

No. 14-11363

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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MCWANE, INC.,  
Petitioner,

v.

FEDERAL TRADE COMMISSION,  
Respondent.

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On Petition for Review of an Order  
of the Federal Trade Commission,  
FTC Docket No. 9351

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FEDERAL TRADE COMMISSION'S BRIEF  
ON SEALED RECORD MATERIALS

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At oral argument, the Court asked the parties to submit briefs addressing whether sealed materials in the record should continue to remain under seal.<sup>1</sup> The Court asked the parties specifically to address whether information falling into the following categories should remain sealed:

1. The market shares of McWane, Inc. and Star Pipe Products in the domestic-only fittings market;
2. The price differences between McWane's fittings for domestic-only projects and for other projects;
3. McWane's profits;
4. Star's estimate of the cost of acquiring a foundry;
5. Star's estimate of the sales levels necessary to justify a foundry; and

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<sup>1</sup> McWane's contemporaneous brief appears to use this supplemental briefing round as an opportunity to rebrief the merits of this case. The Commission does

6. Star's estimate of the cost to produce domestic fittings at its own foundry.

The court also asked the parties to address more generally whether the other sealed record materials must remain so.

As explained below, the Commission does not believe information in any of the categories identified above need remain under seal; however, certain other information that was redacted in the Commission's brief or in its underlying opinion should remain sealed. In addition, other sealed parts of the record should remain sealed unless the party that submitted the information is first given the opportunity to oppose its disclosure.

#### LEGAL STANDARD

The FTC Act directs the Commission "to prevent . . . unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce." 15 U.S.C. 45(a). The Act likewise gives the Commission a "broad power of investigation and subpoena" to further that mission by gathering information on the activities of companies and individuals engaged in commerce. *Automatic Canteen Co. v. FTC*, 346 U.S. 61, 79 (1953); see 15 U.S.C. §§ 46, 49, 57b-1. By necessity, the Commission regularly receives confidential and competitively sensitive commercial information in the course of its investigations. To encourage parties to cooperate in those investigations and to protect the interests of such parties, the Act prohibits the Commission from publicly disclosing various categories of

confidential information, subject to limited exceptions, *see, e.g.*, 15 U.S.C. §§ 46(f), 57b-2.

For example, the Commission generally may not disclose documents and testimony obtained through compulsory process. 15 U.S.C. § 57b-2(b)(3)(C). Information that is provided voluntarily in lieu of compulsory process is likewise protected from disclosure. *Id.*; *National Education Ass'n v. FTC*, 1983 U.S. Dist. LEXIS 13434 (D. Mass. Sept. 26, 1983). The Commission seeks to preserve its ability to conduct investigations by, as appropriate, defending the confidentiality of sensitive information from requests for public disclosure. *See, e.g., In re Air*

administrative or judicial proceeding so long as the party that originally submitted those materials first is “afforded an opportunity to seek an appropriate protective or *in camera* order.” 16 C.F.R. § 4.10(g).

## DISCUSSION

### A. None of the Information Specifically Identified by the Court Need Remain Under Seal.

After argument, the Commission informed Star of the Court’s request for briefing and gave Star the opportunity to object to the release of sealed information that it had submitted to the FTC. Given Star’s response (attached to this brief as Exhibit 1), there is no legal impediment to unsealing any of the six categories of information specifically enumerated by the Court, absent objection from McWane itself.

#### ***1. The market shares of McWane and Star in the domestic-only fittings market***

The FTC’s brief (at 14) states three relevant types of market-share figures: Star’s shares of (1) all fittings sold into all U.S. projects (both domestic and open specifications); (2) fittings sold into projects with open specifications; and (3) fittings sold into projects with domestic-only specifications. Star objected only to disclosure of figures in the first and second categories (and even then, only if McWane’s share is not also disclosed). Star did not object to release of the information the Court specifically asked about: Star’s shares in 2010 and 2011 of



In its response to the Commission's letter, Star did not object to the disclosure of sealed information related to these topics, nor did it identify any redacted information in these categories that it believed should remain sealed. Accordingly, there is no reason the information must remain under seal.

B. Certain Other Redacted Information Should Remain Sealed.

Both the Commission's opinion and its brief include redacted information beyond the categories specifically enumerated by the Court. Star does object to public disclosure of some of that information.

First, Star objects to disclosure of the redacted information on pages 35 and 41 of the Commission's brief, which quantifies Star's relationship with the industry's largest distributor: HD Supply. Star's share of HD Supply's business for projects with domestic-only specifications was extremely small compared to Star's share of HD Supply's business for projects with open specifications. Star is concerned that public disclosure of these two sales numbers could provide an unfair commercial advantage to its competitors. The Court may nonetheless wish

specifications market. The FTC suggests that the Court balance Star's confidentiality interest against the public's interest in access to the material facts of this case by addressing the HD Supply evidence in qualitative rather than quantitative terms.

Star likewise objects to the disclosure of (1) its shares of non-domestic-only fittings sales (as noted above); (2) its profitability in 2009, 2010, or 2011 (p. 10 of the Commission's order); and (3) its sales to the distributor Hajoca (p. 11 of the Commission's order). The Commission agrees that these categories of information are competitively sensitive and should not be disclosed. Thus, insofar as the Court addresses these issues, it should address them in non-quantitative terms.

Lastly, to the extent that the Court wishes to include any other currently sealed material in its opinion, it should first give the party that originally submitted this material an opportunity to seek an appropriate order limiting its disclosure. The FTC is willing to facilitate that process by contacting the relevant party upon request by the Court.



Respectfully submitted,

JONATHAN E. NUECHTERLEIN  
General Counsel

JOEL MARCUS  
Director of Litigation

Dated: February 17, 2014

/s/ Theodore (Jack) Metzler  
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EXHIBIT 1

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Via e-mail and regular mail

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Re: Sealed materials in *McWane, Inc. v. FTC*, No. 14-11363 (11th Cir.)

Dear Mr. Metzler:

As counsel for Star Pipe Products, Ltd., I am responding to your January 26, 2015 letter regarding the confidentiality of sealed materials and information pertaining to Star in the pending

Theodore (Jack) Metzler  
February 5, 2015  
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Star similarly objects to the public disclosure of any of the information identified above (or similar information) to the extent that information may exist in McWane's Eleventh Circuit briefing, any amicus curiae briefing, or the record on appeal

If the FTC will be taking a position as to any of Star's confidential, proprietary, or trade secret information contrary to that of Star as expressed in this letter, please advise me

## CERTIFICATE OF SERVICE

I hereby certify that on February 17, 2015 I filed the foregoing with the Court's appellate CM-ECF system, and that I caused the foregoing to be served