IN THE MATTER OF

OMNICARE, INC.

COMPLAINT AND FINAL ORDER IN REGARD TO ALLEGED VIOLATIONS OF SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT AND SECTION 7 OF THE CLAYTON ACT

Docket No. 9352; File No. 111 0239
Complaint, January 27, 2012 – Decision, February 22, 2012

This case addresses the $760 million acquisition by Omnicare, Inc. of certain assets of PharMerica Corporation. The complaint alleges that the acquisition, if consummated, would violate Section 5 of the Federal Trade Commission Act and Section 7 of the Clayton Act by substantially increasing Ornnicare's bargaining leverage and otherwise reducing competition in the sale of long term care pharmacy services to Plan Sponsors. The Order dismisses the Administrative Complaint without prejudice, because Respondent has announced that it is abandoning the proposed acquisition of PharMerica, and has withdrawn its Hart-Scott-Rodino Notification and Report Form filed for the proposed transaction.

Participants

For the *Commission*: *Jordan S. Andrew*, *Stephanie C. Bovee, Gerald A. Stein, Lore Unt, Mark Seidman, Christine L. White,* and *Daniel Zach.*

For the *Respondent*: *John D. Harkrider* and *Michael L. Keeley*, *Axinn, Veltrop & Harkrider, LLP*, and *Jacqueline I. Grise* and *Roxann E. Henry, Dewey & LeBoeuf.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by the Act, the Federal Trade Commission, having reason to believe that Respondent Omnicare, Inc.'s ("Omnicare") cash tender offer to acquire PharMerica Corporation ("PharMerica"), if consummated, would violate Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I.

NATURE OF THE CASE

1. Twenty-nine million elderly or disabled Americans participate in federally subsidized Medicare Part D Plans ("Part D Plans") to help pay for their prescription drugs; approximately 1.6 million of those beneficiaries reside in skilled nursing facilities ("SNFs"). Part D beneficiaries residing in SNFs receive their medications from the long-term care pharmacy ("LTC Pharmacy") with which the SNF has contracted on an exclusive basis. The beneficiaries' Part D Plan sponsors ("Part D sponsors") reimburse the LTC Pharmacy for that service under contracts that the LTC Pharmacy negotiates directly with the Part D sponsors. Omnicare, the nation's largest LTC Pharmacy, has made a hostile tender offer for its largest competitor, PharMerica (the "Acquisition"). The Acquisition, if successful, threatens to increase substantially Omnicare's negotiating leverage with Part D sponsors, and is likely to result in higher reimbursement rates paid by the Part D sponsors, their beneficiaries, and ultimately, American taxpayers who subsidize the vast majority of the Part D Plans' costs.

2. LTC Pharmacies are specialized pharmacies that do not cater to retail traffic. Instead, they package and deliver prescription medications primarily to SNFs for their residents who are receiving nursing care. Omnicare is already, by far, the largest LTC Pharmacy in the United States, controlling   % of the country's licensed SNF beds. As a result of this market position, it already enjoys considerable leverage in its negotiations with Part D sponsors. Omnicare seeks to extend its market-leading position by acquiring its largest, and only, national competitor, PharMerica, which controls   % of the country's licensed SNF beds. PharMerica's board of directors has rejected Omnicare's offer (and has recommended, in a publicly issued statement, that shareholders not tender their shares to Omnicare), in part because, in PharMerica's words: "Antitrust clearance to combine competitors with #1 and #2 market share in institutional pharmacy is likely to be difficult to achieve and involve lengthy administrative and court proceedings." Post-Acquisition, the combined firm's only competitors would be small, regional and

local pharmacies, none of which currently possesses substantial market share or operates in more than a few states.

3. The Centers for Medicare and Medicaid Services ("CMS") requires Part D sponsors to provide "convenient access" to LTC Pharmacies for their beneficiaries residing in SNFs. SNFs contract exclusively with a single LTC Pharmacy to meet the prescription medication needs of all their residents. Thus, the larger the LTC Pharmacy (measured by number of SNF beds served), the more likely CMS is to require a Part D sponsor to include it in its Part D network. Sponsors that fail to satisfy CMS's "convenient access" requirement risk being barred from offering their Part D Plans to any beneficiaries, even though SNF residents make up only a small portion of their enrollees.

4. Omnicare's exclusive contractual relationships with a large number of the nation's 16,000-plus SNFs are the source of its market-leading position. Because Omnicare serves far more SNF beds than any other LTC Pharmacy, it is often able to extract higher prices and other more favorable contract terms from Part D sponsors. As Omnicare's CEO recently explained to investors, "[Omnicare] basically control[s] 50% of the patient . . . population in the nursing home agencies. . . . So with that type of leverage and market share, you know, we're in a different and unique position when we're negotiating our contracts with [Part D sponsors]."

5. Omnicare has explicitly and successfully invoked the risk that Part D sponsors face if they fail to contract with it in its negotiations with several Part D sponsors. Indeed, Omnicare's standard negotiating practice is to threaten to terminate its participation in the Part D sponsor's LTC Pharmacy network if the sponsor refuses its demand for higher rates or better terms. To drive home that risk, Omnicare has repeatedly threatened to bring the impasse to CMS's attention, placing CMS approval of the sponsor's entire Part D business at risk. A number of the largest Part D sponsors have capitulated to Omnicare's demands to avoid the risk that CMS would refuse to approve their Part D Plan network without Omnicare.

6. Post-Acquisition, Omnicare would control approximately 57% of all of the licensed SNF beds in the United States. The

high pre- and post-merger market shares and concentration levels render the Acquisition presumptively unlawful under the relevant case law and the U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines ("Merger Guidelines"). Evidence from CMS, as well as market participants including Part D sponsors, Pharmacy Benefit Managers ("PBMs") (which assemble LTC Pharmacy networks on their own behalf and on behalf of other Part D sponsors), SNFs, other LTC Pharmacies, and Omnicare and PharMerica themselves, confirms this strong presumption of illegality.

7. The combined firm would have unparalleled power in its negotiations with the Part D sponsors. Already a "should have," Omnicare's post-Acquisition market share will almost certainly make it a "must have" for every Part D Plan seeking to meet CMS's "convenient access" requirement. This will significantly increase Omnicare's bargaining leverage because Omnicare's threats to terminate the Part D sponsor if it refuses to agree to Omnicare's contractual demands will represent an unacceptable risk. Without the combined firm in its network, a Part D Plan would be unlikely to meet CMS's access requirement. And no Part D sponsor would rationally put its entire Part D business at risk in negotiations with the combined entity over reimbursements for the small percentage of its Part D beneficiaries who reside in SNFs.

8. Omnicare's use of termination threats to get price increases from Part D sponsors will likely escalate post-Acquisition as the combined firm flexes its increased bargaining leverage to extract even higher prices and better terms. The cost of these price increases ultimately will, in the end, largely be borne by the federal government, which subsidizes the overwhelming majority (74.5%) of each Part D Plan's costs; as well as many Part D beneficiaries, who will be forced to pay higher premiums, deductibles, and co-pays to receive Part D benefits.

9. Even if the combined firm is not ultimately deemed necessary to meet CMS's "convenient access" requirement, the acquisition of PharMerica's significant additional SNF relationships will further increase Omnicare's already substantial bargaining leverage over Part D sponsors. Omnicare and

PharMerica are also each other's closest competitors for a significant number of SNFs, providing additional leverage for Omnicare in negotiations with Part D sponsors post-Acquisition.

II.

THE RESPONDENT

10. Respondent Omnicare is incorporated in Delaware and is headquartered at 1600 RiverCenter II, 100 East RiverCenter Boulevard, Covington, Kentucky 41011. Omnicare owns and operates approximately 204 LTC Pharmacy facilities located in 44 states, which serve approximately licensed SNF beds through its exclusive contracts with SNF operators. In 2010, Omnicare generated total revenues of approximately $6.1 billion.

III.

THE TARGET OF THE ACQUISITION

11. Omnicare plans to acquire PharMerica, which is incorporated in Delaware and is headquartered at 1901 Campus Place, Louisville, Kentucky 40299. PharMerica owns and operates approximately 97 pharmacy facilities in 43 states, and controls approximately licensed SNF beds. In 2010, PharMerica had total annual revenues of approximately $1.8 billion.

IV.

JURISDICTION

12. Omnicare and each of its relevant operating subsidiaries, are, and at all relevant times have been, engaged in activities in or affecting "commerce" as defined in Section 4 of the FTC Act, 15 U.S.C. § 44, and Section 1 of the Clayton Act, 15 U.S.C. § 12.

13. PharMerica and each of its relevant operating subsidiaries, are, and at all relevant times have been, engaged in activities in or affecting "commerce" as defined in Section 4 of the FTC Act, 15 U.S.C. § 44, and Section 1 of the Clayton Act, 15 U.S.C. § 12.

14. The Acquisition constitutes an acquisition subject to Section 7 of the Clayton Act, 15 U.S.C. § 18.

V.

THE ACQUISITION

15. Through its hostile cash tender offer announced publicly on September 7, 2011, and currently set to expire on February 17, 2012, Omnicare proposes to acquire all outstanding shares of PharMerica to obtain ownership and control of the company. The value of the proposed Acquisition is approximately $760 million.

VI.

OVERVIEW OF PART D BENEFITS PROVIDED TO SNF RESIDENTS

16. Medicare Part D has been in effect since January 1, 2006. Roughly 1.1 billion prescriptions per year are processed under Part D on behalf of the approximately 29 million beneficiaries enrolled in Part D Plans. The majority of patients receiving care at SNFs at any given time in the United States are enrolled in and receive benefits from a Part D Plan.

17. SNF residents may be covered by Medicare Part A or Part D when they first enter the facility. Medicare Part A is a federal program that subsidizes inpatient hospital costs for Medicare beneficiaries, as well their initial stay at a SNF upon release from the hospital (up to the first 100 days). Because the average SNF resident stays well beyond the initial Medicare Part A period, and because some residents are already receiving Part D benefits at the time they enter the SNF, a minority of SNF residents at any given time receive Part A benefits. CMS provides a per diem payment to SNFs to cover Part A residents' cost of care, including prescription medications. SNFs are then responsible for the actual cost of their care. Part A SNF residents almost always receive Part D benefits after their Part A benefits expire.

18. Five actors are involved in providing Medicare Part D benefits to SNF residents:

a. <u>Medicare Part D beneficiaries</u> – select the SNF where they will reside and receive care, and the Part D Plan that covers their medication costs. Beneficiaries do not select the LTC Pharmacies that provide their medications while they reside in a SNF.

b. <u>SNFs</u> – care for Part D beneficiaries and other patients residing in their facilities. SNFs typically select a single LTC Pharmacy to provide the prescription medications for all of the SNF's residents, including Part D beneficiaries. SNFs do not pay for LTC Pharmacy services covered by Part D; that responsibility falls to the Part D sponsors. Indeed, SNFs are generally not even aware of the rates negotiated by Part D sponsors and the LTC Pharmacies. SNFs do not contract with Part D sponsors for drug coverage.

c. <u>LTC Pharmacies (e.g., Omnicare and PharMerica)</u> – dispense and deliver medication for the SNFs' residents, typically on an exclusive basis. LTC Pharmacies contract with (and receive reimbursement payments from) Part D sponsors for providing pharmacy services to the sponsors' beneficiaries residing at those SNFs with which the LTC Pharmacy has a contract.

d. <u>Part D sponsors</u> – offer Medicare beneficiaries, including those residing in SNFs, Part D prescription drug plans. Sponsors contract with and pay LTC Pharmacies to provide medications to their beneficiaries residing in SNFs serviced by the LTC Pharmacy.

e. <u>CMS</u> – approves and contracts with private sponsors that provide Part D Plans to Medicare beneficiaries. CMS subsidizes the majority (approximately 74.5%) of each Part D Plan's costs.

19. CMS regulations require each Part D sponsor to provide "convenient access" to LTC Pharmacies for plan beneficiaries residing at SNFs. If a sponsor does not meet its "convenient

access” obligation, CMS may prohibit the sponsor from offering Part D Plans in all or part of the country.

VII.

THE RELEVANT PRODUCT MARKET

20. The relevant product market in which to analyze the competitive effects of the Acquisition is the sale of LTC Pharmacy services to Part D sponsors for their SNF resident beneficiaries.

21. An appropriate relevant product or service market is found by determining whether a hypothetical monopolist of LTC Pharmacy products and services could profitably raise prices by a small but significant amount. Due to CMS regulations and the needs of Part D Plan beneficiaries residing in SNFs, no other services are reasonably interchangeable with those provided by LTC Pharmacies. Part D Plan beneficiaries residing in SNFs are typically immobile, cognitively impaired, or severely ill, and require medication to be ordered, delivered and administered to them at regular intervals. CMS regulations require Part D sponsors to establish LTC Pharmacy networks to meet the special pharmaceutical needs of their SNF resident beneficiaries. Accordingly, Part D sponsors could not substitute retail or mail order pharmacy services, or any other type of service, for LTC Pharmacy services.

VIII.

THE RELEVANT GEOGRAPHIC MARKET

22. The relevant geographic market in which to analyze the effects of the Acquisition is the United States.

23. An appropriate geographic market is determined by examining the geographic boundaries within which a hypothetical monopolist for the services at issue could profitably raise prices by a small but significant amount.

24. Part D Plans provide benefits to their beneficiaries throughout the country. Part D sponsors typically contract with

LTC Pharmacies to provide pharmacy services from all of their locations in the United States. A hypothetical monopolist controlling all of the LTC Pharmacies in the country could profitably increase prices to Part D sponsors for LTC Pharmacy services by at least a small but significant amount.

25. Omnicare's and PharMerica's own documents and statements to investors assess market share on a national level and focus on providing LTC Pharmacy services to Part D sponsors nationally. CMS, Part D sponsors, and PBMs (contracting on behalf of Part D sponsors), confirm that Part D sponsors purchase LTC Pharmacy services nationally.

IX.

MARKET STRUCTURE AND THE ACQUISITION'S PRESUMPTIVE ILLEGALITY

26. Part D sponsors satisfy CMS's "convenient access" requirement by contracting with LTC Pharmacies that contract with SNFs. Each SNF bed is served by only one LTC Pharmacy, since each SNF typically enters into an exclusive contract with one LTC Pharmacy. The number and share of SNF beds that a LTC Pharmacy has under contract reflects that LTC Pharmacy's importance to a sponsor's Part D Plan network and ability to satisfy CMS's "convenient access" requirement. Therefore, shares in the relevant market are best measured by the number of licensed SNF beds a LTC Pharmacy services. In its business documents and in statements to investors, Omnicare routinely uses the number of SNF beds to measure its market share.

27. The Acquisition reduces the number of national LTC Pharmacies in the United States from two to one, leaving only small, regional and local pharmacies to compete with Omnicare post-Acquisition. Omnicare's post-Acquisition market share would be approximately 57%, as measured by licensed SNF beds. Under relevant case law and the Merger Guidelines, the Acquisition is presumptively unlawful.

28. The Merger Guidelines measure market concentration using the Herfindahl-Hirschman Index ("HHI"). Under that test, a merger or acquisition is presumed likely to create or enhance

market power (and presumed illegal) when the post-merger HHI exceeds 2,500 points and the merger or acquisition increases the HHI by more than 200 points. The market concentration levels here exceed these thresholds by a wide margin. The post-Acquisition HHI level would be at least 3,253, with an increase of 1,404 points. The HHI figures are summarized in the following table.

LTC Pharmacy	**Pre-Acquisition Market Share**	**Post-Acquisition Market Share**
Omnicare	%	57%
PharMerica	%	--
Next Largest LTC Pharmacy	2%	2%
All others combined	41%	41%
	Pre-Acquisition HHI	at least 1,849
	Post-Acquisition HHI	at least 3,253
	HHI Increase	1,404

X.

ANTICOMPETITIVE EFFECTS

29. Omnicare currently possesses considerable bargaining leverage over Part D sponsors because it controls a high percentage of the SNF beds in this country. Omnicare uses that leverage to obtain better prices and other more favorable contract terms than other LTC Pharmacies.

30. Omnicare has substantial leverage in negotiations with sponsors because even now there is doubt among Part D sponsors that they could meet CMS's "convenient access" requirement without Omnicare in their networks. Since Part D went into effect in 2006, CMS has not had occasion to reach a conclusion as to whether or not a participating Part D Plan must include Omnicare in its network. But Omnicare has exploited Part D sponsors'

uncertainty about the need to have Omnicare in their networks to extract higher prices and better terms because sponsors doubt that they could offer their plans at all without reaching an agreement with Omnicare. If a Part D sponsor fails to obtain CMS approval to offer a Part D Plan, it would affect more than just the sponsor's beneficiaries residing in SNFs – the affected Part D sponsor would be barred from participating in Medicare Part D, which would mean losing an entire line of business, and for many sponsors, losing millions of beneficiaries and millions of dollars in revenues.

31. Before Omnicare's CEO, John Figueroa opened negotiations with one of the largest Part D sponsors, he asked his chief negotiator:

His chief negotiator responded:

[redacted]

32. Omnicare also derives negotiating leverage from the fact that, if Omnicare and a Part D sponsor fail to reach an agreement, the Part D sponsor would likely lose most, if not all, of its beneficiaries residing in Omnicare-served SNFs. If Omnicare refuses to participate in a Part D sponsor's network, affected SNFs would likely assist the sponsor's beneficiaries to switch to a covered Part D Plan rather than switching LTC Pharmacies. CMS regulations are designed to provide SNF residents with tremendous flexibility in selecting a Part D Plan, and CMS specifically contemplates that SNF residents will select a Part D Plan that includes the SNF's LTC Pharmacy in its network. The SNFs' other options would be to either bring in a second LTC Pharmacy to serve the out-of-network Part D Plan's beneficiaries, or switch LTC Pharmacies altogether. Neither of these options are likely because they would: upset the exclusive relationship

that exists between the SNF and its LTC Pharmacy; increase the risk of medication errors; and create other administrative, regulatory, and coordination of care problems.

33. In a number of recent negotiations, Omnicare has threatened to terminate its contracts with Part D sponsors to obtain higher prices and better terms. Part D sponsors have capitulated to Omnicare's demands to avoid the substantial risk of not having Omnicare in their networks.

34. Omnicare's own documents and statements demonstrate that Omnicare currently has unique bargaining leverage because of its share of SNF beds. For example, in a recent public statement to financial analysts and investors, John Figueroa, Omnicare's CEO, stated:

> [Omnicare] basically control[s] 50% of the patient, you know, population in the nursing home agencies. So it is pretty difficult for a patient who walks into a nursing home that is contracted with Omnicare to pick a new pharmacy. I mean they can't do it. The easier thing for them to do is actually change their [Part D Plan]. . . . So with that type of leverage and market share, you know, we're in a different and unique position when we're negotiating our contracts with [Part D Plans].

Omnicare's description of the negotiating dynamics are consistent with the tactics it employs in its negotiations with the Part D sponsors and their outcomes.

35. The CEO's view is not an isolated one within the company. In documents prepared for investor meetings, Omnicare executives wrote that,

36. Omnicare acknowledges that, as the largest LTC Pharmacy in the country, Part D sponsors would find it difficult to meet their beneficiaries' needs without Omnicare in their networks, and that this fact gives Omnicare significant bargaining leverage. For example, in a document prepared for an earnings call, Omnicare wrote that,

Just weeks before launching its hostile tender offer, Omnicare explained to potential lenders:

37. As the country's second-largest LTC Pharmacy, PharMerica also has leverage in negotiations with Part D sponsors, though substantially less than that of Omnicare. PharMerica has fewer SNF beds under contract than Omnicare does, therefore it is less likely that CMS would determine that a Part D Plan would not meet the "convenient access" requirement without PharMerica in its network. As a result, PharMerica generally receives lower prices and other less favorable terms than Omnicare.

38. Post-Acquisition, the combined firm would almost certainly become a "must have" for every Part D sponsor. At a minimum, it would be much less likely that any Part D Plan could meet CMS's "convenient access" requirement without the combined firm in its network. As the Chief Medical Officer of the Center for Medicare at CMS, testified:

> While some ambiguity may exist as to whether a Sponsor could drop either PharMerica or Omnicare from its LTC pharmacy network, that ambiguity would be eliminated by the companies' proposed consolidation. Post-consolidation it would be virtually impossible for a Sponsor to establish convenient access without the combined firm in its network due to the sheer number of LTC pharmacies that Omnicare would own.

39. Post-Acquisition, Omnicare would use its substantially greater bargaining leverage as a "must have" to increase prices for Part D sponsors to levels significantly above those that sponsors currently pay Omnicare or PharMerica. Indeed, PharMerica's CEO testified that

40. Even if Part D sponsors could exclude the combined firm from their LTC Pharmacy networks and meet CMS's "convenient access" requirement, Omnicare would possess a substantially greater number of exclusive SNF relationships post-Acquisition. A number of those SNFs, especially larger chains, consider Omnicare and PharMerica to be their two best choices for LTC Pharmacy services. The Acquisition, therefore, decreases the already low likelihood that SNFs would switch LTC pharmacies if Omnicare were to withdraw from a Part D sponsor's network. As a result, the Acquisition will further entrench Omnicare's bargaining leverage in negotiations with Part D sponsors and give it the ability and incentive to extract higher prices and other more favorable terms.

41. If Part D sponsors have higher LTC Pharmacy costs as a result of the Acquisition, these increased costs will likely be passed on to CMS and in the end, largely borne by U.S. taxpayers, as the federal government subsidizes the majority of Part D's costs. Medicare Part D beneficiaries likely also will pay higher costs since Part D sponsors will have to cover some or all of the remainder of the cost increases with higher premiums, co-pays, and deductibles.

42. According to CMS, "Omnicare's proposed acquisition of PharMerica appears likely to result in higher reimbursement rates (or to slow the likely decline in reimbursement rates) and thereby to increase the cost to CMS (and therefore the U.S. government and U.S. taxpayers) as well as any individuals who pay out-of-pocket costs in connection with such services." CMS's testimony is confirmed by the testimony of a number of the largest Part D sponsors.

XI.

ENTRY CONDITIONS

43. Neither entry by new LTC Pharmacies, nor expansion by the remaining small, local and regional LTC Pharmacies, will deter or counteract the Acquisition's likely harm – higher prices paid by Part D sponsors (and others) as a result of the combined firm's increased bargaining leverage.

44. Typically, entry sufficient to counteract the anticompetitive effects of an acquisition is likely where higher post-acquisition prices induce firms to quickly enter the relevant market, providing additional supply and competition which ultimately drive prices back down. That competitive mechanism is absent here. The higher prices charged by the combined entity to Part D sponsors post-Acquisition are not likely to provide timely market opportunities for other LTC Pharmacies to win SNF business because any post-Acquisition price increases to Part D sponsors will likely not impact SNFs. If no opportunity is created to win additional SNF business, no new or fringe LTC Pharmacy is likely to be able to undermine the leverage against Part D sponsors that Omnicare will gain by acquiring PharMerica. Indeed, to the extent that the combined entity chooses to offer slightly better terms to SNFs for their Medicare Part A business after it raises its prices to Part D sponsors, Omnicare will be able to further entrench its share of SNF beds, and hence, its leverage against the Part D sponsors.

45. Only the combined firm will benefit from the expected price increase to Part D sponsors. New LTC Pharmacy entrants (and fringe players) will not benefit from the higher Part D rates because they will not have the bargaining leverage necessary to obtain those rates from Plan D sponsors. For this reason too, the post-Acquisition elevated Part D prices will not encourage entry into the LTC Pharmacy market, and will not reduce the combined firm's bargaining leverage.

46. The remaining small, local and regional LTC Pharmacies are not likely to grow significantly after the Acquisition. Even if they were to do so, they would need to grow to more than twenty times their current size to even approach Omnicare's share post-

Acquisition, and even then, they would not be able to undermine Omnicare's increased bargaining leverage unless their twenty-fold growth came primarily at Omnicare's expense. Such growth (or entry on such a scale) is highly unlikely to occur in a timely manner sufficient to undermine Omnicare's leverage with Part D sponsors.

XII.

EFFICIENCIES

47. Respondent Omnicare will be unable to establish the existence of significant, cognizable, and merger-specific efficiencies sufficient to counteract the anticompetitive effects of the Acquisition.

XIII.

VIOLATIONS

48. The allegations of Paragraphs 1 through 47 above are incorporated by reference as though fully set forth herein.

49. The Acquisition, if consummated may substantially lessen competition in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and would be an unfair method of competition in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

NOTICE

Notice is hereby given to the Respondent that the twenty-seventh day of June, 2012, at 10:00 a.m. is hereby fixed as the time, and Federal Trade Commission offices, 600 Pennsylvania Avenue, N.W., Room 532, Washington, D.C. 20580, as the place when and where an evidentiary 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 and the Clayton 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 facts 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 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 and conclusions under Rule 3.46 of the Commission's Rules of Practice for Adjudicative Proceedings.

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 the answer is filed by the 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., Room 532, Washington, D.C. 20580. Rule 3.21(a) requires a meeting of the parties' counsel as early as practicable before the pre-hearing scheduling conference (but in any event no later than five (5) days after the answer is filed by the Respondent). Rule 3.31(b) obligates counsel for each party, within five (5) days of receiving the Respondent's answer, to make certain initial disclosures without awaiting a discovery request.

NOTICE OF CONTEMPLATED RELIEF

Should the Commission conclude from the record developed in any adjudicative proceedings in this matter that the Acquisition challenged in this proceeding violates Section 7 of the Clayton Act, as amended, or Section 5 of the FTC Act, as amended, the Commission may order such relief against Respondent as is supported by the record and is necessary and appropriate, including, but not limited to:

1. If the Acquisition is consummated, divestiture or reconstitution of all associated and necessary assets, in a manner that restores two or more distinct and separate, viable and independent businesses in the relevant market, with the ability to offer such products and services as Omnicare and PharMerica were offering and planning to offer prior to the Acquisition.

2. A prohibition against any transaction between Omnicare and PharMerica that combines their businesses in the relevant market, except as may be approved by the Commission.

3. A requirement that, for a period of time, Omnicare and PharMerica provide prior notice to the Commission of acquisitions, mergers, consolidations, or any other combinations of their businesses in the relevant market with any other company operating in the relevant market.

4. A requirement to file periodic compliance reports with the Commission.

5. Any other relief appropriate to correct or remedy the anticompetitive effects of the Acquisition or to restore PharMerica as a viable, independent competitor in the relevant market.

IN WITNESS WHEREOF, the Federal Trade Commission has caused this complaint to be signed by its Secretary and its official seal to be hereto affixed, at Washington, D.C., this twenty-seventh day of January, 2012.

By the Commission, Commissioner Rosch dissenting.

ORDER DISMISSING COMPLAINT

On January 27, 2012, the Federal Trade Commission issued the Administrative Complaint in this matter, having reason to believe that Respondent Omnicare, Inc.'s cash tender offer to acquire PharMerica Corporation, if consummated, would violate Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18. Complaint Counsel and Respondent have now filed a Joint Motion to Dismiss Complaint, which states that Respondent is abandoning the proposed acquisition of PharMerica, and has withdrawn its Hart-Scott-Rodino Notification and Report Form filed for the proposed transaction.[1]

The Commission has determined to dismiss the Administrative Complaint without prejudice, as the most important elements of the relief set out in the Notice of Contemplated Relief in the Administrative Complaint have been accomplished without the need for further administrative litigation.[2] In particular, Respondent has announced that it is abandoning the proposed acquisition of PharMerica, and has withdrawn its Hart-Scott-Rodino Notification and Report Form

[1] *See* Joint Motion To Dismiss Complaint (February 21, 2012), *at* http://www.ftc.gov/os/adjpro/d9352/120221omnicaremtn.pdf.

[2] *See, e.g., In the Matter of Thoratec Corporation and HeartWare International, Inc., Docket No. 9339,* Order Dismissing Complaint (August 11, 2009), *at* http://www.ftc.gov/os/adjpro/d9339/090811thoatecorder.pdf; *In the Matter of CSL Limited and Cerberus-Plasma Holdings, LLC, Docket No. 9337*, Order Dismissing Complaint (June 22, 2009), *at* http://www.ftc.gov/os/adjpro/d9337/090622commorderdismisscomplaint.pdf.

filed for the proposed transaction. As a consequence, the Respondent would not be able to effect the proposed transaction without filing a new Hart-Scott-Rodino Notification and Report Form.

For the foregoing reasons, the Commission has determined that the public interest warrants dismissal of the Administrative Complaint in this matter. The Commission has determined to do so without prejudice, however, because it is not reaching a decision on the merits. Accordingly,

IT IS ORDERED THAT the Administrative Complaint in this matter be, and it hereby is, dismissed without prejudice.

By the Commission.

IN THE MATTER OF

AMERIGAS PROPANE, L.P., AMERIGAS PROPANE, INC., ENERGY TRANSFER PARTNERS, L.P., AND ENERGY TRANSFER PARTNERS, GP, L.P.

CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT AND SECTION 7 OF THE CLAYTON ACT

Docket No. C-4346; File No. 121 0022
Complaint, January 10, 2012 – Decision, February 24, 2012

This consent order addresses the $2.9 billion acquisition by AmeriGas Propane, L.P. of four entities owned by ETP, Heritage Operating, L.P., Heritage GP, LLC, Titan Energy Partner, L.P., and Titan Energy GP, L.L.C. The complaint alleges that the acquisition, as originally proposed, would violate Section 5 of the Federal Trade Commission Act and Section 7 of the Clayton Act by substantially lessening competition in the market for preparing, filling, distributing and selling propane exchange cylinders in the United States and in certain regional areas within the United States. The consent order requires the Respondents to comply with all the terms of Amendment 2, including all terms pertaining to the provision of transition services by AmeriGas to Heritage Propane Express, LLC until such time as Heritage Propane Express, LLC is sold to another entity, or, barring a sale, for a period of one year. The Order also requires that, for a period of two years, ETP cannot sell the Heritage Propane Express assets without prior written approval of the Commission.

Participants

For the *Commission*: *Tom Dahdouh, Susan Huber* and *Erika Wodinsky.*

For the *Respondents*: *Alan D. Rutenberg* and *Jay Varon, Foley & Lardner LLP; Wil1iam D. Vigdor, Vinson & Elkins.*

COMPLAINT

Pursuant to the Clayton Act and Federal Trade Commission Act ("FTC Act"), and its authority thereunder, the Federal Trade Commission ("Commission"), having reason to believe that Respondent AmeriGas Propane, L.P. ("AmeriGas"), intends to acquire the assets of Heritage Operating, L.P., Heritage GP, LLC, Titan Energy Partners, L.P., and Titan Energy GP, L.L.C., from Respondent Energy Transfer Partners, L.P. ("ETP"), a company subject to the jurisdiction of the Commission, in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and that such acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows.

I. RESPONDENTS

1. Respondent AmeriGas is a limited partnership, organized, existing, and doing business, under, and by virtue of, the laws of the State of Delaware, with its office and principal place of business located at 460 North Gulph Road, King of Prussia, Pennsylvania 19406. Respondent AmeriGas is engaged in the marketing and sale of propane and propane supply related services, including the distribution and supply of bulk propane to residential, commercial, and agricultural customers, and the preparing, filling, distributing, marketing, and sale of 20 lb. portable cylinders prefilled with propane, typically used by consumers for barbeque grills or other purposes (hereinafter referred to as "propane exchange cylinders").

2. Respondent AmeriGas Propane, Inc. is a corporation, organized, existing and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania, with its office and principal place of business located at 460 North Gulph Road, King of Prussia, Pennsylvania 19406. Respondent AmeriGas Propane, Inc., is the general partner of Respondent AmeriGas, and is a wholly-owned subsidiary of UGI Corporation, a corporation organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania.

3. Respondent ETP is a limited partnership, organized, existing, and doing business under and by virtue of, the laws of the State of Delaware, with its office and principal place of business located at 3738 Oak Lawn Avenue, Dallas, Texas 72519. Respondent ETP is engaged in, among other things, the marketing

and sale of propane and propane supply related services, including the distribution and supply of bulk propane to residential, commercial, and agricultural customers, and the preparing, filling, distributing, marketing, and sale of propane exchange cylinders.

4. Respondent Energy Transfer Partners GP, L.P. ("ETP GP") is a limited partnership, organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 8801 South Yale Ave., Suite 310, Tulsa, OK 74137. Respondent ETP GP is the general partner of Respondent ETP.

5. The office and principal place of business of the four entities to be acquired, Heritage Operating, L.P., Heritage GP, LLC, Titan Energy Partners, L.P., and Titan Energy GP, L.L.C., is 8801 South Yale Avenue, Suite 310, Tulsa, Oklahoma 74137. These four entities are subsidiaries of ETP.

6. Heritage Operating, L.P. has done business as Heritage Propane Express. ETP has engaged in the preparing, filling, distribution, marketing, and sale of propane exchange cylinders primarily or exclusively through this Heritage Propane Express division.

7. Respondents AmeriGas, AmeriGas Propane, Inc., ETP, and ETP GP are, and at all times relevant herein, have been engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and are partnerships or corporations whose businesses are in or affect commerce, as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. § 44.

II. THE PROPOSED ACQUISITION

8. Pursuant to a Contribution and Redemption Agreement dated October 15, 2011, AmeriGas proposed to acquire all of the noncorporate assets of Heritage Operating, L.P., Heritage GP, LLC, Titan Energy Partners, L.P., and Titan Energy GP, L.L.C.

9. In November 2011, Commission staff advised Respondents of potential competitive issues and concerns in connection with AmeriGas's proposed acquisition of certain

propane assets of Heritage Operating, L.P., Heritage GP, LLC, Titan Energy Partners, L.P., and Titan Energy GP, L.L.C., used in connection with the preparation, filling, distributing, marketing and sale of propane exchange cylinders. These assets included, but were not limited to production facilities, depots, district offices, employees, cylinders, delivery trucks, cages used by retail locations to display and dispense exchange cylinders, customer contracts, trademarks, computer and information technology systems, and contracts providing for access to the supply of bulk propane necessary to fill propane exchange cylinders (hereinafter referred to as "exchange cylinder assets").

10. After being advised by Commission staff of potential competitive concerns regarding the exchange cylinder assets, Respondents informed Commission staff of their willingness to enter into an amendment to the Contribution and Redemption Agreement, referred to in Paragraph 8 above, to exclude the exchange cylinder assets from the proposed acquisition.

11. Amendment 2 to the Contribution and Redemption Agreement ("Amendment 2") excludes the exchange cylinder assets from the assets that Respondent AmeriGas will acquire from Respondents ETP and ETP GP. In addition, it requires that Respondents ETP and ETP GP will continue to own and operate the exchange cylinder assets through Heritage Propane Express, LLC, a Delaware limited liability corporation and wholly-owned subsidiary of ETP. Amendment 2 also requires AmeriGas to temporarily provide to Heritage Propane Express, LLC certain specified transition services currently provided by the businesses that AmeriGas is acquiring so that the exchange cylinder assets of Heritage Propane Express, LLC can continue to be used in the preparing, filling, distributing, marketing and sale of propane exchange cylinders.

III. THE RELEVANT MARKETS

12. For purposes of this Complaint, the relevant line of commerce in which to analyze the effects of this acquisition is the preparing, filling, distributing, marketing and sale of propane exchange cylinders for large multi-state retail chains.

13. For purposes of this Complaint, the relevant geographic areas in which to analyze the effects of the acquisition are the United States and smaller regional areas.

IV. THE STRUCTURE OF THE MARKET

14. Consumers and commercial users of propane exchange cylinders typically utilize these cylinders for barbeque grills, patio heaters, and uses requiring the availability of propane in relatively small, portable tanks. Propane exchange cylinders offer consumers a way to obtain prefilled tanks. Many consumers prefer the convenience of obtaining prefilled cylinders rather than transporting the cylinders to commercial propane filling stations and refilling those cylinders. Many retailers also prefer the convenience and safety of selling properly prefilled exchange cylinders rather than maintaining large tanks of propane on retail premises, training employees to fill cylinders, and arranging for certifications usually required in connection with the inspection and filling of propane cylinders. In the past decade, the use of propane exchange cylinders has grown steadily, while refilling cylinders has declined. As a consequence, refilling cylinder services do not act as a competitive constraint on the price of propane cylinder exchange.

15. Prefilled cylinders for cylinder exchange purposes are generally delivered on a regular basis to cages located outside large national or regional retail establishments, as well as grocery, convenience, home improvement and hardware stores. These retail establishments then sell the prefilled cylinders to consumers. In most situations, consumers can choose whether to either purchase a cylinder that is prefilled with propane outright, or to exchange a used, empty exchange cylinder for another exchange cylinder that is prefilled with propane.

16. Many large multi-state retail chains require that their propane exchange cylinder suppliers have the scale and geographic scope of coverage to handle significant portions of their business. These chains also require that their propane exchange cylinder suppliers offer “just in time” deliveries to ensure that cages are continuously stocked with prefilled cylinders, particularly during peak holiday periods and weekends.

17. The market for propane exchange cylinders suppliers that can service large multi-state retail chains is highly concentrated. There are three large propane exchange cylinder competitors in the United States. Ferrellgas Partners, L.P.'s "Blue Rhino" division is the largest supplier of propane exchange cylinders. AmeriGas is currently the second largest supplier of propane exchange cylinders in some or all of the relevant geographic areas through its AmeriGas Cylinder Exchange or "ACE" division.

18. ETP, through its Heritage Propane Express division, is the third largest supplier of propane exchange cylinders in some or all of the relevant geographic areas, providing propane exchange cylinders in 37 states. Heritage Propane Express is a maverick in the market for the distribution and sale of propane exchange cylinders by competing aggressively with Blue Rhino and ACE in terms of price and other terms and conditions. In some or all of the relevant geographic areas, Heritage Propane Express is the only viable alternative to Blue Rhino and ACE for a significant set of large multi-state retail chains.

19. If consummated, AmeriGas's initial proposed acquisition of ETP's propane assets, including the Heritage Propane Express division, pursuant to the original Contribution and Redemption Agreement, would reduce the number of cylinder exchange companies that can service multi-state chain retailers in all or a substantial part of the relevant geographic markets from three to two. It would also eliminate Heritage Propane Express, a low-priced competitor that has brought greater competition to the propane exchange cylinder marketplace for multi-state chain retailers. The current proposed acquisition pursuant to the terms set forth in Amendment 2 does not result in an increase in market concentration because it does not involve AmeriGas acquiring the Heritage Propane Express assets from ETP.

V. ENTRY CONDITIONS

20. Entry into the relevant market would not be timely, likely, or sufficient in magnitude, character, and scope to deter or counteract the anticompetitive effects of the acquisition. Entry into cylinder exchange involves two issues: the general cost of entry and the cost of entering at a sufficiently large scale to service large regional or national retailers. Timely entry at a

scale that would be sufficient to provide services to a large regional or national customer is unlikely.

VI. EFFECTS OF THE PROPOSED ACQUISITION

21. Heritage Propane Express competes head-to-head with AmeriGas's ACE division in the market for the preparing, filling, distributing, marketing, and sale of propane exchange cylinders. The effects of the acquisition of the Heritage Propane Express assets by Respondent AmeriGas pursuant to the Contribution and Redemption Agreement, if consummated as originally proposed, may be to substantially lessen competition and to tend to create a monopoly in the relevant market in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, in the following ways:

a. by eliminating actual, direct and substantial competition between ACE and Heritage Propane Express in the market for propane exchange cylinders;

b. by increasing the likelihood of, or facilitating, collusion or coordinated interaction between Blue Rhino and ACE in the relevant market by removing Heritage Propane Express, a maverick, from the marketplace;

c. by increasing the likelihood that the merged entity will exercise market power unilaterally in the market for the provision of exchange cylinders to multi-state retail chains that sell these products to consumers; and

d. by increasing the likelihood that consumers will be forced to pay higher prices for propane exchange cylinders due to the decrease in competition or the exercise of market power.

VII. VIOLATIONS CHARGED

22. AmeriGas's agreement to acquire Heritage Propane Express, as originally proposed in the Contribution and Redemption Agreement described in Paragraph 8, violates Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and if

consummated, constitutes a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

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

By the Commission.

DECISION AND ORDER
[Redacted Public Version]

The Federal Trade Commission ("Commission") having initiated an investigation of the proposed acquisition by Respondent AmeriGas Propane, L.P. of certain assets of Respondent Energy Transfer Partners L.P. and Energy Transfer Partners GP, L.P., hereinafter referred to as Respondents, and Respondents having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order ("Consent Agreement"), containing an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

Decision and Order

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondents have violated the said Acts and that a Complaint should issue stating its charges in that respect, and having thereupon issued its Complaint and having accepted the executed Consent Agreement and placed such Consent 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 described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order ("Order"):

1. Respondent AmeriGas Propane, L.P. is a limited partnership, organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business at 460 North Gulph Road, King of Prussia, PA 19406.

2. Respondent AmeriGas Propane, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania, with its office and principal place of business at 460 North Gulph Road, King of Prussia, PA 19406. AmeriGas Propane, Inc. is general partner of AmeriGas Propane, L.P and a wholly-owned subsidiary of UGI Corporation. UGI Corporation is a publically-traded corporation, organized, existing and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania, with its office and principal place of business at 460 North Gulph Road, King of Prussia, PA 19406.

3. Respondent Energy Transfer Partners, L.P. is a publicly traded limited partnership, organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business at 3738 Oak Lawn Avenue, Dallas, TX 75219.

4. Respondent Energy Transfer Partners GP, L.P. is a limited partnership, organized, existing and doing

business under and by virtue of the laws of the State of Delaware, with its office and principal place of business at 8801 South Yale Ave., Suite 310, Tulsa, OK 74137. Energy Transfer Partners GP, L.P. is the general partner of Energy Transfer Partners, L.P.

5. The Commission has jurisdiction over the subject matter of this proceeding and of Respondents, and the proceeding is in the public interest.

ORDER

I.

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

A. "AmeriGas" means AmeriGas Propane, L.P. and/or AmeriGas Propane, Inc. the directors, partners, officers, employees, agents, representatives, successors, and assigns of each; and their joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by AmeriGas Propane, L.P. or AmeriGas Propane, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each, and includes UGI Corporation, the parent of AmeriGas Propane, Inc.

B. "ETP" means Energy Transfer Partners, L.P and/or Energy Transfer Partners GP, L.P., the directors, partners, officers, employees, agents, representatives, successors, and assigns of each; and their joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Energy Transfer Partners, L.P. or Energy Transfer Partners GP, L.P., including but not limited to Heritage ETC and Heritage Propane Express, LLC, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "Commission" means the Federal Trade Commission.

D. “Acquisition” means the acquisition by AmeriGas of certain propane assets from ETP pursuant to the Contribution Agreement.

E. “Amendment No. 2” means Amendment No. 2 to the Contribution Agreement, attached hereto as Confidential Appendix A, including the Cylinder Exchange Transition Services Agreement and all other annexes, schedules, exhibits, and amendments to the Amendment.

F. “Buyer” means any person who, pursuant to the terms of this Order, acquires HPX from ETP.

G. “Closing” means the consummation of the Acquisition under the Contribution Agreement.

H. “Contribution Agreement” means the Contribution and Redemption Agreement, dated as of October 15, 2011, as amended, among Energy Transfer Partners, L.P., Energy Transfer Partners GP, L.P., Heritage ETC, L.P., and AmeriGas Partners, L.P., including Amendment No. 2.

I. “Cylinder Exchange Business” means the business of preparing, distributing, marketing and selling 20-pound portable cylinders pre-filled with propane and collecting used 20-pound portable cylinders for refilling or disposal, within the territory of the United States. As used in this definition, 20-pound portable grill cylinders refer to cylinders that are designed to meet Department of Transportation specifications and are primarily used by consumers in barbeque grills.

J. “Heritage Propane Express” or “HPX” means Heritage Propane Express, LLC, a limited liability company, organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business at 8801 South Yale Ave., Suite 310, Tulsa, OK 74137. Heritage Propane Express, LLC, is a wholly-owned indirect subsidiary of ETP. As used in this Order, “Heritage

Propane Express" and "HPX" shall refer to all rights and assets related to or used in any Cylinder Exchange Business in the possession or control of ETP after Closing, including all rights of ETP pursuant to Amendment No. 2.

II.

IT IS FURTHER ORDERED that:

A. At or before Closing, Respondents shall amend the Contribution Agreement to include Amendment No. 2.

B. Upon Closing, Amendment No. 2 shall be incorporated by reference into this Order and made a part hereof. Respondents shall comply with the terms of Amendment No. 2 and a breach by Respondents of any term of Amendment No. 2 shall constitute a violation of this Order. Further, Respondents shall not modify or amend Amendment No. 2 without the prior written approval of the Commission as provided in section 2.41(f) of the Commission's Rules of Practice, 16 C.F.R. § 2.41(f). To the extent any term in Amendment No. 2 conflicts with the term in this Order such that Respondents cannot fully comply with both, Respondents shall comply with this Order.

C. For a period lasting until two (2) years after Closing, Respondent ETP shall not sell, transfer or otherwise convey, directly or indirectly, any interest in HPX to any Person, in connection with the Acquisition or otherwise, without the prior approval of the Commission.

D. For a period lasting ten (10) years after Closing, or until Respondent ETP no longer has an interest in a Cylinder Exchange Business, whichever comes first, Respondent ETP shall not acquire, directly or indirectly, any Cylinder Exchange Business, whether in connection with the Acquisition or otherwise, without providing prior written notification to the Commission before consummating any such transaction; *provided*, *however*, that prior written notification shall not be required for the acquisition of any business with annual net sales in the United States derived from the Cylinder Exchange Business under $22 million. For the avoidance of doubt, revenue from any sales, operations, or line of business other than a Cylinder Exchange Business shall not be included in determining if the revenue figure in this Paragraph is met.

Further, the prior written notification required by this Paragraph shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (hereinafter referred to as the Notification), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such Notification, Notification shall be filed with the Secretary of the Commission, Notification need not be made to the United States Department of Justice, and Notification is required only of Respondent ETP and not of any other party to the transaction, unless otherwise expressly required by this Order. Respondent ETP shall provide the Notification to the Secretary of the Commission at least thirty (30) days prior to consummating any such transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), Respondent ETP shall not consummate the transaction until thirty (30) days after submitting such additional information or documentary material. Early termination of the waiting periods in this Paragraph may be requested and, where appropriate, granted by letter from the Commission's Bureau of Competition; provided, however that Respondent ETP shall not be required to provide prior notification pursuant to this paragraph of a transaction for which notification is required to be made, and has been made pursuant to Section 7A of the Clayton Act, 15 U.S.C. § 18a.

E. For a period lasting until ten (10) years after Closing, Respondent AmeriGas shall not acquire, directly or indirectly, any Cylinder Exchange Business, whether in connection with the Acquisition or otherwise, without providing prior written notification to the Commission before consummating any such transaction; *provided, however,* that prior written notification shall not be required for the acquisition of any business with annual net sales in the United States derived from the Cylinder Exchange Business under $22 million. For the avoidance of doubt, revenue from any sales, operations, or line of business other than a Cylinder Exchange Business shall not be included in determining if the revenue figure in this Paragraph is met.

Further, the prior written notification required by this Paragraph shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (hereinafter referred to as the Notification), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such Notification, Notification shall be filed with the Secretary of the Commission, Notification need not be made to the United States Department of Justice, and Notification is required only of Respondent AmeriGas and not of any other party to the transaction, unless otherwise expressly required by this Order. Respondent AmeriGas shall provide the Notification to the Secretary of the Commission at least thirty (30) days prior to consummating any such transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), Respondent AmeriGas shall not consummate the transaction until thirty (30) days after submitting such additional information or documentary material. Early termination of the waiting periods in this Paragraph may be requested and, where appropriate, granted by letter from the Commission's Bureau of Competition; provided, however that Respondent AmeriGas shall not be required to provide prior notification pursuant to this paragraph of a transaction for which notification is required to be made, and has been made pursuant to Section 7A of the Clayton Act, 15 U.S.C. § 18a.

F. For a period lasting until up to one (1) year after Closing, Respondent AmeriGas shall, at the request of ETP or the Buyer, provide the services required in Amendment No. 2 ("Transition Services") in a manner sufficient to permit ETP or the Buyer to operate HPX in the same manner in all material respects equivalent to the manner in which ETP operated its Cylinder Exchange Business prior to Closing. Further, if ETP sells HPX to a Buyer within a year of Closing, AmeriGas shall, at the request of the Buyer, provide such Buyer with Transition Services for a period of up to six months, which period may, at the option of the Buyer be extended for up to an additional six months (this sentence is intended to enable a Buyer to receive Transition Services for up to twelve (12) months).

G. For a period lasting until two (2) years after Closing, or Respondent ETP retains no interest in a Cylinder Exchange Business, whichever comes first; Respondent ETP shall (i) operate HPX in a manner that maintains its full economic viability and marketability and minimizes the risk of any loss of competitive potential, and prevents the destruction, removal, wasting, deterioration or impairment of any assets of HPX; and (ii) upon the sale of HPX, transfer the HPX assets in a manner that retains their full economic viability and provide such services and assistance to the Buyer as are reasonably necessary to enable the Buyer to operate HPX in a manner at least equivalent to the manner in which it was operated by ETP.

H. The purpose of this Decision and Order is to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint, and to assure that HPX remains viable, independent and competitive.

III.

IT IS FURTHER ORDERED that

A. Respondent AmeriGas shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Order:

1. Thirty (30) days after the Order becomes final;

2. Six (6) months after the Order becomes final and every six months thereafter so long as Respondent AmeriGas is obligated to provide Transition Services pursuant to the Order; and

3. Annually for ten (10) years after the Order becomes final.

B. Respondent ETP shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Order:

1. Thirty (30) days after the Order becomes final;

2. Six months (6) after the Order becomes final and every six months thereafter for two (2) years; and

3. Annually, for ten (10) years after the Order becomes final.

Provided, however, that ETP shall not be required to provide reports under this Paragraph if it no longer owns, directly or indirectly, any interest in a Cylinder Exchange Business.

C. For purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and upon five (5) days' notice to a Respondent made to its principal United States offices, registered office of its United States subsidiary, or its headquarters address, Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

1. access, during business 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 related to compliance with this Order, which copying services shall be provided by Respondent at the request of the authorized representative(s) of the Commission and at the expense of the Respondent; and

2. to interview officers, directors, or employees of Respondent, who may have counsel present, regarding such matters.

IV.

IT IS FURTHER ORDERED that

A. Respondents shall notify the Commission at least thirty (30) days prior to:

1. any proposed dissolution of such Respondents;

2. any proposed acquisition, merger or consolidation of Respondents; or

3. any other change in the Respondents, including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of the Order.

V.

IT IS FURTHER ORDERED that this Order shall terminate on January 10, 2022.

By the Commission.

CONFIDENTIAL APPENDIX A

Amendment No. 2 to the Contribution Agreement

[Redacted From the Public Record Version, But Incorporated By Reference]

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

I. Overview

The Federal Trade Commission has accepted an Agreement Containing Consent Order ("Proposed Order") with AmeriGas Propane, L.P. ("AmeriGas"), AmeriGas Propane, Inc., Energy Transfer Partners, L.P. ("ETP"), and Energy Transfer Partners GP, L.P. ("ETP GP"), which is designed to guard against possible anticompetitive effects that would likely result from the transaction as originally proposed.

Analysis to Aid Public Comment

On October 15, 2011, AmeriGas entered into an agreement with ETP and ETP GP in which AmeriGas proposed to acquire ETP's Heritage Propane business through the approximately $2.9 billion acquisition of four entities owned by ETP, Heritage Operating, L.P., Heritage GP, LLC, Titan Energy Partner, L.P., and Titan Energy GP, L.L.C. ETP's Heritage Propane business includes Heritage Propane Express, an entity that is engaged in the business of preparing, filling, distributing and selling portable cylinders prefilled with propane commonly used for barbeque grills (referred to herein as "propane exchange cylinders"). The AmeriGas Cylinder Exchange or "ACE" division is also engaged in the business of preparing, filling, distributing and selling exchange cylinders, and is the second largest provider of propane exchange cylinders in the United States. In response to competitive concerns raised by Commission staff regarding AmeriGas's purchase of the Heritage Propane Express Business, the parties subsequently proposed a modified transaction that excludes those assets. The Order, as accepted by the Commission, settles charges that the acquisition, as originally proposed, may have substantially lessened competition in the market for preparing, filling, distributing and selling propane exchange cylinders in the United States and in certain regional areas within the United States.

II. The Parties

AmeriGas, a limited partnership, is the largest propane distribution company in the United States. Its ACE division supplies prefilled propane exchange cylinders to retailers who then sell those cylinders to consumers. AmeriGas is the second largest supplier and marketer of propane exchange cylinders.

ETP GP is a publicly traded partnership and the general partner of ETP, which is also a publicly traded partnership. ETP is engaged in the business of supplying propane exchange cylinders through its Heritage Propane Express division. Heritage Propane Express is the third largest supplier and marketer of propane exchange cylinders in the country with operations in 37 states.

III. The Products and the Structure of the Market

Propane exchange cylinders, often referred to as 20 pound DOT cylinders,[1] are small, portable tanks that can be filled with propane, and that are used primarily for barbeque grills, patio heaters, and mosquito magnets. At one time, the only option for consumers who needed to purchase propane for these uses was to purchase empty cylinders and take them to locations where they could have the cylinders filled. Starting in the 1990's cylinder exchange became popular. This option allows consumers to purchase a prefilled cylinder which can then be exchanged for a clean prefilled cylinder when the fuel in the first cylinder has been used. The consumer exchanging an empty cylinder for a full one typically pays only for the propane. Exchange cylinders are available for purchase and exchange at various locations, including grocery stores, home improvement stores, hardware stores, big box stores, conveniences stores, and gas stations. Although consumers have the option of refilling these cylinders, many prefer the convenience of purchasing prefilled exchange cylinders that have been cleaned and safety tested by the supplier before they are sold. Many retailers also prefer the convenience and possible safety benefits of selling prefilled exchange cylinders rather than arranging to have large propane tanks on their premises and training employees to perform refilling services. For these reasons, the use of propane exchange cylinders has grown, and the refilling of cylinders has declined over the last ten years. As a consequence of these changes in demand, refilling cylinders does not provide a competitive constraint on the price of propane cylinder exchange services.

Companies that distribute and sell propane exchange cylinders typically provide the following services, either directly or indirectly: cylinder preparation (including cleaning, rust removal, repainting and valve repairs for the cylinders); refilling with a designated amount of propane; marketing and distribution

1 The metal cylinders can hold approximately 25 pounds of propane, but for safety reasons, can only be filled to 80% capacity, or approximately 20 pounds. In the marketplace at this point in time, most exchange cylinders are only filled with 15 to 17 or so pounds of propane. The reference in this Analysis is intended as a description of the size and type of cylinder, and is not a reference to actual fill levels.

(including delivery and retrieval of cylinders, and placement and maintenance of cages that display and dispense exchange cylinders at retail locations); and sale of exchange cylinders.

IV. The Complaint

The Complaint alleges that the market for propane exchange cylinder services that can serve large multi-state chain retailers is highly concentrated. Large multi-state retail chains generally require that their propane exchange cylinder suppliers have the scale and geographic scope of coverage to handle significant portions of their business. These retailers also require that their propane exchange cylinder suppliers offer "just in time" deliveries to ensure that cages are continuously stocked with prefilled cylinders, particularly during peak holiday periods and weekends. Currently, there are only three suppliers that can provide propane exchange cylinder services to such retailers: Ferrellgas Partners, L.P.'s "Blue Rhino" division, the largest provider of propane exchange cylinder services on a national and regional basis; AmeriGas's ACE, the second largest provider of propane exchange cylinder services; and ETP's Heritage Propane Express, the third largest provider of these services. The Complaint alleges that AmeriGas's acquisition of the Heritage Propane Exchange assets, as originally proposed, would have reduced the number of companies that can supply these services to multi-state retail chains from three to two.

The Complaint further alleges that Heritage Propane Express played the role of a disruptive "maverick," offering lower prices and better terms and conditions than the other two large players. In addition, the Complaint alleges that entry into the market for supply of propane exchange cylinder services to large multi-state chain retailers is not likely to be timely or sufficient to defeat a price increase due to the large scale of entry needed to service large national or regional retailers requiring reliable distribution services in many locations.

The Complaint alleges that the effect of the acquisition, as originally proposed, may be to substantially lessen competition by, *inter alia*, increasing the likelihood of collusion or coordinated interaction among the remaining two large competitors by removing Heritage Propane Express, a disruptive force in the marketplace.

V. The Modified Transaction

AmeriGas, AmeriGas Propane, Inc., ETP and ETP GP have now entered into an amendment to their original agreement. Pursuant to this amendment ("Amendment 2"), AmeriGas will not acquire the Heritage Propane Express assets. Rather, they will continue to be operated by ETP through a new subsidiary, Heritage Propane Express, LLC, until such time as ETP decides to sell those assets. However, because Heritage Propane Express, LLC will no longer have access to certain back office and propane supply services that will be transferred to AmeriGas, AmeriGas is required to make such services available to Heritage Propane Express, LLC at cost for a specified period of time. This provision will allow Heritage Propane Express, LLC to continue to function as a viable entity. Amendment 2 contains a number of other provisions addressing the provision of transition services that are likely to be needed. Because Amendment 2 contains competitively sensitive information, the details of the transition services are not publicly available.

VI. The Order

The Order remedies the Commission's competitive concerns raised by the original transaction, as proposed.

The Order incorporates Amendment 2, described above, into the Order and requires the Respondents to comply with all the terms of that document, including all terms pertaining to the provision of transition services by AmeriGas to Heritage Propane Express, LLC until such time as Heritage Propane Express, LLC is sold to another entity, or, barring a sale, for a period of one year. The specified transition services include access to propane supply under specified terms.

Section II.C of the Order requires that, for a period of two years, ETP cannot sell the Heritage Propane Express assets without prior written approval of the Commission. This ensures that the Commission will have an opportunity to review a future sale of these assets, particularly if the assets would not be reportable under the Hart-Scott-Rodino Antitrust Improvements Act. Section II.D requires ETP to provide prior notification to the Commission before acquiring any other cylinder exchange businesses for the next 10 years. Section II.E similarly requires AmeriGas to provide prior notification to the Commission before acquiring any other cylinder exchange businesses for the next 10 years. Both II.D and II.E provide that prior notification is not necessary for transactions that fall under a certain threshold in terms of the annual sales of propane exchange cylinders by any company that they propose to acquire.

Section II.F addresses the availability of the transition services outlined in Amendment 2. It requires that AmeriGas make these transition and supply services available to ETP for up to one year, so that Heritage Propane Express, LLC can be operated as a viable entity. If that company is sold within one year, Section II.F requires that AmeriGas provide transition and propane supply services to Heritage Propane Express's buyer for a period of six months, with an option to extend the arrangement for another six months. These provisions are designed to ensure that the Heritage Propane Express assets will continue to be viable as a stand-alone propane exchange cylinder business and that any new purchaser will have the necessary services and supply for a short transition period. Section II.G requires ETP to operate the Heritage Propane Express assets in a manner that maintains their economic viability for a period of two years or until ETP no longer holds an interest in the assets.

The remaining Order provisions are standard reporting requirements to allow the Commission to determine on-going compliance with the provisions of the Order.

VII. Opportunity for Public Comment[2]

The Final Order has been placed on the public record for 30 days to receive comments from interested parties. Comments received during this period will become part of the public record. After 30 days, the Commission will review the comments received and determine whether to take further action. The purpose of this analysis is to facilitate comment on the Consent Agreement and Order. This analysis does not constitute and official interpretation of the Consent Agreement or Order, not does it modify its terms in any way. The Consent Agreement does not constitute an admission by AmeriGas, ETP or ETP GP that they have violated the law or that the facts as alleged in the Complaint, other than the jurisdictional facts, are true.

2The Commission normally will issue an order for public comment but not issue a final order until it considers all comments received during the comment period. Here, however, consistent with Commission Rule 2.34(c), 16 C.F.R. § 2.34(c), the Commission has issued the Final Order in advance of the comment period. The Commission took this step to avoid any unnecessary and potentially costly delay to the larger underlying transaction involving the sale of ETP's bulk propane business, which is not the subject of the Order, and is a highly seasonal business; that is, the market for bulk propane and related services is greatest during the winter and early spring. After the public comment period, the Commission will have the option to initiate a proceeding to reopen and modify the Decision and Order or commence a new administrative proceeding if the public comments lead it to believe that such action is appropriate.

IN THE MATTER OF

SIGMA CORPORATION

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

Docket No. C-4347; File No. 101 0080
Complaint, February 27, 2012 – Decision, February 27, 2012

This consent order addresses Sigma Corporation'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 Sigma violated Section 5 of the Federal Trade Commission Act by inviting McWane and Star to collude with Sigma to increase DIPF prices in early 2009. The consent 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.

Participants

For the *Commission*: *Christopher G. Renner*.

For the *Respondent*: *Douglas Jasinski, White & Case LLP*.

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 Respondent Sigma Corporation ("Sigma") has violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and it appearing to the 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 Sigma's unfair methods of competition relating to the marketing and sale of ductile iron pipe fittings ("DIPF").

2. Beginning in January 2008 and continuing through January 2009, Sigma, along with its competitors McWane, Inc. ("McWane") and Star Pipe Products, Ltd. ("Star"), conspired to raise and stabilize the prices at which DIPF are sold in the United States. Sigma, McWane 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 ("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. Instead of competing with one another in the domestic DIPF market, Sigma and McWane conspired to monopolize that market by (i) entering into a distribution agreement 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.

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

THE RESPONDENT

8. Respondent Sigma is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its principal place of business located at 700

Goldman Drive, Cream Ridge, New Jersey 08154. Sigma imports, markets and sells products for the waterworks industry, including DIPF.

9. At all times relevant herein, Sigma 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. Sigma'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

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

12. 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.

13. 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.

14. 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.

15. 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.

16. 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

17. The relevant product market in which to evaluate Sigma's 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).

18. 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").

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

20. 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.

21. The relevant geographic market is 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 States that lack such assets and relationships are unable to constrain the prices of DIPF suppliers that have such assets and relationships.

22. The relevant DIPF markets have several features that facilitate price coordination among DIPF suppliers. The relevant DIPF markets are highly concentrated. In 2008, the Sellers collectively made more than 90 percent of sales within the relevant DIPF markets. Other features of the relevant DIPF markets that facilitate price coordination include product homogeneity, barriers to timely entry of new DIPF suppliers, inelastic demand at competitive prices, and uniform published prices.

THE SELLERS RESTRAINED PRICE COMPETITION IN THE RELEVANT DIPF MARKETS

23. Beginning in January 2008 and continuing through January 2009, the Sellers conspired to raise and stabilize the prices at which DIPF were sold in the United States.

24. 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.

25. In January 2008, McWane formulated a plan 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.

26. McWane communicated the terms of its plan to Sigma and Star. 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.

27. McWane then led a price increase, and Sigma and Star followed.

28. In June 2008, McWane formulated a plan 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").

29. McWane communicated the terms of its plan to Sigma and Star through a public letter sent by McWane to waterworks distributors, the common 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.

30. 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.

31. McWane then led a price increase, and Sigma and Star followed.

DIFRA FACILITATED PRICE COORDINATION AMONG THE SELLERS

32. 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.

33. 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.

SIGMA INVITED McWANE AND STAR TO COLLUDE WITH SIGMA

34. Sigma and Star stopped participating in the DIFRA information exchange in January 2009.

35. In April 2009, McWane announced a new price list for DIPF. McWane's new published prices for medium and large diameter DIPF, the size ranges dominated by Sigma and Star, were lower than prevailing prices.

36. Sigma perceived McWane's new price list as a punishment of Sigma and Star for failing to adhere to published price levels and for withdrawing from the DIFRA information exchange.

37. Sigma initially resisted McWane's new price list, and proposed, in public and private communications with McWane and Star, an alternative arrangement to alleviate McWane's concerns about secret discounting. One term of Sigma's proposal was an offer to resume participation in the DIFRA information exchange. Another term of Sigma's proposal was that McWane would rescind its announced price list and continue the use of the old price list in exchange for the commitment of Sigma and Star to adhere to published price levels for DIPF.

38. McWane and Star rejected Sigma's invitation to collude.

McWANE AND SIGMA CONSPIRED TO MONOPOLIZE 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 44 through 60 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. Federal stimulus of the relevant domestic DIPF market gave Sigma, Star and other suppliers of imported DIPF an incentive to enter the relevant domestic DIPF market.

McWane Eliminated Sigma as an Actual Potential Entrant

44. 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.

45. 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.

46. 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;

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.

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

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

49. 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.

50. 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.

51. 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.

52. 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

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

54. 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").

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 46, 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.

55. 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.

a. Due to Star's perceived or actual status as an untested supplier of <u>domestic</u> 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.

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

57. 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 benefit consumers by constraining the prices of domestically produced DIPF charged by McWane and Sigma.

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

COMPETITIVE EFFECTS

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

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

FIRST VIOLATION
ALLEGED RESTRAINT OF TRADE

61. As alleged herein, Sigma conspired with its competitors 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

62, As alleged herein, Sigma conspired with its competitors to exchange competitively sensitive sales information. 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.

THIRD VIOLATION
ALLEGED INVITATION TO COLLUDE

63. As alleged herein, Sigma invited competitors to collude with Sigma. 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 practices, or the effects thereof, will continue or recur in the absence of appropriate relief.

FOURTH VIOLATION
ALLEGED RESTRAINT OF TRADE

64. 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

65. 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.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twenty-seventh day of February, 2012 , issues its complaint against Sigma.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission ("Commission") having initiated an investigation of certain acts and practices of Sigma Corporation ("Sigma"), hereinafter sometimes referred to as "Respondent," and Respondent having been furnished thereafter with a copy of a draft Complaint that counsel for the Commission proposed to present to the Commission for its consideration and which, if issued, would charge Respondent with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondent, its attorney, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order ("Consent Agreement"), containing an admission by Respondent of all the jurisdictional facts set forth in the aforesaid draft Complaint, a statement that the signing of said Consent 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, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondent has violated said Act, and that a Complaint should issue stating its charges in that respect, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, and having duly considered the comment filed thereafter by an interested person pursuant to Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its complaint, makes the following jurisdictional findings and issues the following Order:

1. Respondent Sigma Corporation is a corporation organized and existing under the laws of the State of New Jersey, with its principal address at 700 Goldman Drive, Cream Ridge, New Jersey 08550.

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.

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 Sigma Corporation, 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.

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 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 Respondent to its customers through a letter, electronic mailing, sales catalog, Web site, or other widely accessible method of posting;

2. information that relates to the terms on which Respondent 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; or

4. information that must be disclosed pursuant to the Federal Securities Laws.

E. "Competitor" means 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.

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. “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 (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.”

O. “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.

P. “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

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:

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. 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 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.

III.

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.

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.

IV.

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

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

V.

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.

VI.

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.

VII.

IT IS FURTHER ORDERED that this Order shall terminate on February 27, 2032.

By the Commission.

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 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.

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 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.

Analysis to Aid Public Comment

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.[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 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 McWane desired to fix prices.[2]

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.[3]

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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").

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

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.[4] 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

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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.

4 *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); *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).

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.[5]

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.[6] Here, the complaint alleges that through their MDA arrangement, McWane and 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.

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5 *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).

6 *See Volvo N. Am. Corp. v. Men's Int'l Prof'l Tennis Council*, 857 F.2d 55, 74 (2d Cir. 1988).

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 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.