ANTITRUST LAW

Unit 18: Unilateral Refusals to Deal

Fall 2014
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Seminal Cases

UNITED STATES v. COLGATE & CO.
250 U.S. 300 (1919)[1]

On December 18, 1917, a grand jury in the Eastern District of Virginia retuned a one-count criminal indictment against Colgate & Company alleging that Colgate had created and engaged in a combination in violation of Section 1 of the Sherman Act with its wholesale and retail dealers throughout the United States to fix the resale prices at which these dealers resold Colgate's laundry soaps, toilet soaps and other toilet articles and so to suppress competition among its dealers. The indictment alleged among other things that Colgate distributed lists of uniform resale prices, urged dealers to conform to them, informed dealers that Colgate would refuse to sell to those that did not adhere to its price lists, requested dealers to inform Colgate of other dealers who sold at different prices, maintained lists of nonconforming dealers, reinstated dealers on the "suspended list" if they gave assurances that they would adhere to the lists in the future.

Resale price maintenance, sometimes called *vertical price fixing*, is a restraint imposed by a seller on a buyer that restricts the price at which the buyer may resell the product.[2] *Minimum resale price maintenance* sets a floor below which the buyer cannot resell, while *maximum resale price maintenance* sets a ceiling above which the buyer cannot resell. Of course, many resale price maintenance arrangements set the specific price at which the buyer must resell. The Supreme Court first confronted resale price maintenance in 1911 in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*,[3] which is generally regarded as adopting a per se rule applicable to all forms of resale price maintenance. No doubt the Justice Department thought that the *Colgate* indictment charged a straightforward resale price maintenance case subject to the per se rule under *Dr. Miles*.

The district court disagreed and sustained a demurrer to the indictment. The district court was troubled that the indictment did not allege (1) any monopolization or attempted monopolization or even that Colgate had any significant share of the overall business in question; (2) that Colgate acted in concert with its manufacturer-competitors; (3) that the resale prices Colgate set were other than fair; (4) that Colgate restricted the buyers to whom its dealers could resell or required its dealers to impose resale restrictions on their customers; or (5) that Colgate had any contracts with its

1. Most internal citations and footnotes omitted. For the opinions in the case, see United States v. Colgate & Co., 253 F. 522 (E.D. Va. Oct 29, 1918), *aff'd*, 250 U.S. 300 (1919).

2. We will examine resale price maintenance in detail in Unit 23.

3. 220 U.S. 373 (1911), *abrogated*, State Oil Co. v. Khan, 522 U.S. 3 (1997) (returning maximum resale price maintenance to rule of reason scrutiny), and Leegin Creative Leather Prods, Inc. v. PSKS, Inc., 551 U.S. 877 (2007) (returning minimum resale price maintenance to rule of reason scrutiny).

dealers that require them to sell at Colgate's resale prices. Moreover, the district court pointedly observed that the indictment was solely against Colgate and did not name any wholesaler or retailer with whom Colgate was alleged to have combined. Since the indictment failed to allege that Colgate and its dealers entered into any contract or agreement that bound the dealers to resell only at the prices Colgate specified, and where some dealers purchased and resold at Colgate's prices but others did not, the indictment did not state a claim under the Sherman Act.[4]

A writ of error was taken directly to the Supreme Court under the Criminal Appeals Act.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

Writs of error from Districts Courts directly here may be taken by the United States "from a decision or judgment quashing, setting aside, or sustaining a demurrer to, any indictment, or any count thereof, where such decision or judgment is based upon the invalidity, or construction of the statute upon which the indictment is founded." Act March 2, 1907, c. 2564, 34 Stat. 1246 (Comp. St. § 1704). Upon such a writ "we have no authority to revise the mere interpretation of an indictment and are confined to ascertaining whether the court in a case under review erroneously construed the statute." "We must accept that court's interpretation of the indictments and confine our review to the question of the construction of the statute involved in its decision."

Being of opinion that "the indictment should set forth such a state of facts as to make it clear that a manufacturer, engaged in what was believed to be the lawful conduct of its business, has violated some known law before it can be haled into court to answer the charge of a commission of a crime," and holding that it "fails to charge any offense under the Sherman Act or any other law of the United States, that is to say, as to the substance of the indictment and the conduct and act charged therein," the trial court sustained a demurrer to the one before us. Its reasoning and conclusions are set out in a written opinion. 253 Fed. 522.

We are confronted by an uncertain interpretation of an indictment itself couched in rather vague and general language. Counsel differ radically concerning the meaning of the opinion below and there is much room for the controversy between them.

The indictment runs only against Colgate & Co., a corporation engaged in manufacturing soap and toilet articles and selling them throughout the Union. It makes no reference to monopoly, and proceeds solely upon the theory of an unlawful combination. After setting out defendant's organization, place and character of business, and general methods of selling and distributing products through wholesale and retail merchants, it alleges:

> "During the aforesaid period of time, within the said Eastern district of Virginia and throughout the United States, the defendant knowingly and unlawfully created and engaged in a combination with said wholesale and retail dealers, in the Eastern district of Virginia and throughout the United

[4] United States v. Colgate & Co., 253 F. 522 (E.D. Va. 1918), *aff'd*, 250 U.S. 300 (1919).

> States, for the purpose and with the effect of procuring adherence on the part of such dealers (in reselling such products sold to them aforesaid) to resale prices fixed by the defendant, and of preventing such dealers from reselling such products at lower prices, thus suppressing competition amongst such wholesale dealers, and amongst such retail dealers, in restraint of the aforesaid trade and commerce among the several States, in violation of the act entitled 'An act to protect trade and commerce against unlawful restraints and monopolies,' approved July 2, 1890."

Immediately thereafter comes this paragraph:

> "By reason of the foregoing, wholesale dealers in the aforesaid products of the defendant in the Eastern district of Virginia and throughout the United States, with few exceptions, resold, at uniform prices fixed by the defendant, the aforesaid products, sold to them by the defendant, and refused to resell such products at lower prices to retail dealers in the state where the respective wholesale dealers did business and in other states. For the same reason retail dealers in the aforesaid products of the defendant in the Eastern district of Virginia and throughout the United States resold, at uniform prices fixed by the defendant, the aforesaid products, sold to them by the defendant and by the aforesaid wholesale dealers, and refused to sell such products at lower prices to the consuming public in the states where the respective retail dealers did business and in other states. Thus competition in the sale of such products, by wholesale dealers to retail dealers, and by retail dealers to the consuming public, was suppressed, and the prices of such products to the retail dealers and to the consuming public in the Eastern district of Virginia and throughout the United States were maintained and enhanced."

In the course of its opinion the trial court said:

> "No charge is made that any contract was entered into by and on the part of the defendant, and any of its retail customers, in restraint of interstate trade and commerce, the averment being, in effect, that it knowingly and unlawfully created and engaged in a combination with certain of its wholesale and retail customers, to procure adherence on their part, in the sale of its products sold to them, to resale prices fixed by the defendant, and that, in connection therewith, such wholesale and retail customers gave assurances and promises, which resulted in the enhancement and maintenance of such prices, and in the suppression of competition by wholesale dealers and retail dealers, and by the latter to the consuming public."

* * *

> "In the view taken by the court, the indictment here fairly presents the question of whether a manufacturer of products shipped in interstate trade, is subject to criminal prosecution under the Sherman Act, for entering into a combination in restraint of such trade and commerce, because he agrees with his wholesale and retail customers, upon prices claimed by them to be fair and reasonable, at which the same may be resold, and declines to sell his products to those who will not thus stipulate as to prices. This, at the threshold, presents for the determination of the court, how far one may control and dispose of his own

> property; that is to say, whether there is any limitation thereon, if he proceeds in respect thereto in a lawful and bona fide manner. That he may not do so, fraudulently, collusively, and in unlawful combination with others, may be conceded. *Eastern States Retail Lumber [Dealers'] Association v. United States*, 234 U.S. 600, 614 [(1914)]. But it by no means follows that being a manufacturer of a given article, he may not, without incurring any criminal liability, refuse absolutely to sell the same at any price, or to sell at a named sum to a customer, with the understanding that such customer will resell only at an agreed price between them, and should the customer not observe the understanding as to retail prices, exercise his undoubted right to decline further to deal with such person."
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> "The pregnant fact should never be lost sight of that no averment is made of any contract or agreement having been entered into whereby the defendant, the manufacturer, and his customers, bound themselves to enhance and maintain prices, further than is involved in the circumstances that the manufacturer, the defendant here, refused to sell to persons who would not resell at indicated prices, and that certain retailers made purchases on this condition, whereas, inferentially, others declined so to do. No suggestion is made that the defendant, the manufacturer, attempted to reserve or retain any interest in the goods sold, or to restrain the vendee in his right to barter and sell the same without restriction. The retailer, after buying, could, if he chose, give away his purchase or sell it at any price he saw fit, or not sell it at all, his course in these respects being affected only by the fact that he might by his action incur the displeasure of the manufacturer who could refuse to make further sales to him, as he had the undoubted right to do. There is no charge that the retailers themselves entered into any combination or agreement with each other, or that the defendant acted other than with his customers individually."

Our problem is to ascertain, as accurately as may be, what interpretation the trial court placed upon the indictment—not to interpret it ourselves; and then to determine whether, so construed, it fairly charges violation of the Sherman Act. Counsel for the government maintain, in effect, that, as so interpreted, the indictment adequately charges an unlawful combination (within the doctrine of *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U. S. 373 [(1911)]) resulting from restrictive agreements between defendant and sundry dealers whereby the latter obligated themselves not to resell except at agreed prices, and to support this position they specifically rely upon the above-quoted sentence in the opinion which begins, "In the view taken by the court," etc. On the other hand, defendant maintains that looking at the whole opinion it plainly construes the indictment as alleging only recognition of the manufacturer's undoubted right to specify resale prices and refuse to deal with any one who failed to maintain the same.

Considering all said in the opinion (notwithstanding some serious doubts) we are unable to accept the construction placed upon it by the government. We cannot, *e.g.*, wholly disregard the statement that "The retailer, after buying, could, if he chose, give away his purchase or sell it at any price he saw fit, or not sell it at all, his course in these respects being affected only by the fact that he might by his action incur the displeasure of the manufacturer who could refuse to make further sales to him, as he had the undoubted right to do." And we must conclude that, as interpreted below, the indictment does not charge Colgate & Co. with selling its products to dealers under agreements which obligated the latter not to resell except at prices fixed by the company.

The position of the defendant is more nearly in accord with the whole opinion and must be accepted. And as counsel for the Government were careful to state on the argument that this conclusion would require affirmation of the judgment below, an extended discussion of the principles involved is unnecessary.

The purpose of the Sherman Act is to prohibit monopolies, contracts and combinations which probably would unduly interfere with the free exercise of their rights by those engaged, or who wish to engage, in trade and commerce-in a word to preserve the right of freedom to trade. 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; and, of course, he may announce in advance the circumstances under which he will refuse to sell. "The trader or manufacturer, on the other hand, carries on an entirely private business, and can sell to whom he pleases." *United States v. Trans-Missouri Freight Association*, 166 U. S. 290, 320 [(1897)]. "A retail dealer has the unquestioned right to stop dealing with a wholesaler for reasons sufficient to himself, and may do so because he thinks such dealer is acting unfairly in trying to undermine his trade." *Eastern States Retail Lumber Dealers' Association v. United States*, 234 U.S. 600, 614 [(1914)]. See also *Standard Oil Co. v. United States*, 221 U. S. 1, 56 [(1911)]; *United States v. American Tobacco Co.*, 221 U.S. 106, 180 [(1911)]; *Boston Store of Chicago v. American Graphophone Co. et al.*, 246 U. S. 8 [(1918)]. In *Dr. Miles Medical Co. v. Park & Sons Co.*, *supra*, the unlawful combination was effected through contracts which undertook to prevent dealers from freely exercising the right to sell.

The judgment of the District Court must be

Affirmed.

NOTES

1. The key to the case was the district court's interpretation that the indictment that

> [A Colgate dealer], after buying, could, if he chose, give away his purchase or sell it at any price he saw fit, or not sell it at all, his course in these respects being affected only by the fact that he might by his action incur the displeasure of the manufacturer who could refuse to make further sales to him, as he had the undoubted right to do.[5]

[5] 250 U.S. at 306 (quoting 253 F. 522, 527 (E.D. Va. 1918)).

In affirming the dismissal of the indictment, McReynolds concluded:

> The purpose of the Sherman Act is to prohibit monopolies, contracts and combinations which probably would unduly interfere with the free exercise of their rights by those engaged, or who wish to engage, in trade and commerce—in a word to preserve the right of freedom to trade. 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; and, of course, he may announce in advance the circumstances under which he will refuse to sell. . . . "A retail dealer has the unquestioned right to stop dealing with a wholesaler for reasons sufficient to himself, and may do so because he thinks such dealer is acting unfairly in trying to undermine his trade." In *Dr. Miles Medical Co. v. Park & Sons Co.*, *supra*, the unlawful combination was effected through contracts which undertook to prevent dealers from freely exercising the right to sell.[6]

2. The Justice Department was unwilling to let the Supreme Court's opinion be the last word on the legality of Colgate's conduct. Less than a year after *Colgate* was handed down, on March 24, 1920, the Justice Department obtained a second indictment charging Colgate in greater detail with engaging in an unlawful combination to maintain resale prices. While the original indictment contained only one count and was six pages in length, the second indictment contained 53 counts and ran 103 pages. Even so, after a demurrer to the indictment had been overruled, Colgate was able to obtain a directed verdict on December 20, 1924.

3. Colgate could not have had better counsel: former Justice Charles Evans Hughes. Hughes was the author of the Court's opinion in *Dr. Miles*, and no one was in a better position to distinguish the case. Hughes advanced the interpretation of the indictment that the district court accepted. Hughes had resigned from the Court on June 10, 1916, to be the Republican candidate for President. In a close election, Hughes was defeated by the Democratic candidate, Woodrow Wilson. Thereafter, Hughes rejoined his old law firm (what is now Hughes Hubbard). Hughes left the firm in 1921 to become President Harding's secretary of state, where he served until 1925. He once again rejoined his firm, only to leave to become the Chief Justice of the Supreme Court in 1930. Hughes retired from the Court in 1941 at the age of 79.[7]

4. *Colgate* establishes two fundamental rules of antitrust law:
    a. A seller in its discretion may refuse to deal for any reason to another firm (or, perhaps more technically, the antitrust do not impose a duty to deal on a firm).
    b. A seller may announce conditions under which it is will to deal and then refuse to deal with a buyer that do not abide to those conditions, provided

[6] 250 U.S. at 307-08 (quoting Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U. S. 600, 614 (1914)).

[7] *See* Mark Byrnes, *Charles Evans Hughes (1862-1948), in* 1 GREAT AMERICAN JUDGES: AN ENCYCLOPEDIA 400 (John R. Vile ed. 2003).

that there is no agreement between the seller and the buyer that the buyer will abide by the conditions.

We see the operation of the second rule in *Colgate*. The indictment, as construed by the district court, did not allege any *agreement* between Colgate and its wholesalers that the wholesalers would abide by Colgate's resale price policy. Rather, under the district court's construction, Colgate would simply sell to a wholesaler, which was free to resell Colgate's products at any price it wished, and Colgate, in turn, was free to refuse to deal with the wholesaler in the future if the wholesaler did not abide by its Colgate's resale price policy.

5. Note the "knife-edge" nature of this construction. If there is an "agreement" within the meaning of Section 1 between the seller and reseller on resale prices, then the agreement is per se unlawful. If there is no agreement, then there is no violation of Section 1 even if the reseller finds itself economically compelled to follow the seller's resale price policy and regardless of the economic effect on the marketplace.

6. We also know from Unit 6 that Section 1 agreements can be proved by circumstantial evidence, including conduct evidence, so in practice the dividing line between having an agreement and not having an agreement on resale prices (or any other resale policy) can be very murky.

7. A very common situation is where the parties start out with no agreement, the reseller violates the seller's resale price policy, and the seller refuses to sell in the future to the aberrant reseller. So far so good. But the reseller then goes to the seller with great contrition, promises not to violate the seller's policy in the future, and begs the seller to continue to sell to it. The seller agrees and resumes its sales to the reseller. Now there is an agreement that Section 1 can reach.

Colgate Plant
Jersey City

LORAIN JOURNAL CO. v. UNITED STATES
342 U.S. 143 (1951)[1]

MR. JUSTICE BURTON delivered the opinion of the Court.

The principal question here is whether a newspaper publisher's conduct constituted an attempt to monopolize interstate commerce, justifying the injunction issued against it under §§ 2 and 4 of the Sherman. Antitrust Act. For the reasons hereafter stated, we hold that the injunction was justified.

This is a civil action, instituted by the United States in the District Court for the Northern District of Ohio, against The Lorain Journal Company, an Ohio corporation, publishing, daily except Sunday, in the City of Lorain, Ohio, a newspaper here called the Journal. The complaint alleged that the corporation, together with four of its officials, was engaging in a combination and conspiracy in restraint of interstate commerce in violation of § 1 of the Sherman Antitrust Act, and in a combination and conspiracy to monopolize such commerce in violation of § 2 of the Act, as well as attempting to monopolize such commerce in violation of § 2. The District Court declined to issue a temporary injunction but, after trial, found that the parties were engaging in an attempt to monopolize as charged. Confining itself to that issue, the court enjoined them from continuing the attempt. They appealed to this Court under the Expediting Act of 1903, 32 Stat. 823, as amended, 62 Stat. 989, 15 U.S.C. (Supp. IV) § 29, and the issues before us are those arising from that finding and the terms of the injunction.

The appellant corporation, here called the publisher, has published the Journal in the City of Lorain since before 1932. In that year it, with others, purchased the Times Herald which was the only competing daily paper published in that city. Later, without success, it sought a license to establish and operate a radio broadcasting station in Lorain.

The court below describes the position of the Journal, since 1933, as "a commanding and an overpowering one. It has a daily circulation in Lorain of over 13,000 copies and it reaches ninety nine per cent of the families in the city." Lorain is an industrial city on Lake Erie with a population of about 52,000 occupying 11,325 dwelling units. The Sunday News, appearing only on Sundays, is the only other newspaper published there.

While but 165 out of the Journal's daily circulation of over 20,000 copies are sent out of Ohio, it publishes not only Lorain news but substantial quantities of state, national and international news. It pays substantial sums for such news and for feature material shipped to it from various parts of the United States and the rest of the world. It carries a substantial quantity of national advertising sent to it from throughout the United States. Shipments and payments incidental to the above matters, as well as the

[1] Most internal citations and footnotes omitted. For the opinions in the case, see United States v. Lorain Journal Co., 92 F. Supp. 794 (N.D. Ohio 1950), *aff'd*, 342 U.S. 143 (1951).

publisher's purchases of paper and ink, involve many transactions in interstate or foreign commerce.

From 1933 to 1948 the publisher enjoyed a substantial monopoly in Lorain of the mass dissemination of news and advertising, both of a local and national character. However, in 1948 the Elyria Lorain Broadcasting Company, a corporation independent of the publisher, was licensed by the Federal Communications Commission to establish and operate in Elyria, Ohio, eight miles south of Lorain, a radio station whose call letters, WEOL, stand for Elyria, Oberlin and Lorain. Since then it has operated its principal studio in Elyria and a branch studio in Lorain. Lorain has about twice the population of Elyria and is by far the largest community in the station's immediate area. Oberlin is much smaller than Elyria and eight miles south of it.

While the station is not affiliated with a national network it disseminates both intrastate and interstate news and advertising. About 65% of its program consists of music broadcast from electrical transcriptions. These are shipped and leased to the station by out-of-state suppliers. Most of them are copyrighted and the station pays royalties to the out-of-state holders of the copyrights. From 10 to 12% of the station's program consists of news, world-wide in coverage, gathered by United Press Associations. The news is received from outside of Ohio and relayed to Elyria through Columbus or Cleveland. From April, 1949, to March, 1950, the station broadcast over 100 sponsored sports events originating in various states.

Substantially all of the station's income is derived from its broadcasts of advertisements of goods or services. About 16% of its income comes from national advertising under contracts with advertisers outside of Ohio. This produces a continuous flow of copy, payments and materials moving across state lines.

The court below found that appellants knew that a substantial number of Journal advertisers wished to use the facilities of the radio station as well. For some of them it found that advertising in the Journal was essential for the promotion of their sales in Lorain County. It found that at all times since WEOL commenced broadcasting, appellants had executed a plan conceived to eliminate the threat of competition from the station. Under this plan the publisher refused to accept local advertisements in the Journal from any Lorain County advertiser who advertised or who appellants believed to be about to advertise over WEOL. The court found expressly that the purpose and intent of this procedure was to destroy the broadcasting company.

The court characterized all this as "bold, relentless, and predatory commercial behavior." To carry out appellants' plan, the publisher monitored WEOL programs to determine the identity of the station's local Lorain advertisers. Those using the station's facilities had their contracts with the publisher terminated and were able to renew them only after ceasing to advertise through WEOL. The program was effective. Numerous Lorain County merchants testified that, as a result of the publisher's policy, they either ceased or abandoned their plans to advertise over WEOL.

> "Having the plan and desire to injure the radio station, no more effective and more direct device to impede the operations and to restrain the commerce of WEOL could be found by the Journal than to cut off its bloodstream of existence the advertising revenues which control its life or demise.

. . .

> “. . . he very existence of WEOL is imperiled by this attack upon one of its principal sources of business and income.”

1. *The conduct complained of was an attempt to monopolize interstate commerce.* It consisted of the publisher’s practice of refusing to accept local Lorain advertising from parties using WEOL for local advertising. Because of the Journal’s complete daily newspaper monopoly of local advertising in Lorain and its practically indispensable coverage of 99% of the Lorain families, this practice forced numerous advertisers to refrain from using WEOL for local advertising. That result not only reduced the number of customers available to WEOL in the field of local Lorain advertising and strengthened the Journal’s monopoly in that field, but more significantly tended to destroy and eliminate WEOL altogether. Attainment of that sought for elimination would automatically restore to the publisher of the Journal its substantial monopoly in Lorain of the mass dissemination of all news and advertising, interstate and national, as well as local. It would deprive not merely Lorain but Elyria and all surrounding communities of their only nearby radio station.

There is a suggestion that the out of state distribution of some copies of the Journal, coupled with the considerable interstate commerce engaged in by its publisher in the purchase of its operating supplies, provided, in any event, a sufficient basis for classifying the publisher’s entire operation as one in interstate commerce. It is pointed out also that the Journal’s daily publication of local news and advertising was so inseparably integrated with its publication of interstate news and national advertising that any coercion used by it in securing local advertising inevitably operated to strengthen its entire operation, including its monopoly of interstate news and national advertising.

It is not necessary, however, to rely on the above suggestions. The findings go further. They expressly and unequivocally state that the publisher’s conduct was aimed at a larger target the complete destruction and elimination of WEOL. The court found that the publisher, before 1948, enjoyed a substantial monopoly in Lorain of the mass dissemination not only of local news and advertising, but of news of out of state events transmitted to Lorain for immediate dissemination, and of advertising of out of state products for sale in Lorain. WEOL offered competition by radio in all these fields so that the publisher’s attempt to destroy WEOL was in fact an attempt to end the invasion by radio of the Lorain newspaper’s monopoly of interstate as well as local commerce.

[*Remainder of section omitted*]

2. *The publisher’s attempt to regain its monopoly of interstate commerce by forcing advertisers to boycott a competing radio station violated § 2.* The findings and opinion of the trial court describe the conduct of the publisher upon which the Government relies. The surrounding circumstances are important. The most illuminating of these is the substantial monopoly which was enjoyed in Lorain by the publisher from 1933 to 1948, together with a 99% coverage of Lorain families. Those factors made the Journal an indispensable medium of advertising for many Lorain concerns. Accordingly, its publisher’s refusals to print Lorain advertising for those using WEOL for like

advertising often amounted to an effective prohibition of the use of WEOL for that purpose. Numerous Lorain advertisers wished to supplement their local newspaper advertising with local radio advertising but could not afford to discontinue their newspaper advertising in order to use the radio.

WEOL's greatest potential source of income was local Lorain advertising. Loss of that was a major threat to its existence. The court below found unequivocally that appellants' conduct amounted to an attempt by the publisher to destroy WEOL and, at the same time, to regain the publisher's pre-1948 substantial monopoly over the mass dissemination of all news and advertising.

To establish this violation of § 2 as charged, it was not necessary to show that success rewarded appellants' attempt to monopolize. The injunctive relief under § 4 sought to forestall that success. While appellants' attempt to monopolize did succeed insofar as it deprived WEOL of income, WEOL has not yet been eliminated. The injunction may save it. "[W]hen that intent (to monopolize) and the consequent dangerous probability exist, this statute (the Sherman Act), like many others, and like the common law in some cases, directs itself against that dangerous probability as well as against the completed result." *Swift & Co. v. United States*, 196 U.S. 375, 396 [(1905)].

> "[T]he 2d section (of the Sherman Act) seeks, if possible, to make the prohibitions of the act all the more complete and perfect by embracing all attempts to reach the end prohibited by the 1st section, that is, restraints of trade, by any attempt to monopolize, or monopolization thereof, even although the acts by which such results are attempted to be brought about or are brought about be not embraced within the general enumeration of the 1st section." *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 61 [(1911)].

The publisher claims a right as a private business concern to select its customers and to refuse to accept advertisement from whomever it pleases. We do not dispute that general right. "But the word 'right' is one of the most deceptive of pitfalls; it is so easy to slip from a qualified meaning in the premise to an unqualified one in the conclusion. Most rights are qualified." The right claimed by the publisher is neither absolute nor exempt from regulation. Its exercise a a purposeful means of monopolizing interstate commerce is prohibited by the Sherman Act. The operator of the radio station, equally with the publisher of the newspaper, is entitled to the protection of that Act. "*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". (Emphasis supplied.) *United States v. Colgate & Co.*, 250 U.S. 300, 307 [(1919)].

3. *The injunction does not violate any guaranteed freedom of the press.* The publisher suggests that the injunction amounts to a prior restraint upon what it may publish. We find in it no restriction upon any guaranteed freedom of the press. The injunction applies to a publisher what the law applies to others. The publisher may not accept or deny advertisements in an 'attempt to monopolize . . . any part of the trade or commerce among the several States . . . ." Injunctive relief under § 4 of the Sherman

Act is as appropriate a means of enforcing the Act against newspapers as it is against others.

4. *The decree is reasonably consistent with the requirements of the case and remains within the control of the court below.* We have considered the objections made to the form and substance of the decree and do not find obvious error. It is suggested, for example, that the decree covers a broader scope of activities than is required by the evidence and requires unnecessary supervision of future conduct of the publisher, that notice of its terms must be published at least once a week for 25 weeks and that the publisher for five years must maintain records relating to the subject of the judgment and keep them accessible for governmental inspection.

While the decree should anticipate probabilities of the future, it is equally important that it do not impose unnecessary restrictions and that the procedure prescribed for supervision, giving notice, keeping records and making inspections be not unduly burdensome.

In the instant case the printed record contains neither the entire testimony nor all the exhibits which were before the court below. It omits also material mentioned during the trial as having been considered by the court when denying the Government's motion for a temporary injunction. Under the circumstances we are content to rely upon the trial court's retention of jurisdiction over the cause for whatever modification the decree may require in the light of the entire proceedings and of subsequent events.

The judgment accordingly is

Affirmed.

MR. JUSTICE CLARK and MR. JUSTICE MINTON took no part in the consideration or decision of this case.

UNITED STATES V. PARKE, DAVIS & CO.
362 U.S. 29 (1960)[1]

Park, Davis illustrates some of the limits of the *Colgate* doctrine. Parke, Davis was a major pharmaceutical manufacturer, producing some 600 products that it distributed through drug wholesalers and retailers. Parke, Davis had announced a resale price policy, which set mandatory resale prices in states with Fair Trade Laws and suggested resale prices in those states without Fair Trade Laws.[2] In non-Fair Trade States, Parke, Davis policy was to sell only to drug wholesalers that followed Park, Davis suggested resale prices. Parke, Davis also sold directly to large retailers, quoting the wholersaler's minimum resale price prescribed by its resale price policy. But Parke, Davis also would provide large retailers with volume discounts off the wholesale price—discounts that its wholesalers were not authorized to provide to their customers under the Parke, Davis resale price policy.

In 1956, retailers several retailers in the District of Columbia and Virginia—neither of which had Fair Trade Laws—advertised and sold Parke, Davis vitamin products at prices substantially less than Parke, Davis' suggested resale level. In an attempt to control this deviation, the Parke, Davis branch manager instituted a new policy under which PDs would not sell to any of the five wholesalers that serviced the area that sold PD products to retailers that did not adhere to PD's suggested resale prices, even if the wholesaler's products were being not being discounted by the retailer. Parke, Davis informed each of the wholesalers that the policy applied to all five wholesalers, and all five wholesalers indicated a willingness to follow the new policy. Parke, Davis also informed its retailers of this new addition to its resale price policy and of the fact that the policy would be applied to all area retailers. Several retailers indicated their willingness to adhere to PD's suggested resale prices. Several other retailers, however, continued to sell at discounted prices. Parke, Davis provided their names to the area wholesalers, and thereafter neither PD nor its wholesalers would sell PD products to the identified retailers. Once the retailers ceased selling below Parke, Davis' suggested

1. United States v. Parke, Davis & Co., 362 U.S. 29 (1960), *rev'g* 164 F. Supp. 827 (D.D.C Jul 16, 1958).

2. "Fair Trade Laws" were state statutes, usually enacted during the Great Depression, that permitted manufacturers to specify the minimum resale price of their products. These statutes were intended to protect independent retailers from the price-cutting by large chain stores. In light of their conflict with the federal antitrust laws, in 1937 Congress amended the Sherman Act through the Miller-Tydings Act to exempt resale price maintenance when authorized by state statue.

This special exception was expanded in 1952 by the McGuire Act (which overruled a 1951 Supreme Court decision that gave a narrower reading of the Miller-Tydings Act). 50 Stat. 693 (1937).

retail resale prices, however, Parke, Davis resumed selling to them and authorized its wholesalers to do the same.

On ____, the DOJ filed a civil complaint against Parke, Davis, alleging that its actions in securing compliance to its suggested retail prices went beyond what *Colgate* permitted and violated Section 1 of the Sherman Act. After the government completed the presentation of its evidence at trial, and without hearing Parke, Davis' evidence in its defense, the district court dismissed the complaint for the government's failure to prove its prima facie case. The district court found that the government's evdeince showed only that Parke, Davis had announced a policy as with whom it would deal and followed that policy, thereby engaging in unilateral action permissible under the *Colgate* doctrine.

The DOJ appealed directly to the Supreme Court under the Expediting Act. The Supreme Court, in a six-to-three decision, reversed and remanded.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

. . .

In the cases decided before [*FTC v. Beech-Nut Packing Co.*, 257 U.S. 441 (1922)] the Court's inquiry was directed to whether the manufacturer had entered into illicit contracts, express or implied. The District Court in this case apparently assumed that the Government could prevail only by establishing a contractual arrangement, albeit implied, between Parke Davis and its customers. Proceeding from the same premise Parke Davis strenuously urges that Rule 52 of the Rules of Civil Procedure compels an affirmance of the District Court since under that Rule the finding that there were no contractual arrangements should "not be set aside unless clearly erroneous." But Rule 52 has no application here. The District Court premised its ultimate finding that Parke Davis did not violate the Sherman Act on an erroneous interpretation of the standard to be applied. The [United States v. Bausch & Lomb Optical Co., 321 U.S. 707 (1944)] and *Beech-Nut* decisions cannot be read as merely limited to particular fact complexes justifying the inference of an agreement in violation of the Sherman Act. Both cases teach that judicial inquiry is not to stop with a search of the record for evidence of purely contractual arrangements. The Sherman Act forbids combinations of traders to suppress competition. True, there results the same economic effect as is accomplished by a prohibited combination to suppress price competition if each customer, although induced to do so solely by a manufacturer's announced policy, independently decides to observe specified resale prices. So long as *Colgate* is not overruled, this result is tolerated but only when it is the consequence of a mere refusal to sell in the exercise of the manufacturer's right "freely to exercise his own independent discretion as to parties with whom he will deal." When the manufacturer's actions, as here, go beyond mere announcement of his policy and the simple refusal to deal, and he employs other means which effect adherence to his resale prices, this countervailing consideration is not present and therefore he has put together a combination in violation of the Sherman Act. Thus, whether an unlawful combination or conspiracy is proved is to be judged by what the parties actually did rather than by the words they used. Because of the nature of the District Court's error we are reviewing a question of law, namely, whether the District Court applied the proper standard to essentially undisputed facts.

The program upon which Parke Davis embarked to promote general compliance with its suggested resale prices plainly exceeded the limitations of the *Colgate* doctrine and under *Beech-Nut* and *Bausch & Lomb* effected arrangements which violated the Sherman Act. Parke Davis did not content itself with announcing its policy regarding retail prices and following this with a simple refusal to have business relations with any retailers who disregarded that policy. Instead Parke Davis used the refusal to deal with the wholesalers in order to elicit their willingness to deny Parke Davis products to retailers and thereby help gain the retailers' adherence to its suggested minimum retail prices. The retailers who disregarded the price policy were promptly cut off when Parke Davis supplied the wholesalers with their names. The large retailer who said he would "abide" by the price policy, the multi-unit Peoples Drug chain, was not cut off.[6] In thus involving the wholesalers to stop the flow of Parke Davis products to the retailers, thereby inducing retailers' adherence to its suggested retail prices, Parke Davis created a combination with the retailers and the wholesalers to maintain retail prices and violated the Sherman Act. Although Parke Davis' originally announced wholesalers' policy would not under *Colgate* have violated the Sherman Act if its action thereunder was the simple refusal without more to deal with wholesalers who did not observe the wholesalers' Net Price Selling Schedule, that entire policy was tainted with the "vice of . . . illegality," when Parke Davis used it as the vehicle to gain the wholesalers' participation in the program to effectuate the retailers' adherence to the suggested retail prices.

Moreover, Parke Davis also exceeded the "limited dispensation which (Colgate) confers," in another way, which demonstrates how far Parke Davis went beyond the limits of the *Colgate* doctrine. With regard to the retailers' suspension of advertising, Parke Davis did not rest with the simple announcement to the trade of its policy in that regard followed by a refusal to sell to the retailers who would not observe it. First it discussed the subject with Dart Drug. When Dart indicated willingness to go along the other retailers were approached and Dart's apparent willingness to cooperate was used as the lever to gain their acquiescence in the program. Having secured those acquiescences Parke Davis returned to Dart Drug with the report of the accomplishment. Not until all this was done was the advertising suspended and sales to all the retailers resumed. In this manner Parke Davis sought assurances of compliance and got them, as well as the compliance itself. It was only by actively bringing about substantial unanimity among the competitors that Parke Davis was able to gain adherence to its policy. It must be admitted that a seller's announcement that he will not deal with customers who do not observe his policy may tend to engender confidence in each customer that if he complies his competitors will also. But if a

6. Indeed, if Peoples resumed adherence to the Parke Davis price scale after the interview between its vice-president and Parke Davis' assistant branch manager, [as the government's evidence showed, then] Parke Davis and Peoples entered into a price maintenance agreement, express, tacit or implied, such agreement violated the Sherman Act without regard to any wholesalers' participation.

manufacturer is unwilling to rely on individual self-interest to bring about general voluntary acquiescence which has the collateral effect of eliminating price competition, and takes affirmative action to achieve uniform adherence by inducing each customer to adhere to avoid such price competition, the customers' acquiescence is not then a matter of individual free choice prompted alone by the desirability of the product. The product then comes packaged in a competition-free wrapping—a valuable feature in itself—by virtue of concerted action induced by the manufacturer. The manufacturer is thus the organizer of a price-maintenance combination or conspiracy in violation of the Sherman Act. Under that Act "competition, not combination, should be the law of trade," and "a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 [(1940)].

. . .

On the record before us the Government is entitled to the relief it seeks. The courts have an obligation, once a violation of the antitrust laws has been established, to protect the public from a continuation of the harmful and unlawful activities. A trial court's wide discretion in fashioning remedies is not to be exercised to deny relief altogether by lightly inferring an abandonment of the unlawful activities from a cessation which seems timed to anticipate suit.

The judgment is reversed and the case remanded to the District Court with directions to enter an appropriate judgment enjoining Parke Davis from further violations of the Sherman Act unless the company elects to submit evidence in defense and refutes the Government's right to injunctive relief established by the present record.

It is so ordered.

MR. JUSTICE STEWART, concurring.

I concur in the judgment. The Court's opinion amply demonstrates that the present record shows an illegal combination to maintain retail prices. I therefore find no occasion to question, even by innuendo, the continuing validity of the *Colgate* decision, or of the Court's ruling as to the jury instruction in [*Frey & Son v. Cudahy Packing Co.*, 256 U.S. 208, 210-11 (1921)].

MR. JUSTICE HARLAN, who MR. JUSTICE FRANKFURTER and MR. JUSTICE WHITTAKER join, dissenting.

The Court's opinion reaches much further than at once may meet the eye, and justifies fuller discussion than otherwise might appear warranted. Scrutiny of the opinion will reveal that the Court has done no less than send to its demise the *Colgate* doctrine which has been a basic part of antitrust law concepts since it was first announced in 1919 in *United States v. Colgate & Co.*, 250 U.S. 300 [(1919)].

I begin with that doctrine and how it was applied by the District Court in this case. In the words of the Court's opinion, *Colgate* held that in the absence of a monopolistic setting, "a manufacturer, having announced a price maintenance policy, may bring about adherence to it by refusing to deal with customers who do not observe that policy." "And," as said in *Colgate* (at 307), "of course, he may announce in advance the circumstances under which he will refuse to sell."

The Government's complaint, seeking to enjoin alleged violations of §§ 1 and 3 of the Sherman Act,FN1 in substance charged Parke Davis with having combined and conspired with wholesalers and retailers of its products in the District of Columbia and Virginia, in four respects: (1) with retailers, to fix retail prices; (2) with retailers, to suppress advertising of cut prices; (3) with wholesalers, to fix wholesale prices; and (4) with wholesalers, to boycott retail price cutters. The Company's defense was that the activities complained of simply constituted a legitimate exercise of its rights under the Colgate doctrine. The detailed findings of the District Court are epitomized in its opinion as follows:

(1) Parke Davis "had well-established policies concerning the prices at which (its) products were to be sold by wholesalers and retailers, and the type of retailers to whom the wholesalers could re-sell";

(2) Parke Davis' "representatives . . . notified retailers concerning the policy under which its goods must be sold, but the retailers were free either to do without such goods or sell them in accordance with defendant's policy";

(3) Parke Davis "representatives likewise contacted wholesalers, notifying them of its policy and the wholesalers were likewise free to refuse to comply and thus risk being cut off by the defendant";

(4) "every visit made by the representatives to the retailers and wholesalers was, to each of them, separate and apart from all others";

(5) "[t]he evidence is clear that both wholesalers and retailers valued [Parke Davis'] business so highly that they acceded to its policy";

(6) "there was no coercion by defendant and no agreement with [wholesaler or retailer] co-conspirators as alleged in the Complaint";

(7) as to the Government's contention that proof of the alleged conspiracy "is implicit in (1) defendant's calling the attention of both retailers and wholesalers to its policy, and (2) the distributors' acquiescence to the policy . . . [t]he Court cannot agree to such a nebulous deduction from the record before it."

On these premises the District Court concluded: "Clearly, the actions of defendant were properly unilateral and sanctioned by law under the doctrine laid down in the case of United States v. Colgate & Company, 250 U.S. 300 . . . ."

. . .

In light of the whole history of the *Colgate* doctrine, it is surely this Court, and not the District Court, that has proceeded on erroneous premises in deciding this case. Unless there is to be attributed to the Court a purpose to overturn the findings of fact of the District Court—something which its opinion not only expressly disclaims doing, but which would also be in plain defiance of the Federal Rules of Civil Procedure, Rule 52(a), and principles announced in past cases—I think that what the Court has really done here is to throw the Colgate doctrine into discard.

To be sure, the Government has explicitly stated that it does not ask us to overrule *Colgate*, and the Court professes not to do so. But contrary to the long understanding of bench and bar, the Court treats Colgate as turning not on the absence of the concerted action explicitly required by §§ 1 and 3 of the Sherman Act, but upon the Court's notion of "countervailing" social policies. I can regard the Court's profession as no more than a bow to the fact that *Colgate*, decided more than 40 years ago, has become part of the economic regime of the country upon which the commercial community and the lawyers who advise it have justifiably relied.

If the principle for which Colgate stands is to be reversed, it is, as the Government's position plainly indicates, something that should be left to the Congress. It is surely the emptiest of formalisms to profess respect for Colgate and eviscerate it in application.

I would affirm.

NOTES

1. *Parke, Davis* is one of the few cases that appears to draw a distinction between a "contract" and a "combination" for Sherman Act § 1 purposes. From a more modern perspective, which does not draw a distinction between a contract and a combination and only requires "a conscious commitment to a common scheme designed to achieve an unlawful objective"[1] or a meeting of minds in an unlawful arrangement,"[2] *Parke, Davis* is an easy case.

- First, as the majority noted in footnote 6, Parke, Davis' reiteration of its resale price policy to Peoples Drug in the wake of its discounting, Peoples's reply that it would stop cutting prices and would abide by the resale policy going forward, and Parke, Davis' continuation of sales to Peoples is recognized today as a classic form of an offer and acceptance--"I offer to sell to you if you promise to abide by my suggested resale prices." Response: "I promise"—sufficient to satisfy the concerted action element of Section 1.
- Parke, Davis' enlistment of the five area drug wholesalers in its scheme to enforce its suggested retail price policy is a secondary boycott under *Lorain Journal*[3] sufficient to satisfy the concerted action element of Section 1, even if does not rise to the level of a Section 2 monopolization offense.
- Third, Parke, Davis' informing each area wholesaler that it was talking to the other four area wholesalers as a means increasing the likelihood that each wholesaler would abide by PD's resale price

1. Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764 (1984).
2. American Tobacco Co. v. United States, 328 U.S. 781, 810 (1946).
3. Lorain Journal Co. v. United States, 342 U.S. 143 (1951).

> policies—which they subsequently did—is probably sufficient to support an inference of a "hub and spokes" conspiracy under *Interstate Circuit*.[4]

2. The more serious question raised by *Parke, Davis* is whether a rigorously followed, classic *Colgate*-type policy—"You are free to resell my products at any price you wish, but by my policy is not to sell to firms that fail to adhere by my resale price policy—coupled with "economic coercion" is sufficient circumstantial evidence to support an inference of concerted action. That is, while it may be the case that a reseller whose profitability is largely independent of whether or not it carries the supplier's goods acts unilaterally when it decides to abide by the supplier's resale price policy, it that still the outcome when the reseller's viability depends on it carrying the supplier's products?

4. Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1939).

OFFICIAL AIRLINE GUIDES, INC. v. FTC
630 F.2d 920 (2d Cir. 1980)

Before OAKES and VAN GRAAFEILAND, Circuit Judges, and NICKERSON, District Judge.

OAKES, Circuit Judge:

This appeal raises the question whether a monopolist publisher of flight schedules not itself an air carrier has some duty under the Federal Trade Commission (FTC) Act not to discriminate unjustifiably between certificated air carriers and commuter airlines so as to place the latter at a significant competitive disadvantage. Petitioner, Official Airline Guides, Inc., which took over publication of the Official Airline Guide from The Reuben H. Donnelley Corp. (Donnelley) in 1979, challenges an FTC order, The order requires Donnelley to publish in the North American edition of its guide, known as the "OAG," connecting flight listings for commuter airlines in the same manner as it publishes connecting flight listings for certificated airlines, and to refrain from arbitrarily discriminating against any air carrier or class of carriers in publishing connecting flight listings. The guide is a semi-monthly publication that provides detailed information on flight schedules and fares in North America. We find the petitioner's three defenses-that (1) the FTC lacks jurisdiction under the Act to regulate petitioner in this case, (2) there is a lack of substantial evidence in the record to support the Commission's findings, and (3) the petitioner's voluntary compliance prior to conclusion of the FTC proceedings prevents a cease and desist order-all to be unavailing. At the same time we find for the petitioner on the merits of the underlying legal question and we do not reach petitioner's First Amendment defense to the order.

Since 1969 the North American edition of the Official Airline Guide (OAG), the "bible" of the industry, has been the only publication distributed in the United States that combines the North American passenger flight schedules of all scheduled domestic air carriers. It is the "primary market tool of . . . virtually every (air) carrier . . . in the United States," and is the standard reference for airline ticket offices, travel agents, businesses, and the public generally, although it has apparently been displaced to some extent by computerized scheduling.

At the time the Commission's complaint was issued in this proceeding, the (OAG) contained four categories of flight schedules: (1) direct flights of certificated carriers, that is, flights which do not involve a change of aircraft between two cities; (2) connecting flights of certificated carriers, that is, flights involving the use of one direct flight in conjunction with another to provide transportation between two cities; (3) direct flights of intrastate air carriers; and (4) direct flights of commuter air carriers. Under Donnelley's publication policy a user of the (OAG) was not readily apprised of connecting flights of commuter air carriers. For example, there are no direct flights between Los Angeles and Rutland, Vermont, and the (OAG) listed only those connections involving certificated carriers. A user of the (OAG), therefore, might be directed to Rutland from Los Angeles by way of Boston, because all three cities are or have been served by direct flights of certificated carriers. A user of the guide, unless he "constructed a connection," would not be informed of commuter connections from intermediate cities, such as New York or Hartford, which may not serve Rutland by direct flights of certificated carriers, even though these cities may be more convenient to the Los Angeles traveler than a flight through Boston. "Constructing a connection" obviously requires looking for direct flights serving points intermediate to the two cities between which the traveler is flying. Because constructing a connection is difficult and time-consuming, it is important to have connecting flights listed in the OAG. Certificated carriers paid Donnelley in 1975 alone hundreds of thousands of dollars in order to have their flights listed.

As a result of OAG's failure to list the connecting flight schedules of commuter airlines, the Commission found that the latter were handicapped in competing with certificated carriers in markets that were served by both, which included some 432 "city pairs" as of April 1975, a "city pair" being two cities between which there is scheduled airline service. Commuter airlines sought as early as 1969 to have Donnelley publish commuter connections in the OAG. At one time, Donnelley representatives did sit down with the certificated carriers' trade association, the Air Traffic Conference, to discuss the commuter connection problem, but evidently the certificated carriers were not interested in the increase in competition, and the subject was dropped. It may be noted parenthetically that the administrative law judge's finding that there was a conspiracy between the certificated air carriers and Donnelley was overturned by the full Commission.

In 1975 the FTC staff undertook an investigation into Donnelley's publication policies and Donnelley then expressed a willingness to modify its practices without, however, agreeing to do so in a binding or enforceable agreement. On April 13, 1976, the Commission issued its complaint, charging that Donnelley had violated section 5 of the FTC Act, first, by refusing to publish the connecting schedules of commuter air carriers; second, by failing to merge the direct flight schedules of commuter air carriers that it did publish with similar schedules of certificated carriers; and third, by conspiring with others in restraint of trade. The administrative law judge found against Donnelley on all counts, but the full Commission reversed him as to the second and third counts, holding that Donnelley had sufficient business justification for not merging into a single listing the schedules of commuter air carriers and certificated carriers, and that the record did not support a finding of any conspiracy. The Commission did, however, affirm the administrative law judge in finding a section 5 violation in Donnelley's arbitrary refusal to publish the connecting flight schedules of commuter air carriers. The Commission's order directed Donnelley to "cease and desist from failing to publish connecting flight listings for commuter air carriers pursuant to whatever guidelines govern the publication of connecting flight listings for certificated carriers" and petitioner filed the pending petition for review, as to which we have jurisdiction under section 5(c) and (d) of the FTC Act.

I. Jurisdiction of the FTC

[*Omitted*]

II. Substantial Evidence

Petitioner argues that the Commission did not properly find that Donnelley arbitrarily injured competition among air carriers. However, substantial evidence supports the Commission's findings of significant competition between certificated and commuter carriers, and of injury to that competition, as well as the finding that Donnelley "arbitrarily" refused to publish the connecting flight schedules of commuter carriers.

Petitioner argues that competition between the certificated and commuter carriers is de minimis inasmuch as the approximately one million passengers carried by commuters in 1974 constituted but a small fraction of the total of some 190 million carried by certificated carriers. But in eighty-two city pairs commuter carriers served almost a million passengers in 1973 and 900,000 passengers in 1974, while certificated carriers served about four million persons in those markets. Thus tens of millions of dollars of revenues are involved in the carrying of passengers by commuter and certificated carriers in the city pairs in which they compete, and this is clearly not "insignificant or insubstantial." See *United States v. Consolidated Laundries Corp.*, 291 F.2d 563, 572 (2d Cir. 1961) ($523,000 in linen supply business not "insignificant or insubstantial"); see also *International Salt Co. v. United States*, 332 U.S. 392, 396 (1947).

Petitioner further claims that the commuter carriers were not injured by its actions and cites the fact that 70% of commuter air traffic in 1971 was comprised of connecting passengers. But this fact merely shows the extent to which commuter carriers depend on connecting traffic and tells us nothing about the number of passengers who never learned of the commuters' unpublished connecting schedules. The Commission's finding that there is little chance that the availability of unpublished connecting flights will be known was properly predicated upon the testimony of industry witnesses, the statements of travel agents and others, and inferences drawn from the Commission's awareness of the OAG's role in the air travel industry and from the reported increases in commuter traffic that did occur after Donnelley began publishing the connecting flight schedules of commuter airlines.

Moreover, Donnelley did not offer the Commission any explanation for its refusal to list commuter connecting flights. While Donnelley now says that it considered the issue to be factually moot, and that its reasons for not publishing the commuter connecting flight schedules prior to 1976 were essentially the same as its reasons for not merging the direct flight schedule listings of commuter and certificated carriers (as to which the Commission, with one dissent, found business justification), neither explanation has merit. There is no mootness defense. And Donnelley's asserted business justification-that commuter airlines are less reliable than certificated airlines-does not explain why it was willing to list direct commuter flights (albeit separately) but not connecting commuter flights. The total expense involved, once Donnelley started listing connecting commuter flights, was $6,000, and the change in policy was made with apparent ease and no ill effects. Thus, since in Donnelley's own view commuter airlines' schedules were not inherently unreliable, and the cost and effort involved in listing them were not excessive, the Commission could properly find Donnelley's refusal to publish them arbitrary.

Donnelley, however, contends that the Commission itself is arbitrary. Donnelley argues that under the Commission's standard if a monopoly were to act in its own economic self-interest the Commission would seize upon that fact and declare such behavior to be monopolization in violation of section 2 of the Sherman Act, while if it could not show any economic self-interest the Commission would find it to be acting "arbitrarily." But this argument ignores the fact that section 2 of the Sherman Act does not forbid a monopolist from ever acting in its own self-interest. Petitioner also ignores the Commission's conclusion that "(i)n examining the question of business justifications, the economic self interest of the monopolist would be the major but not the exclusive consideration," and that "(w)here there is little justification for a business policy, the antitrust laws can require that the monopolist take into account the effect on competition of its actions in the line of commerce made up of its customers, suppliers, or others wishing to deal with it." We see nothing arbitrary in the Commission's finding that Donnelley's policy of not merging schedules into single classifications was reasonable while its policy of not publishing commuter schedules at all was arbitrary, since withholding a group of schedules from publication in toto and disclosing the information but dividing it into separate listings are two entirely different matters.

III. Legal Duty of a Monopolist vis-a-vis its Customers

We turn then to the crucial issue in the case, whether Donnelley as a monopolist had some duty under section 5 of the FTC Act not to discriminate unjustifiably between the competing classes of carriers so as to place one class at a significant competitive disadvantage. In other words, does the FTC Act authorize the Commission to find unlawful the type of challenged activity engaged in by petitioner? The Commission itself recognized that "(t)he question we are presented with is outside the mainstream of law concerning monopolies and monopolization."

On the one hand, the petitioner refers us to the principle expressed in *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919), that

> [i]n the absence of any purpose to create or maintain a monopoly, the (Sherman 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.

The Commission did not find in the present case "any purpose to create or maintain a monopoly," but went on to say that "the philosophy of Colgate must give way to a limited extent where the business judgment is exercised by a monopolist in an arbitrary way." The Commission conceded that its result "may be inconsistent to some extent with the theory of the Colgate doctrine."

The Commission's brief, however, refers us to two lines of cases with which it claims its decision is consistent. The first line recognizes limitations that may be placed upon a monopolist's rights to affect competition. Thus, in *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951), the Court held that a monopolist newspaper violated section 2 of the Sherman Act by refusing to sell advertising space to merchants who also purchased air advertising time from a local radio station. Though recognizing the general right of a private business to select its customers, the Court held that the exercise of this right for the purpose of monopolization violates the Sherman Act. But *Lorain Journal*, unlike the present case, involved a monopolist seeking to preserve its own monopoly. The Commission similarly argues that its position is supported by *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), where the Court held that a monopolist may not abuse its monopoly power in one market to gain an improper advantage or to destroy threatened competition in an adjacent market in which it also operates. But as the Commission itself pointed out, the instant case "differs from ordinary monopolization cases where challenged acts or practices were engaged in to benefit the monopolist competitively, either in the market in which the monopoly power existed or in some adjacent market into which the monopolist had extended its operations." Donnelley, though possibly a monopolist in the airline schedule publishing industry, admittedly had no anticompetitive motive or intent with respect to the airline industry and is engaged in a different line of commerce from that of the air carriers.

The second line of cases relied upon in the Commission's brief recognizes the duty that the joint owners of a scarce resource have to make the resource available to all potential users on nondiscriminatory terms. Thus in *Associated Press v. United States*, 326 U.S. 1, 15-18 (1945), the Court held that the members of a news-gathering cooperative association could not lawfully enforce a by-law provision that allowed any member to block nonmember competitors from becoming members. So too, in *United States v. Terminal Railroad Association*, 224 U.S. 383, 410-12 (1912), the Court held that an association of railroad companies controlling access to the city's only terminal facilities had to make them available to nonmembers on reasonable, nondiscriminatory terms. And in *Silver v. New York Stock Exchange*, 373 U.S. 341, 347-49, 364 (1963), the Court held that the New York Stock Exchange and its members violated section 1 of the Sherman Act when they jointly denied nonmember broker-dealers access to private wire services with certain Exchange members. Each of these cases, however, involved joint refusals to deal resulting in injury to the defendants' competitors, while the instant case involves only unilateral behavior by Donnelley which allegedly has affected competition among air carriers, a business in which Donnelley is not engaged.

The closest case that the Commission could cite is *Grand Caillou Packing Co.*, 65 F.T.C. 799 (1964), *aff'd in part rev'd in part sub nom. LaPeyre v. FTC*, 366 F.2d 117 (5th Cir. 1966). In that case a monopolist manufacturer of shrimp peeling machinery leased the peeling equipment to shrimp canners in the Northwest United States at rental rates substantially higher than those charged to canners on the Gulf Coast, where the manufacturer also ran its own canning operation. The Commission held that this discriminatory pricing policy violated section 5, as the monopolist had improperly attempted to protect its own shrimp canning operations from competition by other canners. Commissioner Elman, concurring stated that the record did not support a finding of anticompetitive intent, and argued that the monopolist had merely been charging what the traffic would bear in an attempt to maximize profits. It was Commissioner Elman's reasoning that the monopolist nevertheless had violated section 5 by breaching its duty to treat all users of its equipment fairly, on which the Commission in this case pinned its holding.

The Fifth Circuit, in reviewing *LaPeyre*, held that it need not decide whether the record supported the majority's finding of discriminatory intent because it was clear that the conduct violated section 5 by unjustly discriminating between classes of users. Thus the Commission argues that *LaPeyre* stands for the proposition that a lack of anticompetitive motive or intent will not, under section 5 of the FTC Act, justify a monopolist's arbitrarily injuring competition in an adjacent market. Yet the fact remains that the utilization of monopoly power in one market in *LaPeyre* resulted in discrimination and the curtailment of competition in another market in which the monopolist himself was also engaged, and this surely distinguishes *LaPeyre* from the present case.

Conceding in effect that there is no case precisely in point, the Commission suggested in oral argument that it was but a "small step" that we would be taking were we to uphold their decision. Of course we are reminded by the line of cases including *FTC v. Cement Institute*, 333 U.S. 683, 692-93, 720 (1948) and *Atlantic Refining Co. v. FTC*, 381 U.S. 357, 367-68 (1965), that "[w]hile the final word is left to the courts, necessarily 'we give great weight to the Commission's conclusion . . .' " as to what is an "unfair method of competition" or "an unfair act or practice" within the meaning of section 5 of the FTC Act. We note that the FTC with some justification states that the arbitrary refusal of a monopolist to deal leaves the disadvantaged competitor, even though in another field, with no recourse to overcome the disadvantage, and the Commission wants us to take the "small step" in terms of "the fundamental goals of antitrust."

But we think enforcement of the FTC's order here would give the FTC too much power to substitute its own business judgment for that of the monopolist in any decision that arguably affects competition in another industry. Such a decision would permit the FTC to delve into, as the Commission itself put the extreme case, "social, political, or personal reasons" for a monopolist's refusal to deal. Professors Areeda and Turner give examples of a monopolist theater which refuses to admit men with long hair or a monopolist newspaper which refuses to publish advertising from cigarette manufacturers. 3 P. Areeda & D. Turner, supra, at 270-71. The Commission says that neither of these examples would trigger antitrust scrutiny because there is no competition among persons who attend movies, and refusing to publish advertisements for all cigarette companies would not place any of them at a disadvantage vis-a-vis a competitor. Nevertheless, the Commission's own example in footnote 38 of its opinion of a monopolist newspaper refusing to take advertisements from a particular cigarette company because of the style of prior advertisements or the political views of its president shows just how far the Commission's opinion could lead us. What we are doing, as the Commission itself recognized, is weighing benefits to competition in the other field against the detrimental effect of allowing the Commission to pass judgment on many business decisions of the monopolist that arguably discriminate among customers in some way. Thus, if the only supermarket in town decides to stock Birdseye vegetables but not Green Giant vegetables, the FTC would be able to require it to stock Green Giant vegetables if it were to find Green Giant competitively disadvantaged.

We do not think that the *Colgate* doctrine is as dead as the Commission would have it. Only recently we said as much in *Oreck Corp. v. Whirlpool Corp.*, 579 F.2d 126, 133 (2d Cir.) (en banc), *cert. denied*, 439 U.S. 946 (1978): "[i]t has always been the prerogative of a manufacturer to decide with whom it will deal." And the Supreme Court in *Reeves, Inc. v. Stake*, 447 U.S. 429, -- (1980), has again referred to " '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.' *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919)." We think that even a monopolist, as long as he has no purpose to restrain competition or to enhance or expand his monopoly, and does not act coercively, retains this right. Absent enlightenment from above, or clarification from Congress, this is our decision on the merits.

IV. Mootness of Case

If the Commission were correct, however, that failure of petitioner to publish commuter airlines connecting flight schedules amounted to an antitrust violation, the fact that petitioner had already begun to publish such information before the conclusion of the proceedings would not make the cease and desist order invalid. In such a situation, as we have held, the Commission has "discretion" to find that an order is warranted because of the possibility of unlawful recurrence of the activity. There is no evidence in our case that the FTC imposed any improper burden on the petitioner, . . . and we see no evidence of an abuse of discretion since quite plainly the mere cessation of illegal activity—even coupled with a promise to obey the law in the future-will not defeat the entry of a cease and desist order.

As previously stated, we need not reach petitioner's First Amendment claim.

Petition to review granted; Commission order reversed for reasons stated above.

ASPEN SKIING CO. v. ASPEN HIGHLANDS SKIING CORP.
472 U.S. 585 (1985)[1]

JUSTICE STEVENS delivered the opinion of the Court.

In a private treble-damages action, the jury found that petitioner Aspen Skiing Company (Ski Co.) had monopolized the market for downhill skiing services in Aspen, Colorado. The question presented is whether that finding is erroneous as a matter of law because it rests on an assumption that a firm with monopoly power has a duty to cooperate with its smaller rivals in a marketing arrangement in order to avoid violating § 2 of the Sherman Act.

I

Aspen is a destination ski resort with a reputation for "super powder," "a wide range of runs," and an "active night life," including "some of the best restaurants in North America." Between 1945 and 1960, private investors independently developed three major facilities for downhill skiing: Aspen Mountain (Ajax), Aspen Highlands Highlands), and Buttermilk. A fourth mountain, Snowmass, opened in 1967.

The development of any major additional facilities is hindered by practical considerations and regulatory obstacles. The identification of appropriate topographical conditions for a new site and substantial financing are both essential. Most of the terrain in the vicinity of Aspen that is suitable for downhill skiing cannot be used for that purpose without the approval of the United States Forest Service. That approval is contingent, in part, on environmental concerns. Moreover, the county government must also approve the project, and in recent years it has followed a policy of limiting growth.

Between 1958 and 1964, three independent companies operated Ajax, Highlands, and Buttermilk. In the early years, each company offered its own day or half-day tickets for use of its mountain. In 1962, however, the three competitors also introduced an interchangeable ticket. The 6-day, all-Aspen ticket provided convenience to the vast majority of skiers who visited the resort for weekly periods, but preferred to remain flexible about what mountain they might ski each day during the visit. It also emphasized the unusual variety in ski mountains available in Aspen.

As initially designed, the all-Aspen ticket program consisted of booklets containing six coupons, each redeemable for a daily lift ticket at Ajax, Highlands, or Buttermilk. The price of the booklet was often discounted from the price of six daily tickets, but

[1] Most internal citations and footnotes omitted. For the opinions in the case, see Aspen Highlands Skiing Corp. v. Aspen Skiing Co., 738 F.2d 1509 (10th Cir. 1984), *aff'd*, 472 U.S. 585 (1985).

all six coupons had to be used within a limited period of time-seven days, for example. The revenues from the sale of the 3-area coupon books were distributed in accordance with the number of coupons collected at each mountain.

In 1964, Buttermilk was purchased by Ski Co., but the interchangeable ticket program continued. In most seasons after it acquired Buttermilk, Ski Co. offered 2-area, 6- or 7-day tickets featuring Ajax and Buttermilk in competition with the 3-area, 6-coupon booklet. Although it sold briskly, the all-Aspen ticket did not sell as well as Ski Co.'s multiarea ticket until Ski Co. opened Snowmass in 1967. Thereafter, the all-Aspen coupon booklet began to outsell Ski Co.'s ticket featuring only its mountains.

In the 1971-1972 season, the coupon booklets were discontinued and an "around the neck" all-Aspen ticket was developed. This refinement on the interchangeable ticket was advantageous to the skier, who no longer found it necessary to visit the ticket window every morning before gaining access to the slopes. Lift operators at Highlands monitored usage of the ticket in the 1971-1972 season by recording the ticket numbers of persons going onto the slopes of that mountain. Highlands officials periodically met with Ski Co. officials to review the figures recorded at Highlands, and to distribute revenues based on that count.

There was some concern that usage of the all-Aspen ticket should be monitored by a more scientific method than the one used in the 1971-1972 season. After a one-season absence, the 4-area ticket returned in the 1973-1974 season with a new method of allocating revenues based on usage. Like the 1971-1972 ticket, the 1973-1974 4-area ticket consisted of a badge worn around the skier's neck. Lift operators punched the ticket when the skier first sought access to the mountain each day. A random-sample survey was commissioned to determine how many skiers with the 4-area ticket used each mountain, and the parties allocated revenues from the ticket sales in accordance with the survey's results.

In the next four seasons, Ski Co. and Highlands used such surveys to allocate the revenues from the 4-area, 6-day ticket. Highlands' share of the revenues from the ticket was 17.5% in 1973-1974, 18.5% in 1974-1975, 16.8% in 1975-1976, and 13.2% in 1976-1977. During these four seasons, Ski Co. did not offer its own 3-area, multi-day ticket in competition with the all-Aspen ticket.[9] By 1977, multiarea tickets accounted for nearly 35% of the total market. Holders of multiarea passes also accounted for additional daily ticket sales to persons skiing with them.

Between 1962 and 1977, Ski Co. and Highlands had independently offered various mixes of 1-day, 3-day, and 6-day passes at their own mountains. In every season except one, however, they had also offered some form of all-Aspen, 6-day ticket, and divided

9. In 1975, the Colorado Attorney General filed a complaint against Ski Co. and Highlands alleging, in part, that the negotiations over the 4-area ticket had provided them with a forum for price fixing in violation of § 1 of the Sherman Act and that they had attempted to monopolize the market for downhill skiing services in Aspen in violation of § 2. In 1977, the case was settled by a consent decree that permitted the parties to continue to offer the 4-area ticket provided that they set their own ticket prices unilaterally before negotiating its terms.

the revenues from those sales on the basis of usage. Nevertheless, for the 1977-1978 season, Ski Co. offered to continue the all-Aspen ticket only if Highlands would accept a 13.2% fixed share of the ticket's revenues.

Although that had been Highlands' share of the ticket revenues in 1976-1977, Highlands contended that that season was an inaccurate measure of its market performance since it had been marked by unfavorable weather and an unusually low number of visiting skiers. Moreover, Highlands wanted to continue to divide revenues on the basis of actual usage, as that method of distribution allowed it to compete for the daily loyalties of the skiers who had purchased the tickets. Fearing that the alternative might be no interchangeable ticket at all, and hoping to persuade Ski Co. to reinstate the usage division of revenues, Highlands eventually accepted a fixed percentage of 15% for the 1977-1978 season. No survey was made during that season of actual usage of the 4-area ticket at the two competitors' mountains.

In the 1970's the management of Ski Co. increasingly expressed their dislike for the all-Aspen ticket. They complained that a coupon method of monitoring usage was administratively cumbersome. They doubted the accuracy of the survey and decried the "appearance, deportment, [and] attitude" of the college students who were conducting it. In addition, Ski Co.'s president had expressed the view that the 4-area ticket was siphoning off revenues that could be recaptured by Ski Co. if the ticket was discontinued. In fact, Ski Co. had reinstated its 3-area, 6-day ticket during the 1977-1978 season, but that ticket had been outsold by the 4-area, 6-day ticket nearly two to one.

In March 1978, the Ski Co. management recommended to the board of directors that the 4-area ticket be discontinued for the 1978-1979 season. The board decided to offer Highlands a 4-area ticket provided that Highlands would agree to receive a 12.5% fixed percentage of the revenue-considerably below Highlands' historical average based on usage. Later in the 1978-1979 season, a member of Ski Co.'s board of directors candidly informed a Highlands official that he had advocated making Highlands "an offer that [it] could not accept."

Finding the proposal unacceptable, Highlands suggested a distribution of the revenues based on usage to be monitored by coupons, electronic counting, or random sample surveys. If Ski Co. was concerned about who was to conduct the survey, Highlands proposed to hire disinterested ticket counters at its own expense—"somebody like Price Waterhouse"—to count or survey usage of the 4-area ticket at Highlands. Ski Co. refused to consider any counterproposals, and Highlands finally rejected the offer of the fixed percentage.

As far as Ski Co. was concerned, the all-Aspen ticket was dead. In its place Ski Co. offered the 3-area, 6-day ticket featuring only its mountains. In an effort to promote this ticket, Ski Co. embarked on a national advertising campaign that strongly implied to people who were unfamiliar with Aspen that Ajax, Buttermilk, and Snowmass were the only ski mountains in the area. For example, Ski Co. had a sign changed in the Aspen Airways waiting room at Stapleton Airport in Denver. The old sign had a picture of the four mountains in Aspen touting "Four Big Mountains" whereas the new sign retained the picture but referred only to three.

Ski Co. took additional actions that made it extremely difficult for Highlands to market its own multiarea package to replace the joint offering. Ski Co. discontinued the 3-day, 3-area pass for the 1978-1979 season, and also refused to sell Highlands any lift tickets, either at the tour operator's discount or at retail. Highlands finally developed an alternative product, the "Adventure Pack," which consisted of a 3-day pass at Highlands and three vouchers, each equal to the price of a daily lift ticket at a Ski Co. mountain. The vouchers were guaranteed by funds on deposit in an Aspen bank, and were redeemed by Aspen merchants at full value. Ski Co., however, refused to accept them.

Later, Highlands redesigned the Adventure Pack to contain American Express Traveler's Checks or money orders instead of vouchers. Ski Co. eventually accepted these negotiable instruments in exchange for daily lift tickets. Despite some strengths of the product, the Adventure Pack met considerable resistance from tour operators and consumers who had grown accustomed to the convenience and flexibility provided by the all-Aspen ticket.

Without a convenient all-Aspen ticket, Highlands basically "becomes a day ski area in a destination resort." Highlands' share of the market for downhill skiing services in Aspen declined steadily after the 4-area ticket based on usage was abolished in 1977: from 20.5% in 1976-1977, to 15.7% in 1977-1978, to 13.1% in 1978-1979, to 12.5% in 1979-1980, to 11% in 1980-1981. Highlands' revenues from associated skiing services like the ski school, ski rentals, amateur racing events, and restaurant facilities declined sharply as well.

II

In 1979, Highlands filed a complaint in the United States District Court for the District of Colorado naming Ski Co. as a defendant. Among various claims,[18] the complaint alleged that Ski Co. had monopolized the market for downhill skiing services at Aspen in violation of § 2 of the Sherman Act, and prayed for treble damages. The case was tried to a jury which rendered a verdict finding Ski Co. guilty of the § 2 violation and calculating Highlands' actual damages at $2.5 million.

In her instructions to the jury, the District Judge explained that the offense of monopolization under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in a relevant market, and (2) the willful acquisition, maintenance, or use of that power by anticompetitive or exclusionary means or for anticompetitive or exclusionary purposes. Although the first element was vigorously disputed at the trial and in the Court of Appeals, in this Court Ski Co. does not challenge the jury's special verdict finding that it possessed monopoly power. Nor does Ski Co. criticize the trial court's instructions to the jury concerning the second element of the § 2 offense.

On this element, the jury was instructed that it had to consider whether "Aspen Skiing Corporation willfully acquired, maintained, or used that power by anti-

18. Highlands also alleged that Ski Co. had conspired with various third parties in violation of § 1 of the Sherman Act. The District Court allowed this claim to go to the jury which rendered a verdict in Ski Co.'s favor.

competitive or exclusionary means or for anti-competitive or exclusionary purposes." The instructions elaborated:

> "In considering whether the means or purposes were anti-competitive or exclusionary, you must draw a distinction here between practices which tend to exclude or restrict competition on the one hand and the success of a business which reflects only a superior product, a well-run business, or luck, on the other. The line between legitimately gained monopoly, its proper use and maintenance, and improper conduct has been described in various ways. It has been said that obtaining or maintaining monopoly power cannot represent monopolization if the power was gained and maintained by conduct that was honestly industrial. Or it is said that monopoly power which is thrust upon a firm due to its superior business ability and efficiency does not constitute monopolization.
>
> "For example, a firm that has lawfully acquired a monopoly position is not barred from taking advantage of scale economies by constructing a large and efficient factory. These benefits are a consequence of size and not an exercise of monopoly power. Nor is a corporation which possesses monopoly power under a duty to cooperate with its business rivals. Also a company which possesses monopoly power and which refuses to enter into a joint operating agreement with a competitor or otherwise refuses to deal with a competitor in some manner does not violate Section 2 if valid business reasons exist for that refusal.
>
> "In other words, if there were legitimate business reasons for the refusal, then the defendant, even if he is found to possess monopoly power in a relevant market, has not violated the law. We are concerned with conduct which unnecessarily excludes or handicaps competitors. This is conduct which does not benefit consumers by making a better product or service available—or in other ways—and instead has the effect of impairing competition.
>
> "To sum up, you must determine whether Aspen Skiing Corporation 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 or sub-market."

The jury answered a specific interrogatory finding the second element of the offense as defined in these instructions.

Ski Co. filed a motion for judgment notwithstanding the verdict, contending that the evidence was insufficient to support a § 2 violation as a matter of law. In support of that motion, Ski Co. incorporated the arguments that it had advanced in support of its motion for a directed verdict, at which time it had primarily contested the sufficiency of the evidence on the issue of monopoly power. Counsel had, however, in the course of the argument at that time, stated: "Now, we also think, Judge, that there clearly cannot be a requirement of cooperation between competitors." The District Court denied Ski Co.'s motion and entered a judgment awarding Highlands treble damages of $7,500,000, costs and attorney's fees.

The Court of Appeals affirmed in all respects. The court advanced two reasons for rejecting Ski Co.'s argument that " 'there was insufficient evidence to present a jury issue of monopolization because, as a matter of law, the conduct at issue was pro-competitive conduct that a monopolist could lawfully engage in.' " First, relying on *United States v. Terminal Railroad Assn. of St. Louis*, 224 U.S. 383 [(1912)], the Court of Appeals held that the multiday, multiarea ticket could be characterized as an "essential facility" that Ski Co. had a duty to market jointly with Highlands. Second, it held that there was sufficient evidence to support a finding that Ski Co.'s intent in refusing to market the 4-area ticket, "considered together with its other conduct," was to create or maintain a monopoly.

In its review of the evidence on the question of intent, the Court of Appeals considered the record "as a whole" and concluded that it was not necessary for Highlands to prove that each allegedly anticompetitive act was itself sufficient to demonstrate an abuse of monopoly power. The court noted that by "refusing to cooperate" with Highlands, Ski Co. "became the only business in Aspen that could offer a multi-day multi-mountain skiing experience"; that the refusal to offer a 4-mountain ticket resulted in "skiers' frustration over its unavailability"; that there was apparently no valid business reason for refusing to accept the coupons in Highlands' Adventure Pack; and that after Highlands had modified its Adventure Pack to meet Ski Co.'s objections, Ski Co. had increased its single ticket price to $22 "thereby making it unprofitable . . . to market [the] Adventure Pack." In reviewing Ski Co.'s argument that it was entitled to a directed verdict, the Court of Appeals assumed that the jury had resolved all contested questions of fact in Highlands' favor.

III

In this Court, Ski Co. contends that even a firm with monopoly power has no duty to engage in joint marketing with a competitor, that a violation of § 2 cannot be established without evidence of substantial exclusionary conduct, and that none of its activities can be characterized as exclusionary. It also contends that the Court of Appeals incorrectly relied on the "essential facilities" doctrine and that an "anticompetitive intent" does not transform nonexclusionary conduct into monopolization. In response, Highlands submits that, given the evidence in the record, it is not necessary to rely on the "essential facilities" doctrine in order to affirm the judgment.

"The central message of the Sherman Act is that a business entity must find new customers and higher profits through internal expansion—that is, by competing successfully rather than by arranging treaties with its competitors." Ski Co., therefore, is surely correct in submitting that even a firm with monopoly power has no general duty to engage in a joint marketing program with a competitor. Ski Co. is quite wrong, however, in suggesting that the judgment in this case rests on any such proposition of law. For the trial court unambiguously instructed the jury that a firm possessing monopoly power has no duty to cooperate with its business rivals.

The absence of an unqualified duty to cooperate does not mean that every time a firm declines to participate in a particular cooperative venture, that decision may not have evidentiary significance, or that it may not give rise to liability in certain circumstances. The absence of a duty to transact business with another firm is, in some respects, merely the counterpart of the independent businessman's cherished right to select his customers and his associates. The high value that we have placed on the right to refuse to deal with other firms does not mean that the right is unqualified.[27]

In *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951), we squarely held that this right was not unqualified. Between 1933 and 1948 the publisher of the Lorain Journal, a newspaper, was the only local business disseminating news and advertising in that Ohio town. In 1948, a small radio station was established in a nearby community. In an effort to destroy its small competitor, and thereby regain its "pre-1948 substantial monopoly over the mass dissemination of all news and advertising," the Journal refused to sell advertising to persons that patronized the radio station.

In holding that this conduct violated § 2 of the Sherman Act, the Court dispatched the same argument raised by the monopolist here:

> "The publisher claims a right as a private business concern to select its customers and to refuse to accept advertisements from whomever it pleases. We do not dispute that general right. 'But the word "right" is one of the most deceptive of pitfalls; it is so easy to slip from a qualified meaning in the premise to an unqualified one in the conclusion. Most rights are qualified.' The right claimed by the publisher is neither absolute nor exempt from regulation. Its exercise as a purposeful means of monopolizing interstate commerce is prohibited by the Sherman Act. The operator of the radio station, equally with the publisher of the newspaper, is entitled to the protection of that Act. '*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.' (Emphasis supplied.) United States v. Colgate & Co., 250 U.S. 300, 307 [(1919)]."

The Court approved the entry of an injunction ordering the Journal to print the advertisements of the customers of its small competitor.

In *Lorain Journal*, the violation of § 2 was an "attempt to monopolize," rather than monopolization, but the question of intent is relevant to both offenses. In the former case it is necessary to prove a "specific intent" to accomplish the forbidden objective-as Judge Hand explained, "an intent which goes beyond the mere intent to do the act." *United States v. Aluminum Co. of America*, 148 F.2d 416, 432 (CA2 1945). In the latter case evidence of intent is merely relevant to the question whether the challenged conduct is fairly characterized as "exclusionary" or "anticompetitive"-to use the words in the trial court's instructions-or "predatory," to use a word that scholars seem to favor. Whichever label is used, there is agreement on the proposition that "no monopolist monopolizes unconscious of what he is doing." As Judge Bork stated more recently: "Improper exclusion (exclusion not the result of superior efficiency) is always deliberately intended."

27. Under § 1 of the Sherman Act, a business "generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently." *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 761 (1984); *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919).

The qualification on the right of a monopolist to deal with whom he pleases is not so narrow that it encompasses no more than the circumstances of *Lorain Journal*. In the actual case that we must decide, the monopolist did not merely reject a novel offer to participate in a cooperative venture that had been proposed by a competitor. Rather, the monopolist elected to make an important change in a pattern of distribution that had originated in a competitive market and had persisted for several years. The all-Aspen, 6-day ticket with revenues allocated on the basis of usage was first developed when three independent companies operated three different ski mountains in the Aspen area. It continued to provide a desirable option for skiers when the market was enlarged to include four mountains, and when the character of the market was changed by Ski Co.'s acquisition of monopoly power. Moreover, since the record discloses that interchangeable tickets are used in other multimountain areas which apparently are competitive, it seems appropriate to infer that such tickets satisfy consumer demand in free competitive markets.

Ski Co.'s decision to terminate the all-Aspen ticket was thus a decision by a monopolist to make an important change in the character of the market. Such a decision is not necessarily anticompetitive, and Ski Co. contends that neither its decision, nor the conduct in which it engaged to implement that decision, can fairly be characterized as exclusionary in this case. It recognizes, however, that as the case is presented to us, we must interpret the entire record in the light most favorable to Highlands and give to it the benefit of all inferences which the evidence fairly supports, even though contrary inferences might reasonably be drawn.

Moreover, we must assume that the jury followed the court's instructions. The jury must, therefore, have drawn a distinction "between practices which tend to exclude or restrict competition on the one hand, and the success of a business which reflects only a superior product, a well-run business, or luck, on the other." Since the jury was unambiguously instructed that Ski Co.'s refusal to deal with Highlands "does not violate Section 2 if valid business reasons exist for that refusal," we must assume that the jury concluded that there were no valid business reasons for the refusal. The question then is whether that conclusion finds support in the record.

IV

The question whether Ski Co.'s conduct may properly be characterized as exclusionary cannot be answered by simply considering its effect on Highlands. In addition, it is relevant to consider its impact on consumers and whether it has impaired competition in an unnecessarily restrictive way.[32] If a firm has been "attempting to exclude rivals on some basis other than efficiency," it is fair to characterize its behavior as predatory. It is, accordingly, appropriate to examine the effect of the challenged pattern of conduct on consumers, on Ski Co.'s smaller rival, and on Ski Co. itself.

32. "Thus, 'exclusionary' comprehends at the most behavior that not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way." 3 P. Areeda & D. Turner, Antitrust Law 78 (1978).

Superior Quality of the All-Aspen Ticket

The average Aspen visitor "is a well-educated, relatively affluent, experienced skier who has skied a number of times in the past . . . ." Over 80% of the skiers visiting the resort each year have been there before—40% of these repeat visitors have skied Aspen at least five times. Over the years, they developed a strong demand for the 6-day, all-Aspen ticket in its various refinements. Most experienced skiers quite logically prefer to purchase their tickets at once for the whole period that they will spend at the resort; they can then spend more time on the slopes and enjoying après-ski amenities and less time standing in ticket lines. The 4-area attribute of the ticket allowed the skier to purchase his 6-day ticket in advance while reserving the right to decide in his own time and for his own reasons which mountain he would ski on each day. It provided convenience and flexibility, and expanded the vistas and the number of challenging runs available to him during the week's vacation.

While the 3-area, 6-day ticket offered by Ski Co. possessed some of these attributes, the evidence supports a conclusion that consumers were adversely affected by the elimination of the 4-area ticket. In the first place, the actual record of competition between a 3-area ticket and the all-Aspen ticket in the years after 1967 indicated that skiers demonstrably preferred four mountains to three. Highlands' expert marketing witness testified that many of the skiers who come to Aspen want to ski the four mountains, and the abolition of the 4-area pass made it more difficult to satisfy that ambition. A consumer survey undertaken in the 1979-1980 season indicated that 53.7% of the respondents wanted to ski Highlands, but would not; 39.9% said that they would not be skiing at the mountain of their choice because their ticket would not permit it.

Expert testimony and anecdotal evidence supported these statistical measures of consumer preference. A major wholesale tour operator asserted that he would not even consider marketing a 3-area ticket if a 4-area ticket were available. During the 1977-1978 and 1978-1979 seasons, people with Ski Co.'s 3-area ticket came to Highlands "on a very regular basis" and attempted to board the lifts or join the ski school. Highlands officials were left to explain to angry skiers that they could only ski at Highlands or join its ski school by paying for a 1-day lift ticket. Even for the affluent, this was an irritating situation because it left the skier the option of either wasting 1 day of the 6-day, 3-area pass or obtaining a refund which could take all morning and entailed the forfeit of the 6-day discount. An active officer in the Atlanta Ski Club testified that the elimination of the 4-area pass "infuriated" him.

Highlands' Ability to Compete

The adverse impact of Ski Co.'s pattern of conduct on Highlands is not disputed in this Court. Expert testimony described the extent of its pecuniary injury. The evidence concerning its attempt to develop a substitute product either by buying Ski Co.'s daily tickets in bulk, or by marketing its own Adventure Pack, demonstrates that it tried to protect itself from the loss of its share of the patrons of the all-Aspen ticket. The development of a new distribution system for providing the experience that skiers had learned to expect in Aspen proved to be prohibitively expensive. As a result, Highlands' share of the relevant market steadily declined after the 4-area ticket was terminated. The size of the damages award also confirms the substantial character of the effect of Ski Co.'s conduct upon Highlands.

Ski Co.'s Business Justification

Perhaps most significant, however, is the evidence relating to Ski Co. itself, for Ski Co. did not persuade the jury that its conduct was justified by any normal business purpose. Ski Co. was apparently willing to forgo daily ticket sales both to skiers who sought to exchange the coupons contained in Highlands' Adventure Pack, and to those who would have purchased Ski Co. daily lift tickets from Highlands if Highlands had been permitted to purchase them in bulk. The jury may well have concluded that Ski Co. elected to forgo these short-run benefits because it was more interested in reducing competition in the Aspen market over the long run by harming its smaller competitor.

That conclusion is strongly supported by Ski Co.'s failure to offer any efficiency justification whatever for its pattern of conduct. In defending the decision to terminate the jointly offered ticket, Ski Co. claimed that usage could not be properly monitored. The evidence, however, established that Ski Co. itself monitored the use of the 3-area passes based on a count taken by lift operators, and distributed the revenues among its mountains on that basis. Ski Co. contended that coupons were administratively cumbersome, and that the survey takers had been disruptive and their work inaccurate. Coupons, however, were no more burdensome than the credit cards accepted at Ski Co. ticket windows. Moreover, in other markets Ski Co. itself participated in interchangeable lift tickets using coupons. As for the survey, its own manager testified that the problems were much overemphasized by Ski Co. officials, and were mostly resolved as they arose. Ski Co.'s explanation for the rejection of Highlands' offer to hire-at its own expense-a reputable national accounting firm to audit usage of the 4-area tickets at Highlands' mountain, was that there was no way to "control" the audit.

In the end, Ski Co. was pressed to justify its pattern of conduct on a desire to disassociate itself from—what it considered the inferior skiing services offered at Highlands. The all-Aspen ticket based on usage, however, allowed consumers to make their own choice on these matters of quality. Ski Co.'s purported concern for the relative quality of Highlands' product was supported in the record by little more than vague insinuations, and was sharply contested by numerous witnesses. Moreover, Ski Co. admitted that it was willing to associate with what it considered to be inferior products in other markets.

Although Ski Co.'s pattern of conduct may not have been as " 'bold, relentless, and predatory' " as the publisher's actions in *Lorain Journal*, the record in this case comfortably supports an inference that the monopolist made a deliberate effort to discourage its customers from doing business with its smaller rival. The sale of its 3-area, 6-day ticket, particularly when it was discounted below the daily ticket price, deterred the ticket holders from skiing at Highlands. The refusal to accept the Adventure Pack coupons in exchange for daily tickets was apparently motivated entirely by a 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. Thus 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.

Because we are satisfied that the evidence in the record, FN44 construed most favorably in support of Highlands' position, is adequate to support the verdict under the instructions given by the trial court, the judgment of the Court of Appeals is

Affirmed.

JUSTICE WHITE took no part in the decision of this case.

NOTES

1.

VERIZON COMMC'NS INC. V. LAW OFFICES OF CURTIS V. TRINKO, LLP
540 U.S. 398 (2004)[1]

JUSTICE SCALIA delivered the opinion of the Court.

The Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56, imposes certain duties upon incumbent local telephone companies in order to facilitate market entry by competitors, and establishes a complex regime for monitoring and enforcement. In this case we consider whether a complaint alleging breach of the incumbent's duty under the 1996 Act to share its network with competitors states a claim under § 2 of the Sherman Act, 26 Stat. 209.

I

Petitioner Verizon Communications Inc. is the incumbent local exchange carrier (LEC) serving New York State. Before the 1996 Act, Verizon, like other incumbent LECs, enjoyed an exclusive franchise within its local service area. The 1996 Act sought to "uproo[t]" the incumbent LECs' monopoly and to introduce competition in its place. Central to the scheme of the Act is the incumbent LEC's obligation under 47 U.S.C. § 251(c) to share its network with competitors, including provision of access to individual elements of the network on an "unbundled" basis. § 251(c)(3). New entrants, so-called competitive LECs, resell these unbundled network elements (UNEs), recombined with each other or with elements belonging to the LECs.

Verizon, like other incumbent LECs, has taken two significant steps within the Act's framework in the direction of increased competition. First, Verizon has signed interconnection agreements with rivals such as AT & T, as it is obliged to do under § 252, detailing the terms on which it will make its network elements available. (Because Verizon and AT & T could not agree upon terms, the open issues were subjected to compulsory arbitration under §§ 252(b) and (c).) In 1997, the state regulator, New York's Public Service Commission (PSC), approved Verizon's interconnection agreement with AT & T.

Second, Verizon has taken advantage of the opportunity provided by the 1996 Act for incumbent LECs to enter the long-distance market (from which they had long been excluded). That required Verizon to satisfy, among other things, a 14-item checklist of statutory requirements, which includes compliance with the Act's network-sharing duties. §§ 271(d)(3)(A) and (c)(2)(B). Checklist item two, for example, includes "nondiscriminatory access to network elements in accordance with the requirements" of § 251(c)(3). § 271(c)(2)(B)(ii). Whereas the state regulator approves an

[1] Most internal citations and footnotes omitted. For the opinions in the case, see Law Offices of Curtis V. Trinko, LLP v. Bell Atlantic Corp., 123 F. Supp. 2d 738 (S.D.N.Y. 2000), *aff'd in part, vacated in part*, 294 F.3d 307 (2d Cir. 2002), *amended and superseded*, 305 F.3d 89 (2d Cir. 2002), *rev'd and remanded sub nom.*, Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004).

interconnection agreement, for long-distance approval the incumbent LEC applies to the Federal Communications Commission (FCC). In December 1999, the FCC approved Verizon's § 271 application for New York.

Part of Verizon's UNE obligation under § 251(c)(3) is the provision of access to operations support systems (OSS), a set of systems used by incumbent LECs to provide services to customers and ensure quality. Verizon's interconnection agreement and long-distance authorization each specified the mechanics by which its OSS obligation would be met. As relevant here, a competitive LEC sends orders for service through an electronic interface with Verizon's ordering system, and as Verizon completes certain steps in filling the order, it sends confirmation back through the same interface. Without OSS access a rival cannot fill its customers' orders.

In late 1999, competitive LECs complained to regulators that many orders were going unfilled, in violation of Verizon's obligation to provide access to OSS functions. The PSC and FCC opened parallel investigations, which led to a series of orders by the PSC and a consent decree with the FCC. Under the FCC consent decree, Verizon undertook to make a "voluntary contribution" to the U.S. Treasury in the amount of $3 million; under the PSC orders, Verizon incurred liability to the competitive LECs in the amount of $10 million. Under the consent decree and orders, Verizon was subjected to new performance measurements and new reporting requirements to the FCC and PSC, with additional penalties for continued noncompliance. In June 2000, the FCC terminated the consent decree. The next month the PSC relieved Verizon of the heightened reporting requirement.

Respondent Law Offices of Curtis V. Trinko, LLP, a New York City law firm, was a local telephone service customer of AT & T. The day after Verizon entered its consent decree with the FCC, respondent filed a complaint in the District Court for the Southern District of New York, on behalf of itself and a class of similarly situated customers. The complaint, as later amended, alleged that Verizon had filled rivals' orders on a discriminatory basis as part of an anticompetitive scheme to discourage customers from becoming or remaining customers of competitive LECs, thus impeding the competitive LECs' ability to enter and compete in the market for local telephone service. According to the complaint, Verizon "has filled orders of [competitive LEC] customers after filling those for its own local phone service, has failed to fill in a timely manner, or not at all, a substantial number of orders for [competitive LEC] customers ..., and has systematically failed to inform [competitive LECs] of the status of their customers' orders." The complaint set forth a single example of the alleged " failure to provide adequate access to [competitive LECs]," namely the OSS failure that resulted in the FCC consent decree and PSC orders. It asserted that the result of Verizon's improper "behavior with respect to providing access to its local loop" was to "deter potential customers [of rivals] from switching." The complaint sought damages and injunctive relief for violation of § 2 of the Sherman Act, 1, pursuant to the remedy provisions of § § 4 and 16 of the Clayton Act. The complaint also alleged violations of the 1996 Act, § 202(a) of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. § 151 et seq., and state law.

II

To decide this case, we must first determine what effect (if any) the 1996 Act has upon the application of traditional antitrust principles. The Act imposes a large number of duties upon incumbent LECs—above and beyond those basic responsibilities it imposes upon all carriers, such as assuring number portability and providing access to rights-of-way. Under the sharing duties of § 251(c), incumbent LECs are required to offer three kinds of access. Already noted, and perhaps most intrusive, is the duty to offer access to UNEs on "just, reasonable, and nondiscriminatory" terms, § 251(c)(3), a phrase that the FCC has interpreted to mean a price reflecting long-run incremental cost. A rival can interconnect its own facilities with those of the incumbent LEC, or it can simply purchase services at wholesale from the incumbent and resell them to consumers. The Act also imposes upon incumbents the duty to allow physical "collocation"—that is, to permit a competitor to locate and install its equipment on the incumbent's premises—which makes feasible interconnection and access to UNEs.

That Congress created these duties, however, does not automatically lead to the conclusion that they can be enforced by means of an antitrust claim. Indeed, a detailed regulatory scheme such as that created by the 1996 Act ordinarily raises the question whether the regulated entities are not shielded from antitrust scrutiny altogether by the doctrine of implied immunity. In some respects the enforcement scheme set up by the 1996 Act is a good candidate for implication of antitrust immunity, to avoid the real possibility of judgments conflicting with the agency's regulatory scheme "that might be voiced by courts exercising jurisdiction under the antitrust laws."

Congress, however, precluded that interpretation. Section 601(b)(1) of the 1996 Act is an antitrust-specific saving clause providing that "nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws." This bars a finding of implied immunity. As the FCC has put the point, the saving clause preserves those "claims that satisfy established antitrust standards."

But just as the 1996 Act preserves claims that satisfy existing antitrust standards, it does not create new claims that go beyond existing antitrust standards; that would be equally inconsistent with the saving clause's mandate that nothing in the Act "modify, impair, or supersede the applicability" of the antitrust laws. We turn, then, to whether the activity of which respondent complains violates pre-existing antitrust standards.

III

The complaint alleges that Verizon denied interconnection services to rivals in order to limit entry. If that allegation states an antitrust claim at all, it does so under § 2 of the Sherman Act, which declares that a firm shall not "monopolize" or "attempt to monopolize." It is settled law that this offense requires, in addition to the possession of monopoly power in the relevant market, "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." *United States v. Grinnell Corp.*, 384 U.S. 563, 570-571 [(1966)]. The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices—at least for a short period—is what attracts "business acumen" in the first place; it induces risk taking that produces innovation and economic growth. 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.

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. Thus, 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." *United States v. Colgate & Co.*, 250 U.S. 300, 307 [(1919)].

However, "[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." *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. We have been very cautious in recognizing such exceptions, because of the uncertain virtue of forced sharing and the difficulty of identifying and remedying anticompetitive conduct by a single firm. The question before us today is whether the allegations of respondent's complaint fit within existing exceptions or provide a basis, under traditional antitrust principles, for recognizing a new one.

The leading case for § 2 liability based on refusal to cooperate with a rival, and the case upon which respondent understandably places greatest reliance, is *Aspen Skiing*. The Aspen ski area consisted of four mountain areas. The defendant, who owned three of those areas, and the plaintiff, who owned the fourth, had cooperated for years in the issuance of a joint, multiple-day, all-area ski ticket. After repeatedly demanding an increased share of the proceeds, the defendant canceled the joint ticket. The plaintiff, concerned that skiers would bypass its mountain without some joint offering, tried a variety of increasingly desperate measures to re-create the joint ticket, even to the point of in effect offering to buy the defendant's tickets at retail price. The defendant refused even that. We upheld a jury verdict for the plaintiff, reasoning that "[t]he jury may well have concluded that [the defendant] elected to forgo these short-run benefits because it was more interested in reducing competition . . . over the long run by harming its smaller competitor."

Aspen Skiing is at or near the outer boundary of § 2 liability. The Court there found significance in the defendant's decision to cease participation in a cooperative venture. 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. Similarly, the defendant's unwillingness to renew the ticket *even if compensated at retail price* revealed a distinctly anticompetitive bent.

The refusal to deal alleged in the present case does not fit within the limited exception recognized in *Aspen Skiing*. The complaint does not allege that Verizon voluntarily engaged in a course of dealing with its rivals, or would ever have done so absent statutory compulsion. Here, therefore, 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 by anticompetitive malice. The contrast between the cases is heightened by the difference in pricing behavior. In *Aspen Skiing*, the defendant turned down a proposal to sell at its own retail price, suggesting a calculation that its future monopoly retail price would be higher. Verizon's reluctance to interconnect at the cost-based rate of compensation available under § 251(c)(3) tells us nothing about dreams of monopoly.

The specific nature of what the 1996 Act compels makes this case different from *Aspen Skiing* in a more fundamental way. In *Aspen Skiing*, what the defendant refused to provide to its competitor was a product that it already sold at retail—to oversimplify slightly, lift tickets representing a bundle of services to skiers. Similarly, in *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), another case relied upon by respondent, the defendant was already in the business of providing a service to certain customers (power transmission over its network), and refused to provide the same service to certain other customers. In the present case, by contrast, the services allegedly withheld are not otherwise marketed or available to the public. The sharing obligation imposed by the 1996 Act created "something brand new"—"the wholesale market for leasing network elements." The unbundled elements offered pursuant to § 251(c)(3) exist only deep within the bowels of Verizon; they are brought out on compulsion of the 1996 Act and offered not to consumers but to rivals, and at considerable expense and effort. New systems must be designed and implemented simply to make that access possible—indeed, it is the failure of one of those systems that prompted the present complaint.[3]

We conclude that Verizon's alleged insufficient assistance in the provision of service to rivals is not a recognized antitrust claim under this Court's existing refusal-to-deal precedents. This conclusion would be unchanged even if we considered to be established law the "essential facilities" doctrine crafted by some lower courts, under which the Court of Appeals concluded respondent's allegations might state a claim. See generally Areeda, Essential Facilities: An Epithet in Need of Limiting Principles, 58 Antitrust L.J. 841 (1989). We have never recognized such a doctrine, see *Aspen Skiing Co.*, 472 U.S., at 611, n.44, and we find no need either to recognize it or to repudiate it here. It suffices for present purposes to note that the indispensable requirement for invoking the doctrine is the unavailability of access to the "essential facilities"; where access exists, the doctrine serves no purpose. Thus, it is said that

3. Respondent also relies upon *United States v. Terminal Railroad Assn. of St. Louis*, 224 U.S. 383 (1912), and *Associated Press v. United States*, 326 U.S. 1 (1945). These cases involved concerted action, which presents greater anticompetitive concerns and is amenable to a remedy that does not require judicial estimation of free-market forces: simply requiring that the outsider be granted nondiscriminatory admission to the club.

"essential facility claims should . . . be denied where a state or federal agency has effective power to compel sharing and to regulate its scope and terms." P. Areeda & H. Hovenkamp, Antitrust Law, p. 150, ¶ 773e (2003 Supp.). Respondent believes that the existence of sharing duties under the 1996 Act supports its case. We think the opposite: The 1996 Act's extensive provision for access makes it unnecessary to impose a judicial doctrine of forced access. To the extent respondent's "essential facilities" argument is distinct from its general § 2 argument, we reject it.

IV

Finally, we do not believe that traditional antitrust principles justify adding the present case to the few existing exceptions from the proposition that there is no duty to aid competitors. Antitrust analysis must always be attuned to the particular structure and circumstances of the industry at issue. Part of that attention to economic context is an awareness of the significance of regulation. As we have noted, "careful account must be taken of the pervasive federal and state regulation characteristic of the industry." "[A]ntitrust analysis must sensitively recognize and reflect the distinctive economic and legal setting of the regulated industry to which it applies."

One factor of particular importance is the existence of a regulatory structure designed to deter and remedy anticompetitive harm. Where such a structure exists, the additional benefit to competition provided by antitrust enforcement will tend to be small, and it will be less plausible that the antitrust laws contemplate such additional scrutiny. Where, by contrast, "[t]here is nothing built into the regulatory scheme which performs the antitrust function," the benefits of antitrust are worth its sometimes considerable disadvantages. Just as regulatory context may in other cases serve as a basis for implied immunity it may also be a consideration in deciding whether to recognize an expansion of the contours of § 2.

The regulatory framework that exists in this case demonstrates how, in certain circumstances, "regulation significantly diminishes the likelihood of major antitrust harm." Consider, for example, the statutory restrictions upon Verizon's entry into the potentially lucrative market for long-distance service. To be allowed to enter the long-distance market in the first place, an incumbent LEC must be on good behavior in its local market. Authorization by the FCC requires state-by-state satisfaction of § 271's competitive checklist, which as we have noted includes the nondiscriminatory provision of access to UNEs. Section 271 applications to provide long-distance service have now been approved for incumbent LECs in 47 States and the District of Columbia.

The FCC's § 271 authorization order for Verizon to provide long-distance service in New York discussed at great length Verizon's commitments to provide access to UNEs, including the provision of OSS. Those commitments are enforceable by the FCC through continuing oversight; a failure to meet an authorization condition can result in an order that the deficiency be corrected, in the imposition of penalties, or in the suspension or revocation of long-distance approval. Verizon also subjected itself to oversight by the PSC under a so-called "Performance Assurance Plan" (PAP). The PAP, which by its terms became binding upon FCC approval, provides specific financial penalties in the event of Verizon's failure to achieve detailed performance requirements. The FCC described Verizon's having entered into a PAP as a significant factor in its § 271 authorization, because that provided "a strong financial incentive for post-entry compliance with the section 271 checklist," and prevented " 'backsliding.' "

The regulatory response to the OSS failure complained of in respondent's suit provides a vivid example of how the regulatory regime operates. When several competitive LECs complained about deficiencies in Verizon's servicing of orders, the FCC and PSC responded. The FCC soon concluded that Verizon was in breach of its sharing duties under § 251(c), imposed a substantial fine, and set up sophisticated measurements to gauge remediation, with weekly reporting requirements and specific penalties for failure. The PSC found Verizon in violation of the PAP even earlier, and imposed additional financial penalties and measurements with daily reporting requirements. In short, the regime was an effective steward of the antitrust function.

Against the slight benefits of antitrust intervention here, we must weigh a realistic assessment of its costs. Under the best of circumstances, applying the requirements of § 2 "can be difficult" because "the means of illicit exclusion, like the means of legitimate competition, are myriad." Mistaken inferences and the resulting false condemnations "are especially costly, because they chill the very conduct the antitrust laws are designed to protect." *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986). The cost of false positives counsels against an undue expansion of § 2 liability. One false-positive risk is that an incumbent LEC's failure to provide a service with sufficient alacrity might have nothing to do with exclusion. Allegations of violations of § 251(c)(3) duties are difficult for antitrust courts to evaluate, not only because they are highly technical, but also because they are likely to be extremely numerous, given the incessant, complex, and constantly changing interaction of competitive and incumbent LECs implementing the sharing and interconnection obligations. Amici States have filed a brief asserting that competitive LECs are threatened with "death by a thousand cuts,"—the identification of which would surely be a daunting task for a generalist antitrust court. Judicial oversight under the Sherman Act would seem destined to distort investment and lead to a new layer of interminable litigation, atop the variety of litigation routes already available to and actively pursued by competitive LECs.

Even if the problem of false positives did not exist, conduct consisting of anticompetitive violations of § 251 may be, as we have concluded with respect to above-cost predatory pricing schemes, "beyond the practical ability of a judicial tribunal to control." *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 223 (1993). Effective remediation of violations of regulatory sharing requirements will ordinarily require continuing supervision of a highly detailed decree. We think that Professor Areeda got it exactly right: "No court should impose a duty to deal that it cannot explain or adequately and reasonably supervise. The problem should be deemed irremedia[ble] by antitrust law when compulsory access requires the court to assume the day-to-day controls characteristic of a regulatory agency." Areeda, 58 Antitrust L. J., at 853. In this case, respondent has requested an equitable decree to "[p]reliminarily and permanently enjoi[n] [Verizon] from providing access to the local loop market ... to [rivals] on terms and conditions that are not as favorable" as those that Verizon enjoys. An antitrust court is unlikely to be an effective day-to-day enforcer of these detailed sharing obligations.[4]

* * *

The 1996 Act is in an important respect much more ambitious than the antitrust laws. It attempts "*to eliminate the monopolies* enjoyed by the inheritors of AT & T's local franchises." Section 2 of the Sherman Act, by contrast, seeks merely to prevent *unlawful monopolization*. It would be a serious mistake to conflate the two goals. The Sherman Act is indeed the "Magna Carta of free enterprise," *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972), but it does not give judges *carte blanche* to insist that a monopolist alter its way of doing business whenever some other approach might yield greater competition. We conclude that respondent's complaint fails to state a claim under the Sherman Act.[5]

Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE SOUTER and JUSTICE THOMAS join, concurring in the judgment.

In complex cases it is usually wise to begin by deciding whether the plaintiff has standing to maintain the action. Respondent, the plaintiff in this case, is a local telephone service customer of AT & T. Its complaint alleges that it has received unsatisfactory service because Verizon has engaged in conduct that adversely affects AT & T's ability to serve its customers, in violation of § 2 of the Sherman Act. Respondent seeks from Verizon treble damages, a remedy that § 4 of the Clayton Act makes available to "any person who has been injured in his business or property." The threshold question presented by the complaint is whether, assuming the truth of its allegations, respondent is a "person" within the meaning of § 4.

Respondent would unquestionably be such a "person" if we interpreted the text of the statute literally. But we have eschewed a literal reading of § 4, particularly in cases in which there is only an indirect relationship between the defendant's alleged misconduct and the plaintiff's asserted injury. *Associated Gen. Contractors of Cal., Inc. v. Carpenters*, 459 U.S. 519, 529-535 (1983). In such cases, "the importance of avoiding either the risk of duplicate recoveries on the one hand, or the danger of complex apportionment of damages on the other," weighs heavily against a literal reading of § 4. *Id*., at 543-544. Our interpretation of § 4 has thus adhered to Justice

4. The Court of Appeals also thought that respondent's complaint might state a claim under a "monopoly leveraging" theory (a theory barely discussed by respondent. We disagree. To the extent the Court of Appeals dispensed with a requirement that there be a "dangerous probability of success" in monopolizing a second market, it erred, *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 459 (1993). In any event, leveraging presupposes anticompetitive conduct, which in this case could only be the refusal-to-deal claim we have rejected

5. Our disposition makes it unnecessary to consider petitioner's alternative contention that respondent lacks antitrust standing.

Holmes' observation that the "general tendency of the law, in regard to damages at least, is not to go beyond the first step." *Southern Pacific Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531, 533 (1918).

I would not go beyond the first step in this case. Although respondent contends that its injuries were, like the plaintiff's injuries in *Blue Shield of Va. v. McCready*, 457 U.S. 465, 479 (1982), "the very means by which . . . [Verizon] sought to achieve its illegal ends," it remains the case that whatever antitrust injury respondent suffered because of Verizon's conduct was purely derivative of the injury that AT & T suffered. And for that reason, respondent's suit, unlike *McCready*, runs both the risk of duplicative recoveries and the danger of complex apportionment of damages. The task of determining the monetary value of the harm caused to respondent by AT & T's inferior service, the portion of that harm attributable to Verizon's misconduct, whether all or just some of such possible misconduct was prohibited by the Sherman Act, and what offset, if any, should be allowed to make room for a recovery that would make AT & T whole, is certain to be daunting. AT & T, as the direct victim of Verizon's alleged misconduct, is in a far better position than respondent to vindicate the public interest in enforcement of the antitrust laws. Denying a remedy to AT & T's customer is not likely to leave a significant antitrust violation undetected or unremedied, and will serve the strong interest "in keeping the scope of complex antitrust trials within judicially manageable limits." *Associated Gen. Contractors*, 459 U.S., at 543.

In my judgment, our reasoning in *Associated General Contractors* requires us to reverse the judgment of the Court of Appeals. I would not decide the merits of the § 2 claim unless and until such a claim is advanced by either AT & T or a similarly situated competitive local exchange carrier.

NOTES

iPod Antitrust Litigation

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

The Apple iPod iTunes Antitrust Litigation

NO. C 05-00037 JW

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION FOR SUMMARY JUDGMENT; DENYING AS PREMATURE PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

I. INTRODUCTION

Plaintiffs[1] bring this class action against Defendant Apple Computer, Inc. ("Apple"), alleging violations of the Sherman Act, 15 U.S.C. § 2, and related state law claims. Plaintiffs allege that Apple has committed unlawful acts in issuing software updates for its iPod, in violation of federal and state antitrust laws.

Presently before the Court are Defendant's Motion for Summary Judgment[2] and Plaintiffs' Motion for Class Certification.[3] The Court conducted a hearing on April 18, 2011. Based on the papers submitted to date and oral argument, the Court GRANTS in part and DENIES in part

[1] Named Plaintiffs are Somtai Troy Charoensak, Mariana Rosen and Melanie Tucker.

[2] (hereafter, "SJ Motion," Docket Item No. 473 (filed under seal).)

[3] (Plaintiffs' Notice of Motion and Renewed Motion for Class Certification and Appointment of Lead Counsel, hereafter, "Class Certification Motion," Docket Item No. 477 (filed under seal).)

Defendant's Motion for Summary Judgment and DENIES as premature Plaintiffs' Motion for Class Certification.

II. BACKGROUND

A. Undisputed Facts[4]

In 2003, Apple launched its iTunes music store ("iTS").[5] When Apple negotiated with record labels about the terms under which Apple could sell digital music files online through the iTS, most of the labels required that the digital music files be protected to guard against privacy. (Id. at 5; Id. at 3.) Apple implemented the required security solution through a proprietary system called "FairPlay." (Id. at 5-6; Id. at 3.) The FairPlay system was used by Apple to encrypt the songs offered on the iTS. (Id. at 6; Id. at 4.)

In July 2004, RealNetworks announced its Harmony technology. (SJ Motion at 8; SJ Opp'n at 6.) Using Harmony, RealNetworks was able to make music purchased from its online music store playable on Apple's iPods. (Id.; Id.) In October 2004, Apple released an update of its iTunes software called iTunes 4.7. (Id.; Id. at 9.) iTunes 4.7 featured a redesigned version of FairPlay. (Id.; Id.) The version of FairPlay used in iTunes 4.7 employed a new encryption method, which ended the interoperability of the July 2004 version of Harmony with the iPod. (Id. at 9; Id.)

In September 2006, Apple released an update of its iTunes software called iTunes 7.0. (SJ Motion at 9; SJ Opp'n at 10.) iTunes 7.0 included a redesign of FairPlay. (Id. at 10; Id.) This redesign prevented third-party applications like RealPlayer (the "jukebox" used by RealNetworks) from placing music onto the iPod, which was accomplished by making it impossible for any source other than iTunes itself to write on the iPod's database. (Id.; Id.)

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[4] As a preliminary matter, although the Court had granted the parties' various Motions to seal the briefs and other documents in support of these Motions, the Court now finds its references to these materials in this Order to be appropriate, as the referenced materials are not sealable under Civ. L.R. 79-5.

[5] (SJ Motion at 6; Plaintiffs' Memorandum in Opposition to Apple's Motion for Summary Judgment at 4, hereafter, "SJ Opp'n," Docket Item No. 477 (filed under seal).)

United States District Court
For the Northern District of California

B. Procedural History

A detailed account of the earlier procedural history in this case may be found in the Court's December 20, 2006 Order Denying Defendant's Motion to Dismiss[6] and in the Court's December 22, 2008 Order Granting Plaintiffs' Motion for Class Certification.[7] The Court reviews the procedural history relevant to the present Motions.

This case is a consolidated putative class action. The original cases were Charoensak v. Apple Computer, Inc., No. C 05-00037 JW, and Tucker v. Apple Computer, Inc., No. C 06-04457 JW.[8] On March 21, 2007, the Court ordered these cases consolidated, and renamed the consolidated case The Apple iPod iTunes Antitrust Litigation.[9] (Docket Item No. 106.) The Court designated The Katriel Law Firm, P.L.L.C. and Coughlin Stoia Geller Rudman & Robbins as Co-Lead Counsel, and designated Somtai Troy Charoensak, Mariana Rosen and Melanie Tucker as Lead Plaintiffs. (Id. at 1.) On April 19, 2007, Plaintiffs filed a Consolidated Complaint for Violations of Sherman Antitrust Act, Clayton Act, Cartwright Act, California Unfair Competition Law, Consumer Legal Remedies Act, and California Common Law of Monopolization. (Docket Item No. 107.)

On December 22, 2008, the Court granted Plaintiffs' Motion for Class Certification as to all but one of Plaintiffs' counts. (December 22 Order at 13-14.) As to the remaining count, which

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[6] (hereafter, "December 20 Order.") This Order may be found as Docket Item No. 27 in the docket for Tucker v. Apple Computer, Inc., No. C 06-04457 JW, which was one of the original cases now included in this consolidated action. It may also be found as Tucker v. Apple Computer, Inc., 493 F. Supp. 2d 1090 (N.D. Cal. 2006).

[7] (Order Granting Plaintiffs' Motion for Class Certification as to Counts Two, Three, Four, Five, Six, and Seven Only and Appointing Class Counsel; *Sua Sponte* Order Reconsidering Defendant's Motion to Dismiss Count One and Requiring Further Briefing, hereafter, "December 22 Order," Docket Item No. 196.)

[8] There is a related case, the "Indirect Purchaser" action, Somers v. Apple Computer, Inc., No. C 07-06507. Somers is a putative class action, which asserts the same causes of action against Apple based on the same alleged anticompetitive conduct. The Plaintiffs in Somers, however, are iPod purchasers who did not purchase iPods directly from Apple. (See Docket Item No. 1 in 07-06507.)

[9] Prior to consolidation, the Court denied Apple's Motion to Dismiss the antitrust claims in Tucker case. (See December 20 Order at 16.) No other dispositive motions were filed in Tucker or in Charoensak prior to consolidation.

stated a claim for Unlawful Tying in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, the Court denied certification without prejudice pending further proceedings in the case. (Id. at 13.) On December 21, 2009, the Court *sua sponte* decertified the classes it had previously certified.[10] In its December 21 Order, the Court explained that the technological interoperability between iPods and media sold through Apple's iTS did not constitute unlawful tying under the Sherman Act. (Id. at 2.) The Court stated that Plaintiffs' monopoly claims "interweave[d] allegations that there were technological ties between Apple products when they were first introduced to the market," which by itself does not constitute anticompetitive conduct, and "allegations that Apple made technological modifications to its products for the express purpose of maintaining monopoly power," which could support a monopoly claim. (Id.) The Court invited Plaintiffs to submit an Amended Consolidated Complaint "that does not depend upon allegations of tying as the anticompetitive conduct upon which they base their monopoly claims." (Id. at 3.)

On January 26, 2010, Plaintiffs filed an Amended Consolidated Complaint[11] alleging six causes of action: (1) Monopolization under Section 2 of the Sherman Antitrust Act, 15 U.S.C. § 2; (2) Attempted Monopolization under Section 2 of the Sherman Antitrust Act, 15 U.S.C. § 2; (3) Violation of the Cartwright Act, Cal. Bus. & Prof. Code §§ 16270, *et seq.*; (4) Violation of California's Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200, *et seq.*; (5) Violation of the Consumers Legal Remedies Act ("CLRA"), Cal. Civ. Code §§ 1750, *et seq.*; (6) and Common Law Monopolization Business Practices.[12] (See ACC.)

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[10] (See Order Decertifying Classes Without Prejudice to Being Renewed; Inviting Further Motions at 2, hereafter, "December 21 Order," Docket Item No. 303.)

[11] (Amended Consolidated Complaint for Violations of Sherman Antitrust Act, Clayton Act, Cartwright Act, California Unfair Competition Law, Consumers Legal Remedies Act, and California Common Law of Monopolization, hereafter, "ACC," Docket Item No. 322.)

[12] On June 29, 2010, the Court dismissed Plaintiffs' Cartwright Act, CLRA and Common Law Monopolization claims with prejudice. (See Order Granting in Part and Denying in Part Defendant's Motion to Dismiss; Denying as Premature Defendant's Motion for Summary Judgment; Granting Indirect Purchaser Leave to File an Amended Complaint at 17, Docket Item No. 377.)

Presently before the Court are Defendant's Motion for Summary Judgment and Plaintiffs' Motion for Class Certification.

III. STANDARDS

A. Summary Judgment

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The purpose of summary judgment "is to isolate and dispose of factually unsupported claims or defenses." Celotex v. Catrett, 477 U.S. 317, 323-24 (1986). The moving party "always bears the initial responsibility of informing the district court of the basis for its motion . . . ." Id. at 323. "The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The non-moving party "may not reply merely on allegations or denials in its own pleading; rather, its response must–by affidavits or as otherwise provided in this rule–set out specific facts showing a genuine issue for trial." Fed. R. Civ. P. 56(e).

When evaluating a motion for summary judgment, the court views the evidence through the prism of the evidentiary standard of proof that would pertain at trial. Anderson v. Liberty Lobby Inc., 477 U.S. 242, 255 (1986). The court draws all reasonable inferences in favor of the non-moving party, including questions of credibility and of the weight that particular evidence is accorded. See, e.g., Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 520 (1992). The court determines whether the non-moving party's "specific facts," coupled with disputed background or contextual facts, are such that a reasonable jury might return a verdict for the non-moving party. T.W. Elec. Serv. v. Pac. Elec. Contractors, 809 F.2d 626, 631 (9th Cir. 1987). In such a case, summary judgment is inappropriate. Anderson, 477 U.S. at 248. However, where a rational trier of fact could not find for the non-moving party based on the record as a whole, there is no "genuine issue for trial." Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 587 (1986).

B. Class Certification

The decision to certify a class is committed to the discretion of the district court within the guidelines of Federal Rule of Civil Procedure 23. See Fed. R. Civ. P. 23; Doninger v. Pacific Northwest Bell, Inc., 564 F.3d 1304, 1309 (9th Cir. 1977). The party seeking class certification bears the burden of establishing that each of the four requirements of Rule 23(a) and at least one requirement of Rule 23(b) have been met. Dukes v. Wal-Mart, Inc., 509 F.3d 1168, 1176 (9th Cir. 2007) (citing Zinser v. Accufix Research Institute, Inc., 253 F.3d 1180, 1186 (9th Cir. 2001), amended, 273 F.3d 1266 (9th Cir. 2001)). A district court may certify a class only if, after "rigorous analysis," it determines that the party seeking certification has met its burden. General Telephone Co. of the Southwest v. Falcon, 457 U.S. 147, 158-61 (1982).

In reviewing a motion for class certification, the court generally is bound to take the substantive allegations of the complaint as true. In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litig., 691 F.2d 1335, 1342 (9th Cir. 1982) (citing Blackie v. Barrack, 524 F.2d 891, 901 (9th Cir. 1975)). However, the court may look beyond the pleadings to determine whether the requirements of Rule 23 have been met. Hanon v. Dataproducts Corp., 976 F.2d 497, 509 (9th Cir. 1992) (citation omitted). In fact, "courts are not only at liberty to but must consider evidence which goes to the requirements of Rule 23 [at the class certification stage] even [if] the evidence may also relate to the underlying merits of the case." Dukes, 509 F.3d at 1178 n.2 (internal quotations and citation omitted).

IV. DISCUSSION

A. Summary Judgment

Defendant moves for summary judgment as to all of Plaintiffs' claims on the grounds that: (1) Section 2 of the Sherman Act permits Defendant to improve its products regardless of the impact on competitors; and (2) because Plaintiffs' claim under Section 2 of the Sherman Act fails, its state law UCL claim necessarily fails as well. (SJ Motion at 12-24.)

1. Section 2 of the Sherman Act

Section 2 of the Sherman Act prohibits monopolization or attempted monopolization. 15 U.S.C. § 2. "There are three essential elements to a successful claim of Section 2 monopolization: (a) the possession of monopoly power in the relevant market; (b) the willful acquisition or maintenance of that power; and (c) causal 'antitrust' injury." Allied Orthopedic Appliances, Inc., v. Tyco Health Care Group LP, 592 F.3d 991, 998 (9th Cir. 2010).

In this case, Defendant does not contest the sufficiency of Plaintiffs' Amended Consolidated Complaint as to the first and third elements. Thus, the Court's analysis will focus on the second element, namely, whether Defendant "willfully acquired or maintained" monopoly power.

If a design change is a product improvement, that design change "by itself does not violate Section 2, even if it is performed by a monopolist and harms competitors as a result." Tyco Health Care Group, 592 F.3d at 998-1000. "If a monopolist's design change is an improvement," then courts may not "balanc[e] the benefits or worth of [the] product improvement against its anticompetitive effects." Id. at 1000. "There is no violation of Section 2 unless [a] plaintiff proves that some conduct of the monopolist associated with its introduction of a new and improved product design 'constitutes an anticompetitive abuse or leverage of monopoly power, or a predatory or exclusionary means of attempting to monopolize the relevant market.'" Id. (quoting Foremost Pro Color, Inc. v. Eastman Kodak Co., 703 F.2d 534, 545-46 (9th Cir. 1983)).

Here, two of Defendant's design changes to its software are at issue: (1) its introduction of iTunes 4.7 in 2004; and (2) its introduction of iTunes 7.0 in 2006. The Court considers each design change in turn.

a. iTunes 4.7

At issue is whether Defendant's introduction of iTunes 4.7 constituted a genuine improvement. Defendant contends that iTunes 4.7 was introduced in response to hackers who had circumvented Defendant's previous anti-piracy software, and that the redesigned version of FairPlay in iTunes 4.7 made files more difficult for hackers to crack, which constituted a genuine improvement. (SJ Motion at 4-8.) Plaintiffs respond that the software updates in iTunes 4.7 were in fact designed to make it impossible for RealNetworks' Harmony technology to play RealNetworks songs on an iPod, and that Defendant's real aim was to end RealNetworks' interoperability with the iPod, rather than to prevent hacks. (SJ Opp'n at 6-9.)

Defendant presents evidence that iTunes 4.7 was designed to prevent hacks as follows:

(1) The earlier versions of Defendant's anti-piracy software had been successfully hacked.[13]

(2) In late 2003 and early 2004, attacks by hackers on Defendant's software increased in frequency, leading the record labels whose music was sold on iTS to demand that Defendant take steps to prevent the hacking.[14]

(3) In accord with its contractual obligations with the record labels, Defendant improved its FairPlay security system by fundamentally changing the way its encryption technology worked, thereby making the system more difficult for hackers to crack.[15]

Plaintiffs do not contend that earlier versions of Defendant's software had not been hacked. Further, Plaintiffs concede that record labels required Defendant to have "content protection to guard against piracy." (SJ Opp'n at 3.) Finally, Plaintiffs' expert presents testimony that iTunes 4.7 "introduced a radically different" encryption technology which was "much more resistant to attack" than previous versions of the software.[16] Based on this evidence, the Court finds that it is not disputed that iTunes 4.7 constituted a genuine improvement.

Because iTunes 4.7 was a genuine improvement, the Court may not balance the benefits or worth of iTunes 4.7 against its anticompetitive effects. Tyco Health Care Group, 592 F.3d at 1000. Therefore, Defendant's introduction of iTunes 4.7 could only be a violation of Section 2 if Plaintiffs can prove that some conduct of Defendant associated with its introduction of iTunes 4.7 constituted "an anticompetitive abuse or leverage of monopoly power, or a predatory or exclusionary means of

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[13] (Declaration of Jeffrey Robbin in Support of Defendant's Renewed Motion for Summary Judgment ¶¶ 21-23, hereafter, "Robbin Decl.," Docket Item No. 468 (filed under seal).)

[14] (Robbin Decl. ¶¶ 23-29; Id., Exs. 10-13.)

[15] (Robbin Decl. ¶¶ 35-40; Declaration of Dr. John P.J. Kelly in Support of Defendant's Renewed Motion for Summary Judgment ¶¶ 17-31, hereafter, "Kelly Decl.," Docket Item No. 536 (filed under seal).)

[16] (Declaration of David F. Martin in Support of Plaintiffs' Opposition to Apple's Motion for Summary Judgment ¶¶ 31-39, hereafter, "Martin Decl.," Docket Item No. 540 (filed under seal).)

attempting to monopolize the relevant market." Id. Plaintiffs offer the following evidence to show that Defendant engaged in such conduct:

(1) Defendant began its redesign of FairPlay, which would be released in iTunes 4.7, in May 2004, a month after Defendant refused to license FairPlay to its competitor RealNetworks.[17]

(2) A number of record labels approved of RealNetworks' technology, and several labels entered into agreements with RealNetworks to have RealNetworks sell their music in its online store.[18]

(3) Defendant released a public statement stating that it was "investigating the [legal] implications" of RealNetworks' actions, and cautioning customers that "when [Defendant] update[s its] iPod software from time to time it is highly likely that [the] Harmony technology will cease to work with current and future iPods."[19]

(4) After it launched Harmony, RealNetworks saw an "immediate and dramatic increase" in its share of the audio digital file market, while Defendant's share of that market "fell below 70%" for the first time since the launch of iTS.[20]

The Court considers those pieces of evidence relevant to proving that Defendant engaged in conduct constituting an anticompetitive abuse or leverage of monopoly power, or a predatory or exclusionary means of attempting to monopolize the relevant market.[21]

I. RealNetworks's Proposal to License FairPlay

At issue is whether Defendant's refusal to license FairPlay to RealNetworks was anticompetitive conduct.

In general, under antitrust law "there is no duty to aid competitors." Verizon Comm., Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 411 (2004). An exception to this rule may arise if there is a "unilateral termination of a voluntary (*and thus presumably profitable*) course of

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[17] (SJ Opp'n at 5; Declaration of Bonny E. Sweeney in Support of Plaintiffs' Memorandum in Opposition to Apple's Motion for Summary Judgment, Ex. 21, hereafter, "Sweeney Decl.," Docket Item No. 515 (filed under seal).)

[18] (SJ Opp'n at 6-7; Sweeney Decl., Exs. 1-4.)

[19] (SJ Opp'n at 7; Sweeney Decl., Ex. 29.)

[20] (SJ Opp'n at 7; Sweeney Decl., Exs. 11, 55.)

[21] Because the second and fourth pieces of evidence produced by Plaintiffs–namely, that record labels entered into agreements with RealNetworks and that Defendant lost market share–do not relate to any *conduct* of Defendant, they are irrelevant to the Court's analysis. See Tyco Health Care Group, 592 F.3d at 1000 (stating that a plaintiff must prove that "some *conduct* of the monopolist" was an abuse or leverage of monopoly power or a means of attempting to monopolize the relevant market) (emphasis added).

dealing" between two parties. Id. at 409 (emphasis in original). Liability under Section 2 on the basis of a duty to aid a competitor "can arise when a defendant voluntarily alters a course of dealing and 'anticompetitive malice' motivates the defendant's conduct." Safeway, Inc. v. Abbott Lab., Nos. C 07-05470 CW, C 07-5985 CW, C 07-6120 CW, C 07-5702 CW, 2010 WL 147988, at *6 (N.D. Cal. Jan. 12, 2010).

Here, Plaintiffs present no evidence that Defendant had a prior course of dealing with RealNetworks. Instead, Plaintiffs contend that under Ninth Circuit law, Defendant's unilateral refusal to license its intellectual property to RealNetworks was an antitrust violation even in the absence of a prior course of dealing. (SJ Opp'n at 18-20.) However, Plaintiffs' reliance on Image Technical Services, Inc. v. Eastman Kodak Co.[22] in support of their contention is misplaced. In Image Technical Services, the Court was addressing "a situation in which a monopolist made a conscious choice to change an established pattern of distribution to the detriment of competitors." Id. at 1211. Thus, its holding does not apply where, as here, there is no evidence of a prior course of dealing.

Plaintiffs' reliance on this Court's December 20 Order is also misguided. In its December 20, 2006 Order, the Court read Trinko as not confining a refusal-to-deal claim to "cases in which a prior course of dealing exists." (See December 20 Order at 13.) However, the Ninth Circuit has since clarified that a refusal-to-deal claim, under Trinko, requires the "unilateral termination of a voluntary and profitable course of dealing" between competitors. See LiveUniverse, Inc. v. MySpace, Inc., 304 Fed. Appx. 554, 556 (9th Cir. 2008) (observing that the Ninth Circuit now recognizes "the narrow scope of the refusal to deal exception").

Accordingly, the Court finds that Defendant's refusal to license FairPlay to RealNetworks was not anticompetitive conduct that would give rise to Section 2 liability.

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[22] 125 F.3d 1195 (9th Cir. 1997).

ii. Defendant's Public Statement

At issue is whether Defendant's public statement was anticompetitive conduct.

To rise to the level of an antitrust violation, a competitor's disparaging statement "must overcome a presumption that the effect on competition" of the statement "was de minimis." Am. Prof'l Testing Serv., Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Publ'ns, Inc., 108 F.3d 1147, 1152 (9th Cir. 1997). A plaintiff may overcome this de minimis presumption by proving that the representations were: "(1) clearly false; (2) clearly material; (3) clearly likely to induce reasonable reliance; (4) made to buyers without knowledge of the subject matter; (5) continued for prolonged periods; and (6) not readily susceptible of neutralization or other offset by rivals." Id. A plaintiff "must satisfy *all* six elements to overcome [the] de minimis presumption." Id. (emphasis in original).

Here, Plaintiffs present no evidence to overcome the de minimis presumption. In particular, Plaintiffs' evidence indicates that Defendant's public statement was a single event, and was not "continued for prolonged periods." Accordingly, the Court finds that Defendant's public statement was not anticompetitive conduct that would give rise to Section 2 liability.

In sum, the Court finds that the undisputed evidence shows that iTunes 4.7 was a genuine improvement. Further, Plaintiffs present no evidence that Defendant engaged in conduct associated with its introduction of iTunes 4.7 that would give rise to Section 2 liability. Accordingly, the Court GRANTS Defendant's Motion for Summary Judgment on Plaintiffs' Section 2 claim as to Defendant's introduction of iTunes 4.7.

b. iTunes 7.0

At issue is whether Defendant's introduction of iTunes 7.0 constituted a genuine improvement. Defendant contends that iTunes 7.0 included improvements to FairPlay that prevented third-party applications from corrupting the iPod by "injecting" content onto its internal database.[23] (SJ Motion at 9-10.) Plaintiffs respond that iTunes 7.0 did not prevent corruption of the iPod, but instead made the software worse by magnifying small errors into enormous errors which treated the database as being devoid of data. (SJ Opp'n at 10-12.)

Here, Defendant presents evidence that iTunes 7.0 was designed to prevent iPod corruption as follows:

(1) Third-party applications like RealPlayer could corrupt the iPod by modifying the iPod's internal database and adding foreign files to it.[24]
(2) To guard against the risk of corruption, the new code included in iTunes 7.0 ensured that only iTunes could write to the iPod's internal database.[25]

In response, Plaintiffs provide the following evidence, based on the testimony of Plaintiffs' expert, David Martin:[26]

(1) Adding foreign files to the iPod's internal database would not corrupt the iPod, because one of the intended functions of the iPod is to act as an external disk, and for RealNetworks to treat the iPod as an external disk would introduce no more risk of corruption than would already exist when an iPod user treats the iPod as an external disk.[27]
(2) The new code included in iTunes 7.0 did not guard against the risk of corruption, but actually made the software worse, because it transformed small errors in the database that did not meaningfully interfere with the user experience into enormous errors that treated the database as devoid of all data.[28]

In light of the parties' conflicting evidence, the Court finds that it is unable to determine, as a matter of law, that iTunes 7.0 was introduced to guard against the risk of corruption and was

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[23] (SJ Motion at 9-10; Apple's Reply in Support of its Motion for Summary Judgment at 9-12, hereafter, "SJ Reply," Docket Item No. 546 (filed under seal).)

[24] (SJ Reply at 9-10; Kelly Decl. ¶¶ 37-38; Declaration of Augustin Farrugia in Support of Defendant's Renewed Motion for Summary Judgment ¶¶ 20, 24, hereafter, "Farrugia Decl.," Docket Item No. 472 (filed under seal).)

[25] (SJ Reply at 10-11; Farrugia Decl. ¶¶ 20-24, 29-32; Declaration of Michael T. Scott in Support of Apple's Reply in Support of its Motion for Summary Judgment, Ex. 2 at 163-70, Docket Item No. 564 (filed under seal).)

[26] Martin is a professor of computer science whose research is in the areas of computer security and privacy. (See Martin Decl. ¶¶ 1-8; Id., Ex. A.)

[27] (SJ Opp'n at 11; Martin Decl. ¶¶ 56-63.)

[28] (SJ Opp'n at 11-12; Martin Decl. ¶¶ 70-76.)

therefore a genuine product improvement. Thus, the Court finds that Defendant is not entitled to summary judgment on Plaintiffs' Section 2 claim as to iTunes 7.0.

Accordingly, the Court DENIES Defendant's Motion for Summary Judgment on Plaintiffs' Section 2 claim as to iTunes 7.0.

2. The UCL

Defendant contends that Plaintiffs' UCL claim only survives if Plaintiffs' Sherman Act claim survives, and that without a valid Sherman Act claim there is no "unlawful" conduct to support Plaintiffs' UCL claim. (SJ Motion at 24.) Plaintiffs respond that because California courts have recognized that an unfair business act or practice need not violate antitrust law to be actionable under the UCL, Plaintiffs' UCL claim survives whether or not its Sherman Act claim survives. (SJ Opp'n at 24-25.)

Under California law, if the "same conduct is alleged to be both an antitrust violation and an 'unfair' business act or practice for the same reason," then the "determination that the conduct is not an unreasonable restraint of trade necessarily implies that the conduct is not 'unfair' toward consumers." Apple, Inc. v. Psystar Corp., 586 F. Supp. 2d 1190, 1204 (N.D. Cal. 2008) (quoting Chavez v. Whirlpool Corp., 93 Cal. App. 4th 963, 975 (Cal. Ct. App. 2001)).

Here, in its June 29 Order, the Court stated that Plaintiffs could state a UCL claim under the "unlawfulness" prong of the UCL if Plaintiffs adequately stated a Section 2 claim. (June 29 Order at 8.) As discussed previously, the Court has found that Defendant is entitled to summary judgment on its Section 2 claim as to iTunes 4.7, but not as to iTunes 7.0. Thus, Defendant is also entitled to summary judgment on its UCL claim as to iTunes 4.7, but not as to iTunes 7.0. See Psystar, 586 F. Supp. 2d at 1204.

Accordingly, the Court GRANTS Defendant's Motion for Summary Judgment on Plaintiffs' UCL claim as to iTunes 4.7. The Court DENIES Defendant's Motion for Summary Judgment on Plaintiffs' UCL claim as to iTunes 7.0.

United States District Court
For the Northern District of California

B. <u>Class Certification</u>

Plaintiffs seek to certify a damages class under Rule 23(b)(3), seeking damages for the supracompetitive price paid for iPods as a result of Defendant's alleged anticompetitive conduct. (Class Certification Motion at 1, 16.) Defendant contends that: (1) Plaintiffs fail to demonstrate a class-wide method of proving impact and damages; and (2) Plaintiffs have also failed to carry their burden to show that resellers may properly be included in the Class.[29]

As discussed previously, the Court earlier certified classes in this case under both Rule 23(b)(2) and Rule 23(b)(3). (<u>See</u> December 22 Order.) The Court later *sua sponte* decertified those classes without prejudice. (<u>See</u> December 21 Order.) However, the Court only decertified the classes in order to reexamine Plaintiffs' Sherman Act claims. (December 21 Order at 2-3, 10-11.) Because the Court finds that there is a genuine issue of fact as to whether Plaintiffs can state a claim under the Sherman Act for iTunes 7.0, the Court's earlier findings that Plaintiffs' proposed class satisfies the requirements of Rule 23(a) and 23(b)(3) still stand. (<u>See</u> December 22 Order at 4-13.)

However, at this time, the Court finds that it lacks information necessary to certify the class. Accordingly, the Court DENIES as premature Plaintiffs' Motion for Class Certification, and sets a hearing to address the issues of how the class should be defined and the length of the class period, in light of the Court's disposition of the Motion for Summary Judgment.

<u>V. CONCLUSION</u>

The Court GRANTS in part and DENIES in part Defendant's Motion for Summary Judgment as follows:

(1) The Court GRANTS Defendant's Motion for Summary Judgment on all of Plaintiffs' claims as to iTunes 4.7; and

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[29] (Apple's Opposition to Renewed Motion for Class Certification at 8-21, hereafter, "Class Certification Opp'n," Docket Item No. 512 (filed under seal).)

(2) The Court DENIES Defendant's Motion for Summary Judgment on all of Plaintiffs' claims as to iTunes 7.0.[30]

The Court DENIES as premature Plaintiffs' Motion for Class Certification and orders as follows:

(1) The Court sets **June 27, 2011 at 9 a.m.**, as a further hearing on Plaintiffs' Motion for Class Certification;

(2) On or before **June 6, 2011**, the parties shall file simultaneous Supplemental Briefs addressing the issues of how the class should be defined and the length of the class period in light of the Court's ruling on Defendant's Motion for Summary Judgment.

Dated: May 19, 2011

JAMES WARE
United States District Chief Judge

[30] In light of the Court's disposition of Defendant's Motion for Summary Judgment, the Court DENIES as moot Plaintiffs' Notice of Motion and Motion to File Under Seal Plaintiffs' Submission of Supplemental Evidence from the Deposition of Steve Jobs in Support of Plaintiffs' Opposition to Summary Judgment and Exhibits 1-3, 5 to the Declaration of Alexandra S. Bernay Pursuant to Local Rule 79-5(b)-(c), Docket Item No. 598, and Plaintiffs' Motion for Leave to File Supplemental Evidence from the Deposition of Steve Jobs in Support of Plaintiffs' Opposition to Apple's Motion for Summary Judgment, Docket Item No. 599.

THIS IS TO CERTIFY THAT COPIES OF THIS ORDER HAVE BEEN DELIVERED TO:

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Dated: May 19, 2011 **Richard W. Wieking, Clerk**

By:___/s/ JW Chambers____________
Sue Imbriani
Courtroom Deputy

United States District Court
Northern District of California

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

THE APPLE IPOD ITUNES ANTITRUST LITIGATION

This Order Relates to:

All Actions

Case No.: 05-CV-0037 YGR

ORDER DENYING: (1) DEFENDANT'S COMBINED MOTION FOR SUMMARY JUDGMENT AND *DAUBERT* MOTION; (2) PLAINTIFFS' *DAUBERT* MOTION; AND (3) PLAINTIFFS' MOTION TO STRIKE EXPERT REPORT

I. INTRODUCTION

The remaining plaintiffs in this long-running antitrust case allege that defendant Apple, Inc. ("Apple"), after lawfully acquiring monopoly power in the market for portable digital music players with the introduction of the iPod, unlawfully maintained its monopoly power in violation of Section 2 of the Sherman Antitrust Act, 15 U.S.C. § 2. These plaintiffs represent a certified class of direct purchasers, specifically, individuals and businesses who purchased certain enumerated models of iPods directly from Apple between September 12, 2006 and March 31, 2009.

Now before the Court are three substantive motions, as well as numerous administrative motions to seal the moving papers and supporting evidence. This Order resolves the substantive motions: (1) Apple's Motion for Summary Judgment and to Exclude Expert Testimony of Roger G. Noll (Dkt. No. 740-4 ("MSJ")); (2) plaintiffs' *Daubert* Motion to Exclude Certain Opinion Testimony of Kevin M. Murphy and Robert H. Topel (Dkt. No. 737-4 ("*Daubert* Motion")); and (3) plaintiffs' Motion to Strike Supplemental Expert Report of Kevin M. Murphy and Robert H. Topel, Dated December 20, 2013 (Dkt. No. 750-3). The Court addresses the administrative motions to seal in a separate Order.[1]

The motions are fully briefed and the Court held hearings in connection with them on February 7, 2014 (Dkt. No. 775) and August 13, 2014 (Dkt. No. 787 ("Tr.")). For the reasons set forth below, the Court **DENIES** all three motions.

II. BACKGROUND

The lengthy procedural history of this case has been recounted in prior opinions.[2] Here the Court sets forth only those background facts necessary to understand the case's present posture and the motions at bar. The facts supplied herein are undisputed unless otherwise noted.

During the class period, Apple provided to iPod owners a software program for loading and managing digital song files on their iPods, as well as for purchasing digital song downloads from Apple. That program is "iTunes" and Apple's online music store is the "iTS."[3] One feature of both iTunes and iPods during the class period was their use of a digital rights management ("DRM") system unique to Apple, called "FairPlay." FairPlay made certain iPods distributed during the class period incapable of playing digital songs downloaded from an online music store unless they had been downloaded from the iTS.[4]

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[1] The parties submitted all of their briefs and the bulk of their supporting evidence under seal pursuant to this Court's Civil Local Rule 79-5, albeit in a procedurally defective manner. The Court cites the unredacted, nonpublic version of the briefs and evidence, taking pains, however, to place in the public record no material designated as sealable. This does not suggest that the materials so designated are in fact sealable.

[2] *See generally Tucker v. Apple Computer, Inc.*, 493 F. Supp. 2d 1090 (N.D. Cal. 2006) ("*iPod I*"); *In re Apple iPod iTunes Antitrust Litig.*, C05-00037 JW, 2008 WL 5574487 (N.D. Cal. Dec. 22, 2008) amended, C05-00037 JW, 2009 WL 249234 (N.D. Cal. Jan. 15, 2009) ("*iPod II*"); *In re Apple iPod iTunes Antitrust Litig.*, 796 F. Supp. 2d 1137 (N.D. Cal. 2011) ("*iPod III*").

[3] Apple initially called its online digital-music retailer the iTunes Music Store but later in the class period rechristened it simply the iTunes Store. The Court refers to both as "iTS."

[4] The Court earlier granted Apple judgment on the pleadings as to a Section 1 tying claim challenging its creation of a so-called "walled garden" through its implementation of FairPlay. (Dkt. No. 274.)

United States District Court
Northern District of California

In July 2004, an Apple competitor in the online music market, third party Real Networks ("Real"), introduced a new version of its own digital-song manager, RealPlayer. RealPlayer included a feature called Harmony. Harmony made songs downloaded from Real's online music store mimic FairPlay, and thus made music purchased from Real playable on iPods.

Apple responded to Harmony by taking technological countermeasures to stop Harmony from mimicking FairPlay. First, in October 2004, Apple issued an iTunes update denominated "4.7." The 4.7 update, among other things, thwarted Harmony's ability to mimic FairPlay. The Court previously held 4.7 to be a genuine product improvement and therefore lawful, and entered summary judgment in favor of Apple to the extent plaintiff's Section 2 claim rested on Apple's introduction of 4.7. *iPod III*, 796 F. Supp. 2d at 1146.

It is Apple's second instance of disabling Harmony that forms the basis of plaintiff's present Section 2 claim. Following Apple's release of 4.7, Real modified Harmony such that it could again mimic FairPlay and make any new songs purchased from Real's online music store playable on iPods. Thereafter, in September 2006, Apple released another iTunes update that introduced a variety of features while also disabling Harmony—namely, "7.0." In an earlier summary judgment order, the Court found a triable issue of fact as to whether 7.0 was a genuine product improvement so as to not be anticompetitive. *Id.* at 1147. Apple's present motion seeks summary judgment on two different bases: (1) a lack of admissible evidence of antitrust impact, and (2) a lack of admissible evidence as to the definition of the relevant market. To understand these arguments, it is necessary to articulate plaintiff's theory of liability.

That theory is intricate, but ultimately it amounts to a charge that Apple's release of 7.0 unlawfully maintained Apple's monopoly in the market for portable digital media players by making demand for iPods less elastic. Specifically, plaintiffs claim that 7.0 resulted in an increased "lock-in" effect for iPod owners who purchased songs online. Lock-in, according to plaintiffs' principal economics expert, "is a form of foreclosure that arises from actions that increase the cost to consumers of switching to a product that has better quality and/or a lower price." (Noll Merits

Report at 4.)[5] Plaintiffs offer expert opinion that Apple, by counteracting Harmony, "raised the cost of switching from iPods to competing portable digital media players by eliminating the ability of consumers to collect a library of downloads that could be played on all players." (*Id.*) That is, 7.0 made iPod owners unable to play songs purchased from iTS competitor Real and thus pushed them to make their online song purchases only on the iTS. As a result, it discouraged iPod owners from buying a competing, non-iPod digital portable music player when it came time to replace their iPods due to loss, breakage, or a desire to upgrade. (*Id.*) Such owners would have to either forego use of the songs they had purchased through Real (as well as any other online music store besides iTunes, though that is not part of the damages alleged in this case), repurchase such songs through other, iPod-compatible means (for instance, iTS or physical CDs), or convert music bought from Real into a non-DRM format, for example, by "burning" that music to a CD and then "ripping" the CD onto their computers in a file format with no DRM, from whence the songs could then be loaded on their iPods. These increased "switching costs," plaintiffs argue, locked iPod owners into continuing to purchase iPods, notwithstanding the allegedly similar or better quality of and lower prices of competing products. They also locked out owners of non-iPod portable digital media players who had downloaded songs from the Real store. The effect of both lock-in and lock-out, plaintiffs say, was to reduce competition in the market for digital portable music players and to reduce the price elasticity of iPods, which permitted Apple to charge a supracompetitive price therefor. (Noll Merits Report at 4-5; Noll Merits Rebuttal at 27.) According to plaintiffs' expert, "[t]he damages in this case are the overcharge on iPods during the class period due to the incompatibility that was created by iTunes 7.0." (Noll Merits Report at 5.) Plaintiffs' expert

[5] The parties submitted numerous expert reports in connection with the motions at bar. In referring to those reports, the Court adopts the nomenclature generally used by the experts themselves. The reports are listed here in chronological order: Dkt. Nos. 751-4, Ex. 1 (Noll report of April 3, 2013 ("Noll Merits Report")); 740-14 (Noll report of May 13, 2013 ("Noll Corrections Report")); 737-8 (Murphy report of August 19, 2013 ("Murphy Report")); 737-9 (Topel report of August 19, 2013 ("Topel Report")); 751-4, Ex. 2 (Noll rebuttal report of November 25, 2013 ("Noll Merits Rebuttal")); 740-23 (joint Murphy and Topel supplemental report of December 20, 2013 ("Joint Report")); 751-15, Ex. 54 (Wooldridge report of December 20, 2013 ("Wooldridge Report")); 751-5 (Noll supplemental rebuttal report of January 13, 2014 ("Noll Supp. Rebuttal")); and 763-5 (Wooldridge supplemental report of January 31, 2014 ("Wooldridge Supp. Report")).

estimates damages to the class of $351,631,153, "consisting of $148,947,126 for resellers, $194,655,141 for direct purchasers, and $8,028,886 for additional iPod sales from the additional transactions." (Noll Merits Rebuttal at 51.)

Apple strenuously disputes the sufficiency of plaintiffs' evidence of this theory. Apple contends that it is entitled to summary judgment because plaintiffs lack admissible evidence of either antitrust impact or the relevant product market, both of which are required elements of plaintiffs' Section 2 claim. The linchpin, and Achilles' heel, of Apple's argument is the word "admissible." Apple disputes the admissibility of the opinions of plaintiffs' principal economics expert, Professor Roger G. Noll. Noll has conducted both (i) a complex statistical analysis that plaintiffs offer as proof of both the fact and the amount of antitrust damages suffered by the class, and (ii) an analysis of the relevant market. In response, Apple offers its own experts, Professors Kevin M. Murphy and Robert H. Topel, who criticize the design and execution of Noll's statistical analyses and fault his relevant market findings. Plaintiffs counter with rebuttal opinion from Noll, as well as opinion testimony from a second expert with special expertise in statistics, Professor Jeffrey M. Woodridge, whose opinions corroborate those of Noll. All of these opinions are subject to *Daubert* motions or procedural objections. It is to those matters that the Court now turns.

III. DISCUSSION

"A trial court may only consider admissible evidence in ruling on a motion for summary judgment." *Ballen v. City of Redmond*, 466 F.3d 736, 745 (9th Cir. 2006). Accordingly, before turning to the substance of Apple's summary judgment motion, the Court first resolves the parties' challenges to the admissibility of the proffered expert opinions.

A. Challenges to Admissibility of Expert Opinions

The principal focus of Apple's *Daubert* motion is a set of opinions offered by Noll as to both the fact and amount of antitrust damages suffered by the class. These opinions have as their bases econometric analyses Noll performed on a dataset supplied by Apple. The dataset consists of Apple's complete sales records for the models of iPod covered by the class definition and sold during the class period, stripped of obvious outliers (e.g., sales where the price was zero or negative, or many times the listed retail price) and incomplete records.[6] Noll used this dataset to perform a hedonic multiple-regression analysis. Multiple-regression analysis is a statistical tool that "permits the comparison between an outcome (called the dependent variable) and one or more factors (called independent variables) that may be related to that outcome." *Manpower, Inc. v. Ins. Co. of Pennsylvania*, 732 F.3d 796, 808 (7th Cir. 2013). The term "hedonic" denotes that the analysis sought to "isolate the effect of one or more product attributes on the price of a product." *In re ConAgra Foods, Inc.*, --- F. Supp. 2d ---, 2014 WL 4104405, at *4 (C.D. Cal. 2014). In short, the attributes of particular models of iPod constituted some (not all) of the independent variables in Noll's regression analysis. Noll's regressions purport to isolate the effect on iPod pricing attributable to Apple's release of 7.0 and the security feature embedded therein. According to plaintiffs and Noll, that pricing effect is the illegal overcharge in this case, and constitutes proof of both the fact of damages and their amount. (*See, e.g.*, Noll Merits Report at 5.) Noll also offers an opinion as to the relevant product markets, identifying two: a market for portable digital media players and a market for digital audio files.

In response to Noll's opinions, Apple submits reports from Murphy and Topel, who purport to identify flaws in Noll's damages analysis that render it so unreliable as to be inadmissible under the familiar standard of *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). Their three main criticisms are summarized as follows: Noll (i) failed to account for "clustering" problems in his regression analysis, (ii) omitted from his hedonic model certain variables that measure product attributes affecting iPod prices, and (iii) used the wrong "but-for" world to calculate damages by turning off the variable for 4.7 on the date that 7.0 was introduced.[7] As to Noll's market definition,

[6] The class period in this case covers the time period beginning with Apple's initial release of 7.0 and ending the date that Apple—following a shift in business strategy by the record companies—entirely stopped using DRM. *See iPod IV*, 2011 WL 5864036, at *4 nn. 22-23. The class is comprised of individuals and businesses who, during the class period, purchased directly from Apple any of 29 individual iPod models distributed among 4 model types. *Id.* at *4-5.

[7] It is common in antitrust cases to estimate damages by comparing the price actually charged to an expert economist's estimation of the price that would have been charged "but for" the asserted anticompetitive conduct. *E.g.*, *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 313 (3d Cir. 2008); *In re Elec. Books Antitrust Litig.*, 11 MD 2293 DLC, 2014 WL 1282298, at *3 (S.D.N.Y. Mar. 28, 2014).

Apple's expert Murphy opines that because Noll failed to use the proper mode of analysis in deriving his market definition, his opinions are inadmissible as merely "untested, subjective opinions." (MSJ at 24.) In response to these criticisms, plaintiffs offer supplemental rebuttal opinion from Noll on damages and market definition and, with respect to the clustering criticism only, the opinions of Wooldridge.

The parties have not challenged any of these experts as unqualified to give their respective opinions.[8] Rather, the parties have objected to the opinions themselves. As set forth herein, the Court finds that the objections to the content of the challenged opinions go to weight rather than admissibility, and that the parties' procedural and other technical objections are insufficient to persuade the Court to exercise its discretion to exclude the opinions.

1. Applicable Legal Standard

"In federal courts, the admission of expert testimony is governed by Federal Rule of Evidence 702, as elucidated by the Supreme Court in *Daubert*." *Barabin v. AstenJohnson, Inc.*, 700 F.3d 428, 432 (9th Cir. 2012). Federal Rule of Evidence 702 allows expert testimony only if 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." Rule 702 permits experts to testify if their testimony is: (i) based upon sufficient facts or data, (ii) the product of reliable principles and methods, and (iii) the result of applying those principles and methods reliably to the facts of the case. *Id.* In determining whether an expert's testimony meets the standards of Rule 702, the court acts as a "gatekeeper" that "ensur[es] that [the] expert's testimony both rests on a reliable foundation and is relevant to the task at hand." *Daubert*, 509 U.S. at 597; *see also Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 148-49 (1999). In addition, the court may exclude expert testimony that is "otherwise admissible may be excluded under Rule 403 if its probative value is substantially

[8] The Court finds all four professors qualified to render expert opinions on economics and econometrics. All four hold distinguished positions as economics professors—Noll at Stanford University, Murphy and Topel at the University of Chicago, and Wooldridge at Michigan State University. All four have also written and taught extensively concerning the subjects upon which they have opined. *See* Noll Merits Report, Appendix A; Murphy Report, Appendix A; Topel Report, Appendix A; Wooldridge Report, Appendix A.

outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." *U.S. v. Rincon*, 28 F.3d 921, 923 (9th Cir. 1994) (citing *Daubert*, 509 U.S. at 595).

The Ninth Circuit has reiterated that the "test of reliability is 'flexible' . . . . When an expert meets the threshold established by Rule 702 as explained in *Daubert*, the expert may testify and the jury decides how much weight to give that testimony." *Primiano v. Cook*, 598 F.3d 558, 564-65 (9th Cir. 2010). "Shaky but admissible evidence is to be attacked by cross examination, contrary evidence, and attention to the burden of proof, not exclusion." *Id.* at 564.

2. Apple's *Daubert* Motion to Exclude Opinions of Noll

The Court first addresses Apple's challenges to Noll's opinions, specifically: (i) his opinions regarding antitrust impact and damages, as based on his regression model, and (ii) his opinion as to which products comprise the relevant market in which iPods reside.

a. Regression Model

Proof of an injury caused by Apple's alleged antitrust conduct is a required element of plaintiffs' Section 2 claim. *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1432-33 (9th Cir. 1995). In this case, plaintiffs seek to demonstrate the required antitrust injury with Noll's regression model. The model purports to isolate the effect on iPod pricing during the class period attributable to the alleged anticompetitive conduct, that is, the effect of Apple's introduction of 7.0 and the consequent inability of iPods loaded with 7.0 to play songs downloaded from Real. As a threshold matter, the Court finds that the dataset relied upon by Noll, as the complete record of sales transactions for covered models of iPods during the class period, constitutes sufficient data upon which to base expert testimony. The Court also finds that hedonic multiple-regression analysis is a sound and, indeed, commonplace method for isolating the pricing effects of alleged anticompetitive conduct. *E.g., In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 660-61 (7th Cir. 2002) ("*Corn Syrup*"); *Conwood Co., L.P. v. U.S. Tobacco Co.*, 290 F.3d 768, 793 (6th Cir. 2002); *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co.*, 998 F.2d 1224, 1238 (3d Cir. 1993). Accordingly, Noll's opinions are admissible under Rule 702 unless they are the result of an unreliable application of otherwise sound methods or would be unhelpful to the trier of fact.

Apple contends that Noll's regression model is inadmissible because (i) it lacks a sufficient "fit" with the facts of the case, (ii) it does not account for all the relevant factors that affect iPod pricing, and (iii) it does not supply statistically significant results (once one modifies the model in the manner suggested by Apple's experts). The Court has weighed Apple's objections carefully and finds that none establish such a level of unreliability or unhelpfulness that would justify wholesale exclusion of Noll's opinions. Rather, they go to the weight of Noll's opinions.

The Court turns first to Apple's arguments as to fit. As a threshold matter, the Court notes that the challenged opinions rest on a regression analysis conducted on data consisting of Apple's actual sales records for iPods during the class period. Given that Noll's regressions, and his opinions based thereon, purport to explain the prices charged in those sales, there is a sufficient fit between the facts and the opinion.

Apple offers four arguments as to fit, none of which persuade. These arguments posit that Noll's regression "rests on unsupported assumptions that conflict with the real world." (MSJ at 14.) First, Apple contends that the requisite fit is lacking because plaintiffs have marshaled no evidence of particular persons who used Harmony or suffered lock-in or lock-out. The lack of direct evidence of named individuals who used Harmony does not disprove their existence. The Court finds nothing unreasonable about an assumption that, among the millions of persons who used iPods during the class period, some may have purchased songs from Real. Under plaintiffs' theory, such purchases give rise to the lock-in effect and reduced elasticity of demand. No "indisputable record facts contradict or otherwise render the opinion unreasonable," *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 242 (1993), nor are Noll's opinions "connected to existing data only by the *ipse dixit* of the expert," *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 157 (1999). Rather, Noll's opinions derive from a dataset of transactions supplied by Apple itself.[9]

[9] Apple analogizes this case to *American Booksellers Association*, but that case is distinguishable. *Am. Booksellers Ass'n, Inc. v. Barnes & Noble, Inc.*, 135 F. Supp. 2d 1031 (N.D. Cal. 2001). In that case, plaintiffs' expert on antitrust damages "concededly made no effort to base his model on actual purchasing data" and "his model ma[de] no attempt to determine the actual prices paid . . . ." *Id.* at 1038. Not so here, where it is uncontested that Noll based his model on actual purchasing data and the actual prices paid.

Second, Apple argues that plaintiffs present no direct evidence of Apple's pricing committee taking into account any effects of the Harmony-disabling countermeasures contained in 7.0 when setting iPod prices. (MSJ at 13.) The Court is not persuaded that this is a valid reason to exclude Noll's testimony. The record contains testimony and documentary evidence sufficient to support an inference that the Apple executives on the pricing committee knew of and were concerned by Harmony. (Dkt. No. 751-13, Ex. 36 (submitted under seal); Dkt. No. 751-15, Ex. 48 at 45:9-19 (submitted under seal).)

Third, the Court rejects Apple's related argument that Noll's opinions must be excluded because his prediction of a constant, immediate lock-in effect resulting in overcharge "is flatly contrary to how Apple set its prices." (MSJ at 13; *see also* Dkt. No. 762-5 ("MSJ Reply") at 6, 7-8.) Apple explains that its prices are set at particular times pursuant to a uniform pricing policy. However, the record contains non-trivial evidence that the actual prices charged were not in fact uniform and that pricing decisions may have incorporated factors above and beyond Apple's preference for so-called "aesthetic" prices. Apple's argument does not sufficiently undermine the reliability of Noll's model to warrant exclusion.

Finally, the Court rejects Apple's argument that the analysis predicts a constant, immediate overcharge that Apple claims is not consistent with the notion of a gradual lock-in over time. Apple purports to demonstrate that Noll's own admissions "are irreconcilable with the single, unchanging overcharge amount predicted by his damages model." (MSJ Reply at 7-8.) That argument ultimately is one of weight, not evidence of the unreliability of the regression analyses themselves.

Apple's second proffered basis for excluding Noll's opinions centers on his supposed failure to account properly for relevant pricing factors. (MSJ at 14-20.) Generally, such deficiencies in a statistical analysis raise issues of weight rather than admissibility. *E.g.*, *Bazemore v. Friday*, 478 U.S. 385, 400 (1986) (reversing lower court's exclusion of regression analysis based on its view that the analysis did not include proper selection of variables); *Hemmings v. Tidyman's Inc.*, 285 F.3d 1174, 1188 (9th Cir. 2002) ("[I]n most cases, objections to the inadequacies of a study are more appropriately considered an objection going to the weight of the evidence rather than its admissibility."); *Obrey v. Johnson*, 400 F.3d 691, 695 (9th Cir. 2005) (same principle); *Rudebusch v. Hughes*, 313 F.3d 506, 516 (9th Cir. 2002) (same); *Maitland v. Univ. of Minnesota*, 155 F.3d 1013, 1017 (8th Cir. 1998) (same); *see also Manpower*, 732 F.3d at 808 (collecting cases). Here, Apple faults Noll for leaving "on" throughout the entire class period a variable representing Apple's introduction of 4.7, for purportedly failing to account for the impact on price of aspects of 7.0 besides the allegedly anticompetitive security feature that disabled Harmony, and for failing to account for certain, though by no means all, of the product characteristics of iPods used in Noll's hedonic model. (MSJ at 14-20.) These criticisms do not persuade that Noll's regression analysis so fundamentally unreliable as to warrant exclusion. Noll supplied cogent reasons for his inclusions and exclusions. Apple's criticisms reflect mere disagreement with those reasons. As such, they go to the weight that should be afforded Noll's opinions, not their admissibility.

Apple's third main reason for excluding Noll's opinions is that his regression, once "corrected" in the manner urged by Apple's experts, does not supply statistically significant results. (*See* MSJ at 20 (arguing Noll's results are statistically insignificant "[w]hen properly calculated").) The Court notes that Apple's argument relies on the Court's acceptance of Apple's experts' criticisms of Noll's methodology. While some of those criticisms are compelling, the Court is not persuaded, in light of Noll's rebuttal opinions and Wooldridge's opinions, that the battle between the economists of the University of Chicago school, on the one hand, and those from Stanford and Michigan State University, on the other, is properly resolved here. It is not lost on the Court that econometrics is in the family of social sciences and therefore necessarily contains certain value judgments and hypotheses that are tested and used in conjunction with statistics. Unless beyond the realms of reason and reliability, these issues are fully within the province of experts to debate and a jury to resolve.

Most significant are Apple's criticisms regarding clustering. Murphy and Topel argue that Noll vastly overstates the precision and reliability of his model by failing to account for clustering and thus generates an artificially high "*t*-statistic." By way of background, a *t*-statistic is one measure of confidence that a statistical result is statistically significant, that is, not the byproduct of chance. A t-statistic of 1.96 translates to a 95 percent confidence level that the result is statistically significant, REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 303, 343 (3d ed. 2011), or, inversely, a 5 percent chance that the figure is statistically *in*significant. Using the inverse measure, confidence levels of 1, 5, or 10 percent have all been treated as benchmark measures of reliability by statistics experts. *See In re High-Tech Employee Antitrust Litig.*, 11-CV-02509-LHK, 2014 WL 1351040, at *15 (N.D. Cal. Apr. 4, 2014) ("*High-Tech*") (collecting authorities). Thus far though, courts have been unwilling to mandate a particular *t*-statistic as a prerequisite for purposes of admissibility. *Id.* (finding no cases legally requiring 10 percent or greater confidence to admit statistical evidence) (citing *Cook v. Rockwell Int'l Corp.*, 580 F. Supp. 2d 1071, 1102 (D. Colo. 2006); *Kadas v. MCI Systemhouse Corp.*, 255 F.3d 359, 362 (7th Cir. 2001)).

The Court is not persuaded that Apple's criticisms of Noll's approach to clustering merit exclusion of Noll's opinions. While Murphy and Topel's modifications to Noll's regression to account for clustering "properly" would, if accepted, dramatically change the *t*-statistics for the iTunes 7.0 coefficient, Noll and Wooldridge make at least a colorable case that no clustering problems exist where, as here, the data set constitutes the entire population of observations, as opposed to a sampling. (*See* Noll Merits Rebuttal at 39 ("[C]luster analysis is irrelevant if the data set is either representative of the entire population of observations or is not a sample at all, but in fact is the entire population."); Noll Supp. Rebuttal at 3-7 (same principle); Wooldridge Report at 10 (same).) The question presented here is not whether Noll's analyses are correct, but whether they are the product of a generally accepted method for demonstrating both the fact and the amount of antitrust damages. In light of the opinions of Noll and Wooldridge, the Court finds that the results of Noll's regression analyses do meet the threshold of reliability necessary for admissibility, even if the proffered claim of accuracy strains credulity. *Obrey*, 400 F.3d at 696 ("As a general matter, so long as the evidence is relevant and the methods employed are sound, neither the usefulness nor the strength of statistical proof determines admissibility under Rule 702."). Given the general acceptance of multiple-regression analysis, Noll's obvious qualifications for conducting such analyses, and the unresolved threshold question of whether Noll's figures should be "corrected" in the precise manner urged by Murphy and Topel, the Court finds Noll's multiple-regression analyses admissible under Federal Rule of Evidence 702 and *Daubert*. Under these circumstances, the issue is more appropriately one of weight and credibility. Accordingly, the Court **DENIES** Apple's *Daubert* motion insofar as it challenges the admissibility of Noll's regression analyses.

b. Relevant Market

Plaintiffs' Section 2 claim requires them to prove the contours of the "relevant market" in which Apple allegedly used unlawful means to maintain its monopoly power. *See Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 481 (1992); *Bhan v. NME Hospitals, Inc.*, 929 F.2d 1404, 1413 (9th Cir. 1991); *Newcal Indus., Inc. v. Ikon Office Solution*, 513 F.3d 1038, 1044 (9th Cir. 2008). "[A] 'market' is the group of sellers or producers who have the actual or potential ability to deprive each other of significant levels of business." *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995) (internal quotation marks omitted). "The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Newcal Indus.*, 513 F.3d at 1045 (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962)).

To prove their relevant market, plaintiffs rely exclusively on the opinions of Noll, who undertook a lengthy analysis of both relevant markets asserted by plaintiffs in this case, respectively, portable digital media players and digital audio files. (Noll Merits Report at 25-32 (portable digital media players), 32-42 (digital audio files).) Noll opined that there are multiple ways of identifying a relevant market. One such method is to estimate cross-elasticity of demand using a formal econometric study. However, Noll further opined that "[i]n most cases data limitations preclude econometric estimation of cross-elasticity of demand" and that such estimation "is usually impossible for products that have extensive product differentiation and that are rapidly evolving, as was the case of portable digital media players during the class period." (*Id.* at 23-24.) Noll looked instead to internal Apple documents, employee testimony, and discovery responses, third-party information such as contemporaneous financial analysis and press coverage of the development of the portable digital media player market, and his own experience.

Apple argues that Noll's opinion on these matters is inadmissible because he failed to conduct either a formal econometric analysis of cross-elasticity of demand or a "hypothetical monopolist" test. While such analyses may be possible or even desirable, Apple's assertion that such formal tests are *required* lacks legal support. Moreover, as plaintiffs point out, Apple's own expert did not measure the cross-elasticity of demand or engage in the hypothetical monopolist test in their own discussions of market definition. (*See generally* Murphy Report at 60-64.) Apple's attacks on Noll's opinion comprise mere disagreement with his conclusions.

For purposes of Rule 702, the district judge serves only as "a gatekeeper, not a fact finder." *Primiano*, 598 F.3d at 564-65 (internal quotation marks omitted). Apple has failed to persuade that Noll's opinion as to the relevant market must be excluded for lack of an accepted methodology. Accordingly, Apple's *Daubert* motion is **DENIED** on this ground.

3. Plaintiffs' *Daubert* Motion to Exclude Opinions of Murphy and Topel

Plaintiffs seek to exclude only those opinions of Murphy and Topel bearing on clustering problems. (*Daubert* Motion at 1.) As was the case with Murphy and Topel's criticisms of Noll's regression analysis, plaintiffs' criticisms of Murphy and Topel's clustering opinions also go to weight, not admissibility. Plaintiffs' motion is premised on a mere disagreement in expert opinion, not a showing that Murphy and Topel used unreliable methods, relied upon facts too far removed from those of this case to be relevant, or are unqualified to render their opinions.

The Court **DENIES** plaintiffs' *Daubert* motion to exclude the opinions of Murphy and Topel.

4. Apple's Objection to Opinions of Wooldridge

Apple argues in its opposition that Wooldridge's opinions must be excluded as having been untimely disclosed and inadmissible under *Daubert*. The Court disagrees on both counts.

First, as to timeliness, even assuming plaintiffs disclosed Wooldridge late, such late disclosure would be harmless under Federal Rule of Civil Procedure 37(c) because Apple had ample time not only to respond to Wooldridge's report (prompting, in turn, a supplemental report by Wooldridge), but also to depose him (which deposition Apple took, *see* Dkt. No. 754-10, Ex. 11 ("Wooldridge Dep.")).

Second, as to Apple's *Daubert* objection to Wooldridge's opinions, Apple argues that Wooldridge's opinions must be excluded because they "are contrary to generally accepted econometrics," "have not been peer reviewed," and "were manufactured for this litigation." (Dkt.

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No. 754-6 at 18-19.) The Court finds none of those points persuasive. The purported lack of peer review or common acceptance of Wooldridge's views does not necessarily justify exclusion of Wooldridge's opinions, given Wooldridge's own apparent status as a leading authority and his specific testimony as to the development of his theories. *See Daubert*, 509 U.S. at 593-94 (peer review and publication of an expert's views are relevant to, but not necessarily dispositive of, reliability determination). "[I]n some instances well-grounded but innovative theories will not have been published." *Id.* at 593. Here, Wooldridge testified, and Apple has not disputed, that Woodridge himself is a leading authority on clustering theory, that he has been revisiting and refining his theories for at least two years, sometimes in collaboration with colleagues at Harvard and Stanford, and that he has of late modified his views such that he now disagrees with certainly commonly accepted views, including views encompassed in recommendations contained in an American Bar Association guide. (Wooldridge Dep. at 62:14-65-2, 91:7-92:10, 117:6-118:24, 158:16-159:13.)[10] Nothing in these statements or elsewhere in the record before the Court establishes that Wooldridge's theories are unreliable, as opposed to merely new.

The same testimony undercuts Apple's contention that Wooldridge's rethinking of his theories predated his engagement as an expert witness in this case. (*See* Wooldridge Dep. at 8:10-9:2 (Wooldridge first contacted about and began working on case in December 2013); *see also id.* at 7:21-24 (Wooldridge never before served as expert witness).) Apple's argument that Wooldridge generated his opinions for the purposes of litigation amounts to an invitation to discredit Wooldridge's contrary testimony. The Court is unwilling to do so on the cold record now before it. Any concerns with Wooldridge's opinions are best addressed through contrary evidence and cross-examination and, if applicable, impeachment of Wooldridge. Should the Court determine at trial, following examination of Wooldridge or for any other reason, that his opinions are unreliable or ersatz, the Court has the option of giving the jury a limiting instruction. *Cf. Hemmings*, 285 F.3d at 1183 (affirming district court's denial of *Daubert* motion where district

[10] It is not clear that the matter on which Wooldridge's views have changed is the same matter at issue here. (*See* Tr. at 95:5-12.)

court stated that "if it determined that portions of [the expert's] analysis were improper, it would give a limiting instruction to the jury").

The Court **OVERRULES** Apple's objections to the opinions of Wooldridge.

5. Plaintiffs' Motion to Strike

Plaintiffs move to strike the Joint Report, that is, the supplemental report submitted jointly by Murphy and Topel in response to the Noll Merits Rebuttal. Plaintiffs contend that the Joint Report is untimely and, because the Noll Merits Rebuttal contained no new opinion, unjustified. Plaintiffs claim they will be prejudiced if the Joint Report is admitted and ask that, if it is, the Court also admit Noll's response to the Joint Report, the Noll Supplemental Rebuttal. Apple raises several arguments in opposition to plaintiffs' motion to strike, but essentially acquiesces in the entry of plaintiffs' requested alternative relief, i.e., allowing *both* the Joint Report and the Noll Supplemental Rebuttal. (Dkt. No. 758-5 at 1.)[11]

The Court finds that permitting the Joint Report to stand, along with the Noll Supplemental Rebuttal, is harmless, given that Noll has responded to the Joint Report and plaintiffs deposed both Murphy and Topel after they issued the Joint Report. Additionally, in light of the new regression analysis contained in the Noll Merits Rebuttal, the Court cannot say that the Joint Report is unjustified. Noll modified several attributes of his regression analysis following the Murphy Report and Topel Report. The regression analyses presented in the Noll Merits Rebuttal cover the same subject matter as those presented in the earlier Noll Merits Report, but they are not the same analyses. Plaintiffs' argument that there was nothing new in the Noll Merits Rebuttal to which

[11] Apple argues that plaintiffs' motion to strike should be denied on procedural grounds as an evidentiary objection not contained in the body of plaintiffs' summary judgment opposition, which objections are prohibited by Civil Local Rule 7-3(a). (Dkt. No. 758-5 at 1.) Plaintiffs respond that the applicable rule is Local Rule 7-8 because plaintiffs move not for exclusion under *Daubert* but for evidentiary sanctions under Federal Rule of Civil Procedure 37, and Local Rule 7-8 requires "[a]ny motion for sanctions, regardless of the sources of authority invoked," to be separately filed. The Court need not address this potential ambiguity in its Local Rules because Apple's acquiescence to plaintiffs' requested alternative relief moots the issue. The Court notes, however, that Apple's citation to *Apple, Inc. v. Samsung Electronics Co.*, 11-CV-01846-LHK, 2011 WL 7036077, at *3 (N.D. Cal. Dec. 2, 2011), is inapposite because, in that case, Samsung moved for *Daubert* exclusion, not, as here, Rule 37 sanctions.

Murphy and Topel could respond does not persuade in light of Noll's changes to the model of his regression analyses.

The Court **DENIES** plaintiffs' motion to strike the Joint Report. Both the Joint Report and the Noll Supplemental Rebuttal are allowed.

B. APPLE'S MOTION FOR SUMMARY JUDGMENT

Apple contends that: (1) Real's "insignificant" share of less than 3 percent of the online music market in 2006, when Apple released 7.0, makes it "implausible" that Harmony could have the effect ascribed to it by plaintiffs (MSJ at 9); (2) "plaintiffs have no evidence regarding what portion of Real's small sales was to iPod owners or potential iPod purchasers" (*id.* at 9-10); (3) "plaintiffs have no proof of the number of people who became locked in or locked out" after 7.0 (*id.* at 10); (4) plaintiffs have not identified evidence showing that Apple's pricing committee "took into account the amount of sales from [Real] or any other online store in setting iPod prices" (*id.* at 10-11); and (5) Apple always abides by an "aesthetic" pricing policy, by which Apple appears to mean a policy of setting prices in fifty-dollar increments, less one dollar (e.g., $199, $249, $399) (*see id.* at 11-12).

The Court rejects these arguments because the admission of Noll's opinions alone supplies a triable issue of fact regarding the fact and amount of antitrust damages, as well as the definition of the relevant market. Apple's five grounds for entering summary judgment are insufficient bases upon which to enter summary judgment in the face of Noll's opinions. Those opinions constitute relevant *circumstantial* evidence of both the fact and amount of damages upon which a jury applying a preponderance standard reasonably could find for plaintiffs. Noll's opinions also supply non-trivial evidence of the relevant market. Apple's asserted bases for summary judgment merely point out possible gaps in plaintiffs' case.

Given that the Court may not intrude upon the province of the jury by weighing the conflicting evidence now before it, Noll's opinions preclude entry of summary judgment. *Cf. Corn Syrup*, 295 F.3d at 660-61 (after surveying each blow in a "battle of the statistical experts", reversing district court's entry of summary judgment in favor of defendant because plaintiffs had presented statistical evidence of price-fixing). The Court **DENIES** Apple's motion for summary judgment.

IV. CONCLUSION

For the foregoing reasons, the Court **DENIES** Apple's *Daubert* motion to exclude the opinions of plaintiffs' expert Noll, **DENIES** plaintiffs' *Daubert* motion to exclude certain opinions of Apple's experts Murphy and Topel, **OVERRULES** Apple's objections to the opinions of plaintiffs' expert Wooldridge, **DENIES** plaintiffs' motion to strike the December 20, 2013 joint report of Murphy and Topel, and **DENIES** Apple's motion for summary judgment.

IT IS SO ORDERED.

Date: September 26, 2014

Yvonne Gonzalez Rogers

YVONNE GONZALEZ ROGERS
UNITED STATES DISTRICT COURT JUDGE

United States District Court
Northern District of California

DOJ Section 2 Report

CHAPTER 7

UNILATERAL, UNCONDITIONAL REFUSALS TO DEAL WITH RIVALS

I. Introduction

Companies are generally under no antitrust obligation to sell or license their products to, or provide their assets for use by, another company. As the Supreme Court explained almost a century ago, "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 [its] own independent discretion as to parties with whom [it] will deal.'"[1] Notwithstanding this general principle, courts, including the Supreme Court, have held that, under certain circumstances, the antitrust laws require a monopolist to deal with a rival.

There is a continuing debate over the application of section 2 to situations involving a refusal to deal with a rival. If a monopolist has something that a rival wants to use to make more, different, or better products, it can appear that consumers would be better off if the monopolist were forced to deal with its rival. But if the monopolist is forced to deal with the rival, the monopolist's incentives to spend the necessary time and resources to innovate may be diminished. Moreover, the incentives of other firms to invest and innovate, considering the potential future returns on their investments, may be diminished if they believe they will be forced to share a successful innovation. If the incentives to innovate are diminished, consumers are likely harmed in the long run. Additionally, if forced sharing is required, difficult decisions must be made on precisely what needs to be shared, at what price, and under what other terms. These issues have led a number of commentators and panelists to call into question whether the antitrust laws should ever require a firm to deal with a rival.[2]

This chapter reviews the law regarding unilateral, unconditional refusals to deal with a rival, analyzes the legal and economic arguments, and then addresses the appropriate role of antitrust where there is an allegation that a unilateral, unconditional refusal to deal violates section 2. It does not address conditional refusals to deal with rivals. In those situations, "[t]he proper focus of antitrust is . . . not on the . . . refusal . . . to deal, but on the competitive consequence of whatever conduct this leads other parties to engage in."[3] That is, antitrust should focus on the conditions, such as tying or exclusivity, not on the refusal. Consequently, those situations raise "very different competitive concerns."[4] Nor does the chapter cover refusals to deal that are a part of an agreement with one or more competitors to allocate customers or markets or fix prices, situations covered by section 1 of the Sherman Act. This chapter concerns only what are referred to as unilateral, unconditional refusals to deal with rivals—essentially cases limited to allegations that a company will never sell or license to a rival or will do so only for a price that is alleged

[1] Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 408 (2004) (quoting United States v. Colgate & Co., 250 U.S. 300, 307 (1919).

[2] *See, e.g.*, Sherman Act Section 2 Joint Hearing: Refusals to Deal Panel Hr'g Tr. 32, July 18, 2006 [hereinafter July 18 Hr'g Tr.] (Pate); *id.* at 104 (Whitener); HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE 244–48, 270 (2005); RICHARD A. POSNER, ANTITRUST LAW 242 (2d ed. 2001).

[3] Dennis W. Carlton & Ken Heyer, *Appropriate Antitrust Policy Towards Single-Firm Conduct* 13 (Econ. Analysis Group, Working Paper No. EAG 08–2, 2008), *available at* http://www.usdoj.gov/atr/public/eag/231610.pdf.

[4] July 18 Hr'g Tr., *supra* note 2, at 8 (Kolasky); *see also id.* at 72 (Whitener).

to be too high. In addition, the essential-facilities doctrine is briefly discussed.

II. Background

The general right of a firm freely to determine with whom it will and will not deal was first established by the Supreme Court nearly nine decades ago. In its 1919 *Colgate* decision, the Supreme Court observed that "[i]n the absence of any purpose to create or maintain a monopoly, 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."[5] The Court reaffirmed that principle eighty-five years later in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, where, citing *Colgate*, the Court affirmed dismissal of an action alleging that non-compliance with state and federal regulations mandating the sale of services to rivals violated section 2.[6] In *Trinko*, the Court noted that, "as a general matter," the antitrust laws impose no duty upon a firm to deal with rivals.[7]

Despite the Court's recognition of a firm's general right to deal or not to deal with whom it chooses, the Court has in a few decisions found that the antitrust laws required a dominant firm to deal with a rival. For example, eight years after *Colgate*, the Court determined there was sufficient circumstantial evidence to allow a jury to decide if Kodak illegally maintained its monopoly through its refusal to sell photography equipment to independent retailers at traditional "dealers' discounts" after Kodak opened its own retail outlets.[8]

In 1973, in *Otter Tail Power Co. v. United States*, the Supreme Court held that the antitrust laws required a firm to sell electric service at "wholesale" to towns seeking to replace Otter Tail as the franchised suppliers of retail electric service with their own municipal power systems.[9] Rejecting Otter Tail's business justification defense that it needed to keep its lines free to serve its own existing and potential retail customers and noting that "[t]here were no engineering factors" preventing Otter Tail from providing the electricity to the towns, the Court concluded that the "refusals to sell at wholesale . . . were solely to prevent municipal power systems from eroding its monopolistic position."[10]

Twelve years later in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, the Court found an unlawful refusal to deal with a rival in a decision subsequently described by the Court as being "at or near the outer boundary of § 2 liability."[11] The Court found that a firm operating three of four mountain ski areas in Aspen, Colorado, violated section 2 by refusing to continue cooperating with the firm that owned the fourth ski area in offering a combined four-area ski pass.[12] In reaching this conclusion, the Court focused on defendant's refusal to sell its rival any lift tickets, even at retail prices,[13] and its refusal to accept retail-price coupons for its mountains issued by its rival, even though the coupons would have provided defendant "with immediate benefits and would have satisfied its potential customers."[14] Characterizing the refusal to continue offering a joint ticket as "a decision by

[5] 250 U.S. at 307.

[6] 540 U.S. at 408, 416.

[7] *Id.* at 408.

[8] Eastman Kodak Co. v. S. Photo Materials Co., 273 U.S. 359, 375 (1927). Although not in the context of a unilateral refusal to deal, the Court also found a duty to deal when addressing the refusal of a joint venture to include one of its member's competitors. *See* Associated Press v. United States, 326 U.S. 1, 18–19 (1945). This chapter does not address those issues. *See e.g.*, Dennis W. Carlton, *A General Analysis of Exclusionary Conduct and Refusal to Deal—Why* Aspen *and* Kodak *Are Misguided*, 68 ANTITRUST L.J. 659, 660–61 (2001) (noting that "the duty to deal that a joint venture of rivals has" implicates "different issues than those raised by the duty to deal that a single firm should have").

[9] 410 U.S. 366, 368 (1973); *see id.* at 381–82.

[10] *Id.* at 378.

[11] *Trinko*, 540 U.S. at 409.

[12] Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 606, 611 (1985).

[13] *Id.* at 593.

[14] *Id.* at 610.

a monopolist to make an important change in the character of the market,"[15] the Court found that the evidence (including, in particular, the cessation of a prior course of voluntary dealing, which the Court presumed to have been profitable) permitted the jury to conclude "that there were no valid business reasons for the refusal."[16]

In 1992, the Supreme Court addressed another refusal to continue dealing with a rival in *Eastman Kodak Co. v. Image Technical Services, Inc.*[17] Both Kodak and independent service operators (ISOs) traditionally serviced Kodak copying equipment. ISOs sued after Kodak began limiting their ability to obtain replacement parts.[18] The Court found that a jury should determine whether Kodak violated the antitrust laws. While discussing Kodak's policies under the rubric of tying and in the context of allegations that went well beyond a unilateral, unconditional refusal to deal, the Court observed that although "[i]t is true that as a general matter a firm can refuse to deal with its competitors," that right "is not absolute; it exists only if there are legitimate competitive reasons for the refusal."[19]

A split among circuits followed. After remand in *Kodak* itself, a jury found that Kodak violated section 2 when it stopped selling replacement parts to ISOs.[20] The Ninth Circuit affirmed, approving a jury instruction that the antitrust laws prohibit a refusal to deal "that unnecessarily excludes or handicaps competitors in order to maintain a monopoly."[21] Some, but not all, of Kodak's parts were patented, and the court held that "a monopolist's 'desire to exclude others'" from using its patented work "'is a presumptively valid business justification'" for any refusal to license.[22] The court found that the ISOs had rebutted the presumption, concluding that the jury "would have found Kodak's presumptively valid business justification rebutted on the grounds of pretext."[23]

The Federal Circuit "decline[d] to follow" the Ninth Circuit's approach in a similar action concerning Xerox's refusal to continue selling patented materials to ISOs.[24] Distinguishing the Supreme Court's *Kodak* decision on the ground that "no patents had been asserted in defense of the antitrust claims" in that case, the court agreed with Xerox's assertion that the patent laws granted Xerox the right to refuse to sell to ISOs. It held that "[i]n the absence of any indication of illegal tying, fraud in the Patent and Trademark Office, or sham litigation, the patent holder may enforce the statutory right to exclude others from making, using, or selling the claimed invention free from liability under the antitrust laws."[25]

Many prominent commentators criticize this refusal-to-deal jurisprudence. For example, one asserts that *Aspen Skiing* and *Kodak* "suffer from confused economic reasoning."[26] Others similarly observe that "[a]ntitrust has twisted itself in knots in *Kodak* and other complementary market/aftermarket cases."[27] Another laments that "*Kodak* was a failed experiment in a type of economic engineering where antitrust has no place."[28] And another concludes that the Court's decision in *Aspen Skiing* "is bound to create systematic error."[29] Even commentators

[15] *Id.* at 604.

[16] *Id.* at 605.

[17] 504 U.S. 451 (1992).

[18] *Id.* at 458–59.

[19] *Id.* at 483 n.32.

[20] Image Technical Servs., Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1201 (9th Cir. 1997).

[21] *Id.* at 1209 (emphasis omitted).

[22] *Id.* at 1218 (quoting Data Gen. Corp. v. Grumman Sys. Support Corp., 36 F.3d 1147, 1187 (1st Cir. 1994)).

[23] *Id.* at 1219–20.

[24] *In re* Indep. Serv. Orgs. Antitrust Litig., 203 F.3d 1322, 1327 (Fed. Cir. 2000).

[25] *Id.*

[26] Carlton, *supra* note 8, at 659.

[27] Kenneth L. Glazer & Abbott B. Lipsky, Jr., *Unilateral Refusals to Deal Under Section 2 of the Sherman Act*, 63 ANTITRUST L.J. 749, 797 (1995).

[28] HOVENKAMP, *supra* note 2, at 310.

[29] Frank H. Easterbrook, *On Identifying Exclusionary Conduct*, 61 NOTRE DAME L. REV. 972, 973 (1986); *see also, e.g.,* Ronald A. Cass & Keith N. Hylton, *Preserving Competition: Economic Analysis, Legal Standards and* Microsoft, 8 GEO. MASON L. REV. 1, 27 (1999) (stating that *Aspen Skiing* "has been roundly criticized");

who agree with the result in *Aspen Skiing* concede that the decision lacks a "coherent analytical framework."[30]

In its most recent decision dealing with an alleged refusal to deal, the Supreme Court declined to find a duty to deal.[31] *Trinko* involved an alleged failure by Verizon to share its local telephone network with competitors as required by the 1996 Telecommunications Act (1996 Act).[32] The Court first held that the 1996 Act did not create new claims extending beyond existing antitrust standards and then held that Verizon's conduct did not consitute an illegal refusal to deal under the antitrust laws. According to the Court:

> 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. Thus, 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."[33]

The Supreme Court in *Trinko* cautioned that forcing a monopolist to deal with a rival may "lessen the incentive for the monopolist, the rival, or both to invest in . . . economically beneficial facilities."

While recognizing 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,'"[34] the Court also said it is important to be "very cautious in recognizing . . . exceptions" to that right "because of the uncertain virtue of forced sharing and the difficulty of identifying and remedying anticompetitive conduct by a single firm."[35] The Court further said that an allegedly anticompetitive refusal to deal "'should be deemed irremedia[ble] by antitrust law when compulsory access requires the court to assume the day-to-day controls characteristic of a regulatory agency.'"[36]

Herbert Hovenkamp, *The Monopolization Offense*, 61 OHIO ST. L.J. 1035, 1044–45 (2000) (noting that the implications of *Aspen* and *Kodak* "are problematic to say the least"); Michael Jacobs, *Introduction: Hail or Farewell? The* Aspen *Case 20 Years Later*, 73 ANTITRUST L.J. 59, 68 (2005) (asserting that the "problematic aspects of *Aspen* lead to a conclusion that the case is an anomaly" and that "*Aspen* was a poor tool for crafting important doctrine under Section 2; the Court's opinion did little to clarify the meaning of Section 2, and much to obscure it"); William E. Kovacic, *The Antitrust Paradox Revisited: Robert Bork and the Transformation of Modern Antitrust Policy*, 36 WAYNE L. REV. 1413, 1456 (1990) (noting that "many commentators have criticized [*Aspen Skiing*'s] result and reasoning"); James B. Speta, *Antitrust and Local Competition Under the Telecommunications Act*, 71 ANTITRUST L.J. 99, 135 (2003) (describing the *Aspen Skiing* decision as "much criticized"). *But see* Jonathan B. Baker, *Promoting Innovation Competition Through the* Aspen/Kodak *Rule*, 7 GEO. MASON L. REV. 495, 496–97 (1999) (arguing that the "*Aspen/Kodak* rule . . . is likely to promote innovation").

[30] Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price*, 96 YALE L.J. 209, 213 (1986) (stating that the *Aspen Skiing* Court "felt its way through murky precedent to what the Justices' instincts told them" was the "correct result[]" (internal quotation marks omitted)).

[31] Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 416 (2004).

[32] Telecommunications Act of 1996, Pub. L. No. 104–104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

[33] *Trinko*, 540 U.S. at 407–08 (quoting United States v. Colgate & Co., 250 U.S. 300, 307 (1919)).

[34] *Id.* at 408 (quoting Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 601 (1985)).

[35] *Id.* at 408.

[36] *Id.* at 415 (quoting Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 ANTITRUST L.J. 841, 853 (1990) (alteration in original)); *see also* Areeda, *supra*, at 855 ("No court should impose

III. Analysis

A. Using the Antitrust Laws to Require a Monopolist to Deal with a Rival

Recent jurisprudence and academic and policy thinking on unilateral, unconditional refusals to deal with rivals focus on several key principles.

- Antitrust law generally does not restrict a firm's right to choose those with which it will deal.[37]
- Antitrust laws protect the competitive process for the benefit of consumers, not the fortunes of any particular competitor.[38]
- Although compelling a firm to deal with a rival can increase short-term static competition, it can also diminish or eliminate incentives for firms (both the monopolist and other firms) to innovate in the future.[39]
- Judges and juries (and antitrust enforcers) are ill-equipped to act as industry regulators deciding the terms on which a firm should be required to sell its products or services.[40]

Using the antitrust laws to require a monopolist to deal with a rival creates a tension between static and dynamic welfare considerations. If a monopolist is forced to deal with a rival, consumers may immediately benefit from short-term price reductions or additional product options. These static benefits, however, are likely to come at a high cost—the loss or diminution of dynamic, long-term efficiencies.

It is nearly universally accepted that innovation—creating new ways of satisfying consumer demand or lowering costs—is key to increasing welfare.[41] Because innovation drives economic growth,[42] diminishing incentives to innovate can harm consumers. Thus, two commentators explain, "an essential element of appropriate antitrust policy is to allow a firm to capture as much of the surplus that, by its own investment, innovation, industry or foresight, the firm has itself brought into existence."[43]

Forcing a firm—even a monopolist—to deal with a rival on terms it would not choose "may lessen the incentive for the monopolist, the rival, or both" to innovate in the future.[44] That is, any firm would have to consider that its investment in a superior or desirable product or service might have to be shared with rivals on terms set by a court at the behest of the rival. In addition, before investing in developing their own improved products to compete in the market, rivals would consider whether they could instead convince a court to give them access to a competitor's product. In light of these potentially skewed investment and innovation decisions and their detrimental impact on economic growth and welfare, the Supreme Court in *Trinko* underscored "the uncertain virtue of forced sharing."[45] Panelists generally agreed that there likely are few circumstances where forced sharing would help consumers in the long run.[46]

a duty to deal that it cannot explain or adequately and reasonably supervise.").

[37] *E.g.*, *Colgate*, 250 U.S. at 307 (explaining that the Sherman Act generally "does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise [its] own independent discretion as to parties with whom [it] will deal").

[38] *E.g.*, Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977) ("The antitrust laws . . . were enacted for 'the protection of competition not competitors.'" (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962))).

[39] *See Trinko*, 540 U.S. at 407–08.

[40] *See id.* at 408.

[41] *See, e.g.*, WILLIAM J. BAUMOL, THE FREE-MARKET INNOVATION MACHINE 20 (2002).

[42] *See, e.g.*, Robert M. Solow, *Technical Change and the Aggregate Production Function*, 39 REV. ECON. & STAT. 312, 316 (1957).

[43] Carlton & Heyer, *supra* note 3, at 1.

[44] *Trinko*, 540 U.S. at 408. *But cf.* July 18 Hr'g Tr., *supra* note 2, at 44 (Salop) (stating that "monopolists have weaker innovation incentives").

[45] 540 U.S. at 408.

[46] *See, e.g.*, Sherman Act Section 2 Joint Hearing: Conduct as Related to Competition Hr'g Tr. 123, May 8, 2007 [hereinafter May 8 Hr'g Tr.] (Rule); July 18 Hr'g Tr., *supra* note 2, at 26 (Pitofsky) ("Let me start with the proposition that the general rule is and must be no general duty to deal."); *id.* at 107 (Salop) (stating that "very few refusals to deal would be actionable under

Panelists generally agreed that there likely are few circumstances where forced sharing would help consumers in the long run.

As one panelist observed:

> [I]ndependent competition among competitors who are not relying upon one another for assistance or even for pulled punches in the competitive process is what best produces innovative products at low prices. . . . The uncertainty that is caused by indeterminate liability rules and duties to assist competitors [is] likely to retard desirable investment.[47]

Refusal-to-deal claims often involve a refusal to license intellectual-property rights, a setting raising particular concerns about the dampening of innovation incentives.[48] Recently, the Department and the FTC issued a Report dealing with antitrust enforcement and intellectual property, an entire chapter of which was devoted to whether there should be antitrust liability for a refusal to license patents.[49] In that Report, the agencies concluded that "liability for mere unilateral refusals to license will not play a meaningful part in the interface between patent rights and antitrust protections."[50]

In addition to the concern about long-run harm to consumers from forced sharing, there is also a concern, noted by the Court in *Trinko*, that courts would have to engage in price regulation, defining "the terms on which cooperation or related transactions will take place."[51] As the Supreme Court explained in *Trinko*, and panelists and commentators alike have emphasized, this is a task for which judges, juries, and antitrust enforcers are very poorly suited.[52] Because commercial relationships are typically complex and fluid, "[a]n antitrust court is unlikely to be an effective day-to-day enforcer of . . . detailed sharing obligations."[53] As one commentator explains, "[O]nce we get into the issue of fair compensation for the manufacturer's past R&D expenditures or simply fair compensation for his creative success, we are in a hopeless situation. . . . How would a court ever assess how much a firm should be fairly rewarded for its creative efforts?"[54]

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my view").

[47] July 18 Hr'g Tr., *supra* note 2, at 30 (Pate).

[48] *See, e.g.*, U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND PROTECTING COMPETITION 23–24 (2007), *available at* http://www.usdoj.gov/atr/public/hearings/ip/222655.pdf.

[49] *See id.* at 15–32.

[50] *Id.* at 30.

[51] George A. Hay, Trinko: *Going All the Way*, 50 ANTITRUST BULL. 527, 539 (2005); *see also, e.g.*, July 18 Hr'g Tr., *supra* note 2, at 24 (Pitofsky) ("[I]f you mandate disclosure, you have not just the decision about mandating, you have a decision about at what royalty, what terms, what timing, and so forth."); *id.* at 76 (Whitener) (stating that "we have to call it what it is, which is price regulation of every firm that is being forced to share"); *id.* at 110 (Walton) (asking "how do we get this pricing").

[52] 540 U.S. 398, 408 (2004) ("Enforced 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."); *see also, e.g.*, ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATION 102 (2007), *available at* http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf ("[F]orced sharing requires courts to determine the price at which such sharing must take place, thereby transforming antitrust courts into price regulators, a role for which they are ill suited."); July 18 Hr'g Tr., *supra* note 2, at 30 (Pate) (stating that courts "are not very well equipped" to set prices); *id.* at 92 (Walton) (reporting that General Motors and the FTC "argued for 19 years" about what were "reasonable" terms of dealing); Hovenkamp, *supra* note 29, at 1044 (observing that "antitrust courts are not public utility agencies").

[53] *Trinko*, 540 U.S. at 415; *see also* POSNER, *supra* note 2, at 242 ("Where the refusal to deal is unilateral, the only effective remedy is an order that the 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.").

[54] George A. Hay, *A Monopolist's "Duty to Deal": The Briar Patch Revisited*, 3 SEDONA CONF. J. 1, 5 (2002); *see also* May 8 Hr'g Tr., *supra* note 46, at 114 (Sidak) (stating that "regulating price . . . is fundamentally not something that a court can do").

Due to the difficulties of devising judicially manageable remedies and the risk that a remedy mandating forced sharing might diminish welfare, some commentators conclude that the antitrust laws should never compel rivals to deal.

In view of these remedial difficulties and the risk that a remedy mandating forced sharing might diminish welfare, some commentators conclude that the antitrust laws should never compel rivals to deal. Judge Posner, for example, concludes that "it cannot be sound antitrust law that, when Congress refuses or omits to regulate some aspect of a natural monopolist's behavior, the antitrust court will step in and, by decree, supply the missing regulatory regime."[55] Professor Hovenkamp raises the same concern, contending that forcing a firm to cooperate with rivals is appropriately dealt with through regulation, not the antitrust laws.[56] Several panelists agreed.[57]

Despite identifying these concerns with forced sharing, the Supreme Court in *Trinko* stated that the right to refuse to deal with rivals is not "unqualified" and reserved the possibility that a refusal to cooperate with rivals "[u]nder certain circumstances . . . can constitute anticompetitive conduct and violate §2."[58] Some commentators agree.[59] Some panelists also agreed, asserting that a per se rule of legality could either unacceptably risk failing to prevent or stop anticompetitive conduct[60] or lead to more sectoral regulation in the place of antitrust.[61]

The Supreme Court in *Trinko* stated that the right to refuse to deal with rivals is not "unqualified."

One panelist opined that a monopolist's decision to stop cooperating with a rival

[55] POSNER, *supra* note 2, at 243–44.

[56] *See* HOVENKAMP, *supra* note 2, at 270 (concluding that "[w]hile price-regulated monopoly may sometimes be appropriate, that decision must be made by a legislature, and never via the antitrust laws," because "a compulsory sales rule turns the defendant into a public utility and places the court in the indefensible position of price regulator"); Sherman Act Section 2 Joint Hearing: Welcome and Overview of Hearings Hr'g Tr. 51, June 20, 2006 (Hovenkamp) (stating that courts should "get out of the business" of forcing firms to deal with competitors under the antitrust laws).

[57] *See, e.g.*, May 8 Hr'g Tr., *supra* note 46, at 112 (Rule) (explaining that "in the area of refusals to deal, particularly if you are talking about unconditional unilateral refusals to deal, the circumstances under which you would ever be concerned . . . are so limited and so rare that that's precisely the kind of place you would want to have a rule of per se legality"); July 18 Hr'g Tr., *supra* note 2, at 59–71 (Walton) (describing the history of the FTC's investigation of GM's failure to deal with independent crash-part dealers and its own dealers on the same terms and stressing that the FTC ultimately found no violation in part because it did not want to commit extensive resources to reviewing GM's interpretations of to whom and at what price it could sell); *id.* at 72 (Whitener) (arguing that "unconditional refusals to deal with competitors simply do not constitute exclusionary conduct").

[58] 540 U.S. at 408.

[59] *See, e.g.*, Areeda, *supra* note 36, at 845 n.21 (stating that distinctions between unilateral conduct and concerted refusals to deal "do not mean that a monopolist should never be required to deal"); Carlton, *supra* note 8, at 660 ("Although it is understandable why some could take the position that the evidence to date on refusals to deal is so ambiguous that there should be no antitrust restrictions, I do not take such an extreme view. I start from the premise that there can be a legitimate role for antitrust restrictions on refusals to deal."); A. Douglas Melamed, *Exclusionary Conduct Under the Antitrust Laws: Balancing, Sacrifice, and Refusals to Deal*, 20 BERKELEY TECH. L.J. 1247, 1266 (2005) (advocating application of the profit-sacrifice test as a means of prohibiting inefficient refusals to deal while avoiding antitrust intervention when forced sharing would be inefficient).

[60] Steven C. Salop, Refusals to Deal 4 (July 18, 2006) (hearing submission); *see also* May 8 Hr'g Tr., *supra* note 46, at 110 (Melamed) (stating that "we ought not to have a per se lawful rule because when an AT&T refuses to deal with a rival even though it deals with others interconnecting into the market or when an Aspen refuses to accept tickets sold at retail prices to a competitor, there ought to be some room to say now we know he has gone too far"); July 18 Hr'g Tr., *supra* note 2, at 25 (Pitofsky) (questioning giving "free rei[]n for the monopolist").

[61] Sherman Act Section 2 Joint Hearing: Policy Issues Hr'g Tr. 116, May 1, 2007 [hereinafter May 1 Hr'g Tr.] (McDavid).

without legitimate justification is "a perfectly legitimate basis for inferring harm to competition."[62] Another panelist noted, however, that there is no reason to believe that "a course of conduct that was once entered into remains efficient forever."[63] Hearing testimony further cautioned that a duty of continued dealing could discourage any dealing in the first place.[64] In light of these latter concerns, the Department believes that a firm's termination of a prior course of dealing generally should not be a significant factor in assessing whether the antitrust laws impose a duty to deal with a rival.

In addition, some panelists disagreed that the difficulty of crafting administrable, effective remedies supports a rule of per se legality.[65] Some suggested that a court may set terms of dealing without excessive difficulty in certain circumstances, for example by using the terms at which sales are made to other companies as a benchmark.[66]

[62] *Id.* at 115 (Baker).

[63] July 18 Hr'g Tr., *supra* note 2, at 37 (Pate); *see also* May 1 Hr'g Tr., *supra* note 61, at 113 (Elhauge) (terming reliance on termination of a course of dealing a "misbegotten notion").

[64] July 18 Hr'g Tr., *supra* note 2, at 37–38 (Pate); *see also* Olympia Equip. Leasing Co. v. W. Union Tel. Co., 797 F.2d 370, 375 (7th Cir. 1986) (Posner, J.) ("If [defendant] had known that by taking steps to promote competition it would be laying itself open to an antitrust suit . . . it probably would not have taken them.").

[65] May 8 Hr'g Tr., *supra* note 46, at 109 (Melamed) ("Answering the liability question with the remedy question is a mistake."); *id.* at 117 (Pitofsky) ("I am upset with the following process of thinking. This is a very, very difficult issue and the remedy is extremely difficult to work out and, therefore, let's call it per se legal. I don't think that's the way antitrust law should proceed.").

[66] *Id.* at 110 (Melamed) (suggesting that "a contemporary discriminating benchmark" is likely to be necessary for demonstrating a refusal to deal); May 1 Hr'g Tr., *supra* note 61, at 116 (Kolasky) (noting that sales to others provide basis for an administrable remedy); July 18 Hr'g Tr., *supra* note 2, at 25 (Pitofsky) ("Sometimes the remedy is easy. Perhaps the monopolist has already been licensing other people, but refuses to license potential competitors. It's not common, but it happens."); *id.* at 57 (Salop) ("Market prices often provide a good benchmark.").

Panelists who supported potential liability for refusals to deal proposed a number of different tests for assessing when a firm should be required to accept a rival's offer to deal. Two panelists endorsed tests ultimately balancing procompetitive and anticompetitive effects of a refusal to deal.[67] A third panelist favored a test under which a monopolist would be compelled to accept offers to deal with a rival above a "protected profits benchmark," that is, a price that would compensate the defendant for its loss of monopoly profits from customers that shift from dealing with the defendant to dealing with the plaintiff.[68] Two other panelists endorsed focusing the inquiry on whether the practice "would make no economic sense for the defendant but for its tendency to eliminate or lessen competition."[69]

After reviewing and considering the case law and commentary, as well as the panelists' views, the Department believes that there is a significant risk of long-run harm to consumers from antitrust intervention against unilateral, unconditional refusals to deal with rivals, particularly considering the effect of economy-wide disincentives and remedial difficulties. Then-Judge Breyer's assessment of the difficulties inherent in establishing whether a price is illegally high under the antitrust laws applies with equal force to evaluating the sufficiency of an offer in refusal-to-deal cases:

> [H]ow is a judge or jury to determine a "fair price?" Is it the price charged by other suppliers of the [monopoly] product? None exist. Is it the price that competition "would have set" were the [market] not monopolized? How can the court determine this price without examining costs and demands, indeed without acting like a rate-setting regulatory agency, the rate-setting proceedings of which often last for several years? . . . Must it be [sufficient]

[67] July 18 Hr'g Tr., *supra* note 2, at 16 (Kolasky); *id.* at 21–22, 25–26 (Pitofsky).

[68] *Id.* at 48 (Salop).

[69] May 8 Hr'g Tr., *supra* note 46, at 115 (Melamed); R. Hewitt Pate, Refusals to Deal and Essential Facilities 23 (July 18, 2006) (hearing submission).

> for all independent competing firms to make a "living profit," no matter how inefficient they may be? If not, how does one identify the "inefficient" firms? And how should the court respond when costs or demands change over time, as they inevitably will?[70]

The Department thus concludes that antitrust liability for unilateral, unconditional refusals to deal with competitors should not play a meaningful part in section 2 enforcement.[71]

B. The Essential-Facilities Doctrine

The essential-facilities doctrine derives from the 1912 *United States v. Terminal Railroad Ass'n of St. Louis* decision in which the Supreme Court condemned a consortium's combination of railroad facilities necessary to carry freight traffic or passengers across the Mississippi River at St. Louis. Rather than order dissolution, the Court held that the consortium could continue so long as it either admitted other railroads into the consortium or agreed to charge railroads that were not in the consortium fees that would "place every such [railroad] upon as nearly an equal plane . . . as that occupied by the [consortium members]."[72]

Although the case involved a joint venture among competitors, lower courts have drawn from *Terminal Railroad* the essential-facilities doctrine—the proposition that the antitrust laws require a single firm in control of a facility essential to its competitors to provide reasonable access to the facility if possible.[73] In *MCI*, the Seventh Circuit set forth a leading formulation of the doctrine, under which a plaintiff must prove four elements to establish liability and defendant's obligation to provide access: "(1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility."[74]

Aspen Skiing contains the Supreme Court's first explicit mention of the essential-facilities doctrine. The Tenth Circuit had affirmed liability on multiple grounds, including the theory that the joint lift ticket constituted an essential facility to which plaintiff had a right of access.[75] The Supreme Court declined "to consider the possible relevance of the 'essential facilities' doctrine" and affirmed on other grounds.[76] In *Trinko*, the Supreme Court similarly declined "either to recognize . . . or to repudiate" the doctrine, noting that, even if it were to exist, it would be inapplicable where government regulations included "extensive provision for access" to the allegedly essential facility.[77]

Many commentators criticize the essential-facilities doctrine, noting that the doctrine fails to provide clear guidance as to what constitutes a facility, what makes a facility essential, and what constitutes a denial of access.[78] Similarly,

[70] Town of Concord v. Boston Edison Co., 915 F.2d 17, 25 (1st Cir. 1990) (Breyer, C.J.).

[71] This is consistent with the conclusion of the 2007 report of the Department and the FTC regarding antitrust enforcement and intellectual property. *See* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, *supra* note 48, at 32.

[72] United States v. Terminal R.R. Ass'n of St. Louis, 224 U.S. 383, 411 (1912).

[73] *See, e.g.*, MetroNet Servs. Corp. v. Qwest Corp., 383 F.3d 1124, 1128–29 (9th Cir. 2004); MCI Commc'ns Corp. v. AT&T, 708 F.2d 1081, 1132–33 (7th Cir. 1983); Hecht v. Pro-Football, Inc., 570 F.2d 982, 992–93 (D.C. Cir. 1977); United States v. AT&T, 524 F. Supp. 1336, 1360–61 (D.D.C. 1981).

[74] *MCI*, 708 F.2d at 1132–33; *see also Hecht*, 570 F.2d at 992 ("The essential facility doctrine . . . states that 'where facilities cannot practicably be duplicated by would-be competitors, those in possession of them must allow them to be shared on fair terms.'"(citations omitted)); July 18 Hr'g Tr., *supra* note 2, at 96 (Pitofsky) (stating that "virtually every lower court adheres to" the Seventh Circuit's definition of essential facilities set forth in the 1983 *MCI* decision).

[75] Aspen Highlands Skiing Corp. v. Aspen Skiing Co., 738 F.2d 1509, 1520–21 (10th Cir. 1984), *aff'd*, 472 U.S. 585 (1985).

[76] 472 U.S. at 611 n.44.

[77] 540 U.S. 398, 411 (2004).

[78] *See, e.g.*, 3A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW, ¶ 771c, at 173 (2d ed. 2002) (noting that "the essential facility doctrine is both harmful and unnecessary and should be abandoned"); Areeda, *supra* note 36, at 852 ("Compulsory access, if it exists at all, is and should be very exceptional."); Donald I. Baker, *Compulsory Access to Network Joint*

many panelists recommended that it be expressly repudiated,[79] although some others supported a limited application of the doctrine in "extraordinary cases."[80]

As critics of the doctrine have observed, each *MCI* factor raises difficult issues for courts. For example, a court must determine what constitutes a facility and how critical access to the facility is to effective competition.[81] The second *MCI* element, asking whether a competitor can reasonably duplicate the facility, may require the court to determine whether the costs of duplicating the facility are reasonable.[82] The third element, denial of access, may appear uncomplicated when an absolute denial is involved, but can become complex when a more limited denial is alleged or when parties merely disagree on the price or other terms at which access to some asset can be bought.[83] Some cases suggest that essential facilities must be made available on terms that are "just and reasonable"[84] or "nondiscriminatory,"[85] but they do not provide any useful guidance on when terms of access will be regarded to be "unreasonable."[86] Analysis of this issue may involve evaluation of the outcome of price negotiations between the monopolist and its competitor, making judicial administrability difficult.[87] Finally, evaluating the feasibility of providing the facility may require the court to make difficult judgments about the impact of forced sharing on the efficient and safe functioning of the facility.[88]

More basically, commentators point out that the concerns about innovation incentives and judicial capacity arising in refusal-to-deal cases apply equally in essential-facility cases. For

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Ventures Under the Sherman Act: Rules or Roulette?, 1993 UTAH L. REV. 999, 1006 (stating that "competition among networks, rather than judicial compulsion, should be the preferred option"); Michael Boudin, *Antitrust Doctrine and the Sway of Metaphor*, 75 GEO. L.J. 395, 402 (1986) (noting "embarrassing weakness" of essential facilities doctrine); Abbott B. Lipsky, Jr. & J. Gregory Sidak, *Essential Facilities*, 51 STAN. L. REV. 1187, 1195 (1999) (stating that "mandatory access remedies, such as the essential facilities doctrine, do not fit comfortably within antitrust law"); Gregory J. Werden, *The Law and Economics of the Essential Facility Doctrine*, 32 ST. LOUIS U. L.J. 433, 480 (1987) (asserting that "courts should reject the doctrine").

79 July 18 Hr'g Tr., *supra* note 2, at 116 (Kolasky) ("I think the essential facilities doctrine should be abandoned all together."); *id.* (Whitener) (stating that he "would eliminate the doctrine").

80 *Id.* at 99 (Salop); *see also id.* at 26 (Pitofsky) (stating that essential facilities doctrine is needed to deal with "bottleneck monopol[ies]"); *id.* at 98–99 (Salop) (asserting that there is no reason a court should not step in when, by "an accident of history," an industry that should be regulated is not, and urging that, although regulation by courts is "rare," that is "not to say that it should never be done").

81 *See, e.g.*, Lipsky & Sidak, *supra* note 78, at 1212 ("'[E]ssentiality' and the 'practicability of duplication' are issues that can depend on matters of degree. . . . It may be difficult indeed to determine whether exclusion from the use of a particular facility will mean inconvenience, extinction, or some intermediate degree of harm to the excluded competitor."); Werden, *supra* note 78, at 452–53 (discussing lack of clarity in case law regarding what constitutes a facility).

82 *See* Lipsky & Sidak, *supra* note 78, at 1211–13; *see also* Fishman v. Estate of Wirtz, 807 F.2d 520, 540 (7th Cir. 1986) (finding a basketball arena to be an essential facility because it "was not duplicable without an expenditure that would have been unreasonable in light of the size of the transaction such duplication would have facilitated").

83 *See* Werden, *supra* note 78, at 456 (discussing the difficulties of evaluating "less overt methods of disadvantaging a competitor" than complete denial of access to a facility).

84 United States v. Terminal R.R. Ass'n of St. Louis, 224 U.S. 383, 411 (1912).

85 MCI Commc'ns v. AT&T, 708 F.2d 1081, 1148 (7th Cir. 1983).

86 *See, e.g.*, Werden, *supra* note 78, at 456 ("The cases provide no guidance as to when terms of access are unreasonable.").

87 *See, e.g.*, *id.*

88 *See, e.g.*, State of Ill. *ex rel.* Burris v. Panhandle E. Pipe Line Co., 935 F.2d 1469, 1483 (7th Cir. 1991) (stating that the feasibility requirement "excuses refusals to provide access [to an essential facility] justified by the owner's legitimate business concerns"); Hecht v. Pro-Football, Inc., 570 F.2d 982, 992–93 (D.C. Cir. 1977) ("The antitrust laws do not require that an essential facility be shared if such sharing would be impractical or would inhibit the defendant's ability to serve its customers adequately."); *see also* Thomas E. Kauper, *Section Two of the Sherman Act: The Search for Standards*, 93 GEO. L.J. 1623, 1626 n.21 (2005) ("Recent cases indicate that sharing even an essential facility is not required where there is an efficiency reason for not doing so.").

example, a firm may be unwilling to assume the risk and costs of creating a facility if it could later be compelled to share that facility on terms it would not otherwise have chosen.[89] Moreover, commentators note that courts granting relief under the doctrine would face the nettlesome task of setting prices and other terms of dealing.[90] In short, the consequences of forcing a firm to deal with its rivals do not disappear with the substitution of the rubric essential facilities for refusals to deal.

The Department agrees that the essential-facilities doctrine is a flawed means of deciding whether a unilateral, unconditional refusal to deal harms competition. The doctrine is essentially a "label that beguiles some commentators and courts into pronouncing a duty to deal without analyzing [its] implications."[91] In addition to the ambiguities and difficulties of application discussed above, the doctrine does not explicitly require harm to competition, rather than to competitors; does not require that conferring access substantially improve competition; and does not expressly allow for a full consideration of legitimate business justifications. As Professor Areeda put it, essential facilities "is less a doctrine than an epithet, indicating some exception to the right to keep one's creations to oneself, but not telling us what those exceptions are."[92]

The Department agrees that the essential-facilities doctrine is a flawed means of deciding whether a unilateral, unconditional refusal to deal harms competition.

IV. Conclusion

The Department believes that there is a significant risk of long-run harm to consumers from antitrust intervention against unilateral, unconditional refusals to deal with rivals, particularly considering the effects of economy-wide disincentives and remedial difficulties. The Department thus concludes that antitrust liability for unilateral, unconditional refusals to deal with rivals should not play a meaningful part in section 2 enforcement.

The Department believes that antitrust liability for unilateral, unconditional refusals to deal with rivals should not play a meaningful part in section 2 enforcement.

[89] *See e.g.*, Areeda, *supra* note 36, at 851 ("Required sharing discourages building facilities . . . even though they benefit consumers."); Paul D. Marquardt & Mark Leddy, *The Essential Facilities Doctrine and Intellectual Property Rights: A Response to Pitofsky, Patterson, and Hooks*, 70 ANTITRUST L. J. 847, 856 (2003) ("If innovation did not carry the promise of potential economic return, there would of course be much less of it."). *Cf.* AREEDA & HOVENKAMP, *supra* note 78, ¶ 771b, at 172 (stating that forced sharing of an essential facility "discourages firms from developing their own alternative inputs").

[90] *See e.g.*, Frank H. Easterbrook, *When Is It Worthwhile to Use Courts to Search for Exclusionary Conduct?*, 2003 COLUM. BUS. L. REV. 345, 352 ("A duty to [share an essential facility] leaves the price term open, so it fails to handle monopoly unless the court becomes a rate regulator—and few think that the isolated examples of judicial rate regulation, such as the blanket license decree for copyrights, have been successful."(footnote omitted)); Lipsky & Sidak, *supra* note 78, at 1248 (stating that courts "feel ill-equipped[] to prescribe and monitor price, terms, and condition of access").

[91] AREEDA & HOVENKAMP, *supra* note 78, ¶ 772a, at 175.

[92] Areeda, *supra* note 36, at 841.

Some Recent Decisions