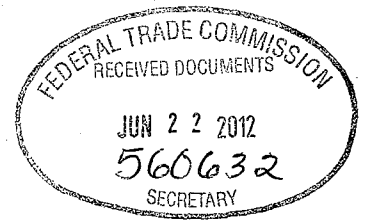


ORIGINAL



**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

COMMISSIONERS: **Jon Leibowitz, Chairman**
 J. Thomas Rosch
 Edith Ramirez
 Julie Brill
 Maureen K. Ohlhausen

In the Matter of)	PUBLIC
McWANE, INC.,)	
a corporation.)	DOCKET NO. 9351

**COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENT'S
MOTION FOR SUMMARY DECISION**

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Dated: June 22, 2012

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Cast of Characters

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

INTRODUCTION

Respondent McWane, Inc. (“McWane”) is the largest seller of ductile iron pipe fittings (“Fittings”) in the United States, and the only significant domestic Fittings manufacturer. The Commission’s Complaint charges that beginning in 2007, McWane engaged in an extensive array of anticompetitive conduct, including: inviting competitors to fix prices, agreeing with competitors to fix prices, facilitating collusion by participating in an unlawful information exchange, foreclosing potential domestic competitors (Star and SIP) through exclusive dealing, and eliminating another potential domestic competitor (Sigma) by arranging for it to distribute McWane’s domestic Fittings.

McWane moves to dismiss all claims; however, McWane appears to fundamentally misunderstand the summary decision process. McWane’s motion rests on a series of denials, but the motion and those denials, ignore the overwhelming contemporaneous evidence supporting the Commission’s Complaint. Moreover, many of the witnesses on whose testimony McWane’s motion rests, professed not to recall the critical events, such as pricing communications with competitors when confronted with contemporaneous evidence of those communications. That a respondent is able to identify a thread of evidence in support of its defense is not a sufficient basis for summary decision – not when the record also includes substantial conflicting evidence on the very same issue.

There is substantial evidence that McWane agreed with competitors to restrain Fittings price competition. This includes classic “plus factors,” such as evidence of a written plan to conspire, conduct contrary to unilateral interest, and extensive inter-firm communications on price and pricing strategy. That evidence contradicts the McWane witnesses’ denials of

participating in a conspiracy and raises a material issue of fact that precludes summary decision.

Point I, *infra*.

[REDACTED]

[REDACTED] Further, the claim that Section 5 of the FTC Act does not reach an invitation to collude is legally incorrect. Point II, *infra*.

There is substantial evidence that the exchange of sales information among Fittings sellers was intended to and did facilitate collusion. McWane's claim that the conduct is per se lawful lacks any case support and is legally incorrect. Point III, *supra*.

There is substantial evidence that McWane's exclusive dealing policy impeded Star's market entry. [REDACTED]

[REDACTED] Competitive harm remains a disputed issue. Point IV, *infra*.

There is substantial evidence that Sigma intended to enter the domestic Fittings market, was prepared to do so, and took affirmative steps toward entry; [REDACTED]

[REDACTED]

[REDACTED] Point V, *infra*.

Therefore, McWane's motion for summary decision should be denied as to all claims.

STATEMENT OF FACTS

A. Industry Background

Fittings are a component of the pipeline systems that are used to transport drinking and waste water in municipal distribution systems. CCS ¶ 2.¹ Fittings are used to join pipes, valves, and hydrants, and to change or direct the flow of water. *Id.* These are commodity products produced to standard, industry-wide specifications. CCS ¶ 3. A waterworks system cannot operate without Fittings, and so demand is inelastic. CCS ¶ 4. Some waterworks projects are required by law to utilize Fittings that are manufactured in the United States. CCS ¶ 5.

There are three primary Fittings sellers in the United States (“Sellers”), collectively [REDACTED]: Respondent McWane [REDACTED] Sigma Corporation (“Sigma”) [REDACTED] and Star Pipe Products, Ltd. (“Star”) [REDACTED] CCS ¶ 6. As of 2008, Sigma and Star imported and sold only Fittings that were manufactured outside of the United States, primarily in China. CCS ¶ 7. Only McWane owned and operated domestic foundries (in addition to selling imported product). *Id.*

McWane, Sigma, and Star sell Fittings to independent wholesale distributors, known as “waterworks distributors.” CCS ¶ 8. The end users of Fittings are typically municipal and regional water authorities. CCS ¶ 10.

B. Restraints on Price Competition

During 2007, the Fittings industry experienced a period of intense competition and declining prices. CCS ¶ 12. The common industry practice is for the Sellers to publish identical list prices, and state-by state discounts known as multipliers. [REDACTED]

¹ CCS ¶ __ refers to Complaint Counsel’s Separate And Concise Statement Of Material Facts As To Which There Is A Genuine Issue For Trial submitted in opposition to Respondent’s Motion For Summary Decision.

[REDACTED] . CCS ¶ 11. [REDACTED]

[REDACTED] CCS ¶¶ 13-14, 17-18. [REDACTED]

[REDACTED] CCS ¶ 14.

[REDACTED]

[REDACTED] CCS ¶¶ 15-18. [REDACTED]

[REDACTED] . CCS ¶ 17. [REDACTED]

[REDACTED] . *Id.* [REDACTED]

[REDACTED]

[REDACTED] . CCS ¶ 18.

[REDACTED]

[REDACTED] . CCS ¶ 26. [REDACTED]

[REDACTED] . CCS ¶ 27. [REDACTED]

[REDACTED] CCS ¶ 27a. [REDACTED]

[REDACTED] CCS ¶ 27b.

[REDACTED]

[REDACTED] CCS ¶ 27c. [REDACTED]

[REDACTED] . CCS ¶ 27d.

[REDACTED]

[REDACTED] CCS ¶¶ 28, 30-98. [REDACTED]

[REDACTED]

CCS ¶¶ 29-98. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] CCS ¶ 30.

On January 11, 2008, McWane disseminated a pricing letter to its distributors. CCS ¶ 33.

[REDACTED]

[REDACTED] *Id.* [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *Id.*

[REDACTED] CCS ¶¶ 35-36. [REDACTED]

[REDACTED]

[REDACTED] CCS ¶¶ 35a, 36-38. Publicly, both Sigma and Star announced increases in list prices identical to the McWane announcement. CCS ¶¶ 35c, 37

[REDACTED]

[REDACTED] CCS ¶¶ 35, 36c, 38. [REDACTED]

[REDACTED] CCS ¶ 36c. [REDACTED]

[REDACTED] CCS ¶ 38. [REDACTED]

[REDACTED]

[REDACTED] *Id.*

[REDACTED]

[REDACTED] CCS ¶ 42. [REDACTED]

[REDACTED] *Id.* [REDACTED]

[REDACTED] *Id.*

[REDACTED]

[REDACTED] CCS ¶¶ 46-48. [REDACTED]

[REDACTED]. CCS ¶ 49. [REDACTED]

[REDACTED] CCS ¶¶ 50, 52. [REDACTED]

[REDACTED]

[REDACTED] CCS ¶ 50. [REDACTED]

[REDACTED] CCS ¶¶ 52-53. [REDACTED]

[REDACTED] CCS ¶ 56. [REDACTED]

[REDACTED] *Id.*

[REDACTED]

[REDACTED] CCS ¶ 57. [REDACTED]

[REDACTED] CCS ¶¶ 57-58. [REDACTED]

[REDACTED] CCS ¶ 59.

On May 7, 2008, McWane disseminated a letter to its Fittings distributors. CCS ¶ 60.

[REDACTED]

CCS ¶ 61. [REDACTED]

[REDACTED] CCS ¶ 62. [REDACTED]

[REDACTED]

[REDACTED] CCS ¶¶ 62-64.

[REDACTED]

[REDACTED] CCS ¶ 65. [REDACTED] *Id.* [REDACTED]

[REDACTED] CCS ¶ 66.

[REDACTED] CCS ¶¶ 68, 71-73. [REDACTED]

[REDACTED]

[REDACTED] CCS ¶¶ 67, 69-72.

[REDACTED] CCS ¶ 73. [REDACTED]

[REDACTED]

[REDACTED] CCS ¶¶ 73-74. [REDACTED]

[REDACTED]

[REDACTED] CCS ¶ 75. [REDACTED]

[REDACTED] CCS ¶ 77. [REDACTED] CCS ¶ 78.

[REDACTED]

[REDACTED] CCS ¶ 81. [REDACTED]

[REDACTED]

[REDACTED] CCS ¶¶ 80-81. [REDACTED]

[REDACTED]

[REDACTED] This is an

application of basic oligopoly theory.

[REDACTED]

[REDACTED] CCS ¶¶ 88-96. [REDACTED]

[REDACTED]

[REDACTED] CCS ¶¶ 95-96. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] CCS ¶ 96.

C. McWane’s Strategy of Exclusion

The American Recovery and Reinvestment Act of 2009 (“ARRA”), enacted by Congress in February 2009, allocated more than \$6 billion to water infrastructure projects, conditioned on the use of domestically produced materials, including Fittings, in those projects (the “Buy American” requirement). CCS ¶ 99.

ARRA significantly altered the competitive dynamics of the Fittings industry. CCS ¶ 100. [REDACTED]

[REDACTED] *Id.* [REDACTED]

[REDACTED]

[REDACTED] CCS ¶ 101. [REDACTED]

[REDACTED] CCS ¶ 104. [REDACTED]

[REDACTED]

[REDACTED] *Id.*

[REDACTED]

[REDACTED] CCS ¶ 105. [REDACTED]

[REDACTED]

[REDACTED] CCS ¶¶ 106-137. [REDACTED]

[REDACTED] CCS ¶¶ 138-207.

Keeping Sigma out of the Market. [REDACTED]

CCS ¶¶ 116-20. [REDACTED]

[REDACTED] CCS ¶ 118. [REDACTED] *Id.*

[REDACTED] CCS ¶¶ 120-23. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] CCS ¶¶ 124-26. [REDACTED]

[REDACTED] CCS ¶¶ 121; 131-32. [REDACTED]

[REDACTED] CCS ¶ 132. [REDACTED]

[REDACTED]

[REDACTED] CCS ¶ 137.

[REDACTED]

[REDACTED] CCS ¶ 135.

[REDACTED]

[REDACTED] CCS ¶ 135. [REDACTED]

[REDACTED] *Id.* [REDACTED]

[REDACTED]

[REDACTED] *Id.*

Keeping Star out of the Market. [REDACTED] [REDACTED]

[REDACTED]

[REDACTED] CCS ¶ 141. [REDACTED]

[REDACTED] CCS ¶¶ 140-151. [REDACTED]

[REDACTED] CCS ¶

140.

[REDACTED]

[REDACTED] *See* CCS ¶ 167. [REDACTED]

[REDACTED]

[REDACTED] *Id.*

[REDACTED]

[REDACTED] CCS ¶ 105. On September 22, 2009 McWane forwarded a letter to waterworks distributors announcing the company's new policies governing the sale of domestic Fittings.

CCS ¶ 172. [REDACTED]

[REDACTED] CCS ¶¶ 174-76. [REDACTED]

[REDACTED]

[REDACTED] CCS ¶¶

174-75. [REDACTED]

[REDACTED] CCS ¶ 175.

[REDACTED]

[REDACTED] CCS ¶¶ 182-202. [REDACTED]

[REDACTED]

[REDACTED] CCS ¶ 182. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] CCS ¶ 182.

McWane's exclusive dealing policy had a substantial negative effect upon consumers. [REDACTED]

[REDACTED]

[REDACTED]

CCS ¶ 207. [REDACTED]

[REDACTED] CCS ¶¶ 204-05. [REDACTED]

ARGUMENT

A motion for summary decision should be denied where there is a genuine issue of material fact to be resolved at trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986). In making this judgment, the Commission must construe the evidence in the light most favorable to the party opposing summary decision, giving that party the benefit of all reasonable inferences. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986).

Judge Posner has identified three “traps” that a court must avoid when asked to enter summary judgment dismissing a price-fixing claim. *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 655-56 (7th Cir. 2002). First, the court should not weigh conflicting evidence or evaluate credibility, but should instead determine whether there is a genuine issue. *Id.* at 655. Second, the court should not require the plaintiff to submit an item of evidence that is sufficient in itself to prove a conspiracy. The question for the court is whether a reasonable fact finder, considering the evidence as a whole, could conclude that it is more likely than not that the defendant has conspired to fix prices. *Id.* at 656. Third, the court should not fail to distinguish between the existence of a conspiracy and its efficacy. An agreement to fix prices is per se unlawful “even if most or for that matter all transactions occur at lower prices.” *Id.*

I. McWane Participated in a Conspiracy to Restrain Price Competition

[REDACTED]

[REDACTED]

[REDACTED] CCS ¶

13. [REDACTED]

[REDACTED] CCS ¶¶ 36-38. [REDACTED]

The central issue presented by McWane’s motion for summary decision is how to explain the Fittings market’s dramatic transformation during 2008. [REDACTED]

[REDACTED]

[REDACTED] The theory of interdependence (sometimes referred to as oligopoly price leadership) posits that in a highly concentrated market any single firm’s price and output decisions will have a noticeable impact on the market and on its rivals. Competing firms may be able to raise prices to supra-competitive levels by observing and reacting to the price and output decisions of a market leader.² [REDACTED]

[REDACTED]

² See *In re Petroleum Products Antitrust Litig.*, 906 F.2d 432, 443 (9th Cir. 1990); PHILLIP E. AREEDA & HERBERT HOVENKAMP, VI ANTITRUST LAW ¶ 1429 (3d ed. 2012).

The better explanation for the sharp transformation in the Fittings market is that sellers were conspiring (acting in concert), [REDACTED] Concerted action is established where two or more distinct entities share “a unity of purpose, or a common design and understanding, or a meeting of the minds,” or a conscious commitment to a common scheme. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771 (1984).³ A more functional definition, favored by some commentators, is that concerted action involves a mutual exchange of assurances to adhere to a common course of action. *In re Flat Glass Litig.*, 385 F.3d 350, 361 (3d Cir. 2004) (PHILLIP E. AREEDA & HERBERT HOVENKAMP, VI ANTITRUST LAW ¶ 1434b (2d ed. 2000)).⁴ Agreement may be shown through direct or circumstantial evidence, or a combination of the two. *West Penn Allegheny Health System, Inc. v. UPMC*, 627 F.3d 85, 99 (3d Cir. 2010). Circumstantial evidence that supports an inference of conspiracy – that tends to exclude the possibility of independent action – is referred to by the courts as a plus factor. *City of Tuscaloosa v. Harcross Chemicals*, 158 F.3d 548, 571 n.35 (11th Cir. 1998).

The exchange of assurances proscribed by the antitrust laws need not be explicit, as in “I promise to do X provided that you promise to do Y.” Reciprocal assurances may be communicated by vague words and even by conduct. *Isaksen v. Vermont Castings, Inc.*, 825 F.2d 1158, 1164 (7th Cir. 1987); PHILLIP E. AREEDA & HERBERT HOVENKAMP, VI ANTITRUST LAW ¶¶ 1404, 1410c (3d ed. 2012). As the Seventh Circuit has noted, the law of conspiracy “has some obligation to keep up with the ingenuity and subtlety of sophisticated businessmen . . .” *United States v. Consolidated Packaging Corp.*, 575 F.2d 117, 126 (7th Cir. 1978).

³ Courts use the shorthand phrase “concerted action” to refer to any form of activity meeting the Section 1 “contract . . . combination or conspiracy” requirement. *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 117 n. 3 (3d Cir. 1999).

⁴ See also William E. Kovacic, *The Identification and Proof of Horizontal Agreements Under the Antitrust Laws*, 38 ANTITRUST BULL. 5, 37 (1993).

Again, an antitrust conspiracy may be established through circumstantial evidence alone. *In re Petroleum Products Antitrust Litig.*, 906 F.2d 432, 439 (9th Cir. 1990).⁵ This means that liability may be established without a confession from any of the alleged conspirators. *See High Fructose Corn.*, 295 F.3d at 662. And a denial of conspiracy by the alleged conspirators does not automatically entitle a defendant to summary dismissal of the claim. *Minpeco, S.A. v. ContiCommodity Servs., Inc.*, 673 F. Supp. 684, 697 (S.D.N.Y. 1987). [REDACTED]

[REDACTED] *See Weit v. Continental Illinois National Bank*, 641 F.2d 457, 461-62 (7th Cir. 1981).

The evidence set forth by Complaint Counsel is more than sufficient to meet that burden. The evidence in this case establishes a range of plus factors recognized by the courts, and it strongly supports the conclusion that McWane and its rivals conspired to restrain price competition in the Fittings market:

(a) *Industry structure susceptible to price fixing.* The Fittings industry is characterized by few sellers, homogeneous product, and inelastic demand. These factors indicate that the market is conducive to price fixing, and further that the sellers have a motive to conspire. *In re Text Messaging Antitrust Litig.*, 630 F.3d 622, 627-28 (7th Cir. 2010) (“[A]n industry structure that facilitates collusion constitutes supporting evidence of collusion.”); *Flat Glass*, 385 F.3d at 360.

(b) *Plan to restrain competition.* [REDACTED]

⁵ *Accord High Fructose*, 295 F.3d at 662; *Harcros*, 158 F.3d at 569; *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., Inc.*, 998 F.2d 1224, 1242 (3d Cir. 1993); *see also*, AREEDA & HOVENKAMP, *supra* note 1 at ¶ 1410c (3d ed. 2012)(An agreement “can exist without any documentary trail and without any admission by the participants. Because insistence upon direct proof would remove too many conspiracies from the embrace of the antitrust laws, the courts necessarily consider circumstantial proof of agreement.”).

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

A similar scenario was present in *In re Sulfuric Acid Antitrust Litig.*, 743 F. Supp. 2d 827 (N.D. Ill. 2010). Plaintiffs alleged that manufacturers of sulfuric acid conspired to curtail production at their respective facilities. Defendants' motion for summary dismissal of this claim was denied. "The most damaging piece of evidence," in the court's view, was a document from the files of one defendant laying out a plan for inducing its competitors to reduce output. *Id.* at 858. Also tending to exclude the possibility that defendants had engaged in independent decision-making was "[e]vidence pointing to compliance with this plan" on the part of other competitors. *Id.* See also *In re Linerboard Antitrust Litig.*, 504 F. Supp. 2d 38, 59 (E.D. Pa. 2007) (document showing one defendant's intention to collude with rivals is a plus factor, and informs the court's interpretation of all the evidence).

(c) *Price-related communications.* In the model of recognized interdependence, firms observe and respond to their rivals' price and output decisions; that is, firms read the market. When competitors supplement this dynamic with non-market communications that facilitate, stabilize, or strengthen this natural market coordination, they cross the line into concerted action.⁶ For this reason, inter-firm communication on the subject of the alleged conspiracy is an important plus factor.⁷ [REDACTED]

[REDACTED]

⁶ William H. Page, *Communication and Concerted Action*, 38 LOY. U. CHI. L.J. 405, 434, 446 (2007) (concerted action is distinguished from interdependence by the presence of a communication that conveys the intention to act to achieve a common goal and reliance on one's rivals to do the same).

⁷ See *Flat Glass*, 385 F.3d at 361:

• [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] CCS ¶¶ 15-21.

• [REDACTED]
[REDACTED] CCS ¶ 32. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] CCS ¶¶ 32-

38. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] CCS ¶¶ 60-74. *Cf. In re Delta/AirTran Baggage Fee*

Antitrust Litig., 2012-1 Trade Cas. (CCH) ¶ 77,816 (N.D. Ga. 2010) (“[C]ollusive communications can be based on circumstantial evidence and can occur in speeches at industry conferences, announcements of future prices, statements on earnings calls, and in other public ways.”). [REDACTED]

[REDACTED]
[REDACTED] *See Flat Glass*, 385 F.3d at 357, 363-64 & n.17.

That evidence may involve “customary indications of traditional conspiracy,” or “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.”

see also Re/Max Int'l v. Realty One, Inc., 173 F.3d 995, 1009(6th Cir. 1999); *In re EPDM Antitrust Litig.*, 681 F. Supp. 2d 141, 173-75 (D. Conn. 2009).

• [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED] CCS ¶ 41.

• [REDACTED]
[REDACTED]

[REDACTED] CCS ¶¶ 44-45.

• [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED] CCS ¶

42.

[REDACTED]
[REDACTED]

[REDACTED] This inference conforms with the reasoning in *United States v. Container Corp.*, 393 U.S. 333 (1969). There, the defendant manufacturer of corrugated containers contacted a competitor and requested information concerning the most recent price charged to a customer. The Court recognized “that when a defendant requested and received price information [from a competitor], it was affirming its willingness to furnish such information in return.” *Id.* at 335. In the very same way, when a firm complains to its competitor about the latter’s low price, the speaker is implicitly

communicating its willingness to adhere to higher prices in return. *See also* AREEDA & HOVENKAMP, VI ANTITRUST LAW ¶ 1419a (“[W]hen a competitor merely complains to its rival about the latter’s ‘low price’ . . . the ‘objective’ meaning of such a statement to the reasonable observer seems clear: the only business rationale for complaining is to induce a higher price.”).

Consistent with this analysis, courts have viewed similar competitor complaints as evidence confirming the existence of, and the speaker’s participation in, a price-fixing conspiracy. *United States v. Beaver*, 515 F.3d 730, 738 (7th Cir. 2008), was an appeal from a criminal conviction for conspiring to fix the price of concrete. Defendant attended meetings of competing concrete producers at which a plan to limit discounts was discussed, but no words of assent were voiced. Defendant argued that the government failed to show that a price-fixing conspiracy existed or that he participated in the cartel. The Seventh Circuit rejected this argument, finding that tacit assent to the plan was voiced when one conspirator “confronted others about cheating on the cartel.” *Id.*

In *United States v. Giordano*, 261 F.3d 1134 (11th Cir. 2001), Defendant Weil appealed from his criminal price fixing conspiracy conviction for fixing scrap metal prices. Weil asserted that he attended meetings with his competitor in order to gather information about their prices, information that he intended to use unilaterally in order to set his own prices. The Eleventh Circuit sustained the price-fixing conviction, relying *inter alia* on testimony that Weil contacted his competitor “on at least one occasion to complain that [the competitor] was cheating” on the agreement. *Id.* at 1139.

In re Scrap Metal Antitrust Litig., 2006 U.S. Dist. LEXIS 75873 (N.D. Ohio 2006), *aff’d*, 527 F.3d 517 (6th Cir. 2008), was a civil case charging a conspiracy to fix the price of scrap metal. Defendant Columbia sought to overturn a jury finding of liability, asserting that there was

insufficient evidence of the alleged conspiracy. The court rejected this motion, citing evidence of inter-company complaints when one scrap dealer bid on an account that “belonged” to a competitor. *Id.* at *41.

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

(d) *Actions contrary to the actor’s unilateral self-interest.* “It is firmly established that actions that are contrary to an actor’s economic interest constitute a plus factor that is sufficient to satisfy a price fixing plaintiff’s burden in opposing a summary judgment motion.” *Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287, 1310 (11th Cir. 2003).⁸ [REDACTED]

[REDACTED]
• [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED] CCS ¶ 40.

• [REDACTED]
[REDACTED]
[REDACTED]

[REDACTED] CCS ¶¶ 49-50, 66-

⁸ *Accord Merck-Medco Managed Care, LLC v. Rite Aid Corp.*, 1992-2 Trade Cas. ¶ 72,640 (4th Cir. 1999) (“Evidence of acts contrary to an alleged conspirator’s economic interest is perhaps the strongest plus factor indicative of a conspiracy.”); *Baby Food Antitrust Litig.*, 166 F.3d at 122; *Harcros*, 158 F.3d at 572; *Petruzzi’s*, 998 F.2d at 1243-45; *Apex Oil Co. v. DiMauro*, 822 F.2d 246, 254 (2d Cir. 1987).

74. [REDACTED]
In re High Pressure Laminates Antitrust Litig., 2006-1 Trade Cas. CCH ¶ 75,298 (S.D.N.Y. 2006) (defendant's sharing of confidential information with competitors was against its individual economic self-interest, and therefore probative of conspiracy).

(e) *Actions that facilitate price collusion.* [REDACTED]

[REDACTED]
[REDACTED] *Todd v. Exxon Corp.*, 275 F.3d 191, 198 (2d Cir. 2001) (competitors' use of facilitating practice, [REDACTED] is a plus factor that supports an inference of a price-fixing agreement); *Petroleum Prods.*, 906 F.2d at 461-62 (same).

[REDACTED]
[REDACTED] CCS ¶¶ 36-40.
[REDACTED]
[REDACTED]
[REDACTED] *United States v. Andreas*, 216 F.3d 645, 652 (7th Cir. 2000).

(f) *Conspirator admissions.* [REDACTED]

[REDACTED] CCS ¶ 86. [REDACTED]
[REDACTED]
[REDACTED] CCS ¶¶ 86-90. These acknowledgments of conspiracy, explicit and implicit, are evidence of that deal or commitment. *High Fructose Corn Syrup*, 295 F.3d at 661-62; *Re/Max Int'l*, 173 F.3d at 1009-10.

All this varied evidence “tends to exclude independent action,” and so shifts to McWane the burden to prove that “drawing an inference of unlawful behavior is unreasonable.”

Petruzzi's, 998 F.2d at 1230. [REDACTED]

[REDACTED] This is the third of Judge Posner's "traps,"
and unavailing for two reasons. [REDACTED]

This precise issue was addressed in *Beaver*:

[Defendant asserts that] the concrete producers' occasional cheating on the discount limit shows that no agreement was ever reached. But this argument is illogical; certainly [defendant] would agree that a breach of contract does not mean that the parties never entered into a contract in the first place. And the argument is also beside the point because § 1 of the Sherman Act does not outlaw only perfect conspiracies to restrain trade. It is not uncommon for members of a price-fixing conspiracy to cheat on one another occasionally, and evidence of cheating certainly does not, by itself, prevent the government from proving a conspiracy.

Beaver, 515 F.3d at 739. *Accord Andreas*, 216 F.3d at 669, 679 (cheating by cartel members did not disprove conspiracy claim); *United States v. SKW Metals & Alloys, Inc.*, 195 F.3d 83 (2d Cir. 1999) (same); *High Fructose*, 295 F.3d at 656 (same); *Alexander v. Phoenix Bond & Indemnity Co.*, 149 F. Supp. 2d 989, 1008 (N.D. Ill. 2001) (same).

In sum, [REDACTED]

[REDACTED] tends to exclude the possibility of independent action, and therefore creates a genuine issue of material fact as to whether McWane and its rivals conspired to restrain price competition. McWane's motion for summary decision should be denied.

II. McWane Invited Collusion

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *Id.*

[REDACTED]

McWane argues, somewhat anachronistically, that the FTC Act does not reach a unilateral, unconsummated invitation to fix prices. Yet, in a series of consent orders the Commission has endorsed the proposition that an invitation to collude is “the quintessential example of the kind of conduct that should be . . . challenged as a violation of Section 5.”⁹ This enforcement policy extends back twenty years.¹⁰ Legal authority for this doctrine is found in a line of Supreme Court decisions interpreting Section 5 as empowering the Commission to ban potentially anticompetitive practices in their incipiency, even before the conduct develops into a “full-blown” violation of the Sherman Act.¹¹

⁹ Statement of Chairman Leibowitz, Commissioner Kovacic, and Commissioner Rosch, *In the Matter of U-Haul Int’l, Inc. and AMERCO*, FTC File No. 081-0157 (June 9, 2010).

¹⁰ *See id.* (listing Commission cases).

¹¹ *See Fed. Trade Comm’n v. Texaco, Inc.*, 393 U.S. 223, 225 (1968); *Fed. Trade Comm’n v. Brown Shoe Co.*, 384 U.S. 316, 321 (1966); *Fed. Trade Comm’n v. Motion Picture Adver. Serv. Co.*, 344 U.S. 392, 394-95 (1953); *Fed. Trade Comm’n v. Cement Inst.*, 333 U.S. 683, 708 (1948); *Fashion Originators’ Guild, Inc. v. Fed. Trade Comm’n*, 312 U.S. 457, 466 (1941).

The First Circuit recently concluded that an invitation to fix prices is an unfair method of competition under Massachusetts consumer protection law. *Liu v. Amerco*, 677 F.3d 489 (1st Cir. 2012). The court relied upon FTC precedent, explaining that an unsuccessful attempt to fix prices is “pernicious conduct with a clear potential for harm and no redeeming value whatever.” *Id.* slip op. at 9. The Commission’s use of Section 5 to condemn invitations to collude has also been endorsed by leading antitrust scholars.¹²

McWane’s Memorandum misrepresents the First Circuit’s *Liu* decision, as well as *United States v. American Airlines*, 743 F.2d 1114 (5th Cir. 1984) (invitation to fix prices violates Sherman Act, Section 2 where the solicitor and the solicited competitor would together exercise monopoly power).

McWane’s next argument is that [REDACTED]

[REDACTED]. For purposes of summary decision, the relevant inquiry is whether Complaint Counsel’s reading is reasonable. *See Flat Glass*, 385 F.3d at 357, 363-64 & n.17; *High Fructose*, 295 F.3d at 662.

[REDACTED] CCS ¶ 32. [REDACTED]
[REDACTED]

Several legal and economic justifications support the imposition of liability upon firms that communicate an invitation to collude where acceptance cannot be proven. First, it may be difficult to determine whether a particular solicitation has or has not been accepted. Second, even an unaccepted solicitation may facilitate coordinated interaction by disclosing the solicitor’s intentions or preferences. Third, the anti-solicitation doctrine serves as a useful deterrent against conduct that is potentially harmful and that serves no legitimate business purpose. Analysis of Agreement Containing Consent Order To Aid Public Comment, *In the Matter of Valassis Communications, Inc.*, File No. 051 0008, <http://www.ftc.gov/os/caselist/0510008/060314ana0510008.pdf>

¹² AREEDA & HOVENKAMP, *supra* note 4, ¶ 1419; Stephen Calkins, *Counterpoint: The Legal Foundation of the Commission’s Use of Section 5 to Challenge Invitations to Collude is Secure*, ANTITRUST Spring 2000, at 69 (“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.”).

(ii) [REDACTED]
[REDACTED] CCS ¶¶ 26-37, 60-78. This evidence demonstrates that it is reasonable to interpret [REDACTED] inviting its competitors to collude.

Cases cited by McWane that address the legality of a bare price announcement are irrelevant. [REDACTED]
[REDACTED]
[REDACTED] are legally irrelevant and/or raise disputed issues to be resolved at trial.

III. McWane Participated in an Illegal Conspiracy to Exchange Sales Information

[REDACTED]
[REDACTED]
[REDACTED]

The exchange of information among competitors violates the antitrust laws where the likely effect is to facilitate supra-competitive pricing or other anticompetitive behavior. *Gypsum*; *United States v. Citizens & Southern National Bank*, 422 U.S. 86 (1975); *Todd*, 275 F.3d at 198; *Petroleum Prods.* 906 F.2d at 448. McWane ignores this authority, and asserts that the exchange of sales information is per se lawful, citing *Williamson Oil*, 346 F.3d 1287. This misreads *Williamson*. The Eleventh Circuit's opinion does not consider or rule on the legality of the information exchange conducted by the defendant cigarette manufacturers; the claim before the court was price fixing. [REDACTED]

[REDACTED]
[REDACTED] *Id.* at 1313.

The Eleventh Circuit's recognition that an information exchange that aggregates and distributes industry sales data among competitors may facilitate price collusion accords with oligopoly theory. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Massimo

Motta, *Competition Policy, Theory and Practice* at 151 (2004).¹³ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] CCS ¶ 83, *see also* CCS ¶ 82.

Cases cited by McWane that address unilateral efforts to gather information about rivals are irrelevant; an information exchange involves concerted action subject to Section 1 review.

Container Corp., 393 U.S. at 337. [REDACTED]

[REDACTED]

[REDACTED] Finally, [REDACTED]

[REDACTED] This is a disputed and material fact appropriately reserved for trial.

¹³ *See also 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); 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.”).

IV. McWane Monopolized the Domestic Fittings Market

The Complaint charges that McWane attempted to maintain, and did maintain, its monopoly in the domestic Fittings market through exclusive dealing practices [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] This fact alone disproves neither monopolization (Count Six), nor attempted monopolization (Count 7).

The offense of monopolization has two elements: “the possession of monopoly power in the relevant market and (2) willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.” *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966); *see also United States v. Microsoft Corp.*, 253 F.3d 34, 50 (D.C. Cir. 2001).

[REDACTED]

[REDACTED]

[REDACTED] Market share of this magnitude is sufficient to support a finding of monopoly power. *E.g.*, *Spirit Airlines v. Northwest Airlines*, 431 F.3d 917, 935-36 (6th Cir. 2005); *Conwood Co. v. United States Tobacco Co.*, 290 F.3d 768, 783 n.2 (6th Cir. 2002); *Image Tech. Servs. v. Eastman Kodak Co.*, 125 F.3d 1195, 1206 (9th Cir. 1997). [REDACTED]

[REDACTED]

[REDACTED] CCS ¶ 207. *See Broadcom Corp. v. Qualcomm, Inc.*, 501 F.3d 297, 307 (3d Cir. 2007) (“The existence of monopoly power may be proven through direct evidence of supracompetitive prices and restricted output.”).

¹⁴ [REDACTED]

[REDACTED]

Exclusionary conduct is “behavior that not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way.” *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 n.32 (1985) (quoting P. Areeda & D. Turner, *Antitrust Law* 78 (1978)). A plaintiff is not required to show that rivals were entirely excluded or extinguished by the monopolist’s conduct. It is sufficient to show that the rivals’ entry or growth was impeded through exclusive dealing, and that this significantly contributed to the maintenance of defendant’s monopoly power. *E.g.*, *U.S. v. Dentsply Int’l*, 399 F.3d 181, 191 (3d Cir. 2005) (“The test is not total foreclosure, but whether the challenged practices bar a substantial number of rivals or severely restrict the market’s ambit.”); *Microsoft*, 253 F.3d at 70 (Microsoft’s actions “have a significant effect in preserving its monopoly; they help keep usage of [Netscape’s] Navigator below the critical level necessary for Navigator or any other rival to pose a real threat to Microsoft’s monopoly.”); *LePage’s, Inc. v. 3M*, 324 F.3d 141, 160-61 (3d Cir. 2003) (foreclosing rivals from “key large volume customers” that were essential to achieving efficiencies of scale” was exclusionary).

McWane miscites *Omega Envt’l v. Gilbarco, Inc.*, 127 F.3d 1157, 1164 (9th Cir. 1997), for the proposition that evidence of any new entry defeats a monopolization claim. In *Gilbarco* plaintiffs produced zero “credible evidence to support their contention that [defendant’s] policy” actually deterred entry into this market.” *Id.* Here, by contrast, [REDACTED]

[REDACTED]

[REDACTED] CCS ¶¶ 168-202. [REDACTED]

[REDACTED] CCS ¶¶ 176-194.

[REDACTED]

[REDACTED] *Id.* [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] CCS ¶ 182. [REDACTED]

[REDACTED] CCS ¶ 196.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] CCS ¶¶

138-207.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

V. McWane Excluded Sigma from the Domestic Fittings Market

McWane and Sigma entered into an agreement providing [REDACTED]

[REDACTED]

[REDACTED] The Complaint charges that this agreement unreasonably restrained competition (Count Four), and was at the heart of a conspiracy to monopolize the

domestic DIPF market (Count Five). [REDACTED]

[REDACTED] This argument relies upon a host of disputed issues of material fact.

The legal standard for establishing that a firm is a potential competitor depends upon the nature and particulars of the claim. *Compare Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46 (1990) (in market division case, that BRG provided bar review services in Georgia was sufficient to establish BRG as a potential competitor outside of Georgia) *with In re B.A.T. Indus., Ltd.*, 104 F.T.C. 852, 937 (1984) (in merger case, party's status as a potential competitor requires assessment of "financial and managerial capabilities, interests, and incentives"). For purposes of

[REDACTED] Resp. Mot. at 33.

[REDACTED] CCS

¶ 110 [REDACTED]

[REDACTED] CCS ¶ 118. [REDACTED]

[REDACTED] CCS ¶ 119, [REDACTED]

[REDACTED] Commission precedent identifies this as the "best evidence" of a firm's intent to enter a market. *See B.A.T. Indus.*, 104 F.T.C. at 922 (subjective evidence that a firm intends to enter a market is among "the best evidence" on the likelihood of that firm's entry). Additionally,

[REDACTED] CCS ¶ 121; *see Engine*

Specialties, Inc. v. Bombardier, Ltd., 605 F.2d 1, 10 (1st Cir. 1979) (the approval of the board of directors in connection with plans to entry was sufficient to establish that “Bombardier had the requisite intent and ability to enter the ... market”).

[REDACTED]

[REDACTED]

[REDACTED] CCS ¶ 132. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] CCS ¶

118.

Prior to the MDA, [REDACTED]

[REDACTED]

[REDACTED] CCS ¶¶ 124-25. [REDACTED]

[REDACTED] CCS ¶ 125. [REDACTED]

[REDACTED]

[REDACTED] CCS ¶¶ 123-125.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

CONCLUSION

For the reasons set forth above, McWane's motion for summary decision should be denied on all Counts.

June 22, 2012

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CERTIFICATE OF SERVICE

I hereby certify that on June 22, 2012, 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:

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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.

June 22, 2012

By: s/ Thomas H. Brock
Attorney

2. Fittings are a component of the pipeline systems that are used to transport drinking and waste water in municipal distribution systems. Fittings are used to join pipes, valves, and hydrants, and to change or direct the flow of water. McWane Answer ¶ 16.

3. [REDACTED]

4. [REDACTED]

5. Some waterworks projects are required by law to utilize Fittings that are manufactured in the United States. *See. e.g.* The Pennsylvania Steel Products Procurement Act, 73 Pa. Stat. §§ 1881-1887.

6. [REDACTED]

7. [REDACTED]

8. [REDACTED]

9. [REDACTED]

10. [REDACTED]

11. [REDACTED]

2007

12. [REDACTED]

13. [REDACTED]

[Redacted text block]

14.

[Redacted text block]

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[Redacted text block]

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[Redacted text block]

18.

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20.

[Redacted text block]

21.

[Redacted text block]

22. [Redacted]

23. [Redacted]

24. [Redacted]

25. [Redacted]

2008: McWane Develops and Implements a Plan

26. [Redacted]

a. [Redacted]

b. [Redacted]

c. [Redacted]

d. [Redacted]

27. [Redacted]

a. [Redacted]

b. [Redacted]

c. [REDACTED]

d. [REDACTED]

28. [REDACTED]

29. [REDACTED]

30. [REDACTED]

a. [REDACTED]

b. [REDACTED]

c. [REDACTED]

d. [REDACTED]

e. [REDACTED]

f. [REDACTED]

g. [REDACTED]

31. [REDACTED]

32.

a.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

b.

[REDACTED]

c.

[REDACTED]

d.

[REDACTED]

33.

[REDACTED]

34.

[Redacted]

35.

[Redacted]

a.

[Redacted]

b.

[Redacted]

c.

[Redacted]

36.

[Redacted]

a.

[Redacted]

b.

[Redacted]

c.

[Redacted]

d.

[Redacted]

37.

[REDACTED]

38.

[REDACTED]

39.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

40.

[REDACTED]

41.

[REDACTED]

Cheating and Complaints

42.

[REDACTED]

a.

[REDACTED]

b.

[REDACTED]

c.

[REDACTED]

d.

[REDACTED]

[REDACTED]

[Redacted]

[Redacted]

43.

[Redacted]

[Redacted]

[Redacted]

[Redacted]

McWane Communicates That It Is The Low Cost Provider

44.

[Redacted]

45.

[Redacted]

DIFRA and the Second Price Increase of 2008

46.

[REDACTED]

47.

[REDACTED]

48.

[REDACTED]

49.

[REDACTED]

[REDACTED]

50.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

63.

[REDACTED]

64.

[REDACTED]

65.

[REDACTED]

66. [REDACTED]

67. [REDACTED]

68. [REDACTED]

69. [REDACTED]

70. [REDACTED]

71. [REDACTED]

72. [REDACTED]

73. [REDACTED]

[REDACTED]

[REDACTED]

74. [REDACTED]

[Redacted]

75. [Redacted]

76. [Redacted]

77. [Redacted]

78. [Redacted]

79. [Redacted]

80. [Redacted]

81. [Redacted]

[Redacted]

82.

[REDACTED]

[REDACTED]

[REDACTED]

83.

[REDACTED]

84.

[REDACTED]

The Market Decline Leads to Cheating

85.

[REDACTED]

86.

[REDACTED]

87.

[REDACTED]

88.

[REDACTED]

89.

[REDACTED]

90.

[REDACTED]

91.

[REDACTED]

92.

[REDACTED]

93.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

94.

[REDACTED]

95.

[REDACTED]

96.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

97.

[REDACTED]

98.

[REDACTED]

The ARRA Had A Dramatic Effect on the Domestic Market

99.

[REDACTED]

100.

[REDACTED]

101.

[REDACTED]

102.

[REDACTED]

103.

[REDACTED]

104.

[REDACTED]

105.

[REDACTED]

[REDACTED]

SIGMA's Domestic Entry

106. [REDACTED]

107. [REDACTED]

108. [REDACTED]

109. [REDACTED]

110. [REDACTED]

111. [REDACTED]

112. [REDACTED]

113. [REDACTED]

114.

[REDACTED]

115.

[REDACTED]

116.

[REDACTED]

117.

[REDACTED]

118.

[REDACTED]

119.

[REDACTED]

120.

[REDACTED]

121.

[REDACTED]

122.

[REDACTED]

123.

[REDACTED]

[REDACTED]

124.

[REDACTED]

125.

[REDACTED]

126.

[REDACTED]

127.

[REDACTED]

128.

[REDACTED]

129.

[REDACTED]

[REDACTED]

130.

131.

132.

133.

134.

135. In September, 2009, Sigma and McWane entered into the MDA, [REDACTED]

a.

b.

[Redacted]

c. [Redacted]

d. [Redacted]

e. [Redacted]

f. [Redacted]

g. [Redacted]

136. [Redacted]

137. [Redacted]

[Redacted]

[REDACTED]

[REDACTED]

[REDACTED]

138. [REDACTED]

139. [REDACTED]

140. [REDACTED]

141. [REDACTED]

142.

[REDACTED]

143.

[REDACTED]

144.

[REDACTED]

145.

[REDACTED]

146.

[REDACTED]

147.

[REDACTED]

148.

[REDACTED]

149.

[REDACTED]

150.

[REDACTED]

151.

[REDACTED]

152.

[REDACTED]

153.

[REDACTED]

154.

[REDACTED]

155.

[REDACTED]

156.

[REDACTED]

157.

[REDACTED]

158.

[REDACTED]

159.

[REDACTED]

160.

[REDACTED]

[Redacted]

161.

[Redacted]

162.

[Redacted]

163.

[Redacted]

164.

[Redacted]

165.

[Redacted]

166.

[Redacted]

167.

[Redacted]

The Impact of McWane's Exclusivity Policy

168.

[Redacted]

169. [Redacted]

170. [Redacted]

171. [Redacted]

172. [Redacted]

173. [Redacted]

174. [Redacted]

175. [Redacted]

176.

[REDACTED]

177.

[REDACTED]

178.

[REDACTED]

179.

[REDACTED]

180.

[REDACTED]

181.

[REDACTED]

182.

[REDACTED]

183.

[REDACTED]

184.

[REDACTED]

185.

[REDACTED]

186.

[REDACTED]

187.

[REDACTED]

188.

[REDACTED]

189.

[REDACTED]

190.

[REDACTED]

191.

[REDACTED]

192.

[REDACTED]

193.

[REDACTED]

[Redacted]

194. [Redacted]

195. [Redacted]

196. [Redacted]

197. [Redacted]

198. [Redacted]

199. [Redacted]

200. [REDACTED]

201. [REDACTED]

202. [REDACTED]

203. [REDACTED]

204. [REDACTED]

205. [REDACTED]

206. [REDACTED]

207. [REDACTED]



**PART II: COMPLAINT COUNSEL'S RESPONSE TO
RESPONDENT'S STATEMENT OF UNDISPUTED FACTS**

Pursuant to Rule 3.24, Complaint Counsel respond to each of the assertions as to which Respondent McWane contends there is no material dispute, and in so doing demonstrates that there are numerous material factual issues as to which there is a genuine issue for trial.

General Objections

1. Complaint Counsel object to Respondent's Statement of Material Facts As To Which There Is No Genuine Dispute ("Material Facts") on the grounds that McWane regularly characterizes as "undisputed" the fact that a witness (or group of witnesses) gave certain deposition testimony. *E.g.*, SOF ¶¶ 20-36 (McWane witnesses); 38-46, 50, 52, 57, 59-62 (Sigma and Star witness). Generally, we do not dispute that the witness' testimony is accurately excerpted, but the issue for the purposes of Respondent's motion is whether the underlying factual issue itself is undisputed, not whether or not a particular witness offered particular testimony, which in and of itself is not dispositive of the issue.

2. Respondent's Material Facts are particularly defective as they quote testimony from witnesses whose recall of the events that occurred four to five years ago was selective, at best. For example, Complaint Counsel do not dispute that [REDACTED]
[REDACTED]
[REDACTED] But that testimony should be considered in light of [REDACTED] failure to remember many of the significant events relating to McWane's pricing decisions. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
3. Complaint Counsel reserve the right to introduce evidence and testimony at trial to controvert each fact set forth in Respondent's Statement of Undisputed Facts even if we do not contest that fact for the purposes of our opposition to Respondent's motion.

* * * * *

Respondent McWane's statements are reprinted herein in italics. Complaint Counsel's replies follow.

I. Allegations

1. *Counts 1 and 2 of the Administrative Complaint ("AC") allege that McWane "conspired" with Sigma and Star, in violation of FTC Act Section 5, "[b]eginning in January 2008" and ending in February 2009 -- when Congress passed Buy-America legislation. (AC ¶¶ 2, 3; see also (January 4, 2012 Statement by Federal Trade Commission, <http://www.ftc.gov/opa/2012/01/mcwane.shtm>.) ("disbanded in early 2009").)*

Response to No. 1: Disputed. Complaint Counsel refer to the specific allegations in the Administrative Complaint and to the extent Respondent's wording differs, this fact is disputed. The Administrative Complaint does not allege that McWane's conspiracy with Sigma and Star ended in February 2009. Complaint Counsel refer to Complaint Counsel's Motion for Partial Summary Judgment dated June 1, 2012, and the evidence cited in Complaint Counsel's Motion, which clearly set forth the evidence supporting the allegation that McWane conspired with Sigma and Star after February 2009.

2. *The three companies allegedly agreed to issue price increases in January and June 2008 and to limit their discounting. (AC ¶¶ 32-34.)*

Response to No. 2: Disputed as incomplete. Complaint Counsel refer to the specific allegations in the Administrative Complaint and to the extent Respondent's wording differs, this fact is disputed.

3. *The AC also alleges that the companies' participation in the Ductile Iron Fittings Research Association ("DIFRA"), a trade association, "facilitated price coordination" for the six month period after June 2008. (AC ¶ 36 ("between June 2008 and January 2009").) The AC alleges that McWane, Sigma, and Star each provided a third-party accounting firm with a monthly report of its tons-shipped data, which the firm then aggregated, and distributed the overall totals back to them. (AC ¶ 35.)*

Response to No. 3: Disputed. The Administrative Complaint does not allege that DIFRA facilitated price coordination for a "six month period." Complaint Counsel refer to the specific allegations in the Administrative Complaint and to the extent Respondent's wording differs, this fact is disputed.

4. *The AC alleges that the combined, aggregated tons-shipped data allowed the DIFRA members to "indirectly" monitor their "output levels." (AC ¶ 36.) Count 3 alleges that McWane "invited" Star and Sigma to collude, in violation of Section 5, by some or all of the same conduct. (AC ¶ 66.)*

Response to No. 4: Disputed. The Administrative Complaint does not allege that the DIFRA information exchange allowed DIFRA member to "'indirectly' monitor their 'output levels.'" Complaint Counsel refer to the specific allegations in the Administrative Complaint and to the extent Respondent's wording differs, this fact is disputed.

5. *Counts 4 through 7 of the Administrative Complaint ("AC") allege that McWane monopolized or attempted to monopolize the market for domestic ductile iron pipe fittings ("DIPF"),¹ in violation of Section 5 of the FTC Act. (AC ¶¶ 67-70.)*

Footnote 1: McWane challenges Complaint Counsel's allegation that a "domestic" market exists for ductile iron waterworks fittings. It is undisputed that imported fittings compete with domestic fittings.

Response to No. 5: Disputed. Complaint Counsel refer to the specific allegations in the Administrative Complaint and to the extent Respondent's wording differs, this fact is disputed.

[REDACTED]

[REDACTED]

6. *Counts 4 and 5 allege that McWane and Sigma entered a Master Distributorship Agreement ("MDA") in September 2009 with the specific intent to monopolize the market for domestic DIPF. (Id. ¶¶ 67-68.)*

Response to No. 6: Disputed as incomplete. Complaint Counsel refer to the specific allegations in the Administrative Complaint and to the extent Respondent's wording differs, this fact is disputed.

7. *Complaint Counsel alleges that Sigma took steps to evaluate entry into domestic production of fittings, and McWane sought to eliminate that risk by inducing Sigma to become a distributor of McWane's fittings rather than a competitor. (Id. ¶¶ 47-55.)*

Response to No. 7: Disputed as incomplete. Complaint Counsel refer to the specific allegations in the Administrative Complaint and to the extent Respondent's wording differs, this fact is disputed.

8. *Counts 6 and 7 allege that McWane willfully engaged in anticompetitive and exclusionary acts and practices to acquire, enhance or maintain its monopoly power, and, at a minimum resulted in a dangerous probability of monopolizing the alleged market for domestic ductile iron fittings. (Id. ¶¶ 69-70.)*

Response to No. 8: Disputed as incomplete. Complaint Counsel refer to the specific allegations in the Administrative Complaint and to the extent Respondent's wording differs, this fact is disputed.

9. *Complaint Counsel alleges that McWane excluded Star by adopting exclusive dealing policies with the intention that these policies would impede and delay the ability of Star to enter the domestic DIPF market. (Id. ¶¶ 56-57.)*

Response to No. 9: Disputed as incomplete. Complaint Counsel refer to the specific allegations in the Administrative Complaint and to the extent Respondent's wording differs, this fact is disputed.

10. *Complaint Counsel further alleges that the effect of these policies has been to compel the majority of waterworks distributors to deal with McWane and Sigma on an exclusive basis for their domestic DIPF business, and foreclose Star from a substantial volume of sales opportunities with waterworks distributors. (Id. ¶ 58-59.)*

Response to No. 10: Disputed as incomplete. Complaint Counsel refer to the specific allegations in the Administrative Complaint and to the extent Respondent's wording differs, this fact is disputed.

II. Background

A. Background of Fittings Market.

11. *McWane produces more than 4,000 individual ductile iron pipe fittings in a range of diameters (from 3" to 48" or larger), configurations (e.g., elbows, tees, and sleeves), joints (flanged, mechanical, push-on), coatings (e.g., tar, epoxy, cement-lined, glass-lined), and finishes at its last remaining foundry in the U.S., the Union Foundry, and in its foundry in China (which makes the same 4,000-plus fittings at lower costs). [REDACTED] see also <http://www.tylerunion.com>.)²*

Footnote 2: McWane's ductile iron fittings business is known as TylerUnion after its now-closed Tyler, Texas foundry and its Union Foundry in Anniston, Alabama. TylerUnion is a division of McWane under the Valve and Hydrant Group.

Response to No. 11: Disputed. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] This fact is disputed.

12. *McWane's competitors in the market for ductile iron pipe fittings include a number of importers (including Sigma, Star, MetalFit, Serampore, NAPAC, and ElectroSteel) who source fittings from third-party foundries in Korea, China, India, Mexico, and Brazil, and a number of domestic foundries (including U.S. Pipe, Griffin Pipe, American Cast Iron Pipe Company ("ACIPCO"), and Backman Foundry), although several of the domestic foundries such as U.S. Pipe, ACIPCO and Griffin Pipe have stopped or cut back their production of domestic fittings.* [REDACTED]

[REDACTED]

[REDACTED]

Response to No. 12: Disputed as misleading and inconsistent. [REDACTED]

[REDACTED]

[REDACTED] This fact is disputed.

13. *The prices customers pay for McWane's fittings depend upon multiple factors. McWane issues a list price, which is nationwide and historically has only changed every few years.*

[REDACTED]

Response to No. 13: Not disputed.

14. [REDACTED]

Response to No. 14: Not disputed.

15. *McWane then issues "multipliers," which are region-by-region and, often, "will vary by state."*

[REDACTED]

There are also different multipliers, in every region and state, for McWane's domestic and foreign or "blended" fittings. [REDACTED]

[REDACTED] to open source [REDACTED]

Response to No. 15: Not disputed.

16. [REDACTED]

Response to No. 16: Not disputed.

17. *McWane also offers "job prices" which are [REDACTED]*
[REDACTED]
Job prices, i.e., discounts from McWane's published multipliers, have been routinely granted in recent years. (Id.)

Response to No. 17: Disputed in Part. Subject to the General Objections set forth above, Complaint Counsel do not dispute that the Respondent quoted the excerpt of the witnesses' testimony accurately. This statement is contradicted by the specific facts set forth and evidence cited in Complaint Counsel's Statement of Material Facts As To Which There Is A Genuine Issue For Trial ("CCS") ¶¶ 30-34. The evidence cited in CCS ¶¶ 30-34 raises a genuine issue of material fact as to [REDACTED]

[REDACTED]

18. *Further, McWane provides additional discounts in the form of rebates.* [REDACTED]

Response to No. 18: Not disputed.

19. *Finally, McWane at times provided additional price concessions in the form of reductions in freight, or extensions of credit or payment terms.* [REDACTED]

[REDACTED]

Response to No. 19: Not disputed.

III. McWane Witnesses Testified They Priced Independently.

20. McWane witnesses testified that [REDACTED]

[REDACTED] McWane also denied participating in the alleged conspiracy in its Answer to the AC. (Respondent McWane, Inc.'s Answer ("McWane Answer") at ¶¶ 1-2, 28-38, 64-66.)

Response to No. 20: Disputed in Part. Subject to the General Objections set forth above, Complaint Counsel do not dispute that McWane witnesses testified they made their pricing decisions independently, however, the issue addressed by this statement is contradicted by the specific facts set forth and evidence cited in CCS ¶¶ 26-98 as well as Complaint Counsel's Motion For Partial Summary Decision dated June 1, 2012. The evidence cited in CCS ¶¶ 26-98, and the evidence cited in Complaint Counsel's Motion raises a genuine issue of material fact as to whether or not McWane made its pricing decisions independently. [REDACTED]

[REDACTED]

[REDACTED] Therefore, Complaint Counsel contend there is a genuine issue of material fact for trial.

21. [REDACTED]

Response to No. 21: Not disputed.

22. [REDACTED]

[REDACTED]

Response to No. 22: Disputed in Part. Subject to the General Objections set forth above, Complaint Counsel do not dispute that the Respondent quoted the excerpt of the witness' testimony accurately. The issue addressed by this statement is contradicted by the specific facts set forth and evidence cited in CCS ¶¶ 26-98 as well as Complaint Counsel's Motion For Partial Summary Decision dated June 1, 2012. The evidence cited in CCS ¶¶ 26-98, and the evidence cited in Complaint Counsel's Motion raises a genuine issue of material fact as to whether or not McWane made its pricing decisions independently. [REDACTED]

[REDACTED]

[REDACTED] Therefore, Complaint Counsel contend there is a genuine issue of material fact for trial.

23. [REDACTED]

Response to No. 23: Disputed in Part. Subject to the General Objections set forth above, Complaint Counsel do not dispute that the Respondent quoted the excerpt of the witness' testimony accurately. The issue addressed by this statement is contradicted by the specific facts set forth and evidence cited in CCS ¶¶ 46-98. The evidence cited in CCS ¶¶ 46-98 raises a

genuine issue of material fact as to whether or not DIFRA data had an effect on McWane's pricing. Therefore, Complaint Counsel contend there is a genuine issue of material fact for trial.

24. [REDACTED]

Response to No. 24: Disputed in Part. Complaint Counsel do not dispute that McWane witnesses testified that pricing decisions were based on a wide range of factors. Subject to the General Objections set forth above, Complaint Counsel do not dispute that the Respondent quoted the excerpt of the witnesses' testimony accurately. The issue addressed by this statement is contradicted by the specific facts set forth and evidence cited in CCS ¶¶ 26-98 as well as Complaint Counsel's Motion For Partial Summary Decision dated June 1, 2012. The evidence cited in CCS ¶¶ 26-98, and the evidence cited in Complaint Counsel's Motion raises a genuine issue of material fact as to whether or not McWane independently made its pricing decisions. Therefore, Complaint Counsel contend there is a genuine issue of material fact for trial.

25. [REDACTED]

Response to No. 25: Disputed in Part. Subject to the General Objections set forth above, Complaint Counsel do not dispute that the Respondent quoted the excerpt of the witness' testimony accurately. The issue addressed by this statement is contradicted by the specific facts set forth and evidence cited in CCS ¶¶ 26-98 as well as Complaint Counsel's Motion For Partial Summary Decision dated June 1, 2012. The evidence cited in CCS ¶¶ 26-98, and the evidence cited in Complaint Counsel's Motion raises a genuine issue of material fact as to whether or not

McWane managed its pricing independently. Therefore, Complaint Counsel contend there is a genuine issue of material fact for trial.

26. [REDACTED]

Response to No. 26: Disputed in Part. Subject to the General Objections set forth above, Complaint Counsel do not dispute that the Respondent quoted the excerpt of the witness' testimony accurately. The issue addressed by this statement is contradicted by the specific facts set forth and evidence cited in CCS ¶¶ 26-98 as well as Complaint Counsel's Motion For Partial Summary Decision dated June 1, 2012. The evidence cited in CCS ¶¶ 26-98, and the evidence cited in Complaint Counsel's Motion raises a genuine issue of material fact as to whether or not McWane made its pricing decisions independently. Therefore, Complaint Counsel contend there is a genuine issue of material fact for trial.

27. [REDACTED]

Response to No. 27: Disputed in Part. Subject to the General Objections set forth above, the issue addressed by this statement is contradicted by the specific facts set forth and evidence cited in CCS ¶¶ 26-98. The evidence cited in CCS ¶¶ 26-98 raises a genuine issue of material fact as to whether or not McWane set its multipliers on multiple factors, including colluding with Sigma and Star. Therefore, Complaint Counsel contend there is a genuine issue of material fact for trial. CCS ¶¶ 26-98. This fact is disputed.

28. [REDACTED]

[REDACTED]

Response to No. 28: Disputed. Complaint Counsel do not dispute that McWane's multipliers varied region-by-region and often state-by-state. Subject to the General Objections set forth above, Complaint Counsel do not dispute that the Respondent quoted the excerpt of the witnesses' testimony accurately. The issue addressed by this statement is contradicted by the specific facts set forth and evidence cited in CCS ¶¶ 26-98. The evidence cited in CCS ¶¶ 26-98 raises a genuine issue of material fact as to whether or not McWane [REDACTED] in collusion with Sigma and Star rather than due to competitive conditions. Therefore, Complaint Counsel contend there is a genuine issue of material fact for trial. CCS ¶¶ 26-98. This fact is disputed.

29.

[REDACTED]

Response to No. 29: Disputed in Part. Subject to the General Objections set forth above, Complaint Counsel do not dispute that the Respondent quoted the excerpt of the witness' testimony accurately. [REDACTED]

[REDACTED] The issue addressed by this statement is contradicted by the specific facts set forth and evidence cited in CCS ¶¶ 26-98 as well as Complaint Counsel's Motion For Partial Summary Decision dated

June 1, 2012. The evidence cited in CCS ¶¶ 26-98, and the evidence cited in Complaint Counsel's Motion raises a genuine issue of material fact as to whether or not McWane made its pricing decisions independently. Therefore, Complaint Counsel contend there is a genuine issue of material fact for trial.

30.

[REDACTED]

Response to No. 30: Disputed in Part. Subject to the General Objections set forth above, Complaint Counsel do not dispute that the Respondent quoted the excerpt of the witnesses' testimony accurately. The issue addressed by this statement is contradicted by the specific facts set forth and evidence cited in CCS ¶¶ 26-98. The evidence cited in CCS ¶¶ 26-98 raises a genuine issue of material fact as to whether or not McWane made decisions to [REDACTED] [REDACTED] independently. Therefore, Complaint Counsel contend there is a genuine issue of material fact for trial.

31.

[REDACTED]

[REDACTED]

Response to No. 31: Disputed in Part. Subject to the General Objections set forth above, Complaint Counsel do not dispute that the Respondent quoted the excerpt of the witness' testimony accurately. The issue addressed by this statement is contradicted by the specific facts set forth and evidence cited in CCS ¶¶ 26-98. The evidence cited in CCS ¶¶ 26-98 raises a genuine issue of material fact as to [REDACTED]

[REDACTED] Therefore, Complaint Counsel contend there is a genuine issue of material fact for trial.

32. *McWane granted job prices for a range of reasons, including large volumes, and if it determined it was necessary to meet or beat its competitors' prices.* [REDACTED]

Response to No. 32: Disputed in Part. Subject to the General Objections set forth above, Complaint Counsel do not dispute that the Respondent quoted the excerpt of the witness' testimony accurately. The issue addressed by this statement is contradicted by the specific facts set forth and evidence cited in CCS ¶¶ 26-98. The evidence cited in CCS ¶¶ 26-98 raises a genuine issue of material fact as to whether or not McWane [REDACTED] in coordination with its competitors. Therefore, Complaint Counsel contend there is a genuine issue of material fact for trial.

33. [REDACTED]

Response to No. 33: Disputed in Part. Subject to the General Objections set forth above, Complaint Counsel do not dispute that the Respondent quoted the excerpt of the witnesses' testimony accurately. The issue addressed by this statement is contradicted by the specific facts set forth and evidence cited in CCS ¶¶ 26-98. The evidence cited in CCS ¶¶ 26-98 raises a genuine issue of material fact as to whether or not McWane [REDACTED] in coordination with its competitors. Therefore, Complaint Counsel contend there is a genuine issue of material fact for trial.

34. [REDACTED]

Response to No. 34: Disputed in Part. Subject to the General Objections set forth above, Complaint Counsel do not dispute that the Respondent quoted the excerpt of the witness' testimony accurately. The issue addressed by this statement is contradicted by the specific facts set forth and evidence cited in CCS ¶¶ 26-98. The evidence cited in CCS ¶¶ 26-98 raises a genuine issue of material fact as to whether or not McWane [REDACTED] in coordination with its competitors. Therefore, Complaint Counsel contend there is a genuine issue of material fact for trial.

35. *In fact, McWane witnesses confirmed that there was always significant amounts of job pricing.* [REDACTED]

[REDACTED]

Response to No. 35: Disputed in Part. Subject to the General Objections set forth above, Complaint Counsel do not dispute that the Respondent quoted the excerpt of the witnesses' testimony accurately. Complaint Counsel do not dispute that McWane offered discounts from time to time. The issue addressed by this statement is contradicted by the specific facts set forth and evidence cited in CCS ¶¶ 26-98. The evidence cited in CCS ¶¶ 26-98 raises a genuine issue of material fact as to whether or not McWane [REDACTED] in coordination with its competitors. Therefore, Complaint Counsel contend there is a genuine issue of material fact for trial.

36. [REDACTED]

Response to No. 36: Disputed in Part. Subject to the General Objections set forth above, Complaint Counsel do not dispute that the Respondent quoted the excerpt of the witness' testimony accurately. Complaint Counsel do not dispute that McWane offered price concessions in the form of freight costs or extended terms from time to time. The issue addressed by this statement is contradicted by the specific facts set forth and evidence cited in CCS ¶¶ 26-98. The evidence cited in CCS ¶¶ 26-98 raises a genuine issue of material fact as to whether or not McWane limited price concessions in coordination with its competitors. Therefore, Complaint Counsel contend there is a genuine issue of material fact for trial.

37. *As a result of high costs, competition, and price concessions, the company's business*

Response to No. 37: Disputed. Subject to the General Objections set forth above, Complaint Counsel do not dispute that the Respondent quoted the excerpt of the witnesses' testimony accurately. The issue addressed by this statement is contradicted by the specific facts set forth and evidence cited in CCS ¶ 84. The evidence cited in CCS ¶ 84 raises a genuine issue of material fact as to

. Therefore, Complaint Counsel contend there is a genuine issue of material fact for trial.

IV. *Sigma and Star Testified They Did Not Discuss Prices With McWane.*

38.

Response to No. 38: Disputed in Part. Subject to the General Objections set forth above, Complaint Counsel do not dispute that the Respondent quoted the excerpt of the witnesses' testimony accurately. The issue addressed by this statement is contradicted by the specific facts set forth and evidence cited in CCS ¶¶ 26-98 as well as Complaint Counsel's Motion For Partial Summary Decision.

The evidence cited in CCS ¶¶ 26-98, and the evidence cited in Complaint Counsel's Motion raises a genuine issue of material fact as to whether or not Star and Sigma coordinated pricing with McWane. Therefore, Complaint Counsel contend there is a genuine issue of material fact for trial.

39.

[REDACTED]

Response to No. 39: Disputed in Part. Subject to the General Objections set forth above, Complaint Counsel do not dispute that the Respondent quoted the excerpt of the witness' testimony accurately. The issue addressed by this statement is contradicted by the specific facts set forth and evidence cited in CCS ¶¶ 26-98 as well as by Complaint Counsel's Motion For Partial Summary Decision dated June 1, 2012. [REDACTED]

[REDACTED] The evidence cited in CCS ¶¶ 26-98, and the evidence cited in Complaint Counsel's Motion raises a genuine issue of material fact as to whether or not Star and Sigma coordinated pricing with McWane. Therefore, Complaint Counsel contend there is a genuine issue of material fact for trial.

40. [REDACTED]

[REDACTED]

Response to No. 40: Disputed in Part. Subject to the General Objections set forth above, Complaint Counsel do not dispute that the Respondent quoted the excerpt of the witness' testimony accurately. The issue addressed by this statement is contradicted by the specific facts set forth and evidence cited in CCS ¶¶ 26-98 as well as Complaint Counsel's Motion For Partial Summary Decision dated June 1, 2012. The evidence cited in CCS ¶¶ 26-98, and the evidence cited in Complaint Counsel's Motion raises a genuine issue of material fact as to whether or not Star and Sigma coordinated pricing with McWane. Therefore, Complaint Counsel contend there is a genuine issue of material fact for trial.

41. [REDACTED]

Response to No. 41: Disputed in Part. Subject to the General Objections set forth above, Complaint Counsel do not dispute that the Respondent quoted the excerpt of the witness' testimony accurately. The issue addressed by this statement is contradicted by the specific facts set forth and evidence cited in CCS ¶¶ 26-98 as well as Complaint Counsel's Motion For Partial Summary Decision dated June 1, 2012. [REDACTED]

[REDACTED] The evidence cited in CCS ¶¶ 26-98, and the evidence cited in Complaint Counsel's Motion raises a genuine issue of material fact as to whether or not Star and Sigma coordinated pricing with McWane. Therefore, Complaint Counsel contend there is a genuine issue of material fact for trial.

42. [REDACTED]

Response to No. 42: Disputed in Part. Subject to the General Objections set forth above, Complaint Counsel do not dispute that the Respondent quoted the excerpt of the witness' testimony accurately. The issue addressed by this statement is contradicted by the specific facts set forth and evidence cited in CCS ¶¶ 26-98. The evidence cited in CCS ¶¶ 26-98 raises a genuine issue of material fact as to Star coordinated pricing with McWane and Sigma. Therefore, Complaint Counsel contend there is a genuine issue of material fact for trial.

43. *Star also denied any price agreements with McWane in its Answer to the AC* [REDACTED]
[REDACTED] *See Respondent Star Pipe Products, Ltd.'s Answer ("Star*
Answer") at ¶¶ 1-2, 28-38, 64-66; [REDACTED]
[REDACTED]

Response to No. 43: Disputed in Part. Subject to the General Objections set forth above, Complaint Counsel do not dispute that the Respondent quoted Star's answer to the Administrative Complaint and February 13, 2012 hearing transcript accurately. The issue addressed by this statement is contradicted by the specific facts set forth and evidence cited in CCS ¶¶ 26-98. The evidence cited in CCS ¶¶ 26-98 raises a genuine issue of material fact as to whether or not Star coordinated pricing with McWane and Sigma. Therefore, Complaint Counsel contend there is a genuine issue of material fact for trial.

44. [REDACTED]

Response to No. 44: Disputed in Part. Subject to the General Objections set forth above, Complaint Counsel do not dispute that the Respondent quoted the excerpt of the witness'

testimony accurately. The issue addressed by this statement is contradicted by the specific facts set forth and evidence cited in CCS ¶¶ 26-98. The evidence cited in CCS ¶¶ 26-98 raises a genuine issue of material fact as to whether or not Sigma coordinated pricing with McWane and Sigma. Therefore, Complaint Counsel contend there is a genuine issue of material fact for trial.

45. [REDACTED]

Response to No. 45: Disputed in Part. Subject to the General Objections set forth above, Complaint Counsel do not dispute that the Respondent quoted the excerpt of the witness' testimony accurately. But [REDACTED]

[REDACTED]. The issue addressed by this statement is contradicted by the specific facts set forth and evidence cited in CCS ¶¶ 26-98. The evidence cited in CCS ¶¶ 26-98 raises a genuine issue of material fact as to whether or not Sigma coordinated pricing with McWane and Sigma. Therefore, Complaint Counsel contend there is a genuine issue of material fact for trial.

46. [REDACTED]

Response to No. 46: Disputed in Part. Subject to the General Objections set forth above, Complaint Counsel do not dispute that the Respondent quoted the excerpt of the witness' testimony accurately. The issue addressed by this statement is contradicted by the specific facts set forth and evidence cited in CCS ¶¶ 26-98. The evidence cited in CCS ¶¶ 26-98 raises a genuine issue of material fact as to whether or not Sigma coordinated pricing with McWane and Star. Therefore, Complaint Counsel contend there is a genuine issue of material fact for trial.

47.

Response to No. 47: Disputed in Part. Subject to the General Objections set forth above, Complaint Counsel do not dispute that the Respondent quoted the excerpt of the document accurately. The issue addressed by this statement is contradicted by the specific facts set forth and evidence cited in CCS ¶¶ 26-98. The evidence cited in CCS ¶¶ 26-98 raises a genuine issue of material fact as to whether or not McWane and Sigma coordinated pricing with each other. Therefore, Complaint Counsel contend there is a genuine issue of material fact for trial.

48.

Response to No. 48: Disputed and misleading. Complaint Counsel did not "concede"

[REDACTED]

[REDACTED] In Complaint Counsel's Objections and Responses to Respondent McWane's First Set or Requests for Admissions,

which responded to Requests for Admissions that were served on Complaint Counsel on the first day of discovery, we limited our response on the grounds that discovery and investigation in this matter were continuing (RFA Responses at 3); we objected to the specific request addressing this topic for using vague and ambiguous terms (Id. at 14); and we stated that “Complaint Counsel, after reasonable inquiry, lacks sufficient information to admit or deny this Request” (Id.) The evidence cited in CCS ¶¶ 26-98 raises a genuine issue of material fact as to whether or not McWane coordinated pricing with Sigma and Star. Therefore, Complaint Counsel contend there is a genuine issue of material fact for trial.

49.

Response to No. 49: Disputed in part. Subject to the General Objections set forth above, Complaint Counsel do not dispute that the Respondent quoted the excerpt of the witnesses’ testimony accurately. The issue addressed by this statement is contradicted by the specific facts set forth and evidence cited in CCS ¶¶ 26-98 [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED] The evidence cited in CCS ¶¶ 26-98 and in the testimony cited herein raises a genuine issue of material fact as to whether or not McWane

coordinated pricing with Sigma and Star. Therefore, Complaint Counsel contend there is a genuine issue of material fact for trial.

A. Star and Sigma Independently Decided To Follow McWane's Multipliers.

50.

Response to No. 50: Disputed as misleading. Subject to the General Objections set forth above, Complaint Counsel do not dispute that the Respondent quoted the excerpt of the witnesses' testimony accurately. The issue addressed by this statement is contradicted by the specific facts set forth and evidence cited in CCS ¶¶ 26-98. The evidence cited in CCS ¶¶ 26-98 raises a genuine issue of material fact as to whether or not Star coordinated pricing with McWane and Star. Therefore, Complaint Counsel contend there is a genuine issue of material fact for trial.

51.

Response to No. 51: Disputed as misleading. Subject to the General Objections set forth above, Complaint Counsel do not dispute that the Respondent quoted the excerpt of the

witnesses' testimony accurately. The issue addressed by this statement is contradicted by the specific facts set forth and evidence cited in CCS ¶¶ 26-98. The evidence cited in CCS ¶¶ 26-98 raises a genuine issue of material fact as to whether or not [REDACTED]

[REDACTED] Therefore, Complaint Counsel contend there is a genuine issue of material fact for trial.

52. [REDACTED]

Response to No. 52: Disputed as misleading. Subject to the General Objections set forth above, Complaint Counsel do not dispute that the Respondent quoted the excerpt of the witnesses' testimony accurately. The issue addressed by this statement is contradicted by the specific facts set forth and evidence cited in CCS ¶¶ 26-98. The evidence cited in CCS ¶¶ 26-98 raises a genuine issue of material fact as to whether or not Star coordinated pricing with McWane and Star. Therefore, Complaint Counsel contend there is a genuine issue of material fact for trial.

1. *Star and Sigma Each Decided To Follow McWane's January 2008 Multiplier*

53. *The Administrative Complaint concedes that McWane issued a multiplier change on January 11, 2008 because its raw materials prices were increasing dramatically and demand was very low following the crash of the housing market. (AC ¶ 30 ("Due to rising input costs, all of the Sellers desired price increases in 2008."))* [REDACTED]

Response to No. 53: Disputed in part. Complaint Counsel do not dispute that certain costs were rising in 2008 but the issue addressed by this statement is contradicted by the specific facts set forth and evidence cited in CCS ¶¶ 26-98. The evidence cited in CCS ¶¶ 26-98

raises a genuine issue of material fact as to why McWane raised prices in January 2008 [REDACTED]

[REDACTED] Therefore, Complaint Counsel contend there is a genuine issue of material fact for trial. Moreover, Complaint Counsel refer to the specific wording in the Administrative Complaint and to the extent Respondent's wording differs, this fact is disputed.

54. [REDACTED]

Response to No. 54: Disputed. [REDACTED]

55. [REDACTED]

Response to No. 55: Disputed as misleading. Complaint Counsel do not dispute that the Respondent quoted the excerpt of the witness' testimony accurately [REDACTED]

56.

[REDACTED]

Response to No. 56: Disputed in part. Complaint Counsel do not dispute that Star and Sigma were facing cost increases in January 2008, but the issue addressed by this statement is contradicted by the specific facts set forth and evidence cited in CCS ¶¶ 26-98. The evidence cited in CCS ¶¶ 26-98 raises a genuine issue of material fact as to whether or not Star and Sigma

[REDACTED]

Therefore, Complaint Counsel contend there is a genuine issue of material fact for trial.

57.

[REDACTED]

[REDACTED]

Response to No. 57: Disputed in Part. Subject to the General Objections set forth above, Complaint Counsel do not dispute that the Respondent quoted the excerpt of the witnesses' testimony accurately. The issue addressed by this statement is contradicted by the specific facts set forth and evidence cited in CCS ¶¶ 26-98. The evidence cited in CCS ¶¶ 26-98 raises a genuine issue of material fact as to whether or not Sigma and Star coordinated price with McWane. Therefore, Complaint Counsel contend there is a genuine issue of material fact for trial.

58. [REDACTED]

Response to No. 58: Disputed in Part. Subject to the General Objections set forth above, Complaint Counsel do not dispute that the Respondent quoted the excerpt of the witnesses' testimony accurately. The issue addressed by this statement is contradicted by the specific facts set forth and evidence cited in CCS ¶¶ 26-98. The evidence cited in CCS ¶¶ 26-98 raises a genuine issue of material fact as to whether or not Sigma and Star coordinated price with McWane. Therefore, Complaint Counsel contend there is a genuine issue of material fact for trial.

59. [REDACTED]

Response to No. 59: Disputed in Part. Subject to the General Objections set forth above, Complaint Counsel do not dispute that the Respondent quoted the excerpt of the witnesses' testimony accurately. [REDACTED]

[REDACTED] The evidence cited in CCS ¶¶ 26-98 raises a genuine issue of material fact [REDACTED]. Therefore, Complaint Counsel contend there is a genuine issue of material fact for trial.

60. [REDACTED]

Response to No. 60: Disputed in Part. Subject to the General Objections set forth above, Complaint Counsel do not dispute that the Respondent quoted the excerpt of the witnesses' testimony accurately. The issue addressed by this statement is contradicted by the specific facts set forth and evidence cited in CCS ¶¶ 26-98. The evidence cited in CCS ¶¶ 26-98 raises a genuine issue of material fact [REDACTED]. Therefore, Complaint Counsel contend there is a genuine issue of material fact for trial.

61. [REDACTED]

Response to No. 61: Disputed in Part. Subject to the General Objections set forth above, Complaint Counsel do not dispute that the Respondent quoted the excerpt of the witness' testimony accurately. The issue addressed by this statement is contradicted by the specific facts set forth and evidence cited in CCS ¶¶ 26-98. The evidence cited in CCS ¶¶ 26-98 raises a genuine issue of material fact as to whether or not [REDACTED]

[REDACTED] Therefore, Complaint Counsel contend there is a genuine issue of material fact for trial.

62. [REDACTED]

Response to No. 62: Disputed in Part. Subject to the General Objections set forth above, Complaint Counsel do not dispute that the Respondent quoted the excerpt of the witness' testimony accurately. The issue addressed by this statement is contradicted by the specific facts set forth and evidence cited in CCS ¶¶ 26-98. The evidence cited in CCS ¶¶ 26-98 raises a genuine issue of material fact as to whether or [REDACTED]

[REDACTED] Therefore, Complaint Counsel contend there is a genuine issue of material fact for trial.

2. *McWane Charted Its Own Course In June 2008* [REDACTED]

63. [REDACTED]

[REDACTED]

Response to No. 63: Disputed in Part. Subject to the General Objections set forth above, Complaint Counsel do not dispute that the Respondent quoted the excerpt of the witnesses' testimony accurately. The issue addressed by this statement is contradicted by the specific facts set forth and evidence cited in CCS ¶¶ 26-98. The evidence cited in CCS ¶¶ 26-98 raises a genuine issue of material fact as to whether or not [REDACTED]

[REDACTED] Therefore, Complaint Counsel contend there is a genuine issue of material fact for trial.

64. [REDACTED]

Response to No. 64: Disputed in Part. Subject to the General Objections set forth above, Complaint Counsel do not dispute that the Respondent quoted the excerpt of the witnesses' testimony accurately. The issue addressed by this statement is contradicted by the specific facts set forth and evidence cited in CCS ¶¶ 26-98. The evidence cited in CCS ¶¶ 26-98

raises a genuine issue of material fact as to whether [REDACTED]
[REDACTED]. Therefore, Complaint Counsel contend there is a genuine issue of material fact for trial.

65. [REDACTED]
[REDACTED]

Response to No. 65: Disputed. Complaint Counsel is not aware of a June 7, 2008 McWane multiplier increase. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] The

evidence cited in CCS ¶¶ 46-77 raises a genuine issue of material fact as to whether or not the [REDACTED]. Therefore, Complaint Counsel contend there is a genuine issue of material fact for trial.

66. [REDACTED]
[REDACTED]

Response to No. 66: Disputed in Part. Subject to the General Objections set forth above, Complaint Counsel do not dispute that the Respondent quoted the excerpt of the witness' testimony accurately. The issue addressed by this statement is contradicted by the specific facts set forth and evidence cited in CCS ¶¶ 26-98. The evidence cited in CCS ¶¶ 26-98 raises a

genuine issue of material fact as to whether or not Star coordinated pricing with McWane and Sigma. Therefore, Complaint Counsel contend there is a genuine issue of material fact for trial.

67. [REDACTED]

Response to No. 67: Disputed in Part. Subject to the General Objections set forth above, Complaint Counsel do not dispute that the Respondent quoted the excerpt of the witnesses' testimony accurately. The issue addressed by this statement is contradicted by the specific facts set forth and evidence cited in CCS ¶¶ 46-77. The evidence cited in CCS ¶¶ 46-77 raises a genuine issue of material fact as to [REDACTED]

[REDACTED] Therefore, Complaint Counsel contend there is a genuine issue of material fact for trial.

68. [REDACTED]

Response to No. 68: Disputed in Part. Subject to the General Objections set forth above, Complaint Counsel do not dispute that the Respondent quoted the excerpt of the witness' testimony accurately. The issue addressed by this statement is contradicted by the specific facts set forth and evidence cited in CCS ¶¶ 46-77. The evidence cited in CCS ¶¶ 46-77 raises a genuine issue of material fact as to [REDACTED]

[REDACTED] Therefore, Complaint Counsel contend there is a genuine issue of material fact for trial.

69.

[REDACTED]

Response to No. 69: Disputed in Part. Subject to the General Objections set forth above, Complaint Counsel do not dispute that the Respondent quoted the excerpt of the witnesses' testimony accurately. The issue addressed by this statement is contradicted by the specific facts set forth and evidence cited in CCS ¶¶ 46-77. The evidence cited in CCS ¶¶ 46-77 raises a genuine issue of material fact as to [REDACTED]

[REDACTED]

Therefore, Complaint Counsel contend there is a genuine issue of material fact for trial.

70.

[REDACTED]

Response to No. 70: Disputed as misleading. The Administrative Complaint does not

[REDACTED]

Complaint Counsel refer to the specific allegations in the Administrative Complaint and to the extent Respondent's wording differs, this fact is disputed. Complaint Counsel further dispute the use of the testimony cited. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

71.

[REDACTED]

Response to No. 71: Disputed in Part. Subject to the General Objections set forth above, Complaint Counsel do not dispute that the Respondent quoted the excerpt of the witnesses' testimony accurately. The issue addressed by this statement is contradicted by the specific facts set forth and evidence cited in CCS ¶¶ 46-77. The evidence cited in CCS ¶¶ 46-77 raises a genuine issue of material fact as to [REDACTED]

[REDACTED] Therefore, Complaint Counsel contend there is a genuine issue of material fact for trial.

3. *Star and Sigma Continued Job Pricing Throughout 2008*

72.

[REDACTED]

Response to No. 72: Disputed in Part. Subject to the General Objections set forth above, Complaint Counsel do not dispute that the Respondent quoted the excerpt of the witnesses' testimony accurately. The issue addressed by this statement is contradicted by the specific facts set forth and evidence cited in CCS ¶ 30. The evidence cited in CCS ¶ 30 raises a genuine issue of material fact as to [REDACTED]

[REDACTED]. Therefore, Complaint Counsel contend there is a genuine issue of material fact for trial.

73. [REDACTED]

Response to No. 73: Disputed in Part. Subject to the General Objections set forth above, Complaint Counsel do not dispute that the Respondent quoted the excerpt of the witnesses' testimony accurately. The issue addressed by this statement is contradicted by the specific facts set forth and evidence cited in CCS ¶ 30. The evidence cited in CCS ¶ 30 raises a genuine issue of material fact as to [REDACTED]

[REDACTED]. Therefore, Complaint Counsel contend there is a genuine issue of material fact for trial.

74. [REDACTED]

Response to No. 74: Disputed as misleading. Subject to the General Objections set forth above, Complaint Counsel do not dispute that the Respondent quoted the excerpt of the witnesses' testimony accurately. The issue addressed by this statement is contradicted by the specific facts set forth and evidence cited in CCS ¶ 30. The evidence cited in CCS ¶ 30 raises a genuine issue of material fact as to [REDACTED]

[REDACTED]. Therefore, Complaint Counsel contend there is a genuine issue of material fact for trial.

75. [REDACTED]

[REDACTED]

Response to No. 75: Disputed in Part. Subject to the General Objections set forth above, Complaint Counsel do not dispute that the Respondent quoted the excerpt of the witnesses' testimony accurately. The issue addressed by this statement is contradicted by the specific facts set forth and evidence cited in CCS ¶ 30. The evidence cited in CCS ¶ 30 raises a genuine issue of material fact as to [REDACTED]

[REDACTED]. Therefore, Complaint Counsel contend there is a genuine issue of material fact for trial.

76. [REDACTED]

Response to No. 76: Disputed in Part. Subject to the General Objections set forth above, Complaint Counsel do not dispute that the Respondent quoted the excerpt of the witnesses' testimony accurately. The issue addressed by this statement is contradicted by the specific facts set forth and evidence cited in CCS ¶ 30. The evidence cited in CCS ¶ 30 raises a genuine issue of material fact as to [REDACTED]

[REDACTED]. Therefore, Complaint Counsel contend there is a genuine issue of material fact for trial.

77. [REDACTED]

[REDACTED]

Response to No. 77: Disputed in Part. Subject to the General Objections set forth above, Complaint Counsel do not dispute that the Respondent quoted the excerpt of the witnesses' testimony accurately. The issue addressed by this statement is contradicted by the specific facts set forth and evidence cited in CCS ¶¶ 46-84. The evidence cited in CCS ¶¶ 46-84 raises a genuine issue of material fact as to whether [REDACTED]. Therefore, Complaint Counsel contend there is a genuine issue of material fact for trial.

78. [REDACTED]

Response to No. 78: Disputed. Star's President Dan McCutcheon testified that Star's [REDACTED]. Therefore, Complaint Counsel contend there is a genuine issue of material fact for trial.

79. [REDACTED]

Response to No. 79: Disputed. Star's President Dan McCutcheon testified [REDACTED]. Therefore, Complaint Counsel contend there is a genuine issue of material fact for trial.

80. [REDACTED]

[REDACTED]

Response to No. 80: Disputed in Part. Subject to the General Objections set forth above, Complaint Counsel submits that the testimony quoted [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Respondent mistakenly references [REDACTED]

[REDACTED]

[REDACTED] The issue addressed by this statement is contradicted by the specific facts set forth and evidence cited in CCS ¶ 30. The evidence cited in CCS ¶ 30 raises a genuine issue of material fact as to [REDACTED]

[REDACTED] Therefore, Complaint Counsel contend there is a genuine issue of material fact for trial.

81. [REDACTED]

Response to No. 81: Disputed in Part. Subject to the General Objections set forth above, Complaint Counsel do not dispute that the Respondent quoted the excerpt of the witnesses' testimony accurately. The issue addressed by this statement is contradicted by the specific facts set forth and evidence cited in CCS ¶ 30. The evidence cited in CCS ¶ 30 raises a genuine issue of material fact as to [REDACTED]

[REDACTED]. Therefore, Complaint Counsel contend there is a genuine issue of material fact for trial.

82. [REDACTED]

Response to No. 82: Disputed as misleading. Subject to the General Objections set forth above, Complaint Counsel do not dispute that the Respondent quoted the excerpt of the witnesses' testimony accurately. The issue addressed by this statement is contradicted by the specific facts set forth and evidence cited in CCS ¶ 30. The evidence cited in CCS ¶ 30 raises a genuine issue of material fact as to [REDACTED]

[REDACTED]. Therefore, Complaint Counsel contend there is a genuine issue of material fact for trial.

83. [REDACTED]

Response to No. 83: Disputed in Part. Subject to the General Objections set forth above, Complaint Counsel do not dispute that the Respondent quoted the excerpt of the witnesses' testimony accurately. The issue addressed by this statement is contradicted by the specific facts set forth and evidence cited in CCS ¶ 30. The evidence cited in CCS ¶ 30 raises a genuine issue of material fact as to [REDACTED]

[REDACTED]. Therefore, Complaint Counsel contend there is a genuine issue of material fact for trial.

V. *The Aggregated Tons-Shipped Data Did Not "Facilitate" Price Coordination.*

84. [REDACTED]

Response to No. 84: Disputed in Part. Complaint Counsel do not dispute that

[REDACTED]
[REDACTED]
[REDACTED]. Subject to the General Objections set forth above, Complaint Counsel do not dispute that the Respondent quoted the excerpt of the witnesses' testimony accurately. The issue addressed by this statement is contradicted by the specific facts set forth and evidence cited in CCS ¶¶ 46-84. The evidence cited in CCS ¶¶ 46-84 raises a genuine issue of material fact as to [REDACTED]

[REDACTED] Therefore, Complaint Counsel contend there is a genuine issue of material fact for trial.

85.

[REDACTED]

Response to No. 85: Disputed in Part. Subject to the General Objections set forth above, Complaint Counsel do not dispute that the Respondent quoted the excerpt of the witnesses' testimony accurately. [REDACTED]

[REDACTED]

[REDACTED] *See also CCS ¶¶ 47-48, 57-65*

[REDACTED] Therefore, Complaint Counsel contend there is a genuine issue of material fact for trial.

86.

[REDACTED]

Response to No. 86: Disputed in Part. Subject to the General Objections set forth above, Complaint Counsel do not dispute that the Respondent quoted the excerpt of the witnesses' testimony accurately. [REDACTED]

[REDACTED] *See e.g.*

CCS ¶¶ 71, 73. [REDACTED]

[REDACTED] Therefore, Complaint Counsel contend there is a genuine issue of material fact for trial.

87. [REDACTED]

Response to No. 87: Disputed in part as vague. Complaint Counsel do not dispute that

[REDACTED] (CCS ¶ 68). [REDACTED]

[REDACTED] (CCS ¶ 73). [REDACTED]

[REDACTED] (CCS ¶ 75). This fact is disputed in part.

88. [REDACTED]

Response to No. 88: Disputed in part as vague and misleading. [REDACTED]

[REDACTED] *See, e.g.* CX 1479. The

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] CCS ¶¶ 46-84. This fact is disputed in part.

89. [REDACTED]
[REDACTED]

Response to No. 89: Disputed in part. The terms “varying” and “many” are vague and ambiguous. Complaint Counsel do not dispute [REDACTED]

90. [REDACTED]
[REDACTED]

Response to No. 90: Disputed in Part. Subject to the General Objections set forth above, Complaint Counsel do not dispute that the Respondent quoted the excerpt of the witnesses’ testimony accurately. The issue addressed by this statement is contradicted by the specific facts set forth and evidence cited in CCS ¶¶ 46-84. The evidence cited in CCS ¶¶ 46-84

[REDACTED]

[REDACTED]. Therefore, Complaint Counsel contend there is a genuine issue of material fact for trial.

91. [REDACTED]
[REDACTED]

[REDACTED]

Response to No. 91: Disputed in Part. Subject to the General Objections set forth above, Complaint Counsel do not dispute that the Respondent quoted the excerpt of the witnesses' testimony accurately. The issue addressed by this statement is contradicted by the specific facts set forth and evidence cited in CCS ¶¶ 46-84. The evidence cited in CCS ¶¶ 46-84 raises a genuine issue of material fact as to [REDACTED]

[REDACTED] Therefore, Complaint Counsel contend there is a genuine issue of material fact for trial.

92. [REDACTED]

Response to No. 92: Disputed in Part. Subject to the General Objections set forth above, Complaint Counsel do not dispute that the Respondent quoted the excerpt of the witness' testimony accurately. The issue addressed by this statement is contradicted by the specific facts set forth and evidence cited in CCS ¶¶ 46-84. The evidence cited in CCS ¶¶ 46-84 raises a genuine issue of material fact as to [REDACTED]

[REDACTED]. Therefore, Complaint Counsel contend there is a genuine issue of material fact for trial.

93. [REDACTED]

[REDACTED]

Response to No. 93: Disputed in Part. Subject to the General Objections set forth above, Complaint Counsel do not dispute that the Respondent quoted the excerpt of the witness' testimony accurately. The issue addressed by this statement is contradicted by the specific facts set forth and evidence cited in CCS ¶¶ 46-84. The evidence cited in CCS ¶¶ 46-84 raises a genuine issue of material fact as to [REDACTED]

[REDACTED]. Therefore, Complaint Counsel contend there is a genuine issue of material fact for trial.

94. [REDACTED]

Response to No. 94: Disputed in Part. Subject to the General Objections set forth above, Complaint Counsel do not dispute that the Respondent quoted the excerpt of the witness' testimony accurately. The issue addressed by this statement is contradicted by the specific facts set forth and evidence cited in CCS ¶¶ 46-84. The evidence cited in CCS ¶¶ 46-84 raises a genuine issue of material fact as to [REDACTED]

[REDACTED]. Therefore, Complaint Counsel contend there is a genuine issue of material fact for trial.

95. [REDACTED]

Response to No. 95: Disputed in Part. Subject to the General Objections set forth above, Complaint Counsel do not dispute that the Respondent quoted the excerpt of the witness' testimony accurately. The issue addressed by this statement is contradicted by the specific facts set forth and evidence cited in CCS ¶¶ 46-84. The evidence cited in CCS ¶¶ 46-84 raises a genuine issue of material fact as to [REDACTED]

[REDACTED]. Therefore, Complaint Counsel contend there is a genuine issue of material fact for trial.

96. [REDACTED]

Response to No. 96: Disputed as misleading. Subject to the General Objections set forth above, Complaint Counsel do not dispute that the Respondent quoted the excerpt of the witnesses' testimony accurately. The issue addressed by this statement is contradicted by the specific facts set forth and evidence cited in CCS ¶¶ 46-84. The evidence cited in CCS ¶¶ 46-84 raises a genuine issue of material fact as to [REDACTED]

[REDACTED] Therefore, Complaint Counsel contend there is a genuine issue of material fact for trial.

[REDACTED]

97. *In June 2009, Star announced that it would begin selling a full range of small, medium and large diameter fittings made for Star by outside foundries in the United States. (See Star's Price List, available online at <http://www.starpipeproducts.com/utilities.asp>.)*

Response to No. 97: Not disputed.

98. [REDACTED]

Response to No. 98: Not disputed.

99. [REDACTED]

Response to No. 99: Not disputed.

100. [REDACTED]

Response to No. 100: Not disputed.

101. [REDACTED]

Response to No. 101: Disputed as misleading. [REDACTED]

169. [REDACTED]

CCS ¶¶ 168-

[REDACTED]

CCS ¶¶ 176 – 194. [REDACTED]

[REDACTED]

[REDACTED] CCS ¶¶ 161-165,

¶¶ 168 -194 and ¶¶ 204-205. Based on these facts, there is a genuine issue of material fact as to

[REDACTED]

[REDACTED]. Therefore, Complaint Counsel contend there is a genuine issue of material fact for trial.

102. [REDACTED]

Response to No. 102: Not disputed.

103. [REDACTED]

Response to No. 103: Disputed as misleading. [REDACTED]

[REDACTED]

[REDACTED] CCS ¶ 198. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] CCS ¶ 198. The evidence cited in CCS ¶¶ 175-203 raises a genuine issue of material fact as to [REDACTED]

[REDACTED]

[REDACTED]. Therefore, Complaint Counsel contend there is a genuine issue of material fact for trial

104. [REDACTED]

Response to No. 104: Disputed as misleading. [REDACTED]

[REDACTED]

[REDACTED] Therefore, Complaint Counsel contend there is a genuine issue of material fact for trial.

105. [REDACTED]

Response to No. 105: Disputed as misleading. As set forth in CCS ¶¶ 185-196, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] CCS ¶¶ 195-196.

106. [REDACTED]

Response to No. 106: Disputed as misleading. [REDACTED]

[REDACTED]

[REDACTED] CCS ¶¶ 184-186. Therefore, Complaint Counsel contend there is a genuine issue of material fact for trial.

107. [REDACTED]

Response to No. 107: Disputed in part as misleading. Complaint Counsel admit that in

2011 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Therefore, Complaint Counsel contend there is a genuine issue of material fact for trial.

108. [REDACTED]

Response to No. 108: Disputed in part as misleading. Complaint Counsel disputes this statement as misleading. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] CCS ¶¶ 168-169. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (CCS ¶¶ 176 – 194). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (CCS ¶¶ ¶161-165, ¶¶ 168 -194 and ¶¶ 204-205). Based on this evidence

there is a genuine issue of material fact as to [REDACTED]

[REDACTED]. Therefore, Complaint Counsel contend

there is a genuine issue of material fact for trial.

109. [REDACTED]

Response to No. 109: Disputed in part as misleading. Complaint Counsel disputes this statement as misleading. [REDACTED]

[REDACTED]

[REDACTED] (CCS §§ 161-165, §§ 168 -194, §§ 204-205). Based on this evidence there is a genuine issue of material fact as to [REDACTED]

[REDACTED]. Therefore, Complaint Counsel contend there is a genuine issue of material fact for trial.

110. [REDACTED]

Response to No. 110: Not disputed.

111. [REDACTED]

Response to No. 111: Disputed in part as misleading. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (CCS §§ 161-165, §§ 168 -194 and §§ 204-205). Based on this evidence there is a genuine issue of material fact as to [REDACTED]

[REDACTED]. Therefore, Complaint

Counsel contend there is a genuine issue of material fact for trial.

112. [REDACTED]

[REDACTED]

Response to No. 112: Disputed in part as misleading. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

113. [REDACTED]

[REDACTED]

Response to No. 113: Disputed in Part. Subject to the General Objections set forth above, Complaint Counsel do not dispute that the Respondent quoted the excerpt of the witness'

testimony accurately. [REDACTED]

[REDACTED]

[REDACTED] (CCS ¶¶ 175-203). Based on this evidence there is a genuine issue of material fact as to [REDACTED]

[REDACTED]. Therefore, Complaint Counsel contend there is a genuine issue of material fact for trial.

114. [REDACTED]

Response to No. 114: Disputed as misleading. [REDACTED]

[REDACTED]

Therefore, Complaint Counsel contend there is a genuine issue of material fact for trial.

VII. The Master Distributorship Agreement McWane Entered with Sigma Was Procompetitive.

115. [REDACTED]

Response to No. 115: Disputed as incomplete, vague and misleading. The issues addressed by this statement are contradicted by the specific facts set forth and evidence cited in

CCS ¶¶ 116-137. The evidence cited in CCS ¶¶ 116-137 raises a genuine issue of material fact

[REDACTED]

[REDACTED] Therefore, Complaint Counsel

contend there is a genuine issue of material fact for trial.

116.

[REDACTED]

Response to No. 116: Disputed as misleading.

[REDACTED]

[REDACTED] The issue addressed by this statement is contradicted by the specific facts set forth and evidence cited in CCS ¶¶ 106-137. The evidence cited in CCS ¶¶ 106-137 raises a genuine issue of material fact [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Therefore, Complaint Counsel contend there is a genuine issue of material fact for trial.

117. [REDACTED]

[REDACTED]

Response to No. 117: Disputed as incomplete and misleading. The term “formal” is vague and ambiguous. [REDACTED]

[REDACTED]

[REDACTED] Subject to the General Objection set forth above, Complaint Counsel do not dispute that the Respondent quoted the excerpt of the witnesses’ testimony accurately. The issue addressed by this statement is contradicted by the specific facts set forth and evidence cited in CCS ¶¶ 106-137. The evidence cited in CCS ¶¶ 106-137 raises a genuine issue of material fact [REDACTED]

[REDACTED]. Therefore, Complaint Counsel contend there is a genuine issue of material fact for trial.

118. [REDACTED]

[REDACTED]

Response to No. 118: Disputed in part as vague and misleading. The term “contacts” is vague and ambiguous. Complaint Counsel do not dispute [REDACTED]

[REDACTED] Subject to the General Objections set forth above, Complaint Counsel do not dispute that Sigma did not own its own foundry inside the United States. The issue addressed by this statement is contradicted by the specific facts set forth and evidence cited in CCS ¶¶ 106-137. The evidence cited in CCS ¶¶ 106-137 raises a genuine issue of material fact as to Sigma’s decision and [REDACTED]. Therefore, Complaint Counsel contend there is a genuine issue of material fact for trial.

119. [REDACTED]

Response to No. 119: Disputed as misleading. [REDACTED]

[REDACTED] Subject to the General Objections set forth above, Complaint Counsel do not dispute that the Respondent quoted the excerpt of the witnesses’ testimony accurately. The issue addressed by this statement is contradicted by the specific facts set forth and evidence cited in CCS ¶¶106-137. The evidence cited in CCS ¶¶ 106-137 raises a genuine issue of

[REDACTED] See also, CCS ¶¶ 122-124.). The issue addressed by this statement is contradicted by the specific facts set forth and evidence cited in CCS ¶¶ 106-137. The evidence cited in CCS ¶¶ 106-137 raises a genuine issue of material fact as to the timing of Sigma's domestic entry. Therefore, Complaint Counsel contend there is a genuine issue of material fact for trial.

121. [REDACTED]

Response to No. 121: Disputed as misleading. Subject to the General Objection set forth above, Complaint Counsel do not dispute that the Respondent quoted the excerpt of the witnesses' testimony accurately. The issue addressed by this statement is contradicted by the specific facts set forth and evidence cited in CCS ¶¶ 106-137. [REDACTED]

[REDACTED] The evidence cited in CCS ¶¶ 106-137 raises a genuine issue of material fact [REDACTED]

[REDACTED] Therefore, Complaint Counsel contend there is a genuine issue of material fact for trial.

122.

[REDACTED]

Response to No. 122: Disputed as misleading. Subject to the General Objection set forth above, Complaint Counsel do not dispute that the Respondent quoted the excerpt of the witnesses' testimony accurately. The issue addressed by this statement is contradicted by the specific facts set forth and evidence cited in CCS ¶¶ 106-137. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] The evidence cited in CCS ¶¶ 106-137 raises a genuine issue of material fact [REDACTED]. Therefore, Complaint Counsel contend there is a genuine issue of material fact for trial.

123.

[REDACTED]

Response to No. 123: Disputed as misleading. Complaint Counsel do not dispute that the Fittings market had declined in 2009 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Subject to the General Objection set forth above, Complaint Counsel do not dispute that the Respondent quoted the excerpt of the witnesses' testimony accurately. The issue addressed by this statement is contradicted by the specific facts set forth and evidence cited in CCS ¶¶ 106-

137. The evidence cited in CCS ¶¶ 106-137 raises a genuine issue of material fact [REDACTED]. Therefore, Complaint Counsel contend there is a genuine issue of material fact for trial.

124. [REDACTED]

Response to No. 124: Disputed as misleading. [REDACTED]

[REDACTED] Subject to the General Objection set forth above, Complaint Counsel do not dispute that the Respondent quoted the excerpt of the witnesses' testimony accurately. The issue addressed by this statement is contradicted by the specific facts set forth and evidence cited in CCS ¶¶ 106-137. The evidence cited in CCS ¶¶ 106-137 raises a genuine issue of material fact [REDACTED]. Therefore, Complaint Counsel contend there is a genuine issue of material fact for trial.

125. [REDACTED]

Response to No. 125: Disputed as misleading. Subject to the General Objection set forth above, Complaint Counsel do not dispute that the Respondent quoted the excerpt of the witnesses' testimony accurately. On its face, the testimony does not support the proposition for

which Respondent cites it. There is no testimony, and certainly no contemporaneous evidence,

[REDACTED] The issue addressed by this statement is contradicted by the specific facts set forth and evidence cited in CCS ¶¶ 106-137. The evidence cited in CCS ¶¶ 106-137 raises a genuine issue of material fact

[REDACTED] Therefore, Complaint Counsel contend there is a genuine issue of material fact for trial.

126. [REDACTED]

Response to No. 126: Disputed as misleading. [REDACTED]

[REDACTED] Subject to the Specific and General Objections set forth above, Complaint Counsel do not dispute that the Respondent quoted the excerpt of the witnesses' testimony accurately. [REDACTED]

[REDACTED] CCS ¶¶ 106-137. The evidence cited in CCS ¶¶ 106-137 raises a genuine issue of material fact [REDACTED]

[REDACTED] Therefore, Complaint Counsel contend there is a genuine issue of material fact for trial.

127. [REDACTED]

Response to No. 127: Disputed as incomplete and misleading. [REDACTED]

[REDACTED] Subject to the Specific and General Objections set forth above, Complaint Counsel do not dispute that the Respondent quoted the excerpt of the witnesses' testimony accurately. The issue addressed by this statement is contradicted by the specific facts set forth and evidence cited in CCS ¶¶106-137. The evidence cited in CCS ¶¶ 106-137 raises a genuine issue of material fact [REDACTED] Therefore, Complaint Counsel contend there is a genuine issue of material fact for trial.

Dated: June 22, 2012.

Respectfully submitted,

s/ Edward D. Hassi

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CERTIFICATE OF SERVICE

I hereby certify that on June 22, 2012, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

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

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

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

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

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Counsel for Respondent McWane, Inc.

CERTIFICATE FOR ELECTRONIC FILING

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

June 22, 2012

By: s/ Thomas H. Brock
Attorney

Confidential Exhibits
Redacted in their Entirety

CX Exhibits

CX 0021	CX 0822	CX 1519	CX 2315
CX 0023	CX 0823	CX 1521	CX 2327
CX 0026	CX 0827	CX 1532	CX 2328
CX 0034	CX 0841	CX 1544	CX 2329
CX 0038	CX 0856	CX 1562	CX 2330
CX 0043	CX 0863	CX 1564	CX 2331
CX 0048	CX 0871	CX 1565	CX 2332
CX 0049	CX 0908	CX 1566	CX 2333
CX 0052	CX 0935	CX 1567	CX 2334
CX 0067	CX 0944	CX 1571	CX 2335
CX 0074	CX 0953	CX 1575	CX 2336
CX 0076	CX 0964	CX 1576	CX 2337
CX 0081	CX 0978	CX 1691	CX 2375
CX 0086	CX 0997	CX 1692	CX 2389
CX 0099	CX 1000	CX 1694	
CX 0110	CX 1014	CX 1695	
CX 0119	CX 1018	CX 1696	
CX 0137	CX 1023	CX 1697	
CX 0138	CX 1053	CX 1698	
CX 0139	CX 1076	CX 1699	
CX 0178	CX 1077	CX 1702	
CX 0179	CX 1085	CX 1706	
CX 0225	CX 1086	CX 1726	
CX 0228	CX 1088	CX 1745	
CX 0231	CX 1092	CX 1748	
CX 0241	CX 1117	CX 1800	
CX 0243	CX 1122	CX 1801	
CX 0271	CX 1123	CX 1801A	
CX 0282	CX 1134	CX 1851	
CX 0313	CX 1138	CX 1853	
CX 0319	CX 1142	CX 1984	
CX 0329	CX 1145	CX 1996	
CX 0366	CX 1149	CX 1997	
CX 0456	CX 1151	CX 2030	
CX 0527	CX 1163	CX 2031	
CX 0534	CX 1170	CX 2032	
CX 0552	CX 1178	CX 2037	
CX 0559	CX 1179	CX 2038	
CX 0607	CX 1186	CX 2039	
CX 0622	CX 1187	CX 2047	
CX 0627	CX 1194	CX 2067	
CX 0651	CX 1226	CX 2089	
CX 0710	CX 1278	CX 2118	
CX 0729	CX 1287	CX 2119	
CX 0746	CX 1335	CX 2120	
CX 0803	CX 1354	CX 2145	
CX 0807	CX 1376	CX 2166	
CX 0814	CX 1395	CX 2173	
CX 0816	CX 1413	CX 2210	
CX 0817	CX 1439	CX 2252	
CX 0818	CX 1460	CX 2253	
CX 0819	CX 1473	CX 2254	
CX 0820	CX 1479	CX 2255	
CX 0821	CX 1505	CX 2294	

Transcripts

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