PUBLIC

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Edith Ramirez, Chairwoman**
Julie Brill
Maureen K. Ohlhausen
Joshua D. Wright

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

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TABLE OF CONTENTS

[redacted]

RECORD REFERENCES iii

[redacted]

I. INTRODUCTION AND SUMMARY OF THE ARGUMENT 1
II. STATEMENT OF FACTS 3

f) Plus Factor Six: Sigma Accepted the Tatman Plan by Curtailing Project

g) Plus Factor Seven: The Suppliers Centralized Pricing Authority in Parallel

RECORD REFERENCES

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

[redacted]

RX - Respondent Exhibit

[redacted]

ID - Initial Decision Page

IDF - Initial Decision Finding

CCPF - Complaint Counsel's Post-Trial Findings of Fact and Conclusions of Law*

CCRRFF - Complaint Counsel's Post-Trial Reply Findings of Fact and Conclusions of Law

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

[redacted]

TABLE OF AUTHORITIES

Cases

American Tobacco Co., v. United States, 328 U.S. 781 (1946) 8

[redacted]

Bd. of Trade of Chicago v. United States, 246 U.S. 231 (1918) 14
Blomkest Fertilizer, Inc., v. Potash Corp. of Sask., 203 F.3d 1028 (8th Cir. 2000) 11
Bolt v. Halifax Hosp. Med. Ctr., 891 F.2d 810 (11th Cir. 1990) 25
Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993) 10

Brown v. Pro Football, Inc., 518 U.S. 231 (1966) 9

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George A. Hay, *The Meaning of "Agreement" Under the Sherman Act*, 16 REV. INDUS. ORG. 113 (2000) 10

Joseph E. Harrington, *How Do Cartels Operate?*, FOUNDATIONS AND TRENDS IN MICROECONOMICS Vol. 2, No 1 (2006) 27

Kovacic et al, *Plus Factors and Agreements in Antitrust Law*, 110 MICH. L. REV. 393 (2011) . 11, 27, 28

Page, *Communication and Concerted Action*, 38 LOY. U. CHI. L.J. 25

Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶1406 (Supp. 2012) 44

Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶1416 (Supp. 2012) 11, 19

I. INTRODUCTION AND SUMMARY OF THE ARGUMENT

Complaint Counsel appeals from the Administrative Law Judge's Initial Decision finding Respondent McWane, Inc. ("McWane") not liable under Count 1 (price fixing) and Count 2 (anticompetitive information exchange) of the Complaint. These portions of the decision are

[redacted]

admitted communications about prices, discounting, and pricing strategy. When competitors supplement their recognized interdependence with communications that facilitate, stabilize, or strengthen coordination, they cross the line into concerted action.

Third, in addition to the slew of inter-competitor communications that [redacted]

II. STATEMENT OF FACTS

A. Fittings

Ductile iron mine fittings are [redacted]

[redacted]

hydrants, and to change or direct water flow. IDF278. The fittings at issue here – 24" or less in

Star also sells Fittings imported from China. IDF108, 113. Star had a { }% share of the U.S. Fittings market in 2008, and a { }% share in 2009. IDF356. In 2009, Star began

[redacted]

New entrants to the U.S. Fittings market face high barriers to entry. IDF1044-50.

b) Distributors

The Suppliers sell "virtually all" of their Fittings to a relatively unconcentrated group of

[redacted]

multiplier changes through customer letters to Distributors. IDF560-561. Typically, Suppliers quickly receive copies of their competitors' price letters, sometimes directly. IDF558-559, 574-578; CCPF672-673. When MoWare announces an increase in list prices or published

[redacted]

multipliers, Sigma and Star nearly always follow with substantially matching price increases.

[redacted]

singularly unhealthy to our entire industry over the past 20-some years, with their reckless, irresponsible, and undisciplined tactics to resort to whatever it takes to grab some business and grow." CCPF867.

D. The Agreement to Restrain Price Competition

In late 2007, McWane Vice President Rick Tatman devised a collusive scheme by which McWane, Sigma, and Star, acting together, could lessen competition and secure higher Fittings prices (the "Tatman Plan"). IDF617, 620, 626, 638; CCPF907-922. The scheme was "collusive" in that McWane did not advance the strategy solely by price leadership and

E. DIFRA

In early 2008, in furtherance of the scheme, the Suppliers formed a trade association, the Ductile Iron Fittings Research Association ("DIFRA"). IDF723-725.[1] DIFRA had four members: McWane, Sigma, Star, and U.S. Pipe, a company that did not manufacture Fittings. IDF192, 720; CCPF1129.

DIFRA members agreed to a reporting system whereby each member would submit its tons-shipped data for 2006, 2007, and January through April of 2008 to an accounting firm, Sellers, Richardson, Holman & West LLP ("SRHW"), by May 15, 2008. IDF731-734; ID353. SRHW would then aggregate the data and issue a report by the 20th of May showing industry-wide tons shipped. IDF733. Thereafter, members would report their prior months' shipment data by the 15th of each succeeding month. IDF732. The data was organized by Fittings

categories (2" to 12", 14" to 24", over 24" in diameter, flanged versus non-flanged). IDF734.

DIFRA issued its first tons-shipped report on June 17, 2008. IDF738. DIFRA continued to issue monthly reports until its final report in January 2009, which covered December 2008 sales data. IDF739.

II. QUESTIONS PRESENTED

[redacted]

than not that McWane acted in concert with its competitors to curtail price discounting for Fittings?

B. **Whether the DIFRA information exchange likely harmed competition**

supporting McWane's liability for price-fixing and for participating in the DIFP A information

exchange.

A. Judge Chappell Employed Incorrect Legal Standards

Judge Chappell made at least three important legal errors when evaluating the evidence.

First, Judge Chappell improperly ignored evidence that Sigma and Star participated in the price-fixing conspiracy. *E.g.*, ID314-315 (reasoning that such evidence does "not implicate" McWane). This was clear error. Evidence that a defendant's competitors conspired is also probative of the defendant's wrong-doing. *E.g.*, *Flat Glass*, 385 F.3d at 363; *In re Currency*

Champion Int'l Corp., No 74-183, 1975 WL 920, at *3 (D. Or. July 16, 1975), *aff'd* 557 F.2d 1270, 1273 (9th Cir. 1977); *United States v. FMC Corp.*, 306 F. Supp. 1106, 1149-50 (E.D. Pa. 1969). Such communications are therefore the antithesis of mere interdependence.

Economic theory teaches that oligopolists may maintain supra-competitive prices by

observing market prices and output, and anticipating the likely competitive response of rivals.

Price coordination through recognized interdependence without

[redacted]

timing and frequency of the communications (explained and unexplained) filled the gaps between the documents; and simply refused to make reasonable inferences from the evidence or to evaluate it as a whole.

B. Properly Evaluated, the Evidence Establishes that McWane Unlawfully Conspired with Sigma and Star to Restrain Price Competition

[redacted]

In his methodical dissection of the individual pieces of evidence, Judge Chappell found no evidence of parallel conduct and no plus factor evidence. ID321 n. 23. This looks

[redacted]

credibility. The Suppliers, who all used the same published pricing, acted in parallel to curtail Project Pricing, exchange information in DIFRA, and raise prices once DIFRA was established. Documents from the three Suppliers' files fit together seamlessly to prove a conspiracy to stabilize prices. Thirteen separate plus factors show the following: McWane devised a collusive plan, communicated the plan to rivals, and secured their participation in the scheme. Sigma understood that its assigned role was to appease McWane by curtailing discounting. Star also

Judge Chappell refers to this evidence as showing only an "intention" to curtail Project

Pricing that may not have resulted in any "corresponding conduct." ID278. But the Sigma and

Star communications to their respective sales staff and customers are corporate acts. These acts

are direct evidence of a change in pricing policy, and powerful circumstantial evidence of the

companies' participation in a common scheme. Specifically, it is reasonable to infer that Mr.

strategy. He informed his sales staff of the "Pricing Strategy Changes" by email dated November 25, 2008:

> [Star employees] have been extremely diligent in protecting the stability of our market pricing ....
>
> However, some of our competition has not performed as admirably.
>
> ....
>
> We have lost too much revenue to tolerate it any longer.
>
> Please get with your teams to be sure we are all clear on the following plan.
>
> ***We will take every order we can after exhausting all avenues to document the competitors pricing .... [W]e will no longer tolerate the competition being irresponsible in the market and being***

[redacted]

together prove that McWane and its competitors were acting in concert.

a) Plus Factor One: The Fittings Market was Conducive to Collusion

[redacted]

of price is reasonable stability and transparency at the prior level.") The Suppliers would [redacted] together move toward greater price transparency. ("[McWane] will encourage/drive both price stability and transparency."). And finally, Sigma and Star would remove pricing authority from local sales personnel in order to bring greater discipline to company pricing. ("Sigma's & Star's mgt pulling price authority away from front line sales and customer service personnel to add discipline to the process."). IDF638; CX0627-004.

Plainly, the Tatman Plan contemplated a fundamental transformation in the dynamics of competition in the Fittings market. How would Sigma and Star learn what was required of [redacted]

document laying out a plan to stabilize the market); *In re Linerboard Antitrust Litig.*, 504 F. Supp. 2d 38, 59 (E.D. Pa. 2007).

Further, the Tatman Plan "provides a context for interpreting the events that followed."

[redacted]

Fittings market in 2008 unfolded according to Mr. Tatman's Plan: inter-company

[redacted]

McWane was formulating its "Desired Message to [] Competitors." And soon after the calls, the Suppliers shifted from aggressive competition to conformity with the Tatman Plan. Other evidence (discussed below) shows that the Suppliers were uninhibited in discussing their respective pricing strategies with one another. Thus, these private communications support the inference of an illegal conspiracy. *Mayor & City Council of Baltimore v. Citigroup, Inc.*, 709 F.3d 129, 136 (2d Cir. 2013) (a "high level of inter-firm communications" may serve as a plus factor supporting an inference of conspiracy); *In re EPDM Antitrust Litig.*, 681 F. Supp. 2d 141, 166-67 (same); *In re High Pressure Laminates Antitrust Litig.*, No. 00 MDL 1368, 2006 WL 1317023, at *3 (S.D.N.Y. May 15, 2006) (same).

d) Plus Factor Four: McWane Invited its Rivals to Collude (January 2008)

The Tatman Plan included two drafts [redacted]

interdependence involves predicting rivals' likely response to competitive moves. Here, likely responses were not being predicted, McWane deliberately told its rivals what to expect; McWane rigged the competitive game.

The January 11 Letter was not a price announcement to customers; it did not reveal McWane's new prices. Instead, it communicated McWane's new pricing strategy to McWane's rivals. Specifically, McWane would: (i) soon notify Distributors of higher published

[redacted]

"[McWane's] past attempts to drive price stability haven't been too successful." IDF620. The January 11 communication — effectively an invitation to collude on price — is a plus factor evidencing the alleged conspiracy. *See Interstate Circuit v. United States*, 306 U.S. 208 (1939) (agreement found when the proposed course of conduct was communicated to rivals as well as customers). Furthermore, Sigma's and Star's acquiescence and subsequent efforts to curtail Project Pricing (described below) are consistent with their understanding McWane's message.

The fact that McWane's January 11 Letter was nominally addressed to McWane's Distributors does not exempt the communication from antitrust scrutiny.[12] The Commission has indicated, however, that before treating a "public" communication as collusive, it will

The claim that McWane intended immediately to defect from coordinated pricing (a head fake) is contrary to the evidence.[13] More importantly, this claim is irrelevant to McWane's liability. A firm that deliberately invites its competitors to collude does not escape antitrust liability by claiming that it secretly harbored an intention not to follow through with the plan. *Antitrust Law* ¶1404 ("[O]bjective manifestations of assent form an ordinary contract notwithstanding any private reservation or intention to perform incompletely or not at all. The same would be true of an agreement for antitrust purposes."); *see also United States v. Giordano*, 261 F.3d 1134 (11th Cir. 2001) (affirming criminal price fixing conviction notwithstanding defendant's claim that he intended only to "play along" and to take advantage of the pricing information collected from rivals).

[redacted]

e) Plus Factor Five: Star Curtailed Project Pricing in Contravention of Its Unilateral Interest (Late January 2008)

[redacted]

In January 2008, Star reformed its strategy and decided to curtail its Project Pricing. IDF686. In a January 22, 2008 email to the company's division managers, Mr. Minamyer instructed: "[o]ur goal is to take a price increase and to stop Project Pricing," except where Star

Mr. Minamver explicitly described Star's new trusting, friendly, and cooperative attitude

toward its rivals in his email announcing the company's new pricing strategy. IDF686. He explained: "What we are doing is what is right for the industry." "We will not [be] part of

interdependence cannot explain why Mr. Pais thought it was incumbent upon both Sigma and Star to undertake a long-term ("patient" "disciplined" and "stable") program to curry favor with McWane. Star, not McWane, had historically been the maverick firm in need of appeasement. The best explanation for Sigma's new strategy of appeasing McWane is that McWane had successfully communicated to Sigma the Tatman Plan's essential message: that if Sigma and Star curtailed Project Pricing, then McWane would again increase published prices. Indeed, Mr. [redacted]

(Project Pricing "was upsetting the gorilla in the room."). Thus, the Pais email is another plus factor offering further evidence of the Suppliers' conscious commitment to a common scheme. See Petruzzi's IGA Supermarkets v. Darling-Delaware Co., 998 F.2d 1224, 1245 (3d Cir. 1993)

656-657; CCPF925-929 (McWane centralized its pricing authority in December 2007/January 2008); IDF686, 690, 696 (Star centralized pricing authority in the hands of Mr. Minamyer on January 22, 2008); *see also* Harrington, *How Do Cartels Operate* at 70-71.

The Supplier's actions were contrary to their unilateral interests absent a common plan. Removing or dampening incentives for sales representatives to offer discounts to win business is a costly strategy if pursued unilaterally, and therefore tends to exclude independent action:

> In an industry where the product made by different firms is largely homogeneous, this kind of shift in the incentives of a sales force

could not be justified as a unilateral noncollusive action. If a firm

h) Plus Factor Eight: Inter-Firm and Internal Complaints About

internal email, a Star regional sales manager identified discounting by Sigma as "cheating on the

fitting deal." CCPF1444. This mindset presupposes a mutual commitment to curb Project

Pais spoke directly with Star (McCutcheon) but not with McWane, is less plausible – given Mr. Pais' frequent meetings with McWane executives. *See* IDF606; CCPF828-841. Further, this alternative inference would require the illogical premise that Sigma and Star ashamed to raise

[redacted]

prices without the participation of the market leader, McWane. *See Flat Glass*, 385 F.3d at 362

agreement. When the agreement broke down, participating in DIFRA was once again inconsistent with Star's interests.

Sigma, in contrast, was an enthusiastic DIFRA member, viewing its participation as a means to promote pricing discipline and, importantly, as one more tangible signal to McWane:

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

IDF762; CCPF1279. Sigma was willing to participate in DIFRA and to "grow in a responsible manner" in order to curry favor with McWane. IDF762; *see also* CCPF867-868, 1038. Once again, Sigma exhibits perfect insight into Mr. Tatman's strategy and Sigma's willingness to conform thereto.

k) Plus Factor Eleven: McWane's Second Invitation to Collude

received the DIFRA reports would "reinforce the message we've been trying to drill in" to

[redacted]

830; CCPF1228-1232.

[redacted]

domestic and global inflation, market and competitive conditions within each region, as well as performance against our own internal metrics." (Does that look familiar?)

IDF835, CCPF1222-1225.

McWane received the first DIFRA report on June 17, 2008 and less than four hours later

Thus, the evidence shows that the Fittings Suppliers communicated frequently regarding [redacted] their pricing policies and practices. This pattern supports the inference that the Suppliers' parallel pricing conduct in 2008 was coordinated through their numerous documented and [redacted]

IV.B.2.m).

} (CCPF884, *in camera*)

- {

[redacted]

- {

} (CCPF923, *in camera*)

- {

} (CCPF952, *in camera*)

- {

} (CCPF1162-1164, *in camera*)

- {

}

(CCPF1206, *in camera*)

- {

- {

}. (CCPF1246, *in camera*)

[redacted]

but it failed to do so. With only insignificant exceptions (IDF612, 614, 644), no expertise

pertained to the wrong time period. Third, even setting aside the flaws in Dr. Normann's

methodology, his "data analysis," when applied to the correct period, yielded results that satisfy

effectively "capture[d]" the lags. ID346. A "rolling average" might "wash out" *systematic* lags, but it cannot "wash out" substantial *nonsystematic* lags. Schumann, Tr. 5804-5805; Normann, Tr. 5091.[21]

Dr. Normann's data were laden with nonsystematic errors. The McWane price data used by Dr. Normann contained many obvious errors. These errors repeatedly overstated prices (and

never understated them). Further, the frequency of these overstated prices peaked in January 2008 at 21%, several times the error rate in other months. CCPF1428-1430. As a result, Dr. Normann's findings understate price changes calculated *from* January 2008 (in which prices

error-laden for the far different analytical purposes to which Dr. Normann put it. For purposes of Dr. Normann's analysis, it was garbage in and garbage out.

Dr. Normann's studies were not appropriately controlled. Dr. Schumann testified, and Dr. Normann acknowledged, that many factors substantially affect Fittings prices at any given

time and place, *e.g.*, new housing starts, funding availability, *etc.* Schumann, Tr. 3839-3841, 4007; Normann, Tr. 5246-5247. One must essentially [illegible]

specific "Figures" in CCRRPF189.[26]

evidentiary record, Dr. Schumann's report, and Complaint Counsel's often-articulated theory of the case reflected a collusive agreement being effected in late January and the breaking down by October-November 2008. CCPF1456-1459. Collusive effects should have been expected in

Direct evidence proves the Suppliers' agreement to exchange information through

[redacted]

Antitrust Law ¶1406 (exchange of information is concerted action under the Sherman Act). .

Under the rule of reason, proof of market power and likely anticompetitive effects establish

Complaint Counsel's *prima facie* case. *E.g., United States v. U.S. Gypsum Co.*, 438 U.S. 422,

[redacted]

441 & n.16 (1978); *Realcomp II, Ltd. v. FTC*, 635 F.3d 815, 825 (6th Cir. 2011).[29] "[T]he susceptibility of the industry to collusion and the nature of the information exchanged are the most important factors in determining likely effects." *McWane*, slip op. at 19. Judge Chappell

[redacted]

reported to DIFRA the number of tons shipped for a given time period. This data, when aggregated, allowed participants indirectly to monitor price levels. *See Petroleum Prods.*, 906 F.2d at 461-462 (exchange of production and supply data can be used to facilitate interdependent

In February 2009, Mr. Pais again confirmed the role that DIFRA played in facilitating (at least) tacit collusion among the Suppliers during the 2008 collapse in market demand:

> In Fittings, there are effectively 3 – McWane, SIGMA and Star – and all suffer from the same challenges and there seems to be a great desire to improve the pricing and each one has demonstrated [redacted]

[redacted]

the presence of a sham member (US Pipe), apparently to paper over antitrust concerns attendant to a three-firm information exchange (CCPF1117-1130);

the reluctance of Star (the maverick) to join and to timely submit its data (CCPF1151-

be rejected as pretextual. *See Image Tech. Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1219 (9th Cir. 1997) (court should disregard justification for challenged conduct when "evidence suggests that the proffered business justification played no part in the decision to act"). There

[redacted]

data to manage production or to set its inventory level. CCPF1200-1212, 1222, 1228. Finally,

[redacted]

2. information that relates to the terms on which a Competitor will buy DIPF from, or sell DIPF to, the Person to whom the Competitively Sensitive Information is Communicated;

3. information that relates to transactions that are [redacted]

L. "Industry Statistics" means statistics derived from Input Data and Communicated by the Third Party Manager.

M. "Input Data" means the Competitively Sensitive Information Communicated by Competitors to the Third Party Manager.

[redacted]

Communicates Industry Statistics; and (2) includes Respondent and at least one other Competitor.

[redacted]

U "Service" means any service, assistance or other support provided by Respondent to a

Customer, including without limitation, responsiveness to requests for bids,

responsiveness in filling purchase orders, product availability, handling of warranty claims, and handling of returns.

E. Attempting to engage in any of the activities prohibited by Paragraphs II.A, II.B, II.C, or II.D.

PROVIDED, HOWEVER, that it shall not of itself constitute a violation of Paragraph II.B, II.C, or II.D of this Order for Respondent to Communicate:

1. Competitively Sensitive Information to a Competitor where such Communication is reasonably related to a lawful joint venture, license, or potential acquisition, and is reasonably necessary to achieve the procompetitive benefits of such a relationship;

2. To any Person reasonably believed to be an actual or prospective purchaser of DIPF, the Price and terms of a sale of DIPF; or

3. To any Person reasonably believed to be an actual or prospective purchaser of DIPF that Respondent is ready and willing to adjust the terms of a sale of DIPF in response to a Competitor's offer.

PROVIDED FURTHER, that it shall not of itself constitute a violation of Paragraphs

8. Any Industry Statistic is sufficiently aggregated or anonymous such that no Competitor that receives that Industry Statistic can, directly or indirectly, identify the Input Data submitted by any other particular Competitor;

9. Respondent does not Communicate with any other Competitor relating to the Information Exchange, other than those Communications (i) occurring at official meetings of the Information Exchange; (ii) relating to topics identified on a written agenda prepared in advance of such meetings; and (iii) occurring in the

policy, practice, agreement, contract, or understanding that offers or provides any

Retroactive Incentive.

C. Discriminating against, penalizing, or otherwise retaliating against any Customer, for the reason, in whole or in part, that the Customer engages in, or intends to engage in, the distribution, purchase or sale of a Competitor's Domestic DIPF, or otherwise refuses to

B. Within sixty (60) days from the date this Order becomes final, distribute by first-class

[redacted]

mail, return receipt requested, or by electronic mail with return confirmation, a copy of this Order with the Complaint, to each Customer of Respondent that has purchased DIPF or Domestic DIPF at any time since September 1, 2012;

C. For ten (10 years) from the date this Order becomes final distribute by first-class mail, return receipt requested, or by electronic mail with return confirmation, a copy of this Order with the Complaint, within sixty (60) days, to each Person who becomes its officer, director, or Designated Manager and who did not previously receive a copy of this Order and Complaint; and

D. Require each Person to whom a copy of this Order is furnished pursuant to Paragraphs

[redacted]

III.A and III.C of this Order to sign and submit to Respondent within sixty (60) days of the receipt thereof a statement that: (1) represents that the undersigned has read and

[redacted]

Complaint Counsel's Post Trial Findings of Fact and

CERTIFICATE OF SERVICE

I hereby certify that on June 4, 2013, I filed the foregoing document electronically using

[redacted]

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

[redacted]

PUBLIC

CERTIFICATE FOR ELECTRONIC FILING

[redacted]