

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



_____))
In the Matter of)) **PUBLIC**
))
McWANE, INC.,)) DOCKET NO. 9351
Respondent.))
))
_____))

**COMPLAINT COUNSEL’S MOTION TO EXCLUDE EVIDENCE RELATING
TO ADVICE RELATED TO DIFRA AND ITS OPERATIONS,
OR IN THE ALTERNATIVE, TO COMPEL RELATED DISCOVERY**

McWane wants to have it both ways. It elicits and relies on advice that counsel for the Ductile Iron Fitting Research Association (“DIFRA”) provided regarding the legality of DIFRA and its information exchange. Yet, at the same time, McWane – as well as DIFRA’s counsel and other DIFRA members – have asserted the attorney-client privilege to thwart discovery into the substance of that advice. McWane’s use of this advice in substantive motion papers and in its responses to requests for admissions suggests that it plans to offer such evidence at trial, and indeed, McWane’s counsel refused to rule out that possibility during meet and confer discussions. *See* Holleran Decl., Exh. A (Meet and Confer Statement).

As this Court recognizes, a party may not use a privileged communication as “both a sword and shield by selectively using the privileged documents to prove a point but then invoking the privilege to prevent an opponent from challenging the assertion.” *In re OSF Healthcare & Rockford Health Sys.*, 2012 FTC LEXIS 70, at *4-5 (Mar. 19, 2012) (citations omitted). Accordingly, Complaint Counsel respectfully requests that this Court preclude McWane from introducing evidence relating to any advice from DIFRA’s

counsel or its members' reliance on any such advice. Alternatively, Complaint Counsel respectfully requests the Court to find that the privilege has been waived, and therefore compel DIFRA, its attorneys, and its members (*i.e.*, McWane, Sigma, Star, and U.S. Pipe, collectively "Members") to provide discovery related to any advice provided by DIFRA's attorneys regarding DIFRA's formation or operation. Complaint Counsel believes that raising this issue now is the only way to protect its ability to obtain meaningful discovery should it become necessary.¹

I. Factual Background

In 2007, DIFRA was created as a trade association under the guidance of Thad Long and other attorneys at Bradley Arant Boult Cummings LLC ("Bradley Arant"). Holleran Decl., Exh. E at 13:20-14:9 (Brakefield Dep. Vol. I). Between June 2008 and January 2009, DIFRA operated an information exchange that collected and reported total fittings shipped by the Members. DIFRA never engaged in any other functions, and has been largely defunct since 2009.

DIFRA's Members used the reports generated by the information to track their market share, to determine whether they were losing sales to other Members, and to detect if one or more of its Members were cheating on their agreement to limit discounting on fittings. As result, the Complaint alleges that the DIFRA information exchange facilitated collusion. *See* Complaint at ¶ 37.

Although McWane claims that it has not asserted an advice of counsel defense, *see* Holleran Decl., Exh. A (Meet and Confer Statement), McWane has nevertheless repeatedly injected advice from DIFRA's counsel into this litigation. For example, in its

¹ Complaint Counsel has met and conferred with all DIFRA Members and was unable to reach a resolution. *See* Exh. A (Meet and Confer Statement).

Motion for Summary Decision, McWane cited {

} *See* Holleran Decl.,

Exh. C at 19 (McWane Summary Decision Memorandum). McWane also cited Mr.

Long's advice in three of its responses to Complaint Counsel's requests for admissions:

{

}

See Holleran Decl., Exh. D at 29-31 (McWane Responses to Requests for Admissions).

Further, McWane's counsel elicited testimony related to Mr. Long's legal advice to

DIFRA during the deposition of DIFRA's president, Mr. Brakefield. For example, Mr.

Ostoyich affirmatively elicited the following testimony:

{

}

Holleran Decl., Exh. E at 56:12-57:6 (Brakefield Deposition Vol. 1); *see also id.*

at 75:11-18 {

}

Notwithstanding these clear acts of waiver, none of DIFRA's Members, including Respondent, have agreed to waive the attorney-client privilege and to allow Complaint Counsel to fully explore the substance of that advice. *See* Holleran Decl., Exh. A. To the contrary, McWane, DIFRA and Bradley Arant have all withheld documents based on the attorney-client privilege, *see* Holleran Decl., Exh. J (McWane Privilege Log), Exh. K

(Bradley Arant Privilege Log), Exh. N (Thad Long Privilege/Redaction Letter), and during his deposition, Mr. Long asserted the attorney-client privilege and refused to answer many questions on subjects that DIFRA's president had addressed in response to questioning by Respondent's counsel.² *E.g.*, Holleran Decl., Exh. M (Long Deposition) at 29:1-7 {

}

II. Legal Analysis

It is well settled that a litigant cannot use the attorney-client privilege as both a sword and a shield. *E.g.*, *In re Dynamic Health*, 2004 FTC LEXIS 253, at * 3-4 (Dec. 6, 2004). Here, Respondent has repeatedly injected the issue of advice from DIFRA's counsel into this litigation, thereby waiving any attorney-client privilege. Yet, Respondent, DIFRA, and the other DIFRA Members have repeatedly asserted privileged to preclude Complaint Counsel from full discovery of that advice. This Court should therefore exclude the introduction of any evidence related to any advice by DIFRA's counsel, or any reliance thereof by DIFRA's Members. This evidence should also be excluded because it is irrelevant -- advice of counsel is not a defense to a Section One claim. In the alternative, to prevent the unfair prejudice caused by Respondent's

² Sigma, U.S. Pipe, and Star did not submit privilege logs in Part 3, and it is therefore unclear whether, and to what extent, these DIFRA Members are withholding relevant DIFRA-related documents on privilege grounds.

selective use of privileged information, this Court should re-open discovery and compel Respondent, DIFRA and the other DIFRA Members to provide full disclosure of all documents and testimony related to any advice by DIFRA's counsel related to DIFRA's formation and operation.

A. The Court Should Exclude All Evidence Related To Any Advice By DIFRA's Counsel Or Any Reliance Thereof By DIFRA's Members

As this Court has explained, “the sword and shield theory applies only if the “sword” is proffered or advanced by Respondents.” *In re OSF Healthcare*, 2012 FTC LEXIS 70, at * 6-7. Although McWane has stated that it does not intend to raise an advice of counsel defense at trial, its reference to advice by DIFRA's attorneys in its discovery responses and summary judgment papers, as well as its affirmative elicitation of related testimony in deposition, implicitly injects privileged issues into the litigation.

For example, in *Cox v. Administrator United States Steel & Carnegie*, the defendant did not assert an advice of counsel defense, but instead claimed that it believed its actions “were lawful.” 17 F.3d 1386, 1418-119 (11th Cir. 1994). By doing so, the court ruled that the defendant had waived its privilege:

Having gone beyond mere denial, affirmatively to assert good faith, USX injected the issue of its knowledge of the law into the case and thereby waived the attorney-client privilege.

Id. at 1419 (ordering disclosure of all privileged communications relating to defendant's knowledge of the law relating to leave of absence policy). Likewise here, despite disavowing a reliance on an advice of counsel defense, McWane injected the privileged issue into this case by purposefully eliciting privileged testimony in depositions and by affirmatively asserting its reliance on advice from DIFRA's counsel in discovery responses and summary judgment papers.

When a party injects a privileged issue into litigation, fairness dictates subject matter waiver: “[A] litigant cannot use the work product doctrine as both a sword and shield by selectively using the privileged documents to prove a point but then invoking the privilege to prevent an opponent from challenging the assertion.” *In re OSF Healthcare*, 2012 FTC LEXIS 70, at 4-5; *see also Mohawk Indus., Inc. v. Interface, Inc.*, 2008 U.S. Dist. LEXIS 104317, at *35 (N.D. Ga. Sept. 29, 2008) (ruling that an affirmative defense is unnecessary for waiving the attorney-client privilege, and that waiver can be caused if defendant raises “factual issues into the case that, in fairness, require disclosure of the communications to the opposing party.”). This holds true even if the privilege belongs to the corporation, DIFRA, but has been waived by its Members. *See Moskowitz v. Lopp II*, 128 F.R.D. 624, 638 (E.D. Penn. 1989) (holding corporation’s privilege waived when individual directors raised advice of counsel defense).

Here, Respondent apparently wants to introduce evidence that its DIFRA conduct received the blessing of counsel while still asserting privilege to thwart discovery into the content of that advice. This same tactic was rejected in *Allvoice Computing PLC v. Nuance Communs., Inc.*, 2006 U.S. Dist. LEXIS 98478, at * 8-10 (S.D. Tex. Jan. 10, 2006). In *Allvoice*, the defendant wanted to introduce evidence regarding the *existence* of an opinion by counsel, but maintain its privilege on the *contents* of that opinion, as part of the jury’s consideration of the totality of evidence regarding the willfulness of its possible infringement. *Id.* The court refused to allow such a tactic and excluded any evidence concerning the legal opinion, reasoning that to rule otherwise would allow the defendant to “benefit from the mere existence of such an opinion, [and] would [] allow Nuance to

use the attorney-client privilege and the applicable precedents as both shield and sword.”
Id. at *10.

Likewise here, McWane should not be permitted to elicit testimony or other evidence at trial that the DIFRA Members complied with counsels’ advice without giving Complaint Counsel a full and fair opportunity to test and challenge that assertion. *Id.*; *see also Columbia Pictures Indus., Inc. v. Krypton Broad. of Birmingham, Inc.*, 259 F.3d 1186, 1196 (9th Cir. 2001) (affirming exclusion of evidence of advice of counsel where witness refused to answer questions regarding his interactions with counsel); *see also Trouble v. The Wet Seal, Inc.*, 179 F. Supp. 2d 291, 304 (S.D.N.Y. 2001) (failing to make full disclosure during discovery “constitutes a waiver of the advice-of-counsel defense”) (citations omitted). To do otherwise would cause fundamental unfairness to Complaint Counsel.

For example, in an unredacted e-mail from Thad Long to DIFRA Members, {

} *See* Holleran Decl., Exh. L. Yet, in his deposition, Mr. Long asserted the privilege and refused to answer Complaint Counsel’s questions about the significance of {

} *See* Holleran Decl., Exh. M at 28:5-17, 35:16-37:12 (Long Deposition). By preventing Complaint Counsel from fully exploring the substance of the advice of DIFRA’s counsel, Respondent can unfairly use the attorney-client privilege as a sword to suggest that its actions were lawful while improperly shielding possible evidence to the contrary.

Excluding evidence related to advice from DIFRA's counsel is also appropriate here because its "probative value is substantially outweighed by the danger of unfair prejudice." 16 C.F.R. § 3.43(b) (2012). McWane has stated it does not intend to call Mr. Long, but if discovery is any indication, it will elicit testimony from DIFRA's members that they acted in accord with his advice. However, this evidence is not probative. This Court, and not Mr. Long, will determine if DIFRA and its operations were unlawful, and neither willfulness nor specific intent is an element to a Section 1 claim. Accordingly, this Court should exclude any evidence relating to any advice from DIFRA's counsel.

B. In the Alternative, Complaint Counsel Should Be Permitted To Conduct Full and Fair Discovery

As discussed above, Respondent has waived the attorney-client privilege with respect to advice from DIFRA's counsel regarding the formation and operation of DIFRA. *See supra* at Part I.³ If the Court does not exclude any reference at trial related to any advice from DIFRA's counsel, or any reliance thereof by its Members, then this Court should reopen discovery for the limited purpose of allowing Complaint Counsel to investigate fully the substance of that advice and the role DIFRA's attorneys played in its creation and operation. Specifically, Complaint Counsel should receive all documents related to DIFRA that are currently being withheld on privilege grounds by all DIFRA Members and their attorneys, and Complaint Counsel should have the right to re-depose Mr. Long, Mr. Brakefield, and each DIFRA Member regarding the substance of that advice.

³ Respondent also waived the privilege by affirmatively questioning witnesses on privileged materials and not objecting to questions on privileged documents. *See* Holleran Decl., Exh. E (Brakefield deposition) at 20:16-22:22; 55:13-60:6; and 102:11-104:8. *See AHF Community Dev., LLC v. The City of Dallas*, 258 FRD 143, 148-49 (N.D. Tex. 2009) (voluntary waiver where documents and questions provided sufficient notice that privileged information was being sought).

III. Conclusion

For the foregoing reasons, this Court should exclude all evidence relating to any advice by DIFRA's counsel, or any reliance thereof by DIFRA Members; or in the alternative, compel the production of any DIFRA related documents that have been withheld on the basis of privilege and permit Complaint Counsel to re-depose DIFRA's counsel and its Members related to the substance of that advice.

Dated: June 27, 2012

Respectfully submitted,

s/ Linda Holleran

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Linda Holleran, Esq.

Joseph A. Baker, Esq.

Thomas H. Brock, Esq.

Michael J. Bloom, Esq.

Jeanine K. Balbach, Esq.

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

)	
In the Matter of)	
)	
McWANE, INC.,)	DOCKET NO. 9351
Respondent.)	
)	

COMPLAINT COUNSEL’S [PROPOSED] ORDER

On June 25, 2012, Complaint Counsel filed its Motion to Exclude Evidence Relating to Advice Related to DIFRA and Its Operations, Or In the Alternative, To Compel Related Discovery Motion. Upon consideration of this motion, and all responses thereto, the Court **Grants** Complaint Counsel’s motion.

IT IS ORDERED that Respondent may not introduce at trial, or otherwise refer to at trial or otherwise, any documents, testimony or other evidence related to or reflecting: (i) any advice or opinions by counsel relating to DIFRA’s formation, operation or legality; or (ii) any reliance or compliance with such advice by any DIFRA member.

ORDERED:

D. Michael Chappell
Administrative Law Judge

Date: July , 2012

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

In the Matter of)
)
)
 McWANE, INC.,) DOCKET NO. 9351
 Respondent.)
)

DECLARATION OF LINDA M. HOLLERAN

1. I have personal knowledge of the facts set forth in this declaration, and if called as a witness I could and would testify competently under oath to such facts.
2. I am an attorney at the Federal Trade Commission and Complaint Counsel in these proceedings. Attached to this declaration are the exhibits submitted in support of Complaint Counsel’s Motion to Exclude Evidence Relating to Advice Related to DIFRA and Its Operations, Or In the Alternative, To Compel Related Discovery.
3. Exhibit A is a true and correct copy of Complaint Counsel’s Statement Regarding Meet and Confer pursuant to Rule 3.22(g) and the Court’s Scheduling Order.
4. Exhibit B is a true and correct copy of a letter from Michael Kades to William Lavery, dated June 21, 2012.
5. Exhibit C is a true and correct of an excerpt of the title page and pages 18 and 19 of the Memorandum Of Law In Support of Respondent McWane, Inc.’s Motion For Summary Decision, dated June 1, 2012.

6. Exhibit D is a true and correct copy of the title page and pages 29, 30 and 31 of the *in camera* version of Respondent McWane, Inc.'s Objections and Responses to Complaint Counsel's Requests for Admissions, dated June 8, 2012.
7. Exhibit E is a true and correct copy of Volume I of the Rule 3.33(c)(1) Deposition of Thomas Brakefield, dated May 4, 2012 ("Brakefield Deposition").
8. Exhibit F is a true and correct copy of a redacted version of a Summary of Third Meeting To Establish Trade Association For Ductile Water Works Fittings, dated November 21, 2006, which was produced by DIFRA with the bates number DIFRA 000011-12.
9. Exhibit G is a true and correct copy of an unredacted version of the Summary of Third Meeting To Establish Trade Association For Ductile Water Works Fittings, dated November 21, 2006, which was produced by Star Pipe & Products LLP with a bates number MESP0000344. Attachment G is an unredacted copy of Attachment F, and was used as Exhibit 3 in the Brakefield Deposition.
10. Exhibit H is a true and correct copy of a redacted copy of an email from Thad Long to Tom Brakefield, the then-President of DIFRA, and to representatives of DIFRA's members: Victor Pais, Larry Rybacki, Gary Crawford, Dan McCutcheon and Rick Tatman; and cc'd to Wood Herron and Michael McKibben, dated Apr. 4, 2008, with the subject line: DIFRA Input Output Format (3).xls. This document was produced by DIFRA with the bates number DIFRA 000322.
11. Exhibit I is a true and correct copy of a redacted version of an e-mail string between Thad Long and DIFRA members, which was produced by Star Pipe

- Products with the bates number MESP000563-64. The second page of Attachment I is an unredacted version of Exhibit H, and was used as Exhibit 8 in the Brakefield Deposition.
12. Exhibit J is a true and correct copy of McWane's Amended Privilege Log provided to Complaint Counsel. Upon information and belief, entries 2 and 3 refer to documents relating to DIFRA that were withheld on the grounds of attorney-client privilege.
 13. Exhibit K is a true and correct copy of the Privileged Log provided by the law firm of Bradley Arant Boult Cummings. Upon information and belief, all entries refer to documents relating to DIFRA that were withheld on the grounds of attorney-client privilege or work product.
 14. Exhibit L is a true and correct copy of a unredacted version of an email from T. Long to Tom Brakefield, that is cc'd to Michael McKibben and K. Wood Herren, dated Mar. 18, 2008, with the subject line: RE: DIFRA Meeting, which was produced by SIGMA, Inc. with the bates number SIG – 0034192. Counsel for SIGMA, Inc. had originally claimed that this document was privileged.
 15. Exhibit M is a true and correct copy of the deposition transcript of Thad Long, counsel for DIFRA during the relevant time period, dated May 30, 2012.
 16. Exhibit N is a true and correct copy of a letter from Thad Long to Andrew Mann, Complaint Counsel, which states that he has redacted documents on behalf of DIFRA. Thad Long is the custodian of DIFRA documents that have been withheld on the basis of the attorney-client privilege. DIFRA did not produce a privilege log.

I declare under the penalty of perjury that the foregoing is true and correct. Executed this
27th day of June, 2012, at Washington, DC.

s/ Linda Holleran
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U.S. Federal Trade Commission
Bureau of Competition
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(202) 326-2267
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Counsel Supporting the Complaint

CERTIFICATE OF SERVICE

I hereby certify that on June 27, 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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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.

June 27, 2012

By: s/ Thomas H. Brock
Thomas H. Brock

Exhibit A

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

_____)	
In the Matter of)	
)	
McWANE, INC.,)	DOCKET NO. 9351
Respondent.)	
_____)	

**COMPLAINT COUNSEL’S MEET AND CONFER
STATEMENT**

On or about June 20, 2012, Complaint Counsel met and conferred with counsel for Respondent McWane, Inc., regarding Complaint Counsel’s Motion to Exclude Evidence Relating to Advice Related to DIFRA and Its Operations, Or In the Alternative, To Compel Related Discovery. Complaint Counsel discussed its concern that McWane was relying on the advice of counsel while still asserting privilege to prevent fair discovery on the issue. McWane claimed that it did not think that the attorney-client privilege had been waived, and that it would not agree to forego relying upon evidence at trial related to Mr. Long’s advice regarding DIFRA, or any reliance thereof by any of the DIFRA members. After a good faith attempt to resolve the issue, both sides agreed that they were at an impasse. These meet and confer efforts are summarized in a letter from M. Kades to W. Lavery, dated June 22, 2012, and is attached as Exhibit B to the Holleran Declaration.

On or about June 21-22, 2012, Complaint Counsel conferred with Michael S. Denniston, Esq., counsel for Bradley Arant Boult Cummings (“Bradley Arant”); Gregory S.C. Huffman, Esq., counsel for Star Pipe Products, Ltd. (“Star”); Jason Leckerman, Esq., counsel for SIGMA Corp.; and Jason D. Cruise, Esq. and Michael L. Hitsky, Esq.,

counsel for United States Pipe and Foundry Company LLC (“US Pipe”). In each case, Complaint Counsel explained its concerns and its intention to file the present motion. Counsel for Bradley Arant, Star, Sigma and US Pipe each expressed their refusal to waive the attorney-client privilege with respect to DIFRA. Because Complaint Counsel’s requested alternative relief could implicate their obligations to produce relevant discovery, Complaint Counsel agreed to serve the instant motion on each party so that they could protect their rights in any way in which they saw fit.

On or about June 21-22, 2012, Complaint Counsel conferred with Richard Gill, personal counsel for Mr. Brakefield, the then-President of DIFRA, regarding Complaint Counsel’s concerns. Mr. Gill expressed his wish to defer any decision regarding waiver of the attorney-client privilege with respect to DIFRA to Mr. Thad Long.

On or about June 21 through June 25, 2012, Complaint Counsel tried on multiple separate occasions to contact Thad Long, an attorney for DIFRA during the relevant time period. Specifically, Complaint Counsel telephoned and left voice messages for Mr. Long on June 21, 2012, June 22, 2012, and June 25, 2012. In his deposition, Mr. Long asserted the attorney-client privilege on multiple occasions and explained that his clients had not waived the attorney-client privilege. *See* Holleran Decl., Exh. M at 14:10-15:18.

Dated: June 25, 2012

Respectfully submitted,

s/ Linda M. Holleran
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Confidential Exhibit
Redacted in its Entirety

Exhibit B

Exhibit C

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

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

**MEMORANDUM OF LAW IN SUPPORT OF RESPONDENT MCWANE, INC.'S
MOTION FOR SUMMARY DECISION**

***REDACTED MATERIAL PROTECTED
PURSUANT TO JANUARY 5, 2012 PROTECTIVE ORDER ENTERED BY THIS COURT***

[REDACTED]

⁶ The AC does not allege that any prices were communicated as part of DIFRA or under its penumbra.

[REDACTED]

[REDACTED]

On the contrary, McWane charted its own course

and job price discounts grew even more fierce in the second half of 2008.

IV. [REDACTED]

[REDACTED]

⁹ Again, a citation will be added as soon as a transcript is available.

Exhibit D

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.)	

**RESPONDENT MCWANE, INC.’S OBJECTIONS AND
RESPONSES TO COMPLAINT COUNSEL’S
REQUESTS FOR ADMISSION**

COMES NOW, McWane, Inc. (“McWane”), and objects and responds as follows to Complaint Counsel’s Requests for Admission (“Requests”):

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

47. Job Pricing reduces the transparency of pricing of Relevant Product.

RESPONSE/OBJECTIONS:

McWane incorporates by reference its General Objections. McWane also objects to this Request as vague and ambiguous as to the undefined term “transparency of pricing”. McWane further objects to this Request as vague and ambiguous in that it does not identify to whom the “transparency of pricing” is allegedly “reduce[d].” [REDACTED]

[REDACTED] Subject to and without

waiving its objections [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] As a matter of common sense, selling at any price that is not published is less transparent to others than selling at a price that is published.

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

RESPONSE/OBJECTIONS:

McWane incorporates by reference its General Objections. McWane objects, as misleading, argumentative, and assuming facts not in evidence, to Complaint Counsel’s

characterization of DIFRA as an “Information Exchange.” [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Subject to and without waiving its objections, McWane denies this Request.

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

RESPONSE/OBJECTIONS:

McWane incorporates by reference its General Objections. McWane objects, as misleading, argumentative, and assuming facts not in evidence, to Complaint Counsel’s characterization of DIFRA as an “Information Exchange.” [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Subject to and without waiving its objections, McWane denies this Request.

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

RESPONSE/OBJECTIONS:

McWane incorporates by reference its General Objections. McWane objects, as misleading, argumentative, and assuming facts not in evidence, to Complaint Counsel's characterization of DIFRA as an "Information Exchange." [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Subject to and without waiving its objections, McWane denies this Request.

/s. Joseph A. Ostoyich
Joseph A. Ostoyich
One of the Attorneys for McWane, Inc.

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Confidential Exhibit
Redacted in its Entirety

Exhibit E

Confidential Exhibit
Redacted in its Entirety

Exhibit F

Confidential Exhibit
Redacted in its Entirety

Exhibit G

Confidential Exhibit
Redacted in its Entirety

Exhibit H

Confidential Exhibit
Redacted in its Entirety

Exhibit I

Confidential Exhibit
Redacted in its Entirety

Exhibit J

Confidential Exhibit
Redacted in its Entirety

Exhibit K

Confidential Exhibit
Redacted in its Entirety

Exhibit L

Confidential Exhibit
Redacted in its Entirety

Exhibit M

Confidential Exhibit
Redacted in its Entirety

Exhibit N