IN THE MATTER OF

CORNING INCORPORATED

CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT AND SECTION 7 OF THE CLAYTON ACT

Docket No. C-4380; File No. 121 0133
Complaint, December 20, 2012 – Decision, December 20, 2012

This consent order addresses the $730 million acquisition by Corning Incorporated of certain assets of Becton, Dickinson and Company's Discovery Labware Division. The complaint alleges that the acquisition, if consummated, would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act by lessening competition in the North American markets for tissue culture treated ("TCT") multi-well plates, dishes, and flasks used in cell culture applications.. The consent order requires Corning to supply Sigma-Aldrich Co., LLC with TCT dishes, multi-well plates, and flasks on an interim basis, and in the future and at Sigma Aldrich's request, provide Sigma Aldrich with the assets and assistance necessary to independently manufacture these products.

Participants

For the *Commission*: *Stephanie C. Bovee, David Gonen, Brian O'Dea, Catherine Sanchez,* and *Aylin Skrojer.*

For the *Respondents*: *Steven Albertson* and *Steven Sunshine, Skadden Arps, Slate, Meagher & F1om, LLP*.

COMPLAINT

Pursuant to the Clayton Act and the Federal Trade Commission Act ("FTC Act"), and its authority thereunder, the Federal Trade Commission ("Commission"), having reason to believe that Respondent Corning Incorporated ("Corning"), a corporation subject to the jurisdiction of the Commission, has entered into an agreement to acquire substantially all of the assets of Becton, Dickinson & Company's Discovery Labware ("BDDL") division, a company subject to the jurisdiction of the Commission, in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and that such acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

I. RESPONDENT

1. Respondent Corning is a corporation organized, existing, and doing business under, and by virtue of, the laws of the State of New York, with its office and principal place of business located at One Riverfront Plaza, Corning, New York, 14831. Respondent Corning is engaged in the research, development and production of tissue culture treated ("TCT") flasks, plates, and dishes used in cell culture.

2. Respondent Corning is, and at all times relevant herein has been, engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and is a company whose business is in or affects commerce, as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. § 44.

II. THE ACQUIRED COMPANY

3. Becton, Dickinson & Company is a corporation organized, existing, and doing business under, and by virtue of, the laws of the State of New Jersey, with its office and principal place of business located at 1 Becton Drive, Franklin Lakes, New Jersey. BDDL's office and principal place of business is Two Oak Park Drive, Bedford, Massachusetts. Becton, Dickinson & Company through its Discovery Labware division is engaged in the research, development and production of TCT flasks, plates, and dishes used in cell culture.

4. Becton, Dickinson & Company is, and at all times relevant herein has been, engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and is a company whose business is in or affects commerce, as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. § 44.

III. THE PROPOSED ACQUISITION

5. Pursuant to an Asset Purchase Agreement ("Acquisition Agreement") dated April 10, 2012, Corning proposes to acquire all nearly all of the assets of BDDL (the "Acquisition").

IV. THE RELEVANT MARKETS

6. For the purposes of this Complaint, the relevant lines of commerce in which to analyze the effects of the Acquisition are the production and sale of:

a. TCT cell culture multi-well plates;

b. TCT cell culture flasks; and

c. TCT cell culture dishes.

7. For the purposes of this complaint, North America is the relevant geographic area in which to analyze the effects of the Acquisition in the relevant lines of commerce.

V. THE STRUCTURE OF THE MARKETS

8. TCT cell culture multi-well plates, flasks and dishes are plastic containers that have been specially treated to promote cell growth. Scientific researchers use these products as surfaces or containers upon which to cultivate cells. Each type of cell culture vessel has a distinct application, and purchasers would not switch between types of cell culture vessels, or to any other product, if faced with a small but significant and non-transitory increase in the price of TCT cell culture multi-well plates, flasks or dishes.

9. The markets for TCT cell culture multi-well plates, flasks and dishes are highly concentrated. Corning and BDDL are the two leading suppliers in each of these markets. Although other firms such as Thermo Fisher and Greiner Bio-One participate in this market, their market shares are substantially smaller than those of either Corning or BDDL. The proposed acquisition would significantly increase concentration in the markets for TCT cell culture multi-well plates, flasks and dishes.

VI. ENTRY CONDITIONS

10. Entry into the relevant markets would not be timely, likely, or sufficient in magnitude, character, and scope to deter or counteract the anticompetitive effects of the Acquisition. Entry would not take place in a timely manner because of the significant time and expense required to develop manufacturing capabilities and develop a reputation for product quality among research scientists.

VII. EFFECTS OF THE ACQUISITION

11. The effects of the Acquisition, if consummated, may be to substantially lessen competition and to tend to create a monopoly in the relevant markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, by eliminating actual, direct, and substantial competition between Corning and BDDL in the markets for TCT cell culture multi-well plates, flasks, and dishes, thereby: (1) increasing the likelihood that Corning would unilaterally exercise market power in these markets; and (2) increasing the likelihood that consumers would be forced to pay higher prices for these products.

VIII. VIOLATIONS CHARGED

12. The Acquisition Agreement described in Paragraph 5 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

13. The Acquisition described in Paragraph 5, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twentieth day of December, 2012, issues its Complaint against said Respondent.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission, having initiated an investigation of the proposed acquisition by Respondent Corning Incorporated of certain assets of Becton, Dickinson and Company, and Respondent having been furnished thereafter with a copy of a draft of complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondent with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing consent orders ("Consent Agreement"), an admission by Respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by Respondent that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondent has violated the said Acts, and that a complaint should issue stating its charges in that respect, and having thereupon issued its complaint and having accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days (and having duly considered the comments received), now in further conformity with the procedure described in § 2.34 of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following Decision and Order ("Order"):

1. Respondent Corning Incorporated is a corporation organized, existing, and doing business under, and by virtue of, the laws of the State of New York, with its office and principal place of business located at One Riverfront Plaza, Corning, New York 14831.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondent and the proceeding is in the public interest.

ORDER

I.

IT IS HEREBY ORDERED that, as used in this Order, the following definitions shall apply:

A. “Corning” means Corning Incorporated, its directors, officers, employees, agents, representatives, successors, and assigns; and the subsidiaries, partnerships, divisions, groups, joint ventures, and affiliates in each case controlled by Corning, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. “Commission” means the Federal Trade Commission.

C. “Acquisition” means the proposed acquisition described in the Asset Purchase Agreement by and between Corning Incorporated and Becton, Dickinson and Company, dated as of April 10, 2012.

D. “Confidential Information” means any competitively sensitive, proprietary and all other business information of any kind disclosed by Sigma to Respondent, except that Confidential Information shall not include information that (i) was, is or becomes generally available to the public other than as a result of a breach of this Order; (ii) was or is developed independently of and without reference to any Confidential Information; or (iii) was available, or becomes available, on a non-confidential basis from a third party not bound by a confidentiality agreement or any legal, fiduciary or other obligation restricting disclosure.

E. “Direct Cost” means the cost of direct material and labor used to provide the relevant assistance, including any reasonable out-of-pocket expenses.

F. “Global Agreement” means the Global Supply Agreement between Corning Incorporated and Sigma-Aldrich International GmbH, dated October 16, 2012.

G. “Intellectual Property” means any and all of the following intellectual property owned or licensed (as licensor or licensee) by Respondent in which Respondent has a proprietary interest: (i) all patents, patent applications and inventions and discoveries that may be patentable; and (ii) all know-how, trade secrets, confidential or proprietary information, software, technical information, data, process technology, plans, drawings, and blue prints.

H. “Lab Products” means the standard tissue culture treated plastic labware products listed in Schedule 3 of the Supply Agreement.

I. “Person” means any individual, partnership, corporation, business trust, limited liability company, limited liability partnership, joint stock company, trust, unincorporated association, joint venture or other entity or a governmental body.

J. “Product Price” has the meaning set forth in the Supply Agreement, as the same may be modified pursuant to Section 3.3(b) of the Supply Agreement.

K. “Sigma” means Sigma-Aldrich Corporation, a corporation organized, existing, and doing business under, and by virtue of, the laws of the State of Delaware, with its office and principal place of business located at 3050 Spruce Street, St. Louis, Missouri 63103.

L. “Supply Agreement” means the Asset Sale and Supply Agreement by and between Corning Incorporated and Sigma-Aldrich Corporation, dated October 16, 2012.

M. "Technical Assistance" means advice, assistance, and training relating to the manufacture of the Lab Products, as set forth in the Supply Agreement.

II.

IT IS FURTHER ORDERED that:

A. For a period of up to sixty (60) months from the date this Order is issued, Respondent shall provide to Sigma:

1. Quantities of Lab Products as Sigma may order to supply customers located in the United States and Canada (i) in substantially the same quality as such products are manufactured and sold by Respondent, and (ii) at a cost to Sigma that does not exceed Respondent's Product Price for the Lab Products; and

2. Technical Assistance as Sigma may request (i) sufficient to enable Sigma to manufacture the Lab Products in substantially the same manner as Respondent, and (ii) at a cost to Sigma that does not exceed Respondent's Direct Cost to provide such assistance; *provided, however,* that Respondent shall not impede the ability of Sigma to obtain labor and services from any third party.

B. Respondents shall provide the assistance required by Paragraph II.A. of this Order pursuant to the Supply Agreement:

1. The Supply Agreement shall be incorporated by reference into this Order and made a part hereof. Respondent shall comply with all terms of the Supply Agreement and failure to comply shall constitute a violation of this Order;

2. In the event there is a conflict between the terms of this Order and the Supply Agreement, or any ambiguity in the language used in the Supply

Agreement, then to the extent that Respondent cannot fully comply with both terms, the terms of this Order shall govern to resolve such conflict or ambiguity; and

3. Respondent shall not modify the terms of the Supply Agreement without the prior approval of the Commission, except as otherwise provided in Rule 2.41(f)(5) of the Commission's Rules of Practice and Procedure, 16 C.F.R. § 2.41(f)(5).

C. No later than ten (10) days after the date this Order is issued, Respondent shall grant to Sigma an irrevocable, worldwide, perpetual covenant not to sue conferring immunity from suit by Respondent based on claims of infringement under all of Respondent's Intellectual Property for the developing, making, having made, using, having used, selling, offering for sale, having sold, and importing of any Lab Product; *provided, however,* that such immunity shall not extend to sales made using misappropriated trade secrets of Respondent. Such immunity shall extend to any third-party manufacturer deriving its authority from Sigma with respect to the Lab Products and shall not be assignable to any other Person without prior written consent of Respondent (which consent shall not be unreasonably withheld).

D. Respondent shall allow Sigma-Aldrich International GmbH the right to terminate the Global Agreement (without penalty of any kind) at the same time Sigma exercises any right to terminate the Supply Agreement.

E. The purpose of this Order is to establish Sigma as an independent provider of Lab Products and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's complaint.

III.

IT IS FURTHER ORDERED that:

A. Respondent shall (i) keep confidential (including as to Respondent's employees) and (ii) not use for any reason or purpose, any Confidential Information pertaining to any assistance that Respondent provides to Sigma pursuant to this Order; *provided, however*, that Respondent may disclose or use such Confidential Information in the course of performing its obligations under this Order or the Supply Agreement, complying with financial reporting requirements, or as required by law.

B. If disclosure or use of any Confidential Information is permitted to Respondent's employees or to any other Person under Paragraph III.A. of this Order, Respondent shall limit such disclosure or use (i) only to the extent such information is required, (ii) only to those employees or Persons who require such information for the purposes permitted under Paragraph III.A., and (iii) only after such employees or Persons have signed an agreement in writing to maintain the confidentiality of such information.

C. Respondent shall enforce the terms of this Paragraph III. as to its employees or any Person, and take such action as is necessary to cause each of its employees and any other Person to comply with the terms of this Paragraph III., including implementation of access and data controls, training of its employees, and all other actions that Respondent would take to protect its own trade secrets and proprietary information.

IV.

IT IS FURTHER ORDERED that:

A. At any time after Respondent signs the Consent Agreement, the Commission may appoint a Person ("Monitor") to monitor Respondent's compliance with its obligations as required by this Order including implementation of the controls and training required by Paragraph III.C. of this Order:

1. The Commission shall select the Monitor, subject to the consent of Respondent, which consent shall not be unreasonably withheld. If Respondent has not opposed in writing, including the reasons for opposing, the selection of any proposed Monitor within ten (10) days after notice by the staff of the Commission to Respondent of the identity of any proposed Monitor, Respondent shall be deemed to have consented to the selection of the proposed Monitor.

2. Respondent shall enter into an agreement with the Monitor, subject to the prior approval of the Commission, that (i) shall become effective no later than one (1) day after the date the Commission appoints the Monitor, and (ii) confers upon the Monitor all rights, powers, and authority necessary to permit the Monitor to perform his duties and responsibilities on the terms set forth in this Order and in consultation with the Commission.

3. Respondent shall indemnify the Monitor and hold him or her harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of his duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from the Monitor's gross negligence or willful misconduct.

B. The Monitor shall (i) serve, without bond or other security, at the expense of Respondent, on such reasonable and customary terms and conditions as the Commission may set, and (ii) employ, at the cost and expense of Respondent, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities.

C. The Monitor shall report in writing to the Commission (i) every sixty (60) days from the date of his or her appointment, (ii) no later than thirty (30) days before the date that Respondent's obligations set forth in Paragraph II. terminate ("Final Report"), and (iii) at any other time as requested by the staff of the Commission, concerning Respondent's compliance with this Order.

D. The Monitor shall act in a fiduciary capacity for the benefit of the Commission. Respondent shall (i) cooperate with, and take no action to interfere with or impede the ability of, the Monitor to perform his duties pursuant to this Order and (ii) insure that the Monitor has full and complete access to all Respondent's personnel, books, records, documents, and facilities relating to compliance with this Order, or to any other relevant information as the Monitor may reasonably request.

E. The Monitor's power and duties shall terminate three business days after the Monitor has completed his final report pursuant to Paragraph IV.C.(ii) of this Order, or at such other time as directed by the Commission.

F. If at any time the Commission determines that the Monitor has ceased to act or failed to act diligently, or is unwilling or unable to continue to serve, the Commission may appoint a substitute Monitor in the same manner as provided in this Paragraph IV.

G. The Commission may on its own initiative or at the request of the Monitor issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Order.

V.

IT IS FURTHER ORDERED that Respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Order:

A. No later than sixty days (60) from the date this Order is issued, and every sixty (60) days thereafter (measured from the due date of the first report filed under this Order) until one year from the date this Order is issued (for a total of six reports during the first year); and

B. No later than two (2) years after the date this Order is issued and annually thereafter until this Order terminates, and at such other times as the Commission staff may request.

VI.

IT IS FURTHER ORDERED that Respondent shall notify the Commission at least thirty (30) days prior to any proposed:

A. Dissolution of Respondent;

B. Acquisition, merger, or consolidation of Respondent; or

C. Any other change in the Respondent, including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of the Order.

VII.

IT IS FURTHER ORDERED that, for purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and upon five (5) days' notice to Respondent, Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

A. Access, during business office hours of the Respondent and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession, or under the control, of the Respondent related to compliance with this Order, which copying services shall be provided by the Respondent at its expense; and

B. To interview officers, directors, or employees of the Respondent, who may have counsel present, regarding such matters.

VIII.

IT IS FURTHER ORDERED that this Order shall terminate on December 20, 2022.

By the Commission.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

I. Introduction

The Federal Trade Commission ("Commission") has accepted from Corning Incorporated ("Corning"), subject to final approval, an Agreement Containing Consent Orders ("Consent Agreement"), which is designed to remedy the anticompetitive effects of Corning's proposed acquisition of substantially all of the assets of Becton, Dickinson and Company's Discovery Labware Division ("BDDL"). Under the terms of the proposed Consent Agreement, Corning would be required to supply Sigma-Aldrich Co., LLC ("Sigma Aldrich") with tissue culture treated ("TCT") dishes, multi-well plates, and flasks on an interim basis, and in the future and at Sigma Aldrich's request, provide Sigma

Aldrich with the assets and assistance necessary to independently manufacture these products.

The proposed Consent Agreement has been placed on the public record for thirty days for receipt of comments; any comments received will also become part of the public record. After thirty days, the Commission will again review the proposed Consent Agreement and the comments received, and will decide whether it should withdraw from the proposed Consent Agreement, modify it, or make it final.

Pursuant to an agreement dated April 12, 2012, Corning proposes to acquire substantially all of the assets of BDDL. The Commission's Complaint alleges that the proposed acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by lessening competition in the North American markets for TCT multi-well plates, dishes, and flasks used in cell culture applications. The proposed Consent Agreement will remedy the alleged violations by replacing the competition that would otherwise be eliminated by the acquisition.

II. The Parties

Headquartered in Corning, New York, Corning is a leading manufacturer of specialty glass, plastics, and ceramics for a variety of applications. Corning's Life Sciences division is a leading manufacturer of consumable plastic labware including TCT cell culture multi-well plates, dishes, and flasks.

Discovery Labware, Inc., a division of Becton, Dickinson and Company, is headquartered in Bedford, Massachusetts. Becton, Dickinson and Company is a global medical technology company that supplies consumable plastic labware through is Discovery Labware division including TCT cell culture multi-well plates, dishes, and flasks.

Analysis to Aid Public Comment

III. The Products and Structure of the Markets

TCT cell culture vessels are plastic containers that are essentially surfaces upon which researchers cultivate cells. These products are purchased primarily by pharmaceutical companies, bio-technology companies, and academic institutions and used by cell culture laboratories. Tissue culture treatment alters the intrinsic qualities of the plastic to promote cell adhesion so that cells are more likely to grow and spread. Other advanced coatings and treatments exist, but these alternatives typically are used only in specialized applications, and are not viable substitutes for standard TCT cell culture vessels.

North America is the relevant geographic area in which to analyze the effects of the proposed acquisition in the TCT cell culture markets.

Each TCT cell culture market is highly concentrated. Corning and BDDL are the leading suppliers in each market. Other suppliers such as Thermo Fisher and Greiner Bio-One participate in each market, but no other suppliers are the size of Corning or BDDL.

IV. Effects of the Acquisition

The Proposed Acquisition would eliminate actual, direct, and substantial competition between Corning and BDDL in the markets for TCT cell culture vessels. By increasing Corning's share in each market, while at the same time eliminating its most significant competitor, an acquisition of BDDL likely would allow Corning to unilaterally charge significantly higher prices for TCT cell culture vessels.

V. Entry

Entry into the relevant markets would not be timely, likely, or sufficient in magnitude, character, and scope to prevent the anticompetitive effects of the proposed acquisition. Entry would not take place in a timely manner because of the significant time required to gain a reputation among research scientists as a supplier of quality products. Given the time needed to enter the relevant markets, relative to the sizes of those markets, it is unlikely that an entrant could obtain sufficient sales to make the investment profitable. As a result, new entry or repositioning by other firms sufficient to ameliorate the competitive harm from the proposed acquisition is not likely to occur.

VI. The Consent Agreement

The proposed Consent Agreement remedies the acquisition's likely anticompetitive effects in the TCT cell culture markets. The Consent Agreement requires Corning to supply Sigma Aldrich, on an interim basis, with Corning-manufactured TCT cell culture products until Sigma Aldrich has developed independent manufacturing capabilities. This supply agreement will enable Sigma Aldrich to immediately sell TCT cell culture products under its own brand name. The Consent Agreement also requires that Corning provide in the future, at Sigma Aldrich's request, technical assistance necessary to begin manufacturing TCT cell culture multi-well plates, flasks, and dishes in a manner substantially similar to the manner in which Corning manufactures these products today.

Headquartered in St. Louis, Missouri, Sigma Aldrich is a leading life sciences company that sells a variety of products used in pharmaceutical research. TCT cell culture multi-well plates, flasks, and dishes will complement Sigma Aldrich's leading position in adjacent markets, including media and regents used in the cell culture process. Sigma Aldrich has an existing infrastructure for the marketing and sales of its laboratory products, and therefore is well-positioned to replace the competition that will be lost as a result of the proposed transaction.

The Commission may appoint an interim monitor to oversee the supply of products and the future transfer of assets at any time after the Consent Agreement has been signed. In order to ensure that the Commission remains informed about the status of the proposed remedy, the proposed Consent Agreement requires the parties to file periodic reports with the Commission until the Decision and Order terminates.

The purpose of this analysis is to facilitate public comment on the proposed Consent Agreement, and it is not intended to constitute an official interpretation of the proposed Consent Agreement or to modify its terms in any way.

IN THE MATTER OF

MAGNESIUM ELEKTRON NORTH AMERICA, INC.

CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF SECTION 5 OF THE FEDERAL TRADE COMMISSION ACTAND SECTION 7 OF THE CLAYTON ACT

Docket No. C-4381; File No. 091 0094
Complaint, December 21, 2012 – Decision, December 21, 2012

This consent order addresses the $15 million acquisition by Magnesium Elektron North America, Inc. of certain assets of Revere Graphics Worldwide, Inc. The complaint alleges that the acquisition violates Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act by significantly reducing competition in the market for magnesium plates for photoengraving. The consent order requires Magnesium Elektron to sell assets used in the development, manufacture, and sale of magnesium plates for photoengraving to Universal Engraving, Inc.

Participants

For the *Commission*: *Sebastian Lorigo* and *David Von Nirschl.*

For the *Respondent*: *Peter Guryan, Fried, Frank, Harris, Shriver & Jacobsen LLP*.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Clayton Act, and by virtue of the authority vested by said Acts, the Federal Trade Commission (the "Commission"), having reason to believe that respondent Magnesium Elektron North America, Inc. ("MEL"), acquired Revere Graphics Worldwide, Inc. ("Revere"), in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

I. RESPONDENT MAGNESIUM ELEKTRON

1. MEL is a division of the Luxfer Group, which is an international group of businesses specializing in the design, manufacture, and supply of high performance materials. MEL is a company organized and existing under the laws of the State of Delaware, with its principal place of business at 1001 College Street, Madison, Illinois, 62060. MEL specializes in the development, manufacture, and supply of magnesium products, including magnesium plates for photoengraving.

II. REVERE GRAPHICS WORLDWIDE

2. Prior to its acquisition by Respondent, Revere was engaged in the manufacture and sale of metal plates used for photoengraving, with its principal place of business located at 5 Boundary Street, Plymouth, Massachusetts, 02366. Revere rolled and coated zinc, copper, brass, and magnesium plates which were used by customers for photoengraving.

III. JURISDICTION

3. MEL is, and at all times relevant herein, has been engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and is a corporation whose business is in or affects commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

IV. THE ACQUISITION

4. In September 2007, MEL acquired the worldwide assets of Revere for approximately $15 million. At the time of the acquisition, both MEL and Revere manufactured magnesium plates for photoengraving. While Revere also manufactured and sold zinc, copper, and brass plates for photoengraving, prior to its acquisition of Revere, MEL only sold magnesium plates for photoengraving applications.

V. THE RELEVANT PRODUCT MARKET

5. For purposes of this Complaint, the relevant line of commerce within which to analyze the effects of the transaction is the market for magnesium plates for photoengraving.

VI. THE RELEVANT GEOGRAPHIC MARKET

6. For purposes of this Complaint, the relevant geographic market within which to analyze the effects of the transaction is the world.

VII. MARKET STRUCTURE

7. The market for photoengraving magnesium plates is highly concentrated. Prior to the transaction, MEL and Revere were the only suppliers of magnesium plates for photoengraving in the world, and thus, the acquisition resulted in a merger-to-monopoly in the relevant market.

VIII. CONDITIONS OF ENTRY

8. Entry into the relevant market has not been, and would not be, timely, likely, or sufficient in magnitude, character, and scope to deter or counteract the anticompetitive effects of the acquisition. Magnesium alloy must be rolled to precise specifications in order to be used for photoengraving applications, and thus, substantial expertise is necessary for entry into this market. Further, the relevant market is small, which deters potential entrants from investing in the skill and expertise required for entry.

IX. EFFECTS OF THE ACQUISITION

9. The effects of the acquisition have been a substantial lessening of competition, and the creation of a monopoly in the relevant market in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45. Specifically, the acquisition has:

a. Eliminated actual, direct, and substantial competition between MEL and Revere in the relevant market;

b. Substantially increased the level of concentration in the relevant market; and

c. Increased MEL's ability to exercise market power unilaterally in the relevant market.

X. VIOLATIONS CHARGED

10. The allegations contained in Paragraphs 1 through 9 above are hereby incorporated by reference as though fully set forth here.

11. The agreement described in Paragraph 4 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

12. The transaction described in Paragraph 4 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twenty-first day of December, 2012, issues its Complaint against said Respondent.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of the acquisition by Magnesium Elektron North America, Inc. ("Magnesium Elektron" or "Respondent") of the assets of Revere Graphics Worldwide, Inc. ("Revere"), and Respondent having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and that, if issued by the Commission, would charge Respondent with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C.

§ 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondent, its attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order ("Consent Agreement"), containing an admission by Respondent of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondent that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondent has violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having thereupon issued its Complaint and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, and having duly considered the comments received from an interested person pursuant to section 2.34 of its rules, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order ("Order"):

1. Respondent Magnesium Elektron North America, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of State of Delaware, with its headquarters address located at 1001 College Street, Madison, Illinois 62060. Luxfer Holdings PLC (the ultimate parent entity of Magnesium Elektron, North America, Inc.) has its headquarters address at Anchorage Gateway, 5 Anchorage Quay, Salford, M50 3XE, England. Magnesium Elektron Ltd., a division of Luxfer Holdings PLC, has its mailing address as P.O. Box 23, Swinton, Manchester, M27 8DD.

2. Revere Graphics Worldwide, Inc., as of the date of the above-described acquisition, was a United States

corporation with its headquarters address located at 5 Boundary Street, Plymouth Massachusetts 02366.

3. The Commission has jurisdiction of the subject matter of this proceeding and of Respondent, and the proceeding is in the public interest.

ORDER

I.

IT IS ORDERED that, as used in the Order, the following definitions shall apply:

A. "Magnesium Elektron" or "Respondent" means Magnesium Elektron North America, Inc. , its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Magnesium Elektron, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. The term "Magnesium Elektron" also includes Luxfer Holdings PLC (the ultimate parent entity of Magnesium Elektron North America, Inc., Inc.), its directors, officers, employees, agents, representatives, successors, and assigns; and their joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Luxfer Holdings PLC, (including, without limitation, Magnesium Elektron Ltd. and the assets of Revere Graphics Worldwide, Inc. acquired pursuant to the Acquisition).

B. "Commission" means the Federal Trade Commission.

C. "Acquirer" means the following:

1. a Person specified by name in this Order to acquire particular assets or rights that Respondent is required to assign, grant, license, divest, transfer, deliver, or otherwise convey pursuant to this Order and that has been approved by the Commission to

accomplish the requirements of this Order in connection with the Commission's determination to make this Order final and effective; or

2. a Person approved by the Commission to acquire particular assets or rights that Respondent is required to assign, grant, license, divest, transfer, deliver, or otherwise convey pursuant to this Order.

D. "Acquisition" means Respondent's acquisition of the assets of Revere Graphics Worldwide, Inc.

E. "Acquisition Date" means September 6, 2007, the date Respondent consummated the Acquisition.

F. "Agency(ies)" means any government regulatory authority or authorities in the world responsible for granting approval(s), specifications(s), clearance(s), qualification(s), license(s), or permit(s) for any aspect of the research, Development, manufacture, marketing, distribution, or sale of a Revere Photoengraving Product.

G. "Closing Date" means the date on which Respondent(s) (or a Divestiture Trustee) consummates a transaction to assign, grant, license, divest, transfer, deliver, or otherwise convey the Revere Photoengraving Product Assets and grants the Revere Photoengraving Product License to an Acquirer pursuant to this Order.

H. "Confidential Business Information" means all information owned by, or in the possession or control of, Respondent acquired from Revere that is not in the public domain and that is directly related to the research, Development, manufacture, marketing, commercialization, importation, exportation, cost, supply, sales, sales support, or use of the Revere Photoengraving Product(s). The term "Confidential Business Information" *excludes* (i) information that is protected by the attorney work product, attorney-client, joint defense or other privilege prepared in connection with the Acquisition and relating to any United States, state, or foreign antitrust or competition Laws and (ii) information relating to Respondent's general business strategies or practices relating to research, Development, manufacture, marketing or sales of products that does not discuss with particularity the Revere Photoengraving Product(s).

I. "Contract Manufacture" means:

1. to manufacture, or to cause to be manufactured, a Contract Manufacture Product on behalf of an Acquirer; and/or

2. to provide, or to cause to be provided, any part of the manufacturing process of a Contract Manufacture Product on behalf of an Acquirer.

J. "Contract Manufacture Product(s)" means Revere Photoengraving Products or equivalent photoresist magnesium photoengraving products, including finished and unfinished products; *provided, however*, in each instance where: (1) an agreement to divest relevant assets is specifically referenced and attached to this Order, and (2) such agreement becomes a Remedial Agreement for a Revere Photoengraving Product, "Contract Manufacture Product(s)" means:

1. the finished magnesium photoengraving products listed in the MENA Products Supply Agreement; and

2. the uncoated semi-finished magnesium photoengraving products listed in the MENA Products Supply Agreement.

K. "Development" means all research and development activities, including, without limitation, the following: test method development; formulation, including without limitation, customized formulation for a particular customer(s); mechanical properties testing; performance testing; safety testing; composition measurements; process development; manufacturing scale-up; development-stage manufacturing; quality assurance/quality control development; statistical analysis and report writing; and conducting experiments and other activities for the purpose of obtaining or achieving any and all Product Approvals and Specifications. "Develop" means to engage in Development.

L. "Direct Cost" means a cost not to exceed the cost of labor, material, travel and other expenditures to the extent the costs are directly incurred to provide the relevant assistance or service. The term "Direct Cost" *excludes* any allocation or absorption of excess or idle capacity. "Direct Cost" to the Acquirer for its use of any of Respondent's employees' labor shall not exceed the average hourly wage rate for such employee; *provided, however*, in each instance where: (1) an agreement to divest relevant assets is specifically referenced and attached to this Order, and (2) such agreement becomes a Remedial Agreement for a Revere Photoengraving Product, "Direct Cost" means such cost as is provided in such Remedial Agreement for that Revere Photoengraving Product.

M. "Divestiture Trustee" means the trustee appointed by the Commission pursuant to the relevant provisions of this Order.

N. "Employee Information" means a complete and accurate list containing the following, for each Revere Photoengraving Product Employee (as and to the extent permitted by the Law):

1. the name of each former employee of Revere;

2. with respect to each such employee, the following information:

    a. the last job title or position held;

b. the facility where the employee was last employed; and

c. employment status (*i.e.*, active, no longer employed, or on leave or disability; full-time or part-time) with Respondent.

O. “Government Entity” means any Federal, state, local or non-U.S. government, or any court, legislature, government agency, or government commission, or any judicial or regulatory authority of any government.

P. “High Volume Account(s)” means any customer of Respondent or Revere within the United States whose annual gross purchase amounts (on a company-wide level), in units or in dollars, of magnesium photoengraving products from Respondent or Revere was among the top twenty (20) highest of such purchase amounts during the period from January 1, 2008 through the Closing Date.

Q. “Interim Monitor” means any monitor appointed pursuant to Paragraph III of this Order.

R. “Law” means all laws, statutes, rules, regulations, ordinances, and other pronouncements by any Government Entity having the effect of law.

S. “Manufacturing Technology” means all technology, trade secrets, know-how, and proprietary information (whether patented, patentable or otherwise) acquired by Respondent pursuant to the Acquisition to manufacture each Revere Photoengraving Product, including, but not limited to, the following:

1. product specifications, including without limitation, the exact combination and proportion of metals, other agents, reactive diluents and other components that achieves a particular set of application and end-use characteristics necessary for photoengraving;

2. processes, including without limitation, hot reversing mill rolling, warm mill rolling, shearing to weight flatten, weight flattening, back coat painting, grinding, final shearing after grinding, pretreatment, photoresist coating and protective film applications;

3. processing equipment specifications;

4. standard operating procedures;

5. product designs and design protocols;

6. plans, ideas, and concepts;

7. operating manuals for photoresist magnesium coated magnesium photoengraving machines acquired by Respondent pursuant to the Acquisition;

8. specifications for purchasing magnesium slabs suitable for use in the Revere Photoengraving Products;

9. safety procedures for handling of materials and substances;

10. flow diagrams;

11. quality assurance and control procedures, including, without limitation, goods inwards testing and polyethylene release testing;

12. research records;

13. annual product reviews;

14. manuals and technical information provided to employees, customers, suppliers, agents or licensees including, without limitation, manufacturing, equipment, and engineering manuals and drawings;

15. audits of manufacturing methods for Revere Photoengraving Products conducted by all of the following:

    a. applicable United States' Agencies;

    b. non-governmental Persons that provide audits and certifications of management systems and/or manufacturing processes and product assessments and certifications related to the use of metals or metal alloys for applications in particular industries, including the engraving industry (*e.g.*, International Organization for Standardization); and

    c. direct purchasers of Revere Photoengraving Products that use the Revere Photoengraving Products to manufacture products.

16. control history;

17. labeling;

18. supplier lists;

19. chemical descriptions and specifications of, all raw materials inputs, components, and ingredients related to the Revere Photoengraving Products; and

20. all other information related to the manufacturing process.

T. "Order Date" means the date on which this Decision and Order becomes final and effective.

U. "Patents" means all patents, patent applications, including provisional patent applications, invention disclosures, certificates of invention and applications for certificates of invention and statutory invention registrations, in each case existing as of the Closing Date (*except* where this Order specifies a different time), and includes all reissues, additions, divisions, continuations, continuations-in-part, supplementary protection certificates, extensions and reexaminations thereof, all inventions disclosed therein, and all rights therein provided by international treaties and conventions, related to any product of or owned by Respondent as of the Closing Date (*except* where this Order specifies a different time).

V. "Person" means any individual, partnership, joint venture, firm, corporation, association, trust, unincorporated organization, or other business or Government Entity, and any subsidiaries, divisions, groups or affiliates thereof.

W. "Product Approval(s) and Specification(s)" means the approvals, specifications, certifications, registrations, permits, licenses, consents, authorizations, and other approvals, and pending applications and requests therefor, related to the research, Development, manufacture, distribution, finishing, packaging, marketing, sale, storage or transport of the Revere Photoengraving Products that have been adopted or required as of the Closing Date by the following:

1. applicable U.S. Agencies;

2. non-governmental Persons that provide audits and certifications of management systems and/or manufacturing processes and product assessments and certifications related to the use of metals or metal alloys for applications in particular industries, including the engraving industry (*e.g.*, International Organization for Standardization), and

3. direct purchasers of Revere Photoengraving Products that use the Revere Photoengraving Products to manufacture products.

X. "Product Assumed Contracts" means all of the following contracts or agreements (copies of each such contract to be provided to the Acquirer on or before the Closing Date and segregated in a manner that clearly identifies the purpose(s) of each such contract):

1. that make specific reference to any Revere Photoengraving Product and pursuant to which any Third Party purchases, or has the option to purchase, any Revere Photoengraving Product from Respondent;

2. pursuant to which Respondent purchases raw materials, inputs, components, or other necessary ingredient(s) or had planned to purchase the raw materials(s), inputs, components or other necessary ingredient(s) from any Third Party for use in connection with the manufacture of any Revere Photoengraving Product;

3. relating to any experiments, audits, or scientific studies involving any Revere Photoengraving Product;

4. with universities or other research institutions for the use of any Revere Photoengraving Product in scientific research;

5. relating to the particularized marketing of any Revere Photoengraving Product or educational matters relating solely to any Revere Photoengraving Product;

6. pursuant to which a Third Party provides the Manufacturing Technology related to any Revere Photoengraving Product to Respondent;

7. pursuant to which a Third Party is licensed by Respondent to use the Manufacturing Technology;

8. constituting confidentiality agreements involving any Revere Photoengraving Product;

9. involving any royalty, licensing, or similar arrangement involving any Revere Photoengraving Product;

10. pursuant to which a Third Party provides any specialized services necessary to the research, Development, manufacture or distribution of the Revere Photoengraving Products to Respondent including, but not limited to, consultation arrangements;

11. pursuant to which any Third Party collaborates with Respondent in the performance of research, Development, marketing, distribution or selling of any Revere Photoengraving Product or the business associated with the Revere Photoengraving Products; and/or

provided, *however*, that where any such contract or agreement also relates to a Retained Product(s), Respondent shall assign the Acquirer all such rights under the contract or agreement as are related to the Revere Photoengraving Product(s), but concurrently may retain similar rights for the purposes of the Retained Product(s).

Y. “Product Intellectual Property” means all of the following related to each Revere Photoengraving Product:

1. Patents;

2. Software;

3. trade secrets, know-how, utility models, design rights, techniques, data, inventions, practices, recipes, raw material specifications, process descriptions, quality control methods in process and in final Revere Photoengraving Products, protocols, methods of production and other confidential or proprietary technical, business, research, Development and other information, and

all rights in any jurisdiction to limit the use or disclosure thereof;

4. rights to obtain and file for patents and copyrights and registrations thereof; and

5. rights to sue and recover damages or obtain injunctive relief for infringement, dilution, misappropriation, violation or breach of any of the foregoing;

provided, however, Product Intellectual Property expressly includes all customer specific product formulations for Revere Photoengraving Products that were acquired by the Respondent pursuant to the Acquisition, licenses from customers related to the manufacture of products for that specific customer, and all proprietary and/or trade secret information related to a particular customer that were acquired by the Respondent pursuant to the Acquisition.

Z. "Proposed Acquirer" means an entity proposed by Respondent (or a Divestiture Trustee) to the Commission and submitted for the approval of the Commission to become the Acquirer of particular assets required to be assigned, granted, licensed, divested, transferred, delivered or otherwise conveyed by Respondent pursuant to this Order.

AA. "Remedial Agreement(s)" means the following:

1. any agreement between Respondent and an Acquirer that is specifically referenced and attached to this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto, related to the relevant assets or rights to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed, and that has been approved by the Commission to accomplish the requirements of the Order in connection with the Commission's determination to make this Order final and effective;

2. any agreement between Respondent and a Third Party to effect the assignment of assets or rights of Respondent related to a Revere Photoengraving Product to the benefit of an Acquirer that is specifically referenced and attached to this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto, that has been approved by the Commission to accomplish the requirements of the Order in connection with the Commission's determination to make this Order final and effective;

3. any agreement between Respondent and an Acquirer (or between a Divestiture Trustee and an Acquirer) that has been approved by the Commission to accomplish the requirements of this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto, related to the relevant assets or rights to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed, and that has been approved by the Commission to accomplish the requirements of this Order; and/or

4. any agreement between Respondent and a Third Party to effect the assignment of assets or rights of Respondent related to a Revere Photoengraving Product to the benefit of an Acquirer that has been approved by the Commission to accomplish the requirements of this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto.

BB. "Research and Development Records" means all research and development records relating to Revere Photoengraving Products acquired by Respondent pursuant to the Acquisition including, but not limited to:

1. inventory of research and development records, research history, research efforts, research notebooks, research reports, technical service

reports, testing methods, invention disclosures, and know how related to the Revere Photoengraving Products;

2. all correspondence, submissions, notifications, communications, registrations or other filings made to, received from or otherwise conducted with (i) Agencies and (ii) non-governmental Persons that provide audits and certifications of management systems and/or manufacturing processes and product assessments and certifications (*e.g.*, International Organization for Standardization) relating to Product Approval(s) and Specification(s) submitted by, on behalf of, or acquired by, Respondent or Revere related to the Revere Photoengraving Products;

3. designs of experiments, and the results of successful and unsuccessful designs and experiments;

4. annual and periodic reports (both internal and external) related to the above-described Product Approval(s) and Specification(s);

5. currently used product usage instructions related to the Revere Photoengraving Products;

6. reports relating to the protection of human safety and health related to the manufacture or use of the Revere Photoengraving Products;

7. reports relating to the protection of the environment related to the manufacture or use of the Revere Photoengraving Products;

8. summary of performance reports, safety reports, and product complaints from customers related to the Revere Photoengraving Products; and

9. product recall reports filed with any Agency related to the Revere Photoengraving Products.

CC. "Retained Product(s)" means any product(s) that is not a Revere Photoengraving Product.

DD. "Revere" means Revere Graphics Worldwide, Inc. as was in existence prior to the Acquisition.

EE. "Revere Photoengraving Product(s)" means photoresist magnesium photoengraving products Developed, in Development, researched, manufactured, marketed or sold prior to the Acquisition by Revere and that were acquired by the Respondent pursuant to the Acquisition and any photoresist magnesium photoengraving product Developed, in Development, researched, manufactured, marketed or sold by Respondent using the Product Intellectual Property or Manufacturing Technology acquired by the Respondent pursuant to the Acquisition.

FF. "Revere Photoengraving Product Assets" means all of Respondent's rights, title and interest in and to: (i) all assets related to the Revere Photoengraving Products acquired by the Respondent pursuant to the Acquisition, and (ii) any and all improvements or changes made thereto, to the extent legally transferable, including the research, Development, manufacture, distribution, marketing, and sale of each Revere Photoengraving Product, including, without limitation, the following:

1. all Product Intellectual Property related to the Revere Photoengraving Product(s);

2. all Product Approvals and Specifications related to the Revere Photoengraving Product(s);

3. all Manufacturing Technology related to the Revere Photoengraving Product(s); and

4. all Product Development Reports related to the Revere Photoengraving Product(s)

5. all Research and Development Records;

6. at the Acquirer's option, all Product Assumed Contracts related to the Revere Photoengraving Product(s) (copies to be provided to the Acquirer on or before the Closing Date);

7. a list of all customers that have purchased any magnesium photoengraving product within the United States from Respondent or Revere from the period beginning January 1, 2008 through the Closing Date and High Volume Accounts including the name of the employee(s) of the customer for each High Volume Account that was responsible for the purchase of the Revere Photoengraving Products on behalf of the High Volume Account and his or her business contact information; and

8. all of the Respondent's operating manuals, books and records, customer files, customer lists and records, vendor files, vendor lists and records, cost files and records, credit information, distribution records, business records and plans, studies, surveys, and files related to the foregoing or to the Revere Photoengraving Product(s);

provided however, "Revere Photoengraving Product Assets" *excludes* (1) documents relating to the Respondent's general business strategies or practices relating to research, Development, manufacture, marketing or sales of photoengraving plates, where such documents do not discuss with particularity the Revere Photoengraving Products; (2) administrative, financial, and accounting records; (3) quality control records that are determined not to be material to the manufacture of the Revere Photoengraving Products by the Interim Monitor or the Acquirer of the Revere Photoengraving Products; (4) manufacturing equipment; and (5) any real estate and the buildings and other permanent structures located on such real estate.

GG. "Revere Photoengraving Product Divestiture Agreements" means the following agreements:

1. "Technology Purchase and Sale Agreement" by and between Magnesium Elektron North America, Inc. and Universal Engraving, Inc., dated as of August 17, 2012, and all amendments, exhibits, attachments, agreements, and schedules thereto;

2. "MENA Products Supply Agreement" by and between Universal Engraving, Inc. and Magnesium Elektron North America, Inc., dated as of August 17, 2012, and all amendments, exhibits, attachments, agreements, and schedules thereto; and

3. "PSI Product Supply Agreement" by and between Universal Engraving, Inc. and Magnesium Elektron North America, Inc., dated as of August 17, 2012, and all amendments, exhibits, attachments, agreements, and schedules thereto;

each related to the Revere Photoengraving Product Assets that have been approved by the Commission to accomplish the requirements of this Order. The Revere Photoengraving Product Divestiture Agreements are attached to this Order and contained in non-public Appendix A.

HH. "Revere Photoengraving Product Employees" means all persons employed by Revere as of the day before the Acquisition Date who participated in the research, Development, manufacture, marketing or sales of the Revere Photoengraving Products, including such persons as are employed by the Respondent as of the Closing Date; *provided*, *however*, in each instance where: (i) an agreement to divest relevant assets is specifically referenced and attached to this Order, and (ii) such agreement becomes a Remedial Agreement for the Revere Photoengraving Products, "Revere Photoengraving Product Employees" means the specific individuals identified as "Revere

Photoengraving Product Employees" in such Remedial Agreement.

II. "Revere Photoengraving Product Releasee(s)" means the Acquirer or any entity controlled by or under common control with the Acquirer, or any licensees, sublicensees, manufacturers, suppliers, distributors, and customers of the Acquirer, or of the Acquirer-affiliated entities.

JJ. "Software" means computer programs related to the Revere Photoengraving Product(s), including all software implementations of algorithms, models, and methodologies whether in source code or object code form, databases and compilations, including any and all data and collections of data, all documentation, including user manuals and training materials, related to any of the foregoing and the content and information contained on any Website; *provided, however*, that the term "Software" *excludes* software that is readily purchasable or licensable from sources other than the Respondent and which has not been modified in a manner material to the use or function thereof (other than through user preference settings).

KK. "Supply Cost" means a cost not to exceed the manufacturer's average direct per unit cost in United States dollars of manufacturing the Revere Photoengraving Product, or raw material or ingredients related to a Revere Photoengraving Product, for the twelve (12) month period immediately preceding the Acquisition Date. "Supply Cost" shall expressly exclude any intracompany business transfer profit; *provided, however,* that in each instance where: (1) an agreement to Contract Manufacture is specifically referenced and attached to this Order, and (2) such agreement becomes a Remedial Agreement for a Revere Photoengraving Product, "Supply Cost" means the cost as specified in such Remedial Agreement for that Revere Photoengraving Product.

LL. "Third Party(ies)" means any non-governmental Person other than the following: the Respondent; or, the Acquirer of particular assets or rights pursuant to this Order.

MM. "Universal" means, Universal Engraving, Inc., a corporation organized, existing, and doing business under and by virtue of the laws of the State of Kansas, with its headquarters address located at 9090 Nieman Road, Overland Park, Kansas 66214.

II.

IT IS FURTHER ORDERED that:

A. Not later than ten (10) days after the Order Date, Respondent shall divest the Revere Photoengraving Product Assets, absolutely and in good faith, to Universal pursuant to, and in accordance with, the Revere Photoengraving Product Divestiture Agreements (which agreements shall not limit or contradict, or be construed to limit or contradict, the terms of this Order, it being understood that this Order shall not be construed to reduce any rights or benefits of Universal or to reduce any obligations of Respondent under such agreements), and each such agreement, if it becomes a Remedial Agreement related to the Revere Photoengraving Product Assets, is incorporated by reference into this Order and made a part hereof;

provided, however, that if Respondent has divested the Revere Photoengraving Product Assets prior to the Order Date, and if, at the time the Commission determines to make this Order final and effective, the Commission notifies Respondent that Universal is not an acceptable purchaser of the Revere Photoengraving Product Assets then Respondent shall immediately rescind the transaction with Universal, in whole or in part, as directed by the Commission, and shall divest the Revere Photoengraving Product Assets within one hundred eighty (180) days from the Order Date, absolutely and in good faith, at no minimum price, to an Acquirer and only in a manner that receives the prior approval of the Commission;

provided further, that if Respondent has divested the Revere Photoengraving Product Assets to Universal prior to the Order Date, and if, at the time the Commission determines to make this Order final and effective, the Commission notifies Respondent that the manner in which the divestiture was accomplished is not acceptable, the Commission may direct Respondent, or appoint a Divestiture Trustee, to effect such modifications to the manner of divestiture of the Revere Photoengraving Product Assets to Universal (including, but not limited to, entering into additional agreements or arrangements) as the Commission may determine are necessary to satisfy the requirements of this Order.

B. Respondent shall secure all consents and waivers from all Third Parties that are necessary to permit Respondent to divest the Revere Photoengraving Product Assets to the Acquirer, and/or to permit the Acquirer to continue the research, Development, manufacture, sale, marketing or distribution of the Revere Photoengraving Products;

provided, however, Respondent may satisfy this requirement by certifying that the Acquirer has executed all such agreements directly with each of the relevant Third Parties.

C. Respondent shall provide the Manufacturing Technology to the Acquirer in an organized, comprehensive, complete, useful, timely, and meaningful manner. Respondent shall, *inter alia*:

1. designate employees of Respondent knowledgeable with respect to such Manufacturing Technology to a committee for the purposes of communicating directly with the Acquirer and the

Interim Monitor (if any has been appointed) for the purposes of effecting such delivery;

2. prepare technology transfer protocols and transfer acceptance criteria for both the processes and analytical methods related to the Revere Photoengraving Products, such protocols and acceptance criteria to be subject to the approval of the Acquirer;

3. prepare and implement a detailed technological transfer plan that contains, *inter alia*, the delivery of all relevant information, all appropriate documentation, all other materials, and projected time lines for the delivery of all Manufacturing Technology to the Acquirer; and

4. upon reasonable written notice and request from the Acquirer to Respondent and pursuant to a Remedial Agreement, provide in a timely manner, at no greater than Direct Cost, assistance and advice to enable the Acquirer to:

   a. manufacture the Revere Photoengraving Products or an equivalent photoresist magnesium photoengraving in the same quality achieved by Respondent and/or Revere and in commercial quantities; and

   b. receive, integrate, and use such Manufacturing Technology.

D. Respondent shall:

1. Contract Manufacture and deliver to the Acquirer, in a timely manner and under reasonable terms and conditions pursuant to a Remedial Agreement, a supply of each of the Contract Manufacture Products at Respondent's Supply Cost, for a period of time sufficient to allow the Acquirer to:

a. manufacture and sell in commercial quantities, the Revere Photoengraving Products or equivalent photoresist magnesium photoengraving products independently of Respondent; and

b. secure sources of supply of the raw materials, inputs and components for the Contract Manufacture Products from entities other than Respondent;

2. make representations and warranties to the Acquirer that the Contract Manufacture Product(s) supplied through Contract Manufacture pursuant to a Remedial Agreement meet the specifications and quality for their intended use;

3. for the Contract Manufacture Products supplied by Respondent, Respondent shall agree to indemnify, defend and hold the Acquirer harmless from any and all suits, claims, actions, demands, liabilities, expenses or losses alleged to result from the failure of the Contract Manufacture Products supplied by Respondent to the Acquirer to meet relevant customer specifications. This obligation may be made contingent upon the Acquirer giving Respondent prompt, adequate notice of such claim and cooperating fully in the defense of such claim. The Remedial Agreement to Contract Manufacture shall be consistent with the obligations assumed by Respondent under this Order; *provided, however*, that Respondent may reserve the right to control the defense of any such litigation, including the right to settle the litigation, so long as such settlement is consistent with Respondent's responsibilities to supply the Contract Manufacture Products in the manner required by this Order; *provided further*, that this obligation shall not require Respondent to be liable for any negligent act or omission of the Acquirer or for any representations and warranties, express or implied, made by the Acquirer that exceed the

representations and warranties made by Respondent to the Acquirer;

4. make representations and warranties to the Acquirer that Respondent shall hold harmless and indemnify the Acquirer for any liabilities or loss of profits resulting from the failure by Respondent to deliver the Contract Manufacture Products in a timely manner as required by the Remedial Agreement to Contract Manufacture unless Respondent can demonstrate that its failure was entirely beyond the control of Respondent and in no part the result of negligence or willful misconduct by Respondent;

5. during the term of the Remedial Agreement to Contract Manufacture, upon request of the Acquirer or Interim Monitor (if any has been appointed), make available to the Acquirer and the Interim Monitor (if any has been appointed) all records that relate to the manufacture, storage, or transport of the Contract Manufacture Products that are generated or created after the Closing Date;

6. during the term of the Remedial Agreement to Contract Manufacture, maintain or cause to be maintained manufacturing facilities necessary to manufacture each of the Contract Manufacture Products; and

7. pursuant to a Remedial Agreement, provide consultation with knowledgeable employees of Respondent and training, at the request of the Acquirer and at a facility in the United States chosen by the Acquirer, for the purposes of enabling the Acquirer to manufacture Revere Photoengraving Products or equivalent photoresist magnesium photoengraving products in the same quality achieved by the Respondent and in commercial quantities, and in a manner consistent with the relevant customer specifications for

photoengraving use, independently of Respondent, and sufficient to satisfy management of the Acquirer that its personnel are adequately trained in the manufacture of Revere Photoengraving Products.

E. Respondent shall:

1. submit to the Acquirer, at Respondent's expense, copies of all Confidential Business Information;

2. deliver copies of the Confidential Business Information as follows:

    a. in good faith;

    b. in a timely manner, *i.e.*, as soon as practicable, avoiding any delays in transmission of the respective information; and

    c. in a manner that ensures its completeness and accuracy and that fully preserves its usefulness; and

3. pending complete delivery of copies of all Confidential Business Information to the Acquirer, provide the Acquirer and the Interim Monitor (if any has been appointed) with access to all such Confidential Business Information and employees who possess or are able to locate such information for the purposes of identifying the books, records, and files directly related to the Revere Photoengraving Products that contain such Confidential Business Information and facilitating the delivery in a manner consistent with this Order.

F. Respondent shall not enforce any agreement against a Third Party or the Acquirer to the extent that such agreement may limit or otherwise impair the ability of the Acquirer to acquire the Manufacturing Technology, the Product Intellectual Property, or the raw materials, inputs, or components, related to the relevant Revere Photoengraving Product(s) from the Third Party. Such agreements include, but are not limited to, agreements with respect to the disclosure of Confidential Business Information related to such Manufacturing Technology or Product Intellectual Property.

G. Not later than ten (10) days after the Closing Date, Respondent shall grant a release to each Third Party that is subject to an agreement as described in Paragraph II.F. that allows the Third Party to provide the relevant Manufacturing Technology, Product Intellectual Property, raw materials, inputs, or components to the Acquirer. Within five (5) days of the execution of each such release, Respondent shall provide a copy of the release to the Acquirer.

H. Respondent shall:

1. for a period of at least eighteen (18) months from the Closing Date, provide the Acquirer with the opportunity to enter into employment contracts with the Revere Photoengraving Product Employees. Each of these periods is hereinafter referred to as the "Revere Photoengraving Product Employee Access Period(s)";

2. not later than the earlier of the following dates: (1) ten (10) days after notice by staff of the Commission to Respondent to provide the Employee Information; or (2) ten (10) days after the Closing Date, provide the Acquirer or the Proposed Acquirer with the Employee Information related to the Revere Photoengraving Product Employees. Failure by Respondent to provide the Employee Information for any Revere Photoengraving Product Employee within the time provided herein shall extend the Revere Photoengraving Product Employee Access Period(s) with respect to that employee in an amount equal to the delay; and

3. during the Revere Photoengraving Product Employee Access Period(s), not interfere with the hiring or employing by the Acquirer of the Revere Photoengraving Product Employees and remove any impediments within the control of Respondent that may deter these persons from accepting employment with the Acquirer, including, but not limited to, any noncompete or nondisclosure provision of employment or other contracts with Respondent that would affect the ability or incentive of those persons to be employed by the Acquirer. In addition, Respondent shall not make any counteroffer to such a Revere Photoengraving Product Employee who has received a written offer of employment from the Acquirer;

provided, however, that, this Paragraph II.H.3. shall not prohibit Respondent from continuing to employ any Revere Photoengraving Product Employee under the terms of such person's employment with Respondent prior to the date of the written offer of employment from the Acquirer to such person.

I. Until Respondent completes delivery of all of the Revere Photoengraving Product Assets to the Acquirer and provides the Manufacturing Technology to the Acquirer,

1. Respondent shall take such actions as are necessary to:

   a. maintain the full economic viability and marketability of the businesses associated with each Revere Photoengraving Product;

   b. minimize any risk of loss of competitive potential for such business;

   c. prevent the destruction, removal, wasting, deterioration, or impairment of any of the assets related to each Revere Photoengraving Product;

d. ensure the Revere Photoengraving Product Assets are delivered to the Acquirer in a manner without disruption, delay, or impairment of the Product Approval and Specification processes related to the business associated with each Revere Photoengraving Product;

e. ensure the completeness of the delivery of the Manufacturing Technology; and

2. Respondent shall not sell, transfer, encumber or otherwise impair the Revere Photoengraving Product Assets (other than in the manner prescribed in this Order) nor take any action that lessens the full economic viability, marketability, or competitiveness of the businesses associated with each Revere Photoengraving Product.

J. Respondent shall not join, file, prosecute or maintain any suit, in law or equity, against the Acquirer or the Revere Photoengraving Product Releasee(s) for the research, Development, manufacture, use, import, export, distribution, or sale of the Revere Photoengraving Product(s) under the following:

1. any Patent owned or licensed by Respondent as of the Acquisition Date that claims a method of making, using, or a composition of matter, relating to a Revere Photoengraving Product;

2. any Patent owned or licensed at any time after the Acquisition Date by Respondent that claim any aspect of the research, Development, manufacture, use, import, export, distribution, or sale of a Revere Photoengraving Product, other than such Patents that claim inventions conceived by and reduced to practice after the Closing Date;

if such suit would have the potential to interfere with the Acquirer's freedom to practice the following: (1) the research, Development, or manufacture of a particular Revere Photoengraving Product; or (2) the use within, import into, export from, or the supply, distribution, or sale within, the United States of a particular Revere Photoengraving Product. Respondent shall also covenant to the Acquirer that as a condition of any assignment, transfer, or license to a Third Party of the above-described Patents, the Third Party shall agree to provide a covenant whereby the Third Party covenants not to sue the Acquirer or the related Revere Photoengraving Product Releasee(s) under such Patents, if the suit would have the potential to interfere with the Acquirer's freedom to practice the following: (1) the research, Development, or manufacture of a particular Revere Photoengraving Product; or (2) the use within, import into, export from, or the supply, distribution, or sale within, the United States of a particular Revere Photoengraving Product.

K. For any patent infringement suit in which the Respondent is alleged to have infringed a Patent of a Third Party prior to the Closing Date or for such suit as the Respondent has prepared or is preparing as of the Closing Date to defend against such infringement claim(s), and where such a suit would have the potential to interfere with the relevant Acquirer's freedom to practice the following: (1) the research, Development, or manufacture of the Revere Photoengraving Product(s); or (2) the use, import, export, supply, distribution, or sale of that Revere Photoengraving Product(s), Respondent shall:

1. cooperate with that Acquirer and provide any and all necessary technical and legal assistance, documentation and witnesses from Respondent in connection with obtaining resolution of any pending patent litigation involving that Revere Photoengraving Product;

2. waive conflicts of interest, if any, to allow the Respondent's outside legal counsel to represent the

relevant Acquirer in any ongoing patent litigation involving that Revere Photoengraving Product; and

3. permit the transfer to that Acquirer of all of the litigation files and any related attorney work-product in the possession of Respondent's outside counsel relating to that Revere Photoengraving Product.

L. Upon reasonable written notice and request from an Acquirer to Respondent, Respondent shall provide, in a timely manner, at no greater than Direct Cost, assistance of knowledgeable employees of Respondent to assist that Acquirer to defend against, respond to, or otherwise participate in any litigation related to the Product Intellectual Property related to any of the Revere Photoengraving Products, if such litigation would have the potential to interfere with the Acquirer's freedom to practice the following: (1) the research, Development, or manufacture of the Revere Photoengraving Products; or (2) the use within, import into, export from, or the supply, distribution, or sale within the United States.

M. Within eighteen (18) months of the Closing Date, Respondent shall either license or assign any and all intellectual property to the Acquirer that constitutes Product Intellectual Property that the Acquirer, with the concurrence of the Interim Monitor, identifies as being necessary to the conduct of the business associated with the Revere Photoengraving Product (as such business had been conducted by Revere prior to the Acquisition Date) and that was not listed and/or included in the intellectual property that was divested to the Acquirer pursuant to the Remedial Agreements previously submitted by Respondent to the Commission.

N. Respondent shall not seek, directly or indirectly, pursuant to any dispute resolution mechanism incorporated in any Remedial Agreement, or in any agreement related to any of the Revere Photoengraving

Products a decision the result of which would be inconsistent with the terms of this Order and/or the remedial purposes thereof.

O. The purpose of the divestiture of the Revere Photoengraving Product Assets and the provision of the Manufacturing Technology and the related obligations imposed on the Respondent by this Order is:

1. to ensure the continued use of the Revere Photoengraving Product Assets in the research, Development, manufacture, use, import, export, distribution, and sale of each of the respective Revere Photoengraving Products;

2. to provide for the future use of the Revere Photoengraving Product Assets for the research, Development, manufacture, use, import, export, distribution, and sale of each of the respective Revere Photoengraving Products;

3. to create a viable and effective competitor, who is independent of the Respondent in the research, Development, manufacture, use, import, export, distribution, or sale of each of the respective Revere Photoengraving Products; and

4. to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint in a timely and sufficient manner.

III.

IT IS FURTHER ORDERED that:

A. At any time after Respondent signs the Consent Agreement in this matter, the Commission may appoint a monitor ("Interim Monitor") to assure that Respondent expeditiously complies with all of its obligations and performs all of its responsibilities as required by this Order and the Remedial Agreements.

B. The Commission shall select the Interim Monitor, subject to the consent of Respondent, which consent shall not be unreasonably withheld. If Respondent has not opposed, in writing, including the reasons for opposing, the selection of a proposed Interim Monitor within ten (10) days after notice by the staff of the Commission to Respondent of the identity of any proposed Interim Monitor, Respondent shall be deemed to have consented to the selection of the proposed Interim Monitor.

C. Not later than ten (10) days after the appointment of the Interim Monitor, Respondent shall execute an agreement that, subject to the prior approval of the Commission, confers on the Interim Monitor all the rights and powers necessary to permit the Interim Monitor to monitor Respondent's compliance with the relevant requirements of the Order in a manner consistent with the purposes of the Order.

D. If an Interim Monitor is appointed, Respondent shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Interim Monitor:

1. the Interim Monitor shall have the power and authority to monitor Respondent's compliance with the divestiture and asset maintenance obligations and related requirements of the Order, and shall exercise such power and authority and carry out the duties and responsibilities of the Interim Monitor in a manner consistent with the purposes of the Order and in consultation with the Commission;

2. the Interim Monitor shall act in a fiduciary capacity for the benefit of the Commission; and

3. the Interim Monitor shall serve until, the latter of:

    a. the date of completion by Respondent of the divestiture of all Revere Photoengraving Product Assets and the delivery of the Manufacturing Technology and Product Intellectual Property in a manner that fully satisfies the requirements of this Order; and

    b. with respect to each Revere Photoengraving Product, the date the Acquirer is able to manufacture, market, import, export, and sell such Revere Photoengraving Product or an equivalent photoresist magnesium photoengraving product for use for photoengraving applications and able to manufacture such Revere Photoengraving Product or an equivalent photoresist magnesium photoengraving product in commercial quantities independently of Respondent;

provided, however, that the Interim Monitor's service shall not exceed five (5) years from the Order Date;

provided further, that the Commission may shorten or extend this period as may be necessary or appropriate to accomplish the purposes of the Order.

E. Subject to any demonstrated legally recognized privilege, the Interim Monitor shall have full and complete access to Respondent's personnel, books, documents, records kept in the normal course of business, facilities and technical information, and such other relevant information as the Interim Monitor may reasonably request, related to Respondent's compliance with its obligations under the Order, including, but not limited to, its obligations related to the relevant assets. Respondent shall cooperate with any reasonable request of the Interim Monitor and shall take no action to interfere with or impede the

Interim Monitor's ability to monitor Respondent's compliance with the Order.

F. The Interim Monitor shall serve, without bond or other security, at the expense of Respondent, on such reasonable and customary terms and conditions as the Commission may set. The Interim Monitor shall have authority to employ, at the expense of Respondent, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Interim Monitor's duties and responsibilities.

G. Respondent shall indemnify the Interim Monitor and hold the Interim Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Interim Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, or bad faith by the Interim Monitor.

H. Respondent shall report to the Interim Monitor in accordance with the requirements of this Order and/or as otherwise provided in any agreement approved by the Commission. The Interim Monitor shall evaluate the reports submitted to the Interim Monitor by Respondent, and any reports submitted by the Acquirer with respect to the performance of Respondent's obligations under the Order or the Remedial Agreement(s). Within thirty (30) days from the date the Interim Monitor receives these reports, the Interim Monitor shall report in writing to the Commission concerning performance by Respondent of its obligations under the Order; *provided, however*, beginning ninety (90) days after Respondent has filed its final report pursuant to Paragraph V.A., and every ninety (90) days thereafter, the Interim Monitor shall report in writing to the Commission concerning progress by the Acquirer toward:

1. the Acquirer's ability to manufacture in commercial quantities, the Revere Photoengraving Products or equivalent photoresist magnesium photoengraving products independently of Respondent; and

2. securing sources of supply of the raw materials, inputs and components for the Revere Photoengraving Products or equivalent photoresist magnesium photoengraving products from entities other than Respondent.

I. Respondent may require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement; *provided, however,* that such agreement shall not restrict the Interim Monitor from providing any information to the Commission.

J. The Commission may, among other things, require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission materials and information received in connection with the performance of the Interim Monitor's duties.

K. If the Commission determines that the Interim Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Interim Monitor in the same manner as provided in this Paragraph.

L. The Commission may on its own initiative, or at the request of the Interim Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of the Order.

M. The Interim Monitor appointed pursuant to this Order may be the same person appointed as a Divestiture Trustee pursuant to the relevant provisions of this Order.

IV.

IT IS FURTHER ORDERED that:

A. If Respondent has not fully complied with the obligations to assign, grant, license, divest, transfer, deliver or otherwise convey the Revere Photoengraving Product Assets as required by this Order, the Commission may appoint a trustee ("Divestiture Trustee") to assign, grant, license, divest, transfer, deliver or otherwise convey these assets in a manner that satisfies the requirements of this Order. In the event that the Commission or the Attorney General brings an action pursuant to § 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. § 45(*l*), or any other statute enforced by the Commission, Respondent shall consent to the appointment of a Divestiture Trustee in such action to assign, grant, license, divest, transfer, deliver or otherwise convey these assets. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to § 5(*l*) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Respondent to comply with this Order.

B. The Commission shall select the Divestiture Trustee, subject to the consent of the Respondent, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a Person with experience and expertise in acquisitions and divestitures. If the Respondent has not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) days after notice by the staff of the Commission to Respondent of the identity of any proposed Divestiture Trustee, Respondent shall be deemed to have consented to the selection of the proposed Divestiture Trustee.

C. Not later than ten (10) days after the appointment of a Divestiture Trustee, Respondent shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the divestiture required by this Order.

D. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Paragraph, Respondent shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:

1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to assign, grant, license, divest, transfer, deliver or otherwise convey the assets that are required by this Order to be assigned, granted, licensed, divested, transferred, delivered or otherwise conveyed.

2. The Divestiture Trustee shall have one (1) year after the date the Commission approves the trust agreement described herein to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the one (1) year period, the Divestiture Trustee has submitted a plan of divestiture or the Commission believes that the divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission; *provided, however,* the Commission may extend the divestiture period only two (2) times.

3. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books,

records and facilities related to the relevant assets that are required to be assigned, granted, licensed, divested, delivered or otherwise conveyed by this Order and to any other relevant information, as the Divestiture Trustee may request. Respondent shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondent shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondent shall extend the time for divestiture under this Paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court.

4. The Divestiture Trustee shall use commercially reasonable efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondent's absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestiture shall be made in the manner and to an Acquirer as required by this Order; *provided, however,* if the Divestiture Trustee receives bona fide offers from more than one acquiring Person, and if the Commission determines to approve more than one such acquiring Person, the Divestiture Trustee shall divest to the acquiring Person selected by Respondent from among those approved by the Commission; *provided further, however*, that Respondent shall select such Person within five (5) days after receiving notification of the Commission's approval.

5. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondent, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of

Respondent, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of Respondent, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by this Order.

6. Respondent shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, or bad faith by the Divestiture Trustee.

7. The Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order; *provided, however*, that the Divestiture Trustee appointed pursuant to this Paragraph may be the same Person appointed as Interim Monitor.

8. The Divestiture Trustee shall report in writing to Respondent and to the Commission every sixty

(60) days concerning the Divestiture Trustee's efforts to accomplish the divestiture.

9. Respondent may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement; *provided, however,* such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.

E. If the Commission determines that a Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute Divestiture Trustee in the same manner as provided in this Paragraph.

F. The Commission or, in the case of a court-appointed Divestiture Trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this Order.

V.

IT IS FURTHER ORDERED that:

A. Within thirty (30) days after the date this Order is issued, and every sixty (60) days thereafter until Respondent has fully complied with the following:

1. Paragraphs II.A , II.B., II.C., II.D., II.E., and II.G.; and

2. all of its responsibilities to render transitional services to the Acquirer as provided by this Order and the Remedial Agreement(s);

Respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Order. Respondent shall submit at the same time a copy of its report concerning compliance with this Order to the Interim Monitor, if any Interim Monitor has been appointed. Respondent shall include in its reports, among other things that are required from time to time, a full description of the efforts being made to comply with the relevant Paragraphs of the Order, including a full description of all substantive contacts or negotiations related to the divestiture of the Revere Photoengraving Product Assets and the identity of all Persons contacted, including copies of all written communications to and from such Persons, all internal memoranda, and all reports and recommendations concerning completing the obligations.

B. One (1) year after the date this Order is issued, annually for the next four (4) years on the anniversary of the date this Order is issued, and at other times as the Commission may require, Respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with the Order.

VI.

IT IS FURTHER ORDERED that Respondent shall notify the Commission at least thirty (30) days prior to:

A. any proposed dissolution of Respondent;

B. any proposed acquisition, merger or consolidation of Respondent; or

C. any other change in Respondent, including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of this Order.

VII.

IT IS FURTHER ORDERED that, in addition to any other requirements and prohibitions relating to Confidential Business Information in this Order, Respondent shall assure that Respondent's counsel (including in-house counsel under appropriate confidentiality arrangements) shall not retain unredacted copies of documents or other materials provided to an Acquirer or access original documents provided to an Acquirer, except under circumstances where copies of documents are insufficient or otherwise unavailable, and for the following purposes:

A. To assure Respondent's compliance with any Remedial Agreement, this Order, any Law (including, without limitation, any requirement to obtain regulatory licenses or approvals, and rules promulgated by the Commission), any data retention requirement of any applicable Government Entity, or any taxation requirements; or

B. To defend against, respond to, or otherwise participate in any litigation, investigation, audit, process, subpoena or other proceeding relating to the divestiture or the Revere Photoengraving Product Assets;

provided, *however*, that Respondent may disclose such information as necessary for the purposes set forth in this Paragraph VII pursuant to an appropriate confidentiality order, agreement or arrangement;

provided further, *however*, that pursuant to this Paragraph VII, Respondent shall: (1) require those who view such unredacted documents or other materials to enter into confidentiality agreements with the relevant Acquirer (but shall not be deemed to have violated this requirement if such Acquirer withholds such agreement unreasonably); and (2) use best efforts to obtain a protective order to protect the confidentiality of such information during any adjudication.

VIII.

IT IS FURTHER ORDERED that:

A. Any Remedial Agreement shall be deemed incorporated into this Order.

B. Any failure by Respondent to comply with any term of such Remedial Agreement shall constitute a failure to comply with this Order.

C. Respondent shall include in each Remedial Agreement related to each of the Revere Photoengraving Products a specific reference to this Order, the remedial purposes thereof, and provisions to reflect the full scope and breadth of Respondent's obligations to the Acquirer pursuant to this Order.

D. Respondent shall not modify or amend any of the terms of any Remedial Agreement without the prior approval of the Commission.

IX.

IT IS FURTHER ORDERED that, for purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and upon five (5) days notice to the Respondent made to its principal United States offices, registered office of its United States subsidiary, or its headquarters address, Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

A. access, during business office hours of the Respondent and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession or under the control of the Respondent related to compliance with this Order, which copying services shall be provided by the Respondent at the request of the authorized representative(s) of the Commission and at the expense of the Respondent; and

B. to interview officers, directors, or employees of the Respondent, who may have counsel present, regarding such matters.

X.

IT IS FURTHER ORDERED that this Order shall terminate on December 21, 2022.

By the Commission.

NON-PUBLIC APPENDIX A

REVERE PHOTOENGRAVING PRODUCT

DIVESTITURE AGREEMENTS

[REDACTED]

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

I. Introduction

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an Agreement Containing Consent Orders ("Consent Agreement") from Magnesium Elektron North America, Inc. ("MEL") to remedy the anticompetitive effects stemming from MEL's acquisition of Revere Graphics Worldwide, Inc. ("Revere"). Under the terms of the proposed Consent Agreement, MEL is required to sell assets used in the development, manufacture, and sale of magnesium plates for photoengraving to Universal Engraving, Inc. ("Universal Engraving").

In September 2007, MEL acquired the worldwide assets of Revere for approximately $15 million. At the time of the acquisition, both parties manufactured and sold magnesium plates for photoengraving. The Commission's Complaint alleges that the acquisition violates Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, in the market for magnesium plates for photoengraving.

The proposed Consent Agreement remedies the alleged violation by requiring MEL to provide Universal Engraving with the intellectual property and know-how used to roll and coat magnesium plates for photoengraving applications. In addition, MEL will enter into a supply agreement with Universal Engraving that requires MEL to provide Universal Engraving with magnesium plates for photoengraving until Universal Engraving is able to produce and sell these products on its own. Finally, MEL will enter into a supply agreement with Universal Engraving for chemicals that are used in the magnesium photoengraving process, which Universal Engraving will be able to sell in conjunction with its magnesium plates.

The proposed Consent Agreement has been placed on the public record for thirty days to receive comments by interested persons. Comments received during this period will become part of the public record. After thirty days, the Commission will review the Consent Agreement again and any comments received, and decide whether to withdraw from the proposed Consent Agreement, modify it, or make final the accompanying Decision and Order.

II. The Relevant Market and Market Structure

The relevant market within which to analyze the competitive effects of the acquisition is the worldwide market for magnesium plates for photoengraving. At the time of the acquisition, MEL and Revere were the only manufacturers and sellers of magnesium plate for photoengraving, combining to account for 100 percent of the relevant market.

III. Entry

Entry is not likely to deter or counteract the anticompetitive effects of the acquisition. In order to be suitable for photoengraving applications, magnesium must be rolled and coated to exact and precise specifications. Accordingly, a new entrant would require substantial expertise in order to enter the market. In addition, the market is relatively small, which deters potential entrants from investing in the skill and expertise required for entry.

IV. Effects of the Acquisition

Absent the proposed Consent Agreement, the acquisition would result in further and ongoing competitive harm in the worldwide market for magnesium plates for photoengraving. Prior to the acquisition, MEL and Revere were the only providers of the relevant product. As a result, the acquisition eliminated actual, direct, and substantial competition between MEL and Revere, and resulted in a merger-to-monopoly in the market for magnesium plates for photoengraving.

V. The Consent Agreement

The proposed Consent Agreement remedies the competitive concerns raised by the acquisition by requiring MEL to sell the technology and know-how for manufacturing magnesium plates for photoengraving to Universal Engraving. This divestiture replaces competition that was eliminated as a result of MEL's acquisition of Revere.

Universal Engraving, based in Overland Park, Kansas, is a global leader in the manufacture and sale of products used in the photoengraving process, including brass and copper plates for photoengraving applications. Currently, Universal Engraving does not sell magnesium plates for the photoengraving process. However, under the terms of the proposed Consent Agreement, Universal Engraving will acquire the assets required to compete effectively in that market.

The proposed Consent Agreement also contains several provisions designed to ensure that the divestiture is successful. First, MEL must supply Universal Engraving with magnesium plate now, thereby allowing Universal Engraving to enter the relevant market immediately in competition with MEL. In addition, MEL must provide Universal Engraving with technical assistance related to the manufacture and sale of magnesium plates for photoengraving. Finally, MEL will supply Universal Engraving with chemicals that are used in the photoengraving process, particularly, chemicals that are used to engrave magnesium plates.

If, after the public comment period the Commission determines that Universal Engraving is not an acceptable acquirer of the assets to be divested, or that the manner of the divestitures is not acceptable, MEL must unwind the divestiture and divest the assets within 180 days of the date the Order becomes final to another Commission-approved acquirer. If MEL fails to divest the assets within the 180 days, the Commission may appoint a trustee to divest the relevant assets.

The purpose of this analysis is to facilitate public comment on the proposed Consent Agreement. This analysis is not intended to constitute an official interpretation of the proposed Consent Agreement or to modify its terms in any way.

INTERLOCUTORY, MODIFYING, VACATING, AND MISCELLANEOUS ORDERS

IN THE MATTER OF

POM WONDERFUL LLC, ROLL INTERNATIONAL CORP., STEWART A. RESNICK, LYNDA RAE RESNICK, AND MATTHEW TUPPER

Docket No. 9344. Order, July 25, 2012

Order denying Complaint Counsel's motions to reopen the record and for leave to reply.

ORDER RULING ON MOTION TO REOPEN THE RECORD AND MOTION FOR LEAVE TO FILE A REPLY

On June 13, 2012, Counsel for the Complaint filed a Motion To Reopen the Record in this matter ("June 13 Motion"), and to admit into the record "(1) certain POM product advertisements that Respondents created after the issuance of the Initial Decision; and (2) the Declaration of William Ducklow authenticating these advertisements." On June 25, 2012, Respondent Matthew Tupper and the other Respondents respectively filed Oppositions to the June 13 Motion. On July 2, 2012, Counsel for the Complaint filed a Motion For Leave To File Reply in support of the June 13 Motion.

The evidence that Complaint Counsel attempt to introduce into the record includes (1) advertisements disseminated by Respondents that include quotes from the ALJ's Initial Decision; and (2) other advertisements, some of which are already in the record, and the meaning of which Complaint Counsel are already in the process of appealing to the Commission.

Under Commission Rules 3.51(e)(1) and 3.54(a), 16 C.F.R. §§ 3.51(e)(1), 3.54(a), a party may move to "reopen the proceeding for the reception of further evidence" at any time before the Commission issues its decision. *Brake Guard Products* sets forth the applicable standard for reopening the record. Under that test, "the Commission considers: (1) whether the moving party can demonstrate due diligence (that is, whether there is a bona fide explanation for the failure to introduce the evidence at trial); (2) the extent to which the proffered evidence is probative; (3) whether the proffered evidence is cumulative; and (4) whether reopening the record would prejudice the non-moving party. *Brake Guard Products, Inc.*, 125 F.T.C. 138, 248 n.38 (1998).

We find that Complaint Counsel has acted with diligence, as the facts regarding publication of these claims and advertisements were not available until after the issuance of the Initial Decision. Based on our analysis of the remaining three factors, however, we do not find that Complaint Counsel's arguments warrant reopening the record in this matter to introduce the proposed new exhibits.

Accordingly,

IT IS ORDERED THAT Complaint Counsel's Motion to Reopen the Record is denied; and

IT IS FURTHER ORDERED THAT Complaint Counsel's Motion for Leave to File a Reply is denied.

By the Commission.

IN THE MATTER OF

RENOWN HEALTH

Docket No. C-4366. Order, August 3, 2012

Order directing Renown Health to suspend enforcement of the non-compete provisions against Renown's cardiologist employees.

ORDER TO SUSPEND ENFORCEMENT OF RENOWN NON-COMPETE

The Federal Trade Commission ("Commission"), having initiated an investigation of the acquisition by Renown Health of Reno Heart Physicians ("RHP"), and Renown Health (hereafter referred to as "Renown Health" or "Respondent Renown") having been furnished thereafter with a copy of a draft Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondent Renown with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18; and

Respondent Renown, its attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders ("Consent Agreement"), containing an admission by Respondent Renown of all the jurisdictional facts set forth in the aforesaid draft Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondent Renown that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondent Renown has violated the said Act, and that a Complaint should issue stating its charges in that respect, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its

Complaint, makes the following jurisdictional findings, and issues the following Order Suspending Enforcement of the Renown Non-Compete ("Order to Suspend Enforcement"):

1. Respondent Renown is a not-for-profit corporation organized, existing and doing business under and by virtue of the laws of the State of Nevada with its office and principal place of business located at 1155 Mill Street, Reno, Nevada 89502.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondent Renown, and the proceeding is in the public interest.

ORDER

I.

IT IS ORDERED that, all the capitalized terms used in this Order to Suspend Enforcement, but not defined herein, shall have the meanings attributed to such terms in the Decision and Order contained in the Consent Agreement. In addition to the definitions in Paragraph I of the Decision and Order attached to the Agreement Containing Consent Orders, the following definitions shall apply:

A. "Decision and Order" means:

   1. the Proposed Decision and Order contained in the Consent Agreement in this matter until the issuance of a final Decision and Order by the Commission; and

   2. the Final Decision and Order issued and served by the Commission.

B. "Monitor" means any monitor appointed pursuant to Paragraph III of the Order to Suspend Enforcement.

C. "Termination Date" means the date on which the Decision and Order becomes final, or on the date Renown Health receives notice from the Commission that a final Decision and Order will not be issued in this matter.

II.

IT IS FURTHER ORDERED that Renown Health shall:

A. From the date this Order to Suspend Enforcement becomes final until the Termination Date ("Suspension Period"), not enforce any Renown Non-Compete Provisions against any Cardiologist Employee for any activity that Cardiologist Employee engages in that Relates To providing Termination Notification; *provided, however*, that this Paragraph II.A does not prohibit Renown Health from enforcing any Renown Non-Compete Provisions against any Cardiologist Employee who terminates Contract Services prior to the date the Decision and Order becomes final.

B. Within three (3) days from the date this Order to Suspend Enforcement becomes final, certify that Renown Health has sent by first-class mail, return receipt requested to each Cardiologist Employee the letter attached as Appendix A to this Order within two (2) days of the Agreement Containing Consent Order in this matter being placed on the public record.

C. For any activity Related To this Paragraph II, waive all rights to seek or obtain legal or equitable relief for breach of contract or for violation by any Cardiologist Employee of any Renown Non-Compete Provisions.

D. Not take any other action to discourage, impede, or otherwise prevent any Cardiologist Employee from seeking to terminate Contract Services, pursuant to this Paragraph II.

E. The purpose of this Paragraph is to ensure that those Cardiologist Employees who seek to terminate their Contract Services can offer Cardiology Services in a Reno Cardiology Practice in competition with Renown

Health and to remedy the lessening of competition alleged in the Commission's Complaint.

III.

IT IS FURTHER ORDERED that:

A. Judge Charles McGee shall be appointed Monitor to assure that Renown Health expeditiously complies with all of its obligations and performs all of its responsibilities as required by this Order.

B. No later than one (1) day after the Commission accepts the Order to Suspend Enforcement issues, Renown Health shall, pursuant to the Monitor Agreement, attached as Appendix B and Confidential Appendix B-1 to this Order, transfer to the Monitor all the rights, powers, and authorities necessary to permit the Monitor to perform its duties and responsibilities in a manner consistent with the purposes of this Order.

C. In the event a substitute Monitor is required, the Commission shall select the Monitor, subject to the consent of Renown Health, which consent shall not be unreasonably withheld. If Renown Health has not opposed, in writing, including the reasons for opposing, the selection of a proposed Monitor within ten (10) days after notice by the staff of the Commission to Renown Health of the identity of any proposed Monitor, Renown Health shall be deemed to have consented to the selection of the proposed Monitor. Not later than ten (10) days after appointment of a substitute Monitor, Renown Health shall execute an agreement that, subject to the prior approval of the Commission, confers on the Monitor all the rights and powers necessary to permit the Monitor to monitor Renown Health's compliance with the terms of this Order and the Order to Suspend Enforcement in a manner consistent with the purposes of this Order.

D. In the event a substitute Monitor is required, the Commission shall select the Monitor, subject to the consent of Renown Health, which consent shall not be unreasonably withheld.

E. Renown Health shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Monitor:

1. The Monitor shall have the power and authority to monitor Renown Health's compliance with the terms of this Order to Suspend Enforcement, and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor in a manner consistent with the purposes of this Order to Suspend Enforcement and in consultation with the Commission, including, but not limited to:

    a. receiving Termination Notification from Cardiologist Employees;

    b. notifying each Cardiologist Employee that submitted a Termination Notification whether or not such notification will be an Acceptable Notification; and

    c. assuring that Renown Health expeditiously complies with all of its obligations and performs all of its responsibilities as required by the this Order.

2. The Monitor shall act in a fiduciary capacity for the benefit of the Commission.

3. The Monitor shall serve for such time as is necessary to monitor Renown Health's compliance with the Paragraph II.

4. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to Renown Health's personnel, books, documents, records kept in the ordinary course of

business, facilities and technical information, and such other relevant information as the Monitor may reasonably request, related to Renown Health's compliance with its obligations under this Order to Suspend Enforcement. Renown Health shall cooperate with any reasonable request of the Monitor and shall take no action to interfere with or impede the Monitor's ability to monitor Renown Health's compliance with this Order to Suspend Enforcement.

5. The Monitor shall serve, without bond or other security, at the expense of Renown Health on such reasonable and customary terms and conditions as the Commission may set. The Monitor shall have authority to employ, at the expense of Renown Health, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities. The Monitor shall account for all expenses incurred, including fees for services rendered, subject to the approval of the Commission.

6. Renown Health shall indemnify the Monitor and hold the Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from malfeasance, gross negligence, willful or wanton acts, or bad faith by the Monitor.

7. Renown Health shall report to the Monitor in accordance with the requirements of this Order and/or as otherwise provided in any agreement approved by the Commission. The Monitor shall evaluate the reports submitted to the Monitor by

Renown Health with respect to the performance of Renown Health's obligations under this Order to Suspend Enforcement.

8. Within one (1) month from the date the Monitor is appointed pursuant to this paragraph, every sixty (60) days thereafter, until the termination of this Order to Suspend Enforcement, and otherwise as requested by the Commission, the Monitor shall report in writing to the Commission concerning performance by Renown Health of its obligations under this Order to Suspend Enforcement.

9. Renown Health may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, that such agreement shall not restrict the Monitor from providing any information to the Commission.

F. The Commission may, among other things, require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement Relating To Commission materials and information received in connection with the performance of the Monitor's duties.

G. If the Commission determines that the Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor in the same manner as provided in this Paragraph III.

H. The Commission may on its own initiative, or at the request of the Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Order to Suspend Enforcement.

I. The Monitor appointed pursuant to Paragraph III of this Order to Suspend Enforcement may be the same

Person appointed as Monitor under the Decision and Order.

IV.

IT IS FURTHER ORDERED that within thirty (30) days after the date this Order to Suspend Enforcement becomes final, and every sixty (60) days thereafter until this Order to Suspend Enforcement terminates, Renown Health shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Order to Suspend Enforcement

V.

IT IS FURTHER ORDERED that Renown Health shall notify the Commission at least thirty (30) days prior to:

A. Any proposed dissolution of Renown Health,

B. Any proposed acquisition, merger or consolidation of Renown Health, or

C. Any other change in Renown Health, including but not limited to assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of the Order to Suspend Enforcement.

VI.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order to Suspend Enforcement, and subject to any legally recognized privilege, and upon written request with reasonable notice to Renown Health, Renown Health shall permit any duly authorized representative of the Commission:

A. Access, during office hours of Renown Health and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and all other records and documents in the possession or under the control of

Renown Health related to compliance with this Order to Suspend Enforcement, which copying services shall be provided by Renown Health at the request of the authorized representative(s) of the Commission and at the expense of Renown Health; and

B. Upon five (5) days' notice to Renown Health and without restraint or interference from Renown Health, to interview officers, directors, or employees of Renown Health, who may have counsel present, regarding such matters.

VII.

IT IS FURTHER ORDERED that this Order to Suspend Enforcement shall terminate on the Termination Date.

By the Commission.

Appendix A - Letter to Cardiologist Employees

Dear Physician:

Renown Health ("Renown") has entered into an agreement with the Federal Trade Commission to resolve allegations that its acquisitions of certain cardiology medical practices and employment of the associated physicians has or will restrict competition in violation of Section 7 of the Clayton Act. Although Renown has not admitted liability or admitted that the facts alleged in the Commission's complaint (other than jurisdictional facts) are true, it has agreed to two FTC orders containing certain terms which the Commission believes will ameliorate the competitive effects of the acquisitions.

For your convenience, Renown's obligations under the FTC's Orders, including the terms under which you may terminate your employment, are summarized below. These obligations are described more fully in the FTC's Orders and its Analysis to Aid Public Comment which are both attached to this letter. **Nothing in this summary is intended to modify any of the terms of the Commission's Orders or to provide legal advice.**

<u>Description of the Orders</u>: The first order ("Order to Suspend Enforcement of Renown Non-Compete" or "Order to Suspend") establishes a period of time during which you, as a cardiologist currently employed by Renown, may explore all employment and professional opportunities in the Reno/Sparks area, whether as an employee, a member of a medical group, or in private practice. Renown cannot enforce any non-compete or non-solicitation provisions in your employment contract to interfere with your discussions during this time period. If you actually terminate your employment with Renown during this period, however, the Order to Suspend does not prohibit Renown from pursuing its contract rights.

The second order ("Decision and Order"), if accepted by the Commission after a period allowing for public comment, will allow you to terminate your employment with Renown without penalty so long as the following conditions are met:

(1) You must submit written notice of your intention to terminate your employment with Renown to the special monitor who has been appointed for the purpose of assuring confidentiality. Contact information for the monitor is provided at the conclusion of this letter;

(2) You must intend to continue to practice in the Reno/Sparks area for at least one year;

(3) You must be among the first 10 physicians to submit your notice to terminate employment. Renown is not required to terminate more than 10 employment contracts. To protect the confidentiality of the doctors who want to leave, the monitor will submit to Renown no more than the first 10 notices he receives; and

(4) You must leave employment with Renown within 60 days of Renown receiving your notice from the monitor, but you may not leave prior to the monitor delivering your notice to Renown.

Timing of the Orders: The Order to Suspend begins on August 6, 2012, and continues for at least 30 days while the Commission receives public comment on the Decision and Order and considers those comments. You may enter into discussions and negotiations for new employment during this period. If you decide during this period to terminate your employment, you may notify the special monitor so that your name will be included in the event that the Decision and Order is accepted as final. Because the Order to Suspend will continue in effect until the Commission votes to accept (or reject) the Decision and Order, the conclusion of this time period cannot be determined at this time. It will, however, not end before September 5, 2012.

If the Commission accepts and issues the Decision and Order as final, a second 30-day period (Release Period) will begin. During this period, you may begin or continue discussions and negotiations for new employment. If you decide to terminate your employment, you should notify the monitor of your intention. The monitor will forward to Renown the names of the first ten physicians who have provided notice of their desire to terminate their employment. Renown is not required to allow more than 10 physicians who have given notice to the monitor and satisfied all of the conditions described above to terminate their employment without any penalty. On the other hand, if at the end of this 30-day Release Period fewer than six doctors have notified the monitor of their intent to terminate employment, the period in which cardiologists may continue to explore other employment opportunities and leave Renown's employment without penalty will remain open. This period will continue to remain open until six (rather than 10) cardiologists have terminated their employment with Renown.

PLEASE NOTE:

- The Orders do not ***require*** any doctor to terminate employment with Renown or to work for any other entity.

- The Orders do not ***require*** Renown to fire any doctors. However, the Orders also do not prohibit Renown from negotiating with a doctor regarding a mutual agreement for that physician's employment to be terminated.

- The Orders prohibit Renown from enforcing any non-compete or non-solicitation provisions in any contract, pursuing any breach of contract action, or taking any retaliatory action against any physician who either terminated his or her employment under the terms of the Orders or who sought new employment as allowed by the Orders but decided not to leave.

- If you terminate your employment at times or under terms not described in the Decision and Order, the Decision and Order does not prohibit Renown from pursuing its contract rights.

- Renown may be required to provide you with transitional assistance if you terminate employment to practice as an independent physician (rather than as an employee of another entity) in the Reno/Sparks area. Please review the proposed Decision and Order and your employment agreement with Renown (or contact the monitor) to determine whether these transitional services are available to you.

- If six or more physicians have terminated their employment with Renown by the end of the Release Period, Renown may pursue its legal remedies against any employee who *subsequently* terminates employment with Renown in violation of that employee's contract.

If you have questions about the information contained in this letter or in the Analysis to Aid Public Comment, including questions regarding timing or implementation of the Orders, please contact the monitor, Judge Charles McGee at (775) 823-9975, or FTC's Bureau of Competition's Compliance Division at (202) 326-2031.

Written notifications of intent to terminate employment should be provided to:

Judge Charles McGee
1575 Delucchi Lane, Suite115-1
Reno, NV 89502
Facsimile: (775) 823-9973
Email: judgemcgee@msn.com

Interlocutory Orders, Etc.

Appendix B – Monitor Agreement
[Redacted Public Version]

MONITOR AGREEMENT

This Monitor Agreement ("Monitor Agreement") entered into this 18th day of July, 2012 by Renown Health and Judge Charles McGee provides as follows:

WHEREAS, the United States Federal Trade Commission (the "Commission"), *In the Matter of Renown Health*, has accepted for public comment an Agreement Containing Consent Order ("Consent Agreement"), incorporating an Order to Suspend Enforcement of Renown Non-Compete ("Order to Suspend Enforcement") and a Decision and Order ("Decision and Order"), collectively referred to as the "Commission Orders," with Renown Health, and the State of Nevada, through its Attorney General ("Nevada Attorney General"), has filed in the United States District Court for the District of Nevada, a Final Judgment ("Nevada Order") with Renown Health (collectively, the Commission Orders and the Nevada Order are referred to as the "Orders"). The Orders, among other things, require Renown Health to waive enforcement of certain contractual terms with its Cardiologist Employees so that a certain number of those employees can leave Renown Health's employment to practice cardiology in the Reno area, and provides for the appointment of one or more Monitors to ensure that Renown Health complies with its obligations under the Orders;

WHEREAS, the staff of the Commission and the Nevada Attorney General have appointed Charles McGee as such monitor (the "Monitor") pursuant to the Orders to monitor Renown Health's compliance with the terms of the Consent Agreement and Orders, and Charles McGee has consented to such appointment;

WHEREAS, the staff of the Commission and the Nevada Attorney General on July 17, 2012 notified Renown Health of the selection of Judge Charles McGee as the Monitor, and Renown Health on July 18, 2012 agreed to the selection of Judge Charles McGee, and is executing this agreement that, subject to the prior approval of the Commission and the Nevada Attorney General, confers on the Monitor all the rights and powers necessary to permit the Monitor to monitor Renown Health's compliance with the relevant requirements of the Orders in a manner consistent with the purpose of the Orders;

WHEREAS, this Monitor Agreement, although executed by the Monitor and Renown Health is not effective for any purpose, including but not limited to imposing rights and responsibilities on Renown Health or the Monitor under the Orders, until it has been approved by the Commission and the Nevada Attorney General; and

WHEREAS, the parties to this Monitor Agreement intend to be legally bound;

NOW, THEREFORE, the parties agree as follows:

1. Capitalized terms used herein and not specifically defined herein shall have the respective definitions given to them in the Orders.

2. The Monitor shall have all of the powers and responsibilities conferred upon the Monitor by the Orders.

3. Renown Health hereby agrees that it will fully comply with all terms of the Orders requiring it to confer all rights, powers, authority and privileges upon the Monitor, or to impose upon itself any duties or obligations with respect to the Monitor, to enable the Monitor to perform the duties and responsibilities of the Monitor thereunder.

4. The Monitor shall have the power and authority to monitor Renown Health's compliance with the terms of the Orders, and shall carry out the duties of the Monitor in consultation with the Commission and the Nevada Attorney General, including but limited to:

   a. receiving Termination Notifications from Cardiologist Employees;

   b. receiving from Renown Health notification that it has terminated the employment of a Cardiologist Employee;

   c. notifying each Cardiologist Employee that submitted a Termination Notification whether or not such notification will be an Acceptable Termination;

   d. forwarding all Acceptable Terminations to Renown Health pursuant to the Order; and

   e. assuring Renown Health's expeditious compliance with all of its obligations and performance of all of its responsibilities as required by the Orders.

5. Renown Health further agrees that:

   a. it will provide the Monitor with copies of all reports submitted to the Commission and the Nevada Attorney General pursuant to the Orders, simultaneous with the submission of such reports to the Commission and the Nevada Attorney General, for the duration of the Monitor's term under this Agreement;

   b. it will, subject to any demonstrated legally recognized privilege, grant the Monitor full and complete access to Renown Health's personnel, books, documents, records kept in the normal course of business, facilities and technical information, and such other relevant information as the Monitor may reasonably request, related to Renown Health's compliance with their obligations under the Orders; and

   c. it will cooperate with any reasonable request of the Monitor and shall take no action to interfere with or impede the Monitor's ability to monitor Renown Health's compliance with the Orders.

6. Renown Health shall promptly notify the Monitor of any significant written or oral communication that occurs after the date of this Monitor Agreement between Renown Health, the Commission, and the Nevada Attorney General related to the Orders, together with copies of such communications.

Interlocutory Orders, Etc.

7. The Monitor shall serve, without bond or other security, at the expense of Renown Health on such reasonable and customary terms and conditions as the Commission and the Nevada Attorney General may set. The Monitor shall have authority to employ, at the expense of Renown Health, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities.

8. Renown Health shall pay the Monitor, in accordance with the fee schedule attached hereto as Confidential Appendix A, for all reasonable time spent in the performance of the Monitor's duties and responsibilities, including all monitoring activities, all work in connection with the negotiation and preparation of this Monitor Agreement, all work in the nature of final reporting and file closure, and all reasonable and necessary travel time.

   a. In addition, Renown Health will pay (i) all out-of-pocket expenses reasonably incurred by the Monitor in the performance of the Monitor's duties and responsibilities, including any international telephone calls and any auto, train or air travel in the performance of the Monitor's duties, and (ii) all fees and disbursements reasonably incurred by such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities.

   b. The Monitor shall have full and direct responsibility for compliance with all applicable laws, regulations and requirements pertaining to work permits, income and social security taxes, unemployment insurance, worker's compensation, disability insurance, and the like.

9. The Monitor shall maintain the confidentiality of all information provided to the Monitor by Renown Health. Such information shall be used by the Monitor only in connection with the performance of the Monitor's duties pursuant to this Monitor Agreement. Such information shall not be disclosed by the Monitor to any third party other than:

   a. persons employed by, or working with, the Monitor under this Monitor Agreement, in which case such persons shall be informed of, and agree in writing to abide by, the confidentiality obligations applicable to the Monitor, in accordance with Paragraph 12 below, or

   b. persons employed at or retained by the Commission or the Nevada Attorney General who are working on this matter.

10. The Monitor shall maintain a record and inform the Commission and the Nevada Attorney General of all persons (other than representatives of the Commission and the Nevada Attorney General) to whom confidential information related to this Monitor Agreement has been disclosed.

11. The Monitor shall act in a fiduciary capacity for the benefit of the Commission and the Nevada Attorney General.

12. Upon termination of the Monitor's duties under this Monitor Agreement, the Monitor shall promptly return to Renown Health all material provided to the Monitor by Renown Health and shall destroy any material prepared by the Monitor that contains or reflects any confidential information of Renown Health. Nothing herein shall abrogate the Monitor's duty of confidentiality.

13. To the extent that the Monitor wishes to retain any employee, agent, consultant or any other third party to assist the Monitor in accordance with the Orders, the Monitor shall ensure that, prior to being retained, such persons execute a confidentiality agreement in a form agreed upon by the Monitor and Renown Health.

14. Nothing in this Monitor Agreement shall require Renown Health to disclose any material or information that is subject to a legally recognized privilege or that Renown Health is prohibited from disclosing by reason of law or an agreement with a third party.

15. Each party shall be reasonably available to the other to discuss any questions or issues that either party may have concerning compliance with the Orders as they relate to Renown Health.

16. Renown Health hereby confirms its obligation to indemnify the Monitor and hold the Monitor harmless in accordance with and to the extent required by the Orders. Renown Health shall indemnify the Monitor and hold the Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of or in connection with, the performance of the Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, or bad faith by the Monitor.

17. In the event of a disagreement or dispute between Renown Health and the Monitor concerning Renown Health's obligations under the Orders, and in the event that such disagreement or dispute cannot be resolved by the parties, either party may seek the assistance of the Commission's Compliance Division or the staff of the Nevada Attorney General to resolve this issue.

18. This Monitor Agreement shall be subject to the substantive law of the State of Nevada (regardless of the choice of law principles of Nevada or those of any other jurisdiction).

19. This Monitor Agreement shall terminate when the last obligation under Paragraphs II, III, IV.A.1-4, and V of the Decision and Order and Paragraphs 33, 34, 35(a)-(d), and 36 of the Nevada Order have been fully performed; provided, however, that the Commission and the Nevada Attorney General may extend this Monitor Agreement as may be necessary or appropriate to accomplish the purposes of the Orders.

20. In the event that, during the term of this Monitor Agreement, the Monitor becomes aware that he has or may have a conflict of interest that may affect or could have the appearance of affecting the performance by the Monitor of any of his duties under this Monitor Agreement, the Monitor shall promptly inform Renown Health, the Commission, and the Nevada Attorney General of such conflict or potential conflict.

21. In the performance of his functions and duties under this Monitor Agreement, the Monitor shall exercise the standard of care and diligence that would be expected of a reasonable person in the conduct of his or her own business affairs.

22. It is understood that the Monitor will be serving under this Monitor Agreement as an independent contractor and that the relationship of employer and employee shall not exist between Monitor and Renown Health.

23. This Monitor Agreement is for the sole benefit of the parties hereto and their permitted assigns, the Commission, and the Nevada Attorney General, and nothing herein express or implied shall give or be construed to give any other person any legal or equitable rights hereunder.

24. This Monitor Agreement contains the entire agreement between the parties hereto with respect to the matters described herein and replaces any and all prior agreements or understandings, whether written or oral.

25. Any notices or other communication required to be given hereunder shall be deemed to have been properly given if sent by mail, facsimile (with acknowledgment of receipt of such facsimile having been received), or electronic mail, to the applicable party at its address below (or to such other address as to which such party shall hereafter notify the other party):

If to the Monitor, to:

Judge Charles McGee
1575 Delucchi Lane, Suite115-1
Reno, NV 89502

Telephone: (775) 823-9975
Facsimile: (775) 823-9973
Email: judgemcgee@msn.com

If to Renown Health, to:

Renown Health
Attention: Kelly Testolin, General Counsel
1155 Mill Street, Z-7

Reno, NV 89502

Telephone: (775) 982-6054
Facsimile: (775) 982-5754
Email: ktestolin@renown.com

With copy to:

William Berlin
Ober Kaler
1401 H Street, N.W., Suite 500
Washington, DC. 20005

Telephone: (202) 326-5011
Facsimile: (202) 408-0640
Email: weberlin@ober.com

If to the Commission, to:

Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, DC 20580
Attention: Secretary
Telephone: (202) 326-2514
Facsimile: (202) 326-2496

With copy to:

Federal Trade Commission
601 New Jersey Avenue, N.W.
Washington, D.C. 20001
Attention: Assistant Director for Compliance
Telephone: (202) 326-2526
Facsimile: (202) 326-3396

If to the Nevada Attorney General, to:

State of Nevada Office of the Attorney General
Bureau of Consumer Protection
Attention: Antitrust Unit
10791 W. Twain Avenue, Suite 100
Las Vegas, NV 89135
Telephone: (702) 486-3420
Facsimile: (702) 486-3283

Interlocutory Orders, Etc.

26. This Monitor Agreement shall not become binding until it has been approved by the Commission and the Nevada Attorney General.

27. This Monitor Agreement may be signed in counterparts.

IN WITNESS WHEREOF, the parties hereto have executed this Monitor Agreement as of the date first above written.

Renown Health

James J. Ha[illegible]

Chief Executive Officer
Renown Health

MONITOR

Charles A. McGee

Confidential Appendix B-1

[Redacted From the Public Version, But Incorporated By Reference]

IN THE MATTER OF

MCWANE, INC.
AND
STAR PIPE PRODUCTS, LTD.

Docket No. 9351. Order, August 6, 2012

Order denying respondent's motion requesting the Commission conduct an oral argument on motions for summary disposition.

ORDER DENYING REQUEST FOR ORAL ARGUMENT

On June 8, 2012, Respondent McWane, Inc. (hereinafter "Respondent") filed a Motion For Summary Decision, and Complaint Counsel filed a Motion For Partial Summary Decision. On July 3, 2012, Respondent filed a Notice of Request For Oral Argument (hereinafter "Motion") in which Respondent requested "oral argument on the pending motions for summary disposition." Although the filing is styled as a Notice of Request, the Commission has determined to treat the filing as a Motion which Complaint Counsel have not opposed.[1]

Commission Rule 3.52(h), 16 C.F.R. § 3.52(h), provides in relevant part that "oral argument will be held in all cases on appeal or review to the Commission, unless the Commission otherwise orders . . ." There is no equivalent rule addressing oral argument relating to motions for summary disposition. Moreover, Respondent's Motion does not provide an explanation as to why oral argument is necessary.[2] The parties have filed extensive briefs covering the issues presented by the motions for summary disposition, and oral argument is not likely to provide any additional information not already thoroughly addressed in those

[1] Commission Rule 3.22(d), 16 C.F.R. § 3.22(d), provides that if a party opposing a given Motion does not file an Answer, the party will be deemed to have consented to granting the relief requested in the Motion.

[2] Indeed, although Commission Rule 3.22(c), 16 C.F.R. § 3.22(c), provides in relevant part that all Motions must state "the grounds" for the action requested, Respondent's Motion states only that "McWane respectfully requests oral argument on the pending motions for summary disposition."

briefs and the related materials.[3] The Commission has therefore determined that oral argument is not necessary to determine the issues currently pending before the Commission. Accordingly,

IT IS ORDERED that Respondent's Motion requesting that the Commission conduct an oral argument be, and it hereby is, **DENIED**.

By the Commission.

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[3] The Commission relied on these same principles to determine not to conduct an oral argument in *In the Matter of Gemtronics, Inc., and William H. Isely, Docket No. 9330* (addressing the Respondents' appeal from the Initial Decision on their application for attorney fees and other expenses). *See* Order Dispensing With Oral Argument (October 7, 2010), *available at* http://www.ftc.gov/os/adjpro/d9330/101007gemtronicsorder.pdf.

IN THE MATTER OF

MCWANE, INC.
AND
STAR PIPE PRODUCTS, LTD.

Docket No. 9351. Order, August 9, 2012

Order denying respondent's Motion for Summary Decision and Complaint Counsel's Motion for Partial Summary Decision.

ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY DECISION AND COMPLAINT COUNSEL'S MOTION FOR PARTIAL SUMMARY DECISION

On June 8, 2012, Respondent McWane, Inc. filed a Motion For Summary Decision, and Complaint Counsel filed a Motion For Partial Summary Decision. The Commission has considered both Motions, as well as both parties' memoranda of law in support of and in opposition to these Motions. For the reasons set forth in the accompanying Opinion, the Commission has determined to deny both Motions. Accordingly,

I.

IT IS ORDERED THAT Respondent's Motion For Summary Decision be, and it hereby is, **DENIED;** and

II.

IT IS FURTHER ORDERED THAT Complaint Counsel's Motion for Partial Summary Decision be, and it hereby is, **DENIED**.

By the Commission.

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.

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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; CX 1186. Each

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

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.

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longer a significant fittings provider (CX 0313-004; Brakefield Dep. 128-29), the others chose to invite it to participate because counsel had advised that having a fourth member would reduce legal risk (CX 0048-001).

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.

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 (3rd Cir. 2004). Because of their "pernicious effect on

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

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

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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).

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 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

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

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.*

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*, 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.

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

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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.

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.*

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).

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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.

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,

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.

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.

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:

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

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.

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

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

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 tonsshipped 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

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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).

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

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 Conversion Fee*

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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).

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

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.

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

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 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).

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.

Finally, there is also evidence belying McWane's contention that job pricing continued unabated following the dissemination of the January pricing letter.

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 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, 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

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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.

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-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

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).

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; *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 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*.

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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").

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

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.

And McWane clearly recognized that Sigma's entry posed a threat to McWane's domestic fittings sales.

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

Bhutada Dep. 74-75.

Id. 74-75, 128. Indeed, Ramesh Bhutada, Star's CEO testified that

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]

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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.

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; 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]

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

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

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 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,

, 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

STATEMENT OF COMMISSIONER J. THOMAS ROSCH, CONCURRING IN PART AND DISSENTING IN PART *IN THE MATTER OF MCWANE, INC. AND STAR PIPE PRODUCTS, LTD.*

This matter, which has been in Part 3 adjudicative proceedings before Chief Administrative Law Judge D. Michael Chappell, comes before the Commission on Complaint Counsel's motion for partial summary decision and Respondent McWane, Inc.'s ("McWane") cross-motion for summary decision on all counts of the Administrative Complaint.[1] The trial of this matter is currently scheduled to begin on September 4, 2012. While I join my colleagues in denying parts of McWane's cross-motion based on the existence of genuine issues of material fact for trial, I would grant McWane's cross-motion as it relates to the sixth and seventh counts of the Complaint for monopolization and attempted monopolization. Those counts relate to McWane's alleged exclusion of its rival, Respondent Star Pipe Products, Ltd. ("Star"), from the relevant market for domestically produced, small- and medium-size, ductile iron pipe fittings ("DIPFs") for use in water infrastructure projects that are specified as domestic only (hereinafter, "domestic-only DIPF market"). *See* Compl. ¶¶ 22, 56–63, 69–70. Additionally, although I join my colleagues in denying Complaint Counsel's motion, I do so for slightly different reasons. Below are my reasons for deciding these two issues differently.

I.

In its cross-motion, McWane has argued that Star's entry into the domestic- only DIPF market—with more than 130 customers and $6.5 million in sales in its first full year of business—conclusively demonstrates as a matter of law that McWane did not engage in any alleged "exclusive dealing" that blocked or deterred Star's entry. Resp't McWane's Mem. Supp. Mot. for Summ. Decision 31–32. In my view, the basic facts and figures concerning Star's

1 Under the Commission's Rules of Practice for Adjudicative Proceedings ("Part 3 Rules"), motions for summary decision made under Rule 3.24(a)(1) are directly referred to and ruled on by the Commission, unless the Commission chooses to refer them back to the Administrative Law Judge for disposition. 16 C.F.R. § 3.22(a) (2012).

entry, which are not seriously controverted by Complaint Counsel, warrant the grant of partial summary decision to McWane on this issue.

Supreme Court case law[2] provides that a party may move for summary decision either by affirmatively producing evidence that negates an essential element of the opposing party's claim, or by demonstrating that the opposing party's evidence is insufficient to establish an essential element of its claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 153–56 (1970). But these two options are not necessarily binary and mutually exclusive. "Courts are rightfully cautious about requiring a defendant to effectively 'prove a negative' in order to avoid trial on a specious claim. . . . Thus, if the summary judgment record satisfactorily demonstrates that the plaintiff's case is, and may be expected to remain, deficient in vital evidentiary support, this may suffice to show that the movant has met its initial burden." *Carmona v. Toledo*, 215 F.3d 124, 133 (1st Cir. 2000) (citations omitted).

In this case, by raising the undisputed fact and extent of Star's entry, McWane challenges Complaint Counsel's ability to prove at trial that McWane's alleged "exclusive dealing" practices have caused a "significant" degree of foreclosure. *United States v. Microsoft Corp.*, 253 F.3d 34, 69 (D.C. Cir. 2001) ("Though what is 'significant' may vary depending upon the antitrust provision under which an exclusive deal is challenged, it is clear that in all cases the plaintiff must both define the relevant market and prove the degree of foreclosure."); *see also id.* ("Because an exclusive deal affecting a small fraction of a market clearly cannot have the requisite harmful effect upon competition, the requirement of a significant degree of foreclosure serves a useful screening function."). Importantly, at least two circuit courts have held that the standard for proving "significant" foreclosure should be

2 Supreme Court case law governing summary judgment motions under Rule 56 of the Federal Rules of Civil Procedure applies to summary decision motions under Commission Rule 3.24 as well. *See, e.g., Realcomp II Ltd.*, No. 9320, 2007 FTC LEXIS 67, at *10 (F.T.C. May 21, 2007); *Basic Research, LLC*, No. 9318, 2005 FTC LEXIS 100, at *2–3(F.T.C. June 27, 2005).

higher "[w]here the exclusive dealing restraint operates at the distributor level, rather than at the consumer level, . . . because it is less clear that a restraint involving a distributor will have a corresponding impact on the level of competition in the consumer market." *Ryko Mfg. Co. v. Eden Servs.*, 823 F.2d 1215, 1235 (8th Cir. 1987). *Accord Omega Envtl., Inc. v. Gilbarco, Inc.*, 127 F.3d 1157, 1162–63 (9th Cir. 1997).

Furthermore, it bears repeating here that the standard of proving "significant" foreclosure is necessary because "'[v]irtually *every* contract to buy 'forecloses' or 'excludes' alternative sellers from *some* portion of the market, namely the portion consisting of what was bought.'" *Microsoft*, 253 F.3d at 69 (quoting *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 236 (1st Cir. 1983) (Breyer, J.)). For this very reason, antitrust law requires exclusionary conduct that is the predicate for a monopolization claim actually to impair a rival from entering and competing effectively. *See* IIB PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 422e3, at 100 (3d ed. 2007) ("Entry while alleged exclusionary conduct is underway may suggest both that entry is easy and that the defendant's conduct is not really predatory at all."); III PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 651d, at 116 (3d ed. 2008) ("Exclusionary behavior must be conduct that prevents actual or potential rivals from competing or that impairs their opportunities to do so effectively.").

Against the backdrop of the above recited law, Complaint Counsel's case rests on establishing the following counterfactual—in the domestic-only DIPF market in which Star was a new entrant, how much more market share should Star have obtained within a specified period of time but for McWane's alleged "exclusive dealing" practices? And was this extra market share significant or substantial? In my view, Complaint Counsel has not pointed to any evidence in the record that would allow a rational trier of fact to answer these questions at trial.

As a threshold matter, it cannot be seriously disputed that if McWane possessed putative monopoly power in a domestic-only DIPF market, as Complaint Counsel alleges, then it acquired that power "from growth or development as a consequence of . . . historic accident[,]" *United States v. Grinnell Corp.*, 384 U.S.

563, 571 (1966)—namely, the passage of the American Recovery and Reinvestment Act of 2009 ("ARRA"), with its "Buy American" requirement, and the fact that McWane happened to be, at that time, the sole supplier of a full line of domestically produced DIPF in the most commonly used size ranges. Compl. ¶¶ 3–4, 39–40; Resp't McWane's Answer to Compl. ¶ 40. Put differently, Star had zero market share in the domestic-only DIPF market when it announced its intent to enter that market in June 2009. Compl. ¶ 56; Resp't McWane's Answer to Compl. ¶ 56; Compl. Counsel's Stmt. of Undisputed Facts ¶ 7; Compl. Counsel's Resp. to Resp't's Stmt. of Undisputed Facts ¶ 97.

Yet, Star was able to enter the domestic-only DIPF market within a few months of its announcement without building or buying a domestic foundry. Compl. Counsel's Resp. to Resp't's Stmt. of Undisputed Facts ¶ 98. During that fall of 2009, Star made sales to 29 customers, ending up with almost $300,000 in sales, despite having projected no sales of domestic-only DIPF for that year. *Id.* ¶¶ 100, 102. Complaint Counsel does not dispute Star's volume of sales for 2009. *Id.* ¶ 103.

Nor does Complaint Counsel dispute that in 2010, Star sold approximately $6.5 million in domestic fittings to 132 customers, that 20 customers had increased their purchases from 2009 levels, and that Star made sales to 106 new customers that year. Compl. Counsel's Stmt. of Undisputed Facts ¶ 204; Compl. Counsel's Resp. to Resp't's Stmt. of Undisputed Facts ¶ 104. Similarly, there is no dispute that in 2011, Star sold approximately $6.5 million in domestic fittings to 126 customers, that 65 customers had increased their purchases from 2010 levels, and that Star made sales to 28 new customers that year. Compl. Counsel's Stmt. of Undisputed Facts ¶ 204; Compl. Counsel's Resp. to Resp't's Stmt. of Undisputed Facts ¶¶ 107–08. Or that Star's sales of domestic fittings for the first quarter of 2012 totaled $1.7 million. Compl. Counsel's Stmt. of Undisputed Facts ¶ 204.

Instead, Complaint Counsel's principal argument is to assert that some of Star's largest customers of domestic fittings had been threatened by McWane with repercussions or had internal corporate policies, out of fear of McWane, not to do business with Star unless they were unable to procure the domestic fittings from McWane. That may be true but it does not change the fact that these customers still accounted for a significant percentage of Star's 2009–12 sales, and many of them have increased their total purchases of domestic fittings from Star year over year since 2009. *See* Compl. Counsel's Stmt. of Undisputed Facts ¶¶ 182, 185, 195–96; Compl. Counsel's Resp. to Resp't's Stmt. of Undisputed Facts ¶¶ 103, 105–06, 109, 111.

It is not enough for Complaint Counsel simply to raise the question whether large waterworks distributors like Ferguson, HD Supply, and WinWholesale might have purchased more domestic fittings from Star but for McWane's alleged "exclusive dealing" practices. The triable issue of material fact is not whether—but how much more—and Complaint Counsel has not pointed to any evidence in the record that would allow a rational trier of fact to answer the latter question at trial. It would be one thing if the record demonstrated that particular distributors made no purchases from Star because of McWane's alleged "exclusive dealing" practices; at least that would be probative of the extent of foreclosure. But even large distributors that supposedly had company-wide policies against doing business with Star still purchased nontrivial amounts of domestic fittings and increased the amounts of those purchases year over year (e.g., HD Supply), and other distributors ignored McWane's threat altogether and chose to do business with Star anyway (e.g., Hajoca).

This is therefore not a case where Complaint Counsel would be able to prove that Star did not have access to any critical channel of distribution. *Cf. LePage's Inc. v. 3M*, 324 F.3d 141, 159–60 (3d Cir. 2003) (describing how 3M cut LePage's off from key retail pipelines, namely, superstores like Kmart and Wal-Mart that provide as cheap, high-volume supply lines to consumers); *Microsoft*, 253 F.3d at 70–71 (describing Microsoft's exclusive deals with 14 of the top 15 Internet access providers in North America, which comprise one of two major channels of distribution for browsers).

Evaluated under any objective standard, and viewing all inferences in a light most favorable to Complaint Counsel (as we must), the undisputed facts demonstrate that Star's entry was not de minimis or trivial. As Complaint Counsel itself points out, Star was the smallest of the three major DIPF sellers, with only a 20 percent share of the DIPF market overall, compared to McWane's

45 percent share. Compl. Counsel's Stmt. of Undisputed Facts ¶¶ 6, 40. Thus, the fact that Star attained a 10 percent share of the domestic-only DIPF market—from zero share—in less than three years, *id.* ¶ 206, undermines Complaint Counsel's basic theory that McWane's alleged "exclusive dealing" practices made entry difficult or ineffective.

McWane is therefore entitled to partial summary decision under the case law. Where a complainant has failed to show that the alleged exclusionary practices have actually created a barrier to entry or expansion into the relevant market, summary judgment dismissing a monopolization claim is appropriate. *See Western Parcel Express v. United Parcel Serv., Inc.*, 65 F. Supp. 2d 1052, 1062–63 (N.D. Cal. 1998), *aff'd*, 190 F.3d 974, 976 (9th Cir. 1999); *CDC Techs., Inc. v. Idexx Labs., Inc.*, 7 F. Supp. 2d 119, 121 (D. Conn. 1998), *aff'd*, 186 F.3d 74, 77 (2d Cir. 1999).

Complaint Counsel's other arguments are unavailing. First, Complaint Counsel argues that Star's entry could have been "better" because Star has thus far not attained the volume of business necessary to justify an investment in its own, low-cost, domestic production facility, which would make it a "fully efficient" competitor. Compl. Counsel's Opp. at 28. But that argument improperly turns the Section 2 question from one about the extent of foreclosure caused by McWane's alleged "exclusive dealing" practices to one about the extent to which Star has been able to realize its own dreams of expansion in the domestic-only DIPF market. *See* Compl. Counsel's Stmt. of Undisputed Facts ¶ 205. That is the wrong inquiry because the antitrust laws were enacted for the protection of competition, not competitors. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977).

Complaint Counsel's other argument is to aver that McWane continues to account for over 90% of all domestic-only DIPF sales, and prices for domestic-only DIPFs are 30%–50% higher than prices for identical fittings in open source projects. Compl. Counsel's Opp. at 26. Neither of those facts is sufficient to create a triable issue concerning the extent of foreclosure.[3] As I pointed

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3 I should note that Complaint Counsel's Statement of Undisputed Facts fails to cite to any support in the record for McWane's 90% market share. *See*

out earlier, McWane's high market share is to be expected since it came by its putative monopoly status by historic accident when ARRA imposed a "Buy American" requirement, and McWane happened to be the only DIPF seller with domestic production. But as circuit courts have held, a high market share does not necessarily equate to durable monopoly power if entry is easy or successful. *See Tops Mkts., Inc. v. Quality Mkts., Inc.*, 142 F.3d 90, 99 (2d Cir. 1997); *United States v. Syufy Enters.*, 903 F.2d 659, 664 & n.6 (9th Cir. 1990).

The fact that prices for domestic fittings are markedly higher than those for open source parts does not create a genuine issue of fact for trial either. One would expect to see higher prices for domestic fittings in what is essentially a price discrimination submarket created by the "Buy American" program. Also, one cannot necessarily expect prices for domestic fittings to go down substantially as a result of Star's entry; after all, Star was entering to get a share of the monopoly profits created by the "Buy American" program. Using a pharmaceutical analogy, Star was entering to compete as another branded company, not as a generic company.

For all of the above reasons, the record taken as a whole, including the undisputed facts concerning Star's entry, would not lead a rational trier of fact to find for Complaint Counsel on the question of significant foreclosure. Accordingly, there is no genuine issue for trial. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

II.

Complaint Counsel has moved for partial summary decision on the issue whether an April 28, 2009 telephone call between Dan McCutcheon, Vice President of Sales of Star, and Rick Tatman, Vice President & General Manager of Tyler/Union (McWane), violated Section 1 of the Sherman Act, which was interpreted by

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Compl. Counsel's Stmt. of Undisputed Facts ¶ 206. But I assume for the purposes of this opinion that Complaint Counsel could prove the market shares of McWane and Star for sales of domestic-only DIPFs.

the Supreme Court in *Sugar Institute, Inc. v. United States*, 297 U.S. 553, 601 (1936), to prohibit as unreasonable restraints "steps taken to secure adherence, without deviation, to prices and terms . . . announced [in advance unilaterally by each competitor]." I would deny Complaint Counsel's motion for the following two reasons.

First, although *Sugar Institute* may support Complaint Counsel's theory of liability regarding that telephone call, *Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1 (1979), arguably does not. In *Broadcast Music*, the Supreme Court cautioned, when applying the per se rule, against the use of "easy labels [that] do not always supply ready answers." *Id.* at 8. The Court explained that price-fixing "is not a question simply of determining whether two or more potential competitors have literally 'fixed' a 'price.'" *Id.* at 9. Rather, "[a]s generally used in the antitrust field, 'price fixing' is a shorthand way of describing certain categories of business behavior to which the per se rule has been held applicable." *Id.*

Here, while the April 2009 telephone call may have involved McWane confirming its issuance of a previously announced price list to Star, that confirmation—which perhaps might be literally interpreted as the "fixing" of a price—does not necessarily mean that McWane and Star engaged in a type of business behavior that has been subject to the per se rule. To apply *Sugar Institute* to this situation is arguably to use "easy labels" that *Broadcast Music* eschews. That makes this a close case in my mind.

Second, even if *Broadcast Music* does not call into question the continuing vitality of *Sugar Institute,* Complaint Counsel has not explicitly relied on this theory of liability in its Complaint. The April 2009 telephone call has not been raised in the Complaint as an overt act of the alleged price-fixing conspiracy. McWane has therefore moved to strike Complaint Counsel's motion for partial summary decision on the ground that the issue of the legality of the April 28, 2009 telephone call is not one that is "being adjudicated." *See* 16 C.F.R. § 3.24(a)(1) (2012) (permitting motions for summary decision only as to "the issues being adjudicated"); *see also N. Am. Philips Corp.*, No. 9209, 1988 FTC LEXIS 161 (F.T.C. Mar. 4, 1988) (order denying respondents' motion for summary decision because complaint counsel was not challenging their advertising of second-generation, replacement filters for the Norelco Clean Water Machine).

In response, Complaint Counsel has argued that although the legality of the April 2009 telephone call is not specifically raised in its Complaint, the issue is reasonably within the scope of the Complaint, and is to be treated in all respects as if it had been raised in the Complaint, as long as it is tried by the express or implied consent of the parties. *See* 16 C.F.R. § 3.15(a)(2) (2012). Commission Rule 3.15(a)(2), invoked by Complaint Counsel, is based on Rule 15(b)(2) of the Federal Rules of Civil Procedure, which makes clear that such amendments to the pleadings relate to issues that have been through trial. FED. R. CIV. P. 15(b) (entitled "Amendments During and After Trial"). Although there has been a split among the circuit courts as to whether Rule 15(b) also applies at the summary judgment stage, *see Ahmad v. Furlong*, 435 F.3d 1196, 1203 n.1 (10th Cir. 2006) (citing circuit court cases going either way), as a matter of practicality, I would follow the plain language of Rule 15(b) and remand this issue to be tried based on Complaint Counsel's reliance on Commission Rule 3.15(a)(2).

IN THE MATTER OF

KINDER MORGAN, INC.

Docket No. C-4355. Order, November 8, 2012

Letter approving the divesture of certain assets to Tallgrass Energy Partners LP.

LETTER ORDER APPROVING DIVESTITURE OF CERTAIN ASSETS

Laura A. Wilkinson, Esq.
Weil, Gotshal & Manges LLP

Re: *In the Matter of Kinder Morgan, Inc., Docket No. C-4355*

Dear Ms. Wilkinson:

This is in reference to the Application For Approval of Proposed Divestiture filed by Kinder Morgan, Inc. ("Kinder Morgan") and received on September 28, 2012 ("Application"). Pursuant to the Decision and Order in Docket No. C-4355, Kinder Morgan requests prior Commission approval of its proposal to divest certain assets to Tallgrass Energy Partners LP ("Tallgrass").

After consideration of Kinder Morgan's Application and other available information, the Commission has determined to approve the proposed divestiture as set forth in the Application. In according its approval, the Commission has relied upon the information submitted and the representations made by Kinder Morgan and Tallgrass in connection with Kinder Morgan's Application and has assumed them to be accurate and complete.

By direction of the Commission, Commissioner Ramirez recused.

IN THE MATTER OF

POM WONDERFUL LLC, ROLL INTERNATIONAL CORP., STEWART A. RESNICK, LYNDA RAE RESNICK, AND MATTHEW TUPPER

Docket No. 9344. Order, November 27, 2012

Order extending the timetable to issue the Decision of the Commission and Final Order until January 18, 2013.

ORDER EXTENDING THE TIMETABLE FOR ISSUING FINAL DECISION AND ORDER

In order to ensure that it can give full consideration to the many issues presented by the cross-appeals in this matter, the Commission has determined, pursuant to Rule 4.3(b), 16 C.F.R. § 4.3(b), to extend until January 18, 2013 the timetable for issuing a final decision and order.

IT IS SO ORDERED.

By the Commission.

GOOGLE, INC.

FTC File No. 111 0163 – Decision, September 7, 2012

RESPONSE TO SAMSUNG TELECOMMUNICATIONS AMERICA, LLC'S REQUEST FOR FULL COMMISSION REVIEW OF ITS PETITION TO LIMIT SUBPOENA *DUCES TECUM* DATED FEBRUARY 9, 2012

Dear Messrs. Huffman and Stoltz and Ms. Williams:

This letter advises you of the Commission's disposition of Samsung Telecommunications America, LLC's ("STA's") request dated June 26, 2012, for full Commission review of the denial of its petition to limit a subpoena *duces tecum* ("subpoena").

The Commission issued the subpoena to STA on February 9, 2012. STA filed its petition to limit the subpoena on April 21, 2012. On June 18, 2012, Commissioner Brill directed the issuance of a letter denying the petition in its entirety and directing STA to comply by July 2, 2012. This ruling was delivered to STA by mail on June 22, 2012. STA timely filed this request for full review by the Commission on June 27, 2012.

The Commission has considered STA's request for full review, STA's initial petition to limit, and Commissioner Brill's letter ruling dated June 18, 2012. For the following reasons, the Commission hereby affirms Commissioner Brill's letter ruling and directs STA to comply with the subpoena no later than September 14, 2012.

I. <u>Background</u>

The Commission issued the subpoena to STA as part of an ongoing investigation of Google, Inc. The purpose of this investigation is to determine whether Google has engaged in unfair methods of competition "by monopolizing, attempting to monopolize, or restraining competition in online or mobile search,

search advertising, or Internet-related goods or services."[1] STA is a manufacturer of devices, including smartphones and tablet computers that are used by consumers for online or mobile searching and Internet-related goods and services. Many of these devices are installed with Google's Android operating systems, as well as other software and applications developed by Google and its competitors.

The Commission issued the subpoena on February 9, 2012. STA did not respond by the initial return date of March 9, 2012. Instead, STA requested two extensions and requested that staff modify the subpoena in several respects.

STA also asked staff to limit the number of custodians whose records would be searched using this method, forego the production of informal agreements as required by specification 8, and extend the return date.

.[2] Staff further agreed to limit the searches for these specifications to a list of six custodians. Finally, staff agreed to extend the return date to April 23, 2012.

On April 20, 2012, STA requested a third extension of the return date. Because STA had produced only 31 documents at that point, staff did not agree to a further extension and STA filed its petition to limit.

As of June 26, 2012, STA had not responded to specification 4, and had only partially responded to specifications 5, 6, 7, 8, 9,

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1 Resolution Authorizing Use of Compulsory Process in Nonpublic Investigation, File No. 111-0163 (June 13, 2011) [hereinafter "Resolution"].

2 Staff later agreed that STA could use the same methodology to search for documents responsive to specification 12.

10, and 12.[3] Some of these productions were extremely limited. For instance, STA produced a total of seven contracts in response to specifications 6, 7, and 12.[4] In discussions with staff occurring since the filing of this request for review by the full Commission, STA indicated that it has collected approximately 361,000 documents responsive to the keywords, but it has not reviewed or produced these documents.

II. Analysis

A. The materials requested by the subpoena are reasonably related to the Google investigation.

In support of its petition, STA argues that the scope of the investigation is narrower than the description in the authorizing resolution—limited to decisions to install (or not install) programs from Google or Google's competitors on STA's mobile devices—and that as a result, it does not possess responsive materials. STA claims that such decisions are made by mobile wireless carriers like Verizon and AT&T and that STA is generally not involved.[5] Thus, STA appears to claim it lacks the types of documents relevant to the FTC's investigation, as STA characterizes it.

It is well-established that the scope of an administrative investigation is determined by the authorizing resolution.[6] Moreover, when determining the relevance of the information requested by an agency, courts look to the scope of the investigation with broad deference to the requesting agency, and

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3 Samsung Telecommunications America, LLC's Request for Full Commission Review of its Petition to Limit Subpoena *Duces Tecum*, and Request for Hearing, at 2 (June 26, 2012) [hereinafter "Request"]. We understand that staff and STA have continued to discuss STA's compliance and that STA has produced additional materials since the filing of this petition, but has not certified that its compliance with the subpoena is complete.

4 *Id.*

5 Request, at 1 ("In short, for purposes of the FTC's investigation the relevant internal considerations and external discussions would seem to be those between the carrier and Google or Google's competitors . . . generally not involving STA.").

6 *FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1088 (D.C. Cir. 1992).

place the burden on subpoena recipients to show that the requests are irrelevant. [7] Here, a review of the Commission process resolution plainly shows that the scope of the investigation is broader than STA asserts – whether Google is or was "monopolizing, attempting to monopolize, or restraining competition in online or mobile search, search advertising, or Internet-related goods or services."[8] By its very terms, the investigation is not confined to software installation, but includes other types of conduct as well. STA has not sufficiently shown that the documents requested in the subpoena are beyond the scope of this investigation.

B. <u>The subpoena requests are sufficiently specific to enable STA to comply.</u>

STA further claims that specifications 5, 9, and 10 are vague and overly broad because they use "complex and ambiguous terms" such as "relating to Samsung's business strategy," or "relating to Samsung's consideration, development, or use of any product or service that competes with a Google Product or Service on any mobile device or smart phone."[9]

A subpoena request may be vague where it lacks reasonable specificity,[10] or is too indefinite to enable a responding party to comply.[11] It may be overbroad where it is "[o]ut of proportion to the ends sought," and "[o]f such a sweeping nature and so unrelated to the matter properly under inquiry as to exceed the investigatory power."[12]

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7 *Id.* at 1090.

8 Resolution.

9 Request, at 2-3, 4.

10 *See, e.g., United States v. Fitch Oil Co.*, 676 F.2d 673, 679 (Temp. Emer. Ct. App. 1982).

11 *See, e.g., United States v. Medic House, Inc.*, 736 F. Supp. 1531 (W.D. Mo. 1989).

12 *United States v. Wyatt*, 637 F.2d 293, 302 (5th Cir. 1981) (quoting, among others, *United States v. Morton Salt Co*., 338 U.S. 632, 652 (1950)).

We do not agree that these specifications are vague, or that, as STA claims, "there is no clear way to identify responsive documents[.]"[13] Contrary to STA's representations about the breadth of specification 5, the specification provides sufficient information to identify responsive documents.[14] The specification does not call for documents related to *any* business strategy of STA, as STA suggests, but rather is limited to documents about two strategies relating to Google and Google products in particular, the precise subject of the Commission's investigation. Further, the specification itself provides examples of the types of documents that would be responsive.

For many of the same reasons, we find that specification 9 is sufficiently defined. The specification identifies the documents at issue clearly and specifically, calling for documents relating to "any policy, practice, contract, or technological mechanism that restrains or restricts any person from licensing, removing, replacing, or modifying any Google Products or Services on Samsung's mobile devices or smart phones."[15] We find this specification sufficiently detailed to enable STA to locate responsive information particularly because, like specification 5, specification 9 also provides examples of types of responsive documents.

Specification 10 too is sufficiently specific. It calls for documents relating to STA's "consideration, development, or use of any product or service that competes with a Google Product or

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13 Request, at 4.

14 Specification 5 reads in full:

> **All documents relating to Samsung's business strategy for (i) placing the Android operating system on its mobile devices or smart phones, or (ii) pre-loading any Google Products or Services on its mobile devices or smart phones, including but not limited to: all strategic plans; business plans; marketing plans; advertising plans; pricing plans; technology plans; forecasts, strategies, and decisions; market studies; and presentations to management committees, executive committees, and boards of directors.**

15 Request, Ex. A.

Service on any mobile device or smart phone employing the Android operating system."[16] This specification does not call for documents about the consideration, use or development of *any* product, but only those products that (1) compete with Google products or services on (2) devices employing the Android operating system. Given these qualifications, we find this specification sufficiently detailed to enable STA to identify responsive documents.

STA's claims also overlook the modifications staff made at STA's request. Specifically, staff agreed to allow STA to use a keyword search process to narrow the universe of potentially-responsive documents and to limit the number of custodians to only six individuals. Thus, rather than a broad search involving "the vast majority" of STA employees, as STA suggests could be required,[17] these specifications, as modified, only require STA to search the documents of a small number of custodians.

STA claims the subpoena is overbroad because it calls for information not reasonably related to staff's inquiry. This claim is akin to the relevance argument we addressed and rejected above and we reject it here for the same reasons. STA also claims that the subpoena specifications are overbroad because they could potentially sweep up a large number of documents.[18] But as Commissioner Brill observed in her letter ruling, a subpoena may properly call for many documents and this fact alone does not provide a basis for limiting a subpoena's scope.[19] And, given staff's modifications to accommodate STA, the number of responsive documents should be substantially smaller than STA suggests.

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16 *Id.*

17 Request, at 6.

18 Request, Ex. D, ¶ 5.

19 Letter ruling, at 8 n.36 (citing *NLRB v. Carolina Food Processors, Inc.,* 81 F.3d 507, 513-14 (4th Cir. 1996)).

C. STA fails to show that the subpoena is unduly burdensome.

STA also argues the challenged specifications are unduly burdensome. In support of its claim, STA submits a declaration from Tim Sheppard, its Vice President, Finance and Operations.[20] Mr. Sheppard claims that the "undefined" and "impossibly vague" requests in specifications 5, 9, and 10 could be read to require production of a "massively broad swath of the documents that STA routinely generates in the course of its day-to-day business."[21] Similarly, he states that specifications 6, 7, and 8, which call for "agreements," would likewise require another "massively broad swath" of documents if "agreements" were interpreted to include understandings outside of those in written formal contracts.[22]

According to STA, compliance with the subpoena would seriously impair and unduly disrupt its normal operations because STA only has two employees in its legal department.[23]

But these conclusory accusations by Mr. Sheppard, most of which merely repeat STA's legal arguments, fail to provide the factual detail needed to satisfy a claim of undue burden.[24] Furthermore, Mr. Sheppard also ignores the significant accommodations that staff have made to limit the specifications in an effort to address STA's concerns about burden.

In addition, STA overlooks that specifications 6, 7, and 8 call for agreements with specific entities, including Google and

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20 Request, Ex. D. STA's request for full review also refers to the declaration of Justin Denison that was attached to the initial petition to limit. Request, at 5. However, Denison's declaration indicates that it was executed on April 10, 2012, on or before staff modified the subpoena at STA's request. *See* Request, Ex. A, Att. 1. Accordingly, Denison's testimony does not relate to the most current, modified version of the subpoena and is not relevant to this analysis.

21 Request, Ex. D, ¶ 5.

22 *Id.*, Ex. D, ¶ 7.

23 *Id.*, Ex. D, ¶ 8.

24 *See, e.g.*, *FTC v. Texaco, Inc.*, 555 F.2d 862, 882 (D.C. Cir. 1977).

wireless service providers. Thus STA should know which of its employees are communicating with these entities and what the most effective way would be to locate these documents, whether they be formal agreements or informal understandings. [25] Thus STA's claim that those specifications would require search and review of an extremely large number of documents is unavailing.

STA's final argument is that by calling for "all documents," the specifications are inherently overboard and unduly burdensome. But, as noted above, the specifications are reasonably defined and tailored to the specific subjects related to the investigation. And staff has made modifications to the specifications, and permitted STA to use keywords for some specifications. Yet STA has not produced the more limited set of documents which should result from these accommodations.

To summarize, STA's claims of burden arise from STA's own misperceptions of the subpoena requests and staff's modifications, and are compounded by STA's failure to engage collaboratively with staff to define the terms of the document production.[26] Therefore, we find that STA's claims of undue burden are without merit.

D. <u>The Commission and its staff have acted reasonably.</u>

STA also alleges that staff has not responded its claims of vagueness or burden reasonably, and that staff should identify for STA "searches which are specific enough to focus on a finite, reasonable volume of documents . . . ."[27]

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25 STA's argument that it should only have to produce formal agreements also fails because it would thwart the investigation. If Google were engaging in anticompetitive behavior, and if STA was involved to some degree, it would be odd for these parties to enter into a formal agreement reflecting that.

26 For cases describing the requisite level of collaboration, *see*, *e.g.*, *William A. Gross Constr. Assocs. v. Am. Mfrs. Mut. Ins. Co*, 256 F.R.D. 134, 135-36 (S.D.N.Y. 2009); *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 259-262 (D. Md. 2008).

27 Request, at 3.

STA's argument disregards both the modifications to the subpoena that staff made at STA's request and STA's own obligations as a subpoena recipient.

Consequently, STA must now either produce the documents that it has collected based on the proposed key word searches, or justify why the proposed key words are not working and offer alternatives based on a reasoned analysis of the documents it has collected. STA has done neither. Instead, STA has insisted that staff further modify the subpoena without providing any substantive information about the universe of documents it has collected.[28] In essence, STA's insistence that staff narrow the subpoena without information about the documents generated thus far from the key word search is merely a demand that staff engage in a guessing game.[29] This is not a proper way to respond to an administrative subpoena. We recognize that STA is a third party to this investigation. However, even third parties are obliged to respond to government compulsory process.[30]

E. STA's other requests are also denied.

STA has requested full Commission review of every issue raised in its petition to limit. After review of that petition and Commissioner Brill's letter ruling, we affirm Commissioner Brill's rulings on all issues not specifically addressed in this ruling by the full Commission.

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28 We acknowledge that STA has been forthcoming with some information, as shown in Exhibit C to the Request. Yet while STA provided information about numbers of hits to search terms, it provided no substantive information about the quality of those hits and whether the documents identified were actually responsive to the terms of the subpoena specifications. Thus, while STA again complains in Exhibit C that the FTC's search terms are overbroad, STA provides no further information that the FTC could use to narrow the terms, assuming of course that the FTC – as the requesting party – had any obligation to do so.

29 *See Da Silva Moore v. Publicis Groupe*, No.11 Civ. 1279 (ALC) (AJP), 2012 WL 607412, *10 (S.D.N.Y. Feb. 24, 2012) (comparing this process to the child's game of "Go Fish").

30 See, *e.g.*, *FTC v. Rockefeller*, 441 F. Supp. 234, 240-42 (S.D.N.Y. 1977).

STA has asked for a hearing on the matter raised in the petition and request for full Commission review. The Commission's Rules of Practice do not provide for such a hearing, and we see no reason to hold one based on the arguments presented by STA. Accordingly, this request will be denied.

STA has also requested a stay of the compliance date. The FTC issued the subpoena to STA in February 9, 2012 and, five months later, STA has yet to provide more than a token production of responsive materials. STA's approach has delayed this investigation substantially. Accordingly, STA's request for a stay of compliance is denied, and STA must produce responses to all the specifications in the subpoena no later than September 14, 2012.

IV. <u>Conclusion and Order</u>

For the forgoing reasons,

IT IS ORDERED THAT the June 18, 2012, letter ruling is **AFFIRMED**;

IT IS FURTHER ORDERED THAT STA must produce responses to all the specifications in the Subpoena *Duces Tecum*, as modified on April 10, 2012, no later than 5 p.m. Eastern Daylight Time on September 14, 2012;

IT IS FURTHER ORDERED THAT STA's request for a hearing is **DENIED**; and

IT IS FURTHER ORDERED THAT STA's request for a stay of the compliance date is **DENIED**.

By direction of the Commission, Commissioner Ohlhausen recused.

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