ORIGINAL

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

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

ORDER ON RESPONDENT'S MOTION TO COMPEL ANSWERS TO INTERROGATORIES

I. Introduction

On April 30, 2012, Respondent McWane, Inc. ("Respondent") filed a Motion to Compel Complaint Counsel to Answer Interrogatories 16 through 23 ("Motion"). Complaint Counsel filed an opposition to the Motion on May 7, 2012 ("Opposition"). Having fully considered the Motion and Opposition, and as more fully explained below, the Motion is GRANTED IN PART and DENIED IN PART.

On February 15, 2012, Respondent served a set of interrogatories on Complaint Counsel, numbered 1 through 23. In Complaint Counsel's Responses and Objections to Respondent's Interrogatories, dated March 16, 2012, Complaint Counsel objected to answering Interrogatories 16 through 23 on the ground that Respondent had exceeded its limit of 25 interrogatories (Motion Exhibit A). The parties were unable to reach an agreement on this dispute, and the instant Motion followed.

II. Applicable Legal Principles

The applicable legal principles have previously been set forth by the April 16, 2012 Order granting Complaint Counsel's earlier filed motion to compel Respondent's Answers to Interrogatories ("April 16, 2012 Order"). Those principles are:

> 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]

April 16, 2012 Order at 1-2.

III. Analysis

The only issue presented by the Motion and Opposition is the appropriate calculation of the number of interrogatories contained in Interrogatories 2, 3, 5, and 10, which are set forth verbatim below.

Respondent contends that Interrogatories 2, 3, 5, and 10, each present one interrogatory. Complaint Counsel contends: Interrogatory 2 presents three discrete subparts; Interrogatory 3 presents three discrete subparts; Interrogatory 5 presents four discrete subparts; and Interrogatory 10 presents three discrete subparts. Complaint Counsel contends that, if the number of discrete subparts in Interrogatories 2, 3, 5, and 10 are properly calculated, it has no obligation to answer Interrogatories 16 through 23 because they exceed the 25 interrogatory limit.

A. Interrogatory No. 2

Interrogatory 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-

[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).

markets, the likelihood of recurrence of such markets or sub-markets, and all facts refuting, or otherwise relating to such market definition.

Respondent asserts that, "by definition, the 'Domestics Fittings' product market includes an inextricable geographic component, namely fittings made in the United States, and thus can only be considered a single request." Motion at 3. Respondent further asserts that Interrogatory 2 seeks all facts supporting Complaint Counsel's definition of any market relevant to its claims in this action and thus, to the extent Interrogatory 2 contains any subparts, those subparts are logically and factually subsumed within and necessarily related to Complaint Counsel's definition of the relevant markets. Motion at 4.

Complaint Counsel responds that Interrogatory 2 contains three discrete subparts that seek: "all facts" that support, refute or otherwise relate to Complaint Counsel's contentions pertaining to: 1) a relevant product market for domestically-produced ductile iron fittings; 2) a relevant geographic market; and 3) an ARRA-specific submarket. First, Complaint Counsel asserts that a relevant market is comprised of two distinct elements - a relevant product market and a relevant geographic market; and that defining a relevant geographic market is an inquiry that is factually and legally independent from defining a relevant product market. Opposition at 3-4. Second, Complaint Counsel asserts that, within the product market, submarkets are considered to be separate and distinct markets from any larger market in which they may be contained, and therefore also represent a factually and legally independent inquiry. Opposition at 4.

Defining a relevant product market and defining a relevant geographic market are two separate factual inquiries. *Brown Shoe Co. v. United States*, 370 U.S. 294, 324 (1962). Thus, the subpart on the product market and the subpart on the geographic market each can stand alone and be answered irrespective of the answer to the other.

Defining a submarket within the relevant product market is factually subsumed within and related to defining the relevant product market. *See Brown Shoe*, 370 U.S. at 325. Thus, the subpart on the product market and the sub-markets are factually intertwined and constitute one subpart.

Accordingly, Interrogatory 2 presents two interrogatories.

B. Interrogatory No. 3

Interrogatory 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.

Respondent asserts that the possession and exercise of market power are so inherently intertwined as to be logically or factually subsumed within and necessarily related to each other. Motion at 4. Respondent thus asserts that because Interrogatory 3 contains no subpart logically or factually independent from the main question, it should be counted as one interrogatory.

Complaint Counsel responds that Interrogatory 3 contains three discrete subparts that seek "all facts" establishing, refuting, or otherwise relating to Complaint Counsel's contentions that Respondent: 1) possesses market power or monopoly power; 2) unlawfully exercised this power through its exclusive dealing policy; and 3) unlawfully exercised this power by entering into a Master Distribution Agreement ("MDA") with its competitor, Sigma, Inc. First, Complaint Counsel asserts that possession of monopoly power and the exercise of monopoly power are separate elements of a monopolization claim and thus should be counted as two discrete subparts. Second, Complaint Counsel asserts that Complaint Counsel's contention that Respondent unlawfully exercised its monopoly power is set forth in Paragraphs 46 through 61 of the Complaint and that those paragraphs of the Complaint allege that Respondent exercised monopoly power through two distinct courses of conduct: (i) implementing an exclusive dealing policy; and (ii) entering into a MDA with Sigma, Inc.

The possession of monopoly power and the exercise of monopoly power are separate elements of a monopolization claim. *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). Thus, the subpart on possession of market or monopoly power and the subpart on exercise of market or monopoly power each can stand alone and be answered irrespective of the answer to the other.

The subpart of the interrogatory inquiring on the exercise of market or monopoly power is one subpart. Regardless of Complaint Counsel's attempt to characterize it as making two separate inquiries based on Complaint Counsel's own interpretation of the interrogatory based on Complaint Counsel's reading of the Complaint issued in the case, this subpart asks for facts relating McWane's exercise of market power. Therefore, the subpart inquiring on the exercise of market or monopoly power constitutes one subpart.

Accordingly, Interrogatory 3 presents two interrogatories.

C. Interrogatory 5

Interrogatory 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.

Respondent asserts that Interrogatory 5 seeks facts supporting Complaint Counsel's allegation that consumers have been harmed by McWane's actions and that 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 consumer injury that Interrogatory 5 should be counted as one interrogatory.

Complaint Counsel argues that Interrogatory 5 is a wide-ranging interrogatory that propounds four distinct inquiries concerning consumer harm. Complaint Counsel further contends that questions – regarding (1) whether consumers were injured; (2) whether consumers could have avoided being injured; (3) whether consumers received any countervailing benefits; and (4) whether the alleged harm is ongoing or likely to recur – can each stand alone and be understood without reference to any inquiry in the interrogatory.

The subparts contained in interrogatory 5 are logically and factually subsumed within and necessarily related to the primary question concerning consumer harm. Accordingly, the subparts of this single topic are considered part of the same interrogatory and Interrogatory 5 presents one interrogatory.

D. Interrogatory 10

Interrogatory 10 states:

> Is it Complaint Counsel's contention that any alleged injury caused by the Domestic Rebate Policy, McWane's participation in DIFRA [Ductile Iron Fittings Research Association], 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.

Respondent asserts that Interrogatory 10 seeks facts supporting Complaint Counsel's contention that consumers, on balance, were harmed rather than benefited by McWane's alleged activities. Respondent further asserts that because Interrogatory 10 seeks details about a common theme – balance of consumer harm/benefit resulted from the challenged conduct – it contains no subpart logically or factually independent from that common theme.

Complaint Counsel argues that Interrogatory 10 contains three discrete subparts supporting, refuting, or otherwise relating to Complaint Counsel's contention regarding: (1) the

balance of harm and alleged efficiencies related to McWane's Domestic Rebate Policy; (2) the balance of harm and any alleged efficiencies related to McWane's participation in DIFRA; and (3) the balance of harm and any alleged efficiencies related to the Sigma MDA. Complaint Counsel asserts that an interrogatory that seeks the same information across distinct allegations or subjects should be counted as three discrete subparts.

Interrogatory 10 seeks information regarding the balance of consumer harm/benefit as it relates to three separate alleged activities: (1) the Domestic Rebate Policy; (2) McWane's participation in DIFRA; and (3) McWane's participation in the Sigma MDA. Each of these distinct subjects can stand alone and be answered irrespective of the answer to the others.

Accordingly, Interrogatory 10 presents three interrogatories.

IV. Conclusion

Respondent's motion to compel is based solely on its proposed calculation of the number of interrogatories it propounded on Complaint Counsel. As discussed above, Respondent's assertion that Interrogatories 2, 3, 5, and 10 constitute a total of 4 interrogatories is rejected. In accordance with this Order, Respondent's Interrogatories 2, 3, 5, and 10 constitute a total of 8 interrogatories. Accordingly, Respondent's Motion is GRANTED in part and DENIED in part.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: May 17, 2012