
IN THE
Supreme Court of the United States

PACIFIC BELL TELEPHONE COMPANY D/B/A
AT&T CALIFORNIA, *et al.*,

Petitioners,

v.

LINKLINE COMMUNICATIONS, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

MAXWELL M. BLECHER

Counsel of Record

GARY M. JOYE

BLECHER & COLLINS, P.C.

515 S. Figueroa Street

17th Floor

Los Angeles, CA 90071

(213) 622-4222

Counsel for Respondents



QUESTIONS PRESENTED

I. Whether petitioners have presented compelling reason to grant the Petition seeking review of the Ninth Circuit decision affirming a district court's denial of motions to dismiss and for judgment on the pleadings on a claim alleging that a vertically integrated monopolist was liable under Section 2 of the Sherman Act (15 U.S.C. § 2) for engaging in a "prize squeeze" by charging competitors wholesale prices that are too high in relation to its unregulated retail prices charged to end-use customers – and for a period charging wholesale prices exceeding retail prices – so as to effectively preclude competition at retail.

II. Whether petitioners have shown the Ninth Circuit decision conflicts with a decision of this Court or a Court of Appeals, is contrary to any important antitrust principles articulated by this Court, or presents any issue of significant practical impact or doctrinal importance that has not been settled and demands intervention by this Court.

**CORPORATE DISCLOSURE STATEMENTS
PURSUANT TO SUPREME COURT RULE 29.6**

Respondent linkLine Communications, Inc., has no corporate parent and no publicly held corporation owns more than 10% of its stock.

Respondent Nitelog, Inc., has no corporate parent and no publicly held corporation owns more than 10% of its stock.

Respondent In-Reach Internet, LLC (now known as InReach Internet, Inc.) has a corporate parent named MobilePro Corp., a publicly held corporation; and In-Reach Internet, LLC, has assigned to its former corporate parent Balco Holdings, Inc., a California corporation, its rights with respect to this litigation subject to retention by MobilePro Corp. of consent and rights to receive a portion of any proceeds from this litigation as set forth in that assignment agreement dated as of October 31, 2005, by and among In-Reach Internet, LLC, InReach Internet, Inc., Balco Holdings Inc; and no publicly held corporation owns more than 10% of the stock of Balco Holdings, Inc., but MobilePro Corp. is a public held corporation that owns, and is the corporate parent of, InReach Internet, Inc., the successor of the original named Plaintiff In-Reach Internet, LLC.

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INTRODUCTION

Respondents (plaintiffs below) allege in their price squeeze monopolization claims that petitioners (defendants below), a vertically integrated monopoly, intentionally charged their retail DSL competitors, the independent ISPs (Internet Service Providers) such as respondents, wholesale prices that were too high in relation to what petitioners were charging their retail DSL customers — and for a period wholesale prices exceeded retail prices — making it impossible for independent ISPs to compete with petitioners at retail, thus assuring preservation of their monopoly. The Ninth Circuit correctly decided that *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004) (“*Trinko*”), does not bar such price squeeze claims. *linkLine Communications, Inc. v. SBC California, Inc.*, 503 F.3d 876, 880-84 (9th Cir. 2007). There is no compelling reason for Petitioners’ Writ of Certiorari to be granted.

The Ninth Circuit’s ruling – that respondents’ price squeeze claims are different from, and satisfy “established antitrust standards” independent of, a *Trinko* claim of a monopolist’s “insufficient assistance” to rivals – neither contradicts *Trinko* nor creates a circuit court conflict. “*Trinko* did not involve a price squeezing theory” and “[it] took great care to explain that in this particular regulatory context, ‘claims that satisfy established antitrust standards’ are preserved.” *linkLine*, 503 F.3d at 883 (citation omitted). “Because a price squeeze theory formed part of the fabric of traditional antitrust law prior to *Trinko*, those claims should remain viable notwithstanding either the telecommunications statutes or *Trinko*.” *Id.*

The Ninth Circuit's reference to price squeeze being part of "traditional antitrust law" was based on a substantial body of pre-*Trinko* circuit court authority recognizing price squeeze allegations as stating valid claims under § 2 of the Sherman Act (15 U.S.C. § 2) against monopolists in regulated industries. *Id.* at 880.¹ And its holding that such price squeeze claims survive *Trinko* accords with *Covad Communications Co. v. BellSouth Corp.*, 374 F.3d 1044 (11th Cir. 2004) ("*BellSouth*"), *cert. denied*, 544 U.S. 904 (2005). There, addressing price squeeze allegations "substantially similar" to those here,² the Eleventh Circuit held "[plaintiff's] price squeezing claim survives because it is based on traditional antitrust doctrine and is not specifically barred by *Trinko*," and indeed *Trinko* "preserves claims that satisfy existing antitrust standards." *Id.* at 1050, 1052 (quoting *Trinko*, 540 U.S. at 407).

Petitioners incorrectly contend a circuit court split is created by the D.C. Circuit's opinion in *Covad Communications Co. v. Bell Atlantic Corp.*, 398 F.3d 666 (D.C. Cir. 2005) ("*Bell Atlantic*"). That opinion held that

1. The Ninth Circuit cited these supporting cases, *inter alia*: *City of Anaheim v. Southern California Edison Co.*, 955 F.2d 1373, 1377 (9th Cir. 1992); *City of Mishawaka v. American Electric Power Co.*, 616 F.2d 976, 983-85 (7th Cir. 1980); *City of Kirkwood v. Union Electric Co.*, 671 F.2d 1173, 1178-79 (8th Cir. 1982); *Borough of Lansdale v. Philadelphia Electric Co.*, 692 F.2d 307, 309-10 (3d Cir. 1982); *City of Groton v. Connecticut Light & Power Co.*, 662 F.2d 921 (2d Cir. 1981).

2. Petitioner's Appendix ("Pet. App.") 49a n.16 (District Court Order (filed Apr. 1, 2005)).

the price squeeze claim there – alleging too high wholesale prices for the provisioning of unbundled loops compelled by new duties imposed under the Telecommunications Act of 1996 – was barred by *Trinko*. *Id.* at 673. Yet, as the D.C. Circuit explained in its order on denial of rehearing on that decision, the argument that “the court’s holding ‘eliminates’ the antitrust claim of a price squeeze, simply misreads our opinion.” *Covad Communications Co. v. Bell Atlantic Corp.*, 407 F.3d 1220, 1222 (D.C. Cir. 2005). “Notably, the court did not face a circumstance similar to that in *Covad Communications Co. v. BellSouth Corp.*, 374 F.3d 1044, 1050-52 (2004), in which the Eleventh Circuit held a claim for predatory pricing of loops could proceed; in that case the complaint alleged the ‘basic prerequisites for . . . price predation.’” *Id.*

Respondents’ price squeeze claims – being substantially similar to those approved by the Eleventh Circuit in *BellSouth* – would similarly survive under that D.C. Circuit’s own reading of its opinion in *Bell Atlantic*. Respondents have argued that their price squeeze claims need not satisfy the predatory pricing requirements of *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993). The Ninth Circuit’s opinion in *linkLine* does not specifically discuss the applicability of *Brooke Group* requirements in holding that respondents’ price squeeze claims could proceed. Nevertheless, as the district court below ruled in denying petitioners’ motion to dismiss, “even if the *Brooke Group* requirements were applied, the [First Amended Complaint] would satisfy those requirements,” noting it “contains price squeeze allegations substantially similar to those approved by the [Eleventh Circuit] in

[*Covad v. BellSouth*].” Pet. App. 48a-49a & n.16; *see id.* at 52a (*quoting* First Amended Complaint (“FAC”) ¶ 26(b)); *see linkLine*, 503 F.3d at 879 (setting forth respondents’ price squeeze allegations).

Neither petitioners nor Judge Gould’s dissent below address that ruling of the district court nor assail the substantial similarity of the price squeeze allegations here to those approved by the Eleventh Circuit in *BellSouth* and that were distinguished by, and would survive under, the D.C. Circuit’s decision in *Bell Atlantic*. Hence, there is no circuit court conflict arising from the Ninth Circuit decision affirming the district court order denying the motions to dismiss the price squeeze claims alleged here.

Further, the Ninth Circuit’s recognition of respondents’ price squeeze claims as an independent basis for liability under Section 2 would not deter legitimate procompetitive pricing conduct, harm consumers or conflict with any regulatory regime designed to address the antitrust harm alleged here. Respondents’ price squeeze claims challenge *unregulated* exclusionary pricing conduct that harms competition (not merely competitors) and consumers. Monopolist-petitioners’ setting of *unregulated* retail prices for a bundled package of DSL service, Internet access, and equipment (modem) that are lower than the wholesale input cost charged to independent ISPs for DSL service is not procompetitive price-cutting. Instead, it entails the exclusionary and purposeful elimination of retail DSL competition (monopolization), thereby depriving consumers of lower prices and choice. Pet. App. 48a-49a, 52a (district court quoting FAC ¶¶ 25(A)(1)-(3), 26(b)).

Such price squeezing is not akin to a mere failure to render sufficient assistance to rivals as alleged in *Trinko*. Rather, it amounts to a refusal to provide competitors the same services or prices otherwise made available to petitioners' retail customers – “reveal[ing] a distinctly anticompetitive bent” that distinguishes it from *Trinko* and places it within the exception to the general “no duty to deal” rule carved out by *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), and *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), as was endorsed in *Trinko*, 540 U.S. at 409.³

Further, imposing antitrust liability for such price squeezing would not undermine or override any regulatory regime or structure designed to deter or remedy its anticompetitive harm. *Trinko*, 540 U.S. at 411-12 (citing *Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 22 (1st Cir. 1990) (Breyer, C.J.)). “*Trinko* did not . . . completely eliminate the viability of a § 2 price squeeze theory in regulated industries.” *linkLine*, 503 F.3d at 883. “Moreover, the existence of regulation does not always eliminate the danger of anticompetitive harm.” *Id.* “The key, under *Trinko*, is the nature of the regulatory structure at issue.” *Id.* (quoting *Trinko*, 540 U.S. at 412). And here – unlike *Trinko* and *Town of Concord* – the challenged conduct does not arise in the context of a fully regulated industry. Rather there has

3. See *MetroNet Services Corp. v. Qwest Corp.*, 383 F.3d 1124, 1132-33 (9th Cir. 2004) (distinguishing *Aspen Skiing* because, unlike the defendant in *Aspen Skiing*, defendant “Qwest has been willing to sell and has sold Centrex [a business phone service] to [plaintiff] MetroNet at its retail price” and “has sold it to MetroNet on the same terms that it sells to direct consumers”), *cert. denied*, 544 U.S. 1049 (2005).

been “no comparable regulatory attention paid to the retail DSL market” and hence any “restrictions on pricing at the retail level derive primarily from the antitrust laws.” *Id.* at 885; *see also Town of Concord*, 915 F.2d at 29 (“stress[ing]” that reasoning underlying its holding – “‘normally’ a price squeeze will not constitute an exclusionary practice in the context of a fully regulated monopoly” such as in the electricity industry – “applies with full force only when the monopolist who engages in the squeeze is regulated at both industry levels”).⁴

Finally, imposing antitrust liability for price squeezing – where, as here, the monopolist refuses to provide its competitors service at prices charged to retail customers – does not raise “concern about the administrability of a judicial remedy” because the “court can simply order the defendant to deal with its competitors on the same terms that it already deals with others in the existing retail market, without setting the terms of dealing.” *MetroNet Services Corp. v. Qwest Corp.*, 383 F.3d 1124, 1133 (9th Cir. 2004), *cert. denied*, 544 U.S. 1049 (2005); *see Town of Concord*, 915 F.2d at 28 (noting price squeeze allegations involving “wholesale prices that *exceeded* retail prices” as “thereby

4. As stated in *Town of Concord*:

We recognize that a special problem is posed by a monopolist, regulated at only one level, who seeks to dominate a second, unregulated level, in order to earn at that second level the very profits that regulation forbids at the first. *See* [3 P. Areeda & D. Turner, *Antitrust Law* ¶ 726e, at 217-20 (1978)].

915 F.2d at 29.

eliminating some of the 'administrative' problems we have found surrounding a jury's efforts to determine the reasonableness of the price 'gap'" (emphasis in original)).

STATEMENT OF THE CASE

1. Background Regarding Parties, Industry and Relevant Markets

Respondents are four Internet Service Providers (ISPs). *linkLine*, 503 F.3d at 877. They provide Internet access, including via DSL service, and related services to their end user customers. *Id.* Unlike facilities-based local telephone companies, however, respondents do not own or control the transmission lines to connect their customers to the Internet; instead, they require access to petitioners' local phone facilities for such connections. *Id.*

Petitioner Pacific Bell Telephone Company or "PacBell" (now doing business as AT&T (formerly SBC California)) operates as an Incumbent Local Exchange Carrier ("ILEC"), providing local telephone services to California consumers within its local service area. *Id.* at 877-88. SBC is a subsidiary of SBC Communications, Inc. *Id.* at 878. On September 17, 1998, SBC received approval from the California Public Utilities Commission ("CPUC") to provide DSL services to California consumers. Pet. App. 27a.

Petitioner Pacific Bell Internet Services ("PBIS") is a subsidiary of SBC which sold DSL Internet access to retail customers using SBC's telephone lines. *Id.* Consumers who ordered SBC's DSL and chose PBIS as

their ISP were billed the associated fee for Internet access on their regular monthly Pac Bell telephone billing statement under the heading “Pacific Bell Internet Services.” *Id.*

Petitioner SBC Advanced Solutions, Inc. (“SBC-ASI”) is a subsidiary of SBC Communications, Inc., and an affiliate of SBC. *Id.* In June 2000, SBC transferred responsibility for the provisioning and billing of DSL to SBC-ASI and the CPUC granted SBC-ASI a certificate of public convenience and necessity to operate as a facilities-based provider of competitive local exchange and intraLATA interexchange services. *Id.* at 27a-28a. SBC-ASI has since provided DSL and other advanced services to independent ISPs (such as respondents) and California consumers. *Id.* Petitioner SBC entities thus were organized so that they sold both wholesale transport DSL access (“DSL transport service”) to independent ISPs (such as respondents) as well as retail DSL (through PBIS and then SBC-ASI) to individual consumers.

Respondents allege that the market for DSL service in SBC’s telecommunication service region in California is a relevant market. (FAC ¶ 11.) DSL is distinguishable from other means of connecting to the Internet because it is (a) faster, (b) “always on,” (c) more reliable, and (d) allows many users in the same geographic area simultaneous access without affecting the speed or quality of the transmission. (*Id.*) DSL is also distinguishable in that it can be made available over existing telephone lines which today connect virtually all businesses and households in California. (*Id.*) There is a discrete and separate market for DSL because of its

distinct characteristics, pricing points and separate and distinct customer demand.⁵ (*Id.*)

For decades, local telephone companies (SBC, formerly PacBell) have owned and controlled facilities that are essential to the provision of many telecommunications services, including DSL service. Pet. App. 29a. In most cases, the ILEC (here SBC) owns and controls the connections to all or substantially all end user customers. *Id.* ISPs (such as respondents) that are not affiliated with the ILEC must obtain access to those customers' connections in order to reach and serve their own end user customers. *Id.* Additionally, such nonaffiliated providers often need to interconnect their own facilities with those of the ILEC if they are to be able to provide communication services on a broad scale. *Id.* Because of the critical nature of the telephone companies' network facilities, they are often referred to as "essential" or "bottleneck" facilities. This is especially true of the "last-mile" connection between the incumbent local telephone company's (SBC) central offices and the end users' premises. *Id.*

2. Respondents' Monopolization-by-Price Squeeze Claims

Because SBC is an ISP (PBIS and then SBC-ASI) and because SBC/SBC-ASI own and control the essential or bottleneck facilities for providing DSL, ISPs like respondents are in direct competition at retail with their wholesale supplier of DSL services upon which they

5. Another relevant market in this case is the market for Internet services in SBC's California service region. (FAC ¶ 12.) A third relevant market is switched local exchange telecommunications service in SBC's California service region. (*Id.*)

depend to provide DSL service. Pet. App. 29a. While there are some locations where ISPs have a choice of DSL providers, this is rare, because the majority of such wholesale DSL providers have ceased to operate in any significant geographical region of California, and SBC-ASI enjoys virtually exclusive control over DSL transport in SBC's service area (which covers approximately 78% of the geographic area of California). *Id.*

Moreover, because the SBC petitioners offer DSL services in both wholesale and retail markets, they determine the cost of the essential components of these competitor ISPs' service offerings. *Id.* at 29a-30a. Petitioners' retail affiliates, which bundle retail DSL access with both online Internet services and equipment (*e.g.*, free modem) as a package retail price to end use customers, have taken in excess of 80% of the retail DSL market. *Id.* at 30a.

Where as here the monopolists' wholesale prices are set too high relative to its low retail prices – and for a period petitioners' wholesale DSL prices to ISPs exceeded petitioners' retail prices charged end users for providing a bundle package of DSL access, Internet service and necessary equipment (*e.g.*, modem and installation) – independent ISPs are put in a price squeeze that makes it impossible to compete with the SBC petitioners in the retail market for DSL Internet service. (FAC ¶¶ 20, 25(A).) That price squeeze enabled petitioners to maintain their DSL monopoly. As respondents' amended price squeeze claims allege:

(1) . . . [D]efendants unlawfully manipulated their dual role as vertically integrated

monopolists as both a wholesale-monopoly supplier and retail competitor of Plaintiffs by engaging in an unlawful price squeeze by intentionally charging independent ISPs wholesale prices that were too high in relation to prices at which [D]efendants were providing retail DSL services and necessary equipment to end-user customers – and for a period by charging wholesale DSL prices to competing ISPs (such as [P]laintiffs) that actually exceeded the prices at which [D]efendants retail affiliate (PBIS) was charging retail end-user customers for DSL services and necessary equipment – thereby making it impossible for independent ISP competitors such as plaintiffs to compete at the low retail prices set by [D]efendants for combined DSL-Internet Service and necessary equipment provided to end-user customers.

(2) If [P]laintiffs charged retail DSL-Internet access customers the same retail price as [D]efendants' retail affiliate charged, [P]laintiffs could not cover the cost of providing DSL service, which costs necessarily includes the wholesale transport costs charged by [D]efendants.

(3) By the same token, if [D]efendants themselves charged their retail affiliates the same wholesale costs for DSL transport that they charged their wholesale ISP customers (such as [P]laintiffs), [D]efendants could not cover their wholesale costs and make a profit

from DSL service at their low retail prices for their bundled offering of DSL, Internet Service and necessary equipment (e.g., free modem and installation), that were in some cases, and for some period, even below the wholesale DSL transport cost. Given the price margin relationship between retail and wholesale prices, [D]efendants are clearly attempting to compensate for deliberately sacrificing profits on the retail end of their operations (with offsetting margins on the wholesale side) in order to stifle, impede and exclude competition from independent ISPs such as [P]laintiffs that are both wholesale customers and retail rivals.

Pet. App. 30a-31a (quoting FAC ¶ 25(A)(1)-(3) (brackets in original)); *linkLine*, 503 F.3d at 879.

Respondents further allege petitioners engaged in additional anticompetitive acts directed at independent ISPs – including anticompetitive provisioning procedures, service disruptions, disparagement, misrepresentations and improper billing – that demonstrate petitioners intended to monopolize through that price squeeze. *linkLine*, 503 F.3d at 879-80.⁶

6. The district court granted petitioners' motion to strike the "additional anticompetitive acts" allegations, ruling that they were relevant only to the previously dismissed "refusal to deal" claims, and irrelevant to the price squeeze claims. Pet. App. 33a-36a. It rejected respondents' argument that these "additional anticompetitive acts" were probative of the requirement – imposed in cases alleging price squeeze in a regulated industry – that plaintiff must prove specific intent to monopolize by "the actions of the utility, taken as a whole." *City of Anaheim*, 955 F.2d at 1378 (citing *City of Mishawaka*).

3. District Court Rulings and Ninth Circuit Opinion

The district court denied petitioners' motions to dismiss these price squeeze claims, determining they were, unlike *Trinko's* refusal to deal claim, cognizable under existing antitrust standards and fell within the range of recognized Sherman Act Section 2 claims even in the context of a regulated (here partially regulated) industry. Pet. App. 54a-55a, 88a-90a.

The district court also addressed petitioners' motion to dismiss respondents' price squeeze claim for failure to allege the requirements of price predation under *Brooke Group*, 509 U.S. at 222-24. Pet. App. 36a-52a. The district court denied that motion, ruling "even if the *Brooke Group* requirements were applied, the [First Amended Complaint] would satisfy those requirements," noting it "contains price squeeze allegations substantially similar to those approved by the [Eleventh Circuit] in [*BellSouth*]." Pet. App. 48a-49a & n.16.

The Ninth Circuit affirmed the district court's orders denying the motions to dismiss and for judgment on the pleadings. *linkLine*, 503 F.3d at 885. The court ruled: "Based on the record before us at this time, we are able to conclude that the district court was correct to deny the SBC Entities' motion for judgment on the pleadings because linkLine's allegation that the pricing scheme created an anticompetitive price squeeze states a potentially valid claim under § 2 of the Sherman Act." *Id.*

REASONS FOR DENYING THE PETITION

Petitioners can state no compelling reasons for granting the Petition. To summarize, taking petitioners' stated grounds in order:

First, the Ninth Circuit decision – denying a motion to dismiss respondents price squeeze claims because they were viable under traditional antitrust law – does not create a circuit court conflict. The decisions of the only two other circuit courts (the Eleventh and D.C. Circuit) having addressed price squeeze claims in light of *Trinko*, have recognized the viability of predatory price squeeze claims of the type alleged here.

Second, the Ninth Circuit decision does not conflict with *Trinko*. Indeed, the price squeeze claim alleged here – involving a predatory refusal to deal with competitors on the same terms as for retail customers – falls within *Trinko*'s delineation of the exception in which a monopolist's refusal to deal gives rise to antitrust liability.

Third, petitioner cannot establish here that the Ninth Circuit decision endorses a doctrinal deviation from traditional Sherman Act principles that demands intervention by this Court – any more than was the case when review was denied of the Eleventh Circuit's decision in *BellSouth*. The Ninth Circuit's standard for imposing price squeeze liability rests on sound and settled antitrust law. Criticisms as to the purported vagueness of, or administrative problems in applying, terms used in early statements of the elements of those price squeeze claims – such as “fair price” and

“living profit”⁷ – are not implicated in cases as here where, the unregulated retail prices are below the monopolist’s own wholesale costs for providing service. See *Town of Concord*, 915 F.2d at 28-29. Indeed, “a special problem” seemingly perfectly suited for antitrust intervention “is posed by a [price squeezing] monopolist, regulated at only one level, who seeks to dominate a second, unregulated level, in order to earn at that second level the very profits that regulation forbids at the first.” *Id.* at 29; see also *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 482-83 (1992) (ruling a triable issue of fact exists on Section 2 claim alleging defendant used its control over one market to gain dominance in another market).

7. These terms were used in Judge Hand’s seminal formulation of the price squeeze elements in *United States v. Aluminum Co. of America*, 148 F.2d 416, 437 (1st Cir. 1945). Though citing this case, neither the district court nor the Ninth Circuit purported to apply these terms in recognizing respondents’ claims here satisfied existing antitrust standards for stating a claim of monopolization through price squeezing. As recognized in *Town of Concord*, where as here wholesale prices exceed retail prices it “eliminate[s] some of the ‘administrative’ problems” of applying these terms and the determining the related “reasonableness of the price ‘gap’” between wholesale and retail prices. 915 F.2d at 28.

I. THE DECISION BELOW DOES NOT CONFLICT WITH PRIOR CIRCUIT PRECEDENT OR WITH *TRINKO*

A. The Ninth Circuit Decision Does Not Conflict with the Prior Decisions of the Eleventh Circuit, the D.C. Circuit or the Law of Other Circuits or *Trinko*

1. The Ninth Circuit decision allowing respondents' claims to proceed accords with the Eleventh Circuit's decision in *BellSouth*, holding that the "[plaintiffs'] price squeezing claim survives because it is based on traditional antitrust doctrine and is not specifically barred by *Trinko*." 374 F3d at 1050. *BellSouth* noted that the *Trinko* Court "preserves claims that satisfy existing antitrust standards" in rejecting the argument that *Trinko* or the federal telecommunication regulation excluded facially valid price squeezing claims. *Id.* at 1052 (quoting *Trinko*, 540 U.S. at 407).

The Eleventh Circuit determined in *BellSouth* that the plaintiffs' price squeezing claim must and did "contain allegations that the two basic prerequisites for a showing of price predation under § 2 of the Sherman Act have been met" – that is, (a) "the prices complained of are below an appropriate measure of its rival's costs" and (b) "a dangerous probability" of recouping "its investment in below-cost prices." *Id.* at 1050-51 (quoting *Brooke Group*, 509 U.S. at 222, 224). Respondents have satisfied that burden here.⁸

8. Respondents have argued below, and contend, their price squeeze claims need not satisfy the predatory pricing requirements of *Brooke Group*. Nothing in the well-established
(Cont'd)

The Ninth Circuit decision did not specifically discuss the applicability of *Brooke Group* requirements in its decision affirming the district court's denial of petitioners' motion to dismiss on respondents' price squeeze allegations based on the record before it. *linkLine*, 503 F.3d at 885. The record before the Ninth Circuit included the price squeeze allegations in the First Amended Complaint ("FAC"). *Id.* at 879. And as the district court ruled, in denying petitioners' motion to dismiss based on *Brooke Group*, "even if the *Brooke Group* requirements were applied, the FAC would satisfy those requirements," noting that it "contains price squeeze allegations substantially similar to those approved by the [Eleventh Circuit] in [*BellSouth*]." Pet. App. 48a-49a & n.16; *see id.* at 52a (quoting FAC ¶ 26(b)); *see linkLine*, 503 F.3d at 879 (setting forth respondents' price squeeze allegations).

In *BellSouth*, where as here the plaintiff argued it need not assert a predatory pricing claim to state a valid

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body of price squeeze authority supports this conflation of price squeeze and predatory pricing claims, particularly where wholesale prices exceed retail prices. There is no reason to apply predatory (below-cost) pricing requirements to such price squeeze claims here any more than there would be to apply them to a "practical refusal to deal" where the monopolist offers to deal with competitors "only on unreasonable terms and conditions" and refuses to "deal with its competitors on the same terms that it already deals with others in the existing retail market." *MetroNet*, 383 F.3d at 1132-33. For those situations, there should be no additional requirement that the retail prices were below cost; indeed, to the contrary, *Trinko* underscores that in *Aspen* the refusal to sell "at its own retail price" suggested a "willingness to forsake short-term profits to achieve an anticompetitive end." 540 U.S. at 409.

price squeeze claim, the Eleventh Circuit held that the allegations, substantially similar to those here, satisfied the *Brooke Group* requirements of “below-cost pricing” and “dangerous probability of recoup[ment].” 374 F.3d at 1050-52. On the below-cost pricing requirement, the court in *BellSouth* relied upon the allegations, substantively identical to those here, that:

‘[BellSouth’s] retail prices for combined DSL and Internet access service are set so low relative to its unbundled wholesale loop prices that Covad cannot meet BellSouth’s . . . retail prices and still make a reasonable return on its investment. If Covad charged retail DSL/Internet access customers the same price as BellSouth does, . . . Covad could not recover the cost of providing the service, e.g., loop costs, collocation costs, transport costs, corporate overhead and sales and market costs.’

Id. at 1050; compare with FAC (¶ 25(A)(1) & (2) (quoted at Pet. App. 48a). After quoting these allegations, the court in *BellSouth* stated:

Whether the last sentence in this passage reflects ‘an appropriate measure of [BellSouth’s] costs,’ *Brooke Group*, 509 U.S. at 222, 113 S.Ct. 2578, is a factual matter for the district court to determine at a later stage of proceedings. For purposes of the pleading stage, Covad’s complaint meets the first *Brooke Group* prerequisite for a showing of price predation.

BellSouth, 374 F.2d at 1051 (brackets in original).

The court in *BellSouth* then – after noting that it was alleged there (as here) that wholesale prices charged to the competitor were higher than prices charged to retail customers for combined DSL and Internet access service – stated:

If it is true that . . . the retail prices it is charging individual customers for combined DSL and Internet service, are ‘below an appropriate measure of [BellSouth’s] costs,’ that fact suffices to satisfy the first prong of a price predation offense under § 2 of the Sherman Act. As noted above, whether the unbundled wholesale loop prices BellSouth charges Covad pursuant to the interconnection agreement are the ‘appropriate measure of [BellSouth’s] costs’ is a matter for the trier of fact to determine.

Id. at 1051-52 (citation omitted; brackets in original).

Here, similarly, respondents’ price squeeze claim alleges that petitioners’ retail prices charged to individual retail customers, for a bundle of DSL access, Internet service and necessary equipment (modem and installation), were set below its wholesale DSL transport costs petitioners charged respondents who competed at retail with petitioners’ affiliates. *linkLine*, 503 F.3d at 879 (quoting price squeeze allegations of FAC). Hence, as alleged by respondents, “‘if defendants themselves charged their retail affiliates the same wholesale costs for DSL transport that they charged their wholesale ISP customers (such as plaintiffs),’” petitioners’ retail affiliates could not cover their costs at their low retail

prices for their bundled offering of DSL, Internet service, and necessary equipment – which were “in some cases, and for some period, even below the wholesale DSL transport cost.” *Id.* (quoting FAC). As in *BellSouth*, the district court below ruled such allegations were sufficient at the pleading stage to satisfy the “below-cost pricing” requirement of *Brooke Group*. Pet. App. 50a-51a.

On the element of recoupment, *BellSouth* relied upon the following allegations that:

‘If BellSouth had charged itself the same wholesale price for loops, BellSouth could not make a profit from its DSL service at current prices . . . As the costs are presently allocated, BellSouth must necessarily realize a significantly higher profit margin on its wholesale sales (for which it faces no competition) than it does on the corresponding retail sales (for which Covad is attempting to compete). BellSouth intended this artificial cost allocation to harm Covad, and it did.’

374 F3d at 1051. The *BellSouth* court held that these allegations, which are substantially similar to those set forth in respondents’ FAC (¶ 25(A)(3)):

suggest that BellSouth is compensating for deliberately reduced profits on the retail end of its operations with correspondingly greater profits on the wholesale side, in order to stifle competition from firms such as Covad that are both wholesale customers and retail rivals. We

find that these allegations are sufficient to allege ‘a dangerous probability’ that BellSouth will ‘recoup[] its investment in below-cost prices.’ *Brooke Group*, 509 U.S. at 224, 113 S. Ct. 2578.

374 F.3d at 1051. The court then added that:

Whether the facts contained in Covad’s complaint and in the record will bear out [this] recoupment allegation against BellSouth is also a matter for the district court to determine at a later stage, not on the basis of a motion to dismiss for failure to state a claim. Taken together, Covad’s price predation allegations meet the ‘exceedingly low’ threshold of sufficiency that a complaint must meet to survive a 12(b)(6) motion.

Id.

Here too substantially similar allegations in respondents’ First Amended Complaint satisfy the recoupment standard as applied in *BellSouth* and hence survive a motion to dismiss on the pleadings. Further, as the district court determined, the complaint allegations here go beyond those found sufficient in *BellSouth* to satisfy the “dangerous probability of recoupment” requirement:

[T]he FAC elsewhere alleges something akin to a dangerous probability of recoupment within the meaning of *Brooke Group* . . . [alleging] that, as a result of Defendants’ anti-competitive conduct, ‘competition in the provision of Internet

services has been effectively eliminated in defendants' California service areas, and consumers have been deprived of lower prices, a choice of service providers, greater efficiency and enhanced products.'

Pet. App. 51a-52a (citation omitted).

Therefore, the Ninth Circuit decision affirming the district court's denial of the motion to dismiss these price squeeze allegations here accords with the Eleventh Circuit's *BellSouth* decision; and those allegations would satisfy the antitrust standards for stating a valid price squeeze claim as set forth in that decision.

2. Petitioners incorrectly contend a "square circuit-court conflict" is created by the D.C. Circuit's opinion in *Bell Atlantic*. That opinion held that the price squeeze claim alleging an ILEC's too high wholesale prices for the provisioning of unbundled loops – a provisioning that was the purely product of "statutory compulsion" – was indistinguishable from and barred by *Trinko*. 398 F.3d at 673.

Petitioners misread this decision as an unqualified rejection of price squeeze claims where the monopolist has no duty to deal absent statutory compulsion. As the D.C. Circuit explained in its order on denial of rehearing on that decision, the suggestion that "the court's holding 'eliminates' the antitrust claim of a price squeeze, simply misreads our opinion." *Bell Atlantic*, 407 F.3d at 1222. "Notably, the court did not face a circumstance similar to that in *Covad Communications Co. v. BellSouth Corp.*, 374 F.3d 1044, 1050-52 (2004), in which the Eleventh

Circuit held a claim for predatory pricing of loops could proceed; in that case the complaint alleged the ‘basic prerequisites for . . . price predation.’” *Id.*

It cannot be disputed here that the price squeeze claim in *BellSouth* involved the pricing for the provisioning of wholesale unbundled loops that was compelled by statute (the 1996 Federal Telecommunications Act), just as was the case in *Bell Atlantic*. Nor can it be disputed that the price squeeze allegations that were regarded by the Eleventh and D.C. Circuits as having “alleged the ‘basic prerequisites for . . . price predation’” are substantially identical to those that have been alleged here.

Hence, the price squeeze claim the Ninth Circuit allowed to proceed here would not have been dismissed based on the D.C. Circuit’s own interpretation of its opinion in *Bell Atlantic*, reconciling that decision with the Eleventh Circuit’s allowing price squeeze claims to proceed on the basis of allegations that are legally indistinguishable from those here.

3. Further, *Bell Atlantic* is, like *Trinko*, distinguishable from this case. In *Bell Atlantic*, the monopolization claims involved access to (pricing of) unbundled loops which was “purely a creature of the 1996 [Telecommunications] Act.” 398 F.3d at 673. As *Trinko* underscored in distinguishing *Aspen Skiing* and *Otter Tail*, such “unbundled elements” (as loops) were “not otherwise marketed or available to the public.” *Trinko*, 540 U.S. at 410.⁹ Instead, the “sharing obligation imposed

9. “In *Aspen Skiing*, what the defendant refused to provide to its competitor was a product that it already sold at retail. . . .”

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by the 1996 Act created ‘something brand new’ – ‘the wholesale market for leasing network elements’” to competitors at cost-based rates, so that “Verizon’s reluctance to interconnect at the cost-based rate of compensation available under [the Act] tells us nothing about dreams of monopoly.” *Id.* at 410, 409 (citation omitted). Indeed, “[t]he unbundled elements offered pursuant to [the Act] exist only deep within the bowels of Verizon; they are brought out on compulsion of the 1996 Act **and offered not to consumers but to rivals, and at considerable expense and effort.**” *Id.* at 410 (emphasis added). Hence, the Court in *Trinko* concluded “Verizon’s alleged insufficient assistance in the provision of service to rivals is not a recognized antitrust claim under this Court’s existing refusal-to-deal precedents.” *Id.*

By contrast, here – like *Aspen Skiing* and *Otter Tail*, but unlike *Trinko* and *Bell Atlantic* – the DSL Internet service at issue is “otherwise marketed or available to the public” and petitioners here, as in *Aspen Skiing* and *Otter Tail*, are refusing to provide competitors the same services or prices made available to their retail customers, instead charging wholesale prices exceeding retail prices. *See Trinko*, 540 U. S. at 409-10 (“In *Aspen Skiing*, the defendant turned down a proposal to sell [to competitor] at its own retail price, suggesting a calculation that its future monopoly retail price would

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Trinko, 540 U.S. at 410. “Similarly, in *Otter Tail* . . . , the defendant was already in the business of providing a service to certain customers (power transmission over its network), and refused to provide the same service to certain other customers.” *Id.*

be higher” and “reveal[ing] a distinctly anticompetitive bent”; and “[i]n the present case, by contrast [to *Otter Tail*], the services allegedly withheld are not otherwise marketed or available to the public.”). *See also MetroNet*, 383 F.3d at 1132.

Hence, petitioners’ price squeezing conduct, charging rivals higher prices than otherwise available to consumers, falls within the exception to the general “no duty to deal” rule carved out by *Aspen Skiing* and *Otter Tail*, as applied by this Court in *Trinko*.

4. Petitioners cite two pre-*Trinko* decision, *Cavalier Telephone, LLC v. Verizon Virginia, Inc.*, 330 F.3d 176, 181, 190 (4th Cir. 2003), and *Goldwasser v. Ameritech Corp.*, 222 F.3d 390, 395 (7th Cir. 2000), dismissing antitrust claims based on violations of duties arising solely from the Telecommunications Act of 1996. These decisions do not discuss whether the plaintiffs there even contended their pricing claim allegations independently satisfied existing antitrust standards. From the cryptic nature of the claims alleged in those cases it is highly doubtful they contained allegations similar to those regarded as sufficient to state valid § 2 price squeeze claims in the post-*Trinko* decisions of the Ninth, D.C. and Eleventh Circuits as discussed above. Hence, no circuit court split arises from the pre-*Trinko* decisions.

B. The Ninth Circuit Decision Does Not Threaten to Undermine *Trinko*

The Ninth Circuit decision does not assail the reasoning or result in *Trinko*. The price squeeze claims here are fundamentally different than from those

addressed in *Trinko* and “satisfy established antitrust standards” and so are preserved under the reasoning of *Trinko. linkLine*, 503 F.3d at 883 (quoting *Trinko*, 540 U.S. at 406); see *BellSouth*, 374 F.3d at 1053. Taking petitioners’ contentions in turn:

1. Respondents’ price squeeze claims are not, as petitioners assert, “logically or legally indistinguishable” from the “insufficient assistance” claims rejected in *Trinko*. Rather, this challenged price squeezing conduct is akin to, and reveal the same “distinctly anticompetitive bent” as, the refusals to sell to competitors at retail prices for services “otherwise marketed or available to the public” that fall within the exception to the general “no duty to deal” rule carved out by *Aspen Skiing* and *Otter Tail*, as applied by this Court in *Trinko*.

Similarly, the recognition of such price squeezing claims does not impinge on any legitimate element of a “free-market system” or chill legitimate economic growth or innovation, as discussed in *Trinko*; nor does it force an upstream monopolist to uneconomically prop up less efficient downstream rivals to the detriment of consumer welfare. The price squeeze claim here alleges an upstream monopolist engaged in exclusionary conduct aimed at dominating an unregulated retail market with the expectation that “its future monopoly retail price would be higher.” *Trinko*, 540 U.S. at 409; see *Town of Concord*, 915 F.2d at 29 (recognizing the “special problem . . . posed by a monopolist, regulated at only one level, who seeks to dominate a second, unregulated level”). That claim does not risk putting upward pressure of retail prices, as petitioners suggest. Rather, by assuring parity of treatment between upstream monopolists’

competitors and customers, it preserves and promotes robust retail competition from equally or more efficient competitors, resulting in lower retail prices and greater choice to consumers.

Nor does redressing such price squeezing conduct impermissibly impose administratively unwieldy “day-to-day” supervisory duties on antitrust courts, as was the case in *Trinko* with respect to alleged anticompetitive violations of the regulatory sharing requirements of the Telecommunications Act of 1996. *Trinko*, 540 U.S. at 415. Unlike “[e]ffective remediation of violations of regulatory sharing requirements [that] will ordinarily require continuing supervision of a highly detailed decree,” redressing price squeezing alleged here does not involve such “continuing supervision,” any more than would be entailed in an addressing below-cost predatory pricing schemes. *Id.* And, as evidenced by the long line of case cited by the Ninth Circuit below, courts have been regarded as providing necessary and effective stewardship of the antitrust function in addressing anticompetitive price squeezing, even in the context of regulated industries.

Indeed, courts are particularly needed and suited to redress such price squeezing where as here “[a]ny restrictions on pricing at the retail level derive primarily from the antitrust laws.” *linkLine*, 503 F.3d at 885. Further, imposing liability for plainly anticompetitive and exclusionary price squeezing of the type alleged here – involving the wholesale rates exceeding retail rates – does not raise concern about the “administrability of a judicial remedy” because “[t]he court can simply order the defendant to deal with its competitors on the same

terms that it already deals with others in the existing retail market, without setting the terms of dealing.” *MetroNet*, 383 F.3d at 1133; see *Town of Concord*, 915 F.2d at 28 (noting price squeeze allegations involving “wholesale prices that *exceeded* retail prices” as “thereby eliminating some of the ‘administrative’ problems we have found surrounding a jury’s efforts to determine the reasonableness of the price ‘gap’” (emphasis in original)).

2. Petitioners contend that *Trinko* mandates dismissal of the price squeeze based on petitioners’ insupportable assertion that any conceivable threat to competition posed by the price squeeze could be remedied by regulatory oversight. Petitioners misread *Trinko*, and the cases it relies upon, and overstate the regulatory oversight here. As the Ninth Circuit properly ruled, “*Trinko* did not . . . completely eliminate the viability of a § 2 price squeeze theory in regulated industries.” *linkLine*, 503 F.3d at 883. Rather, *Trinko*, having determined that the plaintiffs’ “insufficient assistance” claims would not make a “recognized antitrust claim under this Court’s existing refusal-to-deal precedents,” looked to whether “traditional antitrust principles justify adding the present case to the few existing exceptions from the proposition that there is no duty to aid competitors.” 540 U.S. at 410-11. In doing so, it stated that “[o]ne factor of particular importance is the existence of a regulatory structure designed to deter and remedy anticompetitive harm.” *Id.* at 412. Hence, “the Court did not say that the existence of a regulatory scheme was a per se bar to judicial enforcement of the antitrust laws, only that ‘the existence of a regulatory structure [designed to deter and remedy anticompetitive harm]’” is “‘one factor’ to

consider in determining whether antitrust liability might also lie.” *linkLine*, 503 F.3d at 882-83 (quoting *Trinko*, 540 U.S. at 412).

Indeed, with reference to the “implied immunity” doctrine discussed in *Trinko*, it is recognized that “[a]n implied immunity may be found only where there is ‘a convincing showing of clear repugnancy between the antitrust laws and the regulatory system.’” *Phonetele, Inc. v. AT&T Co.*, 664 F.2d 716, 726 (9th Cir. 1981) (Kennedy, J.) (citation omitted). And even then, an exemption will be implied “only to the minimum extent necessary” in order “to make the regulatory Act work.” *Id.* at 730 n.37 (citation omitted). Further, “the mere existence of a [regulatory] remedy within the Act does not indicate a congressional intent to displace the antitrust laws.” *Id.* at 735. This is true even though the remedial scheme under the Act involved “different substantive standards.” *Id.* at 734 n.46. It is well established that the “freedom of a party injured by anticompetitive conduct to elect between an administrative [Federal Communications Act] remedy and a judicial cause of action under the Clayton Act is quite acceptable; the latter need not derogate or interfere with the former.” *Id.*

Moreover, “the existence of regulation does not always eliminate the danger of anticompetitive harm.” *linkLine*, 503 F.3d at 883. “The key, under *Trinko*, is the nature of the regulatory structure at issue.” *Id.* (quoting *Trinko*, 540 U.S. at 412). Significantly, here, unlike *Trinko* and *Town of Concord*, the challenged conduct does not arise in the context of a fully regulated industry. Rather there has been “no comparable regulatory attention paid to the retail DSL market” and hence any “restrictions on pricing at the retail

level derive primarily from the antitrust laws.” *Id.* at 885; *see also Town of Concord*, 915 F.2d at 29 (recognizing the “special problem” posed by a price squeezing “monopolist, regulated at only one level, who seeks to dominate a second, unregulated level”).

Petitioners refer to the FCC’s decision not to subject Internet service to the “common-carrier regulation” duties imposed on ILECs for their provision of transmission facilities used to provide DSL service. *See National Cable & Telecommunications Ass’n v. Brand X Internet Services*, 545 U.S. 967, 976, 993-94 (2005). Yet nothing in that determination suggests, much less establishes, that a “regulatory structure” exists “to deter and remedy anticompetitive harm” (*Trinko*, 540 U.S. at 412) of the type alleged here; nor does it discredit the Ninth Circuit’s ruling that “[a]ny restrictions on pricing at the retail [DSL] level derive primarily from the antitrust laws” (*linkLine*, 503 F.3d at 885), nor demonstrate any tension, much less clear repugnancy, between the regulatory regime and the antitrust laws.

II. THE COURT SHOULD NOT REJECT THE “PRICE SQUEEZE” DOCTRINE ARTICULATED BY THE NINTH CIRCUIT

Petitioners cannot establish that the Ninth Circuit decision endorses a significant doctrinal deviation from traditional Sherman Act principles that demands intervention by this Court.

First, the Ninth Circuit’s price squeeze liability standard relies on well-settled antitrust principles set forth in a substantial body of federal circuit case

authority recognizing the necessary and proper role of courts addressing price squeeze claims of the type alleged here, and their suitability to do so even in the context of a regulated monopolist. *linkLine*, 503 F.3d at 880. Recognizing the viability of the price squeeze claims alleged here accords with antitrust principles informing the approval of a similar claims addressed by the Eleventh Circuit in *BellSouth* and endorsed by the D.C. Circuit in *Bell Atlantic*.

Second, petitioners' criticism as to the difficulty in applying terms used in earlier price squeeze cases (*e.g.*, "fair price" or "living profit") does not render the antitrust courts either unable or unsuited to decide price squeeze claims, particularly in cases as here where the unregulated retail prices are set below the monopolist's own wholesale costs for providing service in order to exclude, or dominate, retail competition – and thereby raise prices and harm consumers. *See Town of Concord*, 915 F.2d at 28-29. Indeed, in such cases, a court's "practicable ability" in assessing price squeeze claims is no more difficult, and requires no more "continuing supervision," than applying pricing and costs standards for predatory pricing claims under *Brooke Group*.

Third, petitioners' attempted jettisoning of price squeeze liability is not supported by the First Circuit's decision in *Town of Concord*, which held that price squeeze allegations do "not ordinarily violate Sherman Act § 2 where the defendant's prices are regulated at both the primary and secondary levels." 915 F.2d at 22. As that court then clarified: "In so holding we *are not* saying either that the antitrust laws do not apply in this regulatory context, or that they somehow apply less stringently here than elsewhere." *Id.* (emphasis in

original). “And we have stressed that our reasoning applies with full force only when the monopolist who engages in the squeeze is regulated at both industry levels.” *Id.* at 29. The court further stated: “We recognize that a special problem is posed by a [price squeezing] monopolist, regulated at only one level, who seeks to dominate a second, unregulated level, in order to earn at that second level the very profits that regulation forbids at the first.” *Id.* (citation omitted).

Such a “special problem” of anticompetitive harm as identified in *Town of Concord* would warrant antitrust court enforcement where, as here, “there is no comparable regulatory attention paid to the retail DSL market” so that “[a]ny restrictions on pricing at the retail level derive primarily from the antitrust laws.” *linkLine*, 503 F.3d at 885. Further, as stated in *Town of Concord*, where the wholesale prices exceed retail prices, it “eliminate[] some of the ‘administrative’ problems we have found surrounding a jury’s efforts to determine the reasonableness of the price ‘gap.’” 915 F.2d at 28; *see also MetroNet*, 383 F.3d at 1133.

Fourth, the price squeeze doctrine relied on here does not, as petitioners suggest, seek to promote competitors at the expense of lawful competition, economic efficiency, legitimate price behavior or consumer welfare. Rather, it seeks to redress plainly anticompetitive conduct aimed at excluding retail competition (vanquishing equally or more efficient competition) in order to thereby monopolize, raise prices and deprive consumers of choice. *See Trinko*, 540 U.S. at 409-10 (in *Aspen Skiing*, defendant’s refusal to sell to competitor at the same retail price it charged other

customers “suggest[ed] a calculation that its future monopoly retail price would be higher” and “revealed a distinctly anticompetitive bent”); *see also Eastman Kodak*, 504 U.S. at 482-83 (Section 2 claim may exist where defendant engaged in exclusionary conduct using control over one market to gain dominance in another market).

Recognizing liability for such exclusionary conduct aimed at domination of an unregulated retail market is not based on any discredited theory of “monopoly leveraging” (using monopoly to gain an competitive advantage in a second market short of attempted monopolization); nor does it condemn lawful price competition. Rather it is grounded in sound and settled antitrust principles directed at redressing anticompetitive conduct that enables the possession and exercise of monopoly power to the detriment of competition-consumer welfare that the antitrust laws were enacted to protect.

Petitioners’ ruminations (based on disputed factual assertions) as to the possible (hypothetical) benefits of vertical integration cannot, on this motion to dismiss on the pleadings, trump or foreclose factual allegations of the type raised here that have been regarded – by the district court and Ninth Circuit, and by the decisions of the Eleventh Circuit and the D.C. Circuit – as stating a valid price squeeze claim under § 2 of the Sherman Act.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

MAXWELL M. BLECHER

Counsel of Record

GARY M. JOYE

BLECHER & COLLINS, P.C.

515 S. Figueroa Street

17th Floor

Los Angeles, CA 90071

(213) 622-4222

Counsel for Respondents