



UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

)
In the Matter of)
)
MCWANE, INC.,)
a corporation, and)
STAR PIPE PRODUCTS, LTD.,)
a limited partnership.)

)

PUBLIC DOCUMENT

DOCKET NO. 9351

**RESPONDENT MCWANE, INC.’S OPPOSITION TO SIP INDUSTRIES’ MOTION TO
QUASH SUBPOENA *DUCES TECUM***

Respondent McWane, Inc. (“McWane”) respectfully requests that the Court deny Non-Party SIP Industries’ (“SIP”) Motion to Quash McWane’s Subpoena *Duces Tecum*.¹ SIP’s motion contains only boilerplate assertions that McWane’s Subpoena is “unreasonable, unduly burdensome, and requests proprietary or confidential information” that the January 5, 2012 Protective Order is “not sufficient under the circumstances” to protect. (SIP Mot. at 4, 9.) SIP has failed to meet its “heavy burden” to show that McWane’s subpoena should be quashed, and therefore SIP’s motion should be denied.

BACKGROUND

On February 17, 2012, McWane served SIP with a subpoena *duces tecum* (“Subpoena”) that requested SIP to produce documents related to its sales and purchases of Ductile Iron Waterworks Fittings (“DIWF”).² SIP filed a motion to quash McWane’s Subpoena (“SIP Mot.”) on March 7, 2012. In order to allow McWane and SIP additional time to negotiate the scope of McWane’s subpoena, this Court granted McWane’s two unopposed motions to extend time to respond to SIP’s motion to quash, on March 20, 2012 and April 2, 2012, extending the

¹ McWane and SIP’s remaining disagreement is with respect to Requests 2, 3, and 5 only.
² SIP received service of the Subpoena via registered mail on February 22, 2012.

time for McWane to respond to April 6, 2012. The parties have been negotiating in good faith since that time in an attempt to come to an agreement, and have narrowed the scope of the Subpoena significantly, but have been unable to reach a final agreement. Specifically, SIP and McWane have been unable to reach an agreement regarding Requests 2, 3, and 5, which read:

Request No. 2: Documents sufficient to identify your purchases of all DIWF products from any Person from January 1, 2003 to the present including, but not limited to the Person from whom you purchased DIWF and the volume, units, SKU number, diameter, size, configuration, coating, finish, price, discount, or rebates attributable to your purchases.”

Request No. 3: Documents sufficient to identify your sales of all DIWF products from January 1, 2003 to present including, but not limited to the Person to whom you sold DIWF, the volume, units, SKU number, diameter, size, configuration, coating, finish, price, discount, and rebates of your sales.

Request No. 5: All Documents constituting or relating to communications between you and any Person relating to a proposed or actual sales price for DIWF, including any discounts or rebates, between January 1, 2003 to the present.

(See SIP Mot. Ex. A.)

McWane has since agreed to narrow Requests 2 and 3 to only seek summary level sales and purchase data, from January 1, 2007 to present. McWane has also agreed to narrow Request 5 to only seek emails from one custodian, the Vice President of Business Development at SIP, from January 1, 2007 to present. SIP continues to object to producing these documents on the grounds that the requests are “unreasonable, unduly burdensome, and requests proprietary or confidential information” that the January 5, 2012 Protective Order is “not sufficient under the circumstances” to protect. (SIP Mot. at 4, 9.)

ARGUMENT

SIP’s motion to quash should be denied for two reasons. First, SIP has not met its “heavy burden” of demonstrating that McWane’s Subpoena seeks documents that are unreasonable or unduly burdensome. To the contrary, the information sought from SIP, a competitor of

McWane's, is directly relevant to McWane's defenses to Complaint Counsel's allegations in this case, and McWane has been reasonable in narrowing its requests to prevent any undue burden. Second, SIP's objection to producing proprietary or confidential information on the ground that the Protective Order is "not sufficient under the circumstances" is unfounded and unsupported.

A. The Law Strongly Favors Discovery of Relevant Evidence

A party moving to quash a subpoena has the burden to show the subpoena is improper. *See In the Matter of Intel Corp.*, No. 9341, 2010 WL 2143904 at *3 (F.T.C. May 19, 2010) (Chappell, J.). Due to the strong public policy in favor of broad discovery, that burden is a heavy one. *Id.* ("The law is clear that a recipient of a subpoena *duces tecum* issued in an FTC adjudicative proceeding who resists compliance therewith bears a heavy burden."); *see also Flowers Indus., Inc.*, No. 9148, 1982 FTC LEXIS 96, at *12 (F.T.C. Mar. 19, 1982). "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." 16 C.F.R. § 3.31(c)(1). "The burden of showing that the request is unreasonable is on the subpoenaed party." *FTC v. Dresser Indus.*, 1977 U.S. Dist. LEXIS 16178, at *13 (D.D.C. 1977) (internal quotations omitted).

B. McWane's Narrowed Subpoena Is Reasonable and Seeks Relevant Documents

SIP asserts that production of the requested documents from a "non-party" is unreasonable and unduly burdensome, but has failed to make any concrete showing of why McWane's significantly narrowed document requests are unreasonable, or how this amounts to undue burden sufficient to quash the Subpoena.

First, the documents McWane seeks are directly relevant and necessary to defend against Complaint Counsel's broad allegations and claimed relief. The Administrative Complaint alleges, among other things, that McWane engaged in anticompetitive practices to "acquire,

enhance or maintain its monopoly power in the relevant domestic DIPF market.” (See Compl. ¶¶ 69-70.) As a competitor to McWane’s, SIP’s purchases and sales of DIWF in the industry are directly relevant to Complaint Counsel’s allegations of monopolization by McWane, and McWane’s defenses. See *In the Matter of N. Tex. Specialty Physicians*, No. 9312, 2004 WL 527340 at *2 (Jan. 30, 2004) (finding competitors’ business documents “crucial” to antitrust cases); *Service Liquor Distributors, Inc. v. Calvert Distillers Corp.*, 16 F.R.D. 507, 509 (S.D.N.V. 1954) (finding competitors’ documents “not only not immune from inquiry, but . . . the source of the most relevant evidence”).

Second, SIP has not demonstrated undue burden in producing these documents. The summary level sales and purchase data McWane now seeks in response to Requests 2 and 3 can be easily gathered by SIP and produced. McWane’s significantly narrowed Request 5 is now only seeking emails from **one custodian**, and SIP cannot claim that collecting emails from a single person in response to **one request** is unduly burdensome.

Finally, SIP cannot use its status as a “non-party” to justify its refusal to comply with the Subpoena. SIP Mot. at 5. This argument has already been rejected in FTC proceedings. See, e.g., *In re Polypore Int’l, Inc.*, 2009 FTC LEXIS 41, at *2-*5 (Jan. 15, 2009). Non-parties, like parties, must show that compliance with the subpoena would “unduly disrupt or seriously hinder normal operations of a business.” *In re Rambus, Inc.*, No. 9302, 2002 FTC LEXIS 90, at *9 (Nov. 18, 2002). McWane’s remaining requests at issue would take minimal time and effort to collect. Accordingly, SIP has provided no basis for the Court to find that the burden is so substantial that it outweighs the strong policy in favor of broad discovery and McWane’s need for the information relevant to its defenses in this case.

C. The January 5, 2012 Protective Order Protects SIP's Confidential Information

Finally, SIP's claim that the Protective Order in this case is "not sufficient" to protect its information from disclosure is unfounded. As McWane's counsel informed SIP, the Protective Order mandates that confidential documents can only be disclosed to:

"(a) the Administrative Law Judge presiding over this proceeding, personnel assisting the Administrative Law Judge, the Commission and its employees, and personnel retained by the Commission as experts or consultants for this proceeding; (b) judges and other court personnel of any court having jurisdiction over any appellate proceedings involving this matter; (c) outside counsel of record for any respondent, their associated attorneys and other employees of their law firm(s), provided they are not employees of a respondent; (d) anyone retained to assist outside counsel in the preparation or hearing of this proceeding including consultants, provided they are not affiliated in any way with a respondent and have signed an agreement to abide by the terms of the protective order; and (e) any witness or deponent who may have authored or received the information in question."

See, January 5, 2012 Protective Order, at ¶ 7.

This Court's Order is more than sufficient to protect the confidentiality of any document that SIP identifies as confidential, and courts routinely order competitors to produce confidential documents in antitrust cases. *See Service Liquor Distributors, Inc.*, 16 F.R.D. at 509. SIP has made no specific showing of how the particular Protective Order in this matter is "not sufficient." Thus, SIP's argument that this Court's Protective Order is insufficient should be rejected, and SIP should be ordered to produce the limited documents that remain at issue.

CONCLUSION

For the reasons set forth herein, Respondent McWane respectfully requests that the Court deny SIP's motion to quash and order it to produce documents responsive to Requests 2, 3, and 5 of McWane's Subpoena no later than April 20, 2012.

Dated: April 6, 2012

/s/ J. Alan Truitt

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**[PROPOSED] ORDER DENYING SIP INDUSTRIES' MOTION TO QUASH
SUBPOENA *DUCES TECUM***

McWane, Inc. ("McWane") proposes the entry of an Order Denying SIP Industries' Motion to Quash Subpoena *Duces Tecum*, and ordering it to produce documents responsive to McWane's Subpoena by April 20, 2012.

Good cause having been shown,

IT IS SO ORDERED:

That SIP's Motion to Quash Subpoena *Duces Tecum* is DENIED; and SIP's deadline to produce documents responsive to McWane's Subpoena is April 20, 2012.

D. Michael Chappell
Administrative Law Judge

DATED: _____

Certificate of Service

I hereby certify that on April 6, 2012, I filed the foregoing document electronically in PDF format using the FTC's E-Filing System, and served a copy on the following by overnight mail:

The Honorable D. Michael Chappell
Administrative Law Judge
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I also certify that on April 6, 2012, I served the forgoing document via email on the following:

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