

Complaint

IN THE MATTER OF

MCWANE, INC.
AND
STAR PIPE PRODUCTS, LTD.

CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF
SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket No. 9351; File No. 101 0080
Complaint, January 4, 2012 – Decision, May 8, 2012

This consent order addresses Star Pipe Products, Ltd.'s business methods, which made it easier to coordinate price levels through an entity known as the Ductile Iron Fittings Research Association. The complaint alleges that Star Pipe Products violated Section 5 of the Federal Trade Commission Act by colluding with McWane to increase DIPF prices. The consent order prohibits the respondent from entering into, adhering to, participating in, maintaining, organizing, implementing, enforcing, or otherwise facilitating any combination, conspiracy, agreement, or understanding between or among any Competitors to raise, fix, maintain, or stabilize prices or price levels, or engage in any other pricing action; or to allocate or divide markets, customers, contracts, transactions, business opportunities, lines of commerce, or territories.

Participants

For the *Commission*: J. Alex Ansaldo, Jeanine K. Balbach, Michael J. Bloom, Thomas H. Brock, Monica Castillo, Edward D Hassi, Linda M. Holleran, and Andrew K. Mann.

For the *Respondents*: Gregory S.C. Huffman, William Katz, Brian Stoltz and Nicole Williams, Thompson & Knight LLP; William Lavery, Joseph Ostoyich, and Andreas Stagard, Baker Botts LLP; and Thomas W. Thagard III and J. Alan Truitt, Maynard Cooper and Gale P.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission ("Commission"), having reason to believe that Respondents McWane, Inc. ("McWane") and Star Pipe Products, Ltd. ("Star") have violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and it appearing to the

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Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this Complaint stating its charges as follows:

NATURE OF THE CASE

1. This action concerns the collusive conduct of Respondents, and the exclusionary conduct of McWane, relating to the marketing and sale of ductile iron pipe fittings (“DIPF”).

2. Beginning in January 2008, McWane and Star, along with their competitor Sigma Corporation (“Sigma”), conspired to raise and stabilize the prices at which DIPF are sold in the United States. McWane, Sigma and Star (collectively, the “Sellers”) exchanged sales data in order to facilitate this price coordination.

3. The passage of the American Recovery and Reinvestment Act of 2009 (“ARRA”) in February 2009 significantly altered the competitive dynamics of the DIPF industry, and upset the terms of coordination among the Sellers. In the ARRA, the United States Congress allocated more than 6 billion dollars to water infrastructure projects, conditioned on the use of domestically produced materials, including DIPF, in those projects (the “Buy American” requirement).

4. At the time the ARRA was passed, McWane was the sole supplier of a full line of domestically produced DIPF in the most commonly used size ranges. Federal stimulus of the domestic DIPF market potentially left McWane in a position to reap a monopoly profit.

5. In response to the passage of the ARRA and its Buy American provision, Sigma, Star and others attempted to enter the domestic DIPF market in competition with McWane.

6. McWane maintained its monopoly in the domestic DIPF market through exclusionary conduct, including (i) entering into a distribution agreement with Sigma that eliminated Sigma as an actual potential entrant into the domestic DIPF market, and (ii) excluding actual and potential competitors, including Star, through the adoption and enforcement of exclusive dealing policies.

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7. Respondents' conduct has restrained competition and led to higher prices for both imported and domestically produced DIPF.

THE RESPONDENTS

8. Respondent McWane is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at 2900 Highway 280, Suite 300, Birmingham, Alabama 35223. McWane manufactures, imports, markets and sells products for the waterworks industry, including DIPF.

9. At all times relevant herein, McWane has been, and is now, a corporation as "corporation" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

10. McWane's acts and practices, including the acts and practices alleged herein, are in or affect commerce in the United States, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

11. Respondent Star is a limited partnership organized, existing and doing business under and by virtue of the laws of the State of Texas, with its principal place of business located at 4018 Westhollow Parkway, Houston, Texas 77082. Star imports, markets and sells products for the waterworks industry, including DIPF.

12. At all times relevant herein, Star has been, and is now, a corporation as "corporation" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

13. Star's acts and practices, including the acts and practices alleged herein, are in or affect commerce in the United States, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

THE DIPF INDUSTRY

14. DIPF are a component of pipeline systems transporting drinking and waste water under pressurized conditions in

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municipal distribution systems and treatment plants. DIPF are used to join pipes, valves and hydrants in straight lines, and to change, divide or direct the flow of water. The end users of DIPF are typically municipal and regional water authorities.

15. DIPF are produced in a broad product line of more than 2000 unique configurations of size, shape and coating. The industry differentiates between “A Items,” or commonly used fittings used routinely and on almost every job, and “oddball” fittings that are either of unusual configuration or size, or both. Although approximately 80 percent of market demand may be serviced with a product line of 100 fittings, DIPF suppliers must be able to supply more than 1900 additional fittings to serve the remaining 20 percent of demand.

16. Independent wholesale distributors, known as “waterworks distributors,” are the primary channel of distribution of DIPF to end users. Waterworks distributors specialize in distributing products for water infrastructure projects, and generally handle the full spectrum of waterworks products, including pipes, DIPF, valves and hydrants. Waterworks distributors employ sales personnel dedicated to servicing the needs of end users, and are generally able to satisfy the needs of end users for rapid service by stocking inventory in relatively close proximity to project sites.

17. Direct sales of DIPF to end users, or to the utility contractors that often serve as the agent of the end user in purchasing and installing DIPF, are uncommon. End users and DIPF suppliers alike prefer to work through waterworks distributors with locations near project sites. As a result, DIPF suppliers need to distribute DIPF through local waterworks distributors in each region of the country in order to compete effectively in that region.

18. Both imported and domestically produced DIPF are commercially available. All of the Sellers sell imported DIPF. Before Star’s entry into domestic production in 2009, McWane was the sole domestic producer of a full line of small and medium-sized DIPF.

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19. The end user of DIPF specifies whether, on a particular project, it will accept both imported and domestically produced DIPF, or only domestically produced DIPF. This specification is often mandated by municipal code, or by state or federal law.

20. Domestically produced DIPF sold for use in projects specified as domestic only are sold at higher prices than imported or domestically produced DIPF sold for use in projects not specified as domestic only.

THE RELEVANT MARKETS

21. The relevant product market in which to evaluate Respondents' conduct is the marketing and sale of DIPF, and narrower relevant markets as contained therein (collectively, the "relevant DIPF markets"), including:

- a. DIPF for projects not specified as domestic only;
- b. DIPF for projects specified as domestic only; and
- c. DIPF of certain size ranges (*e.g.*, 24" in diameter and smaller).

22. In particular, the marketing and sale of domestically produced small and medium-sized (3-24" in diameter) DIPF for use in projects specified as domestic only constitutes a separate relevant product market (the "relevant domestic DIPF market").

23. There are no widely used substitutes for DIPF, and no other product significantly constrains the prices of DIPF.

24. Before and after the passage of the ARRA, some end users purchasing DIPF for use in projects specified as domestic only were unable to substitute imported DIPF, or any other product, for domestically produced DIPF. The passage of the ARRA and its Buy American requirement temporarily expanded the relevant domestic DIPF market.

25. The relevant geographic market is no broader than the United States. To compete effectively within the United States, DIPF suppliers need distribution assets and relationships within the United States. DIPF suppliers located outside the United

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States that lack such assets and relationships are unable to constrain the prices of DIPF suppliers that have such assets and relationships.

26. Each and every state within the United States is also a relevant geographic market, and smaller markets within the boundaries of many states exist as well. DIPF suppliers can and do engage in price discrimination based on customers' location. DIPF end users require local and expeditious service and support, and typically do not purchase DIPF from waterworks distributors located more than 200 miles away. Waterworks distributors typically do not resell DIPF to other waterworks distributors or end users outside their service areas in any substantial quantity. As a result, DIPF suppliers charge different prices in different states, and within certain regions within many states.

**THE RELEVANT DIPF MARKETS ARE CONDUCTIVE TO
COLLUSION**

27. The relevant DIPF markets have several features that facilitate collusion among the Sellers, including product homogeneity, market concentration of DIPF suppliers, barriers to timely entry of new DIPF suppliers, inelastic demand at competitive prices, and uniform published prices.

- a. DIPF are commodity products produced to industry-wide standards. Product homogeneity enhances the Sellers' ability to collude on prices and to detect deviations from those collusive prices.
- b. The relevant DIPF markets are highly concentrated. In 2008, the Sellers collectively made more than 90 percent of sales in the relevant DIPF markets. A highly concentrated market enhances the Sellers' ability and incentive to collude on prices.
- c. Effective *de novo* entry into the relevant DIPF markets takes several years. Barriers to entry include the need for a new entrant to develop a distribution network and a reputation for quality and service with waterworks distributors and end users. Convincing end users to

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allow the use of a new entrant's DIPF is often a time consuming process.

- d. Demand for DIPF is inelastic to changes in price at competitive levels. DIPF are a relatively small portion of the cost of materials of a typical waterworks project, and there are no widely used substitutes for the product.
- e. The Sellers publish nearly identical price books listing per-unit prices for each unique DIPF item carried by a given supplier, and periodically publish uniform multiplier discounts at which they offer to sell DIPF on a state-by-state basis. By simplifying and standardizing published prices, the DIPF price list/multiplier format enhances the Sellers' ability to collude on prices and to detect deviations from those collusive prices.

**THE SELLERS RESTRAINED PRICE COMPETITION IN
THE RELEVANT DIPF MARKETS**

28. Senior executives of the Sellers frequently and privately communicate with one another. These communications often relate to DIPF price and output.

29. Beginning in January 2008, the Sellers conspired to raise and stabilize the prices at which DIPF were sold in the United States.

30. Due to rising input costs, all of the Sellers desired price increases in 2008. However, McWane was concerned that Sigma and Star would not adhere to announced price increases, which would result in lost sales for McWane. The Sellers worked together through 2008 to alleviate McWane's concerns, with the common purpose of clearing the way for McWane to support common price increases.

31. On January 11, 2008, McWane publicly announced its first DIPF price increase of 2008. Sigma and Star followed this price increase.

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32. This January 2008 price increase was the result of a combination and conspiracy among the Sellers.

- a. Before announcing the January 2008 price increase, McWane planned to trade its support for higher prices in exchange for specific changes to the business methods of Sigma and Star that would reduce the risk that local sales personnel for these competitors would sell DIPF at prices lower than published levels.
- b. McWane communicated the terms of its plan to Sigma and Star. McWane acted with the intent of conspiring with Sigma and Star to restrain price competition.
- c. Sigma and Star manifested their understanding and acceptance of McWane's offer by publicly taking steps to limit their discounting from published price levels in order to induce McWane to support higher price levels.
- d. On or about March 10, 2008, McWane and Sigma executives discussed by telephone their efforts to implement the January 2008 price increase.

33. On June 17, 2008, McWane publicly announced its second DIPF price increase of 2008. Sigma and Star followed this price increase.

34. The June 2008 price increase was the result of a combination and conspiracy among the Sellers.

- a. Before announcing the June 2008 price increase, McWane planned to trade its support for higher prices in exchange for information from Sigma and Star documenting the volume of their monthly sales of DIPF. This exchange of information was to be achieved under the auspices of an entity styled as the Ductile Iron Fittings Research Association ("DIFRA").
- b. McWane communicated the terms of its plan to Sigma and Star, at least in part through a public letter sent by McWane to waterworks distributors, the common

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customers of the Sellers. A section of that letter was meaningless to distributors, but was intended to inform Sigma and Star of the terms of McWane's offer. McWane acted with the intent of conspiring with Sigma and Star to restrain price competition.

- c. Sigma and Star manifested their understanding and acceptance of McWane's offer by initiating their participation in the DIFRA information exchange in order to induce McWane to support higher price levels.
- d. McWane then led a price increase, and Sigma and Star followed.
- e. On or about August 22, 2008, executives of McWane and Sigma discussed by telephone their efforts to implement the June 2008 price increase.

**DIFRA FACILITATED PRICE COORDINATION AMONG
THE SELLERS**

35. The DIFRA information exchange operated as follows. The Sellers submitted a report of their previous month's sales to an accounting firm. Shipments were reported in tons shipped, subdivided by diameter size range (*e.g.*, 2-12") and by joint type. Data submissions were aggregated and distributed to the Sellers. Data submitted to the accounting firm was typically no older than 45 days, and the summary reports returned to the Sellers contained data typically no more than 2 months old.

36. During its operation between June 2008 and January 2009, the DIFRA information exchange enabled each of the Sellers to determine and to monitor its own market share and, indirectly, the output levels of its rivals. In this way, the DIFRA information exchange facilitated price coordination among the Sellers on the pricing of DIPF.

37. The acts and practices of Respondents, as alleged herein, have the purpose, capacity, tendency, and effect of (i) fixing, maintaining and raising prices of DIPF in the relevant DIPF

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markets, and (ii) facilitating collusion in the relevant DIPF markets.

38. There are no legitimate procompetitive efficiencies that justify the conduct of Respondents as alleged herein, or that outweigh its anticompetitive effects.

**MCWANE MONOPOLIZED THE RELEVANT DOMESTIC
DIPF MARKET**

39. At the time of the enactment of the ARRA in February 2009 and thereafter, McWane possessed monopoly power in the relevant domestic DIPF market.

40. At the time of the enactment of the ARRA, McWane was the only manufacturer of a full line of DIPF in the relevant domestic DIPF market and controlled nearly 100 percent of the relevant domestic DIPF market. Despite Star's entry into the relevant domestic DIPF market in late 2009, McWane continues to make more than 90 percent of sales in the relevant domestic DIPF market.

41. McWane's monopoly power in the relevant domestic DIPF market is protected by substantial barriers to effective entry and expansion, including the unfair methods of competition of McWane and Sigma, as alleged in Paragraphs 42 through 63, below.

42. For suppliers of the relevant DIPF that have existing relationships and goodwill with waterworks distributors and established reputations for quality and service in the provision of the relevant DIPF, McWane's unfair and exclusionary methods of competition are the primary barriers to effective entry and expansion in the relevant domestic DIPF market.

43. McWane's monopoly power in the relevant domestic DIPF market is further demonstrated directly by its ability to exclude competitors, to control prices, and to coercively impose unwanted distribution policies on its customers.

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44. Federal stimulus gave Sigma, Star and Serampore Industries Private, Ltd. (“SIP”), another imported DIPF supplier, an incentive to enter the domestic DIPF market.

45. Sigma, Star and SIP all attempted to enter the relevant domestic DIPF market in response to the ARRA.

46. McWane maintained its monopoly in the relevant domestic DIPF market by illegally inducing Sigma to abandon its effort to enter the domestic DIPF market, and by implementing an exclusive dealing policy to prevent other competitors from entering or expanding. Through this conduct, McWane eliminated or delayed competition from the only firms with the ability and incentive to enter the relevant domestic DIPF market in a timely fashion. McWane acted with the specific intent to monopolize the relevant domestic DIPF market.

McWane Eliminated Sigma as an Actual Potential Entrant

47. After the enactment of the ARRA, Sigma took steps to evaluate entry into domestic production of DIPF, including but not limited to (i) formulating a complete or nearly complete operational plan, (ii) arranging for an infusion of equity capital to fund domestic production, (iii) obtaining the approval of its Board of Directors for its entry plans, and (iv) casting prototype product.

48. McWane perceived that Sigma was preparing to enter the relevant domestic DIPF market. McWane sought to eliminate the risk of competition from Sigma by inducing Sigma to become a distributor of McWane’s domestic DIPF rather than a competitor in the relevant domestic DIPF market.

49. McWane and Sigma executed a Master Distribution Agreement dated September 17, 2009 (“MDA”). The principal terms of the MDA were as follows:

- a. McWane would sell domestic DIPF to Sigma at a 20 percent discount off of McWane’s published prices;
- b. McWane would be Sigma’s exclusive source for the relevant domestic DIPF;

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- c. Sigma would resell McWane's domestic DIPF at or very near McWane's published prices for domestic DIPF; and
- d. Sigma would resell McWane's domestic DIPF to waterworks distributors only on the condition that the distributor agreed to purchase domestic DIPF exclusively from McWane or Sigma.

50. An unwritten term of the MDA was that McWane would also sell its domestic DIPF at or very near its published prices.

51. In the absence of a sufficiently profitable arrangement with McWane, Sigma would likely have entered the relevant domestic DIPF market in competition with McWane.

52. Under the MDA, McWane controlled the price at which Sigma could sell domestic DIPF and the customers to whom Sigma could sell domestic DIPF. Sigma's participation in the relevant domestic DIPF market under the MDA was not equivalent to, and for consumers not a substitute for, Sigma's competitive entry into the relevant domestic DIPF market.

53. Sigma's independent, competitive entry into the relevant domestic DIPF market would likely have benefitted consumers by constraining McWane's prices for the relevant domestic DIPF and otherwise.

54. Through the MDA, McWane transferred a share of its sales and monopoly profits in the domestic DIPF market to Sigma in exchange for Sigma's commitment to abandon its plans to enter the relevant domestic DIPF market as an independent competitor.

55. Both McWane and Sigma entered into the MDA with the specific intent to maintain and share in McWane's monopoly profits in the relevant domestic DIPF market by eliminating competition among themselves and excluding their rivals.

McWane Excluded Star Through Exclusive Dealing

56. Star announced its entry into the relevant domestic DIPF market in June 2009. McWane knew that, initially, Star would

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have a shorter product line and a smaller inventory than McWane. Star would therefore have difficulty convincing a waterworks distributor to purchase all of its domestic DIPF from Star. McWane nevertheless projected that Star's entry into the domestic DIPF market, if unobstructed by McWane, would place downward pressure on McWane's prices for its domestic DIPF.

57. McWane responded to Star's entry into the relevant domestic DIPF market by adopting restrictive and exclusive distribution policies (collectively, "McWane's exclusive dealing policies"). McWane intended and expected that these policies would impede and delay the ability of Star to enter the domestic DIPF market.

- a. McWane threatened waterworks distributors with delayed or diminished access to McWane's domestic DIPF, and the loss of accrued rebates on the purchase of McWane's domestic DIPF, if those distributors purchased domestic DIPF from Star.
- b. As part of its MDA with McWane, Sigma agreed to implement a similar distribution policy, as alleged in Paragraph 49, above.
- c. McWane threatened some waterworks distributors with the loss of rebates in other product categories, such as ductile iron pipe, waterworks valves, and hydrants, if those distributors purchased domestic DIPF from Star.
- d. Beginning in 2011, McWane changed its rebate structure for domestic DIPF to require waterworks distributors to make certain minimum, and high, shares of their total domestic DIPF purchases from McWane in order to qualify for these rebates.

58. The purpose and effect of McWane's exclusive dealing policies has been and is to compel the majority of waterworks distributors to deal with McWane and Sigma on an exclusive or nearly exclusive basis for their domestic DIPF business.

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- a. Due to Star's perceived or actual status as an untested supplier of domestic DIPF with a shorter product line and smaller inventory than McWane, many distributors interested in purchasing domestic DIPF from Star were unwilling to switch all of their domestic DIPF business to Star.
- b. Instead, many distributors wished to purchase domestic DIPF from both McWane/Sigma and Star, and thereby to garner the benefits of price and service competition.
- c. McWane's exclusive dealing policies increased the risk of purchasing domestic DIPF from Star.
- d. Distributors otherwise interested in purchasing domestic DIPF from Star were and are unwilling to do so under the terms of McWane's exclusive dealing policies, and have remained exclusive or nearly exclusive with McWane and Sigma, contrary to their preference.

59. McWane's exclusive dealing policies have foreclosed Star from a substantial volume of sales opportunities with waterworks distributors.

60. By foreclosing Star from a substantial volume of sales opportunities with waterworks distributors, McWane's exclusive dealing policies tend to minimize and delay Star's ability to compete in the domestic DIPF market and thereby to benefit consumers by constraining the prices of domestically produced DIPF charged by McWane and Sigma, and otherwise.

61. McWane's exclusive dealing policies have also raised barriers to entry into the relevant domestic DIPF market by other potential entrants, including SIP. This conduct has contributed to McWane's monopolization of the relevant domestic DIPF market.

62. The acts and practices of McWane, as alleged herein, have the purpose, capacity, tendency, and effect of (i) maintaining and stabilizing prices of DIPF in the relevant DIPF markets, (ii) eliminating potential competition from Sigma in the relevant domestic DIPF market, (iii) impairing the competitive effectiveness of Star in the relevant domestic DIPF market, and (iv) raising barriers to entry for potential rivals in the relevant

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domestic DIPF market. The conduct of McWane is reasonably capable of making a significant contribution to the enhancement or maintenance of McWane's monopoly power in the relevant domestic DIPF market.

63. There are no legitimate procompetitive efficiencies that justify the conduct of McWane as alleged herein, or that outweigh its anticompetitive effects.

FIRST VIOLATION ALLEGED**RESTRAINT OF TRADE**

64. As alleged herein, McWane and Star conspired, along with their competitor Sigma, to restrain price competition. These concerted actions unreasonably restrain trade and constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45. Such acts and practices, or the effects thereof, will continue or recur in the absence of appropriate relief.

SECOND VIOLATION ALLEGED**RESTRAINT OF TRADE**

65. As alleged herein, McWane and Star conspired, along with their competitor Sigma, to exchange competitively sensitive sales information. These concerted actions unreasonably restrain trade in and constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45. Such acts and practices, or the effects thereof, will continue or recur in the absence of appropriate relief.

THIRD VIOLATION ALLEGED**UNFAIR METHODS OF COMPETITION**

66. As alleged herein, McWane invited its competitors to collude with McWane to restrain price competition. These actions constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45. Such acts and

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practices, or the effects thereof, will continue or recur in the absence of appropriate relief.

FOURTH VIOLATION ALLEGED**RESTRAINT OF TRADE**

67. As alleged herein, McWane and Sigma entered into the MDA. The agreement unreasonably restrains trade and constitutes an unfair method of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45. Such acts and practices, or the effects thereof, will continue or recur in the absence of appropriate relief.

FIFTH VIOLATION ALLEGED**CONSPIRACY TO MONOPOLIZE**

68. As alleged herein, McWane and Sigma entered into the MDA with the specific intent to monopolize the relevant domestic DIPF market, and took overt acts to exclude their rivals in furtherance of their conspiracy, constituting an unfair method of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45. Such acts and practices, or the effects thereof, will continue or recur in the absence of appropriate relief.

SIXTH VIOLATION ALLEGED**MONOPOLIZATION**

69. As alleged herein, McWane has willfully engaged in anticompetitive and exclusionary acts and practices to acquire, enhance or maintain its monopoly power in the relevant domestic DIPF market, constituting unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45. Such acts and practices, or the effects thereof, will continue or recur in the absence of appropriate relief.

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SEVENTH VIOLATION ALLEGED**ATTEMPTED MONOPOLIZATION**

70. As alleged herein, McWane has willfully engaged in anticompetitive and exclusionary acts and practices, with the specific intent to monopolize the relevant domestic DIPF market, resulting, at a minimum, in a dangerous probability of monopolizing the relevant domestic DIPF market, constituting unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45. Such acts and practices, or the effects thereof, will continue or recur in the absence of appropriate relief.

NOTICE

Notice is hereby given to Respondents that the fourth day of September, 2012, at 10:00 a.m., is hereby fixed as the time and Federal Trade Commission offices, 600 Pennsylvania Avenue, NW, Washington D.C. 20580, as the place when and where a hearing will be had before an Administrative Law Judge of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under the Federal Trade Commission Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in the complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the fourteenth (14th) day after service of it upon you. An answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have been admitted.

If you elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all of the material allegations to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint and, together with the complaint, will provide a record

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basis on which the Commission shall issue a final decision containing appropriate findings and conclusions and a final order disposing of the proceeding. In such answer, you may, however, reserve the right to submit proposed findings of fact and conclusions of law under _ 3.46 of said Rules.

Failure to file an answer within the time above provided shall be deemed to constitute a waiver of your right to appear and to contest the allegations of the complaint, and shall authorize the Commission, without further notice to you, to find the facts to be as alleged in the complaint and to enter a final decision containing appropriate findings and conclusions and a final order disposing of the proceeding.

The Administrative Law Judge shall hold a prehearing scheduling conference not later than ten (10) days after an answer is filed by the last answering Respondent. Unless otherwise directed by the Administrative Law Judge, the scheduling conference and further proceedings will take place at the Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington DC 20580. Rule 3.21(a) requires a meeting of the parties' counsel as early as practicable before the prehearing scheduling conference, and Rule 3.31(b) obligates counsel for each party, within five days of receiving the answer of the last answering Respondent, to make certain initial disclosures without awaiting a formal discovery request.

NOTICE OF CONTEMPLATED RELIEF

Should the Commission conclude from the record developed in any adjudicative proceedings in this matter that Respondents have violated or are violating Section 5 of the FTC Act, as amended, as alleged in the Complaint, the Commission may order such relief against Respondents as is supported by the record and is necessary and appropriate, including, but not limited to:

1. Ordering Respondents to cease and desist from the conduct alleged in the Complaint to violate Section 5 of the FTC Act, and to take all such measures as are appropriate to correct or remedy, or to prevent the recurrence of, the anticompetitive practices engaged in by Respondents.

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2. Prohibiting Respondents from agreeing with any competitor to fix prices or to allocate markets, or from soliciting any competitor to enter into such an agreement.
3. Prohibiting Respondents from agreeing with any competitor to exchange competitively sensitive information unless that information exchange meets sufficient criteria to assure that the information exchange will not facilitate collusion among Respondents and their competitors, such conditions to be determined by the Commission, or soliciting any competitor to enter into such an agreement.
4. Prohibiting Respondents from communicating competitively sensitive information to any competitor, except where such communications are the unavoidable result of announcing the terms on which Respondents propose to sell their products to their customers, or where the information communicated by Respondents relates solely to the terms on which Respondents propose to sell any product to, or purchase any product from, the person to whom the information is communicated by Respondents.
5. Requiring, for a period of time, that Respondents document all communications with any competitor, including by identifying the persons involved, the nature of the communication, and its duration, and that Respondents submit such documentation to the Commission.
6. Requiring that Respondents, upon request, provide the Commission with notification of any public price change relating to DIPF, including copies of pricing letters.
7. Prohibiting McWane from conditioning the sale, or any term of sale (including invoice price, delivery terms, credit allowances, rebates, or discounts), of any product on a customer's dealing, refusal to deal, or terms of dealing with any other supplier of domestically produced DIPF.

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8. Prohibiting McWane, for a period of time, from providing any discounts or other incentives that retroactively reduce the price of previously purchased units of McWane's domestically produced DIPF because of the purchase or sale of an additional unit of that product. Provided, however, that McWane shall be permitted to offer discounts or lower prices based solely on volume, provided that these discounts or lower prices are otherwise in accordance with the law.
9. Prohibiting McWane, for a period of time, from offering bundled rebates involving domestically produced DIPF.
10. Requiring that Respondents' compliance with the order shall be monitored at its expense by an independent monitor, for a term to be determined by the Commission.
11. Requiring that Respondents file periodic compliance reports with the Commission.
12. Any other relief appropriate to correct or remedy the anticompetitive effects in their incipency of any or all of the conduct alleged in the complaint.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this fourth day of January, 2012, issues its complaint against Respondents.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission ("Commission") having heretofore issued its complaint charging, *inter alia*, the Respondent Star Pipe Products, Ltd. with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45 ("First and Second Violations"), and the Respondent having

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been served with a copy of that complaint, together with a notice of contemplated relief and having filed its answer denying such charges; and

The Respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent Order, an admission by Respondent of all the jurisdictional facts, solely as those facts relate to the First and Second Violations set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by Respondent that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts related to the First and Second Violations of the complaint, are true and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with § 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure prescribed in § 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following Order:

1. Respondent Star is a limited partnership organized and existing under the laws of the State of Texas, with its principal address at 4018 Westhollow Parkway, Houston, Texas 77082.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondent, and the proceeding is in the public interest.

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ORDER**I.**

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

- A. “Commission” means the Federal Trade Commission.
- B. “Respondent” means Star Pipe Products, Ltd., its officers, directors, employees, agents, attorneys, representatives, successors, and assigns; and the U.S.-based subsidiaries, divisions, groups, and affiliates controlled by it, and the respective officers, directors, employees, agents, attorneys, representatives, successors, and assigns of each.
- C. “Communicate” means to transfer or disseminate any information, regardless of the means by which it is accomplished, including without limitation orally, by letter, e-mail, notice, or memorandum. This definition applies to all tenses and forms of the word “communicate,” including, but not limited to, “communicating,” “communicated” and “communication.”
- D. “Competitively Sensitive Information” means any information regarding the cost, price, output, or customers of or for DIPF marketed by Respondent or any other Competitor, regardless of whether the information is prospective, current or historical, or aggregated or disaggregated.

Provided, however, that “Competitively Sensitive Information” shall not include:

1. information that is a list of prices or other pricing terms that has been widely Communicated by a Competitor to its customers through a letter, electronic mailing, sales catalog, Web site, or other widely accessible method of posting;

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2. information that relates to the terms on which a Competitor will buy DIPF from, or sell DIPF to, the Person to whom the Competitively Sensitive Information is Communicated;
 3. information that relates to transactions that occurred at least three (3) years prior to the date of the Communication of such information;
 4. information that must be disclosed pursuant to the Federal Securities Laws; or
 5. information obtained from or provided, in the ordinary course of Respondent's business, to: (a) a recognized credit rating Person that relates to the credit history or creditworthiness of a customer(s); or (b) another Competitor in relation to the verification of the salary currently being paid by that Competitor to an individual who is seeking or considering employment with Respondent.
- E. "Competitor" means Respondent and any Person that, for the purpose of sale or resale within the United States: (1) manufactures DIPF; (2) causes DIPF to be manufactured; or (3) imports DIPF.
- F. "Designated Manager" means a Regional Manager or the OEM Manager for sales of DIPF in and into the United States, and any employee performing any job function of a Regional Manager or the OEM Manager with responsibility for sales of DIPF in or into the United States.
- G. "Ductile Iron Pipe Fittings" or "DIPF" means any iron casting produced in conformity with the C153/A21 or C110/A21 standards promulgated by the American Water Works Association, including all revisions and amendments to those standards and any successor standards incorporating the C153/A21 or C110/A21 standards by reference.

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- H. “Federal Securities Laws” means the securities laws as that term is defined in § 3(a)(47) of the Securities Exchange Act of 1934, 15 U.S.C. § 78c(a)(47), and any regulation or order of the Securities and Exchange Commission issued under such laws.
- I. “Industry Statistics” means statistics derived from Input Data and Communicated by the Third Party Manager.
- J. “Input Data” means the Competitively Sensitive Information Communicated by Competitors to the Third Party Manager.
- K. “Information Exchange” means the entity Managed by A Third Party Manager that: (1) Communicates Industry Statistics and (2) includes Respondent and at least one other Competitor.
- L. “Insider” means a consultant, officer, director, employee, agent, or attorney of Respondent. *Provided, however*, that no other Competitor shall be considered to be an “Insider.”
- M. “Managed by A Third Party Manager” means that a Third Party Manager is solely and exclusively responsible for all activities relating to Communicating, organizing, compiling, aggregating, processing, and analyzing any Competitively Sensitive Information.
- N. “McWane, Inc.” means McWane, Inc., its officers, directors, employees, agents, attorneys, representatives, successors, and assigns; and the subsidiaries, divisions, groups, and affiliates controlled by it, and the respective officers, directors, employees, agents, attorneys, representatives, successors, and assigns of each.
- O. “Participate” in an entity or an arrangement means (1) to be a partner, joint venturer, shareholder, owner, member, or employee of such entity or arrangement, or

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(2) to provide services, agree to provide services, or offer to provide services through such entity or arrangement. This definition applies to all tenses and forms of the word “participate,” including, but not limited to, “participating,” “participated,” and “participation.”

- P. “Person” means any natural person or artificial person, including, but not limited to, any corporation, unincorporated entity, or government. For the purpose of this Order, any corporation includes the subsidiaries, divisions, groups, and affiliates controlled by it.
- Q. “Third Party Manager” means a Person that (1) is not a Competitor, and (2) is responsible for all activities relating to Communicating, organizing, compiling, aggregating, processing, and analyzing any Competitively Sensitive Information Communicated or to be Communicated between or among Respondent and any other Competitor.

II.

IT IS FURTHER ORDERED that in connection with the business of manufacturing, marketing or selling DIPF in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, Respondent shall cease and desist from, either directly or indirectly, or through any corporate or other device:

- A. Entering into, adhering to, Participating in, maintaining, organizing, implementing, enforcing, or otherwise facilitating any combination, conspiracy, agreement, or understanding between or among any Competitors:
 - 1. To raise, fix, maintain, or stabilize prices or price levels, or engage in any other pricing action; or

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2. To allocate or divide markets, customers, contracts, transactions, business opportunities, lines of commerce, or territories.

Provided, however, that nothing in Paragraph II.A of this Order prohibits Respondent from entering into an agreement with another Competitor regarding the price of DIPF, if and only if that agreement relates exclusively to the terms under which Respondent will buy DIPF from, or sell DIPF to, that other Competitor.

- B. Communicating to any Person who is not an Insider, that Respondent is ready or willing:
 1. To raise, fix, maintain, or stabilize price or price levels conditional upon any other Competitor also raising, fixing, maintaining, or stabilizing price or price levels; or
 2. To forbear from competing for any customer, contract, transaction, or business opportunity conditional upon any other Competitor also forbearing from competing for any customer, contract, transaction, or business opportunity.
- C. Entering into, adhering to, Participating in, maintaining, organizing, implementing, enforcing, or otherwise facilitating any combination, conspiracy, agreement, or understanding between or among any Competitors to Communicate or exchange Competitively Sensitive Information.
- D. Communicating Competitively Sensitive Information to any other Competitor.
- E. Attempting to engage in any of the activities prohibited by Paragraphs II.A, II.B, II.C, or II.D.

Provided, however, that it shall not of itself constitute a violation of Paragraph II.B, II.C, OR II.D of this Order for Respondent to Communicate:

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1. Competitively Sensitive Information to a Competitor where such Communication is reasonably related to a lawful joint venture, license, or potential acquisition, and is reasonably necessary to achieve the procompetitive benefits of such a relationship;
2. To any Person reasonably believed to be an actual or prospective purchaser of DIPF, the price and terms of a sale of DIPF; or
3. To any Person reasonably believed to be an actual or prospective purchaser of DIPF that Respondent is ready and willing to adjust the terms of a sale of DIPF in response to a Competitor's offer.

Provided further, that it shall not of itself constitute a violation of Paragraphs II.B, II.C, II.D or II.E of this Order for Respondent to Communicate with or Participate in an Information Exchange that is limited exclusively to the Communication of Input Data or Industry Statistics when:

1. Any Input Data relates solely to transactions that are at least six (6) months old;
2. Any Industry Statistic relates solely to transactions that are at least six (6) months old;
3. Industry Statistics are Communicated no more than one time during any six (6) month period;
4. Any Industry Statistic represents an aggregation or average of Input Data for transactions covering a period of at least six (6) months;
5. Any Industry Statistic represents an aggregation or average of Input Data received from no fewer than five (5) Competitors;
6. Relating to price, output, or total unit cost, no individual Competitor's Input Data to any Industry

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Statistic represents more than twenty-five (25) percent of the total reported sales (whether measured on a dollar or unit basis) of the DIPF product from which the Industry Statistic is derived;

7. Relating to price, output, or total unit cost, the sum of no three Competitors' Input Data to any Industry Statistic represents more than sixty (60) percent of the total reported sales (whether measured on a dollar or unit basis) of the DIPF product from which the Industry Statistic is derived;
8. Any Industry Statistic is sufficiently aggregated or anonymous such that no Competitor that receives that Industry Statistic can, directly or indirectly, identify the Input Data submitted by any other particular Competitor;
9. Respondent does not Communicate with any other Competitor relating to the Information Exchange, other than those Communications (i) occurring at official meetings of the Information Exchange; (ii) relating to topics identified on a written agenda prepared in advance of such meetings; and (iii) occurring in the presence of antitrust counsel;
10. Respondent retains, for submission to a duly authorized representative of the Commission upon reasonable notice, a copy of all Input Data Communicated to the Third Party Manager and all Industry Statistics Communicated by the Third Party Manager to Respondent; and
11. All Industry Statistics are, at the same time they are Communicated to any Competitor, made publicly available.

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III.

IT IS FURTHER ORDERED that until a final determination of the litigation with McWane, Inc., in this Docket 9351, including any appeals, and in any Commission action related to Docket 9351 that the Commission may take against McWane, Inc. Respondent shall cooperate with Commission staff, to the same extent to which it would have been required had it continued to be a respondent in the Commission action under Part 3 of the Commission's Rules of Practice, to (1) produce, at its own expense, information and documents in its possession, custody, or control; and (2) make its representatives available to provide deposition or hearing testimony, as such may be requested by any duly authorized representative of the Commission. Respondent shall also make its representatives available, upon reasonable notice, for interviews in person or by telephone with Commission staff. Nothing in this paragraph shall require the production of materials as to which Respondent may assert a valid claim of privilege on its own behalf or pursuant to the terms of any written joint defense agreement with any respondent in any Commission proceeding against McWane, Inc.

IV.

IT IS FURTHER ORDERED that Respondent shall:

- A. Within sixty (60) days from the date this Order becomes final distribute by first-class mail, return receipt requested, or by electronic mail with return confirmation, a copy of this Order with the Complaint, to each of its officers, directors, and Designated Managers; and
- B. For five (5) years from the date this Order becomes final, distribute by first-class mail, return receipt requested, or by electronic mail with return confirmation, a copy of this Order with the Complaint, within sixty (60) days, to each Person who becomes its officer, director, or Designated Manager and who did not previously receive a copy of this Order and Complaint.

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- C. Require each Person to whom a copy of this Order is furnished pursuant to Paragraphs III.A and III.B of this Order to sign and submit to Respondent within sixty (60) days of the receipt thereof a statement that: (1) represents that the undersigned has read and understands the Order; and (2) acknowledges that the undersigned has been advised and understands that non-compliance with the Order may subject Respondent to penalties for violation of the Order.

V.

IT IS FURTHER ORDERED that Respondent shall file verified written reports within ninety (90) days from the date this Order becomes final, annually thereafter for five (5) years on the anniversary of the date this Order becomes final, and at such other times as the Commission may by written notice require. Each report shall include, among other information that may be necessary:

- A. A description of any Information Exchange, including a description of (i) the identity of any Competitors participating in such exchange; (ii) the Competitively Sensitive Information being exchanged; (iii) the identity of the Third Party Manager and a description of how the Competitively Sensitive Information has been and is expected to be Managed by the Third Party Manager; and (iv) the identity of each employee of the Respondent who received information, directly or indirectly, from the Third Party Manager;
- B. Copies of the signed return receipts or electronic mail with return confirmations required by Paragraphs III.A, III.B, and III.C of this Order;
- C. One copy of each Communication during the relevant reporting period that relates to changes in Respondent's published list price or multiplier discounts for sales of DIPF made in or into the United States when that Communication is to two (2) or more customers and those changes are simultaneously applicable to two (2) or more customers; and

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- D. A detailed description of the manner and form in which Respondent has complied and is complying with this Order.

VI.

IT IS FURTHER ORDERED that Respondent shall notify the Commission:

- A. Of any change in its principal address within twenty (20) days of such change in address; and
- B. At least thirty (30) days prior to any proposed: (1) dissolution of Respondent; (2) acquisition, merger, or consolidation of Respondent; or (3) any other change in Respondent including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of this Order.

VII.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, Respondent shall permit any duly authorized representative of the Commission:

- A. Access, during office hours of Respondent, and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and all other records and documents in the possession, or under the control, of Respondent relating to compliance with this Order, which copying services shall be provided by Respondent at its expense; and
- B. Upon fifteen (15) days notice, and in the presence of counsel, and without restraint or interference from it, to interview officers, directors, or employees of Respondent.

Concurring and Dissenting Statement

VIII.

IT IS FURTHER ORDERED that this Order shall terminate on May 8, 2032.

By the Commission, Commissioner Ohlhausen not participating.

**Statement of Commissioner J. Thomas Rosch,
Concurring in Part and Dissenting in Part In the Matter of
McWane, Inc. and Star Pipe Products, Ltd., and In the
Matter of Sigma Corporation**

The Commission has voted separately (1) to issue a Part 3 Administrative Complaint against Respondents McWane, Inc. (“McWane”) and Star Pipe Products, Ltd. (“Star”), and (2) to accept for public comment a Consent Agreement settling similar allegations in a draft Part 2 Complaint against Respondent Sigma Corporation (“Sigma”). While I have voted in favor of both actions, I respectfully object to the inclusion—in both the Part 3 Administrative Complaint and in the draft Part 2 Complaint—of claims against McWane and Sigma, to the extent that such claims are based on allegations of exclusive dealing, as explained in Part I below. I also respectfully object to naming Star, a competitor of McWane and Sigma, as a Respondent in the Part 3 Administrative Complaint, which alleges, *inter alia*, that Star engaged in a horizontal conspiracy to fix the prices of ductile iron pipe fittings (DIPFs) sold in the United States, and in a related, information exchange, as described in Part II below.

I.

For reasons similar to those that I articulated in a recent dissent in another matter, *Pool Corp.*, FTC File No. 101-0115, <http://www.ftc.gov/os/caselist/1010115/111121poolcorpstatementrosch.pdf>, I do not think that the Part 3 Administrative Complaint against McWane and the draft Part 2 Complaint against Sigma

Concurring and Dissenting Statement

adequately allege exclusive dealing as a matter of law. In particular, there is case law in both the Eighth and Ninth Circuits blessing the conduct that the complaints charge as exclusive dealing.

II.

I also object to the allegations in the Part 3 Administrative Complaint and in the draft Part 2 Complaint that name Star as a co-conspirator in the alleged horizontal price-fixing of DIPF sold in the United States and the related, alleged DIFRA information exchange.¹ I do not consider naming Star, along with McWane and Sigma, as a co-conspirator to be in the public interest. There are at least three reasons why this is so. First, although there may be reason to believe Star conspired with McWane and Sigma in this oligopolistic industry, Star seems much less culpable than the others. More specifically, I believe that we must be mindful of the consequences of public law enforcement in assessing whether the public interest favors joining Star as a co-conspirator.² Second, I am concerned that a trier of fact may find it hard to believe that Star could be both a victim of McWane's alleged "threats" to deal exclusively with distributors, and at more or less the same time (the "exclusive dealing" program began in September 2009), a co-conspirator with McWane in a price-fixing conspiracy (June 2008 to February 2009). (This concern further explains why I do not have reason to believe that the exclusive dealing theory is a viable one.) Third, I am concerned that Star's alleged participation in the price-fixing conspiracy and information exchange relies, in part, on treating communications to distributors as actionable signaling on prices or price levels.³ See,

1 See McWane/Star Part 3 Administrative Compl. ¶¶ 29–38, 64–65; Sigma draft Part 2 Compl. ¶¶ 23–33.

2 See *Credit Suisse Secs. (USA) LLC v. Billing*, 551 U.S. 264, 281–84 (2007) (questioning the social benefits of private antitrust lawsuits filed in numerous courts when the enforcement-related need is relatively small); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557–60 (2007) (expressing concern with the burdens and costs of antitrust discovery, and the attendant *in terrorem* effect, associated with private antitrust lawsuits).

3 McWane/Star Part 3 Administrative Compl. ¶ 34b; Sigma draft Part 2 Compl. ¶ 29.

Analysis to Aid Public Comment

e.g., Williamson Oil Co., Inc. v. Philip Morris USA, 346 F.3d 1287, 1305–07 (11th Cir. 2003).

**ANALYSIS OF CONSENT ORDER TO AID PUBLIC
COMMENT**

The Federal Trade Commission (“Commission” or “FTC”) has accepted, subject to final approval, an agreement containing a proposed consent order (“Agreement”) from Star Pipe Products, Ltd. (“Star”). The Agreement seeks to resolve in part an administrative complaint issued by the Commission on January 4, 2012. The complaint charges that Star and certain of its competitors violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, by engaging in collusive acts and practices in the market for ductile iron pipe fittings (“DIPF”).

The Commission anticipates that, with regard to Star, the competitive issues described in the complaint will be resolved by accepting the proposed order, subject to final approval, contained in the Agreement. The Agreement has been placed on the public record for 30 days for receipt of comments from interested members of the public. Comments received during this period will become part of the public record. After 30 days, the Commission will again review the Agreement and any comments received, and will decide whether it should withdraw from the Agreement or make final the proposed order contained in the Agreement.

The purpose of this Analysis to Aid Public Comment is to invite and facilitate public comment concerning the proposed order. It is not intended to constitute an official interpretation of the Agreement and proposed order or in any way to modify its terms.

The proposed order is for settlement purposes only and does not constitute an admission by Star that it violated the law, or that the facts alleged in the complaint, other than jurisdictional facts, are true.

Analysis to Aid Public Comment

I. The Complaint

The following allegations are taken from the complaint and publicly available information.

A. Background

The largest sellers of DIPF in the United States are Star, McWane, Inc. (“McWane”), and Sigma Corporation (“Sigma”). DIPF are used in municipal water distribution systems to change pipe diameter or pipeline direction. There are no widely available substitutes for DIPF. Both imported and domestically produced DIPF are commercially available.

DIPF suppliers distribute these products through wholesale distributors, known as waterworks distributors, which specialize in distributing products for water infrastructure projects. The end users of DIPF are typically municipal and regional water authorities.

DIPF prices are based off of published list prices and discounts, with customers negotiating additional discounts off of those list prices and discounts on a transaction-by-transaction basis. DIPF suppliers also offer volume rebates.

B. Challenged Conduct

Between January 2008 and January 2009, Star allegedly conspired with McWane and Sigma to increase the prices at which DIPF were sold in the United States. In furtherance of the conspiracy, and at the request of McWane, Star changed its business methods to make it easier to coordinate price levels, first by limiting the discretion of regional sales personnel to offer price discounts, and later by exchanging information documenting the volume of its monthly sales, along with sales by McWane and Sigma, through an entity known as the Ductile Iron Fittings Research Association (“DIFRA”).

Analysis to Aid Public Comment

II. Legal Analysis

The January and June 2008 price restraints among Star, McWane, and Sigma alleged in the complaint are naked restraints on competition that are *per se* unlawful.¹

The June 2008 agreement, which was allegedly reached after a public invitation to collude by McWane, illustrates how price fixing agreements may be reached in public. Here, McWane's invitation to collude was conveyed in a letter sent to waterworks distributors, the common customers of Star, McWane, and Sigma. McWane's letter contained a section that was meaningless to waterworks distributors, but was intended to inform Star and Sigma of the terms on which McWane desired to fix prices.²

The DIFRA information exchange was a component of the illegal price fixing agreement. Specifically, the complaint alleges that the DIFRA information exchange played a critical role in the 2008 price fixing conspiracy, first as the *quid pro quo* for a price increase by McWane in June 2008, and then by enabling Star, McWane, and Sigma to monitor each others' adherence to the collusive arrangement through the second half of 2008.

Evaluated apart from the price fixing conspiracy, Star's participation in the information exchange is an independent

1 FEDERAL TRADE COMMISSION & UNITED STATES DEPARTMENT OF JUSTICE, ANTITRUST GUIDELINES FOR COLLABORATION AMONG COMPETITORS ("Competitor Collaboration Guidelines")§ 1.2 (2000); *In re North Texas Specialty Physicians*, 140 F.T.C. 715, 729 (2005) ("We do not believe that the *per se* condemnation of naked restraints has been affected by anything said either in *California Dental* or *Polygram*").

2 Because McWane's communication informed its rivals of the terms of price coordination desired by McWane without containing any information for customers, this communication had no legitimate business justification. See *In re Petroleum Products Antitrust Litig.*, 906 F.2d 432,448 (9th Cir. 1990) (public communications may form the basis of an agreement on price levels when "the public dissemination of such information served little purpose other than to facilitate interdependent or collusive price coordination").

Analysis to Aid Public Comment

violation of the antitrust laws because this concerted action facilitated price coordination among the three competitors.³

III. The Proposed Order

The proposed order is designed to remedy the unlawful conduct charged against Star in the complaint and to prevent the recurrence of such conduct.

Paragraph II.A of the proposed order prohibits Star from participating in or maintaining any combination or conspiracy between any competitors to fix, raise or stabilize the prices at which DIPF are sold in the United States, or to allocate or divide markets, customers, or business opportunities.

Paragraph II.B of the proposed order prohibits Star from soliciting or inviting any competitor to participate in any of the actions prohibited in Paragraphs II.A.

Paragraph II.C of the proposed order prohibits Star from participating in or facilitating any agreement between competitors to exchange “Competitively Sensitive Information” (“CSI”), defined as certain types of information related to the cost, price, output or customers of or for DIPF. Paragraph II.D of the proposed order prohibits Star from unilaterally disclosing CSI to a competitor, except as part of the negotiation of a joint venture, license or acquisition, or in certain other specified circumstances. Paragraph II.E of the proposed order prohibits Star from

³ The Commission articulated a safe harbor for exchanges of price and cost information in Statement 6 of the 1996 Health Care Guidelines. See DEPT OF JUSTICE & FEDERAL TRADE COMM’N, STATEMENTS OF ANTITRUST ENFORCEMENT POLICY IN HEALTH CARE, STATEMENT 6: ENFORCEMENT POLICY ON PROVIDER PARTICIPATION IN EXCHANGES OF PRICE AND COST INFORMATION (1996). The DIFRA information exchange failed to qualify for the safety zone of the Health Care Guidelines for several reasons. Although the DIFRA information exchange was managed by a third party, the information exchanged was insufficiently historical, the participants in the exchange too few, and their individual market shares too large to qualify for the permissive treatment contemplated by the Health Care Guidelines. While failing to qualify for the safety zone of the Health Care Guidelines is not in itself a violation of Section 5, firms that wish to minimize the risk of antitrust scrutiny should consider structuring their collaborations in accordance with the criteria of the safety zone.

Analysis to Aid Public Comment

attempting to engage in any of the activities prohibited by Paragraphs II.A, II.B, II.C, or II.D.

The prohibitions on Star's communication of CSI with competitors contained in Paragraphs II.C and II.D of the proposed order are subject to a proviso that permits Star to communicate CSI to its competitors under certain circumstances. Under the proposed order, Star may participate in an information exchange with its competitors in the DIPF market provided that the information exchange is structured in such a way as to minimize the risk that it will facilitate collusion among Star and its competitors. Specifically, the proposed order requires any exchange of CSI to occur no more than twice yearly, and to involve the exchange of aggregated information more than six months old. In addition, the aggregated information that is exchanged must be made publicly available, which increases the likelihood that an information exchange involving Star will simultaneously benefit consumers. The proposed order also prohibits Star's participation in an exchange of CSI involving price, cost or total unit cost of or for DIPF when the individual or collective market shares of the competitors seeking to participate in an information exchange exceed specified thresholds. The rationale for this provision is that in a highly concentrated market the risk that the information exchange may facilitate collusion is high. Due to the highly concentrated state of the DIPF market as currently structured, an information exchange involving Star and relating to price, output or total unit cost of or for DIPF is unlikely to reoccur in the foreseeable future.

Paragraph III of the proposed order requires Star to cooperate with Commission staff in the still-pending administrative litigation against McWane.

The proposed order has a term of 20 years.

Complaint

IN THE MATTER OF

WINCHESTER INDUSTRIESCONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF
SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket No. C-4362; File No. 102 3171
Complaint, May 16, 2012 – Decision, May 16, 2012

This consent order addresses Winchester Industries' marketing and sale of replacement windows for use in residences. The complaint alleges that respondent did not possess and rely upon a reasonable basis substantiating representations that consumers who replace their windows with Bristol and Winter Lock Super Triple-E A-Plus with Alpha-10 windows are likely to achieve residential energy savings of 47% or to save 47% on their heating and cooling costs when it made them. The consent order prohibits respondent from making any representation that: (A) consumers who replace their windows with respondent's windows achieve up to or a specified amount or percentage of energy savings or reduction in heating and cooling costs; or (B) respondent guarantees or pledges that consumers who replace their windows with respondent's windows will achieve up to or a specified amount or percentage of energy savings or reduction in heating and cooling costs; unless the representation is non-misleading and, at the time of making such representation, respondent possesses and relies upon competent and reliable scientific evidence to substantiate that all or almost all consumers are likely to receive the maximum represented savings or reduction.

Participants

For the *Commission*: Robert Frisby, Zachary Hunter, Joshua Millard, and Sarah Waldrop.

For the *Respondent*: Eric Horne, Eckert Seamans Cherin & Mellott, LLC.

COMPLAINT

The Federal Trade Commission, having reason to believe that Winchester Industries ("respondent") has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Winchester Industries is a Pennsylvania partnership with its principal office or place of business at 500 Leech Avenue, Saltsburg, Pennsylvania 15681. The partnership