Nos. 20-1776

IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT

BRUCE E. ELLISON, M.D.,

Plaintiff-Appellant,

v.

AMERICAN BOARD OF ORTHOPAEDIC SURGERY, INC.,

Defendant-Appellee.

On Appeal from the United States District Court for the District of New Jersey, No. 16-CV-8441 (McNulty, J.)

Brief of *Amicus Curiae* Open Markets Institute in Support of Neither Party

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Open Markets Institute is a non-profit corporation and, as such, no entity has any ownership interest in it.

/s/ Jason Rathod
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INTEREST OF *AMICUS CURIAE*[1]

The Open Markets Institute (OMI) is a non-profit organization dedicated to promoting fair and competitive markets. It does not accept any funding or donations from for-profit corporations. Its mission is to safeguard our political economy from concentrations of private power that undermine fair competition and threaten liberty, democracy, and prosperity. OMI regularly provides expertise on antitrust law and competition policy to Congress, federal agencies, courts, journalists, and members of the public.

Among exclusionary and predatory practices, tying is a potent tactic for dominant corporations seeking to maintain and extend their market control. By conditioning the purchase of one product on the purchase of a second product, dominant firms use their power to marginalize rivals in the market for the second product and impose an unwanted purchase on consumers. The Supreme Court has long prohibited the tying of separate products by firms with power in a market, and this Court should affirm this ban.

[1] The plaintiff-appellant consented to the filing of this brief, while the defendant-appellee did not grant consent. *Amicus curiae* has moved for leave to file this brief. No counsel for any party authored this brief in whole or part. Apart from *amicus curiae*, no person contributed money intended to fund the brief's preparation and submission.

SUMMARY OF ARGUMENT

In a tying arrangement, a firm conditions the purchase of one product (tying product) on the purchase of a second separate product (tied product). The practice is harmful to the public when the firm has power in the market for the tying product. For example, a software firm can compel purchasers who want its dominant operating system to also obtain a web browser, even though purchasers may prefer to use the web browser of another developer. Kate Cox, *Slack Says Microsoft Is Up to Its Old Tricks, "Browser-War" Style*, Ars Technica (July 22, 2020), https://arstechnica.com/tech-policy/2020/07/microsoft-is-back-up-to-antitrust-mischief-after-20-years-slack-claims/. When undertaken by a firm with power in a market, the tying of distinct products is an unfair competitive practice that excludes rivals and coerces purchasers. *Fortner Enterprises, Inc. v. U.S. Steel Corp.*, 394 U.S. 495, 498–99 (1969). Given these harms, the Supreme Court and this Court have applied a categorical prohibition, or per se rule, against the tying of separate products by a firm with power in one market.

By engaging in tying, a firm with power in a market uses its leverage to exclude and block rivals. *See Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 605 (1953) ("[T]o the extent the enforcer of the tying arrangement enjoys market control, other existing or potential sellers are foreclosed from offering up their goods to a free competitive judgment; they are effectively

excluded from the marketplace."). Because purchasers are dependent on the seller of the tying product, they must also buy the tied product. Accordingly, purchasers forgo doing business with competing suppliers of the tied product. *See Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 6 (1958) ("[Tying agreements] deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of his power or leverage in another market.").

Tying by a firm with power in a market coerces purchasers. They may prefer to buy the tied product from a rival because it is available at a lower price or has superior features. Alternatively, purchasers may not want the tied product at all. When a firm engages in tying though, purchasers have no choice but to buy the tied product. The firm with power in the market for the tying product imposes an unwanted purchase on at least some consumers. For the consumer, "the freedom to select the best bargain in the second market is impaired by his need to purchase the tying product, and perhaps by an inability to evaluate the true cost of either product when they are available only as a package." *Jefferson Parish Hospital District No. 2. v. Hyde*, 466 U.S. 2, 15 (1984), *abrogated on other grounds by Illinois Tool Works, Inc. v. Independent Ink, Inc.*, 547 U.S. 28 (2006).

Dominant firms in digital markets show how tying can be used to the detriment of competitors, consumers, and producers. The European Commission

ruled that Google improperly bundled its Play Store, where Android owners purchase apps for their devices, with its search tool and browser on Android devices. Facebook has been accused of using tying to extend its dominance in social media and messaging into virtual currencies. Complainants alleged that Amazon has used tying to leverage its dominance in online commerce into adjacent markets. And this summer, Slack, a developer of collaborative work services, claimed that Microsoft tied its Teams product to its office productivity suite to foreclose Slack and other rivals.

The federal courts have applied a modified per se rule to tying. The Supreme Court held that tying of separate products is categorically illegal when "the existence of forcing is probable." *Jefferson Parish*, 466 U.S. at 15. It ruled that tying "violates [Section 1] of the Sherman Act if the seller has 'appreciable economic power' in the tying product market and if the arrangement affects a substantial volume of commerce in the tied market." *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 462 (1992) (quoting *Fortner*, 394 U.S. at 503). *See also Illinois Tool Works*, 547 U.S. at 42–43 (2006) (holding tying arrangements are per se illegal when a plaintiff presents "proof of power in the relevant market"). In line with Supreme Court precedent, this Court described the modified per se rule as follows: "(1) [A] defendant seller ties two distinct products; (2) the seller possesses market power in the tying product market; and (3) a

substantial amount of interstate commerce is affected, then the defendant's tying practices are automatically illegal without further proof of anticompetitive effect." *Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp.*, 959 F.2d 468, 477 (3d Cir. 1992).

ARGUMENT

I. Tying of Separate Products by a Firm with Market Power Unfairly Excludes Rivals and Coerces Consumers

A corporation with power in a market can tie or bundle separate products and services and unfairly exclude rivals and coerce purchasers. *Fortner Enterprises, Inc. v. U.S. Steel Corp.*, 394 U.S. 495, 498–99 (1969) ("*Fortner I*"). In conditioning the purchase of one product (tying product) on the purchase of a second separate product (tied product), the firm uses its power in the tying market to foreclose competitors in the market for the tied product. The firm also compels purchasers who want product A to obtain product B, even though purchasers may prefer to obtain product B from another firm or not to buy product B at all. Dominant firms in digital markets show how tying can disadvantage competitors, consumers, and producers.

A. Tying by a Firm with Market Power Harms Competitors and Consumers

By engaging in tying, a firm with market power[2] uses its power to exclude and block rivals. *See Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 606 (1953) ("[T]o the extent the enforcer of the tying arrangement enjoys market control, other existing or potential sellers are foreclosed from offering up their goods to a free competitive judgment; they are effectively excluded from the marketplace."). Because the tying product is important or even essential for purchasers to obtain, they also must buy the tied product and forgo doing business with a competing supplier of the tied product. *See Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 6 (1958) ("[Tying agreements] deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of his power or leverage in another market."). *See also Eisai, Inc. v. Sanofi Aventis U.S., LLC*, 821 F.3d 394, 405–06 (3d Cir. 2016) ("Analogizing this practice to tying, which is *per se* illegal, we found such bundling anticompetitive because it could 'foreclose

[2] "Market power is defined as the ability 'to raise prices or to require purchasers to accept burdensome terms that could not be exacted in a completely competitive market.'" *Allen-Myland, Inc. v. International Business Machines Corp.*, 33 F.3d 194, 200 (3d Cir. 1994) (quoting *U.S. Steel Corp. v. Fortner Enters., Inc.*, 429 U.S. 610, 620, (1977)).

portions of the market to a potential competitor who does not manufacture an equally diverse group of products and who therefore cannot make a comparable offer.'")

Through tying, a firm with power in one market does *not* gain an advantage in the second market through a superior product or more attractive price. *Jefferson Parish Hospital District No. 2. v. Hyde*, 466 U.S. 2, 14 (1984), *abrogated on other grounds by Illinois Tool Works, Inc. v. Independent Ink, Inc.*, 547 U.S. 28 (2006). Instead, the firm leverages its power in the tying market into an advantage in the tied market. *Allen-Myland, Inc. v. Int'l Bus. Machines Corp.*, 33 F.3d 194, 200 (3d Cir. 1994) ("[T]he antitrust concern over tying arrangements is… in which the seller can exploit its power in the market for the tying product to force buyers to purchase the tied product when they otherwise would not, thereby restraining competition in the tied product market."). Under these circumstances, rivals in the tied market may lose sales even if they offer a superior product on better terms. Dominant firms may foreclose entrants with promising products and technologies from the tied market. Tying can accordingly suppress innovation and so "another fear has been that the second monopoly could impede innovation in the tied product market by reducing competitive pressure in that market." *Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp.*, 959 F.2d 468, 476 (3d Cir. 1992). By tying two separate products, a firm with power can compel entrants to enter two

markets simultaneously—a more difficult task than entering one market now and potentially the second market in the future.[3]

Tying by a firm with market power also coerces purchasers. Purchasers may prefer to buy the tied product from a rival because it is available at a lower price or has superior features—or purchasers may not want the tied product at all. Under a tying arrangement though, they have no choice but to purchase the tied product. The firm with power in the tying market imposes an unwanted purchase on at least some consumers. *See Illinois Tool Works*, 547 U.S. at 34–35 ("[T]he essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms.").

[3] Justice White made this observation in his dissent in *Fortner I:*

> The tying seller may be working toward a monopoly position in the tied product and, even if he is not, the practice of tying forecloses other sellers of the tied product and makes it more difficult for new firms to enter that market. They must be prepared not only to match existing sellers of the tied product in price and quality, but to offset the attraction of the tying product itself. Even if this is possible through simultaneous entry into production of the tying product, entry into both markets is significantly more expensive than simple entry into the tied market, and shifting buying habits in the tied product is considerably more cumbersome and less responsive to variations in competitive offers. *Fortner I*, 394 U.S. at 513 (White, J., dissenting).

Using its economic power, the tying firm prevents consumers from exercising their informed judgment. *See Times-Picayune*, 345 U.S. at 605 ("By conditioning his sale of one commodity on the purchase of another, a seller coerces the abdication of buyers' independent judgment as to the 'tied' product's merits and insulates it from the competitive stresses of the open market."). For the consumer, "the freedom to select the best bargain in the second market is impaired by his need to purchase the tying product, and perhaps by an inability to evaluate the true cost of either product when they are available only as a package." *Jefferson Parish*, 466 U.S. at 15. If a consumer is in a captive relationship with a supplier, tying can hurt the consumer in an aftermarket as well. *Avaya Inc., RP v. Telecom Labs, Inc.*, 838 F.3d 354, 399 (3d Cir. 2016) ("Tying liability may exist in an aftermarket where the seller can exploit customers who have already purchased the equipment and cannot easily shift to another brand.").

Without "appreciable economic power in the tying market,"[4] *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 462 (1992), a firm does not have the same ability to exclude rivals and coerce consumers. Accordingly, a firm without power is much less likely to foreclose rivals from the

[4] "For purposes of determining appreciable economic power in the tying market, this Court's precedents have defined market power as the power to force a purchaser to do something that he would not do in a competitive market, and have ordinarily inferred the existence of such power from the seller's possession of a predominant share of the market." *Eastman Kodak*, 504 U.S. at 452.

market through tying. *See, e.g.*, *Northern Pacific Railway*, 356 U.S. at 7 ("[I]f one of a dozen food stores in a community were to refuse to sell flour unless the buyer also took sugar it would hardly tend to restrain competition in sugar if its competitors were ready and able to sell flour by itself."). Because purchasers have effective alternatives under these conditions, they can forgo the tied products and buy untied products.

B. Tying by Dominant Digital Firms Illustrates the Harms of the Practice

Tying by dominant digital firms shows how the practice injures competitors, trading partners, and end use consumers. Based on allegations and factual findings, four of the most powerful corporations in the world have used tying to extend their existing monopoly positions into new markets. *See Sheridan v. Marathon Petroleum Co.*, 530 F.3d 590, 592 (7th Cir. 2008) (Posner, J.) ("The traditional antitrust concern with such an agreement is that if the seller of the tying product is a monopolist, the tie-in will force anyone who wants the monopolized product to buy the tied product from him as well, and the result will be a second monopoly.").

Google

The European Commission held Google liable for two tying infringements. Google possessed dominance in the Android app store and mobile search markets. Antitrust Procedure Council Regulation Commission Decision on Google Android

(EC) No. 1/2003 of 18 July 2018, art. 7, 2018 O.J. (C AT.40099) 2, 168, n.763. Google's Play Store (app store) had a share of 90% in the market for Android apps. *Id.* at 129–30, n. 597; *id.* at 128–31. Cf. 62, n.248. Google's monthly market share of general search queries in Europe ranged between 87%-99% depending on the device. *Id.* at 192, n. 836, fn. 920. Google tied its products by requiring hardware mobile manufacturers to install Google's products before shipping them to retailers for sale.

The European Commission found that Google improperly tied the Play Store (tying product) to its search application and Chrome browser (tied products). *Id.* at 167, n. 754. The consequences of Google's tying were manifold: Google's general searches grew significantly; consumers and partners found removing Google's product from mobile devices was impossible; and competing services could not overcome Google's dominance. The Commission concluded Google abused its dominant worldwide market share for Android app stores and the national markets for general search services. *Id.* at 166, n. 752.

Facebook

Facebook has allegedly dominated virtual payment systems. Facebook held 90% market share in the social network gaming market and required developers of social network games (tying product) to use its virtual currency, Facebook credits (tied product). *Kickflip, Inc. v. Facebook, Inc.*, 999 F. Supp. 2d 677, 689 (D. Del.

2013). Through this tying of distinct services, Facebook was accused of extending its dominance in social network gaming into virtual currency. *Id.* Earlier this year, Americans for Financial Reform alleged Facebook ties its dominant WhatsApp and Messenger apps (tying products) to its new form of virtual currency, the Novi wallet (tied product). Raúl Carrillo, *Banking on Surveillance: The Libra Black Paper*, AFR Education Fund & Demand Progress, 31–33 (2020). Users of WhatsApp and Messenger automatically receive a Novi account tied to its use, once again through Facebook-owned technology.

Amazon

Amazon, the dominant player in ecommerce, has been accused of exclusionary tying for the past decade. An independent book printer alleged that Amazon tied its online bookstore for print-on demand books (tying product) with its printing services (tied product). *BookLocker.com, Inc. v. Amazon.com, Inc*., 650 F. Supp. 2d 89, 95 (D. Me. 2009). A federal district court denied Amazon's motion to dismiss the plaintiff's tying claim. *Id.* at 105, 107. Recently, a coalition of labor unions accused Amazon of forcing sellers on its marketplace to use its logistics services because prominence in Amazon search rankings (tying product) was tied to the purchase of Amazon services (tied product). International Brotherhood of Teamsters, *Petition for the Investigation of Amazon.com, Inc. Before the FTC*, 5–7 (February 27, 2020). Specifically, Amazon gave greater visibility in search results

to sellers who used Amazon's logistics and shipping services. Accordingly, Amazon appears to use its dominance in online commerce to achieve and maintain power in the market for logistics and shipping. *Id.* at 7.

Microsoft

Software maker Slack alleges Microsoft abused its market dominance to stunt Slack as a competitor in collaboration software. According to Slack's complaint to the European Commission, Microsoft, through technological means, ties Microsoft Office (tying product) to Microsoft Teams (tied product) and exploits its position as the dominant player in office productivity programs. Steve Lohr, *Slack Accuses Microsoft of Illegally Crushing Competition* (July 22, 2020), N.Y. Times, https://www.nytimes.com/2020/07/22/technology/slack-microsoft-antitrust.html. This tying allegedly excludes Slack and other rivals to Microsoft in collaboration software and serves to neutralize potentially broader threats to Microsoft's power. *Id. See also id.* ("'Slack threatens Microsoft's hold on business email, the cornerstone of Office, which means Slack threatens Microsoft's lock on enterprise software,' Jonathan Prince, vice president of communications and policy at Slack, said in a statement.").

II. The Supreme Court and This Court Apply a Modified Per Se Rule to Tying

Under controlling Sherman Act precedent,[5] a modified per se rule applies to tying.[6] If a firm with power in one market (the tying product) requires the purchase of a second separate product (tied product) that affects a substantial volume of commerce, the firm commits a per se violation of the Sherman Act. *Eastman Kodak*, 504 U.S. at 461–62. Importantly, this per se rule does *not* require a showing of monopoly or dominance, *U.S. Steel Corp. v. Fortner Enterprises, Inc*.,

[5] In the sale of goods, the Clayton Act prohibits tying arrangements "where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce." 15 U.S.C. § 14.

[6] In contrast to the per se rule that applies to horizontal price-fixing and market allocation, the per se rule for tying does not categorically condemn all tying arrangements. The Fifth Circuit has described the modified per se rule for tying as follows:

> This odd use of the term "per se" is descriptive of a rule located between a per se and a rule of reason inquiry. The best that can be said for it is that it reflects the intermediate danger tying arrangements pose to the market: unlike other per se illegal arrangements, "not every refusal to sell two products separately can be said to restrain competition." Rather, there must be proof "as a threshold matter ... [of] a substantial potential for impact on competition in order to justify per se condemnation" of a tie. *Roy B. Taylor Sales, Inc. v. Hollymatic Corp*., 28 F.3d 1379, 1382 (5th Cir. 1994).

This modified per se rule is sometimes referred to as the "quasi-per se rule." Einer Elhauge, *Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theory*, 123 Harv. L. Rev. 397, 400 (2009).

429 U.S. 610, 620 (1977) ("*Fortner II*"), but merely proving "appreciable economic power." *Eastman Kodak*, 504 U.S. at 462.

The Supreme Court has consistently applied a modified per se rule to tying.[7] The Court held that tying of separate products is per se illegal when "the existence of forcing is probable." *Jefferson Parish*, 466 U.S. at 15. After *Jefferson Parish*, the Court affirmed the modified per se rule, holding that tying "violates [Section 1] of the Sherman Act if the seller has 'appreciable economic power' in the tying product market and if the arrangement affects a substantial volume of commerce in the tied market." *Eastman Kodak*, 504 U.S. at 462 (quoting *Fortner I*, 394 U.S. at 503). *See also Illinois Tool Works*, 547 U.S. at 42–43 (holding tying arrangements are per se illegal when plaintiff supplies "proof of power in the relevant market").

This Court has followed the Supreme Court's controlling precedent and applied the modified per se rule to tying arrangements.[8] *Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp.*, 959 F.2d 468, 482 (3d Cir. 1992). The Court

[7] A plaintiff whose allegations do not trigger the modified per se rule can still establish illegality under the rule of reason. *See, e.g.*, *Jefferson Parish*, 466 U.S. at 29 ("In order to prevail in the absence of per se liability, respondent has the burden of proving that the Roux contract violated the Sherman Act because it unreasonably restrained competition.").

[8] This Court has even encouraged plaintiffs to plead tying claims under *Jefferson Parish's* modified per se test. *Cable Line, Inc. v. Comcast Cable Communications of Pennsylvania, Inc.*, 767 F. App'x 348, 352 (3d Cir. 2019) (recommending in dicta that a plaintiff, whose allegations included a practice resembling tying, should have brought proper tying claim under *Jefferson Parish* test.).

succinctly defined the per se rule: "(1) [A] defendant seller ties two distinct products; (2) the seller possesses market power in the tying product market; and (3) a substantial amount of interstate commerce is affected, then the defendant's tying practices are automatically illegal without further proof of anticompetitive effect." *Id.* at 476–77. *E.g.*, *Gordon v. Lewistown Hospital*, 423 F.3d 184, 214 (3d Cir. 2005). Under this Court's precedent, tying is per se illegal when the plaintiff establishes significant or "sufficient market power" in the tying market. *Brokerage Concepts, Inc. v. U.S. Healthcare, Inc.*, 140 F.3d 494, 516 (3d Cir. 1998). This Court has "traditionally expressed great concerns about the possible anticompetitive effects of tying arrangements, at least those in poorly functioning or uncompetitive markets. [The courts'] fear has centered on sellers who have market power in one product market and seem intent on exploiting that power in another market." *Town Sound & Custom Tops*, 959 F.2d at 475.

The modified per se rule requires only "appreciable economic power." *Eastman Kodak*, 504 U.S. at 462. Forcing a buyer to obtain an unwanted item, or an item that they would have preferred to purchase from another seller, is the key requirement. *See Jefferson Parish*, 466 U.S. at 12 ("When such 'forcing' is present, competition on the merits in the market for the tied item is restrained and the Sherman Act is violated.").

Critically, the accused firm does *not* need to have monopoly power or dominance in the tying market to trigger the modified per se rule. *Fortner I*, 394 U.S. at 502–03. A plaintiff must show that "the defendant had 'appreciable economic power in the tying market." *Brokerage Concepts, Inc. v. U.S. Healthcare, Inc.*, 140 F.3d 494, 516 (3d Cir. 1998). As the Supreme Court stated, "the question is whether the seller has some advantage not shared by his competitors in the market for the tying product." *Fortner II*, 429 U.S. at 620.

CONCLUSION

The Court should affirm the Sherman Act's modified per se rule for tying and evaluate whether the plaintiff-appellant's tying claim satisfies its requirements.

DATED: November 3, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this date, I caused a true and correct copy of the foregoing to be served on counsel of record for all parties via ECF.

/s/ Jason Rathod

Jason Rathod
Counsel for Amicus Curiae

DATED: November 3, 2020

CERTIFICATE OF COUNSEL

I, Jason Rathod, certify that:

1. According to the word processing application used to draft this brief (Microsoft Word 365), the brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(b) because it contains 4,024 words, not including the certificate of interested parties, table of contents, table of authorities, and this certificate.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5)(A) and the type styles requirement of Fed. R. App. P. 32(a)(6) because it uses proportionately spaced typeface in 14 point Times New Roman using Microsoft Word.

3. In accordance with Third Circuit Local Appellate Rule 31.1(c), the PDF and the paper versions of the brief are identical. The PDF version was scanned for viruses using Windows Defender and no viruses were found.

/s/ Jason Rathod
Jason Rathod

Counsel for Amicus Curiae

DATED: November 3, 2020