



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 . /\*\$0I&(02"3\$"4)\*5\$6(%2 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.<sup>2</sup>

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.

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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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<sup>2</sup> ( "'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 ~~7(5&(4~~ 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. 859.3(“ .34” :&. %” 7(5&(4” :); +.<\*” )36)&. &)\$3” 00

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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.

KU" @I("A%\$5(\*\*j" 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." 2 '\$\$3\$#-'4.l"35" 2 #66#3\$6"71"8.9&6, 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 raisino to th#plaint

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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, (6 ' ' " 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 .5&1.002" 5\$3&.)3(4" )3" & ' (" D\$+E0.)3&, 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.<sup>5</sup> A plaintiff "pleading a conspiracy" must "indicate ~~ne~~ pE % E rth !U

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Dated: August 24, 2012

/s/ J. Alan Truitt

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J. Alan Truitt  
Thomas W. Thagard III  
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1901 Sixth Avenue North  
2400 Regions Harbert Plaza  
Birmingham, AL 35203  
Phone: 205.254.1000  
Fax: 205.254.1999

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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 s àðàp E E

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

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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:

\_\_\_\_\_, 2012

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 D. Michael Chappell  
 Administrative Law Judge

