UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

I The Evidence of McWane's Communications with its Co-conspirators in April 2009

[redacted]

untimely); *See also Dedge v. Kendrick*, 849 F.2d 1398 (11th Cir. 1988) ("[T]he district court

[redacted]

appeal."); *United States Dominator, Inc. v. Factory Ship Robert E. Resoff*, 768 F.2d 1099, 1104 (9th Cir. 1985) ("the record reveals that the defendants never requested a modification of the pretrial order to allow the filing of their motion. Accordingly, we conclude that the district court properly denied the motion as untimely.").

McWane attempts to circumvent the Scheduling Order's requirements by arguing that it lacked notice before the filing deadline that the April 2009 and June 2010 price actions were relevant, and it points to Complaint Counsel's Pretrial Brief as the intervening event that warrants an exception to the Scheduling Order. But Complaint Counsel's Pretrial Brief did not

[redacted]

by McWane's counsel.[2]

In addition to McWane's actual notice (described above) of the relevance of the April 2009 price-fixing agreement, Complaint Counsel's Motion for Partial Summary Judgment

[redacted]

the June 2010 episode. While some of these designations received objections, others did not. If Respondent felt this evidence was irrelevant or unduly prejudicial, it had ample notice of the relevance of the June 2010 signaling behavior to file a timely motion *in limine* by July 27, 2012.

III. The Commission Has Already Rejected McWane's Due Process Arguments

Perhaps most importantly, McWane made the same notice and Due Process arguments its response to Complaint Counsel's Motion for Partial Summary Judgment.[4] The Commission [redacted] be allowed to revive already decided issues in an untimely motion *in limine*.

In its Summary Judgment Decision,

another example of such communication via pricing letters. McWane also had ample [redacted]

June 2010 episode. McWane's decision not to ask Mr. Pais questions about the June 2010 price increase does not justify reopening discovery or excluding evidence.

Not only is the Commission's decision instructive, but it establishes the law of the case [redacted]

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UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

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

DECLARATION OF J. ALEXANDER ANSALDO

Pursuant to 28 U.S.C. § 1746, I make the following statement:

1. My name is J. Alexander Ansaldo. I am making this statement in *In the Matter of McWane, Inc.*, FTC Docket No. 9351, in support of Complaint Counsel's Opposition To McWane, Inc.'s Motion to Exclude Evidence, or in the Alternative, Motion for Continuance. All statements in this Declaration are based on my personal knowledge as a Staff Attorney for the U.S. Federal Trade Commission, Bureau of Competition, and if called upon to testify, I could competently do so.

2. Tab 1 is a true and correct copy of Opinion of the Commission (In Camera), *In re McWane, Inc.* (Aug. 9, 2012) (F.T.C. Docket No. 9351).

3. Tab 2 is a true and correct copy of Complaint Counsel's Reply Memorandum in Support of its Motion for Partial Summary Decision Filed [illegible] 25, 2012

Pursuant to 28 U.S.C. § 1746, I declare, under the penalty of perjury, that the foregoing is true and correct to the best of my knowledge, information, and belief. Executed this 29th day of

[illegible]

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CONFIDENTIAL EXHIBIT

REDACTED IN ENTIRETY

EXHIBIT 1

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EXHIBIT 2

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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*
[redacted]	
McWANE, INC., a corporation.)	DOCKET NO. 9351

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

Richard A. Feinstein
Director

Edward D. Hassi
Linda Holleran
Thomas H. Brock

[redacted]

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[redacted]

I. Introduction

[redacted]

attempted to develop exculpatory evidence in discovery regarding the [redacted] [redacted], and has impliedly consented to the summary disposition of this issue.

A. There is No Genuine Issue of Material Fact Requiring a Trial

Inconsistencies in Mr. [redacted] testimony similarly do not create a triable issue on the existence of an agreement. McWane argues that Mr. [redacted] conclusory denials that he never reached an "agreement or understanding regarding price or price levels" create a triable issue of fact.[1] McWane SOF ¶ 14. McWane's theory flatly contradicts the text of Rule 3.24(3), which provides that "a party opposing the motion may not rest upon the mere allegations or denials of his or her pleading … [but instead] must set forth specific facts showing that there is a genuine issue of material fact for trial." 16 C.F.R. § 3.42(3). As the Supreme Court has held of Rule 56(e), the analogous provision of the Federal Rules of Civil Procedure, the "object of this provision is not to replace conclusory allegations of the complaint or answer with conclusory allegations of an affidavit" or deposition. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888 (1990). The law is clear that conclusory denials do not create a genuine issue of material fact. *See Travelers Ins. Co. v. Liljeberg Enters.*, 7 F.3d 1203, 1206-07 (5th Cir. 1993) (conclusory denial of an element of the movant's claim insufficient to defeat summary judgment); *Post v.* [redacted]

[redacted]

[redacted]

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

[redacted]

assumed *arguendo* that, [redacted] is not a price fixing agreement as a matter of law.

McWane's argument simply ignores controlling Supreme Court and appellate precedent. In *Sugar Institute*, the Court applied the *per se* rule on indistinguishable facts. In *Sugar Institute*, as here, there was an exchange of assurances that the firm announcing a price change would

[redacted]

McWane's reliance on *In re Publication Paper Antitrust Litig.*, 2010 U.S. Dist. LEXIS 131931 (D. Conn. Dec. 14, 2010), is misplaced. In *Publication Paper,* two competitors exchanged information about prior and unilaterally determined plans to follow the announced price increase of a third rival. *Id.* at *37-46. There was no bargained-for exchange of assurances about future pricing in *Publication Paper*; each competitor simply announced its price in turn. Such an exchange of price information, without more, is analyzed under the rule of reason. *United States v. United States Gypsum Co.*, 438 U.S. 422, 441 n.16 (1978). However, an [redacted] *se* illegality.

Three related features of [redacted] distinguish it from the *Publication Paper* communication. First, and most importantly, [redacted]

Publication Paper communication, [redacted]

McWane's reliance on *In re Baby Food Antitrust Litig.*, 166 F.3d 112 (3d Cir. 1999), is

[redacted]

judgment"); *In re Bucyrus Grain Co.*, 1987 U.S. Dist. LEXIS 8193, at *14 (D. Kan., Aug. 13, 1987) ("mere denial of the existence of such an agreement cannot avoid summary judgment"); *Kenko Brenntag, Ltd. v. Regina*, 1981 U.S. Dist. LEXIS 14933, at *6 (S.D.N.Y., Sept. 28, 1981) ("conclusory denials [of agreement] are not sufficient to avert summary judgment"). For the same reasons, [redacted]. McWane SOF ¶¶ 25, 28.

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

Entry of summary decision against McWane on [redacted] is fully consistent with the Commission's Rules and fundamental fairness. As discussed below, [redacted] is reasonably within the scope of the Commission's Complaint, McWane had actual notice of [redacted], and McWane took extensive discovery on this issue. Moreover, the Commission has the authority to conform the pleadings to the evidence on a motion of summary decision, and such action is proper here because McWane has impliedly consented to the litigation and summary disposition of this issue.

1. [redacted] is Reasonably Within the Scope of the

[redacted]

PUBLIC

[redacted]

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. [redacted] the

[redacted]

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 [redacted]

pleadings to the evidence on a Rule 3.24 motion for summary decision. *In re Kroger Co.*, 98 F.T.C. 639, 726 (1981) (Commission's summary decision rule interpreted consistently with federal analogue); *In re Hearst Corp.*, 80 F.T.C. 1011, 1014 (1972) (same).

[redacted]

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

[redacted]

III. Conclusion

For the reasons given above, Complaint Counsel respectfully request, pursuant to Rule

[redacted]

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THE FOLLOWING EXHIBITS ARE

CONFIDENTIAL AND REDACTED IN ENTIRETY:

BHUTADA, R. DEPOSITION EXCERPT

JANSEN DEPOSITION EXCERPT

MCCULLOUGH DEPOSITION EXCERPT

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CERTIFICATE FOR ELECTRONIC FILING

I certify that the electronic copy sent to the Secretary of the Commission is a true

EXHIBIT 3

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[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

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Pursuant to Rule 3.24 of the Federal Trade Commission's Rules of Practice, Respondent McWane, Inc. ("McWane"), submits this memorandum of law, and the accompanying Separate Statement of Undisputed Material Facts ("SOF"), in support of its Opposition and Motion to Strike Complaint Counsel's Motion for Partial Summary Decision.

SUMMARY OF ARGUMENT

[redacted]

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instant allegations. (*Id.* ("between June 2008 and January 2009"); (SOF ¶ 4 ("disbanded in early 2009").)

In short, Complaint Counsel - - implicitly conceding the weakness of its actual case - - [redacted]

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[redacted], (3) [redacted], (4) [redacted], (5) [redacted], (6) [redacted], and (7) [redacted]

[redacted]

[redacted]

[redacted] (SOF ¶ 14.)

[2] SOF ¶ 14.
[3] *Id.*
[4] *Id.*

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Complaint Counsel does not address [redacted]. For that additional [redacted]

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II. Complaint Counsel's Newly Made-Up [redacted] Claim Contradicts The Complaint

Nonetheless, Complaint Counsel moves for summary decision [redacted] (SOF ¶¶3, 4.) [redacted]. (SOF ¶ 5.) [redacted] (SOF ¶ 6.) [redacted]. (SOF ¶ 7.) "[redacted]. (SOF ¶ 8.)

III. CC Ignores Significant [illegible]

PUBLIC

[redacted]

[redacted]

* * *

[redacted]

[redacted]

* * *

[redacted]

[redacted]

* * *

[redacted]

[redacted]

(SOF ¶ 14.)

[redacted] . (SOF ¶ 10 [redacted] .) [redacted]

PUBLIC

[redacted] Indeed, Complaint Counsel's Motion concedes the point. (SOF ¶ 12 [redacted].)[5]

IV. Significant Undisputed Facts Demonstrate That [redacted]

Complaint Counsel acknowledges that [redacted] (SOF ¶ 15 (emphasis added); see also (SOF ¶ 16 [redacted], [redacted]; SOF ¶ 15 [redacted].)

Complaint Counsel also concedes that [redacted] (SOF ¶ 17 [redacted]), *Id.* [redacted].) [redacted] (SOF ¶ 18 [redacted], *Id.* [redacted], *Id.* [redacted] (SOF ¶ 19 [redacted]. (SOF ¶ 20, *Id.* [redacted]

[5] [redacted]

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[redacted] (objections omitted), *Id.* [redacted].) [redacted] (SOF ¶ 21.) [redacted] (SOF ¶ 22, *Id.* [redacted], *Id* [redacted].) [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

(SOF ¶ 23 (objections omitted).)[6]

---

6 [redacted]

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[redacted] (SOF ¶ 25.). [redacted]

[redacted]

(SOF ¶ 26.) [redacted]

[redacted]

(SOF ¶ 28) (emphasis added).) [redacted] (SOF ¶ 34 [redacted].)[7]

[7] Complaint Counsel makes much [redacted]

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[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

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(SOF ¶ 20 (emphasis added) (objections omitted); SOF ¶ 25 [redacted] .)[8] [redacted]

> [redacted]
>
> [redacted]

(SOF ¶ 44 (emphasis added) (objections omitted).)

Although Complaint Counsel argues [redacted] there is simply no factual support for that assertion and significant evidence that contradicts it.

ARGUMENT

FTC Rule 3.24(a)(3) provides that a party may only move for a summary decision in its favor upon all or part "**<u>of the issues being adjudicated.</u>**" The rules does not carve out an exception for Complaint Counsel to allow it alone to move for summary disposition on issues that are not being adjudicated. But that is exactly what Complaint Counsel here has done: it moves for partial summary decision on an allegation that is not contained in the Administrative

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gamesmanship is beyond Complaint Counsel's statutory authority and a clear violation of McWane's due process rights.

[redacted]

[redacted]

elementary and fundamental requirement of due process in any proceeding which is to be [redacted]

1 [redacted]

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(N.D. Ohio 2005) (in granting summary judgment for the defendant, the court noted that "the relief Plaintiff requests in its [reply brief] is beyond the scope of the Complaint. The Court, therefore, will not address Plaintiff's allegations").

[redacted]

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2009" with the February 2009 enactment of the ARRA. (AC ¶¶ 2-3, 36; 16 C.F.R. § 3.15.) Thus, any amendment would have to be certified to the Commission.

Again, this is not a novel rule -- the requirements under the Federal Rules of Civil Procedure are the same. Parties have long been required to either obtain written consent of the opposing party, or to move the court for leave to amend, if they wish to litigate claims beyond the scope of the complaint. *See* Fed.R.Civ.P. 15 (a) ("party may amend its pleading only with the opposing party's written consent or the court's leave"); Fed.R.Civ.P. 15 (b) (requiring consent of the parties for the Court to treat issues not raised in the pleadings as if they had been included).

In addition, a party seeking to amend must do so in a timely manner, *i.e.*, before the close of discovery. Attempts to "amend" a complaint - - without ever a formal motion to amend - - by [redacted]

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III. The Court Should Also The Motion Because Complaint Counsel Ignores Significant Exculpatory Evidence, Including a Sworn Denial By the Only Witness it Relies On

Complaint Counsel's made-up claim, flatly contradicted by the testimony and other evidence in this case, falls far short of showing that there is "no genuine issue as to any material fact regarding liability or relief[.]" 16 C.F.R. 3.24(a)(2). To the contrary, the evidence is not only highly disputed (thus showing ***significant*** "genuine issues" as to material facts), it is

[redacted]

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Complaint Counsel's made-up claim is entirely dependent on [redacted], whose testimony on this issue FTC staff and the Commission obtained during the Part 2 investigation - - and decided not to include in the Complaint - - and which Complaint Counsel had from the beginning of this litigation and decided not to move to amend and add to

[redacted]

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Litig., 166 F.3d 112, 117 (3d Cir. 1999) ("The existence of an agreement is the hallmark" of a conspiracy claim).

At most, Complaint Counsel's evidence shows that [redacted] (SOF ¶ 14 (" [redacted], *Id.* [redacted] *Id.* [redacted] *Id.* [redacted] (SOF ¶ 32 [redacted], *Id.* [redacted]. (SOF ¶ 33 [redacted], *Id.* [redacted] *Id.* [redacted]

Complaint Counsel's argument that [redacted] is simply made-up. Indeed, [redacted]

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[redacted] (SOF ¶ 24 [redacted]

Complaint Counsel admits that [redacted]. Indeed, Complaint Counsel's motion is notable [redacted] 11

[redacted]

"the record demonstrates that their testimony, at most, can be characterized as an exchange of information that each entity had already independently decided to follow the price increase announced by IP on February 10, 2003. A jury could not reasonably interpret the cited testimony as proof of an agreement to raise, fix or stabilize future prices" . . . "at most, Korhonen simply communicated SENA's decision after it had been

[redacted]

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[redacted] (2) [redacted], and (3) [redacted]

Here, like *Publication Paper*, Complaint Counsel, at most, alleges that [redacted]

[redacted]

[redacted]

Courts have made clear that an after-the-fact communication, without more, is not evidence of a price fixing agreement even when it actually addresses prices.

[redacted]

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(individually) to copy an industry leader" . . . "such individual pricing decisions (even when each [redacted]

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Dated: June 25, 2012

/s/ J. Alan Truitt

/s/ Joseph Ostoyich

Maynard Cooper and Gale PC

Baker Botts L.L.P

2400 Regions Harbert Plaza
Birmingham, AL 35203

1299 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2420

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CERTIFICATE OF SERVICE

I hereby certify that on June 25, 2012, I filed the foregoing document electronically using [redacted]

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UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of MCWANE, INC., a corporation, and STAR PIPE PRODUCTS, LTD., a limited partnership.	PUBLIC DOCKET NO. 9351

STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE DISPUTE IN SUPPORT OF RESPONDENT MCWANE, INC.'S OPPOSITION AND MOTION TO STRIKE COMPLAINT COUNSEL'S MOTION FOR SUMMARY DECISION, AND RESPONSE TO COMPLAINT COUNSEL'S STATEMENT OF UNDISPUTED FACTS

CONFIDENTIAL
MATERIAL PROTECTED PURSUANT TO
JANUARY 5, 2012 PROTECTIVE ORDER ENTERED BY THIS COURT

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IV. Significant Undisputed Facts Demonstrate That [redacted]

V. There Is Genuine Dispute As To The Following "F..."

PUBLIC

Pursuant to Rule 3.24 of the Federal Trade Commission's Rules of Practice, Respondent [redacted] Genuine Dispute ("SOF"), in support of its Opposition and Motion to Strike Complaint Counsel's Motion for Partial Summary Decision.

There is no genuine dispute as to the following facts:

I. The Complaint Alleged A Conspiracy To Raise Multipliers (And Stop Job Price Discounts) That Was [redacted] By [redacted]

1. Counts 1 and 2 of the Administrative Complaint ("AC") allege that McWane "conspired" with Sigma and Star to issue "multiplier" price increases for ductile iron pipe fittings in January and June 2008 and to stop their "job price" discounting, beginning in January 2008 and ending in "early 2009." (*See* CC's Motion, Tab 1 AC ¶¶ 2-3.)

2. [redacted]

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[redacted]

4. The Complaint did not [redacted] Instead, it alleged a conspiracy to raise ([redacted]) prices through increases in multipliers ([redacted]) and an end to job price discounts in January 2008 and June 2008 ([redacted]). (*See* CC's Motion, Tab 1 AC ¶¶ 32-24.)

5. [redacted]. (*See* CC's Motion, Tab 1 AC ¶¶ 2-3.; *See* CC's Motion, Tab 3 [redacted]

6. [redacted]").)

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7. [redacted]

8. [redacted]

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[redacted].)

10. [redacted]

11. [redacted]

12. [redacted].)

13. [redacted].)

IV. Significant Undisputed Facts Demonstrate That [redacted]

14. [redacted]

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[redacted]

[redacted]

15. [redacted].)

16. [redacted]

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[redacted], [redacted]

18. [redacted].

19. [redacted]

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[redacted]

21. [redacted]

22. [redacted]

[redacted].)

[redacted]

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[redacted]

24. [redacted]

25. [redacted]

26. [redacted]

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[redacted]

27. [redacted]

28. [redacted]

[redacted]

[redacted]

30. [redacted]

31. [redacted]

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32. [redacted]

33. [redacted]

34. [redacted]

35. [redacted]

36. [redacted]

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[redacted]

37. [redacted]

38. [redacted]

39. [redacted]

40. The undisputed facts also show [redacted]

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Statement Of Undisputed Facts

Pursuant to Rule 3.24, Complaint [illegible]

[redacted]

[redacted]

PUBLIC
PUBLIC

Dated: June 25, 2012

/s/ J. Alan Truitt
J. Alan Truitt
Thomas W. Thagard III
Maynard Cooper and Gale PC
1901 Sixth Avenue North

/s. Joseph Ostoyich
Joseph A. Ostoyich
William Lavery
Baker Botts L.L.P.
The Warner

CERTIFICATE OF SERVICE

I hereby certify that on June 25, 2012, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-113
Washington, DC 20580

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

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

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

Edward Hassi, Esq.
Geoffrey M. Green, Esq.
Linda Holleran, Esq.
Thomas H. Brock, Esq.
Michael L. Bloom, Esq.
Jeanine K. Balbach, Esq.
J. Alexander Ansaldo, Esq.
[illegible]

EXHIBIT 1

This exhibit has been marked Confidential and redacted in its entirety

EXHIBIT 2

This exhibit has been marked Confidential and redacted in its entirety

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EXHIBIT 3

This exhibit has been

EXHIBIT 4

This exhibit has been marked Confidential

[redacted]

EXHIBIT 5

This exhibit has been marked Confidential

[redacted]

EXHIBIT 5

This exhibit has been marked Confidential

[redacted]

EXHIBIT 7

This exhibit has been marked Confidential and redacted in its [redacted]

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[redacted]

I hereby certify that on August 29, 2012, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

Donald S. Clark
Secretary

[redacted]

600 Pennsylvania Ave., NW

[redacted]

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

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

[redacted]

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.

August 29, 2012

By: s/ Thomas H. Brock
Attorney