

ORIGINAL

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



In the Matter of)

McWANE, INC.,)
a corporation, and)

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

DOCKET NO. 9351

**ORDER DENYING RESPONDENT'S MOTION FOR
RECONSIDERATION AND RESPONDENT'S MOTION TO STRIKE**

I. Procedural Background

On June 25, 2012, Complaint Counsel, pursuant to Commission Rule of Practice 3.38, filed a Motion to Compel Respondent McWane, Inc.'s ("McWane" or "Respondent") Responses to Requests for Admissions ("Motion to Compel"). Respondent did not file any response to the Motion to Compel within the 5-day time period allowed under Commission Rule 3.38.¹ By Order dated July 5, 2012, Complaint Counsel's Motion to Compel was granted ("July 5 Order").

After the issuance of the July 5 Order, later in the day on July 5, 2012, Respondent filed two motions: (1) Respondent McWane, Inc.'s Motion for Reconsideration ("Motion

¹ Commission Rule 3.38 provides in pertinent part:

(a) Motion for order to compel. A party may apply by motion to the Administrative Law Judge for an order compelling disclosure or discovery, including . . . a request for admission under § 3.32, . . . Any response to the motion by the opposing party must be filed within 5 days of receipt of service of the motion . . . The Administrative Law Judge shall rule on a motion to compel within 3 business days of the date in which the response is due. Unless the Administrative Law Judge determines that the objection is justified, the Administrative Law Judge shall order that . . . an answer to any requests for admissions, . . . be made.

16 C.F.R. § 3.38(a) (emphasis added). The certificate of service of Complaint Counsel's Motion to Compel represented that Respondent was served electronically on June 25, 2012. Pursuant to Rule 3.38(a), Respondent's response to that motion was due July 2, 2012. No response was filed.

for Reconsideration”); and (2) Respondent McWane, Inc.’s Motion to Strike Complaint Counsel’s Motion to Compel Responses to Requests for Admission as Premature or Moot, or in the Alternative, Opposition to Complaint Counsel’s Motion (“Motion to Strike”). Complaint Counsel filed one opposition to both motions on July 10, 2012 (“Opposition”).

For the reasons set forth below, Respondent’s Motion for Reconsideration is DENIED and Respondent’s Motion to Strike is DENIED.

II. Motion for Reconsideration

Respondent seeks reconsideration of the July 5 Order granting Complaint Counsel’s Motion to Compel, which ordered further responses to certain of Complaint Counsel’s Requests for Admissions and production of related documents by Respondent.

The standard for a motion for reconsideration is as follows:

A motion for reconsideration of a decision may be made only on the grounds of: (a) a material difference in fact or law from that presented to the Administrative Law Judge before such decision, that in the exercise of reasonable diligence could not have been known to the party moving for reconsideration at the time of such decision; (b) the emergence of new material facts or a change of law occurring after the time of such decision; or (c) a manifest showing of a failure to consider material facts presented to the Administrative Law Judge before such decision. . . . Reconsideration motions are not intended to be opportunities “to take a second bite at the apple” and relitigate previously decided matters. . . .

[S]uch motions should be granted only sparingly. Courts have granted motions to reconsider where it appears the court mistakenly overlooked facts or precedent which, had they been considered, might reasonably have altered the result, or where reconsideration is necessary to remedy a clear error or to prevent manifest injustice.

In re Intel Corp., 2010 FTC LEXIS 47, *4-6 (May 28, 2010) (internal citation omitted).

Respondent’s sole argument in support of its Motion for Reconsideration is that Complaint Counsel did not comply with the meet and confer requirements of Commission Rule 3.22; thus, Complaint Counsel’s Motion to Compel was improperly filed under Rule 3.38, and that McWane moved to strike, or in the alternative, opposed, within the 10 day time period allowed for motions under Rule 3.22.

Even if Complaint Counsel failed to comply with the meet and confer requirements of Rule 3.22 (discussed in relation to Respondent’s Motion to Strike, below), Respondent was aware of that “fact” before its opposition to the Motion to Compel was due and before the date of the July 5 Order. Accordingly, Respondent has pointed to no: (a) material difference in fact or law from that presented to the Administrative Law Judge before such decision that could not have been known to Respondent at the time of such decision; (b)

new material fact occurring after the time of such decision; or (c) a manifest showing of a failure to consider material facts presented to the Administrative Law Judge.

Because Respondent's Motion for Reconsideration fails to meet the standards for reconsideration, the Motion for Reconsideration is DENIED.

III. Motion to Strike

Respondent, in its Motion to Strike, seeks to strike Complaint Counsel's Motion to Compel on the grounds that it was premature and was filed before the completion of an appropriate meet and confer on the subject. Respondent represents that McWane's counsel informed Complaint Counsel during the meet and confer, and again via email the following day, June 22, 2012, that McWane would consider Complaint Counsel's requests. Respondent asserts that, as of June 22, 2012, Respondent was "still evaluating" Complaint Counsel's request that it supplement its responses, but Complaint Counsel proceeded to file its motion on June 25, 2012, before the meet and confer process was complete, in an apparent attempt to meet the June 25, 2012 deadline for filing motions to compel.

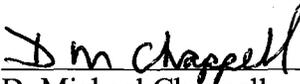
Complaint Counsel responds that Complaint Counsel fully met and conferred in good faith with Respondent before filing its Motion to Compel. According to Complaint Counsel: on June 18, 2012, Complaint Counsel asked to set a time to meet and confer regarding Respondent's Requests for Admission Responses; Respondent's counsel was first available on June 20, 2012; and Complaint Counsel and Respondent's counsel met and conferred during an hour-long telephone conference on June 20, 2012. Complaint Counsel represents that Respondent's counsel, before making his refusal to amend final, stated that he needed to confirm Respondent's position internally. Complaint Counsel states that it emphasized to Respondent's counsel that the deadline for filing its motion was Monday, June 25, 2012, and that Complaint Counsel therefore needed Respondent's final answer by no later than Friday morning, June 22, 2012. Complaint Counsel further states that, after hearing no response from Respondent on Friday morning, Complaint Counsel followed up with counsel for Respondent on Friday afternoon. Finally, Complaint Counsel states that, having received no further response, Complaint Counsel understood Respondent's initial position during the meet and confer discussion to be its final position. To comply with the June 25, 2012 deadline for filing a motion to compel, Complaint Counsel filed its Motion to Compel after 4:00 p.m. June 25, 2012.

Respondent has failed to demonstrate that Complaint Counsel failed to properly meet and confer with Respondent's counsel in a good faith effort to resolve their disagreement before filing Complaint Counsel's Motion to Compel and that Complaint Counsel's Motion to Compel was premature. Accordingly, Respondent's Motion to Strike is DENIED.

In the alternative, Respondent opposes the Motion to Compel, and argues that Complaint Counsel's Motion to Compel should be denied. As stated above, Respondent's opposition to the Motion to Compel was filed after the deadline for filing its response and after the July 5 Order ruling on the Motion to Compel. Respondent has failed to explain

why the deadline was not met or to provide any basis for relieving Respondent from the time requirements imposed by Rule 3.38 or to otherwise reconsider any provisions of the July 5 Order. Accordingly, Respondent's request for consideration of its untimely opposition is DENIED.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: July 11, 2012