A. I would have done that. Q. And you compared that to other benchmarks you'd been using that you've mentioned, for example, the VMA data? A. Yes. And what -- what the initial -- and again, DIPRA -- DIFRA then sent out revised data because this was erroneous here. But I took the initial snapshot of data and analyzed it. And I told you before that I didn't think that I needed this because I thought I knew where we were. 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."); CX 139; CX 627).

Response to Proposed Finding No. 273

The proposed finding is contradicted by the weight of the evidence insofar as the proposed finding suggests that McWane sought and used the DIFRA data for legitimate purposes. Complaint Counsel does not dispute that Mr. Tatman made the statements attributed to him, but the weight of the evidence, including contemporaneous documents, establishes that (1) McWane withheld its June 2008 price increase announcement as a means of extracting Sigma's and Star's agreement to participate in the DIFRA information exchange (*see* CCPF 1174-1259), (2) McWane wanted to "drill in [the message]" that it would not lose visibility of market prices (*see* CCPF 1228-1232), and (3) McWane intended to and did use the DIFRA information exchange data only to monitor market shares, detect competitor Project Pricing, and facilitate higher and more stable prices. (*See* CCPF 1300-1314; s*ee also supra* Response to Proposed Finding No. 270).

274. Sigma used the DIFRA tonnage report to help it determine market trends, and therefore better manage its inventory. (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.").).

Response to Proposed Finding No. 274

The proposed finding is contradicted by the weight of the evidence. Although Mr. Brakefield testified in the abstract that the DIFRA information exchange could be used to see market trends, the evidence establishes that Sigma intended to and did use the DIFRA information exchange data only to monitor market shares, detect competitor Project Pricing, and facilitate higher and more stable prices. (CCPF 1276-1283, 1324-1333; *see also supra* Response to Proposed Finding No. 270).

275. Mr. Pais testified that, at the time DIFRA was formed, he believed the DIFRA data could potentially assist Sigma with inventory planning and in managing its supply chain, which had "long leave times of almost six to eight months' time in some cases". (JX 687 (Pais, Dep. at 27-28 ("Q. All right. Mr. Pais, I think you said that you thought the DIFRA would be a good idea; is that right? A. Yes. Q. And what did you think would be a good idea with DIFRA? What was the benefit that you saw? A. For us, our industry lacks, as I saw it, a lot of other industries like automotive, et cetera, lacked any data as to the market demand, and I felt someone like us who has a burden of a long supply chain, long leave times of almost six to eight months' time in some cases, were really going in a very, if not arbitrary, somewhat like as throwing dots with no particular guidance to plan our business, plan our purchases, and inventory for a business like us was the mother's milk. And we were shooting and with the vast product lines that we have, we just were not being able to plan both on upside and downside.")).).

Response to Proposed Finding No. 275

Complaint Counsel notes that there is no exhibit denominated "JX 687." The proposed finding is contradicted by the weight of the evidence. Complaint Counsel does not dispute that Mr. Pais made the statement attributed to him, but the weight of the evidence, including contemporaneous documents, establishes that Sigma intended to and did use the DIFRA information exchange data only to monitor market shares, detect competitor Project Pricing, and facilitate higher and more stable prices. (CCPF 1276-1283, 1324-1333; *see also supra* Response to Proposed Finding No. 270).

276. Mr. Pais testified that: "To me, I think I testified this morning, the primary purpose of DIFRA, the primary benefit from this effort was to know the market size and the trends that we can use to great advantage, and we did for a short amount of time by planning our supply chain, planning the capacity, being better prepared to respond to the market potential up or down." (JX 687 (Pais, Dep. at 126)).

Response to Proposed Finding No. 276

Complaint Counsel notes that there is no exhibit denominated "JX 687." The proposed finding is contradicted by the weight of the evidence. Complaint Counsel does not dispute that Mr. Pais made the statement attributed to him, but the weight of the evidence, including contemporaneous documents, establishes that Sigma intended to and did use the DIFRA information exchange data only to monitor market shares, detect competitor Project Pricing, and facilitate higher and more stable prices. (CCPF 1276-1283, 1324-1333; *see also supra* Response to Proposed Finding No. 270).

277. Mr. Pais expected to be able to use the DIFRA tonnage report to lower Sigma's inventory and supply chain costs. (JX 687 (Pais, Dep. at 128 ("Q. Was it your expectation that you would be able to use that data to lower your inventory cost and your supply chain costs? A. Absolutely.")).).

Response to Proposed Finding No. 277

Complaint Counsel notes that there is no exhibit denominated "JX 687." The proposed finding is contradicted by the weight of the evidence. Complaint Counsel does not dispute that Mr. Pais made the statement attributed to him, but the weight of the evidence, including contemporaneous documents, establishes that Sigma intended to and did use the DIFRA information exchange data only to monitor market shares, detect competitor Project Pricing, and facilitate higher and more stable prices. (CCPF 1276-1283, 1324-1333; *see also supra* Response to Proposed Finding No. 270).

278. Star used the DIFRA tonnage report in presentations to its lenders, and in making its decision to become a domestic Fittings supplier in 2009. (JX 694 (Bhutada, Dep. at 20-21 ("Q. What benefits did DIFRA offer that made you decide that Star would like to be a member? 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. Q. Correct me if I'm wrong. Knowing your market share, I think you told me, just helped you to plan your business strategy -- correct? -- as one of the reasons? A. That is correct. Q. How does knowing your market share help you plan your business strategy? A. Whatever sales strategy or business strategy we are using, if market share is going down, then you know that you're on the wrong path. If it is stable or going up, then you know that you're on the right path. Q. Did different types of jobs use different types of fittings sizes? A. That is correct. Q. So for example, would plant work use, typically, a different size of fitting than subdivision work? A. Usually. Q. Could knowing your market share help you plan production schedules? A. That is correct. Q. I think you also told me that knowing your market share would help with presentations to the bank? A. That is correct.").)

Response to Proposed Finding No. 278

Complaint Counsel notes that there is no exhibit denominated "JX 694." The proposed finding is misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests that the principal purpose and use of the DIFRA information was something other than to allow the suppliers to monitor market shares, detect competitor Project Pricing, and facilitate higher and more stable prices. The purpose of DIFRA was unrelated to Star's assessment of potential entry into the Domestic Fittings market. The last DIFRA report was circulated in January 2009, and Star did not begin to consider entering the Domestic market until March or April 2009. (*Compare* CCPF 1474 *with* CCPF 1717). Further, Star's understanding of the real purpose of DIFRA was "for [Star's] competitors to get information." (CCPF 1286). Finally, Mr. McCutcheon testified that Star **{**

} (CCPF 1323). Instead, Star used the DIFRA data to **{**

} and to reassess its pricing strategy, and in particular to assess whether any decline of Star's sales of Fittings was due to the decline of the economy or due to a loss of share to McWane or Sigma. (CCPF 1317, 1320, 1321).

279. 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), but instead issued lower multipliers for most states effective February 2008 and did not follow Sigma's large multiplier increase announced in April 2008. (Normann, Tr. 4777-4779 ("What conclusion do you ultimately draw from your figure 1, Dr. Normann? A. Well, first let me just say, if you go through the rest of column E, you'll see that there's a great number of states that saw their multipliers decrease in a year-to-year comparison of Alabama, Alaska, Arizona, Delaware, Florida. Then there's -- you know, Indiana. Then there's many that are unchanged. About half the states or over half the states the published multiplier was unchanged or reflected a decrease. So I think what that means, first of all, it's fundamentally inconsistent with the allegations in the complaint about price announcements of price increases. I think it's fundamentally at odds with that. Number two, we're talking about allegations of a cartel and communication and a conspiracy to raise prices, yet what we see is on a state-by-state level some are going -- the multiplier is going down by five percentage -- or five points, rather, some by three. Some it's remaining the same. Some it goes up slightly. The changes are all over the place. And that type of variability in pricing, of price changes, that seems to me much more consistent with normal competitive behavior, normal independent decision-making, than it is with some sort of coordinated price action. And then finally, another important I think takeaway of this is, remember, at both these time periods, prior to McWane's changes, Sigma and Star had made their own price announcements, which represented significant increases in their published multipliers, but McWane's are all over the place, decreases, stays the same, decreases in a year-to-year comparison. This to me is consistent with independent decision-making. Q. All right. Now, we've created a demonstrative that puts this -- depicts this in numbers. And if we can call up RDX 73, I'll ask you to take a look at this. Is this a fair summary of that figure 1 in numerical form, which states went up, how many states went down, and so forth? A. Yes. It gives -- so what this shows is July 2007 to the first multiplier, new multiplier map of 2008, and you'll see -- I think I touched on some of this already -- but, for example, that first time period when the allegations are of price increases, 28 states, McWane lowered the multiplier in 28 states, and 8 states it was unchanged, so, again, very inconsistent with allegations of price increases. But also notice the variability. You know, 28 went down, 8 were unchanged, 14 increased. That to me does not strike a notion of coordinated price increases. And then in the second set of bullet points -- once again, I think I've touched on this as well -- we see that comparing 2007 to 2008, mid-2008, we see more than half the states decreased or were unchanged.")

Response to Proposed Finding No. 279

The proposed finding and cited testimony are inaccurate, unsupported, misleading, and contradicted by the weight of the evidence. First, the proposed finding inaccurately represents the cited testimony. Dr. Normann did not testify that "there is no economic evidence." Instead, he testified that Figure 1 is inconsistent with the allegations of the complaint. (Normann, Tr. 4777).

Second, the only support given for the proposed finding is the testimony of Dr. Normann about Figure 1 from his report, and Dr. Normann's testimony is unreliable and lacks a reasonable basis for the relevant statements. Figure 1 is a comparison of published multipliers over time. Dr. Normann testified that, prior to making that comparison, he reviewed McWane documents characterizing its price changes as price increases. (Normann, Tr. 5424-5427). Dr. Normann testified that, prior to making his comparison, he had not reviewed CX 1664, in which McWane compared its effective prevailing multipliers with its proposed new multipliers and based on which McWane concluded that its proposed new multipliers constituted price increases. (Normann, Tr. 5428-5433; *see* CCPF 945-949, which discusses CX 1664). Dr. Normann testified that he did not talk with anyone at McWane to understand why McWane had characterized its price changes as price increases. (Normann, Tr. 5433-5435). Dr. Normann also acknowledged that if (as announced in McWane's January 11, 2008 letter (CCPF 932)) McWane intended to sell its Fittings only at new published multipliers beginning February 18, 2008 (without change in its catalog prices), McWane's new published multipliers would be its new effective multipliers. (Normann, Tr. 5435-5436).

Third, the proposed finding is misleading insofar as the statement that "McWane did not follow Sigma's large list price increase in the fall of 2007 (for January 2008), but instead issued lower multipliers . . . " suggests that Sigma's announced list price ever went into effect or that McWane did not increase multipliers in early 2008. (*See supra* Response to Proposed Finding No. 140; s*ee also* CX 2265-A (Schumann Rebuttal Rep. at 22 fig. 2) (showing the states in which McWane's effective multipliers increased from 2007 to 2008).

Finally, the proposed finding is contradicted by the wealth of evidence that price changes in 2008, including multiplier increases and the curtailment of Project pricing, were coordinated among the suppliers. (*See, e.g.*, CCPF 907-1423).

280. Dr. Normann testified that there is no economic evidence of an agreement to reduce job pricing. (Normann, Tr. 4746-4749) ("Let's start with the allegations involving the conspiracy that there was an attempt to raise multipliers and reduce job pricing. I think as first sort of the top-level summary, I literally found no evidence consistent with those allegations. All of the evidence that I found rejected or was inconsistent with those allegations really fundamentally. So I found, for example, that for Star, Sigma and McWane, during the time period of 2008 -- and I realize that, at least from my perspective, the exact timing of the alleged cartel is really very vague -- but over roughly that 2008 time period, McWane's prices were trending downward from the end of 2007 into 2009. Star's prices, Sigma's prices, they rose modestly, but not by a significant degree. And Star's and Sigma's actually went up by a different amount, probably by -- well, they were very modest to begin with, but the price increase between the two of them over about a 12 to 13-month period was different by, you know, 40-50 percent, for example. But this is happening during a time where there's enormous cost increases that had started taking place in 2007. Raw material, the energy, the scrap, the pig iron costs in China were going up dramatically. So we'd expect to see some changes in price because of increases in cost, as a fundamental matter in a competitive market, put upward pressure on prices. But what we see is not parallel movements in price that are going up and going up by significantly more than cost increases. What we in fact see are prices moving independently of one another and, you know, declining for some and modest increases for others, so that's fundamentally inconsistent with a conspiracy. But that's not all I looked at. I also looked at the prices for the imported product against what I consider a relevant benchmark, which is the domestic side. Because there's no allegations on the domestic side of the product, so what I would expect to see is -- domestic product is sold into the same marketplace. Domestic product is completely physically fungible. Domestic product faces the same underlying demand, housing starts, for example. So if there was a conspiracy in 2008, I would expect to see the price of imports rise against -- compared to the price of domestic, but I don't see that. In fact, it declines over the time period. Additionally, I also looked at -- I mentioned a few minutes ago I looked at the pattern of sales because a fundamental question that one needs to address and ask and look at in a cartel case is there evidence of withholding, because you can't raise prices, the cartel can't raise prices, absent the ability to withhold product from the market. And so I looked at inventory data. I looked at 1 sales data controlling for seasonality. And what I found is completely inconsistent. It goes in the opposite direction. I found an increase in output, an increase in sales, not a withholding. So my conclusions are, you know, I ran these tests, and I literally, on the attempt to raise prices, found no evidence of it. I also looked specifically at the job pricing question. And what I did there is I looked at essentially the variation in prices, the dispersion of price point, to see if that was reduced in a parallel way among the three sellers in 2008, and I don't see that. It doesn't happen. Some go up. Some are steady. There's no parallel reduction. There's no evidence in the data suggesting a reduction in job pricing.").

Response to Proposed Finding No. 280

The proposed finding and cited testimony are misleading, unsupported, and contradicted by the weight of the evidence insofar as they imply that there is no evidence of reduced Project Pricing or higher Fittings prices. There is no basis for the proposed finding in Dr. Normann's report nor in his testimony. The Fittings pricing analysis of Dr. Normann is flawed. (*See* CCPF 1424-1435; s*ee also supra* Response to Proposed Finding No. 189). And even if one accepts the pricing data despite its errors, Dr. Normann agreed on cross examination that **{**

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(Normann, Tr. 5776-5782, *in camera* (as corrected by Nov. 7, 2012 Joint Stipulation Regarding Trial Transcript Errata)), which is consistent with the allegations of collusion. (*See also* CCPF 907-1423). Finally, Dr. Normann's opinion is contradicted by the weight of the evidence, including McWane's contemporaneous records, which establishes that the suppliers reduced Project Pricing in 2008. (*See* CCPF 1041-1054, 1339-1342).

IX. McWane's Independent Decision to Lower List Prices on Medium and Large Diameter Fittings in Spring 2009

A. Dr. Schumann Testified the Alleged Conspiracy Regarding Non-domestic Fittings Prices Ended in 2008

281. Dr. Schumann testified that the conspiracy was collapsing by the end of 2008. (Schumann, Tr. 4297-8 (Q. Okay. Now, you agree with me, right, that within a few months of the first DIFRA report coming out and being corrected that the conspiracy you found collapsed? A. I believe that by the end of 2008, that last quarter, the conspiracy was collapsing."), 4298 ("My belief is around the end of the year, November or December, in that last quarter of the year, that it collapsed."), 4304 ("Q. October 23, 2008, so right around the time you say the conspiracy is falling apart and ending; correct? A. This is around the time- Q. Yeah. A.--it seemed to be really starting to collapse."), 4064-4065 ("Q. Dr. Schumann, the conspiracy you found in the odd year of 2008 collapsed, was over, in the fourth quarter of 2008, in your opinion; correct? A. I believe that that episode was over at the end of 2008. Q. No, I'm not talking about that episode. I'm talking about the conspiracy that you claim existed -- A. Yes. Q.-- was over at the end of 2008, fourth quarter; correct, sir? A. Yes. That's my opinion."); 4200-4201).

Response to Proposed Finding No. 281

Complaint Counsel notes that, contrary to this Court's Order, Respondent is improperly citing the testimony of an expert for a proposition of fact. The proposed finding is incomplete, misleading, and contradicted by the weight of the evidence. Dr. Schumann testified that "that [2008] episode was over at the end of 2008," and "my conclusion was that the agreement that I described as happening in 2008 fell apart by the end of the year." (Schumann, Tr. 4064-4065, 4067). Dr. Schumann's report refers to events in 2009 in the section of the report where he discusses his opinion that McWane, Sigma, and Star explicitly colluded. (*See* CX 2260-A (Schumann Rep. at 53-56)). Insofar as the proposed finding suggests that the suppliers' price collusion did not continue in 2009 and 2010, it is contradicted by the weight of the evidence, which establishes that such episodes did in fact continue. (*See* CCPF 1484-1571).

282. Dr. Schumann testified that the alleged conspiracy did not extend into 2009 or 2010. (Schumann, Tr. 4066 ("Q. And therefore, Dr. Schumann, you did not find one big, long conspiracy that lasted into 2010 --A. Right. Q.-- correct? A. Yes, that's correct."), 4067 ("Q. Now, you're the expert. That's not what you found. You found one seven-month conspiracy that ended in the fall of '08; correct, sir? A. I concluded that the conspiracy of 2008 ended at by the end of the year. But, I mean, as I said earlier, when the Bureau of Competition took me on as an expert, it was at their risk. My conclusion was things fell apart at the end of 2008.").).

Response to Proposed Finding No. 282

Complaint Counsel notes that, contrary to this Court's Order, Respondent is improperly citing the testimony of an expert for a proposition of fact. The proposed finding is incomplete, misleading, and contradicted by the weight of the evidence. Dr. Schumann testified that "that [2008] episode was over at the end of 2008," and "my conclusion was that the agreement that I described as happening in 2008 fell apart by the end of the year." (Schumann, Tr. 4064-4065, 4067). Dr. Schumann's report does refer to events in 2009 in the section of the report where he discusses his opinion that McWane, Sigma, and Star explicitly colluded. (*See* CX 2260-A (Schumann Rep. at 53-56)). Insofar as the proposed finding suggests that the suppliers' price

collusion did not continue in 2009 and 2010, it is contradicted by the weight of the evidence, which establishes that such episodes did in fact continue. (*See* CCPF 1484-1571).

B. 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

283. In April 2009, McWane independently restructured its list price to raise the prices of its small diameter Fittings by a small amount, and reduce the prices on its medium and large diameter Fittings by about 12 to 15 percent. (Tatman, Tr. 594-596 ("Q. Now, going back to the 2009 price restructuring, you went up in the 3" to 12" segment? A. I'd have to take a look what we actually published. I could tell you the analysis on the spreadsheet and roughly what it did. You probably have a copy of that. But I think we went up 3 to 4 percent 3 through 12, down 11-ish, 12-ish percent 14 through 24, and down maybe 15-some percent from the large diameter. And I did that from information that I learned from DIFRA data. That DIFRA data gave me knowledge that allowed me to make that decision. Q. And what the DIFRA data told you is that McWane was the strongest in the 3" to 12" segment; right? A. Yes. And I did -- Q. So in that segment you went up; right? A. We went up 3-4 percent. Q. And McWane was weaker in the other two segments where you went down; correct? A. Yes. And that came from looking at DIFRA data. Q. And the DIFRA data told you that Sigma and Star were stronger than McWane in the two segments where you went down; right? A. Remember, I only know what I do. I have to take a look at the other folks, and it doesn't say where that share of volume is coming from.").).

Response to Proposed Finding No. 283

The proposed finding is misleading and contradicted by the weight of the evidence insofar as the use of the word "independent" suggests that McWane did not exchange pricing assurances with Star regarding McWane's April 13, 2009 price restructuring announcement that would become effective on May 1, 2009. The weight of the evidence establishes that McWane and Star exchanged price assurances on approximately April 28, 2009, before the May 1, 2009 effective date of McWane's price restructuring. (CCPF 1533-1553). As a result, Star adopted a substantially identical structure of list prices and multipliers on May 4, 2009. (*See* CCPF 1551). Moreover, the weight of the evidence establishes that McWane's April 2009 price restructuring was, like the Tatman Plan, aimed at reducing its competitors' Project Pricing. (*See* CCPF 1497).

284. McWane's April 2009 List Price change was based on Mr. Tatman's independent product weight analysis. (Tatman, Tr. 976 ("Q. And the same thing, you went sort of product by product or group by group and state by state? A. Yes. We took a look -- you know, that went

into that, but then we actually took our list price and got all the weights of all our product and verified all the weights of our product and got the true dollars per pound and looked at how that varied. This was -- I started this in I think August or September the prior year, so this -- this took a while to evolve.").).

Response to Proposed Finding No. 284

The proposed finding is misleading and contradicted by the weight of the evidence insofar as the use of the word "independent" suggests that McWane did not exchange pricing assurances with Star regarding McWane's April 13, 2009 price restructuring announcement that would become effective on May 1, 2009. The weight of the evidence establishes that McWane and Star exchanged price assurances on approximately April 28, 2009, before McWane's May 1, 2009 effective date. (CCPF 1533-1553). As a result, Star adopted a substantially identical structure of list prices and multipliers on May 4, 2009. (*See* CCPF 1551). Moreover, the weight of the evidence establishes that McWane's April 2009 price restructuring was, like the Tatman Plan, aimed at reducing its competitors' Project Pricing. (*See* CCPF 1497).

285. Mr. Tatman did not share the results of his product weight analysis with Star or Sigma. (Tatman, Tr. 976-977 ("Q. All right, sir. And did you share the fruits of all your analysis with Star or Sigma ahead of time? A. No.").).

Response to Proposed Finding No. 285

Complaint Counsel has no specific response.

286. McWane did not consult with Star or Sigma before restructuring its list prices in 2009. (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, *in camera*† (†**{**

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Response to Proposed Finding No. 286

The proposed finding is misleading insofar as it suggests that McWane did not communicate with its competitors regarding its April 13, 2009 price restructuring announcement

prior to and on the May 1, 2009 effective date of that price restructuring. The weight of the evidence establishes that McWane and Sigma executives communicated about the price list through customer letters and meetings before and on the May 1, 2009 effective date. (*See* CCPF 1501-1524). The weight of the evidence establishes that McWane and Star exchanged price assurances on approximately April 28, 2009, before McWane's May 1, 2009 effective date. (CCPF 1533-1553). As a result, Star adopted a substantially identical structure of list prices and multipliers on May 4, 2009. (*See* CCPF 1551). Moreover, the weight of the evidence establishes that McWane's April 2009 price restructuring was, like the Tatman Plan, aimed at encouraging its competitors to centralize pricing authority, resist Project Pricing, and cut back on terms. (*See* CCPF 1497).

287. 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. (Tatman, Tr. 972-975 ("Q. All right. And as I understand your testimony yesterday, you restructured your list price in the spring of '09? A. We did. Q. And I think you said that you raised the small diameter 3" to 12" prices a small amount? A. Yeah. Like 5 -- 4 -- 3, 4, 5 percent depending on which time I did it. Q. And then you lowered the 14" to 24" medium diameter list prices? A. Double-digit down. Q. And you lowered the 30" and above large diameter prices? A. Even farther than the 14 through 24. Q. And you did that it sounds like partly to try to get share back from Sigma and Star? A. Yeah. Some of our competitive inputs were that competitors were line item pricing, which means not even giving a multiplier but just giving a fixed price on there, harder to track. We also -- when I looked at the DIFRA data, that's the first time that I actually saw two things, which is what was -- I always had a reference to what my share was in total. Now, I was wrong, it was worse than I thought, but at least I had a reference. But I never had a reference of how my share was segmented by those sizes or how my share was segmented between flanged and nonflanged. So when we got hammered that year and had to shut that plant down, started looking for, you know, what's going on there, and I just analyzed that and noticed that huge spread on a dollar-per-ton basis on the list price. I think there was a 250 percent spread within the list price between what the dollars per ton list price was on small-diameter fittings versus some large-diameter fittings. And I thought to make us more competitive out there that I was going to change the game again and just structure our list price the way that I would want to have it structured based on how I wanted to compete. And this was a pretty rational move."); CX 569; McCutcheon, Tr. 2584-2585 ("Q. Right. 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."); CX 532 (McWane's market share has been falling relative to Star's since 2003).).

Response to Proposed Finding No. 287

The proposed finding is misleading insofar as it suggests that McWane's April 2009 price restructuring was not aimed at establishing price stability and encouraging its competitors to reduce Project Pricing. (*See* CCPF 1497).

288. Mr. Rybacki testified that he was so angry about McWane's 2009 list price restructuring that he wanted to sue McWane for predatory pricing. (Rybacki, Tr. 3719 ("Q. In fact, Mr. Rybacki, you were so -- so upset, you thought they were predatorily low, those prices; right? A. Yes. I wanted to sue.").).

Response to Proposed Finding No. 288

Complaint Counsel has no specific response.

289. McWane kept its 2009 list price reductions for medium and large diameter Fittings in place. (Rybacki, Tr. 3664-3665, *in camera*† (†**{**

}); RX 242 in camera; Pais, Tr. 2046 ("Q. And in fact, we know McWane kept its price list decline in place throughout 2009; correct, sir? A. Yes. Q. All right. A. Till this day.").).

Response to Proposed Finding No. 289

The proposed finding is incomplete and therefore misleading. Although McWane's revised price list lowered prices on some products, it increased prices by 7.5% for small diameter Fittings, which make up the majority of Fittings sales, and in which segment McWane enjoyed the largest market share. (CCPF 1492-1498).

290. Complaint Counsel has failed to establish any evidence that a call between Mr. McCutcheon and Mr. Tatman in the spring of 2009--after McWane had already announced its list price adjustments--bears any relation to allegations in the Complaint or constitutes an agreement to do anything unlawful.

Response to Proposed Finding No. 290

Insofar as the proposed finding calls for a conclusion of law regarding whether the allegations in the Complaint encompass the referenced 2009 conduct, no response is warranted.

Insofar as the proposed finding calls for a conclusion of law regarding whether the referenced 2009 conduct is unlawful, no response is warranted, although Complaint Counsel notes that the proposed finding is incorrect and contradicted by the weight of the evidence. (*See* CCPF 1533-1552 (detailing McWane's and Star's advance exchange of assurances regarding intent to proceed with implementation of the announced 2009 price restructuring)).

291. Mr. McCutcheon and Mr. Tatman did not discuss prices or the nature of McWane's announced list price change; Mr. Tatman merely confirmed publicly available information that McWane's previously announced price change would be implemented. (McCutcheon, Tr. 2529-2530 ("Q. Now, so you called Mr. Tatman in the spring of '09 and, as I heard you yesterday, you didn't discuss prices with him at all, did you, sir? A. No, sir. Q. And you simply called and asked about whether you should go ahead and print your list, whatever it was; right? A. Yes, sir. Q. Whether there was some remote chance Mr. Tatman was going to rescind the list he'd already sent out; right? A. Yes, sir. Q. And you didn't offer to change your position, did you? A. No, sir. We didn't talk about my position. Q. And you didn't say to him, "Hey, please rescind that big price decrease," did you, sir? A. No, sir. Q. And that was the entire extent of the conversation, was just are you going to rescind, he said no, and then that was it? A. The -- we had a short conversation right after that -- I think I talked about it some yesterday -- that Mr. Tatman jokingly said that if he didn't print it, he would pay our $25,000 printing fee, and that was the extent of the conversation. Q. Kind of like "I'll eat my hat if it doesn't happen" sort of a thing? A. Yes, sir, very similar thing. Q. Any secret message going on there that you intuited, Mr. McCutcheon? A. No, sir.").)

Response to Proposed Finding No. 291

The proposed finding is misleading and contradicted by the weight of the evidence, which establishes that, after a conversation with Mr. Pais, Mr. McCutcheon called Mr. Tatman in Spring 2009 to determine if McWane was still going to implement its new price list despite Sigma's opposition (information that was not publicly available). (CCPF 1526, 1531, 1533-1553). Based on the conversation, both Mr. Tatman and Mr. McCutcheon proceeded on the

understanding, confirmed in the phone call, that both McWane and Star would implement the list price change. (CCPF 1533-1553).

292. The cost of printing a new price list is roughly $30,000. (Tatman, Tr. 257 ("Q. And you previously estimated those costs at about $30,000 for the cost of printing and mailing? A. I've said -- well, I think when I say 25 or 30 thousand dollars, that's total cost, including the internal burden of doing that, the cost of printing and cost of mailing, and that's an estimate. I don't have an exact number on that. But it's not -- it's not -- let's agree it's not $2,000. It's something of significance."); JX 644 (Tatman, Dep. at 45-46 ("Q. And you mentioned it being expensive. Do you have a ballpark on what one of these things costs to change? A. Well, are you going to count the internal cost? Q. No. The external cost. That's a fair point. A. Okay. I think printing and mailing is around a $30,000 bill, and that's -- that's a real rough estimate.")); Rybacki, Tr. 3542 ("Q. There's a reference here to McWane -- strike that. Were you thinking about a multiplier increase or a list price increase? A. We wanted a price -- a list price increase because they're more effective, but I think it was going to be a -- we were looking at maybe a multiplier increase. Q. And why were you looking at a multiplier increase if a list price increase was more effective? A. The list prices are expensive to do and if -- a multiplier increase is easier, but way less effective.").).

Response to Proposed Finding No. 292

Complaint Counsel has no specific response, other than to note that there is no exhibit denominated "JX 644."

293. Star independently chose to follow McWane's announcement lowering its prices because that was Star's standard operating procedure. (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.").)

Response to Proposed Finding No. 293

The proposed finding is misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests that its decision to follow McWane's price announcement was "independent." Star had specific communications with McWane in which it sought and received assurances that McWane would proceed with changes in its list prices before Star decided to proceed with a change in its catalog prices. (CCPF 1533-1553).

X. McWane Independently Decided Its June 2010 Multipliers

294. In June 2010, Sigma distributed a price increase letter to its customers which did not specify whether it was a list or multiplier change. (CX 1413; JX 687 (Pais, Dep. at 372-377); (JX 690 (Rybacki, Dep. at 210-213)).

Response to Proposed Finding No. 294

Complaint Counsel notes that there is no exhibit denominated "JX 687" or "JX 690." The proposed finding is unsupported by the cited documents and testimony, and contradicted by the weight of the evidence. Neither cited witness testified that the June 2010 customer letter did not specify whether the price change was a list or multiplier change. (*See* CX 2528 (Pais, Dep. at 372-377); CX 2531 (Rybacki, Dep. at 210-213)). The letter itself states that "*multipliers* for Non-Domestic Fittings will be revised." (CX 1413 at 004 (emphasis added)). More importantly, whether the letter specified a list or multiplier change, Sigma intended to and did communicate to its competitors through its customer letter its intent to support a price increase, to which McWane and Star responded. (*See* CCPF 1554-1571; CX 1413 at 001 (Pais June 8, 2010 email: "[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 . . . .")).

295. 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. (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, *in camera*† (†**{**

}†); 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).

Response to Proposed Finding No. 295

Complaint Counsel notes that RXD 001 is not in evidence. The proposed finding is misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests that McWane made its decision "independently," and did not consider and respond to Sigma's improper "heads up" communication that it would support a price increase. The weight of the evidence establishes that McWane's June 17, 2010 letter was a "response" to "recent communication from Sigma and Star." (*See* CCPF 1565; CX 2442-A at 001 (Tatman email in response to Sigma's announcement noting that "we really have two approach options" and discussing potential response communications that McWane could make through customer letters); Tatman, Tr. 319 ("Q. And these two options were prompted by a communication from Sigma and Star; correct? A. Based on the language here, I would say that's probably so."); CCPF 1566; CX 2440 at 001).

296. Mr. Tatman performed complex internal analyses with respect to McWane's June 2010 pricing decisions. (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.").).

Response to Proposed Finding No. 296

The proposed finding is misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests that McWane did not consider and respond to Sigma's improper "heads up" signal that it would support a price increase when determining whether McWane should announce a price increase. The weight of the evidence establishes that McWane's June 17, 2010 letter was a "response" to "recent communication from Sigma and

Star." (*See* CCPF 1565; CX 2442-A at 001 (Tatman email in response to Sigma's announcement noting that "we really have two approach options" and discussing potential response communications that McWane could make through customer letters); Tatman, Tr. 319 ("Q. And these two options were prompted by a communication from Sigma and Star; correct? A. Based on the language here, I would say that's probably so."); CCPF 1566; CX 2440 at 001).

297. Star subsequently announced a multiplier change in June 2010. (CX 1406; CX 2441.)

Response to Proposed Finding No. 297

Complaint Counsel has no specific response.

298. Sigma subsequently announced a multiplier change at the end of June 2010. (CX 1396)

Response to Proposed Finding No. 298

Complaint Counsel has no specific response.

299. McWane, Sigma, and Star did not discuss or agree upon any multiplier adjustments or other pricing in 2010. (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, *in camera*† (†**{** **}**); 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).

Response to Proposed Finding No. 299

Complaint Counsel notes that RXD 001 is not in evidence. The proposed finding is misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests that McWane, Sigma, and Star did not communicate in any manner on the June 2010

price increase. The weight of the evidence establishes that the suppliers actively communicated with each other regarding a price increase through their customer pricing letters (and other means). (*See* CCPF 684-698 (suppliers routinely received each other's pricing letters and communicated through pricing letters); CCPF 1554-1571 (detailing 2010 communication and agreement through pricing letters); *see also supra* Responses to Proposed Finding Nos. 294-296).

XI. Complaint Counsel's "Opportunity to Conspire" Evidence Does Not Support Any Inference of Collusion

300. Complaint Counsel failed to offer any evidence to support its contention that phone calls between **{ }**† had anything to do with the allegations in the Complaint, and witnesses expressly denied that any such calls have any relation to fittings, pricing, or the allegations in the Complaint. (CX 1621A in camera; Complaint ¶ 2).

Response to Proposed Finding No. 300

The proposed finding is unsupported by the weight of the evidence. First, the citations do not relate to any purported denials. In any event, any such denials that phone calls between **{ }** "have any relation to fittings, pricing, or the allegations in the Complaint" are contradicted by the weight of the evidence contemporaneous with the events at issue, including the timing of and circumstances surrounding such calls, and:

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(3) Mr. Tatman's February 7, 2008 email to his superiors reporting that he had spoken with Mr. Rybacki that day regarding restarting DIFRA (CCPF 1111);

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(6) Mr. Tatman's admission that he is unaware of any situation in which it would be appropriate under McWane's policies and protocols regarding contact with competitors for Mr. Tatman to speak with Mr. Rybacki (CCPF 827); and

(7) **{**

} (*See* CCPF 713-786, 884, 894, 895, 922, 952; 1030, 1033, 1034, 1040, 1088, 1504, 1532).

Thus, the weight of the evidence supports the inference that **{**

} were related to Fittings pricing, the Fittings market, and the events alleged in the Complaint.

301. Both Mr. Tatman and Mr. Rybacki testified that they never discussed or agreed upon Fittings prices. (Rybacki, Tr. 3626-3628, *in camera*† & CX 1621A in camera, 3650 (†{

}), 3682; Tatman, Tr. 367-370 & CX 1621A in camera).

Response to Proposed Finding No. 301

Complaint Counsel does not dispute that Mr. Tatman and Mr. Rybacki testified as set forth in the proposed finding. Those denials at trial are contradicted by the weight of the evidence contemporaneous with the events at issue, including **{**

}. (*See supra* Response to Proposed Finding No. 300).

302. Mr. Rybacki recalled that one phone call was likely a "welcome[] to the waterworks business" conversation shortly after Mr. Tatman accepted his new position with McWane. (Rybacki, Tr. 1088-1089 ("I just welcomed Rick to the waterworks industry, a very short call and, you know, just kind of, you know, social. You know, it was holiday season and I just welcomed him to the waterworks business."), 1120 ("I think I stated that I think I talked to him once or twice only in all -- fo ever, and I think I -- I welcomed him to the waterworks industry."), 3626, *in camera*† (†{ }†)).

Response to Proposed Finding No. 302

Complaint Counsel does not dispute that Mr. Rybacki testified as set forth in the proposed finding. Mr. Rybacki's explanation at trial is contradicted by the weight of the evidence contemporaneous with the events at issue, including **{**

} (*See supra* Response to Proposed Finding No. 300).

303. Mr. Rybacki recalled that one call likely related to Sigma's interest in participating in DIFRA. (Rybacki, Tr. 3536-3537 (Q: "Okay. And what did you speak to Mr. Tatman about?" A: "That the DIFRA should continue, that we want -- we will continue being part of DIFRA, and that Star would participate as well.") & CX 1284).

Response to Proposed Finding No. 303

Complaint Counsel does not dispute that Mr. Rybacki testified as set forth in the proposed finding. Mr. Rybacki's explanation at trial is contradicted by the weight of the evidence contemporaneous with the events at issue, including **{**

} (*See supra* Response to Proposed Finding No. 300).

304. Mr. Rybacki testified that the vast majority of any remaining calls to McWane were personal calls between Mr. Rybacki and his personal friend and former colleague, Tom Frank, who at the time was working at McWane. (CX 1621A in camera and RX 467).

{

}

(CX 1621A in camera, CX 1860, RX 467, Tatman, Tr. 207; Rybacki, Tr. 3634, *in camera*†).}

Response to Proposed Finding No. 304

The proposed finding is incomplete, unsupported, and misleading. Mr. Rybacki did not identify any legitimate reason, business or otherwise, for his phone calls to Messrs. Jansen and Tatman, two of which are listed in the proposed finding. Further, the proposed finding asserts

without any supporting citation that **{**

} Finally, the proposed finding omits a large number of **{**

} (CCPF 739-742, 760, 784; *supra* Response to Proposed Finding No. 300).

305. Mr. Rybacki testified that he would periodically call Mr. Frank to check on Mr. Frank and his family. (Rybacki, Tr. 3610-3611, *in camera*† (**{**

}, 3650-3651, *in camera* (**{**

})).

Response to Proposed Finding No. 305

Complaint Counsel does not dispute that Mr. Rybacki testified as set forth in the proposed finding. The proposed finding is incomplete, unsupported, and misleading insofar as it suggests that Mr. Rybacki's periodic calls to Mr. Frank explain or justify the numerous phone calls in the record between him and McWane, or between him and Star. Mr. Rybacki did not identify any legitimate reason, business or otherwise, for his phone calls to Messrs. Jansen and Tatman. Further, the cited evidence does not establish that **{**

} Finally, the proposed finding omits a large number of **{**

} (CCPF 739-742, 760, 784, 1030; *supra* Response to Proposed Finding Nos. 300, 304)

306. Mr. Rybacki did not discuss Fittings prices with Mr. Frank. (Rybacki, Tr. 3650-3651, *in camera*† (†**{**

}), 3682 (Q: "What about your friend Tom -- I forgot his last name -- Tom Frank?" A: "No.")).

Response to Proposed Finding No. 306

Complaint Counsel has no specific response.

307. Mr. Rybacki does not remember the particular substance of any of these calls, and it is unclear that he actually spoke with anyone on the phone on the calls of two minutes or less, as opposed to being put on hold or sent to voice mail. (Rybacki, Tr. 3634-3636,*in camera*† (†**{ }), 3638, *in camera* ({ }) , 3642-3645, *in camera* ({ }†, 3647-3649, *in camera*† ({ }).

Response to Proposed Finding No. 307

The proposed finding is vague as to the meaning of "these calls." Complaint Counsel acknowledges that Mr. Rybacki testified that he does not remember the specific topic of any of the phone calls between him and Mr. Tatman, Mr. Jansen, or Mr. McCutcheon. Those calls are placed in context in Complaint Counsel's Proposed Findings of Fact. (*See*, *e.g.*, CCPF 713-786, 884, 894, 895, 922, 952, 1030, 1033, 1034, 1040, 1088, 1504, 1532).

308. Complaint Counsel identifies two emails - dated March 10, 2008 and August 22, 2008, respectively - from Sigma employee Mitchell Rona to other Sigma employees mentioning two complaints Rick Tatman allegedly made about the state of the Fittings market. (CX 1124, CX 1149).

Response to Proposed Finding No. 308

Complaint Counsel has no specific response.

309. 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.")).

Response to Proposed Finding No. 309

The proposed finding is overbroad and unsupported by the cited testimony. Complaint Counsel acknowledges that, at the time, Mr. Rona was Sigma's OEM Business manager. (CCPF 98). However, Mr. Rona testified that he does not recall "formal dialogue" regarding price, and did not testify that he had "absolutely no involvement in" Sigma's pricing, as the proposed finding claims. (Rona, Tr. 1453-1454). Mr. Rona was a high level executive within Sigma and a member of Sigma's key managerial email distribution lists. (CCPF 98, 118-122). Both of the documented complaints from Mr. Tatman to Mr. Rona were relayed to one or more Sigma executives responsible for pricing and business strategy. (CCPF 1035, 1452). Further, the proposed finding is immaterial. Mr. Rona's level of involvement with Sigma's pricing decisions does not justify Mr. Tatman's communications complaining about Sigma's Project Pricing.

310. "OEM" stands for "original equipment manufacturer" and is different from selling to Distributors. (Rybacki, Tr. 1095 ("OEM stands for original equipment manufacturer, and basically we make product for various companies in the -- mostly in the water industry, some outside. We make parts, you know, for valve and hydrant manufacturers. We make -- you know, we've made widgets for automotive. We made barbells for a company at one time.")).

Response to Proposed Finding No. 310

Complaint Counsel has no specific response.

311. 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.

(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.")).

Response to Proposed Finding No. 311

The proposed finding is overbroad and misleading. Complaint Counsel acknowledges that McWane and Sigma at times engaged in arms-length buy-sell transactions that made them customers of each other. However, McWane and Sigma are also competitors in the OEM segment for sales to companies such as U.S. Pipe. (Rona, Tr. 1692-1693 (U.S. Pipe is an important customer of Sigma); CCPF 2441-2448 (only McWane was allowed to sell Domestic Fittings to U.S. Pipe under the MDA)).

312. 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.")).

Response to Proposed Finding No. 312

The proposed finding is immaterial and misleading insofar as it suggests that the existence of a legitimate business reason for Mr. Tatman and Mr. Rona to communicate justifies

Mr. Tatman complaining about Sigma's Project Pricing or other communications for the purpose of coordinating McWane's and Sigma's pricing policy in the sale of Fittings to Distributors, which it does not.

313. 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.")

Response to Proposed Finding No. 313

The proposed finding is misleading insofar as it suggests that Mr. Rybacki was the only person at Sigma involved in pricing. Mr. Pais was closely involved in setting overall Sigma pricing strategy. (CCPF 68-76, 66).

314. 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. (Rona, Tr. 1453-1454, 1627; Rybacki, Tr. 1096, 3715-3717).

Response to Proposed Finding No. 314

The proposed finding is misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests the two communications are not indicative of, and were not made pursuant to, the overall conspiracy whereby McWane, Sigma, and Star agreed to curtail Project Pricing and to raise and stabilize prices for Fittings. (*See* CCPF 907-1571). The proposed finding is also misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests that Sigma was not aware of, sensitive to, and responsive to its competitors' perceptions and complaints regarding its pricing practices during the conspiracy period. (*See, e.g.*, CCPF 1455; RX-116 at 0001 (as the agreement to curtail Project Pricing was breaking down in November 2008, Mr. Pais wrote to his colleagues, "What's even more disturbing is our two main competitors in Fittings seem to see SIGMA as 'leading' this recent price decline")). The proposed finding is also immaterial, because the impact of the

communications on Sigma's pricing is not relevant to whether Mr. Tatman made the communications in furtherance of an agreement on pricing among McWane, Sigma, and Star.

315. Mr. Rona did not direct the March 10, 2008 email to Mr. Rybacki. (Rona, Tr. 1641-1642 ("I did not send this e-mail to Mr. Rybacki.") & CX 1124).

Response to Proposed Finding No. 315

The proposed finding is incomplete, misleading and immaterial. It is incomplete and misleading because it omits that Mr. Rona did send his March 10, 2008 email to Mr. Pais, who was actively involved in formulating Sigma's business strategy and pricing decisions. (CCPF 1035, 75-76; *see also infra* Response to Proposed Finding No. 328 (Mr. Pais's involvement in Fittings pricing)). The proposed finding is immaterial because whether Mr. Rona conveyed one of Mr. Tatman's illicit communications to Mr. Rybacki is not relevant to whether Mr. Tatman made the communications in furtherance of an agreement on pricing among McWane, Sigma, and Star.

316. 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. (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).

Response to Proposed Finding No. 316

The proposed finding is misleading insofar as it suggests that Sigma's OEM distribution list "happened" to include Mr. Rybacki and that Mr. Rona did know on August 22, 2008 that he was forwarding Mr. Tatman's communication to Mr. Rybacki. Mr. Rybacki was a member of the five-member OEM5 distribution list, a fact of which Mr. Rona was aware. (CCPF 122; Rona, Tr. 1491). Further, the proposed finding is immaterial. Whether Mr. Rybacki remembered at trial that he received the email is not relevant to whether Mr. Tatman made the

communication and Mr. Rona conveyed the communication in furtherance of an agreement on pricing among McWane, Sigma, and Star.

317. 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. (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.")).

Response to Proposed Finding No. 317

The proposed finding is overbroad and unsupported by the cited material. Complaint Counsel acknowledges that, at the time, Mr. Rona was Sigma's OEM Business manager. (CCPF 98). However, Mr. Rona testified that he does not "recall" any sessions or "formal dialogue" regarding price but not that he had "never had a discussion" about Sigma's distribution pricing, as the proposed finding suggests. Mr. Rona was a high level executive within Sigma and a member of Sigma's key managerial email distribution lists. Both of the documented complaints from Mr. Tatman to Mr. Rona were relayed to Sigma executives responsible for pricing and business strategy.

Further, the proposed finding is immaterial. Mr. Rona's level of direct involvement in Sigma's pricing decisions is not relevant to the question whether Mr. Tatman complained to Sigma regarding its level of Project Pricing, nor is it relevant to whether Mr. Tatman made the communications in furtherance of an agreement on pricing among McWane, Sigma, and Star.

318. Mr. Rybacki never spoke with anyone at McWane about stopping or reducing job pricing and never asked Mr. Rona to do so. (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).

Response to Proposed Finding No. 318

Complaint Counsel does not dispute that Mr. Rybacki made the self-serving denials attributed to him. However, the proposed finding is misleading and contradicted by the weight

of the evidence, including contemporaneous documents, which establishes that there were extensive communications among the Fittings suppliers, many involving Mr. Rybacki in particular, at key pricing decision points from 2007 through 2011. (*See* CCPF 1030, 700-827). The evidence establishes that the suppliers agreed, coordinated, and communicated with one another through customer letters and/or direct communications in advance of and regarding implementation of pricing changes in at least January 2008, June 2008, April 2009, and June 2010. (*See* CCPF 931-1021 (January 2008), CCPF 1156-1259 (June 2008), CCPF 1491-1553 (April 2009), CCPF 1554-1571 (June 2010)).

319. The two Rona emails had no effect on Sigma's Fittings prices in the distribution channel. (Rybacki, Tr. 3715-3717 (Q: "Q. And in fact, Mr. Rybacki, pricing got worse in the second half of '08. We already saw that; right?" A: "Pricing got worse." Q: "And in fact, pricing specifically got worse in Florida and California and some other states, didn't it?" A: "It did.") & CX 1149; Rona, Tr. 1645 (Q: "And your e-mail did not result in any multiplier changes in the distribution channel that you're aware of, did it?" A: "No. I don't recall any -- any -- any -- I don't recall there being any change in pricing."), 1647 (Q: "You're not aware of any pricing changes at Sigma that resulted from your e-mail, are you?" A: "No."), 1662 (Q: "Your e-mail did not result in any price changes at Sigma that you're aware of, did it?" A: "Not that I'm aware of.")).

Response to Proposed Finding No. 319

The proposed finding is misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests the two communications were not indicative of, and made pursuant to, the overall conspiracy whereby McWane, Sigma, and Star agreed to curtail Project Pricing and to raise and stabilize prices for Fittings. (*See* CCPF 907-1571). The proposed finding is also misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests that Sigma was not aware of, sensitive to, and responsive to its competitors' perceptions and complaints regarding its pricing practices during the conspiracy period. (*See, e.g.*, CCPF 1455; RX-116 at 0001 (as the agreement to curtail Project Pricing was breaking down in November 2008, Mr. Pais wrote to his colleagues, "What's even more

disturbing is our two main competitors in Fittings seem to see SIGMA as 'leading' this recent price decline")). The proposed finding is also immaterial, because whether the two illicit communications affected price actions by Sigma is not probative of whether Mr. Tatman made the communications in furtherance of an agreement on pricing among McWane, Sigma, and Star.

320. Fittings prices continued downward after Mr. Rona's August 2008 email. (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).

Response to Proposed Finding No. 320

Complaint Counsel notes that CX 1687 is not in evidence. The proposed finding is contradicted by the weight of the evidence. Although sales volume further slowed in August 2008, Sigma's actual transactional multipliers generally increased across most regions and for most products and size ranges. (CCPF 1370-1383; *see also supra* Response to Proposed Finding No. 25 (showing rising prices through 2008 and addressing timing of breakdown of collusion on Project Pricing in late 2008, in relation to the cited testimony of Mr. Rybacki that pricing "got worse" in the second half of 2008)).

321. 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. (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).

Response to Proposed Finding No. 321

Complaint Counsel agrees that Mr. Rona testified as set forth in the citation. Nevertheless, (1) the significance that Mr. Rona attached to Mr. Tatman's comments is not

probative of whether Mr. Tatman made the communications in furtherance of an agreement on pricing among McWane, Sigma, and Star, and (2) Mr. Rona's testimony that he "did not attach any significance" to a phone call from Mr. Tatman complaining about Sigma's prices suggests that such communications were not unusual. (*See also* CCPF 700-841 (history of Fittings supplier communications and relationships)).

322. Mr. Rona testified that he does not recall receiving any response to his August 22 email. (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).

Response to Proposed Finding No. 322

Complaint Counsel has no specific response other than to note that the proposed finding is immaterial for the reasons set forth above in Response to Proposed Finding No. 319.

323. Of the Sigma employees who responded to Mr. Rona's March 10, 2008 email, none of them mentioned or referred to Mr. Tatman's comments. (Rona, Tr. 1647-1648 ("Q: "So Mr. Bhattacharji only responded to the terms of the offer that Rick Tatman was making with regard to selling domestic fittings; correct?" A: "His response was only related to the opportunity that McWane had presented to us."), 1653-1654 (Q: "And there's no mention of Mr. Tatman's comments regarding his hopes or prices in the market in these e-mails, is there?" A: "No.") & CX 1124, CX 2014, CX 2015).

Response to Proposed Finding No. 323

Complaint Counsel has no specific response other than to note that the proposed finding is immaterial for the reasons set forth above in Response to Proposed Finding No. 319.

324. Mr. Rona's comments passed unnoticed by the Sigma personnel, who focused instead on the negotiation of the ordinary, arms-length buy-sell agreement that was the subject of Mr. Rona's March 10, 2008 email. (Rona, Tr. 1647-1648, 1653-1654 & CX 1124, CX 2014, CX 2015).

Response to Proposed Finding No. 324

The proposed finding is unsupported by evidence that the recipients of Mr. Rona's emails did not take note of his comments about Mr. Tatman's complaints. The proposed finding is also immaterial for the reasons set forth above in Response to Proposed Finding No. 319.

Additionally, the proposed finding is contradicted by the weight of the evidence, including the comments made by Mr. Rona in his August 22, 2008 email (CX 1149). Nothing in Mr. Rona's August 22, 2008 email referenced any buy-sell relationship between McWane and Sigma. The entirety of the body of Mr. Rona's August 22, 2008 email reads as follows:

> Guys,
>
> Rick 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 respectively were available from us both without any second thought.
>
> Just FYI

(CX 1149). The sole purpose of the email was to inform Sigma's top managers, including Mr. Rybacki and Mr. Pais, that Mr. Tatman was "upset" by what he perceived to be Sigma Project Pricing, and the transmission of the email with these comments in the ordinary course of business is evidence that Sigma personnel found such comments noteworthy. (*See also* CCPF 1452).

325. Mr. Rona, Mr. Tatman, and Mr. Rybacki all expressly denied reaching or discussing any agreement related to distribution prices at any time. (Tatman, Tr. 456-457 (Q: "But is it your understanding that you could talk about any prices on anything with Mr. Rona or just if there's a particular buy-sell arrangement that the two of you negotiate?" A: "I think our policy is very clear and that we should not have pricing discussions with a competitor."); Rona, Tr. 1643-1644 (Q: "According to your e-mail, Mr. Tatman did not ask you to agree to anything related to prices and distribution, did he?" A: "No." … Q: "You did not agree to anything with Mr. Tatman regarding distribution prices, did you?" A: "Correct."), 1656-1659 (Q: "Okay. And Mr. Tatman, according to your e-mail, Mr. Tatman didn't ask you to agree to anything, did he?" A: "No.") & CX 1149, CX 1124, CX 2014, CX 2015).

Response to Proposed Finding No. 325

Complaint Counsel does not dispute that at trial Messrs. Rona, Tatman and Rybacki made the self-serving denials attributed to them. However, the proposed finding and cited testimony are misleading and contradicted by the weight of the evidence insofar as they suggest

that Sigma never discussed Fittings prices or reached an agreement with McWane. The weight of the evidence, including contemporaneous documents, establishes that there were extensive communications among the Fittings suppliers at key pricing decision points from 2007 through 2011. (*See* CCPF 1030, 700-827). In particular, the evidence establishes that the suppliers agreed, coordinated, and communicated with one another through customer letters and/or direct communications in advance of and regarding implementation of pricing changes in at least January 2008, June 2008, April 2009, and June 2010. (*See* CCPF 931-1021 (January 2008), CCPF 1156-1259 (June 2008), CCPF 1491-1553 (April 2009), CCPF 1554-1571 (June 2010); *see also supra* Response to Proposed Finding Nos. 201-210).

326. 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 they communicated from time to time to discuss foreign business opportunities, merger discussions, and other legitimate business opportunities.

Response to Proposed Finding No. 326

The proposed finding is incorrect, misleading, and unsupported by *any* citation to the record. Moreover, any testimony of Mr. Pais or Mr. Page that contacts between the two were limited to "arms-length communication" regarding "legitimate business opportunities" is substantially outweighed by contemporaneous evidence of their contacts and the circumstances surrounding them. For example, meetings between Mr. Pais and Mr. Page occurred at points in time at which McWane was making key pricing policy decisions, including in September 2007 (as McWane was restructuring its Fittings business and reorienting its market strategy) (CCPF 837); on December 3, 2007 (as Sigma awaited McWane's response to Sigma's announced list price increase) (CCPF 886-887); May 7, 2008 (as Sigma again awaited McWane's response to Sigma's "big bold move" price increase announcement) (CCPF 797, 1166); June 12, 2008 (as Sigma continued to await McWane's price announcement, which was being deferred pending

receipt of DIFRA data) (CCPF 798, 1229-1230); and May 1, 2009 (as Sigma was desperately seeking a "stay of execution" with respect to McWane's announced Fittings price restructuring) (CCPF 803, 1510, 1522). In addition, Sigma documents and testimony confirm that the Fittings market and Fittings pricing were topics of discussion between Mr. Pais and Mr. Page. (*See, e.g.*, CCPF 837-838 (describing Pais email recounting September 2007 discussion with Mr. Page regarding Fittings market conditions), 1510, 1521-1524 (describing Pais May 1, 2009 meeting with Page at which he sought a "stay of execution" of McWane's price restructuring and sought to give McWane "some assurance of our intentions and commitment to a stable and rewarding industry")).

327. Mr. Page, McWane's President and CEO, had no involvement in Fittings pricing decisions. (JX 642 (Page, Dep. at 14, 43-45)).

Response to Proposed Finding No. 327

Complaint Counsel notes that there is no exhibit denominated "JX 642." The proposed finding is inaccurate and mischaracterizes Mr. Page's testimony. Generally, Mr. Page is not involved with the day-to-day Fittings business. (*See* CCPF 43). However, while Mr. Page could not recall specific instances, Mr. Page conceded that he has, from time to time, asked about Fittings pricing, or considered raising prices. (RX-642 (Page, Dep. at 43-44) ("'From time to time,' if that means every couple of years, perhaps."). Moreover, Mr. Page also testified that Mr. McCullough reports to Mr. Page regarding the Fittings business. (CX 2482 (Page, Dep. at 44-45)).

328. Mr. Pais, Sigma's CEO during the time period relevant to this action, had no involvement in Fittings pricing decisions. (JX 687 (Pais, Dep. at 7, 13, 15-17)).

Response to Proposed Finding No. 328

Complaint Counsel notes that there is no exhibit denominated "JX 687." The proposed finding is incorrect, misleading, and contradicted by the weight of the evidence. Mr. Pais's

responsibilities in 2008 and 2009 included setting strategy relating to growth and profitability, including pricing strategy. (Pais, Tr. 1724-1725; CX 2528 (Pais, Dep. at 192-193)). 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.")).

The proposed finding is also contradicted by numerous contemporaneous documents from 2008 through 2010 establishing Mr. Pais's involvement in Sigma's pricing strategy and pricing decisions. (*E.g.*, CX 1138 (April 11, 2008 email proposing "1-2 punch" and attaching draft customer letter); CX 0995 (November, 2008 memo from Mr. Pais to Mr. Rybacki discussing pricing strategy); CCPF 1502-1503, 1509-1510 (in April, 2009, Mr. Pais was involved in responding to McWane's 2009 price list restructuring); CX 1852 (Mr. Pais drafted and circulated within Sigma price increase letters that Sigma regional managers were to distribute within their regions); CCPF 1556 (in June 2010, Mr. Pais was involved in drafting a pricing letter as "heads up" to customers and the market that Sigma would follow if McWane led a price increase); CX 2453 (Mr. Pais's draft letter was circulated without material change) (objection omitted)).

329. Mr. Pais testified that he contacted Mr. Page after learning, in 2003, of McWane's interest in sourcing non-domestic Fittings from China. (Pais, Tr. 1868-1870 ("I went to meet Mr. Ruffner Page and just introduced myself and Sigma and proposed that we would like to supply them, under private label, fittings if they were interested in sourcing.")).

Response to Proposed Finding No. 329

Complaint Counsel has no specific response. (*See also* CCPF 828-841 (discussing history of "close and trusting relationship" between Mr. Pais and Mr. Page)).

330. Mr. Pais agreed to travel to China with Mr. Page, to introduce him to suppliers and reassure him of the quality of the Fittings they produced. (Pais, Tr. 1869-1871 (Q: "Did

there come a time where you traveled with Mr. Page to China?" A: "Yes. I traveled with him one time." Q: "And why did you travel with Mr. Page?" A: "Because he and his president of -- in charge of this business wanted to visit our suppliers to check our quality systems and to make sure that if they committed to sourcing fittings through us that the supply chain would be assured and quality will be met according to their standards.")).

Response to Proposed Finding No. 330

Complaint Counsel has no specific response. (*See also* CCPF 828-841 (discussing history of "close and trusting relationship" between Mr. Pais and Mr. Page)).

331. Sigma began supplying non-domestic Fittings from China to McWane. (Pais, Tr. 1870 (Q: "And did Sigma commence supplying McWane with private label fittings around that time?" A: "Not at that time. It took a while.") ; JX 642 (Page, Dep. at 28-29)).

Response to Proposed Finding No. 331

Complaint Counsel has no specific response, other than to note that there is no exhibit denominated "JX 642." (*See also* CCPF 828-841 (discussing history of "close and trusting relationship" between Mr. Pais and Mr. Page)).

332. This interaction between Mr. Page and Mr. Pais pre-dates the alleged 2008 conspiracy by several years. (Complaint ¶ 2).

Response to Proposed Finding No. 332

Complaint Counsel has no specific response. (*See also* CCPF 828-841 (discussing history of "close and trusting relationship" between Mr. Pais and Mr. Page)).

333. Mr. Pais continued to seek out Mr. Page on occasion during the subsequent years, when he thought there might be international business opportunities for joint ventures between the two companies, but Fittings prices were not discussed on these occasions. (Pais, Tr. 1886-1887 ("And we had the capability of that, and I was trying to supply them towards their global needs, world markets. Plus there were some opportunities that I saw for them to invest in India. So I talked to him to talk about these global opportunities."), 2039-2043 ("Well, I knew that McWane had tried to invest in China in the ductile iron pipe industry and they'd not succeeded. And a little while later, at about this time, in 2007, I thought there was an opportunity. We had separately organized a joint venture with a Chinese manufacturer in India. This is in the iron ore processing industry. And that group had plans to set up a ductile iron pipe plant production in India. And since Mr. Page had expressed interest in investing in global waterworks opportunities, I was trying to -- over a period of time trying to interest him to enter or invest in India." Q: "It had nothing to do with the U.S., nothing to do with fittings, did it, sir?" A: "No.") & CX 2037, CX 2119, CX 2120; JX 642 (Page, Dep. at 117-123)).

Response to Proposed Finding No. 333

Complaint Counsel notes that there is no exhibit denominated "JX 642." The proposed finding is misleading, unsupported by the cited testimony, and contradicted by the weight of the evidence. The proposed finding is misleading insofar as it suggests (1) that all subsequent meetings between Mr. Page and Mr. Pais were motivated solely by or limited to discussion of international business opportunities for joint ventures, or (2) that Mr. Page and Mr. Pais never discussed Fittings pricing and/or Fittings market competitive dynamics at subsequent meetings. The cited testimony describes certain topics that Mr. Pais and Mr. Page discussed, but it does not support a finding that Fittings prices were not discussed. The weight of the evidence establishes that Mr. Pais and Mr. Page discussed competitive dynamics in the Fittings market, including pricing. For example, in 2007 Mr. Page expressed his disappointment in Sigma's "failure to get a better landscape" in the Fittings market. (CCPF 838). Mr. Pais used potential joint ventures and business opportunities as pretext to meet with Mr. Page for illicit discussions about the Fittings market. (CCPF 886-887). Mr. Pais also used these meetings to gain Mr. Page's trust and give him confidence that Sigma was committed to disciplined market pricing. (CCPF 836-837; *see* CCPF 828-841; *see also supra* Response to Proposed Finding No. 326 (establishing timing and substance of some of these subsequent meetings)).

334. Mr. Pais approached Mr. Page in the second half of 2008 to discuss a possible merger between Sigma and McWane. (JX 687 (Pais, Dep. at 141-142).

Response to Proposed Finding No. 334

Complaint Counsel has no specific response, other than to note that there is no exhibit denominated "JX 687."

335. McWane was not interested in combining its business with Sigma. (JX 642 (Page, Dep. at 30-32, 123-124)).

Response to Proposed Finding No. 335

Complaint Counsel notes that there is no exhibit denominated "JX 642." The proposed finding is vague, misleading, and contradicted by the weight of the evidence insofar as the proposed finding suggests that McWane never considered merging its business with Sigma's business. Evidence establishes that McWane and Sigma discussed a potential merger for four months in 2008, and again in 2009. (*See* CCPF 816-817).

336. Fittings prices were not discussed at any of the meetings between Mr. Pais and McWane personnel where a potential combination of Sigma and McWane was discussed. (JX 687 (Pais, Dep. at 141-142)).

Response to Proposed Finding No. 336

Complaint Counsel notes that there is no exhibit denominated "JX 687." The proposed finding is vague because it does not identify the specific meetings to which it refers. The proposed finding and the cited self-serving denial of Mr. Pais are misleading and contradicted by the weight of the evidence contemporaneous with the events at issue insofar as they suggest that Mr. Pais and Mr. Page did not discuss Fittings pricing and/or Fittings market competitive dynamics at any of the meetings identified above in response to Proposed Finding Nos. 326 and 333.

337. Complaint Counsel identified two specific meetings between Mr. Pais and Mr. Page: one in September 2007, and one on or around December 3, 2007 that had nothing to do with fittings pricing. (Pais, Tr. 1881-1886 & CX 2118, CX 2037).

Response to Proposed Finding No. 337

The proposed finding is misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests that Complaint Counsel only identified two meetings between Mr. Page and Mr. Pais, or that Fittings pricing and/or Fittings market competitive dynamics were not discussed at those or other meeting meetings between Mr. Page and Mr. Pais. The weight of the evidence establishes that Fittings pricing and Fittings market competitive

dynamics were topics of discussion at these and other meetings. (*See supra* Responses to Proposed Finding Nos. 326 and 333).

338. Mr. Pais sought the September 2007 meeting because he had learned of David Green's termination from McWane, (Pais, Tr. 1883-1884 (Q: "And he told you about letting Mr. Green, the former president of the fittings business, go?" A: "Yes.") & CX 2118), and inquired regarding with whom Sigma would interact in the future with respect to the ongoing buy-sell arrangement. (Pais, Tr. 1884 ("By the way, that meeting I had sought because we had certain ongoing procurement and supply business of a smaller level. Mr. Green was the primary person along with his other team, and so I wanted to know who will now be interacting with us and what's the outlook of some of that small remnants of business.")).

Response to Proposed Finding No. 338

The proposed finding is misleading. Regardless of the specific impetus for the meeting between Mr. Pais and Mr. Page, the weight of the evidence establishes that they discussed Fittings pricing and Fittings market competitive dynamics at the September 2007 meeting. (CCPF 837). Mr. Pais and Mr. Page knew that they needed some pretext "to meet thru transparent grounds." (CCPF 887). Further, the proffered justification for the meeting – that Mr. Pais wanted to know who was replacing Mr. Green for purposes of ongoing "small remnants" of OEM business between the two companies – is implausible as the sole reason for two high level executives to travel for an in-person meeting, and is contradicted by contemporaneous documents revealing that the meeting involved in-depth discussion of competitive dynamics in the Fittings market. (CCPF 886-887; *see also supra* Response to Proposed Finding Nos. 326 and 333).

339. Mr. Pais testified that the subject of the December 2007 meeting was gauging global or international opportunities. (Pais, Tr. 1886-1887 (Q: "Q. Do you know what you discussed at that meeting?" A: "Yes. Earlier that year -- no. I -- we discussed -- he was interested in growing their global business. They sell pipe and other products internationally, but they did not have a range of metric-size fittings, that is, the same fittings but in metric sizes, which are used in world markets. The same fittings cannot be used in -- outside U.S. because we use inches. And we had the capability of that, and I was trying to supply them towards their global needs, world markets. Plus there were some opportunities that I saw for them to invest in India. So I talked to him to talk about these global opportunities.") & CX 2037).

Response to Proposed Finding No. 339

The proposed finding is misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests that the December 2007 meeting between Mr. Page and Mr. Pais was motivated solely by or limited to discussion of international business opportunities, or that Fittings pricing and/or Fittings market competitive dynamics were not discussed at the meeting. The weight of the evidence establishes that Mr. Pais used potential joint venture opportunities as a pretext "to meet thru transparent grounds," and that Fittings pricing and Fittings market competitive dynamics were discussed at the meeting. (CCPF 886-887; *see also supra* Response to Proposed Finding Nos. 326 and 333).

340. Mr. Pais and Mr. Page have both testified that they never discussed Fittings prices. (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)).

Response to Proposed Finding No. 340

Complaint Counsel notes that there is no exhibit denominated "JX 642." The proposed finding is overbroad, unsupported by the cited testimony, misleading, and contradicted by the weight of the evidence. Mr. Pais's cited self-serving denial refers only to a specific meeting between him and Mr. Page, and does not state that the two "never" discussed Fittings prices. The weight of the evidence, including contemporaneous documents, establishes that, at the referenced meeting and others, Mr. Pais and Mr. Page discussed Fittings pricing and Fittings market competitive dynamics. (*E.g.*, CCPF 828-841; *see also supra* Response to Proposed Finding Nos. 326 and 333).

341. Mr. McCullough is the executive vice president for McWane's valve and hydrant and waterworks Fittings business units, to whom Mr. Tatman reports. (JX 639 (McCullough, Dep. at 8, 17)).

Response to Proposed Finding No. 341

Complaint Counsel has no specific response, other than to note that there is no exhibit denominated "JX 639."

342. Mr. Pais met with Mr. Page and Mr. McCullough in April 2009 in an effort to convince McWane to sell private-label, domestically-manufactured Fittings to Sigma following ARRA's enactment. (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)).

Response to Proposed Finding No. 342

Complaint Counsel notes that there is no exhibit denominated "JX 639" or "JX 687." The proposed finding is misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests that the April and May 2009 meetings between Mr. Page, Mr. Pais, and Mr. McCullough were motivated solely by, or limited to discussion of, the potential sale by McWane to Sigma of private-label Domestic Fittings, or that Fittings pricing more generally and/or Fittings market competitive dynamics were not discussed at the meeting. Complaint Counsel does not dispute that one of the reasons Mr. Pais met with Mr. Page in April 2009 was to request that McWane sell private-label Domestic Fittings to Sigma. Mr. Pais also discussed with Mr. Page and Mr. McCullough Sigma's request that McWane rescind or delay the implementation of its restructured price list. (CCPF 1505-1510, 1520-1524; CX 0211 at 001 (Pais email indicating that he would seek a "stay of execution" from McWane on the price restructuring); *see also supra* Response to Proposed Finding Nos. 326 and 333).

343. Mr. Page and Mr. Pais discussed legitimate business topics, and not pricing or market strategy. (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.").)

Response to Proposed Finding No. 343

Complaint Counsel notes that there is no exhibit denominated "JX 642." The proposed finding and the self-serving denials cited in support are misleading and contradicted by the weight of the evidence. The weight of the evidence, including contemporaneous documents, establishes that Mr. Pais discussed with Messrs. Page and McCullough whether McWane would rescind or delay the implementation of its restructured price list. (CCPF 1505-1510, 1520-1524; CX 0211 at 001 (Pais email indicating that he would seek a "stay of execution" from McWane on the price restructuring); *see also supra* Response to Proposed Finding Nos. 326 and 333).

XII. Dr. Schumann's Conspiracy Opinion

A. Dr. Schumann concedes that a conspiracy could be formed only if McWane, Sigma, and Star communicated terms and acceptance to each other

344. Dr. Schumann testified regarding the formation of the alleged conspiracy: "Q. Now, Dr. Schumann, you do agree with me, however, that for them to have an agreement they do have to -- somebody has to communicate something from one company to the other, and the other companies have to communicate back some sort of understanding and acceptance of that; right? A. Yes. I very much believe that." (Schumann, Tr. 4173).

Response to Proposed Finding No. 344

Complaint Counsel has no specific response.

345. Dr. Schumann's opinion that McWane, Sigma, and Star formed a conspiracy relating to small and medium-diameter non-domestic Fittings in early 2008 is based solely on his interpretation of a handful of documents, specifically:

> CX 1117 – February 1, 2008 email from Mr. Tatman to Mr. Pais re: offer to sell private label Fittings (Schumann, Tr. 4181-4182);
>
> CX 1189 – Sigma's January 29, 2008 customer letter (Schumann, Tr. 4219-4221);

CX 1571 – Internal email exchange among Mr. Tatman, Mr. Page and Mr. McCullough in late February 2008 re: McWane's offer to sell Sigma private label Fittings (Schumann, Tr. 4177-4178);

CX 0848 – Internal Star email dated February 7, 2008 attaching Sigma's Florida customer letter (Schumann, Tr. 4221-4222);

CX 1145 – January 24, 2008 email from Mr. Pais to Sigma regional managers re: multipliers (Schumann, Tr. 4225);

CX 1178 – McWane's Jan 11, 2008 customer letter (Schumann, Tr. 4202-4205);

CX 1177 – Tyler/Union Executive Report for 1st Quarter 2008 (Schumann, Tr. 4239-4244);

CX 893 – Star's February 6, 2008 customer letter (Schumann, Tr. 4228-4230);

CX 178 – Internal email exchange dated January 31, 2008 among Mr. Page, Mr. McCullough and Mr. Tatman, commenting on Star salesman Mr. Leider's January 30, 2008 email to HD Supply re: Star plans to match McWane multipliers effective February 18. (Schumann, Tr. 4230-4234) (Expert Report of Dr. Schumann).

Response to Proposed Finding No. 345

The Proposed Finding is unsupported and misleading. Dr. Schumann's opinion that McWane, Sigma, and Star formed a conspiracy relating to small and medium-diameter non-Domestic Fittings in early 2008 is based on more than a "handful" of documents. It is also based on his review of the testimony of over 40 witnesses who testified in this matter, thousands of pages of McWane, Sigma, and Star business documents (as set forth in the list of materials considered appended to Dr. Schumann's expert report) and economic theory. Respondent only cites three paragraphs of Dr. Schumann's expert report (paragraphs 79, 80, and 88), but Dr. Schumann's opinion that McWane, Sigma, and Star formed a conspiracy relating to small and medium-diameter non-Domestic Fittings in early 2008 is discussed in Section III of his expert report, including paragraphs 46 through 119 and all of the materials cited therein. (*See* CX 2260 (Schumann Rep. at 25-56), *in camera*).

346. Dr. Schumann opined that no conspiracy or agreement existed with respect to domestic Fittings or large-diameter Fittings in 2008. (Schumann, Tr. 4251-4254 ("Q. And you're not saying that domestic fittings that McWane sold were part of any one-mind agreement, are you, sir? A. Well, I guess literally they were. There was only one mind, but I'm not saying they're part of a conspiracy. That's correct. It's to the extent we're talking about the market for domestic only. Q. I'm asking you about your one mind theory. A. My one mind, as I had just testified, was referencing the plan and the indirect and direct communication to reduce project pricing to create greater visibility, as Mr. Tatman described. Q. Dr. Schumann, let me be clear. Star and Sigma did not compete with McWane by selling domestic fittings in 2008, did they? A. Star and Sigma did not manufacture or sell domestic fittings, that's my understanding, that is -- I believe is correct. Q. And you're not testifying that domestic fittings were the subject of a one-mind agreement to reduce project pricing on those, were there -- are you? A. No, I'm not. Q. All right. And you're not testifying that large-diameter fittings were involved in this one mind that you came up with, are you, sir? A. They are not a relevant -- the relevant antitrust market in this matter. Q. Well, it's more than that; right? You reached an affirmative conclusion that they were not implicated by the alleged conspiracy. A. I reached a conclusion that my market -- the relevant market was fittings of 24 inches and less in diameter. I didn't analyze competition in a large-diameter fittings market. Q. Well, Dr. Schumann, you did conclude that large-diameter fittings were not implicated in the Star, Sigma and McWane conduct that you analyzed, didn't you? A. I'm not sure if that would be described as a conclusion or just not part of my assignment to analyze. I -- Q. All right. Well, let's go to your own report. Let's go to CX 2260. It's paragraph 28. And unfortunately, I don't have the page in front of me, Andrew. You'll have to scroll back. There we go. Right up there at the top, if we can highlight that paragraph, this is what you wrote; right, Dr. Schumann? Right, sir? A. It's true I don't include fittings with diameters more than 24 inches. Q. Yeah. And you say one of the reasons is -- A. Right. Q. -- you conclude -- Q. One of the reasons, Dr. Schumann, is you conclude -- you say right there "I conclude," and that's you when you say "I" in your report, isn't it, sir? Right? A. Yes, that's correct. Q. You, Dr. Schumann, concluded that large-diameter fittings were not implicated by McWane, Sigma and Star's conduct; right, sir? A. Yes. Q. So domestic fittings are not implicated and large-diameter fittings are not implicated; right? A. Large -- yes, that's correct. Q. Where in these communications back we saw in paragraph 88, where do those communications carve those products out of your alleged one-mind conspiracy? A. They don't, but they're not the relevant market.").)

Response to Proposed Finding No. 346

The proposed finding is incorrect and misleading as to large-diameter Fittings. Dr. Schumann did not opine that "no conspiracy or agreement existed" with respect to large-diameter Fittings in 2008. He testified that large-diameter Fittings are not within the relevant market. (Schumann, Tr. 3769, 4111; s*ee supra* Response to Proposed Finding No. 2). As to Domestic Fittings, Complaint Counsel does not have a specific response.

347. Dr. Schumann cannot identify "a bright-line point" when the alleged conspiracy began. (Schumann, Tr. 4187-4188 ("Q. Well, I'm actually not asking you about what Mr. Tatman wrote. I'm asking you what your opinion is. This is your expert opinion, sir. Did this or did this not, this February 1 e-mail, contribute to the formation of a conspiracy between Sigma and McWane to reduce project pricing? A. It contributed to Mr. Tatman's plan to stabilize prices, and that would imply, yes, that that was part of his plan. I mean -- Q. Are you done, sir? A. Yes. Q. All right. So prior to February 1, 2008, there was no agreement to reduce project pricing; correct? A. As I said, there was not a bright-line point. I mean, there were -- there were -- there was information that was communicated before this point in time. And the fact that these three paragraphs don't describe that or cite to it doesn't mean it wasn't there. I mean, I do cite to other forms of communication that were taking place during January of 2008.").).

Response to Proposed Finding No. 347

Complaint Counsel does not have a specific response, other than to note that it is immaterial whether the exact beginning point of a price-fixing conspiracy can be identified.

348. Dr. Schumann testified that by November 2008, the alleged conspiracy "was in the process of collapsing." (Schumann, Tr. 4200-4201 ("Q. All right. Let's go back to Dr. Schumann's report, and if we can go to paragraph 86, which is on the next page I believe, Andrew. In fact, just so we're clear on the record, Dr. Schumann, the document we were just looking at, that Star e-mail from the middle of October 2008, that's right around the time you say the conspiracy finally collapsed; right? A. That is around the time. I think it's more in November, but that is around that time. Q. Yeah, so within a couple of weeks or so this conspiracy collapsed, in your opinion. A. Within a couple of weeks of when this e-mail was sent, I think the conspiracy was in the process of collapsing.").).

Response to Proposed Finding No. 348

The proposed finding is improper insofar as, contrary to this Court's Order, Respondent is citing the testimony of an expert for a proposition of fact. The proposed finding is incomplete, misleading, and contradicted by the weight of the evidence. Dr. Schumann testified that "that [2008] episode was over at the end of 2008," and "my conclusion was that the agreement that I described as happening in 2008 fell apart by the end of the year." (Schumann, Tr. 4065, 4067). Dr. Schumann's report refers to events in 2009 in the section of the report where he discusses his opinion that McWane, Sigma, and Star explicitly colluded. (*See* CX 2260-A (Schumann Rep. at 56-57)). Insofar as the proposed finding suggests that the suppliers' price collusion did not

continue in 2009 and 2010, it is contradicted by the weight of the evidence, which establishes that such episodes did in fact continue. (*See* CCPF 1484-1571).

349. Dr. Schumann testified that the method of his analysis was as follows: "Q. Well, I want to be clear on the record because I'm trying to figure out how someone would duplicate what you did, sir. What you did was you reviewed documents and testimony and interpreted them based on your understanding of oligopoly theory; right? A. What I did was start with oligopoly theory and models of oligopoly and how markets operate in the real world, real studies of cartels, studies of oligopolies, studies of agreements, and I then -- yes, I read and reviewed as much of the material as I could to develop a background understanding of the market, of developing the facts that happened or were alleged to have happened in this case and the documents that might support them or not, and I applied those facts to the theory as I've described in my testimony." (Schumann, Tr. 4156)

Response to Proposed Finding No. 349

Complaint Counsel does not have a specific response.

B. Dr. Schumann's Conspiracy Opinions are Based Solely on His Interpretation of Documents

1. The documents do not contain price communications between McWane and its competitors

350. Dr. Schumann relied on CX 1117, an email from Mr. Tatman to Mr. Pais dated February 1, 2008, as part of the basis for his opinion that McWane, Sigma, and Star formed a price-fixing conspiracy. (Schumann, Tr. 4181-4183 ("Q. All right. Now, let's bring up if we can, Andrew, CX 1117. If you scroll down to the bottom, that's the document that you're citing in footnote 110? A. Yes. That's the e-mail that Mr. Tatman had at the end of the previous document. Q. Now, this is the first communication we've actually seen from McWane to Sigma; right? That you're citing in your report in paragraph 79 and 80. A. I say it's the first one that I ever seen? I'm not sure where -- where are you -- do you see that? Q. It's the first document you cite on pages 79 and 80 of your report that constitutes a communication from McWane to Sigma or Star; right, sir? A. That is correct. Q. Now, is this a document that you say led to the formation of the conspiracy, sir? A. As you would have seen if you go back to the documents that we had been looking at, one factor that -- one activity that Mr. Tatman wanted to do -- and this e-mail was discussed both in the previous e-mail and the basic strategy in the others -- was to convince Sigma and Star that their costs were lower than the costs that Sigma and Star could obtain from Star -- I mean -- I'm sorry -- that they could obtain from China. And that was, as Mr. Tatman had described in two e-mails back, a way to help support price stability by convincing your rivals that your costs were lower than theirs. Q. Are you done, sir? A. I believe so. Q. Now, Dr. Schumann, my question is, is this document that you cite in footnote 110 one of the documents you rely on as the basis for your opinion that the parties formed a price-fixing agreement? A. Yes. Q. And just so we're clear, up at the top of this, it's dated February 1, 2008; right, sir? A. That is the date, yes, it is. Q. Yeah. And that's three weeks after McWane had already sent out its multiplier announcement on January 11, 2008. A. Yes, it is. Q. And it's several days -- A. No.

Actually the multiplier -- well, they sent out the announcement that they were going to have an announcement on the 11th, and then they sent out the announcement of the multiplier change on the 18th I believe. Q. All right. Fair enough. But it's after McWane already announced its multipliers at the beginning of 2008; correct? A. That is correct. Q. And the fact is after Sigma had announced its multipliers at the beginning of '08. A. I believe so. Yes.") (objections omitted).).

Response to Proposed Finding No. 350

Complaint Counsel notes that a portion of the cited and excerpted testimony was ordered "disregarded" by the Court. (*See* Schumann, Tr. 4182). The proposed finding is misleading insofar as it suggests that the first communication of an offer by McWane to sell Fittings to Sigma (or the first such communication relied upon by Dr. Schumann) was made on February 1, 2008. Instead, Dr. Schumann testified that CX 1113 was one of many documents that he considered to form the basis of his opinion. (Schumann, Tr. 4671). CX 1113 is an email from Ruffner Page of McWane to Victor Pais of Sigma dated January 4, 2008, in which Mr. Page offers to supply Sigma with small compact Fittings at a competitive price. (CX 1113).

351. CX 1117, which is an offer from McWane to sell Sigma private label Fittings, is dated three weeks after McWane announced its multiplier adjustments on January 11, 2008. (Schumann, Tr. 4183 ("Q. Yeah. And that's three weeks after McWane had already sent out its multiplier announcement on January 11, 2008. A. Yes, it is").).

Response to Proposed Finding No. 351

The proposed finding is misleading insofar as it suggests that the first communication of an offer by McWane to sell Fittings to Sigma (or the first such communication relied upon by Dr. Schumann) was made on February 1, 2008. Instead, Dr. Schumann testified that CX 1113 was one of many documents that he considered to form the basis of his opinion. (Schumann, Tr. 4671). CX 1113 is an email from Ruffner Page of McWane to Victor Pais of Sigma dated January 4, 2008, in which Mr. Page offers to supply Sigma with small compact Fittings at a competitive price. (CX 1113; s*ee supra* Response to Proposed Finding No. 350).

352. CX 1117 had no impact on McWane's January 11, 2008 and January 18, 2008 multiplier adjustments. (Schumann, Tr. 4184 ("Q. -- let's be very clear about this. You're not saying that an e-mail dated February 1, 2008 led McWane to send out its multiplier increases on January 11 and January 18, 2008; correct? A. I'm absolutely not saying that").).

Response to Proposed Finding No. 352

The proposed finding is misleading insofar as it suggests that the first communication of an offer by McWane to sell Fittings to Sigma (or the first such communication relied upon by Dr. Schumann) was made on February 1, 2008. Instead, Dr. Schumann testified that CX 1113 was one of many documents that he considered to form the basis of his opinion. (Schumann, Tr. 4671). CX 1113 is an email from Ruffner Page of McWane to Victor Pais of Sigma dated January 4, 2008, in which Mr. Page offers to supply Sigma with small compact Fittings at a competitive price. (CX 1113; s*ee supra* Response to Proposed Finding No. 350).

353. CX 1117 did not impact Sigma's job pricing decisions. (Schumann, Tr. 4189 ("Q. Dr. Schumann, you don't cite a single document or piece of testimony that shows that Sigma got this e-mail on February 1, 2008 and as a result decided to reduce project pricing because it got this e-mail, do you, sir? A. I do not. As I described, I view this as part of, as a one piece. It's -- and as I had testified earlier, there was not a single meeting. There was not a single memo. But that doesn't mean there was not agreement. This is one piece").).

Response to Proposed Finding No. 353

Complaint Counsel notes that, contrary to this Court's Order, Respondent is improperly citing the testimony of an expert for a proposition of fact. The proposed finding is unsupported and incorrect because the cited testimony does not support the proposed finding. The cited testimony concerns what documents Dr. Schumann did or did not cite and not the facts about what decisions Sigma made or actions it took.

354. Dr. Schumann acknowledged that there was no evidence to support his opinion that anyone at Star or Sigma believed that McWane's January 2008 customer letter was "clear" that McWane, Sigma, and Star must cooperate to curtail job pricing. (Schumann, Tr. 4204 ("I did not cite anything that said that. . . .Oh, right. There's no--nothing cited at the end of that paragraph.").)

Response to Proposed Finding No. 354

The proposed finding is incorrect, unsupported, misleading, and mischaracterizes Dr. Schumann's testimony. In the testimony that Respondents cite (Schumann, Tr. 4204), Dr. Schumann did not testify that there was no evidence to support his opinion. Rather, he acknowledged that he did not cite any evidence near the end of Paragraph 87 of his expert report where he wrote that ". . . but the communication among competitors is clear, McWane's rivals must cooperate or prices will not increase further." (CX 2260-A (Schumann Rep. at 43-44) (quoted sentence does not contain a footnote)). The weight of the evidence establishes that Sigma and Star received McWane's January 11, 2008 letter, understood McWane's invitation to collude, and acted to curtail Project Pricing. (*See* CCPF 950-1021).

355. Dr. Schumann conceded that the Sigma and Star customer letters he claimed "accepted" McWane's "clear" offer in January 2008 did nothing of the sort.

> Q. Now, this letter does not say Sigma is matching all of McWane's multipliers, does it, sir?
>
> A. No, it does not.
>
> Q. It says they're going to pick and choose, they're going to match the ones they want to match and they're going to not follow the ones they don't want to follow, right?
>
> A. That is what it says.
>
> Q. This letter does not say anything about centralizing pricing authority, does it, sir?
>
> A. No, it does not.
>
> Q. It doesn't say anything about reducing job pricing, does it, sir?
>
> A. No, it does not.
>
> (Schumann, Tr. 4221:4-17.)

Response to Proposed Finding No. 355

The proposed finding is incorrect, unsupported, misleading, and mischaracterizes Dr. Schumann's testimony. First, the cited portion of the testimony on page 4221 of the transcript concerns a Sigma letter. There is no testimony cited in the proposed finding that relates to a Star letter. Second, Dr. Schumann did not concede in response to the questions posed by Respondent's counsel in the cited portion of the transcript that the Sigma letter did not demonstrate Sigma's acceptance of the offer. Respondent's questions concerned what was written in the letters and not what Sigma intended to convey in the letter or how McWane interpreted the letter. The weight of the evidence establishes that Sigma and Star received McWane's January 11, 2008 letter, understood McWane's invitation to collude, and acted to curtail Project Pricing. (*See* CCPF 950-1021).

356. Dr. Schumann conceded that McWane obtained Star's January 2008 customer letter from its customers (not Star) -- and was entirely uncertain about Star's intentions and did not consider it to "accept" any conspiratorial offer:

> Q. Yeah. What this does not say, Dr. Schumann, is: Aha, I see this email from Star. We have an agreement and one mind. We're all going to reduce job pricing; That's not what it says, does it, sir?
>
> A No, it doesn't.
>
> Q. And, in fact, you yourself on your direct testimony said there was a lot of uncertainty in this period; right?
>
> A. Yes.
>
> * * *
>
> Q. And you testified that McWane and Star and Sigma, all three companies, were uncertain in 2008, in the beginning of 2008, about what their rivals were going to do with regard to project pricing; correct, sir?
>
> A. They didn't have - - certainly that is correct.

(Schumann, Tr. 4234:15-23, 4235:8-22.)

Response to Proposed Finding No. 356

The proposed finding is incorrect, unsupported, misleading and mischaracterizes Dr. Schumann's testimony. Dr. Schumann did not concede that McWane was "entirely" uncertain about Star's intentions. Dr. Schumann testified that "there was a lot of uncertainty in this period" and "[t]he didn't have -- [certainty] that is correct." (Schumann, Tr. 4234-4235). In the cited portion of the transcript, Dr. Schumann was not asked about and he did not testify about whether McWane considered this Star letter to be an acceptance of a McWane offer. The weight of the evidence establishes that Star received McWane's January 11, 2008 letter and acted to curtail Project Pricing, and that McWane was encouraged by Star's announcement that it would stop Project Pricing. (*See* CCPF 950-1021).

2. Several of the documents are entirely internal

357. Dr. Schumann admits that there is no evidence that the so-called "Tatman Plan" (CX 627) or that the various internal McWane e-mails or internal McWane documents cited by Dr. Schumann in his expert report were ever communicated by McWane to Star or Sigma. (Schumann, Tr. 4174-4179, 4201-4202, 4211-4212, 4227).

Response to Proposed Finding No. 357

The proposed finding is incorrect, unsupported, misleading and mischaracterizes Dr. Schumann's testimony. Dr. Schumann did not testify that there is "no evidence" that the Tatman Plan or other various internal McWane emails or documents were ever communicated to Star or Sigma. Instead, Dr. Schumann testified that he did not cite in his report or in his testimony any evidence that CX 0627 or certain internal McWane emails were communicated to someone outside of McWane. (Schumann, Tr. 4176, 4177, 4179, 4202, 4211).

The proposed finding is also misleading insofar as it suggests that the "message to competitors" contemplated by the Tatman Plan was not communicated to Sigma and Star through, *inter alia*, McWane's January 11, 2008 customer letter, as well as possible telephonic or

other communications. (*See* CCPF 921-922, 931-949 (describing McWane's January 11, 2008 invitation to collude); CCPF 923 (**{**

})).

358. CX 1571 was not communicated to Star or Sigma. (Schumann, Tr. 4177-4178 ("Q. And just so we're clear on the record, CX 1571, you're not citing anything showing that this internal McWane e-mail was sent to anybody at Sigma or Star; right? A. I don't believe so. There is a second page"), CX 1571).

Response to Proposed Finding No. 358

Complaint Counsel notes that, contrary to this Court's Order, Respondent is improperly citing the testimony of an expert for a proposition of fact. The proposed finding is also incorrect, unsupported, and misleading, and mischaracterizes Dr. Schumann's testimony for the reasons set forth above in response to Proposed Finding No. 357. Moreover, the proposed finding is misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests that the McWane quotation for the supply of Fittings to Sigma referenced in CX 1571 was not supplied to Sigma. The weight of the evidence clearly establishes – and CX 1571 confirms – that McWane provided a quote for the supply of Fittings to Sigma for purposes of making Sigma aware of McWane's relative cost advantage and in furtherance of its invitation to collude. (CCPF 1072-1088).

359. CX 848 was not communicated to McWane. (Schumann, Tr. 4222 ("Q. All right. Now, this document -- if we go to the CX 848, Andrew . . . .This does not show any communication from Star to McWane, does it, sir? A. No, it doesn't. Q. Now, let's go to the second page. This one, the second page, doesn't show any communication from Star to McWane, does it, sir? A. Not directly. It's a dear Florida customer letter"); CX 848).

Response to Proposed Finding No. 359

Complaint Counsel notes that, contrary to this Court's Order, Respondent is improperly citing the testimony of an expert for a proposition of fact. The proposed finding is also incorrect, unsupported, and misleading, and mischaracterizes Dr. Schumann's testimony for the reasons set

forth above in response to Proposed Finding No. 357. The proposed finding is also misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests that McWane, Star, and Sigma do not routinely seek, receive, and read each other's pricing letters soon after they are issued. (CCPF 670-678, 684-685).

360. CX 1145 was not ever communicated to McWane. (Schumann, Tr. 4225 ("Q. You don't cite anything in your report showing that this internal Sigma e-mail was transmitted to McWane, do you, sir? A. I don't believe so."), CX 1145).

Response to Proposed Finding No. 360

Complaint Counsel notes that, contrary to this Court's Order, Respondent is improperly citing the testimony of an expert for a proposition of fact. The proposed finding is also incorrect, unsupported, and misleading, and mischaracterizes Dr. Schumann's testimony for the reasons set forth above in response to Proposed Finding No. 357. The proposed finding is also misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests that CX 1145 does not reflect Sigma's receipt of a pricing communication from McWane, specifically the "message to competitors" contemplated by the Tatman Plan. (*See* CCPF 921-922, 931-949 (describing McWane's January 11, 2008 invitation to collude)).

361. RX 415 was not communicated to Star or Sigma. (Schumann, Tr. 4240-4241 ("Q. Now, this document, RX 415, is the document you've cited in footnote 121; right? A. That's correct. Q. Now, this is the only thing you've cited for your support that Star and Sigma indirectly communicated back to McWane that they were of one mind and that further price increases may be imposed without the ordinary risk of market share loss due to cheating on the consensus price; right, sir? A. This is the document that I cite to support that. Q. Now, the document itself doesn't say that Star and Sigma communicated back to McWane, does it, sir? A. No, it does not. Q. In fact it says that McWane, based on its competitive feedback log -- which is just a log that McWane salespeople prepare; right, sir? A. I believe so. That is correct."), RX 415).

Response to Proposed Finding No. 361

Complaint Counsel notes that RX-415 is not in evidence. Complaint Counsel also notes that, contrary to this Court's Order, Respondent is improperly citing the testimony of an expert

for a proposition of fact. The proposed finding is also incorrect, unsupported, and misleading, and mischaracterizes Dr. Schumann's testimony for the reasons set forth above in response to Proposed Finding No. 357. The proposed finding is also misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests that RX-415 does not reflect McWane's favorable assessment of the success of the cartel's efforts to reduce Project Pricing and stabilize and increase Fittings prices pursuant to the Tatman Plan. (*See* CCPF 1053-1054).

3. The remaining documents are merely communications from McWane, Sigma, and Star to their Distributor customers, with no hidden messages

362. Dr. Schumann admitted that McWane's January 11, 2008 customer letter does not state that Sigma and Star must reduce job pricing or McWane will not support further price increases. (Schumann, Tr. 4203 ("Now, Dr. Schumann, you say this letter is clear McWane's rivals must cooperate or prices will not increase further, but the word "rivals" is not in this at all, is it, sir? A. That is correct. Q. And the words "Star and Sigma" aren't in it at all, are they, sir? A. That is correct. Q. And the words "must cooperate" aren't in this at all; right? A. That's also correct. Q. And it doesn't say you must cooperate or prices will not increase further, does it, sir? A. That is correct."), RX 591).

Response to Proposed Finding No. 362

Complaint Counsel notes that RX-591 is not in evidence. The proposed finding is unsupported, misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests that McWane's January 11, 2008 letter did not communicate to Sigma and Star that McWane would not support further price increases unless they curtailed Project Pricing. The cited testimony merely reflects Dr. Schumann's assent that certain specific words do not appear in the text of McWane's January 11, 2008 letter. The weight of the evidence establishes that Sigma and Star received McWane's January 11, 2008 invitation to collude, understood the "message to competitors" contemplated by the Tatman Plan, and acted to curtail Project Pricing accordingly. (*See* CCPF 907-1021).

363. Dr. Schumann admitted that McWane's January 11, 2008 customer letter does not say anything about centralizing project pricing authority. (Schumann, Tr. 4204 ("21 Q. Right.

Now, can we go back to RX 591. This letter doesn't say anything about centralizing project pricing, does it, sir? A. It does not."), RX 591).

Response to Proposed Finding No. 363

Complaint Counsel notes that RX-591 is not in evidence. The proposed finding is misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests that McWane's January 11, 2008 letter did not communicate to Sigma and Star that McWane would not support further price increases unless they curtailed Project Pricing, an objective that would be furthered by the centralization of pricing authority. The weight of the evidence establishes that Sigma and Star received McWane's January 11, 2008 invitation to collude, and understood and acted in accordance with the "message to competitors" contemplated by the Tatman Plan. (*See* CCPF 907-1021).

364. Mr. Rybacki testified that Sigma did not centralize pricing authority or reduce job pricing in 2008, and that its January 29, 2008 customer letter (CX 1145) did not say anything about taking either type of action:

> Q. Now, your letter -- let's be clear about your letter. First, does your letter say anything about Sigma stopping job pricing, sir?
>
> A. It does not.
>
> Q. Well, does it say anything that Sigma is going to reduce job price discounts?
>
> A. No.
>
> Q. Well, does it say anywhere in here that you're going to centralize pricing authority at Sigma and take away pricing authority from line personnel or salespeople at Sigma?
>
> A. No.
>
> 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.
>
> Q. And that was for the entire year of 2008, wasn't it, sir?
>
> A. Correct. (Rybacki, Tr. 3696-3697; CX 1145).

Response to Proposed Finding No. 364

The proposed finding is unsupported by the cited evidence, and contradicted by the weight of the evidence. Complaint Counsel does not dispute that Mr. Rybacki made the statements attributed to him, but neither the quoted testimony nor the cited document indicate whether Sigma reduced Project Pricing during 2008. Rather, the testimony says that a particular letter did not state that Project Pricing would be reduced and that there continued to be some Project Pricing in 2008. The cited document, CX 1145, does not include the letter being discussed in the testimony. The proposed finding is contradicted by CX 1145, which indicates that Sigma initiated an effort to reduce Project Pricing for plant work as well as other jobs:

> 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.

(CX 1145; CCPF 953-966).

The proposed finding is also contradicted by the weight of the evidence contemporaneous with the events at issue because Sigma's January 29, 2008 pricing letter (CX 1189) was a commitment to curtail Project Pricing and to adhere to published pricing levels. In that letter, Mr. Rybacki apologized for Sigma's "lack of discipline," 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 rather than Project Pricing. (Rybacki, Tr. 3520-3522; *see also* CCPF 961-969). Sigma enlisted its regional managers in implementing the strategy to curtail Project Pricing. (CCPF 970).

Finally, contemporaneous business documents generated by Sigma at the end of 2008 establish that, through the course of 2008, Sigma reduced Project Pricing and its transactional Fittings prices **{**

} (CX 1002, *in camera*; CCPF 1373-1380).

365. Mr. Pais testified that "[w]e never took out the authority or the flexibility from any salesperson to vary the price as he or she felt right, and that continued." (Pais, Tr. 1919 ("Q. Okay. You write, "I have urged Larry to initiate a new committed and serious effort to normalize all pricing for fittings -- at same levels -- plant work as well as other orders, to eliminate the confusion we are creating with customers and competitors, leading to lower overall pricing levels." Is that a reference to what we were just talking about getting -- trying to get to one price so that the customer was getting one price and not multiple -- not multiple prices? A. Well, in a way it looks like I may have anticipated your question and answered previously a lengthy explanation. But let me correct your notion. Again, you come back to this one price. Mr. Hassi, our pricing was all over the map, so -- and figures and analysis bears that out. All that this meant was we detected, after doing the same practice for several years, that something that we were doing internally was causing needless confusion and costing us money because then we were forced to give the lower of the two prices, and we could have gotten a slightly higher price for the same order. So we advised our salespeople about this trend and not treat just because a customer sends a list to check stock and treat that as a special plant work, et cetera. So it was not to have just one price. 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 many variations with terms, et cetera, and I was urging Larry, let's try and streamline our pricing policy.").

Response to Proposed Finding No. 365

The proposed finding is misleading insofar as it suggests that Sigma did not implement a new strategy to reduce Project Pricing in early 2008. Complaint Counsel does not dispute that Mr. Pais made the statements attributed to him, but the weight of the evidence establishes that Sigma initiated an effort to reduce Project Pricing for plant work as well as other jobs and communicated that plan to its customers and competitors. (CX 1145; CCPF 953-969). Sigma

enlisted its regional managers in implementing the strategy to curtail Project Pricing (CCPF 970) and contemporaneous business documents show that, through the course of the conspiracy, Sigma's transactional Fittings prices {

} (CX 1002, *in camera*; CCPF 1373-1380).

366. Dr. Schumann testified that Sigma's January 29, 2008 customer letter (CX 1189) does not state that Sigma will centralize pricing authority or reduce job pricing. (Schumann, Tr. 4221 ("Q. This letter does not say anything about centralizing pricing authority, does it, sir? A. No, it does not. Q. It doesn't say anything about reducing job pricing, does it, sir? A. No, it does not.").).

Response to Proposed Finding No. 366

Complaint Counsel does not dispute that Dr. Schumann so testified. The weight of the evidence in the record establishes that Sigma acted to reduce Project Pricing and communicated its commitment to do so through its January 29, 2008 customer letter (CX 1189). (*See* CCPF 950-970). The proposed finding is contradicted by the weight of the evidence because Sigma's January 29, 2008 pricing letter (CX 1189) was a commitment to curtail Project Pricing and to adhere to published pricing levels. In that letter, Mr. Rybacki apologized for Sigma's "lack of discipline," 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 rather than Project Pricing. (Rybacki, Tr. 3520-3522; *see also* CCPF 961-969). Sigma enlisted its regional managers in implementing the strategy to curtail Project Pricing. (CCPF 970). In addition, contemporaneous business documents generated by Sigma at the end of 2008 establish that, through the course of 2008, Sigma reduced Project Pricing and its transactional Fittings prices **{ }** (CX 1002, *in camera*; CCPF 1373-1380).

367. Sigma's January 29, 2008 customer letter (CX 1189) and Star's February 7, 2008 customer letter (CX 893) state nothing about centralizing pricing authority or eliminating or reducing project pricing, and Star's January 30, 2008 email to HD Supply (CX 178) states nothing about centralizing pricing authority. (Schumann, Tr. 4229-4230 ("Q. And if we go to CX 893, down at the bottom you see the Bates number; right, sir? A. Yes, I do. Q. That's the document you cite; correct, sir? A. Yes, it is. Q. All right. Now, this document on its face, correct, sir? A. On its face nothing shows that it was communicated, correct, to McWane, that is correct. Q. And if we scroll down a little bit, Andrew, and we blow up the text, nothing on this document says that Star is going to centralize pricing authority; correct, sir? A. Nothing on that document that I see says Star is going to centralize pricing, project pricing. Q. Nothing on this document says they're going to match all of McWane's prices, multiplier prices; correct, sir? A. That is correct. Q. Nothing on this document says that Star is going to reduce job pricing; right, sir? A. That is correct."), 4233 ("Q. Now, the Star e-mail to HD Supply does not say anything about centralizing project pricing; right? A. That's correct."), 4258-4259 ("Q. All right. Now, let's look at this one, CX 1189. Now, this one actually doesn't show it was communicated to McWane either; right? A. That's correct. Q. It doesn't say anything about centralizing pricing authority; right? A. It does not say that. Q. It doesn't say anything about eliminating or reducing job pricing; right? A. It doesn't say that either."), 4263 ("Q. In fact, you didn't cite any Sigma documents showing that they believed they were of one mind that further price increases may be imposed without the risk -- ordinary risk of market share loss due to cheating on the consensus price, did you, sir? A. Not in this paragraph. Q. You didn't cite any Star documents showing that they believed they were of one mind; right, sir? A. Not in this paragraph I didn't have any Star documents cited that --."); CX 1189, CX 178, CX 893). See also RX 36 ("We are still figuring out what Sigma's plan is as it looks like they have elected to let their regional Managers run individual plans on how to manage the increase and they all have different plans.").

Response to Proposed Finding No. 367

Complaint Counsel notes that, contrary to this Court's Order, Respondent is improperly citing the testimony of an expert for a proposition of fact. The proposed finding is misleading and contradicted by the weight of the evidence, which establishes that Sigma and Star acted to curtail Project Pricing and centralize pricing authority. (*See* CCPF 950-1021).

368. McWane's January 11, 2008 customer letter (RX 591), Sigma's January 29, 2008 customer letter (CX 1189), and Star's February 7, 2008 customer letter (CX 893) do not distinguish between large-diameter Fittings and small to medium-diameter Fittings. (Schumann, Tr. 4256-4257 ("Q. Now, if we go to RX 591, the January 11 letter from McWane to its customers, this letter doesn't distinguish between large-diameter, medium-diameter and small-diameter imported fittings, does it, sir? A. No, it does not. Q. And if we go to CX 1189 and the second page, the Sigma January 29, 2008 letter, this letter doesn't distinguish between large diameter, medium diameter and small diameter; right, sir? A. It does not. Q. And if we go to CX 893, Star's letter February 7, 2008 doesn't draw any distinction among those different size ranges, does it, sir? A. I don't believe so. I think it doesn't.").).

Response to Proposed Finding No. 368

Complaint Counsel notes that RX-591 is not in evidence. Complaint Counsel also notes that, contrary to this Court's Order, Respondent is improperly citing the testimony of an expert for a proposition of fact.

369. Dr. Schumann concedes that he ignored substantial record evidence, including trial testimony from Mr. McCutcheon, Mr. Pais, Mr. Minamyer, and Mr. Bhargava, and contemporaneous documents, including spreadsheets of McWane's job discounts and Star's job discounts, and McWane's "blue book" financial statements. (Schumann, Tr. 4084-4091, 4142-4145, 4149, 4263-4264, 4345-4346, 4367, 4371, 4379-4381). Instead, he stuck with an opinion he formed six months before the litigation began. (Schumann, Tr. 4050, 4053 ("That - - that was about six months, yes, it was"), 4082, 4085-4086 ("Well, I meant I didn't consider it"), 4086:21-4087:4 ("No, I did not"), 4088, 4089-4091, 4264 ("I did not get through it, that's correct. . . . Actually, I think I did not. I - - I - - I know I - - I believe I did not. That - - I did not"), 4367 ("I did not report the blue books. That's correct"), 4371)).

Response to Proposed Finding No. 369

The proposed finding is incorrect and misleading. First, Dr. Schumann did not concede that he ignored substantial record evidence. The proposed finding is misleading insofar as it suggests that Dr. Schumann ignored all spreadsheets of McWane's job discounts and Star's job discounts. Dr. Schumann testified that he did review Star's analysis that showed that the number of requests for project pricing was substantially lower in 2008 than it was in 2007. (*See* Schumann, Tr. 3844: "Q. Are you also familiar with a Star analysis of the number of requests for project pricing in 2007 versus 2008? A. Yes, I am. Q. Could you tell us about that briefly. A. Just that the number of requests for project pricing in 2008 was substantially below -- or it was below the levels of 2007."). Dr. Schumann also testified that he "looked at a lot of spreadsheets and a lot of things like this." (Schumann, Tr. 4085). Dr. Schumann also noted in his testimony that many documents he saw were produced multiple times with different Bates numbers on them and that he may have reviewed the spreadsheets that Respondent's Counsel

was asking him about under a different Bates stamp. (Schumann, Tr. 4085-4086; s*ee supra* Response to Proposed Finding No. 182).

Second, the proposed finding is misleading insofar as it suggests that Dr. Schumann ignored McWane's "blue book" financial statements. Dr. Schumann did consider the "Tyler Union Waterworks Fittings Fin. Stmts," also known as the blue books. (*See* CX 2265-A (Schumann Rebuttal Rep. at 72)).

Third, the proposed finding is misleading insofar as it suggests that Dr. Schumann ignored the testimony of several company executives. Dr. Schumann considered and relied upon the sworn testimony from Depositions and Investigational Hearings of the McWane, Star, and Sigma executives. (*See* CX 2260-A (Schumann Rep. at 92-93)).

Finally, the proposed finding is misleading and incorrect in its assertion that Dr. Schumann "stuck with an opinion he formed about six months before the litigation began." Respondents mischaracterize Dr. Schumann's testimony. Instead, Dr. Schumann testified that approximately six months before the case was filed, he took an initial look at the case and a small set of documents and reported to the attorney assigned to the case: "I didn't tell him what I thought of the case. I didn't have any basis for telling him what I thought of the case. I just told him that on its face it wasn't unreasonable, it had interesting issues, it had things that I'd be willing to pursue, that it wasn't one of these cases that you can look at and think that this -- I just don't see the antitrust issues. I saw potential for antitrust problems, and that's what I meant when I said -- what -- that it wasn't necessarily a bad case. It wasn't a case that on its face I didn't see an antitrust problem. It was something that looked interesting to pursue." (Schumann, Tr. 4051-4052). Dr. Schumann's Expert and Rebuttal Reports and the opinions contained herein are based in substantial part on the evidence obtained through the discovery process after the

complaint was filed. (*See* CX 2260-A (Schumann Rep. at 90-115 (list of materials considered)); CX 2265-A (Schumann Rebuttal Rep. at 70-72 (list of material considered))).

4. Dr. Schumann concedes that his opinions are not based on testable methodology

370. Dr. Schumann did not measure project pricing in any way, let alone conduct any independent analysis quantifying a decline in project pricing during 2008. (Schumann, Tr. 4070:4-13, 4292:5-20 ("Q. You did not do any independent measurement of any curtailment of project pricing in forming your opinions in this case, did you, sir? A. No, I did not. Q. And you didn't present any numbers to the court in your testimony; correct, sir? A. That is correct. Q. In fact, you didn't measure anywhere, in any of the work you did in this case, any actual amount of job pricing in any particular year; correct? A. That is correct. . . .Q. And you haven't quantified, in preparing your opinion in this case, any actual reduction in the number of job prices, the incidences of job prices, have you, sir? A. No, I have not. Q. You haven't quantified in any fashion, in preparing your opinion in this case, that the average amount of the job price discount changed in 2008, have you, sir? A. I've not calculated the average. Q. In fact, you haven't measured job pricing, quantified it in any fashion for any year for any company; right? A. I have not counted - - I have not done a quantification of the number of job pricing that went on in 2008.").)

Response to Proposed Finding No. 370

The proposed finding is misleading insofar as it suggests that McWane and Star did not keep records of the incidence of Project Pricing, and that those records do not reflect a reduction of Project Pricing during 2008. (*See* CCPF 1415-1423 (Star's records indicate that it engaged in Project Pricing less frequently in 2008 than it did in 2007); CCPF 1043-1047 (describing the McWane price protection log and showing that **{**

}); CCPF 1054, 1339 (McWane 2008 management reports stating that reduced Project Pricing had been observed in the marketplace)).

The proposed finding is also misleading insofar as it suggests meaningful econometric analysis of data produced by McWane, Sigma, and Star was feasible or reliable. (*See* CCPF 1424-1435 (describing the numerous problems with the invoice data produced in this matter);

Schumann, Tr. 3775-3779, 4098-4099, 4116, 4138, 4142-4145 (describing why because of the data quality, econometric analysis would not be meaningful in this matter)).

371. Dr. Schumann admitted that his opinions cannot be statistically proven or tested:

> "Q. Dr. Schumann, my question is, there is no statistical test that can tell us whether your read of the documents and application of oligopoly theory or my read of the documents and application of oligopoly theory is right, is there, sir?
>
> A. There's no sociological test. There's no anthropological test. I mean, to have a statistical test you have to have a test statistic. You have to have a random variable of some known or estimated distribution. I don't have a hypothesis that is testable, as you've described it. I mean, you have to have a testable hypothesis to start with. And you haven't described a testable hypothesis, so I don't know how to answer your question.
>
> Q. Just so we're clear, there is no statistical test that can tell us whether your opinion is right or wrong, is there, sir?
>
> A. That's certainly true of my opinion as it's true of anyone's opinion." (Schumann, Tr. 4158-4159, 4155-4156.)

Response to Proposed Finding No. 371

Complaint Counsel does not have a specific response.

XIII. Ductile Iron Waterworks Fittings ("Fittings") are a Commodity Product, Regardless of Country of Origin

372. Fittings are commodity products produced to American Water Works Association ("AWWA") standards and specifications. (JSLF ¶ 7).

Response to Proposed Finding No. 372

Complaint Counsel has no specific response, other than to note that there is no exhibit denominated "JSLF." (*See also* CCPF 415-416).

373. 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. (JSLF ¶ 6).

Response to Proposed Finding No. 373

Complaint Counsel has no specific response, other than to note that there is no exhibit denominated "JSLF." (*See also* CCPF 371-373).

374. The end users of Fittings are typically municipalities, regional water authorities, and the contractors they engage to construct waterworks projects (collectively, "End Users"). (JSLF ¶ 12).

Response to Proposed Finding No. 374

Complaint Counsel has no specific response, other than to note that there is no exhibit denominated "JSLF." (*See also* CCPF 466).

375. In form and functionality, non-domestic and domestic Fittings are completely interchangeable. (Tatman, Tr. 878-879 ("There's no difference in how you apply [or] use the product."); McCutcheon, Tr. 2528 ("For the most part, the fittings are interchangeable. … we all provide an interchangeable fitting"); Webb, Tr. 2730-2731 (Q: "Is there a difference between domestic fittings and import fitting?" A: "In functionality, no"); Tatman, Tr. 878 (non-domestic and domestic Fittings are "exact one for one. You know, it's corn"); Schumann, Tr. 4535-4536 ("The imported fittings are marked as imported. They're marked with the country of origin. Besides that distinction, they're homogeneous products. They're essentially identical."), 4638-4639; JX 694 (Bhutada, Dep. at 14); JX 659 (Swalley, Dep. at 63); JX 669 (Groeniger, Dep. at 36); JX 650 (Morrison, Dep. at 57-58); JX 661 (Prescott, Dep. at 29); JX 646 (Burns, Dep. at 147); JX 701 (Morton, Dep. at 13-14); JX 675 (Sheley, Dep. at 51-52); Complaint ¶ 27(a)).

Response to Proposed Finding No. 375

Complaint Counsel has no specific response, other than to note that the citation to Schumann, Tr. 4638-4639 does not support the proposed finding, and that there is no exhibit denominated "JX 694," "JX 659," "JX 669," "JX 650," "JX 661," "JX 646," "JX 701," or "JX 675." (*See also* CCPF 416-417, 637).

XIV. A Flood of Cheap Non-Domestic Fittings Decimated Domestic Foundries

376. At one time, most Fittings used in waterworks projects in the United States were manufactured in the United States, and full-line Fittings manufacturers included U.S. Pipe and Foundry Company ("U.S. Pipe"), Griffin Pipe ("Griffin"), and American Cast Iron Pipe Company ("ACIPCO"). (Tatman, Tr. 1046-1047 ("Well, if you -- we -- if you look historically, you got to go back at a point in time. At one point in time there were multiple manufacturers producing domestic fittings, and then because the industry died and it wasn't profitable to keep

spending the high capital dollars, they all independently chose to exit. U.S. Pipe exits. Griffin exits. ACIPCO exits.") ; JX 644 (Tatman, Dep. at 191); JX 675 (Sheley, Dep. at 57)).

Response to Proposed Finding No. 376

Complaint Counsel notes that there is no exhibit denominated "JX 644" or "JX 675." The proposed finding is inaccurate insofar as it suggests that ACIPCO no longer makes ductile iron pipe fittings of any kind. ACIPCO continues to manufacture ductile iron pipe fittings ranging from 30" to 60" in diameter. (*See* CCPF 178).

377. At times, some waterworks projects require that only domestic Fittings be used because of either End User preference or because it is required by municipal, state, or federal law ("Domestic-only projects"). (JSLF ¶ 13).

Response to Proposed Finding No. 377

Complaint Counsel has no specific response, other than to note that there is no exhibit denominated "JSLF." (*See also* CCPF 448-449).

378. 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).

Response to Proposed Finding No. 378

Complaint Counsel notes that there is no exhibit denominated "JX 675," or "JX 646." The proposed finding is inaccurate, misleading, and contradicted by the weight of the evidence. In 2003, Buy America preference provisions applied to 10% to 20% of all Fittings shipments. (*See* CCPF 1700, 1619, 1651). Dr. Normann estimates that **{**

} (*See* RX-712B (Normann Rep. at 26, 40 fig. 7, 12), *in camera*; Normann, Tr. 5683-5687). Other estimates indicate that **{**

} in 2010. (*See* CCPF 1653). Currently, the Domestic Fittings market accounts for approximately 20% to 25% of the combined Fittings and Domestic Fittings markets. (*See* CCPF 1654).

379. Non-domestic Fittings have accounted for the majority of sales of Fittings in the United States in the last five years. (JSLF ¶ 5; see also Tatman, Tr. 879 (Q: "[T]he domestic fittings is a small piece of the overall fittings purchased in the U.S.; is that right?" A: "We've used the estimate of 15 to 18 percent of the total market."); JX 669 (Groeniger, Dep. at 34-35); JX 661 (Prescott, Dep. at 33); JX 672 (Webb, IHT at 70-71)).

Response to Proposed Finding No. 379

Complaint Counsel notes that there is no exhibit denominated "JSLF," "JX 669," "JX 661," or "JX 672." From before the passage of ARRA to the present, Domestic Fittings have accounted for **{** **}** (*See* RX-712B (Normann Rep. at 26, 40 fig. 7, 12), *in camera*; Normann, Tr. 5683-5687; CCPF 1619; CCPF 1652-1654).

380. Beginning in the mid-1980s, Fittings importers began to successfully convert End User's domestic-only specifications to "open" specifications, which permitted the use of both domestic and non-domestic Fittings on a particular project. (Tatman, Tr. ("Q. So in going back to the multiplier map, this is a blended utility fittings multiplier map, this particular? A. Yes. But let's clarify the word "blended." Okay? We talked about that what a domestic fittings sale was. When we call something that's domestic, that means when the customer calls us up, he's saying, I need you to ship me a domestic fitting. It has to say "made in the USA" on it because that's the requirement for this job. If it doesn't require made in the USA, we call that an open spec job, meaning they don't care whether that fitting was made in China, Korea, South Vietnam, Cambodia. It doesn't matter. All they want is a fitting. So that is domestic-only jobs, and let's call that open spec, or sometimes I'll refer to that as import job, because it doesn't have to be made in the USA. We no longer use this word "blended" internally, but we did out here. So for us, where that comes from is, you have certain jobs that come in or orders that you have to ship a domestic fitting. If it doesn't require domestic only, customers give us the option of shipping them a fitting made in China or India or made in the USA. They don't care. 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."); McCutcheon, Trans. 2266 ("Q. Do you use the term "open spec," open specification? A. Occasionally, yes, sir. Q. And how do you use that term? A. It's -- it can be used a variety of ways. The majority of the time I believe it's used to mean that a fitting manufactured anywhere in the world could be used on that product -- I mean, on that project."); (JX 644 (Tatman, Dep. at 192-193); JX 694 (Bhutada, Dep. at 12-13); JX 669 (Groeniger, Dep. at 33-34, 49); JX 650 (Morrison, Dep. at 55-56)).

Response to Proposed Finding No. 380

Complaint Counsel notes that there is no exhibit denominated "JX 644," "JX 694," "JX 669," or "JX 650." The proposed finding is unsupported, misleading, and contradicted by the weight of the evidence. The citation to Mr. Tatman's testimony does not support the proposition that Fittings importers were converting Domestic-only Specifications to Open Specifications, and does not indicate what pages are being cited. Moreover, Mr. Groeniger's deposition testimony does not support the proposed finding. The proposed finding is contrary to the weight of the evidence, which establishes that Domestic-only Specifications have remained fairly constant since 2003, except for the period since enactment of ARRA in which such specifications increased. (*See* Response to Proposed Finding No. 378). The proposed finding is also misleading insofar as the citation to Mr. Tatman's testimony suggests that McWane's Domestic Fittings business was hobbled by Open Specifications. To the contrary, the weight of the evidence establishes that in 2008, 2009, and 2010, McWane's Domestic Fittings prices were not constrained by competitor efforts to "flip" Domestic-only Specifications to Open Specifications, and McWane was able to charge higher prices, offer less discounting, and earn higher margins for Domestic Fittings than for otherwise identical non-Domestic Fittings. (*See* CCPF 1694-1699).

381. Domestic-only specifications now comprise only a small percentage of the Fittings market in the United States. (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."); 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)).

Response to Proposed Finding No. 381

Complaint Counsel notes that there is no exhibit denominated "JX 643," "JX 667," or "JX 672." The proposed finding is vague, unsupported, misleading, and contradicted by the weight of the evidence. From before the passage of ARRA to the present, Domestic Fittings have accounted for between **{** **}** (*See* RX-712B (Normann Rep. at 26, 40 fig. 7, 12), *in camera*; Normann, Tr. 5683-5687; CCPF 1619; CCPF 1652-1654).

382. 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. (Tatman, Tr. 275 (Q: "Has it always been the case that your domestic cost of production is higher than your imported cost of production?" A: "Always been the case."), 879 (Q: "Now, are the costs of production different in the U.S. versus your China plant, Tyler Xian Xian?" A: "The costs in the U.S. are much higher, both in direct manufacturing cost, and then when you apply the idle plant cost, it makes the spread significantly different."); JX 642 (Page, Dep. at 112); JX 694 (Bhutada, Dep. at 13-14); JX 669 (Groeniger, Dep. at 40-41); JX 661 (Prescott, Dep. at 29-30, 33); JX 673 (Webb, Dep. at 24-25); JX 646 (Burns, Dep. at 20-21); JX 658 (Keffer, Dep. at 58); JX 672 (Webb, IHT at 70-71); JX 675 (Sheley, Dep. at 55)).

Response to Proposed Finding No. 382

Complaint Counsel notes that there is no exhibit denominated "JX 642," "JX 694," "JX 669," "JX 661," "JX 673," "JX 646," "JX 658," "JX 672," or "JX 675." The proposed finding is vague, incorrect, misleading, and contradicted by the weight of the evidence. The comparative production costs between the United States and the countries listed in the proposed finding are variable over time. For example, the weight of the evidence shows that McWane's costs for certain Domestic Fittings were competitive with Sigma's and Star's costs for importing Fittings from China in 2008. (*See* CCPF 1072-1088).

The proposed finding is misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests that the price of non-domestically manufactured Fittings is always lower than the price of domestically manufactured Fittings. As Mr. Tatman explained,

McWane has substituted domestically manufactured Fittings into Open Specification jobs in 2007 and were sold at Open Specification, not Domestic-Only, prices. (*See* Tatman, Tr. 840; CCPF 450).

The proposed finding is misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests that the price difference between non-Domestic (Open Specification) Fittings and Domestic Fittings (sold into Domestic-only projects) results only from cost differences between United States and overseas production. The weight of the evidence establishes that McWane charges higher prices for – **{**

} – Domestic Fittings sold into Domestic-only Specifications because it has monopoly power in the Domestic Fittings market. (CCPF 1658-1663, 1694-1702).

383. In 2003, McWane filed a complaint before the International Trade Commission (ITC) to challenge "dumping" by Fittings importers seeking to have tariffs imposed on non-domestically produced fittings. (RX 730).

Response to Proposed Finding No. 383

Complaint Counsel has no specific response, other than to note that the proposed finding is immaterial. (*See also* CCPF 1700).

384. In December 2003, the ITC 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. (Schumann, Tr. 4639 (Q: "We see -- up here we see the determination of the ITC in December 2003, and they found that ductile iron waterworks fittings from China are being imported into the U.S. in such increased quantities or under such conditions as to cause market disruption to the domestic producers of ductile iron waterworks fittings; right, sir?" A: "That's exactly what it says."). cite ITC document

Response to Proposed Finding No. 384

Complaint Counsel notes that, contrary to this Court's Order, Respondent is improperly citing the testimony of an expert for a proposition of fact. The proposed finding is unsupported by any other citation to the record, and is immaterial.

385. The ITC found that imported Fittings manufactured in China were materially injuring the domestic Fittings producers in the United States. (Schumann, Tr, 4638-4639 (Q. "Now, the ITC found that Chinese imports were coming in and materially injuring the domestic fittings producers; right?" A. "Yes. Prior to the Chinese imports, my recollection is that most fittings sold in the U.S. were made in the U.S."; RX 730).

Response to Proposed Finding No. 385

Complaint Counsel notes that, contrary to this Court's Order, Respondent is improperly citing the testimony of an expert for a proposition of fact. The proposed finding is also immaterial.

386. Sigma, Inc. ("Sigma"), a fittings importer, describes itself as a "virtual manufacturer," because it does not actually own any manufacturing facilities, but controls the elements of design, quality control, and supply chain planning for the products it sells. (Pais, Tr. 1732 (Q: "Does Sigma itself manufacture the fittings it sells?" A. "The term I have used over the years is Sigma was a virtual manufacturer." Q. "And can you explain what that term means to you?" A: "Yes. We 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.; Rybacki, Tr. 1092 ("We call ourselves a virtual manufacturer. We're responsible for all the technical know-how that goes into producing our product, but our product is actually made overseas, for the most part, in China and Mexico and India, so -- at foundries. And we have people that will administrate and make sure that our drawings are done to our specifications and testing. You know, we have a couple engineering groups, one in China, one in India."); (JSLF ¶ 2).

Response to Proposed Finding No. 386

Complaint Counsel has no specific response, other than to note that there is no exhibit denominated "JSLF."

387. Over the past 25 years, Sigma's non-domestic fittings sales in the United States have steadily grown. (Pais, Tr. 1977-1978 ("Q. Could we go to the second to last paragraph on the page. You refer to this -- you say, "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." The huge step, was that your participation in DIFRA? A. Yes. Q. And how did Sigma demonstrate its commitment to grow in a responsible manner? A. Well, to me, as I said -- I think I've said it a couple of times -- our industry, because the complexion of the market and market acceptance for foreign fittings shifted about just 20-25 years back, and in the beginning all the importers were considered as a big threat or that they didn't have the quality and they didn't understand the market requirements, service requirements, so on and so forth, so we had made great strides. And to be able to have a trade organization based upon which American businesses thrive and get organized and get stronger, I thought it

was a good symbolic -- it may be just me, but it was a good achievement."); (JX 687 (Pais, Dep. at 9-10).

Response to Proposed Finding No. 387

Complaint Counsel has no specific response, other than to note that there is no exhibit denominated "JX 687."

388. By 2012, Sigma's share of the Fittings market in the United States was 25 to 30 percent. (JX 687 (Pais, Dep. at 10-12)).

Response to Proposed Finding No. 388

Complaint Counsel has no specific response, other than to note that there is no exhibit denominated "JX 687."

389. Star Pipe Products Ltd. ("Star") imports and sells Fittings, including non-domestic Fittings, and other waterworks products in the United States. (JSLF ¶ 3); McCutcheon, Tr. 2249 ("Q. And what products does Star sell? A. Ductile iron pipe fittings, joint restraint products, castings and accessories.").)

Response to Proposed Finding No. 389

Complaint Counsel has no specific response, other than to note that there is no exhibit denominated "JSLF."

390. Star does not own or operate the foundries where any of its foreign or domestically manufactured Fittings are made. (JX 694 (Bhutada, Dep. at 7-9, 72-73); McCutcheon, Tr. 2251 (Q: "Where are the fittings that Star sells manufactured?" A: "In mostly China, India, and the United States." … Q. "Well, does Star own the foundries where the fittings are manufactured" A: "Star has several joint ventures that we have controlling interest in foundries." Q: "Q. And where are the foundries -- where are the foundries for which you have a controlling joint -- controlling interest in a joint venture?" A: "In China." Q: "Does Star have employees in China who manage those foundries? A: "Yes, sir." Q: "Does Star own any foundries, in whole or in part, in the United States?" A: "No, sir." Q: "Does Star have any joint ventures with foundries in the United States?" A: "No, sir.").)

Response to Proposed Finding No. 390

Complaint Counsel notes that there is no exhibit denominated "JX 694." The proposed finding is misleading. While Star does not own any of the foreign or domestic foundries at which its Fittings are made, it has significant responsibility for oversight of the foundries from

which it obtains its Domestic and imported Fittings, including responsibility for quality assurance and quality control at the foundries in China it operates as a joint venture. (CCPF 132, 1759).

391. President Bush declined to impose the tariffs recommended by the ITC. (RX 730.009; JX 642 (Page, Dep. at 18-19)).

Response to Proposed Finding No. 391

Complaint Counsel notes that there is no exhibit denominated "JX 642," and the proposed finding is unsupported by the cited passage from Mr. Page's deposition, and immaterial.

392. ACIPCO ceased its domestic production of Fittings of less than 30 inches diameter, due to declining domestic sales and lack of profitability. (JX 646 (Burns, Dep. at 25-28)).

Response to Proposed Finding No. 392

Complaint Counsel has no specific response, other than to note that there is no exhibit denominated "JX 646." (*See also* CCPF 178).

393. 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).

Response to Proposed Finding No. 393

Complaint Counsel has no specific response, other than to note that there is no exhibit denominated "JX 701." (*See also* CCPF 224).

394. 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)).

Response to Proposed Finding No. 394

Complaint Counsel notes that there is no exhibit denominated "JX 643." The proposed finding is unsupported, misleading, and unsupported by the weight of the evidence. The record is inconclusive as to why Griffin ceased production of Domestic Fittings. Respondent's only support for the contention that Griffin's reason for exiting the production of Domestic Fittings is testimony from a McWane representative, Mr. Tatman, and witnesses affiliated with Griffin did not testify as to Griffin's reason for exiting the Domestic Fittings market.

395. Mr. Tatman testified that, by late 2007, McWane was "the last guy standing producing fittings domestically" in the under 30-inch diameter segment of the Fittings market. (JX 643 (Tatman, IHT at 47)).

Response to Proposed Finding No. 395

Complaint Counsel has no specific response, other than to note that there is no exhibit denominated "JX 643." (*See also* CCPF 1658-1663).

396. In the Fall of 2008, McWane closed its domestic Fittings manufacturing facility in Tyler, Texas, the Tyler South Plant because of cheaper imports, which caused underutilization of McWane fittings plants and unsustainable production levels. (Tatman, Tr. 963-964 (Q. "All right. Now, so in the fall of 2008 were you -- were you thinking of closing the Tyler south plant?" A. "I was."), 966-968 (Q. All right. Now, you say here right below this -- there's a paragraph that says "I don't believe." Can we highlight that one. You're telling Mr. McCullough and Mr. Walton, the executive vice president and senior vice president of McWane, "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." What does that mean? A. Like I said, at this point in time I'm feeling pretty beat up. You know, I had a hold 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 I 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. Q. All right. And is that what the end result of this discussion you had was? A. Yeah. Q. Okay. And what does that mean in practical terms? Did you have to shut down the facility after this? A. Yeah. Q. And roughly how many people had to lose their jobs, sir? A. Sorry. A couple hundred.) & RX 616; JX 643 (Tatman, IHT at 47-51)).

Response to Proposed Finding No. 396

Complaint Counsel notes that there is no exhibit denominated "JX 643." The proposed finding is contradicted by the weight of the evidence insofar as the finding suggests that the reason McWane closed the Tyler South plant was because of underutilization of the foundry caused by import products. The weight of the evidence establishes that a large variety of factors contributed to the closure of the Tyler South plant. As a result of Mr. Green's sales and inventory strategies, McWane had substantial excess inventory of Domestic Fittings by the time Mr. Tatman took over the Fittings business. (*See* CCPF 847-848, 855). McWane determined that it could manufacture Fittings more cheaply in China. (*See* CCPF 852). In addition, the economic downturn began in 2007, and resulted in declining demand and increased costs for the entire Fittings industry. (*See* CCPF 843; Tatman, Tr. 268-269 (Fittings market volume declined by 50% between 2006 and 2010); Tatman, Tr. 347 (describing prices "not keeping pace with inflation")). Also, Mr. Tatman explained in his testimony that closing Tyler South resulted in an improvement McWane's "fully burdened cost" because it eliminated $7 million in idle plant costs. (Tatman, Tr. 432-434). And the weight of the evidence demonstrates that the Fittings

business thrived even throughout the recession. (*See* CCPF 17, 1347-1351, 1359; CX 0622 at 005; CCPF 1702; RX-721 (2009 Domestic Fittings gross profits); RX-632 (2010 Domestic Fittings gross profits)).

XV. ARRA's Impact on the Demand for Domestic Fittings Was Short-Lived and Minimal

397. In February 2009, Congress passed the American Recovery and Reinvestment Act of 2009, known as "ARRA." (JSLF ¶ 19).

Response to Proposed Finding No. 397

Complaint Counsel has no specific response, other than to note that there is no exhibit denominated "JSLF." (*See also* CCPF 1572).

398. ARRA allocated more than $6 billion to water infrastructure products and contained certain Buy-American provisions applicable to Fittings. (JSLF ¶¶ 20, 21.)

Response to Proposed Finding No. 398

Complaint Counsel has no specific response, other than to note that there is no exhibit denominated "JSLF." (*See also* CCPF 1573, 1575-1577).

399. In the years immediately preceding the adoption of ARRA and following the expiration of ARRA, domestic Fittings comprised approximately 12 to 20 percent of the overall Fittings market. (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.")).

Response to Proposed Finding No. 399

The proposed finding is misleading because it understates the size of the Domestic Fittings market immediately prior to the passage of ARRA. In 2003, Buy America preference provisions applied to 10% to 20% of all Fittings shipments. (*See* CCPF 1700, 1619, 1651). Dr. Normann estimates that **{**

} (*See* RX-712B (Normann Rep. at 26, 40 fig. 7, 12), *in camera*; Normann, Tr. 5683-5687). Other estimates indicate that **{**

} (*See* CCPF 1653). Currently, the Domestic Fittings market accounts for approximately 20% to 25% of the combined Fittings and Domestic Fittings markets. (*See* CCPF 1654).

400. Dr. Schumann testified that, during ARRA, domestic Fittings comprised 15 to 20 percent of the overall Fittings market in the United States. (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.")

Response to Proposed Finding No. 400

Complaint Counsel does not have a specific response.

401. 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" (Tatman, Tr. 281) and that "[w]e didn't really understand the impact of the ARRA but we all knew that it was a short-term event." (Tatman, Tr. 981).

Response to Proposed Finding No. 401

Complaint Counsel does not dispute that Mr. Tatman made the statements attributed to him, but the characterization of ARRA as a blip is vague, misleading, and contradicted by the weight of the evidence, including contemporaneous documents, which establishes that ARRA increased the number of Domestic Fittings projects, both during and after the period in which

Fittings suppliers were participating in ARRA-funded projects. (*See* CCPF 1647-1654). Market participants experienced the impact of ARRA for at least 2010, and the Domestic Fittings market today is larger than it was before ARRA. (*See* CCPF 1649-1654). ARRA also impacted the Domestic Fittings market by creating an incentive for Star and Sigma to enter the Domestic Fittings market, because they believed (correctly) that the growth in Domestic Fittings demand would extend beyond ARRA, and that ARRA could impact non-Domestic Fittings sales as well. (*See* CCPF 1628-1638 (Buy American sentiment extending beyond ARRA), 1639-1646 (Sigma's and Star's fear of losing non-Domestic Fittings sales)).

402. McWane did not see any effects at all from ARRA until February of 2010. (JX 643 (Tatman, IHT at 92-94)).

Response to Proposed Finding No. 402

Complaint Counsel notes that there is no exhibit denominated "JX 643." The proposed finding is vague and misleading as to the meaning of "any effects at all," and is contradicted by the weight of the evidence, which establishes that the enactment of ARRA generated a substantial amount of activity among participants in the Domestic Fittings market at least as early as February 2009, including incentivizing Star and Sigma to enter the Domestic Fittings market. Complaint Counsel does not dispute that ARRA-funded jobs were primarily serviced during the 2010 calendar year, continuing into 2011, and even as late as May 2012. (*See also* CCPF 1649-1653).

403. Although the peak year for ARRA funding was 2010, (Tatman, Tr. 1003, *in camera*† (†**{** **}** †)), McWane saw only a **{** **}** percent increase in domestic Fittings sales in 2010. (Tatman, Tr. 1004 *in camera*† (†**{** **}**))

Response to Proposed Finding No. 403

The proposed finding is incorrect and misleading, and mischaracterizes the testimony and the referenced document (**{ }**, RX-632 at 0027, *in camera*), in stating that **{ }**. The cited testimony and the document to which the testimony relates (RX-632 at 0027) show **{**

}. (Tatman, Tr. 1004, *in camera*; RX-632 at 0027, *in camera*). On that same page of RX 632, McWane's 2010 Blue Book shows that McWane's Domestic Fittings sales (for all sizes) **{**

}. (RX-632 at 0027, *in camera*). 3"-12" Domestic Fittings sales **{ }**, and 14"-24" Domestic Fittings sales **{ }**. (RX-632 at 0027, *in camera*).

The proposed finding is also misleading and contradicted by the weight of the evidence insofar as the proposed finding is intended to refer to "prices" and thus to suggest that, because **{ }** that McWane was not exercising monopoly power during the ARRA period. The weight of the evidence establishes that prior to 2010, McWane had already increased Domestic Fittings prices (*i.e.*, prices for Domestic-only projects) to levels substantially higher than non-Domestic Fittings prices (CCPF 628-633; 1694-1701), and was **{**

} (CCPF 1702). ARRA thus increased the demand for a product that McWane was already selling at supracompetitive prices. (CCPF 1647-1652). By preventing meaningful entry by Sigma and Star, McWane was able to **{ }**. (RX-632 at 0027, *in camera*; *see also* CCPF 2473-2484). Moreover, assuming that McWane's documents include its sales to Sigma, which were

made at a 20% discount from published prices, McWane's effective prices to Distributors increased significantly more than **{ }** because the sales to Sigma weighed down the overall average. (CCPF 2411).

404. ARRA did not provide an opportunity to McWane to raise domestic Fittings prices and, in any event, McWane did not opt to increase its domestic Fittings price as a result of the passage of ARRA. (Tatman, Tr. 979-981) ("Can we take a look at RX 595, which I believe is a one-page e-mail, so you should be able to see it on the screen. Do you recognize this e-mail from Mr. McCullough, the executive vice president, to you and Mr. Walton? A. Yes, I do. Q. The subject says "BA Substitution Policy." Do you understand what that is, sir? A. Buy America substitution policy. It had to do with the American Recovery and Reinvestment Act . . . . Q. And then in the middle here, towards the bottom of that first paragraph, he says, "It has never been our intent to overcharge because of the Buy America provision." Do you understand what that is a reference to? A. Yeah, I do. I mean, we -- you know, we're a fourth-generation company. We've been around for a long time. We intend to be around for a long time. We didn't really understand the impact of the ARRA, but we all knew that it was a short-term event. And what we didn't want to do because we think long term is we didn't want to overcharge in the short term, make a large business profit off the situation and set ourselves up for the long term where people felt that we took advantage of the situation or we overcharged, and that would be more pressure to work against domestic specs, so Leon is really there -- is really saying always keep your mind on the long term. Q. All right. Or in this particular instance it sounds like you just lowered your domestic price so they could buy at an import price? A. We would have lost money on this sale. Q. And then down below he's saying we can't make a practice of that or we won't be here any longer; is that what that is? A. Yeah.").

Response to Proposed Finding No. 404

The proposed finding is misleading, unsupported by the cited testimony, and contradicted by the weight of the evidence.

The cited testimony does not support the proposition that "ARRA did not provide an opportunity to McWane to raise Domestic Fittings prices." The cited testimony relates to McWane's policy, reflected in the document being discussed, to *not* lower the prices of Domestic Fittings without a justification (such as where a project that had previously been bid as Open Specification but needed to convert to Domestic-only to satisfy ARRA). (RX-595).

The statement that "McWane did not opt to increase its domestic Fittings price as a result of the passage of ARRA" is misleading and contradicted by the weight of the evidence insofar as

the statement suggests that (1) McWane did not continue to exercise its monopoly power to charge supracompetitive prices during the relevant ARRA time period (*see supra* Response to Proposed Finding No. 403), or (2) that McWane did not actually **{**

} during the ARRA period (*see supra* Proposed Finding No. 403 and Response thereto; RX-632 at 0027, *in camera*; CCPF 2473-2484). McWane increased prices for Domestic Fittings following passage of the ARRA and McWane's implementation of its Exclusive Dealing Policy and the MDA. (*E.g.* CCPF 2481-2482).

405. Mr. Page testified that ARRA did not reinvigorate "Buy American" sentiment as a more general matter. (JX 642 (Page, Dep. at 175-176)).

Response to Proposed Finding No. 405

Complaint Counsel notes that there is no exhibit denominated "JX 642." Complaint Counsel does not dispute that Mr. Page made the statement attributed to him. However, the proposed finding is vague, misleading, and contradicted by the weight of the evidence. The weight of the evidence establishes that prior to 2009, Domestic-only Specifications represented 10% to 20% of all Fittings sales, that the Domestic Fittings market increased to approximately 30% to 40% of the overall market in 2010, and that after ARRA, Domestic Fittings account for approximately 20% to 25% of the overall Fittings market, which is a larger proportion of the market than before ARRA. (*See* CCPF 1618-1627, 1647-1654; *see also supra* Response to Proposed Finding No. 378).

406. Mr. Tatman testified that 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." (Tatman, Tr. 280-281 (Q: "The -- you mentioned earlier that the domestic share of the overall fittings market was -- I think you used 15 to 20 percent. Previously you've used - " A: "I think I said 15 to 18 percent. That's my perception. I have no hard facts on that." Q: "And that was before the ARRA, the stimulus bill?" A: "I believe so. And that's probably what it is now or slightly lower. Domestic-only specs have done nothing but erode over time.")).

Response to Proposed Finding No. 406

Complaint Counsel does not dispute that Mr. Tatman made the statements attributed him. However, the proposed finding and cited testimony are vague, misleading, and contradicted by the weight of the evidence. The weight of the evidence establishes that prior to 2009, Domestic-only Specifications represented 10% to 20% of all Fittings sales, that the Domestic Fittings market increased to approximately 30% to 40% of the overall market in 2010 (during the relevant ARRA time period), and that after ARRA, Domestic Fittings account for approximately 20% to 25% of the overall Fittings market, a general trend of Domestic-only Specifications representing a consistent to slightly increasing proportion of the market over time. (*See* CCPF 1618-1627, 1647-1654; *see also supra* Response to Proposed Finding No. 378, 405).

407. Mr. Rona testified that, "[f]or domestic fittings specifically associated with ARRA, we knew that it was not forever." (Rona, Tr. 1671 (Q: "It was a very short time window." A: "Short time, correct.")).

Response to Proposed Finding No. 407

Complaint Counsel does not dispute that Mr. Rona made the statement attributed to him, or that ARRA only funded waterworks projects for a limited time span, but the proposed finding is misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests that ARRA was not expected to have, or did not have, a lasting effect on demand for Domestic Fittings that outlasted ARRA itself. The weight of the evidence establishes that (1) Sigma and Star believed in 2009 that Buy-American sentiment would extend beyond ARRA (CCPF 1628-1638), and (2) post-ARRA, Domestic Fittings account for a higher proportion of the overall Fittings market than they did pre-ARRA. (CCPF 1654; s*ee also supra* Response to Proposed Finding No. 405, 406).

408. Mr. Pais, Sigma's former CEO (JX 687 (Pais, Dep. at 6-7)), testified that "[b]y the definition of that law and the scope, we knew it was going to be a short-term impact." (Pais, Tr. 1738).

Response to Proposed Finding No. 408

Complaint Counsel notes that there is no exhibit denominated "JX 687." Complaint Counsel does not dispute that Mr. Pais made the statement attributed to him, or that ARRA only funded waterworks projects for a limited time span. However, the proposed finding is misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests that ARRA was not expected to have, or did not have, a lasting effect on demand for Domestic Fittings that outlasted ARRA itself. The weight of the evidence establishes that (1) Sigma, and Mr. Pais in particular, believed in 2009 that Buy-American sentiment would extend beyond ARRA (CCPF 1628-1638; CCPF 1630 (Mr. Pais believed that Buy-American sentiment was "slowly spreading and becoming a part of American life and business."); CCPF 1633 (**{**

}), and (2) post-ARRA, Domestic Fittings account for a higher proportion of the overall Fittings market than they did pre-ARRA (CCPF 1654; s*ee also supra* Response to Proposed Finding No. 405, 406).

409. Mr. Morton of U.S. Pipe testified that ARRA "had a limited life." (Morton, Tr. 2888 (Q: "And ARRA had a limited window; right?" A: "That's right." Q: "About a year, year and a half?" A: "I can't recall that, the extent of it, but it had a limited life.")).

Response to Proposed Finding No. 409

Complaint Counsel does not dispute that Mr. Morton made the statement attributed to him, or that ARRA only funded waterworks projects for a limited time span, but the proposed finding is misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests that ARRA was not expected to have, or did not have, a lasting effect on demand for Domestic Fittings that outlasted ARRA itself. The weight of the evidence establishes that (1) Sigma and Star believed in 2009 that Buy-American sentiment would extend beyond ARRA (CCPF 1628-1638), and (2) post-ARRA, Domestic Fittings account for a higher

proportion of the overall Fittings market than they did pre-ARRA (CCPF 1654; s*ee also supra* Response to Proposed Finding No. 405, 406).

410. Mr. Webb of HD Supply testified that ARRA's impact on demand for domestic Fittings was "mild, at best." (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.").

Response to Proposed Finding No. 410

Complaint Counsel notes that there is no exhibit denominated "JX 673." Complaint Counsel does not dispute that Mr. Webb made the statement attributed to him, or that ARRA only funded waterworks projects for a limited time span. However, the proposed finding is misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests that ARRA did not create a substantial increase in demand for Domestic Fittings, or that ARRA was not expected to have, or did not have, a lasting effect on demand for Domestic Fittings that outlasted ARRA itself. The weight of the evidence establishes that (1) Sigma and Star believed in 2009 that Buy-American sentiment would extend beyond ARRA (*see* CCPF 1618-1638), (2) during ARRA, the Domestic Fittings market **{**

} (CCPF 1647-1654), and (3) post-ARRA, Domestic Fittings account for a higher proportion of the overall Fittings market than they did pre-ARRA (CCPF 1654; s*ee also supra* Response to Proposed Finding No. 405, 406).

411. 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. (JX 673 (Webb, Dep. at 28)).

Response to Proposed Finding No. 411

Complaint Counsel notes that there is no exhibit denominated "JX 673." Complaint Counsel does not dispute that Mr. Webb made the statement attributed to him, or that ARRA

only funded waterworks projects for a limited time span. However, the proposed finding is vague as to the meaning of "robust." Further, the proposed finding is misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests that ARRA did not create a substantial increase in demand for Domestic Fittings, or that ARRA was not expected to have, or did not have, a lasting effect on demand for Domestic Fittings that outlasted ARRA itself. The weight of the evidence establishes that (1) Sigma and Star believed in 2009 that Buy-American sentiment would extend beyond ARRA (*see* CCPF 1618-1638), (2) during ARRA, the Domestic Fittings market **{**

} (CCPF 1647-1654), and (3) post-ARRA, Domestic Fittings account for a higher proportion of the overall Fittings market than they did pre-ARRA (CCPF 1654; s*ee also supra* Response to Proposed Finding No. 405, 406).

412. Mr. Sheley, President and Owner of Illinois Meter, 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.")).

Response to Proposed Finding No. 412

Complaint Counsel notes that there is no exhibit denominated "JX 674." Complaint Counsel does not dispute that Mr. Sheley made the statement attributed to him, or that ARRA only funded waterworks projects for a limited time span. However, the proposed finding is misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests that ARRA did not create a substantial increase in demand for Domestic Fittings, or that ARRA was not expected to have, or did not have, a lasting effect on demand for Domestic

Fittings that outlasted ARRA itself. The weight of the evidence establishes that (1) Sigma and Star believed in 2009 that Buy-American sentiment would extend beyond ARRA (*see* CCPF 1618-1638), (2) during ARRA, the Domestic Fittings market **{**

} (CCPF 1647-1654), and (3) post-ARRA, Domestic Fittings account for a higher proportion of the overall Fittings market than they did pre-ARRA (CCPF 1654; s*ee also supra* Response to Proposed Finding No. 405, 406).

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)).

Response to Proposed Finding No. 413

Complaint Counsel notes that there is no exhibit denominated "JX 674." Complaint Counsel does not dispute that Mr. Sheley made the statement attributed to him, but the proposed finding is misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests that ARRA was not expected to have, or did not have, a lasting effect on demand for Domestic Fittings at the national level that outlasted ARRA itself. The weight of the evidence establishes that (1) Sigma and Star believed in 2009 that Buy-American sentiment would extend beyond ARRA (*see* CCPF 1618-1627), and (2) post-ARRA, Domestic Fittings account for a higher proportion of the overall Fittings market than they did pre-ARRA (CCPF 1654; s*ee also supra* Response to Proposed Finding No. 405, 406).

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)).

Response to Proposed Finding No. 414

Complaint Counsel notes that there is no exhibit denominated "JX 673." Complaint Counsel does not dispute that Mr. Webb testified as set forth in the cited transcript, but the proposed finding is contradicted by the weight of the evidence. The weight of the evidence establishes that prior to 2009, Domestic-only Specifications represented 10% to 20% of all Fittings sales, that the Domestic Fittings market increased to approximately 30% to 40% of the overall market in 2010, and that after ARRA, Domestic Fittings account for approximately 20% to 25% of the overall Fittings market, or a larger proportion of the market than before ARRA. (*See* CCPF 1618-1627, 1647-1654; *see also supra* Response to Proposed Finding No. 378, 405).

415. Mr. Swalley, of pipe and Fittings importer Electrosteel, testified that by the third quarter of 2010, bidding on ARRA jobs had ceased. (JX 659 (Swalley, Dep. at 158)).

Response to Proposed Finding No. 415

Complaint Counsel notes that there is no exhibit denominated "JX 659." The proposed finding mischaracterizes the cited testimony, because Mr. Swalley actually testified that bidding on ARRA projects "seemed to have dropped off by late 2010." Further, the proposed finding is incomplete, misleading, and contradicted by the weight of the evidence insofar as the proposed finding suggests that ARRA's impact on the Domestic Fittings market ended, or there was no opportunity to compete for the supply of Domestic Fittings to ARRA jobs, after the third quarter of 2010. Both Star and McWane continued to ship Domestic Fittings to ARRA jobs into 2012. (RX-659 (Swalley, Dep. at 158); CCPF 1650). McWane's National Sales Manager testified that McWane was still competing for ARRA-funded projects "certainly after 2010," and as late as May 2012. (CX 2477 (Jansen, Dep. 107-108)). Mr. Swalley (the witness cited in the proposed finding) testified at his May 2012 deposition that there were still ongoing, unfinished projects using ARRA funds. (CCPF 1650). The proposed finding is also misleading and contradicted by

the weight of the evidence insofar as the proposed finding suggests that ARRA was not expected to have, or did not have, a lasting effect on demand for Domestic Fittings that outlasted ARRA itself. The weight of the evidence establishes that (1) Sigma and Star believed in 2009 that Buy-American sentiment would extend beyond ARRA (CCPF 1628-1638), and (2) post-ARRA, Domestic Fittings account for a higher proportion of the overall Fittings market than they did pre-ARRA (CCPF 1654; s*ee also supra* Response to Proposed Finding Nos. 405, 406).

416. Mr. Keffer from EBAA testified that ARRA's impact did not last long. (JX 658 (Keffer, Dep. at 11-12).

Response to Proposed Finding No. 416

Complaint Counsel notes that there is no exhibit denominated "JX 658." Complaint Counsel does not dispute that Mr. Keffer testified as set forth in the cited transcript, or that ARRA only funded waterworks projects for a limited time span. However, the proposed finding is misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests that ARRA was not expected to have, or did not have, a lasting effect on demand for Domestic Fittings that outlasted ARRA itself. The weight of the evidence establishes that (1) Sigma and Star believed in 2009 that Buy-American sentiment would extend beyond ARRA (CCPF 1628-1638), and (2) post-ARRA, Domestic Fittings account for a higher proportion of the overall Fittings market than they did pre-ARRA (CCPF 1654; s*ee also supra* Response to Proposed Finding Nos. 405, 406).

417. Mr. Backman, owner of Backman Foundry, a domestic foundry, testified that ARRA funded only "a finite amount of jobs." (JX 648 (Backman, Dep. at 109-110).

Response to Proposed Finding No. 417

Complaint Counsel notes that there is no exhibit denominated "JX 648." Complaint Counsel does not dispute that Mr. Keffer testified as set forth in the citation, or that ARRA only funded a finite number of waterworks projects. However, the proposed finding is misleading and

contradicted by the weight of the evidence insofar as the proposed finding suggests that ARRA was not expected to have, or did not have, a lasting effect on demand for Domestic Fittings that outlasted ARRA itself. The weight of the evidence establishes that (1) Sigma and Star believed in 2009 that Buy-American sentiment would extend beyond ARRA (CCPF 1628-1638), and (2) post-ARRA, Domestic Fittings account for a higher proportion of the overall Fittings market than they did pre-ARRA (CCPF 1654; s*ee also supra* Response to Proposed Finding No. 405, 406).

418. Mr. Johnson, an owner of distributor customer Dana Kepner, testified that ARRA's impact was "minimal." (JX 652 (Johnson, Dep. at 30)).

Response to Proposed Finding No. 418

Complaint Counsel notes that there is no exhibit denominated "JX 652." Complaint Counsel does not dispute that Mr. Johnson made the statement attributed to him about the impact of ARRA on Dana Kepner's Domestic Fittings sales, or that ARRA only funded waterworks projects for a limited time span. However, the proposed finding is misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests that ARRA did not create a substantial increase in demand for Domestic Fittings, or that ARRA was not expected to have, or did not have, a lasting effect on demand for Domestic Fittings that outlasted ARRA itself. The weight of the evidence establishes that (1) Sigma and Star believed in 2009 that Buy-American sentiment would extend beyond ARRA (*see* CCPF 1618-1638), (2) during ARRA, the Domestic Fittings market **{**

} (CCPF 1647-1654), and (3) post-ARRA, Domestic Fittings account for a higher proportion of the overall Fittings market than they did pre-ARRA (CCPF 1654, s*ee also supra* Response to Proposed Finding No. 405, 406).

419. Mr. Gibbs of distributor Winwater testified that ARRA did not have much impact on Fittings sales. (JX 705 (Gibbs, Dep. at 23, 106)).

Response to Proposed Finding No. 419

Complaint Counsel notes that there is no exhibit denominated "JX 705." Complaint Counsel does not dispute that Mr. Gibbs testified as set forth in the cited transcript, or that ARRA only funded waterworks projects for a limited time span. However, the proposed finding is misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests that ARRA did not create a substantial increase in demand for Domestic Fittings, or that ARRA was not expected to have, or did not have, a lasting effect on demand for Domestic Fittings that outlasted ARRA itself. The weight of the evidence establishes that (1) Sigma and Star believed in 2009 that Buy-American sentiment would extend beyond ARRA (*see* CCPF 1618-1638), (2) during ARRA, the Domestic Fittings market **{**

} (CCPF 1647-1654), and (3) post-ARRA, Domestic Fittings account for a higher proportion of the overall Fittings market than they did pre-ARRA (CCPF 1654; s*ee also supra* Response to Proposed Finding No. 405, 406).

420. Mr. Coryn of Utility Equipment testified that ARRA did not have much impact on business. (JX 703 (Coryn, Dep. at 24)).

Response to Proposed Finding No. 420

Complaint Counsel notes that there is no exhibit denominated "JX 703." Complaint Counsel does not dispute that Mr. Coryn testified as set forth in the cited transcript, or that ARRA only funded waterworks projects for a limited time span, but the proposed finding is misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests that ARRA did not create a substantial increase in demand for Domestic Fittings, or that ARRA was not expected to have, or did not have, a lasting effect on demand for Domestic

Fittings that outlasted ARRA itself. The weight of the evidence establishes that (1) Sigma and Star believed in 2009 that Buy-American sentiment would extend beyond ARRA (*see* CCPF 1618-1638), (2) during ARRA, the Domestic Fittings market **{**

} (CCPF 1647-1654), and (3) post-ARRA, Domestic Fittings account for a higher proportion of the overall Fittings market than they did pre-ARRA (CCPF 1654; s*ee also supra* Response to Proposed Finding No. 405, 406).

421. Given ARRA's limited effect, former domestic Fittings manufacturers and specialty domestic Fittings manufacturers did not believe ARRA made it worthwhile for them to expand or return to a full line of domestic Fittings production. (Morton, Tr. 2875 (Q: "And despite this history and the fact that it owned patterns in Mexico, it decided in the spring of '09 that it did not make financial sense to try to get back in the domestic market; correct?" … A: "That's correct."); JX 646 (Burns, Dep. at 30-31, 35-36, 176-177); JX 667 (Kuhrts, Dep. at 38, 49-50, 74)).

Response to Proposed Finding No. 421

Complaint Counsel notes that there is no exhibit denominated "JX 646" or "JX 667." Complaint Counsel does not dispute that Griffin, ACIPCO, and U.S. Pipe were not potential entrants into the Domestic Fittings market in 2009, and all stated that they have **{**

} (*See* CCPF 1683-1688).

The proposed finding is vague, misleading and contradicted by the weight of the evidence insofar as the use of the phrase "ARRA's limited effect" suggests that ARRA did not create a substantial increase in demand for Domestic Fittings, or that ARRA was not expected to have, or did not have, a lasting effect on demand for Domestic Fittings that outlasted ARRA itself. The weight of the evidence establishes that (1) Sigma and Star believed in 2009 that Buy-American sentiment would extend beyond ARRA (*see* CCPF 1618-1638), (2) during ARRA, the Domestic Fittings market **{**

} (CCPF 1647-1654), and (3) post-

ARRA, Domestic Fittings account for a higher proportion of the overall Fittings market than they did pre-ARRA (CCPF 1654; s*ee also supra* Response to Proposed Finding No. 405, 406).

The proposed finding is also misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests that "former domestic Fittings manufacturers and specialty domestic Fittings manufacturers" did not face substantial barriers to entry into the Domestic Fittings market that Sigma and Star, as full-line suppliers actively engaged in the Fittings market in 2009, did not then face. (*See* CCPF 642-650, 1664-1693).

422. 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." (JX 648 (Backman, Dep. at 109-110)).

Response to Proposed Finding No. 422

Complaint Counsel notes that there is no exhibit denominated "JX 648." The proposed finding is vague and misleading insofar as it suggests that the market that Mr. Backman characterized as "going to end" was the Domestic Fittings market. Mr. Backman's testimony referred specifically to the finite nature of ARRA funding, not to the Domestic Fittings market. (RX 648 (Backman, Dep. at 109-110) ("[T]here was a fixed amount of money in that budget. So the American -- ARRA was -- there's a finite amount of cash, and we're going to do a finite amount of jobs."); *see also* CCPF 1677).

Complaint Counsel does not dispute that Mr. Backman made the statement attributed to him, or that ARRA only funded waterworks projects for a limited time span. However, the proposed finding is misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests that ARRA did not create a substantial increase in demand for Domestic Fittings, or that ARRA was not expected to have, or did not have, a lasting effect on demand for Domestic Fittings that outlasted ARRA itself. The weight of the evidence

establishes that (1) Sigma and Star believed in 2009 that Buy-American sentiment would extend beyond ARRA (*see* CCPF 1618-1627), (2) during ARRA, the Domestic Fittings market **{** **}** (CCPF 1647-1654), and (3) post-ARRA, Domestic Fittings account for a higher proportion of the overall Fittings market than they did pre-ARRA (CCPF 1654; s*ee also supra* Response to Proposed Finding No. 405, 406).

423. Some ARRA funds were diverted, and therefore had no impact on demand for Fittings; for example, some municipalities were allowed to use ARRA funds to pay off previously installed projects. (JX 672 (Webb, IHT. at 93)).

Response to Proposed Finding No. 423

Complaint Counsel notes that there is no exhibit denominated "JX 672." The proposed finding is misleading, immaterial, and contradicted by the weight of the evidence insofar as the proposed finding suggests that ARRA did not create a substantial increase in demand for Domestic Fittings, or that ARRA was not expected to have, or did not have, a lasting effect on demand for Domestic Fittings that outlasted ARRA itself. The weight of the evidence establishes that (1) Sigma and Star believed in 2009 that Buy-American sentiment would extend beyond ARRA (*see* CCPF 1618-1627), (2) during ARRA, the Domestic Fittings market **{** **}** (CCPF 1647-1654), and (3) post-ARRA, Domestic Fittings account for a higher proportion of the overall Fittings market than they did pre-ARRA (CCPF 1654; s*ee also supra* Response to Proposed Finding No. 405, 406).

424. 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).

Response to Proposed Finding No. 424

The proposed finding is misleading insofar as it suggests that the *de minimis* waiver from ARRA's Buy American requirement applied to Fittings. While the EPA granted a revised *de minimis* waiver on August 10, 2009, the waiver applied only to incidental goods such as "nuts and bolts"-type components whose origins cannot be readily identified prior to procurement. (*See* CCPF 1593; RX-195 at 0002). The weight of the evidence establishes that neither McWane, nor other market participants believed that the *de minimis* waiver applied to Fittings supplied to ARRA projects. (*See* CCPF 1600-1604). Moreover, Star did not sell any imported Fittings for use in any ARRA-funded job under any waiver, and McWane cannot identify any sale of any imported Fittings pursuant to the *de minimis* waiver. (*See* CCPF 1606-1607; *see also* CCPF 1608 (Sigma characterized sales of Fittings pursuant to the *de minimis* waiver as "few and far between.")).

XVI. Star Quickly and Successfully Expanded Into Domestic Fittings

A. Star was undeterred by McWane's September 2009 Rebate Policy

425. Star sold domestic Fittings to many distributors after the Rebate Policy was issued, including **{** **}** (McCutcheon, Tr. 2590-2594 ("Q. And you sold domestic fittings to **{** **}**, and we saw that yesterday; right, sir? A. Yes, sir. Q. You sold domestic fittings to **{** **}**; right, sir? A. Yes, sir. Q. You sold domestic fittings to a company called **{** **}**; right, sir? A. Yes, sir. Q. They're a big regional distributor? A. Yes, sir. Q. You sold domestic fittings to a company called **{** **}**; right, sir? Q. After Star had product available, domestic product available, which was sometime in the fall of 2009; right, sir? A. Yes, sir. Q. And after Tyler's rebate policy was issued; right, sir? A. Yes, sir. Q. You sold to **{** **}**. We saw that yesterday. A. Yes, sir. Q. In fact, you sold to **{** **}** the very same month the rebate policy came out, September; right, sir? A. Yes, sir. Q. After the policy came out, you sold to **{** **}**? They purchased your domestic fittings? A. Yes, sir. Q. You sold to **{** **}**; right, sir? Q. Well, I'll ask the witness to clarify. Do you remember when **{** **}** started buying domestic fittings from you? A. No, sir. Q. You just know that they did buy domestic fittings from you? A. I believe that they did, yes, sir. Q. And a regional chain, **{** **}**, started buying domestic fittings from you after the policy came out; correct? A. Yes, sir. Q. And a company called **{** **}**, they started buying domestic fittings from Star after the policy came out; right? A. Yes, sir. Q. And a

company called **{ }**, they started buying fittings from Star after the policy came out? A. Yes, sir. Q. **{ }**; right? A. Yes, sir. Q. **{ }** A. Yes, sir. Q. **{ }** in Tulsa, Oklahoma; right? A. Yes, sir. Q. **{ }**; right? A. Yes, sir. Q. **{ }** A. I'm not sure. Q. **{ }** buys domestic fittings from you? A. I believe so. Yes, sir. Q. **{ }** buys fittings, domestic fittings, from you after the policy came out? A. Yes, sir. Q. **{ }** in California, they bought domestic fittings from you after the policy came out? A. Yes, sir. Q. **{ }**, they purchased domestic fittings from you? A. I don't recall. Q. Okay**. { }**, they purchased domestic fittings from Star Pipe? A. I don't recall. Q**.{ }** A. Yes, sir. That's R-A-M-S-C-O. Q. **{ }**, they purchased domestic fittings after the policy came out? A. I don't recall. Q. **{ }** A. Yes, sir. Q. In fact, Mr. McCutcheon, the company sold to more than a hundred individual customers domestic fittings after the policy came out and during 2010; right? A. I believe that to be true, but I'd need to see a document to confirm it, but I think it's true.").).

Response to Proposed Finding No. 425

The proposed finding is misleading because it refers to and treats McWane's Exclusive Dealing Policy as a mere "Rebate Policy" rather than an all-or-nothing exclusive dealing policy. To the contrary, the September 22, 2009 letter did not offer or provide any rebate to Distributors in exchange for exclusivity, but rather threatened to deny access to McWane's line of Domestic Fittings as well as to void any accrued rebates on Domestic Fittings for any Distributor that purchased any Domestic Fittings from a competing supplier. (CCPF 1823-1849; *see also* CCPF 1850-1879 (McWane enforced the policy against Hajoca)).

The proposed finding is also misleading and immaterial because it assumes that Star's sales to Distributors are significant, regardless of the size of the Distributor, the quantity of Domestic Fittings purchased, or the extent to which the Distributor did not purchase Domestic Fittings from Star because of McWane's Exclusive Dealing Policy. The proposed finding is also misleading insofar as it suggests that the Distributors' purchases were inconsistent with McWane's Exclusive Dealing Policy, which allowed Distributors to purchase Domestic Fittings from Star (i) as part of a pipe-Domestic Fitting bundle, or (ii) when McWane did not have the

requested Fitting available for timely delivery. (CCPF 1894-1936 (HD Supply); 1937-1952 (Ferguson); 1953-1964 (Winwater); 1965-1992 (Groeniger); 1993-2025 (TDG members)).

The proposed finding is misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests that McWane's Exclusive Dealing Policy did not cause Star to lose sales of Domestic Fittings (CCPF 1893-2063, 2091-2108), ultimately preventing Star from investing in its business as required to become an effective competitor in the Domestic Fittings market (CCPF 2109-2166).

426. As early as April 2010, Star's sales staff recognized that the Rebate Policy was "all bark and no bite." (McCutcheon, Tr. 2617 ("Q. That was part of his job responsi- -- job and responsibilities, right? A. Yes. Q. Okay. And part of his job as a salesman was to go out and get this information, correct? A. Yes. Q. All right. And is it fair to say that it at least appears from here that he's reporting this information within a week of the time he got it? A. I would assume so, yes. . . . Q. Okay. All right. The second bullet point where Mr. Lisowski writes: "There have been no repercussions from Tyler to Mainline for buying Star Pipe Products domestic fittings. The Tyler program seems to be all bark and no bite." What did you understand him to be reporting in that bullet? A. I don't know what Pete's full thought process was on that.").).

Response to Proposed Finding No. 426

The proposed finding is misleading insofar as it refers to and treats McWane's Exclusive Dealing Policy as a mere "Rebate Policy" rather than an all-or-nothing exclusive dealing policy. (*See supra* Response to Proposed Finding No. 425). The proposed finding is also unsupported and misleading because the cited evidence was not a recognition by "Star's sales staff," but an observation from one of Star's five division managers related to a single customer.

The proposed finding is also misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests that McWane's Exclusive Dealing Policy was not enforced by McWane and respected by Distributors. (CCFP 1850-1893, 1894-2031). Also, by the time of the cited comment in April 2010, some Distributors had concluded that McWane would not likely enforce its Exclusive Dealing Policy because of the Commission had opened its investigation into McWane's Policy in January 2010. (CCPF 2028-2029, 2495).

427. Mr. McCutcheon emailed a copy of the Rebate Policy to his division managers, commenting in his email that the Rebate Policy "will actually benefit Star" because customers were angered by it. (McCutcheon, Tr. 2588-2590 ("Q. And so having gotten the rebate policy, this contains your immediate comments; right, sir? That's what it says in the first line? A. Yes, sir. Q. You say -- let's see -- halfway down, "Tyler tried this 'loyalty' program before and we beat them down with better service, flexibility, price, et cetera"; right, sir? A. Yes, sir. Q. And in fact, you gained share throughout the period; right? A. Yes, sir. Q. And you say, actually, "Every customer I talked to is pissed. This will actually benefit Star." That's what you said at the time; right, sir? A. Yes, sir. Q. And you say, right above that, to the sales force, "Get with all of your guys to make sure we hang on to as many independents as we can for now. We only need a few into each market to be successful"; right, sir? A. Yes, sir. Q. And above that, you're talking about the big guys, and by "the big guys" you're talking about HD and Ferguson? A. Yes, sir. Q. And you say they'll probably do this for the time being because they can't take the risk, and then you say, "They all committed to give us more import," and that means support, sir? A. Did you say does it mean support? Q. Yeah. A. I don't understand the question. Q. What did you mean when you said, "They all committed to give us more import"? A. That they agreed to give us more of the import pipe fittings because they couldn't buy domestic. Q. I got you. So they said they're risky on the domestic, buying domestic from you, and then they said but they'll switch to you the second you prove you're ready; right? That's what it says? A. That's correct, yes, sir. Q. And in the meantime they said they'll give you more of their import business; right? A. Yes, sir, I said that. Q. And that's a benefit to Star Pipe if you get more of their import business; correct, sir? A. It would be, yes, sir. Q. Now, in fact, the company -- as we heard yesterday, the company has domestic product. You started from scratch in 2009, and by the fall of 2009 you actually had fittings, domestic fittings; right, sir? A. Yes, sir. Q. And you sold domestic fittings in 2009; right, sir? A. Yes, sir. Q. And you sold more domestic fittings in 2010; right, sir? A. Yes, sir."); CX 0009).

Response to Proposed Finding No. 427

The proposed finding is misleading insofar as it refers to and treats McWane's Exclusive Dealing Policy as a mere "Rebate Policy" rather than an all-or-nothing exclusive dealing policy. (*See supra* Response to Proposed Finding No. 425). The proposed finding is also misleading because the cited email, CX 0009, was an email sent by Mr. McCutcheon on September 23, 2009, only one day after McWane issued its Exclusive Dealing Policy and it therefore does not reflect Mr. McCutcheon's assessment of the actual impact of the policy. Mr. McCutcheon's actual assessment of the effect of McWane's Exclusive Dealing Policy on Star's business was that it had an "immediate negative impact." (McCutcheon, Tr. 2303; *see also* CCPF 2090-2166)). Further, in the cited email, Mr. McCutcheon specifically stated that, "The big guys will

all probably do this for the time being, because they can not take the risk, the ones I talked to feel bad, but feel they cant take a chance right now." (CX 0009).

B. Star quickly became a domestic Fittings supplier and has steadily increased its share of domestic Fittings sales

428. Beginning in 2009, Star contracted with foundries in the United States to manufacture domestic fittings. (JSLF ¶ 4).

Response to Proposed Finding No. 428

Complaint Counsel has no specific response, other than to note that there is no exhibit denominated "JSLF." (*See also* CCPF 1716-1757).

429. In reaction to ARRA's passage in February 2009, Star began to develop plans to expand its product lines to include Fittings that satisfied the "Buy American" provisions of ARRA. (Bhargava, Tr. 2927 ("Q. And what prompted Star to first consider entering the domestic market? A. In 2008, there was a recession and then there was a stimulus package, the ARRA, which specified there will be a significant amount of funds available for projects that would require only domestically produced product, so that made us look at the possibility of going into the domestic market."); McCutcheon, Tr. 2603-2604.)

Response to Proposed Finding No. 429

Complaint Counsel has no specific response. (*See also* CCPF 1716-1757).

430. At a June 2009 AWWA industry conference, Star publicly announced that it would offer Domestic Fittings starting in September 2009. (JSLF ¶ 23; McCutcheon, Tr. 2603-2604 ("Q: Okay. Fair enough. So you had the idea in the spring, and by June of 2009 you'd announced at the AWWA meeting that you were going to sell domestic fittings; right? A: Yes, sir.").)

Response to Proposed Finding No. 430

Complaint Counsel has no specific response, other than to note that there is no exhibit denominated "JSLF ¶ 23." (*See also* CCPF 1713-1715).

431. Star's initial plan to supply Fittings for use in ARRA-funded projects was to import foreign-made Fittings from countries that were members of the World Trade Organization (Korea) or were parties to the North American Free Trade Agreement (Mexico). (Bhargava, Tr. 2927-2928 ("Q. When you first decided to enter the domestic market, what options for sourcing did you consider? A. We started to -- with seeing whether WTO countries could use it, which was -- Korea was one of the options that we talked about, and we started to look into it. And then we looked also whether NAFTA country would be able to fulfill the requirements, so we looked

at Mexico to be able to do it. But after some investigation, we found that it would be -- it would not be a very profit sources to really meet all the requirements of ARRA projects. Q. And why not? A. Because for WTO and NAFTA there were so many different states, there were so many different regulations that products from one country will not qualify for all the different jobs even in the same state, and it would be very difficult practically to follow that and bid on any jobs, so that was not considered a practical option.").).

Response to Proposed Finding No. 431

The proposed finding is misleading. As set forth in the quoted testimony, Star considered the alternative of acquiring Domestic Fittings from foundries in South Korea or Mexico but determined it would not satisfy the requirements of the ARRA, and it did not make its "initial plan" to obtain Fittings from either South Korea or Mexico. (CCPF 1586).

432. Star concluded by March or April of 2009 that ARRA's "Buy American" provisions would require the products actually to be manufactured in the United States. Star then focused on three (3) possible courses of action: (1) building a foundry from "ground zero"; (2) buying an existing foundry in the United States; or, (3) contracting with existing domestic foundries to produce the desired Fittings. (Bhargava, Tr. 2928-9 ("Q. What alternatives did Star identify for domestic production? A. We had looked at three, three different options, that we could set up our own foundry from ground zero, that we could buy an existing foundry and use it for whatever needs, or we could go to contract manufacturing and use them for making of products. Q. When you say set up your own foundry from ground zero, did you mean build a completely new foundry? A. Yes.").).

Response to Proposed Finding No. 432

Complaint Counsel has no specific response. (*See also* CCPF 1586, 1721).

433. Star realized that ARRA provided a limited time window of opportunity, and elected to pursue contract manufacturing as the option that would allow it to get product to the marketplace in the shortest amount of time. (Bhargava, Tr. 2930-2931, *in camera*† (†**{**

}†), 2989-2990, *in camera*†

(†**{**

}).).

Response to Proposed Finding No. 433

The proposed finding is misleading insofar as it suggests that Star did not always plan on also acquiring its own dedicated Domestic Fittings foundry, even as it initially produced Domestic Fittings through independent domestic foundries. (CCPF 1716-1725, 2126-2140).

434. Star concluded in the March/April, 2009 timeframe that †**{** **}** (Bhargava, Tr. 2930-2931, 2989-2990, *in camera* ; (JSLF ¶ 4.))

Response to Proposed Finding No. 434

Complaint Counsel notes that there is no exhibit denominated "JSLF." The proposed finding is misleading insofar as it suggests that Star did not always plan on also acquiring its own dedicated Domestic Fittings foundry, even as it produced Domestic Fittings through independent domestic foundries **{** **}** (CCPF 1716-1725, 2126-2140).

435. †**{** **}** (Bhargava, Tr. 2930, *in camera*).

Response to Proposed Finding No. 435

The proposed finding is misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests that **{**

}

(CCPF 1723, 1729-1732).

436. †**{**

}(Bhargava, Tr. 2956, *in camera* (**{**

} †).).

Response to Proposed Finding No. 436

The proposed finding is misleading and mischaracterizes the cited testimony, which indicates that **{**

} (Bhargava, Tr. 2956, *in camera*). As Mr. Bhargava's testimony indicates, **{** **}** (CCPF 1721; Bhutada, Tr. 2990, *in camera* **({**

}). Further, **{**

} (Bhargava, Tr. 3019, *in camera*).

437. In March and April 2009, Star determined that there were †**{**

}† (Bhargava, Tr. 2931, *in camera* ; JX 643 (Tatman, IHT at 63 ("Q Have you given any thought to selling the foundry rather than carrying the costs of an unused foundry on your books? A It's not sellable. I mean, the problem you've got -- that's the other problem with the industry. There's over-capacity. A lot of the foundry business has moved offshore. That's why we felt it was fairly -- the entry barriers were low. If you want to

come in the U.S. and you want domestic production, there's foundries tripping all over themselves to get some work. All their work has been pushed offshore.")); JX 638 (McCullough, IHT at 41 ("Q. Can you give me an example of that? A. Yes, because Star was having fittings made in China. They were having all the tooling made to produce these fittings. That tooling was made in China also, and when they decided to get into the business domestically here in the states, they went out to a number of domestic foundries, and capacity is not an issue today. I mean, foundries have excess capacity from coast to coast, and so they went to X number of foundries, and if you ask these foundries to have them and their pattern shops or the pattern shops on the outside contractors that they would use develop that tooling, let's say on a given time, that set of tooling may cost you as much as $10,000 or so. But by going to China and having that tooling made in China and then sent to the domestic foundries here, that set of tooling would cost not $10,000 but we're seeing that it's probably $2,500, maybe as much as $3,000, but it's probably a third of what it would be domestically.")).

Response to Proposed Finding No. 437

Complaint Counsel has no specific response, other than to note that there is no exhibit denominated "JX 643" or "JX 638." (*See also* CCPF 1734-1747).

438. Star had † { } (Bhargava, Tr. 2996- 2997, *in camera* ({ }†).).

Response to Proposed Finding No. 438

Complaint Counsel has no specific response. (*See also* CCPF 1734-1747).

439. 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. (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.").).

Response to Proposed Finding No. 439

Complaint Counsel notes that there is no exhibit denominated "JX 694." The proposed finding is misleading. Star has been involved in the operation of the foundries in China from which it purchases imported Fittings, where it has had responsibility for quality assurance and quality control (CCPF 133). The proposed finding is also vague, misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests that Star was able to compete effectively against McWane in spite of its Exclusive Dealing Policy. The evidence establishes that the Policy **{**

} (*See* CCPF 2089-2166).

440. Star began phoning and emailing potential foundry candidates that could make domestic castings for Star. Mr. Bhargava and his staff contacted more than 60 foundries. (Bhargava, Tr. 2931, *in camera*† (†**{**

}).).

Response to Proposed Finding No. 440

Complaint Counsel has no specific response. (*See also* CCPF 1734-1747).

441. Star † **{**

} (Bhargava, Tr. 2997-2999, *in camera* (**{**

}).).

Response to Proposed Finding No. 441

Complaint Counsel has no specific response. (*See also* CCPF 1734-1747).

442. †{

} (Bhargava, Tr. 2934, *in camera* ({

}).).

Response to Proposed Finding No. 442

Complaint Counsel has no specific response. (*See also* CCPF 1734-1747).

443. †{

} (Bhargava, Tr. 3000, *in camera* ({

}†),
2932, *in camera* ({

}†).).

Response to Proposed Finding No. 443

Complaint Counsel has no specific response. (*See also* CCPF 1734-1747).

444. Star decided that it would be a full-line supplier, and ordered all of the patterns needed for a complete line. (Bhargava, Tr. 3011, *in camera*† (†{

}); McCutcheon, Tr. 2605-2606; RX 234).

Response to Proposed Finding No. 444

Complaint Counsel has no specific response. (*See also* CCPF 1726-1728 (Star planned to enter the Domestic Fittings market by offering the most popular Fittings items first), 1748-1757 (Star acquired patterns for producing full line of C153 Domestic Fittings)).

445. In addition to identifying contract foundries and buying patterns, Star also set up a facility in Houston, Texas to perform finishing operations. (Bhargava, Tr. 2999-3000, *in camera*† (†**{**

}), 3001, *in camera* (**{**

}), 3017, *in camera* (**{**

}); JX 696; McCutcheon, IHT at 40-41); McCutcheon, Tr. 2618-2620; RX 572.)).

Response to Proposed Finding No. 445

Complaint Counsel has no specific response, other than to note that there is no exhibit denominated "JX 696." (*See also* CCPF 1755-1757).

446. Finishing is the process, after the foundry makes a casting, of drilling holes, adding lining, and painting the fitting. (Bhargava, Tr. 2937, *in camera*† (†**{**

}).).

Response to Proposed Finding No. 446

Complaint Counsel has no specific response. (*See also* CCPF 1738).

447. †**{**

}

(Bhargava, Tr. 2940, *in camera*† (†**{**

}†).).

Response to Proposed Finding No. 447

Complaint Counsel has no specific response. (*See also* CCPF 1738).

448. In March or April 2009, † **{**

}(Bhargava, Tr. 2990-2991, *in camera* (**{**

}).).

Response to Proposed Finding No. 448

Complaint Counsel has no specific response. (*See also* CCPF 1729, 2110-2125).

449. Star understood that † **{**

} (Bhargava, Tr. 2991, *in camera*).

Response to Proposed Finding No. 449

Complaint Counsel has no specific response. (*See also* CCPF 2116).

450. †{

} (Bhargava, Tr. 2991, *in camera*).

Response to Proposed Finding No. 450

Complaint Counsel has no specific response. (*See also* CCPF 2112-2114).

451. †**{**

}†

(Bhargava, Tr. 2991, 2998-3000, *in camera*).

Response to Proposed Finding No. 451

Complaint Counsel has no specific response. (*See also* CCPF 2112-2114).

452. Star recognized that †**{**

}†

(Bhargava, Tr. 2991-2992, *in camera* (**{**

}).).

Response to Proposed Finding No. 452

Complaint Counsel has no specific response. (*See also* CCPF 2117, 2120-2123).

453. Star decided in March/Apr , 2009 to †**{** **}**†
(Bhargava, Tr. 2991-2992, *in camera*† (†**{**
}).).

Response to Proposed Finding No. 453

Complaint Counsel has no specific response. (*See also* CCPF 1720-1725).

454. Star entered the domestic Fittings market in 2009 with the most commonly sold fittings. (McCutcheon, Tr. 2289-90 ("Q. Why don't I ask you that question. Tell me -- what -- what sort of an assortment of domestic fittings did Star plan on entering the market with in 2009? A. We decided to enter the market with the highest-moving, highest-selling fittings, so we decided to provide C153 full range of fittings. . .flanged fittings full range. C110 fittings were per project, and we were -- and we planned on manufacturing the A items, which we did. We planned on not manufacturing push-on, domestic push-on fittings. That's a general overview.").).

Response to Proposed Finding No. 454

Complaint Counsel has no specific response. (*See also* CCPF 1726-1728).

455. By September 2009, †**{**
}(Bhargava, Tr. 3002, *in camera* (**{**

}†).)

Response to Proposed Finding No. 455

Complaint Counsel has no specific response. (*See also* CCPF 1773).

456. By the end of 2009, Star had { } patterns in place at third-party domestic foundries. (Bhargava, Tr. 3010 ("Q. Okay. And we were talking about the number of patterns that you had. At the end of 2009, Star had { } patterns in place; is that right? A. That is correct. Q. Okay. At domestic foundries. A. At -- in our possession.").).

Response to Proposed Finding No. 456

Complaint Counsel has no specific response. (*See also* CCPF 1748-1754, 1772-1781).

457. As early as January 2010, Hajoca's Tulsa branch had ordered over **{ }** of domestic Fittings from Star. (JX 671 (Pitts, Dep. at 102-103 ("Q Mr. Pitts, I'm handing you what has been marked as Exhibit 61. I apologize for the look of these e-mails. This is how they were produced to us. There is no real formatting to them. They look like plain text. So it's a little hard to identify the different strings. But I'm referring to the e-mail from Mr. Greg Dill, who was one of your former coworkers and employees, to Susan Schepps at Star dated Wednesday, January 13th, 2010 at 8:42 a.m. Do you see that? A Yes. Q The original e-mail. And the subject line is, Domestic product. Have you seen this e-mail? A No, I have not. Q Can you read the single paragraph of its body into the record? A Susan, you guys have me feeling like I need to go back and beg Tyler to let me buy from them. When we get to the point of customers pulling orders and us losing jobs over not being able to ship product, it is time to do something. Knowing that I have over a million dollars in domestic booked with you for the year is making me very nervous right now. Signed, Greg Dill. Q When he says he has over one million in domestic booked with Star, does that mean { } A I assume it does. Q That's your reading? A Yes. We are talking in terms of dollars. Not pounds."); RX 61).

Response to Proposed Finding No. 457

Complaint Counsel has no specific response, other than to note that there is no exhibit denominated "JX 671."

458. †**{**

} (Bhargava, Tr. 3012, *in camera* (**{**

}).).

Response to Proposed Finding No. 458

Complaint Counsel has no specific response. (*See also* CCPF 1753).

459. By the end f 2010, Star had close to **{ }** patterns in stock. (Bhargava, Tr. 3011-3012, *in camera*† (†**{**

}.†).

Response to Proposed Finding No. 459

Complaint Counsel has no specific response. (*See also* CCPF 1753).

460. Star's CEO Mr. Bhutada testified that, by 2010, Star was supplying the same full line of domestic Fittings as McWane. (JX 694 (Bhutada, Dep. at 77-78 ("Q. Can Star now provide 100 percent of all requirements? A. Just about. Q. And Star can provide -- A. -- 100 percent of requirement of what we say we're going to provide. Q. I'm not sure I understand that. Can you provide 100 percent of requirements of what your customers would order? A. Yeah. What the customers would order, we would provide if we commit to those deliveries. Q. Was there something that Tyler can provide that Star is not capable of providing now, currently? A. I wouldn't say not capable, but Star is carrying -- there are 2 million lines of domestic fittings Star carries in stock, which get us to 96 percent of the market requirement. Q. What are those two major lines? A. C-153 MJ and C-110 flange. Q. And Star carries both of those lines? A. That is correct. Q. What is the 4 percent of the market that Star does not carry? A. That is C-110 MJ and C-153 push-on. Q. Could Star obtain patterns to make C-110 MJ? A. We regularly do. Q. You regularly make the C-110 MJ? A. Yeah. If customer asks, if we have the patterns, then we are able to do it. If we don't have the patterns, we get the pattern made and we are able to do it."), 82 ("Q. Could Star provide the same range of fittings in 2010, albeit not a 100 percent, that Tyler could provide? A. Yes, sir.").).).

Response to Proposed Finding No. 460

Complaint Counsel has no specific response, other than to note that there is no exhibit denominated "JX 694," and that portions of the cited and excerpted testimony from Mr. Bhargava's deposition are not in evidence.

461. In September 2010, Star touted on its website that it was "very proud of what we have been able to achieve in such a short period." (RX 572).

Response to Proposed Finding No. 461

The proposed finding is immaterial and misleading insofar as it suggests that the sales puffery on Star's website reflects Star's complete and accurate assessment of its Domestic Fittings operations.

462. Mr. Sheley, of Illinois Meter, testified that Star sells a wide range of domestic Fittings. (JX 675 (Sheley, Dep. at 61 ("Q. Does Star sell a wide range of fittings? A. Yes.").).).

Response to Proposed Finding No. 462

Complaint Counsel has no specific response, other than to note that there is no exhibit denominated "JX 675."

463. Since its initial entry in 2009, Star has sold domestic Fittings every month and every year since then. (Bhargava, Tr. 3027 ("Q. Okay. Let me circle back to domestic fittings and Star's production of domestic fittings. I understand you began selling -- Star began selling domestic fittings in September 2009; correct? A. That is correct. Q. And you sold them every month and every year thereafter; right? A. That is correct."), 3002, 3027; McCutcheon, Tr. 2300 ("Q. Did Star actually start having domestic fittings manufactured in 2009? A. Yes, sir."), 2590 ("Q. Now, in fact, the company -- as we heard yesterday, the company has domestic product. You started from scratch in 2009, and by the fall of 2009 you actually had fittings, domestic fittings; right, sir? A. Yes, sir. Q. And you sold domestic fittings in 2009; right, sir? A. Yes, sir.").).

Response to Proposed Finding No. 463

Complaint Counsel has no specific response.

464. Star's domestic Fittings sales rose from 2009 to 2010. (McCutcheon, Tr. 2590 ("Q. And you sold domestic fittings in 2009; right, sir? A. Yes, sir. Q. And you sold more domestic fittings in 2010; right, sir? A. Yes, sir.").).

Response to Proposed Finding No. 464

The proposed finding is immaterial and misleading because it compares two unequal time periods. It compares the last four months of 2009, when Star began selling Domestic Fittings (CCPF 1773-1774), to the entire year of 2010.

465. On November 10, 2009, Star CEO Ramesh Bhutada sent an email stating that Star's success in domestic fittings was "better than. . .expected." (RX 231 ("our domestic quote log is very impressive. . .lot better than I expected at this stage. . . [c]congratulations…").).

Response to Proposed Finding No. 465

RX-231 was not admitted into evidence. The proposed finding is also incomplete, incorrect, and misleading. The complete quote attributed to Mr. Bhutada, written approximately six weeks after McWane had issued its September 22, 2009, exclusive dealing letter, was, "It is lot better than I expected *at this stage of the game and Tyler/Sigma's push*. Congratulations to you and your team for the same." (RX-231 (not in evidence) (emphasis added)).

466. Star sold domestic Fittings to many distributors during the last quarter of 2009, 2010 and 2011, including McWane's largest customers, HD Supply and Ferguson. (McCutcheon, Tr. 2590-2592 ("Q. And you sold domestic fittings in 2009; right, sir? A. Yes, sir. Q. And you sold more domestic fittings in 2010; right, sir? A. Yes, sir. Q. sir? A. Yes, sir. Q. You sold domestic fittings to a company called Winwater; right, sir? A. Yes, sir. Q. They're a big regional distributor? A. Yes, sir. Q. You sold domestic fittings to a company called Dana Kepner; right, sir? Q. After Star had product available, domestic product available, which was sometime in the fall of 2009; right, sir? A. Yes, sir. Q. And after Tyler's rebate policy was issued; right, sir? A. Yes, sir. Q. You sold to HD Supply. We saw that yesterday. A. Yes, sir. Q. In fact, you sold to HD Supply the very same month the rebate policy came out, September; right, sir? A. Yes, sir. Q. After the policy came out, you sold to Ferguson? They purchased your domestic fittings? A. Yes, sir.") (objections omitted); Webb, Tr. 2798-2800 ("Q. Let's talk about how this policy played out sort of in practice in the real world. To get down -- let's see. HD Supply actually purchased domestic fittings from Star beginning in September of 2009 and has continued doing so every single quarter since that time; isn't that correct? Q. Do you know whether HD Supply purchased domestic fittings from Star in September of 2009 and has continued to buy them from Star since that time? A. I do know that we have bought domestic fittings from Star. I do not know the time frames associated as to when that started. And you said it continues today. I would -- I'll take your word for that. Q. And I don't want to get into the specific numbers. We'll have to do that later. But do you understand that HD Supply purchased -- it purchased tens of thousands of dollars of domestic product from Star in 2009 and purchased many hundreds of thousands of dollars of domestic product from Star in 2010? A. I guess that's yes, I can answer that. Again, I'm aware that we have bought domestic fittings from Star. The hundreds of thousands and the tens of thousands, I would have to look at a report to see what that -- what that -- the specifics dollars are. Q. But you don't have any reason sitting here today to believe that that's not true, do you? A. I don't."); Thees, Tr. 3084 ("Q. Currently who do you buy domestic ductile iron pipe fittings from? A. Primarily McWane, a little bit from Star."), 3111-3112 ("Q. You testified earlier that Star had been producing -- Star started producing domestic fittings in September 2009; is that right? A. I don't believe I mentioned a month. 2009. Q. Fair. And Ferguson started purchasing domestic fittings from Star in 2010; is that right? A. I don't recall. Q. Does Ferguson purchase domestic fittings from Star? A. We have purchased domestic fittings from Star. Q. In fact, Ferguson has purchased hundreds of thousands of dollars in domestic fittings from Star; is that correct, sir? A. Yes. A report I looked at, 2011 it was less than a million dollars. Q. But hundreds of thousands of dollars? A. Yes. Q. Are you aware that Ferguson has increased its purchases of domestic fittings from Star year over year since Star

began selling them? A. Yes. Q. In fact, Ferguson has almost tripled its purchases of domestic fittings from Star between 2010 and 2011; is that right, sir? A. I don't know if it's triple. Q. Is it fair to say it's increased significantly? A. Yes."); Morton, Tr. 2860 ("Did I hear your testimony right that U.S. Pipe bought Star domestic products after September 2009 -- excuse me -- after the September 2009 policy of McWane was enacted? A. That's correct. We bought a minor percentage -- Q. Okay. A. -- after that time. Q. And you purchased them after the October 2009 meeting with Mr. Tatman as well. A. That's correct. Q. And it's true, isn't it, that as early as January of 2010, U.S. Pipe took at least, I think your term was, a minor percentage of domestic product from Star? A. That's correct."), 2867 ("Q. Mr. Morton, is it true that -- isn't it true that U.S. Pipe bought significant quantities of domestic products from Star Pipe starting in September 2010? A. I believe that's correct."); JX 652 (Johnson, Dep. at 17-18 ("Q Do you purchase domestic fittings from Star? A Yes. Q And do you also purchase domestic fittings from Tyler? A Yes. Q When did you start purchasing domestic fittings from Star Pipe? A I would guess about the middle of '10, 1 2010. We may have purchased some earlier, but the majority . . .")).).

Response to Proposed Finding No. 466

Complaint Counsel notes that there is no exhibit denominated "JX 652." The proposed finding is misleading, immaterial, and contradicted by the weight of the evidence. The proposed finding is misleading and immaterial because it does not differentiate Distributors based on size of the Distributor, the number of projects for which the Distributor sought bids, the number of locations the Distributor operated, the amount of Domestic Fittings the Distributor purchased from Star, the circumstances of the purchase and whether it fell into one of the limited exceptions to McWane's Exclusive Dealing Policy (*i.e.*, was part of a Fittings-pipe bundled purchase, or McWane could not timely deliver the requested Domestic Fitting), or other factors necessary to assess the impact of McWane's Exclusive Dealing Policy. Thus, for example, HD Supply, which has 235 branches throughout the United States, and Ferguson, which has approximately 167 branches throughout the United States, might each count as a "new customer," even if only one of the branches of the company bought one Domestic Fitting from Star. (CCPF 266, 275, 1826).

The proposed finding is misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests that McWane's Exclusive Dealing Policy did not cause

Star to lose sales of Domestic Fittings (CCPF 1893-2063, 2091-2108), ultimately preventing Star from investing in its business as required to become an effective competitor in the Domestic Fittings market. (CCPF 2109-2166).

467. Star's success continued into the first and second quarters of 2010, the peak of the ARRA period. (McCutcheon, Tr. 2613-2614.)

Response to Proposed Finding No. 467

The proposed finding is misleading and mischaracterizes the cited testimony. Mr. McCutcheon testified only that the sales of Domestic Fittings under the ARRA peaked in the first two quarters of 2010; that the "vast majority" of the sales of Domestic Fittings occurred through the first through the third quarter of 2010; and that the sales of Domestic Fittings under the ARRA continued through 2011 and 2012. (McCutcheon, Tr. 2613-2614). Mr. McCutcheon's testimony does not relate to "Star's success;" instead, in the cited testimony Mr. McCutcheon merely identifies the amount of Star's sales of Domestic Fittings for ARRA-funded projects that Star made in each of these time periods. (McCutcheon, Tr. 2613-2614).

The proposed finding is misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests that McWane's Exclusive Dealing Policy did not cause Star to lose sales of Domestic Fittings (CCPF 1893-2063, 2091-2108), ultimately preventing Star from investing in its business as required to become an effective competitor in the Domestic Fittings market. (CCPF 2109-2166).

468. In February 2010, Mr. McCutcheon responded to news that large regional distributor Dana Kepner would be using Star for all of its domestic Fittings needs with an enthusiastic "Yahoooooo!!" (McCutcheon, Tr. 2612-2613, 2595; CX 0585.)

Response to Proposed Finding No. 468

The proposed finding is incomplete and misleading insofar as the proposed finding suggests that **{**

} (CCPF 2150).

469. Star – not McWane – was selected as the preferred domestic Fittings supplier for The Distribution Group (TDG) in 2010. (JX 694 (Bhutada, Dep. at 155 ("Q. Was Star identified as a TDG-preferred vendor for domestic in 2010? A. Yes, sir.")); JX 652 (Johnson, Dep. at 35-36 ("Q Did Tyler have a program with TDG for domestic fittings in 2010? A I don't -- I don't remember if they did or not. Q Do you recall TDG rejecting a proposal from Tyler for domestic fittings? A Yes, we did reject one. Q Do you remember when that was? A I'm not sure which year it was. Q See if I can refresh your recollection. Would you flip to Page 81. It's on Page 21. And on Line 3 the question was, "Did Star have a program for domestic fittings with TDG in 2010?" You replied "Yes." Next question, "Did Tyler"? And you replied "No." So does this refresh your recollection that in 2010 Tyler did not have a program with TDG for domestic fittings? A I guess that's correct. Q But Star did, right? A Yes. Q So the vendor selection committee of TDG rejected Tyler's proposal for domestic fittings but accepted Star's proposal, correct? A Apparently they did, yes.") (objections omitted)); JX 675 (Sheley, Dep. at 68 ("Q. Do you recall that you decided to go with Star for domestic fittings in 2010 and not Tyler? A. Yes. Q. So, through TDG, distributors could buy Star's domestic fittings, but not Tyler's for 2010. Right? A. No. We can't tell our members who to buy from. We can only offer them a program with an incentive to buy from a particular manufacturer. Q. And for domestic fittings in 2010 Star was in that program but not Tyler? A. That's correct. Q. Did Star offer a rebate to get in the program? A. Yes.").).

Response to Proposed Finding No. 469

Complaint Counsel notes that there is no exhibit denominated "JX 694," "JX 652," or "JX 675," and that portions of the cited and excerpted testimony from Mr. Sheley's and Mr. Johnson's depositions are not in evidence. The proposed finding is inaccurate because TDG does not have "preferred" vendors, but refers to any firm with a participating TDG rebate program as a "vendor partner." (RX 653 (R. Fairbanks, Dep. at 28-29) ("[T]he word 'preferred vendor,' we never use that word. Q. What do you use? A. Vendor partner."); CX 2516 (Sheley, Dep. at 22)). The proposed finding is misleading insofar as it suggests that (1) TDG is a purchaser of Fittings or Domestic Fittings, (2) Star was "the" exclusive preferred supplier of Domestic Fittings for TDG or its members, (3) TDG has any "preferred" suppliers, (4) that Star's

status as a TDG "vendor partner" required TDG members to buy Domestic Fittings from Star or prevented McWane from also being a TDG vendor partner, or (5) that McWane's failure to include Domestic Fittings in its rebate program with TDG meant that TDG members could not buy Domestic Fittings from McWane.

The evidence establishes that TDG is a buying group that **{**

}, but does not purchase any products, including Domestic Fittings. (CCPF 296, 300). Inclusion of Star as a TDG Domestic Fittings vendor partner did not require TDG members to buy any Domestic Fittings from Star, nor did it preclude TDG members from buying Domestic Fittings from McWane or TDG from also including McWane as a vendor partner for Domestic Fittings. (CX 2494 (R. Fairbanks, Dep. at 17-18, 33, 37-38) ("[O]ur members can buy from wherever they want."); CX 1361 at 051-054, *in camera* (**{**

})). The selection of Star as a vendor partner for the "Ductile Iron Fittings, No. American" prime category in 2010 had nothing to do with TDG's decision to reject McWane's "Ductile Iron Fittings, No. American" rebate offer, which was based on the fact that McWane's Exclusive Dealing Policy was included in its rebate proposal. (CX 2494 (R. Fairbanks, Dep. at 128-129, *in camera*) (**{**

})).

470. In some states, Star's share of domestic Fittings sales has been as high as 20-30% of total domestic Fittings sales. (Normann, Tr. 4930-31 ("Q. Did you at all -- Dr. Normann, did you test whether the rebate policy was consistent across the country, it might have different effects in different parts of the country? Was that part of your study here? A. Well, one of the things I did as well -- I did a couple things. Number one, I made reference in my report that I believe Star sold -- I don't know if this is in camera or not, but Star sold in 2010, for example, to

-- in almost all 50 states. Also I did analysis, I looked at Star's share by state. And I think that's relevant because if the rebate policy were effective in foreclosing Star, then I think we'd expect to see them struggle, you know, kind of uniformly across the nation, for example. But what I found is that there's several states where Star actually has a significant share of that state's domestic sales. There's some states where they have 10 percent, 20 percent, 30 percent of the share, just in 2010. Remember, 2010 is the first full year they've been participating in the sale of domestic spec. Q. And does that lead you to draw any conclusions with regard to Star's sales of domestic? A. Again, I think it indicates that, you know, Star had success in the market and that there's several states where, you know, Star capturing 20-30 percent of that state's share, to me, I do not see how that's consistent with the notion of Star being significantly impeded.").).

Response to Proposed Finding No. 470

The proposed finding is misleading insofar as it suggests that Star achieved 20-30% of Domestic Fittings sales in a significant number of states. The evidence shows that Star achieved 20-30% in only **{ }** states. (CX 2265 (Schumann Rebuttal Rep. at 66), *in camera*) (table shows McWane's and Star's shares of domestic-spec Fittings sales in 2010 by state)). Star's 2010 share of the Domestic Fittings market for the entire United States only amounted to **{ }**. (CX 2265 (Schumann Rebuttal Rep. at 066), *in camera*). Also, the cited support for the proposed finding, Figure 21 of Dr. Normann's report, is unreliable. **{**

} (*See supra* Response to Proposed Finding No. 189 (finding is misleading based on the problems in Dr. Normann's process for characterization of domestically manufactured Fittings sales as Open Specification or Domestic-only sales)). **{**

}

(Normann, Tr. 5689-5690, *in camera*). **{**

}

(Normann, Tr. 5691-5694, *in camera*). **{**

} (Normann, Tr. 5694, *in camera*).

471. On average, Star sold domestic fittings to two new customers a week in 2010. (McCutcheon, Tr. 2595 ("Q. Now, you sold -- I think you said you believe you sold to more than a hundred customers; right, in 2010? A. That's possible. Yes, sir. Q. So roughly two a week new customers throughout 2010; right? A. You could say that. Yes, sir. Q. And you had **{ }** in domestic sales in 2010; right? A. I believe so. That's what I remember.").).

Response to Proposed Finding No. 471

The proposed finding is misleading, immaterial, and contradicted by the weight of the evidence. The proposed finding is misleading and immaterial because it does not differentiate Distributors based on size of the Distributor, the number of projects for which the Distributor sought bids, the number of locations the Distributor operated, the amount of Domestic Fittings the Distributor made from Star, the circumstances of the purchase and whether it fell into one of the limited exceptions to McWane's Exclusive Dealing Policy (*i.e.*, was part of a Fittings-pipe bundled purchase, or McWane could not timely deliver the requested Domestic Fitting), or other factors necessary to assess the impact of McWane's Exclusive Dealing Policy. Thus, for example, HD Supply, which has 235 branches throughout the United States, and Ferguson, which has approximately 167 branches throughout the United States, might each count as a "new customer," even if only one of the branches of the company bought one Domestic Fitting from Star. (CCPF 266, 275, 1826).

The proposed finding is misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests that McWane's Exclusive Dealing Policy did not cause Star to lose sales of Domestic Fittings (CCPF 1893-2063, 2091-2108), ultimately preventing Star from investing in its business as required to become an effective competitor in the Domestic Fittings market. (CCPF 2109-2166).

472. In the 200 business days between September 2009 and June 2010, Star submitted roughly four bids a day for domestic Fittings jobs. (McCutcheon, Tr. 2602 ("Q. So in those 200 business days between September of '09 and June of 2010, Star submitted roughly four bids a day for domestic jobs; right? A. Yes, sir."); CX 2294).

Response to Proposed Finding No. 472

The proposed finding is misleading and immaterial. The cited testimony and exhibit refer only to bids that Star made for Domestic Fittings, but does not identify or refer to any bids that were won. (CCPF 1934).

473. Mr. Bhutada, Star's CEO, testified that Star's share of domestic Fittings sales increased from "hardly any" in 2009 to approximately 5 to 6 percent in 2010, and approximately 7 to 8 percent in 2011. (JX 694 (Bhutada, Dep. at 71 ("Q. In 2010, were there any internal estimates with what Star market share in domestic fittings was? A. About 5 to 6 percent. Q. And then 2011, any internal estimates by Star of what its market share of the domestic fittings market share is? A. About 7 to 8 percent.").).

Response to Proposed Finding No. 473

Complaint Counsel has no specific response, other than to note that there is no exhibit denominated "JX 694." .

474. Star had **{ }** in domestic Fittings sales in both 2010 and 2011, and expects to sell more domestic Fittings in 2012. (Bhargava, Tr. 3027-3028, *in camera*† (†**{**

}†); JX 694 (Bhutada, Dep. at 68-69, *in camera*†

(**{**

}†); McCutcheon, Tr. 2595 ("Q. Now, you sold -- I think you said you believe you sold to more than a hundred customers; right, in 2010? A. That's possible. Yes, sir. Q. So roughly two a week new customers throughout 2010; right? A. You could say that. Yes, sir. Q. And you had **{ }** in domestic sales in

2010; right? A. I believe so. That's what I remember."), 2597 ("Q. All right. Well, when you looked at the annual report, you did see the { } total sales of domestic in 2010; right? A. Yes, sir. That's a number I remember. Q. And you saw a similar amount, roughly **{ }** for sales of domestic fittings in 2011; right? A. Yes, sir. That's what I remember."); Schumann, Tr. 4423).)

Response to Proposed Finding No. 474

Complaint Counsel has no specific response, other than to note that there is no exhibit denominated "JX 694."

475. Star is on pace in 2012 to **{ }** (Bhargava, Tr. 3028, *in camera*† (†**{ }**).).

Response to Proposed Finding No. 475

The proposed finding is misleading. **{ }** (CCPF 2107).

476. †**{ }** (Normann, Tr. 5041 in camera.)

Response to Proposed Finding No. 476

Complaint Counsel does not dispute that Dr. Normann so testified. The proposed finding and cited testimony are misleading and contradicted by the weight of the evidence insofar as they suggest that McWane's Exclusive Dealing Policy did not cause Star to lose sales of Domestic Fittings (CCPF 1893-2063, 2091-2108), ultimately preventing Star from investing in its business as required to become an effective competitor in the Domestic Fittings market. (CCPF 2109-2166).

477. Dr. Norman testified that Star achieved greater market share in states where it had more competitive pricing. (Normann, Tr. 042 in camera (†**{**

}[†]).).

Response to Proposed Finding No. 477

The proposed finding and cited testimony are misleading, unreliable, and contradicted by the weight of the evidence insofar as they suggest that McWane's Exclusive Dealing Policy did not constrain Distributors' purchases of Domestic Fittings from McWane. In effect, Dr. Normann claims that if some Distributors were not constrained by McWane's Exclusive Dealing Policy, then few or no Distributors can have been constrained by it. That is illogical, and ignores the self-evident fact that different Distributors are differently situated as to threat perception, bargaining power, autonomy, and risk aversion. It is also contradicted by the weight of the evidence, which establishes that numerous and important Distributors were constrained by McWane's imposition of its Exclusive Dealing Policy. (*See*, *e.g.*, CCPF 1893-2063).

The proposed finding and cited testimony are also incomplete, misleading, and unreliable because Dr. Normann purports to have **{**

},

which Respondent does not cite in connection with the proposed finding. Dr. Normann purported to **{**

} (RX-712B (Normann Rep. at 68-69), *in camera*).

{

} (Normann, Tr. 5594-5598; RX-712B (Normann Rep. at 68), *in camera*

(**{**

}). **{**

} (*See also* Normann, Tr. 5083-5084, 5092-5099, 5105, 5107-5110 (agreeing with learned treatise material read into evidence regarding importance of statistical significance testing)).

478. Dr. Normann concluded that the Rebate Policy did not exclude Star from selling to over 75 distributors, including 14 of the 20 largest. (Normann, Tr. 5044 in camera (†**{**

}).).

Response to Proposed Finding No. 478

The proposed finding is misleading insofar as it refers to and treats McWane's Exclusive Dealing Policy as a mere "Rebate Policy" rather than an all-or-nothing exclusive dealing policy. (*See supra* Response to Proposed Finding No. 425). The proposed finding is also misleading and immaterial because it does not differentiate Distributors based on size of the Distributor, the number of projects for which the Distributor sought bids, the number of locations the Distributor operated, the amount of Domestic Fittings the Distributor purchased from Star, the circumstances of the purchase and whether it fell into one of the limited exceptions to McWane's Exclusive Dealing Policy (*i.e.*, was part of a Fittings-pipe bundled purchase, or McWane could not timely deliver the requested Domestic Fitting), or other factors necessary to assess the impact of McWane's Exclusive Dealing Policy. (CCPF 266, 275, 1826; *see also supra* Response to Proposed Finding No. 466).

The proposed finding is misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests that McWane's Exclusive Dealing Policy did not cause Star to lose sales of Domestic Fittings (CCPF 1893-2063, 2091-2108), ultimately preventing Star

from investing in its business as required to become an effective competitor in the Domestic Fittings market. (CCPF 2109-2166).

479. Dr. Norman concluded that Star competed with McWane on high-volume domestic fittings. (Normann, Tr. 5054 in camera (†**{**

}).).

Response to Proposed Finding No. 479

Complaint Counsel does not dispute that Dr. Normann made the statements attributed to him, but the proposed finding and cited testimony are unsupported, misleading and unreliable because they are based on an unscientific assessment of flawed data.

Dr. Normann's cited testimony is based on Figure 25 of his expert report, which is based on a "basket" of Domestic Fittings (the same "basket" used in Figure 2) that Dr. Normann has selected using a flawed methodology . (*See supra* Response to Proposed Finding No. 189 (finding is misleading based on Dr. Normann's selection of the basket of Fittings); Normann, Tr. 5053-5054,*in camera* (testimony is based on Figure 25); Normann, Tr. 5705, *in camera* (the 24 products shown in Figure 25 are the same products in the basket used in Figure 2)).

The proposed finding and cited testimony are also unsupported, misleading and unreliable because, by limiting his comparison of Star's and McWane's Domestic Fittings sales to "top-selling" items, Dr. Normann has selected a method that inherently excludes "odd-ball" Fittings, any one of which is by its nature seldom needed. (CCPF 402). By focusing only on "top-selling" items he has not eliminated the possibility that Star sold many different odd-ball Domestic Fittings, no single one of which appears on Dr. Normann's "top-selling" list. (*See* CX

2265-A (Schumann Rebuttal Rep. at 45) (observing that Dr. Normann's methodology likely purged most of Star's sales of less common Fittings from consideration)). Also, Dr. Normann has failed to establish the statistical significance of the correlation he claims to observe, further rendering it unreliable. (*See* CX 2265-A (Schumann Rebuttal Rep. at 44); *supra* Response to Proposed Finding No. 477 (establishing Dr. Normann's agreement with the importance of testing statistical significance)).

The proposed finding is misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests that Star was successful or effective in competing with McWane, or that McWane's Exclusive Dealing Policy did not cause Star to lose sales of Domestic Fittings (CCPF 1893-2063, 2091-2108), ultimately preventing Star from investing in its business as required to become an effective competitor in the Domestic Fittings market. (CCPF 2109-2166).

C. To the extent Star's domestic expansion was slower than it might have wished, factors other than the Rebate Policy were to blame

480. Some Distributors were cautious about purchasing domestic Fittings from Star in 2009 and early 2010 because of prior problems with Star, Star's reputation with certain Distributors, certain Distributors' lack of co fidence in Star, and some delivery and inventory issues. (Bhargava, Tr. 3003, *in camera*† (†**{**

}†); 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)).).

Response to Proposed Finding No. 480

Complaint Counsel notes that there is no exhibit denominated "JX 705." The proposed finding is misleading. Complaint Counsel does not dispute that the witnesses testified as reflected in the citations to the proposed finding. The all-or-nothing nature of McWane's Exclusive Dealing Policy, however, exacerbated any legitimate concerns Distributors may have had in purchasing Domestic Fittings from Star, and prevented Distributors from purchasing Star Domestic Fittings until Star had a full-line of Domestic Fittings (CCPF 1893-2063, 2091-2108), ultimately preventing Star from investing in its business as required to become an effective competitor in the Domestic Fittings market. (CCPF 2109-2166).

481. 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. (Sheley, Tr. 3448-3451.)

Response to Proposed Finding No. 481

The proposed finding is misleading insofar as it suggests that Illinois Meter was never willing to purchase Domestic Fittings from Star. The evidence establishes that Illinois Meter was ready to purchase Domestic Fittings from Star by mid-2010, but refused to do so because of McWane's Exclusive Dealing Policy. (CCPF 2002-2014).

482. The Rebate Policy did not effect [*sic*] 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).).

Response to Proposed Finding No. 482

Complaint Counsel notes that there is no exhibit denominated "JX 675." The proposed finding is misleading insofar as it refers to and treats McWane's Exclusive Dealing Policy as a mere "Rebate Policy" rather than an all-or-nothing exclusive dealing policy. (*See supra* Response to Proposed Finding No. 425). The proposed finding is also misleading because, although Illinois Meter was not ready to purchase Domestic Fittings from Star in 2009, McWane's Exclusive Dealing Policy prevented Illinois Meter from purchasing Star's Domestic Fittings since mid-2010. (CCPF 2002-2014).

483. 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.")).

Response to Proposed Finding No. 483

Complaint Counsel notes that there is no exhibit denominated "JX 674." The proposed finding is misleading and immaterial. The proposed finding is misleading insofar as it refers to and treats McWane's Exclusive Dealing Policy as a mere "Rebate Policy" rather than an all-or-nothing exclusive dealing policy. (*See supra* Response to Proposed Finding No. 425). The proposed finding is also misleading and immaterial because, although 90-plus percent of Illinois Meter's Domestic Fittings purchases likely would have gone to McWane, Illinois Meter wanted to purchase Domestic Fittings from Star but refused to do so because of McWane's Exclusive Dealing Policy. (CCPF 2002-2014).

484. WinWholesale was concerned about Star's reliability as a domestic Fittings supplier regardless of McWane's Rebate Policy. (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).).

Response to Proposed Finding No. 484

Complaint Counsel notes that there is no exhibit denominated "JX 705." The proposed finding is misleading insofar as it refers to and treats McWane's Exclusive Dealing Policy as a mere "Rebate Policy" rather than an all-or-nothing exclusive dealing policy. (*See supra* Response to Proposed Finding No. 425). The proposed finding is also misleading because, prior to McWane issuing its Exclusive Dealing Policy, WinWholesale was interested in purchasing Domestic Fittings from Star. (CCPF 1954-1955). WinWholesale's concerns about Star only manifested themselves after McWane's Exclusive Dealing Policy was implemented. (CCPF 1956-1964). Distributors, including WinWholesale, 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. (CCPF 2095).

485. Because McWane was a known, stable full-line Fittings supplier with a good track record, HD Supply probably would not have purchased discernibly more domestic Fittings from Star than it did, regardless of the Rebate Policy. (JX 673 (Webb, Dep. at 123-25 ("Q. And do you also recall testifying that McWane's policy did not change your behavior discernibly? A. I -- I -- yes, I do recall that. Q. Because would you have continued to purchase Tyler fittings regardless of the policy? A. As I recall, that is the way I believe it would have panned out, regardless, because of the capacity that McWane has versus anybody who may have a domestic agenda. Q. Meaning McWane has a larger capacity than anyone else? A. Yes. Q. So McWane's September 2009 rebate policy did not change HD Supply's purchases -- purchasing habits in any way, is that fair? A. I would have to say it -- I put out a memo as a result of it, so, to that extent, it, m'mm -- whether it changed anything from a functional standpoint, it did -- it was -- it was significant enough that I put out a memo regarding what our branch expectations were. Q. But it did not change HD Supply's purchasing behavior? A. I'll go back to the probably not discernibly.")); JX 672 (Webb, IHT at 201 ("A. And for the near future we haven't ruled out anything as far as, you know, where our domestic purchases will be made. But I think for -- for the most part it would have been the former part of the conversation, just not enjoying being on the side of being told how we'll purchase. And again, I don't think it would have demonstrably

changed our purchase habits, but it's telling the branches what they have to do for -- for the interim.")).

Response to Proposed Finding No. 485

Complaint Counsel notes that there is no exhibit denominated "JX 672" or "JX 673," and the cited portion of Mr. Webb's deposition was not admitted into evidence. The proposed finding is unsupported, incorrect and misleading. The proposed finding is misleading insofar as it refers to and treats McWane's Exclusive Dealing Policy as a mere "Rebate Policy" rather than an all-or-nothing exclusive dealing policy. (*See supra* Response to Proposed Finding No. 425). The proposed finding is also contradicted by the weight of the evidence (including the same witness's testimony), which establishes that Mr. Webb issued a "mandate" letter requiring all HD Supply branches to comply with McWane's Exclusive Dealing Policy (CCPF 1910-1918), that HD Supply refused to purchase Domestic Fittings from Star because of the Exclusive Dealing Policy (CCPF 1920-1936), and that HD Supply probably would have purchased more Domestic Fittings from Star, and would have given Star an opportunity to earn formal "preferred" or "preferred elite" vendor status with HD Supply, if the Exclusive Dealing Policy had never been announced and enforced. (CX 2513 (Webb, IHT at 199, 202-203)).

486. Ferguson had concerns about purchasing domestic Fittings from Star because Star did not disclose which foundries it was using to source Fittings. (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.").).

Response to Proposed Finding No. 486

The proposed finding is misleading insofar as is suggests that McWane's Exclusive Dealing Policy did not affect Ferguson's willingness to purchase Domestic Fittings from Star. Complaint Counsel does not dispute that Mr. Thees made the statements attributed to him in the citations to the proposed finding. However, McWane's Exclusive Dealing Policy affected Ferguson's willingness to purchase Domestic Fittings from Star because it could cause Ferguson to lose rebates and access to McWane's Domestic Fittings supply. (CCPF 1940). Indeed, Ferguson does not know which foreign foundries Star uses to produce its imported Fittings, but continued to purchase imported Fittings from Star during the relevant time period. (Thees, Tr. 3118; CCPF 1950-1952). Furthermore, 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 if the McWane Exclusive Dealing Policy had not been in place. (CCPF 1941).

487. 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. (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.").).

Response to Proposed Finding No. 487

The proposed finding is misleading insofar as is suggests that McWane's Exclusive Dealing Policy did not affect Ferguson's willingness to purchase Domestic Fittings from Star. Complaint Counsel does not dispute that Mr. Thees made the statement attributed to him in the citation to the proposed finding. However, McWane's Exclusive Dealing Policy affected Ferguson's willingness to purchase Domestic Fittings from Star because that could cause Ferguson to lose rebates and access to McWane's Domestic Fittings supply. (CCPF 1940). Furthermore, 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 the McWane Exclusive Dealing Policy not been in place. (CCPF 1941).

488. 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. (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).

Response to Proposed Finding No. 488

The proposed finding is misleading insofar as is suggests that McWane's Exclusive Dealing Policy did not affect Ferguson's willingness to purchase Domestic Fittings from Star. Complaint Counsel does not dispute that Mr. Thees made the statements attributed to him in the citations to the proposed finding. However, McWane's Exclusive Dealing Policy affected Ferguson's willingness to purchase Domestic Fittings from Star because that could cause Ferguson to lose rebates and access to McWane's Domestic Fittings supply. (CCPF 1940). Indeed, Ferguson continued to purchase imported Fittings from Star through the relevant time

period, regardless of any alleged breach of trust. (*see* CCPF 1950-1952). Furthermore, 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 the McWane Exclusive Dealing Policy not been in place. (CCPF 1941). As a result of McWane's Exclusive Dealing Policy, Ferguson refused to purchase Domestic Fittings from Star. (CCPF 1944-1952).

489. Ferguson's decision to buy all of its domestic Fittings from McWane in September 2009 was made regardless of the Rebate Policy. (Thees, Tr. 3108-3109 ("Q. Because you were still uncertain of Star's ability to supply Ferguson with domestic fittings at that time; right, sir? A. That's correct. Q. Now, earlier Mr. Mann asked you some questions about a September 22, 2009 letter that you received from Tyler/Union; right, sir? A. Yes. Q. And I believe that was CX 506. Armando, do you want to go ahead and put that on the screen. The second page, please. Thank you. Now, in September 2009, when you received this letter, you intended to purchase all of your domestic fittings from Tyler unless they were unable to supply them; is that right, sir? A. That is right. Q. And this was regardless of this letter; correct, sir? A. That is right. Q. And Ferguson was planning on purchasing all its needs from Tyler because Ferguson was comfortable with the relationship with Tyler; right, sir? A. That is correct. Q. And at the time, you didn't feel the need to shift your business to Star; is that fair, sir? A. That is fair."); CX 506).

Response to Proposed Finding No. 489

The proposed finding is misleading insofar as it refers to and treats McWane's Exclusive Dealing Policy as a mere "Rebate Policy" rather than an all-or-nothing exclusive dealing policy. (*See supra* Response to Proposed Finding No. 425). Complaint Counsel does not disagree that Mr. Thees made the statements attributed to him in the citations to the proposed finding. However, the proposed finding is misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests that the Exclusive Dealing Policy did not affect Ferguson's willingness to purchase Domestic Fittings from Star. Mr. Thees testified that McWane's Exclusive Dealing Policy was a "component of" and the "catalyst" for Mr. Thees' decision to direct Ferguson's branches to not buy Domestic Fittings from Star. (Thees, Tr. 3092, 3906). 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. (CCPF 1940). Furthermore, 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 the McWane Exclusive Dealing Policy not been in place. (CCPF 1941). As a result of McWane's Exclusive Dealing Policy, Ferguson refused to purchase Domestic Fittings from Star. (CCPF 1944-1952).

490. Regardless of the Rebate Policy, some Distributors simply were not going to switch to Star until Star was able to supply a full line of domestic Fittings. (JX 652 (Johnson, Dep. at 106 ("Q (By Mr. Mann) And what was the overall picture? A Well, we had to have a complete line. Tyler was the only one that could supply that to us. Yeah, maybe we could have bought onesies and twosies, but until Star had a complete line, we wouldn't have bought from them no matter what anybody said. Q Earlier you said it was in July of 2010 that you started to give Star domestic business; is that correct?").).

Response to Proposed Finding No. 490

Complaint Counsel notes that there is no exhibit denominated "JX 652." The proposed finding is misleading insofar as it refers to and treats McWane's Exclusive Dealing Policy as a mere "Rebate Policy" rather than an all-or-nothing exclusive dealing policy. (*See supra* Response to Proposed Finding No. 425). The proposed finding is also unsupported and misleading because it cites the testimony of a single Distributor to draw an overbroad conclusion about what "some" Distributors would or would not do. The proposed finding is also inaccurate because the cited testimony states that Mr. Johnson might have purchased some Domestic Fittings from Star, albeit a small amount, but did not because of McWane's Exclusive Dealing Policy. The proposed finding is also misleading because the all-or-nothing nature of McWane's Exclusive Dealing Policy meant that Distributors could not purchase Domestic Fittings from Star until Star had a full-line of Domestic Fittings. (CCPF 2092-2097).

491. Star recognized that it would not have the full range of domestic Fittings it intended to supply available to its customers on day one, and that a ramp-up period would be required. (McCutcheon, Tr. 2606 ("Q. All right. Now, the ramp-up time essentially was that you didn't expect to have all the patterns available in actual product until sometime around December 2009; right? A. I don't recall that date. Q. Okay. But you do know that there was a ramp-up. You weren't going to have them all on day one; right, sir? A. Yes, sir. Q. Yeah. And they were going to be phased in, and it was going to be sometime much later in the year, after the AWWA meeting in June, when the company would actually have domestic fittings to sell; right, sir? A. Yes, sir.").).

Response to Proposed Finding No. 491

Complaint Counsel has no specific response. (*See also* CCPF 1726-1728).

492. Star experienced problems and delays in filling orders for domestic fittings in 2009 and early 2010. (Bhargava, Tr. 3003, *in camera*† (†**{**

}†).).

Response to Proposed Finding No. 492

The proposed finding is misleading and contradicted by the weight of the evidence, which establishes that Star did not lose any customers due to problems and delays in filling orders, and that {

} (CCPF 1780-1781). Further, the proposed finding is misleading insofar as it suggests that any such delays experienced by Star were abnormal among Fittings suppliers. (*See* CCPF 2485-2491 (delays and quality problems with McWane Domestic Fittings)).

493. Factors other than the Rebate Policy affected Star's domestic Fittings sales in 2009, including Star's delays in delivery and failure to meet delivery times. (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.").).

Response to Proposed Finding No. 493

The proposed finding is misleading and contradicted by the weight of the evidence, which establishes that Star did not lose customers due to its own problems and delays in filling orders, and that {

} (CCPF 1780-1781). Further, the proposed finding is misleading insofar as it suggests that any such delays experienced by Star were abnormal among Fittings suppliers. (*See* CCPF 2485-2491 (delays and quality problems with McWane Domestic Fittings)).

The proposed finding is also misleading insofar as it refers to and treats McWane's Exclusive Dealing Policy as a mere "Rebate Policy" rather than an all-or-nothing exclusive dealing policy. (*See supra* Response to Proposed Finding No. 425).

494. Early in Star's domestic development process, its customer, U.S. Pipe, had concerns about Star's ability to provide a full line of domestic Fittings. (Morton, Tr. 2892-2894 ("Q. And so some of the fittings, for example, the C153s up to 24 inches, would not be available, according to Star in September 2009, until as late as February 15, 2010; correct? A. That's correct according to this memo. Q. And you'll see under the DI flanged there are also some references to product not being developed until as late as February 15; correct? A. Correct. Q. And under DI full-body MJ fittings up to 24" by project, do you know what "by project" means? A. It means that if a customer such as U.S. Pipe had a requirement for a ductile iron full-body MJ fitting, then we would submit it, and they would provide us with a lead time. They wouldn't make any specific commitments to a range of fittings. It would be by project. . . .Q. And the production time for them could take up to 90 days, do you know? A. My understanding is that they would not commit to putting the tooling in place in advance of getting a requirement for volume"); 2899-2901 ("Q. And then below is literally eight pages of single-spaced references to many, many domestic fittings that Star was anticipating producing; correct? A. Correct. Q. And so none of these fittings in these eight pages were expected to be available until the end 2009; right? A. That's what I believe. Yes. Q. And it's true, sir, isn't it, that many of the different item numbers listed on these eight pages were in fact not available by the end of 2009; correct? Q. Sir, do you know whether or not all of the fittings that were listed in the eight pages that we're discussing were actually available from Star by the end of 2009? A. I do not believe they were. Q. And then in the next sentence -- sorry. Going back up to the shaded portion of this document on page 2, you say, "In addition, we can supply any fitting, not on this list, in 90 days. After December, we shall continue to add more patterns to the domestic line." Do you see that? A. I do. Q. And so the fittings that were not listed in the eight pages that we've just referenced would take an additional minimum of 90 days for them to produce for U.S. Pipe; is that correct? A. That's what I understand. Yes. Q. And then it would still be after December before they would

add additional patterns; correct? A. Correct. Q. And is it true, sir, do you know, whether or not Star actually has a complete line of domestic products today? A. I don't believe they do."); CX 1936; RX 213).

Response to Proposed Finding No. 494

The proposed finding is unsupported, misleading, and contradicted by the weight of the evidence. The cited testimony does not support the finding that U.S. Pipe had "concerns about Star's ability to provide a full line of domestic Fittings." The cited testimony demonstrates that Mr. Morton of U.S. Pipe believed that there were sizes and types of Fittings that would not be available from Star by the end of 2009. The testimony does not describe how this information impacted U.S. Pipe's purchasing decisions with respect to Domestic Fittings or whether or not U.S. Pipe was "concerned" by this information. The weight of the evidence establishes that U.S. Pipe declined to purchase Domestic Fittings from Star because of McWane's Exclusive Dealing Policy. (CCPF 2057-2063).

495. Star's "Domestic Bid Log" indicates that Star repeatedly lost bids due to delays beginning in the fall of 2009 and continuing into the peak of ARRA during the first and second quarters of 2010. (McCutcheon, Tr. 2632-2634.)

Response to Proposed Finding No. 495

The proposed finding is misleading and is not supported by the weight of the evidence. Mr. McCutcheon testified that the delays happened "quite a bit" only in the fall of 2009. (McCutcheon, Tr. 2634). Further, the weight of the evidence establishes that Star did not lose customers due to its own problems and delays in filling orders, and that **{**

}

(CCPF 1780-1781). Also, the proposed finding is misleading insofar as it suggests that any such delays experienced by Star were abnormal among Fittings suppliers. (*See* CCPF 2485-2491 (delays and quality problems with McWane Domestic Fittings)).

496. Complaint Counsel's expert 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. Dr. Schumann acknowledged, for example, that:

> Q. All right. Now, this document reflects a lot of domestic bids that Star submitted that they didn't win.
>
> A. Uh-huh.
>
> Q. Because they had delays and couldn't fill the orders in time in the second half of 2009, the fall of 2009 and into early 2010.
>
> A. Well, that was when they were first getting -- trying to get started
>
> (Schumann, Tr. 4379; CX 2294.)

Response to Proposed Finding No. 496

Complaint Counsel notes that, contrary to this Court's Order, Respondent is improperly citing the testimony of an expert for a proposition of fact. The proposed finding is inaccurate and mischaracterizes Dr. Schumann's testimony. Dr. Schumann does not concede that Star did not have sufficient product. Instead, he testified only that the fall of 2009 and early 2010 "was when they were first getting -- trying to get started." (Schumann, Tr. 4379). Further, the proposed finding is misleading insofar as it suggests that any such delays experienced by Star were abnormal among Fittings suppliers. (*See* CCPF 2485-2491 (delays and quality problems with McWane Domestic Fittings)).

497. McWane's rebate policy was not exclusionary as Star was able to quickly enter into the domestic fitting segment, capture market share, and sell to more than 100 distributors including many of the largest distributor customers. (Normann, Tr. 5042-43, *in camera*† (†**{**

}); 4913-4915 (“Q. Now, let's turn then to the rebate letter. Did you analyze, in preparing your opinions in this matter, how Star did in the marketplace with its domestic fittings? A. Yes. I think -- I mean, that's sort of the factual question that we wanted to look at. Starting from the notion that -- this is where I started from. I said, well, let me assume that the rebate policy was designed to be exclusionary. I recognize, you know, you might disagree with that, but from my perspective as an economist, I said let me start from the assumption that the intention, the design, is to be exclusionary and to foreclose Star. I think given that starting point I think it's relevant to look at how did Star actually do, what was Star's market share over time, how did Star do selling to distributors, how did Star do selling to large distributors, did they sell to some of the same distributors as McWane. I think these are all very important questions to ask. Q. All right. And tell us in a broad sense, without getting into the specific in camera figures, what you found in that inquiry. A. Well, I found -- for example, I found that Star had -- on a monthly basis that they had steady share gains. Sort of month after month their share increased of domestic spec sales. Beginning with September and continuing through 2009, 2010, into 2011, their share showed steady growth. And I think what's also relevant about that is is that there wasn't some sort of hockey-stick growth -- and what I mean by that is some kind of exponential growth -- once they had effectively a full range of fittings. Star has testified in IH testimony that -- I think the October 2010 -- that effectively they had a full range of fittings or that even if they didn't have it on hand that they could supply a customer in a reasonable delivery time, so by 2010, mid to late 2010, they could compete on an equal footing with McWane, so there's no potential for exclusion any longer because Star could fully supply. But we don't see this exponential growth, for example. We see steady growth, so Star is getting successful market share gains. Q. What about sheer numbers of distributors? Were they able to scrabble together a few distributors? A. Well, more than that. I think it came out yesterday, for example, that just looking at 2010, just 2010 -- and remember, this is Star's first year on the market, first full year on the market. They first started shipping product in September. So looking just at 2010, you know, they're newly participating in domestic spec sales. They sold to more than a hundred distributors, well over a hundred distributors.”).

Response to Proposed Finding No. 497

The proposed finding is misleading and contradicted by the weight of the evidence, which establishes that McWane’s Exclusive Dealing Policy had an **{**

} (*See* CCPF 2089-2166). The evidence also shows that **{**

}. (CX 2265 (Schumann Rebuttal Rep. at 66), *in camera*).

Additionally, the proposed finding is supported only by Dr. Normann's opinions, which are unreliable and misleading. Dr. Normann did not review ordinary course of business documents or interview market participants or otherwise adjust his analyses to account for customers that otherwise withheld their purchases of Domestic Fittings from Star because of McWane's Exclusive Dealing Policy. (Normann, Tr. 5578-5583). The only support Respondent offers for the proposed finding is Dr. Normann's calculation of the number of Star customers through 2010, which he estimated was **{ }**, and his observation that Star's share of Domestic Fittings sales has grown from the time of its entry through 2010. (RX-712B (Normann Rep. at 60), *in* camera). Those facts alone are of no consequence. (RX-712B (Normann Rep. at 56, 58), *in camera*).

Moreover, in his Report, Dr. Normann acknowledged that it is difficult to establish a metric for measuring the effectiveness of entry based on share (RX-712A (Normann Rep. at 56), and that there is no basis in the economics literature for his claim that Star's share is indicative of that. (Normann, Tr. 5570-5574).

The proposed finding and Dr. Normann's cited testimony are unsupported, misleading and contradicted by the weight of the evidence because they do not differentiate Distributors based on size of the Distributor, the number of projects for which the Distributor sought bids, the number of locations the Distributor operated, the amount of Domestic Fittings the Distributor purchased from Star, the circumstances of the purchase and whether it fell into one of the limited exceptions to McWane's Exclusive Dealing Policy (*i.e.*, was part of a Fittings-pipe bundled purchase, or McWane could not timely deliver the requested Domestic Fitting), or other factors necessary to assess the impact of McWane's Exclusive Dealing Policy. (*E.g.*, Normann, Tr. 5579-5583, 5621-5625, 5630-5634 (Dr. Normann did not analyze the number or kind of

Domestic Fittings that these Distributors purchased from Star)). Also, Dr. Normann did not analyze scale efficiencies in the production and sale of Domestic Fittings, and the related question of whether McWane's Exclusive Dealing Policy sufficiently impaired Star's access to distribution as to preclude it from attaining efficiencies of scale in the production and sale of Domestic Fittings and constraining McWane's monopoly power. (Normann, Tr. 5616-5617 (Dr. Normann did not do an analysis of scale and efficiencies in the production of Domestic Fittings), 5539-5540 (Dr. Normann did not do an analysis of the difficulty of entry into the distribution business at an efficient scale)).

The weight of the evidence establishes that the Exclusive Dealing Policy harmed Star, and competition generally, by foreclosing Star from 50% or more of Distributors. (*See* CCPB at 248-258). This foreclosure is competitively significant because it limited Star's Domestic Fittings sales to a mere **{ }** million in 2010 and 2011, which made it uneconomical for Star to purchase its own Domestic Fittings foundry. (CCPF 2091-2159). By producing Domestic Fittings through more costly and less efficient independent foundries, Star's production costs increased by approximately **{ }** (as compared to producing Domestic Fittings at its own dedicated foundry), and caused its prices to be approximately **{ }** higher than they otherwise would have been. (CCPF 2124, 2160-2166). Thus, McWane's Policy hindered Star's ability to compete effectively and to constrain McWane's monopoly prices.

The proposed finding is also misleading insofar as it refers to and treats McWane's Exclusive Dealing Policy as a mere "Rebate Policy" rather than an all-or-nothing exclusive dealing policy. (*See supra* Response to Proposed Finding No. 425).

XVII. McWane's Rebate Policy Protected Its Remaining Domestic Fittings Foundry And Was Not Enforced

498. The purpose of McWane's September 2009 Rebate Policy was to persuade McWane's customers to support McWane's full line of domestic Fittings—rather than "cherry

picking" and buying only oddball items from McWane, while purchasing the most commonly used Fittings from Star—to generate enough sales volume to keep McWane's last remaining domestic manufacturing facility open. (JX 638 (McCullough, IHT at 34-36 ("Q. Sir, if it's not a -- if the policy is not a real obstacle to your customers in terms of considering purchasing from Star Pipe, why go through the trouble of having the policy at all? A. Well, I think that we need a policy. What we try to do -- one of the things that this policy also tries to do is to generate enough business for us that we can continue to operate the hard facilities that we have. As I said, we're the 1 only company left in the states up until the entry of Star still producing waterworks fittings. Now, to be able to do that, we have to have a certain level of volume to operate our foundries, and I have to go back a little bit here. When I started in this industry, 100 percent of the waterworks fittings were domestic made, 100 percent of them, and you look at what's happened over the past 25, 30 years here, the Tyler Union was the last man standing basically, the last man standing in domestic production, and even then in response to the competition from offshore, we were forced to go to China and invest millions of dollars and build a foundry there. Now, at the same time we're doing that, we're idling plants. We're laying off people, which is very difficult, and so we're trying to establish programs and policies that will let us generate enough tonnage and demand to operate the one facility that we have left. Q. So one purpose of the distribution policy in the September 22 letter is to retain volume for McWane to run its domestic foundry; is that correct? A. Oh, yes, yes. I mean, I don't know if you've ever had to layoff 150 people. Q. Are there any other purposes for the distribution policy embodied in the September 22 letter? A. We did want our customers to support our efforts. I think we say that in here somewhere. We want our customers to fully support our product line. By supporting our product line again we're able to go back and load the foundry. Q. But any other purpose behind the distribution policy in the September 22 letter? A. Not that I can think of at the moment. Q. How does this policy help McWane generate volume for its domestic foundries? A. You know, there's only so much business out there, and what we're trying to do is capture a share of that business that will let us continue our operations and hopefully a policy like this does that. It lets us continue to maintain a presence in the market and to have a reasonable market share that allows us to continue the operations."); (JX 643 (Tatman, IHT at 151 ("Why? It all kind of comes down to this volume thing. This is 2009. ARRA is out, but we don't see it. We're not feeling it. . . .I've got a plant that's running 135 days a year. I'm losing skilled employees. I'm budgeting to lose $5 million pre-tax for 2010. . . .I'm not in a real good position to give up volume. The problem is the pie is so small. The pie is not big enough to feed--I've got an idle foundry. I've got another along that's capable of producing 40,000 and I am going to put 12 in it. I have to take into consideration with production of volume.")).

Response to Proposed Finding No. 498

Complaint Counsel notes that there is no exhibit denominated "JX 638" or "JX 643." The proposed finding is misleading and contradicted by the weight of the evidence, which establishes that McWane's September 2009 Exclusive Dealing Policy was specifically intended to eliminate its competitor, Star, from the Domestic Fittings market. (*See* CCPF 1782-1822). The proposed finding is also misleading insofar as it refers to and treats McWane's Exclusive

Dealing Policy as a mere "Rebate Policy" rather than an all-or-nothing exclusive dealing policy. (*See supra* Response to Proposed Finding No. 425).

499. Mr. Tatman was concerned that Star would choose to manufacture only the highest-selling, fastest-moving items. (JX 643 (Tatman, IHT at 152-153 ("The worst case scenario for me is that Sigma or Star comes into the domestic segment of the waterworks Fittings market with a cherry-picking strategy. They bring in 50 patterns or 100 patterns, and they get those A items, and they go after those, and I lose volume on those items that I need for my plant. . . .")).

Response to Proposed Finding No. 499

Complaint Counsel notes that there is no exhibit denominated "JX 643," and that pages 152-153 of Mr. Tatman's investigational hearing transcript are not in evidence. The proposed finding is misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests that McWane's September 2009 Exclusive Dealing Policy was not specifically intended to eliminate its competitor, Star, from the Domestic Fittings market. (*See* CCPF 1782-1822).

500. McWane wanted to incentivize customers not to buy those items from Star while relying on McWane only for the slower-moving, infrequently-needed "C" and "D" items that it kept in inventory as a full-line manufacturer. (Morton, Tr. 2845-2846; JX 638 (McCullough, IHT at 34-36)).

Response to Proposed Finding No. 500

Complaint Counsel notes that there is no exhibit denominated "JX 638." The proposed finding is misleading insofar as it suggests that McWane's Exclusive Dealing Policy in the Domestic Fittings market was an "incentive." The proposed finding is also misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests that McWane's September 2009 Exclusive Dealing Policy was not specifically intended to eliminate its competitor, Star, from the Domestic Fittings market. (*See* CCPF 1782-1822).

B. Distributors Were Free to Buy Domestic Fittings From the Supplier of Their Choice

501. McWane's September 22, 2009 customer letter states:

> [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. . . . 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.

(Tatman, Tr. 687-689; CX 1606 (emphasis added)).

Response to Proposed Finding No. 501

Complaint Counsel does not dispute that McWane's September 22, 2009 letter contained the quoted language, but the proposed finding is misleading and incomplete insofar as it suggests that the September 22, 2009 letter reflects McWane's policy as communicated by McWane to – or understood by – the Fittings market. The weight of the evidence, including contemporaneous documents, establishes that McWane told Distributors and other customers that if they purchased Star's Domestic Fittings they *would* lose *both* access to McWane's Domestic Fittings *and* their accrued rebates on Domestic Fittings. (*See* CCPF 1830-1831). This message was consistent with the message that McWane conveyed to its sales personnel, that "[o]nce they use Star, they can't EVER buy domestic from us. . . . every branch is cut off. (*See* CCPF 1832; CX 0710 at 002; *see also* CCPF 1845; CX 0119 at 002, 004 ("Although the words "may" and "or" were specifically used, the market has interpreted the communication in the more hard line "will" sense. . . . Violation will result in: Loss of access, loss of accrued rebates."); CCPF 1834; CX 0695 at 004 (explaining that the result of a Distributor's disloyalty would be that McWane "won't sell" (*not* "may not sell" or "might not sell") any Domestic Fittings to that Distributor);

CCPF 1836-1841, 1843 (describing further communications between McWane and Distributors regarding the policy)).

502. Mr. Tatman testified that he purposefully included the soft language "may" and "or" in McWane's September 22, 2009 customer letter announcing the McWane Rebate Policy. (Tatman, Tr. 687-689 ("Q. The policy you adopted, sir, was effective October 1, 2009? A. Yes. Q. And you adopted a program whereby McWane's domestic fittings and accessories would be available only to customers who elect to fully support McWane branded products for their domestic fitting and accessory requirements? A. Yes. With the big words "may" and "or" below. Q. And the big words "may" and "or" below, those refer to the consequences a customer might suffer if they were not to be exclusive with McWane? A. Those were put in there to give me an out clause. Q. But those out clauses are outs from a consequence that a customer might experience should they choose not to be exclusive with McWane; correct, sir? A. Yes. But go back to what letters read and what practicality is through the whole history of discussions that we've had here. Q. So the letter might not actually reflect what happens in the marketplace or the marketplace's understanding of that letter; is what you mean? A. I think everything that we've talked about so far is that there's a letter that goes out, and then competitive conditions determine what actually happens in the marketplace. Q. And the potential consequences for customers were: Customers who elect not to support this program may forgo 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 twelve weeks; correct, sir? A. With the words "may" and "or" specifically put in there by me. Q. That's a yes, sir? A. Yes, sir. Q. And you actually went out before you announced this policy and met with customers to discuss it with them? A. I think one of them or two of them. I couldn't recall for sure."); CX 1606).

Response to Proposed Finding No. 502

Complaint Counsel does not dispute that Mr. Tatman testified as set forth in the citations to the proposed finding. However, the proposed finding is misleading and incomplete insofar as it suggests that the quoted language of the September 22, 2009 letter reflected McWane's actual policy as communicated by McWane to or understood by the Fittings market. The weight of the evidence, including contemporaneous documents, establishes that McWane told Distributors and other customers that if they purchased Star's Domestic Fittings they *would* lose *both* access to McWane's Domestic Fittings *and* their accrued rebates on Domestic Fittings. (*See* CCPF 1830-1831). This message was consistent with the message that McWane conveyed to its sales personnel, that "[o]nce they use Star, they can't EVER buy domestic from us. . . every branch is cut off." (*See* CCPF 1832; CX 0710 at 002; *see also* CCPF 1845; CX 0119 at 002, 004

("Although the words "may" and "or" were specifically used, the market has interpreted the communication in the more hard line "will" sense. . . . Violation will result in: Loss of access, loss of accrued rebates."); CCPF 1834; CX 0695 at 004 (explaining that the result of a Distributor's disloyalty would be that McWane "won't sell" (*not* "may not sell" or "might not sell") any Domestic Fittings to that Distributor); CCPF 1836-1841, 1843 (describing further communications between McWane and Distributors regarding the policy)). On the basis of this hard line message, major Distributors, including HD Supply, Ferguson, and WinWholesale, took steps to ensure company-wide compliance with McWane's policy. (*See* CCPF 1903-1936 (HD Supply); CCPF 1937-1952 (Ferguson); CCPF 1953-1964 (WinWholesale)).

The proposed finding is misleading insofar as it refers to and treats McWane's Exclusive Dealing Policy as a mere "Rebate Policy" rather than an all-or-nothing exclusive dealing policy. (*See supra* Response to Proposed Finding No. 425).

503. McWane recognized that it had little or no ability to dictate terms to the distributors, who held significant market power over it. (Tatman, Tr. 660 ("This is a weak -- a weak stance in this letter because I know when I write this letter that I'm a Chihuahua barking at Rottweiler and I know who has the power here.")).

Response to Proposed Finding No. 503

The proposed finding is misleading and contrary to the weight of the evidence. Other than Mr. Tatman's testimony, Complaint Counsel is aware of no evidence of Distributors having "significant market power over" McWane or other Fittings suppliers. Distributors need access to Fittings and Domestic Fittings to service their customers, the End-Users. (CCPF 487). Prior to Star's entry into the Domestic Fittings market, McWane was the only supplier of Domestic Fittings. (CCPF 1659). McWane understood it had market power in the Domestic Fittings market. (CCPF 1694-1711). Similarly, Distributors understood that McWane had market power, describing McWane as "the absolute gorilla." (CCPF 1660).

504. McWane's customers were always free to purchase domestic Fittings from other suppliers. (JX 643 (Tatman, IHT at 157-160 ("Q Yes, sir. A And then you look at the dialogue around that. It's got the words "may" and "or" in it. Purposefully I put those in there because I knew what was going to happen after that letter comes out. It's got all these sort of exceptions. You got to support our product. If we have it available, if it's not part of your buying your fittings as part of a pipe package, if we've got it available, and then if you don't do that, here's what may happen: may or or. And then if you look at -- I had a conference call with the salespeople right before -- the morning before that letter went out. I think the letter went out in the afternoon. We got together with the sales team in the morning. There's a list of questions they're going to come up in answers. I'm sure in the e-mail trail, you got that. And even if you look at that document, I'm kind of priming the sales force that here's what the letter says, but we're not necessarily going to take a hard line stance. This is "may" or "or." And that letter is kind of analogous to these price increases. When I say I'm raising prices seven percent, would I like to get a seven-percent price increase? Yes. That's what I would like. I hope to get it. That's almost like my Christmas wish list. The reality is, the marketplace will determine what I actually get, and that was the same thing with that letter. We wanted customers to support us because we needed the volume. We wanted them not to cherry-pick us because that's not good for us. It's not good for our volume. It's not good for our business. We're just not set up to compete very well in that type of environment. We know that the customer bears the power and that we would need some sort of flexibility there. So specifically, I had the words "may" and "or" and some conditions in that letter.").).

Response to Proposed Finding No. 504

Complaint Counsel notes that there is no exhibit denominated "JX 643." The proposed finding, and the testimony of Mr. Tatman cited in support, are misleading and contradicted by the weight of the evidence, including contemporaneous documents, which establishes that McWane purposefully, consistently, and systematically communicated and implemented the Exclusive Dealing Policy in the marketplace in an even more "hard line" manner than was explicit in its September 22, 2009 letter (CCPF 1830-1849), including by instructing its sales team to tell customers that that "once they use Star, they can't EVER buy domestic from us." (*See* CCPF 1832).

The weight of the evidence further establishes that Distributors were not able to purchase Domestic Fittings from Star without punitive consequences (CCPF 1850-1892 (describing distributor Hajoca being cut-off by McWane and losing its earned rebate for purchasing Star Domestic Fittings)), and viewed McWane's Exclusive Dealing Policy as presenting an

intolerable risk that McWane would cut them off if they purchased Domestic Fittings from Star. (CCPF 1894-1902).

505. The McWane Rebate Policy, announced in September 2009 as effective October 1, 2009, was only in effect for a short time. By January 2010, McWane issued a new and superseding policy. (Tatman, Tr. 707-709 ("Q. The policy changed -- the policy change you made was made in the form of changes to your rebates with your customers that became effective in 2010? A. We can look at the documents, but from my memory, by the time January 2010 came out and we look at our rebate programs, there was no hint that regardless of what the customers did that there would be any reduction in access to our product. It was only if -- what level of rebate they were going to earn. Where you look at the September 22 letter, although it said "may" and "or," it had a component of shipment of product. We had more competitive information. I just said earlier we understood late in the year about how many patterns Star had. We made an adjustment. We had market provisions. By the time we hit January, we've taken away any allusion that anything that a customer did in terms of buying Star that we would not at all change shipping them product. So we made that adjustment in January 2010.").)

Response to Proposed Finding No. 505

The proposed finding is misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests that the Exclusive Dealing Policy did not remain effective beyond January 2010 and to the present. McWane never modified the Exclusive Dealing Policy by any subsequent letter (CCPF 2064), and Distributors and others in the market have testified that they are unaware of McWane ever rescinding its Exclusive Dealing Policy (CCPF 2065-2067). For example, Mr. Sheley testified at trial that McWane's Exclusive Dealing Policy is still in effect and that he continues to not purchase Domestic Fittings from Star because of McWane's Exclusive Dealing Policy. (CCPF 2065). McWane cut off all branches of Distributor Hajoca from access to Domestic Fittings until April 2010. (CCPF 1886). Hajoca's Tulsa, Oklahoma branch – which committed Hajoca's original "violation" by purchasing Domestic Fittings from Star – continues to be cut-off from access to McWane Domestic Fittings. (CCPF 1887-1888). Moreover, to the extent that some Domestic Fittings customers did not feel constrained by McWane's Exclusive Dealing Policy in 2010 and thereafter, that was not because McWane had relaxed the policy, but rather because such customers had become aware of the

FTC's investigation into the policy, and felt confident that McWane would not enforce it. (CCPF 2028-2029).

The proposed finding is also misleading insofar as it refers to and treats McWane's Exclusive Dealing Policy as a mere "Rebate Policy" rather than an all-or-nothing exclusive dealing policy. (*See supra* Response to Proposed Finding No. 425).

506. Mr. McCutcheon testified that many distributors, including customers of McWane, purchased domestic Fittings from Star after the Rebate Policy was adopted. (McCutcheon, Tr. 2591-2594 ("Q. After Star had product available, domestic product available, which was sometime in the fall of 2009; right, sir? A. Yes, sir. Q. And after Tyler's rebate policy was issued; right, sir? A. Yes, sir. Q. You sold to HD Supply. We saw that yesterday. A. Yes, sir. Q. In fact, you sold to HD Supply the very same month the rebate policy came out, September; right, sir? A. Yes, sir. Q. After the policy came out, you sold to Ferguson? They purchased your domestic fittings? A. Yes, sir. Q. You sold to Winwater; right, sir? Do you remember when Winwater started buying domestic fittings from you? A. No, sir. Q. You just know that they did buy domestic fittings from you? A. I believe that they did, yes, sir. Q. And a regional chain, Dana Kepner, started buying domestic fittings from you after the policy came out; correct? A. Yes, sir. Q. And a company called Hajoca, they started buying domestic fittings from Star after the policy came out; right? A. Yes, sir. Q. And a company called Mainline Supply, they started buying fittings from Star after the policy came out? A. Yes, sir. Q. Minnesota Pipe; right? A. Yes, sir. Q. Michigan Pipe & Supply? A. Yes, sir. Q. Utility Supply in Tulsa, Oklahoma; right? A. Yes, sir. Q. H.D. Fowler; right? A. Yes, sir. Q. Illinois Water? A. I'm not sure. Q. C.I. Thornburg buys domestic fittings from you? A. I believe so. Yes, sir. Q. Western Water buys fittings, domestic fittings, from you after the policy came out? A. Yes, sir. Q. Groeniger in California, they bought domestic fittings from you after the policy came out? A. Yes, sir. Q. Atlantic Plumbing, they purchased domestic fittings from you? A. I don't recall. Q. Okay. Brown Supply, they purchased domestic fittings from Star Pipe? A. I don't recall. Q. Ramsco? A. Yes, sir. That's R-A-M-S-C-O. Q. Schmidt's Wholesale, they purchased domestic fittings after the policy came out? A. I don't recall. Q. Cohen? A. Yes, sir. Q. In fact, Mr. McCutcheon, the company sold to more than a hundred individual customers domestic fittings after the policy came out and during 2010; right? A. I believe that to be true, but I'd need to see a document to confirm it, but I think it's true.").).

Response to Proposed Finding No. 506

Complaint Counsel does not dispute that Mr. McCutcheon made the statements attributed to him. However, the proposed finding and supporting testimony are misleading because they do not differentiate Distributors based on the size of the Distributor, the number of projects for which the Distributor sought bids, the number of locations the Distributor operated, the number

and size of Domestic Fittings purchases the Distributor made from Star, the circumstances of the purchases and whether they fell into one of the limited exceptions to McWane's Exclusive Dealing Policy (*i.e.*, were part of a Fittings-pipe bundled purchase, or were Fittings that McWane could not timely deliver), or other factors necessary to assess the impact of McWane's Exclusive Dealing Policy. Thus, for example, HD Supply, which has 235 branches throughout the United States, and Ferguson, which has approximately 167 branches throughout the United States, might each be counted as a customer of Star, even if only one of the branches of the company bought one Domestic Fitting from Star. (CCPF 266, 275, 1826).

The proposed finding is misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests that McWane's Exclusive Dealing Policy did not cause Star to lose Domestic Fittings sales (CCPF 1893-2063, 2091-2108), ultimately preventing Star from investing in its business as required to become an effective competitor in the Domestic Fittings market. (CCPF 2109-2166).

The proposed finding is also misleading insofar as it refers to and treats McWane's Exclusive Dealing Policy as a mere "Rebate Policy" rather than an all-or-nothing exclusive dealing policy. (*See supra* Response to Proposed Finding No. 425).

507. Ferguson understood when it received the Rebate Policy that its terms could be negotiated. (Thees, Tr. 3109-3111 ("Q. And I believe that was CX 506. Armando, do you want to go ahead and put that on the screen. The second page, please. Thank you. Now, in September 2009, when you received this letter, you intended to purchase all of your domestic fittings from Tyler unless they were unable to supply them; is that right, sir? A. That is right. Q. And this was regardless of this letter; correct, sir? A. That is right. Q. And Ferguson was planning on purchasing all its needs from Tyler because Ferguson was comfortable with the relationship with Tyler; right, sir? A. That is correct. Q. And at the time, you didn't feel the need to shift your business to Star; is that fair, sir? A. That is fair. Q. Now, to be clear, this letter didn't prevent Ferguson from purchasing domestic fittings from Star, did it, sir? A. No. There's some verbiage in there about Tyler/Union or McWane's ability to supply that would -- according to this policy, it would be okay to purchase product from them. Q. And if you could take a look at the sixth paragraph down beginning with "Customers who elect." At the time you received this letter, you thought that it was actually unlikely that Tyler would enforce what's written in paragraph 6 here

of this letter; is that right, sir? A. Yeah. More so on the rebate side. When I look back and think about that, the supplying product, and really the issue around that was, if you were to supply product with Star and they could not perform, picking up shorts from Tyler/Union. Q. When you received this, you thought that the rebate and lead times mentioned in this paragraph were points that could be negotiated; is that fair? A. That's fair. Q. Because Ferguson is a very large customer of McWane's; right, sir? A. That is correct. Q. And has been for many, many years? A. That is correct. Q. And Ferguson is one of the largest waterworks distributors in the United States; right, sir? A. Yes, we are. Q. And you sell -- I believe you said you sell a number of products, not just fittings? A. That is correct. Q. And I believe you also testified that domestic fittings actually make up a very small percentage of your business? A. Of our overall waterworks business, yes. Q. So if McWane chose to take a hard line regarding paragraph 6 of this letter, Ferguson could take its business elsewhere; right, sir? A. That could be a reaction, yes.").).

Response to Proposed Finding No. 507

Complaint Counsel does not dispute that Mr. Thees testified as set forth in the in the citation to the proposed finding. However, the proposed finding is incomplete, misleading, and contradicted by the weight of the evidence insofar as the proposed finding suggests that Ferguson has not been deterred by McWane's Exclusive Dealing Policy from purchasing Domestic Fittings from Star. The weight of the evidence establishes that after Ferguson received McWane's Exclusive Dealing Policy, it took steps to ensure company-wide compliance with the policy and refused to purchase Domestic Fittings from Star because of the policy. (CCPF 1938-1952).

The proposed finding is also misleading insofar as it refers to and treats McWane's Exclusive Dealing Policy as a mere "Rebate Policy" rather than an all-or-nothing exclusive dealing policy. (*See supra* Response to Proposed Finding No. 425).

508. As Mr. Thees, of Ferguson, testified, because Fittings – and particularly domestic Fittings - were a relatively small part of a Distributor's business, a Distributor had the option of taking a hard line against McWane in other product areas if McWane refused to negotiate the Rebate Policy. (Thees, Tr. 3111 ("Q And I believe you also testified that domestic fittings make up a very small percentage of your business? A. Of our overall waterworks business, yes. Q. So if McWane chose to take a hard line regarding paragraph 6 of this [September 22, 2009] letter, Ferguson could take its business elsewhere; right, sir? A. That could be a reaction, yes. Q. For not only fittings but for a number of waterworks products; right, sir? A. Sure.").).

Response to Proposed Finding No. 508

Complaint Counsel does not dispute that Mr. Thees testified as stated above. However, the proposed finding is incomplete, misleading, and contradicted by the weight of the evidence insofar as the proposed finding suggests that Ferguson has not been deterred by McWane's Exclusive Dealing Policy from purchasing Domestic Fittings from Star. The weight of the evidence establishes that after Ferguson received McWane's Exclusive Dealing Policy, it took steps to ensure company-wide compliance with the policy and refused to purchase Domestic Fittings from Star because of the policy. (CCPF 1938-1952).

The proposed finding is misleading insofar as it refers to and treats McWane's Exclusive Dealing Policy as a mere "Rebate Policy" rather than an all-or-nothing exclusive dealing policy. (*See supra* Response to Proposed Finding No. 425).

509. McWane did not refuse to sell domestic Fittings or refuse to pay rebates to its customers who bought domestic Fittings from Star. (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."); JX 638 (McCullough, IHT at 157 ("Q. Has McWane ever not paid a corporate rebate that was otherwise accrued and due because of a distributor's failure to live up to one or more of the requirements? A. To my knowledge, no, we never have. We make it an effort not to."), 173 ("Q. In your estimation, sir, would purchases by Win Wholesale of domestic ductile iron waterworks fittings from Star Pipe possibly disqualify Win Wholesale for eligibility under the McWane corporate

rebate program due to this requirement 3? A. And again I think as you said the key word is possibly. Possibly it could. Has it ever? No, it has not. Have there been instance when it could? Yes. Again has it? No. Chris, we're so easy to do business with, it's amazing.").); Webb, Tr. 2798-2800 ("Q. Do you know whether HD Supply purchased domestic fittings from Star in September of 2009 and has continued to buy them from Star since that time? A. I do know that we have bought domestic fittings from Star. I do not know the time frames associated as to when that started. And you said it continues today. I would -- I'll take your word for that. . . .Q. And no one at McWane ever threatened to cut HD Supply off from domestic fittings since September of 2009, did they? A. I don't recall ever being threatened to be cut off. Q. And McWane never refused to sell or deliver domestic fittings to HD Supply since September of 2009, did they? A. Not that I'm aware of, no. Q. And McWane has never refused to pay HD Supply rebates that it earned on domestic fittings, has it? A. That's correct.") (objections omitted); Thees Tr. 3111-3113 ("Q. In fact, Ferguson has purchased hundreds of thousands of dollars in domestic fittings from Star; is that correct, sir? A. Yes. A report I looked at, 2011 it was less than a million dollars. Q. But hundreds of thousands of dollars? A. Yes. . . .Q. Now, I'd just like to clarify, McWane has never refused to pay Ferguson a rebate it earned on domestic fittings; right, sir? A. Not that I'm aware of. Q. And McWane has never refused to supply Ferguson with domestic fittings; right, sir? A. Not that I'm aware of. Q. Never threatened to cut off Ferguson; right, sir? A. Not that I'm aware of. Q. So is it fair to say McWane never enforced the September 22 letter on Ferguson? Is that fair, sir? A. Yes. Q. And Mr. Thees, there are currently no restrictions that keep your branches from purchasing domestic fittings from Star; is that right? A. Not that I'm aware of. Q. So your branch managers are free to purchase domestic fittings from Star today; is that correct, sir? A. Yes."); Morton, Tr. 2860-2862 ("Q. And it's true, isn't it, that as early as January of 2010, U.S. Pipe took at least, I think your term was, a minor percentage of domestic product from Star? A. That's correct. Q. And it's also true, isn't it, that prior to the end of 2009, Star was not manufacturing many of the fittings that U.S. Pipe required? A. I believe that's correct. Q. You also bought domestic fittings from Eureka Foundry after the September 2009 McWane rebate policy; correct? A. We began buying fittings from Eureka Foundry approximately June 2010. Q. And I think it's also true that prior to that agreement that you just referenced that U.S. Pipe actually had always purchased some amount and some type of fittings from Eureka; is that correct? A. Prior to closing the Chattanooga foundry in 2006, there were minor purchases from Eureka with U.S. Pipe's tooling when U.S. Pipe didn't have the capacity to meet customer requirements. I don't believe after we closed the foundry in 2006 until June of 2010 that there were any fittings purchased from Eureka Foundry. Q. Okay. So from June 2010 until today, from the date that you left U.S. Pipe, there were purchases of domestic product from Eureka. A. 30" and larger. Q. Thank you. And U.S. Pipe also bought domestic fittings from ACIPCO after the September 2009 rebate policy? A. 30" and larger. Correct. Q. And you also -- U.S. Pipe also bought these domestic products after the October 2009 meeting with Mr. Tatman? A. Correct. Q. And McWane never cut U.S. Pipe off from domestic supply of fittings, did it? A. No. Q. And McWane never altered any rebate policy for U.S. Pipe at any point; correct? Q. Is it the case, Mr. Morton, that there was never any rebate policy between McWane and U.S. Pipe, to your knowledge? A. To my knowledge.").).

Response to Proposed Finding No. 509

Complaint Counsel notes that there is no exhibit denominated "JX 638." The proposed finding is misleading and contradicted by the weight of the evidence. The weight of the evidence establishes that McWane refused to sell Domestic Fittings to all Hajoca branches from December 2009 to April 2010, and withheld Hajoca's Fourth Quarter Domestic Fitting Rebate in 2009 for all branches, because one Hajoca branch (Tulsa, Oklahoma) purchased Domestic Fittings from Star. (CCPF 1866-1879, 1889-1892). The weight of the evidence establishes that any Domestic Fittings received by any Hajoca branch from McWane between December 2009 and April 2010 were likely in response to orders placed prior to the December 2009 cut-off date. (CCPF 1879).

The proposed finding is incomplete and misleading insofar as it fails to account for the fact that in most cases McWane was not required to actively enforce its Exclusive Dealing Policy because Distributors and other customers complied with it. (CCPF 1893-2063). Moreover, some Distributors that purchased Domestic Fittings from Star only did so in accordance with the limited exceptions to McWane's Exclusive Dealing Policy (*i.e.*, for Fittings-pipe bundled purchases, or for Fittings that McWane could not timely deliver). (CCPF 2027-2031). These Distributors, therefore, were in compliance with McWane's Exclusive Dealing Policy and there was no reason for McWane to refuse to sell Domestic Fittings or refuse to pay rebates to these customers. (*See* CCPF 1893-2063). In addition, to the extent some Domestic Fittings customers did not feel constrained by McWane's Exclusive Dealing Policy in 2010 and thereafter, that was not because McWane had relaxed the policy, but because such customers had become aware of the FTC's investigation into the policy, and felt confident that McWane would not enforce it. (CCPF 2028-2029).

The proposed finding is also misleading insofar as it refers to and treats McWane's Exclusive Dealing Policy as a mere "Rebate Policy" rather than an all-or-nothing exclusive dealing policy. (*See supra* Response to Proposed Finding No. 425).

510. Since September 2009, Hajoca's domestic Fittings purchases have been split about 50/50 between McWane and Star. (Pitts, Tr. 3337 ("Q. And in fact, is it fair to say that since the time of the McWane domestic policy, Hajoca's domestic fitting business has been split about 50/50 between McWane and Star? A. That's probably fair, yeah.").).

Response to Proposed Finding No. 510

The proposed finding is misleading insofar as it suggests that Hajoca's Domestic Fittings purchases have been split evenly between McWane and Star at all times since September 2009. McWane refused to sell Domestic Fittings to all Hajoca branches from December 2009 to April 2010, because one Hajoca branch (Tulsa, Oklahoma) purchased Domestic Fittings from Star. (CCPF 1866-1879, 1889-1892). Mr. Pitts of Hajoca testified that any Domestic Fittings received by any Hajoca branch from McWane between December 2009 and April 2010 were likely in response to orders placed prior to the December 2009 cut-off date. (CCPF 1879).

511. The Rebate Policy did not prevent the Hajoca branches that preferred buying domestic Fittings from Star from doing so. (Pitts, Tr. 3337 ("Q. So the McWane domestic policy never prevented Hajoca from buying domestic product from Star, did it? A. That's correct.").).

Response to Proposed Finding No. 511

The proposed finding is misleading and incomplete insofar as it fails to state that Hajoca was unable to purchase Domestic Fittings from Star without punitive consequences. (CCPF 1850-1892 (describing Hajoca being cut-off and losing its earned rebate for purchasing Star Domestic Fittings); *see also supra* Response to Proposed Finding No. 509). Also, the weight of the evidence establishes that McWane's decision to apply the Exclusive Dealing Policy to Hajoca on a branch-by-branch basis (rather than company-wide) beginning in April 2010 was

influenced by the fact that the FTC was investigating its Exclusive Dealing Policy. (CCPF 1880-1888).

The proposed finding is also misleading insofar as it refers to and treats McWane's Exclusive Dealing Policy as a mere "Rebate Policy" rather than an all-or-nothing exclusive dealing policy. (*See supra* Response to Proposed Finding No. 425).

512. McWane continued to pay rebates to Hajoca, although its Tulsa branch continued to buy Star domestic Fittings while its Lansdale branch bought McWane domestic Fittings. (Pitts, Tr. 3366 ("Q. And it's true that since that time Hajoca, the Tulsa branch, has continued to buy Star domestic fittings; correct? A. Correct. Q. And it's true that the Lansdale branch has continued to buy McWane domestic fittings; correct? A. Correct. Q. And it's true that McWane has continued to pay you your rebate; correct? A. Correct, sir.").).

Response to Proposed Finding No. 512

The proposed finding mischaracterizes the cited testimony and is misleading. McWane withheld Hajoca's Fourth Quarter Domestic Fitting Rebate in 2009 for all branches because one Hajoca branch purchased Domestic Fittings from Star. (CCPF 1889-1892). The cited testimony refers to the time period ("since that time") after April 2010; which was when McWane changed its position, in light of the FTC's investigation, and reinstated the Lansdale, Pennsylvania branch. (*See* CCPF 1881-1888; *supra* Responses to Proposed Finding Nos. 509, 511).

513. McWane permitted Hajoca's Lansdale branch to pre-order domestic Fittings to meet its contractor needs during the time that McWane and Hajoca successfully negotiated the terms and effect of the Rebate Policy going forward. (Pitts, Tr. 3355-3356 ("Q. Does this document reflect that McWane continued to ship domestic fittings to the Lansdale branch in January, February and March of 2010? A. That's correct Q. And then I think you testified earlier that in early April you sat down with the McWane people; correct? A. Correct, sir. Q. And you all negotiated, and McWane agreed to continue selling the Lansdale branch product; correct? Domestic fittings; correct? A. Correct."); RX 289).

Response to Proposed Finding No. 513

The proposed finding is inaccurate and misleading insofar as it suggests that any Hajoca branch was able to order Domestic Fittings from McWane between December 4, 2009 and April 13, 2010, or that McWane and Hajoca were continuously engaged in negotiations during that

time period. At the time it cut-off Hajoca, McWane only invited Hajoca's Landsdale branch to submit orders for "in process domestic jobs that require near term shipments before December 4." (CCPF 1872). Between December 2009 and April 2010, Hajoca's Lansdale branch wanted to purchase Domestic Fittings from McWane but was unable to place Domestic Fitting orders with McWane because of the Exclusive Dealing Policy. (CCPF 1877-1878). McWane restarted negotiations with Hajoca to apply the Exclusive Dealing Policy on a branch-by-branch basis (rather than company-wide) beginning in April 2010, influenced by the fact that the FTC was investigating its Exclusive Dealing Policy. (CCPF 1880-1888; CCPF 2495).

The proposed finding is also misleading insofar as it refers to and treats McWane's Exclusive Dealing Policy as a mere "Rebate Policy" rather than an all-or-nothing exclusive dealing policy. (*See supra* Response to Proposed Finding No. 425).

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.").).).

Response to Proposed Finding No. 514

Complaint Counsel notes that there is no exhibit denominated "JX 675." The proposed finding is incomplete, misleading, and contradicted by the weight of the evidence insofar as the proposed finding suggests that Illinois Meter has not been deterred by McWane's Exclusive Dealing Policy from purchasing Domestic Fittings from Star. The weight of the evidence establishes that Illinois Meter purchased only "a few" Domestic Fittings from Star to assess their

quality, and did not purchase any Domestic Fittings for purpose of supplying a waterworks project (*i.e.*, "for jobs"). (CCPF 2012, 2027). Moreover, even these minor purchases by Illinois Meter are explained by the fact that Mr. Sheley was Chairman of TDG's vendor selection committee and felt it was important to be informed about Star's Domestic Fittings. (CX 2515 (Sheley, IHT at 95) ("Sitting on the vendor committee at TDG, you know, I have to be able to talk to other members about what's there or what's not there.")). As a result of McWane's Exclusive Dealing Policy, Illinois Meter refuses, even today, to purchase Domestic Fittings from Star. (CCPF 2003-2014).

515. 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.").).).

Response to Proposed Finding No. 515

Complaint Counsel notes that there is no exhibit denominated "JX 669" or "JX 643." The proposed finding is incomplete, misleading, and contradicted by the weight of the evidence insofar as the proposed finding suggests that Groeniger has not been deterred by McWane's Exclusive Dealing Policy from purchasing Domestic Fittings from Star. The weight of the evidence establishes that Groeniger began to purchase Domestic Fittings from Star prior to McWane issuing its Exclusive Dealing Policy, but stopped because of McWane's Exclusive Dealing Policy. (CCPF 1966-1992). McWane punished Groeniger for buying Domestic Fittings from Star by taking the unusual step of raising its prices of Domestic Fittings to Groeniger mid-contract on a contract that had already been awarded to Groeniger and for which Groeniger was

sourcing Domestic Fittings from McWane. (CCPF 1972-1977). The evidence also establishes that Groeniger's limited purchases of Star's Domestic Fittings thereafter were part of bundled pipe-Fittings purchases through Griffin Pipe, an exception to McWane's Exclusive Dealing Policy. (CCPF 1991-1992).

The proposed finding is also misleading insofar as it refers to and treats McWane's Exclusive Dealing Policy as a mere "Rebate Policy" rather than an all-or-nothing exclusive dealing policy. (*See supra* Response to Proposed Finding No. 425).

516. McWane never refused to pay rebates to or sell domestic Fittings to Dana Kepner, even though Dana Kepner purchased domestic Fittings from Star since 2010. (JX 652 (Johnson, Dep. at 17-19 ("Q Do you purchase domestic fittings from Star? A Yes. Q And do you also purchase domestic fittings from Tyler? A Yes. Q When did you start purchasing domestic fittings from Star Pipe? A I would guess about the middle of '10, 2010. We may have purchased some earlier, but the majority . . . Q Has Tyler ever refused to sell you domestic fittings? A Not that I recall. Q Did you ever personally witness Tyler refuse to sell domestic fittings to any other waterworks distributor? A My personal knowledge, not that I can recall. Q Has Tyler ever refused to give Dana Kepner a rebate that it earned on fittings? A No. Q And have you ever personally witnessed Tyler refuse to give a rebate to any other waterworks distributor? A Not to my personal knowledge, no.").).).

Response to Proposed Finding No. 516

Complaint Counsel notes that there is no exhibit denominated "JX 652," and that portions of the cited and excerpted testimony from Mr. Johnson's depositions are not in evidence. The proposed finding is incomplete, misleading, and contradicted by the weight of the evidence insofar as the proposed finding suggests that Dana Kepner has not been deterred by McWane's Exclusive Dealing Policy from purchasing Domestic Fittings from Star. The weight of the evidence establishes that Dana Kepner did not start purchasing Star Domestic Fittings until the middle of 2010, which was after the FTC started its investigation. (*See* CCPF 2495, 1881). Wayne Johnson, Dana Kepner's President, testified that prior to that time, Dana Kepner probably would have purchased some Domestic Fittings from Star, but did not because of McWane's Exclusive Dealing Policy. (CX 2491 (Johnson, IHT at 57) ("Q. If the world were different and

Tyler hadn't announced the policy that it had with respect to purchasing domestic fittings from Star, would you have purchased domestic fittings from Star earlier than you did? A. Probably.); CX 2492 (Johnson, Dep. at 103-104) ("Q. . . . [W]hy did you believe that you probably would have purchased more domestic from Star? A. I don't think I was saying that we would have bought full projects. We might have bought onesie and twosie items . . . ")).

517. McWane never cut off, threatened, or refused to pay rebates to WinWholesale, even though WinWholesale bought domestic Fittings from Star. (JX 705 (Gibbs, Dep. at 35-39 ("Q. So, despite WinWholesale purchasing from -- strike that. Despite WinWholesale's purchase of domestic fittings from Star in 2010 and 2011, McWane never cut you off, right? A. No, they did not. Q. And they never refused to pay WinWholesale a rebate? A. That is correct. Q. Is there anything in McWane's policy that prevents WinWholesale from purchasing domestic fittings from Star Pipe in the future? A. No. Q. And would you consider purchasing domestic fittings from Star Pipe in the future? A. Yes. Q. So, WinWholesale's business is open to Star Pipe on the domestic fittings side going forward right now? A. That is correct.") (objections omitted).).).

Response to Proposed Finding No. 517

Complaint Counsel notes that there is no exhibit denominated "JX 705." The proposed finding is incomplete, misleading, and contradicted by the weight of the evidence insofar as the proposed finding suggests that WinWholesale has not been deterred by McWane's Exclusive Dealing Policy from purchasing Domestic Fittings from Star. The weight of the evidence establishes that there was no reason for McWane to refuse to pay rebates to or sell Domestic Fittings to WinWholesale, because WinWholesale complied with McWane's Exclusive Dealing Policy. 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. (CCPF 1954-1964). At WinWholesale, if a vendor receives "not approved" status, then WinWholesale's "local companies are not to buy from them under any circumstances unless they seek board approval." (CCPF 1958). Despite Star being on the "Not Approved" vendor list for Domestic Fittings,

WinWholesale companies could purchase Domestic Fittings from Star, without seeking board approval, "if, because of Tyler's inability to perform, they have to buy domestic fittings from Star," which is an exception in McWane's Exclusive Dealing Policy. (CCPF 1959).

518. McWane never refused to sell, cut off, or refused to pay rebates to HD Supply, despite the fact that HD Supply bought and continues to buy domestic Fittings from Star. (JX 673 (Webb, Dep. at 46-47 ("Q. Has McWane ever refused to sell HD Supply domestic fittings? A. Not that I'm aware of. Q. Has McWane ever refused to pay HD Supply rebates that it earned on domestic fittings? A. Not that I'm aware of. Q. So at no time has McWane ever cutoff or refused to pay rebate to HD Supply? A. None that I can recall. Q. And you testified earlier that HD Supply does buy domestic fittings from Star, is that right? A. Yes, we have.").).).

Response to Proposed Finding No. 518

Complaint Counsel notes that there is no exhibit denominated "JX 673." The proposed finding is incomplete, misleading, and contradicted by the weight of the evidence insofar as the proposed finding suggests that HD Supply has not been deterred by McWane's Exclusive Dealing Policy from purchasing Domestic Fittings from Star. The weight of the evidence establishes that there was no reason for McWane to cut-off supply or refuse to pay rebates to HD Supply, because HD supply accepted, implemented, and complied with McWane's Exclusive Dealing Policy. At McWane's urging, HD Supply issued an internal mandate letter directing its branches not to purchase Star's Domestic Fittings. (CCPF 1904-1936). McWane's Exclusive Dealing Policy carved out exceptions that allowed Distributors to purchase certain amounts of Star Domestic Fittings. (CCPF 1826). HD Supply's branches complied with the mandate letter and refused to purchase Star Domestic Fittings, except in circumstances that were covered by one of the exceptions. (CCPF 1924; Webb, Tr. 2803 ("Q. Mr. Webb, as far as you know, did all the branches comply with the policy that was outlined in your memo? A. To the best of my knowledge, our branches complied with the memo that I put out. Q. So your – A. That would also include the exceptions."); CCPF 1920-1936).

519. McWane's Rebate Policy had no effect on Utility Equipment's willingness to buy domestic Fittings from Star. (JX 703 (Coryn, Dep. at 134-135 ("Q. Is it fair to say that this policy did not have any effect on your willingness to deal with Star? A. Yes. Q. And also on Page 131, Line 6, you said, "I mean, they can't refuse to sell to you. That wasn't going to work." Did I read that correct? A. Yes. Q. So when you received this letter, was it your opinion that Tyler could not refuse to sell to you? A. What I was referring to there is that they wouldn't be so stupid to actually say to someone, Because of this you are not -- we are not going to sell you anymore. Q. And, in fact, did Tyler ever refuse to sell you domestic product? A. No.") (objections omitted).).).

Response to Proposed Finding No. 519

Complaint Counsel notes that there is no exhibit denominated "JX 703." The proposed finding is incomplete and misleading insofar as it omits that (1) Utility Equipment believed that McWane's Exclusive Dealing Policy made it risky for Utility Equipment to purchase Domestic Fittings from Star (CX 2544 (Coryn, Dep. at 115)), (2) Utility Equipment believed that Star was unable to adequately compensate Utility Equipment for that risk (CX 2544 (Coryn, Dep. at 115)), and (3) Utility Equipment purchased "very few" Domestic Fittings from Star (RX-703 (Coryn, Dep. at 26)). The proposed finding is also misleading insofar as it refers to and treats McWane's Exclusive Dealing Policy as a mere "Rebate Policy" rather than an all-or-nothing exclusive dealing policy. (*See supra* Response to Proposed Finding No. 425).

520. Ferguson purchased hundreds of thousands of dollars worth of domestic Fittings from Star, yet McWane has never cut Ferguson off from McWane's domestic supply or refused to pay Ferguson a rebate. (Thees, Tr. 3112-3113 ("Q. So is it fair to say McWane never enforced the September 22 letter on Ferguson? Is that fair, sir? A. Yes. Q. And Mr. Thees, there are currently no restrictions that keep your branches from purchasing domestic Fittings from Star; is that right? A. Not that I'm aware of. Q. So your branch managers are free to purchase domestic Fittings from Star today; is that correct, sir? A. Yes.").).

Response to Proposed Finding No. 520

The proposed finding is incomplete, misleading, and contradicted by the weight of the evidence insofar as the proposed finding suggests that Ferguson has not been deterred by McWane's Exclusive Dealing Policy from purchasing Domestic Fittings from Star. The weight of the evidence establishes that there was no reason for McWane to cut-off Ferguson from access

to McWane's Domestic Fittings or to refuse to pay Ferguson a rebate. As a result of McWane's Exclusive Dealing Policy, Ferguson refused to purchase Domestic Fittings from Star. (CCPF 1945-1952). Ferguson believed it was in compliance with McWane's Exclusive Dealing Policy and was never told by anyone from McWane that it was not in compliance with the Exclusive Dealing Policy. (Thees, Tr. 3117 ("Q. And did McWane have any reason to not pay you a rebate for domestic fittings? A. Not that I'm aware of."); CCPF 1943).

521. U.S. Pipe bought domestic fittings from Star since September 2009, despite the Rebate Policy and McWane never cut off supplying U.S. Pipe with domestic fittings. (Morton, Tr. 2860 ("Did I hear your testimony right that U.S. Pipe bought Star domestic products after September 2009 -- excuse me -- after the September 2009 policy of McWane was enacted? A. That's correct. We bought a minor percentage -- Q. Okay. A. -- after that time. Q. And you purchased them after the October 2009 meeting with Mr. Tatman as well. A. That's correct."), 2867 ("Q. Mr. Morton, is it true that -- isn't it true that U.S. Pipe bought significant quantities of domestic products from Star Pipe starting in September 2010? A. I believe that's correct. Q. And that's less than a year after your meeting with Mr. Tatman; correct? A. Correct."); CX 2215' CX 1936).).

Response to Proposed Finding No. 521

The proposed finding is incomplete, misleading, and contradicted by the weight of the evidence insofar as the proposed finding suggests that U.S. Pipe was not deterred by McWane's Exclusive Dealing Policy from purchasing Domestic Fittings from Star. When Star entered the Domestic Fittings market, U.S. Pipe pursued the purchase of Domestic Fittings from Star, and Star offered competitive prices. (CCPF 2041-2049). Mr. Tatman then 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. (CCPF 2051-2056). U.S. Pipe therefore declined to purchase Domestic Fittings from Star. (CCPF 2057-2061). With the exception of minor purchases falling within the exceptions to McWane's Exclusive Dealing Policy, U.S. Pipe did not purchase Domestic Fittings from Star until September 2010. (CCPF 2062). 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. (CCPF 2063).

The proposed finding is also misleading insofar as it refers to and treats McWane's Exclusive Dealing Policy as a mere "Rebate Policy" rather than an all-or-nothing exclusive dealing policy. (*See supra* Response to Proposed Finding No. 425).

C. Complaint Counsel and Dr. Schumann Cannot Identify a Single Distributor Who Wanted to Buy Star Domestic Fittings But Could Not Because of the Rebate Policy

522. Complaint Counsel failed to allege or offer evidence that McWane's 2009 Rebate Policy constituted below-cost pricing to customers.

Response to Proposed Finding No. 522

The proposed finding is misleading, immaterial, and irrelevant. The proposed finding is misleading insofar as it refers to and treats McWane's Exclusive Dealing Policy as a mere "Rebate Policy" rather than an all-or-nothing exclusive dealing policy. (*See supra* Response to Proposed Finding No. 425). The proposed finding is also immaterial and irrelevant because the Complaint in this matter does not allege that McWane engaged in predatory pricing.

523. Complaint Counsel failed to allege or offer any evidence that McWane's 2009 Rebate Policy constituted a contract.

Response to Proposed Finding No. 523

The Proposed Finding is misleading, immaterial, and irrelevant. The proposed finding is misleading insofar as it refers to and treats McWane's Exclusive Dealing Policy as a mere "Rebate Policy" rather than an all-or-nothing exclusive dealing policy. (*See supra* Response to Proposed Finding No. 425). The proposed finding is also immaterial and irrelevant because the Complaint challenges McWane's Exclusive Dealing Policy under Section 2 of the Sherman Act, which prohibits anticompetitive unilateral actions and does not require an agreement or contract for establishing liability.

524. 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.").).

Response to Proposed Finding No. 524

The proposed finding mischaracterizes Dr. Schumann's testimony because, in the excerpt of the testimony from transcript page 4400, Dr. Schumann merely states that he couldn't recall the name(s) of the Distributors off the top of his head while on the stand.

The proposed finding is misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests that Dr. Schumann did not identify multiple Distributors that wanted to purchase Domestic Fittings from Star but were deterred by McWane's Exclusive Dealing Policy. In his expert report and his testimony, Dr. Schumann referenced Ferguson, HD Supply, and important regional distributors such as TDG members, Mainline, and Winwater who all withdrew their requests for quotes from Star after McWane announced its Exclusive Dealing Policy. (CX 2260-A (Schumann Rep. at 69)). Also, Dr. Schumann's expert report references HD Supply's memorandum of September 23, 2009, instructing all of its branches to only buy Domestic Fittings from McWane or Sigma, and Ferguson's similar instruction to its branches not to purchase Domestic Fittings from Star on account of McWane's Exclusive Dealing Policy. (CX 2260-A (Schumann Rep. at 70, 74)). In his expert report, Dr. Schumann also identified Groeniger as a distributor who saw McWane's Exclusive Dealing Policy as a threat because Groeniger had been cut off before by McWane. (CX 2260-A (Schumann Rep. at 73)). Finally, Dr. Schumann discusses the case of Hajoca, which was cut off by McWane after

one of its branches purchased Domestic Fittings from Star. (CX 2260-A (Schumann Rep. at 70-72)).

The proposed finding is also misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests that Distributors and other customers have not been deterred by McWane's Exclusive Dealing Policy from purchasing Domestic Fittings from Star. (*See supra* Responses to Proposed Finding Nos. 501-521; CCPF 1893-2063).

The proposed finding is also misleading insofar as it refers to and treats McWane's Exclusive Dealing Policy as a mere "Rebate Policy" rather than an all-or-nothing exclusive dealing policy. (*See supra* Response to Proposed Finding No. 425).

525. 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. . . .").).

Response to Proposed Finding No. 525

Complaint Counsel notes that, contrary to this Court's Order, Respondent is improperly citing the testimony of an expert for a proposition of fact. Compliant Counsel does not dispute that Dr. Normann made the statement attributed to him, but the proposed finding and Dr. Normann's testimony in support are misleading and contradicted by the weight of the evidence insofar as they suggest that Distributors and other customers have not been deterred by McWane's Exclusive Dealing Policy from purchasing Domestic Fittings from Star. (*See supra* Responses to Proposed Finding Nos. 501-521; *supra* Response to Proposed Finding No. 524 (Dr. Schumann identified deterred Distributors); *see also* CCPF 1893-2063).

Further, the proposed finding is overbroad and unsupported by the cited testimony, which says only that Dr. Normann did not "identify" any Distributors that wanted to buy Star Domestic Fittings, but does not say that Dr. Normann concluded there were none, as proposed by the

finding. It is unsurprising that Dr. Normann did not identify the deterred Distributors because he did not interview *any* distributors for *any* purpose relevant to this litigation. (Normann, Tr. 5578-5579).

The proposed finding is also misleading insofar as it refers to and treats McWane's Exclusive Dealing Policy as a mere "Rebate Policy" rather than an all-or-nothing exclusive dealing policy. (*See supra* Response to Proposed Finding No. 425).

D. The Rebate Policy Consisted of Above-Cost Customer Discounts, and Was Not a Contract

526. McWane's September Rebate Policy announced McWane's MDA with Sigma and set forth some general guidelines about how McWane's corporate rebate plans may be handled in the coming months. (Tatman, Tr. 687-689 ("Q. And the letter you put out, that was an outgrowth of those discussions that you had with Mr. McCullough and Mr. Walton from the slides we were just talking about; is that right, sir? A. That probably would have been the first of many discussions. Q. Let's go to that letter. We looked at it earlier. It's 1606. And Terri, if you could just go to page 2, that's the letter itself. A. I'm pretty familiar with that, so I'll work off the screen. Q. The policy you adopted, sir, was effective October 1, 2009? A. Yes. Q. And you adopted a program whereby McWane's domestic fittings and accessories would be available only to customers who elect to fully support McWane branded products for their domestic fitting and accessory requirements? A. Yes. With the big words "may" and "or" below. Q. And the big words "may" and "or" below, those refer to the consequences a customer might suffer if they were not to be exclusive with McWane? A. Those were put in there to give me an out clause. Q. But those out clauses are outs from a consequence that a customer might experience should they choose not to be exclusive with McWane; correct, sir? A. Yes. But go back to what letters read and what practicality is through the whole history of discussions that we've had here. Q. So the letter might not actually reflect what happens in the marketplace or the marketplace's understanding of that letter; is what you mean? A. I think everything that we've talked about so far is that there's a letter that goes out, and then competitive conditions determine what actually happens in the marketplace. Q. And the potential consequences for customers were: Customers who elect not to support this program may forgo 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 twelve weeks; correct, sir? A. With the words "may" and "or" specifically put in there by me. Q. That's a yes, sir? A. Yes, sir. Q. And you actually went out before you announced this policy and met with customers to discuss it with them? A. I think one of them or two of them. I couldn't recall for sure."); CX 1606).

Response to Proposed Finding No. 526

The proposed finding is misleading insofar as it refers to and treats McWane's Exclusive Dealing Policy and the September 22, 2009 letter announcing it as a mere "Rebate Policy" rather

than an all-or-nothing exclusive dealing policy. (*See supra* Response to Proposed Finding No. 425).

The proposed finding is also incomplete, misleading, and contrary to the weight of the evidence insofar as the proposed finding suggests that the Exclusive Dealing Policy announced how Corporate Rebates *may* be handled. In conversations with Distributors and other customers, McWane told Distributors that purchasing Star's Domestic Fittings *would* result in losing *both* access to McWane's Domestic Fittings *and* accrued rebates on Domestic Fittings. (*See* CCPF 1830-1831). This message was consistent with the message that McWane conveyed to its sales personnel, that "[o]nce they use Star, they can't EVER buy domestic from us. . . every branch is cut off." (*See* CCPF 1832; CX 0710 at 002; *see also* CCPF 1845; CX 0119 at 002, 004 ("Although the words "may" and "or" were specifically used, the market has interpreted the communication in the more hard line "will" sense. . . . Violation will result in: Loss of access, loss of accrued rebates."); CCPF 1834; CX 0695 at 004 (explaining that the result of a Distributor's disloyalty would be that McWane "won't sell" (*not* "may not sell" or "might not sell") any Domestic Fittings to that Distributor); CCPF 1836-1841, 1843 (describing further communications between McWane and Distributors regarding the policy)).

527. The letter states in pertinent part: "[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 product 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 purchased from another domestic pipe and fitting manufacturer along with that manufacturer's ductile iron pipe. 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) (emphasis added).

Response to Proposed Finding No. 527

Complaint Counsel does not dispute that McWane's September 22, 2009 letter contains the quoted language, but the proposed finding is incomplete and misleading insofar as it suggests

that the September 22, 2009 letter reflects McWane's actual Exclusive Dealing Policy as implemented. In conversations with Distributors and other customers, McWane told Distributors that purchasing Star's Domestic Fittings *would* result in losing *both* access to McWane's Domestic Fittings *and* accrued rebates on Domestic Fittings. (*See* CCPF 1830-1831). This message was consistent with the message that McWane conveyed to its sales personnel, that "[o]nce they use Star, they can't EVER buy domestic from us. . . every branch is cut off. (*See* CCPF 1832; CX 0710 at 002; *see also* CCPF 1845; CX 0119 at 002, 004 ("Although the words "may" and "or" were specifically used, the market has interpreted the communication in the more hard line "will" sense. . . . Violation will result in: Loss of access, loss of accrued rebates."); CCPF 1834; CX 0695 at 004 (explaining that the result of a Distributor's disloyalty would be that McWane "won't sell" (*not* "may not sell" or "might not sell") any Domestic Fittings to that Distributor); CCPF 1836-1841, 1843 (describing further communications between McWane and Distributors regarding the policy)).

528. On its face, the September 22 letter does not require preclude McWane's customers from purchasing domestic Fittings from other suppliers. (CX 1606).

Response to Proposed Finding No. 528

The proposed finding is unclear as worded, and is misleading insofar as it suggests that the September 22, 2008 letter accurately reflects McWane's Exclusive Dealing Policy as implemented. In conversations with Distributors and other customers, McWane told Distributors that purchasing Star's Domestic Fittings *would* result in losing *both* access to McWane's Domestic Fittings *and* accrued rebates on Domestic Fittings. (*See* CCPF 1830-1831). This message was consistent with the message that McWane conveyed to its sales personnel, that "[o]nce they use Star, they can't EVER buy domestic from us. . . every branch is cut off. (*See* CCPF 1832; CX 0710 at 002; *see also* CCPF 1845; CX 0119 at 002, 004 ("Although the words

"may" and "or" were specifically used, the market has interpreted the communication in the more hard line "will" sense. . . . Violation will result in: Loss of access, loss of accrued rebates."); CCPF 1834; CX 0695 at 004 (explaining that the result of a Distributor's disloyalty would be that McWane "won't sell" (*not* "may not sell" or "might not sell") any Domestic Fittings to that Distributor); CCPF 1836-1841, 1843 (describing further communications between McWane and Distributors regarding the policy)).

529. Regardless of the Rebate Policy, McWane's customers remained free to buy domestic Fittings from the supplier of their choice. (JX 643 (Tatman, IHT at 157-160 ("Q Did you generate significant goodwill with your distributor customers from the program you announced in September of 2009? A A mix. If you look at the accounts that were traditional domestic accounts -- that were traditional domestic accounts and were good long-term supporters of Tyler Union, they were very much in support of that. They wanted that to happen because they felt that, okay -- although nobody knew what it was. ARRA is going to be a market opportunity. We don't know what it is, but it's not going down. We're your Tyler Union distributor. That means we will have a good -- better opportunity to participate in that than a guy that's down the street that's never bought from you or doesn't care to buy from you. You got a real mixed bag. Some people said that was great. You did the right thing. Glad you did it. Thank you. And you got other people that said, you know, I don't like this. You're taking away my free choice. And as we said, you can do as you want to. You got to go back to that letter -- is that the September 22nd one? Q Yes, sir. A And then you look at the dialogue around that. It's got the words "may" and "or" in it. Purposefully I put those in there because I knew what was going to happen after that letter comes out. It's got all these sort of exceptions. You got to support our product. If we have it available, if it's not part of your buying your fittings as part of a pipe package, if we've got it available, and then if you don't do that, here's what may happen: may or or. And then if you look at -- I had a conference call with the salespeople right before -- the morning before that letter went out. I think the letter went out in the afternoon. We got together with the sales team in the morning. There's a list of questions they're going to come up in answers. I'm sure in the e-mail trail, you got that. And even if you look at that document, I'm kind of priming the sales force that here's what the letter says, but we're not necessarily going to take a hard line stance. This is "may" or "or." And that letter is kind of analogous to these price increases. When I say I'm raising prices seven percent, would I like to get a seven-percent price increase? Yes. That's what I would like. I hope to get it. That's almost like my Christmas wish list. The reality is, the marketplace will determine what I actually get, and that was the same thing with that letter. We wanted customers to support us because we needed the volume. We wanted them not to cherry-pick us because that's not good for us. It's not good for our volume. It's not good for our business. We're just not set up to compete very well in that type of environment. We know that the customer bears the power and that we would need some sort of flexibility there. So specifically, I had the words "may" and "or" and some conditions in that letter.")).).

Response to Proposed Finding No. 529

Complaint Counsel notes that there is no exhibit denominated "JX 643." The proposed finding, and the testimony of Mr. Tatman cited in support, are misleading and contradicted by the weight of the evidence insofar as they suggest that Distributors and other customers have not been deterred by McWane's Exclusive Dealing Policy from purchasing Domestic Fittings from Star. (*See supra* Responses to Proposed Finding Nos. 501-521; CCPF 1893-2063). The weight of the evidence, including contemporaneous documents, establishes that McWane purposefully, consistently, and systematically communicated and implemented the Exclusive Dealing Policy in the marketplace in an even more "hard line" manner than was explicit in its September 22, 2009 letter (CCPF 1830-1849), including by instructing its sales team to tell customers that that "once they use Star, they can't EVER buy domestic from us" (CCPF 1832). The weight of the evidence further establishes that Distributors were not able to purchase Domestic Fittings from Star without punitive consequences (CCPF 1850-1892 (describing distributor Hajoca being cut-off by McWane and losing its earned rebate for purchasing Star Domestic Fittings)), and viewed McWane's Exclusive Dealing Policy as presenting an intolerable risk that McWane would cut them off if they purchased Domestic Fittings from Star. (CCPF 1895-1902).

The proposed finding is also misleading insofar as it refers to and treats McWane's Exclusive Dealing Policy as a mere "Rebate Policy" rather than an all-or-nothing exclusive dealing policy. (*See supra* Response to Proposed Finding No. 425).

530. Mr. Bhutada and Mr. McCutcheon testified that Star offered rebates to its customers on its domestic Fittings. (JX 694 (Bhutada, Dep. at 65 ("Q. What rebates, if any, were you offering on your domestic fittings? A. I think we offered rebates between 2 to 8 percent. Q. And was that competitive with the market? A. I don't know. Q. Was that an attempt, do you know, to be competitive in the market? A. Yeah, that was an attempt.")); McCutcheon, Tr. 2341 ("Q. Did Star offer discounts off its published prices for domestic fittings in 2009 and 2010? A. Yes, sir. Q. And can you describe what form those discounts took? A. I don't understand the question. Q. Well, did you offer rebates? A. Yes, sir."), 2635-2636 ("Q. And your rebates are competitive with Tyler's rebates; right? A. I don't know. Q. Okay. But you do know that you're

offering rebates on domestic where necessary? A. Yes, sir. We did."), 2646-2647, *in camera*[†] ([†]{

}[†]); RX 601 in camera).

Response to Proposed Finding No. 530

Complaint Counsel has no specific response, other than to note that there is no exhibit denominated "JX 694."

531. Star offered a rebate to get TDG preferred vendor status for domestic Fittings in 2010. (JX 675 (Sheley, Dep. at 68 ("Q. And for domestic fittings in 2010 Star was in that program but not Tyler? A. That's correct. Q. Did Star offer a rebate to get in the program? A. Yes.").).

Response to Proposed Finding No. 531

Complaint Counsel notes that there is no exhibit denominated "JX 675." The proposed finding is inaccurate because TDG does not have "preferred" vendors, but refers to any firm with a participating TDG rebate program as a "vendor partner." (RX-653 (R. Fairbanks Dep. at 28-29) ("[T]he word 'preferred vendor,' we never use that word. Q. What do you use? A. Vendor partner."); CX 2516 (Sheley, Dep. at 22)). The proposed finding is misleading insofar as it suggests that (1) TDG is a purchaser of Fittings or Domestic Fittings, (2) Star was "the" exclusive preferred supplier of Domestic Fittings for TDG or its members, (3) TDG has any "preferred" suppliers, (4) Star's status as a TDG "vendor partner" required TDG members to buy Domestic Fittings from Star or prevented McWane from also being a TDG vendor partner for Domestic Fittings, or (5) McWane's failure to include Domestic Fittings in its rebate program with TDG meant that TDG members could not buy Domestic Fittings from McWane. (*See supra* Response to Proposed Finding No. 469).

532. Star's executives testified that Star's domestic fittings prices were competitive with McWane. (McCutcheon, Tr. 2635 ("Q. -- and have it cast? And I think you said your pricing is you believe competitive with Tyler/Union on your domestic; right? A. Yes, sir."); JX

694 (Bhutada, Dep. at 82-83 ("Q. I think you told me earlier Star's price was competitive. Correct? A. Yes, sir")).).

Response to Proposed Finding No. 532

Complaint Counsel notes that there is no exhibit denominated "JX 694." Complaint Counsel does not dispute that Mr. McCutcheon and Mr. Bhutada made the statements attributed to them, but the proposed finding is misleading insofar as it suggests that Star was able to compete in such a manner as to effectively constrain McWane's monopoly prices in the Domestic Fittings market. (*See* CCPF 2089-2108 (Star lost sales and missed targets due to impact of Exclusive Dealing Policy), 2109-2159 (Star failed to achieve production cost efficiencies due to impact of Exclusive Dealing Policy), 2160-2166 (Star was unable to lower its prices enough to effectively constrain McWane's monopoly prices in the Domestic Fittings market)).

533. Complaint Counsel offered no evidence that fittings output decreased or that fittings prices increased relative to the rate of inflation as a result of the McWane 2009 Rebate Policy.

Response to Proposed Finding No. 533

The proposed finding is immaterial, misleading, and contradicted by the weight of the evidence insofar as the proposed finding suggests that the Exclusive Dealing Policy did not enable McWane to exercise monopoly power and charge monopoly prices. The weight of the evidence establishes that prior to September 2009, McWane had already increased Domestic Fittings prices to supracompetitive levels substantially higher than non-Domestic Fittings prices (CCPF 628-633; 1694-1702), and was **{**

} (CCPF 1702). By preventing meaningful entry by Sigma and Star, McWane was able to maintain a dominant share, **{**

}, and avoid the introduction of additional, efficient capacity from Sigma (through its SDP plan) or Star (through its investment in its own Domestic Fittings foundry. (*See* CCPF 2473-2484 (McWane was able to maintain its dominant share of Domestic Fittings in 2010); RX-632 at 0027, *in camera* (**{**

}); CCPF 2109-2159 (McWane's Exclusive Dealing Policy prevented Star from investing in its own Domestic foundry); CCPF 2386-2393 (Sigma abandoned its Domestic Fittings production initiative as a result of the MDA); *supra* Response to Proposed Finding No. 403).

The proposed finding is misleading insofar as it refers to and treats McWane's Exclusive Dealing Policy as a mere "Rebate Policy" rather than an all-or-nothing exclusive dealing policy. (*See supra* Response to Proposed Finding No. 425).

The proposed finding is misleading insofar as it suggests that Complaint Counsel did not present evidence that Domestic Fittings prices increased relative to the rate of inflation as a result of McWane's Exclusive Dealing Policy. The weight of the evidence establishes that, as a result of McWane's Exclusive Dealing Policy, McWane did not have to respond to Star's entry into the Domestic Fittings market by discounting prices and that that Star was not able to drive down market prices for Domestic Fittings. (*See* CCPF 2160 through CCPF 2166). The proposed finding is also misleading insofar as it suggests that output of Domestic Fittings should decrease in response to an increase in price in light of evidence that the demand for Fittings is inelastic. (*See* CCPF 419-424, 664(d); *see also* RX-712A (Normann Rep. at 24) (noting that industry demand is likely inelastic); Schumann, Tr. 4015; *see also* CCPF 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 in the Domestic Fittings market, raising price or

imposing a condition on sales (such as an exclusive dealing policy) will not cause a material decrease in the market demand for Domestic Fittings, and one would expect little impact on the quantity of demand from McWane's Exclusive Dealing Policy. Instead, the Exclusive Dealing Policy harmed consumers through higher prices and reduced consumer choice. (*See* CCPF 2160-2166).

XVIII. SIGMA Was Not Prepared To Enter The Domestic Segment In Time To Compete For ARRA Jobs

A. Sigma was not a viable domestic Fittings supplier in 2009 because it was in dire financial straits

534. Sigma knew that ARRA was a short term stimulus program. (JX 687 (Pais, Dep. at 182 ("It 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.").)

Response to Proposed Finding No. 534

Complaint Counsel notes that there is no exhibit denominated "JX 687." The proposed finding is misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests that Sigma did not believe that ARRA would have a significant impact on the demand for Domestic Fittings that would extend beyond the duration of ARRA itself. The weight of the evidence establishes that ARRA created an incentive for Star and Sigma to enter the Domestic Fittings market because, among other things, they believed (correctly) that the growth in Domestic Fittings demand would extend beyond ARRA, and that ARRA could impact non-Domestic Fittings sales as well. (*See* CCPF 1628-1638 (Buy American sentiment extending beyond ARRA), 1639-1646 (Sigma's and Star's fear of losing non-Domestic Fittings sales)).

535. In early September 2009, Sigma did not have a viable domestic production option. (Pais, Tr. 1799 ("Q: At this point in time on September 8, 2009, did you believe, sir, that Sigma had a somewhat viable SDP option or Sigma domestic plan option? A: No, we didn't.").)

Response to Proposed Finding No. 535

The proposed finding is misleading and contradicted by the weight of the evidence, including contemporaneous documents of Sigma and McWane. If not for the MDA, Sigma was ready to enter the Domestic market "when the switch was flipped." (CCPF 2265; *see* CCPF 2210-2311 (Sigma prepared and executed a viable plan for entry into the Domestic Fittings market); *infra* Response to Proposed Finding No. 558 (same); CCPF 2386-2393 (Sigma abandoned its Domestic Fittings production initiative as a result of the MDA)).

536. Sigma's financial condition in the second half of 2008 was very poor. (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.").)

Response to Proposed Finding No. 536

Complaint Counsel notes that there is no exhibit denominated "JX 687." The proposed finding is misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests that Sigma's financial condition would have prevented it from entering the Domestic Fittings market. The weight of the evidence establishes that financial concerns did not prevent Sigma from entering the Domestic Fittings market – Sigma had access to sufficient financial resources to enable it to enter the production of Domestic Fittings, and Sigma's Board, investors, and lenders supported its plan to enter Domestic Fittings production. (CCPF 2282-2311).

537. †**{** **}**† (Pais, Tr. 2193 in camera (†**{** **}**†).).

Response to Proposed Finding No. 537

The proposed finding is misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests that Sigma's financial condition or business performance would have prevented Sigma from entering the Domestic Fittings market. The weight of the evidence establishes that financial concerns did not prevent Sigma from entering the Domestic Fittings market – Sigma had access to sufficient financial resources to enable it to enter the production of Domestic Fittings, and Sigma's Board, investors, and lenders supported its plan to enter Domestic Fittings production. (CCPF 2282-2311). In fact, the proposed finding confirms that Sigma was well aware of its business performance prior to embarking on its plan to enter the Domestic Fittings market, but was undeterred. (*See* CCPF 2210-2311 (Sigma prepared and executed a viable plan for entry into the Domestic Fittings market); *infra* Response to Proposed Finding No. 558 (same)).

538. **{**

} (Pais, Tr. 2195-2196 in camera (**{**

}).).

Response to Proposed Finding No. 538

The proposed finding is misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests that **{**

} To the contrary, the weight of the evidence establishes that financial concerns did not prevent Sigma from entering the Domestic Fittings market – Sigma had access to sufficient financial resources to enable it to enter the production of Domestic

Fittings, and Sigma's Board, investors, and lenders supported its plan to enter Domestic Fittings production. (CCPF 2282-2311). In fact, the proposed finding confirms that Sigma was well aware of its debt prior to embarking on its plan to enter the Domestic Fittings market, but was undeterred. (*See also* CCPF 2210-2311 (Sigma prepared and executed a viable plan for entry into the Domestic Fittings market); *infra* Response to Proposed Finding No. 558 (same)).

{

} (Pais, Tr. 2206-2207, *in camera*; CX 1749 at 004, *in camera*). **{**

}

(Pais, Tr. 2211, *in camera*; CX 1749 at 014, *in camera*). In addition to paying down a significant portion of its debt in 2009, Sigma acquired a portion of **{**

} which was approximately the same projected cost as Domestic Fittings entry; and elevated discussions about acquiring Star, which would have been significantly more expensive than domestic entry. (CCPF 2292, *in camera*; 2293, 2305, *in camera*).

539. Throughout 2009, Sigma was in a "precarious position overall in financial terms." (Pais, Tr. 1760 ("Q. But did the board or Frontenac ever give Sigma a limit to the capital expenditure they would entertain? A. I don't think there was any limit other than the fact that both the board and the team were very aware of our precarious position overall in financial terms.").).

Response to Proposed Finding No. 539

The proposed finding is misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests that Sigma's financial position would have prevented it from entering the Domestic Fittings market. To the contrary, the weight of the evidence establishes that financial concerns did not prevent Sigma from entering the Domestic Fittings market – Sigma had access to sufficient financial resources to enable it to enter the production of

Domestic Fittings, and Sigma's Board, investors, and lenders supported its plan to enter Domestic Fittings production. (CCPF 2282-2311). According to Sigma Board member Mr. Florence (of Frontenac, one of Sigma's investors), domestic entry was Sigma's "#1a priority" – up until the moment that it signed the MDA. *See* CCPF 2176. The proposed finding confirms that Sigma was well aware of its debt prior to embarking on its plan to enter the Domestic Fittings market, but was undeterred. (*See also* CCPF 2210-2311 (Sigma prepared and executed a viable plan for entry into the Domestic Fittings market); *infra* Response to Proposed Finding No. 558 (same)). **{**

} (Pais, Tr. 2206-2207, *in camera*; CX 1749 at 004, *in camera*). **{**

} (Pais, Tr. 2211, *in camera*; CX 1749 at 014, *in camera*). In addition to paying down a significant portion of its debt in 2009, Sigma acquired a portion of **{**

} which was approximately the same projected cost as Domestic Fittings entry; and elevated discussions about acquiring Star, which would have been significantly more expensive than domestic entry. (CCPF 2292, *in camera*; 2293, 2305, *in camera*).

540. In the spring and summer of 2009, Sigma was in a "grave" financial situation. (Pais, Tr. 2163-2164 ("Q. All right. The bottom of the first paragraph, you're talking about updating the board with a midterm review, and you refer to recent -- current trends and recent developments and their collective gravity. Right at the bottom of that first paragraph, sir. A. Yes. Q. And the fact is is that Sigma in May of 2009 was in a grave situation. A. Grave, yes. Q. Yeah. Right below that you point out that the update is definitely and mostly bleak; right, sir? A. Yes. Q. And may cause a certain amount of concern or even anxiety in some or all of you, the board members; right? A. Yes.").).

Response to Proposed Finding No. 540

The proposed finding is misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests that Sigma's financial position would have prevented it from entering the Domestic Fittings market. To the contrary, the weight of the evidence establishes that financial concerns did not prevent Sigma from entering the Domestic Fittings market – Sigma had access to sufficient financial resources to enable it to enter the production of Domestic Fittings; and Sigma's Board, investors, and lenders supported its plan to enter Domestic Fittings production. (CCPF 2282-2311). In fact, the proposed finding confirms that Sigma was well aware of its debt prior to embarking on its plan to enter the Domestic Fittings market, but was undeterred. (*See also* CCPF 2210-2311 (Sigma prepared and executed a viable plan for entry into the Domestic Fittings market); *infra* Response to Proposed Finding No. 558 (same)). **{**

} (Pais, Tr. 2206-2207, *in camera*; CX 1749 at 005, *in camera*). **{**

} (Pais, Tr. 2211, *in camera*; CX 1749 at 014, *in camera*). In addition to paying down a significant portion of its debt in 2009, Sigma acquired a portion of **{**

} which was approximately the same projected cost as Domestic Fittings entry; and elevated discussions about acquiring Star, which would have been significantly more expensive than domestic entry. (CCPF 2292, *in camera*; 2293, 2305, *in camera*).

541. In April 2009, Sigma experienced what Mr. Pais described as a "[p]erfect storm:" at the same time that Sigma's April 2009 revenue was about two-thirds of what was needed to meet bank covenants, McWane announced a price decrease on large and medium diameter

Fittings. (Pais, Tr. 2165 ("Q. And you had a target for revenue, which is referred to in the last sentence there. Your target for April of '09 was $22-1/2 million; right? A. Yes. Q. And then in the beginning of the next paragraph, you say you didn't come close; right? The actual April of '09 revenue was only going to come in around $16 million. A. Yes. Q. So only about two-thirds of what you were hoping. A. That's true. Q. Now, that $6 million swing, that was important to Sigma at the time, wasn't it, sir? A. Very."), 2167-2168 ("Q. Now, let's go to the next page, page 5 of this document. Now, if I'm right, we're here in the beginning of May of '09, and things are bleak. You've just barely made your covenants at the end of '08. A. Uh-huh. Q. Prices have sharply eroded in '08 -- A. Yes. Q. -- right, sir? And the beginning of '09 isn't turning out to be any better; right? A. No. Q. In April, the critical month, you just missed your targets by a third; right, sir? A. Yes. Q. Now, April is also the same month that my client announced a huge list price decline on the medium and large-diameter fittings; right? A. Yes. Included that as well. Q. You mentioned that to the board. A. Yes. Q. That's a significant material event for the board, isn't it, sir? A. Yes. Q. And so you're getting hit not just with the double whammy of the decline in demand and the sharp erosion in prices, now you're getting hit with the triple whammy; right? A. Perfect storm. Q. Perfect storm. That's that movie where those three waves combine to make a gigantic wave and flood the boat -- A. Yes."); CX 214).

Response to Proposed Finding No. 541

The proposed finding is incorrect, unsupported by the cited testimony and misleading insofar as it states that "revenue was about two-thirds of what was needed to meet bank covenants." The cited testimony mentions only internal targets and actually notes that Sigma had been in compliance with its debt covenants. Complaint Counsel is aware of no evidence linking those targets to the debt covenants. Moreover, the weight of the evidence establishes that Sigma was actually ahead of its targets for the first quarter of 2009. (CX 0214 at 002 ("we closed Q1 close to or even slightly ahead of our targets")).

The proposed finding is also misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests that Sigma's financial position would have prevented it from entering the Domestic Fittings market. To the contrary, the weight of the evidence establishes that financial concerns did not prevent Sigma from entering the Domestic Fittings market – Sigma had access to sufficient financial resources to enable it to enter the production of Domestic Fittings, and Sigma's Board, investors, and lenders supported its plan to enter Domestic Fittings production. (CCPF 2282-2311). In fact, the proposed finding confirms that

Sigma was well aware of its debt prior to embarking on its plan to enter the Domestic Fittings market, but was undeterred – Sigma continued to implement its plan for domestic entry for months after CX 0214 was authored. (*See also* CCPF 2210-2311 (Sigma prepared and executed a viable plan for entry into the Domestic Fittings market); *infra* Response to Proposed Finding No. 558 (same)). **{**

} (Pais, Tr. 2206-2207, *in camera*; CX 1749 at 005, *in camera*). **{**

} (Pais, Tr. 2211, *in camera*; CX 1749 at 014, *in camera*). In addition to paying down a significant portion of its debt in 2009, Sigma acquired a portion of **{**

} which was approximately the same projected cost as Domestic Fittings entry; and elevated discussions about acquiring Star, which would have been significantly more expensive than domestic entry. (CCPF 2292, *in camera*; 2293, 2305, *in camera*).

542. 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. (Pais, Tr. 2184 ("Q. Understood. Did the banks ever authorize Sigma to exceed its capital expenditures limits -- A. No. Never. Q. -- to get into domestic production? A. No, they did not. Q. Did the board ever authorize the company to take money and put additional money into virtual domestic manufacturing beyond what had been incurred? A. No, they did not. Q. Did you have sufficient funds at the time to do that, sir, given the amount of debt the company had at the time? A. I wish we did. No. Q. The plan that I saw, the investigation, the exploration, and so forth, was going to take a certain amount of time if you'd had the money; right, sir? A. Yes.").).

Response to Proposed Finding No. 542

Complaint Counsel does not dispute that Mr. Pais made the statements attributed to him, but the proposed finding and cited testimony are misleading and contradicted by the weight of the evidence. The weight of the evidence, including contemporaneous documents and Mr. Pais's

own prior testimony, establishes that financial concerns did not prevent Sigma from entering the Domestic Fittings market. Sigma had access to sufficient financial resources to enable it to enter the production of Domestic Fittings, and Sigma's Board, investors, and lenders supported its plan to enter Domestic Fittings production. (CCPF 2282-2311). Sigma's Board of Directors and investors were kept apprised of Sigma's domestic production efforts and never told Mr. Pais or anyone at Sigma that they should not pursue domestic entry. To the contrary, Sigma Board member Mr. Florence (of Frontenac, one of Sigma's investors), wrote that domestic entry was Sigma's "#1a priority" – up until the moment that it signed the MDA. *See* CCPF 2176. Mr. Pais himself previously testified that Sigma would have been able to finance domestic entry if it had not entered the MDA with McWane. (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"); CCPF 2294).

543. Mr. Rybacki testified that 2009 was "a horrendous year" for Sigma. (Rybacki, Tr. 3663-3664, *in camera*† (†**{**

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Response to Proposed Finding No. 543

The proposed finding is vague, misleading, and contradicted by the weight of the evidence insofar as the proposed finding suggests that market conditions would have prevented it from entering the Domestic Fittings market. To the contrary, the weight of the evidence

establishes that market conditions did not prevent Sigma from entering the Domestic Fittings market – Sigma had access to sufficient financial resources to enable it to enter the production of Domestic Fittings, and Sigma's Board, investors, and lenders supported its plan to enter Domestic Fittings production, and in fact was driven in the direction of entry into the Domestic Fittings market by its assessment of market conditions. (CCPF 2209, 2282-2311). *See also* Response to Proposed Finding No. 541.

544. In 2009, Sigma was **{**

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Response to Proposed Finding No. 544

The proposed finding is vague, misleading, and contradicted by the weight of the evidence insofar as the proposed finding suggests that Sigma's financial position would have prevented it from entering the Domestic Fittings market. To the contrary, the weight of the evidence establishes that financial concerns did not prevent Sigma from entering the Domestic Fittings market. Sigma had access to sufficient financial resources to enable it to enter the production of Domestic Fittings, and Sigma's Board, investors, and lenders supported its plan to enter Domestic Fittings production. (CCPF 2282-2311). *See also* Response to Proposed Finding No. 541.

545. A significant portion of Sigma's **{**
} (Rybacki, Tr. 3672 in camera).

Response to Proposed Finding No. 545

The proposed finding is vague, misleading, and contradicted by the weight of the evidence insofar as the proposed finding suggests that Sigma's financial position would have prevented it from entering the Domestic Fittings market. To the contrary, the weight of the evidence establishes that financial concerns did not prevent Sigma from entering the Domestic Fittings market – Sigma had access to sufficient financial resources to enable it to enter the production of Domestic Fittings, and Sigma's Board, investors, and lenders supported its plan to enter Domestic Fittings production. (CCPF 2282-2311).

{ **}** (CX 1749 at 015, *in camera*). **{**

} (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)). In the summer of 2009, Sigma began discussions with Ares Capital about buying back its second-lien 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)).

Also, **{**

} (Pais, Tr. 2206-2207, *in camera*; CX 1749 at 005, *in camera*). **{**

} (Pais, Tr. 2211, *in camera*; CX 1749 at 014, *in camera*). **{**

} (CX 1740 at 015, *in camera*).

546. **{**

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Response to Proposed Finding No. 546

The proposed finding is vague, misleading, and contradicted by the weight of the evidence insofar as the proposed finding suggests that Sigma's financial position would have prevented it from entering the Domestic Fittings market. To the contrary, the weight of the evidence establishes that financial concerns did not prevent Sigma from entering the Domestic Fittings market – Sigma had access to sufficient financial resources to enable it to enter the production of Domestic Fittings, and Sigma's Board, investors, and lenders supported its plan to enter Domestic Fittings production. (CCPF 2282-2311; *see also supra* Response to Proposed Finding No. 545). *See also* Response to Proposed Finding Nos. 541, 545.

547. **{**
}(Rybacki, Tr. 3670 in camera {

}

Response to Proposed Finding No. 547

The proposed finding is vague, misleading, and contradicted by the weight of the evidence insofar as the proposed finding suggests that Sigma's financial position would have prevented it from entering the Domestic Fittings market. To the contrary, the weight of the

evidence establishes that financial concerns did not prevent Sigma from entering the Domestic Fittings market. Sigma had access to sufficient financial resources to enable it to enter the production of Domestic Fittings, and Sigma's Board, investors, and lenders supported its plan to enter Domestic Fittings production. (CCPF 2282-2311; *see also supra* Response to Proposed Finding No. 545).

548. In 2009, Sigma's **{**
}

Response to Proposed Finding No. 548

The proposed finding is vague, misleading, and contradicted by the weight of the evidence insofar as the proposed finding suggests that Sigma's financial position would have prevented it from entering the Domestic Fittings market. To the contrary, the weight of the evidence establishes that financial concerns did not prevent Sigma from entering the Domestic Fittings market – Sigma had access to sufficient financial resources to enable it to enter the production of Domestic Fittings, and Sigma's Board, investors, and lenders supported its plan to enter Domestic Fittings production. (CCPF 2282-2311; *see also supra* Response to Proposed Finding Nos. 541, 545).

549. As a result of the **{**

} (Rybacki, Tr. 3670-3671 in camera **{**

}

Response to Proposed Finding No. 549

The proposed finding is vague, misleading, and contradicted by the weight of the evidence insofar as the proposed finding suggests that **{**

} (CCPF 2282-2311; *see also supra* Response to Proposed Finding Nos. 541, 545).

550. The financial situation for Sigma {

} (Pais, Tr. 2199-2203, *in camera* (**{**

} RX 163 in camera).

Response to Proposed Finding No. 550

The proposed finding is vague, misleading, and contradicted by the weight of the evidence insofar as the proposed finding suggests that **{**

} (CCPF 2282-2311; *see also supra* Response to Proposed Finding No. 545). Moreover, **{**

} (CCPF 2209; RX-163 at 007; CX 1997 at 008, *in camera*).

551. †**{**

} (Pais, Tr. 2210, *in camera* **{(**

}

Response to Proposed Finding No. 551

The proposed finding is misleading, unsupported, and contradicted by the weight of the evidence, including contemporaneous documents and prior sworn testimony by Mr. Pais. There is no evidence cited to suggest that Sigma's plan for domestic entry was "high risk" or "uncertain," as posited by the proposed finding. The weight of the evidence establishes that

{

} (CCPF 2282-2311; *see also supra* Response to Proposed Finding No. 545).

Moreover, Frontenac viewed domestic entry as Sigma's "#1a priority." (CCPF 2176). Immediately after a meeting of the board in July 2009, Mr. Florence of Frontenac wrote that Frontenac and Sigma shareholders were prepared to invest $7.5 million to fund Domestic production. (CCPF 2295). Mr. Pais previously testified that 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*). Mr. Pais's assertion at trial that financing was unavailable, made for the first time in response to leading questions from Respondent's counsel, should be afforded no weight.

552. 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." (Pais, Tr. 1761-1762 ("Q. And you say -- you used the term "nominal." Can you tell me why you referred to this as a nominal offer? A. Yeah. Because after all our efforts to come to a more wholesome arrangement for a private label production, we got this offer, which was to just to let us have access to fittings without any real margins. Q. But you referred to it at the time as a patronizing accommodation. What did you mean by that? A. Well, we have to be aware these were all very stressful and somewhat emotional times, so a lot was said to reflect our, you know, feelings. But we felt, despite our lengthy discussions, what they offered was, as I call it, a nominal, you know, without any room for any margins for us to recover from this business. Q. Did Sigma accept this offer? A. No, we did not. Q. And what did you -- strike that. Were your instructions to your team instead to seriously go ahead with your SDP plans? A. Mr. Hassi, at that time, as I've repeatedly said, it was just not one or the other. There were no really good options. The SDP plans were a not very discrete or quantifiable effort. It was -- we were at the early stages. There were a lot of variables, a lot of uncertainties, so we naturally wanted to continue that effort because that is independent of anything else. So that effort was ongoing, and something 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. Q. And because they weren't keen to accommodate Sigma -- A. In private label, yes. Q. -- on private label, you asked your team to regroup and get serious and develop a thorough and detailed SDP plan? A. Yes. That need, that request, was ongoing. Because domestic manufacturing is a new activity for us, there were a lot of moving parts. It's a very daunting task, so the advice to our team to continue was ongoing.").).

Response to Proposed Finding No. 552

Complaint Counsel does not dispute that that Mr. Pais made the statements attributed to him. The proposed finding is misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests that, absent the MDA, Sigma would not have been a viable entrant into the Domestic Fittings market. (CCPF 2210-2311 (Sigma prepared and executed a viable plan for entry into the Domestic Fittings market); *infra* Response to Proposed Finding No. 558 (same); CCPF 2386-2393 (Sigma abandoned its Domestic Fittings production initiative as a result of the MDA)).

553. Although Sigma would have had to contract with at least three different domestic foundries to produce the range of approximately 730 different types of domestic Fittings it needed in order to become a viable domestic supplier, it had no contracts with domestic foundries as of September 2009. (Rona, Tr. 1672-1673 ("Q. And I believe you also testified that Sigma would have to contract with more than one foundry to make these 730 -- well, let me take that back because I'm not sure you testified to this. Is it true that Sigma would have to contract with more than one foundry to make these 730 different types of fittings? A. There was no

question that if we were going to develop the full range which was included in the 730 items that it would take -- you know, we had at least three foundries that we thought that would require. Q. And in September of 2009, at the time Sigma signed the MDA, Sigma had not entered into any contracts with domestic foundries to produce domestic fittings, had it? A. No.").).

Response to Proposed Finding No. 553

The proposed finding is incorrect, misleading, and unsupported by the cited testimony insofar as it suggests that Sigma needed to have advance "contracts" in place with foundries in order to proceed with its Domestic Fittings production plan. Only counsel for Respondent used the term "contract" and, in fact, contracts are not necessary for sourcing Domestic Fittings from independent foundries. **{**

} (Bhargava, Tr. 2935-2936, *in camera*; CX 2533 (Bhargava, Dep. at 55), *in camera*).

554. 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.").).

Response to Proposed Finding No. 554

The proposed finding is misleading and contradicted by the weight of evidence insofar as the proposed finding suggests that Sigma needed to have hundreds of Fittings patterns by September 2009 in order to be a viable domestic entrant. Mr. Bhattacharji, Sigma's Executive Vice President, testified that Sigma was ready to begin Domestic Fittings production as soon as the decision was made, or the "switch was flipped." CCPF (CX__ (Bhattacharji, Dep. at 54-55) ("We were more than brainstorming. We had identified the items. We had actual production drawings made for all of the items. We had given them out to pattern shops to quote. We had got back quotations from the pattern shops, what it would cost, how long it would take. We had seen what the pattern shops . . . . So in answer to your question, we were ready with what was needed once the switch was flipped.").

555. Mr. Rona testified that Sigma would have required at least 18 to 24 months lead time to begin production of a full range of Fittings, and approximately 6 months to produce even one fitting. (Rona, Tr. 1673 ("Q. And it takes many months to be build, test and -- build patterns and run samples and test the samples, doesn't it? A. As I stated earlier as well, it would have been a long process that would have rolled out. It was not like flipping a light switch and 730 items would have come out. It would have been a gradual increased program over 18 to 24 months to get to completion."), 1676-1677 (Q. And I believe you testified earlier today when you were examined by Mr. Hassi that you thought it would take six to eight months from the time you started to get the first few fittings up and out the door. Correct? A. 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. So one -- one -- the first fittings I think six to eight months as an estimate is a fair estimate, and then obviously every month you'd be getting more fittings every month. So once it started, you -- Q. All right. Now, you didn't have any pattern orders out in September of 2009, did you? A. That's correct. Q. All right. So if you were to have started in September of 2009, is it fair to say that you couldn't have even had the first fitting out the door until February or March, April, May? A. That's correct.").).

Response to Proposed Finding No. 555

The proposed finding is misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests that, absent the MDA, Sigma would not have been a viable entrant into the Domestic Fittings market. (CCPF 2210-2311 (Sigma prepared and

executed a viable plan for entry into the Domestic Fittings market); *infra* Response to Proposed Finding No. 558 (same); CCPF 2386-2393 (Sigma abandoned its Domestic Fittings production initiative as a result of the MDA)). The 18-month time frame in the cited testimony refers to the time Sigma projected it would need to develop stocking inventory of a full line of Fittings throughout the country. (CCPF 2228). The weight of the evidence establishes that, were it not for the MDA, Sigma would have begun competing in the Domestic Fittings market much more quickly than that – by February 2010. (CCPF 2221-2228).

556. Sigma's 18-24 month timetable would have been unworkable, given ARRA's short window of opportunity. (Rona, Tr. 1671, 1673).

Response to Proposed Finding No. 556

The proposed finding is unsupported by the cited testimony and misleading. Mr. Rona did not testify that Sigma's plan was "unworkable" given ARRA's timeframe. To the contrary, Mr. Rona testified that, although ARRA had a short window, he "knew that it probably would run later than whatever they said it would for the purpose of actually getting jobs let out." (Rona, Tr. 1670; *see also supra* Response to Finding No. 415 (Domestic Fittings suppliers were still competing for and shipping to ARRA projects as of May 2012)). Additionally, it would not have taken 18-24 months for Sigma to compete in the Domestic Fittings market; they could have begun selling Domestic Fittings by February 2010. (CCPF 2221-2228). Finally, the proposed finding is incomplete, misleading, and contradicted by the weight of the evidence insofar as the proposed finding suggests that Domestic Fittings demand, and the ARRA-related increase in Domestic Fittings demand, was limited to ARRA-funded projects. The weight of the evidence establishes that (1) Sigma and Star believed (correctly) in 2009 that Buy-American sentiment would extend beyond ARRA (*see* CCPF 1618-1627), (2) during ARRA, the Domestic Fittings market **{**

} (CCPF 1647-1654), and (3) post-ARRA, Domestic Fittings account for a higher proportion of the overall Fittings market than they did pre-ARRA (CCPF 1652, 1654). (*See also supra* Response to Proposed Finding No. 405, 406).

557. 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. (Pais, Tr. 2173-2175 ("Q. Now, complaint counsel asked you -- this is three months right after ARRA is passed; right, in May of 2009? A. Yes. Q. Mr. Hassi asked you a lot of questions about, well, did you explore domestic, and you said you explored it; right? A. Sure. Q. You investigated it? Yes? A. Yes. Q. You -- I think he showed you a model that Mr. Rona prepared. Sir, did you have a model? Modeling was done? A. Preliminary estimates, yes. Q. But ultimately, sir, the fact is, Sigma had no foundries in the middle of 2009. A. No. Q. No contracts with any foundries. A. None. Q. You had, if I understand it, a couple of patterns to make fittings out of the 700-plus that you needed to have a full line of fittings? A. Yes. That's what we borrowed from our Mexico supplier. Q. You had no core boxes? A. None. Q. You had no machining facilities? A. None at all. Q. What about coating, painting, lining? A. No. Q. No contracts to line up any of those at this point in the middle of 2009? A. No. Q. And ARRA is three months old, already into three months. Shovel-ready projects were necessary; right? A. Exactly. That's what was announced. Q. And it's going to expire nine months later; right? A. About a year. Yeah. Q. Yeah. Now, you had, as I understand it, two fittings, the judge asked you the other day, at the AWWA show which was a month after this, you had two fittings. A. Yes. Q. And they were not commercially ready to sell, they were just trial runs; right? A. Yes. Q. And in fact, he asked you, and I think you said you didn't even display those fittings at the show that year? A. No. Q. Even though you typically would display new products, or so forth, these were just not ready for prime time, were they, sir? A. Yes.").).

Response to Proposed Finding No. 557

The proposed finding is misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests that, absent the MDA, Sigma would not have been a viable entrant into the Domestic Fittings market. (CCPF 2210-2311 (Sigma prepared and executed a viable plan for entry into the Domestic Fittings market); *infra* Response to Proposed Finding No. 558 (same); CCPF 2386-2393 (Sigma abandoned its Domestic Fittings production initiative as a result of the MDA)). Sigma was ready to enter domestic production "once the switch was flipped." (CX 2523 (Bhattacharji, Dep. at 54-55)).

558. By September 2009, 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.").

Response to Proposed Finding No. 558

The proposed finding is misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests that, absent the MDA, Sigma would not have been a viable entrant into the Domestic Fittings market, or that, at the time it abandoned its Domestic Entry efforts it had not taken significant concrete steps toward entry. The proposed finding is also incorrect in stating that Sigma had not taken any concrete steps towards entry. For example, after engaging in strategic planning for domestic entry from February 2009 to May 2009, Sigma: identified a "critical mass" of roughly 700 configurations of Domestic Fittings it would need to produce, which could be produced with 400 different patterns; created a detailed cost analysis for producing these Fittings; identified, visited, and received price quotes from foundries capable of producing castings for Domestic Fittings for Sigma; and produced several sample or prototype Domestic Fittings. (CCPF 2218, 2224, 2227, 2232, 2235-2236, 2277; *see generally* CCPF 2210-2311 (Sigma prepared and executed a viable plan for entry into the Domestic Fittings market); CCPF 2386-2393 (Sigma abandoned its Domestic Fittings production initiative as a result of the MDA)).

559. Obtaining domestic fittings from McWane was one way Sigma could effectively supply domestic Fittings to its customers during ARRA's short time window. (Rona, Tr. 1481 ("Q. Did that -- did McWane -- well, backing up a second, was obtaining domestic fittings from

McWane an alternative that you -- that Sigma pursued in response to the ARRA in 2009? A. Yes."), 1671 ("Q. You personally didn't -- didn't know how much of ARRA was going to be spent on domestic waterworks fittings, did you? A. No. Q. And you had no basis to understand the volume of the domestic fittings market that would continue after ARRA expired, did you? A. No. Whatever -- whatever numbers we would have come up with at that time would have been our own internal calculations and estimations. Q. But you did know that time was of the essence if you were going to take advantage of the ARRA window; is that correct? A. For domestic fittings specifically associated with ARRA, we knew that it was not forever. Correct. Q. It was a very short time window. A. Short time, correct.").).

Response to Proposed Finding No. 559

The proposed finding is misleading insofar as it suggests that sourcing Domestic Fittings was Sigma's only Domestic entry option. When McWane first rejected Sigma's requests for private label Fittings, Sigma pursued independent domestic entry. (CCPF 2171-2209). The proposed finding is also incomplete, misleading, and contradicted by the weight of the evidence insofar as the proposed finding suggests that Domestic Fittings demand, and the ARRA-related increase in Domestic Fittings demand, was limited to ARRA-funded projects. The weight of the evidence establishes that (1) Sigma and Star believed (correctly) in 2009 that Buy-American sentiment would extend beyond ARRA (*see* CCPF 1618-1627), (2) during ARRA, the Domestic Fittings market **{**

} (CCPF 1647-1654), and (3) post-ARRA, Domestic Fittings account for a higher proportion of the overall Fittings market than they did pre-ARRA (CCPF 1652, 1654). (*See also supra* Response to Proposed Finding No. 405, 406).

560. The McWane MDA was Sigma's only viable option to service its customers. (Pais, Tr. 1800-1801 ("Mr. Hassi, you have to see the context of this. This is a very difficult time when the customers are looking to Sigma to come up with an option of a so-called domestic option from a company which had no domestic capability, and it was only mandated because the U.S. government forced it down to us overnight. And there was a lot of agitation by the customers as to what our options were. And we had finally found a recourse by going to our competitor because we thought that was the only option that was viable because the service of the customer was imminent. We were getting orders and requests, et cetera. There was no other option that we could – this is not a premeditated three or four-year plan that we had to enter a

new product. As such, I wanted to signify to them that we just didn't go running to our competitor, that we did try and we are a viable option."); CX 1166).

Response to Proposed Finding No. 560

The proposed finding is misleading and contradicted by the weight of the evidence, including the plain meaning of the language in the document Mr. Pais was explaining, which reads: "I wanted to convey that we did have a somewhat viable SDP option before we chose the MDA route." (CX 1166 at 001; CCPF 2210-2311 (Sigma prepared and executed a viable plan for entry into the Domestic Fittings market); *supra* Response to Proposed Finding No. 558 (same); CCPF 2386-2393 (Sigma abandoned its Domestic Fittings production initiative as a result of the MDA)).

561. Sigma approached McWane about the MDA and McWane supplying domestic fittings to Sigma. (JX 688 (Rona, IHT at 184-188 ("Q. Sir, let me show you a document that's marked Exhibit 243. Exhibit 243 is an e-mail that you wrote, sir, to Thomas Walton at McWane -- A. Okay. Q. -- dated July 4, 2009. Sir, is this the document -- is this the offer you were referring to? A. Yes. Q. Had you had any communications with anyone at McWane in between the time you sent this e-mail and the time that you had received the unacceptable offer in Exhibit 225? A. I probably spoke to someone from McWane, and I believe I spoke to Thomas that one time and -- I believe I spoke to Thomas and just generally, you know, probably discussed that we thought the 5 percent offer was unfair, or we didn't think it was fair, commensurate or whatever, and that, you know, we would hope that they would see some way to give us an improved offer. And he encouraged me to send them an offer. . . .Q. Do you remember, did you initiate that conversation or did Mr. Walton? A. I called him. Q. You called him. During that phone call, did you make -- did you make the point that McWane might need help meeting demand for ARRA projects and that SIGMA's distribution might be able to help McWane meet that demand? A. I don't recall if I said that in that conversation, but I know I discussed that later on with Rick."); JX 643 (Tatman, IHT at 149-150 ("Q After the ARRA was passed, did SIGMA approach Tyler Union for access to domestically produced fittings for SIGMA's use in ARRA-funded projects? A I'm thinking if you look at the time analogy, SIGMA approached us about selling them fittings for private label. Yes. They approached us after the ARRA Buy America provision came out, and they actually approached us prior to Star's announcement or our acknowledgement of Star having domestic fittings that we didn't know about until they showed it at the trade show. I think SIGMA came to us before we realized Star had a program.").)

Response to Proposed Finding No. 561

Complaint Counsel notes that there is no exhibit denominated "JX 688" or "JX 643."

The proposed finding is immaterial, vague, incomplete, and misleading. Although Sigma first

approached McWane about buying private label Domestic Fittings, McWane initially rejected those requests. The final MDA contained restrictions and competitive restraints required by McWane that Sigma preferred not to have. (CCPF 2417; CCPF 2363 ("I am deeply disturbed by some of the clauses."); CCPF 2364 (Sigma had concerns regarding the legality of certain MDA terms required by McWane); CCPF 2376 (Mr. Tatman asked Mr. Pais not to portray the MDA as having been proposed by McWane)). (*See also* CCPF 2379-2448 (describing anticompetitive terms and implementation of the MDA)).

562. Mr. Pais testified that the MDA did not hamper any domestic production effort of Sigma. (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.").).

Response to Proposed Finding No. 562

Complaint Counsel does not dispute that Mr. Pais testified as set forth in the citation to the proposed finding. However, the proposed finding and cited testimony are contradicted by the weight of the evidence, including contemporaneous documents, which establishes that: (1) the MDA supplanted Sigma's plans for domestic entry; (2) McWane told Sigma during negotiations that Sigma was expected "Not [to] introduce your own domestic product while the Master Distributorship is active;" (3) by its terms, the MDA forbade Sigma from establishing any supply of Domestic Fittings apart from McWane; and (4) Sigma executives believed that Sigma independently entering the Domestic Fittings market would be a breach of the MDA contract. (CCPF 2356-2357, 2379-2393).

563. †**{**

}† (Rybacki, Tr. 3672-3673 in camera (†**{**

}

Response to Proposed Finding No. 563

Complaint Counsel has no specific response other than to note that the proposed finding is immaterial and irrelevant and does not relate to the relevant market of Domestic Fittings.

564. Mr. Rybacki described Sigma's domestic restraints project as **{** **}** (Rybacki, Tr. 3672-3673 in camera).

Response to Proposed Finding No. 564

Complaint Counsel has no specific response other than to note that the proposed finding is immaterial and irrelevant and does not relate to the relevant market of Domestic Fittings.

565. Mr. Rybacki believed that it was inadvisable for Sigma to attempt to become a domestic Fittings supplier in 2009, because **{**

} 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.").).

Response to Proposed Finding No. 565

The proposed finding is misleading and irrelevant because Mr. Rybacki did not have responsibility for Sigma's supply chain or sourcing, and was not involved in Sigma's plan for Domestic Fittings entry. (CCPF 86, 92-93). Further, the weight of the evidence establishes that

any misgivings that Mr. Rybacki harbored regarding Domestic Fittings entry were not acted upon by Sigma, which was prepared to enter – and took numerous concrete steps to enter – the Domestic Fittings market had the MDA with McWane not been signed. (CCPF 2210-2311, 2379-2393).

566. The MDA did not eliminate a potential rival, as Sigma was not positioned to enter the domestic market in a timely manner during the ARRA period. (Normann, Tr. 4757-4759 ("Q. Dr. Normann, did you also reach summary conclusions about the Sigma allegations? A. Regarding the MDA, I did. Again, the MDA, in my opinion, I think there's clear procompetitive reasons for the MDA. If you can consider -- if you consider the situation at the time, the position that Sigma was in, for example, there were financial difficulties. ARRA was expected to be short-lived. You know, the -- the -- there was not necessarily huge returns to selling domestic product. But Sigma was in the situation where they clearly wanted to be a participant in domestic sales and potentially the ARRA money because they didn't know how big of an effect ARRA would have, so Sigma really -- they had essentially three choices: not to participate in the sales of domestic at all, try to independently enter, or enter as part of the MDA. And as of the time right before the MDA, Sigma was still clearly not well-positioned to enter. I think the testimony is that they had taken no concrete steps, they'd indicated to U.S. Pipe. So as of August-September they were not well-positioned to participate in domestic sales, so the MDA allowed them immediate access to the market beginning right after it was signed, so clearly for Sigma had procompetitive justifications.").

Response to Proposed Finding No. 566

Complaint Counsel notes that, contrary to this Court's Order, Respondent is improperly citing the testimony of an expert for a proposition of fact. Nor has the expert, Dr. Normann, conducted a study of Sigma's ability to enter the Domestic Fittings market in support of the proffered facts. For example, Dr. Normann reports no analysis of Sigma's financial records in his expert report. (*See* RX-712A (Normann Rep. at 48-51)). Moreover, the proposed finding is misleading and contradicted by the weight of the evidence. The weight of the evidence establishes that, absent the MDA, Sigma would have made a viable independent entry into the Domestic Fittings market. (CCPF 2210-2311 (Sigma prepared and executed a viable plan for entry into the Domestic Fittings market); *supra* Response to Proposed Finding No. 558 (same);

CCPF 2386-2393 (Sigma abandoned its Domestic Fittings production initiative as a result of the MDA)).

B. Dr. Schumann's Assumption That Sigma Would Have Become a Domestic Fittings Supplier Is Purely Hypothetical

567. Dr. Schumann did not make an independent determination that Sigma could have become a viable supplier of domestic Fittings; rather, he was merely asked by Complaint Counsel to make an unsupported assumption. (Schumann, Tr. 4473-4474 ("Q. You were asked by the lawyers to assume that Sigma would have entered but for the MDA. A. My assignment was to assume that but for the MDA Sigma would have entered, that is correct. Q. Let's be clear what that means. What that means is you didn't study and reach a conclusion in your report that Sigma had the financial ability to do that, did you, sir? A. I did not do that. … I didn't do a separate study."); Schumann, Tr. 4495 ("Q. Now we're getting to the rub of it, right, Dr. Schumann, because what you assumed was that they would have entered and their cost structure would have been such a level that they would have had product available that was efficiently made and would have been able to sell it at a price lower than the prevailing market price. Those are all the assumptions you actually -- A. Absolutely not. Q. No. Okay. Then tell us again. What assumption on cost did you make? A. I made an assumption that Sigma would have entered. Had Sigma entered, the -- the act of entering would have been selling output. Had Sigma sold output, it could only do so at the expense of one of its rivals. It could only do so by underbidding them. So when I start, as I was asked to, with the assumption that Sigma had entered the market, that it was selling fittings made in America, that would imply that, having sold those fittings, it was underbidding its competitors in one way or another, that price would have been lower and consumer welfare would have been higher., 4508 ("Q. Well, go back to my hypothetical. Let's assume that Sigma enters with inefficient manufacturing capacity and its products are very high-priced, but let's also assume that some people really like Sigma and they're willing to pay a little more for Sigma's fittings. Then your conclusion here is different, isn't it, sir? A. I haven't done that analysis. I simply assumed, as I was asked to, that Sigma would have entered. And I performed an analysis of the MDA under that assumption that but for the MDA Sigma would have entered.").).

Response to Proposed Finding No. 567

The proposed finding is immaterial, misleading, and contradicted by the weight of the evidence insofar as the proposed finding suggests that, absent the MDA, Sigma would not have become a viable supplier of Domestic Fittings. (CCPF 2210-2311 (Sigma prepared and executed a viable plan for entry into the Domestic Fittings market); *supra* Response to Proposed Finding No. 558 (same); CCPF 2386-2393 (Sigma abandoned its Domestic Fittings production initiative as a result of the MDA)).

XIX. The MDA had Procompetitive Benefits and was Limited in Time Scope and in its Terms

A. MDA Had Limited Scope

568. The MDA was a one-year agreement, terminable by either party with 180 days notice. (Rona, Tr. 1699-1700 ("Q. Isn't it true that Sigma originally asked McWane for a three-year term on the MDA? A. I believe at the time when the original offer was made, or counteroffer as it's been referred to, that we had -- we were seeking to have an agreement that would last for three years. That's what I recall. Q. And McWane said no and the MDA ultimately -- the term of the MDA was ultimately limited to a year; correct? A. That's what I recall. Q. And the MDA could be terminated at any time, but you had to give a hundred days -- 180 days notice; correct? A. That's what I understood."); CX 1194).

Response to Proposed Finding No. 568

Complaint Counsel has no specific response.

569. The MDA was in effect for less than a year, from September 2009 to August 2010. (JX 689 (Rona, Dep. at 303-304 ("Q. Okay. I'm going to show you a document that I've marked as CX 1435. It's an e-mail with an attachment you received on February 17th, 2010. I'm just going to ask you to identify it. A. Yes. Q. Is this an e-mail with an attachment that you received in the regular course of business? A. Yes. Q. Tell me what you understand it to be. A. As per the terms of our agreement with the MDA, McWane needed to give 180 days notice if they wanted to terminate the agreement, and this is the termination of the agreement."); CX 1435).).

Response to Proposed Finding No. 569

Complaint Counsel notes that there is no exhibit denominated "JX 689." The proposed finding is misleading because McWane formally terminated the MDA only after it received notice of the FTC investigation, and it continued to supply Sigma with Domestic Fittings for re-sale to Distributors after the MDA was terminated. (CCPF 2492-2496).

570. In accordance with the written terms of the MDA, Sigma was free to offer customers cash discounts, freight terms, or payments terms that it chose. (Tatman, Tr. 801-803 ("Q. Okay. Terri, that's on page 15. A. Now, what I can't tell you, because I'm not an attorney, the way that language is written, it says not a requirement but a suggestion, so you'll all have to figure out how that plays in the law. But let's just say that this is a suggestion here, because that's all I can understand here because I'm a simpleton. All this says is that over a quarter period, for the 5,000 line items that you're going to sell, that on a weighted average, the suggestion is for that to be within 98 percent of published. You could decide to sell one job at 20 percent off, but of all the thousands of jobs you have, it should come up to 98 percent. The other element that's critical here is this only has to do with published pricing. Sigma is allowed to give any rebate

that they want. They're allowed to give any cash discounts that they want. They're allowed to give any freight terms that they want or any payment terms that 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 percent rebate program." They have that flexibility in how they price this. All this is, again, get with the lawyers on whether it's a suggestion or a guideline, but under that 98 percent, on any job they can do whatever they want to, and that only affects how they have to 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. Q. Sir, going back to Exhibit A, did you have an understanding that this agreement with Sigma would terminate immediately if Sigma did not sell within 98 percent of the published as set out under Exhibit A? A. I've just told you I don't have an understanding of the legalese language of how that works. You're going to have to ask an attorney how that's written. Q. If you go back to pricing, paragraph d, about -- tell me when you're there. About two-thirds of the way down the paragraph, you see a sentence that reads, "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." Do you have an understanding of that? A. As I said before, I don't truly understand the difference between that and the suggestion up above. Ask a lawyer. 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. They can offer 20 percent 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 percent rebate if you do more than $200,000 worth of business. Most accounts don't do $200,000 worth of business for them, so that doesn't apply. They could offer no rebate to somebody. They could offer 10 -- if the guy 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 restriction on freight terms, cash discount terms, length of payment terms. Buy this domestic fitting from me at published pricing, and I'll give you a 30 percent discount off my import product. Complete flexibility here with what they do."); CX 1194).

Response to Proposed Finding No. 570

The proposed finding is misleading insofar as it suggests that Sigma was permitted to, intended to, or did offer cash discounts, freight terms, or payments terms when reselling McWane Domestic Fittings, because such secondary price terms are less significant than Project Pricing in day-to-day competition for Fittings business (*see* CCPF 549-561), and the effective restrictions on Project Pricing provided and implemented under the MDA (requiring Sigma to charge Distributors 98% (weighted average) of whatever McWane choose as the published price for Domestic Fittings) effectively eliminated meaningful price competition between Sigma and McWane in the Domestic Fittings market. (CCPF 2410-2434, 2475-2484).

571. 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. (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.").).).

Response to Proposed Finding No. 571

Complaint Counsel has no specific response, other than to note that there is no exhibit denominated "JX 689."

B. The MDA had Pro-Competitive Effects

1. The MDA expanded the customer base for McWane's domestic Fittings

572. Sigma was able to reach and service customers that McWane could not. (JX 643 (Tatman, IHT at 176-178); JX 642 (Page, Dep. at 61-63).).

Response to Proposed Finding No. 572

Complaint Counsel notes that there is no exhibit denominated "JX 643" or "JX 642." The proposed finding and the testimony cited in support are misleading and contradicted by the weight of the evidence insofar as they suggest that output of Domestic Fittings increased, or that the Domestic Fittings market was expanded, as a result of the MDA. The weight of the evidence, including contemporaneous documents, establishes that the MDA did not increase Domestic Fittings output or expand the market for Domestic Fittings. (CCPF 2449-2453; 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.")). The proposed finding is also misleading because, under the terms of the MDA, Sigma could not sell Domestic Fittings to Distributors that would otherwise not have access to McWane's Domestic Fittings pursuant to McWane's Exclusive Dealing Policy. (CCPF 2394-2399).

The proposed finding is also misleading, unsupported by the cited testimony and contradicted by the weight of the evidence insofar as the proposed finding suggests that, if McWane had remained the only manufacturer of Domestic Fittings, it would have been unable to supply Domestic Fittings directly to the Sigma customers in question. (CX 1182 at 002 (June 1, 2009 letter from Mr. Tatman to Mr. Rona regarding ACIPCO supply agreement, noting that McWane "ha[s] adequate distribution to service our other existing and potential customers" for Domestic Fittings); CX 2483 (Tatman, IHT at 177-178) (describing Sigma's primary added value only as "better relationship[s]" with some customers); CX 2482 (Page, Dep. at 61-63) (not addressing whether McWane would have been unable to sell directly to Sigma's customers in the absence of the MDA)).

The proposed finding is also misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests that McWane believed at the time that entering into the MDA with Sigma would enable it to reach additional customers. Contemporaneous documents show that McWane expressly observed that "having more Domestic suppliers doesn't really increase the size of the pie" (CCPF 2450 (Tatman July 21, 2009 email)), and McWane twice refused to sell Domestic Fittings to Sigma before finally entering into the MDA as a "choice of evils" when Sigma was poised for independent entry. (*E.g.* CCPF 2341).

Finally, the proposed finding is misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests that McWane had any material reason for entering the MDA with Sigma other than to prevent Sigma's independent entry into the Domestic Fittings market, to further impede Star's ongoing attempt at entry, and to retain Domestic Fittings sales and market power for itself, or that Sigma did not share McWane's goal of impeding Star's ongoing attempt at entry. (CCPF 2312-2335 (McWane entered into the MDA

with Sigma because McWane believed that Sigma would otherwise enter the Domestic Fittings market independently), 2454-2465 (McWane and Sigma entered into the MDA with specific intent of marginalizing Star and monopolizing the Domestic Fittings market)).

573. Sigma had relationships with certain distributors and in certain geographic areas that McWane lacked. (JX 642 (Page, Dep. at 69-73)).

Response to Proposed Finding No. 573

Complaint Counsel notes that there is no exhibit denominated "JX 642." The proposed finding is unsupported by the cited testimony, in which Mr. Page admits that he has no actual knowledge of the topic. (RX-642 (Page, Dep. at 71-73) ("I *don't have any firsthand knowledge*, but I'm making the *assumption* that those different groupings of customers exist in the fittings world. . . . I mean, it's all *hypothetical* in terms of I *don't know* what really happened.") (emphasis added)).

The proposed finding is also misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests (1) that output of Domestic Fittings increased, or that the Domestic Fittings market was expanded, as a result of the MDA, (2) that Sigma's customers would not have been able to obtain Domestic Fittings in the absence of the MDA, either through Sigma or directly from McWane, (3) that McWane believed at the time that entering into the MDA would enable it to reach additional customers, or (4) that McWane had any material reason for entering the MDA with Sigma other than to prevent Sigma's independent entry into the Domestic Fittings market, to further impede Star's ongoing attempt at entry, and to retain Domestic Fittings sales and market power for itself, or that Sigma did not share McWane's goal of impeding Star's ongoing attempt at entry. (*See supra* Response to Proposed Finding No. 572).

574. Mr. Rona testified that ACIPCO preferred to buy domestic Fittings from Sigma rather than McWane, because Sigma provided additional specialty services, including coatings, linings, taps and other add-ons, that ACIPCO felt McWane could not provide as effectively. (JX 688 (Rona, IHT 95-96)).

Response to Proposed Finding No. 574

Complaint Counsel notes that there is no exhibit denominated "JX 688." The proposed finding is misleading insofar as it suggests that the MDA related to McWane supplying Sigma with Domestic Fittings that would be resold to ACIPCO. On June 1, 2009, months before entering into the MDA, McWane had already agreed to provide Sigma with Domestic Fittings for resale to ACIPCO. (CX 1182 at 002 (McWane letter offering Sigma 5% discount from list price for Domestic Fittings "solely for resale" to ACIPCO)). Also, under the MDA, McWane did not allow Sigma to supply its Domestic Fittings to U.S. Pipe. (CCPF 2441-2448).

The proposed finding is also misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests (1) that Sigma's customers, and ACIPCO in particular, would not have been able to obtain Domestic Fittings in the absence of the MDA, either through Sigma, or directly from McWane, (2) that output of Domestic Fittings increased, or that the Domestic Fittings market was expanded, as a result of the MDA, (3) that McWane believed at the time that entering into the MDA would enable it to reach additional customers, or (4) that McWane had any material reason for entering the MDA with Sigma other than to prevent Sigma's independent entry into the Domestic Fittings market, to further impede Star's ongoing attempt at entry, and to retain Domestic Fittings sales and market power for itself, or that Sigma did not share McWane's goal of impeding Star's ongoing attempt at entry. (*See supra* Response to Proposed Finding No. 572). ACIPCO was an "extremely willing" partner that could have been "a very stable piece of the puzzle" supporting Sigma's independent entry. (CCPF 2279).

575. Consolidated Pipe also bought domestic Fittings from Sigma, a vendor they preferred, when they likely would not have bought from McWane. (JX 659 (Swalley, Dep. 275-276).).

Response to Proposed Finding No. 575

Complaint Counsel notes that there is no exhibit denominated "JX 659." The proposed finding is unsupported by the cited testimony. Nothing in the cited testimony indicates that Consolidated Pipe would not have bought Domestic Fittings from McWane, and in any event Mr. Swalley's testimony lacks foundation and is unreliable, because it is about a company other than his own and is not based on his personal first-hand knowledge. (*See* RX-659 (Swalley, Dep. at 275-276) (stating only that Consolidated Pipe was "not very excited about [McWane]," and also that "I don't know if we ever sat down point blank and talked about why" and "[I] might be overstating it.")). Distributors would have preferred true competition. (*See* RX 659 (Swalley, Dep. at 275-276); *see also* CCPF 2269-2274 (Sigma's customers supported its entry into the Domestic Fittings market, and Sigma provided assurances to customers); CCPF 1766-1771 (Star had the overwhelming support of its customer base); CCPF 2072-2074 (Distributors, 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)).

The proposed finding is also misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests (1) that output of Domestic Fittings increased, or the Domestic Fittings market was expanded, as a result of the MDA, (2) that Sigma's customers would not have been able to obtain Domestic Fittings in the absence of the MDA, either through Sigma or directly from McWane, (3) that McWane believed at the time that entering into the MDA with Sigma would enable it to reach additional customers, or (4) that McWane had any material reason for entering the MDA with Sigma other than to prevent Sigma's independent entry into the Domestic Fittings market, to further impede Star's ongoing attempt at entry, and to retain Domestic Fittings sales and market power for itself, or that Sigma did not share McWane's

goal of impeding Star's ongoing attempt at entry. (*See supra* Response to Proposed Finding No. 572).

576. Mr. Tatman testified regarding Sigma's established relationship with ACIPCO and fabricators such as Custom Fab:

> Well, if you look at this in practice, Sigma had a relationship with ACIPCO, American Case Iron Pipe. I did not. We did not want to get into the middle of that relationship. That was theirs. . . So they can resell our fittings to [ACIPCO], their customer, go, and other customers, including distributors. . . . And they can sell to fabricators. Fabricators are people like Custom Fab or other people that buy pipe and specialize and do special things to it. They can sell to there.

(Tatman, Tr. 797-798).

Response to Proposed Finding No. 576

The proposed finding is misleading insofar as it suggests that the MDA related to McWane supplying Sigma with Domestic Fittings that would be resold to ACIPCO. On June 1, 2009, months before entering into the MDA, McWane had already agreed to provide Sigma with Domestic Fittings for resale to ACIPCO. (CX 1182 at 002 (McWane letter offering Sigma 5% discount from list price for Domestic Fittings "solely for resale" to ACIPCO)). Also, under the MDA McWane did not allow Sigma to supply its Domestic Fittings to U.S. Pipe. (CCPF 2441-2448).

The proposed finding is also misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests (1) that output of Domestic Fittings increased, or the Domestic Fittings market was expanded, as a result of the MDA, (2) that Sigma's customers would not have been able to obtain Domestic Fittings in the absence of the MDA, either through Sigma or directly from McWane, (3) that McWane believed at the time that entering into the MDA with Sigma would enable it to reach additional customers, or (4) that McWane had any material reason for entering the MDA with Sigma other than to prevent Sigma's independent

entry into the Domestic Fittings market, to further impede Star's ongoing attempt at entry, and to retain Domestic Fittings sales and market power for itself, or that Sigma did not share McWane's goal of impeding Star's ongoing attempt at entry. (*See supra* Response to Proposed Finding No. 572).

2. The MDA resulted in improved customer service

577. 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 120-124, 133-134); JX 643 (Tatman, IHT at 176-177 ("Q Is eliminating that uncertainty just as an uncertainty, was that one of the purposes of the M.D.A. with SIGMA? A . . . . And for us, it was probably better when we think long-term to -- essentially all you have with doing business with SIGMA is they do provide some benefits that we don't have. They got regional distribution yards that we don't have. That's a benefit to customers that we don't have. They have some relationships out there with accounts that are much better than ours. That's a benefit to our customers. That's primarily what they bring to bear. They've got feet on the street there. Theoretically, if they are our master distributor and selling our product, they are at least going to be neutral on any future legislation for domestic-only specs. You would hope that they wouldn't fight it because that's not promoting or protecting your brand. You're at least going to have them be neutral. So those are benefits. . . .And since, by everybody else exiting the marketplace, I essentially -- volume comes from my base, right, and then we have customers that would value those regional distribution yards. We have customers that SIGMA has a better relationship than we did. Potentially that could -- volume could be sold from SIGMA versus Star being able to sell that volume. So it's all kind of protecting that volume scenario."); JX 688 (Rona, IHT at 176-178 ("Q. And why was that? A. . . . Now the ARRA comes, and there's an immediate demand for fittings. We felt, as a distributor for McWane, that we could take their production as they ramped up and help ourselves and in essence help the market and help them to distribute the fittings through our 14 locations nationwide. That, to us, we perceived as a value. Q. Did you make that argument to Rick Tatman at McWane as part of these negotiations? A. I don't exactly -- I mean, I'm not exactly sure if I specifically recanted (sic) those words, but I extolled the value that SIGMA would bring by the network, you know, meaning that was what we believed in, that we had the network of locations and that we could sell to them.").).

Response to Proposed Finding No. 577

Complaint Counsel notes that there is no exhibit denominated "JX 689," "JX 643" or "JX 688," and that pages 120-121 of Mr. Rona's deposition are not in evidence. The proposed finding is misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests (1) that output of Domestic Fittings increased, or the Domestic Fittings market

was expanded, as a result of the MDA, (2) that Sigma's customers would not have been able to obtain Domestic Fittings in the absence of the MDA, either through Sigma or directly from McWane, (3) that McWane believed at the time that entering into the MDA with Sigma would enable it to reach additional customers, or (4) that McWane had any material reason for entering the MDA with Sigma other than to prevent Sigma's independent entry into the Domestic Fittings market, to further impede Star's ongoing attempt at entry, and to retain Domestic Fittings sales and market power for itself, or that Sigma did not share McWane's goal of impeding Star's ongoing attempt at entry. (*See supra* Response to Proposed Finding No. 572).

578. Sigma's distribution centers were more strategically located for more efficient customer delivery than McWane's. (JX 689 (Rona, Dep. at 311-313 ("Q. You take great pride in your ability to service the customer, don't you? A. I would say that's correct. Q. And Sigma has regular customers that don't buy from McWane in the ordinary course -- during this 2008-2009 time frame; correct? A. I can't answer with specifics on a customer by customer basis, but I'm sure based on the number of customers in the country that there are some that buy from us that don't buy from McWane for whatever reason. Q. And your geographically disbursed distribution -- would it be a center? A. Logistic centers. Q. Logistic centers. You have more of those than McWane does, don't you? Q. Do you know? A. I know where Sigma's current locations are. I'm not totally clear on each and every one of McWane's fittings warehouse locations. And I believe we have more. Q. You believe that your distribution systems are better than McWane's? A. I think that our distribution facilities are more strategically located to the customers in the market.") (objections omitted).).).

Response to Proposed Finding No. 578

Complaint Counsel notes that there is no exhibit denominated "JX 689." The proposed finding is unsupported by the cited testimony, which lacks foundation and is unreliable. The cited passage includes Mr. Rona's own acknowledgement "I can't answer with specifics," and "I'm not totally clear on each and every one of McWane's fittings warehouse locations," and Mr. Rona makes no mention of comparative efficiency of Sigma and McWane. (RX-689 (Rona, Dep. at 311-313). The cited testimony merely reflects the witness's confidence in the company for which he works.

The proposed finding is also misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests (1) that output of Domestic Fittings increased, or the Domestic Fittings market was expanded, as a result of the MDA, (2) that Sigma's customers would not have been able to obtain Domestic Fittings in the absence of the MDA, either through Sigma or directly from McWane, (3) that McWane believed at the time that entering into the MDA with Sigma would enable it to reach additional customers, or (4) that McWane had any material reason for entering the MDA with Sigma other than to prevent Sigma's independent entry into the Domestic Fittings market, to further impede Star's ongoing attempt at entry, and to retain Domestic Fittings sales and market power for itself, or that Sigma did not share McWane's goal of impeding Star's ongoing attempt at entry. (*See supra* Response to Proposed Finding No. 572).

579. ACIPCO benefitted logistically from buying McWane domestic Fittings from Sigma, rather than McWane, and found the pricing to be competitive. (JX 646 (Burns, Dep. 139-140 ("Q. Were you concerned when you learned of the MDA that it would give McWane too much control over your costs? A. Concern may be may be too strong. I thought there was -- you know, I was interested to see how this all would play out; you know, how McWane and Sigma were going to work together. I don't think I was that concerned -- or recall being that concerned. Q. How has that arrangement worked out for ACIPCO? A. It's worked out okay. As I mentioned before, I have always complained about the pricing. I think we should get the best price in the industry from everybody. So -- but it's -- you know, frankly speaking, working with Sigma has helped us because they apparently buy domestic fittings from McWane. They have a stock of those. And as far as the logistical aspects, it has really worked out well for us; and the pricing, I feel like has been competitive.)", 175 ("Q. So would you say that the MDA between McWane and Sigma was beneficial to ACIPCO? A. Yes, sir. Q. And it provided ACIPCO competitive pricing? A. In general, yes.") (objections omitted).).).

Response to Proposed Finding No. 579

Complaint Counsel notes that there is no exhibit denominated "JX 646," and that portions of the cited and excerpted testimony from Mr. Burns's deposition are not in evidence. The proposed finding is misleading insofar as it suggests that the MDA related to McWane supplying Sigma with Domestic Fittings that would be resold to ACIPCO. On June 1, 2009, months before

entering into the MDA, McWane had already agreed to provide Sigma with Domestic Fittings for resale to ACIPCO. (CX 1182 at 002 (McWane letter offering Sigma 5% discount from list price for Domestic Fittings "solely for resale" to ACIPCO)). Also, under the MDA McWane did not allow Sigma to supply its Domestic Fittings to U.S. Pipe. (CCPF 2441-2448).

The proposed finding is also misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests (1) that output of Domestic Fittings increased, or the Domestic Fittings market was expanded, as a result of the MDA, (2) that Sigma's customers would not have been able to obtain Domestic Fittings in the absence of the MDA, either through Sigma or directly from McWane, (3) that McWane believed at the time that entering into the MDA with Sigma would enable it to reach additional customers, or (4) that McWane had any material reason for entering the MDA with Sigma other than to prevent Sigma's independent entry into the Domestic Fittings market, to further impede Star's ongoing attempt at entry, and to retain Domestic Fittings sales and market power for itself, or that Sigma did not share McWane's goal of impeding Star's ongoing attempt at entry. (*See supra* Response to Proposed Finding No. 572).

580. Mr. Groeniger testified that his firm preferred buying domestic Fittings from Sigma, because he preferred Sigma's service to both Star and McWane. (JX 669 (Groeniger, Dep. 87-88 ("Q. Yes, sir. What are the ramifications that you were concerned about that you testified earlier that are embodied in Exhibit 2? A. Well, at first appearance this didn't seem like a major threat, mainly because the word SIGMA was involved. SIGMA was our prime supplier of foreign product, but understanding that they were now part of this domestic application, we felt that SIGMA's support, SIGMA's service would now reflect a domestic forehand, that we really did not need Tyler. And going through the hoops and jangles, the policemen looking over our fences, taking pictures of what we did, we could simply buy the Tyler from SIGMA which was potentially great for us. Because SIGMA had the best service, service, service by far, not even close. Better than Star, much better than Tyler. So we felt, we didn't -- if this was as it was on the face of the letter, I could have lived with it. Didn't turn out to be that way, but as this letter here shows, I felt confident that we were, that we would be able to supply through SIGMA and everything was going to be the same format.").).).

Response to Proposed Finding No. 580

Complaint Counsel notes that there is no exhibit denominated "JX 669." The proposed finding is misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests (1) that output of Domestic Fittings increased, or the Domestic Fittings market was expanded, as a result of the MDA, (2) that Sigma's customers would not have been able to obtain Domestic Fittings in the absence of the MDA, either through Sigma or directly from McWane, (3) that McWane believed at the time that entering into the MDA with Sigma would enable it to reach additional customers, or (4) that McWane had any material reason for entering the MDA with Sigma other than to prevent Sigma's independent entry into the Domestic Fittings market, to further impede Star's ongoing attempt at entry, and to retain Domestic Fittings sales and market power for itself, or that Sigma did not share McWane's goal of impeding Star's ongoing attempt at entry. (*See supra* Response to Proposed Finding No. 572).

581. Mr. Prescott testified that distributor Everett J. Prescott preferred to buy domestic Fittings from Sigma when it was concurrently ordering non-domestic Fittings, because Sigma was its preferred non-domestic supplier and it could efficiently round out blended orders. (JX 661 (Prescott, Dep. 35-36 (Q. Is it fair to say that you benefited from Sigma having a master distributorship agreement with McWane? A. The -- the benefit is -- the benefit from us buying from Sigma was we bought a hundred percent domestic came from Tyler, or Sigma, because they were all the same fitting, as you know. We bought most of them from Tyler, but when we were short on foreign, in other words we -- we needed to fill out a load, became very convenient to -- to -- to fill out that shipment because we could get domestic and they were the same. Do you follow? Q. I think so. So, it was beneficial to be able to get fittings from Sigma to fill out orders, correct? A. To fill out an order. The majority came from Tyler direct, but to fill out an order we would do that, yes."), 122-123 ("Q. Yeah, you can just leave it right there. Earlier you stated that you are -- you are currently not purchasing domestic fittings from Star; is that correct? A. Right. Q. Why not? A. I -- I just think because we're so used to Tyler, and they are getting back on track, and it is a good -- you know, it is a good fitting, and I can't -- I can't see the -- the advantage of it. And this -- you know, everything has been kind of resolved, and -- and we're over the hump of this, and that -- you know, that ARRA caused us a lot more trouble than these fittings, you know, as time and effort and everything, so I -- we just haven't done it. We haven't talked about doing it, and -- and to be perfectly honest with you we was hoping that that deal with Sigma lasted so that we could do that, you know. Q. You could fill your trucks? A. Yeah, and so it was convenient in -- in both ways, so.").).).

Response to Proposed Finding No. 581

Complaint Counsel notes that there is no exhibit denominated "JX 661." The proposed finding is misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests (1) that output of Domestic Fittings increased, or the Domestic Fittings market was expanded, as a result of the MDA, (2) that Sigma's customers would not have been able to obtain Domestic Fittings in the absence of the MDA, either through Sigma or directly from McWane, (3) that McWane believed at the time that entering into the MDA with Sigma would enable it to reach additional customers, or (4) that McWane had any material reason for entering the MDA with Sigma other than to prevent Sigma's independent entry into the Domestic Fittings market, to further impede Star's ongoing attempt at entry, and to retain Domestic Fittings sales and market power for itself, or that Sigma did not share McWane's goal of impeding Star's ongoing attempt at entry. (*See supra* Response to Proposed Finding No. 572).

582. There is no evidence that Sigma intended to install McWane as a domestic Fittings monopoly. (JX 688 (Rona, IHT at 187-188 ("Q. Was there ever a concern discussed by you or Rick Tatman that if Star Pipe entered domestic production with its service it may be able to gain significant market share from McWane and that having a joint venture between SIGMA and McWane would help McWane prevent that from happening? Did you ever discuss that? A. That, no. Q. Did you discuss anything similar to that? A. We certainly discussed that I thought that we would be able to extend their brand, make it available, and that obviously with customers having an interest in fulfilling the requirements under the MDA that we would, you know, certainly be able to facilitate that and be a good master distributor for them."); 218-220 ("Was the MDA designed to allow SIGMA to compete effectively against Star Pipe on the domestic side? A. In my opinion, the MDA was designed so that we would get access to domestic fittings so that we could sell the immediate need for customers. The alternative was -- from Exhibit 240 was not viable. And I think from SIGMA's -- from my perspective with SIGMA, we -- I was concerned in my initial thinking that not anyone -- manufacturers, but distributors would have a fear or feel that they had to make choices because they needed to get domestic fittings. So without domestic fittings we might lose business not because of any other reason other than the distributor would be -- feel maybe an obligation to McWane or anyone who could supply them fittings. And as a result for us, we felt, I felt, we needed to have domestic fittings so that people could feel free to assure to give us the business, other business they had already been giving us. And when jobs were changing overnight from jobs that had been previously quoted foreign and now they require domestic, and then we don't have that and they give the order to somebody else, whether it be Star or McWane, and we don't have anything to offer, well, while you're filling up the truck, why don't you give us, you know, 5,000 pounds of restraints, too. That was going to be

a SIGMA order. So I think -- I felt that distribution felt that we needed to show up in order for them to feel reliable to buy the other stuff that they historically bought from us. Having domestic fittings for us was not about worrying about whom else, just we needed to have them.").).).

Response to Proposed Finding No. 582

Complaint Counsel notes that there is no exhibit denominated "JX 688." The proposed finding is misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests that Sigma did not share McWane's goal of impeding Star's ongoing attempt at entry. (*See* CCPF 2454-2458; *supra* Response to Proposed Finding No. 572).

583. Sigma's focus in signing the MDA was on keeping its customers happy and providing domestic Fittings to those customers when needed. (JX 689 (Rona, Dep. at 240 ("A. From my perspective, I was focusing and telling McWane, Sigma needs to do something. I mean, they were probably clear, all the little things that were going on with the waivers, and they probably knew, you know, information gets around. I was focused on the fact that I said we absolutely need to do something, and, obviously, if we don't get this, we'll do something else. And I don't think that that -- that was how I was playing it. Q. And I understand that you believe that Sigma needed to be in this market one way or another; correct? A. Correct."); JX 688 (Rona, IHT at 218-220).).

Response to Proposed Finding No. 583

Complaint Counsel notes that there is no exhibit denominated "JX 689" or "JX 688." The proposed finding is misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests that Sigma did not share McWane's goal of impeding Star's ongoing attempt at entry. (*See* CCPF 2454-2458; *supra* Response to Proposed Finding No. 572).

584. Sigma perceived that if it was unable to supply domestic Fittings to its customers, it might also lose some portion of its non-domestic business with those customers. (JX 689 (Rona, Dep. at 118-120 ("Q. If Sigma did not have domestic fittings, would that be a problem for Sigma's customers? A. I perceived that without domestic fittings, that it could hurt our other fitting or our other products' business. Q. Explain to me why you felt that way. A. The ARRA period was a very volatile time in a down economy, and if people call you and say do you have any fittings for this, no, I don't have any fittings for that job. The same customers were buying domestic fittings, other fittings, accessories or restraint products, manholes, and people could potentially forget about you. And as a result, I felt that it was important that we offer a solution to people that they would not forget about us, so I thought it was critical for us. Q. If your customers were required to turn to McWane or Star for domestic fittings, they might also purchase their imported fittings from them; correct? A. Some customers might choose one-stop shop, some customers might not, but it -- yes. Q. That was a risk presented to Sigma? A. That

would be a risk. Q. And one of the advantages of entering into the master distributor agreement was it resolved that risk? A. Entering into the master distribution agreement with McWane was a solution to the problem we had. Q. It enabled you to handle all of your customers needs; correct? A. It didn't close doors that I felt might possibly get closed.") (objection omitted)); JX 688 (Rona, IHT at 218-220).).

Response to Proposed Finding No. 584

Complaint Counsel has no specific response, other than to note that there is no exhibit denominated "JX 689" or "JX 688," and that page 120 of Mr. Rona's deposition is not in evidence. (*See also* CCPF 1639-1646 (Sigma and Star were concerned that ARRA's requirement for Domestic Fittings would also result in the loss of non-Domestic Fittings business)).

XX. Complaint Counsel Has Not Established Consumer Injury

A. Non-domestic Fittings

585. Complaint Counsel failed to offer any evidence that any fittings customer complained that the prices for McWane, Sigma, or Star's non-domestic fittings were too high during the alleged conspiracy.

Response to Proposed Finding No. 585

The proposed finding is immaterial and irrelevant insofar as it erroneously suggests that Complaint Counsel is required to make a showing of individualized consumer harm. The proposed finding is also misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests that Complaint Counsel has not established harm to competition. (CCPF 1041-1054, 1338-1435, 2068-2166, 2410-2434, 2466-2491).

586. Complaint Counsel failed to offer any evidence that consumers were forced to pay supra-competitive prices for McWane, Sigma, or Star's non-domestic fittings during the alleged conspiracy.

Response to Proposed Finding No. 586

The proposed finding is immaterial and irrelevant insofar as in erroneously suggests that Complaint Counsel is required to make a showing of supra-competitive prices in connection with

its *per se* claim of a price fixing conspiracy. The proposed finding is also misleading and contradicted by the weight of the evidence, which establishes that 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 than would have existed absent the conspiracy, and improved financial performance by the suppliers. (*See* CCPF 1041-1054, 1338-1435).

2. McWane's non-domestic Fittings prices did not even keep pace with inflation in 2008-2010

587. Dr. Normann observed that McWane's non-domestic Fittings prices declined while its costs increased. (Normann, Tr. 4791-4792 ("Q. Now, did you find that McWane's raw materials costs were declining at the same steep rate as the decline in its prices? A. No. No. You know, I've said this. We'll see this in a later figure. Their costs were going up dramatically. It wasn't just McWane's. It was McWane's. It was Sigma's. It was Star's. The costs were going up dramatically. I mean, it's really -- it's very stark. They go up -- you know, essentially they almost double over the relevant time period. Q. And did you plot that out in preparing your opinion and report in this case? A. I did. Q. And is that in figure 2 of your report? A. Well, I believe it's figure 2B, so not in this figure, but there's a figure 2B. Q. All right. Now, just so we're clear on the record, by the way, on this decline in McWane's nondomestic fittings price index, what's the magnitude of that decline in prices that you found? A. 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.").).

Response to Proposed Finding No. 587

The proposed finding and testimony cited in support are vague as to time, and are unsupported, misleading, and contradicted by the weight of the evidence.

First, the proposed finding is unsupported because the underlying pricing analysis and opinions of Dr. Normann are flawed and unreliable. (*See* CCPF 1424-1435; *supra* Response to Proposed Finding No. 189).

Second, the proposed finding is misleading insofar as it suggests that **{**

}. (*See* CX 2416 at 035, 043, *in camera* (**{** **}**); *supra* Response to Proposed Finding No. 25). Even Dr. Normann's agrees that McWane's Fittings prices increased during the period in

which the conspiracy was effective, from February 2008 through October 2008. (Normann, Tr. 5782, *in camera* (**{**

}).

Third, the proposed finding is incomplete, misleading, and contradicted by the weight of the evidence insofar as the proposed finding suggests that **{**

}. (*See supra* Response to Proposed Finding No. 146 (**{** **}**); CCPF 1343-1359 (same)).

Fourth, the proposed finding is unsupported and misleading insofar as it relies on Dr. Normann's calculation of McWane's increase in total costs. Dr. Normann did not report measures of total costs. The Metal and Energy Costs Index depicted in Figure 2B of Dr. Normann's report does not identify which costs are included in the index, but its name suggests that the index does not include all costs of production, including, *e.g.*, labor and administrative costs. (*See* RX-712B (Normann Rep. at 13)). Without full cost information, one cannot conclude that McWane's total or variable costs increased, or if so, to what extent. Further, the proposed finding is vague and therefore unreliable, as it does not distinguish between cost increases McWane experienced for overseas production as compared to cost increases for production in the United States.

588. Dr. Normann concluded that McWane's falling prices in the face of rising costs was inconsistent with allegations of anticompetitive price increases. (Normann, Tr. 4796-4797 ("Q. Now, is there a conclusion you can draw from the fact that McWane's prices declined and its costs are going up? A. I think -- well, I think there's a few conclusions. Number one, obviously it's very inconsistent with allegations of anticompetitive price increases. I think what's also interesting is that if you recall, you know, when we looked at the first figure, McWane was lowering their published multipliers. You know, they want to capture share, so they were being very competitive on their pricing. You remember -- I think there's been testimony about Sigma

and Star initiated or they had announced price increases. I think maybe it was Sigma first. McWane didn't follow. You know, McWane was doing their own independent pricing. They were lowering their published multipliers. Mr. Tatman has testified that they were trying to capture volume. His main concern was to push volume. Remember, in 2008 -- and I mean, I -- I shouldn't chuckle or anything. Remember what's going on in 2008. McWane was forced to close down one of their last two facilities in the United States. They had to shutter their plant because it was so unprofitable and there was so much competition going on. McWane was in a situation where they wanted to push volume both from their domestic product going into domestic and also imports but also from Xian Xian, so they were trying to push volume. This to me is behavior consistent with aggressive independent pricing.").).

Response to Proposed Finding No. 588

The proposed finding is vague as to time, and incomplete, unsupported, misleading, and contradicted by the weight of the evidence for the reasons set forth above in Response to Proposed Finding No. 587.

589. Dr. Schumann testified that he performed no independent analysis of McWane, Sigma, and Star' job pricing in formulating his opinions in this case. (Schumann, Tr. 4070 ("Q. You did not do any independent measurement of any curtailment of project pricing in forming your opinions in this case, did you, sir? A. No, I did not. Q. And you didn't present any numbers to the court in your testimony; correct, sir? A. That is correct. Q. In fact, you didn't measure anywhere, in any of the work you did in this case, any actual amount of job pricing in any particular year; correct? A. That is correct.").).

Response to Proposed Finding No. 589

The proposed finding is incomplete and misleading, and contradicted by the weight of the evidence, for the reasons set forth below in Response to Proposed Finding Nos. 591 and 592.

590. Dr. Schumann performed no regression analysis, or any other type of quantifiable analysis, of any of McWane, Sigma, or Star's pricing data, including actual invoice prices paid by their respective customers. (Schumann, Tr. 4076-4077 ("Q. And you as all part of your work in the case that the judge asked about when you took the -- you know, before my exam started, in all your work, you didn't test, by measuring actual job pricing, whether that appearance was reality or not, did you? A. No. I did not have the data to do that."), 4364 ("Q. I don't want to split hairs, Dr. Schumann, but I want to be clear. There's no quantification at all in your report of any reduction in job pricing, regression analysis or any other type of quantification; correct? A. There's nothing that I did up -- I reference -- well, for example, in the first quarter report. There's also the variance reports. There -- but no, I did not perform regression analysis. I did not perform statistical analysis.").).

Response to Proposed Finding No. 590

The proposed finding is incomplete and misleading, and contradicted by the weight of the evidence, for the reasons set forth below in response to Proposed Finding No. 591.

591. Dr. Schumann did not analyze any of the McWane, Sigma, and Star's actual invoice prices, study the job prices charged by McWane, Sigma, or Star in 2008, or otherwise quantify any alleged curtailment of job pricing in 2008. (Schumann, Tr. 4070, 4076-4077, 4142-4145 ("Q. And nowhere in your report do you analyze and report invoice prices for McWane or Sigma or Star; correct? A. That is correct. . . . Q. Dr. Schumann, I want to be clear about this. The invoice data, that's the job price; right? That's the effective multiplier that the companies charge when they sell product; right? A. Yes. Q. And that invoice data does not reflect, in a way that you categorized, rebates, freight absorption, cash discounts or extension of credit terms or other discounts below the job price; correct? A. That is correct, yes, though -- Q. Go ahead, sir. A. Well, yeah, that is correct. It does not reflect that. Q. And one of the reasons you chose not to use the invoice data to determine whether or not there was collusive pricing was because there were too many of those other discounts; right? A. We didn't -- no. No. I mean, we couldn't link -- like rebates, we couldn't link rebates to specific sales. We couldn't look at a fitting that had a list price, that had a multiplier or implicit multiplier and -- and have any way of linking a rebate to that or a freight discount or a cash discount. But, you know, that was one part of the issue."), 4149 ("Q. Dr. Schumann, there were price concessions, rebates, credit extension terms, freight absorption, cash discounts, price concessions that weren't in the invoice data; right, sir? A. That is my understanding. Q. And one of the reasons you chose not to use the invoice data to determine and analyze whether or not there was a collusive behavior here was because there were price concessions that were not in that data; correct, sir? A. That was one of the three reasons. It really wasn't necessarily the most important. I mean, there were like agreements for rebates and things like that, but yes, that was a problem we had with the data."), 4153 (Q. So you don't report any actual invoice prices, you don't report any actual transaction prices that were paid by customers in your report; correct? A. We do not. We don't have transaction prices. I did not report invoice prices. Q. And you didn't create a but-for world where you report out what you believe the prices would have been for either invoice or transaction; correct, sir? A. Without having in -- transaction prices, we couldn't have even started to do that. But with the invoice data that we had, we could not construct a but-for world. And I mean, the data wasn't appropriate for that. It would have -- no. So I did not do it.").)

Response to Proposed Finding No. 591

The proposed finding is incomplete and misleading, and contradicted by the weight of the evidence. Contrary to the proposed finding, Dr. Schumann did analyze McWane's, Sigma's, and Star's invoice data and determined the data was not useful for econometric analysis. As Dr. Schumann reported in his Rebuttal Report, he had access to the pricing data and decided not to

use it because "the data suffer from serious flaws that render them uninformative and not meaningful." (CX 2265-A (Schumann Rebuttal Rep. at 9); *see also* Schumann, Tr. 3775-3779).

The proposed finding is also misleading insofar as it suggests that Dr. Schumann did not study Project Pricing spreadsheets. Dr. Schumann testified that he did review Star's analysis, which showed that the number of requests for Project Pricing was substantially lower in 2008 than it was in 2007. (*See* Schumann, Tr. 3844: "Q. Are you also familiar with a Star analysis of the number of requests for project pricing in 2007 versus 2008? A. Yes, I am. Q. Could you tell us about that briefly. A. Just that the number of requests for project pricing in 2008 was substantially below -- or it was below the levels of 2007."). Dr. Schumann also testified that he "looked at a lot of spreadsheets and a lot of things like this." (Schumann, Tr. 4085). Dr. Schumann also noted in his testimony that many documents he saw were produced multiple times with different Bates numbers on them and that he may have reviewed the spreadsheets that Respondent's Counsel asked him about under a different Bates stamp. (Schumann, Tr. 4085-4086; *see supra* Response to Proposed Finding No. 182).

Finally, the proposed finding is also misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests that the Fittings suppliers did not curtail Project Pricing during 2008. Any such suggestion is contradicted by the weight of the evidence, including **{**

}. (*See infra* Response to Proposed Finding No. 145; CCPF 1043-1047 (**{** **}**); *see also* 950-970 (Sigma curtailed Project Pricing); 971-1014, 1410-1423 (Star curtailed Project Pricing); CCPF 1054, 1339 (McWane observed reduced Project Pricing in the marketplace)).

592. Dr. Schumann's opinion that job discounting declined is based on Mr. Tatman's speculation in a draft internal report (which Dr. Schumann misquoted) that it "appears" that Sigma and Star have reduced job pricing. (CX 1177.)

Response to Proposed Finding No. 592

The proposed finding is misleading and contradicted by the weight of the evidence. First, the finding is misleading insofar as it suggests that Dr. Schumann's opinion that Project Pricing declined was solely based on CX 1177. Dr. Schumann opinion was also based on other documents and testimony, including:

> CX 0622 (a McWane document titled "2009 Sales Meeting") (*see* CX 2260-A (Schumann Rep. at 44, 108) (CX 0622 is Bates-labeled TU-FTC-0011111, which appears in Dr. Schumann's list of materials considered); *see also infra* Proposed Finding No. 596);
>
> CX 0752 (an email of Minamyer at Star dated Jan. 22, 2008, instructing Star sales staff to stop Project pricing) (*see* CX 2260-A (Schumann Rep. at 44 & n.119) (CX 0752 is Bates-labeled EXP0004665));
>
> CX 0848 (a Star email dated Feb. 7, 2008 circulating Sigma's multiplier increase letter) (*see* CX 2260-A (Schumann Rep. at 44 & n.119) (CX 0848 is Bates-labeled SPP009151));
>
> CX 1145 (a Sigma email dated Jan. 24, 2008) (*see* CX 2260-A (Schumann Rep. at 44 & n.119) (CX 1145 is Bates-labeled SIG-0058464));
>
> CX 2300/CX 0043 (a Star Feb. 2, 2008 email showing communication with TDG) (*see* CX 2260 (Schumann Rep. at 44 & n.119), *in camera*) (CX 0043 is Bates-labeled MESP0009348 but is not in evidence and is a duplicate of CX 2300));
>
> CX 0178 (a McWane email dated Jan. 31, 2008, including Star's communication with HD Supply) (*see* CX 2260-A (Schumann Rep. at 44 & n.119) (CX 0178 is Bates-labeled TU-FTC-0261470)).

Dr. Schumann also testified that he reviewed Star's analysis, which showed that the number of requests for Project Pricing was substantially lower in 2008 than it was in 2007. (*See* Schumann, Tr. 3844).

Second, the proposed finding is misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests that Mr. Tatman's statement in CX 1177 "the level of multiplier discounting by both Star and Sigma appears to have died down significantly" is mere speculation. Mr. Tatman testified that this Executive Report for 1st Quarter 2008 was based on the best information that he had available to him at the time, and went to his bosses, thereby indicating its reliability. (*See* Tatman, Tr. 1063 (discussing CX 1564, which is an email dated Apr. 16, 2008 and sent by Mr. Tatman to his bosses Thomas Walton and Leon McCullough and contains a duplicate of CX 1177)).

The proposed finding is also misleading because Dr. Schumann did not misquote CX 1177 in his expert report. (*See* CX 2260-A (Schumann Rep. at 44 n.121) (containing an accurate quote from CX 1177: "appears to have died down significantly")). Respondent's sole basis for this claim is a demonstrative PowerPoint that is not evidence. (Schumann, Tr. 4071). Also, the proposed finding is misleading and unsupported insofar as it suggests that CX 1177 is a draft document. The citations provided in the proposed finding by Respondents do not support a finding that CX 1177 is a draft document.

Finally, the proposed finding is also misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests that the Fittings suppliers did not curtail Project Pricing during 2008. The weight of the evidence, including McWane's contemporaneous records, **{**

}. (*See infra* Response to Proposed Finding No. 145; CCPF 1043-1047 (**{**

}); *see also* 950-970 (Sigma curtailed Project Pricing); 971-1014,

1410-1423 (Star curtailed Project Pricing); CCPF 1054, 1339 (McWane observed reduced Project Pricing in the marketplace)).

593. CX 1177, an internal draft executive report prepared by Mr. Tatman, is a document on which Dr. Schumann relies to reach his conclusion that instances of job pricing declined in 2008. (Schumann, Tr. 4080-4081 ("Q. Dr. Schumann, let's be clear. That document, which says on its face appearance, it appears that something happened, which Mr. Tatman testified was his speculation, that's one of the documents that you cite in your PowerPoint for the conclusion that there was actually a curtailment of job pricing; isn't that right, sir? A. That is correct, that it's one of the documents that I cite. Q. And that's based on the speculation of the witness who wrote the document -- A. It's based on -- Q. -- for your conclusions, sir. A. It was based on the document."); CX 1177).

Response to Proposed Finding No. 593

The proposed finding is misleading and contradicted by the weight of the evidence for the reasons set forth above in response to Proposed Finding No. 592.

594. Dr. Schumann testified that he does not know whether CX 1177 is a draft or a final document. (Schumann, Tr. 4094-4095 ("Q. Well, do you know if this is a draft document or a final document? A. I don't recall it -- I believe it was the final document. Q. Dr. Schumann -- A. To the best of my knowledge, I thought it was the final document. Q. Sitting here today, do you know in fact know whether this is a final document or is it a draft document? A. My understanding is that it was the final document. Q. Dr. Schumann, I'm not asking for your understanding. I'm asking -- A. I don't know with a hundred percent certainty. Q. The fact is you don't know with any certainty, do you, sir? A. I had thought -- I thought this was the final document. That doesn't mean that it wasn't used in other documents. I know it was an input into the end-of-year blue book.."); CX 1177).

Response to Proposed Finding No. 594

The proposed finding is misleading, immaterial, and unsupported insofar it suggests that Mr. Tatman did not accurately record his market observations in CX 1177. The proposed finding is also misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests that the Fittings suppliers did not curtail Project Pricing during 2008. Any such suggestion is contradicted by the weight of the evidence, including **{**

}. (*See infra* Response to Proposed Finding No. 145; CCPF 1043-1047 (**{** **}**); *see also* 950-970 (Sigma curtailed Project Pricing); 971-1014, 1410-1423 (Star curtailed Project Pricing); CCPF 1054, 1339 (McWane observed reduced Project Pricing in the marketplace)).

595. Dr. Schumann admits that, in his expert report, he misquoted a statement that Mr. Tatman made in CX 1177, by leaving out the word "appears." (Schumann, Tr. 4071 ("Q. And let's take a look at page 77 of your PowerPoint here. In fact, this is the same document. Do you see up at the top you quoted CX 1177? That's the first quarter executive report the company prepared; right, sir? A. Yeah. That's the number. Q. And you say here, "By the end of Q1 2008 McWane perceived," and then you have a quote; right, sir? A. Yes, there is a quote. Q. Yeah. And you say the level of multiplier discounting -- "the level of multiplier discounting by both Star and Sigma to have died down significantly"; right, sir? A. That's -- yes. Q. Now, that's not the actual quote in the document, is it, sir? A. I had thought it was. I -- I --"), 4073 ("Q. This quote is not accurate, is it, sir? A. My recollection is that there was a word that was inadvertently dropped. I think there may have been an "appears," but I'm not a hundred percent sure. Q. Yeah. You left the word, out of your quote, appears to have died down significantly; right, sir? A. Yes."), 4076-4077 ("Q. So you inadvertently left out the word "appears," but you do agree with me that appearances and reality are not always the same, are they, sir; right? A. That can be true. Q. And in fact, you agree with me that this is an appearance, which may or may not reflect reality, and that's what the document actually says; right, sir? A. I think it's consistent with other documents and -- but it is -- it says what it says. It says it appears. Q. Yeah. What it says, so we're clear on the record, is it's an appearance, which may or may not be reality; correct, sir? A. "Appearance" means that's how it appears. It -- I guess it's a possibility is it may not be reality. Q. And you as all part of your work in the case that the judge asked about when you took the -- you know, before my exam started, in all your work, you didn't test, by measuring actual job pricing, whether that appearance was reality or not, did you? A. No. I did not have the data to do that. Q. Now, you were here in the courtroom when Mr. Tatman testified about this particular document and that particular language in the document, weren't you, sir? A. Yes. Q. And you were here when Mr. Tatman said he was just speculating; right? A. I heard him say that."); CX 1177).

Response to Proposed Finding No. 595

The proposed finding is incorrect and misleading. Dr. Schumann did not misquote CX 1177 in his expert report. (*See* CX 2260-A (Schumann Rep. at 44 n.121) (containing an accurate quote from CX 1177: "appears to have died down significantly")). Respondent's sole basis for the proposed finding is a demonstrative PowerPoint that is not in evidence. (Schumann, Tr. 4071).

596. CX 622 is another document on which Dr. Schumann relied in reaching his conclusion that instance of job pricing declined in 2008. (Schumann, Tr. 4125-4126 ("Q. Now, here's another document that you relied upon for the basis for your opinion that project pricing was curtailed, and that's CX 22 -- 622; right, sir? A. Yes. Let me -- the 2009 sales meeting. Q. Can we call up CX 622. Now -- do you have that document, Dr. Schumann? A. Yes, I do. Q. Now, this document is a draft; right? A. Pardon me? Q. This is a draft. A. It may be. Yes."); CX 622).

Response to Proposed Finding No. 596

Complaint Counsel does not have a specific response.

597. Dr. Schumann testified that he does not know whether CX 622 is a draft or a final document. (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).

Response to Proposed Finding No. 597

The proposed finding is misleading, immaterial, and unsupported insofar it suggests that Mr. Tatman did not accurately record his market analysis in CX 0622. The proposed finding is also misleading and contradicted by the weight of the evidence insofar as it suggests that McWane, Sigma and Star did not curtail their Project Pricing and increase their profits. Contemporaneous evidence establishes that **{**

} (CCPF 1343-1357, 1358-1359; CX 0622 at 003, 005).

B. Domestic Fittings

598. Complaint Counsel failed to offer any evidence that fittings customers complained that the price of non-domestic fittings was too high during the alleged conspiracy.

Response to Proposed Finding No. 598

The proposed finding is immaterial and irrelevant insofar as it erroneously suggests that Complaint Counsel is required to make a showing of individualized consumer harm. The proposed finding is also misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests that Complaint Counsel has not established harm to competition. (CCPF 1041-1054, 1338-1435, 2068-2166, 2410-2434, 2466-2491).

599. Complaint Counsel failed to offer any evidence that consumers were forced to pay supra-competitive prices for non-domestic fittings during the alleged conspiracy.

Response to Proposed Finding No. 599

The proposed finding is incorrect, misleading, and contradicted by the weight of the evidence, which establishes that, as a result of its Excusive Dealing Policy and the MDA, McWane was able to prevent Star from effectively competing, co-opt Sigma's potential entry, and maintain its monopoly power and monopoly pricing in the Domestic Fittings market. (CCPF 2068-2166, 2410-2434, 2466-2491). The proposed finding is also misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests that Complaint Counsel has not established harm to competition. (CCPF 1041-1054, 1338-1435, 2068-2166, 2410-2434, 2466-2491).

600. Dr. Normann observed that McWane's domestic Fittings prices were essentially flat, even during the ARRA period:

> "Q: All right. And so what conclusions do you then draw from the fact that McWane's domestic prices as graphed out in your Figure 17 look like they don't keep pace with their raw material costs?
>
> A: So again, you know, remember what my, you know initial conclusions were for the pre-ARRA period. I found what I thought was strong evidence that imported product was replacing domestic….So now what I'm looking to see is was there a change during the ARRA period or potentially as a result of ARRA, you know, 2009 going forward, and there is not this significant increase

> in domestic prices for that ARRA period, so that to me is inconsistent that--inconsistent with the notion of ARRA granting market power for McWane." (Normann, Tr. 4894-95)

Response to Proposed Finding No. 600

Complaint Counsel does not dispute that Dr. Normann testified as excerpted, but the proposed finding is – on its face – unsupported by the cited testimony, and the proposed finding and cited testimony are in any event unsupported, unreliable, misleading, contradicted by the weight of the evidence, and immaterial.

Dr. Normann lacked a reasonable basis for the statement that McWane's Domestic Fittings prices were essentially flat during the ARRA period, and his opinion is unreliable. The opinion is based on Figure 17 of his report, which is methodologically flawed and also shows that McWane's prices increased materially during the ARRA period.

In Figure 17, Dr. Normann applies his price series to the "bucket" of Domestic Fittings for his fixed basket of 24 Fittings to generate an index of weighted average prices for Domestic Fittings. (RX-712A (Normann Rep. at 47); Normann, Tr. 5524-5527, 5530). His approach is methodologically flawed because (1) the McWane-provided data he used was laden with omissions and errors (*see* CCPF 1424-1435), (2) the data was further unsuitable for Dr. Normann's analysis because it measured price at the time of *invoicing* rather than at the time of *price formation* (*see* CCPF 1426), and there are significant and nonsystematic lags between the two points in time (CCPF 445, 446, 1426), (3) the "decision rules" that Dr. Normann employed to sort undifferentiated McWane data for domestically manufactured Fittings into categories for Domestic Fittings (Domestic-only Specification) and non-Domestic Fittings (Open Specification) were flawed and unreliable (*See supra* Response to Proposed Finding No. 189), and (4) Dr. Normann's basket of 24 sample Fittings was neither random nor representative (*see* Normann, Tr. 5301; *see supra* Response to Proposed Finding No. 189). Accordingly, Figure 17,

like Figures 2A and 2B from Dr. Normann's report and a number of Dr. Normann's other figures, is unreliable.

Even setting aside the methodological issues, the proposed finding and Dr. Normann's opinion are misleading and unsupported by Figure 17. Under cross examination, Dr. Normann conceded that his Figure 17 showed that between January 2008 and November 2011, McWane's domestic prices *increased* about 15%, and that nearly half of that (a six or seven percent price increase) occurred during what Dr. Normann had called the ARRA period. (Normann, Tr. 5525-5529). The question from the section of the transcript quoted by Respondent to support the proposed finding relates to whether prices kept up with raw materials costs. Dr. Normann does not address that at all in his answer. Insofar as Figure 17 purports to compare McWane price changes with changes in costs it is also misleading because Dr. Normann's metal and power cost index accounts for only 30% of costs, and the remaining costs, which may have gone up or down during the relevant period are not accounted for. (Normann, Tr. 5530-5534). Moreover, Dr. Normann did not do any statistical analysis to control for or determine the effect of any cost changes on McWane's prices, or the effect on McWane's prices of any of the many other factors affecting supply and demand that may have impacted McWane's prices at any point in time. (Normann, Tr. 5529-5535).

Finally, even if Dr. Normann had reliably established that Domestic Fittings prices were flat during the ARRA period, the proposed finding is misleading and contradicted by the weight of the evidence insofar as the proposed finding suggests that McWane therefore did not have and exercise monopoly power in the Domestic Fittings market. As Dr. Normann acknowledged, Figure 17 does not speak to whether McWane had pricing power over Domestic Fittings sales independent of ARRA, or whether ARRA increased the size of the pre-existing Domestic

Fittings market. (Normann, Tr. 5524-5525, 5538). The weight of the evidence establishes that prior to 2010, McWane had already increased Domestic Fittings prices (*i.e.*, prices for Domestic-only projects) to levels substantially higher than non-Domestic Fittings prices (CCPF 628-633, 1694-1701), and was **{**

}. (CCPF 1702). ARRA thus increased the demand for a product that McWane was already selling at supracompetitive prices. (CCPF 1647-1652). By preventing meaningful entry by Sigma and Star, McWane was able to **{** **}**. (RX-632 at 0027, *in camera*; *see also* CCPF 2473-2484).

601. Dr. Schumann testified that he did not examine or quantify alternative explanations for why Star may have missed out on some domestic sales in late 2009. (Schumann, Tr. 4386 ("Q. Dr. Schumann, my question was, you made no effort to quantify the various reasons why Star did not get orders for its domestic Fittings in the fall of 2009, did you, sir? A That is correct."), 4379-4381 ("Q. All right. Now, this document reflects a lot of domestic bids that Star submitted that they didn't win. A. Uh-huh. Q. Because they had delays and couldn't fill the orders in time in the second half of 2009, the fall of 2009 and into early 2010. A. Well, that was when they were first getting -- trying to get started. Q. So, for example -- if we could call this up, CX 2294, Andrew. Maybe we can go to -- see, Andrew, in the left-hand column there's rows. Let's just pick a few. Let's go to row 496, which is going to be pretty far into it. Row 496? There we go. Perfect. There we go. Thanks. Do you see, Dr. Schumann, this has a job from November, late November 2009, a domestic job, it says right there in the middle in yellow, lost, lead times were too long? Do you see that? A. Yes. Q. Then we got one a little lower in row 500, November 30, so now we're after Thanksgiving, bought from Tyler because of lead times. Do you see that? A. I see that, too. Q. Do you see row 502, early December, the 11th, lost due to lead times? Do you see that, sir? A. Yes, I do. Q. If you go down to row 525, we got lost due to delivery requests? Do you see that? That's in the beginning of January 2010. Do you see that? A. That is January 2010, and I see that. Q. If we go down to 529, we see lost, beginning of January 2010, due to delivery requests; right? A. I see that line, yeah. Q. The same thing on the next line, 530, lost job, domestic job, beginning of 2010, due to delivery requirements; right? A. I see that line, yes. Q. If we go down further, 592, more jobs lost because Star didn't have product available; right? Do you see that? A. I'm not -- are these jobs lost or sales of individual parts? Q. You're the expert, sir. A. Well, as I said, I'm not particularly familiar with this document. Q. Because you didn't actually look at the company's bid records -- A. I saw documents that looked very much like this, and I may have, but I don't know as I sit here. I certainly tried to look for documents like this, but even so, I would have just been reading them as I am now and not necessarily understanding. I mean -- Q. Well, Dr. Schumann, you even interviewed Star people in preparing your opinions and report in this case; right? A. Pardon? Q.

You even interviewed people from Star as part of preparing your opinions and report in this case? A. I did talk to someone from Star regarding a specific topic. It had -- wasn't related to this. At least not directly."), 4458 ("Q. You don't know when the projects supposedly required the products, do you, sir? A. Not as I sit here, no. Q. You don't know if Star had the product available when they were required, do you, sir? A. You know, I don't know. What I do know in terms of the requirements was that Star had told its potential customers they could fulfill orders for whatever fittings they needed. Q. Sure. But as we saw on CX 2294, they had lots and lots of jobs that they had to cancel or they lost because they couldn't fill them because they didn't have product available in 2009 going into the beginning of 2010; right, sir? A. There were orders, projects that were canceled because of that. I don't know how many "lots and lots" are and relative to what it might be. There were orders that were canceled, yes."); CX 2294).

Response to Proposed Finding No. 601

The proposed finding is incorrect, unsupported, and misleading insofar as it suggests that Dr. Schumann did not examine alternative explanations for why Star may have missed out on some domestic sales in late 2009. The cited testimony, in which Dr. Schumann agrees with Respondent's Counsel that Star lost sales, provide no support for the finding that Dr. Schumann did not examine why Star may have missed out on some sales. Dr. Schumann testified that he was aware that Star had orders cancelled because of product availability. (Schumann, Tr. 4458).

The proposed finding is also misleading and unsupported by the weight of the evidence, which establishes that Star's failure to meet its sales targets was not due to its own problems and delays in filling orders, that {

} (CCPF 1780-1781), and that McWane's Exclusive Dealing Policy and MDA with Sigma deterred Distributors and other customers from doing business with Star, substantially foreclosing it from the Domestic Fittings market and hindering its ability to compete effectively and to constrain McWane's monopoly prices. (*See supra* Response to Proposed Finding No. 497).

(b) Star was a less efficient domestic producer than McWane

602. Mr. McCutcheon testified that Star's domestic production costs were higher than they should be because Star used third party foundries for domestic production, rather than its own foundry. (McCutcheon, Tr. 2343 ("Q. Are Star's costs higher because it's using third-party

foundries? A. Higher than what? Q. Higher than they would be if you had your own foundry. A. We believe so. Yes, sir.").).

Response to Proposed Finding No. 602

Complaint Counsel does not dispute that Mr. McCutcheon made the statement attributed to him, or that Star's domestic production costs using third party foundries for domestic production were higher than they would have been using its own foundry. However, the proposed finding is incomplete and misleading because it omits that **{**

} (CCPF 2089-2166).

603. Dr. Normann concluded that Star was not as efficient a competitor as McWane. (Normann, Tr. 4980-81 ("Q. And what conclusions do you draw from the fact that in many of these states Star's domestic prices are higher than McWane's? A. Again, I think it's consistent with the record, that Star was not as efficient a competitor as McWane, and that that's consistent with the notion that now selling domestic product, Star does not have the cost advantages that they had in China, for example, so they're facing a similar cost structure or higher cost structure than McWane.").).

Response to Proposed Finding No. 603

The proposed finding and cited testimony is unsupported and misleading insofar as it suggests that if Star was not an efficient competitor it could not affect the market price. Dr. Normann testified that an entrant that is less efficient can still constrain the market price. (*See* Normann, Tr. 5477 ("Q. I want to talk for just a moment more about efficiency. Does a firm -- as a matter of economic principle, not specifically related to the fittings industry -- as a matter of economic principle, does an entrant need to be as efficient as an incumbent to have an effect on the incumbent's prices? A. No. Not necessarily. I mean, it depends on the margin, for example, the incumbent might be making.")).

The proposed finding is also incomplete and misleading because it omits that **{**

} (CCPF 2089-2166).

604. Dr. Schumann conceded that Star's decision to rely on jobber foundries for its domestic Fittings production made it a less efficient competitor than McWane. (Schumann, Tr. 4440-4442 (Q. All right. Now, Dr. Schumann, you would agree with me that Star was not an efficient competitor relying on jobber foundries to make its fittings; right? A. Yes. If they had had sufficient sales to support a foundry, I think they would have been much more efficient. Q. Just so we're clear, what that means is by contracting with third-party foundries to make their fittings, it was more expensive for them; right? A. That contract foundries would be more expensive than owning and controlling their own foundry. That is correct. Q. And Star decided to go that route rather than buy its own foundry or build its own foundry before the letter came out; right? A. No, that's not right. They were still looking into buying a foundry after the letter came out. Q. That's not what I asked you, sir. What I asked you was, they decided to contract with jobber foundries rather than buy or build before the letter came out. A. Before the letter came out, they -- their plan was to start with contract foundries and then have their own, and not long after the letter came out they were still looking to buy a foundry. Q. But they made the decision to buy from third-party jobber foundries, knowing they were going to be more expensive, they made that decision before the letter came out to Star; right? A. They -- I don't -- I presume they would have known about the expense. Their plan was to enter in a process which involved using contract foundries initially and then buying their plant and having their own foundry. Q. And that's a decision they made before the letter came out, to start with jobber foundries; correct, sir? A. That is correct.").)

Response to Proposed Finding No. 604

Complaint Counsel does not dispute that Dr. Schumann so testified. The proposed finding is incomplete and misleading because it omits that **{**

}

(c) Dr. Schumann's opinion that Star could have offered lower domestic Fittings prices if it had purchased a domestic foundry is pure speculation

605. Star chose not to build or buy a domestic foundry because it could more quickly and cheaply increase domestic output by contracting with existing jobber domestic foundries. (Bhargava, Tr. 2989-2990 ("Q. I think you testified yesterday that as a result of the ARRA, Star decided to sell domestically produced fittings; correct? A. Yes. Q. And I think you identified three alternatives for us that Star considered. The first was to start from scratch and build its own foundry; correct? A. Yes. Q. The second was to what I call source or use contract foundries; correct? A. Yes. Q. And the third was to buy an existing foundry; correct? A. Yes. Q. Okay. And I think you said you needed to move quickly because ARRA provided a limited window of opportunity; correct? A. Correct. Q. Okay. So from the beginning, Star ruled out starting from scratch, building from the ground up; right? A. Yes. Q. That would take too long. A. That would take too long. Q. And considered buying a foundry but ruled that out; correct? In March or April of 2009. A. We did not rule out buying a foundry. Q. You decided in March or April of 2009 not to purchase a foundry at that point; correct? A. No. We did not say that we will not purchase a foundry. What we decided was we will enter the market quickly with the contract manufacturing while we are looking for a foundry to buy. Q. Okay. And the purchasing a foundry would take a good deal longer than enter through contract manufacturing; right? A. Yes. That's correct.").).

Response to Proposed Finding No. 605

The proposed finding is incorrect, mischaracterizes the cited testimony, and is contradicted by the weight of the evidence. Star did not "[choose] not to build or buy a domestic foundry because it could more quickly and cheaply increase domestic output by contracting with existing jobber domestic foundries." Instead, according to the testimony of Mr. Bhargava quoted in the proposed finding, "We [*i.e.*, Star] did not say that we will not purchase a foundry. *What we decided was we will enter the market quickly with the contract manufacturing while we are looking for a foundry to buy*." (Bhargava, Tr. 2989-2990 (italics added); *see* CCPF 1720-1725).

The proposed finding is also incomplete and misleading because it omits that **{**

} (CCPF 2089-2166).

606. Because of ARRA's short-term window of opportunity, Star studied both third-party vendors and building its own foundry. (McCutcheon, Tr. 2284-85 ("Q. What steps did Star take to investigate producing domestic fittings? What were your first steps? A. Identified what we thought the market share was of domestic fittings. Investigated buying a foundry. Investigated green fielding a foundry. Investigated using third-party vendors for our fittings. Q. Do I understand you went with third parties at least at this time for your -- let me back up. You chose to use third-party manufacturers for your domestic fittings? A. Yes, sir. Q. Why did you choose to use third-party manufacturers for your domestic fittings? A. Because it looked like it was the most cost-prudent thing to do. Q. Was there a speed factor in terms of using third-party foundries? A. Yes, sir. Q. And can you explain that? A. We felt that the stimulus was a -- going to provide more opportunity, more short-term opportunity, and we felt that we needed to have a domestic product to the market as quickly as possible, so we simultaneously studied third-party vendors and having a foundry of our own.").).

Response to Proposed Finding No. 606

The proposed finding is misleading and mischaracterizes the cited testimony. As set forth in the cited testimony, Star examined three options: third party contractors, buying a foundry, or building ("green fielding") a foundry. The proposed finding is also incomplete and misleading because it omits that **{**

} (CCPF 2089-2166).

607. Star did not buy a domestic foundry because Star did not believe it would be able to sell enough domestic fittings to sustain the foundry. (McCutcheon, Tr. 2285 ("Q. Did Star believe in 2009 that the domestic market would be large enough for two suppliers? A. Yes, sir. Q. You mentioned investigating a foundry. Why did Star -- why didn't Star buy a foundry? A. We believed at the time that we wouldn't be able to sell enough to sustain the foundry. Q. Did you have an estimate in terms of how much you would have to sell to sustain a foundry? A. Yes, sir. At the time, we believed it was I believe $20 million worth of sales. Q. And when you say "$20 million worth of sales," is that an annual figure? A. Yes, sir. Q. And when did you make this estimate? A. I don't recall. It would have been mid-2009 to third quarter 2009.").).

Response to Proposed Finding No. 607

The proposed finding is incomplete and misleading because it omits that **{**

} (CCPF 2089-2166).

608. Star has never operated its own Fittings foundry, whether inside or outside of the United States, before, during, or after the McWane Rebate Policy, yet has managed for years to be a viable competitor. (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.")).

Response to Proposed Finding No. 608

Complaint Counsel notes that there is no exhibit denominated "JX 694." The proposed finding is misleading. First, while Star does not own any of the foreign or domestic foundries at which its Fittings are made, it has significant responsibility for oversight of the foundries from which it obtains its domestic and imported Fittings, including responsibility for quality assurance and quality control at the foundries in China it operates as a joint venture. (CCPF 132-133). Second, although the proposed finding is correct that Star was a viable competitor in the market for Fittings sold for Open Specification projects, both before and after ARRA, this is because its imported Fittings cost less to produce than Domestic Fittings. Star has not been a viable competitor in the market for Domestic Fittings due to McWane's Exclusive Dealing Policy. (CCPF 451, 628-633, 2089 -2108).

The proposed finding is also misleading insofar as it refers to and treats McWane's Exclusive Dealing Policy as a mere "Rebate Policy" rather than an all-or-nothing exclusive dealing policy. (*See supra* Response to Proposed Finding No. 425).

COMPLAINT COUNSEL'S RESPONSE TO McWANE INC.'S PROPOSED CONCLUSIONS OF LAW

I. BURDEN OF PROOF

1. Complaint Counsel must prove its case under FTC Act Section 5 by "substantial evidence." *FTC v. Cement Institute*, 333 U.S. 683, 705 (1948); *California Dental Ass'n v. FTC*, 224 F.3d 942, 957 (9th Cir. 2000); *Cinderella Career & Finishing Schools, Inc. v. FTC*, 425 F.2d 583, 592 fn.2 (D.C. Cir. 1970); *Rayex Corp. v. FTC*, 317 F.2d 290, 292 (2d Cir. 1963).

Response to Proposed Conclusion of Law No. 1

This proposed conclusion is misleading to the extent it suggests that the "substantial evidence" standard is not satisfied by the preponderance of the evidence. The preponderance-of-the-evidence standard satisfies the requirement under Section 556(d) of the Administrative Procedure Act that agency orders be supported by "reliable, probative and substantial evidence." *Steadman v. SEC*, 450 U.S. 91, 100-102 (1981). Complaint Counsel must therefore prove its case by a preponderance of the evidence. *See In re Adventist Health Sys./West*, 117 F.T.C. 224, at *28 (1994) ("Each element of the case must be established by a preponderance of the evidence . . . .").

2. "Substantial evidence is more than a scintilla, and must do more than create a suspicion of the existence" of the fact to be established." *Rayex Corp. v. FTC*, 317 F.2d 290, 292 (2d Cir. 1963).

Response to Proposed Conclusion of Law No. 2

Complaint Counsel has no specific response.

3. To prove a violation under FTC Act Section 5 Complaint Counsel must proffer "substantial evidence" of: (1) an unfair method of competition, (2) that causes substantial injury, (3) to consumers, (4) is not reasonably avoidable by the consumers, and (5) is not outweighed by countervailing benefits to consumers or competition. (15 U.S.C. § 45(n).)

Response to Proposed Conclusion of Law No. 3

This proposed conclusion is incorrect and misleading because it cites the legal standard applicable to unfair acts and practices in consumer protection cases, and not the unfair methods

of competition standards applicable in antitrust cases. Because the Complaint does not allege any unfair act or practice, this standard is inapplicable to the current action.

4. Sherman Act Sections 1 and 2 caselaw is a guide in evaluating whether Complaint Counsel has met its "substantial evidence" burden under Section 5. *See, e.g,. California Dental Ass'n v. FTC*, 526 U.S. 756, 762 n.3 (1999); *Cement Institute*, 333 U.S. at 691-92 (1948).

Response to Proposed Conclusion of Law No. 4

This proposed conclusion is misleading. Case law interpreting Sections 1 and 2 of the Sherman Act serves as a guide for FTC Act Section 5 cases insofar as the scope of prohibitions under Section 5 overlaps with that of the Sherman Act. *See FTC v. Cement Inst.*, 333 U.S. 683, 691 (1948) ("unfair methods of competition" under Section 5 of FTC Act includes violations of the Sherman Act); *see also Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 762 n.3 (1999) ("The FTC Act's prohibition of unfair competition and deceptive acts or practices . . . overlaps the scope of § 1 of the Sherman Act . . . aimed at prohibiting restraint of trade . . . ."). The FTC Act, however, gives the Commission broader authority to prohibit conduct that does not violate the Sherman Act, such as invitations to collude. *See FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 239 (1972) (Section 5 "does empower the Commission to define and proscribe an unfair competitive practice, even though the practice does not infringe either the letter or the spirit of the antitrust laws."); *In re McWane, Inc.*, No. 93512012 F.T.C. LEXIS 155, at *51-54 (Sept. 14, 2012).

II. McWane Did Not Constrain Price Competition, Exchange Competitively Sensitive Sales Information, or Invite its Competitors to Collude (Counts 1-3)

A. The Government Must Establish the Existence of an Agreement.

5. Section 1 of the Sherman Act prohibits contracts, combinations, and conspiracies that unreasonably restrain trade. 15 U.S.C. § 1.

Response to Proposed Conclusion of Law No. 5

Complaint Counsel has no specific response.

6. To establish a horizontal price-fixing claim, a plaintiff must demonstrate the existence of an agreement, combination, or conspiracy among actual competitors with the purpose or effect of "raising, depressing, fixing, pegging or stabilizing" the price of a commodity product. *United States v. Socony-Vacuum Oil Co*., 310 U.S. 150, 223-24 (1940).

Response to Proposed Conclusion of Law No. 6

Complaint Counsel has no specific response, except to note that price-fixing claims apply to all services and products, and not only commodity products. *See, e.g.*, *Goldfarb v. Va. State Bar*, 421 U.S. 773 (1975) (analyzing price-fixing claim involving fees for legal services relating to residential real estate transactions).

7. Section 1 does not prohibit independent decisions, "even if they lead to the same anticompetitive result as an actual agreement among market actors." *White v. R.M. Packer Co., Inc.*, 635 F.3d 571, 575 (1st Cir. 2011) ("*White*").

Response to Proposed Conclusion of Law No. 7

Complaint Counsel has no specific response.

8. Because the existence of an agreement is the "very essence" of a Section 1 price-fixing claim, the plaintiff must prove that the conduct at issue resulted from an agreement, rather than the defendant's independent decisions. *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 356 (3rd Cir. 2004) (citations omitted) ("*Flat Glass*"); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 553 (2007) ("*Twombly*"). At a minimum, this element requires "a 'unity of purpose or a common design and understanding or meeting of minds' or 'conscious commitment to a common scheme." *Flat Glass*, 385 F.3d at 357 (citations omitted).

Response to Proposed Conclusion of Law No. 8

Complaint Counsel has no specific response.

9. "Unilateral action, regardless of the motivation, is not a violation of Section 1." *Burtch v. Milberg Factors, Inc.*, 662 F.3d 212, 221 (3rd. Cir. 2011) ("*Burtch*").

Response to Proposed Conclusion of Law No. 9

Complaint Counsel has no specific response.

B. The Government Lacks Direct Evidence of an Agreement.

1. The Nature of Direct Evidence.

10. Direct evidence of an agreement to fix prices is "the most compelling means" of establishing a Section 1 claim. *See Rossi v. Standard Roofing, Inc*., 156 F.3d 452, 465 (3rd Cir. 1998) ("*Rossi*").

Response to Proposed Conclusion of Law No. 10

This proposed conclusion is incomplete because the cited authority further states that direct evidence is rare in antitrust cases and that courts have allowed antitrust plaintiffs to rely solely on circumstantial evidence. The complete discussion reads as follows:

> While direct evidence, the proverbial "smoking-gun," is generally the most compelling means by which a plaintiff can make out his or her claim, it is also frequently difficult for antitrust plaintiffs to come by. Thus, plaintiffs have been permitted to rely solely on circumstantial evidence (and the reasonable inferences that may be drawn therefrom) to prove a conspiracy.

Rossi v. Standard Roofing, Inc., 156 F.3d 452, 465 (3d Cir. 1998) (citing cases); *see also ESCO Corp. v. United States*, 340 F.2d 1000, 1007 (9th Cir. 1965) ("[I]t is well recognized law that any conspiracy can ordinarily only be proved by inferences drawn from relevant and competent circumstantial evidence."); *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 662 (7th Cir. 2002) (most conspiracy cases "are constructed out of a tissue of such [ambiguous] statements and other circumstantial evidence, since an outright confession will ordinarily obviate the need for a trial").

11. "Direct evidence in a Section 1 conspiracy must be evidence that is explicit and requires no inferences to establish the proposition or conclusion being asserted." *In re Baby Food Antitrust Litigation*, 166 F.3d 112, 118 (3rd Cir. 1999) ("*Baby Food*"). *See also In re Citric Acid Lit.*, 191 F.3d 1090, 1093-94 (9th Cir. 1999) ("*Citric Acid*").

Response to Proposed Conclusion of Law No. 11

Complaint Counsel has no specific response.

12. Evidence demonstrating opportunities to conspire or consciously parallel pricing behavior does not constitute direct evidence of conspiracy, but is, at most, circumstantial *See Cosmetic Gallery, Inc. v. Schoeneman Corp*., 495 F.3d 46, 52-53 (3rd Cir. 2007) ("*Cosmetic*

Gallery")); *See also, Superior Offshore International, Inc. v. Bristow Group, Inc.*, 2012 WL 3055849, *5 (3rd Cir. July 27, 2012) ("*Superior Offshore*") (vague statements, such as admonitions to competitors to "play by the rules," do not constitute direct evidence).

Response to Proposed Conclusion of Law No. 12

Complaint Counsel has no specific response.

2. The Government Concedes it Has No Direct Evidence Of An Illicit Agreement.

13. Complaint Counsel and its expert conceded that it lacks evidence "that McWane directly communicated its prices to any other DIWF manufacturer or supplier in advance of communicating them to its customers or potential customers."

Response to Proposed Conclusion of Law No. 13

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the Order on Post-Trial Briefs, at 2 (Nov. 13, 2012) ("November 2012 Order").

As a statement of fact, it is misleading insofar as it suggests that McWane did not enter into a *per se* illegal price-fixing conspiracy. *See* CCPF 907-1571; CCPB at 105-164 (discussing price-fixing claim). The statement of fact is also misleading insofar as it suggests that the Complaint allegations relate to a conspiracy to fix published prices instead of curtailing a specific type of discounting off of those published prices, Project Pricing. *Id.*

14. There is no direct evidence of an agreement to fix prices or to eliminate or reduce job pricing.

Response to Proposed Conclusion of Law No. 14

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the November 2012 Order, at 2.

As a statement of fact, the proffered statement is incorrect and misleading. Complaint Counsel acknowledges that Messrs. Tatman, Rybacki and McCutcheon refuse to offer explanations for the numerous documented direct communications between them during key times in 2007 and 2008, when each implemented price increases and business strategies that were against their unilateral self-interest. CCPF 700-827. However, evidence related to the April 2009 price discussions between Mr. Tatman and Mr. McCutcheon constitutes direct evidence of *per se* unlawful communications regarding price. CCPF 1533-1553; CCPB at 157-163.

C. Circumstantial Evidence Does Not Establish McWane Had An Agreement to Fix Prices or Reduce Job Pricing.

15. To prove a case with circumstantial evidence, the Supreme Court has held that a plaintiff must not only produce evidence that reasonably tends to prove parallel conduct, it must also prove that this conduct was contrary to self interest. *Matsushita*, 475 U.S. at 588; *In re Beef Industry Antitrust Litig.*, 907 F.2d 510, 514 (5th Cir. 1990).

Response to Proposed Conclusion of Law No. 15

This proposed conclusion is unsupported and a misstatement of law. Neither *Matsushita* nor *In re Beef Industry* addresses actions contrary to self-interest, or whether such a showing is required in cases involving circumstantial evidence. Moreover, this proposed conclusion is wrong. The relevant case law indicates that acts contrary to self-interest are not required, but rather are a "plus factor" in determining whether a conspiracy may be inferred. *See City of Tuscaloosa v. Harcros Chems.*, 158 F.3d 548, 572 (11th Cir. 1998) (actions against interest are a plus factor); *Merck-Medco Managed Care, LLC v. Rite Aid Corp.*, 1992-2 Trade Cas. ¶ 72,640, 1999 U.S. App. LEXIS 21487, at *29 (4th Cir. 1999) ("Evidence of acts contrary to an alleged conspirator's economic interest is perhaps the strongest plus factor indicative of a conspiracy.").

16. "When an antitrust plaintiff relies on circumstantial evidence of conscious parallelism to prove a § 1 claim, he must first demonstrate that the defendants' actions were parallel. . . . . The cattlemen have not done this.").

Response to Proposed Conclusion of Law No. 16

To the extent this conclusion of law appears to be a quotation from *In re Beef Industry Antitrust Litig.*, 907 F.2d 510, 514 (5th Cir. 1990), Complaint Counsel has no specific response. To the extent this proposed conclusion argues that parallel conduct is required for a price-fixing claim, this is a misstatement of law. While parallel pricing conduct (along with various "plus" factors) is one way to prove a price fixing conspiracy, it is not required. For example, price fixing agreements may also be proven through evidence of a *quid pro quo* arrangement related to price or mutual assurances to adhere to previously published prices. *See, e.g., Sugar Inst, Inc. v. United States*, 297 U.S. 553, 601 (1936) (condemning agreement to adhere to previously published prices, even when those prices were unilaterally set); *United States v. Gen. Motors Corp.*, 384 U.S. 127, 142-43 (1966) (finding "that each party acted in its own lawful interest" to be "of no consequence" where "joint and collaborative action was pervasive in the initiation, execution, and fulfillment of the plan").

Moreover, parallel conduct need not be precisely uniform or simultaneous. *See In re Baby Food Antitrust Litig.*, 166 F.3d 112, 132 (3d Cir. 1999) (recognizing that parallel pricing need not be uniform); *In re Blood Reagents Antitrust Litig.*, 756 F. Supp. 2d 623, 630 (E.D. Pa. 2010) ("Plaintiffs are not required to plead simultaneous price increases—or that the price increases were identical—in order to demonstrate parallel conduct."). In this case, evidence that all three Fittings suppliers abruptly changed their prior business practice by curtailing their use of Project Pricing in January 2008, even as demand continued to drop, is sufficient to show parallel conduct. *See* CCPB at 111-114.

17. Courts are cautious about inferring antitrust conspiracies from circumstantial evidence, because such an inference could "chill the very conduct the antitrust laws are designed to protect," *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574, 594 (1986) ("*Matsushita*").

Response to Proposed Conclusion of Law No. 17

This proposed conclusion is misleading. The *Matsushita* court did not caution against inferring antitrust conspiracies from circumstantial evidence; rather, the court admonished fact finders from "infer[ring] conspiracies when such inferences are *implausible* . . . ." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 593 (1986) (emphasis added) (discussing alleged conspiracy to engage in predatory pricing). Additionally, the conduct at issue in *Matsushita* was predatory pricing, which initially results in lower prices for consumers. There is no similar danger of over-deterrence here, where McWane, Sigma and Star agreed to stop discounting and raise prices.

McWane has cited no other authority, as required by the November 2012 Order, at 2, to support its argument against inferring antitrust conspiracies from circumstantial evidence. Indeed, the relevant case law indicates that most price-fixing agreements will be proven through circumstantial evidence. *See, e.g.*, *ESCO Corp.* 340 F.2d at 1006-1007 (9th Cir. 1965) ("[I]t is well recognized law that any conspiracy can ordinarily only be proved by inferences drawn from relevant and competent circumstantial evidence."); *High Fructose Corn Syrup*, 295 F.3d at 662 (most conspiracy cases "are constructed out of a tissue of such [ambiguous] statements and other circumstantial evidence, since an outright confession will ordinarily obviate the need for a trial").

18. According to the well-established "theory of interdependence," any rational firm in a oligopolistic market, such as DIWF, must take into account the anticipated reaction of its competitors when making its own pricing decisions. *Flat Glass*, 385 F.3d at 359.

Response to Proposed Conclusion of Law No. 18

Complaint Counsel has no specific response.

19. In a concentrated market like DIWF, parallel pricing by competitors "can be a necessary fact of life but be the result of independent pricing decisions" rather than illicit agreement. *Baby Food*, 166 F.3d at 121-22.

Response to Proposed Conclusion of Law No. 19

Complaint Counsel has no specific response.

20. Even if Complaint Counsel was able show parallel behavior - - which they did not - - "follow-the-leader" pricing is normal oligopoly behavior and is perfectly lawful. *Blomkest Fertilizer*, 203 F.3d at 1032-33 (affirming summary judgment because "[e]vidence that a business consciously met the pricing of its competitors does not prove a violation of the antitrust laws"); *Reserve Supply Corp. v. Owens-Corning Fiberglas Corp.*, 971 F.2d 37, 50 (7th Cir. 1992) ("the mere existence of an oligopolistic market structure in which a small group of manufacturers engage in consciously parallel pricing of an identical product does not violate the antitrust laws"); *Clamp-All Corp. v. Cast Iron Soil Pipe Inst.*, 851 F.2d 478, 484 (1st Cir. 1988) ("One does not need an agreement to bring about this kind of follow-the-leader effect in a concentrated industry"); *In re Citric Acid Litigation*, 191 F.3d 1090, 1102 (9th Cir. 1999) ("A section 1 violation cannot, however, be inferred from parallel pricing alone, nor from an industry's follow-the-leader pricing strategy") (internal citations omitted).

Response to Proposed Conclusion of Law No. 20

The proposed conclusion is misleading to the extent it implies that "follow-the-leader" pricing is *per se* lawful. Evidence of parallel or interdependent pricing is lawful only in the absence of an actual agreement or certain "plus factors" serving as "proxies for direct evidence of an agreement." *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 360 (3d Cir. 2004). McWane concedes as much in its Proposed Conclusion of Law No. 22 ("conscious parallelism [is] *possibly* indicative of a conspiracy . . . .") (emphasis in original). To the extent this proposed conclusion disputes that Complaint Counsel has shown parallel conduct, this is a misstatement of fact. McWane has cited no authority to support this position as required by the November 2012 Order, at 2. Furthermore, during summary judgment, McWane argued—and the Commission's summary judgment decision expressly found—that there was parallel conduct in the Fittings market. *See In re McWane*, 2012 F.T.C. LEXIS 155, at *19 ("McWane does not dispute that Star and Sigma announced they were matching McWane's multiplier increases in both January

and June 2008 . . . but maintains that this conduct reflects nothing more than parallel conduct[.]"), 20 ("It is undisputed that there is conscious parallelism in this industry.").

21. Because interdependent pricing behavior is not an "agreement" as defined by the Sherman Act, such conscious parallelism is not prohibited under the antitrust laws, despite its "noncompetitive nature." *Id.* at 359-60 (citations omitted). *See also Citric Acid*, 191 F.3d at 1102-03; *Burtch*, 662 F.3d at 226-27; *In re Travel Agent Commission Antitrust Litg.*, 583 F.3d 896, 903 (6th Cir. 2009) ("*Travel Agent*"). *See also Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993) ("*Brooke Group*"); *Twombly*, 550 U.S. at 553-54, 556-57.

Response to Proposed Conclusion of Law No. 21

Complaint Counsel has no specific response, except to clarify that conscious parallelism, *without more*, is not prohibited by the antitrust laws. *See Flat Glass*, 385 F.3d at 360 (evidence of parallel or interdependent pricing is lawful only in the absence of an actual agreement or certain "plus factors" serving as "proxies for direct evidence of an agreement.").

22. Such conscious parallelism, while *possibly* indicative of a conspiracy, is "just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market." *Burtch*, 662 F.3d at 227 (quoting *Twombly*, 550 U.S. at 554).

Response to Proposed Conclusion of Law No. 22

Complaint Counsel has no specific response, except to clarify that conscious parallelism, *without more*, is not prohibited by the antitrust laws. *See Flat Glass*, 385 F.3d at 360 (Evidence of parallel or interdependent pricing is lawful only in the absence of an actual agreement or certain "plus factors" serving as "proxies for direct evidence of an agreement.").

23. As a result of the inherent economic realities of oligopolistic markets, courts require a plaintiff relying on evidence of conscious parallelism to establish that certain "plus factors" also exist. *Flat Glass*, 385 F.3d at 360.

Response to Proposed Conclusion of Law No. 23

Complaint Counsel has no specific response.

24. Requiring plaintiffs to meet this heightened standard of proof "tends to ensure that courts punish 'concerted action' – an actual agreement – instead of the 'unilateral, independent conduct of competitors.'" *Id.* (citing *Baby Food*, 166 F.3d at 122); *see also Intervest*, 340 F.3d at 159-60 (plaintiff relying on circumstantial evidence must meet heightened burden of proof).

Response to Proposed Conclusion of Law No. 24

This proposed conclusion is misleading to the extent it suggests that antitrust plaintiffs relying on circumstantial evidence are subject to a heightened burden of proof. The burden of proof is the same for all antitrust plaintiffs alleging a price fixing conspiracy: plaintiffs must show the existence of an agreement or "some form of concerted action," *Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 999 (3d Cir. 1994), which may be shown by direct or circumstantial evidence. *See InterVest, Inc. v. Bloomberg, L.P.*, 340 F.3d 144, 159 (3d Cir. 2003) ("Because direct evidence, the proverbial 'smoking gun,' is difficult to come by, 'plaintiffs have been permitted to rely solely on circumstantial evidence (and the reasonable inferences that may be drawn therefrom) to prove a conspiracy.'"). Plaintiffs relying on inferences from consciously parallel behavior must show that certain "plus factors" exist because "the factors serve as proxies for direct evidence of an agreement." *Flat Glass*, 385 F.3d at 360. Thus, whether antitrust plaintiffs prove a price-fixing conspiracy by direct evidence of an agreement or by parallel conduct along with certain "plus factors," the burden of proof is the same. *See Alvord-Polk, Inc.*, 37 F.3d at 999 (3d Cir. 1994) ("The very essence of a section 1 claim, of course, is the existence of an agreement.").

25. Thus, to distinguish between legitimate parallel conduct and an illegal price-fixing scheme, an antitrust plaintiff must present "plus factor" evidence that "tends to exclude the possibility" that the defendant acted independently of its competitors. *Matsushita*, 475 U.S. at 588; *Flat Glass*, 385 F.3d at 360

Response to Proposed Conclusion of Law No. 25

Complaint Counsel has no specific response.

26. Plus factors include: (i) a motive to conspire; (ii) noncompetitive behavior contrary to the defendant's own economic self-interest; and (iii) hallmarks of traditional conspiracy. *Baby Food*, 166 F.3d at 121-22.

Response to Proposed Conclusion of Law No. 26

Complaint Counsel has no specific response, except to note that *Baby Food* does not address the third plus factor listed above (hallmarks of a traditional conspiracy). *Baby Food*, 166 F.3d at 121-22. However, other cases do recognize evidence of a traditional conspiracy (*i.e.*, "proof that the defendants got together and exchanged assurances of common action or otherwise adopted a common plan even though no meetings, conversations, or exchanged documents are shown") as a plus factor. *See, e.g.*, *Flat Glass*, 385 F.3d at 360.

27. The overwhelming evidence is that McWane, lacking any motive to conspire with Star and Sigma, acted independently and in its own economic self-interest.

Response to Proposed Conclusion of Law No. 27

The proposed conclusion is misleading to the extent that it suggests that evidence of plus factors should be considered individually. Rather, plus factors must be considered as a whole, and not individually dissected:

> In antitrust conspiracy cases, plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each. The character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole.

In re High-Tech Emp. Antitrust Litig., 856 F. Supp. 2d 1103,1118 (N.D. Cal. 2012) (internal quotation marks omitted) (quoting *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962); *see also High Fructose Corn Syrup*, 295 F.3d at 655.

Moreover, this is not a proposed conclusion of law because it does not expound on any legal standard or proposition. It is also unsupported by any legal authority or record evidence as required by the November 2012 Order, at 2.

As a statement of fact, the proffered statement is wrong and contradicted by the weight of the evidence, which establishes that: i) McWane, Sigma and Star each had a motive to conspire; ii) conspired to raise and stabilize Fittings prices by curtailing Project Pricing and increasing price transparency; and iii) acted contrary to their own unilateral economic interest. *See* CCPB at 105-164; CCPF 842-906.

28. The government has failed to establish the existence of any plus factors.

Response to Proposed Conclusion of Law No. 28

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the November 2012 Order, at 2.

As a statement of fact, the proffered statement is wrong and contradicted by the weight of the evidence. There is substantial evidence in the record of "plus" factors, *see* CCPB at 108-147 (discussing plus factors). Additionally, the Commission found sufficient evidence of "plus" factors for the Complaint to survive summary judgment. *See In re McWane, Inc.* 2012 F.T.C. LEXIS 155, at *22-23 ("Complaint Counsel has pointed to sufficient evidence of all three plus factors to defeat summary judgment.").

1. McWane lacked motive or incentive to collude, no conspiracy can be inferred.

29. The government has failed to adduce any evidence to establish the plus factor of motive in this case.

Response to Proposed Conclusion of Law No. 29

The proposed conclusion is misleading because evidence of plus factors must be considered as a whole, and not individually dissected. *In re High-Tech Emp. Antitrust Litig.*, 856 F. Supp. 2d at 1118; *Continental Ore Co.*, 370 U.S. at 699; *see also High Fructose Corn Syrup*, 295 F.3d at 655.

Moreover, this is not a proposed conclusion of law because it does not expound on any legal standard or proposition. It is also unsupported by any legal authority or record evidence as required by the November 2012 Order, at 2.

As a statement of fact, the proffered statement is wrong and contradicted by the weight of the evidence, which establishes that McWane, Sigma and Star each had a motive to conspire. *See* CCPB at 105-164; CCPF 842-906. Additionally, the Commission found sufficient evidence of the co-conspirators' motive to conspire for the Complaint to survive summary judgment. *See In re McWane, Inc.*, 2012 F.T.C. LEXIS 155, at *22-23 (concluding that Complaint Counsel pointed to sufficient evidence of motive to enter into a price fixing conspiracy).

30. "An inference of conspiracy is impermissible if the defendants 'had no rational economic motive to conspire, and if their conduct is consistent with other, equally plausible explanations." *Cohlmia v. St. John Medical Center*, 693 F.3d 1269, 1284 (10th Cir. 2012) (citing *Matsushita*, 475 U.S. at 596). *See also In re Ins. Brokerage Antitrust Lit.*, 618 F.3d 300, 322 n. 20 (3rd Cir. 2010); *Southway Theatres v, Georgia Theatre Co.*, 672 F.2d 485, 494 (5th Cir. Unit B 1982).

Response to Proposed Conclusion of Law No. 30

Complaint Counsel has no specific response.

31. McWane stood to gain the most by charting its own independent course to lower prices in order to gain share from its competitors, move volume, and significantly reduce its inventory. McWane stood to gain nothing by colluding with Star and Sigma, because such collusion would only have "locked in" McWane's severely eroded and unsustainably low share of the Fittings market, which led to the idling and ultimate closure of one of McWane's two domestic manufacturing facilities and the lay off of hundreds of workers. McWane's legitimate business justifications are the more plausible explanation for its pricing actions than the alleged conspiracy posited by the government.

Response to Proposed Conclusion of Law No. 31

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the November 2012 Order, at 2.

As a statement of fact, the proffered statements are incorrect and against the weight of evidence. The evidence establishes that McWane consistently announced price ***increases***. CCPF 932 (McWane January 11, 2008 announcement that "[t]he increase will be 10% to 12% above the current prevailing multiplier levels"); CCPF 1242 (McWane June 17, 2008 announcement of roughly 8% price increase); CCPF 1492-1498 (In April, 2009, McWane increased prices for small diameter fittings, its strongest segment, by 7.5%); CCPF 1565-1566 (McWane increase prices in 45 out of 50 states in response to "communication" from Sigma and Star). The statement is also incorrect because McWane's January 11, 2008 announcement that it was curtailing Project Pricing would have caused McWane to ***lose volume*** to Sigma and Star, not gain volume or reduce inventory, unless McWane had assurances that Sigma and Star would also comply. CCPF 930-1071. This statement is further incorrect insofar as it suggests McWane's overcapacity utilization was related solely to its sales volume. To the contrary, McWane had purposefully amassed a large inventory in 2007 in order to reduce its costs of production. CCPF 845-852.

32. Because McWane lacked a rational business motive to enter an unlawful conspiracy, an inference of conspiracy is unwarranted. *See Matsushita,* 475 U.S. at 596-97 (if defendant had no rational economic motive to conspire, or if colluding would offend the defendant's self interest, then conspiracy should not be inferred from ambiguous evidence or mere parallelism). *See also Abraham v. Intermountain Health Care, Inc.,* 461 F.3d 1249, 1257-58 (10th Cir. 2006) ("the antitrust defendants' economic motive is highly relevant;" if the defendant has no economic motive to conspire, an inference of conspiracy is not proper); *Burtch,* 662 F.3d at 228.

Response to Proposed Conclusion of Law No. 32

This proposed conclusion is misleading to the extent it suggests that lack of a rational business motive to enter an unlawful conspiracy is, by itself, sufficient to defeat an inference of conspiracy. Evidence of plus factors must be considered as a whole, and not individually dissected. *In re High-Tech Emp. Antitrust Litig*., 856 F. Supp. 2d at 1118; *Continental Ore Co.*,

370 U.S. at 699; *see also High Fructose Corn Syrup*, 295 F.3d at 655. In fact, McWane's cited authority states that an inference of conspiracy based on ambiguous evidence is improper if (1) the defendant had no rational economic motive to conspire, and (2) the defendant's conduct was consistent with other, equally plausible explanations. *See Matsushita*, 475 U.S. at 596-97; *Abraham*, 461 F.3d at 1257-58; *Burtch*, 662 F.3d at 228; *see also* RPCL No. 30.

This proposed conclusion is also erroneous to the extent it implies that actions contrary to one's self interest are necessary to infer a conspiracy. Actions against one's self-interest are regarded as a "plus factor" weighing in *favor* of inferring an illegal conspiracy. *See Harcros Chems., Inc.*, 158 F.3d at 570-71.

To the extent this proposed conclusion argues that McWane lacked a rational business motive to enter an unlawful conspiracy, this is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the November 2012 Order, at 2. The evidence establishes that McWane had a motive to enter into the unlawful conspiracy. *See* CCPF 845-859 (McWane motive to conspire); CCPB at 114-116 (same).

2. Because McWane refused to act contrary to its own economic self-interest, a conspiracy cannot be inferred.

33. Complaint Counsel has failed to establish the "plus factor" of noncompetitive behavior, because McWane's pricing actions were completely consistent with its own legitimate, economic self-interest: namely, to increase sales volume, reduce excess inventory, keep its foundries operational, and ultimately increase profits. *See Burtch*, 662 F.3d at 229 (citing *Baby Food*, 166 F.3d at 137) (all businesses have a "legitimate understandable motive to increase profits" and such motive is not evidence of a "plus factor").

Response to Proposed Conclusion of Law No. 33

This proposed conclusion is misleading to the extent it implies that motive to increase profits generally is not evidence of a "plus" factor. *Burtch* states that such motive is insufficient

evidence of a plus factor only in the absence of evidence of concerted, collusive conduct. *See Burtch*, 662 F.3d at 229 ("In a free capitalistic society, all entrepreneurs have a legitimate understandable motive to increase profits" and without a "scintilla of evidence of concerted, collusive conduct," this motive does not on its own constitute evidence of a "plus factor.") (quoting *Baby Food*, 166 F.3d at 137). McWane has cited no other authority to support its argument, as required by the November 2012 Order, at 2.

The proposed finding is also misleading because evidence of plus factors must be considered as a whole, and not individually dissected. *In re High-Tech Emp. Antitrust Litig*., 856 F. Supp. 2d at 1118; *Continental Ore Co.*, 370 U.S. at 699; *see also High Fructose Corn Syrup*, 295 F.3d at 655.

To the extent this proposed conclusion argues that McWane's pricing actions were "completely consistent with its own legitimate, economic self-interest," this is not a proposed conclusion of law because it does not expound on any legal standard or proposition. As a statement of fact, the proffered statement is incorrect, misleading, against the weight of evidence, and contrary to the Commission's summary judgment decision, which found that:

> the evidence also shows that McWane and Sigma may have taken actions contrary to their self-interest. First, as with Star, their decisions to curtail job discounting would be against their interest absent an understanding that their competitors were going to do the same. Otherwise, they risked losing sales to competitors who discounted. Second, McWane's decision to curtail discounting and raise prices in 2008, particularly in the face of excess capacity, lower demand, and declining market share (CX 1287-005-007), could also be read as contrary to the company's interests.

In re McWane, Inc., 2012 F.T.C. LEXIS 155, at *27-28; *see also* CCPB at 122-126 (discussing actions against unilateral self-interest); CCPB at 114-143 (discussing other plus factors).

34. The alleged conspiracy would have been directly contrary to McWane's legitimate, economic self-interest. As stated, a conspiracy would have locked McWane into an

unsustainable share of the Fittings market, whereas undercutting competition to drive sales and therefore volumes, and reduce inventory, was in McWane's economic self-interest.

Response to Proposed Conclusion of Law No. 34

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the November 2012 Order, at 2.

As a statement of fact, the proffered statement is misleading, wrong and contradicted by the weight of the evidence. The evidence establishes that Mr. Tatman attributed McWane's loss of market share to McWane's smaller and less nimble sales force being unable to identify and quickly respond to its competitors' Project Pricing. McWane therefore had a particularly strong motive to enter into a price-fixing conspiracy that was designed to curtail Project Pricing and increase price transparency – the very area where McWane did not compete effectively. CCPF 855-859; CCPB at 105-164.

35. The conspiracy inference Complaint Counsel has asked this Court to draw is not only not the most likely inference to be drawn from the evidence, it is actually the *least likely* inference to be drawn from the evidence and, as a result, the requested conspiracy inference should be rejected. *See In re Ins. Brokerage Antitrust Lit.*, 618 F.3d at 322 n. 20, 330 (evidence equally consistent with unconcerted action does not support an inference of conspiracy).

Response to Proposed Conclusion of Law No. 35

This proposed conclusion is misleading to the extent it implies that conduct that is equally consistent with unconcerted action generally does not support an inference of conspiracy; rather, conduct that is as consistent with permissible competition as with illegal conspiracy does not, *without more*, support an inference of conspiracy. *Matsushita*, 475 U.S. at 588. Inference of a conspiracy is appropriate where, as here, certain plus factors exist that tend to exclude the possibility that the conspirators acted independently. *See id.*

To the extent this proposed conclusion argues that a price-fixing conspiracy is the "least likely inference" to be drawn from the evidence, this is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the November 2012 Order, at 2. The weight of the evidence establishes that McWane, Sigma and Star conspired to stabilize and increase Fittings prices by curtailing Project Pricing and increasing price transparency. *See* CCPF 907-1571; CCPB at 105-164.

3. The Government has Failed to Establish Hallmarks of Traditional Conspiracy involving McWane.

36. Ordinarily in an oligopolistic market, motive and noncompetitive behavior are present. *See Flat Glass*, 385 F.3d at 360.

Response to Proposed Conclusion of Law No. 36

Complaint Counsel has no specific response except to note that Project Pricing in the Fittings market is not transparent and frustrates oligopolistic coordination. CCPF 679-683.

37. Even when the first two plus factors are present, a plaintiff also must present substantial evidence of "customary indications of traditional conspiracy," which "tends to exclude the possibility" that the defendant acted independently of its competitors. *Matsushita*, 475 U.S. at 588; *Flat Glass*, 385 F.3d at 360

Response to Proposed Conclusion of Law No. 37

The proposed conclusion is misleading insofar as it suggests that evidence of "plus" factors should not be considered as a whole. "The character and effect of a conspiracy are not to be judged by dismembering it and viewing it separate parts, but only by looking at it as a whole." *In re High-Tech Emp. Antitrust Litig*., 856 F. Supp. 2d at 1118; *see also Continental Ore Co.*, 370 U.S. at 699; *High Fructose Corn Syrup*, 295 F.3d at 655.

38. Customary indications of traditional conspiracy can include ambiguous participant admissions, solicitations of agreement, pricing or output communications between parties, and parallelism that is difficult to explain absent an agreement. VI Phillip E. Areeda &

Herbert Hovenkamp, *Antitrust Law* ¶ 1434b, at 243 (2d ed. 2003); *See Matsushita*, 475 U.S. at 588; *Flat Glass*, 385 F.3d at 360.

Response to Proposed Conclusion of Law No. 38

Complaint Counsel has no specific response except to note that the list of plus factors identified in the proposed conclusion is not exhaustive.

39. Where a defendant's actions are equally consistent with a plausible, non-collusive explanation, as with a conspiracy, the defendant is entitled to judgment in its favor. *See Burtch,* 662 F.3d at 228; *In re Ins. Brokerage Antitrust Lit.*, 618 F.3d at 330. In this case, McWane's actions are much *more* consistent with a plausible, non-collusive explanation than with the conspiracy alleged by the government.

Response to Proposed Conclusion of Law No. 39

This proposed conclusion is misleading to the extent it implies that conduct that is equally consistent with non-collusive conduct generally does not support an inference of conspiracy; rather, conduct that is as consistent with permissible competition as with illegal conspiracy does not, *without more*, support an inference of conspiracy. *Matsushita*, 475 U.S. at 588. Inference of a conspiracy is appropriate where, as here, certain plus factors exist that tend to exclude the possibility that the conspirators acted independently. *See id.*

To the extent this proposed conclusion argues that McWane's actions are "much *more* consistent with a plausible, non-collusive explanation than with the conspiracy alleged by the government," this is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the November 2012 Order, at 2. As a statement of fact, the proffered statement is incorrect and contradicted by the weight of the evidence, which establishes that McWane's actions (and those of its competitors) were against its unilateral self-interest and most reasonably explained by conspiratorial agreement between the firms. *See* CCPB at 122-126 (discussing actions against unilateral self-interest); *see also* CCPB at 114-143 (discussing other plus factors).

40. Because courts recognize that it is perfectly legitimate for a firm to receive its competitors' pricing information from customers, *Citric Acid*, 191 F.3d at 1103, the fact that McWane, Sigma, and Star each came to possess copies of each other's customer pricing letters does not support an inference of a conspiracy. *See Baby Food*, 166 F.3d at 126.

Response to Proposed Conclusion of Law No. 40

This proposed conclusion is misleading to the extent it suggests that all exchanges of pricing information through customers are "perfectly legitimate." Where, as here, suppliers use price letters ostensibly addressed to customers to communicate with their competitors, such letters can support an inference of conspiracy. *See In re Citric Acid Litig.*, 191 F.3d 1090, 1103 (9th Cir. 1999) (citing *United States v. Container Corp. of Am.*, 393 U.S. 333, 340 (1969)). This finding is also misleading to the extent that it suggests that evidence of plus factors should be considered individually. Courts have repeatedly recognized that invitations to collude can be arranged through public signals and communications, thus supporting an inference of conspiracy. *See, e.g., In re Delta/AirTran Baggage Fee Antitrust Litig.*, 733 F. Supp.2d 1348, 1360 (N.D. Ga. 2010) (recognizing that communications supporting an illegal conspiracy "can occur in speeches at industry conferences, announcements of future prices, statements on earnings calls, and in other public ways"); *In re Petroleum Prods. Antitrust Litig.*, 906 F.2d 432, 445-447 (9th Cir. 1990).

Evidence of plus factors must be considered as a whole, and not individually dissected. *In re High-Tech Emp. Antitrust Litig*., 856 F. Supp. 2d at 1118; *Continental Ore Co.*, 370 U.S. at 699; *see also High Fructose Corn Syrup*, 295 F.3d at 655.

As a statement of fact suggesting that the McWane, Sigma and Star's pricing letters do not support an inference of conspiracy, it is incorrect and contradicted by the weight of evidence. The evidence shows that McWane, Sigma and Star intentionally communicated with each other using pricing letters nominally addressed to Distributors, which supports an inference of

conspiracy. *E.g.* CCPF 1554-1571 (Sigma sent "heads up" in pricing letter, which McWane received and considered a "communication" from Sigma).

41. In an oligopolistic market like fittings, a competitor's decision to follow an industry leader's price increase is legitimate, *Baby Food*, 166 F.3d at 128, and it is well established that such "bare 'conscious parallelism' is 'not in itself unlawful.'" *White*, 635 F.3d at 575 (quoting *Brooke Group Ltd*., 509 U.S. at 27)).

Response to Proposed Conclusion of Law No. 41

This proposed conclusion is misleading to the extent it suggests that all instances of following a competitor's price increase are "legitimate." Where, as here, consciously parallel business behavior is "supplemented by additional evidence, an illegal agreement can be inferred." *Baby Food*, 166 F.3d at 128 (internal quotation marks omitted).

42. To distinguish a tacit price-fixing agreement from legitimate conscious parallelism, Complaint Counsel must proffer evidence of "uniform behavior among competitors, preceded by conversations implying that later uniformity might prove desirable or accompanied by other conduct that in context suggests that each competitor failed to make an independent decision." *White*, 635 F.3d at 576.

Response to Proposed Conclusion of Law No. 42

The proposed conclusion is misleading to the extent it suggests that the only way to prove a price-fixing conspiracy through circumstantial evidence is to show evidence of "uniform behavior among competitors preceded by conversations implying that later uniformity might prove desirable…." Complaint Counsel does not disagree that this is one way among many to show a price-fixing conspiracy. Complaint Counsel also notes that parallel conduct need not be precisely uniform or simultaneous to prove a price-fixing conspiracy. *See Baby Food*, 166 F.3d at 132 (recognizing that parallel pricing need not be uniform); *In re Blood Reagents*, 756 F. Supp. 2d at 630 ("Plaintiffs are not required to plead simultaneous price increases—or that the price increases were identical—in order to demonstrate parallel conduct.").

43. Courts have held that evidence of "opportunity to conspire" is insufficient to infer an antitrust conspiracy. *Travel Agent*, 583 F.3d at 905; *Cosmetic Gallery*, 495 F.3d at 53.

Response to Proposed Conclusion of Law No. 43

This proposed conclusion is misleading to the extent it suggests that evidence of opportunity to conspire can never support an inference of conspiracy. Rather, evidence of an opportunity to conspire, "standing alone," is insufficient to infer an antitrust conspiracy. *In re Travel Agent Comm'n Antitrust Litig.*, 583 F.3d 896, 911 (6th Cir. 2009). But where, as here, there is additional evidence tending to exclude the possibility of independent action, opportunity to conspire is a "plus factor" weighing in favor of an inference of conspiracy. *See, e.g.*, *Trist v. First Fed. S & L Ass'n. of Chester*, 466 F. Supp. 578, 587 (E.D. Pa. 1979) (finding a conspiracy when evidence of opportunity to conspire was coupled with a regular exchange of business information: "[a]lthough we agree with defendants that the 'opportunity and inclination' evidence without more would be insufficient to support an inference of conspiracy, we again decline their constant invitation to unravel plaintiffs' factual mesh and consider each strand in isolation."). The proposed conclusion is also misleading to the extent it suggests that an "opportunity to conspire" should be considered individually. Evidence of plus factors must be considered as a whole, and not individually dissected. *In re High-Tech Emp. Antitrust Litig.*, 856 F. Supp. 2d at 1118; *Continental Ore Co.*, 370 U.S. at 699; *see also High Fructose Corn Syrup*, 295 F.3d at 655.

44. It is well-established that competitor communications alone are insufficient evidence of a price-fixing conspiracy. *White*, 635 F.3d at 583-84. *See also Baby Food*, 166 F.3d at 133 (competitors' "chit chat" and "chance meetings" do not constitute plus factors); Appendix of Horizontal Cases.

Response to Proposed Conclusion of Law No. 44

The proposed conclusion is misleading insofar as it suggests that evidence of competitor communications can never support an inference of conspiracy. Numerous courts have found price-fixing conspiracies based on evidence of inter-firm communications. *See, e.g.*, *In re Plywood Antitrust Litig.*, 655 F.2d 627, 634 (5th Cir. 1981) ("The parallel pricing conduct clearly demonstrated in the record plus the numerous items of direct evidence of communication between high-level personnel on pricing policy adequately support the jury's verdict."); *In re High Pressure Laminates Antitrust Litig.*, No. 00 MDL 1368 (CLB), 2006 WL 1317023, at *3 (S.D.N.Y. May 15, 2006) (holding that "'a high level of inter-corporation communications' is a recognized 'plus factor'" and denying defendant's motion for judgment as a matter of law). Additionally, the proposed conclusion is misleading to the extent it asks this Court to review each plus factor individually; rather, evidence of plus factors must be considered as a whole, and not individually dissected. *In re High-Tech Emp. Antitrust Litig*., 856 F. Supp. 2d at 1118; *Continental Ore Co. v. Union Carbide & Carbon Corp*., 370 U.S. at 699 (1962)); *see also High Fructose Corn Syrup*, 295 F.3d at 655.

45. On the record before this Court, as Complaint Counsel is "[f]acing the sworn denial of the existence of conspiracy, it [is] up to plaintiff to produce ***significant probative evidence***" that a conspiracy existed, even to avoid summary judgment, let alone judgment after a full-blown trial. *City of Moundridge v. Exxon Mobil Corp.*, 429 F. Supp. 2d 117, 130 (D.D.C. 2006) (emphasis added) (citation omitted).

Response to Proposed Conclusion of Law No. 45

This proposed conclusion is incorrect and misleading to the extent it suggests that a higher burden of proof applies in light of McWane's "sworn denials" of the existence of a conspiracy. The burden of proof is the same whether or not McWane (or the other conspirators) denies the existence of a conspiracy. *See Minpeco, S.A. v. ContiCommodity Services, Inc.*, 673 F. Supp. 684, 697 (S.D.N.Y. 1987) (finding sufficient evidence of a conspiracy based on

evidence of parallel conduct and "plus factors," despite defendant's "sworn denial to the contrary").

46. A "few scattered communications" and other evidence "falls far short" of overcoming defendants' sworn denials. *City of Moundridge v. Exxon Mobil Corp.*, 409 Fed.Appx. 362, 364 (D.C. Cir. 2011); *see also Superior Offshore*, 2012 WL 3055849, *7 (statement that "everyone more or less agreed to the necessity of a more or less equal rate hike for everyone" insufficient).

Response to Proposed Conclusion of Law No. 46

This proposed conclusion is misleading insofar as it suggests that evidence of competitor communications can never support an inference of conspiracy. Numerous courts have found price-fixing conspiracies established based on evidence of inter-firm communications. *See, e.g.*, *In re Plywood Antitrust Litig.*, 655 F.2d at 634 ("The parallel pricing conduct clearly demonstrated in the record plus the numerous items of direct evidence of communication between high-level personnel on pricing policy adequately support the jury's verdict."); *In re High Pressure Laminates Antitrust Litig.*, 2006 WL 1317023, at *3 (holding that "'a high level of inter-corporation communications' is a recognized 'plus factor'" and denying defendant's motion for judgment as a matter of law).

The proposed conclusion is misleading insofar as it suggests that the inter-firm communications involved in this case could be described as "few" or "scattered" in nature. To the contrary, McWane, Sigma and Star engaged in repeated, intentional and extensive meetings, both in person and via telephone, at times that the firms were making critical decisions regarding price increases and competitive strategy. CCPF 700-827.

47. Complaint Counsel must prove that any alleged exchange of pricing information actually made an impact on pricing decisions. *Id.* at 369; *Baby Food*, 166 F.3d at 125. Complaint Counsel has failed to do so. Complaint Counsel established no evidence if an exchange of price information beyond normal pricing letters to customers.

Response to Proposed Conclusion of Law No. 47

It appears that the citation to authority for this proposed conclusion is erroneous, as it is unclear what case or authority McWane is relying on with the citation: "*id.* at 369."

The proposed conclusion is incorrect and misleading insofar as it suggests that Complaint Counsel must prove that a price-fixing agreement was effective. Price-fixing conspiracies are condemned as *per se* illegal and are condemned even absent evidence that they increased prices or were otherwise effective. *See United States v. W.F. Brinkley & Son Constr. Co., Inc.*, 783 F.2d 1157, 1162 (4th Cir. 1986) ("Since in a price-fixing conspiracy the conduct is illegal *per se*, further inquiry on the issues of intent or the anti-competitive effect is not required.") (internal quotation marks omitted).

Additionally, the argument that Complaint Counsel has failed to prove an impact on pricing decisions, or failed to show evidence of an exchange of pricing information beyond normal pricing letters to customers, is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the November 2012 Order, at 2.

As a statement of fact, the proffered statement is incorrect and contradicted by the weight of the evidence. The weight of evidence establishes that McWane, Sigma and Star conspired to raise and stabilize prices by curtailing Project Pricing and increasing price transparency. *See* CCPB 105-164.

48. Complaint Counsel has thus failed to meet its burden of presenting evidence which tends to exclude the possibility that insert legal cite/quote.

Response to Proposed Conclusion of Law No. 48

This proposed conclusion is not an intelligible statement. Moreover, McWane has cited no authority in support of its proposed conclusion as required by the November 2012 Order, at 2.

D. The Short-Lived Trade Association the Ductile Iron Fittings Research Association (DIFRA) Did Not Facilitate Price Coordination

49. It is well established that legitimate trade associations are perfectly legal. *Citric Acid,* 191 F.3d at 1097-98. Courts have also rejected any antitrust liability premised upon the theory that a company's decision to participate in a trade association that gathers and disseminates aggregated tons-shipped data somehow "facilitated" price collusion. *Williamson Oil*, 346 F.3d at 1313 ("exchange [of] information relating to sales . . . does not tend to exclude the possibility of independent action or to establish anticompetitive collusion"). Even if DIFRA had gathered pricing information (which it did not), it is well-settled that "[g]athering 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." *Citric Acid*, 191 F.3d at 1097-98.

Response to Proposed Conclusion of Law No. 49

This proposed conclusion is incorrect and misleading insofar as it suggests that participation in a trade association or information exchange is always legal under the antitrust laws. An information exchange, although not inherently anticompetitive, is well-recognized as a potential tool for facilitating coordinated behavior. *See, e.g.*, DOJ & FTC, *Statements of Antitrust Enforcement Policy in Health Care*, Statement 6 (1996) (noting that absent "appropriate safeguards . . . information exchanges among competing providers may facilitate collusion or otherwise reduce competition on prices or compensation, resulting in increased prices, or reduced quality and availability of health care services."). In cases such as this one, participation in DIFRA and its information exchange facilitated collusion by allowing McWane, Sigma and Star to monitor their market shares and detect cheating on their collusive scheme. *See Todd v. Exxon Corp.*, 275 F.3d 191, 198 (2d Cir. 2001) (competitors' use of facilitating practice, including an information exchange, is a plus factor that supports an inference of a price fixing agreement); *Petroleum Prods.*, 906 F.2d at 461-462 (same).

To the extent this proposed conclusion argues that DIFRA did not gather pricing information, this is not a proposed conclusion of law because it does not expound on any legal

standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the November 2012 Order, at 2. The evidence demonstrates that McWane, Sigma and Star used the DIFRA information exchange to monitor their market shares, gain confidence that lost sales were due to a declining market and not competition from one another, and to make decisions regarding price. CCPF 1275-1337; CCPB at 168-180.

50. As DIFRA did not disseminate pricing data of its members but rather, only historic, aggregated tons-shipped data, McWane's participation therein is entirely lawful. *Williamson Oil*, 346 F.3d at 1313.

Response to Proposed Conclusion of Law No. 50

This proposed conclusion is misleading to the extent it suggests that the exchange of sales volume data, as opposed to pricing data, is "entirely lawful." While exchanging price information is the most suspect, exchanging sales volume can be a proxy for price and may therefore also harm competition. *See Petroleum Prods.*, 906 F.2d at 462 (exchange of production and supply data can be used to police a cartel or to facilitate interdependent action); *see also* George A. Hay, *Oligopoly, Shared Monopoly, and Antitrust Law*, 67 *Cornell L. Rev*. 439, 454 (1982) ("[F]irms can use information about sales volume, which would indicate an unusual increase in one firm's sales (presumably associated with secret discounts), to monitor adherence to consensus prices.").

The proposed conclusion is also contrary to the Commission's summary judgment decision, which rejected McWane's contention that the exchange of tons-shipped data cannot facilitate price collusion. *In re McWane, Inc.*, 2012 F.T.C. LEXIS 155, at *19. Here, economic theory and the parties' contemporaneous documents establish that the sales volume data exchanged through DIFRA had the potential and tendency to facilitate coordination. *See United States v. U.S. Gypsum Co*, 438 U.S. 422, 457-458 (1978).

E. Complaint Counsel Has No Evidence of Price-Signaling.

51. Count Three of the Complaint alleges that McWane, through "price signaling" and other unilateral actions, invited its competitors to collude to restrain price competition.

Response to Proposed Conclusion of Law No. 51

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the November 2012 Order, at 2. As a statement of fact, the proffered statement its incorrect; it is unclear from where it draws the term "price signaling," which does not appear in the Third Violation Alleged in the Complaint. (Complaint ¶ 66 ("As alleged herein, McWane invited its competitors to collude with McWane to restrain price competition. These actions constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45. Such acts and practices, or the effects thereof, will continue or recur in the absence of appropriate relief."); *see also* CCPB at 90-105 ("McWane Unlawfully Invited Its Competitors to Collude in Violation of Section 5 of the FTC Act")).

52. Because the existence of an actual agreement is the essence of a Sherman Act § 1 claim, one firm's "price signal" or "invitation to collude" is not actionable under the antitrust laws. *See Twombly*, 550 U.S. at 553.

Response to Proposed Conclusion of Law No. 52

The proposed conclusion is misleading insofar as it suggests that invitations to collude are governed by Section 1 of the Sherman Act. An invitation to collude is actionable as an unfair method of competition in violation of Section 5 of the FTC Act. *In re McWane, Inc.*, 2012 F.T.C. LEXIS 155, at *50-54; *see also* 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) ("As a matter simply of the English

language, intercepting attempted price fixing would seem the quintessential example of restraining a practice that otherwise would ripen into a Sherman Act violation, and of banning a practice that conflicts with the Sherman Act's basic policies."); *Liu v. Amerco*, 677 F.3d 489, 494 n.5 (1st Cir. 2012). The Section 1 cases relied upon by McWane "do not relate to Section 5 and are therefore inapposite." *In re McWane, Inc.* 2012 F.T.C. LEXIS 155, at *52.

53. Absent proof that such unilateral actions actually harmed competition, neither are they actionable under Section 5 of the FTC Act. *See Boise Cascade Corp. v. FTC*, 637 F.2d 573, 581-82 (9th Cir. 1980).

Response to Proposed Conclusion of Law No. 53

The proposed conclusion is a misstatement of law. An invitation to collude is actionable as an unfair method of competition in violation of Section 5 of the FTC Act. Even if unsuccessful, an invitation to collude is considered to be "pernicious conduct with a clear potential for harm and no redeeming value whatever." *In re McWane, Inc.*, 2012 F.T.C. LEXIS 155, at *52-54; *Liu v. Amerco*, 677 F.3d at 494 n.5; *see also* 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).

54. In an oligopolistic industry, even proof that a firm's conduct reduced competition is not sufficient to establish a violation of Section 5. *E.I. DuPont de Nemours & Co. v. FTC*, 729 F.2d 128, 137-40 (2nd Cir. 1984).

Response to Proposed Conclusion of Law No. 54

This proposed conclusion is a misstatement of law. In *E.I. du Pont de Nemours & Co. v. FTC*, the court held that conduct that results in a lessening of competition does not violate Section 5 if such conduct is "not collusive, coercive, predatory or exclusionary in character." 729 F.2d 128, 138 (2d Cir. 1984). Such a rule is inapposite here, as Complaint Counsel has established collusive, coercive, predatory or exclusionary conduct by McWane.

55. Labeling an oligopolist's pricing changes as "price signals" does not convert them into "unfair competition." *Id.* at 139.

Response to Proposed Conclusion of Law No. 55

This proposed conclusion is misleading to the extent it suggests that price signaling cannot violate the antitrust laws. Such evidence, when combined with evidence of a tacit agreement or "some indicia of oppressiveness," can indeed constitute an unfair method of competition under Section 5 of the FTC Act. *E.I. du Pont de Nemours*, 729 F.2d at 139. This proposed conclusion is also misleading insofar as it suggests that Count Three is based solely on "price signaling," which it is not. *See* Commission Complaint ¶ 66; CCPB at 90-105. The Complaint does not challenge mere advance price announcements. The evidence establishes that McWane used price letters nominally addressed to customers to communicate with its rivals as part of its Plan whereby, with proper communications among competitors, McWane could "drive both price stability and transparency" and then achieve "net price increases" "in stepped or staged increments." *See* CCPB at 118 (discussing the Tatman Plan), CCPB at 90-104 (discussing McWane's invitation to collude); CCPF 907-929.

56. Instead, Complaint Counsel must prove that indicia of oppressiveness existed, such as (i) evidence of the defendant's anticompetitive intent; or (ii) the absence of legitimate business justifications for the defendant's actions. *Id.* at 139.

Response to Proposed Conclusion of Law No. 56

Complaint Counsel has no specific response except to note that, insofar as this proposed conclusion relates only to stand-alone allegations of "price signaling," it is inapposite to McWane's invitation to collude.

57. Complaint Counsel failed to meet its burden regarding McWane's alleged intent and lack of legitimate business justification. Moreover, the overwhelming evidence establishes that McWane lacked anticompetitive intent and had legitimate business justifications for its actions.

Response to Proposed Conclusion of Law No. 57

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the November 2012 Order, at 2. This proposed finding is also misleadingly vague because it does not identify to which "actions" it is referring. As a statement of fact, it is misleading and against the weight of evidence, because the evidence establishes that McWane invited its competitors to collude with the intent of reducing competition and raising prices. *See* Commission Complaint ¶ 66; CCPB § V.C. Complaint Counsel is unaware of any business justification asserted by McWane related to its January and May 2008 invitation to collude letters.

II. McWane Did not Monopolize, Attempt to Monopolize, or Conspire to Monopolize the Alleged Domestic Fittings Market (Counts 5-7)

A. Standard of Proof

58. Complaint Counsel's Section 5 claims alleging that McWane monopolized, attempted to monopolize, or conspired to monopolize the so-called domestic fittings market must meet the same burden of proof as Sherman Act Section 2 claims. *See, e.g. FTC v. Cement Institute*, 333 U.S. 683, 691-92 (1948).

Response to Proposed Conclusion of Law No. 58

Complaint Counsel has no specific response.

59. Section 2 of the Sherman Act prohibits a firm from monopolizing, attempting to monopolize, or conspiring to monopolize the relevant market. 15 U.S.C. § 2.

Response to Proposed Conclusion of Law No. 59

Complaint Counsel has no specific response.

60. "The purpose of the Act is not to protect businesses from the workings of the market; it is to protect the public from the failure of the market. The law directs itself not against conduct which is competitive, ***even severely so***, but against conduct which unfairly tends to destroy competition itself." *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993) (emphasis supplied).

Response to Proposed Conclusion of Law No. 60

Complaint Counsel has no specific response.

61. Because "[i]t is sometimes difficult to distinguish robust competition from conduct with long-term anticompetitive effects," federal courts have been careful to avoid construing Section 2 in a way that would chill, rather than foster, competition. *Spectrum Sports*, 506 U.S. at 458-59.

Response to Proposed Conclusion of Law No. 61

Complaint Counsel has no specific response.

62. The Supreme Court has made clear that: "[t]he mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices – at least for a short period – is what attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct." *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) ("*Verizon*"). *See also United States v. Microsoft Corp.*, 253 F.3d 34, 51 (D.C. Cir. 2001) ("merely possessing monopoly power is not itself an antitrust violation").

Response to Proposed Conclusion of Law No. 62

Complaint Counsel has no specific response.

63. Acquiring or maintaining monopoly power through "growth or development as a consequence of a superior product, business acumen, or historic accident" is not a violation of Section 2. *Verizon*, 540 U.S. at 407 (quoting *United States v. Grinnell Corp*., 384 U.S. 563, 570-71 (1966)).

Response to Proposed Conclusion of Law No. 63

Complaint Counsel has no specific response.

64. McWane's share of the Fittings market is not the result of willful misconduct, but of its own business acumen and even historic accident – i.e. the exit of other domestic DIWF manufacturers from an unprofitable industry in the wake of a flood of cheap imports. Thus, Complaint Counsel must establish not only that McWane possessed monopoly power in the relevant market, but also that it willfully acquired or maintained that power through anticompetititve conduct. *See Verizon,* 540 U.S. at 407.

Response to Proposed Conclusion of Law No. 64

To the extent this proposed conclusion argues that McWane's share of the Domestic Fittings market is not the result of willful misconduct, this is not a proposed conclusion of law because it does not expound on any legal standard or proposition.

Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004) supports the general proposition that the mere possession of monopoly power is not unlawful unless it is accompanied by anticompetitive conduct; however, the record establishes that McWane, through anticompetitive means, willfully acquired and maintained monopoly power in the Domestic Fittings market. *See* CCPB at 206-258.

65. Because Complaint Counsel cannot meet this burden, McWane is entitled to judgment in its favor on Counts Five through Seven of the Complaint, and Count Four to the extent it is based on monopoly.

Response to Proposed Conclusion of Law No. 65

This proposed conclusion is unsupported by any legal authority or record evidence as required by the November 2012 Order, at 2. As a statement of fact, it is incorrect. The record establishes that McWane, through anticompetitive means, willfully acquired and maintained monopoly power in the Domestic Fittings market. *See* CCPB at 206-258.

B. McWane Lacked Market Power.

66. McWane's market share does not rise to the level of "monopoly power." *See Barr Laboratories, Inc. v. Abbott Laboratories*, 978 F.2d 98, 112-13 (3rd Cir. 1992) (market share of 50% did not establish monopoly power). As numerous witnesses confirmed at trial, both before ARRA and after ARRA, domestic fittings comprise only about 15-20% of the fittings market.

Response to Proposed Conclusion of Law No. 66

To the extent this proposed conclusion argues that McWane does not have monopoly power, this is not a proposed conclusion of law because it does not expound on any legal

standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the November 2012 Order, at 2.

As a statement of fact, the proffered statements are misleading and contrary to record evidence because McWane has monopoly power in the Domestic Fittings market. CCPF 1655-1711. McWane maintained market shares of approximately **{ }**% in 2010 and **{ }**% in 2011. CCPF 1662-1663. Whether or not Domestic Fittings comprise roughly 15-20% of the overall Fittings market is irrelevant to the question of McWane's market share within the Domestic Fittings market.

67. "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 (2nd Cir. 1999) (italics in original, bold supplied).

Response to Proposed Conclusion of Law No. 67

The proposed conclusion is misleading to the extent it suggests that Complaint Counsel must prove McWane priced substantially above the competitive level and did so "for a significant period without erosion." Rather, monopoly power "may be proven directly by evidence of the control of prices or the exclusion of competition, or it may be inferred from one firm's large percentage share" of a relevant market that is characterized by high barriers to entry. *See Tops Mkts., Inc. v. Quality Mkts., Inc.*, 142 F.3d 90, 98 (2d Cir. 1998).

68. Large market share does not conclusively establish monopoly power. *See, e.g., Tops Markets, Inc. v. Quality Markets, Inc.,* 142 F.3d 90, 99 (2nd Cir. 1998) (70% share)*; Epicenter Recognition, Inc. v. Jostens, Inc.,* 81 Fed.App. 910, 911-12 (9th Cir. 2003) (80% share).

Response to Proposed Conclusion of Law No. 68

The proposed conclusion is misleading to the extent it suggests that a large market share, in a market characterized by high barriers to entry, cannot establish monopoly power. *See United States v. Aluminum Co. of Am.*, 148 F.2d 416, 424 (2d Cir. 1945).

69. If a defendant with large market share is unable to control prices or exclude competitors, then it is not a monopoly. *Tops Markets*, 142 F.3d at 99; *see also Metro Mobile CTS, Inc. v. NewVector Comms., Inc.*, 892 F.2d 62, 63 (9th Cir. 1989) ("*Metro Mobile*") (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 Resources, 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).

Response to Proposed Conclusion of Law No. 69

This proposed conclusion is incomplete and misleading to the extent it suggests that monopoly power can only be proven by evidence of the ability to control prices or exclude competitors. While this is one way to prove monopoly power, the cited authority further states that monopoly power may also be "inferred from one firm's large percentage share of the relevant market" when that market is characterized by high entry barriers. *Tops Mkts., Inc. v. Quality Mkts., Inc.*, 142 F.3d at 98.

Furthermore, this proposed conclusion is misleading to the extent it suggests that a high market share, when coupled with high entry barriers, can never serve as proof of monopoly power. As the court held in *United States v. Aluminum Co. of America*, a market share of "over ninety" percent "is enough to constitute a monopoly . . . ." 148 F.2d at 424.

70. The ability to maintain prices above a competitive level "for an extended period" is a key element of monopoly power. *Rebel Oil Co., Inc. v. Atlantic Richfield* Co., 51 F.3d 1421, 1434 (9th Cir. 1995) ("*Rebel Oil*").

Response to Proposed Conclusion of Law No. 70

This conclusion of law is misleading to the extent it suggests that Complaint Counsel must prove that McWane maintained supracompetitive prices "for an extended period." While

this is one way of proving monopoly power, such power also "may be inferred from one firm's large percentage share" of a relevant market characterized by high barriers to entry. *Tops Mkts., Inc. v. Quality Mkts., Inc.*, 142 F.3d at 98.

71. Where barriers to entry[1] into a market are low, a defendant's market power is often much less than its market share would seem to indicate. *Moeckler v. Honeywell International, Inc.*, 144 F.Supp.2d 1291, 1308 (M.D.Fla. 2001).

Response to Proposed Conclusion of Law No. 71

This proposed conclusion is misleading because the cited authority does not state that a defendant's market power is "often much less" than its market share indicates; rather, when entry barriers are low, market share "does not accurately reflect" the defendant's market power. *Moecker v. Honeywell Int'l, Inc.*, 144 F. Supp. 2d 1291, 1308 (M.D. Fla. 2001). The case does not address the degree to which market share and market power may vary when entry barriers are low.

72. "Market share reflects current sales, but today's sales do not always indicate power over sales and price tomorrow." *Ball Memorial Hospital v. Mut. Hospital Ins., Inc.*, 784 F.2d 1325, 1336 (7th Cir. 1986); *see also Oahu Gas*, 838 F.2d at 366 (a firm with a high market share may be able to exert market power in the short run, but substantial market power can persist only if there are significant and continuing barriers to entry).

Response to Proposed Conclusion of Law No. 72

Complaint Counsel has no specific response.

73. The evidence demonstrates that McWane lacks such power.

Response to Proposed Conclusion of Law No. 73

[1] Barriers to entry are additional long-run costs that must be incurred by new entrants but not by incumbent competitors, or "factors in the market that deter entry while permitting incumbent firms to earn monopoly returns." Rebel Oil, 51 F.3d at 1439. Entry barriers are typically legal licensing requirements, control of an essential or superior resource, entrenched buyer preferences for established brands, capital market evaluations which impose higher capital costs on new entrants, and economies of scale. *Id.* To support a finding of monopoly power, entry barriers must be high enough to constrain the normal operation of the market to the extent that natural market forces cannot self-correct the market. *Id.*

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the November 2012 Order, at 2.

As a statement of fact, it is unsupported and wrong. The weight of evidence establishes that McWane has monopoly power, as evidenced by McWane's high market shares in a Domestic Fittings market characterized by high entry barriers and by McWane's ability to control prices and exclude competitors *See* CCPF 1662-1663 (McWane's market shares of approximately **{ }**% in 2010 and **{ }**% in 2011); CCPF 642-650 (barriers to entry); CCPF 1694-1711 (controlling price/excluding competitors).

C. McWane's September 2009 Rebate Policy Did Not Exclude Star and is Pro-competitive.

74. Even if Complaint Counsel could establish that domestic DIWF is a separate relevant market in which McWane has monopoly power (which it cannot), McWane is nevertheless entitled to judgment in its favor because there is no evidence that McWane engaged in anticompetitive conduct to acquire or maintain monopoly power. *See Verizon*, 540 U.S. at 407.

Response to Proposed Conclusion of Law No. 74

To the extent this proposed conclusion argues that the Domestic Fittings market is not a separate relevant market and that McWane does not have monopoly power in the market, this is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the November 2012 Order, at 2. As a statement of fact, it is against the weight of evidence, which establishes a separate relevant product market for Domestic Fittings sold into waterworks projects with Domestic-only Specifications, (*see* CCPB at 72-80), and that McWane has monopoly power in the Domestic Fittings market. *See* CCPB at 207-210.

To the extent this proposed conclusion argues that there is no evidence that McWane engaged in anticompetitive conduct to acquire or maintain monopoly power, this is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the November 2012 Order, at 2.

As a statement of fact, it is incorrect. The evidence establishes that McWane's Exclusive Dealing Policy was anticompetitive because it deterred Distributors from purchasing Domestic Fittings from Star, thereby causing Star to lose sales of Domestic Fittings and ultimately preventing Star from investing in its business as required to become an effective competitor in the Domestic Fittings market. CCPF 1893-2063, 2091-2166.

75. Complaint Counsel alleges two instances of supposed anticompetitive conduct: McWane's September 2009 Rebate Policy ("Rebate Policy") and McWane's Master Distributorship Agreement with Sigma ("MDA"). Both are pro-competitive.

Response to Proposed Conclusion of Law No. 75

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the November 2012 Order, at 2. Complaint Counsel notes that the Complaint alleges that the MDA violated Sections 1 and 2 of the Sherman Act (Violations IV and VII).

To the extent the proposed conclusion argues that McWane's Exclusive Dealing Policy and Master Distributorship Agreement are "pro-competitive," this is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the November 2012 Order, at 2.

As a statement of fact, the proffered statement is misleading because it refers to and treats McWane's Exclusive Dealing Policy as a mere "Rebate Policy" rather than an all-or-nothing exclusive dealing policy. To the contrary, the September 22, 2009 letter did not offer or provide any rebate to Distributors in exchange for exclusivity, but rather threatened to deny access to McWane's line of Domestic Fittings as well as to void any accrued rebates on Domestic Fittings for any Distributor that purchased any Domestic Fittings from a competing supplier. CCPF 1823-1849; *see also* CCPF 1850-1879 (McWane enforced the policy against Hajoca).

As a statement of fact, it is also incorrect. The evidence establishes that McWane's Exclusive Dealing Policy and MDA were anticompetitive because they deterred Distributors from purchasing Domestic Fittings from Star, thereby causing Star to lose sales of Domestic Fittings and ultimately preventing Star from investing in its business as required to become an effective competitor in the Domestic Fittings market. CCPF 1893-2063, 2091-2166.

1. The Rebate Policy is Presumptively Legal

76. "As a general rule, businesses are free to choose the parties with whom they will deal, as well as the prices, terms, and conditions of that dealing." *Pacific Bell Tel. Co. v. Linkline Comm., Inc.*, 555 U.S. 438, 448 (2009).

Response to Proposed Conclusion of Law No. 76

This proposed conclusion is incomplete and misleading because the cited authority further states that there are nevertheless instances in which a dominant firm may incur antitrust liability for purely unilateral conduct, such as predatory pricing or a unilateral refusal to deal with competitors. *Pac. Bell Tel. Co. v. Linkline Commc'ns., Inc.*, 555 U.S. 438, 448 (2009). Although businesses generally have the right to select their counterparties and the terms of doing business, such right "is neither absolute nor exempt from regulation." *Lorain Journal Co. v. United States*, 342 U.S. 143, 155 (1951).

77. The rebates referenced in the Rebate Policy are customer discounts. Because discounts are beneficial to consumers, "price cutting is a practice the antitrust laws aim to promote." *Cascade Health Solutions v. Peacehealth*, 515 F.3d 883, 896 (9th Cir. 2008); *see Nicsand, Inc. v. 3M Co.*, 507 F.3d 442, 452 (6th Cir. 2007) ("[c]utting prices in order to increase business often is the very essence of competition").

Response to Proposed Conclusion of Law No. 77

The proposed conclusion relating to the benefits of discounts to consumers is irrelevant and immaterial because the Complaint does not challenge any discounts offered by McWane. To the extent this proposed conclusion argues that McWane's Exclusive Dealing Policy is a mere rebate policy, this is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the November 2012 Order, at 2.

As a statement of fact, the proffered statement is misleading because it refers to and treats McWane's Exclusive Dealing Policy as a mere "Rebate Policy" rather than an all-or-nothing exclusive dealing policy. To the contrary, the September 22, 2009 letter did not offer or provide any rebate to Distributors in exchange for exclusivity, but rather threatened to deny access to McWane's line of Domestic Fittings as well as to void any already-accrued rebates on Domestic Fittings for any Distributor that purchased any Domestic Fittings from a competing supplier. CCPF 1823-1849; *see also* CCPF 1850-1879 (McWane enforced the policy against Hajoca).

78. Discounted prices that remain above a firm's average variable cost are presumptively legal, because a firm's ability to offer above cost discounts represents competition on the merits. *Concord Boat v. Brunswick Boat Corp.*, 207 F.3d 1039, 1061 (8th Cir. 2000) ("*Concord Boat*").

Response to Proposed Conclusion of Law No. 78

This proposed conclusion is immaterial and irrelevant because the Complaint does not challenge any discounts offered by McWane.

79. Too much judicial oversight of discounting creates "intolerable risks of chilling legitimate price cutting." *Id.* at 1061 (quoting *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 223 (1993)). *See also Southeast Missouri Hosp. v. C.R. Bard, Inc.*, 642 F. 3d 608, 623 (8th Cir. 2011) (plaintiff must overcome a strong presumption of legality where defendant's discounted prices are above its average variable cost).

Response to Proposed Conclusion of Law No. 79

This proposed conclusion is immaterial and irrelevant because the Complaint does not challenge any discounts offered by McWane.

80. There is no evidence that the customer discounts McWane offered under its Rebate Policy were below its average variable cost. *See Safeway, Inc. v. Abbott Laboratories*, 761 F.Supp.2d 874, 898 (N.D.Cal. 2011) (granting summary judgment for defendant on predatory pricing monopoly and attempted monopoly claims, where plaintiff failed to present evidence that defendant priced below cost).

Response to Proposed Conclusion of Law No. 80

This proposed conclusion is immaterial and irrelevant because the Complaint does not challenge any discounts offered by McWane. To the extent this proposed conclusion argues that McWane's Exclusive Dealing Policy is a mere rebate policy, this is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the November 2012 Order, at 2.

As a statement of fact, the proffered statement is incorrect and misleading insofar as it suggests that McWane's Exclusive Dealing Policy is a mere "Rebate Policy" that offers its customers discounts or rebates. Rather, it is an all-or-nothing exclusive dealing policy that did not offer or provide any rebates or discounts to Distributors in exchange for exclusivity, but rather threatened to deny access to McWane's line of Domestic Fittings as well as to void any already-accrued rebates on Domestic Fittings for any Distributor that purchased any Domestic

Fittings from a competing supplier. CCPF 1823-1849; *see also* CCPF 1850-1879 (McWane enforced the policy against Hajoca).

81. A defendant's above-cost customer discounts are presumed legal even if those discounts are offered under an exclusive agreement. *See, e.g., Cascade Health Solutions v. Peacehealth*, 515 F.3d 883, 903 (9th Cir. 2008); *Concord Boat, 207 F.3d at 1061; Nicsand*, 507 F.3d at 451-52, 457.

Response to Proposed Conclusion of Law No. 81

This proposed conclusion is immaterial and irrelevant because the Complaint does not challenge any discounts offered by McWane. The proposed conclusion is also misleading, unsupported, incorrect and a misstatement of law insofar as it suggests that above-cost discounts are presumed legal in all circumstances. The cases cited in this proposed conclusion offer no support for this proposition. Indeed, in Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039 (8th Cir. 2000), the court acknowledged several cases that had specifically "rejected the argument that any pricing practice that leads to above costs prices is per se lawful under the antitrust laws." Id. at 1062 (emphasis in original). The other cases cited do not address the legality or illegality of above-cost pricing. *See Cascade Health Solutions v. Peacehealth*, 515 F.3d 883, 903 & n.13 (9th Cir. 2008) (analyzing the specific issue of when bundled discounts resulting in below-cost prices may be deemed predatory); *Nicsand, Inc. v. 3M Co.*, 507 F.3d 442, 451-52, 457 (6th Cir. 2007) (finding no predatory pricing without further examination because the plaintiff itself conceded that the defendant had not engaged in such conduct).

82. This presumption of legality even applies where the defendant has a super-majority share of the relevant market, provided the exclusive agreement is terminable at will and on short notice. *Epicenter Recognition, Inc. v. Jostens, Inc.*, 81 Fed.App. 910, 911-12 (9th Cir. 2003).

Response to Proposed Conclusion of Law No. 82

This proposed conclusion is immaterial and irrelevant because the Complaint does not challenge any discounts offered by McWane. The proposed conclusion is also misleading, unsupported, incorrect and a misstatement of law insofar as it suggests that above-cost discounts are presumed legal in all circumstances. The cited case law, Epicenter Recognition, Inc. v. Jostens, Inc., 81 F. App'x 910, 911-12 (9th Cir. 2003), does not even address above-cost discounting.

83. McWane's Rebate Policy is not only terminable at will and on short notice, it is terminable ***at any time***, because it is not a legally enforceable contract or agreement.

Response to Proposed Conclusion of Law No. 83

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the November 2012 Order, at 2.

As a statement of fact, the proferred statements are misleadingto the extent this proposed conclusion argues that McWane's Exclusive Dealing Policy is a mere rebate policy. The evidence establishes that McWane's Exclusive Dealing Policy is not a mere "Rebate Policy" rather than an all-or-nothing exclusive dealing policy. To the contrary, the September 22, 2009 letter did not offer or provide any rebate to Distributors in exchange for exclusivity, but rather threatened to deny access to McWane's line of Domestic Fittings as well as to void any accrued rebates on Domestic Fittings for any Distributor that purchased any Domestic Fittings from a competing supplier. CCPF 1823-1849; *see also* CCPF 1850-1879 (McWane enforced the policy against Hajoca). The evidence also establishes that Distributors were not free to "walk away" at any time. *See Lorain Journal Co. v. United States*, 342 U.S. 143, 149-50 (1951) (newspaper publisher's practice of refusing to deal with parties who advertised with a rival was unlawful attempt to monopolize because advertisers were not free to walk away).

84. The possibility that the Rebate Policy increased Star's costs is of no consequence, because the antitrust laws are designed to protect *competition*, not competitors. *Bacchus Inds., Inc. v. Arvin Inds., Inc.*, 939 F.2d 887, 894 (10th Cir. 1991) (citing *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488, 97 S.Ct. 690, 697, 50 L.Ed.2d 701 (1977)) ("Whether or not a practice violates the antitrust laws is determined by its effect on competition and not its effect on an individual competitor.")

Response to Proposed Conclusion of Law No. 84

This proposed conclusion is misleading to the extent it suggests that increasing a rival's costs does not harm consumers. When, as here, a monopolist prevents its rival from lowering costs, consumers suffer because the rivals are unable to engage in meaningful price competition. Salop & Romaine, *Preserving Monopoly- Economic Analysis, Legal Standards, and Microsoft*, 7 *Geo. Mason L. Rev.* 617, 627 (1999) ("If the monopolist can reduce the sales of a competitor through the use of exclusive contracts, bundling, or other means, the rival may suffer higher costs that make it a less formidable competitor in selling to other customers."). Indeed, raising rivals' costs is a recognized mechanism for harming competition in monopolization cases. *See, e.g.*, Thomas G. Krattenmaker & Steven C. Salop, *Raising Rivals' Costs To Achieve Power over Price*, 96 *Yale L.J.* 209, 224-26 n.60 (1986); Elizabeth Granitz & Benjamin Klein, *Monopolization by "Raising Rivals' Costs": The Standard Oil Case*, 39 *J. Law & Econ.* 1 (1996) (forcing high transportation costs on entrants).

To the extent this proposed conclusion argues that McWane's Exclusive Dealing Policy is a mere rebate policy, this is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the November 2012 Order, at 2.

As a statement of fact, the proffered statement is incorrect and misleading insofar as it suggests that McWane's Exclusive Dealing Policy is a mere "Rebate Policy" that offers its customers discounts or rebates. Rather, it is an all-or-nothing exclusive dealing policy that did

not offer or provide any rebates or discounts to Distributors in exchange for exclusivity, but rather threatened to deny access to McWane's line of Domestic Fittings as well as to void any already-accrued rebates on Domestic Fittings for any Distributor that purchased any Domestic Fittings from a competing supplier. CCPF 1823-1849; *see also* CCPF 1850-1879 (McWane enforced the policy against Hajoca).

85. Although conduct that eliminates rivals reduces competition, "reduction of competition does not invoke the Sherman Act until it harms consumer welfare." *Rebel Oil*, 51 F.3d at 1433.

Response to Proposed Conclusion of Law No. 85

This proposed conclusion is misleading to the extent it suggests that harm to competitors cannot serve as evidence of harm to competition. While the antitrust laws are designed to protect competition, and not individual competitors, evidence of foreclosure or elimination of a competitor is relevant evidence of harm to competition. *Full Draw Prods. v. Easton Sports, Inc.*, 182 F.3d 745, 754 (10th Cir. 1999). ("[W]e find it hard to imagine a closer connection between anticompetitive effect and injury than the destruction of [one of two competitors] and the loss of competition in the [relevant] market."); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 (1985) (in determining whether owner of skiing facility engaged in exclusionary conduct, it was "appropriate to examine the effect of the challenged pattern of conduct on consumers, on [the owner's] smaller rival, and on [the owner] itself").

86. As one circuit court put it: "cutthroat competition is a term of praise rather than condemnation. . . consumers gain when firms try to 'kill' the competition and take as much business as they can." *R.J. Reynolds Tobacco Co. v. Cigarettes Cheaper*, 462 F.3d 690, 696 (7th Cir. 2006) (citations omitted).

Response to Proposed Conclusion of Law No. 86

Complaint Counsel has no specific response.

2. Star's Successful Entry as a Domestic Fittings Supplier Refutes any Inference of Monopoly Power.

87. The trial evidence proves that Star quickly became a supplier of domestic fittings within months of ARRA's passage and dramatically increased its domestic fittings sales.

Response to Proposed Conclusion of Law No. 87

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the November 2012 Order, at 2.

As a statement of fact, it is incorrect and misleading to the extent it suggests that Star "dramatically increased" its Domestic Fittings sales. The evidence shows that McWane's Exclusive Dealing Policy limited Star's sales to a mere **{ }** in 2010 and 2011, or a **{ }** market share. CCPB at 223-240.

88. These facts establish that the Rebate Policy is not anticompetitive. *See, e.g., Omega Environmental*, 127 F.3d at 1164 ("actual entry and expansion" of competitor demonstrated that the defendant's policy did not deter entry into the relevant market); *Sterling Merchandising*, 656 F.3d at 126 (attempted monopolization claim "presumptively implausible where the challenged conduct has been in place for at least two years and the market remains competitive, as evidenced by ongoing entry, profitability of rivals, and stability of their aggregate market share.")

Response to Proposed Conclusion of Law No. 88

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the November 2012 Order, at 2.

As a statement of fact, the proffered statement is unclear because it is unknown what "these facts" is referring to. The proffered statement is misleading to the extent it suggests that evidence of Star's entry into the Domestic Fittings market refutes any inference of McWane's monopoly power. Star's entry into the Domestic Fittings market in late 2009 is relevant to the

question of entry barriers, but it does not end the inquiry. *Rebel Oil Co. v. Atlantic Richfield, Co.*, 51 F.3d 1421, 1440-41 (9th Cir. 1995) ("The fact that entry has occurred does not necessarily preclude the existence of 'significant' entry barriers."). Rather, new entry is only relevant if it is "timely, likely, and sufficient" in its "magnitude, character and scope" to challenge the monopolist's power. DOJ & FTC, *Horizontal Merger Guidelines* (August 19, 2010) at § 9; *Rebel Oil*, 51 F.3d at 1440-41 (citing *1992 Merger Guidelines* with approval in attempted monopolization claim); *Oahu Gas Serv. Inc. v. Pacific Resources, Inc.*, 838 F.2d 360, 367 (9th Cir. 1988) (finding monopoly power despite declining market share). If the new entrants cannot meaningfully constrain the monopolist's exercise of monopoly power, as is the case here, then such entry does not preclude a finding of monopoly power. *Oahu Gas*, 838 F.2d at 367 (entry of two rivals did not preclude jury's finding that defendant had monopolized the market); *Reazin v. Blue Cross & Blue Shield of Kansas, Inc.*, 899 F.2d 951, 971-72 (10th Cir. 1990) (upholding jury's finding of monopoly power despite existence of "some 200" insurance companies operating in same area as Blue Cross because "no other entrant remotely approached Blue Cross' domination of the market").

It is also incorrect and misleading to the extent it suggests that McWane's Exclusive Dealing Policy did not harm competition. The evidence shows that McWane's Exclusive Dealing Policy caused Star to lose sales of Domestic Fittings (CCPF 1893-2063, 2091-2108), ultimately preventing Star from investing in its business as required to become an effective competitor in the Domestic Fittings market. CCPF 2109-2166. Evidence of the Exclusive Dealing Policy's impact on Star, as a rival entrant, supports a finding of harm to competition. *See Full Draw Prods.*, 182 F.3d at 754 ((("[W]e find it hard to imagine a closer connection between anticompetitive effect and injury than the destruction of [one of two competitors] and

the loss of competition in the [relevant] market."); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 (1985) (in determining whether owner of skiing facility engaged in exclusionary conduct, it was "appropriate to examine the effect of the challenged pattern of conduct on consumers, on [the owner's] smaller rival, and on [the owner] itself").-.

89. The allegation that Star did not increase its domestic fittings sales as much or as quickly as it would have preferred does not support a monopoly claims or prove that the Rebate Policy is anticompetitive. *See, e.g., Roland Machinery,* 749 F.2d at 394-95; *Sterling Merchandising,* 656 F.3d at 123 n.5.

Response to Proposed Conclusion of Law No. 89

To the extent this proposed conclusion suggests that McWane's Exclusive Dealing Policy only harmed a competitor (Star), not competition, this is not a proposed conclusion of law because it does not expound on any legal standard or proposition.

As a statement of fact, the proffered statement is incorrect and misleading to the extent it suggests that McWane's Exclusive Dealing Policy did not harm competition. The evidence shows that McWane's Exclusive Dealing Policy caused Star to lose sales of Domestic Fittings (CCPF 1893-2063, 2091-2108), ultimately preventing Star from investing in its business as required to become an effective competitor in the Domestic Fittings market. CCPF 2109-2166. Evidence of the Exclusive Dealing Policy's impact on Star, as a rival entrant, supports a finding of harm to competition. *See Full Draw Prods.*, 182 F.3d at 754 .

90. First, the antitrust laws are designed to protect competition, not competitors. *Brunswick Corp.*, 429 U.S. at 488.

Response to Proposed Conclusion of Law No. 90

Complaint Counsel has no specific response.

91. Second, factors other than McWane's Policy explain why Star may not have increased domestic fittings sales as much as it would have liked, including Star's own reputation, distributors' lack of confidence in Star, and Star's own delivery and inventory issues.

Response to Proposed Conclusion of Law No. 91

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the November 2012 Order, at 2.

As a statement of fact, it is misleading and contradicted by the weight of evidence to the extent it suggests that McWane's Exclusive Dealing Policy did not deter Distributors from purchasing Domestic Fittings from Star or that an excluded rival need be a perfect competitor before there can be liability. The appropriate standard is not whether "but for" McWane's exclusive deals, Star would have been able to compete efficiently, but instead, whether McWane's conduct was a "substantial" or "material" cause of Star's foreclosure from the Domestic Fittings market. *E.g., Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 114 n.9 (1969) (plaintiff is required to show that the conduct is a "material cause" of the injury); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 702 (1962) (same). The evidence shows that McWane's conduct was a substantial and material cause of Star's foreclosure from the Domestic Fittings market. *See* CCPB at 228-232.

92. It is well recognized that "it is sometimes difficult to distinguish robust competition from competition with long-run anticompetitive effects." *Arther S. Langenderfer, Inc. v. S.E. Johnson Co.*, 917 F.2d 1413, 1433 (Sixth Cir. 1990).

Response to Proposed Conclusion of Law No. 92

Complaint Counsel has no specific response to this conclusion of law in that it quotes the case cited.

93. Ultimately, by pushing Star to develop a full line of domestic fittings - rather than merely the most commonly used fittings - in order to compete most effectively with McWane, the Rebate Policy had a pro-competitive purpose.

Response to Proposed Conclusion of Law No. 93

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the November 2012 Order, at 2.

As a statement of fact, the proffered statement is also against the weight of evidence to the extent it argues that McWane's Exclusive Dealing Policy had a procompetitive purpose or effect. The evidence shows that McWane developed, adopted, and implemented its Exclusive Dealing Policy with the specific intent of eliminating Star as a competitor in the Domestic Fittings market. CCPF 1783-1822. As a statement of fact the proffered statement is unsupported, misleading, and contradicted by the weight of the evidence insofar as it suggests Star intended to enter with "merely the most commonly used Fittings." The evidence establishes that Star planned to build up the inventory and sales base required to become a full-line supplier with its own domestic foundry. CCPF 1717-1732. This approach to entry is the same that Star and others had taken when entering the import Fittings market. CCPF 1728.

The proffered statement is also misleading insofar as it suggests that entry on a limited basis is not a legitimate form of competition. Gradual entry with less than a full line of products is "the norm in most industries" because it is recognized that entering with a full line of products is often more risky, more difficult, and more time-consuming. *See* Richard A. Posner, *Antitrust Law* 251-253 (2d Ed. 2001). Additionally, piecemeal entry is often a quicker route to eliminating monopoly pricing, and therefore anticompetitive strategies "that forestall new entry by compelling prospective entrants to enter on a full-line basis" are appropriately condemned under Section 2 of the Sherman Act, absent some offsetting efficiency benefit. *Id.* ("The point is not that the new entrant would have to invest more capital but that it would have to embark on a riskier enterprise, that of creating not a single successful product but a whole line of such

products. It's as if one couldn't make commercial aircraft without making military aircraft as well.").

As a statement of fact, the proffered statement is also misleading because it refers to and treats McWane's Exclusive Dealing Policy as a mere "Rebate Policy" rather than an all-or-nothing exclusive dealing policy. To the contrary, the September 22, 2009 letter did not offer or provide any rebate to Distributors in exchange for exclusivity, but rather threatened to deny access to McWane's line of Domestic Fittings as well as to void any accrued rebates on Domestic Fittings for any Distributor that purchased any Domestic Fittings from a competing supplier. CCPF 1823-1849; *see also* CCPF 1850-1879 (McWane enforced the policy against Hajoca).

3. The Rebate Policy did Not Cause Anticompetitive Effects.

94. Because the Rebate Policy is not a contract, it is less restrictive than most of the exclusive agreements and arrangements found to be perfectly legal by the courts.

Response to Proposed Conclusion of Law No. 94

This proposed conclusion is unsupported by any legal authority as required by the November 2012 Order, at 2. Moreover, it is a misstatement of law to the extent it implies that a legally enforceable contract is required for exclusive dealing to violate Section 2 of the Sherman Act. *See United States v. Kellogg Toasted Corn Flake Co.*, 222 F. 725, 731 (E.D. Mich. 1915) ("[W]e see nothing in [prior case law] lending color to the proposition that a legally effective and enforceable contract in restraint of trade is necessary to a violation of the Sherman Act."); *see also United States v. Dentsply Int'l, Inc.*, 399 F.3d 181 (3d Cir. 2005); *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001).

As a statement of fact, the proffered statement is also misleading because it refers to and treats McWane's Exclusive Dealing Policy as a mere "Rebate Policy" rather than an all-or-

nothing exclusive dealing policy. To the contrary, the September 22, 2009 letter did not offer or provide any rebate to Distributors in exchange for exclusivity, but rather threatened to deny access to McWane's line of Domestic Fittings as well as to void any accrued rebates on Domestic Fittings for any Distributor that purchased any Domestic Fittings from a competing supplier. CCPF 1823-1849; *see also* CCPF 1850-1879 (McWane enforced the policy against Hajoca). It is also misleading and contradicted by the weight of evidence insofar as it suggests that Distributors were free to "walk away" from McWane's Exclusive Dealing Policy. *See Lorain Journal Co. v. United States*, 342 U.S. 143, 149-50 (1951) (newspaper publisher's practice of refusing to accept local advertising from parties using a local radio station for local advertising was unlawful attempt to monopolize because advertisers were not free to walk away).

95. Even if the Rebate Policy were a legally enforceable contract, it is well settled that exclusive contracts can have legitimate economic benefits, and must therefore be evaluated in accordance with the rule of reason. *Stop & Shop*,, 373 F.3d at 65-66; *Omega Environmental*, 127 F.3d at 1162; *Roland Machinery*, 749 F.2d at 395.

Response to Proposed Conclusion of Law No. 95

The proposed conclusion is misleading and a misstatement of the law insofar as it suggests that liability under Section 2 of the Sherman act requires a legally enforceable contract. *United States v. Kellogg Toasted Corn Flake Co.*, 222 F. 725, 731 (E.D. Mich. 1915) ("[W]e see nothing in [prior case law] lending color to the proposition that a legally effective and enforceable contract in restraint of trade is necessary to a violation of the Sherman Act."); *see also United States v. Dentsply Int'l, Inc.*, 399 F.3d 181 (3d Cir. 2005); *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001). As a statement of fact, the proffered statement is misleading because it refers to and treats McWane's Exclusive Dealing Policy as a mere "Rebate Policy" rather than an all-or-nothing exclusive dealing policy. To the contrary, the September 22, 2009 letter did not offer or provide any rebate to Distributors in exchange for exclusivity, but

rather threatened to deny access to McWane's line of Domestic Fittings as well as to void any accrued rebates on Domestic Fittings for any Distributor that purchased any Domestic Fittings from a competing supplier. CCPF 1823-1849; *see also* CCPF 1850-1879 (McWane enforced the policy against Hajoca).

Complaint Counsel does not disagree that McWane's Exclusive Dealing Policy should be evaluated under the rule of reason.

96. Under the rule of reason, Complaint Counsel must prove that the Rebate Policy caused anti-competitive consequences that outweigh its pro-competitive benefits. *Stop & Shop*, 373 F.3d at 65-66.

Response to Proposed Conclusion of Law No. 96

This proposed conclusion is misleading and a misstatement of law insofar as it suggests that proof of actual adverse effects is required to prove a restraint in violation of the FTC Act. Rather, a plaintiff may prove that a restraint violated the FTC Act under a plenary rule of reason analysis by showing *either* that the defendants had market power and that restraint has the potential for genuine adverse effects on competition *or* through direct evidence of actual effects. *In re Realcomp II*, No. 9320, 2007 WL 6936319, at *17-19.

As a statement of fact, the proffered statement is also misleading because it refers to and treats McWane's Exclusive Dealing Policy as a mere "Rebate Policy" rather than an all-or-nothing exclusive dealing policy. To the contrary, the September 22, 2009 letter did not offer or provide any rebate to Distributors in exchange for exclusivity, but rather threatened to deny access to McWane's line of Domestic Fittings as well as to void any accrued rebates on Domestic Fittings for any Distributor that purchased any Domestic Fittings from a competing supplier. CCPF 1823-1849; *see also* CCPF 1850-1879 (McWane enforced the policy against Hajoca).

97. Anti-competitive consequences would be a reduction in domestic DIWF output or a supracompetitive rise in domestic DIWF prices. *See CDC Technologies*, 186 F.3d at 80-81. Evidence that a competitor such as Star may have been harmed is insufficient. *See Dentsply*, 399 F.3d at 187; *Stop & Shop*, 373 F.3d at 65-66.

Response to Proposed Conclusion of Law No. 97

This proposed conclusion is misleading insofar as it suggests that proof of actual adverse effects is required to prove a restraint in violation of the FTC Act. Rather, a plaintiff may prove that a restraint violated the FTC Act under a plenary rule of reason analysis by showing *either* that the defendants had market power and that restraint has the potential for genuine adverse effects on competition *or* through direct evidence of actual effects. *Realcomp II*, 2007 WL 6936319, at *17-19.

This proposed conclusion is also misleading insofar as it suggests that direct proof of adverse effects may be shown only through reduced output or supracompetitive prices. Adverse effects can be established in numerous ways, and does not necessarily need to involve elaborate econometric proof that the conduct resulted in higher prices. *See Ind. Fed'n of Dentists*, 476 U.S. 447, 460-461 (1986) (actual anticompetitive effects proven by evidence that insurers in two localities over a period of years were "actually unable to obtain compliance with their requests for submission of x-rays"); *Realcomp II*, 2007 WL 6936319, at *19.

To the extent this proposed conclusion suggests that McWane's Exclusive Dealing Policy only harmed a competitor (Star), not competition, this is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the November 2012 Order, at 2. Indeed, evidence of the Exclusive Dealing Policy's impact on Star, as a rival entrant, supports a finding of harm to competition. *See Full Draw Prods*, 182 F.3d at 754 ; *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 (1985).

98. Complaint Counsel presented no evidence that the Rebate Policy caused domestic DIWF output to fall.

Response to Proposed Conclusion of Law No. 98

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the November 2012 Order, at 2.

The statement of fact is misleading insofar as it suggests that proof of actual adverse effects (such as reduced output) is required to prove a restraint in violation of the FTC Act, and it is unsupported by any legal authority as required by the November 2012 Order, at 2. Moreover, this is a misstatement of law; a plaintiff may prove that a restraint violated the FTC Act by showing *either* that the defendants had market power and that restraint has the potential for genuine adverse effects on competition *or* through direct evidence of actual effects. *Realcomp II*, 2007 WL 6936319, at *17-19.

99. To the contrary, the evidence is that domestic DIWF output increased.

Response to Proposed Conclusion of Law No. 99

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the November 2012 Order, at 2.

As a statement of fact, it is misleading insofar as it suggests that McWane's Exclusive Dealing Policy increased output of Domestic Fittings. To the contrary, the ARRA, which allocated $6 billion in funds to waterworks projects to be built with domestic products, increased the size of the Domestic Fittings market during the relevant time period. CCPF 1573.

100. Complaint Counsel presented no evidence that the Rebate Policy caused the price of domestic DIWF to rise to supracompetitive levels.

Response to Proposed Conclusion of Law No. 100

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the November 2012 Order, at 2.

To the extent this proposed conclusion suggests that proof of actual adverse effects (such as increased prices) is required to prove a restraint in violation of the FTC Act, it is unsupported by any legal authority as required by the November 2012 Order, at 2. Moreover, this is a misstatement of law; a plaintiff may prove that a restraint violated the FTC Act by showing *either* that the defendants had market power and that restraint has the potential for genuine adverse effects on competition *or* through direct evidence of actual effects. *Realcomp II*, 2007 WL 6936319, at *19. Furthermore, direct proof of adverse effects can be established in numerous ways, and does not necessarily need to involve elaborate econometric proof that the conduct resulted in higher prices. *See Ind. Fed'n of Dentists*, 476 U.S. at 460-461 (actual anticompetitive effects proven by evidence that insurers in two localities over a period of years were "actually unable to obtain compliance with their requests for submission of x-rays"); *Realcomp II*, 2007 WL 6936319, at *17-19.

As a statement of fact, it is against the great weight of evidence, which demonstrates that the Exclusive Dealing Policy prevented Star from becoming a viable competitor in the Domestic Fittings market, thus preventing Star from lowering the prices of Domestic Fittings and allowing McWane and Sigma to continue charging monopoly prices for Domestic Fittings. *See* CCPB at 223-240.

101. To the contrary, the evidence is that domestic DIWF prices did not keep place with inflation in 2009-2010.

Response to Proposed Conclusion of Law No. 101

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the November 2012 Order, at 2.

As a statement of fact, it is against the great weight of evidence to the extent it suggests that the Exclusive Dealing Policy did not result in supracompetitive prices for Domestic Fittings. The record evidence demonstrates that the Exclusive Dealing Policy prevented Star from becoming a viable competitor in the Domestic Fittings market, thus preventing Star from lowering the prices of Domestic Fittings and allowing McWane and Sigma to continue charging monopoly prices for Domestic Fittings. *See* CCPB at 223-240. Additionally, McWane increased prices for Domestic Fittings after implementing its Exclusive Dealing Policy. CCPF 2475-2484.

D. The MDA Did Not Foreclose Sigma as a Competitor and Was Pro-competitive.

102. To succeed on its claims relating to the MDA, Complaint Counsel must prove that – as of September 2009 when the MDA was executed - Sigma was prepared and intended to enter the domestic fittings market. *See Gas Utilities Co. of Alabama, Inc. v. Southern Natural Gas Co.*, 99 6 F.2d 282, 283 (11th Cir. 1993) ("Inquiry into procedures is insufficient to establish preparedness . . . party must take some affirmative step to enter"). To meet this burden, Complaint Counsel must prove that Sigma had secured financing and consummated contracts to supply domestic Fittings. *See id.* Evidence that Sigma may have had access to financing in the abstract is not sufficient. *Id*.; *see also* Case *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*., 136 F.Supp.2d 1341, 1354 (S.D. Fla. 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").

Response to Proposed Conclusion of Law No. 102

This proposed conclusion is incorrect and a misstatement of law because it is unnecessary to show that Sigma was a potential competitor in the Domestic Fittings market in order to establish that McWane and Sigma unlawfully conspired to monopolize the Domestic Fittings market. *See, e.g., Dickson v. Microsoft Corp.*, 309 F.3d 193 (4th Cir. 2002) (one alleged

monopolist); *Int'l Distrib. Ctrs., Inc. v. Walsh Trucking Co.*, 812 F.2d 786 (2d Cir. 1987) (same); *Perington Wholesale, Inc. v. Burger King Corp.*, 631 F.2d 1369 (10th Cir. 1979) (same).

The proposed conclusion is incorrect and a misstatement of law because the correct standard for establishing a firm is a potential competitor in a Section 1 claim brought by a Government plaintiff seeking injunctive relief, is when there is a "reasonable probability" of entry by a firm in the absence of the relevant agreement, as evidenced by the firm's intent and ability to enter the relevant market. *See, e.g.*, *In re McWane*, 2012 FTC LEXIS 155, at *55 n.18; *Yamaha Motor Co. v. FTC*, 657 F.2d 971, 977-79 (8th Cir. 1981); *Engine Specialties, Inc. v. Bombardier, Ltd.* 605 F.2d 1, 9 (1st Cir. 1979); FTC & DOJ, *Antitrust Guidelines for Collaborations Among Competitors*, at § 1.1 n.6 (2000); *see also* CCPB at 182-83. The cases cited by McWane relate to Section 2 monopolization cases (not Section 1 cases) in which a private plaintiff (not a Government plaintiff) is seeking damages (not an injunction against future misconduct) for allegedly being excluded from entering a relevant market by the defendant's conduct. The Complaint does not allege that McWane *excluded* Sigma, but that McWane *agreed* with Sigma that Sigma would cede the Domestic Fittings market to McWane.

The proposed conclusion further misstates the law, as well as the cases which it cites, insofar as it suggests that secured financing and consummated contracts are necessary conditions for a firm to be considered a potential competitor. *Gas Utils. Co. v. S. Natural Gas Co.*, 825 F. Supp. 1551, 1569 (N.D. Ala. 1992) (internal quotation omitted) (emphasis added).

In *Gas Utils. Co.*, the case cited by McWane, the court held that evidence that "plaintiffs themselves were able and prepared to" obtain financing – not that they had already secured it – would have been sufficient to show preparedness to enter the market. 996 F.2d at 283 (explaining that the plaintiff must take "some affirmative step to enter the business").

103. As Complaint Counsel failed to offer any proof that Sigma was prepared to and intended to enter domestic production and, in fact the evidence unequivocally established that Sigma had taken no concrete steps to produce domestic fittings, liability cannot be founded on the MDA.

Response to Proposed Conclusion of Law No. 103

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the November 2012 Order, at 2.

As a statement of fact, the proffered statement is contradicted by the weight of evidence. The record contains substantial evidence that Sigma intended to enter the Domestic Fittings market, (*see* CCPB at 184-189), was logistically and financially capable of entering the Domestic Fittings market, (*see* CCPB at 189-193), and took significant affirmative steps before joining forces with McWane. CCPF 2210-2311.

E. McWane Is Entitled to Judgment in Its Favor on the Attempted Monopolization and Conspiracy to Monopolize Claims.

104. For all of the reasons Complaint Counsel's monopoly claims fail, as set forth above, its attempted monopoly and conspiracy to monopolize claims also fail. These two claims also fail for the independent reasons set forth below.

Response to Proposed Conclusion of Law No. 104

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the November 2012 Order, at 2. As a statement of fact, it is also impermissibly vague as it does not reference the reasons for which it claims Complaint Counsel's monopolization, attempted monopolization and conspiracy to monopolize claims are insufficient.

1. Attempted Monopolization

105. To establish an attempted monopoly claim, a plaintiff must prove that the defendant 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 Inds., Inc.*, 7 F.3d 986, 993 (11th Cir. 1993).

Response to Proposed Conclusion of Law No. 105

Complaint Counsel has no specific response.

106. With regard to the specific intent element, the desire to maintain or increase one's market share is not in itself an antitrust violation. *Oahu G*as, 838 F.2d at 368.

Response to Proposed Conclusion of Law No. 106

Complaint Counsel has no specific response.

107. For a claim of attempted monopolization, even "[d]irect evidence of intent to vanquish a rival in an honest competitive struggle cannot help to establish an antitrust violation. It must also be shown that the defendant sought victory through unfair or predatory means." *William Inglis & Sons Baking Co. v. ITT Continental Baking Co., Inc.*, 668 F.2d 1014, 1028 (9th Cir. 1982).

Response to Proposed Conclusion of Law No. 107

Complaint Counsel has no specific response.

108. Because Complaint Counsel has failed to establish that McWane engaged in unfair or predatory conduct. McWane is entitled to judgment in its favor on Count Seven of the Complaint.

Response to Proposed Conclusion of Law No. 108

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the November 2012 Order, at 2.

As a statement of fact, it is contrary to record evidence, which establishes that McWane's Exclusive Dealing Policy harmed competition because it deterred Distributors from purchasing Domestic Fittings from Star, thereby causing Star to lose sales of Domestic Fittings and ultimately preventing Star from investing in its business as required to become an effective

competitor in the Domestic Fittings market. (CCPF 1893-2063, 2091-2166; *see also* CCPB at 223-240).

2. Conspiracy to Monopolize

109. To establish conspiracy to monopolize, a plaintiff 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).*

Response to Proposed Conclusion of Law No. 109

This proposed conclusion is a misstatement of the law to the extent it identifies an additional element of a conspiracy to monopolize claim, "effect upon an appreciable amount of interstate commerce" that is only required by the Tenth Circuit. *See Lantec, Inc. v. Novell, Inc.*, 306 F.3d 1003, 1028 (10th Cir. 2002) (listing conspiracy to monopolize elements "[a]ccording to Tenth Circuit case law"). While a few Circuits require a conspiracy to monopolize claim to show that it had at least some minimal effect on interstate commerce, most Circuits do not or are quiet on the issue. The distinction is irrelevant here because McWane does not dispute that this element is met.

110. Conduct as consistent with permissible competition as with illegal conspiracy does not support an inference of antitrust conspiracy. *Id.* at 1030.

Response to Proposed Conclusion of Law No. 110

This proposed conclusion is misleading to the extent it suggests that conduct that is equally consistent with unconcerted action generally does not support an inference of conspiracy; rather, conduct that is as consistent with permissible competition as with illegal conspiracy does not, *without more*, support an inference of conspiracy. *Matsushita*, 475 U.S. at 588. Inference of a conspiracy is appropriate where, as here, the evidence tends to exclude the possibility that the conspirators acted independently. *See id.*; *see also* CCPB at 249-250.

The proposed conclusion is also misleading insofar as the legal standard only applies when a trier of fact must infer a conspiracy, but there is no need to infer an agreement for the conspiracy to monopolize claim. The MDA, which is a signed written agreement, is sufficient by itself to demonstrate concerted action between McWane and Sigma. *See, e.g.*, *United States. v. Delta Dental*, 943 F. Supp. 172, 174-75 (D.R.I. 1996) ("[C]oncerted action may be amply demonstrated by an express agreement.").

111. Thus, Complaint Counsel must prove that *both* McWane *and* Sigma had a specific intent to endow McWane with monopoly power. *ID Security Sys. Canada, Inc. v. Checkpoint Sys., Inc.*, 249 F.Supp.2d 622, 660-61 (E.D.Pa. 2003).

Response to Proposed Conclusion of Law No. 111

This proposed conclusion is a misstatement of law to the extent it argues that Complaint Counsel must prove that McWane and Sigma had a specific intent to "endow McWane with monopoly power." Rather, McWane's own cited authority states that the specific intent element requires a showing that the parties share a specific intent "to achieve an unlawful objective." *ID Sec. Sys. Canada, Inc. v. Checkpoint Sys., Inc.*, 249 F. Supp. 2d 622, 660-61 (E.D. Pa. 2003) (internal citation omitted). The "crucial question" in analyzing specific intent "is whether appellants specifically intended to vanquish their opposition by ***unfair or unreasonable means***." *Ne. Tel. Co. v. AT&T Co.*, 651 F.2d 76, 85 (2d Cir. 1981) (emphasis added).

112. 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.*

Response to Proposed Conclusion of Law No. 112

This proposed conclusion is a misstatement of law to the extent it argues that Complaint Counsel must prove that McWane and Sigma had a specific intent to "make McWane a monopolist." Rather, McWane's own cited authority states that the specific intent element

requires a showing that the parties share a specific intent "to achieve an unlawful objective." *ID Sec. Sys. Canada, Inc*, 249 F. Supp. 2d at 660-61. Complaint Counsel does not disagree that a general intent to prevail over rivals or to improve market position is insufficient. The "crucial question" in analyzing specific intent "is whether appellants specifically intended to vanquish their opposition by ***unfair or unreasonable means***." *Ne. Tel. Co. v. AT&T Co.*, 651 F.2d at 85 (emphasis added).

113. Further, even if Complaint Counsel could establish that McWane had an intent to achieve a monopoly (which it cannot), Complaint Counsel has no evidence that Sigma shared the same intent.

Response to Proposed Conclusion of Law No. 113

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the November 2012 Order, at 2.

As a statement of fact, the proffered statement is incorrect. The evidence establishes that McWane and Sigma specifically intended to monopolize the Domestic Fittings market through the MDA by preventing Star from becoming a viable competitor and enabling McWane and Sigma to charge supracompetitive prices for Domestic Fittings. *See* CCPB at 250-258.

114. To the contrary, Sigma's focus in signing the MDA was on keeping its own customers happy and providing domestic DIWF to those customers when needed, not on Star.

Response to Proposed Conclusion of Law No. 114

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the November 2012 Order, at 2.

As a statement of fact, it is against the weight of evidence, which establishes that Sigma specifically intended for the MDA to "marginalize" Star and to enable McWane and Sigma to charge supracompetitive prices for Domestic Fittings. *See* CCPB at 250-258; CCPF 2455-2465; CCPB at 250-256 (McWane and Sigma Had the Specific Intent to Monopolize the Domestic Fittings Market).

115. Sigma perceived that if it was unable to supply domestic DIWF to its customers, it might also lose some portion of its non-domestic business with those customers.

Response to Proposed Conclusion of Law No. 115

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the November 2012 Order, at 2. Complaint Counsel does not disagree that Sigma had the incentive to enter the Domestic Fittings market, in part, to protect its non-domestic business. *See* CCPF 1639-1646 (Sigma and Star Were Concerned That ARRA's Requirement for Domestic Fittings Would Also Result in the Loss of Non-Domestic Fittings Business).

116. Thus, McWane is entitled to judgment in its favor on Count Five of the Complaint *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).

Response to Proposed Conclusion of Law No. 116

The proposed conclusion is impermissibly vague and unclear because it is unknown what "thus" means and the reasons to which McWane argues that it is entitled to judgment in its favor. To the extent this proposed conclusion argues that Sigma did not share the same specific intent to monopolize as McWane, this is not a proposed conclusion of law because it does not expound on any legal standard or proposition.

As a statement of fact, it is against the great weight of evidence, which directly shows that both McWane and Sigma specifically intended to monopolize the Domestic Fittings market by preventing Star from becoming a viable competitor and enabling McWane and Sigma to charge supracompetitive prices for Domestic Fittings. *See* CCPB at 246-258 (discussing McWane's liability for all elements of conspiracy to monopolize claim).

III. The MDA Was Not a Restraint of Trade in Violation of Section 5 (Count 4)

117. Count Four of the Complaint consists of a bare, conclusory allegation that the MDA unreasonably restrains trade and constitutes an unfair method of competition in violation of Section 5.

Response to Proposed Conclusion of Law No. 117

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the November 2012 Order, at 2. As a statement of fact, it is misleading because, based on the Complaint, Complaint Counsel's discovery responses, Complaint Counsel's summary judgment briefing, and Complaint Counsel's Pre-trial Brief, McWane is well aware of the allegations in this action with respect to the MDA.

118. As established in Section above, the MDA did not violate Section 2 of the Sherman Act, and was actually procompetitive.

Response to Proposed Conclusion of Law No. 118

The proposed conclusion is unclear and misleading to the extent it cites Section 2 in reference to Count Four of the Complaint. While the MDA violates Section 2 as an unlawful conspiracy to monopolize (Count Seven), Count Four refers to the MDA being an unlawful agreement that eliminated Sigma as a potential competitor in the Domestic Fittings market, in violation of Section 1.

Moreover, this is not a proposed conclusion of law because it does not expound on any legal standard or proposition. It is unsupported by any legal authority or record evidence as required by the November 2012 Order, at 2. As a statement of fact, it is incorrect. The evidence shows that the MDA harmed competition and was not justified by any procompetitive efficiencies. *See* CCPB 180-206.

119. Complaint Counsel has not presented any other evidence of any other manner in which the MDA has allegedly restrained trade.

Response to Proposed Conclusion of Law No. 119

The proposed conclusion is unclear, vague and misleading because it is unknown what "any other manner" refers to. It is also not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the November 2012 Order, at 2. To the extent this proposed conclusion suggests Complaint Counsel has not presented evidence that the MDA restrained trade, this is a statement of fact that is against the weight of evidence. *See supra* Response to Proposed Conclusion of Law No. 118.

120. Moreover, it is well established that vertical agreements such as the MDA can be procompetitive. *See Brantley*, 675 F.3d at 1198, 1202.

Response to Proposed Conclusion of Law No. 120

The proposed conclusion is vague and misleading because it is unknown to what "well established" body of law or "vertical agreements such as the MDA" refers. It is also irrelevant and immaterial because the MDA represents a horizontal agreement between potential competitors and not a vertical agreement. It is also not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the November 2012 Order, at 2.

As a statement of fact, the proffered statement is misleading and against the weight of evidence insofar as it suggests that the MDA is procompetitive. The evidence establishes that there are no procompetitive efficiencies that justify the agreement. *See* CCPB at 240-246.

121. Without more, even evidence that such an agreement increases consumer prices or reduces consumer choice is not sufficient to establish an antitrust violation. *Id.* at 1202. Therefore, McWane is entitled to judgment in its favor on Count Four.

Response to Proposed Conclusion of Law No. 121

This proposed conclusion is vague and unclear because it is unknown what "without more" is referring to. The proposed conclusion is also misleading insofar as it suggests that increased consumer prices or reduced consumer choice cannot serve as proof of harm to competition for establishing an antitrust violation. Rather, McWane's cited authority explains that such effects are insufficient if they result from "pro-competitive conduct." *Brantley v. NBC Universal, Inc.*, 675 F.3d 1192, 1202 (9th Cir. 2012). Moreover, *Brantley* discusses vertical agreements, not horizontal agreements such as the MDA. *Id.* The record establishes that consumer injury resulted from the MDA, which is an unlawful agreement between potential competitors to eliminate competition between themselves in the Domestic Fittings market. *See* CCPB at 223-240.

IV. DR. SCHUMANN'S OPINIONS ARE LEGALLY FLAWED AND SHOULD BE IGNORED

122. Dr. Schumann did not quantify or otherwise provide any economic analyses demonstrating that imported Fittings prices would have been lower but-for the alleged conduct in 2008, nor that domestic Fittings prices would have been lower but-for the rebate letter or the MDA. *St. Francis Medical Center v. C.R. Bard, Inc.*, 657 F.Supp.2d 1069, 1102-03 (E.D. Mo. 2009) (a manufacturer's rebate policy was not anticompetitive where there was no evidence that it led to higher prices or that customers who bought products in various categories under the policy did so unwillingly). His opinion was nothing more than assumption and speculation. That is not enough. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 579-80 (1993) (untestable say-so is not reliable evidence at trial); *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1977) ("Nothing . . . requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert"); *Brooke*

Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 242 (1993) ("when indisputable record facts contradict or otherwise render the opinion unreasonable, it cannot support a jury's verdict."). As such, the Court should not consider any of Dr. Schumann's opinions.

Response to Proposed Conclusion of Law No. 122

The proposed conclusion is factually misleading and unsupported in its characterization of Dr. Schumann's expert opinions, because Dr. Schumann provided economic analyses demonstrating that Fittings prices would have been lower but for McWane's price fixing conduct and that Domestic Fittings prices would have been lower but for the MDA and the Exclusive Dealing Policy. The proposed conclusion is a misstatement of law insofar as it suggests that Complaint Counsel and Dr. Schumann were required to (1) employ econometric analysis or perform empirical tests, (2) prove quantified price effects with respect to the MDA or McWane's Exclusive Dealing Policy, or (3) prove any competitive harm with respect to the *per se* price fixing offense. Finally, the proposed conclusion seeks overbroad relief by asking the Court to disregard *all* of Dr. Schumann's opinions, rather than only those that are the subject of the proposed conclusion.

As an initial matter, the proposed conclusion is misleading because it refers to and treats McWane's Exclusive Dealing Policy as a mere "Rebate Policy" rather than an all-or-nothing exclusive dealing policy. *See supra* Response to Proposed Conclusion of Law No. 75.

The proposed conclusion is also factually misleading and unsupported because Dr. Schumann provided the relevant "economic analysis." Dr. Schumann's analysis indicated, among other things, that **(**1) the Fittings market was highly susceptible to collusion (CX 2260-A (Schumann Rep. at 34)); (2) the Fittings suppliers' conduct was consistent with a conspiracy to reduce Project Pricing, which would increase prices relative to those that would otherwise have prevailed (CX 2260-A (Schumann Rep. at 7-8, 38, 55-56)); (3) McWane was a monopolist in the

Domestic Fittings market (CX 2260 (Schumann Rep. at 19-20), *in camera*); (4) "McWane could not have imposed [the Exclusive Dealing Policy] without exercising its monopoly power" (CX 2260-A (Schumann Rep. at 78)); (5) through its Exclusive Dealing Policy, McWane erected a barrier to entry into the Domestic Fittings market that denied Star Distributor business, impeded Star's growth and "lowered the degree of competition that otherwise would have existed between McWane and Star" (CX 2260-A (Schumann Rep. at 78-79)); *see also* Schumann, Tr. 3815-3816, 3949-3950, 3956-3959, 3984, 4001-4003); (6) effective entry by Star into the Domestic Fittings market would have brought down prices from the supracompetitive prices charged by McWane (*see* CX 2260-A (Schumann Rep. at 62-63)); and (7) assuming that Sigma would have entered Domestic Fittings production absent the MDA, the resulting competition between McWane and Sigma would have lowered prices and enhanced consumer welfare (CX 2260-A (Schumann Rep. at 8, 80, 82-83)).

The proposed conclusion is also incorrect and misleading insofar as it suggests that Dr. Schumann's opinions were mere "assumption," "speculation," or "*ipse dixit*." Dr. Schumann's opinions were well founded and reliable; he applied well-articulated, accepted economic principles to the conditions and conduct observed. At trial, Dr. Schumann described the methodology underlying his opinions, including his study of the background of the industry, review of the record in this matter, identification of the appropriate economic concepts and theories, and application of those concepts and theories to the record. Schumann, Tr. 3770-3771. The relevant concepts of industrial organization covered in Dr. Schumann's report and his opinions, including oligopoly and interdependence, are well accepted theoretical concepts that are widely used to predict how markets will operate. Schumann, Tr. 3772-3773; *see generally*, CX 2260-A (Schumann Rep. at 25-34). Dr. Schumann's expert opinions are based on

overwhelming evidence of the price inelasticity of demand for Fittings, and his cautious application of well-accepted concepts of market definition. His opinions regarding price fixing in the open spec Fittings market are based on George Stigler's classic model of oligogoly and collusion (Schumann, Tr. 3772-3773), as well as the models of Hay and Kelly (CX 2260-A (Schumann Rep. at 28)) and Levenstein and Suslow (CX 2260-A (Schumann Rep. at 27)), and his opinions take account of game theoretic theories and models. Schumann, Tr. 3773. With respect to his opinions relating to McWane's monopolization of the Domestic Fittings market, Dr. Schumann again based his conclusions on cautious application of well accepted economic theories and models, *e.g.*, relating to downward movement of the equilibrium price when constant demand is met with expanding supply, including reliance on such authorities as Carlton and Perloff, among others. *See* CX 2260-A (Schumann Rep. at 57-63).

The proposed conclusion misstates the law by suggesting that *Daubert* requires experts to base their opinions only on empirical tests. But *Daubert* and its progeny do not so hold. The Court in *Kumho Tire* noted the distinction between technical and "other specialized knowledge," such as economics, and the natural sciences, and stressed that, when applying *Daubert* to disciplines other than the natural sciences, judges have "considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable." 526 U.S. at 151-52. This leeway is particularly important where, as here, the expert testimony offered is in a social science, onto which the *Daubert* factors "do not map easily." *See Durmishi v. National Cas. Co.*, 720 F. Supp. 2d 862, 881-82 (E.D. Mich. 2010) (denying defendant's motion to strike expert testimony because the expert relied on "the knowledge of the industry that informs his method").

Daubert simply does not require that no economic opinion may be rendered unless statistical analysis and testing can be competently done, as Respondent's proposed conclusion implies. Such a rule would deprive courts of the ability to rely on other analytical tools and opinions that a court might find helpful. In antitrust litigation, economists routinely use their expertise to review the record to ascertain the economic significance of facts when forming their opinions. *See, e.g., U.S. Info. Sys*., 313 F. Supp. 2d at 236-237 (finding expert testimony to be admissible because "he has applied his [economic] expertise to the facts of the case" to determine whether the situation described was one that tended to show economic indicators of market dominance and monopoly leveraging"); *see also ZF Meritor v. Eaton Corp*., 696 F.3d 254, 290 (3d Cir. 2012) (expert's methodologies, including defining relevant market, determining whether defendant had market power, analyzing defendant's conduct while taking into account market conditions, and examining the effect of exclusive dealing arrangements on prices and consumer choice, were reliable under Rule 702 of the Federal Rules of Evidence).

Dr. Schumann played such a role in this case. For example, he identified nine different economic factors that are conducive to coordination and explicit collusion. Dr. Schumann explained the nine factors, applied them to the record evidence, and concluded that "the Fittings market is highly susceptible to collusion." CX 2260-A (Schumann Rep. at 34). This is exactly the type of analysis a qualified expert economist may perform to assist the trier of fact, especially where, as Complaint Counsel established through Dr. Schumann's testimony on rebuttal, sound data to conduct econometric or statistical analysis is not available. *See* CCPF 1424-1435.

The proposed conclusion is also unsupported and overbroad insofar as it asks the Court to disregard *all* of Dr. Schumann's opinions based only on a purported failure of Dr. Schumann to demonstrate that Fittings prices would have been lower but for McWane's conduct. Even if Dr.

Schumann had failed in the way Respondent claims (which he has not, for the reasons discussed above), there are numerous other aspects of Dr. Schumann's testimony that remain unaddressed by the proposed conclusion, including, for example, his definition of relevant markets and the entirety of his Rebuttal Expert Report, which includes his expert opinions about the quality of Dr. Normann's data and Dr. Normann's methodologies. CX 2265-A (Schumann Rebuttal Rep. at 4-20); *see also* CCPF 1424-1435. In no event should the Court disregard Dr. Schumann's opinions with respect to these other matters.

The proposed conclusion is also incorrect and misleading insofar as it suggests that Complaint Counsel has the burden of establishing that a price fixing conspiracy resulted in prices higher than those that would have been charged in a but-for world. Complaint Counsel has no such burden. The proposed conclusion cites as support *St. Francis Medical Center v. C.R. Bard, Inc*., 657 F.Supp.2d 1069, 1102-03 (E.D. Mo. 2009), but that case is not about a price fixing agreement among competitors. Rather, *St. Francis* involved a *vertical* agreement (an exclusive contract between a manufacturer and a Group Purchasing Organization (GPO)). Vertical agreements may be procompetitive, but restraints such as naked price fixing and market allocation agreements are known to have a "pernicious effect on competition and lack any redeeming virtue," and are thus deemed to be *per se* unlawful, and are condemned without any further market inquiry once the conduct itself has been proven. *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958); *see also Realcomp*, 635 F.3d at 825. Thus, Complaint Counsel is not required in this case to establish that non-Domestic Fittings prices would have been lower but-for the alleged price fixing conduct in 2008.

The proposed conclusion also incorrectly cites *St. Francis Medical Center* to support the proposition that Complaint Counsel must establish that McWane's Exclusive Dealing Policy

directly resulted in higher prices. Contrary to this suggestion, the Court may conclude that McWane's exclusive dealing policy was anticompetitive and harmed competition based on the evidence that McWane's conduct foreclosed its competitors from a key distribution channel and from obtaining sufficient scale to be able to constrain McWane's monopoly prices, and that there are no procompetitive efficiencies that outweigh that harm. CCPB at 207; *see also supra* Response to Proposed Conclusion of Law No. 85. Direct evidence of higher prices as opposed to other types of harm to competition is not required, and *St. Francis Medical Center* did not so hold. Instead, the St. Francis court considered whether the plaintiff had established a price effect in evaluating whether the defendant's rebate policy was unlawful under predatory pricing and tying analyses. *St. Francis Medical Center*, 657 F.Supp.2d at 1102-03. It did not hold, or even state in dictum, that only price-increase evidence would support a finding of anticompetitive effect. *Id.* Complaint Counsel has established that the Exclusive Dealing Policy was anticompetitive and harmed competition by foreclosing Star from the market. *See* CCPF 1712-2166.

V. THE GOVERNMENT IS NOT ENTITLED TO ANY REMEDY

123. The proposed remedy should be denied because there was no proof at trial of any ongoing actual or threatened injury to competition or consumers.

Response to Proposed Conclusion of Law No. 123

The proposed conclusion of law is misleading and erroneous to the extent that it states that *ongoing* injury to competition or consumers is a predicate to a remedy under section 5(b) of the FTC Act, 15 U.S.C. § 45. First, section 5(b) specifies that the Commission may initiate an administrative action when a person "has been . . . using any unfair method of competition." Therefore, a remedy is appropriate even if McWane is not engaged in the illegal conduct today. Second, McWane's purported decision to terminate its participation in the price fixing

agreement and to terminate its MDA with Sigma was voluntary (CCPF 1533-1571, 2492-2496, 2064-2067), and a remedy is appropriate when there is only a voluntary cessation of the illegal activities. *See In re Coca-Cola Co.*, 117 F.T.C. 795, 909 (1994); *In re Warner Commc'ns, Inc.*, No. 9174, 105 F.T.C. 342, at *1 (1985). Third, the officers of McWane who implemented McWane's anticompetitive activities are still in management positions in which they could engage in the anticompetitive conduct again. CCPF 907-929; 1823-1849; *cf. United States v. Uniroyal, Inc.*, 300 F. Supp. 84, 97, 98 (S.D.N.Y. 1969) ("persons involved in most of these episodes have either left defendant's employ or have been transferred to positions not involving district sales."). Finally, Respondent has not shown any extraneous conditions beyond its control that prevent it from re-engaging in the illegal conduct today. CCPF 1438; Brakefield, Tr. 1228; CX 2495 (Brakefield, Dep. (Vol. 1) at 128) (DIFRA is still a corporation in good standing); CCPF 1533-1553 (McWane and Star exchange pricing assurances in April 2009); CCPF 1554-1571 (McWane, Sigma, and Star communicate in 2010); CCPF 2496 (Sigma continues to buy Domestic Fittings from McWane); *see generally Uniroyal, Inc.*, 300 F. Supp. 84 (S.D.N.Y. 1969).

124. Federal judicial power is limited by Article III of the Constitution to live "Cases" or "Controversies."

Response to Proposed Conclusion of Law No. 124

Complaint Counsel has no specific response.

125. Courts cannot grant injunctions unless a plaintiff shows ongoing or imminent harm. The Supreme Court has repeatedly denied injunctive relief to plaintiffs, like Complaint Counsel here, who cannot meet that proof.

Response to Proposed Conclusion of Law No. 125

The proposed conclusion of law is misleading and erroneous to the extent that it states that ongoing or imminent injury to competition or consumers is a predicate to a remedy under section 5(b) of the FTC Act, 15 U.S.C. § 45. First, section 5(b) specifies that the Commission may initiate an administrative action when a person "has been . . . using any unfair method of competition." Therefore, a remedy is appropriate even if McWane is not engaged in the conduct today. Second, McWane's purported decision to terminate its participation in the price fixing agreement and to terminate its MDA with Sigma was voluntary, and a remedy is appropriate when there is only a voluntary cessation of illegal activities. *See Coca-Cola Co.*, 117 F.T.C. at 909; *Warner Commc'ns, Inc.*, 105 F.T.C. 342, at *1. Third, the McWane officers who implemented McWane's anticompetitive activities are still in management positions in which they could engage in the anticompetitive conduct again. CCPF 907-929, 1823-1849; *cf. Uniroyal, Inc.*, 300 F. Supp. at 97-98 ("persons involved in most of these episodes have either left defendant's employ or have been transferred to positions not involving district sales"). Finally, Respondent has not shown any extraneous conditions beyond its control that prevent it from re-engaging in the illegal conduct today. CCPF 1438; Brakefield, Tr. 1228; CX 2495 (Brakefield, Dep. (Vol. 1) at 128) (DIFRA is still a corporation in good standing); CCPF 1533-1553 (McWane and Star exchange pricing assurances in April 2009); CCPF 1554-1571 (McWane, Sigma, and Star communicate in 2010); CCPF 2496 (Sigma continues to buy Domestic Fittings from McWane); *see generally Uniroyal, Inc.*, 300 F. Supp. 84.

126. The 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).

Response to Proposed Conclusion of Law No. 126

The proposed conclusion of law is misleading. The legal conclusion set forth by Respondent, and the case cited by Respondent to support this legal conclusion, *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009), address the type of injury a *private plaintiff* must show to give it *standing* to file a lawsuit, not an enforcement action by the government.

Further, section 5(b) specifies that the Commission may initiate an administrative action when a person "has been . . . using any unfair method of competition." Therefore, a remedy is appropriate even if McWane is not engaged in the conduct today. Second, McWane's purported decision to terminate its participation in the price fixing agreement and to terminate its MDA with Sigma was voluntary, and a remedy is appropriate when there is only a voluntary cessation of illegal activities. *See Coca-Cola Co.*, 117 F.T.C. at 909; *Warner Commc'ns, Inc.*, 105 F.T.C. 342, at *1. Third, the McWane officers who implemented McWane's anticompetitive activities are still in management positions in which they could engage in the anticompetitive conduct again. CCPF 907-929, 1823-1849; *cf. Uniroyal, Inc.*, 300 F. Supp. at 97-98 ("persons involved in most of these episodes have either left defendant's employ or have been transferred to positions not involving district sales"). Finally, Respondent has not shown any extraneous conditions beyond its control that prevent it from re-engaging in the illegal conduct today. CCPF 1438; Brakefield, Tr. 1228; CX 2495 (Brakefield, Dep. (Vol. 1) at 128) (DIFRA is still a corporation in good standing); CCPF 1533-1553 (McWane and Star exchange pricing assurances in April 2009); CCPF 1554-1571 (McWane, Sigma, and Star communicate in 2010); CCPF 2496 (Sigma continues to buy Domestic Fittings from McWane); *see generally Uniroyal, Inc.*, 300 F. Supp. 84 (S.D.N.Y. 1969).

127. 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"); *City of L.A. v.*

Lyons, 461 U.S. 95, 105 (1983) (past injury at hands of police did not entitle plaintiff to enjoin future police practices).

Response to Proposed Conclusion of Law No. 127

The proposed conclusion of law is misleading. The legal conclusion set forth by Respondent and the case cited by Respondent in its brief to support this legal conclusion, are not relevant to this case. In *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2559-60 (2011), the Court addresses the type and range of damages private parties may incur to warrant certifying the group of persons as a class under Rule 23(b)(2) of the Federal Rules of Civil Procedure. In *City of L.A. v. Lyons*, 461 U.S. 95, 105 (1983), the Court addresses the type of damages a private party must suffer to have *standing* under Article III of the United States Constitution. Neither of those cases relate to the Commission's authority to file an enforcement lawsuit or to seek injunctive relief under 15 U.S.C. § 45(b).

Further, section 5(b) specifies that the Commission may initiate an administrative action when a person "has been . . . using any unfair method of competition." Therefore, a remedy is appropriate even if McWane is not engaged in the conduct today. Second, McWane's purported decision to terminate its participation in the price fixing agreement and to terminate its MDA with Sigma was voluntary, and a remedy is appropriate when there is only a voluntary cessation of illegal activities. *See Coca-Cola Company*, 117 F.T.C. at 909; *Warner Commc'ns, Inc.*, 105 F.T.C. 342 at *1. Third, the McWane officers who implemented McWane's anticompetitive activities are still in management positions in which they could engage in the anticompetitive conduct again. CCPF 907-929, 1823-1849; *cf. Uniroyal, Inc.*, 300 F. Supp. at 97-98 ("persons involved in most of these episodes have either left defendant's employ or have been transferred to positions not involving district sales"). Finally, Respondent has not shown any extraneous conditions beyond its control that prevent it from re-engaging in the illegal conduct today.

CCPF 1438; Brakefield, Tr. 1228; CX 2495 (Brakefield, Dep. (Vol. 1) at 128) (DIFRA is still a corporation in good standing); CCPF 1533-1553 (McWane and Star exchange pricing assurances in April 2009); CCPF 1554-1571 (McWane, Sigma, and Star communicate in 2010); CCPF 2496 (Sigma continues to buy Domestic Fittings from McWane); *see generally Uniroyal, Inc.*, 300 F. Supp. 84 (S.D.N.Y. 1969).

128. 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)

Response to Proposed Conclusion of Law No. 128

The proposed conclusion is misleading because the cases cited by Respondent to support this proposition are not relevant to determining when and whether injunctive relief is appropriate in a Part 3 adjudicative proceeding. In *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 22 (2008), the Court defined how a private plaintiff may prove irreparable injury when seeking a preliminary injunction under Rule 65 of the Federal Rules of Civil Procedure, but that provision is not applicable to Part 3 proceedings. In *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006), the Court held that a private plaintiff in a lawsuit under the Patent Act had to meet the equitable standards in a case that is subject to Rule 65 of the Federal Rules.

In Commission enforcement actions, in contrast, section 5(b) specifies that the Commission may initiate an administrative action when a person "has been . . . using any unfair method of competition." Therefore, a remedy is appropriate even if McWane is not engaged in the conduct today. Second, McWane's purported decision to terminate its participation in the price fixing agreement and to terminate its MDA with Sigma was voluntary, and a remedy is appropriate when there is only a voluntary cessation of illegal activities. *See Coca-Cola Co.*, 117 F.T.C. at 909; *Warner Commc'ns, Inc.*, 105 F.T.C. 342, at *1. Third, the McWane officers

who implemented McWane's anticompetitive activities are still in management positions in which they could engage in the anticompetitive conduct again. CCPF 907-929, 1823-1849; *cf. Uniroyal, Inc.*, 300 F. Supp. at 97-98 ("persons involved in most of these episodes have either left defendant's employ or have been transferred to positions not involving district sales"). Finally, Respondent has not shown any extraneous conditions beyond its control that prevent it from re-engaging in the illegal conduct today. CCPF 1438; Brakefield, Tr. 1228; CX 2495 (Brakefield, Dep. (Vol. 1) at 128) (DIFRA is still a corporation in good standing); CCPF 1533-1553 (McWane and Star exchange pricing assurances in April 2009); CCPF 1554-1571 (McWane, Sigma, and Star communicate in 2010); CCPF 2496 (Sigma continues to buy Domestic Fittings from McWane); *see generally Uniroyal, Inc.*, 300 F. Supp. 84 (S.D.N.Y. 1969).

129. It is undisputed that the conduct that is alleged to be unlawful in the Complaint has long since ended. Complaint Counsel's own expert testified that the alleged conspiracy ended over four years ago in late 2008, and has suggested no conspiratorial conduct beyond June 2010. Likewise, it is undisputed that McWane's 2009 Rebate Policy is terminated in early 2010 and is no longer in effect. Finally, the undisputed evidence also establishes that the MDA executed by McWane and Sigma was terminated in 2010. Thus, there is no possibility that the challenged conduct could reoccur.

Response to Proposed Conclusion of Law No. 129

The proposed conclusion is erroneous as a matter of law and misleading. First, both section 5(b) of the FTC Act, 15 U.S.C. § 45(b), and the decisions under that section clearly recognize that actions may be filed and remedies sought against a respondent that is not currently engaged in those practices. 15 U.S.C. § 45(b) (the Commission may issue an administrative complaint whenever it has reason to believe that a person "*has been or is* using any unfair method of competition . . . ." (italics added); *see also Coca-Cola Company*, 117 F.T.C. at 909; *Warner Commc'ns, Inc.*, 105 F.T.C. 342, at *1 (1985). Second, a remedy is appropriate because

the illegal conduct of McWane was the responsibility of officers of McWane who are still in management position at McWane. CCPF 907-929, 1823-1849; *see also Uniroyal, Inc.*, 300 F. Supp. at 97, 98.

Here, as to the price fixing, Respondent did not present any evidence to suggest that the market concentration and other conditions that made it conducive to fixing the prices for Fittings have somehow changed. DIFRA is still a corporation in good standing. CCPF 1438; Brakefield, Tr. 1228; CX 2495 (Brakefield, Dep. (Vol. 1) at 128). And, McWane, Sigma, and Star have continued to communicate and coordinate their prices in 2009 and 2010 – after the Commission had opened its investigation – and even after the three conspirators had stopped exchanging data through DIFRA. CCPF 1533-1553 (McWane and Star exchange pricing assurances in May 2009); CCPF 1554-1571 (McWane, Sigma, and Star exchange pricing coordination in 2010).

Similarly, McWane did not present any evidence that extraneous forces would prevent it from engaging in its monopolization efforts. McWane *voluntarily* terminated the MDA with Sigma, and only after the Commission started the investigation leading to this litigation. CCPF 2492-2496. McWane has never suggested that market forces somehow prevent it from entering another MDA with Sigma; in fact, Sigma continues to buy Domestic Fittings from McWane. CCPF 2496. And, McWane has never publicly withdrawn its Exclusive Dealing Policy. CCPF 2064-2067. Thus, McWane still exercises the ability to engage in both the price fixing, the Exclusive Dealing Arrangement, and the other conduct in this case. And therefore a remedy is appropriate.

Dated: January 28, 2013

Respectfully submitted,

s/ Linda M. Holleran
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CERTIFICATE OF SERVICE

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

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

The Honorable D. Michael Chappell
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CERTIFICATE FOR ELECTRONIC FILING

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

January 28, 2013

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