PUBLIC REDACTED

No. 18-2852

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

VIAMEDIA, INC.,
Plaintiff-Appellant,

v.

COMCAST CORPORATION and COMCAST CABLE COMMUNICATIONS MANAGEMENT, LLC,
Defendants-Appellees.

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

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PLAINTIFF-APPELLANT VIAMEDIA, INC.'S OPENING BRIEF

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October 25, 2018

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 18-2852

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

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

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(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Viamedia, Inc.

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Kellogg, Hansen, Todd, Figel & Frederick, P.L.L.C.

Richard J. Prendergast, Ltd.

Mayer Brown LLP

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

Viamedia, Inc. is a privately held company. Its parent corporation is Viamedia Conduit LLC, which is also a privately held company.

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: s/ Aaron M. Panner Date: 10/25/2018

Attorney's Printed Name: Aaron M. Panner

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Attorney's Signature: s/ James M. Webster Date: 10/25/2018

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Attorney's Signature: s/ Derek T. Ho Date: 10/25/2018

Attorney's Printed Name: Derek T. Ho

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N/A

Attorney's Signature: s/ Matthew R. Huppert Date: 10/25/2018

Attorney's Printed Name: Matthew R. Huppert

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JURISDICTIONAL STATEMENT

The United States District Court for the Northern District of Illinois had jurisdiction pursuant to 28 U.S.C. §§ 1331, 1337(a), and 1367(a), because this action arises under Section 2 of the Sherman Act, 15 U.S.C. § 2, and seeks monetary and equitable relief under Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26.

This Court has jurisdiction pursuant to 28 U.S.C. §§ 1291 and 1294. Final judgment was entered August 16, 2018. SA1. The notice of appeal was timely filed on August 24, 2018. A897.

INTRODUCTION

This case involves Comcast's successful efforts to use its monopoly power over joint-selling arrangements for cable advertising to drive Viamedia out of business in geographic markets where Viamedia once competed with Comcast in providing cable advertising representation services. Comcast drove Viamedia out of Chicago and Detroit, extending its monopoly in those cities and elsewhere. And it pushed Viamedia to the brink, harming competition – and consumers – across the country. Section 2 of the Sherman Act condemns such conduct.

Cable companies and other distributors of video programming sell blocks of commercial advertising (known as availabilities or "avails") to local, regional, and national advertisers. Because each distributor can deliver ads only to its own subscribers – unlike broadcasters, which can reach every household in their broadcast area – multiple competing distributors in regional markets have, for more

than 25 years, gotten together to form "interconnects," collective selling arrangements that allow a single interconnect manager to sell ads for the benefit of all participants, pricing the group's avails and selling them to regional advertisers looking to reach every household in the metropolitan area served by any of the participating distributors.

Distributors typically sell about one-third of avails directly to local merchants; allocate about one-third of avails to the regional interconnect; and allocate the remainder to a national cooperative ("NCC") that places ads across broad regions. Some distributors – particularly small ones – rely on a third-party firm, known as an "ad rep," to sell their avails and to make and to monitor arrangements with interconnects and NCC ("Ad Rep Services").

Viamedia is one such ad rep. Comcast – through its "Spotlight" division[1] – is another. Comcast not only handles its own avails but also represents other distributors, including distributors that compete with Comcast for subscribers and local advertising revenue. Where it is the dominant distributor, Comcast also controls the interconnect. Comcast represents other distributors serving 15 million subscribers (on top of 22 million Comcast subscribers, for a total of 37 million subscribers in the United States), manages 15 of the top 25 interconnects, and owns 60% of NCC.

For a decade – until 2012 – Comcast had an arrangement with Viamedia whereby Viamedia contributed avails of its clients RCN and WOW!, two of

[1] Spotlight is now Comcast Cable Communications Management, LLC.

Comcast's competitors, to the interconnects controlled by Comcast in Chicago and Detroit. That arrangement was consistent with the long practice of broad inclusion of distributors in interconnects. Comcast profited from that arrangement: it earned substantial commissions by selling competitors' avails through the interconnects without significant incremental cost, and broader participation made the interconnect more attractive to advertisers, enhancing the value of Comcast's own avails. Nevertheless, Comcast terminated the arrangement and refused to allow RCN and WOW! to have their avails sold through any Comcast-controlled interconnect as long as they were represented by Viamedia. Comcast adopted that policy for the avowed purpose of making it impossible for Viamedia to compete as an ad rep, ensuring that RCN and WOW! would be forced to turn to Comcast for Ad Rep Services, thereby extending Comcast's monopoly. Comcast succeeded, and Viamedia was forced to exit the market in Chicago and Detroit.

Viamedia challenged Comcast's conduct under § 2 of the Sherman Act, but the district court ruled for Comcast. First, on Comcast's motion to dismiss, the district court held that Comcast had no antitrust duty to continue to allow Viamedia's clients to access interconnects that Comcast controlled. Later, granting summary judgment on Viamedia's tying theory, the court held that Viamedia had not proffered evidence that Comcast had conditioned interconnect access on the purchase of Comcast's Ad Rep Services. These rulings provided the basis for the court's holdings that Viamedia failed to prove antitrust injury and that its experts' opinions would not assist the jury.

This Court should reverse. *First*, the complaint's allegations fit within the class of cases that require a monopolist to show that its refusal to deal with a competitor/customer was justified by legitimate competitive reasons. A monopolist can violate the Sherman Act when it terminates a voluntary course of dealing and denies to a rival something that the monopolist voluntarily provides to others – and thereby sacrifices short-term profits to achieve a long-term monopoly. That is what happened here: Comcast terminated a longstanding arrangement whereby Viamedia's clients could contribute their avails to the Chicago and Detroit interconnects; Comcast voluntarily provides such arrangements to other distributors (and benefits from such arrangements with other interconnect operators); and Comcast sacrificed profits that it can recoup by virtue of having eliminated its sole competitor. Such conduct "reveal[s] a distinctly anticompetitive bent." *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 409 (2004) (discussing *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985)). While Comcast may seek to justify its conduct, Viamedia's refusal-to-deal claim should not have been dismissed before discovery.

Second, having accepted that the services of an interconnect manager ("Interconnect Services") are a separate product from Ad Rep Services, the district court's conclusion that no reasonable juror could find that Comcast conditioned the sale of the first on purchase of the second – conduct the court had recognized as unlawful tying – was irreconcilable with the evidence and summary judgment standards. Evidence from Comcast and distributors represented by Viamedia

showed that Comcast had made clear that it would not provide Interconnect Services to competing distributors in Chicago and Detroit except on the condition that they agreed to purchase Ad Rep Services from Comcast as well. The court's finding that Comcast would have provided stand-alone Interconnect Services, had it been asked, improperly draws inferences in Comcast's favor.

None of the court's remaining rulings purport to provide an independent basis for the judgment. Moreover, the impact of Comcast's conduct was to cement its Ad Rep Services monopoly, depriving distributors of the choice of a third party – rather than their dominant competitor – as their ad rep. If left to stand, the district court's rulings would create a perverse outcome, giving a monopolist free rein to deprive customers of the ability to choose a preferred service provider. Accordingly, this Court should reverse and remand for further proceedings.

STATEMENT OF THE ISSUES

1. Whether the district court erred in granting Comcast's motion to dismiss Viamedia's refusal-to-deal theory of liability under § 2 of the Sherman Act, when Viamedia alleged that Comcast (1) terminated a voluntary and mutually beneficial arrangement guaranteeing Viamedia's clients access to "much-needed" interconnects; (2) thereby sacrificed profits for the promise of later monopoly recoupment; and (3) discriminated against Viamedia and its clients solely to eliminate Viamedia as a competitor.

2. Whether the district court erred in concluding that no reasonable jury could find that Comcast conditioned interconnect access on rival cable companies'

purchase of Ad Rep Services from Comcast, when, in addition to much additional evidence, Comcast admitted that it refused to provide interconnect access to distributors unless they purchased Ad Rep Services from Comcast.

3. Whether the district court erred in finding that Viamedia had failed to proffer evidence of antitrust injury even though the harm Viamedia suffered flowed from Comcast's unlawful tying conduct.

4. Whether the district court abused its discretion in excluding certain testimony by Viamedia's experts when its evidentiary ruling rested on its erroneous rulings regarding tying and antitrust injury, and when the district court ruled that a qualified economist's explanation of the economic significance of record evidence could not assist the jury.

STATEMENT OF THE CASE[2]

I. Industry Background

A. Video Distributors and Spot Cable Advertising

Multichannel video programming distributors ("MVPDs") – cable companies, direct broadcast satellite companies, and phone companies like Verizon and Frontier – deliver video programming to 92 million American households in 210 designated market areas ("DMAs"). A191 (¶ 15). Until the early 1990s, U.S. households were usually served by a single cable company, operating exclusively within a defined franchise area. *See*, *e.g.*, Report, *Competition, Rate Deregulation*

[2] Because Viamedia's refusal-to-deal claim was dismissed on the pleadings, Viamedia relies on the complaint's allegations as well as the evidence proffered at summary judgment.

and the Commission's Policies Relating to the Provision of Cable Television Service, 5 FCC Rcd 4962, ¶¶ 98, 134 (1990). Today, consumers typically have a choice among three or more MVPDs. A192 (¶¶ 16-17). The incumbent cable provider nevertheless frequently maintains a dominant position – including in Chicago, where Comcast serves 60% of subscribers, and Detroit, where Comcast serves 50% of subscribers. A723-24.

MVPDs distribute the programming of multiple national networks, like Comcast affiliates MSNBC and USA. A191 (¶ 15). By long tradition, pursuant to licensing agreements between networks and each MVPD, the MVPD is allocated two-to-three minutes per hour of programming that the MVPD can sell to advertisers. A193 (¶ 18). (The network sells the remainder to national advertisers.) These time periods are divided into blocks known as advertising availabilities, "avails" or "spot cable avails." A55 (¶ 29). Geographically, spot cable advertising can be aired across multiple DMAs where the MVPD operates, in a single DMA, or across one or more smaller advertising "zones" within an MVPD's DMA footprint. A193 (¶ 19).

Even before the emergence of competition among MVPDs, cable companies were often at a disadvantage relative to over-the-air broadcasters in selling avails to companies that wanted to advertise to an entire DMA. A198-99 (¶ 30). A single DMA was often divided among multiple franchise areas served by different MVPDs. As a result, while broadcasters could reach every household within a DMA, no individual MVPD could. *Id.* For many local merchants, avails are sold to run on a

single "zone" within a single MVPD's system. A62-63 (¶¶ 59-64). But for other advertisers – for example, a car dealership that wants to reach all viewers in a metropolitan area – such geographic restrictions made spot cable advertising comparatively less attractive. A57 (¶ 36); A198-99 (¶ 30).

To address that problem and to compete more effectively with local broadcasters, MVPDs came together, beginning in the 1990s, to create DMA-wide spot cable advertising cooperatives called "interconnects." A199 (¶ 30); A49, 57 (¶¶ 4, 36). Interconnects sell avails that air simultaneously on every participating MVPD system in the DMA. For this reason, broader participation makes the interconnect more valuable. A198-200 (¶¶ 30-31); A57-58 (¶¶ 35-37). Interconnects require an administrative mechanism – to identify and reserve avails sold to advertisers – and sales personnel. A201 (¶ 37). Thus, the interconnect is a joint-selling arrangement, not primarily a technological platform. Instead, the technical equipment needed to air advertising on a participating MVPD's system is also used to air interconnect advertising. A103 (¶ 23); A372-81 (82:2-91:6). Interconnects generally rely on participating MVPDs (or their ad reps) to supply this technology. A201 (¶ 37).

Originally, interconnects were generally run by independent boards of directors. A58-59 (¶¶ 38, 42). But, as a result of consolidation among MVPDs, interconnects typically came to be operated and controlled by the largest MVPD in each DMA. A103 (¶ 18); A59 (¶ 44). Comcast is the interconnect manager in dozens of DMAs, including Chicago, Detroit, and Hartford. A103 (¶ 19); A251.

MVPDs also sell avails through NCC, which is, effectively, a "super" interconnect, placing ads simultaneously in multiple DMAs and on multiple MVPD systems. A60 (¶¶ 49, 51). NCC was traditionally managed by the large national MVPDs. *Id.* (¶ 50). With industry consolidation, NCC came to be controlled by Comcast, Charter, and Cox, with Comcast owning 60%. *Id.*

B. Advertising Representation Services

An MVPD may outsource the job of managing its inventory of spot cable avails to a third-party advertising representative or "ad rep." A194-95 (¶¶ 22-23). In a typical arrangement, an MVPD transfers control of some or all avails to its ad rep, which then manages and sells those avails, paying its MVPD client a percentage of the revenue – sometimes with a guaranteed minimum. A195-96 (¶ 24). When a third-party firm takes over responsibility for all of an MVPD's avails, the representation is called "full turnkey." A196 (¶ 25); A104 (¶ 25).

Viamedia has been providing Ad Rep Services for decades and is now the only significant ad rep not affiliated with a major cable company. A551-52 (¶ 9); A893 (271:12-16). Viamedia provides a range of services, including marketing, pricing, and selling avails to advertisers; technical services, such as encoding video files, inserting ads, distributing ads, and remotely monitoring those ads; organizing avails into synchronized schedules; allocating avails across sales channels (e.g., local zone and DMA-wide); assisting MVPDs with marketing of their services; and financial services, such as billing. Viamedia performs these technical functions for

all ads that run on its clients' systems, including ads sold by interconnect managers. A194-95 (¶ 22); A701-02 (¶ 3).

Viamedia's main competitors are in-house advertising sales divisions of large cable incumbents, including Comcast, that offer Ad Rep Services to other MVPDs. A66 (¶ 79); A197, 203-04 (¶¶ 27, 43). Viamedia and Comcast compete – or once competed – in several DMAs, including Chicago, Detroit, and Hartford. A551-52 (¶ 9). Before 2012, Viamedia was a profitable and growing ad rep business. From 2008 to 2012, Viamedia grew from representing MVPDs serving ██ million subscribers to representing MVPDs serving ██ million subscribers. A847-49. Over that same period, Viamedia's annual revenues grew from $██ million to $██ million, and its EBITDA quadrupled from $█ million to $██ million. A606 (fig. 4).

II. Viamedia's 2003 Agreement with Comcast

Wide Open West ("WOW!") and RCN are "overbuilders" that install new wireline facilities to compete against incumbent cable companies like Comcast. A560, 562-63 (¶¶ 24, 31-32). By early 2003, Viamedia had contracted to provide Ad Rep Services on a full-turnkey basis to WOW! in Chicago and Detroit (and elsewhere) and to RCN in Chicago (and elsewhere). A430; A541. Among other things, Viamedia was responsible for providing technical services and maximizing revenue from each MVDP's avails; Viamedia paid each company approximately half of the gross revenue Viamedia received for those avails. A534-35 (§§ 3.1, 3.3); A543-44; A448-49 (§§ 3.1, 3.3); A457-59; A477-78, 481 (§§ 5.01-5.02, 5.10-5.11); A506.

In 2003, as today, Comcast controlled the interconnects in Chicago and Detroit. A211 (¶ 56). Viamedia and Comcast both recognized that it would be

mutually advantageous for the interconnect to include the spot cable avails of RCN and WOW!, which then served 300,000 households in Chicago and Detroit. *See* A430, 441. The two parties therefore negotiated an agreement (the "Interconnect Agreement") to govern the relationship between Viamedia (as ad rep to WOW! and RCN in Chicago and Detroit) and Comcast (as interconnect manager). *See* A430-43.

The agreement provided that Viamedia would make exclusively available to Comcast ██% of RCN's and WOW!'s avails in Chicago and Detroit for sale to national and DMA-wide advertisers. A432 (§ 2(a)). Comcast promised to pay Viamedia up to ██% of net revenues (i.e., revenues less Comcast's costs) generated from selling those avails. A431-33 (§§ 1.4, 2.1), 443. Viamedia also promised to make available its equipment for use in the insertion of advertising and to accommodate any additional equipment Comcast needed for this purpose. A434 (§ 4.3(a)). The parties also agreed that Comcast would not solicit RCN's or WOW!'s ad-rep business in Chicago or Detroit until four months before the expiration of Viamedia's then-existing contracts (though Comcast could engage in discussions initiated by RCN or WOW!, and RCN and WOW! could initiate such discussions). A439 (§ 9.10). Comcast generated more than $██ million in fees from selling RCN's and WOW!'s avails through the interconnects. A230-31, 247 (¶¶ 86, 116). That amount does not include any additional revenues that Comcast earned selling its own avails through the interconnect as a result of the enhanced product offered to advertisers.

III. Exclusion from the Interconnects

A. By 2011, Viamedia had extended its full-turnkey ad rep agreements with RCN and WOW! through the end of 2015 and 2014, respectively. A448 (§ 2.4(a)); A486 (§ 7.05(a)). (The WOW! agreement was later extended to the end of 2015. A529 (§ 2).) Comcast was aware of these extensions. A553 (¶ 14).

On December 7, 2011, Comcast notified Viamedia that Comcast would "not be renewing" the Interconnect Agreement after it expired on May 31, 2012. A546. Before doing so, Comcast conducted an internal analysis of the "Revenue Impact" of excluding RCN's and WOW!'s avails from the Chicago and Detroit interconnects, finding that Comcast would lose $[redacted] in revenue in the first six months after termination, including $[redacted] in lost cash flow. A838; A787-88 (160:8-162:16).

Despite those anticipated losses – which would continue as long as WOW! and RCN were barred from the interconnects – Comcast determined that departing from industry practice and terminating the Interconnect Agreement would help Comcast displace Viamedia as RCN's and WOW!'s ad rep. Comcast's internal talking points discussing the decision to cease [redacted] stated that [redacted] A844. [redacted] *Id.* (emphasis added); *see also* A841 [redacted]

B. The impact of Comcast's decision was in line with Comcast's pre-termination predictions: RCN and WOW! collectively lost approximately $█ million in advertising revenue from June 2012 to December 2015 (on which Comcast would have earned nearly $█ million in commissions), and Viamedia lost at least $█ million in cash flow. A248 (¶ 119); A637, 648 (figs. 35, 46).

WOW! – hopeful to preserve its partnership with Viamedia – repeatedly tried to persuade Comcast to permit WOW! to return to the Chicago and Detroit interconnects while still represented by Viamedia. *See* A834-36. But Comcast made clear that it would not allow WOW! to rejoin the interconnects unless WOW! agreed to employ Comcast, rather than Viamedia, as its ad rep. *See* A556-57 (¶ 19). RCN likewise filed comments with the Federal Communications Commission ("FCC") in 2014 stating that Comcast was "not being truthful" in claiming that "RCN is free to join the Comcast-managed interconnects at any time" because "Comcast will only allow RCN to join the interconnects if RCN employs Comcast [S]potlight instead of Viamedia" as its ad rep. A886-87 (brackets in original omitted).

In an attempt to obtain approval for its acquisition of Time Warner Cable, in 2014 Comcast testified before Congress that it would not exclude competitors from Comcast-controlled interconnects. A73 (¶ 118). Following that testimony, Viamedia contacted Comcast and requested that Viamedia's clients be allowed to participate in any Comcast-controlled interconnects, but Comcast refused. *Id.* (¶¶ 120-121). In the case of Chicago and Detroit specifically, Comcast offered to restore Viamedia's

clients to the interconnects only on terms that Comcast knew were commercially unreasonable and that Viamedia could not accept. A73-74 (¶¶ 122-123).

In 2015, as WOW!'s and RCN's contracts with Viamedia were set to expire, both companies sought proposals from Viamedia and Comcast for Ad Rep Services in Chicago and Detroit, among other DMAs. A116, 118 (¶¶ 90, 99). In response to WOW!'s solicitation, Comcast proposed a made possible by which was of a full-turnkey deal with Comcast. A232-33 (¶ 88). WOW! considered Viamedia to be and had renewed its contracts with Viamedia repeatedly between 2001 and 2015. A560 (¶¶ 25-26). But the financial advantage of regaining access to the interconnects in Chicago and Detroit led WOW! to sign with Comcast – even though WOW! continued to use Viamedia as its ad rep in non-Comcast DMAs, including Cleveland, Tampa, Columbus, and Evansville. A561-62 (¶ 29).

Similarly, though RCN had intended in 2014 to renew its contract with Viamedia, it declined to do so in 2015 due to the loss of interconnect revenue and related concerns about Viamedia's financial stability. A563-64 (¶¶ 34-36). Following the loss of WOW!'s and RCN's business, Viamedia was forced to exit the market for Ad Rep Services in Chicago and Detroit, leaving Comcast with 100% of those markets. A552 (¶ 12).

C. In Hartford – one of the only DMAs where Viamedia has been able to continue to provide Ad Rep Services despite its clients' exclusion from Comcast-controlled interconnect – Comcast's conduct has inflicted substantial financial losses on Viamedia. In 2014, Frontier acquired AT&T's telephone network in Hartford, over which AT&T had provided television service. A113 (¶ 71). AT&T had a full-turnkey agreement with Comcast in Hartford, where Comcast is the dominant MVPD and operates the interconnect; Frontier had the option of assuming that contract. A114 (¶ 72). Frontier, however, had previously contracted with Comcast as its ad rep in other DMAs, where it had been unhappy with Comcast's service, and it had replaced Comcast with Viamedia in those DMAs in 2010. A565 (¶ 37). As a result, Frontier signed a full-turnkey agreement with Viamedia in Hartford in May 2014. A114 (¶ 73). Since then, Frontier's avails have been excluded from the Hartford interconnect, even though Comcast sold those same avails through its Hartford interconnect when AT&T was represented by Comcast. A566 (¶ 39). As a result, the Hartford interconnect has been degraded, and Frontier – and Viamedia – have lost substantial revenues, with Viamedia's damages alone exceeding $█ million. A653 (fig. 53).[3]

D. Although Comcast refuses to allow MVPDs represented by Viamedia to participate in Comcast-controlled interconnects, Comcast permits other MVPDs to participate in Comcast-controlled interconnects on an interconnect-only basis – that

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[3] Viamedia seeks a total of approximately $160 million in damages, before trebling. A600 (fig. 3).

is, it agrees to allow MVPDs to contribute a percentage of their avails to the interconnect even though Comcast does not provide Ad Rep Services for the other avails. Since 2011, Comcast has agreed to interconnect-only arrangements with [redacted] A124-25 (¶ 125). Those interconnect-only agreements contain financial terms like those of the 2003 Viamedia-Comcast agreement, namely a fee to Comcast averaging approximately [redacted]% of revenue. *See* A325 (tbl. 1). These companies generally operate "in different local areas," such that Comcast does not compete against them in (self-)providing Ad Rep Services or in providing television service to end users.[4] A158 (¶ 57 n.80); A820-26.

Comcast (as an ad rep) and Viamedia have also both routinely entered into interconnect-only arrangements in DMAs where Comcast does not operate the interconnect. For example, since 2003, Viamedia has signed interconnect-only agreements with Charter, Time Warner Cable, and Cablevision in seven DMAs (including New York, Tampa, and Dallas) on behalf of six MVPDs (including RCN, WOW!, and Frontier). A205-08 (¶¶ 47, 49); A707 (¶ 18). And, as an ad rep, Comcast has signed interconnect-only deals with [redacted]

[4] According to Comcast, [redacted]'s system, which serves approximately [redacted] households in [redacted], "may overlap" with Comcast's system in the [redacted] DMA, which serves approximately [redacted] households. A826.

[redacted] A206-08 (¶¶ 48-49); A351-59; A820-26. Comcast earned more than $[redacted] between 2011 and 2015 as an intermediary in those interconnect-only arrangements. A247 (¶ 116 n.178).

E. Comcast's exclusion of Viamedia and its clients from Comcast-operated interconnects weakened Viamedia financially by depriving it of commissions derived from interconnect revenue, which weakened the financial offers Viamedia could make to current and prospective MVPD clients and caused MVPDs to lose confidence in Viamedia's financial viability. A560-62, 564, 566-69 (¶¶ 27-30, 35-36, 40-41, 46-49). Viamedia began losing major clients in 2013, including Verizon, RCN, and WOW!. A561-62, 564, 568-69 (¶¶ 29, 36, 47). Comcast's conduct has decimated Viamedia's business: it now represents MVPDs serving [redacted] million subscribers (down from [redacted] million in 2012) and earns $[redacted] million in EBITDA (down from $[redacted] million in 2012). A718 (¶ 47); A606 (fig. 4). Those declines have worsened as Comcast's conduct has continued.

IV. District Court Proceedings

On May 23, 2016, Viamedia sued, alleging that Comcast unlawfully monopolized the market for Ad Rep Services, *inter alia*, through refusal to deal, tying, and exclusive dealing. A37 (¶ 168). Comcast moved to dismiss. ECF 23, at 1.

A. The district court denied the motion in part and granted it in part. It denied the motion with respect to Viamedia's tying theory, holding that Viamedia had plausibly alleged (1) "distinct markets for spot cable advertising representation

services and Interconnect services," and (2) "the existence of a tying arrangement that coerces MVPDs to purchase the tied product, Comcast Spotlight's services." SA98-100. The court held that Viamedia had alleged antitrust injury, because "it plausibly claims that it was excluded from the market and injured by defendants' actions" and "that [Comcast's] conduct has diminished the quality of available spot cable advertising representation services" for "MVPDs [that] find Comcast Spotlight to be an inferior alternative to independent third-party representation." SA93-94 (internal quotation marks omitted).[5]

The district court granted Comcast's motion with respect to Viamedia's refusal-to-deal theory. It held that Viamedia had "not alleged or explained how [Comcast's] refusal to deal with it . . . has no rational procompetitive purpose." SA107. The district court held that Comcast's conduct "offers potentially improved efficiency" because requiring MVPDs to "deal with Comcast directly" to obtain Interconnect Services, rather than allowing them the option of obtaining those services through an intermediary, is a "prototypical valid business purpose." SA107-08.

B. Viamedia filed an amended complaint alleging that Comcast's refusal to deal was "irrational but for its anticompetitive effects." The amended complaint explained that "dealing with Viamedia would have entailed no cost to Comcast . . . ,

[5] With respect to Viamedia's exclusive-dealing theory, the court held that Viamedia had plausibly alleged that Comcast's "conduct harmed competition by excluding all competitors." SA104. To simplify the issues, Viamedia will no longer pursue exclusive dealing as a distinct theory of liability.

would have provided the Interconnect and Comcast . . . with immediate benefits, and would have served the interests of the Interconnect customers, namely the regional advertisers, to reach all subscribers in the market." A82, 85 (¶¶ 158, 168); *see also*, *e.g.*, A82-83 (¶¶ 159-161) (alleging Comcast's refusal diminished the value of its own interconnects and "forfeited direct fees that it otherwise would have received").

Comcast again moved to dismiss, ECF 45, and the district court again granted the motion on the same rationale. SA58-70. The district court reiterated that Comcast's conduct "potentially serves a procompetitive purpose" because it had allowed Comcast to "become 'a one-stop shop' . . . for MVPDs wishing to sell advertisements on a regional basis," and that it was Viamedia's burden to "show that the defendant's actions serve no rational procompetitive purpose." SA66, 69. The court held that Viamedia had "not adequately alleged that Comcast's elimination of a middleman in the regional spot cable advertising business was irrational but for its anticompetitive effect." SA69.

C. After discovery, Comcast moved for summary judgment. The district court granted Comcast's motion, holding that, though Comcast is indisputably a "monopolist," and though the interconnect is a "much-needed sales platform[]," "Comcast's refusal to deal with Viamedia – not coercive conduct directed at their mutual customers – is what caused Viamedia's injuries and damages." SA2-3.

1. The district court held that there was no triable issue as to Viamedia's tying theory. The court assumed that Ad Rep Services and Interconnect Services

were distinct for purposes of Viamedia's tying claim.[6] Nor did the district court question that Comcast had monopoly power in the tying product – Interconnect Services – that it used to consolidate its power in the market for the tied product – Ad Rep Services. But the court held that Viamedia could not "show that Comcast ever withheld the tying product *from customers* unless they also purchase the tied product" because "[t]he real rub of Viamedia's tying claim is, instead, that Comcast withheld the tying product *from its rival Viamedia.*" SA32. The district court found no evidence "showing that Comcast told customers [i.e., rival MVPDs] that they could not receive an interconnect-only deal." SA31. Rather, the court held that a reasonable jury would have to conclude that RCN and WOW! "could have received [Interconnect Services] without [Ad Rep Services]" because Comcast had sometimes agreed to interconnect-only arrangements with other MVPDs in other DMAs. SA36.

The court also found that Viamedia's argument, at the motion-to-dismiss stage, that it was not asserting a "free-standing" "monopoly leveraging" claim meant that it had waived the argument that Comcast's conduct could violate § 2 if it did not also constitute tying (or exclusive dealing). SA47.

2. The district court held that there was no triable issue as to antitrust injury because "[Comcast's] refusal to deal with [Viamedia] explains entirely Viamedia's injuries," and "tying and exclusive dealing were not 'but for' causes of

[6] Viamedia had defined Ad Rep Services and Interconnect Services in detail. *See* A547 (¶ 1); A416-17.

Viamedia's injuries." SA51-52. The court likewise held that there was no triable issue as to damages because Viamedia had "fail[ed] to disaggregate the damages caused by Comcast's lawful refusal to deal from Comcast's supposed tying, exclusive dealing, and other exclusionary conduct." SA54.

3. The district court also granted in part Comcast's motion to exclude testimony from Viamedia's experts. As to Viamedia's liability expert, Dr. Harold Furchtgott-Roth, the district court excluded nine paragraphs from his 120-paragraph opening report (his "tying opinions") because they (1) "rest[] exclusively on a lay interpretation of evidence," and (2) are "contrary to the law," in that they "seek to hold Comcast liable for the mere withholding of the tying product, not the forced sale of a tied product." SA41-43. The district court excluded "the entirety" of the opinions offered by Viamedia's damages expert, Dr. Thomas Lys, because "they rest on the unfounded assumption that Viamedia could have accessed the interconnects but for Comcast's anticompetitive conduct." SA55.

SUMMARY OF ARGUMENT

I. Viamedia adequately alleged that Comcast's refusal to deal with Viamedia violated § 2. As alleged in the complaint, Comcast terminated a voluntary course of dealing and sacrificed profits in the short term that it hoped to recoup by eliminating competition, refusing to provide to Viamedia the very thing that Comcast and other interconnect managers have long provided elsewhere. Such allegations are sufficient to state a claim for unlawful refusal to deal. The nature of the interconnect from which Viamedia's clients were excluded – a joint-selling

arrangement that depends on and gains value from cooperation among otherwise competing firms – reinforces the conclusion that Comcast's actions violate the Sherman Act.

II. Viamedia proffered sufficient evidence to allow a jury to conclude that Comcast conditioned its provision of Interconnect Services on the purchase of Ad Rep Services. Comcast's own witness testified that Comcast had a "business practice" of requiring MVPDs to "hire Comcast as [their] ad sales representative" to get access to Comcast's interconnects; Comcast told an MVPD that was subjected to the tie that the and that Comcast's Much additional evidence is to the same effect. Moreover, contrary to the district court's view, Viamedia never waived any argument that such conduct – whether or not technically considered "tying" – was anticompetitive.

III. The district court's antitrust injury ruling depends on the assumption that Viamedia's refusal-to-deal claim was properly dismissed; if this Court reverses the district court's motion-to-dismiss ruling, its antitrust injury ruling falls as well. Moreover, and in any event, the district court's ruling that Viamedia could not show antitrust injury even if it succeeded in proving unlawful tying was incorrect: where unlawful conduct causes harm – as it did here – a defendant cannot escape liability by arguing that it could have inflicted the same harm through lawful means.

IV. The district court abused its discretion by excluding testimony of Viamedia's experts. The court's *Daubert* rulings rested primarily on the erroneous legal rulings discussed above. Its ruling that an expert's explanation of the economic significance of record evidence does not go beyond a layperson's understanding was likewise an abuse of discretion.

STANDARD OF REVIEW

Dismissal on the pleadings is reviewed de novo, "constru[ing] the complaint in the light most favorable to the plaintiff, accepting as true all well-pleaded facts alleged, and drawing all possible inferences in [its] favor." *Tamayo v. Blagojevich*, 526 F.3d 1074, 1081 (7th Cir. 2008). The grant of summary judgment is likewise reviewed de novo. *Schlaf v. Safeguard Prop., LLC*, 899 F.3d 459, 465 (7th Cir. 2018). "Summary judgment is appropriate only if there are no disputed questions of material fact and the moving party is entitled to judgment as a matter of law." *Id.* This Court "examine[s] the record in the light most favorable to the [non-movant], granting [it] the benefit of all reasonable inferences that may be drawn from the evidence and reversing if [the Court] find[s] a genuine issue concerning any fact that might affect the outcome of the case." *Id.*; *see also Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 456 (1992) (non-movant's "version of any disputed issue of fact . . . is presumed correct").

The district court stated that, "at summary judgment, an antitrust claimant must present evidence that tends to exclude the possibility that the [defendant's] conduct was as consistent with competition as with illegal conduct." SA23-24

(internal quotation marks omitted). To the extent the district court meant that a plaintiff in a § 2 case bears some special burden to rule out potentially lawful explanations for a defendant's conduct, the district court was mistaken: the plaintiff's burden is to demonstrate that there is sufficient evidence to conclude that the defendant's conduct is anticompetitive. *See*, *e.g.*, *United States v. Microsoft Corp.*, 253 F.3d 34, 58-59 (D.C. Cir. 2001). The "tends to exclude" standard – derived from *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) – is properly applied in § 1 cases to the question whether defendants' conduct resulted from conspiratorial agreement rather than unilateral action. *See Omnicare, Inc. v. UnitedHealth Grp., Inc.*, 629 F.3d 697, 707 (7th Cir. 2011). Any broader application of that standard in this case was erroneous. *But see* SA23 ("That is not to say that there is [a] heightened summary-judgment standard in antitrust cases – there is not.").

A district court's determination that expert testimony is inadmissible is reviewed for abuse of discretion. *Salgado ex rel. Salgado v. Gen. Motors Corp.*, 150 F.3d 735, 739 (7th Cir. 1998). Exclusion of expert testimony based on an error of law is reversed under this standard. *See*, *e.g.*, *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 402 (1990).

ARGUMENT

I. The Complaint's Allegations State a Claim for Unlawful Monopolization Based on Comcast's Refusal To Permit Viamedia's Clients To Participate in Comcast-Controlled Interconnects

A. Comcast's refusal to permit MVPDs in Chicago and Detroit to participate in interconnects so long as they were represented by Viamedia falls

within the category of refusals-to-deal that supports liability under § 2 of the Sherman Act. A firm violates § 2 when it (1) possesses "monopoly power in the relevant market"; and (2) engages in "the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004). This second element – "anticompetitive conduct," *id.* – normally does not encompass duties to "affirmatively . . . help . . . competitors." *Goldwasser v. Ameritech Corp.*, 222 F.3d 390, 398 (7th Cir. 2000); *Olympia Equip. Leasing Co. v. W. Union Tel. Co.*, 797 F.2d 370, 375-76 (7th Cir. 1986). Antitrust laws likewise, "as a general matter," do not "restrict the long recognized right of [a] trader or manufacturer . . . freely to exercise his own independent discretion as to parties with whom [it] will deal." *Trinko*, 540 U.S. at 408 (first alteration in original). Nevertheless, the law is clear that, "[u]nder certain circumstances, a refusal to cooperate with rivals can constitute anticompetitive conduct and violate § 2." *Id.*; *see Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).

Requiring a monopolist to deal with potential rivals can ease market entry and sustain existing competitors; all else equal, having many firms offering products and services – competitive rivalry – helps to generate the innovation and lower prices that benefit consumers, the core goal of antitrust law. *See, e.g.*, *Will v. Comprehensive Accounting Corp.*, 776 F.2d 665, 673 (7th Cir. 1985) ("Antitrust law is based on the premise that when markets are competitive, the process of sellers'

rivalry and buyers' choice produces the best results."). But indiscriminately imposing duties to deal can also risk dulling incentives for investment, requiring courts "to act as central planners," and possibly even facilitating collusion among competitors. *See Trinko*, 540 U.S. at 407-08.

Accordingly, a monopolist's unilateral refusal to deal with a competitor or potential competitor can violate § 2 when the monopolist's refusal to deal has seriously hampered competition and when the concerns militating against imposition of a duty to deal are absent or significantly attenuated. In *Aspen Skiing*, for example, the Supreme Court held that a monopolist violated § 2 by refusing to deal with a competitor because the defendant was willing "actually to forgo cash revenues and efficient methods of doing business for the sole purpose of driving its rival out of the market." *Goldwasser*, 222 F.3d at 398. As the Tenth Circuit recently elaborated, two features were critical to the Court's holding in *Aspen Skiing*: "[f]irst, . . . there [was] a preexisting voluntary and presumably profitable course of dealing between the monopolist and rival." *Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064, 1074 (10th Cir. 2013) (Gorsuch, J.). And, second, "the monopolist's discontinuation of the preexisting course of dealing . . . 'suggest[ed] a willingness to forsake short-term profits to achieve an anti-competitive end.'" *Id.* at 1075 (quoting *Trinko*, 540 U.S. at 407). The element of profit sacrifice is significant because, if the termination of *any* voluntary arrangement could give rise to liability, it might unnecessarily discourage voluntary dealing. *See Olympia Equip.*, 797 F.2d at 376.

The Supreme Court has also recognized that "a firm which controls a facility essential to its competitors may be guilty of monopolization if it refuses to allow them access to the facility." *Id.* Here, the crucial question is whether the monopoly supplier has "retaliate[d] against customers who have the temerity to compete with him[] by cutting such customers off." *Id.* Such a supplier "is severing a collateral relationship in order to discourage competition." *Id.*; *see also Novell*, 731 F.3d at 1075 (a monopolist "may have an incentive to take on . . . losses to drive rivals from the market or to discipline them for having the audacity to try competition on the merits"). Furthermore, in many such circumstances, the monopolist already shares the needed facility with some customers, and the primary concern is discrimination against a rival because it is a competitive threat to the monopolist. *See, e.g.*, *United States v. Terminal R.R. Ass'n of St. Louis*, 224 U.S. 383, 410-11 (1912); *Trinko*, 540 U.S. at 409 (monopolist's "unwillingness to renew the ticket *even if compensated at retail price* revealed a distinctly anticompetitive bent"); *Olympia Equip.*, 797 F.2d at 377 ("The essential feature of the refusal-to-deal cases [is] a monopoly supplier's discriminating against a customer because the customer has decided to compete with it . . . .").

Limiting refusal-to-deal claims to circumstances that share such features ensures that subjecting a monopolist's refusal to deal to scrutiny – demanding a procompetitive justification for the refusal and resolving the adequacy of that justification as a matter of fact – will not disserve antitrust law's goals. There will be no undue discouragement of investment if the plaintiff challenges the

termination of a voluntary, profitable arrangement, or if the monopolist refuses to sell to a competitor-customer on terms voluntarily offered to non-competitors. The administrative burdens on the courts are alleviated by the existence of a voluntary-dealing baseline that can supply the terms on which the defendant may be required to deal. *See*, *e.g.*, *MetroNet Servs. Corp. v. Qwest Corp.*, 383 F.3d 1124, 1133 (9th Cir. 2004). And in circumstances "where some cooperation is indispensable to effective competition," *Olympia Equip.*, 797 F.2d at 379, requiring a monopolist to permit an additional participant is unlikely to exacerbate any risk of harmful, collusive conduct. *See Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973) (requiring a retail distributor of power to duplicate interstate distribution facilities would preclude competition where it might otherwise benefit consumers); *Terminal R.R.*, 224 U.S. at 410 (a single railroad bridge and shared terminal facilities and turntables rather than several may reduce waste while preserving competition among the railroads that use those facilities); *see also Aspen Skiing*, 472 U.S. at 605-07 (a joint lift ticket promotes consumer convenience).

B. The complaint's allegations – reinforced by facts developed in discovery on Viamedia's remaining claims – satisfy the requirements of an unlawful refusal-to-deal claim, recognized by *Trinko*, *Aspen Skiing*, *Goldwasser*, *Olympia Equipment*, and decisions of other courts of appeals.

1. *First*, Comcast terminated a voluntary and profitable course of dealing with Viamedia, losing millions of dollars, including $[redacted] in the first six months alone. The complaint alleged that continuing the interconnect arrangement

with Viamedia in Chicago and Detroit offered only upside for Comcast in the short- to medium-term – it would have enhanced the value of Comcast's interconnects and entitled Comcast to ██% of the revenues generated from selling RCN's and WOW!'s avails through those interconnects. A80-82 (¶¶ 154-157). By contrast, the arrangement "would have entailed no cost to Comcast as the Interconnect manager." A82 (¶ 158). Continuing the arrangement posed no threat to whatever investment Comcast had made as interconnect manager in Chicago and Detroit, since Viamedia did not and does not compete with Comcast in the market for Interconnect Services anywhere. Comcast could not even identify any capital investment it had made in the interconnects, A369-81 (79:4-91:6) – not surprising, since interconnects depend on the infrastructure investment of participating MVPDs or their ad reps for technical functions, as described above.

By terminating its arrangement with Viamedia, Comcast thus deliberately sacrificed millions of dollars in profits – a sacrifice that makes sense only if Comcast believed that it would recoup those lost profits once it forced its sole competitor from the market. WOW! and RCN were under contract with Viamedia – as Comcast knew – through 2015. Comcast would necessarily continue to give up millions of dollars in profits each year for at least as long as those contracts lasted by forgoing commissions associated with their participation in the interconnect.

Evidence developed in discovery on Viamedia's other claims reveals that Comcast indeed made a calculation before excluding Viamedia that it would lose profits and that the profit sacrifice was worth it because it would help Comcast to

achieve its hoped-for monopoly in Ad Rep Services. For example, Spotlight's chief operating officer, Hank Oster, who made the decision not to renew the Interconnect Agreement, testified that [redacted]

A788-89 (165:17-22, 167:3-169:12). Mr. Oster admitted that [redacted] was a primary reason why Comcast decided not to renew the Interconnect Agreement. A789 (168:2-169:3). This is accordingly a case where "a reasonable jury could infer that [Comcast's] discontinuation of this arrangement suggested a willingness to sacrifice short-term profits . . . in a manner that was irrational but for its tendency to harm competition." *Novell*, 731 F.3d at 1076; *Olympia Equip.*, 797 F.2d at 378 (citing circumstances where a jury might find that a defendant had "forgo[ne] normal competitive benefits in the hope . . . of reaping long-term anticompetitive gains").

The allegations relevant to the Hartford interconnect likewise establish a voluntary-dealing baseline: Frontier's system (then owned by AT&T) had access to the Hartford interconnect, but Viamedia was rebuffed in its attempt to maintain that access for Frontier. Just as it did in Chicago and Detroit, Comcast has sacrificed profits in order to cripple Viamedia's efforts to compete as an ad rep in Hartford. In addition to Chicago, Detroit, and Hartford, Viamedia alleged that similar conduct was occurring or likely to occur in "many other DMAs" where

Comcast controls the interconnect. A78, 83 (¶¶ 142, 162). Those allegations were confirmed in discovery, which showed that Comcast has continued to refuse to allow Viamedia's clients to participate in interconnects in major DMAs across the country, such as Seattle, Minneapolis-St. Paul, Portland, and Baltimore. A218 (¶ 69) (citing evidence). If Viamedia were permitted discovery on its refusal-to-deal claims, the evidence would almost certainly show that these other refusals have similarly cost both Comcast and Viamedia millions.

2. *Second*, the complaint's allegations – and the post-complaint evidence that Comcast was perfectly willing to provide stand-alone interconnect access to non-competitors on the same terms that it refused such access to Viamedia for its clients – reinforce the conclusion that Viamedia's allegations state a claim. The value of an interconnect, as Viamedia alleged, depends on the participation of as many MVPDs as possible within a DMA; were there a single MVPD serving all households, there would be no need to have a mechanism for pooling avails. The interconnect is thus established *for the very purpose* of accommodating rival (or adjacent) MVPDs. *See* A57-58 (¶¶ 36-39) (interconnects were formed to "solve th[e] problem" of advertisers having "to cobble together a wide-footprint MVPD-based advertising campaign" by negotiating with each MVPD individually); *Olympia Equip.*, 797 F.2d at 377 ("[C]ompetition required some cooperation among competitors."). Selectively denying interconnect access to reinforce Comcast's monopoly in the provision of Ad Rep Services is precisely the sort of "discriminat[ion] against a customer because the customer has decided to compete

with it" that characterizes "refusal-to-deal cases" recognized by this Court. *Olympia Equip.*, 797 F.2d at 377.

Reinforcing that conclusion, discovery demonstrated that Comcast's refusal to deal with Viamedia was indeed discriminatory and motivated solely by Comcast's desire to eliminate an Ad-Rep-Services-market rival.[7] In particular, Comcast maintained a significant number of interconnect-only arrangements, almost exclusively with non-competing MVPDs in DMAs where Viamedia is not present, which allow those MVPDs to participate in Comcast-controlled interconnects on terms equivalent to those that Comcast had previously granted to Viamedia. *See supra* pp. 16-17. The only distinction is that Viamedia competes with Comcast in the provision of Ad Rep Services; those other MVPDs do not.

Not only that: interconnect managers in other DMAs (incumbent MVPDs that are similarly situated to Comcast) often agree to deal with Viamedia to ensure that Viamedia's clients' avails will be included in the interconnect, and Comcast itself, in its capacity as ad rep, enters into such arrangements with other interconnect managers. *Cf. Olympia Equip.*, 797 F.2d at 377 (noting lack of "evidence that suppliers of telecommunications equipment customarily provide their customers with lists containing the names of competing suppliers"). And Viamedia has also maintained an agreement with NCC – a joint-selling arrangement

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[7] Viamedia had no opportunity to seek leave to amend its complaint after discovery had begun because the district court dismissed its refusal-to-deal theory "with prejudice" at Comcast's request. *See* SA58 (granting Comcast's motion "to dismiss with prejudice"); ECF 46, at 14 (asking for dismissal "with prejudice").

analogous to an interconnect but typically placing ads nationally. A78-79 (¶¶ 144-145). Comcast's refusal to deal with Viamedia makes it an outlier in the industry; its otherwise anomalous conduct is fully explainable by its hope – quickly realized – of driving a competitor from the market.

3. *Third*, the nature of the interconnect – a facility made more valuable to consumers (advertisers) by having broad participation by MVPDs – further supports Viamedia's claim. The interconnect is more attractive to advertisers with the avails of WOW! and RCN (or Frontier) included than it is without them. Refusing to enter into an arrangement with Viamedia, knowing that WOW!, RCN, and Frontier would be unable to participate in the interconnect, thus degraded Comcast's own product by reducing the number of subscribers viewing interconnect ads.

In this regard, the interconnect is analogous to the four-area lift ticket at issue in *Aspen Skiing*. The Supreme Court cited evidence that consumers "demonstrably preferred" the four-area ticket to the defendant's three-area lift ticket. *See Aspen Skiing*, 472 U.S. at 606-07 ("A major wholesale tour operator asserted that he would not even consider marketing a 3-area ticket if a 4-area ticket were available."). By killing the four-area ticket, the defendant "was apparently willing to forgo daily ticket sales," to give up "immediate benefits," and to frustrate "its potential customers." *Id.* at 608, 610. Likewise, here, Comcast gave up revenues and profits and deprived its own customers (advertisers) of a superior product. It was, in short, "willing to sacrifice short-run benefits and consumer

goodwill in exchange for a perceived long-run impact on its smaller rival." *Id.* at 610-11. Contrary to the district court's holding, such conduct is not immune from antitrust scrutiny.

C. The district court held that Viamedia failed to state a refusal-to-deal claim because Comcast's refusal to deal "offer[ed] potentially improved efficiency" in that it "replac[ed] an intermediary with a direct relationship." SA107-08; *see also* SA67-69 (similar). That determination was inconsistent with the complaint's allegations and economic logic and, at best, was premature.

First, because RCN and WOW! had signed full-turnkey contracts with Viamedia through 2015, terminating the arrangement with Viamedia in 2012 would not create any opportunity for supposedly more efficient direct participation by RCN and WOW!, at least not until their arrangements with Viamedia expired years later. Nothing restricted Comcast from encouraging RCN and WOW! to enter into a direct relationship with Comcast once their contractual commitments to Viamedia expired, regardless of whether Comcast continued to deal with Viamedia.

Second, and relatedly, Comcast's argument lacks economic logic because Viamedia's access to interconnects does not hamper Comcast's ability to pursue and realize any possible efficiencies from contracting directly with rival MVPDs. To be sure, when Viamedia provides Ad Rep Services, in exchange for the services it provides, including technical services associated with running interconnect ads, it typically retains a percentage of any revenues that the MVPD earns from the sale of its avails, including sales through the interconnect. But Viamedia's services allow

the MVPD to avoid the expense of handling all the functions required to sell its avails profitably, and the MVPD may benefit from Viamedia's expertise, specialization, and economies of scale. And, though Comcast may be able to offer MVPDs a better price than Viamedia, MVPDs may prefer to avoid dealing with a competitor that could use its Ad Rep Services relationship to undermine the MVPDs' effectiveness as a video distribution competitor – including in ways that the MVPD may have difficulty detecting (e.g., using advanced knowledge of an MVPD's forthcoming marketing campaign to undercut it). Viamedia, unlike Comcast, has no divided loyalties and can partner with clients to market and build their brands. A701-03 (¶¶ 3-4). Viamedia alleged facts explaining – and discovered facts confirming – that small and medium-sized MVPDs like RCN, Frontier, and WOW! derive economic value from dealing with an independent ad rep like Viamedia, *not* video distribution rivals like Comcast. A66-67, 71, 85-86 (¶¶ 80-83, 107-108, 171, 173); *cf. HR Staffing Consultants LLC v. Butts*, 627 F. App'x 168, 172 (3d Cir. 2015) (observing that "middlemen exist because they provide a useful and highly-valued service"). When Viamedia has access to interconnects, MVPDs are free to choose the ad rep they prefer, and any skin off Comcast's nose is the result of consumer choice. Comcast's conduct forced MVPDs to sell their avails without the aid of an independent intermediary, and the district court had no basis to conclude, as a matter of law, that overriding market choices in this manner was "efficient."

Comcast was already offering full-turnkey service to MVPDs in Chicago and Detroit long before it refused to deal with Viamedia. That service included both Ad

Rep Services and Interconnect Services and had no "middleman," but RCN and WOW! chose not to buy it (though other MVPDs in Chicago and Detroit did).[8] A214 (¶ 60), 252. Comcast A736 (37:13-23), and it likewise A730.4 (107:13-109:18). Comcast's interconnect arrangement with Viamedia did not preclude RCN or WOW! from switching to Comcast's integrated offering in response to these overtures. A439 (§ 9.10); A238 (¶ 98). This is simply not a case where an upstream monopolist refuses to deal in order to "take over the retail function" so that it can realize "cost savings from bringing into the firm a function formerly performed outside it." *See Jack Walters & Sons Corp. v. Morton Bldg., Inc.*, 737 F.2d 698, 710 (7th Cir. 1984).

Third, assuming for the sake of argument that Comcast had offered a "potentially . . . procompetitive purpose" for its refusal to deal with Viamedia, it was error for the district court to treat that potential justification as a reason to dismiss Viamedia's refusal-to-deal claim on the pleadings. "Whether valid business reasons motivated a monopolist's conduct is a question of fact." *Illinois ex rel. Burris v. Panhandle E. Pipe Line Co.*, 935 F.2d 1469, 1482 (7th Cir. 1991). The burden of proof with respect to such a justification lies with Comcast and is not a basis for dismissal. *See Covad Communications Co. v. Bell Atl. Corp.*, 398 F.3d 666, 676

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[8] As of December 2011, Comcast was providing full-turnkey service to in the Chicago and Detroit DMAs. A820-26.

(D.C. Cir. 2005) (whether a "refusal to deal was economically justified . . . depends upon a question of fact and therefore is not cognizable in support of a motion to dismiss"); *Collins Inkjet Corp. v. Eastman Kodak Co.*, 781 F.3d 264, 271 (6th Cir. 2015) ("valid business justification" for firm's conduct is "a sort of affirmative defense" to antitrust liability). Although plaintiff bears the ultimate burden of persuasion to show that defendant's conduct is anticompetitive, "complaints need not anticipate and attempt to plead around" all potential defenses, because "[a] complaint states a claim on which relief may be granted whether or not some defense is potentially available." *United States v. N. Trust Co.*, 372 F.3d 886, 888 (7th Cir. 2004); *see also Concord Assocs., L.P. v. Entm't Props. Trust*, 817 F.3d 46, 52 (2d Cir. 2016) ("there is no heightened pleading standard in antitrust cases"). By treating a "potential[]" efficiency justification as sufficient to bar Viamedia's claim, SA108; SA69, the district court misperceived Viamedia's burden at the pleading stage.

II. The District Court Erred in Granting Summary Judgment on Viamedia's Tying Claim

A. Viamedia Proffered Sufficient Evidence That Comcast Conditioned Access to Its Interconnects on MVPDs Hiring Comcast As Their Ad Representative

Viamedia proffered evidence that Comcast refused to provide MVPDs in Chicago, Detroit, and Hartford access to its Interconnect Services unless they agreed to purchase Ad Rep Services from Comcast as well. This is a tying arrangement that violates § 2: Comcast used its monopoly over Interconnect Services – the tying product – to "force the buyer into the purchase of a tied product

[Ad Rep Services] that the buyer . . . might have preferred to purchase elsewhere on different terms." *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 13 (1984); *see also Times-Picayune Publ'g Co. v. United States*, 345 U.S. 594, 605 (1953) (a tying scheme "coerces the abdication of buyers' independent judgment as to the 'tied' product's merits").

Whether a tying seller has "forced" or "coerced" customers depends on whether the defendant has "utilized customers' desire for its product *A* to constrain improperly their choice between its product *B* and that of its rivals," such that the "practical effect" of the conduct "is to foreclose, even partially, rival suppliers of the allegedly tied product." 10 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶¶ 1752a, 1752e (3d ed. 2011) ("Areeda & Hovenkamp"). An "announced condition" that the tying product will not be sold without the tied product or evidence of an "understood condition" whereby the monopolist "acts as to lead reasonable buyers to understand that they cannot get product *A* unless they also take the defendant's product *B*" is enough to satisfy this conduct element. *Id.* ¶¶ 1754b-1754c. "[T]he quantum of pressure necessary" to establish tying need not rise to "overt coercion." *Tire Sales Corp. v. Cities Serv. Oil Co.*, 637 F.2d 467, 473 (7th Cir. 1980). Rather, coercion can also be shown where a buyer is "induced to purchase from" a monopolist "because of the inherent power which the [monopolist] possessed as the company upon which [buyers] depended." *Id.*; *see also id.* at 474 (coercion shown where buyers "understood it to be potentially dangerous to rock the boat").

Viamedia proffered sufficient evidence that Comcast did indeed force MVPDs to purchase its Ad Rep Services as a condition of access to Interconnect Services. *First*, Teresa Lucido, who worked in the division of Comcast responsible for both Interconnect Services and Ad Rep Services in Chicago and Detroit, testified that Comcast had a "business practice" that, "if an MVPD wants to get access to a Comcast controlled interconnect, it has to hire Comcast as its ad sales representative." A777-78 (254:16-255:2). A reasonable jury could accept that testimony as sufficient proof that Comcast engaged in tying.

Second, consistent with that "business practice," Comcast announced to WOW! in 2014 that WOW! would in order to access the Chicago and Detroit interconnects, A749-50 (89:24-90:4), and Comcast to WOW! that A811 (234:2-7, 235:5-11) (emphasis added).

Third, RCN similarly reported to the FCC in 2014 that "Comcast will only allow RCN to join the interconnects if RCN employs Comcast [S]potlight *instead of Viamedia*." A887 (emphasis added).

Fourth, Comcast stated contemporaneously in 2012 that its purpose in refusing to make stand-alone sales of Interconnect Services in Chicago and Detroit was not merely to MVPDs but to do so in A844.

Whether understood as an "announced condition" or an "understood condition," the foregoing evidence could reasonably be viewed as the kind of economic coercion sufficient to establish tying. *See* 10 Areeda & Hovenkamp ¶ 1752e. Requiring a full-turnkey relationship to obtain interconnect access meant that MVPDs needed to hire Comcast as both their Ad Rep Services provider and their Interconnect Services provider to obtain Interconnect Services. Comcast thereby foreclosed Viamedia (and any other potential competitors) from providing Ad Rep Services to any MVPD that wanted to obtain Comcast's Interconnect Services in Chicago, Detroit, and Hartford. *See id.* ¶ 1752a. This conduct "utilized [MVPDs'] desire for" access to Comcast's interconnects "to constrain improperly their choice between" Comcast's Ad Rep Services "and that of its rivals." *Id.* ¶ 1752e. At a minimum, a reasonable jury could conclude as much.

B. The District Court's Treatment of the Evidence Was Inconsistent with Summary Judgment Standards

1. Despite the foregoing evidence, the district court granted summary judgment on Viamedia's tying claim, concluding that "[n]o evidence shows that Comcast told MVPDs, expressly or impliedly, that they could only purchase Interconnect Services on the condition that they also purchase Ad Rep Services." SA29. In arriving at that conclusion, the district court made a series of errors.

First, the district court's opinion overlooked much of the clearest evidence of coercion. For example, it made no mention of the testimony of Comcast's general manager that he [redacted] to WOW! in 2014 that Comcast's [redacted] A811 (234:2-7). The

opinion likewise disregards Comcast's admission that it was refusing to make stand-alone sales of Interconnect Services in order to [REDACTED] A844, as well as RCN's statement to the FCC noted above. The district court's failure to "examine the record as a whole" – even though all of this evidence was brought to its attention – was erroneous. *Tom Beu Xiong v. Fischer*, 787 F.3d 389, 397 (7th Cir. 2015); *see Bass v. Joliet Pub. Sch. Dist. No. 86*, 746 F.3d 835, 837 (7th Cir. 2014) (review of summary judgment ruling requires a "fresh look at the record").

Second, as to the evidence that the district court did consider, the court failed to draw reasonable inferences in Viamedia's favor. For example, the district court refused to allow for the inference that, when Comcast and WOW! testified that MVPDs were required to hire Comcast as their "representative" in order to gain interconnect access, those witnesses meant "full turnkey representative." *See*, *e.g.*, SA36 (concluding this testimony "does not mean that the MVPDs could not have received an interconnect-only deal"). Notwithstanding the district court's view, the inference that "representative" means "full turnkey representative" would be reasonable (at a minimum), given that Comcast's admitted reason for imposing the condition was to [REDACTED] A811, and the district court's acknowledgement that the statements were made "in an industry dominated by full-turnkey business." SA37. For the district court's interpretation to prevail, "representative" in this context would have to refer to interconnect avails only, but there was nothing in the record to support that understanding and other parts of

the record tend to contradict it. *See*, *e.g.*, A774 (121:6-19) (Comcast executive testifying that, when Comcast sells avails through its interconnects, [REDACTED] [REDACTED].

Moreover, the district court improperly drew an inference against Viamedia in holding that the only reasonable view of the evidence is that RCN and WOW! were free to sign interconnect-only deals with Comcast in Chicago and Detroit. *See* SA30-31, 34. The only evidentiary basis for that holding appears to be that several of the agreements that Comcast signed since December 2011 "are interconnect-only." SA30; *see* A124 (¶ 124). But, as discussed above (pp. 16-17), all of those agreements were signed in DMAs *other than* Chicago and Detroit with MVPDs *other than* RCN and WOW! – indeed, almost exclusively with MVPDs (unlike RCN and WOW!) that do not compete with Comcast for subscribers or (unlike Viamedia) do not compete with Comcast in the provision of Ad Rep Services. A351-59. The record contains no evidence that Comcast was willing to offer RCN or WOW! (or any other MVPD in Chicago, Detroit, or Hartford) an interconnect-only deal, and the record contains substantial evidence to the contrary. *See supra* p. 39.

The fact that Viamedia's claims are national in scope is irrelevant. There is no dispute that the relevant geographic market for both Interconnect Services and Ad Rep Services is the DMA. The district court could not conclude, as a matter of law, that the absence of tying in one geographic market precludes an inference of

tying in a different market, particularly where there is direct evidence of tying in the relevant market, as there is here.[9]

2. The district court's statement that the record evidence "is, at a minimum, equally consistent with Comcast's refusal to deal with Viamedia as it is [with] a tying arrangement," SA37, provides a reason to deny summary judgment, not to grant it. If a reasonable jury could conclude *either* that Comcast required MVPDs to purchase Ad Rep Services as a condition of access to Interconnect Services – and thus engaged in tying – *or* that Comcast did not engage in tying but simply refused to deal with Viamedia, then Viamedia was entitled to a favorable inference on summary judgment, and the dispute of fact was for the jury. Nothing in substantive antitrust law authorizes a district court to shield a monopolist from defending its conduct at trial simply because a jury could reasonably conclude either that the defendant's conduct was lawful *or* that it was unlawful.

C. Viamedia's Tying Claim Cannot Be Dismissed As a Refusal To Deal with Viamedia

1. The district court also erred in finding that no reasonable jury could conclude that "Comcast's conduct was anything more than a refusal to deal with Viamedia." SA37. That conclusion was based on the district court's view that "[t]he

[9] The district court's conclusion that an interconnect-only deal must have been available to RCN and WOW! in Chicago and Detroit is also hard to square with the court's conclusion that Comcast did not offer and had "no reason to offer" such a deal to RCN and WOW!. SA32. In arriving at that conclusion, the district court found, without citation to any record evidence, that an interconnect-only deal would be "less substantial," "less profitable," and "less efficient" for Comcast than a full-turnkey deal. *Id.* But that underscores Comcast's economic incentive to tie Ad Rep Services to Interconnect Services.

real rub of Viamedia's tying claim is . . . that Comcast withheld the tying product *from its rival Viamedia*" and not "that Comcast ever withheld the tying product *from customers* unless they also purchase[d] the tied product." SA32. These findings were mistaken.

First, the findings are inconsistent with the record evidence discussed above (p. 39), indicating that, when RCN and WOW! negotiated directly with Comcast, they came away with the understanding that they could not obtain Interconnect Services from Comcast without also buying Ad Rep Services from Comcast. Comcast is free to argue that RCN's and WOW!'s understanding was based on the assumption that they could have had but did not want a direct, interconnect-only deal with Comcast, but nothing compels that interpretation of the evidence.

Second, the evidence also would allow a reasonable jury to conclude that Comcast's refusal to allow RCN and WOW! to participate in interconnects while they were still under contract with Viamedia (that is, from mid-2012 until the end of 2015) was part and parcel of Comcast's tying conduct. During that period, Viamedia was WOW!'s and RCN's representative with respect to those MVPDs' participation in interconnects. Furthermore, the Interconnect Agreement between Comcast and Viamedia did not simply allow Viamedia to contribute any avails it chose into the interconnect; rather, it covered only the specific avails of WOW! and RCN that were being handled by Viamedia and required that advertising sold by the interconnect be displayed on those specific systems, not any system that Viamedia chose. A430, 441. By terminating its arrangement with Viamedia,

Comcast refused to provide Interconnect Services to WOW! and RCN, who sought those services through their designated ad rep. As noted above, when WOW! sought to be restored to participation in the interconnects, it was told that Comcast's Interconnect Services would remain unavailable unless and until WOW! agreed to purchase Ad Rep Services from Comcast. *See also* A789 (168:2-169:3) (testimony by Spotlight's COO that Comcast's termination of its Interconnect Agreement with Viamedia was motivated by [redacted]

[redacted]. That conduct was therefore not only a refusal to deal with Viamedia, but integral to Comcast's tying conduct as well.

For this reason, *Aerotec International, Inc. v. Honeywell International, Inc.*, 836 F.3d 1171 (9th Cir. 2016), provides no support for the district court's holding. In *Aerotec*, the plaintiff claimed that the defendant had tied the sale of services to the sale of parts, but its claim failed for "lack of any evidence that airlines" – the relevant consumers – "were presented with an offer for the sale of parts that could have been reasonably perceived as conditioned on refraining from the purchase of parts or services from any other service provider besides" the defendant. *Id.* at 1180. By contrast, in this case, the evidence would allow a jury to conclude that Comcast made Interconnect Services available to MVPDs – in those DMAs where it faced competition from Viamedia – only on the condition that they also use Comcast as their ad rep.

Third, to the extent the district court determined that Viamedia's claim was barred because Interconnect Services are simply an input into Ad Rep Services – as

aluminum ingot is an input into aluminum building wall sections, *see* SA38 – the district court similarly misconstrued the record. Viamedia proffered sufficient evidence to allow a reasonable jury to conclude that (1) an ad rep takes responsibility for handling some or all of an MVPD's spot cable avails; (2) the ad rep, even if it handles all of an MVPD's avails, may or may not place any of those avails in an interconnect (assuming one exists in the relevant DMA); (3) an MVPD may obtain Interconnect Services (but not Ad Rep Services) directly from the interconnect manager; (4) the same MVPD that purchases Interconnect Services from the interconnect manager may obtain Ad Rep Services for another portion of its avails from an ad rep other than the interconnect manager. *See* A573-80 (¶¶ 62-70). The record thus supports the conclusion that MVPDs – the consumers – have distinct demand for Ad Rep Services and Interconnect Services. *See Jefferson Parish*, 466 U.S. at 21 ("no tying arrangement can exist unless there is a sufficient demand for the purchase of [the tied product] separate from [the tying product]").

Furthermore, *Jefferson Parish* shows that it does not matter whether MVPDs obtain the benefit of Interconnect Services indirectly through a representative, rather than directly. In that case, the Supreme Court found anesthesiological services to be separate from hospital services where anesthesiological services "could be selected [separately] either by the individual patient *or by one of the patient's doctors*." *Id.* at 22 (emphasis added). And the Supreme Court concluded that "consumers differentiate between anesthesiological services and the other hospital services," even though "an anesthesiologist [wa]s *normally selected by the*

surgeon, rather than the patient" who received and paid for the anesthesia. *Id*. at 23 (emphasis added).

This analysis demonstrates that *Service & Training, Inc. v. Data General Corp.*, 963 F.2d 680 (4th Cir. 1992), is likewise inapposite. In that case, no customers who purchased computer repair services (the alleged tied product) from the defendant licensed the supposedly tying product – a diagnostic tool – at all; customers who serviced their own computers were permitted to license the diagnostic tool without purchasing repair services from the defendant. There was thus no evidence that customers who purchased repair services had any independent demand for the diagnostic tool. By contrast, MVPDs that purchase *both* Ad Rep Services and Interconnect Services often obtain them from different providers.

3. Even if Comcast's conduct somehow fell outside traditional tying doctrine – because Comcast's arrangement was with the MVPD's representative and not the MVPD directly – it would nevertheless be anticompetitive for all of the reasons that tying is anticompetitive. Comcast effectively used its power in one market to force consumers (MVPDs) to purchase services from Comcast that they might have preferred to purchase elsewhere if not subjected to that economic pressure. *See Jefferson Parish*, 466 U.S. at 12; *see also id*. at 21 n.34 ("The legality of [defendant's] conduct depends on its competitive consequences, not whether it can be labeled 'tying.'"); *Eastman Kodak*, 504 U.S. at 482-83 (conduct violates § 2 if it "use[s] . . . monopoly power to foreclose competition, to gain a competitive

advantage, or to destroy a competitor") (internal quotation marks omitted); *MCI Communications Corp. v. AT&T Co.*, 708 F.2d 1081, 1144 (7th Cir. 1983) ("Whether we label AT&T's violation of the antitrust laws as tying or the denial of an essential facility, our prime concern is that AT&T used its monopoly power . . . as a lever to impede or destroy competition in other markets.").

The district court held (SA47-48) that Viamedia had disavowed any claim of exclusionary conduct that did not fit within the specific contours of tying (or exclusive dealing). But Viamedia did no such thing. Rather, it made clear at the motion-to-dismiss stage that it was not pursuing a "free-standing" monopoly *leveraging* claim – that is, a claim that a monopolist gained an advantage in some separate market, in the *absence* of anticompetitive conduct. *See* ECF 32, at 6-10; *see also Trinko*, 540 U.S. at 415 n.4. But Viamedia always maintained that Comcast's conduct *was* anticompetitive. ECF 32, at 8-9 ("Comcast has exercised monopoly control over Interconnects *to eliminate all competition* in the relevant markets for advertising representation services . . . ."). It disclaimed no argument in support of that contention.

III. The District Court Erred in Holding That No Reasonable Jury Could Find That Comcast's Anticompetitive Conduct Caused Viamedia's Injuries

Viamedia established antitrust injury because its claimed harm – revenues lost when its clients' avails were excluded from Comcast-controlled interconnects, the destruction of its business in Chicago and Detroit, and the harm to the company that resulted – constitute antitrust injury because they are precisely the harms that flow from Comcast's anticompetitive conduct. The district court nevertheless held

that Viamedia could not show that Comcast's tying conduct caused Viamedia's injury, because it would have suffered the same consequences from Comcast's refusal to deal with Viamedia, which the district court considered lawful. *See* SA50-51. That holding, of course, cannot stand if the district court's motion-to-dismiss ruling is reversed. In any event, moreover, the district court was wrong to hold that Comcast could not be held liable for unlawful tying because it *also* engaged in a supposedly lawful refusal to deal.

To recover on an antitrust claim, a plaintiff "must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977); *see also Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334 (1990) (harm must be "attributable to an anti-competitive aspect of the practice under scrutiny"). "[T]o prove a 'causal connection' between a defendant's unlawful conduct and the plaintiff's injury, the plaintiff need only demonstrate that [the defendant's] conduct was a substantial or materially contributing factor in producing that injury." *In re Publ'n Paper Antitrust Litig.*, 690 F.3d 51, 66 (2d Cir. 2012) (internal quotation marks omitted); *accord Holleb & Co. v. Produce Terminal Cold Storage Co.*, 532 F.2d 29, 36 (7th Cir. 1976) ("[P]laintiff needed to show only that [defendant's] illegal conduct materially or substantially contributed to its injury.").

The causation element of antitrust injury "is enriched and refined by study of causation principles as developed in the tort law context." *Publ'n Paper*, 690 F.3d at

66; *Jack Walters*, 737 F.2d at 708-09 (antitrust injury "is the application to antitrust law of venerable principles of tort causation"). Under those principles, "[o]nce a plaintiff presents evidence that he suffered the sort of injury that would be the expected consequence of the defendant's wrongful conduct, he has done enough to withstand summary judgment on the ground of absence of causation." *BCS Servs., Inc. v. Heartwood 88, LLC*, 637 F.3d 750, 758 (7th Cir. 2011); *accord Publ'n Paper*, 690 F.3d at 66 (applying the same rule in an antitrust case). "The causal relation between a defendant's act and a plaintiff's injury . . . need only be probable." *BCS Servs.*, 637 F.3d at 758.

In this case, Viamedia claims two basic categories of injuries: (1) lost revenues associated with the interconnect portion of its existing (or then-existing) contracts with RCN, WOW!, and Frontier; and (2) revenues associated with contract renewals or new contracts that Viamedia would have won in the absence of Comcast's conduct. A557-71 (¶¶ 20-53). These are "the sort of injur[ies] that would be the expected consequence of" Comcast's unlawful tying. *BCS Servs.*, 637 F.3d at 758. That is, Viamedia suffered harm because it was unable to obtain stand-alone Interconnect Services (the tying product) for WOW! and RCN; and it suffered lost sales of the tied product (Ad Rep Services) because consumers were forced to buy both of those products from Comcast. Those losses undermined Viamedia's business everywhere.

The district court's holding that Viamedia could not prove causation of antitrust injury because the same consequences flowed from Comcast's refusal to

deal with Viamedia – which the court deemed lawful – is incorrect because, so long as Viamedia's injury flowed from Comcast's violation of its duty under the antitrust laws not to engage in unlawful tying, it does not matter that the same conduct, or some aspect of it, (supposedly) did not violate any separate duty to deal with Viamedia. For the same reason, the district court's holding that Viamedia had not done enough to distinguish between those damages caused by unlawful tying as opposed to a lawful refusal to deal was in error. The district court did not question that Viamedia had proffered sufficient evidence that its damages flowed from unlawful tying; instead, the district court held that Viamedia was obligated to show that those damages did *not* result from a supposedly lawful refusal to deal. There is no such requirement. *LePage's, Inc. v. 3M*, 324 F.3d 141, 166 (3d Cir. 2003) (en banc).

Novell, which the district court relied on (SA51-52) is not to the contrary. In that case, Novell argued that Microsoft unlawfully withdrew access to certain software modules that developers could use to develop software to use on the next version of the Windows operating system. *See* 731 F.3d at 1066. The court of appeals affirmed judgment against the plaintiff, holding that there (unlike here) there was "no evidence from which a reasonable jury could infer that Microsoft's discontinuation of this arrangement suggested a willingness to sacrifice short-term profits." *Id*. at 1076. As a last gasp, Novell also argued that Microsoft could be held liable for "acting deceptively when it withdrew the [modules]," giving "pretextual technical reasons" when its "real reasons were competitive in nature." *Id.* at 1079.

In that case, assuming that Microsoft had an antitrust duty to be honest about its reasons for acting, its violation of that duty did not cause any harm – rather the harm was caused by the withdrawal of the software modules and *not* by the deception. Here, by contrast, the harm was caused by the unlawful tying, and that is enough to support a finding of causal antitrust injury.

IV. The District Court Erred in Excluding Testimony of Viamedia's Proffered Experts

This Court should reverse the district court's decision to exclude a portion of the liability opinions of Dr. Furchtgott-Roth and the damages opinions of Dr. Lys because those rulings rested on the legal errors discussed above. Furthermore, the district court's holding that Dr. Furchtgott-Roth's tying opinions "rest[ed] exclusively on a lay interpretation of evidence," SA41, was an abuse of discretion, because Dr. Furchtgott-Roth's report offered expert analysis that would assist a jury to understand not merely *what* happened but the *economic significance* of what happened.

1. Dr. Furchtgott-Roth – a Stanford Economics Ph.D. who is a Senior Fellow at the Hudson Institute, former Commissioner of the FCC, former chief economist of the House Commerce Committee, and a principal drafter of the Telecommunications Act of 1996 – has deep expertise in industrial organization economics and the application of economic principles to the telecommunications industry. In his report, he offered the opinions that (1) Spot Cable Ad Rep Services and Interconnect Services are distinct product markets; (2) the relevant geographic market for the provision of these services is the DMA; (3) Comcast has monopoly

power over Interconnect Services where it is the interconnect manager; (4) Comcast has monopoly power over provision of Ad Rep Services in several relevant DMAs; (5) Comcast has forced MVPDs that purchased Interconnect Services also to purchase Ad Rep Services; (6) Comcast's conduct has foreclosed competition in the provision of Spot Cable Ad Rep Services; and (7) Comcast's stated justifications for its conduct do not withstand economic scrutiny.

The district court's *Daubert* ruling focused exclusively on the fifth of these opinions – that is, the opinion that Comcast had required MVPDs to purchase Ad Rep Services, holding that it was "contrary to the law." SA42. But the district court did not assert that Dr. Furchtgott-Roth's understanding of tying as an economic matter was inconsistent with its legal definition. Rather, the district court apparently disagreed with Dr. Furchtgott-Roth's interpretation of the record evidence. The court thus suggested that Dr. Furchtgott-Roth based his tying opinion on "the mere withholding of the tying product . . . [from] a competitor." SA42-43. But that was not Dr. Furchtgott-Roth's opinion: he expressly stated that his opinion that Comcast engaged in tying was based on evidence that MVPDs "could not obtain Interconnect Services from Comcast . . . unless they also purchased Spot Cable Ad Rep Services from Comcast." HFR Rep. (¶ 64). The district court appeared to agree that such conduct would constitute tying. *See* SA29 ("No evidence shows that Comcast told MVPDs, expressly or impliedly, that they could only purchase Interconnect Services on the condition that they also purchase Ad Rep Services."). The district court's disagreement with Dr. Furchtgott-Roth's

expert conclusions has nothing to do with any supposed inconsistency between legal standards and the economic standard Dr. Furchtgott-Roth applied.

The district court's holding that Dr. Furchtgott-Roth merely offered a "lay interpretation of evidence" is no better supported and is an abuse of discretion. Expert opinion testimony is admissible if (a) "the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue"; (b) "the testimony is based on sufficient facts or data"; (c) "the testimony is the product of reliable principles and methods"; and (d) "the expert has reliably applied the principles and methods to the facts of the case." Fed. R. Evid. 702. An expert's opinions are not inadmissible simply because they "overlap[] with the jurors' own experiences" or "cover matters that are within the average juror's comprehension." *Lawson v. Trowbridge*, 153 F.3d 368, 376 (7th Cir. 1998). Rather, to assist the jury, an expert need only use some kind of "specialized knowledge" to place relevant events "into context." *Id.*; *see also United States v. Williams*, 81 F.3d 1434, 1441 (7th Cir. 1996) ("All you need to be an expert witness is a body of specialized knowledge that can be helpful to the jury.").

In light of these standards, the district court abused its discretion in concluding that "no expertise is needed to interpret, contextualize, or synthesize" the evidence of coercion in this case and that Dr. Furchtgott-Roth's opinions "rest[] exclusively on a lay interpretation of [that] evidence." SA41-42. Dr. Furchtgott-Roth has undisputed "specialized knowledge" in the fields of economics and telecommunications. And the complex facts of this antitrust case, including the

economic incentives faced by a set of interrelated firms in the two-sided market for spot cable advertising, are hardly "obvious to the layperson." *Ancho v. Pentek Corp.*, 157 F.3d 512, 519 (7th Cir. 1998).

In arriving at his conclusions about tying, Dr. Furchtgott-Roth summarized relevant facts and applied his specialized knowledge to place those facts "into context." *Lawson*, 153 F.3d at 376. Specifically, Dr. Furchtgott-Roth examined evidence of Comcast's conduct toward Viamedia, RCN, and WOW! to contextualize the economic constraints that Comcast was placing on those firms. *See*, *e.g.*, A217-18 (¶¶ 67-68) (explaining why "the exclusion of Viamedia from the Chicago and Detroit Interconnects . . . ma[de] it impossible for MVPDs to obtain Spot Cable Ad Rep Services from Viamedia while also obtaining Interconnect Services from Comcast Spotlight"); A218-19 (¶ 70) (explaining why exclusion of Viamedia was "an integral part of Comcast's tying conduct" because, "[i]f Viamedia is unable to include an MVPD's avails in the Interconnect, it cannot make a competitive offer to provide Spot Cable Ad Rep Services"). Such testimony is admissible if it otherwise satisfies *Daubert* standards, which Dr. Furchtgott-Roth's testimony did.

2. The district court excluded the opinions of Dr. Lys exclusively because he had "assume[d]" for purposes of his damages opinion "that but for Comcast's supposed anticompetitive practices, Viamedia would have been able to access the interconnects and compete as it had before." SA55. That ruling is based on the district court's erroneous antitrust-injury ruling – that is, its ruling that Viamedia could not show that Comcast's unlawful tying was the but-for cause of its injury. As

explained above, *see supra* pp. 48-52, that determination was in error. The district court did not rely on any other basis for excluding Dr. Lys's testimony. Accordingly, if the district court's antitrust-injury ruling is reversed, then its exclusion of Dr. Lys's testimony should also be reversed.

CONCLUSION

The Court should reverse the judgment.

Respectfully submitted,

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October 25, 2018

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I certify that the foregoing brief complies with Circuit Rule 32(c), because the brief contains 13,981 words, including footnotes and excluding the parts exempted by Rule 32(f).
I further certify that this brief complies with the typeface and type style requirements of Circuit Rule 32(b) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2013 and is set in Century Schoolbook, 12-point font.

/s/ *Aaron M. Panner*
Aaron M. Panner

October 25, 2018

No. 18-2852

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

VIAMEDIA, INC.,
Plaintiff-Appellant,

v.

COMCAST CORPORATION and COMCAST CABLE COMMUNICATIONS MANAGEMENT, LLC,
Defendants-Appellees.

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

PLAINTIFF-APPELLANT VIAMEDIA, INC.'S
CIRCUIT RULE 30(a) APPENDIX

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

Viamedia, Inc., Plaintiff(s), v. Comcast Corporation and Comcast Spotlight, Inc., Defendant(s).	Case No. 16-cv-5486 Judge Amy J. St. Eve

JUDGMENT IN A CIVIL CASE

Judgment is hereby entered (check appropriate box):

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

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

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

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

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

.

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

☐ other:

This action was *(check one)*:

☐ tried by a jury with Judge presiding, and the jury has rendered a verdict.
☐ tried by Judge without a jury and the above decision was reached.
☒ decided by Judge Amy J. St. Eve on a motion for summary judgment.

Date: 8/16/2018

Thomas G. Bruton, Clerk of Court

Katie Franc , Deputy Clerk

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

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

MEMORANDUM OPINION AND ORDER

AMY J. ST. EVE, Circuit Judge*:

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

At the motion-to-dismiss stage, the Court ruled that Comcast had no antitrust duty to deal with Viamedia and thus its refusal to deal was not cognizably anticompetitive under *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004), and its progeny. *Viamedia, Inc. v. Comcast Corp.*, 218 F. Supp. 3d 674, 698–69 (N.D. Ill. 2016); *Viamedia, Inc. v. Comcast Corp.*, No. 16-CV-5486, 2017 WL 698681, at *3–6 (N.D. Ill. Feb. 22, 2017). Now, at the summary-judgment stage, the question is whether Comcast's conduct can be characterized

* Sitting by designation (R. 346).

as something more—tying, exclusive dealing, or another form of anticompetitive conduct. It cannot. Undisputed facts reveal that Viamedia's alternative theories are lacking as a matter of law. Undisputed facts demonstrate that Comcast's refusal to deal with Viamedia—not coercive conduct directed at their mutual customers—is what caused Viamedia's injuries and damages.

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

BACKGROUND

I. Factual Background

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

including references to the affidavits, parts of the record, and other materials relied upon to support those facts. L.R. 56.1 (b)(3)(C); *see also Ciomber v. Coop. Plus, Inc.*, 527 F.3d 635, 643–44 (7th Cir. 2008).

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

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[1] Comcast argues that Viamedia's Statement of Additional Facts exceeds the court-ordered limit of 75 facts (*see* R. 315) by compounding multiple facts into single paragraphs, and asks the Court to strike the stated facts exceeding

A. The Spot Cable Business and Interconnects

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

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

In any given DMA, there are different ways in which MVPDs sell avails to advertisers. Some MVPDs sell directly through their own sales force. CSF ¶ 10. Others hire advertising-representation firms that specialize in spot cable advertising ("Ad Reps"). *Id.* ¶ 11. Viamedia is such an Ad Rep, and it has no corporate affiliation with any MVPD. *Id.* ¶ 13. Viamedia, in fact,

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that limit. R. 339 at 25. Although Comcast has a point—Viamedia's fact-packing borders on gamesmanship—the Court, in its discretion, will not strike any of Viamedia's stated facts. *See Benuzzi v. Bd. of Educ. of Chi.*, 647 F.3d 652, 655 (7th Cir. 2011) (courts have "broad discretion" in enforcing local rules). Comcast is (though less so) guilty of the same tactic, and the additional facts Viamedia offers do not impact the Court's analysis.

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

is the only independent Ad Rep with significant market presence. VSF ¶ 9.[3] Comcast, under the trade name Comcast Spotlight, also does business as an Ad Rep, both on its own behalf and on behalf of other MVPDs.[4] CSF ¶ 5.

When an MVPD hires an Ad Rep, the two typically enter into an "advertising purchase and sale" agreement. *Id.* ¶ 11. Under these agreements, an Ad Rep is responsible for managing and selling an MVPDs' avail inventory (or some portion of it) to advertisers. *Id.* ¶¶ 11–12; VSF ¶ 1. Ad Reps can represent their MVPD customers: (1) locally, selling only a part of an MVPD's avails in a DMA to local advertisers; (2) regionally, selling all of the MVPD's avails in a DMA; or (3) nationally. Furchtgott-Roth Report ¶ 21. In any event, Ad Reps' sales responsibilities entail ancillary responsibilities, too, including: marketing and pricing the avails; maintaining the software and hardware needed to run, insert, traffic, monitor and advertise spot cable ads; organizing inventory into schedules and ensuring each ad runs correctly during those schedules; and performing financial services, like accounting, billing, and collection. VSF ¶ 1. Ad Reps are also responsible for working with interconnects to sell avails. *Id.* These services make up "Ad Rep Services," according to Viamedia. *Id.*; *see also* Furchtgott-Roth Report ¶¶ 22–29.

An interconnect is a "one stop shop" where advertisers can purchase spot cable ads on a DMA-wide basis. CSF ¶ 16. Developed by MVPDs in the 1990s, interconnects solve a market inefficiency. Before interconnects, an advertiser wanting to reach television audiences with commercials running at the same time on the same channel across the DMA had to either rely on

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

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

over-the-air broadcast stations exclusively or negotiate separately with each MVPD. CSF ¶¶ 14–15, Resp. to ¶ 14. An interconnect—of which there is one per DMA—fixes that problem by pooling together avails among the DMAs' MVPDs, scheduling allocations, selling and coordinating the sale of those avails, and billing the parties. *Id.* ¶ 17, Resp. to ¶ 17. These collective services make up "Interconnect Services," according to Viamedia. *Id.*; *see also* Furchtgott-Roth Report ¶¶ 30–42.

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

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

business. *Id.* ¶ 41.

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

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

Interconnect operators can also work directly with an MVPD customer to sell a portion of the MVPD's avails without a third-party Ad Rep. *See id.* ¶ 53; CSF ¶ 29. This arrangement is called an "interconnect-only" agreement. CSF ¶ 30. In such an agreement, the MVPD sells a portion of its avails to the interconnect operator for sale on a DMA-wide basis. *Id.* ¶ 29. Interconnect-only agreements allow interconnect operators to provide Interconnect Services directly to MVPDs. VSF ¶ 67. To sell the remaining avails on a local (*i.e.*, not regional or DMA-wide) basis, MVPDs with an interconnect-only agreement may sell their own avails or hire an Ad Rep for "local-only" agreements. CSF ¶¶ 29, 31, 33, 126; *see also* VSF ¶ 67.

Verizon and Frontier, Verizon's successor in certain DMAs, have previously opted for this arrangement in some DMAs. CSF ¶¶ 32–37. For its part, Comcast has been willing to enter into interconnect-only agreements; since December 2011, 14 percent of Comcast's agreements with MVPDs have been interconnect-only. *Id.* ¶ 129. Comcast entered into its most recent interconnect-only deal in September 2016. *Id.* ¶ 125; Comcast Ex. 58.

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

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

Ad Reps require interconnect "access" to compete effectively for MVPDs' business

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

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

Months before that expiration date, in December 2011, Comcast notified Viamedia that it would not be renewing the agreement. VSF ¶ 15; CSF ¶ 47. As a result, from June 2012 until the expiration of Viamedia's exclusive contracts with RCN and WOW!, Viamedia, RCN, and

WOW! lost out on revenue they may have made if Viamedia could have continued to use Comcast's interconnects. *See* VSF ¶ 17.

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

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

In 2014, however, Comcast and Viamedia began negotiating a contract to permit

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

C. Viamedia's Subsequent Lost Business

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

1. RCN

Up until 2015, Viamedia was RCN's only Ad Rep nationwide. VSF ¶ 32. In 2014, RCN and Viamedia began to negotiate renewing their full-turnkey agreements. CSF ¶ 96. During negotiations, Viamedia "stepped back its guarantees" and gave a "less favorable" offer in November of that year, which caused RCN to react negatively. CSF ¶ 97. RCN then, and for apparently the first time in its relationship with Viamedia, requested Viamedia's financials, which showed that the company was suffering. VSF ¶ 33. According to Viamedia, without interconnect access in Chicago and Detroit, it was "unable to make a competitive financial offer." *Id.* ¶ 33. RCN requested a bid for exclusive, full-turnkey services from Comcast in 2015.

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

CSF ¶ 99. It never sought from Comcast an interconnect-only agreement. *See id.* Comcast ultimately offered superior terms, which, as a former RCN executive testified, made the offers "nowhere near equal" and a "not [ ] very difficult decision" for RCN to make. *Id.* ¶ 100. It selected Comcast as its full-turnkey Ad Rep, knowing that its decision could result in Viamedia exiting the Chicago DMA market. *Id.* ¶ 103.

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

2. WOW!

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

Comcast in those regions. CSF ¶¶ 91, 92. In so doing, WOW! recognized that its decision could force Viamedia out of the Chicago and Detroit regions. *Id.* ¶ 94. WOW!, however, selected Viamedia to represent it in other DMAs, like Columbus, Cleveland, and Tampa. VSF ¶ 29.

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

3. Verizon

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

In January 2013, pursuant to the Verizon-TWC contract, TWC notified Verizon that it

was contemplating exercising the Local Business Option and attached its performance-metric calculations. *Id.* ¶ 62. Verizon responded on February 15, 2015, with a metrics report. Under the original TWC-Verizon contract, TWC had until March 15, 2013, or 30 days after receipt of the metrics report to exercise its Local Business Option. VSF ¶ 50. On March 15, 2013, however, the parties amended the agreement and extended the date by which TWC could exercise the Local Business Option to April 5, 2013. VSF ¶ 50, Resp. to ¶ 50. TWC exercised the Local Business Option on that day. *Id.* ¶ 50. Verizon then replaced Viamedia with TWC in those DMAs. *See* CSF ¶ 65. Further, and also in 2013, Verizon informed Viamedia that it had selected other Ad Reps—including Bright House, Cox, and Comcast—to represent it in several respective DMAs. VSF ¶ 47, Resp. to ¶ 47.

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

4. Frontier

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

those potential sales, and Frontier's revenues fell below the baselines guaranteed by Viamedia in 2015 and 2016. *Id.* ¶ 41.

Outside of Hartford, Viamedia bid for Frontier's business in Los Angeles and Dallas (where Comcast does not run the interconnects). CSF ¶ 77. Frontier rejected Viamedia's offer because it fell "significantly below market value." *Id.* ¶ 78. Viamedia also lost Frontier's business in Tampa (where Comcast also does not control the interconnects) to Bright House. *Id.* ¶ 79.

5. Atlantic Broadband

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

6. Other Claimed Losses

Viamedia also claims that Comcast's refusal to allow its acquired avails to be sold on the Chicago, Detroit, and Hartford interconnects has harmed it in a bevy of ways. The refusal, according to Viamedia, has forced it to negotiate debt amendments, and incur bank and legal fees. *Id.* ¶ 54. In addition, it has had to pay certain personnel expenses, like "retention bonuses and severance payments," as well as wasteful fixed expenses, like "rent on unused office space in Chicago." *Id.* In 2012, Viamedia generated $212 million in revenue and had $23.5 million in

EBITA annually, plus 460 employees who worked for 32 MVPD partners covering 4.7 million subscribers in 57 DMAs. *Id.* ¶ 56. Since 2012, however, Viamedia claims to have lost millions of investment dollars, its good reputation, talented employees, and the ability to renew or obtain new contracts with MVPD partners. *Id.* ¶ 57.

II. Procedural Background

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

A. The Motion-to-Dismiss Decisions

Comcast moved to dismiss the first complaint. R. 22, 23. As every claim of monopolization or attempted monopolization requires anticompetitive conduct, Viamedia proffered three in response to Comcast's motion to dismiss: tying, of Comcast's Interconnect Services to its Ad Rep Services; exclusive dealing, in that Comcast's contracts with MVPDs

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

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

Viamedia amended its complaint, realleging its refusal to deal claim. Comcast moved to dismiss this part of the amended complaint, R. 45, 46, which the Court granted. Again, the Court ruled, Viamedia did not plead that Comcast's decision to exclude it from the interconnects was an independently anticompetitive act. *Viamedia, Inc. v. Comcast Corp.*, No. 16-CV-5486, 2017 WL 698681, at *4–6 (N.D. Ill. Feb. 22, 2017) (*Viamedia II*). As such, this case proceeded to discovery on Viamedia's tying and exclusive dealing claims.

B. Comcast's Liability and Damages Experts

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

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

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

damages.

1. Dr. Furchtgott-Roth's Opinions

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

Having defined separate products, Dr. Furchtgott-Roth explains his tying opinion. Interconnect Services are the tying product, and Ad Rep Services are the tied product. *Id.* ¶ 63.

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

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

on avails, and Comcast has cut off Viamedia's access to Comcast-controlled interconnects. *Id.* ¶ 89–90.

2. Dr. Lys's Opinions

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

On April 4, 2018, the Court held an evidentiary hearing regarding Dr. Lys's opinions pursuant to *Daubert v. Merrell Dow Pharm.*, Inc., 509 U.S. 579 (1993), and Federal Rule of

Evidence 702. At the hearing, Dr. Lys explained his Amended Report in greater detail. In addition, he confirmed that his Amended Report assumed causation. The facts supporting his causation assumptions had been provided by Viamedia's management, although Dr. Lys noted that he "poked" their assertions to ensure that they had some sound basis. Dr. Lys elaborated that he did not think causation in this case could be demonstrated with economic analysis, because the market is one for services, not commodities. At the hearing, Viamedia's counsel, too, confirmed that Dr. Lys was not offered as an expert on causation.[9]

LEGAL STANDARDS

I. Summary Judgment Standard

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

The party seeking summary judgment has the burden of establishing that there is no genuine dispute as to any material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). After "a properly supported motion for summary judgment is made, the adverse party 'must set forth specific facts showing that there is a genuine issue for trial.'" *Anderson*, 477 U.S. at 255 (quotations omitted). That is, the nonmovant "must point to specific facts showing that there is a

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

genuine issue for trial, and inferences relying on mere speculation or conjecture will not suffice." *DiPerna v. Chicago Sch. of Prof'l Psychology*, 893 F.3d 1001, 1006 (7th Cir. 2018) (citation omitted); *see also Bunch v. United States*, 880 F.3d 938, 941 (7th Cir. 2018) ("The party that bears the burden of proof for an issue at trial must 'cite the facts which it believes [would] satisf[y]' that burden and 'demonstrate why the record is so one-sided as to rule out the prospect of a finding in favor of the non-movant.'") (quoting *Hotel 71 Mezz Lender LLC v. Nat'l Ret. Fund*, 778 F.3d 593, 601 (7th Cir. 2015)). If the nonmovant "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial, summary judgment must be granted." *Blow v. Bijora, Inc.*, 855 F.3d 793, 797–98 (7th Cir. 2017) (citation and quotations omitted). "When ruling on a motion for summary judgment, '[t]he court should neither look the other way to ignore genuine issues of material fact, nor strain to find material fact issues where there are none.'" *Simpkins v. DuPage Hous. Auth.*, 893 F.3d 962, 964 (7th Cir. 2018) (quoting *Sec'y of Labor, U.S. Dep't of Labor v. Lauritzen*, 835 F.2d 1529, 1534 (7th Cir. 1987)).

"In the field of antitrust law, summary judgment serves a vital function—it avoids wasteful trials and prevents lengthy litigation that may have a chilling effect on pro-competitive market forces." *Anderson News, L.L.C. v. Am. Media, Inc.*, --- F.3d. ----, 2018 WL 3716083, at *7 (2d Cir. July 19, 2018) (citation, modifications, and quotations omitted); *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986). Indeed, "the very nature of antitrust litigation encourages summary disposition of such cases when permissible." *Collins v. Associated Pathologists, Ltd.*, 844 F.2d 473, 476 (7th Cir. 1988). That is not to say that there is heightened summary-judgment standard in antitrust cases—there is not. Nevertheless, at summary judgment, an antitrust claimant must "present evidence that tends to exclude the

possibility that the [defendant's] conduct was as consistent with competition as with illegal conduct." *Mercatus Grp., LLC v. Lake Forest Hosp.*, 641 F.3d 834, 856 (7th Cir. 2011) (quoting *Nelson v. Monroe Reg'l Med. Center,* 925 F.2d 1555, 1578 (7th Cir. 1991)); *see also Matsushita*, 475 U.S. at 594; *It's My Party, Inc. v. Live Nation, Inc.*, 811 F.3d 676, 685 (4th Cir. 2016); *Indiana Grocery, Inc. v. Super Valu Stores, Inc.*, 864 F.2d 1409, 1412 (7th Cir. 1989).

II. Rule 702 and *Daubert* Standard

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

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert has reliably applied the principles and methods to the facts of the case.

FED. R. EVID. 702. In *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579 (1993), "the Supreme Court interpreted Rule 702 to require the district court to act as an evidentiary gatekeeper,

ensuring that an expert's testimony rests on a reliable foundation and is relevant to the task at hand." *Gopalratnam v. Hewlett-Packard Co.*, 877 F.3d 771, 778 (7th Cir. 2017).

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

ANALYSIS

Comcast argues that summary judgment is appropriate for numerous reasons: Viamedia cannot establish anticompetitive conduct; Viamedia cannot establish causation, in the antitrust sense or for damages purposes; and Viamedia cannot otherwise establish harm to competition.

The first two matters are dispositive, and so the Court will address only them. Along the way, the Court will address Comcast's motions to exclude Viamedia's expert opinions where relevant to the analysis.

I. Viamedia Cannot Establish Anticompetitive Conduct

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

Not usually counted among the traditional anticompetitive practices is a refusal to deal.

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

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

> Firms may acquire monopoly power by establishing an infrastructure that renders them uniquely suited to serve their customers. Compelling such firms to share the source of their advantage is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities. Enforced sharing also requires antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing—a role for which they are ill suited. Moreover, compelling negotiation between competitors may facilitate the supreme evil of antitrust: collusion.

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

Indisputably, Comcast refused to deal with Viamedia by disallowing it access (or

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

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

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

Viamedia claims that Comcast tied access to the interconnects, or Interconnect Services (the tying product), to Comcast's Ad Rep Services (the tied product). "A tying arrangement is 'an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier.'" *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 461–62 (1992) (quoting *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5–6 (1958)). The Supreme

Court has emphasized that the "essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms." *Jefferson Par. Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 12 (1984); *see also Sheridan v. Marathon Petroleum Co. LLC*, 530 F.3d 590, 592 (7th Cir. 2008) ("The traditional antitrust concern with such an agreement is that if the seller of the tying product is a monopolist, the tie-in will force anyone who wants the monopolized product to buy the tied product from him as well, and the result will be a second monopoly."). Accordingly, a tie, whether expressly instituted or effectively applied, exists only where "the defendant improperly imposes conditions that explicitly or practically require buyers to take the second product if they want the first one." Phillip E. Areeda and Herbert Hovenkamp, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 1752b (3d ed. 2018).

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

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

No evidence shows that Comcast told MVPDs, expressly or impliedly, that they could only purchase Interconnect Services on the condition that they also purchase Ad Rep Services. *See Photovest Corp. v. Fotomat Corp.*, 606 F.2d 704, 722 (7th Cir. 1979) ("we are reluctant to

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

find a tying arrangement without some evidence that [the defendant]" created applied a "de facto tying clause"); Areeda & Hovenkamp, Antitrust Law ¶ 1700i ("products are not tied unless the supplier refuses to accommodate those who prefer one without the other"). To the contrary, it is undisputed that 14 percent of Comcast's agreements with MVPDs are interconnect-only. CSF ¶¶ 123–24. With an interconnect-only agreement, an MVPD is free to: forego employing any Ad Rep Services; hire another Ad Rep to sell a portion of their remaining avails on a non-full-turnkey basis[11]; and/or self-provide Ad Rep Services by selling its own avails. *See* CSF ¶¶ 29, 32–36, 126. In antitrust terms, the customer (an MVPD) can purchase the tying product (Interconnect Services) without purchasing the tied product (Ad Rep Services). *Accord Datagate, Inc. v. Hewlett-Packard Co.*, 60 F.3d 1421, 1427 (9th Cir. 1995) ("The harm from tying arrangements is the forced sale of the *tied* product, not the withholding of the tying product.") (emphasis in original). That Comcast has so often entered into such standalone sales of the tying product belies any inference that Comcast tied its services. *See Live Nation*, 811 F.3d at 685 (14 percent of non-tied sales "exceed [ ] sufficiently" whatever baseline is required "to cast doubt on any allegation of tying"); Areeda & Hovenkamp, ANTITRUST LAW ¶ 1756b2 (suggesting that "10 percent unbundling" rebuts "an otherwise established or presumed inference of a tying condition").

Viamedia tries to do away with this inconvenient fact in two ways. First, it argues that Comcast did not sell interconnect-only deals in Chicago, Detroit, and Hartford, where Comcast denied Viamedia use of the interconnects. This case, however, is not limited to those markets—Viamedia challenges Comcast's conduct in the markets in which it operates the interconnects

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

generally. Am. Compl. ¶¶ 1, 180; *see also* Furchtgott-Roth Report ¶¶ 63–73. Second, Viamedia contends that substantial evidence of unbundled sales does little to defeat a tying claim in cases where there is an "announced condition," "rebuffed request for separate provision," or "publicized policy" of tying. *See* Areeda & Hovenkamp, ANTITRUST LAW ¶¶ 1756a, 1756b. True enough, but this is no such case. The record lacks evidence showing that Comcast told customers that they could not receive an interconnect-only deal—that is, Interconnect Services—standing alone.[12]

Even focusing exclusively on Chicago, Detroit, and Hartford, there is insufficient evidence of conditioning. "A high percentage, even 100 percent, of unbundled sales does not itself indicate that two products may have been tied together" because "buyers may have all bought the products bundled because they preferred them together." *Id.* ¶ 1756b2. Viewing the record in the light most favorable to Viamedia, this is precisely what it reflects. It is undisputed that both RCN and WOW! *wanted* full-turnkey representation, and whichever company they hired had to have the ability to make available to them both Interconnect Services and Ad Rep Services. CSF ¶¶ 90, 99. When "a consumer wants to purchase a bundle of the alleged tying and tied products, the seller is simply satisfying consumer demand and monopolization concerns are irrelevant." *Kaufman v. Time Warner*, 836 F.3d 137, 142 (2d Cir. 2016).

Viamedia responds by pointing out that Comcast never *offered* RCN or WOW! an

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

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

Viamedia thus cannot show that Comcast ever withheld the tying product *from customers* unless they also purchase the tied product. *Live Nation*, 811 F.3d at 684 (if "the buyer is free to decline the tied product or to purchase the two products separately, then by definition there is no unlawful tying"). The real rub of Viamedia's tying claim is, instead, that Comcast withheld the tying product *from its rival Viamedia*. The consequence: customers that contracted with Viamedia could not obtain Comcast's Interconnect Services through their Viamedia representation, and customers wanting a full-turnkey deal that made available to them both Interconnect Services and Ad Rep Services could not get such a deal through Viamedia. In Viamedia's words, Comcast withholds Interconnect Services from "*Viamedia's MVPD partners*"—not MVPDs, period—and therefore "constrains improperly [MVPDs'] choice" by "excluding Viamedia" as a competitor. R. 326 at 19.

Viamedia's theory extends tying beyond the law's recognition. The constraining of consumer choice is of course a feature of a tying arrangement, Areeda & Hovenkamp, ANTITRUST LAW ¶ 1756b2, but there must still be an actual "tie" of products or services, *Reifert*

v. S. Cent. Wisconsin MLS Corp., 450 F.3d 312, 317 (7th Cir. 2006); *Photovest*, 606 F.2d at 722. Viewing the record in Viamedia's favor, it shows none.

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

[13] Viamedia's attempt to distinguish *Aerotec* is meritless. It argues that, "unlike the plaintiff in *Aerotec*, Viamedia does not purchase Interconnect Services for its own account, but rather purchases them on behalf of MVPDs." R. 326 at 28. How one could read *Aerotec* and conclude that the plaintiff (a repair servicer) purchased replacement airplane parts "for its own account"—as opposed to "on behalf of" its airplane-owning customers—is questionable. Like Viamedia, it was precisely because the plaintiff could not make available the supposedly tying product (replacement parts) to its customers that its business suffered. *Aerotec*, 836 F.3d at 1177; *see also Aerotec Int'l, Inc. v. Honeywell Int'l, Inc.*, 4 F. Supp. 3d 1123, 1133 (D. Ariz. 2014) ("Aerotec asserts that Honeywell's practices

A similar story unfolded in *Serv. & Training, Inc. v. Data Gen. Corp.*, 963 F.2d 680 (4th Cir. 1992). In that case, Data General manufactured computer systems and offered a diagnostic tool that was critical to servicing those systems. Data General used the diagnostic tool in servicing its systems for customers, but it refused to license the diagnostic tool to competing third-party maintenance servicers. *Data Gen.*, 963 F.2d at 682–83. One servicer sued, alleging that Data General effectively tied the provision of its diagnostic tool to the sale of its services. *Id.* at 683. The district court granted Data General summary judgment and the Fourth Circuit affirmed. The Fourth Circuit held that, even if the diagnostic tool and maintenance services could be tied together, the plaintiff-servicer had not produced sufficient evidence of such a tie. *Id.* at 687–88. Evidence showed that customers demanded that their servicers be able to use the diagnostic tool, and, as the result of Data General's refusal to license, third-party servicers simply could not compete for that business. *See id.* at 687. This was not a tying condition, according to the court. *See id.* at 687–688; *see also id.* at 686 ("The fact that Data General has selectively licensed [the diagnostic tool] is not evidence of an illegal tying arrangement. Data General may lawfully license [the tool] to whomever it chooses.").

Like the third-party competitors in *Aerotec* and *Data General*, Viamedia has shown "no direct condition" of a tie. *Aerotec*, 836 F.3d at 1179; *see Data Gen.*, 36 F.2d at 687–88. It admits that Comcast has been willing to deal with MVPDs on an interconnect-only basis, and no evidence shows that a sales condition—as opposed to prevailing MVPD preference combined with Comcast's refusal to deal—is what kept RCN and WOW! from purchasing Viamedia's Ad Rep Services. *See Data Gen.*, 36 F.2d at 687–88. Rather than show a direct tying condition on

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amount to per se illegal tying, claiming that Honeywell uses its dominant position in the market for Honeywell APU parts to coerce APU owners, *who need Honeywell APU component parts for APU repairs*, to purchase MRO services from Honeywell.") (emphasis added). Whatever Viamedia means by "on its own account," it is an economically meaningless distinction in comparing *Aerotec* to this case.

MVPD customers, Viamedia takes issue with how Comcast has chosen (not) to deal with *it* and the consequences that choice has had on *its* ability to compete. But "tactics imposed on a third-party competitor" are insufficient "to create a tie with respect to a separate buyer simply because they make it less desirable to purchase from the third party." *Aerotec*, 836 F.3d at 1180; *accord Linkline*, 555 U.S. at 450 (a monopolist can generally wield its "upstream" power "to prevent rival firms from competing effectively" in a downstream market).[14]

Viamedia's insistence that comments made by RCN, WOW!, and Comcast create a genuine issue of fact as to whether there was tying is misplaced. RCN and WOW! stated that they understood that they could not have their avails sold on Comcast-operated interconnects without hiring Comcast as their "representative." VSF ¶ 18. A Comcast executive, moreover, answered "yes" when asked by the Department of Justice whether it was Comcast's "business practice" that if "an MVPD wants to get access to a Comcast controlled Interconnect, it has to hire Comcast as its ad sales representative." *See id.* ¶¶ 13, 18, 19. None of these statements, however, "tend[ ] to exclude the possibility" that Comcast's conduct "was as consistent" with a legal refusal to deal as an illegal tying of its services. *Mercatus Grp.*, 641 F.3d at 856; *see also Authenticom*, 874 F.3d 1019 (after a preliminary-injunction hearing, expressing "dubious[ness] in the extreme" that a dealers' supposed tying of two related products "amounts to tying, rather

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

than simply participation at two levels of the market, as in *Linkline*").

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

Data General is again instructive. There, the plaintiff-servicer presented evidence that in pitching its maintenance service Data General had "stated to potential customers that *only* Data General" could use the diagnostic tool—the implication being, of course, that customers had to hire Data General services to receive the benefit of the diagnostic tool. *Data Gen.*, 963 F.2d at 687 (emphasis added). But this evidence did not tend to exclude legal conduct. *Id.* Other servicers had no right to use the diagnostic tool, and so Data General's statements were "entirely consistent" with it "lawfully extolling the superiority of its repair services." *Id.* Similarly, in *Data General* the "customers as a matter of fact have demanded that any" servicers "be able" to use the diagnostic tool, and thus the evidence that they choose Data General over other servicers suggested simply that customers "preferred Data General services using [the diagnostic tool]

over [third-party servicers] that do not." *Id.* at 687. The same is true here. Viewing the record in Viamedia's favor, Comcast said that its "practice"—in an industry dominated by full-turnkey business, where MVPDs generally prefer not to do interconnect-only deals—is that an MVPD must employ Comcast to have its avails sold on the interconnects. *See* VSF ¶ 13. Likewise, RCN and WOW! did not complain that were unable to receive Interconnect Services from Comcast on a standalone basis. The record shows they complained, at most, that they could not receive Interconnect Services *through* Viamedia, and had to work with Comcast directly because they wanted full-turnkey representation that could make available Interconnect Services. *See, e.g.*, VSF ¶ 18. This evidence is, at a minimum, equally consistent with Comcast's refusal to deal with Viamedia as it is a tying arrangement.

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

Another wrinkle of Viamedia's claim is worth addressing. Although Viamedia does not define Ad Rep Services as only full-turnkey services, *see* Furchtgott-Roth Report ¶¶ 22–29, it occasionally refers to Comcast's tie as one of Interconnect Services to full-turnkey Ad Rep

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

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

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

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

Viamedia submits that this principle applies only "to situations where the only separate demand for the tying product comes from the defendant's rivals." R. 326 at 31; *see also* R. 235 at 10. Not so. "Even if the separate provision of ingot [the tying product] and fabrication [the tied product] is common in competitive analogues," there is no liability for tying "when the

plaintiff's theory of injury is not that customers of the defendant's bundle would buy the items unbundled if they could, but rather that a rival could sell the *same bundle* if only the defendant would sell it a particular input." Areeda & Hovenkamp, ANTITRUST LAW ¶ 1748b; *see also id.* ¶ 1748b n.2 (a finished-product exists even where the claimant meets the "threshold requirement of showing buyer interest because we can find some buyers desiring the items unbundled").

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

Viamedia further argues that deciding Comcast did not tie services would "conflict[ ] with sound antitrust policy." R. 326 at 29. It provides no authority for its perspective on what antitrust policy should be, and understandably. Viamedia's view "demand[s] that holders of market power cooperate with rivals"—a view that "bit the dust" with *Trinko*. Frank H. Easterbrook, *The Chicago School & Exclusionary Conduct*, 31 HARV. J.L. & PUB. POL'Y 439, 441–42 (2008). Courts routinely tout the procompetitive benefits of integration, even if

middlemen suffer. *See, e.g.*, *It's My Party*, 811 F.3d at 689 ("A single firm incorporating separate but closely related production processes can often be far more efficient than various independent entities transacting to produce the same good or bundle of goods."). Viamedia's contrary claim "echoes a plea for relief on behalf of a competitor, not for the sake of competition itself." *Aerotec*, 836 F.3d at 1180.[15]

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

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

Rule 702(a) and *Daubert* provide that "[a]n expert's opinion is helpful only to the extent the expert draws on some special skill, knowledge, or experience to formulate that opinion"—in other words, "the opinion must be an *expert* opinion." *United States v. Benson*, 941 F.2d 598, 604 (7th Cir. 1991), *amended on other grounds* 957 F.2d 301 (7th Cir. 1992); *see also* FED. R. EVID. 702(a); *Owens*, 895 F.3d at 972 (the expert's testimony must "assist the trier of fact"). "Expert testimony does not assist the trier of fact when the jury is able to evaluate the same evidence and is capable of drawing its own conclusions without the introduction of a proffered expert's testimony." *Matter of the Complaint of Ingram Barge Co.*, No. 13 C 3453, 2016 WL 3763450, at *10 (N.D. Ill. July 14, 2016); *see also Dhillon v. Crown Controls Corp.*, 269 F.3d

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

865, 871 (7th Cir. 2001) ("An expert must testify to something more than what is 'obvious to the layperson' in order to be of any particular assistance to the jury."); *Taylor v. Ill. Cent. R.R. Co.*, 8 F.3d 584, 585–86 (7th Cir. 1993) (affirming the exclusion of expert testimony where "any lay juror could understand th[e] issue without the assistance of expert testimony"). As such, expert testimony "cannot be presented to the jury solely for the purpose of constructing a factual narrative based upon record evidence." *Newman ex rel. Newman v. McNeil Consumer Healthcare*, No. 10 C 1541, 2013 WL 9936293, at *6 (N.D. Ill. Mar. 29, 2013); *United States v. Hall*, 93 F.3d 1337, 1343 (7th Cir. 1996) ("Unless the expertise adds something, the expert is at best offering a gratuitous opinion, and at worst is exerting undue influence on the jury."). Expert testimony, further, must be consistent with the law; otherwise it is necessarily unhelpful and risks confusing and misleading the jury. *Loeffel Steel Prod., Inc. v. Delta Brands, Inc.*, 387 F. Supp. 2d 794, 806 (N.D. Ill. 2005) ("Expert opinions that are contrary to law are inadmissible. They cannot be said to be scientific, to be reliable, or to be helpful to the trier of fact.") (citations omitted).

Dr. Furchtgott-Roth's tying opinions fail these requirements. Furchtgott-Roth Report ¶¶ 63–71. His opinion that Comcast had a tying policy rests exclusively on a lay interpretation of evidence that this Opinion has already discussed. *Id.* ¶¶ 64–66. Quoting the Comcast testimony provided to the DOJ cited above, *supra* at 34–35, for example, he matter-of-factly asserts that "Comcast has admitted that it ties Spot Cable Ad Rep Services to Interconnect Services." *Id.* ¶ 64. He also relies on the MVPDs' statements to conclude that the MVPDs "understood" that they had to deal with Comcast to obtain Interconnect Services. *Id.* ¶ 64. Although Dr. Furchtgott-Roth later adopts his interpretation of those documents "[a]s a matter of economics," *id.* ¶ 68, he does not undertake any expert assessment in arriving at that conclusion.

Elorac, Inc. v. Sanofi-Aventis Canada Inc., No. 14 C 1859, 2017 WL 3592775, at *27 (N.D. Ill. Aug. 21, 2017) (excluding expert because "[n]o expert economic analysis is necessary on [a] basic point, nor, in truth, did [the expert] perform any; his opinion appears to be based simply on his review of [evidence], not a scientific analysis"); *In re Live Concert Antitrust Litig.*, 863 F. Supp. 2d 966, 993 (C.D. Cal. 2012) (excluding expert opinions because a "key ingredient missing" was "*economic analysis* (be it quantitative or qualitative) tying these statements by [witnesses and observers] to" the "ultimate conclusion") (emphasis in original). All he cites is the undisputed and unremarkable fact that Comcast and Viamedia were the only two full-turnkey Ad Reps in certain DMAs, like Chicago and Detroit. *Id.* ¶ 67.

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

Dr. Furchtgott-Roth's narrative, moreover, is contrary to the law for reasons already explained. His opinions seek to hold Comcast liable for the mere withholding of the tying

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

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

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

hazard barriers to deals, and preventing free-riding." *VBR Tours, LLC v. Nat'l R.R. Passenger Corp.*, No. 14-CV-00804, 2015 WL 5693735, at *12 (N.D. Ill. Sept. 28, 2015) (citing *Republic Tobacco*, 381 F.3d at 736).

Viamedia does not explain its exclusive dealing claim.[16] It is not clear if Viamedia takes issue with the exclusive and full-turnkey representations that are the undisputed industry norm, the fact that Comcast deals exclusively with MVPDs that work directly with it, or some combination of the two. In any event, Viamedia's claim fails.

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

[16] Viamedia's defense of its exclusive dealing claim is near perfunctory. It devotes just a page and a half to this claim in its 46-page brief, and in the course of that page and a half neither cites a single fact nor raises a single case save for *Viamedia I*.

Health, 859 F.3d at 410 (affirming summary judgment because plaintiff had not shown evidence of the "dire consequences" required to deem exclusive contracting illegal).

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

That Comcast's exclusive deals do not harm competition is further established by the fact that they are the very deals that MVPD-consumers seek. To be sure, the law can prohibit monopolists from engaging in conduct generally permitted to those without market power.

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

Eastman Kodak, 504 U.S. at 488 (Scalia, J., dissenting); *E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 637 F.3d 435, 441 (4th Cir. 2011); *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181, 187 (3d Cir. 2005). But here it is undisputed that both RCN and WOW! *requested* "exclusive, full turnkey representation," CSF ¶¶ 90, 99, and only for a fixed period in limited geographic markets. *See Methodist Health*, 859 F.3d at 410; Areeda & Hovenkamp, ANTITRUST LAW 1802g2. Frontier wanted the same in Hartford, a deal which Viamedia won and assented to. *Id.* ¶ 73. MVPDs' desire for exclusive, full-turnkey deals is, moreover, economically sound. It is undisputed that such Ad Rep Services provide both MVPDs and advertisers a "one stop shop" for the sale and purchase of avails. CSF ¶ 28. Thus, doing as Viamedia requests—requiring a monopolist to rebuff customers' requested, and mutually beneficial, terms in order to assist competitors—would itself "impair[ ] the health of the competitive process." *Roland Mach.*, 749 F.2d at 394.

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

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

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

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

Viamedia, however, is procedurally barred from raising this claim. Despite extensive motion to dismiss briefing and numerous hearings in court, Viamedia has never raised this claim before. "It is well settled that a plaintiff may not advance a new argument in response to a summary judgment motion." *Abuelyaman v. Illinois State Univ.*, 667 F.3d 800, 814 (7th Cir. 2011); *see also, e.g.*, *Anderson v. Donahoe*, 699 F.3d 989, 998 (7th Cir. 2012); *Midco Int'l, Inc. v. Metro. Life Ins. Co.*, No. 14 CV 9470, 2017 WL 2868949, at *4 n.1 (N.D. Ill. July 5, 2017) ("a new theory" of liability "raised for the first time in response to the motion for summary judgment" that "was not plaintiff's theory at the motion-to-dismiss stage" is "waived"). Viamedia, in fact, was not just silent in failing to advance this theory earlier. It affirmatively disavowed any "free-standing" monopolization claim "unaccompanied by . . . 'any of the normal exclusionary practices.'" R. 32 at 7 (quoting *Schor*, 457 F.3d at 610–11).

The Court relied on that assertion in *Viamedia I*, concluding that Viamedia's claim was not "'free standing' because it alleges particular types of anticompetitive conduct." *Viamedia I*, 218 F. Supp. 3d at 695; *see also id.* ("Viamedia's success turns on whether it states a claim based on those three classes of anticompetitive conduct [tying, exclusive dealing, and a refusal to deal],

not whether a free-standing leveraging theory is independently viable."). Now accepting Viamedia's claim—about which Viamedia's liability expert did not clearly opine—would add a new dimension to this two-year-old litigation after the close of all fact and expert discovery and allow Viamedia to circumvent motion to dismiss procedures. *See, e.g.*, *Shuffle Tech Int'l LLC v. Sci. Games Corp.*, No. 15 CV 3702, 2017 WL 3838096, at *8 (N.D. Ill. Sept. 1, 2017) (judicial estoppel "requires that the court accepted the earlier position such that its acceptance of the new position would lead to inconsistent determinations"). It would, moreover, prejudice Comcast by forcing it to defend a claim that Viamedia indicated at the motion to dismiss stage that it was not pursuing. *See The Medicines Co. v. Mylan Inc.*, No. 11-CV-1285, 2014 WL 1979261, at *3–4 (N.D. Ill. May 15, 2014).

Setting waiver and estoppel aside, Viamedia's claim fails.[19] It hits the same roadblock Viamedia's tying claim did: viewing the record in light most favorable to Viamedia, no evidence tends to exclude the fact that Comcast's conduct was merely a refusal to deal, rather than anticompetitive conduct. *See Mercatus Grp.*, 641 F.3d at 856. The claim is just a "recast" of the refusal to deal, complaining, again, about Comcast's refusal to allow Viamedia to resell MVPDs' avails on the Interconnects and the impact that conduct has had on its ability to compete. *Novell*, 731 F.3d at 1079; *see* R. 326 at 25 (complaining that "Comcast has used its control over the Interconnects to squeeze its only competitor"). The "refusal to deal doctrine is not so easily evaded." *Novell*, 731 F.3d at 1079. Viamedia may have been rendered unable to "compete effectively," *Linkline*, 555 U.S. at 450, *see also* Furchtgott-Roth Report ¶¶ 86–92, but even Section 2 does not concern itself with the welfare of a competitor; it asks whether the

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

monopolist's actions were cognizably anticompetitive. *Id.* at 448–450; *Trinko*, 540 U.S. at 407–08; *see also Schor*, 457 F.3d at 611–14 (rejecting monopoly claims not tied to "normal exclusionary practices"); *Ball Mem'l Hosp., Inc. v. Mut. Hosp. Ins., Inc.*, 784 F.2d 1325, 1338 (7th Cir. 1986) ("Action that injures rivals *may* ultimately injure consumers, but it is also perfectly consistent with competition, and to deter aggressive conduct is to deter competition. Thus the plaintiff faces a stiff burden in any § 2 litigation."). For reasons explained above, and in *Viamedia I* and *Viamedia II*, Comcast's refusal to permit Viamedia to participate in the interconnects does not violate the Sherman Act.

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

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

A. Viamedia Cannot Show Antitrust Injury

To establish an antitrust injury, a plaintiff must show that the anticompetitive conduct complained of was "the cause-in-fact of the injury"—that is, "'but for' the violation, the injury would not have occurred." *Kochert v. Greater Lafayette Health Servs., Inc.*, 463 F.3d 710, 718 (7th Cir. 2006) (antitrust injury must "reflect the anticompetitive effect of either the violation or of anticompetitive acts made possible by the violation"); *see also O.K. Sand & Gravel*, 36 F.3d

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

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

Without exception, each injury Viamedia identifies—the lost revenue from the Chicago and Detroit interconnects after Comcast refused to renew the 2003 agreement in 2012; lost contracts with MVPDs; the lost revenue from the Hartford interconnect; and the attendant

business expenses and talent loss—is fully attributable to Comcast's decision to deny Viamedia interconnect access. Dr. Furchtgott-Roth, for example, asserts that Viamedia's foreclosure from the market "flows *directly* from Viamedia's inability to access" the interconnects. Furchtgott-Roth Report ¶ 90 (emphasis added). Dr. Lys, likewise, premises all of his damages opinions on the assumption that absent Comcast's anticompetitive conduct Viamedia would have had reasonable access to the interconnects. *E.g.*, Lys Report ¶ 34(1)–(7). He even testified that his "entire damages estimate is based directly or indirectly on Viamedia's lack of access to Comcast Spotlight's interconnect in Chicago, Detroit, and Hartford." Comcast Ex. 7 at 235:18–236:20. Mark Lieberman, Viamedia's CEO, similarly complains that "Viamedia lost business and revenues as a consequence of being excluded from Comcast-operated Interconnects." Viamedia Ex. 5 at 5. By all accounts, Viamedia's refusal to deal with Comcast explains entirely Viamedia's injuries. *See MCI Commc'ns Corp.*, 708 F.2d at 1161.

Novell is on point. In that case, a software-providing competitor of Microsoft's, Novell, filed suit under Section 2. *Novell*, 731 F.3d at 1065 (Gorsuch, J.). In rolling out Windows 95, Microsoft had initially decided to share certain intellectual property—like namespace extensions, which allow users to search for and open documents outside of a particular application—with independent software providers. *Id.* at 1067–68. It later changed course, after concluding that not sharing the intellectual property would maximize its profits. *Id.* at 1068. This conduct impeded Novell's ability to build (and sell) software around the extensions, and its "business suffered" because it was delayed in launching its new software. *Id.* at 1069. Unable to sustain a refusal to deal case under *Aspen Skiing* and *Trinko*, Novell argued at summary judgment that Microsoft's conduct was not merely a refusal to deal but an act of business deception that sufficed independently for Section 2 purposes. *Id.* at 1079–1080. The Tenth Circuit disagreed,

concluding that Novell lacked antitrust injury to bring such a claim. *Id.* at 1080. It reasoned that even if Microsoft had been upfront about its competitive decisions, and engaged in nothing nearing a business tort, "Novell and consumers *still* would have suffered the same alleged harm"—the delayed release of products caused by Microsoft's refusal to deal. *Id.* (emphasis in original). So too here. Viamedia's own evidence decisively establishes that Comcast's refusal to deal was sufficient unto itself to cause Viamedia's injuries.

Viamedia offers no meaningful rejoinder to this plain fact. At most, Viamedia submits that as long as it has established the type of injuries with which the antitrust laws are concerned, the Court should "presume that such an injury . . . was caused by" an anticompetitive act. R. 326 at 35 (citing *Publ'n Paper*, 690 F.3d at 66). Even if that were true, Viamedia's own evidence shows that tying and exclusive dealing were not "but for" causes of Viamedia's injuries. *Publ'n Paper*, 690 F.3d at 67 (the presumption is rebuttable). Those injuries, which Viamedia concedes stem from Comcast's decision to deny Viamedia interconnect access in Chicago, Detroit, and Hartford, would have occurred with or without attendant tying and exclusive dealing. *Supra* at 50; *infra* at 53–55; Furchtgott-Roth Report ¶ 91; *see generally* Lys Am. Report. No evidence suggests otherwise. Apart from that argument, Viamedia offers little to explain how it can demonstrate that anticompetitive conduct, not an independent and already-deemed legal refusal to deal, caused its antitrust injury.[20]

It is black-letter law that Viamedia must show that it would have suffered antitrust injury but for Viamedia's anticompetitive conduct. *E.g.*, *Kochert*, 463 F.3d at 718; *MCI Commc'ns Corp.*, 708 F.2d at 1161. Critically, Viamedia does not argue or present any evidence showing that absent tying or exclusive dealing practices, Comcast would have felt any differently about

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

excluding Viamedia from the interconnects. To the contrary, the record presents ample evidence of Comcast's decision to stop dealing with middlemen and go after full-turnkey relationships with more MVPDs. As such, in the but-for world, Comcast still would have refused to deal with Viamedia; it just could not further condition services or engage in anticompetitive exclusive dealing. Viamedia makes no effort to account for that but-for world, and that is the fundamental flaw in its case.

B. Viamedia Cannot Show Damages Resulting from Supposedly Anticompetitive Conduct

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

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

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

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

Under the law, Viamedia must be able to segregate the damages (to a reasonable degree, at least) caused by lawful competition from those caused by anticompetitive acts. *See MCI Commc'ns Corp.*, 708 F.2d at 1162; *see also* ABA Section of Antitrust Law, *Proving Antitrust Damages: Legal and Economic Issues* 13–14 (3d ed. 2017) ("courts require that the antitrust

violation be the sole cause of the plaintiff's damages, by insisting on a but-for world that eliminates only the defendant's unlawful conduct separately from all other sources that may also have caused the plaintiff's damages"). Considering them to be one in the same, Viamedia fails to do so.[21] It therefore seeks to "force" Comcast "to pay treble damages for conduct that was determined to be entirely lawful." *MCI Comm'ns*, 708 F.2d at 1162–63.

2. Dr. Lys's Damages Opinions Are Inadmissible

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

Dr. Lys's opinions are inadmissible, as they rest on the unfounded assumption that Viamedia could have accessed the interconnects but for Comcast's anticompetitive conduct. *See, e.g.*, *Buscaglia v. United States*, 25 F.3d 530, 533 (7th Cir. 1994) (expert testimony may not be

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

based on "unsupported assumptions"); *see also, e.g.*, *Craftsmen Limousine, Inc. v. Ford Motor Co.*, 363 F.3d 761, 777 (8th Cir. 2004); *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1055–1057 (8th Cir. 2000); *Rickman v. Deere & Co.*, 36 F.3d 1093 (4th Cir. 1994); *accord Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 242 (1993) ("When an expert opinion is not supported by sufficient facts to validate it in the eyes of the law, or when indisputable record facts contradict or otherwise render the opinion unreasonable, it cannot support a jury's verdict."); Areeda & Hovenkamp, ANTITRUST LAW ¶ 657b ("If the plaintiff's expert's damages study cannot segregate lawful from unlawful practices, then no damages may be awarded on the basis of that study.").

3. Viamedia's Claim for Injunctive Relief Fails

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

Antitrust law does not allow the injunctive relief Viamedia seeks. *See* Areeda & Hovenkamp, ANTITRUST LAW ¶ 774c. *Trinko* and *Linkline* prohibit enforced sharing absent a duty to deal, and for good reason. Forced sharing "lessen[s] the incentive for the monopolist, the rival, or both to invest," it requires courts to act as "central planners" over the proper terms of such sharing, and it can compel the "supreme evil of antitrust: collusion." *Trinko*, 540 U.S. at 407–08; *see also* Easterbrook, *The Chicago School & Exclusionary Conduct*, at 441–42; Richard

A. Posner, ANTITRUST LAW 242 (2d ed. 2001) ("Where the refusal to deal is unilateral, the only effective remedy is an order that defendant do business with the victim of the refusal to deal. The antitrust court becomes charged with the supervision of an ongoing commercial relationship, a function that courts are not equipped to perform effectively."). Indeed, while examining claims similar to the ones Viamedia brings, the Seventh Circuit recently warned about "fail[ing] to adhere to the lessons of" *Trinko* and *Linkline*. *Authenticom*, 874 F.3d at 1021. In doing so, it vacated a preliminary injunction that forced two firms that dominated upstream markets to allow their downstream competitors access to their systems. The Seventh Circuit noted that if there is a tie, "the proper remedy would be to enjoin the tie"—not, as Viamedia requests, "to create a duty to deal." *Id.* at 1026.

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

CONCLUSION

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

Dated: August 16, 2018

ENTERED

AMY J. ST. EVE
United States Circuit Court Judge
Sitting by Designation

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

VIAMEDIA, INC.,	)	
	)	
Plaintiff,	)	Case No. 16-cv-5486
	)	
v.	)	Hon. Amy J. St. Eve
	)	
COMCAST CORPORATION and COMCAST SPOTLIGHT, LP,	)	
	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

AMY J. ST. EVE, District Court Judge:

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

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

BACKGROUND[2]

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

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

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

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

Viamedia's participation in the Chicago and Detroit Interconnects ended, however, in June of 2012. (*Id.* at ¶ 110.) "Comcast informed WOW and RCN that if they wished to regain access to the Interconnects, they would be required to cease using Viamedia as their Spot Cable Advertising Representative and would instead be required to retain Comcast Spotlight." (*Id.* at ¶ 113.)

Viamedia alleges that, as an Interconnect manager, Comcast has an incentive to maximize participation in the Interconnect by eligible MVPDs because Comcast collects fees from Interconnect participants and "[t]he economic value of each Interconnect is derived from its ability to provide a single point of access for advertisers to purchase Spot Cable Avails that are capable of reaching *all* subscribers within a DMA." (*Id.* at ¶ 154–55, 157 (emphasis in original).) According to Viamedia, when Comcast refused to deal with Viamedia, it prevented WOW and RCN from participating in regional ad sales through the Interconnects. (*Id.* at ¶¶ 159–60.) This refusal allegedly "reduced significantly the number of cable subscribers covered by the [Chicago and Detroit] Interconnect[s]." (*Id.*) Additionally, it reduced the fees Comcast would have collected if WOW and RCN had continued to participate in the Interconnects. (*Id.*) Accordingly, Viamedia claims that Comcast's exclusion of Viamedia was "irrational and contrary to" Comcast's economic incentives. (*Id.* at ¶ 158–60.) Additionally, Viamedia alleges that dealing with Viamedia "would have entailed no cost to Comcast as the Interconnect manager, would have provided the Interconnect and Comcast . . . with immediate benefits, and would have served the interests of the Interconnect customers, namely the regional advertisers, to reach all subscribers in the market." (*Id.* at ¶ 158.)[3]

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

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

On May 26, 2016, Viamedia filed a six-count complaint against Defendants Comcast and Comcast Spotlight, asserting, among other things, that Defendants violated Section 2 of the Sherman Act through attempted monopolization and "unlawful monopolization in markets for spot cable advertising representation in DMAs where Comcast controls the Interconnect[]." (R. 1 at ¶¶ 164–82.) Specifically, Viamedia alleged that Defendants, "[b]y refusing to deal with Viamedia and MVPDs represented by Viamedia, by conditioning access to Interconnects upon an MVPD's agreement to deal with Comcast Spotlight, [and] by requiring that MVPDs deal exclusively with Comcast Spotlight as a Spot Cable Advertising Representative" and "by conditioning access to Interconnects upon an MVPD's agreement to deal with Comcast Spotlight," imposed upon RCN and WOW an invalid tying arrangement and engaged in impermissible exclusive dealing. (*Id.* at ¶¶ 168, 176.) In other words, Viamedia alleged that Defendants violated the Sherman Act through tying, exclusive dealing, and a refusal to deal. (R. 36, Mem. Op. & Order, 18.) Viamedia repeats those allegations in its amendment complaint. (R. 40 at ¶¶ 183, 191.)

On July 22, 2016, Defendants filed a Motion to Dismiss, (R. 22), which the Court denied in part and granted in part, *Viamedia*, 2016 WL 6568074, at *17. Specifically, the Court dismissed Viamedia's refusal to deal claim without prejudice but denied Defendants' motion

with respect to Viamedia's other claims. *Id.* The Court reasoned that "Viamedia has not alleged or explained how Defendants' refusal to deal with it—separate from Defendants' other conduct like conditioning MVPDs' access to Interconnects on accepting Comcast Spotlight's services even for advertising sales that do not involve an Interconnect—has no rational competitive purpose." *Id.* at 16.

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

LEGAL STANDARD

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

ANALYSIS

The only issue before the Court is whether Comcast's alleged refusal to deal plausibly constitutes the type of anticompetitive conduct that violates Section 2 of the Sherman Act.[4] (*See* R. 45.) The Supreme Court has long held that "[a]s a general rule, businesses are free to choose the parties with whom they will deal, as well as the prices, terms, and conditions of that dealing." *Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc.*, 555 U.S. 438, 448 (2009) (citing *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919)). Accordingly, a business's refusal to deal is generally not actionable. *See id.*; *see also Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 408 (2004). The Supreme Court has explained that "[c]ompelling . . . firms to share the source of their advantage is in some tension with the underlying purpose of antitrust law" for three central reasons. *Trinko*, 540 U.S. at 408-09. First, court-mandated cooperation among businesses "may lessen the incentive for the monopolist, the rival or both to invest in" the capital projects that give them a competitive advantage. *Id.* at 409. Second, "[e]nforced sharing . . . requires antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing-a role for which they are ill suited." *Id.* Third, "compelling negotiation between competitors may facilitate the supreme evil of antitrust: collusion." *Id.*; *see also Schor v. Abbott Labs.*, 457 F.3d 608, 610 (7th Cir. 2006) ("[A]ntitrust law does not require monopolists to cooperate with rivals by selling them products that would help the rivals compete. Cooperation is a *problem* in antitrust, not one of its obligations." (emphasis in original) (citation omitted)).

Nevertheless, the Supreme Court explained that "[t]he high value that we have placed on the right to refuse to deal with other firms does not mean that the right is unqualified." *Trinko*,

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

540 U.S. at 408 (*quoting Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 601 (1985)). "Under certain circumstances, a refusal to cooperate with rivals can constitute anticompetitive conduct and violate § 2." *Id.* "The leading case for § 2 liability based on refusal to cooperate with a rival . . . is *Aspen Skiing*." *Id.*

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

The Supreme Court affirmed a jury verdict for the plaintiff. *Aspen Skiing*, 472 U.S. at 610. As the *Trinko* Court described it, the *Aspen Skiing* Court "found significance in the defendant's decision to cease participation in a cooperative venture." *Trinko* at 540 U.S. at 409 (citing *Aspen Skiing*, 472 U.S. at 608, 610–11). "The unilateral termination of a voluntary *(and thus presumably profitable)* course of dealing suggested a willingness to forsake short-term profits to achieve an anticompetitive end." *Id.* (emphasis in original) (citing *Aspen Skiing*, 472 U.S. at 608, 610–11). Additionally, "the defendant's unwillingness to renew the ticket *even if compensated at retail price* revealed a distinctly anticompetitive bent." *Id.* Thus, "the evidence

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

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

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

In opposing the first motion to dismiss in this case, Viamedia relied on the *Aspen Skiing* exception to courts' general aversion to imposing antitrust liability on the basis of a unilateral

refusal to deal. (R. 28 at 10–14.) Once again, Viamedia relies on the *Aspen Skiing* exception, contending that Comcast's actions were irrational but for their anticompetitive effects. (R. 56, Pl.'s Opp., 4–10.) As the Court concluded in resolving the first motion to dismiss, Viamedia fails to meet its pleading burden.

Viamedia argues that "[t]he immediate effect of" Comcast terminating Viamedia and its clients' access to the Chicago and Detroit Interconnects "was to significantly reduce the number of eligible cable subscribers to the Interconnects in those DMAs, reducing the value of the Interconnect regional advertisers and forfeiting fees Comcast otherwise would have received as the Interconnect manager." (*Id.* at 4.) Accordingly, Viamedia contends that Comcast "was exercising its monopoly power to simply exclude Viamedia and Viamedia's clients from the Interconnect[s], to Comcast's own economic detriment." (*Id.* at 4–5.)

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

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

731 F.3d at 1075. Accordingly, plaintiffs seeking to establish an unlawful refusal to deal must show that the defendant's actions serve no rational procompetitive purpose. *See id*; *see also VBR*

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

Tours, 2015 WL 5693735, at *9 ("[T]he question is not whether [the defendant] chose the most competitive offer but whether it had *any procompetitive purpose*. . . . *Aspen Skiing*'s limited exception authorizes intervention only when a defendant's decision is 'irrational but for its anticompetitive effect.'" (quoting *Novell*, 731 F.3d at 1075)). As, Judge Easterbrook explained, *Aspen Skiing* and arguments "demanding[ing] that holders of market power cooperate with rivals" represent "the last gasp of the old school antitrust." Frank H. Easterbrook, *The Chicago School and Exclusionary Conduct*, 31 Harv. J.L. & Pub. Pol'y 439, 441–42 (2008). Post-*Trinko*, "[m]any of these themes bit the dust"; no longer does "even a monopolist ha[ve a] general duty to cooperate with rivals." *Id.* at 442.

Thus, Viamedia must adequately allege that Comcast's refusal to deal was irrational but for its anticompetitive effects. In the Court's previous decision, it explained that, based on Plaintiff's allegations, "[a]fter Comcast's refusal to deal, for the portion of [spot cable advertising] sold through an Interconnect, MVPDs simply deal with Comcast directly." *Viamedia*, 2016 WL 6568074, at *16. The Court reasoned that this offered "potentially improved efficiency" because it replaced an intermediary with a direct relationship. *Id.* This type of vertical integration or elimination of a middleman, the Court explained, represented a "prototypical valid business purpose." *Id.* (quoting *Port Dock & Stone Corp v. Oldcastle Ne., Inc.*, 507 F.3d 117, 124 (2d Cir. 2007)); *see also It's My Party, Inc. v. Live Nation, Inc.*, 811 F.3d 676, 689 (4th Cir. 2016) (Wilkinson, J.) ("A single firm incorporating separate but closely related production processes can often be far more efficient than various independent entities transacting to produce the same good or bundle of goods."); *Jack Walters & Sons Corp. v. Morton Bldg., Inc.*, 737 F.2d 698, 710 (7th Cir. 1984) ("We just said that vertical integration is not an improper objective. But that puts the matter too tepidly; vertical integration is usually

procompetitive."); *Institutional Foods Packing, Inc. v. Creative Prods., Inc.*, No. 89 C 4499, 1992 WL 111133, at *3 (N.D. Ill. May 12, 1992).

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

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

not necessary in order to realize any such efficiencies.").) Because Viamedia's complaint consistently treats Comcast and Comcast Spotlight as a single entity, its arguments in its opposition brief imploring the Court to do otherwise fall flat.

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

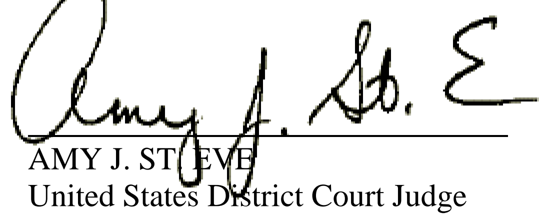
Based on the above, the Court sees no reason to alter its prior conclusion that Comcast's refusal to deal potentially serves a procompetitive purpose. *See Viamedia*, 2016 WL 6568074, at *16. Viamedia's allegations in the amended complaint, which are effectively the same as its allegations in its first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

CONCLUSION

For the foregoing reasons, the Court grants Defendants' motion.

DATED: February 22, 2017

ENTERED



AMY J. ST. EVE
United States District Court Judge

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

VIAMEDIA, INC.,	)	
	)	
Plaintiff,	)	Case No. 16-cv-5486
	)	
v.	)	Hon. Amy J. St. Eve
	)	
COMCAST CORPORATION and COMCAST SPOTLIGHT, LP,	)	
	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

AMY J. ST. EVE, District Court Judge:

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

BACKGROUND[2]

This case concerns the spot cable advertising business, which generates approximately $5.4 billion annually in television advertising revenues. (R. 1, Compl., at ¶ 3.) Spot cable advertisements account for two-to-three minutes per hour of television programming and are sold by cable service providers—called, according to industry terminology, "multichannel video programming distributors" ("MVPDs")—like Comcast. (*Id.* at ¶¶ 23–25, 27, 30.) Viamedia, a

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

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

spot cable advertising representation company, "represents cable television companies in the sale, placement, and distribution of Spot Cable Advertising." (*Id.* at ¶¶ 1–2.) Comcast is "one of the largest" MVPDs in the United States with "more than 22 million cable and high-speed Internet subscribers." (*Id.* at ¶¶ 8, 24.) It also owns, among other assets, Comcast Spotlight, a direct competitor to Viamedia and "the country's largest Spot Cable Advertising Representative." (*Id.* at ¶¶ 8, 19.)

Broadly speaking, Viamedia alleges that "[t]hrough its control of technical and business infrastructure that is critical for the sale of Spot Cable Advertising time," Comcast has unlawfully "impaired the ability of Viamedia and other Spot Cable Advertising Representatives to compete with Comcast Spotlight." (*Id.* at ¶ 2.) To evaluate Viamedia's claim, the Court first describes how the spot cable advertising business functions and what role the parties play in the industry.

I. The Spot Cable Advertising Market

A. MVPDs

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

MVPDs enter into "carriage agreements" with cable networks (*e.g.*, ESPN and CNBC) under which (1) MVPDs pay the networks a fee to carry their programming, and (2) MVPDs

gain the right to sell a percentage of advertising time. (*Id.* at ¶ 27.) "This reserved advertising time is referred to as 'Spot Cable Advertising,'" and a "15-second, 30-second, or one-minute block of [spot cable advertising] inventory is described as a 'Spot Cable Advertising Avail' or a 'Spot Cable Avail.'" (*Id.* at ¶¶ 27, 29.) Spot cable advertising is one of the two key ways in which MVPDs generate revenue, the other being the collection of subscription fees from households in exchange for providing cable service. (*Id.* at ¶ 26.) Thus, "[t]he ability to sell Spot Cable Advertising is crucial to the economic survival" of an MVPD. (*Id.* at ¶ 28.)

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

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

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

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

1. Regional sales through an Interconnect

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

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

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

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

2. Multiregional sales through National Cable Communications

If an advertiser wishes to air a commercial at a particular time during a particular broadcast across more than one DMA, it can purchase Spot Cable Avails from National Cable

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

NCC was created in 1981 "as a joint venture among the five largest MVPDs that existed at the time." (*Id.* at ¶ 50.) Through a series of acquisitions of other MVPDs, Comcast attained a 60% ownership stake in NCC, thereby gaining "the ability to effectively control NCC." (*Id.*) "Historically, NCC has had agreements in place with virtually every MVPD or its representative in all 210 DMAs across the United States . . . ." (*Id.* at ¶ 52.) Indeed, NCC says in its promotion materials that "its participating members cover 98 percent of all multichannel television households in the United States." (*Id.*) As described further below, Viamedia contends that Comcast has abused its control of NCC, altering how it has historically functioned in the service of Comcast's anticompetitive goals.

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

The final manner in which MVPDs sell spot cable advertising is "Local Spot Cable Advertising," which "do[es] not involve an Interconnect or NCC acting as an intermediary." (*Id.* at ¶ 59.) In this advertising sale method, "an advertiser deals directly with a single MVPD or its representative to purchase those Spot Cable Avails that run in a specific number of the MVPD's ad zones," which are subdivisions of a DMA that "allow[] advertisements to be displayed on a neighborhood-by-neighborhood or even a block-by-block basis." (*Id.* at ¶¶ 59–60.) Thus, a

business can use local spot cable advertising to reach "narrowly targeted geographic audiences" at a cost that is "generally less expensive . . . than regional or national Spot Cable Advertising through an Interconnect or NCC." (*Id.* at ¶¶ 61-62.)

C. Spot cable advertising representatives

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

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

Comcast Spotlight directly competes with Viamedia to represent MVPDs to sell their Spot Cable Avails. (*Id.* ¶ 79.) It does this despite the fact that Comcast competes with other MVPDs for household cable subscriptions and advertising sales. (*Id.* at ¶¶ 78, 80.) Through its control of Comcast's Spot Cable Avails, which reach Comcast's twenty-two million subscriber

households, as well as its representation of other MVPDs that have more than 13 million subscribers combined, Comcast Spotlight "control[s] Spot Cable Advertising for . . . more than half of the entire cable industry." (*Id.* at ¶¶ 8, 85.) Comcast Spotlight's dominance is even greater in DMAs in which it controls the Interconnect. (*Id.* at ¶¶ 85–94.) In the Chicago, Detroit, Philadelphia, Boston, and Washington, D.C. DMAs, for example, Comcast Spotlight controls approximately 98–100% of all Spot Cable Advertising Avails available for sale. (*Id.* at ¶¶ 86–90.) Viamedia alleges that Comcast "has used its power to exclude independent MVPDs and their representatives [from accessing Interconnects that it controls] and to coerce them into behaviors that benefit Comcast." (*Id.* at ¶ 96.) The Court details the specifics of Viamedia's allegations below.

II. Viamedia's allegations of anticompetitive conduct

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

The crux of Viamedia's allegations is that Comcast has used its control over certain Interconnects to (1) exclude Viamedia from accessing the critical Interconnect infrastructure, and (2) force MVPDs to engage Comcast Spotlight as their spot cable advertising representatives instead of Viamedia or its competitors.

Viamedia's complaint focuses on Comcast's conduct in the Chicago and Detroit DMAs, where Comcast exercises unilateral control of regional advertising through the DMAs' respective Interconnects. (*Id.* at ¶ 102.) Between 2002 and 2012, Viamedia "participated in the Interconnects for Chicago and Detroit" in its representation of its "then most significant MVPD clients, WOW and RCN." (*Id.* at ¶ 103.) In 2011, Comcast Spotlight began to express its interest in representing WOW and RCN, but the MVPDs were not interested. (*Id.* at ¶¶ 104–06.) Indeed, RCN explained, "Comcast would prefer that RCN use Comcast Spotlight and not

Viamedia . . . . [But] RCN is not comfortable having its largest and most formidable rival as its representative in the spot cable market and should be free to choose a representative for such services that does not present such an obvious conflict and competitive disadvantage." (*Id.* at ¶ 108 (alterations in original).) Then, between 2011 and early 2012, "Comcast repeatedly told advertising agencies that it would have sole control over all of WOW's and RCN's Spot Cable Advertising Avails 'by years end.'" (*Id.* at ¶ 109.)

"On June 1, 2012, Comcast unilaterally ended Viamedia's access to the Chicago and Detroit Interconnects and removed WOW and RCN from participating in regional ad sales through the Interconnects." (*Id.* at ¶ 110.) This was, according to Viamedia, the first time a "third-party representation firm or MPVD had *ever* been excluded from an Interconnect for any reason." (*Id.* at ¶ 116 (emphasis in original).) Comcast's sudden closing of the doors to the Interconnect precluded Viamedia, WOW, and RCN "from selling any Spot Cable Advertising Avails through the Interconnects for Chicago and Detroit, two of the largest markets for regional Spot Cable Advertising sales in the country," causing "Viamedia and its MVPD clients [to lose] tens of millions of dollars in revenue." (*Id.* at ¶¶ 114–15.) Initially, Comcast did not give a reason for the exclusion, but later "acknowledged that the exclusion was motivated by Comcast Spotlight's desire to replace Viamedia as WOW's and RCN's Spot Cable Advertising Representative." (*Id.* at ¶¶ 111–12.)

Although Viamedia requested that Comcast restore it and its clients' access to the Interconnect, Comcast did not oblige. (*Id.* at ¶¶ 120–21.) In Chicago and Detroit, for example, "Comcast said that it would be willing to consider Viamedia's readmission if, and only if, Viamedia agreed to certain commercially unreasonable terms, which would have prevented Viamedia from meaningfully competing with Comcast Spotlight." (*Id.* at ¶ 122.) Specifically,

"Comcast demanded that it be given the right to preempt, at its sole discretion and with virtually no advance notice, any of the Spot Cable Avails previously sold or controlled by Viamedia, whether such ads were sold through the Interconnect or not." (*Id.* at ¶ 123.) This, Viamedia alleges, "would have given Comcast the unilateral ability to assume control over the entire inventory of Viamedia's MVPD clients and to resell Avails that had already been sold by Viamedia to other advertisers." (*Id.* at ¶ 123.) Viamedia did not agree to these terms. (*Id.*)

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

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

Comcast has also used this practice to "gain control of other MVPDs' Avails, allowing Comcast to consolidate its control over Spot Cable Advertising in many of the largest DMAs in the United States." (*Id.* at ¶ 134.) In fact, "no MVPD is able to sell a Spot Cable Avail and no advertiser is able to purchase a Spot Cable Avail in five of the 10 largest DMAs in the United States without dealing exclusively with Comcast Spotlight." (*Id.* at ¶ 135.)

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

B. Conduct stemming from Comcast's control of NCC

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

term extension that would ensure Viamedia's continued access to NCC beyond that date." (*Id.* at ¶ 145.)[3]

III. The impact of Defendants' conduct

Viamedia claims that "Comcast and Comcast Spotlight's exclusionary conduct harms competition in several ways." (*Id.* at ¶ 154.) First, Viamedia and other independent advertising representatives "cannot compete with Comcast Spotlight" because they will not have access to Comcast-controlled Interconnects or NCC, "which together represent more than two-thirds of the [revenue] generated annually from Spot Cable Advertising sales." (*Id.* at ¶ 155.) Second, MVPDs suffer because they are unable to choose their preferred advertising representative and "many do not want to cede control over their Spot Cable Avails to Comcast, their largest competitor," potentially being "forced to provide Comcast with sensitive business information." (*Id.* at ¶¶ 156, 158.) Moreover, if an MVPD does not acquiesce to Comcast's demands, it would limit its "ability to compete against Comcast for . . . subscribers because the MVPD[] will have to either increase [its] subscriber fees or reduce [its] promotional efforts in order to compensate for [its] losses in advertising revenue." (*Id.* at ¶ 157.)

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

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

IV. Viamedia's Claims

Viamedia's complaint specifies six counts against Defendants. In Count One, Viamedia asserts that Defendants violated Section 2 of the Sherman Act, 15 U.S.C. § 2, through "unlawful monopolization in markets for spot cable advertising representation in DMAs where Comcast controls the Interconnect[]." (*Id.* at 36, ¶¶ 164-73.) For this claim, Viamedia alleges: (1) "[t]he provision of Spot Cable Advertising Representation services constitutes a relevant product market, (2) "the regional DMAs in which Comcast controls the Interconnect constitute relevant geographic markets," (3) "Comcast has monopoly power in Spot Cable Advertising Representation in each of the DMAs where it controls the Interconnect," (4) Comcast has excluded Viamedia and its clients from accessing Comcast-controlled Interconnects, and (5) "[b]y refusing to deal with Viamedia and MVPDs represented by Viamedia, by conditioning access to Interconnects upon an MVPD's agreement to deal with Comcast Spotlight, by requiring that MVPDs deal exclusively with Comcast Spotlight as a Spot Cable Advertising Representative, [and] by requiring NCC to refuse to commit to a long term arrangement with Viamedia and to otherwise offer []discriminatory terms to Viamedia . . . Comcast has unlawfully acquired and maintained its monopoly power in each of the markets where it controls the Interconnect." (*Id.* at ¶¶ 165–68.)

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

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

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

LEGAL STANDARD

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

ANALYSIS

I. Documents considered

Defendants have attached a contract between Viamedia and Comcast that they contend the Court may consider. (R. 23, Mem. Supp. Defs.' Mot. Dismiss, at 1 & n.1, 4–5 & n.3, Ex. 1.) According to Defendants, the contract shows that Viamedia's access to the Detroit and Chicago

Interconnects resulted from a nine-year agreement that expired by its own terms on May 31, 2012—the day before Viamedia claims Comcast "unilaterally ended" its access to those Interconnects. (*Id.* at 4–5 (quoting R. 1 at ¶ 110).) Viamedia objects to Defendants' inclusion of this contract, arguing that the Court cannot properly consider it at this stage in the litigation. (R. 28, Pl.'s Opp., at 13 & n.6.) The Court agrees with Viamedia.

"In general, if 'matters outside the pleadings are presented to and not excluded by the court, the motion [to dismiss under Rule 12(b)(6)] must be treated as one for summary judgment under Rule 56.'" *United States v. Rogers Cartage Co.*, 794 F.3d 854, 861 (7th Cir. 2015) (quoting Fed. R. Civ. P. 12(d)); *see Serban v. Cargurus, Inc.*, No. 16 C 2531, 2016 WL 4709077, at *2 (N.D. Ill. Sept. 8, 2016); *F.D.I.C. v. Pantazelos*, No. 13 C 2246, 2013 WL 4734010, at *3 (N.D. Ill. Sept. 3, 2013). An exception to this rule exists, however, when the parties present documents "to which the Complaint ha[s] referred," that are "concededly authentic," and "central" to the plaintiff's claims. *Santana v. Cook Cty. Bd. of Review*, 679 F.3d 614, 619 (7th Cir. 2012) (quoting *Hecker v. Deere & Co.*, 556 F.3d 575, 582 (7th Cir. 2009)). A court may also consider materials that are attached to the complaint. *See* Fed. R. Civ. P. 10(c) ("A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes."); *Tierney v. Vahle*, 304 F.3d 734, 738 (7th Cir. 2002); *Pantazelos*, 2013 WL 4734010, at *3.

Defendants contend that although "Viamedia fails to mention the [contract] explicitly, . . . the complaint refers to its end date." (R. 23 at 5 n.3 (citing R.1 at ¶ 110).) Viamedia counters by arguing that it does not refer to the contract in its complaint. (*See* R. 28 at 13 n.6.) Viamedia has the better of the argument. It is too far of a stretch to say that Viamedia referenced the contract by merely noting the day upon which it claims Comcast barred it from accessing the Interconnects without making any reference to the agreement. This assertion is too

far from "the usual example" of a plaintiff failing to attach a contract in a suit for breach of contract. *Tierney*, 304 F.3d at 738; *cf., e.g.*, *Wright v. Associated Ins. Cos. Inc.*, 29 F.3d 1244, 1248 (7th Cir. 1994) (considering an agreement that is "repeatedly quote[d]" in the complaint). The Court therefore excludes the contract. *See Sams v. City of Chicago*, No. 13 CV 7625, 2014 WL 6685809, at *2 n.5 (N.D. Ill. Nov. 25, 2014) (refusing to consider letters that were not referred to in the plaintiff's complaint).

The contract also is not "central" to Viamedia's claims. Defendants argue to the contrary, maintaining that "Viamedia essentially asks the Court to extend its terms." (R. 23 at 5 n.3.) The Court disagrees. Viamedia's claims center on the allegations that (1) Comcast excluded it and its clients from the Interconnects when no third-party representation firm or MVPD had ever been excluded before, and (2) Comcast forced MVPDs to hire Comcast Spotlight as their exclusive advertising representative. While perhaps the contract will ultimately be relevant to this case or even central to Defendants' defense, it is not central to Viamedia's allegations. *See Fleece v. Volvo Constr. Equip. N. Am.*, No. 10 C 4496, 2010 WL 4386866, at *1 (N.D. Ill. Oct. 27, 2010); *Lincoln Nat'l Life Ins. Co. v. Donaldson, Lufkin & Jenrette Sec. Corp*, 9 F. Supp. 2d 994, 999 (N.D. Ind. 1998) ("While [a certain document] . . . is clearly evidence that would be relevant at trial, and may very well be central to [the defendant's] defense, the court determines that it is not central to the claim asserted by the Plaintiffs.").[4]

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

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

II. Viamedia's Sherman Act Claims

Viamedia alleges that Defendants are liable for monopolization and attempted monopolization under Section 2 of the Sherman Act. To succeed in its monopolization claim, Viamedia must prove "(1) 'the possession of monopoly power in the relevant market[,]' . . . (2) 'the willful acquisition or maintenance of that power[,] as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident,'" and (3) the monopolization caused injury. *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1438 (2013) (third alteration in original) (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966)); *Hannah's Boutique, Inc. v. Surdej*, No. 13 C 2564, 2013 WL 4553313, at *3 (N.D. Ill. 2013). To prove attempted monopolization, Viamedia must show (1) "[Comcast's] specific intent to achieve monopoly power in a relevant market; (2) predatory or anticompetitive conduct directed to accomplishing this purpose; and (3) a dangerous probability that the attempt at monopolization will succeed." *Mercatus Grp., LLC v. Lake Forest Hosp.*, 641 F.3d 834, 854 (7th Cir. 2011); *Hannah's Boutique*, 2013 WL 4553313, at *3.

The second element of both monopolization and attempted monopolization requires proof of anticompetitive conduct. *See Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) ("To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct.*" (emphasis in original)); *Mercatus*, 641 F.3d at 854 ("The second element of each claim can be met by showing that the Hospital engaged in predatory or anticompetitive conduct of

some kind."); *Endsley v. City of Chicago*, 230 F.3d 276, 283 (7th Cir. 2000) ("Under § 2, intent to obtain a monopoly is unlawful only where an entity seeks to maintain or achieve monopoly power by anticompetitive means."); *VBR Tours, LLC v. Nat'l R.R. Passenger Corp.*, 14-cv-00804, 2015 WL 5693735, at *6 (N.D. Ill. Sept. 28, 2015). Here, Viamedia alleges that Defendants violated Section 2 of the Sherman Act through tying, exclusive dealing, and refusing to deal.[5] (*See* R. 1 at ¶ 168; R. 28 at 7–14.)

Defendants do not base their motion to dismiss on a failure to plead monopoly power in a relevant market or a dangerous probability that attempted monopolization will succeed. (R. 29 at 3 n.3.) Instead, Defendants contend that Viamedia failed to plead antitrust injury and anticompetitive conduct.[6] The Court addresses these issues in turn. First, however, it is necessary to address a preliminary matter regarding whether Viamedia's complaint places tying and exclusive dealing at issue.

A. Viamedia's complaint raises tying and exclusive dealing

Viamedia argues that Defendants failed to address in their opening brief Viamedia's tying and exclusive dealing claims, which Viamedia contends are "not hidden in the interstices of the

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

[6] Defendants contend that they "expressly argued that the Complaint does not establish that [they] acted with anticompetitive intent." (R. 29 at 3 n.3 (citing R. 23 at 10).) Defendants are referring to a passage of their brief in which they argue that they engaged in procompetitive conduct rather than an illegal refusal to deal, and therefore their actions are not evidence of anticompetitive intent. It thus appears that Defendants' arguments regarding intent are intertwined with their arguments regarding a lack of anticompetitive conduct. The Court therefore will consider and resolve those arguments together. *See Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 459 (1993) (explaining that anticompetitive conduct "may be sufficient to prove the necessary intent to monopolize"); *Lenox MacLaren Surgical Corp. v. Medtronic, Inc.*, 762 F.3d 1114, 1130 (10th Cir. 2014) ("We have elsewhere concluded that the fact-finder could reasonably infer monopoly power and exclusionary conduct. With these inferences, the jury could also find an intent to monopolize."); *M & M Med. Supplies & Serv., Inc. v. Pleasant Valley Hosp., Inc.*, 981 F.2d 160, 166 (4th Cir. 1992) ("Specific intent may be inferred from the defendant's anticompetitive practices."); *see also Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 603 (1985) ("Improper exclusion (exclusion not the result of superior efficiency) is always deliberately intended." (quoting Robert Bork, The Antitrust Paradox 160 (1978))); 2-16 Earl W. Kinter et al., Federal Antitrust Law § 16.17 (2015) ("[I]n both monopolization and attempted monopolization cases, courts typically infer intent from the character of the practice.").

Complaint." (R. 28 at 9; *see also* R. 32, Pl.'s Surreply, at 1–2.) Defendants respond by contending that "[t]he word 'tying' appears nowhere in the Complaint," that Viamedia "d[id] not plead" tying or exclusive dealing claims, and that "Viamedia did not clearly allege tying or exclusive dealing claims." (R. 29 at 9–10 n.8.) Thus, Defendants contend, "[i]t is perfectly appropriate for [Defendants] to address for the first time on reply theories not clearly made in the complaint but asserted for the first time in an opposition brief." (*Id.*) The Court then gave Viamedia the opportunity to respond in a surreply to any new arguments Defendants raised in their reply in order to "allay any concerns that [Viamedia] would suffer prejudice." (R. 31, Order Oct. 6, 2016); *see Autotech Techs. Ltd. P'ship v. Automationdirect.com, Inc.*, 235 F.R.D. 435, 437 (N.D. Ill. 2006) ("To insure that the aggrieved party is not impermissibly affected, a court must either invoke the waiver doctrine or allow the filing of a surreply" when a party raises new matter in its reply brief); *see also Flory v. Mays*, No. 06 C 3523, 2007 WL 4232781, at *3 (N.D. Ill. Nov. 26, 2007) ("Since plaintiff was permitted to file a surreply, no argument of defendants will be treated as waived for failure to raise it in the opening brief.").

To the extent that Defendants contend that Viamedia hid the ball as to its tying and exclusive dealing claims so to require dismissal of those claims, Defendants' argument fails. First, "Plaintiffs need only plead facts, not legal theories, in their complaints." *Reeves ex rel. Reeves v. Jewel Food Stores, Inc.*, 759 F.3d 698, 701 (7th Cir. 2014); *see also Polzin v. Ericksen*, 607 F. App'x 572, 574 (7th Cir. 2015) ("[F]ederal complaints need not cite law or develop legal theories."); *Collier v. City of Chicago*, No. 08-cv-5645, 2010 WL 476649, at *3 (N.D. Ill. Feb. 4, 2010) ("The plaintiff is not required to plead facts or legal theories or cases or statutes, but merely to describe his claim briefly and simply." (quoting *Shah v. Inter-Continental Hotel Chi. Operating Corp.*, 314 F.3d 278, 282 (7th Cir. 2002))). They need not invoke particular "magic

words" in their complaint. *See Vance v. Bureau of Collection Recovery LLC*, No. 10-cv-06324, 2011 WL 881550, at *2 (N.D. Ill. Mar. 11, 2011) ("[P]leading certain 'magic words' that track the language of a legal theory 'is no more necessary than including other legal arguments in the complaint.'" (quoting *Gustafson v. Jones*, 117 F.3d 1015, 1018 (7th Cir. 1997))); *see also, e.g.*, *King v. Rubenstein*, 825 F.3d 206, 222 (4th Cir. 2016). Accordingly, Defendants' argument that Viamedia failed to use the word "tying" in its complaint falls flat.

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

> By *refusing to deal* with Viamedia and MVPDs represented by Viamedia, by *conditioning access* to Interconnects upon an MVPD's agreement to deal with Comcast Spotlight, by requiring that MVPDs *deal exclusively* with Comcast Spotlight as a Spot Cable Advertising Representative, . . . Comcast has unlawfully acquired and maintained its monopoly power in each of the markets where it controls the Interconnect, in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2.

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

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

Marathon Petroleum Co., 530 F.3d 590, 592 (7th Cir. 2008) ("In a tying agreement, a seller conditions the sale of a product or service on the buyer's buying another product or service from . . . the seller."); *Rocha v. FedEx Corp.*, 15 F. Supp. 3d 796, 810 (N.D. Ill. 2014) ("A tying agreement is an 'agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product[.]'" (alteration in original) (quoting *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5–6 (1958))).

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

B. Antitrust Injury

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

Private antitrust plaintiffs seeking damages must plead more than mere injury; instead, they must plead antitrust injury—"injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful." *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334 (1990) (quoting *Brunswick Corp v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977)); *see Alarm Detection Sys., Inc. v. Orland Fire Protection Dist.*, 129 F. Supp. 3d 614, 634 (N.D. Ill. 2015). Plaintiffs seeking injunctive relief must plead "threatened" antitrust injury. *Cargill, Inc. v. Monfort of Col., Inc.*, 479 U.S. 104, 113 (1986); *see Static Control Components, Inc. v. Lexmark Int'l, Inc.*, 697 F.3d 387, 409 (6th Cir. 2012) ("The only difference between a claim for equitable relief and one for damages is that equitable relief is available at the mere threat of antitrust injury."); IIA Phillip E. Areeda et al., *Antitrust Law*

¶ 335b (4th ed. 2014). "The antitrust-injury doctrine was created to filter out complaints by competitors and others who may be hurt by productive efficiencies, higher output, and lower prices, all of which the antitrust laws are designed to encourage." *U.S. Gypsum Co. v. Ind. Gas Co.*, 350 F.3d 623, 627 (7th Cir. 2003). It ensures that antitrust lawsuits carry out the purpose of the antitrust laws, which are "concern[ed] with the protection of competition, not competitors." *See Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962); *Alarm Detection*, 129 F. Supp. 3d at 634.

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

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

Viamedia also alleges that Defendants' conduct has diminished the quality of available spot cable advertising representation services, further demonstrating harm to competition. *See Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 31 (1984) (explaining that the petitioner's conduct "does not have the obviously unreasonable impact on purchasers that has characterized the tying arrangements that [the Supreme Court] has branded unlawful," as "[t]here is no evidence that the price, *the quality*, or the supply or demand for either the 'tying product' or the 'tied product' involved in this case has been adversely affected" (emphasis added)), *abrogated on other grounds by Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28 (2006); *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1433 (9th Cir. 1995) (explaining that an act is anticompetitive when it, among other things, diminishes the quality of available goods); *Synthes, Inc. v. Emerge Med., Inc.*, No. 11-1566, 2012 WL 4473228, at *16 n.12 (E.D. Pa. Sept. 28, 2012) ("[A]n antirust plaintiff must allege that 'the challenged conducted affected the prices, quantity or quality of goods or services, not just his own welfare.'" (internal quotation marks omitted)

(quoting *Mathews v. Lancaster Gen. Hosp.*, 87 F.3d 624, 641 (3d Cir. 1996)); *cf. VBR Tours*, 2015 WL 5693735, at *12 n.13 (explaining that a lower "quality-adjusted price to the consumer" may indicate procompetitive effects (quoting *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 395 (7th Cir. 1984))). Specifically, Viamedia pleads facts indicating that MVPDs find Comcast Spotlight to be an inferior alternative to independent third-party representation. (*See, e.g.*, R.1 at ¶ 108 (alleging that RCN said, "RCN is not comfortable having its largest and most formidable rival as its representative in the spot cable market and should be free to choose a representative for such services that does not present such an obvious conflict and competitive disadvantage"); *id.* at ¶ 129 (explaining that Viamedia still represents RCN and WOW in DMAs where Comcast does not control the Interconnect); *id.* at ¶ 156 (explaining that MVPDs "do not want to cede control over their Spot Cable Avails to Comcast, their largest competitor); *id.* at ¶ 158 (alleging that MVPDs "will be forced to provide Comcast with sensitive business information" if they must sign on with Comcast Spotlight, and that "[t]his sensitive business information will give Comcast an advantage over its rival MVPDs and limit the ability of independent MVPDs to compete for cable subscribers")). Accordingly, Viamedia has plausibly alleged that Defendants engaged in conduct that lowered the quality of service available in the spot cable advertising representation market, and that this conduct resulted in harm to Viamedia. These allegations sufficiently plead antitrust injury.[8]

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

C. Anticompetitive Conduct

1. Tying

"In a tying agreement, a seller conditions the sale of a product or service on the buyer's buying another product or service from . . . the seller." *Sheridan*, 530 F.3d at 592; *see Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 461 (1992) ("A tying arrangement is 'an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier.'" (quoting *N. Pac. Ry.*, 356 U.S. at 5–6)). The Supreme Court teaches that the "essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms." *Jefferson Parish*, 466 U.S. at 12. As the parties agree, tying constitutes a type of anticompetitive conduct that can give rise to Section 2 liability. (R. 29 at 12–14; R. 32 at 4 & n.3); *see, e.g.*,

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victories are duplicative of one another. For example, successful predatory pricing, exclusive dealing, or similar exclusionary practices injure rivals by destroying their profits or their business; it ultimately injures consumers as well through higher product prices. There is no sense in which the lost-profit injury incurred by the competitors 'duplicates' that incurred by consumers, and awarding damages to one interest does nothing to make the other interest whole.").

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

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

Sheridan, 530 F.3d at 593 ("The Court has not discarded the tying rule, and we have no authority to do so."); *It's My Party, Inc. v. Live Nation, Inc.*, 811 F.3d 676, 683–84 (4th Cir. 2016); *Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Publ'ns, Inc.*, 63 F.3d 1540, 1550 (10th Cir. 1995) ("Illegal tie-ins . . . under section 1 may also qualify as anticompetitive conduct for section 2 purposes."); *Great Escape, Inc. v. Union City Body Co.*, 791 F.2d 532, 541 (7th Cir. 1986) (noting that "[p]redatory conduct [under Section 2] may be broadly defined as conduct that is in itself an independent violation of the antitrust laws); *Oracle Am., Inc. v. Terix Comput. Co.*, 5:13-cv-03385-PSG, 2014 WL 5847532, at *7 (N.D. Cal. Nov. 7, 2014); *Hon Hai Precision Indus. Co.*, *v. Molex, Inc.*, No. 08 C 5582, 2009 WL 310890, at *2 (N.D. Ill. Feb. 9, 2009).

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

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

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

petitioners provide," and (3) "patients or surgeons often request specific anesthesiologists to come to a hospital and provide anesthesia." *Id.* at 22.

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

Viamedia has plausibly alleged distinct markets for spot cable advertising representation services and Interconnect services. First, the complaint alleges that MVPDs have hired representation firms like Viamedia that do not provide Interconnect services themselves. Thus, similar to how patients could have purchased anesthesiology services separate from hospital services absent a tying arrangement in *Jefferson Parish*, 466 U.S. at 22, and how customers purchased parts and service separately in *Eastman Kodak*, 504 U.S. at 462, MVPDs have acquired Interconnect services and representation services separately. Second, similar to how "patients or surgeons often request[ed] specific anesthesiologists to come to a hospital and provide anesthesia" in *Jefferson Parish*, 466 U.S. at 22, Viamedia has alleged that MVPDs prefer

to engage independent third-party representatives like Viamedia to handle their entire spot cable advertising inventory. Finally, spot cable advertising representation concerns the sale of Spot Cable Avails "across the three tiers of the sales system"—sales through Interconnects, sales through NCC, and local sales directly to advertisers—while Interconnect services concern only one of the three tiers of the sales system. (R. 1 at ¶ 70.) Additionally, representation firms "[p]lan[] and coordinat[e] an MVPD's Spot Cable Advertising transactions," identify buyers and negotiate business terms, and provide "complete turn-key advertising sales, spot insertion, encoding, validation, IT, monitoring, traffic, billing, and collection services." (*Id.* at ¶¶ 70, 75.) In contrast, the complaint indicates that Interconnects merely "aggregate Spot Cable Avails . . . and sell packaged Avails to advertisers in such a way that the purchased advertisements will run on all MVPDs across a given DMA simultaneously." (*Id.* at ¶ 35.) Thus, while Interconnect services are related to spot cable advertising representation services in that *some* Spot Cable Avails are sold through an Interconnect, Viamedia has pled that advertising representation firms offer qualitatively different services than an Interconnect. Taking the allegations in the complaint as true, it is plausible that the demand for spot cable advertising representation services is distinct from the demand for Interconnect services. Viamedia therefore adequately alleges that there are two distinct products at issue.

Defendants also contend that "[t]he deficiency of Viamedia's purported tying claim is further underscored by its failure (in either the Complaint or opposition brief) to fully address the essential elements of such a claim." (R. 29 at 13.) Defendants, however, offer analysis only with respect to the element of whether there are two separate products at issue. As previously noted, Viamedia need not enumerate the elements of its claim. *See supra* § II.A. Additionally, "perfunctory and undeveloped legal arguments are waived." *Schaefer v. Universal Scaffolding*

& Equip., LLC, No. 15-2393, 2016 WL 5864513, at *5 (7th Cir. Oct. 7, 2016) (published opinion); *see also United States v. Alden*, 527 F.3d 653, 664 (7th Cir. 2008); *United States v. Key*, No. 13 CR 726, 2016 WL 6135666, at *9 n.1 (N.D. Ill. Oct. 21, 2016).

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

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

2. Monopoly Leveraging

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

Unlike in *Trinko* and *Schor*, however, Viamedia's claim is not "free-standing" because it alleges particular types of anticompetitive conduct—namely, tying, exclusive dealing, and refusing to deal. Viamedia's success turns on whether it states a claim based on those three classes of anticompetitive conduct, not whether a free-standing leveraging theory is independently viable. In *Schor*, in contrast, the Seventh Circuit took care to note that "Schor's complaint does not allege any of the normal exclusionary practices—tie-in sales (or another form of bundling), group boycotts, exclusive dealing and selective refusal to deal, or predatory

pricing." 457 F.3d at 610. Furthermore, in *Schor*, the defendant supposedly leveraged a monopoly in one market to gain a relative advantage in a second market, but did not foreclose all competition in that second market. *See id.* at 611 (explaining that without an allegation that the defendant would "knock[] out" rivals from the market, "[a]nd without any prospect of rivals' exit, there is . . . no antitrust worry"); *id.* at 613 (noting that "[a]s long as rivals continue to sell," monopoly leveraging theories fail). Here, in contrast, Viamedia alleges that Defendants have used specific anticompetitive practices—tying, exclusive dealing, and refusing to deal—to successfully eliminate all competition.

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

3. Exclusive Dealing

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

As Viamedia points out, Defendants "do[] not appear to genuinely dispute that the Complaint establishes exclusive dealing." (R. 32 at 5.) Instead, Defendants argue that Viamedia's exclusive dealing claim "fails because the Complaint establishes that exclusivity in the Spot Cable Advertising Representative business is the norm and Viamedia simply seeks to replace one allegedly exclusive deal (between an MVPD and Comcast) with another (between an

MVPD and Viamedia)." (R. 29 at 14.) Defendants go on to say "[t]hat exclusivity is the norm is consistent with it being efficient and with the presumption that it is procompetitive." (*Id.* at 15.)

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

4. Refusal to Deal

The Supreme Court has explained that, "as a general matter, the Sherman Act 'does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.'" *Trinko*, 540 U.S. at 408 (emphasis in original) (quoting *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919)). The Supreme Court enumerated three reasons why refusals to deal are generally not actionable. First, "[c]ompelling such firms to share the source of their

advantage is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities." *Id.* at 407–08. Second, "[e]nforced sharing . . . requires antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing—a role for which they are ill suited." *Id.* at 408. Finally, "compelling negotiation between competitors may facilitate the supreme evil of antitrust: collusion." *Id.*; *see also Schor*, 457 F.3d at 610 ("[A]ntitrust law does not require monopolists to cooperate with rivals by selling them products that would help the rivals to compete. Cooperation is a *problem* in antitrust, not one of its obligations." (emphasis in original) (citation omitted)).

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

liability); *VBR Tours*, 2015 WL 5693735, at *7 (considering a refusal to deal claim based on *Aspen Skiing*).

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

The Supreme Court affirmed a jury verdict for the plaintiff. *Aspen Skiing*, 472 U.S. at 610. As the *Trinko* Court described it, the *Aspen Skiing* Court "found significance in the defendant's decision to cease participation in a cooperative venture." *Trinko* at 540 U.S. at 409 (citing *Aspen Skiing*, 472 U.S. at 608, 610–11). "The unilateral termination of a voluntary *(and thus presumably profitable)* course of dealing suggested a willingness to forsake short-term profits to achieve an anticompetitive end." *Id.* (emphasis in original) (citing *Aspen Skiing*, 472 U.S. at 608, 610–11). Additionally, "the defendant's unwillingness to renew the ticket *even if compensated at retail price* revealed a distinctly anticompetitive bent." *Id.* Thus, "the evidence

suggested that the defendant's decision was 'irrational but for its anticompetitive effect.'" *VBR Tours*, 2015 WL 5693735, at *7 (quoting *Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064, 1075 (10th Cir. 2013)). Accordingly, *Aspen Skiing* is a "narrow[]" opinion. *Olympia Equip. Leasing Co. v. W. Union Tel. Co.*, 797 F.2d 370, 379 (7th Cir. 1986). Indeed, the Seventh Circuit has said that if *Aspen Skiing* "stands for any principle that goes beyond its unusual facts, it is that a monopolist may be guilty of monopolization if it refuses to cooperate with a competitor in circumstances where some cooperation is indispensable to effective competition." *Id.*

Defendants argue that Viamedia has failed to plead facts showing that Defendants' decision was irrational but for its anticompetitive effects because "replac[ing] an intermediary with a direct relationship . . . is a 'prototypical valid business purpose.'" (R. 29 at 8 (quoting *Port Dock & Stone Corp v. Oldcastle Ne., Inc.*, 507 F.3d 117, 124 (2d Cir. 2007)); *see also It's My Party*, 811 F.3d at 689 ("A single firm incorporating separate but closely related production processes can often be far more efficient than various independent entities transacting to produce the same good or bundle of goods."); *Jack Walters & Sons Corp. v. Morton Bldg., Inc.*, 737 F.2d 698, 710 (7th Cir. 1984) ("We just said that vertical integration is not an improper objective. But this puts the matter too tepidly; vertical integration is usually procompetitive."); *Institutional Foods Packing, Inc. v. Creative Prods., Inc.*, No. 89 C 4499, 1992 WL 111133, at *3 (N.D. Ill. May 12, 1992). The Court agrees. Viamedia has not alleged or explained how Defendants' refusal to deal with it—separate from Defendants' other conduct like conditioning MVPDs' access to Interconnects on accepting Comcast Spotlight's services even for advertising sales that do not involve an Interconnect—has no rational procompetitive purpose. *See VBR Tours*, 2015 WL 5693735, at *9 ("[T]he question is not whether [the defendant] chose the most competitive offer but whether it had *any* procompetitive purpose." (emphasis in original)); *see also Novell*,

731 F.3d at 1075–77. Before Comcast's refusal to deal, MVPDs gave Viamedia control of their Spot Cable Avails and then Viamedia gave control over a portion of those Avails to the Interconnect. After Comcast's refusal to deal, for the portion of Avails sold through an Interconnect, MVPDs simply deal with Comcast directly. Consequently, at least with respect to the portion of advertising sales made through Interconnects, Defendants' refusing to deal with Viamedia offers potentially improved efficiency. Given the Supreme Court's hesitancy to force "firms to share the source of their advantage," *Trinko*, 540 U.S. at 407–08, the administrability problems associated with forcing a company to deal with its rival, *see Novell*, 731 F.3d at 1073 (citing *Trinko*, 540 U.S. 407–08), and the principle that replacing intermediaries is a "prototypical valid business purpose," *Port Dock*, 507 F.3d at 124, Viamedia's current allegations of an illegal refusal to deal cannot proceed.

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

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

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

CONCLUSION

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

DATED: November 4, 2016

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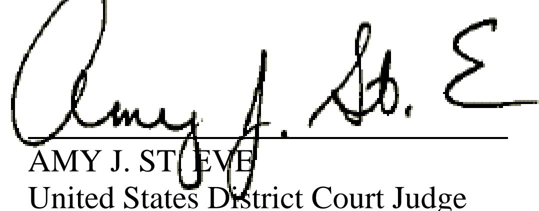

AMY J. ST. EVE
United States District Court Judge

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

CIRCUIT RULE 30(d) CERTIFICATION

Pursuant to Circuit Rule 30(d), the undersigned counsel for Plaintiff-Appellant states that all the materials required by Circuit Rule 30(a) and 30(b) are included, respectively, in the Short Appendix bound with this brief and in the Circuit Rule 30(b) Appendix filed concurrently with this brief.

/s/ *Aaron M. Panner*
Aaron M. Panner

October 25, 2018

CERTIFICATE OF SERVICE

I hereby certify that, on October 25, 2018, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ *Aaron M. Panner*
Aaron M. Panner