No. 22-2168

IN THE

United States Court of Appeals for the Fourth Circuit

NTE CAROLINAS II, ET AL.,
Counterclaimants-Appellants,

v.

DUKE ENERGY CAROLINAS, ET AL.,
Counterclaim Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of North Carolina, Charlotte Division
Case No. 3:19-cv-00515-KDB-DSC (Hon. Kenneth D. Bell)

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND NORTH CAROLINA CHAMBER LEGAL INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF COUNTERCLAIM DEFENDANTS-APPELLEES

Andrew R. Varcoe
Tyler S. Badgley
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, D.C. 20062

Counsel for the Chamber of Commerce of the United States of America

Michael F. Murray
Mary Walser
PAUL HASTINGS LLP
2050 M Street, NW
Washington, D.C. 20036

Counsel for Amici Curiae

May 19, 2023

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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No. 22-2168 Caption: NTE Carolinas II, et al. v. Duke Energy Carolinas, et al.

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Chamber of Commerce of the United States of America and North Carolina Chamber Legal Institute
(name of party/amicus)

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If yes, identify all parent corporations, including all generations of parent corporations:

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If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☐NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

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If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Michael Murray Date: 5/19/2023

Counsel for: Amici Curiae

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INTEREST OF *AMICI CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation.[1] It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

The North Carolina Chamber Legal Institute is a nonpartisan, nonprofit affiliate of the North Carolina Chamber, the leading business advocacy organization in North Carolina, and provides a medium through which North Carolina persons and companies can promote their common business interests by, *inter alia*, advocating for job providers on precedent-setting legal issues with broad business climate, workforce development, and quality of life implications before state and federal courts.

[1] No counsel for any party authored this brief in whole or in part and no entity or person, aside from *amici curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

The *amici* and their members have a substantial interest in this appeal for two reasons. First, *amici*'s members rely on the well-established principle that plaintiffs may not aggregate lawful acts into a viable Sherman Act claim. These types of claims are closely circumscribed by precedents of the Supreme Court and courts throughout the federal system. Those precedents help provide clarity, predictability, and administrability to federal antitrust law. They are critical to the functioning of businesses, especially in the face of the treble damages available under federal antitrust law. The *amici* have a deep interest in ensuring that settled legal precedents are not undermined by the appellants' theories.

Second, refusal-to-deal liability can exist only when a firm unilaterally terminates a prior profitable course of dealing and, even then, only when the refusal to continue dealing has no pro-competitive justification. Any other rule—and especially the freewheeling test the appellants propose—seriously threatens the ability of businesses to freely and efficiently operate by depriving businesses of the certainty required to innovate in competitive markets, while subjecting them to costly antitrust litigation that will deter pro-competitive behavior and thus undermine consumer welfare.

INTRODUCTION AND SUMMARY OF ARGUMENT

The district court in this case carefully and properly analyzed the appellants' aggressive and novel antitrust claims. Those claims ambitiously try to turn a series of competitively-neutral or even pro-competitive actions—a dispute over the termination of a *contractual* relationship, a decision to *lower* prices, among others—into a federal antitrust claim that would cast a district court as a day-to-day energy regulator. That is exactly what the Supreme Court has warned against: antitrust liability does not arise without an element of "anticompetitive *conduct*," *Verizon Commc'ns Inc. v. L. Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) (emphasis in original), and courts should tread lightly when assessing whether conduct is "anticompetitive," because "the means of legitimate competition" are "myriad." *Id.* at 414.

That is particularly true for the types of alleged conduct primarily at issue in this appeal—a refusal to deal and predatory pricing. "In cases seeking to impose antitrust liability for prices that are too low, mistaken inferences are "especially costly, because they chill the very conduct the antitrust laws are designed to protect." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986). Similarly, the Court has clearly stated 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*, 550 U.S. at 408. To address these concerns, the Court has developed specific tests keyed to particular types of allegedly anticompetitive conduct.

At the same time, and correspondingly, the Supreme Court has warned against the "amalgamation" of meritless claims. *Pacific Bell Tel. Co. v. Linkline Commc'ns*, 555 U.S. 438, 452 (2009). Such claims are at a particular risk of requiring 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." *Trinko*, 550 U.S. at 408. That is because allowing the aggregation of disparate, meritless claims into a viable antitrust claim would "require courts simultaneously to police" multiple disparate practices, while "aiming at a moving target, since it is the interaction" between the practices that purportedly creates the illegality. *Linkline*, 555 U.S. at 453.

The appellants seek to upend antitrust jurisprudence in a variety of ways. Most prominently, the appellants ask this Court to rewrite clear Supreme Court precedent that forbids the aggregation of conduct, all of which is independently lawful, into a viable Sherman Act claim. In addition to directly contravening *Linkline* and numerous other precedents, the appellants' proposal is also inconsistent with the Supreme Court's repeated "emphasi[s on] the importance of clear rules in antitrust law." *Linkline*, 555 U.S. at 452. There is a good reason for the courts to use defined rules when evaluating alleged anticompetitive conduct.

Businesses need to be able plan their activities without fear of unpredictable liability or costly litigation. Antitrust rules "must be clear enough for lawyers to explain them to clients." *Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 25 (1st Cir. 1990) (Breyer, C.J.). If the appellants are correct that plaintiffs may aggregate lawful acts into a viable antitrust claim, then businesses will be unable to reliably assess the risk of their conduct, and certainly will not be able to do so without, at a minimum, constantly re-evaluating ever-changing market conditions, competitor interactions, and new business practices.

In addition, the appellants seek to expand the very narrow exception to the general rule that the antitrust laws do not require companies to deal with their rivals. The Supreme Court has long held that the Sherman Act generally "does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919). The only narrow, limited exception to this rule arises when a plaintiff demonstrates *both* (1) that the defendant has terminated a prior voluntary course of profitable dealing between the parties, *and* (2) that no pro-competitive justification exists for the refusal to deal. *See Trinko*, 540 U.S. at 407. The district court rightly ruled for the appellees in light of this test. There simply is no profitable course of dealing where a party refuses to pay for a service.

At the end of the day, the district court properly conceptualized and applied the antitrust laws. There is no legal error mandating reversal.[2]

ARGUMENT

I. The District Court Properly Analyzed NTE Carolina's Disparate Allegations by Requiring At Least One Unlawful Act.

The district court properly concluded that "where none of the alleged exclusionary conduct is unlawful," disparate acts cannot be aggregated to support a Sherman Act violation. Summary Judgment Opinion at 20. As the district court put it, "[a]dding up several instances of lawful conduct cannot total unlawful conduct. In simple mathematical terms, 0 + 0 = 0." *Id.* That conclusion is well-grounded in law and logic. The Supreme Court and numerous other courts have indicated that plaintiffs may not aggregate solely lawful acts to support a monopolization claim. That principle provides important clarity, predictability, and administrability to antitrust law and moderates antitrust law's potential to chill activities that benefit customers, through competition, innovation, or both.

[2] Although this brief does not discuss the flaws in the appellants' predatory pricing claims, it should not be read to endorse the appellants' theories or arguments. To the contrary, the undersigned *amici* are in agreement with the appellees' presentation of the issues.

A. Consistent with the Supreme Court's Practice, Numerous Courts Require At Least One Unlawful Act to Support a Monopolization Claim.

Section 2 of the Sherman Act makes it unlawful to "monopolize" or "attempt to monopolize." 15 U.S.C. § 2. To succeed on a monopolization claim, the plaintiff must demonstrate both (1) the defendant's possession of monopoly power in a relevant market and (2) anticompetitive conduct. *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 307 (3d Cir. 2007). To establish attempted monopolization, the plaintiff must show (1) anticompetitive conduct, (2) a specific intent to monopolize, and (3) a dangerous probability of achieving monopoly power in a relevant market. *Phila. Taxi Ass'n, Inc. v. Uber Techs., Inc*., 866 F.3d 332 (3d Cir. 2018). Notably, both types of claims require the plaintiff to show the defendant engaged in "anticompetitive conduct." *See id*. at 338 ("Anticompetitive conduct is the hallmark of an antitrust claim.").

1. The Supreme Court has made it quite clear that aggregating multiple acts that are not individually actionable as exclusionary conduct under the Sherman Act does not constitute anticompetitive conduct actionable under Section 2. *Pacific Bell Tel. Co. v. Linkline Commc'ns*, 555 U.S. 438, 452 (2009). In *Linkline*, the plaintiffs alleged a "price squeeze" theory, by which the defendant allegedly charged plaintiffs too much in the wholesale market and consumers too little in the retail market,

thereby "squeezing" the profit margins of the plaintiffs to eliminate them as competitors. The Supreme Court rejected this theory, ruling for the defendants.

But it is the Supreme Court's methodology that is most significant here. The Supreme Court analyzed the two types of conduct separately. It first assessed the wholesale market allegations as a purported refusal to deal under *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), and *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004). Then, it assessed the retail market allegations as purported predatory pricing under *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993). The Court concluded that plaintiffs could not satisfy either sets of legal precedents and thus rejected plaintiffs' claim, concluding that "[t]wo wrong claims do not make one that is right." *Linkline*, 555 U.S. at 457. The plaintiffs' claims, as the Supreme Court put it, consisted of an "amalgamation of meritless claims." *Id.*

This methodology has direct application to whether conduct can be aggregated as the appellants' claim. The plaintiffs in *Linkline* framed their case as a "price squeeze" theory. But they could just as well have framed it as a course of conduct consisting of a refusal to deal and discounted pricing. There can be no doubt that the Supreme Court would have rejected that framing just as decisively as it rejected the "prize squeeze" framing.

Requiring plaintiffs to plead at least one instance of conduct not otherwise insulated from antitrust scrutiny is consistent with the approach taken by other circuits. *See, e.g.*, *Viamedia, Inc. v. Comcast Corp.*, 951 F.3d 429, 463 (7th Cir. 2020); *Eatoni Ergonomics, Inc. v. Research in Motion Corp.*, 486 Fed. App'x 186, 191 (2d Cir. 2012) (affirming dismissal of an antitrust scheme claim; "[b]ecause these alleged instances of misconduct are not independently anti-competitive, we conclude that they are not cumulatively anti-competitive either"); *United States v. Microsoft Corp.*, 253 F.3d 34, 78 (D.C. Cir. 2001) (rejecting a "course of conduct" argument); *Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346, 1367 (Fed. Cir. 1999) (concerning "interrelated and interdependent acts"); *Northeastern Tel. Co. v. AT&T*, 651 F.2d 76, 96 (2d Cir. 1981) ("[A] new trial is ordered to enable Northeastern to prove without resort to evidence of conduct that we have found not to have been anticompetitive that appellant[] violated the Sherman Act."); Opening Brief at 45.

2. It is no answer to this clear precedent to cite, as the appellants and their amicus do, cases such as *Continental Ore Co. v. Union Carbide & Carbon Co.*, 370 U.S. 590 (1962), aggregating the same type of conduct or, as the appellees pithily put it, conduct that is "inherently similar and related." Duke Energy Brief at 47; *see* Opening Brief at 30-38; AAI Amicus Brief at 4-5. Antitrust plaintiffs may aggregate intrinsically similar conduct because its effects are commensurable. For example, a plaintiff who alleges that a defendant has managed to construct exclusive deals with

four customers with each foreclosing twenty percent of the market can perhaps plausibly allege that eighty percent of the market is foreclosed, which is in fact the relevant test for exclusive dealing. *See generally Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961). Similarly, a plaintiff who alleges that a defendant has managed to construct exclusive deals with two customers, with each foreclosing twenty percent of the market, and also has managed to construct tying arrangements with two additional customers, with each foreclosing twenty percent of the market, can perhaps plausibly allege that eighty percent of the market is foreclosed. Again, that is consistent with the relevant test. *See generally Jefferson Par. Hosp. Dist. No. 2 et al. v. Hyde*, 466 U.S. 2, 19 (1984).

The same cannot be said of other plaintiffs, however. It is not at all clear how a typical refusal to deal claim—where the test concerns not whether a rival is foreclosed but whether that foreclosure is justified, *see e.g.*, *Trinko*, 550 U.S. at 408—can be added quantitatively with a typical exclusive dealing or tying claim based on foreclosure, let alone a predatory pricing claim based on price-cost tests. Indeed, those claims at times are in significant tensions in terms of their anticompetitive effects. Some of the claims are based on the theory that the defendant is driving costs up, others that the defendant is driving costs down. Similarly, some claims are based on the theory that the defendant is excluding a

party from the market in the first place, others are based on the theory that the defendant is driving the party from the market.

The Ninth Circuit's decision in *Federal Trade Commission v. Qualcomm*, 969 F.3d 974 (9th Cir. 2020), illustrates this distinction. There, the Federal Trade Commission claimed that Qualcomm's licensing practices, colloquially known as "no license, no chips," resulted in "anticompetitive, ultralow prices on its own modem chips." *Id.* at 1000. One of the (numerous) problems with that allegation, the court concluded, was that the Federal Trade Commission also alleged that Qualcomm's refusal to provide licenses pursuant to this scheme constituted an improper refusal to deal that enabled Qualcomm to charge "monopoly prices on modem chips." *Id*. at 1001. The refusal-to-deal and predatory pricing allegations were, in the courts view, irreconcilable. The consequence of that tension, the court observed, was that the Federal Trade Commission was forced to fault Qualcomm for "lowering its prices only when other companies introduced [their] modem chips." But there is "no authority holding that a monopolist may not lower its rates in response to a competitor's entry into the market with a lower-priced product." *Id*.

B. The Threshold Requirement of At Least One Unlawful Act Provides Important and Desirable Calibration, Clarity, and Administrability in Antitrust Law.

The courts' requirement of at least one unlawful act to support a monopolization claim also properly strikes the balance between over- and

underdeterrence through the antitrust laws. The antitrust laws are a powerful tool that require proper calibration to achieve competitive goals without chilling positive business activity. Their application also benefits from clarity and administrability.

First, the Supreme Court has "repeatedly emphasized the importance of clear rules in antitrust law." *Linkline*, 555 U.S. at 452. Different antitrust claims, therefore, are subject to different tests and different sets of evidence under its corresponding rule. The very reason why each antitrust claim has a separate test and separate elements, each of which must be satisfied by plaintiffs, is in service to the Supreme Court's directive to utilize "clear rules in antitrust law." *Id*.

There is a good reason for the courts to use defined rules when evaluating alleged anticompetitive conduct. As then-Chief Judge Breyer explained, antitrust rules "must be clear enough for lawyers to explain them to clients." *Town of Concord v. Boston Edison Co*., 915 F.2d 17, 25 (1st Cir. 1990) (Breyer, C.J.). Businesses need to be able to plan their activities, their investments, their allocation of resources, and their strategies. "Simple" and "[s]trong presumptions … guide businesses in planning their affairs by making it possible for counsel to state that some things do not create risks of liability." Frank H. Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 14 (1984). Without a requirement that a monopolization claim be grounded in at least one unlawful act, businesses would

have to constantly and continuously assess the interactive and interlocking effect of all of their business practices on every competitor in every market in which they operate. That is asking too much.

Second, the requirement of at least one unlawful act guides courts to appropriate remedies. The Supreme Court repeatedly warns against "requir[ing] antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing." *Trinko*, 540 U.S. at 408. Specifically, the Court has rejected the task of imposing a remedy "that it cannot explain or adequately and reasonably supervise." *Id.* at 415.

That concern is particularly applicable to monopolization claims that rest on multiple, lawful forms of interacting conduct. Courts would be faced with disputes as to whether they must enjoin all or some of those forms of conduct, whether those injunctions must be constantly evaluated, and whether new forms of conduct should constantly be added to the mix for reconsideration. That opens courts up to the charge of "assum[ing] the day-to-day controls characteristic of a regulatory agency." *Id.* That concern is particularly applicable here, where the appellants' theory would seem to require not only that the district court police a contract dispute about termination, but also ensure that Duke Energy set a particular price that Duke Energy must charge to all of its customers on the same terms.

Third, the Supreme Court repeatedly has cautioned against expanding antitrust liability such that the cure is worse than the purported problem. Indeed, the Court has drawn the exact opposite inference from plaintiffs' repeated refrain that there are multiple ways to run afoul of Section 2. *See* Opening Brief at 24.

As the Court put it in *Trinko*, against the benefits of "antitrust intervention here, [the courts] must weight a realistic assessment of its costs." 540 U.S. at 414. Even "under the best of circumstances, applying the requirements of § 2 'can be difficult' because of the means of 'the means of illicit exclusion, like the means of legitimate competition, are myriad.'" *Id*. (quoting *Microsoft* , 253 F.3d at 58). And "[m]istaken inferences and the resulting false condemnations 'are especially costly, because they chill the very conduct the antitrust laws are designed to protect.'" *Id*. (quoting *Matsushita*, 475 U.S. at 594). Consequently, "[t]he cost of false positives counsels against an undue expansion of § 2 liability." *Id.*

These concerns are particularly acute when courts attempt to aggregate disparate allegations. As the Court put it in *Linkline*, "[i]t is difficult enough for courts to identify and remedy an alleged anticompetitive practice at one level, such as predatory pricing in retail markets or a violation of the duty-to-deal doctrine at the wholesale level." *Id.* at 453. Doing both "would require courts simultaneously to police both the wholesale and retail prices to ensure that rival firms are not being squeezed." *Id*. And it is even more complicated, because the aggregation of

disparate allegations necessarily involves so-called synergistic effects: "courts would be aiming at a moving target, since it is the interaction between these two prices that may result in a squeeze." *Id*.

The district court recognized as much in its own way. As the court explained, *see* Summary Judgment Opinion at 20, the "[t]he [Sherman Act] directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself." *Id.* (quoting *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993)). The harm must be to competition itself and not to any particular competitor. *See* Duke Energy Brief at 46-47. Antitrust claims, particularly under Section 2, are not meant to be easy hurdles to surpass.

The appellants' theory would swing wide the courthouse doors to meritless antitrust litigation and lower the bar for burdensome discovery. The exorbitant costs of antitrust litigation have long been recognized. For decades, courts have warned "against sending the parties into discovery" based on dubious claims given "the costs of modern federal antitrust litigation." *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984); *see Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558 (2007) (observing the "unusually high cost of discovery in antitrust cases"). Antitrust litigation remains notoriously expensive to this day. *See, e.g.*, David F. Herr, *Annotated Manual for Complex Litigation* § 30 (4th ed., updated

May 2022) (noting that antitrust litigation "involve[s] voluminous documentary and testimonial evidence, extensive discovery, complicated legal, factual, and technical (particularly economic) questions, numerous parties and attorneys, and substantial sums of money").

The burdens of antitrust litigation are exacerbated by the outsized threat of antitrust *liability*. By statute, antitrust defendants must pay treble damages if they are found liable—*i.e.*, three times the aggregate overcharge imposed through the alleged antitrust conspiracy. *See* 15 U.S.C. § 15. That figure often amounts to billions of dollars. The consequences for antitrust defendants can be "economically devastating." Edward D. Cavanagh, *The Private Antitrust Remedy: Lessons from the American Experience*, 41 Loy. U. Chi. L.J. 629, 633–34 (2010). And as a result, there is intense pressure to settle antitrust cases. Indeed, antitrust "[d]efendants frequently face a Hobson's choice: either pay some amount to settle, even though they believe in their innocence, or try the matter and risk uncapped liability." Edward D. Cavanagh, *Contribution, Claim Reduction, and Individual Treble Damage Responsibility: Which Path to Reform of Antitrust Remedies?*, 40 Vand. L. Rev. 1277, 1284 (1987); *see also Twombly*, 550 U.S. at 559 ("[T]he threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching [summary judgment and trial] proceedings.").

C. The District Court Properly Applied the Law Regarding the Aggregation of Conduct

The district court properly ruled that NTE's farfetched "campaign of anticompetitive conduct" theory is not cognizable under Section 2. In granting summary judgment for Duke, the district court correctly analyzed NTE's theory that allegations of acts by Duke, taken together, somehow amount to an anticompetitive scheme cognizable under Section 2. Unmoved by NTE's attempts to string together a series of instances of lawful conduct rather than allege facts that would support a single finding of antitrust liability, the district court properly evaluated each alleged anticompetitive act under the prevailing rules applicable to each claim. Summary Judgment Opinion at 25 (refusal to deal), 33 (predatory pricing), 34 (sham litigation), defamation (35). NTE is asking this Court to bypass accepted law by short-changing the review of the elements of each of different theories of alleged exclusionary behavior and go straight to a gestalt "campaign" approach. NTE should not be permitted such a shortcut.[3]

* * *

In sum, and as the district court rightly pointed out, a Section 2 claimant has a high bar to meet and "to safeguard the incentive to innovate, the possession of

[3] To be clear, the undersigned *amici* do not believe that any of the alleged acts qualify as anticompetitive conduct under the appropriate legal tests. In this case, the appellants seek aggregation of a string of zeroes.

monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct." Summary Judgment Opinion at 19 (quoting *Trinko*, 540 U.S. at 407); *see also Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 225 (1993) ("Even an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws; those laws do not create a federal law of unfair competition or 'purport to afford remedies for all torts committed by or against persons engaged in interstate commerce.'") (internal citations omitted). Adding together acts that are not exclusionary (*e.g.*, cancelling a contract that had not been paid) and procompetitive acts (*e.g.*, offering a reduced price above cost to secure business) is an "amalgamation of meritless claims" within *Linkline* and cannot somehow amount to one of the "rare instances in which a dominant firm may incur antitrust liability purely for unilateral conduct." *Linkline*, 555 U.S. at 448. There is no coherent basis for distinguishing *Linkline* and no authority for the assertion that a combination of otherwise unobjectionable, unilateral ingredients can be combined into an anticompetitive whole. Absent an independent actionable theory of exclusionary conduct, *Linkline* is fatal to NTE's argument that its claims somehow survive when viewed in combination. Whether it is called a "campaign," a "course of conduct," a "scheme," or a "broth," (*see generally* Daniel A. Crane, *Does Monopoly Broth Make Bad Soup?*, 76 Antitrust L.J. 663 (2010)), what is

clear is that courts require an independent actionable claim to survive Sherman Act Section 2 scrutiny. NTE has failed in that regard, and therefore the district court should be affirmed.

II. The District Court Properly Analyzed and Rejected the Refusal to Deal Claim in This Case.

As a general principle, parties in a free market have the right to choose with whom they do business. The Supreme Court has long held that the Sherman Act generally "does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." *Colgate*, 250 U.S. at 307. Consequently, there are only "limited circumstances in which a firm's unilateral refusal to deal with its rivals can give rise to antitrust liability." *Linkline*, 555 U.S. at 448.

There are important reasons for retaining stringent limitations on antitrust liability in cases of refusal to deal. First, compelling parties to deal reduces the incentive of market participants to invest, innovate, and create useful new products. 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." *Trinko*, 540 U.S. at 407–08. "Put

another way, already large and successful firms 'might be deterred from investing, innovating, or expanding . . . with the knowledge [that] anything [they] creat[e] [they] could be forced to share,' while 'smaller [competitors] might be [similarly] deterred, knowing [they] could just demand the right to piggyback on [their] larger rival.'" *New York v. Facebook, Inc.*, 549 F.Supp.3d 6, 24 (D.D.C. 2021) (Boasberg, J.) (quoting *Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064, 1073 (10th Cir. 2013) (Gorsuch, J.)).

Second, compelling firms to deal would put the court in the position of central planner. It would require them to pick and choose applicable terms and conditions of the forced dealing. Yet courts are ill-equipped for that role. *Trinko*, 550 U.S. at 408.

Third, compelling firms to deal would simply "facilitate the supreme evil of antitrust: collusion." *Id.* at 407. To say the least, it would be ironic for antitrust law to require such a result.

With these principles in mind, the Supreme Court has "been very cautious in recognizing" any "exceptions" to "the right to refuse to deal with other firms." *Id.* at 408. The limited exception announced by the Supreme Court in *Aspen Skiing* lies "at or near the outer boundary of Section 2 liability." *Id.* at 409. After *Trinko*, the Supreme Court requires a plaintiff to demonstrate both (1) that the defendant has

terminated a prior voluntary course of profitable dealing between the parties, and (2) that no pro-competitive justification exists for the refusal to deal.

The district court rightly found that NTE failed this test. There simply is no profitable course of dealing where a party refuses to pay for a service. It also is hard to imagine a more compelling justification for the termination of a business relationship than that the counterparty refuses to pay for the goods or services that it receives.

Following the Supreme Court's admonishment to exercise caution, this Court should not extend any additional "exceptions" beyond the "narrow-eye needle of refusal to deal doctrine" accepted by the Supreme Court. *Novell*, 731 F.3d at 1073.

CONCLUSION

For the reasons above, this Court should affirm the district court's decision in favor of the appellees.

Dated: May 19, 2023

Respectfully submitted,

/s/ Michael F. Murray
Michael F. Murray
Mary Walser
PAUL HASTINGS LLP
2050 M Street, NW
Washington, D.C. 20036
T: (202) 551-1988
F: (202) 551-0488
michaelmurray@paulhastings.com

Counsel for Amici Curiae

Andrew R. Varcoe
Tyler S. Badgley
U.S. CHAMBER
LITIGATION CENTER
1615 H Street, NW
Washington, D.C. 20062

Counsel for the Chamber of Commerce of the United States of America

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the length limitations of Federal Rule of Appellate Procedure 29(a)(5) because this brief, excluding the portions excepted by the rules, contains 4,799 words, according to the word-count feature of the software used to generate this brief.

I certify that this brief complies with the typeface and type style requirements of Federal Rule of Appellate Procedure 32(a)(5)–(6).

/s/ Michael F. Murray
Michael F. Murray

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of May 2023, I electronically filed the foregoing brief with the Clerk of Court for the United States Court of Appeals for the Fourth Circuit by using the Court's CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Michael F. Murray
Michael F. Murray