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2. Complaint Counsel objects to Respondent's Interrogatories to the extent they seek to impose duties and obligations upon Complaint Counsel beyond the Commission's Rules of Practice for Adjudicative Proceedings. Complaint Counsel's responses will comply with the Commission's Rules of Practice for Adjudicative Proceedings.
3. Complaint Counsel objects to Respondent's Interrogatories to the extent the interrogatories, 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 February 15, 2012, Scheduling Order.
4. Complaint Counsel objects to Respondent's Interrogatories to the extent they seek information that relates to expert testimony prior to the dates prescribed by the February 15, 2012, Scheduling Order.
5. Complaint Counsel objects to Respondent's Interrogatories to the extent the interrogatories seek information protected by deliberative process privilege, law enforcement investigative privilege, informant's privilege, or the attorney work product doctrine. Complaint Counsel does not, by any response to any Request, waive or partially waive any applicable privilege or attorney work product claim.
6. Complaint Counsel objects to Respondent's Interrogatories to the extent it seeks information and materials from sources and persons within the Commission that are beyond the scope of the records search that Complaint Counsel are required to undertake pursuant to Rule 3.31(c)(2), and/or are expressly excluded from interrogatory responses by Rule 3.35(a)(1).
7. Complaint Counsel objects to Respondent's Interrogatories to the extent they are overly broad, vague, ambiguous, unduly burdensome, oppressive, and are not reasonably calculated to lead to the discovery of admissible evidence.

8. Complaint Counsel objects to Respondent's Interrogatories to the extent the interrogatories call for information previously provided to Respondent McWane or for information that may be less onerously obtained through other means.
9. Complaint Counsel objects to Respondent's Interrogatories as overly broad, unduly burdensome and oppressive in that they ask Complaint Counsel to disclose information that is already in Respondent McWane's possession or control, or is a matter of public record. Complaint Counsel will not undertake to catalogue and organize these materials for Respondent McWane.
10. Complaint Counsel objects to each Interrogatory to the extent that it seeks information for which the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served.
11. Complaint Counsel objects to Respondent's Interrogatories to the extent that, as framed, they purport to obligate Complaint Counsel to conduct an extensive and complete investigation of detailed facts within the thirty (30) days allowed for its responses and objections when such facts are known to Respondent McWane and/or contained in hundreds of pages of documents already produced by Respondent McWane.
12. Complaint Counsel reserves all of its evidentiary objections or other objections to the introduction or use of any response hereinat the hearing in this action, and does not, by any the htiar ncr

In addition to the General Objections, Complaint Counsel specifically objects to this interrogatory to the extent it impermissibly seeks attorney work product and Complaint Counsel's trial strategy. Complaint Counsel also objects to this interrogatory as premature to the extent it seeks information relating to issues that may be the subject of expert testimony in this case. Counsel Complaint Counsel further objects to the interrogatory as unduly burdensome to the extent it seeks to compel Complaint Counsel to undertake investigation, discovery, and analysis on behalf of Respondent. Complaint Counsel also objects to this interrogatory as premature and unduly burdensome because it is a contention interrogatory and no response is required prior to the close of discovery pursuant to Rule 3.35 (b)(2). Complaint Counsel will supplement its answer, as appropriate, after the close of discovery, as set forth in Rule 3.35(b)(2).

Interrogatory No. 3

Identify all facts that you contend establish that McWane possesses or possessed market power or monopoly power in any relevant antitrust market, including but not limited to any evidence relating to market shares, the ability to control prices or output, the time period during which McWane allegedly possessed market power, and all facts that you contend establish that McWane acquired, enhanced, maintained, or exercised such market power through anticompetitive or unfair conduct or attempted to do so, and all facts refuting, or otherwise relating to McWane's alleged possession or exercise of market power.

Response to Interrogatory No. 3

Complaint Counsel notes that this interrogatory contains at least two discrete subparts, and seeks: (1) all facts establishing, refuting or otherwise that McWane possesses market power or monopoly power; and (2) all facts establishing, refuting or otherwise relating to McWane exercising such power through anticompetitive or unfair conduct or attempted to do so.

In addition to the General Objections, Complaint Counsel specifically objects to this interrogatory as premature to the extent it seeks information relating to issues that may be the subject of expert testimony in this case. Counsel Complaint Counsel also objects to the

interrogatory as unduly burdensome to the extent it seeks to compel Complaint Counsel to undertake investigation, discovery, and analysis on behalf of Respondent. Complaint Counsel further objects to this interrogatory as premature and unduly burdensome because it is a contention interrogatory and no response is required prior to the close of discovery pursuant to Rule 3.35 (b)(2). Complaint Counsel will supplement its answer, as appropriate, after the close of discovery, as set forth in Rule 3.35(b)(2).

Interrogatory No. 4

Identify all facts that you contend establish that McWane had the specific intent to monopolize a relevant antitrust market or that there was or is a dangerous probability that McWane could monopolize a relevant antitrust market, including all facts refuting, or otherwise relating to, such contention.

Response to Interrogatory No. 4

Complaint Counsel notes that this interrogatory contains at least two discrete subparts, and seeks: (1) all facts establishing, refuting or otherwise relating to McWane's specific intent to monopolize; and (2) all facts establishing, refuting or otherwise relating to the dangerous probability that McWane would monopolize a relevant antitrust market.

In addition to the General Objections, Complaint Counsel specifically objects to this interrogatory as premature to the extent it seeks information relating to issues that may be the subject of expert testimony in this case. Counsel Complaint Counsel also objects to the interrogatory as unduly burdensome to the extent it seeks to compel Complaint Counsel to undertake investigation, discovery, and analysis on behalf of Respondent. Complaint Counsel further objects to this interrogatory as premature and unduly burdensome because it is a contention interrogatory and no response is required prior to the close of discovery pursuant to Rule 3.35 (b)(2). Complaint Counsel will supplement its answer, as appropriate, after the close of discovery, as set forth in Rule 3.35(b)(2).

Interrogatory No. 5

Identify all facts supporting, refuting, or otherwise relating to Complaint Counsel's contention that consumers were substantially injured or likely to be injured as a result of

to the extent it seeks to compel Complaint Counsel to undertake investigation, discovery, and analysis on behalf of Respondent. Complaint Counsel also objects to this interrogatory as premature and unduly burdensome because it is a contention interrogatory and no response is required prior to the close of discovery pursuant to Rule 3.35 (b)(2). Complaint Counsel will supplement its answer, as appropriate, after the close of discovery, as set forth in Rule 3.35(b)(2).

Interrogatory No. 9

Is it Complaint Counsel's contention that any decision by McWane to change its DIWF pricing in 2008-09 was not made independently? If so, identify and describe the basis for Complaint Counsel's contention and identify all facts relating to the contention upon which Complaint Counsel based the Complaint and upon which Complaint Counsel may or will rely at trial in support of the contention, including all facts refuting, or otherwise relating to, your contention.

Response to Interrogatory No. 9

In addition to the General Objections, Complaint Counsel specifically objects to the terms "any decision" and "independently" as vague and ambiguous. Complaint Counsel further objects to this interrogatory as compound to the extent that McWane made multiple pricing decisions in 2008 and 2009. Complaint Counsel also objects to this interrogatory to the extent it impermissibly seeks attorney work product and Complaint Counsel's trial strategy. Counsel Complaint Counsel further objects to the interrogatory as unduly burdensome to the extent it seeks to compel Complaint Counsel to undertake investigation, discovery, and analysis on behalf of Respondent. Complaint Counsel also objects to this interrogatory as premature and unduly burdensome because it is a contention interrogatory and no response is required prior to the close of discovery pursuant to Rule 3.35 (b)(2). Complaint Counsel will supplement its answer, as appropriate, after the close of discovery, as set forth in Rule 3.35(b)(2).

Interrogatory No. 10

Is it Complaint Counsel's contention that any alleged injury caused by the Domestic Rebate Policy, McWane's participation in DIFRA, and/or the Sigma MDA was not outweighed by countervailing benefits or pro-competitive justifications? If so, state with particularity why consumers are or were harmed on balance, by identifying and describing the basis for this contention, and identify all facts relating to the contention upon which Complaint Counsel based the Complaint and upon which Complaint Counsel may or will rely at trial in support of the contention, including all facts refuting, or otherwise relating to, your contention.

Response to Interrogatory No. 10

Complaint Counsel notes that this interrogatory contains at least three distinct subparts, and seeks: (1) all facts relating to the balance of harm and any alleged efficiencies related to McWane's Domestic Rebate Policy; (2) all facts relating to the balance of harm and any alleged efficiencies related to McWane's participation in

Interrogatory No. 11

Is it Complaint Counsel's contention thatMcWane had no valid business reason for changing its published multipliers for DIWF in 2008? If so, identify and describe the basis for Complaint Counsel's contention and identifyall facts relating to the contention upon which Complaint Counsel based the Compla[illegible]t and upon which Complaint Counsel may or will rely at trial in support of the contenti on, including all facts refuting, or otherwise relating to, your contention.

Response to Interrogatory No. 11

In addition to the General Objections, Compla

Response to Interrogatory No. 12

In addition to the General Objections, Complaint Counsel specifically objects to the terms "reasonably avoid" and "countervailing benefits" as vague and ambiguous. Complaint Counsel also objects to this interrogatory as impermissibly seeking attorney work product and Complaint Counsel's trial strategy. Complaint Counsel further objects to this interrogatory as premature to the extent it seeks information relating to issues that may be the subject of expert testimony in this case. Counsel Complaint Counsel also objects to this interrogatory as unduly burdensome to the extent it seeks to compel Complaint Counsel to undertake investigation, discovery, and analysis on behalf of Respondent. Complaint Counsel further objects to this interrogatory as premature and unduly burdensome because it is a contention interrogatory and no response is required prior to the close of discovery pursuant to Rule 3.35 (b)(2). Complaint Counsel will supplement its answer, as appropriate, after the close of discovery, as set forth in Rule 3.35(b)(2).

Interrogatory No. 13

Is it Complaint Counsel's contention that McWane had no valid business reason for implementing McWane's Domestic Rebate Policy? If so, identify and describe the basis for Complaint Counsel's contention and identify all facts relating to the contention upon which Complaint Counsel based the Complaint and upon which Complaint Counsel may or will rely at trial in support of the contention, including all facts refuting, or otherwise relating to, your contention.

Response to Interrogatory No. 13

In addition to the General Objections, Complaint Counsel specifically objects to the term "valid business reason" as vague and ambiguous. Complaint Counsel also objects to this interrogatory as impermissibly seeking attorney work product and Complaint Counsel's trial strategy. Counsel Complaint Counsel also objects to the interrogatory as unduly burdensome to the extent it seeks to compel Complaint Counsel to undertake investigation, discovery, and

analysis on behalf of Respondent. Complaint Counsel further objects to this interrogatory as premature and unduly burdensome because it is a contention interrogatory and no response is required prior to the close of discovery pursuant to Rule 3.35 (b)(2). Complaint Counsel will supplement its answer, as appropriate, after the close of discovery, as set forth in Rule 3.35(b)(2).

Interrogatory No. 14

Is it Complaint Counsel's contention that McWane's Domestic Rebate Policy foreclosed or was likely to foreclose competition in a relevant product market and precluded Star or any other supplier from selling Domestic or imported DIWF products to any Person? If so, identify and describe the basis for Complaint Counsel's contention including, but not limited to, the identification of any foreclosure of competition, the type of product at issue, the identity of any Person from which Star was allegedly foreclosed and the basis for the alleged foreclosure, the percentage of foreclosure in the alleged relevant market that was caused by McWane's Domestic Rebate Policy, and all facts relating to the contention upon which Complaint Counsel based the Complaint and upon which Complaint Counsel may or will rely at trial in support of the contention, including all facts refuting, or otherwise relating to, your contention.

Response to Interrogatory No. 14

In addition to the General Objections, Complaint Counsel specifically objects to the terms "foreclosed," "foreclosure" and "precluded" as vague and ambiguous. Complaint Counsel also objects to this interrogatory as impermissibly seeking attorney work product and Complaint Counsel's trial strategy. Complaint Counsel further objects to this interrogatory as premature to the extent it seeks information relating to issues that may be the subject of expert testimony in this case. Counsel Complaint Counsel also objects to the interrogatory as unduly burdensome to the extent it seeks to compel Complaint Counsel to undertake investigation, discovery, and analysis on behalf of Respondent. Complaint Counsel further objects to this interrogatory as premature and unduly burdensome because it is a contention interrogatory and no response is required prior to the close of discovery pursuant to Rule 3.35 (b)(2). Complaint Counsel will supplement its answer, as appropriate, after the close of discovery, as set forth in Rule 3.35(b)(2).

Interrogatory No. 15

Is it Complaint Counsel's contention that McWane or Sigma have made threats related to the Domestic Rebate Policy, and if so, identify all threats you contend McWane or Sigma have made, including but not limited to whom the threat was made, who has personal knowledge of it, and what effect each such threat had.

Response to Interrogatory No. 15

In addition to the General Objections, Complaint Counsel specifically objects to the terms "threats" as vague and ambiguous. Complaint Counsel further objects to this interrogatory as premature to the extent it seeks information relating to issues that may be the subject of expert testimony in this case. Complaint Counsel also objects to this interrogatory as unduly burdensome to the extent it seeks to compel Complaint Counsel to undertake investigation, discovery, and analysis on behalf of Respondent. Complaint Counsel further objects to this interrogatory as premature and unduly burdensome because it is a contention interrogatory and no response is required prior to the close of discovery pursuant to Rule 3.35 (b)(2). Complaint Counsel will supplement its answer, as appropriate, after the close of discovery, as set forth in Rule 3.35(b)(2).

Interrogatory No. 16

Is it Complaint Counsel's contention that any of the allegedly anticompetitive or unfair conduct by any Respondent is ongoing at present? If so, identify and describe the basis for Complaint Counsel's contention and identify all facts relating to the contention upon which Complaint Counsel based the Complaint and upon which Complaint Counsel may or will rely at trial in support of the contention.

Response to Interrogatory No. 16

In addition to the General Objections, Complaint Counsel specifically objects to this interrogatory because Respondent has exceeded its allotted number of interrogatories, including all subparts, as specified in Rule 3.35(a) and in Paragraph 10 of the February 15, 2012, Scheduling Order.

Interrogatory No. 17

Identify each and every alleged anticompetitive or unfair conduct of each Respondent or other third party regarding the prices of Non-domestic Fittings or in any manner relating to their participation or membership in DIFRA.

Response to Interrogatory No. 17

In addition to the General Objections, Complaint Counsel specifically objects to this interrogatory because Respondent has exceeded its allotted number of interrogatories, including all subparts, as specified in Rule 3.35(a) and in Paragraph 10 of the February 15, 2012, Scheduling Order.

Interrogatory No. 18

Is it Complaint Counsel's contention that McWane's participation in DIFRA, including its receipt of aggregated, anonymized shipment tonnage data compiled by SRHW, caused the price of DIWF products it sold into Open Preference jobs to be higher than they otherwise would have been? If so, identify and describe the basis for Complaint Counsel's contention and identify all facts relating to the contention upon which Complaint Counsel based the Complaint and upon which Complaint Counsel may or will rely at trial in support of the contention, including all facts refuting, or otherwise relating to, your contention.

Response to Interrogatory No. 18

In addition to the General Objections, Complaint Counsel specifically objects to this interrogatory because Respondent has exceeded its allotted number of interrogatories, including all subparts, as specified in Rule 3.35(a) and in Paragraph 10 of the February 15, 2012, Scheduling Order.

Interrogatory No. 19

Is it Complaint Counsel's contention that McWane had no valid business reason for participating in DIFRA or receiving aggregated, anonymized volume data compiled by SRHW? If so, identify and describe the basis for Complaint Counsel's contention and identify all facts relating to the contention upon which Complaint Counsel based the Complaint and upon which Complaint Counsel may or will rely at trial in support of the contention, including all facts refuting, or otherwise relating to, your contention.

CERTIFICATE OF SERVICE

I hereby certify that on March 16, 2012, I delivered via electronic mail a copy of the foregoing document to:

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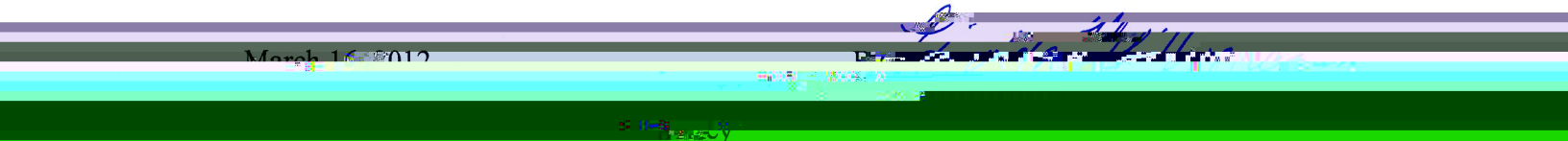

UNITED STATES OF AMERICA

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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 properly count interrogatory subparts. See Exhibit B (Complaint Counsel's Statement Regarding Meet and Confer Pursuant to

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 voiceisid<</MC (a61[(uding wincl)Tj 1230.0038 .997.385 0 Tllsuchl

> 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). 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). 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 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.

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. Rawstron, 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.')").

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. 6 and 10 and their discrete subparts as a total of four interrogatories (rather than eight as contended by Respondent), and by

Public

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.	)	

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

[redacted]

EXHIBIT D

UNITED STATES OF

!!

United States of America
FEDERAL TRADE COMMISSION

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

April 25, 2012

VIA ELECTRONIC MAIL

William Lavery, Esq.
BakerBotts LLP
The Warner
1299 Pennsylvania Ave., NW

You claim that Interrogatory No. 2 seeks information for only two separate subparts related to domestic product markets, and geographic markets. While this interrogatory clearly seeks information regarding a possible ARRA-specific submarket, we are willing to amend our position and count this interrogatory as containing two subparts, and not three.

Please feel free to call me at (202) 326-2267 if you have any questions or would like to discuss this matter further.

Regards,

/s/

Linda M. Holleran

cc: Andreas Stargard, Esq.
Ted Hassi, Esq.