UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

RESPONDENT McWANE, INC.'S OPPOSITION TO COMPLAINT COUNSEL'S MOTION TO COMPEL ANSWERS TO INTERROGATORY NOS. 13-16

Pursuant to Rule 3.38 of the Federal Trade Commission's Rules of Practice for Adjudicative Proceedings, Respondent McWane, Inc. ("McWane") respectfully requests that the Court deny Complaint Counsel's Motion to Compel Respondent McWane, Inc.'s Answers to Interrogatories 13-16 ("Motion"), because the three specific interrogatories at issue in Complaint Counsel's Motion consist of at least eight distinct subparts.[1] Complaint Counsel ("CC") has therefore exceeded its allotted number of interrogatories and permissible subparts as of Interrogatory 12, inclusive.

I. FACTUAL BACKGROUND

On February 21, 2012, CC served its interrogatories on McWane. On March 22, 2012, Respondent served its answers and objections to CC's Interrogatories and supplemented those answers on March 27, 2012.

The vast majority of CC's Interrogatories contain requests for multiple, distinct pieces of information. Thus, they exceeded the twenty-five interrogatories permitted by the scheduling order. In its Motion, CC challenges only three of McWane's objections to its tactic of lumping multiple distinct requests under a single Interrogatory.

[1] McWane expressly reserves its relevance objections and all other general and specific objections contained in its Interrogatory responses (including objections to Interrogatories 13-16), *e.g.*, undue burden, and does not intend by this opposition to relinquish its objections.

Interrogatory 1. CC concedes that Interrogatory 1 requests multiple distinct pieces of information. It is easy to see why: the Interrogatory explicitly contains twenty-two (22) distinct "and/or" connectors and many additional "and/ors" are implicit. CC concedes that this jam-packed Interrogatory contains more than one distinct request, but argues that it should be interpreted to contain "no more than 2 discrete subparts" - - one, calling for the identification of employees with responsibility for pricing decisions and another calling for the identification of employees who had any communication with competitors on any topic. The parties are in agreement that these are clearly two distinct requests. The only difference is whether the Interrogatory contains two additional, distinct requests. On its face, it does: subpart (a) calls for telephone numbers (and service providers) (business, home, voice, fax, and cellular) assigned to or used by the identified employees "for any business purpose," *i.e.*, for purposes beyond - - and distinct from - - either price determinations or communications with competitors; .subpart (b), likewise, calls for telecopier and email identifiers assigned to or used "for business purpose," again, beyond - - and distinct from - - pricing decisions or communications.[2]

Interrogatory 6. This Interrogatory also calls for two distinct pieces of information on its face. First, it asks McWane to "quantify" efficiencies with regard to its participation in a ductile iron fittings trade association. That requires McWane to provide a number. Second, it calls for McWane to "describe in detail the basis" for its determination of that number. That requires a narrative explanation of the economic or mathematical methodologies or models used to determine the quantification.

Interrogatory 10. This Interrogatory contains the same distinct requests to "quantify" and "describe in detail" as Interrogatory 6, but applied to a different topic. Again, providing a

[2] As a practical matter, the request for information related to "any business purpose" will require information to be gathered from different and distinct sources, particularly for employees who have multiple jobs with different responsibilities in different parts of McWane over a several year period. Of course, it is not clear how emails, telephone numbers, and faxes unrelated to pricing decisions or to communications with competitors are relevant to this litigation. McWane expressly reserves its relevance objection to this Interrogatory.

number is distinct from providing a detailed explanation of the methodologies or models used to determine the number.[3]

Indeed, CC lodged similar "counting" objections to McWane's written discovery, objecting, for example, to McWane's Interrogatory 3 on the grounds that it constitutes "at least two discrete subparts ...: (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." (*See* CC's March 16, 2012 Response and Objections to Respondent McWane's First Set of Interrogatories). There are many similar instances of CC's strict method of counting subparts (in McWane's Requests for Admission and Interrogatories, both of which were only partially answered by CC due to its subpart-counting objections). As a result, CC **refused to respond to roughly one-third** of McWane's interrogatories and **10%** of its RFAs.[4]

II. ARGUMENT

McWane's count of the multiple distinct requests in Interrogatories 1, 6, and 10 fits squarely within the caselaw. In *Potluri v. Yalamanchili*, where the parties were likewise faced with a discovery limitation of 25 requests, the court found three distinct interrogatories calling "for discrete pieces of information" - - the (1) "identi[t]y [of] all entities" in which defendant owned an interest, (2) a description of the "nature of the business interest," and (3) the identity of "the location of the business interest." *Potluri v. Yalamanchili*, No. 06-13517, 2007 WL 1201576, at *1–2 (E.D. Mich. Apr. 20, 2007). The Court rejected plaintiff's argument that they should be treated as one simply because plaintiff lumped them together under a single interrogatory. In *Trevino v. ACB Am., Inc.*, 232 F.R.D. 612 (N.D. Cal. 2006), the court likewise found multiple distinct requests for information lumped together under a single interrogatory that

[3] Again, McWane reserves its other objections to this Interrogatory, including that it is premature to the extent it calls for expert calculation and assessment.

[4] It should be noted that McWane offered to withdraw all of its "counting" objections to Complaint Counsel's discovery if Complaint Counsel would withdraw its "counting" objections to McWane's discovery. That was a reasonable compromise, but Complaint Counsel rejected it and continues to insist it can use "counting" objections as both a shield and a sword. (*See* Ex. A, March 26, 2012, Stargard e-mail to Ms. Holleran).

called for (1) the identification of expected expert witnesses at trial, (2) a description of the expected subject matter of their testimony, and (3) a summary of the grounds for each opinion and expert's qualifications. three distinct answers: expert identification, subject matter, and grounds for each opinion. "This looks to the court to be three separate interrogatories." *Id*. at 614.

McWane's position is also quite reasonable - - as demonstrated by the fact that CC used the same bases to count McWane's written discovery and lodge its objections. The three Interrogatories discussed herein really mask multiple discrete requests. They contain requests for multiple "discrete areas" of inquiry and thus should be "counted as more than one." 8A Charles Alan Wright & Arthur Miller, Federal Practice and Procedure §2168.1 at 261 (2d ed. 1994); s*ee also In Re Dynamic Health of Florida*, 2004 FTC Lexis 254, at *2 (Dec. 9, 2004) (subparts are discrete when answer is capable of "stand[ing] alone" without response to other subpart of interrogatory). Indeed, CC concedes as much, at least with respect to Interrogatory 1. Thus, CC has exceeded its allotted number of interrogatories and permissible subparts as of Interrogatory 12, inclusive.

IV. CONCLUSION

In sum, the Court should deny Complaint Counsel's Motion.

Dated: April 11, 2012

/s/ J. Alan Truitt

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CERTIFICATE OF SERVICE

I hereby certify that on April 11, 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
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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:

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

Exhibit A

From: Stargard, Andreas
Sent: Monday, March 26, 2012 17:10
To: 'Holleran, Linda'
Cc: Lavery, William
Subject: Counting interrogatory subparts

Linda:
I hope your Dr's appointment went well.

We have a proposal to cut through the procedural rhetoric as far as the counting of subparts is concerned, as follows:

Without prejudice to any party's future counting of subparts of new discovery requests, if any, let's simply agree for both CC and McWane to respond with substantive answers to all interrogatories and RFAs. We can both keep the objections alive for the record, but will both answer in substance without resort to the objection.

Think about it. It's a win-win, I think, which gets both sides farther and in addition avoids bickering over how to count relative clauses vs. sequences of items separated by commas vs. etc etc. If you agree, let me know.

Andreas.

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