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." Order, ¶¶ II.A-D. We explain our reasons for denying McWane's application below.

[1] Commissioner Wright dissents from the Commission's decision to deny McWane's request for a stay on the ground that he believes McWane is likely to succeed on the merits of its appeal, for reasons stated in his dissenting opinion on the merits of this case.

[2] The Commission's opinion in this matter is available at http://www.ftc.gov/system/files/documents/cases/140206mcwaneopinion.pdf. The order is available at http://www.ftc.gov/system/files/documents/cases/140206mcwaneorder.pdf.

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 served," unless "stayed, in whole or in part and subject to such conditions as may be appropriate, by . . . the Commission" or "an appropriate court of appeals of the United States." 15 U.S.C. § 45(g)(2).

Pursuant to Commission Rule 3.56(c), an application for a stay must address the following four factors: (1) the likelihood of the applicant's success on appeal; (2) whether the applicant will suffer irreparable harm absent a stay; (3) the degree of injury to other parties if a stay is granted; and (4) whether the stay is in the public interest. *See* 16 C.F.R. § 3.56(c); *In re North Carolina Bd. of Dental Exam'rs*, 2012 WL 588756, at *1 (FTC Feb. 10, 2012); *In re Toys "R" Us, Inc.*, 126 F.T.C. 695, 696 (1998). The required likelihood of success is "inversely proportional to the amount of irreparable injury suffered absent the stay," *In re North Texas Specialty Physicians*, 141 F.T.C. 456, 457-58 & n.2 (2006), and varies based on the assessment of the balance of equities described by the last three factors. *Id.*; *see also North Carolina Bd.*, 2012 WL 588756, at *1. We consider these factors below.

Analysis

McWane argues first that the Commission's opinion is contrary to well-settled case law because it relies on harm to a single competitor, Star Pipe Products, Ltd., rather than harm to competition. McWane argues further that the evidence even failed to show harm to Star, and that even if such harm had been proved, it should be disregarded because Star was a less efficient competitor than McWane and, in any event, Star had successfully entered the market.

These arguments are familiar to us. McWane advanced each of them in its appeal to the Commission, and the Commission carefully considered and, for reasons explained in our opinion, rejected them. Although McWane now cites to the dissent issued by Commissioner Wright in support of its application, its repetition of the dissent's arguments neither changes the Commission's conclusion that it engaged in illegal monopoly maintenance nor establishes a likelihood of success on appeal. *See Toys "R" Us*, 126 F.T.C. at 697 (emphasizing that the renewal of previously-rejected arguments alone cannot justify the granting of a stay).

In fact, rather than showing the requisite likelihood of success on appeal, McWane instead contends that it need only show that its appeal involves serious and substantial questions going to the merits of the Commission's decision. While such a showing might support a stay when a serious legal question is involved and the balance of the equities weighs heavily in favor of granting the stay, *NTSP*, 141 F.T.C. at 458 n.3, as discussed below, the balance of the equities here falls far short of that. Indeed, even assuming, *arguendo*, that the existence of serious and substantial questions would be sufficient to satisfy the first factor, "Respondent's mere disagreement with our decision does not establish serious and substantial questions going to the merits." *In re Realcomp II, Ltd.*, 2010 WL 5576189, at *2 (FTC Jan. 7, 2010).

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 Star from substantially reducing its costs and threatening McWane's monopoly. Finally, the Commission also rejected McWane's claim that Star's purported inefficiency rendered its exclusion meaningless to competition, explaining that the fundamental concern with exclusive dealing when the dominant firm is already a monopolist is that the conduct prevents the *development* of effective competition.

Turning to the equities, McWane bears the burden of demonstrating that its alleged irreparable injury "is both substantial and likely to occur absent the stay." *NTSP*, 141 F.T.C. at 457. "Simple assertions of harm or conclusory statements based on unsupported assumptions will not suffice. A party seeking a stay must show, with particularity, that the alleged irreparable injury is substantial and likely to occur absent a stay." *In re California Dental Ass'n*, 1996 FTC LEXIS 277, at *6 (May 22, 1996); *see also Toys "R" Us*, 126 F.T.C. at 698. Because McWane failed to demonstrate likely success on the merits, its burden for demonstrating irreparable harm is high, *California Dental*, 1996 FTC LEXIS 277, at *10, and McWane's showing falls far short of this standard.

McWane provided no supporting affidavits or sworn statements with its application to support its argument of irreparable harm. *See* 16 C.F.R. § 3.56(c). Instead, McWane falls back on conclusory statements and claimed evidence of factory conditions dating back more than five years, which provides no basis for assessing the potential for irreparable injury today. Respondent's Application for Stay of Order Pending Review by U.S. Court of Appeals, at 10. As a result, McWane's assertions that the Commission's order will "unquestionably threaten the viability of McWane's last remaining domestic foundry," *id.*, carry little weight. Similarly, citations to trial testimony suggesting that Star might "cherry pick[]" McWane's business by "simply buying a few dozen patterns" and offering just the most common fittings, *id*., had little relevance by June 2010, at which time "Star had a Domestic Fittings pattern stock comparable to McWane's." *In re McWane, Inc.*, Initial Decision, 2013 FTC LEXIS 76, at *355 (May 8, 2013).

Indeed, McWane's unsubstantiated claims of irreparable injury are particularly suspect in light of its protestations on appeal of the Initial Decision that "[t]he proposed injunctive remedy," which contained the provisions currently at issue, was "moot." Respondent's Appeal Brief at 41. McWane there insisted that its exclusionary conduct was an outgrowth of "a short-term stimulus statute" that had expired, leaving "no threat of recurrence." *Id*. at 41, 43. McWane's current argument that exclusive arrangements in the domestic fittings market are now vital to its well-being is thus belied by its prior assertions. *See Toys "R" Us*, 126 F.T.C. at 699

(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]

Indeed, the Commission's order is carefully tailored to prohibit only conduct similar to McWane's anticompetitive exclusive dealing practices. It prohibits practices that require exclusivity and penalties against customers who sell competitors' products. It also bars discounts that are conditioned on exclusivity and retroactive incentives, which could effectively demand exclusivity,[4] but expressly preserves McWane's ability to offer discounts that are volume-based, above average cost, and not retroactive incentives. The claim that the Commission's order places McWane at a disadvantage to its competitors is belied by a specific order proviso permitting McWane to provide discounts, rebates, or other price or non-price incentives that are "designed to meet competition." Order, ¶ II.

Finally, the Commission must consider the potential injury to other market players if a stay is granted, as well as whether a stay is in the public interest. The Commission considers these factors together because, in enforcing the law, Complaint Counsel is responsible for representing the public interest. *North Carolina Bd.*, 2012 WL 588756, at *3; *California Dental*, 1996 FTC LEXIS 277, at *8.

On these points, McWane repeats its claims that the Commission's order will harm consumers by denying them the benefit of lawful competitive practices and by exposing them to lost jobs and higher prices if McWane closes its last domestic foundry. As discussed above, the first contention ignores both the anticompetitive use McWane made of its exclusive dealing program and the narrow scope of the order's provisions, which expressly permit procompetitive conduct. McWane is free to cut its prices and offer discounts that are not structured or conditioned so as to result in exclusivity. Further, McWane's contentions concerning any impact of the order on the viability of McWane's domestic foundry are unpersuasive because they are both unsupported and speculative.

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[3] *See FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952) (FTC orders need not be restricted to the "narrow lane" of the respondent's violation, but rather may "close all roads to the prohibited goal, so that its order may not be by-passed with impunity"); *see also FTC v. National Lead Co.*, 352 U.S. 419, 430-31 (1957) (noting the need "not only to suppress the unlawful practice but to take such reasonable action as is calculated to preclude the revival of the illegal practices" and observing that "those caught violating the Act must expect some fencing in"); *Toys "R" Us, Inc. v. FTC*, 221 F.3d 928, 940 (7th Cir. 2000) ("[T]he FTC is not limited to restating the law in its remedial orders. Such orders can restrict the options for a company that has violated § 5, to ensure that the violation will cease and competition will be restored.").

[4] *See, e.g.*, Willard K. Tom, David A. Balto & Neil W. Averitt, *Anticompetitive Aspects of Market-Share Discounts and other Incentives to Exclusive Dealing*, 67 Antitrust L.J. 615 (2000) (explaining that discounts structured to produce total or partial exclusivity should be evaluated like exclusive dealing).

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