Analysis to Aid Public Comment

In the Matter of Mr. Jacob J. Alifraghis, Also Doing Business As InstantUPCCodes.com, and In the Matter of 680 Digital, Inc., Also Doing Business As Nationwide Barcode, and Philip B. Peretz, File No. 141-0036

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an agreement containing consent order ("Consent Agreement") from Mr. Jacob J. Alifraghis, who operates InstantUPCCodes.com ("Instant"), and a separate Agreement from Philip B. Peretz and 680 Digital, Inc., also d/b/a Nationwide Barcode ("Nationwide"). These individuals and entities are collectively referred to as "Respondents." The Commission's complaints ("Complaints") allege that each Respondent violated Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by inviting certain competitors in the sale of barcodes to join together in a collusive scheme to raise prices.

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prices and to make some money.

In their correspondence, Mr. Alifraghis and Mr. Peretz also threatened to lower their own prices if the other parties did not cede to their demands to collectively increase pricing. For example, on August 19, Mr. Peretz stated in an email to Instant and Competitor A:

> Gentlemen,
> Have we given up on this conversation?
>
> This is the busiest time of year . . . and I am considering meeting and/or beating your prices. Would like to see what your thoughts are before I screw up our industry even more.

Mr. Peretz and Mr. Alifraghis continued to exchange communications about price levels into January 2014, until they learned of the FTC's investigation.

II. Analysis

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 or other important terms of competition. Mr. Alifraghis' August 4 email to his competitors outlining a mechanism by which the three companies can and should fix the price of barcodes is a clear example of an invitation to collude. The ensuing private communications among barcode sellers outlined in the Complaints establish a series of subsequent invitations, with each Respondent repeatedly communicating its willingness to raise and fix prices for barcodes, contingent on other competitors doing so, and soliciting rivals to participate in a common scheme.

For 20 years, the Commission has held that an invitation to collude may violate Section 5 doctrine serves as a useful deterrent against potentially harmful conduct that serves no legitimate business purpose.[2]

If the invitation is accepted and the competitors reach an agreement, the Commission will refer the matter to the Department of Justice for a criminal investigation. In this case, the complaint does not allege that Nationwide, Instant, and Competitor A reached an agreement.

An invitation to collude, which, if accepted, would constitute a *per se* violation of the Sherman Act, is a violation of Section 5. Although this case involves particularly egregious conduct, less egregious conduct may also result in Section 5 liability. It is not essential that the Commission find such explicit invitations to increase prices. Nor must the Commission find repeated misconduct attributable to the principals of firms.

III. The Proposed Consent Orders

The Proposed Orders have the following substantive provisions:

Section II, Paragraph A of the Proposed Orders enjoin Respondents from communicating with their competitors about rates or prices, with a proviso permitting public posting of rates and a second proviso that permits Respondents to buy or sell barcodes.

Section II, Paragraph B prohibits Respondents from enter8ta8Td [(d p P)-4it om ente