

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). Interrogatory “April

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:

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:

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

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

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,

s/ Thomas H. Brock

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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.

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
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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