PUBLIC

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

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

MCWANE, INC.'S MOTION TO EXCLUDE EVIDENCE, OR IN THE ALTERNATIVE, MOTION FOR CONTINUANCE

In an apparent "trial by ambush" strategy, Complaint Counsel's Pre-Trial Brief, filed last Friday, August 17, 2012, discloses ***for the first time*** that it now intends to introduce evidence regarding an additional significant fact issue - - regarding a June 2010 multiplier increase - - that was not contained anywhere in the Administrative Complaint. This disclosure comes on the heels of Complaint Counsel raising allegations relating to an April 2009 list price decrease in a Motion For Partial Summary Decision it filed on June 1, 2012, at the close of business on the day fact discovery closed. Evidence regarding these new allegations should be excluded as prejudicial, untimely and flatly counter to the Complaint's allegations (and the Commission's own interpretations of those allegations) that the alleged conspiracy existed only between January 2008 and early 2009.[1]

[1] Complaint Counsel's new allegations regarding the June 2010 multiplier increase were raised for the first time ***three weeks after*** the deadline in the Scheduling Order for filing motions *in limine* (July 27, 2012). Thus, McWane also had no opportunity to preclude admission of this evidence by filing a motion *in limine* by that deadline and has moved as promptly as possible given the multitude of other pre-trial deadlines the parties face. McWane's counsel conferred with Complaint Counsel on this issue but could not reach a resolution.

Based on the Commission's Administrative Complaint, as well as statements made in conjunction with settlements with Star and Sigma, McWane reasonably believed it was being charged with an alleged conspiracy that began in January 2008 and continued only through February 2009 at the latest and, thus, did not conduct full discovery regarding the April 2009 allegations, and ***absolutely no discovery*** regarding the June 2010 allegations. The expansion to June 2010 is particularly egregious and prejudicial, as it occurred months after the close of fact discovery and a mere two weeks before trial. Notably, Complaint Counsel cites no testimony and only a handful of documents regarding the June 2010 allegations, which, by themselves, do not support Complaint Counsel's allegations.[2]

McWane respectfully requests that this Court bar Complaint Counsel from introducing such prejudicial evidence at trial, or in the alternative, grant a 60 day continuance to allow McWane sufficient time to conduct fact and expert discovery on these new issues.

FACTUAL BACKGROUND

The allegations regarding the April 2009 list price decrease and June 2010 multipliers are beyond the scope of the initial Complaint and should not be considered by this Court. The Complaint identified the January and June 2008 multipliers as conspiratorial, and DIFRA tons-shipped data as a mechanism to facilitate the conspiracy. (Compl. ¶¶ 32-34.) The Complaint did contain any allegations about April 2009 or June 2010. (Compl. ¶¶ 28-38.) Further, the Complaint, on its face, alleged that the February 2009 passage of ARRA "upset the terms of coordination" and the Commission acknowledged that DIFRA "disbanded in early 2009." (Compl. ¶ 3; January 4, 2012 FTC News Release, http://www.ftc.gov/opa/2012/01/mcwane.shtm.) The Settlement Complaint with Sigma is

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[2] *See* CX 1413; CX 2438; CX 2442; CX 2440; CX 1384; CX 2450; CX 1406; CX 2441; CX 1396; CX 1378.

verbatim the same on this description ("[b]eginning in January 2008 and continuing through January 2009"), and the Commission's press release and statement addressing the Complaints alleged a conspiracy between "early 2008 . . . and January 2009." (Sigma Compl. ¶ 2; January 4, 2012 FTC News Release; Jan. 10, 2012 FTC Statement.) Moreover, the Sigma Complaint also alleged that Sigma invited McWane and Star to "resume" the alleged collusion in April 2009 but "McWane and Star ***rejected*** Sigma's invitation to collude." (Sigma Compl. ¶ 38.) The Commission's statement in aid of the Complaints and press release both reiterated that "Sigma attempted to revive the conspiracy by convincing McWane and Star to raise their prices and to resume the exchange of sales data through DIFRA. ***McWane and Star rejected Sigma's invitation to collud***e. (Jan. 10, 2012 FTC Statement (emphasis added); January 4, 2012 FTC News Release ("Sigma tried to revive the conspiracy by attempting to convince McWane and Star to raise their prices and resume exchanging pricing data in April 2009. However . . . at this point McWane and Star ***refused*** Sigma's invitation to collude") (emphasis added).)

Because the allegations were not contained in the Complaint or in any filing prior to the Summary Decision briefing, and the Commission stated that its own interpretation of the Complaints were that the alleged conspiracy ended in early 2009, McWane was not on notice that it should conduct full discovery on anything after early 2009. Specifically, McWane was not on notice that it needed to conduct full discovery on its April 2009 dramatic list price decrease on all medium and large diameter fittings and Star's decision to follow that decrease, and, indeed, McWane conducted ***no discovery*** at all on the June 2010 allegations.[3] McWane also

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[3] The mere fact that Complaint Counsel asked questions in some depositions about April 2009 and June 2010 price decisions did not put McWane on notice that the allegations *were being tried*. It is obviously permissible and commonplace to conduct discovery into any area that *might* "lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1); 16 C.F.R. 3.31(c)(1). The Complaint's allegations and any Rule 3.15 amendment - - which did not occur here - - limit what can be tried, however.

did not conduct any discovery on Star's internal decision-making process surrounding the April 2009 list price change, or the Star or Sigma decisions regarding the June 2010 change in multipliers, which obviously goes to the heart of Complaint Counsel's late-breaking allegations.

Notably, Complaint Counsel's expert, Dr. Schumann, did not opine ***at all*** on the new June 2010 allegations, conceding that the alleged conspiracy ended in October of 2008. (Schumann Dep. at 51:17-24 ("I suspect that things really fell apart more in the October range").) After Complaint Counsel's Summary Decision briefing, Dr. Schumann did what appears to be a last-minute cursory review of April 2009 events, but again, did not opine that it was part of the conspiracy. On the contrary, he opined that the conspiracy was formed in January 2008, when he claimed the parties communicated "indirectly through letters to customers," (*Id.* at 96:24-25), and that it "fell apart" in October 2008. (*Id.* at 51:17-24.) Nor did he offer any opinion of what, if any, alleged injury to consumers resulted from the April 2009 allegations. He did not address the June 2010 allegations at all. As a result, McWane's expert, Dr. Normann, has also not had a chance to address these new allegations.

Further, it is not even clear whether Complaint Counsel is now alleging that Star merely matched McWane's list price in April 2009, and that Sigma and Star merely matched McWane's multipliers in June 2010 - - or whether they are alleging that Star, Sigma, and McWane also agreed not to offer job discounts or other price concessions.[4] The lack of clarity in its claims alone amounts to sufficient prejudice for exclusion.

[4] Complaint Counsel has indicated that it does not object to McWane adding at least one exhibit to its trial exhibit list, TU-FTC-0259568-69, which flatly disproves the inference about Mr. Tatman's speculation about what Star would decide and when (which entirely hinges on an April 28, 2009 email in which Mr. Tatman said he was "highly confident" that Star would follow McWane's list price decrease). The exhibit shows that two days later, on April 30, 2009, Mr. Tatman responded to a colleague who said "***Who knows?*** We will soon find out" with a response indicating that he was entirely uncertain what Star would do and only time would tell: "***I think it will be mid next week until the dust settles***. ***If*** they stick with the old List and a .32/.35, then we should sell a lot in the Northwest." (TU-FTC-0259568-69 (emphasis added).) This is further evidence of the fact that additional discovery is necessary to address and rebut these new - - and highly circumstantial - - allegations.

ARGUMENT

The addition of these new allegations this late in the proceedings violates the Due Process Clause of the Fifth Amendment of the United States Constitution, and the notice requirements inherent in all federal litigation - - including proceedings governed by the Commission's Rules of Practice.

1. ***Due Process.*** Due Process "requires . . . notice, reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 795 (1983). McWane is entitled to procedural due process, which includes advance notice - -prior to the close of discovery - - of the precise claims against it. Complaint Counsel's attempt to avoid this fundamental due process requirement by raising allegations not contained in - - and contrary to - - the Complaint is a clear violation of McWane's due process rights. *See In re Ruffalo*, 390 U.S. 544, 550-51 (1968) ("[s]uch procedural violation of due process would never pass muster in any normal civil or criminal litigation"); *Mullane v. Central Hanover Bank & Trust Co*., 339 U.S. 306, 314 (1950) ("An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated . . . [and] notice must be of such nature as reasonably to convey the required information."). This Court should exclude evidence relating to issues that are not reasonably encompassed within the Complaint to avoid tainting the proceedings with unconstitutionality.

2. ***Rules***. Federal courts expressly refuse to do what Complaint Counsel now asks - - revise a complaint to include what the plaintiff finds convenient but was unwilling to seek at procedurally proper times. "We will not rewrite plaintiff's complaint to contain a count that was not included in it. . . . No motion was made to amend the complaint. We do not think our duty to

liberally construe the pleadings gives a plaintiff the license to amend the complaint by memorandum in the district court and by brief in the appellate court." *Daury v. Smith*, 842 F.2d 9, 15 (1st Cir. 1988). The Commission's rules specifically provide mechanisms for Complaint Counsel to seek amendment of the Complaint. *See* FTC Rule 3.15(a)(1) (amendments by leave). As *Daury* noted, the failure to seek such an amendment makes the later attempt to gain the benefit of such an amendment without even bothering to follow the rules all the more egregious.

The consequence of this violation is that the evidence exceeding claims reasonably included within the Complaint must be excluded. *See, e.g.*, *Christopher v. Harbury*, 536 U.S. 403, 416 (2002) (the elements of the plaintiff's claim(s) "must be addressed by allegations in the complaint sufficient to give fair notice to a defendant" . . . "the underlying cause of action and its lost remedy must be addressed by allegations in the complaint sufficient to give fair notice to a defendant."); *Seeds of Peace Collective v. City of Pittsburgh*, 453 F. App'x. 211, 215 n.3 (3d Cir. 2011) ("we do not consider factual allegations made in Three Rivers' brief but not pleaded in the complaint"); *Kost v. Kozakiewicz*, 1 F.3d 176, 183 n.4 (3d Cir. 1993) ("We firmly reject appellants' attempt to augment the factual record relevant to their claims by the voluminous inclusion in their briefs on appeal of facts not alleged in their complaint or otherwise properly appearing in the record.") Administrative proceedings undertaken "without observance of procedure required by law" must also be "set aside" by the court of appeals. 5 U.S.C. § 706(2)(D). The reason for this consequence is that allowing Complaint Counsel to proceed with new and unpleaded claims cannot "avoid prejudicing" McWane. *See* FTC Rule 3.15(a)(1). McWane did not have notice of any alleged wrongdoing and could not conduct full discovery regarding the April 2009 list price increase and June 2010 multiplier increase. Preparing to defend itself against allegations raised two weeks before the trial and without McWane's

advance knowledge that they would be at issue in the trial, would be nearly impossible, particularly since the tools of discovery are now out of its hands.

Further, as this Court knows from prior briefings, (*see* McWane's Mtn. for Summary Decision; McWane's Mtn. to Exclude Opinion Testimony of Dr. Schumann), the record contains more than 250 sworn denials regarding the alleged conspiracy ***actually contained in the Complaint***, and McWane believes the same witnesses would similarly deny the new allegations if given the opportunity.

McWane was not given even the bare minimum of notice pleading under the federal rules and the rules of the FTC.[5] A plaintiff "pleading a conspiracy" must "indicate the parties, general purpose, *and approximate date*, so that the defendant has *notice of what he is charged with*." *Walker v. Thompson,* 288 F.3d 1005, 1007 (7th Cir.2002) (emphasis added). This has long been the law:

> A general allegation of conspiracy without a statement of the facts is an allegation of a legal conclusion and insufficient of itself to constitute a cause of action. Although detail is unnecessary, the plaintiffs must plead the facts constituting the conspiracy, its object and accomplishment. The plaintiffs have pleaded none of these facts. *Neither the date of the alleged conspiracy* nor its attendant circumstances are set forth.

Black & Yates, Inc. v. Mahogany Ass'n, Inc., 129 F.2d 227, 231-32 (3d Cir. 1941) (emphasis added). And after *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), which required sufficient factual allegations to make claims plausible rather than merely possible, there can be no doubt that the absence of sufficient notice of timing is a fatal pleading defect. *See id.* at 565 n.10 (noting that the omission of "time" from the "pleadings" indicated a "lack of notice").

[5] *See* Fed. R. Civ. P. 8; FTC Rule 3.41(c) ("Every party, except intervenors, whose rights are determined under §3.14, shall have the right of due notice, cross-examination, presentation of evidence, objection, motion, argument, and all other rights essential to a fair hearing.").

The Commission's observation that its rules do not "require Complaint Counsel to set out explicitly in the Complaint each and every episode of the allegedly unlawful conduct," (Commission Summary Decision Opinion ("Op.") at 29), misses the point. McWane's objection is that the Complaint **gave it no discernible basis for understanding *the timing* of the alleged conspiracy** - - at least as Complaint Counsel now intends to present the conspiracy at trial. The Complaint makes *no* suggestion that the alleged conspiracy extended beyond February 2009, and indeed affirmatively states that the February 2009 passage of ARRA "upset the terms of coordination among the Sellers," which the Commission acknowledges resulted in the "disband[ing]" of the alleged conspiracy. (Compl. ¶ 3; (January 4, 2012 FTC News Release.) The Commission's statements in aid of its Administrative Complaint support McWane's belief that the alleged conspiracy did not extend beyond January 2009: "Between June 2008 and January 2009." *Id.* The Administrative Complaint, combined with the FTC's statements, certainly did not give McWane any "notice [that it] is charged with" alleged violations in April 2009 and June 2010. In fact, the statements specifically note that McWane ***refused*** the alleged April 2009 invitation.

The only alternative reading is worse for Complaint Counsel, not better, because the alternative reading is that *no* reliable "indicat[ion]" of an "approximate date," *Walker*, 288 F.3d at 1007, was provided. Consequently, the Commission's choice of this alternative is puzzling. It breezily asserted that the complaint "contains no allegation as to the end date of the conspiracy, or, for that matter, any allegation of the conspiracy ending at all." (Op. at 28-29.) That point supports McWane, not (as the Commission apparently believed) the Complaint Counsel. The omission of such basic information as the timing of the conspiracy renders the complaint invalid as to anything beyond January 2009. And although the Commission's decision says a fact

question exists regarding April 2009, the Court retains discretion over what evidence it permits the parties to introduce at trial. 16 C.F.R. 3.43(b)-(d). Moreover, even if the Court believes the Commission's decision forces it to try the April 2009 events, Complaint Counsel's most recent expansion to June 2010 was not addressed by the Commission and is not governed by its ruling.

3. ***Alternative relief.*** For the reasons expressed above, the court should limit the trial proceedings to those that are encompassed within the Complaint. But to the extent that it decides to allow Complaint Counsel to pursue the newly alleged issues, McWane respectfully requests adequate time to prepare. As described above, McWane could not reasonably have anticipated the ever-increasing scope of the claims that Complaint Counsel's eleventh-hour filings indicate. The scope of preparation would likely entail a number of additional depositions of witnesses (or the re-opening of depositions), potentially additional document requests, additional expert analyses, and the supplementation of McWane's trial exhibit list and deposition designations and possibly trial witness list accordingly. If Complaint Counsel is able to force McWane to litigate those issues *and* is able to force McWane to do so without adequate preparation, the effect would be to encourage gaming the system by withholding allegations until the last minute. It would also heighten the violation of McWane's Fifth Amendment and rule-based rights. Accordingly, McWane requests that it be permitted to conduct relevant discovery and that the trial be continued for 60 days. If these issues are tried without such fundamental due process and rules-based protections, they will be tried over McWane's strenuous objection. [6]

CONCLUSION

For the reasons set forth herein, McWane's Motion is due to be granted.

Dated: August 24, 2012

/s/ J. Alan Truitt

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[6] Should the new allegations remain in the case, McWane may seek leave to amend its Answer, for example, to raise additional affirmative or other defenses or denials.

CERTIFICATE OF SERVICE

I hereby certify that on August 24, 2012, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

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

I also certify that I delivered via overnight mail a copy of the foregoing document to:

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

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

Edward Hassi, Esq.
Geoffrey M. Green, Esq.
Linda Holleran, Esq.
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Michael L. Bloom, Esq.
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By: __/s/ William C. Lavery_____

Counsel for McWane, Inc.

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	)	
Respondents.	)	
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PROPOSED ORDER

On August 24, 2012, McWane, Inc. filed its Motion To Exclude Evidence, Or In The Alternative, Stay This Proceeding For 60 Days. Upon consideration of this motion, it is hereby GRANTED.

ORDERED:

_____
D. Michael Chappell
Administrative Law Judge

_____, 2012

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STATEMENT REGARDING MEET AND CONFER

Pursuant to Paragraph 4 of the Scheduling Order, counsel for McWane met and conferred in good faith with Complaint Counsel regarding the issues raised in this motion but could not reach an agreement.

By: _/s/ William C. Lavery_____

Counsel for McWane, Inc.