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**No. 11-2062**

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**UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

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LOREN DATA CORP.,

*Plaintiff-Appellant,*

v.

GXS, INC.,

*Defendant-Appellee.*

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On Appeal From the United States District Court For the  
District of Maryland

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**BRIEF FOR APPELLANT**

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Dated: December 1, 2011

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## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to FED. R. APP. P. 26.1 and Local Rule 26.1, appellant Loren Data Corp. certifies that it has no parent companies, subsidiaries or affiliates that have issued shares to the public and that no publicly held corporation, whether or not a party to the present litigation, has a direct financial interest in the outcome of this case by reason of a franchise, lease, other profit sharing agreement, insurance, indemnity agreement or otherwise.

/s/ Glenn B. Manishin  
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## **JURISDICTIONAL STATEMENT**

The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331, 1337 and supplemental jurisdiction over the state law claims under 28 U.S.C. § 1367(a).

This Court's jurisdiction to review the district court's August 9, 2011 judgment dismissing the complaint with prejudice and subsequent August 30, 2011 order denying appellant's post-judgment motions arises under 28 U.S.C. § 1291. Appellant timely filed its notice of appeal on September 29, 2011, within 30 days of disposition of its Rule 59 motion to alter or amend the judgment. FED. R. APP. P. 4(a)(4)(A).

## **STATEMENT OF THE ISSUES**

1. Whether the district court misinterpreted or misapplied the Supreme Court's recent precedents establishing a new "plausibility" standard for Rule 12(b)(6) motions.
2. Whether the district court correctly held that as a matter of law, Loren Data's amended complaint did not allege plausible claims for unreasonable restraint of trade, attempted monopolization or monopolization.
3. Whether the district court's determination that dismissal should be with prejudice, without consideration of futility or prejudice, was inconsistent with the appropriate application of FED. R. CIV. P. 15 in a complex antitrust case.

4. Whether the district court's denial of clarification and reconsideration, based on a *sub silentio* prior finding that further amendment of the complaint would be futile, was erroneous or an abuse of discretion.

### **STATEMENT OF THE CASE**

This appeal is from the dismissal of appellant's complaint alleging civil violations of the Sherman Antitrust Act (15 U.S.C. §§ 1, 2) for failure to state a claim for relief pursuant to FED. R. CIV. P. 12(b)(6). (J.A. 36.)<sup>1</sup> The district court concluded that Loren Data Corp. ("Loren Data") had not asserted "plausible" federal claims for unreasonable restraint of trade, attempted monopolization or monopolization. The court dismissed the amended complaint with prejudice except with respect to a supplemental state law breach of contract claim (Count VI of the complaint), dismissed without prejudice. The district court also denied Loren Data's post-judgment motion for clarification and subsequent protective motion to alter or amend the judgment pursuant to FED. R. CIV. P. 59. (J.A. 70.)

In December 2010, Loren Data brought a civil antitrust action against GXS, Inc. ("GXS"), seeking damages and equitable relief principally under the federal antitrust laws. Loren Data is a provider of services in the Electronic Data Inter-

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<sup>1</sup> Citations to the Joint Appendix in this brief utilize the convention "J.A. \_\_\_." The district court's August 9, 2011 memorandum opinion dismissing the complaint is reproduced at J.A. 36-75. The court's August 30 memorandum denying Loren Data's post-judgment motions appears at J.A. 84-93.

change (“EDI”) industry. The EDI communications market involves the automated electronic transmission of business information, such as invoices and purchase orders, through a series of interconnected electronic Value Added Networks (“VANs”). These VANs are private data networks connected with each other using industry-standard EDI networking protocols.

Loren Data is an innovative firm, offering a wholesale business model that gives small “service bureau” retail providers access to EDI services for the first time and provides end users a lower-priced alternative to more established VANs. As a “network effects” industry, the EDI communications market is such that the value of any VAN depends on whether it is interconnected with other networks, because trading partners naturally desire and thus demand (like telephone users) to be able to reach subscribers of all other competing providers. In its complaint, Loren Data alleged that the industry-standard method of connecting EDI networks is a “non-settlement peer interconnect,” allowing transfer of EDI transactions via a direct connection between systems, without charge to either interconnected VAN (*i.e.*, recovering costs from each firm’s own customer pricing).

Loren Data’s complaint alleged that GXS unlawfully refused, individually and in combination with other EDI providers, to interconnect with Loren Data’s VAN in order to exclude appellant as an effective competitor in the EDI market. GXS has repeatedly denied Loren Data’s requests for such a “peer” intercon-

nection. The complaint alleged essentially that GXS treated Loren Data — and among all national EDI firms *only* Loren Data — as a customer, not an EDI “peer” competitor. GXS did so by offering only inferior, unworkable and paid “commercial mailbox” access to the GXS network. This requires manual intervention to retrieve and send EDI messages to the destination trading partner, contradicting the basic function of EDI as a standard-formatted means of automated electronic transactions. It is as if Verizon Wireless offered Cricket Mobile or some other, smaller wireless competitor only a voicemail message box for its customers to use in calling Verizon subscribers, requiring manual pickup of messages and no ability to make actual telephone calls — a second-tier and impracticable competitive alternative in networked industries.

Count I of the complaint asserts that GXS entered into anticompetitive agreements with other EDI providers to boycott Loren Data by prohibiting appellant from gaining anything but such crippled access to the core GXS network. GXS agreed with these approximately 36 or so other EDI networks, under express, written contracts, that the peer interconnects established may not be used to “transit” EDI traffic to the GXS network. This factual allegation was supported by a letter, attached to the amended complaint, in which GXS admitted the uniform existence of such agreements with *all* VANs in the EDI market other than Loren Data. (Amended Compl., Exh. A. (J.A. 31-32.))

Count II alleged that GXS' acquisitions of market share over the past five years, coupled with its exclusion of Loren Data via denial of peer interconnects, constituted an attempt to monopolize in violation of Section 2 of the Sherman Act. In support, Loren Data asserted that GXS' refusal to grant a peer interconnect was motivated by a desire to keep "wholesale innovators out of the market," to stop "novel operators from bringing to market new technologies that would allow on-demand delivery models," generally to "disable and harm an innovative competitor." To demonstrate that GXS' motivation was anticompetitive, *i.e.*, not based on efficiency or legitimate business reasons, Loren Data included factual allegations showing that a peer interconnect would benefit, not harm, GXS financially.

Loren Data also asserted GXS' rapidly increasing dominance of the EDI market, highlighting GXS' acquisition of the Information Exchange division of IBM in 2005 and its merger with another leading EDI competitor, Inovis, Inc., in 2010. These corporate deals not only increased GXS' market share to more than 50%, but now allow GXS to boast of "a client base" of between 65% and 80% of Fortune 500 firms in key industries such as automobiles, banking and retailing.

Loren Data recognized that a 50% share is at the cusp of the threshold from which to infer monopoly power for purposes of the Sherman Act. Count III of the complaint therefore contends, in the alternative, that GXS unlawfully maintained its *existing* monopoly power by refusing Loren Data a peer interconnect. Loren

Data contended this was the industry standard and that the “commercial mailbox” offered by GXS was not a feasible alternative to interconnection, technologically or economically. (Compl. ¶¶ 9, 13-15 (J.A. 9-11).) Loren Data also maintained that the peer interconnect it had earlier achieved with Inovis, now part of the GXS corporate family, did not extend to the core GXS network and was subject to potential termination post-merger.

Loren Data’s monopolization allegations principally relied upon the “essential facilities” doctrine, asserting that the VANs operated by GXS are essential to competition in the EDI market and that GXS had refused reasonable access to the facilities it controlled, that cannot feasibly be replicated. (Compl. ¶¶ 9, 33, 35-36 (J.A. 9, 16-17).) As with its attempted monopoly claim, Loren Data also alleged that GXS’ denial of an interconnect was motivated by a desire to eliminate a technologically innovative, disruptive and lower-priced competitor from the EDI market.<sup>2</sup>

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<sup>2</sup> In addition to the antitrust counts, Loren Data’s complaint alleged a violation of Md. Code Ann., Commercial Law Art. § 11-204(a)(1), along with related claims for tortious interference and breach of contract. (Compl. ¶¶ 37-45 (J.A. 17-18).) The district court’s disposition of these state law claims is not directly at issue in this appeal. However, because the district court dismissed the state antitrust claim for the same reasons as the federal antitrust claims (J.A. 69) under *Hinkelman v. Shell Oil Co.*, 962 F.2d 372, 279 (4th Cir. 1992), if this Court reverses dismissal of the Sherman Act claims such a disposition should extend as well to the Maryland state antitrust claim.

GXS moved to dismiss the complaint pursuant to FED. R. CIV. P. 12(b)(6). On March 23, 2011, Loren Data filed an amended complaint; the amended complaint did not modify the substantive claims in the lawsuit, but added a “supplemental statement of facts” in support of Loren Data’s claims, incorporating by reference the initial complaint’s factual allegations. (J.A. 21-34.) The parties stipulated that the motion to dismiss and Loren Data’s opposition papers should apply as well to the amended complaint. (J.A. 42.) On April 27, 2011, Loren Data filed a request under the district court’s local rules that the presiding judge hear oral argument. (J.A. 42.) Some three months later, deeming no hearing necessary (J.A. 36), the district court issued an August 9, 2011 memorandum opinion dismissing Loren Data’s complaint in its entirety. (J.A. 36-75.)

Chief District Judge Chasanow concluded that Loren Data’s Section 1 claim contained only conclusory allegations and did not allege “adequate facts to establish that GXS contracted, combined, or conspired with other VANs to boycott Loren Data.” August 9 Memorandum Op. (“Mem.”) at 12 (J.A. 47). The court held that the complaint was defective because it did 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 agreement.” *Id.* at 13 (J.A. 48). The district court did not address the GXS letter attached to the amended complaint, rejecting as vague and conclusory Loren Data’s assertion that GXS had

“made clear” that it would not permit interconnected EDI competitors to deal with “resale” EDI providers like Loren Data *Id.* at 14 n.2 (J.A. 48-49). The district court’s opinion then concluded that Loren Data failed to allege facts which could plausibly support claims for monopolization or attempted monopolization. *Id.* at 28-31 (J.A. 63-66).

The court found that the facts alleged in the complaint regarding monopolization did “not demonstrate that the GXS VAN is essential or that Loren Data [had] not been offered reasonable means of access” because “there are 36 VANs aside from GXS, as well as other means of transferring EDI from one trading partner to another,” and Loren Data had “successfully worked around GXS’ refusal to provide an interconnect for the past ten years . . . .” *Mem.* at 28 (J.A. 63). With regard to the attempted monopolization claim, the court concluded that “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.” *Id.* at 30-31 (J.A. 65-66). The court further held that “GXS is not likely to gain monopoly control over the industry if it refuses to deal with only one of 36 available VAN networks,” reasoning that “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.” *Id.* at 31 (J.A. 66).

Although GXS argued forcefully for dismissal with prejudice, nowhere in the opinion did the district court state whether the antitrust claims had been dismissed with prejudice, or provide an explanation why some or all Loren Data's complaint should or would be dismissed with prejudice. Accompanying the opinion was an order by the district judge which reads, in full, as follows:

For the reasons stated in the foregoing Memorandum Opinion, it is this 9th day of August, 2011, by the United States District Court for the District of Maryland, ORDERED that:

1. The motion to dismiss filed by Defendant GXS, Inc. (ECF No. 9) BE, and the same hereby IS, GRANTED;
2. Counts I-V of the Complaint BE, and the same hereby ARE, DIMISSED [sic] for failure to state a claim;
3. Count VI of the Complaint BE, and the same hereby IS, DIMISSED without prejudice for lack of subject matter jurisdiction; and
4. The clerk will transmit copies of the Memorandum Opinion and this Order to counsel for the parties and CLOSE this case.

(J.A. 76.)

Subsequent to the district court's decision, Loren Data filed a post-judgment motion for clarification to determine whether, and if so why, Counts I-V had been dismissed with prejudice. (J.A. 77-80.) On August 23, 2011 Loren Data timely filed another post-judgment motion, this time for reconsideration and to alter or amend the judgment under FED. R. CIV. P. 59 and 60. (J.A. 81-83). In the motion and accompanying memorandum, Loren Data made clear that this second motion was filed as a protective measure to preserve its appellate rights in the event the

district court could not decide the pending motion for clarification within the 30-day time period for filing a notice of appeal under FED. R. APP. P. 4. (J.A. 82-83).

On August 30, 2011 the district court denied both of Loren Data's post-judgment motions. The court declared for the first time that the state and federal antitrust claims had been dismissed with prejudice. August 30 Memorandum Op. ("Mem. II") at 6 (J.A. 89). The district court further stated that its prior August 9 decision to dismiss the complaint was predicated on a finding of futility, thus warranting dismissal with prejudice. *Id.* at 7-9 (J.A. 90-92). The court reasoned that appellant had "wholly fail[ed] to address the three limited grounds for reconsideration under Rule 59(e), and none of them is applicable here." *Id.* at 6-7 (J.A. 89-90).

This appeal followed.

### **STATEMENT OF FACTS**

The "EDI communications market" involves the automated transmission of digital business transactional messages, such as invoices and purchase orders, through a series of interconnected electronic VANs.<sup>3</sup> (Compl. ¶¶ 1-2, 7 (J.A. 5-6,

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<sup>3</sup> "Electronic data interchange (EDI) is the structured transmission of data between organizations by electronic means. It is used to transfer electronic documents or business data from one computer system to another computer system, *i.e.*, from one trading partner to another trading partner without human intervention. It is more than mere e-mail; for instance, organizations might replace bills of lading and even cheques with appropriate EDI messages. It also refers specifically to a

8).) These VANs are private data communications networks connected with each other using industry-standard EDI networking protocols.<sup>4</sup> (*Id.* ¶ 3 (J.A. 6.) Loren Data is an innovative EDI firm, offering a wholesale business model that for the first time gives small trading partners access to EDI services, via Loren Data’s retail customers, at reasonable cost, with lower prices and more features for end user customization. (Compl. ¶¶ 10, 20; Amended Compl., Summary ¶ j (J.A. 9-10, 28).) Like all EDI firms in this “network effects” market, Loren Data must connect its VAN with other VANs to establish routes over which information can be exchanged among Loren Data’s wholesale customers and their end users’ trading partners on other EDI networks. “The EDI communications market is similar to the telephone market where each user chooses a particular phone company thereby gaining ubiquitous access to any other telephone user on any telephone service.” (Compl. ¶ 2 (J.A. 6).) The industry-standard method of connecting VANs is a “non-settlement peer interconnect,” in which both networks allow transfer of EDI messages without charge to either interconnected VAN. (Compl. ¶ 3 (J.A. 6-7).)

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family of standards.” WIKIPEDIA, *Electronic Data Interchange*, available at [http://en.wikipedia.org/wiki/Electronic\\_data\\_interchange](http://en.wikipedia.org/wiki/Electronic_data_interchange).

<sup>4</sup> Network protocols for EDI are standardized by ASC X12, a voluntary industry standards-setting organization accredited by the American National Standards Institute to develop EDI standards for national and global markets. ASC X12, *About ASC X12*, available at <http://www.x12.org/x12org/about/index.cfm/>. “With more than 275 transaction sets, ASC X12 standards can be used to electronically conduct nearly every facet of business-to-business operations.” *Id.*

GXS has repeatedly denied a peer interconnect to Loran Data and instead offers only inferior, unworkable and prohibitively expensive “commercial mailbox” access to the GXS network.<sup>5</sup> (Compl. ¶¶ 11-16 (J.A. 10-12).) GXS refuses to deal with Loren Data in order to prevent appellant’s innovative business model from competing effectively in the United States EDI market. (Compl. ¶¶ 10, 29, 31; Amend. Compl. ¶ 19, Summary ¶¶ g-j (J.A. 9-11, 15-16; 26-28).) This is despite the fact that GXS voluntarily enters into peer interconnects with every other competing VAN in the market. (Compl. ¶ 20 (J.A. 13.)) GXS has agreed with these approximately 36 or so other EDI networks, under express, written contracts, that the peer interconnects may not be used to “transit” EDI traffic to the GXS network. These contracts explicitly forbid so-called “daisy-chaining” of EDI traffic to companies such as Loren Data (Amended Compl. ¶¶ 17-19 (J.A. 26)), that is, prohibiting use of a peer interconnect with GXS to transmit EDI messages originating on or destined for Loren Data’s network. This restraint precludes other VANs offering a peer interconnect to Loren Data from using those interconnect-

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<sup>5</sup> ASC X12 states that in the EDI industry, “interconnection” is “a peer-to-peer communication between two EDI networking companies to exchange documents on behalf of their customers.” *ASC X12 VAN/Clearinghouse Summit Identifies Interconnect Issues and Need for Standard EDI Networks Practices*, ASC X12 Press Release (Feb. 1, 2010), available at <http://store.x12.org/store/news/37-asc-x12-van-clearinghouse-summit-identifies-interconnect-issues-and-need-for-standard-edi-networks-practices>.

ions to forward EDI transactions from Loren Data’s customers to trading partners on the GXS network. (Amended Compl. ¶¶ 15, 17 & Exh. A (J.A. 25-26, 31-32).)

“[A]ny network offering EDI message routing must have access to all GXS networks in order to conduct business.” (Compl. ¶ 9 (J.A. 9).) The commercial mailbox offered by GXS is not a feasible alternative to interconnection, technologically or economically. (Compl. ¶¶ 9, 13-15 (J.A. 9-11).) It requires manual, human intervention to retrieve and send EDI messages to the destination trading partner, which contradicts the basic function of EDI as a standard-formatted means of automated electronic data exchange.<sup>6</sup> “GXS[’] provisioning Loren Data[’s] ECGrid with a [m]ailbox is akin to Verizon connecting to AT&T with a home telephone line.” (Compl. ¶ 15 (J.A. 11).) GXS imposed this second-tier status on

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<sup>6</sup> The U.S. National Institute of Standards and Technology (“NIST”) has formally defined Electronic Data Interchange. According to NIST, EDI is:

[T]he computer-to-computer interchange of strictly formatted messages that represent documents other than monetary instruments. EDI implies a sequence of messages between two parties, either of whom may serve as originator or recipient. The formatted data representing the documents may be transmitted from originator to recipient via telecommunications or physically transported on electronic storage media. In EDI, the usual processing of received messages is by computer only. Human intervention in the processing of a received message is typically intended only for error conditions, for quality review, and for special situations.

FIPS PUB 161-2, § 3.1, National Institute of Standards and Technology (April 29, 1996), available at <http://www.itl.nist.gov/fipspubs/fip161-2.htm>.

Loren Data because it disagrees with the wholesale approach Loren Data has pioneered, and evidently fears the price competition this new business model promises. GXS explained that it does not agree with “[t]he value proposition” that is “at the core of [Loren Data’s] business model.” (Amended Compl., Exh. A (J.A. 31-32).)

GXS currently has a market share of “over 50% or more of the EDI communications market” in the United States, including its 2005 purchase of IBM’s EDI division and merger last year with Inovis, Inc. (Compl. ¶¶ 5, 7 (J.A. 7-8).) As of September 2011, GXS was ranked third among all global information technology companies, ahead of IBM, Salesforce.com and Dell, moving up from sixth in 2010.<sup>7</sup> According to GXS itself:<sup>8</sup>

The GXS and Inovis merger combine[d] two of the world’s largest B2B integration services providers. Operating as GXS, the new company ... process[es] billions of transactions per year for approximately 40,000 customers worldwide, including more than 70 percent of the Fortune 500.

The official GXS press release on the June 3, 2010 Inovis transaction boasted that “[t]he merger creates the world’s largest [EDI] network.” *GXS Completes Merger*

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<sup>7</sup> *GXS Ranks 73rd on 2011 InformationWeek 500, 3rd Among IT Vendors*, GXS Press Release (Sept. 14, 2011), available at <http://www.marketwatch.com/story/gxs-ranks-73rd-on-2011-informationweek-500-3rd-among-it-vendors-2011-09-14>.

<sup>8</sup> *GXS, Inovis Merger*, available at <http://www.gxs.com/inovis/>.

*With Inovis* (June 3, 2010), available at <http://www.marketwire.com/press-release/GXS-Completes-Merger-With-Inovis-1270447.htm>.

Loren Data has a peer interconnect with Inovis, but that contract covers only the far smaller Inovis VAN (known as “Inovisworks”), not the core Trading Grid Messaging Service (“TGMS”) network operated by GXS itself.<sup>9</sup> (Amended Compl. ¶ 7 (J.A. 23.)) TGMS remains the largest VAN, with the most trading partners, in the EDI market. The GXS network cannot feasibly be replicated by Loren Data or any other EDI competitor. (Compl. ¶¶ 9, 35 (J.A. 9, 35-36.)) “[A]ny network offering EDI message routing must have access to all GXS networks in order to conduct business.” (Compl. ¶ 9 (J.A. 9.)) GXS will not permit Loren Data access to its TGMS network through a contract interconnect with any other VAN. (Amended Compl. ¶ 18 (J.A. 76.))

GXS’ decision to deny peer interconnection to Loren Data was not based on efficiency or legitimate business reasons. A peer interconnect would benefit, not harm, GXS financially. *Id.* GXS’ refusal to grant a peer interconnect to Loren Data was motivated by a desire to keep “wholesale innovators out of the market,” to stop “novel operators from bringing to market new technologies that would allow on-demand delivery models,” and to “disable and harm an innovative comp-

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<sup>9</sup> GXS, *Trading Grid Messaging Service*, available at [http://www.gxs.com/products/transact\\_messaging/edi/trading\\_grid\\_messaging\\_service](http://www.gxs.com/products/transact_messaging/edi/trading_grid_messaging_service).

etitor.” (Compl. ¶¶ 20, 25 (J.A. 13-14).) Its correspondence with Loren Data explains that GXS denied a standard peer interconnect because GXS does not view the innovative model of serving EDI service bureaus as customers — in essence a wholesale (or resale) offering as opposed to retail service provided only to EDI end users<sup>10</sup> — as a valid method of doing business. GXS concedes that “[o]ur current VAN interconnect agreements expressly prohibit daisy chaining, which is the core of your business model.” (Amended Compl., Exh. A (J.A. 31) (emphasis supplied).) GXS contends that that this business model is invalid because “Loren Data will choose the third parties who will gain access to the GXS network” and because “[t]he value proposition” for a wholesale EDI provider “is different” from what GXS views as “a partner focused on growing the EDI community.” *Id.*

### **SUMMARY OF ARGUMENT**

This appeal presents the Court with the important issue of how properly to implement the new “plausibility” standard for assessing the legal sufficiency of complaints in complex antitrust cases. The district court’s dismissal below with prejudice should be reversed on the pleading requirement and antitrust merits, as well as for procedural reasons regarding the putative futility of further amendment.

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<sup>10</sup> Loren Data Corp’s ECGridOS is “the industry’s only API programmable EDI communications network.” *About ECGrid*, ECGrid OS, available at <http://ecgridos.com/about-2/>. “We do not offer any end user services...” *Id.*

The district court fundamentally erred by insisting on detailed factual allegations that are not necessary under the *Twombly*<sup>11</sup> standard and are clearly inapplicable to a Section 1 claim premised on express agreements among competitors, as opposed to a tacit conspiracy inferred from parallel conduct. The district court appears improperly to have concluded that some of the underlying facts alleged by Loren Data, such as the competitive necessity for interconnection with all EDI provider networks, were themselves not plausible. Loren Data contended that interconnections with VANs other than appellee's are not in fact adequate for competition in the EDI market. The district court's approach represents a serious error of law because *Twombly* imposes no heightened pleading requirement for antitrust cases and still requires courts to treat all the well-pleaded factual matters in a complaint as true for Rule 12(b)(6) purposes.

The district court's substantive antitrust conclusions of law should be reversed. The court incorrectly disregarded key facts alleged in the complaint and refused to credit its central factual contention, that Loren Data's disruptive, wholesale business model posed a direct threat to GXS, the EDI market's dominant firm, thus giving GXS a powerful incentive to exclude appellant as a viable competitor. The court's dismissal of the Section 1 claim was error because it ignores the amended complaint's attached documents plainly showing, from GXS itself, an entire

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<sup>11</sup> *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

series of presumptively unlawful contractual restraints between GXS and *all* of Loren Data's other EDI communications market competitors.

The district court erroneously dismissed the Section 2 claim for attempted monopolization. The court did not consider the relationship of market share to the likelihood of success and failed to assess the factors for evaluating “dangerous probability” of achieving a monopoly that must be applied. The decision as to monopolization is also flawed because the court exceed its proper role on a motion to dismiss, determining factual matters adversely to the plaintiff and contrary to the facts actually alleged.

The essence of the complaint — which in this respect was set forth in great detail — is that an end user, paid “commercial mailbox” on the core GXS network is not the viable commercial equivalent of a peer interconnection, the industry standard, among competing EDI providers. Nonetheless, the court below found to the contrary that “there are other means of transferring EDI from one trading partner to another,” and that appellant was only complaining of “the terms and conditions” of GXS’ dealings. Loren Data made specific factual allegations, in this “network effects” industry, why access to the VANs operated by the EDI market’s dominant firm is essential to competition and cannot feasibly be replicated. These contentions of fact constitute a legally valid basis for stating a plausible claim of “essential facilities” Section 2 liability.

The district court’s decision to dismiss with prejudice — terminating Loren Data’s ability to amend — was error because the court did not even assess futility of amendment or prejudice to GXS, the only conceivable grounds for denying leave here consistent with the longstanding liberal standard of Rule 15. There are no “apparent” grounds for futility supporting affirmance if the antitrust claims are evaluated correctly in light of the well-pled facts set forth in the amended complaint.

The denial of Loren Data’s post-judgment motions for clarification and to alter or amend the judgment, which asked only that the district court state explicitly whether its prior dismissal of the antitrust claims was with or without prejudice, was a clear mistake in judgment and thus an abuse of discretion. By making a *nunc pro tunc* determination of futility, on which the district court had not ruled or even considered in dismissing the complaint — thus requiring Loren Data to show the *absence* of futility as a condition of avoiding procedural default — the court applied an incorrect legal standard and reacted out of frustration, not dispassionate judicial fairness. Federal policy as applied by this Court requires that a plaintiff “be given every opportunity to cure a formal defect in his pleading.”<sup>12</sup>

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<sup>12</sup> *Laber v. Harvey*, 438 F.3d 404, 426 (4th Cir. 2006)

## **STANDARD OF REVIEW**

Appellate review of a district court’s grant of a motion to dismiss under FED R. CIV. P. 12(b)(6) is *de novo*. *In re Pec Solutions, Inc. Securities Litig.*, 418 F.3d 379, 387 (4th Cir. 2005). A district court’s disposition of a Rule 59 post-judgment motion and a district court’s decision on whether to grant or deny leave to amend are generally reviewed for an abuse of discretion. *See, e.g., HealthSouth Rehabilitation Hosp. v. American Natl. Red Cross*, 101 F.3d 1005, 1010 (4th Cir. 1996). A reviewing court “is obligated to reverse” for abuse of discretion where it “has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors.” *Gannett Co. v. Clark Constr. Group, Inc.*, 286 F.3d 737, 741 (4th Cir 2002), quoting *Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 261 (4th Cir. 1999) (citation omitted).

## **ARGUMENT**

### **I. THE DISTRICT COURT ERRED BY DEVIATING FROM THE APPLICABLE LEGAL STANDARD FOR EVALUATING THE “PLAUSIBILITY” OF ANTITRUST CLAIMS IN A CIVIL DAMAGES COMPLAINT**

The current standard for evaluating a motion to dismiss under FED R. CIV. P. 12(b)(6) dates only from the Supreme Court’s 2007 decision in *Twombly*.<sup>13</sup> That

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<sup>13</sup> *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

test is simple to explicate but, as this appeal makes evident, rather difficult to apply in practice. See, e.g., *Nemet Chevrolet, Ltd. v. Cosumeraffairs.com, Inc.*, 591 F.3d 250 (4th Cir. 2009).<sup>14</sup>

“To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, ‘to state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009), quoting *Twombly*, 550 U.S. at 570. A district court must rule under this standard “by separating the legal conclusions from the factual allegations, assuming the truth of only the factual allegations, and then determining whether those allegations allow the court to reasonably infer” that the plaintiff is entitled to relief. *A Society Without A Name v. Virginia*, 655 F.3d 342, 346 (4th Cir. 2011). Dismissal “is inappropriate unless, accepting as true the well-pled facts in the complaint and viewing them in the light most favorable to the plaintiff, the plaintiff is unable to ‘state a claim to relief.’” *Brockington v. Boykins*, 637 F.3d 503, 505-06 (4th Cir. 2011) (citation omitted).

The district court faithfully recited these controlling precedents. Mem. at 7-8 (J.A. 42-43). As the court observed in *Southeastern Milk Antitrust Litigation*, 555 F. Supp. 2d 934, 949 (E.D. Tenn. 2008), however, “arguing that plaintiffs have

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<sup>14</sup> “While the present federal pleading regime is a significant change from the past, it remains true that a plaintiff in federal court need not allege in its initial pleading all of the facts that will allow it to obtain relief. Otherwise, the summary judgment process under Rule 56 would have little meaning.” *Nemet Chevrolet*, 591 F.3d at 260-62 (Jones, J., concurring in part and dissenting in part).

not pleaded sufficient facts appears to have become the mantra of defendants in antitrust cases.” In this context, it is important to mind this Court’s most recent admonition. Despite a common perception that *Twombly* fundamentally changed the dynamics of assessing complaints, in antitrust cases “dismissals at the pre-discovery, pleading stage remain relatively rare and are generally limited to certain types of glaring deficiencies,” such as failing to allege a legally valid relevant market. *E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 637 F.3d 435, 444 (4th Cir. 2011) (reversing dismissal of Section 2 claim).<sup>15</sup>

In this case, the district court appears to have made several logical assumptions as to whether the facts alleged by Loren Data were themselves “plausible.” Although not citing to the controlling *Twombly* standard in the substantive portions of its opinion, the district court repeatedly observes that the existence of peer interconnects between GXS and all EDI networks other than Loren Data means that, as

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<sup>15</sup> As the district court observed with evident frustration, Loren Data did not specifically articulate in its complaint the relevant geographic and product markets applicable to its Sherman Act claims, omitting a factual analysis of the cross-elasticity and related considerations arising in antitrust product market definition. Mem. at 17 (J.A. 52) (“At the pleading stage, Loren Data need only identify [the relevant markets]. Loren Data seems determined however, to comply with this straightforward pleading requirement in the most circuitous fashion.”). Nonetheless, the court properly construed the complaint’s allegations of GXS’ 50% share of the “EDI industry” and “EDI communications market” in the U.S. to mean, correctly, that Loren Data alleged that EDI is the relevant antitrust product market and that the relevant geographic market is nationwide. *Id.* Antitrust plaintiffs are of course not required to include “magic words” in order to avoid dismissal. *Kolon Indus.*, 637 F.3d. at 448.

a matter of law, there can be no plausible antitrust claims asserted against GXS. Mem. at 12, 14 n.2, 31 (J.A. 48-49 66). The legal issue raised by this approach is whether the district court’s analysis is consistent with the other side of *Twombly*, one frequently overlooked by defendants. There is no heightened factual pleading requirement for antitrust. *Twombly*, 550 U.S. at 570 (“we do not require heightened fact pleading of specifics”). Likewise, “a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations.” *Id.* at 555.

The best example of this is the district court’s insistence that Loren Data was required to “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 agreement.” Mem. at 13 (J.A. 48). As demonstrated in Section II below, that is a gloss placed on *Twombly* by lower courts applicable to contentions, unlike those at issue here, of a tacit, unwritten horizontal conspiracy to be inferred from parallel conduct of competitors in a market. It has no relevance to cases, such as Loren Data’s Section 1 claim, that are based on express, written agreements.

As the Justice Department’s Antitrust Division recently explained to this Court in an *amicus* brief, opposing a rule that antitrust plaintiffs must always plead specific details about who, when and how a defendant agreed to anticompetitive restraints under Section 1:

In *Twombly*, the plaintiffs sought to infer an agreement from defendants’ parallel failures to enter particular service markets for

several years, which “common economic experience” showed could have occurred absent an agreement. 550 U.S. at 550-51, 564-65. . . . Similarly, in *Estate Construction*, two real estate developers alleged a conspiracy to drive them out of the real estate business in violation of Section 1. . . .<sup>16</sup> This Court affirmed the dismissal of the Section 1 claim, because the complaint failed to include facts indicating “that a conspiracy existed” and “lack[ed] completely any allegations of communications, meetings, or other means through which one might infer the existence of a conspiracy.” *Id.* at 221.

Here, by contrast, the challenged agreements are embodied in specific written MLS rules identified in the complaints. It is not a matter of inference, nor even a subject of dispute, that these rules have been adopted. The additional factual details appellants demand are unnecessary to provide “fair notice of what the . . . claim is and the grounds upon which it rests.” *Twombly*, 550 U.S. at 555 (citation omitted).

Brief For the United States As Amicus Curiae In Support of Plaintiffs-Appellees, at 31-32, *Robertson v. Sea Pines Real Estate Companies, Inc.*, Nos. 11-1538 *et al.* (4th Cir. 2011).

The district court did not cite *Estate Construction* but rather *Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield, Inc.*, 552 F.3d 430, 437 (6th Cir. 2008), for the proposition that a Section 1 claim under *Twombly* “should include information as to the specific time and place of the illicit agree-

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<sup>16</sup> Citing *Estate Construction Co. v. Miller & Smith Holding Co.*, 14 F.3d 213, 222 & n.15 (4th Cir. 1994). To prevail on a Section 1 claim, “a plaintiff must establish two elements: (1) There must be at least two persons acting in concert, and (2) the restraint complained of must constitute an unreasonable restraint on interstate trade or commerce.” *Id.* at 220, citing *Oksanon v. Page Memorial Hosp.*, 945 F.2d 696, 702 (4th Cir. 1991), *cert. denied*, 502 U.S. 1074 (1992).

ment and the names of the parties to the agreement.” Mem. at 10 (J.A. 45). The result is no different. Consistent with *Twombly* and *Iqbal*, a complaint must be dismissed if it does not allege facts (and reasonable inferences) from which a tacit horizontal conspiracy can plausibly be inferred. That same conclusion clearly does *not* hold in a case, like this, involving express contracts among competitors.

*Total Benefits* is a non-controlling opinion in which the 6th Circuit ruled that absent factual allegations on the contours of competition in the market, the validity of an antitrust complaint’s relevant market allegations cannot be tested and should be dismissed. *See* 552 at 437 (“Without an explanation of the other [competitors] involved, and their products and services, the court cannot determine the boundaries of the relevant product market and must dismiss the case for failure to state a claim.”). *Total Benefits* is hence irrelevant to Loren Data’s Section 1 claim. In this appeal, the district court correctly gave plaintiff its proper inferences as to relevant market, since as the court recognized elsewhere there was detailed discussion in the complaint of the boundaries of competition and the identity of firms in the “EDI communications market.”<sup>17</sup> Therefore, by insisting on a level of detail unwarranted for the complaint’s Section 1 allegation of express horizontal

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<sup>17</sup> Mem. at 19 (J.A. 54) (“The complaint further explains details regarding the Electronic Data Interchange industry and its contours. Whether this industry [constitutes a relevant antitrust market] is a factual allegation that should ultimately be determined by the factfinder...”). *See supra* at 22 n.15.

agreements and inconsistent with the many caveats in *Twombly* that antitrust cases have no heightened pleading requirement, the district court below fundamentally departed from the appropriate standard for evaluating the “plausibility” of antitrust claims in a civil damages complaint.

In reality, the district court concluded that the *facts* alleged by Loren Data were not plausible. The existence of peer interconnects between GXS and EDI networks other than Loren Data, which the court below repeatedly cited as fatal to the complaint, does nothing to undermine the “plausibility” of either the Section 1 claim or the Section 2 monopolization and attempted monopolization claims. That is because interconnection with VANs other than GXS does not permit exchange of EDI transactions with customers on the GXS network itself, as the complaint thoroughly explained. Loren Data squarely alleged that, due to GXS’ dominance of the EDI market and the eight billion commercial EDI transactions it delivers yearly, a peer interconnection with the GXS VAN is essential to competitive success in the market. This assertion is plainly not a legal conclusion and does not require “detailed factual allegations” under *Twombly* (550 U.S. at 555). Given that assertion, which of course must be treated as true for purposes of Rule 12(b)(6), the district court erred by finding that interconnections with VANs other than appellee’s are adequate for a competitor in the EDI market. The court’s conclusion impermissibly decided well-pled facts of the complaint adversely to Loren Data,

erroneously treating the new “plausibility” standard as one akin to summary judgment under Rule 56. *Nemet Chevrolet*, 591 F.3d at 260-62 (Jones, J., concurring in part and dissenting in part).

## **II. THE DISTRICT COURT’S ANALYSIS OF THE SUFFICIENCY OF THE SHERMAN ACT CLAIMS ALLEGED IN LOREN DATA’S AMENDED COMPLAINT WAS INCORRECT AS A MATTER OF LAW AND SHOULD BE REVERSED**

Loren Data’s allegations, although hardly a model of clarity and sometimes confusing, were sufficient to meet its initial burden under Rule 8 and the Supreme Court’s *Twombly* standard for asserting “plausible” Sherman Act claims. FED. R. CIV. P. 8 (requiring “short and plain statement” of a claim for relief); *Twombly*, 550 U.S. at 555, 570.

The district court’s legal analysis of Loren Data’s Section 1, attempted monopolization and monopolization claims was erroneous because the court (a) improperly disregarded key factual allegations, (b) failed to view the facts and reasonable inferences in the light most favorable to Loren Data, and (c) incorrectly declined to credit the central factual assertion that Loren Data’s disruptive business model posed a direct threat to GXS, the EDI market’s dominant firm, giving GXS a powerful incentive to exclude appellant as a viable competitor. On each of the three antitrust claims, the district court’s analysis is either contradicted by the well-pled allegations of the complaint itself, when viewed in light of the proper criteria

for evaluating Rule 12(b)(6) motions, or is inconsistent with prevailing antitrust law on the substantive elements of the claims.

**A. The District Court Improperly Disregarded Express Factual Allegations, Supported by Incorporated Documents, Which On Their Face Demonstrate an Unlawful Horizontal Section 1 Agreement Among Competitors**

The district court dismissed the claim of an unlawful horizontal boycott agreement among GXS and other EDI providers (Count I) on the ground that Loren Data had “not alleged adequate facts to establish that GXS combined . . . with other VANs to boycott Loren Data.” Mem. at 12, 14 n.2 (J.A. 47, 49). That is erroneous because the court improperly disregarded express factual allegations, supported by incorporated documents, that on their face plainly demonstrate an *entire series* of putatively illegal Section 1 agreements among GXS and Loren Data’s other EDI market competitors.

The gist of the district court’s perceived problem with the amended complaint was the allegation that GXS had entered into agreements for peer interconnects with all EDI providers other than Loren Data.<sup>18</sup> Mem. at 13 (J.A. 48).

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<sup>18</sup> The district court did not reach the issue whether the claimed combination is a *per se* unlawful group boycott or an agreement subject to the Section 1 “rule of reason” due to its holding that Loren Data had not sufficiently alleged the predicate of a horizontal agreement. Mem. at 14 (J.A. 49). This Court consequently need not decide into which antitrust classification the alleged agreements between GXS and other EDI competitors fall. In any event, market power is an element of a *per*

“Agreements with other VANs to establish peer interconnects with GXS do not constitute an agreement to boycott Loren Data.” *Id.* This meant, according to the court, that there could not be a horizontal agreement for Section 1 purposes unless Loren Data

allege[d] 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.

Mem. at 13 (J.A 48). The unstated and obvious assumption underlying this analysis is that a peer interconnection with one VAN is a substitute for a peer interconnection with GXS.

That is a matter on which Loren Data’s complaint included both explicit factual allegations to the contrary and supporting documentation. As the amended complaint explained, GXS agreed with every VAN other than Loren Data to establish peer interconnects, under contracts that flatly prohibited the “transit” of EDI traffic from Loren Data’s VAN to the GXS network. This means that while Loren Data could exchange EDI messages with GXS’ competitors on the industry-standard basis, all of those other EDI networks are precluded by contractual restriction from delivering Loren Data’s traffic to GXS. Consequently, GXS has entered into

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*se* group boycott claim, but that was pleaded factually in this case. The courts have indicated that 30% market share is sufficient to establish market power for Section 1 purposes. *E.g., Breaux Bros. Farms, Inc. v. Teche Sugar Co., Inc.*, 21 F.3d 83, 87 (5th Cir. 1994). Loren Data alleged that GXS has at least a 50% share of the United States EDI market.

agreements with Loren Data’s competitors, *i.e.*, “combined” with them in Section 1 terms, that deny these competitors the ability to send EDI transactions upstream to GXS. This contractual restraint reinforces the refusal of GXS itself to offer a peer interconnect to Loren Data, or in antitrust parlance protects the GXS-led EDI cartel by allowing cheaters to be identified and punished.<sup>19</sup>

These horizontal agreements did not “force” competitors to “deny interconnects” to Loren Data (Mem. at 13 (J.A 48)), but instead forced them to limit use of their interconnections such that Loren Data cannot exchange EDI transactions with GXS through third-party peer interconnects. By prohibiting this so-called transit traffic, GXS agreed with every other competitor to assign Loren Data to second-tier status in the EDI market. As the letter from GXS attached to the amended complaint (J.A. 31-32) explains,<sup>20</sup> GXS imposed this industry structure because appellee does not regard the Loren Data model of serving electronic commerce

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<sup>19</sup> “The absence of effective enforcement mechanisms has led to the demise of many cartels. Consequently, successful cartels develop mechanisms for detecting and punishing cheating.” H. Hovenkamp & T. Leslie, *The Firm as Cartel Manager*, 64 VANDERBILT L. REV. 813, 835 (2011).

<sup>20</sup> “In deciding whether a complaint will survive a motion to dismiss, a [district] court evaluates the complaint in its entirety, as well as documents attached or incorporated into the complaint.” *Kolon Indus.*, 637 F.3d at 448. Indeed, even a document outside the complaint that is “integral to and explicitly relied on in the complaint,” the authenticity of which the parties do not challenge, may be considered. *Id.* at 448, quoting *Phillips v. LCI Intl. Inc.*, 190 F.3d 609, 618 (4th Cir. 1999).

service providers (“ECSPs”) as customers — a wholesale, or “resale,” offering in contrast to retail service provided to EDI end users — as a valid method of doing business. Pejoratively describing the arrangement as that of a “service bureau,” GXS admits that “[o]ur current VAN interconnect agreements expressly prohibit *daisy chaining*, which is the core of your business model.” J.A. 31 (emphasis supplied). GXS contends that this is an invalid business model because “Loren Data will choose the third parties who will gain access to the GXS network” and “[t]he value proposition” for a wholesale EDI provider “is different” from what GXS views as “a partner focused on growing the EDI community.” *Id.*

Whether these “current VAN interconnect agreements” between GXS and every other EDI provider are characterized as a unitary conspiracy among all market competitors (see *Interstate Circuit v. United States*, 306 U.S. 208 (1939)),<sup>21</sup> or a series of individual, bilateral agreements is immaterial for purposes of an

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<sup>21</sup> In *Interstate Circuit*, each of the members of an alleged horizontal anti-trust conspiracy agreed individually with only one central firm, knowing that other competitors were independently agreeing to the same terms. The Supreme Court held that such a “hub-and-spoke” conspiracy was illegal. “It is elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators. Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act.” *Interstate Circuit*, 306 U.S. at 227 (citations omitted). The amended complaint alleges all the elements of such a horizontal Section 1 hub-and-spoke conspiracy.

antitrust complaint. The district court dismissed the allegation of a horizontal “combination” on the basis that Loren Data did not sufficiently allege an agreement between GXS and anyone else except in conclusory terms the court was not required to assume were true. That may have been correct if Loren Data were asking the district court to infer a tacit agreement from parallel conduct alone. *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) (conspiracy claims must exclude the possibility of independent business decisions). To the contrary, however, Loren Data alleged an express agreement between GXS and other EDI providers and established the existence of such “current . . . agreements” from the lips of GXS itself. The only material legal question is one the district court did not reach: whether such agreements constitute a *per se* unlawful Section 1 group boycott as a matter of law.

In sum, viewed correctly Loren Data’s complaint more than sufficiently alleges that GXS, a firm having achieved market power in the United States EDI communications market, expressly agreed with Loren Data’s competitors to restrict them from “end-running” its decision not to interconnect with Loren Data. While the legal validity of appellee’s unilateral refusal to deal is evaluated under Section 2 of the Sherman Act, the agreements alleged in the complaint are explicit, and did not require the district court to draw inferences of agreement from parallel conduct

alone.<sup>22</sup> The anticompetitive purpose and restrictive effect of these contracts are likewise apparent on the face of the GXS correspondence, namely to block implementation of a new EDI business model GXS dislikes. Of course, it is settled that under the Sherman Act, no firm has a right to agree with another competitor, or competitors, in the market to refuse to deal with a firm whose “business model” is regarded as invalid, or even unlawful.<sup>23</sup> The amended complaint made just such an allegation in colloquial parlance, asserting that GXS “objects” to Loren Data’s “innovative business model, . . . but frankly it is none of their business.” (Amended Compl., Summary ¶ j (J.A. 28).) Accordingly, the district court’s dismissal of

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<sup>22</sup> Even if Loren Data had not alleged an express agreement, the complaint’s allegations would still rise above mere parallel conduct due to the inclusion of a recognized “plus factor.” *In Re Insurance Brokerage Antitrust Litigation*, 618 F.3d 300, 321 (3rd Cir. 2010), citing *Twombly*, 550 U.S. at 554 (“plaintiff’s offer of conspiracy evidence must tend to rule out the possibility that the defendants were acting independently”). Courts have identified motive and “evidence that the defendant acted contrary to its interests” as plus factors. *Id.* (internal citations omitted). Loren Data alleged that by denying it a peer interconnect, GXS was acting contrary to its own economic interests, sacrificing short-term revenues and rejecting its own customer’s requests for a peer interconnection with the Loren Data VAN. (Complaint ¶¶ 17, 32; Amend. Complaint ¶ 8 (J.A. 12, 16, 23).)

<sup>23</sup> *Radiant Burners, Inc. v. People’s Gas Co.*, 340 U.S. 656 (1961) (refusal of trade association members to offer gas for use in competing, unapproved burners was *per se* unlawful); *Fashion Originators’ Guild v. FTC*, 312 U.S. 457 (1941) (refusal by garment manufacturers to deal with stores selling “style pirate” clothing was *per se* unlawful). See *FTC v. Indiana Fed. of Dentists*, 470 U.S. 447, 465 (1986) (“[t]hat a particular practice may be unlawful is not, in itself, a sufficient justification for collusion among competitors to prevent it”).

Loren Data’s Section 1 claim on the ground that the complaint alleged a horizontal agreement only in legally defective, conclusory terms is erroneous as a matter of law and should be reversed.

**B. The District Court’s Determination That Loren Data Had Not Alleged a “Dangerous Probability” of Monopolization Is Erroneous As a Matter of Law**

The district court dismissed Loren Data’s claim for attempted monopolization under Section 2 of the Sherman Act (Count II) on the basis that “Loren Data has not alleged facts to establish a dangerous probability that GXS will succeed in establishing a monopoly.” Mem. at 30 (J.A. 65). The court reasoned that GXS is “not likely” to monopolize the EDI market “if it refuses to deal with only one of 36 available EDI networks,” and that “two acquisitions in a ten year period . . . do not suggest that GXS is on a path to market domination.” *Id.* This legal conclusion is erroneous as a matter of law.

The court’s opinion correctly recites that attempted monopolization requires “specific intent” to monopolize and a “dangerous probability” of success. Mem. at 30 (J.A. 65), citing *In re Microsoft Antitrust Litig.*, 333 F.3d 517, 534 (4th Cir. 2003).<sup>24</sup> Yet although the district court quoted extensively from *M&M Medical Supplies & Servs., Inc. v. Hartz Mountain Corp.*, 981 F.2d 160, 166 (4th Cir. 1982)

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<sup>24</sup> See *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456-57 (1993) (elements of attempted monopolization under Section 2).

(Mem. at 30 (J.A. 65)), it did not apply the factors for assessing attempted monopolization claims set forth by this Court.

*First*, the district court did not evaluate the relationship of market share to the plausibility of a likelihood of success. *M&M* makes clear that “[a] rising share may show more probability of success than a falling share.” Mem. at 30 (J.A. 65). Loren Data alleged that GXS controls a market share of at least 50% in the United States and 90% in the United Kingdom. (Compl. ¶¶ 5, 7-8 (J.A. 7-9).) It further contended that GXS has engaged in “an aggressive campaign” to monopolize through a series of acquisitions to increase its market control, specifically pointing to GXS’ acquisition of IBM’s EDI division in 2005 and its merger with Inovis in June 2010. (Compl. ¶ 7 (J.A. 8).) Although Loren Data did not clearly assert that GXS’ market share had been increasing, that is the evident inference from the complaint’s factual allegations, an inference which under Rule 12(b)(6) a district court is required to draw in favor of the plaintiff as non-moving party. *See Kendall v. Balcerzak*, 650 F.3d 515, 522 (4th Cir. 2011).<sup>25</sup>

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<sup>25</sup> Under Rule 12(b)(6), it is settled that a district court ““must accept as true all of the factual allegations contained in the complaint,”” and must ““draw all reasonable inferences in favor of the plaintiff.”” *Kolon Indus.*, 637 F.3d at 440, quoting *Erickson v. Pardus*, 551 U.S. 89, 94 (2007), and *Nemet Chevrolet*, 591 F.3d at 253. By concluding that “two acquisitions in a ten year period . . . do not suggest that GXS in on a path to market domination,” Mem. at 30 (J.A. 65), the district court violated this rule. The complaint asserted that Loren Data has competed as a VAN for about ten years (since 1997), but that GXS made a series of acquisitions

*Second*, the district court did not evaluate the interplay between anticompetitive conduct, specific intent and “[o]ther factors [that] *must* be considered” in assessing the validity of a claim of attempted monopolization. Mem. at 30 (J.A. 65), quoting *M&M*, 981 F.2d at 168 (emphasis supplied), and 3 P. Areeda & D. Turner, ANTITRUST LAW ¶ 835, at 346-48 (1st ed. 1978). The court’s reasoning with regard to the alleged refusal to deal with Loren Data suffers from the same fundamental infirmity as the district court’s Section 1 holding. By failing to credit the complaint’s factual allegation that Loren Data’s disruptive, wholesale business model poses a substantial competitive threat to GXS, and that GXS responded by imposing restraints — across the entire industry — which preclude smaller retail service bureaus from utilizing Loren Data’s EDI networks to exchange commercial transactions with GXS’ end user customers, the district court totally missed the central point of this lawsuit. The contractual restrictions demanded by GXS, together with their expressed anticompetitive motivation, represent the “compelling evidence” of exclusionary conduct which “reduces the level of market share

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*over five years* (2005-10) to enhance its market power. (Compl. ¶ 7 (J.A. 8).) While the complaint did state that [i]n the past decade” GXS has conducted “an aggressive campaign” to monopolize “the EDI communications market,” *id.*, it specifically alleged acquisitions over the past five years. The court’s rejection of this well-pled factual allegation as a basis for plausible Section 2 liability did not draw all reasonable inferences in favor of Loren Data and contradicts the facts actually asserted in the complaint.

that need be shown” to make out a valid claim of attempted monopolization.

*M&M*, 981 F.2d at 168.

Had the district judge properly analyzed these factors, it would have been required as a legal matter to sustain the complaint against GXS’ facial challenge. Loren Data alleged that as a networks effects industry, the EDI market is such that the value of any individual VAN is dependent on whether it is interconnected with other EDI networks, because end user trading partners naturally desire and this demand (like telephone users) to be able to reach subscribers of all other competing networks. (Compl. ¶¶ 2-4 (J.A. 6-7)).<sup>26</sup> Loren Data alleged that GXS wanted to exclude Loren Data because 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.<sup>27</sup>

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<sup>26</sup> See, e.g., *United States v. Microsoft Corp.*, 253 F.3d 34, 49 (D.C. Cir. 2001) (en banc) (“[a]n individual consumer’s demand to use (and hence her benefit from) the telephone network . . . increases with the number of other users on the network whom she can call or from whom she can receive calls.”); *United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 240 (2d Cir. 2003) (retail merchants must participate in all major credit card networks or risk losing a substantial amount of business); H. Shelanski & J. Sidak, *Antitrust Divestiture in Network Industries*, 68 U. CHI. L. REV. 1, 8 (2001).

<sup>27</sup> For the enhanced competitive significance for antitrust purposes of disruptive or so-called “maverick” firms, see, e.g., J. Baker, *Mavericks, Mergers, and Exclusion: Proving Coordinated Competitive Effects Under the Antitrust Laws*, 77 N.Y.U. L. REV. 135 (2002); U.S. Department of Justice & Federal Trade Commis-

Since communications network deployment is plainly a major capital and time investment, the EDI industry is surely not one in which “ease of entry . . . heralds slight chance of success.” *M&M*, 981 F.2d at 168. Consequently, Loren Data made the precise factual allegations warranting a legal conclusion that the likelihood of success from GXS’ efforts to monopolize the EDI market — at the stage of evaluating the legal sufficiency of Loren Data’s complaint — is “substantial and real.” *Id.*

**C. The District Court Erroneously Determined Factual Issues Adversely To Loren Data In Holding That Appellee Had Not Denied Network Interconnection Or Access To an “Essential Facility” To Loren Data**

The district court dismissed Loren Data’s Section 2 claim for monopolization (Count III) on several bases, but principally that Loren Data had not alleged an unlawful or anticompetitive refusal to deal and that the GXS network is not an “essential facility” in the EDI market because (i) “there are other means of transferring EDI from one trading partner to another,” and (ii) the plaintiff “has successfully worked around GXS’ refusal to provide an interconnect for the past ten years.” Mem. at 28 (J.A. 63). These conclusions are erroneous because they

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tion, COMMENTARY ON THE MERGER GUIDELINES (2006) (“section 2.12 of the Guidelines addresses the acquisition of ‘maverick’ firms, *i.e.*, ‘firms that have a greater economic incentive to deviate from the terms of coordination than do most of their rivals (*e.g.*, firms that are unusually disruptive and competitive influences in the market),” available at <http://www.justice.gov/atr/public/guidelines/215247.htm#26>.

determined material facts adversely to Loren Data and contrary to the factual matters actually alleged in the complaint.

The district court relied on *Verizon Communications v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004), for the proposition that “a private company has the right to choose with whom it does business and has no duty to aid competitors.” It also reasoned that GXS had not refused to deal with Loren Data because appellee offered “three current connections between the Loran Data VAN and the GXS VAN.” Mem. at 24-25 (J.A. 59-60.) However, *Trinko* did not overrule a long line of cases, including *Lorain Journal v. United States*, 342 U.S. 143 (1951), *Aspen Skiing v. Aspen Highlands Skiing*, 472 U.S. 585 (1985), and *United States v. Microsoft Corp.*, 253 F.3d 34, 70-71 (D.C. Cir. 2001) (en banc), in which courts have found firms with market power liable for refusing to deal with rivals or companies that worked with rivals, under circumstances analogous to those alleged here. Nor do either *Trinko* or *Twombly* authorize a district court to reject factual allegations of a complaint as untrue simply because the defendant argues they are not correct.

For example, in *Lorain Journal*, the Court found that a newspaper was liable when it refused to do business with advertisers that also did business with a new competitor. In *United States v. Microsoft*, the D.C. Circuit held that Microsoft violated section 2 of the Sherman Act when it conditioned its willingness to cooperate

with various third parties on their agreement to work exclusively or near exclusively with Microsoft. And in *Aspen Highlands*, the defendant had dealt with a competing ski area for years, then terminated the relationship at expiration of the parties' contract for interchangeable lift tickets, which the Supreme Court found was an exclusionary act maintaining Aspen's monopoly power. Consequently, it is clear that a refusal to deal by a firm with monopoly power can be the legal basis for a Section 2 claim of unlawful monopolization.

The court here actually determined factual issues, pled squarely by Loren Data, to support its improper conclusion that GXS had not refused to deal, only refusing "the terms and conditions desired by a plaintiff" and charging Loren Data for the mailbox arrangement. Mem. at 25 (J.A. 60).<sup>28</sup> While the district court accepted GXS' argument on brief that the complaint "identified three current connections" with GXS, *id.*, the complaint itself was explicitly to the contrary, albeit somewhat terse. Loren Data asserted that these arrangements (a) are not

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<sup>28</sup> There is a wealth of antitrust literature on how raising rivals' costs can be used as an exclusionary tactic by a firm with market power to drive competitors out of and thus monopolize a relevant product market. The seminal work is S. Salop & D. Scheffman, *Raising Rivals' Costs*, 73 AM. ECON. REV. 267 (1983). See *Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins., Inc.*, 784 F.2d 1325 (7th Cir. 1986) ("When a firm finds a way to confront its rivals with higher costs, it may raise its own prices to consumers without drawing increased output from them."); *cf. Aspen Highlands*, 472 U.S. at 604 n.31 ("By disturbing optimal distribution patterns one rival can impose costs upon another, that is, force the other to accept higher costs."); R. Bork, *THE ANTITRUST PARADOX* 156 (1978).

actually interconnects, but are instead qualitatively different and non-substitutable forms of message exchange, such as the manual end user “commercial mailbox” on the GXS network that does not allow automated delivery of transactional messages, the key feature of EDI,<sup>29</sup> (b) are incompatible with the “industry standard” form of EDI interconnection, namely a peer interconnect, and (c) with respect to Inovis, involve a peer interconnect with just one small part of the GXS network, inherited only by acquisition, not the core and far larger TGMS network operated by GXS itself. (Compl. ¶ 6) (J.A. 8).)

In short, what the district court did here was pick-and-choose among the complaint’s allegations to manufacture a factual finding that is directly inconsistent with the facts Loren Data specifically alleged. The essence of the complaint is that an end user, paid “commercial mailbox” on the GXS network is not in fact an interconnection among competing EDI VANs. The GXS correspondence annexed to the complaint makes plain that GXS itself does not regard a mailbox arrangement as a network interconnection because it refuses interconnects with “resale” EDI providers, of which Loren Data is the pioneer. Only GXS’ lawyers have ever

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<sup>29</sup> Amended Compl. ¶ 7 (J.A. 23). The formal U.S. government definition of EDI makes clear that “[i]n EDI, the usual processing of received messages is by computer only. Human intervention in the processing of a received message is typically intended only for error conditions, for quality review, and for special situations.” NIST, FIPS PUB 161-2, *supra*, § 3.1.

suggested that a paid commercial EDI mailbox is in fact a peer interconnect or its commercial substitute.

More importantly, the amended complaint goes into detail about why a mailbox assignment is not technically or economically a viable alternative to a peer interconnect. (*E.g.*, Compl. ¶¶ 3, 9, 13-15, 21, 24 (J.A. 6, 9-11, 13-15).) The purpose of those allegations was two-fold: to provide a basis for the Section 2 claims by asserting exclusionary practices not grounded in efficiency (thus satisfying the anticompetitive conduct element of a monopolization offense), and to offer the facts necessary for a plausible legal claim that the GXS network is an essential facility because EDI message exchange other than via peer interconnection is not a competitively effective alternative to GXS' VAN. Concluding that GXS has only differed as to the "terms and conditions" of its dealings with Loren Data in light of these allegations is an impermissible evaluation of whether a plaintiff's factual allegations — as opposed to its legal claims — are themselves "plausible." Even factual allegations a district court believes the plaintiff cannot possibly prove must as a matter of law be treated as true for purposes of a Rule 12(b)(6) motion.<sup>30</sup>

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<sup>30</sup> The district judge's conclusion as to the lack of "essentiality" to the GXS network is infirm for many of these same reasons. Loren Data did not simply parrot the elements of a Section 2 monopolization claim under the essential facilities doctrine in conclusory terms. To the contrary, the complaint at some

Finally, the district court’s conclusion that appellant “has successfully worked around GXS’ refusal to provide an interconnect for the past ten years,” Mem. at 28 (J.A. 63), is totally contrary to the facts pled in the complaint. Loren Data has *not* been successful in its efforts to establish a new model for EDI transactions or in competing with GXS or any of the other interconnected VANs in the EDI market. In sharp contrast, Loren Data has “missed numerous market opportunities, attained reduced market footprint, lost revenue, and was forced into taking on extraordinary expenses.” (Compl. ¶ 21 (J.A. 13).) Loren Data asserted that the commercial mailbox alternative was “horribly under-provisioned and intentionally degraded” by GXS, *id.* ¶ 24 (J.A. 14), and included comprehensive factual allegations why a mailbox is commercially impracticable. *Id.* ¶¶ 13-14 (J.A. 10-11). Loren Data has “languished” in the market due to the lack of a peer interconnect, *id.* ¶ 21 (J.A. 13), and the anticompetitive offer of a mailbox by GXS has “result[ed] in a loss of message visibility and tracking across networks, creating confusion, and a loss of Loren Data brand recognition and value.” *Id.* ¶ 24 (J.A. 14).

Revealingly, the amended complaint asserted that 55% of Loren Data’s EDI customer transactions are destined for GXS trading partners, asking rhetorically

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length provides a thorough explanation why interconnection with the TGMS network operated by GXS is essential to competition in network effects industries such as the EDI communications market.

“What business that has labored in its field for [nearly] 20 years could survive a loss of 55% of its business?” (Amended Compl., Summary ¶ m (J.A. 29).) That is hardly the stuff of a “successful” EDI provider competitor. The district court’s baseless conclusion to the contrary demonstrates a disturbing tendency of the district judge, in this case at least, to substitute her own view of the facts for those actually pled.

### **III. THE DISTRICT COURT ERRED BY DISMISSING THE AMENDED COMPLAINT WITH PREJUDICE ABSENT ANY CONSIDERATION OF OR FINDING THAT FURTHER AMENDMENT WOULD BE FUTILE**

Loren Data moved the district court for clarification of whether its dismissal of the federal and state antitrust claims was with prejudice. (J.A. 77-79.) Its motion explained that “Loren Data seeks clarification in order to determine whether to move the [district] court for reconsideration of any prejudicial dismissal or, as appropriate, file a notice of appeal.” (J.A. 77.) The court denied this motion on the ground, in part, that its August 9 decision was a final judgment that dismissed the complaint with prejudice except for the supplemental state breach of contract claim. (J.A. 89.)

The propriety of the district court’s denial of Loren Data’s post-judgment motions is addressed in Section IV below. The initial motion for clarification is mentioned here to highlight one incontestable procedural fact. The district court did not address, evaluate or state in connection with dismissal of the complaint

whether “amendment would be prejudicial to the opposing party, there has been bad faith on the part of the moving party, or the amendment would [be] futile.” *In re Rood*, 426 B.R. 538, 558 (D. Md. 2010) (Chasanow, J.), citing *Laber v. Harvey*, 438 F.3d 404, 426-27 (4th Cir. 2006) (citations omitted). That was reversible error.

The court’s opinion conspicuously declined to adopt — indeed, does not ponder at all — GXS’ argument that Loren Data had supposedly “admitted” facts in its complaint which “entirely foreclose any plausible allegation” of an antitrust violation. GXS Memorandum of Law In Further Support of Motion To Dismiss, at 21 (April 20, 2011) (ECF Doc. 18). Nor does the district court’s order state whether the antitrust claims were dismissed with prejudice; although to be fair, the implication from the order’s “without prejudice” language regarding Count VI suggests they were. (J.A. 76.)

It is still true that in federal court a “dismissal with prejudice is a harsh sanction that should not be invoked lightly in view of ‘the sound public policy of deciding cases on their merits.’” *Reizakis v. Loy*, 490 F.2d 1132, 1135 (4th Cir. 1974), quoting 9 C. Wright & A. Miller, FEDERAL PRACTICE & PROCEDURE § 2370, at 216-17 (1st ed. 1973); accord, *Matrix Capital Mgmt. Fund, L.P. v. Bearingpoint*, 576 F.3d 172, 194 (4th Cir. 2009). Under *Foman v. Davis*, 371 U.S. 178 (1962), a failure by the district court to make determinations as to prejudice, bad

faith of futility “alone may constitute an abuse of discretion.” *Id.* at 182. This Court has further held that a district court’s “failure to articulate reasons for [denying leave to amend] does not amount to an abuse of discretion” so long as its reasons are “apparent.” *In re PEC Solutions, Inc. Securities Litig.*, 418 F.3d 379, 391 (4th Cir. 2005); *Edwards v. City of Goldsboro*, 178 F.3d 231, 242 (4th Cir. 1999).

Unlike *PEC Solutions*, however, here the district court did not even address amendment, let alone opine in summary fashion that dismissal should be with prejudice “for the reasons stated above” in its decision. 418 F.3d at 391. Nor is there anything in the district court’s August 9 opinion that articulates an “apparent” basis for concluding amendment would necessarily be futile.

As this Court has observed, the courts of appeal are “ill-suited to decide a claim of futility not addressed by the district court.” *Franks v. Ross*, 313 F.3d 184, 193 n.12 (4th Cir. 2002). The ordinary result in federal court is that an opinion dismissing a complaint states whether dismissal is with prejudice, and if so addresses why amendment would be inconsistent with the liberal standard of FED. R. CIV. P. 15. Appellant is not arguing for a rule of law that requires this in every case on pain of reversal. In light of the evident viability of Loren Data’s antitrust claims (properly construed, as demonstrated above), however, there is no

legitimate ground in this case for concluding that further amendment would be futile.

The district court's failure to explain why the dismissal was with prejudice is amplified by its refusal to permit an oral hearing on the motion to dismiss. Loren Data's complaint and its legal memorandum opposing the motion to dismiss were confusing, "circuitous" (Mem. at 17 (J.A. 52)) and plainly prepared by a solo practitioner not thoroughly familiar with the complex history of federal court antitrust decisions. By declining to permit trial counsel to explicate the theory animating his complaint — in which, for instance, the importance of Exhibit A (the GXS correspondence) would surely have been pointed out — the district court seems to have acted more out of frustration than judicial fairness.

Even under the abuse of discretion standard, this Court "must engage in meaningful appellate review." *United States v. Abu Ali*, 528 F.3d 210 261 (4th Cir. 2008). The typical test for abuse of discretion is whether the district court "committed a clear error of judgment . . . upon a weighing of the relevant factors." *Gannet Co.*, 286 F.3d at 741. Because the district court below did not weigh *any* of the relevant factors at all, and its opinion has no apparent grounds for a finding of futility of amendment, dismissal of the antitrust claims in the amended complaint should be reversed.

#### **IV. DENIAL OF LOREN DATA’S POST-JUDGMENT MOTIONS WAS A REVERSIBLE ABUSE OF DISCRETION BECAUSE THE DISTRICT COURT IMPROPERLY SHIFTED THE BURDEN OF DEMONSTRATING THE ABSENCE OF FUTILITY OR PREJUDICE TO APPELLANT**

Loren Data, through the undersigned substitute counsel, timely moved the district court after entry of the order dismissing its complaint (a) to clarify “whether the order . . . was made with prejudice or without prejudice,” Mem. II at 6 (J.A. 89), and (b) subsequently, and explicitly as a “protective” measure to safeguard its right to appeal, for reconsideration and to “alter or amend” the judgment under FED. R. CIV. P. 59 and 60. *Id.* at 2-3 & 2 n.3. Relying on *Pacific Ins. Co. v. Am. Natl. Fire Ins. Co.*, 148 F.3d 396, 403 (4th Cir. 1998), the district court with barely suppressed annoyance denied both motions, concluding that Loren Data “wholly fail[ed] to address the three limited grounds for reconsideration under Rule 59(e), and none of them is applicable here.” Mem. II at 6-7 (J.A. 89-90).

The court’s error is that, contrary to its decision, Loren Data did *not* “seek to convince the court to dismiss its . . . claims *without prejudice* in order for Plaintiff subsequently to request leave to amend its complaint.” *Id.* at 6 (J.A. 89) (emphasis in original). To the contrary, Loren Data explained that it was caught in a “Catch 22” situation because, if dismissal was with prejudice, leave to amend would not be in order. That is because “once judgment is entered the filing of an amended complaint is not permissible until judgment is set aside or vacated.” *National*

*Petrochemical Co. of Iran v. M/T Stolt Sheaf*, 930 F.2d 240, 244 (2d Cir. 1991).

“Loren Data cannot unilaterally assume the dismissal was without prejudice because that might result in procedural default, *i.e.*, denial of a motion for leave to amend if the Court has already determined further amendment will not, for some reason, be permitted.” (J.A. 78).

In this light, the court’s characterization of the motions as seeking reconsideration of the dismissal itself is invalid. Loren Data utilized available procedures reasonably to attempt to determine — because the court’s opinion did not rule on GXS’ Rule 12(b)(6) request that the antitrust claims be dismissed with prejudice — the status of its complaint. As the conclusion to the clarification motion makes clear, Loren Data asked only that the Court “issu[e] a revised or supplemental Order stating whether the August 9, 2011 dismissal of Counts I-V of the Amended Complaint was with prejudice to further amendment.” (J.A. 89.)

The second motion likewise did not attempt substantive reconsideration.

Rather, Loren Data moved for:

1. Reconsideration of the Order pursuant to Local Rule 105(10) because neither the Order nor the Court’s accompanying Opinion specified whether dismissal of counts I-V of the Complaint for failure to state a claim for relief was without prejudice to amend.
2. To alter or amend the Court’s Order under Rules 59 and 60 of the Federal Rules of Civil Procedure (Fed. R. Civ. P. 59(e), 60(a)) to state whether the dismissal was with or without prejudice.
3. Alternatively, to extend the time for appeal pursuant to Rule 4 of the Federal Rules of Appellate Procedure (Fed. R. App. P. 4(a)(5)) until the later of 30 days after entry of judgment or 14 days

after the Court decides Plaintiff’s pending Motion for Clarification (ECF No. 24).

(J.A. 81.). The motion stated directly (as its title indicated) that “Loren Data seeks this relief solely as a protective matter in order not to waive or default on its right to appeal if . . . further amendment is not to be permitted.” (J.A. 82.)

The problem Loren Data faced was that there was no assurance the district court would or could decide the motion for clarification within the 30 days allowed for appeal under FED. R. APP. P. 4. “[I]f the Court is unable to rule on Plaintiff’s Motion for Clarification until after the 30-day time period for appeal has run — a distinct possibility if the Court awaits an opposition from Defendant, currently due September 6 — Loren Data could lose its right to appeal the Order.”<sup>31</sup> Loren Data Memorandum of Law, at 1-2 (Aug. 23, 2011) (ECF Doc. 27). Thus, because filing an immediate appeal could otherwise divest the district court of jurisdiction,<sup>32</sup> Loren Data simply sought to preserve its appellate rights.

The district court therefore applied the wrong legal standard in ruling that Loren Data had not satisfied the bases for the “extraordinary remedy” of “recon-

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<sup>31</sup> The September 6 date for submission by GXS of an opposition to the clarification motion was just two days before expiration of the 30-day period for filing a notice of appeal. That would have left precious little time for a reply memorandum by Loren Data, let alone a decision by the district court, prior to the Rule 4 deadline.

<sup>32</sup> *Venen v. Sweet*, 758 F.2d 117, 122 n.6 (3d Cir. 1985); see Fed. R. App. P. 4(a)(4).

sideration of a judgment after its entry.” Mem. II at 5 (J.A. 79) (citation omitted). Use of an incorrect legal standard is by definition an abuse of discretion. *E.g.*, *Hunter v. Earthgrains Co. Bakery*, 281 F.3d 144, 150 (4th Cir. 2002). Likewise, to the extent futility and prejudice represent factual determinations, as this Court has implied, “a decision [denying amendment] premised on a ‘clearly erroneous finding of material fact’ constitutes an abuse of discretion.” *Franks v. Ross*, 313 F. 3d at 194, quoting *Quince Orchard Valley Citizens Assn. v. Hodel*, 872 F. 2d 75, 78 (4th Cir. 1989).<sup>33</sup> On that basis alone, the district court’s judgment should be reversed.

More pointedly, what the district court did was to reverse the burden of persuasion by requiring Loren Data to show that amendment would *not* be futile. Even if the court’s failure to address futility in its August 9 opinion and order was not error or an abuse of discretion under the liberal Rule 15 standard (*see* Section III above), this certainly was.

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<sup>33</sup> It is more likely that futility of amendment is properly considered a legal question. As with statute of limitations, this Court arguably should review denial of amendment on that ground *de novo*. “Where, as here, the challenge is not to the existence of certain facts, but instead rests on “whether those facts demonstrate a failure [to bring a timely claim,] resolution . . . turns on questions of law which are reviewed *de novo*.” *Franks v. Ross*, 313 F. 3d at 192 (ellipses in original), quoting *United States v. United Med. and Surgical Supply Corp.*, 989 F.2d 1390, 1398 (4th Cir. 1993). Disposition of Loren Data’s appeal as to the post-judgment motions denied below, however, does not turn on the applicable standard of appellate review.

While it is of course true that a dismissal under Rule 12(b)(6) is “with prejudice unless it specifically orders dismissal without prejudice,” Mem. II at 6, quoting *Carter v. Norfolk Cmty. Hosp. Assn.*, 761 F.2d 970, 974 (4th Cir. 1985), that is a thoroughly formalistic approach to amendment in a complex antitrust case, especially given the ambiguity courts today face in applying the new *Twombly* “plausibility” standard. As the district court here made no findings on futility or prejudice, its *sub silentio* determination that the complaint should be dismissed with prejudice required Loren Data to disprove futility, without benefit of any reasoning to be countered on reconsideration. It is the party *opposing* amendment, however, that “bears the burden” under Rule 15(a). *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186-87 (9th Cir. 1987).<sup>34</sup>

As the Ninth Circuit explained with respect to amendment of a dismissed complaint:

[I]t is the consideration of prejudice to the opposing party that carries the greatest weight. Prejudice is the “touchstone of the inquiry under rule 15(a).” Absent prejudice, or a strong showing of any of the remaining *Foman* factors, there exists a presumption under Rule 15(a) in favor of granting leave to amend. A simple denial of leave to amend without any explanation by the district court is subject to reversal. Such a judgment is “not an exercise of discretion; it is

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<sup>34</sup> Counsel has been unable to find a reported opinion by this Court expressly deciding which party bears the burden as to the “futility” and “prejudice” elements of the Rule 15 standard for amendment.

merely abuse of that discretion and inconsistent with the spirit of the Federal Rules.”

*Eminence Capital, LLC v. Aspeon, Inc.*, 316 F. 3d 1048, 1052 (9th Cir. 2003) (citations omitted).

This Court emphasized just five years ago that “[t]he federal policy of deciding cases on the basis of the substantive rights involved rather than on technicalities requires that [the] plaintiff be given every opportunity to cure a formal defect in his pleading.” *Laber v. Harvey*, 438 F. 3d at 426, quoting 5A C. Wright & A. Miller, FEDERAL PRACTICE & PROCEDURE § 1357 (2d ed. 1990), and citing *Ostrzenski v. Seigel*, 177 F.3d 245, 252-53 (4th Cir. 1999). Amendments adding an entirely new claim for relief, not at issue here, are permissible even on the eve of trial. *Medigen of Kentucky v. Public Serv. Commn. of West Virginia*, 985 F. 2d 164 (4th Cir. 1993). Under these precedents, Loren Data respectfully suggests that the unexplained, *nunc pro tunc* determination of a prejudicial dismissal, which required appellant unfairly to show the *absence* of futility or prejudice, constitutes an abuse of discretion and should be reversed.

## **CONCLUSION**

For all the foregoing reasons, the district court's judgment dismissing Loren Data's amended complaint should be reversed in part and remanded as to appellant's federal and state law antitrust claims.

## **REQUEST FOR ORAL ARGUMENT**

Counsel requests argument pursuant to Local Rule 34(a).

Respectfully submitted,

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Dated: December 1, 2011

## **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) in that the brief contains 13,516 words, as calculated by the Microsoft Word 2010 software application, excluding those parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii); and

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) in that the brief has been prepared in a proportionately spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

/s/ Glenn B. Manishin  
Glenn B. Manishin

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on this 1st day of December, 2011, he caused to be served a true and correct copy of the foregoing Brief for Appellant upon counsel for appellee, at the addresses below named, by ECF and electronic mail:

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