

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 MOTION
FOR PARTIAL SUMMARY DECISION**

Richard A. Feinstein
Director

Peter J. Levitas
Deputy Director

Melanie Sabo
Assistant Director

Geoffrey M. Green
Deputy Assistant Director

Edward D. Hassi
Chief Trial Counsel

Michael J. Bloom
Jeanine Balbach
Office of Policy & Coordination

Linda Holleran
Thomas H. Brock
J. Alexander Ansaldo
Andrew Mann
Monica Castillo
Attorneys

Federal Trade Commission
Bureau of Competition
Anticompetitive Practices Division
600 Pennsylvania Ave., N.W.
Washington, DC 20580
Telephone: (202) 326-2470
Facsimile: (202) 326-3496
Email: ehassi@ftc.gov

Counsel Supporting the Complaint

Dated: June 8, 2012

**COMPLAINT COUNSEL'S MOTION FOR PARTIAL SUMMARY DECISION
AND [PROPOSED] ORDER**

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

Please take notice that, pursuant to Commission Rule 3.24, Complaint Counsel hereby respectfully move for a partial summary decision in this action. For the reasons set forth in the accompanying Memorandum, this Motion should be granted.

By this Motion, Complaint Counsel seek a partial summary decision in their favor that McWane, Inc. ("McWane"), along with its competitor Star Pipe Products, Ltd. ("Star"), unlawfully restrained price competition in the ductile iron pipe fittings ("Fittings") market in April 2009. In April 2009, McWane announced a new Fittings price list. Subsequently, senior executives of McWane and Star had a telephone conversation during which Star sought assurances that McWane would implement its announced price list, and McWane provided those assurances. Subsequently, Star followed McWane's Fittings price list changes by adopting a substantially identical price list.

McWane and Star thereby unlawfully restrained price competition in the Fittings market, and partial summary judgment should be entered accordingly, for the reasons set forth in the accompanying Memorandum. This Motion is supported by the accompanying Memorandum and the authorities cited therein; the witness testimony and exhibits attached to the Declaration of Edward D. Hassi, and the accompanying separate statement of undisputed facts.

Complaint Counsel do not seek summary decision as to the remaining allegations of the Commission's Complaint, including the alleged concerted action involving McWane between January 2008 and January 2009. Complaint Counsel request entry of an Order granting partial summary decision on McWane's unlawful restraint of price competition in April and May 2009 and directing Chief Administrative Law Judge Chappell to receive evidence and issue an initial

decision on all of the remaining factual and legal allegations in the Commission's Complaint, including those allegations relating to the price competition restraints by McWane alleged in the Complaint. A Proposed Order is attached.

Respectfully submitted,

s/ Edward D. Hassi
Edward D. Hassi
Federal Trade Commission
600 Pennsylvania Ave. NW
Washington, D.C.
(202) 326-2470

Counsel Supporting the Complaint

Dated: June 8, 2012

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
Washington, DC 20580

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

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

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

Joseph A. Ostoyich
William C. Lavery
Baker Botts L.L.P.
The Warner
1299 Pennsylvania Ave., NW
Washington, DC 20004
(202) 639-7700
joseph.ostoyich@bakerbotts.com
william.lavery@bakerbotts.com

J. Alan Truitt
Thomas W. Thagard III
Maynard Cooper and Gale PC
1901 Sixth Avenue North
2400 Regions Harbert Plaza
Birmingham, AL 35203
(205) 254-1000
atruitt@maynardcooper.com
tthagard@maynardcooper.com

Counsel for Respondent McWane, Inc.

CERTIFICATE FOR ELECTRONIC FILING

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

s/ Thomas H. Brock
Thomas H. Brock
Federal Trade Commission
600 Pennsylvania Ave. NW
Washington, D.C.
(202) 326-2813

Counsel Supporting the Complaint

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

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

[PROPOSED] ORDER

Having carefully considered Complaint Counsel’s Motion for Partial Summary Decision, McWane Inc.’s (“McWane”) Opposition thereto, and Complaint Counsel’s Reply, and all supporting and opposing declarations and other evidence, and the applicable law, it is hereby ORDERED AND ADJUDGED, that McWane unlawfully restrained price competition in April 2009, and Complaint Counsel’s Motion for Partial Summary Decision as to this issue is hereby GRANTED.

Chief Administrative Law Judge Chappell is hereby directed to receive and consider all of the parties’ evidence on all other factual and legal allegations in the Administrative Complaint, specifically including the allegations of concerted action by McWane and others between January of 2008 and January 2009, and to issue an initial decision on all such allegations. See Section 3.24(a)(5) of the Commission’s Rules of Practice, 16 C.F.R. § 3.24(a)(5); Complaint ¶¶ 28-38.

ORDERED:

By the Commission.

Donald S. Clark
Secretary

SEAL

ISSUED:

**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 MEMORANDUM IN SUPPORT OF
MOTION FOR PARTIAL SUMMARY DECISION**

Richard A. Feinstein
Director

Peter J. Levitas
Deputy Director

Melanie Sabo
Assistant Director

Geoffrey M. Green
Deputy Assistant Director

Edward D. Hassi
Chief Trial Counsel

Michael J. Bloom
Jeanine Balbach
Office of Policy & Coordination

Linda Holleran
Thomas H. Brock
J. Alexander Ansaldo
Andrew Mann
Monica Castillo
Attorneys

Federal Trade Commission
Bureau of Competition
Anticompetitive Practices Division
600 Pennsylvania Ave., N.W.
Washington, DC 20580
Telephone: (202) 326-2470
Facsimile: (202) 326-3496
Email: ehassi@ftc.gov

Counsel Supporting the Complaint

Dated: June 8, 2012

TABLE OF CONTENTS

I. Introduction..... 1

II. Statement of Facts..... 2

III. Standard for Partial Summary Decision 5

IV. Argument 5

 A. Analytical Framework for Output Reducing Horizontal Agreements 6

 B. McWane and Star Conspired in April 2009..... 7

 C. Summary Decision on McWane’s Price Fixing is Appropriate..... 10

V. Conclusion 12

TABLE OF AUTHORITIES

Cases

<i>Arizona v. Maricopa County Med. Soc’y</i> , 457 U.S. 332 (1982).....	12
<i>Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.</i> , 509 U.S. 209 (1993).....	9
<i>Business Elecs. Corp. v. Sharp Elecs. Corp.</i> , 485 U.S. 717 (1988).....	9
<i>Carr Office Park, LLC v. Charles Schwab & Co.</i> , 2006 U.S. Dist. LEXIS 96320, (D. Colo., June 8, 2006).....	12
<i>Catalano, Inc. v. Target Sales, Inc.</i> , 446 U.S. 643 (1980).....	8, 12
<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317 (1986).....	12
<i>Costco Wholesale Corp. v. Maleng</i> , 522 F.3d 874 (9th Cir. 2008).....	8
<i>Energex Lighting Industries, Inc. v. North American Philips Lighting Corp.</i> , 765 F. Supp. 93 (S.D.N.Y. 1991).....	8
<i>Esco Corp. v. United States</i> , 340 F.2d 1000 (9th Cir. 1965).....	7
<i>Fireman's Ins. Co. of Newark, N. J. v. Dufresne</i> , 676 F.2d 965 (3d Cir. 1982).....	11
<i>G-I Holdings, Inc. v. Baron & Budd</i> , 2003 U.S. Dist. LEXIS 20603 (S.D.N.Y., November 21, 2003).....	12
<i>In re High Fructose Corn Syrup Antitrust Litig.</i> , 295 F.3d 651 (7th Cir. 2002) (Posner, J.).....	6, 11
<i>In re North Carolina State Board of Dental Examiners</i> , 151 F.T.C. 607 (2011).....	5
<i>In re North Texas Specialty Physicians</i> , 140 F.T.C. 715 (2005).....	6
<i>In re Polygram Holding, Inc.</i> , 136 F.T.C. 310 (2003), <i>aff’d</i> , <i>Polygram Holding, Inc. v. FTC</i> , 416 F.3d 29 (D.C. Cir. 2005).....	6
<i>Monsanto Co. v. Spray-Rite Service Corp.</i> , 465 U.S. 752 (1984).....	5
<i>Nash v. United States</i> , 229 U.S. 373 (1913).....	6
<i>Plymouth Dealers’ Ass’n of Northern California v. United States</i> , 279 F.2d 128 (9th Cir. 1960).....	6, 11
<i>Realcomp II, Ltd. v. FTC</i> , 635 F.3d 815 (6th Cir. 2011).....	5
<i>Sugar Institute v. United States</i> , 297 U.S. 553 (1936).....	<i>passim</i>

<i>TFWS, Inc. v. Schaefer</i> , 242 F.3d 198 (4th Cir. 2001).....	8
<i>United States v. Socony-Vacuum Oil Co.</i> , 310 U.S. 150 (1940).....	6
<i>United States v. Trenton Potteries Co.</i> , 273 U.S. 392 (1927).....	6, 11

Statutes

16 C.F.R. § 3.24(a)(1).....	4
16 C.F.R. § 3.24(a)(2).....	4
16 C.F.R. § 3.24(a)(5).....	1
16 C.F.R. §3.24(a)(3).....	5
Section 1 of the Sherman Act	10
Section 1 of the Sherman Act (15 U.S.C. § 1).....	7

Other Authorities

George J. Stigler, <i>A Theory of Oligopoly</i> , 72 J. Pol. Econ. 44 (1964).....	9
Jonathan B. Baker, <i>Two Sherman Act Section 1 Dilemmas: Parallel Pricing, The Oligopoly Problem, and Contemporary Economic Theory</i> , 38 Antitrust Bull. 143, 179 & n. 73 (1993) .	10

Treatises

HERBERT HOVENKAMP, <i>ANTITRUST LAW</i> § 1407 (3d ed. 2003).....	7, 9
---	------

I. Introduction

The ductile iron pipe fittings industry is highly concentrated. The top three suppliers, McWane, Sigma, and Star, collectively represent at least { } percent of all sales of ductile iron pipe fittings (“Fittings”). All three suppliers generally use virtually identical Fitting list prices that are typically announced first by one of the three, and quickly followed by the other two. This parallel pricing behavior, by itself, does not violate the antitrust laws. But this motion addresses a direct communication between McWane and Star in which they went beyond merely following each other’s prices and instead exchanged assurances about their future prices.

It is undisputed that in April 2009, { } After McWane announced it was changing its list prices, but before those prices became effective, Sigma announced it would not follow McWane, but would continue to use the then prevailing price list. {

} This agreement to adhere to the previously announced list price is a *per se* violation of the Sherman Act.

Complaint Counsel move for partial summary decision as to this specific concerted action between McWane and Star during the conspiratorial period alleged in the Complaint. Specifically, Complaint Counsel respectfully request a ruling that McWane conspired to restrain price competition in April and May of 2009. Complaint Counsel do not request summary decision as to the concerted action alleged in the Complaint between January of 2008 and January 2009, and intend to enter evidence supporting those allegations at trial regardless of the Commission’s ruling on this motion. *See* Hassi Decl. Tab 1 (Compl. ¶¶ 28-38); 16 C.F.R. §

3.24(a)(5) (outlining procedure for summary decision on a portion of the allegations in the complaint).

II. Statement of Facts

McWane, Inc. (“McWane”) manufactures and sells Fittings in interstate commerce. *See* Hassi Decl. Tab 2 (Answer ¶ 10). McWane competes with Star Pipe Products, Ltd. (“Star”) and Sigma Corporation (“Sigma”) in the sale of Fittings. *See* Hassi Decl. {

} The fittings market is highly concentrated, with McWane, Sigma and Star representing the vast majority of sales. *See* Hassi Decl. {

}

Fittings are commodity products that are produced pursuant to industry-wide standards. *See* Hassi Decl. Tab 2 (Answer ¶ 27(a)). As a result, price competition is an important element of competition among suppliers of fittings. *See* Hassi Decl. {

Fittings suppliers, including McWane, publish price lists that set forth individual prices for each specific fitting; and then generally quote prices to customers that are based on a published percentage discount from those list prices, known as a “multiplier.” *See* Hassi Decl. {

}

On April 15, 2009, McWane announced a new price list, to be effective May 1, 2009 (“Announced Price List”). *See* Hassi Decl. { }The Announced Price List contained higher prices for small diameter fittings and lower prices for medium and large diameter fittings. *See* Hassi Decl. {

} On April 22, 2009, Star announced its intent to change its price list, effective May 19, 2009, but did not specify whether it would match McWane’s Announced Price List. *See* Hassi Decl. {

}

Subsequently, Star followed McWane's Announced Price List by adopting a substantially identical Fittings price list. Hassi Decl. { }

III. Standard for Partial Summary Decision

Commission Rule 3.24 provides that “[a]ny party ... may move ... for a summary decision in the party’s favor upon all or any part of the issues being adjudicated.” 16 C.F.R. § 3.24(a)(1). Rule 3.24 further provides that if the Commission determines that there is no genuine issue as to any material fact regarding liability or relief, it shall issue a final decision and order. 16 C.F.R. § 3.24(a)(2).

When a motion for summary decision is made and adequately supported, “a party opposing the motion may not rest upon the mere allegations or denials of his or her pleading; the response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue of material fact for trial.” 16 C.F.R. §3.24(a)(3). Once the moving party has adequately supported its motion, the nonmoving party must “do more than simply show that there is some metaphysical doubt as to the material facts.” *In re North Carolina State Board of Dental Examiners*, 151 F.T.C. 607, 611 (2011) (internal citations and quotation marks omitted). The non-moving party must instead establish “specific facts showing that there is a genuine issue for trial.” *Id.* (internal citations and quotation marks omitted); *see also* 16 C.F.R. § 3.24(a)(3). And “[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no ‘genuine issue for trial.’” *North Carolina State Board*, 151 F.T.C. at 611 (internal citations and quotation marks omitted).

IV. Argument

There is no genuine issue of material fact that McWane and Star unlawfully restrained price competition in April 2009, and partial summary decision should be granted to this effect.

A. Analytical Framework for Output Reducing Horizontal Agreement

An unlawful horizontal agreement occurs when there is (i) an agreement among competitors that (ii) restrains trade unreasonably. *E.g., Realcomp II, Ltd. v. FTC*, 635 F.3d 815, 824 (6th Cir. 2011). A horizontal agreement is proven when there is evidence that competitors shared a “conscious commitment to a common scheme designed to achieve an unlawful objective.” *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 768 (1984) (internal citation and quotation marks omitted).

With respect to the restraint of trade element, “the evaluation of horizontal restraints takes place along an analytical continuum in which a challenged practice is examined in the detail necessary to understand its competitive effect.” *In re Polygram Holding, Inc.*, 136 F.T.C. 310, 336 (2003), *aff’d*, *Polygram Holding, Inc. v. FTC*, 416 F.3d 29 (D.C. Cir. 2005). “Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*.” *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940); *see also In re North Texas Specialty Physicians*, 140 F.T.C. 715, 729 (2005) (“We do not believe that the *per se* condemnation of naked restraints has been affected by anything said either in *California Dental* or *Polygram*”).

An agreement between horizontal competitors to fix prices is itself a violation of the antitrust laws. There is no requirement that the conspirators have the ability to achieve their unlawful ends or take any overt acts in furtherance of the conspiracy. *Socony-Vacuum*, 310 U.S. at 224-25 n.59; *United States v. Trenton Potteries Co.*, 273 U.S. 392, 402 (1927); *Nash v. United States*, 229 U.S. 373, 378 (1913). Agreements on list prices are *per se* unlawful even if list prices are only the starting point in negotiations with customers. *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 656 (7th Cir. 2002) (Posner, J.); *Plymouth Dealers’ Ass’n of Northern California v. United States*, 279 F.2d 128, 130-33 (9th Cir. 1960). Agreements to

adhere to published price levels are also *per se* unlawful, even when those price levels were set unilaterally. *Sugar Institute v. United States*, 297 U.S. 553, 580-81, 601 (1936).

B. McWane and Star Agreed to Fix Prices in April 2009

The undisputed evidence of {
 } establishes an agreement under Section 1 of
the Sherman Act, 15 U.S.C. § 1. It is undisputed that {

} This bargained-for
exchange of express assurances firmly establishes an agreement under Section 1. *See, e.g., Esco Corp. v. United States*, 340 F.2d 1000, 1007-8 (9th Cir. 1965) (finding such an express exchange of oral assurances unnecessary to establish an agreement); *see also* HERBERT HOVENKAMP, ANTITRUST LAW § 1405(a) (“Clearly sufficient [evidence of agreement] would be explicit, personally expressed reciprocal assurances of common action”).

The Supreme Court’s decision in *Sugar Institute*, 297 U.S. 553, offers controlling precedent. In *Sugar Institute*, the Court examined the rules of a combination of competing sugar refiners, including a rule that required firms that announced a price increase to adhere to that increase for a period of time. *Id.* at 582 (describing “a requirement of adherence, without deviation, to the prices and terms publically announced”). There was no requirement in the rules of the Sugar Institute that price increases be reported or agreed to among competitors before being announced, there was no guarantee that rivals would follow announced increases, and the evidence showed that price changes taken by one firm were often not followed by its rivals. *Id.*

at 580-82. The Court nevertheless condemned the “steps taken to secure adherence, without deviation, to prices and terms thus announced. It was that concerted undertaking which cut off opportunities for variation in the course of competition [.]” *Id.* at 601.

Sugar Institute established the longstanding rule that an agreement to adhere to previously announced prices and terms of sale is unlawful *per se* under the Sherman Act, “even though advance price announcements are perfectly lawful and even though the particular prices and terms were not themselves fixed by private agreement.” *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647 (1980) (*per curiam*) (*discussing Sugar Institute*, 297 U.S. 553); *Costco Wholesale Corp. v. Maleng*, 522 F.3d 874, 895-96 (9th Cir. 2008) (“an agreement to adhere to posted prices is a *per se* violation[.]” explaining that “agreements to adhere to posted prices are anticompetitive because they are highly likely to facilitate horizontal collusion”); *TFWS, Inc. v. Schaefer*, 242 F.3d 198, 209 (4th Cir. 2001) (“agreements to adhere to previously announced prices are unlawful *per se*”); *Energex Lighting Industries, Inc. v. North American Philips Lighting Corp.*, 765 F. Supp. 93, 106-107 (S.D.N.Y. 1991) (“An agreement that a published price list will be adhered to is a violation of the Sherman Act because it interferes with the setting of prices by free market forces”).

The Court’s decision in *Sugar Institute* is soundly grounded in fundamental cartel theory. Firms seeking to fix prices must (i) reach consensus on the prices to be charged; (ii) monitor adherence to those prices; and (iii) have the ability to punish defection. *See* George J. Stigler, *A Theory of Oligopoly*, 72 J. Pol. Econ. 44 (1964). Agreements to adhere to already-announced prices facilitate the process of reaching consensus by eliminating uncertainty among rivals as to future prices. *See Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 727 (1988) (“Cartels are neither easy to form nor easy to maintain. Uncertainty over the terms of the cartel, particularly the prices to be charged in the future, obstructs both formation and adherence by making cheating easier.”); *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S.

209, 238 (1993) (“Uncertainty is an oligopoly’s greatest enemy.”); *see also* ANTITRUST LAW § 1407(e) (“Uncertainty is the most general of the impediments to cartel-like results in oligopoly. It follows that collective practices to reduce such uncertainty ... are dangerous to competition”).

The undisputed evidence here further illustrates how communications can facilitate collusion by providing conspirators with a “focal point” on which to coordinate their prices. *See* Jonathan B. Baker, *Two Sherman Act Section 1 Dilemmas: Parallel Pricing, The Oligopoly Problem, and Contemporary Economic Theory*, 38 Antitrust Bull. 143, 179 & n. 73 (1993) (explaining how the private exchange of “mere assurances . . . may nevertheless facilitate coordination by helping firms establish an equilibrium outcome as focal”). {

} Baker, *Two Sherman Act Section 1 Dilemmas*, 38 Antitrust Bull. at 179 (“[b]y raising the costs of reaching such complex bargains, antitrust law hopes to reduce the prevalence of such bargains”).

{ } should be condemned under *Sugar Institute*. As in *Sugar Institute*, {

} As in *Sugar Institute*, the exchange of assurances facilitated price coordination and “cut off opportunities for variation in the course of competition[.]” *Sugar Inst.*, 297 U.S. at 601. In fact, this case is stronger than *Sugar Institute*: {

} This negotiated elimination of uncertainty as to future prices is precisely the type of agreement forbidden *per se* by Section 1 of the Sherman Act. *See Sugar Institute*, 297 U.S. at 601 (condemning agreement to adhere to published prices that “cut off opportunities for variation in the course of competition”).

C. Summary Decision on McWane’s Price Fixing is Appropriate

Summary condemnation of the { } is appropriate because no additional facts beyond the evidence of the communication itself are necessary to establish the violation. “Because price fixing is a *per se* violation of the Sherman Act, an admission by the defendants that they agreed to fix their prices is all the proof a plaintiff needs.” *High Fructose Corn Syrup*, 295 F.3d at 654. Accordingly, the Commission should not inquire further into the effects of the McWane/Star Communication: “[O]nce the agreement to fix a price is made, it is conclusively presumed that a conspiracy to restrain trade exists, and it is ‘immaterial whether the agreements were ever actually carried out, whether the purpose of the conspiracy was accomplished in whole or in part, or whether an effort was made to carry the object of the conspiracy into effect.’” *Plymouth Dealers’ Ass’n*, 279 F.2d at 132 (citing *Trenton Potteries*, 273 U.S. at 402).

The existence and contents of the { } are undisputed. { }

} *E.g., Fireman's Ins. Co. of Newark, N. J. v. Dufresne*,
 676 F.2d 965, 969 (3d Cir. 1982) (holding that a party's denial of knowledge of facts, without an
 offering of evidence to call into question the summary judgment movant's evidence, is not
 sufficient to create a material issue of fact). { failure of recall is at most an
 absence of evidence – and the absence of evidence in support of the non-movant's case entitles
 the moving party to summary decision as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S.
 317, 325 (1986) (“the burden on the moving party may be discharged by ‘showing’ – that is,
 pointing out to the district court – that there is an absence of evidence to support the nonmoving
 party's case”); *Carr Office Park, LLC v. Charles Schwab & Co.*, 2006 U.S. Dist. LEXIS 96320,
 at *10 & n.2 (D. Colo., June 8, 2006) (“Ask any first-year law student: an absence of knowledge
 is insufficient to controvert a summary judgment movant's factual assertions That is why
 we have discovery.”) (internal citation omitted); *G-I Holdings, Inc. v. Baron & Budd*, 2003 U.S.
 Dist. LEXIS 20603, at *15 (S.D.N.Y., November 21, 2003) (“failure to recall . . . [is] not,
 without more . . . sufficient to survive summary judgment once discovery is complete”).

Supreme Court precedent makes clear that summary judgment for the plaintiff
 proceeding on a price fixing theory may be appropriate. In *Arizona v. Maricopa County Med.
 Soc'y*, 457 U.S. 332 (1982), the Court reviewed the decision of an appellate panel to deny partial
 summary judgment after limited discovery on a *per se* theory to agreements among competing
 physicians to “to abide by maximum fee schedules[.]” *Id.* at 337. Because “the undisputed facts

disclose[d] a violation of” the Sherman Act, the Court reversed and entered judgment for the plaintiffs, citing the benefits of “business certainty and litigation efficiency” in the summary condemnation of price fixing agreements. *Id.* at 337, 343-44; *see also Catalano*, 446 U.S. 649-50 (summarily condemning price fixing agreement, relying on *Sugar Institute*).

V. Conclusion

For the reasons given above, Complaint Counsel respectfully requests the entry of an order granting partial summary decision on the issue of whether McWane unlawfully restrained price competition with Star in April and May of 2009. Complaint Counsel do not request summary decision as to the concerted action alleged in the Complaint between January of 2008 and January 2009. Complaint Counsel intends to introduce evidence supporting those allegations at trial before Chief Administrative Law Judge Chappell, and anticipates that proving at trial the complaint allegations related to January 2008 – January 2009 will support greater remedial relief. *See* Compl. ¶¶ 28-38; 16 C.F.R. § 3.24(a)(5) (outlining procedure for summary decision on a portion of the allegations in the complaint).

Respectfully submitted,

s/ Edward D. Hassi
Edward D. Hassi
Federal Trade Commission
600 Pennsylvania Ave. NW
Washington, D.C.
(202) 326-2470

Counsel Supporting the Complaint

Dated: June 8, 2012

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
Washington, DC 20580

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

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

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

Joseph A. Ostoyich
William C. Lavery
Baker Botts L.L.P.
The Warner
1299 Pennsylvania Ave., NW
Washington, DC 20004
(202) 639-7700
joseph.ostoyich@bakerbotts.com
william.lavery@bakerbotts.com

J. Alan Truitt
Thomas W. Thagard III
Maynard Cooper and Gale PC
1901 Sixth Avenue North
2400 Regions Harbert Plaza
Birmingham, AL 35203
(205) 254-1000
atruitt@maynardcooper.com
tthagard@maynardcooper.com

Counsel for Respondent McWane, Inc.

CERTIFICATE FOR ELECTRONIC FILING

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

s/ Thomas H. Brock

Thomas H. Brock
Federal Trade Commission
600 Pennsylvania Ave. NW
Washington, D.C.
(202) 326-2813

Counsel Supporting the Complaint

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

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

COMPLAINT COUNSEL’S STATEMENT OF UNDISPUTED FACTS

Pursuant to Rule 3.24, Complaint Counsel submits the following material facts in support of its motion for partial summary decision as to which there is no genuine dispute:

1. Respondent McWane, Inc. (“McWane”) manufactures and sells ductile iron pipe fittings (“Fittings”) in interstate commerce. Hassi Decl. Tab 2 (Answer ¶ 10).
2. McWane competes with Star Pipe Products, Ltd. (“Star”) and Sigma Corporation (“Sigma”) in the sale of Fittings. Hassi Decl. { }
3. McWane, Sigma and Star accounted for more than { } percent of Fitting sales in 2008. Hassi Decl. { }
4. Fittings are commodity products produced pursuant to industry standards. Hassi Decl. Tab 2 (Answer ¶ 27(a)).
5. Price competition is an important element of competition among Fitting suppliers. Hassi Decl. { }
6. Fittings suppliers, including McWane, publish price lists that set forth individual prices for each specific Fitting, and then generally quote prices to customers that are based on a

published percentage discount from those list prices, known as a “multiplier.” Hassi Decl. {
}

7. On April 15, 2009, McWane announced a new price list, to be effective May 1, 2009 (“Announced Price List”). Hassi Decl. { }

8. McWane’s new price list contained higher prices for small diameter Fittings and lower prices for medium and large diameter Fittings. Hassi Decl. {
}

9. On April 22, 2009, Star announced its intent to change its price list, effective May 19, 2009, but did not specify the actual prices. Hassi Decl. { }

10. {

}

11. {

}

12. {

}

13. {

}

14. {

}

15. {

}

16. {

}

17. {

}

18. {

}

19. {

}

20. Subsequently, Star followed McWane's price change by adopting a substantially identical price list Hassi Decl. { }

Dated: June 8, 2012

Respectfully submitted,

s/ Edward D. Hassi
Edward D. Hassi
Federal Trade Commission
600 Pennsylvania Ave. NW
Washington, D.C.
(202) 326-2470

Counsel Supporting the Complaint

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
Washington, DC 20580

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

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

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

Joseph A. Ostoyich
William C. Lavery
Baker Botts L.L.P.
The Warner
1299 Pennsylvania Ave., NW
Washington, DC 20004
(202) 639-7700
joseph.ostoyich@bakerbotts.com
william.lavery@bakerbotts.com

J. Alan Truitt
Thomas W. Thagard III
Maynard Cooper and Gale PC
1901 Sixth Avenue North
2400 Regions Harbert Plaza
Birmingham, AL 35203
(205) 254-1000
atruitt@maynardcooper.com
tthagard@maynardcooper.com

Counsel for Respondent McWane, Inc.

CERTIFICATE FOR ELECTRONIC FILING

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

s/ Thomas H. Brock
Thomas H. Brock
Federal Trade Commission
600 Pennsylvania Ave. NW
Washington, D.C.
(202) 326-2813

Counsel Supporting the Complaint

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

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

DECLARATION OF EDWARD D. HASSI

1. I have personal knowledge of the facts set forth in this declaration, and if called as a witness I could and would testify competently under oath to such facts.
2. I am an attorney at the Federal Trade Commission and Complaint Counsel in these proceedings. Attached to this declaration are the exhibits submitted in support of Complaint Counsel's Motion for Partial Summary Decision.
3. Tab 1 is a true and correct copy of the Administrative Complaint issued by the Federal Trade Commission in the above captioned matter dated January 4, 2012.
4. Tab 2 is a true and correct copy of the Answer of Respondent McWane, Inc. ("McWane") to the Complaint in the above captioned matter.
5. Tab 3 is a true and correct copy of a transcript of the Investigational Hearing of Richard Tatman, dated July 21, 2010.
6. Tab 4 is a true and correct copy of CX 1873, the Second Daniel McCutcheon Declaration, dated May 25, 2011.
7. Tab 5 is a true and correct copy of CX 0569, a McWane e-mail from Rick Tatman to Thomas Walton, dated April 13, 2009.

8. Tab 6 is a true and correct copy of CX 2349, a McWane e-mail from Rick Tatman to Thomas Walton, dated April 23, 2009.
9. Tab 7 is a true and correct copy of five exhibits: the First Daniel McCutcheon Declaration, dated April 20, 2010 (CX 0807); the Second Daniel McCutcheon Declaration, dated May 25, 2011 (CX 1873); CX 2350, the Ramesh Bhutada Declaration, dated April 28, 2010; a transcript of the Investigational Hearing of Daniel McCutcheon, dated October 12, 2010; and a transcript of the Deposition of Daniel McCutcheon, dated May 16, 2012.
10. Tab 8 is a true and correct copy of CX 1180, a McWane e-mail from Rick Tatman to Leon McCullough and Thomas Walton, dated April 28, 2009.
11. Tab 9 is a true and correct copy of a transcript of the Richard Tatman Deposition, dated May 10, 2012.
12. Tab 10 is a true and correct copy of CX 2352, a McWane e-mail from Greg Adams to Marla Drake, dated May 1, 2009.
13. Tab 11 is a true and correct copy of a transcript of the Investigational Hearing of Matthew Minamyner, dated November 10, 2011.
14. Tab 12 is a true and correct copy of two exhibits, CX 2359, the Star Price List effective May 12, 2009, and CX 2358, the Tyler Union List Price LP-5091 effective May 1, 2009.

I declare under the penalty of perjury that foregoing is true and correct. Executed this
8th day of June, 2012, at Washington, D.C.

s/ Edward D. Hassi
Edward D. Hassi
Federal Trade Commission
600 Pennsylvania Ave. NW
Washington, D.C.
(202) 326-2470
(202) 326-3496 Facsimile

Counsel Supporting the Complaint

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
Washington, DC 20580

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

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

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

Joseph A. Ostoyich
William C. Lavery
Baker Botts L.L.P.
The Warner
1299 Pennsylvania Ave., NW
Washington, DC 20004
(202) 639-7700
joseph.ostoyich@bakerbotts.com
william.lavery@bakerbotts.com

J. Alan Truitt
Thomas W. Thagard III
Maynard Cooper and Gale PC
1901 Sixth Avenue North
2400 Regions Harbert Plaza
Birmingham, AL 35203
(205) 254-1000
atruitt@maynardcooper.com
tthagard@maynardcooper.com

Counsel for Respondent McWane, Inc.

CERTIFICATE FOR ELECTRONIC FILING

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

s/ Thomas H. Brock
Thomas H. Brock
Federal Trade Commission
600 Pennsylvania Ave. NW
Washington, D.C.
(202) 326-2813

Counsel Supporting the Complaint

TAB 1

Filed *In Camera* & Redacted In Its Entirety

TAB 2

Filed *In Camera* & Redacted In Its Entirety

TAB 3

Filed *In Camera* & Redacted In Its Entirety

TAB 4

Filed *In Camera* & Redacted In Its Entirety

TAB 5

Filed *In Camera* & Redacted In Its Entirety

TAB 6

Filed *In Camera* & Redacted In Its Entirety

TAB 7

Filed *In Camera* & Redacted In Its Entirety

TAB 8

Filed *In Camera* & Redacted In Its Entirety

TAB 9

Filed *In Camera* & Redacted In Its Entirety

TAB 10

Filed *In Camera* & Redacted In Its Entirety

TAB 11

Filed *In Camera* & Redacted In Its Entirety

TAB 12

Filed *In Camera* & Redacted In Its Entirety