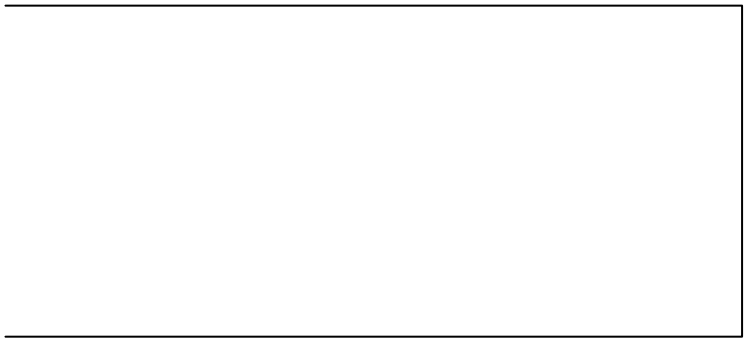
PROVISIONALLY REDACTED VERSION

UNITED STATES OF AMERICA



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.

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.

CX 1186. Each company agreed to report this data to DIFRA on a monthly basis thereafter.

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 roti FTC Febpan algMT 0.001

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[5] 15 U.S.C. § 1; *In ro Flat Glats Antitrust Litig.* , 385 F.3d 350, 356

[5] ViolaTc -20.63Sr rman Act Sections 1 and 2 also constitu5 6violaTc -20.63Section 5 of tr 2 FTC Act, 15 U.S.C. § 45, as unfair me35 d20.63competition.
526 U.S. 756, 762 & n.3 (1999), *FTC v. Motion Picturo Adver. Serv. Co.* , 34

(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 th

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.

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

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

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

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;

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[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).

stimulus would have ended, rendering the enterprise unprofitable. McWane also contends that

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

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

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

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.