[BILLING CODE: 6750-01S]

FEDERAL TRADE COMMISSION

[File No. 101 0080]

Sigma Corporation; Analysis of Proposed Consent Order to Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed Consent Agreement.

SUMMARY: The consent agreement in this matter settles alleged violations of federal law prohibiting unfair or deceptive acts or practices or unfair methods of competition. The attached Analysis to Aid Public Comment describes both the allegations in the draft complaint and the terms of the consent order -- embodied in the consent agreement -- that would settle these allegations.

DATES: Comments must be received on or before February 6, 2012.

ADDRESSES: Interested parties may file a comment online or on paper, by following the instructions in the Request for Comment part of the **SUPPLEMENTARY INFORMATION** section below. Write “Sigma, File No. 101 0080" on your comment, and file your comment online at https://ftcpublic.commentworks.com/ftc/sigmaconsent, by following the instructions on the web-based form. If you prefer to file your comment on paper, mail or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Room H-113 (Annex D), 600 Pennsylvania Avenue, NW, Washington, DC 20580.

FOR FURTHER INFORMATION CONTACT: Christopher Renner (202-326-3173), FTC, Bureau of Competition, 600 Pennsylvania Avenue, NW, Washington, D.C. 20580.

SUPPLEMENTARY INFORMATION: Pursuant to section 6(f) of the Federal Trade

Commission Act, 38 Stat. 721, 15 U.S.C. 46(f), and § 2.34 the Commission Rules of Practice, 16 CFR 2.34, notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of thirty (30) days. The following Analysis to Aid Public Comment describes the terms of the consent agreement, and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained from the FTC Home Page (for January 4, 2012), on the World Wide Web, at http://www.ftc.gov/os/actions.shtm. A paper copy can be obtained from the FTC Public Reference Room, Room 130-H, 600 Pennsylvania Avenue, NW, Washington, D.C. 20580, either in person or by calling (202) 326-2222.

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before February 6, 2012. Write "Sigma, File No. 101 0080" on your comment. Your comment – including your name and your state – will be placed on the public record of this proceeding, including, to the extent practicable, on the public Commission Website, at http://www.ftc.gov/os/publiccomments.shtm. As a matter of discretion, the Commission tries to remove individuals' home contact information from comments before placing them on the Commission Website.

Because your comment will be made public, you are solely responsible for making sure that your comment does not include any sensitive personal information, like anyone's Social Security number, date of birth, driver's license number or other state identification number or foreign country equivalent, passport number, financial account number, or credit or debit card number. You are also solely responsible for making sure that your comment does not include any sensitive health information, like medical records or other individually identifiable health

information. In addition, do not include any "[t]rade secret or any commercial or financial information which is obtained from any person and which is privileged or confidential," as provided in Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2). In particular, do not include competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

If you want the Commission to give your comment confidential treatment, you must file it in paper form, with a request for confidential treatment, and you have to follow the procedure explained in FTC Rule 4.9(c), 16 CFR 4.9(c).[1] Your comment will be kept confidential only if the FTC General Counsel, in his or her sole discretion, grants your request in accordance with the law and the public interest.

Postal mail addressed to the Commission is subject to delay due to heightened security screening. As a result, we encourage you to submit your comments online. To make sure that the Commission considers your online comment, you must file it at https://ftcpublic.commentworks.com/ftc/sigmaconsent by following the instructions on the web-based form. If this Notice appears at http://www.regulations.gov/#!home, you also may file a comment through that website.

If you file your comment on paper, write "Sigma, File No. 101 0080" on your comment and on the envelope, and mail or deliver it to the following address: Federal Trade Commission, Office of the Secretary, Room H-113 (Annex D), 600 Pennsylvania Avenue, NW, Washington, DC 20580. If possible, submit your paper comment to the Commission by courier or overnight

[1] In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. *See* FTC Rule 4.9(c), 16 CFR 4.9(c).

service.

Visit the Commission Website at http://www.ftc.gov to read this Notice and the news release describing it. The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives on or before February 6, 2012. You can find more information, including routine uses permitted by the Privacy Act, in the Commission's privacy policy, at http://www.ftc.gov/ftc/privacy.htm.

Analysis of Agreement Containing Consent Order to Aid Public Comment

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a proposed consent order ("Agreement") from Sigma Corporation ("Sigma"). The Agreement seeks to resolve charges that Sigma violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, by engaging in a variety of collusive and exclusionary acts and practices in the market for ductile iron pipe fittings ("DIPF").

The Commission anticipates that 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 Sigma 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

DIPF are used in municipal water distribution systems to change pipe diameter or pipeline direction. 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.

Both imported and domestically produced DIPF are commercially available. Sigma and its largest competitors in the DIPF market, McWane, Inc. ("McWane") and Star Pipe Products Ltd. ("Star"), all sell imported DIPF. McWane was the only domestic producer of a full line of small and medium-sized DIPF until Star's entry into domestic production in 2009.

There are no widely available substitutes for DIPF. Some projects require that only domestically produced DIPF be used. Domestically produced DIPF sold for use in these projects typically command higher prices than comparable imported DIPF.

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, Sigma allegedly conspired with McWane and Star to increase the prices at which imported DIPF were sold in the United States. In furtherance of the conspiracy, and at the request of McWane, Sigma 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 McWane and Star, through an entity known as the Ductile Iron Fittings Research Association ("DIFRA").

After the collapse of the DIFRA information exchange in early 2009, Sigma attempted to revive the conspiracy by convincing McWane and Star to raise their prices and to resume the exchange of sales data through DIFRA. McWane and Star rejected Sigma's invitation to collude.

The collapse of DIFRA coincided with the enactment of The American Recovery and Reinvestment Act of 2009 ("ARRA") in February 2009. In the ARRA, the United States Congress allocated more than $6 billion to water infrastructure projects, but included a provision requiring the use of domestically produced materials in those projects (the "Buy American" requirement). At the time the ARRA was passed, McWane was the sole supplier of a full line of domestic DIPF in the most commonly used size ranges, and possessed monopoly power in that market.

In response to the passage of the ARRA and its Buy American provision, Sigma, Star and others attempted to enter the domestically produced DIPF market in competition with McWane. Rather than compete with one another in the domestic DIPF market, Sigma and McWane executed a Master Distributor Agreement ("MDA"), whereby Sigma was appointed as a

distributor of McWane's domestically produced DIPF. Through the MDA, Sigma accepted compensation from McWane in exchange for abandoning its planned entry into the domestic DIPF market. Sigma also agreed to adopt exclusive dealing policies similar to those adopted by McWane, in furtherance of a conspiracy with McWane to exclude Star and to monopolize the domestic DIPF market.

The complaint alleges that Sigma had no legitimate business justification for this course of conduct, and that Sigma's collusive and exclusionary conduct has caused higher prices for both imported and domestically produced DIPF.

II. Legal Analysis

We analyze first the various agreements allegedly reached by Sigma with its competitors to limit competition relating to imported DIPF, and then address Sigma's participation, along with McWane, in the alleged monopolization of the domestic DIPF market.

A. Sigma's Involvement in the 2008 Price Fixing Conspiracy

The January and June 2008 price restraints among Sigma, McWane and Star alleged in the complaint are the sort of naked restraints on competition that are *per se* unlawful.[2] 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 McWane, Sigma and Star. McWane's letter contained a section that was meaningless to waterworks distributors, but was intended to inform Sigma and Star of the terms on which

[2] 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

McWane desired to fix prices.[3]

The DIFRA information exchange was also illegal. 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 Sigma, McWane and Star to monitor each others' adherence to the collusive arrangement through the second half of 2008.[4]

B. Sigma's 2009 Invitation to Collude

The complaint includes allegations of a stand-alone Section 5 violation, namely that Sigma invited McWane and Star to collude with Sigma to increase DIPF prices in early 2009.[5]

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anything said either in *California Dental* or *Polygram*").

[3] 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").

[4] 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.

[5] *In re U-Haul International, Inc.*, F.T.C. File No. 081-0157, 2010 FTC LEXIS 61, *6 (July 14, 2010); *In re Valassis Communications, Inc.*, F.T.C. File No. 051-008, 2006 FTC LEXIS 25, *4-7 (April 19, 2006); *In re MacDermid, Inc.*, F.T.C. File No. 991-0167, 1999 FTC LEXIS 191, *10 (Feb. 4, 2000); *In re Stone Container Corp.*, 125 F.T.C. 853 (1998); *In re Precision Moulding Co.*, 122 F.T.C. 104 (1996); *In re YKK (USA) Inc.*, 116 F.T.C. 628 (1993);

The term "invitation to collude" describes an improper communication from a firm to an actual or potential competitor that the firm is ready and willing to coordinate on price or output. Such invitations to collude impose a significant risk of anticompetitive harm to consumers, and as such, violate Section 5 of the FTC Act absent a legitimate business justification.

C. Sigma's Involvement in a 2009 Conspiracy with McWane to Eliminate Competition in the Domestic DIPF Market

The complaint alleges that, after the passage of the ARRA, Sigma prepared to enter the domestic DIPF market in competition with McWane. However, McWane wanted to avoid this competition, so McWane and Sigma agreed that Sigma would participate in the domestic DIPF market only as a distributor of McWane's product. Through this arrangement, McWane shared a portion of its monopoly profits in the domestic DIPF market with Sigma in exchange for Sigma's commitment to abandon its plans to enter that market in competition with McWane. Such agreements are presumptively unlawful.[6]

D. McWane and Sigma Conspired to Monopolize the Domestic DIPF Market

The elements of a conspiracy to monopolize are: (1) the existence of a combination or conspiracy; (2) an overt act in furtherance of the conspiracy; and (3) a specific intent to monopolize.[7] Here, the complaint alleges that through their MDA arrangement, McWane and

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In re A.E. Clevite, Inc., 116 F.T.C. 389 (1993); *In re Quality Trailer Products Corp.*, 115 F.T.C. 944 (1992). In addition, an invitation to collude may violate Section 2 of the Sherman Act as an act of attempted monopolization, and may also violate federal wire and mail fraud statutes. *See United States v. American Airlines*, 743 F.2d 1114 (5th Cir. 1984); *United States v. Ames Sintering Co.*, 927 F.2d 232 (6th Cir. 1990).

[6] *E.g.*, *Palmer v. BRG of Georgia, Inc*., 498 U.S. 46, 49-50 (1990); *United States v. Masonite Corp.*, 316 U.S. 265, 281 (1942)*; In re SKF Industries, Inc.*, 94 F.T.C. 6, 97-104 (1979).

[7] *See Volvo N. Am. Corp. v. Men's Int'l Prof'l Tennis Council*, 857 F.2d 55, 74 (2d Cir.

Sigma agreed to limit competition between themselves in the domestic DIPF market, and to exclude their rivals in that market, including Star, by the adoption of duplicate exclusive dealing policies, and did so with the common and specific intent to maintain and share monopoly profits in the domestic DIPF market.

III. The Proposed Order

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

Paragraph II.A of the proposed order prohibits Sigma 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 Sigma 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 Sigma 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 Sigma 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 Sigma from attempting to engage in any of the activities prohibited by Paragraphs II.A, II.B, II.C, or II.D.

The prohibitions on Sigma's communication of CSI with competitors contained in

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1988).

Paragraphs II.C and II.D of the proposed order are subject to a proviso that permits Sigma to communicate CSI to its competitors under certain circumstances. Under the proposed order, Sigma 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 the Sigma 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 Sigma will simultaneously benefit consumers. The proposed order also prohibits Sigma'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 Sigma and relating to price, output or total unit cost of or for DIPF is unlikely to reoccur in the foreseeable future.

The proposed order has a term of 20 years.

By direction of the Commission.

Donald S. Clark
Secretary.

STATEMENT OF COMMISSIONER J. THOMAS ROSCH, CONCURRING IN PART

AND DISSENTING IN PART

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 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.[8] 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.9 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.[10] *See, e.g., Williamson Oil Co., Inc. v. Philip Morris USA*, 346 F.3d 1287, 1305–07 (11thCir. 2003)

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

[9] *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).

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

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