UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

In the Matter of **MCWANE, INC.,** **a corporation, and** **STAR PIPE PRODUCTS, LTD.** **a limited partnership.**	**Docket No. 9351**

OPINION OF THE COMMISSION

By Commissioner Edith Ramirez,

In this case we address allegations of anticompetitive conduct relating to the sale of ductile iron pipe fittings. Pipe fittings are used in water distribution systems for the installation of valves, water meters, and hydrants and to change the flow of water. Three companies—Respondent McWane, Inc., Sigma Corporation, and Star Pipe Products, Ltd.—account for the overwhelming majority of pipe fitting sales in the United States. Complaint Counsel alleges that these three companies entered into an agreement beginning in 2008 to fix prices. Complaint Counsel also alleges that McWane, the largest of the three suppliers, has a monopoly in the market for U.S.-made pipe fittings and that it illegally sought to maintain its monopoly after Sigma and Star tried to enter in 2009.

Before us are cross-motions for summary decision by Respondent McWane and Complaint Counsel. McWane seeks summary decision in its favor on all seven counts of the Complaint. Complaint Counsel moves for summary decision only on a narrow price fixing claim arising out of a brief telephone conversation between two McWane and Star executives in April 2009.

The allegations of price fixing have been met with strenuous denials, with McWane insisting that, at most, the suppliers engaged in consciously parallel conduct. Pointing to such denials and other claimed exculpatory evidence, McWane contends that its innocence can be established as a matter of law with respect to all the price-fixing charges. McWane also challenges the basis for Complaint Counsel's claims of monopolization and attempted monopolization, arguing that those claims should also be summarily dismissed. As discussed

below, we find that genuine issues of material fact exist as to all of the counts in the Complaint, thereby precluding summary decision.

For its part, Complaint Counsel focuses its limited request for summary decision on a conversation between McWane's fittings division general manager and Star's head of sales. But while the substance of the communication is not disputed, its significance is vigorously contested by McWane. We conclude that this issue too must await trial.

We therefore deny the summary decision motions of both McWane and Complaint Counsel in their entirety.

I. COMPLAINT ALLEGATIONS

On January 4, 2012, the Commission issued a seven count administrative complaint against McWane[1] and Star.[2] The first three counts, charging violations of Section 5 of the Federal Trade Commission Act, are based on allegations that, beginning in January 2008, McWane, Sigma, and Star conspired to increase the prices at which imported and domestic pipe fittings were sold in the United States. Specifically, Complaint Counsel alleges that in early 2008 McWane devised a plan to raise and fix industry prices and invited Sigma and Star to collude with it. Compl. ¶¶ 29-30.[3]

McWane publicly announced a pipe fittings price increase on January 11, 2008, and Sigma and Star followed suit. *Id.* ¶ 31. McWane's actions leading up to the price increase included an invitation to Sigma and Star to curtail price discounting in exchange for higher future prices. *Id.* ¶ 32.a-c. According to Complaint Counsel, Sigma and Star accepted McWane's offer by "publicly taking steps to limit their discounting from published price levels" and centralizing pricing authority. *Id.* ¶ 32.c.

[1] McWane's ductile iron fittings business is known as "TylerUnion," named after McWane's now-closed Tyler, Texas facility and Union Foundry in Anniston, Alabama. R's SOF at 5, n.2.

[2] At the same time that the Commission issued its complaint against McWane and Star, it also issued a proposed complaint and consent order against Sigma. Final approval of the Sigma consent order was granted on February 27, 2012. *In re Sigma Corp.*, Decision and Order, Docket No. C-4347 (Feb. 27, 2012). The Commission accepted for public comment a proposed consent order against Star on March 20, 2012, and approved the final order on May 8. *In re McWane, Inc. & Star Pipe Prods., Ltd.*, Star Decision and Order, Docket No. C-9351 (May 8, 2012).

[3] An index of the abbreviations used to refer to the parties' documents cited herein is attached at the end of this opinion.

A second round of collusive price increases allegedly took place in June 2008. *Id.* ¶ 34. Before announcing this round of increases, McWane allegedly decided to trade its support for higher prices in exchange for monthly sales information from Sigma and Star disseminated by an industry association called the Ductile Iron Fittings Research Association ("DIFRA"). *Id.* ¶ 34.a. According to Complaint Counsel, Sigma and Star accepted McWane's offer by submitting their shipment data to DIFRA, following which McWane announced its second price increase on June 17, 2008. *Id.* ¶¶ 33, 34.c-d. Sigma and Star later matched McWane's June price increase. *Id.* ¶ 34.d.

The remaining counts relate to the domestic pipe fittings market, in which McWane, as the only major supplier with domestic production capability, is alleged to be a monopolist. Complaint Counsel contends that the passage of the American Recovery and Reinvestment Act of 2009 ("ARRA") in February 2009, which set aside more than $6 billion for potential use in water infrastructure projects, "significantly altered the competitive dynamics of the [fittings] industry, and upset the terms of coordination" among McWane, Sigma, and Star. *Id.* ¶ 3. Because ARRA funding was conditioned on the use of domestically-produced fittings, it spurred Sigma and Star to seek to enter the domestic fittings market. *Id.* ¶¶ 3, 18, 44. Counts four through seven are based on McWane's alleged efforts to exclude competitors from this market. In counts four and five, Complaint Counsel alleges that McWane induced Sigma to become a distributor of McWane's domestic fittings to prevent it from becoming an independent competitor, in violation of Section 5 of the FTC Act. *Id.* ¶ 48. In counts 6 and 7, Complaint Counsel claims that McWane adopted restrictive and exclusive distribution policies to impede or delay the ability of Star and others to enter the domestic fittings market in violation of Section 5 of the FTC Act. *Id.* ¶¶ 57, 61.

McWane denies the substantive allegations of the Complaint.

II. BACKGROUND AND UNDISPUTED FACTS

A. The Ductile Iron Pipe Fittings Industry

Ductile iron pipe fittings ("pipe fittings" or "fittings") are used to join pipes, valves, and hydrants and to change or direct the flow of water in the pipeline systems used in municipal, state, and federal drinking and waste water distribution systems. R's Ans. ¶ 14. Although there are more than 4,000 individual fittings of different diameters (ranging from 3 inches to 48 inches or larger), configurations (*e.g.*, elbows, tees, and sleeves), joints, coatings, and finishes (R's SOF ¶ 11), approximately 80% of demand may be serviced with fewer than 100 commonly-used sizes and configurations (R's Ans. ¶ 15).

There are three primary pipe fittings sellers in the United States: Respondent McWane, Sigma, and Star. McWane is a full-line supplier of fittings, selling more than 4,000 individual fittings that are both imported and domestically produced. As of 2008, Sigma and Star only sold fittings that were manufactured outside the United States. Compl. ¶ 18; R.'s SOF ¶ 12. In 2009, Star began selling fittings produced by U.S. foundries. Star Ans. ¶ 18; R's Ans. ¶ 18.

Some waterworks infrastructure projects specify whether the end user prefers or mandates the use of domestic pipe fittings. R's Ans. ¶ 19. While a majority of end users currently issue "open source" specifications that do not indicate a preference for domestic or imported fittings, some government projects require the use of domestic fittings, often a result of a legal mandate requiring domestic sourcing. *Id.* Domestic fittings sold for use in jobs specified as "domestic only" are generally sold at prices higher than imported or domestic fittings sold for use in projects that are not designated as such. R's Ans. ¶ 20.

Fittings suppliers publish list prices for each unique item they carry. *Id.* ¶ 27.e. They then periodically publish multiplier discounts on a state-by-state basis. *Id.* At times, suppliers also offer further special "job price discounts," which are below the multiplier discounts. These discounts are negotiated individually by customers for particular projects. R's SOF ¶¶ 30-33.

Pipe fittings are sold primarily through independent wholesale distributors specializing in distributing products for waterworks infrastructure projects. Compl. ¶ 16. The two largest national distributors represent 50% of the waterworks distribution market. Thees IH 87-88; Tatman IH 83; R's SOF ¶ 111. The third largest distributor has a network in 22 states. Gibbs Dep. 8, 12. There are also a number of regional players (CC's SOF ¶ 170) and hundreds of small distributors, many with only a single location (McCutcheon IH 50, 204; Tatman IH 83-85).

B. The January and June 2008 Price Increases

McWane, the largest of the three main fittings suppliers, was most often the industry price leader. McCutcheon IH 421, 458; McCutcheon Dep. 182-83. In late 2007, however, Sigma and Star both announced they would be increasing list prices in early 2008. CC's SOF ¶¶ 23-24; R's SOF ¶ 54. McWane elected not to follow the price increases announced by Sigma and Star. CC's SOF ¶ 25. Instead, on January 11, 2008, McWane issued a pricing letter to its customers ("January pricing letter") announcing a 10% to 12% increase on the multiplier applicable to imported fittings and a 3% to 5% increase on domestic fittings, effective February 18, 2008. CX 1178-001. The letter noted that McWane anticipated the need to raise prices again within the next six months "as conditions require." *Id.* Sigma and Star soon matched McWane's announced pricing. CC's SOF ¶¶ 35-36; R's SOF ¶ 57.

In February, soon after these price increases, McWane, Sigma, and Star began discussing the possibility of creating an industry trade association, DIFRA, which would include a forum for exchanging their aggregated sales information. Discussions about creating such an exchange had taken place since at least 2005, but the effort had always stalled. CC's SOF ¶ 46. Led by Rick Tatman, general manager of McWane's fittings division, the initiative gained renewed momentum in Spring 2008. CX 0179-1.

By April 2008, the members of DIFRA had agreed to share monthly fittings shipment data for 2006, 2007, and the first four months of 2008 by May 15, 2008.[4] CX 1479-001;

[4] In addition to McWane, Sigma, and Star, a fourth company, U.S. Pipe, agreed to participate in DIFRA. (CX 1479-001.) Although by 2008 U.S. Pipe was no longer a significant fittings provider (CX 0313-004; Brakefield Dep. 128-29), the others chose to invite it to

CX 1186. Each company agreed to report this data to DIFRA on a monthly basis thereafter. CX 1479-001. They provided the information to a third-party accounting firm, which aggregated the information and disseminated it to the members. *Id*.

On April 24, Sigma sent a letter to its customers announcing a large multiplier price increase, effective May 19. CX 0137. Star announced similar multiplier price increases on May 7, also to take effect on May 19. CX 0816.

In a customer letter dated May 7 (referred to as the "June pricing letter"), McWane indicated it would not be following the price increases announced by its competitors. CX 0138. McWane stated it would instead perform a pricing analysis by the end of May before deciding how to proceed. *Id.* As a result, both Sigma and Star retracted their previously announced price increases. CX 0527-001; Tatman Dep. 142.

On June 5, Star submitted its data to DIFRA. CX 0049. McWane received the DIFRA report on June 17 and later that same day announced an eight percent price increase. CX 0366-001; CX 1576. Sigma and Star soon announced they were following McWane's price increases. CX 1851; CX 1734; CX 2254-001; CX 2255. Sigma and Star stopped submitting data to DIFRA by February 2009. CX 1278-001; Brakebill Dep. 124-125.

C. ARRA and the Domestic Fittings Market

With passage of ARRA in February 2009, Congress set aside more than $6 billion in stimulus funds for water and other infrastructure projects. This funding, however, was conditioned on the use of domestically produced materials, including pipe fittings (the "Buy American" requirement). Following ARRA's enactment, Sigma publicly announced its intention to supply its customers with domestic fittings. Rona IH 99-100, 105-07; Box Dep. 62.

Lacking its own domestic manufacturing capability, Sigma approached McWane in Spring 2009 regarding the possibility of having Sigma purchase McWane domestic fittings and sell them under a private label. CC's SOF ¶ 116; R's SOF ¶ 115. These initial discussions proved unsuccessful. CX 908. Later, during the summer, Sigma renewed negotiations with McWane. CC's SOF ¶ 123. Ultimately, in September, McWane and Sigma entered into a master distribution agreement ("MDA") pursuant to which Sigma would purchase domestic fittings from McWane at 20% off McWane's published prices. CX 1194-001. [redacted]

participate because counsel had advised that having a fourth member would reduce legal risk (CX 0048-001).

Like Sigma, Star began to explore the possibility of entering the domestic fittings market following the passage of ARRA. Bhargava Dep. 8. By Spring 2009, Star had decided to enter the domestic market (*id.* at 22) and publicly announced it was doing so in June (R's Ans. ¶ 56; CX 2330; CX 2331). Rather than operating its own foundry, it chose to purchase fittings from existing independent foundries in the United States. Bhargava Dep. 22-23, 118-19. By the close of 2009, Star had sold domestic fittings to 29 customers. R's Ex. 21 ¶ 2. In 2010 and 2011, Star sold approximately $6.5 million worth of domestic fittings each year. *Id.* ¶ 9.

On September 22, 2009, McWane issued a letter to its distributors announcing that, pursuant to the MDA, McWane domestic fittings would be available through Sigma. CX 559-002. The letter also notified customers that McWane was adopting a program requiring that customers purchase domestic fittings exclusively from McWane or risk losing unpaid rebates for domestic fittings and experiencing delays in product shipments of up to 12 weeks. *Id.* The policy contained an exception if McWane domestic fittings were unavailable or if fittings were purchased from a competitor along with pipe. *Id.*

III. STANDARD FOR SUMMARY DECISION

We review the parties' cross motions for summary decision pursuant to Rule 3.24 of our Rules of Practice, which is virtually identical to Federal Rule of Civil Procedure 56. *Polygram Holding, Inc.*, 136 F.T.C. 310, 2002 WL 31433923, at *1 (FTC Feb. 26, 2002). Accordingly, we treat a motion for summary decision analogously to a motion for summary judgment. As with a summary judgment motion, the party seeking summary decision "bears the initial responsibility of . . . identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (internal quotations omitted). The "party opposing the motion may not rest upon the mere allegations or denials of his or her pleading" and must instead "set forth specific facts showing that there is a genuine issue of material fact for trial." 16 C.F.R. §3.24(a)(3); *Celotex*, 477 U.S. at 323. We are required to resolve all factual ambiguities and draw all justifiable inferences in the light most favorable to the party opposing the motion. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

We turn first to McWane's request that we summarily decide in its favor on all counts of the Complaint and then address Complaint Counsel's more limited motion.

IV. MCWANE'S MOTION FOR SUMMARY DECISION

A. Count One: Conspiracy to Fix Prices

Section 1 of the Sherman Act prohibits contracts, combinations, and conspiracies that unreasonably restrain trade.[5] 15 U.S.C. § 1; *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 356

[5] Violations of Sherman Act Sections 1 and 2 also constitute violations of Section 5 of the FTC Act, 15 U.S.C. § 45, as unfair methods of competition. *See California Dental Ass'n v. FTC*, 526 U.S. 756, 762 & n.3 (1999), *FTC v. Motion Picture Adver. Serv. Co.*, 344 U.S. 392, 394-95

(3rd Cir. 2004). Because of their "pernicious effect on competition and lack of any redeeming virtue," *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958), price-fixing agreements are *per se* illegal. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007). Accordingly, to establish a horizontal price-fixing scheme, a plaintiff need only demonstrate the existence of an agreement, combination, or conspiracy among actual competitors with the purpose or effect of "raising, depressing, fixing, pegging or stabilizing" the price of a commodity. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223-224 (1940).

"The existence of an agreement is '[t]he very essence of a section 1 claim.'" *In re Flat Glass*, 385 F.3d at 356 (quoting *Alvord-Polk, Inc. v. Shumacher & Co.*, 37 F3d 996, 999 (3d Cir. 1994)). The crucial question then is "whether the challenged anticompetitive conduct stems from independent decision or from an agreement." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 553 (2007). Evidence of parallel behavior or even conscious parallelism alone, without more, is insufficient to establish a Section 1 violation. *Id.* at 553-54. Thus, to survive a motion for summary judgment, a plaintiff alleging a violation of Section 1 "must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently." *Matsushita*, 475 U.S. at 588 (quoting *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 768 (1984)).[6] Put differently, there must be evidence "that reasonably tends to prove . . . a conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto*, 465 U.S. at 768.

More often than not, a plaintiff lacks direct evidence of a conspiracy. Indeed, "[i]t is only in rare cases that a plaintiff can establish the existence of a conspiracy by showing an explicit agreement; most conspiracies are inferred from the behavior of the alleged conspirators . . . and from other circumstantial evidence." *City of Tuscaloosa v. Harcos Chems.*, 158 F.3d 548, 569 (11th Cir. 1998); *see also ES Dev., Inc. v. RWM Enters., Inc.*, 939 F.2d 547, 553 (8th Cir. 1991) ("[I]t is axiomatic that the typical conspiracy is rarely evinced by explicit agreements, but must always be proven by inferences that may be drawn from the behavior of the alleged conspirators.") (internal quotations omitted); VI PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1410c, at 63 (2d ed. 2003) (an agreement "can exist without any documentary trail and without any admission by the participants").[7] This circumstantial evidence of a

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(1953). We will therefore only reference the Sherman Act for our analysis of the relevant claims.

[6] As the Supreme Court has explained, *Matsushita* does not "introduce a special burden on plaintiffs facing summary judgment in antitrust cases." *Eastman Kodak Co. v. Image Technical Servs.*, 504 U.S. 451, 468-69 (1992). Rather, it only requires that "the nonmoving party's inferences be reasonable in order to reach the jury, a requirement that was not invented, but merely articulated, in that decision." *Id.*; *see also In re Flat Glass*, 385 F.3d at 357 (recognizing that in a price fixing case, the summary judgment standard is no different than that applied generally).

[7] Unless otherwise noted, citations to Areeda and Hovenkamp's ANTITRUST LAW treatise refer to volume VI of the second edition.

conspiracy, when considered as a whole, must tend to rule out the possibility of independent action. *Matsushita*, 475 U.S. at 764; *Toys 'R' Us, Inc. v. FTC*, 221 F.3d 928, 934 (7th Cir. 2000).

1. Parallel Behavior

In support of its claim of conspiracy, Complaint Counsel first points to parallel pricing behavior in the pipe fittings market in 2008. Specifically, Complaint Counsel cites to two identical industry-wide multiplier price increases in 2008—one in January and another in June—as well as alleged efforts during this time period by the three claimed conspirators to centralize pricing authority and reduce price discounting on individual jobs. CC's SOF ¶¶ 30, 35, 37, 77-78. But although probative of an agreement, "[parallel pricing behavior] falls short of conclusively establishing an agreement."[8] *Cosmetic Gallery Inc. v. Schoeneman Corp.*, 495 F.3d 46, 51-52 (3d Cir. 2007); *see also In re Baby Food Antitrust Litig.*, 166 F.3d 112, 122 (3d Cir. 1999) (noting that when competitors act individually, but in a parallel manner, "this may provide probative evidence of an understanding by the competitors to fix prices," but is insufficient alone to prove a conspiracy) (internal quotations omitted).

McWane does not dispute that Star and Sigma announced they were matching McWane's multiplier increases in both January and June 2008 (R's SOF ¶¶ 57, 66), but maintains that this conduct reflects nothing more than parallel conduct (R's SD Br. at 12-17). According to McWane, the price increases were merely necessary responses to rising costs. R's SOF ¶ 53. Not surprisingly, the four McWane employees who testified all consistently stated that they made their pricing decisions independently. R's SOF ¶¶ 22, 25-26, 30-31. Employees from Sigma and Star also all testified that they unilaterally decided to follow McWane's announced prices. R's SOF ¶¶ 50-51, 57-58.

McWane is correct that evidence of parallel pricing alone would be insufficient to show a conspiracy. In a market dominated by a small number of firms, "any single firm's 'price and output decisions will have a noticeable impact on the market and its rivals.'" *In re Flat Glass*, 385 F.3d at 359 (quoting AREEDA ¶ 1429, at 206-07). It follows, according to the theory of interdependence, that a rational oligopolist "must take into account the anticipated reaction" of its rivals when making decisions about price and other issues. *Id.* The result is that "firms in a concentrated market may maintain their prices at supracompetitive levels, or even raise them to those levels, without engaging in any overt concerted action." *In re Flat Glass*, 385 F.3d at 359.

Because this conduct, referred to as "conscious parallelism," may stem from independent conduct, it is well established that the Sherman Act does not prohibit it. *See, e.g., Brooke Group*,

[8] In an oligopolistic market, "conscious parallelism" to raise or maintain prices is not necessarily unlawful because it could stem from independent conduct. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993). In dicta, the Supreme Court has described "conscious parallelism" as "the process, not in itself unlawful, by which firms in a concentrated market might in effect share monopoly power, setting their prices at a profit maximizing, supracompetitive level by recognizing their shared economic interests and their interdependence with respect to price and output decisions." *Id.*

509 U.S. at 227 (describing "conscious parallelism" as "the process, not in itself unlawful, by which firms in a concentrated market might in effect share monopoly power"). Accordingly, to distinguish between lawful behavior and an illegal price-fixing scheme, a plaintiff is required to show evidence of certain other factors known as "plus factors." *In re Flat Glass*, 385 F.3d. at 360; *Williamson Oil Co. v. Philip Morris USA, Inc.*, 346 F.3d 1287, 1301 (11th Cir. 2003).

It is undisputed that there is conscious parallelism in this industry. McWane acknowledges that market participants regularly track each other's pricing, obtained from their customers, and that Sigma and Star routinely follow McWane's announced pricing changes. R's SOF ¶¶ 50, 57-58. We now turn to whether Complaint Counsel has pointed to sufficient evidence of "plus factors" to defeat McWane's motion for summary decision.

2. Plus Factors

The existence of plus factors "tends to ensure that courts punish 'concerted action'—an actual agreement—instead of the unilateral, independent conduct of competitors." *In re Flat Glass*, 385 F.3d at 360 (internal quotations omitted); *see also Blomkest Fertilizer, Inc. v. Potash Corp. of Sask.*, 203 F.3d 1028, 1032-33 (8th Cir. 2000); *City of Tuscaloosa*, 158 F.3d at 570. There is no exhaustive list of plus factors (AREEDA ¶ 1434a, at 241-42), but the main types of relevant evidence can be grouped into the following three categories: "(1) evidence that the alleged conspirator had a motive to enter into the price fixing conspiracy; (2) evidence that it acted contrary to its self-interest; and (3) evidence implying a traditional conspiracy." *In re Flat Glass*, 385 F.3d at 360 (internal quotations omitted); *see also Re/Max Int'l v. Realty One*, 173 F.3d 995, 1009 (6th Cir. 1999) (listing plus factors); *Apex Oil Co. v. DiMauro*, 822 F.2d 246, 254 (2d Cir. 1987) (same).

It has been pointed out, however, that "in the context of parallel pricing, the first two factors largely restate the phenomenon of interdependence." *In re Flat Glass*, 385 F.3d at 360; AREEDA ¶ 1429, at 207. Evidence that the alleged price-fixer had reason to enter into a conspiracy, for instance, may merely show "that the industry is conducive to oligopolistic price fixing, either interdependently or through a more express form of collusion." *In re Flat Glass*, 385 F.3d at 360. Similarly, evidence that it acted contrary to its interests may only mean that the conduct would be irrational in the context of a fully competitive market. *Id.* Accordingly, while important because they help distinguish between competitive market conduct and oligopolistic behavior, these first two factors alone do not suffice to defeat summary judgment. Here, as in most price-fixing cases, the third factor, "customary indications of traditional conspiracy," will be the most important.[9] *Id.* As shown below, Complaint Counsel has pointed to sufficient evidence of all three plus factors to defeat summary judgment.

[9] Customary indications of a traditional conspiracy include information exchanges, ambiguous participant admissions, solicitations of agreement, communications between parties, and parallelism that it is difficult to explain absent an agreement. AREEDA ¶ 1434b, at 243.

a) Motive

To show that McWane and its alleged co-conspirators had a motive to enter into a price fixing conspiracy, Complaint Counsel emphasizes that the structure of the pipe fittings market is conducive to secret price fixing. Market structure can facilitate collusion when it: (1) involves a commodity product with few substitutes; (2) is concentrated on the supply side; (3) reflects a lack of concentration on the buying side; (4) has excess capacity; and (5) features published prices. *Cf. In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 656-58 (7th Cir. 2002) (noting that the high fructose corn syrup market exhibited these characteristics, making price fixing feasible and providing parties with a motive to engage in such conduct). The parties do not dispute that pipe fittings are a commodity product designed to industry-wide specifications, that they have no substitutes, and that suppliers publish list prices. R's Ans. ¶¶ 23, 27(a) & (e). There is also evidence that McWane, Sigma, and Star together account for about 95% of sales in the fittings market (CX 1163-006), and that buyers, primarily distributors, are far less concentrated (CC's SOF ¶¶ 168-171). And during the relevant time period, the market had excess capacity. CX 1287-007; CX 0627-001; CX 2145-006. McWane does not offer evidence to the contrary.

b) Actions Against Interest

Actions against interest by a participant in a conspiracy are actions that would have been economically irrational for a firm acting in a competitive market. *In re Flat Glass*, 385 F.3d at 360-61; *Williamson Oil*, 346 F.3d at 1310. Complaint Counsel focuses on Star, the industry's claimed pricing maverick, arguing Star behaved contrary to its economic self-interest throughout the period of the alleged conspiracy. Complaint Counsel points to two acts in particular: Star's decision to curtail discounting throughout much of 2008, and its decision to participate in the DIFRA information exchange. Read in the light most favorable to Complaint Counsel, a plausible interpretation of the evidence could be that Star's conduct only made sense in the context of a conspiracy.

Star had long relied on discounting off list prices to gain market share. McCutcheon Dep. 152-53. In fact, competitors frequently complained about Star's "reckless, irresponsible, and undisciplined" pricing. CX 1076-003; *see also* Tatman IH 232-34; Rybacki Dep. 114. Yet, beginning in January 2008, following the release of the McWane January pricing letter, which Complaint Counsel posits included a veiled message to its competitors to stop discounting in exchange for future price increases (CC's SOF ¶¶ 27-29), Star abruptly announced it was curtailing discounting (CX 1170-3).[10] To ensure that this occurred, Star removed pricing authority from its sales force and centralized it with its National Sales Manager, Matt Minamyer. *Id.* [redacted]

[10] In fact, when announcing Star's new approach, Mr. Minamyer wrote to Star's district sales managers that "[d]on't think we need the price increases. . . . The truth is that we would come out of a price war stronger than ever and with a bigger market share, but we don't think the industry needs that right now." CX 1170-3.

Ultimately, this shift in policy appeared to have backfired. By late November 2008, Star had "lost too much revenue" and resumed project pricing. CX 0746. Nonetheless, one reasonable interpretation of the decision to centralize its pricing authority and reduce job discounting beginning in early 2008 supports Complaint Counsel's view that Star was not acting independently. *Cf. United States v. Andreas*, 216 F.3d 645, 652 (7th Cir. 2000) (noting that the ringleaders of the lysine cartel had urged competitors to centralize pricing to minimize cheating on the cartel agreement).

Star's agreement to exchange company sales information through DIFRA can also be seen as an action against self-interest. Mr. McCutcheon declared that he had long been reluctant to join DIFRA because he feared that the data would only be used by McWane and Sigma to gain insight into Star's pricing and sales information to undermine Star in the future. CX 0807. Yet in Spring 2008, after significant pressure from McWane and Sigma, Star agreed to participate in DIFRA (CX 0807), thereby arguably making its pricing decisions more transparent to its competitors (CC's SOF ¶¶ 46-47). Star stopped providing DIFRA data shortly after resuming its practice of job discounting. CC's SOF ¶¶ 95-97. Star's participation in the DIFRA exchange, even though short-lived, plausibly fits with Complaint Counsel's claim that it was driven primarily by an understanding with its competitors, rather than the company's economic self-interest.

Although Complaint Counsel focuses on Star because it had been the industry's most aggressive discounter, the evidence also shows that McWane and Sigma may have taken actions contrary to their self-interest. First, as with Star, their decisions to curtail job discounting would be against their interest absent an understanding that their competitors were going to do the same. Otherwise, they risked losing sales to competitors who discounted. Second, McWane's decision to curtail discounting and raise prices in 2008, particularly in the face of excess capacity, lower demand, and declining market share (CX 1287-005-007), could also be read as contrary to the company's interests.

c) The Alleged Conspiracy

As described by Complaint Counsel, in 2007 the fittings industry was suffering from declining demand and excess capacity, leading to pricing that trailed inflation. CX 1287; CX 0627-001; CX 1088-003. Star was placing additional pressure on prices. CC's SOF ¶ 13. McWane had answered by matching Star's pricing, but its profitability had suffered. CC's SOF ¶¶ 14, 18. McWane's senior management decided to shake up its fittings business, appointing Rick Tatman as Vice President and General Manager in an effort to turn the struggling business around. CC's SOF ¶ 16.

Against this backdrop, Complaint Counsel contends that McWane, led by Mr. Tatman, developed a strategy in December 2007 to stabilize and increase industry-wide prices for fittings in 2008. CX 0627; CC's SOF ¶¶ 26-31. As described in a presentation that appears to have been shared with various McWane senior executives, [redacted]

[redacted] According to Complaint Counsel, McWane viewed the centralization of pricing authority at the management level and reduction of individual job pricing as key to the plan. *Id*. at 005.

As the first step in the plan, McWane issued the January pricing letter in early 2008, announcing a 10% to 12% increase on the multiplier applicable to imported fittings and a 3% to 5% increase on domestic fittings, effective February 18. CX 1178-001. The letter noted that McWane anticipated the need to raise prices again within the next six months "as conditions require" (*id.*), which Complaint Counsel contends was an offer from McWane to Sigma and Star. McWane would consider a larger price increase if its two competitors limited their discounts off of list prices. CC's SOF ¶ 34. By early February, both Sigma and Star had indicated they would match the previously-announced McWane pricing. CC's SOF ¶¶ 35-36.

[redacted]

Complaint Counsel alleges that following the first round of industry-wide price increases in early 2008, McWane moved on to the next stage of its plan—an increase in industry transparency. CX 0627-004. Sigma supported McWane's interest in creating an industry association, ultimately known as DIFRA, for the purpose of exchanging industry data, believing it would "create trust and respect among [DIPF] suppliers, which could lead to mature and disciplined decision making." CX 1088-001. Star was initially reluctant to participate in DIFRA, but later gave in to pressure from McWane and Sigma and agreed to join. CX 0807.

During Spring 2008, both in-person and telephonic negotiations to set up DIFRA were underway. CX 1479. The parties reached an agreement in April 2008 that they would share monthly fittings shipment data for 2006, 2007, and the first four months of 2008 by May 15. CX 1479-001; CX 1186. Going forward, each company would continue to provide their sales data to DIFRA on a monthly basis. CX 1479-001.

According to Complaint Counsel, Sigma viewed the successful implementation of DIFRA as the time to again raise prices. CC's SOF ¶¶ 57-58. Sigma announced a large multiplier price increase on April 24, which would be effective May 19, shortly after the DIFRA data was due. CX 0137. On May 7, Star announced similar multiplier price increases. CX 0816. McWane considered its competitors actions, but chose not to support such large price increases because they "would lead to instability." CX 0137.

In the June pricing letter, McWane indicated it would not be following the price increases announced by its competitors. CX 0138. Instead, McWane indicated that before making any

pricing decision, it would "carefully analyze all factors including: domestic and global inflation, market and competitive conditions within each region, as well as our own performance against our own internal metrics." *Id.* McWane also noted that it would complete its pricing analysis by the end of May. *Id.*

Following McWane's statement, both Sigma and Star retracted their previously announced price increases. CX 0527-001; Tatman Dep. 142. [redacted]

On June 5, 2008, Star submitted its data to DIFRA. CX 0049. That same day, Dan McCutcheon, then Star's Vice President of Sales, notified Sigma by e-mail that Star had submitted its data. He recited language from the June pricing letter:

[redacted]

McWane received the DIFRA data on June 17. Later that day, McWane announced an eight percent price increase for fittings, effective July 14. CX 0366-001; CX 1576. Sigma and Star quickly followed McWane's price increases. CC's SOF ¶ 78.

By August 2008, the declining U.S. housing market put significant pressure on the fittings businesses. Rybacki Dep. 134-35. Complaint Counsel contends that this pressure led to increased complaints from McWane, Sigma, and Star, each claiming the others were failing to abide by the agreement not to deviate from published pricing. CC's SOF ¶ 85. For example, on August 22, Mr. Tatman at McWane complained to Mitchell Rona, Vice President of Operations at Sigma, that he was "upset" by Sigma and Star's pricing in California and Florida. CX 1149-001; Rona Dep. 194-98.

Similarly, according to Complaint Counsel, Star became increasingly concerned about its competitors' pricing, asserting that they were not living up to their commitments to minimize discounting off of list prices. In a number of e-mails, Star employees complained that its competitors, particularly Sigma, were "cheating." By October 2008, Star was "catching Sigma cheating more and more." CX 1698. In an October 22 e-mail, Mr. Minamyer, then Star's National Sales Manager, wrote that "Sigma is silently bringing the markets down and acting as if they are being good stewards." CX 0827-001. According to Complaint Counsel, McWane also viewed Sigma as responsible for the decline in prices. CX 0456.

Complaint Counsel alleges that by late November 2008, Star had decided to resume discounting. CC's SOF ¶¶ 95-96. On November 25, Mr. Minamyer wrote to Star sales managers to announce that, having lost substantial revenue, Star would return to matching competitor pricing, albeit stealthily. CX 0746-001. He noted that while Star had been "extremely diligent in protecting the stability" of fittings pricing, the competition had not been as diligent. *Id.* By February 2009, Star and Sigma no longer participated in DIFRA. CC's SOF ¶ 97.

d) Analysis

Complaint Counsel maintains this evidence supports an inference of conspiracy. For its part, McWane insists that there was no conspiratorial plan at all. According to McWane, the strategy described by Mr. Tatman in the documents was nothing more than his "personal . . . brainstorming"—ideas that were never communicated to Sigma or Star. Moreover, it argues that the sequence of price increases shows at most conscious parallelism, not concerted action. We disagree.

As an initial matter, the strategy laid out in Mr. Tatman's presentation is both suggestive of possible collusion and provides a context for interpreting the events that followed. *See, e.g.*, *In re Sulfuric Acid Antitrust Litig.*, 743 F. Supp. 2d 827, 858 (N.D. Ill. 2010) (noting that the "most damaging piece of evidence" for the defendants was a document laying out a plan to stabilize the market); *In re Linerboard Antitrust Litig.*, 504 F. Supp. 2d 38, 59 (E.D. Pa. 2007) (indicating that all of the evidence supporting allegations of a conspiracy were "contextualized within" a document discussing a strategy to encourage competitors to reduce inventory).

While McWane denies that it ever intended to convey any plan to its competitors, there is evidence suggesting otherwise. The slide laying out the elements of the plan is titled the [redacted] *Id*. Both versions contained language that Complaint Counsel contends was aimed at competitors and would have been meaningless to customers. Thus, a reasonable inference could be that McWane intended to use its pricing letters to communicate a plan to its competitors.

Moreover, both the January and June pricing letters could reasonably be read as veiled communications to Sigma and Star. [redacted] While not explicitly referring to "job discounts," a plausible reading is that McWane's intent going forward was to adhere to the published multipliers and not engage in job discounting. McWane makes much of Mr. Jansen's denial—mild though it is—of any such message, (Jansen Dep. 253 ("I don't think I'm

announcing that we're not going to do job pricing")), as well as denials by others, but these are precisely the type of disputed facts that preclude summary decision.

Additionally, internal communications at both Sigma and Star as well as their behavior show that both firms interpreted McWane's January pricing letter as an offer to support higher prices, particularly if each curtailed job discounting. In a January 24 e-mail, Sigma CEO, Victor Pais, wrote to Sigma's regional managers that [redacted] Mr. Pais then notes that he "urged" Larry Rybacki, Sigma's former Vice President of Sales and Marketing, to match McWane's new pricing, which it did on January 29, 2008, and [redacted] Complaint Counsel contends that Mr. Pais is referring to curtailing project pricing. Shortly thereafter, Sigma informed its customers that as of May 5, it was eliminating project pricing. CX 1138-004 (announcing that Sigma would "cease to use any varying 'special' pricing" and that orders would instead be processed using the prevailing list prices).

Like Sigma, Star responded to the January pricing letter by announcing in a customer letter that it would match McWane's multiplier price increases. CX 2336; CX 2315-001. Star also decided to curb project pricing, *i.e.*, discounting. In a January 22 e-mail discussing McWane's pricing letter, Mr. Minamyer, Star's National Sales Manager, ordered Star employees to "*stop project pricing*." CX 1170-2-3 (emphasis in original); *see* CX 0034-1. Mr. Minamyer noted that the elimination of project pricing "is best for the industry and that [Star] need[s] to be part of the effort to help [the fittings] industry. We will not [be] part of damaging the industry due to lack of discipline." CX 1170-3. Shortly after receiving the McWane letter, Star notified customers that there would be "no utility project pricing nationwide." CX 2315-001. To ensure compliance with the restrictions on project pricing, Star decided to centralize pricing authority with Mr. Minamyer. CX 1170-3.

McWane also argues that the June pricing letter on its face "says nothing at all about DIFRA . . . [or] about any willingness to support higher prices in exchange for submissions of tons-shipped data to DIFRA." R's Reply Br. at 4. That may very well be, but, at a minimum, Sigma and Star's reactions to the June pricing letter raise disputed questions of fact about whether it also contained veiled communications to Sigma and Star.

Specifically, Complaint Counsel interprets the June letter, particularly its references to McWane needing until the end of May to determine whether a further price increase was warranted, as conveying a message to Sigma and Star that McWane would only support higher pricing after it received and analyzed the DIFRA data. CC's SOF ¶¶ 62-64. It contends that only Sigma and Star knew that the companies had agreed to submit DIFRA data "by the end of May." CC's SOF ¶ 64. Prior to receiving the pricing letter, Star had not yet confirmed it would share its sales data with DIFRA, but within hours of receipt, Dan McCutcheon, then Star's Vice President for Sales, e-mailed the other DIFRA members confirming that Star would submit its data. CX 1085-001; CX 0863. Further, Complaint Counsel contends that Mr. McCutcheon's

quoting of select language from McWane's June letter in his e-mail to Sigma demonstrates that Star understood McWane was offering to raise prices contingent on its competitors providing their sales data to DIFRA. CC's SOF ¶ 74. Complaint Counsel further contends that Star accepted the offered price increase by submitting the requested data. *Id.* Whether that is or is not an accurate account of what happened is a matter that will have to be resolved at trial, not on summary decision.[11]

McWane also takes issue with Complaint Counsel's assertion that the DIFRA information exchange serves as evidence of a conspiracy. In particular, McWane stresses that the DIFRA data was limited to aggregated sales volume numbers and provided no insight into pricing. But where there is evidence suggesting that the exchange of information may have been closely intertwined with the alleged conspiracy, an inference of conspiracy is plausible.[12] *In re Flat Glass*, 385 F.3d at 369 (finding that exchanges of information among competitors supported an inference of a conspiracy where they were "tightly linked" with the alleged concerted behavior); *In re Petroleum Prods. Antitrust Litig.*, 906 F.2d at 462 ("an inference of conspiracy drawn from the appellants' evidence of supply data exchanges is plausible").

Here, there is evidence that McWane delayed a price increase until receipt of the DIFRA data. In a May 24 e-mail from Mr. Tatman to other McWane executives, he wrote that [redacted] McWane finally announced a price increase on June 17, hours after it received, and quickly analyzed, the DIFRA data. CC's SOF ¶¶ 75-77. This evidence shows a plausible link between the DIFRA information exchange and the alleged conspiracy.[13] *See In re Currency*

[11] In addition to the January and June pricing letters, Complaint Counsel also points to other examples of pricing-related communications among the alleged conspirators. Many of these communications involve complaints about a rival's low pricing. CC's SOF ¶¶ 15-21, 41-42. While the evidence surrounding the pricing letters is more than sufficient to conclude that summary decision would be inappropriate here, these additional communications lend further support to an inference of a conspiracy. *See* AREEDA ¶ 1419a, at 122-23 ("[W]hen a competitor merely complains to its rival about the latter's 'low price' . . . the 'objective' meaning of such a statement to the reasonable observer seems clear: the only business rationale for complaining is to induce a higher price."); *In re Plywood Antitrust Litig.*, 655 F.2d 627, 633 (5th Cir. 1981) (recognizing a high level of inter-firm communication as a plus factor).

[12] It is uncontested that the DIFRA data lacked specific pricing information (R's SOF ¶¶ 87-91; CC's SOF ¶ 56), but this fact is not dispositive. *See In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 906 F.2d 432, 461-62 (9th Cir. 1990) (holding that an agreement to exchange non-price information with competitors can serve as circumstantial evidence of an agreement to raise prices); *see also Am. Column & Lumber Co. v. United States*, 257 U.S. 377, 398 (1921) (recognizing that disseminating production and supply data cannot be treated categorically different than the exchange of price information).

Conversion Fee Antitrust Litig., 773 F. Supp. 2d 351, 370 (S.D.N.Y. 2011) (holding that timing of defendants' decisions to raise prices—within days of an exchange of information—supported a finding that the information had an impact on the pricing decision).

Moreover, as discussed at greater length below, there is also evidence that all three suppliers believed that the DIFRA data allowed monitoring of the market and their competitors' behavior. Specifically, Complaint Counsel presents evidence that the data provided sufficient insight into the market, much of which the alleged conspirators could not access previously, to allow them to determine whether they were losing sales due to a downturn in the market (shown by a steady market share) or discounting by competitors (evidenced by a declining share). CX 1092. As a result, it seems the recipients believed the information would help maintain pricing stability. *Id.*; CX 1287.

Finally, Complaint Counsel also points to a number of statements by the parties suggestive of a conspiracy. Various Star documents refer directly to "cheating" in the fittings marketplace, implying the existence of an agreement that Star believed a coconspirator had breached. In a number of e-mails, Star's regional division managers complained to Mr. Minamyer that their competitors were cheating. [redacted] There are similar references by McWane employees. For example, in a May 18, 2009 e-mail to Ruffner Page, CEO of McWane, in anticipation of his meeting with Mr. Pais, former CEO of Sigma, Mr. Tatman wrote that [redacted] These references to "cheating" and "agreements" clearly support the possibility of a conspiracy. *See Blomkest Fertilizer*, 203 F.3d at 1050 (Gibbons, J. dissenting) (noting that "the use of the word 'cheating' denotes the breach of an agreement or convention, not independent action"); *see also In re High Fructose Corn Syrup*, 295 F.3d at 662 (recognizing that statements suggestive of an agreement among competitors serve as circumstantial evidence of a conspiracy).

We close this discussion by addressing one overarching argument made by McWane—that a price-fixing conspiracy could not have existed here because individual job discounting continued throughout 2008. McWane's argument is flawed for several reasons. First, courts

[13] Although McWane concedes that it announced a price increase hours after receiving the DIFRA data, it responds that rather than match its competitors' previously announced—and subsequently suspended—price increases, it instead announced smaller price increases. R's Reply Br. at 10. This does not disprove a conspiracy, however. Indeed, some evidence suggests that McWane actually preferred smaller increases because they reduced the likelihood of cheating, thereby promoting price stability. For example, a December 31, 2007 e-mail to Mr. Tatman from Thomas Walton, McWane Senior Vice President, responding to Mr. Tatman's proposed strategy, praised the recommendation to only raise prices half as much as McWane's competitors as part of an effort [redacted]

have consistently held that "[a]n agreement to fix list price . . . is a per se violation of the Sherman Act even if most or for that matter all transactions occur at lower prices." *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d at 656. As Judge Posner has explained, that is because "the list price is usually the starting point for the bargaining and the higher it is, the higher the ultimately bargained price is going to be." *Id.*; *see also Plymouth Dealers' Ass'n v. United States*, 279 F.2d 128, 132 (9th Cir. 1960) (holding that an agreement among competitors on common list prices as the starting point for bargaining with customers violated the Sherman Act). That the claimed conspiracy here allegedly involved a reduction in discounting off of list prices (Compl. ¶ 32) only heightens the concern that raising list prices may have resulted in higher prices for customers.

Second, evidence that job pricing continued, at least to some degree, in 2008 does not preclude a finding of conspiracy. In evaluating a claim of price fixing, one must distinguish "between the existence of a conspiracy and its efficacy." *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d at 656. The fact that not all of the claimed conspirators complied fully with the conspiracy does not mean there was no conspiracy.[14] *See United States v. Beaver*, 515 F.3d 730, 739 (7th Cir. 2008) (holding that evidence of cartel "cheating" did not undermine the government's case that a cartel existed); *Andreas*, 216 F.3d at 679 (same).

Finally, there is also evidence belying McWane's contention that job pricing continued unabated following the dissemination of the January pricing letter. [redacted] Similarly, in its Second Quarter 2008 Executive Report, McWane continued to observe a decrease in discounting and job pricing. CX 1562-004.

Considered as a whole, the evidence presented by Complaint Counsel more than suffices to defeat summary decision as to count one. *See Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962) (emphasizing that "the character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but [rather] by looking at it as a whole"); *InterVest, Inc. v. Bloomberg, L.P.*, 340 F.3d 144, 160 (3d Cir. 2003) ("a court should not tightly compartmentalize the evidence put forward by the nonmovant, but instead analyze it as a whole to see if together, it supports an inference of concerted action.").

B. Count Two: Conspiracy to Exchange Sales Information

In addition to arguing that the DIFRA information exchange is a plus factor supporting the inference of a price-fixing agreement, Complaint Counsel also alleges that it constitutes an

[14] Moreover, Complaint Counsel does not argue that McWane and its rivals intended to or would "stop" all job discounting; rather, Complaint Counsel argue and offer evidence that McWane intended to "curtail" job discounting, and that it was soliciting its rivals to do the same in part through its January pricing letter. *See, e.g.*, CC's SOF ¶¶ 28-30, 33-34. Accordingly, that at least some job pricing continued is not inconsistent with the conspiracy allegations.

independent violation of Sherman Act Section 1 as a facilitating practice. Compl. ¶¶ 35-38, 65. McWane seeks summary dismissal of this claim on the ground that McWane, Star, and Sigma witnesses uniformly testified that the DIFRA shipping data they received provided them with no insight into competitor pricing, and therefore, could not facilitate a price fixing agreement. This argument does not hold up under the facts before us.

A facilitating practice is one that "makes it easier for parties to coordinate price or other anticompetitive behavior in an anticompetitive way. It increases the likelihood of a consequence that is offensive to antitrust policy." AREEDA ¶ 1407b, at 29-30; *see also In re Brand Name Prescription Drugs Antitrust Litig.*, 288 F.3d 1028, 1033 (7th Cir. 2002) (recognizing that "there is authority for prohibiting as a violation of the Sherman Act or of section 5 of the Federal Trade Commission Act an agreement that facilitates collusive activity"). As an initial matter here, the fact that the traded information was non-price data does not necessarily absolve McWane and its rivals. *See In re Petroleum Prods. Antitrust Litig.*, 906 F.2d at 462 (holding that the exchange of non-price information can facilitate collusion). Whether an agreement to exchange competitive information constitutes an unreasonable restraint of trade is analyzed under the rule of reason. Therefore, the question is whether the anticompetitive effect of the agreement outweighs its beneficial effects. *United States v. United States Gypsum*, 438 U.S. 422, 441 n.16 (1978); *Todd v. Exxon*, 275 F.3d 191, 199 (2d Cir. 2001); *In re Petroleum Prods. Antitrust Litig.*, 906 F.2d at 447 n.13; *Ipenne v. Greater Minneapolis Area Bd. of Realtors*, 604 F.2d 1143, 1148 (8th Cir. 1979). In assessing the competitive effects of the information exchange, the susceptibility of the industry to collusion and the nature of the information exchanged are the most important factors in determining likely effects. *United States Gypsum*, 438 U.S. at 441 n.16; *Todd*, 438 F.3d at 207-08.

As discussed above, the fittings industry has characteristics arguably making it susceptible to collusion: fittings are fungible; demand is largely inelastic; and the market is concentrated. In evaluating the nature of the information exchanged, courts look to the timeliness and specificity of the data to determine its anticompetitive potential. *Todd*, 438 F.3d at 211-13. Here, the DIFRA members agreed to share data regarding monthly fittings shipments. Although the data was not prospective, which would be particularly troubling, it was nonetheless very recent, sometimes reflecting sales data less than two weeks old. CX 2334. The parties also apparently believed it provided them with a much more accurate picture of sales in the industry than prior sources of data. CX 1706; CX 2337. Moreover, it was sufficiently detailed that with some manipulation, the parties could calculate their market share down to at least the state level. CX 2335. Perhaps most importantly, it allowed the parties to monitor competitor discounting. CC's SOF ¶¶ 80-82. There are also a number of documents explaining that the DIFRA data allowed the members to determine whether sales losses resulted from overall market decline or from competitor discounting.[15] *See* CX 0313-004; CX 1077-002. Based on this evidence,

[15] [redacted]

Complaint Counsel reasonably argues that the DIFRA exchange allowed the parties to monitor their competitors and thereby promoted the conspiracy. *See In re Corn Syrup Antitrust Litig.*, 295 F.3d at 656 (recognizing that the ability to detect cheating "tends to shore up a cartel").

Relying on *Williamson Oil*, McWane argues that the exchange of sales information, as opposed to price data itself, is far less indicative of a price fixing conspiracy. It is certainly true that the exchange of sales information does not in and of itself suggest a conspiracy, but the inquiry does not end there. Importantly, in *Williamson Oil*, not only was there a lack of evidence tying the exchange of information to the claimed conspiracy, but the parties also had evidence of a procompetitive justification for the exchange. 346 F.3d at 1313. Here, by contrast, McWane fails to identify a single procompetitive purpose for the DIFRA exchange.[16] Additionally, the fact that the data exchange began during the alleged conspiracy period (CC's SOF ¶ 46), and stopped shortly after Complaint Counsel alleges that Star withdrew from the conspiracy (CC's SOF ¶ 97), raises doubt about whether the exchange of data served any procompetitive objective. Tellingly, when Sigma attempted to revive DIFRA reporting in May 2009, it did not provide a procompetitive reason, but rather said [redacted]

In sum, Complaint Counsel presents evidence plausibly showing that the agreement among McWane, Sigma, and Star to exchange sales data may have facilitated their alleged collusion. This, coupled with McWane's failure at this stage to provide evidence of any procompetitive justification to offset the potential anticompetitive harm, requires that we deny McWane's motion for summary decision on count two.

C. Count Three: Invitations to Collude

McWane also moves for summary decision on Complaint Counsel's allegations that McWane's January and June pricing letters constitute unlawful invitations to collude in violation of Section 5 of the FTC Act. Compl. ¶ 66. McWane acknowledges that the FTC has previously asserted that invitations to collude are an unfair method of competition but argues that summary decision is warranted because the issue has not been litigated and no court has held that an invitation to collude violates Section 5. As discussed above, McWane also disputes as a factual matter that its January and June 2008 pricing letters were invitations to collude. Neither argument provides a basis for summary decision.

For more than twenty years, the Commission has held that an invitation to collude is "the quintessential example of the kind of conduct that should be . . . challenged as a violation of Section 5." Statement of Chairman Leibowitz and Commissioners Kovacic and Rosch, *In re U-*

[redacted]

[16] Although McWane presents evidence that one of DIFRA's primary purposes was to address technical specifications of fittings (R's SOF ¶ 85), it provides no evidence demonstrating that this goal was related to the exchange of the sales volume data.

Haul Int'l, Inc., Docket No. C-4294 (June 9, 2010), at 1 (identifying cases). This conclusion is based on the longstanding principle that the scope of Section 5 of the FTC Act is broader than the Sherman Act. As the Supreme Court has explained, Section 5 empowers the Commission to challenge anticompetitive practices in their incipiency:

> The unfair methods of competition which are condemned by §5 of the Act are not confined to those that were illegal at common law or that were condemned by the Sherman Act. . . . [T]he FTCA was designed to supplement and bolster the Sherman Act and the Clayton Act, to stop in their incipiency acts and practices, which, when full-blown, would violate those Acts, as well as to condemn as unfair methods of competition existing violations of them.

FTC v. Motion Picture Adver. Serv. Co., 344 U.S. 392 (1953).[17]

McWane ignores this well-established authority and instead directs us to Sherman Act Section 1 conspiracy cases. But these cases do not relate to Section 5 and are therefore inapposite. Even *Liu v. Amerco*, upon which McWane principally relies, makes clear the distinction between the requirements of Section 1 of the Sherman Act and Section 5. 677 F.3d 489, 494 (1st Cir. 2012).

Liu was a follow-on private action to the Commission's complaint and consent decree in *In re U-Haul International*, the most recent case in which the Commission has challenged an invitation to collude under Section 5. In *Liu*, the First Circuit held that Liu's complaint stated a cognizable claim under the Massachusetts consumer protection statute, which, like Section 5, prohibits "unfair methods of competition." *Id.* at 494-95. The First Circuit endorsed the Commission's position, noting that "while . . . an unsuccessful attempt [to conspire] is not a violation of Section 1 of the Sherman Act," the FTC has concluded under Section 5 of the FTC Act that a "proposal to engage in horizontal price fixing is dangerous merely because of its potential to cause harm to consumers if the invitation is accepted." *Id.* at 493-94.

McWane also ignores leading antitrust scholars who have endorsed the Commission's use of Section 5 to challenge invitations to collude. *See, e.g.*, AREEDA ¶ 1419e, at 129-38; Stephen Calkins, *Counterpoint: The Legal Foundation of the Commission's Use of Section 5 to Challenge Invitations to Collude is Secure*, 14 Antitrust 69 (Spring 2000) ("intercepting attempted price fixing would seem the quintessential example of restraining a practice that otherwise would ripen into a Sherman Act violation, and of banning a practice that conflicts with the Sherman Act's basic policies"). While there may be some debate about the precise contours of Section 5, there is widespread agreement that invitations to collude are, and should be, an unfair method of competition. After all, "an unsuccessful attempt to fix prices is pernicious conduct with a clear potential for harm and no redeeming value whatever." *Liu*, 677 F.3d at 494;

[17] *Accord FTC v. Texaco*, 393 U.S. 223, 225 (1969); *FTC v. Brown Shoe Co.*, 384 U.S. 316, 321 (1966); *FTC v. Cement Inst.*, 333 U.S. 683, 708 (1948); *Fashion Originators' Guild, Inc. v. FTC*, 312 U.S. 457, 466 (1941).

see also In re Valassis, 141 F.T.C. 279, 282-86 (2006) (delineating the legal and economic justifications for imposing liability on invitations to collude under Section 5).

Equally unpersuasive is McWane's argument that there is no factual support for this count. As discussed above, whether McWane's January and June pricing letters are invitations to collude present genuine issues of fact to be resolved at trial.

D. Counts Four and Five: McWane's Efforts to Exclude Sigma from the Domestic Fittings Market

Complaint Counsel also alleges that McWane induced Sigma to abandon its plan to enter the domestic fittings market as an independent competitor and instead distribute product manufactured by McWane. Complaint Counsel charges that the resulting distribution arrangement, embodied in a master distribution agreement ("MDA"), violates Sherman Act Sections 1 and 2 by excluding Sigma and maintaining McWane's alleged monopoly in the domestic fittings market. McWane challenges these allegations on a single ground, arguing that Sigma was not in a position to enter the domestic fittings market at the time it entered into the MDA with McWane. In other words, McWane contends Sigma was not an actual potential competitor in that market. R's SD Br. at 11, 32-33; R's Reply Br. at 6-7. The question for us is whether the uncontroverted evidence supports McWane's contention. We conclude that it does not.

The parties dispute whether Sigma was an actual potential competitor in the domestic fittings market. Complaint Counsel, for the purposes of this motion, agrees with McWane that a firm is an actual potential entrant when it can be shown that it has taken "affirmative steps to enter the business" and has an "intention" and "preparedness" to do so.[18] R's SD Br. at 33 (citing *Gas Utils. Co. of Ala. v. Southern Natural Gas Co.*, 996 F.2d 282, 283 (11th Cir. 1993) (holding that a "party must take some affirmative step to enter"); *Cable Holdings of Ga., Inc. v. Home Video, Inc.*, 825 F.2d 1559, 1562 (11th Cir. 1993) (requiring "an intention to enter the business" and a "showing of preparedness")).

In arguing that Sigma was not positioned to enter the market, McWane relies heavily on what it characterizes as undisputed testimony from Larry Rybacki, Sigma's former Vice President of Sales and Marketing, and Siddarth Bhatacharji, Sigma's Executive Vice President, that it would have taken at least 18-24 months for Sigma to begin domestic manufacturing of fittings. By that time, argues McWane, the spike in domestic sales resulting from ARRA

[18] Given that the parties agree on the standard at this juncture, and based on the conflicting evidence before us, we do not find it necessary at this stage to address the appropriate standard for establishing an "actual potential competitor." We do note that in the merger context, for a firm to be an "actual potential competitor," most courts require a "reasonable probability" of entry. *See Yamaha Motor Co. v. FTC*, 657 F.2d 971, 977-79 (8th Cir. 1981); *United States v. Siemens Corp.*, 621 F.2d 499, 506-07 (2d Cir. 1980); *see also* V PHILLIP W. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1121b, at 53 (2d ed. 2003) (noting that the appropriate standard should be that the potential entrant "would probably have entered the market within a reasonable period of time").

stimulus would have ended, rendering the enterprise unprofitable. McWane also contends that Sigma lacked the financial resources to undertake the estimated $5 to $10 million cost of developing domestic manufacturing capability. There is some merit to both points, but there is also contrary evidence that Sigma had other options.

For example, Mr. Rybacki testified that Sigma was also exploring using its [redacted] Rybacki Dep. 130-31; CX 0086-005. In investigating this possibility, Mr. Rybacki was told by some that it could be done in as little as 120 days. Rybacki Dep. 137-38. His personal view was that Sigma could be in a position to enter the market within nine months. *Id*. Meanwhile, although Mr. Bhatacharji estimated that it would take at least 18-24 months for Sigma to have a full line of fittings available across the country even using a virtual manufacturing model, he also explained that Sigma would have been able to operate successfully earlier than that with less than a full range of fittings. Bhatacharji Dep. 247-48.

Star's entry into the domestic market is also instructive. Star, like Sigma, employs a virtual manufacturer model for fittings. *See* Bhutada Dep. 6-9. And it began selling domestic fittings manufactured by third-party foundries within a few months of its June 2009 announcement that it was entering the market and less than nine months after passage of the ARRA. R's SOF ¶ 98.

There is also evidence that Sigma's owners and board supported Sigma's domestic entry even absent ARRA, based on the belief that "Buy American" requirements as well as end-user preferences could lead to the domestic market increasing to 25% to 30% of the overall fittings market. *See* CX 0081-004; CX 0225-001; CX 0978-001.

As for Sigma's financial condition, it appears that Sigma had sufficient capital to invest into entering the domestic market. A July 27, 2009 e-mail from Sigma's equity owner to Sigma's executive management, for instance, indicates that Sigma's liquidity was "fine" and that investors and shareholders were prepared to invest up to $7.5 million "to fund [the] domestic sourcing initiative" as well as other strategic additions to "help Sigma grow." CX 0099-007. Sigma's CEO also testified that if no deal had been struck with McWane, Sigma "would have brought in the finances" necessary to fund domestic production. Pais IH 180-81.

Complaint Counsel also points to other evidence showing that Sigma had the intent to enter the domestic market. Sigma executives testified that absent an agreement with McWane, Sigma would have entered the domestic market. Pais IH 179-80; Rona IH 102-04. Contemporaneous business documents confirm this. In a June 5, 2009 e-mail following receipt of McWane's initial low offer, Mr. Pais wrote that "it's time [Sigma] seriously went ahead with [its] SDP [Sigma Domestic Plan] plans." CX 0225-001. Similarly, in a board of directors update from the same day, Sigma management wrote that the company [redacted] CX 0086-005; *see In re B.A.T.*

Indus., 104 F.T.C. 852, 922 (1984) (noting that the "best evidence that a firm is an actual potential entrant . . . will ordinarily consist of internal, non-public information").

In fact, Sigma had taken a number of affirmative steps to enter the market. These included visiting domestic foundries and securing offers to produce domestic fittings; purchasing tooling equipment; acquiring patterns; ordering production drawings; and conducting test manufacturing. Bhattacharji Dep. 55-56; Box Dep. 27-28; CX 0282; R's Ex. 27 at 6165-66. According to Mr. Bhattacharji, Sigma's domestic plan was "ready with what was needed once the switch was flipped." Bhattacharji Dep. 54-55.

The record also suggests that McWane itself believed that Sigma could soon begin selling domestic fittings. R's RFA Resp. No. 35; CX 1179-002; CX 0329. [redacted] And McWane clearly recognized that Sigma's entry posed a threat to McWane's domestic fittings sales. [redacted]

This evidence suffices to raise a factual dispute about whether Sigma was an actual potential entrant into the domestic fittings market at the time it entered into the MDA with McWane. Accordingly, we deny McWane's motion for summary decision on counts four and five.

E. Counts Six and Seven: Exclusive Dealing

McWane also seeks summary decision with respect to the final two counts, in which Complaint Counsel alleges that McWane adopted exclusive dealing policies to monopolize or attempt to monopolize the domestic pipe fittings market. Compl. ¶¶ 69-70. In particular, Complaint Counsel alleges that McWane threatened to withhold rebates, delay deliveries, and refuse to deal with waterworks distributors that purchased domestic fittings from Star. Compl ¶ 57; CC's SOF ¶¶ 175-77. According to Complaint Counsel, McWane's exclusionary distribution policies are "the primary barriers to effective entry and expansion" in this market for domestic fittings for suppliers like Star that have established "reputations for quality and service" in the broader fittings market. Compl. ¶ 42.

McWane argues that Star's "successful expansion" into the domestic fittings market compels summary decision in its favor on these two claims. As described by McWane, the undisputed evidence shows that Star announced its decision to sell domestic fittings in June 2009 and was able to sell to 126 customers, including some of the largest U.S. distributors, by the end of 2011. R's SOF ¶¶ 97-98, 101. McWane also points to the fact that Star sold nearly $300,000 of domestic fittings in 2009, and approximately $6.5 million per year in 2010 and 2011. R's SOF ¶¶ 102, 104, 107. In McWane's view, Star's sales numbers, which are uncontroverted, do not permit a trier of fact to conclude that McWane had monopoly power or that its distribution policies were exclusionary. We disagree.

The offense of monopolization has two elements: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as

distinguished from growth or development as a consequence of superior product, business acumen or historic accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). Attempted monopolization, in turn, requires proof "(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." *Spectrum Sports v. McQuillan*, 506 U.S. 447, 456 (1993). Monopoly power is defined as "the power to control prices or exclude competition." *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956). But "having a monopoly does not itself violate [Section] 2." *United States v. Microsoft*, 253 F.3d 34, 58 (D.C. Cir. 2001). There must also be a showing that the challenged conduct is "exclusionary." In other words, to be condemned, the act must have an anticompetitive effect. As the *Microsoft* court explained, this means "it must harm the competitive *process* and thereby harm consumers. . . . [H]arm to one or more *competitors* will not suffice." *Id.* (emphasis in original).

An exclusive dealing arrangement is not unlawful under the antitrust laws unless it is likely to "foreclose competition in a substantial share of the line of commerce affected." *Microsoft*, 253 F.3d at 68 (citing *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961)). Under Section 2, however, a plaintiff is not required to show that the claimed monopolist excluded all entry by rivals. As explained in *United States v. Dentsply International*, "[t]he test is not total foreclosure, but whether the challenged practices bar a substantial number of rivals or severely restrict the market's ambit." 399 F.3d 181, 191 (3d Cir. 2005). Accordingly, the question here is whether McWane's conduct foreclosed a substantial portion of the effective channels of distribution, and whether the conduct had a significant effect in preserving McWane's monopoly. *See Microsoft*, 253 F.3d at 70 (noting that "a monopolist's use of exclusive contracts . . . may give rise to a § 2 violation even though the contracts foreclose less than the roughly 40% or 50% share usually required in order to establish a § 1 violation").

The undisputed facts that provide the basis for McWane's motion are not dispositive of Complaint Counsel's monopolization claims. Complaint Counsel disputes the competitive significance of Star's sales, characterizing Star's purported success as mere "toehold entry," and has provided evidence that could lead a fact finder to conclude that McWane's policies deterred distributors from dealing with Star and had a significant effect on McWane's ability to monopolize the domestic market. Significantly, it appears that at least 85% of domestic fittings are sold through distributors. CC's SOF ¶ 8. And the two largest national distributors, HD Supply and Ferguson Enterprises, which are responsible for 50% of all waterworks sales, each testified that they directed their regional managers to purchase domestic fittings exclusively from McWane. *Id.* at 168, 182, 185, 189-93. The evidence also plausibly shows that McWane's policies did in fact cause Star to lose business with at least Ferguson. A Star sales manager testified that Ferguson regional managers refused to do business with Star as a direct result of McWane's policies. CC SOF ¶¶ 188-93, Berry Dep. 131-44. This testimony is confirmed by Star's internal bidding records. CX 2294-012 ("All Ferguson are lost-they only get quotes from us for reference.")

Similarly, McWane's policies seemingly led the third largest distributor, WinWholesale, to add Star's domestic fittings to its "Not Approved" list, preventing its branches from purchasing Star domestic fittings. CC's SOF ¶¶ 169, 194. Although Complaint Counsel does not dispute that these three large distributors purchased a small share of their supply of domestic

fittings from Star, McWane's distribution policies did permit sales where it could not readily fill a customer's order. CX 0059-002. Material factual disputes remain as to whether Star's sales to these customers fell within this exception, and whether McWane's distribution policies prevented Star from competing more broadly for the business of these large distributors.

Moreover, Star testified that [redacted] Bhutada Dep. 74-75. [redacted] *Id.* 74-75, 128. Indeed, Ramesh Bhutada, Star's CEO, testified that [redacted] *Id.* at 84. This suggests that Star could arguably have been a more effective competitor absent McWane's allegedly exclusionary policies.

In light of this evidence, and drawing as we must all reasonable inferences in favor of the nonmoving party, we conclude that a fact finder could find in favor of Complaint Counsel on these claims. Moreover, because the power to exclude competition provides direct evidence of monopoly power, triable issues also remain as to whether McWane possessed monopoly power. *Dentsply*, 399 F.3d at 190 (finding that Dentsply's power over a dealer network provided direct evidence of monopoly power).

The authority McWane relies on does not hold differently or otherwise support summary decision on the narrow ground McWane advances here. For instance, the court in *Omega Environmental v. Gilbarco* correctly held that an exclusive dealing claim cannot succeed without proof of likely competitive harm. 127 F.3d 1157, 1165 (9th Cir. 1997). But the court also recognized that in determining whether there is competitive harm, one must examine a broad range of evidence. While the court took account of the fact that a competitor was able to enter and grow its market share from 6% to 8% in affirming judgment for the defendant, that evidence did not provide the sole basis for its decision. It also considered a variety of other industry evidence, including the volume of direct sales to end users, ease of entry into distribution, prices, output, and fluctuations in market shares, all of which suggested that the defendant's policy harmed competition. *Id.* at 1162-65. Moreover, the court in *Omega* concluded that the plaintiffs had not produced any credible evidence that the defendant's policy had actually deterred entry. 127 F.3d at 1164. In contrast, Complaint Counsel has identified evidence that could lead a fact finder to conclude that McWane's alleged exclusive dealing policies had an anticompetitive effect. CC's SOF ¶¶ 8, 168, 180-82, 185, 187-94, 202.

McWane's reliance on *Tops Market v. Quality Markets*, 142 F.3d 90 (2d. Cir. 1998), is similarly unavailing. In *Tops*, the court rejected the plaintiff's effort to provide evidence of market power solely through a conclusory affidavit. *Id.* at 98. The court also held that the plaintiff could not prove market power in light of evidence of meaningful entry by a large competitor, as well as the plaintiff's own contemporaneous market studies showing that competitors (including the plaintiff) could readily enter the defendant's market and compete effectively. *Id.* at 99. We do not understand *Tops* to hold that evidence of *some* entry on its own provides conclusive proof that the defendant lacks monopoly power as a matter of law. As the

Ninth Circuit explained in *Rebel Oil Co. v. Atlantic Richfield Co*., "[i]f the output or capacity of the new entrant is insufficient to take significant business away" from the accused, the entrant is "unlikely to represent a challenge to the [defendant's] market power." 51 F.3d 1421, 1440 (9th Cir. 1995).[19] Nothing in *Tops* suggests that Complaint Counsel would be precluded from establishing monopoly power at trial on the facts here.

Whether Complaint Counsel can ultimately prove that McWane's distribution policies constitute monopoly maintenance remains to be seen. But Star's sales numbers standing alone do not rule out that possibility. And, because we find there are genuine issues of fact on the question whether McWane has monopolized the domestic market, we also find triable issues remain on Complaint Counsel's attempted monopolization claim, which requires a lesser showing. *See McGahee v. Northern Propane Gas Co*., 858 F.2d 1487, 1505 (11th Cir. 1988) ("Determining whether a defendant possesses sufficient market power to be dangerously close to achieving a monopoly requires analysis and proof of the same character, but not the same quantum, as would be necessary to establish monopoly power for an actual monopolization claim."). Accordingly, we also deny McWane's request for summary decision on Complaint Counsel's attempted monopolization claim.[20]

V. Complaint Counsel's Motion for Partial Summary Decision

For its part, Complaint Counsel moves for partial summary decision on one discrete claim: that McWane and Star unlawfully restrained price competition in the fittings market in April 2009. On April 15, 2009, McWane announced a new price list, effective May 1, which contained lower prices for some fittings and higher prices for others. CX 1873 ¶ 14, CX 0569; Tatman Dep. 167-69. After McWane announced the new price list but before it became effective, Sigma announced it would not follow McWane. CX 0807 ¶ 5; CX 1873 ¶ 15;

[19] McWane fares no better with its citation to *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), a predatory pricing case brought under the Robinson Patman Act. In *Brooke Group*, the Supreme Court affirmed judgment as a matter of law in favor of the defendant because the plaintiff failed to show the defendant had a reasonable prospect of recovering its losses and thus later harming competition. *Id.* at 243. There is nothing in *Brooke Group* that would suggest that Star's sales numbers, isolated from a broader factual picture, compel summary decision here. To the contrary, *Brooke Group* specifically rejects a formulistic approach in favor of a more fact-specific analysis of competitive effects. *Id.* at 230 ("We decline to create a *per se* rule of nonliability—when recoupment is alleged to take place through supracompetitive oligopoly pricing.").

[20] While we agree with Commissioner Rosch's dissent that Complaint Counsel must ultimately prove that McWane's distribution policy harmed competition in the domestic fittings market, we disagree that Star's entry alone is dispositive of that question, or that Complaint Counsel is necessarily required to quantify the additional sales Star would have made absent McWane's policy. Instead, as detailed above, we find that Complaint Counsel comes forward with evidence sufficient to permit a fact finder to conclude that McWane substantially constrained Star's entry into the market, and harmed competition.

CX 2350 ¶ 1. Star, on the other hand, apparently intended to follow McWane, but was uncertain whether McWane would actually implement its new price list. CX 1873 ¶ 16; McCutcheon Dep. 43, 227-28. In an attempt to resolve the uncertainty, Star's Vice President of Sales, Mr. McCutcheon, called McWane's general manager, Mr. Tatman, to determine whether McWane was in fact going to implement its new price list. He received assurances from Mr. Tatman that McWane intended to do so. CX 1873 ¶ 17; McCutcheon Dep. 227-28.

Complaint Counsel bases its claim primarily on Mr. McCutcheon's testimony describing the conversation:

McCutcheon IH 258. Arguing that this "bargained-for exchange of express assurances firmly establishes an agreement" (CC's SD Br. at 7), Complaint Counsel asks us to find that this discussion violates Section 1 as a matter of law.

McWane does not dispute that the communication occurred. Instead, in addition to disputing the significance of the communication, it argues that we should strike the motion because the Complaint does not include specific allegations regarding the exchange. In particular, McWane argues it did not receive adequate notice of the claims in violation of procedural due process, and further that the FTC Act prohibits the Commission from addressing allegations not contained in the Complaint. In the alternative, McWane urges us to deny Complaint Counsel's motion on the ground that the evidence shows "that McWane independently decided its April 2009 price list reduction and that Star independently decided to follow." R's Opp'n Br. at 5-11, 23.

We first address McWane's request to strike Complaint Counsel's motion. Complaint Counsel argues that the conversation and the circumstances surrounding it, although not specifically set out in the Complaint, are well within its reasonable scope; that McWane had actual notice that the communication was at issue in the case; and that the Commission may, under its rules, conform the pleadings to the evidence at the summary judgment stage.

It is true that the Complaint does not describe this specific communication, and that the discussion involved price lists rather than multipliers or job discounting. R's Opp'n Br. at 5. But the Complaint is not necessarily limited to collusion on multipliers and job discounts. As detailed in the Complaint, standardized price lists and multipliers are alleged to enhance the ability of the sellers here to collude. Compl. ¶ 27(e). Moreover, the Complaint nowhere states that the conspiracy was "disbanded" in early 2009 (before the communication), despite McWane's repeated assertions to the contrary. Rather, the Complaint alleges that McWane, Star, and Sigma *began* fixing prices of fittings in January 2008 (Compl. ¶¶ 2, 29), but contains no

allegation as to the end date of the conspiracy, or, for that matter, any allegation of the conspiracy ending at all (*see id.* ¶¶ 3, 36). Indeed, the closest the Complaint comes to alleging an ending date are allegations that the DIFRA sales data exchange ended in January 2009, and that the enactment of ARRA in February 2009 "upset the terms of coordination" among McWane and its rivals. Compl. ¶ 3.

The Commission's rules require only that complaints contain "[a] clear and concise 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). The Complaint here is clear that the conduct at issue is price-fixing by McWane and its rivals, Star and Sigma. We do not read our rule to require Complaint Counsel to set out explicitly in the Complaint each and every episode of the allegedly unlawful conduct. *See In re Basic Research, LLC*, 2004 WL 1942068 (F.T.C.), at *3 (Aug. 17, 2004) (recognizing that FTC complaints need only satisfy the requirements of notice pleading); *cf. Ericson v. Pardus*, 551 U.S. 89, 94 (2007) (holding that "[s]pecific facts are not necessary" to satisfy the notice pleading requirement); *Tamayo v. Blagojevich*, 526 F.3d 1074, 1081 (7th Cir. 2008) (holding that federal notice pleading does not require the plaintiff to allege all facts raised by a claim). Accordingly, we conclude that the communication and its surrounding circumstances are "reasonably within the scope of the original complaint." 16 C.F.R. § 3.15(a)(2).

Nor are we persuaded that McWane lacked sufficient notice that the communication was also in contention. McWane had actual notice of the claim arising out of the communication, and, in fact, actively engaged in discovery on the issue. The conversation first emerged in Mr. McCutcheon's investigational hearing on May 4, 2011. McCutcheon IH 257-58. It was also a topic of a declaration by Mr. McCutcheon. CX 1873-003-004. In subsequent discovery, after the Complaint issued, McWane's counsel appeared at the deposition of ten different individuals, including both Mr. Tatman and Mr. McCutcheon, where testimony about the events of April and May 2009 surrounding McWane's change in list prices, and/or the communication itself, was elicited and given. *See, e,g.*, Bhutada Dep. 97-98; Jansen Dep. 255-57; McCullough Dep. 231-38; McCutcheon Dep. 42-45; 221-36; Minamyer Dep. 229-39; Page Dep. 244-47; Pais Dep. 149-50, 325-36; Rybacki Dep. 193-201, 284-88; Tatman Dep. 167-81; Walton Dep. 151-60. Indeed, McWane's counsel questioned Mr. McCutcheon about the communication before Complaint Counsel even raised the issue in his deposition. McCutcheon Dep. 42-43, 227-31. Thus, there can be little question that McWane had actual notice and ample opportunity to conduct its own discovery on the issue. Accordingly, we deny McWane's request to strike Complaint Counsel's motion.[21]

[21] Although there appears to be no Commission precedent for conforming the pleadings to the evidence on a motion for summary decision, we note that many courts have interpreted Rule 15(b)(2) of the Federal Rules of Civil Procedure, which is analogous to our Rule 3.15(a)(2), to permit such action in appropriate cases. *See, e.g., McCree* v. *SEPTA*, No. 07-4908, 2009 U.S. Dist. LEXIS 4803, at *33 (E.D. Pa. Jan. 23, 2009) (noting that "the vast majority of the Circuit Courts of Appeals" apply Rule 15(b) at summary judgment); *but see Ahmad* v. *Furlong*, 435 F.3d 1196, 1203 n.1 (10th Cir. 2006) (noting circuit split). However, in light of our finding that the claim is reasonably within the scope of the Complaint, we need not decide at this time

We turn next to the merits of Complaint Counsel's motion. McWane argues that "after the fact" assurances about price are not unlawful and that, at most, the evidence shows that "McWane made its own decision to announce a radical list price decrease (on April 14) and that Star subsequently learned about the decrease from its customers and decided to follow (before Mr. McCutcheon called Mr. Tatman)." R's Opp'n Br. at 19-21. According to McWane, "follow-the-leader behavior is entirely lawful." *Id.* at 21. In reply, Complaint Counsel urges us to conclude that the communication here is essentially the same as the agreement to adhere to previously announced prices at issue in *Sugar Institute v. United States*, 297 U.S. 553 (1936), and that it is therefore *per se* unlawful.

We deny Complaint Counsel's motion for two reasons. First, we disagree that the facts in *Sugar Institute* are "indistinguishable" from those here. In *Sugar Institute*, 15 refiners that collectively processed nearly all of the sugar refined in the United States and supplied 70 to 80 percent of the sugar consumed formed an association that adopted numerous rules governing pricing practices of the refiners. *Id.* at 572. Among the adopted rules, the firms agreed to publicly announce prices and conditions of sale in advance, to abolish all price discrimination between customers, and to strictly adhere to their publicly announced prices. *Id.* at 573-74. The Court found the rule requiring pre-announced prices to be reasonable, but condemned the combination of rules in which the refiners agreed not to grant price concessions or variations in prices, *i.e.*, discounting off of the pre-announced list prices. *Id.* at 601. Here, Complaint Counsel insists that the communication constitutes an agreement to adhere to previously announced prices just like that in *Sugar Institute*. However, the uncontroverted evidence adduced thus far does not support the contention that there was any agreement to adhere to posted prices.

Second, viewing the evidence in the light most favorable to McWane, there is a genuine issue of disputed fact as to whether there was an "agreement" to fix prices. Mr. McCutcheon testified that the exchange about paying Star $25,000—which Complaint Counsel argues was part of the "bargained-for exchange of assurances about future pricing"—was only a joke. McCutcheon Dep. 43. Mr. Tatman testified that he not only had no recollection of the call, but also that he never had any conversations with anyone at Star about what they were going to do in response to the revised McWane pricing. Tatman Dep. 177-80.

As discussed above, to establish an unlawful agreement under Section 1, there must be evidence "that reasonably tends to prove that [the parties] had a conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 768 (1984). Complaint Counsel points to McWane's guarantee as a key part of the agreement to adhere to the previously announced list price. But the testimony contains no mention of any "guarantee" by McWane, and Mr. McCutcheon characterized the whole exchange as a joke. To be sure, Mr. McCutcheon testified that he called Mr. Tatman to assure himself that McWane was actually going to "come out with" or "stay with" the new price

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whether Commission Rule 3.15(a)(2) should be construed to apply on a motion for summary decision under the circumstances here.

list, and Mr. Tatman said "yes" rather than hanging up the phone. McCutcheon IH 257-58; McCutcheon Dep. 43-44. Evidence that Mr. Tatman may have confirmed that McWane was "staying with" its new price list does not necessarily equate to a commitment to *adhere* to the previously announced list price, as had been the case in *Sugar Institute*. Although Complaint Counsel relies on an April 28, 2009 e-mail from Mr. Tatman stating, [redacted], McWane points to later communications in which Mr. Tatman continued to express uncertainty about Star's plans as evidence of the lack of understanding or agreement. *See* R's Ex. 4. In addition, there is evidence that McWane independently determined its new pricing list after months of internal analysis, and that Star independently decided to follow McWane's new pricing before ever contacting Mr. Tatman. McCutcheon Dep. 226-27; Tatman Dep. 168-71. In short, there are disputed facts about the existence of an agreement, an essential element of the claim, thereby precluding summary decision.

VI. Conclusion

For all of the reasons stated above, we deny McWane's Motion for Summary Decision and Complaint Counsel's Motion for Partial Summary Decision.

Index of Abbreviations

CC's Opp'n Br. – Complaint Counsel's Opposition to Respondent McWane's Motion for Summary Decision

CC's Reply Br. – Complaint Counsel's Reply Memorandum in Support of its Motion for Partial Summary Decision

CC's Resp. to R's SOF – Complaint Counsel's Response to Respondent's Statement of Undisputed Facts

CC's SD Br. – Complaint Counsel's Memorandum in Support of its Motion for Partial Summary Decision

CC's SOF – Complaint Counsel's Concise Statement of Material Facts as to Which There is a Genuine Issue for Trial

Compl. – Complaint

CX – Complaint Counsel's Exhibit

Dep. – Deposition Transcript

IH – Investigational Hearing Transcript

R's Ans. – Respondent's Answer

R's Ex. – Respondent's Exhibit

R's Opp'n Br. – Memorandum of Law in Support of Respondent McWane, Inc.'s Opposition To and Motion to Strike Complaint Counsel's Motion for Partial Summary Decision

R's Reply Br. – Reply Brief in Support of Respondent McWane, Inc.'s Motion for Summary Decision

R's RFA Resp. – Respondent McWane, Inc.'s Response to Complaint Counsel's Request for Admission

R's SD Br. – Memorandum of Law in Support of Respondent McWane, Inc.'s Motion for Summary Decision

R's SOF – Statement of Material Facts as to Which There is no Genuine Dispute in Support of Respondent McWane, Inc.'s Motion for Summary Decision

Star Ans. – Star's Answer