

Analysis of Proposed Consent Order to Aid Public Comment
In the Matter of Star Pipe Products, Ltd., Docket No. 9351

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.

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”).

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.

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”).

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

³ The Commission articulated a safe harbor for exchanges of price and cost information in Statement 6 of the 1996 Health Care Guidelines. *See* DEP'T 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.

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.