

PUBLIC

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

ORIGINAL

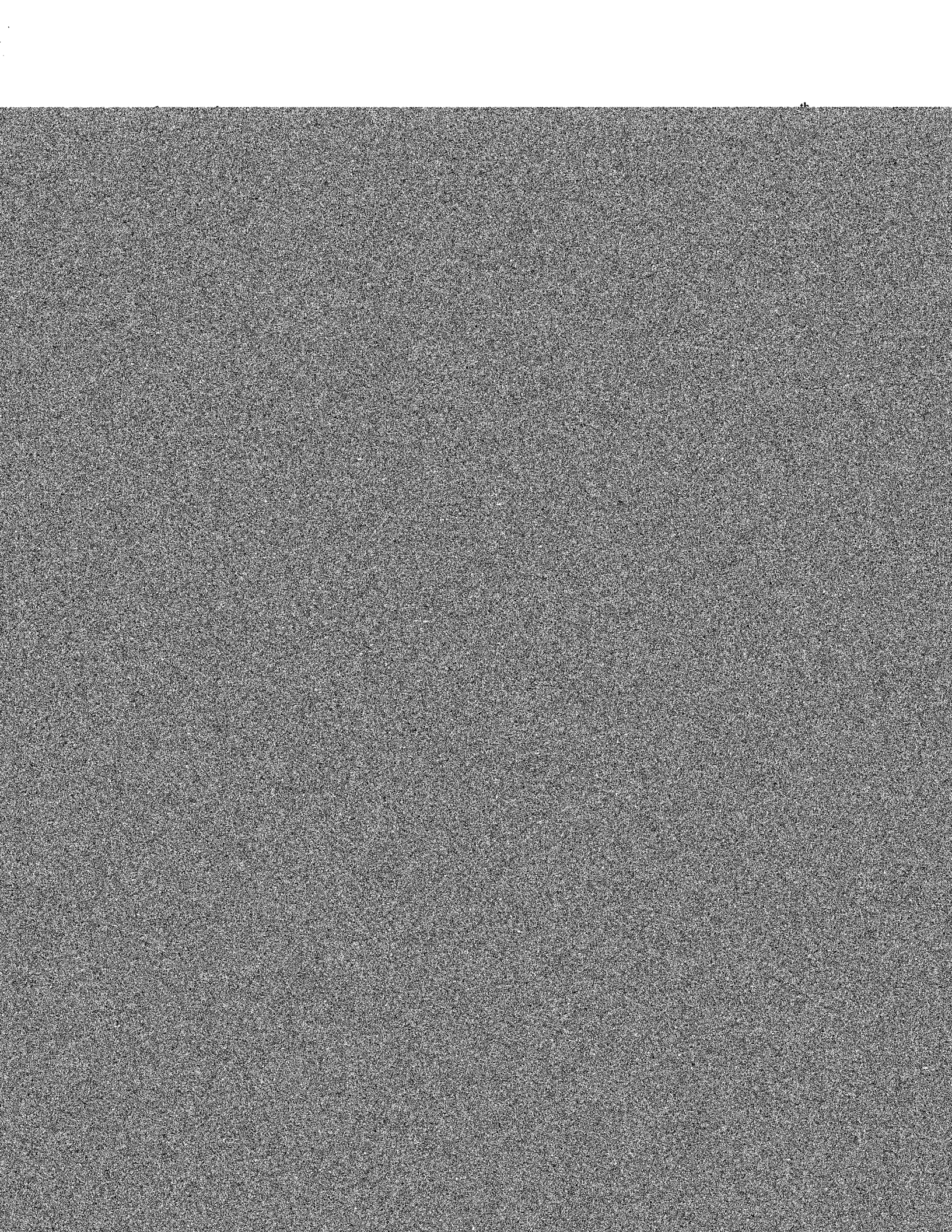
I. BURDEN OF PROOF

1. Complaint Counsel must prove its case under FTC Act Section 5 by "substantial

12. Evidence demonstrating opportunities to conspire or consciously parallel pricing behavior does not constitute direct evidence of conspiracy, but is, at most, circumstantial. See *Cosmetic Gallery, Inc. v. Schoeneman Corp.*, 495 F.3d 46, 52-53 (3rd Cir. 2007) (“*Cosmetic*

established that such "bare 'conscious parallelism' is 'not in itself unlawful.'" *White*, 635 F.3d

E. Complaint Counsel Has No Evidence of Price-Signaling.



106. With regard to the specific intent element, the desire to maintain or increase one's market share is not in itself an antitrust violation. *Oahu Gas*, 838 F.2d at 368.

107. For a claim of attempted monopolization, even "[d]irect evidence of intent to vanquish a rival in an honest competitive struggle cannot help to establish an antitrust violation. It must also be shown that the defendant sought victory through unfair or predatory means." *William Inglis & Sons Baking Co. v. ITT Continental Baking Co., Inc.*, 668 F.2d 1014, 1028 (9th Cir. 1982).

108. Because Complaint Counsel has failed to establish that McWane engaged in unfair or predatory conduct. McWane is entitled to judgment in its favor on Count Seven of the Complaint.

2. Conspiracy to Monopolize

109. To establish conspiracy to monopolize, a plaintiff must prove: (i) the existence of

