No. 18-2852

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

VIAMEDIA, INC.,

Plaintiff-Appellant,

v.

COMCAST CORPORATION and COMCAST CABLE COMMUNICATIONS MANAGEMENT, LLC,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 1:16-cv-05486, The Honorable Amy J. St. Eve, District Judge

BRIEF FOR THE AMERICAN ANTITRUST INSTITUTE AND PUBLIC KNOWLEDGE AS AMICI CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT

RICHARD M. BRUNELL
Counsel of Record
RANDY M. STUTZ
AMERICAN ANTITRUST INSTITUTE
1025 Connecticut Avenue, NW
Suite 1000
Washington, DC 20036
(202) 600-9640
rbrunell@antitrustinstitute.org

Counsel for Amici Curiae

November 1, 2018

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 18-2852

Short Caption: Viamedia, Inc. v. Comcast Corp. et al.

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None. Both amici are not-for-profit corporations

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Attorney's Signature: s/ Richard M. Brunell Date: 11-1-2018

Attorney's Printed Name: Richard M. Brunell

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** X **No** ____

Address: 1025 Connecticut Avenue, NW, Suite 1000, Washington, DC 20036

Phone Number: 202-600-9640 Fax Number: N/A

E-Mail Address: rbrunell@antitrustintitute.org

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None

Attorney's Signature: s/ Randy M. Stutz Date: 11-1-2018

Attorney's Printed Name: Randy M. Stutz

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ______ **No** X

Address: 1025 Connecticut Avenue, NW, Suite 1000, Washington, DC 20036

Phone Number: 202-905+5420 Fax Number: N/A

E-Mail Address: rstutz@antitrustintitute.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES AND RULES

OTHER AUTHORITIES

INTEREST OF AMICI CURIAE[1]

The American Antitrust Institute ("AAI") is an independent nonprofit organization devoted to promoting competition that protects consumers, businesses, and society. It serves the public through research, education, and advocacy on the benefits of competition and the use of antitrust enforcement as a vital component of national and international competition policy. AAI enjoys the input of an Advisory Board that consists of over 130 prominent antitrust lawyers, law professors, economists, and business leaders. See http://www.antitrustinstitute.org.

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[1] All parties consent to the filing of this amicus brief. No counsel for a party has authored this brief in whole or in part, and no party, party's counsel, or any other person—other than amici or their counsel—has contributed money that was intended to fund preparing or submitting this brief. Individual views of members of the American Antitrust Institute's Board of Directors or its Advisory Board may differ from its positions.

STATEMENT OF THE CASE

This appeal raises two very important questions of antitrust law. First, what is the appropriate test for establishing an unlawful refusal to deal with a competitor under Section 2 of the Sherman Act? Second, what is the appropriate standard for evaluating evidence on summary judgment on Section 2 claims more generally? The district court applied standards that are too demanding of plaintiffs and not warranted by *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004), or *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). The court also erred by evaluating acts of monopolistic conduct in isolation, contrary to the teaching of *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962). As a result, the court improperly denied the plaintiff the opportunity to prove its claim that Comcast unlawfully monopolized an important component of the cable television advertising business and eliminated competition that benefits smaller, independent cable television operators, local advertisers, and ultimately the consumers of cable video programming.

According to the complaint, the spot cable advertising business "generates over $5.4 billion in television advertising revenues annually through the sale of Spot Cable Advertising time [Spot Cable Avails] during the two to three minute commercial breaks on cable networks that are reserved for sale by local cable television service providers" and other multichannel video program distributors

(MVPDs). Compl. ¶¶ 3, 23.[2] Plaintiff-appellant Viamedia "represents" MVPDs in "[o]rganizing, marketing, and selling" their inventory of spot advertising. *Id.* at ¶ 70. It "offers its MVPD clients complete turn-key advertising sales, spot insertion, encoding, validation, IT, monitoring, traffic, billing, and collection services." *Id.* at ¶ 75. It competes in the market for spot advertising representation services (Ad Rep Services) with Comcast Spotlight, a division of defendant-appellee Comcast Corp., which is an MVPD and "the world's largest broadcast and cable television provider." *Id.* at ¶ 8.

The complaint alleges that Comcast has "monopoly control" over various regional advertising interconnects, which "provide a single point of access for advertisers to purchase Spot Cable Avails that are capable of reaching *all* subscribers within a" designated market area (DMA). Compl. ¶¶ 154, 192. Access to such interconnects is essential for smaller MVPDs "to remain competitive with large competitors like Comcast." *Id.* at ¶¶ 69, 192. Regional interconnects constitute "critical infrastructure" for MVPDs to sell Spot Cable Avails to regional advertisers, which generates a "significant portion of an MVPD's total advertising revenue." *Id.* at ¶¶ 46, 66.

Historically, interconnects were joint ventures of cable operators open to all MVPDs in the region or to their advertising representative. Compl. ¶¶ 36, 38. Even after cable industry consolidation enabled it to acquire control of various interconnects, Comcast for a time provided access to all MVPDs and their representa-

[2] References to the complaint are to the Amended Complaint, ECF No. 40 (Pl. App., Vol. I, A48).

tives. *Id.* at ¶ 99; *see also* Pl. Br. 10-11. Comcast, other MVPDs, and advertisers benefitted from open access because the more MVPDs that participate, the greater is the reach and volume of the advertising sold through the interconnect. Compl. ¶¶ 99, 155. Notwithstanding their cooperation with respect to sales of DMA-wide advertising, MVPDs historically "have vigorously competed with Comcast and each other for [local] Spot Cable Advertising sales." *Id.* ¶¶ 41, 64.

The complaint alleges that Comcast also has monopoly power over Ad Rep Services in DMAs where it controls the interconnect. Compl. ¶¶ 85-94, 181. Viamedia was able to compete successfully with Comcast in some of these markets (e.g., Chicago and Detroit) until Comcast refused to renew interconnect agreements with Viamedia in order "to replace Viamedia" as the ad representative for two MVPDs. *Id.* at ¶ 112. Comcast "made clear" that it would not allow the MVPDs to have access to those interconnects as long as Viamedia represented them, and that it would not provide Viamedia access to other interconnects that it controls. *Id.* at ¶¶ 113, 125, 182.

The complaint alleges that "[b]y refusing to deal with Viamedia and MVPDs represented by Viamedia, by conditioning access to Interconnects upon an MVPD's agreement to deal with Comcast Spotlight, [and] by requiring that MVPDs deal exclusively with Comcast Spotlight as a Spot Cable Advertising Representative, . . . Comcast has unlawfully acquired and maintained its monopoly power" in Ad Rep Services markets where it controls the interconnect, in violation of Section 2 of the Sherman Act. Compl. ¶ 183.

Comcast's monopolization of those markets by excluding Viamedia has the anticompetitive effect of allowing Comcast "to impose higher prices and other onerous terms on MVPDs." Compl. ¶ 171. Specifically, the complaint alleges that competition is harmed because independent representation by Viamedia "offers a number of pro-competitive advantages to MVPD[s]" over representation by Comcast. *Id.* at ¶ 81. MVPDs prefer not to give control of their spot advertising to their largest competitor. *Id.* at ¶¶ 108, 171. Doing so allows Comcast to have sensitive business information, including "before-market knowledge of their future pricing [and] promotions" contained in an MVPD's promotional spot advertising. *Id.* at ¶¶ 107, 173. And Comcast has an obvious incentive to favor the sale of its own local spot advertising over the sale of its rivals'.

Indeed, the complaint alleges that competition with respect to local spot advertising "is eliminated when one MVPD is able to control its competitors' Spot Cable Avails," harming not only smaller MVPDs, but small business advertisers as well. *Id.* at ¶ 64; *see also id.* at ¶ 2. In contrast, an independent ad representative like Viamedia has the incentive to market its clients' local advertising aggressively, as well as the ability to monitor and ensure that the interconnect manager provides fair treatment of its MVPD clients. *Id.* at ¶ 82.

The complaint alleges that there "are no procompetitive justifications for Comcast's refusal to deal with Viamedia and its exclusion of MVPDs represented by Viamedia from the Interconnects that it controls." Compl. ¶ 165. "[D]ealing with Viamedia would have entailed no cost to Comcast as the Interconnect manager, [but rather] would have provided [it] . . . as the Interconnect manager and as a participating MVPD . . . with immediate benefits." *Id.* at ¶ 158.

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Treating the complaint as if it involved separate claims for refusing to deal, tying, and exclusive dealing, the district court granted Comcast's motion to dismiss the refusal-to-deal claim, but not the latter two claims. The court accepted that the complaint adequately alleged that Viamedia's exclusion from Ad Rep Services markets harmed competition, but found the complaint defective because it failed to "explain[] how Defendants' refusal to deal with it—separate from Defendants' other conduct like conditioning MVPDs' access to Interconnects on accepting Comcast Spotlight's services even for advertising sales that do not involve an Interconnect—has no rational procompetitive purpose." Mem. Op. & Order at 37, Nov. 4, 2016 (MTD Op.). Rather, the court theorized that Comcast's refusal to deal with Viamedia, "at least with respect to the portion of advertising sales made through Interconnects, . . . offers potentially improved efficiency" by eliminating Viamedia as the middleman with respect to those sales. *Id.* at 38. On the same grounds, the court dismissed the refusal-to-deal claim set forth in plaintiff's amended complaint. Mem. Op. & Order, Feb. 22, 2017 (MTD Op. II).

On summary judgment, the district court dismissed the remaining claims because, among other reasons, Viamedia had failed to present evidence that "tends to exclude the possibility" that Comcast was engaged in lawful conduct. Mem. Op. & Order at 22-23, Aug. 16, 2018 (SJ Op.). On appeal, Viamedia challenges the dismissal of the refusal-to-deal claim as well as the grant of summary judgment on the tying claim; it is not pursuing a distinct exclusive-dealing claim. Pl. Br. 18 n.5.

SUMMARY OF ARGUMENT

1. a. The district court applied an overly demanding test for refusals to deal. Neither the Supreme Court nor this Court has adopted a requirement that a plaintiff must show that a monopolist has sacrificed profits (although such a sacrifice is alleged here), that the monopolist's conduct is irrational but for its anticompetitive effect, or that the monopolist's refusal to deal serves *no* potential procompetitive purpose.

b. The complaint states a prima facie claim for an unlawful refusal to deal because it alleges: (i) Comcast's refusal to deal enabled it to extend or preserve its monopoly in markets for Ad Rep Services, which had anticompetitive effects on "consumers," i.e., independent MVPDs and advertisers; (ii) Comcast acted with a predatory intent, as reflected in its sacrifice of profits and discrimination on the basis of rivalry (i.e., willingness to deal with non-competitors but not a rival); and (iii) the policy concerns that tend to militate against a "duty to deal"—administrability, diminishing investment incentives, and fostering collusion—are not present here.

c. The court erred in accepting Comcast's "disintermediation" defense, because a procompetitive justification must be proved not merely posited. Moreover, vertical integration is not a sufficient defense for a refusal to deal that involves monopolization of both of the vertically related markets. Disintermediation may or may not be efficient, but it is the supplier's choice that is presumptively determinative, not the middleman's. In any event, Comcast's disintermediation defense applies only to sales made by the interconnect, but the complaint alleges that Comcast's refusal to deal was intended to and did enable Comcast to take over all of Viamedia clients' spot advertising sales and to monopolize Ad Rep Services markets.

2. a. The district court applied an overly demanding standard for plaintiffs to avoid summary judgment on a Section 2 claim. The Supreme Court stated in *Matsushita* that a party opposing summary judgment must present evidence that "tends to exclude the possibility that the alleged conspirators acted independently." 475 U.S. at 588 (internal quotation marks omitted). But that requirement applies only to conspiracies. The district court erred in extending it to antitrust claims generally by requiring evidence that tends to exclude the possibility that a defendant engaged in lawful conduct.

b. The district court's disaggregation of plaintiff's monopolization claim into separate and independent claims for refusing to deal and tying led it to discount each of the claims improperly. The court failed to heed the rule that an antitrust plaintiff should be given the full benefit of its proof without tightly compartmentalizing the various factual components. The court should have recognized that the refusal-to-deal and tying claims reinforced each other, given the common object of Comcast's conduct to monopolize Ad Rep Services markets.

ARGUMENT

I. THE DISTRICT COURT IMPROPERLY DISMISSED PLAINTIFF'S REFUSAL-TO-DEAL CLAIM

A. The District Court's Test for Refusals to Deal Is Too Demanding

The district court held that, in order to state an actionable refusal-to-deal claim, a plaintiff must show not only that "'the monopolist decided to forsake short-term profits,'" but also that "'the monopolist's conduct must be irrational but for its anticompetitive effect.'" MTD Op. II at 8 (quoting *Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064, 1075 (10th Cir. 2013)). The court appears to have combined the restrictive and controversial "profit sacrifice" and "no economic sense" tests as necessary conditions for exclusionary conduct. Commentators have sharply criticized the former because, among other reasons, anticompetitive exclusion can be fully profitable, even in the short run.[3] The "no economic sense" test has been proposed as an *alternative*, whereby a monopolist's conduct is deemed exclusionary only if it is profitable because of its anticompetitive impact.[4] But the "no economic sense" variant is also highly problematic because, among other reasons, it may permit conduct with substantial anticompetitive effects and only minimal procompetitive benefits. *See* 3

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[3] *See, e.g.,* Gregory J. Werden, *Identifying Exclusionary Conduct Under Section 2: The "No Economic Sense" Test*, 73 Antitrust L.J. 413, 424 (2006); 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. *See* Einer Elhauge, *Defining Better Monopolization Standards*, 56 Stan. L. Rev. 253, 287-88 (2003) (noting profitability of refusal to deal in *Aspen Skiing*); 3B Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 772c, at 218 n.37 (4th ed. 2015) (same).

[4] *See* Werden, *supra*, at 414 (favoring such a test); Melamed, *supra*, 391-403 (same).

Areeda & Hovenkamp, *supra*, ¶ 651b3, at 106-07 (criticizing "no economic sense" test insofar as it would allow "an act [that would] benefit the defendant very slightly while doing considerable harm to the rest of the economy" and noting that "[n]ot all monopolizing conduct that we might wish to condemn is 'irrational' in the sense that the only explanation that makes it seem profitable is the destruction or discipline of rivals").[5] Indeed, under the district court's formulation, "plaintiffs . . . must show that the defendant's actions serve *no* rational procompetitive purpose." MTD Op. II at 9 (emphasis added).

The district court's overly demanding test is not warranted by *Trinko* or this Court's refusal-to-deal precedents. While the Court in *Trinko* was skeptical about refusal-to-deal claims based on legitimate policy considerations discussed below, it did not adopt the "no economic sense" test notwithstanding that the government had urged it to do so. *See* Brief for the United States and the Fed. Trade Comm'n as Amici Curiae Supporting Petitioner at 15-20, *Trinko*, 540 U.S. 398 (2004) (No. 02-682) (proposing test).[6] Nor did the Court repudiate the general test for exclusionary

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[5] *See also* Steven C. Salop, *Exclusionary Conduct, Effect on Consumers, and the Flawed Profit-Sacrifice Standard*, 73 Antitrust L.J. 311, 345 (2006) (criticizing profit-sacrifice test and no-economic-sense variant as inconsistent with antitrust's consumer-welfare goal). The "no economic sense" test may require a court to 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. But critics point out that distinguishing these effects is the very problem the test purports to resolve. *See* John Vickers, *Abuse of Market Power*, 115 Econ. J. F244, F254 (2005); Elhauge, *supra*, at 293; *see also* Salop, *supra*, at 323 n.50, 363.

[6] Moreover, as Professor Gavil points out, *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.

conduct articulated in *Aspen Skiing*, 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 Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 (1985) (quoting Robert Bork, *The Antitrust Paradox* 138 (1978));[7] *see also Goldwasser v. Ameritech Corp.*, 222 F.3d 390, 398 (7th Cir. 2000) (while "[m]onopolists are just as entitled as other firms to choose efficient methods of doing business, [that] is not . . . what the Ski Company was doing").

To be sure, anticompetitive intent or the lack of an adequate business justification is a central issue in a refusal-to-deal case. *See Trinko*, 540 U.S. at 409 (because Verizon had been compelled to deal by statute, its prior conduct, unlike that of the monopolist in *Aspen Skiing*, "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"); *Aspen Skiing*, 472 U.S. at 610 ("the evidence supports an inference that Ski Co. was not motivated by efficiency concerns"); *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 ac-

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Gavil, *Exclusionary Distribution Strategies By Dominant Firms: Striking A Better Balance*, 72 Antitrust L.J. 3, 58 (2004).

[7] In *Aspen Skiing*, the Court further defined exclusionary behavior as "'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.'" 472 U.S. at 605 n.32 (quoting Phillip Areeda & Donald Turner, *Antitrust Law* 78 (1978)).

tions”); *see also Illinois ex rel. Burris v. Panhandle Eastern Pipe Line Co.*, 935 F.2d 1469, 1481-82 (7th Cir. 1991) (“[T]he presence of a legitimate business justification reduces the likelihood that the conduct will produce undesirable effects on the competitive process.”); *Olympia Equip. Leasing Co. v. W. Union Tel. Co.*, 797 F.2d 370, 378 (7th Cir. 1986) (“Conjoined with other evidence, lack of business justification may indicate probable anticompetitive effect. But there is a clear business justification in this case.”).

However, contrary to the district court’s formulation, where, as here, a complaint plausibly alleges that a refusal to deal is prima facie anticompetitive (*see infra* I.B), it is not sufficient for the monopolist merely to postulate a *possible* procompetitive justification. *See* MTD Op. at 38 (“Defendants’ refusing to deal with Viamedia offers potentially improved efficiency.”); MTD Op. II at 12 (“potentially serves a procompetitive purpose”). The question of procompetitive justification is one that a defendant has the burden to establish as a matter of fact. *See United States v. Microsoft Corp.*, 253 F.3d 34, 59 (D.C. Cir. 2001) (en banc) (if plaintiff makes out a prima facie case, it is defendant’s obligation to establish a “nonpretextual claim that its conduct is indeed a form of competition on the merits because it involves, for example, greater efficiency or enhanced consumer appeal”); *Aspen Skiing*, 472 U.S. at 608-09 (jury reasonably rejected defendant’s purported business justifications as pretextual); *Burris*, 935 F.2d at 1482 ("Whether valid business reasons motivated a monopolist's conduct is a question of fact").[8]

Moreover, contrary to the district court's formulation, there is no requirement that a plaintiff establish that the monopolist lacked "'*any* procompetitive purpose.'" MTD Op. at 37 (quoting *VBR Tours, LLC v. Nat'l R. Passenger Corp.*, No. 14-804, 2015 WL 5693735 at *9 (N.D. Ill. 2015)); MTD Op. II at 10. Rather, it is sufficient for plaintiff to show that the monopolist's *primary* purpose is anticompetitive. *See Aspen Skiing*, 472 U.S. at 597 (approving instruction that required jury to determine whether Aspen's policies "were designed *primarily* to further any domination of the relevant market") (emphasis added); *cf. Microsoft*, 253 F.3d at 58-59 (rule of reason under § 2 condemns conduct whose anticompetitive effect outweighs its procompetitive benefits); *McWane, Inc. v. Fed. Trade Comm'n*, 783 F.3d 814, 833 (11th Cir. 2015) (same).

B. The Complaint Plausibly Alleges an Unlawful Refusal to Deal

The complaint satisfies the requisites of unlawful monopolization by means of a refusal to deal.[9] First, the complaint alleges that by excluding Viamedia from Ad Rep Services markets, Comcast's refusal to deal has an "anticompetitive effect" and

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[8] Although not germane to the outcome here, the district court also erred by suggesting that *Trinko* requires a "'preexisting voluntary and presumably profitable course of dealing between the monopolist and rival.'" MTD Op. II at 8 (quoting *Novell*, 731 F.3d at 1074). While the termination of a prior course of dealing is one possible way to show anticompetitive intent under *Trinko*, it is not the only way. *See, e.g., Mylan Pharms. v. Celgene Corp.*, No. 14-2094-ES, 2014 WL 12810322, at *4-*6 (D. N.J. 2014) (refusal to supply drug samples to generic competitor); *see also infra* I.B.

[9] For purposes of the motion to dismiss, Comcast's monopoly power in the relevant market(s) is assumed. *See* MTD Op. at 18.

harms consumers (here, independent MVPDs and local advertisers). *See Microsoft*, 253 F.3d at 58-59 (elements of prima facie case); *accord McWane*, 783 F.3d at 833. Indeed, the district court recognized the harm to competition, noting that the complaint alleges that the exclusion of Viamedia "diminished the quality of available spot cable advertising representation services," as "MVPDs find Comcast Spotlight to be an inferior alternative to independent third-party representation." MTD Op. at 23-24.

Second, the complaint alleges that Comcast acted with predatory intent, as reflected in a sacrifice in short-term profits and discrimination on the basis of rivalry, the two key factors identified in *Trinko* that were present in the Court's other refusal-to-deal cases (*Aspen Skiing* and *Otter Tail*) and were not present in *Trinko*. *See Trinko*, 540 U.S. at 409-410; *see also Olympia Equip. Leasing*, 797 F.2d at 377 ("essential feature of the refusal-to-deal cases [is] a monopoly supplier's discriminating against a customer because the customer has decided to compete with it").

The complaint alleges that Comcast sacrificed millions of dollars between the time it cut off Viamedia and it was able to obtain the business of Viamedia's clients, Compl. ¶¶ 157-61, as the district court recognized, MTD Op. II at 9 ("Comcast's discontinuation of its business relationship with Viamedia caused Comcast to suffer short-term losses"). And, as in *Aspen Skiing*, Comcast degraded the product it offered by making its interconnect less valuable to MVPDs and advertisers. Comp. ¶¶ 154-55. Moreover, Comcast discriminated on the basis of rivalry, because it provides access to MVPDs that are not competing against it in the Ad Rep Services market or in the sale of local advertising. *Id.* at ¶ 163; *see also* Pl. Br. at 15-16. And when Comcast acts as an ad rep in markets in which it does not control the interconnect, it is able to obtain access to the interconnect on behalf of its clients. *See* Compl. ¶ 164; c*f. Aspen Skiing*, 472 U.S. at 603 & n.30 (noting that Ski Co. participated in interchangeable ticket programs in other markets).

Third, the refusal-to-deal claim does not implicate the policy justifications for limiting such claims, at least so far as it appears from the complaint. *See Trinko*, 540 U.S. at 408 (citing administrability, diminishing investment incentives, and facilitating collusion).[10] There is little or no administrability problem where, as here, the monopolist has previously sold the product to the rival or sells it to others, so a ready benchmark for setting the terms of dealing is available. *See MetroNet Servs. Corp. v. Qwest Corp.*, 383 F.3d 1124, 1133 (9th Cir. 2004); *see generally* Steven C. Salop, *Refusals to Deal and Price Squeezes by an Unregulated, Vertically Integrated Monopolist,* 76 Antitrust L.J. 709, 717 (2010).

Moreover, using such a benchmark at which the monopolist has otherwise been willing to deal should eliminate the risk that the monopolist's compensation will be inadequate to encourage investment. *See*, *e.g.*, John Thorne, *A Categorical Rule Limiting Section 2 of the Sherman Act:* Verizon v. Trinko, 72 U. Chi. L. Rev. 289, 298-99 (2005); Elhauge, *supra*, at 310. And concerns about investment incentives are low when the "facility" at issue was "built" as a joint venture under an

[10] *Trinko* also noted the "particular importance [of] the existence of a regulatory structure designed to deter and remedy anticompetitive harm," which is not present here. 540 U.S. at 412.

open-access regime. *Cf.* Herbert Hovenkamp, *Exclusive Joint Ventures and Antitrust Policy*, 1995 Colum. Bus. L. Rev. 1, 102 (explaining that a free-rider argument is hard to maintain when venture "pursues a general policy of taking on new members but selectively excludes a few").

Finally, the risk of "collusion" cuts in *favor* of enabling MVPDs to employ an independent ad representative. An interconnect by necessity entails cooperation among MVPD rivals. But an independent ad representative ameliorates the risks of such cooperation by promoting smaller MVPDs' interest in vigorously competing against Comcast in the sale of non-interconnect local advertising and video services. *Cf.* Fed. Trade Comm'n & U.S. Dep't of Justice Antitrust Division, *Antitrust Guidelines for Collaborations Among Competitors* §§ 3.2, 3.31(a) (April 7, 2000) (joint selling agency may be procompetitive, as with *BMI*'s blanket license, but restrictions on competition that are not reasonably necessary to achieve its procompetitive benefits may be unlawful).

C. Theoretical Benefits of Vertical Integration Do Not Warrant Dismissal

The district court held that "because replacing an intermediary with a direct relationship is a prototypical valid business purpose," Comcast's refusal to deal "offers potentially improved efficiency" and therefore is not actionable. MTD Op. at 37-38 (brackets, ellipsis, and quotation marks omitted); *see also* MTD Op. II at 10. The court explained, "Before Comcast's refusal to deal, MVPDs gave Viamedia control of their Spot Cable Avails and then Viamedia gave control over a portion of those Avails to the Interconnect. After Comcast's refusal to deal, for the portion of

Avails sold through an Interconnect, MVPDs simply deal with Comcast directly." MTD Op. at 38.

The court's acceptance of Comcast's "disintermediation" defense is flawed for several reasons. First, as noted above, merely positing a potential efficiency is insufficient to rebut a prima facie monopolization case. Second, "vertical integration" itself is not a sufficient defense to a refusal to deal where, as here, it comes with monopolizing the vertically related market. Cases like *Otter Tail*, *Kodak*, and *AT&T* demonstrate this point. *See Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973); *Kodak*, 504 U.S. 451; *MCI Commc'ns Corp. v. AT&T Co.*, 708 F.2d 1081 (7th Cir. 1983). The court cited *Jack Walters* for the proposition that "'vertical integration is usually procompetitive.'" MTD Op. at 37 (quoting *Jack Walters & Sons Corp. v. Morton Building, Inc.*, 737 F.2d 698, 710 (7th Cir. 1984)). But even a manufacturer's vertical integration into the distribution of its own product, as in *Jack Walters*, is not necessarily immunized when it involves the extension or preservation of a monopoly in both markets. *See Jack Walters*, 737 F.2d at 710-11 (noting that defendant "has no monopoly," and identifying circumstances in which vertical integration might be anticompetitive but "nothing of this kind is suggested here"); *cf. Eastman Kodak Co. v. S. Photo Materials Co.*, 373 U.S. 359, 375 (1927) (monopolist's refusal to sell goods to dealer in furtherance of scheme to monopolize retail distribution violated Section 2).

Third, a supplier's decision to eliminate a middleman (say a distributor) in order to deal directly with a consumer, as in *Jack Walters*, is fundamentally different from a middleman's determination to preclude a supplier from dealing with the middleman of its choice. A retailer, for example, may seek to deal directly with a manufacturer, but the manufacturer may choose to deal only through an "extra layer" of wholesalers because that is the most efficient way for it to do business. Disintermediation may or may not be efficient, depending on the circumstances, but it is the supplier's choice (here, MVPDs') that is presumptively determinative, not the middleman's. *Cf.* Salop, *Refusals to Deal*, *supra*, at 735 ("Providing the input to a downstream competitor would not eliminate the defendant's customer relationship, but simply would require the monopolist to compete for the customer. That is the competitive process demanded by antitrust.").

Fourth, the district court recognized that the tying and exclusive-dealing claims involved "more than merely eliminat[ing] a middleman in the provision of Interconnect services." MTD Op. at 25 n.8. Rather, those arrangements "foreclosed competition in the market for advertising representation even for ad sales that do not involve an Interconnect." *Id.*; *see id.* at 38 (ad representation services include "advertising sales that are unrelated to the use of Interconnects[,] like local sales directly to advertisers"). And as to the monopolization of Ad Rep Services through tying and exclusive dealing, the court concluded that Viamedia had sufficiently alleged harm to competition (including the harms discussed above), and that Comcast's "disintermediation" justification was not dispositive. *See id.* at 23-24 & n.8.[11]

[11] On summary judgment, however, the court minimized those harms, and invoked "the procompetitive benefits of integration," including the ability of Comcast as an ad rep to offer better revenue shares to MVPDs. SJ Op. at 38, 44.

The same reasoning should have applied to the refusal to deal, the alleged purpose of which was not merely to eliminate Viamedia as a middleman in the provision of interconnect services, but to take over the ad representation of Viamedia's clients and to monopolize Ad Rep Services markets. *See, e.g.,* Compl. ¶¶ 84, 112.

II. THE DISTRICT COURT IMPROPERLY GRANTED SUMMARY JUDGMENT

A. The District Court's Standard for Summary Judgment Is Too Stringent

The district court applied an overly restrictive standard for antitrust plaintiffs in opposing summary judgment, namely that "at summary judgment, an antitrust claimant must 'present evidence that tends to exclude the possibility' that the [defendant's] conduct was as consistent with competition as with illegal conduct.'" SJ Op. at 22-23 (quoting *Mercatus Group, LLC v. Lake Forest Hosp.*, 641 F.3d 834, 856 (7th Cir. 2011)) (brackets in original); *see id.* at 36 ("[A]t summary judgment the claimant must present evidence tending to exclude the possibility that the defendant engaged in legitimate conduct.").[12]

In *Matsushita*, a case involving a horizontal predatory price-fixing conspiracy, the Supreme Court adopted a "tends to exclude" standard, which it borrowed from *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), a case involving

[12] *See also* SJ Op. at 34 (statements by MVPDs that they understood that they could not sell their ads through the interconnect without hiring Comcast as their ad rep did not "tend to exclude the possibility that Comcast's conduct was as consistent with a legal refusal to deal as an illegal tying of its services") (brackets and quotation marks omitted); *id.* at 36 ("This evidence is, at a minimum, equally consistent with Comcast's refusal to deal with Viamedia as it is a tying arrangement."); *id.* at 47 ("[N]o evidence tends to exclude the fact that Comcast's conduct was merely a refusal to deal, rather than anticompetitive conduct.").

a vertical price-fixing conspiracy. In *Matsushita*, the Court declared, "To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of § 1 must present evidence 'that tends to exclude the possibility that the alleged conspirators acted independently." *Matsushita*, 475 U.S. at 588 (quoting *Monsanto*, 465 U.S. at 764). The Court explained that, while inferences from the facts must be drawn in the non-movant's favor, "antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case." *Id.* Since *Matsushita*, courts have applied the "tends to exclude" standard to conspiracies based on proof of circumstantial, but not direct, evidence. *See Toys "R" Us, Inc. v. Fed. Trade Comm'n*, 221 F.3d 928, 934 (7th Cir. 2000).

There is debate among commentators and courts as to whether the "tends to exclude" standard applies to all conspiracy claims built on circumstantial evidence, or just those, like predatory pricing conspiracies, that are implausible. *See* Andrew I. Gavil, *Introductory Note, Symposium*, *Thirty Years On: The Past Influence and Continued Significance of* Matsushita, 82 Antitrust L.J. 1, 5-6 (2018).[13] But there is

[13] This Court has followed a sliding-scale approach, whereby "[m]ore evidence is required the less plausible the charge of collusive conduct." *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 661 (7th Cir. 2002) (Posner, J.). Judge Posner described the Supreme Court's "tends to exclude" formulation as "an unfortunate dictum." *See* Richard A. Posner, *Antitrust Law* 99-100 (2d ed. 2001) (noting that "[i]t is unusual to require a plaintiff as part of his burden of proof to prove a sweeping negative"); *see also* M. Laurence Popofksy, *Does* Leegin *Liberate the Law Governing Horizontal Conspiracies From its Vertical Contamination?*, 78 Antitrust L.J. 23, 34 (2012) (criticizing "tends-to-exclude concept" in horizontal conspiracy cases as "opaque," "difficult to apply," and as placing an unjustified "thumb on the scale" on the side of defendants). The "tends to exclude" formulation has also been criticized because it encourages lower courts to weigh evidence. *See, e.g.,* Edward D. Cavanagh, Matsushita *at Thirty: Has the Pendulum Swing too Far in Favor of*

no debate over, nor any basis for, extending this standard beyond the conspiracy context. Indeed, in *Kodak*, which involved tying and monopolization, the Court read *Matsushita* as "demand[ing] only that the nonmoving party's inferences be reasonable in order to reach the jury," and made no reference to the "tends to exclude" formulation. *Kodak*, 504 U.S. at 468. That should foreclose using the "tends to exclude" formulation in such cases, or using it as a general rule for summary judgment in antitrust cases.

To be sure, in dicta originating in *Indiana Grocery, Inc. v. Super Valu Stores, Inc.*, this Court did state that "an antitrust plaintiff opposing a motion for summary judgment must present evidence that tends to exclude the possibility that the defendant's conduct was as consistent with competition as with illegal conduct." 864 F.2d 1409, 1412-13 (7th Cir. 1989) (citing *Matsushita*, 475 U.S. at 588). But *Indiana Grocery* involved predatory pricing and vertical maximum price fixing, two types of claims that are particularly disfavored because "of the chill antitrust litigation can have on legitimate price competition," as the court explained. *Id.* at 1412. Moreover, *Indiana Grocery* preceded *Kodak*, which makes clear that "*Matsushita* . . . did not introduce a special burden on plaintiffs facing summary judgment in antitrust cases." *Kodak*, 504 U.S. at 468; a*ccord Omnicare, Inc. v. UnitedHealth Group, Inc.*, 629 F.3d 697, 707 (7th Cir. 2011). Accordingly, *Indiana Grocery* and the other

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Summary Judgment?, 82 Antitrust L.J. 81, 98-99 (2018); *cf. In re High Fructose Corn Syrup*, 295 F.3d at 655 (cautioning courts against falling into this "trap").

cases cited by the district court[14] provide no basis for extending the "tends to exclude" formulation to antitrust claims generally.

B. The District Court Improperly Disaggregated Plaintiff's Claims

The court's disaggregation of Viamedia's monopolization claim into separate and independent claims for refusing to deal and tying led it improperly to discount each of the claims. In considering Comcast's motion to dismiss, the district court isolated the refusal to deal and treated it as if it involved only interconnect services, and had nothing to do with Comcast's objective to coerce MVPDs to use Comcast rather than Viamedia as their ad rep and thereby to monopolize Ad Rep Services markets. *See supra* I.C. Then, on summary judgment, the court held that Viamedia was required to prove tying wholly apart from the refusal to deal. But Viamedia could not do so, according to the court, because Comcast's refusal to deal made any tying arrangement superfluous. SJ Op. at 30 ("undisputed that both RCN and WOW! *wanted* full-turnkey representation, and whichever company they hired had to have the ability to make available to them both Interconnect Services and Ad Rep Services"). According to the court, the refusal to deal was sufficient to exclude Viamedia and enable Comcast to monopolize the Ad Rep Services market "with or without attendant tying and exclusive dealing." *Id.* at 51.

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[14] The district court also cited the *dissent* in *Nelson v. Monroe Reg'l Med. Center*, 925 F.2d 1555, 1578 (7th Cir. 1991) (Pell, J., concurring in part, dissenting in part), which quoted the *Indiana Grocery* dicta. And it cited *Mercatus,* which also quoted the dissent in *Nelson*, but in any event involved no arguably disputed material facts and a claim that amounted to, "at best, a claim for breach of contract . . . not an antitrust case." 641 F.3d at 856.

The court failed to heed the rule that "a plaintiff 'should be given the full benefit of [its] proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each.'" *Mercatus*, 641 F.3d at 839 (quoting *Continental Ore*, 370 U.S. at 699) (brackets in original); *see also Aspen Skiing*, 472 U.S. at 599 (noting that "Court of Appeals considered the record 'as a whole' and concluded that it was not necessary for Highlands to prove that each allegedly anticompetitive act was itself sufficient to demonstrate an abuse of monopoly power"); *Goldwasser*, 222 F.3d at 398 (monopolist's refusal to deal may be actionable if it is "part of a broader effort to maintain its monopoly power").[15]

In particular, rather than considering the claims independently, the court should have seen that the refusal-to-deal and tying claims reinforced each other, given the common object of Comcast's conduct to monopolize Ad Rep Services markets. *See MCI*, 708 F.2d at 1144 ("Whether we label AT&T's violation of the antitrust laws as tying or the denial of an essential facility, our prime concern is that AT&T used its monopoly power in local telephone service as a lever to impede or destroy competition in other markets."); 3B Areeda & Hovenkamp, *supra*, ¶ 772h at 254-55 (fact that refusals to deal in network industries "resemble tying arrangements" makes them "grist for rule of reason treatment under § 2").[16]

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[15] To be sure, in *Mercatus*, this Court was mindful to segregate effects from conduct that was immunized under the *Noerr-Pennington* doctrine from the effects of conduct "not so immunized." 641 F.3d at 839. But a refusal to deal is not analogous to conduct immunized by the First Amendment, particularly where, as here, the refusal to deal is prima facie anticompetitive for the reasons stated in I.B, *supra*.

[16] The district court acknowledged this authority, but dismissed it because "there is no tying effect, as no evidence shows that MVPDs cannot obtain (from Comcast at

CONCLUSION

For the foregoing reasons, this Court should reject the overly demanding tests articulated by the district court for claims against monopolists, and reverse the judgment dismissing the complaint.

Respectfully submitted,

/s/ Richard M. Brunell
RICHARD M. BRUNELL
Counsel of Record
RANDY M. STUTZ
AMERICAN ANTITRUST INSTITUTE
1025 Connecticut Avenue, NW
Suite 1000
Washington, DC 20036
(202) 600-9640
rbrunell@antitrustinstitute.org

November 1, 2018

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least) the tying product alone." SJ Op. at 34 n.14. But in *MCI*, consumers could get unbundled local telephone service; the "tying effect" was that because AT&T's rivals could not, consumers could only purchase bundled long-distance service from AT&T. *See MCI*, 708 F.2d at 1144. Putting aside whether the evidence shows that Viamedia's clients could have received interconnect-only services if they had asked, *see* Pl. Br. 37-43, Comcast's denial of "monopoly" interconnect-only services to its rival to force Viamedia's clients to take "competitive" Ad Rep Services from it qualifies as a "tying effect" that Section 2 is designed to prevent. *Cf. Illinois Tool Works Inc. v. Independent Ink, Inc.*, 547 U.S. 28, 34-35 (2006) (a "'seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that [she] . . . might have preferred to purchase elsewhere on different terms" is an "essential characteristic of an invalid tying arrangement" (quoting *Jefferson Parrish Hosp. v. Hyde*, 466 U.S. 2, 12 (1984)).

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I certify:

1 This brief complies with the type-volume limitation of Circuit Rule 29(b) because the brief contains 6588 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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s/ Richard M. Brunell
Richard M. Brunell

Dated: Nov. 1, 2018

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I hereby certify that I served a copy of the foregoing document on all registered counsel on Nov. 1, 2018 by electronic means through the Court's CM/ECF system.

s/ Richard M. Brunell
Richard M. Brunell

Dated: Nov. 1, 2018