No. 17-11733-E

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

AVERY INSURANCE GROUP, INC., ET AL.,

Plaintiffs-Appellants-Cross Appellees,

v.

DELTA AIR LINES, INC. AND AIRTRAN AIRWAYS, INC.,

Defendants-Appellees-Cross Appellants.

On Appeal from the United States District Court
for the Northern District of Georgia, Atlanta Division
Civil Action No. 1:09-MD-2089-TCB

BRIEF OF THE AMERICAN ANTITRUST INSTITUTE AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS AND SUPPORTING REVERSAL

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Local Rule 26.1-2, the following parties, not identified in the earlier-filed briefs, have an interest in the outcome of this appeal (as defined under the rule):

- American Antitrust Institute – Amicus Curiae
- Richard M. Brunell – counsel for Amicus Curiae

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel certifies that amicus curiae American Antitrust Institute is a nonprofit, non-stock corporation. It has no parent corporations, and no publicly traded corporations have an ownership interest in it.

/s/ Richard M. Brunell
Richard M. Brunell

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INTEREST OF AMICUS CURIAE

The American Antitrust Institute ("AAI") is an independent nonprofit organization devoted to promoting competition that protects consumers, businesses, and society. It serves the public through education, research, and advocacy on the benefits of competition and the use of antitrust enforcement as a vital component of national and international competition policy. AAI is managed by its Board of Directors with the guidance of an Advisory Board that consists of over 130 prominent antitrust lawyers, law professors, economists, and business leaders. *See* http:/www.antitrustinstitute.org.[1] AAI has a strong interest in ensuring that the Sherman Act ban against tacit price-fixing agreements applies in full to collusion that is facilitated by public companies' investor conference calls. AAI submits this amicus brief because the district court's overly restrictive approach to such collusion, if upheld, would weaken that ban at a time when it is sorely needed.

[1] All parties have consented to the filing of this brief. Individual views of members of AAI's Board of Directors or Advisory Board may differ from AAI's positions. Certain members of the Advisory Board (and a member of the Board of Directors) or their law firms represent parties in this matter but played no role in AAI's deliberations or the drafting of the brief. No party's counsel authored this brief in whole or in part, and no party or party's counsel made a monetary contribution to fund the preparation or submission of this brief. No person or entity other than amicus made a monetary contribution to the preparation or submission of this brief. AAI has also filed a brief in the consolidated appeal involving class certification.

INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiffs allege that Delta and AirTran's adoption of first-bag fees in December 2008 was the product of a price-fixing conspiracy. Plaintiffs' theory of the case is that Delta and AirTran were at an impasse in adopting first-bag fees. Br. of Plaintiffs-Appellants ("P. Br.") 2. While each wanted to adopt such fees to generate additional revenue, as other airlines had, each concluded that it would not be profitable to do so unless the other did as well, and neither wanted to go first. *Id.* at 5-11; *cf.* VI Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1430, at 224 (3d ed. 2010) ("Notwithstanding recognized interdependence, oligopolists may have difficulty settling upon a noncompetitive price when there is great peril in charging a supracompetitive price that is not followed and when each is uncertain about its rivals' prospective responses.").

Plaintiffs claim that AirTran CEO Robert Fornaro broke the impasse in a statement he made during an earnings call with investors and analysts. In the October 23, 2008 call, the first question asked by an analyst was, "First check bag fee, you don't have one, do you? And will you?" Summary Judgment Order ("Op.") 20. In response to this simple question, Mr. Fornaro expounded:

> Kevin, good question. Let me tell you what we've done on the first bag fee. 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 [i.e., Delta] hasn't done it. And I think, we don't think we want to be in a position to be out there alone with a competitor who we compete

> on, has two-thirds of our nonstop flights and probably 80 to 90% of our revenue is not doing the same thing. So I'm not saying we won't do it. But at this point, I think we prefer to be a follower in a situation rather than a leader right now.

Id.

The analyst "followed up by asking, 'But if they were, you'd consider it? It's not a matter of practice?' Fornaro responded: 'We would strongly consider it, yes.'" *Id.* Shortly thereafter, Delta adopted a $15 first-bag fee, and AirTran quickly followed suit.

The district court recognized that invitations to collude are unlawful under Section 5 of the FTC Act,[2] that they can serve as evidence of a conspiracy, and that earnings calls can be vehicles for public signaling and are not immune from anti-trust sanction by virtue of the securities laws. Op. 62-63, 66-68. Nonetheless, in granting summary judgment to the defendants, the court held that Fornaro's state-ment was not a "plus factor" nor otherwise a basis for inferring an agreement under

[2] The FTC has defined an invitation to collude as "'an improper communication from a firm to an actual or potential competitor that the firm is ready and willing to coordinate on price or output or other important terms of competition.'" Op. 66-67 (quoting *In re Fortiline, LLC*, No. 151-0000, 2016 WL 4379041, at *11 (F.T.C. Aug. 9, 2016) (analysis in aid of public comment)). It has long held such conduct to be unlawful under Section 5 of the FTC Act. *See In re McWane, Inc.*, No. 9351, 2012 WL 4101793, *17 (F.T.C. Sep. 14, 2012) (opinion of the Commission) (since 1992 "the Commission has held that an invitation to collude is the quintessential example of the kind of conduct that should be challenged as a violation of Section 5") (internal quotation marks and ellipsis omitted).

Section 1. Plaintiffs point to evidence that the statement was intended to convey an assurance to Delta that AirTran would impose a bag fee if Delta did first, that Delta understood it as such, and that Delta would not have adopted the fee but for AirTran's assurances. P. Br. 36-37. The district court questioned this evidence, and this brief takes no position on whether the evidence creates a triable issue of fact.[3] The court also suggested, however, that Fornaro's comment could not be the basis of a Section 1 violation—even if AirTran's invitation was accepted by Delta—because of its public nature and the fact that it provided information of interest to investors. Op. 71-72. This was error and, if accepted by this Court, would create a gaping hole for firms in concentrated industries to collude at a time when the risks of such collusion have never been higher.

Invitations to collude that are accepted by performance are unlawful tacit agreements. The fact that an invitation is made in a public forum does not undermine its use as a plus factor. Investor earnings calls also are not exempt. Firms do not need to disclose competitively sensitive information to investors. And the FTC

[3] We do note that the requirement that a plaintiff, in order to defeat summary judgment, "must present evidence that tends to exclude the possibility that the alleged conspirators acted independently," *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986) (internal quotation marks and citation omitted), simply means that the plaintiff must present "sufficient evidence to allow a reasonable fact finder to infer that the conspiratorial explanation is more likely than not." Phillip E. Areeda & Herbert Hovenkamp, *Fundamentals of Antitrust Law* § 14.03[B], at 14-25 (4th ed. 2014 Supp.).

has sanctioned invitations to collude made in earnings calls similar in critical respects to Fornaro's. With many industries like airlines becoming increasingly concentrated, investor earnings calls pose a heightened danger for promoting collusion. Accordingly, this Court should reject the district court's narrowing of Section 1 liability based on invitations to collude made during such calls.

ARGUMENT

I. A PUBLIC INVITATION TO COLLUDE MAY FORM THE BASIS OF A SECTION 1 VIOLATION

A. Invitations to Collude Accepted by Performance Are Unlawful Tacit Agreements

It is well-settled that an *accepted* invitation to collude constitutes (indeed, defines) an unlawful agreement under Section 1. As the district court noted, "Numerous cases have recognized that an invitation to collude can serve as evidence of a conspiracy." Op. 67 (citing, *inter alia*, *Interstate Circuit v. United States*, 306 U.S. 208, 227 (1939) ("Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act.")). "Verbal acceptance is not essential. Even the traditional contract offer can be accepted without words. Performance of a requested act can complete the contract . . . ." Areeda & Hovenkamp, *supra*, ¶ 1419a, at 136.

An invitation to collude that is accepted by performance is appropriately characterized as an unlawful *tacit* agreement. *See First Nat'l Bank of Ariz. v. Cities Service Co.*, 391 U.S. 253, 287 (1968) (describing *Interstate Circuit* scenario as involving a "tacit agreement"); *Gainesville Utilities Dept. v. Florida Power & Light Co.*, 573 F.2d 292, 300 (5th Cir. 1978) ("proof of a conspiracy under § 1 of the Sherman Act does not require the existence of an express agreement" (citing, *inter alia*, *Interstate Circuit*)); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 553 (2007) ("[T]he crucial question is whether the challenged anticompetitive conduct stem[s] from independent decision or from an agreement, tacit or express.") (internal quotation marks omitted; second bracket in original); *see generally* William Page, *Tacit Agreement Under Section 1 of the Sherman Act*, 81 Antitrust L.J. 593, 607 (2017) (a tacit agreement is "one in which rivals communicate their intentions in language without forming a complete agreement, but then indicate their assent to the suggested course of action by subsequent interdependent pricing or other competitive actions").[4]

[4] In denying defendants' motion to dismiss, the district court correctly observed that under Eleventh Circuit law, plaintiffs do not have to "demonstrate the existence of an 'actual, manifest agreement,'" as some Third Circuit case law seems to demand. *In re Delta/AirTran Baggage Fee Antitrust Litig.* (*Delta/AirTran*), 733 F. Supp. 2d 1348, 1359 (N.D. Ga. 2010).

B. The Public Nature of Fornaro's Statement Does Not Undermine its Use as a Plus Factor

In an earlier ruling, the district court correctly recognized that "collusive communications . . . can occur in speeches at industry conferences, announcements of future prices, statements on earnings calls, and in other public ways." *Delta/AirTran*, 733 F. Supp. 2d at 1360 (citing, *inter alia*, *In re Coordinated Pre-trial Proceedings in Petroleum Products Antitrust Litig.* (*Petroleum Products*), 906 F.2d 432, 447 (9th Cir. 1990)).[5] And the court denied defendants' motion to dismiss, noting "Plaintiffs do not allege mere price announcements; they allege that each Defendant signaled its willingness to cut capacity and increase prices if the other Defendant acted in concert." *Id.* at 1362.[6]

On summary judgment, however, the district court suggested that the public nature of Fornaro's statement strongly militated against, if not precluded, its use as

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[5] *Accord In re Domestic Airline Travel Antitrust Litig.* (*Airline Travel*), 221 F.Supp. 3d 46, 67 (D.D.C. 2016); *see also McWane*, 2012 WL 4101793, at *13 (public pricing announcements "could reasonably be read as veiled communications to" rivals and support an inference of conspiracy); Michael D. Blechman, *Conscious Parallelism, Signaling and Facilitating Devices: The Problem of Tacit Collusion Under the Antitrust Laws*, 24 N.Y.L. Sch. L. Rev. 881, 901-03 (1979) (pricing announcements may be construed as an assurance or commitment and hence support an inference of an unlawful agreement, depending on the intent and understanding of the parties) (article cited with approval in *Twombly*, 550 U.S. at 556 n. 4).

[6] Plaintiffs abandoned their claims for relief based allegations that the defendants conspired to reduce capacity.

a basis for Section 1 liability. The court said, "Plaintiffs' invitation-to-collude argument . . . would take unilateral action by a company (i.e., Delta) and deem it collusive *merely because* it was preceded in time by another unilateral action by a competitor (i.e., AirTran)," adding that "one company's public statements cannot 'immobilize[]' a competitor and preclude it from subsequently taking otherwise lawful actions." Op. 74 (quoting *United States v. Standard Oil Co.*, 316 F.2d 884, 896 (7th Cir. 1963)) (emphasis added).

The court seemed to ignore that plaintiffs' theory is that the two actions were *not* independent. Rather, they claim that but for AirTran's assurance, Delta would not have adopted a first-bag fee. P. Br. 22-23. To be sure, Areeda & Hovenkamp rightly point out that "[i]t would be poor policy to allow the uninvited solicitation to disable an innocent recipient from lawfully taking a step it would otherwise have taken." Areeda & Hovenkamp, *supra*, ¶ 1419a, at 137. But they also explain that "the offeree would always be tempted to deny any conspiracy and to insist that his own actions were independent of the solicitation." *Id.* at 138. The implication is that plaintiffs must *prove* that the subsequent "price increase by the solicitee . . . result[s] from the solicitation and thus . . . complete[s] a conspiracy." *Id.* at 144 n.19; *see also id.* at 147-49 (recognizing that invitation to collude in public speech may be actionable). In short, solicitees are not immobilized from taking action

consistent with a solicitation "if the act would have occurred without reference to the solicitation." *Id.* at 137.

Public statements of contingent pricing intentions that reference a particular rival are not the type of "normal" oligopolistic interaction that antitrust law does or should permit. The district court quoted the following statement from the lower court in the *Williamson Oil* case: "'Because in competitive markets, particularly oligopolies, companies will monitor each other's communications with the market in order to make their own strategic decisions, antitrust law permits such [public] discussions even when they relate to pricing . . . .'" Op. 72 (quoting *Holiday Wholesale Grocery Co. v. Philip Morris Inc.*, 231 F.Supp.2d 1253, 1276 (N.D. Ga. 2002)) (ellipsis in original). But oligopolies prone to coordinated interaction are *not* "competitive markets."[7] It is for this reason, and because oligopolists *do*

[7] There is a consensus that supracompetitive oligopoly pricing is harmful to consumers whether it is the product of an explicit cartel or "merely" interdependent interaction. *See* Areeda & Hovenkamp, *supra*, ¶ 1429b, at 221; Louis Kaplow, *Competition Policy and Price Fixing* 218 (2015). As then Justice Breyer explained, simple oligopoly pricing by itself is lawful "not because such pricing is desirable (it is not), but because it is close to impossible to devise a judicially enforceable remedy for 'interdependent' pricing. How does one order a firm to set its prices without regard to the likely reactions of its competitors?" *Clamp-All Corp. v. Cast Iron Soil Pipe Inst.*, 851 F.2d 478, 484 (1st Cir. 1988). But "practices which unjustifiably facilitate interdependent pricing and which can be readily identified and enjoined" may be the basis for finding a price-fixing agreement. *Petroleum Products*, 906 F.2d at 448; Herbert Hovenkamp, *The Antitrust Enterprise* 131 (2005) ("an agreement may be inferred from additional actions that firms take in order to make an oligopoly market more stable").

closely monitor each other's communications, that public communications facilitating coordinated interaction should be and are treated skeptically under antitrust law.

The district court thought the public statement here was on a par with "the 'signals' in *Williamson Oil*," which this Court found were insufficient to create a triable issue of collusion. Op. 75. But in contrast to Fornaro's statement, the public statements in *Williamson Oil* did not involve proposals directed at a specific rival, and many involved announcements of a price cut or other "unquestionably competitive[] behavior," rather than a price increase. *Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287, 1306-07 (11th Cir. 2003) (noting *Brooke Group*'s caveat "against discouraging competitive pricing behavior"); *see Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 223-224 (1993) ("Even in an oligopolistic market, when a firm drops its prices to a competitive level to demonstrate to a maverick the unprofitability of straying from the group, it would be illogical to condemn the price cut.").

II. STATEMENTS IN EARNINGS CALLS MAY FORM THE BASIS OF A SECTION 1 VIOLATION

A. Competitively Sensitive Information Need Not Be Disclosed to Investors

The district court also erred in concluding that Fornaro's statement about AirTran's baggage-fee plans is "precisely 'the type of information companies legitimately convey to their shareholders.'" Op. 71-72 (quoting *Holiday Wholesale*, 231 F. Supp. 2d at 1277). In ruling on defendants' motion to dismiss the district court suggested the opposite: "Defendants went well beyond disclosing the type of financial information that companies must legitimately convey to their shareholders pursuant to SEC regulations." *Delta/AirTran*, 733 F. Supp. 2d at 1364 (referring to Fornaro's Oct. 23 earnings call statement and others). The court's earlier ruling is manifestly correct. Public companies have no duty to disclose sensitive competitive information. *See, e.g.*, *In re Canandaigua Sec. Litig.*, 944 F. Supp. 1202, 1211 (S.D.N.Y.1996) ("It is inherently absurd to impose on companies in highly competitive, consumer-based industries an affirmative duty to disclose to competitors sensitive pricing and marketing decisions."); *see also* Staff Legal Bulletin No. 1., S.E.C. Release No. SLB – 1, WL 34684190, at *2 (Feb. 28 1997) (confidential treatment available for disclosures to SEC that may cause "competitive harm," including pricing terms).

Nor is sensitive pricing or strategic competitive information like that conveyed by Mr. Fornaro the kind of information that companies *should* convey to investors. Well-schooled managers know that the disclosure of competitively sensitive information is not only *not* required by securities law, such disclosure is to be avoided. *See, e.g.*, Colin J. Diamond & Irina Yevmenenko, White & Case LLP, *Earnings Releases and Earnings Calls*, Practical Law 9 (Sep. 18, 2015) (best practices for companies include: "Avoid unnecessary forward-looking statements" and "Company executives should avoid inadvertently disclosing sensitive competitive information or citing 'price leadership' or other hints about competition or future pricing plans"), *available at* https://www.whitecase.com/publications/article/earnings-releases-and-earnings-calls. Indeed, some of Delta's employees recognized as much.[8]

[8] The district court noted that several Delta employees recognized the impropriety of Mr. Fornaro's statement. Op. 21 n.15 ("Gorman found Fornaro's comments 'inappropriate' in light of Defendants' antitrust training and compliance and explained that Delta was left in 'almost disbelief that he made such a comment.' Hauenstein similarly described the statement as '[un]wise' given 'antitrust compliance' and prohibitions on discussing future pricing. Bastian 'found it kind of odd . . . that AirTran would even talk about that topic on the call . . . [b]ecause we know not to talk about pricing matters in a public call.' Gail Grimmett in revenue management described the conversations as 'could you believe . . . that he made a pricing comment on a call.'"). And AirTran executives knew how to decline answering a question on the basis that it sought confidential information, as one did during the earnings call at issue. *See* R:556 at PX223 (3274).

B. The FTC Has Held Statements Similar to Fornaro's to Be Improper Invitations to Collude

The Fornaro statement is the kind of message the FTC has held to constitute an invitation to collude.[9] In a case brought during the George W. Bush administration, the FTC found that statements made by the CEO of Vallasis Communications during an earnings call were unlawful where the CEO essentially offered that it "would cease competing for [its rival's] customers, *provided that* [the rival] likewise ceased competing for Valassis customers." *In re Valassis Commc'ns, Inc.*, 141 F.T.C. 247 (2006), 2006 WL 6679058, at *9 (analysis in aid of public comment). The CEO announced that Valassis was raising the floor price on offers to customers of its rival and on additional business from joint customers, but that if the rival "continues to pursue our customers and market share, then we will go back to our previous strategy." *Id.* at *3 (transcript attached as exhibit to complaint).

[9] The fact that invitations to collude are unlawful under Section 5 of the FTC Act, even if not accepted by the invitee, *supports* rather than undercuts their use as a plus factor under the Sherman Act. An invitation to collude is unlawful because it lacks redeeming virtue and would constitute a per se violation of the Sherman Act *if* accepted. *See Liu v. Amerco*, 677 F.3d 489, 494 (1st Cir. 2012) ("a proposal to engage in horizontal price fixing is dangerous merely because of its potential to cause harm to consumers if the invitation is accepted"); *see also* Areeda & Hovenkamp, *supra*, ¶ 1419e4, at 149 (difficulty of proving that solicitation caused subsequent price increase "is the main reason why 'unsuccessful' solicitations concern us").

More recently, the FTC found that statements made in an earnings call by the CEO of U-Haul in response to a question about "pricing in the [truck rental] industry" constituted an unlawful invitation to collude. *In re U-Haul Int'l*, *Inc.*, 150 F.T.C. 1 (2010), 2010 WL 9549977, at *13. The CEO said that U-Haul was trying to function as a "price leader" and that he had "encouraged everybody who has rate setting authority in the Company to give i[t] more time and see if you can't get it to stabilize," but that if its rival Budget continues to cut, "we're not going to just stand still and let that go through." *Id.* at *13, *18; *see Liu*, 677 F.3d at 494-95 (holding that same conduct alleged by the FTC also violated the Massachusetts baby FTC Act: "The alleged conduct is not mere oligopolistic pricing . . . . What is alleged here are *express proposals* to a competitor to raise prices, which are unambiguous, more dangerous, and serve no proper purpose.").

Like the *Valassis* and *U-Haul* statements, the Fornaro statement referenced a specific rival and course of action. While perhaps not as detailed, AirTran's earnings call statement is arguably more pernicious than those in *Valassis* or *U-Haul* because the solicitation did not accompany increased pricing itself, which may be costly (and hence self-deterring to a degree) to the solicitor, but was an offer to *follow* a price increase by a rival. *Cf. United States v. Airline Tariff Publishing Co.*, Proposed Final Judgment and Competitive Impact Statement, 59 Fed. Reg. 15,225, 15,233, 15,235-36 (Mar. 31, 1994) (in Section 1 case against airlines involving

public dissemination of fare information, settlement prohibited use of announcements of fares that were not yet available for purchase, but allowed announcement of bona fide fares which involved "risk of losing sales as a result of [a] fare increase").

C. Earnings Calls Pose A Significant Danger of Facilitating Collusion

Earnings calls deserve more, not less, scrutiny than other public statements like price announcements made to customers. For one thing, statements made in earnings calls may be particularly credible to rivals precisely *because* of the securities laws. *See Vallasis*, 2006 WL 6679058, *8 ("Given the obligation under the securities laws not to make false and misleading statements with regard to material facts, [an] invitation to collude, made in the context of an earnings call with analysts, may [be] viewed . . . as even more credible than a private communication.") (analysis in aid of public comment); *see also U-Haul*, 2010 WL 9549977, *18 (CEO of U-Haul stating that, "I don't think these people [i.e., officials of rival, Budget] would fib on a conference call").[10] For another thing, pricing announcements made to customers, even if they facilitate collusion, often provide *some*

[10] And a transcript of an earnings call will be on the desk of the executives of the company's rivals hours later, as was the case here. *See* R:556 at PX223 (3257). Professor Page points out: "Because anyone, including rivals, can usually listen in on earnings calls or read a transcript of them on the firm website, they provide an opportunity to make far more detailed statements about competitive strategy than a

benefit to customers. *E.g.*, *E.I. du Pont de Nemours & Co. v.* FTC, 729 F.2d 128, 134 (2d Cir. 1984). Moreover, customers are naturally resistant to price increases and may be alert to efforts by suppliers to coordinate prices.

On the other hand, statements by executives of public companies to investors about contingent future pricing behavior offer no independent benefit to consumers and little benefit to investors other than to signal management's commitment to bolstering industry profits at the expense of consumers. *Cf. Matsushita*, 475 U.S. at 594 (mistaken inferences of conspiracy are a concern when they chill *price cutting*, "the very conduct that the antitrust laws are designed to protect"); *Petroleum Products*, 906 F.2d at 440 (inference of conspiracy should not be not be permitted if it "would pose a significant deterrent to beneficial procompetitive pricing behavior").

Indeed, the investor audience for earnings calls makes them an ideal breeding ground for promoting collusion. Shareholders of a particular company have the same incentives as management to maximize profits by facilitating collusion. *See, e.g., Osborn v. Visa Inc.*, 797 F.3d 1057, 1065 (D.C. Cir. 2015) ("insulation [from competition] yields higher profits for [the firms] (and higher returns for their

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bare announcement of a future price increase. They allow a rival to discuss its reasoning about future price and output decisions in a setting typically monitored by competitors and generally not by consumers." Page, *supra*, at 636.

shareholders"). And investors in general have an even stronger interest in promoting collusion than management at any single company insofar as they own shares in multiple firms in an industry. *See* Einer Elhauge, *Horizontal Shareholding*, 129 Harv. L. Rev. 1267, 1269-70 (2016).

Recent trends suggest that earnings calls pose a heightened competitive danger. In recent years the incidence of ownership of shares in multiple competing firms (what Elhauge refers to as "horizontal shareholding") has increased,[11] while the level of concentration in many industries has also jumped.[12] The airline industry provides a prime example of both of these troubling trends. A handful of firms

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[11] Professor Elhauge notes that "a small group of institutions has acquired large shareholdings in horizontal competitors throughout our economy, causing them to compete less vigorously." Elhauge, *supra*, at 1267. Institutional investors now hold 70-80% of U.S. publicly traded firms. *See* José Azar, Martin C. Schmalz & Isabel Tecu, Anti-Competitive Effects of Common Ownership 1 (Univ. of Mich. Stephen M. Ross Sch. of Bus., Working Paper No. 1235, March 15, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2427345. Elhauge describes this phenomenon as an "economic blockbuster." Elhauge, *supra*, at 1267; *see also* Eric A. Posner, Fiona Scott Morton, and E. Glen Weyl, *A Proposal to Limit the Anticompetitive Power of Institutional Investors*, 81 Antitrust L.J. (forthcoming 2017), manuscript at 2 (contending that "concentration of markets through large institutional investors is the major new antitrust challenge of our time"), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2872754.

[12] *See, e.g., Too Much of a Good Thing*, The Economist, Mar. 26, 2016 (showing that two thirds of American industries became more concentrated between 1997 and 2012, some substantially more so), https://www.economist.com/news/briefing/21695385-profits-are-too-high-america-needs-giant-dose-competition-too-much-good-thing; Council of Economic Advisors, *Benefits of Competition and Indicators of Market Power* 1, 4–6 (May 2016) (noting that "[s]everal indicators

are now the leading investors in multiple airlines. Azar et al., *supra*, at 11 & Table 1. At the same time, the number of airlines has declined dramatically.[13] Both trends appear to contribute to higher fares.[14]

Perhaps it is no coincidence that reports of airlines using earnings calls and other public forums to coordinate industry conduct are also on the rise. *See, e.g.*, James B. Stewart, *'Discipline' for Airlines, Pain for Fliers*, N.Y. Times, June 12, 2015, at B1 (reporting on airlines' very public efforts to restrict industry capacity growth); *Airline Travel*, 221 F. Supp. 3d at 69 (denying motion to dismiss complaint based on allegations that airlines conspired to limit capacity growth using numerous public statements "not only about their own exercise of capacity discipline but also about the importance of the practice within the industry").

This is no time to relax the proscription against using earnings calls to facilitate tacit price-fixing agreements.

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suggest that competition may be decreasing in many economic sectors" and identifying evidence of "increasing concentration across a number of industries"), https://www.whitehouse.gov/sites/default/files/page/files/20160502_competition_issue_brief_updated_cea.pdf.

[13] *See* American Antitrust Institute, Letter re: The Open Skies Debate—Promoting Competition or Protecting a U.S. Airline Oligopoly? 4 (Nov. 9, 2015), http://www.antitrustinstitute.org/sites/default/files/AAI_DOT-OST-2015-0082_11-10-15.pdf.

[14] *See id.;* Azar et al., *supra*, at 38; *see also* Complaint ¶ 46, *United States v. U.S. Airways Group, Inc.*, No. 1:13-cv-01236-CKK (D. D.C. Sep. 5, 2013) ("Coordination becomes easier as the number of major airlines dwindles and their business models converge.").

CONCLUSION

This Court should reject the district court's overly restrictive approach for allowing a price-fixing claim to reach a jury when the claim is based on an invitation to collude made during an investor earnings call.

Respectfully submitted,

s/ Richard M. Brunell

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 28(a)(10) and 32(a)(7)(C), I certify that the foregoing brief complies with the type-volume, typeface, and type style requirements of Federal Rules of Appellate Procedure 32(a). The brief is proportionately-spaced, has a type-face of 14 points, and, as calculated by my word processing software (Microsoft Word), contains 4413 words, excluding the part of the brief exempted by rules.

/s/ Richard M. Brunell
Richard M. Brunell

September 8, 2017

CERTIFICATE OF SERVICE

I hereby certify that this brief has been served through the Court's ECF system on counsel for all parties required to be served on September 8, 2017.

/s/ Richard M. Brunell
Richard M. Brunell

September 8, 2017