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

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

RESPONDENT MCWANE, INC.'S MOTION FOR RECONSIDERATION

On July 5, 2012, this Court issued an Order Granting Complaint Counsel's Motion to Compel Respondent McWane, Inc.'s Responses to Requests for Admission, on the ground that Respondent did not file its opposition within 5 days as required under Rule 3.38. For the reasons stated in the attached Motion, Respondent McWane respectfully requests that this Court reconsider its order. Complaint Counsel did not comply with its meet and confer requirements under Rule 3.22, and thus, their motion to compel was improperly filed under Rule 3.38, and McWane moved to strike, or in the alternative, opposed within the 10 days provided under Rule 3.22.

Dated: July 5, 2012

/s/ J. Alan Truitt

J. Alan Truitt
Thomas W. Thagard III
Maynard Cooper and Gale PC
1901 Sixth Avenue North
2400 Regions Harbert Plaza
Birmingham, AL 35203
Phone: 205.254.1000
Fax: 205.254.1999

atruitt@maynardcooper.com
tthagard@maynardcooper.com

/s/ Joseph A. Ostoyich

Joseph A. Ostoyich
William C. Lavery
Baker Botts L.L.P.
The Warner
1299 Pennsylvania Ave., N.W.

Washington, D.C. 20004-2420
Phone: 202.639.7700
Fax: 202.639.7890
joseph.ostoyich@bakerbotts.com
william.lavery@bakerbotts.com

Attorneys for Respondent McWane, Inc.

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

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

RESPONDENT MCWANE, INC.'S MOTION TO STRIKE COMPLAINT COUNSEL'S MOTION TO COMPEL RESPONSES TO REQUESTS FOR ADMISSION AS PREMATURE AND MOOT, OR IN THE ALTERNATIVE, OPPOSITION TO COMPLAINT COUNSEL'S MOTION

Pursuant to Rule 3.22 of the Federal Trade Commission's Rules of Practice for Adjudicative Proceedings, Respondent McWane, Inc. ("McWane") respectfully moves to strike CC's motion, on the grounds that it was premature and was filed before the completion of an appropriate meet and confer on the subject. Indeed, as the attached declaration and email show, McWane responded late in the day Friday June 22 that it was "still evaluating" CC's request that it supplement its answers - - but CC went ahead and filed its motion on Monday before any further discussions were held. CC improperly rushed to file its Motion before the meet and confer process was complete, in an apparent attempt to meet its June 25, 2012 deadline for filing motions to compel.

In the alternative, McWane opposes CC's motion and requests that the Court deny Complaint Counsel's ("CC's") Motion to Compel Respondent McWane, Inc. to supplement its Responses to Requests Nos. 1-12, 15, 17, 18, 22, 33, 37, 38, 40, 42-43, and 48-50 of Complaint Counsel's Requests for Admission (1-50), dated May 22, 2012 ("RFAs"). McWane's Objections and Responses to CC's RFAs ("Responses") were appropriate under Rule 3.32(b), and CC cannot force McWane to admit assertions that are in dispute, are outside the scope of

Respondent's knowledge, or are too vague to admit or deny as stated. Thus, McWane has already complied with its obligations in responding to CC's RFAs.[1]

I. BACKGROUND

On May 22, 2012, CC served its Requests for Admission on McWane. On June 1, 2012, this Court extended the time in which Respondent had to serve its Responses to June 8, 2012. On June 8, 2012, Respondent served its Responses to CC's RFAs. On June 25, 2012, CC served its Motion to Compel Respondent to supplement twenty-five (25) of its fifty (50) Responses to CC's RFAs ("Motion").

II. ARGUMENT

RFAs 3, 5, 6, 37, 48, 49 and 50 are argumentative and make assertions that McWane has denied because its investigation showed that the statements were not accurate. McWane denied RFAs 1, 3, 5, 6, 9, 11, 17 and 33 because they also call for information outside McWane's possession and that is, instead, likely in the possession of third parties CC chose not to depose on these topics. "[R]equests for admissions as to central facts in dispute . . . have consistently been held improper." *Pickens v. Equitable Life Assurance Soc. of the U.S.*, 413 F.2d 1390, 1393–94 (5th Cir. 1969). Parties also have no obligation to engage in speculation in order to respond to requests for admission.[2] *Carmichael Lodge No. 2103, Benevolent and Protective Order of Elks of U.S. of America v. Leonard*, 2009 WL 1118896 at *5 (E.D. Cal. 2009) ("a party, however, is not required to speculate about a request that contains genuinely vague or ambiguous statements"); *Shelley v. Hoenisch*, 2008 WL 2489927 at *1 (W.D. Wis. 2008) (holding that

[1] Complaint Counsel did not meet Rule 3.22(d)'s requirement to make an "effort in good faith to resolve by agreement the issues raised by the motion" and thus, filed this motion to compel under 3.38 prematurely and improperly. Complaint Counsel states that they met and conferred with McWane's counsel on June 21, 2012, but that the parties "could not reach a resolution." This misrepresents what occurred. McWane's counsel informed CC during the meet and confer, and again via email the following day, June 22, that McWane would consider CC's requests. (*See* Ex. A (email from Lavery to Holleran). McWane, at minimum, was willing to offer to supplement RFAs 2, 4, 7, 8, 22, 42 and 43, and reiterates that offer here. McWane may also be willing to supplement a number of CC's remaining RFAs, if CC will simply clarify their vague statements. Accordingly, because CC's rushed motion did not comply with 3.22(d)'s meet and confer requirements, it was improperly filed under 3.38 and McWane moves to strike.

[2] FTC Rule 3.32(a) tracks the language of Federal Rule of Civil Procedure 36(a)(1).

"defendants need not provide any additional information in response" to an RFA where "defendants must speculate as to what they actually are admitting, something the rule does not require them to do"). Further, parties responding to requests for admission are not obligated to conduct additional discovery on behalf of the serving party. *Hendricks v. Ohio Dept. of Rehabilitation and Correction*, 2012 WL 2075317 at *2 (S.D. Ohio 2012) ("Rule 36 is not a discovery device, and its proper use is as a means of avoiding the necessity of proving issues which the requesting party will doubtless be able to prove") (citing *Misco, Inc. v. United States Steel Corp.*, 784 F.2d 198, 205 (6th Cir. 1986)).

A motion to compel is no proper simply because CC disagrees with McWane's answers. Despite its objections to CC's RFAs, McWane made a good faith effort to admit or deny each of CC's RFAs to the best of its knowledge, and added additional information to make its admission or denial clear where required. When McWane stated that it lacked sufficient knowledge and thus, denied, it did not say it lacked sufficient knowledge and then deny outright. McWane made a reasonable inquiry, per Rule 3.32(b), by reviewing internal documents or interviewing relevant employees at McWane, and then answered the parts of the questions it could. Here, CC is moving to compel simply because they disagree with McWane's responses, and is attempting to force McWane to conduct additional discovery on its behalf in an effort to burden Respondent in the months leading up to trial. *Cada v. Costa Line, Inc.*, 95 F.R.D. 346, 348 (N.D. Ill.1982) (the district court held it "would be disinclined to thrust on [defendants], as a condition of making a good faith statement of 'reasonable inquiry' under Rule 36(a), the burden of doing [plaintiffs'] job for them."). This is an improper use of a motion to compel.

A. Respondent Provided Good Faith Responses To CC's RFAs Despite Its Objections

CC claims that McWane made improper objections to RFA Nos. 1-11, 15, 17, 18, 22, 33, 37, and 42-43. CC is attempting to confuse the issue here. [redacted]

[redacted] As in any court, here Respondent is entitled to preserve its objections to CC's improper RFAs - - CC does not cite any case law requiring a party to admit or deny RFAs without preserving all objections. Further, McWane's objections were valid and speak for themselves.

B. Respondent Answered All RFAs To The Best Of Its Ability

CC further claims that Respondent provided nonresponsive or evasive responses to RFA Nos. 1, 3-6, 8, 10-12. This contention is untrue.

RFA 1. RFA 1 states *"All ARRA Waterworks Projects are subject to a Buy American requirement."* McWane denied this RFA for two reasons: first, McWane has no first-hand knowledge of the workings of ARRA. Second, CC did not define the term "requirement," but it suggests that it was absolute. That is not McWane's understanding and the statute on its face (and industry intelligence McWane obtained during the ARRA period) suggests that that there were waivers and exemptions that permitted imported product to be used on ARRA jobs (and, thus, that domestic was not required in those circumstances). CC cannot force McWane to change its response and engage in speculation simply because they do not agree with McWane's answer. The fact that McWane went further than required under the Rules by providing what information it had shows a good faith attempt to answer this RFA. [redacted]

RFAs 3, 5 and 6. RFAs 3, 4 and 5 concern sales of *"Imported Relevant Product for use in an ARRA Waterworks Projects"* pursuant to various waivers, or manufactured outside of the United States.

McWane denied RFAs 3, 5 and 6, stating that they were more properly directed towards third parties and also objected on the ground that they asked for information beyond McWane's custody or control. [redacted]

[redacted]

RFA 8. RFA 8 states *"Respondent competed for sales of Domestic Relevant Product for use in ARRA Waterworks Projects after February 2010."* [redacted] McWane's response is perfectly valid under the Rules and it has no obligation to re-write CC's RFAs for them.

RFAs 10, 11 and 12. RFAs 10-12 relate to the manufacturing of *"Relevant Product that is 24" in diameter or smaller."* Each of these RFAs call for speculation and/or information beyond McWane's custody or control, as McWane does not know with certainty what its competitors have produced, and what their plans are for future production. McWane is not required to speculate to respond to CC's RFAs and thus, denied the RFAs as stated.

[redacted]

[redacted] McWane made a good faith effort to respond to the RFA by providing additional information rather than simply denying the assertion.

C. McWane Conducted Sufficient Inquiry When It Stated It Lacked Sufficient Knowledge

CC argues that Respondent improperly claimed to lack sufficient knowledge on RFA Nos. 9, 18, 22, and 33.

RFA 9. RFA 9 states that *"Respondent continues to compete for sales of Domestic Relevant Product for use in ARRA Waterworks Projects today."* [redacted] RFA 9 is another example of an affirmative statement that McWane cannot admit with certainty.

RFA 18. RFA 18 states *"Respondent has historically offered less Job Pricing on its Domestic Relevant Product than its Imported Relevant Product."* [redacted]

[redacted]

RFA 33. RFA 33 states *"Distributors need access to a Full-Line of Domestic Relevant Product that can be delivered in a timely fashion, i.e. generally less than 12 weeks."* This RFA is objectionable, as it expressly calls for information that is known to non-party distributors (what they need) and not to McWane. McWane is not in a position to say what distributors "need," [redacted] It should be noted that on the meet and confer, CC did not attempt to re-define the vagueness of this RFA, and as such McWane has no obligation to re-write CC's RFAs for them. McWane's objections, and its response stating it lacked sufficient information and thus, denied this request, were perfectly valid under the Rules.

D. Complaint Counsel's Claims Regarding RFAs 37 And 48-50 Are Unsupported

Finally, CC claims that RFA Nos. 37 and 48-50 are unsupported by the record.

RFA 37. RFA 37 states *"Respondent does not assert a free-riding justification for its Exclusive Dealing Arrangements."* CC has been on notice that McWane intended to assert a "free-riding" or "cherry-picking" defense since before discovery commenced. [redacted] Second, McWane's Answer specifies that McWane is asserting an affirmative defense that "[t]he alleged

conduct has substantial pro-competitive justifications and benefits consumers and the public interest." (AC at 9.) [redacted] CC claims that during a prior meet and confer, Andreas Stargard, a former employee of Baker Botts, agreed with Complaint Counsel that McWane was not asserting a free-riding defense. However, Mr. Stargard denies that this conversation ever took place and CC does not attach any support for their assertion. It is CC's burden to prove McWane waived this defense, and their unsupported say-so is not sufficient to meet this burden.

RFAs 48-50. RFAs 48-50, respectively, ask McWane to admit that it did not use data obtained from the "DIFRA Information Exchange" to: (48) manage its inventory, (49) manage its production schedules, or (50) reduce its costs. [redacted] As discussed *supra*, CC's disagreement with RFAs that were answered is not a proper basis for a motion to compel.

IV. CONCLUSION

In sum, the Court should deny Complaint Counsel's Motion.

Dated: July 5, 2012

/s/ J. Alan Truitt
J. Alan Truitt

/s/ Joseph A. Ostoyich
Thomas W. Thagard III

Maynard Cooper and Gale PC
1901 Sixth Avenue North
2400 Regions Harbert Plaza
Birmingham, AL 35203
Phone: 205.254.1000
Fax: 205.254.1999
atruitt@maynardcooper.com
tthagard@maynardcooper.com

Joseph A. Ostoyich

William C. Lavery
Baker Botts L.L.P.
The Warner
1299 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2420
Phone: 202.639.7700
Fax: 202.639.7890
joseph.ostoyich@bakerbotts.com
william.lavery@bakerbotts.com

Attorneys for Respondent McWane, Inc.

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MCWANE, INC., **a corporation,** and **STAR PIPE PRODUCTS, LTD.,** **a limited partnership.**	)	**DOCKET NO. 9351**

RESPONDENT MCWANE, INC.'S RESPONSE TO COMPLAINT COUNSEL'S STATEMENT REGARDING MEET AND CONFER PURSUANT TO SCHEDULING ORDER

On June 20, 2012, Respondent's counsel met and conferred with Complaint Counsel regarding its Requests for Admission. During the meet and confer, Respondent's counsel informed Complaint Counsel that it would consider each if Complaint Counsel's requests, but first had to run them by the client. On June 22, 2012, Respondent's counsel informed Complaint Counsel via email that it was still evaluating the requests. On June 25, 2012, Complaint Counsel filed its Motion to Compel before confirming Respondent's position. Because Complaint Counsel filed its Motion before completing the meet and confer process, McWane files the instant motion to strike Complaint Counsel's Motion as improper under 3.38.

Respectfully submitted,

/s/ William C. Lavery
William C. Lavery
Counsel for McWane, Inc.

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

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	)	
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	)	
STAR PIPE PRODUCTS, LTD., a limited partnership,	)	
	)	
Respondents.	)	
	)	

PROPOSED ORDER

On July 5, 2012, McWane, Inc. filed a Motion to Strike Complaint Counsel's Motion to Compel. Upon consideration of this motion, this Court grants McWane's motion.

ORDERED:

D. Michael Chappell
Administrative Law Judge

_____, 2012

CERTIFICATE OF SERVICE

I hereby certify that on July 10, 2012, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-113
Washington, DC 20580

I also certify that I delivered via hand delivery a copy of the foregoing document to:

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-110
Washington, DC 20580

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

Edward Hassi, Esq.
Geoffrey M. Green, Esq.
Linda Holleran, Esq.
Thomas H. Brock, Esq.
Michael L. Bloom, Esq.
Jeanine K. Balbach, Esq.
J. Alexander Ansaldo, Esq.
Andrew K. Mann, Esq.

By: /s/ William C. Lavery
William C. Lavery
Counsel for McWane, Inc.

EXHIBIT A

This exhibit has been marked Confidential and redacted in its entirety

EXHIBIT B

This exhibit has been marked Confidential and redacted in its entirety

EXHIBIT C

This exhibit has been marked Confidential and redacted in its entirety

EXHIBIT D

This exhibit has been marked Confidential and redacted in its entirety

EXHIBIT E

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EXHIBIT F

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