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Proving Refusal to Deal Liability: Three Emerging Alternatives to *Aspen Skiing*

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I. Introduction

A common question under Section 2 of the Sherman Act, which proscribes unlawful monopolization, is whether a company with market power engages in "exclusionary conduct" by choosing not to deal with a competitor. Although the general rule is that an alleged monopolist, like any other company, has no duty to deal with anyone, there are exceptions, the scope of which are frequently debated and litigated.

Since 1970, the U.S. Supreme Court has addressed an alleged monopolist's duty to deal with competitors in five seminal decisions: *Otter Tail Power Co. v. United States*[2] in 1973; *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*[3] in 1985; *Eastman Kodak Co. v. Image Technical Services, Inc.*[4] in 1992; *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*[5] in 2004; and *Pacific Bell Telephone Co. v. Linkline Communications, Inc.*[6] in 2009. Neither of the latter two cases, which each held that the defendant had no duty to deal, overruled the earlier three, which reached (or at least implied) the opposite conclusion for reasons that are difficult to reconcile with the latter two.

In the wake of *Trinko* and *Linkline*, many lower courts today appear to view *Aspen Skiing* as not merely "at or near the outer boundary" of Section 2 liability, as framed by the Court in *Trinko*,[7] but the *only* path for a viable refusal-to-deal theory. That means that to state a viable Section 2 claim, courts generally require a plaintiff to allege facts closely analogous to *Aspen Skiing* (i.e., that the defendant terminated a voluntary and presumably profitable prior course of dealing with the plaintiff *and* the conduct had no economic justification except its tendency to exclude the plaintiff).

Since *Trinko*, however, at least three lines of cases have emerged under which courts have found a duty to deal with competitors in circumstances not strictly analogous to those in *Aspen Skiing*. *First*, some courts have held that a plaintiff may allege a viable Section 2 claim when an alleged monopolist breaches promises to standard setting organizations ("SSOs") to license standard essential patents ("SEPs") on fair, reasonable and non-discriminatory ("FRAND") terms. *Second*, some courts have held (and the Federal Trade Commission ("FTC") has argued) that generic drug manufacturers may state viable Section 2 claims when brand drug manufacturers refuse to provide necessary samples so the generics can perform bioequivalence studies necessary for their entry. *Third*, some courts continue to recognize an "essential facility" doctrine allowing plaintiffs to plead Section 2 claims against owners of facilities that competitors must access in order to compete even when one or more elements from *Aspen Skiing* are missing.

Notwithstanding those three emerging lines of cases, many courts will likely remain reluctant to hold that companies may be liable for refusing to deal with competitors in circumstances dissimilar to those in *Aspen Skiing*. But companies would be well-advised to be aware of their emergence and monitor whether lower courts expand their reasoning to find potential refusal to deal liability in other contexts in the future.

II. The U.S. Supreme Court's Five Modern Refusal to Deal Decisions

Under Section 2 of the Sherman Act,[8] it is unlawful for a company to monopolize "any part of the trade or commerce among the several States, or with foreign nations."[9] To establish liability under Section 2, a plaintiff must prove that a defendant engaged in anticompetitive or exclusionary conduct to acquire or maintain (or attempt to acquire or maintain) a monopoly.[10]

Although a company generally has the right to do (or not to do) business with anyone it wishes, in limited circumstances, a company's "refusal to cooperate with rivals can constitute anticompetitive conduct" that violates Section 2.[11] The first arises when the company breaches its unilateral duty to deal.[12] At least in some circuits, a second

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[1] The views in this article represent only the author's views and not necessarily those of Axinn, Veltrop & Harkrider LLP or any of its clients.
[2] 410 U.S. 366 (1973).
[3] 472 U.S. 585 (1985).
[4] 504 U.S. 451 (1992).
[5] 540 U.S. 398 (2004).
[6] 555 U.S. 438 (2009).
[7] *Trinko,* 540 U.S. at 409.
[8] 15 U.S.C. § 2.
[9] *Id.*
[10] *See Trinko,* 540 U.S. at 407; United States v. Microsoft Corp., 253 F.3d 34, 58 (D.C. Cir. 2001) (en banc and per curiam).
[11] *Trinko,* 540 U.S. at 408.
[12] *See Aspen Skiing,* 472 U.S. at 587, 611.

may arise when a company refuses to share an "essential facility" with a competitor.[13]

Five decisions by the Court provide the modern framework for lower courts evaluating refusal to deal cases. In *Otter Tail*, an alleged monopolist of electric transmission lines also sold electric power.[14] When towns served by the defendant voted to establish their own municipal distribution systems, the defendant refused to sell energy to the new systems at wholesale price and refused to transmit or "wheel" power to them from other suppliers.[15] With little discussion of its reasoning, the Court held that the defendant had used "its monopoly powers in the towns in its service area to foreclose competition or gain a competitive advantage, or to destroy a competitor, all in violation of the antitrust laws."[16]

In *Aspen Skiing*, the defendant owned three of the four major facilities for downhill skiing in Aspen, and the plaintiff owned the fourth.[17] After previously cooperating with the plaintiff to offer customers a joint ticket usable at all four facilities, the defendant terminated its cooperation and refused to sell the plaintiff any lift tickets even at retail price so the plaintiff could replace the joint offering.[18] Under those facts, the Court held that the trial record "comfortably supports an inference that the monopolist made a deliberate effort to discourage its customers from doing business with its smaller rival,"[19] and willingly sacrificed short-run benefits (e.g., sales at retail price) and customer goodwill "in exchange for a perceived long-run impact on its smaller rival."[20] The Court thus affirmed the jury's verdict against the defendant.[21]

In *Kodak*, the defendant manufactured and sold photocopiers and micrographic equipment, and also sold service and replacement parts for its equipment.[22] Subsequently, the defendant allegedly adopted policies to limit the availability of parts to independent service organizations in order to make it more difficult for them to compete with the defendant in servicing the equipment.[23] In affirming the denial of summary judgment, the Court stated if the defendant "adopted its parts and service policies as part of a scheme of willful acquisition or maintenance of monopoly power, it will have violated § 2."[24]

In *Trinko*, the Court considered whether a defendant's alleged breach of a statutory duty to share its network with competitors was sufficient to state a Section 2 claim.[25] The plaintiff did not allege that the defendant had ever voluntarily shared its network with rivals, nor that it would have done so absent statutory compulsion.[26] Under those facts, the Court held that the plaintiff had failed to state a claim.[27] It distinguished *Aspen Skiing* because it concluded that the defendant's prior conduct "shed[] no light upon the motivation of its refusal to deal . . . ."[28] The Court also distinguished *Otter Tail* because the allegedly withheld services had never been marketed or made publicly available, unlike in *Otter Tail* where the defendant provided power transmission service to some customers but not others.[29]

Most recently, in *Linkline*, the Court held that plaintiffs could not bring a viable "price-squeeze" claim under Section 2 when the defendant, a vertically-integrated competitor that controlled inputs the plaintiff needed, had no antitrust obligation to sell the inputs to the plaintiffs in the first place.[30] In so ruling, the Court stated that instances where a dominant company may be liable for purely unilateral conduct are "rare."[31]

III. Potential Refusal to Deal Liability in Circumstances Dissimilar to *Aspen Skiing*

Although none of *Otter Tail*, *Aspen Skiing* and *Kodak* has been explicitly overruled, the general thrust of case law since *Trinko* has been that unless a complaint hews closely to *Aspen Skiing*, a plaintiff cannot state a Section 2 claim based on a refusal to deal.[32] But companies should be

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13 *See, e.g.,* Aerotec Int'l, Inc. v. Honeywell Int'l, Inc., 836 F.3d 1171, 1184-85 (9th Cir. 2016); MCI Commc'ns Corp. v. Am. Tel. & Tel. Co., 708 F.2d 1081, 1132-33 (7th Cir. 1983). *But see Trinko,* 540 U.S. at 411 (stating that the Court had "never recognized" the essential facilities doctrine, but declining "either to recognize it or repudiate it here").
14 410 U.S. at 368, 370.
15 *See id.* at 368, 371.
16 *Id.* at 377 (citing United States v. Griffith, 334 U.S. 100, 107 (1948)).
17 *Aspen Skiing,* 472 U.S. at 587-89.
18 *See id.* at 592-93.
19 *Id.* at 610.
20 *Id.* at 610-11.
21 *Id.* at 611.
22 *Kodak,* 504 U.S. at 455.
23 *Id.*
24 *Id.* at 483.
25 *Trinko,* 540 U.S. at 401.
26 *Id.* at 409.
27 *Id.* at 416.
28 *Id.* at 409.
29 *Id.* at 410 (citing *Otter Tail,* 410 U.S. at 370-71).
30 *Linkline,* 555 U.S. at 442.
31 *Id.* at 448.
32 *See, e.g.,* Novell, Inc. v. Microsoft Corp., 731 F.3d 1064, 1074-75 (10th Cir. 2013) (Gorsuch, J.) (explaining that "at least two features present in *Aspen* must be present" to state a refusal to deal claim: (1) "a preexisting voluntary and presumably profitable course of dealing between the monopolist and the rival," and (2) "the monopolist's discontinuation of

aware that lower courts have sustained alternative routes for plaintiffs. Indeed, three lines of cases have recently held in circumstances quite different from *Aspen Skiing* that plaintiffs had stated viable theories of liability under Section 2.

A. Refusals to License SEPs to Competitors on FRAND Terms

In the first line of cases, some courts have held that plaintiffs had stated a monopolization claim based on a defendant's alleged breach of its promises to SSOs to license its SEPs on FRAND terms.[33] Unlike in *Aspen Skiing*, the theories of liability in those cases were not that the defendants had terminated a prior course of dealing in the sense of ending a licensing arrangement with their competitors. Nevertheless, the courts held that the alleged conduct could support a viable refusal to deal claim.[34]

Two of those cases concern the actions of Qualcomm Incorporated ("Qualcomm"). In the earlier case, *Broadcom Corp. v. Qualcomm Inc.*, the plaintiff alleged that Qualcomm was a member of an SSO and committed to abide by the SSO's policy to license technologies included in the standard on FRAND terms, in return for which the SSO incorporated Qualcomm's proprietary technology into the standard.[35] Despite making that commitment, Qualcomm allegedly demanded that the plaintiff license its technology on terms that plaintiff alleged were non-FRAND.[36]

On appeal, the U.S. Court of Appeals for the Third Circuit held that even if the case did involve a refusal to deal, it would hold that the plaintiff had stated a viable Section 2 claim on a refusal-to-deal theory.[37] According to the court, Qualcomm's actions differed from the defendant's conduct in *Trinko* because Qualcomm allegedly actively marketed its technology for inclusion in an industry-wide standard and voluntarily agreed to license its technology on FRAND terms.[38] *Trinko* was distinguishable in the court's view, because, in *Trinko,* no allegations suggested the defendant would have marketed the withheld services absent a statutory duty to do so.[39] The court also found *Trinko* distinguishable, because in that case there was an "extensive regulatory framework" to oversee the defendant's conduct, whereas no framework existed to oversee Qualcomm's.[40]

In the latter case, *FTC v. Qualcomm Inc.*, the FTC filed a complaint against Qualcomm for allegedly refusing to license its FRAND-encumbered SEPs to competing modem chip manufacturers, again allegedly in breach of its commitments to SSOs.[41] In denying Qualcomm's motion to dismiss, the district court held that the "FTC's allegations that Qualcomm voluntarily participated in the standards setting process and voluntarily committed to license its SEPs to its modem chip competitors are sufficient to allege that Qualcomm altered a voluntary and profitable course of dealing."[42]

B. Brand Drug Manufacturers' Refusals to Provide Samples to Generic Manufacturers for Bioequivalence Testing

In the second line of cases, the U.S. District Court for the District of New Jersey has held in a series of decisions that generic drug manufacturers stated plausible refusal to deal claims against brand drug manufacturers that had never done business with them.[43] In those cases, the brand

the preexisting course of dealing must 'suggest[] a willingness to forsake short-term profits to achieve an anti-competitive end'" (citations omitted)); *In re* Elevator Antitrust Litig., 502 F.3d 47, 52 (2d Cir. 2007) (holding that "because plaintiffs do not allege that defendants terminated any prior course of dealing—the sole exception to the broad right of a firm to refuse to deal with its competitors—the allegations are insufficient to state a unilateral-monopolization claim"); Covad Commc'ns Co. v. BellSouth Corp., 374 F.3d 1044, 1049 (11th Cir. 2004) (holding that "*Trinko* now effectively makes the unilateral termination of a voluntary course of dealing a requirement for a valid refusal-to-deal claim under *Aspen*").

[33] *See, e.g.,* Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 303, 315 (3d Cir. 2007); FTC v. Qualcomm Inc., No. 17-CV-00220-LHK, 2017 WL 2774406, at *20 (N.D. Cal. June 26, 2017); *see also* Apple Inc. v. Samsung Elecs. Co., No. 11-CV-01846, 2012 WL 1672493, at *7-8 (N.D. Cal. May 14, 2012) (denying motion to dismiss counterclaim and discussing case law "recogniz[ing] that fraudulent FRAND declarations that are used to induce SSOs to adopt standards essential patents can be monopoly conduct for the purposes of establishing a Section 2 claim" (citations omitted)); Research in Motion Ltd. v. Motorola, Inc., 644 F. Supp. 2d 788, 796-97 (N.D. Tex. 2008) (denying motion to dismiss where plaintiff alleged that SSOs relied on defendant's false promises to license its patents on FRAND terms).

[34] *See Broadcom,* 501 F.3d at 314; *Qualcomm,* 2017 WL 2774406, at *20; *Apple,* 2012 WL 1672493, at *7-8; *Research in Motion,* 644 F. Supp. 2d at 796-97.

[35] *Broadcom,* 501 F.3d at 304.

[36] *Id.* at 305.

[37] *See id.* at 316.

[38] *See id.*

[39] *See id.*

[40] *See id.* at 316-17.

[41] See *Qualcomm,* 2017 WL 2774406, at *5-6.

[42] *Id.* at *21.

[43] *See* In re Thalomid & Revlimid Antitrust Litig., No. 14-6997 (KSH), 2015 WL 9589217, at *14-16 (D.N.J. Oct. 29, 2015); Transcript of Oral Opinion 17-18, Mylan Pharm. v. Celgene Corp., No. 14-cv-2094 (D.N.J. Dec. 22, 2014) ("*Mylan* Transcript"); Federal Trade Commission's Br. as *Amicus Curiae* 9, Mylan Pharm., Inc. v. Celgene Corp. (D.N.J. June 17, 2014) ("FTC *Mylan* Br."), *available at* https://www.ftc.gov/system/files/documents/amicus_briefs/mylan-pharmaceuticals-inc.v.celgene-corporation/140617celgeneamicusbrief.pdf (citing Order, Lannett Co. v. Celgene Corp., No. 08-cv-3920 (E.D. Pa. Mar. 20, 2011) (ECF No. 42); Order, Actelion Pharms. Ltd. v. Apotex, Inc., No. 12-cv-5743 (D.N.J. Oct. 17,

drug companies allegedly refused to provide generic companies with drug samples so the generics could perform bioequivalence studies and enter the market.[44] The alleged reason was that the brand companies' risk evaluation and mitigation strategies ("REMS") forbade such distribution, and that such restrictions were necessary to ensure the safe distribution of their products.[45] In holding that plaintiffs could plausibly state a refusal to deal claim in such circumstances, the court explained that, based on its reading of *Aspen Skiing* and *Trinko*, the alleged monopolist's "motivation is central" to its liability (i.e., whether an "anti-competitive motivation" was the cause of its refusal to deal), an element it deemed satisfied by the alleged conduct.[46]

Notably, the FTC has publicly taken the position that abuse of the REMS process by brand drug companies to prevent entry by generics may lead to liability on a refusal to deal theory even in the absence of a prior course of dealing.[47] It filed amicus briefs in two REMS cases arguing that the generics had stated allegations that "fit within the Supreme Court's existing refusal to deal precedent in *Otter Tail* and *Aspen Skiing*, as clarified in *Trinko*."[48] The FTC asserted that conduct of the type allegedly committed by the defendant, if successful, "threatens to undermine the careful balance created by the Hatch-Waxman Act and potentially preserve a brand firm's monopoly indefinitely."[49]

Although the FTC acknowledged that some courts outside the Third Circuit had required allegations of a prior course of dealing, it argued that no such allegations are required to plead a refusal to deal claim under *Aspen Skiing* and *Otter Tail*.[50] According to the FTC, the allegations that the defendant was "willing to provide access to non-competitors, despite its distribution restrictions, but refuses to provide access to its potential competitors, even if compensated at full retail price" supported "a viable theory of exclusionary conduct under existing precedent."[51]

C. The Essential Facilities Doctrine: Alive and Well in Some Circuits

Lastly, a number of courts have noted, post-*Trinko*, the ongoing vitality of essential facilities claims, which generally do not require a prior course of dealing or allegations that a defendant's actions made no economic sense but-for their anticompetitive effects, as a basis for Section 2 liability.[52] For instance, the U.S. Court of Appeals for the Ninth Circuit expressly stated in a 2016 opinion that even though "the Supreme Court has never recognized the doctrine," the court "ha[s] continued to treat it as having a basis in § 2 of the Sherman Act."[53] Thus, the essential facilities doctrine may offer a cognizable theory in some circuits for a defendant to be held liable under Section 2 without ever having done business with a plaintiff like the defendant in *Aspen Skiing*.

A recent opinion from the U.S. District Court for the Northern District of California highlights how the essential facilities doctrine may yield different outcomes than a

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2013) (ECF No. 90)). *But see* Natco Pharma Ltd. v. Gilead Sciences, Inc., No. 14-3247 (DWF/JSM), 2015 WL 5718398, at *5 (D. Minn. Sept. 29, 2015) (holding that plaintiff's claim that defendant refused to deal "by requiring a REMS-certified physician to write a prescription does not support a refusal to deal claim"); In re Suboxone (Buprenorphine Hydrochloride & Naloxone) Antitrust Litig., 64 F. Supp. 3d 665, 688 (E.D. Pa. 2014) ("The antitrust laws do not impose a duty on [brand drug manufacturer] to aid the Generics in obtaining expeditious approval of an [Abbreviated New Drug Application]."); Henry N. Butler, *REMS-Restricted Drug Distribution Programs and the Antitrust Economics of Refusals to Deal with Potential Generics Competitors,* 67 Fla. L. Rev. 977, 981 (2015) (arguing that "refusal-to-deal claims in the REMS context fail under current refusal-to-deal jurisprudence").

[44] *See, e.g., Thalomid,* 2015 WL 9589217, at *14; Mylan Transcript 4, 17-18.

[45] *See, e.g., Mylan* Transcript 3-4.

[46] *Thalomid,* 2015 WL 9589217, at *15; see Mylan Transcript at 17-18.

[47] Additionally, the FTC testified in July 2017 before the House Judiciary Committee's Subcommittee on Regulatory Reform, Commercial and Antitrust Law that because refusal to deal liability is "an unsettled area of antitrust law," it "seems unlikely that the prospect of antitrust liability alone will create the proper incentives for branded and generic firms to reach agreement on a shared REMS program." Prepared Statement of Markus H. Meier, Acting Director, Bureau of Competition, U.S. Federal Trade Commission 10-11 (July 27, 2017), *available at* https://www.ftc.gov/system/files/documents/public_statements/1234663/p859900_commission_testimony_re_at_concerns_and_the_fda_approval_process_house_7-27-17.pdf.

[48] FTC *Mylan* Br. 9; *see* Federal Trade Commission's Br. as *Amicus Curiae* 9, Actelion Pharm. Ltd. v. Apotex Inc. (D.N.J. Mar. 11, 2013) ("FTC *Actelion* Br."), *available at* https://www.ftc.gov/sites/default/files/documents/amicus_briefs/actelion-pharmaceuticals-ltd.et-al.v.apotex-inc./130311actelionamicusbrief.pdf.

[49] *See* FTC *Mylan* Br. 8.

[50] *See id.* at 11-12.

[51] *Id.* at 14. The FTC also argued that the provision of samples to generic drug manufacturers did not "seem to raise the policy concerns" of enforced sharing that the Supreme Court identified in *Trinko* for three reasons: (1) allowing generic competitors to purchase product samples "would not undermine the incentive to invest"; (2) the brand drug company "already routinely sells [its] products to retail and wholesale customers and provides access to research organizations"; and (3) the risk of collusion was remote because a "remedy would not require an ongoing commercial relationship, just a one-time sale." *Id.* at 15; accord FTC *Actelion* Br. 15.

[52] *See* ABA Section of Antitrust Law, *Antitrust Law Developments* 273 (8th ed. 2017) (describing the Seventh Circuit's test for essential facilities claims, which "has been subsequently adopted by many other courts," as requiring "(1) control of the essential facility by the monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility" (quoting *MCI,* 708 F.2d at 1132-33)).

[53] *Aerotec,* 836 F.3d at 1184-85 (citations omitted).

refusal to deal theory. In that case, *hiQ Labs, Inc. v. LinkedIn Corp.*,[54] the plaintiff alleged that the defendant had attempted to terminate its ability to access otherwise publicly available information on profiles of LinkedIn users (e.g., by employing "various blocking techniques designed to prevent [plaintiff]'s automated data collection methods").[55] The court held that because there was "a plausible inference" that the defendant terminated the plaintiff's "access to its public member data in large part because it wanted exclusive control over that data for its own business purposes," the plaintiff had "raised at least serious enough questions on the merits . . . to support the issuance of a preliminary injunction" for its claim under California's Unfair Competition Law, which among other things prohibits practices that violate policies "embodied in the federal antitrust laws."[56]

In so ruling, the court noted the plaintiff's argument that the defendant's "conduct violates the 'essential facilities' doctrine."[57] The court agreed that the plaintiff "has raised serious questions with respect to its claim that [the defendant] is unfairly leveraging its power in the professional networking market for an anticompetitive purpose."[58] However, the refusal to deal doctrine, as interpreted and applied by many courts, could easily suggest a different outcome, notwithstanding *Kodak*, because of the conceivable procompetitive benefits of the defendant vertically integrating into another space.[59] Indeed, as another court put it, "[i]t is a deep-dyed canon of antitrust law that the supplier of a product may vertically integrate its distribution channels without facing liability."[60]

The above opinion is difficult to square with *Trinko*, *Linkline* and most modern refusal to deal cases. Nevertheless, until the U.S. Supreme Court clarifies whether the essential facilities doctrine can provide a separate theory of liability, the basic question of whether the owner of an essential facility has a heightened duty to cooperate with rivals will likely continue to be vigorously litigated and yield considerable uncertainty.

IV. Conclusion

For the foregoing reasons, at least three lines of authority appear to provide potential routes for plaintiffs to establish Section 2 liability in the absence of any facts akin to those in *Aspen Skiing*. Although such cases represent a minority view, companies would be well-advised to be aware of different theories plaintiffs have successfully used to allege Section 2 claims. Until the day comes when the U.S. Supreme Court reconciles its refusal to deal decisions, however, lower courts might continue to diverge on basic questions of Section 2 liability.

[54] No. 17-cv-03301-EMC, 2017 WL 3473663 (Aug. 14, 2017).
[55] *Id.* at *1.
[56] *Id.* at *11-12.
[57] *Id.* at *11.
[58] *Id.*
[59] *See, e.g.,* Viamedia, Inc. v. Comcast Corp., 218 F. Supp. 3d 674, 698 (N.D. Ill. 2016) (agreeing with defendants that plaintiff "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") (internal quotation marks and citations omitted); *see also* It's My Party, Inc. v. Live Nation, Inc., 811 F.3d 676, 689 (4th Cir. 2016) ("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." (citation omitted)). *But see Kodak,* 504 U.S. at 483 ("If [defendant] adopted its parts and service policies [in the aftermarket] as part of a scheme of willful acquisition or maintenance of monopoly power, it will have violated § 2").
[60] WHDH-TV v. Comcast Corp., 186 F. Supp. 3d 107, 116 (D. Mass. 2016).