No. 18-2852

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

VIAMEDIA, INC.,
Plaintiff-Appellant,
v.
COMCAST CORP., et al.,
Defendants-Appellees.

On Appeal from an Order of the
United States District Court for the Northern District of Illinois
Case No. 1:16-cv-05486 (The Honorable Amy J. St. Eve)

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF NEITHER PARTY

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STATEMENT OF INTEREST

The United States enforces the federal antitrust laws and has a significant interest in their correct interpretation. In this amicus brief, the United States addresses the limited circumstances in which a firm may violate Section 2 of the Sherman Act, 15 U.S.C. § 2, by refusing to deal with one of its rivals. The United States has a strong interest in ensuring that any liability under Section 2 for refusing to deal with rivals be properly cabined because coerced dealing can deter innovation, facilitate collusion, and turn courts into economic regulatory agencies. The United States urges this Court to hold that a refusal to deal does not violate Section 2 unless it would make no economic sense for the defendant but for its tendency to eliminate or lessen competition, but the United States takes no position on the merits of any of the plaintiff's claims. The United States submits this amicus brief pursuant to Federal Rule of Appellate Procedure 29(a).

STATEMENT

1. Cable television service in the United States is provided by multichannel video programming distributors (MVPDs). First Amended

Complaint, Doc. 40, ¶ 23 (FAC).[1] As part of MVPDs' carriage agreements with cable networks that provide programming, "MVPDs are given the right to sell a certain designated percentage of advertising time, typically two to three minutes per hour on the network, to advertisers who wish to reach the MVPD's subscribers in a particular geographic area." *Id.* ¶ 27. That reserved advertising time is "Spot Cable Advertising," with each 15-second, 30-second, or one-minute block called a "Spot Cable Avail." *Id.* ¶¶ 27, 29. "A Spot Cable Avail differs from traditional national cable advertising time, which is sold directly by the cable network to the advertiser" and "airs simultaneously everywhere that the network is carried throughout the United States." *Id.* ¶ 30.

Spot Cable Advertising "generates over $5.4 billion in television advertising revenues annually." *Id.* ¶ 3. It is sold on national, multi-regional, regional, and local levels. *Id.* ¶¶ 31-34, 49-58.

National and multi-regional spot cable advertising is conducted through a national clearinghouse operated by National Cable

[1] The facts in this brief are taken from the FAC.

Communications LLC (NCC). *Id.* ¶¶ 34, 49-58. Regional spot cable advertising for a Designated Market Area (DMA),[2] such as the Chicago DMA that covers Northeast Illinois and Northeast Indiana, is conducted "through a central clearinghouse called an Interconnect." *Id.* ¶¶ 24, 34-48. The Interconnects are "managed and controlled by the largest MVPD in the DMA, which charges a fee to other participating MVPDs or their representatives." *Id.* ¶ 44. Local spot cable advertising that reaches households in a particular neighborhood or on certain blocks is "purchased directly from a single MVPD or its representative by local businesses to be aired in a specific ad zone." *Id.* ¶¶ 31-34, 59-64.

2. This case involves a dispute between Viamedia, Inc. (Viamedia) and Comcast Corp. (Comcast) regarding Viamedia's exclusion from the Chicago and Detroit Interconnects, which Comcast operates. Viamedia is a "Spot Cable Advertising Representative" that contracts with MVPDs "for the purpose of marketing and selling their Spot Cable Avail inventory to national, regional, and local advertisers." FAC ¶¶ 17, 72-77. Viamedia offers "its MVPD clients complete turn-key advertising

[2] Nielsen Market Research "divides the United States into 210 separate DMAs." FAC ¶ 24.

sales" and a variety of other technological services that they "would otherwise need to develop internally in order to sell, bill for, and insert Spot Cable Advertisements into its programming on its own." *Id.* ¶ 75. From 2002 to 2012, Viamedia paid Comcast over $23 million "on behalf of two of its then most significant MVPD clients, WOW and RCN," for access to the Chicago and Detroit Interconnects. *Id.* ¶¶ 103, 110. On June 1, 2012, "Comcast unilaterally ended Viamedia's access to the Chicago and Detroit Interconnects and removed WOW and RCN from participating in regional ad sales through the Interconnects." *Id.* ¶ 110.

Comcast "informed WOW and RCN that if they wished to regain access to the Interconnects, they would be required to cease using Viamedia as their Spot Cable Advertising Representative and would instead be required to retain Comcast Spotlight," a "wholly owned subsidiary of Comcast," which provides spot cable advertising representation services. *Id.* ¶¶ 19, 113. WOW and RCN subsequently signed agreements with Comcast, giving Comcast complete control in Chicago and Detroit over all their national, regional, and local spot cable advertising inventory. *Id.* ¶¶ 126-32. Comcast now "controls

approximately 100 percent of all Spot Cable Advertising Avails available for sale" in the Chicago and Detroit DMAs. *Id.* ¶¶ 86-87.

Viamedia sued Comcast and Comcast Spotlight for monopolization and attempted monopolization under Section 2 of the Sherman Act. *Id.* ¶¶ 179-97. The district court construed the complaint as alleging distinct claims for refusing to deal, tying, and exclusive dealing. Memorandum Opinion and Order, Doc. 36, at 21, 38 (SA91, SA108). The court dismissed Viamedia's refusal-to-deal claim, holding that Viamedia failed to "adequately allege that Comcast's refusal to deal was irrational but for its anticompetitive effects." Memorandum Opinion and Order, Doc. 60, at 10 (SA67). The court reasoned that Comcast's termination of its relationship with Viamedia "offered 'potentially improved efficiency' because it replaced an intermediary with a direct relationship" with WOW and RCN, and this "type of vertical integration or elimination of a middleman . . . represented a 'prototypical valid business purpose.'" *Id.* (quoting *Port Dock & Stone Corp. v. Oldcastle Ne., Inc.*, 507 F.3d 117, 124 (2d Cir. 2007)).[3]

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[3] The district court held that Viamedia adequately alleged claims for tying and exclusively dealing but subsequently granted summary

SUMMARY OF ARGUMENT

Supreme Court and Seventh Circuit precedent make clear that a monopolist's refusal to deal with its rivals violates Section 2 of the Sherman Act only in limited circumstances. The situations in which a monopolist violates Section 2 by refusing to deal with its rivals are heavily circumscribed because coerced dealing can deter innovation, facilitate collusion, and turn courts into economic regulatory agencies.

This Court should follow the Tenth Circuit's decision by then-Judge Gorsuch in *Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064, 1075 (10th Cir. 2013), and hold that a refusal to deal does not violate Section 2 unless it would make no economic sense for the defendant but for its tendency to eliminate or lessen competition. This position permits refusals to deal that are supported by valid business justifications and is consistent with longstanding Department of Justice policy. The United States expresses no opinion on whether Viamedia's refusal-to-deal allegations are sufficient to satisfy the "no economic sense" test here.

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judgment on those claims. *See* Memorandum Opinion and Order, Doc. 356 (SA2-SA57). The United States does not address those claims here.

ARGUMENT

In *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), the Supreme Court upheld a jury's determination that a monopolist violated Section 2 of the Sherman Act, 15 U.S.C. § 2, by refusing to deal with a rival. The Court has since made clear that "*Aspen Skiing* is at or near the outer boundary of § 2 liability," *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 409 (2004), for even monopolists generally "are free to choose the parties with whom they will deal, as well as the prices, terms, and conditions of that dealing," *Pac. Bell Tel. Co v. linkLine Commc'ns, Inc.*, 555 U.S. 438, 448 (2009) (citing *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919)).

This Court should hold that a refusal to deal is not actionable under Section 2 unless it would make no economic sense for the defendant but for its tendency to eliminate or lessen competition. This test was recently endorsed by then-Judge Gorsuch in his opinion for the court in *Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064, 1075 (10th Cir. 2013), and is consistent with Supreme Court and Seventh Circuit precedent and with longstanding Department of Justice policy.

A. Both The Supreme Court And This Court Have Made Clear That A Monopolist Violates Section 2 Of The Sherman Act By Refusing To Deal With A Rival Only In Limited Circumstances

The offense of monopoly under § 2 of the Sherman Act has "two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historical accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). Thus, "merely being a monopolist does not violate Section 2." *Goldwasser v. Ameritech Corp.*, 222 F.3d 390, 397 (7th Cir. 2000). Rather, "[t]o safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct*." *Trinko*, 540 U.S. at 407.

In "certain circumstances, a refusal to cooperate with rivals can constitute anticompetitive conduct and violate § 2." *Id.* at 408. "The leading case for § 2 liability based on refusal to cooperate with a rival . . . is *Aspen Skiing*." *Id.* As the Supreme Court summarized the relevant facts:

> The Aspen ski area consisted of four mountain areas. The defendant, who owned three of those areas, and the plaintiff, who owned the

> fourth, had cooperated for years in the issuance of a joint, multiple-day, all-area ski ticket. After repeatedly demanding an increased share of the proceeds, the defendant canceled the joint ticket. The plaintiff, concerned that skiers would bypass its mountain without some joint offering, tried a variety of increasingly desperate measures to re-create the joint ticket, even to the point of in effect offering to buy the defendant's tickets at retail price. The defendant refused even that.

Id. at 408-09 (citation omitted). The Supreme Court upheld a jury verdict for the plaintiff, reasoning that "[t]he jury may well have concluded that [the defendant] elected to forgo these short-run benefits because it was more interested in reducing competition . . . over the long run by harming its smaller competitor." *Id.* at 409 (quoting *Aspen Skiing*, 472 U.S. at 608).

Aspen Skiing "is narrowly written." *Olympia Equip. Leasing Co. v. W. Union Tel. Co.*, 797 F.2d 370, 379 (7th Cir. 1986). As Judge Posner noted soon after *Aspen Skiing* was decided: "If it stands for any principle that goes beyond its unusual facts, it is that a monopolist may be guilty of monopolization if it refuses to cooperate with a competitor in circumstances where some cooperation is indispensable to effective competition." *Id.*

Both this Court and the Supreme Court have since confirmed that *Aspen Skiing* "represented the high-water mark in Section 2 cases for a

duty-to-deal theory," *Authenticom, Inc. v. CDK Global, LLC*, 874 F.3d 1019, 1026 (7th Cir. 2017), and that a monopolist's refusal to deal with a rival only is anticompetitive in "limited circumstances." *linkLine*, 555 U.S. at 448. The antitrust laws "permit dominant firms to engage in vigorous competition," *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 116 (1986), and, even for a monopolist, "[p]art of competing like everyone else is the ability to make decisions about with whom and on what terms one will deal." *Goldwasser*, 222 F.3d at 397. Compelling a monopolist to deal with a rival can undermine "the underlying purpose of antitrust law" by "lessen[ing] the incentive for the monopolist, the rival, or both to invest in [] economically beneficial facilities"; by "requir[ing] antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing—a role for which they are ill suited"; and, most importantly, by "facilitat[ing] the supreme evil of antitrust: collusion." *Trinko*, 540 U.S. at 407-08. Typically, "[c]ooperation is a *problem* in antitrust, not one of its obligations." *Schor v. Abbott Labs.*, 457 F.3d 608, 610 (7th Cir. 2006).

B. This Court Should Hold That A Refusal To Deal Is Not Actionable Under Section 2 Unless It Would Make No Economic Sense But For Its Tendency To Eliminate Or Lessen Competition.

"Exclusionary" conduct includes "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." *Aspen Skiing*, 472 U.S. at 605 n.32 (citation omitted). Thus, as the Solicitor General explained in *Trinko*, in refusal-to-deal cases, "conduct is not exclusionary or predatory *unless* it would make no economic sense for the defendant but for its tendency to eliminate or lessen competition." Brief for the United States and the Federal Trade Commission as Amici Curiae Supporting Petitioner at 15, *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004) (No. 02-682), *available at* 2003 WL 21269559. "That demanding standard . . . reflects the infrequent pro-competitive benefits and the frequent anticompetitive risks posed by a generalized requirement that firms assist rivals." *Id.* at 17.

The Solicitor General explained that was true even though the defendant controlled a "so-called essential facility." *Id.* at 23. The Supreme Court "has never adopted the essential facilities doctrine in a

Section 2 case." *Id.* at 21 (citing *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 428 (2000) (Breyer, J., concurring in part and dissenting in part)). Moreover, "the doctrine has been heavily criticized." *Id.* Even if such a doctrine were viable, the Solicitor General noted, there must be some showing of "conduct that would not make sense but for its tendency to reduce or eliminate competition" before applying Section 2 to avoid interfering "with the fundamental, pro-competitive goals of the antitrust laws." *Id.* at 21-22; *see also* Gregory J. Werden, *Identifying Exclusionary Conduct Under Section 2: The "No Economic Sense" Test*, 73 Antitrust L.J. 413, 422-25 (2006) (discussing the "no economic sense" test).

Profit sacrifice alone does not make conduct anticompetitive under the "no economic sense" test. For example, "[i]nvesting in R&D or purchasing new capital equipment sacrifices current profit to obtain what is expected to be a significantly greater future profit," but these investments "make economic sense apart from any tendency to eliminate competition." Werden, *supra*, at 424. "When the defendant's conduct entails a short-run profit sacrifice, the no economic sense test further asks why it is rational to make that sacrifice." *Id.* The plaintiff's

burden under the test is to show that the sacrifice makes sense only if the conduct causing it serves to eliminate or lessen competition.

The *Trinko* decision did not articulate any legal test for refusals to deal, but it did pointedly observe that the facts of *Aspen Skiing* "suggested a willingness to forsake short-term profits to achieve an anticompetitive end." 540 U.S. at 409; *see also Olympia Equip.*, 797 F.2d at 378 (noting that "[t]he defendant in *Aspen* . . . [was] forgoing normal competitive benefits in the hope (so the jury found at any rate) of reaping long-term anticompetitive gains"). Moreover, the application of the "no economic sense" test in the refusal-to-deal context has been endorsed since. Citing the government's brief, the leading antitrust treatise concurs that, "before a unilateral refusal to deal is unlawful under § 2, the refusal must be 'irrational' in the sense that the defendant sacrificed an opportunity to make a profitable sale only because of the adverse impact the refusal would have on a rival." 3B Philip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 772d3, at 232 & n.91 (4th ed. 2015). The authors note that limits are necessary because "[a]n overly expansive § 2 duty to deal comes dangerously close

to being a form of 'no-fault' monopolization if refusal to share productive assets with rivals is the monopolist's only offense." *Id.* ¶ 772d2, at 229.

Then-Judge Gorsuch likewise held in *Novell* that, to be actionable, a "monopolist's discontinuation of the preexisting course of dealing must 'suggest[] a willingness to forsake short-term profits to achieve an anticompetitive end.'" *Novell*, 731 F.3d at 1075 (quoting *Trinko*, 540 U.S. at 409). The court held that it is not enough merely to show that "the monopolist decided to forsake short-term profits," or that it terminated a course of prior dealing. *Id.* Firms "routinely sacrifice short-term profits for lots of legitimate reasons that enhance consumer welfare (think promotional discounts)," and even "a monopolist might wish to withdraw from a prior course of dealing and suffer a short-term profit loss in order to pursue perfectly procompetitive ends—say, to pursue an innovative replacement product of its own." *Id.*[4] Rather, to be actionable, there must also be a "showing that the monopolist's refusal to deal was part of a larger anticompetitive enterprise, such as . . .

[4] A monopolist also might wish to withdraw from a prior course of dealing that threatens to harm its reputation or its customers, even if it would cause short-term economic losses.

seeking to drive a rival from the market or discipline it for daring to compete on price." *Id.* "Put simply, the monopolist's conduct must be irrational but for its anticompetitive effect." *Id.*

This Court should follow *Novell* and hold that satisfying the "no economic sense" test is necessary to bring a Section 2 refusal-to-deal case. This test helps ensure that a refusal to deal with a competitor does not violate Section 2 if "valid business reasons exist for that refusal." *Aspen Skiing*, 472 U.S. at 597; *see also id.* at 608 ("Perhaps most significant, however, is the evidence relating to Ski Co. itself, for Ski Co. did not persuade the jury that its conduct was justified by any normal business purpose."); 3B Areeda & Hovenkamp, *supra*, ¶772c2, at 222 ("*Aspen* leaves monopolists free to refuse to deal or cooperate with rivals for legitimate business reasons"). If a refusal to deal serves a legitimate business purpose, Section 2 makes no further inquiry into its effects on competition. *See Morris Commc'ns Corp. v. PGA Tour, Inc.*, 364 F.3d 1288, 1295 (11th Cir. 2004) (a "refusal to deal that is designed to protect or further the legitimate business purposes of a defendant does not violate the antitrust laws, even if that refusal injures competition").

The "no economic sense" test also helps ensure that even a monopolist does not "pull[] its competitive punches," as a "'monopolist, no less than any other competitor, is permitted and indeed encouraged to compete aggressively on the merits,'" *Olympia Equip.*, 797 F.2d at 375 (quoting *Foremost Pro Color, Inc. v. Eastman Kodak Co.*, 703 F.2d 534, 544 (9th Cir. 1983)). "Monopolists are just as entitled as other firms to choose efficient methods of doing business (which is not, recall, what the Ski Company was doing, and that was why the Court and the jury were able to spot its conduct for the exclusionary practice it was)." *Goldwasser*, 222 F.3d at 398.

* * *

Viamedia claims that it can satisfy the "no economic sense" test here. Its amended complaint alleges that "Comcast's refusal to deal with [it] is irrational but for its anticompetitive effects" of excluding Viamedia from the market for Spot Cable Advertising Representation. FAC ¶¶ 154-68 (capitalization altered); *see also* Viamedia Br. 30 (claiming that Comcast's "discontinuation of [its] arrangement [with Viamedia] suggested a willingness to sacrifice short-term profits . . . in a manner that was irrational but for its tendency to harm competition'"

(quoting *Novell,* 731 F.3d at 1076)). The United States expresses no position on the sufficiency of these allegations under the pleading standards set forth in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

CONCLUSION

The Court should hold that a refusal to deal is not actionable under Section 2 of the Sherman Act unless it would make no economic sense but for its tendency to eliminate or lessen competition.

Respectfully submitted.

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November 8, 2018

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with Seventh Circuit Rule 29 because it contains 3,275 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type-style requirements of Rule 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2013 with 14-point New Century Schoolbook font in text and the footnotes.

November 8, 2018

/s/ Nickolai G. Levin
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CERTIFICATE OF SERVICE

I, Nickolai G. Levin, hereby certify that on November 8, 2018, I electronically filed the foregoing Brief for the United States as Amicus Curiae in Support of Neither Party with the Clerk of the Court of the United States Court of Appeals for the Seventh Circuit by using the CM/ECF System. Once the brief is accepted for filing by the Clerk's Office, I will send fifteen copies to the Clerk of the Court by FedEx.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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