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UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of	)	
MCWANE, INC., **a corporation,** and **STAR PIPE PRODUCTS, LTD., a limited partnership.**	)	**PUBLIC**
	)	**DOCKET NO. 9351**

RESPONDENT MCWANE, INC.'S PRE-TRIAL BRIEF

J. Alan Truitt
Thomas W. Thagard III
Maynard Cooper and Gale PC
1901 Sixth Avenue North
2400 Regions Harbert Plaza
Birmingham, AL 35203

Joseph A. Ostoyich
Erik T. Koons
William Lavery
Heather Souder Choi
Baker Botts L.L.P.
The Warner
1299 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2420

Attorneys for Respondent McWane, Inc.

Dated: August 31, 2012

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I. INTRODUCTION

Complaint Counsel must prove its case by "substantial evidence." *FTC v. Cement Institute*, 333 U.S. 683, 705 (1948); *California Dental Ass'n v. F.T.C.*, 224 F.3d 942, 957 (9th Cir. 2000); *Cinderella Career & Finishing Schools, Inc. v. F.T.C.*, 425 F.2d 583, (D.C. Cir. 1970); *Rayex Corp. v. F. T. C.*, 317 F.2d 290, 292 (2nd Cir. 1963). It cannot. The overwhelming evidence at trial will demonstrate that McWane made its own price decisions at all times and did not fix prices with Sigma or Star. The overwhelming evidence at trial will demonstrate that McWane did not monopolize domestic fittings and did not exclude Star or Sigma.

No Conspiracy. The overwhelming evidence at trial will demonstrate that McWane was not involved in any conspiracy with Sigma or Star. The Court will hear and read hundreds of sworn denials, and will see contemporaneous documents demonstrating that McWane made its own price decisions. (*See* Sworn Denials Exh. at 1-8.) In fact, the Court will see that McWane consistently kept its published list and multipliers for imported fittings *below* Sigma and Star during the alleged conspiracy. The Court will see that Sigma and Star had no advance knowledge of McWane's prices and, when they learned about McWane's prices from customers (not McWane), they often expressed surprise and aggravation that McWane was under pricing them. The Court will see that Sigma and Star decided, for their own reasons, to follow McWane's *lower* published prices.

Complaint Counsel's case is thus a follow-the-leader *down* case. It is also entirely circumstantial and built on a series of misconstructions of documents and disregard for the testimony. For example, Complaint Counsel points to McWane's letters to its customers and Star and Sigma letters to their customers to infer a meeting of the minds. But the evidence will show that the companies' letters do not contain the "messages" Complaint Counsel posits, and

the contemporaneous documents will show that each company was, in fact, *uncertain* about its competitors' behavior and *skeptical* about the letters. The witnesses will testify that this *distrust* of each others' letters stems from a long history of every company offering discounts and other price concessions below the multiplier discounts set out in their letters.

One example of Complaint Counsel's creativity in drawing inferences upon inferences will suffice. Complaint Counsel argues that McWane's May 7, 2008 customer letter contained a coded message to Sigma and Star to send in their DIFRA tons-shipped data and, if they did so, McWane would announce a multiplier increase (albeit one that the Court will see was substantially *smaller* than McWane's actual raw materials costs increases at the time - - and *far lower* than the multipliers Sigma had already announced and Star had followed). Putting that aside, the Court will hear the Sigma and Star witnesses flatly reject Complaint Counsel's interpretation and testify that the thought never occurred to them. Star's Vice President of Sales, Dan McCutcheon, will testify that:

Q. And it's your testimony here today that you made no connection between - - is it your testimony here today that you made no connection between the submission of your DIFRA data and this letter, the May 7th, 2008, letter?

A. Absolutely none. As a matter of fact, the first time that thought - - I've even heard that was today. Of linking that to DIFRA?

Q. (By Mr. Hassi) Linking this May 7th letter to the need to submit your DIFRA data?

A. No, sir.

Q. It's your testimony, sir, that you did not have an understanding that McWane was not going to increase prices until you had a report from DIFRA?

A. Absolutely not. (McCutcheon Dep. at 198:13-199:4)

Sigma's CEO, Victor Pais, will likewise flatly reject Complaint Counsel's strained interpretation:

Q. Sir, you understood, didn't you, that in June of 2008 or the Springtime of 2008, McWane was not going to increase prices on fittings until all of the DIFRA members submitted their data and the report was issued?

A. Where did you get that impression?

Q. Did you have that understanding, sir?

A. I didn't.

Q. You didn't?

A. No.

Q. Did you have any understanding that McWane was waiting to increase prices until after it had the DIFRA data and the DIFRA report?

A. It is so farfetched and ridiculous, what can I say? No, no.

Q. Did you note at the time that McWane increased prices on the very same day that the DIFRA report was issued?

A. If you say so today, I have to take your word for it, but I was never aware that happened. (Pais Dep. at 381:4-382: 11)

No Monopolization of Domestic Fittings. Commissioner Rosch has twice dissented from the Commission's actions and noted his view that McWane's alleged monopolization of domestic fittings involves conduct - - a rebate policy - - that has been "blessed" by several Courts of Appeals and does not amount to a violation as a matter of law. (Jan. 4, 2012 Statement of Commissioner J. Thomas Rosch.) For good reason.

First, there is no domestic market for fittings. The Court will hear from witness after witness that fittings are fittings. They are commodities that are functionally interchangeable and competitive substitutes no matter where they are made. And they are made by dozens of foundries all around the world from China to Korea to India to Mexico to Brazil - - and sent to the U.S. Indeed, the Court can take judicial notice that the International Trade Commission unanimously ruled that fittings from China were being dumped into the U.S. by Sigma and Star,

among others, only a few years ago. (U.S. ITC Publication 3657, *Certain Ductile Iron Waterworks Fittings from China*, December 2003.)

The Court will see evidence that cheap imports have flooded into the U.S. in the last ten years and taken the lion's share of the fittings market from long-time U.S. foundries like McWane. Domestic manufacturers, like U.S. Pipe, American Cast Iron Pipe, and Griffin Pipe, were once vibrant, but have shut down or cut back.

The Court will hear testimony that McWane has lost substantial market share over the last ten years as a result of this flood of cheap imports, and was forced to close its Tyler, Texas foundry in 2008. Its last remaining fittings foundry (Union Foundry) in Anniston, Alabama, has been operating at a fraction of its capacity for years.

To be sure, there are still a few municipal engineers and contractors who prefer to buy domestic fittings out of patriotism or loyalty to American foundry workers or incentives created by statute, but the number has dwindled to a small fraction of the overall specification base. Complaint Counsel and its expert witness, Dr. Laurence Schumann, point to the American Reinvestment and Recovery Act of 2009 and argue that it required domestic purchases. But the Court will see evidence that the ARRA contained exemptions and waivers for imported fittings and, in the end, was short-lived (its expired in February 2010 and its effects were over by Fall 2010) and had only a modest impact on domestic demand.

Second, overwhelming evidence will show that McWane's September 2009 rebate policy did not exclude Star from sourcing and re-selling domestic fittings. Indeed, Star went from idea (February 2009) to announcement (June 2009) to selling domestic fittings in less than nine months (Fall 2009). In 2010, its first full year selling domestic fittings, Star sold to more than [redacted] individual distributors, including more than [redacted] exclusive distributors, and its sales totaled

more than [redacted] million. Star sold domestic fittings to both of the industry's largest national chains, including HD Supply and Ferguson, many of the largest regional chains, including WinWater and Dana Kepner, and dozens and dozens of additional distributors. In 2011, Star again sold to more than [redacted] separate customers and its sales to HD Supply, Ferguson, and many others increased year over year over year. Complaint Counsel's own expert, Dr. Schumann, [redacted]

[redacted]. Not surprisingly, given Star's extraordinary success, he has not quantified any injury to Star or to the competitive process. The evidence will, instead, show that McWane's September 2009 rebate policy had a pro-competitive effect: it allowed Union Foundry to avoid the fate of every other domestic fittings foundry and being cherry-picked into oblivion.

Third, overwhelming evidence will show that McWane did not exclude Sigma from getting into "virtual manufacturing" of domestic fittings. On the contrary, Sigma excluded Sigma - - -and for very good reasons. [redacted]

[redacted]. In short, Sigma concluded in mid-2009 that virtual domestic manufacturing was not a viable option during the ARRA period for its own, valid reasons. The Court will see that Complaint Counsel has no real evidence to the contrary, let alone the "substantial evidence" necessary to meet its burden - - which is why it had to ask its

expert, Dr. Schumann, to assume that Sigma could have expanded into domestic fittings. By definition, that is a concession that the actual evidence is too weak.

Faced with dire financial straits and no viable option (and with the ARRA clock running), Sigma asked to buy domestic fittings from McWane in order to keep its customers happy -- a pro-competitive result. And McWane agreed to sell Sigma in order to get 3,000 tons of domestic production for its ailing Union Foundry, so it could keep its manufacturing costs in line and stay in business and keep its foundry workers employed - - a pro-competitive result.

No Injury To Consumers. Complaint Counsel must also prove "substantial injury" to consumers by substantial evidence under Section 5 of the FTC Act. (15 U.S.C. § 45(n).) Substantial injury can be shown through "concrete and quantifiable" findings of fact. *See FTC v. Neovi, Inc.*, 604 F.3d 1150, 1157 (9th Cir. 2010); *Orkin Exterminating Co., Inc. v. FTC*, 849 F.2d 1354, 1364-65 (11th Cir. 1988).

Complaint Counsel's expert, Dr. Schumann, has not quantified any alleged harm to consumers from any of the conduct at issue in this case. Moreover, he concedes, that he does not even know *how* consumers would have been injured. For example, he does not know whether the alleged conspiracy affected the incidences of job pricing (for example, that instead of 10 out of 10 customers getting a job discount, only 8 out of 10 would) or whether the amount of job pricing was reduced (for example, that the average job discount went from 5% to 4%) or some something else altogether. In short, this is guesswork and all he will be able to do at trial is repeat his generic *ipse dixit*.

II. THE ALLEGATIONS

Complaint Counsel alleges that McWane engaged in "two distinct courses of illegal and anticompetitive conduct," (1) "a series of agreements with its main rivals…to stabilize and raise [f]ittings prices above competitive levels," and (2) an "illegal course of conduct designed to protect its dominant [d]omestic [f]ittings position." (CC's Pre-Trial Br. at 11-12.) The Administrative Complaint ("Complaint") lays out the following seven counts:

Count I: McWane restrained price competition in violation of Section One of the Sherman Act and Section Five of the FTC Act by unlawfully engaging in a price-fixing agreement with Sigma and Star. (Compl. ¶64; CC's Pre-Trial Br. at 48.)

Count II: McWane restrained price competition in violation of Section One of the Sherman Act and Section Five of the FTC Act by unlawfully engaging in an unlawful information exchange with Sigma and Star through the trade association, DIFRA. (Compl. ¶65; CC's Pre-Trial Br. at 48.)

Count III: McWane restrained price competition in violation of Section One of the Sherman Act and Section Five of the FTC Act by unlawfully inviting Star and Sigma to collude. (Compl. ¶66; CC's Pre-Trial Br. at 48.)

Count IV: McWane restrained price competition in violation of Section One of the Sherman Act and Section Five of the FTC Act by unlawfully engaging in an agreement with Sigma to purposefully eliminate Star from the domestic fittings market. (Compl. ¶67; CC's Pre-Trial Br. at 48.)

Count V: McWane unlawfully conspired with Sigma to monopolize the domestic fittings market in violation of Section One of the Sherman Act. (Compl. ¶68; CC's Pre-Trial Br. at 48-49.)

Count VI: McWane unlawfully monopolized the domestic fittings market through its exclusive dealing policy in violation of Section Two of the Sherman Act. (Compl. ¶69; CC's Pre-Trial Br. at 48-49.)

Count VII: McWane unlawfully attempted to monopolize the domestic fittings market through its exclusive dealing policy in violation of Section Two of the Sherman Act. (Compl. ¶70; CC's Pre-Trial Br. at 48-49.)

Additionally, Complaint Counsel for the first time last week, in its Pre-Trial Brief, alleges that McWane and its competitors also engaged in inappropriate price communications in April 2009 and June 2010. (CC's Pre-Trial Br. at 34-36.) Those allegations - - and Complaint Counsel's allegations regarding the April 2009 list price which it set out on the last day of fact discovery in its Motion For Partial Summary Decision - - are not in the Administrative Complaint and counter to the Commission's own interpretations of the Complaint allegations. If those issues are tried they will be tried over McWane's strenuous objection, as discussed below and in McWane's separate Motion To Exclude Evidence, Or In The Alternative, Motion For Continuance, filed today.

III. FACTUAL BACKGROUND

Respondent McWane manufactures more than 4,000 individual ductile iron pipe fittings in a wide range of diameters, configurations, joints, coatings, and finishes at its last remaining foundry in the U.S., the Union Foundry, and in its foundry in China, Tyler Xin Xin. (Tatman IH, at 14:11-25, 23:4-27:5; *see also* http://www.tylerunion.com.)[1] McWane's competitors include a number of importers (Sigma, Star, MetalFit, Serampore, NAPAC, and ElectroSteel), and a number of domestic foundries (U.S. Pipe, Griffin Pipe, American Cast Iron Pipe Company, and

[1] McWane's ductile iron fittings business is known as Tyler Union.

Backman Foundry), although several of the domestic foundries have stopped or cut back their production in the face of a flood of cheap imports. (*See* Tatman IH, at 47:3-15.)

The Court will hear and see overwhelming evidence of independent (and pro-competitive) decision-making by McWane throughout the alleged conspiracy period. That independent conduct directly contradicts the inferences Complaint Counsel will ask this Court to draw from the circumstantial evidence it has cobbled together in an effort to manufacture the "plus factors" the case law requires to infer an agreement. Indeed, this independent conduct - - these "minus factors" - - overwhelmingly demonstrate that McWane's decisions were independent and that there was no conspiracy. For example:

- It is undisputed that there was no express agreement between the alleged co-conspirators. The Court will hear Complaint Counsel's own expert concede he saw no evidence "that the parties met in some smoke filled room . . . ." (Schumann Dep. at 38:7-10.)
- The Court will see contemporaneous documents and hear McWane testimony regarding its independent decision-making.
- The Court will and read hundreds of sworn denials from every Sigma and Star witness that they discussed and agreed upon prices with anyone from McWane. (*See* Sworn Denials Exh. at 1-8.)
- McWane kept its list prices ***below*** Sigma and Star in Winter 2008 and did not follow large increases they announced.
- McWane ***lowered*** many of its published multiplier discounts in Winter 2008 to levels ***below*** Sigma and Star's published multipliers.
- McWane kept its published multiplier discounts ***below*** Sigma and Star in Spring 2008 and did not follow larger published multipliers they had announced.
- McWane ***dramatically lowered*** its list prices on all medium and large diameter fittings in Spring 2009 to prices far below the list prices Sigma and Star had in effect.
- McWane continued to offer job price discounts throughout this period, including 2008.
- McWane continued to offer rebates throughout this period, including 2008.

- McWane continued to offer price protection throughout this period, including 200.

- McWane continued to offer a host of other price concessions (including freight absorption, extended credit terms, and marketing funds) throughout this period, including 2008.

- McWane expanded into large diameter domestic fittings and the government's own expert will concede that that this segment was competitive and not impacted by any conspiracy.

- McWane sold off inventory into the market.

- McWane did not withhold supply of fittings from the market (and, instead, was scrambling to get enough tonnage to keep Union Foundry alive).

- The Court will see evidence that the structure of the market was not conducive to price fixing, that major distributors like HD Supply, Ferguson, and TDG had significant market or buyer power and routinely obtained price concessions.

- The Court will see evidence that distributors of all sizes routinely demanded and received price concessions.

- The Court will see evidence that McWane lost market share steadily throughout this period, including 2008.

- McWane's blended fittings prices (i.e., imported fittings or domestic sold to open source jobs) declined steadily throughout this period, including 2008.

- McWane's margins on open source fittings declined steadily throughout this period, including 2008.

- The Court will see numerous contemporaneous McWane (and Sigma and Star) documents - - including the very documents Complaint Counsel tries to use to draw its inferences - - that show that each company was ***uncertain*** and often ***upset*** about its competitors' prices.

- The Court will hear that McWane (and Sigma and Star) ***distrusted*** each others' customers letters and other market intelligence they gained because of a long history of each company pricing below its published list and multiplier discounts.

A. McWane Made Independent Pricing Decisions

The prices customers ultimately pay for McWane's fittings depend upon multiple tiers of discounts, which are commonly employed in the industry. First, McWane issues a list price,

which is nationwide and typically only changes every few years. (*See* Tatman IH, at 32:17-33:10.) Virtually no customer pays list price. (*See* McCullough IH at 220:1-7.) Second, McWane issues "multipliers," which are region-by-region and, often, state-by-state discounts off the list price. (*See* Tatman IH 32:17-33:10 ("And multipliers will vary by state. They used to vary a lot more. Your pricing regions in the country have really compressed. If you look historically at our multiplier maps, they have changed a lot").) McWane's multipliers around the country differ based on "where the competitive levels are." (*Id.* at 34:7.) There are also different multipliers, in every region and state, for McWane's domestic and foreign or "blended" fittings. (Tatman IH at 32:17-34:4; *See* Jansen Dep. at 265:19-266:1.) Third, McWane offers "job prices" or "project prices" which are further discounts off the multiplier discount granted based on competition for a specific job. (See Tatman IH, at 37:25-38:5 ("A job price is just a discount off published. If it's the State of Texas the published multiplier is a .29 and the customer calls up and says, Look, I need a .25; I need a .23, if we give that to him, that's going to be a job price."); *See* McCullough IH at 220:6-7 ("Everything is bought off of a job price.").) Fourth, McWane provided additional discounts in the form of rebates. (*See* Tatman IH, at 201:2-12 ("Tyler Union has a rebate program, and the big national guys kind of have specific rebate programs. Most of the people have kind of one generic size fits all. We have rebate on our non-domestic product line. Sometimes we have rebates on accessories, which is like gaskets and nuts and bolts and things like that. And we have a rebate on our domestic product line."), 277:5-12 ("These rebates are intended to be incentives to maintain a certain level of volume of business with us.").) Fifth, McWane at times provided additional price concessions in the form of reductions in freight or credit or other terms. (*See* Tatman Dep. at 16:3-20.)

The evidence will show that McWane has consistently made its pricing decisions independently. (*See generally* Tatman Dep.; Tatman IH.; McCullough Dep.; McCullough IH; Jansen Dep.; Page Dep.) McWane Vice President and General Manager Rick Tatman had day-to-day responsibility for the company's ductile iron fittings business. (*See* Tatman IH at 11.) McWane's decisions were based on its assessment of a wide range of factors, and the evidence will show that McWane always determined its multipliers independently "based on what's the competitive level out there in the marketplace[.]" (Tatman IH, at 44:24-45:1; 109:11-22 ("[i]t's an independent decision. You look at everything. You look at your inventory position. You look at what you need for volume in your plants. You look at do you think you're losing share or gaining share. You look at do you think that you are uncompetitive right now with pricing. Do you look at, you know--do you think that you can actually realize any price and still meet your volume requirements to run your facility. And you put that all together, and you make a judgment call. I wish it was an exact science with an exact formula, and it's just not.").) When Mr. Tatman learned from customers that Star or Sigma "put out a letter" announcing a multiplier change, he "took those into account along with everything else" and made his own "independent decision." (Tatman IH, at 121:12-14; Tatman Dep. at 35:19-36:1 ("Q. And you read them fairly carefully to see what you can learn from those letters about what your competitors are saying to the marketplace? A. . . . It is an input along with a whole host of other things that we look at before we make an independent decision on what we're going to do, but we don't put that much faith in those letters.").)

McWane also made independent decisions to provide special job price discounts, below its multipliers, on a regular basis. (Tatman Dep. at 26:10-27:9 ("Q. So if, for example, you had a multiplier in a geographic area that was a .30 -- A. Uh-huh. Q. -- and you or one of your

competitors offered a .28, you would call that a job price? A. We would call that a job price. Q. Okay. In the 2007-2008 time frame, did McWane offer job pricing? A. A lot. Q. Was that something that you thought was a good idea in the market? A. It is a reaction to the competitive environment that's out there."), 109:17-110:8 ("Q. Do you recall in 2008 determining that in fact incidents of job pricing were decreasing? A. We put out around 500 job prices in 2008. I can't tell you what we put out in 2007 because we weren't tracking it, to my knowledge, in 2007. But I know for 2008 we put out close to 500 job prices. . . . I know when Vince keeps a file, from memory when I looked at it and scanned it, it appeared to be in the range of 500-ish job prices for 2008."); Tatman IH, at 57:13-17 ("Q. And job pricing is an acknowledgement of the fact that Tyler Union's published price is above the competitive price in that market? A. A job price is always going to be a price level below what your published pricing is."); *See* Jansen Dep. at 271:5-8.) McWane granted these lower job prices for a range of reasons, including large volumes. (*See* Tatman IH,. at 37:12-38:9.) It also routinely granted lower job prices if it determined it was necessary to meet or beat its competitors. (*Id.* ("[i]f a big job came up and they needed some help, they'd pick up the phone and say, Look, this is a big job. I need a little help on this. I had to take it short. What are you going to give me? And you give him a job price on that."); Tatman IH, at 41:4-14 ("we assess where we are from a competitive standpoint there and, you know, how far the gap is between what we were publishing and what we were having to sell at. Plus we get competitive inputs from our field guys. Every week they turn in a file that says where things are going at in the marketplace, where the other guys are quoting jobs at, competitive information they get."); McCullough IH at 221:4-18 ("We're constantly lowering the prices to compete with Sigma, Star and others"); Jansen Dep. at 253:15-18 ("Q. Why did you announce then to the industry that you were intending to not do price -- job pricing

in the future? THE WITNESS: I don't believe I'm saying that. We're going to the -- to sell all products off our newly published multipliers. We will continue to monitor the competitive environment and adjust regional multipliers as required to provide [customers] with competitive pricing") (objection omitted).)

In addition, McWane, at times, absorbed freight costs, extended credit terms, and provided other price concessions. (Tatman Dep. at 16:3-20 ("We consider price rebate programs. We consider price cash discount terms because essentially they're getting a cash discount for paying you on time. . . . We consider pricing freight allowance terms. We consider pricing extended payment terms beyond our standard. We consider pricing job pricing that's given out. We're going to consider pricing as any special incentives to a branch. We support your advertising. We're going to kick in so much money so you could take your contractors fishing. We're going to offset so you stock some local inventory there. You want some help with advertising. And so there's a whole--in this industry there's a whole cascade of mechanisms that I call price.").)

McWane's average blended fittings price (the price of imported or domestic fittings sold for open source jobs) declined steadily and substantially throughout 2008, 2009, and 2010 and the business was "break-even[,]" at best. (McCullough IH, at 219:18-220:7 ("I mean, this is a nasty business. It's one of those businesses that like you can see, for us it's a breakeven business").) In fact, McWane's average prices during the latter half of 2008 - -during DIFRA's brief operations - - were actually *lower* than its average prices during the first half of the year. At the same time, McWane's market share decreased from 2008 to 2010 as Star and Sigma's share steadily increased. (Expert Rpt. of Parker Normann ¶¶82, 88.) Further, McWane's cost to buy pig iron, scrap and other raw materials increased by 42% during the first six months of 2008.

(Expert Rpt. of Parker Normann ¶30 Fig. 2B) As a result, McWane's gross profit margin was cut in half in 2008. (*Id.* at ¶¶79-80 Fig. 11.)

B. Sigma And Star Made Independent Pricing Decisions

The evidence, including testimony from witnesses from both Star and Sigma, will demonstrate that both companies made their own, independent price decisions. The evidence will establish that McWane personnel did not have any *advance* discussion of prices or an *agreement* with Star of Sigma.

Dan McCutcheon, Star's Vice President of Sales, was not on friendly terms with McWane and never discussed prices, market share, or any other competitive factors with anyone at McWane. (McCutcheon Dep. at 31:25-32:4 ("Q. Did you agree upon with anyone at McWane what published multiplier Star was going to put out in the marketplace? A. No, sir.") (objections omitted), 34:24-35:5 ("Q. . . . And in that meeting with Mr. Green and Mr. Page, did you, Mr. McCutcheon, agree upon the prices, any price, that Star Pipe was going to charge its customer for ductile iron waterworks fittings? A. No, sir.") (objections omitted), 36:4-8 ("Q. (By Mr. Ostoyich) And I take it, then, you never agreed with him on a price for ductile iron pipe fittings that Star Pipe was offering its customers? A. That's correct.") (objections omitted), 37:20-23 ("Q. All right. At the one discussion you had with Mr. McCullough at McWane, did you and Mr. McCullough discuss ductile iron pipe fittings prices? A. No, sir."), 39:14-39:18 ("Q. (By Mr. Ostoyich) Did you agree with Mr. Walton on a price that McWane was offering for ductile iron pipe fittings? A. No, sir.") (objections omitted), 40:21-41:2 ("Q. Did you agree with Mr. Jansen . . .? A. I did not agree with Mr. Jansen on pricing on ductile iron pipe fittings.") (objections omitted), 41:18-21 ("Q. Did you and Mr. Tatman discuss ductile iron pipe fittings, Mr. McCutcheon? A. No, sir.") (objections omitted).) In fact, Mr. McCutcheon's contact with McWane fittings personnel was both limited and perfunctory. (McCutcheon IH. at 255:14-15,

257:2-6, 257:7-20, 260:6-25, 261:8-20, 261:21-262:6; McCutcheon Dep. at 39:5-9.) Similarly, Star's National Sales Manager, Matt Minamyer, never discussed pricing or marketing strategy with any McWane personnel. (Minamyer Dep. at 14:10-15 ("Q. Okay. During the time that you were national sales manager at Star, did you have any communications with anyone at McWane about pricing or market strategy? A. No.") (objections omitted), 15:17-16:19 ("Q. Okay. Did you personally every have an communications with any competitor while you were with Star about pricing? A. No.").)

Sigma's President, Victor Pais, never had any discussions with McWane regarding pricing. (Pais IH, at 68:12-17 ("Q. Did you ever discuss prevailing market conditions at either of the two different meetings? A. Not at all. Q. Did you discuss your prices or your plans for price increases or price cuts? A. Not at all."), 207:6-9 ("Q. I understand, sir. Did you discuss Tyler Union's new pricing move with Leon McCullough when you spoke with him on April 28? A. No, I did not."), 218: 1-11 ("Q. Did you discuss this plan with Mr. Page in Birmingham? A. No, not at all. Q. Did you discuss import pricing at all with Mr. Birmingham? A. Not at all. Q. I'm sorry, sir, just to ask a general question to be clear on the record. Did you discuss this plan with any of your competitors at this time period by phone, by Email, in person? A. No, not at all.").) Finally, Larry Rybacki, Sigma's Vice President of Sales and Marketing never had any discussions with McWane regarding price. (Rybacki Dep. at 91:20-23 ("Q. And did you have any communications at all with the companies where you talked about doing a big bold move? A. No."), 192:1-8 ("Q. Did you ever talk to him about pricing? A. Never. Q. Ever talk to him about price lists? A. No. Q. Ever talk to him about impending changes to price lists? A. I don't recall ever talking about price lists or anything. I don't.").)

Tellingly, Complaint Counsel has produced *no evidence* suggesting that McWane communicated its January 2008 or June 2008 multiplier changes (or any of the other alleged price increases that Complaint Counsel recently added) in advance to either Star or Sigma. (*See* Complaint Counsel's Objections and Responses to Respondent McWane's First Set of Requests for Admissions ("RFA Responses") at 14.) In fact, the evidence will show that McWane never directly communicated its multiplier changes to Star or Sigma at all.

C. The January 2008 Multiplier Changes

McWane announced a multiplier change on January 11, 2008 for one simple reason: its raw materials prices were increasing dramatically. (Tatman Dep. at 96:21-97:10; Compl. ¶30.) But, it also wanted its published prices to be below Star and Sigma. So, its multiplier change was, in fact, a decrease or no change at all in the majority of states from its published multipliers in mid-2007 and an increase in only a handful of states. (Expert Rpt. of Parker Normann Fig.1.)

That strategy, of staying under Sigma and Star published prices, was consistent with McWane's conduct before the alleged conspiracy. For example, in the Fall of 2007, Sigma reacted to the same increase in raw materials prices by announcing a list price (not multiplier) increase to go in effect in January 2008. At the time, McWane made the independent decision *not to follow* Sigma's list price increase. [redacted] Instead, McWane announced a multiplier change in January of 2008 because its multiplier changes were "not keeping up with where costs [were] going." (Tatman Dep. at 96:21-97:10.) The announced multipliers were higher than Sigma and Star's multipliers in some regions, lower in some regions, and comparable in others. (Rybacki Dep. at 83:18-84:6.)

1. Sigma And Star Independently Decide To Follow McWane's Multiplier Changes When It Suited Their Interests

In early 2008, Star and Sigma were also facing significant cost increases. [redacted] Each company subsequently obtained McWane's January 11 multiplier announcement from customers [redacted] There was no advance coordination or even direct communication between McWane, Sigma, and Star. (McCutcheon IH at 441:2-20, 458:19-24; McCutcheon Dep. at 61:6-62:10.) Star and Sigma read McWane's customer letter after they got it from customers (and not from McWane). Sigma selectively followed McWane and Star rescinded its higher 2007 list price increase. [redacted]

2. McWane's January 2008 Customer Letter Announced That The Company Would Continue To Adjust Multipliers To Stay Competitive

The evidence will show that McWane's January 2008 customer letter was not intended as and did not serve as a communication regarding job pricing. (Jansen Dep. at 253:22-23 ("I don't think I'm announcing that we're not going to do job pricing.").) The evidence will also establish that neither Star not Sigma interpreted the letter to suggest that McWane would stop job price discounts and, in any event distrusted McWane and never believed that McWane was likely to stop job pricing. [redacted]. Moreover, the face of the letter establishes that, contrary to Complaint Counsel's allegations of alleged signaling, McWane announced that it would make additional adjustments to its multipliers as would be necessary to remain competitive. Indeed, consistent with McWane's letter and as discussed below, McWane did not in fact discontinue job pricing after its January 2008 customer letter and, in fact, consistently priced below Sigma and Star.

D. McWane, Star, and Sigma Continued Job Pricing Throughout 2008

The evidence will show that, contrary to Complaint Counsel's claim of conspiracy that depends on the theory that McWane, Sigma, and Star coordinated to eliminate or curtail job pricing, job pricing by each of three companies (i.e., additional *discounting*) continued throughout 2008. McWane continued to offer "[a] lot" of job pricing and put out close to 500 job prices in 2008. (Tatman Dep. at 27:3-5, 109:22.) Numerous contemporaneous documents from the Sigma and Star sales force report their views that McWane was providing job price discounts and leading prices *down* in 2008. [redacted]; RX-037 ("For what it is worth, I was told by [HD Supply, a customer] that Tyler and SIP were at

a .26 and only us and Star are holding the .28") ("from my vantage point it appears that Union/Tyler was the first of the three fitting manufacturers to move to a .25 from .28").)

Similarly, Star "didn't stop job pricing" and, in fact, job pricing was "particularly fierce." (Minamyer IH, at 31: 17-22, 35:9-15.) Customers "routinely" auctioned one supplier off against another for specific jobs or large volumes. [redacted] Star's job prices varied day-to-day and job-to-job, depending on competitive market conditions. [redacted] As a result, Star's fittings business was "not profitable" in recent years and has not been profitable since "before 2008." [redacted]

Sigma also continued job discounts and competitive pricing throughout 2008. (Rybacki Dep. at 24:14-16 ("pricing is so competitive"), 66:19-67:5 ("It had always been competitive . . . extremely competitive . . . prices eroded very quickly"); Rona IH, at 202:16-17 ("pricing in the

market was very competitive"); Pais IH, at 72:4-10 ("market conditions were tough and very competitive . . . really cut throat . . . intense"), 74:2-7 ("very intense").) At Sigma, pricing was a "day-to-day phenomena" and "very dynamic," and they routinely decided to price below their multiplier to win specific jobs. (Pais IH, at 73:11-16.) Prices varied "depending upon the costs, depending upon the market factors." (*Id.* at 85:2-23) Thus, the evidence plainly establishes that the crux of Complaint Counsel's theory of conspiracy--McWane, Star, and Sigma's alleged agreement to eliminate job pricing to raise prices--simply *did not happen.* The evidence of McWane's use of aggressive job pricing and other discounts is, of course, entirely consistent with the empirical economic evidence that McWane's pricing declined steadily during this time period and until February 2009 by 11.6%.[2]

E. McWane's *Lower* June 2008 Multiplier

In late April 2008, Sigma announced it was increasing its multipliers by a very large amount (roughly 40%) due to continued cost increases. (RX-417.) It "hoped" and "prayed" McWane and Star would follow[3], but the evidence will show that Star did not have any discussions about the increase with anyone from McWane. (Pais Dep. at 92:1-22.) Star did follow, but *McWane did not.* [redacted] Although McWane also faced continued cost increases, it internally decided, after learning of the increase letters from customers, that its customers would not accept such large increases. (RX-419; Tatman Dep. at 75:20 ("that was too high").) As a result, *McWane charted its own course and did not follow Star and Sigma.* (Tatman IH, at 127:5-128:5 ("Although Sigma announced an increase in the range of 20 to 40

[2] Complaint Counsel's primary evidence that job pricing actually decreased is a 1st Quarter 2008 Executive Report. (CC's Pre-Trial Br. at 22-23.) This report is based on incomplete data and multiple layers of hearsay. Further, the report is an outlier and contrary to other evidence (cited above) that establishes that the report's description of job pricing by competitors was either wrong or significantly overstated what was actually happening in the marketplace.

[3] The fact that contemporaneous documents establish that an alleged co-conspirator needed to "hope" and "pray" that others would follow is, of course, strong evidence contradicting that the parties had an agreement.

percent, I don't believe we should follow that.") Instead, McWane announced its own multiplier increase on May 7, 2008. (RX-592.) *The announced multipliers were different from - - and substantially lower than - - Sigma and Star's multipliers in 50 out of the 51 states and territories across the country.* For example, McWane's multiplier in New York was .33 (versus .38 for Sigma and Star), McWane's multiplier in Pennsylvania was .40 (versus .48) its multiplier in Florida was .28 (versus .35), its multiplier in California was .33 (versus .42), and its multiplier in Texas was .30 (versus .35). (MWP-FTC_00015846.)

1. Sigma And Star Independently Decide To Follow McWane's *Lower* Multipliers

Star and Sigma learned of McWane's lower multipliers from customers - - not McWane - - and each subsequently decided to rescind *its higher multipliers*, and instead, to follow McWane's *lower multipliers*. [redacted] There is no evidence of any communications between McWane and either Star or Sigma in advance of McWane's multiplier announcement. In fact, there is no evidence of any communication between McWane and either

Star or Sigma regarding the June 2008 announcement at all. Indeed, had there been any such alleged communication on pricing, one would not expect to see the uncoordinated pricing moves that actually occurred here where Sigma's attempt to dramatically increase pricing was thwarted by McWane's substantially lower prices.

F. DIFRA Tons-Shipped Data Did Not "Facilitate" Price Coordination

DIFRA was a short-lived trade association for fittings suppliers that was operational only during the second half of 2008. (Brakefield Dep. at 10:14-19, 11:10-16.) McWane, Sigma, Star, and U.S. Pipe were members. (*Id.* at 13:19.) One of DIFRA's main purposes was to address standardization of technical specifications of fittings in the marketplace, such as product configurations, joints, thickness of the fitting, linings, and coatings. (Brakefield Dep. at 25:17-26:2 ("there [were] so many different approaches to that, that it needed some housecleaning").) DIFRA's operations were overseen by three lawyers, including very experienced antitrust counsel, Thad Long, of the Bradley Arant firm in Birmingham, Alabama. (*Id.* at 14:8-15:12.) Following Mr. Long's guidelines, each member began submitting monthly tons-shipped data for January through April 2008 (and annual tons-shipped data for 2006-07) to a third-party accounting firm, Seller Richardson, in June 2008. (*Id.* at 66:4-70:6.) Sellers Richardson then combined the members' monthly data and sent overall total tons-shipped back to the members the following month. (*Id.* at 39:16-22.)

The evidence will show that the tons-shipped data did not contain any breakdown of the thousands of unique fittings SKUs. Instead, the data was aggregated into broad size-ranges: 2-12", 14-24", and 30" and greater. (*Id.* at 39:16-44:7.) Each broad size-range lumped together dozens, and perhaps hundreds, of unique SKUs. (*Id.* at 39:16-22.) The tons-shipped data did not contain any geographic breakdown of where in the country the tons were shipped. (*Id.*) Nor did it contain any breakdown of whether the shipments were of domestic or imported fittings. As

noted above, fittings multipliers vary region-by-region and state-by-state (and job prices, obviously, vary by job). The tons-shipped data made no such distinction, however. Indeed, the tons-shipped data each month did not reliably reflect anything about price or sales -- not even when they occurred. (*Id.* at 39:16-44:7.) Indeed, many jobs do not ship for six months or more after they are initially bid. Each sale could thus have occurred anytime over a six month or longer period before shipment date. (*See* RX-053 ("SHIPMENT figures should be used, rather than sales, since . . . sales could reflect items whose shipping date is so far in the future as not to reflect reliably current economic activity in the products").)

As a result, the tons-shipped data did not give McWane any insight into their competitors' prices. (Tatman IH, at 104:13-17) ("Q. Is it possible to, by comparing your monthly sales to your share of the DIFRA data, detect discounting on the part of your competitors who are also DIFRA members? A. No."); 107:4-11 ("there's no pricing there"), 122:7-23 ("The DIFRA data isn't going to give me any sense of how they're pricing"); McCullough IH, at 219:15-17 ("DIFRA numbers report nothing as far as prices").) Likewise, Star and Sigma did not have any insight into their competitor's prices based on the DIFRA data. (McCutcheon IH at 329:5-12 ("No, sir. . . . Not from what I got, not from what we received, it's not possible"); 335:10-336:1 ("DIFRA didn't influence the way we ran our business at all . . . [o]n the price side"); Pais IH, at 70: 17-20 ("Q. Could you also use the DIFRA data to figure out where your prices were in comparison to the prevailing market prices? A. Not at all"); Brakefield Dep. (Vol. I) at 37:16-23 ("Q. And was there any exchange of pricing data as part of DIFRA? A. No, sir, none that I saw at all.").)

The evidence will show that the tons-shipped data did not "facilitate" price coordination. On the contrary, McWane charted its own course with lower multipliers after receiving the tons-

shipped data in June 2008 -- *and job price discounts grew even more fierce in the second half of 2008*. (Tatman Dep. at 27:3-5, 109:22; Rybacki Dep. at 121:4-122:22.)

G. McWane's Independent Decision to Dramatically Lower All Medium And Large Diameter Fittings List Prices In April 2009

McWane objects to trial of this late-breaking charge, which was not contained in the Complaint or in any amendment under Rule 3.15, but raised by Complaint Counsel on the last day of fact discovery in its Motion For Partial Summary Decision. McWane addresses this allegation here and, if necessary, at trial over its objection and only to preserve its rights.

Beginning in the summer of 2008, McWane spent six to eight months internally determining how to restructure its 2007 list prices to more closely align its prices with its costs to manufacture fittings of different diameters and to make it more competitive against the imported fittings of Star and Sigma, which had done particularly well in medium (14"-24") and large diameter (30" and above) size ranges. (Tatman Dep. at 44:18-23 ("So we do list prices when necessary, but it's certainly a much deeper level of thought. . . . we actually started working on [the April 2009 list price change] I believe August-September of 2008"), 45:1-47:22.) The result was McWane's dramatically restructured price list, issued by the company on April 14, 2009, which *lowered* McWane's prices significantly on all sizes above 14" and contained only a modest increase on 2" -12" fittings. (*Id.*) McWane expected the net effect across all fittings to be relatively flat pricing.

1. Star Learns About McWane's List Price Decreases After-The-Fact And Independently Decides to Follow

The evidence will show that Star learned about McWane's list price decrease from customers after the fact. [redacted]

[redacted] Sigma asked Star not to follow McWane's new, lower list prices (prices Sigma considered to be "predatorily low") and Star informed Sigma that Star had already decided to follow McWane. (Rybacki Dep. at 297:17-20 ("Q. Just so we're clear on the record, when you say predatory pricing," you're saying McWane's prices were too low? A. McWane's prices were at our cost."); [redacted] Moreover, The Administrative Complaint against Sigma alleged that Sigma invited McWane and Star to "resume" the alleged collusion but "McWane and Star rejected Sigma's invitation to collude." (Sigma Compl. ¶ 38.) The Commission's statement in aid of the Complaints reiterated that "Sigma tried to revive the conspiracy by attempting to convince McWane and Star to raise their prices and resume exchanging pricing data in April 2009. However . . . at this point ***McWane and Star refused Sigma's invitation to collude***." (January 4, 2012 FTC News Release (emphasis added).)

2. The "After-the-Fact" Telephone Conversation Between Star And McWane Had No Impact On McWane's Behavior

Although Mr. McCutcheon did not believe McWane had ever rescinded a list price it had announced, his conversation with Sigma "created some uncertainty in my mind." (McCutcheon Second Dec. ¶16.) Mr. McCutcheon did not want to spend the $25,000 to print and mail his

lower, matching list price out if McWane was going to rescind the lower prices and keep its older, higher list prices in place. (McCutcheon IH at 258:10-11 ("It cost us about $25,000 to print a new price list."); McCutcheon Dep. at 233:11-13 ("We're getting ready to spend 25 grand to print it, and I don't want to have to spend $25,000 and retract it.").) As a result, Mr. McCutcheon testified that he called McWane and spoke with Rick Tatman, and in a brief phone call, "only want[ed] to know one thing" - - whether McWane was going to rescind the lower list prices that McWane had ***already announced***. (McCutcheon Dep. at 43:7-44:10.) In response to Mr. McCutcheon's question about the "one thing" he wanted to know, Mr. Tatman said that McWane's lower list prices were going into effect shortly- - as the company had already informed its customers - - and were not rescinded. (McCutcheon Dep. at 42:13-43:6.)

The only other words spoken during Mr. McCutcheon's call were a brief joke made by Mr. Tatman that he was so confident that McWane would not rescind its lower list prices (having never done so before) that if he was wrong, he would personally pay Mr. McCutcheon's costs if he had to re-print his voluminous price list. (McCutcheon Dep. at 227:8-233:1 ("Q. And did you say to you in words or in substance, "If I retract it, McWane will pay the $25,000 cost"? A. He didn't say McWane. He said, "I'll pay the 25" -- it was a laughing matter at the time, joking. . . . We laughed and hung up the phone.") (objections omitted).) Mr. Tatman has testified that he did not remember Mr. McCutcheon ever calling him. (Tatman Dep. at 179:20-180:18 ("Q. . . . Do you recall getting a call from Dan McCutcheon that day, in the interim between those two e-mails, in which he spoke to you about your list price? A. No, I don't.").) Complaint Counsel has not established exactly when this alleged conversation took place.

The evidence will show that Mr. McCutcheon did not discuss Star's prices or McWane's prices with McWane: "At no point did I discuss with Mr. Tatman specific pricing or price

levels, nor did we reach any agreement or understanding regarding pricing or price levels." (McCutcheon Second Decl. ¶18.). McWane did not have any advance notice regarding whether or not Star would match McWane's new list prices. (Tatman Dep. at 177:15-23 ("Q. Did you know at any point before they put out a letter what they were going to do? A. No. Q. Did you have any conversations with anybody at Star about what they were going to do?" A. No.).) Indeed, contemporaneous documents demonstrate that Mr. Tatman did not know in advance whether Star was likely to follow McWane's lower prices. For example, on April 30, 2009, Mr. Tatman opined to his National Sales Manager, Jerry Jansen, that "I think it will be mid-next week until the dust settles. *If they stick with the old List* and a 0.32/0.35 the[n] we should sell allot in the Northwest."(TU-FTC-0259568 (emphasis added).) Similarly, Mr. Tatman expressed uncertainty when his sales force reported on May 6, 2009 learning of Star's announcement from their customers: "*It would appear* that Star will follow our List and Published multipliers (except for PA) on Fittings and Accessories. This was also what Glenn Fielding said was communicated to him earlier this week. . . . It will now be very interesting to see what Sigma does.. ."(TU-FTC-0032674) (emphasis added).)

There is no evidence that McWane did anything in response to Mr. McCutcheon's call. Indeed, Complaint Counsel does not even argue that McWane changed its behavior in any way as a result of the alleged phone call. As for Star, the phone call had *no impact* on Star's decision to do what it had always done, follow McWane's lower list price. (McCutcheon Second Decl. ¶18 ("At no point did I discuss with Mr. Tatman specific pricing or price levels, nor did we reach any agreement or understanding regarding pricing or price levels. The conversation with Mr. Tatman did not impact or otherwise influence Star's prior, unilateral decision to follow McWane's announced price decrease.").)

Complaint Counsel bases its entire inference regarding the telephone conversation on a single document, dated April 28, in which Tatman says he is "highly confident" that Star will follow. (CC's Pre-Trial Br. at 34.) Although Complaint Counsel puts no date on the McCutcheon call, it asks this Court to assume it occurred on April 28th and asks this Court to infer a violation simply because, earlier in the day, Mr. Tatman expressed uncertainly about what Star would do. Again, Complaint Counsel does not allege that McWane's conduct was in any way affected by the call. Indeed, it is undisputed that McWane kept its dramatically lower medium and large diameter fittings list prices in effect. McWane believes that there is significant evidence that will disprove Complaint Counsel's theory regarding the timing of the alleged phone call and accordingly moves today for a continuance to conduct additional fact and expert discovery on this issue and the June 2010 issue below.

H. Domestic Manufacturing Was "Not A Viable Option" For Sigma In Mid-2009

On September 17, 2009, McWane (through its subsidiary, Tyler Union) entered into a short-term Master Distributorship Agreement ("MDA") with Sigma under which Sigma purchased Tyler Union Fittings for re-sale during the ARRA period. In the months preceding the MDA, Sigma had explored the feasibility of "virtually" manufacturing domestic fittings (i.e., buying them from an outside company and re-selling them) and concluded that virtual manufacturing was "not a viable option" for at least 18-24 months -- long after the ARRA period was over. (RX-284 ¶¶ 4-15; RX-287 ¶¶ 3-14; RX-286 ¶¶ 5-6; Bhattacharji Dep. at 30:24-31:5, 47:15-21, 118:20-119:17, 121:20-124:8.)

The evidence will show that Sigma had not taken the concrete steps necessary to begin virtual manufacturing any time soon. (Rona Dep. at 79:7-23 ("I don't recall us making any formal plans by this date that we were going to go ahead with domestic manufacturing").) [redacted]

[redacted]

[redacted] It owned no foundries and no machining equipment, and did not have any contracts with outside companies to cast or machine fittings. (Rona Dep. at 36:21-23; Rybacki Dep. at 130:12-21.)

Sigma's VP of Engineering believed the 18-24 months it would take to begin virtual manufacturing was too late to supply ARRA jobs (which were largely funded between the statute's passage in February 2009 and mid-2010) and that virtual manufacturing was thus "not a viable option." [redacted]

[redacted]

Because Sigma had no viable option for domestic manufacturing, it approached McWane to determine whether it could buy and re-sell Tyler Union domestic fittings. (Tatman IH, at 211:24-212:6; RX-284 ¶ 15.) The resulting MDA was negotiated at arms' length over several months. The evidence will show that the MDA was pro-competitive because it was the only way Sigma was able to satisfy its customers' demand for domestic fittings during the ARRA period, and it was a benefit to Sigma's customers. (Rybacki Dep. at 147:21-148:22 ("very good for customers"); Prescott Dep. at 35:6-22 ("became very convenient to -- to fill out that shipment because we could get domestic and they were the same.").)

I. Star Successfully Began Selling Domestic Fittings In 2009

In February 2009, following the passage ARRA, Star began exploring the possibility of sourcing and re-selling domestic fittings. In June 2009, Star had announced that it would begin selling a full range of small, medium, and large diameter domestic fittings by the end of 2009. (*See* Star's Price List, available online at http://www.starpipeproducts.com/utilities.asp.) Star did not build or buy a foundry. Instead, it sourced castings from seven of the 100+ domestic foundries that had excess capacity. (McCutcheon Dep. at 8:14-16.) In the Fall of 2009, during its ramp-up phase, Star won its first domestic fittings job.

The evidence will show that Star was quickly successful. In 2010, its first full year with domestic fittings, Star sold domestic fittings to more than [redacted] separate customers -- including more than [redacted] exclusive customers -- and its sales topped [redacted] million. (Trout Decl. at ¶¶ 2-5, 8-9.) Star had nearly [redacted] separate customers in 2010 who each purchased [redacted] or more of its domestic fittings and its biggest customer that year, Hajoca Corporation, purchased more than [redacted]. (Trout Decl. at ¶¶ 2-4, 6, 8, 9.) Star's domestic fittings sales to HD Supply, the

largest national chain, topped $500,000. (Trout Decl. at ¶ 6; Thees IH at 87:14-19.) Star's 2011 sales of domestic fittings also hit [redacted] million -- despite a downturn in demand for domestic fittings following the end of significant "Buy America" funding under ARRA -- and it again had [redacted] domestic fittings customers, including [redacted] exclusive customers. (Trout Decl. at ¶¶ 2-4, 8, 9; McCutcheon Dep. at 135:17-138:10.) Dozens of distributors increased their purchases of Star domestic fittings year over year over year, including the largest national and regional chains like HD Supply (more than 230 branches), Ferguson (more than 160 branches), Win Wholesale (43 waterworks branches), and dozens of large regional chains, such as Dana Kepner (15 branches in MT, WY, CO, TX, AZ and NV). [redacted]

J. June 2010 Multiplier Increases

As with the April 2009 allegations, McWane objects to the trial of this late-raised claim. McWane did not have notice of this claim prior to Complaint Counsel's Pre-Trial Brief filed on August 17, 2012. As such, McWane did not conduct fact or expert discovery regarding the June 2010 multiplier changes. However, Complaint Counsel's arguments are entirely circumstantial and fail on their face. McWane addresses the issue below over that objection.

In the summer of 2010, Star announced a price increase for a fittings-related accessory, *not* DIPF. (*See* CX 1413 at 001.) In June 2010, Sigma crafted and distributed a price increase letter to its customers. (CX 1413; Pais Dep. at 372-377; Rybacki Dep. at 210-213.) The letter announced increases in the list prices of restrained joint products, Protecto 401 lined products, and the net prices on municipal castings. (CX 1413.) The letter also stated that multipliers for non-domestic fittings would be revised. (*Id.*) McWane was unsure whether it would following

Sigma's announced multiplier increase. (CX 2442 ("I'm somewhat concerned about following Sigma from both a market leadership perception and their judgment on what the proper multiplier structure should be. Too large of a published increase would be difficult for both our customers and other import competitors to take seriously....").) So, it did not. McWane announced a multiplier change on June 17, 2010. (CX 2440.) The announcement proposed modest increases in some states, maintaining in other states, and decreasing the multiplier in others. (*Id.*) Star subsequently followed McWane and announced a multiplier change. (CX 1406, CX 2441.) Sigma followed McWane and Star and announced its multiplier change at the end of June. (CX 1396.) There is no evidence that McWane communicated with either Star or Sigma in advance of its multiplier change or that McWane had an *agreement* with Sigma and Star to have the same multiplier discounts or to charge the same prices.

IV. ARGUMENT AND LEGAL ANALYSIS

Complaint Counsel's arguments ignore the facts the Court will see and hear at trial: hundreds of sworn denials of any conspiracy, Star's [redacted]-plus domestic fittings customers and its quick and robust grab of 10% or more of all domestic fittings sales, and Sigma's financial woes in 2009. They ignore the economics: remarkably, they proffer an economic expert who performed no empirical and duplicable test of any issue in the case and, instead, simply wants to usurp the Court's function and offer his untestable say-so interpretation of the documents and testimony the Court will see. And, Complaint Counsel ignores the law. Indeed, the law of conspiracy is clear that an overwhelming record of independent decision-making and sworn denials cannot be ignored in favor of a handful of strained interpretations of documents. The law of monopolization is also clear. It does not protect an inefficient competitor like Star - - which the government's own expert will concede at trial was the case - - from the rigors of rebates and other price competition it could have matched, but chose not to.

A. McWane Independently Determined Its Multipliers In 2008 And Continued Offering Job Price Discounts Throughout The Year

Count I of the Complaint alleges a "conspiracy" in violation of Section 5 of the FTC Act and Section 1 of the Sherman Act. (Compl. ¶¶63-64; CC's Pre-Trial Br. at 48.) "The existence of an agreement is the hallmark" of a conspiracy claim. *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 117 (3d Cir. 1999); *see Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771 (1984) (conspiracy requires proof of "unity of purpose or a common design and understanding or a meeting of the minds in an unlawful arrangement").[4] That requires proof that defendants discussed and agreed upon "a unity of purpose or common design and understanding, or a meeting of minds in an unlawful arrangement." *American Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946). Moreover, the agreement must *precede* the allegedly fixed price. *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1966 (2007) ("when allegations of parallel conduct are set out in order to make a § 1 claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action."). A plaintiff fails to show a preceding agreement if it simply establishes that defendants had an opportunity to conspire and asks the court to speculate that they must have done so. *Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 1013 (3d Cir. 1994) (affirming grant of summary judgment because the "evidence tends to show only an opportunity to conspire, not an agreement to do so"); *Venzie Corp. v. United States Mineral Products Co., Inc.*, 521 F.2d 1309, 1313-4 (3d Cir. 1975) ("an opportunity is significant only if other evidence permits an inference that an agreement did in fact exist.").

[4] An agreement under FTC Act Section 5 requires the same proof as an agreement under Sherman Act Section 1. *See, e.g., FTC v. Cement Institute*, 333 U.S. 683, 691-92 (1948) ("soon after its creation the Commission began to interpret the prohibitions of s 5 as including those restraints of trade which also were outlawed by the Sherman Act, and that this Court has consistently approved that interpretation of the Act.").

1. Complaint Counsel's "Conspiracy" Proof Fails As A Matter Of Law

McWane witnesses have testified that they made all of their price decisions independently, including their decision to issue the January and June 2008 multipliers. (Tatman Dep. at 35:11-36:1; Tatman IH, at 121:12-14.) The Star and Sigma witnesses, likewise, have testified that they never discussed and agreed upon prices with anyone from McWane. (McCutcheon Dep. at 36:9-13 (Q. . . . never agreed with him on a price for ductile iron pipe fittings . . . ? A. That's correct.") (objections omitted); McCutcheon IH, at 245:20-246:15 ("nobody said anything about market share"), 256:5-17 ("There was not a conversation about that"); Minamyer Dep. at 14:10-15, 15:17-16:19; Minamyer IH, at 14:13-18, 15:13-23, 17:12-17; Pais IH, at 68:12-17, 104:6-8, 109:12-15, 225:5-13, 110:8-15; Rona IH at 203:4-6, 210:25-211:14, 214:25-215:4.) Indeed, in total, the evidence establishes more than 250 sworn denials that anyone discussed or agreed upon any price with anyone from McWane. (*See* Sworn Denial Exhibit at 1-8.) The witnesses were clear: they learned about McWane's multipliers from customers *after* the multipliers were announced.

A plaintiff confronted with sworn denials faces a high burden to overcome them: "Facing the sworn denial of the existence of conspiracy, it [is] up to plaintiff to produce *significant probative evidence by affidavit or deposition* that conspiracy existed..." *City of Moundridge v. Exxon Mobil Corp.*, 429 F. Supp. 2d 117, 130 (D.D.C. 2006) (emphasis added) (citation omitted). In *Moundridge*, the defendants testified, as here, that they made their price and output decisions independently. In the face of this testimony, the plaintiffs proffered evidence that defendants had an opportunity to conspire (during a series of industry meetings) and pointed to numerous internal documents that they argued suggested a conspiracy. The district court granted summary judgment because plaintiffs' factual evidence did not overcome the defendants' sworn denials, and in the face of these denials the opinion of plaintiffs'

"liability" expert was entitled to "no weight." No. 04-940, 2009 U.S. Dist. LEXIS 123954, at * 39 (D. D.C. Sept. 30, 2009). The D.C. Circuit affirmed and held that the plaintiffs' "few scattered communications" and other evidence "falls far short" of creating a genuine issue of material fact. *City of Moundridge v. Exxon Mobil Corp.*, 409 Fed.Appx. 362, 364 (D.C. Cir. 2011).

In *Baby Foods*, the Third Circuit similarly affirmed summary judgment in favor of defendants because plaintiffs failed to present significant evidence of a conspiracy sufficient to overcome defendants' sworn denials. The Court found direct evidence lacking even though there was evidence that defendants notified each other of price increases before announcing them to customers and regularly exchanged sales information. *In re Baby Foods*, 166 F.3d at 118-121. Unlike *Baby Foods,* there is no evidence that McWane provided Star or Sigma with proprietary pricing information before issuing its January or June 2008 multipliers (or any other pricing decision) - - indeed, Complaint Counsel conceded that it lacked such evidence in its answers to McWane's Requests For Admission. (*See* Complaint Counsel's Objections and Responses to Respondent McWane's First Set of Requests for Admissions ("RFA Responses") at 14.)

In *Williamson Oil Co. v. Philip Morris USA*, the Eleventh Circuit likewise affirmed summary judgment in favor of defendants despite 11 consecutive parallel price increases announced by every defendant, numerous alleged price "signals" between the defendants suggesting a desire to end a price war (and its subsequent end), regular sharing of very detailed sales information broken down by company, and an expert's opinion that it all amounted to a conspiracy. 346 F.3d 1287 (11th Cir. 2003). The Court found that the plaintiffs' evidence was insufficient to overcome defendants' sworn denials and it would be improper to permit the jury "to engage in speculation" in the face of defendants' denials. *Id.* at 1310. ("None of the actions .

. . that appellants label 'signals' tend to exclude the possibility that the primary players in the tobacco industry were engaged in rational, lawful, parallel pricing behavior.").

The Eighth Circuit reached the same conclusion in *Blomkest Fertilizer, Inc. v. Potash Corporation of Saskatchewan*, 203 F.3d 1028 (8th Cir. 2000). The Court affirmed summary judgment despite evidence that defendants engaged in "a high level of inter-firm communications," including evidence plaintiffs argued demonstrated that the defendants "signaled pricing intentions to each other through advance price announcements," and evidence that all defendants raised their prices "markedly higher." *Id.* at 1033, 1037. The Court found the evidence insufficient to overcome defendants' denials and "far too ambiguous to defeat summary judgment." *Id.; see also Lamb's Patio Theatre, Inc. v. Universal Film Exchanges, Inc.*, 582 F.2d 1068, 1070 (7th Cir. 1978) (affirming summary judgment because plaintiff had only "its bald allegation of conspiracy to refute the sworn affidavit denying a conspiracy"); *American Key Corp. v. Cumberland Associates*, 579 F. Supp. 1245, 1259 (N.D. Ga. 1983) (affirming summary judgment because each of the defendants submitted "sworn affidavits denying the existence of any contract, combination or conspiracy" and plaintiff failed to "come forward with significant probative evidence supporting its allegations of a conspiracy.").[5]

2. McWane's Decision To Chart Its Own Course In 2008 And Star And Sigma's Decisions To Follow McWane Demonstrate Independent Conduct

[5] Complaint Counsel asks this Court to infer that the parties formed a conspiracy based upon a handful of public customer price letters wherein McWane, Sigma, and Star purportedly agreed to "reduce" in some unspecified way one of the many types of price concessions each independently offered. These public letters are insufficient to establish the inference of a conspiracy as a matter of law. Indeed, Complaint Counsel's expert, Dr. Schumann, conceded that it is ***not*** evident from the letters, or otherwise, the specific amount or number of instances of any agreed-upon reduction and, when pressed, conceded that the alleged co-conspirators were not of one mind. (Schumann dep. at 190:11-18, 191:3-15; 192:8-12, 194:12-20.) The Court should resist embracing Complaint Counsel's unfettered reading of Section 5 to condemn normal and independent price communications with customers and follow-the-leader pricing behavior. *See E.I. du Pont Nemours & Co. v. FTC*, 729 F.2d 128, 137-39 (2d. Cir. 1984) (rejecting Commission's attempt to prove unfair method of competition by labeling company price change in oligopolistic market as "signal" or by arbitrarily defining prices as "supra-competitive); *Boise Cascade Corp. v. FTC*, 637 F.2d 573 (9th Cir. 1980) (allegedly similar pricing system adopted by plywood manufacturers constituted mere parallel pricing not in violation of Section 5.)

The evidence establishes that McWane independently decided to chart its own course in January 2008 after Sigma publicly announced a significant list price increase in the Fall of 2007. McWane did not change its list price at all and, instead, issued new -- and in many states, lower -- multiplier discounts. (Tatman IH, at 108:5-109:22, 119:25-121:16, 127:5-128:14, 121:12-14, 122:2-6; Tatman Dep. at 35:19-36:1; Rybacki Dep. at 83:18-84:6.) Star and Sigma each learned of McWane's new multipliers from customers [redacted]. Complaint Counsel cannot show this Court any evidence of any direct communication between McWane and either Sigma or Star regarding any January 2008 price announcements.

Undisputed evidence also establishes that although cost increases continued, *McWane did not follow* Star and Sigma's large multiplier increases in the Spring 2008, after McWane learned of them, but instead, issued multipliers that differed - - *and were lower* - - in 50 of the 51 states and territories across the U.S. Undisputed evidence establishes that Star and Sigma learned of McWane's lower multipliers from their customers (not McWane) and subsequently decided to rescind their higher multipliers and, instead, to follow McWane's lower multipliers. Again, Complaint Counsel can offer no evidence of any direct communications or anything other than unilateral and follow-the-leader pricing action.

It is well-established that a price increase in the face of raw materials cost increases suggests rational independent decision-making, not a conspiracy. *Baby Foods*, 166 F.3d at 131 (document showing that "prices were being raised due to market factors, including increased

costs in raw materials and packaging" reflected defendant's "competitive behavior and not conscious parallelism"). A subsequent decision by other suppliers to follow a price increase, likewise, suggests independent decision-making, not a conspiracy. *Blomkest Fertilizer*, 203 F.3d at 1032-33 (affirming summary judgment because "[e]vidence that a business consciously met the pricing of its competitors does not prove a violation of the antitrust laws."); *Serfecz v. Jewel Food Stores*, 67 F.3d 591, 600-01 (7th Cir. 1995) (affirming summary judgment because "[t]he mere existence of mutual economic advantage, by itself, does not tend to exclude the possibility of independent, legitimate action and supplies no basis for inferring a conspiracy"); *Kreuzer v. American Academy of Periodontology*, 735 F.2d 1479, 1488 n.12 (D.C. Cir. 1984) (plaintiff must provide facts demonstrating that the "acts by the defendants [are] in contradiction of their own economic interests"); *Baby Foods*, 166 F.3d at 129-30 ("[e]ven in a concentrated market, the occurrence of a price increase does not in itself permit a rational inference of a conscious parallelism") (internal citation omitted); *Venzie Corp*, 521 F.2d at 1314 ("[t]he absence of action contrary to one's economic interests renders consciously parallel business behavior 'meaningless, and in no way indicates agreement'.").

Moreover, the undisputed fact that job price discounts continued throughout this period - - "[a] lot," "close to 500 job prices [in 2008]"), "everyday," "constantly," and was "particularly fierce" - - underscores the independent nature of each company's decision-making. (Tatman Dep. at 27:3-5, 109:22; McCullough IH at 72:23-24, 221:3-18; Minamyer IH, at 31: 17-22, 35:9-15).) *In Clamp-All Corp. v. Cast Iron Soil Pipe Institute*, 851 F.2d 478 (1st Cir. 1988) (Breyer, J.), the First Circuit affirmed summary judgment for defendants in a case in which defendants in a concentrated market followed each other's list prices, but - - as here - - routinely offered discounts off list. The Court held that the fact that suppliers "often set prices that deviated from

their price list helps support the inference that the similarity of price lists reflect *individual* decisions to copy, rather than any more formal pricing agreement." *Id.* at 484. Other Circuits agree. *See, e.g., Baby Foods*, 166 F.3d at 128 ("In an oligopoly . . . there is pricing structure in which each company is likely aware of the pricing of its competitors"); *In re Citric Acid Litigation*, 191 F.3d 1090, 1103 (9th Cir. 1999) ("Varni has not . . . produced evidence tending to exclude the possibility that Cargill received these price lists legitimately from customers after they were distributed by competitors"); *Market Force Inc. v. Wauwatosa Realty Co.*, 906 F.2d 1167, 1173 (7th Cir. 1990) ("[i]t is well established that evidence of informal communications among several parties does not unambiguously support an inference of a conspiracy.") Finally, job pricing is only one factor in the final price paid by a McWane customer. (*See* Tatman IH at 32:17-33:10, 34:7, 32:17-34:4, 201:2-12; McCullough IH at 220:1-7; Jansen Dep. at 265:19-266:1; Tatman Dep. at 16:3-20 (discussing list prices, multipliers, rebates, freight and other credit terms.).)

It is well established that "antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case," *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986), and that it is not possible to infer that McWane conspired from the subsequent Star and Sigma decisions to follow McWane's multipliers in January and June of 2008. *See Citric Acid*, 191 F.3d at 1102 ("A section 1 violation cannot, however, be inferred from parallel pricing alone, nor from an industry's follow-the-leader pricing strategy") (internal citations omitted). As an initial matter, Complaint Counsel's evidence does not even support its claim of parallel pricing. *In re Baby Food Antitrust Litigation*, 166 F.3d 112, 132 (3d Cir. 1999) (affirming summary judgment because undisputed facts "refute rather than support" plaintiffs' allegation of parallel conduct and demonstrate that defendants increased prices not

contemporaneously, but rather three to six months after each other); *In re Beef Indus. Antitrust Litig.*, 907 F.2d 510, 514 (5th Cir. 1990) ("When an antitrust plaintiff relies on circumstantial evidence of conscious parallelism to prove a §1 claim, he must first demonstrate that the defendants' actions were parallel....The cattlemen have not done this."); *Clamp-All Corp. v. Cast Iron Soil Pipe Inst.,* 851 F.2d 478, 484 (1st Cir. 1988) (defendants' many price differences "support[ed] the inference that the similarity of price lists reflects individual decisions to copy, rather than any more formal pricing agreement."); *Aviation Specialties, Inc. v. United Techn. Corp.*, 568 F.2d 1186, 1192 (5th Cir. 1978) (affirming summary judgment because plaintiff "brought forth no evidence of parallel behavior suggesting an unlawful agreement"); *LaFlamme v. Société Air France*, 702 F. Supp. 2d 136, 151-153 (E.D.N.Y. 2010) (stating that although "the illegal price fixing need not be exactly simultaneous and identical," the "questionable allegations of parallel conduct here do not match the brazen parallel pricing, price floors, lockstep price increases..." found in cases surviving a motion to dismiss); *In re Late Fee and Over-Limit Fee Litig.*, 528 F. Supp. 2d 953, 962 (N.D. Cal. 2007) (dismissing claim because "the defendants' fee levels have all followed different pricing paths at different times, not even roughly in parallel").

Even assuming parallel conduct, parallel pricing is simply ambiguous conduct that is consistent with independent decision-making and does not "tend[] to exclude the possibility of independent action[.]" *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 768 (1984); *see also Williamson Oil*, 346 F.3d at 1300 (affirming summary judgment: "Evidence that does not support the existence of a price fixing conspiracy any more strongly than it supports conscious parallelism is insufficient to survive a defendant's summary judgment motion"); *Mitchael v. Intracorp, Inc.*, 179 F.3d 847, 858 (10th Cir. 1999) (affirming summary judgment because

"ambiguous conduct that is as consistent with permissible competition as with illegal conspiracy does not by itself support an inference of antitrust conspiracy under Sherman Act section 1"); *Baby Foods*, 166 F.3d at 122 ("no conspiracy should be inferred from ambiguous evidence or from mere parallelism when defendants' conduct can be explained by independent business reasons.") Indeed, inferring that McWane conspired because its competitors followed its lower prices would turn the antitrust laws on their head.

B. There Was No Invitation To Collude And The Tons-Shipped DIFRA Data Did Not Facilitate Price Coordination

Counts II and III of the Complaint alleges that McWane "invited" Star and Sigma to stop job price discounts by sending its January and June 2008 letters to customers and by participating in DIFRA's monthly tons-shipped reporting which, it alleges, "facilitated" collusion. (Compl. ¶¶65-66; CC's Pre-Trial Br. at 48.) But the evidence will show that the letters did not contain any "invitation" regarding job prices and that the Suppliers distrusted each other's price letters and did not expect any supplier to stop job pricing: [redacted]

[redacted] The evidence is undisputed that job price discounts continued throughout 2008 and accelerated during the Fall of 2008 - - during the brief period when DIFRA was operational. The witnesses also flatly deny that DIFRA's tons-shipped data suggested anything about their competitors' prices: "No, sir" "there's no pricing there," "doesn't give me any sense of how they're pricing," "it's not possible," "didn't influence the way we ran our business at all . . . on the pricing side," "No." (Brakefield Dep. (Vol. I) at 93; McCutcheon IH at 329:5-12, 333:11-21; Minamyer IH, at 23:4-8.)

The "invitation to collude" Count (Count III) also fails because no court has ever found an antitrust violation based upon a one-way " invitation" or "offer" or "attempt" or "signal" to collude that was unconsummated. On the contrary, court after court has rejected antitrust liability when presented with a one-way offer. *Liu v. Amerco*, No. 11-2053, 2012 WL 1560170, (1st Cir. May 4, 2012) ("Section 1 of the Sherman Act, however, does not condemn an attempt to conspire, nor a solicitation to conspire"); *Catalano, Inc. v. Target Sales*, 446 U.S. 643, 647 (1980) (per curium) ("advance price announcements are perfectly lawful"); *Baby Foods*, 166 F.3d at 125 ("to survive summary judgment, there must be evidence that the exchanges of information had an impact on pricing decisions"), *Reserve Supply Corp. v. Owens-Corning Fiberglas Corp.*, 971 F.2d 37, 54 (7th Cir. 1992) (advance announcements of price changes "served important purpose" in construction industry because customers "bid on building contracts well in advance of starting construction and, therefore, required sixty days' or more advance notice of price increases"); *United States v. American Airlines*, 570 F. Supp. 654, 657 (N.D. Tex. 1983) (Sherman Act's prohibition of conspiracies "does not reach attempts"), rev'd on other grounds, 743 F. 2d 1114, 1119 (5th Cir. 1984) ("our decision that the government has stated a claim [under Sherman Act Section 2] does not add attempt to violations of Section 1 of the Sherman Act.").

Courts have also rejected any antitrust liability premised upon the theory that a company's decision to participate in a trade association that merely gathers and disseminates aggregated tons-shipped data somehow "facilitated" price collusion. *Williamson Oil*, 346 F.3d at 1313 (in finding that gathering volume data (like here) was entirely consistent with each participant's unilateral self-interest, the Court held that "it is *far less indicative of a price fixing conspiracy to exchange information relating to sales as opposed to prices*") (emphasis added).

In *Williamson Oil*, the Court found that it was "*plainly beneficial* for each individual appellee to keep tabs on the commercial activities of its competitors, so the receipt of the information concerning their sales does not tend to exclude the possibility of independent action or to establish anticompetitive collusion." *Id.* (emphasis added); *Citric Acid*, 191 F.3d at 1103 (no violation of the antitrust laws where Cargill received "price lists legitimately from customers after they were distributed by competitors.").

Complaint Counsel may cite consent orders the Commission entered on administrative complaints about signaling or invitations to collude. But a consent cannot create new law (and, indeed, does not even constitute an admission that any law was violated). That is the province of the courts, *FTC v. Texaco, Inc.*, 393 U.S. 23, 226 (1968) ("ultimate responsibility for the construction of this statute rests with the courts"), and the courts have roundly rejected the theory, as discussed above. Indeed, courts have struck down the FTC's expansive interpretation of "unfairness" under FTC Act Section 5 when, as here, it attempts to penalize competitive conduct based on the "elusive concept" of unfairness which is "often dependent upon the eye of the beholder." *E.I. DuPont de Nemours & Co. v. FTC*, 729 F.2d 128, 137-38 (2d Cir. 1984). The First Circuit's recent *Liu* decision recognized in dicta that the FTC had entered consent orders prohibiting invitations to collude under Section 5, but did not concern an appeal from a Section 5 invitation to collude case.

There is a good reason for this unanimous rejection of any invitation to collude liability in these circumstances: it is consistent with a competitive marketplace. "[I]n competitive markets, particularly oligopolies, companies will monitor each other's communications with the market in order to make their own strategic decisions." *Williamson Oil*, 346 F.3d at 1305, citing *Holiday Wholesale Grocery v. Philip Morris, Inc.*, 231 F.Supp.2d 1253, 1276 (N.D.Ga. 2002);

Blomkest Fertilizer, 203 F.3d at 1036 ("evidence that the alleged conspirators were aware of each other's prices, before announcing their own prices, is nothing more than a restatement of conscious parallelism, which is not enough to show an antitrust conspiracy"); *United States v. General Motors*, 1974 Trade Cas. (CCH) para 75,253 (E.D. Mich. 1974) ("The public announcement of a pricing decision cannot be twisted into an invitation or signal to conspire; it is instead an economic reality to which all other competitors must react.").

Any other rule - - particularly if applied to two customer letters with entirely ordinary and commonplace language and a plain vanilla trade association volume-gathering practice - - would turn the antitrust laws on their head and throttle *competitive* practices that are widespread throughout the economy.

C. McWane Objects To The April 2009 and June 2010 Allegations As Outside The Scope Of The Complaint[6]

The allegations regarding the April 2009 list price increase and June 2010 multiplier increase are beyond the scope of the initial Complaint and should not be considered by this Court. Complaint Counsel raised the April 2009 allegations at the close of business on the last day of fact discovery in its Motion for Partial Summary Decision filed on June 1, 2012. Complaint Counsel raised the June 2010 allegations *for the first time* on August 17, 2012 in its Pre-Trial Brief. The new allegations are clearly beyond the scope of the conspiracy as alleged in the Complaint: the Complaint did not allege a conspiracy related to list prices and did not allege any conspiracy in 2009 or 2010. The Complaint identified the January and June 2008 multipliers as conspiratorial and DIFRA tons-shipped data as a mechanism to facilitate the conspiracy. (Compl. ¶¶ 32-34.) The Complaint did not say anything at all about April 2009 or June 2010. (Compl. ¶¶ 28-38.) Further, the Complaint, on its face, said that the February 2009 passage of

[6] Respondent today files a separate motion requesting that this Court exclude all evidence regarding the April 2009 and June 2010 allegations at trial, or, in the alternative, continue the trial for additional discovery on these issues.

ARRA "upset the terms of coordination" and the Commission acknowledged that DIFRA "disbanded in early 2009." (Compl. ¶ 3; January 4, 2012 FTC News Release, http://www.ftc.gov/opa/2012/01/mcwane.shtm..) The Settlement Complaint with Sigma is verbatim the same on this description ("[b]eginning in January 2008 and continuing through January 2009"), and the Commission's statements in aid of the Complaints both alleged a conspiracy between "early 2008 . . . and January 2009." (Sigma Compl. ¶ 2; January 4, 2012 FTC News Release.) Moreover, the Sigma Complaint also alleged that Sigma invited McWane and Star to "resume" the alleged collusion but "McWane and Star rejected Sigma's invitation to collude." (Sigma Compl. ¶ 38.) The Commission's statement in aid of the Complaints reiterated that "Sigma tried to revive the conspiracy by attempting to convince McWane and Star to raise their prices and resume exchanging pricing data in April 2009. However . . . at this point ***McWane and Star refused Sigma's invitation to collude***." (January 4, 2012 FTC News Release (emphasis added).)

1. Addition Of The April 2009 And June 2010 Allegations Is Prejudicial To McWane

McWane reasonably relied on the language in the Complaint, the Commission's consent orders with alleged co-conspirators Star and Sigma, and the Commission's own public statements regarding the alleged conspiracy for its belief that the charged conspiracy continued only through January 2009. (January 4, 2012 Statement by FTC; Compl. ¶ 3.) Complaint Counsel's attempt to constructively amend the Complaint at the eleventh hour prejudices McWane by misleading it and causing it to omit various preparations and discovery. Specifically, McWane did not conduct any discovery on Star or Sigma's internal decision-making process surrounding the April 2009 list price change, or the June 2010 change in multipliers, which obviously goes to the heart of Complaint Counsel's late-breaking allegations.

The law is clear that the "need for additional discovery" is a sufficient basis for denying constructive amendment to a complaint, even where the parties have long known about the subject matter involved. In *the Matter of Daniel Chapter One,* Dkt. No. 9329, 2009 WL 871702 (FTC Mar. 9, 2009) (Order Denying Respondents' Second Motion to Amend Answer), respondents sought to add an affirmative defense via Rule 3.15(a) that the FTC's complaint burdened their free exercise of religion contrary to the Religious Freedom Restoration Act. *Id.* at *1. Complaint Counsel opposed the amendment. In response Daniel Chapter One's argument that there was no conceivable prejudice to the Complaint Counsel from the amendment *because the religious issue had been involved in the case*, the ALJ stated that the assertion "that allowing a new affirmative defense to be added at this point in these proceedings would not require additional discovery or delay the trial belies logic and reason." *Id.*

Complaint Counsel may argue, based on *Ahmad v. Furlong*, 435 F.3d 1196 (10th Cir. 2006) and *McCree v. SEPTA*, No. 07-4908, 2007 U.S. Dist. LEXIS 4803 (E.D Pa. Jan. 22, 2009) (both cited in the Commission's Opinion), that because the parties fully addressed the April 2009 claim in their summary decision papers, there is no real prejudice. As an initial matter, the June 2010 allegations were not raised as part of Complaint Counsel's Motion for Partial Summary Decision. Additionally, although both cases support the proposition that Federal Rule of Civil Procedure 15(b) applies at the summary-judgment stage, they both involve situations in which *both parties acted in ways that demonstrate their full notice and acceptance of the pleadings that were not literally written. Ahmad*, 435 F.3d at 1203 ("If [defendants] intended to raise the defense and [plaintiff] thought they had, why should a court insist on reading the motion differently?"); *McCree*, 2007 U.S. Dist. LEXIS at *30-31 ("We are persuaded that under the circumstances here, Rule 15(b) provides for constructive amendment of the Complaint to include

Plaintiff's ADA claim since the parties were on notice of the claim for over a year, litigated the claim after Plaintiff asserted it, and *addressed the merits of the claim in their summary judgment briefing*." (emphasis added). The parties in *Ahmad* and *McCree* both addressed the merits of the claim in their summary-judgment filings; McWane has *taken every opportunity to argue that it cannot do so*, particularly with regard to the June 2010 allegations.

Finally, Complaint Counsel's failure to expressly state in its Complaint important aspects of the alleged conspiracy - -aspects that the Commission *knew at the time*- - is itself a basis for denying Complaint Counsel's apparent effort to treat the Complaint more expansively now. *In the Matter of Daniel Chapter One*, 2009 WL at 2 ("[A]bsent special circumstances a party's awareness of facts and failure to include them in pleading might give rise to the inference that the party was engaging in tactical maneuvers." (quoting *Dussouy v. Gulf Coast Inv. Corp*, 660 F.2d 594, 599 (5th Cir. 1981) (Wisdom, J.)). Complaint Counsel's failure to include the allegations in its Complaint, amend the Complaint to reflect the allegations (or to even raise the June 2010 allegations in its Motion for Partial Summary Decision) clearly constitutes the type of "tactical maneuvers" rejected *Daniel Chapter One*.

2. The April 2009 and June 2010 Allegations Are Violations Of Due Process And FTC Rules

The addition of these new allegations so late in the proceedings violates the Due Process Clause of the Fifth Amendment of the United States Constitution. Due Process "requires . . . notice, reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 795 (1983). The remedy Complaint Counsel seeks in its Complaint directly affects McWane's interests. Accordingly, McWane is entitled to procedural due process, which includes advance notice - - prior to the close of discovery - - of the precise

claims against it. Complaint Counsel's attempt to avoid this fundamental due process requirement by raising allegations not contained in -- and contrary to -- the Complaint is a clear violation of McWane's due process rights. *See In re Ruffalo*, 390 U.S. 544, 550-51 (1968) ("[s]uch procedural violation of due process would never pass muster in any normal civil or criminal litigation"); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) ("An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated . . . [and] notice must be of such nature as reasonably to convey the required information."); *Christopher v. Harbury*, 536 U.S. 403, 416 (2002) (the elements of the plaintiff's claim(s) "must be addressed by allegations in the complaint sufficient to give fair notice to a defendant" . . . "the underlying cause of action and its lost remedy must be addressed by allegations in the complaint sufficient to give fair notice to a defendant."); *Seeds of Peace Collective v. City of Pittsburgh*, 453 Fed.Appx. 211, 215 n.3 (3d Cir. 2011) ("we do not consider factual allegations made in Three Rivers' brief but not pleaded in the complaint"); *Kost v. Kozakiewicz*, 1 F.3d 176, 183 n.4 (3d Cir. 1993) ("We firmly reject appellants' attempt to augment the factual record relevant to their claims by the voluminous inclusion in their briefs on appeal of facts not alleged in their complaint or otherwise properly appearing in the record.").

The Court should not consider the newly added allegations because they are violation's of the FTC's own rules. *See* 5 U.S.C. § 706(2)(D) (requiring Courts of Appeals to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . without observance of procedure required by law . . . ."). The Commission has never amended its Complaint. Indeed, Complaint Counsel has never moved for leave to do so. This Court's jurisdiction is limited to the allegations that are actually contained in the Complaint. Even an

amendment under Rule 3.15 - - which, again, Complaint Counsel has never requested - - is permissible "only if the amendment is reasonably within the scope of the original complaint or notice." In addition, of course, a motion to amend must be sent to the Commission itself: "Motions for other amendments of complaints or notices shall be certified to the Commission." (16 C.F.R. § 3.15 (emphasis added).) Complaint Counsel's failure to amend the Complaint means that this Court should not consider evidence related to the April 2009 and June 2010 allegations at trial. *Daury v. Smith*, 842 F.2d 9, 15 (1st Cir. 1988) ("We will not rewrite plaintiff's complaint to contain a count that was not included in it. . . . No motion was made to amend the complaint. We do not think our duty to liberally construe the pleadings gives a plaintiff the license to amend the complaint by memorandum in the district court and by brief in the appellate court.").

McWane is not arguing that the Complaint Counsel had any extraordinary pleading burdens—McWane is only asking for the bare minimum of notice pleading under the Federal Rules and the Rules of the FTC.[7] "[I]t is enough in pleading a conspiracy merely to indicate the parties, general purpose, *and approximate date*, so that the defendant has *notice of what he is charged with.*" *Walker v. Thompson,* 288 F.3d 1005, 1007 (7th Cir.2002) (emphasis added). This has long been the law:

> A general allegation of conspiracy without a statement of the facts is an allegation of a legal conclusion and insufficient of itself to constitute a cause of action. Although detail is unnecessary, the plaintiffs must plead the facts constituting the conspiracy, its object and accomplishment. The plaintiffs have pleaded none of these facts. *Neither the date of the alleged conspiracy* nor its attendant circumstances are set forth.

[7] *See* Fed. R. Civ. P. 8; FTC Rule 3.41(c) ("Every party, except intervenors, whose rights are determined under §3.14, shall have the right of due notice, cross-examination, presentation of evidence, objection, motion, argument, and all other rights essential to a fair hearing.").

Black & Yates, Inc. v. Mahogany Ass'n, Inc., 129 F.2d 227, 231-32 (3d Cir. 1941). And after *Bell Atlantic Corp. v.* Twombly, 550 U.S. 544 (2007), which required sufficient factual allegations to make claims plausible rather than merely possible, there can be no doubt that the absence of sufficient notice of timing is a fatal pleading defect. *See id.* at 565 n.10 (noting that the omission of "time" from the "pleadings" indicated a "lack of notice.").

The Commission's observation that its rules do not "require Complaint Counsel to set out explicitly in the Complaint each and every episode of the allegedly unlawful conduct," Decision at 29, is accordingly irrelevant, because McWane's objection is that the Complaint, as now interpreted by Complaint Counsel, gives it *no* basis for understanding the timing of the alleged conspiracy. The complaint, as actually written, makes *no* suggestion that the alleged conspiracy extended beyond January 2009, and indeed affirmatively states that it ended then (and the Commission's settlements with the other alleged co-conspirators made that reading all but inevitable). It certainly gave McWane no "notice [that it] is charged with" alleged violations in April 2009 and June 2010.

The only alternative reading is worse for Complaint Counsel, not better, because the alternative reading is that *no* reliable "indicat[ion]" of an "approximate date," *Walker*, *supra*, at 1007, was provided. Consequently, the Commission's choice of this alternative is puzzling. It breezily asserted that the Complaint "contains no allegation as to the end date of the conspiracy, or, for that matter, any allegation of the conspiracy ending at all." Decision at 28-29. That point supports McWane, not (as the Commission apparently believed) the Complaint Counsel. The omission of such basic information as the timing of the conspiracy renders the complaint invalid as to anything beyond January 2009. And even if the Commission's decision binds the Court as to the April 2009 events, the most recent expansion to June 2010 has no such protection.

D. McWane Independently Decided To Lower Its List Prices On All Medium And Large Diameter Fittings In April 2009 And Star Independently Decided To Follow

To prove a horizontal price-fixing agreement, Complaint Counsel must come forth with facts that demonstrate McWane and Star had an actual advance agreement to fix the price of fittings. *Twombly*, 550 U.S. at 557 ("preceding agreement"); *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771 (1984) (conspiracy requires proof of "unity of purpose or a common design and understanding or a meeting of minds in an unlawful arrangement") (citation omitted). That requires proof that defendants discussed and agreed upon "a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement." *American Tobacco Co.*, 328 U.S. at 810; *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 117 (3d Cir. 1999) ("The existence of an agreement is the hallmark" of a conspiracy claim).

At most, Complaint Counsel's evidence shows that McWane made its own decision to announce a radical list price *decrease* (on April 14) and that Star subsequently learned about the decrease from its customers and decided to follow (before Mr. McCutcheon called Mr. Tatman). Mr. McCutcheon has flatly denied that he discussed prices with Mr. Tatman in his subsequent, brief conversation and flatly denied that he agreed to follow McWane. (McCutcheon Dep. at 31:18-32:4, 43:19-44:23, 32:11-17, 43:19-44:23; McCutcheon IH at 260:2-3.)

The conversation was, by Complaint Counsel's own concession, brief and inconsequential: McWane did not change its behavior at all, but instead kept its lower list prices in place (and continued to offer multiplier discounts and job price discounts). (CC's Mot. for Summ. Decision at 1-4 ("brief phone call"), 9 ("Before the McWane/Star Communication, both McWane and Sigma had announced their intentions with respect to future prices"). Star did not change its behavior at all: it followed McWane's lower list prices just as it had already decided to do (and continued to offer multiplier and job price discounts). (*Id.* at 1 ("Star intended to

follow McWane"), 3 ("Star had made the decision to follow any price change actually implemented by McWane"), 4 ("Subsequently, Star followed McWane's Announced Price").)

Complaint Counsel's argument that McWane "guaranteed" it would implement the new list prices and offered to pay Star $25,000 if it did not, is simply made-up. Indeed, the word "guarantee" is nowhere in McCutcheon's testimony about the brief phone call - - and Mr. McCutcheon repeatedly stated that he understood Mr. Tatman's comment that he would personally pay for Star's costs if it had to print another voluminous list price to be a joke. (McCutcheon Dep. at 233:14-234:1 (objections omitted) ("Q. And did you say to you in words or in substance, "If I retract it, McWane will pay the $25,000 cost"? A. He didn't say McWane. He said, "I'll pay the 25" -- it was a laughing matter at the time, joking. . . . We laughed and hung up the phone.".) Indeed, the conversation was so non-substantive, Mr. Tatman did not even recall it.

Complaint Counsel admits that the alleged conversation was an *after the fact* communication about a price change and that it had no effect on McWane's behavior or Star's behavior. (CC's Pre-Trial Br. at 33-34 (stating that the telephone call occurred *after* McWane announced its new list prices and Star announced that it would also change its price list).) Courts have uniformly upheld that these types of after the fact communications are lawful. In *Baby Food*, the Court found evidence lacking even though there was evidence that defendants notified each other of price increases *before* announcing them to customers and regularly exchanged sales information. *Baby Food*, 166 F.3d at 117. Unlike *Baby Food*, here it is undisputed that (1) that McWane's April 14th list price announcement lowered its list prices on all fittings above 12," (2) that Star independently decided to follow the lower prices, and (3) the alleged phone call was after McWane's announcement and after Star's decision to follow.

Here, Complaint Counsel, at most, alleges that Mr. McCutcheon called McWane after McWane independently decided to lower its list prices and announced them to customers and after Star had independently decided to follow McWane's lower prices. The brief phone call did not address prices at all and did not result in any agreement that Star would follow McWane's lower list prices, according to Mr. McCutcheon. Moreover - - by Complaint Counsel's own concession - - the call had no effect on McWane's decision. (CC's Motion at 9 ("Before the McWane/Star Communication, both McWane and Sigma had announced their intentions with respect to future prices").)

Complaint Counsel knows full well that the record shows ample evidence that McWane and Star both continued to offer multiplier discounts and job prices below their list prices throughout 2009. It cannot duck those facts by characterizing its made-up claim as *per se* illegal. (CC's Pre-Trial Brief at 65 ("In addition, McWane's April 2009 exchanges of assurances on price with Star is also *per se* unlawful.").) Moreover, it would be particularly perverse - - and contrary to Supreme Court and uniform Courts of Appeals case law - - to infer that McWane's independent decision *to lower* its list prices can magically be transformed into a wrong *by McWane* simply because Star independently decided to follow - - but called to ask about a wild rumor that McWane might rescind its lower prices. Complaint Counsel does not cite any case for that novel proposition, and none exists.

E. McWane Acted Independently By Changing Its Multipliers In June 2010

Complaint Counsel's allegations regarding the June 2010 multiplier increases strain credibility. As noted above, to prove a horizontal price-fixing agreement, Complaint Counsel must prove that McWane, Star, and Sigma had an actual advance agreement to fix the price of fittings. *Twombly*, 550 U.S. at 557 ("preceding agreement"); *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771 (1984) (conspiracy requires proof of "unity of purpose or a

common design and understanding or a meeting of minds in an unlawful arrangement") (citation omitted). Inexplicably, Complaint Counsel alleges both that McWane illegally excluded Star from the market for domestic fittings beginning in 2009 (Compl. ¶¶68-70; CC's Pre-Trial Br. at 48-49.) and illegally conspired with Star (the alleged "victim") to raise prices in June of the following year. (CC's Pre-Trial Br. at 34-36.)

It's clear from the June 2010 allegations that all that is truly alleged (for the first time in Complaint Counsel's Pre-Trial Brief) is follow-the-leader activity that was prompted by public announcements to customers. First, Complaint Counsel resuscitates the same unconvincing arguments regarding "signaling" in the price letters (*Id.*) In reality, the price letters cited by Complaint Counsel are clear and unambiguous. Additionally, Complaint counsel acknowledges that the initial Star announcement *didn't even relate to fittings*. (*Id.*) Second, the June 2010 allegations take place two years *after* the supposed "Tatman Plan" was implemented. Finally, there is absolutely no evidence of any direct communication between McWane, Sigma, and Star regarding the June 2010 announcements. The June 2010 multiplier changes are classic follow-the-leader behavior and not a violation of antitrust laws. *See Citric Acid*, 191 F.3d at 1102.

F. McWane Did Not Have Monopoly Power

Complaint Counsel, in Counts V-VII, allege that McWane conspired to monopolize, attempted to monopolize, and actually monopolized the market for domestic fittings by excluding Star. (Compl. ¶¶68-70; CC's Pre-Trial Br. at 48-49.) McWane's alleged monopolization -- that is, its purported ability to control competition and pricing -- is wholly belied by Plaintiffs' allegations that, during the very period that McWane was at the height of its unlawful exercise of monopoly power with market shares of nearly 100%, entry barriers were minimal or nonexistent, Star successfully entered into and quickly expanded its share of the domestic DIPF market, and McWane's domestic market share dropped. Star's successful

expansion into selling domestic fittings affirmatively disproves any allegations that McWane exercised monopoly power and excluded Star from competing.

Complaint Counsel's argument that McWane's high market share is determinative of monopoly power is incorrect as a matter of law. (CC's Pre-Trial Br. at 81.) Courts uniformly hold that high market share alone is not dispositive of market or monopoly power. *See Eastern Food Servs., Inc. Pontifical Catholic Univ. Servs. Assoc., Inc.*, 357 F.3d 1, 6 (1st Cir. 2004) ("A defendant's high share is only a presumptive basis for inferring market power (entry barriers to the market may be very low); *accord Am. Council of Certified Podiatric Physicians & Surgeons v. Am. Bd. of Podiatric Surgery, Inc.*, 185 F.3d 606, 623 (6th Cir. 1999) ("market share is only a starting point for determining whether monopoly power exists, and the inference of monopoly power does not automatically follow from the possession of a commanding market share"); *Defiance Hosp. v. Fauster-Camron, Inc.*, 344 F. Supp. 2d 1097, 1113 (N.D. Ohio 2004) ("market share is only a starting point for determining whether monopoly power exists."). Indeed, courts recognize that "[m]arket share...does not raise an inference of a dangerous probability of market power if there are low entry barriers or other evidence of the defendant's inability to control prices or competitors." *Confederated Tribes of Siletz Indians v. Weyerhaeuser Co.*, 411 F.3d 1030, 1034 (9th Cir. 2005).

Complaint Counsel cannot demonstrate that there are "significant barriers to entry" into the domestic fittings market sufficient to demonstrate that McWane had monopoly power. Complaint Counsel argues that new entrants into the fittings market "must develop a supply chain and stocking yards throughout the United States, expertise in design engineering, a marketing force, and relationships with Distributors that will carry its products." (CC's Pre-Trial Br. at 7.) As a successful importer of DIPF, Star plainly had the necessary expertise, marketing

force, and relationship with distributors. Complaint Counsel implicitly acknowledges the weakness of its barriers argument by claiming that "McWane's Exclusive Dealing policy represents the *most significant* barrier to entry..." (*Id.* at 82) Indeed, the purported barriers here are no greater for a new entrant than an incumbent and, as a matter of law, do not constitute true "barriers" precluding competitive entry. *See Burlington N. R.R. Co. v. Surface Transp. Bd.*, 114 F.3d 206, 214 (D.C. Cir. 1997) (Surface Transportation Board's definition of entry barriers as "those costs that a new entrant must incur that were not incurred by the incumbent" was reasonable); *Los Angeles Land Co. v. Brunswick Corp.*, 6 F.3d 1422, 1428 (9th Cir. 1993) ("The fact that many lenders do not understand the bowling market does not mean that the capital costs for new entrants and incumbents in the market differ, or that it is any more difficult for new entrants to obtain financing than incumbents"); *see also Richard A. Posner, The Chicago School of Antitrust Analysis*, 127 U. Pa. L. rev. 925, 945 (1979).

In its first full year with domestic fittings, Star had more than [redacted] customers, including more than [redacted] exclusive domestic customers, and [redacted] million in sales. Star's huge (and often, exclusive) customer base and significant sales are dispositive here. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 226 (1993) ("[W]here new entry is easy . . . summary disposition of the case is appropriate"); *Advo, Inc. v. Philadelphia Newspapers*, 51 F.3d 1191, 1202 (3d Cir. 1995). It is well-established that actual entry of a new competitor or actual expansion by an existing competitor "precludes a finding that exclusive dealing is an entry barrier of any significance" *Omega Envt'l. v. Gilbarco, Inc.*, 127 F.3d 1157, 1164 (9th Cir. 1997), and easy entry conditions "rebut inferences of market power." *Tops Mkts., Inc. v. Quality Mkts., Inc.*, 142 F.3d 90, 99 (2d Cir. 1998). Thus, Star's actual successful entry -- the fact that it

has been able to source a full line of domestic fittings and bid for jobs across the country -- conclusively shows that McWane did not (and could not) exercise monopoly power.

1. Domestic And Imported Fittings Constitute A Single Market

"Market definition involves identifying the products to which consumers are willing and able to substitute as a result of a change in price or product characteristics." (Expert Rpt. of Parker Normann, Ph.D. at ¶43.) Complaint Counsel, in reliance on the testimony of Dr. Laurence Schumann, claims that "[t]his case involves two antitrust product markets: (1) Fittings and (2) Domestic Fittings sold for use in projects with Domestic-only specifications." (CC's Pre-Trial Br. at 54, 55-56.) However, both domestic and imported fittings are frequently sold to "the same distributors, sold for the same end use...in every state in the country." (Normann Rpt. at ¶46.) As noted in Dr. Normann's expert report, the ITC determined in December 2003 that DIPF imported from China were used interchangeably with domestic DIPF. (Id. at 50-51 (citing U.S. ITC Publication 3657, Certain Ductile Iron Waterworks Fittings from China, December 2003, p.6.).) Additionally, sellers of imported DIPF regularly lobby to "flip" the specifications of a particular waterworks product from domestic to open. (Normann Rpt. at ¶55 (quoting McCutcheon IH at 96:5-18.).) Finally, much of the demand for domestic DIPF stems from preference for domestic product and not from binding legal requirements. (Normann Rpt. at ¶58.) As a result, and contrary to Complaint Counsel's claims, imported and domestic DIPF constitute a single product market. (Id. at ¶52.)

2. Star Was Not Excluded From Supplying Domestic Fittings

Respondent is unable to find a single case in the history of the federal antitrust laws in which a supplier with more than [redacted] customers, including more than [redacted] exclusive customers, in

its first year in the market segment was considered "excluded." Complaint Counsel essentially argues that Star did not achieve all the success it hoped and dreamed for (CC's Pre-Trial Br. at 86 ("...Star had difficulty making sufficient sales to realize cost efficiencies or justify operating a foundry of its own.")) - - but the antitrust laws do not guarantee that. They only ensure that a company has the opportunity to compete - - and it is undisputed that Star, with [redacted]-plus domestic fittings customers in its first year (and [redacted]-plus exclusive customers), had that by any definition. *United States v. Syufy Enters.*, 903 F.2d 659, 664 (9th Cir. 1990) ("[T]he nature of competition is to make winners and losers.")

Star's [redacted]+ domestic fittings customers (and [redacted]+ exclusive domestic customers) disprove Complaint Counsel's allegation that McWane's rebate policy excluded Star. True, long-term exclusive deals - - and the rebate policy was not one, for the reasons set out by Commissioner Rosch - - are only problematic if they "foreclose competition in a substantial share of the line of commerce affected." *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961). To foreclose competition in a substantial share of the affected line of commerce, the exclusive deals must "foreclose so large a percentage of the available . . . outlets that entry into the concentrated market is unreasonably constricted," *E. Food Servs., Inc. v. Pontifical Catholic Univ. Servs. Ass'n, Inc.*, 357 F.3d 1, 8 (1st Cir. 2004), and significant sellers are "frozen out of a market by the exclusive deal." *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 45 (1984) (O'Connor, J., concurring). Neither Complaint Counsel nor its expert offers any evidence of what percentage of the market Star was allegedly foreclosed from, let alone that the percentage was "substantial," and therefore cannot satisfy its burden of proof. Indeed, the evidence establishes that, as per Star's meteoric rise in the alleged domestic market, the market was wide open.

McWane's rebate policy on its face could not constitute exclusive dealing "as a matter of law" and has been "blessed" by several Courts of Appeals - - as Commissioner Rosch set out in his separate statement disagreeing with the Part 3 action against McWane. Moreover, there was a perfectly legitimate reason for McWane to have the policy: to ensure that the last remaining foundry dedicated to domestic fittings in 3"-24" diameters would have enough volume to stay in business in the face of a long-term flood of cheap imports coming into the U.S. from Korea, China, India, Mexico, Brazil, and elsewhere. Union Foundry was only operating at a fraction of its rated capacity at the time (and still is).

Here, more than [redacted] significant waterworks distributors across the country are already buying Star's domestic fittings. By definition, Star was not "frozen out" of access to them and was not foreclosed. (Aug. 9, 2012 Statement of Commissioner J. Thomas Rosch at 5 ("Thus, the fact that Star attained a 10 percent share of domestic-only DIPF market-from zero share-in less than three years...undermines Complaint Counsel's basic theory that McWane alleged "exclusive dealing" practices made entry difficult or ineffective.").) The fact that Star may not have sold as much product as it hoped and dreamed it would (or as soon as it would have liked) is irrelevant.

3. McWane Did Not Exclude Sigma From Virtual Domestic Manufacturing

In Count IV, Complaint Counsel alleges that the MDA between McWane and Sigma constituted a violation of Section 5 of the FTC Act and Section One of the Sherman Act by eliminating Sigma as a potential entrant into the domestic fittings market. (Compl. ¶67; CC's Pre-Trial Br. at 73.) McWane will introduce evidence that virtual domestic manufacturing was "not a viable option" for Sigma in mid-2009 for at least 18-24 months. It had huge debt, little cash, and sharply declining sales. It had already breached debt-to-earnings covenants with its banks and was in danger of doing so again. [redacted]

[redacted]. It did not own foundries or machine shops and had no contracts with third-party companies to cast or machine fittings. Its board and its banks did not authorize it to exceed its capital expense limits, nor to proceed with virtual domestic manufacturing. It simply had no viable option in the middle of 2009 to participate in domestic jobs during the ARRA period (February 2009-mid-2010). The evidence will also establish that, without the MDA with McWane, Sigma would have been unable to supply its customers with domestic fittings at all during ARRA. (Rybacki Dep. at 141:6-9; Pais IH at 158:13; Bhattacharji Dep. at 121:20-124:8.)

Buy-sell arrangements among competitors are commonplace and not alone anticompetitive, an act in furtherance of maintaining or enhancing alleged monopoly power, or an agreement among competitors to do something illegal. This Court should not infer a conspiracy from Sigma's reasoned business decision not to virtually manufacture domestic fittings. *Twombly,* 550 U.S. at 569 (holding that a company's failure to expand beyond its traditional business and enter a new segment of the market was inconsistent with its self-interest and was not suggestive of any anticompetitive scheme); *In re Baby Food Antitrust Litigation,* 166 F.3d 112, 127 (3d Cir. 1999) (affirming summary judgment for defendants in part because company's decision not to enter a market was "more plausibly explained as an exercise of independent business judgment"). The MDA was pro-competitive, as it allowed domestic ductile iron pipe fittings to reach more distributors and expanded the purchasing options available to end users. Customers even acknowledged that the MDA was beneficial to them, as it provided them additional access to the domestic fittings they needed. (*See* Prescott Dep. at

35:6-22 ("became very convenient to -- to fill out that shipment because we could get domestic and they were the same.").)

Case law makes clear that a party is not an "actual potential competitor" unless it has taken "affirmative steps to enter the business" and has an "intention" and "preparedness" to do so. *Gas Utils. Co. of Alabama, Inc. v. Southern Natural Gas Co.*, 996 F.2d 282, 283 (11th Cir. 1993) ("Inquiry into procedures is insufficient to establish preparedness . . .party must take some affirmative step to enter"); *Cable Holdings of Ga., Inc. v. Home Video, Inc.*, 825 F.2d 1559, 1562 (11th Cir. 1987) (requiring "an intention to enter the business" and a "showing of preparedness"); *Sunbeam Television Corp., v. Nielsen Media Research, Inc.*, 136 F.Supp.2d 1341, 1354 (S.D.Fla. 2011) ("a would-be purchaser suing an incumbent monopolist for excluding a potential competitor . . . must prove the excluded firm was willing and able to supply it but for the incumbent firm's exclusionary conduct"). Sigma had not taken the necessary steps to become a virtual manufacturer. It was thus not an actual potential competitor for domestic jobs during the ARRA period - - and was not excluded by McWane.

G. Complaint Counsel Cannot Prove That McWane's Actions Causes "Substantial Injury" To Consumers

Under Section 5 of the FTC Act, a challenged practice or act is only "unfair" if it "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition." 15 U.S.C. § 45(n). Complaint Counsel has not -- and cannot -- demonstrate "substantial harm" as a result of McWane's conduct as alleged in the Complaint. Courts have held that the substantial harm can be show through "concrete and quantifiable" findings of fact. *See FTC v. Neovi, Inc.*, 604 F.3d 1150, 1157 (9th Cir. 2010) ("The district court acknowledged that the number of fraudulent items created could not be definitively quantified, but it also said

that more than half of the total value of all the checks drawn...came from accounts later frozen for fraud. That *concrete and quantifiable* finding is sufficient to show substantial harm...") (emphasis added); *Orkin Exterminating Co., Inc. v. FTC*, 849 F.2d 1354, 1364-65 (11th Cir. 1988) ("The Commission's finding of "substantial" injury is supported by the undisputed fact that Orkin's breach of its pre-1975 contracts generated, during a four-year period, more than $7,000,000 in revenues from renewal fees to which the Company was not entitled.").

In contrast, Complaint Counsel's expert witness did not even attempt a statistical analysis of the fittings market during the alleged conspiracy or during McWane's alleged monopolistic behavior. (Rebuttal Expert Rpt. of Laurence Schumann, PhD at ¶8 ("I concluded that given these problems, any statistical work I might undertake, irrespective of whether it appeared to support the Complaint or not, necessarily would be unreliable.").) As a result, Complaint Counsel's assertions that McWane's conduct resulted in "restrained competition and led to higher prices for both imported and domestically produced DIPF" is utterly baseless. (Compl. ¶7.)

H. McWane Objects To The Admissibility Of Out-Of-Court Competitor Hearsay

Communications between only alleged co-conspirators Star and Sigma, *and not Mcwane*, are not admissible against McWane.[8] Complaint Counsel bases its entire argument for admissibility on Federal Rule of Evidence 801(d)(2)(E). (CC's Pre-Trial Br. at 52-54; Fed. R. Evid. 801(d)(2)(E) (a statement is not hearsay if it is offered against an opposing party and "was made by the party's coconspirator during and in furtherance of the conspiracy.").) Complaint

[8] In it's brief, Complaint Counsel does not clearly specify the statements it seeks to admit. (CC's Pre-Trial Br. at 53 (generally referring to Sigma and Star's statements before and during DIFRA and the alleged price fixing conspiracy), n266 (referring to the general factual bases of the challenged conduct).) However, Part II of Complaint Counsel's Brief refers to an alleged communication between Victor Pais (Sigma) and Dan McCutcheon (Star) whereby Pais explained that "if both firms kept their actual prices close to McWane's published price, then McWane would 'treat us better and we could live happily ever after.' " (*Id.* at 21.) This statement is inadmissible for the reasons described above.

Counsel's argument is incorrect for two reasons. First, Complaint Counsel cannot prove the existence of a conspiracy between the declarants (Star and Sigma) and McWane by a preponderance of the evidence as required under the Rule. *Bourjaily v. United States*, 483 U.S. 171, 176 ("when the preliminary facts relevant to Rule 801(d)(2)(E) are disputed, the offering party must prove them by a preponderance of the evidence") (1987). Second, even assuming the applicability of Rule 801(d)(2)(E), the statements are not automatically admissible simply because they are not hearsay. (*See* Fed. R. Evid. 401-402 (Relevance); 403 (Prejudice).)

Complaint Counsel cannot meet its burden of proving the existence of a conspiracy to reduce job pricing and illegally tons-shipped data between McWane, Sigma, and Star. The overwhelming evidence at trial will show that the conspiracy as alleged by Complaint Counsel simply *did not exist.* Complaint Counsel concedes that the hearsay statements themselves are not sufficient to prove a conspiracy by a preponderance of the evidence. (CC's Pre-Trial Br. at 53 ("...this Court may consider the proffered co-conspirator statements themselves, *along with other hearsay and non-hear say evidence*, when determining whether a conspiracy existed between McWane, Sigma, and Star.").) In *Bourjaily v. United States*, the Supreme Court did not hold that the hearsay statements *alone* were sufficient evidence to prove a conspiracy between the petitioner and the declarant by a preponderance of the evidence. (*Bourjaily*, 483 U.S. at 181 ("We need not decide in this case whether the courts below could have relied solely upon [declarant's] hearsay statements to determine that a conspiracy had been established by a preponderance of the evidence.")) Instead, the Court noted that the hearsay statements at issue were "corroborated by independent evidence." *Bourjaily*, 483 U.S. at 180.

Since *Bourjaily*, other courts have held the party offering the hearsay statements must also have independent evidence to support the existence of a conspiracy. (*U.S. v. Benson*, 591

F.3d 491, 501 (6th Cir. 2010) (citing *U.S. v. Clark*, 18 F.3d 1337 (6th Cir. 1994) for the proposition that "proof of the defendant's knowledge and participating in the conspiracy must be supported by independent, corroborating evidence other than co-conspirator hearsay."); *U.S. v. Baines*, 486 F. Supp. 2d 1288, 1294 (D.NM 2007) (quoting *U.S. v. Lopez-Guitierrez*, 83 F.3d 1235, 1242 (10th Cir. 1996) ("...the proffered co-conspirator statement alone is not sufficient to establish the existence of a conspiracy...[t]he government must also submit some 'independent evidence linking the defendant to the conspiracy.'")).) The independent evidence --or lack thereof-- in this case proves that there was no conspiracy. There was no direct communication between McWane and either Sigma or Star regarding pricing. McWane *did not follow* its competitors multiplier increases in January 2008 and June 2008. (Rybacki Dep. at 82:17-83:7; Tatman IH 127:5-128:6.) Aggressive job pricing continued throughout 2008. (Tatman Dep. at 27:3-5, 109:22; Rybacki Dep. at 69:18-70:13; RX-037; Minamyer IH at 31:17-22, 33:10-16, 35:9-15; McCutcheon IH at 54:18-55:5; Rybacki Dep. at 24:14-16; Rona IH at 202:16-17; Pais IH at 73:11-16.) McWane's prices, profit margin, and market share all *decreased* throughout 2008. (Normann Expert Rpt. ¶¶27-28 (prices); ¶¶79-80 Fig. 11 (profit margin); ¶¶82, 88 (market share).) Because Complaint Counsel cannot meet its burden that a conspiracy actually existed between McWane, Star and Sigma, communications between Star and Sigma are not admissible against McWane under Rule 801(d)(2)(E).

Complaint Counsel simply assumes, without justification, that if the communications between Star and Sigma clear the hearsay hurdle, they are automatically admissible. Conversations and communications between Star and Sigma --*without McWane*-- are completely irrelevant and of no pro regarding whether McWane entered into an illegal agreement with either company in violation of Section 5 of the FTC Act and are therefore inadmissible. (Fed. R. Evid.

402; FTC Rule 3.43(b).) Even if relevant to Complaint Counsel's allegations, any probative value of the statements is vastly outweighed by their prejudicial impact. (Fed. R. Evid. 403.)

V. REMEDY

The proposed remedies are moot or otherwise flawed as a matter of law. The evidence at trial will show that the proposed remedy as stated in the Notice of Contemplated Relief is unwarranted and moot because (1) ARRA expired more than a year ago; (2) DIFRA has ceased operations and its information-gathering and dissemination activities ended more than three years ago; (3) the MDA between McWane and Sigma was terminated in September 2010 and the parties no longer have a buy-sell relationship; (4) McWane's rebate policy was changed in 2011 and communicated to customers; and (5) Complaint Counsel has no evidence that any of the foregoing are likely to reoccur. Finally, any remedy based on the April 2009 or June 2010 allegations constitute a violation of Due Process for the reasons discussed above.

VI. CONCLUSION

For the foregoing reasons, Complaint Counsel will be unable to establish that McWane violated Section Five of the FTC Act as alleged in the Complaint. This Court should deny the relief sought by the Notice of Contemplated Relief.

Dated: August 31, 2012

/s/ Joseph A. Ostoyich

J. Alan Truitt
Thomas W. Thagard III
Maynard Cooper and Gale PC
1901 Sixth Avenue North
2400 Regions Harbert Plaza
Birmingham, AL 35203
Phone: 205.254.1000
Fax: 205.254.1999
atruitt@maynardcooper.com
tthagard@maynardcooper.com

Joseph A. Ostoyich
William Lavery
Baker Botts L.L.P.
The Warner
1299 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2420
Phone: 202.639.7700
Fax: 202.639.7890
joseph.ostoyich@bakerbotts.com
william.lavery@bakerbotts.com

Attorneys for Respondent McWane, Inc

CERTIFICATE OF SERVICE

I hereby certify that on August 31, 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 overnight 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:

Edward Hassi, Esq.
Geoffrey M. Green, Esq.
Linda Holleran, Esq.
Thomas H. Brock, Esq.
Michael L. Bloom, Esq.
Jeanine K. Balbach, Esq.
J. Alexander Ansaldo, Esq.
Andrew K. Mann, Esq.

By: /s/ William C. Lavery
William C. Lavery
Counsel for McWane, Inc.

McCutcheon 2nd Declaration

This exhibit has been marked Confidential and redacted in its entirety

MWP-FTC_00015846

This exhibit has been marked Confidential and redacted in its entirety

Schumann Rebuttal Report

This exhibit has been marked Confidential and redacted in its entirety

Sworn Denials Exhibit

This exhibit has been marked Confidential and redacted in its entirety

Trout Declaration

This exhibit has been marked Confidential and redacted in its entirety

From:	Rick Tatman <rtatman@tylerunion.com>
Sent:	Wednesday, May 6, 2009 9:51 PM
To:	McCullough, Leon (McWane Executive Vice President) <lmccullough@clowvalve.com>; Walton,Thomas (McWane Sr. Vice President) <twalton@MH-Valve.com>
Subject:	FW: New Multiplier - Star Pipe Products

It would appear that Star will follow our List and Published multipliers (except for PA) on Fittings and Accessories.

This was also what Glenn Fielding said was communicated to him earlier this week.

Also note that they were not going to follow our Joint Restraint (TufGrip) List which had some fairly minor changes. You can make your own assessment to what the message is there.

I would expect their new List to post to the Web within a few days.

We will probably send out our new TufGrip multipliers sometime next week.

It will now be very interesting to see what Sigma does. They've been doing a lot of line item net pricing lately so they may continue that mode for a period of time....although I think they will ultimately have to follow suite.

Richard (Rick) Tatman
VP&GM Tyler/Union
McWane Waterworks Fittings Division
(903) 882-2440
rtatman@tylerunion.com
www.tylerunion.com

From: Star Pipe Products [mailto:marketing@starpipeproducts.com]
Sent: Wednesday, May 06, 2009 6:58 PM
To: Michalek, Ed H [Ferguson] - 1716 NEWINGTON_WATERWORKS
Subject: New Multiplier - Star Pipe Products

May 4, 2009

RE: - Price List Change for AWWA Fittings (See change in effective date)
- State Multiplier Letter for AWWA Fittings
- Effective May 12th, 2009

To Our Valued Customers in the states of:

ME, VT, NH, MA, RI, CT, NY, NJ, DE, MD, VA, WV, NC, SC, GA, FL, PR, AL, MS, TN, KY, OH, IN, IL, MI, WI, MN, IA, MO, AR, LA, TX, OK, KS, NE, SD, ND, WY,

CO, NM, PA

The following multipliers will be effective May 12th, 2009 and will be applicable to the upcoming new AWWA "Utility Fitting, Accessories, and Fabricator Products" Price List UPL09.01 that is also effective May 12th, 2009.

Our current "Joint Restraint Products" Price List will remain unchanged (JRPL.08.01B).

Product Description	***New Multiplier***
• *3" – 48" Utility Fittings C110 & C153*	*.25*
• *3" – 48" Accessories C110 and C153*	*.25*
• *P401 Lined Fittings*	*CALL**
• *3" – 48" Joint Restraint Products*	*No Change*

(please contact your local Star representative for pricing)*

*The new **Price List and associated new multipliers** will be effective May 12th. The new Price List will be on the website shortly @ www.StarPipeProducts.com. Hard copies will be distributed upon request by our sales and customer services departments.*

Please contact your Territory Managers to inform them of existing quotations and annual contracts before May 12, 2009.

We remain committed to earning your business.

Regards,

Matt Minamyer
National Sales Manager
Star Pipe Products

STAR PIPE PRODUCTS
4018 WESTHOLLOW PARKWAY, HOUSTON, TEXAS 77082-4804
www.starpipeproducts.com
T. 281.558.8000
F. 281.558.8001

This message was sent from Star Pipe Products to edward.michalek@Ferguson.com. It was sent from: Star Pipe Products, 4018 Westhollow Pkwy, Houston, TX 77082. You can modify/update your subscription via the link below.

Manage your subscription

From: jjansen@tylerunion.com
Sent: Thursday, April 30, 2009 2:37 PM
To: Rick Tatman <rtatman@tylerunion.com>
Subject: Re: Fowler/Sigma

Really, I loved it that in FL Star says to use our list and a .24. They just can't be the same.

Also, we thought we had 3 truckloads at .23 for Summit in Mississippi for big Gulf Coast job but Sigma came in this week with a .20. Its all 6-12". They have now taken a several huge jobs down there at .20 or lower.

Jerry
------Original Message------
From: Rick Tatman
To: Jerry Jansen
ReplyTo: Rick Tatman
Subject: RE: Fowler/Sigma
Sent: Apr 30, 2009 2:17 PM

Glenn Fielding said yesterday that Star was using our List.

I think it will be mid next week until the dust settles.

If they stick with old List and a 0.32/0.35 the we should sell allot
in the Northwest

Richard (Rick) Tatman
VP&GM Tyler/Union
McWane Waterworks Fittings Division
(903) 882-2440
rtatman@tylerunion.com
www.tylerunion.com

-----Original Message-----
From: jjansen@tylerunion.com [mailto:jjansen@tylerunion.com]
Sent: Thursday, April 30, 2009 1:52 PM
To: Rick Tatman
Subject: Fw: Fowler/Sigma

Fyi. I've heard from Tom Frank and Mike now that said Star isn't
having a new list. I heard from Ruffin that Star was in with HD
Orlando yesterday and said use a .24 off our new list.

Who knows? We will soon find out.

Jerry

------Original Message------
From: mlsnyder503@aol.com
To: Jerry Jansen
ReplyTo: mlsnyder503@aol.com
Subject: Fowler/Sigma
Sent: Apr 30, 2009 12:48 PM

Nelson got a letter from Sigma which stated Sigma will stay on current price pages and hold a .35. He spoke with Star yesterday who said they will stay on current price pages and will offer a .32
Sent from my Verizon Wireless BlackBerry

Sent from my BlackBerry Smartphone provided by Alltel

Sent from my BlackBerry Smartphone provided by Alltel

From:	Mike Walsh
Sent:	Friday, June 25, 2010 09:14:04 AM
To:	Mike Roy; Susan Van Hook; Kevin Flanagan; Richard Hueth; Ken Stephenson; Harry Bair; Julie Bell
Subject:	FW: New Sigma Price Increase Letter
Attachments:	Sigma Price Increase 6-24-2010.pdf

We need to get this letter out today. Each of you need to handle your respective customers. MW

From: lryb446150@aol.com [mailto:lryb446150@aol.com]
Sent: Thursday, June 24, 2010 5:24 PM
To: Iona Shenoy; Chris King; Mike Walsh; Al Richardson; Greg Fox; David Pietryga; Mitchell Rona; Steve Goodwyn
Subject: New Sigma Price Increase Letter

FYI

Cindy Dayotas
Sigma / Allcast Corporation
lryb446150@aol.com

Σ SIGMA *Your Fitting Choice…*

June 24, 2010

To: Sigma Customers in the following territories:

MA, CT, ME, VT, NH, RI, NY, NJ, DE, MD, VA, WV, NC, SC, GA, FL, AL, MS, TN, KY, OH, IN, IL, MI, WI, MN, IA, MO, AR, LA, TX, OK, KS, NE, SD, ND, WY, CO, NM, CA, AZ, HI, and Puerto Rico

Re: The New Multipliers take effect July 1, 2010.

Dear Sigma Customers,

As I stated in my previous letter about the rising costs of producing product overseas, we at Sigma Corporation will be increasing our multipliers to a .29 in the above mentioned territories. The new multipliers will be off our current list prices and will be as follows:

.29 for MJ Push On and Flanged Fittings C110 and C153 (3"- 48")

.29 for Glands and Accessories (3"- 48")

P.O.A. 401 lined and any other special coated Fittings.

Our Domestic Fitting prices remain in effect.

All annual municipal bid contracts will be honored per the terms of the contract. Any job quoted prior to today's letter will be honored through July 31, 2010 provided orders for immediate release have been received prior to July 31, 2010. Thank you for your support and we look forward to working with all of you for many years to come.

Sincerely yours,

Larry

SIGTP00005144
CONFIDENTIAL-FTC Docket No. 9351
FOIA Exempt/Protected by Court Order

CX 1396-002

From: Craig Schapiro
Sent: Friday, June 18, 2010 06:01:56 PM
To: SIGALL
Subject: FW: Star - New Fitting Multipliers

Craig Schapiro
SIGMA Corporation
(800) 999-2550 x238
OEM AWWA Waterworks

From: Star Pipe Products [mailto:marketing@starpipeproducts.com]
Sent: Friday, June 18, 2010 5:52 PM
To: Craig Schapiro
Subject: Star - New Fitting Multipliers

June 18, 2010

TO: *Star Pipe Customers in the following trading areas:*
AL, AR, AZ, CA, CO, CT, DE, FL, GA, HI, IA, IL, IN, KS, KY, LA, MA, MD, ME, MI, MN, MO, MS, NC, ND, NE, NH, NJ, NM, NY, OH, OK, PR, RI, SC, SD, TN, TX, VA, VT, WI, WV, WY

RE: *New Multipliers for Fittings and Accessories Effective July 1, 2010*

To Our Valued Customers:

The following multipliers will be effective July 1, 2010 and will apply to our AWWA "Utility Fittings & Accessories Price List" (UPL09.02). The Price List is on our website at www.starpipeproducts.com.

IMPORT	Size	Multiplier

SIGTP00006846
CONFIDENTIAL-FTC Docket No. 9351
FOIA Exempt/Protected by Court Order

Utility Fittings C110 and C153	3" - 48"	**.29**
Accessories	3" - 48"	**.29**
Protecto 401 Lined Fittings	All Sizes	**POA**

Please provide your local Territory Manager with documentation regarding any existing quotations. Municipal and Annual Contracts will be honored per the terms of the contract, not to exceed one year.

We remain committed to earning your business.

Regards,

Dan McCutcheon

This message was sent from Star Pipe Products to cs1@sigmaco.com. It was sent from: Star Pipe Products, 4018 Westhollow Pkwy, Houston, TX 77082. You can modify/update your subscription via the link below.

Email Marketing by

 Manage your subscription 

From:	Victor Pais
Sent:	Tuesday, June 08, 2010 01:50:32 PM
To:	M20
Cc:	Jim Stohr; Joel Wilmsmeyer; Kane Connor; Mike Walsh; Scott Marlow; Tom Paquette
Subject:	VP to LR : Price Increase Letter
Attachments:	MID-YEAR PRICE INCREASE LETTER-060810.docx
Importance:	High

Larry,

Since our price increase letter at this point is largely a 'heads up' to the customers and the market about our intention to follow suit when Star or others take a definitive action on price increases, I thought the attached revised letter would be more effective. As you can see, it captures the 2 specific actions signaled by Star while adding a few 'wishful thoughts' of our own thrown in, hopefully to create some momentum and traction...

We must note that while increases on F&A and PRPs are our obvious focus, there has been increase on the costs of MCC as well, which get reflected and enacted thru increase in 'floor' prices. Of course, this mechanism has largely frayed as suppliers offer discounts off the FP levels, due to the current weak market demand. Yet, the raw material and labor costs for MCC spiked sharply in Feb – April period. Though some of these pressures have abated a bit, our suppliers, mainly CEC, had to cover themselves for the raw material to produce our new orders, which took a spurt as we were adjusting our lower OHI levels and slightly revived ASFs! Fortunately, due to SB1's dogged patient negotiation, we have mitigated much of this increase and secured a fairly positive pricing package for the recent MCC purchases. (These discounts will be reflected in our AIC over the next few days and should help the respective PCA for June!)

Yet, the import market overall would have experienced a certain increase in MCC costs and as such, I urge each region to reflect a modest increase of say 4% on A items and 6% on others, from 6/15/10. Though MCC market is fragmented and somewhat free-ranging, I am confident SIGMA's lead thru regional general price increase letters, followed by increased price quotes will be readily followed by the regional MCC suppliers.

So, I suggest LR finalizes the attached letter and all regions/SST circulate it ASAP.

So, let's *get-it-done*!

Regards,

Victor Pais
SIGMA Corp.
609-758-0800 x 555 (W)
609-529-2020 (C)
vp@sigmaco.com

SIGTP00006788
CONFIDENTIAL-FTC Docket No. 9351
FOIA Exempt/Protected by Court Order

From: Jim McGivern
Sent: Monday, June 07, 2010 9:42 PM
To: Victor Pais; M20
Subject: RE: VP to LR : Price Increase Letter

Larry
I agree with Victors comments. On the fittings it will be interesting to hear the views of the RMs and Tom. I would say Victor is right about a multiplier increase on the fittings but others may have a different perspective.
Why are we waiting until mid July? Can we not say July 1? I look forward to other comments and then getting the letter out tomorrow.
Regards
Jim

From: Victor Pais
Sent: Monday, June 07, 2010 6:09 PM
To: M20
Subject: VP to LR : Price Increase Letter
Importance: High

Larry,

The plan to increase LIST for PRP is sound and we should go ahead with it, to follow Star's published move.

For P-401, I am not sure who is leading the pricing? Is it C&B? In any case, all involved including Star will have to follow too...

For any FTGs, it will be a confusing situation if we raise LISTs. Even if Star and other suppliers like SIP etc follow suit, what happens if McW doesn't? There will be confusion in the market...

Also, at present, FTG List is all inclusive – S, M and L size all in one. Changing some and not others will be confusing. SB1 likely suggested raising the multipliers...

This may need additional thought – but, I applaud your efforts to improve pricing...
Regards,

Victor Pais
SIGMA Corp.
609-758-0800 x 555 (W)
609-529-2020 (C)
vp@sigmaco.com

From: lryb446150@aol.com [mailto:lryb446150@aol.com]
Sent: Monday, June 07, 2010 4:37 PM
To: M20
Subject: Price Increase Letter

Guys,

Before I send this out I want your feedback.

Larry

Σ SIGMA *Your Fitting Choice...*

June 7, 2010
To: Sigma Customers
Fm: Larry Rybacki
Sub: New list prices on PRP, 401 and Large Diameter Fittings

Dear Valued Customer,

As we enter the mid year, we at Sigma Corporation hope that you, your company, and your families are doing well as we meander through another difficult year.

In order to continue providing you with the level of service that you've been accustomed to, we at Sigma Corporation plan to make a few adjustments to our pricing of a few of our products, to reflect the recent cost trends in the raw material, currency exchange, transportation, health care and other operational expenses. The following is a summary of these changes :

1. The List Prices of all of our Restrained Joint Products will be increased by about 12%.

2. The List Prices of our Protecto 401 Lined products will be increased by about 12%.

3. The Net Prices of our Municipal Castings including Valve Boxes and Meter Boxes will be increased, at a regional basis.

4. The multipliers for Domestic and Non-domestic Restraints will be revised.

5. The multipliers for Non-Domestic Fittings will be revised.

The List Price increases will be published in our website by the start of AWWA – June 20, 2010. The new prices will be in effect Monday July 1, 2010 with no exceptions.

Thank you for your support and friendship and with a little luck we'll find the next 6 months better than the last.

Sincerely yours,

Larry

SIGTP00006791
CONFIDENTIAL-FTC Docket No. 9351
FOIA Exempt/Protected by Court Order

CX 1413-004

From: Rick Tatman
Sent: Thursday, June 17, 2010 8:40 PM
To: Butch Doane (butch.doane@ferguson.com)
Subject: Tyler Union Price Announcement
Attachments: NON DOMESTIC FTG 7-1-10.pdf; MC - Non Domestic 6-17-10.docx; MC - NV Non Domestic 6-17-10.docx; NMC - WA OR ID MT AK Non Domestic 6-17-10.docx; NON DOMESTIC ACCESS 7-1-10.pdf

Butch,

The attached letters will go out this afternoon.

Basically we:

- Moved the prior 0.27 areas to 0.29
- Moved CA, AZ and HI from 0.28 to 0.29
- Moved NV down from 0.32 to 0.29 as the 0.32 was no even where close to the competitive level
- Maintained WA, OR, ID , MT and AK @ 0.32

There will not be any change in Domestic pricing at this point

If you need me to call and discuss further please let me know.

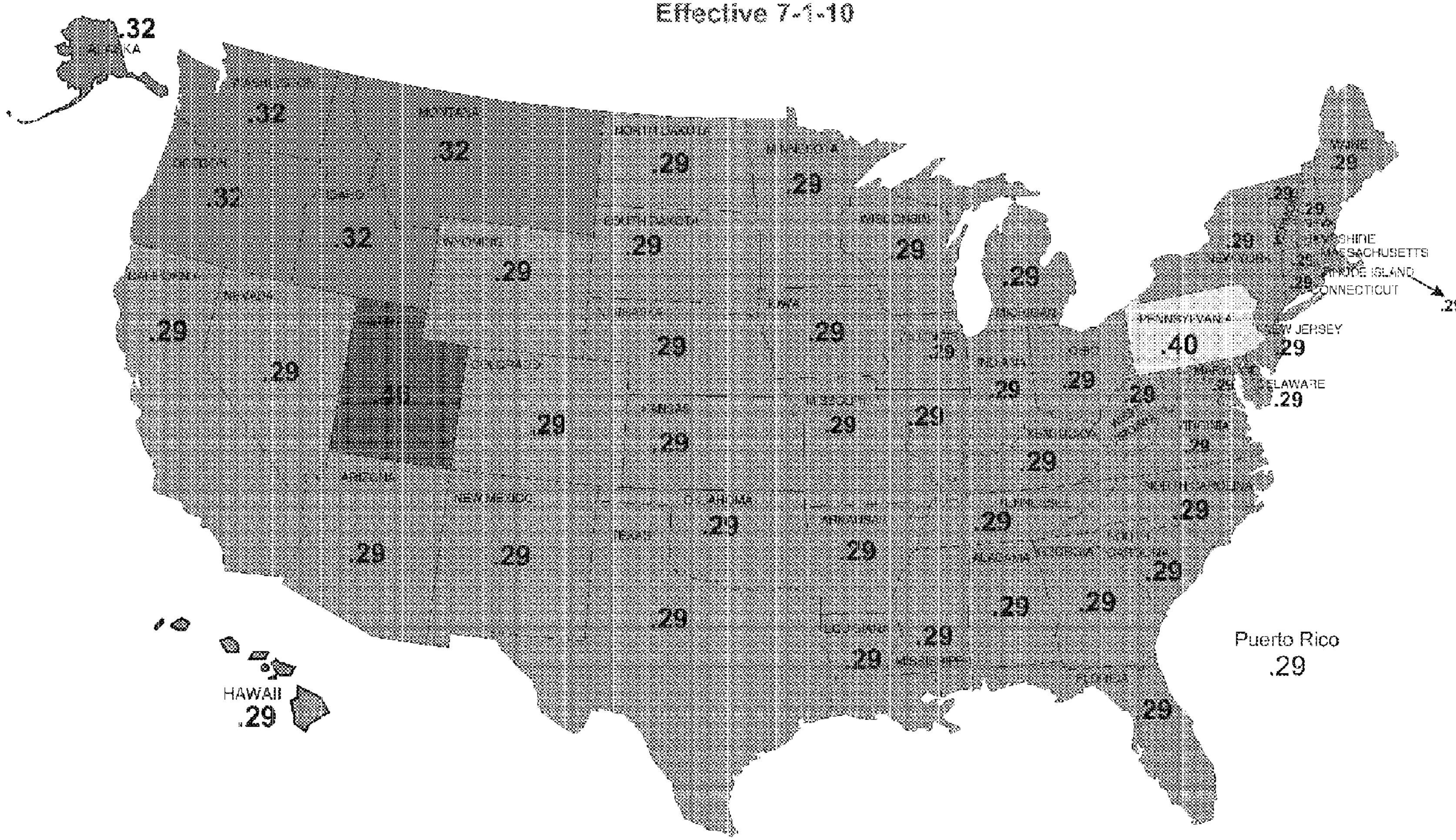
Not sure if you are going to AWWA, but if so I hope to see you in Chicago

Richard S. Tatman

GM & VP Tyler Union
rtatman@tylerunion.com

Non-Domestic Utility Fittings Multiplier Map LP-5091

Effective 7-1-10



Confidential

McWane-018586

CX 2440-002

TYLER UNION®
Quality Waterworks Products

June 17, 2010

To: Tyler Union Customers in the following market areas.

ME, VT, NH, MA, RI, CT, NY, NJ, DE, MD, VA, WV, NC, SC, GA, FL, PR, AL, MS, TN, KY, OH, IN, IL, MI, WI, MN, IA, MO, AR, LA, TX, OK, KS, NE, SD, ND, WY, CO, NM, CA, AZ, HI, Puerto Rico

Re: New Multipliers Effective July 1, 2010

Dear Valued Customer,

Due to rising global costs associated with both the manufacturing and importing of non Domestic iron products, effective July 1, 2010 Tyler Union will be implementing a price increase on all non Domestic ductile iron waterworks fittings, glands and accessory products. This increase will be accomplished by a change in our published multipliers for those products against our current List Price, LP 5091, as follows:

Non Domestic - Import Product Group

.29 Utility Fittings C110 and C153 (3"– 48")

.29 Glands and Accessories (3"– 48")

Non Domestic Valve and Service Boxes - Call for Pricing

We will not be implementing any price action, at this time, for our Domestic products

All annual municipal bid contracts will be honored per the terms of the contract. Jobs quoted prior to today's announcement will be honored through July 31, 2010 provided orders for immediate release have been received on or prior to July 31, 2010.

If you have any questions regarding this announcement, please contact your local Tyler Union territory manager. We look forward to continuing to work together to provide you and the waterworks industry quality products and service.

We thank you for your business and support.

Jerry Jansen
National Sales Manager

TYLER UNION®
Quality Waterworks Products

June 17, 2010

To: Tyler Union Customers in Nevada

Re: New Multipliers Effective July 1, 2010

Dear Valued Customer,

Due to rising global costs associated with both the manufacturing and importing of non Domestic iron products, we announced a price increase for many of our market areas.

Although we are seeing increased costs, we are also committed to keeping our customers competitive within their market areas. As such, effective July 1, 2010 Tyler Union will be implementing a price decrease on all non Domestic ductile iron waterworks fittings, glands and accessory products. This decrease will be accomplished by a change in our published multipliers for those products against our current List Price, LP 5091, as follows:

Non Domestic - Import Product Group

.29 Utility Fittings C110 and C153 (3"– 48")

.29 Glands and Accessories (3"– 48")

Non Domestic Valve and Service Boxes - Call for Pricing

We will not be implementing any price action, at this time, for our Domestic products

All annual municipal bid contracts will be honored per the terms of the contract. If required, jobs quoted prior to today's announcement will be honored through July 31, 2010 provided orders for immediate release have been received on or prior to July 31, 2010.

If you have any questions regarding this announcement, please contact your local Tyler Union territory manager. We look forward to continuing to work together to provide you and the waterworks industry quality products and service.

We thank you for your business and support.

Jerry Jansen
National Sales Manager

TYLER UNION®
Quality Waterworks Products

June 17, 2010

To: Tyler Union Customers in WA, OR, ID, MT, AK

Re: Non Domestic product multipliers

Dear Valued Customer,

Due to rising global costs associated with both the manufacturing and importing of non Domestic iron products, we announced a price increase for many of our market areas.

Although we are seeing increased costs, we are also committed to keeping our customers competitive within their market areas. As such, we will not be adjusting our published multipliers for your market areas. Our published multipliers will remain as per below against our current List Price, LP 5091.

Non Domestic - Import Product Group

.32 Utility Fittings C110 and C153 (3"– 48")

.32 Glands and Accessories (3"– 48")

Non Domestic Valve and Service Boxes - Call for Pricing

We will also not be implementing any price action, at this time, for our Domestic products

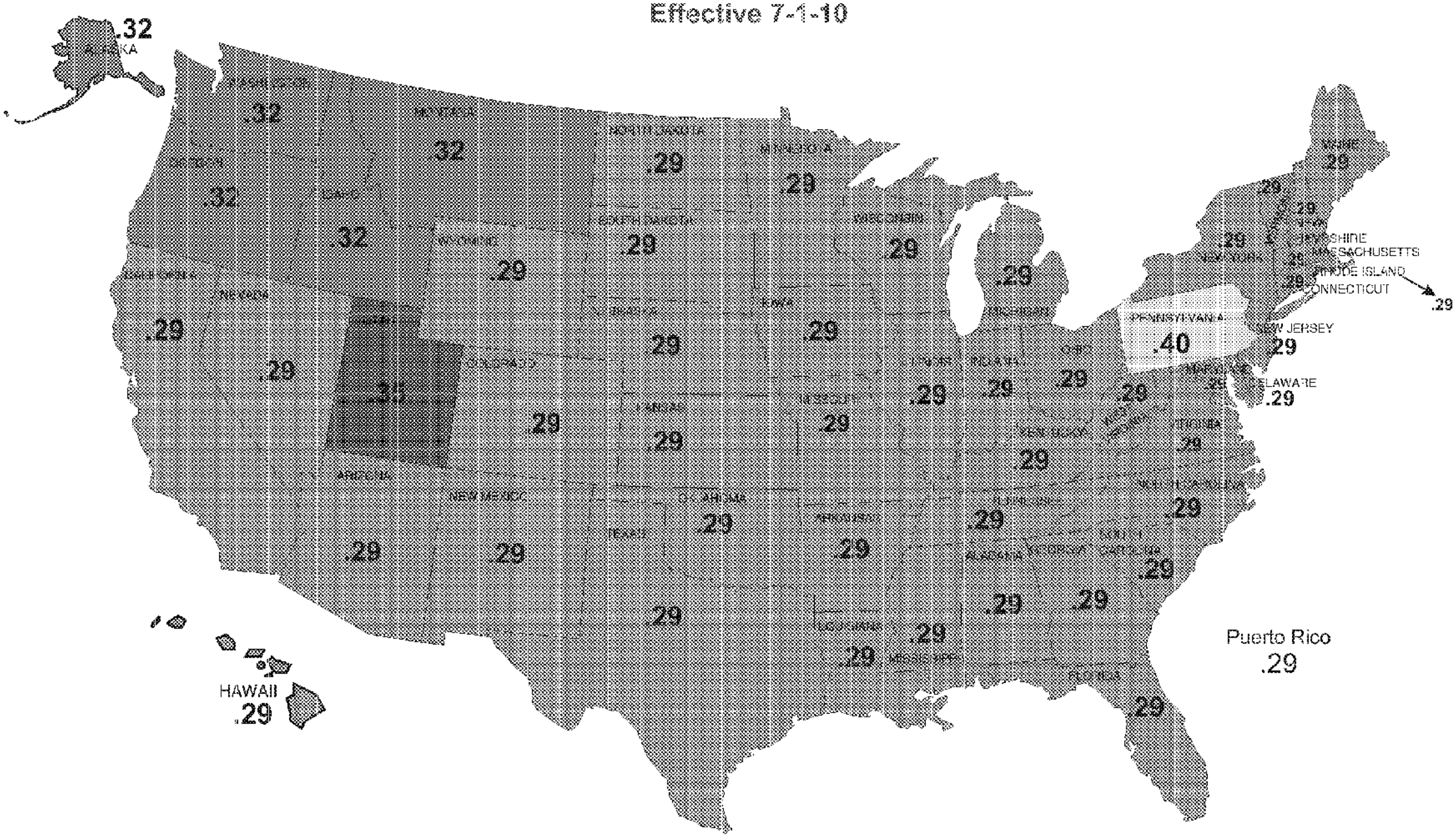
If you have any questions regarding this announcement, please contact your local Tyler Union territory manager. We look forward to continuing to work together to provide you and the waterworks industry quality products and service.

We thank you for your business and support.

Jerry Jansen
National Sales Manager

Non Domestic Accessories Multiplier Map LP-5091

Effective 7-1-10



Confidential

McWane-018590

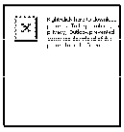
CX 2440-006

From: Rick Tatman
Sent: Saturday, June 19, 2010 6:43 PM
To: Jerry Jansen
Subject: Re: Star - New Fitting Multipliers

Send NW and NV when available

Sent via iPhone

On Jun 19, 2010, at 11:34 AM, "Jerry Jansen" <Jerry.Jansen@tylerunion.com> wrote:

> Fyi
>
> ---
>
> **From**: Curry, Rusty [HDS] <Rusty.Curry@hdsupply.com>
> **To**: Jerry Jansen
> **Sent**: Sat Jun 19 08:08:00 2010
> **Subject**: FW: Star - New Fitting Multipliers
>
> ---
>
> **From:** Star Pipe Products [mailto:marketing@starpipeproducts.com]
> **Sent:** Friday, June 18, 2010 5:53 PM
> **To:** Curry, Rusty [HDS]
> **Subject:** Star - New Fitting Multipliers
>
> 
>
> *June 18, 2010*
>
> ***TO:*** *Star Pipe Customers in the following trading areas:*
> ***AL, AR, AZ, CA, CO, CT, DE, FL, GA, HI, IA, IL, IN, KS, KY, LA, MA, MD, ME, MI, MN, MO, MS, NC, ND, NE, NH, NJ, NM, NY, OH, OK, PR, RI, SC, SD, TN, TX, VA, VT, WI, WV, WY***
>
> ***RE:*** *New Multipliers for Fittings and Accessories Effective July 1, 2010*
>
> *To Our Valued Customers:*
>
> *The following multipliers will be effective July 1, 2010 and will apply to our AWWA "Utility Fittings & Accessories Price List" (UPL09.02). The Price List*

is on our website at www.starpipeproducts.com.

IMPORT	Size	Multiplier
Utility Fittings C110 and C153	3" - 48"	**.29**
Accessories	3" - 48"	**.29**
Protecto 401 Lined Fittings	All Sizes	**POA**

Please provide your local Territory Manager with documentation regarding any existing quotations. Municipal and Annual Contracts will be honored per the terms of the contract, not to exceed one year.

We remain committed to earning your business.

Regards,

Dan McCutcheon

This message was sent from Star Pipe Products to rusty.curry@hdsupply.com. It was sent from: Star Pipe Products, 4018 Westhollow Pkwy, Houston, TX 77082. You can modify/update your subscription via the link below.

Email Marketing by

Manage your subscription

From: Rick Tatman
Sent: Wednesday, June 16, 2010 5:18 AM
To: Leon G. McCullough; Jerry Jansen
Subject: Price Announcement
Attachments: Non Domestic Draft B.docx; Non Domestic Draft A.doc

Tracking:

Recipient	Read
Leon G. McCullough	
Jerry Jansen	Read: 6/16/2010 1:06 PM

Leon & Jerry,

In regards to recent communication from Star and Sigma, I believe our response will be to support a price increase on non domestic fittings, glands and accessories, but not to provide any supporting communication on restraints of other products.

I believe Sigma is waiting for either a supporting communication from us or an announcement on specific price actions.

At this stage we really have two approach options:

1. Send out an "it's coming" communication prior to any further announcements from either Sigma or Star and then quickly decide on what multipliers we want to publish and send out that announcement by week's end to which most likely the others will follow.
2. Send out communication supporting the need for a price increase, wait for Sigma or Star to publish new multipliers and then follow

The attached Draft A supports options #1 and Draft B support option #2.

I am open Jerry's input and Leon's judgment, but I prefer something along the lines of Draft A.

I'm somewhat concerned about following Sigma both from a market leadership perception and their judgment on what the proper multiplier structure should be.

Too large of a published increased would be difficult for both our customers and other import competitors to take seriously which might make any degree of traction difficult.

If we're going to publish, I'll need Thursday morning to analyze data, but my gut sense would be to increase the 0.270 region and potentially not adjust the 0.32 markets in the Northwest as even stock orders are selling @ 0.27 in that market. NV is published @ 0.32 and selling @ 0.23 so I might even align NV with CA.

I'll be driving to Dallas in the morning but can be reached via cell or e-mail on my i-phone.

Once we have a general document, Laura can clean-up my grammar and publish under Jerry's signature.

Richard S. Tatman

GM & VP Tyler Union
rtatman@tylerunion.com

From: MW (Mike Walsh - CRM)
Sent: Wednesday, March 05, 2008 10:50:17 AM
To: 'AR1 (Al Richardson-HTN)'
Subject: FW: VP to AR : RE: SIP & TYLER

Yea....it's about time you started monitoring the mkt pricing!

From: VP (Victor Pais - CRM) [mailto:vp@sigmaco.com]
Sent: Wednesday, March 05, 2008 9:25 AM
To: Larry Rybacki; RM6
Cc: SB1 (Siddharth Bhattacharji-CRM); TB2 (Tom Brakefield - ALX)
Subject: VP to AR : RE: SIP & TYLER

Al,

It's good that we are starting to monitor the mkt pricing -- and equally, sharing the info!

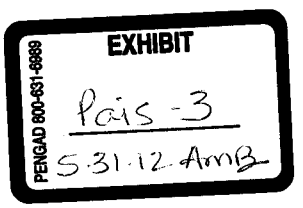
While Tyler and SIP could certainly be lower than the 'MAP' multiplier, we also need to keep an eye on the back-end. SIP may not be having much of a traction withy the VRs, so they may offer it upfront. The same may be true with Tyler who has known to be less aggressive at the VR than Star who in turn has forced us go deep...

Let's keep watching.

Victor Pais
SIGMA Corp
609-758-0800 x 555
609-529-2020 (cell)
vp@sigmaco.com

From: AR1 (Al Richardson-HTN) [mailto:ar1@sigmaco.com]
Sent: Wednesday, March 05, 2008 8:59 AM
To: Larry Rybacki
Cc: VP (Victor Pais - CRM); SB1 (Siddharth Bhattacharji-CRM); RM6
Subject: FW: SIP & TYLER

Al Richardson
SW Regional Manager
Houston, TX
281-987-1200



SIGTP00021606
CONFIDENTIAL-FTC Docket No. 9351
FOIA Exempt/Protected by Court Order

800-999-0109
281-987-0200 Fax

-----Original Message-----
From: GC1 (Glen Chaissan-HTN)
Sent: Wednesday, March 05, 2008 7:57 AM
To: AR1 (Al Richardson-HTN)
Subject: SIP & TYLER

For what it is worth, I was told by HDSWW on Thomas Rd. that Tyler and SIP were at a .26 and only us and STAR are holding the .28.

This is only a verbal acknowledgement and no proof in the form of letters from either mfg'r. I'm not sure how much we could believe them, but
they called me back about an hour later after I had inquired about who's doing what in the market. Let's see if anyone else comes up with
similar information but again, without written proof, it's hard to accept at this point. Could just be a plot to try and get us to react....

As usual, they wanted anonymity on the info.

Glenn

EXHIBIT

9DIFRA

1

DEFENDANT'S EXHIBIT

RX-SR- 9

SRHW-00419

RX-053

From: Long, Thad G.
Sent: Friday, April 25, 2008 4:46 PM
To: 'Tom Brakefield'; 'TB2@sigmaco.com'; 'VP (Victor Pais - CRM)'; 'Dan McCutcheon'; rtatman@tylerunion.com; 'Gary Crawford'
Cc: Herren, K. Wood; McKibben, Michael D.
Subject:

Gentlemen:

This morning there was a conference telephone call to discuss certain issues relating to DIFRA member reporting of data, in which the participants were Tom Brakefield and Victor Pais (Sigma), Tick Tatman (Tyler-McWane) and Dan McCutcheon (Star). Gary Crawford of U.S. Pipe was out of the country but had previously said he would accept whatever decision was made concerning these reporting issues. The subjects of the telephone call were: (1) the format of the reporting forms and reporting standards for assuring that data were being reported in a consistent manner across the various reporting companies; and (2) the geographic area of sales to be included in the reporting data. A consensus was reached on all these outstanding issues, and I am undertaking in this email to summarize the conclusions reached and to integrate them with previous decisions and reiterate them in a single comprehensive summarizing email herein.

1. **Reporting Area Geographically, and Reporting Subject (Shipments, not Sales).** The geographic extent covered by the reporting would include **shipments in tons (short tons - 2,000#)** of the **entirety of the United States and Puerto Rico**, but excluding all of the rest of the world. For example, neither Canada nor Mexico, nor Central America, nor South America nor the Caribbean would be included, but Alaska, Hawaii and Puerto Rico would be included. Please note that SHIPMENT figures should be used, rather than sales figures, since sales can be canceled and never shipped, and sales could reflect items whose shipping date is so far in the future as not to reflect reliably current economic activity in the products. Reporting forms have been attached.

2. **Elimination of Duplications in Reporting.** Reporting companies would exclude, from reported shipments, all shipments to other DIFRA members who also report. Thus if member A ships to member B, member A would subtract out of its report whatever the shipments were to member B; but when member B ships the items it has purchased from member A, member B would report those shipments. In that manner, there will be no duplication of shipments of the same items from two companies which each make shipments of the same physical items. To elaborate further, if a DIFRA member ships to another ductile iron fittings supplier which is NOT a DIFRA member (such as a smaller importer of ductile iron fittings), the shipping member WOULD report that shipment, because there would be no duplication in any of the reported sales data, since the purchaser in this example in not a DIFRA member and would not be participating in supplying data.

3. **Definition.** "Non-Flange fittings" mean mean all types of fittings, specialty or otherwise, which are not flanged fittings, such as MJ, restrain, grooved and flanged configurations (such as MJ & flange, TJ & flange, etc.)

4. **Commencement of Reporting, Timeframes, and Reporting Deadlines.** It was determined in the conference call that reports would be submitted by all DIFRA members no later than May 15, 2008 (which would reflect data for April 2008 and

for prior time periods as will be indicated below), and that monthly reports would thereafter be made by the 15th calendar date of each month for data referable to the immediately preceding calendar month. The initial reports which would be filed by May 15, 2008 would also reflect some "catch-up" data for the years 2006 and 2007. For the year 2006, it is necessary only to report annual aggregate data for that entire year. For the year 2007, monthly data should be reported to that year-to-year variations can be ascertained relative to 2008. At this time, DIFRA has elected to utilize the accounting firm of Sellers Richardson Watson Haley & Logan LLP CPA, 2100 Southbridge Parkway, Birmingham, AL 35209, to compile the data and to report back to each member, monthly, aggregate data only with no information provided as to sales by any single company. The data should normally be sent to the attention of Rick Haney at Sellers Richardson, unless otherwise advised.

I would appreciate your comments on the reporting forms and the criteria which govern the filling out of the forms, as set forth above. I look forward to hearing from you when you have had an opportunity to review this email and its attachments to be sure I am accurately reflecting the decisions you have made. Thanks. My best. Thad Long

Thad G. Long

For Attorney Profile click below

Thad G. Long

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Ductile Iron Fitting Research Association
Schedule of Ductile Iron Waterworks Fittings (Trade Tons Shipped)
For the Year Ended December 31, 2006

	total 2,006
Member Name	
2"-12"	
Flanged	0
All Other	0
14"-24"	
Flanged	0
All Other	0
> 24"	
Flanged	0
All Other	0
Total Trade Tons Shipped	0

SRHW-00422

RX-053.0004

3/1/2012

Ductile Iron Fitting Research Association
Schedule of Ductile Iron Waterworks Fittings (Trade Tons Shipped)
For the Year Ended December 31, 2007

Member Name	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	YTD
2"-12"													
Flanged	0	0	0	0	0	0	0	0	0	0	0	0	0
All Other	0	0	0	0	0	0	0	0	0	0	0	0	0
14"-24"													
Flanged	0	0	0	0	0	0	0	0	0	0	0	0	0
All Other	0	0	0	0	0	0	0	0	0	0	0	0	0
> 24"													
Flanged	0	0	0	0	0	0	0	0	0	0	0	0	0
All Other	0	0	0	0	0	0	0	0	0	0	0	0	0
Total Trade Tons Shipped	**0**	**0**	**0**	**0**	**0**	**0**	**0**	**0**	**0**	**0**	**0**	**0**	**0**

Ductile Iron Fitting Research Association

Schedule of Ductile Iron Waterworks Fittings (Trade Tons Shipped)

For the Year Ended December 31, 2008

Member Name	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	YTD
2"-12"													
Flanged	0	0	0	0	0	0	0	0	0	0	0	0	0
All Other	0	0	0	0	0	0	0	0	0	0	0	0	0
14"-24"													
Flanged	0	0	0	0	0	0	0	0	0	0	0	0	0
All Other	0	0	0	0	0	0	0	0	0	0	0	0	0
> 24"													
Flanged	0	0	0	0	0	0	0	0	0	0	0	0	0
All Other	0	0	0	0	0	0	0	0	0	0	0	0	0
Total Trade Tons Shipped	**0**	**0**	**0**	**0**	**0**	**0**	**0**	**0**	**0**	**0**	**0**	**0**	**0**

SRHW-00424

RX-053.0006

3/1/2012

Ductile Iron Fitting Research Association

Schedule of Ductile Iron Waterworks Fittings (Trade Tons Shipped) - 2008

Total DIFRA - 2007	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Total Year
2"-12"													
Flanged	0	0	0	0	0	0	0	0	0	0	0	0	0
All Other	0	0	0	0	0	0	0	0	0	0	0	0	0
14"-24"													
Flanged	0	0	0	0	0	0	0	0	0	0	0	0	0
All Other	0	0	0	0	0	0	0	0	0	0	0	0	0
> 24"													
Flanged	0	0	0	0	0	0	0	0	0	0	0	0	0
All Other	0	0	0	0	0	0	0	0	0	0	0	0	0
Total Trade Tons Shipped	**0**	**0**	**0**	**0**	**0**	**0**	**0**	**0**	**0**	**0**	**0**	**0**	**0**

Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	YTD

SRHW-00425

RX-053.0007

3/1/2012

From: SB2 (Stuart Box - CRM)
Sent: Friday, April 24, 2009 11:36:07 AM
To: VP (Victor Pais-CRM); OEM5
Cc: Ron DRMetals
Subject: RE: VP to OEM team : BA Options

Victor,

I thought I would go ahead and give a short "brain dump" of my knowledge of what it would take for us to make fittings domestically in advance of a conference call.

Also, I spent some time last year looking at possible sources for a domestic SLD. I will send my analysis separately.

TOOLING:

1. USP fittings patterns and core boxes, 4-24 inch, at MFT are not c153. They are close to C110. Wall thickness is c110 but lay length is somewhat different.

2. USP large diameter tooling is all at ACIPCO. These patterns are not C153. Lay length would be c153 but the wall is c110.

3. USP has, in storage in Chattanooga, a full line of (4-12) c153 patterns and core boxes that are currently set up for ISO/metric push on. These patterns and core boxes would require MJ bell tooling development.

4. The cope and drag patterns and core boxes for the MJ C153 fittings that were made at USP were scraped. There is some hit and miss tooling available but I do not have a comprehensive list. We could probably get one from Steve Hembree as he was the USP guy that knew the most about the tooling and was responsible for the idling of Chattanooga and this included the tooling disposition.

5. The USP patterns at MFT (4-24) and ACIPCO (30-64) are all set up to be modular and can be converted to make flange and mj fittings. USP has the flange conversion tooling in storage in Chattanooga. I am not sure about the MJ conversion tooling?

6. One thing to remember is that if the tooling, at MFT and ACIPCO, is moved to a domestic foundry, that foundry will then be required to make all the TR Flex and HP Loc that are now being made at MFT and ACIPCO. Would USP be willing to move all that business to us?

CASTING:

1. There is a foundry still operating in downtown Chattanooga called **Eureka**. They made a significant number of fittings for USP when we had a backlog that was too large for our no-bake unit to handle. If my memory is correct they can make up to 48 inch in their no- bake foundry. There is also a green sand line that could make small diameter. This is a family owned business and I know the owners quite well. Jim Swafford and I

EXHIBIT

actually are the ones from USP who coordinated USP outsourcing with them. They are very qualified and did a great job for USP. USP had work at Glidewell that we moved to Eureka, as we found **Glidewell** difficult to work with. McWane has quite a bit of stoke with Glidewell as a result of their V&H volume booked there. It is my opinion that fittings do not fit well at Glidewell and business would need to be very bad for them to actively seek fittings work. Compared to what they currently make, fittings are a poor mold yield. If I remember correctly, Glidewell sells off of "mold revenue" and this would cause the fittings price per pound to be quite high.

2. **Southern Ductile** is a very capable facility for what they do. Unfortunately, their molding equipment does not lend itself to a wide size range of fittings. I think they have (3) Hunter 20 molding lines that can only make some 4 and 6 inch fittings. These are flaskless molds. They also have a BMM cope and drag line that might be able to make 12 inch fittings, but I do not know the flask depth. If it is less than 12 over 12 then it would be limited to 12 inch flange and maybe 16 inch MJ. Obviously, this is just my opinion based on past fitting manufacturing experience.
3. The 4-12 inch fittings should be made on a Disa if we want the best possible cost per pound. Unfortunately, we do not have access to any Disa fittings tooling that I am aware of. A set of tools, patterns core box and changeable ends, for MJ and Flange tooling would cost about 30-40 k each. We would need to conduct an analysis to see if this option would be a sound business decision.
4. Lost foam fittings might be a good solution to the machining issues below. **Mueller in Albertville** probably needs the volume. A set of tooling for foam is not much different than what is required for a DISA and the cost per pound is about the same. I think MA could make up to 16 inch with their existing equipment. MA also has equipment for machining flange fittings.

MACHINING:

1. We currently do not have the equipment at any of our facilities to machine flange fittings. The simple way to handle this is with HMC's (horizontal machining centers). They offer the most flexibility, but could be a thru put issue if the volumes are large.
2. We do not have the equipment, and we will also find that most of the casting producers do not have the equipment, to drill bolt holes in MJ fittings. All of the USP tooling is set up so that this drilling is required. None of the bolt holes are cored.
3. Specialty equipment for these machining functions might be available on the used market, but it would be hit and miss.

LINING and PAINTING:

1. You should be aware that neither Glidewell or Eureka were interested in cement lining or painting USP material. I think that Eureka would be more receptive to the idea especially if we could book enough business with them. However, machining is required prior to lining and most commercial foundries do not have this capability.
2. We could ship castings to ALX and gear up m26 for the lining and coating. By gear up, I mean that we would have to invest in the plant and equipment to minimize our labor cost. Depending on the volume of fittings to be processed, there could be some environmental concerns. However, any environmental issues will be much easier to handle in Coosa County AL than any of our other locations.
3. I have been asking Mike Hayes when ACIPCO is going to give us the opportunity to move into step two of our ASD plan, which includes the opportunity to process fittings on the

ACIPCO property. He is receptive to the idea, but has not helped move this process along. Environmentally, this will be a much longer lead time than ALX.

Please do not think I am being pessimistic about the possibility of domestic fittings manufactured by or for Sigma. I just thought I should give you a quick overview of what my experience tells me we should all be aware of.

Thanks,

Stuart

From: VP (Victor Pais-CRM)
Sent: Friday, April 24, 2009 8:10 AM
To: OEM5
Cc: SB2 (Stuart Box - CRM); Ron J. Douglas (ron@drmetals.com)
Subject: VP to OEM team : BA Options

Attn :OEM5 cc : SB2 + RJD

As we are winding down our campaign to extract a waiver for the BA eligibility with the EPA, I don't see much hope for any general waiver nor for even the Large size range. EPA just doesn't seem amenable to issue it as such based on whatever presentations we make -- relying on the market place + their readiness to issue the waivers on a case by case basis on merits...

Our only 2 credible choices for a BA alternative source :

1. Korea -- as Korea is one of the 38 countries who qualify thru the GPA (Govt Purch Agrmt) route as they have signed reciprocal buying agreements with USA, but perhaps the ONLY one among the 38 who has a competitive foundry footprint. Of course, we were active in Korea with a full range of C110 AWWA Ftgs between 97 - 03, when they became expensive and we moved it all to China. *(Unfortunately, Mexico does NOT qualify, even thru NAFTA, as the latter had language to bar NAFTA use for funding thru US grants and loans. It qualifies for US Govt's direct buying, which is minimal!)*

2. USA : Use the patterns we have from ACIPCO and USP and produce domestically.

We now need to get into a full action phase as we have just about sufficient time as the ARRA is just heating up, but may not have much time!

Yesterday, Mitch and I had a long talk with RJD who had called to mention a real possibility with the Southern Ductile Foundry unit of Citation, who is nearing bankruptcy. SDF is said to be very profitable and has a good order book -- but, may be getting throttled under Citation's debt burden...

During this chat, he also mentioned that McWane has approached Glidewell, a reliable, steady and independent No Bake foundry in AL -- to explore the feasibility for L/S fittings.

I SUGGEST WE EXPLORE A VIABLE OPTION TO PRODUCE FTGS FOR SIGMA IN A DOMESTIC FOUNDRY USING THE PTNS FROM USP/ACIPCO AND EVEN METALFIT (AS THEY WON'T BE ABLE TO USE THEM AT HOME!) SO WE CAN OFFER A BA BRAND!

We should also explore producing a DOM-Restraint range, for which we may have to produce glands in US, with inserts and bolts from China. This combination is definitely admissible under the BA guidelines. We may have to also explore the legality of importing all the 3 parts here and assembling -- with the logic that individually these parts are not functional or so!

I suggest we have a conf call to brainstorm these options and I suggest Monday 4/21 as I will be away 4/22 - 4/23.

SB2 + RJD--> Please advise any likely foundry who can produce FTGs using the existing patterns. In this climate, we should be able to find suitable facilities. We may also be able to offer Tyler the L/S thru our production!

Any and all views are welcome. We need to have a suitable sourcing response/plan for ACIPCO and USP -- beyond the individual waivers and the 5% deminimus option which may be used on some jobs!

Regards,

Victor Pais
SIGMA Corp
609-758-0800 x 555
609-529-2020 (cell)
vp@sigmaco.com

DECLARATION OF LARRY RYBACKI

I, Larry Rybacki, declare as follows:

1. I am currently Vice President of Sales and Marketing for Sigma Corporation ("SIGMA"). I have held this position since 1990. As Vice President of Sales and Marketing, I was intimately involved in SIGMA's analysis of the possibility of entry into the domestic ductile iron pipe fittings market and in the decision to enter a Master Distribution Agreement ("MDA") with McWane Inc. I make this declaration based upon my personal knowledge.

2. SIGMA is an importer of waterworks products including ductile iron pipe fittings. SIGMA is not a manufacturer. Rather, SIGMA relies on foreign third-party foundries to produce fittings. SIGMA then distributes these foreign made fittings to its customers.

Experience at NAPPCO

3. Prior to working at SIGMA, I worked for the North American Pipe Products Company ("NAPPCO") from 1977 until 1990. I worked my way up through NAPPCO to become Vice President of Sales and Marketing. While I was employed there, I was aware of the company's efforts to build a domestic foundry to manufacture fittings. The foundry project proved to be exorbitantly expensive and time consuming and led ultimately to NAPPCO's bankruptcy. In the final year of NAPPCO's existence, I was promoted to President, and helped to liquidate the company.

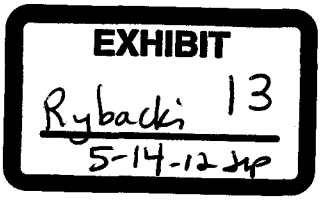
Analysis of Entry into Domestic Ductile Iron Pipe Fittings Showed that SIGMA's Entry was Unrealistic

4. In 2008, SIGMA's core ductile iron pipe fittings ("DIPF") business was substantially weakened by the economic crisis. SIGMA's business model relies heavily on the sub-division housing market. In the ten years prior to 2008, approximately 60% of SIGMA's business was tied to housing work. Beginning in 2008, the economic crisis devastated the housing market, and as a result SIGMA's core business.

5. In early 2009, I learned of the "Buy American" clause in the American Recovery and Reinvestment Act ("ARRA"). SIGMA believed the ARRA would lead to a short-term spike in demand for domestic fittings for a limited period of time. Because of SIGMA's loss of core business and the promise of new business in the domestic market, SIGMA researched the possibility of selling its own domestic fittings to its customers.

6. Two hurdles that SIGMA identified early on were the overwhelming cost of production and the long time line that would be necessary to bring a full product line to its customers.

7. I estimate that SIGMA would have needed to invest ten to twelve million dollars to produce a full line of fittings. *See, e.g.*, Exhibit [1] (SIG-0002750; SIG-0004703). In fact, producing the "A" items alone would have required an investment of approximately five to eight million dollars.



8. The high prohibitive cost of domestic production was discussed at a SIGMA board meeting in Boston. SIGMA was heavily burdened with debt, and could not borrow the necessary capital expenditure to produce a full line of domestic fittings without violating its debt covenants. *See* Exhibit [2] (September 9, 2010 letter to FTC regarding debt covenants). And producing only a partial line was not a viable option because it would have prevented SIGMA from bidding on many of the domestic projects that were funded by the ARRA. Our customers almost always look to a single source to fulfill an order and are reluctant to split a job into piecemeal orders, even if the customer has to place the order with a supplier that is not its first choice.

9. Because SIGMA was an importer and distributor of fittings, SIGMA had no manufacturing experience. Manufacturing a full line of ductile iron pipe fittings is a specialized process that requires a number of distinct steps. For example, designing and fabricating the tooling that a foundry will need in order to make castings is necessary for each individual fitting and often individual to each specific foundry. The tooling for one foundry is not interchangeable with the tooling for another foundry.

10. SIGMA could not produce a full line of fittings in time to meaningfully participate in the spike in domestic demand from the ARRA. Producing a full line of fittings would have required several years. Throughout 2009, I believed the spike in demand for domestic fittings created by the ARRA would last for only about twelve to eighteen months. I currently expect the uptick in domestic demand for fittings to fade by the end of 2010. By the time SIGMA brought a credible line of domestic fittings to market, the ARRA and the increased demand for domestic fittings would likely have passed. SIGMA decided that, among other things, the overwhelming cost of production and the risk that SIGMA would entirely miss the spike in demand made entry unrealistic.

11. My concerns regarding the time line for domestic production for fittings have been born out in part by SIGMA's experiences in trying to pursue domestic production of pipe restraints ("PRP"). Initially, SIGMA believed a full range of domestic PRP would be ready for sale in April 2010.

12. SIGMA identified two domestic foundries to manufacture different ranges of PRP, but because of extensive issues regarding machining, tooling, and quality control tests, SIGMA was only able to release its first production purchase orders in June 2010—over a year after SIGMA decided to manufacture domestic PRP. SIGMA's chosen domestic foundries have continued to face more production delays due to problems with capacity and tooling. SIGMA eventually was forced to pull all domestic PRP production from one of the domestic foundries, and currently must rely on only one domestic foundry to produce domestic PRP.

13. Nearly two years after SIGMA decided to manufacture domestic PRP, SIGMA can only manufacture restraints in the 20" to 48" range. Even though a full range of PRP requires fewer items than domestic ductile iron pipe fittings, SIGMA vastly underestimated the capital expenditure and the time required to produce domestic PRP. In the end, SIGMA still cannot produce a full range of domestic PRP.

14. SIGMA's recent struggles with domestic PRP production, as well as my earlier experiences with NAPPCO's attempts at building a domestic foundry provide me with a unique insight into the high cost and time consuming nature of manufacturing domestic castings. I was particularly wary of SIGMA's research into the feasibility of selling its own domestic ductile iron pipe fittings. The necessary and substantial financial investment, coupled with the short lead time to get a full-line of fittings to meet the ARRA demand were hurdles that SIGMA correctly identified as too high to overcome.

The MDA Was Good For Customers

15. In early 2009, after hearing about the ARRA, SIGMA first tried to engage McWane in a Buy-Sell Agreement for McWane's domestic fittings. McWane offered to sell SIGMA domestic fittings at a discount of 5% less than distributor costs. SIGMA declined the offer as a 5% discount would be unprofitable and likely cause SIGMA to sell fittings at a loss. SIGMA also approached McWane about the production of private-label, SIGMA-branded domestic fittings on a cost-plus basis. McWane did not accept SIGMA's offer.

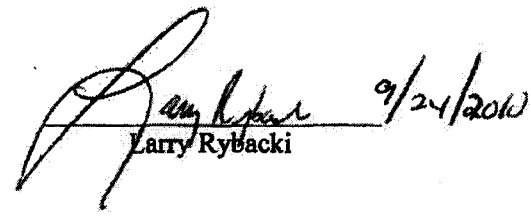
16. Eventually, after months of hard negotiations, SIGMA entered into a distribution agreement with McWane that would allow Sigma to sell domestic ductile iron pipe fittings to its customers. Without the MDA, SIGMA most likely would have remained on the sidelines and would have been unable to supply its customers with domestic ductile iron pipe fittings.

17. The MDA was good for customers because SIGMA's extensive distribution network increased the size and scope of the domestic market by enabling domestic iron pipe fittings to reach more distributors and expanded the purchasing options available to end users. Distributors now had competing suppliers of domestic fittings, and two inventories from which to order. In addition, because SIGMA has superior distribution capabilities, SIGMA can reach distributors that McWane traditionally has not supplied. The MDA also increased competition between distributors for sales to their customers by enabling more distributors to bid against each other for domestic requirement projects.

18. It is likely that the MDA also enabled McWane to more efficiently meet the spike in domestic demand created by the ARRA. Without SIGMA's superior distribution abilities and agreement to carry domestic fittings in its inventory, McWane most likely would have suffered a bottleneck in production and delayed delivery of domestic iron pipe fittings that were needed for "shovel-ready" ARRA projects. The MDA ensured that domestic fittings reached more customers faster, and more efficiently.

19. In my capacity as Vice President of Sales and Marketing, I was responsible for explaining to SIGMA's customers the MDA's rationale. I explained that the MDA was a win-win arm's length agreement that would benefit customers through greater distribution services and increased access to domestic fittings from more than one supplier. SIGMA's customers responded that the MDA made it easier for them to supply jobs that required domestic ductile iron pipe fittings and welcomed the opportunity to buy domestic fittings from SIGMA.

I declare under penalty of perjury that the foregoing is true and correct.



Larry Rybacki

Executed this 24th day of September 2010
Northborough, Massachusetts

DECLARATION OF SIDDHARTH BHATTACHARJI

I, SIDDHARTH BHATTACHARJI, declare as follows:

1. I am Sigma Corporation's ("SIGMA") Executive Vice President. I am a member of SIGMA's board of directors as well as a shareholder. I make this declaration based upon my personal knowledge.

2. I have worked for SIGMA since 1985 and have held my current position since that time.

3. SIGMA imports a wide range of products for use in the waterworks industry in North America. Among other items, SIGMA imports ductile iron AWWA pipe fittings and accessories ("DIWF"), pipe restraint products ("PRP"), municipal construction castings, including a wide range of valve boxes, meter boxes, service boxes, curb boxes, manhole covers and grates, and meter box lids.

4. SIGMA has never manufactured any of the products that it sells to its customers. Prior to 2010, SIGMA's business model focused on purchasing items from foreign foundries, importing them into the United States, and selling them to customers through its regional network of distribution hubs.

5. In 2009, in response to the American Recovery and Reinvestment Act ("ARRA"), SIGMA analyzed the feasibility of constructing a domestic supply chain for DIWF as well as PRP. I was part of the group of SIGMA employees that studied the possibility of both strategies.

6. I estimated that it would take a capital expenditure of between $5 million and $10 million to construct a domestic DIWF supply chain and that it would take between $0.5 million and $1 million to construct a domestic PRP supply chain.

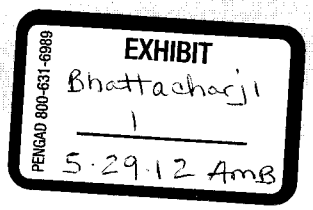
7. SIGMA was unable to pursue both strategies. SIGMA's loan agreements precluded it from borrowing the necessary investment without breaching its debt covenants. *See, e.g.*, September 9, 2010 letter to FTC regarding debt covenants.

8. SIGMA determined that it would be substantially more difficult for SIGMA to construct a domestic DIWF supply chain than a domestic PRP supply chain. As such, SIGMA elected to proceed with domestic production for only PRP.

9. I believed SIGMA would encounter fewer productions problems with PRP compared to DIWF, as fewer items (30 unique items) are needed for a PRP range to be considered complete for sale to U.S. customers. The steps needed to build a domestic PRP supply chain, although simpler, are similar to the steps needed to build a domestic DIWF supply chain.

10. The SIGMA Domestic PRP Foundry Team was formed in January 2009 to survey foundries and indentify facilities that could manufacturer domestic PRP.

11. The team identified approximately 100 foundries whose facilities might be suitable for domestic PRP production. The SIGMA Domestic PRP Foundry Team identified 10 of those facilities as potentially capable and cost effective manufacturers.



12. In the fall of 2009, the SIGMA Domestic PRP Foundry Team carried out a detailed audit of each of the 10 foundry candidates, and selected Akron Foundry ("AF") in Indiana and Talladega Foundry ("TF") in Alabama to be SIGMA's PRP contract manufacturers.

13. SIGMA's audit revealed that AF was able to cast the 3" to 18" PRP and TF was able to cast 20" to 48". After casting the 3" to 18" PRP at AF, SIGMA would need to transfer the 3" to 18" PRP to a nearby facility for machining and assembly. SIGMA was unable to locate a facility near TF capable of both machining and assembling of the 20" to 48" PRP. SIGMA determined that it would need to machine the 20" to 48" PRP near TF and then transfer the unassembled restraints to SIGMA's Birmingham warehouse for assembly. The machining of the castings produced in AF and TF to be done at Machine Castings Specialties in Rochester, IN and Industrial Machine and Supply, Inc. in Talladega, AL respectively.

14. Neither TF nor AF owned the tooling necessary for PRP production. SIGMA was obligated to locate and purchase appropriate tooling for each foundry.

15. AF's production line required a different type of tooling than that of TF. AF agreed to have the tooling made for 3", 4", 6" restraints, and SIGMA would acquire tooling for 8" to 18" from a tool maker in India and ship it to AF. TF agreed to manufacture the 20" to 36" tooling in-house and SIGMA agreed to purchase the tooling for 42" and 48" PRP from its Chinese supplier. TF also agreed to manufacture any other tooling they required.

16. Before tooling was purchased, SIGMA and the foundries worked to determine the shrinkage allowance that was needed. There are industry norms to adjust for the fact that the molten metal shrinks as it hardens into final shape, but both TF and AF had differing estimates for the shrinkage. To resolve this issue, SIGMA had to send its existing tooling for 8" and 20" from the Chinese PRP manufacturer by airfreight (at an additional cost of $10,000) and samples of castings to AF and TF respectively. They used the tooling to make samples and confirm our estimate of the shrinkage was correct. It took approximately two months to manufacture sample castings and to determine the shrinkage allowance at each foundry.

17. Once the shrinkage allowance assessment was resolved, purchase orders were issued to the foundries and the Indian tool makers began producing the necessary tooling for PRP with the appropriate shrinkage allowance.

18. AF and TF received the first tooling in February of 2010. After the tooling were inspected, it was then determined that minor modifications were needed before the rest of the tooling could be produced. TF agreed to make the necessary tooling modifications themselves. It took longer for AF to check out the tooling and they wanted more adjustments to be made to the tooling. While TF worked closely together with Sigma's engineering team on the development of samples, AF was less open in having Sigma involved in the sample development process. As a result both AF and Sigma did not anticipate certain issues which were to come up during development process.

19. SIGMA's development plan required each foundry to send sample restraints and to conduct certain quality control tests to ensure the quality of the domestic PRP. These tests were

RX-286.0002

necessary for the products to meet AWWA specifications, as well as industry accepted approvals from Underwriters Laboratories ("UL") and Factory Mutual ("FM").

20. TF complied with SIGMA's quality testing program and provided the material samples and requested reports.

21. AF agreed to acquire a spectrometer and a tensile testing machine, relatively common pieces of equipment used to test the chemical and mechanical composition of the ductile iron metal. Unknown to SIGMA, AF had only leased the spectrometer for three months and quietly returned the equipment without telling SIGMA. They were unable to provide verification of their metal quality as required by the ASTMA A536 standards.

22. AF and TF went ahead and provided samples for testing and Sigma found that the samples to be acceptable (Metallurgical, Functional and Mechanical) following which we had UL and FM conduct their audits with the assistance of Sigma engineers. UL and FM cleared the facilities for manufacture.

23. In June of 2010 SIGMA moved out of the development stage and released production purchase orders to AF and TF. TF began production immediately, but AF ran into additional problems that significantly delayed their production.

24. AF delayed ordering cores and informed SIGMA that the tooling would need to be repaired again. AF requested that SIGMA pay for some of the costs of these repairs. SIGMA agreed to do so in order to keep production deadlines from slipping again.

25. AF then informed SIGMA that it would focus initially on producing only 3" to 12" PRP and postpone the production of the 14" to 18" PRP until later.

26. Shortly thereafter, AF requested that SIGMA cancel all of the orders for PRP outside of the 3" to 12" range. This necessitated SIGMA to again look for suitable foundries. SIGMA complied and released orders in the 3" to 12" range for AF. SIGMA also supplied AF with a list of urgent orders in this range to fill immediately.

27. AF informed SIGMA that it would not produce each size at the same time, and would instead ramp up production gradually, starting with the smallest diameter restraints and working up to 12". AF also informed SIGMA that it could not supply sufficient quantities as required by the purchase orders due to production limitations. SIGMA engineers were brought in to review the production problems with the restraints.

28. Around this time TF encountered problems with electricity availability that slowed production capacity. They had to limit their melting to night times to take advantage of the off-peak load electricity rates and hence limiting the number of molds they could produce.

29. Once AF's production problems were resolved, AF ran a production batch of 3" and 6" restraints. Neither batch met SIGMA's minimum requirements of the material grade. In addition, AF was unwilling to purchase necessary test equipment it had previously agreed to purchase. AF thereafter asked SIGMA for additional financial support to purchase the necessary testing equipment.

RX-286.0003

30. In early July, AF abruptly stopped all PRP production and told SIGMA that it was not interested in producing domestic PRP in any size or configuration. At first the owner of AF would not give any reason for his abrupt decision and SIGMA had to approach AF's partner in Massachusetts to intervene and he said that AF would produce PRP only if SIGMA agreed to a price increase and provided additional financial support with lump sum payments. SIGMA agreed to provide additional support if AF agreed to resolve its production quality issues. After a few weeks of trials, AF again halted production and decided to abandon the PRP project altogether.

31. SIGMA was forced to quickly determine whether other foundries could be brought in to replace Akron. Ultimately, SIGMA determined that AF's range was best transferred to TF so that we did not have to monitor too many suppliers. This decision was made with severe reservation since the production line to be used in TF had been mothballed for a long time. I estimate that SIGMA lost approximately $25,000 through the failed relationship with AF. This does not include lost business, the need for new tooling as the existing tooling was made exclusively for AF or the cost increase due to transportation of castings from Alabama to Indiana for machining.

32. SIGMA is transferring the tooling from AF to TF. TF has begun making samples of 4" to 12" PRP for quality approval. The 14" to 18" tooling is currently being reworked to suit the TF machines at least on a temporary basis till such time new tooling is made. SIGMA expects that sampling and testing for the 4" to 12" restraints to be completed by the end of September 2010. In addition to this since the machine and assembly shop approved for sizes 4-18 is in Rochester, IN Sigma is shipping the castings all the way from Talladega, AL to Rochester IN incurring additional cost.

33. Approximately twenty one months after deciding to supply domestic PRP, SIGMA is only able to fill orders for restraints in the 20" to 48" range, approximately 10 unique items. The process has required significantly more management oversight and financial commitment from SIGMA than initially anticipated.

34. SIGMA's experience with building a domestic supply chain for PRP is typical for any new casting production involving foundries. Based on my 25 years of experience in managing foreign supply chains for DIWF, SIGMA would have undoubtedly experienced similar, if not more, production delays and problems with U.S. foundries if SIGMA had pursued a domestic supply chain for DIWF.

I declare under penalty of perjury that the foregoing is true and correct.

Siddharth Bhattacharji

Executed this 27 day of September 2010
Cream Ridge, NJ

EXHIBIT

4

DECLARATION OF TOM BRAKEFIELD

I, TOM BRAKEFIELD, declare as follows:

1. Since November 2003, I have been employed at Sigma Corporation ("SIGMA") as a National Sales Manager. Prior to joining SIGMA, I worked at U.S. Pipe for over 34 years. During my tenure at U.S. Pipe, I started as a mail clerk and rose through the sales force in the soil pipe and pressure pipe divisions, and was eventually promoted to Sales Manager - Pipe in 1998, and Vice President of Marketing and Sales in 1999. In my over 40 years in the industry, I have been involved in many industry organizations serving in many different capacities from president to committee member. I make this declaration based upon my personal knowledge.

2. As a National Sales Manager for SIGMA, I utilize my extensive experience in the water and sewer industry to assist SIGMA managers and sales personnel with planning and strategy. I assist SIGMA sales management on key sales relationships with OEM and large distribution customers like HD Supply (formally Hughes Supply). I also assist in developing international sales of SIGMA's products, including ductile iron pipe fittings ("DIPF"), pipeline restrains and special coatings and linings.

Evaluating the Domestic Production of Ductile Iron Pipe Fittings

3. I was involved in SIGMA's response to the challenges posed by "Buy American" provisions of the American Recovery and Reinvestment Act ("ARRA") that was enacted in February 2009. Specifically, I was involved in helping to organize the Water and Sewer Manufacturers Association (WASMA), and engaging with lobbyists to advance SIGMA's position.

4. I was also involved in SIGMA's efforts to evaluate options regarding the production of SIGMA-branded domestic ductile iron pipe fittings. To this end I evaluated the market effects of the ARRA, including effects on the distribution segment of the market, as well as on the public works segment. Additionally, I assisted evaluating the results of the work performed by Stuart Box and Mitchell Rona in identifying potential options for sourcing domestic DIPF from U.S foundries.

5. SIGMA's evaluation of the steps necessary to have domestic DIPF produced on its behalf in the United States to meet the "Buy America" provisions of the ARRA revealed that there were several significant challenges and barriers to overcome. Producing just a single DIPF configuration for sale to OEM and distribution customers involves a number of distinct processes. These processes include designing and fabricating the tooling that a foundry will need in order to make castings. Tooling includes patterns, molds and sand core molds for each individual fitting configuration.

6. SIGMA had no captive foundry capabilities in the United States. SIGMA had to survey foundries in the U.S. for suitability to pour castings for each individual DIPF configuration. SIGMA also needed to find foundries or finishing facilities to machine the castings (*i.e.*

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Sep 27 10 02:11p Tom Brakefield 205-437-0972 p.2

drilling holes, sanding), cleaning, painting and lining the fittings, and plan for delivery and logistics for the various processes.

7. Through its survey of U.S. foundry capabilities, SIGMA discovered that no single foundry could produce all of SIGMA's projected unique domestic DIPF configurations, and that many foundries were limited in the size and number of DIPF items that they could produce.

8. To produce a full line of domestic DIPF that SIGMA would have needed to meet ARRA demand, SIGMA estimated that it would need to fabricate approximately 600 to 800 unique patterns and tooling configurations. In the longer term, for SIGMA to have a complete line of DIPF it would have to add additional 1200 to 1400 more patterns and configurations. The patterns and tooling are necessary to cast DIPF. SIGMA owned no patterns at the time the ARRA came into being, and had little experience in the design and fabrication of patterns.

9. SIGMA also lacked experience in coordinating the many processes needed to manufacture DIPF. Coordination of these processes by several third-party vendors would have been imperative for SIGMA to have DIPF manufactured in the United States.

10. In order to use more than one foundry, SIGMA would have needed to have someone else, foreign or domestic, design and fabricate tooling for compatibility with the production process in each domestic foundry. Some foundries could not produce larger size DIPF configurations, while other foundries did not have the facilities for high volume production of smaller size DIPF configurations.

11. Many of the foundries that SIGMA evaluated for domestic production did not have the machining or finishing capabilities to complete the casted DIPF. SIGMA would have needed to transport unfinished DIPF around the country, or even across international borders, to have the DIPF machined and finished before the DIPF could be sold as domestic DIPF in the United States.

12. A piecemeal approach to producing domestic DIPF would have required a significant management and operational effort in terms of coordinating logistics both for production and delivery to buyers. Managing these logistics would have imposed significant tangible and non-tangible costs on SIGMA, and would have taxed SIGMA's management, distribution and other non-financial resources.

13. It must be understood that SIGMA's historical business model has been to source DIPF from foundries in China, India, and Mexico. SIGMA has never been involved in foundry operations to produce DIPF. Rather, SIGMA's business model has relied on third-party manufacturers and service providers to perform the numerous steps needed to produce DIPF for sale in the U.S. water and sewer market.

14. SIGMA had no prior experience in the actual manufacture of DIPF, and did not have substantial engineering or design resources to commit to the domestic production of DIPF. The result was that any domestic production for SIGMA would have required a piecemeal approach.

TPO 9/27/10 2/4

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ARRA Demand for Domestic Ductile Iron Pipe Fittings was Specific and Immediate

15. In addition to the challenges posed in creating such a segmented supply chain in the United States, SIGMA faced a significant timing problem to meet the specific ARRA demand. The ARRA was enacted in February 2009, and SIGMA realized that it would take a few months for the ARRA funds to be awarded. During this time, SIGMA made efforts to secure waivers from the Environmental Protection Agency to allow the use of non-domestic fittings on ARRA-funded projects. SIGMA also began its research into finding a domestic manufacturing option.

16. SIGMA would have faced a significant coordination problem if SIGMA had tried to have domestic DIPF manufactured in the United States. Connecting the dots to build a steady domestic supply chain for DIPF would have proven extremely difficult for SIGMA, particularly in light of the specific and immediate demand for domestic DIPF because of the ARRA "shovel ready" projects.

17. ARRA funds were targeted at projects that were "shovel ready," and would be awarded in a short amount of time, about one year from the date the ARRA went into effect. To meet the accelerated time table, SIGMA would have needed to have domestic DIPF manufactured in the United States on a highly compressed timeline.

18. Meeting an accelerated timeline for entry posed a number of major difficulties. First, obtaining the tooling necessary to produce the range of DIPF configurations that would be needed to credibly meet ARRA demand could not be achieved quickly. SIGMA would have needed at least four to six months to fabricate the first dozen or so patterns and toolings for domestic DIPF. Second, any foundries located in the United States would have needed to shift production very quickly to be able to employ the tooling, including testing and other preparatory steps, so that SIGMA could meet the ARRA demand for domestic DIPF. There was no guarantee that SIGMA and any single foundry, let alone multiple foundries, could accomplish these production requirements in the timeframe forced on SIGMA by the ARRA.

19. There were no options for SIGMA to expedite this entry process, despite SIGMA's efforts to locate alternative production capacity. For example, in January and February 2009, Victor Pais and I had discussions with Mike O'Brien, V.P. Sales & Marketing, Jerry Burns, Sales Manager – Ductile Iron Pipe; Skip Benton, Assistant Sales Manager – Ductile Iron Pipe, and Mike Hays, Director of Purchasing at ACIPCO about ACIPCO's foundry capacity. Within the last several years, ACIPCO had shut down two of three foundries that could handle production of a full range of domestic DIPF. However, even in the face of potential demand arising from the ARRA, ACIPCO indicated that it was dismantling its idled foundries and had no interest in putting them back into operation and helping WASMA or SIGMA in meeting the new demand from the ARRA. ACIPCO indicated that if SIGMA could find other foundries to make larger diameter DIPF, ACIPCO would have considered sharing its patterns for larger fittings in order to increase their capacity for the large diameter fittings market. SIGMA, however, found that it was nearly impossible to find U.S. foundries that had the technical ability to handle larger sized DIPF configurations. Thus, ACIPCO would not support WASMA or SIGMA strategy to meet the ARRA demand. Their only consideration was the large diameter segment of the market.

TPP 9/22/10 3/4

Sep 27 10 02:12p Tom Brakefield 205-437-0972 p.4

20. During my previous employment at U.S. Pipe, I experienced the difficulties of investing in the production of domestic DIPF. In the late 1990s, U.S. Pipe examined its Chattanooga fitting plant to upgrade the processes used to produce DIPF, particularly for large size fittings. One of the reasons for the upgrades was to improve the efficiency of the foundry, which was a 100 year old plant with buildings set-up such that the manufacturing line was not efficient. The upgrades, which took approximately 2 years to complete, included upgraded tooling, patterns, robotic grinding, new processes for fusion bonded coatings and new conveyor belts for the movement of DIPF throughout the foundry. Before the upgrades, U.S. Pipe had to handle and re-handled the fitting with front-end loaders that had very large buckets in order to get the fitting from one process in one building to another process in another building. The improvements allowed U.S. Pipe to eliminate the loaders and connect the upgraded processes together. The cost to upgrade the DIPF production processes at Chattanooga alone was approximately $15 to 20 million.

21. In analyzing its options for domestic manufacturing of DIPF, SIGMA confronted a highly compressed time schedule for domestic fittings demand. The lifespan of the increased demand seemed short, and coupled with the need to engage in the management of a segmented production process, SIGMA was facing some very high hurdles. Not only would domestic manufacturing of DIPF have strained SIGMA's financial resources, but SIGMA's human capital would have been asked to undertake a process with which it had no experience in managing. SIGMA has never been involved in the actual manufacture of DIPF, domestically or elsewhere.

22. SIGMA has been importing DIPF for sale in the U.S. for over 20 years. SIGMA's successful efforts at selling low-cost imported DIPF in the U.S. are one of the main reasons that the domestic supply of DIPF has significantly declined over the last 20 years. Prior to the enactment of the ARRA in February 2009, SIGMA never attempted to have its own domestic DIPF manufactured in the United States, although there were some states and local governments that enforced a "Buy American" provision for DIPF. That part of the market was and remains so small that it does not merit the capital investment required to produce domestic DIPF.

I declare under penalty of perjury that the foregoing is true and correct.

Tom Brakefield

Executed this 27 day of September, 2010

In: Birmingham, Alabama

4/4

Sep 27 10 02:12p Tom Brakefield 205-437-0972 p.5

RX-287.0004

From:	Rick Tatman <rtatman@tylerunion.com>
Sent:	Friday, April 25, 2008 3:05 PM
To:	McCullough, Leon (McWane Executive Vice President) <lmccullough@clowvalve.com>; Walton,Thomas (McWane Sr. Vice President) <twalton@MH-Valve.com>
Subject:	Sigma Price Increase Letter 5-19-08
Attach:	Sigma Price Inc 5-19-08.pdf

Thought you might find this interesting reading.

- Multipliers vs List Price
- Increase of Up to 10 multiplier points.
- The % increase for this region is between 18% and 40% (Prior multipliers penciled in as a reference)
- Move to transition to broader regional multipliers
- Note the comment to eventually get to a national multiplier.

I believe this is great for helping us achieve our business objective of regaining share while netting price. We can talk more next week about strategy. We'll try to gather the other Sigma regional letters and multiplier maps.

I don't think any of us truly believe that degree of net price will stick. Just this week we had a pretty solid input from a Mainline regional manager stating that when Sigma came in pitching the need for this increase they then offered to increase the cash discount from 2% to 5% if Mainline would sign up for some incremental volume. We already have a hard copy of a Mainline invoice showing 90 day terms.

Richard (Rick) Tatman

VP&GM Tyler/Union
McWane Waterworks Fittings Division
(903) 882-240
rtatman@tylerunion.com

SIGMA

CORPORATION

Date: April 16, 2008
To: SIGMA Corporation's Valued Customers
From: Larry Rybacki
Sub: Multiplier Increase May 19, 2008

Dear Friends,

To say this year has been a challenge is a gross understatement. With rising costs in transportation, labor, medical benefits, raw materials etc., 2008 will certainly be a difficult year for all of us. Hopefully we will learn something from it and be better businesses in the future for having endured this very tough downturn.

SIGMA Corporation, like all manufacturers in the Waterworks Industry, has been hit with unprecedented increases in scrap iron prices which have increased 7 fold in just a few short years. As a result we will be raising multipliers as high as 10 multiplier points depending on your region. The increase will take place on May 19, 2008 and your SIGMA Regional Manager will inform you by letter before the end of April of your new multiplier.

We've cut the number of different multipliers across the country down to four or five with the ultimate goal of one multiplier for Fittings (MJ, Push-on, & Flange, C153 & C110) nationwide in the not too distant future. We can't promise that this will be the last increase in 2008, but we can promise we will give you ample warning of any future changes.

Only orders that are placed before May 19, 2008 with a specific shipping date will be honored and any jobs that are held for release will be subject to the new multipliers.

In conclusion, we at SIGMA thank you for your loyalty and friendship and we wish you all the best during these trying times in our marketplace.

Sincerely yours,

Larry

The FITTING Choice!

AWWA Pipe Fittings

CHI - Multiplier Map – 508

Effective 5/19/2008

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TU-FTC-0255107
RX-417.0003

Jennifer McDaniel

From: Rick Tatman [rtatman@tylerunion.com]
Sent: Monday, May 05, 2008 3:04 PM
To: McCullough, Leon (McWane Executive Vice President)
Cc: Walton,Thomas (McWane Sr. Vice President)
Subject: Draft Announcement letter
Attachments: May Price Increase Draft C.doc; sigma increase.pdf; Current Map 4 14 08.ppt; Map #4 Conservative.ppt; Map #5 Aggressive.ppt

Leon,

Per your request, attached is the draft letter I was working on when you called. Also, as a reference I have attached the Sigma letter as well as several multiplier maps.

This draft would align with the approach of waiting until the DIFRA data is available before announcing any price actions. I have other draft letters developed in the event we'd elect to announce something sooner.

Although the Sigma announcement represented an increase range of 20% to 40%, I don't believe we would follow that lead regardless of the DIFRA data as it would lead to instability.

The attached Map #4 is probably the most conservative approach we'd take which represents an overall increase of ~ 8% on Blended products While Map #5 probably is the most aggressive recommendation for this next step with an overall increase of ~12%.

The current pricing is reflected in the map dated 4/14/08.

Thomas and I were scheduled to review this subject today @ 4pm

Richard (Rick) Tatman

VP&GM Tyler/Union
McWane Waterworks Fittings Division
(903) 882-240
rtatman@tylerunion.com

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TYLER UNION®
Quality Waterworks Products

Rough Draft Copy C

May 6, 2008

To: All Tyler Union Utility Customers

RE: Pricing for Utility Fittings and Accessories

Dear Valued Customer,

You have likely heard or read about continued increases in factors of production impacting both domestic and global operations. The foundry industry has been hit particularly hard with sharp increases in scrap iron, alloys and transportation costs. While the financial impact to our business is real, we also recognize there are restrictions as to the level and timing at which pricing can be accommodated in the market.

Since several misperceptions are starting to circulate, we wanted to send out this general communication to clearly define our intention in regards to any future pricing actions.

Before announcing any price actions we carefully analyze all factors including: Domestic and Global inflation, market & competitive conditions within each region as well as performance against our own internal metrics. We are currently waiting on updates for several factors but anticipate being able to complete our analysis towards the middle of the month. At that point we will be sending out specific letters to each region detailing changes, if any, to our current pricing policy.

For planning purposes only, we expect for regions that do have a change that multipliers will increase in the range of 6% up to 16% effective about 3 weeks after the announcement date. As always, annual municipal bid contracts will be honored per the terms of the contract and jobs quoted prior to the announcement date will be honored through a specified period provided in the announcement.

Sincerely,

Jerry Jansen
National Sales Manager

SIGMA CORPORATION

Date: April 24, 2008
To: SIGMA Corporation's Valued Customers
From: Larry Rybacki
Sub: Multiplier Increase May 19, 2008

Dear Friends,

To say this year has been a challenge is a gross understatement. With rising costs in transportation, labor, medical benefits, raw materials. etc., 2008 will certainly be a difficult year for all of us. Hopefully we will learn something from it and be better businesses in the future for having endured this very tough downturn.

SIGMA Corporation, like all manufacturers in the Waterworks Industry, has been hit with unprecedented increases in scrap iron prices which have increased 7 fold in just a few short years. As a result we will be raising multipliers up to 10 multiplier points depending on your region. The increase will take place on May 19, 2008 and your SIGMA Regional Manager will inform you by letter before the end of April of your new multiplier.

We've cut the number of different multipliers across the country down to four or five with the ultimate goal of one multiplier for Fittings (MJ & Push-on, C-153, Flanged C-110) nationwide in the not too distant future. We can't promise that this will be the last increase in 2008, but we can promise we will give you ample warning of any future changes.

Only orders that are placed before May 19, 2008 with a specific shipping date will be honored and any jobs that are held for release will be subject to the new multipliers.

In conclusion, we at SIGMA thank you for your loyalty and friendship and we wish you all the best during these trying times in our marketplace.

Sincerely yours,

Larry

316 So. Bon View Ave.
Ontario, CA 91761

SIGMA CORPORATION

(800) 888-8230
(909) 983-7944
FAX: (909) 391-2033

April 24, 2008

Utility Fitting & Accessory Multiplier Adjustment effective May 19, 2008

Dear Valued **NEVADA** Customer:

The multiplier referenced below is to be used against the SIGMA price book dated July1, 2007.

Utility Fittings	.38
Accessories	.38

Please contact your regional sales office with any questions.

Sincerely,

Larry Rybacki

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RX-419.0004

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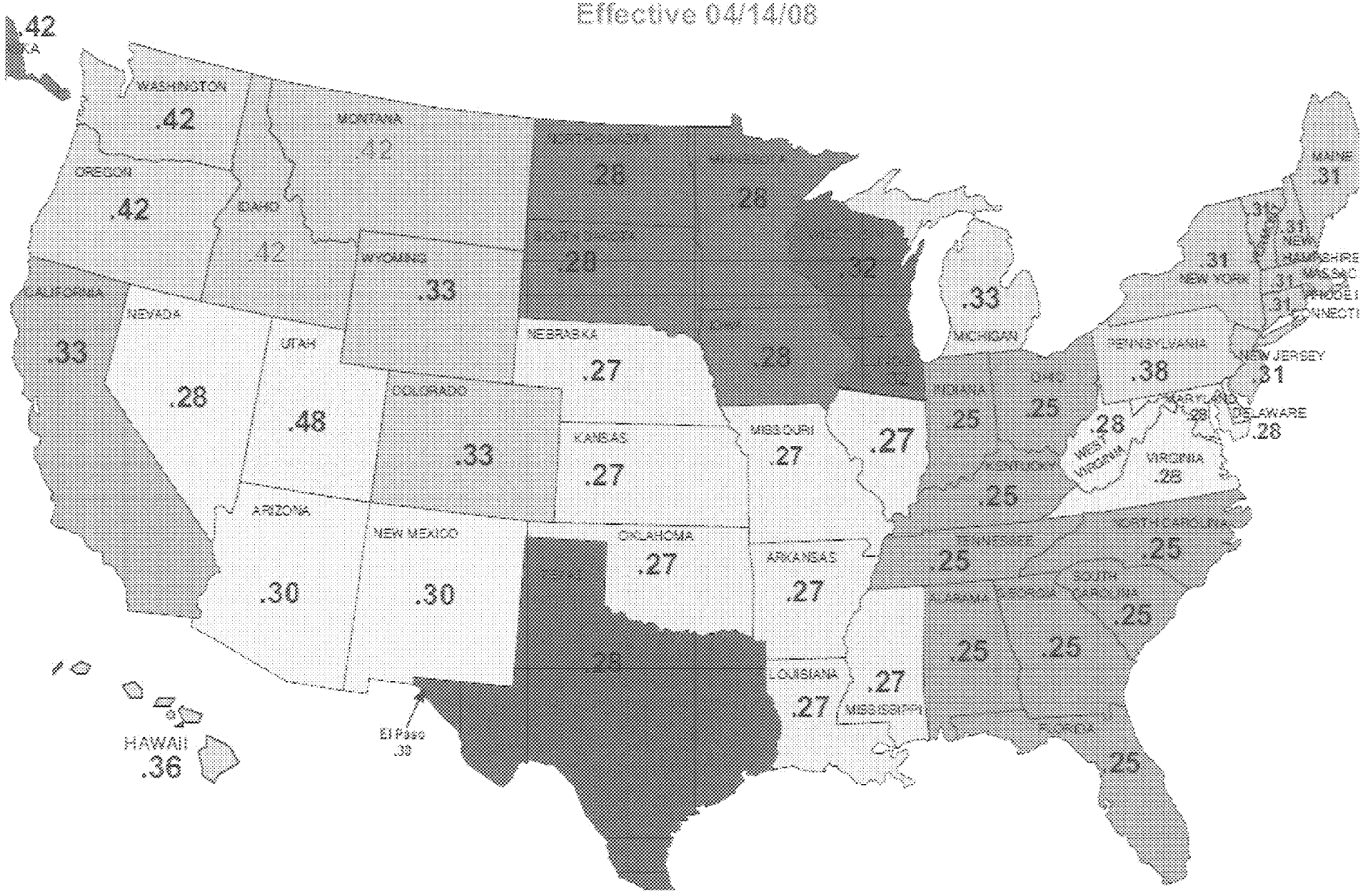
Blended Utility Fittings Multiplier Map LP-5072

Effective 04/14/08

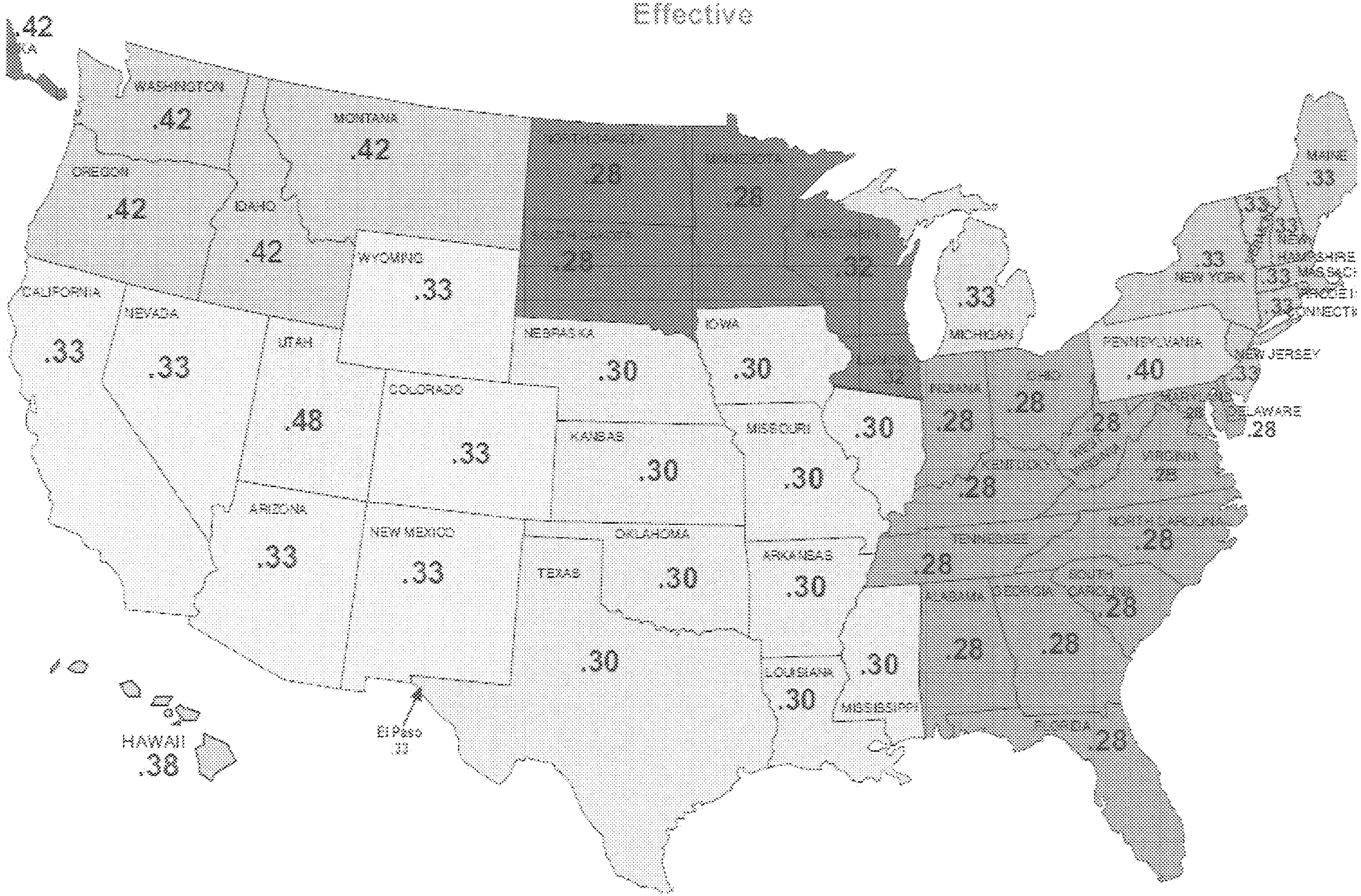


TU-FTC-0266216
RX-419.0005

Blended Utility Fittings
Multiplier Map LP-5072

Effective

~ 8% Increase



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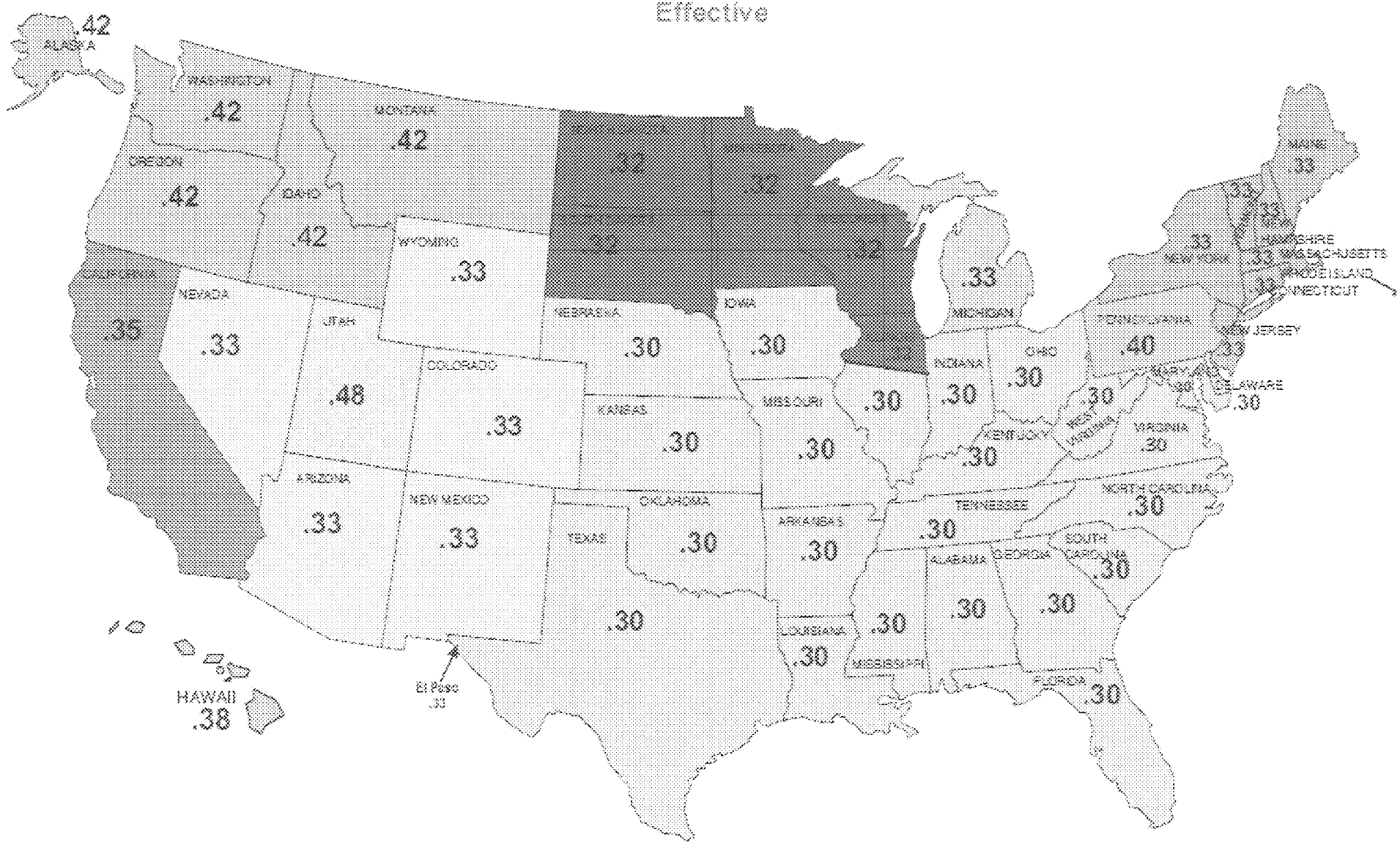
Blended Utility Fittings Multiplier Map LP-5072

~ 12% Increase

Effective



TU-FTC-0266218
RX-419.0007

TYLER UNION®
Quality Waterworks Products

January 11, 2008

RE: Pending Price Change for Utility Fittings and Accessories

Dear Valued Customer,

Due to continued rising costs, especially within our off-shore operations, we find it necessary to increase pricing on Utility Fittings and Accessories.

As per our prior letter of October 5, 2007, we will adjust pricing by increasing multipliers while retaining our current List Price, LP-5072. Letters stating the new region specific multipliers will be mailed January 18, 2008. The increase will be 10% to 12% above the current prevailing multiplier levels on Blended Fittings and Accessories and 3% to 5% on Domestic Fittings effective February 18, 2008.

To help our distribution customers better manage their inventory valuations and compete on a more level playing field, it is our intention going forward to sell all products only off the newly published multipliers. We will continue to monitor the competitive environment and adjust regional multipliers as required to provide you with competitive pricing.

All annual municipal bid contracts will be honored per the terms of the contract. Jobs quoted prior to this announcement will be honored through March 1, 2008, with acceptable documentation provided to your local Tyler/Union sales representative.

If the current inflationary trends continue as forecasted, we anticipate the need to announce another multiplier increase within the next six months. However, we will only do so as conditions require.

We thank you for your business and as always we remain committed to providing you with quality products and service at competitive prices.

Sincerely,

Jerry Jansen

Jerry Jansen
National Sales Manager

TYLER UNION®
Quality Waterworks Products

May 7, 2008

To: All Tyler Union Distribution Customers

RE: Pricing for Utility Fittings and Accessories

Dear Valued Customer,

You have likely heard or read about continued increases in factors of production impacting both domestic and global operations. The foundry industry has been hit particularly hard with sharp increases in scrap iron, alloys and transportation costs. While the financial impact to our business is real, we also recognize there are restrictions as to the level and timing at which pricing can be accommodated in the market.

We are sending this general communication to our waterworks distribution customers to more clearly define our intention in regards to future pricing actions.

Before announcing any price actions, we carefully analyze all factors including: domestic and global inflation, market and competitive conditions within each region, as well as performance against our own internal metrics. We anticipate being able to complete our analysis by the end of May. At that point, we will send out letters to each specific region detailing changes, if any, to our current pricing policy.

For planning purposes only, we expect for regions with a change that multipliers will increase in the range of 6% up to 16% effective June 16th.

Sincerely,

Jerry Jansen
National Sales Manager