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# CLASS 10 SLIDES

For October 3, 2019

Unit 7: Hertz/Avis Budget/Dollar Thrifty

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Merger Antitrust Law

Georgetown University Law Center

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# Hertz/Avis Budget/Dollar Thrifty



# Covenants

7. Obligations to “fix” the agency’s concerns
  - Example: 2010 Hertz/Dollar Thrifty § 6.03(b)

In furtherance, and not in limitation of the foregoing, each of the Company and Parent **agrees to cooperate** with each other and **use its reasonable best efforts to resolve such objections**, if any, as may be asserted by the United States **Federal Trade Commission**, the **Antitrust Division** of the United States Department of Justice, the **CBC**, **state antitrust enforcement authorities** or **competition authorities of any other nation** or other jurisdiction or any other Governmental Authority of competent jurisdiction with respect to the transactions provided for in this Agreement under Antitrust Laws, to permit the Merger and the other transactions contemplated hereby to be consummated prior to the Termination Date.

# Covenants

## 8. Obligations to litigate

- Example: 2010 Hertz/Dollar Thrifty § 6.03(b) (con't)

If any **administrative or judicial action** or proceeding, **including any proceeding by a private party**, is instituted (or threatened to be instituted) challenging the transactions provided for in this Agreement as violative of any Antitrust Laws or that would otherwise prevent, materially impede or delay the consummation of the Merger and the other transactions contemplated hereby, each of the Company and Parent shall use its **reasonable best efforts** to **cooperate** and take, or cause to be taken, all actions, and to do, or cause to be done, and to assist and cooperate with each other in doing, all things necessary, proper or advisable to as promptly as reasonably practicable **vigorously contest** and resist any such action or proceeding, **including appeal**, and to have vacated, lifted, reversed, or overturned any decree, judgment, injunction or other order, whether temporary, preliminary or permanent, that is in effect and that restrains, enjoins, prohibits, prevents, or restricts or would otherwise materially impede or delay the consummation of the Merger and the other transactions contemplated hereby, to permit the Merger and the other transactions contemplated hereby to be consummated in the most expeditious manner practicable.

# Covenants

9. Limitations on the obligation to “fix” the antitrust concerns
  - Example: 2010 Hertz/Dollar Thrifty § 6.03(c)

For purposes of Section 6.03(a) and (b), Parent’s “**reasonable best efforts**” shall include an obligation of Parent and its Subsidiaries to **license, franchise, divest or hold separate** any business locations or business lines of the **Company, Parent** or their respective Subsidiaries (**including the Advantage business locations** and business line owned by Parent and its Subsidiaries (“Advantage”)), or to take any similar measure, **reasonably necessary** to secure **HSR Approval** or **CBC Approval** (a “Divestiture Action”).

- Standing alone, this is an unqualified hell or high water provision
- May be qualified

# Covenants

9. Limitations on the obligation to “fix” the antitrust concerns
  - Example: 2010 Hertz/Dollar Thrifty § 6.03(c)—Qualification

**Notwithstanding** the immediately preceding sentence, “reasonable best efforts” **shall not require** Parent or its Subsidiaries to license, franchise, divest or hold separate any business locations or business lines of the Company, Parent or their respective Subsidiaries **other than**

- (i) **Advantage** and
- (ii) **in addition to Advantage, business locations** or business lines that produced **aggregate gross revenues** in an amount **not in excess of \$175 million** (“Divested Revenues”) for Parent, the Company and their respective Subsidiaries during the 2009 calendar year, calculated in accordance with GAAP, on a basis consistent with the accounting principles used in preparing their respective 2009 financial statements included in the Company SEC Reports or Parent SEC Reports, as applicable.

# Covenants

9. Limitations on the obligation to “fix” the antitrust concerns
  - Example: 2010 Hertz/Dollar Thrifty § 6.03(c)—Qualification (con’t)

**For the avoidance of doubt**, in calculating Divested Revenues, only the business locations (or in the case of an entire business line, the business locations within such business line) for which a Divestiture Action is taken, shall be included. For example, if a Divestiture Action is required at an airport where the Parent and the Company each have a business location (or multiple business locations), **only the business location at such airport that is divested shall be included in the calculation of Divested Revenues.**

# Covenants

## 10. Obligations not to make acquisitions that could impede the transaction

- Example: 2010 Hertz/Dollar Thrifty § 6.03(d)

Neither the Company nor Parent shall, nor shall they permit their respective Subsidiaries to, **acquire or agree to acquire any business**, person or division thereof, or otherwise acquire or agree to acquire any assets, **if, upon advice of such party's outside legal counsel**, the entering into of a definitive agreement relating to or the consummation of such acquisition,

- (i) would **reasonably be expected to delay or to increase the likelihood of not obtaining** the applicable action, nonaction, waiver, clearance, consent or approval under the HSR Act or applicable requirements of the Competition Act in connection with the Merger and the other transactions contemplated hereby prior to the Termination Date or
- (ii) would **reasonably be expected to require any action**, nonaction, waiver, clearance, consent or approval of any Governmental Authority **not listed on Section 7.01 of the Company Disclosure Schedule** with respect to the transactions contemplated hereby.



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# Antitrust reverse termination fee

- Basic idea

- Provides to the payment by the buyer to the seller of a fixed fee (or other value) in the event that the transaction does not close because of a failure of the antitrust conditions
  - Can be written as liquated damages (or not)
  - May provide a carve-out for any willful and material breach

# Antitrust reverse termination fee

## ■ Standard provision

### □ Example: 2010 Hertz/Dollar Thrifty § 8.02(c)

In the event that

- (i) this **Agreement has been terminated** by either the Company or Parent pursuant to Section 8.01(b)(i), **[failure to close by termination date]**, Section 8.01(b)(ii) **[nonappealable Restraint prevents closing]** or, as a result of a material breach under Section 6.03 **[affirmative antitrust obligations]**, [or] Section 8.01(d) **[breach of affirmative obligations]**, and
- (ii) the **condition set forth in** the first sentence of Section 7.01(d) **[regulatory authorizations]**, Section 7.01(f) (in the case of any **Restraint** arising out of any suit, action or proceeding brought by any person or Governmental Authority in respect of or under any Antitrust Law) or Section 7.02(d) **[threatened or pending litigation]** **has not been satisfied as of the date of such termination but all other conditions to Closing** set forth in Section 7.01 and Section 7.02 **shall otherwise have been satisfied** (other than those conditions that by their nature are to be satisfied at Closing, but which conditions would have been satisfied if the Closing Date were the date of such termination), then  
...

# Antitrust reverse termination fee

- Standard provision

- Example: 2010 Hertz/Dollar Thrifty § 8.02(c) (con't)

then concurrently with such termination (in the case of a termination by Parent) or within three business days following such termination (in the case of a termination by the Company), **Parent shall pay to the Company a fee equal to \$44,600,000 (the “Parent Termination Fee”)** by wire transfer of immediately available funds to a bank account provided to Parent by the Company.

- Equal to about 3.7% of transaction value (\$44.6 million/\$1.2 billion)
- Statistics for strategic deal over the last three years
  - Mean: 4.7%
  - Median: 4.4%

# Antitrust reverse termination fee

- Carve-out for material breach
  - Example: 2010 Hertz/Dollar Thrifty § 8.03

Effect of Termination. In the event of **termination** of this Agreement by either the Company or Parent as provided in Section 8.01, this Agreement shall forthwith become **void and have no effect, without any liability or obligation on the part of Parent, Merger Sub or the Company** [with listed exceptions],

provided that nothing herein (including the payment of any amounts under Section 8.02) **shall relieve any party from any liability for any willful and material breach** hereof prior to such termination. For purposes of this Agreement, “willful and material breach” shall mean a material breach that is a consequence of an act undertaken by the breaching party with the actual knowledge that the taking of such act would, or would be reasonably expected to, cause a material breach of this Agreement . . . .

# Antitrust reverse termination fee

- Reimbursement of Seller's transaction expenses
  - Example: 2010 Hertz/Dollar Thrifty § 8.02(d)

**In the event that a Parent Termination Fee is payable** by Parent to the Company, Parent shall pay to the Company an amount equal to the sum of the Company's **documented Transaction Expenses** by wire transfer of immediately available funds to a bank account designated to Parent by the Company, as promptly as reasonably practicable (and, in any event, within three business days after the Company provides Parent with an invoice for such amount and related documentation); provided, that **in no event** shall Parent be required to reimburse the Company's Transaction Expenses **in excess of \$5,000,000 in the aggregate**

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# Avis Budget Enters the Bidding

# 2012 Hertz/Dollar Thrifty deal

## Contested Takeover Dance

April 26, 2010	Hertz signs agreement to DT buy for \$1.2 billion
May 3, 2010	Avis sends letter to DT saying it will make a “superior offer”
May 13, 2010	Avis files its HSR form for an open market purchase
May 14, 2010	Hertz files its HSR form for April 26 deal
June 15, 2010	Avis receives a second request
June 16, 2010	Hertz receives a second request
July 28, 2010	Avis offers \$1.33 billion (\$46.50 per share 80/20 cash/stock)
Aug. 3, 2010	DT rejects offer as “superior” because of: <ul style="list-style-type: none"><li>—Lack of deal certainty</li><li>—No antitrust reverse breakup fee</li></ul>
Aug. 31, 2010	Hertz releases comparative AT analysis <ul style="list-style-type: none"><li>—Avis is 3 → 2 in mid-tier value brands</li><li>—Avis closer in average rental price than Hertz to DT</li><li>—Avis would require a much larger brand divestiture</li><li>—Avis deal provides less contractual protection on AT risk (\$250m v. \$335m in U.S. HOHW revenue cap; no ARTF v. \$44.6m)</li></ul>

# 2012 Hertz/Dollar Thrifty deal

## Contested Takeover Dance

Sept. 2, 2010	Avis raises bid to \$1.36 billion —Rejects significance of ARTF —Hertz has higher leisure revenue than Avis Budget (AAA)
Sept. 12, 2010	Hertz to \$1.43 billion (\$50/share)
Sept. 23, 2010	Avis raises bid to \$1.5 billion (\$52.71/share v. \$50.25/share)
Sept. 24, 2010	Hertz affirms bid is “best and final”
Sept. 27, 2010	DT rejects Avis bid and affirms recommendation for Hertz merger
Sept. 27, 2010	Avis announces it will launch a (hostile) exchange offer for DT —Asks that DT shareholder vote be delayed from 9/30 until 12/30 (DT denies request)
Sept. 29, 2010	Hertz announces it will terminate merger agreement if DT shareholders reject merger agreement
Sept. 30, 2010	DT shareholders rejects Hertz merger agreement
Sept. 30, 2010	Hertz announces it will terminate 2010 merger agreement
Sept. 30, 2010	Avis reaffirms commitment to acquire DT and pursue exchange offer



# 2012 Hertz/Dollar Thrifty deal

## Contested Takeover Dance

Oct. 5, 2010	Avis and DT agree to cooperate in seeking regulatory approval
Jan. 11, 2011	FTC update—review continuing
May 9, 2011	Hertz offers \$2.1 billion (\$72/share 80/20) [ARTF ?]
May 12, 2011	Hertz and DT to cooperate in seeking regulatory approval
May 24, 2011	Hertz commences exchange offer for DT
June 6, 2011	DT recommends that shareholders take no action on either deal
July 14, 2011	Hertz files HSR form for exchange offer
Aug. 15, 2011	Hertz receives second request
Aug. 21, 2011	DT wants best and final offers by Oct. 10
Sept. 14, 2011	Avis pulls out of bidding
Oct. 10, 2011	No new proposals submitted by Hertz or Avis DT formally terminates solicitation process
Oct. 27, 2011	Hertz withdraws bid
Aug. 23, 2012	DT major shareholders say they would accept a \$2.4 billion bid
Aug. 27, 2012	Sign deal at \$2.3 billion (\$87.50/share in cash)

# 2012 Hertz/Dollar Thrifty deal

- Comparison with 2010 deal

	2010 Deal	2012 Deal
Total price	\$1.3 billion	\$2.3 billion
Price per share	\$41.00 (80/20)	\$87.50 cash
Deal structure	Rev. triangular	Tender offer*
Annual synergies	\$180 million	\$160 million
Termination date	12 months	4 months
HOHW cap	Advantage + ≤ \$175 m rev.	Advantage presold + undisclosed “Proposed Consent Agreement”**
ARTF	\$44.6 million	None
Reimbursement of expenses	Up to \$5 million	Up to \$5 million

\* Pursuant to Agreement and Plan of Merger between Hertz and Dollar Thrifty.

\*\* Probably already negotiated with the DOJ

# 2012 deal premium

## ■ Parameters

- Calculate concern value  $V_c$  of DTAG
  - Hertz set the corporate enterprise of DTAG postmerger at \$2.3 billion
  - Hertz said the multiple represented a 40% premium over DTAG's premerger multiple
  - Discounting for the 40% premium gives a  $V_c$  of \$1.4 billion
    - Almost 50% more than the \$932 million (after dividend) Hertz ascribed to Dollar Thrifty premerger in 2010
- Hertz claimed an expected annually recurring synergy gain of \$160 million
  - \$20 million less per year than Hertz claimed in 2010
  - Value as a 10-year annuity:

$$V_g = A \left[ \frac{1 - (1 + r)^{-n}}{r} \right] = \$160 \text{ million} \left[ \frac{1 - (1 + 0.07)^{-10}}{0.07} \right] = \$1.12 \text{ billion}$$

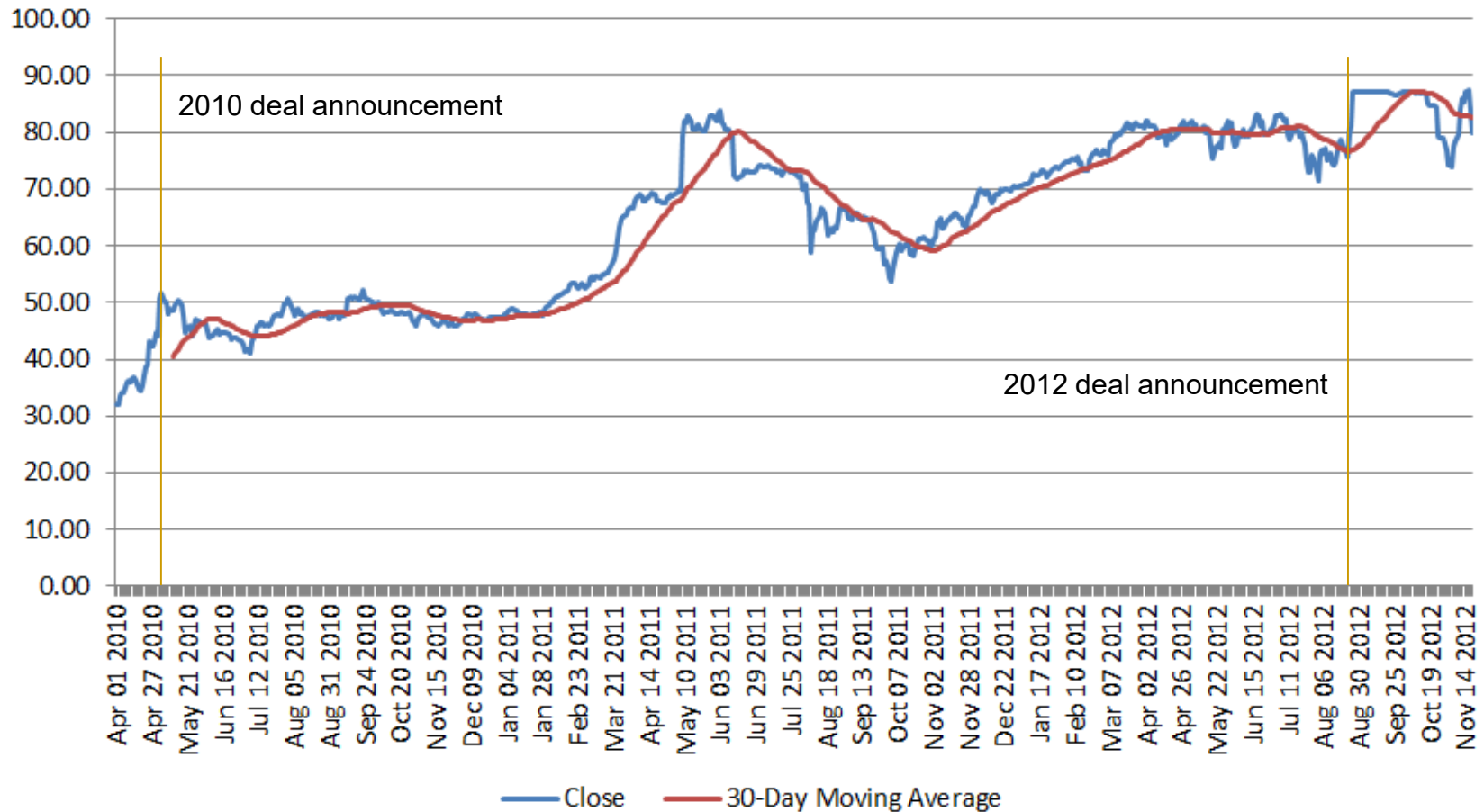
- So Hertz expects that the total value  $V_t$  of Dollar Thrifty postmerger will be:

$$\begin{aligned} V_t &= V_c + V_g = \$1.4 \text{ billion} + \$1.12 \text{ billion} \\ &= \$2.52 \text{ billion} \end{aligned}$$

Implies that Hertz, with an offer of \$2.3 billion, gave up most of the synergies to DTAG shareholders *under our assumptions*

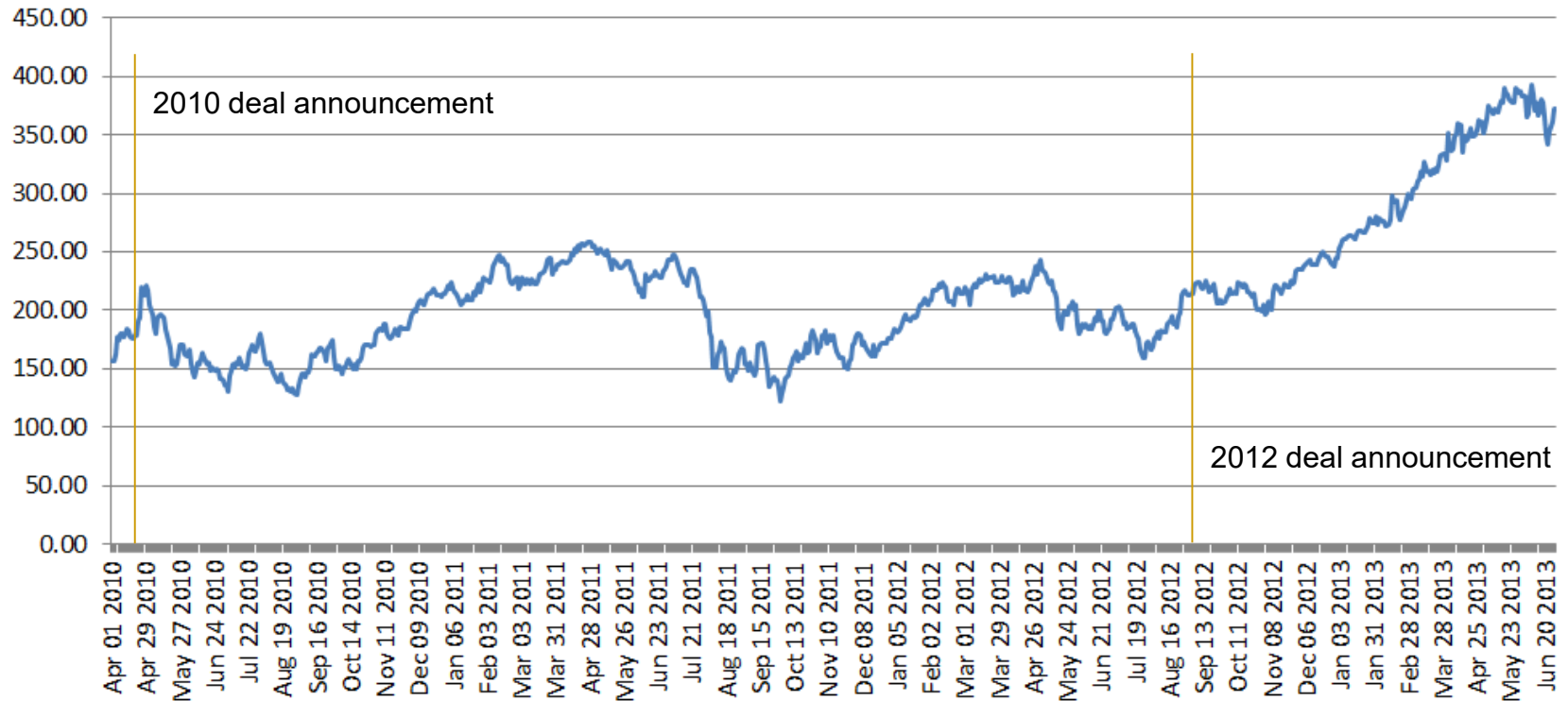
# Dollar Thrifty stock prices

## Dollar Thrifty Closing Prices April 1, 2010 — June 30, 2012



# Hertz stock prices

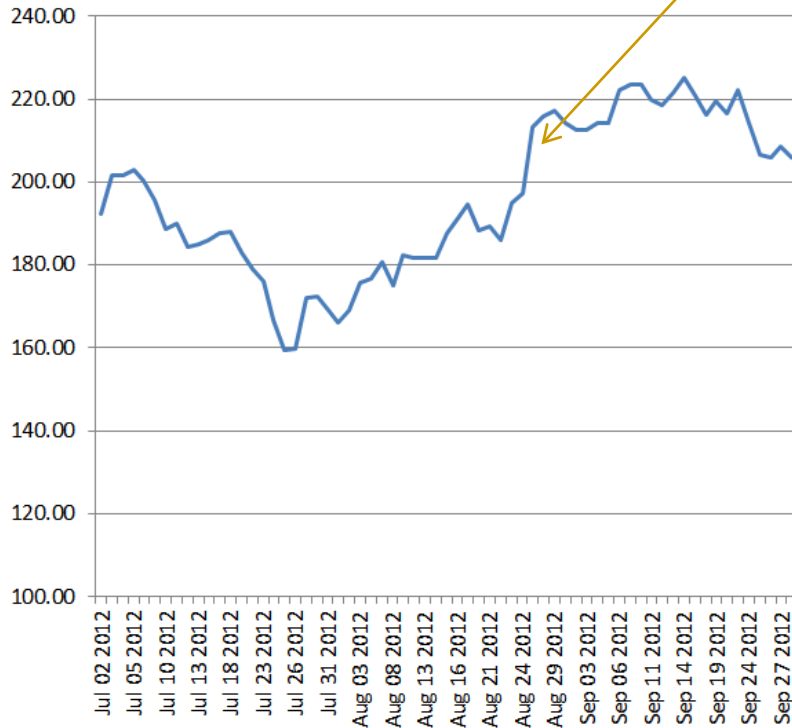
**Hertz Closing Prices**  
**April 1, 2010 — June 30, 2012**



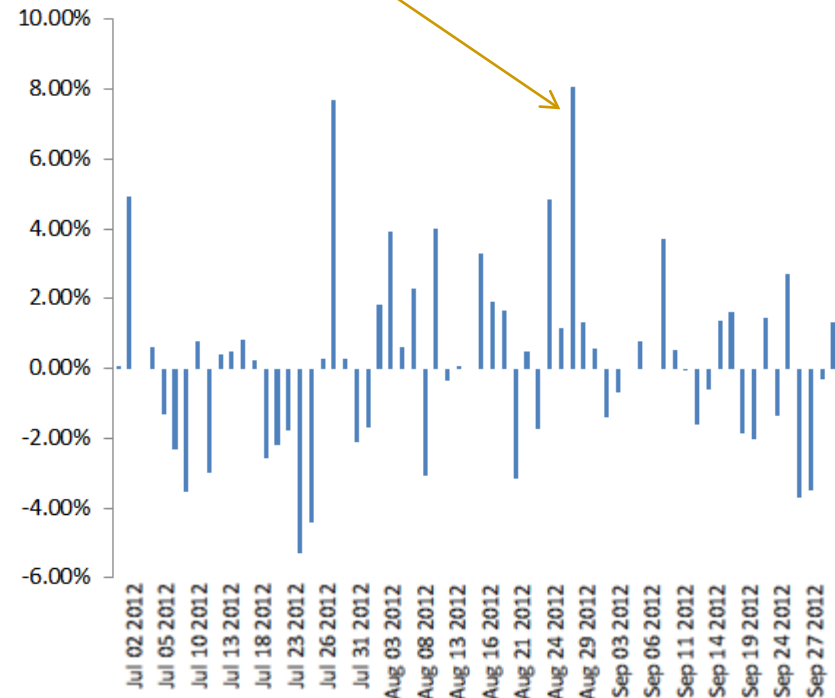
# Hertz stock prices

Announcement: + 8.06%

**Hertz Closing Prices  
July 2, 2012 — Sept. 28, 2012**



**Hertz Closing Prices  
Day-to-day percentage changes**



Query: Why did Hertz stock price jump up if Hertz gave up most the deal synergies to DTAG shareholders in the purchase price?

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# The FTC Consent Order

# FTC administrative complaint

- Issued November 15, 2012
  - Eight-month investigation (HSR filed July 12, 2012)
- Relevant markets
  - Product market: Airport car rentals
    - Alternative: Non-contracted airport car rentals (excludes rentals made at prenegotiated rates and terms)
  - Geographic markets: 72 airports
- Competitive effects
  - Eliminates direct competition between parties (all markets)
  - Eliminates future competition between parties (several markets)
  - Increases likelihood of unilateral exercise of market power by Hertz
  - Increases likelihood of coordinated interaction
  - Increases likelihood that customers will pay higher prices



# FTC administrative complaint

- No ease of entry—Need:
  - On-airport concession locations
  - Recognized brand
  - Relationships with online travel agencies and other distribution channels
  - Sufficient size to achieve economies of scale
- Violations
  - Acquisition, if consummated, would violate Clayton Act § 7 and FTC Act § 5
  - Acquisition agreement violates FTC Act § 5

# FTC consent order

- Agreement containing consent order(s)
  - Divestiture agreement negotiated and signed by parties prior to Commission vote
    - Buyer upfront consent decree
  - Parties
    - Hertz Global Holdings, Inc.—merging party
    - Franchise Services of North America Inc. (FSNA) (operates U-Save rental business)—divestiture buyer
    - Macquarie—providing financing for divestiture buyer

# FTC consent order

- Proposed consent order: Hertz to divest—
  1. Its Advantage Rent-a-Car business + 16 Dollar Thrifty on-airport locations where Advantage does not yet operate to FNSA/Macquarie jv
    - Advantage: 15 days after the Effective Date or December 12, 2012, whichever is later
    - DT assets: 90 days after the Effective Date
    - Purchase price: \$16 million—1/2 of what Hertz paid to acquire Advantage out of bankruptcy in 2009
  2. PLUS 13 Dollar Thrifty on-airport locations to FNSA/Macquarie jv or another Commission-approved buyer (post-acquisition)
    - 60 days after signing of Agreement to submit signed divestiture agreement
    - 6 months after the Effective Date to divest
- Hold to maintain assets
  - Contrast with Hold Separate Order

# FTC consent order

- Commission vote to provisionally accept consent order
  - 4-1, with Comm. Rosch dissenting from acceptance of consent order (insufficient as relief at several dozen airports)
- Subsequent events
  - November 26, 2012: Federal Register notice published to begin comment period
    - 30 days for the FTC under Commission rules
    - 60 days for the DOJ under the Tunney Act
  - December 17, 2012: Comment period ends
    - Six comments received
  - July 11, 2013: Final Commission acceptance
    - 3-0-1, with Rosch dissenting and Wright not participating

# Aftermath

- Divestiture arrangement and leasing risk
  - JV buyer to lease 24,000 vehicles from Hertz and bear the residual value risk
  - When JV began to turn over fleet, experienced significant losses
  - October 25, 2013: JV had lost \$8.6 million
- Deal falls apart
  - October 2, 2013: JV missed scheduled payment to Hertz
  - November 2, 2013
    - Refinancing negotiations fail
    - Hertz terminates Master Lease Agreement and seeks return of all leased vehicles
  - November 5, 2013: JV seeks bankruptcy protection

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# Aftermath

## ■ Subsequent transactions

- January 30, 2014: FTC grants FSNA's petition FTC to sell Advantage to Catalyst Capital Group (winning bidder in bankruptcy auction—40 locations, excluded 28)
- May 29, 2014: FTC grants FNSA's petition to sell 22 former Advantage locations to Hertz (10) and Avis (12)
- September 5, 2014: FTC grants FNSA's petition to sell Portland location to Avis and San Jose locations to Sixt Rent-A-Car