

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. )  
\_\_\_\_\_)

**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.<sup>1</sup>

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

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<sup>1</sup> 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

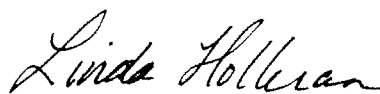


assuming *arguendo* that Respondent properly counted the subparts of all other interrogatories propounded by Complaint Counsel, Respondent's Interrogatory Responses answered no more than 21 interrogatories. Respondent's objections to Interrogatory Nos. 13-16 that Complaint Counsel exceeded its allotted 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,



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

_____	)	
In the Matter of	)	<b>PUBLIC</b>
	)	
<b>McWANE, INC.,</b>	)	DOCKET NO. 9351
<b>a corporation, and</b>	)	
	)	
<b>STAR PIPE PRODUCTS, LTD.,</b>	)	
<b>a limited partnership.</b>	)	
_____	)	

**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	)	<b>PUBLIC</b>
	)	
<b>McWANE, INC.,</b>	)	DOCKET NO. 9351
<b>a corporation, and</b>	)	
	)	
<b>STAR PIPE PRODUCTS, LTD.,</b>	)	
<b>a limited partnership.</b>	)	
_____	)	

**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:

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*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 A

UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

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

MCWANE, INC.’S RESPONSES AND OBJECTIONS  
TO COMPLAINT COUNSEL’S FIRST  
SET OF INTERROGATORIES

COMES NOW, McWane, Inc. (“McWane”), and objects and responds as follows to  
Complaint Counsel’s First Set of Interrogatories (“Interrogatories”):

**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 Interrogatories, 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 information or documents provided in response to the Interrogatories, 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 Interrogatories.

3. McWane objects to the Interrogatories to the extent that they seek information containing, revealing, discussing, or referring to: (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's responses to the Interrogatories shall not be deemed or construed to be a waiver of any privilege, right or objection on the part of McWane. In the event that information or documents containing privileged or work product information are inadvertently produced by McWane, such production is not and shall not be deemed or construed as a waiver of any privilege, right or objection on the part of McWane, and McWane hereby reserves the right to claw back such inadvertently produced documents.

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

6. McWane objects to the Interrogatories to the extent that they seek information within 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.



7. McWane objects to the Interrogatories to the extent that they call for the production of electronically stored information that is not reasonably accessible because of undue burden or cost. McWane's counsel is available to meet and confer generally regarding issues presented by the collection of electronically stored information to insure that any such collection is completed in an efficient and cost-effective manner.

8. McWane's statement in response to any particular Interrogatory that it will undertake to produce responsive information does not constitute an admission that such information exists.

9. McWane objects to the Interrogatories 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.

10. McWane objects to the Interrogatories to the extent they, 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 Court's February 15, 2012, Scheduling Order.

11. Subject to further fact and/or expert discovery, McWane reserves the right at any time to supplement, revise, correct, add to, or clarify its objections or responses to these Interrogatories.

12. McWane reserves the right to refer Complaint Counsel to the business records which it has previously produced and/or is in the process of producing, where an answer to an Interrogatory is contained within or may be compiled or derived from such business records.

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

**SPECIFIC OBJECTIONS AND RESPONSES**

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.

**RESPONSE TO INTERROGATORY 1:**

McWane objects to this Interrogatory as not reasonably limited in time, geographic and subject matter scope. Subject to and without waiving these specific objections and its General Objections, McWane states that, at different points in time within the January 1, 2007 - present time frame, the following persons have had at least some management or supervisory responsibilities with respect to the pricing of the Domestic Relevant Product: Rick Tatman, Jerry

Jansen, Leon McCullough, Ruffner Page, Vince Napoli, former employee David Green and former employee Thomas Walton. The requested contact information for these persons, to the extent available to McWane at this time, is set forth in the attached Excel spreadsheet and also available from the documents McWane has previously produced and may be contained within the documents McWane is in the process of producing to Complaint Counsel.

2. Describe each information technology, telecommunication system, and internal VoIP or network structure used by the Company, including without limitation the identity of each telecommunication service provider and each external or contract service provider.

**RESPONSE TO INTERROGATORY 2:**

McWane objects to this Interrogatory as overly broad, unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence, and as not reasonably limited in time, geographic and subject matter scope. Subject to and without waiving these specific objections and its General Objections, McWane will undertake to provide responsive documents or information with regard to its business for the time period January 1, 2007 to present.

3. For each employee identified in response to Specification 1 above, Identify and describe in detail every Communication between that employee and any Competitor, including without limitation in-person communications, meetings, phone calls, emails, faxes or other communications.

**RESPONSE TO INTERROGATORY 3:**

McWane objects to this Interrogatory as not reasonably limited in time, geographic and subject matter scope. McWane also objects to this Interrogatory as overly broad, unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence to the extent it seeks all communications, including those involving McWane's or any Competitor's occasional sale or purchase, in the ordinary course of business, of products to or from one another. Subject to and without waiving these specific objections and its General Objections, and for the time period January 1, 2007 to the present, McWane states that responsive information relating to the Relevant Products is contained within the documents McWane has previously produced and may be contained within the documents McWane is in the process of producing to Complaint Counsel.

4. For each trade or research association in which the Company has participated in the past ten years and that conducts an information exchange among its members, Identify the name, address, telephone number, email address, and website of the association; the names of every officer, director, member, attorney, and accountant of the association; the name of each of the Company's employees who attended or otherwise participated in (in- person or by telephone) any of the association's meetings; and the nature, content, and frequency of the information exchange conducted by that association.

**RESPONSE TO INTERROGATORY 4:**

McWane objects to this Interrogatory as not reasonably limited in time, geographic and subject matter scope. McWane also objects to this Interrogatory as overly broad, unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence to the

extent it calls for information regarding trade associations not related to the Relevant Product. Subject to and without waiving these specific objections and its General Objections, and for the time period January 1, 2007 to the present, McWane states that responsive information relating to the Ductile Iron Fittings Research Association is contained within the documents McWane has previously produced and may be contained within the documents McWane is in the process of producing to Complaint Counsel.

5. Identify and describe in full every act, omission, practice, instance, Document, and/or Communication constituting or relating to any business justification, efficiency, rationale, or Effect of the Company's participation in the Ductile Iron Fittings Research Association, including but not limited to any information exchange facilitated by the Ductile Iron Fittings Research Association.

**RESPONSE TO INTERROGATORY 5:**

Subject to and without waiving its General Objections, McWane refers Complaint Counsel to the July 21, 2010 testimony of Rick Tatman and the August 12, 2010 testimony of Leon McCullough in Federal Trade Commission Case No. 101-0080 and to DIFRA's articles of incorporation. By way of further response, McWane states that additional responsive information is contained within the documents McWane has previously produced and may be contained within the documents McWane is in the process of producing to Complaint Counsel.

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.

**RESPONSE TO INTERROGATORY 6:**

McWane objects to this Interrogatory as vague and ambiguous as to what is meant by the term “quantify.” McWane further objects on the ground that this interrogatory is premature at this stage of the case, to the extent it seeks expert opinion or testimony. Subject to and without waiving this specific objection and its General Objections, and to the extent McWane understands this Interrogatory, McWane refers Complaint Counsel to the July 21, 2010 testimony of Rick Tatman in Federal Trade Commission Case No. 101-0080 and states that additional responsive information is contained within the documents McWane has previously produced and may be contained within the documents McWane is in the process of producing to Complaint Counsel.

7. Identify each Person that has entered the market for Manufacturing or supplying any Relevant Product since January 1, 2000, or that is a potential entrant in the market for any Relevant Product, and describe the date of entry or Planned entry, the manner of entry (e.g., importing any Relevant Product, building US foundries, contracting with existing US foundries, etc.), and the current estimated US sales of the entrant.

**RESPONSE TO INTERROGATORY 7:**

McWane objects to this Interrogatory as vague and ambiguous with respect to the undefined term “potential entrant in the market.” McWane also objects to this Interrogatory as overly broad and unduly burdensome, to the extent that any foundry with capacity anywhere in the world could be a “potential entrant,” as McWane understands the term, in the alleged market for Relevant Product(s). McWane further objects to this request as seeking information outside of McWane’s custody and control, seeking information as readily available to Complaint

Counsel as to McWane, and as not reasonably limited in time, geographic and subject matter scope. McWane further objects on the ground that this interrogatory is premature at this stage of the case, to the extent it seeks expert opinion or testimony. Subject to and without waiving these specific objections and its General Objections, and to the extent McWane understands this Interrogatory, McWane states on information and belief that the following Persons have entered the market, or increased their share position in the market, for Manufacturing or supplying the Relevant Product since January 1, 2000: North American Cast Iron Products (NACIP), ElectroSteel, Serampore Industries, MetalFit Inc., NAPAC Inc., Star Pipe, Sigma, Backman Foundry, and Accucast Ltd. By way of further response, McWane states that responsive information is contained within the documents McWane has previously produced and may be contained within the documents McWane is in the process of producing to Complaint Counsel.

8. Identify and describe in full every act, omission, practice, instance, Document, and/or Communication constituting, tending to support, deny, or limit, or otherwise relating to your statement to the Court at the February 13, 2012 Scheduling Conference that:

[T]he shipments, nobody knows what the time period is. That lags a bit, but like a lot of industries, a project goes out for bid, it's bid, and then you don't - the ground doesn't break until the springtime. So, there could be a three, six-month lag time before there is ground-breaking and then another couple of months before there is a shipment of these products and where you are in a position to put the pipe in the ground. So, you can't tell from looking at a shipment in February whether that was bid yesterday or ten months ago. There's no way to tell that. [56:24-57:09]

**RESPONSE TO INTERROGATORY 8:**

Subject to and without waiving its General Objections, McWane states that

responsive information is contained within the documents McWane has previously produced and may be contained within the documents McWane is in the process of producing to Complaint Counsel.

9. Identify and describe in full every act, omission, practice, instance, document, and/or Communication constituting or relating to any business justification, rationale or Effect of any Exclusive Dealing Arrangement enforced, proposed, or considered by the Company.

**RESPONSE TO INTERROGATORY 9:**

McWane objects to this request as argumentative, misleading and assuming facts not in evidence with respect to the phrase “Exclusive Dealing Arrangement.” McWane denies that it has been a party to or participated in any so-called “Exclusive Dealing Arrangement,” and avers that to the best of its knowledge its customers source fittings from one or more suppliers in addition to McWane. McWane also objects to this request as not reasonably limited in time, geographic and subject matter scope. Subject to and without waiving these specific objections and its General Objections, and to the extent McWane understands this Interrogatory, McWane refers Complaint Counsel to the July 21, 2010 testimony of Rick Tatman in Federal Trade Commission Case No. 101-0080. By way of further response, McWane states that information regarding its corporate rebate programs and customer incentive programs relating to the Domestic Relevant Product, for the time period January 1, 2007 to present, is contained within the documents McWane has previously produced and may be contained within the documents McWane is in the process of producing to Complaint Counsel.



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.

**RESPONSE TO INTERROGATORY 10:**

McWane objects to this Interrogatory as vague and ambiguous as to what is meant by the term “quantify.” McWane further objects on the ground that this interrogatory is premature at this stage of the case, to the extent it seeks expert opinion or testimony. Subject to and without waiving this specific objection and its General Objections, and to the extent McWane understands this Interrogatory, McWane incorporates by reference its responses and objections to Specification 9 above.

11. Separately for each item (e.g., SKU) of each transaction occurring between January 1, 2002 and December 31, 2011 involving the sale of any Relevant Product by the Company to any customer located in the United States, provide Transaction Data and Pricing Data.

**RESPONSE TO INTERROGATORY 11:**

McWane objects to this Interrogatory as not reasonably limited in time scope. Subject to and without waiving this specific objection and its General Objections, McWane states responsive information for the time period January 1, 2007 to present is contained within the documents McWane has previously produced and may be contained within the documents McWane is in the process of producing to Complaint Counsel.

12. Separately for each month between January 1, 2002 and December 31, 2011: (a) provide Inventory Data, and (b) separately for each location of Manufacture operated by the Company, provide Raw Materials Data, and Landed Cost Data.

**RESPONSE TO INTERROGATORY 12:**

McWane objects to this Interrogatory as not reasonably limited in time scope. Subject to and without waiving this specific objection and its General Objections, McWane states responsive information for the time period January 1, 2007 to present is contained within the documents McWane has previously produced and may be contained within the documents McWane is in the process of producing to Complaint Counsel.

13. Separately for each facility at which any Relevant Product is Manufactured by or for the Company, and separately for each of the last five years, describe: each piece of equipment used in the Manufacture of any Relevant Product having a capital cost of \$5,000 U.S. dollars or more. Such description shall include: the identity of the Manufacturer of the piece of equipment, its function, its capacity, each item (e.g., SKU) of Relevant Product Manufactured using that piece of equipment, the number of units of each such item Manufactured using that piece of equipment, the revenues derived by the Company therefrom, each other product Manufactured using that piece of equipment, the number of units of each such product Manufactured using that piece of equipment, and the revenues derived by the Company therefrom.

**RESPONSE TO INTERROGATORY 13:**

In addition to its General Objections, McWane specifically objects to this

Interrogatory because 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. McWane further objects to this Interrogatory as overly broad, unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence.

14. Identify each and every instance of an Imported Relevant Product installed, sold, or purchased for use on an ARRA funded project, whether under a de minimis waiver or otherwise.

**RESPONSE TO INTERROGATORY 14:**

In addition to its General Objections, McWane specifically objects to this Interrogatory because 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. McWane further objects to this Interrogatory as seeking information outside of its custody and control.

15. Identify each and every instance of any Competitor making a sale of any Relevant Product directly to a contractor, municipality, or other entity for installation by that entity.

**RESPONSE TO INTERROGATORY 15:**

In addition to its General Objections, McWane specifically objects to this Interrogatory because 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. McWane further objects to this Interrogatory as seeking information outside

of its custody and control.

16. Identify any Joint Defense Agreement between you and any Competitor.

**RESPONSE TO INTERROGATORY 16:**

In addition to its General Objections, McWane specifically objects to this Interrogatory because 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. McWane further objects to this Interrogatory to the extent it is overly broad, not reasonably limited in subject matter scope, and seeks information protected by the attorney-client privilege, work product doctrine, joint defense privilege, or common interest privilege.

/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  
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[jelmer@maynardcooper.com](mailto:jelmer@maynardcooper.com)

**CERTIFICATE OF SERVICE**

This is to certify that on March 22, 2012, I served via electronic mail delivery 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 Lavery            
One of the Attorneys for McWane  
William Lavery

# Exhibit B

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

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In the Matter of	)	<b>PUBLIC</b>
	)	
<b>McWANE, INC.,</b>	)	DOCKET NO. 9351
<b>a corporation, and</b>	)	
	)	
<b>STAR PIPE PRODUCTS, LTD.,</b>	)	
<b>a limited partnership.</b>	)	

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**COMPLAINT COUNSEL’S STATEMENT REGARDING MEET AND CONFER  
PURSUANT TO SCHEDULING ORDER**

Complaint Counsel has met and conferred with counsel for Respondent McWane, Inc., regarding Respondent McWane Inc.’s Answers and Objections to Complaint Counsel’s First Set of Interrogatories (“Respondent’s Interrogatory Responses”). Counsel spoke several times during the weeks of March 26, 2012 and April 2, 2012; and exchanged at least one substantive e-mail, dated March 27, 2012, and one letter, dated March 28, 2012. Through these discussions, Complaint Counsel was able to resolve by agreement the majority of issues related to Respondent’s Interrogatory Responses. Consistent with these agreements, McWane supplemented Respondent’s Interrogatory Responses on April 3, 2012 (“Supplemented Answers”). The Supplemented Answers do not answer Interrogatory Nos. 13-16, and McWane continues to maintain its objections to answering these interrogatories. Despite the good faith efforts of counsel, Complaint Counsel was 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/ Linda Holleran  
Linda Holleran  
Counsel Supporting the Complaint  
Bureau of Competition  
Federal Trade Commission  
Washington, DC 20580

Dated: April 3, 2012

# Exhibit C

---

**From:** andreas.stargard@bakerbotts.com  
**Sent:** Tuesday, March 27, 2012 12:24 PM  
**To:** Holleran, Linda  
**Cc:** william.lavery@bakerbotts.com  
**Subject:** RE: McWane Interrogatory Response

Linda:

Below are the -- conservative -- counts for CC's interrogatories and subparts thereof. We could have been more aggressive, as CC has been in counting McWane's RFAs and interrogatories. Our objection kicks in at rog no. 13. My offer from yesterday stands until COB tomorrow.

1. 4 parts
2. 1
3. 1
4. 4
5. 1
6. 2
7. 4
8. 1
9. 1
10. 2
11. 2
12. 2

This comes to a total of 25 by rog no. 12.

Andreas.

---

**From:** Stargard, Andreas  
**Sent:** Tuesday, March 27, 2012 11:38  
**To:** 'lholleran@ftc.gov'  
**Cc:** Lavery, William  
**Subject:** Re: McWane Interrogatory Response

You will get our response shortly.

---

**From:** Holleran, Linda [<mailto:lholleran@ftc.gov>]  
**Sent:** Tuesday, March 27, 2012 08:54 AM  
**To:** Stargard, Andreas  
**Cc:** Lavery, William  
**Subject:** FW: McWane Interrogatory Response

Andreas, Please see below...

\*\*\*\*\*  
Linda M. Holleran, Esq.  
Anticompetitive Practices Division  
Bureau of Competition

Federal Trade Commission  
601 New Jersey Ave, NW  
Washington D.C. 20580  
Ph: (202) 326-2267  
Fax: (202) 326-3496

\*\*\*\*\*

---

**From:** Holleran, Linda  
**Sent:** Tuesday, March 27, 2012 9:53 AM  
**To:** Ansaldo, Alexander  
**Cc:** 'william.lavery@bakerbotts.com'  
**Subject:** McWane Interrogatory Response

Andreas, I need the information about how McWane counted our interrogatory subparts, which you promised you would get me yesterday afternoon. If you'd rather do it by telephone, that's okay, but then we need to talk this morning. Thanks, Linda

\*\*\*\*\*

Linda M. Holleran, Esq.  
Anticompetitive Practices Division  
Bureau of Competition  
Federal Trade Commission  
601 New Jersey Ave, NW  
Washington D.C. 20580  
Ph: (202) 326-2267  
Fax: (202) 326-3496

\*\*\*\*\*

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# Exhibit D



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

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

March 28, 2012

**VIA ELECTRONIC MAIL**

Andreas Stargard, 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 Andreas:

This letter confirms our meet and confer discussions on March 26, 2012, and March 27, 2012, regarding (i) McWane, Inc.'s Responses and/or Objections to Complaint Counsel's First Set of Requests for Production of Documents ("McWane's Document Responses"); and (ii) McWane, Inc.'s Responses and Objections to Complaint Counsel's First Set of Interrogatories ("McWane's Interrogatory Responses").

**McWane's Document Responses**

General Objections:

During our discussions, you confirmed that McWane is not withholding any documents from its production based on the common interest privilege or the "First Amendment associational privilege," as set forth in your General Objection No. 3. You also confirmed that you are not withholding any documents based on your General Objection No. 5.

During our discussion, you confirmed that McWane was withholding public documents from its production pursuant to your General Objection No. 6. However, subject to our discussion, you agreed to produce immediately any public documents that were in the files of the McWane custodians as part of your document production, and any public documents relied upon by the expert during expert discovery.

Request No. 4: You confirmed that McWane is only withholding routine purchase orders and invoices from its production of documents responsive to this request, and no other documents.

Request No. 7: We agreed that McWane can limit its production of responsive information and documents to the document custodians whose files we have previously agreed would be searched.

Andreas Stargard, Esq.  
March 28, 2012  
Page 2

Request No. 9: We agreed, as set forth in your response, that McWane would produce all responsive documents that Relate to the Relevant Product. With respect to responsive documents that fall outside of fittings, Complaint Counsel agreed that McWane can initially limit its production to providing a list of responsive transactions between McWane and a Competitor with a brief description of the transaction. After we review and discuss this list, we will discuss with you whether any additional documents related to those transactions need to be produced.

Request No. 10: We agreed that McWane would produce all responsive documents relating to any Agreement for the sale or distribution of any Domestic Relevant Product by Respondent to any Competitor from January 1, 2007, to present, and not limit McWane's production to only those documents relating to the MDA with Sigma from September 1, 2009, to present.

Request No. 11: We agreed that McWane would produce all responsive documents relating to McWane's capital expenditures, and not limit McWane's production to only those documents relating to patterns and molds.

Request No. 12: We agreed that McWane would produce all BLS or other responsive data that was in McWane's files immediately as part of its document production, and any responsive documents solely in McWane's economist's files during expert discovery.

Request No. 13: We agreed that McWane would produce all responsive documents relating to any Relevant Product for the entire time period for January 1, 2007, to present, and not limit McWane's production to only those documents relating to McWane's corporate rebates programs and customer incentive programs relating to Domestic Relevant Products from September 1, 2009, to present.

Request No. 22: We agreed that McWane would produce all responsive documents relating to any claim, investigation or allegation that McWane violated the antitrust laws in the Relevant Product market, and not limit McWane's productions to only a list of class actions filed against McWane.

Finally, we agreed that McWane would prioritize its rolling document production based on the list of custodians identified in my e-mail to you on March 22, 2012, and you indicated that McWane would begin its document production during the week of April 2, 2012. I have stated that McWane's production would need to be completed by April 13-16, 2012, in order to allow Complaint Counsel sufficient time to review the documents and schedule depositions.

### **McWane's Interrogatory Responses**

#### **General Objections:**

Like McWane's Document Responses, you confirmed that McWane was not refusing to provide responsive information based on the common interest privilege, the "First Amendment associational privilege," or because the interrogatories sought information related to third parties.

Andreas Stargard, Esq.  
March 28, 2012  
Page 3

Objection No. 10 erroneously asserts that Complaint Counsel's interrogatories, including all distinct subparts, exceeded the allowable 25 interrogatories, and on that basis, McWane refused to answer Interrogatory Nos. 13-16. As Judge Chappell has previously ruled in *In re Polypore International, Inc.*, a subpart should only be counted individually if the subpart is "logically or factually independent of the question posed by the basic interrogatory." Thus, for example, a data request about cost is a single interrogatory even if it identifies multiple data elements related to cost. As will be discussed below for each interrogatory, McWane's count of Complaint Counsel's interrogatories is inaccurate, and McWane must supplement its Interrogatory Responses to answer Interrogatory Nos. 13-16.

Consistent with Objection No. 12, McWane's interrogatory responses consistently point to its document production generally in lieu of, or in addition to, providing the specific information requested in the interrogatory. This practice violates Rule 3.35(c), which states that parties that wish to answer an interrogatory by reference to documents "shall include sufficient detail to permit the interrogating party to identify readily the individual documents from which the answer may be ascertained." You have agreed to supplement the McWane Interrogatory Responses such that McWane will provide the bates numbers of any documents to which it relies on answering an interrogatory. To avoid prejudice, any interrogatory that is not supplemented to refer to the bates range of documents or that otherwise specifically identifies the relevant documents, will be read as not referring to any documents. In other words, the reference to any documents not specifically identified in the McWane Interrogatory Responses will effectively be deleted from the response.

Interrogatory No. 1: This interrogatory was erroneously counted as 4 separate subparts: (1) identifying employees with pricing authority; (2) identifying employees who have any communications with any competitor; (3) the phone numbers for the above employees; and (4) the e-mail addresses for the above employees. This interrogatory, at most, should count only as 2 separate subparts (pricing authority employees and employees who have communicated with competitors), as the request for phone numbers and e-mail addresses simply specifies which information should be included when identifying the employees.

We also note that McWane has failed to identify the employees who have had Communications with any Competitor, which needs to be immediately supplemented.

Interrogatory No. 2: You agreed that you will supplement this interrogatory with the responsive information by March 31, 2012.

Interrogatory No. 3: This interrogatory seeks McWane to identify and describe each Communication between an employee identified in Interrogatory No. 1 (e.g., the seven employees identified as having pricing authority) and any Competitor. Other than generally referring to McWane's entire document production, McWane has refused to answer this interrogatory as unduly burdensome, and you have stated that McWane will not supplement this interrogatory because you believe that Complaint Counsel should obtain the requested information via deposition.



Andreas Stargard, Esq.  
March 28, 2012  
Page 4

Complaint Counsel agrees that McWane need not respond to this interrogatory by cataloguing every e-mail in its document production. However, this interrogatory seeks information about all forms of communications, including in-person meetings and telephone calls – which may or may not be reflected in the documents. It is within Complaint Counsel’s discretion to use whichever discovery tool it wishes to gather information, and McWane may not refuse to provide responsive information simply because it prefers Complaint Counsel to use a different discovery method. The requested information will be valuable for use in depositions, where Complaint Counsel can then probe for additional detailed information about these communications.

Accordingly, unless you indicate that McWane has changed its position by Friday, March 30, 2012 and will supplement this interrogatory, Complaint Counsel will move to compel an answer to this interrogatory.

Interrogatory No. 4: We agreed that McWane may limit its answer to providing responsive information about DIFRA.

Interrogatory No. 6: This interrogatory seeks information on how McWane quantifies its efficiencies related to DIFRA, and was incorrectly counted as having 2 distinct subparts.

Interrogatory No. 7: You agreed that you will supplement this interrogatory in order to provide information regarding actual entrants or potential entrants since January 1, 2000, rather than collectively providing information for entrants and entities that “increased their share position in the market.”

This interrogatory also needs to be supplemented to provide, for each entrant, the date of entry or planned entry; the manner of entry; and the current estimated US sales of the entrant – which McWane counted as separate and discrete subparts.

Interrogatory No. 10: This interrogatory seeks information on how McWane quantifies its efficiencies related to its Exclusive Dealing Arrangements, and was incorrectly counted as having 2 distinct subparts.

Interrogatory Nos. 11 and 12: You indicated that McWane was producing responsive data in response to these interrogatories, and planned to provide this data by March 30, 2012.

Interrogatory Nos. 13-16: With the correct count of Complaint Counsel’s interrogatories and discrete subparts, these interrogatories should be answered and therefore need to be immediately supplemented.

\* \* \*

Andreas Stargard, Esq.  
March 28, 2012  
Page 5

We have reached agreement regarding the vast majority of our discovery dispute. However, we are still at an impasse regarding Interrogatory No. 3, and the proper count of Complaint Counsel's interrogatories. Please contact me by Friday, March 30, 2012 to let me know if McWane has changed its position regarding the above issues.

Regards,

/s/

Linda M. Holleran

cc: Joseph Ostoyich, Esq.  
William Lavery, Esq.  
Ted Hassi, Esq.