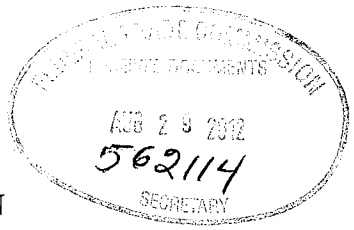

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

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

COMPLAINT COUNSEL'S OPPOSITION TO MCWANE, INC.'S MOTION TO EXCLUDE EVIDENCE, OR IN THE ALTERNATIVE, MOTION FOR CONTINUANCE

Respondent McWane's Motion to Exclude Evidence, or in the Alternative, Motion for Continuance ("Motion") should be denied. McWane's latest filing is yet another untimely distraction filled with hyperbole that reflects Respondent's continuing disregard for the Commission's Rules of Practice and the Court's February 15, 2010 Scheduling Order, as amended June 1, 2012. ("Scheduling Order"). McWane's Motion should be denied because McWane fails to meet the standards for motions *in limine*: the facts surrounding McWane's April 2009 price-fixing agreement and June 2010 price signaling are directly relevant to the claims and defenses in this case, particularly in light of McWane's assertion that any remedy in this case would be moot. McWane's Motion should also be denied because it is untimely, its claimed lack of notice is simply untrue, and perhaps most importantly, because the Commission has already considered and rejected McWane's arguments.[1]

1

I. The Evidence of McWane's Communications with its Co-conspirators in April 2009 and June 2010 is Relevant and Probative to the Claims and Defenses in this Case

As this Court has already ruled, "[e]vidence should be excluded on a motion *in limine* only when the evidence is clearly inadmissible on all potential grounds." (Order Denying Respondent's Motion to Preclude Complaint Counsel's Proposed Proffer of Investigational Hearing Transcripts at Trial, issued August 15,2012 ("August 15 Order"), at 1 (citations omitted)). Commission Rule 3.34(b) provides that "[r]elevant, material, and reliable evidence shall be admitted. Irrelevant, immaterial, and unreliable evidence shall be excluded. Evidence, even if relevant, may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or if the evidence would be misleading, or based on considerations of undue delay, waste of time, or needless presentation of cumulative evidence." 16 C.F.R. § 3.43(b).

This is a price-fixing case. Yet, McWane's Motion seeks to exclude all evidence related to its agreement to fix prices with one co-conspirator, Star Pipe Products Ltd ("Star"), in April 2009 when both sides provided mutual assurances that they would adopt the same price list. McWane's Motion also seeks to exclude evidence that McWane and its other co-conspirator, Sigma, Inc., used pricing letters to communicate their intent to stabilize prices. These facts are directly relevant to the Complaint's allegations that McWane, along with its co-conspirators Star and Sigma, colluded to fix prices. The June 2010 episode is also relevant to a key issue in this case: whether McWane and its co-conspirators communicated among themselves through the guise of letters nominally addressed to customers – an allegation that McWane denies. The documentary evidence and testimony surrounding the June 2010 episode corroborates that, in fact, McWane and Sigma used their letters to communicate with each other.

These facts are also directly relevant to McWane's Fourth Defense, mootness. (Answer of Respondent McWane, Inc. (Feb. 2, 2012), at 10 ("McWane Answer"). McWane's Pretrial Brief attacks the proposed remedies as "moot or otherwise flawed," claiming that Complaint Counsel has no evidence that the conduct is likely to recur. The June 2010 episode is particularly telling. *After* receiving subpoenas pursuant to the Commission's investigation in this matter, McWane and Sigma continued to craft letters, only nominally addressed to customers, with the intent and effect of communicating to competitors and stabilizing prices. McWane's brazen effort to continue to stabilize prices after learning of the Commission's investigation provides strong support for the need of a remedy in this case.

Importantly, McWane does not assail the relevance or probative value of the evidence in question. McWane's only meaningful reference to the standard for motions *in limine* is that it would introduce prejudice, but McWane's Motion does not explain the basis for its prejudice claim. It does not argue that the evidence itself is somehow unfairly prejudicial. Instead, the basis for its argument seems to be that, based on its crabbed reading of the Complaint, McWane now finds itself surprised that this evidence is relevant. McWane's conclusory claims are of the same sort that this Court has repeatedly rejected. *See* August 15 Order, at 4 ("Respondent's general assertions of unreliability or duplication of evidence are insufficient.") (citations omitted).

II. McWane's Motion to Exclude is Untimely and Respondent Had Ample Notice of the Relevance April 2009 and June 2010 Price Events

McWane acknowledges that its Motion is untimely because the July 27, 2012, deadline for filing motions *in limine* has passed. *See* Motion at 1 n.1. The Court may deny McWane's Motion as untimely without considering its merits. *In re N.C. Bd. of Dental Examiners,* 2011 FTC LEXIS 135, *7-8 (declining to consider Respondent's arguments because motion was

untimely); *See also Dedge v. Kendrick*, 849 F.2d 1398 (11th Cir. 1988) ("[T]he district court properly denied the motion as untimely, and we need not address the merits of the motion in this appeal."); *United States Dominator, Inc. v. Factory Ship Robert E. Resoff*, 768 F.2d 1099, 1104 (9th Cir. 1985) ("the record reveals that the defendants never requested a modification of the pretrial order to allow the filing of their motion. Accordingly, we conclude that the district court properly denied the motion as untimely.").

McWane attempts to circumvent the Scheduling Order's requirements by arguing that it lacked notice before the filing deadline that the April 2009 and June 2010 price actions were relevant, and it points to Complaint Counsel's Pretrial Brief as the intervening event that warrants an exception to the Scheduling Order. But Complaint Counsel's Pretrial Brief did not introduce any new allegations, and McWane had notice of the relevance of the April 2009 and June 2010 events well before the July 27, 2012 deadline for filings motions *in limine*.

A. McWane Had Ample Notice of the Relevance of the April 2009 Price-Fixing Agreement

Contrary to its assertions, McWane had actual notice of the claims against it arising out of the April 2009 price-fixing agreement between McWane and Star and took substantial discovery on the issue. This particular price fixing episode first emerged in Mr. McCutcheon's 2011 Investigational Hearing, a copy of which was produced to McWane at the beginning of discovery. The April 2009 price-fixing agreement was discussed at the depositions of no less than nine individuals. McWane's counsel not only attended these depositions, they asked questions about the April 2009 price-fixing agreement, and even raised the issue of the April 2009 agreement at the deposition of Star's President, Dan McCutcheon, *before* Complaint Counsel raised the issue in that deposition. Complaint Counsel also questioned McWane

executives Rick Tatman and Leon McCullough about the April 2009 episode without objection by McWane's counsel.[2]

In addition to McWane's actual notice (described above) of the relevance of the April 2009 price-fixing agreement, Complaint Counsel's Motion for Partial Summary Judgment regarding assurances McWane and Star exchanged in April 2009 regarding future plans for list prices, which was filed on June 1, 2012, provided explicit notice of Complaint Counsel's intention to introduce the April 2009 events as evidence of McWane's unlawful price fixing. The Pretrial Brief is consistent with Complaint Counsel's Partial Summary Judgment Motion, and there simply is no basis for McWane's argument that it did not have notice of the relevance of April 2009 price-fixing agreement before the July 27, 2012 deadline for filing motions *in limine*.

B. McWane Had Ample Notice of the Relevance of the June 2010 Price Signaling Conduct

Like the April 2009 price-fixing agreement, the parties also took discovery related to the June 2010 price-signaling between Sigma and McWane. During the course of fact discovery, Complaint Counsel elicited deposition testimony from two witnesses regarding the June 2010 episode.[3] Respondent also took testimony about the subject. On May 14, 2012, Complaint Counsel deposed Larry Rybacki, Sigma's current President and Vice President of Marketing and Sales at the time of the events, and questioned him about Sigma's June 2010 signaling letter (CX 1413) that was directed to McWane:

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[2] This significant discovery flatly contradicts McWane's stated need for 60 days of additional discovery or else it will suffer unfair prejudice. *See also* Ansaldo Decl., Exh. 2, at 10 (Complaint Counsel's Reply Memorandum in Support of its Motion for Partial Summary Decision, Filed June 25, 2012); Complaint Counsel's Pre-Trial Brief and Accompanying Exhibits at 33-34.

[3] *See also* Complaint Counsel's Pre-Trial Brief and Accompanying Exhibits at 34-36.

Q. Do you know what Mr. Pais means by hopefully to create some momentum and traction?
A. I know we needed a price increase because it was -- you know, our profits were so low.
Q. And so you wanted to create some momentum and traction for a price increase, is that fair?
A. We wanted a price increase desperately, no question.
Q. And you wanted the market and your customers to know that, is that fair?
A. Sure.

* * *

Q. He says "Since our price increase letter at this point is largely a 'heads up' to the customers and the market," do you see that?
A. It's to everybody, everybody that's in the market.
Q. Okay, and that would include your competitors; right?
A. Correct.

(Rybacki, Dep. at 215-216 (objections omitted)). Respondent's counsel asked Mr. Rybacki about the same document on re-direct. (Rybacki, Dep at 303-304).

Complaint Counsel also asked Sigma's Mr. Pais about these events, eliciting seven pages of testimony about CX 1413 and the circumstances surrounding the June 2010 price increase. (Pais, Dep. at 370-377). McWane's lead counsel, Mr. Ostoyich, even noted at the time that McWane's objection of "relevance is reserved and always has been, so I just hope we're not going to spend a lot of time on it at this point, but go ahead." (Pais, Dep. at 370). If McWane wished to assert a relevance objection, it had from the time of Mr. Pais' deposition until the deadline for motions *in limine*.

Additionally, on July 6, 2012, Complaint Counsel identified all of the underlying documents relating to the June 2010 pricing action as exhibits to be introduced at trial and Respondent did not object to any of them based on relevance or undue prejudice. Also on July 6, 2012, Complaint Counsel designated the relevant portions of the deposition transcripts related to

the June 2010 episode. While some of these designations received objections, others did not. If Respondent felt this evidence was irrelevant or unduly prejudicial, it had ample notice of the relevance of the June 2010 signaling behavior to file a timely motion *in limine* by July 27, 2012.

III. The Commission Has Already Rejected McWane's Due Process Arguments

Perhaps most importantly, McWane made the same notice and Due Process arguments its response to Complaint Counsel's Motion for Partial Summary Judgment.[4] The Commission

and that decision is the law of the case. Respondent should not be allowed to revive already decided issues in an untimely motion *in limine*.

In its Summary Judgment Decision,

The same analysis applies to the June 2010 events. The Complaint alleges that "McWane communicated the terms of its plan to Sigma and Star, at least in part through a public letter sent by McWane to waterworks distributors, the common customers of the Sellers." Complaint at ¶ 34(b). This allegation provides McWane with notice that its use of nominal pricing letters to communicate with its competitors is a subject of this litigation. The June 2010 episode is yet

[4] *See* Ansaldo Decl., Exh. 3, at 10-17 (Respondent McWane, Inc.'s Opposition to and Motion to Strike Complaint Counsel's Motion for Partial Summary Decision).

another example of such communication via pricing letters. McWane also had ample opportunity to avail itself of discovery on this issue. McWane questioned Mr. Rybacki about the June 2010 episode. McWane's decision not to ask Mr. Pais questions about the June 2010 price increase does not justify reopening discovery or excluding evidence.

Not only is the Commission's decision instructive, but it establishes the law of the case. Once issues have been resolved in litigation, courts generally decline to revisit them under the law of the case doctrine. *New York v. Microsoft Corp.*, 209 F. Supp. 2d 132, 141 (D.D.C. 2002). *Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735, 739 (D.C. Cir. 1995) ("'law-of-the-case doctrine' refers to a family of rules embodying the general concept that a court involved in later phases of a lawsuit should not reopen questions decided (i.e., established as the law of the case) by that court or a higher one in earlier phases."). This doctrine prevents reconsideration of a court's explicit decisions, as well as those issues decided by necessary implication. *Id.*; *LaShawn A. v. Barry,* 87 F.3d 1389, 1394 (D.C. Cir. 1996) (*en banc*) ("The law-of-the-case doctrine, the Supreme Court said, turns 'on whether a court previously decide[d] upon a rule of law ... not whether, or how well, it explained the decision."') (quoting *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988)).

The Commission's decision

And McWane has offered no justification for asking this court to entertain arguments that contradict the decided law of this case.[5]

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[5] Respondents' retread Motion relies on newly-cited statements made in the Analysis to Aid Public Comment ("AAPC") and press release issued by the Commission when McWane's coconspirators settled the price fixing allegations. However, the AAPC expressly states that:

> [t]he purpose of this Analysis to Aid Public Comment is to invite and facilitate public comment concerning the proposed order. It is not intended to constitute an official interpretation of the Agreement and proposed order or in any way to modify its terms.

IV. Conclusion

Respondent had ample notice and ample opportunity to take discovery and to fully prepare for its defense in this case related to the April 2009 price-fixing agreement and June 2010 price signaling actions. The evidence related to those events is relevant to the allegations against McWane, and the defenses it asserts. Accordingly, this Court should deny Respondent's Motion. Complaint Counsel further respectfully requests that the Court order Respondent to seek leave prior to filing any further untimely motions.

Dated: August 29, 2012

Respectfully submitted,

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(available at http://www.ftc.gov/os/fedreg/2012/01/120110sigmafrn.pdf). Unofficial interpretations issued by the Commission do not govern discovery or trial, especially in other proceedings. McWane gives no explanation and cites no authority for its proposition that these statements should limit the case against it.

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

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

DECLARATION OF J. ALEXANDER ANSALDO

Pursuant to 28 U.S.C. § 1746, I make the following statement:

1. My name is J. Alexander Ansaldo. I am making this statement in *In the Matter of McWane, Inc.*, FTC Docket No. 9351, in support of Complaint Counsel's Opposition To McWane, Inc.'s Motion to Exclude Evidence, or in the Alternative, Motion for Continuance. All statements in this Declaration are based on my personal knowledge as a Staff Attorney for the U.S. Federal Trade Commission, Bureau of Competition, and if called upon to testify, I could competently do so.
2. Tab 1 is a true and correct copy of Opinion of the Commission (In Camera), *In re McWane, Inc.* (Aug. 9, 2012) (F.T.C. Docket No. 9351).
3. Tab 2 is a true and correct copy of Complaint Counsel's Reply Memorandum in Support of its Motion for Partial Summary Decision, Filed June 25, 2012.
4. Tab 3 is a true and correct copy of Respondent McWane, Inc.'s Opposition to and Motion to Strike Complaint Counsel's Motion for Partial Summary Decision, Filed June 18, 2012.

Pursuant to 28 U.S.C. § 1746, I declare, under the penalty of perjury, that the foregoing is true and correct to the best of my knowledge, information, and belief. Executed this 29th day of August, 2012, at Washington, D.C.

Respectfully submitted,

s/ J. Alexander Ansaldo
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CONFIDENTIAL EXHIBIT

REDACTED IN ENTIRETY

EXHIBIT 1

EXHIBIT 2

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

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

COMPLAINT COUNSEL'S REPLY MEMORANDUM IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY DECISION

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June 27, 2012

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

I. Introduction

McWane's opposition does not contest the facts or the law on which Complaint Counsel's Motion for Partial Summary Decision rests. McWane fails to even mention, let alone distinguish, *Sugar Institute*, the controlling Supreme Court precedent. *See Sugar Institute v. United States*, 297 U.S. 553 (1936). Instead, McWane attempts to limit the time period covered by the Complaint with its own contrived reading of the allegations and by quoting language that does not appear anywhere in the Commission's Complaint. The Complaint does not allege that the "conspiracy existed only until 'January 2009' and 'disbanded' in February 2009" (McWane SOF ¶ 2). Indeed, the word "disbanded" does not appear in the Complaint and repeating it in its Opposition like a mantra will not permit McWane to escape the undisputed facts. McWane's counsel did not operate under any illusion that McWane's actions after February 2009 were not at issue in these proceedings. McWane elicited testimony from the only non-McWane participant in [redacted] during his deposition and McWane never once objected when Complaint Counsel took testimony related to those events from nine different witnesses. McWane's due process and related procedural defenses are a smokescreen designed to hide the fact that McWane cannot contest the law or the facts that McWane and Star conspired to restrain price competition [redacted]

II. Argument

McWane has failed to identify a genuine issue of material fact relating to the [redacted] requiring a trial, and partial summary decision on this issue is appropriate. Rule 3.24(3); 3.24(5), 16 C.F.R. §§ 3.24(3); 3.24(5). McWane has had actual notice of the claims against it arising out of the [redacted] has actively

attempted to develop exculpatory evidence in discovery regarding the [redacted], and has impliedly consented to the summary disposition of this issue.

A. There is No Genuine Issue of Material Fact Requiring a Trial

In its Opposition, McWane admits or fails to adequately contest the material facts that compel judgment for Complaint Counsel as a matter of law. McWane does not contest the existence, contents or circumstances of any material fact relating to the [redacted] Specifically, McWane does not dispute:

- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]

McWane only points to two pieces of relevant admissible evidence to dispute the factual predicates of Complaint: [redacted]. McWane SOF ¶¶ 30, 34. Mr. [redacted] lack of memory of the event, which is no more than the absence of contrary evidence, does not create a triable issue. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986); *Attorney Gen. of Maryland v. Dickson*, 717 F. Supp. 1090, 1097 (D. Md. 1989) (failure to recall participation in a conspiracy does not create a genuine issue of fact as to the element of agreement).

Inconsistencies in Mr. [redacted] testimony similarly do not create a triable issue on the existence of an agreement. McWane argues that Mr. [redacted] conclusory denials that he never reached an "agreement or understanding regarding price or price levels" create a triable issue of fact.[1] McWane SOF ¶ 14. McWane's theory flatly contradicts the text of Rule 3.24(3), which provides that "a party opposing the motion may not rest upon the mere allegations or denials of his or her pleading ... [but instead] must set forth specific facts showing that there is a genuine issue of material fact for trial." 16 C.F.R. § 3.42(3). As the Supreme Court has held of Rule 56(e), the analogous provision of the Federal Rules of Civil Procedure, the "object of this provision is not to replace conclusory allegations of the complaint or answer with conclusory allegations of an affidavit" or deposition. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888 (1990). The law is clear that conclusory denials do not create a genuine issue of material fact. *See Travelers Ins. Co. v. Liljeberg Enters.*, 7 F.3d 1203, 1206-07 (5th Cir. 1993) (conclusory denial of an element of the movant's claim insufficient to defeat summary judgment); *Post v. City of Fort Lauderdale*, 7 F.3d 1552, 1557 (11th Cir. 1993) ("Conclusory allegations or evidence setting forth legal conclusions are insufficient" to create a genuine fact issue"). [redacted] as set forth in Complaint Counsel's motion papers, therefore trumps any conclusory denials [redacted]

McWane's other factual arguments fail to identify factual disputes that are material. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) ("As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome

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[1] [redacted]

of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted"). For example, it is irrelevant, as a matter of substantive antitrust law, whether or not:

- [redacted] *U.S. v. Socony-Vacuum Oil*, 310 U.S. 150, 223 (1940) ("a combination formed for the purpose and with the effect of raising [or] depressing ... the price of a commodity in interstate ... is illegal *per se*");
- [redacted] *In re High Fructose Corn Syrup Antitrust Litig*, 295 F.3d 651, 656 (7th Cir. 2002) ("An agreement to fix list prices is . . . a *per se* violation of the Sherman Act, even if most or for that matter all transactions occur at lower prices") (Posner, J.); *Plymouth Dealers' Asso. v. United States*, 279 F.2d 128, 132-33 (9th Cir. 1960) (agreement on list prices *per se* unlawful despite the fact that list prices are only the starting point in negotiations, most sales are made below list prices, and prices declined during the conspiracy); and
- [redacted] Specific intent is not an element of a civil claim under Section 1 of the Sherman Act. *United States v. United States Gypsum Co.*, 438 U.S. 422, 436 n.13 (1978).

The Commission can enter partial summary decision against McWane without addressing any of these issues.

B. The [redacted] Constitutes an Illegal Price Fixing Conspiracy as a Matter of Law

McWane argues that the material facts set forth above do not, as a matter of law, amount to a *per se* illegal price fixing agreement. The legal conclusions to be drawn from the undisputed material facts are an appropriate issue for summary decision. *TSI Incorporated v. United States*, 977 F.2d 424, 426 (1992) (affirming summary judgment where the "only dispute below was over the legal conclusions to be drawn from the agreed facts."); *Sagers v. Yellow Freight System, Inc.*, 529 F.2d 721, 728 n.13 (5th Cir. 1976) ("the mere fact that the [non-movant] vigorously disputed the legal conclusions to be drawn from the facts presented by the [movant] was no bar

to the grant of summary judgment."). Here, McWane argues that because it is undisputed or assumed *arguendo* that, [redacted] is not a price fixing agreement as a matter of law.

McWane's argument simply ignores controlling Supreme Court and appellate precedent. In *Sugar Institute*, the Court applied the *per se* rule on indistinguishable facts. In *Sugar Institute*, as here, there was an exchange of assurances that the firm announcing a price change would implement in that announced change in fact. *Id.* at 582. In *Sugar Institute*, as here, prices were assumed to be set unilaterally, as was the decision to follow the rival's announced prices. *Id.* at 585-86. *Sugar Institute* sets forth a simple rule: while follow-the-leader parallelism is lawful, the exchange of assurances that facilitate price parallelism is *per se* unlawful. Thus, even assuming [redacted] they committed a *per se* unlawful agreement under *Sugar Institute* when [redacted] The Supreme Court has affirmed the continued vitality of *Sugar Institute*. *See Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647 (1980) (*per curiam*) (reiterating the illegality of "an agreement to adhere to previously announced prices and terms of sale, even though advance price announcements are perfectly lawful and even though the particular prices and terms were not themselves fixed by private agreement") (citing *Sugar Institute*, 297 U.S. 553, 601-602). *Sugar Institute* also disposes of McWane's argument that a price fixing agreement must come before prices are formulated and announced (Opp. at 18-19, 22); an agreement regarding implementation of previously announced prices is itself unlawful. *Sugar Institute*, 297 U.S. at 601.

McWane's reliance on *In re Publication Paper Antitrust Litig.*, 2010 U.S. Dist. LEXIS 131931 (D. Conn. Dec. 14, 2010), is misplaced. In *Publication Paper,* two competitors exchanged information about prior and unilaterally determined plans to follow the announced price increase of a third rival. *Id.* at *37-46. There was no bargained-for exchange of assurances about future pricing in *Publication Paper*; each competitor simply announced its price in turn. Such an exchange of price information, without more, is analyzed under the rule of reason. *United States v. United States Gypsum Co.*, 438 U.S. 422, 441 n.16 (1978). However, an exchange of assurances on pricing, with the intent of inducing reliance, crosses the line into *per se* illegality.

Three related features of [redacted] distinguish it from the *Publication Paper* communication. First, and most importantly, [redacted] went much further than *Publication Paper*. [redacted] This communication was absent in *Publication Paper*, and brings this case under the rule of *Sugar Institute*. Second, [redacted] – the first step in cartel formation – was to be achieved. There was no such reduction in uncertainty or incremental tendency towards coordination and cartel formation in the *Publication Paper* communication, as the communicating competitors sought to match the prices previously set by a third party, not by one another, and thus already knew what prices to set to facilitate coordination. Third, there was no expression of interdependence in the

Publication Paper communication, [redacted]

McWane's reliance on *In re Baby Food Antitrust Litig.*, 166 F.3d 112 (3d Cir. 1999), is also misplaced. That case stands for the proposition that "[e]vidence of sporadic exchanges of shop talk among field sales representatives who lack pricing authority" does not establish a price fixing agreement. *Id.* at 125. The Third Circuit expressly distinguished its holding from cases – as in this one – where the exchange of information about future pricing took place among senior managers with pricing authority. *See id.* at 125 fn.8 (distinguishing cases where "*upper* level executives engaged in secret conversations regarding product pricing") (emphasis in original); *see also In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 369 (3d Cir. 2004) (same). [redacted] and not simply a sharing of information.

Finally, *Blomkest Fertilizer Inc. v. Potash Corp. of Saskatchewan*, 203 F.3d 1028, 1034 (8th Cir. 1999), is distinguishable from this case because the communications there related to the exchange of price information about "particular completed sales, not future market prices."

Whether [redacted] constitutes an agreement within the meaning of the antitrust laws is a legal question to be decided by the Commission. [redacted]

BankAtlantic v. Coast to Coast Contrs., 22 F. Supp. 2d 1354, 1358-59 (S.D. Fla. 1998) (mere denials of participation in a conspiracy do not create a genuine issue of fact); *Nielsen v. Basit*, 1992 U.S. Dist. LEXIS 852, *9-10 (N.D. Ill. 1992) ("Conclusory denials of conspiracy contained in affidavits are entitled to little weight in deciding whether to grant a motion for summary

judgment"); *In re Bucyrus Grain Co.*, 1987 U.S. Dist. LEXIS 8193, at *14 (D. Kan., Aug. 13, 1987) ("mere denial of the existence of such an agreement cannot avoid summary judgment"); *Kenko Brenntag, Ltd. v. Regina*, 1981 U.S. Dist. LEXIS 14933, at *6 (S.D.N.Y., Sept. 28, 1981) ("conclusory denials [of agreement] are not sufficient to avert summary judgment"). For the same reasons, [redacted]. McWane SOF ¶¶ 25, 28.

C. Entry of Summary Decision Will Not Violate McWane's Due Process Rights

Entry of summary decision against McWane on [redacted] is fully consistent with the Commission's Rules and fundamental fairness. As discussed below, [redacted] is reasonably within the scope of the Commission's Complaint, McWane had actual notice of [redacted], and McWane took extensive discovery on this issue. Moreover, the Commission has the authority to conform the pleadings to the evidence on a motion of summary decision, and such action is proper here because McWane has impliedly consented to the litigation and summary disposition of this issue.

1. [redacted] is Reasonably Within the Scope of the Complaint

It is well settled law that federal and administrative complaints require only notice pleading, with the specific facts being established during discovery. *Swierkiewicz v. Sorema*, 534 U.S. 506, 512 (2002) ("This simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims."); *In re Basic Research*, 2004 FTC WL 1658381, at *6 (notice pleading applies to Commission complaints). Rule 3.11(b)(2) of the Commission's Rules of Practice

provides that the Commission's complaint shall contain "a clear and concise factual statement sufficient to inform each respondent with reasonable definiteness of the *type of acts or practices* alleged to be in violation of the law." 16 C.F.R. § 3.11(b)(2) (emphasis added).

[redacted] is one example of the conspiratorial conduct – price fixing – that is expressly alleged within the Commission's Complaint. As such, Commission precedent establishes that [redacted] is "reasonably within the scope of the original complaint." Rule 3.15(2). Although there appears to be no Commission precedent interpreting the cited language of Rule 3.15(2), the identical language in Rule 3.15(1) has been interpreted to encompass "amendments which clarify the allegations of a complaint or which merely add examples of practices already challenged." *See In re Champion Home Builders*, 1982 FTC LEXIS 52, at *2-3 (1982); *In re Orkin Exterminating Company, Inc.*, Dkt. No. 9176, 1984 FTC WL 251774, at *1 (Nov. 15, 1984) (in action involving price increases of contracted services, "enumerat[ing] an additional contract service falling within the category of services on which annual fees were raised is well within the scope of the original complaint allegations").

McWane argues that the [redacted] is outside of, and contrary to the Complaint. McWane is incorrect. The Complaint alleges that McWane began fixing prices of Fittings in January 2008. Compl., ¶¶ 2, 29. Although the Complaint alleges that the monthly exchange of sales information among McWane and its rivals through the Ductile Iron Fittings Research Association ("DIFRA") ceased in January 2009, and that the passage of the American Recovery and Reinvestment Act of 2009 in February 2009 "upset the terms of coordination" among McWane and its rivals, the Complaint contains no allegations as to the ending date of this conspiracy, or indeed any allegation that the conspiracy ended at all. Compl., ¶¶ 3, 36. Nowhere in the Commission's Complaint is there any statement that would have led McWane reasonably

to believe that the specific examples of price fixing alleged in the Complaint in 2008 were exhaustive rather than illustrative. Indeed, the Complaint specifically alleges that McWane and Sigma collusively fixed prices of domestically produced Fittings in 2009. Compl., ¶¶ 49-50.

McWane represents to the Commission that the Complaint alleges that any conspiracy involving McWane was "disbanded" "in early 2009." McWane SOF ¶¶ 1-2; Opp. Brief at 5 ("the Commission's Complaint acknowledged the alleged conspiracy 'disbanded"). This is blatantly misleading. [redacted] the conspiracy to exchange information through DIFRA is not coextensive with the larger price fixing conspiracy described in the Complaint, and it is disingenuous of McWane to equate the two. *See* Compl. ¶¶ 29-32 (conspiracy before DIFRA); ¶¶ 49-50 (conspiracy after DIFRA); ¶¶ 64-65 (price fixing and information exchange pled as distinct violations of the FTC Act).

Contrary to its assertions, McWane had actual notice of the claims against it arising out of [redacted] and took substantial discovery on this issue. This particular price fixing episode first emerged [redacted] a copy of which was produced to McWane at the commencement of discovery. McWane's counsel appeared at the deposition of nine individuals where testimony about the events of [redacted] was given. McWane's counsel questioned [redacted] before Complaint Counsel raised the issue in his deposition. Complaint Counsel also questioned McWane executives [redacted] without objection by McWane's counsel. And both McWane and Complaint Counsel raised the [redacted] and the events surrounding them in the depositions of nine different witnesses. Thus, McWane had actual notice of the claims against it well before the

close of discovery and had ample opportunity to defend itself against those claims. This simple fact distinguishes this case from all of the due process cases relied upon by McWane. *See* McWane Opp. 12-13.

2. The Commission May Conform the Pleadings to the Evidence on a Motion for Summary Decision

The Commission's Rules of Practice give the Commission the authority to enter partial summary decision on [redacted]. Specifically, Rule 3.15(2) provides that

> When issues not raised by the pleadings or notice of hearing but reasonably within the scope of the original complaint or notice of hearing are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings or notice of hearing; and such amendments of the pleadings or notice as may be necessary to make them conform to the evidence and to raise such issues shall be allowed at any time. 16 C.F.R. § 3.15(2).

Although no Commission precedent exists for conforming the pleadings to the evidence on a motion for summary decision pursuant to Rule 3.24, the weight of federal practice under the analogous provision of the Federal Rules of Civil Procedure, Rule 15(b)(2), supports the authority of the Commission to do so.[2] The majority rule interprets Rule 15(b)(2) to apply at the summary judgment stage, and that summary judgment may be sought on issues not previously raised in the pleadings. *See Ahmad v. Furlong*, 435 F.3d 1196, 1203 n.1 (10th Cir. 2006) (noting circuit split); *McCree v. SEPTA*, 2009 U.S. Dist. LEXIS 4803, *33 (E.D. Pa., Jan. 23, 2009) ("the vast majority of the Circuit Courts of Appeals" apply Rule 15(b) at summary judgment); *Cruz v. Coach Stores, Inc.*, 202 F.3d 560, 569 (2d Cir. 2000); *Suiter v. Mitchell Motor Coach*

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[2] *See* Fed. R. Civ. Pro. 15(b)(2) ("When an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings. A party may move—at any time, even after judgment—to amend the pleadings to conform them to the evidence and to raise an unpleaded issue. But failure to amend does not affect the result of the trial of that issue.")

Sales, Inc., 151 F.3d 1275, 1279-80 (10th Cir. 1998); *Smith v. Transworld Sys., Inc.*, 953 F.2d 1025, 1030 (6th Cir. 1992).

Because the Commission interprets its Rules of Practice in conformity with analogous provisions in the Federal Rules of Civil Procedure, the Commission should follow the majority rule of the federal courts and hold that Rule 3.15(2) allows the Commission to conform the pleadings to the evidence on a Rule 3.24 motion for summary decision. *In re Kroger Co.*, 98 F.T.C. 639, 726 (1981) (Commission's summary decision rule interpreted consistently with federal analogue); *In re Hearst Corp.*, 80 F.T.C. 1011, 1014 (1972) (same).

3. McWane has Impliedly Consented to the Summary Decision of this Issue

Like Rule 3.15(2) of the Commission's Rules of Practice, Rule 15(b) of the Federal Rules of Civil Procedure requires that a issues not raised in the pleadings be tried – or litigated – by "the express or implied consent of the parties" before the pleadings may be deemed conformed to the evidence. 16 C.F.R. § 3.15(2); Fed. R. Civ. Pro. 15(b). Federal courts interpreting Rule 15(b) have held that the test for establishing such consent is "whether the opposing party had a fair opportunity to defend and whether he could have presented additional evidence had he known sooner the substance of the amendment." *Hardin v. Manitowoc-Forsythe Corp.*, 691 F.2d 449, 456 (10th Cir. 1982).

McWane's litigation of [redacted] shows implied consent to the summary adjudication of this issue. "One sign of implied consent is that issues not raised by the pleadings are presented and argued without proper objection by opposing counsel." *In re Prescott*, 805 F.2d 719, 725 (7th Cir. 1986). McWane has demonstrated consent by affirmatively developing evidence on [redacted] and its surrounding circumstances – none of which are relevant to the narrow reading of the Complaint McWane

now espouses. *See Prescott*, 805 F.2d at 725 ("Implied consent may also be found if the opposing party itself presents evidence on the matter"). McWane has also demonstrated consent by failing to object to the testimony Complaint Counsel has elicited relating to the same matters. *See Prescott*, 805 F.2d at 725 ("To demonstrate lack of consent, the objection should be on the ground that the contested matter is not within the issues made by the pleadings") (internal citation and quotation marks omitted); *see also United States Fidelity and Guaranty Co. v. United States*, 389 F.2d 697, 698-99 (10th Cir. 1968) ("where no objection is made to evidence on the ground it is outside the issues of the case, the issue raised is nevertheless before the trial court for determination, and the pleadings should be regarded as amended in order to conform to the proof").

McWane has also fully briefed this issue in its Opposition to Complaint Counsel's Motion for Partial Summary Judgment, and had a full opportunity to defend itself by entering additional affidavits or pointing to any exculpatory evidence. *See People for the Ethical Treatment of Animals v. Doughney*, 263 F.3d 359, 367-68 (4th Cir. 2001) (affirming summary judgment for the plaintiff on claim raised for the first time in summary judgment motion when the defendant "vigorously defended" the summary judgment motion); *Whitaker v. T.J. Snow Co.*, 151 F.3d 661, 663 (7th Cir. 1998) ("Because both parties squarely addressed the strict liability theory in their summary judgment briefs, the complaint was constructively amended to include that claim"); *Transworld Systems,* 953 F.2d at 1030 (affirming summary judgment on affirmative defense raised for the first time at summary judgment where "the "plaintiff responded to defendant's ... claims after raising his objections to use of the defense... [and] had ample opportunity to file affidavits or deposition testimony to rebut defendant's use of the defense").

McWane has not asserted that it needs more time to prepare a defense to Complaint Counsel's Motion or pointed to any specific potentially exculpatory evidence it would be able to marshal at trial that it does not have at present. *See* Rule 3.24(4) (outlining procedure for non-moving party to seek additional time to conduct discovery to defeat a motion "for reasons stated" in the affidavits in opposition to the motion). McWane's failure to identify a single fact on which it needs more discovery is unsurprising: [redacted] There is no more discovery to be taken. Although McWane objects to the propriety of summary decision, that objection does not itself establish a lack of consent under Rule 3.15(2). *See PETA*, 263 F.3d at 367 (affirming grant of summary judgment despite objection by non-moving party that claim was raised for the first time on summary judgment); *Transworld Systems*, 953 F.2d at 1030 (same). A contrary rule would be nonsensical, allowing any party that had otherwise demonstrated its consent to the litigation of an issue to avoid summary decision simply by changing its mind.

The cases cited by McWane to support its assertion that courts refuse to address claims beyond the scope of complaints are all distinguishable as involving claims added by the non-moving party to escape summary judgment. *See* McWane's Opp. at 13. Evading summary judgment by asserting novel claims is not the equivalent of impliedly consenting to the summary disposition of claims by actively litigating and briefing in these claims.

III. Conclusion

For the reasons given above, Complaint Counsel respectfully request, pursuant to Rule 3.15(a)(2), that the Commission conform its Complaint against McWane to expressly include allegations relating to the existence, circumstances and content of [redacted] and enter an order granting partial summary decision on the issue of whether McWane unlawfully restrained price competition [redacted] and to allow Complaint Counsel to try the remaining price-fixing allegations in the Complaint, which may result in broader relief.

Respectfully submitted,

s/ Edward D. Hassi
Edward D. Hassi

Counsel Supporting the Complaint
Bureau of Competition
Federal Trade Commission
Washington, DC 20580

Dated: June 27, 2012

THE FOLLOWING EXHIBITS ARE

CONFIDENTIAL AND REDACTED IN ENTIRETY:

BHUTADA, R. DEPOSITION EXCERPT

JANSEN DEPOSITION EXCERPT

MCCULLOUGH DEPOSITION EXCERPT

MCCUTCHEON DEPOSITION EXCERPT

PAGE DEPOSITION EXCERPT

PAIS DEPOSITION EXCERPT

RYBACKI DEPOSITION EXCERPT

TATMAN DEPOSITION EXCERPT

WALTON DEPOSITION EXCERPT

CERTIFICATE OF SERVICE

I hereby certify that on June 27, 2012, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

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

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

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

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

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Counsel for Respondent McWane, Inc.

CERTIFICATE FOR ELECTRONIC FILING

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

June 27, 2012

By: s/ Thomas H. Brock
Attorney

EXHIBIT 3

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

MEMORANDUM OF LAW IN SUPPORT OF RESPONDENT McWANE, INC.'S OPPOSITION TO AND MOTION TO STRIKE COMPLAINT COUNSEL'S MOTION FOR PARTIAL SUMMARY DECISION

CONFIDENTIAL
MATERIAL PROTECTED PURSUANT TO
JANUARY 5, 2012 PROTECTIVE ORDER ENTERED BY THIS COURT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

Pursuant to Rule 3.24 of the Federal Trade Commission's Rules of Practice, Respondent McWane, Inc. ("McWane"), submits this memorandum of law, and the accompanying Separate Statement of Undisputed Material Facts ("SOF"), in support of its Opposition and Motion to Strike Complaint Counsel's Motion for Partial Summary Decision.

SUMMARY OF ARGUMENT

Complaint Counsel - - in what appears to be a first in the 98-year history of the Federal Trade Commission - - filed a motion for summary decision on "facts" that the Commission's Administrative Complaint ("Complaint") does not allege violate FTC Act Section 5 and, indeed, are not contained anywhere in the Complaint. To the contrary, they are expressly ***outside*** the scope of the alleged violation - - and, thus, not subject to adjudication in this proceeding. (*See* Rule 3.24(a)(3).)

The focus of Complaint Counsel's motion is [redacted]

The [redacted] is, on its face, ***outside*** the Commission's Complaint: indeed, the Complaint did not allege any conspiracy related to [redacted], did not allege any conspiracy [redacted], and did not allege any conspiracy to [redacted]. (SOF ¶ 4.) Instead, it alleged a conspiracy to raise ([redacted]) prices through increases in multipliers ([redacted]) and an end to job price discounts in January 2008 and June 2008 ([redacted]). (*Id.*)

Complaint Counsel's instant motion is thus entirely disconnected from, and contrary to, the allegations contained in the actual Complaint. Most notably, the allegations in the actual Complaint allege that the conspiracy "disbanded in early 2009[,]" when the passage of the ARRA Buy-America statute "upset the terms of coordination" which, of course, predates the

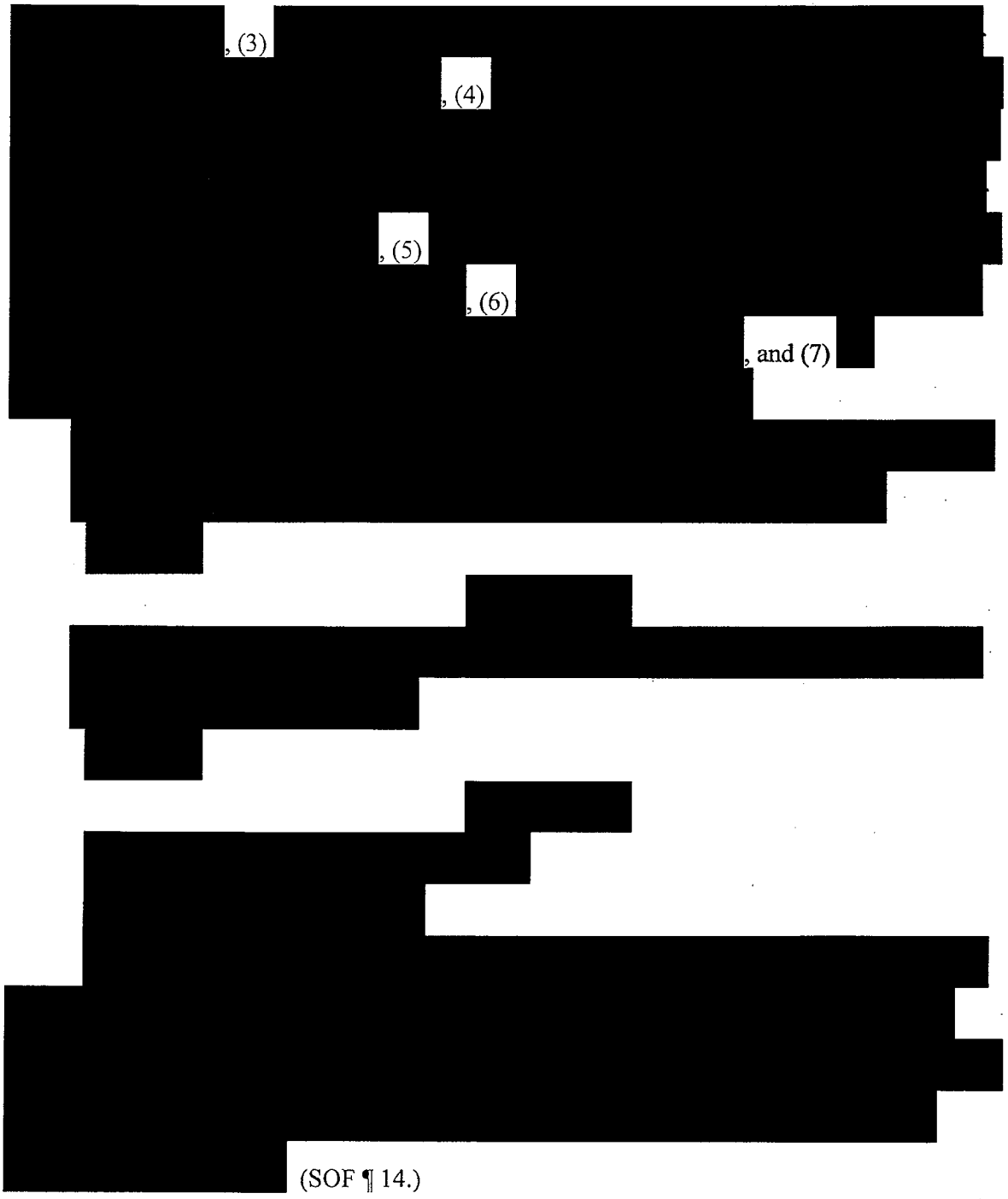
instant allegations. (*Id.* ("between June 2008 and January 2009"); (SOF ¶ 4 ("disbanded in early 2009").)

In short, Complaint Counsel - - implicitly conceding the weakness of its actual case - - has simply made up a new and different case.[1] The Court should strike Complaint Counsel's motion in its entirety. It is outside the scope of the Commission's case - - indeed, the core "facts" concerning the [redacted] were known to the Commission during the Part 2 investigation and the Commission chose not to include them in its Complaint and, instead, to allege a conspiracy that ended in early 2009. (SOF ¶¶ 1-3.) The Complaint has not been amended by the Commission, and Complaint Counsel did not seek amendment at any time as required by FTC Rule 3.15. Courts routinely refuse to address motions for summary disposition that challenge alleged conduct that is outside the scope of the complaint. Complaint Counsel's made-up violation is beyond the Commission's statutory authority, was not the subject of full Part 3 litigation, and would violate the due process clause if addressed here.

If the Commission had elected to include the alleged [redacted] in the Complaint (which it did not), this Court should still deny the motion because it literally ignores dispositive, exculpatory evidence establishing that [redacted] - - including sworn testimony from the witnesses involved and contemporaneous documents. [redacted].

To the contrary, [redacted] testimony and the documents are clear (and uncontradicted): (1) [redacted], (2) [redacted]

[1] Complaint Counsel did not move for summary decision on any of the allegations actually in the Complaint.



[2] SOF ¶ 14.
[3] *Id.*
[4] *Id.*

Complaint Counsel does not address [redacted]. For that additional reason, the Court should deny the motion. Complaint Counsel cannot simply ignore sworn testimony that contradicts its argument. The denials are insurmountable and Complaint Counsel cannot get around them by simply pretending they do not exist. Instead of addressing the sworn facts, Complaint Counsel stretches to suggest something that simply did not occur: [redacted]. (SOF ¶ 23.)

SUMMARY OF ALLEGATIONS AND UNDISPUTED MATERIAL FACTS

I. The Complaint Alleged A Conspiracy That Was "Disbanded" By "Early 2009"

Counts 1 and 2 of the Administrative Complaint ("AC") allege that McWane "conspired" with Sigma and Star to issue "multiplier" price increases for ductile iron pipe fittings in January and June 2008 and to stop their "job price" discounting, beginning in January 2008 and ending in **"early 2009."** (SOF ¶ 1.) The conspiracy thus existed only until "January 2009" and **"disbanded"** in February 2009 because "the passage of the American Recovery and Reinvestment Act of 2009 ("ARRA") **in February 2009** . . . upset the terms of coordination among the Sellers." (SOF ¶ 2.) The AC contained [redacted]

II. Complaint Counsel's Newly Made-Up [redacted] Claim Contradicts The Complaint

Nonetheless, Complaint Counsel moves for summary decision [redacted] (SOF ¶¶3, 4.) [redacted]. (SOF ¶ 5.) [redacted] (SOF ¶ 6.) [redacted]. (SOF ¶ 7.) " [redacted]. (SOF ¶ 8.)

III. CC Ignores Significant Exculpatory Evidence That Demonstrates That McWane Made [redacted]

[redacted]. (SOF ¶ 9 [redacted], *Id.* [redacted], *Id.* [redacted], *Id* [redacted].)

[redacted]

* * *

[redacted]

* * *

[redacted]

* * *

[redacted]

(SOF ¶ 14.)

[redacted]

. (SOF ¶ 10

.)

Indeed, Complaint Counsel's Motion concedes the point. (SOF ¶ 12 .)[5]

IV. Significant Undisputed Facts Demonstrate That

Complaint Counsel acknowledges that

(SOF ¶ 15 (emphasis added); see also (SOF ¶ 16 ; SOF ¶ 15 .)

Complaint Counsel also concedes that

(SOF ¶ 17), *Id.* .)

(SOF ¶ 18 , *Id.* , *Id.*

(SOF ¶ 19

. (SOF ¶ 20, *Id.*

[5]

(objections omitted), *Id.*

.)

(SOF ¶ 21.)

(SOF ¶ 22, *Id.*

, *Id*

.)

(SOF ¶ 23 (objections omitted).)[6]

6

(SOF ¶ 25.).

(SOF ¶ 26.)

(SOF ¶ 28) (emphasis added).)

(SOF ¶ 34

.)[7]

[7] Complaint Counsel makes much

In response to [redacted]. (SOF ¶ 35.)

There is no evidence that [redacted] (SOF ¶ 31.)

Tellingly, the undisputed facts [redacted] (SOF ¶ 39.) The undisputed facts also show [redacted] (SOF ¶ 40 [redacted], *Id.* [redacted], *Id.* [redacted].)

Complaint Counsel also acknowledges that [redacted] (SOF ¶ 17.) Indeed, [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

(SOF ¶ 20 (emphasis added) (objections omitted); SOF ¶ 25 [redacted].)[8]

[redacted]

(SOF ¶ 44 (emphasis added) (objections omitted).)

Although Complaint Counsel argues [redacted] there is simply no factual support for that assertion and significant evidence that contradicts it.

ARGUMENT

FTC Rule 3.24(a)(3) provides that a party may only move for a summary decision in its favor upon all or part "**of the issues being adjudicated.**" The rules does not carve out an exception for Complaint Counsel to allow it alone to move for summary disposition on issues that are not being adjudicated. But that is exactly what Complaint Counsel here has done: it moves for partial summary decision on an allegation that is not contained in the Administrative Complaint and, in fact, is expressly contrary to the Complaint's allegations. This kind of

[8] Notably, Complaint Counsel acknowledges that [redacted]

gamesmanship is beyond Complaint Counsel's statutory authority and a clear violation of McWane's due process rights.

I. The Court Should Strike Complaint Counsel's Motion For Summary Disposition Of A Made Up Claim Not Contained In And Contrary To The Complaint

A. The Due Process Clause Prohibits The Court From Addressing An Allegation Not Contained In The Complaint

The Supreme Court has made clear that the Due Process Clause of the Fourteenth Amendment of the United States Constitution protects the life, liberty, and property of all U.S. citizens and "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 relief Complaint Counsel seeks in its Motion 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 moving for summary decision on allegations not contained in - - and contrary to - - the Complaint is a clear violation of McWane's due process rights. For example, in *In re Ruffalo*, 390 U.S. 544 (1968), an attorney was informed of new allegations against him for the first time during his hearing. He had no opportunity to conduct discovery or prepare an adequate defense. The United States Supreme Court found that this violated the fundamental fairness of due process, holding that "[s]uch procedural violation of due process would never pass muster in any normal civil or criminal litigation." *Id.* at 550-51.

Fundamental fairness is thus a key element of due process for all proceedings, including this one, and courts have long recognized that a party must not only receive notice of the claims against it, but the notice must also contain sufficient specificity to allow the party to defend itself. *See 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.").

In this case, McWane had no notice that [redacted] change would be a subject of adjudication. In fact, it was notified the opposite: that the ***Commission did not allege wrongdoing related*** [redacted] (which was not mentioned anywhere in the Complaint) and, instead, alleged that the conspiracy was "disbanded" in early 2009 when Congress passed the ARRA in February. The Complaint was also clearly limited to January and June 2008 multiplier increases, not [redacted], and job pricing in 2008).

Courts routinely refuse to address claims beyond the scope of complaints, holding that it is unfair and prejudicial for plaintiffs to attempt to "amend" their complaints after-the-fact during summary judgment briefing. *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."); *Golodner v. City of New London*, No. 3:08-cv-1319, 2010 WL 3522489 at *9 (D.Conn. 2010) (granting defendant's motion for summary judgment, the court refused to address plaintiffs' allegations that were "beyond the scope of the complaint", holding that a "plaintiff cannot amend his claim through a response to summary judgment"); *Karath v. Board of Trustees*, No. 3:07-cv-1073, 2009 WL 4879553 at *3 (D. Conn. 2009) ("The Court will not permit plaintiff to amend his complaint by implication in response to summary judgment"); *Beacon Journal Publishing Co., Inc. v. Gonzales*, No. 5:05-cv-1396, 2005 WL 2099787 at *2

(N.D. Ohio 2005) (in granting summary judgment for the defendant, the court noted that "the relief Plaintiff requests in its [reply brief] is beyond the scope of the Complaint. The Court, therefore, will not address Plaintiff's allegations").

This is not a novel rule. It applies to all courts in all jurisdictions. For example, appellate courts have similarly refused to consider factual allegations made for the first time in appellate briefs as a matter of fundamental fairness. *See 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"); *see 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.")

By moving for summary decision on an the [redacted] - - which the Complaint expressly alleges occurred ***after*** the alleged conspiracy "disbanded" - - Complaint Counsel is simply attempting to bully McWane regarding a [redacted] that the Commission has implicitly decided was ***lawful***. McWane did not have notice of any alleged wrongdoing and did not conduct full discovery on the alleged [redacted]. This Court should thus strike Complaint Counsel's motion for partial summary decision as improper under the due process clause.

B. The FTC Act Prohibits The Court From Addressing An Allegation Not Contained In The Complaint

In the FTC's administrative process, **the Commission itself** is responsible for deciding on the content of Administrative Complaints. (15 U.S.C. § 45; 16 C.F.R. § 3.11.) While the Commission has delegated authority to various subordinate units, like the Bureau of Competition, the Commission retains final authority as to whether any complaint shall issue and must vote on the content of any issued complaint. (16 C.F.R. § 3.11.) In this case, the

Commission voted to issue a Complaint that specifically alleges that the conspiracy ended **in early 2009**. (AC ¶¶ 1-3, 32-36.) Under Section 5(b) of the FTC Act, the Commission can issue a complaint "[w]henever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition[.]" (15 U.S.C. § 45(b).)

All pertinent information cited in Complaint Counsel's motion regarding McWane's [redacted] was obtained during the staff's Part 2 investigation and was thus fully known to the FTC staff, the Commission, and Complaint Counsel before this litigation began. The Commission affirmatively chose not to include allegations regarding [redacted] in its Administrative Complaint. Because the Commission had all information regarding the alleged [redacted] when it voted on the Complaint, it implicitly concluded that there was no "reason to believe" that a violation of the law had occurred during that time period. (*Id.*)

The Commission has never amended its Complaint. Indeed, Complaint Counsel has never moved for leave to do so. Thus, Complaint Counsel has no statutory authority to move for summary decision on an allegation that is beyond the scope of - - and contrary to - - the Complaint. Moreover, 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).) None of that is applicable here, however, because Complaint Counsel has never bothered to file a motion to amend the Complaint. Had it done so, this still would be beyond its statutory authority because allegations relating to [redacted] are clearly not "reasonably within the scope of the original complaint" when the AC specifically stated that the conspiracy "disbanded" in "early

2009" with the February 2009 enactment of the ARRA. (AC ¶¶ 2-3, 36; 16 C.F.R. § 3.15.) Thus, any amendment would have to be certified to the Commission.

Again, this is not a novel rule -- the requirements under the Federal Rules of Civil Procedure are the same. Parties have long been required to either obtain written consent of the opposing party, or to move the court for leave to amend, if they wish to litigate claims beyond the scope of the complaint. *See* Fed.R.Civ.P. 15 (a) ("party may amend its pleading only with the opposing party's written consent or the court's leave"); Fed.R.Civ.P. 15 (b) (requiring consent of the parties for the Court to treat issues not raised in the pleadings as if they had been included).

In addition, a party seeking to amend must do so in a timely manner, *i.e.*, before the close of discovery. Attempts to "amend" a complaint - - without ever a formal motion to amend - - by simply tossing a new claim into a summary judgment brief are routinely denied. In *Farrell v. Einemann*, CA No. 04-2088, 2006 WL 1644826 (D.N.J. 2006), a plaintiff raised a claim for the first time in its summary judgment brief. The court refused to rule on the claim, holding that "the parties seem to have moved on to litigating a claim which is absent from the Complaint . . . this Court will not . . . rule on a claim which has not been stated in the Complaint." *Id.* at *2. The court went on to note that Federal Rule of Civil Procedure 15(b) prevented it from treating issues not raised in the pleadings without consent of the parties. *Id.*; Fed. R. Civ. P 15(b).[9]

Even assuming *arguendo* that Complaint Counsel had the statutory authority seek leave to amend the complaint (which they do not), they should not be permitted to do so in such an improper and after-the-fact manner. They should have followed Rule 15, but did not. If they had followed the Commission's rules and requested leave to amend the Complaint, the motion should still have been denied. Under Rule 15, a court may deny leave to amend if there is undue delay, bad faith, dilatory motive, undue prejudice to the opposing party, or if the amendment would be futile. *See Park v. City of Chi.*, 297 F.3d 606, 612–13 (7th Cir. 2002). "[T]he longer

[9] Federal Trade Commission Rule 3.15 is substantively identical to Fed. R. Civ. P. 15.

the delay, the greater the presumption against granting leave to amend." *King v. Cooke*, 26 F.3d 720, 723 (7th Cir. 1994) (internal quotation marks and citation omitted). Here, there is both undue prejudice and undue delay. McWane has been operating under the assumption that the Complaint meant what it said: that the alleged conspiracy was limited in time to 2008 and was "disbanded" in "early 2009" when ARRA was enacted in February (and also that it was limited to 2008 multiplier increases and job prices, [redacted]).

Again, the pertinent facts related to McWane's [redacted] were obtained by FTC staff during its Part 2 investigation and were, thus, known to the Commission (which chose to exclude them from its Complaint) and to Complaint Counsel - - which chose not to move to amend the Complaint. Discovery is now closed. While a party may move for summary decision at any time, as a general rule summary judgment should not be granted until the party opposing the motion has had an adequate opportunity to conduct discovery. *Ala. Farm Bureau Mut. Cas. Co. v. American Fid. Life Ins. Co.*, 606 F.2d 602 (5th Cir. 1979). Indeed, Federal Rule of Civil Procedure 56(f) expressly gives a defendant facing a summary judgment motion before the close of discovery the opportunity to oppose the motion in order to complete discovery. The provisions of FTC Rule 3.24 governing the standards for summary decision are virtually identical to the provisions of Fed. R. Civ. P. 56, governing summary judgment in the federal courts. *In re Hearst Corp.*, 80 F.T.C. 1011, 1014 (1972) ("Rule 3.24(a)(4) tracks Federal Rule 56(f)"). Because the Commission's Complaint told McWane that its [redacted] was ***not at issue in the case***, it has not had a full opportunity to conduct discovery on Complaint Counsel's new allegation. Summary decision should be denied and the Court should strike Complaint Counsel's made-up motion.

III. The Court Should Also The Motion Because Complaint Counsel Ignores Significant Exculpatory Evidence, Including a Sworn Denial By the Only Witness it Relies On

Complaint Counsel's made-up claim, flatly contradicted by the testimony and other evidence in this case, falls far short of showing that there is "no genuine issue as to any material fact regarding liability or relief[.]" 16 C.F.R. 3.24(a)(2). To the contrary, the evidence is not only highly disputed (thus showing ***significant*** "genuine issues" as to material facts), it is undisputed that [redacted] If this were a real claim in the case, those undisputed facts would warrant summary judgment in ***McWane's favor***. Indeed, Complaint Counsel concedes that [redacted]

Instead, the Supreme Court and every Circuit have repeatedly dismissed cases challenging parallel, follow-the-leader conduct because that, by itself, does not suggest any preceding agreement. *See, e.g., Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (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") (emphasis added); *Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287, 1310 (11th Cir. 2003) ("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"); *Venzie Corp. v. United States Mineral Products Co.*, 521 F.2d 1309, 1314 (3d Cir. 1975) ("The absence of action contrary to one's economic interests renders consciously parallel business behavior 'meaningless, and in no way indicates agreement.'").

Complaint Counsel's made-up claim is entirely dependent on [redacted], whose testimony on this issue FTC staff and the Commission obtained during the Part 2 investigation - - and decided not to include in the Complaint - - and which Complaint Counsel had from the beginning of this litigation and decided not to move to amend and add to the Complaint. That alone warrants this Court denying the motion. In addition, though, even the partial discovery taken on this issue shows facts quite different from the picture Complaint Counsel paints. In short, Complaint Counsel ignores substantial evidence and testimony that [redacted]. Complaint Counsel also ignores the testimony of its only witness, [redacted]

A. Complaint Counsel Ignores Exculpatory Evidence That [redacted]

To prove a horizontal price-fixing agreement, Complaint Counsel must come forth with facts that demonstrate [redacted]. *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).[10] 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. v. United States*, 328 U.S. 781, 810 (1946); *In re Baby Food Antitrust*

[10] 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").

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 [redacted] (SOF ¶ 14 (" [redacted] , *Id.* [redacted] *Id.* [redacted] *Id.* [redacted] (SOF ¶ 32 [redacted] , *Id.* [redacted] . (SOF ¶ 33 [redacted] , *Id.* [redacted] *Id.* [redacted]

Complaint Counsel's argument that [redacted] is simply made-up. Indeed, [redacted]

(SOF ¶ 24

Complaint Counsel admits that

. Indeed, Complaint Counsel's motion is notable

[11]

Complaint Counsel concedes

as lawful:

> "the record demonstrates that their testimony, at most, can be characterized as an exchange of information that each entity had already independently decided to follow the price increase announced by IP on February 10, 2003. A jury could not reasonably interpret the cited testimony as proof of an agreement to raise, fix or stabilize future prices" . . . "at most, Korhonen simply communicated SENA's decision after it had been made. That communication cannot have affected the decision UPM had already made to follow"

In re Publication Paper Antitrust Litigation, CA No. 3:04-md-1631, 2010 WL 5253364 at *8 (D.Conn. 2010)

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)

[11] Complaint Counsel knows full well that the record shows ample evidence . It cannot duck those facts by .)

[redacted] (2) [redacted], and (3) [redacted]

Here, like *Publication Paper*, Complaint Counsel, at most, alleges that [redacted]

Courts have made clear that an after-the-fact communication, without more, is not evidence of a price-fixing agreement even when it actually addresses prices. *Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan*, 203 F .3d 1028, 1034 (8th Cir. 1999) (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."). It is hard to understand [redacted] - - could somehow suggest a "preceding agreement." *Twombly*, 550 U.S. at 557.

Court after court has held that no inference of conspiracy can be drawn from the after-the-fact decision by one company to follow another company's price. *Id.* 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"); *Clamp-All Corp. v. Cast Iron Soil Pipe Institute*, 851 F.2d 478, 484 (1st Cir. 1988) (Breyer, J.) (affirming summary judgment for defendants in a case in which defendants in a concentrated market followed each other's list prices, holding that "the price lists still show no more than what defendants concede: that each firm, acting individually, copied the price list of the industry leader. A firm in a concentrated industry typically has reason to decide

(individually) to copy an industry leader" . . . "such individual pricing decisions (even when each firm rests its own decision upon its belief that competitors will do the same) do not constitute an unlawful agreement under section 1 of the Sherman Act"); *Apex Oil Co. v. DiMauro*, 822 F.2d 246, 253–54 (2nd Cir. 1987) ("parallel conduct alone will not suffice as evidence of such a conspiracy, even if the defendants 'knew the other defendant companies were doing likewise.'").

Moreover, it would be particularly perverse - - and contrary to Supreme Court and uniform Courts of Appeals case law - - to infer that [redacted] Complaint Counsel does not cite any case for that novel proposition, and none exists.

CONCLUSION

For the reasons discussed herein, the Court should strike Complaint Counsel's motion for summary decision on a claim that is not contained in - - and contrary to - - the Complaint. [redacted] Complaint Counsel cannot simply ignore those facts. Accordingly, the Court should strike Complaint Counsel's made-up motion (or, at a minimum, deny it because there are genuine issues of material disputed fact).

Dated: June 25, 2012

/s/ J. Alan Truitt

J. Alan Truitt
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Attorneys for Respondent McWane, Inc.

CERTIFICATE OF SERVICE

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

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Jeanine K. Balbach, Esq.
J. Alexander Ansaldo, Esq.
Andrew K. Mann, Esq.

By: /s/ William C. Lavery
One of the Attorneys for McWane

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE DISPUTE IN SUPPORT OF RESPONDENT MCWANE, INC.'S OPPOSITION AND MOTION TO STRIKE COMPLAINT COUNSEL'S MOTION FOR SUMMARY DECISION, AND RESPONSE TO COMPLAINT COUNSEL'S STATEMENT OF UNDISPUTED FACTS

CONFIDENTIAL
MATERIAL PROTECTED PURSUANT TO
JANUARY 5, 2012 PROTECTIVE ORDER ENTERED BY THIS COURT

TABLE OF CONTENTS

Page

Pursuant to Rule 3.24 of the Federal Trade Commission's Rules of Practice, Respondent McWane, Inc. ("McWane"), submits this Statement of Material Facts as to Which there is no Genuine Dispute ("SOF"), in support of its Opposition and Motion to Strike Complaint Counsel's Motion for Partial Summary Decision.

There is no genuine dispute as to the following facts:

I. The Complaint Alleged A Conspiracy To Raise Multipliers (And Stop Job Price Discounts) That Was [redacted] By [redacted]

1. Counts 1 and 2 of the Administrative Complaint ("AC") allege that McWane "conspired" with Sigma and Star to issue "multiplier" price increases for ductile iron pipe fittings in January and June 2008 and to stop their "job price" discounting, beginning in January 2008 and ending in "early 2009." (*See* CC's Motion, Tab 1 AC ¶¶ 2-3.)

2. According to the Complaint and statements by the Commission, the alleged conspiracy existed only until [redacted]" and [redacted] in February 2009 because "the passage of the American Recovery and Reinvestment Act of 2009 ("ARRA") in February 2009 . . . upset the terms of coordination among the Sellers." (*See* CC's Motion, Tab 1 AC ¶3 (emphasis added); January 4, 2012 Statement by Federal Trade Commission, http://www.ftc.gov/opa/2012/01/mcwane.shtm); (*See* CC's Motion, Tab 1 AC ¶ 36 ("January 2009").)

II. Complaint Counsel's New Claim Regarding [redacted] Is Not Contained In The Complaint

3. In its Motion for Partial Summary Decision, Complaint Counsel [redacted]

[redacted]

[redacted]

4. The Complaint did not [redacted] Instead, it alleged a conspiracy to raise ([redacted]) prices through increases in multipliers ([redacted]) and an end to job price discounts in January 2008 and June 2008 ([redacted]). (*See* CC's Motion, Tab 1 AC ¶¶ 32-24.)

5. [redacted]. (*See* CC's Motion, Tab 1 AC ¶¶ 2-3.; *See* CC's Motion, Tab 3 [redacted]

6. [redacted]").)

7. [redacted]

8. [redacted])

III. Undisputed Testimony Demonstrates That [redacted]

9. [redacted]

[redacted]).)

10. [redacted]

11. [redacted]

12. [redacted].)

13. [redacted].)

IV. Significant Undisputed Facts Demonstrate That [redacted]

14. [redacted]

[redacted]

15. [redacted]

[redacted].)

16. [redacted]

[redacted]

[redacted]

17. [redacted]

18. [redacted]

19. [redacted]

20. [redacted]

21. [redacted]

22. [redacted]

.)

23. [redacted]

[redacted]

24. [redacted]

25. [redacted]

26. [redacted]

[redacted]

27. [redacted]

28. [redacted]

30. [redacted]

31. [redacted]

32. [redacted]

33. [redacted]

34. [redacted]

35. [redacted]

36. [redacted]

[redacted]

37. [redacted]

38. [redacted]

39. [redacted]

40. The undisputed facts also show [redacted]

V. There Is Genuine Dispute As To The Following "Facts" From Complaint Counsel's Statement Of Undisputed Facts

Pursuant to Rule 3.24, Complaint Counsel submitted a Statement of Undisputed Facts with its Motion for Partial Summary Decision. Respondent McWane Responds as follows. McWane believes that while Complaint Counsel has mischaracterized or skewed a number of the "facts" cited, for reasons explained in more detail *supra*, there is genuine dispute as to the following paragraphs in Complaint Counsel's Statement:

41. [redacted] The testimony cited does not support the statement.

42. [redacted]

43. [redacted] This statement mischaracterizes the document -- [redacted]

[redacted]

Dated: June 25, 2012

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Andrew K. Mann, Esq.

By: /s/ William C. Lavery
One of the Attorneys for McWane

EXHIBIT 1

This exhibit has been marked Confidential and redacted in its entirety

EXHIBIT 2

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EXHIBIT 3

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EXHIBIT 4

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EXHIBIT 5

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EXHIBIT 5

This exhibit has been marked Confidential and redacted in its entirety

EXHIBIT 7

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CERTIFICATE OF SERVICE

I hereby certify that on August 29, 2012, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

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Counsel for Respondent McWane, Inc.

CERTIFICATE FOR ELECTRONIC FILING

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

August 29, 2012

By: s/ Thomas H. Brock
Attorney