UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Edith Ramirez, Chairwoman**
Julie Brill
Maureen Ohlhausen
Joshua Wright

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

RESPONDENT'S APPLICATION FOR STAY
OF ORDER PENDING REVIEW BY U.S. COURT OF APPEALS

Pursuant to Rule 3.56(d) of the Commission's Rules of Practice for Adjudicative Proceedings, Respondent McWane, Inc. hereby applies to the Federal Trade Commission for Stay of its Final Order served on February 11, 2014, pending judicial review by a U.S. Court of Appeals.

J. Alan Truitt Joseph A OP

I. INTRODUCTION

The Commission has now dismissed six of the seven counts in the Complaint it brought against McWane. The lone remaining claim, Count 6, was a split decision that drew a lengthy dissent from Commissioner Wright th

(2009) (

II.

F.T.C. 233, 235 (1999) (". . .it is well settled that arguable difficulties arising from the application of the law to a complex factual record can support a finding that a stay applicant has made a substantial showing on the merits.").

McWane satisfies this requirement, as the Commission's Opinion is contrary to well-settled case law. The Supreme Court and numerous Circuits have repeatedly held that an antitrust violation requires harm to *competition*—instead of a single competitor—such as increased prices or decreased output. *See Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962) (antitrust laws concerned with the "protection of competition, not competitors"); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977) (holding plaintiff competitor lacked standing to pursue antitrust claim that harmed it as a competitor but did not harm competition); *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181, 187 (3d Cir. 2005) ("Predatory or exclusionary practices in themselves are not sufficient. There must be proof that competition, not merely competitors, has been harmed"); *Roland Mach. Co.*, 749 F.2d at 395 ("The exclusion of one or even several competitors, for a short time or even a long time, is not ipso facto unreasonable. The welfare of a particular competitor who may be hurt as the result of some trade practice is the concern not of the federal antitrust laws.").

Here, the Commission was sharply split and Commissioner Wright's dissent concluded that "Complaint Counsel fail[ed] totally to establish, as it must under the antitrust laws, that McWane's conduct harmed *competition*" and "[t]he record is clear there is no such proof." Dissenting Statement of Commissioner Joshua D. Wright, *In the Matter of McWane, Inc. et al.*, Docket No. 9351 at 4-6 (February 6, 2014). Commissioner Wright found Complaint Counsel's legal arguments "at best, question begging, and, at worst, misleading," and further noted that what was "strikingly absent" from the Commission's decision was "any evidence establishing

the requisite analytical link between what the Commission describes as 'foreclosure' and harm to competition." *Id.* at 25-26. Thus, given the "dearth of record evidence demonstrating McWane's conduct has had an adverse effect on competition," Commissioner Wright dissented from the Commission's decision, finding that Complaint Counsel failed to establish a necessary element of a monopolization claim: "that McWane's conduct was [actually] exclusionary." *Id.* at 45-47.

Commissioner Wright also found evidence of harm to even a single competitor lacking, as there was "undisputed evidence that Star was able successfully to enter the domestic fittings industry and to succeed in expanding its business once it did enter." *Id.* He thus concluded that the "more plausible inference to draw" from Complaint Counsel's "very weak" "indirect evidence" is that McWane's rebate policy "had almost no impact on Star's ability to grow its business, which, under the case law, strongly counsel's against holding that McWane's conduct was exclusionary." *Id*. Indeed, the ALJ likewise found that "[c]learly, Star entered the Domestic Fittings market" during tough economic times when "[n]o other supplier of imported Fittings" and "no pipe supplier or domestic foundry . . . [even] considered entering the market for manufacturing and selling Domestic Fittings." Initial Dec. at 377, 383. "[S]ince its entry in 2009, Star has sold Domestic fittings every month and every year" and was able to successfully "pick off" orders of Domestic Fittings from McWane," and at the time of trial, was on pace "to have its best year ever for Domestic Fittings sales in 2012." F. 1134-

B. McWane and its Customers Will Suffer Irreparable Harm if a Stay Is Not Granted.

McWane and its customers will suffer irreparable ha

CERTIFICATE OF SERVICE

I hereby certify that on March 13, 2014, a true and correct copy of a RESPONDENT'S APPLICATION FOR STAY OF ORDER PENDING REVIEW BY U.S. COURT OF APPEALS was filed electronically in PDF format using the FTC's E-Filing System, and served by hand delivery on the following:

Donald S. Clark
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The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
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I further certify that on March 13, 2014, a true and correct copy of RESPONDENT'S APPLICATION FOR STAY OF ORDER PENDING REVIEW BY U.S. COURT OF APPEALS was served by email on the following:

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By: /s/ William C. Lavery____
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[PROPOSED] ORDER GRANTING RESPONDENT'S APPLICATION FOR STAY PENDING REVIEW BY U.S. COURT OF APPEALS

Upon consideration of Respondent McWane, Inc.'s application to stay enforcement of the Commission's Order, issued January 30, 2014,

IT IS ORDERED that enforcement of the Commission's Final Order of January 30, 2014 be stayed upon the filing of a timely petition for review of the Order in an appropriate court of appeals pursuant to 15 U.S.C. § 45(c). This stay shall remain effective until the expiration of all periods for petitions for rehearing, rehearing en banc or certiorari, or until final disposition of all such petitions and any proceedings initiated by a grant of such a petition.

ORDERED: _____

ISSUED: _____, 2014