EXHIBIT 1

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

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

RESPONDENT'S APPLICATION FOR STAY
OF ORDER PENDING REVIEW BY U.S. COURT OF APPEALS

Pursuant to Rule 3.56(d) of the Commission's Rules of Practice for Adjudicative Proceedings, Respondent McWane, Inc. hereby applies to the Federal Trade Commission for Stay of its Final Order served on February 11, 2014, pending judicial review by a U.S. Court of Appeals.

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Dated: March 13, 2014

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

I. INTRODUCTION

The Commission has now dismissed six of the seven counts in the Complaint it brought against McWane. The lone remaining claim, Count 6, was a split decision that drew a lengthy dissent from Commissioner Wright that chronicled the evolution of the case law on exclusive dealing and examined the factual record in detail. Indeed, the dissent on that single Count was substantially longer than the majority opinion on all Counts.

Commissioner Wright concluded that Count 6 failed for multiple factual and legal reasons. He concluded that "Complaint Counsel fails totally to establish, as it must under the antitrust laws, that McWane's conduct harmed *competition*" and "[t]he record is clear there is no such proof." Dissenting Statement of Commissioner Joshua D. Wright, *In the Matter of McWane, Inc. et al.*, Docket No. 9351 at 4-6 (February 6, 2014). Commissioner Wright found "undisputed evidence that Star was able successfully to enter the domestic fittings industry and to succeed in expanding its business once it did enter," and thus the "more plausible inference to draw" from Complaint Counsel's "very weak" "indirect evidence" is that McWane's rebate policy "had almost no impact on Star's ability to grow its business, which, under the case law, strongly counsel's against holding that McWane's conduct was exclusionary." Wright Statement at 45-47. Former Commissioner Rosch likewise rejected the FTC's theory at the outset, stating that "the undisputed facts demonstrate that Star's entry was not de minimis or trivial" and "the fact that Star attained a 10 percent share . . . in less than three years undermines Complaint Counsel's basic theory." Statement of Commissioner J. Thomas Rosch, *In the Matter of McWane, Inc. et al.*, Docket 9351 at 5-6 (August 9, 2012); *see also* Jan. 4, 2012 Statement of Commissioner J. Thomas Rosch at 1 ("there is case law in both the Eighth and Ninth Circuits blessing the conduct that the complaints charge as exclusive dealing").

As a result, the Commission promulgated its Order that effectively prohibits McWane from engaging in business practices that are perfectly legal, and have been blessed by numerous circuit courts. Thus, the Order is unwarranted and will impose substantial hardship on McWane, putting it at a distinct disadvantage to its competitors that are under no such restriction. This infringes McWane's rights, will harm its customers, and *has no quantified benefit for consumers.* For these and other reasons, McWane will petition for review in a Circuit Court of Appeals.

The Commission should not, prior to judicial review, promulgate an Order that is unwarranted and goes far beyond the law to prohibit two types of conduct that are plainly lawful and plainly pro-competitive: first, the Order would prohibit McWane from selling Domestic Fittings exclusively to even a single customer (or seeking any exclusive relationship); second, the Order would prohibit McWane from offering any rebate to even a single customer based on that customer buying any threshold percentage of McWane's Domestic Fittings. Courts have repeatedly held, though, that even true exclusive dealing arrangements have "well-recognized economic benefits" such as "the enhancement of interbrand competition" by incentivizing manufacturers to compete vigorously for exlusive distribution, thereby incentivizing the distributor to promote its supplier's products more vigorously against rival manufacturers' products. *Omega Envtl., Inc. v. Gilbarco, Inc.*, 127 F.3d 1157, 1162 (9th Cir. 1997) (citing *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 395 (7th Cir.1984)). And, it only becomes a potential antitrust problem if the exclusive dealing contracts are multi-year in length and "foreclose competition in a substantial share of the line of commerce affected." *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961). Courts have also repeatedly held that price concessions of any type benefit customers, are encouraged by the antitrust laws, and cannot cause antitrust injury. *Pacific Bell Telephone Co. v. linkLine Comm'ns, Inc.*, 129 S. Ct. 1109

(2009) ("cutting prices in order to increase business often is the very essence of competition."). The only exception—which was not at issue in the case and is not applicable here—is for predatorily low prices that are below-cost and raise a dangerous probability they will exclude competitors, allowing the defendant to recoup its losses with sustained supra-competitive pricing afterward. *Id.* at 1120 (a plaintiff challenging a defendant's pricing practices must prove that "the prices complained of are below an appropriate measure of [the defendant's] costs"); *see Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 325–26 (2007) ("plaintiff must prove that the alleged predatory bidding led to below-cost pricing of the predator's outputs"); *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 223 (1993) (any harm to a competitor from above-cost rebates simply "represents competition on the merits, or is beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price-cutting.").

Any enforcement prior to, or during, McWane's well-grounded appeal will thus irreparably harm McWane *and* its customers, and will be contrary to the public interest. The Commission's track record on appeal further underscores the need for a stay: as Commissioner Wright recently concluded in an academic paper, the Commission gets reversed 20% of the time on appeal, a significantly higher percentage than the reversal rate of Article III judges. *See* Joshua D. Wright & Angela Diveley, *Do Expert Agencies Outperform Generalist Judges? Some Preliminary Evidence from the Federal Trade Commission*, J. OF ANTITRUST ENFORCEMENT at 16 (Dec. 2012) ("Commission opinions are reversed 20 per cent of the time and decisions by Article III judges are reversed only 5 per cent of the time."). For these reasons and the reasons below, the Commission should stay its Final Order pending judicial review.

II. ARGUMENT

Pursuant to Rule 3.56(b), "(a)ny party subject to a cease and desist order under section 5 of the FTC Act . . . may apply to the Commission for a stay of all or part of that order pending judicial review." 16 C.F.R. § 3.56(b). McWane will petition for review by filing a timely notice of appeal in a federal Circuit Court of Appeals. Under Rule 3.56(c), an applicant for a stay must address: (1) the likelihood of the applicant's success on appeal; (2) whether the applicant will suffer irreparable harm if a stay is not granted; (3) the degree of injury to other parties if a stay is granted; and (4) why the stay is in the public interest. *Id.* These four factors are to be balanced with one another and "cannot be reduced to a set of rigid rules." *Hilton v. Braunskil*, 481 U.S. 770, 777 (1987); *CityFed Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 747 (D.C. Cir. 1995). Moreover, the strength of one factor may outweigh "rather weak" arguments in other areas. *See Wash. Metro. Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843-45 (D.C. Cir. 1977) (granting stay despite the applicant's inability to prevail on one factor). That is, the traditional factors are typically evaluated on a sliding scale and a strong showing on one factor overrides a weak showing in another. *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1291 (D.C. Cir. 2009). In this case, McWane meets all four factors, and has a particularly strong showing of a likelihood of success on appeal.

A. McWane Will Likely Succeed On Appeal.

To meet the requirement of demonstrating the likelihood of success on appeal, McWane need not prove that it will prevail. Instead, it must only show that its appeal involves serious and substantial questions going to the merits of the Commission's decision. *Six Clinics Holding Corp., II v. Cafcomp Sys., Inc.*, 119 F.3d 393, 402 (6th Cir. 1997) ("it is ordinarily sufficient if the plaintiff has raised questions going to the merits so serious, substantial, difficult, and doubtful as to make them a fair ground for litigation."); *In the Matter of Novartis Corp.*, 128

F.T.C. 233, 235 (1999) (". . .it is well settled that arguable difficulties arising from the application of the law to a complex factual record can support a finding that a stay applicant has made a substantial showing on the merits.").

McWane satisfies this requirement, as the Commission's Opinion is contrary to well-settled case law. The Supreme Court and numerous Circuits have repeatedly held that an antitrust violation requires harm to *competition*—instead of a single competitor—such as increased prices or decreased output. *See Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962) (antitrust laws concerned with the "protection of competition, not competitors"); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977) (holding plaintiff competitor lacked standing to pursue antitrust claim that harmed it as a competitor but did not harm competition); *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181, 187 (3d Cir. 2005) ("Predatory or exclusionary practices in themselves are not sufficient. There must be proof that competition, not merely competitors, has been harmed"); *Roland Mach. Co.*, 749 F.2d at 395 ("The exclusion of one or even several competitors, for a short time or even a long time, is not ipso facto unreasonable. The welfare of a particular competitor who may be hurt as the result of some trade practice is the concern not of the federal antitrust laws.").

Here, the Commission was sharply split and Commissioner Wright's dissent concluded that "Complaint Counsel fail[ed] totally to establish, as it must under the antitrust laws, that McWane's conduct harmed *competition*" and "[t]he record is clear there is no such proof." Dissenting Statement of Commissioner Joshua D. Wright, *In the Matter of McWane, Inc. et al.*, Docket No. 9351 at 4-6 (February 6, 2014). Commissioner Wright found Complaint Counsel's legal arguments "at best, question begging, and, at worst, misleading," and further noted that what was "strikingly absent" from the Commission's decision was "any evidence establishing

the requisite analytical link between what the Commission describes as 'foreclosure' and harm to competition." *Id.* at 25-26. Thus, given the "dearth of record evidence demonstrating McWane's conduct has had an adverse effect on competition," Commissioner Wright dissented from the Commission's decision, finding that Complaint Counsel failed to establish a necessary element of a monopolization claim: "that McWane's conduct was [actually] exclusionary." *Id.* at 45-47.

Commissioner Wright also found evidence of harm to even a single competitor lacking, as there was "undisputed evidence that Star was able successfully to enter the domestic fittings industry and to succeed in expanding its business once it did enter." *Id.* He thus concluded that the "more plausible inference to draw" from Complaint Counsel's "very weak" "indirect evidence" is that McWane's rebate policy "had almost no impact on Star's ability to grow its business, which, under the case law, strongly counsel's against holding that McWane's conduct was exclusionary." *Id.* Indeed, the ALJ likewise found that "[c]learly, Star entered the Domestic Fittings market" during tough economic times when "[n]o other supplier of imported Fittings" and "no pipe supplier or domestic foundry . . . [even] considered entering the market for manufacturing and selling Domestic Fittings." Initial Dec. at 377, 383. "[S]ince its entry in 2009, Star has sold Domestic fittings every month and every year" and was able to successfully "pick off" orders of Domestic Fittings from McWane," and at the time of trial, was on pace "to have its best year ever for Domestic Fittings sales in 2012." F. 1134-35, 1141-44.

In any event, Star was "a less efficient supplier of domestic Fittings than McWane because of its use of multiple jobber factories, rather than its own, dedicated foundry" with prices that were always higher than McWane's. Initial Dec. at 411. Thus, Star's successful entry did not enhance consumer welfare (and, even if Star was somehow excluded it would be

meaningless to competition): "the presence of Star in the Domestic Fittings market in various states did not result in lower prices." F. 1090. Complaint Counsel did not test and prove harm to a single competitor, much less to competition itself, as required under the law. This reason alone satisfies the first prong of the test, and counsels against enforcement of the Order prior to judicial review.

Commissioner Wright's dissent is buttressed by the two dissents of former Commissioner Rosch, who served on the Commission during the pre-trial phases of the case. Commissioner Rosch specifically dissented from the FTC's pursuit of this claim at the outset, concluding that there was nothing illegal or unfair about McWane's rebate program. Commissioner Rosch held that "I do not think that the Complaint against McWane adequately alleges exclusive dealing as a matter of law. In particular, there is case law … blessing the conduct that the complaints charge as exclusive dealing." January 4, 2012 Rosch Statement at 1. On summary judgment he again concluded that this count should be dismissed, because "[e*]valuated under any objective standard*, and viewing all inferences in a light most favorable to Complaint Counsel (as we must), the *undisputed facts* demonstrate that Star's entry was not de minimis or trivial. . . . Thus, the fact that Star attained a 10 percent share of the domestic-only DIPF market - - from zero share - - in less than three years undermines Complaint Counsel's basic theory" and "*would not lead a rational trier of fact to find for Complaint Counsel*." August 9, 2012 Rosch Statement at 6.

On appeal, McWane will challenge the Commission's finding against McWane on the single remaining count as directly contrary to long-standing case law. As discussed above, McWane has demonstrated that it has serious and substantial grounds for its appeal and is likely to succeed.

B. McWane and its Customers Will Suffer Irreparable Harm if a Stay Is Not Granted.

McWane and its customers will suffer irreparable harm if a stay is not granted here. Irreparable harm warranting a stay has been found when compliance with an order subsequently reversed on appeal would result in: (1) unrecoverable costs and business losses; (2) confusion and costly notification; (3) harm to reputation; and (4) prohibition of lawful business activities. Absent a stay, McWane (or its customers) will suffer each of these consequences. *See, e.g., In re Novartis Corp.*, 128 F.T.C. 233, 235-36 (1999) ("such costs constitute irreparable injury under these facts.").

The Commission's Order requires McWane to cease and desist from "[i]nviting, entering into, adhering to, maintaining, implementing, enforcing, or attempting thereto any condition, policy, practice, agreement, contract, or understanding that requires Exclusivity with a Customer. . . ." Final Order at 3-4.[1] This effectively bars McWane from having an exclusive Domestic Fittings sales relationship with even a single customer. Numerous circuits have held that exclusive dealing arrangements are often procompetitive and have "well-recognized economic benefits" for customers. *Omega Envtl.*, 127 F.3d at 1162 (citing *Roland Mach. Co.*, 749 F.2d at 395). Exclusive deals are only problematic if the exclusive dealing contracts are multi-year in length and "foreclose competition in a substantial share of the line of commerce affected." *Tampa Elec.*, 365 U.S. at 327. Thus, the Commmission's overbroad Order would deprive McWane and many of its customers of "well-recognized economic benefits" that courts have found to be procompetitive and perfectly lawful, and would unfairly inhibit McWane's ability to

[1] The Order defines "Exclusivity" or "Exclusive" as "any requirement, whether formal or informal, or direct or indirect, by the Respondent that a Customer purchase all of their Domestic DIPF from Respondent, or any other requirement that a Customer restrain, refrain from, or limit its future purchases of Domestic DIPF from any Competitor." Final Order at 2.

compete with its primary competitor for domestic sales, Star, who at the time of trial had dozens of exclusive customers itself. F. 1141-43.

The Order also restricts McWane from "inviting, entering into, adhering to, maintaining, implementing, enforcing, or attempting thereto any condition, policy, practice, agreement, contract, or understanding that offers or provides any Retroactive Incentive" for a period of 10 years. *Id.*[2] The Order thus prohibits McWane from offering any rebates, discounts, and other incentives conditioned on Domestic Fittings exclusivity to even a single customer, which are perfectly lawful under well-settled precedent, and in fact ***lower*** prices for consumers. This is especially problematic, as rebates are simply price concessions, and the Supreme Court has repeatedly recognized that offering lower prices in the form of rebates is lawful and beneficial to customers, and cannot cause antitrust injury so long as those prices are above cost. *linkLine*, 129 S. Ct. at 1120 (to be problematic, prices must be "below an appropriate measure of [the defendant's] costs"). Competition is benefited, not harmed, when a more efficient firm such as McWane is permitted to offer discounts and rebates to increase its sales, keeping its last remaining domestic foundry in business, even if it thereby takes business away from a less efficient rival. As the Supreme Court has explained, "cutting prices in order to increase business often is the very essence of competition." *Id.*

Thus, on its face the Order is so overbroad that it will not only harm McWane by prohibiting it from competing on a level playing field with its less efficient rival but will also deprive McWane's customers of well-recognized economic benefits such as rebates and other price concessions. The Order's overbroad mandate therefore harms the very consumers the

[2] The Order defines "Retroactive Incentive" as "any flat or lump-sum payment of monies or any other item(s) of pecuniary value to a customer based upon the Customer's sales or purchases of Respondent's Domestic DIPF reaching a specified threshold. . .or otherwise reducing the Price of one unit of Respondent's Domestic DIPF because of the purchase or sale of an additional unit of that product." *Id.* at 3.

agency is tasked with protecting. *See Arthur Murray Studio of Washington, Inc. v. F.T.C.*, 458 F.2d 622, 625 (5th Cir. 1972) ("Moreover, the remedy should be no broader in restricting legitimate acts than is reasonably necessary under the circumstances obtaining.").

The Commission's Order will also unquestionably threaten the viability of McWane's last remaining domestic foundry, Union Foundry. McWane's modest rebate policies are simply efforts to keep enough volume to keep Union Foundry alive. The Commission's Order puts McWane at risk of having a less efficient competitor free ride on its efforts by simply buying a few dozen patterns—without investing in a foundry or a full line of Fittings—and potentially grab the lion's share of the highest volume Fittings. That risk of being "cherry picked" could leave Union Foundry with only low-volume "oddball" Fittings and insufficient tonnage to justify remaining in business. (Normann, Tr. 5055; JX 638 (McCullough, IHT at 34-36).) Such a shutdown would clearly constitute irreparable injury and be bad for customers, who would then be left with Star's less efficient, higher priced jobber-made Domestic Fittings. Customers will also be worse off without the benefits of the exclusive sales relationships and rebates that the Order would bar.

C. A Stay Would Serve the Public Interest and Would Result in No Significant Harm to Any Party.

Here, as discussed in detail above, the Order would cause harm, not protection, for consumers of ductile iron pipe fittings who benefit from McWane's lower prices. Indeed, the ALJ did not find that any purported harm caused by McWane's rebate policy was either ongoing or likely to recur. Initial Dec. 445-47. There were no Findings addressing any purported current or ongoing impacts on competition or consumers—to the contrary, the record demonstrates that McWane's rebates changed more than three years ago (*Id.* at 445)—but the Commission's Order

will punish all customers (and McWane) for years to come with no corresponding benefit to customers.

The Commission's Order likewise imperils the future of McWane's last remaining domestic foundry, which the ALJ found was more efficient than Star. Without Union Foundry, hundreds of employees will lose their jobs and customers will suffer increased prices for Domestic Fittings. Thus, the Order will not serve the public interest and will harm the very consumers the Commission is tasked with protecting.

III. CONCLUSION

For all the foregoing reasons, the Commission should stay the effect and enforcement of its Order pending final disposition of McWane's appeal.

Dated: March 13, 2014

Respectfully submitted,

/s/ William C. Lavery

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CERTIFICATE OF SERVICE

I hereby certify that on March 13, 2014, a true and correct copy of a RESPONDENT'S APPLICATION FOR STAY OF ORDER PENDING REVIEW BY U.S. COURT OF APPEALS was filed electronically in PDF format using the FTC's E-Filing System, and served by hand delivery on the following:

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UNITED STATES OF AMERICA
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COMMISSIONERS: **Edith Ramirez, Chairwoman**
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In the Matter of	)	**PUBLIC**
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[PROPOSED] ORDER GRANTING RESPONDENT'S APPLICATION FOR STAY PENDING REVIEW BY U.S. COURT OF APPEALS

Upon consideration of Respondent McWane, Inc.'s application to stay enforcement of the Commission's Order, issued January 30, 2014,

IT IS ORDERED that enforcement of the Commission's Final Order of January 30, 2014 be stayed upon the filing of a timely petition for review of the Order in an appropriate court of appeals pursuant to 15 U.S.C. § 45(c). This stay shall remain effective until the expiration of all periods for petitions for rehearing, rehearing en banc or certiorari, or until final disposition of all such petitions and any proceedings initiated by a grant of such a petition.

ORDERED: _____

ISSUED: _____, 2014