



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 COMPEL COMPLAINT
COUNSEL’S ANSWERS TO INTERROGATORY NOS. 16-23**

Pursuant to Rule 3.38 of the Federal Trade Commission’s Rules of Practice for Adjudicative Proceedings, McWane respectfully moves the Court to compel Complaint Counsel to answer at least five (5) of Interrogatory Nos. 16 through 23 of McWane’s First Set of Interrogatories, dated February 15, 2012 (“McWane’s Interrogatories”). In Complaint Counsel’s Response and Objections to McWane’s Interrogatories, dated March 16, 2012 (“Complaint Counsel’s Response”), Complaint Counsel objected to answering Interrogatory Nos. 16 through 23 because McWane allegedly exceeded its allotted 25 interrogatories. *See* Exh. A at 15-18 (Complaint Counsel’s Interrogatory Responses). Complaint Counsel’s objection is erroneous, because it is based on a miscalculation of the number of discrete subparts in Interrogatory Nos. 2, 3, 5 and 10. When those subparts are properly counted, Complaint Counsel has answered only twenty (20) interrogatories at most, and should be compelled to answer at least five (5) of the remaining Interrogatory Nos. 16-23. As Complaint Counsel argued in its Motion to Compel (“Motion”), and this Court held in its April 16, 2012 Order (“Order”), “[i]f interrogatory subparts

‘are logically or factually subsumed within and necessarily related to the primary question,’ they are to be counted as one interrogatory.” See Exh. B (Motion) at 7; see Exh. C (Order) at 2, citing *Safeco of America v. Rawstrom*, 181 F.R.D. 441, 445 (C.D. Cal. 1998). Any subparts in Respondent’s Interrogatory Nos. 2, 3, 5 and 10 are logically and factually subsumed within and related to the primary questions, and thus each should be counted as one interrogatory.

Although McWane’s counsel has met and conferred with Complaint Counsel, no resolution on the issue of how to properly count interrogatory subparts could be reached, despite the fact that Complaint Counsel’s position is in direct conflict both with the arguments made in its own Motion and with this Court’s April 16, 2012 Order granting that Motion. See Exh. B (Motion) and Exh. C (Order); see also Exh. D (McWane’s Statement Regarding Meet and Confer Pursuant to Scheduling Order); Exh. E (L. Holleran Letter to W. Lavery, dated April 25, 2012).

Factual Background

On February 15, 2012, McWane propounded 23 interrogatories to Complaint Counsel. On March 16, 2012, Complaint Counsel served its Response, but refused to answer Interrogatory Nos. 16-23, objecting that “Responded has exceeded its allotted number of interrogatories, including all subparts, as specified in Rule 3.35(a) and in Paragraph 10 of the February 15, 2012 Scheduling Order.” See Exh. A at 15-18. Complaint Counsel’s objection arises from a miscounting of alleged multiple discrete subparts in many of McWane’s Interrogatories, including Interrogatory Nos. 2, 3, 5, and 10.

Argument

1. Interrogatory No. 2

Complaint Counsel incorrectly contends that Interrogatory No. 2 contains three discrete subparts. Interrogatory No. 2 states:

State all facts that you contend support your definition of a relevant Domestic Fittings product market, including but not limited to all facts upon which Complaint Counsel based the product and geographic market allegations in the Complaint and all facts upon which Complaint Counsel may or will rely at trial, including the relevant start and end dates of any ARRA-related markets or sub-markets, the likelihood of recurrence of such markets or sub-markets, and all facts refuting, or otherwise relating to such market definition.

Exh. A at 4.

Complaint Counsel initially contended that Interrogatory No. 2 contains three discrete subparts: 1) Domestic Fittings product market; 2) geographic market(s); and (3) ARRA-related submarkets. Exh. A at 4. Because any alleged ARRA-related submarket is subsumed within the Domestic Fittings product market, this contention is an artificially strained parsing of the phrases in the interrogatory. Complaint Counsel later revised its objection to allege that Interrogatory No. 2 contains two, rather than three, distinct subparts: 1) Domestic Fittings product market, including ARRA submarkets; and 2) geographic markets. *See* Exh. E. This artificial distinction does not pass muster on its face because, by definition, the “Domestic Fittings” product market includes an inextricable geographic component, namely fittings made in the United States, and thus can only be considered a single request. Complaint Counsel’s revised objection also conflicts with the position Complaint Counsel took in its own Motion, and with this Court’s Order granting that Motion. *See* Exh. B and Exh. C.

It is well settled that an interrogatory with subparts should be counted as a single interrogatory where the subparts are “logically or factually subsumed within and necessarily related” to the primary question. *In re Netbank, Inc. Securities Litigation*, 259 F.R.D. 656, 679 (N.D.Ga. 2009) (citations omitted). Overly restrictive readings of the numerical limit on interrogatories are discouraged, because such readings “would be inconsistent with the Federal Rules’ notions of broad discovery”. *Id.* As one court has explained: “Legitimate discovery

efforts should not have to depend upon linguistic acrobatics, nor should they sap the court's limited resources in order to resolve hypertechnical disputes." *Id.* (quoting *Ginn v. Gemini, Inc.*, 137 F.R.D. 320, 322 (D.Nev. 1991).

McWane's Interrogatory No. 2 seeks all facts supporting Complaint Counsel's definition of any market relevant to its claims in this action. To the extent Interrogatory No. 2 contains any subparts, those subparts are logically and factually subsumed within and necessarily related to Complaint Counsel's definition of the relevant markets. Therefore, Interrogatory No. 2 should count only as one interrogatory.

2. Interrogatory No. 3

Complaint Counsel incorrectly contends that Interrogatory No. 3 contains two discrete subparts. Interrogatory No. 3 states:

Identify all facts that you contend establish that McWane possesses or possessed market power or monopoly power in any relevant antitrust market, including but not limited to any evidence relating to market shares, the ability to control prices or output, the time period during which McWane allegedly possessed market power, and all facts that you contend establish that McWane acquired, enhanced, maintained, or exercised such market power through anticompetitive or unfair conduct or attempted to do so, and all facts refuting, or otherwise relating to McWane's alleged possession or exercise of market power.

Exh. A at 5. Complaint Counsel contends this interrogatory seeks: 1) facts relating to McWane's *possession* of market power; and 2) facts relating to McWane's *exercise* of market power. *Id.* The possession and exercise of market power, however, are so inherently intertwined as to be "logically or factually subsumed within and necessarily related" to each other, and thus should be counted as one interrogatory. *See Safeco*, 181 F.R.D. at 445, citing *Kendall v. GES Exposition Services*, 174 F.R.D. 684 (D.Nev. 1997); *Banks v. Office of the Senate Sergeant-at-Arms*, 222 F.R.D. 7, 10 (D.D.C. 2004). Complaint Counsel's objection should be overruled because

Interrogatory No. 3 contains no subpart logically or factually independent from the main question in the interrogatory. *See* Exh. C (Order) at 2. *See also In re Polypore Int'l, Inc.*, 2008 FTC LEXIS 155, at *3-4 (Nov. 14, 2008); *In re Dynamic Health of Florida*, 2004 FTC LEXIS 254, at *2 (Dec. 9, 2004).

3. Interrogatory No. 5

Complaint Counsel incorrectly contends that Interrogatory No. 5 contains four discrete subparts. Interrogatory No. 5 states:

Identify all facts supporting, refuting, or otherwise relating to Complaint Counsel's contention that consumers were substantially injured or likely to be injured as a result of McWane's alleged anticompetitive or unfair conduct, including but not limited to McWane's 2008-09 DIWF prices, that such injury was not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers, including, but not limited to (1) each specific instance of any Respondent's alleged anticompetitive or unfair conduct, (2) the alleged harm associated with each specific instance, (3) any specific consumer(s) allegedly injured, and (4) the likelihood of the alleged anticompetitive or unfair conduct or any resulting harm recurring in the future.

Exh. A at 7. Interrogatory 5 simply seeks facts supporting Complaint Counsel's allegation that consumers have been harmed by McWane's actions. Whether an alleged consumer injury could have been avoided, whether the consumer experienced any countervailing benefit, and whether the consumer's injury is likely to recur are matters so logically and factually subsumed within and necessarily related to the primary question of the existence of a consumer injury that Interrogatory No. 5 should be counted as one interrogatory. *See Estate of Manship v. United States*, 232 F.R.D. 552, 545-55 (M.D.La. 2005); *Safeco of America*, 181 F.R.D. at 445 (C.D.Cal. 1998); *Banks*, 222 F.R.D. at 10; *In re Polypore Int'l, Inc.*, 2008 FTC LEXIS 155, at *3-4 (Nov. 14, 2008); *In re Dynamic Health of Florida*, 2004 FTC LEXIS 254, at *2 (Dec. 9, 2004). As

Complaint Counsel stated in its own Motion on this very issue, subparts “directed at eliciting details concerning a common theme should be considered a single question”. See Complaint Counsel’s Motion at 5, citing 8B Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice & Procedure* § 2168.1, at 39-40 (3d ed. 2010); see Exh. B at 5; see also *Mezu v. Morgan State University*, 269 F.R.D. 565, 572-73 (D. Md. 2010) (same).

4. Interrogatory No. 10

Complaint Counsel incorrectly contends that Interrogatory No. 10 contains three discrete subparts. Interrogatory No. 10 states:

Is it Complaint Counsel’s contention that any alleged injury caused by the Domestic Rebate Policy, McWane’s participation in DIFRA, and/or the Sigma MDA was not outweighed by countervailing benefits or pro-competitive justifications? If so, state with particularity why consumers are or were harmed on balance, by identifying and describing the basis for this contention, and identify all facts relating to the contention upon which Complaint Counsel based the Complaint and upon which Complaint Counsel may or will rely at trial in support of the contention, including all facts refuting, or otherwise relating to, your contention.

Exh. A at 11. Complaint Counsel awkwardly parses and construes this interrogatory in order to contend that it contains three subparts: one relating to McWane’s Domestic Rebate Policy, one relating to McWane’s participation in DIFRA, and one relating to the Sigma MDA. To the contrary, Interrogatory 10 simply seeks facts supporting Complaint Counsel’s allegation that consumers on balance were harmed rather than benefited by McWane’s alleged activities in the relevant market. Because Interrogatory No. 10 seeks details about a common theme -- namely, the balance of consumer harm / benefit resulting from alleged conduct that is the subject of the Complaint -- it contains no subpart logically or factually independent from that common theme, and thus counts as one interrogatory. See *Swackhammer v. Sprint Corp. PCS*, 225 F.R.D. 658, 664-65 (D.Kan. 2004); *In re Polypore Int’l, Inc.*, 2008 FTC LEXIS 155, at *3-4 (Nov. 14, 2008);

In re Dynamic Health of Florida, 2004 FTC LEXIS 254, at *2 (Dec. 9, 2004).

WHEREFORE, for the reasons set forth herein, as well as in this Court's Order dated April 16, 2012, McWane's Motion is due to be GRANTED.

/s/ Joseph A. Ostoyich
Joseph A. Ostoyich
One of the Attorneys for McWane, Inc.

OF COUNSEL:
Joseph A. Ostoyich
Andreas Stargard
William C. Lavery
Baker Botts L.L.P.
The Warner
1299 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2420
Phone: 202.639.7700
Fax: 202.639.7890
joseph.ostoyich@bakerbotts.com
andreas.stargard@bakerbotts.com

J. Alan Truitt
Thomas W. Thagard, III
Julie S. Elmer
Maynard, Cooper & Gale, P.C.
1901 Sixth Avenue North
2400 AmSouth/Harbert Plaza
Birmingham, AL 35203-2608
(205) 254-1000
(205) 254-1999 (facsimile)
atruitt@maynardcooper.com
tthagard@maynardcooper.com
jelmer@maynardcooper.com

CERTIFICATE OF SERVICE

I hereby certify that on April 30, 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.
Thomas H. Brock, Esq.
Michael L. Bloom, Esq.
Jeanine K. Balbach, Esq.
J. Alexander Ansaldo, Esq.
Andrew K. Mann, Esq.

By: /s/ William C. Lavery
William C. Lavery
Counsel for McWane, Inc.

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PROPOSED ORDER

On April __, 2012, McWane, Inc. filed McWane's Motion to Compel Complaint Counsel's Answers to Interrogatory Nos. 16-23. Upon consideration of this motion, this Court grants McWane's motion. Complaint Counsel is ordered to answer five (5) of McWane's Interrogatory Nos. 16 through 23.

ORDERED:

_____, 2012

D. Michael Chappell
Administrative Law Judge

EXHIBIT A

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

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**COMPLAINT COUNSEL’S RESPONSE AND OBJECTIONS TO RESPONDENT
MCWANE INC.’S FIRST SET OF INTERROGATORIES (1-23)**

Pursuant to Section 3.35(b) of the Federal Trade Commission’s Rules of Practice, Complaint Counsel hereby responds to Respondent McWane, Inc.’s First Set of Interrogatories (“Respondent’s Interrogatories”). Subject to the General and Specific Objections below, and without waiving these objections, Complaint Counsel answers as follows:

General Objections

The following General Objections apply to all of Respondent’s Interrogatories and are hereby incorporated by reference into each of the following responses. The assertion of the same, similar, or additional objections or the provision of partial answers in response to an individual interrogatory does not waive any of Complaint Counsels’ general objections as to the other interrogatories.

1. Complaint Counsel objects to Respondent’s Interrogatories to the extent the interrogatories are directed to the Federal Trade Commission rather than to Complaint Counsel.

2. Complaint Counsel objects to Respondent's Interrogatories to the extent they seek to impose duties and obligations upon Complaint Counsel beyond the Commission's Rules of Practice for Adjudicative Proceedings. Complaint Counsel's responses will comply with the Commission's Rules of Practice for Adjudicative Proceedings.
3. Complaint Counsel objects to Respondent's Interrogatories to the extent the interrogatories, including all separate and distinct subparts, exceed the 25 interrogatories allowed under Rule 3.35(a) of the Commission's Rules of Practice for Adjudicative Proceedings and in Paragraph 10 of the February 15, 2012, Scheduling Order.
4. Complaint Counsel objects to Respondent's Interrogatories to the extent they seek information that relates to expert testimony prior to the dates prescribed by the February 15, 2012, Scheduling Order.
5. Complaint Counsel objects to Respondent's Interrogatories to the extent the interrogatories seek information protected by deliberative process privilege, law enforcement investigative privilege, informant's privilege, or the attorney work product doctrine. Complaint Counsel does not, by any response to any Request, waive or partially waive any applicable privilege or attorney work product claim.
6. Complaint Counsel objects to Respondent's Interrogatories to the extent it seeks information and materials from sources and persons within the Commission that are beyond the scope of the records search that Complaint Counsel are required to undertake pursuant to Rule 3.31(c)(2), and/or are expressly excluded from interrogatory responses by Rule 3.35(a)(1).
7. Complaint Counsel objects to Respondent's Interrogatories to the extent they are overly broad, vague, ambiguous, unduly burdensome, oppressive, and are not reasonably calculated to lead to the discovery of admissible evidence.

8. Complaint Counsel objects to Respondent's Interrogatories to the extent the interrogatories call for information previously provided to Respondent McWane or for information that may be less onerously obtained through other means.
9. Complaint Counsel objects to Respondent's Interrogatories as overly broad, unduly burdensome and oppressive in that they ask Complaint Counsel to disclose information that is already in Respondent McWane's possession or control, or is a matter of public record. Complaint Counsel will not undertake to catalogue and organize these materials for Respondent McWane.
10. Complaint Counsel objects to each interrogatory to the extent that it seeks information for which the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served.
11. Complaint Counsel objects to Respondent's Interrogatories to the extent that, as framed, they purport to obligate Complaint Counsel to conduct an extensive and complete investigation of detailed facts within the thirty (30) days allotted for its responses and objections when such facts are known to Respondent McWane and/or contained in hundreds of pages of documents already produced by Respondent McWane.
12. Complaint Counsel reserves all of its evidentiary objections or other objections to the introduction or use of any response herein at the hearing in this action, and does not, by any response to any Request, waive any objection to that Request, stated or unstated.
13. Complaint Counsel's has not completed its investigation of the facts relating to this case, its formal discovery or its preparation for trial. Complaint Counsel reserves the right to assert additional objections to Respondent's Interrogatories, and to amend or supplement these objections and responses as necessary after the close of discovery.

SPECIFIC OBJECTIONS AND RESPONSES

Subject to the foregoing, Complaint Counsel provides the following responses to

Respondent's Interrogatories:

Interrogatory No. 1

Identify every communication, if any, between the FTC and any other agency or instrumentality of the federal or a state government referring or relating to the subject matter of the DIWF Investigation or the allegations in the Complaint.

Response to Interrogatory No. 1

In addition to the General Objections, Complaint Counsel specifically objects to this interrogatory because it seeks information protected by the law enforcement investigative privilege, attorney work product doctrine, and deliberative process privilege. Complaint Counsel also specifically objects to this interrogatory as irrelevant and not reasonably calculated to lead to the discovery of admissible evidence.

Interrogatory No. 2

State all facts that you contend support your definition of a relevant Domestic Fittings product market, including but not limited to all facts upon which Complaint Counsel based the product and geographic market allegations in the Complaint and all facts upon which Complaint Counsel may or will rely at trial, including the relevant start and end dates of any ARRA-related markets or sub-markets, the likelihood of recurrence of such markets or sub-markets, and all facts refuting, or otherwise relating to such market definition.

Response to Interrogatory No. 2

Complaint Counsel notes that this interrogatory contains at least three discrete subparts, and seeks: (1) all facts relating to a Domestic Fittings product market, (2) all facts supporting the geographic market(s) alleged in the Complaint; and (3) all facts relating to any ARRA-related submarkets.

In addition to the General Objections, Complaint Counsel specifically objects to this interrogatory to the extent it impermissibly seeks attorney work product and Complaint Counsel's trial strategy. Complaint Counsel also objects to this interrogatory as premature to the extent it seeks information relating to issues that may be the subject of expert testimony in this case. Counsel Complaint Counsel further objects to the interrogatory as unduly burdensome to the extent it seeks to compel Complaint Counsel to undertake investigation, discovery, and analysis on behalf of Respondent. Complaint Counsel also objects to this interrogatory as premature and unduly burdensome because it is a contention interrogatory and no response is required prior to the close of discovery pursuant to Rule 3.35 (b)(2). Complaint Counsel will supplement its answer, as appropriate, after the close of discovery, as set forth in Rule 3.35(b)(2).

Interrogatory No. 3

Identify all facts that you contend establish that McWane possesses or possessed market power or monopoly power in any relevant antitrust market, including but not limited to any evidence relating to market shares, the ability to control prices or output, the time period during which McWane allegedly possessed market power, and all facts that you contend establish that McWane acquired, enhanced, maintained, or exercised such market power through anticompetitive or unfair conduct or attempted to do so, and all facts refuting, or otherwise relating to McWane's alleged possession or exercise of market power.

Response to Interrogatory No. 3

Complaint Counsel notes that this interrogatory contains at least two discrete subparts, and seeks: (1) all facts establishing, refuting or otherwise that McWane possesses market power or monopoly power; and (2) all facts establishing, refuting or otherwise relating to McWane exercising such power through anticompetitive or unfair conduct or attempted to do so.

In addition to the General Objections, Complaint Counsel specifically objects to this interrogatory as premature to the extent it seeks information relating to issues that may be the subject of expert testimony in this case. Counsel Complaint Counsel also objects to the

interrogatory as unduly burdensome to the extent it seeks to compel Complaint Counsel to undertake investigation, discovery, and analysis on behalf of Respondent. Complaint Counsel further objects to this interrogatory as premature and unduly burdensome because it is a contention interrogatory and no response is required prior to the close of discovery pursuant to Rule 3.35 (b)(2). Complaint Counsel will supplement its answer, as appropriate, after the close of discovery, as set forth in Rule 3.35(b)(2).

Interrogatory No. 4

Identify all facts that you contend establish that McWane had the specific intent to monopolize a relevant antitrust market or that there was or is a dangerous probability that McWane could monopolize a relevant antitrust market, including all facts refuting, or otherwise relating to, such contention.

Response to Interrogatory No. 4

Complaint Counsel notes that this interrogatory contains at least two discrete subparts, and seeks: (1) all facts establishing, refuting or otherwise relating to McWane's specific intent to monopolize; and (2) all facts establishing, refuting or otherwise relating to the dangerous probability that McWane would monopolize a relevant antitrust market.

In addition to the General Objections, Complaint Counsel specifically objects to this interrogatory as premature to the extent it seeks information relating to issues that may be the subject of expert testimony in this case. Counsel Complaint Counsel also objects to the interrogatory as unduly burdensome to the extent it seeks to compel Complaint Counsel to undertake investigation, discovery, and analysis on behalf of Respondent. Complaint Counsel further objects to this interrogatory as premature and unduly burdensome because it is a contention interrogatory and no response is required prior to the close of discovery pursuant to Rule 3.35 (b)(2). Complaint Counsel will supplement its answer, as appropriate, after the close of discovery, as set forth in Rule 3.35(b)(2).

Interrogatory No. 5

Identify all facts supporting, refuting, or otherwise relating to Complaint Counsel's contention that consumers were substantially injured or likely to be injured as a result of McWane's alleged anticompetitive or unfair conduct, including but not limited to McWane's 2008-09 DIWF prices, that such injury was not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers, including, but not limited to (1) each specific instance of any Respondent's alleged anticompetitive or unfair conduct, (2) the alleged harm associated with each specific instance, (3) any specific consumer(s) allegedly injured, and (4) the likelihood of the alleged anticompetitive or unfair conduct or any resulting harm recurring in the future.

Response to Interrogatory No. 5

Complaint Counsel notes that this interrogatory contains at least four discrete subparts, and seeks: (1) all facts establishing, refuting or otherwise relating to consumers being injured by McWane's anticompetitive conduct; (2) all facts establishing, refuting or otherwise relating to the ability of consumers to reasonably avoid the harm; (3) all facts establishing, refuting or otherwise relating to any alleged countervailing benefits to consumers from McWane's anticompetitive conduct; and (4) all facts establishing, refuting or otherwise relating to the likelihood of the alleged anticompetitive conduct or any resulting harm recurring in the future.

In addition to the General Objections, specifically objects to the terms "substantially injured," "likely to be injured," "reasonably avoidable," and "countervailing benefits" as vague and ambiguous. Complaint Counsel also objects to this interrogatory as premature to the extent it seeks information relating to issues that may be the subject of expert testimony in this case. Counsel Complaint Counsel further objects to the interrogatory as unduly burdensome to the extent it seeks to compel Complaint Counsel to undertake investigation, discovery, and analysis on behalf of Respondent. Complaint Counsel also objects to this interrogatory as premature and unduly burdensome because it is a contention interrogatory and no response is required prior to

the close of discovery pursuant to Rule 3.35 (b)(2). Complaint Counsel will supplement its answer, as appropriate, after the close of discovery, as set forth in Rule 3.35(b)(2).

Interrogatory No. 6

Identify all facts that you contend establish that McWane’s alleged conduct raised prices to supra-competitive levels, artificially decreased output, otherwise harmed consumers or the competitive process, or was contrary to McWane’s own self-interest.

Response to Interrogatory No. 6

Complaint Counsel notes that this interrogatory contains at least two discrete subparts, and seeks: (1) all facts establishing that McWane’s conduct harmed consumers or the competitive process; and (2) all facts establishing that McWane’s conduct was contrary to its own self-interest.

In addition to the General Objections, Complaint Counsel specifically objects to the term “artificially decreased output” as vague and ambiguous. Complaint Counsel further objects to this interrogatory as premature to the extent it seeks information relating to issues that may be the subject of expert testimony in this case. Counsel Complaint Counsel also objects to the interrogatory as unduly burdensome to the extent it seeks to compel Complaint Counsel to undertake investigation, discovery, and analysis on behalf of Respondent. Complaint Counsel further objects to this interrogatory as premature and unduly burdensome because it is a contention interrogatory and no response is required prior to the close of discovery pursuant to Rule 3.35 (b)(2). Complaint Counsel will supplement its answer, as appropriate, after the close of discovery, as set forth in Rule 3.35(b)(2).

Interrogatory No. 7

Is it Complaint Counsel’s contention that McWane directly communicated its list prices, multipliers, specific job bids, or any other information related to the pricing of its DIWF products to any other manufacturers or suppliers of Domestic Fittings or Non-domestic Fittings before it communicated those prices to its customers or potential

customers? If so, identify and describe the basis for Complaint Counsel’s contention and identify all facts relating to the contention upon which Complaint Counsel based the Complaint and upon which Complaint Counsel may or will rely at trial in support of the contention, and all facts refuting, or otherwise relating to your contention.

Response to Interrogatory No. 7

In addition to the General Objections, Complaint Counsel specifically objects to the term “directly communicated” as vague and ambiguous. Complaint Counsel also objects to this interrogatory to the extent it impermissibly seeks attorney work product and Complaint Counsel’s trial strategy. Counsel Complaint Counsel further objects to the interrogatory as unduly burdensome to the extent it seeks to compel Complaint Counsel to undertake investigation, discovery, and analysis on behalf of Respondent. Complaint Counsel also objects to this interrogatory as premature and unduly burdensome because it is a contention interrogatory and no response is required prior to the close of discovery pursuant to Rule 3.35 (b)(2). Complaint Counsel will supplement its answer, as appropriate, after the close of discovery, as set forth in Rule 3.35(b)(2).

Interrogatory No. 8

Is it Complaint Counsel’s contention that there was parallel pricing relating to Domestic Fittings or Non-domestic Fittings by McWane or any other DIWF manufacturer or supplier? If so, identify and describe the basis for Complaint Counsel’s contention and identify all facts relating to the contention upon which Complaint Counsel based the Complaint and upon which Complaint Counsel may or will rely at trial in support of the contention, including all facts refuting, or otherwise relating to, your contention.

Response to Interrogatory No. 8

In addition to the General Objections, Complaint Counsel specifically objects to the term “parallel pricing” as vague and ambiguous. Complaint Counsel also objects to this interrogatory to the extent it impermissibly seeks attorney work product and Complaint Counsel’s trial strategy. Counsel Complaint Counsel further objects to the interrogatory as unduly burdensome

to the extent it seeks to compel Complaint Counsel to undertake investigation, discovery, and analysis on behalf of Respondent. Complaint Counsel also objects to this interrogatory as premature and unduly burdensome because it is a contention interrogatory and no response is required prior to the close of discovery pursuant to Rule 3.35 (b)(2). Complaint Counsel will supplement its answer, as appropriate, after the close of discovery, as set forth in Rule 3.35(b)(2).

Interrogatory No. 9

Is it Complaint Counsel's contention that any decision by McWane to change its DIWF pricing in 2008-09 was not made independently? If so, identify and describe the basis for Complaint Counsel's contention and identify all facts relating to the contention upon which Complaint Counsel based the Complaint and upon which Complaint Counsel may or will rely at trial in support of the contention, including all facts refuting, or otherwise relating to, your contention.

Response to Interrogatory No. 9

In addition to the General Objections, Complaint Counsel specifically objects to the terms "any decision" and "independently" as vague and ambiguous. Complaint Counsel further objects to this interrogatory as compound to the extent that McWane made multiple pricing decisions in 2008 and 2009. Complaint Counsel also objects to this interrogatory to the extent it impermissibly seeks attorney work product and Complaint Counsel's trial strategy. Counsel Complaint Counsel further objects to the interrogatory as unduly burdensome to the extent it seeks to compel Complaint Counsel to undertake investigation, discovery, and analysis on behalf of Respondent. Complaint Counsel also objects to this interrogatory as premature and unduly burdensome because it is a contention interrogatory and no response is required prior to the close of discovery pursuant to Rule 3.35 (b)(2). Complaint Counsel will supplement its answer, as appropriate, after the close of discovery, as set forth in Rule 3.35(b)(2).

Interrogatory No. 10

Is it Complaint Counsel’s contention that any alleged injury caused by the Domestic Rebate Policy, McWane’s participation in DIFRA, and/or the Sigma MDA was not outweighed by countervailing benefits or pro-competitive justifications? If so, state with particularity why consumers are or were harmed on balance, by identifying and describing the basis for this contention, and identify all facts relating to the contention upon which Complaint Counsel based the Complaint and upon which Complaint Counsel may or will rely at trial in support of the contention, including all facts refuting, or otherwise relating to, your contention.

Response to Interrogatory No. 10

Complaint Counsel notes that this interrogatory contains at least three distinct subparts, and seeks: (1) all facts relating to the balance of harm and any alleged efficiencies related to McWane’s Domestic Rebate Policy; (2) all facts relating to the balance of harm and any alleged efficiencies related to McWane’s participation in DIFRA; and (3) all facts relating to the balance of harm and any alleged efficiencies related to the Sigma MDA.

In addition to the General Objections, Complaint Counsel specifically objects to the terms “countervailing benefits” and “harmed on balance” as vague and ambiguous. Complaint Counsel also objects to the interrogatory as impermissibly seeking attorney work product and Complaint Counsel’s trial strategy. Complaint Counsel further objects to this interrogatory as premature to the extent it seeks information relating to issues that may be the subject of expert testimony in this case. Counsel Complaint Counsel also objects to the interrogatory as unduly burdensome to the extent it seeks to compel Complaint Counsel to undertake investigation, discovery, and analysis on behalf of Respondent. Complaint Counsel further objects to this interrogatory as premature and unduly burdensome because it is a contention interrogatory and no response is required prior to the close of discovery pursuant to Rule 3.35 (b)(2). Complaint Counsel will supplement its answer, as appropriate, after the close of discovery, as set forth in Rule 3.35(b)(2).

Interrogatory No. 11

Is it Complaint Counsel's contention that McWane had no valid business reason for changing its published multipliers for DIWF in 2008? If so, identify and describe the basis for Complaint Counsel's contention and identify all facts relating to the contention upon which Complaint Counsel based the Complaint and upon which Complaint Counsel may or will rely at trial in support of the contention, including all facts refuting, or otherwise relating to, your contention.

Response to Interrogatory No. 11

In addition to the General Objections, Complaint Counsel specifically objects to the term "valid business reason" as vague and ambiguous. Complaint Counsel also objects to this interrogatory as impermissibly seeking attorney work product and Complaint Counsel's trial strategy. Complaint Counsel further objects to this interrogatory as compound to the extent that McWane made multiple pricing decisions in 2008. Counsel Complaint Counsel also objects to the interrogatory as unduly burdensome to the extent it seeks to compel Complaint Counsel to undertake investigation, discovery, and analysis on behalf of Respondent. Complaint Counsel further objects to this interrogatory as premature and unduly burdensome because it is a contention interrogatory and no response is required prior to the close of discovery pursuant to Rule 3.35 (b)(2). Complaint Counsel will supplement its answer, as appropriate, after the close of discovery, as set forth in Rule 3.35(b)(2).

Interrogatory No. 12

Is it Complaint Counsel's contention that any alleged injury arising from McWane's Domestic Rebate Policy that consumers could not reasonably avoid was not outweighed by countervailing benefits to consumers or to competition? If so, identify and describe the basis for Complaint Counsel's contention and identify all facts relating to the contention upon which Complaint Counsel based the Complaint and upon which Complaint Counsel may or will rely at trial in support of the contention, including all facts refuting, or otherwise relating to, your contention.

Response to Interrogatory No. 12

In addition to the General Objections, Complaint Counsel specifically objects to the terms “reasonably avoid” and “countervailing benefits” as vague and ambiguous. Complaint Counsel also objects to this interrogatory as impermissibly seeking attorney work product and Complaint Counsel’s trial strategy. Complaint Counsel further objects to this interrogatory as premature to the extent it seeks information relating to issues that may be the subject of expert testimony in this case. Counsel Complaint Counsel also objects to the interrogatory as unduly burdensome to the extent it seeks to compel Complaint Counsel to undertake investigation, discovery, and analysis on behalf of Respondent. Complaint Counsel further objects to this interrogatory as premature and unduly burdensome because it is a contention interrogatory and no response is required prior to the close of discovery pursuant to Rule 3.35 (b)(2). Complaint Counsel will supplement its answer, as appropriate, after the close of discovery, as set forth in Rule 3.35(b)(2).

Interrogatory No. 13

Is it Complaint Counsel’s contention that McWane had no valid business reason for implementing McWane’s Domestic Rebate Policy? If so, identify and describe the basis for Complaint Counsel’s contention and identify all facts relating to the contention upon which Complaint Counsel based the Complaint and upon which Complaint Counsel may or will rely at trial in support of the contention, including all facts refuting, or otherwise relating to, your contention.

Response to Interrogatory No. 13

In addition to the General Objections, Complaint Counsel specifically objects to the term “valid business reason” as vague and ambiguous. Complaint Counsel also objects to this interrogatory as impermissibly seeking attorney work product and Complaint Counsel’s trial strategy. Counsel Complaint Counsel also objects to the interrogatory as unduly burdensome to the extent it seeks to compel Complaint Counsel to undertake investigation, discovery, and

analysis on behalf of Respondent. Complaint Counsel further objects to this interrogatory as premature and unduly burdensome because it is a contention interrogatory and no response is required prior to the close of discovery pursuant to Rule 3.35 (b)(2). Complaint Counsel will supplement its answer, as appropriate, after the close of discovery, as set forth in Rule 3.35(b)(2).

Interrogatory No. 14

Is it Complaint Counsel’s contention that McWane’s Domestic Rebate Policy foreclosed or was likely to foreclose competition in a relevant product market and precluded Star or any other supplier from selling Domestic or imported DIWF products to any Person? If so, identify and describe the basis for Complaint Counsel’s contention including, but not limited to, the identification of any foreclosure of competition, the type of product at issue, the identity of any Person from which Star was allegedly foreclosed and the basis for the alleged foreclosure, the percentage of foreclosure in the alleged relevant market that was caused by McWane’s Domestic Rebate Policy, and all facts relating to the contention upon which Complaint Counsel based the Complaint and upon which Complaint Counsel may or will rely at trial in support of the contention, including all facts refuting, or otherwise relating to, your contention.

Response to Interrogatory No. 14

In addition to the General Objections, Complaint Counsel specifically objects to the terms “foreclosed,” “foreclosure” and “precluded” as vague and ambiguous. Complaint Counsel also objects to this interrogatory as impermissibly seeking attorney work product and Complaint Counsel’s trial strategy. Complaint Counsel further objects to this interrogatory as premature to the extent it seeks information relating to issues that may be the subject of expert testimony in this case. Counsel Complaint Counsel also objects to the interrogatory as unduly burdensome to the extent it seeks to compel Complaint Counsel to undertake investigation, discovery, and analysis on behalf of Respondent. Complaint Counsel further objects to this interrogatory as premature and unduly burdensome because it is a contention interrogatory and no response is required prior to the close of discovery pursuant to Rule 3.35 (b)(2). Complaint Counsel will supplement its answer, as appropriate, after the close of discovery, as set forth in Rule 3.35(b)(2).

Interrogatory No. 15

Is it Complaint Counsel's contention that McWane or Sigma have made threats related to the Domestic Rebate Policy, and if so, identify all threats you contend McWane or Sigma have made, including but not limited to whom the threat was made, who has personal knowledge of it, and what effect each such threat had.

Response to Interrogatory No. 15

In addition to the General Objections, Complaint Counsel specifically objects to the terms "threats" as vague and ambiguous. Complaint Counsel further objects to this interrogatory as premature to the extent it seeks information relating to issues that may be the subject of expert testimony in this case. Counsel Complaint Counsel also objects to the interrogatory as unduly burdensome to the extent it seeks to compel Complaint Counsel to undertake investigation, discovery, and analysis on behalf of Respondent. Complaint Counsel further objects to this interrogatory as premature and unduly burdensome because it is a contention interrogatory and no response is required prior to the close of discovery pursuant to Rule 3.35 (b)(2). Complaint Counsel will supplement its answer, as appropriate, after the close of discovery, as set forth in Rule 3.35(b)(2).

Interrogatory No. 16

Is it Complaint Counsel's contention that any of the allegedly anticompetitive or unfair conduct by any Respondent is ongoing at present? If so, identify and describe the basis for Complaint Counsel's contention and identify all facts relating to the contention upon which Complaint Counsel based the Complaint and upon which Complaint Counsel may or will rely at trial in support of the contention.

Response to Interrogatory No. 16

In addition to the General Objections, Complaint Counsel specifically objects to this interrogatory because Respondent has exceeded its allotted number of interrogatories, including all subparts, as specified in Rule 3.35(a) and in Paragraph 10 of the February 15, 2012, Scheduling Order.

Interrogatory No. 17

Identify each and every alleged anticompetitive or unfair conduct of each Respondent or other third party regarding the prices of Non-domestic Fittings or in any manner relating to their participation or membership in DIFRA.

Response to Interrogatory No. 17

In addition to the General Objections, Complaint Counsel specifically objects to this interrogatory because Respondent has exceeded its allotted number of interrogatories, including all subparts, as specified in Rule 3.35(a) and in Paragraph 10 of the February 15, 2012, Scheduling Order.

Interrogatory No. 18

Is it Complaint Counsel's contention that McWane's participation in DIFRA, including its receipt of aggregated, anonymized shipment tonnage data compiled by SRHW, caused the price of DIWF products it sold into Open Preference jobs to be higher than they otherwise would have been? If so, identify and describe the basis for Complaint Counsel's contention and identify all facts relating to the contention upon which Complaint Counsel based the Complaint and upon which Complaint Counsel may or will rely at trial in support of the contention, including all facts refuting, or otherwise relating to, your contention.

Response to Interrogatory No. 18

In addition to the General Objections, Complaint Counsel specifically objects to this interrogatory because Respondent has exceeded its allotted number of interrogatories, including all subparts, as specified in Rule 3.35(a) and in Paragraph 10 of the February 15, 2012, Scheduling Order.

Interrogatory No. 19

Is it Complaint Counsel's contention that McWane had no valid business reason for participating in DIFRA or receiving aggregated, anonymized volume data compiled by SRHW? If so, identify and describe the basis for Complaint Counsel's contention and identify all facts relating to the contention upon which Complaint Counsel based the Complaint and upon which Complaint Counsel may or will rely at trial in support of the contention, including all facts refuting, or otherwise relating to, your contention.

Response to Interrogatory No. 19

In addition to the General Objections, Complaint Counsel specifically objects to this interrogatory because Respondent has exceeded its allotted number of interrogatories, including all subparts, as specified in Rule 3.35(a) and in Paragraph 10 of the February 15, 2012, Scheduling Order.

Interrogatory No. 20

Is it Complaint Counsel's contention that the MDA was not an arms-length transaction between McWane and Sigma? If so, identify and describe the basis for Complaint Counsel's contention and identify all facts relating to the contention upon which Complaint Counsel based the Complaint and upon which Complaint Counsel may or will rely at trial in support of the contention, including all facts refuting, or otherwise relating to, your contention.

Response to Interrogatory No. 20

In addition to the General Objections, Complaint Counsel specifically objects to this interrogatory because Respondent has exceeded its allotted number of interrogatories, including all subparts, as specified in Rule 3.35(a) and in Paragraph 10 of the February 15, 2012, Scheduling Order.

Interrogatory No. 21

Is it Complaint Counsel's contention that McWane had no valid business purpose for selling Domestic Fittings to Sigma and/or for entering into the MDA? If so, identify and describe the basis for Complaint Counsel's contention and identify all facts relating to the contention upon which Complaint Counsel based the Complaint and upon which Complaint Counsel may or will rely at trial in support of the contention, including all facts refuting, or otherwise relating to, your contention.

Response to Interrogatory No. 21

In addition to the General Objections, Complaint Counsel specifically objects to this interrogatory because Respondent has exceeded its allotted number of interrogatories, including

all subparts, as specified in Rule 3.35(a) and in Paragraph 10 of the February 15, 2012, Scheduling Order.

Interrogatory No. 22

Is it Complaint Counsel's contention that, but for the MDA, Sigma would have begun selling Domestic Fittings during or after the ARRA period? If so, identify when you contend Sigma would have begun selling Domestic DIPF, in what diameter sizes and configurations, and at what prices and describe the basis for this contention and identify all facts relating to the contention upon which Complaint Counsel based the Complaint and upon which Complaint Counsel may or will rely at trial in support of the contention, including all facts refuting, or otherwise relating to, your contention and all facts referring or relating in any manner to Sigma's plans, preparations for, and entry into the Domestic Fittings market and Sigma's decision to produce, buy, or sell Domestic Fittings.

Response to Interrogatory No. 22

In addition to the General Objections, Complaint Counsel specifically objects to this interrogatory because Respondent has exceeded its allotted number of interrogatories, including all subparts, as specified in Rule 3.35(a) and in Paragraph 10 of the February 15, 2012, Scheduling Order.

Interrogatory No. 23

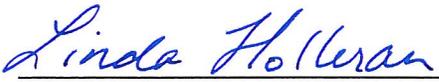
Is it Complaint Counsel's contention that McWane's Domestic or imported DIPF prices would have been lower but-for McWane's conduct and, if so, state all facts and counter-facts.

Response to Interrogatory No. 23

In addition to the General Objections, Complaint Counsel specifically objects to this interrogatory because Respondent has exceeded its allotted number of interrogatories, including all subparts, as specified in Rule 3.35(a) and in Paragraph 10 of the February 15, 2012, Scheduling Order.

Dated: March 16, 2012

Respectfully submitted,



Edward Hassi, Esq.

Geoffrey M. Green, Esq.

Linda Holleran, Esq.

Thomas H. Brock, Esq.

Michael J. Bloom, Esq.

Jeanine K. Balbach, Esq.

J. Alexander Ansaldo, Esq.

Andrew K. Mann, Esq.

Monica M. Castillo, Esq.

Counsel Supporting the Complaint

Bureau of Competition

Federal Trade Commission

Washington, DC 20580

Telephone: (202) 326-2470

Facsimile: (202) 326-3496

Electronic Mail: ehassi@ftc.gov

CERTIFICATE OF SERVICE

I hereby certify that on March 16, 2012, that I delivered via electronic mail a copy of the foregoing document to:

Joseph A. Ostoyich
Andreas Stargard
William C. Lavery
Baker Botts L.L.P.
The Warner
1299 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 639-7700
joseph.ostoyich@bakerbotts.com
andreas.stargard@bakerbotts.com
william.lavery@bakerbotts.com

J. Alan Truitt
Thomas W. Thagard III
Maynard Cooper and Gale PC
1901 Sixth Avenue North
2400 Regions Harbert Plaza
Birmingham, AL 35203
(205) 254-1000
atruitt@maynardcooper.com
tthagard@maynardcooper.com

Counsel for Respondent McWane, Inc.

Gregory S.C. Huffman
William Katz
Nicole Williams
Brian Stoltz
Thompson and Knight LLP
One Arts Plaza
1722 Routh Street, Suite 1500
Dallas, TX 75201
(214) 969-1700
Gregory.Huffman@tklaw.com
William.Katz@tklaw.com
Nicole.Williams@tklaw.com
Brian.Stoltz@tklaw.com

Counsel for Respondent Star Pipe Products, Ltd.

March 16, 2012

By: Linda Holleran
Linda Holleran
Attorney

EXHIBIT B

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

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

**COMPLAINT COUNSEL’S MOTION TO COMPEL RESPONDENT
MCWANE, INC.’S ANSWERS TO INTERROGATORY NOS. 13-16
(REQUEST FOR EXPEDITED BRIEFING)**

Pursuant to Rule 3.38 of the Federal Trade Commission’s Rules of Practice for Adjudicative Proceedings, Complaint Counsel respectfully moves the Court to compel Respondent to answer Interrogatory Nos. 13 through 16 of Complaint Counsel’s First Set of Interrogatories, dated February 21, 2012 (“Complaint Counsel’s Interrogatories”). In McWane, Inc.’s Responses and Objections to Complaint Counsel’s First Set of Interrogatories, dated March 22, 2012 (“Respondent’s Interrogatory Responses”), Respondent objects to answering these interrogatories on the basis that Complaint Counsel allegedly exceeded its allotted 25 interrogatories. *See* Exhibit A at 12-14 (Respondent’s Interrogatory Responses). Respondent reaches this erroneous conclusion by miscounting the number of discrete subparts in Interrogatory Nos. 1, 6 and 10 of Complaint Counsel’s Interrogatories. When properly counting only those subparts that are logically or factually independent of the main interrogatory, Respondent has answered no more than 21 interrogatories and should therefore be compelled to answer Interrogatory Nos. 13 through 16 of Complaint Counsel’s Interrogatories.

Complaint Counsel met and conferred with counsel for Respondent regarding a number of issues related to Respondent's Interrogatory Responses, but counsel could not reach a resolution on the issue of how to properly count interrogatory subparts. *See* Exhibit B (Complaint Counsel's Statement Regarding Meet and Confer Pursuant to Scheduling Order); *see also* Exhibit C (A. Stargard E-Mail to L. Holleran, dated March 27, 2012 ("March 27, 2012 E-Mail")); Exhibit D (L. Holleran Letter to A. Stargard, dated March 28, 2012 ("March 28, 2012 Letter")). Given the short time frame allowed for discovery in this matter, Complaint Counsel respectfully requests expedited briefing of this issue. *See* Rule 3.22(d) (allowing the Administrative Law Judge to set a shorter or longer period of time to respond to a written motion).

I. Factual Background

On February 21, 2012, Complaint Counsel propounded 16 interrogatories to Respondent McWane. On March 22, 2012, Respondent answered Complaint Counsel's Interrogatories, but refused to answer Interrogatory Nos. 13-16 due to its objection that, "Complaint Counsel has exceeded its allotted number of interrogatories, including all subparts, as specified in Rule 3.35(a) and in Paragraph 10 of the Court's February 15, 2012, Scheduling Order." *See* Exh. A at 12-14 (Respondent's Interrogatory Responses). Respondent bases its objection by counting multiple discrete subparts in many of Complaint Counsel's interrogatories, including Interrogatory Nos. 1, 6 and 10.¹

Specifically, Respondent counts four discrete subparts in Interrogatory No. 1, which states:

¹ Respondent counted multiple subparts on most of Complaint Counsel's interrogatories. *See* Exh. C (March 27, 2012 E-Mail). While Complaint Counsel believes that Respondent over-counted the number of discrete subparts in many of its interrogatories, for purposes of this motion, Complaint Counsel is assuming *arguendo* that Respondent's count of subparts is accurate except for Interrogatory Nos. 1, 6 and 10.

1. Identify each current or former employee of the Company who has or had any management or supervisory responsibilities or duties with respect to pricing of any Relevant Product, including without limitation: involvement in marketing, sales, distribution, or influencing list prices, catalog prices, multiplier prices, project discounts or any form of rebates; or who has had any Communication with any Competitor; and for each such current or former employee of the Company, provide:

- a. The business and home telephone numbers and telephone service providers of each voice, facsimile or cellular line assigned to or used for any business purpose by each employee (whether exclusive or not), and the period during which each such number was assigned to or used by the employee; and,
- b. Each business and home telecopier and electronic mail identifier assigned to or used for business purpose by the employee (whether exclusive or not) and the period during which each such identifier was assigned to or used by the employee.

Exh. A (Respondent's Interrogatory Responses) at 4.

Respondent initially counted the subparts in Interrogatory No. 1 as follows: (i) the identification of Respondent's employees with pricing authority; (ii) the identification of Respondent's employees with communications with Competitors; (iii) the phone numbers of those employees; and (iv) the e-mail addresses of those employees. *See Exhibit C (March 27, 2012 E-Mail); Exhibit D (March 28, 2012 Letter).* During subsequent conversations, Respondent conceded that telephone numbers were not a separate and discrete subpart, but continued to count four subparts by now counting them as follows: (i) the identification of Respondent's employees with pricing authority; (ii) the e-mail addresses of employees with pricing authority; (iii) the identification of employees who communicate with competitors; and (iv) the e-mail addresses of employees who communicate with competitors. As discussed further below, this interrogatory consists of no more than 2 discrete subparts.

Respondent also counts two discrete subparts in Interrogatory No. 6, which states:

6. Quantify each justification, efficiency, rationale or Effect identified in response to Specification 5 above, and describe in detail the basis used in quantifying the justification, efficiency, rationale or Effect.

Exh. A (Respondent's Interrogatory Responses) at 8. Specifically, Respondent counts the following as distinct subparts: (i) the quantification of any claimed efficiencies relating to DIFRA; and (ii) the description of how it reached this quantification. *See* Exh. B (March 28, 2012 Letter). As discussed below, this is a single interrogatory.

Finally, Respondent counts two discrete subparts in Interrogatory No. 10, which states:

10. Quantify each justification, efficiency, rationale or Effect identified in response to Specification 9 above, and describe in detail the basis used in quantifying the justification, efficiency, rationale or Effect.

Exh. A (Respondent's Interrogatory Responses) at 11. Consistent with its approach to Interrogatory No. 6, Respondent counts the following as distinct subparts: (i) the quantification of any claimed efficiencies relating to its exclusive dealing arrangements; and (ii) the description of how it reached this quantification. This is also a single interrogatory.

II. Legal Analysis

Rule 3.35(a) of the Commission's Rules of Practice for Adjudicative Proceedings and Paragraph 10 of the Court's February 15, 2012, Scheduling Order allot each party 25 interrogatories, including all discrete subparts. Discrete subparts are included in the total count of interrogatories propounded by a party so as to prevent a litigant from evading the numerical limit on interrogatories by requesting many different types of information under the guise of a single interrogatory. Under the appropriate standard for identifying discrete subparts, Interrogatory Nos. 1, 6 and 10 should be counted as no more than four

total interrogatories, and not eight as contended by Respondent. Accordingly, even assuming *arguendo* that Respondent correctly counted the subparts of all other interrogatories, Respondent has answered no more than 21 interrogatories in Complaint Counsel's Interrogatories, and should therefore be compelled to answer Interrogatory Nos. 13 through 16.

A. Interrogatories Have Discrete Subparts Only If the Subparts are Logically or Factually Independent from the Main Question of the Interrogatory

Following the approach of courts interpreting Rule 33(a) of the Federal Rules of Civil Procedure, the Commission counts a subpart as "discrete," or as a separate interrogatory under Rule 3.35(a), only if the subpart is logically or factually independent from the main question in the interrogatory. *See In re Polypore Int'l, Inc.*, 2008 FTC Lexis 155, at *3-4 (2008); *In Re Dynamic Health of Florida*, 2004 FTC Lexis 254, at *2 (2004) (finding subpart discrete when answer could be understood and "stand alone" without a response to the other aspects of the interrogatory request). As explained in *Moore's Federal Practice & Procedure*,

However, courts agree generally that a discrete subpart is one that is not logically or factually subsumed within and necessarily related to the primary question. Therefore, even if a question is listed as a subpart, if it can be answered independently from the primary question, that subpart must be counted as a separate interrogatory. On the other hand, multiple interrelated questions in subparts constitute a single interrogatory. For example, a subpart is not a separate interrogatory if it requests that the time, place, persons present, and contents be stated separately.

2-15 *Moore's Federal Practice and Procedure* § 15.25(3)(b) (2011); *see also* 8B Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice & Procedure* § 2168.1, at 39-40 (3d ed. 2010) (subparts "directed at eliciting details concerning a common theme should be considered a single question"); *Kendall v. GES Exposition*

Servs., Inc., 174 F.R.D. 684, 685 (D. Nev. 1997)) (“Probably the best test of whether subsequent questions, within a single interrogatory, are subsumed and related, is to examine whether the first question is primary and subsequent questions are secondary to the primary question. Or, can the subsequent question stand alone? Is it independent of the first question?”).

B. Interrogatory Nos. 1, 6 and 10 of Complaint Counsel’s Interrogatories Should Be Counted As No More Than a Total of Four Interrogatories

Applying the appropriate standard for identifying discrete subparts here, Complaint Counsel’s Interrogatory No. 1 should count as two interrogatories, and Interrogatory Nos. 6 and 10 should each only count a single interrogatory.

1. Interrogatory No. 1

Interrogatory No. 1 seeks two distinct areas of information and should be counted as two discrete subparts: (i) identifying employees with pricing authority; and (ii) identifying employees who have communications with competitors. The identification of employees with pricing authority can be understood and “stand alone” without reference to the identity of employees who have had communications with competitors.

Respondent counts two additional subparts for this interrogatory by separately counting the Interrogatory’s request for the above employees’ e-mail addresses. In doing so, Respondent relies on the fact that the definition of “Identify” in Complaint Counsel’s Interrogatories does not explicitly call for e-mail addresses. This definition, however, does not undermine the concept that e-mail addresses for these two categories of employees fails the factual independence test for discrete subparts.

As explained by the Advisory Committee Notes to FED. R. CIV. P. 33(a), an interrogatory asking for details about a single topic should be counted as a single

interrogatory. FED. R. CIV. P. 33(a), *Advisory Committee's Note* (1993 Amendments). In the example provided by the Advisory Committee, a “question asking about communications of a particular type should be treated as a single interrogatory even though it requests that the time, place, persons present, and contents be stated separately for each such communication.” *Id.* Likewise here, the request for e-mail addresses of employees identified by Respondent is “subsumed” in the identity of the employee and should not be counted as discrete subparts. *See Safeco of America v. Rawstrom*, 181 F.R.D. 441, 445 (C.D. Cal. 1998) (stating that “a single question asking for several bits of information relating to the *same topic* counts as one interrogatory. (E.g., ‘State the name, address and telephone number of each person present at the meeting.’)”).

2. Interrogatory Nos. 6 and 10

Interrogatory Nos. 6 and 10 seek information related to the quantification of any efficiency claims by Respondent and should each count as a single interrogatory. Complaint Counsel propounded four separate interrogatories seeking information related to Respondent’s efficiency claims: Interrogatory No. 5 asks Respondent to identify and describe any efficiencies related to Respondent’s participation in the Ductile Iron Fittings Research Association (“DIFRA”); Interrogatory No. 6 asks Respondent to quantify, and describe the basis for that calculation, any DIFRA-related efficiencies; Interrogatory No. 9 asks Respondent to identify and describe any efficiencies related to Respondent’s exclusive dealing arrangements; and Interrogatory No. 10 asks Respondent to quantify, and describe the basis for that calculation, any exclusive dealing-related efficiencies. Respondent counted Interrogatory Nos. 5 and 9 as single interrogatories, but counted

Interrogatory Nos. 6 and 10 as each containing two discrete subparts for a total of four separate interrogatories.

In Interrogatory Nos. 6 and 10, Complaint Counsel seeks information about a single topic – how Respondent quantifies its efficiencies. Respondent calculates two discrete subparts for each of these interrogatories by erroneously de-coupling the quantification of an efficiency from the calculations or basis used for arriving at that calculation. Describing the basis, or the component parts, that Respondent used to calculate or quantify its efficiencies is necessarily related to the main question of the interrogatory: how does Respondent quantify its efficiencies? Put simply, these are not “stand alone” questions or concepts. *See In Re Dynamic Health of Florida*, 2004 FTC Lexis 254, at *2.

For example, in *Polypore Int'l*, this Court found that Complaint Counsel’s interrogatory seeking cost data for each relevant market and in each relevant area was a single interrogatory notwithstanding the fact that Complaint Counsel had sought numerous data elements as part of the requested cost data. *Polypore Int'l*, 2008 FTC Lexis 155, at * 3-4. The Court ruled that seeking the various data elements were “logically or factually subsumed within and necessarily related to the primary question” regarding Respondent’s costs. Because the components of an efficiency calculation are similar to the data elements of an interrogatory seeking cost data, Interrogatory Nos. 6 and 10 should likewise be counted as a single interrogatory.

III. Conclusion

By properly counting Interrogatory Nos. 1, 6 and 10 and their discrete subparts as a total of four interrogatories (rather than eight as contended by Respondent), and by

assuming *arguendo* that Respondent properly counted the subparts of all other interrogatories propounded by Complaint Counsel, Respondent's Interrogatory Responses answered no more than 21 interrogatories. Respondent's objections to Interrogatory Nos. 13-16 that Complaint Counsel exceeded its allotted 25 interrogatories are therefore improper, and Complaint Counsel respectfully moves this Court to compel Respondent to answer Interrogatory Nos. 13 through 16 of Complaint Counsel's Interrogatories.

Given the short time frame allowed for discovery in this matter, Complaint Counsel respectfully requests that this Court set an expedited briefing schedule to address this motion, and require Respondent's Response by no later than 5:00 pm on April 10, 2012.

Dated: April 4, 2012

Respectfully submitted,



Edward Hassi, Esq.
Geoffrey M. Green, Esq.
Linda Holleran, Esq.
Thomas H. Brock, Esq.
Michael J. Bloom, Esq.
Jeanine K. Balbach, Esq.
J. Alexander Ansaldo, Esq.
Andrew K. Mann, Esq.
Monica M. Castillo, Esq.

Counsel Supporting the Complaint
Bureau of Competition
Federal Trade Commission
Washington, DC 20580
Telephone: (202) 326-2470
Facsimile: (202) 326-3496
Electronic Mail: ehassi@ftc.gov

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

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

PROPOSED ORDER

On April 4, 2012, Complaint Counsel filed Complaint Counsel's Motion to Compel Respondent McWane, Inc.'s Answers to Interrogatory Nos. 13-16. Upon consideration of this motion, this Court grants Complaint Counsel's motion. Respondent is ordered to answer Complaint Counsel's Interrogatory Nos. 13 through 16.

ORDERED:

D. Michael Chappell
Administrative Law Judge

April __, 2012

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

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

PROPOSED ORDER FOR EXPEDITED RESPONSE

On April 4, 2012, Complaint Counsel filed Complaint Counsel’s Motion to Compel Respondent McWane, Inc.’s Answers to Interrogatory Nos. 13-16.

Rule 3.22(d) of the Commission’s Rules of Practice provides for a response period of “10 days after service of any written motion, or within such longer or shorter time as may be designated by the Administrative Law Judge...” 16 C.F.R. § 3.22(d).

Pursuant to Rule 3.22, it is hereby ORDERED that any written response to Complaint Counsel’s Motion to Compel Respondent McWane, Inc.’s Answers to Interrogatory Nos. 13-16 shall be submitted no later than 5:00 p.m. on April 10, 2012.

ORDERED:

D. Michael Chappell
Administrative Law Judge

Date: April __, 2012

CERTIFICATE OF SERVICE

I hereby certify that on April 4, 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 electronic mail and hand delivery 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 delivered via electronic mail a copy of the foregoing document to:

Joseph A. Ostoyich
Andreas Stargard
William C. Lavery
Baker Botts L.L.P.
The Warner
1299 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 639-7700
joseph.ostoyich@bakerbotts.com
andreas.stargard@bakerbotts.com
william.lavery@bakerbotts.com

J. Alan Truitt
Thomas W. Thagard III
Maynard Cooper and Gale PC
1901 Sixth Avenue North
2400 Regions Harbert Plaza
Birmingham, AL 35203
(205) 254-1000
atruitt@maynardcooper.com
tthagard@maynardcooper.com

Counsel for Respondent McWane, Inc.

Gregory S.C. Huffman
William Katz
Nicole Williams
Brian Stoltz
Thompson and Knight LLP
One Arts Plaza
1722 Routh Street, Suite 1500
Dallas, TX 75201
(214) 969-1700
Gregory.Huffman@tklaw.com
William.Katz@tklaw.com
Nicole.Williams@tklaw.com
Brian.Stoltz@tklaw.com

Counsel for Respondent Star Pipe Products, Ltd.

*Counsel for Respondent
Star Pipe Products, LTD*

CERTIFICATE FOR ELECTRONIC FILING

I certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and the adjudicator.

April 4, 2012

By: s/ Thomas H. Brock
Attorney

EXHIBIT C

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

ORIGINAL



In the Matter of)

McWANE, INC.,)
a corporation, and)

STAR PIPE PRODUCTS, LTD.,)
a limited partnership,)
Respondents.)

DOCKET NO. 9351

**ORDER GRANTING COMPLAINT COUNSEL'S MOTION TO COMPEL
RESPONDENT'S ANSWERS TO INTERROGATORIES**

I. Introduction

On April 4, 2012, Complaint Counsel filed a Motion to Compel Respondent McWane, Inc. ("Respondent") to Answer Interrogatories 13 through 16 ("Motion"). Respondent filed an opposition to the Motion on April 11, 2012 ("Opposition"). Having fully considered the Motion and Opposition, and as more fully explained below, the Motion is GRANTED.

On February 21, 2012, Complaint Counsel served a set of interrogatories on McWane, numbered 1 through 16 (Motion Exhibit A). McWane refused to answer Interrogatories 13 through 16 on the ground that, counting all discrete subparts of Interrogatories 1 through 12, Complaint Counsel reached its limit of 25 interrogatories (Motion Exhibits C and D). The parties were unable to reach an agreement on this dispute, and the instant Motion followed.

II. Applicable Legal Principles

Commission Rule of Practice 3.35(a)(1) states in pertinent part: "Any party may serve upon any other party written interrogatories, not exceeding 25 in number, including all discrete subparts, . . ." 16 C.F.R. § 3.35 (a)(1). Rule 3.35(a)(1) is the same in this regard as Federal Rule of Civil Procedure 33(a) ("Unless otherwise stipulated or ordered by the court, a party may serve on any other party no more than 25 written interrogatories, including all discrete subparts."). Fed. R. Civ. P. 33.

"In determining whether a request is a discrete subpart, courts look to 'whether one question is subsumed and related to another or whether each question can stand alone and be answered irrespective of the answer to the others.' . . . Courts have found that a subpart is

discrete when it is logically or factually independent of the question posed by the basic interrogatory.” *In re Dynamic Health of Florida*, 2004 FTC LEXIS 254 (Dec. 9, 2004) (citations omitted); *accord In re Polypore Int’l*, 2008 FTC LEXIS 155, at *3-4 (Nov. 14, 2008). If interrogatory subparts “are logically or factually subsumed within and necessarily related to the primary question,” they are to be counted as one interrogatory. *Safeco of America v. Rawston*, 181 F.R.D. 441, 445 (C.D. Cal. 1998), citing *Kendall v. GES Exposition Services*, 174 F.R.D. 684 (D. Nev. 1997). *See also Kendall v. GES Exposition Serv., Inc.*, 174 F.R.D. 684, 685 (D. Nev. 1997) (“Genuine subparts should not be counted as separate interrogatories.”); *Banks v. Office of the Senate Sergeant-at-Arms*, 222 F.R.D. 7, 10 (D.D.C. 2004) (noting that subparts related to a single topic are considered part of the same interrogatory).¹

III. Analysis

The only issue presented by the Motion and Opposition is the appropriate calculation of the number of interrogatories contained in Interrogatories 1, 6 and 10, which are set forth verbatim below. Complaint Counsel contends that Interrogatory No. 1 presents no more than two interrogatories, while Respondent contends that this Interrogatory presents four discrete subparts. Complaint Counsel contends that Interrogatories 6 and 10 each presents only one interrogatory, while Respondent argues that each interrogatory presents two interrogatories. Respondent contends that, if the number of discrete subparts in Interrogatories 1, 6, and 10 are properly calculated, it has no obligation to answer Interrogatories 13 through 16 because they exceed the 25 interrogatory limit.

A. Interrogatory No. 1

Interrogatory 1 states:

Identify each current or former employee of the Company who has or had any management or supervisory responsibilities or duties with respect to pricing of any Relevant Product, including without limitation: involvement in marketing, sales, distribution, or influencing list prices, catalog prices, multiplier prices, project discounts or any form of rebates; or who has had any Communication with any Competitor; and for each such current or former employee of the Company, provide:

- a. The business and home telephone numbers and telephone service providers of each voice, facsimile or cellular line assigned to or used for any business purpose by each employee (whether exclusive or not), and the period during which each such number was assigned to or used by the employee; and,

¹ Where, as in this case, the Federal Rules of Civil Procedure are similar to the Commission’s Rules of Practice, those rules and case law interpreting them are useful, though not controlling, in adjudicating a dispute. *In re L.G. Balfour Co.*, No. 8435, 61 F.T.C. 1491, 1492, 1962 FTC LEXIS 367, *4 (Oct. 5, 1962); *In re Gemtronics, Inc.*, 2010 FTC LEXIS 40, *10 (April 27, 2010).

b. Each business and home telecopier and electronic mail identifier assigned to or used for business purpose by the employee (whether exclusive or not) and the period during which each such identifier was assigned to or used by the employee.

The parties agree that the foregoing interrogatory requests identification for two distinct classes of persons – employees with responsibility for pricing decisions and employees who had any communication with competitors on any topic. Respondent maintains that the subparts a. and b., asking for both telephone numbers and electronic mail (email) addresses for each such employee that are used for “any business purpose,” present two additional discrete questions, for a total of four interrogatories. Complaint Counsel argues that the subparts in Interrogatory No. 1 are not discrete but are subsumed within the primary question of identification.

The advisory committee notes to Federal Rule 33 state in part, a “question asking about communications of a particular type should be treated as a single interrogatory even though it requests that the time, place, persons present, and contents be stated separately for each such communication.” Fed. R. Civ. P. 33(a), *Advisory Committee’s Note* (1993 Amendments). Applying a similar principle in *Polypore*, 2008 FTC LEXIS 155, it was held that an interrogatory asking for all sales, by relevant product, and relevant market, and for additional specific information as to such sales constituted a single interrogatory. “Simply asking for data elements for the same topic, as Complaint Counsel has done here, does not multiply each data element into a separate interrogatory. The interrogatories seeking various data elements for each relevant market and in each relevant area are logically or factually subsumed within and necessarily related to the primary question.” *Id.* at *4. In the instant case, the requests in Interrogatory No. 1 for telephone numbers and email addresses are requesting various data elements that are both logically and factually subsumed within the primary request for identification. Accordingly, Interrogatory No. 1 presents two, and not four, interrogatories.

B. Interrogatories 6 and 10

Interrogatory No. 6 states: “Quantify each justification, efficiency, rationale or Effect identified in response to [Interrogatory 5 as arising in connection with Respondent’s participation in the Ductile Iron Fittings Research Association (“DIFRA”)], and describe in detail the basis used in quantifying the justification, efficiency, rationale or Effect.”

Interrogatory No. 10 states: “Quantify each justification, efficiency, rationale or Effect in response to [Interrogatory 9 as arising in connection with any exclusive dealing arrangement], and describe in detail the basis used in quantifying the justification, efficiency, rationale or Effect.”

Respondent contends that the foregoing interrogatories each present two discrete subparts by requesting Respondent to “quantify” certain efficiencies, by providing a number, and then to “describe in detail the basis” for that number, which requires a narrative explanation of the underlying methodologies or models used to determine the number. Complaint Counsel contends that the request in each of these interrogatories for the component parts or basis used

for arriving at the number requested by the interrogatory is not adding discrete, or “stand alone” questions.

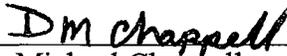
Respondent relies on *Potluri v. Yalamanchili*, 2007 U.S. Dist. LEXIS 29238 (E.D. Mich. Apr. 20, 2007), in which the court held that an interrogatory asking to set forth all business interests held by the plaintiff, as well as for the nature of the interest and the location of the business, requested discrete pieces of information. Respondent also cites *Trevino v. ABC Am., Inc.*, 232 F.R.D. 612, 614 (N.D. Cal. 2006), in which it was held that a single interrogatory requesting identification of each expert witness, the subject matter on which the expert was expected to testify, the substance of the facts and opinions to which the expert would testify, a summary of the grounds for each expert opinion, and the expert’s qualifications presented three discrete subparts.

Respondent’s cited authorities are not sufficiently analogous, on the facts or the applicable law, and, thus, are not persuasive. In this case, the primary question in both Interrogatories 6 and 10 presents a single topic – Respondent’s efficiency defenses. *See Banks*, 222 F.R.D. at 10 (noting that subparts related to a single topic are considered part of the same interrogatory). The basis for the requested quantification is logically subsumed within the primary question. A number and its basis are not “stand alone” concepts. *Compare In re Dynamic Health of Florida*, 2004 FTC LEXIS 254, at *2 (Dec. 9, 2004) (finding interrogatory requesting the identity of certain business associates of respondent and information about their compensation presented two separate interrogatories). Accordingly, both Interrogatories 6 and 10 present only one interrogatory each.

IV. Conclusion

Complaint Counsel has demonstrated that Interrogatory No. 1 consists of two interrogatories and that Interrogatories 6 and 10 consist of only one interrogatory each. Because Respondent’s Opposition is based solely on its proposed higher calculation, Complaint Counsel’s Motion is GRANTED.²

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: April 16, 2012

² Respondent asserts that Complaint Counsel refused to respond to certain of Respondent’s interrogatories by applying a strict counting methodology, similar to that which is proposed herein by Respondent. The nature of any dispute between Complaint Counsel and Respondent over Respondent’s Interrogatories is not dispositive as to whether Complaint Counsel’s Motion to Compel Respondent’s answers to Complaint Counsel’s interrogatories should be granted.

EXHIBIT D

**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. |) | |
| |) | |

**RESPONDENT MCWANE, INC.’S STATEMENT REGARDING MEET AND CONFER
PURSUANT TO SCHEDULING ORDER**

Counsel for Respondent McWane, Inc. has conferred with Complaint Counsel regarding Complaint Counsel’s Objections and Responses to Respondent McWane, Inc.’s First Set of Interrogatories. Counsel spoke during the weeks of April 16 and 23, and Complaint Counsel sent a letter in response, dated April 25, 2012. Despite the good faith efforts of counsel, the parties were unable to reach a resolution with respect to how interrogatory subparts should be counted, and we remain at an impasse related to the issues raised by the motion.

Respectfully submitted,

/s/ William C. Lavery _____
William C. Lavery
One of the Attorneys for McWane, Inc.

EXHIBIT E



United States of America
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Linda M. Holleran
Anticompetitive Practices
Phone: 202-326-2267
Email: lholleran@ftc.gov

April 25, 2012

VIA ELECTRONIC MAIL

William Lavery, Esq.
BakerBotts LLP
The Warner
1299 Pennsylvania Ave., NW
Washington, D.C. 20004-2400

Re: *In the Matter of McWane, Inc. and Star Pipe Products, Ltd.*, Dkt No. 9351

Dear Will:

In our telephone conversation on April 20, 2012, you expressed concerns regarding how Complaint Counsel counted the subparts to Interrogatory Nos. 2, 3, 5 and 10 in Complaint Counsel's Response and Objections to Respondent McWane Inc.'s First Set of Interrogatories (1-23), dated March 16, 2012. This letter addresses each of your concerns in turn.

Interrogatory No. 2

State all facts that you contend support your definition of a relevant Domestic Fittings product market, including but not limited to all facts upon which Complaint Counsel based the product and geographic market allegations in the Complaint and all facts upon which Complaint Counsel may or will rely at trial, including the relevant start and end dates of any ARRA-related markets or sub-markets, the likelihood of recurrence of such markets or sub-markets, and all facts refuting, or otherwise relating to such market definition.

Response to Interrogatory No. 2

Complaint Counsel notes that this interrogatory contains at least three discrete subparts, and seeks: (1) all facts relating to a Domestic Fittings product market, (2) all facts supporting the geographic market(s) alleged in the Complaint; and (3) all facts relating to any ARRA-related submarkets.

In addition to the General Objections, Complaint Counsel specifically objects to this interrogatory to the extent it impermissibly seeks attorney work product and Complaint Counsel's trial strategy. Complaint Counsel also objects to this interrogatory as premature to the extent it seeks information relating to issues that may be the subject of expert testimony in this case. Counsel Complaint Counsel further objects to the interrogatory as unduly burdensome to the extent it seeks to compel Complaint Counsel to undertake investigation, discovery, and analysis on behalf of Respondent. Complaint Counsel also objects to this

interrogatory as premature and unduly burdensome because it is a contention interrogatory and no response is required prior to the close of discovery pursuant to Rule 3.35 (b)(2). Complaint Counsel will supplement its answer, as appropriate, after the close of discovery, as set forth in Rule 3.35(b)(2).

You claim that Interrogatory No. 2 seeks information for only two separate subparts related to domestic product markets, and geographic markets. While this interrogatory clearly seeks information regarding a possible ARRA-specific submarket, we are willing to amend our position and count this interrogatory as containing two subparts, and not three.

Interrogatory No. 3

Identify all facts that you contend establish that McWane possesses or possessed market power or monopoly power in any relevant antitrust market, including but not limited to any evidence relating to market shares, the ability to control prices or output, the time period during which McWane allegedly possessed market power, and all facts that you contend establish that McWane acquired, enhanced, maintained, or exercised such market power through anticompetitive or unfair conduct or attempted to do so, and all facts refuting, or otherwise relating to McWane's alleged possession or exercise of market power.

Response to Interrogatory No. 3

Complaint Counsel notes that this interrogatory contains at least two discrete subparts, and seeks: (1) all facts establishing, refuting or otherwise that McWane possesses market power or monopoly power; and (2) all facts establishing, refuting or otherwise relating to McWane exercising such power through anticompetitive or unfair conduct or attempted to do so.

In addition to the General Objections, Complaint Counsel specifically objects to this interrogatory as premature to the extent it seeks information relating to issues that may be the subject of expert testimony in this case. Counsel Complaint Counsel also objects to the interrogatory as unduly burdensome to the extent it seeks to compel Complaint Counsel to undertake investigation, discovery, and analysis on behalf of Respondent. Complaint Counsel further objects to this interrogatory as premature and unduly burdensome because it is a contention interrogatory and no response is required prior to the close of discovery pursuant to Rule 3.35 (b)(2). Complaint Counsel will supplement its answer, as appropriate, after the close of discovery, as set forth in Rule 3.35(b)(2).

You claim that Interrogatory No. 3 only contains one interrogatory. In essence, you assert that asking for information related to how McWane exercised its monopoly power is somehow subsumed into the topic of providing information that establishes the existence of McWane's monopoly power. In fact, this interrogatory contains three separate subparts that ask for distinct information related to: i) the existence of McWane's monopoly power; ii) McWane's exercise of monopoly power using its exclusive dealing policy; and iii) McWane's exercise of monopoly power through its Master Distribution Agreement with Sigma. An interrogatory that asks for information related to the different elements of a claim (*e.g.*, monopoly power and the exercise of monopoly power), as well as asking for the same information across several distinct allegations, are appropriately counted as separate subparts.

Interrogatory No. 5

Identify all facts supporting, refuting, or otherwise relating to Complaint Counsel's contention that consumers were substantially injured or likely to be injured as a result of McWane's alleged anticompetitive or unfair conduct, including but not limited to McWane's 2008-09 DIWF prices, that such injury was not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers, including, but not limited to (1) each specific instance of any Respondent's alleged anticompetitive or unfair conduct, (2) the alleged harm associated with each specific instance, (3) any specific consumer(s) allegedly injured, and (4) the likelihood of the alleged anticompetitive or unfair conduct or any resulting harm recurring in the future.

Response to Interrogatory No. 5

Complaint Counsel notes that this interrogatory contains at least four discrete subparts, and seeks: (1) all facts establishing, refuting or otherwise relating to consumers being injured by McWane's anticompetitive conduct; (2) all facts establishing, refuting or otherwise relating to the ability of consumers to reasonably avoid the harm; (3) all facts establishing, refuting or otherwise relating to any alleged countervailing benefits to consumers from McWane's anticompetitive conduct; and (4) all facts establishing, refuting or otherwise relating to the likelihood of the alleged anticompetitive conduct or any resulting harm recurring in the future.

In addition to the General Objections, specifically objects to the terms "substantially injured," "likely to be injured," "reasonably avoidable," and "countervailing benefits" as vague and ambiguous. Complaint Counsel also objects to this interrogatory as premature to the extent it seeks information relating to issues that may be the subject of expert testimony in this case. Counsel Complaint Counsel further objects to the interrogatory as unduly burdensome to the extent it seeks to compel Complaint Counsel to undertake investigation, discovery, and analysis on behalf of Respondent. Complaint Counsel also objects to this interrogatory as premature and unduly burdensome because it is a contention interrogatory and no response is required prior to the close of discovery pursuant to Rule 3.35 (b)(2). Complaint Counsel will supplement its answer, as appropriate, after the close of discovery, as set forth in Rule 3.35(b)(2).

You claim that Interrogatory No. 5 only contains two subparts, essentially combining Complaint Counsel's 1st, 2nd and 4th subparts; and separately, the 3rd subpart. While all of the subparts relate generally to the issue of consumer injury, they are distinct inquiries that can be answered independently of one another; they are not merely details of a single topic, such as the time, date and place of a communication. These inquiries are therefore properly counted as discrete subparts, which is consistent with how McWane counted Complaint Counsel's interrogatories (*see, e.g.*, McWane's response to CC's Interrogatory No. 4). In addition, because McWane asks for this information across all seven counts of the complaint, this interrogatory should really be counted as containing 28 subparts. To avoid this result, we recommend that you identify the specific anticompetitive conduct for which you would like information. If McWane fails to identify which count Interrogatory No. 5 is intended to address, Complaint Counsel will choose which of the seven counts it will address in its response.

Interrogatory No. 10

Is it Complaint Counsel's contention that any alleged injury caused by the Domestic Rebate Policy, McWane's participation in DIFRA, and/or the Sigma MDA was not outweighed by countervailing benefits or pro-competitive justifications? If so, state with particularity why consumers are or were harmed on balance, by identifying and describing the basis for this contention, and identify all facts relating to the contention upon which Complaint Counsel based the Complaint and upon which Complaint Counsel may or will rely at trial in support of the contention, including all facts refuting, or otherwise relating to, your contention.

Response to Interrogatory No. 10

Complaint Counsel notes that this interrogatory contains at least three distinct subparts, and seeks: (1) all facts relating to the balance of harm and any alleged efficiencies related to McWane's Domestic Rebate Policy; (2) all facts relating to the balance of harm and any alleged efficiencies related to McWane's participation in DIFRA; and (3) all facts relating to the balance of harm and any alleged efficiencies related to the Sigma MDA.

In addition to the General Objections, Complaint Counsel specifically objects to the terms "countervailing benefits" and "harmed on balance" as vague and ambiguous. Complaint Counsel also objects to the interrogatory as impermissibly seeking attorney work product and Complaint Counsel's trial strategy. Complaint Counsel further objects to this interrogatory as premature to the extent it seeks information relating to issues that may be the subject of expert testimony in this case. Complaint Counsel also objects to the interrogatory as unduly burdensome to the extent it seeks to compel Complaint Counsel to undertake investigation, discovery, and analysis on behalf of Respondent. Complaint Counsel further objects to this interrogatory as premature and unduly burdensome because it is a contention interrogatory and no response is required prior to the close of discovery pursuant to Rule 3.35 (b)(2). Complaint Counsel will supplement its answer, as appropriate, after the close of discovery, as set forth in Rule 3.35(b)(2).

Finally, you claim that Interrogatory No. 10 should be counted as a single interrogatory. In essence, you assert that the first question of the interrogatory requires a yes or no answer, and that the second half of the interrogatory merely asks for an explanation of that answer. As indicated above, interrogatories that ask for the same information across multiple, distinct allegations are appropriately counted as discrete subparts. Because this interrogatory seeks information regarding three separate allegations – the Domestic Rebate Policy, DIFRA, and the Sigma MDA – this interrogatory is properly counted as containing three subparts.

Our position with respect to how interrogatory subparts should be counted is fully consistent with the Judge's ruling in this case as well as all applicable caselaw. Because the true subpart count for these four interrogatories is actually greater than what is set forth in our interrogatory response, we do not see the need to supplement any additional interrogatories based on our objection that Respondent exceeded 25 interrogatories. Please note that Complaint Counsel is not waiving our objections to these or any other interrogatories, and that any answers, at the appropriate time, will be subject to those objections.

William Lavery, Esq.
April 25, 2012
Page 5

Please feel free to call me at (202) 326-2267 if you have any questions or would like to discuss this matter further.

Regards,

/s/

Linda M. Holleran

cc: Andreas Stargard, Esq.
Ted Hassi, Esq.