APPENDIX

APPENDIX A

In the
United States Court of Appeals
For the Seventh Circuit

No. 18-2852

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 **Amy J. St. Eve**, *Judge*.

ARGUED FEBRUARY 7, 2019
DECIDED FEBRUARY 24, 2020

Before BAUER, HAMILTON, and BRENNAN, *Circuit Judges*.

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HAMILTON, *Circuit Judge*. Plaintiff Viamedia, Inc. has sued defendant Comcast Corporation for violating Section 2 of the Sherman Act, 15 U.S.C. § 2. Viamedia accuses Comcast of using its monopoly power in one service market to exclude competition and gain monopoly power in another service market. The district court dismissed Viamedia s case, in part on the pleadings and in part on summary judgment. We reverse. Viamedia s allegations and evidence are sufficient to state and support claims that should be presented to a jury.

Because the district court dismissed part of the case on the pleadings and the rest on summary judgment, we must treat as true Viamedia s factual allegations and give it the benefit of factual disputes and favorable inferences from the evidence. To make sense of this case, we explain some basic business arrangements in the markets that put television programming in American homes, as well as market definitions necessary in evaluating the antitrust claims.

The parties agree on the definitions of the relevant geographic and service markets. Viamedia asserts claims against Comcast for monopolization in three geographic markets: the Chicago, Detroit, and Hartford metropolitan areas. In each of those three geographic markets Comcast now has monopoly power over two separate service markets: Interconnect services and advertising representation services. Interconnect services are cooperative selling arrangements for advertising through an Interconnect that enables providers of retail cable television services to sell advertising targeted efficiently at regional audiences. Advertising representation services for retail cable television providers assist those providers with the sale and delivery of national, regional, and local advertising slots. This market in advertising representation services is the one in which Viamedia competed with Comcast. In each geographic market, according to Viamedia s evidence, Comcast used its monopoly power over the cooperative Interconnects to force its smaller retail cable television competitors to stop doing business with Viamedia, thereby gaining monopoly power over the market for advertising representation services.

Viamedia has presented evidence that Comcast s elimination of its only competitor in the advertising representation services market has harmed competition in violation of Section 2. According to Viamedia s evidence, its customers for advertising representation services (i.e., Comcast s retail cable competitors) did not switch to Comcast because it offered a better-quality or lower-priced service. They switched because Comcast used its monopoly power over the Interconnects to present its cable competitors with a Hobson s choice: either start buying advertising representation services from us and regain access to the Interconnects, or keep buying those services from Viamedia and stay cut off from the Interconnects they needed to compete effectively. According to Viamedia s evidence, Comcast deliberately adopted a strategy it knew would cost Comcast itself millions of dollars in the short run, but the strategy eventually gave it monopoly power in these local markets for advertising representation services. Giving Viamedia the benefit of its allegations and evidence, this is not a case in which Section 2 is being misused to protect weaker competitors rather than competition more generally. See *Lee-gin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 906 (2007), quoting *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 338

(1990) (purpose of the antitrust laws is to protect *competition,* not *competitors*).

As now the sole provider of advertising representation services to its cable competitors, Comcast can also damage competition beyond the relatively narrow markets for advertising representation services in Chicago, Detroit, and Hartford. This control allows it to undercut competition in two more markets: cable television services to retail customers, and the sale of advertising spots to local retailers. By establishing itself as the gatekeeper for its cable competitors advertising, Comcast has gained access to their sensitive marketing and promotional pricing information. And because Comcast took control of its rival cable companies inventory of local ads, local retailers no longer have a choice of cable companies from whom they buy ad time.[1]

Viamedia has thus offered evidence to defeat summary judgment on its claim that Comcast unlawfully used its monopoly power over the Interconnects to tie those services to its advertising representation services. Viamedia has also adequately stated a claim that Comcast has unlawfully refused to deal with Viamedia and any cable competitor that bought advertising representation services from Viamedia. On the pleadings and the summary judgment record, Viamedia s *prima facie* claims of monopolization are similar to but stronger than the successful plaintiff s Section

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[1] Comcast sells advertising representation services through an entity called Comcast Cable Communications Management, LLC, which was formerly called Comcast Spotlight. The district court and the parties have referred to Comcast s ad-related services division as both Comcast and Comcast Spotlight. We use Comcast to refer to both together but make clear when we refer to Comcast Spotlight in particular.

2 claim in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985). We remand this case for any further necessary discovery and for trial.

In Part I, we lay out the key facts: in Part I-A, the structure of the cable television markets; in Part I-B, the specifics of Comcast s and Viamedia s businesses, including the advertising representation services they both offer and the critical role that Interconnects play for providers of cable television programming; and in Part I-C, Comcast s refusal to continue providing Interconnect access to Viamedia or any of its customers in Chicago, Detroit, and Hartford. In Part II, we review the district court proceedings. Then, in Part III-A, we lay out the legal standards under Section 2 that apply to Viamedia s claims. In Part III-B-1, we apply that law to Comcast s decision to refuse to allow Viamedia or its customers access to the Interconnects. In Part III-B-2, we apply that law to Viamedia s claim that Comcast illegally tied Interconnect services to advertising representation services. In Part III-C, we evaluate in greater detail the harm to competition alleged by Viamedia and the procompetitive justifications offered by Comcast, highlighting considerations that will be relevant on remand. Finally, in Parts III-D and III-E, we address issues of antitrust injury and the district court s exclusion of expert witnesses.

I. *The Markets and the Competitors*

Because the district court dismissed one claim on the pleadings and the other on summary judgment, we present the relevant allegations and evidence in the light reasonably most favorable to plaintiff Viamedia, the non-moving party. The parties agree on the definition of the relevant geographic markets, and the relevant service-product markets are not disputed on appeal. The relevant geographic markets are the Chicago, Detroit, and Hartford metropolitan areas, called Direct Marketing Areas or DMAs. The monopolized service market in each metropolitan area is that for the sale of advertising representation services (ad rep services in industry terms) related to so-called spot advertising on cable systems. To assess the harm to competition that can result from monopolization of the market for ad rep services, we must explain the related markets for retail cable television services to consumers, as well as access to the cable companies cooperative advertising distribution platforms called Interconnects.

A. *Cable Television: History, Revenue Sources, and Competition*

Understanding these markets competitive dynamics requires a bit of history about the evolution of television in the United States, including the challenges that cable companies have faced in competing with over-the-air broadcast programming.

1. *Television Programming and Advertising*

An awkward acronym, MVPDs, stands for multichannel video programming distributors. That umbrella term includes cable companies like Comcast and Cox, as well as overbuilders like RCN and Wide Open West, known as WOW!. Beyond cable companies, MVPDs also include direct-broadcast satellite companies (AT&T s DirecTV and Dish Network), as well as companies formerly associated only with telephone service (e.g., Verizon s FiOS and AT&T s U-verse). The two largest MVPDs are Comcast and

AT&T-DirecTV, which together have more than 20 million television subscribers.[2]

Focusing on the advertising-supported network programming carried by these MVPDs, we explain the special obstacles cable companies face in taking advantage of advertising revenue. The cable companies solution jointly developing the Interconnects created a later opening for a dominant cable company like Comcast to use its power over several Interconnects to gain a monopoly in a related market and to gain some measure of oversight and control of its smaller cable competitors.

For decades, television programming was dominated by three broadcast networks and was funded largely by the advertisements that ran in the programming. To help advertisers know how many and which viewers they were reaching, the industry adopted various audience measurement metrics, most importantly Designated Market Areas or DMAs. DMAs are meant to capture regional audiences that are likely to view the same programming. They often encompass more than a single county and can also cross state lines.

As cable television companies got started, they typically won exclusive franchise areas granted by local governments. Their further expansion was then subsidized by monopoly profits from these exclusive territories. U.S. Dep t of Justice, *Voice, Video and Broadband: The Changing Competitive Landscape and Its Impact on Consumers* 71 (Nov. 2008) (DOJ Report). Cable companies then grew and consolidated by

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[2] For statutory definitions of multichannel video programming distributor (MVPD), cable service, and video programming, see 47 U.S.C. § 522(13), (6), and (20).

sewing together such local franchises. Critically for this case, the patchwork combinations of local franchise areas did not align with DMAs.

2. *Revenue Sources: Competition and Cooperation*

Most revenue for MVPDs comes from (1) the sale of advertising and (2) customer subscription fees. In geographic areas where MVPDs overlap, they compete on both fronts. The conduct at issue in this litigation affects both fronts and millions of households in the key metropolitan areas, and it potentially affects tens of millions more in other metropolitan areas.

a. *Competition for Advertising Dollars and Cooperation Through Interconnects*

The mechanics of advertising are central to this lawsuit, accounting for the existence of the market in which Comcast and Viamedia competed. For every hour of programming, networks allot a certain number of minutes for advertisements. Contracts between an MVPD and a network (e.g., CNN or ESPN) typically make two or three of those minutes per hour available for the MVPDs to sell themselves, with the networks selling the remainder. MVPDs can sell these time slots to advertisers in various increments of time, such as 15, 30, or 60 seconds. Each increment is typically referred to as a spot cable availability, or spot avail. Approximately 75% of the spot avails are sold to advertisers. The MVPDs use the remaining 25% to advertise their own products and services.

This brings us to the source of the problem here. In the early days of cable, advertisers who wanted to reach an entire DMA such as Chicago faced an obstacle. Cable systems had grown organically, with each cable service obtaining franchises through the simple addition of new systems as opportunities arose, leaving cable company holdings . . . typically scattered across the country. Patrick R. Parsons, *Horizontal Integration in the Cable Television Industry: History and Context*, 16 The Journal of Media Economics, no. 1 (2003) at 23, 37. Most important, the DMAs that helped broadcast television advertising reach entire marketing areas did not align with cable companies franchise areas. And yet, for a substantial percentage of spot avails, it would be most profitable to sell them on a regional, DMA-wide level.

As a result, cable companies had a weaker competitive position for advertising dollars vis-à-vis the broadcast networks and satellite providers, who could easily deliver advertising to an entire DMA. Cable companies could not offer DMA-wide coverage, so advertisers would pay less for spot avails. To ensure DMA-wide coverage, an advertiser had to contract separately with each cable provider whose footprint included any part of that DMA. This was inefficient.

The cable companies came up with a solution. They banded together to create a platform called an Interconnect that could bring together all cable providers within a given DMA. The cable companies could contribute their DMA-wide spot avails to the Interconnect, which would provide a single point of contact for advertisers. An advertiser could then purchase a particular time slot and be assured that its advertisement would appear in cable subscribers programming throughout the DMA. Thus, Interconnect services are provided DMA by DMA. As described by Comcast, interconnects were formed voluntarily by

MVPDs in markets to pool their resources and offer DMA-wide selling of cable/MVPD advertising inventory[.] . . . Otherwise, advertisers trying to cobble together a wide-footprint, MVPD-based advertising campaign would have to go MVPD-by-MVPD.

To cable subscribers, the national, regional, and local advertisements appear seamlessly within television shows and live sports events. But the hidden seam of the Interconnects and the ways its spot avails are paid for and delivered is the locus of Comcast s allegedly anticompetitive conduct.

For purposes of this suit, the services provided by the Interconnects must be distinguished from advertising representation services. An Interconnect operator will:

- Pool inventory of spot avails from multiple MVPDs on a DMA-wide basis;
- Employ sales personnel to sell and/or coordinate sales of DMA-wide spot avails;
- Distribute schedules of participating MVPDs spot avails to facilitate coordinated merging of local advertising schedules;
- Coordinate insertion of ads (although MVPDs themselves generally provide the technical equipment for ad insertion into programming); and
- Collect money from Interconnect advertisers and coordinate payment to participating MVPDs or their ad representatives.

Thus, the Interconnects allow the participating MVPDs to sell their DMA-wide advertising in a way that mimics the broadcast networks and satellite providers comprehensive coverage of a DMA.[3]

All participating MVPDs were intended to benefit from the Interconnects, and all were encouraged to participate to maximize the value of the DMA-wide spot avails. To quote Comcast again: The value of an interconnect increases as more MVPDs in an area participate, so our incentive is to have as many MVPDs participate as possible. First Am. Cplt. ¶ 39. Because MVPDs will contribute only about one-third of their spot avails to the Interconnects, and compete with one another for local ad sales, Interconnect participants took steps to avoid giving preferential treatment to any single MVPD participant. To ensure fair administration of the Interconnects, they were initially conceived as being operated by non-MVPD, neutral third parties. At the time of their formation, Interconnects were overseen by boards of directors elected by all MVPD members.

Interconnects thus became valuable bridges to advertisers, translating into millions of dollars of advertising revenue each year in each market. Interconnects are especially valuable to smaller MVPDs. Once an Interconnect gains a critical mass of subscribers, regional or national advertisers are less likely to bother dealing with standalone MVPDs, especially those with small shares of DMA subscribers. And selling spot avails only to local (as opposed to DMA-wide or national) advertisers will not compensate for the

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[3] This type of cooperative arrangement is also available at the national level, with National Cable Communications (NCC) able to place ads across multiple DMAs or nationwide, replicating broadcast networks and satellite providers nationwide coverage. As the country s largest cable provider, Comcast now controls 60% of the NCC.

lost revenue if an MVPD is shut out of the Interconnect. Purely local spot avails are sources of revenue and local business relationships, but they have lower profit margins.

An Interconnect is what economists call a two-sided platform. It serves as a clearinghouse, offering different products or services to two different groups who both depend on the platform to intermediate between them. *Ohio v. American Express Co.*, 138 S. Ct. 2274, 2280 (2018). Such connectivity gives an Interconnect its value but can also be misused to harm competition.

On one side of the Interconnect are the advertisers, who are interested in reaching the greatest number of viewers, especially within a targeted DMA. The more subscribers an MVPD can bring to the table, the more advertisers will pay to reach that expanded audience. On the other side of the Interconnect are the MVPDs and their retail customers. The more advertisers that participate, the more valuable the Interconnect is to the MVPDs and their customers. Cable customers watching a ballgame or their favorite comedy may not think about the value of the advertisements they see, but MVPDs can use advertising revenue to keep monthly subscription prices lower and to run promotional discounts to bring in even more subscribers. Those new subscribers will in turn make the MVPD a more valuable and attractive advertising venue. The Interconnect can thus produce a competitively virtuous feedback loop. [T]he value of the services that [an Interconnect] provides increases as the number of participants on both sides of the [Interconnect] increases. See *American Express*, 138 S. Ct. at 2280 81. Or, as Comcast puts it: The value of an interconnect increases as more MVPDs in an area participate, so our incentive is to have as many MVPDs participate as possible.

An Interconnect is not necessarily, however, a one-way ratchet to increased demand. Decreased participation on either side of the Interconnect can also reduce its value. Thus, adapting language from *American Express*, an Interconnect losing participation on [the cable provider side] decreases the value of the advertiser side, and if advertisers leave due to this loss in value, then the [Interconnect] has even less value to [the cable providers] risking a feedback loop of declining demand. 138 S. Ct. at 2281.

Whether the Interconnects are procompetitive or not depends on the competitive dynamics among its participants. In a competitive market, for example, the risk of negative feedback may serve as a check on the ability of any one participant to raise prices or otherwise exert market power. See 138 S. Ct. at 2281 n.1. Conversely, in a less competitive market, access to the crucial Interconnects can be used to exclude competitors and harm competition. The Interconnects are so important that exclusionary conduct can become a weapon to injure competitors.[4]

b. *Competition for Subscribers*

We have just outlined the ways in which MVPDs compete and cooperate in the pursuit of advertising

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[4] There is no challenge here to the legality of the Interconnects themselves, at least as originally conceived, which seem to fit the model of certain procompetitive cooperative arrangements among competitors. See generally *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc*., 441 U.S. 1 (1979). Whether that remains the case when one MVPD controls an Interconnect is a question not presented here.

revenue, which is the focus of Viamedia s claims. Yet to see the full potential harm to competition caused by Comcast s alleged conduct, we must also describe the MVPDs competition for subscribers. Comcast s alleged conduct is all the more dangerous to competition because it was made possible by accelerating industry consolidation and has the potential to interfere with MVPDs competition with one another. The industry dynamics provide important context to understand the exclusion of Viamedia from a handful of DMA Interconnects, at least initially, and the broader potential impact on MVPD markets in general.

i. *Growing MVPD Competition*

Until the mid-1990s, cable companies typically operated as monopolists with exclusive local cable franchises in their respective areas. They showed little interest in building into one another s franchise areas and forcing competition. A combination of legal, regulatory, and practical barriers limited competitive entry by new MVPDs, and those limits were often supported by incumbent cable providers. DOJ Report at 32. Thus, only satellite companies DirecTV and Dish Network, with their nationwide coverage, could compete with cable companies for subscribers. Satellite companies were able to take some market share, particularly in rural areas, but their competitive threat to cable companies proved to be limited. DOJ Report at 5, 10, 22 & n.88, 59.

The 1990s saw major changes in the MVPD landscape. The cable industry shifted toward regional consolidation, with specific companies carving out large parts of the country within which to group their systems. Patrick R. Parsons, *Horizontal Integration in the Cable Television Industry: History and Context*, 16 Journal of Media Economics, no. 1 (2003) at 23, 37.

The larger companies bought and traded individual systems, with the various systems in a given city increasingly fall[ing] into the hands of a single cable company. *Id.*

With changes in technology and the regulatory environment, however, cable companies were about to face new competitors. The Telecommunications Act of 1996 was intended to break down barriers among cable, telephone, satellite, and internet businesses to galvanize competition and it did. Larry Satkowiak, *The Cable Industry: A Short History Through Three Generations* 47 48 (The Cable Center 2015). The lines between MVPDs, traditional telephone companies, and new broadband internet service providers became increasingly blurred as these companies started offering multiple services to consumers. DOJ Report at 1, 17, 19. Cable companies introduced telephone voice services, which had previously been a legal monopoly in many states, and started selling bundles of telephone, video, and broadband Internet access. *Id.* at 9, 11. Meanwhile, broadband internet service providers like RCN and WOW!, known as overbuilders, built their own infrastructure in areas already served by incumbent cable companies and rolled out multiple services. *Id.* at 8 & n.33, 21 & n.78, 47.[5] And traditional telephone service providers responded in kind. Verizon introduced its FiOS service

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[5] The term overbuild describes the situation in which a second cable operator enters a local market in direct competition with an incumbent cable operator. In these markets, the second operator, or overbuilder, lays wires in the same area as the incumbent, overbuilding the incumbent s plant, thereby giving consumers a choice between cable service providers. Report and Order and Further Notice of Proposed Rulemaking at 15 n.97, *In the Matter of Implementation of Section 621(a)(1) of the Cable*

in 2005, and AT&T followed with its MVPD service dubbed U-Verse. *Id.* at 6 7.

Thus, cable providers formerly the beneficiaries of cable franchise monopolies suddenly faced a new array of competitors. Today, many DMAs are served by an incumbent cable provider (e.g., Comcast), one or more overbuilder cable providers (e.g., RCN and WOW!), one or more telephone companies offering video services (e.g., Verizon FIOS), and two satellite dish providers (DISH and AT&T-DirecTV).

ii. *Incumbent Cable Companies' Efforts to Stymie Competition for Subscribers*

This new competition led to credible reports of lower prices and falling cable subscription rates in areas with new MVPD entrants exactly what one would hope to see in competitive markets. DOJ Report at 38 39 & nn.180 83. Incumbent cable companies were forced to respond[] to new entry by improving customer service, increasing bandwidth speeds . . ., adding more programming channels and services, and rolling out enhanced products (such as HD). *Id.* at 48; see also *id.* at 45 46. But new MVPD competitors continued to encounter obstacles, including some put in place by the incumbent cable providers. The incumbents had strong incentives to try to stymie these new competitors. As the FCC noted, competition from new cable companies reduces rates far more than competition from satellite companies. FCC 2007 Report and Order at 26 ¶ 50.

Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992, FCC MB Docket 05-311 (Mar. 5, 2007) (FCC 2007 Report and Order).

Among the obstacles for new competitors relevant to this case, incumbent cable providers entered into exclusive contracts with apartment buildings dense with potential subscribers, which new entrants could not reach, and exclusive and discriminatory contracts with programmers, whose content new entrants could not carry. FCC 2007 Report and Order at 18 ¶ 35. Overbuilders and the FCC reported in 2008 that [e]xclusivity and discrimination in access to programming are the most powerful tactics that incumbent operators use in an effort to block or otherwise constrain [new] competition. DOJ Report at 74; see also *id.* at 73, 75, 89; Petition of RCN Telecom Services, Inc., to Deny Applications or Condition Consent at 24, 27, *In the Matter of Applications for Consent to the Transfer of Control of Licenses of Comcast Corporation and AT&T Corporation to AT&T Comcast Corp.*, FCC MB Docket 02-70 (Apr. 29, 2002) (RCN 2002 FCC Petition) (RCN recounting the difficulties it has encountered in gaining, and keeping, access to critical, non-substitutable local programming controlled by Comcast and the numerous instances in which the incumbents (Comcast and its predecessors) have received exclusive building rights covering a period of years).

Incumbent providers also created barriers to signing up individual customers by locking existing subscribers into long-term contracts. Because of these long-term contracts there is only a small window when a customer is able to move. DOJ Report at 52. The incumbent [cable provider] knows when that window is, but the new entrant does not. *Id.* The new entrant must spend resources marketing to customers during periods when they cannot switch or will have disincentives to doing so, while an incumbent can target discounts and other incentives to subscribers immediately prior to the expiration of their contracts. *Id.* at 52 53. This competitive dynamic helps explain why smaller cable companies would hesitate to turn over their promotional advertising plans to their dominant cable competitor in advance of the actual promotions which is the likely result of Comcast s actions challenged in this case.

B. *The Ad Rep Services Market*

1. *The Role of Viamedia*

As MVPDs were trying to establish themselves in new markets, the sale of spot avails provided a key source of revenue that helped subsidize offers to attract subscribers. Incumbent cable companies had been selling their spot avails to advertisers for decades, with the scale, internal structures, and sales and operational personnel to support those activities. The new overbuilders and telephone service providers had no such experience or infrastructure.

Enter Viamedia. The new MVPD competitors could have all spent money to hire their own advertising sales staffs, to buy and implement billing systems, to set up monitoring protocols, and to deal with the necessary equipment to insert those ads seamlessly and accurately into programming. Many, including MVPDs in Chicago, Detroit, and Hartford, chose instead to contract for these spot advertising services with Viamedia. RCN, for example, could focus on competing with incumbent MVPDs through attracting subscribers and building out its footprint, with an assured ad revenue stream managed by Viamedia. With an Interconnect already in place, the new MVPDs (or Viamedia on their behalf) could sign an agreement with that Interconnect so that advertisers could place

DMA-wide ads that reached the new entrants subscribers along with the those of the incumbents.

These ad rep services are at the core of this lawsuit. The ad rep services that Viamedia provides its customer MVPDs include:

- Allocating the MVPD s inventory of spot avails among different sales channels i.e., local ads, sold in competition with other MVPDs; DMA-wide ads; or multi-DMA/national ads;
- Researching, marketing, pricing, and selling an MVPD s inventory of spot avails to advertisers, including the approximately one-third of spot avails sold to local retailers in competition with other MVPDs;
- Interfacing with the relevant Interconnect for spot avails allocated to regional, DMA-wide ads;
- Providing technical services such as encoding video files and operating and maintaining the software needed to run, insert, traffic, monitor, and archive ads;
- Organizing the MVPD s inventory of spot avails into schedules and ensuring that each ad runs correctly during those schedules; and
- Performing financial services, such as accounting, billing, and collection.

Viamedia employs the personnel needed for these functions, spreading these costs among all of its MVPD customers. If an MVPD retained Viamedia to provide this full range of services for all of its inventory of spot avails, including the competitive selling of local spot avails, it was said that the MVPD had secured full turnkey representation. As overbuilders and telephone companies continued their build out, Viamedia was able to expand the areas and MVPD customers to which it could supply services.

2. *Vertically Integrated MVPDs*

By contrast, Comcast does not need an independent ad rep services provider like Viamedia. Instead, Comcast is vertically integrated and has its own wholly-owned subsidiary that provides ad rep services both in-house and to other competing MVPDs. In markets where Comcast does not operate the Interconnects, its in-house ad rep services arm secures Interconnect access for its own MVPD service and its customer/competitors MVPD services, just as Viamedia used to do in Chicago, Detroit, and Hartford. Several other MVPDs have similar internal divisions that provide spot cable ad rep services.[6] In fact, Viamedia is unique in that it is the only ad rep services firm of any size that is independent i.e., not owned by an MVPD.

MVPDs that have their own ad rep services divisions or subsidiaries, such as Comcast, compete with Viamedia to provide these services to other MVPDs. And just as MVPDs compete for subscribers wherever their service footprints overlap, the providers of ad rep services compete DMA by DMA. The ad rep services providers organize their sales forces around the boundaries of DMAs and provide services only to the MVPDs who have subscribers within those DMAs. Hybrid arrangements also exist. Some MVPDs do not

[6] These include Charter s Spectrum Reach, Cox s Cox Media, Altice s Suddenlink Media and Altice Media Solutions, and Mediacom s OnMedia.

contract for full turnkey services, but instead seek ad rep services for only a portion of their spot avails and sell the remaining spot avails themselves.

This unusual market structure thus involves three levels of competition: (1) MVPDs compete against one another for subscribers; (2) some vertically integrated MVPDs ad rep services arms compete against Viamedia (and potentially against each other) for clients; and (3) MVPDs compete with one another for some sales of their spot avails to advertisers. We need to keep all three levels in mind.

3. *Back to the Interconnects*

As part of the continuing industry consolidation in the 2000s, Comcast moved into many new DMAs. It also expanded from being one of several cable companies that participated in some DMA Interconnects to being the largest participant. For example, Comcast was able to acquire over 3,300 local cable franchising areas through its purchase of AT&T Broadband s and Adelphia s cable properties. FCC 2007 Report and Order at 15 & n.95. As Comcast repeatedly acquired other cable systems, it grew to be the largest participant in dozens of DMAs and became the sole operator or manager of those DMAs Interconnects, including in Chicago, Detroit, and Hartford.

Yet the Interconnects continued to function as they had before industry consolidation. They provided a single point of contact for distributing DMA-wide ads, as well as access to and collecting fees from all MVPDs (or their ad rep service providers) that participated in the Interconnects. If an MVPD did not participate in an Interconnect, an advertiser could not reach its subscribers, making an ad buy within the

DMA less valuable for any remaining MVPD Interconnect participants.

During this period, in 2003, Viamedia entered into agreements with Comcast for Interconnect access in the Chicago and Detroit DMAs, which ran until May 2012. Viamedia sought this access because it provided ad rep services to cable overbuilders RCN (in Chicago) and WOW! (in Chicago and Detroit) under contracts that ran until 2014. As noted above, typical industry practice is for approximately one-third of an MVPD s spot avail inventory to be sold on a DMA-wide basis. In line with that practice, Viamedia agreed to sell a portion of RCN s and WOW! s spot avail inventory on a DMA-wide basis through the Comcast-controlled Interconnects. Viamedia sold the remaining portion of RCN s and WOW! s spot avails both nationally and in competition with Comcast locally. Comcast also agreed not to solicit Viamedia s MVPD clients until four months before the Viamedia/MVPD contracts expired, although the MVPDs remained free to contact Comcast.

C. *Comcast Refuses Interconnect Access to Viamedia*

This was the competitive landscape for Comcast s conduct challenged in this lawsuit. Internal Comcast PowerPoint presentations explained that Comcast viewed its Next phase as consolidat[ing the] core business of ad rep services, and then look[ing] at other businesses we can leverage (our technologies or platforms). A212 n.68. There is evidence that Comcast saw the Interconnects as one such point of leverage.

As noted, Viamedia s Interconnect access agreements with Comcast for the Chicago and Detroit

DMAs were due to expire in 2012. Viamedia s contracts for ad rep services with RCN and WOW! were extended until 2015 (RCN) and 2014 (WOW!). As 2012 neared, Comcast faced a choice. It could compete for RCN s and WOW! s ad rep services business the following year, as it already competed for RCN s, WOW! s, and other MVPDs business in many other DMAs. Or it could try to use its control over the Interconnects to shut out the competition for ad rep services. At first, it appeared that Comcast would take the route of competition, contacting RCN and WOW! to express interest in selling them ad rep services. But Comcast then changed its strategy. It tried instead to take advantage of its control over the Interconnects. Comcast noticed Viamedia in December 2011 that it would refuse to permit Viamedia any further access to the Interconnects. In June 2012 Comcast executed on that notice. For the first time in any DMA since the Interconnects had been created, an Interconnect operator   Comcast   had cut off Interconnect access to an MVPD or an MVPD representative.

Comcast executed this strategy in other DMAs, as well, similarly denying Viamedia access to Interconnects on behalf of Viamedia s customer MVPDs (Comcast s competitor MVPDs). For example, in the Hartford DMA, Comcast had previously provided full-turnkey service to AT&T s MVPD. When Frontier acquired AT&T s Hartford network in 2014, it had the option of assuming the Comcast contract. Frontier, however, had been unhappy with Comcast s customer service when it used Comcast in other DMAs, so it switched from Comcast to Viamedia. Comcast then excluded Frontier s spot avails from the Hartford Interconnect, resulting in millions of dollars in lost ad revenues for Frontier and Viamedia, as well as Comcast itself, and degrading the value of the Hartford Interconnect.[7] By contrast, in DMAs where the Interconnects were controlled not by Comcast but by other large, incumbent cable companies such as Time-Warner Cable, access to the Interconnects had not yet been pulled.

Comcast then returned to Viamedia with a series of offers that would have required Viamedia to assign 100% of its customers spot avails to Comcast in exchange for a one-time finder s fee. That was essentially an offer to pay Viamedia to exit the marketplace. At the end of July 2014, Comcast provided a more detailed offer. It would have had the same effect as the first offer a payment to Viamedia to stop providing spot cable ad rep services. In August 2014, Viamedia received the third iteration of Comcast s offer, which at first appeared promising. When Viamedia received a detailed offer in writing, however, it discovered that Comcast had added a provision that would permit Comcast unilaterally, and on just four hours notice, to take any ad inventory from Viamedia and contribute it to the Interconnect. That uncertainty would have rendered those spot avails virtually worthless to advertisers.

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[7] On these points, the record contains more precise numbers in documents that have been under seal. Here and elsewhere in this opinion, we have used verbal descriptions rather than specific numbers for important information that has been submitted under seal. We are skeptical, however, about the grounds for sealing much, if not all, of the evidence under seal. Simultaneously with this decision, we are issuing an order that unseals evidence we identified in an earlier order to show cause, and we are ordering the parties to show cause why any of the remaining sealed evidence, including that obtained from non-parties, should remain under seal at this time.

Along with these onerous terms, the revenue-share proposals appeared to be below market rate for Interconnect-only access, compared to both Viamedia s prior agreement with Comcast and other Interconnect-only access agreements in any other comparable DMAs. In short, the agreements did not offer access to the Interconnect in a way that would allow Viamedia to provide ad rep services to its MVPD customers. Nor were these terms to be found in any other Interconnect-only agreement employed by any Interconnect operator in any DMA.

Moreover, during these negotiations in July 2014, the head of Comcast s cable spot ad rep services division and his colleague, Hank Oster, expressed concern that Comcast COO Dave Watson was wavering on why we won t let Viamedia in the Interconnects. Whatever second thoughts some within Comcast might have had, however, Comcast s approach did not change. As Oster later candidly explained, by July 2014 Comcast already had made the decision to exclude Viamedia from the Interconnects. Comcast was also telling WOW! that it would not allow it to return to the Interconnect with Viamedia as its ad rep, and that Comcast was taking that position as part of its strategic plan. A230.

Comcast urges us to infer as a matter of law that it was acting for procompetitive reasons. The evidence, though, can easily support the inference that Comcast was instead choosing to inflict financial pain on both its competitors *and itself* to gain monopoly power in the ad rep services market, which would also produce a new advantage over its retail cable competitors. By cutting Viamedia off from the Chicago and Detroit Interconnects in 2012, Comcast ensured that its competitor MVPDs spot avails could not be distributed through the Interconnects while they were represented by Viamedia under their existing contracts.

This was an expensive decision for Comcast. As operator of the Interconnect, Comcast s internal analysis of the Revenue Impact of its decision predicted that Comcast itself would lose $10.6 million in just the first six months after cutting off Viamedia s (and thus RCN s and WOW! s) access, including $2.3 million in lost cash flow. A838, A787 88. The evidence of actual effects is consistent with that prediction. In the years that RCN and WOW! were unable to access the Interconnects (June 2012 through December 2015), they lost approximately $27 million in ad revenue. Comcast itself lost $7 million in commissions. A248, A637, A648 (figs. 35, 46). Moreover, Comcast s own spot avails would have decreased in value because an advertiser could no longer reach all cable subscribers within the DMA through the Interconnect.

But as an amicus supporting Comcast points out, Comcast could easily afford to sacrifice millions in Interconnect fees and lower ad revenue in order to inflict this harm on its MVPD competitors, advertisers, and Viamedia. As the dominant MVPD provider in markets across the country, this temporary and localized lost revenue is small potatoes, a mere rounding error. Brief for Washington Legal Foundation s as Amicus Curiae Supporting Appellees at 22. Just so.

With Comcast and Viamedia as the only two providers of ad rep services in the Chicago and Detroit DMAs, Comcast s denial of Interconnect access to Viamedia left Comcast with an effective monopoly over both Interconnect services *and* ad rep services. The window of time between Viamedia s foreclosure from Interconnect access and Comcast s competitor

MVPDs return to the market to seek bids for their ad rep services would be the time for Comcast to overpower ViaMedia, as a Comcast employee in the Detroit DMA explained. A217 (budget presentation). So the evidence supports an inference that Comcast willingly chose to inflict short-term financial losses on itself. Why? A reasonable explanation is that it did so because it could survive those losses (the small potatoes and rounding error) to obtain and use monopoly power in the ad rep services market.

In this lawsuit Comcast has argued that RCN and WOW! chose it over Viamedia on the merits of its offered services. Comcast highlights, for example, testimony from an RCN representative that after comparing Comcast s offer with Interconnect access to Viamedia s offer without It was not in the end a very difficult decision to make. DA688. But this answer presupposes that Comcast shutting its competitors out of the Interconnects could be a reasonable basis to treat RCN s decision as uncoerced. There is evidence that Comcast did just that. Contrary to the assertions of the district court and our colleague who dissents in part, for example, a Comcast employee working in the Chicago and Detroit DMAs explained that Comcast had adopted a business practice that if an MVPD wants to get access to a Comcast controlled Interconnect, it has to hire Comcast as its sale representative. A215.

Viamedia s evidence also supports a finding that WOW! and RCN did not go willingly into Comcast s arms. Both pushed back against Comcast s demands (or threats) that they either use it for their advertising services or face exclusion from the Interconnects if they stayed with Viamedia. A WOW! employee communicating with Comcast reported back to WOW! colleagues that Comcast was maintaining their position that [WOW!] can be in the IC [Interconnect] but only if they [Comcast] rep us directly. A215 n.81, A230 n.129. It is a factual question whether it was reasonable at the time for the smaller MVPDs to understand [that] to be part of the interconnect [they] would need to be with Comcast Spotlight, Comcast s ad rep services arm. DA687.

Comcast s competitor MVPDs immediately began losing money after Comcast excluded them from the Interconnects. They lamented that their reductions in cash flow were primarily due to the loss of the Comcast Interconnect revenues in Chicago and Detroit. A233. Despite that pressure, though, the MVPDs continued to resist Comcast s demands. As discussed above, at the time, Comcast was trying to buy TimeWarner Cable, a proposed deal that was under review by federal agencies. With a forum to share their ongoing experiences with Comcast, RCN (futilely) filed comments with the FCC, alerting regulators that Comcast was not being truthful when it said RCN is free to join the Comcast-managed interconnects at any time, because Comcast will only allow RCN to join the interconnects if RCN employs Comcast Spotlight instead of Viamedia. A215 n.81, A886 87.

Viamedia also was not going quietly. Even though Comcast had barred it from Interconnect access, Viamedia continued to compete for RCN s and WOW! s business. Without Interconnect access, their MVPD customers spot avails would not bring in nearly as much revenue, which left Viamedia s bids proposed revenue shares at a substantial disadvantage compared to Comcast s bids. A231 32. Nonetheless, Viamedia s bids caused consternation for Comcast. Internal Comcast emails reflect executives disbelief. They called it absolutely unbelievable that Viamedia could make a remotely competitive bid without Interconnect access. A232. In contrast to Viamedia s bids, Comcast bids touted the exclusive benefit of Interconnect access that WOW! would receive if it selected Comcast for ad rep services. Comcast said that the generous financial terms it offered included the sizable annual guarantee that would be attributable to the opportunity to add WOW! subscribers [back] to the important Detroit and Chicago Interconnects. In other words, sign up with Comcast for ad rep services, and we will stop your bleeding the bleeding that we have inflicted by barring you from the DMA Interconnects.

Substantial evidence thus shows that Comcast s MVPD competitors did not want to buy ad rep services from Comcast. Their reluctance was not based on a short-sighted inability to see the procompetitive benefits of Comcast s vertical integration or what Comcast touts as one-stop shopping. Rather, these MVPDs had economically rational reasons for seeking to avoid this entanglement with their dominant competitor, which would naturally have divided loyalties. In addition, WOW! considered Viamedia to be by far the best ad partner from a technical team to work with. A560, DA 685. RCN testified that it would prefer to obtain ad rep services from an independent company like Viamedia rather than Comcast because, all things being equal, even close to being equal, it had concerns about being a partner with a company associated with our competitor. A236 n.150.

Thus, as Comcast s MVPD competitors assessed the situation, the possible outcomes all amounted to unfair wins for Comcast. Its actions could have resulted in three different outcomes, each of which would work to its benefit and harm its competitors. First, if Comcast succeeded in having its competitor MVPDs buy Comcast ad rep services, Comcast would gain the following benefits:

- Comcast s smaller MVPD rivals would now be contributing additional revenue toward their dominant competitor, Comcast;
- The majority of spot avails that MVPDs had formerly kept out of the Interconnects to allocate to, among other outlets, local ads (for which the MVPDs compete against each other for sales) would now come under the control of their competitor Comcast whose contracts required that Comcast have sole and exclusive control over all spot avails;
- Comcast s competitor MVPDs would just have to trust that Comcast would make the best business decisions on behalf of its competitors when allocating adds to the national, regional, and local sales markets. For example, the smaller MVPDs prefer to weight some of their ad sales to non-Interconnect local sales, which help the MVPDs with local business relationships that can lead to additional sales of services, such as providing business internet connectivity (sales for which they compete against Comcast); the Interconnect operator, on the other hand, prefers DMA-wide Interconnect ad sales for which it gets higher margins an ad mix choice that Comcast would be

free to make for its smaller MVPD competitors;

- Comcast would be a single seller of advertisements in the local market, eliminating competition;
- Comcast would not only have access to its competitor MVPDs ad sales information, but the MVPDs would have to provide Comcast with all of their own promotional ad materials to current and potential subscribers that they are attempting to retain or win away from Comcast, giving Comcast a chance to undercut them. That would be in addition to other competitively sensitive information (e.g., number and location of its subscribers) that would need to be disclosed.

Viamedia has offered evidence that what drove Comcast s actions was this close relationship with competing MVPDs not hypothesized economic efficiencies from ordinary vertical integration. For example, there are some DMAs where Comcast controls the Interconnects, but the participating MVPDs do not have overlapping footprints with Comcast s service areas. In those DMAs, Comcast still offers Interconnect-only agreements on terms similar to the terms of the former Comcast-Viamedia agreements for the Chicago and Detroit DMAs.

Viamedia offered evidence on summary judgment (described above) of a second outcome in which Comcast s MVPD competitors would forgo Interconnect access entirely and renew with Viamedia rather than switch to Comcast. If its MVPD competitors made that choice, those MVPDs would be cut off from a large percentage of ad revenue, which in turn would hinder them from funding promotional offers to their subscribers, potentially leading their subscribers to switch to Comcast. In the meantime, Comcast s lost millions from Interconnect fees and reduced advertising revenue within the DMA would continue to be a mere rounding error.

In the third potential outcome which only Comcast contends was actually a possibility Comcast would not bar competing MVPDs completely from Interconnect access but instead would permit them to have Interconnect-only access if they took care of their own ad services, without using either Viamedia s or Comcast s ad rep services. In this scenario, Comcast would lose the revenue it would have gained from providing full-turnkey service to the MVPDs, but it would still earn Interconnect access fees and the Interconnect s value would not be degraded. The result would also raise rivals costs by forcing them to provide internally the staff, technology, and services that Viamedia had previously provided at lower cost. Those fixed costs would be difficult for those MVPDs to afford and would shift revenue away from subscriber promotions and further infrastructure build-out. See FCC 2007 Report and Order at 8 ¶ 13 (Revenues from cable services are, in fact, a driver for broadband deployment, i.e., the build-out of additional cable infrastructure).[8]

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[8] Viamedia has presented evidence that RCN and WOW! did not view bringing ad rep services in-house as a viable option. When confronted with Comcast s refusal to deal with Viamedia, both said they had no choice but to enter into ad rep agreements with Comcast. A215, A887. The in-house option was always available in theory. But RCN and WOW! are presumed to be economically rational actors. They had always chosen to buy

Faced with this Hobson s choice, Comcast s competitor MVPDs chose to sign with Comcast in 2015. WOW! noted that a key decision point in this choice was its understanding that in order to remain competitive, we need to be in the Interconnect. A233. WOW! signed with Comcast for ad rep services in Chicago and Detroit in 2015. WOW! continued, however, to use Viamedia as its ad rep in some non-Comcast DMAs. Similarly, although RCN had planned to renew its contract with Viamedia, it too ultimately decided to sign with Comcast for Chicago and Detroit. By 2016, a Comcast employee congratulated a colleague regarding its new monopoly in ad rep services in the Chicago DMA: THE WOW AND RCN DEALS PROVIDE [COMCAST] WITH COMPLETE REPRESENTATION OF THE CHICAGO MARKET. A214 n.77.

II. *District Court Proceedings*

In 2016, Viamedia sued Comcast for violating Section 2 of the Sherman Antitrust Act, as well as various state antitrust statutes, and for tortious interference. The parties agree that analysis under the state antitrust statutes tracks federal antitrust law, so the federal antitrust analysis controls whether the state antitrust claims survive. Viamedia is no longer pressing its tortious interference claim, so our only focus is Section 2 of the Sherman Act.

Comcast moved to dismiss the complaint for failing to state a claim. The district court construed Viamedia s complaint as alleging that Comcast engaged in three types of monopolistic conduct recognized by the antitrust laws: (1) Comcast s refusal to deal with

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these services from outside companies, suggesting that in-house was not an economically viable option.

Viamedia by cutting off access to the Interconnects, (2) Comcast s exclusive dealing, and (3) Comcast s tying of Interconnect access to the purchase of Comcast s ad rep services.

The district court granted the motion to dismiss with respect to Viamedia s refusal-to-deal claim, faulting Viamedia for failing to demonstrate through its allegations that Comcast s conduct was irrational but for its anticompetitive effects. *Viamedia, Inc. v. Comcast Corp.*, 218 F. Supp. 3d 674, 698 (N.D. Ill. 2016). The court hypothesized that Comcast s complete foreclosure of Viamedia from the market potentially serves a procompetitive purpose and offers potentially improved efficiency. 218 F. Supp. 3d at 699. And because vertical integration is usually procompetitive, Comcast likely had a rational procompetitive purpose: it has become a one- stop shop in certain DMAs for MVPDs wishing to sell advertisements on a regional basis. *Id*. at 698 99. Comcast s short-term losses in excluding Viamedia and Comcast s competitor MVPDs from the Interconnects were not necessarily indicative of anticompetitive conduct, the court reasoned in dismissing a later version of the complaint on identical grounds, because a monopolist might wish to withdraw from a prior course of dealing . . . in order to pursue perfectly competitive ends. *Viamedia, Inc. v. Comcast Corp.*, No. 16-CV5486, 2017 WL 698681, at *4 (N.D. Ill. Feb. 22, 2017), quoting *Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064, 1075 (10th Cir. 2013).

After discovery on Viamedia s exclusive dealing and tying claims, the district court granted Comcast s motion for summary judgment because Viamedia had failed to present evidence that tends to exclude the possibility that [defendant s] conduct was as consistent with competition as with illegal conduct. *Viamedia, Inc. v. Comcast Corp.*, 335 F. Supp. 3d 1036, 1054 (N.D. Ill. 2018). In the district court s view, there was no evidence that Comcast conditioned its sale of Interconnect services to MVPDs on their purchase of ad rep services because in DMAs outside the relevant geographic markets, Comcast *did* offer Interconnect-only access to other MVPDs. *Id*. at 1058 59. Further, because both RCN and WOW! *wanted* full-turnkey representation, the purchase of the two products together could not be considered tying. *Id*. at 1059. In fact, the district court concluded (in tension with the observation that Comcast offered Interconnect-only access in other DMAs), Comcast had no reason to oĕer Interconnect-only access to RCN and WOW! because, the district court again hypothesized, an Interconnect-only deal would be less substantial, less profitable, and less efficient for Comcast than a full-turnkey deal. *Id*. at 1059.

In any event, even if Comcast had refused to deal with its competitor MVPDs unless they met Comcast s condition of purchasing ad rep services, the court viewed this as simply a reformulation of Viamedia s already-dismissed refusal-to-deal claim. 335 F. Supp. 3d at 1062, 1070, 1072. To support this conclusion, the district court noted that Viamedia sought injunctive relief that would restore its access to the Interconnects and give RCN and WOW! the option to decline purchase of Comcast s ad rep services. *Id*. at 1074.

In addition, the district court found that Viamedia s two experts testimony was based upon an incorrect understanding of the law i.e., that Comcast had engaged in anticompetitive conduct for which it could be held responsible under the antitrust laws. *Id*. at 1064 74. The district court concluded that this justified excluding the damages expert s testimony in its entirety, as well as a portion of the economic expert s testimony. Viamedia has appealed the final judgment dismissing its claims.

III. *Legal Standards and Analysis*

With the facts and competitive dynamics set out, we turn to the legal standards and analysis. In Part III-A, we describe the standards for an antitrust violation under Section 2, the monopolization provision of the Sherman Act. Undisputed by the parties, we explain that Comcast is a monopolist in the relevant geographic markets (here: Chicago, Detroit, and Hartford) for both Interconnect and ad rep services, and that it is the dominant MVPD retail cable provider.

In Part III-B, we address Viamedia s two claims. In Part III-B-1, we set out the legal test for refusals to deal and assess Comcast s conduct, explaining why this claim should not have been dismissed on the pleadings. In Part III-B-2, we turn to Viamedia s tying claim. These related claims are both based on the same course of conduct, resulted in the same anticompetitive harms, and would be subject to the same procompetitive justifications or defenses. The decision to dismiss one claim on the pleadings while allowing the other, closely related claim to go as far as summary judgment offered potential for confusion, but in the end, both claims need to be tried.

In Part III-C, we evaluate in greater detail the harm to competition alleged by Viamedia and the procompetitive justifications offered by Comcast, highlighting considerations that will be relevant on remand. In Part III-D, we explain that Viamedia has presented evidence of a cognizable antitrust injury as a rival driven from the market by a tying arrangement.

Finally, in Part III-E, we address the district court s rulings excluding expert witness evidence. Our resolution of Viamedia s refusal-to-deal and tying claims largely resolves its challenge to the testimony s exclusion. The district court s decision on this score was based almost entirely upon its erroneous legal analysis. On remand, the district court will need to take a fresh look at the expert reports in light of this opinion.

A. *Sherman Act Section 2—Illegal Monopolization*

Section 2 of the Sherman Antitrust Act imposes liability on Every person who shall monopolize . . . any part of the trade or commerce among the several States. 15 U.S.C. § 2. A private plaintiff like Viamedia may bring a civil claim as a person who was injured in his business or property by reason of anything forbidden in the antitrust laws. 15 U.S.C. § 15(a).

Judicial decisions interpreting Section 2 have long held that simple possession of monopoly power, or the pursuit of it, is not in itself illegal. *United States v. U.S. Steel Corp.*, 251 U.S. 417, 451 (1920) ([T]he law does not make mere size an offence, or the existence of unexerted power an offense. It . . . requires overt acts.); *United States v. Aluminum Co. of America*, 148 F.2d 416, 429 30 (2d Cir. 1945) (size does not determine guilt as the monopolist may have gained market power by force of accident, or by virtue of his superior skill, foresight and industry ; therefore, there must be some exclusion of competitors). Thus, a firm violates the monopoly provision in Section 2 only when it both (1) possesses monopoly power in the relevant market *and* (2) engages in the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004), quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 570 71 (1966); see also Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 600a, at 3, ¶ 650a, at 91 (4th ed. 2015) (Areeda & Hovenkamp).[9]

On appeal, the parties do not dispute several often-contentious issues in antitrust cases: the relevant geographic and product markets, and market power. See *Goldwasser v. Ameritech Corp.*, 222 F.3d 390, 397 (7th Cir. 2000) (Few would say that the first element is easily proved: it is exceedingly difficult to prove market power, or monopoly power . . . .). The relevant geographic markets are the specific DMAs in which Viamedia asserts Comcast s conduct harmed competition: Chicago, Detroit, and Hartford. See *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 332 33 (1961) (a relevant antitrust geographic market is the area in which sellers operate and where purchasers can predictably turn for supplies). Comcast s conduct in other DMAs may be relevant for comparison purposes.

The relevant product market allegedly monopolized is ad rep services for MVPDs. The immediate

[9] This appeal does not present any issues under the Section 2 language barring attempts and conspiracies to monopolize.

effect of Comcast s conduct was to force out its only competitor in that market to gain monopoly power in the relevant geographic markets for those services. This market is inextricably connected to access to the cooperative mechanism of the Interconnects, as well as to the related markets for MVPD retail cable services and the sale of MVPD spot avails. Understanding the harm to competition in these related markets helps in assessing Comcast s alleged conduct. Antitrust analysis must always be attuned to the particular structure and circumstances of the industry at issue. *Trinko*, 540 U.S. at 411; see also Areeda & Hovenkamp ¶ 1802d, at 79 80 (When assessing exclusionary conduct, it is necessary to examine market power or share at *both* of the two market levels involved.).

As for market power, in the Chicago, Detroit, and Hartford markets, Comcast started with monopoly control over Interconnect access and services. Comcast has acquired a pure monopoly in the market for ad rep services in these metropolitan areas, where it is also by far the dominant MVPD retail cable provider.[10]

A firm s market power is important because, without it, a firm will have little to no ability to distort or harm competition, no matter how great its desire to do so, even when engaging in conduct that in different circumstances might be perceived as anticompetitive. See *Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064, 1071 (10th Cir. 2013) (Gorsuch, J.) (Not infrequently,

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[10] For antitrust purposes monopoly power and market power typically are used interchangeably and simply mean that a firm can influence the price it receives for its product. Dennis W. Carlton and Jeffery M. Perloff, *Modern Industrial Organization* 137 (2d ed. 1994).

the initial question of market power proves decisive.). Even [m]ildly reprehensible behavior might be enough to challenge a firm whose power is significant. Areeda & Hovenkamp ¶ 600b, at 4.

B. *Claims of Anticompetitive Conduct: Refusals to Deal and Tying*

The dispute here focuses on the second prong of the Section 2 test: did Comcast willfully acquire or maintain its new monopoly power in the ad rep services market, or is its new market dominance a consequence of a superior product or business acumen or the result of an historic accident ?

Baked into this inquiry is an assessment of what types of anticompetitive conduct are prohibited as illegally acquiring or maintaining monopoly power, rather than the kind of pro-competitive conduct the antitrust laws do not impede. The latter includes innovation resulting in superior products, the introduction of efficiencies reflecting superior business acumen, or even the luck of a firm that unwittingly stumbles into a monopoly position. See Areeda & Hovenkamp ¶ 600a, at 3 (setting out first two prongs identified above and articulating the two subsidiary questions : (3) given that § 2 requires some element of conduct in addition to substantial market power, what kinds of conduct or intent transform power into unlawful monopolization; and (4) what defenses, if any, save monopoly power from condemnation?).

The statutory text does not provide the answers, but case law over more than a century provides extensive guidance. Courts recognize various types of conduct that have the potential to harm competition. The types of conduct alleged in this case are exclusionary in nature, impairing rivals opportunity to compete in a way that is inconsistent with competition on the merits. Areeda & Hovenkamp ¶ 650a, at 92; see also *id.* ¶ 651b, at 99 100; *Covad Communications Co. v. Bell Atlantic Corp.*, 398 F.3d 666, 675 76 (D.C. Cir. 2005) (agreeing with plaintiff s description of defendant s refusal to deal as predatory . . . because, in the vernacular of antitrust law, a predatory practice is one in which a firm sacrifices short-term profits in order to drive out of the market or otherwise discipline a competitor).

In the present case, Viamedia alleges and has offered evidence that Comcast: (1) refused to deal with Viamedia by denying it Interconnect access, and (2) engaged in tying by denying MVPDs Interconnect access unless they purchased Comcast s ad rep services.[11] We set out below the legal tests for refusals to deal and tying, which help in assessing whether such conduct is anticompetitive and illegal, or instead harmless or even procompetitive.

Conduct that can harm competition may fit into more than one of these court-devised categories. After all, the means of illicit exclusion, like the means of legitimate competition, are myriad. *Trinko*, 540 U.S. at 398, quoting *United States v. Microsoft Corp.*, 253 F.3d 34, 58 (D.C. Cir. 2001) (en banc). Although the standard for a § 2 violation is significantly stricter in its power assessment [than for a § 1 claim], it is broader and less categorical in its definition of proscribed conduct. Areeda & Hovenkamp ¶ 777a, at 324. This means that a dominant firm s conduct may be susceptible to more than one court-defined category of anticompetitive conduct. A simple refusal to deal

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[11] To simplify the issues on appeal, Viamedia elected not to pursue exclusive dealing as a distinct theory of liability.

is conduct where one firm refuses to deal no matter what, whereas [t]ying and exclusive dealing are two common examples of conditional refusals to deal i.e., one firm will refuse to deal with another firm unless some condition is met. Herbert Hovenkamp, *FRAND and Antitrust*, CORNELL L. REV. (forthcoming 2020) (manuscript at 11), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=3420925. Similarly, [m]any of the practices that have been characterized as exclusive dealing could also be described as tying because [t]he economic distinction between the two is most often slight or nil. Areeda & Hovenkamp ¶ 1800b, at 7 8, ¶ 1800a, at 4.

The fact that the categories of conduct here are conceptually related and may overlap should not cause confusion if we stay focused on the underlying inquiry: the conduct must harm the competitive *process* and thereby harm consumers. *Microsoft*, 253 F.3d at 58; see also *Nynex Corp. v. Discon, Inc.*, 525 U.S. 128, 135 (1998) (plaintiffs must allege and prove harm, not just to a single competitor, but to the competitive process, i.e., to competition itself). At bottom, the purpose of identifying these categories of conduct is to help determine the presence or absence of harmful effects, which are both the reason for any antitrust concern and often the simplest element to disprove. Areeda & Hovenkamp ¶ 1701d, at 33. We therefore start by assessing how Comcast s conduct fits into these categories under Section 2, mindful that we should stay focused on the effect Comcast s conduct has on competition.

1. *Refusals to Deal*

The district court dismissed on the pleadings the portion of Viamedia s complaint focused on a refusal-to-deal theory. We review *de novo* a grant of a motion to dismiss, constru[ing] the complaint in the light most favorable to the plaintiff, accepting as true all well-pleaded facts alleged, and drawing all possible inferences in [its] favor. *Tamayo v. Blagojevich*, 526 F.3d 1074, 1081 (7th Cir. 2008); see also *Goldberg v. United States*, 881 F.3d 529, 531 (7th Cir. 2018) (in reviewing dismissal for failure to state a claim, we accept facts alleged by plaintiff without vouching for their objective truth). We next set out the general principles underlying a refusal-to-deal claim and then explain how the leading case *Aspen Skiing* maps onto Comcast s conduct. We then reject Comcast s argument that Viamedia s claim could properly be dismissed on the pleadings.

a. *Monopolists and Refusals to Deal*

Monopolists are both expected and permitted to compete like any other firm. *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 116 (1986). A monopolist is not obliged to watch[] the quality of its products deteriorate and its customers become disaffected and lie down and play dead because even a monopolist is entitled to compete. *Goldwasser v. Ameritech Corp.*, 222 F.3d 390, 397 (7th Cir. 2000). Part of competing like everyone else is the ability to make decisions about with whom and on what terms one will deal. *Id.*; see also *Authenticom, Inc. v. CDK Global, LLC*, 874 F.3d 1019, 1025 (7th Cir. 2017). And just because a firm has monopoly power doesn t mean that the law should prevent it from competing, as [i]t would be absurd to require the [monopolist] to hold a price umbrella over less efficient entrants. Richard A. Posner, *Antitrust Law* 196 (2d ed. 2001). Thus, the general rule is that even monopolists are free to choose the parties with whom they will deal, as well as the prices, terms, and conditions of that dealing.

Pacific Bell Telephone Co. v. Linkline Communications, Inc., 555 U.S. 438, 448 (2009), citing *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919).

Yet there are limited circumstances under which a monopolist s refusal to deal with another party will be illegal anticompetitive conduct. *Id.*; see also Areeda & Hovenkamp ¶ 1800c5, at 21 (Section 2 of the Sherman Act reaches unilateral refusals to deal when the refusals constitute monopolization . . . .). For example, in *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951), a monopolist newspaper was an indispensable medium of advertising for many local businesses but refused to deal with any advertiser who placed any ad with a new radio competitor in an effort to destroy and eliminate the new competitor. *Id.* at 152, 150. The Court was not persuaded by the newspaper s argument that it had a right as a private business concern to select its customers and to refuse to accept advertisements from whomever it pleases. *Id.* at 155.

In a holding that resonates in this case, *Lorain Journal* explained: *In the absence of any purpose to create or maintain a monopoly*, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. *Id.*, quoting *Colgate*, 250 U.S. at 307; see also *Goldwasser*, 222 F.3d at 397 (acknowledging circularity of *Colgate* test). With the newspaper s clear expectation that it would outlast the new competition and regain its complete monopoly, and with no apparent efficiency justification for its conduct, *Lorain Journal* has been described as entirely correct. Robert H. Bork, *The Antitrust Paradox: A Policy at War with Itself* 344 45 (2d ed. 1993).

This theory of liability was endorsed again in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), the leading case on this issue.

b. *Aspen Skiing and Comcast*

Comcast takes the position that after the Supreme Court s 2003 *Trinko* decision, any antitrust claims based on a duty to deal with rivals bit the dust. In the face of both *Aspen Skiing* and the actual language of *Trinko*, we must reject that argument about what the law should be. *Trinko* itself said just the opposite: Under certain circumstances, a refusal to cooperate with rivals can constitute anticompetitive conduct and violate Section 2, and the leading case for § 2 liability based on refusal to cooperate with a rival . . . is *Aspen Skiing*. 540 U.S. at 408; see also *Linkline*, 555 U.S. at 448 (There are also limited circumstances in which a firm s unilateral refusal to deal with its rivals can give rise to antitrust liability.), citing *Aspen Skiing*, 472 U.S. at 608 11.

What do those limited circumstances look like? In addition to reiterating *Aspen Skiing* s continued, albeit narrow, validity, the Court has also provided useful guidance on primary factors to consider when determining whether potentially anticompetitive conduct falls within *Aspen Skiing's* bounds. To provide background on what role those factors play in a court s analysis, we summarize the facts of *Aspen Skiing*, focusing on the primary factors the Supreme Court has continued to highlight.

The case involved four ski mountains that were initially developed and operated under separate ownership. 472 U.S. at 587. For over a decade, the four mountains offered a variety of ski-lift tickets and packages, including a joint ticket that allowed skiers to gain convenient access to all four mountains. *Id.* at 588 89. Even as defendant Aspen Skiing Company (Ski Co.) came to control three of the four mountains, thus gaining market power over the Aspen ski area, the joint interchangeable ticket program continued to include the fourth mountain, which was independently owned by plaintiff Aspen Highlands Skiing Corporation (Highlands). *Id.* at 590 92. Revenues from this cooperative arrangement were distributed according to mountain usage. The joint ticket was a popular and profitable package for both parties. The four-mountain package outsold by a two-to-one margin the Ski. Co. packages that offered access to only its three mountains. *Id.* at 592.

Ski Co. management concluded, however, that if the four-mountain ticket were not available at all, customers would default to buying just Ski Co. s three-mountain pass. Ski Co. s president explained that the 4-area ticket was siphoning off revenues that could be recaptured by Ski Co. if the ticket was discontinued. *Id.* In the following year s negotiations, Ski Co. made a revenue share offer to Highlands on such unfavorable terms that Ski Co. correctly expected Highlands could not accept it. *Id.* The joint ticket was no longer offered. *Id.* In an attempt to stanch the flow of lost business, Highlands tried a variety of increasingly desperate measures to re-create the [four-mountain] joint ticket, including offering to buy the defendant s tickets at retail price. *Trinko*, 540 U.S. at 408 09, citing *Aspen Skiing*, 472 U.S. at 593 94. Ski Co. refused to permit Highlands even to pay full retail value for the daily lift tickets, with a Ski Co. official explaining, we will not support our competition. *Aspen Skiing*, 472 U.S. at 593 94 n.14. Highlands filed suit.

At trial, defendant Ski Co. primarily relied on the testimony of its economic expert, which included the theory that Ski Co. s conduct had such procompetitive justifications as eliminating free-riding by Highlands. [12] Ski Co. offered evidence that its own product was being devalued by being associated with the inferior skiing services offered at Highlands. *Aspen Skiing*, 472 U.S. at 609 10. Ski Co. also argued that it could save administrative expenses and other costs by eliminating the joint ticket, which Ski Co. found administratively cumbersome. *Id.* at 592. In short, defendant Ski Co. argued that the conduct at issue was pro-competitive conduct that a monopolist could lawfully engage in. *Id.* at 599.

Procompetitive justifications were also highlighted in the jury instructions. The jury was instructed that a monopolist is not barred from taking advantage of scale economies by constructing a large and efficient factory, nor is it under a duty to cooperate with its business rivals . . . if valid business reasons exist for that refusal. *Id.* at 597. Ski Co. could be found liable only if it gained, maintained, or used monopoly power in a relevant market by arrangements and policies which rather than being a consequence of a superior product, superior business sense, or historic element, were designed primarily to further any domination of the relevant market. *Id.* Therefore, if there were legitimate business reasons for the refusal [to deal], then the defendant, even if he is found to possess monopoly power in a relevant market, has not violated the law, because the law is not

[12] See George L. Priest & Jonathan Lewinsohn, *Aspen Skiing: Product Differentiation and Thwarting Free Riding as Monopolization*, in *Antitrust Stories* 248 (Eleanor M. Fox and Daniel A. Crane, eds., 2007).

concerned with conduct which may benefit consumers by making a better product or service available only conduct that has the effect of impairing competition. *Id.* at 597. The jury resolved all contested questions of fact in Highlands favor, *id.* at 599, including a finding that there were no valid business reasons for the refusal. *Id.* at 605.

The Supreme Court upheld the jury verdict for the plaintiff. The Court reiterated *Lorain Journal* s rejection of the argument that the right to refuse to deal with other firms . . . is unqualified. *Id.* at 601 02 & n.27, citing *Lorain Journal*, 342 U.S. at 155, and *Colgate*, 250 U.S. at 307. This conclusion was supported by three key factors.

First, Ski Co. elected to make an important change in a pattern of distribution that had originated in a competitive market and had persisted for several years, including after the character of the market was changed by Ski Co. s acquisition of monopoly power. *Id.* at 603. Such a pre-existing relationship supports a presumption that the joint arrangement was efficient and profitable. *Trinko*, 540 U.S. at 408 09 (distinguishing *Aspen Skiing* from situation where that presumption would not apply e.g., a defendant who would never have voluntarily engaged in a course of dealing with its rivals . . . absent statutory compulsion); see also *Linkline*, 555 U.S. at 450 (refusing to impose a duty to deal on a defendant when such duty arises only from FCC regulations, not from the Sherman Act). The Court explained in *Aspen Skiing*:

> In any business, patterns of distribution develop over time; these may reasonably be thought to be more efficient than alternative patterns of distribution that do not develop.

> The patterns that do develop and persist we may call the optimal patterns. By disturbing optimal distribution patterns, one rival can impose costs upon another, that is, force the other to accept higher costs.

472 U.S. at 604 n.31, quoting Robert H. Bork, *The Antitrust Paradox* 156 (1978).

Second, the Court compared Ski Co. s conduct in the Aspen market with Ski Co. s arrangements in comparable markets where it lacked such dominance, noting that cooperative joint tickets were used in other multimountain areas which apparently are competitive. *Aspen Skiing*, 472 U.S. at 603 04 & n.30. The Court could thus infer that such tickets satisfy consumer demand in free competitive markets. *Id.*

Third, defendant Ski Co. decided to forgo profitable transactions by refusing to permit Highlands to purchase ski tickets at the retail price for the sake of harming Highlands. 472 U.S. at 608 (The jury may well have concluded that Ski Co. elected to forgo these short-run benefits because it was more interested in reducing competition . . . over the long run by harming its smaller competitor.). Ski Co. made this decision to avoid providing any benefit to Highlands even though accepting the coupons would have entailed no cost to Ski Co. itself, would have provided it with immediate benefits, and would have satisfied its potential customers. *Id.* at 610.

These factors all pointed to Ski Co. s conduct causing anticompetitive harm. But whether its conduct may properly be characterized as exclusionary also required consideration of possible procompetitive justifications, including any beneficial or harmful impacts on consumers or competition itself. *Id.* at 605, citing Bork, *Antitrust Paradox* at 138. Critical to this case, the Court treated procompetitive justification as a factual issue properly resolved by the jury. The Court focused on 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. *Id.* at 608 (emphasis added). Conflicting evidence presented at trial undermined Ski Co. s arguments that the joint ticket was administratively cumbersome (no more so than the joint tickets Ski Co. used in other, competitive markets) and that Highlands inferior skiing services were free-riding on Ski Co. s services (a joint ticket allowed consumers to make their own choice on these matters of quality). *Id.* at 608 10.

Highlands refuted Ski Co. s procompetitive justifications with exactly the kind of evidence that is helpful to prove exclusionary conduct or predation, including statements made by the officers or agents of the company, evidence that the conduct was used threateningly and did not continue when a rival capitulated, or *evidence that the conduct was not related to any apparent efficiency*. *Id.* at 608 09 n.39, quoting Bork, A*ntitrust Paradox* at 157 (emphasis in *Aspen Skiing*). The Court concluded that the evidence supports an inference that Ski Co. was not motivated by efficiency concerns and that it was willing to sacrifice short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival. *Id.* at 611.

The *Aspen Skiing* factors help case-by-case assessments of whether a challenged refusal to deal is indeed anticompetitive, even though no factor is always decisive by itself. For example, 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. *Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064, 1075 (10th Cir. 2013) (Gorsuch, J.). Similarly, forgoing short-run profits may sometimes reflect desirable, procompetitive behavior, such as efforts to oĕer promotional discounts. *Id*. And a defendant may have procompetitive rationales for treating a rival differently, such as if it s more costly to deal with distant rivals than other nearby customers. *Id.* at 1078 n.4. But because the factors as a whole provide a window into likely harm to competition, a court should start with the *Aspen Skiing* factors in determining whether a refusal to deal is unlawful.

The Supreme Court has described *Aspen Skiing* as at or near the outer boundary of § 2 liability. *Trinko*, 540 U.S. at 409. Given the facts we must assume here, Viamedia has presented a case that is well within those bounds and appears stronger than *Aspen Skiing*. A comparison of Viamedia s allegations to the facts found by the jury in *Aspen Skiing* (and which the Supreme Court considered significant to its analysis) is instructive:

ASPEN SKIING	VIAMEDIA ALLEGATIONS
Long-term business relationship that created joint offering	Same
Relationship existed absent any statutory obligation/duty (*Trinko*)	Same

ASPEN SKIING	VIAMEDIA ALLEGATIONS
Can presume prior relation- ship was thus mutually advantageous	Same
Sudden course reversal	Same
Course reversal came at a monetary loss for defendant	Same
Refused to sell service/product at retail price	Same
Sold product at retail price to others in the relevant market	Same
Unhappy customers	Same
Discouraged customers from doing business with its smaller rival	Same
Defendant continued to deal with competitors in other competitive markets	Same
Procompetitive justifications are a question for the factfinder	Same
Exclusionary conduct aimed at the only other competitor in the market	Same
Ski Mountain Passes	Different: Ad Rep Services

In light of the similarities, unless the Court meant to limit *Aspen Skiing* to ski resorts, we see no sound basis to distinguish Viamedia s case as a matter of law. Comcast s alleged conduct, absent compelling evidence to the contrary, indicates its calculation that its future monopoly retail price would be higher by foreclosing its ad rep services competitor. *Trinko*, 540 U.S. at 409. In addition, unlike in *Aspen Skiing*, where the ultimate customers were skiers who did not compete against the defendant ski resort, Comcast s refusal to deal with Viamedia has left its MVPD customers in these markets no practical choice but to turn over their ad sales business, along with their sensitive business information and a large percentage of their ad revenue, to their dominant MVPD competitor.

c. *Refusals to Deal and Motions to Dismiss*

Comcast nonetheless contends this case can be decided on the pleadings because there is no liability under *Aspen Skiing* where, as here, the defendant s alleged termination of a preexisting course of dealing was not irrational but for its anticompetitive effect. Comcast relies on the district court s acceptance of Comcast s thinly supported assertion that it had a valid business purpose in refusing to deal with Viamedia because Comcast s replacement of Viamedia as WOW! s and RCN s ad representative is a course of conduct that offers *potentially* improved efficiency. See 218 F. Supp. 3d at 698 99 (emphasis added). Comcast contends this valid business objective is what distinguishes this case from *Aspen Skiing*, where the defendant fail[ed] to offer any efficiency justification whatever for its pattern of conduct. Appellees Br at 27, quoting *Aspen Skiing*, 472 U.S. at 608.

Comcast s argument has the facts wrong. Its reading fails to comport with the actual language of the opinion, the jury instructions, and the evidence presented by both parties. In *Aspen Skiing* the Court was reviewing a jury verdict. Only after a month-long trial had the jury resolved all contested questions of fact in Highlands favor and concluded that there were no valid business reasons for the refusal. *Aspen Skiing*, 472 U.S. at 599, 605. The Court concluded that the evidence *supports an inference* that Ski. Co. was not motivated by efficiency concerns. *Id.* at 610 (emphasis added).

Comcast next cites *Novell* in support of its argument that a factual dispute regarding the existence of procompetitive justifications is appropriate for resolution on the pleadings. Yet *Novell* was a decision based on an eight-week trial. 731 F.3d at 1066. And what about *Olympia Equipment Leasing Co. v. Western Union Telegraph Co.*, 797 F.2d 370 (7th Cir. 1986)? That decision followed a trial [that] lasted more than six weeks and produced the usual mountain of testimony and exhibits. *Id.* at 372. Valid business justifications are relevant only to the rebuttal of a *prima facie* case of monopolization.

Thus, balancing anticompetitive effects against hypothesized justifications depends on evidence and is not amenable to resolution on the pleadings, at least where the plaintiff has alleged conduct similar to that in *Aspen Skiing*. See also, e.g., *Illinois ex rel. Burris v. Panhandle Eastern Pipe Line Co.*, 935 F.2d 1469, 1482 (7th Cir. 1991) (Whether valid business reasons motivated a monopolist s conduct is a question of fact.). Adapting language from our colleagues in the D.C. Circuit, the correct approach in this situation requires a district court to acknowledge that:

> [Comcast s] defense that its refusal to deal was economically justified depends upon a question of fact and therefore is not cognizable in support of a motion to dismiss. It is, of course, entirely possible [Comcast] will be able to prove . . . [that] its refusal to deal was a reasonable business decision. On the other hand, it is also possible [Comcast s] refusal to deal reflected its willingness to sacrifice immediate profits from the sale of [Interconnect access] in the hope of driving [Viamedia] out of the market and recovering monopoly profits in the long-run. . . . The district court cannot choose between these competing explanations without first resolving questions of fact not before it upon a motion to dismiss.

Covad Communications Co. v. Bell Atlantic Corp., 398 F.3d 666, 676 (D.C. Cir. 2005) (reversing dismissal of refusal-to-deal claim on pleadings). This analysis must also include the harm from Comcast s alleged tying conduct, which we turn to below. Viamedia has alleged and offered evidence of enough harm to competition from Comcast s refusal-to-deal and tying conduct for its claim to go forward. Consideration of procompetitive justifications must wait for a comprehensive rule of reason analysis.

i. *Comcast's Proposed Legal Standard*

Comcast both misunderstands the law and relies on inapposite cases by conflating the vertical integration of its MVPD and ad rep services functions with its control over the cooperative Interconnects and alleged misuse of that power. Comcast proposes that if a defendant merely postulates a valid business purpose apparently including any business purpose a defendant could dream up, regardless of feasibility or value that ends the inquiry. [T]here is no balancing of benefits and harms, Comcast declares. In support of that proposition, Comcast points to the United States Amicus Brief (in support of neither party) filed in this case, which offers a test dubbed the no economic sense test. Appellee Br at 27 28; see also United States Brief at 11 12 (relying on the formulation articulated in the United States amicus brief in *Trinko*, available at 2003 WL 21269559, and elaborated upon in Gregory J. Werden, *Identifying Exclusionary Conduct Under Section 2: The "No Economic Sense" Test*, 73 Antitrust L.J. 413, 422 25 (2006)).

The proposed no economic sense test would condemn conduct as exclusionary or predatory only if it would make no economic sense for the defendant but for its tendency to eliminate or lessen competition. United States Brief at 11. A gross benefit [or gain] for the defendant is not enough, however: Conduct fails the no economic sense test if it is expected to yield a negative payoff, *net of the costs of undertaking the conduct, and not including any payoff from eliminating competition*. Werden at 416 (emphasis added). Or as explained by the government at oral argument here it is an objective balancing test that requires more than just a slight procompetitive benefit or efficiency gain. [13]

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[13] Comcast s confusion may stem from the terse proposed name of no economic sense, which does not appear to invite balancing. The test is actually more nuanced than the name suggests, and it is not meant to resolve every Section 2 challenge.

This test is essentially the same one employed by the Tenth Circuit in *Novell*, which noted that the monopolist s conduct must be irrational but for its anticompetitive effect. 731 F.3d at 1075, citing *Aspen Skiing*, 472 U.S. at 597, *Trinko*, 540 U.S. at 407, and Werden at 422 25. However formulated, this test is aimed in part at the potential overweighting of the *Aspen Skiing* factor of a defendant forsaking short-term profits. *Id.* As noted, this factor is relevant but should not always be dispositive because a short-term profit sacrifice is neither necessary nor sufficient for conduct to be exclusionary. Werden at 424; see also *id.*

As Werden sensibly notes, its utility . . . ultimately is apt to vary, and we should not presume that a single test must resolve every exclusionary conduct case. Werden at 421 & n.31.

Furthermore, it has been observed that although the no economic sense test offers good insights into when aggressive actions by a single firm go too far, it can lead to erroneous results unless one also seek[s] to balance gains to the monopolist against losses to consumers, rivals, or others. Areeda & Hovenkamp ¶ 651b3, at 106 07. Otherwise we could arrive at absurd outcomes: Theoretically, an act might benefit the defendant very slightly while doing considerable harm to the rest of the economy, and it would be lawful. *Id.* It is possible the test could be adapted to meet these criticisms, given that a court should not consider any gain from eliminating competition, but in any event the no economic sense test was not intended to displace all other approaches. Rather, it is likely to be most useful as one part of a sufficient condition: If challenged conduct has a tendency to eliminate competition and would make no economic sense but for that tendency, the conduct is exclusionary. Werden at 418. Areeda and Hovenkamp also suggest a broader approach, in which harm wholly disproportionate to the valid business justification can also support a refusal-to-deal-claim. ¶ 772c2, at 223 (Condemnation would be appropriate only for conduct that (1) clearly injures an actual or prospective rival either (2a) with no good business justification at all, or (2b) with a business justification that is poorly fitted to the result or wholly disproportionate to the harm that is inflicted.).

(short-run profit sacrifice also is not necessary for conduct to be exclusionary because the anticompetitive gains from exclusionary conduct sometimes can be reaped immediately); Areeda & Honvenkamp ¶ 651b3, at 107 (monopolizing conduct is not necessarily costly to the defendant).

Because the *Aspen Skiing* factors are helpful but not dispositive, this more nuanced approach considering both pro-competitive benefits and anticompetitive harms is necessary to answer the ultimate question of whether competition was harmed. The plaintiff ultimately needs to prove that the monopolist s refusal to deal was part of a larger anticompetitive enterprise, such as (again) seeking to drive a rival from the market or discipline it for daring to compete on price. *Novell*, 731 F.3d at 1075. The result of such conduct is to harm competition by entrench[ing] a dominant firm and enabl[ing] it to extract monopoly rents once the competitor is killed off or beaten down. *Id.*

As the above paragraphs suggest, and without our endorsing any particular catchy title for this analytical approach, the calculation of procompetitive benefits net of anticompetitive harms does not easily lend itself to a *pleading* standard. Rule of reason cases place[] a premium on objective tests based on evidence that is typically not in the defendant s exclusive control for example, Comcast s cost savings and other efficiencies it may have obtained due to its conduct. See Herbert Hovenkamp, *The Rule of Reason*, 70 FLA. L. REV. 81, 86 (2018). This is why it is typically considered an adequate pleading in a rule of reason antitrust case for a plaintiff to allege (1) evidence of market structure (i.e., market power and relevant markets, which are not in dispute in this case) and (2) exclusionary effect (i.e., foreclosure of a competitor from a market, which is also not in dispute in this case) both of which can ordinarily be obtained without access to the defendant s own records [and] indicate that an antitrust violation is plausible. *Id* at 90.

To the extent that refusal-to-deal claims require more at the pleading stage, it is enough to allege plausibly that the refusal to deal has some of the key anticompetitive characteristics identified in *Aspen Skiing*. The Supreme Court said as much in *Trinko*, in which it affirmed dismissal of a complaint, distinguished *Aspen Skiing*, and emphasized that the defendant s 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 competitive malice. 540 U.S. at 409. *Trinko* specifically identified the absence of two factors a prior and voluntary course of dealing, and refusal to sell at retail price in distinguishing *Aspen Skiing*. The former factor was important, because it suggested a willingness to forsake short-term profits to achieve an anticompetitive end. *Id.*, citing *Aspen Skiing*, 472 U.S. at 608, 610 611. In *Covad*, the D.C. Circuit adopted a similar, if slightly more explicit, holding that a plaintiff must eventually show a sacrifice of short-term profits to prevail on a refusal-to-deal claim and that alleging that a refusal to deal was predatory was sufficient at the pleadings stage. 398 F.3d at 675 76.

Viamedia s pleading adequately alleges an anticompetitive refusal to deal. As described above, Viamedia s claim closely tracks *Aspen Skiing* and contains the key elements that were missing in *Trinko*: a prior course of voluntary conduct, sacrifice of short-term profits, and refusal to sell to rivals on the same terms as other potential buyers. Certainly, no more is required. We leave open the question whether allegations of short-term losses are necessary to state a refusal-to-deal claim. A case might present itself in which other factors such as a prior course of conduct, exploitation of power over a cooperative network, refusal to sell at retail price, and discriminatory treatment of rivals could plausibly support the inference that a refusal to deal is prompted . . . by anticompetitive malice. *Trinko*, 540 U.S. at 880. But this case is easier and does not require precise delineation of the requirements of a refusal-to-deal pleading.

Even if an allegation that a defendant s conduct was irrational but for its anticompetitive effect were necessary, Viamedia has plausibly alleged just that. In a section of the First Amended Complaint entitled Comcast s Refusal to Deal with Viamedia is Irrational But for its Anticompetitive Effects, Viamedia walked through the long-term course of dealing prior to Comcast s conduct; the subsequent degradation of the value of the cooperative Interconnects; the financial losses suffered by Comcast itself, as well as by Viamedia and Comcast s competitor MVPDs; Comcast s willingness to offer Interconnect-only access in other markets where it did face competition; and the fact that [t]here are no procompetitive justifications to be achieved by the conduct given that there were no material administrability problems in allowing Viamedia to participate in Interconnects on behalf of its MVPD customers. First Am. Cplt. ¶¶ 154 68. Viamedia s allegations regardless of the standard applied are more than sufficient to pass muster under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

With Viamedia meeting the appropriate pleading standard and presenting evidence of harm to competition, the remainder of the case should settle into the traditional analysis followed in rule of reason cases, with the burden shifting to Comcast, which may, of course, introduce its own proof of inevitability, superior skill, or business justification. Areeda & Hovenkamp ¶ 650c, at 94. To be more specific, under this burden-shifting framework, once Viamedia has successfully establish[ed] a *prima facie* case under § 2 by demonstrating anticompetitive effect, then [Comcast] may proffer a procompetitive justification . . . 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. *Microsoft*, 253 F.3d at 59. If such a justification is offered, the burden shifts back to [Viamedia] to rebut that claim. *Id*. If Viamedia cannot rebut the evidence of Comcast s procompetitive justifications, then [Viamedia] must demonstrate that the anticompetitive harm of the conduct outweighs the procompetitive benefit. *Id*. This burden-shifting has evolved based on which party has access to the various categories of evidence and information, with any evidence of pro-competitive justifications likely to be under the defendant s control. Cf. United States Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines* § 10, at 30 (Aug. 19, 2010) (Merger Guidelines) (much of the information relating to efficiencies is uniquely in the possession of the firms seeking to justify a transaction).[14]

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[14] Courts apply a similar balancing approach in rule of reason cases, whether alleged under § 1 or § 2. *Microsoft*, 253 F.3d at 59, citing *Standard Oil Co. v. United States*, 221 U.S. 1 (1911). The Supreme Court has recently reiterated this balancing test

ii. *Inapposite Vertical Integration Cases*

Comcast also relies on cases involving vertically integrated defendants with facts that, in crucial ways, do not map onto this case. In seeking to shoehorn this case into this category, Comcast caused confusion in the district court and continues in this effort on appeal by glossing over the unusual market structures in this case and portraying itself as just a prototypical vertically integrated firm. This misconception is accomplished by conflating (1) Comcast s actual vertical integration of its MVPD cable services with its ad rep services functions with (2) its control over the cooperative Interconnects in the relevant geographic markets. Comcast s argument for dismissal on the pleadings depends upon this confusion.

To start, [e]ven a monopolist . . . is free to integrate, especially when integration creates no new monopoly in any second area. Areeda & Hovenkamp ¶ 1700j1, at 14 15. Such an integration allows the defendant to achieve cost-savings by elimination of double marginalization. *United States v. AT&T, Inc.*,

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for a rule of reason § 1 case: To determine whether a restraint violates the rule of reason . . . a three-step, burden-shifting framework applies. Under this framework, the plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market. If the plaintiff carries its burden, then the burden shifts to the defendant to show a pro-competitive rationale for the restraint. If the defendant makes this showing, then the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means. *Ohio v. American Express Co.*, 138 S. Ct. 2274, 2284 (2018) (omitting internal citations); see also Areeda & Hovenkamp ¶ 1820a, at 188, ¶ 1821, at 207 (observing that courts require stronger proof of offsetting efficiencies when defendants possess greater ability to foreclose rivals from the market).

916 F.3d 1029, 1036 (D.C. Cir. 2019). In other words, prior to vertical integration, the firms providing complementary products would earn[] margins over cost before their products reached consumers. *Id.* at 1044. After integration, goes the theory, there is no need for two entities to earn margins over cost, and the merged entity would eliminate that cost and . . . pass on some of those cost savings to consumers in order to attract additional customers. *Id*. Thus, it would rarely be an antitrust violation for a firm to supply itself through vertical integration, and a plaintiff would not generally have a right under antitrust law to demand that a defendant forgo supplying itself from an in-house source. Areeda & Hovenkamp ¶ 1700j1, at 14 16 & n.35.

This principle has been illustrated in some Section 2 cases, in which a company claimed antitrust injury when a larger company vertically integrated and provided in-house what it formerly purchased from the smaller company. For example, in *Port Dock & Stone Corp. v. Oldcastle Northeast, Inc.*, 507 F.3d 117 (2d Cir. 2007), a company with a local monopoly in crushed stone (aggregate) sold the aggregate through two distributors. The aggregate monopolist decided to vertically integrate by purchasing one of the distributors and bringing all of its distribution in-house. *Id.* at 119. The remaining distributor alleged a Section 2 violation, claiming that its injury resulted from [defendant s] vertical integration into the distribution market. *Id.* at 120. The facts of *Port Dock* do not map onto the conduct of Comcast, which was already vertically integrated and was instead exploiting its control over the cooperative Interconnects.

Similarly, the defendant in *Christy Sports, LLC v. Deer Valley Resort Co.*, 555 F.3d 1188 (10th Cir. 2009), owned the mountain on which it leased property to plaintiff, and the creator of a resort has no obligation under the antitrust laws to allow competitive suppliers of ancillary services on its property. *Id.* at 1193. Notably, the mountain was not a cooperative enterprise, and the customers (skiers) did not compete against the defendant mountain resort. And in *Novell* (which, recall, was a case that went to trial), defendant Microsoft was the sole owner of the intellectual property it had made available to independent software vendors. 731 F.3d at 1067. And again, the customers (computer users) did not compete against Microsoft.

These opinions about prototypical vertically integrated firms recognize, nevertheless, that different circumstances could support a cognizable antitrust claim in cases like this one. See *Port Dock*, 507 F.3d at 124 25 (Vertical expansion by a monopolist, without more, does not violate section 2, unless there is an allegation of an anticompetitive incentive to create a downstream monopoly, or other special circumstances in which a monopolist s vertical expansion could be anticompetitive.); *Christy Sports*, 555 F.3d at 1196 (We would not even preclude the theoretical possibility that such a change [by refusing to deal] could give rise to an antitrust claim, for example, if by first inviting an investment and then disallowing the use of the investment the [defendant] imposed costs on a competitor that had the effect of injuring competition in a relevant market.); *Novell*, 731 F.3d at 1076 (plaintiff could have proven refusal-to-deal case against Microsoft, but at trial presented no evidence from which a reasonable jury could infer that Microsoft s discontinuation of this arrangement suggested a willingness to sacrifice short-term profits, let alone in a manner that was irrational but for its tendency to harm competition).

Even if this were a vertical integration case, Viamedia adequately alleged that Comcast presented just such a special circumstance. Its conduct eliminated its only competitor in the ad rep services market and increased control over its MVPD competitors in the retail cable market. But again, this is not a case of simple vertical integration. Comcast *is* vertically integrated and has been at all relevant times. No one objects to a vertically integrated Comcast offering both Interconnect services and ad rep services. Viamedia does not seek to force Comcast to buy ad rep services from Viamedia; nor does Viamedia seek to force Comcast to allow Viamedia to re-sell or distribute Comcast s ad rep services. Viamedia simply wants to ensure that MVPDs can freely choose Viamedia as their supplier of ad rep services if that is their preferred choice.

Another distinguishing fact is that the Interconnects are joint, cooperative efforts among competing MVPDs. That distinguishes this case from cases involving vertically integrated defendants, as in *Port Dock*. Viamedia seeks to regain access to the Interconnects to operate on behalf of its MVPD customers. It is true that by virtue of acquiring numerous other cable companies, Comcast now controls the Interconnects at issue. But they are cooperative ventures that jointly set prices for competitor MVPDs spot avails. Comcast itself has described the Interconnects as a collection of two or more cable TV systems that work together to distribute commercials to a wider geographic area than a single system would otherwise reach, giving advertisers the option to reach all cable households within a market with one buy. First Am. Cplt. ¶ 156.

The Interconnects cooperative structure explains why Comcast describes itself not as an Interconnect owner but as an Interconnect operator and describes its function as a firm that operates interconnects in DMAs including Chicago and Detroit. See, e.g., Appellees Br. at 7. It also explains why Comcast describes Viamedia as having participated in interconnects, and after being denied access, Comcast says, Viamedia sought readmission. *Id*. Typical vertically integrated firms do not refer to themselves as the operators of their assets, and they do not describe their buyers as participating in the vertically integrated firms services, let alone say that buyers might seek readmission to those services. Taking control of and exploiting control of a previously cooperative mechanism is *not* vertical integration.[15]

Accordingly, we reverse the Rule 12(b)(6) dismissal of Viamedia s claim for monopolization through an unlawful refusal to deal.

2. *Tying*

The essential characteristic of an invalid tying arrangement lies in the seller s exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms. *Jefferson Parish Hos-*

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[15] Viamedia disputes the accuracy of describing Comcast as an Interconnect owner. Deposition testimony characterizes an Interconnect simply as an agreement between two or more MVPDs in a DMA to distribute commercials . . . across all partners in the interconnect.

pital Dist. No. 2 v. Hyde, 466 U.S. 2, 12 (1984). Viamedia contends that Comcast conditioned the sale of Interconnect services (the tying product) on the purchase of ad rep services (the tied product). Viamedia alleges that Comcast engaged in anticompetitive conduct on two fronts. Comcast inserted itself between Viamedia and its competitor MVPDs by: (1) denying Viamedia access to the Comcast-controlled Interconnects, and (2) then using its control over the Interconnects to demand that its smaller MVPD competitors turn over to Comcast 100% of their spot avails, including the sale of local spots, an area in which Comcast and the MVPDs had formerly competed. Viamedia has offered evidence that this two-front strategy was successful. Comcast excluded its only competitor in the ad rep services market gaining a pure monopoly. It also gained new control over and insight into its MVPD competitors that it could not have achieved otherwise.

The district court, however, granted summary judgment on Viamedia s tying claim, a decision we also review *de novo*. *Schlaf v. Safeguard Prop., LLC*, 899 F.3d 459, 465 (7th Cir. 2018). Summary judgment is appropriate only if there are no disputed questions of material fact and the moving party is entitled to judgment as a matter of law, so we examine the record in the light most favorable to the [non-movant], granting [it] the benefit of all reasonable inferences that may be drawn from the evidence and reversing if we find a genuine issue concerning any fact that might affect the outcome of the case. *Id.* (citations omitted); see also *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (on summary judgment, courts must refrain from making credibility determinations or weighing evidence).

a. *Summary Judgment Standard*

The district court applied, and Comcast argues for, a summary judgment standard that requires plaintiffs in Section 2 monopolization cases to present evidence that tends to exclude the possibility that a monopolist s conduct is just as consistent with competition as with illegal conduct.   335 F. Supp. 3d at 1061, quoting *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986). The proper question on summary judgment is whether Viamedia has presented evidence to establish a genuine dispute of material fact as to whether Comcast engaged in exclusionary conduct forbidden by Section 2. See *Matsushita*, 475 U.S. at 585; *Eastman Kodak Co. v. Image Technical Services*, 504 U.S. 451, 483 (1992); see also, generally, *In re Text Messaging Antitrust Litig.*, 782 F.3d 867 (7th Cir. 2015). When determining whether there is a genuine issue of material fact . . . the substantive law will identify which facts are material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 247 48 (emphasis omitted). The Court s requirement in *Matsushita* that the plaintiffs claims make economic sense did not introduce a special burden on plaintiffs facing summary judgment in antitrust cases. *Eastman Kodak*, 504 U.S. at 467 68.

Viamedia s tying theory is not economically implausible, unlike the alleged twenty-year-long conspiracy to charge predatorily low prices in *Matsushita* itself. A competitor s claim that a rival used monopoly power in a tying product market to gain a monopoly in a tied product market is facially anticompetitive and exactly the harm that antitrust laws aim to prevent. *Eastman Kodak*, 504 U.S. at 479. The sufficiency of the tying claim depends on whether Comcast forced RCN and WOW! to buy its ad rep services. Our summary judgment inquiry can be framed in the language of *Matsushita* are the facts as consistent with forcing as with noncoerced action? but this formulation does not get us anywhere beyond the general summary judgment standard. In the following analysis, we ask whether Viamedia has presented evidence of forcing sufficient to create a genuine dispute for trial.

b. *Tying and Comcast's Conduct*

In granting summary judgment, the district court concluded that no reasonable jury could find as a matter of fact that Comcast tied Interconnect services to the purchase of its ad rep services. We respectfully disagree. Viewing the evidence in the light most favorable to Viamedia, and without making credibility determinations or weighing the parties competing evidence, we conclude that Viamedia has offered sufficient evidence that Comcast illegally tied purchase of its ad rep services to the Interconnect access it already controlled.

First, it is undisputed that Comcast (a) has market power in the tying market for Interconnect services and (b) has now foreclosed all competition in the tied market for ad rep services. Second, there is substantial evidence that the cooperative Interconnects are a separate service from Comcast s ad rep services. Third, Viamedia offered evidence that Comcast forced its competitor MVPDs to become its customers for ad rep services if they also wanted to keep their access to the Interconnects.

i. *Definition*

Tying is conduct in which a firm will sell one product [the tying product] but only on the condition that the buyer also purchases a different (or tied) product. *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1, 5 6 (1958); see also *Sheridan v. Marathon Petroleum Co.*, 530 F.3d 590, 592 (7th Cir. 2008); Areeda & Hovenkamp ¶ 1700a, at 4. The seller will purchase the tied product not because the party imposing the tying requirement has a better product or a lower price but because the seller has power or leverage in the market for the tying product. *Northern Pacific Railway*, 356 U.S. at 6.

Tying is still nominally subject to a per se rule of illegality, but it is a most peculiar per se rule. Areeda & Hovenkamp ¶ 1701c, at 31; see *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. at 26 29; *Eastman Kodak*, 504 U.S. at 462.[16] The factual elements that must be proven for a tying claim capture much of what must be demonstrated in a rule of reason case. Showing that the purchase of the tied product was forced uses many of the same concepts used to analyze refusals to deal: some assessment of market power, rough predictions of anticompetitive harm, and consideration of procompetitive justifications. See, e.g., *Illinois Tool Works Inc. v. Independent*

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[16] We stay still because in recent years the Supreme Court has held that some categories of conduct that were formerly treated as per se illegal are now subject to a rule of reason analysis. See *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 907 (2007) (resale price maintenance no longer per se illegal, overruling *Dr. Miles Medical Co. v. John D. Park & Sons*, 220 U.S. 373 (1911)); *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 57 (1977) (non-price vertical restraints no longer per se illegal, overruling *United States v. Arnold, Schwinn, & Co.*, 388 U.S. 365 (1967)); *State Oil Co. v. Khan*, 522 U.S. 3, 22 (1997) (vertical maximum price restraints no longer per se illegal, overruling *Albrecht v. Herald Co.*, 390 U.S. 145 (1968)).

Ink, Inc., 547 U.S. 28, 44 (2006) (While some such [tying] arrangements are still unlawful, such as those that are the product of a true monopoly . . . that conclusion must be supported by proof of power in the relevant market.) (citation omitted); *Sheridan v. Marathon Petroleum Co.*, 530 F.3d 590, 593 94 (7th Cir. 2008) (describing the tying rule and its market-power requirement); Areeda & Hovenkamp ¶ 1760(b), at 379 (noting that, even when treated as per se illegal, the Supreme Court has almost always been willing to consider a defendant s offered justifications).

When the defendant is a dominant firm and meets a much stricter power requirement, however, the special screening function of the tying factors is largely unnecessary, and the more general standards of § 2 become relevant because the technical requirements . . . attach only to per se ties. Areeda & Hovenkamp ¶ 777, at 324. Thus, when the defendant is a monopolist in the tying product, it may be superfluous to go through a detailed inquiry into whether there are separate products. *Id.* ¶ 617b2, at 52 53; see also *id.* ¶ 777, at 324 25 & n.9 (noting that in *Eastman Kodak*, the Supreme Court treated a conditional refusal to sell parts without service as a tying arrangement, although on remand the tying claim was dropped and a Section 2 violation was found without any separate products requirement); *United States v. Microsoft Corp.*, 253 F.3d 34, 96 97 (D.C. Cir. 2001) (en banc). Similarly, [w]hen a defendant s market share and the underlying market structure make monopolization or attempt plausible, then a tie that contributes significantly to the maintenance or creation of monopoly power violates § 2 even though it is unilaterally imposed. Areeda & Hovenkamp ¶ 777, at 325.

Here, Comcast s monopoly power in the tying market of Interconnect services in the three metropolitan areas and its successful capture of a monopoly position in the tied market of ad rep services in the same areas are undisputed. And yet great effort has been made to parse whether Comcast s conduct satisfies some platonic ideal of tying conduct. We, too, walk through the tying factors at issue (separate product and forced purchase) and determine, taking the record as a whole, that Viamedia has provided sufficient evidence to create a question of fact as to each factor. Ultimately, the focus in this Section 2 case must remain on whether, viewing the monopolist s conduct as a whole, it has unreasonably maintained or enhanced its monopoly position. *Id.* ¶ 777, at 324.

ii. *Separate Products or Services*

[W]hether one or two products are involved turns . . . on the character of the demand for the two items. *Jefferson Parish*, 466 U.S. at 19; see also *Eastman Kodak*, 504 U.S. at 462 (For service and parts to be considered two distinct products, there must be sufficient demand so that it is efficient for a firm to provide service separately from parts.); *Northern Pacific Railway*, 356 U.S. at 5 6. Comcast disputes whether Interconnect access and ad rep services are separate services. The district court assumed they are. On this record, that was correct.

The fact that buyers may wish to purchase and use two complementary products together does not, in and of itself, convert the two separate products into a single product. Rather, the market must be assessed at the pre-contract rather than post-contract stage. Areeda & Hovenkamp ¶ 1802d6, at 89, citing *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961); see also *id.* ¶ 1802d6, at 88 (noting that a grouping of sales covered by [a single] contract does not become a relevant market for that reason). In this case, RCN and WOW! viewed the services as separate prior to entering into their present contracts with Comcast.

Interconnect services and ad rep services are different functionally, as already described at length. See above at pages 10 24. To summarize, a provider of Interconnect services bundles and re-sells ads from multiple MVPDs in a regional market. An ad rep has a more direct relationship with an MVPD, directly representing it in regional and/or local ad sales, and potentially acting as its representative with an Interconnect. The character of the demand for the two services also differs, as demonstrated by how the market participants have sold and purchased the services. See *Jefferson Parish*, 466 U.S. at 19 21. Viamedia has offered only ad rep services for almost two decades. Comcast formerly offered the two services separately in the relevant DMA geographic markets. It continues to offer them separately in other DMAs. MVPDs like Comcast that also operate Interconnects often have separate salespeople selling local advertising and selling Interconnect advertising. DA650. And the other alleged victims of Comcast s tying conduct its smaller MVPD competitors previously purchased these services separately and, as shown above, expressed strong interest in continuing to do so when Comcast was forcing them to buy the two together in Chicago, Detroit, and Hartford.

Comcast s claim that the two services are not distinct is also flatly inconsistent with one of Comcast s primary arguments on the next factor. In arguing that it did not force the MVPDs to buy its ad rep services, Comcast points to other DMAs where it sells Interconnect services separately. Even if there might be a viable factual dispute on whether it is possible to consider these two services a single unified market, which we doubt, that would be at minimum a question to be resolved by the trier of fact. *Eastman Kodak*, 504 U.S. at 463. Comcast is not entitled to summary judgment on this ground.

iii. *Forced Purchase*

Ample evidence shows that Comcast conditioned MVPDs access to the Interconnects on hiring Comcast as their ad rep. Internal Comcast documents indicate that it ended its relationship with Viamedia specifically to obtain full-turnkey deals with the MVPDs. A216 n.84. Internal WOW! emails show that its executives understood that WOW! would have to hire Comcast for ad rep services if it wanted to regain access to the Interconnects. A215 n.81. RCN testified to the FCC that Comcast will only allow RCN to join the interconnects if RCN employs Comcast spotlight instead of Viamedia. *Id*. A Comcast employee working in the Chicago and Detroit markets testified to the Department of Justice that Comcast had a business practice that if an MVPD wants to get access to a Comcast [Spotlight] controlled Interconnect, it has to hire Comcast [Spotlight] as its ad sales representative. *Id*., A835. And a Comcast employee responded to the question were you also clear . . . that Comcast Spotlight was interested only in a turnkey deal? with Direct relationship, full turnkey, yes, we made that clear to [WOW!]. A811. Both Comcast and the partial dissent offer explanations and rationales to try to defang these unusually explicit pieces of evidence. See Post at 136 37. On review of summary judgment, of course, Viamedia is entitled to the benefit of reasonable inferences and interpretations in its favor. The opposing arguments are suitable for a trial but are not grounds for affirmance.

A jury could easily find that Comcast improperly forced the smaller MVPDs to buy its ad rep services using its monopoly in the Interconnect services market. The entire purpose of its refusal to deal with Viamedia conceded repeatedly by Comcast was to force RCN and WOW! to become full-turnkey clients for ad rep services. A789. Every party involved understood that this was the practical effect of banning from the Interconnects MVPDs that received ad rep services from Viamedia.

The fact that the arrangements were structured so that ownership of the slot avails passed from the MVPDs to Viamedia does not affect this analysis. In applying the antitrust laws, we care more about economic substance than about form. See *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 760 (1984). Smaller MVPDs do not have their own ad rep services divisions. As a practical matter, they cannot self-provide ad rep services and must work with an ad rep to interface with the Interconnects. Given these dynamics, Viamedia offered sufficient evidence that Comcast explicitly used its control over the Interconnects to deny access to its competitor MVPDs or their agent to force RCN and WOW! to use Comcast s ad rep services for *all* spot avails, including the two-thirds of spot avails sold outside of the Interconnects, many of which used to be sold locally in competition with Comcast. See *Collins Inkjet Corp. v. Eastman Kodak Co.*, 781 F.3d 264, 272 (6th Cir. 2015) (When a defendant adopts a policy that makes it unreasonably difficult or costly to buy the tying product (over which the defendant has market power) without buying the tied product from the defendant, it forces buyers to buy the tied product from the defendant and not from competitors.); *Microsoft*, 253 F.3d at 64 (liability appropriate where monopolist bars rival from cost-efficient means of distribution even if some means of distribution remain open).[17]

Because this is not a typical bundling case, Comcast s and the partial dissent s reliance on *Aerotec Int'l, Inc. v. Honeywell Int'l, Inc.*, 836 F.3d 1171 (9th Cir. 2016), is misplaced. In that case, the plaintiff purchased Honeywell s replacement parts and then bundle[d] parts and repairs in an effort to woo the ultimate airline customers, in part reselling defendant s products. *Id.* at 1176. Moreover, Aerotec presented no evidence that Honeywell explicitly or implicitly tied or conditioned the sale of the tying prod-

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[17] The partial dissent insists that that there was no conditioning and that RCN and WOW! maintained the ability to deal directly with Comcast and access the Interconnect without any ad representative should they choose not to employ Comcast. Post at 118 19 This is wrong as a matter of fact. As described above, every party involved Comcast, RCN, and WOW! understood that RCN and WOW! would be unable to access the Interconnects unless they hired Comcast to provide ad rep services. Even though its reasoning relies on the possibility that RCN and WOW! could access the Interconnects without Viamedia or Comcast, the partial dissent points to no evidence supporting that possibility. The record contains evidence of the opposite: RCN and WOW! needed to employ an ad rep services provider, and once Comcast refused to deal through their chosen intermediary, they had no practical choice but to obtain ad rep services from Comcast. As described above, substantial evidence shows that both RCN and WOW! understood themselves to be forced by Comcast into purchasing its ad rep services. A215 n.81. We cannot affirm summary judgment by overlooking that evidence about the realities of the parties dealings and the economic realities of the market.

uct of parts to the ultimate airline customers pur-chase of the tied product of maintenance. *Id.* at 1179. The court found compelling that Honeywell allows airlines to purchase parts and services in separate transactions from whichever supplier they please. *Id*. But Viamedia is not a bundler. It has presented substantial evidence of an explicit tie, and its former customers could not separately obtain Interconnect access.

There are other fundamental differences between the product offered in *Aerotec* and the one offered here. Honeywell sold airplane parts and repair services. Comcast, by contrast, operates a platform that is necessarily cooperative. RCN and WOW! are not just potential customers of Comcast as the airlines were potential customers of Honeywell. They are also Comcast s rivals in the retail cable market. Because self-providing ad rep services was not a viable option for RCN and WOW!, refusing to deal with their chosen intermediary had the effect of forcing them into much less desirable direct relationships with Comcast, their monopolist-competitor. Viamedia has presented evidence that the MVPDs were reluctant to be forced into their more powerful rivals arms. A886 87. There was no evidence in *Aerotec* that the airlines felt similarly threatened, that providing repairs in-house was economically infeasible, or that the airlines viewed Honeywell as a necessary intermediary.

Comcast s reliance on *It's My Party, Inc. v. Live Nation, Inc.*, 811 F.3d 676 (4th Cir. 2016), is even further off-base. That case involved a world of robust market competition where [the ultimate customers] were free to take a package deal of promotion and venues, free to purchase those products separately, free to turn down both, and where they in fact exercised all those options to their advantage. *Id*. at 687. That does not bear even a passing resemblance to the markets here.

The district court s holding that Viamedia failed to offer evidence of forcing was premised on three assumptions: first, that the refusal-to-deal claim was correctly dismissed; second, that Viamedia acted as a reseller of Interconnect services rather than as the MVPD s agent for Interconnect access; and third, that RCN and WOW! could have purchased Interconnect-only access separately. Viewing the record as a whole, as we must, we disagree. We address each assumption in turn.

First, the district court acknowledged Viamedia s evidence that Interconnect access was conditioned on the purchase of Comcast s ad rep services. Yet the court discounted this evidence because such a condition could be explained by Comcast s legal refusal to deal rather than an illegal tying. 335 F. Supp. 3d at 1061. This analysis fails on its own terms. As described above, Viamedia alleged a *prima facie* refusal-to-deal claim. Such potentially illegal conduct cannot justify Comcast s related tying of Interconnect services to ad rep services, and more fundamentally, a tying claim does not fail as a matter of law simply because it was implemented by refusing to deal with an intermediary.

Second, the district court conflated access to the cooperative Interconnects, formerly granted uniformly to competing MVPDs or their ad rep services agents, with the Interconnect services themselves. The district court s conclusion that the MVPDs wanted a single entity to make available to them both Interconnect Services and Ad Rep Services is simply wrong as a matter of fact. Before Comcast excluded

Viamedia, RCN and WOW! received Interconnect services from Comcast and ad rep services *separately* from Viamedia. The district court misunderstood Viamedia to be a reseller of Interconnect services as part of a bundle that included ad rep services, and concluded there was no impermissible tying simply because Viamedia could not offer that bundle any longer due to Comcast s (supposedly) legal refusal to deal with Viamedia. 335 F. Supp. 3d at 1058 n.12. That characterization does not have a factual basis in the record, and it is certainly not beyond reasonable factual dispute. Even Comcast characterized Viamedia not as a reseller of Interconnect services but as a re-seller of MVPD spot avails to the Interconnect operator. DA638. Comcast s characterization of ad rep services including its own ad rep services provided to customer/competitor MVPDs as reselling spot avails and disconnected from its MVPDs customers best interests is troubling in its own right, but we return to that below. Neither the district court s nor Comcast s characterization of Viamedia s role was accurate.

As an ad rep services provider, Viamedia acted in the best interests of its MVPD customers and served as their agent or interface with the Comcast-controlled Interconnects for the one-third of MVPD spot avails that they sold cooperatively not competitively on a regional, DMA-wide basis. The district court acknowledged as much elsewhere in its opinion, explaining that MVPDs view themselves as receiving Interconnect Services from interconnect operators (like Comcast) even when they have hired an unaffliated Ad Rep (like Viamedia) on a full-turnkey basis. 335 F. Supp. 3d at 1058 n.10. We agree with the district court s latter characterization.

Third, in considering the summary judgment evidence, the district court drew inferences in favor of Comcast in concluding that RCN s and WOW! s purchases of Interconnect services and ad rep services from Comcast were not forced. It did not credit RCN s and WOW! s reasonable understanding that Comcast was tying Interconnect services to ad rep services. The court (1) read Comcast s statements as more ambiguous than they actually were; (2) concluded that, because the MVPDs ultimately purchased Comcast s ad rep services, they must have wanted both services to be provided by Comcast; and (3) pointed to out-of-market evidence to infer that Comcast would have offered an Interconnect-only deal if only RCN and WOW! had asked for one. This analysis departed from summary judgment standards in several respects.

Even if Comcast s statements had been ambiguous, a plaintiff does not need an express, written declaration of a proposed tying arrangement. A sale on the announced or implied condition that the buyer purchase the tied goods from the seller ordinarily satisfies the tying-agreement requirement. Areeda & Hovenkamp ¶ 1754b c, at 315 20. Although it is not enough for the services to be merely complementary, a seller is not immunized from a tying claim if there is a factual dispute as to whether the buyer wished to purchase the tied service (here ad rep services) from the defendant with market power in the tying service market (here Interconnect services). The MVPDs ultimate decisions, after much financial pain, to sign with Comcast for ad rep services do not disprove an illegal tie. (And notably, in Hartford, Frontier has continued to resist signing with Comcast for ad rep services and remains cut off from the Interconnects.) After all, the great majority of tying and exclusive-dealing provisions that exclude rivals are engaged in by one market-dominating party and one party that is innocent in the sense that it cannot profit from monopoly in the market, but is agreeing to the exclusivity only at the behest of the other party. Areeda & Hovenkamp ¶ 1803a, at 107 n.5.

Finally, the district court incorrectly inferred from the fact that Comcast offers Interconnect-only access in other local markets that RCN and WOW! could have obtained Interconnect-only access if only they had asked. That reasoning denies the non-moving party the benefit of reasonable inferences from the evidence. It also overlooks the evidence showing that in-house provision of ad rep services simply was not a practical option for RCN or WOW! in these markets.

More specifically, the evidence from other markets actually supports Viamedia s case, not Comcast s defense. It is undisputed that competition takes place within metropolitan (DMA) markets. If an advertiser wishes to purchase advertising time in the Chicago DMA, buying a spot avail in New Orleans is not an adequate substitute. Similarly, if Comcast was not permitting RCN an Interconnect-only deal in Chicago, an Interconnect-only deal in Denver was not an adequate substitute. And we summarized above at pages 24 35 the evidence indicating that RCN and WOW! did *not* willingly agree to Comcast s terms.

The Interconnect-only arrangements that Comcast offered in other DMAs, where it did not have (or exercise) so much market power, help Viamedia. Those arrangements show that Interconnect and ad rep services are indeed separate products. They need not be sold together. At the same time, Comcast s willingness to offer Interconnect-only access in other DMAs may reflect that Comcast does not have an overlapping footprint i.e., does not compete in those markets. In contrast, the evidence could support a finding that in Chicago, Detroit, and Hartford, Comcast tied Interconnect services to ad rep services to exclude its competitor in ad rep services and thereby force its MVPD competitors into its not-so-tender arms. See Areeda & Hovenkamp ¶ 1744g, at 198 99 (explaining that bundling in non-competitive markets does not necessarily provide insight into whether a tie is efficient rather than reflective of increased market power exploitation, while unbundling in competitive markets likely reflects efficiencies). In drawing inferences in favor of the non-moving party, we must also recognize the possibility that Comcast was testing the waters in Chicago, Detroit, and Hartford with an eye toward expanding its tying demands to other markets if it is not held accountable.[18]

Outside of the district court s inconclusive comparison of other, more competitive markets, there was no basis in the record to support Comcast s speculation that if RCN and WOW! had just asked once more, Comcast would have abandoned its strategic plan and agreed to standalone Chicago and Detroit Interconnect access. To make such an inference, we would

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[18] The partial dissent incorrectly looks to arrangements in other geographic markets to draw conclusions about forcing in the relevant markets. Post at 132 33. The ad rep services and Interconnect markets are distinct for each DMA. Viamedia s tying allegations and evidence focused on Comcast s conduct in Chicago, Detroit, and Hartford. The fact that Comcast did not simultaneously monopolize or attempt to monopolize ad rep services in other geographic markets is not a defense to its monopolization of Chicago, Detroit, and Hartford. The dissent s only support for its novel market-aggregating approach comes from a calculation of profit sacrifice in *Novell*, 731 F.3d at 1077, which has nothing to do with market definition or tying. See post at 133.

have to assume that the MVPDs went several years without access to the Interconnects, lost millions of dollars in advertising revenue, complained to Comcast and federal regulators, and then chose the ad rep services provider that they least preferred, all because of a mere misunderstanding. Comcast is free to offer this misunderstanding theory at trial, but the theory cannot support summary judgment. We reverse summary judgment for Comcast on Viamedia s tying claim.

C. *Section 2 Monopolization: Harms, Efficiencies, & Remedies*

Undisputed geographic markets, service markets, and market power make this case unusual. In addition, Viamedia has offered sufficient evidence to demonstrate *prima facie* claims for monopolization of the ad rep service markets in three DMAs through refusal to deal and tying. Comcast s actions also forced a new, intimate, and unwelcome relationship upon its smaller MVPD competitors. If credited, that evidence will shift to Comcast the burden to prove what would need to be some dazzling procompetitive benefits to justify its conduct. We set out below considerations for the district court to consider in the rule of reason analysis it will have to conduct on remand.

1. *Harm to Competition*

The potential harm in this case from Comcast s refusal to deal and tying ripples outward. Prior to Comcast s conduct, there was competition in three related markets: (1) between Comcast and other MVPDs for subscribers; (2) between Viamedia and Comcast in ad rep services; and (3) between Comcast and other MVPDs for the sale of spot avails in the local DMA market. By forcing out its only competitor in the market for ad rep services and forcing its MVPD competitors to turn over 100% of their spot avails, Comcast eliminated competition in the market for ad rep services and the market for the sale of local spot avails. At the same time, it gained the ability to impair competition in the market for MVPD subscribers. These harms to competition are prototypical antitrust harms.

a. *Ad Rep Services*

The ad rep services market went from two service providers to a single, monopolist provider. With no other ad rep services providers, the elimination of Viamedia unquestionably harmed competition. The harms that typically flow from a competitive market shifting to total control by a monopolist include potentially higher prices, lower output, and reduced innovation. The market at issue here may not have had time to show ultimate effects from total foreclosure. But Comcast is forthright about the fact that it has refused to allow Viamedia entry into other DMAs. Appellees Br. at 35 36. The DMAs that have never had a competitive ad rep services market may provide useful comparison points to the relevant DMAs here, which are still governed by contracts that were signed while Viamedia was still trying to compete with Comcast.

b. *The MVPD Market: MVPDs, Advertisers, Cable Subscribers*

Recall that the MVPDs faced three possible scenarios when Comcast refused to deal with Viamedia and then conditioned the MVPDs access to the Interconnects on the MVPDs turning over all of their spot avails to Comcast s ad rep services arm. Above at pages 31 35. Each scenario entailed its own potential harm to competition.

The MVPDs elected the first scenario, giving in to Comcast and signing up for its ad rep services. To summarize, this arrangement has resulted in:

- Comcast s smaller MVPD rivals contributing additional revenue toward their dominant competitor;
- MVPDs turning over to Comcast the majority of spot avails they had formerly kept out of the Interconnects, a large portion of which are allocated to local ads (for which the MVPDs formerly competed against each other);
- RCN and WOW! being forced to trust that their dominant, incumbent cable rival Comcast will make ad sales decisions in the smaller competitors best interests, despite Comcast s divided loyalties as it is more profitable for Comcast to place ads in ways that are different from how RCN and WOW! might allocate them;
- Comcast gaining access to its competitor MVPDs competitively sensitive information, including number and location of subscribers, ad sales, promotional ad materials to current and potential subscribers (including promotions trying to get customers to switch away from Comcast);
- And it is not just the MVPDs that have been harmed. Comcast is now the only seller of spot avails in the local market. As Viamedia s counsel noted at oral argument, local advertisers used to have several outlets to choose among at various price points when buying

> spot avails. Comcast is now their only-stop-shop, as well.

And recall that this was the MVPDs *least*-bad choice the one they chose when Comcast denied them their best option. Comcast and the district court hypothesized that Comcast was not actually barring competing MVPDs completely from Interconnect access. The hypothesis was instead that Comcast would have permitted the MVPDs to have Interconnect-only access without using either Viamedia s or Comcast s ad rep services. In this scenario, Comcast would lose ad rep services revenue, but would not lose millions from forgoing Interconnect access fees and from its own spot avails being less valuable when placed through a degraded Interconnect.

But contrary to what the district court seemed to assume, this result still would have been harmful. Forcing RCN and WOW! to forsake the benefits they had gained by outsourcing ad sales to an independent Viamedia would have dramatically raised their costs. RCN and WOW! would have needed to hire staff, purchase technology, and pay for services that Viamedia had previously provided at lower cost. Those fixed costs would have been difficult for those MVPDs to afford, as shown by the fact that the option was always available in theory, and they never took it, and as shown by RCN s filing with the FCC and WOW! s internal emails. A215 n.81.

In the other possible scenario, RCN and WOW! could continue working with Viamedia for ad rep services, but Comcast would continue barring them from the cooperative Interconnects. If the MVPD competitors had made that choice, they would have remained cut off from a large percentage of their advertising revenue.

Any loss of revenue or higher costs from these scenarios is not just a loss for competitors. It leads to a negative feedback loop in the market in which the MVPDs compete for cable subscribers, further harming competition. Higher costs and less advertising revenue lead to fewer promotional offers to subscribers and reduced expansion. See FCC 2007 Report and Order at 8 ¶ 13 (Revenues from cable services are, in fact, a driver for broadband deployment, i.e., the build-out of additional cable infrastructure). This in turn hampers RCN and WOW! from obtaining new cable subscribers or retaining the subscribers they already have (who may switch to Comcast). With a weakened RCN and WOW!, Comcast benefits further by not needing to oĕer the promotions it otherwise would have if it faced a more vibrant RCN or WOW!

To the extent that cable subscribers are left with higher priced and lower quality services and competition has been eliminated in the market for the sale of local spot avails, a trier of fact would have to account for that additional anticompetitive harm.

c. *Back to the Interconnects*

Comcast s conduct also turned a previously procompetitive platform into a weapon to decrease competition in related markets. As originally conceived and implemented, the Interconnects appear to have been comfortably on the reasonable side of a rule of reason analysis for such cooperative ventures among competitors. See generally *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979). Comcast has described the Interconnects in these procompetitive terms, as a collection of two or more cable TV systems that work together to distribute commercials to a wider geographic area than a single system would otherwise reach, giving advertisers the option to reach all cable households within a market with one buy. First Am. Cplt. ¶ 156. Consistent with that description, Comcast itself has told the FCC that the revenue share in an interconnect is often the same for all participants, and fairly standardized across interconnects. Opposition to Petitions to Deny and Response to Comments at 279 n.883, *In the Matter of Applications of Comcast Corp., Time Warner Cable Inc., et al. for Consent to Assign or Transfer Control of Licenses and Authorizations*, FCC MB Docket 14-57 (Sept. 23, 2014) (Comcast 2014 FCC Response). Which is as it should be if this cooperative mechanism is procompetitive rather than a weapon to inflict anticompetitive harm.

In congressional hearings on its proposed merger with TimeWarner Cable, Comcast highlighted the non-exclusionary nature of the Interconnects. A Comcast executive was sent to testify to a congressional committee about the proposed purchase. Much of the concern focused on the potential power of a combined Comcast/TimeWarner Cable to harm other content providers who relied on access to cable companies pipes into the home (e.g., Netflix, YouTube). One Representative, however, asked about Comcast s actions with the Interconnects it controlled.

Comcast executive vice president David Cohen was asked to provide assurances that Comcast will not exclude competitors or advertising firms from the advertising interconnects that Comcast operates. Cohen replied, We are not in the business of excluding businesses who want to buy advertising from us. Cohen was again pressed: So your short answer is that you are not going to exclude competitors or advertising . . . [f]rom the interconnects. Correct. According to Viamedia s evidence, however, Comcast was in the midst of doing just what Cohen was denying.[19]

In this lawsuit, moreover, Comcast now argues that its control over the cooperative Interconnects is the *source* of its competitive advantage. If that were correct, it would call into question the legality of the Interconnects themselves. Antitrust law is rightly skeptical of mechanisms that permit competitors jointly to set prices and other terms of dealing. Collaboration between actual or potential competitors can be rife with opportunities for anticompetitive activity. *American Society of Mech. Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 571 (1982).

Based on Comcast s portrayal and use of the Interconnects in this suit, such skepticism is now warranted. The government antitrust enforcement agencies provide guidance on competitor collaborations. A number of the factors that show anticompetitive effect appear to be met by the Interconnects *as now portrayed by Comcast*. The factors include whether the collaboration may:

[19] Comcast abandoned the Time/Warner transaction after investigations by federal enforcement and regulatory agencies. The government s significant concerns about the merger were focused on the likelihood that it would make Comcast an unavoidable gatekeeper for Internet-based services that rely on a broadband connection to reach consumers. DOJ Press Release, *Comcast Corporation Abandons Proposed Acquisition of Time Warner Cable After Justice Department and Federal Communications Commission Informed Parties of Concerns* (Apr. 24, 2015), at http://www.justice.gov/opa/pr/comcast-corporation-abandons-proposed-acquisitiontime-warner-cable-after-justice-department (last visited on Feb. 21, 2020).

- [L]imit independent decision making or combine the control of or financial interests in production, key assets, or decisions regarding price, output, or other competitively sensitive variables;
- [O]therwise reduce the participants ability or incentive to compete independently;
- Potentially facilitate[] explicit or tacit collusion through facilitating practices such as the exchange or disclosure of competitively sensitive information or through increased market concentration;
- Successfully eliminate[] procompetitive pre-collaboration conduct, such as withholding services that were desired by consumers when offered in a competitive market.

Federal Trade Commission and United States Department of Justice, *Antitrust Guidelines for Collaborations Among Competitors* § 2.2, at 6, § 3.31, at 12 (April 2000) (Collaboration Guidelines). Check, check, check, and check.

These red flags were not raised by the truly cooperative original concept of the Interconnects. Having taken control of at least some Interconnects, though, Comcast now has the ability and now even claims the *right* to use the mechanism as a *source of its competitive advantage over rivals*, distorting competition in related markets. The use of the Interconnects to take control of and set prices for competitors local ads does not appear related to accomplishing the Interconnects procompetitive goals. These facts weigh against Comcast, not for it.

2. *Procompetitive Justifications?*

The potential harms stemming from Comcast s conduct will not lead to Section 2 liability if Comcast proves that its monopoly in ad rep services is a consequence of a superior product, business acumen, or historic accident, or if its conduct was the result of, or necessary to achieve, much greater procompetitive benefits. *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966); see also Areeda & Hovenkamp ¶ 650c, at 94 95. The procompetitive benefits typically recognized in antitrust law include evidence of higher output, improved product quality, energetic market penetration, successful research and development, cost-reducing innovations, and the like. Areeda & Hovenkamp ¶ 651d, at 119.[20] As this issue must also be decided by a trier of fact on remand, we offer some observations.

a. *The Interconnects*

We start with Comcast s monopoly control over the Interconnects in Chicago, Detroit, and Hartford, which Comcast has identified as the source of its competitive advantage that permitted it, in turn, to gain monopoly control over ad rep services. It appears that the only skill and foresight demonstrated by Comcast in obtaining monopoly control over the Interconnects

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[20] As a general matter, the evidence supporting a prima facie case need not be as specific as the evidence supporting a procompetitive justification because [i]f the defendants have a procompetitive justification, it must have been a motivating factor for the restraint, and the defendants should be able to establish it rather easily. Herbert J. Hovenkamp, *The Rule of Reason*, 70 FLA. L. REV. 81, 107 (2018); see also *id.* at 110 (To the extent that the defendants expectation of profit came from something other than a restriction of competition, they should have evidence and are in the best position to provide it.).

was its ability to acquire a multitude of other cable MVPD providers without facing a challenge from government antitrust enforcers. Comcast s acquisitions are not in and of themselves evidence of superior skills, services, or accident.

What Comcast now identifies as a source of competitive advantage was produced by the kind of mergers that the agency Merger Guidelines describe as anticompetitive. The Guidelines identify as their unifying theme the proposition that mergers should not be permitted to create, enhance, or entrench market power or facilitate its exercise by enhancing [a firm s] market power. § 1, at 2. One example of an anticompetitive merger is directly on point:

> Merging Firms A and B operate in a market in which network effects are significant, implying that any firm s product is significantly more valuable if it commands a large market share or if it is interconnected with others that in aggregate command such a share. Prior to the merger, they and their rivals voluntarily interconnect with one another. The merger would create an entity with a large enough share that *a strategy of ending voluntary interconnection would have a dangerous probability of creating monopoly power in this market*. The interests of rivals and consumers would be broadly aligned in preventing such a merger.

Merger Guidelines § 2, at 6 (emphasis added). Comcast cannot now justify exclusionary conduct by pointing to control over the Interconnects, which was acquired through mergers that themselves may have been anticompetitive *precisely because of the risk that they could enable Comcast's exclusionary conduct*.

b. *The Ad Rep Services Market*

Comcast s new monopoly position in the ad rep services markets in Chicago, Detroit, and Hartford, if we draw reasonable inferences in favor of Viamedia, is a result not of its superior services but of its exclusionary conduct. Any claimed benefits from that conduct must be procompetitive and not simply the result of eliminating competition. For example, if Comcast has reduced advertising, promotions, or other incentives that it previously offered to customers or local retailers when competing with Viamedia, those savings would represent harm to competition. See *Covad Communications Co. v. Bell Atlantic Corp.*, 398 F.3d 666, 674 (D.C. Cir. 2005), citing Bork, *Antitrust Paradox* at 314. Similarly, any savings gained by forgoing investments in research and development, infrastructure, or sales personnel, that otherwise would have been made under competitive conditions are properly categorized as harm to competition, not benefits. Finally, any defense premised upon the proposition that competition itself is inefficient, unreasonable, or confusing is not cognizable. See *National Society of Professional of Engineers v. United States*, 435 U.S. 679, 696 (1978).

Viewing the facts in the light most reasonably favorable to Viamedia, Comcast s procompetitive justifications seem to fall into this latter category. If Comcast could offer improved efficiencies by offering ad rep services and Interconnect services together to MVPDs, it was always free to do so. If this were the case, it could have passed on some of those savings to MVPD customers and possibly outcompeted Viamedia. Refusing to deal with the MVPD s representative of choice appears to be an attempt to avoid competition on the merits in the markets for ad rep services.

On the procompetitive side of the ledger, evidence of reduced pricing could offset harm although current contracts may not yet reflect ultimate post-competition pricing. They were signed when Comcast was still bidding against Viamedia. And while protection against free-riding is generally recognized as a procompetitive goal, [w]hen payment is possible, free-riding is not a problem because the ride is not free. *Chicago Prof'l Sports Ltd. Partnership v. NBA*, 961 F.2d 667, 675 (7th Cir. 1992); see also Hovenkamp, *The Rule of Reason*, 70 FLA. L. REV. at 111, 113 (Often instances of claimed free riding are really complaints about competition, particularly when there are joint costs, and complete market exclusion is a suspiciously excessive remedy for claimed free riding, even where a certain amount of free riding actually occurs.). If Comcast has evidence of truly procompetitive benefits, it should submit that evidence to the trier of fact. But the hypotheses it has offered thus far do not entitle it to summary judgment.

3. *Remedies*

Comcast s final defense focuses on the challenge of remedying its conduct. After all, Comcast points out, Courts are ill suited to act as central planners, identifying the proper price, quantity, and other terms of dealing. *Pacific Bell Telephone Co. v. Linkline Communications, Inc.*, 555 U.S. 438, 452 (2009), quoting *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 408 (2004). Call this the So what? defense.

We agree that a court should not impose a duty to deal that it cannot explain or adequately and reasonably supervise. *Linkline*, 555 U.S. at 452 53, quoting *Trinko*, 540 U.S. at 415. Yet courts are often called upon to undertake complicated, long-term supervision of complex cases and remedies. The judiciary need not and should not adopt a posture of learned helplessness in the face of proven antitrust violations. For example, courts regularly preside over dozens, if not hundreds or even thousands, of related cases in multidistrict litigation that present complicated questions of liability, not to mention supervising and implementing remedies over years if not decades. See, e.g., *MDL 875 In re: Asbestos Products Liability Litigation* (No. VI) (overseeing thousands of asbestos cases, including class actions, since 1991). Courts oversee the bankruptcy process for companies with complicated corporate structures and far-flung assets, supervising sales of those assets worth hundreds of billions of dollars. See, e.g., *In re Lehman Brothers Holdings, Inc.*, Case No. 08-13555 (Bankr. S.D.N.Y.). And of course federal courts currently supervise at least 115,000 individuals on supervised release, implementing difficult-to-monitor and intrusive conditions limiting those individuals jobs, the family and friends they can see, their drug and alcohol consumption, and locations to which they can travel, among others all enforced through routine interviews of family and associates, electronic monitoring, drug tests, and random searches. Administrative Office of the United States Courts, *Overview of Probation and Supervised Release Conditions* 42 93 (Nov. 2016). In this antitrust case, we are not yet ready to cry uncle by affirming dismissal based on the unsubstantiated claim that this case poses insoluble administrability problems.

In any event, this defense puts the cart before the horse. The trier of fact must first evaluate the evidence and determine whether Comcast s procompetitive justifications outweigh the anticompetitive harms from its conduct. If Comcast is found liable, the district court will then face a decision about appropriate remedies. That will be the time to face the practical problems Comcast hypothesizes.

The record thus far offers reasons to think the problems would be manageable. Comcast and Viamedia did business voluntarily, presumably on profitable terms for both. That history may well simplify the problems. As then-Judge Gorsuch wrote for the Tenth Circuit in *Novell*, evidence of that earlier course of dealing helps address, at least to some degree, administrability concerns presumably profitable terms already agreed to by the parties may suggest terms a court can use to fashion a remedial order without having to cook them up on its own. 731 F.3d at 1075.

Moreover, Comcast itself told the FCC that this should not be an insoluble problem. It told the FCC that the revenue share in an interconnect is often the same for all participants, and fairly standardized across interconnects. Comcast 2014 FCC Response at 279 n.883. Such comparison points (both within a given Interconnect and against other Interconnects in which Comcast sells or buys Interconnect-only access) may be used to establish a remedy that addresses pricing.

That being said, Antitrust courts normally avoid direct price administration, relying on rules and remedies . . . that are easier to administer. *Linkline*, 555 U.S. at 453, quoting *Concord v. Boston Edison Co.*, 915 F.2d 17, 25 (1st Cir. 1990) (Breyer, C.J.). If a pricing remedy proves too complicated, then structural remedies may be preferable. See, e.g., Areeda & Hovenkamp ¶ 600b, at 4 (even [m]ildly reprehensible behavior might be enough to challenge a firm whose power is significant and could justify imposing a more substantial remedy (e.g., divestiture or dissolution versus an injunction)).

Comcast knows that courts are capable of overseeing structural and behavioral remedies (including ones that govern pricing disputes) that ameliorate competitive concerns. It agreed to such an arrangement as a condition for court approval of its challenged 2009 merger with NBC Universal. *United States v. Comcast Corp.*, 808 F. Supp. 2d 145, 147 48 (D.D.C. 2011) (Comcast agreeing to certain remedies to prevent anticompetitive conduct post-merger). Such court-imposed and court-supervised remedies can also be imposed without a defendant s consent after a finding of liability. One obvious possibility would be to prohibit Comcast s control over Interconnects, which, in light of the evidence of misuse of that power to harm competition, raises serious problems under Section 1 of the Sherman Act.[21]

D. *Antitrust Injury*

A private civil plaintiff in an antitrust case must also establish antitrust injury, which requires proof that its claimed injuries are of the type the antitrust laws were intended to prevent and reflect the anticompetitive effect of either the violation or of anticompetitive acts made possible by the violation. *Kochert v. Greater Lafayette Health Servs., Inc.*, 463 F.3d 710,

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[21] An amicus brief filed in support of Comcast argued that any relief for arbitrary refusals to deal should be left to the legislature. Brief for the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Appellees at 25 (internal quotation marks omitted). The Chamber s argument that courts should not enforce Section 2 in refusal-to-deal claims is a policy position and not one with which we are free to agree.

716 (7th Cir. 2006) (internal quotation marks and citations omitted). Viamedia has offered evidence of antitrust injury.

When a monopolist creates a monopoly in the tied market, rivals are often excluded from the market, thereby losing market share or sales. In such cases courts ordinarily grant standing to the excluded or impeded rival. Areeda & Hovenkamp ¶ 1767a, at 449; see also *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 490 n.14 (1977) ([C]ompetitors may be able to prove injury before they actually are driven from the market and competition is thereby lessened. Of course, the case for relief will be strongest where competition has been diminished.). We have also often recognized that competitors suffer antitrust injury when they are forced from the market by exclusionary conduct. See, e.g., *Tri-Gen Inc. v. Int'l Union of Operating Engineers, Local 150, AFL-CIO*, 433 F.3d 1024, 1032 (7th Cir. 2006) ([T]his Court has recognized that competitors can bring an antitrust claim when they are excluded from the market and injured by defendants actions.); *Serfecz v. Jewel Food Stores*, 67 F.3d 591, 597 (7th Cir. 1995) (When the plaintiff s injury is linked to the injury inflicted upon the market, such as when consumers pay higher prices because of a market monopoly *or when a competitor is forced out of the market*, the compensation of the injured party promotes the designated purpose of the antitrust law the preservation of competition.) (emphasis added). This rule is integral to an effective antitrust regime because the foreclosed rival s injury is entirely independent of the amount or existence of any injury to buyers. Areeda & Hovenkamp ¶ 1767a, at 449.

The general rule is that customers and competitors in the affected market have antitrust standing.

See *Associated General Contractors*, 459 U.S. at 539; *McGarry & McGarry, LLC v. Bankruptcy Mgmt. Solutions, Inc.*, 937 F.3d 1056, 1065 66 (7th Cir. 2019), citing *In re Aluminum Warehousing Antitrust Litig.*, 833 F.3d 151, 158 (2d Cir. 2016), citing in turn *Serpa Corp. v. McWane, Inc.*, 199 F.3d 6, 10 (1st Cir. 1999) (Competitors and consumers in the market where trade is allegedly restrained are presumptively the proper plaintiffs to allege antitrust injury.), and *SAS of P.R., Inc., v. P.R. Tel. Co.*, 48 F.3d 39, 45 (1st Cir. 1995) (competitors and consumers are favored plaintiffs in antitrust cases). Viamedia is not seeking relief based on a theory that competition should have been *reduced*. Cf. *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. at 488 (rejecting claim for loss of income that would have been earned if other competitors had been forced out of the market and competition had thus been reduced). Instead, Viamedia seeks only an opportunity for fair competition in the ad rep services markets, based on the quality and prices of its services. It is an appropriate plaintiff to seek damages based on exclusionary conduct that forced it out of that market.

Viamedia claims that Comcast s exclusionary conduct drove it from the ad rep services markets in Chicago, Detroit, and Hartford, thus reducing competition. Viamedia has presented evidence indicating that if Comcast not tied its sale of Interconnect services to ad rep services, RCN and WOW! likely would have continued to obtain ad rep services from Viamedia. The harm to competition is particularly pronounced since Viamedia was Comcast s only competitor in in the relevant markets. To the extent that Comcast engaged in exclusionary conduct, the evidence indicates that the exclusionary conduct caused

Viamedia s injuries by forcing it from the ad rep services markets.

The partial dissent expresses great skepticism toward rivals antitrust suits and argues that Viamedia cannot show antitrust injury on its tying claim. As a general matter, caution is appropriate. The partial dissent goes astray, however, by contending it is uncommon for a single foreclosed rival to have standing in a tying case. Post at 122 23. The leading tying cases and the leading treatise s specific, on-point discussion of antitrust standing in tying cases teach otherwise.

The foundational tying cases of the past 40 years were brought by tied-market rivals. *Eastman Kodak*, 504 U.S. 451; *Jefferson Parish*, 466 U.S. 2. The partial dissent cites no case law for its assertion that such cases are uncommon. It also does not cite any case in which an excluded rival in the tied market was found to lack antitrust injury. In the single tying case cited in the partial dissent s discussion of antitrust injury, the plaintiff lacked antitrust injury precisely because she was *not* participating in the tied market when the tie was allegedly implemented. See *Kochert*, 463 F.3d at 716.

And where Areeda and Hovencamp address antitrust standing in tying cases, they recognize that standing is appropriate in cases like this. Viamedia was competing with Comcast in the tied market for ad rep services. It was forced out of that market in Chicago, Detroit, and Hartford. Areeda and Hovencamp explain:

> Rivals in that market [the tied market] may be foreclosed when their entry or expansion is impeded or they lose existing market share

> or sales. Consumers lose the benefits of any entry, expansion, competition, or innovation that independent rivals might have injected into the tied market. *In such cases courts ordinarily grant standing to the excluded or impeded rival.*

¶1767a, at 449 50 (emphasis added); accord, *Eastman Kodak*, 504 U.S. at 479 (reversing summary judgment for defendant: market foreclosure in tied market resulting from illegal tying is facially anticompetitive and exactly the harm that antitrust laws aim to prevent). To the extent that the partial dissent suggests that the tying conduct at issue is not illegal or exclusionary, that goes to the merits, not to antitrust injury.

The partial dissent also suggests that Viamedia s injuries cannot establish antitrust injury because they are the same as those alleged from the refusal to deal. Post at 125. This point also reflects only disagreement on the merits of the tying claim and the confusion that has stemmed from the different treatment of the two claims in the district court. Because the same general course of conduct supports both the refusal-to-deal and tying claims, the two theories necessarily allege similar injuries and damages.

E. *Role of Expert Witnesses*

The final issue is the admissibility of expert testimony. We review the district court s exclusion for an abuse of discretion. *Salgado v. General Motors Corp.*, 150 F.3d 735, 739 (7th Cir. 1998). If a discretionary ruling is based on an error of law, though, it can often be deemed an abuse of discretion. E.g., *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 402 (1990) (Rule 11 sanctions); *Ervin v. OS Restaurant Services, Inc.*, 632 F.3d 971, 976 (7th Cir. 2011) (class certification).

The district court struck Viamedia s expert testimony largely based on the view that Viamedia s claims should fail as a matter of law. We disagree with the district court s view of the law, so we reverse the court s rulings regarding Viamedia s expert witnesses.[22] We address separately the district court s ruling regarding a portion of Viamedia s expert economic witness, whom the court perceived as merely offering lay testimony, as well as an objection Comcast has raised on appeal that Viamedia failed to offer a causation expert, which Comcast believes should be fatal.

1. *Standard*

Expert opinion testimony is admissible if (a) the expert s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case. Fed. R. Evid. 702. An expert s opinion may overlap[] with the jurors own experiences or cover matters that are within the average juror s comprehension, so long as the expert uses some kind of specialized knowledge to place the litigated events into context. *Lawson v.*

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[22] Viamedia offered Dr. Lys as an expert on damages issues. The only basis for excluding his opinion was that he assumed that Comcast s conduct had violated the antitrust laws and thus caused Viamedia cognizable harm, and the court had concluded that Viamedia could not legally prevail on its antitrust claims. As we are reversing the district court s legal rulings, the court s exclusion of Dr. Lys expert opinion must also be reversed.

Trowbridge, 153 F.3d 368, 376 (7th Cir. 1998) (citations omitted); see also *United States v. Williams*, 81 F.3d 1434, 1441 (7th Cir. 1996) (All you need to be an expert witness is a body of specialized knowledge that can be helpful to the jury.).

2. *Economic Expert Witness*

Viamedia offered Dr. Furchtgott-Roth as an expert witness on the economic rationales of Comcast s conduct and the competitive ramifications from such conduct. Setting aside the district court s ruling regarding Dr. Furchtgott-Roth s report based on the court s legal holdings, the court also excluded a portion of his testimony as offering only a lay impression of the market and Comcast s conduct.

Viamedia argues that Dr. Furchtgott-Roth s undisputed specialized knowledge would be helpful to a jury to place Comcast s conduct into context, and that there are some complex facts in this case, including the economic incentives faced by a set of interrelated firms in the two-sided market for spot cable advertising, which are not obvious to the layperson.

Dr. Furchtgott-Roth clearly drew conclusions through expert assessment, not merely a lay interpretation of the evidence. While he did summarize and repeat some relevant facts, he drew significantly on expertise to add something context and supporting information to the record. Viamedia contends that its exclusion from the Interconnects furthered Comcast s tying policy. Dr Furchtgott-Roth s opinion that self-provision is not a viable business option for smaller MVPDs is an expert interpretation of evidence on a highly relevant factual point. So too is his opinion that Viamedia cannot make a competitive offer for ad rep services if Comcast conditions its competitor MVPDs Interconnect access on forgoing Viamedia s services. He drew on his expertise to make these two determinations, both of which required analysis of market conditions. These opinions informed his broader opinion that Comcast s exclusion of Viamedia from the Interconnects was integral to its tying conduct. The district court therefore abused its discretion in concluding that Dr. Furchtgott-Roth s testimony was not significantly informed by his expertise. It was, and it therefore meets the requirement of Federal Rule of Evidence 702(a).

3. *Lack of Expert Witness on Causation*

Comcast also argues that Viamedia s case must fail because it has not offered an expert on causation. Hiring another expert on causation is not a legal requirement for successfully bringing an antitrust case. Rather than requiring § 2 liability [to] turn on a plaintiff s ability or inability to reconstruct the hypothetical marketplace absent a defendant s anticompetitive conduct, which would only encourage monopolists to take more and earlier competitive action, courts have inferred causation when a defendant s conduct reasonably appear[s] capable of making a significant contribution to . . . maintaining monopoly power. *United States v. Microsoft Corp.*, 253 F.3d 34, 78 79 (D.C. Cir. 2001) (en banc) (citation omitted). To the extent there may be an underlying problem of proof, the defendant is made to suffer the uncertain consequences of its own undesirable conduct, and causation queries go to questions of remedy, not liability. *Id.* at 79 80 (citation omitted).

Conclusion

Viamedia alleged sufficiently, and at summary judgment offered sufficient evidence, that Comcast violated Section 2 of the Sherman Act. Viewing the allegations and evidence in the light most favorable to Viamedia, Comcast abruptly terminated decade-long, profitable agreements and sacrificed short-term profits to obtain and entrench long-term market power, and used its monopoly power in Interconnect services market to force its MVPD competitors into a relationship that makes Comcast a gatekeeper of its competitors advertising revenue. This conduct reveal[s] a distinctly anticompetitive bent. *Trinko*, 540 U.S. at 409, discussing *Aspen Skiing*, 472 U.S. 585. Comcast is free to contest these issues at trial, as well as to try to prove and quantify any procompetitive justifications. The factual disputes in this case are numerous, genuine, and material. The judgment of the district court is REVERSED and the case is REMANDED for further proceedings consistent with this opinion.

BRENNAN, *Circuit Judge*, concurring in part and dissenting in part. The majority opinion is synoptic in its coverage, deeply researched, and meticulous in its consideration of the antitrust issues this case presents. It deserves much respect. While I agree Viamedia has plausibly alleged an antitrust violation and is entitled to reversal and remand on its refusal-to-deal claim, I would affirm summary judgment on its tying claim because the undisputed facts do not present evidence of an illegal tie. I also respectfully part company with my colleagues on some other issues the majority opinion tackles.

The last several decades have brought a new regime to antitrust law in the world of exclusionary conduct. Outdated monopolization doctrines have given way to a sharper and narrower understanding of what constitutes exclusionary behavior under § 2 of the Sherman Act, 15 U.S.C. § 2. *See Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064, 1072 (10th Cir. 2013); *United States v. Microsoft Corp.*, 253 F.3d 34, 49 (D.C. Cir. 2001). History teaches this new regime promotes competition and innovation in the marketplace, and it informs the resolution of the claims and defenses before us now.

I. Refusal to Deal

A 2003 agreement between Viamedia and Comcast granted Comcast the exclusive right to sell on its Chicago, Detroit, and Hartford Interconnects advertising availabilities that Viamedia purchased from multichannel video programming distributors (MVPD) WOW! and RCN. Viamedia understood that, upon the agreement s expiration, Comcast had the right to solicit RCN s and WOW! s advertising business directly. The agreement between Viamedia and Comcast expired May 31, 2012. The next day

Comcast informed Viamedia of its intent not to renew their agreement and to seek RCN s and WOW! s business directly.

Comcast prefers to deal directly with MVPDs, rather than with intermediaries such as Viamedia, and has found substantial benefits from direct dealings. Appellee s Br. 11. When their contracts with Viamedia expired in 2015, RCN and WOW! contracted with Comcast to be their ad representative in Chicago and Detroit and sell their availabilities on its Interconnects. Up to that point, Viamedia s agreements with RCN and WOW! prevented them from dealing directly with Comcast.

Cut out of the deal, Viamedia sued Comcast for allegedly violating § 2 of the Sherman Act, claiming Comcast s decision to end Viamedia s access to the Interconnects lacked a valid business reason under *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985). Specifically, Viamedia alleged Comcast s decision caused Comcast to forfeit fees upfront and reduced the economic value of the Interconnects. The allegations do not claim that Comcast s sacrificed profits later led to monopoly recoupment.

The district court dismissed Viamedia s refusal-to-deal claim. *Viamedia, Inc. v. Comcast Corp.*, 218 F. Supp. 3d 674 (N.D. Ill. 2016). The court found that Viamedia s own allegations admitted a valid business purpose for Comcast s refusal: removing an intermediary, Viamedia, to deal directly with MVPD customers.[1] *Id*. at 698. The court further found that Viamedia failed to allege or explain how Comcast s refusal to

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[1] This court has characterized this common business practice of vertical integration or disintermediation as pro-competitive and efficient. *See Jack Walters & Sons Corp. v. Morton Bldg.,*

deal with it had no rational procompetitive purpose. *Id*.

A. *The Refusal-to-Deal Claim Survives a Motion to Dismiss.*

We review the grant of a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss de novo and ask whether there is plausibility in the complaint. *Christy Sports, LLC v. Deer Valley Resort Co.*, 555 F.3d 1188, 1191 (10th Cir. 2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 564 (2007)) (internal citations omitted); *see also Deppe v. NCAA*, 893 F.3d 498, 500 (7th Cir. 2018). A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Plausibility does not ask whether the allegations are likely true; the court must assume they are. Instead, the inquiry is whether, if the allegations are true, it is plausible and not merely possible that the plaintiff is entitled to relief. *Christy Sports,* 555 F.3d at 1191 92. The plaintiff must plausibly allege more than wholly conclusory statements that a defendant violated § 2 of the Sherman Act to advance past the pleadings stage. *Id*.

In considering the alleged violation at the root of Viamedia s refusal-to-deal claim, we must be cognizant that the antitrust laws rarely impose on firms even dominant firms a duty to deal with rivals. *Novell*, 731 F.3d at 1066; *see also Verizon Commc'ns v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 411

Inc., 737 F.2d 698, 710 (7th Cir. 1984) (holding vertical integration usually is procompetitive).

(2004) (holding even a monopolist has no duty to cooperate with rivals). As a general rule purely unilateral conduct does not run afoul of section 2 businesses are free to choose whether or not to do business with others and free to assign what prices they hope to secure for their own products. 731 F.3d at 1072. In the past, some courts suggested that a monopolist must lend smaller rivals a helping hand, but today it is understood that forcing rivals to cooperate usually leaves consumers paying more for less. *Id.*; *see also* Frank H. Easterbrook, *The Chicago School & Exclusionary Conduct*, 31 HARV. J.L. & PUB. POL Y 439, 441 42 (2008) (antitrust themes incentivizing cooperation among firms largely bit the dust in *Verizon v. Trinko* and now the main goal of antitrust is to compel firms to be rivals); *Olympia Equip. Leasing v. Western Union Telegraph*, 797 F.2d 370, 375 (7th Cir. 1986) (Today it is clear that a firm with lawful monopoly power has no general duty to help its competitors, whether by holding a price umbrella over their heads or by otherwise pulling its competitive punches.).

Despite this hesitancy to condemn refusals to deal, a monopolist s behavior violates § 2 if it is irrational but for its anticompetitive effect. *Novell*, 731 F.3d at 1075; *see also* 3 Phillip E. Areeda & Herbert Hovenkamp, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION 651b3, p. 107 (4th ed. 2015) (monopolizing conduct is irrational if only explanation that makes it seem profitable is destruction or discipline of rivals) (hereinafter Areeda & Hovenkamp, ANTITRUST LAW); *Trinko*, 540 U.S. at 407 (defendant must be seeking an anticompetitive end); *Aspen Skiing*, 472 U.S. at 605 (If a firm has been attempting to exclude rivals on some basis other than efficiency, it is fair to characterize its behavior as predatory.) (internal citations omitted);

Christy Sports, 555 F.3d at 1194 (in rare circumstances a refusal to cooperate with competitors might constitute a § 2 violation).

It is unclear particularly on a motion to dismiss when a plausibly alleged violation is all that is required whether conduct irrational but for its anticompetitive effect is to be treated the same as conduct with no rational procompetitive purpose. *See* 218 F. Supp. 3d at 698. Although slight, there is a difference: the former provides an antitrust plaintiff the opportunity to argue that, despite some efficiency justification proffered by an antitrust defendant, the rational or intended goal of the conduct was its anticompetitive impact. The latter, in contrast, requires the antitrust defendant to put forward any evidence of some business reason for its conduct, regardless of potential anticompetitive effect. The district court applied the latter and found there was a rational procompetitive purpose because Comcast offered evidence of vertical integration and disintermediation motives that I agree reflect lawful and procompetitive marketplace conduct.[2] But it did so by disregarding the plausibility of Viamedia s allegations of anticompetitive conduct and weighing the evidence in Comcast s favor. This is not the court s role on a Rule 12(b)(6) motion.

Any confusion here may stem from a misunderstanding of how to handle conflicting evidence of conduct in the allegations. If only one party advances evidence showing pro-competitive or anticompetitive

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[2] The majority opinion reviews vertical integration and disintermediation cases cited by Comcast and concludes they are inapposite here on the question of procompetitive conduct. *See* Majority op. at pp. 63 67. While it does not change my agreement with the majority to remand the refusal-to-deal claim, I do not reach this same conclusion.

conduct, the court may find the lack of any opposing evidence shows either rationality or irrationality for § 2 purposes. *See Novell*, 731 F.3d at 1076 (on review of judgment as a matter of law, finding no evidence from which a reasonable jury could conclude monopolist s conduct was irrational); *see also Aspen Skiing*, 472 U.S. at 610 (on review of summary judgment, finding no evidence of efficiency justification for the refusal to deal). But even these instances are post-pleading. What of the parties who, at the pleading stage, proffer allegations of competing economic justifications for behavior? Are we to accept the defendant s proffered justification as conclusive of procompetitive rationality without considering the plaintiff s allegations of anticompetitive conduct? If so, can an antitrust plaintiff ever advance past the pleadings stage when a defendant asserts a procompetitive justification? The district court effectively held the plaintiff cannot, 218 F. Supp. 3d at 698, but this is up for debate. *See* 3 Areeda & Hovenkamp, ANTITRUST LAW ¶ 651b3, pp. 106 07 (criticizing approach that relies on facts which benefit the defendant very slightly while doing considerable harm to the rest of the economy; [n]ot all monopolizing conduct that we might wish to condemn is irrational); *Microsoft Corp.*, 253 F.3d at 59 (defendant bears the burden of presenting a nonpretextual claim and proving procompetitive justification on the facts); *Illinois ex rel. Burris v. Panhandle Eastern Pipe Line Co.*, 935 F.2d 1469, 1481 82 (7th Cir. 1991) (finding the presence of a legitimate business justification *reduces the likelihood* that the conduct will produce undesirable effects on the competitive process ; [w]hether valid business reasons motivated a monopolist s conduct is a question of fact for a fact-finder); *Olympia*, 797 F.2d at 378 (reasoning the lack of a clear business justification among conflicting evidence *may indicate* probable anticompetitive effect but is not conclusive). We need not settle this debate, though, as it does not impact the decision to remand.

As the majority opinion recognizes, the calculation of procompetitive benefits net of anticompetitive harms does not easily lend itself to a *pleading* standard. Majority op. at p. 59. Viamedia alleged Comcast s conduct could achieve no pro-competitive justifications because there were no problems in allowing Viamedia to participate in Interconnects on behalf of its MVPD customers. Viamedia s allegations show more than market power; they allege Comcast s exclusionary conduct was anticompetitive and harmful to the economic purpose of the Interconnects, *see Christy Sports*, 555 F.3d at 1192 (anticompetitive allegation must appear in the pleadings), specifically by denying Viamedia access to the Interconnects. Giving Viamedia the benefit of its allegations, its refusal-to-deal claim clears the Rule 12(b)(6) pleading bar because it plausibly alleges it was excluded from the market and injured by defendant[s] actions, *Tri-Gen Inc. v. Int'l Un. of Op. Eng's Local 150*, 433 F.3d 1024, 1032 (7th Cir. 2006) an alleged injury that harms both competitors *and* competition, *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 118 (1986). Down the road, the facts Viamedia has pleaded or other facts discovered may render its refusal-to-deal claim a candidate for summary disposition. *See Collins v. Associated Pathologists, Ltd.*, 844 F.2d 473, 475 (7th Cir. 1988) (considering various antitrust claims: the very nature of antitrust litigation encourages summary disposition of such cases when permissible). But viewing the facts in a light favorable to Viamedia, its refusal-to-deal claim has not reached that point.

On a motion to dismiss, an antitrust plaintiff seeking § 2 damages must point to plausible allegations showing its rival s refusal to deal was irrational but for its anticompetitive effect. Regardless of how this court in the future resolves competing justifications at the dismissal stage, Viamedia has plausibly alleged refusal to deal in violation of § 2 and was entitled to advance that claim beyond the pleadings.

B. *The Refusal-to-Deal Claim Is Different than the Claim in* Aspen Skiing.

The majority opinion concludes this case is indistinguishable from *Aspen Skiing*, 472 U.S. 585. Majority op. at p. 54. I respectfully do not join the majority s conclusion that *Aspen Skiing* maps onto Comcast s conduct, *id.* at 44, or that on a refusal-to-deal theory this case appears stronger than *Aspen Skiing*. *Id.* at 52.

The familiar holding of *Aspen Skiing* is that the defendant s failure to offer any efficiency justification whatever for its pattern of conduct resulted in a § 2 violation. 472 U.S. at 608; *see also Christy Sports*, 555 F.3d at 1197 (finding the critical fact in *Aspen Skiing* was that there were no valid business reasons for the refusal to deal). Its holding is specific: the defendant could not justify either its insistence on breaking up the joint lift pass or its refusal to sell the other owner its passes for the same value just to keep the pass together. 472 U.S. at 603. There was no efficiency reason offered for the defendant s conduct; the only apparent purpose was to eliminate competition. *Id.* at 608. The Supreme Court later explained that this conduct constituted a violation because the unilateral termination of a voluntary (and thus presumably profitable) course of dealing suggested a willingness to forsake short-term profits to achieve an anticompetitive end. *Trinko*, 540 U.S. at 409. The defendant s unwillingness to renew the ticket even if compensated at retail price revealed a distinctly anticompetitive bent. *Id.*; *see also Goldwasser v. Ameritech Corp.*, 222 F.3d 390, 398 (7th Cir. 2000) (explaining the decision to forgo cash revenues and efficient methods of doing business for the sole purpose of driving its rival out of the market is a § 2 violation).

The application of *Aspen Skiing* s holding has been the subject of substantial debate. Albeit a seminal antitrust opinion, *Aspen Skiing* is recognized as a factual and legal exception under current antitrust law. *See Trinko*, 540 U.S. at 409 (*Aspen Skiing* is at or near the outer boundary of § 2 liability.). Today, it fits within the narrow world of refusal to deal cases. [3] *Novell*, 731 F.3d at 1079; *see* Easterbrook, *The Chicago School & Exclusionary Conduct*, at 441 42 (describing the Court s holding in *Aspen Skiing* as the last gasp of the old school of antitrust).

Not all refusal-to-deal challenges fall within the limited exception of *Aspen Skiing*. *Novell*, 731 F.3d at 1074 75. To invoke that exception, there must be a preexisting, voluntary, and presumably profitable course of dealing between a monopolist and a rival, and the discontinuation of that dealing must reveal irrational willingness to forsake short-term profits to

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[3] *See* Gov t s Br. in Supp. of Neither Party at 6, 8 11, ECF No. 33 (arguing only limited circumstances have been recognized in which a monopolist violates § 2 by refusing to deal with a rival, and those circumstances are tightly circumscribed due to the negatives of coerced dealing; recommending this court follow *Novell* and its test that a refusal to deal does not violate § 2 unless it would make no economic sense for the defendant but for its tendency to eliminate or lessen competition).

achieve an anti-competitive end. *Id*. Evidence of forsaking short-term profits may isolate conduct that has *no* possible efficiency justification. *Id.* at 1077. When considering sacrificed profits, though, courts should not disaggregate profits from different lines of business as [p]arsing profits would defeat the purpose of holding firms liable for making moves that enhance their overall efficiency. *Id.* (disaggregating profits would make it difficult to assess firm s goal of maximizing overall profits and is inconsistent with the Court s reasoning in *Aspen Skiing* and *Trinko*); *see also Christy Sports*, 555 F.3d at 1194 (businesses have ability to recoup [their] investment[s] in any number of ways). In finding the *Aspen Skiing* exception applies here, the majority opinion points to three key factors underlying the Supreme Court s decision in that case: (1) an important change in a pattern of distribution that had persisted for years; (2) conduct in the market with arrangements in comparable markets; and (3) forgoing profitable transactions. Majority op. at pp. 49 51. On these factors, I see *Aspen Skiing* and this case as different.

First, in *Aspen Skiing* there was more than an important change in the distribution pattern, as in that case the joint pass was terminated altogether. 472 U.S. at 603. Here, no termination of the Interconnect occurred; instead, Comcast encouraged additional MVPD participation and sought to secure their access to the Interconnects by contracting with them directly. Second, in *Aspen Skiing*, the monopolist s conduct in comparable markets where it lacked dominance included the use of cooperative tickets in areas that apparently were competitive. *Id.* at 603 04. But Comcast participates in Interconnects across other DMAs, and, where it is the largest MVPD in a market, it operates the Interconnect there, too. 335 F. Supp.

3d at 1046. Third, in *Aspen Skiing* the forgoing of profitable transactions was not alone, but in exchange for perceived long-run impact on its smaller rival, and referenced in *Aspen Skiing* only in the context of finding no efficiency justification for the refusal to deal. 472 U.S. at 608, 610. That is not the case here, as Comcast was able to proffer an efficiency justification (disintermediation and vertical integration) for its conduct. *See* Appellee s Br. 3.

Aspen Skiing would be more analogous to this case if a third-party vendor had managed the sales and advertising of the joint pass directly to skiers, and then Aspen Skiing Company (the monopolist) took over that role for vertical integration or other efficiency reasons. Instead, Aspen Skiing Company terminated the joint pass altogether; that would be like Comcast terminating the Interconnects to create a sub-optimal new platform to sell advertising, which of course did not happen here. Rather than terminate the Interconnects, Comcast encouraged MVPD participation and sought to secure MVPDs access to the Interconnects by contracting directly with them. The record also contains evidence that Comcast acted pursuant to a rational business purpose: Comcast claimed it sought vertical integration and disintermediation, and Viamedia admitted such an efficiency justification in its allegations. *See id.* at 3.

Still, the reinstatement of Viamedia s refusal-to-deal claim does not depend on *Aspen Skiing*. Because that claim survives the plausibility requirement we apply under Rule 12(b)(6), that portion of the judgment should be reversed and remanded.

C. *Opinion Testimony on the Refusal-to-Deal Claim May Be Allowed.*

Lastly on the refusal-to-deal claim, the district court s order regarding expert witnesses, which we review for abuse of discretion, is properly vacated. *See Salgado ex rel. Salgado v. Gen. Motors Corp.*, 150 F.3d 735, 739 (7th Cir. 1998). On remand, the landscape of this case will have sufficiently changed to allow for this method of proof on the refusal-to-deal claim. This reversal allows for Viamedia to name expert witnesses on this claim, subject to the usual later motion practice to exclude or limit their testimony on this cause of action.

II. Tying

After their agreements with Viamedia expired, RCN and WOW! sought exclusive, full-turnkey relationships with Comcast. Neither RCN nor WOW! ever sought Interconnect-only services. The record contains no evidence that Comcast has ever declined an MVPD s request for Interconnect-only services; in fact, 14 percent of Comcast s agreements with MVPDs across all DMAs since December 2011 were Interconnect-only agreements. *Viamedia, Inc. v. Comcast Corp.*, 335 F. Supp. 3d 1036, 1058 (N.D. Ill. 2018). None of those Interconnect-only agreements prevent an MVPD from hiring another ad representative for local sales or conducting their own ad representation.

Under its tying theory, Viamedia claimed Comcast conditioned access to the Interconnect (the tying product) on the purchase of Comcast s ad representation services (the tied product). But for whom? Viamedia conceded that both RCN and WOW! maintained the ability to deal directly with Com- cast and access the Interconnect without any ad representative should they choose not to employ Comcast at the termination of their agreements with Viamedia.

The district court granted summary judgment on Viamedia s tying claim. 335 F. Supp. 3d at 1074. In so doing the court found there was no evidence that Comcast conditioned access to the Interconnect on the purchase of ad representation services. *Id.* at 1058 (finding the fact that RCN and WOW! both requested full-turnkey representation and that 14 percent of Comcast s agreements with MVPDs are Interconnect-only belies any inference that Comcast tied its services.). The court further found there was no triable issue as to antitrust injury or damages, both necessary elements of an actionable claim. Notably, Viamedia admitted its injuries were fully attributable to Comcast s decision to deny Viamedia Interconnect access, *id.* at 1070, thereby failing to establish a cognizable antitrust injury separate from the refusal to deal. Viamedia likewise failed to separately prove damages caused by the alleged tying conduct, again collapsing that showing into the refusal-to-deal claim. *Id.* at 1072 73.

To the district court, the crux of Viamedia s tying claim was that Comcast withheld the alleged tying product from its *rival*, Viamedia, not from its *customers*, WOW! and RCN. As the court found, Viamedia aimed to sell MVPDs a bundle of Comcast s Interconnect services with Viamedia s ad representation services, but Viamedia has no antitrust right to force Comcast to help it sell such a bundle to their mutual customers. *Id.* at 1064. Finding the undisputed evidence did not show tying conduct, the district court granted summary judgment. *Id.* at 1074.

A. *Antitrust Injury and Standing are Lacking on the Tying Claim.*

As a threshold matter, a plaintiff must have antitrust standing to bring an antitrust claim. *See McGarry & McGarry v. Bankr. Man. Solut.*, 937 F.3d 1056, 1063 (7th Cir. 2019) (antitrust standing required to identify which plaintiffs may bring the cause of action); *see also Novell*, 731 F.3d at 1080 ([A] private party must establish some link between the defendant s alleged anticompetitive conduct, on the one hand, and its injuries and the consumer s, on the other.). A showing of antitrust standing requires more than the standing inquiry under Article III. *See McGarry*, 937 F.3d at 1063 ([T]he Sherman Act has additional rules for determining whether the plaintiff is the proper party to bring a private antitrust action.) (citing *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 535 n.31 (1983)); *see also Kochert v. Greater Lafayette Health Servs., Inc.*, 463 F.3d 710, 716 (7th Cir. 2006) (Antitrust standing requires more than the injury in fact and the case or controversy required by Article III of the Constitution.).

To establish antitrust standing, a plaintiff must first show it was injured by anticompetitive conduct. *See McGarry*, 937 F.3d at 1063 64. Antitrust standing is limited to (1) those who have suffered the type of injury that the antitrust laws were intended to prevent and (2) those whose injuries are a result of the defendant s unlawful conduct. *Id.* (quoting *Serfecz v. Jewel Food Stores*, 67 F.3d 591, 595 (7th Cir. 1995)); *see also Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977) (antitrust plaintiff must be able to show that its injury is of the type the antitrust laws were intended to prevent).

Even if a plaintiff can show its injuries are the result of unlawful anticompetitive conduct, it must be able to efficiently vindicate the purposes of the antitrust laws to gain antitrust standing. *Kochert*, 463 F.3d at 716; *see also Associated Gen. Contractors*, 459 U.S. at 537 44 (plaintiff s ability to efficiently vindicate the law s purpose confers antitrust standing if shown antitrust injury); *In re Industrial Gas Antitrust Litig.*, 681 F.2d 514, 526 (7th Cir. 1982) (not all persons who have suffered an injury flowing from [an] antitrust violation have standing to sue). Simply, the successful antitrust plaintiff must prove both antitrust injury and antitrust standing. *See Kochert*, 463 F.3d at 716.

We usually presume that competitors and consumers in the relevant market are the only parties who suffer antitrust injuries and are in a position to efficiently vindicate the antitrust laws. *McGarry*, 937 F.3d at 1065 (citing *Associated Gen. Contractors*, 459 U.S. at 538; *In re Aluminum Warehousing Antitrust Litig.*, 833 F.3d 151, 158 (2d Cir. 2016)). But presumptively does not mean always, *SAS of Puerto Rico v. Puerto Rico Telephone Co.*, 48 F.3d 39, 45 (1st Cir. 1995) (finding third-party suppliers are not automatically improper antitrust plaintiffs), and often consumers or competitors are denied antitrust standing.

The majority opinion proffers a bright-line rule that customers and competitors in the affected market have antitrust standing, Majority op. at p. 99. But in each case cited in the majority opinion the court denied antitrust standing, including to competitors. *See Kochert*, 463 F.3d at 718; *Tri-Gen Inc. v. Int'l Union of Operating Engineers, Local 150, AFL-CIO*, 433 F.3d 1024, 1031 32 (7th Cir. 2006); *Brunswick*, 429

U.S. at 477 78, 484, 488 (collectively, competitors); *see also McGarry*, 937 F.3d at 1063 66; *In re Aluminum*, 833 F.3d at 158; *Serfecz*, 67 F.3d at 597 98; *Serpa Corp. v. McWane, Inc.*, 199 F.3d 6, 10 (1st Cir. 1999); *SAS of P.R., Inc.*, 48 F.3d at 44; *Associated Gen. Contractors*, 459 U.S. at 540 (collectively, neither consumers nor competitors).

Instead, on this prerequisite the relevant case law prioritizes the type, directness, and cause of an antitrust injury, rather than applying a bright-line rule for antitrust standing based on the plaintiff s status. *See McGarry*, 937 F.3d at 1064 65 (examining the type of injury alleged, the remote[ness] or direct link between the alleged antitrust violation and the claimed antitrust injury, and the causal connection) (citing *Associated Gen. Contractors*, 459 U.S. at 537 40 (explaining these factors)); *see, e.g., Blue Shield of Va. v. McCready*, 457 U.S. 465, 476 77 (1982) (plaintiff s status was neither consumer nor competitor, but granted antitrust standing based on type, directness, and cause of antitrust injury suffered).

Even with the presumption favoring consumers and competitors, standing is granted to rivals only when it serves antitrust policy. 2A Areeda & Hovenkamp, ANTITRUST LAW ¶ 348a, p. 232 (4th ed. 2014) (examples include when a rival is in a position to detect a violation earlier than consumers, or the rival s injury is large while consumers injuries are small or their suits less likely). [T]he elimination of a single competitor, standing alone, does not prove anticompetitive effect. *Austin v. McNamara*, 979 F.2d 728, 739 (9th Cir. 1992) (quoting *Kaplan v. Buroughs Corp.*, 611 F.2d 286, 291 (9th Cir. 1979)). Thus, it is uncommon that a suit by a single foreclosed rival disputing a tying arrangement will have antitrust standing.[4] *See* 2A Areeda & Hovenkamp, ANTITRUST LAW ¶ 348a, p. 232 (courts are properly skeptical of many rivals suits, particularly when the practices are not obviously exclusionary). First, the rival must show it suffered the type of injury the antitrust laws intend to prevent. This is consistent with antitrust jurisprudence that looks to market injury, like raised prices and decreased output or quality, to determine a competitor s antitrust injury. *See Tri-Gen*, 433 F.3d at 1031 (To have standing as a competitor, [plaintiff] needed to show that its loss comes from acts that reduce output or raise prices to consumers.) (quoting *Stamatakis Industries, Inc. v. King*, 965 F.2d 469, 471 (7th Cir. 1992)); *see also Serfecz*, 67 F.3d at 597 (plaintiff s injury was linked to the injury inflicted upon the market, including consumers paying higher prices); *Associated Gen. Contractors*, 459 U.S. at 539 n.40 (finding no antitrust injury from alleged predatory behavior because competitor failed to show that output has been curtailed or prices enhanced throughout an entire competitive market).

Next, the rival must show it is the party who can most efficiently vindicate the purposes of the antitrust

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[4] The leading treatise acknowledges the possibility that a rival could have standing if an illegal tying arrangement creates, enlarges, or perpetuates a monopoly for a tied product, and that rival may be foreclosed if it loses existing market share or sales. But [i]njury to the foreclosed rival occurs, of course, only because a tie has forced buyers to purchase the defendant s tied product rather than the rival s. 10 Areeda & Hovenkamp, ANTITRUST LAW ¶ 1767a, p. 449. This is a high bar: the rival must show (a) a monopoly in the tied-market, (b) the loss of its existing market share or sales (not limited to certain customers), and (c) an injury based only on buyers being forced to purchase defendant s product over their own.

laws against unlawful ties. *Kochert*, 463 F.3d at 718 (quoting *Serfecz*, 67 F.3d at 598). But, having been forced to purchase a product it did not want, the tied consumer is almost always in the superior position to sue the violator. *McGarry*, 937 F.3d at 1066 (concluding [t]here is, after all, a more appropriate person to pursue [a] claim when that person s self-interest would normally motivate them to vindicate the public interest in antitrust enforcement); *see also Kochert*, 463 F.3d at 718; 2A Areeda & Hovenkamp, ANTITRUST LAW ¶ 348a, p. 232 (recognizing that consumers almost always have the correct incentives for suit, [but] rivals do not). The presence of a more appropriate person to bring a claim diminishes the justification for allowing a more remote party to step in. *McGarry*, 937 F.3d at 1066 (quoting *Associated Gen. Contractors*, 459 U.S. at 542). Whether or not there is a more appropriate plaintiff, a rival may not pursue an antitrust injury that is entirely derivative of other injuries. *Id.* And even when standing is recognized, a foreclosed rival cannot oppose efficient, legitimate, or even aggressive lawful competition by its rivals. 2A Areeda & Hovenkamp, ANTITRUST LAW ¶ 348a, p. at 231 ([A] rival may allege an antitrust violation by its rivals not to protect competition but to protect itself from competition. . . . Such losses are not antitrust injury, so the rival is [] denied standing.).

Here, Viamedia claims it is a foreclosed rival harmed by Comcast s alleged tying conduct. First, Viamedia must show it suffered an injury the antitrust laws intend to prevent that is directly linked to or caused by Comcast s alleged tying conduct. But Viamedia relies on the injuries and damages it claims from Comcast s refusal to deal rather than any distinct tying injury. *See* 335 F. Supp. 3d at 1069 73 (Viamedia s expert testified that foreclosure from the market and resulting injury or damages flows directly from Viamedia s inability to access the Interconnects, not tying); *see also Novell*, 731 F.3d at 1080 (declining to recognize separate, cognizable antitrust injury for other exclusionary conduct that relied on alleged refusal-to-deal injury). Viamedia has conceded that any injury it suffered is derivative of Comcast s refusal to deal, not the alleged tie. So Viamedia lacks an independent basis for advancing a tying claim, and recognizing it as a foreclosed rival with standing to sue under the narrow exception described above would not serve[] antitrust policy. 2A Areeda & Hovenkamp, ANTITRUST LAW ¶ 348a, p. 232. While Comcast offered its customers, RCN and WOW!, access to the Interconnect and exclusive ad representation services, it was not required to make such an offer to its rival, Viamedia. This reveals the fatal flaw in Viamedia s tying theory: even if Comcast acted precisely as Viamedia claims by tying Interconnect access and ad representation services, Viamedia would suffer no separate, cognizable antitrust injury. 335 F. Supp. 3d at 1071; *see Novell*, 731 F.3d at 1080 (Even if Microsoft had behaved just as Novell says it should have, it would have helped Novell not at all.).

Next, Viamedia must show it is the party who can most efficiently vindicate the antitrust laws regarding tying. *Kochert*, 463 F.3d at 718 (quoting *Serfecz*, 67 F.3d at 598). While Viamedia enjoys the general presumption of antitrust standing as a competitor, this presumption is limited by the court s determination of whether an antitrust injury occurred. *See* 2A Areeda & Hovenkamp, ANTITRUST LAW ¶ 348a, p. 232. Here, RCN and WOW! would have been directly impacted by Comcast s alleged tying conduct and would be in the superior position to pursue a claim against Comcast. Viamedia could not participate directly in this alleged tying arrangement, and it now seems motivated to protect itself from competition rather than enforce the antitrust laws. *See* Majority op. at p. 66 (Viamedia simply wants to ensure that MVPDs can freely choose Viamedia as their supplier of ad rep services if that is their preferred choice.).[5]

Because Viamedia has not shown a cognizable injury that the antitrust laws intend to prevent or that was directly linked to an antitrust violation caused by Comcast s conduct, it has no antitrust injury. Without an antitrust injury, and not able to efficiently enforce the law against illegal tying, Viamedia lacks antitrust standing to bring this claim.

B. ***Summary Judgment Was Properly Granted on the Tying Claim.***

The district court s grant of summary judgment on Viamedia s tying claim, which we review de novo, was proper. We construe all facts and reasonable inferences in favor of the nonmoving party, and we refrain from weighing any evidence. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *see also In re High Fructose Corn Syrup Antitrust Litigation*, 295

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[5] Even if somehow Viamedia could be considered a foreclosed rival with antitrust injury and standing, the leading treatise notes the possibility of injunctive relief which the district court correctly concluded was misplaced on these facts, 335 F. Supp. 3d at 1074 and that treatise observes how difficult it is in such a circumstance to prove damages without speculation. 10 Areeda & Hovenkamp, ANTITRUST LAW ¶ 1767a, p. 450 (Even for those established in the market, estimating the number of sales lost as a result of the tying arrangement is elusive at best.).

Viamedia s status as a foreclosed rival, though, would depend on the existence of a tie. I conclude below the undisputed facts show no evidence of tying conduct because there was no conditioned sale of services.

F.3d 651, 655 (7th Cir. 2002) (describing the weighing of evidence as a trap to avoid). But the nonmoving party must go beyond the pleadings at summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). It must affirmatively demonstrate through evidence that there is a genuine issue for trial. *Anderson*, 477 U.S. at 249.

Liability under § 2 requires anticompetitive conduct. *Mercatus Grp.*, 641 F.3d at 854; *Endsley v. City of Chicago*, 230 F.3d 276, 282 (7th Cir. 2000). On summary judgment, the § 2 plaintiff must present evidence tending to exclude the possibility that the monopolist s conduct is as likely to be pro-competitive as anticompetitive. *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 588 (1986) (conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy); *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 768 (1984) ([T]here must be evidence that tends to exclude the possibility of independent [pro-competitive] action by the manufacturer and distributor.).

As noted previously, firms even monopolies generally have the right to decide with whom they will do business. In this vein, antitrust law does not require monopolists to cooperate with rivals by selling them products that would help the rivals to compete. *Schor v. Abbott Labs.*, 457 F.3d 608, 610 (7th Cir. 2006); *see Pac. Bell Tel. Co. v. Linkline Commc'ns*, 555 U.S. 438, 450 (2009) (monopolist may wield upstream power to prevent rival firms from competing effectively in a downstream market); *see also Trinko*, 540 U.S. at 409 10 (a monopolist has no duty to deal with a rival, let alone a duty to deal on favorable terms). In presenting its tying claim, though, Viamedia argued that Comcast s conduct constituted more than a mere refusal to deal. 335 F. Supp. 3d at 1057. Viamedia claimed that when Comcast excluded Viamedia from the Interconnects, Comcast engaged in the distinct practice of tying, pressing forward with this claim as an alternative theor[y] of relief. *Id.* After discovery on Viamedia s tying theory, the district court ruled that the record leaves no genuine issue of material fact. *Id.* The district court correctly evaluated Viamedia s tying claim and rightly concluded that Viamedia s proffered evidence did not tend to exclude the possibility that Comcast s alleged tying conduct was as likely procompetitive as anticompetitive. *Id*. at 1055 64.

Under the new antitrust regime, [o]utright condemnation of product tying has been reversed. Hon. Richard D. Cudahy & Alan Devlin, *Anticompetitive Effect*, 95 MINN. L. REV. 59, 76 (2010); *see Microsoft Corp.*, 253 F.3d at 49 ([N]ot all ties are bad.). The essential characteristic of an invalid tying arrangement lies in the seller s exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms. *Jefferson Par. Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 12 (1984). An illegal tie, whether express or as applied, exists only when the defendant improperly imposes *conditions* that explicitly or practically require buyers to take the second product if they want the first one. 10 Areeda & Hovenkamp, ANTITRUST LAW¶ 1752b, p. 291 (4th ed. 2018). The fundamental feature of a tying claim is the conditioned sale, including by force. *See Sheridan v. Marathon Petrol. Co. LLC*, 530 F.3d 590, 592 (7th Cir.

2008). No conditioning occurs if a buyer wants to purchase a bundle of the tied and tying products from the same seller. *See Will v. Comprehensive Acct. Corp.*, 776 F.2d 665, 669 (7th Cir. 1985) (A tie within the meaning of antitrust depends on showing that the buyer did *not* want to take both products from the same vendor.). Without the actual, conditioned sale of the tied product, there is no tie. *See It's My Party, Inc. v. Live Nation, Inc.*, 811 F.3d 676, 684 (4th Cir. 2016) (If . . . the buyer is free to decline the tied product . . ., then by definition there is no unlawful tying.).

Other circuits have acknowledged the essential and indispensable role conditioning plays in a tying claim. In *Aerotec Int'l, Inc. v. Honeywell Int'l, Inc.*, 836 F.3d 1171 (9th Cir. 2016),[6] the Ninth Circuit con-

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[6] The majority opinion relies on certain factual assumptions to attempt to distinguish *Aerotec*.

First, the majority assumes this is not a typical bundling case, Majority op. at 77, so *Aerotec* should not control. But *Aerotec* provides an instructive framework for determining whether a tie has occurred and illustrates the important role that conditioning plays in an unlawful tying arrangement, *see* 836 F.3d at 1179.

Second, the majority assumes self-providing ad rep services was not a viable option for RCN and WOW!, Majority op. at 78, and so they needed to employ [a third-party] ad rep services provider. *Id.* at 77 n.17. As discussed elsewhere in this opinion, infra at 28 29, this assumption relies on the majority opinion s conclusion that it must not have been economically feasible for RCN and WOW! to internalize ad representation, either regionally or locally. This is not supported by the record, which contains undisputed evidence of various economically feasible options MVPDs choose in structuring their advertising sales. *See* infra at 25 26. Regardless, this assumption does not prevent Aerotec s application here.

cluded there was no evidence that Honeywell, a monopolist manufacturer of replacement airplane parts, explicitly or implicitly tie[d] or condition[ed] the sale of replacement parts on a requirement that its customers use its in-house repair services. *Id.* at 1179. When Honeywell ceased supplying parts to Aerotec a third-party repair service provider for repairs, Aerotec sued Honeywell for alleged unlawful tying. *Id.* at 1177. Honeywell explained it had long preferred the benefits it achieved from internalizing its repair services and working with its affiliated servicers, rather than with independent ones like Aerotec. *Id.* at 1176 77. The court found it did not matter whether Honeywell had refused to deal with Aerotec, even if that made it more difficult for Aerotec to compete. *Id.* at 1179 80. The Ninth Circuit decline[d] to stretch the tying construct to accommodate the claim that . . . conduct toward third party servicers . . . acts as an effective, or de facto, tying condition. *Id.* at 1178.

Third, the majority assumes RCN and WOW! had no choice but to obtain ad rep services from Comcast, Majority op. at 34 n.8, and were forced by Comcast to do so. *Id.* at 77 n.17. This in turn assumes that RCN and WOW! did not want ad representation services from Comcast. But the evidence shows the opposite: neither RCN nor WOW! ever requested Interconnect-only services from Comcast, and both sought full-turnkey relationships with Comcast to receive ad representation and Interconnect services together. Ultimately, Comcast s and Viamedia s offers to solicit RCN s and WOW! s business were nowhere near equal, and it was not a very difficult decision for the MVPDs to make. 335 F. Supp. 3d at 1048. Comcast was able to offer superior terms and better prices with full Interconnect access and ad representation services. The assumption that any MVPD was forced or threatened to purchase ad representation services to gain access to the Interconnects does not follow from the evidence and is not a distinguishing factor from Aerotec.

In *Serv. & Training, Inc. v. Data Gen. Corp.*, 963 F.2d 680 (4th Cir. 1992), the Fourth Circuit reached the same conclusion, finding there was no conditioned sale of a licensed product when customers demanded access to it, even though this hindered the ability of third-party servicers to compete with the company. *Id.* at 687 88. The same is true with the D.C. Circuit, *see Microsoft Corp.*, 253 F.3d at 85 (tying requires consumer to have no choice but to purchase the tied product), and this court, *see Reifert v. South Cent. Wisconsin MLS Corp.*, 450 F.3d 312, 318 (7th Cir. 2006) (conditioning access to a service based on the forced purchase of a membership was essential element of tying).

Like these other third-party rivals, Viamedia has offered no evidence of conditioning. Such evidence is simply absent from the undisputed facts on which Viamedia attempted to build its tying claim:

- An ad representative is responsible for managing and selling an MVPD s avails to advertisers and can represent their MVPD customers: (1) locally, selling only a part of an MVPD s avails in a DMA to local advertisers; (2) regionally, selling all of the MVPD s avails in a DMA; or (3) nationally. *Id.* at 1044.
- The industry standard relationship between an ad representative and an MVPD is exclusive, region-wide, full-turnkey representation. *Id.* at 1045.
- MVPDs in a full-turnkey relationship with an ad representative have an exclusive agreement with that ad representative, which makes Interconnect services available to them

without requiring a direct relationship with the Interconnect operator. *Id*. at 1063 64.

- Interconnect operators may pursue a direct relationship with MVPDs to sell a portion of their avails regionally without a third-party ad representative. *Id.* at 1046. This is called an Interconnect-only agreement. *Id.*
- Some MVPDs retain a portion of their avails for local advertising and hire an ad representative to represent them locally. *Id.* at 1045.
- Some MVPDs choose to conduct their own ad representation regionally, locally, or both. *Id.*
- RCN and WOW! are MVPD customers of Comcast and Viamedia, which compete for MVPDs business on the relevant Interconnects. *Id*. at 1046.
- Comcast refused to deal with Viamedia by disallowing it access to the relevant Interconnects. *Id*. at 1057.[7]
- No evidence shows that Comcast told MVPDs across all DMAs, expressly or impliedly, that they could only access the Interconnects on

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[7] The majority opinion casts Comcast s refusal to deal as a negative fact, noting that Comcast conceded repeatedly that it had done so. Majority op. at p. 76. It is undisputed that Comcast refused to deal with Viamedia; the question on remand is whether that refusal was anticompetitive, which Viamedia will have to prove. As discussed, refusals to deal are now not disfavored, and in fact the opposite cooperation among rivals is a red flag under antitrust law. *See* Easterbrook, *The Chicago School & Exclusionary Conduct*, at 442 (cooperation is to be feared rather than welcomed).

the condition that they also purchase ad representative services. *Id*. at 1058.

- Fourteen percent of Comcast s agreements with MVPDs across all DMAs are Interconnect-only. *Id*.
- RCN and WOW! never requested Interconnect-only services from Comcast, and both pursued full-turnkey relationships with Comcast. *Id*. at 1059.

These facts do not show illegal tying conduct. Both parties stipulate that Comcast never denied an MVPD s request to access the Interconnect on a standalone basis. In fact, 14 percent of Comcast s agreements with MVPDs across all DMAs are Interconnect-only. *Id.* at 1058; *see, e.g., It's My Party*, 811 F.3d at 685 (14 percent of standalone, non-tied sales exceed [] sufficiently the minimum threshold required to cast doubt on any allegation of tying); *see also* 10 Areeda & Hovenkamp, ANTITRUST LAW ¶ 1756b2, p. 334 (10 percent unbundle[ed] sales rebuts any established or presumed inference of a tying condition); *see also Novell*, 731 F.3d at 1077 (aggregating sales and profits across entire market to assess firm s overall efficiency and not singling out smaller market or product line). And there is no evidence Comcast withheld Interconnect access from MVPDs unless they also purchased ad representative services from Comcast. Instead, the evidence shows that RCN and WOW! sought a full-turnkey relationship with Comcast to receive access to the Interconnects and ad representation services as a bundle. They were neither forced to purchase ad representation services from Comcast nor denied access to the Interconnects unless they purchased ad representation from Comcast. Further, if they wished, they were free to contract with a third-party ad representative for local sales. Even while under exclusive contract with Viamedia, RCN and WOW! were not forced to purchase ad representation services from Comcast. Comcast never poached RCN or WOW! during that time to capture their business in the ad market, and RCN and WOW! could have chosen to forgo ad representation altogether at the conclusion of those exclusive contracts.

That Comcast did not affirmatively offer RCN or WOW! Interconnect-only access does not alter these facts. Courts need not assume antitrust laws require a business to offer its customer a less profitable or less efficient option than the one the customer seeks. Here, it is undisputed that RCN and WOW! sought Interconnect access and ad representation services as a bundle in a full-turnkey relationship with Comcast. *See* 9 Areeda & Hovenkamp, ANTITRUST LAW ¶ 1700i, p. 12 (4th ed. 2018) ([F]inding two products does not mean that they are tied together. The franchisee may have preferred a turnkey franchise and never asked for the tying product separately); *see also Will*, 776 F.2d at 670 (the voluntary purchase of two products together is not a tie at all). The district court recognized, and correctly rejected, how broad a view of tying Viamedia attempts to advance. 335 F. Supp. 3d at 1059 (the constraining of consumer choice is of course a feature of a tying arrangement . . . but there must still be an actual tie of products or services).[8]

[8] Further, if tying occurred, one would expect to see higher prices or lower output. *See* Washington Legal Foundation s Br. in Supp. of Def. at 12, ECF No. 45. There is no such evidence here.

Viewing the record in the light most favorable to Viamedia, the evidence reflects that WOW! and RCN wanted full-turnkey representation, and they were prepared to hire the company with the ability to deliver both Interconnect access and ad representation services. Here, that company was Comcast.

My colleagues in the majority conclude, at various points, that it was not economically feasible for RCN or WOW! to conduct their own ad representation. *See* Majority op. at p. 34 n.8 (finding RCN and WOW! had always chosen to buy [ad representation] services from outside companies, suggesting that in-house was not an economically viable option); *id.* at 77 n.17 (concluding sufficient evidence existed of a forced sale because RCN and WOW! needed to employ [a third-party] ad rep services provider); *id.* at 78 (deciding self-providing ad rep services was not a viable option for RCN and WOW!); *id.* at 82 (finding evidence showing that in-house provision of ad rep services simply was not a practical option for RCN or WOW! in these markets). This conclusion assumes that if RCN and WOW! chose to outsource ad representation to a third-party, either locally or regionally, then it must have been economically feasible to do so. It also assumes the inverse: that internalizing these services must be economically *in*feasible. Such assumptions go beyond the court s role and presume underlying facts about the parties business practices and strategies that we simply do not know and cannot accurately predict. These assumptions are not supported by the record, which instead contains evidence of various economically feasible options MVPDs choose in structuring their advertising sales, including internalizing part of or all ad representation services. 335 F. Supp. 3d at 1044. I respectfully do not share this economic feasibility conclusion and rely only on the evidence presented.

The majority opinion also references [a]mple evidence the jury could have relied upon to easily find that Comcast improperly forced the smaller MVPDs to buy its ad rep services through a tying arrangement. Majority op. at pp. 75 76. In particular, the majority points to internal Comcast and WOW! documents, deposition responses, and testimonies before the Federal Communications Commission and the Department of Justice. But the relevant evidence shows Comcast s desire to solicit RCN s and WOW! s business directly, *not* the forced purchase of a service that neither RCN nor WOW! wanted. For example, the majority references an email from a WOW! employee to his colleagues explaining his understanding that [WOW!] can be in the [Interconnect] but only if [Comcast] rep[s] us directly. *See* Majority op. at p. 75.

The majority opinion reads this as revealing Comcast s demands and threats with which RCN and WOW! did not willingly comply. *Id.* But in context, the email reflects only ongoing business negotiations between WOW! and Comcast, in which Comcast expressed its desire to no longer accommodate third-party ad representatives (its competitors) on the Interconnects it operates. This is consistent with Comcast s position all along that it wishes to increase efficiency by internalizing services and does not constitute tying as defined.

Some other examples: in a different email, a Comcast employee expressed to a WOW! employee Comcast s desire to have a direct relationship with MVPDs on the Interconnects and noted that Comcast would be thrilled to do business directly with WOW, reiterating the tremendous value and benefits [Comcast] can deliver for WOW in a direct relationship. Another Comcast employee noted in a deposition that working through a middleman like Viamedia really brought no value to the table and the decision not to renew its contract with Viamedia was primarily to have a direct relationship with WOW and RCN. Explaining RCN s decision to contract directly with Comcast, an RCN executive testified to the superior terms Comcast could provide, noting that Comcast s and Viamedia s offers were nowhere near equal and that it was not a very difficult decision for RCN to make. 335 F. Supp. 3d at 1048. WOW!, too, selected Comcast s direct representation based on better financial terms. *Id.*

These statements are consistent with Comcast s position to directly solicit the business of MVPDs. When questioned by the Department of Justice, a Comcast executive acknowledged it was Comcast s business practice to inform MVPDs that want to get access to a Comcast controlled Interconnect, it has to hire Comcast as its ad sales representative instead of a third-party rival. *Id.* at 1061. This does not reveal a forced purchase that neither RCN nor WOW! wanted. If anything, such evidence depicts hard-nosed business practices like those the Tenth Circuit noted but did not find anticompetitive in *Novell*, 731 F.3d at 1078 (finding email evidence may suggest an uncharitable intent toward rivals or even an intent to undo a competitor, but did not show that conduct was irrational but for its exclusionary tendencies). None of this evidence tends to exclude the possibility that Comcast s conduct was as consistent with lawful conduct as with illegal tying conduct. *Mercatus Grp.*, 641 F.3d at 856.

Importantly, the internal documents the majority opinion references are dated 2014, when WOW! and RCN were still under exclusive contract with Viamedia but soliciting bids from other representatives to sell advertising avails on the Interconnects. While soliciting bids, RCN and WOW! engaged in back-and-forth negotiations with Comcast and Viamedia, leading ultimately to new contracts with Comcast. The timing of these discussions, as preserved in the record, is key. When reviewing the evidence here, this court is limited by the prospective nature of these then-ongoing negotiations. Our perspective is necessarily predictive not retrospective. These internal documents do not contain evidence of the economic impact *after* the negotiated deals were made, but only *before* when offers were being made, accepted, and rejected. They do not describe the economic results of these then-prospective relationships. Because of their prospective nature, they are not a reliable metric for understanding what has transpired since, but merely what the parties had hoped to achieve. Under our antitrust regime, [w]hat distinguishes exclusion from efficiency is what happens in the future, Easterbrook, *The Chicago School & Exclusionary Conduct*, at 443, not what the parties want to happen.

None of this evidence measures whether Comcast s conduct has resulted in a market injury, such as raised prices or decreased output. It does not show that RCN or WOW! understand their contracts with Comcast to be coercive or conditioned, and there is no evidence indicating RCN and WOW! are unhappy with their current relationship with Comcast. While viewing this evidence in Viamedia s favor, it is crucial to acknowledge its limitations in this case.

As the district court noted, the real gravamen of Viamedia s tying claim [is] that Comcast s refusal to provide [Viamedia] Interconnect access prevents [Viamedia] from selling the kind of full-turnkey Ad Rep Services that WOW! and RCN desire. *Id.* at 1063 (internal quotations omitted). That differs from the paradigmatic tying claim, which requires conditioning and a forced sale to a *customer* rather than a withheld advantage from a *rival*. *See* 9 Areeda & Hovenkamp, ANTITRUST LAW ¶ 1700a, p. 4. Antitrust law does not require Comcast to help Viamedia sell the same bundle it offers to their mutual customers. *See* 10 Areeda & Hovenkamp, ANTITRUST LAW ¶ 1748b, pp. 251 53 (no tied product when the plaintiff s theory of injury is not that customers of the defendant s [tied] bundle would buy the items unbundled if they could, but rather that a rival could sell the *same bundle* if only the defendant would sell it a particular input).

Finally, even if Viamedia s refusal-to-deal claim had survived a motion to dismiss, summary judgment was appropriate on the tying claim because the undisputed facts do not show Comcast conditioned access to the Interconnects on the purchase of ad representation services. Although acknowledging that [t]hese related claims are both based on the same course of conduct, resulted in the same anticompetitive harms, and would be subject to the same procompetitive justifications or defenses, Majority op. at p. 38, the majority opinion does not explain how Viamedia has established a distinct tying claim that should have advanced beyond summary judgment on its own merits. In framing its tying analysis, the majority opinion focuses on whether, when viewing Comcast s conduct as a whole, [Comcast] has unreasonably maintained or enhanced its monopoly position. *Id.* at 73. While this framework would not necessarily reveal anticompetitive conduct in violation of § 2, I hesitate to apply it here for the simpler reason that our antitrust jurisprudence does not instruct us to do so. Instead, looking to the undisputed facts, Viamedia has failed to prove the elements of a tying claim.

To the extent the majority opinion also concludes that the existence of a viable refusal-to-deal claim saves Viamedia s tying claim, I am not convinced of that connection. In comparison to refusal to deal, tying is a form of exclusionary conduct with more specific requirements, which the district court noted. 218 F. Supp. 3d at 698 (a refusal-to-deal claim is different than a tying claim); *accord Novell*, 731 F.3d at 1072 (distinguishing unilateral refusals to deal from other recognized forms of anticompetitive conduct like tying). Viamedia, seeking an escape route and trying to recast Comcast s refusal to deal as unlawful tying conduct, *see Novell*, 731 F.3 at 1078, has treated these two claims interchangeably. But parties claims stand and fall on their own merits, so the district court was correct to consider them separately.

Conditioning, an essential element of tying, requires the forced sale of a product the buyer did not want. Based on the record before us, to which we are limited, there was no conditioning. Because the undisputed facts show no evidence of tying conduct separate from Viamedia s refusal-to-deal claim, I would affirm that portion of the district court s judgment.

III. Section 2 Monopolization Analysis

The majority opinion acknowledges Viamedia raised only two claims on appeal: refusal-to-deal and tying. Majority op. at p. 42 n.11. It also suggests an alternative means of § 2 recovery should Viamedia fail on either of its alleged claims. Per the majority opinion, Viamedia has sufficiently pleaded and presented evidence for the court to find an alternative § 2 monopolization claim. Such an open-ended approach may place courts in the role of the decision-maker on dense and complex economic issues better left to the free market. *See* Easterbrook, *The Chicago School & Exclusionary Conduct*, at 442 (Markets are much better than judges at sifting efficient from anticompetitive practices.). We are no more skilled at predicting market shifts than anyone else, and courts are very rarely the best forum for discerning between exclusionary and efficient conduct. *See id.* at 442 45.

The district court hewed to the particular types of exclusionary conduct Viamedia alleged (tying and refusal to deal; its exclusive dealing claim was abandoned on appeal). The court found Viamedia had affirmatively disavowed any free-standing § 2 monopolization claim. 335 F. Supp. 3d at 1068. Having failed to plead or preserve an alternative claim before the district court, Viamedia should not be entitled to pursue a vague § 2 monopolization theory on appeal. *King v. Kramer*, 763 F.3d 635, 641 (7th Cir. 2014) (this court not in a position to advance claims that party abandons or fails to preserve below); *Geva v. Leo Burnett Co.*, 931 F.2d 1220, 1225 (7th Cir. 1991) (an issue not properly preserved below in the district court is generally waived). Nor should the court be required to consider the restraint on trade or the impact on monopoly powers generally that may arise from Viamedia s allegations.

This rule is particularly relevant in antitrust law, which is susceptible to high rates of false positives that occur when the court confuses real competition with exclusion. *See* Easter-brook, *The Chicago School*

& Exclusionary Conduct, at 445; *see also Microsoft Corp.*, 253 F.3d at 87 (discussing false positives). The new antitrust regime identifies problems like false positives, unpredictability, and past court confusion, and it seeks to protect consumers and promote competition in a technologically advancing marketplace. Many cases and authorities point in this direction. An alternative § 2 monopolization theory is not consistent with how courts now consider potentially exclusionary conduct. Accordingly, I am unable to join this portion of the majority opinion.

IV. Conclusion

The majority opinion dives deep into this case s complicated facts and thoroughly covers swaths of antitrust law in an insightful manner. As Viamedia has plausibly alleged an anticompetitive refusal to deal, I join the majority in reversing and remanding on that claim. But the undisputed facts do not show an illegal tie, so summary judgment was proper on that allegation. For the reasons above, I respectfully concur in part and dissent in part.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

VIAMEDIA, INC.,	)	
	)	
Plaintiff,	)	Case No. 1:16-cv-05486
	)	
v.	)	Hon. Amy J. St. Eve
	)	
COMCAST CORPORATION and COMCAST SPOTLIGHT, LP,	)	
	)	
Defendants.	)	

<u>MEMORANDUM OPINION AND ORDER</u>

AMY J. ST. EVE, District Court Judge:

Defendants Comcast Corporation (Comcast) and Comcast Spotlight, LP (Comcast Spotlight)[1] have moved to dismiss Plaintiff Viamedia, Inc. s (Viamedia) complaint under Federal Rule of Civil Procedure 12(b)(6). (R. 22.) For the following reasons, the Court grants in part and denies in part Defendants motion.

[1] The Court refers to Comcast and Comcast Spotlight collectively as Defendants.

BACKGROUND[2]

This case concerns the spot cable advertising business, which generates approximately $5.4 billion annually in television advertising revenues. (R. 1, Compl., at ¶ 3.) Spot cable advertisements account for two-to-three minutes per hour of television programming and are sold by cable service providers called, according to industry terminology, multichannel video programming distributors (MVPDs) like Comcast. (*Id*. at ¶¶ 23 25, 27, 30.) Viamedia, a spot cable advertising representation company, represents cable television companies in the sale, placement, and distribution of Spot Cable Advertising. (*Id*. at ¶¶ 1 2.) Comcast is one of the largest MVPDs in the United States with more than 22 million cable and high-speed Internet subscribers. (*Id*. at ¶¶ 8, 24.) It also owns, among other assets, Comcast Spotlight, a direct competitor to Viamedia and the country s largest Spot Cable Advertising Representative. (*Id*. at ¶¶ 8, 19.)

Broadly speaking, Viamedia alleges that [t]hrough its control of technical and business infrastructure that is critical for the sale of Spot Cable Advertising time, Comcast has unlawfully impaired the ability of Viamedia and other Spot Cable Advertising Representatives to compete with Comcast Spotlight. (*Id*. at ¶ 2.) To evaluate Viamedia s claim, the Court first describes how the spot cable advertising

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[2] The facts presented in the Background are taken from the complaint and are presumed true for the purpose of resolving the pending motion to dismiss under Rule 12(b)(6). *See Teamsters Local Union No. 705 v. Burlington N. Santa Fe, LLC*, 741 F.3d 819, 823 (7th Cir. 2014); *Alam v. Miller Brewing Co*., 709 F.3d 662, 665 66 (7th Cir. 2013); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

business functions and what role the parties play in the industry.

I. The Spot Cable Advertising Market

A. MVPDs

MVPDs for example, Comcast, Wide Open West (WOW), and RCN Corporation (RCN) provide households across the United States with what is colloquially referred to as cable television service. (*Id*. at ¶¶ 23, 25.) In some Designated Market Areas (DMAs) a regional viewing area used to measure television ratings Comcast is the dominant MVPD. (*Id*. at ¶¶ 4, 24.) In the Chicago DMA (which encompasses Northeast Illinois and Northwest Indiana), for example, approximately three out of every four cable households are Comcast subscribers. (*Id*. at ¶ 24.)

MVPDs enter into carriage agreements with cable networks (e.g., ESPN and CNBC) under which (1) MVPDs pay the networks a fee to carry their programming, and (2) MVPDs gain the right to sell a percentage of advertising time. (*Id*. at ¶ 27.) This reserved advertising time is referred to as Spot Cable Advertising, and a 15-second, 30-second, or one-minute block of [spot cable advertising] inventory is described as a Spot Cable Advertising Avail or a Spot Cable Avail. (*Id*. at ¶¶ 27, 29.) Spot cable advertising is one of the two key ways in which MVPDs generate revenue, the other being the collection of subscription fees from households in exchange for providing cable service. (*Id*. at ¶ 26.) Thus, [t]he ability to sell Spot Cable Advertising is crucial to the economic survival of an MVPD. (*Id*. at ¶ 28.)

Spot cable advertising differs from traditional national advertising. A cable network sells traditional advertising time directly to advertisers, and traditional advertisements air simultaneously on the network across the United States. (*Id*. at ¶ 30.) In contrast, MVPDs sell spot cable advertisements. (*Id*.) Consequently, a spot cable advertisement reaches only households that subscribe to the MVPD that sold the ad, while a traditional advertisement reaches any household watching the television network that sold the ad, irrespective of the MVPD providing cable service. (*Id*.)

Spot cable advertising allows advertisers to geotarget customers, meaning that the advertiser does not have to buy advertising on a cable network throughout the entire nation, but can instead select a particular geographic area to display the ad by buying Spot Cable Avails from an MVPD serving that area. (*Id*. at ¶ 31.) By purchasing spot advertising during a national broadcast like the World Series, for example, a Chicago-area car dealership can advertise only in the Chicago DMA while a Cleveland restaurant can simultaneously advertise exclusively in the Cleveland DMA. (*See id*. at ¶¶ 31 33.)

B. The three mediums through which MVPDs sell Spot Cable Avails

Spot Cable Avails are generally sold to advertisers in three ways, (*id*. at ¶ 34), each of which accounts for approximately one-third of an MVPD s Spot Cable Avail inventory, (*id*. at ¶¶ 41, 66 68). The Court describes each in turn.

1. Regional sales through an Interconnect

In the past, the market for regional spot cable advertising presented a problem for advertisers. Because individual MVPDs sold spot cable advertising rather than television networks, and because multiple MVPDs could operate in a single DMA, an advertiser wishing to run a commercial in all households in a DMA at a particular time during a particular broadcast would have to separately negotiate with each MVPD. (*Id.* at ¶ 36) [M]any advertisers found [this] difficult, if not impossible. (*Id.*)

In the 1990s, however, competing MVPDs cooperated with one another to develop Interconnects in each DMA, which act as a clearinghouse that aggregate Spot Cable Avails from the MVPDs in a DMA and sell packaged Avails to advertisers in such a way that the purchased advertisements will run on all MVPDs across a given DMA simultaneously. (*Id.* at ¶¶ 35 37.) Each DMA has typically contained just one Interconnect, in which all of the MVPDs operating within that DMA have participated by making a portion of [their] Spot Cable Advertising inventory available through the Interconnect. (*Id.* at ¶¶ 35, 37.) In short, Interconnects provide[] a business and technical interface that . . . provid[e] regional advertisers with a one-stop shop where they can buy same-time Avails from all the MVPDs in the DMA. (*Id.*) They [are] the only viable and efficient option for advertisers that wish to purchase Spot Cable Advertising across the entire DMA. (*Id.* at ¶ 47.) An Interconnect therefore has no competitors, [n]or could a competing Interconnect be developed. (*Id.* at ¶¶ 47 48.)

MVPDs pay a fee to the Interconnect in exchange for its coordination services and receive the revenues generated from . . . regional sales on approximately a pro rata basis. (*Id.* at ¶ 35.) Because MVPDs compete with one another, the Interconnects were originally designed to avoid giving preferential treatment to any single MVPD participant, and the dominant MVPD in the region was not able to exercise its influence over the Interconnect to the detriment of other participating MVPDs. (*Id*. at ¶ 41.) Thus, at least early on, Interconnect oversight was performed by boards of directors that were elected by a vote of all the MVPD members of the Interconnect. (*Id*. at ¶ 42.) The boards would make decisions by majority vote with the best interests of all MVPDs in mind. (*Id*.) In form and practice, Interconnects avoided discriminating among or disadvantaging individual MVPD or representative members. (*Id*.)

Over time, industry consolidation has led to the largest MVPD managing and controlling the Interconnect in each DMA. (*Id*. at ¶ 44.) Interconnects controlled by dominant MVPDs other than Comcast generally continue to treat all participating MVPDs equally by, for example, charging the same fees to all MVPDs and ensuring all MVPDs or their representatives have open and equal access to the Interconnect. (*Id*. at ¶ 45.) Comcast, however, controls the Interconnect in fifteen of the twenty-five largest television markets and twenty-six of the largest fifty markets, including, for example, the Chicago, Detroit, Philadelphia, Boston, Washington D.C., and Denver DMAs. (*Id*. at ¶¶ 44, 86 94.) Viamedia s allegations of illegality, which are described below, stem in part from Comcast s conduct in DMAs in which it is the dominant MVPD.

2. Multiregional sales through National Cable Communications

If an advertiser wishes to air a commercial at a particular time during a particular broadcast across more than one DMA, it can purchase Spot Cable Avails from National Cable Communications LLC (NCC), a national clearinghouse that historically functioned on a multi-DMA level in much the same way that the Interconnects have functioned on a single-DMA level. (*Id*. at ¶¶ 34, 49.) Thus, NCC collects fees from MVPDs, aggregates Spot Cable Avails from across multiple DMAs, and sells them to advertisers. (*Id*. at ¶¶ 51 52.) Buying through NCC is the only practical option for advertisers that wish to purchase Spot Cable Advertising across multiple DMAs, and such advertisers have no choice but to use it. NCC has no competitors. (*Id*. at ¶ 54.)

NCC was created in 1981 as a joint venture among the five largest MVPDs that existed at the time. (*Id*. at ¶ 50.) Through a series of acquisitions of other MVPDs, Comcast attained a 60% ownership stake in NCC, thereby gaining the ability to effectively control NCC. (*Id*.)

Historically, NCC has had agreements in place with virtually every MVPD or its representative in all 210 DMAs across the United States . . . . (*Id*. at ¶ 52.) Indeed, NCC says in its promotion materials that its participating members cover 98 percent of all multichannel television households in the United States. (*Id*.) As described further below, Viamedia contends that Comcast has abused its control of NCC, altering how it has historically functioned in the service of Comcast s anticompetitive goals.

3. Local spot cable advertising without the involvement of an Interconnect or NCC

The final manner in which MVPDs sell spot cable advertising is Local Spot Cable Advertising, which do[es] not involve an Interconnect or NCC acting as an intermediary. (*Id*. at ¶ 59.) In this advertising sale method, an advertiser deals directly with a single MVPD or its representative to purchase those Spot Cable Avails that run in a specific number of the MVPD s ad zones, which are subdivisions of a DMA that allow[] advertisements to be displayed on a neighborhood-by-neighborhood or even a block-by-block basis. (*Id*. at ¶¶ 59 60.) Thus, a business can use local spot cable advertising to reach narrowly targeted geographic audiences at a cost that is generally less expensive . . . than regional or national Spot Cable Advertising through an Interconnect or NCC. (*Id*. at ¶¶ 61-62.)

C. Spot cable advertising representatives

Viamedia fits into the spot cable advertising landscape by representing MVPD clients for the purpose of selling their Spot Cable Avails. (*Id*. at ¶ 74.) More specifically, Viamedia provides MVPDs sales, marketing, and technology expertise and support to sell their Spot Cable Avails to local, regional, and national advertisers, including by accessing and participating in the Interconnects and NCC. (*Id*.) While some large MVPDs like Comcast devote entire subsidiary organizations to directing and organizing their Spot Cable Advertisement sales operations, smaller MVPDs do not have the resources to do this. (*Id*. at ¶ 71.) Consequently, these smaller MVPDs turn to companies like Viamedia for spot cable advertising representation. (*Id*. at ¶ 72.)

Viamedia represents more than sixty MVPDs across more than seventy DMAs, and each day, Viamedia inserts about one million advertisements . . . for over 7,000 advertisers nationwide. (*Id*. at ¶¶ 76 77.) These numbers make Viamedia the largest independent Spot Cable Advertising Representative in the United States, meaning that it is the largest representative firm that is not wholly owned and controlled by a cable television service provider such as Comcast. (*Id*. at ¶ 17 (emphasis in original).)

Comcast Spotlight directly competes with Viamedia to represent MVPDs to sell their Spot Cable Avails. (*Id*. ¶ 79.) It does this despite the fact that Comcast competes with other MVPDs for household cable subscriptions and advertising sales. (*Id*. at ¶¶ 78, 80.) Through its control of Comcast s Spot Cable Avails, which reach Comcast s twenty-two million subscriber households, as well as its representation of other MVPDs that have more than 13 million subscribers combined, Comcast Spotlight control[s] Spot Cable Advertising for . . . more than half of the entire cable industry. (*Id*. at ¶¶ 8, 85.) Comcast Spotlight s dominance is even greater in DMAs in which it controls the Interconnect. (*Id*. at ¶¶ 85 94.) In the Chicago, Detroit, Philadelphia, Boston, and Washington, D.C. DMAs, for example, Comcast Spotlight controls approximately 98 100% of all Spot Cable Advertising Avails available for sale. (*Id*. at ¶¶ 86 90.) Viamedia alleges that Comcast has used its power to exclude independent MVPDs and their representatives [from accessing Interconnects that it controls] and to coerce them into behaviors that benefit Comcast. (*Id*. at ¶ 96.) The Court details the specifics of Viamedia s allegations below.

II. Viamedia's allegations of anticompetitive conduct

A. Conduct stemming from Comcast's control of the Interconnects

The crux of Viamedia s allegations is that Comcast has used its control over certain Interconnects to

(1) exclude Viamedia from accessing the critical Interconnect infrastructure, and (2) force MVPDs to engage Comcast Spotlight as their spot cable advertising representatives instead of Viamedia or its competitors.

Viamedia s complaint focuses on Comcast s conduct in the Chicago and Detroit DMAs, where Comcast exercises unilateral control of regional advertising through the DMAs respective Interconnects. (*Id*. at ¶ 102.) Between 2002 and 2012, Viamedia participated in the Interconnects for Chicago and Detroit in its representation of its then most significant MVPD clients, WOW and RCN. (*Id*. at ¶ 103.) In 2011, Comcast Spotlight began to express its interest in representing WOW and RCN, but the MVPDs were not interested. (*Id*. at ¶¶ 104 06.) Indeed, RCN explained, Comcast would prefer that RCN use Comcast Spotlight and not Viamedia . . . . [But] RCN is not comfortable having its largest and most formidable rival as its representative in the spot cable market and should be free to choose a representative for such services that does not present such an obvious conflict and competitive disadvantage. (*Id*. at ¶ 108 (alterations in original).) Then, between 2011 and early 2012, Comcast repeatedly told advertising agencies that it would have sole control over all of WOW s and RCN s Spot Cable Advertising Avails by years end. (*Id*. at ¶ 109.)

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*. at ¶ 110.) This was, according to Viamedia, the first time a third-party representation firm or MPVD had ever been excluded from an Interconnect for any reason. (*Id*. at ¶ 116 (emphasis in original).) Comcast s sudden closing of the doors to the Interconnect precluded Viamedia, WOW, and RCN from selling any Spot Cable Advertising Avails through the Interconnects for Chicago and Detroit, two of the largest markets for regional Spot Cable Advertising sales in the country, causing Viamedia and its MVPD clients [to lose] tens of millions of dollars in revenue. (*Id*. at ¶¶ 114 15.) Initially, Comcast did not give a reason for the exclusion, but later acknowledged that the exclusion was motivated by Comcast Spotlight s desire to replace Viamedia as WOW s and RCN s Spot Cable Advertising Representative. (*Id*. at ¶¶ 111 12.)

Although Viamedia requested that Comcast restore it and its clients access to the Interconnect, Comcast did not oblige. (*Id*. at ¶¶ 120 21.) In Chicago and Detroit, for example, Comcast said that it would be willing to consider Viamedia s readmission if, and only if, Viamedia agreed to certain commercially unreasonable terms, which would have prevented Viamedia from meaningfully competing with Comcast Spotlight. (*Id*. at ¶ 122.) Specifically, Comcast demanded that it be given the right to preempt, at its sole discretion and with virtually no advance notice, any of the Spot Cable Avails previously sold or controlled by Viamedia, whether such ads were sold through the Interconnect or not. (*Id*. at ¶ 123.) This, Viamedia alleges, would have given Comcast the unilateral ability to assume control over the entire inventory of Viamedia s MVPD clients and to resell Avails that had already been sold by Viamedia to other advertisers. (*Id*. at ¶ 123.) Viamedia did not agree to these terms. (*Id*.)

In 2015, Comcast told WOW and RCN that they could resume [their] participation in the Comcast-controlled Interconnects if they ended their relationship with Viamedia and retained Comcast Spotlight as their sole Spot Cable Advertising Representative. (*Id*. at ¶ 124.) In April of that year, WOW accepted a proposal from Defendants to replace Viamedia with Comcast Spotlight in the Detroit and Chicago DMAs in exchange for renewed access to those DMAs Interconnects. (*Id*. at ¶ 126 28.) Accordingly, Comcast Spotlight gained control of WOW s Spot Cable Advertising in Chicago and Detroit for national, regional, and local inventory. (*Id*. at ¶ 128.) Going forward, no advertiser will be able to reach WOW s Chicago and Detroit subscribers without dealing with Comcast Spotlight. (*Id*.) Viamedia claims that it would have continued to represent WOW in the Chicago and Detroit DMAs but for Comcast s actions. (*Id*. at ¶ 129.) Indeed, Viamedia continues to represent WOW in DMAs where Comcast does not control the Interconnect. (*Id*.)

A similar course of events unfolded with respect to RCN in the Chicago, Detroit, New York, Philadelphia, Boston, and Washington, D.C. DMAs which represent *six* of the 11 largest DMAs in the United States (constituting all of the markets in which RCN operates). (*Id*. at ¶¶ 130, 132.) Consequently, Comcast now controls all of RCN s Spot Cable Advertising national, regional, and local inventory in [those DMAs]. (*Id*. at ¶ 131.)

Comcast has also used this practice to gain control of other MVPDs Avails, allowing Comcast to consolidate its control over Spot Cable Advertising in many of the largest DMAs in the United States. (*Id*. at ¶ 134.) In fact, no MVPD is able to sell a Spot Cable Avail and no advertiser is able to purchase a Spot Cable Avail in five of the 10 largest DMAs in the

United States without dealing exclusively with Comcast Spotlight. (*Id*. at ¶ 135.)

Comcast s conduct is not limited to only the largest media markets. In the Hartford DMA, for example, Comcast excluded the MVPD Frontier Communications which had acquired a system operating in the DMA with over 200,000 subscribers when it transferred the Spot Cable Avails inventory for its newly acquired Connecticut subscribers to Viamedia. (*Id*. at ¶ 136.) Comcast, however, intends to condition Frontier s re-admission to the Hartford Interconnect upon Frontier firing Viamedia as its sales representative and entering into an exclusive representation agreement with Comcast Spotlight. (*Id*. at ¶ 138.)

B. Conduct stemming from Comcast's control of NCC

Viamedia also claims that, [a]s [Comcast] has done with the Interconnects, [it] now intends to shut Viamedia and its MVPD clients out of participating in national Spot Cable Advertising sales as a way of coercing independent MVPDs into transferring control of their Spot Cable Avails to Comcast Spotlight. (*Id*. at ¶ 147.) NCC and Comcast, for example, have approached some of Viamedia s clients and have urged them to terminate their representation agreements with Viamedia if they wish to continue to have access to NCC. (*Id*. at ¶¶ 148 49.) Additionally, although Viamedia currently has an agreement with NCC to access NCC s services, that agreement expires in December 2017, and NCC has refused to entertain a long-term extension that would ensure Viamedia s continued access to NCC beyond that date. (*Id*. at ¶ 145.)[3]

III. The impact of Defendants' conduct

Viamedia claims that Comcast and Comcast Spotlight s exclusionary conduct harms competition in several ways. (*Id*. at ¶ 154.) First, Viamedia and other independent advertising representatives cannot compete with Comcast Spotlight because they will not have access to Comcast-controlled Interconnects or NCC, which together represent more than two-thirds of the [revenue] generated annually from Spot Cable Advertising sales. (*Id*. at ¶ 155.) Second, MVPDs suffer because they are unable to choose their preferred advertising representative and many do not want to cede control over their Spot Cable Avails to Comcast, their largest competitor, potentially being forced to provide Comcast with sensitive business information. (*Id*. at ¶¶ 156, 158.) Moreover, if an MVPD does not acquiesce to Comcast s demands, it would limit its ability to compete against Comcast for . . . subscribers because the MVPD[] will have to ei-

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[3] Defendants argue that Viamedia s NCC claim is not ripe. (R. 23, Mem. Supp. Defs. Mot. Dismiss, at 12.) Viamedia disavows that it has a separate NCC claim; instead, Viamedia says its allegations concerning NCC are indicative of Comcast s pattern of conduct and part of its overall course of anticompetitive conduct. (R. 28 at 15.) Because Viamedia alleges that Comcast intends to close access to NCC in the future but has not yet done so, the Court will focus on Viamedia s allegations regarding the Interconnects. Nevertheless, because Comcast s conduct with respect to NCC mirrors its conduct with respect to the Interconnects, the Court s analysis of Comcast s conduct associated with the Interconnects would apply to Comcast s possible future conduct associated with NCC.

ther increase [its] subscriber fees or reduce [its] promotional efforts in order to compensate for [its] losses in advertising revenue. (*Id*. at ¶ 157.)

As for Viamedia specifically, it has lost several clients as well as revenue from spot cable advertising sales through Interconnects. (*Id*. at ¶¶ 161 62.) In total, Viamedia claims it will lose no less than $75 million. (*Id*.)

IV. Viamedia's Claims

Viamedia s complaint specifies six counts against Defendants. In Count One, Viamedia asserts that Defendants violated Section 2 of the Sherman Act, 15 U.S.C. § 2, through unlawful monopolization in markets for spot cable advertising representation in DMAs where Comcast controls the Interconnect[]. (*Id*. at 36, ¶¶ 164-73.) For this claim, Viamedia alleges: (1) [t]he provision of Spot Cable Advertising Representation services constitutes a relevant product market, (2) the regional DMAs in which Comcast controls the Interconnect constitute relevant geographic markets, (3) Comcast has monopoly power in Spot Cable Advertising Representation in each of the DMAs where it controls the Interconnect, (4) Comcast has excluded Viamedia and its clients from accessing Comcast-controlled Interconnects, and (5) [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, by requiring that MVPDs deal exclusively with Comcast Spotlight as a Spot Cable Advertising Representative, [and] by requiring NCC to refuse to commit to a long term arrangement with Viamedia and to otherwise offer []discriminatory terms to Viamedia . . . Comcast has unlawfully acquired and maintained its monopoly power in each of the markets where it controls the Interconnect. (*Id*. at ¶¶ 165 68.)

Viamedia s second count is for attempted monopolization in violation of Section 2 of the Sherman Act based on the same conduct that it alleges in Count One. (*Id*. at ¶¶ 174 82.)

Viamedia s third, fourth, and fifth counts allege violations of state antitrust laws in Illinois, Michigan, and Connecticut. (*Id*. at ¶¶ 183 215.) Finally, for its sixth claim, Viamedia alleges tortious interference with a business expectancy. (*Id*. at ¶¶ 216 23.)

Viamedia seeks damages, costs, attorneys fees, punitive damages, injunctive relief, and the [o]rdering [of] such divestitures by Comcast as may be required to restore competition and to prevent the recurrence of future antitrust violations. (*Id*. at 46.)

LEGAL STANDARD

A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) challenges the viability of a complaint by arguing that it fails to state a claim upon which relief may be granted. *Camasta v. Jos. A. Bank Clothiers, Inc*., 761 F.3d 732, 736 (7th Cir. 2014). Under Rule 8(a)(2), a complaint must include a short and plain statement of the claim showing that the pleader is entitled to relief. Fed. R. Civ. P. 8(a)(2). The short and plain statement under Rule 8(a)(2) must give the defendant fair notice of what the . . . claim is and the grounds upon which it rests. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). A plaintiff s [f]actual allegations must be enough to raise a right to relief above the speculative level. *Id*. Put differently, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). In determining the sufficiency of a complaint under the plausibility standard, courts must accept all well-pleaded facts as true and draw reasonable inferences in [a plaintiff s] favor. *Roberts v. City of Chicago*, 817 F.3d 561, 564 (7th Cir. 2016).

ANALYSIS

I. Documents considered

Defendants have attached a contract between Viamedia and Comcast that they contend the Court may consider. (R. 23, Mem. Supp. Defs. Mot. Dismiss, at 1 & n.1, 4 5 & n.3, Ex. 1.) According to Defendants, the contract shows that Viamedia s access to the Detroit and Chicago Interconnects resulted from a nine-year agreement that expired by its own terms on May 31, 2012 the day before Viamedia claims Comcast unilaterally ended its access to those Interconnects. (*Id*. at 4 5 (quoting R. 1 at ¶ 110).) Viamedia objects to Defendants inclusion of this contract, arguing that the Court cannot properly consider it at this stage in the litigation. (R. 28, Pl. s Opp., at 13 & n.6.) The Court agrees with Viamedia.

In general, if matters outside the pleadings are presented to and not excluded by the court, the motion [to dismiss under Rule 12(b)(6)] must be treated as one for summary judgment under Rule 56. *United States v. Rogers Cartage Co*., 794 F.3d 854, 861 (7th Cir. 2015) (quoting Fed. R. Civ. P. 12(d)); *see Serban v. Cargurus, Inc*., No. 16 C 2531, 2016 WL 4709077, at *2 (N.D. Ill. Sept. 8, 2016); *F.D.I.C. v. Pantazelos*, No. 13 C 2246, 2013 WL 4734010, at *3 (N.D. Ill. Sept. 3, 2013). An exception to this rule exists, however, when the parties present documents to which the

Complaint ha[s] referred, that are concededly authentic, and central to the plaintiff s claims. *Santana v. Cook Cty. Bd. of Review*, 679 F.3d 614, 619 (7th Cir. 2012) (quoting *Hecker v. Deere & Co.*, 556 F.3d 575, 582 (7th Cir. 2009)). A court may also consider materials that are attached to the complaint. *See* Fed. R. Civ. P. 10(c) (A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes.); *Tierney v. Vahle*, 304 F.3d 734, 738 (7th Cir. 2002); *Pantazelos*, 2013 WL 4734010, at *3.

Defendants contend that although Viamedia fails to mention the [contract] explicitly, . . . the complaint refers to its end date. (R. 23 at 5 n.3 (citing R.1 at ¶ 110).) Viamedia counters by arguing that it does not refer to the contract in its complaint. (*See* R. 28 at 13 n.6.) Viamedia has the better of the argument. It is too far of a stretch to say that Viamedia referenced the contract by merely noting the day upon which it claims Comcast barred it from accessing the Interconnects without making any reference to the agreement. This assertion is too far from the usual example of a plaintiff failing to attach a contract in a suit for breach of contract. *Tierney*, 304 F.3d at 738; *cf., e.g.*, *Wright v. Associated Ins. Cos. Inc.*, 29 F.3d 1244, 1248 (7th Cir. 1994) (considering an agreement that is repeatedly quote[d] in the complaint). The Court therefore excludes the contract. *See Sams v. City* of Chicago, No. 13 CV 7625, 2014 WL 6685809, at *2 n.5 (N.D. Ill. Nov. 25, 2014) (refusing to consider letters that were not referred to in the plaintiff s complaint).

The contract also is not central to Viamedia s claims. Defendants argue to the contrary, maintaining that Viamedia essentially asks the Court to extend its terms. (R. 23 at 5 n.3.) The Court disagrees. Viamedia s claims center on the allegations that (1)

Comcast excluded it and its clients from the Interconnects when no third-party representation firm or MVPD had ever been excluded before, and (2) Comcast forced MVPDs to hire Comcast Spotlight as their exclusive advertising representative. While perhaps the contract will ultimately be relevant to this case or even central to Defendants defense, it is not central to Viamedia s allegations. *See Fleece v. Volvo Constr. Equip. N. Am.*, No. 10 C 4496, 2010 WL 4386866, at *1 (N.D. Ill. Oct. 27, 2010); *Lincoln Nat'l Life Ins. Co. v. Donaldson, Lufkin & Jenrette Sec. Corp*, 9 F. Supp. 2d 994, 999 (N.D. Ind. 1998) (While [a certain document] . . . is clearly evidence that would be relevant at trial, and may very well be central to [the defendant s] defense, the court determines that it is not central to the claim asserted by the Plaintiffs.).[4]

Accordingly, the Court does not consider the contract because Viamedia does not refer to it in its complaint nor is it central to Viamedia s claims. Defendants are of course free to rely on the document at the appropriate procedural stage.

II. Viamedia's Sherman Act Claims

Viamedia alleges that Defendants are liable for monopolization and attempted monopolization under Section 2 of the Sherman Act. To succeed in its monopolization claim, Viamedia must prove (1) the possession of monopoly power in the relevant market[,]

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[4] Because the Court concludes that the contract is not central to Viamedia s allegations, the Court also rejects Defendants argument that it should consider the contract because Viamedia strategically avoided including the contract in its complaint and courts consistently reject such artful pleading efforts. (R. 29, Defs. Reply, at 2.) Moreover, the Court disagrees that Viamedia engaged in this sort of artful pleading given Viamedia s claims in this case.

. . . (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 historic accident, and (3) the monopolization caused injury. *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1438 (2013) (third alteration in original) (quoting *United States v. Grinnell Corp*., 384 U.S. 563, 570 71 (1966)); *Hannah's Boutique, Inc. v. Surdej*, No. 13 C 2564, 2013 WL 4553313, at *3 (N.D. Ill. 2013). To prove attempted monopolization, Viamedia must show (1) [Comcast s] specific intent to achieve monopoly power in a relevant market; (2) predatory or anticompetitive conduct directed to accomplishing this purpose; and (3) a dangerous probability that the attempt at monopolization will succeed. *Mercatus Grp., LLC v. Lake Forest Hosp*., 641 F.3d 834, 854 (7th Cir. 2011); *Hannah's Boutique*, 2013 WL 4553313, at *3.

The second element of both monopolization and attempted monopolization requires proof of anticompetitive conduct. *See Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) (To 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*. (emphasis in original)); *Mercatus*, 641 F.3d at 854 (The second element of each claim can be met by showing that the Hospital engaged in predatory or anticompetitive conduct of some kind.); *Endsley v. City of Chicago*, 230 F.3d 276, 283 (7th Cir. 2000) (Under § 2, intent to obtain a monopoly is unlawful only where an entity seeks to maintain or achieve monopoly power by anticompetitive means.); *VBR Tours, LLC v. Nat'l R.R. Passenger Corp*., 14-cv-00804, 2015 WL 5693735, at *6 (N.D. Ill. Sept. 28, 2015). Here, Viamedia alleges that Defendants violated Section 2 of the Sherman Act through tying, exclusive dealing, and refusing to deal.[5] (*See* R. 1 at ¶ 168; R. 28 at 7 14.)

Defendants do not base their motion to dismiss on a failure to plead monopoly power in a relevant market or a dangerous probability that attempted monopolization will succeed. (R. 29 at 3 n.3.) Instead, Defendants contend that Viamedia failed to plead antitrust injury and anticompetitive conduct.[6] The Court

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[5] Defendants argue that Viamedia also has a claim based on a monopoly-leveraging theory. Viamedia, however, denies this. The Court discusses this argument in Section II.C.2.

[6] Defendants contend that they expressly argued that the Complaint does not establish that [they] acted with anticompetitive intent. (R. 29 at 3 n.3 (citing R. 23 at 10).) Defendants are referring to a passage of their brief in which they argue that they engaged in procompetitive conduct rather than an illegal refusal to deal, and therefore their actions are not evidence of anticompetitive intent. It thus appears that Defendants arguments regarding intent are intertwined with their arguments regarding a lack of anticompetitive conduct. The Court therefore will consider and resolve those arguments together. *See Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 459 (1993) (explaining that anticompetitive conduct may be sufficient to prove the necessary intent to monopolize); *Lenox MacLaren Surgical Corp. v. Medtronic, Inc.*, 762 F.3d 1114, 1130 (10th Cir. 2014) (We have elsewhere concluded that the fact-finder could reasonably infer monopoly power and exclusionary conduct. With these inferences, the jury could also find an intent to monopolize.); *M & M Med. Supplies & Serv., Inc. v. Pleasant Valley Hosp., Inc.*, 981 F.2d 160, 166 (4th Cir. 1992) (Specific intent may be inferred from the defendant s anticompetitive practices.); *see also Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 603 (1985) (Improper exclusion (exclusion not the result of superior efficiency) is always deliberately intended. (quoting Robert Bork, The Antitrust Paradox 160 (1978))); 2-16 Earl W. Kinter et

addresses these issues in turn. First, however, it is necessary to address a preliminary matter regarding whether Viamedia s complaint places tying and exclusive dealing at issue.

A. Viamedia's complaint raises tying and exclusive dealing

Viamedia argues that Defendants failed to address in their opening brief Viamedia s tying and exclusive dealing claims, which Viamedia contends are not hidden in the interstices of the Complaint. (R. 28 at 9; *see also* R. 32, Pl. s Surreply, at 1 2.) Defendants respond by contending that [t]he word tying appears nowhere in the Complaint, that Viamedia d[id] not plead tying or exclusive dealing claims, and that Viamedia did not clearly allege tying or exclusive dealing claims. (R. 29 at 9 10 n.8.) Thus, Defendants contend, [i]t is perfectly appropriate for [Defendants] to address for the first time on reply theories not clearly made in the complaint but asserted for the first time in an opposition brief. (*Id.*) The Court then gave Viamedia the opportunity to respond in a surreply to any new arguments Defendants raised in their reply in order to allay any concerns that [Viamedia] would suffer prejudice. (R. 31, Order Oct. 6, 2016); *see Autotech Techs. Ltd. P'ship v. Automationdirect.com, Inc.*, 235 F.R.D. 435, 437 (N.D. Ill. 2006) (To insure that the aggrieved party is not impermissibly affected, a court must either invoke the waiver doctrine or allow the filing of a surreply when a party raises new matter in its reply brief); *see also Flory v. Mays*, No. 06 C 3523, 2007 WL 4232781, at *3

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al., Federal Antitrust Law § 16.17 (2015) ([I]n both monopolization and attempted monopolization cases, courts typically infer intent from the character of the practice.).

(N.D. Ill. Nov. 26, 2007) (Since plaintiff was permitted to file a surreply, no argument of defendants will be treated as waived for failure to raise it in the opening brief.).

To the extent that Defendants contend that Viamedia hid the ball as to its tying and exclusive dealing claims so to require dismissal of those claims, Defendants argument fails. First, Plaintiffs need only plead facts, not legal theories, in their complaints. *Reeves ex rel. Reeves v. Jewel Food Stores, Inc.*, 759 F.3d 698, 701 (7th Cir. 2014); *see also Polzin v. Ericksen*, 607 F. App x 572, 574 (7th Cir. 2015) ([F]ederal complaints need not cite law or develop legal theories.); *Collier v. City of Chicago*, No. 08-cv-5645, 2010 WL 476649, at *3 (N.D. Ill. Feb. 4, 2010) (The plaintiff is not required to plead facts or legal theories or cases or statutes, but merely to describe his claim briefly and simply. (quoting *Shah v. Inter-Continental Hotel Chi. Operating Corp.*, 314 F.3d 278, 282 (7th Cir. 2002))). They need not invoke particular magic words in their complaint. *See Vance v. Bureau of Collection Recovery LLC*, No. 10-cv-06324, 2011 WL 881550, at *2 (N.D. Ill. Mar. 11, 2011) ([P]leading certain magic words that track the language of a legal theory is no more necessary than including other legal arguments in the complaint. (quoting *Gustafson v. Jones*, 117 F.3d 1015, 1018 (7th Cir. 1997))); *see also, e.g., King v. Rubenstein*, 825 F.3d 206, 222 (4th Cir. 2016). Accordingly, Defendants argument that Viamedia failed to use the word tying in its complaint falls flat.

Second, the Court agrees with Viamedia that its claims are not hidden in the interstices of the complaint. (R. 28 at 9.) In Count I, for example, Viamedia says:

> By *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, 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 each of the markets where it controls the Interconnect, in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2.

(R. 1 at ¶ 168 (emphasis added).) This paragraph plainly enumerates three anticompetitive acts through which Defendants allegedly acquired monopoly power in violation of the Sherman Act. Viamedia though it is by no means required to do so explicitly used the phrase deal exclusively, indicating an exclusive dealing claim. Additionally, Viamedia alleges that Defendants condition[ed] access to Interconnects upon an MVPD s agreement to deal with Comcast Spotlight. This assertion sufficiently refers to a tying claim.[7] *See Sheridan v. Marathon Petroleum Co*., 530 F.3d 590, 592 (7th Cir. 2008) (In a tying

[7] Other portions of Viamedia s complaint also reference its tying and exclusive dealing claims. (*See, e.g*., R. 1 at ¶ 2 (Comcast has used its unilateral power to admit or deny competing cable television companies access to this infrastructure and condition access to this infrastructure upon those companies exclusive use of Comcast Spotlight as their Spot Cable Advertising Representative. Comcast has also banned any competing company that wishes to access this infrastructure from doing business with Viamedia.); *id*. at ¶ 95 (explaining that Comcast has used its power over the Interconnects to forc[e] [MVPDs] to accept representation agreements with Comcast Spotlight); *id*. at ¶ 153 (Comcast s conditioning of access to the Interconnects and

agreement, a seller conditions the sale of a product or service on the buyer s buying another product or service from . . . the seller.); *Rocha v. FedEx Corp*., 15 F. Supp. 3d 796, 810 (N.D. Ill. 2014) (A tying agreement is an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product[.] (alteration in original) (quoting *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 6 (1958))).

In short, Viamedia s complaint raises tying and exclusive dealing claims. The question remains, however, whether those claims (as well as Viamedia s refusal-to-deal claim) pass muster under Rule 8. The Court turns to that question now.

B. Antitrust Injury

Defendants argue that all of Viamedia s Sherman Act claims fail because Viamedia does not plead harm to competition and therefore cannot establish antitrust injury and antitrust standing. (*See* R. 23 at 12 14; R. 29 at 8 9.) The Court disagrees.

Private antitrust plaintiffs seeking damages must plead more than mere injury; instead, they must plead antitrust injury injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants acts unlawful. *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334 (1990) (quoting *Brunswick Corp v. Pueblo Bowl-O-Mat, Inc*., 429 U.S. 477, 489 (1977)); *see Alarm Detection Sys., Inc. v. Orland Fire Protection Dist*., 129 F. Supp. 3d 614, 634 (N.D. Ill. 2015). Plaintiffs seeking

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NCC on its rival MVPDs entering into exclusive dealing arrangements with Comcast Spotlight . . . is an anticompetitive means of acquiring and maintaining monopoly power in the market for Spot Cable Advertising Representation.).

injunctive relief must plead threatened antitrust injury. *Cargill, Inc. v. Monfort of Col., Inc.*, 479 U.S. 104, 113 (1986); *see Static Control Components, Inc. v. Lexmark Int'l, Inc.*, 697 F.3d 387, 409 (6th Cir. 2012) (The only difference between a claim for equitable relief and one for damages is that equitable relief is available at the mere threat of antitrust injury.); IIA Phillip E. Areeda et al., *Antitrust Law* ¶ 335b (4th ed. 2014). The antitrust-injury doctrine was created to filter out complaints by competitors and others who may be hurt by productive efficiencies, higher output, and lower prices, all of which the antitrust laws are designed to encourage. *U.S. Gypsum Co. v. Ind. Gas Co.*, 350 F.3d 623, 627 (7th Cir. 2003). It ensures that antitrust lawsuits carry out the purpose of the antitrust laws, which are concern[ed] with the protection of competition, not competitors. *See Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962); *Alarm Detection*, 129 F. Supp. 3d at 634.

Viamedia can plead antitrust injury by sufficiently alleging that its loss comes from acts that reduce output or raise prices to consumers. *Tri-Gen Inc. v. Int'l Union of Operating Eng'rs, Local 150, ALF-CIO*, 433 F.3d 1024, 1031 (7th Cir. 2006) (quoting *Stamatakis Indus. v. King*, 965 F.2d 469, 471 (7th Cir. 1992)). Additionally, the [Seventh Circuit] has recognized that competitors can bring an antirust claim when they are excluded from the market and injured by defendants actions. *Id*. at 1032; *see Serfecz v. Jewel Food Stores*, 67 F.3d 591, 597 (7th Cir. 1995) ([The antitrust injury] test focuses on the connection between the purpose of the antitrust laws (protecting market competition) and the alleged injury. When the plaintiff s injury is linked to the injury inflicted upon the market, such as when consumers pay higher prices because of a market monopoly or *when a competitor is forced out of the market*, the compensation of the injured party promotes the designated purpose of the antitrust law the preservation of competition. (emphasis added)); *Hannah's Boutique*, 2013 WL 4553313, at *4 (explaining that the plaintiff established antitrust injury because it alleged conduct that affects the relevant market as a whole, including forcing competitors out of the market); William Holmes & Melissa Mangiaracina, *Antitrust Law Handbook* § 9:6 n.19 (2015) (describing *Tri-Gen* as setting out two paths to prove antitrust standing).

Viamedia alleges antitrust injury because it plausibly claims that it was excluded from the market and injured by defendants actions. *Tri-Gen*, 433 F.3d at 1032. By allegedly forcing customers in this case, MVPDs to accept Comcast Spotlight s representation services, Viamedia and representation firms like it cannot compete in the spot cable advertising market in areas where Comcast controls the Interconnect. Additionally, Viamedia alleges that Defendants conduct could entirely foreclose competition in the spot cable advertising representation market nationwide due to firms inability to generate revenue in the DMAs in which Comcast controls the Interconnect. (R. 1 at ¶¶ 155, 159.) In short, Viamedia s alleged injury is one that harms both competitors and competition, *see Cargill*, 479 U.S. at 117 (emphasis in original), and the antitrust laws properly address such harm.

Viamedia also alleges that Defendants conduct has diminished the quality of available spot cable advertising representation services, further demonstrating harm to competition. *See Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 31 (1984) (explaining that the petitioner s conduct does not have the obviously unreasonable impact on purchasers that has characterized the tying arrangements that [the Supreme Court] has branded unlawful, as [t]here is no evidence that the price, *the quality*, or the supply or demand for either the tying product or the tied product involved in this case has been adversely affected (emphasis added)), *abrogated on other grounds by Ill. Tool Works Inc. v. Indep. Ink, Inc.,* 547 U.S. 28 (2006); *Rebel Oil Co. v. Atl. Richfield Co*., 51 F.3d 1421, 1433 (9th Cir. 1995) (explaining that an act is anticompetitive when it, among other things, diminishes the quality of available goods); *Synthes, Inc. v. Emerge Med., Inc*., No. 11-1566, 2012 WL 4473228, at *16 n.12 (E.D. Pa. Sept. 28, 2012) ([A]n antirust plaintiff must allege that the challenged conducted affected the prices, quantity or quality of goods or services, not just his own welfare. (internal quotation marks omitted) (quoting *Mathews v. Lancaster Gen. Hosp*., 87 F.3d 624, 641 (3d Cir. 1996)); *cf. VBR Tours*, 2015 WL 5693735, at *12 n.13 (explaining that a lower quality-adjusted price to the consumer may indicate procompetitive effects (quoting R*oland Mach. Co. v. Dresser Indus., Inc*., 749 F.2d 380, 395 (7th Cir. 1984))). Specifically, Viamedia pleads facts indicating that MVPDs find Comcast Spotlight to be an inferior alternative to independent third-party representation. (*See, e.g.*, R.1 at ¶ 108 (alleging that RCN said, RCN is not comfortable having its largest and most formidable rival as its representative in the spot cable market and should be free to choose a representative for such services that does not present such an obvious conflict and competitive disadvantage); *id*. at ¶ 129 (explaining that Viamedia still represents RCN and WOW in DMAs where Comcast does not control the Interconnect); *id*. at ¶ 156 (explaining that MVPDs do not want to cede control over their Spot Cable Avails to Comcast, their largest competitor); *id*. at ¶ 158 (alleging that MVPDs will be forced to provide Comcast with sensitive business information if they must sign on with Comcast Spotlight, and that [t]his sensitive business information will give Comcast an advantage over its rival MVPDs and limit the ability of independent MVPDs to compete for cable subscribers)). Accordingly, Viamedia has plausibly alleged that Defendants engaged in conduct that lowered the quality of service available in the spot cable advertising representation market, and that this conduct resulted in harm to Viamedia. These allegations sufficiently plead antitrust injury.[8]

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[8] Defendants present a brief argument in a footnote that Viamedia lacks antitrust standing because it cannot assert claims based on alleged harm to MVPDs. (R. 23 at 13 n.7.) Such cursory arguments are deemed waived. *See Harmon v. Gordon*, 712 F.3d 1044, 1053 (7th Cir. 2013); *Long v. Teachers' Ret. Sys. of Ill.*, 585 F.3d 344, 349 (7th Cir. 2009); *Keith v. Ferring Pharma., Inc.*, No. 15 FC 10381, 2016 WL 5391224, at *13 (N.D. Ill. Sept. 27, 2016); *see also Hammes v. AAMCO Transmissions, Inc.*, 33 F.3d 774, 778 (7th Cir. 1994) ([D]espite the suggestive terminology, antitrust standing is not a jurisdictional requirement and is therefore waivable.); *ChampionsWorld, LLC v. U.S. Soccer Fed'n*, 890 F. Supp. 2d 912, 924 (N.D. Ill. 2012). Moreover, while MVPDs are harmed by Comcast s alleged conduct, so is Viamedia based on its exclusion from the market. Both consumers and competitors may have standing to enforce the antitrust laws. *See Illinois ex rel. Ryan v. Brown*, 227 F.3d 1042, 1046 (7th Cir. 2000) (explaining that normally only consumers or competitors have [antitrust] standing); Areeda*, supra*, at ¶ 339d (The mere fact that an antitrust violation produces two different classes of victims hardly entails that their victories are duplicative of one another. For example, successful predatory pricing, exclusive dealing, or similar exclusionary practices injure rivals by destroying their profits or their business; it ultimately injures consumers as well through higher product prices. There is no sense in which the

C. Anticompetitive Conduct

1. Tying

In a tying agreement, a seller conditions the sale of a product or service on the buyer s buying another product or service from . . . the seller. *Sheridan*, 530 F.3d at 592; *see Eastman Kodak Co. v. Image Tech.*

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lost-profit injury incurred by the competitors duplicates that incurred by consumers, and awarding damages to one interest does nothing to make the other interest whole.).

Defendants also argue that there is no antitrust in-jury because there is simply no reason to infer that Comcast s decision to replace an intermediary with a direct relationship with MVPDs has an anticompetitive motive or effect. (R. 23 at 14.) Such disintermediation, Defendants say, is a prototypical valid business purpose. (*Id*. (quoting *Port Dock & Stone Corp. v. Oldcastle Ne., Inc*., 507 F.3d 117, 124 (2d Cir. 2007).)

This argument fails. First, the Court has already found that Viamedia has alleged antitrust injury based on Defendants exclusion of competition and the diminished quality of spot cable advertising representation in a market in which Comcast Spotlight is the only option. Second, the cases Defendants cite deal with manufacturers vertically expanding to dis-tribute their own product. (*Id*. at 14 & n.8); *see Port Dock*, 507 F.3d at 124; *Jack Walters & Sons Corp v. Morton Bldg., Inc*., 737 F.2d 698, 710 (7th Cir. 1984); *Institutional Foods Packing, Inc. v. Creative Prods., Inc*., No. 89 C 4499, 1992 WL 111133, at *3 (N.D. Ill. May 12, 1992). That sort of cutting out of a middle-man usually is procompetitive. *Jack Walters*, 737 F.2d at 710. It is for this reason, as explained further below, that Viamedia fails to state a claim based on Defendants refusal to deal with Viamedia. Nevertheless, at this stage of the litigation, Viamedia has adequately alleged that Defendants tying and exclusive dealing arrangements have done more than merely eliminate a middleman in the provision of Interconnect services. Instead, Viamedia has alleged these arrangements have entirely foreclosed competition in the market for advertising representation even for ad sales that do not involve an Interconnect. For these reasons, Viamedia has sufficiently pled antitrust in-jury.

Servs., Inc., 504 U.S. 451, 461 (1992) (A tying arrangement is an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier. (quoting *N. Pac. Ry.*, 356 U.S. at 5 6)). The Supreme Court teaches that the essential characteristic of an invalid tying arrangement lies in the seller s exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms. *Jefferson Parish*, 466 U.S. at 12. As the parties agree, tying constitutes a type of anticompetitive conduct that can give rise to Section 2 liability. (R. 29 at 12 14; R. 32 at 4 & n.3); *see, e.g., Sheridan*, 530 F.3d at 593 (The Court has not discarded the tying rule, and we have no authority to do so.); *It's My Party, Inc. v. Live Nation, Inc.*, 811 F.3d 676, 683 84 (4th Cir. 2016); *Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Publ'ns, Inc.*, 63 F.3d 1540, 1550 (10th Cir. 1995) (Illegal tie-ins . . . under section 1 may also qualify as anticompetitive conduct for section 2 purposes.); *Great Escape, Inc. v. Union City Body Co.*, 791 F.2d 532, 541 (7th Cir. 1986) (noting that [p]redatory conduct [under Section 2] may be broadly defined as conduct that is in itself an independent violation of the antitrust laws); *Oracle Am., Inc. v. Terix Comput. Co.*, 5:13-cv-03385-PSG, 2014 WL 5847532, at *7 (N.D. Cal. Nov. 7, 2014); *Hon Hai Precision Indus. Co., v. Molex, Inc.*, No. 08 C 5582, 2009 WL 310890, at *2 (N.D. Ill. Feb. 9, 2009).

A tying claim has four elements: (1) the tying arrangement is between two distinct products or services, (2) the defendant has sufficient economic power in the tying market to appreciably restrain free competition in the market for the tied product, (3) a not insubstantial amount of interstate commerce is affected, and (4) the tying seller . . . has some economic interest in the sales of the tied product. *Reifert v. S. Cent. Wis. MLS Corp.*, 450 F.3d 312, 316 17 (7th Cir. 2006) (quoting *Carl Sandburg Vill. Condo. Ass'n No. 1 v. First Condo. Dev. Co.*, 758 F.2d 203, 207 08 (7th Cir. 1985)). Viamedia alleges that Comcast has conditioned access to the Interconnects in which it exercises exclusive control to MVPDs acceptance of Comcast Spotlight s services. This arrangement, Viamedia contends, constitutes illegal tying because MVPDs are forced to purchase a service they do not want Comcast Spotlight s representation services in order to obtain something that they need access to Interconnects to make regional spot cable advertising sales. (*See* R. 1 at ¶ 2; R. 28 at 8; R. 32 at 3.)

Defendants argue that Viamedia s tying claim is deficient as a matter of law because Viamedia s own allegations establish that [Interconnect services and spot cable advertising representation services] are part of the *same alleged product market*. (R. 29 at 13 (emphasis in original).) Defendants point to the complaint s description of the market for spot cable advertising representation, which defin[es] the services provided by Spot Cable Advertising Representation firms as assum[ing] responsibility for [MVPDs] Spot Cable Advertising for the purpose of marketing and selling their Spot Cable Avail inventory to national, regional, and local advertisers. (R. 29 at 13 (quoting R. 1 at ¶ 72).) Defendants contend that this is *exactly* what Comcast does when it operates an Interconnect, according to Viamedia s complaint. (*Id*. at 13 14 (citing R.1 at ¶¶ 35, 48).)

A tying arrangement must be between two distinct products or services. *Reifert*, 450 F.3d at 317 (quoting *Carl Sandburg*, 758 F.2d at 207); *see also Jefferson Parish*, 466 U.S. at 19 21. To determine if two products are separate, the question . . . turns not on the functional relation between them, but rather on the character of the demand for the two items. *Jefferson Parish,* 466 U.S. at 19; *see also, e.g., In re Time Warner Inc. Set-Top Cable Television Box Antitrust Litig*., Nos. 08 MDL 1995(PKC), 08 Civ. 7616(PKC), 2010 WL 882989, at *4 (S.D.N.Y. Mar. 5, 2010). In *Jefferson Parish*, the Supreme Court concluded that anesthesiological services and other hospital services were distinct products. 466 U.S. at 18 25. The Court looked to a number of factors to reach this conclusion, including the fact that (1) the anesthesiological component of the package offered by the hospital could be provided separately and could be selected either by the individual patient or by one of the patient s doctors if the hospital did not insist on including anesthesiological services in the package it offers to its customers, (2) anesthesiological services are billed separately from the hospital services petitioners provide, and (3) patients or surgeons often request specific anesthesiologists to come to a hospital and provide anesthesia. *Id*. at 22.

Similarly, in *Eastman Kodak Co. v. Image Technical Services, Inc*., the Supreme Court considered the issue of whether the provision of service and the provision of parts for photocopiers and micrographic equipment constituted separate products. 504 U.S. at 456 57, 459, 462 63. The Supreme Court framed the test from *Jefferson Parish* as whether there was sufficient consumer demand so that it is efficient for a firm to provide service separate from parts. *Id*. at 462. The Supreme Court concluded that [e]nough doubt [was] cast on Kodak s claim of a unified market that it should be resolved by the trier of fact. *Id*. at 463. The Court noted that service and parts have been sold separately in the past and still are sold separately to self-service equipment owners, and that the development of the entire high-technology service industry is evidence of the efficiency of a separate market for service. *Id*. at 462. Moreover, the Court rejected the contention that because there is no demand for parts separate from service, there cannot be separate markets for service and parts. *Id*. at 463.

Viamedia has plausibly alleged distinct markets for spot cable advertising representation services and Interconnect services. First, the complaint alleges that MVPDs have hired representation firms like Viamedia that do not provide Interconnect services themselves. Thus, similar to how patients could have purchased anesthesiology services separate from hospital services absent a tying arrangement in *Jefferson Parish*, 466 U.S. at 22, and how customers purchased parts and service separately in *Eastman Kodak*, 504 U.S. at 462, MVPDs have acquired Interconnect services and representation services separately. Second, similar to how patients or surgeons often request[ed] specific anesthesiologists to come to a hospital and provide anesthesia in *Jefferson Parish*, 466 U.S. at 22, Viamedia has alleged that MVPDs prefer to engage independent third-party representatives like Viamedia to handle their entire spot cable advertising inventory. Finally, spot cable advertising representation concerns the sale of Spot Cable Avails across the three tiers of the sales system sales through Interconnects, sales through NCC, and local sales directly to advertisers while Interconnect services concern only one of the three tiers of the sales system. (R. 1 at ¶ 70.) Additionally, representation firms [p]lan[] and coordinat[e] an MVPD s Spot Cable Advertising transactions, identify buyers and negotiate business terms, and provide complete turnkey advertising sales, spot insertion, encoding, validation, IT, monitoring, traffic, billing, and collection services. (*Id*. at ¶¶ 70, 75.) In contrast, the complaint indicates that Interconnects merely aggregate Spot Cable Avails . . . and sell packaged Avails to advertisers in such a way that the purchased advertisements will run on all MVPDs across a given DMA simultaneously. (*Id*. at ¶ 35.) Thus, while Interconnect services are related to spot cable advertising representation services in that some Spot Cable Avails are sold through an Interconnect, Viamedia has pled that advertising representation firms offer qualitatively different services than an Interconnect. Taking the allegations in the complaint as true, it is plausible that the demand for spot cable advertising representation services is distinct from the demand for Interconnect services. Viamedia therefore adequately alleges that there are two distinct products at issue.

Defendants also contend that [t]he deficiency of Viamedia s purported tying claim is further underscored by its failure (in either the Complaint or opposition brief) to fully address the essential elements of such a claim. (R. 29 at 13.) Defendants, however, offer analysis only with respect to the element of whether there are two separate products at issue. As previously noted, Viamedia need not enumerate the elements of its claim. *See supra* § II.A. Additionally, perfunctory and undeveloped legal arguments are waived. *Schaefer v. Universal Scaffolding & Equip., LLC*, No. 15-2393, 2016 WL 5864513, at *5 (7th Cir. Oct. 7, 2016) (published opinion); *see also United States v. Alden*, 527 F.3d 653, 664 (7th Cir. 2008);

United States v. Key, No. 13 CR 726, 2016 WL 6135666, at *9 n.1 (N.D. Ill. Oct. 21, 2016).

Even putting waiver aside, however, Viamedia pleads all of the necessary elements of a tying claim. As described above, Viamedia pleads the existence of two separate products. It also alleges the existence of a tying arrangement that coerces MVPDs to purchase the tied product, Comcast Spotlight s services. *See Jefferson Parish*, 466 U.S. at 12 (Our cases have concluded that the essential characteristic of an invalid tying arrangement lies in the seller s exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms. When such forcing is present, competition on the merits in the market for the tied item is restrained and the Sherman Act is violated.); *It's My Party*, 811 F.3d at 684 85 (describing the importance of coercion to distinguish illegal tying from a legal package deal). With respect to the second element of market power in the tying product market, the complaint alleges that Comcast has total control of Interconnect services in the Chicago and Detroit DMAs, among other locations. The third element whether a not substantial amount of interstate commerce is affected is adequately alleged because the complaint claims that competitors in the tied product market, including Viamedia, are being entirely excluded from competition. *Reifert*, 450 F.3d at 316 18. Indeed, as noted above, the complaint specifically alleges that Defendants tying arrangement forced WOW and RCN to drop Viamedia for Comcast Spotlight. Finally, with respect to the final element, Viamedia alleges Defendants economic interest in the sales of the tied product Comcast Spotlight s representation services.

In short, while Defendants may of course attempt later in the litigation to show why their conduct does not violate the Sherman Act, Viamedia s allegations of a tying arrangement sufficiently state a claim at this stage.

2. Monopoly Leveraging

Defendants argue that Viamedia bases its claims on a monopoly leveraging theory the use of monopoly power in one market to gain a competitive advantage in a second market that must fail under *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398 (2004), and *Schor v. Abbott Laboratories*, 457 F.3d 608 (7th Cir. 2006). (R. 29 at 11 12.) In *Trinko*, the Supreme Court, rejected a monopoly leveraging theory, explaining that leveraging presupposes anticompetitive conduct, which in this case could only be the refusal-to-deal claim we have rejected. 540 U.S. at 415 n.4; *see also Four Corners Nephrology Assocs., P.C. v. Mercy Med. Ctr. of Durango*, 582 F.3d 1216, 1222 (10th Cir. 2009) (citing *Trinko* and rejecting a monopoly leveraging theory where there is no viable claim for anticompetitive conduct like a refusal to deal). In *Schor*, as Defendants point out, the Seventh Circuit explained that there is no Section 2 liability for a free-standing monopoly leveraging theory that lacks any underlying anticompetitive conduct. (R. 29 at 12 (*citing Schor*, 457 F.3d at 611 13).)

Unlike in *Trinko* and *Schor*, however, Viamedia s claim is not free-standing because it alleges particular types of anticompetitive conduct namely, tying, exclusive dealing, and refusing to deal. Viamedia s success turns on whether it states a claim based on those three classes of anticompetitive conduct, not whether a free-standing leveraging theory is independently viable. In *Schor*, in contrast, the Seventh Circuit took care to note that Schor s complaint does not allege any of the normal exclusionary practices tie-in sales (or another form of bundling), group boycotts, exclusive dealing and selective refusal to deal, or predatory pricing. 457 F.3d at 610. Furthermore, in *Schor*, the defendant supposedly leveraged a monopoly in one market to gain a relative advantage in a second market, but did not foreclose all competition in that second market. *See id*. at 611 (explaining that without an allegation that the defendant would knock[] out rivals from the market, [a]nd without any prospect of rivals exit, there is . . . no antitrust worry); *id*. at 613 (noting that [a]s long as rivals continue to sell, monopoly leveraging theories fail). Here, in contrast, Viamedia alleges that Defendants have used specific anticompetitive practices tying, exclusive dealing, and refusing to deal to successfully eliminate all competition.

Defendants also argue in a sentence that Viamedia s claims fail because based on *Schor* s reasoning, . . . monopoly leveraging cannot violate the antitrust laws because it cannot increase an alleged monopolist s profits. (R. 29 at 12 (quoting *VBR Tours*, 2015 WL 5693735, at *11, *13).) As noted above, perfunctory or undeveloped legal arguments are waived. *See Alden*, 527 F.3d at 664; *see also Puffer v. Allstate Ins. Co*., 675 F.3d 709, 718 (7th Cir. 2012) (explaining that arguments that are undeveloped, conclusory, or unsupported by law are waived). Defendants do not explain the economic principles at issue in *Schor* or how they apply in this case. Nor do they explain why *Schor* should control despite the factual differences between that case and the current one discussed in the preceding paragraph. In short, Defendants one-sentence argument is insufficient to allow the Court to evaluate the strength of their contention. This invites the court to play the role of advocate [rather] than judge an invitation that the Court must decline. *See Nichols v. Vilsack*, No. 13-01502 (RDM), 2015 WL 9581799, at *1 (D.D.C. Dec. 30, 2015). Accordingly, while Defendants are free to develop this argument at the appropriate time, the Court will not evaluate it in resolving this motion to dismiss.

3. Exclusive Dealing

Exclusive dealing can violate Section 2 of the Sherman Act. *See, e.g., United States v. Microsoft Corp*., 253 F.3d 34, 69 71 (D.C. Cir. 2001) (per curiam); *see also LePage's Inc. v. 3M*, 324 F.3d 141, 157 59 (3d Cir. 2003) (en banc); *VBR Tours, LLC v. Nat'l R.R. Passenger Corp*., No. 14-cv-804, 2016 WL 4945015, at *3, *6 (N.D. Ill. Sept. 15, 2016). Courts often approve of exclusive dealing because of its procompetitive benefits. *See Republic Tobacco Co. v. N. Atl. Trading Co*., 381 F.3d 717, 736 (7th Cir. 2004) (noting that exclusive dealing can eliminate[] divided loyalties and reduce[] free riding (citing *Roland Mach*., 749 F.2d at 395)); *VBR Tours*, 2015 WL 5693735, at *12. [E]xclusive dealings violate the Sherman Act only when they foreclose competition in a substantial share of the line of commerce at issue. *VBR Tours,* 2015 WL 5693735, at *12 (quoting *Republic Tobacco*, 381 F.3d at 738); *see also Kolon Indus. Inc. v. E.I. DuPont de Nemours & Co*., 748 F.3d 160, 175 (4th Cir. 2014) (citing *Tampa Elec. Co. v. Nashville Coal Co*., 365 U.S. 320, 327 (1961)); *Microsoft*, 253 F.3d at 69. This requirement exists to ensure that the exclusive dealing has an adverse effect on competition. *Microsoft*, 253 F.3d at 69; *see Kolon*, 748 F.3d at 175; *Roland Mach.*, 749 F.2d at 394 (explaining that exclusive dealing is cause for antitrust concern only if there is injury to competition).

As Viamedia points out, Defendants do[] not appear to genuinely dispute that the Complaint establishes exclusive dealing. (R. 32 at 5.) Instead, Defendants argue that Viamedia s exclusive dealing claim fails because the Complaint establishes that exclusivity in the Spot Cable Advertising Representative business is the norm and Viamedia simply seeks to replace one allegedly exclusive deal (between an MVPD and Comcast) with another (between an MVPD and Viamedia). (R. 29 at 14.) Defendants go on to say [t]hat exclusivity is the norm is consistent with it being efficient and with the presumption that it is procompetitive. (*Id*. at 15.)

Once again, Defendants argument that exclusive dealing is the norm and therefore is efficient and procompetitive is conclusory and unaccompanied by citations to authority. The Court therefore need not consider it. *See Puffer*, 675 F.3d at 718; *Alden*, 527 F.3d at 664. Even if the Court considers the argument, however, it fails. As described above, the complaint alleges that Defendants conduct harmed competition by excluding all competitors. Thus, although an exclusive dealing arrangement may be procompetitive when certain advertising representation firms engage in it, the complaint alleges that Defendants exclusive dealing and unique position in the spot cable advertising business caused harm to competition. *See E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 637 F.3d 435, 441 (4th Cir. 2011) (explaining that sometimes a monopolist may not engage in conduct in which nonmonopolists may engage); *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181, 187 (3d Cir. 2005).

Viamedia does not assert that exclusive dealing is generally unlawful; instead, it contends that Defendants exclusive dealing violates the Sherman Act. Accordingly, at this juncture, Defendants argument does not persuade the Court to dismiss Viamedia s exclusive dealing claim.

4. Refusal to Deal

The Supreme Court has explained that, as a general matter, the Sherman Act does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. *Trinko*, 540 U.S. at 408 (emphasis in original) (quoting *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919)). The Supreme Court enumerated three reasons why refusals to deal are generally not actionable. First, [c]ompelling such firms to share the source of their advantage is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities. *Id*. at 407 08. Second, [e]nforced sharing . . . requires 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. *Id*. at 408. Finally, compelling negotiation between competitors may facilitate the supreme evil of antitrust: collusion. *Id*.; *see also Schor*, 457 F.3d at 610 ([A]ntitrust law does not require monopolists to cooperate with rivals by selling them products that would help the rivals to compete. Cooperation is a *problem* in antitrust, not one of its obligations. (emphasis in original) (citation omitted)).

Pointing to these legal principles, Defendants contend that [i]t is axiomatic that a firm has no legal duty to deal with its rivals. (R. 23 at 7.) While it is true that refusals to deal are *generally* legal, Defendants overstate the law. [T]he high value that [the Supreme Court] ha[s] placed on the right to refuse to deal with other firms does not mean that the right is unqualified. *Trinko*, 540 U.S. at 408; s*ee also VBR Tours*, 2015 WL 5693735, at *7. The Supreme Court ha[s] been very cautious in recognizing exceptions to the general rule allowing refusals to deal, but one such exception comes from *Aspen Skiing Co. v. Aspen Highlands Skiing Corp*., 472 U.S. 585, 601 (1985). *Trinko*, 540 U.S. at 408 09; *VBR Tours*, 2015 WL 5693735, at *7. While the Supreme Court has said that *Aspen Skiing* is at or near the outer boundary of § 2 liability, *Trinko*, 540 U.S. at 409, the Court has reaffirmed that Aspen Skiing provides a viable path to liability for a refusal to deal claim, *id*.; *see also Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc*., 555 U.S. 438, 448 (2009) (citing *Aspen Skiing* for the proposition that [t]here are also limited circumstances in which a firm s unilateral refusal to deal with its rivals can give rise to antitrust liability); *VBR Tours*, 2015 WL 5693735, at *7 (considering a refusal to deal claim based on *Aspen Skiing*).

Viamedia argues that, under *Aspen Skiing*, Defendants refusal to provide access to its Interconnects violates the Sherman Act. (R. 28 at 10.) The Court therefore turns to that case. *Aspen Skiing* concerned the four mountains that constituted the Aspen ski area. 472 U.S. at 587 95. The defendant owned three of the mountains, and the plaintiff owned the fourth. *Id*. at 589 91. For a number of years, the owners cooperated by selling a joint ticket, providing customers access to all of the mountains. *Id*. Later, however, the defendant demanded an increasingly greater percentage of the revenue generated from the joint ticket until the cooperative relationship between the defendant and the plaintiff ended. *Id*. at 591 93; *see also Trinko*, 540 U.S. at 408 09 (analyzing *Aspen Skiing*). The plaintiff tried what the *Trinko* Court referred to as a variety of increasingly desperate measures to recreate the joint ticket, even to the point of in effect offering to buy the defendant s tickets at retail price. *Trinko*, 540 U.S. at 408 09 (citing *Aspen Skiing*, 472 U.S. at 593 94). The defendant rebuffed these efforts. *Aspen Skiing*, 472 U.S. at 592 94; *see also Trinko*, 540 U.S. at 408 09.

The Supreme Court affirmed a jury verdict for the plaintiff. *Aspen Skiing*, 472 U.S. at 610. As the *Trinko* Court described it, the *Aspen Skiing* Court found significance in the defendant s decision to cease participation in a cooperative venture. *Trinko* at 540 U.S. at 409 (citing *Aspen Skiing*, 472 U.S. at 608, 610 11). The unilateral termination of a voluntary *(and thus presumably profitable)* course of dealing suggested a willingness to forsake short-term profits to achieve an anticompetitive end. *Id*. (emphasis in original) (citing *Aspen Skiing*, 472 U.S. at 608, 610 11). Additionally, the defendant s unwillingness to renew the ticket *even if compensated at retail price* revealed a distinctly anticompetitive bent. *Id*. Thus, the evidence suggested that the defendant s decision was irrational but for its anticompetitive effect. *VBR Tours*, 2015 WL 5693735, at *7 (quoting *Novell, Inc. v. Microsoft Corp*., 731 F.3d 1064, 1075 (10th Cir. 2013)). Accordingly, *Aspen Skiing* is a narrow[] opinion. *Olympia Equip. Leasing Co. v. W. Union Tel. Co*., 797 F.2d 370, 379 (7th Cir. 1986). Indeed, the Seventh Circuit has said that if *Aspen Skiing* 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*.

Defendants argue that Viamedia has failed to plead facts showing that Defendants decision was irrational but for its anticompetitive effects because replac[ing] an intermediary with a direct relationship . . . is a prototypical valid business purpose. (R. 29 at 8 (quoting *Port Dock & Stone Corp v. Oldcastle Ne., Inc*., 507 F.3d 117, 124 (2d Cir. 2007)); *see also It's My Party*, 811 F.3d at 689 (A single firm incorporating separate but closely related production processes can often be far more efficient than various independent entities transacting to produce the same good or bundle of goods.); *Jack Walters & Sons Corp. v. Morton Bldg., Inc*., 737 F.2d 698, 710 (7th Cir. 1984) (We just said that vertical integration is not an improper objective. But this puts the matter too tepidly; vertical integration is usually procompetitive.); *Institutional Foods Packing, Inc. v. Creative Prods., Inc*., No. 89 C 4499, 1992 WL 111133, at *3 (N.D. Ill. May 12, 1992). The Court agrees. Viamedia has not alleged or explained 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. *See VBR Tours*, 2015 WL 5693735, at *9 ([T]he question is not whether [the defendant] chose the most competitive offer but whether it had *any* procompetitive purpose. (emphasis in original)); *see also Novell*, 731 F.3d at 1075 77. 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. Consequently, at least with respect to the portion of advertising sales made through Interconnects, Defendants refusing to deal with Viamedia offers potentially improved efficiency. Given the Supreme Court s hesitancy to force firms to share the source of their advantage, *Trinko*, 540 U.S. at 407 08, the administrability problems associated with forcing a company to deal with its rival, *see Novell*, 731 F.3d at 1073 (citing *Trinko*, 540 U.S. 407 08), and the principle that replacing intermediaries is a prototypical valid business purpose, *Port Dock*, 507 F.3d at 124, Viamedia s current allegations of an illegal refusal to deal cannot proceed.

Viamedia s tying and exclusive dealing claims are distinct from the refusal to deal claim. Unlike a unilateral refusal to deal, they involve some assay . . . into the marketplace to limit the abilities of third parties to deal with rivals (exclusive dealing), [or] to require third parties to purchase a bundle of goods rather than just the ones they really want (tying). *Novell*, 731 F.3d at 1072. Refusing to provide Viamedia access to Interconnects is, for example, different than conditioning MVPDs access to Interconnects on their acceptance of Comcast Spotlight s representation services even for advertising sales that are unrelated to the use of Interconnects (like local sales directly to advertisers).[9]

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[9] At times it appears that Viamedia s refusal to deal claim also turns on Comcast refusing to provide Interconnect services to MVPDs. This refusal, however, is simply part of the tying claim. Indeed, Comcast has now provided WOW and RCN with access to the Interconnects at issue. The potential problem with Comcast s conduct, however, is that it provided this access only

Defendants argue, however, that Viamedia s exclusive dealing and tying claims are really just Viamedia s refusal to deal claim in disguise. (R. 29 at 10 11.). They point to *Novell, Inc. v. Microsoft Corp*., 731 F.3d 1064 (10th Cir. 2013), where the Tenth Circuit rejected the plaintiff s attempt to recast the defendant s refusal to deal as an affirmative act of interference, (R. 29 (citing *Novell*, 731 F.3d at 1078 79)). Here, however, Viamedia is not merely attempting to recast its refusal to deal claim. Rather, it has alleged different claims involving distinct conduct: tying, exclusive dealing, and refusing to deal. Indeed, as explained in the preceding paragraph, *Novell* specifically discusses the difference between unilateral refusals to deal and other anticompetitive conduct like exclusive dealing and tying. *Novell*, 731 F.3d at 1072 74. Accordingly, Viamedia s exclusive dealing and tying claims may proceed without the refusal to deal claim.[10]

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after allegedly coercing the MVPDs to accept Comcast Spotlight s services.

[10] Viamedia also alleges various claims under state antitrust law as well as a state law claim for tortious interference with a business expectancy. (R. 1 at ¶¶ 183 223.) Comcast contends that there are no relevant differences between Viamedia s state and federal antitrust claims. (R. 23 at 15.) The Court accordingly treats those claims just as it treats Viamedia s claims under the Sherman Act. Comcast also argues that the Court should relinquish supplemental jurisdiction over any remaining state law claims if the Court dismisses the federal antitrust claims. (*Id*.) Because the Court does not dismiss the federal claims, it maintains supplemental jurisdiction.

CONCLUSION

For the foregoing reasons, the Court grants Defendants motion in part and dismisses Viamedia s refusal to deal claim without prejudice. The Court denies Defendants motion with respect to Viamedia s other claims.

DATED: November 4, 2016 ENTERED

/s/ Amy J. St. Eve
AMY J. ST. EVE
United States
District Court Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

VIAMEDIA, INC.,	)	
	)	
Plaintiff,	)	Case No. 1:16-cv-05486
	)	
v.	)	Hon. Amy J. St. Eve
	)	
COMCAST CORPORATION and COMCAST SPOTLIGHT, LP,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

AMY J. ST. EVE, District Court Judge:

Defendants Comcast Corporation (Comcast) and its wholly owned subsidiary Comcast Spotlight, LP (Comcast Spotlight),[1] (R. 40, Am. Compl., ¶ 1), have moved, pursuant to Federal Rule of Civil Procedure 12(b)(6), to dismiss with prejudice Counts I-V of Plaintiff Viamedia, Inc. s (Viamedia) amended complaint, to the extent the monopolization claims asserted are based on alleged refusal to deal. (R. 45.) For the following reasons, the Court grants Defendants motion.

[1] The Court refers to Comcast and Comcast Spotlight collectively as Defendants.

BACKGROUND[2]

In the 1990s, competing cable service providers called, according to industry terminology, multichannel video program distributors (MVPDs) developed Interconnects, cable industry cooperatives that facilitate the sale of spot cable advertising across particular Designated Media Markets (DMAs). (R. 40, Am. Compl., ¶¶ 23, 34-36.) Specifically, an Interconnect functions as the central marketplace around which all regional Spot Cable Advertising sales in [a] DMA are transacted. (*Id.* at ¶ 37.) Regional spot cable advertising sales are one of the three ways in which MVPDs sell spot cable advertising time. (*Id.* at ¶ 34.)

Initially, Interconnects were open to all MVPDs and their representatives, and MVPDs were encouraged to participate in order to maximize the numbers of households advertisers could reach in that DMA. (*Id.* at ¶ 38.) Following the formation of the Chicago and Detroit Interconnects, Comcast acquired competing MVPDs in the Chicago and Detroit DMAs, which allowed Comcast to gain majority interest in and assume unilateral control of regional advertising through the Interconnects in the two DMAs. (*Id*. at ¶ 102.)

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[2] The Court takes the facts presented in the Background from Plaintiff s Amended Complaint and presumes them as true for purposes of resolving the pending motion to dismiss under Rule 12(b)(6). *See Teamsters Local Union No. 795 v. Burlington N. Santa Fe, LLC*, 741 F.3d 819, 823 (7th Cir. 2014); *Alam v. Miller Brewing Co.*, 709 F. 3d 662, 665-66 (7th Cir. 2013); *see also Bell Atl. v. Twombly*, 550 U.S. 544, 555 (2007). The Court also presumes the parties familiarity with the Court s prior opinion in this case. *See Viamedia Inc. v. Comcast Corp.*, No. 16-cv-5486, 2016 WL 6568074 (N.D. Ill. Nov. 4, 2016) (published op.).

Between 2002 and 2012, Viamedia, a spot cable advertising representation company, participated in the Interconnects for Chicago and Detroit on behalf of two of its then most significant MVPD clients, Wide Open West (WOW) and RCN Corporation (RCN). (*Id.* at ¶ 103.) During this period, Viamedia paid over $23 million to Comcast in its role as Interconnect manager to participate in the Chicago and Detroit Interconnects. (*Id.* at ¶ 157).

Viamedia s participation in the Chicago and Detroit Interconnects ended, however, in June of 2012. (*Id*. at ¶ 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. (*Id.* at ¶ 113.)

Viamedia alleges that, as an Interconnect manager, Comcast has an incentive to maximize participation in the Interconnect by eligible MVPDs because Comcast collects fees from Interconnect participants and [t]he economic value of each Interconnect is derived from its ability to provide a single point of access for advertisers to purchase Spot Cable Avails that are capable of reaching *all* subscribers within a DMA. (*Id.* at ¶ 154 55, 157 (emphasis in original).) According to Viamedia, when Comcast refused to deal with Viamedia, it prevented WOW and RCN from participating in regional ad sales through the Interconnects. (*Id.* at ¶¶ 159 60.) This refusal allegedly reduced significantly the number of cable subscribers covered by the [Chicago and Detroit] Interconnect[s]. (*Id.*) Additionally, it reduced the fees Comcast would have collected if WOW and RCN had continued to participate in the Interconnects. (*Id.*) Accordingly, Viamedia claims that Comcast s exclusion of Viamedia was irrational and contrary to Comcast s economic incentives. (*Id.* at ¶ 158 60.) Additionally, Viamedia alleges that dealing with Viamedia would have entailed no cost to Comcast as the Interconnect manager, would have provided the Interconnect and Comcast . . . with immediate benefits, and would have served the interests of the Interconnect customers, namely the regional advertisers, to reach all subscribers in the market. (*Id.* at ¶ 158.)[3]

Comcast continued to exclude WOW and RCN from the Chicago and Detroit Interconnects until they retained Comcast Spotlight as their spot cable advertising representative. (*Id.* at ¶¶ 113, 124, 126.) Eventually, at least by January 1, 2016, WOW and RCN capitulated to Comcast s demands and retained Comcast Spotlight as their sole spot cable advertising representative in the Detroit and Chicago DMAs. (*Id.* at ¶¶ 126 31.) Viamedia also alleges that Comcast has used this coercive tactic in other DMAs. (*See, e.g.*, *id.* at ¶¶ 132 35.)

On May 26, 2016, Viamedia filed a six-count complaint against Defendants Comcast and Comcast Spotlight, asserting, among other things, that Defendants violated Section 2 of the Sherman Act through attempted monopolization and unlawful monopolization in markets for spot cable advertising representation in DMAs where Comcast controls the Interconnect[]. (R. 1 at ¶¶ 164 82.) Specifically, Viamedia alleged that Defendants, [b]y refusing to deal with Viamedia and MVPDs represented by Viamedia, by

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[3] Viamedia alleges that Comcast repeated its conduct in other DMAs outside of Chicago and Detroit. (R. 40 at ¶¶ 161 62.)

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 and by conditioning access to Interconnects upon an MVPD s agreement to deal with Comcast Spotlight, imposed upon RCN and WOW an invalid tying arrangement and engaged in impermissible exclusive dealing. (*Id.* at ¶¶ 168, 176.) In other words, Viamedia alleged that Defendants violated the Sherman Act through tying, exclusive dealing, and a refusal to deal. (R. 36, Mem. Op. & Order, 18.) Viamedia repeats those allegations in its amendment complaint. (R. 40 at ¶¶ 183, 191.)

On July 22, 2016, Defendants filed a Motion to Dismiss, (R. 22), which the Court denied in part and granted in part, *Viamedia*, 2016 WL 6568074, at *17. Specifically, the Court dismissed Viamedia s refusal to deal claim without prejudice but denied Defendants motion with respect to Viamedia s other claims. *Id.* The Court reasoned that Viamedia has not alleged or explained 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 competitive purpose. *Id.* at 16.

Viamedia filed an Amended Complaint on November 21, 2016. (*See* R. 40.) Defendants subsequently filed a Motion to Dismiss the Refusal to Deal Claims as Restated in the Amended Complaint. (R. 45.)

LEGAL STANDARD

A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) challenges the viability of a complaint by arguing that it fails to state a claim upon which relief may be granted. *Camasta v. Jos. A. Bank Clothiers, Inc.*, 761 F.3d 732, 736 (7th Cir. 2014). Under Rule 8(a)(2), a complaint must include a short and plain statement of the claim showing that the pleader is entitled to relief. Fed. R. Civ. P. 8(a)(2). The short and plain statement under Rule 8(a)(2) must give the defendant fair notice of what the . . . claim is and the grounds upon which it rests. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). A plaintiff s [f]actual allegations must be enough to raise a right to relief above the speculative level. *Id.* Put differently, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). In determining the sufficiency of a complaint under the plausibility standard, courts must accept all well-pleaded facts as true and draw reasonable inferences in [a plaintiff s] favor. *Roberts v. City of Chicago*, 817 F.3d 561, 564 (7th Cir. 2016).

ANALYSIS

The only issue before the Court is whether Comcast s alleged refusal to deal plausibly constitutes the type of anticompetitive conduct that violates Section 2 of the Sherman Act.[4] (*See* R. 45.) The Supreme

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[4] The Court previously outlined the standards for monopolization and attempted monopolization under Section 2 of the Sherman Act. *See Viamedia*, 2016 WL 6568074, at *17-18.

Court has long held that [a]s a general rule, businesses 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)). Accordingly, a business s refusal to deal is generally not actionable. *See id.*; *see also Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 408 (2004). The Supreme Court has explained that [c]ompelling . . . firms to share the source of their advantage is in some tension with the underlying purpose of antitrust law for three central reasons. *Trinko*, 540 U.S. at 408-09. First, court-mandated cooperation among businesses may lessen the incentive for the monopolist, the rival or both to invest in the capital projects that give them a competitive advantage. *Id.* at 409. Second, [e]nforced sharing . . . requires 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. *Id.* Third, compelling negotiation between competitors may facilitate the supreme evil of antitrust: collusion. *Id.*; *see also Schor v. Abbott Labs.*, 457 F.3d 608, 610 (7th Cir. 2006) ([A]ntitrust law does not require monopolists to cooperate with rivals by selling them products that would help the rivals compete. Cooperation is a *problem* in antitrust, not one of its obligations. (emphasis in original) (citation omitted)).

Nevertheless, the Supreme Court explained that [t]he high value that we have placed on the right to refuse to deal with other firms does not mean that the right is unqualified. *Trinko*, 540 U.S. at 408 (*quoting Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 601 (1985)). Under certain circumstances, a refusal to cooperate with rivals can constitute anticompetitive conduct and violate § 2. *Id.* The leading case for § 2 liability based on refusal to cooperate with a rival . . . is *Aspen Skiing*. *Id.*

Aspen Skiing concerned the four mountains that constituted the Aspen ski area. 472 U.S. at 587 95. The defendant owned three of the mountains, and the plaintiff owned the fourth. *Id.* at 589 91. For a number of years, the owners cooperated by selling a joint ticket, providing customers access to all of the mountains. *Id.* Later, however, the defendant demanded an increasingly greater percentage of the revenue generated from the joint ticket until the cooperative relationship between the defendant and the plaintiff ended. *Id.* at 591 93; *see also Trinko*, 540 U.S. at 408 09 (analyzing *Aspen Skiing*). The plaintiff tried what the *Trinko* Court referred to as 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. *Trinko*, 540 U.S. at 408 09 (citing *Aspen Skiing*, 472 U.S. at 593 94. The defendant rebuffed these efforts. *Aspen Skiing*, 472 U.S. at 592 94; *see also Trinko*, 540 U.S. at 408 09.

The Supreme Court affirmed a jury verdict for the plaintiff. *Aspen Skiing*, 472 U.S. at 610. As the *Trinko* Court described it, the *Aspen Skiing* Court found significance in the defendant s decision to cease participation in a cooperative venture. *Trinko* at 540 U.S. at 409 (citing *Aspen Skiing*, 472 U.S. at 608, 610 11). The unilateral termination of a voluntary *(and thus presumably profitable)* course of dealing suggested a willingness to forsake short-term profits to achieve an anticompetitive end. *Id.* (emphasis in original) (citing *Aspen Skiing*, 472 U.S. at 608, 610

11). Additionally, the defendant s unwillingness to renew the ticket *even if compensated at retail price* revealed a distinctly anticompetitive bent. *Id.* Thus, the evidence suggested that the defendant s decision was irrational but for its anticompetitive effect. *VBR Tours, LLC v. Nat'l R.R. Passenger Corp.*, No. 14-cv-804, 2015 WL 5693735, at *7 (N.D. Ill. Sept. 28, 2015) (quoting *Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064, 1075 (10th Cir. 2013) (Gorsuch, J.), and citing 3B Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 772, at 223 (3d ed. 2008) (the refusal must be irrational but for its anticompetitive tendencies)).

The Supreme Court has made clear that *Aspen Skiing* is at or near the outer boundary of Section 2 liability. *Trinko*, 540 U.S. at 409. To state it more clearly, [s]ince *Aspen* [*Skiing*], the Supreme Court has refused to extend liability to various other refusal to deal scenarios, emphasizing that *Aspen* [*Skiing*] represents a limited exception to the general rule of firm independence. *Novell*, 731 F.3d at 1074 (quoting *Trinko*, 540 U.S. at 409).

To invoke *Aspen*[] [*Skiing* s] limited exception, the Supreme Court . . . explained, at least two features present in *Aspen* [*Skiing*] must be present in the case at hand. *Id.* First, there must be a preexisting voluntary and presumably profitable course of dealing between the monopolist and rival. *Id.* Second, the monopolist s discontinuation of the preexisting course of dealing must suggest[] a willingness to forsake short-term profits to achieve an anticompetitive end. *Id.* (quoting *Trinko*, 540 U.S. at 407). Importantly, courts require proof not just that the monopolist decided to forsake short-term profits. Just as in predatory pricing cases, [courts] *also* require a showing that the monopolist s refusal to deal was part of a larger anticompetitive enterprise. *Id.* at 1075 (emphasis in the original). Put it simply, the monopolist s conduct must be irrational but for its anticompetitive effect. *Id.* (citing, among other authorities, *Trinko*, 540 U.S. at 407, and 3B Areeda & Hoevnkamp, *supra*, ¶ 772, at 223).

In opposing the first motion to dismiss in this case, Viamedia relied on the *Aspen Skiing* exception to courts general aversion to imposing antitrust liability on the basis of a unilateral refusal to deal. (R. 28 at 10 14.) Once again, Viamedia relies on the *Aspen Skiing* exception, contending that Comcast s actions were irrational but for their anticompetitive effects. (R. 56, Pl. s Opp., 4 10.) As the Court concluded in resolving the first motion to dismiss, Viamedia fails to meet its pleading burden.

Viamedia argues that [t]he immediate effect of Comcast terminating Viamedia and its clients access to the Chicago and Detroit Interconnects was to significantly reduce the number of eligible cable subscribers to the Interconnects in those DMAs, reducing the value of the Interconnect regional advertisers and forfeiting fees Comcast otherwise would have received as the Interconnect manager. (*Id.* at 4.) Accordingly, Viamedia contends that Comcast was exercising its monopoly power to simply exclude Viamedia and Viamedia s clients from the Interconnect[s], to Comcast s own economic detriment. (*Id.* at 4 5.)

While these allegations, taken as true, establish that Comcast s discontinuation of its business relationship with Viamedia caused Comcast to suffer short-term losses, this is not by itself necessarily indicative of anticompetitive conduct.[5] As the Tenth Circuit recognized in *Novell*:

> [F]irms routinely sacrifice short-term profits for lots of legitimate reasons that enhance consumer welfare (think promotion discounts). Neither is it unimaginable that a monopolist might wish to withdraw from a prior course of dealing and suffer a short-term profit loss in order to pursue perfectly competitive ends say, to pursue an innovative replacement product of its own.

731 F.3d at 1075. Accordingly, plaintiffs seeking to establish an unlawful refusal to deal must show that the defendant s actions serve no rational procompetitive purpose. *See id*; *see also VBR Tours*, 2015 WL 5693735, at *9 ([T]he question is not whether [the defendant] chose the most competitive offer but whether it had *any procompetitive purpose*. . . . *Aspen Skiing* s limited exception authorizes intervention only when a defendant s decision is irrational but for its anticompetitive effect. (quoting *Novell*, 731 F.3d at 1075)). As, Judge Easterbrook explained, *Aspen Skiing* and arguments demanding[ing] that holders of market power cooperate with rivals represent the last gasp of the old school antitrust. Frank H. Easterbrook, *The Chicago School and Exclusionary Conduct*, 31 Harv. J.L. & Pub. Pol y 439, 441 42 (2008). Post-*Trinko*, [m]any of these themes bit the dust ; no

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[5] The Court also notes that Comcast s refusal to deal with Viamedia did not, by itself, exclude MVPDs from participating in the Interconnects. Instead, it had the temporary effect of excluding such MVPDs, presumably because of their representation contracts with Viamedia. Comcast s alleged tying arrangement, however, resulted in the temporary exclusion of MVPDs.

longer does even a monopolist ha[ve a] general duty to cooperate with rivals. *Id.* at 442.

Thus, Viamedia must adequately allege that Comcast s refusal to deal was irrational but for its anticompetitive effects. In the Court s previous decision, it explained that, based on Plaintiff s allegations, [a]fter Comcast s refusal to deal, for the portion of [spot cable advertising] sold through an Interconnect, MVPDs simply deal with Comcast directly. *Viamedia*, 2016 WL 6568074, at *16. The Court reasoned that this offered potentially improved efficiency because it replaced an intermediary with a direct relationship. *Id.* This type of vertical integration or elimination of a middleman, the Court explained, represented a prototypical valid business purpose. *Id.* (quoting *Port Dock & Stone Corp v. Oldcastle Ne., Inc.*, 507 F.3d 117, 124 (2d Cir. 2007)); *see also It's My Party, Inc. v. Live Nation, Inc.*, 811 F.3d 676, 689 (4th Cir. 2016) (Wilkinson, J.) (A single firm incorporating separate but closely related production processes can often be far more efficient than various independent entities transacting to produce the same good or bundle of goods.); *Jack Walters & Sons Corp. v. Morton Bldg., Inc.*, 737 F.2d 698, 710 (7th Cir. 1984) (We just said that vertical integration is not an improper objective. But that puts the matter too tepidly; vertical integration is usually procompetitive.); *Institutional Foods Packing, Inc. v. Creative Prods., Inc.*, No. 89 C 4499, 1992 WL 111133, at *3 (N.D. Ill. May 12, 1992).

In an effort to establish that Comcast s refusal to deal lacks any procompetitive purpose, Viamedia argues that Comcast did not engage in procompetitive disintermediation. (R. 56 at 5 7.) Instead, Viamedia contends, Comcast simply replaced one intermediary (Viamedia) with another (Comcast Spotlight). (*Id.*)

Viamedia s argument fails. Indeed, Viamedia s allegations belie its argument that the Court should treat Comcast and Comcast Spotlight as two separate entities that cannot achieve efficiencies that can result from vertical integration. (*See id.* at 5.) In the amended complaint, Viamedia treats Comcast and Comcast Spotlight as a single economic entity a sensible thing to do given that Comcast Spotlight is Comcast s wholly-owned subsidiary. (*See, e.g.*, R. 40 at ¶ 165 (alleging that Comcast s refusal to deal requires that MVPDs either transfer their Spot Cable Advertising Representation from Viamedia *to Comcast*, a direct competitor, or cease participating in the Interconnect at all. (emphasis added)); *id.* at ¶ 155 (explaining that Comcast competes, through Comcast Spotlight with representation firms like Viamedia); *id.* at ¶ 181 (*Comcast* has monopoly power in Spot Cable Advertising Representation in each of the DMAs where in controls the Interconnect. (emphasis added)); *id.* at ¶ 174 (alleging that *Comcast* has or will monopolize the market for Spot Cable Advertising Representation in every DMA in which Comcast manages the Interconnect (emphasis added)); *id.* at ¶ 14 (*Comcast* has acted with the specific intent to monopolize the market for representing cable television service providers . . . . (emphasis added); *id.* at ¶ 166 (Even if there were any potentially improved efficiencies to be realized by consolidating management of an Interconnect with Comcast s provision of Spot Cable Advertising Representation services, refusing to deal with Viamedia is not necessary in order to realize any such efficiencies.).) Because Viamedia s complaint consistently treats Comcast and Comcast Spotlight as a single entity, its arguments in its opposition brief imploring the Court to do otherwise fall flat.

Viamedia s argument that Comcast has not removed a middleman because Comcast Spotlight will fill the role Viamedia used to play also is unavailing. Such replacement is a common feature of vertical integration. If a firm, for example, sells its products directly to the public at its own stores rather than through independent retail outlets, the firm is vertically integrated even though it fills the role that independent retail outlets would otherwise play. *See Jack Walters*, 737 F.2d at 770. The same goes for a computer manufacturer that makes its own steel and creates and places its own advertising though the manufacturer has replaced rather than eliminated elements of production and distribution processes, the manufacturer nonetheless has vertically integrated. *See It's My Party*, 811 F.3d at 689. In this case, based on Viamedia s allegations, Comcast has engaged in a business practice that has a rational procompetitive purpose: it has become a one-stop shop in certain DMAs for MVPDs wishing to sell advertisements on a regional basis. *See id.* at 688.

Based on the above, the Court sees no reason to alter its prior conclusion that Comcast s refusal to deal potentially serves a procompetitive purpose. *See Viamedia*, 2016 WL 6568074, at *16. Viamedia s allegations in the amended complaint, which are effectively the same as its allegations in its first complaint, fail to raise a plausible inference that Comcast s refusal lacked any rational, procompetitive business purpose. In other words, Viamedia has not adequately alleged that Comcast s elimination of a middleman in the regional spot cable advertising business was irrational but for its anticompetitive effect.

CONCLUSION

For the foregoing reasons, the Court grants Defendants motion.

DATED: February 22, 2017

ENTERED

/s/ Amy J. St. Eve
AMY J. ST. EVE
United States District
Court Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

VIAMEDIA, INC.,	)	
	)	Case No.
Plaintiff,	)	1:16-cv-05486
	)	
v.	)	
	)	Hon. Amy J. St. Eve
COMCAST	)	
CORPORATION and	)	
COMCAST SPOTLIGHT,	)	
LP,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

AMY J. ST. EVE, Circuit Judge*:

This antitrust suit was born when a monopolist in one market decided not to do business with a competitor from a related market. The monopolist, Comcast Corporation, denied its competitor, Viamedia, Inc., access (or access on terms Viamedia considered reasonable) to much-needed sales platforms called interconnects. Hurting as it lost revenue and customers turned to Comcast, Viamedia sued under Section 2 of the Sherman Act and various state antitrust laws. *See* Compl., R. 1; Am. Compl., R. 40.

* Sitting by designation (R. 346).

At the motion-to-dismiss stage, the Court ruled that Comcast had no antitrust duty to deal with Viamedia and thus its refusal to deal was not cognizably anticompetitive under *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004), and its progeny. *Viamedia, Inc. v. Comcast Corp.*, 218 F. Supp. 3d 674, 698 69 (N.D. Ill. 2016); *Viamedia, Inc. v. Comcast Corp.*, No. 16-CV-5486, 2017 WL 698681, at *3 6 (N.D. Ill. Feb. 22, 2017). Now, at the summary-judgment stage, the question is whether Comcast s conduct can be characterized as something more tying, exclusive dealing, or another form of anticompetitive conduct. It cannot. Undisputed facts reveal that Viamedia s alternative theories are lacking as a matter of law. Undisputed facts demonstrate that Comcast s refusal to deal with Viamedia not coercive conduct directed at their mutual customers is what caused Viamedia s injuries and damages.

Before the Court are Comcast s motion for summary judgment (R. 264), motion to exclude opinions proffered by Viamedia, Inc. s damages expert, Thomas Lys, Ph.D. (R. 212), and motion to exclude certain opinions proffered by Viamedia s liability expert, Harold Furchtgott-Roth (R. 208). For the reasons explained below, the Court grants Comcast s motion for summary judgment, grants in part Comcast s motion to exclude Dr. Furchtgott-Roth s opinions and denies the remainder as moot, grants Comcast s motion to exclude Dr. Lys s opinions, and enters judgment in Comcast s favor.

BACKGROUND

I. Factual Background

Northern District of Illinois Local Rule 56.1 frames how district courts receive facts at the summary-judgment stage. *See Delapaz v. Richardson*, 634 F.3d 895, 899 (7th Cir. 2011). Local Rule 56.1(a)(3) requires the movant to provide a statement of material facts as to which the moving party contends there is no genuine issue and that entitle the moving party to a judgment as a matter of law. L.R. 56.1(a)(3); *Curtis v. Costco Wholesale Corp.*, 807 F.3d 215, 219 (7th Cir. 2015). The nonmovant must then file a response to each numbered paragraph in the moving party s statement, including, in the case of any disagreement, specific references to the affidavits, parts of the record, and other supporting materials relied upon. L.R. 56.1(b)(3)(B); *Petty v. Chicago*, 754 F.3d 416, 420 (7th Cir. 2014). The nonmovant may also submit a separate statement of additional facts that require the denial of summary judgment, including references to the affidavits, parts of the record, and other materials relied upon to support those facts. L.R. 56.1 (b)(3)(C); *see also Ciomber v. Coop. Plus, Inc.*, 527 F.3d 635, 643 44 (7th Cir. 2008).

The purpose of Local Rule 56.1 statements and responses is to identify the relevant admissible evidence supporting the material facts, not to make factual or legal arguments. *Cady v. Sheahan*, 467 F.3d 1057, 1060 (7th Cir. 2006); *see also United States v. 5443 Suffield Terrace, Skokie, Ill.*, 607 F.3d 504, 510 (7th Cir. 2010) ([S]ummary judgment may only be defeated by pointing to admissible evidence in the summary judgment record that creates a genuine issue of material fact, and it was not the district court s job to sift through the record and make [a claimant s] case for him). Unresponsive, argumentative, evasive, and unsupported denials are improper, *e.g.*, *Morrill v. Nielsen*, *Phillips v. Quality Terminal Servs., LLC*, 855 F. Supp. 2d 764, 771 (N.D. Ill. 2012), and district courts may disregard improper denials and deem the opponent s facts admitted, *e.g.*, *Aberman v. Bd. of Educ. of Chi.*, 242 F. Supp. 3d 672, 677 (N.D. Ill. 2017). *See also Boss v. Castro*, 816 F.3d 910, 914 (7th Cir. 2016) (The district court s discretion to require strict compliance with Local Rule 56.1 has been upheld time and again.). Moreover, [w]hen reviewing a summary judgment motion, courts may only consider admissible evidence. FED. R. CIV. P. 56(c); *McGreal v. Vill. of Orland Park*, 850 F.3d 308, 312-14 (7th Cir. 2017). To be considered on summary judgment, evidence must be admissible at trial, though the form produced at summary judgment need not be admissible. *Cairel v. Alderden*, 821 F.3d 823, 830 (7th Cir. 2016) (quoting *Wragg v. Village of Thornton*, 604 F.3d 464, 466 (7th Cir. 2010)). With those principles and the Rule 56 standard in mind, the parties respective Local Rule 56.1 statements and responses describe the following backdrop to this lawsuit.[1]

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[1] Comcast argues that Viamedia s Statement of Additional Facts exceeds the court-ordered limit of 75 facts (*see* R. 315) by compounding multiple facts into single paragraphs, and asks the Court to strike the stated facts exceeding that limit. R. 339 at 25. Although Comcast has a point Viamedia s fact-packing borders on gamesmanship the Court, in its discretion, will not strike any of Viamedia s stated facts. *See Benuzzi v. Bd. of Educ. of Chi.*, 647 F.3d 652, 655 (7th Cir. 2011) (courts have broad discretion in enforcing local rules). Comcast is (though less so) guilty of the same tactic, and the additional facts Viamedia offers do not impact the Court s analysis.

A. The Spot Cable Business and Interconnects

Cable networks, like ESPN or CNN, typically allocate small windows of air time two to three minutes per hour to the multichannel video programming distributors (MVPDs) that show their programming. CSF ¶ 7.[2] These windows, according to industry parlance, are called availabilities, avails, or spot cable ads. *Id.* ¶¶ 7, 9. About a quarter of the time, MVPDs retain those avails to advertise their or their affiliates services. VSF ¶ 5. MVPDs sell the remainder to outside advertisers and how they choose to do so is the focus of this case. *See* CSF ¶ 9.

There are many MVPDs nationwide, including Comcast, RCN Corporation, Wide Open West (WOW!), Charter Communications, Inc., Atlantic Broadband, and Verizon Communications. MVPDs come in different forms cable operators, like Comcast or Charter; telecom providers, like Verizon and AT&T; overbuilders, like WOW! and RCN; and satellite providers, like DISH or DirectTV. *Id.* ¶ 8. Most MVPDs offer their services in one or more metropolitan regions, called designated market areas (DMAs). *Id.* ¶ 5. There are typically four or more MVPDs in a DMA. Comcast Ex. 2, Furchtgott-Roth Report ¶ 17 (R. 273-5).

In any given DMA, there are different ways in which MVPDs sell avails to advertisers. Some

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[2] The Court will refer to Comcast s Rule 56.1 Statement of Undisputed Facts with Viamedia s responses (R. 327) as CSF, and Viamedia s Rule 56.1 Statement of Additional Facts with Comcast s responses (R. 341) as VSF. Unless otherwise noted specifically, with a Resp. to ¶ a citation to a paragraph refers to the paragraph itself and not to the opposing party s response.

MVPDs sell directly through their own sales force. CSF ¶ 10. Others hire advertising-representation firms that specialize in spot cable advertising (Ad Reps). *Id.* ¶ 11. Viamedia is such an Ad Rep, and it has no corporate affiliation with any MVPD. *Id.* ¶ 13. Viamedia, in fact, is the only independent Ad Rep with significant market presence. VSF ¶ 9.[3] Comcast, under the trade name Comcast Spotlight, also does business as an Ad Rep, both on its own behalf and on behalf of other MVPDs.[4] CSF ¶ 5.

When an MVPD hires an Ad Rep, the two typically enter into an advertising purchase and sale agreement. *Id.* ¶ 11. Under these agreements, an Ad Rep is responsible for managing and selling an MVPDs avail inventory (or some portion of it) to advertisers. *Id.* ¶¶ 11 12; VSF ¶ 1. Ad Reps can represent their MVPD customers: (1) locally, selling only a part of an MVPD s avails in a DMA to local advertisers; (2) regionally, selling all of the MVPD s avails in a DMA; or (3) nationally. Furchtgott-Roth Report ¶ 21. In any event, Ad Reps sales responsibilities entail ancillary responsibilities, too, including: marketing and pricing the avails; maintaining the software and hardware needed to run, insert, traffic, monitor and advertise spot cable ads; organizing inventory into schedules and ensuring each ad runs correctly during those

[3] Comcast challenges this fact, proffered by Viamedia s expert Dr. Furchtgott-Roth, as unsupported because Dr. Furchtgott-Roth s opinions are inadmissible. *See* Furchtgott-Roth Report ¶ 44. Comcast, however, did not move to exclude this opinion from Dr. Furchtgott-Roth s report. *See* R. 211.

[4] Comcast Cable Communications Management, LLC is a successor to Comcast Spotlight, and it is a wholly owned subsidiary of Comcast Corporation. CSF ¶ 5. Both parties nevertheless refer to Comcast s spot cable ad rep business as Spotlight, and so will the Court.

schedules; and performing financial services, like accounting, billing, and collection. VSF ¶ 1. Ad Reps are also responsible for working with interconnects to sell avails. *Id.* These services make up Ad Rep Services, according to Viamedia. *Id.*; *see also* Furchtgott-Roth Report ¶¶ 22 29.

An interconnect is a one stop shop where advertisers can purchase spot cable ads on a DMA-wide basis. CSF ¶ 16. Developed by MVPDs in the 1990s, interconnects solve a market inefficiency. Before interconnects, an advertiser wanting to reach television audiences with commercials running at the same time on the same channel across the DMA had to either rely on over-the-air broadcast stations exclusively or negotiate separately with each MVPD. CSF ¶¶ 14 15, Resp. to ¶ 14. An interconnect of which there is one per DMA fixes that problem by pooling together avails among the DMAs MVPDs, scheduling allocations, selling and coordinating the sale of those avails, and billing the parties. *Id.* ¶ 17, Resp. to ¶ 17. These collective services make up Interconnect Services, according to Viamedia. *Id.*; *see also* Furchtgott-Roth Report ¶¶ 30 42.

Over the last decade or so, the largest MVPD in a DMA has come to operate that DMA s interconnect. *Id.* ¶ 18; *see also* Am. Compl. ¶¶ 13, 44. In operating the interconnect, the controlling MVPD makes investments to support and maintain the platform. The degree and nature of those investments are disputed, but, at a minimum, MVPDs invest in and maintain a sales infrastructure for the interconnects. CSF ¶ 20, Resp. to ¶ 20; *see also* Comcast Ex. 14 at 147:11 14 (David Solomon, Viamedia s Chief Revenue Officer, testifying that, I m sure [Comcast] ha[s] over the past

18 years . . . spent significant [sic] to establish support, build and maintain their infrastructure over the interconnects).

Ad Reps, pursuant to the purchase and sale agreements, profit from the sale of MVPDs avails based on an agreed revenue share, or split, with the MVPD. CSF ¶ 38. The split is the percentage division of the revenue generated from the avails sales, with a share going to the Ad Rep and the remainder to the MVPD. *Id.* A higher split share for the Ad Rep means a worse price for the Ad Rep s services to the MVPD, and vice versa. *Id.* ¶ 39. Also important, of course, is the amount of revenue generated an MVPD could concede a less favorable split if it thought that the Ad Rep would be able to generate more revenue. *Id.*, Resp. to ¶¶ 38, 39. Ad Reps also sometimes provide MVPDs with minimum-revenue guarantees. *Id.* ¶ 40. Revenue splits and guarantees are critical points of competition between Ad Rep firms vying for MVPD business. *Id.* ¶ 41.

As to other terms of Ad Rep-MVPD agreements, the industry standard is exclusive, region-wide, full-turnkey representation. CSF ¶¶ 25 27. In a full-turnkey representation, the MVPD sells all of its avails in one or more DMA (absent the portion it wants to retain for self-advertising) to a single Ad Rep. *Id.* The Ad Rep then enjoys the exclusive right to manage and sell the avails. *Id.* ¶ 27; VSF ¶ 2. This arrangement offers one stop shopping for both MVDPs and Ad Reps. CSF ¶ 28. Full-turnkey representation comes with other services, too; Viamedia, for example, assists MVPDs with their branding efforts, product promotions, and technical problems. VSF ¶ 6.

Though the most prominent, full-turnkey is not the only form of Ad Rep Services. Some MVPD customers hire Ad Reps to represent them locally, and sign over only a portion of their avails in a DMA. *E.g.*, Furchtgott-Roth Report ¶¶ 24 25; *see also id.* ¶ 53 (Spot Cable Ad Rep Services and Interconnect Services are separate products regardless of whether Spot Cable Ad Rep Services are provided on a full turnkey basis). Other MVPDs may self-provide Ad Rep Services. Furchtgott-Roth Report ¶¶ 24 25.

Interconnect operators can also work directly with an MVPD customer to sell a portion of the MVPD s avails without a third-party Ad Rep. *See id.* ¶ 53; CSF ¶ 29. This arrangement is called an interconnect-only agreement. CSF ¶ 30. In such an agreement, the MVPD sells a portion of its avails to the interconnect operator for sale on a DMA-wide basis. *Id.* ¶ 29. Interconnect-only agreements allow interconnect operators to provide Interconnect Services directly to MVPDs. VSF ¶ 67. To sell the remaining avails on a local (*i.e.*, not regional or DMA-wide) basis, MVPDs with an interconnect-only agreement may sell their own avails or hire an Ad Rep for local-only agreements. CSF ¶¶ 29, 31, 33, 126; *see also* VSF ¶ 67. Verizon and Frontier, Verizon s successor in certain DMAs, have previously opted for this arrangement in some DMAs. CSF ¶¶ 32 37. For its part, Comcast has been willing to enter into interconnect-only agreements; since December 2011, 14 percent of Comcast s agreements with MVPDs have been interconnect-only. *Id.* ¶ 129. Comcast entered into its most recent interconnect-only deal in September 2016. *Id.* ¶ 125; Comcast Ex. 58.

B. Comcast's Competition with Viamedia and Control of the Interconnects

Viamedia and Comcast compete as Ad Reps for business from MVPD clients in many DMAs. VSF ¶ 9. The record reflects that both have respective advantages. Comcast, as a large MVPD, and in some DMAs the largest (and therefore the operator of the interconnect), requires less incremental operation expenses to represent fellow MVPDs. CSF ¶ 115; Comcast Ex. 96 at 16 (internal Viamedia presentation stating Viamedia can not [sic] compete economically within the footprint of a major cable company); *see also* Comcast Ex. 18 at 93:5 19. Particularly relevant here, Comcast operates the interconnects in Chicago, Detroit, and Hartford, Connecticut. *Id.* ¶ 10. At the same time, some MVPDs have expressed that all things being equal they would prefer that a competitor, like Comcast, not represent them. VSF ¶ 7; Viamedia Ex. 69 at 8 (RCN is not comfortable having its largest and most formidable rival as its representative in the spot cable market). This benefits an unaffiliated Ad Rep, like Viamedia. *Id.* Viamedia s former Chief Financial Officer, Christopher Black, has also testified that Viamedia had [l]ong term relationships with . . . certain MVPDs and provided strong customer service. *Id.* ¶¶ 6, 8; Viamedia Ex. 8. Both Viamedia and Comcast pursue full-turnkey relationships with their MVPD clients, *Id.* ¶ 55; VSF ¶ 7, although, as noted, Comcast has entered into interconnect-only agreements with some frequency.

Ad Reps require interconnect access to compete effectively for MVPDs business because of the substantial amount of advertising revenue interconnects generate. Am. Compl. ¶ 73; CSF ¶ 111; VSF ¶ 20. The parties engage in a semantic debate about whether Ad Reps access interconnects on behalf of their MVPD clients, and whether the MVPD clients feel as though they participate in the interconnects, but the economic facts of the transaction are straightforward. For an Ad Rep to obtain access, the interconnect operator contracts with the Ad Rep to acquire a portion of ad inventory from the Ad Rep, which the Ad Rep has already acquired responsibility for selling from its MVPD-client. *See* CSF ¶ 42; Comcast Ex. 34. The interconnect operator then arranges for the sale of those avails on the interconnect, and distributes proceeds to the Ad Rep accordingly. *Id.*

This was the agreement Comcast and Viamedia entered into in 2003. *Id.* ¶¶ 42 43. Pursuant to that agreement, Comcast had the exclusive right to sell through its Chicago and Detroit interconnects a portion of an ad inventory for which Viamedia had acquired responsibility from two of its clients, RCN and WOW!. *Id.* ¶ 43. Viamedia s representations of RCN and WOW! were, as is typical, exclusive and full-turnkey, meaning that RCN and WOW! could not resell their avails through another third party in the Chicago and Detroit DMAs. *Id.* ¶¶ 44, 49. Viamedia s exclusive relationship with RCN was to expire at the end of 2015, and its exclusive relationship with WOW! was to expire at the end of 2014. CSF ¶¶ 88, 96; VSF ¶¶ 26, 32. Further, the 2003 agreement contained a non-solicitation clause, which prohibited Comcast from contacting RCN or WOW! for certain periods. CSF ¶ 45. The 2003 agreement between Comcast and Viamedia contemplated an expiration date of May 31, 2012. *Id.* ¶ 46.

Months before that expiration date, in December 2011, Comcast notified Viamedia that it would not be renewing the agreement. VSF ¶ 15; CSF ¶ 47. As a result, from June 2012 until the expiration of Viamedia s exclusive contracts with RCN and WOW!, Viamedia, RCN, and WOW! lost out on revenue they may have made if Viamedia could have continued to use Comcast s interconnects. *See* VSF ¶ 17.

Comcast did not renew its contract with Viamedia so that it could pursue full-turnkey relationships with RCN and WOW!. *Id.* ¶ 15. According to Comcast, it prefers to do direct deals with MVPDs rather than intermediaries like Viamedia. CSF ¶ 48. Put another way, Comcast s strategy, starting in 2011, was to get MVPDs to employ Comcast on a full-turnkey basis. VSF ¶ 15; Viamedia Ex. 57; *see also, e.g.*, Viamedia Ex. 53 (citing Comcast s [r]ealigned business strategy for 2012 and beyond with non-renewal of Viamedia contract for allowing for full turnkey opportunities into the future.). To that end, Comcast stopped contracting with middlemen media firms, such a Viamedia. Viamedia Ex. 69 at 9. One Comcast executive explained: Working through a middleman, intermediary, like Viamedia really brought no value to the table other than their contract with their respective MVPDs, and so the company looked to deal directly with the MVPDs. Viamedia Ex. 21 at 167.

Whatever Comcast s motivations, its strategy and Viamedia s resultant inability to access the interconnects in Chicago and Detroit cost Viamedia, RCN, and WOW! millions of dollars in revenue between June 2012 and 2015. VSF ¶ 23. This came as no surprise to Comcast. In 2011, it knew that Viamedia had the exclusive right to sell all of WOW! and RCN s avails in Chicago and Detroit for several years into the future, VSF ¶ 14, and it conducted an internal analysis that projected that its decision to not renew with Viamedia would negatively impact Comcast Spotlight, Viamedia, RCN, and WOW! in 2012, *id.* ¶ 16. In addition to Chicago and Detroit, Comcast has denied Viamedia s request to enter into an interconnect agreement with it in the Hartford DMA, where Viamedia represents Frontier. *Id.* ¶ 18.

In 2014, however, Comcast and Viamedia began negotiating a contract to permit Viamedia access to the Chicago, Detroit, and Hartford interconnects. *Id.*, Resp. to ¶ 18. WOW! even got involved, and directly requested that Comcast allow its avails (still contracted to Viamedia) to be sold on the interconnects immediately. *See* VSF ¶ 19.[5] Yet Comcast and Viamedia failed to reach terms. Viamedia s Chief Executive Officer, Mark Lieberman, called Comcast s offer neither fair nor reasonable. Comcast Ex. 116.

C. Viamedia's Subsequent Lost Business

From 2011, when Comcast notified Viamedia that it would not renew their interconnect agreement in Chicago and Detroit, until 2016, when Viamedia filed this lawsuit, Viamedia operated in 90 DMAs representing at least nine MVPDs. CSF ¶¶ 54, 57. In that period, Viamedia bid for and lost several MVPD clients and it attributes many of those losses, and others, to Comcast s conduct in Chicago, Detroit, and Hartford.

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[5] Viamedia paints these requests by WOW! as directly solicited proposals. VSF ¶ 19. To the extent Viamedia means that WOW! sought a direct, interconnect-only deal with Comcast, it is mistaken. The record makes clear that WOW! in 2014 was still under contract with Viamedia (and so could not directly engage Comcast for anything, even an interconnect-only deal), and that WOW! s 2014 request sought to get *Viamedia* back into the Chicago and Detroit interconnects. Viamedia Ex. 14 at 108:25 109:4; *id.* at 105:16 19 (emphasis added).

1. RCN

Up until 2015, Viamedia was RCN s only Ad Rep nationwide. VSF ¶ 32. In 2014, RCN and Viamedia began to negotiate renewing their full-turnkey agreements. CSF ¶ 96. During negotiations, Viamedia stepped back its guarantees and gave a less favorable offer in November of that year, which caused RCN to react negatively. CSF ¶ 97. RCN then, and for apparently the first time in its relationship with Viamedia, requested Viamedia s financials, which showed that the company was suffering. VSF ¶ 33. According to Viamedia, without interconnect access in Chicago and Detroit, it was unable to make a competitive financial offer. *Id.* ¶ 33. RCN requested a bid for exclusive, full-turnkey services from Comcast in 2015. CSF ¶ 99. It never sought from Comcast an interconnect-only agreement. *See id.* Comcast ultimately offered superior terms, which, as a former RCN executive testified, made the offers nowhere near equal and a not [ ] very difficult decision for RCN to make. *Id.* ¶ 100. It selected Comcast as its full-turnkey Ad Rep, knowing that its decision could result in Viamedia exiting the Chicago DMA market. *Id.* ¶ 103.

RCN understood that it could not have its avails sold on Comcast-operated interconnects if it sought to do so through a third-party Ad Rep, like Viamedia. *Id.*, Resp. to ¶ 104; *see also* VSF ¶ 19. RCN wrote to the Federal Communications Commission during Comcast s proposed merger with Times Warner Cable (TWC), and explained that Comcast limit[s] access to the interconnects to those firms [*i.e.*, MVPDs] that eschew the use of Viamedia and other third party representatives. Viamedia Ex. 69. It cited Comcast s policy, that it does not typically contract with middlemen media firms, such as Viamedia. *Id.*

2. WOW!

WOW! and Viamedia s relationship began in 2001. VSF ¶ 26. As of 2015, and after several contract renewals, Viamedia represented WOW! in 12 DMAs. *Id.* Expecting its contract with WOW! to expire at the end of 2014, WOW! solicited bids from Viamedia and Comcast in October 2013. CSF ¶ 88. WOW! selected Viamedia, but only for a year to the end of 2015. *Id.* ¶ 89. In 2015, WOW! issued another bid to Comcast and Viamedia seeking proposals for exclusive, full-turnkey representation in eight DMAs, including Chicago and Detroit. *Id.* ¶ 90. WOW!, like RCN, never requested an interconnect-only deal from Comcast. *See id.* By the 2015 request for bids, WOW! was very unhappy that Viamedia had not been able to sell its avails on the Chicago and Detroit interconnects. VSF ¶ 27. Comcast again offered better financial terms to represent WOW! in the Chicago and Detroit DMAs, and WOW! selected Comcast in those regions. CSF 11 91, 92. In so doing, WOW! recognized that its decision could force Viamedia out of the Chicago and Detroit regions. *Id.* ¶ 94. WOW!, however, selected Viamedia to represent it in other DMAs, like Columbus, Cleveland, and Tampa. VSF ¶ 29.

WOW! valued having its avails sold on the interconnects and the resulting substantial revenue. *Id.* ¶ 28. WOW!, like RCN, understood that if it wanted its avails sold on the Comcast-operated interconnects in Chicago and Detroit, it would need to directly contract with Comcast it could not do so through Viamedia. *Id.* In weighing Viamedia and Comcast, for example, WOW! listed Comcast s interconnect access as a pro and Viamedia s lack thereof as a con. Viamedia Ex. 68. Internal WOW! emails similarly reflect that the company believed it needed to have a rep agreement with Comcast to have its avails sold on the interconnects. CSF ¶ 95, Resp. to ¶ 95.

3. Verizon

In 2006, Viamedia and Verizon entered into a full-turnkey representation agreement for nine DMAs. CSF ¶ 58. In 2009, the parties extended the agreement through December 2013, but contracted to allow for Verizon to negotiate for the sale of regional and/or national Commercial Advertising in any Other Market by means of an interconnect in such DMA, including Dallas, Los Angeles, and New York. *Id.* ¶ 59. In May 2010, Verizon and TWC entered into an agreement, pursuant to which TWC purchased 40 percent of Verizon s avails in Dallas, Los Angeles, and New York where TWC operated the interconnects for sale on TWC s interconnects. *Id.* ¶ 60. That agreement contained a Local Business Option. If TWC met certain performance metrics in 2011 and 2012, it could elect to present Verizon s local advertising sales business beginning in 2014. *Id.* ¶ 61.

In January 2013, pursuant to the Verizon-TWC contract, TWC notified Verizon that it was contemplating exercising the Local Business Option and attached its performance-metric calculations. *Id.* ¶ 62. Verizon responded on February 15, 2015, with a metrics report. Under the original TWC-Verizon contract, TWC had until March 15, 2013, or 30 days after receipt of the metrics report to exercise its Local Business Option. VSF ¶ 50. On March 15, 2013, however, the parties amended the agreement and extended the date by which TWC could exercise the Local Business Option to April 5, 2013. VSF ¶ 50, Resp. to ¶ 50. TWC exercised the Local Business Option on that day. *Id.* ¶ 50. Verizon then replaced Viamedia with TWC in those DMAs. *See* CSF ¶ 65. Further, and also in

2013, Verizon informed Viamedia that it had selected other Ad Reps including Bright House, Cox, and Comcast to represent it in several respective DMAs. VSF ¶ 47, Resp. to ¶ 47.

Before then, Verizon and Viamedia had started to negotiate for Viamedia s continued representation after 2013. *Id.* ¶ 50. During those negotiations, Verizon expressed concerns about Viamedia s fiscal health. *Id.* ¶ 50. In each DMA that Viamedia lost Verizon s business, it failed to match the terms offered by the competing Ad Reps. CSF ¶ 69.

4. Frontier

Viamedia has been an Ad Rep for Frontier since 2010. VSF ¶ 37. In 2014, Frontier acquired AT&T s MVPD system in Hartford. CSF ¶ 71. Comcast, which operates the Hartford interconnect, had previously represented AT&T on a full-turnkey basis, and, under that agreement, any successor (like Frontier) had the right to assume Comcast s Ad Rep agreement. *Id.* ¶ 72. Frontier instead entered into an exclusive, full-turnkey agreement with Viamedia for the Hartford DMA, set to expire at the end of 2018. *Id.* ¶ 73; VSF ¶ 37. Comcast, however, has refused to enter into an agreement with Viamedia to allow for the sale of Frontier s avails on the Hartford interconnect. *Id.* ¶ 39. As a result, Viamedia and Frontier have not benefited from those potential sales, and Frontier s revenues fell below the baselines guaranteed by Viamedia in 2015 and 2016. *Id.* ¶ 41.

Outside of Hartford, Viamedia bid for Frontier s business in Los Angeles and Dallas (where Comcast does not run the interconnects). CSF ¶ 77. Frontier rejected Viamedia s offer because it fell significantly below market value. *Id.* ¶ 78. Viamedia also lost

Frontier s business in Tampa (where Comcast also does not control the interconnects) to Bright House. *Id.* ¶ 79.

5. Atlantic Broadband

In 2014, Atlantic Broadband sought bids from Comcast and Viamedia for exclusive, full-turnkey representation in seven DMAs (none of which was Chicago, Detroit, or Hartford). *Id.* ¶ 82. At the time, Comcast already represented Atlantic Broadband in each DMA; Viamedia had never represented Broadband. *Id.* ¶¶ 84 85. Comcast offered Atlantic Broadband terms superior to Viamedia. *Id.* ¶ 86. Atlantic Broadband chose Comcast. *Id.* ¶ 87. Viamedia, however, believes that it was well positioned to compete for Atlantic Broadband s business, and could have offered better terms and a more substantial guarantee if it had been allowed access to Comcast-controlled interconnects. VSF ¶¶ 51, 53.

6. Other Claimed Losses

Viamedia also claims that Comcast s refusal to allow its acquired avails to be sold on the Chicago, Detroit, and Hartford interconnects has harmed it in a bevy of ways. The refusal, according to Viamedia, has forced it to negotiate debt amendments, and incur bank and legal fees. *Id.* ¶ 54. In addition, it has had to pay certain personnel expenses, like retention bonuses and severance payments, as well as wasteful fixed expenses, like rent on unused office space in Chicago. *Id.* In 2012, Viamedia generated $212 million in revenue and had $23.5 million in EBITA annually, plus 460 employees who worked for 32 MVPD partners covering 4.7 million subscribers in 57 DMAs. *Id.* ¶ 56. Since 2012, however, Viamedia claims to have lost millions of investment dollars, its good reputation, talented employees, and the ability to renew or obtain new contracts with MVPD partners. *Id.* ¶ 57.

II. Procedural Background

Out of that factual backdrop, Viamedia filed this lawsuit on May 23, 2016. Viamedia brings claims of monopolization and attempted monopolization by Comcast in markets where it operates the interconnects in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2. Viamedia additionally raises state-law antitrust claims under the Illinois Antitrust Act, 740 ILCS 10/3, Michigan Antitrust Reform Act, Mich. Comp. Laws § 445.771, and Connecticut Antitrust Act, Title 35, § 35-27.[6] (Viamedia also brought a claim for tortious interference with business expectancy, which it has since abandoned. *See* R. 326 at 14 n.2.) For Comcast s supposed antitrust wrongs, Viamedia seeks damages and asks the Court to [e]njoin[ ] Comcast from engaging in the anticompetitive . . . conduct alleged, including any effort to exclude Viamedia or its MVPD clients from participating on a fair and open basis in the Interconnects. Compl. at 46; Am Compl. at 50.

A. The Motion-to-Dismiss Decisions

Comcast moved to dismiss the first complaint. R. 22, 23. As every claim of monopolization or attempted monopolization requires anticompetitive conduct, Vi-

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[6] Comcast and Viamedia agree that there is no material difference between the federal antitrust claims and their state-law claims. R. 271 at 11 n.3; R. 23 at 15; R. 28 at 15. For the same reasons why Viamedia s federal antitrust law claims fail (as explained below), so too does its state-law claims.

amedia proffered three in response to Comcast s motion to dismiss: tying, of Comcast s Interconnect Services to its Ad Rep Services; exclusive dealing, in that Comcast s contracts with MVPDs were exclusive; and a refusal to deal, by denying interconnect agreements with Viamedia or offering commercially unacceptable terms.[7] Viamedia, via a surreply, made clear that it was pursuing only straightforward tying and exclusive dealing theories, plus refusal to deal or essential facilities claims; it was not pursuing a free-standing monopolization claim. R. 32. The Court held that Viamedia sufficiently pled tying and exclusive dealing so as to permit discovery on those claims, but dismissed the refusal to deal claim without prejudice because it did not meet the high bar set by *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), and *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).[8] Namely, Viamedia did not plead that Comcast s exclusion of it from the interconnects was irrational but for an anticompetitive purpose. *See Viamedia, Inc. v. Comcast Corp.*, 218 F. Supp. 3d 674, 698 99 (N.D. Ill. 2016) (*Viamedia I*).

Viamedia amended its complaint, realleging its refusal to deal claim. Comcast moved to dismiss this part of the amended complaint, R. 45, 46, which the Court granted. Again, the Court ruled, Viamedia did

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[7] Viamedia also raised a monopoly-leveraging theory, but that claim is predicated on underlying anticompetitive activity. *See Schor v. Abbott Labs.*, 457 F.3d 608, 611 13 (7th Cir. 2006).

[8] At the pleading stage, Viamedia also complained that Comcast had threatened to shut Viamedia and its MVPD clients out of using National Cable Communications LLC (NCC), a multi-DMA exchange. *See* Compl. ¶ 59. Viamedia appears to no longer pursue that theory, as NCC is mentioned in neither its response brief nor its Statement of Additional Facts.

not plead that Comcast s decision to exclude it from the interconnects was an independently anticompetitive act. *Viamedia, Inc. v. Comcast Corp.*, No. 16-CV-5486, 2017 WL 698681, at *4 6 (N.D. Ill. Feb. 22, 2017) (*Viamedia II*). As such, this case proceeded to discovery on Viamedia s tying and exclusive dealing claims.

B. Comcast's Liability and Damages Experts

During discovery, and in support of its case, Viamedia identified and proffered two expert witnesses: Dr. Furchtgott-Roth, to opine on Comcast s liability; and Dr. Lys, to opine on damages.

1. Dr. Furchtgott-Roth's Opinions

Dr. Furchtgott-Roth s opinions touch on the nature and extent of Comcast s monopoly power, the distinction between Ad Rep Services and Interconnect Services, and the exclusionary nature of Comcast s actions and their impact on the Ad Rep Services market. According to Dr. Furchtgott-Roth, Ad Rep Services and Interconnect Services are separate products because there is a sufficient demand to purchase those services separately. Furchtgott-Roth Report ¶ 47. He cites substantial evidence in support, including Viamedia s own business model and the MVPDs that receive unbundled Ad Rep and Interconnect Services. By a conservative estimate, he submits, 21.5% of cable subscribers use an MVPD that relies on unbundled services, once subscribers to MVPDs that self-provide Ad Rep Services are removed from the mix. *Id.* ¶ 50. He includes in that group MVPDs that enter into full-turnkey agreements with third-party Ad Reps, which in turn contract with the interconnect operator to have a portion of the avails sold on the interconnects. *Id.* Dr. Furchtgott-Roth further notes that, although Interconnect Services also entail the selling of avails to advertisers, Ad Rep Services include additional back office services, unlike Interconnect Services, which entail creating and maintaining schedules of advertising, inserting advertising, negotiating with and monitoring Interconnect operators, and allocating advertising inventory among multiple sales channels. *Id.* ¶ 51. In further support of his separate-products opinion, Dr. Furchtgott-Roth states that some MVPDs unbundle services by entering into interconnect-only agreements and self-providing Ad Rep Services. *Id.* ¶ 53.

Having defined separate products, Dr. Furchtgott-Roth explains his tying opinion. Interconnect Services are the tying product, and Ad Rep Services are the tied product. *Id.* ¶ 63. Evidence of Comcast s tying policy, according to Dr. Furchtgott-Roth, is found in testimony in which a Comcast executive who worked in the Chicago and Detroit DMAs agreed with the proposition that if an MVPD wants to get access to Comcast [Spotlight] controlled Interconnect, it has to hire Comcast [Spotlight] as its ad sales representative. *Id.* ¶ 64. Dr. Furchtgott-Roth also cites testimony and documents suggesting that WOW! and RCN understood that they had to purchase Ad Rep Services from Comcast Spotlight to obtain access to the interconnects in 2014 and 2015. *Id.* Dr. Furchtgott-Roth reasons further that Comcast had to exclude Viamedia from Comcast-controlled interconnects as a necessary part of this tying policy, as it ostensibly made clear in 2011 when it announced that it was not going to renew its Interconnect agreement with Viamedia as a continuation of a strategy to have full turnkey direct relationships with the MVPDs. *Id.* ¶ 65. Similarly, Comcast Spotlight s chief operating officer testified that non-renewal with Viamedia freed [Comcast Spotlight] up to have the opportunity to present and have a direct relationship with WOW and RCN. *Id.* That tying practice has manifested in at least ten other DMAs as well, according to Dr. Furchtgott-Roth, as Comcast has also declined Viamedia interconnect access in those DMAs. *Id.* ¶ 69. Dr. Furchtgott-Roth opines further that the same conduct that amounts to tying also amounts to exclusive dealing. *Id.* ¶ 72.

These practices lead Dr. Furchtgott-Roth to conclude that Comcast has foreclosed competition in the market for Ad Rep Services. *Id.* ¶ 90. That is, by tying Spot Cable Ad Rep Services to Interconnect Services and entering into multi-year, exclusive contracts to provide both services as a bundle, Comcast Spotlight has created a formidable competitive advantage for itself over Viamedia. *Id.* ¶ 87. There is additional market foreclosure, Dr. Furchtgott-Roth opines, because MVPDs recognize that interconnect access is necessary to maximize their profits on avails, and Comcast has cut off Viamedia s access to Comcast-controlled interconnects. *Id.* ¶ 89 90.

2. Dr. Lys's Opinions

Dr. Lys s Amended Report calculates the damages Viamedia has purportedly suffered as a result of Comcast s conduct. He opines, ultimately, that Comcast has caused Viamedia $158 million in damages. Comcast Ex. 6, Lys Am. Report ¶ 37 (R. 273-9). Dr. Lys s opinions assume Comcast s liability for committing anticompetitive conduct. *Id.* ¶ 16. His opinions make the additional assumptions albeit phrased as understanding[s] in his Amended Report that Comcast s anticompetitive behavior resulted in the loss of several MVPD contracts. *Id.* ¶¶ 57 59. Specifically, Dr. Lys predicates his opinions on the understanding that Comcast s anticompetitive conduct caused Viamedia to lose the RCN and WOW! agreements in 2015, had a material adverse effect on Viamedia s retention of an agreement with Verizon in 2013, and caused Viamedia to fail to obtain an agreement with Atlantic Broadband in 2014. *Id.* His opinions also assume that Comcast s exclusion of Viamedia from the interconnects in Chicago, Detroit, and Hartford caused Viamedia to lose interconnect-related revenues, *id.* ¶ 56, and that Viamedia lost out of pocket expenses from Comcast s conduct. *Id.* ¶ 60. Dr. Lys divides his damages opinions into seven categories. His ultimate conclusion analyzes Viamedia s damages relating to: (1) interconnect-revenue losses in Chicago and Detroit; (2) interconnect-revenue losses in Hartford; (3) lost future agreements with WOW! for two DMAs; (4) lost agreements with RCN for five DMAs; (5) lost agreements with Verizon for nine DMAs; (6) lost agreements with Atlantic Broadband for six DMAs; and (7) out-of-pocket expenses.

On April 4, 2018, the Court held an evidentiary hearing regarding Dr. Lys s opinions pursuant to *Daubert v. Merrell Dow Pharm.*, Inc., 509 U.S. 579 (1993), and Federal Rule of Evidence 702. At the hearing, Dr. Lys explained his Amended Report in greater detail. In addition, he confirmed that his Amended Report assumed causation. The facts supporting his causation assumptions had been provided by Viamedia s management, although Dr. Lys noted that he poked their assertions to ensure that they had some sound basis. Dr. Lys elaborated that he did not think causation in this case could be demonstrated with economic analysis, because the market is one for services, not commodities. At the hearing, Viamedia s counsel, too, confirmed that Dr. Lys was not offered as an expert on causation.[9]

LEGAL STANDARDS

I. Summary Judgment Standard

Summary judgment is appropriate if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. FED. R. CIV. P. 56(a). A genuine dispute as to any material fact exists if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In deciding summary-judgment motions, facts must be viewed in the light most favorable to the nonmoving party but only if there is a genuine dispute as to those facts. *Scott v. Harris*, 550 U.S. 372, 380 (2007).

The party seeking summary judgment has the burden of establishing that there is no genuine dispute as to any material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). After a properly supported motion for summary judgment is made, the adverse party must set forth specific facts showing that there is a genuine issue for trial. *Anderson*, 477 U.S. at 255 (quotations omitted). That is, the non-movant must point to specific facts showing that there is a genuine issue for trial, and inferences relying on mere speculation or conjecture will not suffice. *DiPerna v. Chicago Sch. of Prof'l Psychology*, 893 F.3d 1001, 1006 (7th Cir. 2018) (citation omitted); *see also Bunch v. United States*, 880 F.3d 938, 941 (7th Cir.

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[9] Belatedly, and despite not designating Dr. Lys as causation expert, Viamedia submitted additional opinions from Dr. Lys, including opinions regarding causation. The Court granted Comcast s motion to strike those opinions. R. 283.

2018) (The party that bears the burden of proof for an issue at trial must cite the facts which it believes [would] satisf[y] that burden and demonstrate why the record is so one-sided as to rule out the prospect of a finding in favor of the non-movant.) (quoting *Hotel 71 Mezz Lender LLC v. Nat'l Ret. Fund*, 778 F.3d 593, 601 (7th Cir. 2015)). If the nonmovant fails to make a showing sufficient to establish the existence of an element essential to that party s case, and on which that party will bear the burden of proof at trial, summary judgment must be granted. *Blow v. Bijora, Inc.*, 855 F.3d 793, 797-98 (7th Cir. 2017) (citation and quotations omitted). When ruling on a motion for summary judgment, [t]he court should neither look the other way to ignore genuine issues of material fact, nor strain to find material fact issues where there are none. *Simpkins v. DuPage Hous. Auth.*, 893 F.3d 962, 964 (7th Cir. 2018) (quoting *Sec'y of Labor, U.S. Dep't of Labor v. Lauritzen*, 835 F.2d 1529, 1534 (7th Cir. 1987)).

In the field of antitrust law, summary judgment serves a vital function it avoids wasteful trials and prevents lengthy litigation that may have a chilling effect on pro-competitive market forces. *Anderson News, L.L.C. v. Am. Media, Inc.*, --- F.3d. ----, 2018 WL 3716083, at *7 (2d Cir. July 19, 2018) (citation, modifications, and quotations omitted); *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986). Indeed, the very nature of antitrust litigation encourages summary disposition of such cases when permissible. *Collins v. Associated Pathologists, Ltd.*, 844 F.2d 473, 476 (7th Cir. 1988). That is not to say that there is heightened summary-judgment standard in antitrust cases there is not. Nevertheless, 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. *Mercatus Grp., LLC v. Lake Forest Hosp.*, 641 F.3d 834, 856 (7th Cir. 2011) (quoting *Nelson v. Monroe Reg'l Med. Center,* 925 F.2d 1555, 1578 (7th Cir. 1991)); *see also Matsushita*, 475 U.S. at 594; *It's My Party, Inc. v. Live Nation, Inc.*, 811 F.3d 676, 685 (4th Cir. 2016); *Indiana Grocery, Inc. v. Super Valu Stores, Inc.*, 864 F.2d 1409, 1412 (7th Cir. 1989).

II. Rule 702 and *Daubert* Standard

Courts may decide the admissibility of an expert witness s testimony in the context of a summary-judgment motion and when deciding whether the case presents a genuine issue of material fact warranting trial. *See, e.g.*, *Manpower, Inc. v. Ins. Co. of Pa.*, 732 F.3d 796, 806 (7th Cir. 2013); *Lewis v. CITGO Petroleum Corp.*, 561 F.3d 698, 704 (7th Cir. 2009); *see also Porter v. Whitehall Labs., Inc.*, 9 F.3d 607, 612 (7th Cir. 1993) (expert testimony must be admissible to be considered in a motion for summary judgment). Any assessment of the admissibility of expert witness testimony begins with Federal Rule of Evidence 702 and the Supreme Court s opinion in *Daubert*, as together they govern the admissibility of expert witness testimony. *Krik v. Exxon Mobil Corp.*, 870 F.3d 669, 673 (7th Cir. 2017); *see also Owens v. Auxilium Pharm., Inc.*, 895 F.3d 971, 972 (7th Cir. 2018). Rule 702 states:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) the expert s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.

FED. R. EVID. 702. In *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579 (1993), the Supreme Court interpreted Rule 702 to require the district court to act as an evidentiary gatekeeper, ensuring that an expert s testimony rests on a reliable foundation and is relevant to the task at hand. *Gopalratnam v. Hewlett-Packard Co.*, 877 F.3d 771, 778 (7th Cir. 2017).

In deciding whether to admit expert testimony under Rule 702 and *Daubert*, the district court must evaluate: (1) the proffered expert s *qualifications*; (2) the *reliability* of the expert s methodology; and (3) the *relevance* of the expert s testimony. *Gopalratnam*, 877 F.3d at 779 (emphases in original). A district court s evaluation of expert testimony under *Daubert* does not take the place of the jury to decide ultimate issues of credibility and accuracy. *Lapsley v. Xtek, Inc.*, 689 F.3d 802, 805 (7th Cir. 2012); *see also Ortiz v. City of Chicago*, 656 F.3d 523, 536 (7th Cir. 2011) (The admissibility determination is not intended to supplant the adversarial process, and so even shaky testimony may be admissible.). Once a court determines that the proposed expert testimony meets the *Daubert* threshold of relevance and reliability, the accuracy of the actual evidence is to be tested before the jury with the familiar tools of vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof. *Lapsley*, 689 F.3d at 805 (quoting *Daubert*, 509 U.S. at 596); *see also Manpower*, 732 F.3d at 806. The proponent of the expert bears the burden of demonstrating that the expert s testimony would satisfy the *Daubert* standard by a preponderance of the evidence. *Lewis*, 561 F.3d at 705; *see also United States v. Saunders*, 826 F.3d 363, 368 (7th Cir. 2016) ([F]or expert testimony to be admissible, the proponent of the evidence must establish that the expert s testimony is reliable (and relevant) by a preponderance of the evidence).

ANALYSIS

Comcast argues that summary judgment is appropriate for numerous reasons: Viamedia cannot establish anticompetitive conduct; Viamedia cannot establish causation, in the antitrust sense or for damages purposes; and Viamedia cannot otherwise establish harm to competition. The first two matters are dispositive, and so the Court will address only them. Along the way, the Court will address Comcast s motions to exclude Viamedia s expert opinions where relevant to the analysis.

I. Viamedia Cannot Establish Anticompetitive Conduct

Under Section 2 of the Sherman Act, [e]very person who shall monopolize, or attempt to monopolize is subject to antitrust liability. 15 U.S.C. § 2; *see also* 15 U.S.C. § 15 (providing individual right of action). But like its fraternal twin, Section 1, Section 2 bans less than its literal reading suggests. Simply possessing monopoly power and charging monopoly prices does not violate Section 2. *Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc.*, 555 U.S. 438, 447 48 (2009) (citing *United States v. Grinnell Corp.*, 384 U.S. 563, 570 571 (1966)). Instead, liability under Section 2, whether for monopolization or the attempt at it, requires anticompetitive conduct. *Mercatus Grp.*, 641 F.3d at 854; *Endsley v. City of Chicago*, 230 F.3d 276, 282 (7th Cir. 2000) (The offense of monopoly under § 2 requires the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident); *American Acad. Suppliers, Inc. v. Beckley-Cardy, Inc.*, 922 F.2d 1317, 1320 (7th Cir. 1991) (The offense of monopolization is the acquisition of monopoly by improper methods or, more commonly . . . the abuse of monopoly); *State of Ill. ex rel. Burris v. Panhandle E. Pipe Line Co.*, 935 F.2d 1469, 1481 (7th Cir. 1991) (Section 2 forbids not the intentional pursuit of monopoly power but the employment of unjustifiable means to gain that power.). Such conduct, or exclusionary practices, comes in many forms tie-in sales . . . , group boycotts, exclusive dealing . . . , or predatory pricing. *Schor*, 457 F.3d at 610.

Not usually counted among the traditional anticompetitive practices is a refusal to deal. Under well-rooted antitrust principles, firms generally have the right to determine with whom they will do business. *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919). That right extends to monopolists, as antitrust law does not require monopolists to cooperate with rivals by selling them products that would help the rivals to compete. *Schor*, 457 F.3d at 610; *see also Authenticom, Inc. v. CDK Glob., LLC*, 874 F.3d 1019, 1025 (7th Cir. 2017) (Even monopolists are almost never required to assist their competitors); *Goldwasser v. Ameritech Corp.*, 222 F.3d 390, 400 (7th Cir. 2000); *Olympia Equip. Leasing Co. v. W. Union Tel. Co.*, 797 F.2d 370, 375 (7th Cir. 1986).

In the flagship case of *Trinko*, the Supreme Court held that a telecommunications monopolist had no antitrust duty to deal with a rival, let alone a duty to deal on favorable terms. 540 U.S. 409 10. *Trinko* teaches:

> Firms may acquire monopoly power by establishing an infrastructure that renders them uniquely suited to serve their customers. Compelling such firms to share the source of their advantage is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities. Enforced sharing also requires 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. Moreover, compelling negotiation between competitors may facilitate the supreme evil of antitrust: collusion.

Id. at 407 08. A few years later, the Supreme Court echoed these principles. In *Linkline*, it held that another telecommunications monopolist had no duty to deal, let alone a duty to deal on favorable terms, in selling services to its competitors in the retail market. 555 U.S. at 450. *Linkline* confirmed that a monopolist can generally wield its upstream power to prevent rival firms from competing effectively in a downstream market. *Id.*; *see also Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064, 1074 (10th Cir. 2013) (Even a monopolist generally has no duty to share (or continue to share) its intellectual or physical property with a rival.).

Indisputably, Comcast refused to deal with Viamedia by disallowing it access (or refusing it reasonable access) to the Chicago, Detroit, and Hartford interconnects. *See, e.g.*, CSF ¶ 48, VSF ¶ 15. That was its right under *Trinko* and the law of this case. *See Viamedia I*, 218 F. Supp. 3d at 697-99; *Viamedia II*, 2017 WL 698681 at *4-6. As *Linkline* explains, the fact that Comcast may have refused to deal (or refused to deal on certain terms) to prevent Viamedia from competing effectively is largely irrelevant in the absence of a duty to deal. 555 U.S. at 450; *cf.* Furchtgott-Roth Report ¶¶ 97 120 (opining on whether Comcast s proposed justifications for excluding Viamedia from the Chicago and Detroit Interconnects are persuasive); Comcast Ex. 1.1, Report of Dennis W. Carlton (R. 273-2) (opining of the economic efficiencies of Comcast s conduct).

Viamedia, however, submits that Comcast s conduct constitutes more than a mere refusal to deal. R. 326 at 26. It argues that Comcast, in excluding Viamedia (and by extension, Viamedia s customers) from the interconnects and later taking RCN s and WOW! s business, has engaged in the distinct practices of tying, exclusive dealing, or general exclusionary conduct. *See Viamedia I*, 218 F. Supp. 3d at 699. Yet discovery has demonstrated otherwise. The record leaves no genuine issue of material fact regarding the viability of Viamedia s alternative theories.

A. There Is Insufficient Evidence that Comcast Engaged in Anticompetitive Tying

Viamedia claims that Comcast tied access to the interconnects, or Interconnect Services (the tying product), to Comcast s Ad Rep Services (the tied product). A tying arrangement is an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier. *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 461 62 (1992) (quoting *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 6 (1958)). The Supreme Court has emphasized that the essential characteristic of an invalid tying arrangement lies in the seller s exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms. *Jefferson Par. Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 12 (1984); *see also Sheridan v. Marathon Petroleum Co. LLC*, 530 F.3d 590, 592 (7th Cir. 2008) (The traditional antitrust concern with such an agreement is that if the seller of the tying product is a monopolist, the tie-in will force anyone who wants the monopolized product to buy the tied product from him as well, and the result will be a second monopoly.). Accordingly, a tie, whether expressly instituted or effectively applied, exists only where the defendant improperly imposes conditions that explicitly or practically require buyers to take the second product if they want the first one. Phillip E. Areeda and Herbert Hovenkamp, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 1752b (3d ed. 2018).

1. No Evidence Tends to Exclude the Likelihood That Comcast, Rather Than Tying Services, Simply Refused to Deal with Viamedia

Viamedia has not identified a genuine issue of fact as to whether Comcast tied the sale of Interconnect Services and Ad Rep services.[10] A fundamental element of a tying claim conditioning is absent from Viamedia s construct. *See Sheridan v. Marathon Petroleum Co. LLC*, 530 F.3d 590, 592 (7th Cir. 2008); *Carl Sandburg Vill. Condo. Ass'n No. 1 v. First Condo. Dev. Co.*, 758 F.2d 203, 207 (7th Cir. 1985).

No evidence shows that Comcast told MVPDs, expressly or impliedly, that they could only purchase Interconnect Services on the condition that they also purchase Ad Rep Services. *See Photovest Corp. v. Fotomat Corp.*, 606 F.2d 704, 722 (7th Cir. 1979) (we are reluctant to find a tying arrangement without some evidence that [the defendant] created applied a de facto tying clause); Areeda & Hovenkamp, Antitrust Law ¶ 1700i (products are not tied unless the supplier refuses to accommodate those who prefer one without the other). To the contrary, it is undisputed that 14 percent of Comcast s agreements with MVPDs are interconnect-only. CSF ¶¶ 123-24. With an interconnect-only agreement, an MVPD is free to: forego employing any Ad Rep Services; hire another Ad Rep to sell a portion of their remaining avails on a non-

[10] The Court assumes that Interconnect Services and Ad Rep services are distinct services for tying purposes, and that MVPDs consider themselves as receiving Interconnect Services from interconnect operators (like Comcast) even when they have hired a unaffiliated Ad Rep (like Viamedia) on a full-turnkey basis. *See, e.g.*, R. 326 at 27.

full-turnkey basis[11]; and/or self-provide Ad Rep Services by selling its own avails. *See* CSF ¶¶ 29, 32-36, 126. In antitrust terms, the customer (an MVPD) can purchase the tying product (Interconnect Services) without purchasing the tied product (Ad Rep Services). *Accord Datagate, Inc. v. Hewlett-Packard Co.*, 60 F.3d 1421, 1427 (9th Cir. 1995) (The harm from tying arrangements is the forced sale of the *tied* product, not the withholding of the tying product.) (emphasis in original). That Comcast has so often entered into such standalone sales of the tying product belies any inference that Comcast tied its services. *See Live Nation*, 811 F.3d at 685 (14 percent of non-tied sales exceed [ ] sufficiently whatever baseline is required to cast doubt on any allegation of tying); Areeda & Hovenkamp, ANTITRUST LAW ¶ 1756b2 (suggesting that 10 percent unbundling rebuts an otherwise established or presumed inference of a tying condition).

Viamedia tries to do away with this inconvenient fact in two ways. First, it argues that Comcast did not sell interconnect-only deals in Chicago, Detroit, and Hartford, where Comcast denied Viamedia use of the interconnects. This case, however, is not limited to those markets Viamedia challenges Comcast s conduct in the markets in which it operates the interconnects generally. Am. Compl. ¶¶ 1, 180; *see also* Furchtgott-Roth Report ¶¶ 63 73. Second, Viamedia contends that substantial evidence of unbundled sales does little to defeat a tying claim in cases where there is an announced condition, rebuffed request for separate provision, or publicized policy of tying. *See*

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[11] As noted, Viamedia does not define Ad Rep Services as exclusive, full-turnkey representation. *See, e.g.*, Furchtgott-Roth Report ¶¶ 24-25; R. 326 at 7. Doing so would necessarily defeat its tying claim, for reasons discussed below.

Areeda & Hovenkamp, ANTITRUST LAW ¶¶ 1756a, 1756b. True enough, but this is no such case. The record lacks evidence showing that Comcast told customers that they could not receive an interconnect-only deal that is, Interconnect Services standing alone.[12]

Even focusing exclusively on Chicago, Detroit, and Hartford, there is insufficient evidence of conditioning. A high percentage, even 100 percent, of unbundled sales does not itself indicate that two products may have been tied together because buyers may have all bought the products bundled because they preferred them together. *Id.* ¶ 1756b2. Viewing the record in the light most favorable to Viamedia, this is precisely what it reflects. It is 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. CSF ¶¶ 90, 99. When a consumer wants to purchase a bundle of the alleged tying and tied products, the seller is simply satisfying consumer demand and monopolization concerns are

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[12] Viamedia does not claim a negative tie. *See In re Dealer Mgmt. Sys. Antitrust Litig.*, --- F. Supp. 3d ----, 2018 WL 2193236, at *20 (N.D. Ill. May 14, 2018). Even if it did, the record would not support it. There is no evidence suggesting that Comcast conditioned the sale of Interconnect Services *to MVPDs* on them agreeing not to purchase Viamedia s Ad Rep Services. *Cf. Eastman Kodak*, 504 U.S. 463 n. 8 (Assuming, *arguendo*, that Kodak s refusal to sell parts to any company providing service can be characterized as a unilateral refusal to deal, its alleged sale of parts to third parties on condition that they buy service from Kodak is not.). As discussed further below, RCN and WOW! wanted full-turnkey representation and at least a portion of their avails sold on the Interconnects; because of Comcast s refusal to deal with Viamedia, a full-turnkey agreement with Viamedia could not offer that bundle.

irrelevant. *Kaufman v. Time Warner*, 836 F.3d 137, 142 (2d Cir. 2016).

Viamedia responds by pointing out that Comcast never *offered* RCN or WOW! an interconnect-only deal. VSF ¶ 19. But why would it? Firms soliciting business have no reason to offer potential customers a less substantial (and presumably less profitable and less efficient) deal than the one those customers seek. Areeda & Hovenkamp, ANTITRUST LAW ¶ 1700i ([F]inding two products does not mean that they are tied together. The franchisee may have preferred a turnkey franchise and never asked for the tying product separately); *see also Kaufman*, 836 F.3d at 142. RCN and WOW! sought both Interconnect Services and Ad Rep Services made available through a single full-turnkey relationship, and the voluntary purchase of two products together is not a tie at all. *Will v. Comprehensive Accounting Corp.*, 776 F.2d 665, 669 (7th Cir. 1985).

Viamedia thus cannot show that Comcast ever withheld the tying product *from customers* unless they also purchase the tied product. *Live Nation*, 811 F.3d at 684 (if the buyer is free to decline the tied product or to purchase the two products separately, then by definition there is no unlawful tying). The real rub of Viamedia s tying claim is, instead, that Comcast withheld the tying product *from its rival Viamedia*. The consequence: customers that contracted with Viamedia could not obtain Comcast s Interconnect Services through their Viamedia representation, and customers wanting a full-turnkey deal that made available to them both Interconnect Services and Ad Rep Services could not get such a deal through Viamedia. In Viamedia s words, Comcast withholds Interconnect Services from *Viamedia's MVPD partners* not

MVPDs, period and therefore constrains improperly [MVPDs] choice by excluding Viamedia as a competitor. R. 326 at 19.

Viamedia s theory extends tying beyond the law s recognition. The constraining of consumer choice is of course a feature of a tying arrangement, Areeda & Hovenkamp, ANTITRUST LAW ¶ 1756b2, but there must still be an actual tie of products or services, *Reifert v. S. Cent. Wisconsin MLS Corp.*, 450 F.3d 312, 317 (7th Cir. 2006); *Photovest*, 606 F.2d at 722. Viewing the record in Viamedia s favor, it shows none.

Aerotec Int'l, Inc. v. Honeywell Int'l, Inc., 836 F.3d 1171 (9th Cir. 2016), illustrates the point. In *Aerotec*, a manufacturer, Honeywell, operated in two related markets. *Id.* at 1175. It was a monopolist in the replacement parts market, and a competitor in the repair services market. *Id.* at 1175 76. Honeywell had long dealt on prioritized and better terms with itself and its affiliated servicers than with independent ones, like Aerotec. *Id.* at 1176 77. But when a parts shortage hit, Honeywell s supply of parts to Aerotec came to a halt. This was ruinous for Aerotec; it could not live up to certain contracts and lost future work, including work that went to Honeywell. *Id.* at 1177. Aerotec sued alleging, among other things, anticompetitive tying of replacement parts to repair services (it called the parts shortage pretextual). The district court granted Honeywell summary judgment, and the Ninth Circuit affirmed. Regarding the tying claim, the Ninth Circuit reasoned that there was no evidence that Honeywell explicitly or implicitly ties or conditions the *sale* of APU parts *to APU owners* on a requirement that the owners use Honeywell services. *Id.* at 1179 (emphases in original). It did not matter if Honeywell had refused to deal fairly with Aerotec, which made it more difficult for Aerotec to compete and owners to receive Honeywell parts without Honeywell repair services. *Id.* at 1179 80. The Ninth Circuit decline[d] to stretch the tying construct to accommodate the claim that . . . conduct toward third party servicers . . . acts as an effective, or de facto, tying condition. *Id.* at 1178.[13]

A similar story unfolded in *Serv. & Training, Inc. v. Data Gen. Corp.*, 963 F.2d 680 (4th Cir. 1992). In that case, Data General manufactured computer systems and offered a diagnostic tool that was critical to servicing those systems. Data General used the diagnostic tool in servicing its systems for customers, but it refused to license the diagnostic tool to competing third-party maintenance servicers. *Data Gen.*, 963 F.2d at 682 83. One servicer sued, alleging that Data General effectively tied the provision of its diagnostic

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[13] Viamedia s attempt to distinguish *Aerotec* is meritless. It argues that, unlike the plaintiff in *Aerotec*, Viamedia does not purchase Interconnect Services for its own account, but rather purchases them on behalf of MVPDs. R. 326 at 28. How one could read *Aerotec* and conclude that the plaintiff (a repair servicer) purchased replacement airplane parts for its own account as opposed to on behalf of its airplane-owning customers is questionable. Like Viamedia, it was precisely because the plaintiff could not make available the supposedly tying product (replacement parts) to its customers that its business suffered. *Aerotec*, 836 F.3d at 1177; *see also Aerotec Int'l, Inc. v. Honeywell Int'l, Inc.*, 4 F. Supp. 3d 1123, 1133 (D. Ariz. 2014) (Aerotec asserts that Honeywell s practices amount to per se illegal tying, claiming that Honeywell uses its dominant position in the market for Honeywell APU parts to coerce APU owners, *who need Honeywell APU component parts for APU repairs*, to purchase MRO services from Honeywell. (emphasis added). Whatever Viamedia means by on its own account, it is an economically meaningless distinction in comparing *Aerotec* to this case.

tool to the sale of its services. *Id.* at 683. The district court granted Data General summary judgment and the Fourth Circuit affirmed. The Fourth Circuit held that, even if the diagnostic tool and maintenance services could be tied together, the plaintiff-servicer had not produced sufficient evidence of such a tie. *Id.* at 687 88. Evidence showed that customers demanded that their servicers be able to use the diagnostic tool, and, as the result of Data General s refusal to license, third-party servicers simply could not compete for that business. *See id.* at 687. This was not a tying condition, according to the court. *See id.* at 687 688; *see also id.* at 686 (The fact that Data General has selectively licensed [the diagnostic tool] is not evidence of an illegal tying arrangement. Data General may lawfully license [the tool] to whomever it chooses.).

Like the third-party competitors in *Aerotec* and *Data General*, Viamedia has shown no direct condition of a tie. *Aerotec*, 836 F.3d at 1179; *see Data Gen.*, 36 F.2d at 687 88. It admits that Comcast has been willing to deal with MVPDs on an interconnect-only basis, and no evidence shows that a sales condition as opposed to prevailing MVPD preference combined with Comcast s refusal to deal is what kept RCN and WOW! from purchasing Viamedia s Ad Rep Services. *See Data Gen.*, 36 F.2d at 687 88. Rather than show a direct tying condition on MVPD customers, Viamedia takes issue with how Comcast has chosen (not) to deal with *it* and the consequences that choice has had on *its* ability to compete. But tactics imposed on a third-party competitor are insufficient to create a tie with respect to a separate buyer simply because they make it less desirable to purchase from the third party. *Aerotec*, 836 F.3d at 1180; *accord Linkline*, 555

U.S. at 450 (a monopolist can generally wield its upstream power to prevent rival firms from competing effectively in a downstream market).[14]

Viamedia s insistence that comments made by RCN, WOW!, and Comcast create a genuine issue of fact as to whether there was tying is misplaced. RCN and WOW! stated that they understood that they could not have their avails sold on Comcast-operated interconnects without hiring Comcast as their representative. VSF ¶ 18. A Comcast executive, moreover, answered yes when asked by the Department of Justice whether it was Comcast s business practice that if an MVPD wants to get access to a Comcast controlled Interconnect, it has to hire Comcast as its ad sales representative. *See id.* ¶¶ 13, 18, 19. None

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[14] The Court recognizes that commentators and courts have remarked on the fact that a refusal to deal with related-market competitors and vertical integration generally can appear to have a tying effect in certain markets. *MCI Commc'ns Corp. v. Am. Tel. & Tel. Co.*, 708 F.2d 1081, 1144 & n. 96 (7th Cir. 1983) (noting the similarity in the plaintiffs claims but not imply[ing] that a tying violation will always flow from any denial of an essential facility by a dominant firm); *Live Nation*, 811 F.3d at 689 (it is no surprise that vertical integration has generally been permitted despite its apparent similarity to tying); Glen O. Robinson, *On Refusing to Deal with Rivals*, 87 CORNELL L. REV. 1177, 1178 (2002). Professor Hovenkamp, for example, has noted that in dominated, path-dependent networks, refusals to deal with competitors can resemble tying arrangements. *See* Herbert Hovenkamp, *The Obama Administration and Section 2 of the Sherman Act*, 90 B.U. L. REV. 1611, 1642 43 (2010); Areeda & Hovenkamp, ANTITRUST LAW *¶* 772. Here, however, there is no tying effect, as no evidence shows that MVPDs cannot obtain (from Comcast at least) the tying product alone they just cannot obtain it through Viamedia s representation. That MVPDs typically choose not to obtain the tying product alone underscores the fact that this dispute should be resolved by the market, not the courts.

of these statements, however, 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. *Mercatus Grp.*, 641 F.3d at 856; *see also Authenticom*, 874 F.3d 1019 (after a preliminary-injunction hearing, expressing dubious[ness] in the extreme that a dealers supposed tying of two related products amounts to tying, rather than simply participation at two levels of the market, as in *Linkline*).

The undisputed context of those statements matters. *See Matsushita*, 475 U.S. at 586. Only two companies competed for RCN s and WOW! s Chicago and Detroit business in 2015, Viamedia and Comcast. They did so, at RCN s and WOW! s invitations, on a full-turnkey basis. CSF ¶¶ 90, 99. RCN and WOW! knew that they could not have their avails sold on the interconnects if they contracted with Viamedia; Comcast, as interconnect operator, had made clear that it did not want to do business with Viamedia. Thus, to have their avails sold on the interconnects, RCN and WOW! had to deal directly with Comcast, the only source who made could make both services available in a single full-turnkey deal. This does not mean that the MVPDs could not have received an interconnect-only deal if they had requested one that is, that they could have received the tying product without the tied product but the record indisputably shows they did not want that service alone, instead opting for the full-turnkey bundle. *See Will*, 776 F.2d at 669.

Data General is again instructive. There, the plaintiff-servicer presented evidence that in pitching its maintenance service Data General had stated to potential customers that *only* Data General could use the diagnostic tool the implication being, of course, that customers had to hire Data General services to receive the benefit of the diagnostic tool. *Data Gen.*, 963 F.2d at 687 (emphasis added). But this evidence did not tend to exclude legal conduct. *Id.* Other servicers had no right to use the diagnostic tool, and so Data General s statements were entirely consistent with it lawfully extolling the superiority of its repair services. *Id.* Similarly, in *Data General* the customers as a matter of fact have demanded that any servicers be able to use the diagnostic tool, and thus the evidence that they choose Data General over other servicers suggested simply that customers preferred Data General services using [the diagnostic tool] over [third-party servicers] that do not. *Id.* at 687. The same is true here. Viewing the record in Viamedia s favor, Comcast said that its practice in an industry dominated by full-turnkey business, where MVPDs generally prefer not to do interconnect-only deals is that an MVPD must employ Comcast to have its avails sold on the interconnects. *See* VSF ¶ 13. Likewise, RCN and WOW! did not complain that were unable to receive Interconnect Services from Comcast on a standalone basis. The record shows they complained, at most, that they could not receive Interconnect Services *through* Viamedia, and had to work with Comcast directly because they wanted full-turnkey representation that could make available Interconnect Services. *See, e.g.*, VSF ¶ 18. This evidence is, at a minimum, equally consistent with Comcast s refusal to deal with Viamedia as it is a tying arrangement.

None of this is to say that, as a matter of law, for a tying condition to be cognizably anticompetitive it must be applied directly and only to the end user, not its representative. *Cf. COPECA, Inc. v. Western Aviation Servs. Corp.*, 653 F. Supp. 2d 141, 147 (D.P.R. 2009) (not seeing the relevance that a defendant applied an alleged tie via an intermediary because the defendant could still impose its condition). It is to say, however, that at summary judgment the claimant must present evidence tending to exclude the possibility that the defendant engaged in legitimate conduct. Viamedia lacks any evidence that Comcast withheld Interconnect Services from customers (as opposed to Viamedia) unless they also purchased Ad Rep Services, and it has not otherwise pointed to evidence suggesting that Comcast s conduct was anything more than a refusal to deal with Viamedia.

Another wrinkle of Viamedia s claim is worth addressing. Although Viamedia does not define Ad Rep Services as only full-turnkey services, *see* Furchtgott-Roth Report ¶¶ 22 29, it occasionally refers to Comcast s tie as one of Interconnect Services to full-turnkey Ad Rep Services, *see* VSF ¶ 18, CSF, Resp. to ¶ 48. That changes little. For one, the record is devoid of evidence that customers could not receive Comcast s Interconnect Services standing alone (only that they could not receive those services through Viamedia s representation). Equally important, in a full-turnkey relationship with a third-party Ad Rep the MVPD does not directly contract for Interconnect Services. It relies on its Ad Rep to which it has assigned all of its avails in a DMA to make sure that a portion of those avails are sold on the interconnects. *See, e.g.*, VSF ¶¶ 1 3. Focusing on that scenario, there can be no anticompetitive tie.

Professors Areeda and Hovenkamp explain why. Suppose an ingot manufacturer refuses to sell separately but rather fabricates into products like building wall sections, which it sells directly to builders. Areeda & Hovenkamp, ANTITRUST LAW ¶ 1748a. A rival fabricator demands ingot separately so that it too can bundle it with fabrication services in order to make and sell walls. When the defendant refuses, [the rival] claims the defendant is tying ingot to fabrication services. *Id.* The claim fails as a matter of law:

> [T]he gravamen of the complaint is not that the defendant s bundled sales have foreclosed rivals from selling unbundled fabrication to the defendant s customers. Rather, the gravamen is that the defendant s refusal to sell unbundled ingot to the defendant s rival has prevented the rival from selling the very same ingot/fabrication bundle sold by the defendant. . . . For example, the plaintiff does not want the defendant to offer ingot separately to builders; nor would doing so eliminate any relevant foreclosure when builders do not want un-tied ingot in order to arrange separately for its fabrication. Rather, the plaintiff seeks to hold the defendant liable for not selling the plaintiff ingot so that it can fabricate ingot into wall sections too.

Id. ¶ 1748b. The antitrust laws do not favor such attacks on vertical integration, which are resolvable only by enforcing a duty to deal with a rival. *Id.*; *see also id.* ¶ 1700j1.

Viamedia submits that this principle applies only to situations where the only separate demand for the tying product comes from the defendant s rivals. R. 326 at 31; *see also* R. 235 at 10. Not so. Even if the separate provision of ingot [the tying product] and fabrication [the tied product] is common in competitive analogues, there is no liability for tying when the plaintiff s theory of injury is not that customers of the defendant s bundle would buy the items unbundled if they could, but rather that a rival could sell the *same* *bundle* if only the defendant would sell it a particular input. Areeda & Hovenkamp, ANTITRUST LAW ¶ 1748b; *see also id.* ¶ 1748b n.2 (a finished-product exists even where the claimant meets the threshold requirement of showing buyer interest because we can find some buyers desiring the items unbundled).

This is the gravamen of Viamedia s tying claim that Comcast s refusal to provide it interconnect access prevents it from selling the kind of full-turnkey Ad Rep Services that WOW! and RCN desire. Although MVPDs in a full-turnkey relationship with a third-party Ad Rep may consider themselves to receive Interconnect Services from the interconnect operator, *see* VSF ¶ 3, it is undisputed that those MVPDs have one agreement with one Ad Rep that makes those Interconnect Services available to them without having to have a direct relationship with the interconnect operator. (That is, of course, Viamedia s business model.) *See, e.g.*, *id.* ¶¶ 1, 3; *see also* Furchtgott-Roth Report ¶ 53 (describing arrangements, unlike Viamedia s practice, in which MVPDs contract separately for Ad Rep Services and Interconnect Services as unbundle[d] transactions). Viamedia has no antitrust right to force Comcast to help it sell such a bundle to their mutual customers. *See* Areeda & Hovenkamp, ANTITRUST LAW ¶¶ 1748a, 1748b; *accord Linkline*, 555 U.S. at 450.

Viamedia further argues that deciding Comcast did not tie services would conflict[ ] with sound antitrust policy. R. 326 at 29. It provides no authority for its perspective on what antitrust policy should be, and understandably. Viamedia s view demand[s] that holders of market power cooperate with rivals
a view that bit the dust with *Trinko*. Frank H. Easterbrook, *The Chicago School & Exclusionary*

Conduct, 31 HARV. J.L. & PUB. POL Y 439, 441 42 (2008). Courts routinely tout the procompetitive benefits of integration, even if middlemen suffer. *See, e.g.*, *It's My Party*, 811 F.3d at 689 (A single firm incorporating separate but closely related production processes can often be far more efficient than various independent entities transacting to produce the same good or bundle of goods.). Viamedia s contrary claim echoes a plea for relief on behalf of a competitor, not for the sake of competition itself. *Aerotec*, 836 F.3d at 1180.[15]

2. Dr. Furchtgott-Roth's Opinions Regarding Comcast's Supposed Tying Are Inadmissible

Dr. Furchtgott-Roth also opines that Comcast had an effective tying policy. He asserts that Comcast s own admissions and MVPDs statements demonstrate that Comcast had a practice of tying, and that excluding Viamedia from the interconnects was a necessary aspect of that tying strategy. Furchtgott-Roth Report ¶ 3.e.; *see also id.* ¶¶ 63 71. These opinions, however, are inadmissible. They would not assist the trier of fact and are contrary to the law.

Rule 702(a) and *Daubert* provide that [a]n expert s opinion is helpful only to the extent the expert draws on some special skill, knowledge, or experience to formulate that opinion in other words, the opin-

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[15] Viamedia makes no argument that Comcast effectively and anticompetitively ties Interconnect Services to Ad Rep Services through discounted bundling. Nor could it, as no evidence shows that Comcast ever predatorily priced or even sold below cost its services. *See Midwest Gas Servs., Inc. v. Indiana Gas Co.*, 317 F.3d 703, 713 (7th Cir. 2003).

ion must be an *expert* opinion. *United States v. Benson*, 941 F.2d 598, 604 (7th Cir. 1991), *amended on other grounds* 957 F.2d 301 (7th Cir. 1992); *see also* FED. R. EVID. 702(a); *Owens*, 895 F.3d at 972 (the expert s testimony must assist the trier of fact). Expert testimony does not assist the trier of fact when the jury is able to evaluate the same evidence and is capable of drawing its own conclusions without the introduction of a proffered expert s testimony. *Matter of the Complaint of Ingram Barge Co.*, No. 13 C 3453, 2016 WL 3763450, at *10 (N.D. Ill. July 14, 2016); *see also Dhillon v. Crown Controls Corp.*, 269 F.3d 865, 871 (7th Cir. 2001) (An expert must testify to something more than what is obvious to the layperson in order to be of any particular assistance to the jury.); *Taylor v. Ill. Cent. R.R. Co.*, 8 F.3d 584, 585 86 (7th Cir. 1993) (affirming the exclusion of expert testimony where any lay juror could understand th[e] issue without the assistance of expert testimony). As such, expert testimony cannot be presented to the jury solely for the purpose of constructing a factual narrative based upon record evidence. *Newman ex rel. Newman v. McNeil Consumer Healthcare*, No. 10 C 1541, 2013 WL 9936293, at *6 (N.D. Ill. Mar. 29, 2013); *United States v. Hall*, 93 F.3d 1337, 1343 (7th Cir. 1996) (Unless the expertise adds something, the expert is at best offering a gratuitous opinion, and at worst is exerting undue influence on the jury.). Expert testimony, further, must be consistent with the law; otherwise it is necessarily unhelpful and risks confusing and misleading the jury. *Loeffel Steel Prod., Inc. v. Delta Brands, Inc.*, 387 F. Supp. 2d 794, 806 (N.D. Ill. 2005) (Expert opinions that are contrary to law are inadmissible. They cannot be said to be scientific, to be reliable, or to be helpful to the trier of fact.) (citations omitted).

Dr. Furchtgott-Roth s tying opinions fail these requirements. Furchtgott-Roth Report ¶¶ 63 71. His opinion that Comcast had a tying policy rests exclusively on a lay interpretation of evidence that this Opinion has already discussed. *Id.* ¶¶ 64 66. Quoting the Comcast testimony provided to the DOJ cited above, *supra* at 34 35, for example, he matter-of-factly asserts that Comcast has admitted that it ties Spot Cable Ad Rep Services to Interconnect Services. *Id.* ¶ 64. He also relies on the MVPDs statements to conclude that the MVPDs understood that they had to deal with Comcast to obtain Interconnect Services. *Id.* ¶ 64. Although Dr. Furchtgott-Roth later adopts his interpretation of those documents [a]s a matter of economics, *id.* ¶ 68, he does not undertake any expert assessment in arriving at that conclusion. *Elorac, Inc. v. Sanofi-Aventis Canada Inc.*, No. 14 C 1859, 2017 WL 3592775, at *27 (N.D. Ill. Aug. 21, 2017) (excluding expert because [n]o expert economic analysis is necessary on [a] basic point, nor, in truth, did [the expert] perform any; his opinion appears to be based simply on his review of [evidence], not a scientific analysis); *In re Live Concert Antitrust Litig.*, 863 F. Supp. 2d 966, 993 (C.D. Cal. 2012) (excluding expert opinions because a key ingredient missing was *economic analysis* (be it quantitative or qualitative) tying these statements by [witnesses and observers] to the ultimate conclusion) (emphasis in original). All he cites is the undisputed and unremarkable fact that Comcast and Viamedia were the only two full-turnkey Ad Reps in certain DMAs, like Chicago and Detroit. *Id.* ¶ 67.

So unhelpful are Dr. Furchtgott-Roth s tying opinions that Viamedia, in arguing that there is an issue of fact as to whether Comcast engaged in tying, does not rely on them (either directly or via its Statement of Additional Facts). *See* R. 326 at 18 22, 26 30. Viamedia, instead, simply cites directly to many of the same pieces of evidence that Dr. Furchtgott-Roth does. Indeed, no expertise is needed to interpret, contextualize, or synthesize that evidence. *See Davis v. Duran*, 276 F.R.D. 227, 231 (N.D. Ill. 2011) (expert testimony is helpful to the jury if it concerns a matter beyond the understanding of the average person). But this betrays that Viamedia simply seeks to use Dr. Furchtgott-Roth s tying opinion to give an expert mouthpiece to its preferred (and unreasonable) narrative of the evidence. *See, e.g.*, *McNeil Consumer*, 2013 WL 9936293, at *6; *Sullivan v. Alcatel-Lucent USA Inc.*, No. 12 C 07528, 2014 WL 3558690, at *5 (N.D. Ill. July 17, 2014) (excluding expert who simply reads and interprets documents without drawing on any expert qualifications or experience).

Dr. Furchtgott-Roth s narrative, moreover, is contrary to the law for reasons already explained. His opinions seek to hold Comcast liable for the mere withholding of the tying product, not the forced sale of a tied product, and not even to a customer, but to a competitor. *See* Furchtgott-Roth Report ¶¶ 67, 69 71; *see Aerotec*, 836 F.3d at 1178 80. Those opinions are inconsistent with the definitions of tying and coercion in the context of tying claims, and thus inadmissible. *Gumwood HP Shopping Ptrs., L.P. v. Simon Prop. Grp., Inc.*, No. 3:11-CV-268 JD, 2016 WL 6091244, at *4 (N.D. Ind. Oct. 19, 2016); *accord Norwest Bank v. K-Mart Corp.*, No. 3:94-CV-78RM, 1997 WL 33479072, at *3 (N.D. Ind. Jan. 29, 1997) (excluding opinions close enough to this case s legal issues so as to create a risk of jury confusion). The Court, accordingly, excludes Dr. Furchtgott-Roth s opinions on whether Comcast had a tying practice. *See* Report ¶¶ 3.e. 64 71.

B. There Is Insufficient Evidence that Comcast Engaged in Anticompetitive Exclusive Dealing

Viamedia next contends that Comcast engaged in exclusive dealing. Generally, [a]n exclusive dealing contract obliges a firm to obtain its inputs from a single source. *Paddock Publ'ns, Inc. v. Chicago Tribune Co.*, 103 F.3d 42, 46 (7th Cir. 1996); *see also* Areeda & Hovenkamp, ANTITRUST LAW ¶ 1800a; *Methodist Health Servs. Corp. v. OSF Healthcare Sys.*, 859 F.3d 408, 410 (7th Cir. 2017). The objection to exclusive-dealing agreements is that they deny outlets to a competitor during the term of the agreement. *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 393 (7th Cir. 1984); *see also, e.g.*, *Methodist Health Servs. Corp. v. OSF Healthcare Sys.*, No. 13-CV-01054, 2016 WL 5817176, at *8 (C.D. Ill. Sept. 30, 2016) (Exclusive dealing claims brought under § 2 are analyzed in much the same way as § 1 claims). As the Court has recognized, however, the law often approve[s] of exclusive dealing because of its procompetitive benefits. *Viamedia I*, 218 F. Supp. 3d at 696 (N.D. Ill. 2016) (quoting *Republic Tobacco Co. v. N. Atl. Trading Co.*, 381 F.3d 717, 736 (7th Cir. 2004)). These benefits include increasing allocative efficiency, reducing adverse selection and moral hazard barriers to deals, and preventing free-riding. *VBR Tours, LLC v. Nat'l R.R. Passenger Corp.*, No. 14-CV-00804, 2015 WL 5693735, at *12 (N.D. Ill. Sept. 28, 2015) (citing *Republic Tobacco*, 381 F.3d at 736).

Viamedia does not explain its exclusive dealing claim.[16] It is not clear if Viamedia takes issue with

[16] Viamedia s defense of its exclusive dealing claim is near perfunctory. It devotes just a page and a half to this claim in its 46-

the exclusive and full-turnkey representations that are the undisputed industry norm, the fact that Comcast deals exclusively with MVPDs that work directly with it, or some combination of the two. In any event, Viamedia s claim fails.

The exclusion of competitors is cause for antitrust concern only if it impairs the health of the competitive process itself. *Roland Mach.*, 749 F.2d at 394. Hence a plaintiff must be able to prove that the probable (not certain) effect of the exclusion will be to raise prices above (and therefore reduce output below) the competitive level, or otherwise injure competition. *Id.* Viamedia has not produced any such evidence. It does not meaningfully argue that Comcast s exclusive dealings have harmed *competition*; it cites only is exclusion as a competitor. *See* R. 326 at 22 23. Indeed, the record lacks any evidence showing that Comcast has raised, plans to raise, or even has the ability to raise prices. *Accord Schor*, 457 F.3d at 612 (The monopolist can take its profit just once; an effort to do more makes it worse off and is self-deterring.); *see also, e.g.*, *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2288 (2018) (claim of anticompetitive conduct failed, in part, because it did not offer any evidence that the [defendant s] price . . . was higher than the price one would expect to find in a competitive market). Nor does the record contain any evidence showing that Comcast has reduced or plans to reduce output. *See Methodist Health*, 859 F.3d at 410 (affirming summary judgment because plaintiff had not shown evidence of the dire consequences required to deem exclusive contracting illegal).

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page brief, and in the course of that page and a half neither cites a single fact nor raises a single case save for *Viamedia I*.

To the contrary, Viamedia s own expert, Dr. Furchtgott-Roth, explains the procompetitive benefits of Comcast s deals. By bundling Interconnect Services and Ad Rep Services and selling them on an exclusive basis, Comcast is able to offer financial terms to MVPDs that are much more generous than any terms Viamedia could feasibly (much less profitably) offer. Furchtgott-Roth Report ¶ 87.[17] Elsewhere in its brief, Viamedia cites the fact that MVPDs consider Viamedia s lack of MVPD-affiliation in weighing Ad Rep Services. But Viamedia provides no support for the notion that the fact that MVPDs deal with a fellow MVPD for the terms of their Ad Rep Services contracts constitutes a cognizable harm to competition. MVPDs themselves made clear that such a concern matters only when all else [is] equal meaning they, like any rational consumer, value price and quality foremost. *See* R. 326 at 42; VSF ¶ 7; *see also* CSF ¶ 100 (RCN representative saying that Comcast s and Viamedia s offers were nowhere near equal and it was not [ ] very difficult decision for RCN to choose Comcast). Viamedia, further, has presented no expert evidence showing that it could have offered terms equal to Comcast s. *See id.* ¶¶ 116 122 (Comcast, on average, offered better revenue shares to MVPDs than Viamedia).

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[17] To the extent Dr. Furchtgott-Roth opines that Comcast has foreclosed Viamedia from the market as a result of its tying or exclusive dealing practices, *see* Furchtgott-Roth Report ¶ 90, those opinions are inadmissible because, for the reasons discussed in the text, his predicate opinions regarding the alleged tying and exclusive dealing are inadmissible as they are unhelpful to the jury and contrary to the law. In any event, Viamedia s response does not rely on Dr. Furchtgott-Roth s foreclosure opinions.

That Comcast s exclusive deals do not harm competition is further established by the fact that they are the very deals that MVPD-consumers seek. To be sure, the law can prohibit monopolists from engaging in conduct generally permitted to those without market power. *Eastman Kodak*, 504 U.S. at 488 (Scalia, J., dissenting); *E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 637 F.3d 435, 441 (4th Cir. 2011); *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181, 187 (3d Cir. 2005). But here it is undisputed that both RCN and WOW! *requested* exclusive, full turnkey representation, CSF ¶¶ 90, 99, and only for a fixed period in limited geographic markets. *See Methodist Health*, 859 F.3d at 410; Areeda & Hovenkamp, ANTITRUST LAW 1802g2. Frontier wanted the same in Hartford, a deal which Viamedia won and assented to. *Id.* ¶ 73. MVPDs desire for exclusive, full-turnkey deals is, moreover, economically sound. It is undisputed that such Ad Rep Services provide both MVPDs and advertisers a one stop shop for the sale and purchase of avails. CSF ¶ 28. Thus, doing as Viamedia requests requiring a monopolist to rebuff customers requested, and mutually beneficial, terms in order to assist competitors would itself impair[ ] the health of the competitive process. *Roland Mach.*, 749 F.2d at 394.

Viamedia does not dispute these facts. It admits that full turnkey Spot Cable Ad Rep Services agreements have benefits. R. 326 at 23. It complains, instead, that it lacks a fair playing field on which to compete for such agreements, because of Comcast s use of its conceded monopoly power over the Interconnects. *Id.* That is not a complaint about exclusive dealing, *see, e.g.*, *Roland Mach.*, 749 F.2d at 394, but about Comcast s refusal to deal with Viamedia. As such, Viamedia has presented evidence neither showing exclusive dealing that harms competition nor evidence tending to exclude Comcast s legal conduct.[18]

C. Viamedia's Claim for Otherwise Anticompetitive Conduct is Procedurally Barred and Meritless

Viamedia also invokes a catchall exclusionary conduct claim, arguing that however Comcast s conduct is described it is anticompetitive. As Viamedia notes, the law precludes exclusionary conduct for Section 2 s purposes even if that conduct does not neatly fall into one of the traditional forms of anticompetitive conduct under Section 1. *See, e.g.*, Areeda & Hovenkamp, ANTITRUST LAW ¶ 777a (While the standard for a § 2 violation is significantly stricter in its power assessment, it is broader and less categorial in its definition of proscribed conduct.).

Viamedia, however, is procedurally barred from raising this claim. Despite extensive motion to dismiss briefing and numerous hearings in court, Viamedia has never raised this claim before. It is well settled that a plaintiff may not advance a new argument in response to a summary judgment motion.

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[18] Viamedia s response does not rely on Dr. Furchtgott-Roth s opinion about exclusive dealing. This opinion, in any event, is inadmissible. *See* Furchtgott-Roth Report ¶¶ 72 73. Constituting just two paragraphs, Dr. Furchtgott-Roth s opinion conflates tying and exclusive dealing. He asserts, the same conduct by Comcast Spotlight that amounts to tying also amounts to exclusive dealing. *Id.* ¶ 72. Dr. Furchtgott-Roth, again, applies no expertise, analysis, or study in reaching that conclusion. *See* FED. R. EVID. 702. He merely posits the broad assertion. Further, because his predicate tying opinions are inadmissible, so too is his one-in-the-same exclusive dealing opinion. The Court therefore excludes it. *Id.* ¶¶ 71 72.

Abuelyaman v. Illinois State Univ., 667 F.3d 800, 814 (7th Cir. 2011); *see also, e.g.*, *Anderson v. Donahoe*, 699 F.3d 989, 998 (7th Cir. 2012); *Midco Int'l, Inc. v. Metro. Life Ins. Co.*, No. 14 CV 9470, 2017 WL 2868949, at *4 n.1 (N.D. Ill. July 5, 2017) (a new theory of liability raised for the first time in response to the motion for summary judgment that was not plaintiff s theory at the motion-to-dismiss stage is waived). Viamedia, in fact, was not just silent in failing to advance this theory earlier. It affirmatively disavowed any free-standing monopolization claim unaccompanied by . . . any of the normal exclusionary practices. R. 32 at 7 (quoting *Schor*, 457 F.3d at 610 11).

The Court relied on that assertion in *Viamedia I*, concluding that Viamedia s claim was not free standing because it alleges particular types of anticompetitive conduct. *Viamedia I*, 218 F. Supp. 3d at 695; *see also id.* (Viamedia s success turns on whether it states a claim based on those three classes of anticompetitive conduct [tying, exclusive dealing, and a refusal to deal], not whether a free-standing leveraging theory is independently viable.). Now accepting Viamedia s claim about which Viamedia s liability expert did not clearly opine would add a new dimension to this two-year-old litigation after the close of all fact and expert discovery and allow Viamedia to circumvent motion to dismiss procedures. *See, e.g.*, *Shuffle Tech Int'l LLC v. Sci. Games Corp.*, No. 15 CV 3702, 2017 WL 3838096, at *8 (N.D. Ill. Sept. 1, 2017) (judicial estoppel requires that the court accepted the earlier position such that its acceptance of the new position would lead to inconsistent determinations). It would, moreover, prejudice Comcast by forcing it to defend a claim that Viamedia indicated at the motion to dismiss stage that it was not pursuing. *See The*

Medicines Co. v. Mylan Inc., No. 11-CV-1285, 2014 WL 1979261, at *3 4 (N.D. Ill. May 15, 2014).

Setting waiver and estoppel aside, Viamedia s claim fails.[19] It hits the same roadblock Viamedia s tying claim did: viewing the record in light most favorable to Viamedia, no evidence tends to exclude the fact that Comcast s conduct was merely a refusal to deal, rather than anticompetitive conduct. *See Mercatus Grp.*, 641 F.3d at 856. The claim is just a recast of the refusal to deal, complaining, again, about Comcast s refusal to allow Viamedia to resell MVPDs avails on the Interconnects and the impact that conduct has had on its ability to compete. *Novell*, 731 F.3d at 1079; *see* R. 326 at 25 (complaining that Comcast has used its control over the Interconnects to squeeze its only competitor). The refusal to deal doctrine is not so easily evaded. *Novell*, 731 F.3d at 1079. Viamedia may have been rendered unable to compete effectively, *Linkline*, 555 U.S. at 450, *see also* Furchtgott-Roth Report ¶¶ 86 92, but even Section 2 does not concern itself with the welfare of a competitor; it asks whether the monopolist s actions were cognizably anticompetitive. *Id.* at 448 450; *Trinko*, 540 U.S. at 407 08; *see also Schor*, 457 F.3d at 611 14 (rejecting monopoly claims not tied to normal exclusionary practices); *Ball Mem'l Hosp., Inc. v. Mut. Hosp. Ins., Inc.*, 784 F.2d 1325, 1338 (7th Cir. 1986)

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[19] Viamedia appears to use its catchall theory as protection in case the Court found that Interconnect Services and Ad Rep Services are not separate products for tying purposes. *See* R. 326 at 25 (In particular, unlike Section 1 tying claims, Section 2 doctrine does not require Viamedia to establish the existence of separate products). As noted earlier, the Court has assumed that the products are separate.

(Action that injures rivals *may* ultimately injure consumers, but it is also perfectly consistent with competition, and to deter aggressive conduct is to deter competition. Thus the plaintiff faces a stiff burden in any § 2 litigation.). For reasons explained above, and in *Viamedia I* and *Viamedia II*, Comcast s refusal to permit Viamedia to participate in the interconnects does not violate the Sherman Act.

II. Even If Comcast Had Engaged in Anticompetitive Conduct, Viamedia Cannot Show that It Caused Viamedia's Antitrust Injury or Damages

Even if Viamedia had presented a question of fact as to whether Comcast engaged in tying, exclusive dealing, or other anticompetitive conduct, its case still fails. At summary judgment, a plaintiff must demonstrate an issue of fact with respect to each element of its claim including causation. *See Dalton v. Teva N. Am.*, 891 F.3d 687, 691 (7th Cir. 2018); *O.K. Sand & Gravel, Inc. v. Martin Marietta Techs., Inc.*, 36 F.3d 565, 573 (7th Cir. 1994). Viewing the record in the light most favorable to Viamedia, there is no issue of fact for the jury to decide regarding whether Comcast s anticompetitive conduct caused: (1) Viamedia s antitrust injury, or (2) its damages.

A. Viamedia Cannot Show Antitrust Injury

To establish an antitrust injury, a plaintiff must show that the anticompetitive conduct complained of was the cause-in-fact of the injury that is, but for the violation, the injury would not have occurred. *Kochert v. Greater Lafayette Health Servs., Inc.*, 463 F.3d 710, 718 (7th Cir. 2006) (antitrust injury must reflect the anticompetitive effect of either the violation or of anticompetitive acts made possible by the violation); *see also O.K. Sand & Gravel*, 36 F.3d at 573 (holding that antitrust injury requires not only that the injury is of the type intended to be protected by the antitrust laws, but that the violation was the cause-in-fact of the injury: that but for the violation, the injury would not have occurred) (citing *Greater Rockford Energy & Tech. Corp. v. Shell Oil Co.*, 998 F.2d 391, 395 (7th Cir. 1993)); *see also, e.g.*, *In re Publ'n Paper Antitrust Litig.*, 690 F.3d 51, 66 (2d Cir. 2012) (to prevail on an antitrust claim, a plaintiff must establish that the injuries alleged would not have occurred *but for* [the defendant s] antitrust violation . . . adding necessity to the materiality requirement of our antitrust causation analysis.) (emphasis in original, internal citation omitted). A plaintiff, thus, must be able to distinguish between financial loss from the *lawful* activities of a competitor from loss caused by the *unlawful* acts of the defendant. *MCI Commc'ns Corp. v. Am. Tel. & Tel. Co.*, 708 F.2d 1081, 1161 (7th Cir. 1983) (citing *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977)). In other words, if lawful competition fully accounts for a plaintiff s claimed injury, the law will deny any injury because the plaintiff s situation would be the same with or without the challenged restraint. Areeda & Hovenkamp, ANTITRUST LAW ¶ 338b c.

In assessing whether a defendant s anticompetitive conduct caused a plaintiff s antitrust injury, courts assume that the defendant acted anticompetitively. *Id.* ¶ 338. Here, that means assuming that Comcast engaged in tying, exclusive dealing, or other exclusionary and cognizably anticompetitive conduct. So doing, Viamedia is nevertheless unable to present an issue of fact as to whether its alleged antitrust injuries resulted from that anticompetitive conduct as opposed to Comcast s undisputed and legal refusal to deal.

Without exception, each injury Viamedia identifies the lost revenue from the Chicago and Detroit interconnects after Comcast refused to renew the 2003 agreement in 2012; lost contracts with MVPDs; the lost revenue from the Hartford interconnect; and the attendant business expenses and talent loss is fully attributable to Comcast s decision to deny Viamedia interconnect access. Dr. Furchtgott-Roth, for example, asserts that Viamedia s foreclosure from the market flows *directly* from Viamedia s inability to access the interconnects. Furchtgott-Roth Report ¶ 90 (emphasis added). Dr. Lys, likewise, premises all of his damages opinions on the assumption that absent Comcast s anticompetitive conduct Viamedia would have had reasonable access to the interconnects. *E.g.*, Lys Report ¶ 34(1) (7). He even testified that his entire damages estimate is based directly or indirectly on Viamedia s lack of access to Comcast Spotlight s interconnect in Chicago, Detroit, and Hartford. Comcast Ex. 7 at 235:18 236:20. Mark Lieberman, Viamedia s CEO, similarly complains that Viamedia lost business and revenues as a consequence of being excluded from Comcast-operated Interconnects. Viamedia Ex. 5 at 5. By all accounts, Viamedia s refusal to deal with Comcast explains entirely Viamedia s injuries. *See MCI Commc'ns Corp.*, 708 F.2d at 1161.

Novell is on point. In that case, a software-providing competitor of Microsoft s, Novell, filed suit under Section 2. *Novell*, 731 F.3d at 1065 (Gorsuch, J.). In rolling out Windows 95, Microsoft had initially decided to share certain intellectual property like namespace extensions, which allow users to search for and open documents outside of a particular application with independent software providers. *Id.* at 1067 68. It later changed course, after concluding that not sharing the intellectual property would maximize its profits. *Id.* at 1068. This conduct impeded Novell s ability to build (and sell) software around the extensions, and its business suffered because it was delayed in launching its new software. *Id.* at 1069. Unable to sustain a refusal to deal case under *Aspen Skiing* and *Trinko*, Novell argued at summary judgment that Microsoft s conduct was not merely a refusal to deal but an act of business deception that sufficed independently for Section 2 purposes. *Id.* at 1079 1080. The Tenth Circuit disagreed, concluding that Novell lacked antitrust injury to bring such a claim. *Id.* at 1080. It reasoned that even if Microsoft had been upfront about its competitive decisions, and engaged in nothing nearing a business tort, Novell and consumers *still* would have suffered the same alleged harm the delayed release of products caused by Microsoft s refusal to deal. *Id.* (emphasis in original). So too here. Viamedia s own evidence decisively establishes that Comcast s refusal to deal was sufficient unto itself to cause Viamedia s injuries.

Viamedia offers no meaningful rejoinder to this plain fact. At most, Viamedia submits that as long as it has established the type of injuries with which the antitrust laws are concerned, the Court should presume that such an injury . . . was caused by an anticompetitive act. R. 326 at 35 (citing *Publ'n Paper*, 690 F.3d at 66). Even if that were true, Viamedia s own evidence shows that tying and exclusive dealing were not but for causes of Viamedia s injuries. *Publ'n Paper*, 690 F.3d at 67 (the presumption is rebuttable). Those injuries, which Viamedia concedes stem from

Comcast s decision to deny Viamedia interconnect access in Chicago, Detroit, and Hartford, would have occurred with or without attendant tying and exclusive dealing. *Supra* at 50; *infra* at 53 55; Furchtgott-Roth Report ¶ 91; *see generally* Lys Am. Report. No evidence suggests otherwise. Apart from that argument, Viamedia offers little to explain how it can demonstrate that anticompetitive conduct, not an independent and already-deemed legal refusal to deal, caused its antitrust injury.[20]

It is black-letter law that Viamedia must show that it would have suffered antitrust injury but for Viamedia s anticompetitive conduct. *E.g.*, *Kochert*, 463 F.3d at 718; *MCI Commc'ns Corp.*, 708 F.2d at 1161. Critically, Viamedia does not argue or present any evidence showing that absent tying or exclusive dealing practices, Comcast would have felt any differently about excluding Viamedia from the interconnects. To the contrary, the record presents ample evidence of Comcast s decision to stop dealing with middlemen and go after full-turnkey relationships with more MVPDs. As such, in the but-for world, Comcast still would have refused to deal with Viamedia; it just could not further condition services or engage in anticompetitive exclusive dealing. Viamedia makes no effort to account for that but-for world, and that is the fundamental flaw in its case.

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[20] In fact, Viamedia s short shrift of the issue prompts Comcast to argue that Viamedia has waived any argument about causation and antitrust injury. R. 339 at 4 n.3.

B. Viamedia Cannot Show Damages Resulting from Supposedly Anticompetitive Conduct

Viamedia s asserted damages suffer the same problem. Despite the complicated nature of proving damages causation in an antitrust case, *see J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 566 (1981), Viamedia elected not to employ an expert to opine on causation. Instead, Viamedia submits affidavits signed by three executives: CEO Lieberman (Viamedia Ex. 5), co-founder and former president Jeff Carter (Viamedia Ex. 3), and co-founder and former CEO Todd Donnelly (Viamedia Ex. 4). Viamedia rests primarily on these affidavits (most often, Lieberman s), Viamedia management project[ions], and its track record with its partners to support its notion of what profits Viamedia would have made but for Comcast s anticompetitive conduct. R. 326 at 36.

1. Viamedia's Evidence of Causation Does Not Distinguish Between Damages Caused by Competitive and Anticompetitive Conduct and Thus Fails

When a plaintiff improperly attributes all losses to a defendant s illegal acts, despite the presence of significant other factors like lawful competition the evidence does not permit a jury to make a reasonable and principled estimate of the amount of damage. *MCI Commc'ns Corp.*, 708 F.2d at 1162; Areeda & Hovenkamp, ANTITRUST LAW ¶ 675b; *see also Comcast Corp. v. Behrend*, 569 U.S. 27, 35 (2013) (it is an unremarkable premise that a claimant is entitled only to damages resulting from to the claimed anticompetitive conduct).

That it is precisely what Viamedia has done. Its evidence fails to disaggregate the damages caused by Comcast s lawful refusal to deal from Comcast s supposed tying, exclusive dealing, and other exclusionary conduct. Lieberman s affidavit is exemplary. He attests that Viamedia s exclusion from the Chicago and Detroit Interconnects has caused Viamedia and its MVPD partners to lose revenues they otherwise would have earned from Interconnect sales, which has, in turn, reduced Viamedia s cash flows and financial stability, causing in turn MVPD partners to switch to other ad representation firms. Viamedia Ex. 5 at 6. It repeats similar claims for pages. *See id.* at 7 (Due to loss of access to the Chicago and Detroit Interconnects, Viamedia was ultimately unable to make a competitive financial offer to RCN), 11 (complaining of the purported results of Comcast s decision to deny[ ] Viamedia the ability to continue purchasing Interconnect Services on behalf of [its] MVPD clients), 13 (If Viamedia had never been excluded from the Interconnects Chicago, Detroit, and Hartford, I am confident that the momentum Viamedia had in the marketplace prior to 2012 . . .). Dr. Lys s damages opinion likewise conflates the financial consequences of Comcast s refusal to deal with the results of Comcast s supposedly anticompetitive conduct. *See generally* Lys Am. Report. He, again, admitted that his entire damages estimate is based directly or indirectly on Viamedia s lack of access to the interconnects in Chicago, Detroit, and Hartford. Comcast Ex. 7 at 236:10 20. All of this evidence (to the extent it is admissible) attributes Viamedia s damages to Comcast s decision not to permit Viamedia interconnect access its refusal to deal.

Under the law, Viamedia must be able to segregate the damages (to a reasonable degree, at least) caused by lawful competition from those caused by anticompetitive acts. *See MCI Commc'ns Corp.*, 708 F.2d at 1162; *see also* ABA Section of Antitrust Law, *Proving Antitrust Damages: Legal and Economic Issues* 13 14 (3d ed. 2017) (courts require that the antitrust violation be the sole cause of the plaintiff s damages, by insisting on a but-for world that eliminates only the defendant s unlawful conduct separately from all other sources that may also have caused the plaintiff s damages). Considering them to be one in the same, Viamedia fails to do so.[21] It therefore seeks to force Comcast to pay treble damages

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[21] Even assuming *arguendo* that the but-for world is a place where Comcast decides to permit Viamedia on the interconnects on friendly terms, the Court is dubious that Viamedia s lay evidence of causation regarding the loss of future business (the largest part of its damages claim) would suffice. Despite Viamedia s pronouncements about its management team s work (*e.g.*, R. 326 at 40), Viamedia s projections are not based on any economic price or terms analyses (at least as far as the record is concerned). Viamedia s refrain that it need not examine prices because the Ad Rep market is a relationship business is convenient; there is in fact no specific evidence showing that Viamedia could have competed with Comcast on price. *See* CSF ¶¶ 116 122 (Comcast, on average, offered better revenue shares to MVPDs than Viamedia). Further, not a single MVPD testified that it would have selected Viamedia but for its lack of interconnect access. Viamedia did not hire an expert to opine on causation, and lay persons are generally forbidden from doing precisely as Viamedia s management does here testify regarding hypotheticals or assumptions about what might have happened in the future. *Gumwood HP Shopping Ptrs. L.P. v. Simon Prop. Grp., Inc.*, 2017 WL 3016385, at *4 (N.D. Ind. July 17, 2017). In short, this multimillion-dollar antitrust case is far removed from situations in which a causation issue is so obvious that a plaintiff may forgo expert testimony. *Dalton*, 891 F.3d at 691. The Court, however, need not ultimately decide whether Comcast has presented sufficient evidence with respect to this part of

for conduct that was determined to be entirely lawful. *MCI Comm'ns*, 708 F.2d at 1162 63.

2. Dr. Lys's Damages Opinions Are Inadmissible

As Dr. Lys s Report and testimony, plus Viamedia s representations at the *Daubert* hearing, make clear, the entirety of his opinion assumes that but for Comcast s supposed anticompetitive practices, Viamedia would have been able to access the interconnects and compete as it had before 2011. *See, e.g.*, *Daubert* Hr g Tr., R. 354, at 153:24 154:5 (Viamedia s counsel indicating that Dr. Ly s assume[d] causation and that the question of whether those assumptions are permissible is a question about summary judgment). An expert s testimony is inadmissible, however, if it does not fit the facts of the case. *Owens*, 895 F.3d at 971.

Dr. Lys s opinions are inadmissible, as they rest on the unfounded assumption that Viamedia could have accessed the interconnects but for Comcast s anticompetitive conduct. *See, e.g.*, *Buscaglia v. United States*, 25 F.3d 530, 533 (7th Cir. 1994) (expert testimony may not be based on unsupported assumptions); *see also, e.g.*, *Craftsmen Limousine, Inc. v. Ford Motor Co.*, 363 F.3d 761, 777 (8th Cir. 2004); *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1055 1057 (8th Cir. 2000); *Rickman v. Deere & Co.*, 36 F.3d 1093 (4th Cir. 1994); *accord Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 242 (1993) (When an expert opinion is not supported by sufficient facts to validate it in the eyes of

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its damages case because Viamedia has failed to meet its threshold burden to show an issue of fact as to whether the any of the damages it seeks stem from unlawful conduct.

the law, or when indisputable record facts contradict or otherwise render the opinion unreasonable, it cannot support a jury s verdict.); Areeda & Hovenkamp, ANTITRUST LAW ¶ 657b (If the plaintiff s expert s damages study cannot segregate lawful from unlawful practices, then no damages may be awarded on the basis of that study.).

3. Viamedia's Claim for Injunctive Relief Fails

On a final note, Viamedia also requests injunctive relief from Comcast s conduct. R. 40 at 50. As an initial and obvious matter, Viamedia is not entitled to this relief because it has not shown an issue of fact as to whether Comcast engaged in anticompetitive conduct or that any such conduct caused it injury or damages. But the Court addresses Viamedia s request that it enjoin Comcast from any effort to exclude Viamedia or its MVPD clients from participating on a fair and open basis in the Interconnects because it, too, betrays the fundamental flaw in its case.

Antitrust law does not allow the injunctive relief Viamedia seeks. *See* Areeda & Hovenkamp, ANTITRUST LAW ¶ 774c. *Trinko* and *Linkline* prohibit enforced sharing absent a duty to deal, and for good reason. Forced sharing lessen[s] the incentive for the monopolist, the rival, or both to invest, it requires courts to act as central planners over the proper terms of such sharing, and it can compel the supreme evil of antitrust: collusion. *Trinko*, 540 U.S. at 407 08; *see also* Easterbrook, *The Chicago School & Exclusionary Conduct*, at 441 42; Richard A. Posner, ANTITRUST LAW 242 (2d ed. 2001) (Where the refusal to deal is unilateral, the only effective remedy is an order that defendant do business with the victim of the refusal to deal. The antitrust court becomes charged with the supervision of an ongoing commercial relationship, a function that courts are not equipped to perform effectively.). Indeed, while examining claims similar to the ones Viamedia brings, the Seventh Circuit recently warned about fail[ing] to adhere to the lessons of *Trinko* and *Linkline*. *Authenticom*, 874 F.3d at 1021. In doing so, it vacated a preliminary injunction that forced two firms that dominated upstream markets to allow their downstream competitors access to their systems. The Seventh Circuit noted that if there is a tie, the proper remedy would be to enjoin the tie not, as Viamedia requests, to create a duty to deal. *Id.* at 1026.

Viamedia brought this case in an attempt to force under Court order Comcast to provide it access to the interconnects on favorable terms. Antitrust law does not oblige.

CONCLUSION

For the foregoing reasons, the Court grants Comcast s motion for summary judgment, grants in part Comcast s motion to exclude Dr. Furchtgott-Roth s opinions and denies the remainder as moot, grants Comcast s motion to exclude Dr. Lys s opinions, and enters judgment in Comcast s favor.

Dated: August 16, 2018 ENTERED

/s/ Amy J. St. Eve.
AMY J. ST. EVE
United States Circuit Court Judge
Sitting by Designation

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

VIAMEDIA, INC., Plaintiff(s), v. COMCAST CORPORATION AND COMCAST SPOTLIGHT, INC., Defendant(s).	Case No. 16-cv-5486 Judge Amy J. St. Eve

JUDGMENT IN A CIVIL CASE

Judgment is hereby entered (check appropriate box):

☐ in favor of plaintiff(s) and against defendant(s) in the amount of $,

which ☐ includes pre judgment interest.
☐ does not include pre judgment interest.

Post-judgment interest accrues on that amount at the rate provided by law from the date of this judgment.

Plaintiff(s) shall recover costs from defendant(s).

☒ in favor of defendant(s) Comcast Corporation and Comcast Spotlight, Inc. and against plaintiff(s) Viamedia, Inc.

Defendant(s) shall recover costs from plaintiff(s).

☐ other:

This action was *(check one)*:

☐ tried by a jury with Judge presiding, and the jury has rendered a verdict.

☐ tried by Judge without a jury and the above decision was reached.

☒ decided by Judge Amy J. St. Eve on a motion for summary judgment.

Date: 8/16/2018

Thomas G. Bruton, Clerk of Court

Katie Franc, Deputy Clerk

APPENDIX F

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

April 7, 2020

Before

WILLIAM J. BAUER, *Circuit Judge*

DAVID F. HAMILTON, *Circuit Judge*

MICHAEL B. BRENNAN, *Circuit Judge*

No. 18-2852 VIAMEDIA, INC., *Plaintiff-Appellant,* v. COMCAST CORPORATION, ET AL., *Defendants-Appellees.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 1:16-cv-05486 Amy J. St. Eve, *Judge*.

O R D E R

On consideration of defendants petition for rehearing en banc, filed March 23, 2020, no judge in active service has requested a vote on the petition for rehearing en banc, and all judges on the original panel have voted to deny the petition for rehearing.*

Accordingly, the petition for rehearing en banc filed by defendants is DENIED.

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* Judge Flaum, Judge Rovner, and Judge St. Eve took no part in the consideration of the petition for rehearing en banc.

APPENDIX G

STATUTORY PROVISIONS INVOLVED

15 U.S.C. § 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

* * *

15 U.S.C. § 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

APPENDIX H

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

VIAMEDIA, INC., *Plaintiff*, v. COMCAST CORPORATION, and COMCAST SPOTLIGHT, LP, *Defendants.*	))))))))))))))))	Case No. 16-cv-5486 Hon. Amy J. St. Eve FIRST AMENDED COMPLAINT **JURY TRIAL DEMANDED**

<u>SUMMARY OF ACTION</u>

1. Plaintiff Viamedia, Inc. (Viamedia) represents cable television companies in the sale, placement, and distribution of Spot Cable Advertising, an important source of revenue for cable television systems. In this business, Viamedia competes directly with Defendant Comcast Spotlight, L.P. (Comcast Spotlight), a wholly-owned subsidiary of Defendant Comcast Corporation (Comcast). This lawsuit arises from Comcast s and Comcast Spotlight s intentional and anticompetitive efforts to deny Viamedia the ability to compete and, thereby, to enable Comcast and

Comcast Spotlight to acquire and maintain monopolies in the Spot Cable Advertising Representation market in geographic regions in which Comcast provides cable services.

2. Through its control of technical and business infrastructure that is critical for the sale of Spot Cable Advertising time, Comcast has impaired the ability of Viamedia and other Spot Cable Advertising Representatives to compete with Comcast Spotlight. Comcast has used its unilateral power to admit or deny competing cable television companies access to this infrastructure and condition access to this infrastructure upon those companies exclusive use of Comcast Spotlight as their Spot Cable Advertising Representative. Comcast has also banned any competing company that wishes to access this infrastructure from doing business with Viamedia. This anticompetitive conduct has harmed not only Viamedia, but also competition in the Spot Cable Advertising Representation market more generally in areas in which Comcast provides cable services, as well as harmed small business advertisers and those cable television companies that compete with Comcast to provide cable television service.

3. The Spot Cable Advertising industry generates over $5.4 billion in television advertising revenues annually through the sale of Spot Cable Advertising time during the two to three minute commercial breaks on cable networks that are reserved for sale by local cable television service providers.

4. Cable operators in distinct regions of the country known as Designated Market Areas (DMAs) have historically made use of critical technical and business infrastructure called Interconnects to market, organize, and sell Spot Cable Advertising time to

regional and national advertisers. Interconnects were created to allow regional and national advertisers the ability to buy Spot Cable Advertising Availabilities (Avails) on all cable television service providers within a DMA simultaneously. As such, the Interconnects function as the central marketplace around which regional Spot Cable Advertising purchases are conducted. Cable television service providers have also used critical infrastructure called NCC to market, organize, and sell national Spot Cable Advertising time to national advertisers.

5. Maintaining open access to this critical infrastructure for all cable television service providers and their third-party sales representatives has been a longstanding practice in the industry, to enable ease of access for national and regional advertisers.

6. Comcast has acknowledged that access to the Interconnects is crucial to efficient and effective competition. In 2014, a senior Comcast executive testified before a congressional committee during Comcast s failed attempt to acquire Time Warner Cable and, when pressed by the Committee Chairman to unequivocally state that Comcast would not exclude competitors or advertising from the Interconnects, the Comcast executive unambiguously testified that it would not.

7. In response to press reports that the U.S. Department of Justice has launched a formal investigation into whether Comcast s business practices have hindered competition in Spot Cable Advertising, a Comcast spokesperson was quoted as saying that Interconnects increase efficiency and help keep costs down for advertisers and that Interconnects are good for advertisers and consumers.

8. Comcast is the world s largest broadcast and cable television provider by revenue, with annual revenues of nearly $70 billion and a market capitalization valued at more than $155 billion. It serves more than 22 million cable and high-speed Internet subscribers. It owns Universal Studios and theme parks, the Fandango online ticketing service, the NBC and Telemundo television networks, 10 NBC affiliate television stations in different cities (including the six top television markets), 17 Telemundo affiliate television stations, nine regional sports networks, and 16 cable programming networks. Through Comcast Spotlight, Comcast is also the country s largest Spot Cable Advertising Representative, controlling Spot Cable Advertising for over 35 million cable subscriber households nationwide (or more than half of the entire cable industry) by virtue of its representation agreements with other cable television service providers.

9. Viamedia is an independent third-party Spot Cable Advertising Representative, representing primarily small and medium-sized independent cable television service providers that opt not to maintain their own in-house advertising sales organizations for purposes of selling and managing their Spot Cable Advertising. Viamedia employs roughly 360 people, has approximately 7,000 advertisers, and its clients collectively serve approximately 2.9 million subscriber households across the United States.

10. Through a series of acquisitions, Comcast has gained control of the Interconnects in 15 of the 25 most populous DMAs (and 26 of the 50 most populous DMAs) in the United States. With that control, Comcast has undertaken to fundamentally and anticompetitively change how Interconnects operate by excluding competing third-party sales representatives

like Viamedia and their clients from the Interconnects.

11. Comcast has excluded Viamedia and its clients from the Interconnects in large DMAs, such as Chicago and Detroit, where Viamedia had previously participated in Interconnect sales for more than a decade. In other DMAs, Comcast has refused to allow Viamedia to participate in Comcast-controlled Interconnects for purposes of representing Viamedia s clients.

12. Comcast has also used its control over the Interconnects and its ability to selectively exclude or threaten to exclude others from the Interconnects to coerce cable television service providers, such as RCN and WOW, to end their business relationships with Viamedia and transfer their business to Comcast Spotlight. In such cases, Comcast and Comcast Spotlight informed rival cable companies that they would only be permitted to access the Interconnects if they ceased transacting business with Viamedia.

13. In the Hartford, CT, DMA, Comcast has refused to allow cable operators represented by Viamedia to access the Interconnect, even though the systems owned by these operators had, for years, freely accessed the Interconnect prior to their entering a business relationship with Viamedia.

14. Comcast is unlawfully exercising its control over Interconnects in an attempt to drive Viamedia and other independent Spot Cable Advertising Representatives out of business by denying or threatening to deny cable television service providers access to Interconnects if those providers are represented by anyone other than Comcast Spotlight. Comcast has acted with the specific intent to monopolize the market for representing cable television service providers and

with the specific intent to enable Comcast and Comcast Spotlight to control all Spot Cable Advertising sales in each of the DMAs where Comcast provides cable services.

15. As is alleged further below, Comcast has employed other tactics along with its abuse of its power over Interconnects in furtherance of its anticompetitive agenda. For example, Comcast has used acquisitions to gain control of NCC, the lone national clearinghouse for Spot Cable Advertising sales. On information and belief, Comcast is in the process of leveraging its control over NCC to anticompetitively change the way that NCC operates and to embark on a strategy to exclude or threaten to exclude clients of Comcast Spotlight s competitors from NCC, much as Comcast has done with Interconnects.

16. Comcast s and Comcast Spotlight s exclusionary conduct harms competition and continues to injure Viamedia, causing losses to Viamedia s business of tens of millions of dollars, and not less than $75 million, in violation of state and federal antitrust statutes and other laws.

PARTIES

17. Plaintiff Viamedia Inc. is a Pennsylvania corporation with offices in New York, New York, and Lexington, Kentucky. Viamedia is the largest *independent* Spot Cable Advertising Representative in the United States, meaning that it is the largest representative firm that is not wholly owned and controlled by a cable television service provider such as Comcast. At present, Viamedia sells Spot Cable Advertising inventory on behalf of more than 60 small and independent cable television service providers that collectively

serve approximately 2.9 million video subscribers across the United States.

18. Defendant Comcast Corporation (Comcast) is a Pennsylvania corporation with its headquarters and principal place of business in Philadelphia, Pennsylvania. Comcast operates across the United States and transacts a substantial amount of business in the Northern District of Illinois, where it is the dominant provider of paid television and broadband internet services.

19. Defendant Comcast Spotlight LP (Comcast Spotlight) is a Delaware corporation and a wholly owned subsidiary of Comcast, with offices in New York, New York. Comcast Spotlight operates across the United States and transacts a substantial amount of business in the Northern District of Illinois, where Comcast controls the Interconnect for the Chicago DMA. Through Comcast Spotlight, Comcast provides Spot Cable Advertising Representative services to other cable television service providers in the Northern District of Illinois and throughout the country. Based on its exclusive control of all Avails sold by Comcast and the competitor cable television providers it represents, Comcast Spotlight controls the Spot Cable Advertising for more than 35 million cable subscriber households across the United States. For the same reason, Comcast Spotlight today controls 100 percent of all Spot Cable Advertising sold in the Chicago DMA.

JURISDICTION AND VENUE

20. In this action, Viamedia asserts violations of federal antitrust laws, including Section 2 of the Sherman Act, 15 U.S.C. § 2, against Comcast. Viamedia seeks monetary and equitable relief under those laws

and Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 & 26. Viamedia also asserts claims for violations of state antitrust laws and tortious interference with a business expectancy against Defendants.

21. This Court has subject matter jurisdiction over all claims herein, the bulk of which arise under federal law and present federal questions, pursuant to 28 U.S.C. §§ 1331, 1337(a), 1367(a), 2201-02, and 35 U.S.C. § 1, *et seq*.

22. Venue is proper in this District pursuant to 28 U.S.C. § 1391, because a substantial portion of the acts and omissions giving rise to Viamedia s claims occurred here.

MULTI-CHANNEL VIDEO PROGRAMMING AND SPOT CABLE ADVERTISING SERVICES

23. Tens of millions of households in the United States subscribe to in-home multi-channel cable video programming service, often colloquially referred to as cable television service. Cable television service is provided by a number of multichannel video programming distributors (MVPDs), which range in size, geographic reach, and number of subscribers. MVPD is generally used to describe both conventional cable television companies and other types of video program providers, such as telecommunications and satellite-based companies that provide similar services.

24. Of the MVPDs, Defendant Comcast is the one of the largest in the United States, and it dominates many DMAs. A DMA is a regional viewing area used to measure television ratings. Nielsen Market Research divides the United States into 210 separate DMAs, which represent distinct metropolitan areas. For example, the Chicago DMA which includes all of Northeast Illinois and Northwest Indiana is the

third largest in the country, and includes more than 8.2 million households. In the Chicago DMA, approximately three out of every four cable households are Comcast subscribers.

25. There are also smaller MVPDs that provide multi-channel video programming services. For example, Wide Open West (WOW) and RCN Corporation (RCN) are two independent MVPDs that have historically competed with Comcast to supply cable television services to subscribers in many of the same DMAs, including the Chicago DMA.

26. These smaller MVPDs generally generate revenue in two ways. First, they charge a subscription fee to their subscribers in exchange for providing cable (and related telecommunications and/or Internet) service; and second, they sell advertising time inventory to advertisers in the form of Spot Cable Advertising.

27. MVPDs enter into carriage agreements with cable networks familiar examples include, among many others, CNBC, ESPN, MTV, and Comedy Central under which the MVPDs pay the cable networks a fee to carry their programming. As part of these carriage agreements, 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. This reserved advertising time is referred to as Spot Cable Advertising.

28. The ability to sell Spot Cable Advertising is crucial to the economic survival of independent MVPDs, which must pay increasingly high cable programming costs.

29. For purposes of this Complaint (and consistent with industry usage), a 15-second, 30-second, or one-minute block of designated MVPD advertising inventory is described as a Spot Cable Advertising Avail or a Spot Cable Avail.

30. A Spot Cable Avail differs from traditional national cable advertising time, which is sold directly by the cable network to the advertiser. Advertising sold by the cable network airs simultaneously everywhere that the network is carried throughout the United States. For example, an advertisement sold by CNBC during a political debate will air simultaneously everywhere in the country that CNBC is aired. Spot Cable Avails on CNBC, on the other hand, are separately controlled by each of the various MVPDs that carry the network and, therefore, are distributed only to the subscribers of that MVPD.

31. Because of this local distribution, Spot Cable Advertising offers significant advantages to advertisers. It allows them to geo-target their prospective customers, meaning that the advertiser does not have to buy advertising on a cable network throughout the entire nation, but can instead select a particular geographic area to display the ad by buying Spot Cable Avails from an MVPD serving that area. This targeted area is sometimes called an ad zone.

32. Geo-targeting allows advertisers to take advantage of the effectiveness of cable television advertising while maximizing the efficient use of their advertising dollars by focusing on specific geographic targets for their message. Using the CNBC debate example, geo-targeting would allow an advertiser to reach viewers in a particular geographic area such as early voting states like Iowa or New Hampshire or

even a single congressional district without having to advertise to the debate s entire national audience.

33. Geo-targeting is particularly important to local and regional businesses (and to candidates for public office), whose consumer base (or target voter) does not fit the entire national footprint of a cable network. For example, a local grocery chain or auto dealer can effectively and efficiently advertise by purchasing Spot Cable Avails from MVPDs in the DMA where it operates, but will not generally purchase national advertising from a cable network.

34. Spot Cable Avails are generally sold to advertisers in three ways. First, they are aggregated and sold on a regional basis through a central clearinghouse called an Interconnect, each of which covers an entire DMA. Second, they are aggregated and sold on a *multi*-regional basis through National Cable Communications LLC (NCC), which allows Spot Cable Avails to be combined among multiple MVPDs and aired in multiple DMAs simultaneously. Third, they are sold in local transactions, in which individual Spot Cable Avails are purchased directly from a single MVPD or its representative by local businesses to be aired in a specific ad zone.

A. <u>Regional Spot Cable Advertising Through Interconnects</u>

35. Regional Spot Cable Advertising refers to sales conducted through the Interconnects, which act as clearinghouses that aggregate Spot Cable Avails from the MVPDs in a DMA and sell packaged Avails to advertisers in such a way that the purchased advertisements will run on all MVPDs across a given DMA simultaneously. Each MVPD in a DMA has historically participated in that DMA s Interconnect by

making a portion of its Spot Cable Advertising inventory available through the Interconnect. The MVPDs receive the revenues generated from such regional sales on approximately a pro rata basis and pay a fee to the Interconnect in exchange for its coordination services.

36. Prior to the formation of Interconnects, many advertisers found it difficult, if not impossible, to negotiate separately with each individual MVPD in a DMA in order to coordinate their advertisements across multiple MVPDs and ensure that their advertisements would run at the same time on the same cable network across the entire DMA simultaneously. Interconnects were first developed in the 1990s as cooperative organizations among multiple MVPDs in order to solve this problem by providing the logistical and technical coordination necessary to run DMA-wide advertisements across all of the MVPDs in a DMA at once.

37. In the absence of exclusionary conduct, the Interconnect functions as the central marketplace around which all regional Spot Cable Advertising sales in the DMA are transacted. Among other things, an Interconnect provides a business and technical interface that allows MVPDs to list and sell Spot Cable Avails in a single platform, providing regional advertisers with a one-stop shop where they can buy same-time Avails from all the MVPDs in the DMA. As a result, each DMA has typically contained just one Interconnect, in which all of the MVPDs operating within that DMA have participated.

38. Until Comcast began its anticompetitive campaign, Interconnects were open to all MVPDs and their representatives, and MVPDs were encouraged to participate in order to maximize the numbers of

households advertisers could reach in that DMA. In this way, the Interconnects provided a service a single point of access for broad-based regional Spot Cable Advertising that did not exist prior to their creation.

39. As Comcast itself has described the process, interconnects were formed voluntarily by MVPDs in markets to pool their resources and offer DMA-wide selling of cable/MVPD advertising inventory . . . Otherwise, advertisers trying to cobble together a wide-footprint MVPD-based advertising campaign would have to go MVPD-by-MVPD. As Comcast further explained, [t]he value of an interconnect increases as more MVPDs in an area participate, so our incentive is to have as many MVPDs participate as possible.

40. Although they participate jointly in Interconnects for the purpose of facilitating regional sales, MVPD participants in a given Interconnect also compete with one another for cable subscribers as well as Spot Cable Advertising revenue.

41. Historically, many independent MVPDs have allocated roughly a third of their Spot Cable Avail inventories to regional advertiser sales through Interconnects and have vigorously competed with Comcast and each other for Spot Cable Advertising sales. For this reason, the Interconnects were originally designed to avoid giving preferential treatment to any single MVPD participant, and the dominant MVPD in the region was not able to exercise its influence over the Interconnect to the detriment of other participating MVPDs.

42. At the time of their formation, oversight of the Interconnects was performed by boards of directors that were elected by a vote of all the MVPD members of the Interconnect. Regular board meetings were

held and decisions were based upon majority votes, with the best interests of all MVPDs in mind. In form and practice, Interconnects avoided discriminating among or disadvantaging individual MVPD or representative members.

43. Access to Interconnects is critical for MVPDs, enabling them to participate in regional Spot Cable Advertising sales and to receive revenue generated from regional sales.

44. Over time, and as a result of industry consolidation, regional advertising through the Interconnects in each given DMA has come to be managed and controlled by the largest MVPD in the DMA, which charges a fee to other participating MVPDs or their representatives. Due to its size, Comcast today controls the Interconnects in 15 of the nation s 25 largest television markets and 26 of the Interconnects in the nation s top 50 television markets.

45. Interconnects controlled by dominant MVPDs other than Comcast generally continue to treat all participating MVPDs equally by, for example, charging the same fees to all MVPDs and ensuring all MVPDs or their representatives have open and equal access to the Interconnect.

46. Interconnect managers including Comcast have promised Congress and federal regulators not to exclude their competitors from participating in Interconnects, acknowledging that the Interconnects constitute critical infrastructure that should be open to all participants. One senior Comcast executive testified before the House Subcommittee on Antitrust that Comcast would not exclude any competitor from any Interconnect that it controlled. Implicit in this commitment is the recognition that terms of access to

and participation in the Interconnects ought to be applied by Interconnect managers in a nondiscriminatory manner, allowing for open access to the Interconnects for all MVPDs and their sales representatives that wish to participate.

47. In each DMA, the existing regional Interconnect is the only viable and efficient option for advertisers that wish to purchase Spot Cable Advertising across the entire DMA. Due to their historical position and wide participation, the Interconnects have no competitors that offer a similar ability to sell regional Spot Cable Avails across multiple MVPDs in a DMA.

48. Nor could a competing Interconnect be developed. In each region, the existing Interconnect already controls all or close to all of the available Spot Cable Avail inventory, such that there would not be enough remaining inventory for a competitor to meaningfully compete for regional sales or to achieve simultaneity across multiple MVPDs in a DMA.

B. <u>National Spot Cable Advertising Through NCC</u>

49. National Spot Cable Advertising refers to sales conducted through NCC, the national clearinghouse that has historically functioned on a multi-DMA level in much the same way that the Interconnects have functioned on a single-DMA level.

50. Formed in 1981 as a joint venture among the five largest MVPDs that existed at the time, NCC acts as the central clearinghouse for advertisers seeking to place Spot Cable Advertising in multiple DMAs simultaneously. As a result of its acquisitions of other MVPDs over the past 20 years, Comcast now owns 60 percent of NCC. By virtue of this majority ownership

position, Comcast has the ability to effectively control NCC.

51. NCC provides a one-stop shop for advertisers seeking to advertise on a national or multi-regional basis by aggregating Spot Cable Avails from MVPDs across multiple DMAs simultaneously. NCC, therefore, functions as the central marketplace around which all national and multi-regional Spot Cable Advertising sales are conducted.

52. Historically, NCC has had agreements in place with virtually every MVPD or its representative in all 210 DMAs across the United States, including major markets such as Chicago. In its promotional materials, NCC states that its participating members cover 98 percent of all multichannel television households in the United States. Each participating MVPD or its representative pays a fee to NCC. Due to its broad participation base, which includes nearly all MVPDs and representatives across the country, NCC has become the lone point-of-contact for advertisers seeking to purchase Spot Cable Avails across multiple MVPDs in multiple DMAs simultaneously.

53. NCC s aggregation of Spot Cable Avails from multiple MVPDs across the country allows advertisers to combine the broad reach of a national advertising campaign with the geo-targeting ability of Spot Cable Advertising. For example, an advertiser for a four-wheel-drive vehicle can use the NCC to simultaneously target multiple Northern DMAs Chicago, Boston, New York where snowy conditions are likely to make such a vehicle more attractive to potential buyers.

54. Buying through NCC is the only practical option for advertisers that wish to purchase Spot Cable

Advertising across multiple DMAs, and such advertisers have no choice but to use it. NCC has no competitors.

55. To attempt to build such an inventory, a would-be competitor would have to simultaneously coordinate advertising purchases across multiple geographies and multiple MVPDs in each region, something which is impossible without NCC s existing infrastructure. Even if the would-be competitor could build the necessary infrastructure, NCC already controls so much of the available Spot Cable Advertising inventory through its existing agreements with virtually every MVPD in the country that there would not be enough remaining inventory for a competitor to offer the ability to display ads simultaneously across multiple DMAs, which is one of the critical goals of national Spot Cable Advertising.

56. For these reasons, NCC long ago became the only functional clearinghouse for all multi-DMA Spot Cable Advertising sales in the United States.

57. There is a close technical and operational relationship between NCC and Interconnects.

58. Access to NCC is critical for all MVPDs, enabling them to participate in national Spot Cable Advertising sales and to share in the revenue generated from national sales.

C. <u>Local Spot Cable Advertising</u>

59. Local Spot Cable Advertising refers to Spot Cable Advertising sales that do not involve an Interconnect or NCC acting as an intermediary. In these local sales, an advertiser deals directly with a single MVPD or its representative to purchase those Spot Cable Avails that run in a specific number of the MVPD s ad zones.

60. Each DMA is divided into dozens of different ad zones, allowing advertisements to be displayed on a neighborhood-by-neighborhood or even a block-by-block basis. The division of its service area into ad zones allows a single MVPD to run multiple advertisements at the same time in different areas within its own MVPD footprint.

61. Local Spot Cable Advertising, therefore, is well-suited to small businesses and other advertisers with narrowly targeted geographic audiences. For example, a local hardware store might wish to advertise only to cable subscribers within a several-block radius of its location. Local Spot Cable Advertising sales would allow the store to purchase Avails in the desired ad zones directly from the MVPD at relatively low overall price.

62. Because Local Spot Cable Advertisements reach the narrowest audience, they are generally less expensive to advertisers than regional or national Spot Cable Advertising through an Interconnect or NCC.

63. From the perspective of local and small businesses, Local Spot Cable Advertisements are a cost-effective way to promote their businesses on television in parity with larger national and regional advertisers. By allowing small businesses like the local hardware store to purchase Avails on cable networks alongside national or regional chain competitors within a targeted ad zone, Local Spot Cable Advertising allows small businesses to more affordably and efficiently compete in those targeted zones in which they operate.

64. Historically, local Spot Cable Advertising has been an area of significant competition among

MVPDs. This competition has benefitted small business advertisers by reducing the price of local Spot Cable Advertising and giving them multiple opportunities to purchase local Spot Cable Advertising in specific ad zones. Such competition is eliminated when one MVPD is able to control its competitors Spot Cable Avails.

D. <u>The Need For Access To Regional, National, and Local Sales Platforms</u>

65. In order to have a meaningful opportunity to sell its entire inventory of Spot Cable Avails to advertisers, an MVPD or its representative must have access to all three tiers of the system described above.

66. Regional sales through Interconnects can typically account for approximately one third to one half of a given MVPD s Spot Cable Advertising sales. These sales generate a significant portion of an MVPD s total advertising revenue. Interconnects, therefore, are important pieces of infrastructure for allowing MVPDs to maximize their Spot Cable Advertising revenue.

67. National or multi-regional sales through NCC can typically fill up to one third of a given MVPD s Spot Cable Avail inventory. NCC, therefore, is also an important piece of infrastructure for allowing MVPDs to maximize their Spot Cable Advertising revenue.

68. Local Spot Cable Advertising sales generally account for the remaining approximately one third of a given MVPD s Spot Cable Advertising sales.

69. Independent MVPDs rely heavily on all three tiers of advertising revenue in order to remain competitive with large competitors like Comcast. These independent MVPDs experience a substantial loss of revenue when they are excluded from participating in

the Interconnects, making access to the Interconnects crucial for their business.

<u>THE MARKET FOR SPOT CABLE ADVERTISING REPRESENTATION</u>

70. Planning and coordinating an MVPD s Spot Cable Advertising transactions across the three tiers of the sales system including identifying the buyers and achieving favorable business terms for transactions in each of these tiers is often complex and time consuming. Organizing, marketing, and selling Spot Cable Advertising on behalf of MVPDs, therefore, takes a substantial amount of specialized knowledge, infrastructure, resources, and technical ability.

71. Some of the largest MVPDs such as Comcast devote entire subsidiary organizations to directing and organizing their Spot Cable Advertisement sales operations. But most independent MVPDs do not have the resources to invest in the highly-specialized infrastructure, equipment, staff, and expertise necessary to run their own in-house Spot Cable Advertising sales operations.

72. As a result, there is a market for the provision of third-party Spot Cable Advertising Representation services to independent MVPDs, in which Viamedia participates. In this market, third-party representative firms contract with MVPDs to assume responsibility for their Spot Cable Advertising for the purpose of marketing and selling their Spot Cable Avail inventory to national, regional, and local advertisers. After handling all aspects of such sales, the third-party representative firm generally retains a share of the revenue generated by the ad sales and pays the remaining portion to the MVPD client.

73. In order to compete in this market and to sell Spot Cable Avails effectively, a representative firm must have access to the Interconnects and NCC on behalf of it clients, as these are the only existing infrastructure for advertisers who wish to place regional ads and the only points-of-contact for advertisers seeking to buy Spot Cable Avails on a regional basis.

74. Viamedia is in the business of representing MVPD clients for the purpose of selling their Spot Cable Avails. In this regard, Viamedia has long provided its MVPD clients with the necessary sales, marketing, and technology expertise and support to sell their Spot Cable Avails to local, regional, and national advertisers, including by accessing and participating in the Interconnects and NCC.

75. Viamedia offers its MVPD clients complete turn-key advertising sales, spot insertion, encoding, validation, IT, monitoring, traffic, billing, and collection services. These constitute all of the services that an independent MVPD would otherwise need to develop internally in order to sell, bill for, and insert Spot Cable Advertisements into its programming on its own.

76. Viamedia operates in more than 70 DMAs across the United States, representing more than 60 distinct MVPD clients. These MVPDs vary in size and sophistication, and range from a few thousand subscribers to several hundred thousand. All of them have made a decision to outsource their Spot Cable Advertising sales functions to Viamedia rather than to invest in such functions internally. Historically, many have also decided that they do not want to cede control of their Spot Cable Avails to a competitor such as Comcast.

77. Viamedia inserts about one million advertisements per day for over 7,000 advertisers nationwide. However, Viamedia s MVPD clients often account for only a small percentage of Spot Cable Advertising Avails in any given DMA.

78. Comcast is the dominant MVPD in many of the DMAs where Viamedia s MVPD clients operate. Viamedia s MVPD clients, therefore, have historically competed directly with Comcast to provide multichannel video programming services to subscribers and to sell Spot Cable Avails to advertisers.

79. Comcast Spotlight competes with Viamedia to represent independent MVPDs for purposes of controlling and selling these competing MVPDs Spot Cable Advertising to be aired in the competing MVPDs subscriber households in exchange for a share of the advertising sales revenue.

80. In this way, although Comcast directly competes with independent MVPDs for subscribers and advertising sales, it is also simultaneously seeks to represent those same MVPDs and in many cases is representing them for purposes of assuming control of and selling their Spot Cable Avail inventories.

81. As opposed to Comcast Spotlight, Viamedia s status as an independent third-party representative offers a number of pro-competitive advantages to MVPD clients. Many small MVPDs are simply more comfortable giving control of their Spot Cable Avail inventory to an independent representative that is not wholly owned and controlled by a competitor.

82. Viamedia s independence allows it to focus on obtaining both numerous local advertisers and a fair share of advertising revenue for its MVPD clients in Interconnects, which often involves monitoring and,

when appropriate, challenging the decisions of Interconnects on behalf of its MVPD clients.

83. For these reasons, on a level playing field and absent any coercion or exclusion by Comcast, a substantial number of independent MVPDs would elect to use Viamedia or some other independent firm as their Spot Cable Advertising Representative instead of Comcast Spotlight.

84. Comcast has abused its control of Interconnects and NCC to avoid having to fairly compete with Viamedia (and other independent firms) on a level playing field. Instead, Comcast has threatened to exclude and has actually excluded Viamedia and its MVPD clients from accessing the Interconnects and NCC as a means of stifling competition in the Spot Cable Advertising Representation market and achieving Comcast s other anticompetitive goals.

COMCAST'S DOMINANT ROLE IN CABLE ADVERTISING

85. Comcast Spotlight is the largest Spot Cable Advertising Representation firm in the United States. It controls 100 percent of all Spot Cable Advertising Avails sold on Comcast s own 22 million subscriber cable system, and through its third-party representation of other MVPDs, Comcast Spotlight also controls the Spot Cable Avails for more than 13 million additional subscribers. By virtue of its contracts with the MVPDs it represents, Comcast and Comcast Spotlight make all significant decisions about how these Spot Cable Avails are sold.

86. Comcast s dominance is even more pronounced in specific large-market DMAs. For example, in the Chicago DMA, Comcast manages the Interconnect and as a result of the conduct described below

Comcast controls approximately 100 percent of all Spot Cable Advertising Avails available for sale in that market.

87. In the Detroit DMA, Comcast manages the Interconnect and as a result of the conduct described herein Comcast controls approximately 100 percent of all Spot Cable Advertising Avails available for sale.

88. In the Philadelphia DMA, Comcast manages the Interconnect and as a result of the conduct described herein Comcast controls approximately 98 percent of all Spot Cable Advertising Avails available for sale.

89. In the Boston DMA, Comcast manages the Interconnect and as a result of the conduct described herein Comcast controls approximately 98 percent of all Spot Cable Advertising Avails available for sale.

90. In the Washington, DC, DMA, Comcast manages the Interconnect and as a result of the conduct described herein Comcast controls approximately 100 percent of all Spot Cable Advertising Avails available for sale.

91. In the Denver DMA, Comcast manages the Interconnect and controls approximately 93 percent of all Spot Cable Advertising Avails available for sale.

92. In the Seattle-Tacoma DMA, Comcast manages the Interconnect and controls approximately 84 percent of all Spot Cable Advertising Avails available for sale.

93. In the Pittsburgh DMA, Comcast manages the Interconnect and controls approximately 96 percent of all Spot Cable Advertising Avails available for sale.

94. In the Portland, OR., DMA, Comcast manages the Interconnect and controls approximately 97 percent of all Spot Cable Advertising Avails available for sale.

95. Increasingly, Comcast in concert and coordination with Comcast Spotlight has used its majority control and ownership in these Interconnects to exclude and disadvantage other MVPDs as a means of coercing them into transferring control over their Spot Cable Avail inventories to Comcast by forcing them to accept representation agreements with Comcast Spotlight as a condition of having access to the Interconnects and NCC.

96. Since Comcast has come to control the majority of large regional Interconnects in the country, it has used its power to exclude independent MVPDs and their representatives and to coerce them into behaviors that benefit Comcast. In so doing, Comcast has acquired and maintained a monopoly over all Spot Cable Advertising and all Spot Advertising Representation in those DMAs where it controls the Interconnect.

97. Competition for advertisers is an important aspect of competition between and among MVPDs. As a result of its control of the Interconnects in, among other DMAs, Chicago, Detroit and Hartford, Comcast has the ability to exclude or limit its MVPD competitors from competing for certain advertising revenues.

98. Comcast has likewise used acquisitions to gain control of NCC. As a result, Comcast now owns a 60 percent stake in NCC, giving it control over this critical infrastructure for national Spot Cable Advertising and the power to exclude other MVPDs and

their representatives when doing so suits Comcast s business interests.

COMCAST'S MONOPOLIZATION AND EXCLUSIONARY ACTS

99. Before Comcast embarked upon its current coercive and exclusionary conduct, the three-tiered system for Spot Cable Advertising encompassing regional, national, and local sales had functioned competitively since at least the 1990s. All MVPDs and their representatives were permitted access to the regional Interconnects. This access allowed them to efficiently offer advertisers the desired combinations of Spot Cable Avails in regional, national, and local markets, while competing with one another to increase their respective subscriber bases and their own advertising revenue.

A. The Exclusion of Competitors From Regional Interconnects

100. An example of Comcast s anticompetitive use of the Interconnect and NCC infrastructure which are essential to participation in the market for Spot Cable Avails is its exclusion of competitors from the regional Interconnects for the Chicago and Detroit DMAs, in violation of the longstanding cooperative agreements and practices that had governed those regional Interconnects operations since the 1990s.

101. The Chicago Interconnect was formed in August 1998 as an industry cooperative. At that time, there were a number of independent MVPDs that participated in the Interconnect and that competed directly against both Comcast and each other for advertising sales.

102. Through a series of acquisitions of MVPDs, however, Comcast gained a majority interest in the Chicago Interconnect, ceased doing business under the Interconnect s preexisting structure, and assumed unilateral control of regional advertising through the Chicago Interconnect. The same practices were repeated in Detroit, where Comcast s acquisition of other MVPDs permitted it to assume unilateral control of regional advertising through the Detroit Interconnect.

103. From 2002 to 2012, Viamedia, acting on behalf of two of its then most significant MVPD clients, WOW and RCN, participated in the Interconnects for Chicago and Detroit. Throughout this time, Viamedia represented WOW and RCN for the purpose of selling their Spot Cable Advertising.

104. In 2011, Comcast Spotlight began attempting to take WOW s and RCN s business away from Viamedia.

105. Comcast s executives made a series of calls to WOW and RCN on behalf of Comcast Spotlight, expressing Comcast Spotlight s interest in representing WOW and RCN for the purpose of selling their Spot Cable Advertising in national, regional, and local markets.

106. At the time of these calls, both WOW and RCN had longstanding contractual relationships with Viamedia. Neither company had any interest, at that time, in transferring its Spot Cable Advertising Representation from Viamedia to Comcast Spotlight.

107. Independent MVPDs frequently advertise and promote their own video subscription and broadband services using some of their own Spot Cable in-

ventory. WOW and RCN are among the many independent MVPDs that follow this practice. Tendering to Comcast Spotlight control over their Spot Cable Avails, therefore, would also have required that WOW and RCN provide Comcast Spotlight with the ad schedule and advance copies of their actual advertisements, giving Comcast before-market knowledge of their future pricing, promotions, and other efforts to take market share away from Comcast.

108. As RCN put it at the time: Comcast would prefer that RCN use Comcast Spotlight and not Viamedia . . . . [But] RCN is not comfortable having its largest and most formidable rival as its representative in the spot cable market and should be free to choose a representative for such services that does not present such an obvious conflict and competitive disadvantage. Accordingly, both WOW and RCN remained with Viamedia as their Spot Cable Advertising Representative, for the time being.

109. Throughout 2011 and early 2012, on information and belief, Comcast repeatedly told advertising agencies that it would have sole control over all of WOW s and RCN s Spot Cable Advertising Avails by year s end.

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. This occurred despite the fact that Viamedia had represented WOW and RCN in both Interconnects for over ten years, during which time Viamedia paid over $23 million in fees to Comcast to participate in the Chicago and Detroit Interconnects.

111. At first, Comcast did not state the reasons for this exclusion. It merely stated that MVPDs represented by Viamedia would not be permitted to continue to participate in or access the Interconnects in the future.

112. When pressed by Viamedia to provide a reason for the exclusion during subsequent conversations, however, Comcast acknowledged that the exclusion was motivated by Comcast Spotlight s desire to replace Viamedia as WOW s and RCN s Spot Cable Advertising Representative.

113. 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. Comcast also said that it had no intention of allowing Viamedia to participate in the Interconnects in the future.

114. The immediate consequence of this forced exclusion from the Interconnects was that Viamedia and the MVPDs it represented were completely foreclosed from selling any Spot Cable Advertising Avails through the Interconnects for Chicago and Detroit, two of the largest markets for regional Spot Cable Advertising sales in the country.

115. As a direct result of the exclusion, Viamedia and its MVPD clients lost tens of millions of dollars in revenue from the sale of Spot Cable Advertising through the Detroit and Chicago Interconnects.

116. To Viamedia s knowledge, prior to the sudden and unilateral exclusion of Viamedia and its MVPD clients from the Chicago and Detroit Interconnects, no third-party representation firm or MVPD

had *ever* been excluded from an Interconnect for any reason. Nor is such an exclusion reconcilable with the economic purpose of the Interconnects or Comcast s own observation that [t]he value of an interconnect increases as more MVPDs in an area participate.

117. In April 2014, a senior Comcast executive was called to testify before the House Subcommittee on Antitrust in connection with Comcast s efforts to acquire Time Warner Cable.

118. During the executive s testimony, Subcommittee Chairman Spencer Bachus of Alabama raised the issue of Comcast s dominance over regional Interconnects and asked the executive whether he would provide assurances that Comcast will not exclude competitors or advertising firms from the advertising interconnects that Comcast operates. In response, the executive stated that Comcast was not in the business of excluding competitors from Interconnects it controlled. When further pressed by Chairman Bachus to clearly and unequivocally state that Comcast would not exclude competitors or advertising from the Interconnects, the executive unambiguously testified that it would not.

119. At the time that this promise was made, Comcast had been excluding Viamedia and its MVPD clients from the Chicago and Detroit Interconnects for several months.

120. Following the executive s testimony, Viamedia contacted Comcast and requested that Viamedia and all of its MVPD clients be given restored access to the Interconnects, consistent with the executive s statement to Congress.

121. In response to Viamedia s requests, Comcast refused to provide any assurance that Viamedia

or its MVPD clients would be permitted future to access any Comcast-controlled Interconnece. Comcast refused Viamedia s requests to access Interconnects in many DMAs.

122. With respect to the Chicago and Detroit Interconnects specifically, Comcast said that it would be willing to consider Viamedia s readmission if, and only if, Viamedia agreed to certain commercially unreasonable terms, which would have prevented Viamedia from meaningfully competing with Comcast Spotlight.

123. For example, Comcast demanded that it be given the right to preempt, at its sole discretion and with virtually no advance notice, any of the Spot Cable Avails previously sold or controlled by Viamedia, whether such ads were sold through the Interconnect or not. This aspect of the Comcast s proposal would have given Comcast the unilateral ability to assume control over the entire inventory of Viamedia s MVPD clients and to resell Avails that had already been sold by Viamedia to other advertisers. This requirement would have made it virtually impossible for Viamedia to sell Avails to any regional or local advertisers for fear that their ads would be preempted and resold to different advertisers by Comcast. It was a term that Comcast knew no Spot Cable Advertising Representative could reasonably accept, as it would have eliminated Viamedia s ability to compete with Comcast Spotlight or sell any local advertising on behalf of its MVPD clients. This proposal was not a genuine offer to allow Viamedia or its MVPD clients to rejoin any Interconnect.

124. On information and belief, in 2015, Comcast informed WOW and RCN that each could resume

its participation in the Comcast-controlled Interconnects if they ended their relationship with Viamedia and retained Comcast Spotlight as their sole Spot Cable Advertising Representative.

125. Again, Comcast made clear that it would not allow WOW and RCN to participate in the Interconnects as long as Viamedia continued to represent them and controlled their Spot Cable Advertising Avails.

126. Upon information and belief, in April of 2015 Comcast provided a formal proposal to WOW, which contemplated WOW s readmission to the Chicago and Detroit Interconnects after WOW agreed to replace Viamedia with Comcast Spotlight as its sole Spot Cable Advertising Representative in those DMAs. WOW accepted this proposal.

127. As of January 1, 2016, Comcast Spotlight now serves as WOW s sole Spot Cable Advertising representative in the Chicago and Detroit DMAs.

128. In order to gain access to the Chicago and Detroit Interconnects, WOW was compelled to transfer to Comcast Spotlight total control of all of WOW s Spot Cable Avail inventory for the Chicago and Detroit DMAs. This transfer allows Comcast Spotlight to control all of WOW s Spot Cable Advertising in Chicago and Detroit for national, regional, and local inventory. Going forward, no advertiser will be able to reach WOW s Chicago and Detroit subscribers without dealing with Comcast Spotlight.

129. On information and belief, were it not for Comcast s anticompetitive acts, including its exclusion of Viamedia and its MVPD clients from the Chicago and Detroit Interconnects, WOW would have

continued to retain Viamedia as its Spot Cable Advertising Representative. WOW has, in fact, elected to retain Viamedia as its sales representative in those DMAs where Comcast does not control the Interconnect, and therefore does not have the power to exclude WOW from the Interconnect.

130. On information and belief, also in early 2015, Comcast Spotlight provided a formal proposal to RCN to represent it in all Spot Cable Advertising transactions for the Chicago, Detroit, New York, Philadelphia, Boston, and Washington, DC, DMAs. This proposal also contemplated RCN s readmission to the Chicago and Detroit Interconnects if, and only if, RCN replaced Viamedia with Comcast Spotlight as its sole Spot Cable Advertising representative. RCN accepted this proposal.

131. As of January 1, 2016, therefore, Comcast now controls all of RCN s Spot Cable Advertising national, regional, and local inventory in Chicago (the third largest DMA), Detroit (the eleventh largest DMA), New York (the largest DMA), Philadelphia (the fourth largest DMA), Boston (the seventh largest DMA), and Washington, DC (the eighth largest DMA). No advertiser will be able to reach RCN s subscribers in all markets without dealing with Comcast Spotlight.

132. Comcast successfully used the threat of continued exclusion from the Chicago and Detroit Interconnects to coercively gain control of all of RCN s Spot Cable Advertising Avails for *six* of the 11 largest DMAs in the United States (constituting all of the markets in which RCN operates).

133. On information and belief, were it not for Comcast s anticompetitive acts and exclusion of Viamedia and its MVPD clients from the Chicago and Detroit Interconnects, RCN would have continued to retain Viamedia as its Spot Cable Advertising Representative in these and other markets, consistent with RCN s previous statements to the FCC.

134. On information and belief, Comcast has used similar threats and exclusionary acts to gain control of other MVPDs Avails, allowing Comcast to consolidate its control over Spot Cable Advertising in many of the largest DMAs in the United States.

135. As of January 1, 2016 due to the conduct described above no MVPD is able to sell a Spot Cable Avail and no advertiser is able to purchase a Spot Cable Avail in five of the 10 largest DMAs in the United States without dealing exclusively with Comcast Spotlight.

136. This type of exclusionary conduct has also occurred in other Interconnects that Comcast controls. For example, in 2014, Frontier Communications (Frontier) acquired a system that provides service to approximately 200,000 subscribers in the DMA for Hartford and southern Connecticut. Comcast Spotlight had previously been the representative for that system for Spot Cable Advertising sales in Connecticut. Frontier has been represented by Viamedia in the Portland, Oregon, Ft. Wayne, Indiana, and Seattle-Tacoma, Washington, DMAs. When Frontier transferred the Spot Cable Avails inventory for its newly acquired Connecticut subscribers to Viamedia (despite Comcast Spotlight s bid to retain the business), both Frontier and Viamedia were abruptly dropped from the Comcast-controlled Hartford Interconnect.

137. To date, Comcast has continued to refuse to allow Viamedia, acting on behalf of Frontier, access to the Hartford Interconnect. This exclusion has deprived Viamedia of the ability to participate in Interconnect sales in the Hartford DMA on behalf of Frontier, costing Viamedia and Frontier millions of dollars in lost revenue.

138. On information and belief as it did with WOW and RCN in Chicago and Detroit Comcast intends to condition Frontier s re-admission to the Hartford Interconnect upon Frontier firing Viamedia as its sales representative and entering into an exclusive representation agreement with Comcast Spotlight.

139. Comcast Spotlight has also contacted another MVPD client of Viamedia in Eastern Pennsylvania, whose current term of representation with Viamedia is scheduled to expire on December 31, 2016. Comcast Spotlight has told that MVPD that Comcast will guarantee the MVPD s admission into the New York City Interconnect, but only if the MVPD ends its relationship with Viamedia and switches its representation from Viamedia to Comcast Spotlight.

140. Other independent MVPDs and their representatives have expressed concerns about Comcast s practice of excluding competitors from Interconnects unless they agree to retain Comcast Spotlight. For example, Patriot Media, the company that manages the MVPD Grande Communications Networks and Choice Cable TV (and RCN), has stated in public filings that it believes [c]ompetition in cable advertising markets will be harmed as Comcast increases its ownership and control of entities that control national and regional advertising and seeks to extend that into local spot advertising markets.

141. As independent MVPD CenturyLink put it: [Comcast s] control over the crucial regional interconnects means that it can discriminate against smaller MVPDs and deny access to the interconnects unless the MVPDs comply with conditions [imposed by Comcast]. For example, Comcast can use its control to deny access to the interconnects to force smaller MVPDs to deal with Comcast Spotlight . . . instead of independent firms like Viamedia, or risk being excluded from the interconnect.

142. On information and belief, Comcast plans to continue its exclusionary behavior in Chicago, Detroit, and Hartford, as well as many other DMAs, with the ultimate goal of eliminating all independent competition in the Spot Cable Advertising Representation market.

B. <u>The Planned Exclusion of Competitors From NCC</u>

143. Like the Interconnects, NCC was created as a cooperative among several MVPDs to make possible multi-regional coordination for Spot Cable Advertising and traditionally operated under an open-architecture in which all MVPDs were permitted to participate.

144. For years, Viamedia has participated in NCC for the purpose of selling Spot Cable Advertising to national advertisers on behalf of Viamedia s MVPD clients. During this time, Viamedia has remained in good standing with NCC and has paid more than $40 million in fees to NCC related to its national Spot Cable Advertising sales.

145. Viamedia s current agreement with NCC provides that its access to NCC will expire in December 2017. Despite repeated requests by Viamedia,

however, NCC has refused to entertain a long-term extension that would ensure Viamedia s continued access to NCC beyond that date. On information and belief, Comcast as NCC s majority and controlling owner is responsible for NCC s decision not to allow Viamedia s to enter a long-term extension with NCC.

146. On information and belief, Comcast has also caused NCC to act in a discriminatory manner toward Viamedia and other independent Spot Cable Advertising Representatives in other ways. For example, Comcast has caused NCC to charge Viamedia a fee for participation that is substantially greater than the fee that Comcast itself pays or that NCC charges to other participants. Comcast has also insisted that NCC impose other onerous conditions upon Viamedia, with the planned culmination of Viamedia s complete exclusion from NCC in December 2017.

147. As it has done with the Interconnects, Comcast now intends to shut Viamedia and its MVPD clients out of participating in national Spot Cable Advertising sales as a way of coercing independent MVPDs into transferring control of their Spot Cable Avails to Comcast Spotlight.

148. On information and belief, Comcast and NCC, acting jointly, have approached several of Viamedia s remaining MVPD clients and have urged them to terminate their representation agreements with Viamedia if they wish to continue to have access to NCC and participate national Spot Cable Advertising sales beyond the expiration of Viamedia current access agreement.

149. In late 2014, NCC sent a presentation to one of Viamedia s MVPD clients showing that if the

MVPD failed to terminate its relationship with Viamedia in favor of using NCC as its national sales representative and Comcast Spotlight as its Spot Cable Advertising Representative for local and regional sales, it would face a substantial reduction in revenue due to being excluded from participating in national sales through NCC. On information and belief, NCC was acting at Comcast s behest in sending this presentation to Viamedia s client.

150. As with the Interconnects, national Spot Cable Advertising sales through NCC is a critical component of every independent MVPD s business; exclusion from NCC would have a significant adverse effect on an MVPD s profitability. Comcast s power to exclude independent MVPDs from participating in national Spot Cable Advertising through NCC gives Comcast significant power to force MVPDs to enter into exclusive Spot Cable Advertising Representative agreements with Comcast Spotlight that the MVPDs would not normally accept.

151. On information and belief, many MVPDs that would otherwise choose to be represented by Viamedia (or some other independent third party) will be forced to transfer control of their Spot Cable Avails to Comcast Spotlight in order to avoid exclusion from NCC.

152. As the American Cable Association stated, Comcast s control over the NCC and its corresponding ability to restrict its competitors access to NCC gives Comcast a powerful lever to raise competing MVPDs costs, restrict its competitors advertising capabilities, and harm consumers.

153. Comcast s conditioning of access to the Interconnects and NCC on its rival MVPDs entering into

exclusive dealing arrangements with Comcast Spotlight and the corresponding concerted boycott of Viamedia is an anticompetitive means of acquiring and maintaining monopoly power in the market for Spot Cable Advertising Representation.

C. <u>Comcast's Refusal to Deal with Viamedia Is Irrational But For its Anticompetitive Effects</u>

154. As described above, Comcast today controls and manages the Interconnects in 15 of the nation s 25 largest television markets (DMAs) and 26 of the Interconnects in the nation s top 50 DMAs. The economic value of each Interconnect is derived from its ability to provide a single point of access for advertisers to purchase Spot Cable Avails that are capable of reaching *all* subscribers within a DMA, which in turn increases the economic value to the advertisers and to participating MVPDs.

155. Therefore, as the Interconnect manager, Comcast has an incentive to maximize participation in the Interconnect by eligible MVPDs (and their corresponding cable subscribers), despite the fact that Comcast also competes with other MVPDs for subscribers and Spot Cable Advertising sales, and despite the fact that Comcast also competes (including through Comcast Spotlight) with representation firms such as Viamedia. Comcast acknowledges this by explaining, as noted above, that [t]he value of an interconnect increases as more MVPDs in an area participate, so our incentive is to have as many MVPDs participate as possible.

156. Consistent with this statement, Comcast further states on its website that an Interconnect is [a] collection of two or more cable TV systems that

work together to distribute commercials to a wider geographic area than a single system would otherwise reach, giving advertisers the option to reach *all* cable households within a market with one buy, one contact and one tape. (Emphasis added.) Similarly, the Video Advertising Bureau, in which Comcast is on the Board, states that An interconnect gives advertisers the option to reach *all* cable households within a given market with one buy and one contact. (Emphasis added.)

157. As an Interconnect manager, Comcast also receives fees directly from participating MVPDs and representation firms, who compensate Comcast for managing and providing access to the Interconnects that it controls. Viamedia has paid and offered to pay Comcast fair market value in exchange for accessing the Interconnects that Comcast manages. For example, as discussed above, prior to Comcast s refusal to deal, Viamedia paid over $23 million to Comcast in its role as Interconnect manager to participate in the Chicago and Detroit Interconnects alone.

158. Therefore, dealing with Viamedia would have entailed no cost to Comcast as the Interconnect manager, would have provided the Interconnect and Comcast both as the Interconnect manager and as a participating MVPD with immediate benefits, and would have served the interests of the Interconnect customers, namely the regional advertisers, to reach all subscribers in the market. Comcast s refusal to deal with Viamedia is thus irrational and contrary to these economic incentives.

159. For example, when Comcast refused to deal with and excluded Viamedia from accessing the Detroit Interconnect on June 1, 2012, and Comcast prevented WOW from participating in regional ad

sales through the Interconnects because WOW was being represented by Viamedia, this reduced significantly the number of cable subscribers covered by the Detroit Interconnect from virtually all eligible cable subscribers in the Detroit DMA to approximately 80% of such subscribers. This significantly reduced the economic value of the Interconnect and its regional advertisements, and was directly contrary to Comcast s own stated economic incentive as the Interconnect manager and a participating MVPD to have as many MVPDs participating as possible and to reach all cable households within a market with one buy in the Interconnects that it controls. Further, as a result of excluding Viamedia and WOW from the Detroit Interconnect, Comcast also forfeited direct fees that it otherwise would have received pursuant to its role as the Interconnect manager.

160. Similarly, when Comcast refused to deal with and excluded Viamedia and by association RCN and WOW from the Chicago Interconnect on June 1, 2012, the number of cable subscribers covered by the Chicago Interconnect was reduced significantly from virtually all eligible cable subscribers in the Chicago DMA to approximately 90% of such subscribers. This significantly reduced the economic value of the Interconnect and its regional advertisements, and was directly contrary to Comcast s own stated economic incentive as the Interconnect manager and a participating MVPD. Further, as a result of excluding Viamedia, WOW and RCN from the Chicago Interconnect, Comcast also forfeited direct fees that it otherwise would have received pursuant to its role as the Interconnect manager.

161. In the Hartford DMA, Comcast s refusal to deal with Viamedia by excluding it from the Hartford

Interconnect in 2014 caused the subscribers owned by Frontier, an MVPD represented by Viamedia, to cease participating in the Interconnect as well. This reduced the number of eligible cable subscribers covered by the Hartford Interconnect from virtually all eligible cable subscribers to approximately 80% of such subscribers. As a result, the economic value of the Hartford Interconnect to Comcast, as the Interconnect manager, as well as the advertisers and the MVPDs participating in the Hartford DMA, including Comcast, was significantly reduced. Further, as a result of excluding Viamedia and Frontier from the Hartford Interconnect, Comcast also forfeited direct fees that it otherwise would have received pursuant to its role as the Interconnect manager.

162. Comcast is now similarly refusing to deal with Viamedia in the Seattle, Washington, Minneapolis, Minnesota, Jacksonville, Florida and Knoxville, Tennessee DMAs, which is economically irrational for the same reasons stated above.

163. Unsurprisingly, because it would be irrational to do so, to Viamedia s knowledge, no other third-party representation firm (or MVPD represented by a third-party representation firm) had *ever* been excluded from an Interconnect until Viamedia and its represented MVPDs were excluded by Comcast as detailed above.

164. By contrast, in DMAs where Comcast is not the dominant player, Viamedia has access to the Interconnect on behalf of the MVPDs it represents. For example, in the Cincinnati, Tampa, Dallas, and Waco-Temple-Bryan, Texas DMAs, where Charter Communications (Charter) controls and manages the Interconnects, Viamedia has access to the Inter-

connects on behalf of its represented MVPDs. Similarly, in the New York DMA, where the Interconnect is controlled and managed by Cablevision, Viamedia has access to the Interconnect on behalf of the MVPDs it represents, and Comcast is also a participating member of the New York Interconnect on behalf of an MVPD that Comcast represents. Behind Comcast, Charter and Cablevision are the second and third largest Interconnect managers in the United States.

165. 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. These MVPDs either transfer their Spot Cable Advertising Representation business from Viamedia to Comcast, a direct competitor, or cease participating in the Interconnect at all. If the MVPDs place their Spot Advertising Representation business with Comcast, this simply replaces one intermediary with another because Comcast still acts as an intermediary between the MVPDs and the advertisers who purchase regional advertising through the Interconnects.

166. Even if there were any potentially improved efficiencies to be realized by consolidating management of an Interconnect with Comcast s provision of Spot Cable Advertising Representation services, refusing to deal with Viamedia is not necessary in order to realize any such efficiencies.

167. Moreover, there are no material administrability problems in allowing Viamedia to participate in Interconnects that it controls. As discussed above, the other MVPDs participating in the Interconnects compete with Comcast in its role as an MVPD for cable subscribers as well as Spot Cable Advertising revenue, and at least some of the MVPDs

that participate in the Interconnects managed and controlled by Comcast also manage and control their own Interconnects in other DMAs. Thus, by the very nature of its role as Interconnect manager, Comcast is already dealing with competitors.

168. Refusing to deal with Viamedia as described herein is irrational but for its anticompetitive effects, namely, its potential to eliminate competition by using control of Interconnect to eventually cause Viamedia to exit the market for Spot Cable Advertising Representation services.

D. <u>Harm To Competition</u>

169. Comcast s and Comcast Spotlight s exclusionary conduct harms competition in several ways.

170. Comcast s conduct harms other participants in the market for Spot Cable Advertising Representation. Without access to Interconnects and NCC, which together represent more than two-thirds of the over $5 billion generated annually from Spot Cable Advertising sales, Viamedia and other independent representatives cannot compete with Comcast Spotlight for Spot Cable Advertising Representation contracts with MVPDs. Left unchecked, Comcast s tactics will ultimately force independent representatives, like Viamedia, out of the Spot Cable Advertising Representation business, and will prevent others from entering the market. In time, therefore, MVPDs will have no other option but Comcast Spotlight for their Spot Cable Advertising Representation.

171. MVPDs are also harmed by this conduct. Most MVPDs want choice in their Spot Cable Advertising Representation and many do not want to cede control over their Spot Cable Avails to Comcast, their largest competitor. In addition, as Comcast Spotlight

eliminates independent competitors from representing MVPDs, it increasingly grows more able to impose higher prices and other onerous terms on MVPDs, including terms that may ultimately make it impossible for MVPDs to compete effectively with Comcast.

172. Comcast s dominance over Spot Cable Advertising gives it the incentive and ability to reduce its rivals revenue by eliminating their access to regional and national sales and cutting them off from these critical sources of funds. Without firms such as Viamedia, independent MVPDs will have no choice but to acquiesce to Comcast s demands to control all of their Spot Cable Avails or face being excluded from national advertising revenue (through NCC) and regional advertising revenue (through Interconnects). This exclusion will limit rival MVPDs ability to compete against Comcast for cable, broadband, and telephone subscribers because the MVPDs will have to either increase their subscriber fees or reduce their promotional efforts in order to compensate for their losses in advertising revenue.

173. In addition, MVPDs obliged to enter into Spot Cable Advertising Representation agreements with Comcast Spotlight will be forced to provide Comcast with sensitive business information, such as marketing efforts (including the schedule for placement of the MVPD s promotional ads), and special offers (including their own future prices and promotions to subscribers). This sensitive business information will give Comcast an advantage over its rival MVPDs and limit the ability of independent MVPDs to compete for cable subscribers.

174. In sum, Comcast s exclusionary conduct, coupled with the power it has amassed over Interconnects and NCC, impermissibly harms competition. It

also creates a dangerous probability that Comcast has or will monopolize the market for Spot Cable Advertising Representation services in every DMA in which Comcast manages an Interconnect, and ultimately the market for Spot Cable Advertising Representation services nationwide.

E. Injury to Viamedia

175. Comcast s use of its control of the Interconnects and NCC to exclude Viamedia and its MVPD clients constitutes a restriction on competition that has handicapped Viamedia s ability to meaningfully compete with Comcast Spotlight in the market for Spot Cable Advertising Representation.

176. Comcast s conduct has severely damaged Viamedia and its business in many ways and will continue to do so. Viamedia has lost and will continue to lose revenues from Spot Cable Advertising sales through Interconnects, including Chicago, Detroit, and Hartford, and its valuable contracts with WOW and RCN, among others. This loss has resulted and will continue to result in lost profits to Viamedia of tens of millions of dollars, and in any event no less than $50 million.

177. Viamedia has also lost a number of other representation clients and contracts as a result of its exclusion from the Interconnects, its threatened exclusion from NCC, and other anticompetitive conduct by Comcast. The amount of additional profits lost to Viamedia attributable to these actions of Comcast is tens of millions of dollars, and in any event no less than an additional $25 million.

178. Comcast s exclusion of Viamedia from the Interconnects, its threatened exclusion of Viamedia from NCC, and its other anticompetitive conduct has

caused other injuries to Viamedia s business. For example, Viamedia s shareholder value has fallen precipitously as a result of its inability to participate in regional Spot Cable Advertising sales, and Viamedia has lost potential investors as a further consequence of Comcast s exclusionary conduct. These injuries are the direct and proximate result of Comcast s anticompetitive actions.

CLAIMS

COUNT I: UNLAWFUL MONOPOLIZATION IN MARKETS FOR SPOT CABLE ADVERTISING REPRESENTATION IN DMAS WHERE COMCAST CONTROLS THE INTERCONNECT(S)

179. Viamedia repeats and realleges Paragraphs 1-163 above as if fully set forth herein.

180. The provision of Spot Cable Advertising Representation services constitutes a relevant product market and the regional DMAs in which Comcast controls the Interconnect constitute relevant geographic markets under the antitrust laws.

181. Comcast has monopoly power in Spot Cable Advertising Representation in each of the DMAs where it controls the Interconnect.

182. Comcast has excluded Viamedia and MVPDs represented by Viamedia from access to Interconnects controlled by Comcast in DMAs where Viamedia had previously represented MVPDs, and Comcast has further refused to allow Viamedia and MVPDs represented by Viamedia to have access to other Interconnects controlled by Comcast.

183. By 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, by requiring that MVPDs deal exclusively with Comcast Spotlight as a Spot Cable Advertising Representative, by requiring NCC to refuse to commit to a long term arrangement with Viamedia and to otherwise offer nondiscriminatory terms to Viamedia, and through other exclusionary and anticompetitive acts, Comcast has unlawfully

acquired and maintained its monopoly power in each of the markets where it controls the Interconnect, in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2.

184. Comcast could not have acquired or maintained its monopoly power in markets for Spot Cable Advertising Representation but for its restrictions on participation in the Interconnects, its coercive and exclusionary agreements and refusals to deal, and other anticompetitive conduct. Thus, its monopolization is not due to growth or development as a consequence of a superior product, business acumen, or historic accident.

185. Comcast s monopolization has injured and will continue to injure competition in these markets.

186. Comcast s exclusionary and anticompetitive acts effect interstate commerce and injures competition in multiple states.

187. As a direct and proximate result of Comcast s acts of monopolization and monopoly maintenance, Viamedia has suffered antitrust injury and damages, including the loss of Spot Cable Advertising Representation clients and the revenues generated therefrom, as well as other damage to its business.

188. Viamedia continues to suffer damage, and will continue to do so, if Comcast does not cease its monopolistic conduct.

COUNT II: UNLAWFUL ATTEMPTED MONOPOLIZATION IN MARKETS FOR SPOT CABLE ADVERTISING REPRESENTATION IN DMAS WHERE COMCAST CONTROLS THE INTERCONNECT(S)

189. Viamedia repeats and realleges Paragraphs 1-163 above as if fully set forth herein.

190. Comcast has excluded Viamedia and MVPDs represented by Viamedia from access to Interconnects controlled by Comcast in DMAs where Viamedia had previously represented MVPDs, and Comcast has further refused to allow Viamedia and MVPDs represented by Viamedia to have access to other Interconnects controlled by Comcast.

191. By 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, by requiring that MVPDs deal exclusively with Comcast Spotlight as a Spot Cable Advertising Representative, by requiring NCC to refuse to commit to a long term arrangement with Viamedia and to otherwise offer nondiscriminatory terms to Viamedia, and through other exclusionary and anticompetitive acts, Comcast has unlawfully attempted to acquire monopoly power in each of the markets where it controls the Interconnect, in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2.

192. Because of Comcast s monopoly control of regional Interconnects and its unilateral ability to exclude competitors from this infrastructure, which is essential to market participation, there is a dangerous probability that Comcast will be able to leverage its position to gain and maintain monopoly power in the

markets for Spot Cable Advertising Representation where Comcast controls the Interconnect.

193. Comcast has acted with the specific intent of monopolizing the markets for Spot Cable Advertising Representation in regions where Comcast controls the Interconnect.

194. Comcast s attempted monopolization has injured and will continue to injure competition.

195. Comcast s exclusionary conduct and anticompetitive acts effect interstate commerce and injures competition in multiple states.

196. As a direct and proximate result of Comcast s attempted monopolization, Viamedia has suffered antitrust injury and damages, including the loss of Spot Cable Advertising Representation clients and the revenues generated therefrom, as well as other damage to its business.

197. Viamedia will continue to suffer additional damage in the future if Comcast is permitted to continue its monopolistic conduct.

<u>COUNT III</u>: VIOLATION OF THE ILLINOIS ANTITRUST ACT (740 ILCS 10/3)

198. Viamedia repeats and realleges Paragraphs 1-163 above as if fully set forth herein.

199. Comcast exercises exclusive control over the Interconnects in many DMAs, including the Interconnect for the Chicago DMA. These Interconnects are critical infrastructure for the sale of Spot Cable Advertising time, and open access to the Interconnects is essential for any person or entity seeking to represent MVPDs for purposes of selling their Spot Cable Advertising Avails.

200. The Interconnects cannot be practically or reasonably duplicated, and there is no alternative to the Interconnects that allows for the coordination of or participation in regional Spot Cable Advertising sales.

201. Comcast has excluded independent representatives that compete with Comcast Spotlight and has threatened to exclude competing MVPDs from the Interconnects that Comcast controls, unless they enter into exclusive representation agreements with Comcast Spotlight as a precondition for accessing the Interconnects.

202. Comcast has engaged in this exclusionary action despite the fact that it could, if it elected to do so, feasibly provide independent representatives and their MVPD clients with access to the Interconnects.

203. Through its threats to make participation in the Interconnects available only to MVPDs that use Comcast Spotlight for Spot Cable Advertising Representation services, its additional coercive and exclu-

sionary agreements, and other anticompetitive conduct, Comcast has monopolized and unlawfully attempted to acquire a monopoly for Spot Cable Advertising Representation in Illinois in violation of Section 3 of the Illinois Antitrust Act. 740 ILCS 10/3(3).

204. The provision of Spot Cable Advertising Representation services constitutes a relevant product or service market under the Illinois Antitrust Act.

205. Comcast entered into coercive and exclusionary agreements related to the Interconnects with the specific intent of monopolizing the market for Spot Cable Advertising Representation in Illinois.

206. Comcast s monopolization and attempted monopolization has injured and will continue to injure competition.

207. As a direct and proximate result of Comcast s monopolization and attempted monopolization, Viamedia has suffered antitrust injury and damages, including the loss of Spot Cable Advertising Representation clients and the revenues generated therefrom, as well as other damage to its business.

208. Viamedia will continue to suffer additional damage in the future if Comcast is permitted to continue its monopolistic conduct.

<u>COUNT IV</u>: VIOLATION OF THE MICHIGAN ANTITRUST REFORM ACT, (Mich. Comp. Laws, Sec. 445.771 *et seq*.)

209. Viamedia repeats and realleges Paragraphs 1-163 above as if fully set forth herein.

210. Comcast exercises exclusive control over the Interconnects in many DMAs, including the Interconnect for the Detroit DMA. These Interconnects are critical instrumentalities for the sale of Spot Cable Advertising time and open access to the Interconnects is essential for any person or entity seeking to represent MVPDs for purposes of selling their Spot Cable Advertising Avails.

211. The Interconnects cannot be practically or reasonably duplicated and there is no alternative to the Interconnects that allows for the coordination of or participation in regional Spot Cable Advertising sales.

212. Comcast has excluded independent representatives that compete with Comcast Spotlight and has threatened to exclude competing MVPDs from the Interconnects that Comcast controls, unless they enter into exclusive representation agreements with Comcast Spotlight as a precondition for accessing the Interconnects.

213. Comcast has engaged in this exclusionary action despite the fact that it could, if it elected to do so, feasibly provide independent representatives and their MVPD clients with access to the Interconnects.

214. Through its threats to make participation in the Interconnects available only to MVPDs that use Comcast Spotlight for Spot Cable Advertising Repre-

sentation services, its additional coercive and exclusionary agreements, and other anticompetitive conduct, Comcast has monopolized and unlawfully attempted to acquire a monopoly for Spot Cable Advertising Representation in Michigan in violation of the Michigan Antitrust Reform Act. Mich. Comp. Laws, Sec. 445.773.

215. The provision of Spot Cable Advertising Representation services constitutes a relevant product or service market under the Michigan Antitrust Reform Act.

216. Comcast entered into coercive and exclusionary agreements related to the Interconnects with the specific intent of monopolizing the market for Spot Cable Advertising Representation in Michigan.

217. Comcast s monopolization and attempted monopolization has injured and will continue to injure competition.

218. As a direct and proximate result of Comcast s monopolization and attempted monopolization, Viamedia has suffered antitrust injury and damages, including the loss of Spot Cable Advertising Representation clients and the revenues generated therefrom, as well as other damage to its business.

219. Viamedia will continue to suffer additional damage in the future if Comcast is permitted to continue its monopolistic conduct.

<u>COUNT V</u>: VIOLATION OF THE CONNECTICUT ANTITRUST ACT (Title 35, Sec. 35-27)

220. Viamedia repeats and realleges Paragraphs 1-163 above as if fully set forth herein.

221. Comcast exercises exclusive control over the Interconnects in many DMAs, including the Interconnect for the Hartford DMA. These Interconnects are critical infrastructure for the sale of Spot Cable Advertising time and open access to the Interconnects is essential for any person or entity seeking to represent MVPDs for purposes of selling their Spot Cable Advertising Avails.

222. The Interconnects cannot be practically or reasonably duplicated and there is no alternative to the Interconnects that allows for the coordination of or participation in regional Spot Cable Advertising sales.

223. Comcast has excluded independent representatives that compete with Comcast Spotlight and has threatened to exclude competing MVPDs from the Interconnects that Comcast controls, unless they enter into exclusive representation agreements with Comcast Spotlight as a precondition for accessing the Interconnects.

224. Comcast has engaged in this exclusionary action despite the fact that it could, if it elected to do so, feasibly provide independent representatives and their MVPD clients with access to the Interconnects.

225. Through its threats to make participation in the Interconnects available only to MVPDs that use Comcast Spotlight for Spot Cable Advertising Representation services, its additional coercive and exclu-

sionary agreements, and other anticompetitive conduct, Comcast has unlawfully monopolized and attempted to acquire a monopoly for Spot Cable Advertising Representation in Connecticut, in violation of Title 35, Sec. 35-27 of the Connecticut General Statutes (the Connecticut Antitrust Act).

226. The provision of Spot Cable Advertising Representation services constitutes a relevant product or service market under the Connecticut Antitrust Act.

227. Comcast entered into coercive and exclusionary agreements related to the Interconnects with the specific intent of monopolizing the market for Spot Cable Advertising Representation in Connecticut.

228. Comcast s monopolization and attempted monopolization has injured and will continue to injure competition.

229. As a direct and proximate result of Comcast s monopolization and attempted monopolization, Viamedia has suffered antitrust injury and damages, including the loss of Spot Cable Advertising Representation clients and the revenues generated therefrom, as well as other damage to its business.

230. Viamedia will continue to suffer additional damage in the future if Comcast is permitted to continue its monopolistic conduct.

<u>COUNT VI</u>: TORTIOUS INTERFERENCE WITH A BUSINESS EXPECTANCY

231. Viamedia repeats and realleges Paragraphs 1-163 above as if fully set forth herein.

232. Comcast hired at least one former Viamedia sales executive who surreptitiously listened in on Viamedia sales meetings after that executive had left Viamedia and shared access to Viamedia proprietary information with other Comcast executives, thereby creating and/or enhancing Comcast s ability to interfere with Viamedia relationships with its clients and advertisers.

233. Based on its longstanding prior business relationship with WOW and RCN, Viamedia possessed a reasonable expectancy of continuing its profitable contractual and business relationships with WOW and RCN for purposes of providing them with Spot Cable Advertising Representation.

234. Comcast and Comcast Spotlight knew of Viamedia s profitable contractual and business relationships with both WOW and RCN and knew of Viamedia s reasonable expectancy of continuing those relationships.

235. Comcast and Comcast Spotlight intentionally and unjustifiably interfered with Viamedia s reasonable expectancy by deliberately excluding Viamedia and its MVPD clients from Comcast-controlled Interconnects as a means of coercing WOW and RCN into transferring their Spot Cable Advertising Representation business from Viamedia to Comcast Spotlight.

236. Comcast and Comcast Spotlight s intentional and unjustifiable conduct caused WOW and

RCN to terminate some or all of their profitable business relationships with Viamedia.

237. As a direct and proximate result of Comcast s conduct, Viamedia s expectancy of obtaining further business from WOW and RCN was diminished and lost. Viamedia has suffered significant injury and damages as a result of Comcast s actions, including lost sales and revenue relating to its representation of WOW and RCN and other damage to its business.

238. After Comcast took over the WOW and RCN markets on January 1, 2016, Comcast has continued to make it more difficult for Viamedia to operate by further interfering in Viamedia s relationships with advertisers and other MVPDs. In addition, Comcast has unlawfully contacted and tried to recruit various Viamedia sales executives to join Comcast and thereby obtain confidential proprietary information of Viamedia.

PRAYER FOR RELIEF

WHEREFORE, Viamedia prays for judgment against Defendants Comcast and Comcast Spotlight as follows:

A. Awarding Viamedia all damages to which it is entitled under state and federal antitrust laws and its other claims for relief, including treble damages, reasonable costs, and attorneys fees pursuant to 15 U.S.C. § 2, and 15 U.S.C. §§ 15 & 26.

B. Awarding Viamedia all damages to which it is entitled under state tort law and its other claims for relief, including punitive damages for Comcast s willful and malicious tortious conduct;

C. Enjoining Comcast from engaging in the anticompetitive and tortious conduct alleged herein, including any effort to exclude Viamedia or its MVPD clients from participating on a fair and open basis in Interconnects and NCC in the future;

D. Ordering such divestitures by Comcast as may be required to restore competition and to prevent the recurrence of future antitrust violations; and

E. Granting such further relief as the Court deems just and proper.

JURY DEMAND

Viamedia demands a jury trial for those issues so triable herein.

Date: November 21, 2016 Respectfully submitted,

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