

Complaint

IN THE MATTER OF

FORTILINE, LLCCONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF
SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket No. C-4592; File No. 151 0000**Complaint, September 23, 2016 – Decision, September 23, 2016*

This consent order addresses Fortiline, LLC's invitation to collude while in both a horizontal (interbrand) and a vertical (intra-brand) relationship with the invitee. The complaint alleges that Fortiline violated Section 5 of the Federal Trade Commission Act by inviting a competing seller of ductile iron pipe to raise and fix prices. The consent order 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.

Participants

For the *Commission*: Mark Taylor.

For the *Respondent*: Timothy Muris, Kirkland & Ellis LLP.

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 Fortiline, LLC (hereinafter sometimes referred to as "Fortiline" or "Respondent"), has 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 the public interest, hereby issues this Complaint stating its charges as follows:

Nature of the Case

1. Fortiline, a distributor of ductile iron pipe ("DIP"), invited a rival to raise and fix prices in North Carolina and Virginia. By

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inviting collusion, Fortiline endangered competition and violated Section 5 of the FTC Act.

Respondent

2. Fortiline is a limited liability company organized, existing, and doing business under and by virtue of the laws of North Carolina, with its principal place of business located in Concord, North Carolina.

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

4. Fortiline is the third largest distributor of waterworks infrastructure products in the United States, operating approximately 37 branches in 12 states throughout the Southeast, the Mid-Atlantic, the Midwest, and Texas.

Jurisdiction

5. At all times relevant herein, Fortiline 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.

6. The business practices of Fortiline, 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.

DIP Industry

7. DIP is a commodity product used in underground waterworks distribution systems and water treatment plants. End users of DIP are primarily municipalities and water utilities. For a typical project, the end user seeks bids from multiple contractors.

8. Contractors, in turn, solicit DIP bids from waterworks infrastructure distributors (such as Fortiline) and/or directly from

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DIP manufacturers. Contractors that buy direct from DIP manufacturers often pay a lower price, but forgo value-added services that distributors provide.

9. At all times relevant herein, each of the major DIP manufacturers in the United States periodically published to its distributors a nationwide “price list” or “pricing schedule.” Sometimes, instead of publishing a new price list, a DIP manufacturer announced a price adjustment stated in terms of a “multiplier,” a decimal number by which the published price was multiplied to arrive at the new price. A higher multiplier translated to a higher price for DIP.

The Manufacturer A – Fortiline Relationship

10. From its founding in 1997 until late 2009, most Fortiline branches distributed only DIP manufactured by Manufacturer A.

11. On or about December 14, 2009, Fortiline terminated Manufacturer A as its DIP supplier in North Carolina and in most of Virginia. After December 14, 2009, Fortiline branches in this region bid on new waterworks projects with DIP manufactured by Manufacturer B, a rival of Manufacturer A.

12. After December 14, 2009, some Fortiline branches outside of North Carolina and most of Virginia continued to distribute Manufacturer A’s DIP. In addition, even though Fortiline terminated Manufacturer A in North Carolina, Fortiline continued to supply Manufacturer A’s DIP to North Carolina contractors as needed to complete projects where Fortiline had, prior to December 14, 2009, submitted to the contractor a bid specifying Manufacturer A’s DIP.

13. Fortiline’s termination of Manufacturer A in North Carolina and most of Virginia left Manufacturer A without a major distributor in that region. In response, Manufacturer A began to market and sell DIP direct to contractors in North Carolina and most of Virginia, in competition with North Carolina/Virginia distributors and their DIP suppliers, including Fortiline and its new supplier Manufacturer B.

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14. Manufacturer A did not offer North Carolina and Virginia contractors the value-added services provided by distributors. In order to entice contractors to forgo those services and to buy directly from Manufacturer A, Manufacturer A offered lower prices to contractors.

15. Fortiline and other distributors (in conjunction with their DIP suppliers) reduced their prices in order to compete with Manufacturer A's lower prices.

Invitations to Collude

16. On two occasions in 2010, when Fortiline and Manufacturer A were competing against one another to sell DIP in North Carolina and most of Virginia, Fortiline communicated to Manufacturer A an invitation to collude on DIP pricing in that region.

17. On February 12, 2010, the chief executive officer and the vice president of sales for Fortiline met with Manufacturer A's vice president of sales. Among other things, they discussed Manufacturer A's practice of selling direct in North Carolina and most of Virginia at low prices.

18. During the evening of February 12, 2010, Fortiline's vice president of sales forwarded to Manufacturer A's vice president of sales an email reporting on market conditions in North Carolina. The email detailed Manufacturer A's practice of undercutting its rivals' prices. In contrast, the email stated, other major DIP manufacturers "have been trying to keep their numbers up thus far." The Fortiline email included the following commentary: "This is the type of irrational behavior [by Manufacturer A] that we were discussing earlier today. With this approach we will be at a .22 [multiplier] soon instead of a needed .42."

19. In substance, the February 12, 2010, email communicated Fortiline's dissatisfaction with Manufacturer A's low pricing in North Carolina, and its preference that both Fortiline and Manufacturer A bid to contractors using the higher .42 multiplier.

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

21. In substance, this conversation communicated Fortiline’s dissatisfaction with Manufacturer A’s low pricing in Virginia, and its preference that both Fortiline and Manufacturer A bid to contractors using a substantially higher multiplier in that region.

Violation Charged

22. As set forth in Paragraphs 16 through 21 above, Fortiline invited a competitor to raise and fix prices for DIP in North Carolina and Virginia, in violation of Section 5 of the Federal Trade Commission Act, as amended. The acts and practices of Fortiline, 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 and practices of Fortiline may continue or recur in the absence of appropriate relief.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twenty-third day of September, 2016, issues its complaint against Respondent.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission (“Commission”) having initiated an investigation of certain acts and practices of Fortiline, LLC, a North Carolina limited liability company (“Fortiline”), and Fortiline having been furnished thereafter with a copy of the

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draft Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Fortiline with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Fortiline, its attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order (“Consent Agreement”), containing an admission by Fortiline 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 Fortiline 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 Fortiline has 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. Fortiline, LLC, is a limited liability company organized, existing, and doing business under and by virtue of the laws of North Carolina, with its principal place of business in Concord, North Carolina.
2. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and of Fortiline, and this proceeding is in the public interest.

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ORDER**I.**

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

- A. “Respondent” means Fortiline, LLC, its directors, officers, employees, agents, representatives, successors, and assigns; and any joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates in each case controlled by Fortiline, LLC, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “Commission” means the Federal Trade Commission.
- C. “Competitor” means any Person engaged in the business of selling or distributing ductile iron pipe, and any such Person’s employees, agents, and representatives. The term “Competitor” does not include any Contractor.
- D. “Contractor” means any Person who constructs and installs waterworks infrastructure that uses ductile iron pipe according to stated requirements or specifications, at a mutually agreed upon price and within a specified timeframe, for another Person who shall be the ultimate owner of the infrastructure and its component ductile iron pipe.
- E. “Designated Employee” means any employee of Respondent with responsibility for the purchase, sale, or pricing of ductile iron pipe.
- F. “Manufacturer” means any Person engaged in the business of manufacturing or fabricating ductile iron pipe, and any such Person’s employees, agents, and representatives.

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- G. “Person” includes Respondent and means both natural persons and artificial persons, including, but not limited to, corporations, partnerships, unincorporated entities, or governments. For the purpose of this Order, any corporation includes the subsidiaries, divisions, groups, and affiliates controlled by it.

II.

IT IS FURTHER ORDERED that in connection with the sale or distribution of any ductile iron pipe, 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:

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 Respondent and any Competitor:

- A. 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; or
- B. To allocate or divide markets, customers, contracts, transactions, business opportunities, lines of commerce, or territories.

Provided, however, that it shall not, of itself, constitute a violation of Paragraph II. of this Order for Respondent to engage in any conduct that is (1) reasonably related to a lawful manufacturer-distributor relationship, lawful joint venture agreement, or lawful merger, acquisition or sale agreement; and (2) reasonably necessary to achieve the procompetitive benefits of such manufacturer-distributor relationship or of such agreement. For the avoidance of doubt, it shall not constitute a violation of Paragraph II of this Order for Respondent: (i) to communicate with a Manufacturer regarding Respondent’s desire to receive prices or rates

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(including rebates and discounts) at least as favorable as those granted by that Manufacturer to a Competitor or Contractor; (ii) to request, negotiate, or enter into an agreement with a Manufacturer under which Respondent shall be that Manufacturer's exclusive or quasi-exclusive distributor; or (iii) to request or enter into an agreement with a Manufacturer under which Respondent distributes that Manufacturer's ductile iron pipe to a Contractor previously or potentially served by that Manufacturer.

Provided, further, however, that it shall not, of itself, constitute a violation of Paragraph II. of this Order for Respondent to negotiate with a Competitor regarding the terms of an agreement, or to enter into an agreement, if that negotiation or agreement relates exclusively to the terms under which Respondent either will buy ductile iron pipe from that Competitor, or will sell ductile iron pipe to that Competitor.

III.

IT IS FURTHER ORDERED that Respondent shall:

- A. Within thirty (30) days after the date on which this Order is issued, provide to each of Respondent's officers, directors and Designated Employees a copy of this Order and the Complaint.
- B. For a period of three (3) years from the date this Order is issued, provide a copy of this Order and the Complaint to any Person who becomes a director, officer, or Designated Employee of Respondent, and provide such copies within thirty (30) days of the commencement of such Person's employment or term as an officer, director, or Designated Employee.
- 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 Respondent within thirty (30) days of the receipt thereof a statement that (1) represents that the undersigned has read and

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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.

- D. Retain documents and records sufficient to record Respondent's compliance with its obligations under Paragraph III of this Order.

IV.

IT IS FURTHER ORDERED that Respondent shall file a verified written report within sixty (60) days from the date this Order is issued, annually thereafter for three (3) years on the anniversary of the date this Order is issued, 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.C. of the Order; and
- B. 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 or place of business within twenty (20) days of such change in address; and
- B. At least thirty (30) days prior to:
 - 1. Any proposed dissolution of Respondent;
 - 2. Any proposed acquisition, merger, or consolidation of Respondent; or

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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, upon written request and upon five (5) days notice, 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 Respondent relating to compliance with this Order, which copying services shall be provided at the request of the authorized representative(s) of the Commission and at the expense of Respondent; and
- B. The opportunity to interview officers, directors, or employees of Respondent, who may have counsel present, related to compliance with this Order.

VII.

IT IS FURTHER ORDERED that this Order shall terminate on September 23, 2036.

By the Commission.

Analysis to Aid Public Comment

Dissenting Statement of Maureen K. Ohlhausen

The proposed order settles the FTC's allegations that Fortiline, LLC violated Section 5 of the FTC Act. I agree with my colleagues that it is unlawful for a firm to invite its competitor to collude even if they have a vertical relationship in other markets. The evidence regarding whether Fortiline made an invitation to collude and whether the communications arose in a vertical or horizontal context is ambiguous, however. Because I am concerned that imposing liability in such equivocal factual circumstances may chill procompetitive vertical conduct in markets with dual distribution, I respectfully dissent.

**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 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 inviting a competing seller of ductile iron pipe ("DIP"), Manufacturer A, to raise and fix prices.

This is the first Commission challenge to an invitation to collude by a firm that is in both a horizontal (interbrand) and a vertical (intrabrand) 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

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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. DIP is a commodity product used in underground waterworks distribution systems and water treatment plants. End users of DIP are primarily municipalities and water utilities. For a typical project, the end user seeks bids from multiple contractors. Contractors, in turn, solicit DIP bids from waterworks distributors (such as Fortiline) and/or directly from DIP manufacturers. Contractors that buy direct from DIP manufacturers often pay a lower price, but forgo value-added services that distributors provide.

Each of the major DIP manufacturers in the United States periodically publishes a nationwide “price list” or “pricing schedule.” Sometimes, rather than publishing a new price list, a DIP manufacturer would announce a price adjustment stated in terms of a “multiplier,” a decimal number by which the published

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price was multiplied to arrive at the new list price. A higher multiplier translated to a higher price for DIP. The price list and the multiplier would serve as the starting point for transaction price negotiations with customers; the final transaction price on each project was decided on a job-by-job basis.

From its founding in 1997 until late 2009, most Fortiline branches distributed only DIP manufactured by Manufacturer A. However, on or about December 14, 2009, Fortiline terminated Manufacturer A as its DIP supplier in North Carolina and in most of Virginia. After December 14, 2009, Fortiline branches in this area bid on new waterworks projects with DIP manufactured by Manufacturer B, a competitor of Manufacturer A.

After December 14, 2009, some Fortiline branches outside of North Carolina and in one part of Virginia continued to distribute Manufacturer A's DIP. In addition, even though Fortiline terminated Manufacturer A in North Carolina and in most of Virginia, Fortiline continued to supply Manufacturer A's DIP to contractors in that area as needed to complete projects where Fortiline had, prior to December 14, 2009, submitted a bid specifying Manufacturer A's DIP.

Fortiline's termination of Manufacturer A in North Carolina and most of Virginia left Manufacturer A without a major distributor in that region. In response, Manufacturer A began to market and sell DIP directly to contractors in North Carolina and most of Virginia, in competition with North Carolina and Virginia distributors and their DIP suppliers, including Fortiline and its new supplier, Manufacturer B.

Manufacturer A did not offer North Carolina and Virginia contractors the value-added services provided by distributors. In order to entice contractors to forgo those services and to buy directly from Manufacturer A, Manufacturer A offered lower prices. In response, Fortiline and other distributors (in conjunction with their DIP suppliers) reduced their own prices in order to compete with Manufacturer A's lower prices.

On two occasions in 2010, when Fortiline and Manufacturer A were competing against one another to sell DIP in North Carolina

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and most of Virginia, Fortiline invited Manufacturer A to collude on DIP pricing in that region.

On February 12, 2010, the chief executive officer and the vice president of sales for Fortiline met with Manufacturer A's vice president of sales. Among other things, they discussed Manufacturer A's practice of selling direct in North Carolina and most of Virginia at low prices.

That evening, Fortiline's vice president of sales forwarded to his counterpart at Manufacturer A an email reporting on market conditions in North Carolina. The email detailed Manufacturer A's practice of undercutting its competitors' prices. In contrast, the email reported, other major DIP manufacturers "have been trying to keep their numbers up thus far." The Fortiline email included the following commentary: "This is the type of irrational behavior [by Manufacturer A] that we were discussing earlier today. With this approach we will be at a .22 [multiplier] soon instead of a needed .42."

In substance, the February 12th email communicated Fortiline's dissatisfaction with Manufacturer A's low 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.

Analysis to Aid Public Comment

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. The Commission has long held that invitations to collude violate Section 5 of the FTC Act. An invitation to collude is “potentially harmful and . . . serves no legitimate business purpose.”¹ For those reasons, the Commission treats such conduct as “inherently suspect” (that is, presumptively anticompetitive).² This means that, in the absence of a procompetitive justification, an invitation to collude can be condemned under Section 5 without a showing that the respondent possesses market power³ and without proof that the competitor accepted the invitation.⁴ There are various reasons for this. First, unaccepted solicitations may harm competition by facilitating coordination between competitors because they reveal information about the solicitor’s intentions or preferences.

1 *In re Valassis Commc’ns, Inc.*, 141 F.T.C. 247, 283 (2006) (Analysis of Agreement Containing Consent Order to Aid Public Comment); *see also* Address by FTC Chairwoman Edith Ramirez, Section 5 Enforcement Principles, George Washington University Law School at 5 (Aug. 13, 2015) (discussing invitations to collude), https://www.ftc.gov/system/files/documents/public_statements/735411/150813section5speech.pdf.

2 *See, e.g., In re North Carolina Bd. of Dental Examiners*, 152 F.T.C. 640, 668 (2011) (noting that inherently suspect conduct is such that be “reasonably characterized as ‘giv[ing] rise to an intuitively obviously inference of anticompetitive effect’”).

3 *See, e.g., In re Realcomp II, Ltd.*, 148 F.T.C. 137, No. 9320, 2009 FTC LEXIS 250 at *51 (Oct. 30, 2009) (Comm’n Op.) (explaining that if conduct is “inherently suspect” in nature, and there are no cognizable procompetitive justifications, the Commission can condemn it “without proof of market power or actual effects”).

4 *See, e.g., In re Valassis Commc’ns, Inc.*, 141 F.T.C. 247 (2006); *In re Stone Container*, 125 F.T.C. 853 (1998); *In re Precision Moulding*, 122 F.T.C. 104 (1996). *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)).

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Second, it can be difficult to discern whether a competitor has accepted a solicitation. Finally, finding a violation may deter similar conduct that has no legitimate business purpose.⁵

As described above, during the relevant time period, Fortiline competed with Manufacturer A in selling DIP to customers while also serving as Manufacturer A's distributor. 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 *per se* analysis.⁶ The relevant issue is not whether the parties are in a vertical or horizontal *relationship*, but whether the *restraint* on competition is an intrabrand restraint or an interbrand restraint.⁷ A similar analysis applies in the context of an invitation to collude.

5 *In re Valassis Commc'ns*, 141 F.T.C. at 283 (Analysis of Agreement Containing Consent Order to Aid Public Comment).

6 See *Gen. Leaseways, Inc. v. Nat'l Truck Leasing Ass'n*, 744 F.2d 588, 594 (7th Cir. 1984) ("It does not follow that because two firms sometimes have a cooperative relationship there are no competitive gains from forbidding them to cooperate in ways that yield no economies but simply limit competition."). See also *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46, 49 (1990) (*per se* liability where conspirators had both horizontal and vertical (licensor/licensee) relationship); *Eli Lilly and Co. v. Zenith Goldline Pharmaceuticals, Inc.*, 172 F.Supp.2d 1060 (S.D. Ind. 2001) (*per se* liability where conspirators had both horizontal and vertical relationship); *United States v. General Electric Co.*, 1997-1 Trade Cas. (CCH) ¶ 71,765 (D. Mont. 1997) (same).

7 See *United States v. Apple, Inc.*, 791 F.3d 290, 322 (2d Cir. 2015) (internal citations omitted) (rejecting Apple's argument that its role in a horizontal conspiracy with publishers should be evaluated under rule of reason because it was in a vertical relationship with publishers, noting that "it is the type of restraint that Apple agreed with the publishers to impose that determines whether the *per se* rule or the rule of reason is appropriate. These rules are means of evaluating 'whether [a] restraint is unreasonable,' not the reasonableness of a particular defendant's role in the scheme.").

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Here, the Complaint charges that Fortiline invited Manufacturer A to collude on pricing *across the board*, including on transactions in which Fortiline was distributing for a rival manufacturer, Manufacturer B.⁸ Certainly, market and price-related communications between a manufacturer and its distributor can be appropriate and procompetitive.⁹ A firm may not, however, use an intrabrand relationship to shield itself from anticompetitive interbrand conduct.¹⁰ As an intrabrand relationship will not immunize an otherwise unlawful agreement, it likewise will not immunize an unlawful invitation to collude. If Manufacturer A accepted Fortiline's requests to raise prices on projects for which the firms were interbrand competitors, the resulting agreement would be *per se* unlawful. It follows that Fortiline's communications to Manufacturer A—its attempts to secure an unlawful agreement—were unlawful invitations to collude.

III. The Proposed Consent Order

The Commission recognizes the need to tailor relief that will prevent Fortiline from engaging in the anticompetitive conduct described in the complaint, yet avoid chilling procompetitive communications and efficient contracting between Fortiline and each of its current and future suppliers.

8 The Commission has previously found similar communications to constitute unlawful invitations to collude. *E.g.*, *In re Step N Grip LLC*, 160 F.T.C. 1111, Docket No. C-4561 (Dec. 7, 2015), <https://www.ftc.gov/enforcement/cases-proceedings/151-0181/step-n-grip-llc-matter> (respondent communicated to competitor that both parties should sell at the same price); *In re Precision Moulding*, 122 F.T.C. 104 (1996) (respondent complained to competitor that the competitor's pricing was "ridiculously low" and that the competitor did not have to "give the product away"); *In re AE Clevite*, 116 F.T.C. 389, 391 (1993) (respondent complained to competitor about its pricing, and subsequently faxed the competitor comparative price lists from both companies).

9 See *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 764-65 (1984).

10 See *supra* notes 6-8.

Analysis to Aid Public Comment

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-VI of the Proposed Order impose certain standard reporting and compliance requirements on Fortiline.

The Proposed Order will expire in 20 years.

Complaint

IN THE MATTER OF

ON SEMICONDUCTOR CORPORATIONCONSENT 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-4593; File No. 161 0061**Complaint, September 30, 2016 – Decision, September 30, 2016*

This consent order addresses the \$2.4 billion acquisition by ON Semiconductor Corporation of certain assets of Fairchild Semiconductor International, Inc. The complaint alleges that the acquisition, if consummated, would violate Section 7 of the Clayton Act and Section 5 of the FTC Act by substantially lessening competition in the worldwide market for insulated-gate bipolar transistors (“IGBTs”) used in automotive ignition systems (“Ignition IGBTs”). The consent order requires ON to divest its Ignition IGBT business to Littelfuse, Inc.

Participants

For the *Commission*: *Llewellyn Davis*, and *Joonsuk Lee*.

For the *Respondent*: *Jeff Jaeckel*, *Morrison and Foerster*.

COMPLAINT

Pursuant to the Clayton Act and the Federal Trade Commission Act, and its authority thereunder, the Federal Trade Commission (“Commission”), having reason to believe that Respondent ON Semiconductor Corporation (“ON”), a corporation subject to the jurisdiction of the Commission, has agreed to acquire Fairchild Semiconductor International, Inc. (“Fairchild”), in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act (“FTC Act”), 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: