“Collusion in Plain Sight: Firms’ Use of Public Announcements to Restrain Competition”

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Abstract

This paper identifies three classes of public announcements which facilitate coordination among competitors to restrict competition. Nine episodes of collusion are investigated to understand how this method of communication operates and is effective. An assessment of the conduct of competition authorities and courts in these cases reveals inadequate enforcement. Recommendations are offered for how to more appropriately enforce antitrust law when firms publicly invite competitors to collude or agreements are reached through public announcements.

Contents

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I. INTRODUCTION

Though collusion is a collective activity, it typically begins with one firm deciding that competition is too intense and something should be done about it. With that state of mind, the firm must then communicate with its competitors in order to achieve a common understanding that they are not to compete or at least compete less aggressively. The canonical approach is for firms to secretly meet and expressly propose and agree to a collusive plan. Though direct communication is the most effective means for obtaining the requisite mutual understanding, it exposes the firms to almost certain prosecution should evidence of such communications be discovered. However, private unfettered communication is not the only means by which competitors can reach an unlawful agreement. Firms can also communicate through public announcements. Carefully constructed public announcements could coordinate firms to reduce competition, while making prosecution more challenging due to the absence of a nakedly expressed offer and acceptance to collude and because their public nature provides potential cover by suggesting they are intended for market participants other than competitors. Compared to private communications, public announcements trade off a lower chance of producing a collusive plan that is comprehensive and sophisticated with a higher chance of escaping conviction in the event they are successful in producing an agreement.

While the risk of public announcements facilitating an agreement to restrain trade has always existed, it has risen in recent years and will likely continue to rise. A recent study established that firms' public disclosures can substitute for private communications to coordinate with competitors.[2] Another found that more effective enforcement against explicit collusion was associated with increasing use of terms in their earnings calls that could facilitate coordinated conduct.[3] Given the recent enforcement success against the most egregious cartels by the U.S. Department of Justice's Antitrust Division (DOJ),[4] firms seeking to undermine the competitive process could well turn to more subtle communication methods than the proverbial "smoke-filled room."

The objective of this study is to examine the use of public announcements by firms for the purpose of coordinating to restrict competition. Though the use of public announcements has been discussed in some brief policy papers motivated by one or two cases,[5] this study is the first to systematically collect and

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[2] John Kepler, *Private Communication among Competitors and Public Disclosure*, J. ACCT. & ECON. (forthcoming 2021), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3269911.

[3] Thomas Bourveau, Guoman She, and Alminas Žaldokas, Corporate Disclosure as a Tacit Coordination Mechanism: Evidence from Cartel Enforcement Regulations, 58 J. ACCOUNTING RESEARCH 295 (2020).

[4] Studies measuring the increased enforcement success of competition authorities in the U.S. and elsewhere include Nathan H. Miller, *Strategic Leniency and Cartel Enforcement*, 99 AM. ECON. REV. 750 (2009); Ailin Dong, Massimo Massa, and Alimnas Žaldokas, *The Effects of Global Leniency Programs on Margins and Mergers*, 50 RAND J. ECON. 883 (2019).

[5] *See, e.g.*, Howard Rosenblatt and Tomas Nilsson, *Analyst Calls and Price Signaling under EU Law,* ANTITRUST SOURCE (June 30, 2012); Chris MacAvoy, *"Are You Talking to Me?" Antitrust Risks and Guidelines for Earnings Calls and Investor Presentations*, LEXOLOGY (Mar. 13, 2015); Peter C. Carstensen, *Information Exchange – An Underappreciated Anticompetitive Strategy*, CPI ANTITRUST CHRON. (Jan. 9, 2020).

analyze announcements from both a legal and economic perspective. It has several deliverables. First, it categorizes different types of announcements that can embody anticompetitive intent and populates those categories with recent cases. Second, it investigates the manner in which these announcements act as a coordinating practice. When the evidence is available, the efficacy of public announcements in facilitating collusion is also examined. Third, it offers approaches to prosecuting this form of collusion. It is my assessment that antitrust authorities have been reluctant to take on cases involving public announcements, while the handling of private litigation by the courts has been equivocal and deferential to defendants. This study offers a foundation for a more assertive and decisive role by enforcement agencies and the courts.

Part II defines public announcements and collusion, while Part III reviews public announcements in the context of antitrust and securities law. The core of the paper is Parts IV-VI where cases are presented and legal treatments are proposed for establishing that firms have an agreement under Section 1 of the Sherman Act. Part VII explores public announcements in the context of *Twombly* and the use of Section 2 of the Sherman Act and Section 5 of the Federal Trade Commission (FTC) Act. Part VIII provides a summary, along with concluding remarks, and can be read as a standalone piece.

II. ANTICOMPETITIVE PUBLIC ANNOUNCEMENTS

A. *Defining Public Announcements*

In this study, a "public announcement" refers to the conveyance of information by a firm or one of its employees using a medium that is widely accessible to individuals outside of the firm. Firms routinely make public announcements through a variety of media. For a publicly-traded company, its annual report and 10-K provide information to shareholders, financial analysts, and the public at large regarding financial measures, the products and services it offers, corporate strategy, and other high-level information. Earnings calls, typically conducted on a quarterly basis, provide a myriad of financial and market data to analysts and anyone else inclined to listen in. They often go well beyond reporting earnings to include forecasts on cost and demand, the status of investment projects, and, in principle, any and all matters pertinent to projecting future performance. A firm's executives can provide information through speeches and panel discussions at semi-public industry meetings comprising competitors but also analysts, journalists, and other parties, and by executives participating in interviews published in trade journals. These venues are often used to assess future industry developments and trends such as entry and exit, innovation, and regulation. Most of the media just described are easily accessible to industry insiders such as analysts, journalists, input suppliers, industrial customers, and competitors. A firm can inform the broader public—including consumers—through press releases and interviews carried in the general press as well as advertisements.

As just described, announcements vary in terms of their content and the medium used to convey that content. Subtler than an announcement's content is its meaning. By "meaning," I am referring to "the thing that one intends to convey."[6] Putting aside announcements that a firm is legally obligated to provide (e.g., a 10-K as required by the Securities and Exchange Commission) and accidental announcements (e.g., unintended slips of the tongue at a public gathering), an announcement by a firm or a firm's executive is done for the purpose of potentially influencing the conduct of some actors who could affect the firm's future performance. Thus, an announcement has both an intended audience as well as a message that the announcing firm would like the audience to infer which could affect the audience's conduct and consequently the firm's performance.

The four primary candidates for the "intended audience" are customers, suppliers, the capital market, and competitors. Certain announcements are made to better inform a firm's customers, such as when a firm notifies them of a new or improved product or a planned change in prices. A firm may announce so as to inform its suppliers. For example, communicating a plan to increase future production informs suppliers to anticipate a rise in demand for the inputs they provide. Announcements that inform a firm's customers or suppliers generally benefit the firm and are integral to the competitive process.[7] The capital market comprises financial analysts, fund managers (e.g., mutual funds, hedge funds, and pension funds), creditors (such as banks), and individual investors. The primary incentive for a firm to inform the capital market is to lower its cost of capital by reducing uncertainty about its future profit stream.[8] Generally, announcements for which the intended audience are customers, suppliers, and the capital market are not an anticompetitive concern. However, that concern is acute when the intended audience is a firm's competitors.

From the universe of announcements made by a firm, this study will focus on those announcements conveyed using media that are easily accessible by a firm's competitors, which is generally the case with the ones described above, and which contain content relevant to the future state of competition in the market. Relevant content encompasses variables that affect the intensity of competition—such as the prices that are to be charged and how much is to be supplied—and that which are the consequence of the intensity of competition—such as market shares and profits. Many of the announcements that satisfy those conditions will be innocent of any anticompetitive intent. One of the primary objectives of this study is to identify the type of content which can serve as a credible device for coordinating competitors' conduct in a manner that could harm consumers.

Towards that end, let us distinguish between public announcements in which a firm refers only to its own conduct or performance and those in which it refers to competitors' conduct or performance. The latter may be inclusive of its own conduct or performance as, for example, by referring to "industry" conduct or performance. While public announcements that refer only to a firm's own conduct and performance may

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[6] *Meaning*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/meaning (last visited Apr. 13, 2020).
[7] It is not universally true that accurately informing customers and suppliers serves the best interests of the firm. For example, a firm may mislead consumers into believing a new product's arrival is imminent in order to prevent them from purchasing rival firms' products.
[8] For surveys on the role of a firm's disclosures in the capital market, see Robert E. Verrecchia, Essays on Disclosure, 32 J. ACCT. & ECON. 97 (2001); and Anne Beyer, Daniel A. Cohen, Thomas Z. Lys, and Beverly R. Walther, *The Financial Reporting Environment: Review of the Recent Literature*, 50 J. ACCT. & ECON. 296 (2010).

be an anticompetitive concern—with advance price announcements being a case in point[9] —this study will not consider such announcements. Our focus is on *public announcements that reference rival firms' conduct*. When an announcement directly or indirectly refers to the conduct of competitors, there is inherently a risk that it could facilitate coordinated, rather than independent, conduct, which is a defining element of unlawful collusion.

The first deliverable of this study is identifying three classes of public announcements that reference rival firms' conduct. First, a firm's announcement describes how its future conduct is contingent on a rival firm's conduct. Second, a firm's announcement recommends how rival firms or the industry at large should behave. Third, a firm's announcement forecasts future conduct by rival firms or the industry at large. These three classes are examined in Parts IV-VI.

B. *Collusion and its Prerequisites*

In order to understand what types of public announcements could facilitate collusion, it is useful to review how collusion operates and what is needed to make it work. At its core, *collusion* is a supracompetitive outcome and a self-enforcing reward-punishment scheme for achieving and sustaining that outcome. The outcome could be some common price for competitors which exceeds what was being achieved under competition, along with the understanding that if firms comply with that price then each firm will continue to price at that level (thus a firm's compliance is *rewarded* by other firms maintaining a high price), but if some competitors do not comply then firms will return to setting the competitive price (thus a firm's noncompliance is *punished* by other firms lowering their prices). For collusion to be effective, this understanding or "agreement" needs to be self-enforcing in that each firm finds it in its best interest to abide by it. In the simple scheme just described, it requires that each firm finds it optimal to charge the supracompetitive price when there has been compliance, and to charge the competitive price when there has been noncompliance. Containing the typical "if … then" clauses of a contract, collusion can be viewed as a contractual arrangement which includes what each firm is to do and what happens if they do not do what they are supposed to.[10]

In practice, collusion can be complex and sophisticated, as has been documented for many cartels that engaged in private express communication.[11] The supracompetitive outcome can encompass an array of prices—which vary across customer types and cartel members—and a market allocation scheme—such as the assigning of sales quotas, customers, or territories across cartel members. Collusion can include a protocol for monitoring compliance such as the sharing of sales data or having a third party verify the

[9] Severin Borenstein, *Rapid Price Communication and Coordination: The Airline Tariff Publishing Case* (1994), *in* THE ANTITRUST REVOLUTION 233 (John E. Kwoka, Jr. and Lawrence J. White eds., 2004).
[10] For a more developed treatment, see Joseph E. Harrington, Jr., *Developing Competition Law for Collusion by Autonomous Artificial Agents*, 14 J. COMP. L. & ECON. 331, 334-36 (2018).
[11] *See* Joseph E. Harrington, Jr., *How Do Cartels Operate?*, 2 FOUND. & TRENDS MICROECONOMICS 1, (2006); JOHN M. CONNOR, GLOBAL PRICE FIXING (2d upd. & rev. ed. 2008); and Robert C. Marshall and Leslie M. Marx, THE ECONOMICS OF COLLUSION: CARTELS AND BIDDING RINGS (2012).

prices that were charged. Punishment can involve transfers among cartel members (with those who deviated paying those who were harmed) or targeting low prices at the customers of the cartel member who did not comply.

Such complexity typically requires extensive communication which is generally infeasible when coordination occurs through public announcements. However, collusion need not require a high level of sophistication and detail in order for it to prove effective. It can be as simple as firms understanding that they are to raise price, limit supply, or just compete less aggressively (as in, for example, not trying to take other firms' customers) with the understanding that there will be a return to more aggressive competition should any firm fail to go along. It will be such simple forms of collusion that will be relevant in markets for which firms coordinate their conduct through public announcements.

III. Antitrust Law on Public Announcements

A. *Section 1 of the Sherman Act*

The most fitting statutory basis for condemning collusion facilitated by public announcements is Section 1 of the Sherman Act. Section 1 proscribes every contract, combination, or conspiracy in restraint of trade.[12] Under the Sherman Act, concerted action is judged more harshly than unilateral behavior.[13] This is because "[c]oncerted activity inherently is fraught with anticompetitive risk. It deprives the marketplace of the independent centers of decision making that competition assume and demands."[14] For this reason, courts impose a stricter standard on the conduct of concerted activity. Section 1 condemns any agreement in restraint of trade that is "unreasonable."[15]

Horizontal price fixing[16] and market allocation agreements,[17] among others, are "conclusively presumed to be unreasonable,"[18] and are per se unlawful. Therefore, plaintiffs alleging a Section 1 violation need prove only that an unlawful agreement existed among the defendants. It is not necessary to demonstrate

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[12] 15 U.S.C. § 1.
[13] Jeanery, Inc. v. James Jeans, Inc., 849 F.2d 1148, 1152 (9th Cir. 1988) ("[T]he Sherman Act treats concerted action more harshly than unilateral behavior. …"); Shaw v. Rolex Watch, U.S.A., Inc., 673 F. Supp. 674, 677 (S.D.N.Y. 1987) ("This distinction imposes a stricter standard on the conduct of concerted activity.").
[14] Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768-69 (1984).
[15] *Copperweld*, 467 U.S. at 768.
[16] Price fixing refers to the manipulation of prices through any means, including the restriction of capacity. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 222 (1940) ("An agreement to pay or charge rigid, uniform prices would be an illegal agreement under the Sherman Act. But so would agreements to raise or lower prices whatever machinery for price-fixing was used.").
[17] United States v. Topco Associates, Inc., 405 U.S. 596, 608 (1972) ("One of the classic examples of a *per se* violation of § 1 is an agreement between competitors at the same level of the market structure to allocate territories to minimize competition.").
[18] United States v. McKesson & Robbins, Inc., 351 U.S. 305, 310 (1956).

market power, anticompetitive effect, or any other element that might otherwise be required under a rule of reason analysis.[19]

Section 1's prohibition of contracts, combinations, and conspiracies is generally understood to require that an agreement exist among the defendants.[20] In particular, courts will ask "whether the challenged anticompetitive conduct stems from independent decision or from an agreement."[21] "An agreement exists when there is a unity of purpose, a common design and understanding, a meeting of the minds, or a conscious commitment to a common scheme."[22] Without evidence of an express agreement, courts will not find that Section 1 has been violated.

Of course, an agreement can only exist if there is a "meeting of the minds" between at least two parties. Even with public statements, evidence of acceptance of an offer is required to conclude that there is a qualifying agreement under Section 1. Rival firms who merely receive or even contemplate an invitation to collude are simply acting as any prudent firm would by being informed about the competitive landscape.[23] Therefore, a rival firm should *not* be assumed to have accepted an announcing firm's invitation unless there is (a) an announcement by the rival that can be interpreted as acceptance, or (b) evidence that the rival altered its behavior to act in accordance with the announcing firm's proposed plan of action.[24]

B. *The Securities-Antitrust Implied Immunity Doctrine*

Before exploring how firms' public announcements in earnings calls or other fora may violate antitrust laws, it is worth noting that these announcements are not immune from antitrust liability due to any perceived conflict with securities law regulation. In *Billing*, the Supreme Court articulated a four-factor analysis for determining within a given context whether the securities laws are sufficiently incompatible with the application of the antitrust laws such that the former can be said to preclude the latter: (1) whether the challenged practices lie squarely within an area of financial market activity that the securities laws seek to regulate; (2) the existence of regulatory authority under the securities laws to supervise the

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[19] *McKesson*, 351 U.S. at 310 ("It makes no difference whether the motives of the participants are good or evil; whether the price fixing is accomplished by express contract or by some more subtle means; whether the participants possess market control; … or whether the effect…is to raise or decrease prices.").
[20] 6 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1403 (4th ed. 2013).
[21] Bell Atl. Corp. v. Twombly, 550 U.S. 544, 553 (2007) (internal quotation marks, citation, and alteration omitted).
[22] W. Penn Allegheny Health Sys. v. UPMC, 627 F.3d 85, 99 (3d Cir. 2010).
[23] *In re* Text Messaging Antitrust Litig., 782 F.3d 867, 875 (7th Cir. 2015) ("Competitors in concentrated markets watch each other like hawks," even when they are not violating antitrust law).
[24] In *Foley*, defendant real estate agent Foley announced a plan to raise his commission rate from 6% to 7% and suggested that his competitors do the same. While verbal acceptance of this proposal by the other agents was disputed, the Fourth Circuit found convincing evidence that the other defendants all "substantially adopted a [7%] commission rate" in the following months. United States v. Foley, 598 F.2d 1323 (4th Cir. 1979), *cert. denied*, 444 U.S. 1043 (1980).

activities in question; (3) ongoing SEC regulation; and (4) a resulting risk that the securities laws and antitrust laws, if both applicable, would conflict.[25]

In a handful of cases, courts have applied the four *Billing* factors to conclude that securities laws impliedly precluded the application of antitrust laws. In *Billing* itself, the Supreme Court applied preclusion to an antitrust lawsuit brought against securities underwriters that marketed and distributed securities.[26] In *Short Sale*, the Second Circuit applied preclusion to an antitrust lawsuit alleging that securities brokers conspired to fix the prices of certain securities.[27]

Commentators had previously hypothesized that public companies' disclosures would be immune from antitrust attack under the implied preclusion doctrine, so long as the statements are not "uniquely unequivocal" and "unambiguous" in terms of both the specificity of the offer and its anticompetitive import.[28] However, the only caselaw addressing whether defendants are immunized from antitrust liability based on statements made on earnings calls or other public outlets has concluded that antitrust laws are not impliedly precluded in such contexts.

In *In re Domestic Airline Travel Antitrust Litig.*, defendant AirTran was accused of inviting Delta to collude through a series of earnings calls with industry analysts and speeches and break-out sessions at industry conferences.[29] Defendants argued that the legal doctrine of implied preclusion should bar Plaintiffs' antitrust claims. In particular, Defendants argued that because the securities laws encourage truthful statements to the investor community, including information about a company's future plans and expectations, imposing antitrust liability here would undermine that core SEC objective. Relying on the four *Billing* factors, the court rejected the Defendants' implied-preclusion arguments, reasoning that:[30]

- Plaintiffs' complaint alleges that Defendants went well beyond disclosing the type of financial information that companies must legitimately convey to their shareholders pursuant to SEC regulations;

[25] Credit Suisse Securities (USA) LLC v. Billing, 551 U.S. 264, 285 (2007).
[26] *Id.*
[27] Elec. Trading Group, LLC v. Banc of Am. Sec. LLC ("*Short Sale*"), 588 F.3d 128 (2d Cir. 2009), *cert. denied*, 130 S. Ct. 3276 (2010).
[28] Richard M. Steuer, John Roberti, and Daniel Jones, *The Application of Antitrust to Public Companies' Disclosures*, 63 ADMIN. L. REV. 159, 177-78 (2011).
[29] In re Delta/AirTran Baggage Fee Antitrust Litig., 733 F. Supp. 2d 1348, 1352 (N.D. Ga., Aug. 2, 2010).
[30] *Id.* at 1363-65. See also In re Delta/Airtran Baggage Fee Antitrust Litig., 245 F. Supp. 3d 1343, 1369-70 (N.D. Ga. 2017), *aff'd sub nom.* Siegel v. Delta Air Lines, Inc., 714 F. App'x 986 (11th Cir. 2018), *cert. denied*, 139 S. Ct. 827 (2019).

- Defendants did not cite to any SEC regulation that clearly regulates the unlawful conduct alleged in this case;

- There is no SEC authority that would prevent anticompetitive collusion or coordination via earnings calls and industry conferences;

- No cause of action exists for Plaintiffs under the securities laws for the conduct alleged; and

- If implied preclusion of antitrust liability were to exist in this case, businesses would essentially be given a "free pass to collude in public forums and leave consumers who are harmed by such anticompetitive conduct no remedy."

The District Court's decision was affirmed by the Eleventh Circuit and the Supreme Court denied certiorari.[31] In sum, firms that use public statements to unlawfully coordinate with competitors can be found to have violated antitrust laws.

IV. A Firm Announces How It Will Behave in Response to Rival Firms' Conduct

Parts IV-VI examine three class of public announcements referring to rival firms' conduct. Each part is composed of three sections. The first describes the class of announcements and how such announcements can be effective in facilitating collusion. The second section reviews a collection of cases that illustrate how these announcements were used to facilitate collusion. The third section offers an approach for determining when the class of announcements might satisfy the requirements of Section 1.

A. *Description*

Whether it is on an earnings call, in an interview published in a trade journal, or a remark on a panel at a trade association meeting, consider a firm describing how its future conduct will depend on what competitors do. While such an announcement need not be done to facilitate collusion, it can certainly serve that purpose. As previously reviewed, collusion is a supracompetitive outcome and a reward-punishment scheme to sustain it. That reward-punishment scheme is a set of contingency plans for how firms will respond to what rivals do. As a result, this class of announcements could embody part or all of that reward-punishment scheme and, should it succeed in producing mutual understanding, could well lead firms to take the actions that would produce a supracompetitive outcome.

Let us begin with some theoretical examples before turning to some actual cases. A firm announces: "As a small player in the market, it is not for us to get us out of this price war. However, if another firm raises

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[31] Siegel v. Delta Air Lines, Inc., 714 F. App'x 986 (11th Cir. 2018), *cert. denied*, 139 S. Ct. 827 (2019).

price, we will be a good citizen and act likewise." Or consider: "Firms need to restrict supply if price is to rise. If other firms limit their production, we will not try to gain market share and will pull back our supply, too." These announcements describe what could be the "reward" element of a collusive scheme. If the announcement is viewed as credible by a rival firm, it could be incentivized to take the lead knowing that the announcing firm would favorably respond. The result would then be a coordinated rise in price or reduction in output.

Alternatively, a public announcement could convey the "punishment" dimension to a reward-punishment scheme. A firm's executive could state: "Prices have been falling but our firm is intent on reversing course by raising price. However, continuance of our plan will require other firms to follow suit." Or they might say: "With the projected weakening of demand, our firm will take some capacity offline and restrict supply in order to maintain price at its current level. But success in stabilizing price will only work if others are similarly restrained in their output." Now, the announcing firm is taking the lead to move to a supracompetitive outcome and, in doing so, threatening to punish firms that do not also compete less aggressively, where the punishment is a retraction of the rise in price or reduction in supply.

Though these announcements leave much unspecified regarding a collusive scheme—certainly far less is said than when cartel members engage in private express communication—they could nevertheless describe enough to make collusion succeed. The key is incentivizing one or more firms to take the lead, and the other firms finding it profitable to follow that lead. A firm that announces what it will do—such as raise price—and how it will respond to rival firms' conduct—such as lowering price if they do not raise price—could find it optimal to lead with a price increase because, based on their announcements, it believes other firms will match its price increase. The announcing firm would want to raise price to a level such that if all firms priced at that level then their profits would all rise. If that were the case, it could be reasonable for the firm to expect that other firms would follow along with its price hike. As long as the anticipated time it takes for rival firms to respond is sufficiently short—so the announcing firm is not at a price disadvantage for too long—that firm could be incentivized to take the lead.

Alternatively, a firm could announce it is willing to be a follower. This it could do by announcing how it would respond to a rival's conduct—such as following another firm's price increase and being content to maintain, rather than add, market share. This assurance that the announcing firm would follow suit could induce the rival firm to take the lead by raising its price. If all firms are better off from the higher price and the lag in following is sufficiently short, a rival firm could be willing to respond to the announcement by making the first move, and the announcing firm could be willing to follow through on the contingent plan it had announced. In these scenarios, the announcement does not need to include the specific supracompetitive outcome; that is left for the leader to determine. The announcement just needs to describe enough of the reward-punishment scheme to incentivize a firm to be a leader and for the other firms to follow.

B. *Cases*

1. Free-standing Newspaper Inserts

Free-standing newspaper inserts (FSI) are multi-page booklets containing discounts from retailers which are placed inside newspapers.[32] During the relevant period, there were two FSI suppliers: News America and Valassis Communications. With each firm charging $6 per full page per thousand booklets, Valassis raised its price in June 2001 by 5% to $6.20. News America did not match that price increase and Valassis, after having lost some market share, retracted it in February 2002. Competition subsequently intensified until prices were below $5 by 2004. At the time, Valassis had a publicly announced goal of increasing its market share to 50%.

That history of aggressive competition is relevant background for a Valassis earnings call conducted by President and CEO Alan Schultz. Analysts were listening in and one can expect News America was as well. In both prepared remarks and in answering analysts' questions, Mr. Schultz conveyed an objective to get prices higher.

> [W]e've been in a declining price environment since basically June of 2001. … [T]his is an attempt to change that trendline and create a positive trendline in terms of pricing and reverse that negative trendline.[33]

Valassis then conveyed it would bring price back to the 2001 level of $6 and it would no longer strive to increase its market share.

> As far as our 50% market share goal … our goal has always been to create a long-term more profitable FSI industry to create a long-term more profitable Valassis. … [W]e believe our goal can best be accomplished with no further changes in market share from where we're at today.[34]

Of course, Valassis would not be able to maintain its market share at this higher price if News America continued to undercut that price. Here is where Valassis described how its future conduct would be contingent on what News America did: "[W]e will defend our customers and market share and use whatever pricing is necessary to protect our share."[35] Furthermore, it explicitly stated that it would return to lower prices and reclaim its goal of raising market share should News America continue to be aggressive.

> 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.[36]

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[32] The ensuing facts are from Valassis Comm., Inc., 141 F.T.C. 247 (2006).
[33] Q2 2004 Valassis Communications Inc. Earnings Conference Call – Final (July 22, 2004).
[34] *Id.*
[35] *Id.*
[36] *Id.*

In sum, Valassis' CEO proposed a collusive arrangement in an earnings call in which the supracompetitive outcome involved a price of $6 and a market allocation scheme fixed at the current market shares. Valassis would take the lead and, should News America not comply, Valassis would punish it by lowering its price.

The Federal Trade Commission (FTC) noted that while earnings calls serve a legitimate purpose, Valassis had abused them in this setting.

> Although the proposal was made in the context of an analyst call, Valassis' statements provided information that would not ordinarily have been disclosed to the securities community, and the company would not have made the statements except in the expectation that its sole competitor would be listening. … Valassis' statements described with precision the terms of its invitation to collude to News America. If the invitation had been accepted by News America, the result likely would have been higher FSI prices and reduced output.[37]

The FTC went on to make an interesting observation: providing a collusive plan in the context of an earnings call imposed a certain level of commitment on Valassis which is not present when conveyed in private.

> Given the obligation under the securities laws not to make false and misleading statements with regard to material facts, Valassis' invitation to collude, made in the context of a conference call with analysts, may have been viewed by News America as even more credible than a private communication.[38]

As there was no evidence that Valassis' proposed agreement was consummated, it was prosecuted as an invitation to collude under Section 5 of the FTC Act. The FTC issued a consent order enjoining Valassis from future unlawful activities.

2. Truck Rentals

In the market for one-way truck rentals, the two largest firms were U-Haul with a market share of 54% and Budget with 15%.[39] Competition was intense and, from late 2006 to early 2008, there is documented communications that U-Haul was seeking to act as a price leader and conveying to Budget that it should follow U-Haul's lead.

While our focus will be on U-Haul's public announcements, let us first review some internal communications as they are relevant to this episode. In internal memoranda, U-Haul CEO and Chairman

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[37] Analysis of Agreement Containing Consent Order to Aid Public Comment at 3, Valassis Comm., Inc., 141 F.T.C. 247 (2006).
[38] *Id.* at 4.
[39] Liu v. Amerco, 677 F.3d 489, 493 (1st Cir. 2012). U-Haul is a subsidiary of Amerco.

Edward J. (Joe) Shoen[40] conveyed to U-Haul regional managers that U-Haul was to respond to Budget's low rates.

> Budget continues in some markets to undercut us on One-Way rates. Either get below them or go up to a fair rate. Whatever you do, LET BUDGET KNOW. Contact a large Budget Dealer and tell them. … My direction is either get up to a fair rate or get down below the competitor. EITHER WAY, LET THEM KNOW.[41]

Notably, they were not to match Budget's rates. Shoen was not interested in keeping prices at these low levels but rather getting them higher. That could be done by pricing above Budget—and conveying to Budget that it was expected to follow—or pricing below Budget—and presumably conveying that U-Haul would continue to do so until Budget raised prices. As Shoen stated in a memo to dealers:

> We are successfully meeting or beating our Budget and Penske competitors. However, their rates are WAY TOO LOW. … [W]e should be able to exercise some price leadership and get a rate that better reflects our costs.[42]

If the regional managers and dealers were communicating with Budget as suggested by Shoen, then there were also private communications between competitors intended to coordinate their conduct. However, any such private communications were also supplemented with public ones.

In an earnings call in February 2008, Shoen spoke extensively about U-Haul's efforts to be a price leader.

> [W]e are very, very much trying to function as a price leader and not give away share … I'm trying to exhibit some price leadership because … there are markets that are being priced well below the cost of providing the service. … So we've been trying to force prices.[43]

It is noteworthy that he refers to "trying to force prices." Given that a firm has complete control over its own prices, presumably Shoen is referring to U-Haul's attempt to induce (or "force") Budget to set higher prices. Given the complexity of pricing in this market—prices are specific to the origin and destination of a truck—Shoen notes that it can be difficult to infer U-Haul's pricing strategy from its prices.

> I think our competitors have a hard time seeing what we do just because the pricing matrix is so vast and any one decision-maker who does some pricing analysis has a hard time really saying in a way that they could fairly represent to their company the trend is up or the trend is down or more likely U-Haul is holding the line, we don't need to just cut, cut, cut.[44]

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[40] Shoen is also Chairman, President, and Director of Amerco.
[41] Complaint at 3, U-Haul Int'l, Inc., Docket No. C-4294, 2010 F.T.C. LEXIS 61 (2010) (emphasis in original).
[42] *Id.* at 4.
[43] Q3 2008 AMERCO Earnings Conference Call – Final (Feb. 7, 2008).
[44] *Id.*

This difficulty of conveying a pricing strategy through the prices charged could well have made it all the more critical for Shoen to publicly announce its strategy to lead on price. Along with expressing its role as a price leader, Shoen also conveyed that U-Haul will be patient in awaiting Budget's response but "if it starts to affect share I'm going to respond."[45]

As with the *FSI* case, there was no evidence that Budget responded in a manner that would indicate that it and U-Haul had reached an agreement. U-Haul was prosecuted under Section 5 of the FTC Act for inviting Budget to collude and a consent order was issued.

3. Mobile Telecom

This case involves the Dutch mobile telecom market where the suppliers are the mobile network operators KPN, T-Mobile, and Vodafone.[46] KPN conveyed a public announcement through an interview with one of its executives that was published in the May 2009 issue of the trade journal *Telecom Update*. The KPN executive noted that intense competition—as reflected in lower prices and higher expenses for acquiring customers (referred to as subscriber acquisition cost or "SAC") and retaining customers (subscriber retention cost or "SRC")—had harmed all firms.

> In the past few years, operators have focused too heavily on increasing their market shares by continually raising the SAC/SRC and by reducing prices. Actually, we all have tried to buy ourselves a larger market share. However, all competitors are walking the same path, so we don't make any progress at the end of the day. The industry is a captive of its own model.[47]

He then proposed a new strategy for KPN which involved higher prices and maintaining its current market share.

> KPN has a market share of around 50% … and we are happy with that. … [W]e are following a new strategy. We will carefully start lowering the SAC/SRC and raising prices this year. It is really a paradigm shift. … We have clearly set a new course.[48]

However, implementation of this strategy is conditional on other firms complying: "If we will be punished by the markets and our market share will be immensely under pressure, then we will have to make other plans."[49] As KPN would most likely lose market share unless the other operators similarly raised their prices, this was a clear statement that KPN's higher price was contingent on a collective price increase. The public announcement had all of the essential ingredients of a collusive arrangement.

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[45] *Id.*
[46] Facts are from ACM Case 13.0612.53, *Mobile Operators*, 2014.
[47] *Id.* ¶ 30.
[48] *Id.*
[49] *Id.*

There is also documentary evidence that rival T-Mobile drew the appropriate inference. A T-Mobile employee shared a copy of the interview with senior management, and there was a discussion as reflected in an internal email.

> To summarize: KPN wants to maintain its market shares, but also to improve its profit margin by aiming for value and reducing its commissions. A dilemma for T-Mobile given the growth ambition.[50]

If T-Mobile had only viewed KPN as announcing higher prices, it would have been a golden opportunity to gain market share and thereby satisfy its "growth ambition." However, that it viewed this as a "dilemma" is consistent with it being interpreted as an invitation to coordinate on higher prices. T-Mobile was forced to decide whether to forsake its goal of expanding its customer base in exchange for higher margins on existing customers. In other words, it must decide whether to coordinate with KPN or continue to compete aggressively.

The mobile network operators entered into a commitment (or consent order) with the Dutch competition authority that

> their senior management will not make any oral or written announcements in the public domain about future prices and other commercial conditions for mobile-communication services in the Dutch market that would leave consumers worse off, before the internal decision-making about such future prices and commercial conditions has been finalized and laid down in writing, whereby each of the MNO's individual behavior become dependent on their competitors' reactions.[51]

4. Common Elements in the FSI, Truck Rentals, and Mobile Telecom Cases

While free-standing newspaper inserts, truck rentals, and mobile telecom are very different products and services, the way in which public announcements were used to facilitate collusion is quite similar. Whether through an earnings call or an interview in a trade journal, a firm could be assured that its competitors would receive the information that was conveyed. In all three episodes, a high-ranking company official noted the excessive or intensifying state of competition, whether it was the "declining price environment" in the FSI market, that some truck rentals were "being priced well below the cost of providing the service," or that suppliers in the mobile telecom market had "focused too heavily on increasing their market shares … by reducing prices." The point conveyed is that all firms are being hurt and the "industry is a captive of its own model [of competition]."

Having stated the problem, the firm then proposed a solution in the form of inviting its competitors to participate in a collusive arrangement. The arrangement involves the announcing firm taking the lead by

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[50] *Id.* ¶ 32.
[51] *Id.* ¶ 51.

raising its own prices with the maintenance of those higher prices being conditional on the other firms following suit. The latter "conditional clause" to the agreement could be inferred from the announcing firms' statements that they would change their plan if they lost market share. In these markets with highly similar products or services, a firm would lose market share should its prices exceed rivals' prices. Only if the rivals followed their leader could they expect Valassis, U-Haul, or KPN to maintain the higher prices they set.

There is no evidence that these public announcements proved effective in coordinating firms' conduct. Given that the *FSI* and *Truck Rentals* cases were pursued by the FTC as an unfair practice in the form of an "invitation to collude," rather than as an unlawful agreement by the DOJ, it is likely there was not sufficient evidence of announcements or actions consistent with the invitation to collude having been accepted. However, firms presumably would not have made these announcements without believing there was a reasonable chance of success.

On the issue of effect in connection with an invitation to collude which is not accepted, a private litigation suit in the *Truck Rentals* case made the valid point that it has effect when it involves a firm raising its price. That higher price, even if it is not matched, is harmful to consumers; both those who bought at that price and those who would have bought at the lower price that prevailed prior to the attempt at leading a coordinated price increase.[52]

5. Baggage Fees

This case offers a clean episode of public announcements inviting collusion and that invitation being accepted. It involved AirTran and Delta Airlines who controlled 92% of the traffic at Hartsfield-Jackson Atlanta International Airport and dominated route markets which had Atlanta as the origin or destination.[53] AirTran and Delta were close competitors with Delta being the larger firm in terms of routes and revenues. Delta was present in 90% of AirTran's total routes and 100% of AirTran's routes to and from Atlanta.

At the time, it had become commonplace for airlines to charge for certain services that had previously been provided when purchasing a ticket. In particular, many airlines had moved to charging for the first checked bag (in addition to charging for additional checked bags which had been standard). However, as of mid-2008, AirTran and Delta had not yet instituted a first-bag fee.

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[52] "Liu says that the economic analysis in the study suggests an overcharge of at least 10 percent. This exercise provides some further grounding for Liu's claim that U-Haul's representatives did increase prices in response to Shoen's directive " Liu v. Amerco, 677 F.3d 489, 495-96 (1st Cir. 2012). The district court dismissed the case but its decision was vacated and the matter was remanded by the circuit court. The case was settled on January 22, 2013.
[53] Facts are from *In re* Delta/AirTran Baggage Fee Antitrust Litig., 733 F. Supp. 2d 1348 (N.D. Ga. 2010).

In its second quarter earnings call on July 16, 2008, Delta was asked whether it would impose a first-bag fee. It replied that it was examining the issue "but [had] no plans to implement it at this point."[54] Three months later during its third quarter earnings call on October 23, 2008, AirTran CEO Robert Fornaro was similarly asked about adopting a first-bag fee. His response was rather detailed.

> We have the 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 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.[55]

An analyst followed up by asking whether AirTran would adopt a first-bag fee if Delta did so, to which Fornaro replied he "would strongly consider it, yes."[56]

What we have thus far is AirTran publicly announcing that it would not take the lead on charging for the first-checked bag but it would be very likely to do so if Delta adopted a first-bag fee.

Internal Delta documents at the time showed that it was considering the institution of a first-bag fee, as it had conveyed during its earnings call in July 2008. However, the current assessment was that it would be unprofitable.

> Delta continued to study the first-bag fee internally. Revenue management … prepared a "value proposition" analysis of the first-bag fee, which it generally opposed. … Initially, Delta predicted there was only a fifty percent probability that AirTran would match, yielding a mid-range estimate of a $46 million loss to Delta.[57]

That analysis was conducted prior to AirTran's earnings call. After Fornaro conveyed AirTran was inclined to follow Delta should it lead, Glen Hauenstein (an executive vice president for Delta) raised the probability from 50% to 90% that AirTran would match a first-bag fee and "[a]t that increased likelihood, Delta's mid-range estimate became 'slightly positive' for the first time."[58] The revised value proposition analysis was presented before the Corporate Leadership Team at their October 27, 2008 meeting, where it was decided to institute a first-bag fee.

On November 5, 2008, Delta issued a press release announcing that it would charge $15 for the first checked bag, effective December 5, 2008. One week later on November 12th, AirTran announced it, too, would charge $15 for the first checked bag, effective December 5, 2008.

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[54] *Id.* at 1354.
[55] *Id.* at 1356.
[56] *Id.*
[57] *In re* Delta/AirTran Baggage Fee Antitrust Litig., 245 F. Supp. 3d 1343, 1354-55 (N.D. Ga. 2017).
[58] *Id.* at 1355.

This is a compelling case in which public announcements were used by competitors to coordinate. To summarize, Delta conveyed during an earnings call that it was considering a first-bag fee but had not yet decided to adopt it. AirTran could well have inferred that Delta's reluctance was due to uncertainty over what AirTran would do in response. Reducing that uncertainty, AirTran stated in an earnings call that it would not lead with a first-bag fee but was very likely to follow should Delta adopt one. The impact of that announcement is quantified by Delta increasing the probability assigned to AirTran matching a first-bag fee from 50% to 90% which, according to Delta's analysis, would make a first-bag fee profitable. It was only four days after AirTran's earnings call that Delta decided to adopt a first-bag fee and then publicly announced it nine days later with it becoming effective in one month. One week after Delta's press release, AirTran publicly announced the adoption of a first-bag fee equal to Delta's with the same effective date. Thus, there are communications to facilitate an agreement between AirTran and Delta to adopt a first bag-fee, and evidence of effect in that they did adopt a first-bag fee.

A private litigation case was pursued under Section 1 of the Sherman Act. As the defendants' motion to dismiss was denied by the District Court in March 2010, collusion was seen as sufficiently plausible to satisfy the *Twombly* standard. Surprisingly, the District Court ruled in favor of AirTran and Delta on summary judgment, which was affirmed by the Eleventh Circuit in March 2018.[59] In sum, the court ruled there was a plausible case for collusion but that one could not rule out the two airlines having independently made the decision to institute a first-bag fee.

6. Synthesis

These four episodes—*FSI*, *Truck Rentals*, *Mobile Telecom*, and *Baggage Fees*—exemplify a general collusive strategy which does not require articulating a specific plan. A firm announces it will act as a leader or as a follower which facilitates mutual understanding among competitors as to who should take the initiative in raising prices. Furthermore, that announcement describes how its actions are contingent on what a rival does. This is immediate in the case that a firm is conveying its intent to be a follower for it is describing that, should the other firm raise price, it will match that price. In the case of a firm announcing its intent to initiate a price increase, it also describes how maintenance of that higher price is contingent on the rival firms raising their prices or, equivalently, it not losing market share. Having used public announcements to coordinate on which firm should lead and the expectation that rival firms will follow, the primary challenge for the leader is choosing a price that the followers would be willing to match.

C. *Treatment*

Consider a firm publicly announcing that it will raise its price (or reduce its supply) but will retract this change should competitors fail to similarly raise price (or reduce supply). With such an announcement a

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[59] *In re* Delta/AirTran Baggage Fee Antitrust Litig., 245 F. Supp. 3d 1343 (N.D. Ga. 2017), *aff'd sub nom.* Siegel v. Delta Air Lines, Inc., 714 F. App'x 986 (11th Cir. 2018).

firm is communicating that it will act as a leader. Or suppose a firm announces that it will not raise price (or reduce supply) but, should another firm do so, it will match that higher price (or reduced supply). That firm is communicating it will act as a follower. These announcements facilitate the formation of an **agreement** between firms to have a leader-follower arrangement. Furthermore, this leader-follower arrangement would, if consummated, result in higher prices or lower supply and thereby **restrain trade**.

These public announcements are invitations to collude which, should they be accepted by competitors, would be violations of Section 1. Evidence of acceptance by other firms could take one of two forms. First, a competitor publicly (or privately) communicates that it is willing to act as a follower (should the original announcement be that the firm would lead) or as a leader (should the original announcement be that the firm would follow). When invited to be a follower, a competitor could convey acceptance by announcing that it will not seek to have the lowest price or is content with its market share (indicating that, should the firm raise price, it will not undercut to gain sales). All such statements convey that it will accommodate a price increase by raising price itself so as to lead to a mutually beneficial outcome.

Second, and more likely, a competitor reveals its acceptance of the invitation by acting in the manner prescribed by that invitation; either by matching the higher price or lower supply (when it is invited to follow) or initiating a higher price or lower supply (when it is invited to lead). Here it is important to note that a leader-follower arrangement can be profitable for all firms even if the follower undercuts the leader's price, as long as the follower raises prices and the price differential is small enough.[60] Supportive evidence of an effective leader-follower arrangement is that firms' prices are higher and these prices persist over time. Persistence would reveal all firms are content with the new outcome (so all are earning higher profits even if their prices are not identical), and higher prices imply a restraint of trade.

As so described, this evidence is sufficient for establishing a violation of Section 1 of the Sherman Act for there is an overt act of communication which facilitated a meeting of minds and coordinated conduct showing that firms achieved their common objective.

In providing guidance to firms and courts, it is proposed that an announcement is an invitation to collude when it refers to how a firm's conduct is contingent on variables predictably influenced by a competitor—so that firms could reasonably foresee the consequences of their conduct—and the implied conduct would restrain trade. An announcement's *implied conduct* refers to firms acting in their best interests under the assumption that the announcing firm will act as claimed it would. When a firm announces it will be a leader, the implied conduct comprises the announcing firm acting as it announced and the non-announcing firm optimally responding to the announcing firm's action. When a firm announces it will be a follower, the implied conduct comprises the non-announcing firm choosing an optimal action assuming the announcing firm will respond as it announced, and the announcing firm acting as it announced.

[60] We know from economic theory that prices are higher when firms price in a sequential manner – one leading and the other following – than when they price without a leader (i.e., simultaneously choose prices). *See, e.g.,* Eric van Damme and Sjaak Hurkens, *Endogenous Price Leadership*, 47 GAMES & ECON. BEHAV 404 (2004).

This definition obviously encompasses announcements pertaining to a firm's price and output, for a firm controls those variables and thus predictably influences them. It also includes announcements pertaining to the customers or markets that a firm serves. For example, suppose two firms offer the same product or service but operate in different geographic markets; firm 1 operates in market A and firm 2 in market B. Firm 1 announces that if firm 2 enters market A then it will enter market B. Or consider a firm announces that it will not poach a rival firm's customers as long as the rival firm does not approach its customers. These announcements are an invitation to coordinate on allocating markets or customers.

Announcements referring to market shares require some judgment as to whether a firm predictably influences them such that they could reasonably foresee the effect of their conduct. Consider a firm announcing that it will raise price but will retract the price hike should its market share decline. Market shares are determined by consumers' purchasing decisions though constrained by firms' output decisions and influenced by their pricing decisions. Where firms' products or services are near identical, and thereby consumers' decisions are highly sensitive to firms' prices, there is a clear and direct effect of a firm's price on firms' market shares. In that situation, a rival firm could reasonably foresee that the announcing firm's market share would decline unless it matched (or came close to matching) the announcing firm's price increase. The announcing firm is then effectively saying that it will maintain the price increase if and only if the rival firm matches that increase, even though reference is made to its market share not declining. In those circumstances, such an announcement would be understood as an invitation to collude.

The *Baggage Fees* case has all of the required evidence to establish a Section 1 violation. AirTran communicated its willingness to follow Delta should Delta adopt a first-bag fee. This announcement was an invitation to Delta to participate in a leader-follower arrangement. With this unambiguously expressed assurance from AirTran, Delta accepted this invitation by publicly announcing its plan to institute a first-bag fee. Subsequently, AirTran responded with an identical plan for having a first-bag fee, which is evidence of a meeting of minds. There was communication to facilitate an agreement and effect to show its existence.

Despite this evidence, the DOJ chose not to prosecute AirTran and Delta, while private litigants lost on summary judgment. The Baggage Fee case is exhibit #1 that the DOJ is not sufficiently assertive and courts are too deferential. Public announcements referring to how a firm's price is contingent on a competitor's price are not part of the competitive process and are inherently dangerous given the risk of facilitating coordinated conduct.

V. A Firm Announces How Rival Firms Should Behave

A. *Description*

When a firm's public announcement communicates to competitors how they should behave, the risk of coordinated conduct and anticompetitive harm is high. There are two classes of such announcements. The first class encompasses announcements that expressly recommend how competitors or the industry at large should behave. Here are some hypothetical examples:

> "We should stop this price war and return to pricing at rational levels."

> "I intend to focus on increasing price-cost margins while being content with my market share and I encourage other firms to do so, too."

> "The industry runs the risk of too much supply chasing too little demand. We should all limit how much capacity we are operating."

These are all invitations to coordinate conduct in order to reduce the intensity of competition.

Announcements in the second class involve commenting on past conduct by competitors or the industry at large. A firm may commend competitors or the industry at large for certain past conduct and thereby implicitly recommend continuation of that conduct, or it may criticize past conduct and thereby implicitly recommend discontinuation of that conduct. As examples:

> "All firms in the industry have shown a level of restraint when it comes to supply, and we have benefitted as a result."

> "Prices have been rising in recent quarters and I am grateful that my rivals have focused on margins, not volume."

> "My competitors have priced at insanely low levels which is a path to destroying profitability."

> "As soon as demand returned to reasonable levels, all the industry could think about was expanding capacity and supply. As a result, prices did not rise and we squandered an opportunity for higher profits."

Though these are not as explicit an invitation as the first class, the message is no less clear in conveying either a continuation of constrained competition or a discontinuation of aggressive competition. While converting these announcements into anticompetitive conduct is not immediate, that they would facilitate doing so is clear.

B. *Cases*

1. Broiler Chicken[61]

The defendants are industrial producers of chicken meat who supplied 88% of the market for broiler chickens. Plaintiffs accused them of coordinating supply reductions over 2008 to 2016. Their evidence is

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[61] I am working as a consulting expert for certain plaintiffs in this case. Facts are based on *In re* Broiler Chicken Antitrust Litig., 290 F. Supp. 3d 772, 798 (N.D. Ill. 2017). In this decision, the defendants' motion to dismiss was denied: "Plaintiffs plausibly alleged an injury in fact by alleging that they paid inflated prices, which could be fairly traced to defendants' price-fixing scheme, and which could be redressed by a favorable judicial decision."

of three sorts. First, public announcements facilitating such supply reductions. Second, the sharing of confidential supply data with a third party, Agri Stats. Third, evidence of parallel supply cuts. I will not evaluate the validity of this complaint and instead focus on assessing how the public announcements could serve to facilitate collusion.[62]

The International Poultry Expo took place over January 23-25, 2008 which, according to the plaintiffs, was attended by executives of several chicken suppliers.

> After that meeting, executives from Tyson, Pilgrim's, and Sanderson made statements that their companies would raise prices or cut production in response to market prices that were below the cost of production. Pilgrim's CFO stated that "the rest of the market is going to have to pick-up a fair share." And Sanderson's CEO stated that he expected the industry to make production cuts. … Additionally, Sanderson's CEO stated at a conference presentation, "I know some companies have cut back and have not announced."[63]

With this public announcement, Pilgrim's CFO was inviting its rivals to cut their supply and the other announcements suggest it may have been part of an industry plan. We can only speculate what might have been discussed at the International Poultry Expo which led to these announcements.

In spite of the *Wall Street Journal* reporting production cuts and rising prices in May 2008, Pilgrim's CEO "called for additional production cuts because 'there is still too much breast meat available to drive market pricing significantly higher.'" About one month later, Peco's CEO publicly commented that "the poultry industry is entering a second phase of production cutbacks . . . . We are hearing talk that this was not nearly enough, so liquidation is in round two."[64] Notable is Peco's reference to cuts by the "industry" and not just to its own supply.

From January to June of 2008, high-level executives of Peco, Pilgrim's, and Sanderson Farms all made public announcements which encouraged their competitors to reduce supply and conveyed the expectation that they would do so. Complementing these communications was a private announcement by Agri Stats to the firms: "Those who have announced cutbacks indicated they will continue until margins normalize. At this time we expect to see the declines continue until at least late 2009, and cuts could be deeper than now projected."[65] There is some evidence that output did fall and prices did rise.

> [I]n September 2008, an industry publication reported that "most U.S. broiler integrators had announced plans to close small operations, consolidate complexes and further processing plants and to reduce output by 3 percent to 5 percent." … The production cuts

[62] For a discussion of the broiler chicken and pork cases (the latter will be covered next), *see* Carstensen, *supra* note 3.
[63] *In re Broiler Chicken*, 290 F. Supp. 3d at 782.
[64] *Id.*
[65] *Id.*

> of 2007-09 had the effect of increasing Broiler prices "through mid to late 2008, staying at or near all-time highs until late 2009."[66]

During an earnings call in April 2012, Pilgrim's CEO commented that "the die is cast for 2012," and "we're comfortable that the industry is going to remain constrained."[67] Here we see reference to what the suppliers *will* do ("the industry is going to remain constrained") which could have served as affirming other communications as to what they *should* do. I will discuss such "forecasts" in Part VI below.

2. Pork

The case involving the "other white meat"[68] is strikingly similar to that of the broiler chicken. Suppliers engaged in public announcements recommending output reductions, they shared confidential information through Agri Stats, and there is evidence of reduced industry supply. Even though the public announcements were more egregious in the pork case, the court concluded that the plaintiffs' initial complaints failed to meet the *Twombly* standard of plausibility because of a lack of evidence of parallel supply cuts by producers.[69] Amended complaints submitted since then have largely survived defendants' motions to dismiss.[70] Thus far, one of the defendants has settled for $24.5 million.[71]

The four largest defendants—Smithfield, Tyson, JBS USA, and Hormel—made up almost 70% of pork sales. Some of the pork producers began reducing supply and calling on others to follow their lead. In May 2009, the CEO of Smithfield Foods conveyed at the BMO Capital Markets Agriculture, Protein & Fertilizer Conference:

> We made the decision with the over-supply of livestock to take the leadership position and start reducing our sow herds because we saw the overproduction and the oversupplies of the hogs into the market, which was driving our hog market down.[72]

Referring to Smithfield cutting supply by 10% and then 3%, he noted in an earnings call one month later that "our 3% will not fix the hog industry. … Somebody else has got to do something. We cut 13%. The

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[66] *Id.* at 783.
[67] *Id.*
[68] "Pork. The Other White Meat." was an advertising slogan developed in 1987 for the National Pork Board.
[69] Facts are based on *In re* Pork Antitrust Litig., No. 18-1776, 2019 U.S. Dist. LEXIS 133165, 2019 WL 3752497, at *22-25 (D. Minn., Feb. 7, 2019).
[70] Amended Memorandum Opinion and Order at 83, *In Re Pork Antitrust Litig.*, Nos. 18-1776, 19-1578, and 19-2723 (D. Minn., Oct. 20, 2020) (denying defendants' joint motion to dismiss the federal law claims).
[71] Christopher Cole, *Pork Buyers Win Initial Approval of $24.5M Deal With JBS*, LAW360, Jan. 14, 2021, https://www.law360.com/articles/1344854/pork-buyers-win-initial-approval-of-24-5m-deal-with-jbs.
[72] Direct Purchaser Plaintiffs' Third Amended and Consolidated Class Action Complaint ¶ 138, *In re* Pork Antitrust Litig., No. 18-1776, 2019 U.S. Dist. LEXIS 133165, 2019 WL 3752497 (D. Minn., Feb. 7, 2019) [hereinafter Third Amended Complaint]; Smithfield Foods at BMO Capital Markets Agriculture, Protein & Fertilizer Conference – Final (May 13, 2009).

first 10% didn't fix it."[73] The point was iterated yet again in the next quarter's earnings call: "I think this industry has got to solve it collectively. … there are others cutting back. We're not the only one."[74] And the next quarter's as well: "I think we've certainly done more than our fair share [but] I have not seen the significant Midwest reduction that would probably be needed to put this industry back in balance." [75]

The CEO of Smithfield Foods could not be clearer when publicly announcing that the "industry has got to solve it collectively," that Smithfield had done its "fair share," and that "somebody else has got to do something." The message to Smithfield's competitors was unambiguous: coordinate on reducing supply by following the lead of Smithfield.

Some of the other pork producers were also restricting supply including Tyson, with cuts of over 25% during 2008-09, and Hormel.[76] In an earnings call, Hormel's CEO said that Hormel would "certainly look for opportunities particularly in January where we could reduce the number [of hogs] that we had going through."[77]

Complementing Smithfield's request to competitors that they cut supply, some of those competitors subsequently made announcements consistent with affirmation of that plan as, during earnings calls, they forecast diminishing supply and consequently rising profits. Hormel's CEO "expected to see a 3% reduction in overall pork supply in 2009"[78] and the Chief Operating Officer for Tyson Foods noted: "We do expect to see liquidation accelerate and pork production decrease into 2010 and beyond to improve producer profitability."[79] That forecast was also in Tyson Foods' 2009 10K Report: "We expect to see a gradual decline in hog supplies through the first half of fiscal 2010, which will accelerate into the second half of fiscal 2010."[80]

Through earnings calls and public statements at conferences, Smithfield Foods communicated to its competitors that it had done its part to reduce industry supply and that others needed to contribute if industry performance was to improve. This was an invitation to coordinate conduct for anticompetitive purposes. As confirmation of this plan, some of the pork producers, including Hormel and Tyson Foods, communicated their belief that industry supply would decline.

3. Generic Pharmaceuticals

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[73] Third Amended Complaint, ¶ 140; Q4 2009 Smithfield Foods Earnings Conference Call – Final (June 16, 2009).
[74] Third Amended Complaint, ¶ 145; Q1 2010 Smithfield Foods Earnings Conference Call – Final (Sept. 8, 2009).
[75] Third Amended Complaint, ¶ 146; Q2 2010 Smithfield Foods Earnings Conference Call – Final (Dec. 10, 2009).
[76] *Id.* ¶ 126, 128.
[77] *Id.* ¶ 128; Q1 2009 Hormel Foods Corporation Earnings Conference Call – Final (Feb. 19, 2009).
[78] Third Amended Complaint, ¶ 135; Q4 2008 Hormel Foods Corporation Earnings Conference Call – Final (Nov. 25, 2008).
[79] Third Amended Complaint, ¶ 142; Q3 2009 Tyson Foods Earnings Conference Call – Final (Aug. 3, 2009).
[80] Third Amended Complaint, ¶ 143.

More than 15 manufacturers are being prosecuted and privately litigated for colluding on the prices of many generic pharmaceuticals. The state of Connecticut began an investigation in 2014, the first criminal charges were brought by the DOJ in December 2016, and there are on-going civil suits by dozens of states and private litigants. The complaints claim there were private communications among the defendants which resulted in coordinated price increases and adoption of a market allocation scheme.[81] What we do know is that there were massive price increases.[82]

Our interest is not in any private communications but rather in the public announcements made by one of the defendants, Lannett Company. Largely conducted through earnings calls, these messages may have served to shore up an agreement made through private communications. Whether or not that is true, they exemplify the types of public announcements that could facilitate coordinated conduct.

Lannett's CEO Arthur Bedrosian is the communicant. On August 23, 2016, Bedrosian commented that price competition "usually doesn't get you to results you want. So, I think a lot of people have learned that lesson by now."[83] Less than three weeks later during an earnings call, he announced a path towards higher prices: Lannett would be a price leader and competitors would follow its price increases.

> We're not a price follower. We tend to be a price leader … Sometimes, it doesn't stick and we have to go back and reduce our price, and other times it does. I am finding a climate out there has changed dramatically and I see more price increases coming from our … competitors than I've seen in the past. … We have more price increases planned for this year within our budget. And hopefully, our competitors will follow suit."[84]

Mentioning that some price increases were retracted because they did not "stick" and that competitors were expected to "follow suit" suggests that those competitors should expect Lannett to return to lower prices if they did not raise their prices. In other words, Lannett was conveying a plan for an industry-wide price increase.

Bedrosian didn't just criticize competitors for aggressive pricing but also commended them for raising their prices: "So whenever people start acting responsibly and raise prices as opposed to the typical spiral down of generic drug prices, I'm grateful."[85]

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[81] "[T]he prices for a large number of generic pharmaceutical drugs skyrocketed throughout at least 2013 and 2014. According to one report, "[t]he prices of more than 1,200 generic medications increased an average of 448 percent between July 2013 and July 2014." Plaintiff States' Consolidated Amended Complaint, *In re* Generic Pharms. Pricing Antitrust Litig., 338 F. Supp. 3d 404 (E.D. Pa. 2018); Complaint, Humana Inc. v. Actavis Elizabeth, LLC, No. 2:18-cv-03299 (E.D. Pa. Aug. 3, 2018).
[82] Plaintiff States' Consolidated Amended Complaint ¶ 110, *In re* Generic Pharms. Pricing Antitrust Litig., 338 F. Supp. 3d 404 (E.D. Pa. 2018).
[83] *Id.* ¶ 212.
[84] *Id.* ¶ 200.
[85] Id. ¶ 212; Q4 2013 Lannett Company Inc Earnings Conference Call – Final (Sept. 10, 2013).

Having described a plan of coordinated price increases during the fall of 2014, Bedrosian provided affirmation of that plan in a February 2015 earnings call by predicting that prices will not decline.

> If you're saying that the price increases that we've had in place, are they sustainable, and are they maintaining? My answer would be yes, they continue to hold up. … I think you're going to find … less competition, in a sense. You won't have price wars. You are still going to have competition, because there's a lot of generic companies in the market. I just don't see the prices eroding like they did in the past.[86]

These public announcements are explicit in calling for less price competition and encouraging competitors to follow Lannett's price increases. Irrespective of what evidence is found of private communications, these public messages could have been sufficient to result in supracompetitive prices.

4. Steel

The steel industry consolidated over 2000-2004 with a series of bankruptcies, mergers, and acquisitions which left ArcelorMittal, Nucor, and U.S. Steel with 55% of domestic steel capacity. Building on the reduction in competition from this consolidation, public announcements were made at industry meetings to engage in "supply discipline" in order to maintain price levels. Private litigation was pursued that survived defendants' motion to dismiss[87] and ended with a settlement of $193.9 million.[88] The evidence described below is compelling that several steel producers publicly announced a plan to limit output and capacity for the purpose of raising prices, and that the announcement was effective in doing so.

From March to June of 2005, senior executives at Mittal conveyed a message that the history of the industry is one of excessive competition, and then put forth a proposal for all producers to "manage" supply and capacity so as to achieve "fair" prices. These announcements were clearly intended to coordinate the output of competitors for the purpose of producing supracompetitive prices.

At a steel industry meeting in Chicago on March 1, 2005, Mittal executive Louis Schorsch criticized the traditional mode of conduct which "ensured that most producers would cut price before reducing volume."[89] In order to prevent "an inevitable race to the bottom,"[90] he then described what Mittal and its competitors needed to do.

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[86] *Id.* ¶ 208, 209.
[87] Std. Iron Works v. Arcelormittal, 639 F. Supp. 2d 877, 896-97 (N.D. Ill. 2009) ("It is certainly plausible that absent coordination and agreement by each producer to give its 'pint of blood,' no Defendant would have sacrificed profitable production. But all eight Defendants made that sacrifice, and did so on multiple occasions. This, I find plausibly suggests agreement.").
[88] Diana Novak Jones, *Steel Buyers' $30M Deal Approved, Ending Antitrust Row*, LAW360 (Feb. 16, 2017).
[89] *Arcelormittal*, 639 F. Supp. 2d at 884.
[90] *Id.*

> [I]f we are going to see improved conduct and thus improved performance, it will only be because the consolidation we have undergone encourages a change in behavior to match the industry structure. This means an emphasis on value instead of just cost, a focus on profits rather than on tons.[91]

Two months later, Mittal Chief Operating Officer Malay Mukherjee provided a similar message at a meeting of the Association for Iron and Steel Technology.

> What is needed from the industry is a disciplined approach to bringing on supply and managing capacity. A better collective understanding of the microeconomics of our industry … will help ensure that we achieve a better match of supply with demand, more stable price levels and a financially healthier industry overall.[92]

Key here was calling for a "collective" industry effort to control supply in order to maintain price levels. In attendance were CEOs from U.S. Steel, Nucor, Steel Dynamics, Gerdau, and Commercial Metals. In a meeting in June 2007 with at least six CEOs present, Schorsch was even more specific in calling for them "to adjust their production rates so the price of steel doesn't drop,"[93] which led others to voice that "they all need to work together to keep the prices high regardless of the flexibility in the marketplace."[94]

This invitation to jointly limit supply was, according to industry analysts, followed with supply reductions.

> An experienced market analyst surveyed the industry's mid-2005 downtime and reported having "never seen such a rapid drop in output corresponding to a rapid drop in demand and pricing . . . clearly this is unprecedented in our 30-year history analyzing this sector."[95]

The success in implementing this industry plan was subsequently affirmed by public announcements that commended competitors for their restraint with respect to supply.

> Steel Dynamics CEO Keith Busse summarized the industry's unprecedented collective action: "I've been around the industry for 20 years. And I haven't seen this kind of discipline. … everybody is, to some degree, giving that pint of blood."[96]
>
> In a February 23, 2006 interview with Financial Times, Lakshmi Mittal looked back on the past few good years and commented, "[t]he industry has changed immensely. . . . On top of this [consolidation] there is a new discipline in the industry which means when demand

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[91] *Id.*
[92] *Id.* at 884-85.
[93] *Id.* at 892.
[94] *Id.*
[95] *Id.* at 887.
[96] *Id.* at 888.

> is soft, as happened in the second quarter of 2005, companies cut production to better manage supply/demand."[97]

That the industry was following a collective plan to limit output was perceived by industry observers. In mid-2005, the trade press reported that "U.S. steel producers appear to be sticking to their pledges to reduce production,"[98] and, at a Steel Manufacturers Association meeting in mid-2007, an industry analyst encouraged them to "maintain focus on SUPPLY DISCIPLINE."[99]

In sum, these public announcements are a blatant call for competitors to be part of a coordinated plan to limit supply for the objective of achieving higher prices.

5. Airlines

A series of mergers and acquisitions led to a substantial decline in the number of airlines serving routes throughout the United States. Delta and Northwest merged in 2008, Southwest acquired AirTran in 2010, Continental merged with United in 2010, and American Airlines joined with US Airways in 2015. This increased concentration is a contributing factor to the collusion we will describe. The collusive plan is built around a reduction in industry capacity which, by reducing the number of available seats, would allow airlines to implement and sustain higher fares.

The earliest documented public communications regarding capacity restrictions are found in some 2008 earnings calls by AirTran and Delta. In one of them, AirTran Vice President of Finance Arne Haak commented that "the elimination of inefficient and redundant domestic capacity is long overdue."[100] During that same call, CEO Robert Fornaro noted: "Just raising prices, without reductions in capacity is not going to raise the average fare. And so, in order to support the price increases, the capacity has to drop."[101]

Such a strategy only makes sense if *industry* capacity was curtailed, not just AirTran's capacity. For if AirTran raised its fares, it would be imperative that customers could not find available seats at lower fares with other airlines.

A day after AirTran's earnings call, Delta commented during its earnings call that, while it was willing to reduce capacity, its competitors had to join the effort if the desired effect was to be realized.

> Bill Green, Analyst, Morgan Stanley: "If you priced the product such that you could be profitable, how much capacity would you actually need to take out?" Glen Hauenstein, EVP of Network and Revenue Management, Delta Air lines, Inc.: "I think Delta can't do it

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[97] *Id.*
[98] Complaint ¶ 86, Std. Iron Works v. Arcelormittal, 639 F. Supp. 2d 877, 896-97 (N.D. Ill. 2009).
[99] *Arcelormittal*, 639 F. Supp. 2d at 891.
[100] Q1 2008 AirTran Holdings, Inc. Earnings Conference Call – Final (Apr. 22, 2008).
[101] *Id.* at 7.

alone. We have to do it in conjunction with the other carriers because certainly the capacity cuts that we can do on our own, while they will help us, will not remedy the industry's woes. … And I would say if the industry could achieve a 10% reduction in capacity year-over-year by the fall that we'd be in pretty shape."[102]

Offering a specific recommendation of a 10% reduction would surely facilitate adoption of a common plan.

Two months later at the Merrill Lynch Transportation Conference, Delta's President Ed Bastian conveyed a similar message.

> I said no in terms of has enough capacity been cut. … So I think everyone while they've made some fairly significant announcements, everybody is watching each other in terms of how the capacity coming over and exactly what's coming out."[103]

This point was reiterated by Delta executive Glen Hausenstein a month later during an earnings call.

> [W]e're not doing more capacity cuts right now. We're waiting to see essentially where this equilibrium goes and how, when we fine tune it, what more we get out and as the industry starts to come to the party in the fall what the implication of that is.[104]

Reference to "everybody is watching" and "waiting to see" conveys the necessity of coordinated cuts in capacity, and that Delta would continue only if other airlines were to act in a similar manner by reducing their capacities.

Evidence of success in implementing industry-wide capacity discipline was expressed by United President John Tague during a third quarter earnings call in 2009.

> [W]ithout the level of capacity discipline that we have led and most people in the industry have participated in, this would be a very, very dire time. So we're going to have to keep our lid on capacity going forward.[105]

Public announcements made in 2010 at industry conferences conveyed that the plan was working, encouraged competitors to comply with it, and foresaw that airlines would do so.

> Kathryn Mikells (United, Senior Vice President and CFO): "What we have seen so far is I think very good overall behavior in terms of capacity discipline on the part of the industry.

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[102] Q1 2008 Delta Airlines, Inc. Earnings Conference Call – Final (Apr. 23, 2008).
[103] *In re* Delta/Air Tran Baggage Fee Antitrust Litig., 733 F. Supp. 2d 1348, 1353 (N.D. Ga. 2010).
[104] Q2 2008 Delta Air Lines, Inc. Earnings Conference Call – Final (July 16, 2008).
[105] Q3 2009 UAL Corporation Earnings Conference Call – Final (Oct. 20, 2009); Consolidated Amended Class Action Complaint ¶ 88, *In re* Domestic Airline Travel Antitrust Litig., No. 1:15-mc-01404 (D.D.C. Oct. 13, 2015) [hereinafter Consolidated Complaint].

> … We've been clearly an industry leader and have long been preaching the need across the industry for capacity discipline."[106]
>
> Gerard Arpey (American Airlines, CEO): "There are ... hopeful signs that the industry has learned its lesson about keeping capacity growth in line with demand – and will continue to apply that lesson even as the economy comes back." [107]
>
> Ed Bastian (Delta, President): "[W]e are doing our share at maintaining the overall discipline across our structure and we would expect our competitors hopefully to do the same."[108]
>
> Scott Kirby (US Airways, President): "I don't think rapid capacity growth is going to become a problem in this industry, at least for the foreseeable future."[109]

That there was a coordinated plan to reduce capacity was never stated as clearly as an episode in 2015. Southwest had announced a capacity increase of 7-8 percent, and the response of John Rainey (United, CEO) was: "[W]e are very focused on capacity discipline, but we're not going to do it at the expense of United and to the benefit of others. The whole industry needs to have that level of discipline."[110]

Over the period of 2008 to 2015, airline executives repeatedly used earnings calls and statements at industry conferences to lay out and solicit support for an industry plan to limit capacity. By their own admission, this plan was effective.

> Tom Horton (American, CFO): "[W]e have been the industry leader in exercising capacity discipline [and] much of the industry followed our lead … All told, when measured against 2007, 2009 mainline capacity for the network carriers was down a whopping 14.5%."[111]

However, we do not need to rely exclusively on such claims of effect. A recent empirical analysis found that when all legacy airlines on a route mentioned phrases related to "capacity discipline" in their earnings calls, capacity fell by an economically and statistically significant amount in the ensuing quarter.[112]

In light of the egregious public announcements designed to coordinate capacity reductions among competitors and the associated evidence showing effect, it is dismaying how ineffective public and private

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[106] *Id.* ¶ 88, 91.
[107] *In re* Domestic Airline Travel Antitrust Litig., 221 F.Supp.3d 46, 62 (D.D.C. 2016).
[108] Consolidated Complaint, ¶ 94.
[109] *Id.* ¶ 60.
[110] *Id.* ¶ 65.
[111] *Id.* ¶ 92.
[112] Gaurab Aryal, Federico Ciliberto, and Benjamin T. Leyden, *Coordinated Capacity Reductions and Public Communication in the Airline Industry* 4 (CESifo Working Paper Series No. 8115), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3544501.

enforcement have been. The DOJ opened an investigation in July 2015 which it closed in January 2017.[113] Private litigation did manage to surmount the *Twombly* hurdle.

> [T]hese statements upon which Plaintiffs rely demonstrate two points that support the plausibility of … the inference that Defendants' conduct was the result of an agreement. First, Defendants made public statements about their own commitment to capacity discipline as well as the importance of maintaining the capacity discipline within the industry. … Second, Defendants' statements concerning the focus on exercising capacity discipline commenced in 2009 and were a deviation from past business practices.[114]

In May 2019, final approval was given to a settlement with American for $45 million and Southwest for $15 million.[115] Delta and United are yet to settle. In light of the substantial industry profits earned during this time period, these are very modest sums.

6. Common Elements in *Airlines* and *Steel* Regarding Capacity Discipline

The episodes in the airline and steel industries have very similar features. Both industries experienced consolidation which resulted in a market structure more conducive to lessened competition. Indeed, firms saw this connection as they commented that "the consolidation we have undergone encourages a change in behavior to match the industry structure." Some executives criticized past conduct in which "producers would cut price before reducing volume" and stressed the need to "focus on profits rather than [volume]" and not "empire building." They used earnings calls and statements at industry meetings to convey a plan to reduce competition. To enhance profits, they expressed a need for "the elimination of inefficient and redundant domestic capacity" and a plan for "capacity discipline … to make the industry profitable." A coordinated industry effort was critical because a firm is "not going to do it at [its own] expense … and to the benefit of others. The whole industry needs to have ... discipline." And when they succeeded, executives provided affirmation and support as they noted that "everybody is, to some degree, giving that pint of blood." In short, they expressed and implemented a plan to coordinate capacity reduction in order to reduce supply and thereby cause higher prices.

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[113] It is possible that the DOJ had hoped to find evidence of private communications. The case was closed just prior to the end of the Obama administration and may have reflected the reality of the case not continuing under the Trump administration. On the closing of the investigation, law professor Stephen Calkins opined: "Successor enforcers, particularly ones less aggressive than their predecessors, are unlikely to prioritize predecessors' envelope-pushing investigations." Brent Kendall and Susan Carey, *Obama Antitrust Enforcers Won't Bring Action in Airline Probe*, WALL ST. J., Jan. 11, 2017, https://www.wsj.com/articles/obama-antitrust-enforcers-wont-bring-action-in-airline-probe-1484130781.
[114] *In re Domestic Airline Travel Antitrust Litig.*, 221 F.Supp.3d at 62-63.
[115] Order on Motion for Settlement, In re Domestic Airline Travel Antitrust Litig., No. 1:15-mc-01404-CKK (May 5, 2019).

C. *Treatment*

If a firm *privately* communicated to its competitors that they should all raise their prices (or reduce their output or take some capacity offline or some other joint action that would restrain trade) and those competitors responded with similar messages or acted in accordance with the recommended conduct, jurisprudence is unequivocal that there is an unlawful agreement under Section 1. How should the court's treatment change if the firm instead *publicly* communicated this plan? As is explained below, the treatment should be the same. Public announcements about how competitors should behave ought to be treated by courts as if they were made privately.

Consider a firm publicly announcing how rival firms or the industry at large should price or produce which, if that recommendation were to be adopted by the industry, would restrain trade. The only possible avenue for finding such a public announcement not to have anticompetitive intent is that it is expressed for the benefit of parties other than competitors. If those announcements were informative without affecting conduct then that would be an alternative justification for them and confound concluding they are an invitation to collude. However, that is not the case for *these announcements are informative only if they affect firms' conduct*. All parties—customers, input suppliers, the capital market—know that a firm would prefer its competitors to price higher, and a firm announcing that they should do so provides no new information with regards to future conduct and performance *unless* that statement is viewed as making it more likely that they will price higher. It is only when announcements form an agreement to restrain competition that they are informative, and it is only when they are informative that they could be of use to other parties.

The implication is that making these communications public does not provide another rationale for them but only an ancillary effect. Privately inviting firms to price higher or supply less is done with the purpose of causing firms to price higher or supply less. Making that invitation public does nothing more than inform other parties of the proposed plan to restrain competition. In evaluating public announcements that have a firm stating how other firms or the industry at large should behave, courts should treat them "as if" they were made privately and draw on jurisprudence based on private communications.

A firm's announcement regarding how firms should behave goes from an invitation to collude to an unlawful agreement when other firms make similar or affirming announcements or act in a manner consistent with adopting the recommended conduct. In *Pork*, Smithfield Foods reduced its supply and invited competitors to do so, too. If it can be established that some of its competitors also reduced their supply and their change in conduct cannot be attributed to other causes, it can then be concluded there was an agreement to coordinate on reducing industry supply.

In *Airlines* and *Steel*, the evidence appears to demonstrate that firms violated Section 1. In *Steel*, Mittal executives publicly invited firms to reduce their capacities in order to increase prices. Subsequently, firms reduced their outputs which was noted by analysts as a clear departure from previous conduct. We therefore have evidence of an invitation to collude and acceptance of that invitation. In *Airlines*, executives from AirTran and Delta (and possibly other airlines) publicly announced the need to cut capacities with the intended effect of raising fares. Many airlines did reduce their capacities (and presumably fares did rise). Furthermore, numerous airlines—including American, United, and US

Airways—publicly conveyed affirming messages that "capacity discipline" was working. Treating these announcements as if they were made privately would have led courts to conclude that airlines and steel manufacturers had agreements to restrain trade.

Airlines and *Steel* are exhibits #2 and #3 that the DOJ should be more aggressive in prosecuting public collusion cases and the courts should be more condemning of this practice. While the DOJ did initially investigate the airlines, it ultimately dropped the case while private litigation continued; and it did not investigate the steel manufacturers. As regards the courts, private litigation has been (or is in the process of being) settled. At least for *Airlines*, the obviously low settlement amounts reveal that plaintiffs expect courts to be inhospitable. However, if the announcements in *Airlines* and *Steel* were to be treated as though they had been made privately, the evidence of a Section 1 violation would be comparable to cases involving private communications taken on by the DOJ and which have led to convictions. The equivalence between public and private announcements ought to be recognized rather than giving firms a loophole for avoiding a Section 1 conviction which lacks any procompetitive justification.

VI. A Firm Announces How Rival Firms Will Behave

A. *Description*

A firm announcing a forecast of future industry conduct and performance would seem innocent enough. It is exactly the type of information that is of interest to the capital market because it helps them to predict firms' future profit streams. Input suppliers value demand forecasts as they aid them in making appropriate production decisions. Consumers want to know whether prices are expected to rise or fall and, therefore, whether they should buy now or postpone purchases. Thus, industry forecasts are useful to many parties in their decision making which means these forecasts enhance efficiency. Furthermore, firms in the industry are particularly well informed when it comes to making them (though may have an incentive to suppress those forecasts that would harm the firm or its management). In practice, these forecasts are communicated in earnings calls, speeches and panels at industry meetings, press releases, interviews, and other media.

In spite of the many legitimate bases for a firm publicly prognosticating on future industry conduct and performance, such statements could be made with anticompetitive intent. When a firm announces what it thinks rival firms will do in the future, it may be less of a forecast and more of a recommendation. While the announcement may prove to be accurate, that may be so only because the announcement itself induced firms to act in the manner that was foretold. In other words, the forecast proves self-fulfilling because it facilitates coordinated conduct.

So as to illustrate the anticompetitive concerns, consider firms who are in the midst of a price war. A firm is considering raising its price on the hope that it would induce other firms to raise theirs. However, it is concerned of losing sales should rival firms not follow, so it precedes the price increase by announcing: "We believe that prices will be higher as firms come to their senses and end this price war." This announcement is making clear that the firm's price is higher not because, say, its cost is higher but rather because it is anticipating other firms will raise their prices. However, the firm's prediction that all firms will raise their prices may only happen if all firms believe it will happen, and the public forecast is the device to facilitate them having that common belief. As a result, rival firms may interpret this "prediction" as an invitation to end the price war. Forecasts can then be perilously close to espousing what firms *should* do rather than what they *will* do.

Other forecasts that could prove self-fulfilling because they facilitate coordinated conduct might be:

> "The market has experienced excess supply but we predict firms will begin closing down some capacity to make supply line up better with demand."
>
> "Firms have learned that pricing below cost is bad business, and we expect prices to rise to more sustainable levels."

In the second announcement, it is worth noting that the word "expect" can mean "to consider probable or certain"—so it refers to what one thinks others *will* do—but it can also mean "to consider bound in duty or obligated," in which case it refers to what one thinks others *should* do.[116] Thus, a firm which announces: "We expect prices to rise over the next few quarters," could be saying that it is the duty of all firms to raise their prices. The announcement is then not a prediction but rather a call to firms and, only due to the implicit message resulting in a coordinated rise in prices, does the prediction prove accurate.

Though it is plausible that an announcement could disguise a forecast as an invitation to act according to that forecast, there are no documented cases to my knowledge. It is put forth as a possibility which warrants keeping in mind when a firm makes statements that predict what rival firms or the industry at large will do in the future.

There is a second manner in which forecasts can facilitate collusion. Other communications, either private or public, may have invited firms to coordinate their conduct, and the purpose of the publicly announced forecast is to affirm the intent of those communications. Suppose firms privately communicated and all agreed to raise their prices. A firm may subsequently announce a forecast of rising prices as a way to remind firms of their plan or convey evidence that firms are going through with that plan. While this affirmation could also have been done through private communications, firms recognize the risk from any private contact and thus may choose to minimize them. For example, firms may have privately met while attending a legitimate trade association meeting and agreed to a price increase in six weeks. One month later, a firm announces that it predicts rising prices in order to provide affirmation of the plan. Given the lack of a natural opportunity at that time to meet privately, this public announcement comes with less risk and may be effective in shoring up the agreement.

Rather than use private communications to initially coordinate, as just described, firms may coordinate through recommendations (what firms should do) made in public announcements and then use forecasts (what firms will do) to provide affirmation of that plan. The *Pork* case exemplifies this use of forecasts. Some time after the Smithfield Foods CEO called for the industry to "collectively" solve the oversupply problem, top executives of Hormel and Tyson's Foods expressed that they "expected" to see supply

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[116] *Expect*, Merriam-Webster, https://www.merriam-webster.com/dictionary/meaning (last visited June 12, 2020)

reductions. Thus, publicly revealed forecasts can complement other communications intended to facilitate collusion.

B. *Treatment*

The challenge is distinguishing a legitimate forecast about future conduct and performance from a forecast intended to coordinate competitors' conduct so as to restrain competition. How can a firm make a legitimate forecast without running the risk of prosecution? Would prohibiting forecasts that might be done with anticompetitive intent serve to "chill" legitimate forecasts intended to inform customers, input suppliers, or the capital market?

Only forecasts that pertain to future firm conduct—such as what prices are to be charged and how much output is to be supplied—could possibly run the risk of facilitating a restraint of trade. If a firm predicts that prices will rise or output will fall and the prediction is not based on forming an agreement to produce that outcome, it must be caused by some other factor. Relevant factors include a rise in demand, an increase in input prices, capacity to be taken offline for maintenance, and many other exogenous events which could be the basis for a firm forecasting higher prices.

In providing guidance to firms and courts, it is proposed that a forecast be interpreted as an invitation to collude when: (1) it describes the conduct of other firms or the industry at large and does not credibly attribute this conduct to some exogenous factor (such as a change in cost or demand); (2) the predicted conduct would restrain trade; and (3) it would not be in the self-interest of a firm to act according to the forecast unless other firms did so, too. The third condition is a commonly-used plus factor.[117] A firm that is making a legitimate forecast can avoid having it interpreted as an invitation to collude, as well as provide more information to market participants, by providing the actual factor—such as cost or demand—that is the basis for the predicted conduct. Note that if a change in cost or demand is the driving force then this plus factor is inapplicable for it is in the unilateral interests of a firm to raise price when, for example, demand is stronger or cost is higher.

One concern is that a firm with anticompetitive intent could always falsely claim the predicted rise in firms' prices is due to a rise in demand or cost. However, that is not without legal risks. If a firm does not truly expect demand or cost to rise but forecasts that it will, a firm opens itself up for litigation.[118] Thus,

[117] "[I]f the defendants have engaged in conduct that would further the interests of a conspiracy but would be against each defendant's interests if it were acting separately, the actions taken by the defendants are circumstantial proof of conspiracy." PROOF OF CONSPIRACY UNDER FEDERAL ANTITRUST LAWS 70 (2010).
[118] *See, e.g.*, 17 C.F.R. § 240.10b-5 (202x) (making it unlawful to "employ any device, scheme, or artifice to defraud," "make any untrue statement of a material fact…," or "engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person," in connection with the purchase or sale of any security).

requiring that a firm explain the source of the predicted change in conduct could deter firms from putting forth a forecast intended to facilitate an unlawful agreement.

A forecast satisfying these three criteria is an invitation to collude. Evidence that other firms accepted that invitation—so there is an agreement—comes from those firms making affirming forecasts or engaging in conduct consistent with accepting the invitation. If a firm forecasts supply reductions and firms subsequently reduce output then that is evidence of an agreement. The third criterion ensures that firms will not be penalized for simply making accurate forecasts. That plus factor establishes that the forecast is accurate only because it facilitates an agreement as otherwise no firm would act in the predicted manner.

A class of forecasts that are challenging to assess are those that predict an exogenous event will raise price or reduce supply when that outcome is a possible but not necessary consequence. The forecast could increase the likelihood of higher prices if it contributes to firms believing their rivals will raise prices. An example of such an event and forecast is: "The industry consolidation resulting from recent mergers is expected to reduce competition and result in higher prices and margins." Many empirical studies have shown that a reduction in the number of competitors—such as through a merger—might do exactly as this forecast predicts. However, there is a range of possible price effects depending on whether the post-consolidation market is characterized by competition or collusion.[119] The potential concern with this forecast is that it may facilitate a mutual understanding to compete less aggressively, beyond that which is a necessary implication of the market having fewer firms. In *Steel*, a Mittal executive made clear that the industry's recent consolidation "encourages a change in behavior to match the industry structure." Whatever was the imagined "change in behavior," it was not seen as an immediate implication of the structural change, and thus had to be "encouraged." There, the encouragement took the form of a recommendation but it could as well have been a forecast.

VII. ADDITIONAL LEGAL ISSUES ASSOCIATED WITH PUBLIC ANNOUNCEMENTS

In the first section below, I discuss how public announcements can be a basis for surmounting the *Twombly* plausibility standard and describe the type of relevant evidence that could be revealed through discovery. The remainder of Part VII examines the use of Section 2 of the Sherman Act and Section 5 of the Federal Trade Commission (FTC) Act to prosecute attempts to form unlawful agreements.

A. *Twombly: Plausibility and Discovery*

[119] A merger among competitors may result in higher prices because of unilateral effects (firms continue to compete but competition is weakened with fewer firms) or coordinated effects (fewer firms, especially the elimination of a maverick firm, may cause a shift from competition to collusion). The price rise will be greater when there are coordinated effects. W. Kip Viscusi, Joseph E. Harrington, Jr., and David E. M. Sappington, ECONOMICS OF REGULATION AND ANTITRUST ch.6 (5th ed. 2018).

In *Twombly*,[120] the Court established a plausibility standard to evaluate motions to dismiss at the pleading stage. Plaintiffs must plead "enough facts to state a claim to relief that is plausible on its face," or to warrant an inference of conspiracy.[121] Plaintiffs need not "plead facts that, if true, definitely rule out all possible innocent explanations."[122] What is required is that the Plaintiff "state enough facts to 'raise a reasonable expectation that discovery will reveal evidence of illegal agreement' even if the court believes such proof is improbable."[123]

The *Twombly* plausibility standard is likely to be met where a plaintiff alleges both (1) collusive conduct (such as parallel behavior or a leader-follower pattern) and (2) public statements suggesting that rivals ought to engage in that conduct. Public announcements encouraging rival or industry anticompetitive behavior should be regarded by the courts as highly suggestive of collusion. In *In re Domestic Airline Travel Antitrust Litig.*, the court observed that "collusive communications can be based upon circumstantial evidence and can occur in speeches at industry conferences, announcements of future prices, statements on earnings calls, and in other public ways."[124] The fact that such statements are made in public does not exempt them from antitrust scrutiny. In *Petroleum Products*, the Ninth Circuit noted that

> "[T]he form of the exchange—whether through a trade association, through private exchange…, or through public announcements of price changes—should not be determinative of its legality." …The fact that it is feasible…to communicate the necessary price information through press releases does not "immunize the exchange of price information from legal sanction [where] the conditions of the market suggest that the exchange promotes collusive rather than competitive pricing."[125]

Furthermore, that the communications may be intended for or of value to other parties, such as investors or market analysts, is not determinative of their legality.

> Defendants also argue that the public statements on which Plaintiffs rely "had purposes wholly apart from conspiracy," such as responses to questions from shareholders and the press. But this argument merely notes the circumstances in which the statements were made. It is certainly possible for a statement to have multiple purposes or meanings directed at different audiences. For purposes of evaluating Plaintiffs' conspiracy claims,

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[120] 550 U.S. 544 (2007).
[121] *Id.* at 570.
[122] *In re* Niaspan Antitrust Litig., 42 F. Supp. 3d 735, 753 (E.D. Pa. 2014).
[123] SigmaPharm, Inc. v. Mut. Pharm. Co., 772 F. Supp. 2d 660, 669 (E.D. Pa. 2011) (quoting *Twombly*, 550 U.S. at 556), *aff'd* 454 F. App'x 64 (3d Cir. 2011).
[124] *In re* Delta/AirTran Baggage Fee Antitrust Litig., 733 F. Supp. 2d 1348, 1360 (N.D. Ga. 2010).
[125] *In re* Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig., 906 F.2d 432, 447 (quoting RICHARD POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 146-47 (1976)).

> what is important to the Court's analysis is not so much the immediate context in which the statements were made, but the larger context of the market and industry actions.[126]

Limited discovery on the agreement issue should be permitted when there are public announcements promoting coordinated conduct and evidence of other firms adopting that conduct.

Through discovery, plaintiffs may find that the public statements were in fact supplementing private communications between defendants (as in *Generic Pharmaceuticals*), providing direct evidence of collusion and obviating the need to rely on circumstantial evidence. Where direct evidence is not uncovered, discovery may lead to additional circumstantial evidence that points to the existence of an agreement facilitated by the public statements. Examples may include finding internal memoranda of the announcing firm which illustrate that the intent of the announcement was to coordinate the conduct of competitors, or internal memoranda of the receiving firm demonstrating an understanding that the announcement was an invitation or plan to coordinate conduct. Discovering evidence of the announcement being the cause of suspected collusive conduct—such as parallel capacity cuts or price hikes—is also possible.

1. Evidence of Anticompetitive Intent

Given that a firm's public announcements are received not only by its competitors but also market participants such as customers and the capital market, one of the challenges in showing there is an agreement is establishing the firm's intent. Plaintiffs claiming the announcements are an invitation to collude need to show they were intended for competitors and did not serve some other legitimate purpose. Discovery can deliver such evidence as exemplified by several cases.

In *Truck Rentals*, U-Haul's Chairman and CEO Edward Shoen mentioned publicly during an earnings call that U-Haul is "trying to exhibit some price leadership" and "to force prices" up in the one-way truck rental market dominated by U-Haul and Budget. On that call, Shoen announced a price increase conditioned on Budget responding in kind with rates that were "within 3 to 5 percent of U-Haul's." Internal memoranda support the hypothesis that these announcements were directed at Budget for the purpose of coordinating price increases. Those documents reveal Shoen told regional managers to "contact" their local Budget and Penske competitors and "LET THEM KNOW" that either they get "up to a fair rate" or else U-Haul will undercut their prices.

If a rival firm interprets a firm's announcement as an invitation to coordinate, that should be taken as evidence supportive of it having been the firm's intent. Such a rival firm's interpretation was substantiated by internal documents in *Mobile Telecom* and *Baggage Fees*. In *Mobile Telecom*, mobile network operator KPN announced in a publicly available interview that it was "happy with" its current market share and that it would start raising prices. But the KPN executive noted that it would stick to this plan only if KPN is not "punished by the markets." In an internal email, rival T-Mobile confirmed that it understood the

[126] *In re* Broiler Chicken Antitrust Litig., 290 F. Supp. 3d 772, 799 (N.D. Ill. 2017).

announcement as an invitation to coordinate on higher prices: "KPN wants to maintain its market shares, but also to improve its profit margin by aiming for value and reducing its commissions. A dilemma for T-Mobile given the growth ambition." The "dilemma" was that T-Mobile's matching of those higher prices would run contrary to satisfying it desire to increase market share. And in *Baggage Fees*, an executive vice president for Delta raised the probability from 50% to 90% that AirTran would match if Delta imposed a first-bag fee after AirTran announced during an earnings call that it has not yet initiated a first-bag fee because "our largest competitor [Delta]…hasn't done it" and that AirTran would "prefer to be a follower…than a leader right now." Internal documents not only showed that AirTran's announcement had the effect of altering Delta's beliefs in a manner to coordinate their conduct, but it actually quantified the extent of the effect.

These three cases show that internal documents can provide evidence that the public statements were intended to facilitate coordination. Such evidence of the announcing firm's intention and the receiving firm's understanding—both instructive as to the existence of an agreement—are typically available to plaintiffs only through discovery.

2. Evidence of Anticompetitive Effect

Evidence of an announcement's direct effect on firm and market outcomes, such as price or output, would also be useful to a court's assessment of whether the firms had an agreement. Industry-level data indicating parallel behavior and its anticompetitive effects may be publicly available. For example, in the Aryal et al. study, the researchers found that "when all legacy carriers operating in an airport-pair market communicate about capacity in a given quarter, the average number of seats offered in that market decreases by 1.79% in the subsequent quarter."[127] However, data that confirm the announcement's effect on firm-level decision making may only be obtained through discovery.

In *Pork*, plaintiffs alleged that eight of the leading domestic pork producers conspired to limit the supply of pork in order to fix prices. Some of the defendants began reducing supply and encouraging others in the industry to do the same publicly with statements like that of Smithfield Foods that the "industry has got to solve [the problem of low prices] collectively." These announcements were met with "forecasts" of lower supply by competitors including Hormel. The court determined that the plaintiffs failed to meet the plausibility standard. This was largely because plaintiffs relied "exclusively on industry-wide data" and asking the court "to infer that individual Defendants all contributed to the decreased production."[128] "Plaintiffs do not plead with any specificity which Defendants reduced production during which years."[129] While the court acknowledged that the public statements should be viewed as plus factors, it concluded

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[127] Gaurab Aryal, Federico Ciliberto, and Benjamin T. Leyden, *Coordinated Capacity Reductions and Public Communication in the Airline Industry* 4 (CESifo Working Paper Series No. 8115), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3544501.
[128] *In re Pork Antitrust Litig.*, 2019 U.S. Dist. LEXIS 133165 at *24.
[129] *Id.* at *25.

that there was insufficient evidence of parallel conduct.[130] I believe the court was misguided in granting defendants' joint motion to dismiss. This case illustrates a situation where public statements point to the defendants' involvement in a price fixing scheme, but where discovery is needed to uncover details as to each defendant's specific role and conduct.

In sum, public statements by rival firms can provide direct evidence of an unlawful agreement to restrain trade where offer and acceptance are identifiable. In cases where direct evidence is unavailable, courts should recognize that public invitations to collude, together with anticompetitive effect, are highly indicative of an underlying agreement among competitors and, accordingly, permit discovery as to the issue of an agreement where these elements are at play.

B. *Section 2: Attempted Monopolization*

For public statements to be condemned under Section 1, an agreement—both offer and acceptance—is required. In other words, Section 1 requires group behavior. Statements inviting coordination that are not accepted by competitors—through reciprocal statements or parallel action—are not actionable. Section 2 of the Sherman Act, however, provides an appropriate framework for addressing unilateral anticompetitive conduct including cases of attempted collusion.

Section 2 makes it unlawful for firms to "attempt to monopolize, or…conspire…to monopolize…."[131] As the Supreme Court explained in *Standard Oil*, the role of Section 2 is "to make the prohibitions of [the Sherman Act] all the more complete and perfect by embracing all attempts to reach the end prohibited by [Section 1], that is, restraints of trade, by any attempt to monopolize" even where the anticompetitive acts are "not embraced within the general enumeration of [Section 1]."[132]

The *American Airlines*[133] case illustrates just how Section 2 may be triggered by invitations to collude. In the early 1980s, American and Braniff together had a market share of 76% of monthly enplanements at Dallas/Fort Worth International Airport ("DFW"), including more than 90% of the passengers on non-stop flights between DFW and eight major cities. For years, the two airlines competed fiercely "for passengers flying to, from and through DFW, by offering lower fares and better service."[134] But in February 1982, American's President Robert Crandall said to Braniff's president during a telephone conversation "there's no reason that I can see to put both companies out of business. … Raise your goddamn fares twenty percent. I'll raise mine the next morning."[135]

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[130] *Id.* ("Plaintiffs are correct that public statements are often considered relevant in determining whether a conspiracy was adequately alleged…as 'plus factors.'").
[131] 15 U.S.C. § 2.
[132] Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 61 (1911).
[133] United States v. Am. Airlines, 743 F.2d 1114 (5th Cir. 1984).
[134] *Id.* at 1116.
[135] *Id.*

The parties settled before a decision was reached, but *American Airlines* is nevertheless instructive. While Braniff did not raise its fares in response to Crandall's proposal, the Fifth Circuit Court of Appeals noted that "an agreement is not an absolute prerequisite for the offense of attempted joint monopolization."[136] Though the proposal from American to Braniff to raise its fares was a private one, it would have been no less problematic if it were done in public.

Although neither an agreement nor successful monopolization is needed, the attempted monopolization offense does require proof "(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power."[137] The "dangerous probability" requirement can only be met where the defendant has a certain amount of market power, though the threshold may be lower for attempt cases. This requires that enforcers define a relevant product and geographic market in which the defendant has enough market share such that the attempt is likely to succeed.

Furthermore, Section 2 is only implicated in invitation to collude cases where the invitation itself clearly establishes anticompetitive intent. As the Fifth Circuit explained in *American Airlines*, this requirement alleviates the concern of firms or executives being "subject to liability for ambiguous or 'intemperate words.'"[138] "[A] person must specifically intend to monopolize for his conduct to violate [S]ection 2; without the requisite intent, no liability attaches."[139] There, the court found that "Crandall's statements [were] not ambiguous."[140]

Where an announcing firm and its invitees together control a significant share of the market, regulators may find success in targeting unequivocal public invitations via attempted joint monopolization actions similar to the case against Crandall in *American Airlines*. Where applicable, Section 2 is well suited for dealing with anticompetitive public announcements. For one, an invitation to collude can likely be detected before a collusive agreement in violation of Section 1 is formed. As such, "[t]he application of Section 2 principles to defendants' conduct will deter the formation of monopolies at their outset when the unlawful schemes are proposed, and thus, will strengthen the [Sherman] Act."[141] Furthermore, there is typically no pro-competitive rationale underlying an invitation to collude. Therefore, there is a far lower risk of chilling legitimate business conduct than in typical Section 2 cases which involve possible exclusion in the form of tying, exclusive dealing, or aggressively low pricing.

C. *FTCA Section 5: Invitations to Collude*

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[136] *Id.* at 1122.
[137] Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456 (1993).
[138] *Am. Airlines*, 743 F.2d at 1122.
[139] *Id.*
[140] *Id.*
[141] *Id.*

Like Section 2, Section 5 of the FTC Act does not require proof of an agreement before condemning anticompetitive conduct among firms and it allows the Commission to pursue other facilitating practices that yield collusion-like results. Section 5 condemns, *inter alia*, "unfair methods of competition,"[142] which includes, but is not limited to, antitrust violations under the Sherman or Clayton Acts. Remedies under the FTC Act are typically limited to injunctive relief, consisting of a "cease and desist" order instructing the defendant to stop engaging in a certain practice.

Section 5 can only be enforced by the Commission itself using either judicial or administrative processes, but even administrative adjudications are subject to judicial review by United States courts of appeals. Where there is no evidence of an agreement, courts have required the Commission to prove either (1) evidence of anticompetitive intent or purpose, or (2) the absence of any competitive justification for the challenged practices.[143]

In both Free-*Standing Newspaper Inserts* and *Truck Rentals*, there was no evidence that the receiving firms—News America and Budget—ever responded in a manner that would indicate that they had an agreement with the announcing firm. They never made any public statements expressing such agreement, nor did they act in accordance with the proposed plan. As such, these cases were prosecuted under Section 5 and resulted in consent orders enjoining Valassis and U-Haul from future unlawful behaviors.

As the above examples show, Section 5 is an apt tool for regulating invitations to collude via public announcements for several reasons. First, an agreement may have not yet formed to permit prosecution under Section 1. Given the invitation is public, detection may occur prior to any rival firm having the opportunity to express acceptance in its announcements or conduct. Second, the announcing firm and its rival(s) may have arrived at an agreement, but evidence of agreement may be insufficient to sustain a Section 1 claim. Competitors may be disinclined to explicitly voice their acceptance where an invitation to collude is extended publicly. In such cases, prosecutors must rely heavily on circumstantial evidence, including parallel conduct, but courts may not always find existing evidence sufficient to survive a motion to dismiss or summary judgment. Finally, Section 5 provides the FTC an enforcement mechanism where no agreement exists at all. Section 5 allows the Commission to condemn firms' unilateral announcements inviting coordination similar to Section 2, but without Section 2's requirements of a specific intent to monopolize and a dangerous probability of doing so. In all these situations, FTCA Section 5 is the only basis under which regulators can consistently go after firms inviting others to conspire to fix prices.

While the scope of Section 5 is broad, its deterrent effect is diminished due to the limited remedies available to the Commission. In both *Free-Standing Newspaper Inserts* and *Truck Rentals*, the infringing firms were simply ordered to "cease and desist," the remedy most frequently used by the FTC. Typically,

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[142] 15 U.S.C. § 45.
[143] E.I. du Pont De Nemours & Co. v. FTC, 729 F.2d 128, 139 (2d Cir. 1984) (vacating the FTC's order condemning the use of advance price change announcements, uniform delivered prices, and most-favored-nation clauses in the highly concentrated market for lead antiknock compounds for gasoline); Boise Cascade Corp. v. Federal Trade Com., 637 F.2d 573, 577 (holding that "in the absence of evidence of overt agreement," the Commission must demonstrate that the non-collusive practices had a measurable anticompetitive effect).

only after an order is violated does the Commission seek to assess civil penalties against an infringing firm.[144]

However, the FTC does have the power to assess civil penalties in the first instance for *explicit* violations of FTC rules and practices.[145] These are situations where firms violate Section 5 "with actual knowledge or knowledge fairly implied on the basis of objective circumstances." Public invitations to collude should be treated as explicit violations of Section 5, permitting the FTC to assess civil penalties without a prior cease and desist order. Public statements inviting coordination among rivals are easily recognizable in earnings calls, trade meetings, and other public media. Firms should know that such invitations to collude, which lack any procompetitive justification, are impermissible even in the first instance.

Some commentators have expressed concern with using Section 2 of the Sherman Act or Section 5 of the FTC Act to prosecute firms for announcements facilitating an agreement which is not consummated.[146] While they recognize it is desirable to deter attempts at forming anticompetitive agreements, they note that "firms often have legitimate reasons" for these announcements and express concern with the chilling effect created by "uncertainty as to when a unilateral statement may later be seen to violate the antitrust law."[147] However, in illustrating these concerns, their focus is on announcements that reference only the firm's own conduct and performance, such as future prices and earnings. The proposed approach targets instead announcements that reference *rival firms' conduct*. This distinction is crucial for two reasons. First, the risk of facilitating coordinated conduct is significantly greater when a firm's announcement speaks to rival firms' future conduct. Second, the approach offers clear guidance for firms. A firm is on safe ground when its announcements do not refer to what rival firms should or will do or how the firm would respond to what a rival firm does. It is when their public statements reference rival firms' conduct that they may be in violation of the antitrust laws.

VIII. Summary and Concluding Remarks

A public announcement refers to the conveyance of information by a firm using a medium that is widely accessible to individuals outside of the firm. The attention has been on announcements with content pertaining to rival firms' conduct. The media used for these public announcements includes annual reports (*Pork*), interviews in trade publications (*Mobile Telecom*), speeches and panel discussions at semi-public

[144] *See* 15 U.S.C. 45(l), 45(m)(1)(B). Although the FTC does have the authority to assess the same penalties against firms for explicit violations of Section 5, where the firm acts "with actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is…prohibited by such rule." *See* 15 U.S.C. 45(m)(1)(A).
[145] 15 U.S.C. § 45(m)(1)(A).
[146] Paula W. Render, J. Bruce McDonald, and Thomas York, *Sending the Wrong Message? Antitrust Liability for Signaling*, 31 Antitrust 83 (2016).
[147] *Id.* at 86.

industry meetings (*Airlines, Broiler Chicken, Pork, Steel*), and, most commonly, earnings calls (all eight U.S. cases).

This study has identified three types of messages about a rival firm's conduct which have the potential of coordinating firms' behavior. First, a firm describes how its future conduct is contingent on a rival firm's conduct. Second, a firm prescribes how rival firms or the industry at large should behave in the future. This category includes commending or criticizing rival firms or the industry for past conduct, as that could be an implicit recommendation that future conduct should be consistent with that which was commended or contrary to that which was criticized. Third, a firm describes how rival firms or the industry at large will behave in the future. This forecast could be an invitation to firms to act consistent with that forecast.

Regarding a firm's announcement as to how its future conduct will be contingent on a rival firm's conduct, there were three cases in which the firm's message cast it as a leader to be followed—*Free-standing Newspaper Inserts*, *Truck Rentals*, and *Mobile Telecom*—and one in which the firm's message described how it would act as a follower—*Baggage Fees*. The first three episodes all had a high-ranking company official publicly comment that competition is "excessive." Having stated the problem, they then went on to propose a solution by announcing that it would raise price with its continuance conditional on other firms raising their prices. In *Baggage Fees*, a firm stated its willingness to be a follower in response to the adoption of a first-bag fee. That then led its rival to adopt the fee which the follower did indeed match as it said it would. With these four episodes, public announcements were not used to coordinate on a *price* but rather to coordinate on a *price leader* with the understanding that a price increase would be matched by the other firms. These announcements facilitate the formation of an agreement between firms to have a leader-follower arrangement which would have the effect of raising prices. Firms should avoid public announcements when they refer to how a firm's conduct is contingent on variables predictably influenced by a competitor and the implied conduct would restrain trade.

Next, we considered announcements in which a firm publicly conveys how rival firms should behave. In both the *Broiler Chicken* and *Pork* cases, firms engaged in public announcements recommending output reductions, they shared confidential information through a third party, and there is evidence of reduced industry supply. The episodes in the airline and steel industries are similar in their own way. Both industries experienced consolidation which resulted in a market structure more conducive to lessened competition. Through earnings calls and statements at industry meetings, senior executives criticized past conduct as having been too aggressive and put forth a plan to reduce capacity and supply. Those announcements underscored the importance of a coordinated industry response. There is evidence of subsequent reductions in capacities.

In those four cases, public announcements described an industry plan to raise prices or reduce supply with the anticipated effect of higher prices. Firms' executives recommended that competitors should compete less aggressively for the purpose of making the industry more profitable. Past conduct was criticized when it was too aggressive, and was commended when competition was restrained. If these communications had been made privately, they would have been condemned by courts. Making them in public should not change their treatment as they are informative to parties other than competitors only if they affect firms' conduct, which implies they come with anticompetitive intent. Therefore, courts should treat these public announcements the same as if they were made privately. Consequently, agreements reached via public announcements that prescribe what competitors and the industry at large should do, and for which consumers would be harmed should those recommendations be adopted, ought to be subject to a *per se* prohibition.

The final class of public announcements involves forecasting future conduct by rival firms or the industry at large. While there are many legitimate bases for a firm publicly prognosticating about future conduct and performance, such statements could be done with anticompetitive intent. When a firm announces what it thinks other firms will do in the future, it may be intended as a recommendation for what firms should do. The proposal is to interpret a forecast as an invitation to collude when it fails to credibly attribute the conduct to some exogenous factor such as a change in cost or demand, the predicted conduct would restrain trade (as is the case with higher prices or reduced output), and it would not be in the self-interest of a firm to act according to the forecast unless other firms did so, too.

I conclude with a few recommendations to competition authorities and the courts. The FTC should treat public invitations to collude as explicit violations of Section 5 of the FTC Act, permitting the Commission to assess civil penalties without a prior cease and desist order. The DOJ should be more willing to take on cases involving public announcements. Invitation to collude cases in concentrated markets may be prosecuted under Section 2 of the Sherman Act which provides for more severe penalties than FTCA Section 5. Under Section 1, the DOJ should prosecute cases involving public announcements with the same vigor that they have shown when firms engage in private communications. Courts should be less deferential to firms. A firm publicly talking about the conduct of its competitors is *not* a part of the competitive process. Public announcements should be given considerable weight in deciding to move to discovery and the *per se* rule should be applied to Section 1 violations conducted publicly or facilitated by public statements.

Finally, the competition authorities and the courts should work to deliver clear guidance to firms regarding what they should avoid stating in their public announcements. It is disturbing that firms' executives find it appropriate to publicly instruct their competitors what price to set and how much to supply. However, it is hardly surprising that they do so given most of these episodes escape public prosecution and, when they are privately litigated, the courts hesitate to find an unlawful agreement. Just as much as most executives know not to communicate with competitors about prices and outputs in private, they should know not to do so in public either. Savviness in enforcing the law can bring clarity that serves both consumers and firms.