UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

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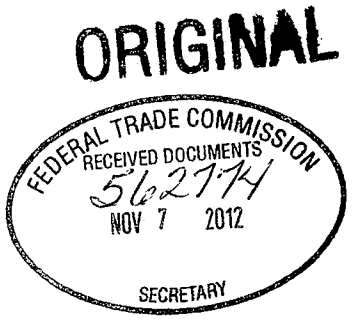

In the Matter of	)	
McWANE, INC., a corporation, and	)	DOCKET NO. 9351
STAR PIPE PRODUCTS, LTD., a limited partnership, Respondents.	)	

ORDER DENYING RESPONDENT'S MOTION TO DISMISS AT THE CLOSE OF EVIDENCE OFFERED IN SUPPORT OF THE COMPLAINT

I.

The Complaint in this matter brings seven counts against Respondent McWane, Inc. ("Respondent"), including charges that Respondent violated Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 45, by conspiring to restrain trade (Counts 1, 2 and 4); inviting collusion (Count 3); conspiring to monopolize (Count 5); and engaging in exclusionary conduct in furtherance of monopolization (Count 6) or attempted monopolization (Count 7).

Unfair methods of competition under Section 5 of the FTC Act include any conduct that would violate Sections 1 or 2 of the Sherman Act. *See, e.g.*, *California Dental Assn. v. FTC*, 526 U.S. 756, 762 & n.3 (1999); *FTC v. Cement Inst.*, 333 U.S. 683, 691-92 (1948); *Rambus Inc. v. FTC*, 522 F.3d 456, 462 (D.C. Cir. 2008). Section 1 of the Sherman Act prohibits "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . ." 15 U.S.C. § 1. Thus, a Section 1 violation requires proof of the existence of a contract, combination, or conspiracy among two or more separate entities, that unreasonably restrains trade in the relevant market. *Valuepest.com of Charlotte, Inc. v. Bayer Corp.*, 561 F.3d 282, 286 (4th Cir. 2009); *Law v. NCAA*, 134 F.3d 1010, 1016 (10th Cir. 1998). A Section 2 violation requires proof of "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). Attempted monopolization requires proof: "(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability

of achieving or obtaining monopoly power." *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993).

Trial in this matter commenced on September 4, 2012. On October 18, 2012, Complaint Counsel rested. On October 19, 2012, Respondent, on the record at trial, made an oral motion for judgment as a matter of law. Complaint Counsel opposed the motion on October 19, 2012. As set forth below, Respondent's motion is DENIED.

II.

Respondent stated that it recognizes that a motion for judgment as a matter of law is unorthodox under the Commission's Rules of Practice and urged its motion pursuant to Commission Rule 3.41(c), which provides that each party shall have the rights "essential to a fair hearing." 16 C.F.R. § 3.41(c). In support of its motion, Respondent argued that the government at the close of its case had failed to meet its burden of proof on any of the counts in the Complaint. Trial Vol. 22 (Oct. 19, 2012), Tr. 4716.

Complaint Counsel argued in response that the Commission's Rules do provide for the filing of a motion to dismiss at the close of the government's case in Commission Rule 3.22(a). Complaint Counsel further argued that it believes it has presented a prima facie case on each of the counts of the Complaint. Trial Vol. 22 (Oct. 19, 2012), Tr. 4719.

Respondent's motion for judgment as a matter of law, to the extent allowed under Rule 3.41(c), was denied on the record on October 19, 2012. Trial Vol. 22 (Oct. 19, 2012), Tr. 4720. The motion is next considered under Commission Rule 3.22(a).

Rule 3.22(a) of the Commission's Rules of Practice sets forth:

> When a motion to dismiss is made at the close of the evidence offered in support of the complaint based upon an alleged failure to establish a prima facie case, the Administrative Law Judge shall defer ruling thereon until immediately after all evidence has been received and the hearing record is closed.

16 C.F.R. § 3.22(a). Although Respondent's motion was made at the close of the government's case, Rule 3.22(a) requires the Administrative Law Judge to defer ruling on such motion until after all evidence has been received and the hearing record is closed. The record closed on November 7, 2012.

Based on the evidentiary record, and having considered the positions of the parties, Respondent failed to demonstrate that the Complaint should be dismissed for failure to establish a prima facie case. The issues raised by the Motion, to the extent necessary or appropriate with regard to a determination of the merits for the initial decision in this case, and to the extent briefed by the parties in their post-hearing briefs, will be addressed in the initial decision when issued. *See, e.g., In re Chicago Bridge & Iron Co.*, 2003 FTC LEXIS 28, *2-3 (Jan. 28, 2003); *In re Porter & Dietsch*, 90 F.T.C. 770, 1977 FTC LEXIS 11 (Dec. 20, 1977).

III.

Accordingly, Respondent's Motion is DENIED.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: November 7, 2012