

Complaint

IN THE MATTER OF

**680 DIGITAL, INC.
D/B/A
NATIONWIDE BARCODE;
AND
PHILIP B. PERETZ**CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF
SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT

*Docket No. C-4484; File No. 141 0036
Complaint, August 20, 2014 – Decision, August 20, 2014*

This consent order addresses 680 Digital, Inc.'s invitation to certain competitors in the sale of barcodes to join together in a collusive scheme to raise prices. The complaint alleges that Respondent violated Section 5 of the Federal Trade Commission Act by inviting certain competitors in the sale of barcodes to join together in a collusive scheme to raise prices. The consent order requires Respondents to cease and desist from communicating with their competitors about rates or prices. They are also barred from entering into, participating in, inviting, or soliciting an agreement with any competitor to divide markets, to allocate customers, or to fix prices.

Participants

For the *Commission*: Dana Abrahamsen and Matthew Accornero.

For the *Respondents*: Douglas Ross, Davis Wright Tremaine.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. § 41, et seq., and by virtue of the authority vested in it by said Act, the Federal Trade Commission (“Commission”), having reason to believe that 680 Digital, Inc., also d/b/a Nationwide Barcode and Phil Peretz, (hereinafter sometimes collectively referred to as “Respondents”), have violated the provisions of 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

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the public interest, hereby issues this Complaint stating its charges as follows:

NATURE OF THE CASE

1. 680 Digital, Inc., also d/b/a Nationwide Barcode (“Nationwide”), is one of the largest sellers of barcodes in the United States. On multiple occasions, Nationwide invited two of its closest competitors, InstantUPCCodes.com (“Instant”) and Competitor A, to join with Nationwide in a collusive scheme to raise and fix prices for barcodes. The collusive plan included invitations to match the higher prices of another barcode seller, Competitor B. By inviting collusion, Nationwide endangered competition and violated Section 5 of the FTC Act.

PRELIMINARY ALLEGATIONS

2. Respondent 680 Digital, Inc. also d/b/a Nationwide Barcode is a corporation organized, existing, and doing business under and by virtue of the laws of Washington, with its business mailing address at PO Box 2750, Issaquah, WA 98027.

3. Respondent Philip B. Peretz is an individual living in Nevada and doing business in Nevada, with a mailing address of 3495 Lakeside Drive, # 144, Reno, NV 89509. Mr. Peretz’s written communications to his competitors, as set forth below, were by email.

4. The primary business of Nationwide is selling barcodes over the internet. Nationwide operates a website that permits individuals to transmit written messages to Mr. Peretz. Instant’s written communications to Mr. Peretz, as set forth below, were transferred through this portal.

5. Instant is owned and operated by an individual by the name of Jacob J. Alifraghis.

JURISDICTION

6. At all times relevant herein, Respondent 680 Digital 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.

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7. The business practices of Respondents, including the acts and practices alleged herein, are in commerce or affect commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

LINE OF COMMERCE

8. A barcode is a unique 12-digit number that allows a retailer to track sales of products within its inventory system. Universal product codes (“UPCs”) are the predominant form of barcodes used in the United States. UPC barcodes are issued by GS1 (formerly the Uniform Commercial Council), a nonprofit group that sets standards for international commerce. In order to avoid GS1 membership fees or minimum purchase requirements, many small businesses purchase UPC barcodes on the online secondary market.

9. Nationwide, Instant and Competitor A are three of the largest sellers of barcodes in the United States. Nationwide’s closest competitors, and the principal competitive constraints upon Nationwide’s pricing power, are Instant and Competitor A. Competition between and among Instant, Nationwide, and Competitor A has driven down the prices for barcodes charged by each of these sellers.

INVITATIONS TO COLLUDE

10. Prior to August 4, 2013, the principal of Instant, Mr. Alifraghis, had never communicated with the principals of Nationwide and Competitor A.

11. On August 4, 2013, Mr. Alifraghis transmitted a long message to Nationwide and Mr. Peretz through Nationwide’s website. Mr. Alifraghis sent the same message to Competitor A. This message contained an explicit invitation to raise and fix prices of barcodes. Mr. Alifraghis proposed that both Nationwide and Competitor A match the higher prices of Competitor B. The email stressed that all three firms had to act in concert or the plan would not succeed. Mr. Alifraghis proposed that the parties raise their prices within 48 hours:

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Hello Phil, Our company name is InstantUPCCodes.com, as you may be aware, we are one of your competitors within the same direct industry that you are in. The reason for this email is because of the constant price changing from multiple vendors within this industry. The 3 main problems are US, YOU and [Competitor A].

However, there is a specific problem with YOU and [Competitor A] in general and it only hurts YOUR business. I want to explain this situation in its entirety so that you understand exactly where I'm coming from and why all 3 of us are only digging our own graves in our own industry.

When I got in this business (exactly one year ago), the prices per package were 2-3x the amount per amount of UPC codes ordered. I made a promise to myself to never go lower than any of the competition even though I didn't have a large customer base like my competitors. I would always match the prices of YOU and [Competitor A] specifically. Recently [Competitor A] was out of business until he came back and slammed his prices down again. So you know what I did? I went and matched his prices. The problem is that his prices were lower than yours which I knew you would lower yours once again, it was only a matter of time.

Here's the deal Phil, I'm your friend, not your enemy. My sales are doing excellent from the huge client base that we've built and our profits rise steadily every month. The problem is that there are only so many customers that need UPC codes in the first place and when we sell them for pennies, they won't be coming back in the future for as much repeat business, because they stocked up on a huge bulk package and they are set for the next few years. While our business might be booming now, it will only get worse in the future if we keep going at this pace.

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I can even assure you right now, that I will never lower my prices under yours, I will only match your prices. This problem has to stop between the 3 of us constantly lowering our prices. Here's what I'd like to do:

All 3 of us- US, YOU and [Competitor A] need to match the price that [Competitor B] has. The reason why they won't lower their price is because they would kill their sales from their existing customer database. I am also going to send this email to [Competitor A] regarding this as well. I'd say that 48 hours would be an acceptable amount of time to get these price changes completed for all 3 of us. The thing is though, we all need to agree to do this or it won't work. If [Competitor A] or you decide not to go through with the price change to match [Competitor B] pricing, then it won't work, we need all 3 of us to do this.

Reply and let me know if you are willing to do this or not. In the mean time I will contact [Competitor A] with the same message and ask him if he's okay with doing this. If this is acceptable by everyone, I will coordinate a date when the change must be completed so that everyone's on board.

If you do not decide you want to match the prices of [Competitor B], I will match your prices upon receiving your reply or within 48 hours, whichever comes first, this will make [Competitor A] obviously change his prices as well and we will all be at a lower price.

If you, or [Competitor A] cannot make it in this industry at the same matched price as my company, then you need to fix your sites, work on advertising, seo etc... I make profit, when you and [Competitor A] have lower prices than my company. We need to all work together on this to

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bring the prices back up to where they should be. Have you seen the prices on eBay? I mean this is ridiculous.

We all need to work together on keeping the prices where they should be. We also need to have identical UPC packages or this will not work either. I will forward this message to [Competitor A] now. Let me know if you are interested in doing this or not. Even though I am your competitor, you need to realize sometimes we have to work together shape up an industry.

12. The next day, on August 5, Mr. Peretz forwarded Mr. Alifraghis' message (*see* paragraph 11 above) to Competitor A asking for Competitor A's thoughts on the proposal to raise and fix prices:

Good morning folks,

I received this last night[. . .]
would love to get your thoughts on this.

Best Regards,
Phil

13. On August 6, Mr. Peretz emailed Mr. Alifraghis and Competitor A. He stated that rather than raise price within the next 48 hours as proposed by Mr. Alifraghis, he would prefer to wait until Sunday, August 11, to raise his rates. Mr. Peretz added a second condition: he wanted Instant to raise its prices first:

We are open to what you suggest [. . .] and are willing to pull the trigger on this at midnight Sunday, August 11th.

Since I am in the Pacific Time zone, this will give me the chance to see what you have done BEFORE I go live with my updated prices.

I am not going to change my quantity breakdowns, but will meet those prices (I might stay higher in a

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few areas where it makes sense to me) but for all intent and purpose, the prices will be the same or higher. I will base these on [Competitor B's] prices as you suggest.

* * *

I will be ready to make this switch on Sunday Midnight and will look to you to lead the charge.

I also look forward to increasing our revenues.

14. Competitor A did not respond to the email from Mr. Alifraghis (*see* paragraph 11 above), and did not respond to the emails from Mr. Peretz (*see* paragraphs 12 and 13 above). Mr. Peretz had a telephone conversation with a representative of Competitor A.

15. On August 7, Mr. Peretz sent an email to Mr. Alifraghis and Competitor A trying to overcome what he perceived as an impasse in the planning to coordinate an increase in prices. Mr. Peretz explained that a lack of trust was leading all three of the firms to make less money:

It seems that we have hit an impasse.

After some conversation with [Competitor A], the issue of trust came up.

It seems that none of us really trust one another and the issue of "price fixing" with someone who is nameless becomes a sticking point. We will not be doing this.

We do agree that prices need to rise, but [Competitor A] is fairly satisfied with destroying the market with his 10,000 barcodes for 1,000. He blames you [. . .] I blame him.

Like I said [. . .] none of us trust one another [. . .] we first need to resolve this 3-way issue of ethics.

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In the meantime [. . .] we will all be making less money.

16. Mr. Alifraghis feared that Competitor A was not ready and willing to cooperate with the proposal to raise prices. On August 9, Mr. Alifraghis transmitted another message to Mr. Peretz via Nationwide's website, urging his competitors to see the benefits to all the companies of collusive pricing:

I personally think that [Competitor B's] prices are TOO low, but he is the highest priced out of all of us and it[']s for a good reason, not only does he want higher revenues from his established customers, but he wants to keep the pricing higher for a reason.

All of our pricing should be something like this:

1 UPC - \$39
5 UPC's - \$ 159
10 UPC's - \$219
and so on[. . .]

The best part is that the above pricing is not even the top tier of how high it could be. Not only would this improve the quantity of overall but also the amount of revenue per sale.

* * *

If you want to make money now and in the future, we all need to raise our pricing.

* * *

I sincerely believe that [N]ationwide is an asset to this industry based on his dedication. I also commend [N]ationwide since I can sincerely see that he understands this logic. Since I know that [N]ationwide is willing to move forward with these price changes, I can see that he clearly understands

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the reasoning behind what [I]’m saying. Therefore this message is directly aimed at [Competitor A].

[Competitor A], if you cannot truly grasp my reasoning behind why everything [I]’ve said so far is logical and you are not willing to change your prices [. . .] then I understand that is a decision you can choose to make. However, since I believe you are incorrect about this decision, I do not have to continue business at the pace you decide to move.

I believe competition is good for every industry as things only improve within time. The problem is, your decisions have an effect on not only you, but also for me and others in the business. I am a man of my word and I reached out to you which means I take this business very seriously. You may not and that may be your problem but it doesn’t have to be mine. I’m not in business to make pennies and [I]’m not a charity. I’m in business because [I]’m here for profit, not bad decisions.

This is what I will leave you with [. . .] You need to make a responsible and logical decision by changing your prices. . . . This is the final and last straw for me to play these games like this. If you decide you don’t want to keep the longevity of the business, I can easily put up 3-6 more sites and push everyone lower.

* * *

I respect everyone in this business and industry even though you are my competitors.

Mr. Peretz forwarded this August 9 message from Instant to Competitor A.

17. On August 11, Mr. Peretz emailed Mr. Alifraghis and Competitor A asking each of them to confirm their “intentions” with regard to the price-fixing scheme under discussion.

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18. Mr. Alifraghis responded with another message transmitted through Nationwide's website. Mr. Alifraghis' message stated that Instant would increase prices only after receiving assurances from Competitor A:

When I thought we were ALL on board, I was willing to change my prices first so that you could see my intentions were obviously real which is why I contacted you both about this.

We'll see what he says about changing ALL of his prices to match [Competitor B]. If he agrees to change ALL of his prices, I will still change mine first so that everyone can see my intentions are as good as my word.

You or [Competitor A] may not know me or trust me or even want to know me or trust me, but I can assure you that I'm a man of my word. If I make a promise, I will stick to it. From what I see, [Competitor A] doesn't seem to take this business as seriously as everyone else, who knows maybe he will come around.

Until [Competitor A] agrees to change all of his prices, I will not change mine first. I know that YOU are on board with the price changes, but like I said it won't work if just me and you change our prices. We'll just be handing free sales to [Competitor A]. I am not interested in handing my sales to anyone, I am interested in bringing the prices back up where they need to be.

I don't mind being the first to change my prices, but everyone needs to be in agreement.

19. On August 11, the price increase discussed by the barcode competitors in multiple email messages failed to materialize. Two days later, on August 13, Mr. Peretz wrote again to Instant and Competitor A. Mr. Peretz implored his competitors to continue their dialogue and to take the opportunity presented to raise prices. Mr. Peretz advised his competitors -- incorrectly --

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that their joint actions would not constitute illegal collusion on price:

This is a dialog [. . .] a dialog is a very good thing and it seems, regardless of how I feel about each of you and how you feel about each other or me, this is an opportunity to increase profitability. All it takes is conversation and a leap of faith.

This is the opportunity that we have all wanted [. . .] to be able to increase our prices and to make some money.

I am higher than you fellows...the sign of good intent would be to meet my prices, then [. . .] over the next several months, increase our prices to where they should be. As we each observe where the other is at, we adjust our prices accordingly.

This is, however, a slippery slope, and could be misconstrued as collusion, which is illegal.

It is not illegal, however, for one of us to raise our prices and then have others follow.

Our discussion has NOT been price fixing, merely a courtesy that we will meet each other's prices [. . .] even if we have to raise them to do this.

20. When Mr. Peretz did not hear back from his competitors, he threatened to lower his prices to punish his rivals for not entering into a price-fixing conspiracy. Mr. Peretz's August 19 email to Instant and Competitor A stated:

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.

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21. Mr. Alifraghis replied to Nationwide later that evening renewing his plea for Nationwide to obtain Competitor A's cooperation in the plan to raise prices. Mr. Alifraghis also threatened to lower prices to punish its rivals if they did not agree to set higher prices:

Nationwide, This is the problem [. . .] you are not accepting responsibility for YOUR own actions. You brought us here to this moment. YOU brought us here, if you would have stopped lowering your prices, YOU wouldn't be here in this situation. I can care less if you match my prices, that would be a smart move for you at this point. But if you go lower, I will continue to bring the entire industry to ground zero.

You going lower than me will do nothing for you, because I'll be right there or if [Competitor A] goes lower I'll still be right there matching both of you. You're still going to have the same problems.

* * *

I'll change my prices and put everyone out of business tomorrow. I'll put the prices so low, there will be no profits PERIOD.

* * *

I messaged you both to bring the prices up, not go down. [Competitor A] is your problem[. . .] [G]et him to agree to matching [Competitor B's] prices and I'll change mine before everyone [. . .] like I said.

* * *

If you both don't wanna raise your prices [. . .] just keep going lower and lower and lower. I don't mind, go either direction you decide I'll be right there matching the prices. . . . I'll surprise the both

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of you with the lowest prices you've ever seen. You are pushing me to put everyone out of business.

22. Mr. Peretz and Mr. Alifraghis continued to exchange communications about price levels into January 2014. On October 21, 2013, Mr. Alifraghis contacted Nationwide and complained that its prices were too low. Mr. Peretz responded by claiming that Instant was priced lower than Nationwide. On January 6, Mr. Alifraghis contacted Nationwide and complained that Competitor A and Competitor B had lowered their prices. Nationwide responded by stating that, "If you want to be colleagues, certainly we can," but that Mr. Alifraghis had shown a lack of respect for Nationwide's business.

23. The FTC served a subpoena on Nationwide in January 2014.

VIOLATION CHARGED

24. As set forth in Paragraphs 10 through 23 above, Respondents invited their competitors to collude with 680 Digital to raise prices for barcodes in violation of Section 5 of the Federal Trade Commission Act, as amended.

25. The acts, policies and practices of Respondents, as alleged herein, constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended. Such acts, policies and practices of Respondents will continue or recur in the absence of appropriate relief.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twentieth day of August, 2014, issues its complaint against Respondents.

By the Commission.

Decision and Order

DECISION AND ORDER

The Federal Trade Commission (“Commission”) having initiated an investigation of certain acts and practices of 680 Digital, Inc., a corporation, and Phillip B. Peretz an individual, (hereinafter referred to as “Respondents”), and Respondents having been furnished thereafter with a copy of the draft of Complaint that counsel for the Commission proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of 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

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondents have violated the 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, 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 Order:

1. Respondent 680 Digital, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of Washington with its business mailing address at PO Box 2750, Issaquah, WA 98027.
2. Respondent Philip B. Peretz, who operates 680 Digital, Inc. d/b/a NationwideBarcode.com, is an individual

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living in Nevada and doing business in Nevada, with a mailing address of 3495 Lakeside Drive, # 144, Reno, NV 89509.

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

ORDER**I.**

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

- A. “Respondent 680 Digital, Inc.” means 680 Digital Inc., its members, directors, officers, trustees, employees, attorneys, agents, consultants, and representatives; its divisions, subsidiaries, affiliates, partnerships, and joint ventures, including, without limitation, Nationwide Barcode and NationwideBarcode.com; and the directors, officers, trustees, employees, attorneys, agents, consultants, and representatives, successors, and assigns of each.
- B. “Respondent Philip B. Peretz” means Philip Bernard Peretz; all businesses, partnerships, joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Philip B. Peretz; and the respective partners, directors, officers, agents, employees, attorneys, representatives, consultants, representatives, successors, and assigns of each.
- C. Respondents means Respondent 680 Digital, Inc. and Respondent Philip B. Peretz, individually and collectively.
- D. “Barcode” means a machine-readable code in the form of numbers and a pattern of parallel lines of varying widths, used to identify a product; Barcode includes

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machine-readable codes commonly referred to as “Universal Product Codes” or “UPCs.”

- E. “Commission” means the Federal Trade Commission.
- F. “Communicating” means any transfer or dissemination of information, regardless of the means by which it is accomplished, including orally, by letter, e-mail, notice, or memorandum.
- G. “Competitor” means any Person engaged in the business of selling, leasing, renting, or licensing Barcodes, including, but not limited to, firms such as InstantUPCCodes.com.
- H. “Person” means both natural persons and artificial persons, including, but not limited to, corporations, partnerships, and unincorporated entities.

II.

IT IS FURTHER ORDERED that in connection with the sale, leasing, renting or licensing of any Barcode in or affecting commerce, as “commerce” is defined by the Federal Trade Commission Act, Respondents shall cease and desist from, either directly or indirectly, or through any corporate or other device:

- A. Communicating with any Competitor regarding prices or rates, or prospective prices or rates, of Respondents or any Competitor; *provided, however*, that for purposes of this Paragraph II.A, Communicating does not include the transfer or dissemination of information to the public through websites or other widely accessible methods of advertising such as newspapers, television, signage, direct mail or online and social media; *provided, further, however*, that it shall not, of itself, constitute a violation of Paragraph II .A. of this Order for Respondent to Communicate, or enter into an agreement, with a Competitor regarding prices or rates at which Respondent will buy Barcodes from, or sell Barcodes to, such Competitor.

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- B. Entering into, attempting to enter into, adhering to, participating in, maintaining, organizing, implementing, enforcing, inviting, encouraging, offering or soliciting any agreement or understanding, express or implied, between or among Respondents and any Competitor:
 - 1. To raise, fix, maintain, or stabilize prices or price levels, rates or rate levels, or payment terms, or to engage in any other pricing action;
 - 2. To allocate or divide markets, customers, contracts, transactions, business opportunities, lines of commerce, or territories; or
 - 3. To set, change, limit or reduce service terms or service levels.
- C. Exhorting, requesting, suggesting, urging, advocating, encouraging, advising, or recommending to any Competitor, either publicly or privately, that it:
 - 1. Set, change, raise, fix, stabilize or maintain its prices or price levels, rates or rate levels, or payment terms, or engage in any other pricing action; or
 - 2. Set, change, reduce, limit, maintain, or reduce its service terms or service levels.

III.

IT IS FURTHER ORDERED that Respondents shall:

- A. Within thirty (30) days after the date on which this Order becomes final, provide to each of Respondents' officers, directors and employees a copy of this Order and the Complaint.
- B. For a period of four (4) years from the date this Order becomes final, provide a copy of this Order and the Complaint to any person who becomes a director,

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officer, or employee of Respondents, and shall provide such copies within thirty (30) days of the commencement of such Person's employment or term as an officer or director.

- C. Require each person to whom a copy of this Order is furnished pursuant to Paragraph III.A. and III.B. above to sign and submit to Respondents within thirty (30) 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 Respondents to penalties for violation of the Order.
- D. Retain documents and records sufficient to record Respondents' compliance with its obligations under Paragraph III of this Order.

IV.

IT IS FURTHER ORDERED that Respondents shall file verified written reports within sixty (60) days from the date this Order becomes final, annually thereafter for four (4) 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 copy of the acknowledgement(s) required by III.D. of the Order; and
- B. A detailed description of the manner and form in which Respondents have complied and are complying with this Order.

V.

IT IS FURTHER ORDERED that each Respondents shall notify the Commission:

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- 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:
 - 1. Any proposed dissolution of Respondents;
 - 2. Any proposed acquisition, merger, or consolidation of Respondents; or
 - 3. Any other change in Respondents 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, upon written request and upon five (5) days notice to the applicable Respondent, such Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

- A. Access, during office hours and in the presence of counsel, to all facilities and access to inspect and obtain copies of relevant books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession or under the control of Respondents relating to compliance with this Order, which copying services shall be provided by such Respondent at the request of the authorized representative(s) of the Commission and at the expense of such Respondent; and
- B. The opportunity to interview officers, directors, or employees of such Respondent, who may have counsel present, related to compliance with this Order.

Analysis to Aid Public Comment

VII.

IT IS FURTHER ORDERED that this Order shall terminate on August 20, 2034.

By the Commission.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

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.

Under the terms of the proposed Consent Agreements, Respondents are required to cease and desist from communicating with their competitors about rates or prices. They are also barred from entering into, participating in, inviting, or soliciting an agreement with any competitor to divide markets, to allocate customers, or to fix prices.

The Commission anticipates that the competitive issues described in the Complaints will be resolved by accepting the Proposed Orders, subject to final approval, contained in the Consent Agreements. The Consent Agreements have 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

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Commission will review the Consent Agreements again and the comments received, and will decide whether it should withdraw from the Consent Agreements or make final the accompanying Decisions and Orders (“Proposed Orders”).

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 Agreements and the accompanying Proposed Orders or in any way to modify their terms.

The Consent Agreements are for settlement purposes only and do not constitute an admission by Respondents that the law has been violated as alleged in the Complaints or that the facts alleged in the Complaints, other than jurisdictional facts, are true.

I. The Complaints

The allegations of the Complaints are summarized below:

Instant, Nationwide, and a firm we refer to as Competitor A sell barcodes over the Internet. A firm we refer to as Competitor B also sells barcodes over the Internet, but at higher prices than Instant, Nationwide, and Competitor A. Price competition among these firms caused the price of barcodes to decrease over time.

Prior to August 2013, Instant had never communicated with Nationwide or Competitor A. On the evening of August 4, 2013, Mr. Alifraghis of Instant sent a message to Mr. Peretz of Nationwide proposing that all three competitors raise their prices to meet the higher prices charged by Competitor B:

Hello Phil, Our company name is InstantUPCCodes.com, as you may be aware, we are one of your competitors within the same direct industry that you are in. . . . Here’s the deal Phil, I’m your friend, not your enemy. . . .

Here’s what I’d like to do: All 3 of us- US, YOU and [Competitor A] need to match the price that [Competitor B] has. . . . I’d say that 48 hours would be an acceptable amount of

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time to get these price changes completed for all 3 of us. The thing is though, we all need to agree to do this or it won't work. . . . Reply and let me know if you are willing to do this or not.

Mr. Alifraghis then sent a similar email message to Competitor A. The next day, on August 5, Mr. Peretz forwarded Mr. Alifraghis' message to Competitor A, asking for Competitor A's thoughts on the proposal to raise and fix prices.

On August 6, Mr. Peretz emailed Mr. Alifraghis and Competitor A. He stated that, rather than raise price within the next 48 hours as proposed by Mr. Alifraghis, he would prefer to wait until Sunday, August 11, to raise his prices. Mr. Peretz added a second condition: he wanted Instant to raise its prices first:

We are open to what you suggest . . . and are willing to pull the trigger on this at midnight Sunday, August 11th.

Competitor A did not respond to this email or to any emails in the series. Not having heard from Competitor A, Mr. Alifraghis emailed Mr. Peretz stating that he would have to hear from Competitor A directly before any price increase could take place.

On August 7, Mr. Peretz sent an email to Mr. Alifraghis and Competitor A, trying to overcome the lack of lack of trust that he perceived as impeding efforts to coordinate a price increase.

On August 11, the price increase discussed by the barcode competitors in multiple email messages failed to materialize. Two days later, on August 13, Mr. Peretz wrote again to Mr. Alifraghis and Competitor A. Mr. Peretz urged his competitors to continue their dialogue and to take the opportunity presented to raise prices:

This is a dialog [. . .] a dialog is a very good thing and it seems, regardless of how I feel about each of you and how you feel about each other or me, this is an opportunity to increase profitability. All it takes is conversation and a leap of faith.

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This is the opportunity that we have all wanted [. . .]
to be able to increase our 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 of the FTC Act.¹ Several legal and

¹ See, e.g., *In re Quality Trailer Prods.*, 115 F.T.C. 944 (1992); *In re AE Clevite*, 116 F.T.C. 389 (1993); *In re Precision Moulding*, 122 F.T.C. 104

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economic justifications support the imposition of liability upon a firm that communicates an invitation to collude, even where there is no proof of acceptance. First, difficulties exist in determining whether a competitor has or has not accepted a particular solicitation. Second, even an unaccepted solicitation may facilitate coordinated interaction by disclosing the solicitor's intentions or preferences. Third, the anti-solicitation 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.

(1996); *In re Stone Container*, 125 F.T.C. 853 (1998); *In re MacDermid*, 129 F.T.C. (C-3911) (2000); *see also In re McWane, Inc.*, Docket No. 9351, *Opinion of the Commission on Motions for Summary Decision* at 20-21 (F.T.C. Aug. 9, 2012) (“an invitation to collude is ‘the quintessential example of the kind of conduct that should be . . . challenged as a violation of Section 5’”) (citing the Statement of Chairman Leibowitz and Commissioners Kovacic and Rosch, *In re U-Haul Int’l, Inc.*, 150 F.T.C. 1, 53 (2010)). This conclusion has been affirmed by leading antitrust scholars. *See*, P. Areeda & H. Hovenkamp, VI ANTITRUST LAW ¶ 1419 (2003); Stephen Calkins, *Counterpoint: The Legal Foundation of the Commission’s Use of Section 5 to Challenge Invitations to Collude is Secure*, ANTITRUST Spring 2000, at 69. In a case brought under a state’s version of Section 5, the First Circuit expressed support for the Commission’s application of Section 5 to invitations to collude. *Liu v. Amerco*, 677 F.3d 489 (1st Cir. 2012).

² *Valassis Communications, Inc.*, Analysis of Agreement Containing Consent Order to Aid Public Comment, 71 Fed. Reg. 13976, 13978-79 (Mar. 20, 2006).

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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 entering into, participating in, maintaining, organizing, implementing, enforcing, inviting, offering, or soliciting an agreement with any competitor to divide markets, to allocate customers, or to fix prices.

Section II, Paragraph C bars Respondents from urging any competitor to raise, fix or maintain its price or rate levels or to limit or reduce service terms or levels.

Sections III-VI of the Proposed Orders impose certain standard reporting and compliance requirements on Respondents.

The Proposed Orders will expire in 20 years.

Complaint

IN THE MATTER OF

I-HEALTH, INC.**AND****MARTEK BIOSCIENCES CORP.**CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF
SECTIONS 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT*Docket No. C-4486; File No. 122 3067**Complaint, August 21, 2014 – Decision, August 21, 2014*

This consent order addresses i-Health, Inc.'s and Martek Biosciences Corporation's advertising for the BrainStrong Adult dietary supplement containing algal docosahexaenoic acid ("DHA"), an omega-3 fatty acid. The complaint alleges that the companies violated Sections 5(a) and 12 of the Federal Trade Commission Act by making the unsubstantiated representation that BrainStrong Adult improves memory and prevents cognitive decline in adults. The consent order prohibits any representation about the health benefits, performance, safety, or efficacy of any dietary supplement, food, or drug promoted to prevent cognitive decline or improve memory, or containing DHA, unless it is non-misleading and supported by competent and reliable scientific evidence that is sufficient in quality and quantity based on standards generally accepted in the relevant scientific fields, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate that the representation is true.

Participants

For the *Commission*: Victor DeFrancis, Keith Fentonmiller, and Edwin Rodriguez.

For the *Respondents*: Charles Dickinson, Martin Hahn, and Corey Roush, Hogan Lovells US LLP; Jason Stephans, In-House Counsel.

COMPLAINT

The Federal Trade Commission ("FTC" or "Commission"), having reason to believe that i-Health, Inc. and Martek Biosciences Corporation ("Respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges: