

11-2062

IN THE
United States Court of Appeals
FOR THE FOURTH CIRCUIT

LOREN DATA CORPORATION,

Plaintiff-Appellant,

—v.—

GXS, INC.,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND AT GREENBELT

BRIEF FOR DEFENDANT-APPELLEE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Local Rule 26.1, GXS, Inc. who is Defendant-Appellee, makes the following disclosure:

1. Is party a publicly held corporation or other publicly held entity? NO
2. Does party have any parent corporations? YES, Defendant-Appellee is a wholly owned subsidiary of GXS Worldwide, Inc., which is a wholly owned subsidiary of GXS Holdings, Inc., which is a wholly owned subsidiary of GXS Group, Inc.
3. Is 10% or more of the stock of a party owned by a publicly held corporation or other publicly held entity? NO
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 (Local Rule 26.1(b))? NO
5. Is party a trade association? NO
6. Does this case arise out of a bankruptcy proceeding? NO

Dated: January 10, 2012

/s/ David H. Evans
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Defendant-Appellee GXS, Inc. ("GXS") respectfully submits this brief in opposition to the appeal of Plaintiff-Appellant Loren Data Corp. ("Loren Data").

COUNTERSTATEMENT OF ISSUES PRESENTED

1. Did the District Court err in dismissing Loren Data's Section 1 conspiracy claim under Rule 12(b)(6) when no facts were alleged about the supposed conspiratorial agreement and the stated object of the supposed conspiracy was implausible?

2. Did the District Court err in dismissing Loren Data's Section 2 monopolization claim under Rule 12(b)(6) when Loren Data's own allegations showed there was no refusal to deal, there was no denial of access to any supposedly "essential" facility, and that the facility in question was not "essential"?

3. Did the District Court err in dismissing Loren Data's Section 2 attempted monopolization claim under Rule 12(b)(6) when Loren Data alleged no facts showing a specific intent by GXS to monopolize nor any "dangerous probability" of GXS achieving monopoly power?

4. Did the District Court err in dismissing Loren Data's Section 1 and 2 claims under Rule 12(b)(6) when Loren Data did not allege any antitrust injury but only injury to its own interests?

5. Did the District Court abuse its discretion in denying Loren Data's post-dismissal motions for "clarification" and "reconsideration" as to whether the dismissal of its federal antitrust claims was with prejudice?

COUNTERSTATEMENT OF CASE

This appeal arises from the District Court's dismissal with prejudice on a Rule 12(b)(6) motion of an antitrust suit filed by Loren Data against GXS.

Loren Data commenced this action on December 13, 2010, by filing a complaint ("Complaint") against GXS which alleged that GXS violated (1) Section 1 of the Sherman Act, 15 U.S.C. § 1, by combining with competitors to refuse to deal with Loren Data; (2) Section 2 of the Sherman Act, 15 U.S.C. § 2, by attempting to monopolize an electronic commerce market; (3) Section 2 of the Sherman Act by willfully acquiring and maintaining monopoly power in an electronic commerce market; and (4) various provisions of Maryland state antitrust law. Loren Data also alleged that GXS was liable for tortious interference with Loren Data's business relationships and that GXS had breached its contracts with Loren Data. (J.A. 15-18 [¶¶ 27-45].)

GXS moved to dismiss the Complaint for failure to state a claim and lack of subject matter jurisdiction as to the pendent state-law claims. (J.A. 41-42.) In response, Loren Data filed both an opposition to the motion to dismiss and a First Amended Complaint ("FAC"), which incorporated by reference all of the claims

and allegations in the Complaint and added a supplemental statement of facts. (J.A. 42.) The parties stipulated that GXS's motion to dismiss and Loren Data's opposition to the motion to dismiss would be deemed to apply to the FAC. (Id.)

On August 9, 2011, Chief Judge Chasanow of the District Court for the District of Maryland issued a Memorandum Opinion and Order dismissing the antitrust and tortious interference claims with prejudice for failure to state a claim and the breach of contract claim without prejudice for lack of subject matter jurisdiction, and ordering the case closed. (J.A. 36-76.)

On August 19, 2011, Loren Data filed a "motion for clarification" asking whether the District Court had in fact dismissed the FAC with prejudice. (J.A. 77-80.) On August 23, 2011, Loren Data filed a second motion asking the District Court to alter the judgment to specify whether it was dismissed with prejudice. (J.A. 81-83.) In response, the Court issued a Memorandum Opinion and Order on August 30, 2011, which denied both motions and made clear that the dismissal had been with prejudice. (J.A. 84-94.)

On September 29, 2011, Loren Data filed a notice of appeal from both of the District Court's rulings. (J.A. 95-96.) In its opening brief ("App. Br."), however, Loren Data addressed only the substance of Loren Data's federal antitrust claims. (See App. Br. 1 ¶ 2, 6 n.2, 27-44.) Loren Data thereby waived any appeal issues associated with the dismissal of its Maryland common-law claims, see Edwards v.

City of Goldsboro, 178 F.3d 231, 241 n.6 (4th Cir. 1999), or of those portions of its Maryland antitrust claims that do not parallel its federal claims under Sections 1 and 2 of the Sherman Act, (see J.A. 17-18 [¶ 40] (state-law price discrimination claim)).

COUNTERSTATEMENT OF FACTS

A. The Use of EDI VANs for Business Communication

This case is a private antitrust action between two companies involved in the business of providing Electronic Data Interchange ("EDI"), which is described by Loren Data as "the electronic exchange of business data and documents, such as purchase orders or invoices, in a standardized digital format that can be processed via the Internet by computer systems." (J.A. 5 [¶ 1].) As summarized by the District Court, "EDI messages are generated, sent, received, and ingested into enterprise computing systems for parties engaged in commercial trading, such as retailers and suppliers, shippers and receivers, and manufacturers and vendors." (J.A. 37; see J.A. 6 [¶ 2].) "These messages travel over a system of private networks interconnected to each other with network protocols called Value Added Networks ('VANs') that are secure. For example a shipper might send a purchase order formatted in EDI over a VAN to its trading partners." (Id.)

There are many VANs. (J.A. 6 [¶ 2], 22 [¶ 3].) "Although VANs are privately owned, trading partners on different VANs can still communicate with

each other if their VANs are connected. One common way this occurs is through an interconnect jointly maintained by two VAN providers; another option is through a commercial mailbox." (J.A. 37; see J.A. 6-7, 10 [¶¶ 2, 3, 4, 12].) GXS operates a number of VANs. (J.A. 8, 13 [¶¶ 5, 7, 20]). Loren Data has alleged that it operates a VAN. (J.A. 7, 8 [¶¶ 3, 5], 22, 25 [¶¶ 3, 14].) This action is a dispute that arises from Loren Data's unhappiness with the terms on which GXS is willing to have Loren Data's VAN connected to GXS's VAN.

Loren Data contends that it "is a long standing practice in the EDI industry for VANs to grant 'non-settlement peer Interconnects' to each other to facilitate the flow of EDI data. . . ." (J.A. 37; see J.A. 7 [¶ 3].) "In a non-settlement peer interconnect, EDI messages are transferred from one VAN to another with each VAN absorbing its own costs." (J.A. 37; see J.A. 6-7 [¶¶ 3, 4].) The message transfer is in effect free. (See J.A. 22 [¶ 3].) Another form of connection is a "commercial mailbox," which "is a paid service for transmitting messages sent on one VAN to trading partners using a different VAN." (J.A. 37-38; see J.A. 10-11 [¶¶ 12-13].) In contrast to a non-settlement peer Interconnect, a VAN "typically charges for use of a commercial mailbox based on the amount of data being transmitted." (J.A. 38; see J.A. 23 [¶ 7].) "Mailboxes also differ from interconnects in that the messages are not delivered to the receiving trading partner with the same ease and speed." (J.A. 38; see J.A. 10-11 [¶¶ 13-14].) In either case,

however, the message goes from the sender's "mailbox" to the recipient's "mailbox," much like an email. (J.A. 10-11[¶ 13].)

B. GXS's and Loren Data's Relations with VANs Generally

GXS brands its "core" VAN in the United States as "TGMS," (J.A. 8 [¶ 6]), but GXS also has a number of other VANs that it acquired over the years. These VANs are known as "IE" ("Information Exchange"), "InovisWorks" and "Tradanet" (the brand in the United Kingdom) (collectively, the "acquired VANs"). (J.A. 8, 9 [¶¶ 8, 9].)

GXS has granted "interconnects" to many other VANs, both large and small, (J.A. 13 [¶ 20]), but, Loren Data alleges GXS's TGMS VAN currently has no "interconnect" with Loren Data, (J.A. 8 [¶ 6]). Nevertheless, there are other lines of electronic communication between GXS and Loren Data. Loren Data expressly alleged that it has a transit agreement with Inovis, a GXS company, under which Loren Data sends messages to TGMS through Inovis. (J.A. 14 [¶¶ 23, 25].) Loren Data also alleged that it has been granted interconnects with every other existing VAN, including with two of GXS's acquired VANs (IE and InovisWorks). (J.A. 8 [¶ 6].) Loren Data further alleges that there are 36 VANs other than GXS and that Loren Data is interconnected to all of them. (J.A. 8 [¶ 6], 22 [¶ 3].)

C. Alleged Size of the Parties and of the Alleged Market

Loren Data alleges that it has been functioning as a VAN since 1997, (J.A. 8 [¶ 6]), and that since that time it has accumulated approximately "18,000 trading partners," (J.A. 11 [¶ 15]). Loren Data alleges that GXS, by contrast, has over "40,000 customers worldwide," (J.A. 8 [¶ 7]), making Loren Data just slightly less than half GXS's size in this regard. Remarkably though, of these 40,000 GXS customers, Loren Data alleges that only about a mere 0.2%—just "over 80" of them—"ha[ve] trading partners on the Loren Data . . . network." (J.A. 12 [¶ 17].)

Loren Data further alleges that it "estimates its trading partner relationships to be as high as 54,000 with 18,000 originating on the Loren Data end." (J.A. 22 [¶ 4].) By contrast, Loren Data alleges that GXS controls approximately 50 percent of the alleged EDI market and that GXS has "6 million trading partner relationships." (J.A. 22 [¶ 5].) Given Loren Data's allegation that GXS "exert[s] control over 50% or more of the EDI communications market," (J.A. 7-8 [¶ 5]), this implies a total "market" of about 12 million trading partners, which would mean that Loren Data's alleged 54,000 trading partners represent a 0.45% market share, and its 18,000 trading partners that "originat[e] on the Loren Data end" represent a 0.15% market share, (see J.A. 22 [¶ 4]).

D. Details of Loren Data's History with GXS

Although the gravamen of this action is Loren Data's complaint that it does not have a "non-settlement peer interconnect" with GXS, Loren Data concedes that it has been able to function as a VAN since 1997 without having an interconnect to GXS at all for large amounts of time and by using a commercial mailbox exclusively during various periods. (J.A. 8-10, 12-13 [¶¶ 6, 10, 12, 19].) The FAC sets forth revealing allegations on the history of this issue between the parties.

Loren Data alleges that in November 2000, three years after Loren Data began operating, it first approached GXS to request a free interconnect. (J.A. 8, 10 [¶¶ 6, 11].) Loren Data further alleges that in February 2001, GXS provided Loren Data with a commercial mailbox while the parties discussed the requested free interconnect. (J.A. 10 [¶ 12].) In August 2001, however, GXS refused Loren Data's application for a free interconnect and terminated Loren Data's commercial mailbox. (J.A. 11 [¶ 16].) Loren Data describes this event as "sudden and unprecedented." (*Id.*) Loren Data concedes, however, that GXS had asked Loren Data to pay \$30,000 in outstanding fees that Loren Data owed and GXS only terminated the commercial mailbox after warning Loren Data that it would do so unless Loren Data paid the outstanding \$30,000. (*Id.*)

Nevertheless, Loren Data alleges that after the commercial mailbox was terminated, it still was able to access the GXS network and "create free direct

connections to those [customers] willing." (J.A. 11-12 [¶ 16].) Loren Data states further that those customers that did not want to continue to do business with Loren Data "migrate[d] to alternative networks that enjoy access to the GXS system." (J.A. 7 [¶ 3].) Those customers were able to switch, and in fact switched, to providers *other than GXS itself* to secure service. (Id.)

In June 2002, still in business a year later without a GXS interconnect or mailbox, Loren Data once again requested a free interconnect from GXS. (J.A. 12 [¶ 17].) GXS again rejected the request for a free interconnect. (Id.)¹ In September 2003, Loren Data approached GXS yet again about a free interconnect. At the time, Loren Data was soliciting Covisint, a large new customer that said it would use Loren Data if it had "connectivity" to GXS. (J.A. 12 [¶ 19].) Only then did Loren Data decide it would settle its long outstanding debt to GXS and acquire a GXS commercial mailbox. (Id.) That commercial mailbox apparently was sufficient to enable Loren Data to win this significant client. (See id.)²

¹ The Complaint is silent as to whether GXS offered Loren Data a commercial mailbox.

² For the Court's general background in case it is unfamiliar with the name Covisint, Covisint is a very large B2B (business-to-business) e-commerce portal founded by the major global automobile manufacturers. See generally About Covisint, <http://www.covisint.com/web/guest/about-covisint> (last visited January 9, 2012).

In 2005, GXS acquired from IBM a VAN called IE. (J.A. 12 [¶ 18].) IE had an interconnect arrangement with Loren Data. (J.A. 12, 14 [¶¶ 18, 25].) Loren Data admits that GXS has honored the IE interconnect arrangement with Loren Data since this acquisition took place. (Id.)

In March 2009, Loren Data reached an agreement with Inovis, another VAN, to route data to GXS customers over Inovis's VAN under a "transit agreement." (J.A. 14 [¶¶ 23, 25].) In addition to the transit agreement, Loren Data and Inovis maintained a separate interconnect arrangement. (J.A. 14 [¶ 23].) When it entered into this transit agreement with Inovis, Loren Data had been using its IE interconnect and had maintained its GXS commercial mailbox for *over four years*. (J.A. 12, 14 [¶¶ 18, 19, 25].) The following year, in June 2010, GXS acquired Inovis and assumed the transit agreement with Loren Data, which ran through May 2011. (J.A. 14 [¶ 25].)

The FAC contains no allegations that GXS has failed to honor the Inovis transit agreement or that GXS has discontinued any of the existing interconnect arrangements it has with Loren Data. Instead, Loren Data alleges only that "GXS has expressed intent to revert [the current connections] to a unified commercial agreement of unknown cost" when the existing arrangements expire by their terms. (Id.) In other words, Loren Data alleged nothing more than that its contract was up for review in May 2011, when its term expired. Loren Data made no allegation

that GXS will terminate Loren Data. It alleged only that GXS would like to negotiate some new unspecified "commercial agreement." (Id.) Loren Data placed no new or additional facts before the District Court as to whether GXS had in fact terminated the Inovis transit agreement when the agreement was up for renewal in May 2011. (See J.A. 3.)

E. The Alleged Conspiracy to Exclude Loren Data

Loren Data charges that GXS "has restrained trade and commerce by denying the Plaintiff an essential facility and by preventing the Plaintiff from competing in the EDI field by combining with other EDI providers to provide peer non-settlement interconnects to the exclusion of the Plaintiff Loren Data." (J.A. 15 [¶ 28].) Yet, the FAC is devoid of any allegations purporting to identify the other persons or entities with which GXS allegedly conspired, what contacts GXS might allegedly have had with any such other persons or entities about Loren Data, or how such an alleged conspiracy would have worked. In addition, the FAC contains no allegation that might purport to explain why GXS would have any reason to conspire with others concerning how GXS does business with Loren Data when GXS just as easily could take those same actions unilaterally.

F. Allegations of Actual or Incipient Monopoly Power by GXS

Loren Data charges that GXS "possesses monopoly power in the Electronic Data Interchange Industry," (J.A. 16 [¶ 35]), or "has attempted to create a

monopoly" in that industry, (J.A. 15 [¶ 30]).³ The FAC, however, does not set forth any facts showing the existence of a monopoly or of any probability of obtaining monopoly power. Indeed, the FAC expressly alleges facts inconsistent with, if not contradicting, such claims. Moreover, the FAC alleges no facts about industry structure or participants, or of the dynamics of competition, relevant to the question of whether an actual or incipient monopoly exists.

G. Loren Data's Claims in Its FAC

The gravamen of Loren Data's FAC is that GXS has not granted Loren Data a free interconnect to GXS's TGMS VAN, and that upon the expiration in May 2011 of Loren Data's commercial arrangements with GXS, it is possible that those arrangements might not continue unchanged. (J.A. 24 [¶ 12].) Thus, despite Loren Data's current connections with GXS, Loren Data's continued operations for over ten years, and Loren Data's interconnects with every VAN other than GXS, Loren Data charges that GXS allegedly wrongfully refused to deal with Loren Data, (J.A. 9-15 [¶¶ 9, 11-26]), and that GXS's network is an "essential facility" that Loren

³ Loren Data uses a variety of terms in its Complaint to describe the industry in which an alleged harm to competition is supposedly occurring, but alleged no clear or consistent definition of a relevant product or geographic market for its antitrust claims. (See J.A. 51-56 (noting Loren Data's confusing pleadings, but declining to dismiss based on those failings because Loren Data's other allegations failed to state a claim)).

Data requires for its business to function because Loren Data "cannot feasibly duplicate" it, (J.A. 9 [¶ 9]). Loren Data also charges that GXS conspired with other VANs so that all VANs other than Loren Data would have non-settlement interconnects with GXS. (J.A. 8 [¶ 6].)

SUMMARY OF ARGUMENT

Loren Data's FAC contained essentially five claims against GXS. Loren Data appeals the District Court's decision dismissing three of them: a purported industry-wide conspiracy to refuse to deal with Loren Data; attempted monopolization of a market that includes EDI; and denial of access to an essential facility in furtherance of an illegal monopoly. Loren Data also appeals the District Court's denial of Loren Data's two post-judgment motions for clarification and reconsideration.

Loren Data alleges that GXS combined with competitors to refuse to deal with Loren Data by denying it an interconnect. Loren Data fails to provide any factual or inferential basis for the existence of such a conspiracy, and has affirmatively pleaded facts supporting the conclusion that GXS's competitors, as well as GXS itself, are dealing with Loren Data. Loren Data argues that the District Court ignored certain factual allegations to conclude that Loren Data had not stated a claim. Loren Data fails, however, to explain how there could be an industry-wide conspiracy not to deal with Loren Data when, by Loren Data's

pleading, the entire industry, including GXS, is dealing with Loren Data. The District Court did not err.

Loren Data also argues that GXS has denied it access to an essential facility in furtherance of a monopolistic scheme. Loren Data, however, has affirmatively pleaded facts that contradict its legal conclusion that access to GXS's VAN is essential. Loren Data pleaded that it had operated, successfully, for long periods without an interconnect and with a commercial mailbox. Loren Data also pleaded that even without an interconnect with GXS (1) it can recreate the functionality itself, (2) other suppliers have access to the alleged essential facility, and (3) customers can easily switch to other suppliers or even purchase additional mailboxes, and still access GXS. Loren Data argues that the District Court ignored certain factual allegations to conclude that Loren Data was not denied access to an essential facility. Among others, Loren Data alleges for the first time on appeal that a commercial mailbox is "qualitatively different and non-substitutable forms of message exchange" than an interconnect. Loren Data fails, however, to explain how it was able to operate successfully without an interconnect and with a commercial mailbox for long periods if that mailbox is qualitatively different from the "essential" interconnect. It also fails to explain how the denial of an interconnection to GXS would result in monopolization or, indeed, have any effect

on competition in the market as its customers could turn to 36 VANs other than GXS to secure the access it alleges is essential. The District Court did not err.

Loren Data further alleges no facts that show that GXS had the requisite specific intent to monopolize or that it stands a "dangerous" probability of achieving monopoly power. Loren Data claims that GXS has engaged in a series of acquisitions designed to build monopoly power. The two transactions it alleges, however, have closed.⁴ Any incremental market power any of them may have conferred has already been conferred. Loren Data also alleges that "GXS has expressed intent to revert [the current connections] to a unified commercial agreement of unknown cost" when its then-current arrangements expired in May 2011. This empty allegation, combined with Loren Data's admission that its customers could switch to at least 36 different VANs with connections to GXS and thus are hardly required to become GXS customers themselves, provides no

⁴ And having closed necessarily implies that the transactions satisfied any governmental antitrust scrutiny they received, which is indeed the case. See Federal Trade Commission, Transaction Granted Early Termination (June 1, 2010), <http://www.ftc.gov/bc/earlyterm/2010/06/et100601.pdf> (granting early termination; Francisco Partners is GXS's parent company under the HSR Act); Report, Competition Commission, Francisco Partners LP and G International, Inc (Sept. 2005), http://www.competition-commission.org.uk/rep_pub/reports/2005/fulltext/502.pdf (addressing GXS's 2005 acquisition of IBM's EDI VAN business)).

plausible basis to infer that some event in the near future would precipitously confer upon GXS monopoly power. Loren Data's allegations make clear that the lack of a free interconnect does not preclude it from competing, as Loren Data has done for many years without one.

Moreover, Loren Data's admission that GXS offered such interconnects to other VANs is inconsistent with an intent to monopolize. Nor does GXS's seeking to charge Loren Data for such services suffice to show an illicit intent to monopolize. Here again, Loren Data argues that the District Court ignored certain factual allegations to conclude that GXS did not stand a dangerous probability of success, including that Loren Data had implied that GXS's market share was increasing and, for the first time on this appeal, that Loren Data was a "maverick" the loss of which would adversely affect competition. Loren Data admits, however, that it never alleged below that GXS's market share was increasing and has alleged no facts to suggest that it was. Loren Data also did not allege any facts to support its belated contention that it is a "maverick," but rather has pleaded that it does nothing more than resell GXS's product, which Loren Data thinks it should get for free. The District Court did not err.

Indeed, Loren Data's allegations indicated that it has a trivial presence in the market, that its customers could turn to 36 providers other than GXS to gain the same access to GXS that they would have through Loren Data, and that Loren Data

does not provide competitive VAN services but rather is a reseller. Loren Data thus has failed to allege facts sufficient to show harm to competition and, therefore, has failed to allege antitrust injury. The failure to allege antitrust injury serves as an independent basis to affirm the dismissal.

Loren Data also appeals the denial of its post-judgment motions. Loren Data's motions only asked for clarification whether the dismissal was with prejudice. The District Court stated unequivocally that the claims were dismissed with prejudice, and once it made this statement there was nothing left to clarify or reconsider. Since Loren Data received the relief it requested, Loren Data was not "aggrieved" so as to be entitled to appeal.

Although Loren Data never asked the District Court to modify the dismissal to make it without prejudice or grant it leave to amend, the District Court elected to construe Loren Data's motions as if Loren Data had asked for that relief. The District Court did not abuse its discretion in determining not to grant that relief. It held that Loren Data had not provided a basis under Rule 59(e) to alter the judgment or a basis to allow it to amend further its pleading. The District Court specifically held that further amendment would be futile. Loren Data's attempt to argue the District Court erred in shifting the burden to Loren Data is simply wrong: after GXS's motion to dismiss was granted with prejudice, the burden was on

Loren Data to show a “clear error of law” that justified altering or amending the judgment. Loren Data failed to do so, and there was thus no abuse of discretion.

The District Court properly dismissed all of Loren Data's claims with prejudice and properly denied its post-judgment motions.

ARGUMENT

I. TO SURVIVE DISMISSAL, THE FAC NEEDED TO PLEAD ENOUGH FACTS TO STATE A CLAIM FOR RELIEF THAT WAS PLAUSIBLE ON ITS FACE

The District Court dismissed Loren Data's FAC as insufficient under Fed. R. Civ. P. 12(b)(6). That rule requires that a complaint be dismissed if it fails "to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6); Edwards, 178 F.3d at 243. A plaintiff in its complaint has an obligation to "provide the 'grounds' of [its] . . . entitle[ment] to relief," which "requires more than labels and conclusions." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (hereinafter "Twombly") (internal citation and quotation omitted); see Francis v. Giacomelli, 588 F.3d 186, 193 (4th Cir. 2009). Rather, to survive dismissal a complaint must plead "enough facts to state a claim to relief that is plausible on its face." Twombly, 550 U.S. at 570; see Francis, 588 F.3d at 193.

"[A] formulaic recitation of the elements of a cause of action" or "naked assertion[s] devoid of further factual enhancement" are not enough to state a claim. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (internal quotations and citations

omitted). The Court cannot accept unsupported legal allegations, Dickson v. Microsoft Corp., 309 F.3d 193, 212-13 (4th Cir. 2002); legal conclusions couched as factual allegations, Iqbal, 129 S. Ct. at 1950; or conclusory allegations devoid of any reference to actual events, United Black Firefighters v. Hirst, 604 F.2d 844, 847 (4th Cir. 1979). See Francis, 588 F.3d at 193 ("[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged-but it has not shown-that the pleader is entitled to relief, as required by Rule 8.") (internal quotations and citations omitted).

Twombly, itself an antitrust case, explains why application of these principles is particularly important in antitrust cases. The Supreme Court required that antitrust complaints be examined to see if they contain "enough fact to raise a reasonable expectation that discovery will reveal evidence" of the alleged antitrust violations, 550 U.S. at 556, because if the allegations in a complaint cannot raise a claim of entitlement to relief, that "basic deficiency should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court," id. at 558 (internal citations and quotation omitted). This requirement ensures that meritless claims—particularly those based on a flawed legal theory—are dismissed. See id. at 558-59; Reiter v. Sonotone Corp., 442 U.S. 330, 345 (1979) (emphasizing that courts need to "exercise sound discretion and use the tools available" to dismiss baseless antitrust claims).

An important corollary to the need to plead non-conclusory facts is that when a complaint simply fails to address key factual points that are relevant to whether a claim exists, the complaint should not be treated as necessarily implying that such facts exist. Rather, if the necessary facts are not set forth in allegations, the claim must fail. See Estate Constr. Co. v. Miller & Smith Holding Co., 14 F.3d 213, 221 (4th Cir. 1994) (stating that courts should not "assume that plaintiffs can prove facts that they have not alleged or that the defendants have violated the antitrust laws in ways that have not been alleged") (quotations and citation omitted).

Because Loren Data's FAC failed to plead viable antitrust claims against GXS in accordance with these requirements, the District Court's dismissal of this action was proper and should be affirmed.

II. THE FAC WAS PROPERLY DISMISSED FOR FAILURE TO STATE A CLAIM UNDER SECTION 1 OF THE SHERMAN ACT

Section 1 of the Sherman Act prohibits any "contract, combination . . . or conspiracy, in restraint of trade." 15 U.S.C. § 1; see Valuepest.com of Charlotte, Inc. v. Bayer Corp., 561 F.3d 282, 286 (4th Cir. 2009). Loren Data purported to allege a Section 1 claim against GXS by asserting that GXS "combin[ed] with other EDI providers to provide peer non-settlement interconnects to the exclusion of Loren Data." (J.A. 15 [¶ 28].)

Fundamental to a claim under Section 1 is that there be an agreement. See Oksanen v. Page Mem'l Hosp., 945 F.2d 696, 702 (4th Cir. 1991) (citing Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 761 (1984)); see also Valuepest.com of Charlotte, Inc., 561 F.3d at 286 (Section 1 liability only applies to an agreement between two legally distinct parties). Unilateral conduct, by contrast, does not violate Section 1. Twombly, 550 U.S. 544, 545 (2007) ("[T]he crucial question is whether the challenged anticompetitive conduct stems from independent decision or from an agreement, tacit or express.") (quotations and citation omitted).

Loren Data explains the alleged conspiracy in two sentences, which lay clear the emptiness of its Section 1 pleading:

"By its conduct, practices and intent, Defendant GXS, Inc., has entered into contracts, combinations and/or conspiracies in restraint of trade and/or commerce among the several states and with foreign nations that exclude the Plaintiff from participation in the EDI field of business in violation of 15 USC [sic] Sec. 1. Specifically it has restrained trade and commerce by denying the Plaintiff an essential facility and by preventing the Plaintiff from competing in the EDI field by combining with other EDI providers to provide peer non-settlement interconnects to the exclusion of the Plaintiff Loren Data."

(J.A. 15 [¶ 28].)

Nothing in these two sentences alleges even the barest of facts about the purported conspiracy: nothing about where the agreement was made, when or with whom. See Twombly, 550 U.S. at 565 n.10 (dismissing Section 1 complaint that "mentioned no specific time, place, or person involved in the alleged

conspiracies"); Muigai v. IB Prop. Holdings, LLC, No. 09-01623, 2010 WL 5173313, at *4 (D. Md. Dec. 14, 2010) (dismissing Section 1 complaint where "Plaintiff allege[d] no specific facts as to how or when [defendant] conspired. Plaintiff ma[de] mere legal conclusions"); Kendall v. Visa U.S.A., Inc., 518 F.3d 1042, 1048 (9th Cir. 2008) (affirming dismissal of Section 1 claim because "the complaint does not answer the basic questions: who, did what, to whom (or with whom), where, and when"); Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield, 552 F.3d 430, 436 (6th Cir. 2008) (upholding dismissal of Section 1 claim because "nowhere did Plaintiffs allege when Defendants joined the . . . conspiracy, where or how this was accomplished, and by whom or for what purpose"). The District Court thus correctly noted that

"The complaint does not identify the parties with whom GXS agreed to restrain trade, the time or place at which such an agreement was reached, or the specific contours of such an agreement. Inserting the word "combine" into [such an] allegation is not enough to state a claim under section 1."

(J.A. 48.)

Not only does the FAC fail to set forth facts showing any agreement, it expressly sets forth factual allegations that exclude the possibility of conspiracy. Loren Data affirmatively alleges that other VANs dealt with Loren Data on the very terms that Loren Data was seeking: Loren Data "has been granted Interconnects with every other VAN." (J.A. 8 [¶ 6].) IBM, one of GXS's

competitors, "contracted with Loren Data to provide all interconnect outsourcing for their US Federal Government and Department of Defense EDI traffic." (J.A. 12 [¶ 18].) A second competitor, Inovis, even contracted with GXS to route Loren Data's GXS-related traffic through Inovis's network to TGMS, as well as to arrange an interconnect. (J.A. 14 [¶ 23].)

Although unclear, Loren Data appears to allege in these circumstances that GXS somehow agreed with other VANs that GXS alone would charge Loren Data for an interconnect or a mailbox, while other VANs would not (*i.e.*, that only GXS was refusing to provide a "non-settlement" interconnect).⁵ In the absence of any specific allegations as to time, place, or persons involved for such an alleged conspiracy, the suggestion that competitors entered into such an agreement is implausible and, frankly, nonsensical. It is implausible that GXS would go to the effort of entering into an agreement with other VANs where GXS would charge Loren Data, but no other co-conspirators would. GXS would not need the agreement or even the acquiescence of any other VAN to charge Loren Data. As the District Court aptly noted, this would be "an agreement lacking any substance

⁵ See, *e.g.*, J.A. 12 [¶ 19] ("As mailboxes are metered connections, Loren Data was charged for every byte sent and received, for reports, and for failed communication sessions.").

as GXS does not need the permission or consent of third parties to decide whether it will do business with Loren Data." (J.A. 48.) Behavior equally consistent with unilateral action is not evidence of a conspiracy. Twombly, 550 U.S. at 554; see Mylan Labs., Inc. v. Akzo, N.V., 770 F. Supp. 1053, 1068 (D. Md. 1991) (dismissing Section 1 claim in part because the plaintiff "ha[d] alleged nothing tending to exclude the possibility that the defendants acted independently") (citations omitted).

Indeed, according to the FAC, GXS would not have needed to enter into any conspiracy because "[o]nly GXS had the market power to do this before and after its spate of consolidation." (J.A. 13 [¶ 20].) Where a defendant has "no rational economic motive to conspire, and if their conduct is consistent with other, equally plausible explanations, the conduct does not give rise to an inference of conspiracy." Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 575, 596-97 (1986); see also Twombly, 550 U.S. at 552 ("[P]laintiffs must allege additional facts that tend to exclude independent self-interested conduct as an explanation" for the allegedly wrongful behavior.) (citation and quotation omitted); Mylan Labs., Inc., 770 F. Supp. at 1068 (dismissing Section 1 claim, in part because "defendants' actions [were] at least as likely to have been the product of self-interested competition as anti-competitive conspiracy"); Power Conversion, Inc. v. Saft Am., Inc., 672 F. Supp. 224, 227 (D. Md. 1987) ("[I]f the factual

context renders plaintiff's claim implausible—if the claim is one that makes no economic sense—plaintiffs must come forward with more persuasive evidence to support their claim than would otherwise be necessary.") (citations and quotations omitted).

The District Court held that Loren Data had "not alleged adequate facts to establish" a conspiracy, and that the complaint "contains only the conclusory allegations" that GXS conspired. (J.A. 47). Loren Data argues that this conclusion was in error because the Court "insist[ed] on a level of detail unwarranted for the complaint's Section 1 allegation" and that it ignored "express contracts" among competitors. (App. Br. 25.) The Court never insisted that Loren Data provide *every* detail with regard to the alleged conspiracy; it only observes that Loren Data provided *no* detail about the alleged conspiracy. Twombly requires Loren Data to provide at least *some* detail for its allegation to be regarded as plausible.

Indeed, Loren Data's argument is the very argument that the Supreme Court expressly rejected in Twombly. In his dissent in Twombly, Justice Stevens argued vigorously that the Fed. R. Civ. P. 8 "does not require, or even invite, the pleading of facts" once there had been an express allegation that a conspiratorial agreement was entered into. Twombly, 550 U.S. at 580 (Stevens, J. dissenting). The majority took exception to that statement noting that Justice Stevens "greatly oversimplifies matters by suggesting that the Federal Rules somehow dispensed with the pleading

of facts altogether." Id. at 555 n.3. Indeed, the majority noted that "[w]ithout some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only 'fair notice' of the nature of the claim, but also 'grounds' on which the claim rests." Id. (citing 5 Wright & Miller §1202, at 94, 95 (Rule 8(a) "contemplate[s] the statement of circumstances, occurrences, and events in support of the claim presented" and does not authorize a pleader's "bare averment that he wants relief and is entitled to it.")). On appeal, Loren Data argues essentially that it is enough merely to assert that an agreement was made, even when no facts are pleaded that might tend to substantiate an agreement's existence and even when it is implausible to infer that such an agreement was entered into. The Supreme Court has expressly rejected this argument. See id.

The District Court also noted that "Loren Data [did] not allege that these VANs failed to provide peer interconnects to Loren Data, that they were ever forced to deny interconnects by GXS, or that they agreed to deny interconnects to Loren Data." (J.A. 48.) Indeed, "Loren Data alleges that 'it has been granted Interconnects with every other VAN.'" (Id.). The District Court held that Loren Data had pleaded facts that established Loren Data was dealing *with every other VAN* in the market and that these facts contradicted Loren Data's bare legal conclusion that GXS had engineered an industry-wide conspiracy. (Id.)

Loren Data also argues belatedly on appeal that GXS has agreements with all other VANs that they will not deliver Loren Data's traffic to GXS. (App. Br. 29). But the FAC makes no such allegation. Rather, the FAC merely states that GXS has "let it be known that it will not permit any other VAN that interconnects with GXS to enter into an agreement with Loren Data that is similar to Loren Data's current agreement with Inovis." (J.A. 28-29 [¶ k].) The District Court correctly concluded, under basic Twombly/Iqbal principles, that without any "further details [being] alleged to indicate how, when, or to whom this intention was conveyed or how GXS intends to carry out its intent," such an allegation "is far from adequate to allege an illegal boycott or any other form of conspiracy to restrain trade." (J.A. 49 n.2.)

Loren Data also claims that a September 2010 GXS letter to Loren Data that was attached to the FAC, (see J.A. 31-32), constitutes "supporting documentation" of this alleged agreement, (App. Br. 29). But the letter in question says nothing about how other VANs would deal with Loren Data. Rather, the letter addressed to Loren Data merely explains GXS's reluctance to enter into an interconnect with Loren Data in part by noting that Loren Data functions "almost entirely" as "a service bureau [i.e., a reseller of GXS's service, (see App. Br. 37, 41),] and not [as] a VAN." (J.A. 31.) The letter also states that "[GXS's] current VAN interconnect agreements expressly prohibit daisy chaining, which is the core of [Loren Data's]

business model" as such a reseller. (Id.) In other words, this letter is a statement about GXS's reluctance to open up an interconnect with Loren Data because it does not view Loren Data as a genuine VAN.⁶ Ultimately, however, this statement says nothing about how any such third party VAN may choose to deal with Loren Data. Indeed, Loren Data's argument cannot be reconciled with its express allegation that it has been granted interconnects (on the very terms that Loren Data seeks from GXS) with every other existing VAN, including with two of GXS's acquired VANs. (J.A. 8-9 [¶¶ 6, 10].) Nor did this supposed provision prevent Loren Data from entering into the transit agreement with Inovis for the very transmission of traffic to GXS that Loren Data now argues this provision makes impossible. (J.A. 14 [¶¶ 23, 25].)

As the District Court thus correctly concluded:

"Loren Data has not alleged any facts to suggest the existence of a horizontal group boycott. At most Loren Data has alleged GXS was boycotting Loren Data and other VANs did not try to stop GXS from doing so. Single party boycotts are not *per se* violations of the Sherman Act."

(J.A. 49 (footnote omitted).) Loren Data's claim under Section 1 of the Sherman Act was thus properly dismissed.

⁶ The letter in fact offers to deal with Loren Data on commercial terms.

III. THE FAC FAILED TO STATE CLAIMS FOR MONOPOLIZATION OR ATTEMPTED MONOPOLIZATION UNDER SECTION 2 OF THE SHERMAN ACT

Section 2 of the Sherman Act provides that it is illegal to:

"monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations."

15 U.S.C. § 2; see Oksanen, 945 F.2d at 710. The District Court correctly dismissed Loren Data's Section 2 claims against GXS for both monopolization and attempted monopolization.

A. Loren Data Failed to State a Claim Under Section 2 of the Sherman Act Based Upon Either a Supposed Refusal to Deal or Denial of Access to a Supposedly Essential Facility

Liability for 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); see also Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004) ("To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct*.")) (hereinafter "Trinko").

Loren Data alleges in the FAC that GXS refused to deal with Loren Data and denied it access to an alleged essential facility, thereby illegally monopolizing

a relevant market. (J.A. 9, 17 [¶ 9, 36].) The District Court correctly held that Loren Data failed to state a monopolization claim based on either of these theories. (J.A. 56-64.)

1. A Unilateral Refusal to Deal Is Not Anticompetitive Conduct, and Loren Data in Any Event Did Not Allege Facts Showing that GXs Refused to Deal, but Rather Just the Opposite

Section 2 does not prohibit a business from conducting its operations in a normal business fashion just because it is claimed to be larger than its competitors:

"In the absence of any purpose to create or maintain a monopoly, the [Sherman Act] does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. . . ."

United States v. Colgate & Co., 250 U.S. 300, 307 (1919); see also Trinko, 540 U.S. at 408. Courts should be "very cautious in recognizing . . . exceptions [to the right to refuse to deal] because of the uncertain virtue of forced sharing and the difficulty of identifying and remedying anticompetitive conduct by a single firm." Trinko, 540 U.S. at 408.

A monopolization claim must therefore plead a "lack of a legitimate business justification for the challenged action(s)" to withstand a motion to dismiss. See E.I. DuPont de Nemours and Co. v. Kolon Indus., Inc., 688 F. Supp. 2d 443, 456 (E.D. Va. 2009). A monopolist will not violate the Sherman Act by

refusing to deal with a free-rider or by merely refusing to deal with a plaintiff on the terms and conditions that the plaintiff desires. See Abcor Corp. v. AM Int'l, Inc., 916 F.2d 924, 929-30 (4th Cir. 1990); see also Olympia Equip. Leasing Co. v. W. Union Tel. Co., 797 F.2d 370, 375 (7th Cir. 1986) (no violation of Sherman Act by refusing to deal with a competitor). And monopolists do not have to give away their product for free. See Laurel Sand & Gravel, Inc. v. CSX Transp., Inc., 924 F.2d 539, 544-45 (4th Cir. 1991) (holding that it was reasonable for a monopolist to demand payment for its services).

The fundamental problem with Loren Data's claim is that it has alleged facts showing that GXS has not refused to deal with Loren Data. By Loren Data's own admission, it currently has *three* connections with GXS, (J.A. 9-10 [¶ 10]), thus belying any suggestion that there is any ongoing refusal to deal. As the cases cited above show, the fact that the scope or terms of this dealing may not be to Loren Data's liking does not make the situation a refusal to deal or otherwise actionable.⁷

The facts here are thus nothing like those in cases like Lorain Journal v. United

⁷ See, e.g., J.A. 10 [¶ 12] (In 2001, "GXS made available to Loren Data a 'mailbox' to facilitate interim continuity of operations."); J.A. 12 [¶ 19] (In 2003, "Loren Data was forced by this arrangement to again rely on the retail services oriented GXS Mailbox."); and J.A. 14 [¶ 23] ((n 2009, "GXS was given an opportunity to match the offer and countered with a \$13,000 per month offer on the crippled Mailbox.").

States, 342 U.S. 143 (1951), Aspen Skiing v. Aspen Highlands Skiing, 472 U.S. 585 (1985), or United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001) (en banc), upon which Loren Data attempts to rely. (See App. Br. 39-40.) All of these cases involved actual refusals to deal at any price.⁸

Nor are Loren Data's allegations any better regarding what might happen in the future. Loren Data alleged only that "GXS has expressed intent to revert . . . [the current connections] . . . to a unified commercial agreement of unknown cost" when certain contractual arrangements expired by their terms in May 2011. (J.A. 14 [¶ 25].) Loren Data made no allegation that GXS will terminate Loren Data at that time or that GXS intends to do so; but only that GXS would like to negotiate some "commercial agreement" at that time. (Id.) Notably, May 2011 passed while GXS's motion to dismiss was sub judice. Yet, during the months before the District Court ruled, Loren Data made no effort to offer any new or additional facts, whether by a further amended pleading or otherwise, regarding whether GXS had in fact terminated the Inovis transit agreement. (See J.A. 3.)

⁸ Additionally, all these cases were decided before Twombly, and therefore cannot stand for the proposition that such a refusal to deal is sufficient to state plausible harm to allow litigation and discovery to go forward under the Twombly/Iqbal standards.

Loren Data alleged that the commercial mailbox it now has is inadequate for its needs, (J.A. 12 [¶ 19]), but it contradicted this claim by admitting that it was able to operate from February 2001 through August 2001 with a commercial mailbox, (see J.A. 10-11 [¶¶ 12, 16]). Loren Data further admitted that after operating from August 2001 to August 2003 without any connection to GXS at all, (J.A. 12 [¶ 19]), Loren Data reestablished its relationship with GXS in 2003 only in order to win a single new, large customer, at which time it received simply a commercial mailbox, (See id.). There is no allegation that this commercial mailbox was not sufficient to enable Loren Data to serve that large client. The District Court thus properly held that "the complaint alleges that Loren Data has successfully worked around GXS's refusal to provide an interconnect for the past ten years, by using a metered mailbox and by interconnecting with other VANs that can interconnect with GXS's customers." (J.A. 63).⁹

⁹ It is also difficult for the FAC to raise a plausible inference that Loren Data's current level of access is so inadequate as to constitute a violation of Section 2 when Loren Data at the same time has been posting statements on its website asserting that it could easily have continued on for years under its current arrangements with GXS, and boasting how successful its business has been in 2010, see Todd Gould, GXS Antitrust Litigation (Jan. 10, 2011), <http://www.ld.com/gxs-antitrust-litigation> (last visited Jan. 9, 2012)—material freely available to the entire world to which a court need not blind itself on a Rule 12(b)(6) motion. Cf. Iqbal, 129 S. Ct. at 1950 (Rule 12(b)(6) plausibility

(Cont'd on following page)

Loren Data has now shifted gears on appeal, and its counsel now argues that options like the commercial mailbox are "qualitatively different and non-substitutable forms of message exchange" than an interconnect, and therefore constitutes a refusal to deal. (App. Br. 41.) This conclusion is contradicted by the affirmative allegations conceding Loren Data was able to operate for years with no access, and to serve large customers with a commercial mailbox.

Loren Data also asserts for the first time on appeal that the Inovis transit agreement grants access to only a small part of the GXS network, (*id.*), but this argument is of no avail. To begin with, there simply is no such allegation in the FAC. Loren Data's belated attempt to expand its allegations through unsubstantiated assertions of counsel in an appellate brief is improper and should be disregarded. *See, e.g., First Nat. Bank of North East v. Fockler*, 649 F.2d 213, 215-16 (4th Cir. 1981) ("This court cannot consider materials outside the record, and declines the invitation to do so.").

In any event, this new assertion is contradicted by the facts Loren Data affirmatively pleaded in the FAC: "In March of 2009, Inovis . . . offered Loren

(Cont'd from preceding page)

analysis is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." (citation omitted).

Data the ability to route to GXS customers. . . ." (J.A. 14 [¶ 23].) Moreover, "GXS was given an opportunity to match the offer and countered with a \$13,000 per month offer on the crippled Mailbox." (*Id.*) Indeed, Loren Data has complained that the conversion of these "multiple interconnects" to a unified commercial agreement would be "debilitating." (J.A. 14 [¶ 25].) Loren Data has thus conceded that the Inovis transit agreement gives it access over a peer interconnect to GXS's customers, and that the Inovis transit agreement is so important that it would be "debilitating" if it were lost. Loren Data's statement on appeal that this same Inovis transit agreement is so insignificant that it amounts to a refusal to deal cannot be reconciled with its allegation in the FAC that terminating that transit agreement would be "debilitating."

2. Loren Data Failed to Allege that Access to GXS's Network Is Essential or that Loren Data Has Been Denied Access to It

Faced with these difficulties, Loren Data alternatively seeks refuge in arguing that it is being denied access to a supposed "essential facility." The District Court correctly rejected this argument as well. (J.A. 61-64.)

The Supreme Court has never recognized the essential facilities doctrine. Trinko, 540 U.S. at 410-11. It is thus not clear post-Trinko that denying access to an alleged "essential facility" could even be the basis for a viable monopolization claim. There is pre-Trinko Fourth Circuit precedent, however, that addressed the

requirements for pleading an essential facilities claim. Loren Data's allegations would fail to state a claim even under this older case law.

In 1991, the Fourth Circuit in Laurel Sand & Gravel held that to state a Section 2 claim for denying access to an essential facility, a plaintiff must allege: (1) control by a monopolist of an essential facility; (2) the inability of the competitor seeking access to practically or reasonably duplicate the facility; (3) the denial of the facility to the competitor; and (4) the feasibility of the monopolist to provide the facility. 924 F.2d at 544. The plaintiff must allege that the facility is "not merely helpful but *vital* to the claimant's competitive viability." Am. Online, Inc. v. GreatDeals.net, 49 F. Supp. 2d 851, 862 (E.D. Va. 1999) (emphasis added and internal citation and quotation omitted). "[A]ccess to the facility must be necessary for meaningful competition." In re Microsoft Corp. Antitrust Litig., 274 F. Supp. 2d 743, 745 n.3 (D. Md. 2003). As a result, "more than inconvenience, or even some economic loss" is necessary to show that a facility is essential. Advanced Health-Care Servs., Inc. v. Giles Mem'l Hosp., 846 F. Supp. 488, 498 (W.D. Va. 1994) (internal quotations omitted).

In addition, plaintiffs may not use the essential facilities doctrine as a means to dictate the terms of its access to a facility. For example, a competitor may not demand his own price or terms, even if the offered rate is uneconomic for that competitor. See Laurel Sand & Gravel, 924 F.2d at 544-45 (competitor of national

railroad not entitled to access to its rail network at a highly discounted rate so that the competitor could provide services to a potential customer, even if the competitor and its customer allegedly could not compete at the commercial rate that was being offered; "[a]ccess to the essential facility was not refused through the [terms offered]"). Given that the commercial rate offered to the competitor was reasonable from the perspective of the alleged monopolist, the facility could be duplicated by the competitor simply paying the commercial rate. Id. at 544. "Although [the highly discounted rate was] preferable, that, alone, did not make the rate offer unreasonable." Id. at 545.

Similarly, in America Online, the court dismissed a spammer's claim demanding access to AOL's email network. 49 F. Supp. 2d at 854, 57-63. The spammer alleged that AOL possessed monopoly power in Internet access or information services and that for AOL to charge for the right to advertise on AOL's network constituted a Section 2 violation. See id. at 857-89.

Moreover, this is not simply a principle about price terms. Monopolists that operate a network also do not have to provide competitors with the best possible access to that network. In fact, they can provide access and service that is significantly degraded and still not violate the Sherman Act. In Trinko, for example, an incumbent monopolist phone company "denied interconnection services to rivals in order to limit entry." 540 U.S. at 407. The incumbent phone

company also allegedly discriminated against rivals in terms of filling orders and providing service, among others. Id. at 404. Nonetheless, the Supreme Court "conclude[d] that [the monopolist's] alleged insufficient assistance in the provision of service to rivals is not a recognized antitrust claim." Id. at 410; see also Midwest Gas Servs., Inc. v. Indiana Gas Co., Inc., 317 F.3d 703, 714 (7th Cir. 2003) ("[T]he most economical route is not an essential facility when other routes are available.") (citation omitted).

The facts pleaded in the FAC thus foreclose any viable "essential facilities" claim. The supposed essential facility here appears to be access to GXS's network of customers. The FAC fails to make any non-conclusory allegations as to why access to this "facility" is "essential" to competition, and thus the claim should fail on that basis alone. Indeed, the FAC pleads facts that are inconsistent with Loren Data's conclusory assertion that the facility in question is "essential." Loren Data alleged that it was able to operate from 1997 to 2001 without a connection to the GXS network, (J.A. 8, 10 [¶¶ 6, 12]); for a period in 2001 with a commercial mailbox, (J.A. 10 [¶ 12]); and from late 2001 to 2003 with no connection at all to GXS, (J.A. 12 [¶ 19]).

The FAC also makes clear that consumers still have ample access to this supposed "essential facility," regardless of what GXS or Loren Data might be doing. Loren Data pleaded that when GXS "terminated" its mailbox and denied it

an interconnect in 2003, "Loren Data was forced, at increased expense, to create free direct connections to those [customers] willing." (J.A. 11-12 [¶ 16].) Loren Data also conceded that without an interconnect, "users such as retailers and suppliers [customers]" would not be left without options but rather "would be forced to purchase mailboxes on multiple VANs," (J.A. 7 [¶ 4]), or "migrate to alternative networks," (J.A. 7 [¶ 3]). Moreover, Loren Data pleaded that "GXS granted non-settlement peer interconnects to [numerous] other VANs." (J.A. 13 [¶ 20].) Thus, Loren Data has admitted that customers have many options for connecting to the GXS network even if they do not do so through Loren Data.¹⁰

But even if Loren Data had pleaded facts plausibly showing that this facility could properly be regarded as "essential," the more fundamental fact is that GXS has not denied Loren Data access to it. Loren Data may well prefer to have different price terms for accessing this facility—indeed, Loren Data would prefer

¹⁰ In addition, Loren Data admits that it has been granted interconnects with every other existing VAN, including with two of GXS's acquired VANs (IE and InovisWorks). (J.A. 8-9 [¶¶ 7, 10].) While the FAC is conveniently silent regarding the extent of internal interconnections among GXS's own VANs, it is implausible to presume from such silence that GXS would not interconnect its own VANs. When VANs are interconnected, there is no practical consequence from the question of which particular GXS VAN one was connected to because the net result is that one could communicate with any GXS customer, which further belies Loren Data's conclusory allegations that it has been denied access.

not to have to pay at all for accessing this facility—but, as the District Court noted, "[t]here are also no alleged facts from which one can conclude that the terms offered by GXS for Loren Data to connect via a commercial mailbox are unreasonable." (J.A. 63-64.) Loren Data's essential facilities claim was thus properly rejected.

In short, Loren Data has pleaded that if it fails to obtain an interconnect with GXS or loses the connections it now has, (1) it can recreate the functionality itself, (2) other suppliers have access to the alleged essential facility, and (3) customers can easily switch to other suppliers or even purchase additional mailboxes, and still access GXS. Thus, even if GXS were a monopolist and its customers were an "essential facility," Loren Data's own allegations concede that Loren Data and its customers had and continue to have access to the very facility that Loren Data terms essential. The District Court thus correctly held that Loren Data "has not alleged facts to establish that GXS is liable pursuant to the essential facilities doctrine." (J.A. 63.) Specifically:

"Loren Data acknowledges that there are at least 36 VANs aside from GXS, as well as other means of transferring EDI. . . . In addition, the complaint alleges that Loren Data has successfully worked around GXS' refusal to provide an interconnect for the past ten years, by using a metered mailbox and by interconnecting with other VANs that

can interconnect with GXS' customers."

(Id.)¹¹

Loren Data contends on appeal that this conclusion by the District Court is "totally contrary" to the facts pleaded. (App. Br. 43.) Loren Data points to various conclusory allegations it made about how its business was not as large, profitable or successful as its business allegedly might have been had Loren Data had free access to GXS's customer network. (See id. 43-44.) But such allegations are precisely what the courts hold is insufficient to make out an essential facilities claim. Complaints from a competitor that the price, terms or technological level of access to the facility are less than what the competitor deems optimal are not antitrust violations. See Laurel Sand & Gravel, 924 F.2d at 544-45; Trinko, 540 U.S. at 410. Allegations of "inconvenience," "reduce[d] . . . profits" or even "some economic loss," as the District Court correctly pointed out, are not enough. (J.A. 62-63 (citing Laurel Sand & Gravel, 924 F.2d at 544; Midwest Gas Servs., 317 F.3d at 714; Advanced Health-Care Servs., 846 F. Supp. at 498).) This claim was properly dismissed.

¹¹ Loren Data also notably makes no allegation that it could not enter into a transit agreement with any of the other VANs that have interconnections to GXS.

B. Loren Data Failed to State a Claim Under Section 2 of the Sherman Act for Attempted Monopolization and Was Properly Dismissed

To state a claim for attempted monopolization under Section 2, a plaintiff must allege: (1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize the relevant market and (3) a dangerous probability of achieving monopoly power. Sun Microsystems, Inc. v. Microsoft Corp., 333 F.3d 517, 534 (4th Cir. 2003) (citing Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456 (1993)). The FAC alleges no facts that show that GXS had the requisite specific intent to monopolize or that it stands a "dangerous" probability of achieving monopoly power. This claim was properly dismissed as well. (See J.A. 64-66.)

A plaintiff raising a Section 2 attempted monopolization claim must allege that the defendant had a "specific intent to destroy competition or build monopoly." Times-Picayune Publ'g Co. v. United States, 345 U.S. 594, 626 (1953) (citations omitted). This intent must be "more than an intent to compete vigorously." Spectrum Sports, 506 U.S. at 459; see also U.S. Steel Corp. v. Fortner Enters., Inc., 429 U.S. 610, 612 n.1 (1977) ("'increasing sales' and 'increasing market share' are normal business goals, not forbidden by § 2 without other evidence of an intent to monopolize") (citations omitted); Abcor Corp., 916 F.2d at 927 (allegation that company wanted to increase market share or drive

competitor out of business is insufficient to demonstrate specific intent, as plaintiff must show defendant sought to create a monopoly by circumventing the competitive process).

The FAC does not set forth any facts that might indicate that GXS had a "specific intent to monopolize" the relevant market. Loren Data's admission that GXS offered interconnects to other VANs, (J.A. 13 [¶ 20]), is entirely inconsistent with an intent to monopolize, as the District Court noted, (J.A. 64). The allegation that GXS will not offer Loren Data a free interconnect does not show specific intent to monopolize, particularly when, as shown above in Point III.A.1., such refusal is not itself actionable. Merely seeking to charge Loren Data for such services cannot suffice to show an illicit intent to monopolize. See Laurel Sand & Gravel, 924 F.2d at 545 (alleged monopolist may charge prices for access to its facility). Moreover, Loren Data's allegations make clear that a free interconnect is not necessary to compete, as Loren Data itself was able to compete with a commercial mailbox and without any connection to GXS. (J.A. 12 [¶ 19].)

In addition, Loren Data alleges that GXS's decision not to extend an interconnect to Loren Data dates back to 2001, (J.A. 11 [¶ 16]), when, according to the FAC, GXS's EDI network represented no more than 25 percent of the alleged "market," (J.A. 8 [¶ 5]). The fact that GXS's refusal to grant Loren Data an interconnect dates back to a time when there was no possibility that such denial

could give GXS monopoly power cannot be reconciled with Loren Data's conclusory assertion that the denial is being done with the specific intent to monopolize.

Loren Data also failed to allege facts that plausibly show a "dangerous" probability of achieving monopoly power. Loren Data alleges that GXS has engaged in a series of acquisitions designed to build monopoly power. (J.A. 16 [¶ 31].) All of these transactions, however, have closed. (Id.) Any incremental market power any of them may have conferred has already been conferred. Moreover, as the District Court noted, "two acquisitions in a ten year period with no allegation of plans for future mergers or acquisitions do not suggest that GXS is on the path to market domination." (J.A. 65-66.)

The District Court also correctly noted that Loren Data's own allegations render implausible its conclusory allegation that GXS's refusal to grant Loren Data an interconnect threatens a dangerous probability that GXS will achieve monopoly power:

"The problem with this argument is that Loren Data simultaneously alleges that GXS has granted interconnects to every other VAN, large or small, and that GXS has refused to grant an interconnect to Loren Data for the past ten years. (Id. ¶ 6). GXS is not likely to gain monopoly control over the industry if it refuses to deal with only one of 36 available VAN networks. Moreover the fact that GXS has granted interconnects to so many other VANs makes it unlikely that GXS' denial of an interconnect to Loren Data will have a negative impact on competition in the relevant market."

(J.A. 66.) Indeed, even if Loren Data were to exit the market, the FAC alleges no facts to suggest that its customers would necessarily migrate to GXS as opposed to any of the 36 other VANs who have interconnects with GXS.

Loren Data now argues on appeal that the District Court "did not evaluate the relationship of market share to the plausibility of a likelihood of success" in light of this Court's statement in M & M Med. Supplies & Serv., Inc. v. Pleasant Valley Hosp., Inc., 981 F.2d 160, 168 (4th Cir. 1992) that "[a] rising share may show more probability of success than a falling share." (App. Br. 35.) But M & M did not hold that a rising market share was *sufficient* to show a dangerous probability that GXS will achieve monopoly power, only that it was likely to be a more helpful fact than a falling market share. A rising market share, for example, could be entirely due to business acumen, superior product or historical accident, rather than monopolistic designs. See Grinnell Corp., 384 U.S. at 571.

But more fundamentally, Loren Data itself concedes that its pleading "did not clearly assert that GXS's market share had been increasing." (App. Br. 35.) While Loren Data now claims this can be inferred from the FAC's factual allegations, (see id.), the only facts that the FAC alleges is that GXS completed two acquisitions in ten years, activity that the FAC conclusorily characterizes as "aggressive," (J.A. 8 [¶ 7]). Given the FAC's utter silence on all the other industry factors that might play a role in determining market shares during this period (e.g.,

the activities of the various other competitors in the market who are never mentioned), no plausible inference of increasing market share can be drawn from such allegations.

Most preposterous of all, however, is Loren Data's belated argument on appeal that GXS's actions toward Loren Data dangerously threaten monopolization of the electronic commerce industry because they supposedly are an attempt to remove a disruptive "maverick" from the market. (See App. Br. 37-38 n.27.)

Loren Data asserts that

"its disruptive business model posed the possibility of a sea-change in market structure, permitting small service bureaus to enter the EDI market on a 'resale' basis, that is without constructing their own data networks."

(Id. 37.) What Loren Data, somewhat astonishingly, suggests is that if it could get access to GXS's network for free via an interconnect, it could then resell that service to others undercutting GXS because, unlike GXS, Loren Data would not have had to bear the cost of constructing and maintaining the data network upon which the service is based. In short, Loren Data's "disruptive business model" is nothing more than acquiring for free a product someone else manufactured and reselling it at a profit. Of course, a business would do better if another entity paid its costs, but that is not how the free market operates. Loren Data is not a

"maverick"; it is a "free-rider." As a free-rider, its complete departure from the market would not harm competition, it would enhance it.¹²

For all these reasons, the District Court did not err in concluding that Loren Data failed to plead facts sufficient to show attempted monopolization and thus dismissing the claim. (J.A. 66.)

IV. DISMISSAL OF THE FAC WAS FURTHER PROPER BECAUSE LOREN DATA FAILED TO PLEAD ANTITRUST INJURY

Although the District Court did not have occasion to reach the issue in light of its rulings on the other grounds for dismissal, the FAC was also properly dismissed because it failed to allege any "antitrust injury."

"To have standing to bring an antitrust claim [under Sections One and Two], plaintiff must show an antitrust injury by demonstrating that the alleged injury results from some anti-competitive conduct."

Cogan v. Harford Mem'l Hosp., 843 F. Supp. 1013, 1018 (D. Md. 1994) (citing

¹² Loren Data's theory of liability is also not sound policy. Loren Data's theory rewards free-riding over investment and business acumen; requires manufacturers to deal with distributors who fail to pay bills and undermine brand value and customer loyalty; undermines incentives to invest in infrastructure and customer bases; and disincentivizes networks from fostering open access lest they be hijacked by small competitors who would rather sue than invest in their business or the community. See generally Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 228 (D.C. Cir. 1986) ("[T]he Supreme Court made it clear that elimination of the free ride is an efficiency justification" for conduct being challenged on antitrust grounds.) (citing Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85, 104-05 (1984)).

Brunswick Corp. v. Pueblo Bowl-o-Mat, Inc., 429 U.S. 477, 489 (1977)).

"Because the antitrust laws are intended to protect competition, and not simply competitors, only injury caused by damage to the competitive process may form the basis of an antitrust claim."

Thompson Everett, Inc. v. Nat'l Cable Adver. L.P., 57 F.3d 1317, 1325 (4th Cir.

1995) (citing Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962)); see also

Brunswick Corp., 429 U.S. at 488 ("The antitrust laws . . . were enacted for the protection of competition, not competitors.") (internal citation and quotation omitted).

For these reasons, "[t]he elimination of a single competitor standing alone, does not prove anti-competitive effect." Military Servs. Realty, Inc. v. Realty Consultants of Va., Ltd., 823 F.2d 829, 832 (4th Cir. 1987) (citation omitted); see also Dickson, 309 F.3d at 206 ("Harm to one or many competitors will not suffice.") (internal citation and quotation omitted). Rather, courts will find antitrust injury only where a plaintiff shows an anticompetitive effect in a relevant market. See, e.g., Cont'l Airlines, Inc. v. United Airlines, Inc., 277 F.3d 499, 515-16 (4th Cir. 2002) (no antitrust injury because, despite increased costs resulting from competitor's allegedly anticompetitive conduct, plaintiff had not established anticompetitive effect on the market itself); Oksanen, 945 F.2d at 709 (when plaintiff failed to demonstrate that "competition as a whole in the relevant market ha[d] been harmed," the fact that plaintiff was harmed by alleged anticompetitive

conduct did not show antitrust injury); Mylan Labs., Inc., 770 F. Supp. at 1062 n.9 ("Having held that [plaintiff] has not sufficiently alleged an anticompetitive effect, this Court cannot now hold that [plaintiff] has suffered an antitrust injury."). The harm to the competitive process necessary to support an antitrust claim manifests as "acts that reduce output or raise prices *to consumers*." Cont'l Airlines, Inc., 277 F.3d at 516 (emphasis added and citation and quotations omitted).

While Loren Data laments its own individual purported loss of revenues, reputation, client business, market opportunities, and market footprint due to GXS's decision to deny it a free interconnect, (see J.A. 9, 11-12, 13 [¶¶ 8, 16, 21]), Loren Data has not alleged any facts that would show GXS's conduct to have had an anticompetitive effect on the market as a whole. There is no allegation that any end-customers who supposedly required access to GXS's network were ever denied access or faced higher prices. Indeed, the FAC acknowledges that Plaintiff's customers could, and did, either access GXS's VANs via "non-native transit" or migrate to any number of the large or small "alternative networks that enjoy access to the GXS system." (J.A. 7 [¶ 3].) The FAC acknowledges that customers also can open mailboxes on multiple VANs. (J.A. 7 [¶ 4].) They need not be limited to a single VAN.

In addition, by Loren Data's own pleading, Loren Data itself can continue to function commercially without any connection at all to GXS. (J.A. 12 [¶¶ 17-19].)

Even a complete termination of Loren Data's connections to GXS would not eliminate Loren Data as a competitor. And even if Loren Data shuttered its doors, its customers could move to at least 36 other VANs and get the same access to GXS. (See J.A. 66 ("[T]he fact that GXS has granted interconnects to so many other VANs makes it unlikely that GXS' denial of an interconnect to Loren Data will have a negative impact on competition in the relevant market.").)

Moreover, Loren Data's allegations indicate that only a tiny percentage of customers in the "market" would be affected by a complete termination of all connections between Loren Data and GXS. Since Loren Data alleges that only 80 out of 40,000 customers on GXS's network communicate with Loren Data's customers, (J.A. 8, 12 [¶¶ 7, 17]), the lack of any interconnect or any future change in Loren Data's contract will affect only a mere 0.2% of GXS's customers. And if GXS has 50% of the "market," as Loren Data alleges, (see J.A. 8 [¶ 5]), the lack of the interconnect would only affect a de minimis 0.1% of the "market."

In short, because Loren Data has failed to allege facts showing an injury to competition, the FAC was properly dismissible for this additional ground as well.

V. THE DISTRICT COURT'S DENIAL OF LOREN DATA'S POST-JUDGMENT MOTIONS WAS NOT AN ABUSE OF DISCRETION

A. Loren Data Has Nothing to Appeal from Because it Was Not "Aggrieved" by the Ruling on Its Post-Judgment Motions

On August 19, 2011, after the District Court directed the Clerk to "CLOSE" the case, (J.A. 76), Loren Data filed what it styled a "motion for clarification," (J.A. 77-80). Loren Data's motion asked the District Court to "issu[e] a revised or supplemental Order stating whether" the dismissal of its antitrust and tortious interference claims "was with prejudice to further amendment." (J.A. 79.)

Before this motion had been ruled upon, Loren Data filed a second post-judgment motion. The second motion asked the District Court to "reconsider" its August 9 order because "neither the order nor the Court's accompanying Opinion specified whether dismissal of counts I-V of the Complaint . . . was without prejudice to amend"; "[t]o alter or amend the Court's order under Rules 59[(e)] and 60[(a)] . . . to state whether the dismissal was with or without prejudice"; or "to extend the time for appeal pursuant to Rule 4" until the Court decided the motion for clarification. (J.A. 81.)

While the District Court nominally "denied" both these motions, (J.A. 84-94), its decision in fact provided Loren Data with essentially all the relief its curiously framed motions had requested. The District Court stated unequivocally that "the dismissal of these claims was with prejudice." (J.A. 89 (citing Carter v.

Norfolk Cmty. Hosp. Ass'n, 761 F.2d 970, 974 (4th Cir. 1985).) Once the District Court made this statement, there was nothing left to clarify, no need to reconsider so as to provide such clarification, and thus, no need to extend time to appeal.

In other words, given how Loren Data had framed the limited relief it was seeking—which Loren Data now stresses on appeal was never intended to have any "substantive" content, (App. Br. 49)—Loren Data was not "aggrieved" by the District Court's August 30, 2011, ruling so as to be entitled to appeal therefrom. See, e.g., Custer v. Sweeney, 89 F.3d 1156, 1164 (4th Cir. 1996). Its appeal from the August 30, 2011 ruling should, therefore, be denied on that basis alone.

B. There Was No Abuse of Discretion in Any Event Because There Was No "Clear Error of Law" in Dismissing with Prejudice

Although Loren Data made the odd and presumably tactical decision in its post-judgment motion not to expressly ask the District Court to modify the dismissal to make it without prejudice and concomitantly not to formally request leave to amend, (see App. Br. 48-49), the District Court generously elected to construe Loren Data's post-judgment motions as if that were what they said, (J.A. 89). There was no abuse of discretion in the District Court's determination not to grant such relief.

The District Court treated Loren Data's motions as Rule 59(e) motions to alter or amend a judgment, (J.A. 86-88), and on appeal Loren Data apparently does

not challenge this characterization, (see App. Br. 1). As the District Court correctly noted, (see J.A. 88), "reconsideration of a judgment after its entry is an extraordinary remedy which should be used sparingly." Pac. Ins. Co. v. Am. Nat'l Fire Ins. Co., 148 F.3d 396, 403 (4th Cir. 1998) (quotations and citation omitted). Courts recognize only three limited grounds for granting Rule 59(e) relief: "(1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice." Id. (citations omitted).

As there was no claim of change in law or newly available evidence, the only issue presented by Loren Data's motions was one of "clear error of law," a term that has a limited and technical meaning. A Rule 59(e) motion "may not be used to relitigate old matters, or to raise arguments on or present evidence that could have been raised prior to the entry of judgment." Id. (quotation and citation omitted). Similarly, "mere disagreement does not support a Rule 59(e) motion." Hutchinson v. Staton, 994 F.2d 1076, 1081-82 (4th Cir. 1993) (citation omitted).

The Court did not abuse its discretion by denying Loren Data's first post-judgment motion because there was in fact no ambiguity to clarify. (J.A. 89.) A "district court's dismissal under Rule 12(b)(6) is, of course, with prejudice unless it specifically orders dismissal without prejudice." Carter, 761 F.2d at 974. In addition, the directive to "*close*" the case likewise indicates dismissal with

prejudice. (J.A. 89.) As there was no ambiguity, there was no clear error in the August 9, 2011, ruling, and therefore, no reason to alter the judgment.

With respect to whether the dismissal should have been with prejudice and whether Loren Data should be free to seek leave to amend, there was no abuse of discretion either. The District Court correctly rejected Loren Data's suggestion that engaging new counsel of allegedly higher quality could provide a basis for Rule 59(e) reconsideration of the adverse rulings received by prior counsel. (J.A. 90-91 (citing In re Fisherman's Wharf Fillet, Inc., 83 F. Supp. 2d 651, 656-57 (E.D. Va. 1999 and In re Walters, 868 F.2d 665, 668-89 (4th Cir. 1989)); J.A. 93 ("Such innuendo, however, does not entitle plaintiff to a third bite at the apple.")). Loren Data makes no attempt to continue with this argument on appeal.

With regard to the issue of whether dismissing with prejudice was proper because further amendment would be futile, (see J.A. 91-93), Loren Data ignores the context in which this issue was raised. The order appealed from was not a Rule 15 motion for leave to amend, it was a Rule 59(e) motion for reconsideration, which requires a showing of "clear error." The District Court thus correctly held that the mere fact that no futility analysis was expressly set forth in its dismissal ruling was "grossly insufficient to demonstrate that a clear error of law results from the dismissal of plaintiff's antitrust and tortious interference claims with prejudice." (J.A. 91.)

Loren Data complains of supposed burden-shifting, (App. Br. 50-53), but it ignores the fundamental point that the relevant burden was its burden to show Rule 59(e) "clear error" in support of its post-judgment motions. It was incumbent upon Loren Data, as movant, to proffer some argument which demonstrated clear error. But Loren Data's motions failed to demonstrate any clear error. Its argument is essentially to assert (without actually showing) that it *could* replead the claims with more precision if it had the opportunity because it had new counsel. That argument does not identify at all, what error the Court allegedly made. The Court did not impermissibly shift the burden to Loren Data to show non-futility; Loren Data impermissibly attempted to relieve itself of its burden to substantiate its own Rule 59(e) motion. There was no abuse of discretion in the District Court's rejection of Loren Data's attempt.

In any event, whatever the burden and whoever had it, the indicators of futility were sufficiently apparent that refusing to grant Rule 59(e) relief allowing amendment cannot be "clear error." Loren Data already had amended its pleading once after seeing all the objections GXs raised in its motion to dismiss, and yet the FAC still failed. As the District Court correctly noted, this fact alone suggests that further amendment would be futile. (J.A. 92 (citing Glaser v. Enzo Biochem, Inc., 464 F.3d 474, 480 (4th Cir. 2006)). Moreover, in stark contrast to a case like Matrix Capital Mgmt. Fund, L.P. v. BearingPoint, Inc., 576 F.3d 172, 193 (4th Cir.

2009), upon which Loren Data relies, (see App. Br. 45), Loren Data did not seek leave for further amendments in its opposition to the motion to dismiss.

Additionally, neither that opposition nor its post-judgment motions included any proffer of what new or different facts its new, experienced counsel might say in a further amended pleading that would save the claims from dismissal. (See J.A. 92-93.) Indeed, Loren Data seeks refuge in the procedures that govern when a party actually makes a formal Rule 15 motion. (App. Br. 51-53.) But, Loren Data did not even attempt to comply with the District Court's Local Rule 103(6)(a), which requires a party seeking leave to amend to attach a copy of its proposed new pleading, (see J.A. 2-3).

Futility is also apparent from the numerous allegations in Loren Data's FAC, discussed above, which doom its claims—e.g., that GXS is in fact dealing with Loren Data, that Loren Data has been able to do business for many years without the supposedly "essential" interconnect it seeks, that there are too many other VANs in the market for GXS to have any "dangerous probability" of monopolizing the market, that the matters Loren Data complains of do not amount to "antitrust injury," among others. Given how effectively Loren Data has pleaded itself out of court, there was no abuse of discretion in not allowing further attempts to amend that were not even requested.

Loren Data also argues that irrespective of whether further amendment is futile, the District Court erred by dismissing the FAC with prejudice because it did not expressly articulate in its August 9, 2011 Memorandum Opinion that further amendment would be futile. (App. Br. 44-45.) Given the District Court's express subsequent ruling on futility on August 30, 2011, (J.A. 92-93), remand to incorporate this point into the actual decision dismissing the claims with prejudice would be a waste of judicial resources bordering on the absurd. Moreover, a court need not articulate the reason for dismissing a claim with prejudice if the reasons are apparent. See Matrix Capital Mgmt. Fund, L.P., 576 F.3d at 194 (citing Ganey v. PEC Solutions, Inc. (In re PEC Solutions, Inc. Sec. Litig.), 418 F.3d 379, 391 (4th Cir. 2005)). As obvious from this appeal, the reasons for dismissing Loren Data's claims with prejudice are apparent. There was thus no abuse of discretion.

CONCLUSION

Loren Data's claims were without merit, and the District Court properly dismissed them. The District Court's decision should be affirmed.

Dated: January 10, 2012

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,947 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14 point Times News Roman font.

Dated: January 10, 2012

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CERTIFICATE OF SERVICE

I hereby certify that on January 10, 2012, I electronically filed the foregoing Brief of Defendant-Appellee GXS, Inc. with the Clerk of the Court of the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system, which will send notice of such filing to registered CM/ECF users, including the following participants addressed as follows:

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I certify that an original and seven hard copies of the foregoing Brief for Defendant-Appellee were sent to the Clerk's Office by Federal Express Next Business Day Delivery to:

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on this 10th day of January 2012.

/s/ Ramiro Honeywell
Ramiro Honeywell