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**

RESPONDENT McWANE, INC.'S MOTION [AND PROPOSED ORDER] FOR SUMMARY DECISION

Pursuant to Rule 3.24 of the Federal Trade Commission's Rules of Practice, Respondent McWane, Inc. ("McWane") respectfully moves for summary decision in this action. For the reasons set forth in the accompanying memorandum, this motion should be granted.

Dated: June 8, 2012

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PUBLIC VERSION

CERTIFICATE OF SERVICE

I hereby certify that on June 8, 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
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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
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I further certify that I delivered via electronic mail a copy of the foregoing document to:

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[PROPOSED ORDER]

Having carefully considered Respondent's Motion, Complaint Counsel's Opposition, and Respondent's Reply, and all supporting and opposing evidence, and the applicable law, it is hereby ORDERED AND ADJUDGED, that Respondent's Motion for Summary Decision is hereby GRANTED and this action is DISMISSED.

ORDERED:

Judge D. Michael Chappell
Administrative Law Judge

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MEMORANDUM OF LAW IN SUPPORT OF RESPONDENT McWANE, INC.'S MOTION FOR SUMMARY DECISION

REDACTED MATERIALPROTECTED
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 Motion for Summary Decision.

SUMMARY OF ARGUMENT

[redacted] ***there was no conspiracy to fix prices (or eliminate job price discounts) in 2008 or any other time***. [redacted] Instead, undisputed facts show that McWane charted its own course - - [redacted]. The evidence is also crystal clear [redacted] continued to offer job price discounts (and other price concessions) throughout 2008 and, as a result, that price deterioration was severe. Summary disposition of Counts 1 and 2 should thus be granted.

Count 3 also fails. Complaint Counsel's allegations that McWane "invited" Star and Sigma to collude by sending its January and June 2008 letters to customers, and "facilitated" collusion by participating in DIFRA, are also flatly contradicted by the evidence. [redacted] The "invitation to collude" Count also fails because the doctrine has not been litigated and affirmed by any Court of Appeals. On the contrary, Courts of

Appeals have consistently rejected antitrust liability when presented with a one-way offer. Courts have also rejected any antitrust liability premised upon the theory that a company's decision to participate in a trade association that gathers and disseminates aggregated tons-shipped data (not prices) is sufficient to establish a price-fixing conspiracy.

Counts 4-7 - - alleging that McWane monopolized a domestic market for fittings by "excluding" Star and Sigma - - fails because it is undisputed that neither company was excluded by McWane. [redacted] Indeed, Respondent has not found a single "exclusion" case in the history of the antitrust laws where a supplier had more than [redacted]

Nor did McWane exclude Sigma [redacted]

[redacted] Accordingly, the undisputed facts demonstrate that McWane did not "exclude" Star or Sigma and summary disposition of Counts 4-7 should be granted.[1]

THE ALLEGATIONS

Counts 1 and 2 of the Administrative Complaint ("AC") allege that McWane "conspired" with Sigma and Star, in violation of FTC Act Section 5, "[b]eginning in January 2008" and ending in February 2009 - - when Congress passed Buy-America legislation. (SOF ¶ 1.) The three companies allegedly agreed to issue "multiplier" price increases for ductile iron pipe fittings in January and June 2008 and to stop their "job price" discounting. (SOF ¶ 2.) The AC also alleges that the companies' participation in a trade association (the Ductile Iron Fittings Research Association or "DIFRA") "facilitated price coordination" for the six-month period after June 2008. (SOF ¶ 3 ("between June 2008 and January 2009").) The AC alleges that McWane, Sigma, and Star each provided a third-party accounting firm with a monthly report of its tons-shipped data, which the firm then aggregated, and distributed the overall totals back to them. (*Id*.) The AC alleges that the combined, aggregated tons-shipped data allowed the DIFRA members to "indirectly" monitor their "output levels." (SOF ¶ 4.) Count 3 alleges that McWane "invited" Star and Sigma to collude, in violation of Section 5, by some or all of the same conduct. (*Id*.)

[1] To be clear, McWane is not conceding any of the other elements that Complaint Counsel needs to prove on any of its Counts, and has simply focused on the most obvious and undisputed failures of proof for purposes of this motion. There are many others. For example, the record is clear that all fittings (whether made inside or outside the U.S.) are interchangeable for virtually all jobs and that McWane's share of the total fittings sales in the U.S. has steadily declined over the last decade and is nowhere near the thresholds required to establish a monopoly. It is also clear - - as Commissioner Rosch stated in his separate disagreement with the Commission's decision to file its AC - - that McWane's short-term rebate policy and short-term Master Distributorship Agreement with Sigma do not constitute exclusionary conduct as a matter of law: "***I do not think that the Part 3 Administrative Complaint against McWane and the draft Part 2 Complaint against Sigma adequately allege exclusive dealing as a matter of law. In particular, there is case law in both the Eighth and Ninth Circuits blessing the conduct that the complaints charge as exclusive dealing.***" (Jan. 4, 2012 Statement of Commissioner J. Thomas Rosch.) McWane expressly reserves its rights on this and other legal defects, as well.

Counts 4 through 7 of the Administrative Complaint ("AC") allege that McWane monopolized or attempted to monopolize the market for domestic fittings, in violation of FTC Act Section 5, by "excluding" two importers, Star and Sigma, from sourcing and re-selling domestic fittings (aka, "virtual manufacturing"). (SOF ¶ 5.) Counts 4 and 5 allege that McWane "excluded" Sigma by agreeing to sell it domestic fittings under a one-year sales agreement signed in September 2009. (*Id.*) Counts 6 and 7 allege that McWane "excluded" Star by modifying its domestic fittings rebate policy in September 2009. (SOF ¶¶ 8-9.)

SUMMARY OF UNDISPUTED MATERIAL FACTS

McWane produces more than 4,000 individual ductile iron pipe fittings in a range of diameters, configurations, joints, coatings, and finishes at its last remaining foundry in the U.S., the Union Foundry, and in its foundry in China, Tyler Xin Xin. (SOF ¶ 11.)[2] McWane's competitors include a number of importers (Sigma, Star, MetalFit, Serampore, NAPAC, and ElectroSteel), and a number of domestic foundries (U.S. Pipe, Griffin Pipe, American Cast Iron Pipe Company, and Backman Foundry), although several of the domestic foundries have stopped or cut back their production in the face of a flood of cheap imports. (SOF ¶ 12.)

[redacted]

[2] McWane's ductile iron fittings business is known as TylerUnion.

I. [redacted]

[redacted]

McWane's decisions were based on its assessment of a wide range of factors, and McWane witnesses testified at length [redacted]

McWane also made independent decisions to provide special job price discounts, below its multipliers, on a regular basis. [redacted]

[redacted]

II. [redacted]

[redacted]

Star denied any price agreements with McWane in its Answer to the AC

[redacted]

[redacted]

A. McWane Charted Its Own Course In January 2008 [redacted]

McWane issued a multiplier change on January 11, 2008 because - - as the AC concedes - - its raw materials prices were increasing dramatically. [redacted]

There was no advance coordination and no meeting of the minds. [redacted]

[3] [redacted]

[redacted]

B. McWane Charted Its Own Course In June 2008 [redacted]

[redacted]

[4] Undisputed evidence supporting this sentence will be provided as soon as a recent deposition transcript is received from the court reporter.

[redacted]

C. [redacted]

[redacted]

[5] McWane's independent decision to price at different [redacted] is, of course, inconsistent with any alleged meeting of the minds - - perhaps explaining why the AC literally ignores it. It is difficult to see how this squares with a lawyer's obligation to the court. It would be perverse, of course, to hold McWane liable for ***not following*** a higher price increase ***and, instead, issuing a lower price*** increase - - [redacted].

[redacted]

III. [redacted]

DIFRA was a short-lived trade association for fittings suppliers that was operational only during the second half of 2008. [redacted]

[redacted]

[6] The AC does not allege that any prices were communicated as part of DIFRA or under its penumbra.

[redacted]

[redacted] On the contrary, McWane charted its own course [redacted] and job price discounts grew even more fierce in the second half of 2008. [redacted]

IV. [redacted]

[redacted]

[9] Again, a citation will be added as soon as a transcript is available.

[redacted]

V. [redacted]

[redacted]

[10] [redacted]

[redacted]

ARGUMENT

The standards governing a motion for summary decision are well settled. FTC Rule 3.24(a)(3) provides that "[a]ny party may move, with or without supporting affidavits, for a summary decision in the party's favor upon all or any part of the issues being adjudicated." "A mere unsubstantiated allegation . . . creates no 'genuine issue of fact' and will not withstand summary judgment." *Harding v. Gray*, 9 F.3d 150, 154 (D.C. Cir. 1993). Instead, the party opposing the motion "***must set forth specific facts***" and the facts must be ***significant*** enough to establish a genuine issue of disputed, material fact for trial. CRP 3.24(a)(1). *See also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) ("the plain language of Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case"). "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 255 (1986). If the evidence "is merely colorable, or is not significantly probative," summary judgment must be granted. *Id*. at 249 (internal citations omitted). [11]

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

Counts 1 and 2 of the AC borrow the language of Sherman Act Section 1 and allege a conspiracy in violation of FTC Act Section 5. "The existence of an agreement is the hallmark" of a conspiracy claim. *In re Baby Food Antitrust Litig*., 166 F.3d 112, 117 (3d Cir. 1999); *see*

[11] 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)").

Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 771 (1984) (conspiracy requires proof of "unity of purpose or a common design and understanding or a meeting of the minds in an unlawful arrangement").[12] That requires proof that defendants discussed and agreed upon "a unity of purpose or common design and understanding, or a meeting of minds in an unlawful arrangement." *American Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946). Moreover, the agreement must *precede* the allegedly fixed price. *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1966 (2007) ("when allegations of parallel conduct are set out in order to make a § 1 claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action"). A plaintiff fails to show a preceding agreement if it simply establishes that defendants had an opportunity to conspire and asks the court to speculate that they must have done so. *Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 1013 (3d Cir. 1994) (affirming grant of summary judgment because the "evidence tends to show only an opportunity to conspire, not an agreement to do so"); *Venzie Corp. v. United States Mineral Products Co., Inc.*, 521 F.2d 1309, 1313-4 (3d Cir. 1975) ("an opportunity is significant only if other evidence permits an inference that an agreement did in fact exist.").

A. Undisputed Testimony Establishes That McWane Was Not Involved In Any Conspiracy

[redacted]

[12] 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"); *Fashion Originators' Guild v. FTC,* 312 U.S. 457, 463-64 (1941) ("If the purpose and practice of the combination of garment manufacturers and their affiliates runs counter to the public policy declared in the Sherman and Clayton Acts, the Federal Trade Commission has the power to suppress it as an unfair method of competition.).

A plaintiff confronted with sworn denials faces a high burden to overcome them: "Facing the sworn denial of the existence of conspiracy, it [is] up to plaintiff to produce ***significant probative evidence by affidavit or deposition*** that conspiracy existed if summary judgment [is] to be avoided." *City of Moundridge v. Exxon Mobil Corp.*, 429 F. Supp. 2d 117, 130 (D.D.C. 2006) (emphasis added) (citation omitted). In *Moundridge*, the defendants testified, as here, that they made their price and output decisions independently. In the face of this testimony, the plaintiffs proffered evidence that defendants' had an opportunity to conspire (during a series of industry meetings) and pointed to numerous internal documents that they argued suggested a conspiracy. The district court granted summary judgment because plaintiffs' factual evidence did not overcome the defendants' sworn denials, and in the face of these denials the opinion of plaintiffs' "liability" expert was entitled to "no weight." No. 04-940, 2009 U.S. Dist. LEXIS 123954, at * 39 (D. D.C. Sept. 30, 2009). The D.C. Circuit affirmed and held that the plaintiffs' "few scattered communications" and other evidence "falls far short" of creating a genuine issue of material fact. *City of Moundridge v. Exxon Mobil Corp*., 409 Fed.Appx. 362, 364 (D.C. Cir. 2011).

In *Baby Foods*, the Third Circuit similarly affirmed summary judgment in favor of defendants because plaintiffs failed to present significant evidence of a conspiracy sufficient to overcome defendants' sworn denials. The Court found direct evidence lacking even though there was evidence that defendants notified each other of price increases before announcing them to customers and regularly exchanged sales information. *In re Baby Foods*, 166 F.3d at 118-121.

Unlike *Baby Foods*, there is no evidence that [redacted]

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

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

any contract, combination or conspiracy" and plaintiff failed to "come forward with significant probative evidence supporting its allegations of a conspiracy.").

II. McWane's Decision To Chart Its Own Course In 2008 [redacted]

Undisputed evidence establishes that McWane independently decided to chart its own course in January 2008 [redacted]

Undisputed evidence also establishes that although cost increases continued, ***McWane did not follow*** [redacted]

It is well-established that a price increase in the face of raw materials cost increases suggests rational independent decision-making, not a conspiracy. *Baby Foods,* 166 F.3d at 131 (document showing that "prices were being raised due to market factors, including increased costs in raw materials and packaging" reflected defendant's "competitive behavior and not conscious parallelism"). A subsequent decision by other suppliers to follow a price increase, likewise, suggests independent decision-making, not a conspiracy. *Blomkest Fertilizer*, 203 F.3d at 1032-33 (affirming summary judgment because "[e]vidence that a business consciously met the pricing of its competitors does not prove a violation of the antitrust laws."); *Serfecz v. Jewel Food Stores*, 67 F.3d 591, 600-01 (7th Cir. 1995) (affirming summary judgment because "[t]he

mere existence of mutual economic advantage, by itself, does not tend to exclude the possibility of independent, legitimate action and supplies no basis for inferring a conspiracy"); *Kreuzer v. American Academy of Periodontology*, 735 F.2d 1479, 1488 n.12 (D.C. Cir. 1984) (plaintiff must provide facts demonstrating that the "acts by the defendants [are] in contradiction of their own economic interests"); *Baby Foods*, 166 F.3d at 129-30 ("[e]ven in a concentrated market, the occurrence of a price increase does not in itself permit a rational inference of a conscious parallelism") (internal citation omitted); *Venzie Corp*, 521 F.2d at1314 ("[t]he absence of action contrary to one's economic interests renders consciously parallel business behavior 'meaningless, and in no way indicates agreement'.")

Moreover, the undisputed fact that job price discounts continued throughout this period - [redacted] underscores the independent nature of each company's decision-making. [redacted] In *Clamp-All Corp. v. Cast Iron Soil Pipe Institute*, 851 F.2d 478 (1st Cir. 1988) (Breyer, J.), the First Circuit affirmed summary judgment for defendants in a case in which defendants in a concentrated market followed each other's list prices, but - - as here - - routinely offered discounts off list. The Court held that the fact that suppliers "often set prices that deviated from their price list helps support the inference that the similarity of price lists reflect *individual* decisions to copy, rather than any more formal pricing agreement." *Id*. at 484.

Other Circuits agree. *See, e.g., Baby Foods*, 166 F.3d at 128 ("In an oligopoly . . . there is pricing structure in which each company is likely aware of the pricing of its competitors"); *In re Citric Acid Litigation*, 191 F.3d 1090, 1103 (9th Cir. 1999) ("Varni has not . . . produced evidence tending to exclude the possibility that Cargill received these price lists legitimately from customers after they were distributed by competitors"); *Market Force Inc. v. Wauwatosa Realty Co.*, 906 F.2d 1167, 1173 (7th Cir. 1990)("[i]t is well established that evidence of informal communications among several parties does not unambiguously support an inference of a conspiracy.")

It is well established that "antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case," *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986), and that it is not possible to infer that McWane conspired from the subsequent Star and Sigma decisions to follow McWane's multipliers in January and June of 2008. *See Citric Acid*, 191 F.3d at 1102 ("A section 1 violation cannot, however, be inferred from parallel pricing alone, nor from an industry's follow-the-leader pricing strategy") (internal citations omitted). Parallel pricing is simply ambiguous conduct that is consistent with independent decision-making and does not "tend[] to exclude the possibility of independent action[.]" *Monsanto Co. v. Spray-Rite Serv. Corp*., 465 U.S. 752, 768 (1984); *see also Williamson Oil*, 346 F.3d at 1300 (affirming summary judgment: "Evidence that does not support the existence of a price fixing conspiracy any more strongly than it supports conscious parallelism is insufficient to survive a defendant's summary judgment motion"); *Mitchael v. Intracorp*, *Inc.*, 179 F.3d 847, 858 (10th Cir. 1999) (affirming summary judgment because "ambiguous conduct that is as consistent with permissible competition as with illegal conspiracy does not by itself support an inference of antitrust conspiracy under Sherman Act section 1"); *Baby Foods*, 166 F.3d at 122 ("no conspiracy should be inferred from ambiguous evidence or from mere parallelism when defendants' conduct can be explained by independent business reasons.") [redacted]

III. There Was No Invitation To Collude [redacted]

[redacted]

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

Courts have also rejected any antitrust liability premised upon the theory that a company's decision to participate in a trade association that gathers and disseminates aggregated

tons-shipped data somehow "facilitated" price collusion. *Williamson Oil*, 346 F.3d at 1313 (in finding that gathering volume data (like here) was entirely consistent with each participant's unilateral self-interest, the Court held that "it is ***far less indicative of a price fixing conspiracy to exchange information relating to sales as opposed to prices***") (emphasis added). In *Williamson Oil*, the Court found that it was "***plainly beneficial*** for each individual appellee to keep tabs on the commercial activities of its competitors, so the receipt of the information concerning their sales does not tend to exclude the possibility of independent action or to establish anticompetitive collusion." *Id*. (emphasis added); *Citric Acid*, 191 F.3d at 1103 (no violation of the antitrust laws where Cargill received "price lists legitimately from customers after they were distributed by competitors").

There is a good reason for this unanimous rejection of any invitation to collude liability in these circumstances: it is consistent with a competitive marketplace. "[I]n competitive markets, particularly oligopolies, companies will monitor each other's communications with the market in order to make their own strategic decisions." *Williamson Oil*, 346 F.3d at 1305, citing *Holiday Wholesale Grocery v. Philip Morris, Inc.*, 231 F.Supp.2d 1253, 1276 (N.D.Ga. 2002); *Blomkest Fertilizer*, 203 F.3d at 1036 ("evidence that the alleged conspirators were aware of each other's prices, before announcing their own prices, is nothing more than a restatement of conscious parallelism, which is not enough to show an antitrust conspiracy"); *United States v. General Motors*, 1974 Trade Cas. (CCH) para 75,253 (E.D. Mich. 1974) ("The public announcement of a pricing decision cannot be twisted into an invitation or signal to conspire; it is instead an economic reality to which all other competitors must react.").

Any other rule - - [redacted] - - would turn the antitrust laws on their head and throttle *competitive* practices that are widespread throughout the economy.[13]

[13] Complaint Counsel may cite consent orders the Commission entered on administrative complaints about signaling or invitations to collude. But a consent cannot create new law (and, indeed, does not even constitute an admission

IV. Star Was Not Excluded [redacted]

[redacted] affirmatively disproves any allegations that McWane exercised monopoly power and excluded Star from competing. [redacted] *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp*., 509 U.S. 209, 226 (1993) ("[W]here new entry is easy . . . summary disposition of the case is appropriate"); *Advo, Inc. v. Philadelphia Newspapers*, 51 F.3d 1191, 1202 (3d Cir. 1995). It is well-established that actual entry of a new competitor or actual expansion by an existing competitor "precludes a finding that exclusive dealing is an entry barrier of any significance" *Omega Envt'l. v. Gilbarco, Inc*., 127 F.3d 1157, 1164 (9th Cir. 1997), and easy entry conditions "rebut inferences of market power." *Tops Mkts., Inc. v. Quality Mkts., Inc*., 142 F.3d 90, 99 (2d Cir. 1998). Thus, [redacted] conclusively shows that McWane did not (and could not) exercise monopoly power.

Indeed, Respondent is unable to find a single case in the history of the federal antitrust laws in which a supplier with more than [redacted] customers, including more than [redacted] *exclusive* customers, in its first year in the market segment was considered "excluded." [redacted] the antitrust laws do not guarantee that. They only ensure that a company has the *opportunity* to compete - - [redacted]

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

[redacted] *United States v. Syufy Enters.*, 903 F.2d 659, 664 (9th Cir. 1990) ("[T]he nature of competition is to make winners and losers.")

[redacted] disprove Complaint Counsel's allegation that McWane's rebate policy excluded Star. True, long-term exclusive deals - - and the rebate policy was not one, for the reasons set out by Commissioner Rosch[14] - - are only problematic if they "foreclose competition in a substantial share of the line of commerce affected." *Tampa Elec. Co. v. Nashville Coal Co*., 365 U.S. 320, 327 (1961). To foreclose competition in a substantial share of the affected line of commerce, the exclusive deals must "foreclose so large a percentage of the available . . . outlets that entry into the concentrated market is unreasonably constricted," *E. Food Servs., Inc. v. Pontifical Catholic Univ. Servs. Ass'n, Inc*., 357 F.3d 1, 8 (1st Cir. 2004), and significant sellers are "frozen out of a market by the exclusive deal." *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 45 (1984) (O'Connor, J., concurring).

[redacted]

V. McWane Did Not Exclude Sigma [redacted]

[redacted]

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

[redacted]

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

[15] [redacted]

CONCLUSION

[redacted] McWane did not participate in any conspiracy to fix fittings prices in 2008, the tons-shipped DIFRA data did not "facilitate" price coordination in the second half of 2008, and McWane did not exclude Star or Sigma from selling domestic fittings. Summary disposition should thus be granted on all Counts.

Dated: June 8, 2012

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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 MOTION FOR SUMMARY DECISION

REDACTED 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 Motion for Partial Summary Decision.

There is no genuine dispute as to the following facts:

I. Allegations

1. Counts 1 and 2 of the Administrative Complaint ("AC") allege that McWane "conspired" with Sigma and Star, in violation of FTC Act Section 5, "[b]eginning in January 2008" and ending in February 2009 - - when Congress passed Buy-America legislation. (AC ¶¶ 2, 3; *see also* (January 4, 2012 Statement by Federal Trade Commission, http://www.ftc.gov/opa/2012/01/mcwane.shtm.) ("disbanded in early 2009").)

2. The three companies allegedly agreed to issue price increases in January and June 2008 and to limit their discounting. (AC ¶¶ 32-34.)

3. The AC also alleges that the companies' participation in the Ductile Iron Fittings Research Association ("DIFRA"), a trade association, "facilitated price coordination" for the six-month period after June 2008. (AC ¶ 36 ("between June 2008 and January 2009").) The AC alleges that McWane, Sigma, and Star each provided a third-party accounting firm with a monthly report of its tons-shipped data, which the firm then aggregated, and distributed the overall totals back to them. (AC ¶ 35.)

4. The AC alleges that the combined, aggregated tons-shipped data allowed the DIFRA members to "indirectly" monitor their "output levels." (AC ¶ 36.) Count 3 alleges that McWane "invited" Star and Sigma to collude, in violation of Section 5, by some or all of the same conduct. (AC ¶ 66.)

5. Counts 4 through 7 of the Administrative Complaint ("AC") allege that McWane monopolized or attempted to monopolize the market for domestic ductile iron pipe fittings ("DIPF"),[1] in violation of Section 5 of the FTC Act. (AC ¶¶ 67-70.)

6. Counts 4 and 5 allege that McWane and Sigma entered a Master Distributorship Agreement ("MDA") in September 2009 with the specific intent to monopolize the market for domestic DIPF. (*Id.* ¶¶ 67-68.)

7. Complaint Counsel alleges that Sigma took steps to evaluate entry into domestic production of fittings, and McWane sought to eliminate that risk by inducing Sigma to become a distributor of McWane's fittings rather than a competitor. (*Id.* ¶¶ 47-55.)

8. Counts 6 and 7 allege that McWane willfully engaged in anticompetitive and exclusionary acts and practices to acquire, enhance or maintain its monopoly power, and, at a minimum resulted in a dangerous probability of monopolizing the alleged market for domestic ductile iron fittings. (*Id.* ¶¶ 69-70.)

9. Complaint Counsel alleges that McWane excluded Star by adopting exclusive dealing policies with the intention that these policies would impede and delay the ability of Star to enter the domestic DIPF market. (*Id.* ¶¶ 56-57.)

10. Complaint Counsel further alleges that the effect of these policies has been to compel the majority of waterworks distributors to deal with McWane and Sigma on an exclusive basis for their domestic DIPF business, and foreclose Star from a substantial volume of sales opportunities with waterworks distributors. (*Id.* ¶ 58-59.)

[1] McWane challenges Complaint Counsel's allegation that a "domestic" market exists for ductile iron waterworks fittings. It is undisputed that imported fittings compete with domestic fittings.

II. Background

A. Background of Fittings Market.

11. McWane produces more than 4,000 individual ductile iron pipe fittings in a range of diameters (from 3" to 48" or larger), configurations (*e.g.*, elbows, tees, and sleeves), joints (flanged, mechanical, push-on), coatings (*e.g.*, tar, epoxy, cement-lined, glass-lined), and finishes at its last remaining foundry in the U.S., the Union Foundry, and in its foundry in China (which makes the same 4,000-plus fittings at lower costs). (; *see also* http://www.tylerunion.com.)[2]

12. McWane's competitors in the market for ductile iron pipe fittings include a number of importers (including Sigma, Star, MetalFit, Serampore, NAPAC, and ElectroSteel) who source fittings from third-party foundries in Korea, China, India, Mexico, and Brazil, and a number of domestic foundries (including U.S. Pipe, Griffin Pipe, American Cast Iron Pipe Company ("ACIPCO"), and Backman Foundry), although several of the domestic foundries such as U.S. Pipe, ACIPCO and Griffin Pipe have stopped or cut back their production of domestic fittings. [redacted]

[2] McWane's ductile iron fittings business is known as TylerUnion after its now-closed Tyler, Texas foundry and its Union Foundry in Anniston, Alabama. TylerUnion is a division of McWane under the Valve and Hydrant Group.

13. The prices customers pay for McWane's fittings depend upon multiple factors. McWane issues a list price, which is nationwide and historically has only changed every few years. [redacted]

15. McWane then issues "multipliers," which are region-by-region and, often, "will vary by state." [redacted] There are also different multipliers, in every region and state, for McWane's domestic and

foreign or "blended" fittings.

16. "

17. McWane also offers "job prices" which are multiplier granted based on competition for a specific job.

Job prices, i.e., discounts from McWane's published multipliers, have been routinely granted in recent years.

18. Further, McWane provides additional discounts in the form of rebates.

19. Finally, McWane at times provided additional price concessions in the form of reductions in freight, or extensions of credit or payment terms.

III. McWane Witnesses Testified They Priced Independently.

20. McWane witnesses testified that

McWane also denied participating in the alleged conspiracy in its Answer to the AC. (Respondent McWane, Inc's Answer ("McWane Answer") at ¶¶ 1-2, 28-38, 64-66.)

[redacted]

22. [redacted]

23. [redacted]

[redacted]

[redacted]

32. McWane granted job prices for a range of reasons, including large volumes, and if it determined it was necessary to meet or beat its competitors' prices.

[redacted]

In fact, McWane witnesses confirmed that there was always ***significant*** amounts of job pricing. [redacted]

As a result of high costs, competition, and price concessions, the company's business

[redacted]

[redacted]

[redacted]

[redacted]

Star also denied any price agreements with McWane in its Answer to the AC[redacted] *See* Respondent Star Pipe Products, Ltd.'s Answer ("Star Answer") at ¶¶ 1-2, 28-38, 64-66; [redacted]

[redacted]

[redacted]

[redacted]

49. [redacted])

[redacted] [redacted]

[redacted] [redacted]

[redacted]

[redacted]

52. [redacted]

53. The Administrative Complaint concedes that McWane issued a multiplier change on January 11, 2008 because its raw materials prices were increasing dramatically and demand

was very low following the crash of the housing market. (AC ¶ 30 ("Due to rising input costs, all of the Sellers desired price increases in 2008.").)

[redacted]

[redacted]

[redacted]

(“[redacted]

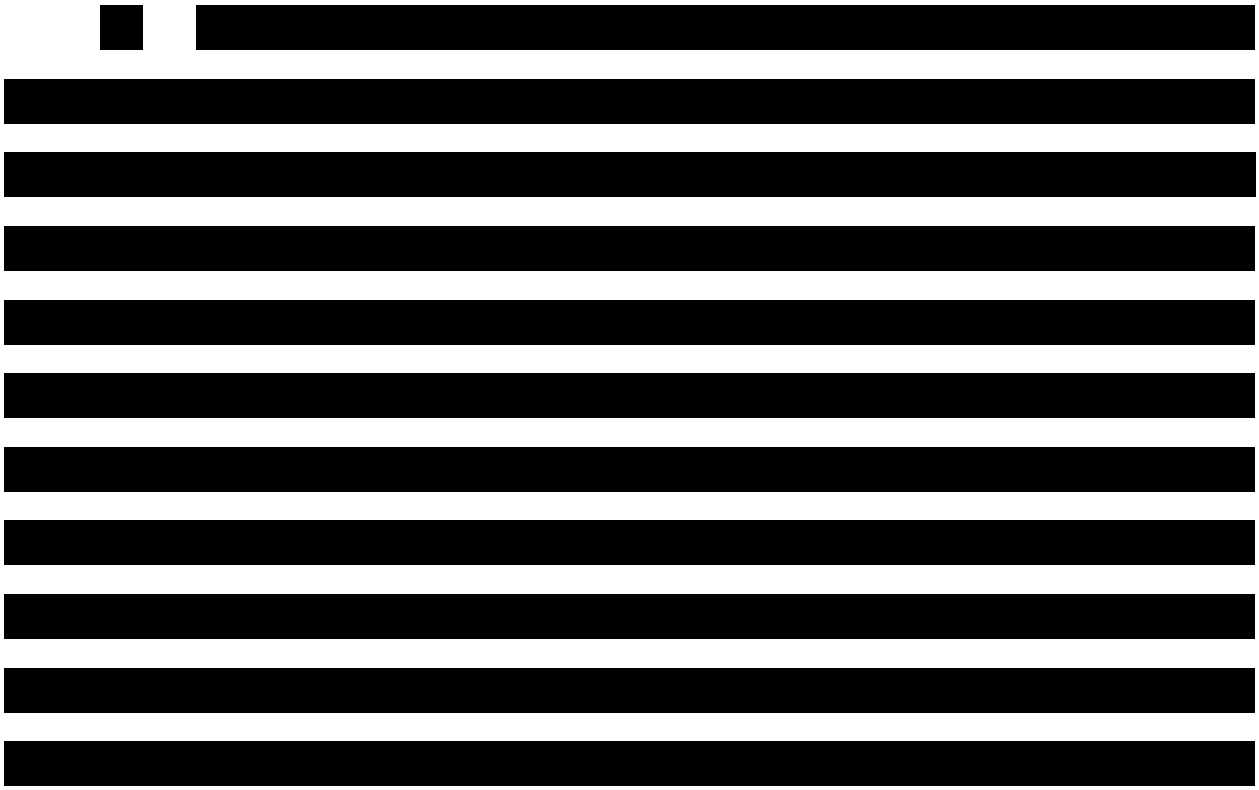
[redacted] [redacted]

[redacted] [redacted]

[redacted] [redacted]

2. McWane Charted Its Own Course In June 2008 [redacted]

[redacted] [redacted]



65. [redacted]

[redacted]

71. [redacted]

72. [redacted]

76. [redacted]

[redacted]

78. [redacted]

[redacted]

81. [redacted]

83. [redacted]

V. The Aggregated Tons-Shipped Data Did Not "Facilitate" Price Coordination.

[redacted]

86. [redacted]

[redacted]

[redacted]

[redacted]

97. In June 2009, Star announced that it would begin selling a full range of small, medium and large diameter fittings made for Star by outside foundries in the United States. (*See* Star's Price List, available online at http://www.starpipeproducts.com/utilities.asp.)

[redacted]

[redacted]

[redacted]

[redacted]

114.

116. [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

Dated: June 8, 2012

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One of the Attorneys for McWane

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