

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



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

DOCKET NO. 9351

**RESPONDENT MCWANE, INC.'S SUPPLEMENTAL
RESPONSES TO COMPLAINT COUNSEL'S
REQUESTS FOR ADMISSION**

COMES NOW, McWane, Inc. ("McWane") and, in accordance with the Court's Order dated July 5, 2012, supplements its responses to Complaint Counsel's Requests for Admission ("Requests") as follows:

GENERAL OBJECTIONS

1. McWane objects to the Definitions and Instructions to the extent they seek to impose discovery obligations exceeding the requirements of the Federal Trade Commission's Rules of Practice.
2. McWane submits its objections and responses without conceding the relevancy or materiality of the subject matter of any of the Requests, and without prejudice to all objections to the admissibility of any response. McWane's responses are made without waiving, or intending to waive, the right to object on the grounds of incompetency, privilege, relevancy, or materiality (or any other grounds) to the use of any documents provided in response to the Requests, in any subsequent proceeding in this action or any other action. McWane reserves the right to object on

any and all grounds, at any time, to subsequent interrogatories and requests, or any other discovery procedures, involving or relating to the subject matter of the Requests.

3. McWane objects to the Requests to the extent that they seek (a) confidential communications between McWane or its representatives and its counsel or its counsel's representatives; (b) the work product of McWane's attorneys; (c) information compiled in anticipation of litigation by, on behalf of, or at the direction of McWane's in-house or outside counsel; (d) information protected by the common interest privilege; (e) information protected by the First Amendment associational privilege; or (f) any other applicable privilege or protection.

4. McWane objects to the Requests as improperly seeking from a party legal conclusions or expert opinions, the latter of which may be discovered only through expert reports or expert depositions.

5. McWane's responses to the Requests shall not be deemed or construed to be a waiver of any privilege, right or objection. In the event privileged or work product information is inadvertently produced by McWane, such production is not and shall not be deemed or construed as a waiver of any privilege, right or objection, and McWane hereby reserves the right to claw back such inadvertently produced information.

6. McWane objects to the Requests to the extent that they are not reasonably limited in time, geographic, or subject matter scope; to the extent they seek information outside McWane's custody and control; or to the extent they seek information regarding third parties with no relationship to the claims set forth in the Federal Trade Commission's January 4, 2012 administrative complaint ("Complaint"). The disclosure of the latter information would be unduly and unnecessarily invasive of the privacy of third parties with no relationship to the Complaint.

7. McWane objects to the Requests as seeking information in the public domain, within Complaint Counsel's or the Commission's possession, or obtainable from a source other than McWane at less cost or burden to Complaint Counsel than to McWane.

8. McWane objects to the Requests to the extent they are duplicative; call for the disclosure of information irrelevant to any claim or defense in this action; are not reasonably calculated to lead to the discovery of admissible evidence; or are overly broad or unduly burdensome.

9. McWane reserves the right at any time to revise, correct, add to, or clarify its objections or responses to the Requests.

10. Each of the above General Objections shall be deemed to apply to each of McWane's specific responses set forth below.

SPECIFIC SUPPLEMENTAL RESPONSES

In response to Complaint Counsel's requests that McWane admit the following, McWane responds as follows, subject to the General Objections set forth above:

1. All ARRA Waterworks Projects are subject to a Buy American requirement.

RESPONSE:

McWane denies this Request, in light of the waivers and exemptions that permitted the use of non-domestic fittings and/or other products in ARRA Waterworks Projects under certain circumstances, thus making certain projects not subject to a Buy America requirement. The EPA issued a Nationwide Buy American waiver effective May 22, 2009 to allow the use of de minimis incidental components of eligible projects where such components comprise no more

than 5 percent of the total cost of the materials used in and incorporated into a project. [REDACTED]

[REDACTED]

[REDACTED] See, e.g., 74 Federal Register, No. 104 (June 2, 2009) 26398-99 (national waiver exempting from the Buy American requirement components that comprised less than 5% of the total cost of materials incorporated into a project); 74 Federal Register No. 152 (August 10, 2009) 39959-60; [REDACTED]

[REDACTED]; see “Tracking the De Minimis Waiver”, available at <http://dec.alaska.gov/water/muniloan/pdfs/De%20Minimis%20waiver%20tracking%20and%20example.pdf>, (last accessed June 28, 2012).

2. The Environmental Protection Agency (“EPA”) must grant or approve any and all waivers to the Buy American requirement of ARRA for any ARRA Waterworks Project.

RESPONSE:

Admitted. However, McWane objects to this request as misleading, as the EPA in 2009 issued the de minimis waiver, which was a blanket waiver that did not require application to and approval by the EPA for each job. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]; *see also* Answer to RFA 1, *supra*.

3. Respondent cannot identify any sale of Imported Relevant Product for use in an ARRA Waterworks Projects pursuant to a Public Interest Waiver other than the three Public Interest Waivers set forth in Exhibit A.

RESPONSE:

McWane has no first hand knowledge of a sale pursuant to a Public Interest Waiver because it has not attempted to sell any of its non-domestic fittings for use in an ARRA Waterworks Project pursuant to a Public Interest Waiver. McWane accordingly admits that it possesses no documentation of a grant of a Public Interest Waiver other than the three Public Interest Waivers set forth in Exhibit A but after reasonable inquiry, lacks sufficient information at this time to admit or deny this Request with respect to third parties. [REDACTED]

[REDACTED]

[REDACTED]

4. Respondent is unaware of any statement or opinion by the EPA that Imported Relevant Product is an “incidental component,” as described in 74 Federal Register No. 152 (Monday, August 10, 2009) 39959-60.

RESPONSE:

Denied. [REDACTED]

5. Respondent cannot identify any sale of any Imported Relevant Product for use in any ARRA Waterworks Projects pursuant to the waiver for *de minimis* incidental components as described in 74 Federal Register No. 152 (Monday, August 10, 2009) 39959-60.

RESPONSE:

McWane admits it has no first-hand knowledge of a grant of the *de minimis* waiver because it did not attempt to sell any of its non-domestic fittings for use in an ARRA Waterworks Project pursuant to the waiver for *de minimis* incidental components as described in 74 Federal Register No. 152 (Monday, August 10, 2009) 39959-60. [REDACTED]

[REDACTED] Thus, after reasonable inquiry, McWane lacks sufficient information at this time to admit or deny this Request with respect to third parties. *See, e.g.*, 74

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]; “Tracking

the De Minimis Waiver”, available at <http://dec.alaska.gov/water/muniloan/pdfs/De%20Minimis%20waiver%20tracking%20and%20example.pdf>, (last accessed June 28, 2012).

6. Respondent cannot identify any sale of any Imported Relevant Product that was Manufactured in Mexico or Canada for use in any ARRA Waterworks Project.

RESPONSE:

McWane admits it has no first-hand knowledge of any sales of Imported Relevant Product Manufactured in Mexico or Canada for use in any ARRA Waterworks Project because it does not manufacture Imported Relevant Product in Mexico or Canada and, accordingly, did not attempt to sell any Mexican or Canadian Imported Relevant Product to any ARRA Waterworks Project. After reasonable inquiry, McWane lacks sufficient information at this time to admit or deny whether any third parties sold Imported Relevant Product that was Manufactured in Mexico or Canada for use in any ARRA Waterworks Project [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

7. The ARRA increased the number of Waterworks Projects being built, repaired or otherwise commissioned in the United States.

RESPONSE:

McWane has no first hand knowledge regarding the total number of Waterworks Projects that were built, repaired or otherwise commissioned in the United States after the passage of ARRA. McWane was not the builder, repairer or commissioner of any Waterworks Projects, but only a supplier of fittings to distributors, who then sold fittings for the various Waterworks Projects. On information and belief, McWane generally admits that the total number of Waterworks Projects being built, repaired or otherwise commissioned in the United States increased during the period that ARRA funding was available.

8. Respondent competed for sales of Domestic Relevant Product for use in ARRA Waterworks Projects after February 2010.

RESPONSE:

Admitted.

9. Respondent continues to compete for sales of Domestic Relevant Product for use in ARRA Waterworks Projects today.

RESPONSE:

Denied. McWane has no first hand knowledge of any ARRA funding available today and, accordingly, McWane is not competing for sales of Domestic Relevant Product in ARRA Waterworks Projects today. The record contains additional testimony consistent with McWane's

understanding. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

10. The only Persons that currently Manufacture a Full-Line of Domestic Relevant Product that is 24" in diameter or smaller are Respondent and Star.

RESPONSE:

Admitted.

11. Respondent is unaware of any Person that has Plans to begin Manufacturing Domestic Relevant Product that is 24" in diameter or smaller within the next two years.

RESPONSE:

Admitted.

12. Prior to Star's entry in 2009 when it began Manufacturing Domestic Relevant Product, Respondent was the only Manufacturer of Full-Line of Domestic Relevant Product that was 24" in diameter or smaller.

RESPONSE:

Admitted insofar as prior to Star's entry, McWane was the only manufacturer of a full line of Domestic Relevant Product in 2008 and 2009. At times prior to that, a number of other manufacturers sold a full line of Domestic Relevant Product, including U.S. Pipe, ACIPCO, and Griffin Pipe.

15. Imported Relevant Products are not a substitute for Domestic Relevant Products when the specification for a Waterworks Project has a Buy American requirement.

RESPONSE:

Denied. *See, e.g.*, 74 Federal Register, No. 104 (June 2, 2009) 26398-99 (national waiver exempting from the Buy American requirement components that comprised less than 5% of the total cost of materials incorporated into a project); 74 Federal Register No. 152 (August 10, 2009) 39959-60 (same); [REDACTED]

[REDACTED]; “Tracking the De Minimis Waiver”, available at <http://dec.alaska.gov/water/muniloan/pdfs/De%20Minimis%20waiver%20tracking%20and%20example.pdf>, (last accessed June 28, 2012).

17. When a regulation, code or statute requires Domestic Relevant Products be used for publicly funded Waterworks Projects, Imported Relevant Products generally cannot be used for those projects.

RESPONSE:

McWane did not attempt to sell Imported Relevant Products under the circumstances of this Request and thus has no first-hand knowledge of the prevalence of Imported Relevant Products being used for publicly funded Waterworks Projects. After reasonable inquiry, McWane lacks sufficient information at this time to determine the circumstances under which Imported Relevant Products sold by third parties were sold and whether they were “generally” used as described in this Request. By way of further response, McWane incorporates by reference its supplemental responses to Request Nos. 1 through 6 above, which show examples of non-domestic fittings being used for publicly funded Waterworks Projects, and its response to Request No. 16.

18. Respondent has historically offered less Job Pricing on its Domestic Relevant Product than its Imported Relevant Product.

RESPONSE:

Admitted in part, but only insofar as follows: The number of waterworks projects utilizing domestically manufactured fittings is significantly smaller than the number of projects with open specifications. Most of the witnesses estimated that 20-25% or less of all projects used domestic fittings. It is unclear, as the term “less” is not defined, whether this Request seeks absolute or relative information. Because McWane’s domestic tons sold are a small fraction of the amount of Imported tons sold, McWane believes that on an absolute basis, it has offered fewer total job prices on projects with domestic only specifications than it has offered on projects with open specifications. McWane does not have sufficient information to admit or deny this request on a comparative or relative percentage basis or price basis.

22. The Relevant Product represents five percent (5%) or less of the cost of a typical Waterworks Project.

RESPONSE:

Admitted.

33. Distributors need access to a Full-Line of Domestic Relevant Product that can be delivered in a timely fashion, *i.e.* generally less than 12 weeks.

RESPONSE:

After reasonable inquiry, McWane lacks sufficient information to admit or deny whether third party distributors “generally” need access to a full line of products delivered within 12 weeks. There are hundreds of distributors whose requirements vary state by state and job by job.

[REDACTED]

[REDACTED]

37. Respondent does not assert a free-riding justification for its Exclusive Dealing Arrangements.

RESPONSE:

Denied. McWane's Answer, IH testimony, and expert report make clear that McWane intends to assert a "free-riding" justification. *See* McWane's Answer at 9 ("The alleged conduct has substantial pro-competitive justifications and benefits consumers and the public interest");

[REDACTED]

38. The MDA between Respondent and Sigma did not lower the price of Domestic Relevant Product.

RESPONSE:

After reasonable inquiry, McWane lacks sufficient information to admit or deny this Request as stated. [REDACTED]

[REDACTED]

[REDACTED]

40. Sigma, Star and Respondent together account for 90% or more of the sales in Imported Relevant Product in the United States.

RESPONSE:

Admitted.

42. In 2008, Respondent, Sigma and Star sold Imported Relevant Product pursuant to nearly identical list prices.

RESPONSE:

Denied. [REDACTED]

[REDACTED]

[REDACTED]

43. In 2008, Respondent, Sigma and Star sold Imported Relevant Product pursuant to nearly identical multiplier maps.

RESPONSE:

Denied. [REDACTED]

[REDACTED]

[REDACTED]

48. Respondent did not use data obtained from the DIFRA Information Exchange to manage its inventory.

RESPONSE:

Denied. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

49. Respondent did not use data obtained from the DIFRA Information Exchange to manage its production schedules.

RESPONSE:

Denied. [REDACTED]

50. Respondent did not use data obtained from the DIFRA Information Exchange to reduce its costs.

RESPONSE:

Denied. [REDACTED]

[REDACTED]

/s/ Joseph A. Ostoyich

Joseph A. Ostoyich

One of the Attorneys for McWane, Inc.

OF COUNSEL:

Joseph A. Ostoyich

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 July 19, 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 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:

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.