No. 12-4143

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

NOVELL, INC.,

Plaintiff-Appellant,

v.

MICROSOFT CORP.,

Defendant-Appellee.

Appeal from the United States District Court
for the District of Utah
(No. 2:04-CV-01045-JFM, Hon. J. Frederick Motz, U.S.D.J.)

BRIEF FOR AMICUS CURIAE AMERICAN ANTITRUST INSTITUTE SUPPORTING PLAINTIFF-APPELLANT'S PETITION FOR REHEARING EN BANC

RICHARD M. BRUNELL
General Counsel
AMERICAN ANTITRUST INSTITUTE
2919 Ellicott St., N.W.
Washington, D.C. 20008
202-600-9640

Oct. 29, 2013

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, the American Antitrust Institute states that it is a nonprofit corporation and, as such, no entity has any ownership interest in it.

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT i

TABLE OF AUTHORITIES...... ……………………………………………….iii

INTEREST OF AMICUS CURIAE 1

INTRODUCTION 2

ARGUMENT 3

I. PROFIT SACRIFICE IS NOT AN ESSENTIAL ELEMENT OF A REFUSAL-TO-DEAL CLAIM 3

II. THE PANEL MISAPPLIED THE CONCEPT OF PROFIT SACRIFICE 9

III. A HIGHLY RESTRICTIVE TEST FOR REFUSALS TO DEAL IS NOT APPROPRIATE IN NETWORK MARKETS 11

CONCLUSION 13

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(C) ....

CERTIFICATE OF SERVICE ....

CERTIFICATE OF DIGITAL SUBMISSION ....

TABLE OF AUTHORITIES

Cases | Page

Aspen Skiing Co. v. Aspen Highlands Skiing Corp.,
472 U.S. 585 (1985) 3, 5, 8

Christy Sports, LLC v. Deer Valley Resort Co.,
555 F.3d 1188 (10th Cir. 2009)...4, 5

Eastman Kodak Co. v. Image Tech. Servs., Inc.,
504 U.S. 451 (1992) 5

Four Corners Nephrology Assocs., P.C. v. Mercy Med. Ctr. of Durango, 582 F.3d 1216 (10th Cir. 2009) 4, 5

Law v. NCAA, 134 F.3d 1010 (10th Cir. 1998) 9

Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal and Prof'l Publ'ns, Inc., 63 F.3d 1540 (10th Cir. 1995) 5

Olympia Equip. Leasing Co. v. W. Union Tel. Co.,
797 F.2d 370 (7th Cir. 1986)...6

Otter Tail Power Co. v. United States,
410 U.S. 366 (1973) 6

United States v. Microsoft Corp.,
253 F.3d 34 (D.C. Cir. 2001) 8, 10, 11

Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP,
540 U.S. 398 (2004) 3, 4

Other Authorities

Phillip E. Areeda & Herbert Hovenkamp,
Antitrust Law (3d ed. 2008 & Supp. 2013) 7, 8, 11, 12

Phillip Areeda & Donald Turner, *Antitrust Law* (1978)..5

Robert Bork, *The Antitrust Paradox* (1978) 5

Einer Elhauge, *Defining Better Monopolization Standards*,
56 Stan. L. Rev. 253 (2003) 7, 8, 11

Andrew I. Gavil, *Exclusionary Distribution Strategies By Dominant Firms: Striking A Better Balance*, 72 Antitrust L. J. 3 (2004) 4

Herbert Hovenkamp, *The Obama Administration and Section 2 of the Sherman Act*, 90 B.U. L. Rev. 1611 (2010) 12

A. Douglas Melamed, *Exclusive Dealing Agreements and Other Exclusionary Conduct—Are There Unifying Principles?*, 73 Antitrust L. J. 375 (2006) 7

Steven C. Salop, *Exclusionary Conduct, Effect on Consumers, and the Flawed Profit-Sacrifice Standard*, 73 Antitrust L. J. 311 (2006) 6, 7, 11

John Vickers, *Abuse of Market Power*, 115 Econ. J. F244 (2005) 6, 8

Philip J. Weiser, *Regulating Interoperability: Lessons From* AT&T*,* Microsoft*, and Beyond*, 76 Antitrust L. J. 271 (2009) 12

Gregory J. Werden, *Identifying Exclusionary Conduct Under Section 2: The "No Economic Sense" Test*, 73 Antitrust L. J. 413 (2006) 7, 8

INTEREST OF AMICUS CURIAE

All parties have consented to the filing of this brief. The American Antitrust Institute (AAI) is an independent and non-profit education, research, and advocacy organization devoted to advancing the role of competition in the economy, protecting consumers, and sustaining the vitality of the antitrust laws. AAI is managed by its Board of Directors with the guidance of an Advisory Board consisting of over 125 prominent antitrust lawyers, law professors, economists and business leaders.[1] AAI submits that rehearing en banc is necessary to correct the Panel's adoption and misuse of the so-called "profit sacrifice test" as an essential element of liability for a refusal to deal. If allowed to stand, the ruling would impair the ability of innovative companies and the government to prevent monopolists that dominate critical sectors of the economy from denying or degrading access to their networks to rivals who pose a threat to the network

[1] The Board of Directors alone has approved this filing; individual views of members of the Board of Directors or Advisory Board may differ from AAI's positions. Pursuant to Fed. R. App. P. 29(c)(5), amicus states that no counsel for a party has authored this brief in whole or in part, and no party, party's counsel, or any other person or entity – other than AAI or its counsel – has contributed money that was intended to fund preparing or submitting this brief. Two members of AAI's Advisory Board are attorneys at firms that represent appellant Novell, and one member was an expert for Novell at trial; none played any role in the Directors' deliberations or the drafting of the brief.

monopoly, even when such exclusion harms consumers and has no legitimate justification.

INTRODUCTION

Novell claims that Microsoft, just prior to the launch of Windows 95, withdrew certain APIs Novell needed to compete effectively against Microsoft's office productivity suite, and that Microsoft withdrew the APIs for the purpose of retarding Novell's (and other rivals') growth relative to Microsoft Office, thereby preserving Microsoft's operating system monopoly. The theory was that Microsoft's control of key applications preserved its operating system monopoly because popular applications like WordPerfect were available across platforms and contained middleware that might erode the applications barrier to entry (the same theory as the government's *Microsoft* case involving the browser), and because any rival operating system would need access to the most popular applications to compete effectively. The Panel affirmed the trial court's dismissal of the complaint under Rule 50 on the ground that no reasonable jury could find that Microsoft's conduct was "exclusionary" for purposes of Section 2 of the Sherman Act, *regardless of the purpose and effect of the conduct on the operating systems market*, because the conduct was profitable in the applications market and therefore Novell could not satisfy a profit-sacrifice test. The Panel's decision—

which goes well beyond the reasoning of either the district court or Microsoft[2]—is fundamentally flawed because refusal-to-deal claims do not require a showing of profit sacrifice, and the Panel misapplied the concept in any event by equating profits with efficiency.[3]

ARGUMENT

I. PROFIT SACRIFICE IS NOT AN ESSENTIAL ELEMENT OF A REFUSAL-TO-DEAL CLAIM

The Panel held that a refusal-to-deal claim is subject to a "profit sacrifice test," which it described as requiring a plaintiff to show that "the monopolist's discontinuation of [a] preexisting course of dealing must 'suggest[] a willingness to forsake short-term profits to achieve an anti-competitive end.'" Op. at 21 (quoting *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 409 (2004) describing *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585

[2] The district court discussed the profit-sacrifice issue in a footnote. It did cite profits from applications as the reason for rejecting Novell's argument that Microsoft had sacrificed short-term profits, but it did not suggest that profit sacrifice was a necessary element of Novell's claim. J.A. 219 n.18. Moreover, the court "recognize[d] that this conclusion may appear somewhat disturbing because arguably it rewards Microsoft for unsavory behavior in the applications market." *Id.* Microsoft itself barely mentioned the lack of profit sacrifice. Microsoft Br. at 49 n.28 (Jan. 23, 2013).

[3] Except as noted below, AAI takes no position on whether there was sufficient evidence to support Novell's theory as to the purpose and effect of Microsoft's conduct, or any of the other bases on which the district court dismissed the complaint. However, AAI agrees with Novell's argument that the Panel erred by not properly taking into account that Microsoft's conduct was not merely a passive failure to assist rivals.

(1985)) (second alteration in original). However, neither *Trinko*, nor *Aspen*, nor this court's decisions in *Christy Sports, LLC v. Deer Valley Resort Co.*, 555 F.3d 1188 (10th Cir. 2009), and *Four Corners Nephrology Assocs., P.C. v. Mercy Med. Ctr. of Durango*, 582 F.3d 1216 (10th Cir. 2009), impose any such requirement.

In *Trinko*, the Supreme Court explained that profit sacrifice can demonstrate a defendant's anticompetitive intent, noting that in *Aspen*, defendant's termination of a voluntary course of dealing and unwillingness to renew the multi-mountain pass even if compensated at retail price "revealed a distinctly anticompetitive bent." *Trinko*, 540 U.S. at 409. Because Verizon had been compelled to deal by statute, however, its prior conduct "sheds no light upon the motivation of its refusal to deal—upon whether its regulatory lapses were prompted not by competitive zeal but by anticompetitive malice." *Id.* The Court added, "Verizon's reluctance to interconnect at the cost-based rate of compensation under § 251(c)(3) tells us nothing about dreams of monopoly." *Id.*

As Professor Gavil observes, *Trinko*'s "observation that Aspen's sacrifice of profits evidenced its anticompetitive intentions . . . is a far cry from a wholesale endorsement of 'sacrifice' as a *necessary* condition for" liability. Andrew I. Gavil, *Exclusionary Distribution Strategies By Dominant Firms: Striking A Better Balance*, 72 Antitrust L. J. 3, 58 (2004). Rather, as this Court explained in *Christy Sports*, "The critical fact in *Aspen Skiing* was that there were no valid business

reasons for the refusal." 555 F.3d at 1197; *see Four Corners Nephrology*, 582 F.3d at 1225 ("in *Christy Sports*, we held that 'the key fact' permitting liability in *Aspen Skiing* 'was that the defendant terminated a profitable relationship without any economic justification' other than an anticompetitive one").

Trinko did not repudiate the general test for exclusionary conduct articulated in *Aspen*, namely that "[i]f a firm has been 'attempting to exclude rivals on some basis other than efficiency,' it is fair to characterize its behavior as predatory." *Aspen Skiing*, 472 U.S. at 605 (quoting Robert Bork, *The Antitrust Paradox* 138 (1978)). Stated differently, "'exclusionary' comprehends at the most behavior that not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way.'" *Id.* at 605 n.32 (quoting Phillip Areeda & Donald Turner, *Antitrust Law* 78 (1978)); *see also Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 483 (1992) (where Kodak sought to maintain its parts monopoly and use its control over parts to strengthen its monopoly in service by, among other things, refusing to sell parts to rivals, "[l]iability turns . . . on whether 'valid business reasons' can explain Kodak's actions"); *Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal and Prof's Publ'ns, Inc.*, 63 F.3d 1540, 1550 (10th Cir. 1995) ("practices are illegal if they impair opportunities of rivals and are not competition on the merits or are more restrictive than reasonably necessary for such

competition, if the conduct appears reasonably capable of contributing significantly to creating or maintaining monopoly power") (internal quote marks omitted).

Profit sacrifice is relevant because it is *one* way to show anticompetitive intent or lack of a legitimate justification. If a monopolist is sacrificing profits in a manner that makes no sense but for its elimination or lessening of competition, the implication is that there is no legitimate business or efficiency justification. However, anticompetitive purpose or the lack of a legitimate business justification may be demonstrated in other ways, as Novell apparently did here through documentary evidence and testimony. *See* Steven C. Salop, *Exclusionary Conduct, Effect on Consumers, and the Flawed Profit-Sacrifice Standard*, 73 Antitrust L.J. 311, 313, 355 (2006); John Vickers, *Abuse of Market Power*, 115 Econ. J. F244, F254 (2005). Another way is to show that the monopolist's refusal to deal discriminates on the basis of rivalry. *See, e.g., Otter Tail Power Co. v. United States*, 410 U.S. 366, 378 (1973); *Olympia Equip. Leasing Co. v. W. Union Tel. Co.*, 797 F.2d 370, 376 (7th Cir. 1986).[4]

---

[4] Using logic that is difficult to grasp, the Panel declined to opine "whether discrimination is essential for success in a refusal to deal case or just helpful to its cause," because "Novell's refusal to deal claim fails anyway." Op. at 29-30 n.4. Obviously, if it is "helpful," it ought to be considered. At the same time, the Panel said it was unsure "how a discrimination rule might apply to a situation like this case where the contested conduct (withdrawing [the APIs]) affected *only* rivals." *Id.* But given Microsoft's practice of making APIs available, if the only ones

As a requirement, a profit-sacrifice test is problematic because anticompetitive exclusion can be fully profitable, even in the short run, as the advocates of the "no economic sense" variant cited by the Panel recognize. *See* Gregory J. Werden, *Identifying Exclusionary Conduct Under Section 2: The "No Economic Sense" Test*, 73 Antitrust L.J. 413, 424 (2006) ("anticompetitive gains from exclusionary conduct sometimes can be reaped immediately"); A. Douglas Melamed, *Exclusive Dealing Agreements and Other Exclusionary Conduct—Are There Unifying Principles?*, 73 Antitrust L. J. 375, 391 (2006). And this is true in the refusal-to-deal context, as in others. Indeed, even in *Aspen*, defendant's conduct *overall* appears to have been profitable right from the start. Its market share increased in the first year, and it presumably sold more three-mountain weekly passes. *See* Einer Elhauge, *Defining Better Monopolization Standards*, 56 Stan. L. Rev. 253, 287-88 (2003); 3B Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 772c, at 209 n.37 (3d ed. 2008).

To be sure, the "no economic sense" variant, which requires no actual sacrifice of profits, is not subject to this critique. *See* Salop, *supra*, at 359 ("there is a *conceptual* profit sacrifice even if there is no *temporal* profit sacrifice"). But the no-economic sense variant is flawed too because it requires a court to

---

withdrawn were those used by rival applications (or primarily by rival applications), the case for discrimination on the basis of rivalry would appear to be quite strong.

distinguish between the profit gains from the challenged conduct "attributable to legitimate competition on the merits" and those attributable "to the elimination of competition," Werden, *supra*, at 420-2l, which is the very problem the test purports to resolve. *See* Vickers, *supra*, at F254 ("while the sacrifice test might be useful in assessing wilfulness or intent, it does not naturally yield a substantive standard of what behaviour is exclusionary"); Elhauge, *supra*, at 293 (criticizing sacrifice test because it "beg[s] the question" of what the criteria are for distinguishing between desirable and undesirable profits and obscures the underlying efficiency inquiry).

Finally, a profit-sacrifice test (of whatever variant) is also incomplete because, as the Panel recognized, if it is satisfied, "it isolate[s] conduct that has *no* possible efficiency justification," Op. at 27, whereas the rule of reason condemns conduct whose anticompetitive effect outweighs its procompetitive benefits. *See, e.g., United States v. Microsoft Corp.*, 253 F.3d 34, 58-59 (D.C. Cir. 2001) (en banc); *Aspen*, 472 U.S. at 597 (approving instruction that required jury to determine whether policies "were designed *primarily* to further any domination of the relevant market") (emphasis added); 3 Areeda & Hovenkamp, *supra*, ¶ 651b3, at 104 (noting that profit-sacrifice test would allow "an act [that would] benefit the defendant very slightly while doing considerable harm to the rest of the economy").

II. THE PANEL MISAPPLIED THE CONCEPT OF PROFIT SACRIFICE

The Panel erroneously concluded that Novell could not satisfy a profit-sacrifice test because even if Microsoft sacrificed profits in the operating system market (by making Windows less attractive), Microsoft's conduct was undoubtedly profitable in the applications market and apparently profitable overall. The Panel failed to appreciate that "profitable" is not the same thing as a legitimate business justification, or efficiency, or competition on the merits. *Cf. Law v. NCAA*, 134 F.3d 1010, 1023 (10th Cir. 1998) ("mere profitability" is not a defense under the antitrust laws, in contrast to "increasing output, creating operating efficiencies, making a new product available, enhancing product or service quality, and widening consumer choice"). More specifically, it failed to recognize that under a profit-sacrifice test, the profits earned from exclusion that has no legitimate justification do not legitimize that conduct. And this is true regardless of whether the profits are earned in markets that the plaintiff does not claim are unlawfully monopolized.

For example, if a monopolist of product A also makes product B (but is not a monopolist or near monopolist in product B) and burns down its rival's plant (which also makes products A and B) and thereby maintains its monopoly in product A, any extra profits gained from product B would not somehow be exculpatory. More realistically, if Microsoft earned ancillary revenues from

Internet Explorer and sought to monopolize the browser market to protect its operating system monopoly *and* to increase profits from the browser, the result in *United States v. Microsoft* would not have been any different; those extra browser profits would not have provided a legitimate business justification even if, as the D.C. Circuit held, the government failed to show that Microsoft was guilty of attempting to monopolize the browser market. 253 F.3d at 80-84. And if Microsoft had refused to allow Novell access to *any* of its APIs and thereby made WordPerfect essentially non-functional on the Windows platform, and did so for the specific purpose of putting Novell out of business to maintain its Windows monopoly *and* to earn more revenue from Microsoft Word and Office, the fact that the exclusion would be entirely profitable should not make the conduct lawful, although it would be legal under the Panel's reasoning.[5]

In short, in the absence of a legitimate business justification (and delaying your rival's product so you can get a leg up hardly qualifies), the Panel erred by treating the extra profits earned by Microsoft in the applications market as profits attributable to "competition on the merits" rather than to the "elimination of competition."

---

[5] That Novell had no claim against Microsoft for attempting to monopolize applications would not (and does not) mean that the anticompetitive effects of the challenged conduct in the applications market should be counted as "procompetitive" in an action for monopolizing the operating systems market.

III. A HIGHLY RESTRICTIVE TEST FOR REFUSALS TO DEAL IS NOT APPROPRIATE IN NETWORK MARKETS

The Panel also erred by grounding its highly restrictive approach to refusals to deal on the general policy concerns with "forced sharing" cited in *Trinko* (innovation, "collusion" and "central planning") without considering whether those concerns are present in this case.[6] Indeed, a restrictive approach is not warranted in unregulated network markets, like those at issue here, that depend upon interoperability. *Cf. Microsoft*, 253 F.3d at 65 (applying normal rule of reason to product-design claims, notwithstanding reasons for judicial skepticism). When a monopolist controls a ubiquitous platform to which rivals need access in order to compete effectively, as is increasingly common in our networked economy, and the monopolist ordinarily provides access to others, a refusal to deal can have particularly harmful consequences for consumers and dynamic competition, and

[6] The Panel repeatedly emphasized the risk of promoting "collusion" and of "central planning," Op. at 17, 24, 28, 31, yet insofar as these concerns are relevant in a case that seeks only damages, it is obvious that the terms of dealing could be easily established based upon the prior course of dealing, as the Panel at one point recognizes. *Id.* at 21. Moreover, the risk of collusion seems remote. *See* 3B Areeda & Hovenkamp, *supra*, ¶ 772f, at 233 ("risk of collusion presumably diminishes as the shared input is further removed from the price-setting process"). Likewise, the risk that imposing liability would undermine the incentives of Microsoft (or similarly situated monopolists) to invest in its Windows platform also seems minimal, *cf.* Elhauge, *supra*, at 308-09 (course of dealing with non-rivals undermines investment incentives argument), while the harm to innovation if rivals cannot depend on continued access to APIs seems severe, *cf.* Salop, *supra* at 350 ("anticompetitive exclusion . . . reduce[s] innovation in dynamic markets by eliminating rivals that would innovate and by decreasing competitive pressure that would force the monopolist to innovate").

can be remedied without the concerns that may otherwise militate against imposing a "duty to deal" under Section 2.

As the Areeda & Hovenkamp treatise explains, "Refusals to deal in dominated, path-dependent networks can have a much different look than refusals to deal generally." Areeda & Hovenkamp, *supra*, ¶ 772h, at 340 (Supp. 2013); *see generally* Herbert Hovenkamp, *The Obama Administration and Section 2 of the Sherman Act*, 90 B.U. L. Rev. 1611, 1632 (2010) ("Liability [for refusal to deal] can make sense in network industries, such as computer operating systems and applications software, in which the network has evolved with multiform participation and cooperation is necessary for the network's continued efficient operation."); *see also* Philip J. Weiser, *Regulating Interoperability: Lessons From* AT&T*,* Microsoft*, and Beyond*, 76 Antitrust L. J. 271, 273 (2009) (explaining that antitrust oversight in network industries is necessary because "cooperation is essential for rivals of dominant firms to have any chance of success in the marketplace").

CONCLUSION

For the foregoing reasons, the Court should grant Novell's petition for rehearing *en banc.*

Respectfully submitted,

s/ Richard Brunell

RICHARD M. BRUNELL
General Counsel
AMERICAN ANTITRUST INSTITUTE
2919 Ellicott St., N.W.
Washington, D.C. 20008
(202) 600-9640

October 29, 2013

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 29.1, this amicus brief is proportionately spaced, has a typeface of 14 points, and contains 2991 words, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

s/ Richard Brunell

October 29, 2013

CERTIFICATE OF SERVICE

I hereby certify that on October 29, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

s/ Richard Brunell

October 29, 2013

CERTIFICATE OF DIGITAL SUBMISSION

I certify that a copy of the foregoing document as electronically filed with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit in Digital Form via the Court's CM/ECF system is an exact copy of the written document filed with the Clerk, that all required privacy redactions have been made, and that the digital transmission has been scanned for viruses.

s/ Richard Brunell

October 29, 2013