UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

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

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

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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

, 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

Specifically, McWane does not dispute:

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McWane only points to two pieces of relevant admissible evidence to dispute the factual predicates of Complaint: . McWane SOF ¶¶ 30, 34. Mr. 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. testimony similarly do not create a triable issue on the existence of an agreement. McWane argues that Mr. 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

[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:

- *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*");

- *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

- 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 distinguish it from the *Publication Paper* communication. First, and most importantly,

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,

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,

. McWane SOF ¶¶ 25, 28.

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

Entry of summary decision against McWane on is fully consistent with the Commission's Rules and fundamental fairness. As discussed below, is reasonably within the scope of the Commission's Complaint, McWane had actual notice of , 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).

is one example of the conspiratorial conduct – price fixing – that is expressly alleged within the Commission's Complaint. As such, Commission precedent establishes that 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. 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 and took substantial discovery on this issue. This particular price fixing episode first emerged 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 was given. McWane's counsel questioned before Complaint Counsel raised the issue in his deposition. Complaint Counsel also questioned McWane executives without objection by McWane's counsel. And both McWane and Complaint Counsel raised the 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 . 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*

[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:

> 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

and enter an order granting partial summary decision on the issue of whether McWane unlawfully restrained price competition 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
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Dated: June 27, 2012

THE FOLLOWING EXHIBITS ARE

CONFIDENTIAL AND REDACTED IN ENTIRETY:

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MCCULLOUGH DEPOSITION EXCERPT

MCCUTCHEON DEPOSITION EXCERPT

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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
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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
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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