

Analysis to Aid Public Comment
In the Matter of Fortiline, LLC,
File No. 151-0000

The Federal Trade Commission (“Commission”) has accepted, subject to final approval, an agreement containing consent order (Consent Agreement) from Fortiline, LLC (“Fortiline”). The Commission’s Complaint alleges that Fortiline violated Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by irrevocably selling of ductile iron pipe (“DIP”) Manufacturer A to raise and fix prices.

This is the first Commission challenge to an invitation to collude by affiliates in both a horizontal (interbrand) and a vertical (intra brand) relationship with the invitee sometimes referred to as a dual distribution relationship. During the time period relevant to the Complaint, Fortiline, a DIP distributor, sold DIP to customers in competition with Manufacturer A (principally a manufacturer but also engaged in direct sales) while it also served as Manufacturer A’s distributor in certain circumstances. Fortiline thus had a vertical distributor relationship with Manufacturer A in certain areas and circumstances and a horizontal competitor relationship with Manufacturer A in others. This case makes clear that the existence of an intrabrand relationship between firms does not immunize an invitation to fix prices for interbrand transactions falling outside of that intrabrand relationship just as the law would not condone an actual price fixing agreement under similar circumstances.

The Consent 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 review the Consent Agreement again and the comments received, and will decide whether it should withdraw from the Consent Agreement or make final the accompanying Decision and Order (“Proposed Order”).

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

I. The Complaint

The allegations of the Complaint are summarized below:

Fortiline distributes waterworks infrastructure products, such as pipe (including DIP), tubing, valves, fittings and piping accessories.

Each of the major DIP manufacturers in the United States periodically publishes nationwide “price list” or “pricing schedule.” Sometimes, rather than

In substance, the February 12th email communicated Fortiline's dissatisfaction with Manufacturer A's slow pricing in North Carolina and parts of Virginia and its preference that both Fortiline and Manufacturer A should bid to contractors using the higher .42 multiplier.

Eight months later, on October 26, 2010, executives from Fortiline and Manufacturer A met again, this time at a trade association meeting. At that meeting, Fortiline complained that Manufacturer A had sold direct to a Virginia customer, which had previously purchased from Fortiline, at a 0.31 multiplier, and that this price was "20% below market."

In substance, this October 26th conversation communicated Fortiline's dissatisfaction with Manufacturer A's lower pricing in Virginia, and its preference that both Fortiline and Manufacturer A should bid to contractors using a substantially higher multiplier in that region.

Fundamentally, the fact that the firms are competitors in some transactions and collaborators in others does not alter the legal analysis. An agreement between actual or potential competitors that restrains interbrand price competition between the two firms presumptively harms competition. The existence of an intrabrand component to the conspirators' relationship (such as a distribution agreement or a license agreement) does not necessarily foreclose analysis.⁶

The Proposed Order contains the following substantive provisions. Section II prohibits Fortiline from entering into, attempting to enter into, participating in, maintaining, organizing, implementing enforcing, inviting, encouraging, offering or soliciting an agreement or understanding with any competitor to raise or fix prices or any other pricing action, or to allocate or divide markets, customers, contracts, transactions, business opportunities, lines of commerce, or territories. Two provisos apply to Section II. The first proviso makes clear that Fortiline may engage in conduct that is reasonably related to, and reasonably necessary to achieve the procompetitive benefits of, a lawful manufacturer-distributor relationship, joint venture agreement, or lawful merger, acquisition, or sale agreement. The second proviso makes clear that Fortiline may negotiate and enter into an agreement to buy DIP from, or sell DIP to, a competitor.

Paragraphs III of the Proposed Order impose certain standard reporting and compliance requirements on Fortiline.

The Proposed Order will expire in 20 years.