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

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

COMPLAINT COUNSEL'S OPPOSITION TO MCWANE, INC.'S MOTION TO COMPEL COMPLAINT COUNSEL'S ANSWERS TO INTERROGATORY NOS. 16-23

Introduction

McWane, Inc.'s Motion to Compel Complaint Counsel's Answers to Interrogatory Nos. 16-23 ("Respondent's Motion") is based on a flawed application of the standard for counting discrete subparts of interrogatories, and should be denied. While an overly rigid approach to counting subparts is not recommended, the rules purposefully count discrete subparts as separate interrogatories in order to prevent parties from evading the numerical limits on interrogatories.

Both parties agree that a subpart is "discrete when it is logically or factually independent of the question posed by the basic interrogatory." *See* Order Granting Complaint Counsel's Motion to Compel Respondent's Answers to Interrogatories, at * 1-2 (Apr. 16, 2012) ("April Order") (citing *In re Dynamic Health of Florida*, 2004 FTC LEXIS 254 (Dec 9, 2004)); *Kendall v. GES Exposition Svcs., Inc*., 174 FRD 684, 685 (D. Nev. 1997) (explaining that a subpart is discrete if the subsequent question can "stand alone" and be answered independently of the primary question). When this standard is properly applied, McWane's First Set of

Interrogatories ("Respondent's Interrogatories") exceeds the 25 interrogatory limit imposed by Paragraph 10 of this Court's February 15, 2012 Scheduling Order. Accordingly, Complaint Counsel should not be required to answer any additional interrogatories.[1] *See* Holleran Declaration at paragraph 3.

Analysis

On the first day of discovery, Respondent served contention interrogatories -- formally numbered 1 through 23 -- that asked Complaint Counsel to identify "all facts" supporting, refuting, or otherwise relating to allegations in the Complaint. Importantly, this type of interrogatory is universally condemned by courts as overly broad and unduly burdensome.[2] As discussed further below with respect to Interrogatory Nos. 2, 3, 5 and 10, these interrogatories also contain numerous subparts in that they seek information about separate elements of the claims in the Complaint, distinct allegations of alleged misconduct, and otherwise separate and independent inquiries that "stand alone" from the primary question in the interrogatory.

Interrogatory No. 2

Interrogatory No. 2 contains three discrete subparts that seek "all facts" that support, refute or otherwise relate to Complaint Counsel's contentions relating to: 1) a relevant product market for domestically-produced ductile iron fittings; 2) a relevant geographic market; and

[1] Notably, Complaint Counsel offered Respondent the opportunity to withdraw and re-submit their discovery requests and/or to prioritize which requests Complaint Counsel would answer first. Counsel for Respondent rejected this offer and stated that it wanted Complaint Counsel to answer the requests as written, and in the order in which they were presented. Complaint Counsel's answers followed Respondent's desired approach.

[2] *See, e.g., In re Dynamic Health of Florida*, 2004 FTC LEXIS 254, at *3 (Dec. 9, 2004) (striking similar interrogatory as overly broad); *Lucero v. Valdez*, 240 F.R.D. 591, 594 (D. N.M. 2007) ("Contention interrogatories that systematically track all of the allegations in an opposing party's pleadings, and that ask for 'each and every fact' and application of law to fact that supports the parties allegations, are an abuse of the discovery process because they are overly broad and unduly burdensome."); *Lawrence v. First Kansas Bank & Trust Co.*, 169 F.R.D. 657, 662-63 (D. Kan. 1996) (finding similar interrogatory to place "an unreasonable burden upon the party who must answer them"). In an effort to promote the interests of discovery, Complaint Counsel nevertheless agreed to answer these interrogatories as appropriate.

3) an ARRA-specific submarket. *See* Exh. A to Respondent's Motion (Complaint Counsel's Objections and Responses to McWane, Inc.'s First Set of Interrogatories) ("CC's Interrogatory Answers").[3] *See* Holleran Declaration at paragraph 4. This conservative count combines Respondent's requests for information that support, that refute, or that otherwise relate to the above inquiries, and also combines the specific types of information Respondent requested regarding an ARRA-specific submarket. Respondent does not dispute that this interrogatory seeks all of the above information, but nevertheless insists that it should count as a single interrogatory because it seeks information related to a "common theme," *i.e.*, a relevant market. *See* Motion at 5-6. Courts have uniformly rejected this approach.

For example, in *Security Ins. Co. of Hartford v. Trustmark Ins. Co.*, the district court ruled that an interrogatory seeking the basis for the plaintiff's claim for common law fraud had three discrete subparts, one for each element of the fraud claim that was in dispute. 2003 U.S Dist. LEXIS 18196, at *4-5 (D. Conn. 2003). The court rejected the party's argument that the "common theme" of fraud could define the scope of a single interrogatory, reasoning that such an "expansive" interpretation of the permissible scope of an interrogatory would allow a party to pose "interrogatories requiring that the opposing party describe in detail all evidence supporting the allegations in Count X. ***Under no theory would such an interrogatory be appropriate***." *Id.* at *5 (emphasis added).

Likewise here, it is well-settled law that a relevant market is comprised of two distinct elements: i) a relevant product market; and ii) a relevant geographic market. *See, e.g.*, *Brown*

[3] During meet and confer discussions, Respondent asserted that this interrogatory contained two subparts: one seeking information related to the relevant product market and one seeking information related to the relevant geographic market. *See* Exh. E to Respondent's Motion (L. Holleran Letter. to W. Lavery, dated Apr. 25, 2012) ("Holleran Letter"). In a good faith effort to minimize the discovery dispute, Complaint Counsel had been willing to adopt this approach. Respondent's motion papers, however, reject this agreement by now contending that this interrogatory represents a single interrogatory; therefore Complaint Counsel retains its original (and proper) count of three subparts.

Shoe Co. v. United States, 370 U.S. 294, 324 (1962). Put differently, defining a relevant geographic market is an inquiry that is factually and legally independent from defining a relevant product market. *Id.*; *see also Antitrust Law Developments* at 571 *et seq*. (7th ed. 2012) (discussing factual and legal standards for establishing relevant product markets); and *id.* at 613 *et seq*. (discussing different factual and legal standards for establishing relevant geographic markets). Likewise, submarkets are considered to be a separate and distinct from any larger market in which they may be contained, and therefore also represent a factually and legally independent inquiry. *See Brown Shoe*, 370 U.S. at 325; *FTC v. Staples, Inc.*, 970 F. Supp. 1066 (D.D.C. 1997) (office supply superstores is a submarket within larger market for sale of office products); *see also Collaboration Properties, Inc. v. Polycom, Inc.*, 224 F.R.D. 473, 475 (N.D. Cal. 2004) (ruling that a single interrogatory seeking the same information for multiple products contained discrete subparts for each product). Accordingly, Interrogatory No. 2 is properly counted as containing three distinct subparts.

Interrogatory No. 3

Interrogatory No. 3 contains three discrete subparts that seek "all facts" establishing, refuting, or otherwise relating to Complaint Counsel's contentions that Respondent: i) possesses market power or monopoly power; ii) unlawfully exercised this power through its exclusive dealing policy; and iii) unlawfully exercised this power by entering into a Master Distribution Agreement ("MDA") with its competitor, Sigma, Inc. *See* Exh. E of Respondent's Motion (Holleran Ltr). The interrogatory specifically calls for information related to Complaint Counsel's contention that Respondent unlawfully exercised its monopoly power, which is set forth in Paragraphs 46 through 61 of the Complaint. These Paragraphs specifically allege that Respondent unlawfully exercised monopoly power through two distinct courses of conduct:

i) implementing an exclusive dealing policy, which had multiple components; and ii) entering into a Master Distributor Agreement ("MDA") with its competitor, Sigma, Inc. *See* Complaint ¶¶ 46-61. Respondent does not contest that this interrogatory seeks all of the above information, but instead asserts that the possession and exercise of monopoly power are "inherently intertwined," and that they therefore relate to a common theme and a single interrogatory. *See* Motion at 4.

In fact, the possession of monopoly power and the exercise of monopoly power are separate elements of a monopolization claim, and should therefore be counted as two discrete subparts. *See United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966) (holding that the elements of a monopolization claim are: i) the possession of monopoly power; and ii) the unlawful exercise of monopoly power); *see also Trustmark*, 2003 U.S Dist. LEXIS 18196, at *4-5 (counting each element of a claim as a discrete subpart).

Moreover, courts are clear that an interrogatory that asks the same question across multiple, distinct subjects or allegations constitutes multiple discrete subparts. For example, in *New Colt Holding Corp. v. RIG Holdings of Fla., Inc.*, the plaintiff argued that it had issued a single interrogatory that sought information about the defendant's trade dress infringement contention. 2003 U.S. Dist LEXIS 17930, at *4-5 (D. Conn. Feb. 6, 2003). The district court rejected this argument because the interrogatory asked about the trade dress infringement contention as it applied to multiple, distinct products. *Id.* (ruling that contention interrogatory asking for comparisons of multiple distinct revolvers to the subject revolver "cannot be read as a single question"). The court reasoned that characterizing such a question as a single interrogatory "would sanction unlimited subparts tied only by a legal theory. It would effectively eliminate any presumptive limitation on interrogatories by the use of subparts and

will not be permitted." *Id.* (emphasis added); *see also Bujnicki v. Am. Paving & Excavating, Inc.*, 2004 U.S. Dist. LEXIS 8869, at *24 (W.D.N.Y. 2004) (counting discrete subparts for each affirmative defense in an interrogatory that sought factual basis for each of the defendant's affirmative defense); *Polycom*, 224 F.R.D. at 475 (same).

Because Interrogatory No. 3 seeks information relating to Complaint Counsel's contentions that i) Respondent possesses monopoly power; ii) that Respondent unlawfully exercised this monopoly power through its exclusive dealing policy, and iii) that Respondent unlawfully exercised this monopoly power through the Sigma MDA agreement, it is properly counted as containing three discrete subparts.

Interrogatory No. 5

Interrogatory No. 5 is a wide-ranging interrogatory that propounds four distinct inquiries concerning consumer harm across each of the seven causes of action alleged in the Complaint. As discussed above, seeking the same information across multiple allegations represents a discrete subpart for each allegation. *See New Colt Holding Corp.*, 2003 U.S. Dist LEXIS 17930, at *4-5; *Bujnicki*, 2004 U.S. Dist. LEXIS 8869, at *24; *Polycom*, 224 F.R.D. at 475.

Moreover, this interrogatory contains four distinct inquiries, representing four discrete subparts, into "all facts" establishing, refuting, or otherwise relating to Complaint Counsel's contentions regarding: i) consumer injury from McWane's anticompetitive conduct; ii) the ability of consumers to reasonably avoid the harm; iii) any alleged countervailing benefits to consumers from McWane's anticompetitive conduct; and iv) the likelihood of the alleged anticompetitive conduct or any resulting harm to recur in the future. Complaint Counsel's Interrogatory Answers conservatively counted this interrogatory as comprising four discrete

subparts. However, a more accurate count would yield 28 discrete subparts -- these four discrete subparts multiplied across each of the Complaint's seven counts.

Respondent does not dispute that this interrogatory seeks *all* of the above information, but simply states that this should count as a single interrogatory because it deals with the primary question of consumer injury. In so arguing, Respondent fails to take into account that the interrogatory seeks the same information across the seven distinct counts of the Complaint, thereby automatically representing seven discrete subparts. It also fails to distinguish between interrogatories that merely ask for bits of information about the same topic -- such as the date, time and place of a communication, whose subparts would be meaningless without reference to the primary question regarding communications – and discrete inquiries that can stand alone and be understood without reference to the prior question. *See Kendall*, 174 FRD at 685; *see also* 2-15 Moore's *Federal Practice & Procedure* §15.25(3)(b) (2011) ("if a question "can be answered independently from the primary question, that subpart must be counted as a separate interrogatory").

For example, in *In re Dynamic Healthcare*, the ALJ counted two discrete subparts for an interrogatory that 1) asked to identify individuals involved in the dietary supplement business and their role; and 2) requested information about their compensation. 2004 FTC LEXIS 254, at *2-3. Likewise here, the questions of Complaint Counsel's contentions regarding whether consumers were injured (by each and every allegation of misconduct), whether consumers could have avoided being injured (from each and every allegation of misconduct), whether consumers received any countervailing benefits (from each and every allegation of misconduct), and whether Complaint Counsel contends that the harm (from each and every allegation of misconduct) is ongoing or likely to recur, can all stand alone and be understood without

reference to any other inquiry in the interrogatory. As such, these inquiries are properly counted as discrete subparts.

Interrogatory No. 10

Interrogatory No. 10 contains three discrete subparts that seek "all facts" supporting, refuting or otherwise relating to Complaint Counsel's contentions regarding: i) the balance of harm and any alleged efficiencies related to McWane's Domestic Rebate Policy; ii) the balance of harm and any alleged efficiencies related to McWane's participation in DIFRA; and iii) the balance of harm and any alleged efficiencies related to the Sigma MDA. Respondent's argument that the interrogatory represents a single question – whether McWane's Domestic Rebate Policy, participation in DIFRA, and Sigma MDA agreement harmed consumers on balance – is without merit. As already discussed, an interrogatory that seeks the same information across distinct allegations or subjects – here, McWane's Domestic Rebate Policy (*i.e.*, exclusive dealing policy), McWane's participation in DIFRA, and the MDA agreement between McWane and Sigma – should be counted as three discrete subparts. *See, e.g., See New Colt Holding Corp.*, 2003 U.S. Dist. LEXIS 17930, at *4-5; *Bujnicki*, 2004 U.S. Dist. LEXIS 8869, at *24; *Polycom*, 224 F.R.D. at 475.

Interrogatory Nos. 16-23

Finally, it should be noted that Respondent's Motion assumes that Interrogatory Nos. 16-23 should each count as a single interrogatory. This simply is not the case. For example, Interrogatory No. 16 asks for Complaint Counsel's contentions regarding whether the alleged misconduct is ongoing or likely to recur across all of the counts of the Complaint. Accordingly, should this Court determine that any additional interrogatories need to be answered, Complaint

Counsel respectfully requests the Court to take into account the discrete subparts contained in any such additional interrogatories.

Conclusion

Because the true count of discrete subparts in Respondent's Interrogatories is greater than the conservative count used by Complaint Counsel in its Interrogatory Answers, and because Complaint Counsel has already answered at least 25 interrogatories, Complaint Counsel respectfully requests that this Court deny Respondent's Motion.

Dated: May 7, 2012

Respectfully submitted,

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McWANE, INC.,	)	DOCKET NO. 9351
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a limited partnership.	)	
	)	

DECLARATION OF LINDA M. HOLLERAN

Pursuant to 28 U.S.C. § 1746, I make the following statement:

1. My name is Linda M. Holleran. I am making this statement in In the Matter of McWane, Inc. and Star Pipe Products, LTD, FTC Docket No. 9351. All statements in this Declaration are based on my personal knowledge as Attorney for the U.S. Federal Trade Commission, Bureau of Competition, or, if so-indicated, on information and belief.
2. This Declaration responds to claims made in Respondent, McWane's Motion to Compel Complaint Counsel's Answers to Interrogatory Nos. 16-23 that was filed on April 30, 2012 ("Motion to Compel").
3. Complaint Counsel participated in several meet and confer discussions to discuss discovery-related issues with Respondent. During one call that occurred shortly after Respondent served its discovery requests upon Complaint Counsel, Complaint Counsel offered Respondent the opportunity to withdraw and re-submit their discovery requests, or, in the alternative, to prioritize which requests Complaint Counsel would answer first.

Counsel for Respondent rejected this offer and stated that it wanted Complaint Counsel to answer the requests as written, and in the order in which they were presented. Complaint Counsel's answers followed Respondent's desired approach.

4. During meet and confer discussions immediately preceding Respondent's filing of the instant motion, Respondent asserted that Interrogatory No. 2 contained two subparts: one seeking information related to the relevant product market and one seeking information related to the relevant geographic market. *See* Exh. E to Respondent's Motion (L. Holleran Letter. to W. Lavery, dated Apr. 25, 2012). In a good faith effort to minimize the discovery dispute, Complaint Counsel had been willing to adopt Respondent's approach as a compromise. Respondent's motion papers, however, reject this compromise proposal by now contending that this interrogatory represents a single interrogatory; therefore Complaint Counsel retains its original (and proper) count of three subparts: 1) a relevant product market for domestically-produced ductile iron fittings; 2) a relevant geographic market; and 3) an ARRA-specific sub-market.

Pursuant to 28 U.S.C. § 1746, I declare, under the penalty of perjury, that the foregoing is true and correct to the best of my knowledge, information, and belief.

Respectfully submitted,

s/ Linda M. Holleran
Counsel Supporting the Complaint
Bureau of Competition
Federal Trade Commission
Washington, DC 20580

CERTIFICATE OF SERVICE

I hereby certify that on May 7, 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
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Washington, DC 20580

I further certify that I delivered via electronic mail a copy of the foregoing document to:

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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.

May 7, 2012 By: s/ Thomas H. Brock
Attorney