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.[1] 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

[1] McWane's contemporaneous brief appears to use this supplemental briefing round as an opportunity to rebrief the merits of this case. The Commission does not take a similar view of the Court's request for further briefing but will respond to McWane's new factual arguments, which are meritless, if the Court so requests. The Commission does wish to stress, however, that McWane's proposed legal standard for judging anticompetitive effects (*see* Supp. Br. 2-3) is misconceived. The cases that McWane cites for its standard are not monopolization cases brought under Section 2 of the Sherman Act; they are instead cases involving concerted action cognizable under Section 1. As we have previously explained (*see* FTC Br. 46-49, 54-57), a plaintiff in a monopoly-maintenance case, as opposed to a plaintiff in cases involving more competitive markets, need only show that the "defendant has engaged in anticompetitive conduct that reasonably appear[s] capable of making a significant contribution to maintaining monopoly power." *United States v. Microsoft*, 253 F.3d 34, 79 (D.C. Cir. 2001) (en banc) (internal quotation marks and ellipsis omitted). To prove liability (as distinguished from damages) in such cases, the plaintiff bears no burden of proving that the conduct caused specific harm that would have been absent in the but-for world, and "the defendant is made to suffer the uncertain consequences of its own undesirable conduct." *Id.* at 79 (internal quotation marks omitted).

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.[2] *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 Passenger Computer Reservation Systems Antitrust Litig.*, 116 F.R.D. 390, 392 (C.D. Cal. 1986); *United States v. AT&T Co.*, 86 F.R.D. 603, 647 (D.D.C. 1979).

However, the Act "specifically limits the confidentiality provisions so that they apply only to the agency." *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1180 (6th Cir. 1983). "Any disclosure of relevant and material information in . . . judicial proceedings to which the Commission is a party shall be governed by . . . court rules or orders." 15 U.S.C. § 57b-2(d)(2). Finally, the Commission's regulations permit the disclosure of confidential materials in an

[2] In this case, the record materials at issue were sealed under the administrative law judge's protective order. FTC Admin. Docket No. 3 (Jan. 5, 2012); *see also* 16 C.F.R. § 3.31(d) (governing the designation and treatment of confidential material in agency adjudications). The administrative law judge, the parties, and the Commission maintained the confidentiality of those materials by submitting briefs and issuing opinions under seal and by preparing redacted versions for the public.

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

the domestic-only market. Accordingly, there is no need for these figures to remain sealed.

***2. The price differential between McWane's fittings sold into domestic-specification vs. open-specification projects***

The administrative law judge's opinion found (at ¶ 1076) that McWane's price multipliers for fittings in domestic-only projects were 21%-96% higher than those for physically identical fittings sold for projects with open specifications. That information, while redacted in the Commission's brief, is thus already a part of the public record, and there is no reason to redact it from any judicial decision.

***3. McWane's profits***

The Commission found (Op. 16-18) that McWane possessed monopoly power throughout the relevant period. The evidence of that monopoly power included the wide (and widening) gap between McWane's profits on fittings for domestic-only projects and its profits on fittings for open-specification projects, which faced greater competition. *See* Op. 18 (citing ALJ ¶ 1091); FTC Br. 30-31. Unless McWane itself objects, there is no impediment to unsealing the specific profitability figures. *See* p. 3, *supra*; 16 C.F.R. § 4.10(g).

***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***

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

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 to discuss the large discrepancy between these numbers. That discrepancy confirms that, after McWane announced its exclusivity mandate, this leading distributor not only canceled pending orders with Star (*see* FTC Br. 35), but thereafter refused to do substantial business with Star in the domestic-only market, even though it continued to do considerable business with Star in the open-

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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February 5, 2015

**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 Eleventh Circuit proceeding.

Star takes the position that the following information should continue to be maintained under seal, and not made a part of the public record pursuant to Eleventh Circuit Rule 25-5. This information is proprietary and a trade secret, and Star believes that disclosure of this information is competitively-sensitive and could be misused by or provide an unfair commercial advantage to Star's competitors.

- FTC Eleventh Circuit Brief p. 14: Star's percentage of fittings and non-domestic fitting market share;
- FTC Eleventh Circuit Brief pp. 35 and 41: Star's percentage of HD Supply business for any product;
- Commission Decision p. 10: Star's profits in 2009, 2010, or 2011;
- Commission Decision p. 11: Hajoca's purchases from Star.

Star takes no position on whether the remaining excerpts specifically identified in your January 26, 2015 letter should remain sealed.

Further as to the broad topics identified by the Court as areas of interest, Star is concerned only with the confidentiality of the market share of Star in the fittings market, which reveals proprietary and trade secret information. If the market shares of both Star and McWane are unsealed, then Star takes no position on the disclosure of both market figures; however, if only Star's market share were to be unsealed, Star does object because this non-reciprocal unsealing of information could be misused by or provide an unfair commercial advantage to Star's competitors.

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 immediately so that Star may take appropriate measures before the Court.

Sincerely,

Gregory Huffman

GH/lc

cc: Joe Ostoyich, counsel for McWane (*via e-mail*)

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## 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 through the CM-ECF system on counsel of record for petitioner, who are registered ECF users.

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