

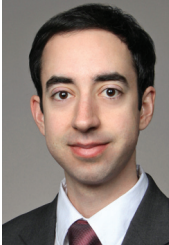
The New Realm of Antitrust from Public Disclosures

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A recent trend in US antitrust law has been a new emphasis on claims based on public disclosures. This trend has manifested itself in two ways.

First, the Federal Trade Commission (FTC) has revived the “invitation to collude” theory. This theory posits that a company that makes a specific and concrete offer to enter into an unlawful agreement may be found liable, even if the offer is never accepted. Illustrating this point, the FTC brought two cases, including one this past summer, based on alleged “collusive” statements made during calls with securities analysts and investors.

Second, in response to heightened pleading requirements, civil plaintiffs are looking for public statements that can be used as evidence of an actual agreement when competing companies take parallel actions. Over the past five years, the Supreme Court has made it clear that plaintiffs must be very specific when pleading an agreement of unlawful collusion (the “unlawful agreement theory”), advancing something more than generalized allegations to state a Section 1 claim. Public statements are a means for plaintiffs to do just that.

This article considers both the invitation to collude and the unlawful agreement theories and offers some practical suggestions to companies as they strive to limit their potential antitrust liability.

Invitations to Collude

An “invitation to collude” is an antitrust claim that involves a specific, directed offer from one competitor to another to agree on issues of competitive significance, such as price or output, which is not accepted. The first reported invitation to collude case was *United States v. American Airlines, Inc.*¹ In that case, American’s president, Robert Crandall, called his competitor and said, “Raise your goddamn fares twenty percent. I’ll raise mine the next morning . . . You’ll make more money and I will too.”² According to the Fifth Circuit, all that remained before an unlawful agreement could be finalized was for the competitor to say “yes.”

Unfortunately for Mr. Crandall, however, American’s competitor had taped the conversation and turned the tapes over to the Department of Justice (DOJ). Unable to fit Crandall’s conduct into a traditional Section 1 theory, the DOJ instead charged American and Mr. Crandall with an attempt to monopolize through an invitation to collude. Significantly, the Fifth Circuit emphasized, Mr. Crandall’s words were “uniquely unequivocal” and “not ambiguous,”³ which allowed the court to conclude that there was collusive behavior.

Since *American*, the US government has brought a series of invitation-to-collude cases under the Sherman Act

and the Federal Trade Commission Act. These cases have typically involved a direct communication between competitors in which a specific and unequivocal offer was made and the only thing preventing an unlawful agreement from being formed was the offeree's decision not to accept the offer.⁴

For example, in *United States v. Microsoft Corp.*,⁵ there was a meeting between Microsoft and Netscape that the district court concluded led to an invitation to collude. Netscape's CEO testified that, in a private meeting between executives of both companies, Microsoft proposed that Netscape withdraw from "the market for browsing technology for Windows," leaving Microsoft a single-firm monopoly in that market.⁶ The court found that if Netscape had accepted Microsoft's offer, "this market allocation scheme would, without more, have left Internet Explorer with such a large share of browser usage as to endow Microsoft with de facto monopoly power in the browser market."⁷ According to the government's version of events, that offer was exceptionally detailed and specific:

[I]f Netscape would agree not to produce a Windows 95 browser that would compete with Internet Explorer, Microsoft would allow Netscape to continue to produce cross-platform versions of its browser for the relatively small market of non-Windows 95 platforms: namely, Windows 3.1, Macintosh, and UNIX. Moreover, Microsoft made clear that if Netscape did not agree to its plan to divide the browser market, Microsoft would crush Netscape, using its operating system monopoly, by freely incorporating all the functionality of Netscape's products into Windows.⁸

Notwithstanding the *Microsoft* decision, most of the invitation to collude cases have been brought pursuant to Section 5 of the FTC Act, not the Sherman Act.⁹ The two most notable of these—*U-Haul* and *Valassis*—have come in the form of consent decrees based on statements made during analyst calls. This is not surprising. Invitation to collude cases have been (and are likely to continue to be) an area of emphasis for the FTC, and it would appear that the FTC is actively seeking to file such cases. Indeed, in a recent American Bar Association panel discussion, the FTC's lead lawyer explained that the FTC discovered the *U-Haul* case while doing a routine review of public disclosures.¹⁰

The U-Haul Consent

The FTC's most recent invitation to collude case was brought in early 2010 against U-Haul International (U-Haul), a "do-it-yourself" one-way truck rental business. The FTC alleged that U-Haul invited its closest competitor, Avis Budget Group, Inc. (Budget) to collude to increase prices on truck rentals: an invitation that Budget apparently did not accept.¹¹

According to the FTC's complaint, U-Haul and Budget together comprise more than 70 percent of the one-way truck rental transactions in the United States.¹² The FTC alleged that in 2006, U-Haul's CEO and Chairman discovered that competition from Budget forced U-Haul to lower prices on rentals. To combat the downward pressure on prices, U-Haul's CEO allegedly invited Budget—both privately and publicly—to collude in order to obtain a price increase.¹³

U-Haul's private strategy was two-fold: U-Haul would raise rates and then contact Budget to communicate those rates and encourage a similar rate increase. If Budget did not follow U-Haul's price increase, U-Haul would then discipline Budget by lowering its prices below Budget's prices and inform Budget of the rate reduction.¹⁴ In 2006, U-Haul's Chairman allegedly instructed local U-Haul dealers to communicate with counterparts at Budget and Penske using the following script:

Are you tired of renting 500 miles for \$149 and a \$28 commission? Then, tell your Budget/Penske rep that U-Haul is up and they should be too.¹⁵

In the same document, the Chairman told dealers that they "know how to have this conversation and who to call to have it. We should be able to exercise some price leadership and get a rate that better reflects our costs."¹⁶ Local dealers, according to the complaint, encouraged their counterparts to monitor U-Haul rates on websites. This strategy was successful in at least a few instances, according to documents obtained during the FTC investigation.¹⁷

The complaint further alleges that in 2008, U-Haul's Chairman employed a "public strategy" by using earnings conference calls—which were monitored by Budget—to communicate messages about pricing.¹⁸ The complaint alleges that the CEO delivered the following five messages during the 2008 conference call:

- U-Haul was attempting to be a price leader and competitors should raise rates: “Me trying to get us to exercise price leadership...[is] another indicator to [Budget] as to, hey, don’t throw the money away. Price at cost at least.”¹⁹
- Budget’s low pricing was unprofitable for the entire industry: “Budget appears to be continuing [to] undercut as their sole pricing strategy....It’s when somebody decides they have to gain share from somebody that you get this kind of turbulence that results in no economic gain for the group, in fact probably economic loss. So I remain encouraged and the official position of Budget is that they’re not doing this....But many a slip between the cup and the lip....If they cave on prices the net effect is we got less money.”²⁰
- U-Haul was waiting for a response from Budget: “For the last 90 days, I’ve encouraged everybody who has rate setting authority in the Company to give in more time and see if you can’t get it to stabilize. In other words, hold the line at a little higher. And if [Budget] perceive[s] that we’ll let them come up a little bit, I remain optimistic they’ll come up, and it has a profound affect [sic] on us.”²¹
- U-Haul would tolerate a 3 to 5 percent price differential from Budget: “Okay, what can we do to justify a price difference given that in many cases we’re going to be above them? But it’s not that hard in the economy to justify 3 or 5% with service in my belief....I’m not driving them hard on match, match, match.”²²
- U-Haul would not allow Budget to impede on its market share: “[I]f it starts to affect share I’m going to respond, that’s all.”²³

Overall, the complaint alleges that these statements made it clear to Budget that U-Haul would raise their rates and maintain these new rates so long as Budget stayed within 3 to 5 percent of U-Haul’s price and refrained from price cutting to gain market share.

The settlement order against U-Haul and its parent company AMERCO prohibits collusion or invitations to collude. The companies are prohibited from inviting a competitor to divide markets, allocate customers or fix prices, as well as from participating in, maintaining, organizing, implementing, enforcing,

offering or soliciting any other company to engage in such conduct. The order expires in 20 years and includes provisions regarding compliance.

The Valassis Consent

The U-Haul consent decree is reminiscent of a similar FTC case from a few years earlier. In 2006, the FTC issued a complaint and consent judgment that condemned statements made during a securities analyst call as an unlawful invitation to collude.

In *In re Valassis Communications, Inc.*,²⁴ Valassis’ CEO opened an analyst call with a prepared statement detailing the company’s strategy to end a three-year price war with its only competitor in the advertising insert business, *News America*. Valassis’ CEO stated that Valassis would quote customers of News America a price that was in effect three years prior and would not go below that price. Outstanding price quotes below that price level would shortly be revoked. Valassis’ CEO promised to “defend our customers and market share and use whatever pricing is necessary to protect our share.”

Valassis’ CEO then stated that Valassis would watch for News America’s reaction. “In the recent past *News America* has been quick to make their intentions known. We don’t expect the need to read the tea leaves. We expect that concrete evidence of *News America’s* intentions will be available in the marketplace in short order. If *News* continues to pursue our customers and market share, then we will go back to our previous strategy.”²⁵

The FTC staff condemned these statements as going “far beyond a legitimate business disclosure”:

Valassis specified how it proposed to split the business of those customers it shared with News America and explained what its pricing would be with regard to pending bids to four News America customers. Valassis historically had not provided information of this type to the securities community, analysts had no need for the information and did not report it, and Valassis had no legitimate business justification to disclose the information. Valassis would not have disclosed the detailed information except in the expectation that News America would be monitoring the call and except for the purpose of conveying its proposal to News America.²⁶

The FTC staff concluded that Valassis' lack of any legitimate business purpose for its statements was essential to its case, and therefore the FTC would not challenge company statements to analysts unless this standard was met, because "[c]orporations have many obvious and important reasons for discussing business strategies and financial results with shareholders, securities analysts, and others." The FTC also reasoned that antitrust challenges are appropriate only in the "limited circumstances" where the "information would not have been publicly communicated, even to investors and analysts interested in [the company's] business strategy, but for [the company's] effort to induce collusion."²⁷

As *Valassis* and *U-Haul* illustrate, antitrust enforcers (particularly the FTC) can and will scrutinize analyst calls for communications that (i) appear to be directed at competitors, rather than analysts or investors and (ii) lack an apparent legitimate business purpose. Executives participating in analyst calls should therefore be aware of the "invitation to collude" theory and should tailor their remarks accordingly.

Unlawful Agreement Theory—Challenges to Public Statements as Price Fixing

Section 1 of the Sherman Act prohibits agreements in restraint of trade.²⁸ The key, however, is that an actual agreement (and not merely an attempt to agree) must be proven. While companies may act in parallel with respect to pricing, output reduction or other competitively significant decisions, the Supreme Court has made clear that parallel behavior alone is insufficient to prove a Section 1 violation.²⁹ Therefore, plaintiffs must allege other facts and circumstances that, in combination with the parallel activities, may support an inference of concerted action.

Prior to 2007, most courts had adopted an extremely liberal pleading standard³⁰ and allowed plaintiffs to survive a motion to dismiss simply by making many generalized allegations of parallel conduct and vague additional facts and circumstances. Some plaintiffs' lawyers believed that simply by surviving a motion to dismiss, they would be able to force a settlement with the defendants based on nothing other than the potential discovery costs or the emails or other documents found during discovery.

With its decisions in *Bell Atlantic Corp. v. Twombly*³¹ and *Ashcroft v. Iqbal*,³² the Supreme Court has made such tactics less effective, as plaintiffs must now provide specific allegations of conspiracy. Lower courts have interpreted *Twombly* and *Iqbal* as requiring plaintiffs to allege specific facts in support of a collusion claim,³³ including dates and times of alleged meetings, participants in alleged meetings and similar details.³⁴

In response to these heightened pleading requirements, plaintiffs started scouring the public record for usable material. Seizing on analyst call transcripts (which they claimed were evidence of signaling), plaintiffs began alleging that those calls, combined with parallel conduct, were sufficient to state a claim under the Sherman Act. In *Avery, et al. v. Delta Air Lines Inc.*,³⁵ for example, a plaintiff seeking to represent a class of airline passengers alleged that Delta and AirTran, two large competitors in providing flights in and out of Atlanta, Georgia, conspired to set the fees for the handling of baggage.

A main contention in the complaint was that AirTran's CEO made an offer to Delta during an analyst call. In response to a question from an analyst, AirTran's CEO noted that AirTran had the proper "programming" to initiate a first baggage charge, but explained that it had not done so because Delta, AirTran's largest competitor, had not initiated such a fee. When asked if AirTran would consider such a fee if Delta instituted one, AirTran's CEO stated: "We would strongly consider it, yes."³⁶

Shortly after this call, Delta instituted a baggage handling fee, and AirTran followed.³⁷ The plaintiff claimed that the analyst call was a pretext for the price-fixing agreement.³⁸ A number of other plaintiffs brought similar complaints, and the cases were consolidated in a multidistrict litigation proceeding.

The plaintiffs subsequently filed a consolidated amended complaint placing unparalleled weight on investor calls as the basis for the alleged agreement between AirTran and Delta.³⁹ Specifically, the plaintiffs relied on statements made by Delta and AirTran executives in six earnings calls over the course of several months, in addition to executives' public statements at industry conferences and in press releases.⁴⁰ Plaintiffs' monopolization claims under Section 2 of the Sherman Act have recently been

dismissed, but their Section 1 claim alleging an agreement in restraint of competition remains pending.⁴¹

Similarly, in *Pemiscot Memorial Hospital v. CSL Limited*,⁴² the plaintiffs alleged that defendant Baxter International used analyst calls to signal CSL that it was willing to limit supply of Blood Plasma Proteins. The plaintiffs accused Baxter and CSL of signaling each other through analyst calls and cited an example from a Baxter International investor call, during which Baxter's CEO stated the following: "Why any of us would, for a very short-term gain, do anything to change [the current marketplace dynamics], I just don't see why we would. It wouldn't make sense and *from everything we read and all the signals we get, there is nothing that says anyone would do that. I think people are very consistent in the messages they deliver, which are pretty consistent with what we have told you today.*"⁴³

Other recent complaints have also quoted statements from analyst calls to support the idea that competitors were signaling one another through these calls.⁴⁴ Such claims exponentially increase the pressure felt by executives of public companies, who must strive to strike a balance between frankly answering analyst questions while simultaneously avoiding potential exposure to antitrust liability.

Guidelines for Minimizing Antitrust Risk

Recent efforts by both the government and private plaintiffs make it clear that companies should pay particular attention to public statements made by their executives. To that end, we offer a few practical tips to keep in mind.

Know the danger zones. In general, the riskiest public statements are those that discuss future prices or output levels. If the statement is going to discuss one of these items, it first should be scrutinized by counsel. Likewise, if an executive is going to speak on a public analyst call or otherwise face questions from investors, analysts or the public, the company should prepare a question-and-answer sheet (again reviewed by counsel) that will assist the executive with the answers.

It is also best not to announce price increases or similar acts during public calls; instead, communicate these announcements to customers first, definitively and not conditionally, and only so far in advance as

may be necessary. While there is no necessity to justify price increases, any announcements about the reasons for the increase should be based on the company's own costs, capacity and customer demand—not on those of "the industry."

Focus on your own company. Executives should focus solely on their own company and not presume to speak for "the market" or "the industry." This could lead to speculation that the industry has coordinated on pricing or that the executives are inviting the other players in the industry to do so. Any justification offered for a price increase or change in output should be in terms of the company's own costs and consumer demand: it should not, in any way, refer to actions already taken by a competitor. If speaking about the conditions in the industry as a whole, executives should avoid statements that call for specific changes in prices or supply.⁴⁵

Be only as specific as you need to be. Many times, it will be possible to provide the necessary information to the investing public without providing too much detail to competitors. For example, if information about prices, output or costs is aggregated, the antitrust risk may be reduced. An important corollary to this admonition is to disclose what is necessary and no more.

Be definitive in explaining future actions. It is unwise to announce conditional market strategies based on the actions of a company's competitors. By announcing conditional or contingent plans, an antitrust plaintiff can argue that the announcement is nothing more than a signal meant to determine if competitors will agree. If competitors do act in conformance with the announcement, then plaintiffs will argue that a signal was received and an agreement was reached.

Avoid speculation. Similarly, it is wise to avoid speculation about what may happen in the future, particularly when making predictions about competitors' behavior. For example, it is generally not prudent to discuss the extent to which price increases will "stick." Likewise, with respect to price or output, it is unwise to discuss what any competitor (or the industry) is doing or might do with respect to price or output, or to address rumors of, or plans for, future competitor price increases.

Some things are better left unsaid. The best course is to avoid speculating about how competitors or the market may react. For example, it would be best to avoid discussions about whether a potential price increase will stick, or what the company might do if a competitor does or does not respond to the company's actions. Sometimes, the best answer is a decision not to respond.

Be aware of statements by competitors. Much of the compliance advice focuses on ensuring that companies avoid statements that could be misconstrued. However, an interesting challenge arises if a competitor makes a statement that could be taken as some sort of signal. In most circumstances, the best that can be done is to ensure that the contemporaneous record is both clear and preserved. If contemporaneous documents clearly reflect that a decision was made without regard to the alleged signal, they will greatly assist any defense. Most companies monitor public statements and disclosures from competitors, and this is perfectly lawful. The key is to ensure that this monitoring does not appear to be a means of communication. Documents describing these programs should be accurate and carefully written. It may even be wise to have the commentary reviewed by counsel.

Conclusion

Aggressive scrutiny of public companies' analyst calls by the private plaintiffs' bar and government enforcers may be a fact of life post-*Twombly* and *Iqbal*. However, by arming executives with simple guidelines to follow during analyst calls, companies can potentially minimize antitrust risk while still complying with both the letter and spirit of securities regulations promoting full and accurate disclosure. ♦

Endnotes

1 743 F.2d 1114 (5th Cir. 1984).

2 *Id.* at 1116.

3 *Id.* at 1119, 1122.

4 *See In re MacDermid, Inc.*, Docket No. C-3911 (F.T.C. Dec. 21, 1999) (“[O]n several occasions [after the licensing agreement expired, the respondent] invited [its competitor] not to compete...in North America in return for [competitor’s] agreement not to compete...in Japan,” “invitations, if consummated, [that] would have had the purpose and effect of allocating or dividing markets...and restricting competition, including price competition between [respon-

dent and competitor].”); *In re Stone Container Corp.*, 125 F.T.C. 853, 854 (1998) (“Senior officers of Stone Container contacted their counterparts at competing linerboard manufacturers to inform them of the extraordinary planned downtime and linerboard purchases. In the course of these communications, Stone Container arranged and agreed to purchase a significant volume of linerboard from each of several competitors...The specific intent of Stone Container’s communications with its competitors was to coordinate an industry-wide price increase.”); *In re Precision Moulding Co., Inc.*, 122 F.T.C. 104, 105 (1996) (“[T]he President and General Manager of respondent visited the headquarters of the new competitor and met with an officer thereof. During the meeting, the General Manager of respondent told the competitor that its prices for stretcher bars were ‘ridiculously low.’”); *In re YKK (USA) Inc.*, 116 F.T.C. 628, 629 (1993) (an attorney for YKK sent a letter to the President of a competitor accusing the competitor of predatory tactics and asked the competitor to “stop engaging in these ‘unfair’ practices” by ceasing to offer free equipment to customers. Later, at a meeting with the competitor, YKK’s attorney restated its request.); *In re AE Clevite*, 116 F.T.C. 389, 390 (1993) (respondent told an Australian competitor that its prices were lower than respondent’s and that it was “ruining the marketplace.” It thereafter faxed the competitor a comparative price list of its prices for certain locomotive engine bearings and prices in the United States.); *In re Quality Trailer Prods. Corp.*, 115 F.T.C. 944, 945 (1992) (“[T]wo representatives of Quality Trailer Products visited the headquarters of a competitor and met with an officer of the firm...They told the competitor that its price for certain axle products was too low, that there was plenty of room in the industry for both firms, and that there was no need for the two companies to compete on price.”); *United States v. Ames Sintering Company*, 927 F.2d 232, 233–34 (6th Cir. 1990) (the defendant called its competitor and specifically proposed that they “enter into an agreement to ‘rig’ the bids so that both companies could maintain their previous share [of 40 percent and 60 percent, respectively]” and followed up with several calls on the subject over the next few days); *see also Biovail Corp. v. Hoechst AG*, 49 F. Supp. 2d 750, 771 (D.N.J. 1999) (at a private meeting between Hoechst and Biovail, Hoechst proposed that it “would refrain from instituting a patent infringement suit against Biovail if Biovail agreed to delay the launch of its generic form of Cardizem CD”).

5 87 F. Supp. 2d 30, 45–46 (D.D.C. 2000), *rev’d in part on other grounds*, 253 F.3d 34 (D.C. Cir. 2001).

6 *Id.* at 45.

7 *Id.* at 45–47.

8 Plaintiffs’ Joint Proposed Findings of Fact in *United States v. Microsoft Corp.*, No. 98-1232 (TPJ), ¶ 67.4(i), available at http://www.usdoj.gov/atr/cases/f2600/2613a_1.htm.

9 Indeed, certain FTC commissioners have gone so far as to suggest that invitation to collude claims are not actionable under the Sherman Act. *In re U-Haul International, Inc.*, File No. 081 0157 (F.T.C. June 9, 2010) (concurring statements of Chairman Leibowitz and Commissioners Kovacic and Rosch).

10 Author John Roberti was also a panelist.

11 *In re U-Haul International, Inc.*, File No. 081 0157 (F.T.C. June 9, 2010) (Analysis to Aid Public Comment).

- 12 *In re U-Haul International, Inc.*, File No. 081 0157 (F.T.C. June 9, 2010) (Complaint ¶10).
- 13 *Id.* ¶¶11-12.
- 14 *Id.* ¶¶ 12-13.
- 15 *Id.* ¶ 14.
- 16 *Id.*
- 17 *Id.* ¶¶16-19.
- 18 *Id.* ¶¶ 20-26.
- 19 *Id.* ¶ 20a.
- 20 *Id.* ¶ 20b.
- 21 *Id.* ¶ 20c.
- 22 *Id.* ¶ 20d.
- 23 *Id.* ¶ 20e.
- 24 File No. 051 0008 (F.T.C. March 14, 2006).
- 25 *In re Valassis Communications, Inc.*, File No. 051 0008 (F.T.C. March 14, 2006) (Compl. Ex. A at 4), available at <http://www.ftc.gov/os/caselist/0510008/060314cmpexha0510008.pdf>.
- 26 *In re Valassis Communications, Inc.*, Analysis of Agreement Containing Consent Order to Aid Public Comment, 71 Fed. Reg. 13976, 13979 n. 11 (March 20, 2006).
- 27 *Id.* at 13978-79.
- 28 15 USC 1.
- 29 *Theatre Enterprises v. Paramount Film Distributing Corp.*, 346 US 537, 541 (1954); *In Re Flat Glass Antitrust Litig.*, 385 F.3d 350, 360 (3d Cir. 2004); *Blomkest Fertilizer, Inc. v. Potash Corp.*, 203 F.3d 1028, 1032 (8th Cir. 2000) (en banc).
- 30 *Conley v. Gibson*, 355 US 41, 45 (1957) (“a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief”).
- 31 550 U.S. 544 (2007).
- 32 129 S. Ct. 1937, 1950 (2009).
- 33 See, e.g., *Tam Travel, et al. v. Delta Airlines (In re Travel Agent Commission Antitrust Litig.)*, 583 F.3d 896 (6th Cir. 2009); *Marangos v. Swett*, 2009 WL 1803264, *2 (3d Cir. January 25, 2009); *In re Hawaiian & Guamanian Cabotage Antitrust Litig.*, No. 08-md-1972 TSZ, 2009 WL 2581510 (W.D. Wash. August 18, 2009); *Bailey Lumber & Supply Co. v. Ga.-Pac. Corp.*, No. 1:08CV1394LG-JMR, 2009 WL 2872307 (S.D. Miss. August 10, 2009); *Burtch v. Milberg Factors, Inc.*, No. 07-556-JJF-LPS, 2009 WL 1529861 (D. Del. May 31, 2009).
- 34 See, e.g., *In re Travel Agent Commission Antitrust Litig.*, 583 F.3d at 905-06; *In re Urethane Antitrust Litig.*, 2009 WL 3337247, *8-9 (D. Kan. August 14, 2009).
- 35 No. 1:09-cv-1391 (N.D. Ga. Filed May 22, 2009).
- 36 The exchange during that call went as follows:
- [Analyst Question]: First check bag fee, you don't have one, do you and will you?
- [Response from AirTran Executive]: Good question. Let me tell you what we've done on the first bag fee. We have the appropriate programming in place to initiate a first bag fee and at this point we have elected not to do it, primarily because our largest competitor in Atlanta where we have 60% of our flights hasn't done it, and I think we don't think we want to be in a position to be out there alone with a competitor who we compete on has two-thirds of our nonstop flights and probably 80% to 90% of our revenue is not doing the same thing. So I'm not saying we won't do it, but at this point, I think we prefer to be a follower in a situation rather than a leader right now.
- [Analyst Question]: But if they were, you would consider, it's not a matter of fact.
- [Response from AirTran Executive]: We would strongly consider it, yes.
- Complaint ¶20 (AirTran Q3 Investment Call, October 23, 2008).
- 37 Compl. ¶22.
- 38 *Id.*
- 39 *In re Airline Baggage Fee Antitrust Litig.*, No. 1:09-md-2089 (N.D. Ga. Filed February 1, 2010).
- 40 Compl. ¶¶ 32-59.
- 41 *In re Airline Baggage Fee Antitrust Litig.*, No. 1:09-md-2089 (N.D. Ga. Filed August 2, 2010).
- 42 No. 2:09-cv-03143 (E.D. Pa. Filed July 15, 2009).
- 43 Compl. ¶90 (emphasis added). The CSL complaint is derived from an FTC administrative complaint that sought to challenge a merger between CSL and Talecris. *In the Matter of CSL Limited*, Docket No. 9337 (F.T.C. filed May 27, 2009). The parties eventually abandoned this merger.
- 44 E.g., *In re Potash Antitrust Litig. II*, Direct Purchaser Amended Consolidated Class Action Complaint, MDL Docket No. 1996, Civil No. 1:08-cv-6910 ¶¶ 136-143 (N.D. Ill. Filed April 3, 2009); *In re Rail Freight Fuel Surcharge Antitrust Litig.*, MDL Docket No. 1869, Misc. No. 07-489 (PLF) ¶¶ 4, 11, 68 (D.D.C. filed April 15, 2008).
- 45 See 3A P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 1419e4, at 133-34 (2d ed. 2003) (distinguishing between speech that “deplore[s] prevailing prices as insufficient for industry solvency or for needed innovations” and speech that “specifically indicate[s] that the industry needs a 10 percent price increase”; the latter being “more dangerous than necessary to convey appropriate information to stockholders, customers, market analysts, and government officials”).