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

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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.

, (3)

, (4)

, (5)

, (6)

, and (7)

(SOF ¶ 14.)

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[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") **<u>in February 2009</u>** . . . upset the terms of coordination among the Sellers." (SOF ¶ 2.) The AC contained [REDACTED]

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

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

III. CC Ignores Significant Exculpatory Evidence That Demonstrates That McWane Made

. (SOF ¶ 9 , *Id.* , *Id.* , *Id* .)

*   *   *

*   *   *

*   *   *

(SOF ¶ 14.)

. (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 . (SOF ¶ 35.)

There is no evidence that (SOF ¶ 31.)

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

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

(SOF ¶ 20 (emphasis added) (objections omitted); SOF ¶ 25

.)[8]

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

Although Complaint Counsel argues 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 "**<u>of the issues being adjudicated.</u>**" 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

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] [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

(SOF ¶ 14 ("

, *Id.*

Id.

Id.

(SOF ¶ 32

, *Id.*

. (SOF ¶ 33

, *Id.*

Id.

Complaint Counsel's argument that

is simply made-up. Indeed,

(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 .)

(2) , and (3)

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

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 -- 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

I hereby certify that on June 25, 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 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:

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
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

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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") <u>in February 2009</u> . . . 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]").)

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III. Undisputed Testimony Demonstrates That

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IV. Significant Undisputed Facts Demonstrate That

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PUBLIC

[REDACTED]

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25. [REDACTED]

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40. The undisputed facts also show

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]

Dated: June 25, 2012

/s/ J. Alan Truitt
J. Alan Truitt
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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 7

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