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

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

ORDER DENYING RESPONDENT'S MOTION TO EXCLUDE EVIDENCE, OR IN THE ALTERNATIVE, MOTION FOR CONTINUANCE

I.

On August 24, 2012, Respondent McWane, Inc. ("Respondent" or "McWane") filed a Motion to Exclude Evidence, or in the Alternative, Motion for Continuance ("Motion"). By Order dated August 27, 2012, Complaint Counsel was ordered to file an expedited response to the Motion. Complaint Counsel filed its Opposition on August 29, 2012. Oral argument on the Motion was heard at the final prehearing conference in this matter on August 30, 2012, after which a ruling was issued from the bench denying Respondent's Motion. This Order details the reasoning for that ruling.

II.

According to the motion papers, the evidence at issue involves certain price-related communications and conduct by and/or among Respondent, Sigma Corporation ("Sigma") and Star Pipe Products Ltd. ("Star") that occurred in April 2009 and June 2010 (collectively, the "Challenged Evidence"). Respondent requests an order excluding the Challenged Evidence, or in the alternative, an order granting a 60-day continuance to conduct fact and expert discovery on the Challenged Evidence.

Respondent asserts that the Challenged Evidence constitutes new allegations or claims. Furthermore, Respondent contends, it had no notice that Complaint Counsel would rely on pricing conduct occurring in April 2009 and June 2010. Respondent argues that the conduct to which the Challenged Evidence relates is not alleged in the Complaint, and furthermore, the Complaint, the FTC press release accompanying the Complaint, and the complaint issued against alleged co-conspirator Sigma, asserted that the alleged conspiracy ended in early 2009. Respondent contends it first learned that Complaint Counsel would rely on the Challenged

Evidence from April 2009 when Complaint Counsel cited the evidence in its June 1, 2012 Motion for Partial Summary Decision, and first learned Complaint Counsel would rely on the Challenged Evidence from June 2010 when Complaint Counsel referred to that evidence in its August 17, 2012 Pre-Trial Brief. Accordingly, Respondent states, it did not obtain "full" discovery on the April 2009 evidence and obtained no discovery on the June 2010 evidence during the discovery phase of this case, which terminated June 1, 2012. Respondent argues that, under these circumstances, admitting the Challenged Evidence at trial would be unfair, prejudicial, and a denial of Respondent's due process rights.

Complaint Counsel responds that the Challenged Evidence shows that in April 2009, Respondent and Star exchanged mutual assurances that they would adopt the same price list, and in June 2010, Respondent and Sigma used letters to customers to "signal" one another about price coordination. Complaint Counsel argues that such evidence is directly relevant to the claim that Respondent conspired with others to fix prices.

Complaint Counsel further asserts that Respondent had ample notice regarding the April 2009 and June 2010 pricing evidence at issue and that Respondent should have filed a motion *in limine* in accordance with the Scheduling Order deadline of July 27, 2012. Complaint Counsel states that the April 2009 communications were first disclosed at a 2011 investigational hearing, which was produced to Respondent at the beginning of discovery; that these communications were also addressed in testimony at nine depositions taken in this case; that Respondent asked questions regarding these communications at the depositions; and that Complaint Counsel cited these communications in its June 1, 2012 Motion for Partial Summary Decision. As to the June 2010 evidence, Complaint Counsel states that during discovery it elicited deposition testimony on the subject from two deposition witnesses, and that Respondent also took testimony on the subject. In addition, Complaint Counsel asserts, Complaint Counsel included the relevant June 2010 pricing documents and deposition testimony on its pre-trial exhibit list and deposition designations, submitted July 6, 2012.

Finally, Complaint Counsel notes that the Commission, in its ruling denying Complaint Counsel's Motion for Partial Summary Decision, rejected Respondent's notice and due process arguments with respect to the April 2009 pricing conduct, holding that the Complaint did not allege the conspiracy ended in early 2009; that the Complaint did not have to specifically allege each instance of unlawful conduct; that Respondent had actual notice of the April 2009 evidence; and that Respondent conducted extensive discovery into the April 2009 conduct.

III.

A.

The admissibility of evidence is governed by Rule 3.43(b), which states in pertinent part:

> (b) Admissibility. Relevant, material, and reliable evidence shall be admitted. Irrelevant, immaterial, and unreliable evidence shall be excluded. Evidence, even if relevant, may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or if the evidence would be misleading, or based on

considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

16 C.F.R. § 3.43(b).

This action charges, *inter alia*, that beginning in January 2008, McWane, with others, "conspired to raise and stabilize" prices, thereby restraining price competition in violation of Section 5 of the FTC Act. Complaint ¶¶ 29, 65. According to Complaint Counsel, the Challenged Evidence is offered to show that in April 2009, Respondent and Star exchanged mutual assurances that they would adopt the same price list, and in June 2010, Respondent and Sigma used letters to customers to "signal" one another about price coordination. Such evidence is relevant to whether there was, in fact, a conspiracy to fix prices. Accordingly, the Challenged Evidence is relevant. Indeed, Respondent does not argue to the contrary.

However, even though the Challenged Evidence is relevant, pursuant to Rule 3.43(b), it must be further determined whether use of the evidence would be unfair and/or prejudicial, or a violation of due process rights, as Respondent argues, because Respondent lacked adequate notice. As further explained below, Respondent had sufficient notice of the Challenged Evidence and, therefore, the Motion to Exclude is DENIED.[1]

B.

It should be noted at the outset that Respondent does not contend that it had no notice that the Challenged Evidence existed, nor does Respondent deny that the parties engaged in at least some discovery regarding the Challenged Evidence. Rather, Respondent contends it had inadequate notice that Complaint Counsel would *rely* on the evidence to prove its conspiracy charge at trial, and that, therefore, Respondent did not engage in "full" discovery on the April 2009 evidence and obtained no discovery on the June 2010 evidence. Motion at 1-2, 6-7. In support of its claim that Respondent did not receive notice of the Challenged Evidence, Respondent relies on the fact that the Complaint does not include any references to the April 2009 and January 2010 conduct, and therefore, Respondent argues, the Challenged Evidence constitutes new allegations presented on the eve of trial. This argument lacks merit. Notwithstanding Respondent's persistent references to the Challenged Evidence as "claims" and "allegations," the Challenged Evidence is just that – evidence. The "claim" at issue is whether, beginning in January 2008, Respondent conspired to fix prices and thereby unlawfully restrained competition. Complaint ¶¶ 29, 65.

Respondent's related assertion that it did not engage in full discovery on the Challenged Evidence because it believed that conduct occurring in April 2009 and June 2010 was beyond the scope of the Complaint is similarly unpersuasive. First, contrary to Respondent's assertions, the

[1] The fact that Respondent did not seek to exclude the Challenged Evidence by means of a motion *in limine* by the deadline provided under the Scheduling Order is not dispositive in this instance. Given the importance of the notice issues raised by Respondent, it is a proper exercise of discretion to address the motion on its merits. *See In re N.C. Bd. of Dental Examiners*, 2011 FTC LEXIS 135, at *7-8 (July 11, 2011) (choosing to address untimely motion for *in camera* treatment of evidence introduced at trial, where respondent asserted that North Carolina state statute barred public disclosure of the evidence).

Complaint does not allege that the conspiracy "ended" in early 2009.[2] Respondent cites allegations in the Complaint that the Ductile Iron Fittings Research Association ("DIFRA"), an alleged instrument of Respondent's conspiracy, operated between "June 2008 and January 2009," Complaint ¶ 36, and that the passage of the American Recovery and Reinvestment Act of 2009 ("ARRA") "upset the terms of the coordination" among the alleged co-conspirators. *Id.* ¶ 3. The foregoing allegations are not fairly read as alleging that the conspiracy ended in early 2009. Rather, the Complaint alleges that the conspiracy began in January 2008, and does not allege any end date. The cases cited by Respondent for the proposition that fair notice requires an allegation as to the "timing" of a conspiracy do not require an allegation of the time or date that a conspiracy ended.

Moreover, the fact that the Complaint refers to certain January 2008 and June 2008 price increases is not dispositive of what time period is encompassed by the alleged conspiracy. The alleged January 2008 and June 2008 price increases are described in the Complaint as "the result of" the alleged conspiracy beginning in 2008, and in this regard the alleged 2008 price increases constitute examples of acts taken in furtherance of, or demonstrating, that alleged conspiracy. Complaint ¶¶ 32-34. Similarly, the Challenged Evidence is offered as examples of conduct in furtherance of, or demonstrating, such alleged conspiracy. Respondent cites no authority supporting the proposition that, in order to provide adequate notice of a conspiracy claim, the Complaint must set forth each act taken in furtherance of the alleged conspiracy, or each item of evidence that is relevant to demonstrating the alleged conspiracy. Rather, the specific facts and documents upon which Complaint Counsel intends to rely to prove the alleged conspiracy are more properly subjects for discovery. *See* Rule 3.31(c)(1) (stating that "parties may obtain discovery to the extent that it may be reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent"); *see also Guilford Nat'l Bank v. Southern R. Co.*, 297 F.2d 921, 924 (4th Cir. 1962) (stating that "one important purpose of discovery is to disclose all relevant and material evidence before trial in order that the trial may be an effective method for arriving at the truth and not 'a battle of wits between counsel.'" (quoting *Hickman v. Taylor*, 329 U.S. 495, 516 (1947) (Jackson, J., concurring))).

With respect to discovery, it appears from the record submitted on the Motion that the parties addressed the Challenged Evidence and/or the underlying pricing conduct during depositions. Moreover, at oral argument on the instant motion Respondent was asked whether it had issued a broad interrogatory requiring Complaint Counsel to identify all facts upon which it relied with respect to the charge of conspiracy. Respondent identified its Interrogatory No. 9 issued to Complaint Counsel, which asked whether it was Complaint Counsel's "contention that any decision by McWane to change its [fittings] pricing in 2008-2009 was not made independently . . . [and i]f so [to] identify and describe the basis for Complaint Counsel's contention and identify all facts relating to the contention . . . upon which Complaint Counsel may or will rely at trial" to support the contention. Final Prehearing Conference, Tr. 62; *see* Respondent's First Set of Interrogatories to Complaint Counsel, Interrogatory No. 9. Arguably, this interrogatory seeks only information as to certain 2008 and 2009 conduct, which the Complaint alleges resulted from the conspiracy. In this regard Interrogatory No. 9 is not the sort

[2] Respondent erroneously relies on statements made in an FTC press release and statements in the complaint against Sigma that accompanied the entry of a settlement agreement with Sigma. Neither of these documents determines the scope of the Complaint against Respondent.

of broad-based interrogatory that would inevitably lead to the disclosure of *all* evidence upon which Complaint Counsel would rely to prove the underlying conspiracy, such as any price-related communications and conduct by and/or among Respondent, Sigma and Star that occurred in April 2009 and June 2010. In any event, however, Complaint Counsel stated at oral argument, and Respondent did not dispute, that Complaint Counsel answered the interrogatory by incorporating by reference its June 1, 2012 Statement of Material Facts submitted in support of Complaint Counsel's Motion for Partial Summary Decision, and such Statement described the Challenged Evidence. The foregoing further demonstrates that Respondent had notice of the existence and relevance of the Challenged Evidence.

Based on all of the foregoing, there is an insufficient basis to conclude that Respondent lacked adequate notice of the Challenged Evidence or its relevance to the case. Whatever the reason for Respondent's judgment that it did not need to engage in "full" discovery on the Challenged Evidence, it cannot be attributed to a reasonable belief that the Challenged Evidence and the underlying conduct to which it relates were outside the scope of the Complaint. Accordingly, Respondent has failed to demonstrate that admission of the Challenged Evidence would be unfair or unduly prejudicial, and should be excluded under Rule 3.43(b). The Motion to Exclude is therefore DENIED. Respondent of course retains all rights to test the Challenged Evidence through cross-examination at trial.

IV.

In the alternative, Respondent moves for an order continuing the trial for 60 days to allow Respondent to conduct fact and expert discovery relating to the Challenged Evidence, potentially including "a number" of unspecified additional depositions, or reopening of prior depositions, document requests, and expert analyses.

Commission Rule 3.41(b) provides that an administrative hearing "will take place on the date specified in the notice accompanying the complaint, . . ." 16 C.F.R. § 3.41(b). Although Respondent's Motion requests a continuance, because the request involves additional time to conduct discovery it will be treated herein as either: (1) a motion to reopen and extend the discovery deadline in the Scheduling Order, pursuant to Rule 3.21(c)(2), which states: "The Administrative Law Judge may, upon a showing of good cause, grant a motion to extend any deadline or time specified in this scheduling order other than the date of the evidentiary hearing." 16 C.F.R. § 3.21(c)(2) and/or (2) a motion to suspend proceedings to allow deferred discovery under Rule 3.41(b)(1), which states:

> The Administrative Law Judge may order hearings at more than one place and may grant a reasonable recess at the end of a case-in-chief for the purpose of discovery deferred during the prehearing procedure if the Administrative Law Judge determines that such recess will materially expedite the ultimate disposition of the proceeding.

16 C.F.R. § 3.41(b). Analyzing Respondent's request to delay the hearing under these applicable Rules, Respondent's requested relief is unwarranted. Respondent contends it declined to take full discovery regarding the Challenged Evidence because it lacked notice that the Challenged Evidence would be "at issue in the trial." Motion at 7. As set forth above, Respondent has failed to demonstrate that it lacked such notice, and consequently, that such asserted lack of notice justified its decision not to engage in full discovery on the Challenged Evidence during the

discovery period. Moreover, it is unclear why Respondent waited nearly three months after receiving Complaint Counsel's Answer to Interrogatory Number 9 to seek additional discovery. Therefore, Respondent has not demonstrated good cause to reopen discovery under Rule 3.21(c)(2). Moreover, Respondent's allegations of unspecified, "potential" discovery needs do not support a recess of 60 days under Rule 3.41(b). Respondent presents no basis for concluding that such a suspension of proceedings "will materially expedite the ultimate disposition" of the case, as required under Rule 3.41(b), and would also conflict with the requirements in the Rules that administrative hearings "proceed with all reasonable expedition." 16 C.F.R. § 3.41(b); *see also id.* at § 3.21(c)(2) (providing that in determining whether to grant a motion to revise scheduling order, the Administrative Law Judge shall consider, *inter alia*, "the need to conclude the evidentiary hearing and render an initial decision in a timely manner").

For all the foregoing reasons, Respondent's alternative request for a continuance is DENIED.

V.

Having fully considered Respondent's Motion, Complaint Counsel's Opposition thereto, and oral argument on the Motion, and for all the foregoing reasons, Respondent's Motion to Exclude Evidence, or in the Alternative, Motion for Continuance is DENIED.

ORDERED:

D M Chappell
D. Michael Chappell
Chief Administrative Law Judge

Date: September 7, 2012