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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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**REPLY BRIEF FOR APPELLANT**

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Glenn B. Manishin  
DUANE MORRIS LLP  
505 9th Street, N.W., Suite 1000  
Washington, D.C. 20004  
202.776.7813  
202.478.2875 fax

*Counsel for Appellant Loren Data Corp.*

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## ARGUMENT

### **I. LOREN DATA’S KEY FACTUAL CONTENTIONS HAVE NOT BEEN WAIVED AND, CONTRARY TO GXS’ SUGGESTION, WERE NOT PRESENTED FOR THE FIRST TIME ON APPEAL**

GXS rightfully points out the obvious: Loren Data did not appeal, and thus waived, the dismissal of its state law tortious interference and price discrimination claims. Brief For Defendant-Appellee (“GXS Br.”) at 3-4. Appellee implies, however, that Loren Data also improperly raised two issues only on appeal, suggesting that (a) Loren Data did not contend that a commercial EDI mailbox is not a substitute for a peer interconnection between VANs, and (b) Loren Data’s status as a disruptive or so-called “maverick” competitor was not alleged below.<sup>1</sup>

GXS is plainly incorrect. The amended complaint, and Loren Data’s opposition to the motion to dismiss, each set forth — repeatedly and in relatively thorough detail — both of those key factual allegations. For instance:

There are neither satisfactory alternative routing measures nor technologies that can substitute for a native, non-settlement peer-ing connection. . . . The exchange of mutual, bi-directional EDI message traffic at network-scale is only economically feasible via non-settlement, peer interconnects using the industry standard X12.56 Interconnect Mailbag Control Structure.

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<sup>1</sup> GXS Br. at 14 (“Loren Data argues for the first time on appeal that a commercial mailbox is ‘qualitatively different and non-substitutable forms of message exchange’ [sic] than an interconnect.”); *id.* at 16 (Loren Data argues “for the first time on appeal that Loren Data was a ‘maverick’ the loss of which would adversely affect competition.”). *Accord, id.* at 27, 34.

[In contrast,] an EDI “[m]ailbox” is an endpoint for EDI information. Mailboxes are paid services for trading partners, whose connection requirements differ greatly from a peer VAN. . . . Mailbox requires the end-user to set-up, and manually configure[,] each and every trading partner relationship, . . . do not commonly have an automated file-by-file confirmation system and depend on a response from the other trading partner, which the mailbox user has a direct relationship with, to determine if a transmission is ultimately successful.

Compl. ¶¶ 9, 13 (J.A. 9, 10). That is simply one example; a compilation of Loren Data’s relevant allegations as to these matters is annexed as Exhibit 1.

This illustrates that GXS’ position on appeal avoids the facts and arguments actually presented by Loren Data. A core (indeed, the very first) argument advanced by appellant to this Court is that the district judge determined certain material facts adversely to Loren Data as plaintiff. Brief For Appellant (“Opening Br.”) at 20-26. Yet GXS neither cites to nor defends the propriety of the district court’s application of the settled rule that on a motion to dismiss, a complaint’s allegations of fact must not only be assumed true, but interpreted (with all reasonable inferences) in the light most favorable to the plaintiff. *See id.* at 17, 21, 25, 26, 35 n.25, 42.

The heart of Loren Data’s complaint was that the imposition of a “commercial mailbox” arrangement is neither technically, economically nor as a matter of industry practice and standards an interconnection between EDI VANs. Repeating the shibboleth that Loren Data instead complains only of being forced to pay for

access to the GXS network (*e.g.*, GXS Br. at 36-38, 46-47) belies the reality of the amended complaint, the evident antitrust theory of the case and the ample supporting factual allegations advanced by Loren Data.<sup>2</sup>

As summarized in the complaint, “[p]eer networks at scale, such as Loren Data’s ECGrid network with 18,000 trading partners, cannot use a [m]ailbox since such services are designed for end users with manual configuration. . . . [Since 2003] GXS persisted in its refusal to provide an appropriately configured [i]nterconnect using the standard protocols and configuration granted to other peer networks of scale, and Loren Data was forced by this arrangement to . . . rely on the retail services oriented GXS [m]ailbox and its manual web interfaces.” (Compl. ¶¶ 15, 19 (J.A. 11, 12).) There are some things, like market definition, that were not fully explicated by Loren Data, but the competitive impracticability and non-substitutability of a commercial mailbox — which as set forth below and on brief here (Opening Br. at 4, 13, 41) is a form of “manual” communication directly inconsistent with the automated delivery of electronic messages inherent to EDI — is not one of them.

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<sup>2</sup> See Section II *infra* at 4-8. Notwithstanding GXS’ incorrect insistence that this dispute is only about the price of “access” to its customers, unilateral practices by a firm with monopoly power that raise rivals’ costs are an established basis for Section 2 liability. Opening Br. at 40 n.28.

In sum, Loren Data has not waived its antitrust arguments; they were not only preserved for appeal,<sup>3</sup> but under any legitimate view satisfy the *Twombly* standard for pleading sufficient facts — without “detailed factual allegations,” which are unnecessary, 550 U.S. at 555 — to support a “plausible” antitrust claim for relief.<sup>4</sup> Appellee’s clumsy implication that these central factual issues are not properly before this Court is unfounded.

**II. THE AMENDED COMPLAINT SHOWS A CONCRETE, SPECIFIC, EXPRESS AND PLAUSIBLE CONSPIRACY THAT CANNOT BE REPUDIATED WITHOUT VIOLATING THE FUNDAMENTAL LIMITS OF A MOTION TO DISMISS**

No “magic words” are required to state a valid antitrust claim for relief. *E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 637 F.3d 435, 448 (4th Cir. 2011). Nonetheless, GXS continues to insist that the district court’s dismissal of Loren Data’s Section 1 conspiracy claim was proper for failure to specify in detail

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<sup>3</sup> This Court’s jurisprudence about matters raised for the first time on appeal is prudential. The decisions provide that “[i]ssues raised for the first time on appeal are generally not considered absent exceptional circumstances” *Williams v. Professional Transp. Inc.*, 294 F.3d 607, 614 (4th Cir. 2002), unless the district court committed plain error or declining appellate consideration would result in a miscarriage of justice. *Karpel v. Inova Health Sys. Servs.*, 134 F.3d 1222, 1227 (4th Cir. 1998).

<sup>4</sup> *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). See Opening Br. at 20-27.

the parties, time and place, and “specific contours” of an agreement, such that no horizontal combination may permissibly be inferred. GXS Br. at 21-23.

The Court cannot affirm the judgment on that ground because these pleading requirements apply when an antitrust plaintiff is alleging a tacit horizontal conspiracy, not express contractual restraints. Opening Br. at 23-26, 29-30. Incredibly, GXS not only fails to respond to this point — thus making most of Section I of its brief irrelevant — but largely ignores the amended complaint’s inclusion of and allegations regarding the GXS correspondence, *i.e.*, that “[GXS] current VAN interconnect agreements expressly prohibit daisy chaining, which is the core of your business model.” (Amended Compl. ¶¶ 17-18 & Exh. A (J.A. 6, 31-32).)

These allegations and supporting documentation are important for three reasons. *First*, they are direct evidence of the existence of express “agreements” between GXS and its “current” interconnect partners — which the complaint contends are all 36 other EDI competitors in the U.S. market except for Loren Data — that restrain how the contracting parties may deal with appellant.<sup>5</sup> *Second*, they

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<sup>5</sup> See Opening Br. at 28 (correspondence demonstrates “an entire series of putatively illegal Section 1 agreements among GXS and other EDI competitors”). As this Court has noted, “[d]irect evidence is extremely rare in antitrust cases and is usually referred to as the ‘smoking gun.’ We agree with the Third Circuit that direct evidence in this context is ‘explicit and requires no inferences to establish the proposition or conclusion being asserted.’” *American Chiropractic Assn. v. Trigon Healthcare, Inc.*, 367 F.3d 212, 226 (4th Cir.), *cert. denied*, 543 U.S. 979 (2004), quoting *InterVest, Inc. v. Bloomberg, L.P.*, 340 F.3d 144, 159 (3d Cir.

demonstrate that Loren Data did not leave it to the district court or GXS to ferret out its allegation of an express horizontal conspiracy, but instead said so directly. The amended complaint squarely alleges the GXS letter “reveals that GXS will not permit Loren Data access to TGMS through a contract with another VAN” and shows “GXS’s established practice of combining with all other VANs with which it conducts business to exclude Loren Data and others with a similar business model.” (Amended Compl. ¶¶ 18-19 (J.A. 31).)<sup>6</sup>

*Third*, these allegations supply the anticompetitive motive GXS maintains does not exist. (GXS Br. at 24-25.) In this network effects marketplace, GXS needs no help from other VANs to itself deny a peer interconnect with Loren Data, yet is powerless, without cooperation by its rivals, to prevent such firms from sending Loren Data’s EDI transactions to customers of the GXS network as so-called “transit” traffic. Consequently, the GXS correspondence shows that appellee has a business motive to conspire with other interconnected VANs in order to “mak[e] it impossible for Loren Data to access the GXS VANs *either directly or indirectly*” (Amended Compl., Summary ¶ 1 (J.A. 29) (emphasis supplied)) and

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2003). Loren Data’s documentation supplies such direct evidence of a horizontal agreement for Section 1 purposes.

<sup>6</sup> GXS falsely contends that Loren Data “makes no allegation that it could not enter into a transit agreement with any of the other VANs that have interconnections to GXS.” GXS Br. at 41 n.11. That is precisely what the amended complaint asserts, supported by GXS’ own words.

thus “exclude an innovative competitor from the market.” *Id.*, Summary ¶ j (J.A. 28)).

Loren Data explained that GXS’ motivation to eliminate transit traffic is (a) based on its disagreement with Loren Data’s business model and “value proposition,” a patently anticompetitive purpose (Opening Br. at 15-16, 30-31), and (b) requires agreement among competitors to prevent cheating, which as an economic matter is the typical Achilles’ Heel of horizontal conspiracies. *Id.* at 30 & n.19. GXS does not even attempt to refute these arguments.<sup>7</sup>

Asserting that this case involves just one isolated, conclusory paragraph of the complaint (GXS Br. at 21) and that Loren Data supplied “no” other detail of the alleged horizontal agreements (*id.* at 25) is misleading. Indeed, to the extent GXS deals with the correspondence at all, appellee violates the proper rules for a motion to dismiss. Construing a letter which admits that all of GXS’ “current

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<sup>7</sup> GXS admits by its silence that claims of an express Section 1 agreement need not include the detailed “time and place” allegations attendant to a tacit horizontal conspiracy. Opening Br. at 23-26, 32. Appellee also fails to address Loren Data’s argument that classification of the express horizontal agreement alleged as either a *per se* group boycott or a Section 1 rule of reason violation is not at issue in this appeal, because the district court ruled that no horizontal conspiracy had been pleaded. *Id.* at 28 & n.18, 32. Finally, GXS evidently concedes that a series of bilateral agreements may, under the “hub-and-spokes” theory, as a matter of law constitute the equivalent of a single horizontal agreement. *Id.* at 31-32. *See Dickinson v. Microsoft Corp.*, 309 F.3d 193, 203-05 (4th Cir. 2002) (recognizing Section 1 validity of hub and spoke, or “rimless wheel,” conspiracy).

VAN interconnect agreements” prohibit “daisy chaining” transit traffic as “merely explain[ing] GXS’ reluctance to enter into an interconnect with Loren Data” is hardly viewing the facts and all reasonable inferences in the light most favorable to Loren Data. GXS Br. at 27. GXS indeed makes no contention that this self-serving interpretation is even permissible under Rule 12(b)(6).

Maintaining that the letter from GXS’ Steven Scala “says nothing about how any such third party VAN may choose to deal with Loren Data” (GXS Br. at 28) is hypocrisy. Giving Loren Data the proper benefit of viewing this admission in the most favorable light, GXS concedes it “current[ly]” has agreements with every EDI provider other than Loren Data to restrict transit traffic and thus prevent an end-run of its unilateral decision to deny a peer interconnect. *See* Opening Br. at 29-31. The lawyers for GXS will have an opportunity to interpret or explain away its Senior Vice President’s written statement at trial or, if appropriate, summary judgment; it is plainly erroneous, however, for a federal court to accept this interpretation in the context of a motion to dismiss.

### **III. THE SECTION 2 CLAIMS WERE LEGALLY SUFFICIENT AND DID NOT FAIL TO ALLEGE “ANTITRUST INJURY”**

With respect to its claims for attempted monopolization and monopolization, Loren Data contends that the district 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. Opening Br. at 27. GXS again avoids addressing these points, arguing for affirming dismissal of the Section 2 claims on the separate ground that Loren Data “has alleged facts showing that GXS has not refused to deal with Loren Data.” GXS Br. at 31.

The flaw in this approach is that the legal sufficiency of an antitrust complaint, no more than any other claim, is not properly assessed by the label assigned to a cause of action by counsel. *Electronic Comms. Corp. v. Toshiba Am. Consumer Prods., Inc.*, 129 F.3d 240, 246 n.1 (2d Cir. 1997) (“Mere labels do not alter the essential nature of the economic relationship.”). Hence, whether the denial of a peer VAN interconnection and imposition of an inefficient, unworkable and unprecedented commercial mailbox arrangement on Loren Data constitutes a unilateral refusal to deal is not dispositive of whether that practice meets the “anticompetitive or exclusionary conduct” element of a monopolization claim.<sup>8</sup> As this con-

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<sup>8</sup> Unlawful monopolization has two elements: (1) monopoly power in a relevant market, and (2) the willful acquisition, maintenance or use of that power by anticompetitive or exclusionary means. *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71, (1966)). As a legal matter, a group boycott can be shown by agreements requiring firms to deal with a competitor only on certain terms. ABA Section of Antitrust Law, ANTITRUST LAW DEVELOPMENTS (SIXTH) at 105 (2007) (“Courts have interpreted Section 1 to restrict competitors from agreeing not to deal, or to deal only on specified terms, with other economic actors.”). Thus, the

duct increases barriers to entry, raises Loren Data's costs and decreases its market impact without any offsetting (or even claimed) efficiency justification, it is clearly exclusionary within the meaning of Section 2 jurisprudence.<sup>9</sup>

More significantly, GXS cannot prevail on this ground without doing violence to the facts alleged and antitrust theory of the complaint. Loren Data explained that a commercial mailbox is a customer ("retail") arrangement which is inapplicable to and incompatible with interconnection between EDI networks. It is, as analogized previously, "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." Opening Br. at 3. Neither that mailbox nor the grandfathered Inovis contract are in fact "connections" with the GXS' network; instead, they represent deficient alternatives offered to Loren Data

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alleged unilateral refusal to deal by GXS is not dispositive of monopolization liability. *See also infra* at 16-17 (allegations of "intentionally degraded" commercial mailbox arrangements supply independent basis for plausible claim of anticompetitive conduct).

<sup>9</sup> A defendant's practices are anticompetitive for purposes of Section 2 where they are not based on economic efficiency. "If a firm has been attempting to exclude rivals on some basis other than efficiency, it is fair to characterize its behavior as predatory [or exclusionary.]" *Conwood Co. v. United States Tobacco Co.*, 290 F.3d 768, 783 (6th Cir. 2002), *quoting Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 (1985).

due to GXS' insistence that appellant is not a "real" EDI network. GXS does not and cannot (at least at this juncture) contend that there is a physical or routing interconnection between its network and Loren Data; that is what Loren Data has been fighting for since 2003.

Contrary to GXS' contentions, Loren Data has not "contradicted" this claim or "admitted" that it has been "able" to operate as a viable business or compete effectively with a commercial mailbox. GXS Br. at 33. The facts alleged are that Loren Data developed an innovative and lower-cost model for EDI communications but has been almost totally stymied in making inroads into the marketplace by GXS' refusal to interconnect. Opening Br. at 43-44 (citations omitted). GXS repeats, but conspicuously declines to adopt, the district court's erroneous finding that Loren Data "has *successfully* worked around GXS' refusal to provide an interconnect for the past ten years." GXS Br. at 33 (emphasis supplied); *see* Opening Br. at 43. Indeed, deletion of the adjective "successfully" from the GXS' argument should tell this Court all it needs to know. Loren Data has *not* been successful in utilizing the non-interconnect options made available by GXS because, as an anti-trust matter, they are not competitive substitutes for the standard and crucial peer interconnect in this network effects market.

We address above GXS' suggestion that Loren Data "has now shifted gears on appeal" by arguing that a commercial mailbox is a qualitatively different, non-

substitutable form of EDI message exchange. GXS Br. at 34. It is impossible fairly to read the amended complaint and reach such a conclusion. Beyond that, however, all GXS proffers is repetition of the incorrect assertion that because Loren Data has been “able to operate,” interconnection must not be “essential.” GXS Br. at 37-38. To the contrary, the ability of a competitor to operate does not doom a Section 2 monopolization claim as a matter of law. Aspen Highlands, Netscape and MCI (among others) all operated in the market yet were able as a matter of law to sustain Section 2 claims.<sup>10</sup> There is no requirement that to state a viable monopolization claim, a plaintiff must already have been driven out of the marketplace and into bankruptcy.

GXS’ assertion that “customers still have ample access to this supposedly ‘essential facility,’” GXS Br, at 38, is a red herring. What GXS argues is that without an interconnect, Loren Data’s customers and trading partners can still utilize GXS by “purchasing mailboxes on multiple VANs” or “migrat[ing]” to other networks. *Id.* at 39. All that indicates is that Loren Data’s customers could still trade with GXS’ customers *if they spend more money and give their business to one or more of the VANs with whom GXS has a peer interconnection.* In other words, GXS says the monopolization claim must fail as a legal matter because consumers

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<sup>10</sup> *Aspen Skiing, supra*, 472 U.S. 585; *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (en banc); *MCI Comms. Corp. v. AT&T*, 708 F.2d 1081 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983).

can switch from Loren Data to other firms for their EDI services. Of course, that is the essence of the harm to appellant complained about in this case and, because it would obviously make EDI more expensive for customers, is the type of consumer welfare loss the antitrust laws are designed to prevent.

As to attempted monopolization, GXS argues that by establishing peer interconnects with the rest of the industry, its conduct is “entirely inconsistent” with an intent to monopolize. GXS Br. at 43. To the contrary, by denying that same, industry standard interconnection to Loren Data, GXS is manifesting the specific intent to monopolize required by Section 2. Put in economic context, Loren Data’s business model offers smaller firms an opportunity to engage in EDI transactions, at a lower cost, by serving as customers companies that themselves do not own a VAN. In contrast, GXS admits its declines to deal with what it deems “resale” providers, meaning that trading partner customers can only afford EDI services if they are of substantial size. Hence, by imposing its own view of the proper business model for EDI on Loren Data (and under its interconnection agreements, the rest of the industry), GXS is utilizing its scale economies to raise barriers to entry, forcing other VANs not to allow Loren Data’s trading partners access to the GXS network “indirectly” via their own peer interconnects. The purpose is to exclude an EDI business model GXS deems inappropriate, and thus to maintain prices and

profit margins against erosion. Even appellee is not so bold as to aver that this is a legitimate business justification or antitrust defense.

Put in context, therefore, GXS contends it may with impunity refuse to interconnect with a new EDI competitor offering a lower-priced and innovative service because it views that firm as different. *E.g.*, GXS Br. at 7 (Loren Data is not a “competitive VAN services” provider but a “reseller”); Amended Compl., Exh. A (J.A. 31-32). Whatever else it may reveal, this position that Loren Data is different from other EDI firms reinforces Loren Data’s allegations that its disruptive business model makes it a “maverick” competitor. GXS’ response is simply adjectives, calling the proposition “preposterous” and an example of “free riding” by “acquiring for free a product someone else manufactured and reselling at a profit.” GXS Br. at 46, 47 n.12.

These accusations are not only false, but offensive. *First*, Loren Data has in fact already borne the cost of constructing its own “ECGrid” network. *Id.* at 46; Compl. ¶¶ 6, 10 (J.A. 5, 6-7).<sup>11</sup> Indeed, Loren Data could not have peer interconnects with the rest of the industry if it had not built its own VAN. The “free riding” charge that Loren Data wants to enter the market without investing capital in

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<sup>11</sup> ECGrid is based on “innovative, proprietary products and procedures” and “is the VAN at issue” for interconnects with GXS. (Compl. ¶¶ 10 (J.A. 6-7).) *See* Opening Br. at 15 & n.16 (ECGrid is the industry’s only “API programmable EDI communications network”).

an EDI network is fallacious. *Second*, all other EDI competitors have peer interconnects with GXS, which of course is “access to GXS’ network for free,” GXS Br. at 46, so there obviously is nothing untoward in this relevant market about “free” interconnection. *Third*, Loren Data is not asking to resell GXS’ services, but instead is seeking direct access to the GXS network. Loren Data offers *its own network EDI service to wholesale customers, who in turn serve retail end user trading partners*. This is the “resale” model GXS opposes because it lowers barriers to entry, decreases scale requirements for trading partners, and allows smaller businesses to conduct EDI transactions, at a lower per-unit cost, without buying services from multiple VANs.

GXS’ argument on antitrust standing (“antitrust injury”) fails for the same reason. Suggesting there is no harm to competition and consumers because customers “can open mailboxes on multiples VANs,” GXS Br. at 49, merely illustrates that the harm done to Loren Data affects prices and hurts consumers, forcing them to spend more money on duplicative EDI services from multiple vendors. Using the relatively tiny market share enjoyed by Loren Data as an argument why only a single competitor has been injured (GXS Br. at 50) disregards the new business model pioneered by Loren Data and its potential for substantial impact on competition in the market. Simply put, it is precisely because GXS “has granted interconnects to so many other VANs,” *id.* at 50, that the denial of the same to

Loren Data — because it is an upstart, a disruptive competitor that does not play by the rules established by the industry’s dominant firm and wants to fundamentally transform the EDI market — is so competitively significant.<sup>12</sup>

Finally, GXS’ insistence that the monopolization and attempted monopolization claims may be resolved solely on the alleged refusal to deal are wrong. The complaint specifically asserts that GXS “intentionally degraded” Loren Data’s commercial mailbox. (Compl. ¶¶ 19, 22, 24 (J.A. 12, 13, 14).) These sort of intentional, malicious bad acts directed against a rival as a matter of law demonstrate anticompetitive purpose and are sufficient to supply the exclusionary conduct element of a Section 2 claim. *E.g.*, *Novell, Inc. v. Microsoft Corp.*, 505 F.3d 302, 306 (4th Cir. 2007) (Microsoft liable for “degrading Novell’s products’ performance on other operating systems”); *MCI v. AT&T*, 708 F.2d at 1150-54 (AT&T liable for

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<sup>12</sup> Some of GXS’ factual arguments are incredulous. In its Summary of Argument, GXS asserts that “Loren Data . . . is a reseller,” GXS Br. at 17, a contention contradictory to the complaint and refuted on the previous page. In its Counterstatement of the Facts, GXS asserts that “Loren Data [is] just slightly less than half GXS’ size” based on trading partner data. *Id.* at 7. Yet in arguing against injury to competition, GXS later contends — in the face of the complaint’s well-pleaded allegations (Amended Compl., Summary ¶ m (J.A. 29) (55% of Loren Data’s EDI business is destined to GXS); Opening Br. at 43-44 — that only 0.2% of Loren Data’s customers must communicate with GXS and thus that denial of an interconnect “only affect[s] a *de minimis* 0.1% of the market.” GXS Br. at 50. GXS cannot have it both ways. Either Loren Data is half of GXS’ size, in which case competitive harm and antitrust standing are clear, or it is a struggling entrant with low market share, for which its status as a “maverick” with a new and lower-cost business model is an important element of the standing inquiry.

supplying “inappropriate or inefficient equipment or procedures for interconnection” to rival); *Advance Bus. Sys. & Supply Co. v. SCM Corp.*, 287 F. Supp. 143 (D. Md. 1968) (“acts of sabotage” against competitor). As a result, even if GXS were correct that a unilateral refusal to deal can never serve as the basis for anti-trust liability (which is not the law), the district court’s dismissal of the Section 2 claims was still erroneous.

#### **IV. THE POST-JUDGMENT RULING REPRESENTS A “BAIT-AND-SWITCH” APPROACH THAT UNFAIRLY DEPRIVED LOREN DATA OF THE CHANCE TO REQUEST FURTHER AMENDMENT, ROUTINELY ALLOWED IN ANTITRUST CASES**

The response of GXS with regard to the district court’s post-judgment decision is internally inconsistent. On the one hand, GXS indicates that Loren Data is not aggrieved because the court granted the requested relief.<sup>13</sup> (Of course, the record shows the district court denied both motions.) GXS Br. at 51-52. On the other hand, GXS maintains the court’s denial of reconsideration was proper because there was no “clear error” of law as to futility of amendment. *Id.* at 53.

The problem with this response is that it places a plaintiff in the impossible situation of having no futility analysis against which to argue on a Rule 59 motion.

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<sup>13</sup> 28 U.S.C. § 1291 allows a party to appeal as of right from a final district court judgment. Unlike review of administrative action, 5 U.S.C. § 702, there is no statutory requirement that appellant be “aggrieved.” But in any case, Loren Data was harmed by depriving it of the ability to seek leave to amend under the correct legal standard.

Loren Data's limited motions below were not "tactical," *id.* at 52, but driven by the unchallenged fact that a motion for leave to amend after judgment is procedurally impermissible unless the judgment is first set aside, an even *higher* burden for the moving party. Therefore, the district court's denial of reconsideration on the basis that Loren Data had not shown that futility was clearly erroneous is an unfair bait-and-switch procedure that deprived Loren Data of any ability actually to request further amendment.

GXS' suggestion that by amending once, Loren Data had shown that "further amendment would be futile," *id.* at 55, presents a serious issue warranting this Court's guidance. There is not, and in complex antitrust cases cannot be, any rule of law to the effect that plaintiffs are only allowed one amendment of their complaint. Leave should be denied when it is pointless or prejudicial, not based on the number of bites at the apple already permitted a litigant. *See, e.g., Race Tires America, Inc. v. Hoosier Racing Tire Corp.*, 614 F.3d 57, 69-71 (3d Cir. 2010) (affirming denial of leave for fourth amendment of antitrust complaint). Neither the district court nor GXS explain why amendment here would necessarily have been futile, because it plainly was not.

## **CONCLUSION**

The judgment dismissing Loren Data's amended complaint should be reversed in part and remanded as to appellant's federal and state law antitrust claims.

Respectfully submitted,

By: /s/ Glenn B. Manishin

Glenn B. Manishin

DUANE MORRIS LLP

505 9th Street, N.W., Suite 1000

Washington, D.C. 20004

202.776.7813

202.478.2875 fax

*Counsel for Appellant Loren Data Corp*

Dated: January 27, 2012

## EXHIBIT 1

The following cited excerpts from the Complaint, Amended Complaint and Response to Motion to Dismiss (Dkt. No. 14) are set forth in full. The shaded lines in the latter are provided solely for the Court's convenience and do not appear in the original brief.

\* \* \* \* \*

Therefore, the conclusion is that any network offering EDI message routing must have peer access to all GXS networks in order to conduct business. There are neither satisfactory alternative routing measures nor technologies that can substitute for a native, non-settlement peering connection into each of GXS' networks, notably TGMS, IE, InovisWorks, and Tradanet. The exchange of mutual, bi-directional EDI message traffic at network-scale is only economically feasible via non-settlement, peer interconnects using the industry standard X12.56 Interconnect Mailbag Control Structure. . . . **Compl. ¶ 9 (J.A. 9).**

An EDI "Mailbox" is an endpoint for EDI information. Mailboxes are paid services for trading partners, whose connection requirements differ greatly from a peer VAN. Trading partners have a low configuration burden, do not utilize X12.56 Mailbags, and are well served by a retail service with a metered data transit model with a manual web browser interface for configuration - a GXS TGMS Mailbox requires the end-user to set-up, and manually configure each and every trading partner relationship. Mailboxes are generally set up as "Push-Pull" where the client both pushes data to the mailbox (uploads) and then pulls data down from the mailbox (downloads) on a schedule determined by the client. GXS provides a "Push-Push" configuration at extra cost, where GXS will push data to the client's system proactively. Mailboxes do not commonly have an automated file-by-file confirmation system and depend on a response from the other trading partner, which the mailbox user has a direct relationship with, to determine if a transmission is ultimately successful. **Compl. ¶ 13 (J.A. 10-11).**

VAN Interconnects are a transit point for information between networks. Interconnect configuration is managed independently by each VAN on its own end, with routine, low-level routing information shared between the two VANs' respective network operations staffs, each equally sharing the burden of configuration and

support. Interconnects are virtually all "Push- Push" as the transit times must be kept to a minimum for the benefit of the trading partners. The X12.56 Mailbags allow the VANs to directly track the success and failure of each and every file sent between the VANs over the Interconnect independently of the content therein and the trading partners involved. **Compl. ¶ 14 (J.A. 11).**

Peer networks at scale, such as Loren Data's ECGrid network with 18,000 trading partners cannot use a Mailbox since such services are designed for end users with manual configuration and only requiring occasional adjustments. GXS provisioning Loren Data ECGrid with a Mailbox, is akin to a Verizon connecting to AT&T with a home telephone line. The forcing of Loren Data to use an end-user mailbox rather than a VAN Interconnect results in degradation of Loren Data's system of providing efficient and competitive EDI communications for its clients. It is a deliberate act of under-provisioning intended by GXS to damage Loren Data in its processes, its ability to compete, and to its reputation. **Compl. ¶ 15 (J.A. 11).**

Loren Data was forced by this [Mailbox] arrangement to again rely on the retail services oriented GXS Mailbox and its manual web interfaces. As mailboxes are metered connections, Loren Data was charged for every byte sent and received, for reports, and for failed communication sessions. Furthermore, GXS' technical network interfaces were regularly degraded and modified to cripple the relationship, causing vexing, serious and damaging system-wide failures within the Loren Data network. These system-wide failures would not have occurred if GXS had allowed Loren Data the industry standard peer Interconnect. **Compl. ¶ 19 (J.A. 9-10).**

GXS has made clear that it will only offer Loren Data an interconnect by first routing its messages to a "mailbox." This adds another step in the chain that is entirely unnecessary, in addition to being cumbersome, inefficient, and expensive. Through its current contract with Inovis Loren Data is charged \$0.01 per kc (kilo character) of transmitted data to GXS VANs. With the mailboxes imposed on Loren Data by GXS since 2001 it has charged Loren Data \$0.04 per kc adding an unnecessary and discriminatory expense to Loren Data of \$25k to \$30k per month beginning in 2001. The industry standard is to charge \$0.00 per kc for a VAN interconnect." **Amended Compl. ¶ 7 (J.A. 23).**

GXS has consistently denied Loren Data the industry standard non-settlement interconnect to its VAN. Instead it has offered, and at times Loren Data has been forced to accept, a cumbersome, inefficient, and expensive vehicle called a "mailbox" for connection to the TGMS VAN. Beginning ten years ago Loren Data was

forced to pay GXS as much as \$30,000.00 per month for this service. **Amended Compl., Summary ¶ g (J.A. 28).**

Loren Data's brand named VAN, ECGrid®, provides EDI routing services predominately to application service providers through its innovative, proprietary products and procedures, managing EDI message flow between service providers and to a global pool of VANs through Interconnects. ECGrid serves a population of approximately 18,000 EDI IDs. ECGrid has been in operation for over 10 years. ECGrid® is the VAN at issue for such Interconnects to the GXS EDI systems, including but not limited to, TGMS (through its contract with Inovis), Tradanet (blocked), IE (native peer), and InovisWorks (native peer). GXS has expressed its intention to nullify Loren Data's peer interconnects with IE and Inovis Works. **Compl. ¶ 10 (J.A. 6-7).**

All the foregoing occurred while GXS granted non-settlement peer interconnects to other VANs, both large (Sterling, Inovis, Easylink, NuBridges) and small (Advanced Communications Systems, I-Connect, York Worldwide). The foregoing demonstrates that Loren Data was discriminated against in a monopolistic fashion, driven by GXS' corporate desire to control the market while restraining trade and commerce to the detriment of the consuming public, by holding wholesale innovators out of the market, and stopping novel operators from bringing to market new technologies that would allow on-demand delivery models, scale economies, and heretofore unknown possibilities. Only GXS had the market power to do this before and after its spate of consolidation. **Compl. ¶ 20 (J.A. 13).**

Defendant GXS has purchased multiple competing corporations in the EDI industry, with the intent of gaining monopoly power and using such power to foreclose competition and to destroy those competitors such as Loren Data Corp. whose innovative business models pose a threat to GXS's profit margins." **Compl. ¶ 31 (J.A. 16).**

Loren Data has developed an innovative business model through which trading partners send data to electronic commerce service providers (ECSPs) for translation to Loren Data's VAN, ECGrid. The ECSP thus enables smaller and more diverse trading partners to access EDI services at reasonable cost. This model does not in any way hinder or encumber the transmission or reception of data through ECGrid. GXS objects to this business model, but it is frankly none of their business. Loren Data is able to interconnect with all other VANs, notably the next largest VAN Sterling Systems, without any such objections. GXS's true intention is to

exclude an innovative competitor from the market that adds numerous trading partners who compete with GXS. **Amended Compl., Summary ¶ j (J.A. 8).**

Loren Data's complaint not only alleges the possession of Monopoly by GXS, but also clearly describes efforts by GXS to bar entry into the EDI Market. Connection to GXS' network is critical to being competitive in the EDI Market, and GXS has taken advantage of that fact by denying interconnections to the GXS network, instead offering crippled "mailbox" service at prices which are not economically viable. (Compl. ¶¶ 19, 23). Moreover, Loren Data alleges that while using GXS' mailbox system, GXS actively degraded and modified the requirements for said system, with the intent to interfere with Loren Data's network operations. (*Id.* at ¶¶ 19, 22).

Due to the rarity of evidence directly proving the existence of monopoly, courts have turned to an examination of market structure. *USA v. Microsoft Corp.*, 253 F.3d at 51. ("Because such direct proof is only rarely available, courts more typically examine market structure in search of circumstantial evidence of monopoly power. (citations omitted) Under this structural approach, monopoly power may be inferred from a firm's possession of a dominant share of a relevant market that is protected by entry barriers. *id.*)

By refusing to grant an interconnect to Loren Data, and offering only a prohibitively expensive mailbox with crippled functionality, GXS has intentionally degraded the performance of Loren Data's service. (Compl. ¶¶ 15,19,21,22) The Fourth Circuit has recognized that intentional degradation of a competitor's product is a type of anticompetitive behavior that antitrust laws are designed to prevent. See *Novell, Inc. v. Microsoft Corp.*, 505 F.3d at 316. In *Novell*, the Plaintiff alleged that "Microsoft required Novell to use Windows-specific technologies in order to be certified as Windows-compatible, degrading Novell's products' performance on other operating systems and harming their advantageous compatibility." *Id.* The parallels to the current case are undeniable, as GXS has made it clear that in order to connect to the GXS network, Loren Data will have to do so on terms that not only degrade Loren Data's ability to offer its customers a flexible and innovative service (Compl. ¶¶ 19,22,32) but also preclude the possibility of operating a profitable business (*Id.* at ¶ 23).

Being forced to accept the degradation of a company's own product in order to connect to the GXS network hamstring a company's competitive ability and is, in effect, a barrier to entry in the EDI Industry. GXS' erection of such protective bar-

riers, in addition to their dominant position in the market, are clear indicators of the possession of monopoly power. See USA v. Microsoft Corp., 253 F.3d at 51.

**Response to Motion to Dismiss at 18-19.**

GXS asserts a failure on the part of Loren Data to adequately allege a dangerous probability of success. (Def.'s Mot. Dismiss. 40). This argument is premised on the flawed assumption that because its acquisitions of companies such as IBM and Inovis have ended, GXS has reached the height of its power. *Id.* GXS cites to no analysis or metrics to support this highly suspect contention that their growth as a business is in stasis, and its argument ignores a central theme of the Complaint. Loren Data's allegations of attempted monopoly do not merely rely on the growth of GXS in the industry through acquisition. A major premise in the Complaint is GXS' specific intent to monopolize through the elimination of competition, specifically - Loren Data. (Compl. ¶¶20,31,32, and Amend Compl. ¶¶ 15 thru 19). If GXS were to terminate Loren Data's connections to its network, it would be one step closer to eliminating competition from Loren Data, and similar businesses, in the marketplace. Given GXS' current power and the position in the Market, and their expressed intentions to alter the aforementioned connections, there is a dangerous probability of it successfully monopolizing the industry without intervention from the courts, if, in fact, it has not succeeded already. "The determination whether a dangerous probability of success exists is a particularly fact-intensive inquiry." USA v. Microsoft Corp., 253 F.3d at 80. As Loren Data has alleged a dangerous probability of success, and identified the position of, and conduct by, GXS which create such a probability, it would be inappropriate and premature to dismiss Loren Data's claim before it has had the opportunity to discover additional factual evidence. **Response to Motion to Dismiss at 21.**

As in the *Aspen* case, Loren Data has alleged, and can (a) demonstrate that an interconnect between Loren Data and GXS would result in lower configuration and support costs, and greater economic benefits to GXS (Compl. ¶¶ 14-15) and (b) identify several GXS customers who have requested an interconnect with Loren Data to access their trading partners, only to be denied their request (thus jeopardizing their goodwill). In short, Loren Data has alleged the same species of anti-competitive behavior and harm present in *Aspen*, which Loren Data believes will only be strengthened by the discovery process.

The Complaint also contains another clear allegation of antitrust injury - the harm to technological innovation in the EDI industry, and the end consumer's freedom to choose which technology best suits their business model. *Id.* at ¶¶ 17,20, 22,32) Loren Data has been able to gain a customer base in an industry dominated by

larger players by offering innovative solutions not found in the large VANs. However, GXS has, through strategic acquisitions and monopolistic market tactics (see supra section II (b)(4) on barriers to entry), reached the point where it can, and is, neutralizing the benefits technological innovation can provide. Such conduct stagnates the entire industry and deprives customers of the advantages innovative competitors such as Loren Data can provide. **Response to Motion to Dismiss at 23-24.**

## **CERTIFICATE OF COMPLIANCE**

The undersigned hereby certifies that:

1. This reply brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) in that the brief (including Exhibit 1) contains 6,920 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 27th day of January, 2012, he caused to be served a true and correct copy of the foregoing Brief for Appellant upon counsel for appellee, at the address below named, by ECF and electronic mail:

David H. Evans  
Chadbourne & Parke LLP  
2101 New Hampshire Avenue, N.W.  
Washington, DC 20036

/s/ Glenn B. Manishin  
Glenn B. Manishin