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UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

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

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

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June 27, 2012

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I. Introduction

McWane's opposition does not contest the facts or the law on which Complaint Counsel's Motion for Partial Summary Decision rests. McWane fails to even mention, let alone distinguish, *Sugar Institute*, the controlling Supreme Court precedent. *See Sugar Institute v. United States*, 297 U.S. 553 (1936). Instead, McWane attempts to limit the time period covered by the Complaint with its own contrived reading of the allegations and by quoting language that does not appear anywhere in the Commission's Complaint. The Complaint does not allege that the "conspiracy existed only until 'January 2009' and 'disbanded' in February 2009" (McWane SOF ¶ 2). Indeed, the word "disbanded" does not appear in the Complaint and repeating it in its Opposition like a mantra will not permit McWane to escape the undisputed facts. McWane's counsel did not operate under any illusion that McWane's actions after February 2009 were not at issue in these proceedings. McWane elicited testimony from the only non-McWane participant in [redacted] during his deposition and McWane never once objected when Complaint Counsel took testimony related to those events from nine different witnesses. McWane's due process and related procedural defenses are a smokescreen designed to hide the fact that McWane cannot contest the law or the facts that McWane and Star conspired to restrain price competition [redacted]

II. Argument

McWane has failed to identify a genuine issue of material fact relating to the [redacted] requiring a trial, and partial summary decision on this issue is appropriate. Rule 3.24(3); 3.24(5), 16 C.F.R. §§ 3.24(3); 3.24(5). McWane has had actual notice of the claims against it arising out of the [redacted] has actively

Inconsistencies in Mr. testimony similarly do not create a triable issue on the existence of an agreement. McWane argues that Mr. conclusory denials that he never reached an "agreement or understanding regarding price or price levels" create a triable issue of fact.[1] McWane SOF ¶ 14. McWane's theory flatly contradicts the text of Rule 3.24(3), which provides that "a party opposing the motion may not rest upon the mere allegations or denials of his or her pleading … [but instead] must set forth specific facts showing that there is a genuine issue of material fact for trial." 16 C.F.R. § 3.42(3). As the Supreme Court has held of Rule 56(e), the analogous provision of the Federal Rules of Civil Procedure, the "object of this provision is not to replace conclusory allegations of the complaint or answer with conclusory tify factual dispute

(1990). The law is clear that conclusory denials do not create a genuine issue of material fact. *See Travelers Ins. Co. v. Liljeberg Enters.*, 7 F.3d 1203, 1206-07 (5th Cir. 1993) (conclusory denial of an element of the movant's claim insufficient to defeat summary judgment); *Post v. City of Fort Lauderdale*, 7 F.3d 1552, 1557 (11th Cir. 1993) ("Conclusory allegations or evidence setting forth legal conclusions are insufficient" to create a genuine fact issue"). [redacted] as set forth in Complaint Counsel's motion papers, therefore trumps any conclusory denials

McWane's other factual arguments fail to identify factual disputes that are material. *See*

of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted"). For example, it is irrelevant, as a matter of substantive antitrust law, whether or not:

> *U.S. v. Socony-Vacuum Oil*, 310 U.S. 150, 223 (1940) ("a combination formed for the purpose and with the effect of raising [or] depressing … the price of a commodity in interstate … is illegal *per se*");
>
> *In re High Fructose Corn Syrup Antitrust Litig*, 295 F.3d 651, 656 (7th Cir. 2002) ("An agreement to fix list prices is . . . a *per se* violation of the Sherman Act, even if most or for that matter all transactions occur at lower prices") (Posner, J.); *Plymouth Dealers' Asso. v. United States*, 279 F.2d 128, 132-33 (9th Cir. 1960) (agreement on list prices *per se* unlawful despite the fact that list prices are only the starting point in negotiations, most sales are made below list prices, and prices declined during the conspiracy)*;* and
>
> Specific intent is not an element of a civil claim under Section 1 of the Sherman Act. *United States v. United States Gypsum Co.*, 438 U.S. 422, 436 n.13 (1978).

The Commission can enter partial summary decision against McWane without addressing any of these issues.

B. The [redacted] Constitutes an Illegal Price Fixing Conspiracy as a Matter of Law

McWane argues that the material facts set forth above do not, as a matter of law, amount to a *per se* illegal price fixing agreement. The legal conclusions to be drawn from the undisputed material facts are an appropriate issue for summary decision. *TSI Incorporated v. United States*, 977 F.2d 424, 426 (1992) (affirming summary judgment where the "only dispute below was over the legal conclusions to be drawn from the agreed facts."); *Sagers v. Yellow Freight System, Inc*., 529 F.2d 721, 728 n.13 (5th Cir. 1976) ("the mere fact that the [non-movant] vigorously disputed the legal conclusions to be drawn from the facts presented by the [movant] was no bar

to the grant of summary judgment."). Here, McWane argues that because it is undisputed or assumed *arguendo* that,

is not a price fixing agreement as a matter of law.

McWane's argument simply ignores controlling Supreme Court and appellate precedent. In *Sugar Institute*, the Court applied the *per se* rule on indistinguishable facts. In *Sugar Institute*, as here, there was an exchange of assurances that the firm announcing a price change would implement in that announced change in fact. *Id*. at 582. In *Sugar Institute*, as here, prices were assumed to be set unilaterally, as was the decision to follow the rival's announced prices. *Id*. at 585-86. *Sugar Institute* sets forth a simple rule: while follow-the-leader parallelism is lawful, the exchange of assurances that f

Publication Paper communication,

McWane's reliance on *In re Baby Food Antitrust Litig.*, 166 F.3d 112 (3d Cir. 1999), is also misplaced. That case stands for the proposition that "[e]vidence of sporadic exchanges of shop talk among field sales representatives who lack pricing authority" does not establish a price fixing agreement. *Id*. at 125. The Third Circuit expressly distinguished its holding from cases – as in this one – where the exchange of information about future pricing took place among senior managers with pricing authority. *See id*. at 125 fn.8 (distinguishing cases where "*upper* level executives engaged in secret conversations regarding product pricing") (emphasis in original); *see also In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 369 (3d Cir. 2004) (same). [redacted]

judgment"); *In re Bucyrus Grain Co.*, 1987 U.S. Dist. LEXIS 8193, at *14 (D. Kan., Aug. 13,

to believe that the specific examples of price fixing alleged in the Complaint in 2008 were exhaustive rather than illustrative. Indeed, the Complaint specifically alleges that McWane and Sigma collusively fixed prices of domestically produced Fittings in 2009. Compl., ¶¶ 49-50.

McWane represents to the Commission that the Complaint alleges that any conspiracy involving McWane was "disbanded" "in early 2009." McWane SOF ¶¶ 1-2; Opp. Brief at 5 ("the Commission's Complaint acknowledged the alleged conspiracy 'disbanded"). This is blatantly misleading. the conspiracy to exchange information through DIFRA is not coextensive with the larger price fixing conspiracy described in the Complaint, and it is disingenuous of McWane to equate the two. *See* Compl. ¶¶ 29-32 (conspiracy before DIFRA); ¶¶ 49-50 (conspiracy after DIFRA); ¶¶ 64-65 (price fixing and information exchange pled as distinct violations of the FTC Act).

Contrary to its assertions, McWane had actual notice of the claims against it arising out of and took substantial discovery on this issue. This particular price fixing episode first emerged a copy of which was produced to McWane at the commencement of discovery. McWane's counsel appeared at the deposition of nine individuals where testimony about the events of was given. McWane's counsel questioned before Complaint Counsel raised the issue in his deposition. Complaint Counsel also questioned McWane executives without objection by McWane's counsel. And both McWane and Complaint Counsel raised the and the events surrounding them in the depositions of nine different witnesses. Thus, McWane had actual notice of the claims against it well before the

close of discovery and had ample opportunity to de

Sales, Inc., 151 F.3d 1275, 1279-80 (10th Cir. 1998); *Smith v. Transworld Sys., Inc.*, 953 F.2d 1025, 1030 (6th Cir. 1992).

Because the Commission interprets its Rules of Practice in conformity with analogous provisions in the Federal Rules of Civil Procedure, the Commission should follow the majority rule of the federal courts and hold that Rule 3.15(2) allows the Commission to conform the

now espouses. *See Prescott*, 805 F.2d at 725 ("Implied consent may also be found if the opposing party itself presents evidence on the matter"). McWane has also demonstrated consent by failing to object to the testimony Complaint Counsel has elicited relating to the same matters. *See Prescott*, 805 F.2d at 725 ("To demonstrate lack of consent, the objection should be on the ground that the contested matter is not within the issues made by the pleadings") (internal citation and quotation marks omitted); *see also United States Fidelity and Guaranty Co. v. United States*, 389 F.2d 697, 698-99 (10th Cir. 1968) ("where no objection is made to evidence on the ground it is outside the issues of the case, the issue raised is nevertheless before the trial court for determination, and the pleadings should be regarded as amended in order to conform to the proof").

McWane has also fully briefed this issue in its Opposition to Complaint Counsel's Motion for Partial Summary Judgment, and had a full opportunity to defend itself by entering additional affidavits or pointing to any exculpatory evidence. *See People for the Ethical Treatment of Animals v. Doughney*, 263 F.3d 359, 367-68 (4th Cir. 2001) (affirming summary judgment for the plaintiff on claim raised for the first time in summary judgment motion when the defendant "vigorously defended" the summary judgment motion); *Whitaker v. T.J. Snow Co.*, 151 F.3d 661, 663 (7th Cir. 1998) ("Because both parties squarely addressed the strict liability theory in their summary judgment briefs, the complaint was constructively amended to include that claim"); *Transworld Systems*, 953 F.2d at 1030 (affirming summary judgment on affirmative defense raised for the first time at summary judgment where "the "plaintiff responded to defendant's … claims after raising his objections to use of the defense… [and] had ample opportunity to file affidavits or deposition testimony to rebut defendant's use of the defense").

McWane has not asserted that it needs more time to prepare a defense to Complaint Counsel's Motion or pointed to any specific potentially exculpatory evidence it would be able to marshal at trial that it does not have at present. *See* Rule 3.24(4) (outlining procedure for non-moving party to seek additional time to conduct discovery to defeat a motion "for reasons stated" in the affidavits in opposition to the motion). McWane's failure to identify a single fact on which it needs more discovery is unsurprising:

> There is no more discovery to be taken.

Although McWane objects to the propriety of summary decision, that objection does not itself establish a lack of consent under Rule 3.15(2). *See PETA*, 263 F.3d at 367 (affirming grant of summary judgment despite objection by non-moving party that claim was raised for the first time on summary judgment); *Transworld Systems*, 953 F.2d at 1030 (same). A contrary rule would be nonsensical, allowing any party that had otherwise demonstrated its consent to the litigation of an issue to avoid summary decision simply by changing its mind.

The cases cited by McWane to support its assertion that courts refuse to address claims beyond the scope of complaints are all distinguishable as involving claims added by the non-moving party to escape summary judgment. *See* McWane's Opp. at 13. Evading summary judgment by asserting novel claims is not the equivalent of impliedly consenting to the summary disposition of claims by actively litigating and briefing in these claims.

III. Conclusion

For the reasons given above, Complaint Counsel respectfully request, pursuant to Rule 3.15(a)(2), that the Commission conform its Complaint against McWane to expressly include allegations relating to the existence, circumstances and content of

and enter an order granting partial summary decision on the issue of whether McWane unlawfully restrained price competition and to allow Complaint Counsel to try the remaining price-fixing allegations in the Complaint, which may result in broader relief.

Respectfully submitted,

s/ Edward D. Hassi
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Dated: June 27, 2012

THE FOLLOWING EXHIBITS ARE

CONFIDENTIAL AND REDACTED IN ENTIRETY:

BHUTADA, R. DEPOSITION EXCERPT

JANSEN DEPOSITION EXCERPT

MCCULLOUGH DEPOSITION EXCERPT

MCCUTCHEON DEPOSITION EXCERPT

PAGE DEPOSITION EXCERPT

PAIS DEPOSITION EXCERPT

RYBACKI DEPOSITION EXCERPT

TATMAN DEPOSITION EXCERPT

WALTON DEPOSITION EXCERPT

CERTIFICATE FOR ELECTRONIC FILING

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

June 27, 2012

By: s/ Thomas H. Brock
Attorney