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

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

**In the Matter of**

**MCWANE, INC.,**
**a corporation, and** **Docket No. 9351**

**STAR PIPE PRODUCTS, LTD.**
**a limited partnership.**

# DECISION AND ORDER DENYING RESPONDENT'S APPLICATION FOR STAY OF ORDER PENDING REVIEW BY U.S. COURT OF APPEALS

On March 13, 2014, Respondent McWane, Inc. applied for a stay of the Commission's Final Order in this matter, pending judicial review by an appropriate U.S. court of appeals. Complaint Counsel opposes the stay. For the reasons discussed below, McWane has failed to demonstrate that a stay is warranted. It has shown neither a likelihood of success on appeal, nor that it will suffer irreparable harm absent a stay. It has also failed to show that staying the order would be in the public interest. Accordingly, the Commission denies McWane's application.[1]

The Commission's Opinion and Final Order in this matter issued on January 30, 2014.[2] The Commission held that McWane unlawfully maintained its monopoly of the domestic ductile iron pipe fittings market by means of exclusive dealing imposed through its Full Support Program. The Commission's order prohibits McWane from: (1) implementing or enforcing any condition, policy, or practice requiring exclusivity with a customer; (2) implementing or enforcing any retroactive rebate program that would effectively demand exclusivity; (3) "[d]iscriminating against, penalizing or otherwise retaliating" against any customer that purchases a competitor's domestic fittings or that "otherwise refuses to enter into or continue any condition [or] agreement" requiring exclusivity; and (4) "enforcing any condition, requirement, policy, agreement, contract or understanding that is inconsistent with the terms of [the] Order."

## Applicable Standard

Section 5(g) of the Federal Trade Commission Act provides that Commission cease and desist orders (except divestiture orders) take effect "upon the sixtieth day after such order is

We briefly address why we are not swayed by McWane's arguments. McWane's assertion that the Commission opinion is contrary to case law is unpersuasive; our ruling adheres closely to the analysis in the three leading opinions that have considered the use of exclusive dealing. *See ZF Meritor LLC v. Eaton Corp.*, 696 F.3d 254 (3d Cir. 2012); *United States v. Dentsply, Int l, Inc.*, 399 F.3d 181 (3d Cir. 2005); *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001). Moreover, McWane's argument that the Commission failed to identify harm to Star, let alone to competition, is directly belied by the evidence, detailed in the Commission opinion, showing that McWane's exclusive dealing program raised barriers to entry and kept its only rival from achieving the critical sales level necessary to challenge McWane's monopoly. We explained that McWane's program foreclosed Star from accessing a substantial share of distributors and deprived Star of the sales volume needed to operate its own domestic foundry, thereby preventing

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(recognizing that it would be illogical for a respondent to argue that it would be irreparably harmed by a Commission order prohibiting conduct that the respondent claims it no longer engages).

McWane also argues that the Commission's order is overbroad and will deprive the company and many of its customers of the benefits of lawful exclusive dealing and discounting. Yet the Commission's opinion found *unlawful* exclusive dealing, and to prevent a recurrence of anticompetitive conduct, the order prohibits McWane from repeating its harmful conduct and other arrangements with similar anticompetitive effects.[3]

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On the other hand, staying the order would cause harm to competition and consumers. The Commission found that McWane's exclusivity arrangements unlawfully maintained its monopoly and deprived consumers of the benefits of price competition and the ability to choose between competing suppliers. Although McWane contends that it has dropped its Full Support Program, the record showed that McWane has not publicly withdrawn its policy or notified distributors of any changes and that at least some distributors remain concerned that the exclusive dealing policy has continued. *See* Commission Opinion at 39-40. Exposing consumers to the continued effects of the Full Support Program or to similar policies and prolonging McWane's ability to unlawfully maintain its monopoly would not be in the public interest.

## Conclusion

For the foregoing reasons, we find that McWane has failed to meet its burden for a stay of the Final Order pending appeal. Accordingly,

**IT IS ORDERED THAT** Respondent McWane's Application for Stay of Order Pending Review by an appropriate U.S. Court of Appeals is **DENIED**.

By the Commission, Commissioner Wright dissenting.

Donald S. Clark
Secretary

ISSUED: April 11, 2014