No. 22-1164

IN THE
United States Court of Appeals for the Tenth Circuit

CHASE MANUFACTURING, INC.,
Plaintiff-Appellant,
v.

JOHNS MANVILLE CORPORATION,
Defendant-Appellee.

On Appeal from the
United States District Court for the District of Colorado
Honorable Michael E. Hegarty
No. 1:19-cv-00872-MEH

BRIEF FOR THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF NEITHER PARTY

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTEREST OF THE UNITED STATES 1

STATEMENT OF ISSUE PRESENTED 2

STATEMENT 3

ARGUMENT 7

THE DISTRICT COURT ERRED IN APPLYING *NOVELL*'S TEST FOR UNILATERAL REFUSALS TO DEAL WITH RIVALS TO A CLAIM BASED ON ANTICOMPETITIVE CONDITIONS IMPOSED ON CUSTOMERS 8

CONCLUSION 23

CERTIFICATE OF COMPLIANCE 24

CERTIFICATE OF DIGITAL SUBMISSION 25

CERTIFICATE OF SERVICE 26

TABLE OF AUTHORITIES

Cases **Page(s)**

Aspen Skiing Co. v. Aspen Highlands Skiing Corp.,
472 U.S. 585 (1985) 8, 10, 14

Buccaneer Energy (USA) Inc. v. Gunnison Energy Corp.,
846 F.3d 1297 (10th Cir. 2017) 18

Eastman Kodak Co. v. Image Technical Services, Inc.,
504 U.S. 451 (1992) 7, 8, 13, 14

In re EpiPen,
44 F.4th 959 (10th Cir. 2022) 8, 9, 10

Instructional Systems Development Corp. v. Aetna Casualty & Surety Co., 817 F.2d 639 (10th Cir. 1987) 9, 18

Lorain Journal Co. v. United States,
342 U.S. 143 (1951) 6, 16, 17

Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal & Professional Publications, Inc., 63 F.3d 1540 (10th Cir. 1995) 9

Mylan Pharmaceuticals, Inc. v. Warner Chilcott Public Ltd. Co.,
838 F.3d 421 (3d Cir. 2016) 10

New Mexico Oncology & Hematology Consultants Ltd. v. Presbyterian Healthcare Services, 994 F.3d 1166 (10th Cir. 2021) 18, 21

New York ex rel. Schneiderman v. Actavis PLC,
787 F.3d 638 (2d Cir. 2015) 10

Novell, Inc. v. Microsoft Corp.,
731 F.3d 1064 (10th Cir. 2013) 2, 5, 7, 10, 12, 18, 19, 20, 21

Otter Tail Power Co. v. United States,
410 U.S. 366 (1973) 10, 11, 20

Pacific Bell Telephone Co. v. linkLine Communications,
555 U.S. 438 (2009) 9, 10, 13, 14, 15

United States v. Colgate & Co.,
250 U.S. 300 (1919) 10

United States v. E.I. du Pont de Nemours & Co.,
351 U.S. 377 (1956) 7

United States v. Grinnell Corp.,
384 U.S. 563 (1966) 8

United States v. Microsoft Corp.,
253 F.3d 34 (D.C. Cir. 2001) 9

Verizon Communications, Inc. v. FCC,
535 U.S. 467 (2002) 15

Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP,
540 U.S. 398 (2004) 10, 11, 12, 13, 14, 15, 16

Viamedia, Inc. v. Comcast Corp.,
951 F.3d 429 (7th Cir. 2020) 9, 12

Statutes

15 U.S.C. § 2 1

Rules

Fed. R. App. P. 29 1

Other Authorities

Herbert Hovenkamp, *Antitrust Error Costs*,
24 U. Pa. J. Bus. L. 293 (2022) 19, 20

Jonathan B. Baker, *Taking the Error Out of "Error Cost" Analysis: What's Wrong With Antitrust's Right,* 80 Antitrust L.J. 1 (2022) . 19, 20

INTEREST OF THE UNITED STATES

The United States enforces the federal antitrust laws and has a strong interest in the correct application of Section 2 of the Sherman Act. 15 U.S.C. § 2. In this case, the District Court erroneously applied the test governing unilateral refusals to deal with *rivals* to a monopolist's imposition of anticompetitive conditions on *customers*. If uncorrected, this error would impede Section 2 enforcement significantly.

The United States files this brief pursuant to Federal Rule of Appellate Procedure 29(a)(2). The United States takes no position on the merits of the plaintiff's antitrust claims.

STATEMENT OF ISSUE PRESENTED

Whether the District Court erred by applying the standard governing liability for unilateral refusals to deal with *rivals*—"a discrete category of section 2 cases"—set forth in *Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064, 1076 (10th Cir. 2013), *cert. denied*, 572 U.S. 1096 (2014), to a monopolist's imposition of anticompetitive conditions on *customers*.

STATEMENT

1. This lawsuit concerns defendant Johns Manville Corporation's ("JM's") alleged efforts to prevent its customers from dealing with a new rival.[1] JM manufactures and sells mechanical insulation materials used in industrial settings, including hydrous calcium silicate thermal insulation ("calsil"). App.Vol.V. at 3-4.[2] JM was the sole seller of calsil in the United States until March 2018, when plaintiff Chase Manufacturing, Inc. ("TPS") entered the market and began selling calsil to the same customer base—namely, distributors, which, in turn, sell to downstream contractors. *Id.*

According to TPS, JM responded to TPS's entry with a campaign to pressure its distributors not to purchase calsil from TPS. Among other conduct, JM allegedly threatened to withhold calsil and other products from—or otherwise retaliate against—distributors purchasing calsil from TPS—what the District Court referred to as a "refusal to supply."

[1] Part of the record related to the summary-judgment motion—the basis of this appeal—remains under seal. App.Vol.V. at 9. This brief is based on the information in publicly available filings.

[2] Citations to "App.Vol.V." are to the District Court's Order of April 26, 2022, which is contained in Volume V of the Appendix to Appellant's Opening Brief.

App.Vol.V. at 15.[3] For example, JM "warned [one distributor] that continued purchases from [TPS] would cause a change in the relationship." App.Vol.V. at 17. It stopped supplying a particular location of a distributor that dealt with TPS. App.Vol.V. at 18. And it held up an order from another distributor while it investigated the amount of business the distributor was doing with TPS. *Id.* Additionally, other distributors felt it necessary to assure JM that they were not doing business with TPS. App.Vol.V. at 17.

2. As relevant here, TPS claims that JM violated Section 2 of the Sherman Act through a course of anticompetitive conduct, including the "refusal to supply." App.Vol.V. at 5.[4] The District Court granted JM summary judgment, concluding that TPS failed to present evidence that

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[3] TPS also alleges that JM entered into exclusive-dealing arrangements with distributors; disparaged TPS's product; and tied the sale of calsil to the sale of other products. App.Vol.V. at 19-31.

[4] The United States does not take a position on the District Court's analysis of TPS's tying claim under Section 1 of the Sherman Act or of antitrust injury.

any of JM's practices constituted anticompetitive conduct. App.Vol.V. at 32-33.

The District Court began its analysis by stating that, to show anticompetitive conduct, a Section 2 plaintiff "must demonstrate conduct whose only rational benefit is to harm competition." App.Vol.V. at 15. Turning to the "refusal to supply," the District Court acknowledged that JM directed its threats at "third-party customers"; that JM "tried to leverage distributors' dependence on it to discourage them from doing business with [TPS]"; and that JM continued to deal with those distributors that acceded to its demand. App.Vol.V. at 16-19. It nonetheless framed the alleged anticompetitive conditions, enforced through threatened refusals to supply, as "a unilateral refusal to deal," and applied this Court's test for a monopolist's refusal to deal with "*a rival or competitor*," even though, as the District Court put it, "[t]hat is not the situation presented here." App.Vol.V. at 15-16.

Invoking *Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064 (10th Cir. 2013), *cert. denied*, 572 U.S. 1096 (2014), which dealt with refusals to deal with rivals, the District Court required TPS to show that "(1) the monopolist had a preexisting voluntary and presumably profitable course

of dealing (2) which the monopolist willingly discontinued and gave up short-term profit from it in order to achieve an anticompetitive end." App.Vol.V. at 15. It held that TPS failed to satisfy the second element, as the record lacked "probative evidence that [JM] willingly inflicted upon itself harm in the short run in order to thwart [TPS's] entry into the U.S. calsil market." App.Vol.V. at 16.

The District Court distinguished *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951), where the Supreme Court held that the defendant newspaper violated Section 2 by refusing to sell advertising space to customers that also purchased advertising time from a radio station. App.Vol.V. at 18-19. The District Court found the situation here "distinguishable" from that in *Lorain Journal* because "[t]here is no evidence that [JM's] alleged scheme went so far or was as effective"; "[t]here is no evidence that [JM] went so far as to fully withhold [calsil]"; and "[i]n actuality, it was the threat to sell to a distributor's competitor that [JM] leveraged." *Id.*

The District Court held that the other practices challenged by TPS—JM's alleged tying, exclusive dealing, and disparagement of TPS's

product—did not constitute anticompetitive conduct for various reasons. App.Vol.V. at 19-31.

ARGUMENT

Section 2 of the Sherman Act was intended to "achieve for the Nation the freedom of enterprise from monopoly." *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 385-86 (1956). Generally, courts approach Section 2 claims on a "case-by-case basis," applying a flexible analysis in determining whether the defendant has engaged in anticompetitive conduct. *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 466-67, 481-83 (1992). But for certain "discrete categor[ies] of section 2 cases"—including unilateral refusals to deal with rivals—some courts (such as this Court) have developed conduct-specific tests. *Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064, 1076 (10th Cir. 2013), *cert. denied*, 572 U.S. 1096 (2014).

The District Court erred by applying *Novell*'s test—which this Court made clear applies solely to the unique circumstances of a refusal to deal with rivals—to the distinct and distinguishable context of a monopolist's imposition of anticompetitive conditions on customers. If affirmed, this expansion of *Novell*'s "underinclusive" test could handcuff

antitrust courts and shelter anticompetitive conduct, and would ignore Congress's intent.

THE DISTRICT COURT ERRED IN APPLYING *NOVELL*'S TEST FOR UNILATERAL REFUSALS TO DEAL WITH RIVALS TO A CLAIM BASED ON ANTICOMPETITIVE CONDITIONS IMPOSED ON CUSTOMERS

1. The offense of monopolization under Section 2 requires "(1) the possession of monopoly power in the relevant market and (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." *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). Courts term the second element "anticompetitive," "exclusionary," or "predatory" conduct. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 602 (1985).

A determination of whether challenged conduct is anticompetitive under Section 2 usually requires an inquiry into "actual market realities," "focusing on the particular facts disclosed by the record" and using the best available evidence to assess the challenged conduct's likely effect on competition. *Kodak*, 504 U.S. at 466-467 (internal quotation marks omitted). This approach affords the flexibility needed to account for the "myriad" "means of illicit exclusion," *In re EpiPen*, 44 F.4th 959,

981 (10th Cir. 2022) (quoting *United States v. Microsoft Corp.*, 253 F.3d 34, 58 (D.C. Cir. 2001) (en banc)), as well as changes in the economy and developments in the field of economics, *cf. Pac. Bell Tel. Co. v. linkLine Commc'ns*, 555 U.S. 438, 442, 452 n.3 (2009) (referencing "developments in economic theory").

This Court has described anticompetitive conduct as "conduct constituting an abnormal response to market opportunities," and as practices that "impair opportunities of rivals and are not competition on the merits or are more restrictive than reasonably necessary." *Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Publ'ns, Inc.*, 63 F.3d 1540, 1550 (10th Cir. 1995) (quoting *Instructional Sys. Dev. Corp. v. Aetna Cas. & Surety Co.*, 817 F.2d 639, 649 (10th Cir. 1987)). Further, the anticompetitive conduct "must appear reasonably capable of contributing significantly to creating or maintaining monopoly power." *Instructional Sys.*, 817 F.2d at 649.[5]

Though this framework generally applies, courts have sometimes "'develop[ed] considerably more specific rules" for a small number of

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[5] Many Circuits use a burden-shifting framework drawn from *Microsoft*. *Microsoft*, 253 F.3d at 58-59; *see also, e.g.*, *Viamedia, Inc. v. Comcast Corp.*, 951 F.3d 429, 463-64 (7th Cir. 2020), *cert. denied*, 141 S. Ct. 2877

categories of alleged misconduct. *In re EpiPen*, 44 F.4th at 982 (quoting *Novell*, 731 F.3d at 1072). Unilateral refusals to deal with rivals represent one such category. *Novell*, 731 F.3d at 1072.

2. The Supreme Court has long recognized that "a refusal to cooperate with rivals can constitute anticompetitive conduct and violate §2." *Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004); *see also Aspen Skiing*, 472 U.S. at 601; *Otter Tail Power Co. v. United States*, 410 U.S. 366, 377-78 (1973); *cf. United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919) (the "right" of a business to choose its partners obtains only "in the absence of any purpose to create or maintain a monopoly"). For example, in *Aspen Skiing*, the Supreme Court restated that the "high value that we have placed on the right to refuse to deal with other firms does not mean that the right is unqualified." 472 U.S. at 601. And most recently, *Trinko* and *linkLine* reaffirmed that a unilateral refusal to deal with rivals can sometimes violate Section 2. *linkLine*, 555 U.S. at 448; *Trinko*, 540 U.S. at 408-09.

(2021); *Mylan Pharm, Inc. v. Warner Chilcott Public Ltd. Co.*, 838 F.3d 421, 438 (3d Cir. 2016); *New York ex rel. Schneiderman v. Actavis PLC*, 787 F.3d 638, 652 (2d Cir. 2015); *cf. In re EpiPen*, 44 F.4th at 981 (citing *Microsoft* in discussing the general Section 2 analysis).

For example, *Trinko* discussed why liability was appropriate in *Aspen Skiing* and also favorably discussed the Supreme Court's prior decision in *Otter Tail*. 540 U.S. at 408-10. Additionally, *Trinko* acknowledged that, in appropriate cases, "traditional antitrust principles" could justify new "exceptions from the proposition that there is no duty to aid competitors." *Id.* at 411.

Trinko raised concerns about errantly imposing Section 2 liability for refusals to deal with rivals, placing *Aspen Skiing* "at or near the outer boundary of § 2 liability." 540 U.S. at 409. In particular, the Supreme Court postulated that, in the heavily regulated and infrastructure-intensive telecommunications context at issue, "forced sharing" might discourage investment and innovation, encourage collusion, and strain judicial capabilities. *Id.* at 408; *see also id.* at 412 ("One factor of particular importance is the existence of a regulatory structure designed to deter and remedy anticompetitive harm.").

Sensitive to these concerns about imposing liability on a monopolist for its failure to aid a rival, this Court in *Novell* held that a plaintiff challenging a monopolist's refusal to cooperate with a rival must show (1) "a preexisting voluntary and presumably profitable course of dealing

between the monopolist and rival," (2) the termination of which suggests "'a willingness to forsake short-term profits to achieve an anti-competitive end.'" *Id.* at 1074-75 (quoting *Trinko*, 540 U.S. at 407).[6]

3. The District Court erred in applying *Novell*'s two-part test for analyzing unilateral refusals to deal with rivals to JM's alleged threats not to deal with disloyal customers. Neither the Supreme Court's nor this Court's decisions support the District Court's expansion of the "narrow field" of refusals to deal with *competitors* to alleged anticompetitive conditions imposed on *customers*. *Novell,* 731 F.3d at 1076.

The District Court recognized that JM's alleged "refusal to supply" entailed conditional refusals "to do business with . . . third-party customers." App.Vol.V. at 16. TPS, thus, does not allege harm from "a

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[6] The Seventh Circuit has elucidated a more flexible approach for analyzing refusals to deal with rivals under *Aspen Skiing* and *Trinko*. *Viamedia*, 951 F.3d at 457 ("*Aspen Skiing* factors help case-by-case assessments of whether a challenged refusal to deal is indeed anticompetitive, even though no factor is always decisive by itself."). For the United States' view on the proper Section 2 analysis of unilateral refusals to deal with rivals, *see* Brief of the United States as Amicus Curiae Supporting Plaintiffs-Appellants at 19-24, *New York v. Facebook, Inc.*, No. 21-7078 (D.C. Cir. Jan. 28, 2022), *available at* https://www.justice.gov/atr/case-document/file/1467321/download.

refusal to cooperate with *rivals*." *Trinko*, 540 U.S. at 408 (emphasis added); *see also linkLine*, 555 U.S. at 448-49 (*Trinko* and *Aspen Skiing* address "a firm's unilateral refusal to deal with its *rivals*" (emphasis added)); *Trinko*, 540 U.S. at 411 ("no duty to aid *competitors*" given plaintiff's allegations (emphasis added)). Instead, TPS challenges the conditions on which JM will sell calsil and other products to third parties, its distributor customers. JM's alleged "refusal" consisted of "a leverage to discourage distributors from leaving it," App.Vol.V. at 16, not a refusal to cooperate with its rival.

a. The Supreme Court has explicitly rejected attempts to treat such conditions to dealing as refusals to deal with rivals. In *Kodak*, defendant Kodak unsuccessfully asserted that its policy of selling parts to customers on condition that they not purchase service from competing independent service providers should be analyzed only as a refusal to deal. 504 U.S. at 463 n.8. The Supreme Court's retort was categorical: "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." *Id.*

The Supreme Court has recognized two narrow, related situations that are properly analyzed as unilateral refusals to deal with rivals: (i) where the defendant outright refused to provide a rival a requested product or service, *see Trinko*, 540 U.S. at 407-09 (defendant refused to provide competitors with access to certain internal telephone-network elements); *Aspen Skiing*, 472 U.S. at 608-11 (defendant refused to sell joint lift tickets); and (ii) where a rival challenged an ongoing deal with commercially disadvantageous terms, which the Court viewed as challenging the defendant's refusal to offer more favorable terms, *see linkLine*, 555 U.S. at 442, 451 (plaintiff charged that defendant's high wholesale prices and low retail prices created insufficient profit margins for rivals).

In refusing to deal with a rival, the monopolist harms competition by withholding valuable access from rivals, thereby weakening or eliminating those rivals. Because the remedy for this harm requires the

monopolist to share its property with a rival, unique considerations of antitrust policy may arise. *Trinko*, 540 U.S. at 408.

However, when a monopolist instead imposes anticompetitive conditions on a trading partner that directly restrict some form of rivalry, competition is threatened by a different mechanism than with a refusal to deal with a rival. Whereas a refusal weakens a competitor by denying it a valuable deal or needed access, a restrictive condition can prevent the trading partner in an ongoing deal from partnering with the monopolist's competitors or itself becoming a rival of the monopolist.

The unique concerns raised in *Trinko* have less purchase in the latter case—when the competitive harm stems from an anticompetitive condition imposed on customers.[7] Potential Section 2 liability will not dissuade the monopolist from investing in an economically beneficial

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[7] Moreover, both of the Supreme Court's most recent refusal-to-deal-with-rivals decisions dealt with the heavily regulated telecommunications industry. In *Trinko* and *linkLine*, the defendants were under new regulatory requirements to supply services they had not previously provided to their rivals. *See linkLine*, 555 U.S. at 442-43; *Trinko*, 540 U.S. at 410 ("The sharing obligation imposed by the 1996 Act created 'something brand new'" (quoting *Verizon Commc'ns, Inc. v. FCC*, 535 U.S. 467, 528 (2002)). In both cases, that "particular structure and circumstances of the [telecommunications] industry at issue" played a significant role in the Supreme Court's conclusion that the defendant did not have a duty to deal with its rivals. *Trinko*, 540 U.S. at 411.

facility, as it would not be forced to share that facility with a rival. The monopolist is already selling to the customer or other customers—or is ready to do so—thus the conduct "is amenable to a remedy that does not require judicial estimation of free-market forces." *Trinko*, 540 U.S. at 410 n.3. And, at least in the case of a condition imposed on a non-competitor, enjoining the exclusionary conduct poses no possibility of facilitating collusion on price or other terms, as the monopolist and its customers do not compete with each other in the relevant market. *Cf. id.* at 408 ("compelling negotiation between competitors may facilitate the supreme evil of antitrust: collusion").

Lorain Journal Co. v. United States, 342 U.S. 143 (1951), is instructive. There, a newspaper publisher attempted to defend its monopoly over the dissemination of news and advertising by refusing to accept local advertising from customers that advertised on a competing radio station. *Id.* at 143-44, 149-50, 152, 153. Thus, much like JM allegedly has done, the publisher used its "leverage" over its customers to disadvantage a rival. App.Vol.V. at 16; *see also Lorain Journal*, 342 U.S. at 152 (publisher violated Section 2 "by forcing advertisers to boycott a competing radio station"). But, unlike the District Court, the *Lorain*

Journal Court analyzed the conduct under general Section 2 principles. *E.g.*, *id.* at 154 n.7.

Lorain Journal illustrates that, contrary to the District Court's view, "mere threats" to refuse to sell to a disloyal customer can have anticompetitive effect, and it is not necessary to show that a customer "suffered actual negative repercussions and harm as a result of a purchase of [the rival's product]." App.Vol.V. at 17; *see also* App.Vol.V. at 19 (distinguishing *Lorain Journal* on the ground that "there is no evidence that [JM] went so far as to fully withhold the product being sold"). Here, JM's threats could have harmed competition by communicating an anticompetitive condition to distributors and dissuading them from buying the TPS's product. The harm to competition would arise when the distributors comply with the condition (in which case those distributors are not terminated). *See Lorain Journal*, 342 U.S. at 153 (advertisers acceded to anticompetitive condition because "they could not afford to discontinue their newspaper advertising in order to use the radio"). In any event, all that is required

of the threat is that it be "reasonably capable" of maintaining a monopoly. *Instructional Sys.*, 817 F.2d at 649.

b. The Tenth Circuit decisions upon which the District Court relied—*Novell* and *New Mexico Oncology & Hematology Consultants, Ltd. v. Presbyterian Healthcare Servs.*, 994 F.3d 1166 (10th Cir. 2021)—do not teach differently. *Novell* itself makes clear that its test applies only to Section 2 claims based on a monopolist's "refusing to deal with its rivals." *Id.* at 1074; *see also, e.g.*, *id.* (a monopolist "generally has no duty to share (or continue to share) its intellectual or physical property with a rival"); *id.* at 1072 ("a monopolist is much more likely to be held liable for failing to leave its rivals alone than for failing to come to their aid"); *id.* at 1074-75 (explaining that its test addresses the Court's concerns about mandating dealing with "rivals"); *New Mexico Oncology*, 994 F.3d at 1172 (a refusal to deal claim involves "dealing between the monopolist and rival" (quoting *Novell*, 731 F.3d at 1074-75)); *Buccaneer Energy (USA) Inc. v. Gunnison Energy Corp.*, 846 F.3d 1297, 1309 (10th Cir. 2017) ("this general right to refuse to deal with *competitors*" (emphasis added)). *Novell* explained that its analysis for claims for refusing to deal with rivals was purposely "underinclusive"—that is, it

permits some anticompetitive conduct in order to avoid "false positives"—because of the unique policy concerns about imposing antitrust liability in that context. 731 F.3d at 1076; *see also supra* p. 11.

Novell expressly contrasted refusals to deal with rivals with conduct that involves "some assay by the monopolist into the marketplace," as does conditioning sales to customers on whether they themselves deal with rivals. 731 F.3d at 1072. As *Novell* explained, refusal-to-deal-with-rivals doctrine does not apply when a monopolist "fail[s] to leave its rivals alone," for example, by "limit[ing] the abilities of third parties to deal with rivals (exclusive dealing)." *Id.* at 1072; *see also id.* (distinguishing tying claims). In this situation, an underinclusive standard would disserve Section 2's purposes by improperly sheltering a monopolist's interference in the marketplace. *Id.* at 1076 ("a rival is always free to bring a section 2 claim for affirmatively interfering with its business activities in the marketplace").[8]

The District Court's contrary approach would wipe away a large body of Section 2 jurisprudence. Under its approach, an exclusive-

[8] Recent scholarship has discussed the importance of balancing the risk of "false positives" *and* "false negatives," rather than just focusing on the former. *See, e.g.*, Herbert Hovenkamp, *Antitrust Error Costs*, 24 U. Pa.

dealing or a tying arrangement could be characterized as a mere "refusal to supply" customers when tying or exclusive-dealing conditions are not met, subject to the same onerous standard as a refusal to cooperate with rivals. But, as *Novell* recognized explicitly, those types of conduct are *not* subject to a refusal-to-deal-with-rivals test. *See* 731 F.3d at 1072. Indeed, under the District Court's approach, even horizontal non-compete conditions could be characterized as refusals to deal, even though it is well established that antitrust law outlaws "agreements not to compete, with the aim of preserving or extending a monopoly." *Otter Tail*, 410 U.S. at 377. The District Court therefore erred in applying *Novell* to the "refusal to supply," which likewise "involves some assay by the monopolist into the marketplace." *Novell*, 731 F.3d at 1072.

4. The District Court also misread Tenth Circuit refusal-to-deal-with-rivals precedent as putting a thumb on the scale in favor of monopolists in all Section 2 cases. First, citing *Novell*, 731 F.3d at 1072,

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J. Bus. L. 293, 294, 302 (2022); Jonathan B. Baker, *Taking the Error Out of "Error Cost" Analysis: What's Wrong With Antitrust's Right*, 80 Antitrust L.J. 1, 2 (2015) ("These assumptions systematically overstate the incidence and significance of false positives, understate the incidence and significance of false negatives, and understate the net benefits of various rules by overstating their costs.").

the District Court stated that "[t]o prove monopolization, Plaintiff must demonstrate conduct whose *only* rational benefit is to harm competition." App.Vol.V. at 15 (emphasis added). This Court has never imposed such a requirement as a necessary element either for a refusal-to-deal-with-rivals claim[9] or outside of that specific context.[10]

Second, in setting forth a "general rule" that "unilateral conduct cannot be considered anticompetitive," App.Vol.V. at 15 (quoting *New Mexico Oncology*, 994 F.3d at 1172), the District Court misread *New Mexico Oncology*. That decision does state that, "[g]enerally, unilateral conduct cannot be considered anticompetitive." 994 F.3d at 1172. That descriptive proposition is obviously true: "generally" the conduct of a single firm is not anticompetitive because many firms lack significant market power and many of a firm's business decisions have little impact

[9] This element is even more onerous than a requirement that conduct entail a "sacrifice [of] short-term profits" or "be irrational but for its anticompetitive effect." *Novell*, 731 F.3d at 1075. A refusal to deal may have some "rational benefit" to the monopolist even if, on balance, it results in an economic loss for the monopolist (putting aside any gains to the monopolist from a reduction in competition). App.Vol.V. at 15.

[10] While *Novell* states that a plaintiff must show that a refusal to deal with rivals was "irrational but for its anticompetitive effect," 731 F.3d at 1075, it does not state that such proof is required outside the refusal-to-deal-with-rivals context.

on competition or reflect competition on the merits. But it does not follow that there is a prescriptive "general rule" that unilateral conduct challenged under Section 2 is not anticompetitive conduct.

CONCLUSION

The District Court erred in extending *Novell*'s test for unilateral refusals to deal with rivals to a claim challenging anticompetitive conditions imposed on customers.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This amicus brief complies with the type-volume limit of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because, excluding the parts exempted by Fed. R. App. P. 32(f), the brief contains 4077 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(b) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 2019 in 14-point New Century Schoolbook font.

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CERTIFICATE OF DIGITAL SUBMISSION

I certify that (1) all required privacy redactions have been made from this brief per 10th Cir. R. 25.5; (2) this ECF submission is an exact copy of the hard copies that will be submitted to the Court; and (3) this brief has been scanned for viruses by Microsoft Defender (Anti-Virus Version 1.377.118.0 and Anti-Malware Version 4.18.2207.7), last updated on September 23, 2022, and, according to the program, is free of viruses.

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CERTIFICATE OF SERVICE

I certify that on October 12, 2022, I caused the foregoing to be filed through this Court's CM/ECF system, which will serve a notice of electronic filing on all registered users, including counsel for the parties.

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