RECORD REFERENCES

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

JX# – Joint Exhibit

CX# – Complaint Counsel Exhibit

RX# – Respondent Exhibit

Name of Witness, Tr. xx – Trial Testimony

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

[redacted]

JSLF ¶ x – Joint Stipulations of Law and Fact

[redacted]

PUBLIC

[redacted]

II. There Was No Invitation To Collude, And The Term Sheet [redacted] Did Not

TABLE OF AUTHORITIES

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EXECUTIVE SUMMARY

Overwhelming evidence at trial demonstrated that McWane made its pricing decisions [redacted]

declined more in the second half of 2008, during DIFRA's brief operational period. Indeed, Mr. Tatman concluded in late Summer 2008 that the prospects for his fittings business looked bleak for the next three to five years. (Tatman, Tr. 96-68). The direct evidence of McWane's independent and pro-competitive pricing was thus overwhelming.

In the face of all this direct evidence of McWane's independent and pro-competitive decisions to underprice its competitors, Complaint Counsel put on a strictly circumstantial case. But a circumstantial case fails in the first instance because the evidence was overwhelming that

down (when it suited their interests) - - and all three companies continued to offer their customers a myriad of job price discounts, rebates, and a host of other price concessions. That is called "competition." Judgment on Counts 1-3 should thus be granted in McWane's favor.

Judgment should also be granted for McWane on Counts 4-7 which allege that McWane monopolized domestic Fittings. The overwhelming evidence at trial demonstrated that imported and domestic Fittings are entirely interchangeable and, indeed, a flood of cheap imports from China, India, Korea, Mexico and Brazil surged into the U.S. over the last decade and drove the

national distributors (HD Supply and Ferguson) and dozens and dozens and dozens of regional

and local distributors, including Dana Kepner, Mainline, Cohen, Atlantic Supply and many more. In 2011, as Dr. Schumann concedes, ***Star doubled its share of domestic Fittings*** to 10%.

In 2012, Star's top executives conceded at trial it is on pace to have its best domestic Fittings year yet. All of that growth was accomplished after McWane's September 2009 rebate letter - - which Star's own witnesses testified was "more bark than bite." (McCutcheon, Tr. 2615-2617;

get into domestic Fittings. Neither its board of directors nor its banks authorized the company to exceed its capital expense limits. As a result, it was never an actual potential competitor in the alleged domestic fittings market. On the contrary, the overwhelming evidence at trial showed that Sigma had no viable option in mid-2009 for getting into domestic Fittings during the brief Buy-America period, and its decision not to enter domestic production had nothing [redacted]

and fire hydrants; and, ductile iron waterworks Fittings (hereinafter, "DIWF" or "Fittings").

[redacted]

hydrants in straight lines, and to change, divide or direct the flow of water. [redacted]

Chinese imports had surged "into the United States in such increased quantities or under such conditions as to cause market disruption to the domestic producers[,]" , but then-President Bush declined to impose the recommended tariffs. (RX 730.009.); JX 642 (Page, Dep. at 18-19).) Imported Fittings have increased their share significantly since then, while the domestic industry

2009[.]" (Complaint ¶ 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

[redacted]

Counts 4-7 allege that McWane monopolized, attempted, and conspired to monopolize a market for domestic Fittings, in violation of FTC Act Section 5, by "excluding" its alleged co-conspirators, Sigma and Star, from sourcing and re-selling domestic Fittings. Counts 4 and 5 allege that McWane "excluded" Sigma by agreeing to sell it domestic Fittings under a one year

[redacted]

sales agreement signed in September 2009. Counts 6 and 7 allege that McWane "excluded" Star by issuing a domestic rebate letter to its customers in September 2009. (Complaint, ¶¶ 1, 46.) McWane's Answer denied that it participated in any unlawful conduct. (Answer ¶¶ 2-7, 35-70.)

2012 press release further confirmed that the Commission was alleging a conspiracy which "disbanded in early 2009[.]" (January 4, 2012 Statement by Federal Trade Commission, http://www.ftc.gov/opa/2012/01/mcwane.shtm.) The Commission had the "evidence" Complaint Counsel relies upon during the investigative phase of this matter, but chose not to include the allegations in its Complaint - - strongly suggesting that it understood just how weak any claims would be.

Moreover, Complaint Counsel flatly objected and refused to answer McWane's interrogatories seeking all bases for its Complaint during the discovery period. (*See* Complaint Counsel's Responses to McWane's Interrogatories, filed March 16, 2012.) And, when it finally supplemented its responses several weeks after the close of [illegible]

regarding the prices of Non-domestic Fittings." (Complaint Counsel's Responses to McWane's Interrogatories, filed June 21, 2012.)

At the final pre-trial conference, Complaint Counsel nonetheless for the first time argued that its new-found allegations were part of the same conspiracy alleged in the Complaint:

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

(Final Prehearing Conference, August 30, 2012 Tr. at 159.)

[redacted]

The April 2009 and June 2010 allegations were tried over McWane's objection, and

[redacted]

the time you say the conspiracy is falling apart and ending; correct? A. This is around the time - Q. Yeah. A. -- it seemed to be really starting to collapse."); Schumann, Tr. 4200-4201).[1]

THE FACT RECORD

[redacted]

followed McWane's prices down. Job price discounts and other concessions remained rampant.

[redacted]

analysis of McWane's existing published multipliers, what it believed was the much lower true invoice price that resulted from job pricing, and where he believed McWane should set its new published multipliers. (Tatman, Tr. 887.) As a result of his analyses, McWane kept its list prices from mid-2007 in place and, on January 11, 2008, announced new multipliers that were not only *much lower* than Sigma's huge list price increase, but in many states lower than McWane's prior

multipliers and even, in some states, its invoice prices. (Tatman, Tr. 882, 884-885; 892-893; CX 1178; CX 1664; RX 591.)[2] Mr. Tatman did this is order to win business and gain share. (Tatman, Tr. 967 ("From a competitive environment, I went out and I tried to get volume, I tried

letter? Trying to figure out what Tyler was doing with its multipliers? A. Yes"); 3692-3693 ("Q. Once you got that, did you and Mr. Fox and the others discuss let's analyze that and figure out

below Sigma's multipliers at the time; right, sir? A. Correct. Q. Now, you say you're almost --

[redacted]

actually follow all of the multipliers that McWane [redacted]

area's multiplier is, if it goes up, we will change to that number. If it goes down, we will discuss it." (CX 752.)

C. McWane Again Charted Its Own Course With Lower Multipliers In Spring 2008 In Order To Win Business And Gain Share

In April 2008, Sigma independently decided to announce a very large multiplier increase because of the continued raw materials increases. (RX 47; Pais, Tr. 2079 (describing declining multipliers and rebate increases as a "double whammy").) Mr. Pais characterized this effort as "BIG BOLD MOVES (BBM, baby!)." (RX 47.) At trial, Mr. Pais confirmed that he never discussed the "Big Bold Move" with anyone at McWane. (Pais, Tr. 2080 ("Q. Now, did you call anyone at McWane and say, "Hey, I got a plan, big bold move. I'm going to increase prices. You

As a result, he issued multipliers that were substantially below Sigma and Star in virtually every state across the country which, he hoped, would allow McWane to back share and "make victory all the swe[e]ter." (RX 424; Schumann, Tr. 4284-86.)

D. McWane, Star, And Sigma Provided Job Price Discounts And Other Price

The trial evidence establishes that McWane continued to offer hundreds and hundreds of job price discounts and a host of and other price concessions throughout 2008 and beyond, as did Sigma and Star. Every single witness denied having any agreement to eliminate or reduce job pricing. (Tatman, Tr. 924; Rybacki, Tr. 3659; Minamyer, Tr. 3278; McCutcheon, Tr. 2554, 2689-2690.)

2052-55 & RX 17 ("examples of where Tyler has in writing current pricing good through June"), 2071-74 & RX 37 ("for what it is worth, I was told by HDSW [HD Supply] . . . that Tyler and

[redacted]

Minamyer, Tr. 3277-3278 ("the market was always very competitive. We – we had to fight pretty hard for every order"); Rybacki, Tr. 3701 (Sigma had "[n]o choice but to" offer job discounting throughout 2008).)

Likewise, Star never stopped or reduced job pricing during the alleged conspiracy. (McCutcheon, Tr. 2540-2541; 2547-2548; RX 557, 2550-2551, 2553-2554; Minamyer, Tr. 3174-

[redacted]

[redacted]

no evidence that any other Fittings manufacturer or supplier learned of McWane's prices in

[redacted]

"None.").) He also specifically denied coming to any agreements with McWane regarding the January 2008, June 2008, and June 2010 multipliers. (Pais, Tr. 2045-2048 ("Absolutely not." … "Never." "Not at all." "Never.").) Mr. Rybacki likewise testified that he "never" discussed

[redacted]

Fittings prices or reached an agreement of any kind with anyone at McWane, including Mr. Tatman, Mr. Jansen, Mr. Frank, or Mr. Page. (Rybacki, Tr. 3649-3651 ("Never." … "Never." … "No." … "No."), 3659 "No, I did not."), 3682-3683 ("Never." … "No." … "No." "No." … "No.").) 1115-1116 (Q. Did you speak to anybody at McWane about that?" A. "No.").)

[redacted]

Mr. Tatman and other McWane witnesses testified that they made their pricing decisions independently at all times. (JX 644 (Tatman, Dep. at 138-139) ("independent decision"); JX 643 (Tatman, IHT at 108-109. ("an independent decision")). Jerry Jansen, McWane's National Sales Manager, likewise testified that McWane has always made pricing decisions independently. (JX 637 (Jansen Dep. at 271).)

[redacted]

decisions and flatly denied any agreement with McWane on price. Mr. McCutcheon testified that he and McWane employees never discussed prices, market share, or any other competitive

III. DIFRA Did Not "Facilitate Price Coordination"

Complaint Counsel introduced no evidence at trial that Fittings prices were ever

groupings of pipe (3-12," 14-24," and 24" and above) and [redacted] DIERA

[redacted]

members. (RX 113; Brakefield Tr. 1396-1397.) No pricing data was ever collected by DIERA

[redacted]

or disseminated to any DIERA member. (Brakefield Tr. 1252-1253 ("Q. And it was also

jobs; and, critically (vii) at what price any fitting was actually sold. (Brakefield, Tr. 1352-53,1384-1389; JSLF ¶ 18; JX 694 (Bhutada Dep. at 28, 111-112); McCutcheon, Tr. 2563.)

The DIFRA members used the DIFRA data for pro-competitive purposes. McWane's

large diameter Fittings and he set out analyzing how to target them and win back business. Ultimately, that resulted in McWane's announcement of a 20-25% reduction in medium and large diameter Fittings list prices in Spring 2009. (Tatman, Tr. 594-595, 972-973; CX 569.)

McWane and Sigma witnesses also testified that the DIFRA tons-shipped data allowed them to better manage inventory, production, and order schedules in the face of dramatically declining demand and, consequently, to lower their costs. (Tatman, Tr. 594-595; 972-973; Brakefield, Tr. 1305-1306; 1306-1306; 1308; 1369-1370 ("Q. . . . that would have lowered costs of manufacturing? A. No question."); Brakefield, Tr. 1389-1391 ("Q. Do you know, sir, then whether or not the DIFRA data permitted Sigma to manage its inventory? A. I think that's probably the best way to put it…").)

IV. The Evidence - - And Even Dr. Schumann - - Disprove The After-The-Fact "One Conspiracy" Contention

A. McWane's Dramatically Dropped Its Medium and Large Diameter Imported Fittings List Prices In Spring 2009

(Rybacki, Tr. 3719 ("Q. In fact, Mr. Rybacki, you were so -- so upset, you thought they were predatorily low, those prices; right? A. Yes. I wanted to sue. Q. You thought about actually

[redacted]

McWane's list price decrease from customers after the fact and internally decided - - on its own - - to follow McWane's lower price lists. (McCutcheon, Tr. 2526-2527.)

At trial, Complaint Counsel asked questions only about a single, brief telephone call Mr. McCutcheon placed to Mr. Tatman - - ***after*** McWane had announced its dramatic ***list price drop*** and ***after*** Mr. McCutcheon testified Star had already independently decided to follow McWane's

of knowledge and complete uncertainty about what Star would do. He internally opined to his National Sales Manager, Jerry Jensen, that "*I think it will be mid-next week until the dust* [illegible]

[redacted]

If they stick with the old List and a 0.32/0.35 the[n] we should sell allot in the Northwest." (CX 3027 (emphasis added).) Again, reflecting his hopes that McWane's lower prices would allow it to win business and gain share.

B. McWane Independently Decided Its June 2010 Multipliers

Mr. Tatman testified that he made McWane's June 2010 pricing decisions independently

[redacted]

[redacted]

evidence. Thus, the sum total of the evidence of McWane conduct is that McWane independently determined its own prices after legitimately obtaining a competitor's letter from a customer.

V. Dr. Schumann's Conspiracy Opinion Is Junk Science

Complaint Counsel's expert, Dr. Schumann, conceded that his review of the record showed no evidence of any advance communication of multipliers (or any other price) and no evidence of any meeting to raise multipliers or curtail job discounting: "I have not found anything to suggest that any executives at Sigma and Star and McWane met in a specific place

Dr. Schumann agreed that McWane's decision to undercut Star and Sigma was entirely consistent with independent and pro-competitive conduct and Mr. Tatman's goal of winning back market share:

> Q. Dr. Schumann, I didn't ask you if they implemented it. I asked, one way to get back your share is to announce multipliers that are lower than your competitors have in the market; right, sir?
>
> A. One way to get back share would be to have prices – negotiate prices that are lower than your competitors' prices.

(Schumann, Tr. 4061-4062,4167-4169, 4268, 4286, 4269-4273 (McWane's Spring 2008

[redacted]

McWane multipliers were lower than what multipliers were on the Sigma map").)

4175, 4175-4176, 4176, 4177, 4178-4179 ("Nothing on the document indicates it was sent to Sigma or Star"), 4179 ("I don't show anything that indicates it was provided to Sigma or Star, that is correct"), 4201-4202 ("I am not saying that those rough drafts caused the conspiracy, that's correct. . . . I don't say in my report that it was given to Star and Sigma, that's right")

4211-4212, 4223, 4225, 4227, 4229-4230, 4232).[4]

Dr. Schumann's interpretation of CX 627 is indicative of his re-imagining of the facts to support his conspiracy opinion - - an opinion he formed six months before the Complaint was filed. (Schumann, Tr. 4050 ("I didn't think it was necessarily just a horrible case"), 4051, 4053

"brainstorming document" he prepared for the first of several internal discussions with his

Mr. Tatman testified that, as a result, the "core" of his brainstorm was his belief that it would be better for McWane to keep its published prices *lower* than Sigma's and Star's prices, so that it could to win back business and "gain share", and to continue to adjust them downward "as required to remain competitive within any given market area. That's the core of where

my thought process was." (Tatman, Tr. 357; 967 ("I tried to get share"); 988 ("I'm obviously trying to grow share"); 1070 ("bullet number 3 is clearly the strategy that

[redacted]

Tatman's own brainstorm about the potential to beat Sigma and Star and gain share by *under*

Q And the words 'must cooperate' aren't in this at all, right?

A. That's also correct.

Q. And it doesn't say you must cooperate or prices will not increase further, does it, sir?

A. That is correct.

(Schumann, Tr. 4203).

Dr. Schumann also acknowledged that the January 11 letter said nothing at all about another core tenet of his conspiracy:

Q. Right. Now, can we go back to RX 591. This letter doesn't say anything about centralizing project pricing, does it, sir?

A. It does not.

(Schumann, Tr. 4204-4205.) Finally, he admitted that there was no evidence to support his opinion that anyone at Ster or Sigma believed the letter was "[redacted]

Q. It doesn't say anything about reducing job pricing, does it, sir?

A. No, it does not.

(Schumann, Tr. 4221.) Dr. Schumann agreed that Star's customer letter and email contained none of the key terms of his conspiracy:

Q. And if we scroll down a little bit, Andrew, and we blow up the text, nothing on this document says that Star is going to centralize pricing authority; correct, sir?

A. Nothing on that document that I see says Star is going to centralize pricing, project pricing.

Q. Nothing on this document says they're going to match all of McWane's prices, multiplier prices; correct, sir?

A. That is correct.

Q. Nothing on this document says that Star is going to reduce job pricing; right, sir?

A. That is correct.

(Schumann, Tr. 4230.) Moreover, he conceded that McWane obtained Star's letter from its customers (not Star) - - and was entirely uncertain about Star's intentions and did not consider it to "accept" any conspiratorial offer:

Q. Yeah. What this does not say, Dr. Schumann, is: Aha, I see this email from Star. We have an agreement and one mind. We're all going to reduce job pricing; That's not what it says, does it, sir?

(Schumann, Tr. 4234-4235.)

B. Dr. Schumann's Opinion That Job Pricing Was Reduced Is Pure Speculation

Dr. Schumann admitted that McWane, Sigma and Star all offered job price discounts and

other price concessions, including rebates, freight absorption, and credit extension, throughout

2008. (Schumann, Tr. 4287-4288 ("

Q. In fact, you haven't measured job pricing, quantified it in any fashion for any year for

any company; right?

A. I have not counted. I have not done a quantification of the number of job pricing

that went on in 2008.

(Schumann, Tr. 4070, 4292); *see also* Schumann, Tr. 4076-4077, 4142-4143.) Nor did he create

* * *

Q. You left the word, out of your quote, *appears* to have died down significantly; right, sir?

A. Yes.

(Schumann, Tr. 4071, 4073.) (emphasis added)

C. Dr. Schumann Conceded That His Opinion Was Not Based On Any Peer-

[redacted]

Dr. Schumann did not perform any peer-accepted economic test of any issue in this case. Instead, he reviewed some documents and some testimony and simply offered his interpretation of them - - a role reserved for this Court and an exercise that did not require any economic expertise. He conceded on cross-examination that his opinion was simply his say-so and could

[redacted]

4085-4086 ("Well, I meant I didn't consider it"), 4086-4087 ("No, I did not"), 4088, 4089-4091, 4264 ("I did not get through it, that's correct. . . . Actually, I think I did not. I - - I - - I know I - - I believe I did not. That - - I did not"), 4367 ("I did not report the blue books. That's correct"), 4371).)

VI. Cheap Imports Dominate The U.S. Fittings Market

As has been the case with much of the heavy manufacturing sector in the United States, the Fittings industry has changed dramatically over the last 20 years. According to the U.S.

International Trade Commission, sales of non-domestic Fittings into the United States increased by 47.2% between 2000 and 2007. At one time, most Fittings used in waterworks projects in the

in form and functionality non-domestic and domestic Fittings that meet AWWA standards are completely interchangeable. (Tatman, Tr. 878-879; Webb, Tr. 2730-2731.) It is thus an undisputed fact that Fittings are commodity products. (JSLP ¶ 12.)

Sales of domestic Fittings declined year-over-year-over year in the face of this import surge. (McCutcheon, Tr. 2579, 2585, 2638-39.) As Mr. Tatman testified: "domestic only [illegible]

[redacted]

have done nothing but erode over time." (Tatman, Tr. 280-281.)In response to this flood of cheap imports, McWane filed a complaint before the International Trade Commission (ITC) to challenge the surge in imports. (RX 730.) In December, 2003, the ITC determined that Fittings from China were being imported into the United States [illegible]

[redacted]

VII. Star Quickly and Successfully Expanded Into Domestic Fittings

In February 2009, Congress passed the American Recovery and Reinvestment Act ("ARRA") to stimulate the domestic economy. In an effort to support domestic manufacturers,

[redacted]

preference for domestic-made products in certain waterworks infrastructure projects. Although Star had been a major player in the destruction of the domestic Fittings industry, it decided to try to take advantage of ARRA by expanding its product lines to include domestic Fittings.

[redacted]

Tyler tried this 'loyalty' program before and we beat them down with better service, flexibility, price etc. . . .
Every customer I talked to is pissed, this will benefit us greatly.

(McCutcheon, Tr. 2588-2589; CX 0009.)

Star's confidence stemmed from its success in "beating down" other "monopolistic"

McWane rebate policies in the recent past. In 2003, Mr. McCutcheon and his Star colleagues complained to the ITC that McWane had a rebate policy that allowed it monopolize the Fittings market. (McCutcheon, Tr. 2584-2585.) But the ITC unanimously concluded the story was not right. Instead, it concluded that surging Chinese imports were the real problem - - not McWane

or its rebates - - and were causing material damage to the U.S. domestic producers. The ITC

Q. And after Tyler's rebate policy was issued; right, sir?
A. Yes, sir.

Q. You sold to HD Supply. We saw that yesterday.
A. Yes, sir.

Q. In fact, you sold to HD Supply the very same month the rebate policy came out, September; right, sir?
A. Yes, sir.

Q. After the policy came out, you sold to Ferguson? They purchased your domestic fittings?
A. Yes, sir.

(McCutcheon, Tr. 2591-2592, 2607-2608; CX 1973.) Mr. McCutcheon and other Star executives acknowledged that Star grew its domestic Fittings sales month after month after month throughout Fall 2009, all of 2010, and 2011 [redacted]

Bhargava, Tr. 3027; JX 696 (McCutcheon, IHT at 40-41)). Star's "Domestic Bid Log" indicates that between September 2009 and June 2010, Star actively competed for ARRA jobs, submitting

By the end of 2011, Star had doubled its share of the domestic Fittings segment of the

[redacted]

Tr. 3027-3028; JX 694 (Bhutada, Dep. at 71); McCutcheon, Tr. 2595; Schumann, Tr. 4423). And in 2012, as a Star executive testified, the company is on pace to have its best year of domestic Fittings sales yet. (Bhargava, Tr. 3028.)

Unlike Dr. Schumann, Dr. Normann analyzed Star sales records and found that, in some

VIII. The Legitimate Business Purpose of McWane's Rebate Policy (Which Was Not Enforced) Was To Protect The Last Remaining Domestic Foundry Dedicated To Fittings

In November 2008, faced with high inventory levels and insufficient demand for

domestic Fittings, McWane closed its Tyler South plant. (Tatman, Tr. 968, 960 ("I've got high inventory levels and I don't have enough demand, domestic only, to keep up with production. And if I start substituting domestic product with

operating at full capacity. (Tatman, Tr. 1046-1047; JX 643 (Tatman IHT at 47-51)). ARRA did not change the prognosis. (Tatman, Tr. 280-281, 981, 1003-1004 *in camera*; Schumann, Tr. 4634-4635). As Mr. Tatman testified, the overall trend in the Fittings market has been the same after ARRA as it was before ARRA: "domestic

time." (Tatman, Tr. 280-281).

Confronted with Star's announcement in June 2009 that it

distributors, who held significant market power over it. (Tatman, Tr. 660 ("This is a weak -- a

weak stance in this letter because I know when I write this letter that I'm a Chihuahua barking at Rottweiler and I know who has the power here.").) It was never McWane's expectation or intention to profit from ARRA by overcharging its customers. (RX 595 ("It has never been our intent to overcharge because of the Buy America provision"); Tatman, Tr. 981 ("we didn't want to overcharge in the short term, make a large business profit off the situation and set ourselves up for the long term where people felt that we took advantage of the situation.").) McWane's

McWane domestic customers. (JX 643 (Tatman, IHT at 157-160); McCutcheon, Tr. 2588-2590.)

As Star's salesmen quickly realized, the letter was "all bark and no bite." McWane did not refuse to sell domestic Fittings to the dozens and dozens of customers who purchased domestic Fittings from Star. (Tatman, Tr. 714-718, 720, 725-726, 731-732; JX 638 (McCullough, IHT at 18-21, 157-172); Webb, Tr. 2798-2800; Thee, Tr. 2111-2112; Mont[illegible], Tr.

2860-2862.) Indeed, out of a total of 630 waterworks distributors nationwide that Dr. Schumann found, he identified only Hajoca, and only one of its branches (Lansdale, Pennsylvania) as a purported "victim" of McWane's rebate letter. (Schumann, Tr. 4440, 4432-4435.) Even that impact, if there was any at all, was limited to a 12-week period in early 2010, and Roy Pitts from Hajoca testified that McWane permitted Hajoca's Lansdale branch to pre-order domestic Fittings to meet is needs during that period. Moreover, by April 2010, McWane permitted the Lansdale

99); JX 643 (Tatman, IHT at 197-198); JX 652 (Johnson, Dep. at 17-19); JX 705 (Gibbs, Dep. at

[redacted]

Webb, Tr. 2798-2800; Morton, Tr. 2834-2835, 2839, 2856-2857, 2860, 2867; CX 2215; CX

1936.) By early 2010, McWane had modified its rebate policy so that "[redacted]

was still uncertain as to when it would have a full line of domestic Fittings available. As Star

. . . .

Q. 130. I apologize.

Now, Mr. McCutcheon, there are lots and lots of other reasons in here completely unrelated to the

[redacted]

Q. And many of them -- I don't want to go through

Further, many distributors were cautious about purchasing domestic Fittings from Star in

2009 and early 2010 because of Star's reputation among the distributors and a general lack of

domestic Fittings. (Webb, Tr. 2796; JX 673 (Webb Dep. at 123-125); JX 672 (Webb IHT at

201).) Eddie Gibbs of Win Wholesale testified that he was concerned about Star's reliability as a domestic Fittings supplier "regardless of what the September 22, 2009 letter said." (JX 705 (Gibbs, Dep. at 93-94).) Dennis Shelev of Illinois Meter testified that his company was not

[redacted]; Pais, Tr. 2193 *in camera*; Rybacki, Tr. 3672 *in camera*)

[redacted]

By the end of 2008, Sigma had over $100 million in debt. (Pais, Tr. 2193-2195 in camera). When Congress enacted MAP-21 in 2000, Sigma [redacted]

[redacted]

[redacted] (Rybacki, Tr. 3672 & RX 242.0003 *in camera*). [redacted] (Rybacki, Tr. 3670-3671 *in camera*).

Mr. Pais testified that throughout 2009 Sigma was in a "precarious position overall in financial

capital expenditures - - far below the amounts it estimated would be necessary to begin virtual manufacturing of domestic Fittings [redacted] (Pais, Tr. 2178; Rybacki, Tr. 3671 *in camera*.) Mr. Pais testified that by the Spring and Summer of 2009, months after ARRA's enactment, Sigma was in a "grave" financial situation. (Pais, Tr. 2163-2164.) [redacted] (Pais, Tr. 2165, 2167-2168; CX 214; Rybacki, Tr. 3664-3665 *in camera*.) McWane's list price decrease alone drove Sigma's [redacted]

A. No, they did not.
Q. Did the board ever authorize the company to take money and [redacted]

[redacted]

beyond what had been incurred?
A. No, they did not.
Q. Did you have sufficient funds at the time to do that, sir, given the amount of debt the company had at the time?

[redacted]

(Pais, Tr. 2184.)

[redacted]

that this would have been difficult because was "already behind the eight ball on day one." (JX 687 (Pais Dep. 182).) ARRA was already several months old and set to expire within a year. In

Sigma's view, its effects were thus uncertain and short-term. As of mid-2009, Sigma did not own any domestic foundries, did not have

McWane's domestic Fittings for resale (Tatman, Tr. 615; JX 689 (Rona, Dep. at 118-19); JX 688 (Rona, IHT at 184-188); JX 643 (Tatman, IHT at 149-150).)

McWane could have said no and, if it had monopoly power, preserved its monopoly. But it did not. McWane recognized that there were compelling pro-competitive reasons to consider selling to Sigma. From McWane's perspective, the MDA provided much-needed volume for its

Michael Caponigro testified that his company preferred [redacted]

Sigma, because he preferred Sigma's service to both Star and McWane. (JX 669 (Groeniger, Dep. at 87-88).) Peter Prescott from Everett J. Prescott testified that his company preferred to purchase domestic Fittings from Sigma when it was concurrently ordering non-domestic Fittings

the three companies' invoice prices also found substantial variation in prices for contemporaneous sales of the same Fittings. He concluded that this price variation was

[redacted]

any agreement to eliminate or reduce job pricing. (Normann, Tr. 4746-4749) ("I literally found no evidence consistent with those allegations.").)

Dr. Normann's analyses of the Fittings market concluded that there was one relevant antitrust product market for all Fittings (not separate domestic and import markets) and that McWane did not have monopoly power and did not exclude Sigma or Star. The undisputed fact

consumers as a result of McWane's conduct as alleged in the Complaint. Complaint Counsel's expert, Dr. Schumann, testified that he did not even attempt to do a statistical analysis of the Fittings market during the alleged conspiracy period, or during McWane's alleged monopolistic

letter. As for Sigma, well, he was asked by Complaint Counsel to just assume that Sig... 11

[redacted]

have expanded into domestic Fittings.

[redacted]

DISCUSSION OF LEGAL AUTHORITIES

contracts, combinations and conspiracies that unreasonably restrain trade. (15 U.S.C. § 1.) The existence of a preceding agreement is the "hallmark" and the "very essence" of a Section 1 claim. *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 356 (3d Cir. 2004) ("*Flat Glass*") (The existence of an agreement is 'the very essence of a section 1 claim'"); *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 117 (3d Cir. 1999) ("*Baby Food*") ("The existence of an agreement is the hallmark of a Section 1 claim. The agreement is the very essence of

150 223 24 (1940). At a minimum, this element requires "a 'unity of purpose or a common

[redacted]

design and understanding or meeting of minds' or 'conscious commitment to a common

[redacted]

full-blown trial. *City of Moundridge v. Exxon Mobil Corp.*, 429 F. Supp. 2d 117, 130 (D.D.C. 2006) (emphasis added) (citation omitted). In *City of Moundridge*, the defendants testified, as each McWane, Sigma and Star witness did here, that they made their pricing decisions

[redacted]

had an opportunity to conspire (during a series of industry meetings) and pointed to internal

the possibility that the primary players in the tobacco industry were engaged in rational, lawful,

[redacted]

about McWane's intent came from Rick Tatman, who cogently explained that his primary goal during 2008 was to regain market share, a goal he planned to achieve by undercutting the prices of his competitors through both lower multipliers and continued job pricing. Consistent with that intent, the both the objective statistical evidence and the contemporaneous internal documents establish that McWane continued to offer both job pricing and a host of other price concessions to its customers throughout 2008, 2009, 2010 and into the present. (Tatman, Tr. 387, 904-905, 907, 909-910, 914-915; RX 399, 921, 930-931; RX 598, 933-934, 995-998; RX 396, 1071-1072.) Similarly, and contrary to any implication of an agreement otherwise, Sigma never stopped or reduced its job pricing, (Rybacki, Tr. 107, 3715; Pais, Tr. 2192) and made no effort to centralize pricing authority or remove pricing authority from its salespeople. (Rybacki, Tr.

alleged curtailment of job pricing in 2008. (Schumann, Tr. 4070, 4076-4077, 4142-4145.) McWane, Sigma and Star's actual pricing data reflects the reality that, in the fiercely competitive Fittings market, it was not possible to eliminate or reduce job pricing. (Minamyer, Tr. 3277-

antitrust laws"); *Clamp-All Corp. v. Cast Iron Soil Pipe Inst.*, 851 F.2d 478, 484 (1st Cir. 1988) ("One does not need an agreement to bring about this kind of follow-the-leader effect in a concentrated industry"); *City of Atlantic City*, 101 F.3d at 1102 ("A [illegible]

however, be inferred from parallel pricing alone, nor from an industry's follow-the-leader pricing strategy") (internal citations omitted).

In *Clamp-All*, the First Circuit affirmed summary judgment for defendants in a case which defendants in a concentrated market followed each other's list prices, but as here

company is likely aware of the pricing of its competitors"). Independent, but parallel actions are

[redacted]

571, 575 (1st Cir. 2011) ("*White*") ("Each producer may independently decide that it can maximize its profits by matching one or more other producers' price, on the hope that the market

[redacted]

seller will in the future likely be forced to met the lower price –

same time frame – and a seller who will not compete (like Augusta) will lose business. But this is not an agreement to restrain trade; it is just competition at work.

Augusta News Co. v. Hudson News Co., 269 F.3d 41, 47-48 (1st Cir. 2001).

McWane charted its own course again in the spring of 2008 when Sigma made an independent internal decision to issue a large multiplier adjustment amounting to a price increase in the range of 25 to 30 percent. (Rybacki, Tr. 3708, 3710-3711; CX 1858; Pais, Tr. 2080-2081; CX 1138, 2100-2102; CX 1858.) Sigma did not discuss its decision with anyone at McWane. (Rybacki, Tr. 3708, 3710-3711.) After analyzing Sigma's proposed price increase, McWane, independently determined that its goal of gaining share and increasing

possibility of mistaking the workings of a competitive market-where firms might increase price

when, for example, demand increases-with interdependent, supracompetitive pricing . . . since these factors often restate interdependence.") Requiring plaintiffs to meet these additional

elements "tends to ensure that courts punish 'concerted action' – an actual agreement – instead of the 'unilateral, independent conduct of competitors.'" *Id.* (citing *Baby Food*, 166 F.3d at 122); *see also Intervest Inc. v. Bloomberg*, L.P., 340 F.3d 144, 159-60 (3d Cir. 2003) (plaintiff relying on circumstantial evidence must meet heightened burden of proof). Thus, to distinguish

for the second theory and the complaint's allegations that the defendant's actions were independently motivated"); *see also In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 329-30 (3rd Cir. 2010) ("it is at least equally consistent with unconcerted action."). In this case, McWane's actions - - keeping its prices lower than its competitors' in an attempt to gain share,

dissemination of price information is not itself a per se violation of the Sherman Act." *Burtch*

[redacted]

Second, there is no evidence that McWane, Star and Sigma consulted each other before making their pricing decisions. Each competitor learned about the others' pricing changes only after the

[redacted]

him. (Schumann, Tr. 4249-4250 ("I haven't testified to that.").) Complaint Counsel did not identify any specific meeting between Mr. Pais and Mr. Page at which an agreement was purportedly reached, or point to any particular letter or email reflecting such an agreement. Regardless, all witnesses testified that they never discussed or agreed upon Fittings prices, and

Count 3 of the Complaint alleges that during DIFRA's short-lived existence in the latter

half of 2008 the [redacted]

accounting firm enabled the Competitors to monitor compliance with an alleged agreement to

reduce job pricing. (Complaint ¶¶ 25-29.) This [redacted]

It is well established that legitimate trade associations are perfectly legal. *Citric Acid,* 191 F.3d at 1097-98. Courts have also rejected any antitrust liability premised upon the theory that a company's decision to participate in a trade association that gathers and disseminates aggregated tons-shipped data somehow "facilitated" price collusion. *Williamson Oil*, 346 F.3d at 1313 ("exchange [of] information relating to sales ... does not tend to exclude the possibility of

[under Sherman Act Section 2] does not add attempt to violations of Section 1 of the Sherman Act").

A. Complaint Counsel's Contention that the Alleged Conspiracy Continued Into 2009 and Beyond

1. Mr. McCutcheon's Spring 2009 Call To Mr. Tatman Does Not Support An Inference of Conspiracy

was in any other way affected by the alleged call. Courts have uniformly upheld after-the-fact communications as lawful. *Blomkest*, 203 F.3d at 1034 (affirming summary judgment, the Court found "*[s]ubsequent* price verification evidence on particular sales cannot support a conspiracy"); *see Baby Food,* 166 F.3d at 128 (decisions to follow an industry leader's price

its customers. (CX 1413; IX 687 (Pais Dep. at 372-377); IX 600 (Rybacki Dep. at 210-213).)

[redacted]

McWane announced its own multiplier change on June 17, 2010, which Mr. Tatman testified was a result of his own independent decision-making. Importantly, that change ***did not match*** Sigma's announcement, which had no prices at all, but raised some states, lowered some, and kept others the same. (CX 2440.) Star subsequently followed McWane's multiplier change later in June (CX 1406, CX 2441), and Sigma followed at the end of June. (CX 1396.)

This sequence demonstrates an absence of collusion rather than its presence. McWane ***did not match*** Sigma. The fact that the Sigma and Star learned about McWane's lower prices from customers after-the-fact and subsequently ***lowered*** their multipliers was a rational response to the real threat that McWane's lower price would likely shift volume to McWane, which was precisely what Tatman intended. If McWane [redacted]

The Commission alleged in Counts 4-7 that McWane monopolized, attempted to monopolize, and conspired to monopolize a "domestic Fittings" market in violation of FTC Act Section 5. The Commission's Section 5 case is guided by Sherman Act Section 2 case law *Cement Inst.*, 333 U.S. at 691-92; 15 U.S.C. § 2.

A. There Is No Separate Market For Domestic Fittings And McWane Did Not Have

[redacted]

The Court heard overwhelming evidence - - including testimony from Dr. Schumann - - that imports and domestic Fittings that meet AWWA standards are entirely interchangeable commodities that are metallurgically and functionally the same. (Schumann, Tr. 4535-36;

[redacted]

[redacted]

merger case here:

[redacted]

effect"); JX 658 (Keffer, Dep. at 11-12) (ARRA impact did not last long); JX 648 (Backman, Dep. at 109-110) (ARRA funded only "a finite amount of jobs"); JX 652 (Johnson, Dep. at 30) (ARRA's impact was "minimal"); JX 705 (Gibbs, Dep. at 23, 106) (ARRA did not have much impact on Fittings sales); JX 703 (Coryn, Dep. at 24) (ARRA did not have much impact on business).)

Indeed, the impact of ARRA was so minimal that current and former domestic Fittings

Dr. Schumann's assumption that ARRA created a separate domestic Fittings market is insufficient to meet Complaint Counsel's "substantial evidence" burden, particularly given the substantial evidence that ARRA had limited impact on domestic Fittings and his own acknowledged failure to study the impact of the many ARRA waivers.

Dr. Normann's conclusions, in contrast, were consistent with the facts. He found substantial evidence that domestic and imported Fittings were entirely interchangeable before ARRA and that ARRA had insufficient impact to change that. (Normann, Tr. 4830, 4870 ("not really a dramatic change in the marketplace as a result of ARRA.).)

He concluded, as a result, that there was no separate domestic Fittings market and that McWane did not possess monopoly power in the overall Fittings market. (Normann, Tr. 4832 ("Where I guess we disagree is Dr. Schumann then implies that once the spec is determined, now

product market: "Consumer preferences for visco-elastic foam mattresses versus traditional innerspring mattresses . . . may vary[.] The allegations that visco-elastic foam mattresses are more expensive than traditional innerspring mattresses and have 'unique attributes' are similarly

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of little help"); *Buehler A.G. v. Ocrim S.P.A.*, 836 F. Supp. 1305, 1326 (N.D. Tex. 1993) (judgment for counter-defendant in part because fact that [redacted]

[redacted]

of it, that alone does not suggest the company possessed monopoly power. Rather, the overwhelming evidence at trial was that McWane's Union Foundry was simply the last dedicated Fittings foundry standing in an industry decimated by cheap imports. A high share, under those circumstances, does not amount to monopoly power. *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966) (distinguishing monopolies obtained through business acumen and historic accident from monopolies obtained by predatory conduct).

[redacted]

of states McWane actually lowered their published multipliers, they reduced them").) Dr.

[redacted]

present. (McCutcheon, Tr. 2590.) As early as November 2009, Star's domestic performance had exceeded the expectations of its CEO. (*See* RX 231 (Mr. Bhutada's November 10, 2009,

[redacted]

lot better than I expected at this stage congratulations"). Star's customers included many of

[redacted]

for at least two years and the remaining market remains robustly competitive as evidenced by ongoing entry, profitability of rivals, and stability of their aggregate market share.")

The Court should also grant judgment for McWane, even if it finds that McWane had monopoly power over domestic Fittings, is because the mere possession of monopoly power is not unlawful. The United States Supreme Court has long made it clear that the antitrust laws

of the available outlets that entry into the concentrated market [illegible]

[redacted]

Food Servs., Inc. v. Pontifical Catholic Univ. Servs. Ass'n, Inc. 357 F.3d 1, 8, (1st Cir. 2004),

and significant sellers are "frozen out of a market by the exclusive deal." *Jeffe[illegible]*

2010, its first full year with product, with no apparent ramification at all. Indeed, he was unable to identify a single distributor (out of hundreds) which wanted to buy Star domestic, but was cowed from doing so. Complaint Counsel may point to Hajoca, but Hajoca epitomizes exactly how much McWane's letter was. It was McWane's [redacted] from Star

anyway, and did so. (Pitts, Tr. 3337, 3355-56, 3366; Tatman, Tr. 251-52, 687-89; CX 1606.) Indeed, Hajoca shows that Star was right - - McWane's letter had no bite at all - - and there is no [redacted]

It is well settled that even true exclusive contracts that are not strictly enforced are entirely permissible. *See Digene Corp. v. Third Wave Techs., Inc.,* 323 F. App'x 902, 912 (Fed. Cir. 2009); (*See also* Appendix of Vertical Cases.) In this case, the overwhelming evidence is that the short-lived, unenforced Rebate Policy posed no barrier to entering the domestic Fittings market, assuming such a separate market ever even existed.

It is unclear whether Complaint Counsel will argue - - despite Star's success - - that the *rebates* were somehow exclusionary. But, rebates are simply price concessions and, since there

and cannot cause antitrust injury. *Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc.*, 555 U.S. 438, 452 (2009) (plaintiff challenging a defendant's pricing practices must prove that "the prices

(plaintiff must overcome a strong presumption of legality where defendant's discounted prices are above its average variable cost).

Complaint Counsel has not submitted a shred of evidence that McWane's rebates were below its average variable cost or any other appropriate measure of cost. *See Safeway, Inc. v.*

defendant on predatory pricing monopoly and attempted monopoly claims, where plaintiff failed to present evidence that defendant priced below cost). In fact, McWane's competitor

S.Ct. 690, 697, 50 L.Ed.2d 701 (1977) ("Whether or not a practice violates the antitrust laws is determined by its effect on competition and not its effect on an individual competitor.").

[redacted]

[redacted]

Envtl.., 127 F.3d at 1164.

2. McWane's Rebate Letter Was Short-Term And Presumptively Lawful

McWane's rebate policy was not a contract and did not require any customer to buy domestic Fittings from McWane. Because it was not a legally enforceable contract or agreement, it was not only terminable at will and on short notice, it was terminable ***at any time***. (CX 1606.) Even its potential ramifications – loss of unpaid rebates or [redacted]

anticompetitive because it was terminable by either party without cause on three months written notice).

The rebate letter was analogous to the market share discounts at issue in *Concord Boat*

[redacted]

In that case, a boat engine supplier with 75% of the market share offered discounts of varying levels to boat builders. The more engines a builder bought from the alleged predator, the greater

[redacted]

Complaint Counsel presented no evidence that the rebate letter caused domestic Fittings output to fall. To the contrary, the evidence is that domestic Fittings output increased after September 22, 2009. (Tatman, Tr. 1001-1003 & RX 632 *in camera*.) Similarly, Complaint Counsel presented no evidence that the rebate letter caused the price of domestic Fittings to rise

[redacted]

to supracompetitive levels. To the contrary, the evidence is that domestic Fittings prices barely kept place with inflation in 2009-2010. (Tatman, Tr. 979-981, 988-989; RX 595.) McWane's domestic Fittings prices increased a mere 3.1 percent in 2010, the peak of ARRA'S effect. (Tatman, Tr. 1001-1005; RX 632 *in camera*.) Star's domestic Fittings prices were higher than McWane's in the majority of states during this time period. (Tatman, Tr. 1001-1005; RX 632 *in camera*; Normann, Tr. 4970 ("this shows that Star's pricing was generally higher than McWane's pricing.") Further, McWane never expressed any intention to profit from ARRA by

[redacted]

violate federal antitrust laws, despite the fact that those contracts preempted 87% of the relevant co-generation market. 250 F.3d at 977-78. The Sixth Circuit found that: (i) no evidence existed that the alternative provider allegedly excluded from the co-generation market actually could have served as a lower-cost alternative to the defendant; (ii) the discounted rates the defendant offered to customers under its exclusive agreements were not competitive; (iii) the

[redacted]

with domestic foundries as of September 2009. (Rona, Tr. 1672-1673.) Although Sigma required a minimum of 450 core patterns to produce those 730 types of Fittings, very few of those patterns were even physically present in the United States, as of September 2009. (Rona, Tr. 1673- 1675.) Mr. Rona testified that Sigma would have required at least 18 to 24 months lead time to begin production of a full range of Fittings, and approximately 6 months to produce even one fitting. (Rona, Tr. 1673, 1676-1677.) He conceded that this timetable would have been unworkable, given ARRA's short window of opportunity. (Rona, Tr. 1671.)

Given Sigma's precarious financial situation, as of September 2009, it simply had no viable domestic supply or production option – other than to enter into the MDA with McWane. (Pais, Tr. 1799-1804, 1854-1855, 2173-2175, 2184, 2210, 2217-2218, 2222.) Unquestionably, Sigma lacked the financial wherewithal to become a domestic Fittings supplier at that time. (Rybacki, Tr. 3663-

[redacted]

(Rybacki, Tr. 3672-3673 *in camera*.) [redacted] (Rybacki, Tr. 3672-3673 *in camera*.) Thus, it is hardly surprising that Mr. Rybacki believed that it was inadvisable for Sigma to attempt to become a domestic Fittings supplier in 2009, when its financial situation was so precarious. (Rybacki, Tr. 3677-3678; 3682.)

It is noteworthy in this regard that Sigma did not get into virtual manufacturing of domestic Fittings before the MDA, nor after. That also demonstrates that something other than the MDA caused it to refrain from expanding into domestic Fittings. Indeed, the MDA was a one-year agreement, easily terminable by either party with 180 days notice. (Rona, Tr. 1699-1700; CX-1104.) MaWana provided notice in early 2010 as it was going [redacted]

[redacted]

from September 2009 to August 2010. (JX 689 (Rona Dep. at 303-304).) Yet Sigma has not

A. There Is No Evidence That McWane Had The Requisite "Specific Intent," Nor That It Had A Dangerous Probability Of Monopolizing Anything

To establish an attempted monopoly claim, a plaintiff must prove that the defendant possessed the specific intent to achieve monopoly power by predatory or exclusionary conduct;

[redacted]

that the defendant in fact engaged in such anticompetitive conduct; and that a dangerous

[redacted]

power. *U.S. Anchor Mfg. Inc. v. Rule Indus., Inc.*, 7 F.3d 986, 993 (11th Cir. 1993). With regard

focus in signing the MDA was on keeping its own customers happy and providing domestic

[redacted]

Fittings to those customers when needed, not on Star. (JX 689 (Rona, Dep. at 221); JX 688

[redacted]

(Rona, IHT at 218-220).) Sigma perceived that if it was unable to supply domestic Fittings to its customers, it might also lose some portion of its non-domestic business with those customers. (JX 689 (Rona, Dep. at 118-119); JX 688 (Rona, IHT at 187-188, 218-220).) Thus, McWane is

[redacted]

prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition") (quoting *Atl. Richfield*, 495 U.S. at 340); *Matsushita*, 475 U.S. at 594 ("[cutting prices in order to increase business often is the

[redacted]

essence of competition").

B. The Rebate Letter And The MDA Had Legitimate Pro-Competitive Benefits

[redacted]

with its network of regional distribution yards and larger field sales force, was better able than McWane to provide certain servicing benefits, such as faster delivery, to purchasers of domestic Fittings. (JX 689 (Rona Dep. at 123-124, 133-134); JX 643 (Tatman, IHT at 176-177); JX 688 (Rona, IHT at 177-178).) Sigma's distribution centers were more strategically located for more efficient customer delivery than McWane's. (JX 689 (Rona, Dep. at 311-313).) Sigma also had relationships with certain distributors and in certain geographic areas that McWane lacked. (JX 642 (Page, Dep. at 69-73).) For example, Mr. Rona of Sigma testified that ACIPCO preferred to

[redacted]

buy domestic Fittings from Sigma rather than McWane, because Sigma provided additional specialty services, including coatings, linings, taps and other add-ons, that ACIPCO felt McWane could not provide as effectively. (JX 688 (Rona, IHT 95-96); JX 689 (Rona, Dep.

[redacted]

His opinion was nothing more than assumption and speculation. That is not enough. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 579-80 (1993) (untestable say-so is not reliable evidence at trial); *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1977) ("Nothing . . . requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert"); *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 242 (1993) ("when indisputable record facts contradict or otherwise render the opinion unreasonable, it cannot support a jury's verdict.").

VI. The Government Is Not Entitled To Any Remedy

Complaint Counsel is not entitled to its proposed remedy because judgment should be granted in favor of McWane on all Counts. In addition, however, the proposed remedy should be denied because there was no proof at trial of any ongoing actual or threatened injury to

declaratory relief against its employment practices"); *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983) (past injury at hands of police did not entitle plaintiff to enjoin future police practices). The mere possibility that past conduct might occur again is insufficient. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) (plaintiff seeking injunctive relief required

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CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2012, I filed the foregoing document electronically using the FTC's E-Filing System. I also certify that I delivered via electronic mail a copy of the foregoing document to:

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