In Re Travel Agency Commission Antitrust Litigation: A Case of Nonprice Predation within the Travel Industry

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I. INTRODUCTION

WITH MOST THINGS these days, we are confronted with numerous choices that complicate even the simplest travel plans. As Goethe expressed in the above stanza, traveling can, at times, be stressful, so we seek security and peace of mind from the Night and Wind. For those travelers using travel agencies, the complexity and worry of travel is eased by the accumulated experience of travel professionals who are more accustomed in dealing with airlines and other travel providers. For example, in one particular test, a travel agency saved a flier $1,000 on a flight from Chicago to Tokyo “by spotting hairline distinctions between minimum-stay requirements among airlines.” Thus, one can imagine the frustration of each traveler who, on his own, has to learn “the travel business,” suffer the effects of “revenue management,” or otherwise go to each airline either by phone or the Internet in an attempt to make the best deal. As with

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* Dieser Artikel ist in Dankbarkeit der Firma und Belegschaft von “Overseas Travel” gewidmet, die mir die Welt gezeigt haben, und all den anderen Personen, die diese Reise so lohnend machten.

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2 Revenue management is the “well-developed strategy” whereby one seat on an airline may carry nine, sixteen, nineteen, or even thirty different fares. See
most things these days, this time could be spent more productively elsewhere.

While airlines may be welcoming the day of no commission payments, it is unlikely that travelers will benefit. Travel agents have expertise and experience, which they use to create stress-free travel plans. Like a tax accountant or a lawyer, a travel agent navigates through the complexities of his trade so that his client does not have to. But this service is not ultimately free.

Since the airlines stopped paying commissions on ticket sales in 1995, travel agencies have quickly been forced out of business. If there were ever an example to highlight the goals and policies behind antitrust laws, the dissolution of one business group due to the strong-arming of another makes an excellent cause celebre. Since the commission cuts by the airlines, travel agents have fallen by the way side, seemingly unnoticed. This paper will therefore bring to light the tenuous business relationship between the airlines and travel agencies and attempt to pick up where the court in In Re Travel Agency Commission Antitrust Litigation left off—that is, to provide a legal analysis of the airlines' termination of that relationship.

As might be evident, the legal conclusion of this paper is that airlines were engaging in collusion and conspiracy to eliminate travel agencies. Granted, there is no express legal obligation for airlines to pay commissions, and the airlines claim legitimate justifications for their actions. Therefore, antitrust law will be set forth as relevant to this specific situation, and thereafter, the airlines' business decisions will be analyzed to separate legitimate business conduct from unlawful collusion and unreasonable restraints on trade. In doing so, this paper will conclude that the airlines' major motivation for bringing about such a change was the pursuit of increased oligopoly power and profits.

A. THE LAWSUIT: IN RE TRAVEL AGENCY COMMISSION ANTITRUST LITIGATION

In 1995, the American Society of Travel Agents (ASTA) brought suit against the seven largest American airlines, which control eighty-five percent of the domestic air travel market, for

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Jeffrey Leib, *Fare Game: Airline Pricing Plans Aim High; Goals are Full Planes, Top-Dollar Tickets*, DENVER POST, Nov. 15, 1998, at A-01.

3 898 F. Supp. 685 (D. Minn. 1995) [hereinafter *Travel Agency*].
antitrust violations.\(^4\) Earlier that year, the defendant airlines had brought about a fundamental change in both the air travel industry and the nature of the business relationship between travel agents and airlines. Since 1960, airlines had paid a customary ten percent commission to travel agents for each ticket sold, and after deregulation of the airline industry, the “use of travel agencies significantly increased.”\(^5\) Over the years, the traveling public developed a reliance on travel agents for advice and booking, especially as the airlines’ fare structures became more complex.\(^6\) In turn, the travel agents developed a reliance on commission income, and the airlines utilized this system as an efficient means of ticket sales and distribution. By the time of the commission cuts and caps, travel agencies were selling eighty percent of airline tickets.\(^7\)

The beginning of the end occurred on December 1, 1994, when Delta Airlines reduced its commission on international fares from the customary ten percent to eight percent following leaks to the press earlier that fall indicating Delta’s compensation scheme to travel agents was under reconsideration.\(^8\) Then, on February 9, 1995, Delta announced commission caps on domestic flights,\(^9\) effective immediately. While Delta did not actually implement these caps until April 1, the other airlines quickly followed suit.\(^10\)

Within twenty-four hours of Delta’s February announcement, both American Airlines and Northwest Airlines announced that they were also implementing Delta’s plan, to be effective as soon as they adjusted their respective computerized booking programs.\(^11\) On February 13 and 14, United, USAir, TWA, and Continental all announced their own commission plans based

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\(^4\) See id. at 687 n.1. Defendants were American Airlines, Delta Airlines, Northwest Airlines, United Airlines, USAir, Continental Airlines, and Trans World Airlines (TWA). See id. Defendants’ market share is measured in terms of revenue passenger miles. See Plaintiffs’ Consolidated and Amended Class Action Complaint, at 13, In re Travel Agency Comm’n Antitrust Litig., 898 F. Supp. 685 (D. Minn. 1995) [hereinafter Plaintiffs’ Complaint].


\(^6\) See id.

\(^7\) See Allison Connolly, Travel Agents Take Third Hit from Airlines, MIDDLESEX NEWS, Dec. 6, 1998.

\(^8\) See Plaintiffs’ Complaint, supra note 4, at 21.


\(^10\) See id. The caps were $50 on round-trip tickets priced above $500 and $25 on one-way tickets priced above $250. See id.

\(^11\) See Plaintiffs’ Complaint, supra note 4, at 22.
Within days of Delta’s announcement, the long-established partnership between the airlines and travel agents was over.

After two more rounds of cap reductions, United Airlines, American Airlines, Northwest, Continental, Delta, and USAir had limited commission payments to $100 for round trips and $50 for one-way trips. These caps had a far more profound impact on agent income than the reduced commission rates. For example, for a round-trip ticket costing $3,742, an eight percent commission would yield $299.36. The travel agency, however, would only receive $100 due to the cap—a forfeiture of nearly $200 in commission. One agency reported that the aggregate forfeiture amount meant a twenty percent reduction in gross revenue, severely undercutting its ability to operate at a profit.

The reduced commission structures quickly became the norm across most air carriers, and except for America West and Northwest Airlines, administrative exchange fees (at $75.00) and commission fees (at $25.00) became identical among the defendant airlines. Ironically, almost a year before Delta made its first intimations of commission reductions, the U.S. District Court of Washington D.C. had enjoined the airlines from engaging in collusive practices regarding fares.

Although ASTA survived a difficult summary judgment challenge, it settled out of court for $86 million, which was divided among ASTA members after attorneys’ fees were collected. Considering that ASTA’s domestic membership numbers around 11,000 and travel agents were losing around $1 million

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12 See id. at 23-24.
13 See Connolly, supra note 7.
14 See id.
15 See id.
19 See Travel Agency, 898 F. Supp. at 691.
20 See Fax from Jeanne Epping, President & Chief Executive Officer, ASTA, to all ASTA members (Sept. 5, 1996) (on file with author).
21 See Fax from Jeanne Epping, President & Chief Executive Officer, ASTA, to all ASTA members 1 (Sept. 6, 1996) (on file with author).
22 See Plaintiffs’ Complaint, supra note 4, at 11.
daily,\textsuperscript{23} this settlement was no impressive victory. But ASTA and its counsel feared protracted litigation with an uncertain outcome.\textsuperscript{24} Moreover, the Department of Justice stated that it "would not permit any agreement requiring the lifting of the caps," and the court expressed its unwillingness to "direct the future commission policies of the airlines."\textsuperscript{25} Therefore, ASTA accepted the settlement offer, which was "among the largest of all antitrust settlements."\textsuperscript{26}

Since the settlement, ASTA has called into question other anticompetitive airline practices. Because travel agents are dependent upon the airline owned and operated computerized booking systems such as the Computer Reservations Systems\textsuperscript{27} (CRS), Airlines Reporting Corporation\textsuperscript{28} (ARC), and American's closely held SABRE,\textsuperscript{29} they have been subject to further abuse. For one, ASTA requested that ARC include a space on the airline tickets showing the printing fees that the travel agents were forced to pass along to their customers in lieu of a commission payment,\textsuperscript{30} and the Department of Justice has investigated "possible tacit collusion among the airlines through [ARC]."\textsuperscript{31} Second, ASTA emphasized "that the airline-owned

\begin{itemize}
\item \textsuperscript{24} See Fax, \textit{supra} note 20 at 1. \textit{See also} Fax from DATELINE ASTA to all ASTA members 2 (June 10, 1997) (on file with author).
\item \textsuperscript{25} Fax, \textit{supra} note 20, at 1.
\item \textsuperscript{26} Id.
\item \textsuperscript{27} CRS "is essential to all travel agencies because it carries the fares, schedules, and flight availability of all carriers and receives and disseminates the information collected by the Airline Tariff Publishing Company on a daily basis." Plaintiffs' Complaint, \textit{supra} note 4, at 4.
\item \textsuperscript{28} "ARC provides a centralized method for administering most of the details of the agency relationship between airlines and travel agents." \textit{Id.} "Its purpose is to act as a clearinghouse through which airlines and travel agents deal with each other. It provides three services to its members: agency accreditation, the provision of common ticket stock, and a centralized reporting system through which the agencies report and settle their accounts with the airlines." Omega World Travel, Inc. v. Airlines Reporting Corp., No. 98-1033, 1999 WL 46756, at *1 (4th Cir. Feb. 3, 1999) (per curiam).
\item \textsuperscript{29} See Jennifer Michels, \textit{First Class Travel Insists Airline Collusion is Alive and Well}, TRAVEL AGENT, June 22, 1998, at 6.
\item \textsuperscript{30} See ASTA's Post-Cuts Strategy Fights Today for Travel Agents' Future, DATELINE ASTA (ASTA, Alexandria, Va.), Special Issue No. 18-97, at 1.
SATO directly competes against all travel agents. SATO’s cost factor, which is equivalent to the agent’s commission, is much higher than 8 percent.” This raised the question of whether the airlines’ claim that they can more efficiently distribute tickets is indeed valid. Third, travel agents complained of new difficulties in using SABRE and in negotiating for SABRE contracts. Some also alleged that American was creating tying contracts whereby travel agents’ corporate clients were enticed to get SABRE access themselves in order to get corporate discounts. Relying on the Department of Transportation’s own statement that “the agency system is the most efficient means of distributing tickets,” ASTA requested the DOT to investigate similar abuses of the airline-owned CRS, such as the prevention of display bias, shorter contract options, and the prohibition on tying arrangements, but to no avail. In addition to leaving travel agents exposed to this further harassment at the hands of airlines, the end result of the settlement was to leave the possible illegality of the airlines’ conduct unaddressed.

B. The Travel Agents’ Response

Before the major airlines implemented their second round of commission cuts, the president of ASTA, Mike Spinelli, delivered a speech at ASTA’s 67th World Travel Congress wherein he asked, “Isn’t this the greatest business in the world?”

This world has 5.5 billion people. By 2020, we reach 8.5 billion people! Only 550 million of them travel internationally. By 2005, left alone, travel will grow by 50 percent . . . . For those taking trips, travel agents make 55 percent of the decisions [, and frequent fliers] prefer to call travel agents over and above any other booking means, like airlines, the Internet, or their own PC.

In answering his own question, he concluded, “Indeed, it is the greatest business in the world!”

from canceling agency’s ARC subscription on the grounds that the agency’s antitrust allegations will probably fail in light of the “at will” nature of the contract).

Klingaman, supra note 31


See id.

ASTA President Mike Spinnelli, Address at ASTA’s 67th World Travel Congress (Sept. 8, 1997), in DATELINE ASTA (ASTA, Alexandria, Va.), Sept. 1997, at 1.

Id.

Id.
In support of his optimistic outlook, Spinelli could point to numerous endorsements of the travel agent system as the ideal, and most popular, means of ticket distribution. For example, the Federal Trade Commission’s Bureau of Consumer Protection applauded ASTA for keeping consumers aware of various schemes of travel fraud.\textsuperscript{38} ABC’s news program, 20/20, advised travelers to use travel agents after conducting a comparison of between “airline ticket prices as quoted by a travel agent versus airline reservations agents.”\textsuperscript{39} Fodor’s, the largest English language travel guidebook publisher, also endorsed the use of travel agencies,\textsuperscript{40} as did numerous other newspapers and magazines.\textsuperscript{41}

For travel agents, such accolades were nice to hear, but did not pay their bills. In its fight against commission cuts, ASTA was forced to expend dwindling resources lobbying federal and state congresses for favorable legislation as part of its “Operation: Take Control” initiative.\textsuperscript{42} Such efforts included the drafting of model state legislation, called the “Travel Agency Fair Treatment Act” (TAFT), to “bar any travel service supplier from ‘substantially changing the competitive circumstances of an appointment without good cause.’”\textsuperscript{43} At the federal level, ASTA lobbied Congress to pass various laws to improve travel service and to regulate collusive practices.\textsuperscript{44}


\textsuperscript{40} See id. at 4.

\textsuperscript{41} See LA Times Shines Light on Value of Knowledgeable Travel Agents, DATELINE ASTA (ASTA, Alexandria, Va.), Oct. 1996, Issue I, at 6; Consumer Group Study Touts the Value of Travel Agents, DATELINE ASTA (ASTA, Alexandria, Va.), Nov. 1997, Issue II, at 4 (“California PIRG [Public Interest Research Group] Consumer Advocate Jon Golinger said that it is ridiculous that consumers aren’t being told the lowest airfares . . . . He also said that airlines won’t stop their deceptive pricing practices [such as passive bookings, back-to-backs, hidden city, and refunding the non-refundable] unless consumers and the Department of Justice put an end to them.”); ASTA in the News, DATELINE ASTA (ASTA, Alexandria, Va.), Jan. 1998, Issue I, at 4, Issue II, at 3 (highlighting those newspapers recommending the use of travel agents for airline bookings).


\textsuperscript{44} See ASTA Takes Member Concerns to the United States Congress, DATELINE ASTA (ASTA, Alexandria, Va.), Apr. 1998, Issue I, at 1, 6 (Summarizing S. 1331—Aviation Competition Enhancement Act of 1997; H.R. 2748—Airline Service Im-
ASTA also launched a national public relations campaign to educate the public about the new ticketing fees, which travelers have never paid before. Named the “Air 'Fair' Challenge,” this initiative called upon travelers to ask airlines:

For the specified route, do other airlines offer lower fares? Do other airlines have a non-stop or direct flight, or provide more convenient departure times? Could you suggest a hotel downtown? Is there a number where I could call you directly later? Have other travelers had any problems at this destination?45

Numerous other activities and tips also appeared throughout ASTA's newsletter, DATELINE ASTA.

II. ARGUMENT

Section One of the Sherman Act states, "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."46 Literally, this text would prohibit any contract or agreement between two businesspersons because by its very nature, a business agreement restrains trade. For this reason, the Sherman Act is limited to those agreements that unreasonably limit trade. In other words, only agreements with an anticompetitive effect, and thus harmful to consumers, are considered Sherman Act violations.

To prove a Sherman Act violation, a plaintiff must establish three prima facie elements.47 The first is proof of a contract, agreement, or conspiracy for the purposes of restraining trade. The second is proof that the restraint affects interstate commerce. The third element, which developed through case law, is proof that the restraint of trade is unreasonable. Thus, a conspiracy in violation of the antitrust laws is one that limits the ability of firms to form those business arrangements that benefit consumers.48

47 See, e.g., Fuentes v. South Hills Cardiology, 946 F.2d 196, 198 (3d Cir. 1991) (delineating the necessary elements of a § 1 claim).
The defendant airlines’ conduct satisfied all three of these elements. Because the defendants’ operations are wide-spread, this analysis assumes the second element—the restraint affects interstate commerce. The analysis thus focuses on the first and third elements and concludes that the airlines colluded to eliminate travel agents and that this behavior was an unreasonable restraint of trade.

A. COLLUSION

In proving the first element, that the defendants engaged in concerted action, a plaintiff need not have direct evidence such as a “smoking contract” revealing that the respective businesses had any specific intent to collude. Rather, a plaintiff may demonstrate collusion inferentially through circumstantial evidence. The reason for this is perfectly sensible since firms rarely sign formal contracts to collude. More often deals are done surreptitiously, and for the antitrust laws to be enforceable, plaintiffs must be able to show collusion through other means.\(^4\)

While reliance on inferential evidence is necessary in antitrust litigation, courts hold the quality of this evidence to a high standard and greatly limit the range of possible inferences.\(^5\)

1. Surviving Summary Judgment

In order to enforce this high standard, the U.S. Supreme Court established a specific summary judgment inquiry that a plaintiff’s evidence must satisfy in an antitrust case. In *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, the Supreme Court stated two issues that district courts should consider at the summary judgment stage: (1) whether the defendants had any rational motive to join the alleged conspiracy, and (2) whether the defendants’ conduct is consistent with the defendants’ independent interests.\(^5\) In evaluating these issues, the Supreme Court advised the district courts to “consider the nature of the alleged conspiracy and the practical obstacles to its implementation.”\(^5\) In other words, the purpose of the inquiry is to determine whether the collusion makes good business sense.

\(^4\) “As is usual in cases of alleged unlawful agreements to restrain commerce, [plaintiffs are] without aid of direct testimony that the [defendants] entered into any agreement with each other to impose the restrictions...” Interstate Circuit, Inc. v. United States, 306 U.S. 208, 221 (1939).

\(^5\) See *Matsushita*, 475 U.S. at 588.

\(^5\) See id. at 587.

\(^5\) Id. at 588.
The summary judgment inquiry established in *Matsushita* is often characterized as a stricter or heightened summary judgment standard. In *Travel Agency*, the airline defendants argued that *Matsushita* established a heightened standard of proof whereby plaintiffs must support their inference with evidence falling just short of a preponderance. The court in *Travel Agency*, however, was quick to point out that plaintiffs carry no special burden under *Matsushita* to survive summary judgment. Rather, the *Matsushita* inquiry distinguishes inferences that are reasonable in business terms from those that are not.

*Travel Agency* survived summary judgment, despite the heightened standard instituted in *Matsushita*. By virtue of ASTA’s case surviving summary judgment under this special standard, one can infer that ASTA’s allegations had some merit. Unfortunately, the court offered no in-depth commentary, but instead seemed satisfied that ASTA’s contentions were sufficiently reasonable based on the evidence that ASTA wanted to present. While it is not necessary in light of the district court’s opinion to argue that ASTA’s case should survive summary judgment, it is helpful to distinguish *Travel Agency* from *Matsushita* to see why ASTA survived summary judgment. In this way, it becomes clear that unlike in *Matsushita*, collusion made perfectly good business sense in *Travel Agency*.

In *Matsushita*, American television manufacturers alleged that twenty-one Japanese corporations conspired to “dump” Japanese-made televisions on the American market at prices below production costs. The goal, as alleged, was to drive American manufacturers out of business and later increase prices at will after American competition had been eliminated. The Court found, however, that the plaintiffs’ inferences of price predation made no economic sense and that the defendants had no mo-

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53 See also *Brokers’ Assistant, Inc. v. Williams Real Estate Co.*, 646 F. Supp. 1110, 1113 (S.D.N.Y. 1986) (citing *Matsushita* as indication of “a growing willingness on the part of the federal courts to use summary judgment as an effective tool for expediting litigation”).

54 See *Travel Agency*, 898 F. Supp. at 690.

55 See id. (quoting *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 468 (1992)).

56 See id.

57 See id. at 690-91.

58 ASTA asserted the existence of “a set of occurrences, speeches, meetings, events, official and unofficial corporate utterances, and conferences,” which was “purposefully designed to communicate” the desire to collude. *Id.* at 691.

59 See *Matsushita*, 475 U.S. at 577-78.
tive to join the conspiracy.\textsuperscript{60} In support of this conclusion, the Court emphasized that the defendants had engaged in this activity for over fifteen years.\textsuperscript{61} If their plan, as alleged, had been successful, the Court reasoned that the Japanese manufacturers would have to greatly increase prices, requiring yet another act of collusion, to recoup the losses incurred over such a long period of time. These high prices would, in turn, encourage American upstarts or Korean manufacturers to enter the market.\textsuperscript{62} The proposition that the Japanese firms could eventually eliminate all of their rivals, recoup all of their lost income, and maintain the monopoly in order to earn the subsequent monopoly profits was unreasonable.\textsuperscript{63} Instead, the Court found it more likely that the Japanese “were just engaged in hard competition.”\textsuperscript{64}

The lynchpin of the Supreme Court’s analysis was that there was little economic motive for firms to conspire to charge predatory prices. The airlines in \textit{Travel Agency}, however, were not engaged in predatory pricing, but rather nonprice predation. Under nonprice predation, the predatory firms suffer no short-term losses and need not totally exclude rivals for success.\textsuperscript{65} Instead, the predatory firms make rivals’ operations unprofitable by increasing the targets’ costs, limiting the targets’ income, or both.\textsuperscript{66} Later, when the firms gain market share, they raise prices above prior competitive levels.\textsuperscript{67} In other words, to form a cartel for the purposes of nonprice predation makes good business sense from the viewpoint that the colliding firms suffer neither short-term nor long-term losses.

ASTA showed that the circumstances reasonably tended to exclude the possibility that the airlines acted independently. Thus, ASTA survived summary judgment:

\begin{quote}
[D]uring the late 1980s, American Airlines and United Airlines made separate unilateral commission cuts. Competitor airlines did not follow, and travel agents’ customers apparently patron-
\end{quote}

\footnotesize
\begin{itemize}
\item \textsuperscript{60} See id. at 587.
\item \textsuperscript{61} See id. at 591-92 n.15 (quoting Judge Easterbrook, \textit{The Limits of Antitrust}, 63 TEX. L. REV. 1, 26-27 (1984)).
\item \textsuperscript{62} See id.
\item \textsuperscript{63} See id.
\item \textsuperscript{64} Id.
\item \textsuperscript{65} See ABA \textsc{Antitrust Section: Monograph No. 18, Nonprice Predation Under Section 2 of the Sherman Act 8 (1991)} [hereinafter \textsc{Nonprice Predation}].
\item \textsuperscript{66} See id.
\item \textsuperscript{67} See id.
\end{itemize}
ized airlines which continued to pay the 10% commission. Both American Airlines and United Airlines abandoned their commission revision programs shortly thereafter. Extrapolating from this evidence, [ASTA] suggest[ed] that [the defendant airlines] . . . conspired to ensure all airlines would cut commissions.\textsuperscript{68}

The reason for this original failure to cut commissions is simple. Travel agents have the power to direct flyers to those airlines providing better terms to both the traveler and the travel agents. This ability to influence bookings provides airlines with an added incentive not to be the lone airline slashing commissions.\textsuperscript{69} If the airlines acted together, however, they could thwart this ability and pay less, or eventually nothing, in commissions.\textsuperscript{70}

2. Parallelism

While showing that collusion would have been economically plausible gets a case past summary judgment, it is, alone, insufficient to win a case. To win, a plaintiff first must prove concerted activity or a "conscious commitment to a common scheme" shared by the co-conspirators,\textsuperscript{71} but this does not mean a plain-

\textsuperscript{68} Travel Agency, 898 F. Supp. at 688 n.5. See also Plaintiffs' Complaint, supra note 4, at 4 ("In 1981, United lowered its commission rates by imposing a system of flat fee commissions, based on miles traveled per ticket. After the system was in place for only four or five days, United reverted to the system of percentage commission rates when other carriers declined to follow United's lead.").

\textsuperscript{69} To increase their patronage, new entrants to the market or other airlines without the market share that the defendants in Travel Agency enjoy often use the power of travel agents to direct flyers to those airlines offering favorable terms. Even after the big airlines cut their commissions, these smaller airlines continued to offer customary commission rates. By November 1997, those airlines that did not cut commissions included American Trans Air, Eastwind Airlines, Laker Airways, Midway Airlines, Air Tran Airlines, and other similarly small domestic and foreign carriers. See Airlines That Have NOT Cut Commissions, HOT FLASHES (Central/North Fla. ASTA, Bartow, Fla.), Nov. 1997, at 3.

\textsuperscript{70} "The airlines estimate, and for these purposes the plaintiffs have not contested, that they will realize substantial savings as a result of the revised commissions. For example, Northwest Airlines estimates an annual savings of $50-58 million . . . . American Airlines estimates a $150 million annual savings." Travel Agency, 898 F. Supp. at 688 n.6.

\textsuperscript{71} Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 768 (1984). See also Rochez Bros., Inc. v. North Am. Salt Co., Inc., 1994 WL 735932, at *3 (W.D. Pa. Nov. 2, 1994) ("[T]here is no specific requirement under § 1 that the alleged conspirators have a complete 'mutuality of interest.'"); Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., 998 F.2d 1224, 1243 (3d Cir. 1993) ("[T]he defendants need not share the same motive. Rather, all that is required is that they each have a motive to conspire.").
tiff must demonstrate an express agreement. The same powers of inference permitted to present a case with genuine, triable issues of fact may also be used to prove an inferred agreement among competitors to satisfy the first element of a Section One violation.

Evidence of parallel business behavior, or parallelism, is one way of proving this first element of conspiracy and collusion, but absolute parallelism alone will not support a Section One claim. A plaintiff must also prove that the parallelism was not the result of coincidence, independent actions, or the natural forces within the relevant market; but instead, the parallelism was purposeful and served as the basis for the actions of each colluding firm.

To prove actionable parallelism, the plaintiff must distinguish natural parallel behavior from conscious parallel behavior. Natural parallel conduct can often be consistent with the rational exercise of independent business decisions. For example, in Theatre Enterprises v. Paramount Film Distributing Corp., suburban theaters alleged that various movie producers and distributors had conspired “to restrict ‘first-run’ pictures to downtown Baltimore theatres, thus confining its suburban theaters to subsequent runs and unreasonable ‘clearances.” After first noting that there was no direct evidence of an illegal agreement, the Court proceeded to list the various economic factors behind the arrangement. Thus, what appeared to be collusion between film producers was in fact attributable to legitimate business considerations. Courts are less willing to allow an inference of anticompetitive conduct when the conduct in question has significant procompetitive benefits or when allowing such an inference might chill management’s reasonable attempts to maintain a firm’s competitive edge.

72 See Standard Oil Co. of New Jersey et al. v. United States, 221 U.S. 1, 50-60 (1911); Wilcox v. First Interstate Bank of Oregon, 815 F. 2d 522, 525 (9th Cir. 1987).


75 Id. at 538.

76 See id. at 539-40.

77 See In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation, 906 F.2d 432, 439 (9th Cir. 1990).

78 See id. at 440.
For example, banks set their prime lending rate similar or equivalent to major banks. Reliance on the rates, which industry leaders establish, is a convenient way for the banks to determine the national market rate. This process serves to stabilize interest rates. In comparison, those markets that are not as stable, but rather supercompetitive, also tend to be naturally parallel as firms attempt to avoid price wars. These very different market structures share the common characteristic of significant interdependence among the competing firms.

A market dominated by an oligopoly presents a similar situation of natural parallelism and interdependency. "[O]ligopolists acting independently might sell at the same above-marginal cost price as their competitors because the firms are interdependent and competitors would match any price cut. Therefore, they quickly learn that price cuts do not increase market share and return to their noncompetitive pricing."

The airline industry, especially after deregulation, is an example of parallelism in an oligopolistic market. Because the airlines operate within an "extremely competitive" market, a change in fare price by one "will inevitably result in a similar change by other carriers."

Precisely because of the detrimental effects of price wars or other consequences associated with such a tight market, the district court in Continental Airlines, Inc. v. American Airlines, Inc. used reasoning similar to that used in Matsushita and found an alleged scheme of collusive price predation in the airline industry as economically implausible. To prove parallel conduct in that case, the plaintiff, Continental Airlines, cited public statements by the defendants, American Airlines, United, and Delta, announcing price cuts "almost simultaneously." Continental alleged that the price cuts were an attempt to force it from the relevant market. The court, however, reasoned that the larger airlines "would not be able to maintain supracompetitive prices

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79 See Wilcox, 815 F.2d at 528.
80 See id. at 526.
81 See id. at 528.
82 See Petruzi's, 998 F.2d at 1244.
83 See id.
84 Id.
86 See id.
87 See id.
long enough to recover their losses and make a profit. . . .”

Therefore, because the defendant airlines had no rational motive to collude, parallel action was not conclusive proof of collusion.

In *Travel Agency*, the same airlines made announcements of common conduct within a very short time span, and in response to antitrust allegations, posited the same defense. “[A]irlines operate in an oligopolistic market, with widely disseminated information. Under such conditions, they argue that rapid price coalescence is an economic inevitability. They claim these factors led to the swift adoption of the [commission cuts.]” But both American and United Airlines quickly abandoned their earlier, unilateral attempts to cut commissions. Therefore, it seems the only successful way to cut commissions would be to work together, the motive to maintain the cartel being the additional profits that each of them would inevitably make.

The airlines’ assertion in *Travel Agency* that the swift adoption of commission cuts was due to natural parallelism in an oligopolistic market may actually tend to establish an inference of collusion. First, if the commission cuts were indeed due to competitive pressure, one would expect these savings to be passed along to consumers. But despite the airlines’ assertions that the commission cuts are a cost-cutting measure, airfares have dramatically increased in price in the year since then with domestic flights increasing by 17% and international flights by 30%. Second, the defense of natural parallelism is unconvincing against an allegation of nonprice predation. In *Continental*, it was clear to see how price predation could seriously injure the colluding parties, especially if they had no reasonable expectation of a return on their “investment” in below cost pricing. In nonprice predation, however, those in the cartel not only gain during the predatory behavior, but gain later when the competition is eliminated. Interdependency of a natural oligopoly can,

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88 *Id.*

89 *Travel Agency*, 898 F. Supp. at 688.

90 See *id.* at 688 n.5.

91 See Woods, *supra* note 1 at 127. The airlines’ have a track record of not passing savings along to consumers. For example, when certain federal airline taxes reverted, the airlines did not lower fares, but rather increased them by ten percent. Likewise, as the cost of jet fuel fell to a nine-year low, airfares continued to rise. *See ASTA Calls on Airlines to Pass Along Savings on Fuel Prices to Travelers, Hot Flashes* (Central/North Fla. ASTA, Bartow, Fla.), April, 1998, at 4.
therefore, be evidence of unlawful nonprice predation rather than a defense to it.\textsuperscript{92}

Similarly, firms may cite to the legitimate effects of a natural oligopoly as pretext for collusion that, in of itself, may be construed as evidence of collusion:\textsuperscript{93}

\[ \text{[S]tatements regarding the competitiveness of the air transportation market cut both ways: they also tend to support an inference that the alleged conspirators could have reasonably believed that their scheme had a good chance of success because the factors cited...would tend to mask [their] actions. Air carriers tend to match the price changes of other air carriers. Thus, the alleged conspirators could have reasonably assumed that it would not attract too much unwanted attention if other airlines lowered (at the beginning of the conspiracy) or raised (after smaller competitors had been driven from the market) their prices in response to American's price initiatives.}\textsuperscript{94}

If the public has grown accustomed to a certain degree of \textit{price} parallelism, then the airlines might also feel comfortable that their up-to-now successful defense of oligopolistic coalescence will also mask \textit{nonprice} parallelism.

3. \textit{Plus Factors}

After showing that the parallelism between named firms is conscious rather than natural, the second analysis necessary in extrapolating unlawful collusion from parallel business activity consists of "plus factors." Without the added plus factors, conscious parallelism, per se, would not support a violation of the Sherman Act.\textsuperscript{95} These plus factors are, in effect, the little bit extra needed before the courts will allow circumstantial evidence as conclusive proof of collusion. Examples of plus factors include "price parallelism, product uniformity, exchange of price information, and opportunity to meet to form anti-competitive policies."\textsuperscript{96}

\begin{itemize}
\item \textsuperscript{92} \textit{See} Barry v. Blue Cross of Ca., 805 F.2d 866, 869 (9th Cir. 1986) (holding that interdependence is required to infer a conspiracy from parallelism.).
\item \textsuperscript{93} \textit{See} Dimidowich v. Bell & Howell, 803 F. 2d 1473, 1479-80 (9th Cir. 1986).
\item \textsuperscript{94} \textit{Continental}, 824 F. Supp. at 705 (the quotation continues: "Moreover, many inefficient air carriers have gone bankrupt since deregulation, and observers might tend to credit the passing of a few more smaller carriers to inefficiency rather than to predatory pricing.").
\item \textsuperscript{95} \textit{See} Theatre Enterprises, 346 U.S. at 541.
\item \textsuperscript{96} \textit{Wilcox}, 815 F.2d at 525-26.
\end{itemize}
Through plus factors, a plaintiff shows not only that the parallelism was conscious, but also that the named firms had both a plausible reason and an opportunity to collude. Depending on the case, this often amounts to re-proving that the parallelism was conscious, but with more conclusive, direct evidence of an agreement. At times, it even appears that the requirement for these additional factors contradicts the Court's assurance that because of the difficulty in proving antitrust violations through direct evidence, inferential evidence suffices.\textsuperscript{97}

For example, in \textit{American Tobacco, Co. v. United States},\textsuperscript{98} the defendant cigarette manufacturers were quite bold in their price fixing schemes. Within the same day of defendant Reynolds' unexpected increase of its list price, the other major competitors raised their list prices to the same level, seizing "the opportunity of making some money."\textsuperscript{99} When consumers switched to minor, cheaper brands in response to the price hike, the defendants again acted in concert, this time to lower prices to a level that would eliminate the competition from the minor brands.\textsuperscript{100} Then the defendants began to raise prices again; this time, when a retailer heard of a price hike announcement from one producer and attempted to buy from another, the other refused to fill the order until it had also announced its price hike.\textsuperscript{101}

Of course, as antitrust law has evolved, so has big business's attempts to act more surreptitiously. In \textit{Interstate Circuit, Inc. v. United States},\textsuperscript{102} a movie exhibitor sent a letter to eight film distributors naming all eight as addressees in the letter. The letter urged the distributors to include in all subsequent licensing agreements with exhibitors a provision fixing prices on admission and another provision limiting the number of double fea-

\textsuperscript{97} See, e.g., \textit{Petruzzi's}, 998 F.2d at 1233-42. (approving defendants' testimonial evidence of an agreement and secretly recorded tapes of defendants discussing their agreement as acceptable plus factors, but disapproving evidence in the form of market analysis presented by expert testimony and defendants' infrequent account turnovers as insufficient to draw definite conclusions despite their suggestive value); \textit{Wilcox}, 815 F.2d at 528 (requiring proof of an agreement in the form of actual price fixing rather than inferential proof based on proffered evidence); \textit{United States v. Container Corp. of America}, 393 U.S. 333, 337 (1969) (approving plaintiff's proffered evidence of a confidential, informal agreement to fix prices charged to specific customers).

\textsuperscript{98} 328 U.S. 781 (1946).

\textsuperscript{99} \textit{Id.} at 805.

\textsuperscript{100} See \textit{id.} at 806.

\textsuperscript{101} See \textit{id.} at 808.

\textsuperscript{102} 306 U.S. 208 (1939).
tures. Subsequently, all eight distributors put these provisions in their contracts. This letter did not reveal an agreement, formal or informal, but rather its evidentiary value was limited to showing that each distributor was aware "that the proposals were under consideration by the others."\textsuperscript{103} The \textit{Interstate Circuit} letter highlights the second way in which plus factors are used—that is, to show that the conduct would be in the parties' self-interest if all acted in the same way, but would be contrary to their self-interest if each acted alone. Such evidence is the most compelling plus factor.\textsuperscript{104}

Each was aware that all were in active competition and that without substantially unanimous action with respect to the restrictions for any given territory there was risk of a substantial loss of the business and good will of the subsequent-run and independent exhibitors, but that with it there was the prospect of increased profits.\textsuperscript{105}

Because the proposal meant a dramatic departure from previous business practices, the court reasoned further that without an agreement diversity of action would follow:

It taxes credulity to believe that the several distributors would, in the circumstances, have accepted and put into operation with substantial unanimity such far-reaching changes in their business methods without some understanding that all were to join, and we reject as beyond the range of probability that it was the result of mere chance.\textsuperscript{106}

The Third Circuit restated this principle in \textit{Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co.}\textsuperscript{107} In \textit{Petruzzi's}, the defendants had an agreement not to bid as aggressively on each other's existing accounts as they bid on new accounts. The Third Circuit noted that these actions, if done independently, would be against the self-interest of the individual defendants.\textsuperscript{108} This fact was an important plus factor that the court considered in reversing the district court's granting of summary judgment.

Another plus factor is the opportunity to collude such as through correspondence, meetings, or other communications. This can be necessary to prove "that the defendants were con-

\textsuperscript{103} Id. at 222.
\textsuperscript{104} See id.
\textsuperscript{105} Id. at 222.
\textsuperscript{106} Id. at 223.
\textsuperscript{107} See 998 F.2d at 1242-45.
\textsuperscript{108} See id.
scious of each other’s conduct and that this awareness was an
element in their decision making processes." For example,
the Interstate Circuit letter served as a vehicle to create awareness
of one distributor’s proposal. Indeed, the courts treat infor-
mation disseminated privately as more suspect than through
public channels, but this does not mean that exchange of in-
formation publicly as with the banks in Wilcox is per se
inapplicable.

The most probable reason why some courts require almost or
absolute direct proof of carteling as the plus factor, while others
allow less stringent forms of circumstantial evidence, may be re-
lated to the type of antitrust violation alleged. In those cases
where plaintiffs had to carry a higher standard of proof, the al-
leged anticompetitive conduct consisted of fixing prices at an
artificially low level to drive out weaker competitors. In such a
cartel, there is great incentive to cheat because firms are per-
haps incurring losses or at least foregoing greater earnings by
charging below market prices. But in nonprice predation, the
colluding firms bear no losses, and as a consequence, this “game
theory” or “prisoner’s dilemma” is not a problem. For this rea-
son, the heightened standard placed on plus factors found in
price predation cases should not be applied in nonprice preda-
tion case such as Travel Agency.

As an example of nonprice predation, the court in Brokers’ As-
sistant, Inc. v. Williams Real Estate Co. found persuasive evi-
dence of opportunity to collude without “direct evidence
explicitly showing agreement among all the defendants,” but
rather, from a substantial amount of evidence from which one
could infer the existence of a conspiracy. Thus, the main argu-
ment in Brokers’ concerned the sufficiency of the plaintiff’s evi-
dence of the defendants’ opportunity to collude.

109 Id. at 1243. See also Pittsburgh Plate Glass Co. v. United States, 260 F. 2d 397,
401 (4th Cir. 1958) (“The proposition is too elementary to require elaboration,
that participation in a criminal conspiracy need not be proved by direct evidence;
a common purpose and plan may be inferred from a "development and a collo-
cation of circumstances."” (quoting Glasser v. United States, 315 U.S. 60, 80
(1942))).

110 See Interstate Circuit, 306 U.S. at 222.
111 See Wilcox, 815 F.2d at 526-27.
112 See Petruzzi’s, 998 F.2d at 1233; Wilcox, 815 F.2d at 525; American Tobacco, 328
U.S. at 806.
113 See Petruzzi’s, 998 F.2d at 1233.
115 Id. at 1118.
The Brokers' Assistant (TBA) compiled lists of available commercial office space and prospective tenants. For a fee, TBA provided its lists to commercial real estate brokers. TBA obtained the information for its lists from brokers such as the defendants. When the defendants all at once stopped providing the information to TBA, TBA sued alleging that the defendants had conspired to put TBA out of business.

TBA proffered a variety of evidence to show an agreement existed. First, a representative of one of the defendants met with a TBA representative and stated that his real estate brokerage firm would no longer provide market listings that he and the others had been providing TBA and each other for quite some time. Then, the defendant called the other brokerage firms and informed them that he was no longer providing the lists to TBA. Because there were disputes as to what exactly had been said in these various conversations, defendants argued that this evidence was inconclusive as to whether “defendants knew what each other was doing, much less that any of them agreed with any other.”

Instead, defendants argued that the evidence only supported “findings of mere communications among competitors and conscious parallelism.” The court, however, disagreed with the defendants' characterization of the evidence. Echoing Interstate Circuit, the court observed that shortly after these conversations, the defendants simultaneously reversed a long-standing business practice. Taken together, this evidence pointed toward conspiracy.

In applying plus factors to Travel Agency, the two principal evidentiary considerations are motive and the opportunity to form a collusive agreement. As discussed in the summary judgment analysis, the facts of Travel Agency reasonably supported an infer-

116 See id. at 1115.

117 See id.

118 However, “[i]t is undisputed that at this [initial] meeting Cohen [defendant’s representative] also told Gross [plaintiff] that major brokerage firms . . . would from that time on refuse to provide TBA with listings of available space.” Id.

119 Id. at 1117.

120 Brokers’, 646 F. Supp. at 1117.

121 See id. at 1118.

122 Certainly others exist such as price parallelism and product uniformity, but considering the nonprice predation element and the service-centered nature of air travel, these other plus factors derived from pricing and manufacturing activities are mostly inapplicable.
ence that the alleged antitrust activity made good business sense. Proving an actual agreement to collude, in contrast, might have been more difficult. But drawing upon the strong indications of motive to cartel, coupled with the nonprice predation argument, the court would not have required direct evidence of conspiracy as in \textit{Wilcox} or \textit{Petrucci}.'s. Rather, ASTA would have been allowed to rely on evidence showing that the circumstances pointed to the existence of an agreement, or more likely, a tacit understanding.

\section{Motive in \textit{Travel Agency}}

As regards the first plus factor, motive, there exists strong similarities between \textit{Brokers'} and \textit{Travel Agency}.\footnote{Note that \textit{Brokers'} addressed these issues in a summary judgment proceeding and presents no actual holding or findings based on any final adjudications. \textit{See Brokers'}, 646 F. Supp. at 1117 ("The issue before this Court upon defendants' motion for summary judgment is not whether TBA has presented enough evidence to establish its antitrust claim. Rather, the Court only faces the question of whether defendants have satisfied their burden so as to be entitled to summary judgment."}). For example, in both cases there were refusals to deal and the sharing of information by the defendants. Also, both cases involved service industries.

The defendants in \textit{Brokers'} were large real estate brokers who, for a commission, solicited tenants to rent office space in the greater New York area. A substantial part of the trade was the compilation of lists of prospective tenants and available office spaces. These lists were customarily shared among licensed brokers. The plaintiff, TBA, was a relatively young company that developed a computerized brokerage system to coordinate this solicitation process. It relied heavily on these lists, as did all real estate brokers, and had invested a considerable amount of capital in its operations. TBA claimed that many in the community favored using TBA's system, and that it provided better, more efficient service without directly competing with the brokers.\footnote{"Subscribers were enthusiastic about the service. Even non-subscribers appeared to appreciate the benefit TBA conferred upon the real estate market." \textit{Id.} at 1115.} Also, TBA claimed that by adding to the aggregate of listing information among brokers, it furthered the business interests of all.\footnote{TBA also claimed that it provided a promotional services to the business at large, because it "issued press releases, conducted surveys, placed advertisements in newspapers and trade journals, joined the Real Estate Board, circulated pro-}
When the established brokers stopped providing these lists to TBA, TBA's business was devastated. The court found it clear that without the lists, "the value of TBA's services to its subscribers was certainly reduced. TBA's 'faucet was turned off;' it was 'dead in the water.'"

In justification of their action, the defendants claimed that "TBA merely redistribute[d] listings provided by the brokers." The defendants also argued that TBA was a free rider, using information on which they had spent time and money to compile for their own use. Although defendants attempted to introduce evidence and arguments to support an inference of independent action, the court found only one reasonable inference based on the nature of the defendants' conduct:

The inference of anticompetitive motives on the part of defendants can be bolstered by engaging in some basic economic reasoning. If TBA's service survived absent any one defendant's listings in its data base, but with the listings of all remaining defendants, including the withdrawing individual defendant's rivals, the withdrawing defendant would be damaged. Information regarding its competitors' space would receive wider distribution than information about its own space. Therefore, getting all the defendants to join the boycott was essential for any one defendant to succeed in suffocating TBA.

Applying this same economic reasoning to the facts of Travel Agency, the circumstances surrounding the commission cuts and institution of commission caps indicates an anticompetitive motive and a plausible reason to collude. To begin with, the lessons learned during earlier attempts at unilateral cuts made the airlines aware of their need to collude for the scheme to be successful. That is, by acting alone, each stood a substantial risk of loss of business and goodwill from their main distributors, the
travel agencies, similar to that between the movie distributors and exhibitors found in *Interstate Circuit*.

Because of the volume of ticket sales generated through travel agencies, agencies had the very real ability to negatively impact one airline's business by encouraging travelers to book with those airlines not cutting commissions. The source of this influence comes from the access travel agents have to the full gamut of booking information and the ability to "weed" through it. This is similar to the way TBA's services organized and condensed information to better facilitate market transactions. The crux of the services provided by both TBA and the airlines was simply better organized information. Not only did this benefit consumers directly by enabling them to make better choices, but it had the indirect commercial benefit of maintaining a check against the airline's oligopoly.

More importantly, the airlines had to act together if they were to create such a fundamental change in how airline tickets were sold, which the Supreme Court in *Interstate Circuit* found telling of collusion. In *Brokers*, the court was cognizant of the cooperative relationship between TBA and the larger brokerage houses. In *Travel Agency*, this synergy was far more pronounced. The travel agents and airlines had developed a symbiotic relationship spanning many decades. But fearing that travel agents were benefiting too much from this relationship, or rather, that travel agents were an easily eliminated cost of doing business, the airlines acted to force them out of business in order to strengthen their oligopoly power, which they needed in order to charge above-market, supra-competitive prices.

Another important similarity between these cases consists of the strong consumer preference shown for the one being squeezed-out. As with TBA, there is strong evidence that the public generally favors using travel agents over direct booking, even with the advent of the Internet. This reflects two factors of the business of travel agencies that are, by themselves, documented by direct evidence. The first is that travel agents are a better, more efficient way of retailing or distributing airline tickets. The second is that ASTA has no qualms with existing in a dual distribution system whereby the airlines develop Internet service.\(^1\) If these factors were not true, then logically the public would no longer prefer travel agents.

\(^{1}\) Two nationally syndicated columnists "emphasized the advantages of using travel agents over booking travel on the Internet, noting that: 'a call to a travel
Travel Agents is distinguishable from Brokers’ because there is no free rider problem that would strengthen the airlines’ claim that they were acting with legitimate business conduct. Travel agents pay a substantial fee for computer links to scheduling and bookings even though much of this information is available free on the Internet or by calling the airlines directly. In return, the airlines pay a commission for the travel agents’ service of bringing customer and carrier together.

Lastly, in American Tobacco, the Supreme Court ruled that evidence of a rise in prices during a time of surplus indicates the existence of a cartel.\textsuperscript{132} When the defendants in that case summarily raised their prices for cigarettes, the costs of tobacco and manufacturing had been falling for years.\textsuperscript{133} Therefore, the Court could find no economic justification for the price increase.\textsuperscript{134} Similarly, the airlines slashed commissions at a time of record profits and falling fuel costs and taxes.\textsuperscript{135} The irony is that “the airlines continue to raise their fares and cut commissions for their primary distribution system (travel agents) while raking in record profits. The airlines have realized a 600\% combined profit increase in the last year alone.”\textsuperscript{136} Yet, the airlines claimed that the cuts were legitimate, independent actions to reduce operating costs in their competitive market. Viewed in light of the airlines’ wide profit margins, such a claim seems more like a pretext than a legitimate business decision.

b. Opportunity to Collude in Travel Agency

The other principal plus factor ASTA would have had to establish is the airlines’ opportunity to collude. ASTA had no direct evidence of an agreement, not even an informal agreement.

agent will produce the lowest fare and book a flight in a single swoop. The agent can also handle other travel arrangements, such as hotels and car rentals. Computers can’t suggest alternatives.” \textit{ASTA in the News, DATELINE ASTA} (ASTA, Alexandria, Va.), Nov. 1997, Issue II, at 4.

The Travel Industry Association determined that travel agents were the preferred source over the Internet and other sources from a survey based on the following criteria: reservations, prices, types of vacations, schedules, where to go, things to do, and maps. \textit{See Travel Agents vs. the Internet, DATELINE ASTA} (ASTA, Alexandria, Va.), Dec. 1997, Issue I, at 1.

\textsuperscript{132} See American Tobacco, 328 U.S. at 805.
\textsuperscript{133} See id.
\textsuperscript{134} See id.
\textsuperscript{135} See \textit{ASTA Calls on Airlines to Pass Along Savings on Fuel Prices to Travelers}, supra note 91.
ASTA did assert, however, that various meetings and other exchanges of information took place, which suggested an overall subtle scheme of forming the cartel terms. This was in addition to evidence of nearly simultaneous and identical cuts in commissions. ASTA argued that the airlines:

participated in a knowing conspiracy involving public speeches, electronic communications, subtle press releases, private dinners for airline executives and attendant antitrust counsel, and industry-bonding meetings at the Super Bowl and other locations. Plaintiffs do not deny that the airline industry needs to control costs, but argue it was not happenstance that each defendant, within days, "stumbled" onto the identical price structure chosen by their confederates. Plaintiffs seem to acknowledge the statistical probability that a cube of ice can appear in a vat of boiling water, but doubt they have seen one yet.137

While it is for a factfinder to adjudicate the true evidentiary value of these assertions, the district court found it compelling enough to use it as a primary basis for allowing ASTA’s case to survive summary judgment.138

In Pittsburgh Plate Glass Co. v United States,139 the Fourth Circuit held that such communications between the defendants shortly before the parallel behavior was sufficient evidence to sustain a criminal antitrust conviction. In Pittsburgh Plate Glass, the members of a mirror manufacturing association all sent their respective customers announcements of price increases within days of returning from the association’s annual convention. The Fourth Circuit held:

[P]roof that PPG announced a price rise identical with that announced almost simultaneously by its competitors was not enough by itself to convict. However, PPG’s "conscious parallelism," in light of its apparent close connection with the climax of the conspiracy, reasonably permitted the jury to infer that PPG sent the letters pursuant to an agreement with some or all of the conspirators.140

The district court in Brokers’ came to the same holding under similar reasoning.141 The plaintiffs in Brokers’ had no direct evidence showing any agreement between the defendants. The court, however, still denied summary judgment because the evi-

138 See id. at 691.
139 260 F.2d 397, 401 (4th Cir. 1958).
140 Pittsburgh, 260 F.2d at 401
141 See Brokers’, 646 F. Supp. at 1118.
idence that the defendants communicated with one another shortly before the parallel conduct allowed a reasonable inference of a conspiracy.142

B. UNREASONABLE RESTRAINT OF TRADE

Assuming ASTA could have successfully proven concerted action with the intent to collude, it would then have had to prove the final element, unreasonable restraint of trade. There are two means of proving that a restraint of trade is unreasonable and harmful to competition. The first and easiest way is to pigeon-hole the business activity into a pre-recognized category of unlawful conduct.143 These categories comprise business practices that are so facially anticompetitive that further inquiry is unnecessary.144 Generally, the courts will find firms in per se violation of section one of the Sherman Act when they collude directly, or indirectly through persuasion of others in the market, to deny a competitor access to a supply or facility that the competitor needs to compete.145 Also, the colluding firms usually enjoy a dominant position in the marketplace.146

When the conduct is not a per se violation, courts apply the Rule of Reason.147 Under this analysis, the plaintiff must prove that the anticompetitive effects outweigh any procompetitive benefits.148

The conduct in Travel Agency is a vertical restraint, which falls under the Rule of Reason.149 The airlines argue efficiency (or,
reduction in transaction costs), freedom to change their method of distribution, and freedom not to deal with competitors, none of which necessarily indicate blatantly unlawful behavior. There is also evidence, however, that the airline industry is concentrated enough that vertical restraints would be a viable means of accomplishing market dominance. Therefore, any vertical restraints imposed in this industry should be subject to careful Rule of Reason analysis.

1. Evidence of Anticompetitive Effects

The Rule of Reason draws a thin line between legitimate business conduct and anticompetitive conduct. Because the distinction is often difficult to make, the courts require compelling evidence of adverse anticompetitive effects. Proof of actual detrimental effects, however, is not necessary if an analysis of the pertinent market structure shows that the defendant has the ability to set prices independent of market forces.

Situations involving a dual distributorship, where suppliers sell both directly to buyers and through independent dealers, fall under vertical restraint analysis. In the dual distributorship between airlines and travel agents, an unreasonable restraint can take the form of an unlawful refusal to deal, proof of which hangs on this difficult distinction between legitimate business conduct and unlawful anticompetitive behavior.

One method of determining an unlawful refusal to deal is the Intent Test, which attempts to distinguish a firm's right to

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a strong defense if their actions severely impeded the travel agents’ ability to do business. Also, evidence of horizontal collusion among the airlines to eliminate travel agency commissions would invoke per se analysis. See Illinois Corp. Travel v. American Airlines, Inc., 806 F.2d 722, 726 (7th Cir. 1986).

See Klingaman, supra note 31.


See Arnold, Schwinn, 388 U.S. at 372.

See Aladdin Oil Co. v. Texaco, Inc., 603 F.2d 1107, 1113-16 (5th Cir. 1979) (discussing the distinction between concerted activity that is an innocent aspect of business and concerted activity that is inimical to competition).

Compare Alaska Airlines, Inc. v. United Airlines, Inc., 948 F.2d 536, 544 (9th Cir. 1991) (holding that a facility is essential “only if control of the facility carries with it the power to eliminate competition in the downstream market.”) with Official Airline Guides, Inc. v. FTC, 630 F.2d 920, 925-26 (2d Cir. 1980) (holding that the essential facilities doctrine was not applicable because the monopolist publisher of flight schedules engaged in a different line of commerce than the plaintiff air carrier).
deal with whomever it pleases (legitimate business intent) from monopolistic practices (anticompetitive intent). The Supreme Court held in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.* that the right to refuse to deal with a competitor is not absolute. Rather, there might exist limited circumstances when cooperation to some degree is necessary for effective competition and consumer welfare.

Aspen is a ski resort comprised of four major skiing venues, three of which were owned by the defendant, Ski Co. Entry into the market is limited by geographical considerations and government environmental regulations. When each venue was individually owned, an interchangeable ticket replaced the older tickets good for only one venue. This new ticket system was based on a similar method used in the Alps and quickly became popular among skiers who wanted to ski throughout Aspen. Over the years, the interchangeable ticket continued to improve. It became easier for skiers to use, and the revenue allocation system became more accurate.

However, after Ski Co. had acquired three of the four resorts, it began to express a desire to discontinue the ticket’s use, stating that it wanted to compete for skier loyalty directly and eliminate the “administratively cumbersome” method of ticket monitoring. In response to Ski Co’s criticism that the method of revenue allocation was inaccurate, the plaintiff, Highlands, offered to hire a third-party auditor to audit the revenue allocation. In addition, Highlands offered to accept a fixed percentage of total ticket revenue that was well below the actual percentage of time skiers actually spent at Highlands’ facility. In the end, Ski Co. simply rejected all of Highland’s offer and discontinued participation in the interchangeable ticket.

The plaintiff’s attempts to operate without the joint tickets were frustrated by Ski Co.’s misleading advertising and other

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158 See id. at 601 (reaffirming Lorain Journal Co. v. United States, 342 U.S. 143 (1951)).
159 See id.
160 See id. at 587-88.
161 See id. at 589-90.
162 See *Aspen Skiing Co.*, 472 U.S. at 588.
163 See id. at 591-92.
tactics. Moreover, the plaintiff was unable to protect itself from its loss of revenue and skiers. “The development of a new distribution system for providing the experience that skiers had learned to expect in Aspen proved to be prohibitively expensive.”

In support of its position, which was accompanied by an amicus curiae brief filed by American Airlines, Ski Co. asserted its right not to cooperate with its competitors. Ski Co. could not, however, offer any plausible efficiency justifications for refusing the interchangeable ticket. Its new ticket system was no more efficient than the one it replaced.

Echoing Interstate Circuit, the Court consequently found that Ski Co. was not motivated by efficiency concerns but “was willing to sacrifice short-run benefits and consumer goodwill” to inflict injury on its rival. The Court focused on how Ski Co.’s actions brought about a fundamental change “in the pattern of distribution that had originated in a competitive market and persisted for several years.” In addition, this distribution system was practiced throughout the world, which supported Highlands’ argument that this was the most efficient method of selling lift tickets. Furthermore, consumers were benefited from this joint lift ticket. Instead of having to go to the individual competitors for access, they could buy one ticket for access to all of the

164 See id. at 593-95. These other tactics are also forms of nonprice predation where the goal is to raise a rival’s cost above his income. See Nonprice Predation, supra note 65, at 8-9.
165 Aspen Skiing Co., 472 U.S. at 608.
166 See id. at 587.
167 “Aspen Skiing Corporation is required to compete. It is required to make independent decisions. It is required to price its own product. It is required to make its own determination of the ticket that it chooses to offer and the tickets that it chooses not to offer.” Id. at 598 n.22.
168 See id. at 609.
169 Id. at 610-11.
170 Id. at 603. “In any business, patterns of distribution develop over time; these may reasonably be thought to be more efficient than alternative patterns of distribution that do not develop. The patterns that do develop and persist we may call the optimal patterns. By disturbing optimal distribution patterns one rival can impose costs upon another, that is, force the other to accept higher costs.” Id. at 604 n.31 (quoting R. Bork, The Antitrust Paradox 156 (1987)). “In § 1 cases where this Court has applied the per se approach to invalidity to concerted refusals to deal, “the boycott often cut off access to a supply, facility or market necessary to enable the boycotted firm to compete... and frequently the boycotting firms possessed a dominant position in the relevant market.” Id. at 604 n.31 (quoting Northwest Wholesale Stationers, 472 U.S. at 294).
171 See id. at 603.
resorts. Consumer surveys and expert testimony indicated strong consumer preference for, and reliance on, the interchangeable ticket.

Applying this case to Travel Agency, it becomes clear that there exists a credible allegation of unreasonable restraint on the part of the airlines. Consumers have shown a preference for making their travel arrangements through travel agents. And a similar dual distribution system of selling tickets had evolved between the travel agents and the airlines both in this country and around the world.

The relationship that developed over the years benefited both travel agents and airlines. Travelers could either buy their tickets directly from the airlines, or if they wanted "thorough counseling," could patronize "full-service agencies." In this way, travelers had differing levels of service based on their particular preference.

American [Airlines] has no particular reason to cram unwanted money down the throats of travel agents. If travel agents are charging too much for their services, why does American not reduce the commission and thereby angle for passengers with lower net prices at no cost to itself? It must be purchasing some sort of valuable service from these travel agents.

Both distribution systems were similar in that the relevant services were not "resold." In Aspen Skiing, the resorts ran their respective ski lifts independently of each other, but revenues from the ticket did not reflect actual usage. Instead, revenues were based on percentages. Thus, there was the potential that the distribution system resulted in one resort bearing the risk of reduced sales revenue of the other. In Travel Agency, the airlines established their independent schedules and pricing, which were provided to travel agencies through ARC to sell to consumers. As with any true agency relationship, the principal, the

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172 See id. at 605-06.
173 See id. at 606-07.
174 See Illinois Corporate Travel, 806 F.2d at 728. The Seventh Circuit emphasized that the plaintiff was not alleging conspiracy among the airlines, but between one airline and other travel agents. See id. at 726. The court did not express an opinion as to the legal effects of such a conspiracy between airlines, but it did seem to have a strong opinion that travel agents are important to the industry at large.
175 See id. at 729.
176 Id. at 728.
177 "The relation of travel agent to airline is not substantially different from the relation of broker to real estate owner, of brokerage house to investor, or of
airlines, bore certain risks that were not passed on to the agents.\textsuperscript{178} However, travel agents accounted for eighty percent of all domestic airline sales.\textsuperscript{179}

Of course, the airlines would like the funds “siphoned off” by commissions but they have offered no real efficiency justifications for eliminating travel agents. Without the travel agents, the airlines will have to bear the administrative costs of ticket sales themselves; therefore, it is incorrect to assume that without the travel agents these costs will simply disappear.

In fact, the added administrative burden might prove to be more costly. For example, there is the cost of redundancy. Travel agents pooled their expertise and services at one location but sold tickets from all of the airlines. Now, each airline must have its own distribution system. Furthermore, the airlines’ ticket sales staff cannot provide the sort of expertise and courtesy that professional travel agents offer.

Finally, like the ski resort in \textit{Aspen Skiing}, travel agents faced difficulties in adapting to the new business circumstances in the face of nonprice predatory conduct. Travel agents were already tied to the airlines with exclusive dealing contracts in order to have access to airline schedules, prices, and bookings. Computer programs providing the access, such as SABRE, are not free, and in fact require commitments to long-term contracts. Thus, as travel agencies faced reduced commissions, the added liability of long-term, expensive contracts was further incentive not to stay in business.

Travel agencies also incurred the added expense of lobbying efforts and public relations campaigns in an attempt to stay profitable with the new commission policy. In light of various legal obstacles and strong consumer resistance to the new printing fees, these added costs only increased the burdens on existing travel agents and discouraged new agents from entering the market.

\textsuperscript{178} “The travel service operator takes no risk of unfilled seats or of the many problems, from mechanical difficulties to weather, that may make the airline unable to deliver transportation as promised. The airline takes all credit risks on the credit cards it accepts. . . . [T]he travel agent loses its commission when the traveler does not show and has his ticket refunded, but this is true of any agent when a sale falls through.” \textit{Illinois Corporate Travel}, 806 F.2d at 725.

\textsuperscript{179} See Plaintiffs’ Complaint, \textit{supra} note 4, at 3.

The courts recognize that some changes in a vertical distribution system benefit consumers by improving efficiency, and thus, promote interbrand competition.\(^{180}\) In order to separate those vertical restraints with the "redeeming virtues" of promoting competition from those that facilitate collusion or the exclusion of rivals, the Rule of Reason is implicit in every decision sustaining vertical restrictions.\(^{181}\) However, it is much easier to assert improved efficiency than it is to prove.\(^{182}\) First, economic analysts find measuring the difference between transaction costs between vertically related firms and transaction costs within a single vertically integrated firm problematic. This in turn makes proving the procompetitive benefits of vertical mergers difficult.\(^{183}\) Therefore, a defendant must prove through concrete facts all issues relating to efficiency, including the efficiencies of alternatives and the impact on consumers.\(^{184}\) Second, those efficiency savings that can be proven will be taken into account among other factors, but do not constitute an absolute defense.\(^{185}\) In fact, cost savings to the integrating firm are not relevant; rather, "efficiencies are relevant only to the extent that they can be expected to result in benefits to consumers."\(^{186}\)

The efficiencies defense works well when applied to firms that produce goods that are later resold through retailers, and the courts have developed the defense within this context. The reasons usually given for legitimate vertical integration is the need to eliminate distortions from various forms of market failures,\(^{187}\) to facilitate the flow of information between levels, or to mini-


\(^{181}\) See id.

\(^{182}\) See U.S. Department of Justice, Merger Guidelines § 3.5 (1984).

\(^{183}\) See ABA Antitrust Section: Monograph No. 14, Non-Horizontal Merger Law and Policy 8 (1988) [hereinafter Non-Horizontal Mergers].

\(^{184}\) See id. at 90 (referring to the second criteria suggested to the courts in evaluating efficiency claims as posited in U.S. Department of Justice's Memorandum in support of Plaintiff's Motion in Limine Relating to Efficiencies 4, 13-18, United States v. Archer-Daniels-Midland Co., Civ. No. 83-51-D (S.D. Iowa, May 4, 1987)).

\(^{185}\) See id. (quoting U.S. Department of Justice, Statement Accompanying Release of Revised Merger Guidelines, 49 Fed. Reg. 26,823, 26,826 (1984)).

\(^{186}\) Id. (quoting in part the five criteria suggested to the courts in evaluating efficiency claims as posited in Department of Justice’s Memorandum in Support of Plaintiff’s Motion in Limine Relating to Efficiencies 4, 13-18, United States v. Archer-Daniels-Midland Co., Civ. No. 83-51-D (S.D. Iowa, May 4, 1987)).

\(^{187}\) Such as build-ups in inventory, cyclical problems associated with markets, and coordinating non-peak load production periods.
mize transaction costs in advertising, sales presentations, etc.\footnote{See id. at 87-91.} These costs represent situations that occur at the retail level and pose financial uncertainty on the producer.

Vertical merger theory and the efficiencies defense have not been developed in the context of the retail role played by travel agents. Looking at the reasons for vertical integration in this context, there are few potential procompetitive effects of vertical integration. Travel agents, who were already well-established in their role as independent agents, posed none of the traditional concerns that a producer might have over what occurs at the retail level. First, travel agents were the most efficient means of ticket distribution, a state of affairs that always benefits consumers. Second, there were never any quality control problems, and travel agents had little impact on an airline's overall management or investment decisions. Third, the airlines were not bound to restrictive retail contracts like many upstream retail suppliers. Rather, the airlines were making a considerable amount of money from the fees travel agents pay for access to computerized airline schedules and bookings such as SABRE and ARC. Finally, travel agents were paying for supplemental advertising and other promotional activities from which the airlines directly or indirectly benefited. Therefore, what first appear to be legitimate efficiency claims begin to look more like the displacement of an efficient distribution system. Indeed, at the end of 1998 one travel agency stated that when the agency middlemen are cast off, "consumers will have to pay more eventually when airlines hike up fares to hire people to do what [travel agents] do."\footnote{See Connolly, supra note 7.}

Another consideration is whether the airlines may be seeking to eliminate a lower link in the distribution chain to facilitate horizontal collusion. Thus, the focus shifts from the retail-level firm to upstream, market-dominate firms that will be in the position to form a stronger oligopoly as a result. Anticompetitive consequences are likely if (1) the upstream firms are generally prone to collusion already and (2) a large share of the upstream product is sold through vertically integrated retailers.\footnote{See Non-Horizontal Mergers, supra note 183, at 81 (referring to U.S. Department of Justice Merger Guidelines § 4.221 (1984)).} When a market is highly concentrated, it is considered oligopolistic if
price parallelism is common. Clearly, the airlines have a history of following each other's lead in pricing, commission cuts, and other business practices. In fact, they have even admitted to parallelism, albeit natural parallelism, and have been the subject of criticism for growing ever more concentrated.

In the business environment after Travel Agency, the conditions at the horizontal level become more conducive to collusion. Without the travel agents' ability to funnel customers and provide expert advice, and thereby foster competition via helping upstarts and supporting those with the best deals, airlines can more easily collude. That is, for those airlines that want to cheat the horizontal cartel, travel agents would pose a tempting resource to use in undercutting the less-competitive offers from the cartel members. In the absence of travel agents, it becomes easier to monitor the cartel members, and there is less incentive and opportunity to cheat.

Similarly, the airline cartel may need to eliminate a disruptive middleman to strengthen its market dominance. "Successful collusion in the upstream market often depends on relatively acquiescent buyers in the downstream market. Aggressive buyers can disrupt a cartel's operations by encouraging cartel members to cheat the cartel policy." By analogy, travelers who buy directly from the airlines will be more at the mercy of the airlines than travel agents, who are more aggressive in curbing airline oligopoly power.

III. CONCLUSION

One could infer from the facts of Travel Agency and its surrounding developments that the airlines engaged in nonprice predation to bring about a fundamental change in the business environment of the air travel industry. Although there was no

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191 See 1995 Vertical Restraints Guidelines of the National Association of Attorneys General § 4.8, Mar. 27, 1995. Practices constituting price parallelism in this context include: (1) price leadership, (2) pre-announced price changes, (3) price rigidity in response to excess capacity or diminished demand, (4) public pronouncements and discussions of the 'right price' for the industry, (5) systematic price discrimination, and (6) past collusion regarding prices or marketing practices. See id.

192 See Klingaman, supra note 31.

193 See Airlines That Have Not Cut Commissions, supra note 69.

194 See Non-Horizontal Mergers, supra note 183, at 80-82 (discussing that decreasing the costs of monitoring cartel performance is one prerequisite to form a cartel).

195 See id. at 82.
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one single piece of evidence conclusively establishing antitrust violations in Travel Agency, the facts and the inferences drawn from those facts demonstrate that this sort of conduct could reasonably occur in an industry as concentrated as the airline industry. Airlines have every business incentive to build a cartel. Only through a cartel’s collective power could the airlines drive travel agents out of business and retain those funds that are normally paid out in commissions. Moreover, once travel agents are eliminated, the airlines gain added oligopoly power to facilitate the full range of collusive practices such as parallel price maintenance.

When the airlines cut commissions paid to travel agents, they justified their actions as a more efficient, cost-saving measure and promised that these savings would lead to airfare reductions. But the post-commission cut era has not led to the promised reductions in costs and airfares. In January 1998, Kiplinger’s Personal Finance Magazine reported that “[a]irfares have taken off over the past year or so, and it will probably be a while before they come back down to earth,” with business passengers being hit hardest.196 Earlier in 1996 and 1997, business fares increased by 9% and 16%, respectively, and 1998 saw a 5% to 6% increase; since 1994, business fares have increased by 30%.197 By the beginning of 1999, the major airlines were again announcing airfare increases “on business tickets by 2 percent and leisure tickets by 4 percent, effective immediately,”198 while some observers have reported an average increase of 3% and 7%, respectively.199

Analysts blame a strong economy and increased demand for travel as the reason behind the increase,200 but others have mentioned the oligopolistic dynamics of the industry, whereby the airlines tend to act either in unison, or not at all, for fear of losing business to others.201 With these rate increases, “the industry’s profits are likely to rise to a record for the fourth straight year.”202 It also seems evident that the warnings of the

196 Woods, supra note 1, at 127.
197 See Guy Boulton, As Air Fares for Businesses Continue to Rise, Some Find Ways to Contain Cost, THE COURIER-JOURNAL (Louisville, Ky.), Feb. 18, 1998, at 1E.
199 See Chris Woodyard, Firms Stretch Travel Dollars Higher, Costs Bump Employees into Coach, or Even into Vans, USA TODAY, Mar. 16, 1999, at 1B.
200 See Boulton, supra note 197.
201 See Pauly & Knowles, supra note 198.
202 Id.
travel agencies, prior to their minimization, may be bearing true. Without travel agents to temper the effects of the airline oligopoly, the airlines are far less shy in taking advantage of their position. Because there are no real alternatives for travel in the United States or internationally, and because modern society and commerce require travel, the airlines now have one less check on their control of market prices. While businesses are certainly allowed to find ways of cutting costs, they may not do it illegally. Instead of being a legitimate business move, the airlines' actions appear to be an attempt to drive travel agents' income below their costs—the classic definition of illegal non-price predation.
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