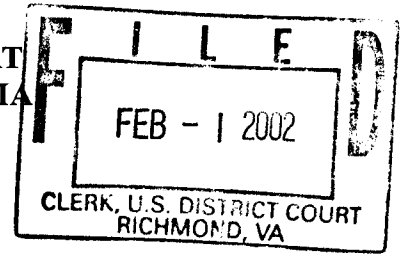


IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division



CAVALIER TELEPHONE, LLC)
)
Plaintiff,)
)
v.)
)
VERIZON VIRGINIA INC.)
)
Defendant.)
_____)

Civil Action No. 3:01CV736

**DEFENDANT VERIZON VIRGINIA INC.'S REPLY MEMORANDUM IN SUPPORT
OF ITS MOTION TO DISMISS**

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INTRODUCTION AND SUMMARY

Cavalier devotes much of its argument to the proposition that the 1996 Act does not confer any “implied immunity” from the antitrust laws. Cavalier thus betrays its inability to respond to Verizon’s central point: wholly apart from any issue of “immunity,” Cavalier’s allegations do not state a claim under established antitrust standards. This conclusion follows directly from the Seventh Circuit’s decision in *Goldwasser v. Ameritech Corp.*, 222 F.3d 390 (7th Cir. 2000) – written by Judge Diane Wood, an antitrust scholar, University of Chicago law professor, and Deputy Assistant Attorney General in the Antitrust Division of the Justice Department – which makes clear that Cavalier’s central allegations, that Verizon failed to live up to its affirmative duties *under the 1996 Act*, do not make out an *antitrust* claim. *Goldwasser* also rests upon the settled principle that the presence or absence of a cause of action under the antitrust laws may depend upon the extent to which access and pricing decisions are already controlled by regulators. In light of settled limitations on any affirmative duties imposed under section 2 – most of which Cavalier does not contest – Cavalier’s federal antitrust claims cannot survive. Because Virginia antitrust law adopts federal standards, Cavalier’s state law antitrust claims should also be dismissed.

Cavalier’s claims under the Communications Act of 1934 fail as well. In its complaint, Cavalier alleges violations of only sections 201 and 202 of the 1934 Act. Cavalier has apparently abandoned its claim under section 202, and its passing reference to section 201 is likewise unavailing, because once a carrier has chosen interconnection pursuant to sections 251 and 252, section 201 does not apply. Cavalier’s supposed claim under section 251 appears nowhere in its complaint and is, in any event, subject to state commission enforcement and subsequent judicial review, not federal court adjudication in the first instance.

Cavalier’s remaining federal statutory claims – as well as claims for “enforcement” of the parties’ interconnection agreement – should also be dismissed. Cavalier cites no specific provision of the *BA/GTE Merger Order* that allegedly has been violated, and it pleads no facts to establish such a violation. In addition, the doctrine of primary jurisdiction requires that the FCC be given the first opportunity to give content to the language of the *BA/GTE Merger Order*. Contrary to

Cavalier's argument that the interconnection agreement constitutes a "private contract" not subject to regulatory oversight, the Agreement is a federally mandated tariff; for that reason, the SCC must be given the first opportunity to resolve the technical and policy issues presented by Cavalier's complaint. And Cavalier's Lanham Act claim fails because isolated telephone contacts with particular customers out of the millions of potential purchasers of telephone service in Virginia do not constitute commercial dissemination or promotion within the meaning of that statute. Moreover, Cavalier has failed to specify the content of *any* alleged misrepresentation and therefore has failed to satisfy both general pleading requirements and the specific requirements of Rule 9(b).

The Court should dismiss Cavalier's remaining state law claims because the parties are nondiverse. While Cavalier suggests that its holding company, Cavtel, owns and manages a multi-state operating company in addition to Cavalier, *see* Opp. at 36-37, the affidavit submitted by Cavalier makes clear that this is *not* the case, *see id.* Exh. 11, ¶ 2. In fact, *all* Cavtel does is own and manage Cavalier, and under Fourth Circuit precedent this means that Cavtel's principal place of business for purposes of diversity is the same as Cavalier's. Because Cavalier has pled that its principal place of business is Virginia, *see* Compl. ¶ 2, and because that is clearly correct under any relevant test, Cavtel's principal place of business is also Virginia and the parties are nondiverse.

ARGUMENT

I. CAVALIER HAS NOT PLED A CLAIM UNDER SECTION 2.

A. *Goldwasser* Squarely Applies.

Goldwasser rests on the basic proposition of antitrust law – embraced by Cavalier – that “the antitrust laws . . . have generally been understood to impose only” negative duties – to refrain from exclusionary conduct. *See* Opp. at 9 (quoting *USM Corp. v. SPS Techs., Inc.*, 694 F.2d 505, 513 (7th Cir. 1982)). Cavalier insists, however, that its allegations are “not even conceivably limited to failures to comply with the affirmative obligations of the 1996 Act,” *id.* at 11, arguing that “[o]nly one allegation in Cavalier's Complaint would change” if the 1996 Act had never been enacted, *id.* Cavalier is wrong.

Cavalier's suggestion that a complaint alleging antitrust liability for failure to fulfill duties under the 1996 Act can avoid dismissal under *Goldwasser* simply by avoiding mention of the 1996 Act contradicts the Seventh Circuit's holding and subsequent district court decisions. See *Goldwasser*, 222 F.3d at 401 (dismissing claim as "inextricably linked" to the 1996 Act despite absence of explicit reference to the 1996 Act); see also, e.g., *MGC Communications, Inc. v. BellSouth Telecomms., Inc.*, 146 F. Supp. 2d 1344, 1352 (S.D. Fla. 2001) (same); *Building Communications, Inc. v. Ameritech Servs., Inc.*, No. 97-CV-76336, slip op. at 24 (E.D. Mich. June 21, 2001) (same). *Goldwasser* did not institute a pleading game. Rather, it stands for a basic and significant proposition of substantive antitrust law: that the duties imposed by the 1996 Act "are not found in the antitrust laws." 222 F.3d at 401. Precisely because the 1996 Act creates "affirmative duties to help one's competitors" (*id.* at 400), the allegation that an ILEC has violated such duties (however labeled) does not state an antitrust claim. "A complaint like this one," alleging that a monopolist "didn't help its competitors enter the market so that they could challenge its monopoly," "does not state a claim under Section 2." *Id.*¹

Cavalier's suggestion that its antitrust claims do not involve affirmative duties under the 1996 Act cannot withstand even a cursory examination of the factual allegations of the complaint. Verizon established in its opening brief that "the allegations in the complaint, almost without exception, track matters addressed in detail" by the 1996 Act. Verizon Mem. at 10. Cavalier not only does not contest this; it positively confirms it in summarizing the complaint. Each of the areas of "anticompetitive conduct" that it identifies (Opp. at 9-11) again tracks the Act, the regulations promulgated under the Act, and the interconnection agreement required by the Act:

¹ Like Cavalier, AT&T devotes the bulk of its brief to arguing that the 1996 Act confers no "implied immunity" from antitrust liability for conduct that otherwise violates the antitrust laws. But *Goldwasser* is not an immunity decision – *i.e.*, it does *not* assume antitrust liability under traditional standards but then find that a different federal statute immunizes otherwise illegal conduct. Rather, *Goldwasser* holds that the antitrust laws have never required the type of affirmative assistance to competitors required by the 1996 Act, and that expansion of the antitrust laws to reach such duties is both unnecessary in light of the 1996 Act's comprehensive regulatory scheme and also likely to interfere with the intended operation of that scheme. *Goldwasser* is thus a merits ruling on the scope of section 2, not an immunity decision.

ALLEGATIONS	1996 ACT	FCC REGULATIONS	ICA PROVISION
“Interconnection Obstacles”	§ 251(c)(2)	§ 51.305	Attach. IV
“Collocation Obstacles”	§ 251(c)(6)	§ 51.323	Attach. V
“Pre-Order and Ordering Issues” ²	§ 251(c)(3)	§ 51.319(g)	Attach. VIII
“Facilities Assignment”	§ 251(c)(3)	§ 51.319	Attach. III
“Provision of Last-Mile Facilities”	§ 251(c)(3)	§ 51.319(a) § 51.319(h)	Attach. III
“Network Related Problems”	§ 251(b)(4) § 251(c)(3)	§ 1.1401 § 51.319(a)(1)	Attachs. III, VI
“Billing”	§ 251(c)(3) § 271(c)(2)(B)(ii)	271 Proceedings	Attach. VIII

Cavalier’s argument that its claims do not involve Verizon’s duties under the 1996 Act is thus “belied by both the remaining factual allegations and the law.” *Schuylkill Energy Res., Inc. v. Pennsylvania Power & Light Co.*, 113 F.3d 405, 417 (3d Cir. 1997).

Nor can Cavalier avoid dismissal through rote application of “exclusionary conduct” labels to factual allegations that do not support such conclusions. *Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 526 (1983); *Estate Constr. Co. v. Miller & Smith Holding Co.*, 14 F.3d 213, 220-21 (4th Cir. 1994). “A complaint will not withstand a 12(b)(6) motion when facts which fail to outline a violation of the Sherman Act are

² As Verizon has noted (Mem. at 17 n.17), the sole allegation that does not rest on a duty imposed by the 1996 Act is the claim that members of Verizon’s retail organization have made unspecified misrepresentations to an unspecified number of existing or potential Cavalier customers. Cavalier argues in conclusory terms that such conduct is barred by the antitrust laws, but business torts of the kind alleged by Cavalier do not pose an antitrust concern. AT&T identifies nothing else that can even arguably be characterized as interference with Cavalier’s conduct of its own business, as opposed to a failure to provide Cavalier with adequate affirmative assistance under the 1996 Act. *See* AT&T Mem. at 15. AT&T relies on two examples of Verizon’s supposed failure adequately to coordinate customer conversions (citing Compl. ¶¶ 104-107), which merely reflect alleged inadequacies in the systems that Verizon has created to assist in providing a smooth transition to rivals’ service, not any exclusionary conduct. (Indeed, the SCC has already held that any alleged difficulty in coordinating customer conversions was unintentional. *See* Verizon Mem. at 8 & n.9.) In any event, Cavalier does not attribute the loss of a single customer, let alone any harm to competition, to these supposed delicts. As Fourth Circuit law makes clear, such routine operational quibbles, in the context of a complex commercial relationship involving (as Cavalier concedes) more than 100,000 lines, cannot support an antitrust claim. *See Abcor Corp. v. AM Int’l, Inc.*, 916 F.2d 924, 931 (4th Cir. 1990).

presented in the language of antitrust law.” *Reynolds Metals Co. v. Columbia Gas Sys. Inc.*, 669 F. Supp. 744, 750 (E.D. Va. 1987) (citation omitted). “The presence . . . of a few conclusory legal terms does not insulate a complaint from dismissal under Rule 12(b)(6) when the facts alleged in the complaint’ cannot support the legal conclusion.” *Migdal v. Rowe Price-Fleming Int’l, Inc.*, 248 F.3d 321, 326 (4th Cir. 2001) (citation omitted).

B. Dismissal Is Required By Traditional Antitrust Doctrine.

Cavalier belatedly addresses the dispositive question by attempting to recast its complaint to fit within the few carefully defined exceptions to the uncontested basic principle that section 2 requires a monopolist only to refrain from “interfer[ing] with the freedom to compete.” *Johnson v. University Health Servs., Inc.*, 161 F.3d 1334, 1338 (11th Cir. 1998).³ This attempt fails.

1. As to “essential facilities,” Cavalier tacitly concedes, as it must: (1) that the essential facilities doctrine never requires a monopolist to permit a competitor to take exclusive control over a facility; (2) that the essential facilities doctrine never requires a defendant to construct new facilities or to alter the nature of its business; and (3) that an essential facilities claim cannot succeed without a claim that market power in one market is being used to create or further a monopoly in a different market. Nor does Cavalier deny that each one of these limitations *standing alone* would bar Cavalier’s reliance on the essential facilities doctrine. Instead, Cavalier argues that its factual allegations manage to skirt all of these conceded limitations and that disputes over the terms of access can support an essential facilities claim. Cavalier is mistaken.

³ The recent brief filed by the government in *Covad Communications Co. v. BellSouth Corp.*, No. 01-16064-C (11th Cir.), is devoted entirely to the proposition that the 1996 Act does not require blanket antitrust immunity in cases involving matters covered by the 1996 Act. The government pointedly declined (in this most recent statement of its views) to take a position “as to whether Covad’s complaint stated a claim under the Sherman Act.” Opp. Exh. 1, at 12. The government’s brief nonetheless identifies the fundamental flaw in Cavalier’s case: “Alleged failure to meet the 1996 Act’s affirmative obligations . . . do not in themselves give rise to Sherman Act liability.” *Id.* at 13. “Indeed, many of the detailed factual allegations . . . involve staples of 1996 Act controversy *that have not been the basis of liability in antitrust cases.*” *Id.* at 28 (emphasis added).

First, it is uncontested that, when Cavalier takes “last mile” facilities under the 1996 Act, it gains exclusive control over those facilities; the FCC has so held. *Local Competition Order*,⁴ 11 FCC Rcd at 15693, ¶ 385. Cavalier speculates that it might be possible for carriers to share last-mile facilities using “access code[s].” Opp. at 17 n.8. But this is irrelevant⁵ because Cavalier does not and cannot allege that it has sought any such arrangement; rather, it seeks to “take” – gain exclusive access to – specific facilities, a point that Cavalier does not and cannot contest. Accordingly, its claim must be dismissed. See Verizon Mem. at 18-19.

AT&T concedes that Cavalier seeks exclusive access to portions of Verizon’s network, but argues that such access “could not be deemed ‘exclusive’ in any meaningful sense,” because the occupancy of individual loops will be exclusive only for so long Cavalier serves the customer in question. AT&T Mem. at 19. This is doublespeak. Cavalier seeks to displace Verizon from its own facilities; no antitrust case contemplates that result. Far from supporting Cavalier, *United States v. Terminal Railroad Association*, 224 U.S. 383 (1912), and *Hecht v. Pro-Football, Inc.*, 570 F.2d 982 (D.C. Cir. 1977), illustrate how far Cavalier is reaching. *Terminal Railroad* involved a compact among independent entities, not unilateral conduct of a single firm: a combination of railroads acquired a toll bridge and terminal facilities that had been open to all comers, then denied (previously available) access to outsiders. Unlike the local loops in this case, moreover, the facilities at issue had been and could be shared. *Hecht* is another case involving an exclusionary contract between independent entities – there, a restrictive covenant in a lease between the owners of RFK Stadium and the Washington Redskins. Even in that setting, the court specifically held that the “essential facility” doctrine would not require displacement of the defendant football team from the stadium. See 570 F.2d at 992 (“[n]ecessarily, this principle must be carefully delimited: the

⁴ First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 15693, ¶ 385 (1996) (“*Local Competition Order*”) (subsequent history omitted).

⁵ It is also nonsense. Every telephone subscriber needs a provider of dial-tone service; one cannot dial an “access code” without having a dial-tone provider in the first place. This elementary fact is subject to judicial notice. See Fed. R. Evid. § 201(b).

antitrust laws do not require that an essential facility be shared *if such sharing would be impractical*)” (emphasis added).

Second, there is and can be no dispute that (absent the 1996 Act) Verizon has *never* been in the business of providing exclusive use of its network facilities to others as opposed to providing telecommunications services. Rather, the 1996 Act has compelled Verizon to undertake a new activity. “To use a simple analogy, the unbundled access provision is akin to requiring one car manufacturer to sell a competitor access not to one of its completed vehicles, but to the individual elements of the vehicle, such as the engine, radiator, and tires, all of which the manufacturer has unbundled, or segregated out, for the competitor’s convenience.” *AT&T Communications of Southern States, Inc. v. BellSouth Telecomms., Inc.*, 268 F.3d 1294, 1297 (11th Cir. 2001). Provision of such access has indisputably required Verizon to invest in new systems and modifications to existing facilities. While the 1996 Act, as interpreted by the FCC, requires all this, the antitrust laws do not. *See* Verizon Mem. at 20; *Laurel Sand & Gravel, Inc. v. CSX Transp., Inc.*, 924 F.2d 539, 545 (4th Cir. 1991) (noting that it is “not feasible” for a provider of freight service to “transform itself” into a renter of trackage rights); *see also AT&T Corp. v. Iowa Utils. Bd.*, 526 U.S. 366, 429 (1999) (Breyer, J., concurring in relevant part) (“[o]ne would not ordinarily believe it practical, for example, to require a railroad to share its locomotives, fuel, or work force”).⁶

Third, Cavalier argues that its passing reference to a so-called “market for last-mile facilities” (Compl. ¶ 192) is adequate to satisfy the (unchallenged) requirement that a claim under the essential facilities doctrine allege an effort to extend market power from one market to another. But Cavalier does not define such a market – to the contrary, it alleges that “*the* relevant product market is Basic Telecommunications Services,” *id.* ¶ 24 – and it could not do so if it tried. The *sine qua non* for a market is a product for which there are buyers and sellers, but Verizon has never

⁶ Like Cavalier, AT&T ignores the undisputed fact that Cavalier’s demands for access require significant modifications to both facilities and operations support systems to accommodate the novel demands imposed by the 1996 Act. AT&T also argues that the essential facilities doctrine may require a monopolist to alter the nature of its business (AT&T Mem. at 21), but this assertion is flatly contrary to *Laurel Sand* and is unsupported by any case.

voluntarily sold its “last-mile facilities” to anyone, and Cavalier does not allege that it has. To the contrary, Verizon has provided access to such facilities only as required under binding regulations. By definition, “last mile” facilities are installed and deployed for the purpose of providing retail telecommunications services – which is the only market that Cavalier has properly alleged.⁷

Fourth, Cavalier argues both that Verizon has completely *denied* it access to essential facilities and that disputes over *terms of access* to such facilities can constitute an antitrust claim. Cavalier is wrong on both counts. First, the only example of denial of access that Cavalier can muster is Verizon’s alleged refusal to provide access to loops on integrated digital loop carriers (“IDLC”). But the FCC has observed that IDLC systems “establish a direct, digital interface with the LEC central office switch, *making it difficult, if not impossible, for requesting carriers to access individual loops at that location.*” Third Report and Order, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 14 FCC Rcd 20912, 20946, ¶ 69 n.152 (1999) (emphasis added). Because Cavalier does not directly claim that it is feasible for Verizon to provide the access Cavalier seeks, it has not stated a claim: the “essential facilities” doctrine never requires a monopolist to provide access where not technically feasible. *Laurel Sand*, 924 F.2d at 545. And Cavalier cites no case, and Verizon is aware of none, where mere disputes over the terms of access were a basis for liability under the antitrust laws where access was actually being provided.⁸

⁷ AT&T’s again relies on *Terminal Railroad* and *Hecht* to dispute the legal point; its reliance is again misplaced. In *Terminal Railroad*, the participants in the railroad trust purchased terminal and bridge facilities that had operated independently and offered a distinct product from the freight service that the defendants provided. The challenged conduct was objectionable precisely because the participants in the trust deliberately (and jointly) developed market power in one market in order to foreclose competition in the railroad market. And, in *Hecht*, the supposed “bottleneck facility” was RFK Stadium – which was leased for many uses – while the monopolized market was for professional football.

⁸ AT&T cannot find one either. See AT&T Mem. at 18. *Litton Systems, Inc. v. AT&T Co.*, 700 F.2d 785 (2d Cir. 1983), was not an essential facilities case, but instead involved AT&T’s restrictions on retail customers’ ability to purchase the equipment of their own choosing. See note 9, *infra*. *Southern Pacific Communications Co. v. AT&T Co.*, 740 F.2d 980 (D.C. Cir. 1984), resulted in a verdict for the defendant. And AT&T’s claim that competition can be obstructed in the same way whether access is being provided (despite disputes over terms) or being blocked completely (AT&T Mem. at 18-19) makes no sense. In one case, the rival has access and is offering service over the facilities (as Cavalier concedes that it is); in the other, the rival lacks access and cannot offer service over the facilities in question.

Cavalier attempts to rely on *MCI Communications Corp. v. AT&T Co.*, 708 F.2d 1081 (7th Cir. 1983), but that case is distinguishable on all of the foregoing grounds. First, MCI was simply seeking to transmit calls across AT&T's local distribution networks; it was not "asking that AT&T in any way abandon its facilities." *Id.* at 1133 (emphasis added). Cavalier asks Verizon to do precisely that.⁹ Second, AT&T was *already* in the business of providing the type of *service* that MCI sought – transmission of long-distance calls over its local distribution network – Verizon has never been in the business of renting network *facilities*. Moreover, AT&T itself received that type of service MCI sought from hundreds of independent local telephone companies across the country, so it could hardly argue that providing such service was contrary to ordinary business practice. By contrast, no local telephone company has ever voluntarily surrendered exclusive access to its facilities to a rival, precisely because devoting one's capital to one's own use is ordinary business behavior fully justified by the legitimate need to earn a return from investment. Third, AT&T was attempting to extend its monopoly in the market for local access into the separate long-distance market; Cavalier has alleged only a single market – the market for "Basic Telecommunications Services." Fourth, AT&T terminated existing interconnections and completely denied MCI passage over its local distribution network, excluding MCI completely from the affected portion of the long-distance market. *See id.* at 1132-33. Here, it is uncontested that Verizon has *provided* Cavalier with access to more than 100,000 local lines. Compl. ¶ 18.¹⁰ In addition, MCI was legally *barred*

⁹ MCI was not even seeking "preferential access" to the facilities, which, the Seventh Circuit observed, would "justify a denial." 708 F.2d at 1133. By contrast, Cavalier here demands the ultimate preference: exclusive use of Verizon's facilities. In the absence of the 1996 Act, such a demand would similarly "justify a denial."

¹⁰ AT&T attempts to rely on two other cases, neither of which has anything to do with the essential facilities doctrine, in which it was accused of having monopolized the market for telephone terminal equipment (not telephone service). In *Litton*, liability was premised on the finding that AT&T had filed sham tariffs – which were filed without review and which, when finally reviewed years later, were held unlawful – that effectively barred competing manufacturers from providing equipment to AT&T's customers. *See* 700 F.2d at 790 (AT&T "proposed and fought to maintain the tariff – all in bad faith in order to exclude competition in the terminal equipment market"). Such naked interference with rival manufacturers' freedom to compete has no counterpart in Cavalier's complaint. To the contrary, Cavalier concedes at the outset that Verizon has assisted it in gaining 100,000 customers in Virginia in just a few months of operations. In *Phonetele, Inc. v. AT&T Co.*, 664 F.2d 716 (9th Cir. 1981), the issue of liability was never reached, and the court did not consider whether any particular conduct would violate section 2 standards.

from making its own local connections to bypass AT&T's local distribution network; Cavalier faces no such obstacle. See 47 U.S.C. § 253(a), (c). *MCI v. AT&T*, 708 F.3d at 1133.

Moreover, Cavalier does not and cannot distinguish *MCI*'s holding that a monopolist need not assume "the extraordinary obligation to fill in the gaps in its competitor's network." *MCI v. AT&T*, 708 F.2d at 1149; Verizon Mem. at 19. *Goldwasser*'s holding that a monopolist has no duty under the antitrust laws to assist its local competitors by providing access to network facilities is not merely consistent with *MCI v. AT&T* (compare AT&T Mem. at 16); it explicitly relies on its analysis. See *Goldwasser*, 222 F.3d at 400 (citing *MCI v. AT&T* for the proposition that the 1996 Act imposes "the kinds of affirmative duties to help one's competitors that we have already noted do not exist under the unadorned antitrust laws").

2. Cavalier's reliance on Verizon's supposed duty to deal with Cavalier under these circumstances is equally unavailing. This is not a case where a defendant terminated a voluntary and pre-existing (and therefore presumably efficient and mutually beneficial) relationship. See *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 610-11 (1985).¹¹ Cavalier has never alleged that Verizon has refused to deal (much less terminated an existing relationship); to the contrary, it concedes that the parties are in a contractual relationship. Just as important, Cavalier's complaint contains no allegation that Verizon has forgone any economic advantage by allegedly failing to provide Cavalier with the accommodations it desires. This omission is hardly incidental because Cavalier does not claim that any company has ever voluntarily provided to a rival the kind of assistance that Cavalier seeks. This is not a case where Cavalier was Verizon's "customer" against whom Verizon "retaliate[d]" because it had "the temerity to compete." *Olympia Equipment*

¹¹ Cavalier also quotes *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992), but it does not argue that the case is on point. It is not. Far more than a simple refusal to deal was at issue in *Kodak*: Kodak not only terminated voluntary arrangements with the competing service providers, but conditioned the sale of parts to its own retail customers on their not purchasing service from a rival service provider and, indeed, sought agreements from other manufacturers that they "would not sell parts that fit Kodak equipment to anyone other than Kodak." *Id.* at 458. Nowhere did the *Kodak* Court state or imply that Kodak had an antitrust duty to enter into contracts with competing service providers in the first place. Nothing in *Kodak* speaks to the question that *Goldwasser* resolved, either generally or as applied here: whether the Sherman Act imposes the duties to enter into the new relationships mandated by the 1996 Act.

Leasing Co. v. Western Union Tel. Co., 797 F.2d 370, 376 (7th Cir. 1986). Verizon “did not withhold from one member of the public a service offered to the rest; nor was it in the habit of supplying” access to component parts of its network. *Id.* at 377. Rather, the 1996 Act requires Verizon to take on a role as a provider of network facilities at cost – a role that the antitrust laws would not require it to undertake. Because those affirmative duties of access are “a form of special assistance . . . there is no . . . [antitrust] duty to give or continue such assistance.” *Id.*

3. Cavalier cannot rescue its claims by relying on Virginia antitrust law, because Virginia law explicitly adopts the standards of the Sherman Act. *See* Va. Code Ann. § 59.1-9.17 (providing that Virginia law “shall be applied and construed . . . in harmony with judicial interpretation of comparable federal statutory provisions”). Because Cavalier “has failed to establish” its “monopoly claims under federal law, [its] state law antitrust claims likewise fail.” *Oksanen v. Page Memorial Hosp.*, 945 F.2d 696, 710 (4th Cir. 1991).¹²

C. The 1996 Act’s Substantive Duties And Remedial Scheme Eliminate Any Risk To Competition From Disputes Over Access.

1. Cavalier’s “implied immunity” straw man leads it to ignore the distinct point that antitrust analysis must take account of the existence of pervasive and tightly enforced duties of access under the 1996 Act. *See* Verizon Mem. at 20-22. Where, as here, a regulatory scheme directly addresses the very conduct at issue, that scheme is a central “fact of market life.” *Mid-Texas Communications Sys., Inc. v. AT&T Co.*, 615 F.2d 1372, 1385 (5th Cir. 1980) (internal quotation marks omitted). The 1996 Act provides Cavalier the key to Verizon’s facilities, granting Cavalier access “well beyond” anything that the antitrust laws might contemplate. *Goldwasser*, 222 F.3d at 400. No one could argue that existing rules are insufficient to satisfy any demands that the antitrust laws might impose.

¹² Moreover, all of Cavalier’s state law antitrust claims against Verizon are independently barred by a state statutory immunity for conduct that is “authorized, regulated or approved . . . by an administrative or constitutionally established agency of this Commonwealth or of the United States having jurisdiction of the subject matter and having authority to consider the anticompetitive effect, if any, of such conduct.” Va. Code Ann. § 59.1-9.4(b).

Just as significant, the 1996 Act provides for extraordinarily close supervision of private conduct. The Act leaves none of the implementation of its duties to ILECs' private will. Rather, *every* term governing Verizon's relationship with Cavalier is the result of agreement or was imposed by the responsible agency; all such terms are subject to approval *before* becoming effective.

This scheme sharply distinguishes the 1996 Act from those regulatory regimes that *permit* a monopolist to obstruct access. Thus, in *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), Congress had "rejected a pervasive regulatory scheme for controlling the interstate distribution of power in favor of *voluntary* commercial relationships" permitting decisions about interconnection to be "governed *in the first instance by business judgment and not regulatory coercion.*" *Id.* at 374 (emphases added). The remedial scheme *permitted* the defendant to obstruct access, with the understanding that its conduct would be subject to antitrust scrutiny.

Likewise, *MCI v. AT&T* and other cases involving pre-divestiture AT&T all rested on the central observation that the 1934 Act permitted AT&T to impose terms and conditions on its customers (and on competitors that relied on access to its local distribution network) through tariffs that were not subjected to any regulatory review before becoming effective. AT&T was free to refuse (and did refuse) to provide any access to MCI for many years; its tariffs (which created intentional barriers to equipment makers' freedom to compete) were filed unilaterally and without effective oversight. *See MCI v. AT&T*, 708 F.2d at 1103 ("neither AT&T's interconnection decisions nor its price structure policies are dictated, in the first instance, by the FCC"); *United States v. AT&T Co.*, 461 F. Supp. 1314, 1326 (D.D.C. 1978) (noting that AT&T's tariffs "become effective upon filing . . . after 90 days notice without the necessity for Commission scrutiny or approval"). The 1996 Act leaves no such gap in supervision: indeed, the contrast between the old 1934 Act and the new 1996 Act could hardly be sharper – under the new law, state and federal regulators dictate the terms of access at the outset and remain responsible for ensuring effective implementation of the statute.

2. Cavalier does take issue with *Goldwasser*'s conclusion that litigation of matters "directly covered" by the 1996 Act as antitrust claims would disrupt implementation of the 1996 Act and undermine state commission authority. 222 F.3d at 401. But Cavalier essentially concedes that it may not attack conduct that is *consistent* with the parties' agreement, even asserting that it has "no complaint with the agreement." Opp. at 24.¹³ And its argument that it may litigate supposed *violations* of the parties' agreement as antitrust claims rests on the assertion that state commissions lack the authority to interpret and enforce such agreements, an assertion that is flatly contrary to controlling circuit law, the position of the FCC, and Cavalier's own past filings with the SCC. See pp. 16-20, *infra*. This very suit illustrates the need for caution: Cavalier withdrew an SCC complaint raising substantially all of the matters that it raises here. Rather than permit regulators to do their job, Cavalier would prefer "to repair to court to play litigation lottery." *Taffet v. Southern Co.*, 967 F.2d 1483, 1492 (11th Cir. 1992). Antitrust law does not permit such tactics.

II. CAVALIER HAS NOT PLED A CLAIM UNDER THE 1934 ACT.

In its complaint, Cavalier pleads violations of sections 201 and 202 of the Communications Act of 1934. See Compl. ¶¶ 206-218 (Count 4). Cavalier now does not even mention section 202; it has therefore abandoned that claim. See, e.g., *Farnham v. Windle*, 918 F.2d 47, 51 (7th Cir. 1990). Nor can Cavalier defend its claim under section 201. Instead, it now erroneously claims that the Court has jurisdiction over a claim that it did not plead – a supposed violation of section 251 of the 1996 Act.

1. Cavalier explicitly concedes that the parties' relationship is governed in "some respects" by the parties' agreement. Opp. at 24. (Indeed, it identifies no "respect" in which the parties' relationship is not governed by the agreement.) Accordingly, Cavalier cannot rely on section 201, because, as the FCC has made clear, "a requesting carrier would have the *choice* of negotiating an interconnection agreement pursuant to sections 251 and 252 or of taking tariffed

¹³ Cavalier's response to Verizon's "filed rate" argument misconstrues the scope and nature of the doctrine. See Verizon Mem. at 22-24; see also *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981) (contract governing terms of service and filed with appropriate regulatory agency is a tariff).

interstate service” under section 201. *Local Competition Order*, 11 FCC Rcd at 15809, ¶ 611 (emphasis added). A requesting carrier must choose between two distinct regulatory mechanisms: the federal tariff regime of section 201 (enforced primarily by the FCC) or the interconnection regime of sections 251 and 252 (enforced primarily by state commissions).¹⁴ Moreover, even if Cavalier did have a claim under section 201, it would have to be heard by the FCC in the first instance pursuant to the doctrine of primary jurisdiction. *Verizon Mem.* at 29-32. Cavalier does not dispute this point.

2. In its complaint, Cavalier has not alleged a claim for violation of section 251. Accordingly, the Court need not reach the question whether 1996 Act duties are enforceable under sections 206 and 207. *See Prudential-Bache Secs., Inc. v. Cullather*, 678 F. Supp. 601, 609 (E.D. Va. 1987) (Spencer, J.) (noting that because statutory subsection “was not included in the complaint, it is axiomatic” that plaintiff had failed to allege elements of claim under that subsection).¹⁵ If the Court does reach this question, it should agree with every other federal court to decide the matter and hold that any such claim could not proceed. As discussed in connection with Cavalier’s claims for enforcement of the Interconnection Agreement, *see pp. 16-20, infra*, the exclusive means for enforcement of duties under section 251 is the interconnection agreement arbitration, approval, and enforcement process provided under section 252 and applicable law. *See*

¹⁴ Section 201(b), by its terms, does not apply to interconnection services ordered under 1996 Act interconnection agreements. Rather, as made clear in section 201(a), it applies only to services offered generally to the public or in situations where the FCC has specifically ordered interconnection as necessary or in the public interest. Neither of the situations referenced in section 201(a) is present here, and the FCC has never construed section 201(b) to reach the terms and conditions of local interconnection.

¹⁵ AT&T likewise argues about whether a CLEC plaintiff could bring a claim under sections 206 and 207 of the 1934 Act for violation of section 251(c) of the 1996 Act; as noted, this is a claim that Cavalier did not make in its complaint. In any event, in so arguing, AT&T ignores at least a half dozen cases that have directly rejected its position and miscites two others. *Conboy v. AT&T Corp.*, 84 F. Supp. 2d 492, 498 (S.D.N.Y. 2001), *aff’d*, 241 F.3d 242 (2d Cir. 2001), involved a claim for violation *not* of section 251, but of section 222, which is not subject to the remedial scheme under section 252. And *Law Offices of Curtis V. Trinko, LLP v. Bell Atlantic Corp.*, 123 F. Supp. 2d 738 (S.D.N.Y. 2000), is fully consistent with the basic principle that a CLEC cannot bring a claim under sections 206 and 207 for alleged violations of section 251, but must pursue the remedies set forth in the statute. *See id.* at 743 (citing cases “involving potential competitors attempting to circumvent the provisions of 47 U.S.C. § 252”). In fact, there is no case anywhere (to Verizon’s knowledge) that has accepted AT&T’s argument, and AT&T cites none.

Alexander v. Sandoval, 121 S. Ct. 1511, 1521-22 (2001) (“The express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others.”). For these reasons, every court to decide the question has held that claims for violation of section 251 – however styled – cannot be brought in federal court in the first instance.¹⁶

III. THE COURT SHOULD DISMISS CAVALIER’S BA/GTE MERGER ORDER CLAIM.

Cavalier misapprehends the nature of the requirements 47 U.S.C. § 401(b) imposes on a plaintiff. Section 401(b) is not a pleading requirement that somehow modifies the rule of notice pleading embodied in Federal Rule of Civil Procedure 8. *See Opp.* at 27-28. Rather, the limitations on section 401 claims are jurisdictional in nature. “Congress intended that, in order to promote the enforcement role of the FCC, section 401(b) would be given narrow scope.” *New England Tel. & Tel. Co. v. Public Utils. Comm’n*, 565 F. Supp. 949, 956 (D. Me. 1983). As a result, Cavalier can only maintain a cause of action under this section if “the order in question *requires or prohibits specific action* by a specific party.” *MGC Communications*, 146 F. Supp. 2d at 1353 (emphasis added).

Cavalier has failed to plead that a specific provision of the *BA/GTE Merger Order* requires or prohibits any action of which it complains—indeed its Complaint does not cite any specific provision of the order at all. Cavalier musters only a reference to the FCC’s hope that public disclosure of Verizon’s performance will induce it to use “best practices” in its provision of services. Compl. ¶ 225; *BA/GTE Merger Order*¹⁷ ¶ 279. A plaintiff must do more than quote an aspirational statement of the Commission to plead a claim under section 401(b). *See MGC*

¹⁶ *See* Verizon Mem. at 34 n.22 (citing cases); *see also, e.g., Electronet Intermedia Consulting, Inc. v. Sprint-Florida, Inc.*, No. 4:00cv176-RH, slip op. at 7 (N.D. Fla. Sept. 21, 2000); *Atlantic Alliance Telecomms., Inc. v. Bell Atlantic*, No. 99 CV 4915, 2000 U.S. Dist. LEXIS 19649, at *6, *15-*16 (E.D.N.Y. Apr. 17, 2000); *AT&T Communications of California, Inc. v. Pacific Bell*, 60 F. Supp. 2d 997, 1002 (N.D. Cal. 1999).

¹⁷ Memorandum Opinion and Order, *GTE Corp. and Bell Atlantic Corp., For Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Applications to Transfer Control of a Submarine Cable Landing License*, 15 FCC Rcd 14032 (2000).

Communications, 146 F. Supp. 2d at 1353.¹⁸

Even if this Court does not dismiss this claim outright, the Court should refer the claim to the FCC. Cavalier asks this Court to determine whether Verizon has complied with a general “best practices” standard, Compl. ¶ 223, that is, those practices that “clearly favor public rather than private interests,” *BA/GTE Merger Order* ¶ 279. If this provision is enforceable at all, it is the FCC’s role, in the first instance, to determine what serves the “public interest” and which business practices or technological solutions among many constitute “best practices.” As the agency that issued this order, the FCC “should be the entity to make the initial decision concerning its own language.” *Texas Oil & Gas Corp. v. Valley Gas Transmission, Inc.*, 608 F.2d 231, 234 n.3 (5th Cir. 1979). Furthermore, to provide the “simple enforcement” Cavalier seeks, Opp. at 28, this Court would have to make policy and technical decisions that are committed to the FCC, thus depriving the agency of its ability to “creat[e], interpret[], and modify[] communications policy.” *See New England Tel. & Tel. Co. v. Public Utils. Comm’n*, 742 F.2d 1, 14 (1st Cir. 1984).¹⁹

IV. THE COURT SHOULD DISMISS CAVALIER’S CLAIM FOR ENFORCEMENT OF THE PARTIES’ 1996 ACT INTERCONNECTION AGREEMENT.

The SCC has exclusive jurisdiction over the interpretation and enforcement of interconnection agreements in the first instance; Cavalier must present its claims to the SCC prior to seeking judicial review in any court. Bedrock principles concerning allocation of decision-making authority under schemes like the 1996 Act require that issues of the kind raised by Cavalier be

¹⁸ In fact, Cavalier itself characterizes the “best practices” portion of the *BA/GTE Merger Order* as a “goal.” *See* Compl. ¶ 223. Cavalier now contends that its *BA/GTE Merger Order* claims are based upon Verizon’s policy with respect to high-capacity loops and its failure to extend loop discounts to Cavalier. Opp. at 28. None of the specific conditions of the *BA/GTE Merger Order* apply to high-capacity loops, so this claim is nothing more than a recasting of Cavalier’s general “best practices” claim. With respect to loop discounts, the Complaint makes no reference to loop discounts or the provisions of the *BA/GTE Merger Order* that deal with loop discounts. Nor has Cavalier pled that it has met the conditions that would make it eligible for these discounts, *see BA/GTE Merger Order* ¶ 35, or that Verizon has denied the discounts in contravention of any specific provision of the order. The *BA/GTE Merger Order* provides detailed rules for the availability, application and crediting of these discounts, including certain set-offs, as well as conditions for use of the loops involved. *See id.* at ¶ 35(a)–(g).

¹⁹ Cavalier’s citation of the Seventh Circuit’s decision in the MCI antitrust action in response to this point is baffling. *See* Opp. at 28 (citing *MCI v. AT&T*, 708 F.2d at 1105-06). That case dealt with judicial enforcement of the antitrust laws – not an agency order that contains its own regulatory enforcement mechanism.

resolved by the expert agency charged with supervision of the complex carrier-to-carrier relationship at issue here.

Cavalier's assertion that the interconnection agreement constitutes a "private contract" beyond the ken of the regulatory agency responsible for its formation and content, Opp. at 29, flies in the face of clear Fourth Circuit precedent, and the position of the FCC. In *Bell Atlantic – Maryland, Inc. v. FCC*, 240 F.3d 279 (4th Cir. 2001), the court squarely held that claims seeking to enforce the terms of interconnection agreements, "are left by the 1996 Act for the resolution by State commissions and for review in State courts, and therefore federal courts have no jurisdiction to decide them." *Id.* at 309. An interconnection agreement is not an arms-length commercial agreement. See *Local Competition Order*, 11 FCC Rcd at 15528, ¶ 55 ("Negotiations between incumbent LECs and new entrants are not analogous to traditional commercial negotiations."). Rather, the Agreement is a tariff: it sets forth the terms and conditions pursuant to which Verizon provides certain services; it is required by law, see 47 U.S.C. § 251(c)(1); it is subject to regulatory approval, see *id.* § 252(e)(1); it must be publicly filed, see *id.* § 252(h); and its terms and conditions are available to all requesting telecommunications carriers, see *id.* § 252(i).

"Congress appropriately recognized the benefit of employing the vast resources and expertise of State public service commissions to resolve ongoing disputes arising from the administration and interpretation of interconnection agreements." *Bell Atlantic – Maryland*, 240 F.3d at 305. Likewise, the FCC has repeatedly determined that "a dispute arising from an interconnection agreement, seeking interpretation and enforcement of the agreement, . . . falls within a state's responsibilities under section 252." Memorandum Opinion and Order, *US LEC of Va. LLC, Petition for Preemption of Jurisdiction of the Va. State Corp. Comm'n Pursuant to § 252(e)(5) of the Telecommunications Act of 1996*, CC Docket No. 01-268, DA 02-97 (rel. Jan. 22, 2002).²⁰ Cavalier itself has invoked the jurisdiction of the SCC to interpret and enforce the

²⁰ Besides being precluded by Fourth Circuit precedent and contrary to FCC decisions, Cavalier's reliance on *BellSouth Telecomm., Inc. v. MCIMetro Access Transmission Servs.*, Nos. 00-12809, 00-12810, 2002 WL 27099 (11th Cir. Jan. 10, 2002), is contrary to Virginia law. The Eleventh Circuit's decision rested in large part on the premise that

interconnection agreement on numerous occasions—an action directly contrary to its argument before this Court.²¹

Moreover, Cavalier seeks review of precisely the kind of technical and policy issues that Congress, by vesting state commissions and the FCC with central rulemaking and oversight roles, intended that those agencies would address in the first instance. Each issue that Cavalier assures this Court requires no “unique administrative expertise,” Opp. at 30, has been the subject of extensive rulemaking by the FCC. *See generally, e.g.*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696 (1999) (promulgating rules for the provision of unbundled network elements, including billing, delays in provisioning, dial tone, and directory listings); Memorandum Opinion and Order, *Application of BellSouth Corp., et al. for Provision of In-Region, InterLATA Services in Louisiana*, 13 FCC Rcd 20599, 20670-87, ¶¶ 107-133 (1988) (provisioning delays); *id.* at 20698-99, ¶¶ 158-160 (billing practices); *id.* at 20748-50, ¶¶ 256-259 (directory listings); *id.* at 20759-66, ¶¶ 277-286 (loss of dial tone or “interim parity”). State commissions are responsible for implementation of these federal requirements and have the experience and technical sophistication to ensure their proper application in light of local conditions.

The decisions on which Cavalier relies did not involve issues requiring technical expertise or policy judgment. In *National Communications Association v. AT&T*, 46 F.3d 220 (2d Cir. 1995), the court confronted the sole issue of “whether [the plaintiff] had timely paid its bills.” *Id.* at 223.

the Georgia Commission was a “quasi-legislative” body without adjudicatory authority. *See id.* at *11. By contrast, the Virginia Code empowers the SCC to “supervis[e], regulat[e] and control[] all public service companies doing business in this Commonwealth, in all matters relating to the performance of their public duties and their charges therefor, and of correcting abuses therein by such companies.” Va. Code Ann. § 56-35 (2001). The Virginia code further provides that where a party has a grievance with a carrier, the SCC sits as the “court of record” over that dispute. *See* Va. Code Ann. § 56-6 (2001).

²¹ In fact, in an informal complaint to the SCC alleging, *inter alia*, breach of the interconnection agreement, Cavalier asserted that the Commission not only had jurisdiction under the Agreement but also under “the [1996] Act and under Title 56 to the Code of Virginia (1950) as amended.” Verizon Mem. Exh. 3, ¶ 20. Cavalier further contended that “the Federal Act expressly acknowledges independent State authority to regulate telecommunications services” and acknowledged that the SCC “has the authority to enforce the Agreement.” *Id.* at ¶ 22.

Likewise, *Lipton v. MCI WorldCom, Inc.*, 135 F. Supp. 2d 182 (D.D.C. 2001), involved the question of whether the carrier was charging rates that were higher than its tariff authorized.²² By contrast, Cavalier raises issues such as the “technical feasibility” of providing certain types of loops to competitors, Compl. ¶ 93, and the timing, allocation and cost of space in the incumbent’s central office, *id.* ¶¶ 159–164. Despite its continued refrain that the Agreement is just a “contract,” Cavalier concedes, as it must, that the Court will be required to engage in “some inquiry into telecommunications law and *policy*, and the *reasonableness* of Verizon’s conduct.” Opp. at 29 (emphasis added).²³ Unlike a collection action, Cavalier’s claims do not involve a simple search for the “contractual intent of the parties” – rather, they require the resolution of complex technological issues and the setting of telecommunications policy. See *DeBruce Grain, Inc. v. Union Pac. R.R.*, 149 F.3d 787, 789 (8th Cir. 1998) (claims that “require not only legal analysis, but also ‘an informed evaluation of the economics or technology of the regulated industry,’” are properly addressed by the regulatory bodies in the first instance) (citation omitted). Congress intended that these issues would be resolved by the state commissions in the first instance, with judicial review to follow.

Nor does the SCC’s lack of authority to award monetary damages counsel against allowing it to exercise its jurisdiction in this matter. In regulatory schemes like the 1996 Act, permitting responsible regulators to act in the first instance ensures that “agencies . . . regulating the subject matter [are] not . . . passed over.” *Far E. Conference v. United States*, 342 U.S. 570, 574 (1952). A

²² There is an obvious distinction between contract claims based on the clear breach of a commercial term of an agreement (*e.g.*, nonpayment or violation of a fixed price provision) and claims that require the exercise of policy judgment and technical expertise to establish *future performance standards* that, by their terms, should apply to all carriers. Cavalier’s claims, asking this Court to order Verizon to adopt new ordering systems and procedures, Compl. ¶ 93, and to declare certain charges “unreasonable” based on an examination of Verizon’s costs, Compl. ¶¶ 118-120, require regulatory determinations that the SCC must make in the first instance. See *National Communications Ass’n*, 46 F.3d at 223 (distinguishing between an action to enforce a tariff “as opposed to a challenge to the reasonableness of a tariff”) (citation omitted).

²³ We note that in its mandatory disclosures pursuant to Federal Rule of Civil Procedure 26(a)(1), Cavalier identified three members of the SCC’s telecommunications staff as having discoverable information regarding the issues raised in the complaint, thus highlighting the fact that the knowledge and expertise of the SCC is essential to adjudication of Cavalier’s claims.

comprehensive regulatory regime, like that established by the 1996 Act, “transfers from court to agency the power to determine some of the incidents of [commercial] relations.” *United States v. Western Pac. R.R. Co.*, 352 U.S. 59, 65 (1956) (emphasis added). Requiring Cavalier’s claims to be brought before the SCC in the first instance reflects concern with bypassing legislatively delegated agency authority, the need for agency expertise, and the threat of inconsistent standards. See *AT&T Communications of Va., Inc. v. Bell Atlantic – Virginia, Inc.*, 35 F. Supp. 2d 493, 497-98 (E.D. Va. 1999). Moreover, the SCC has the power to afford full injunctive relief on all of Cavalier’s claims; that fact alone distinguishes all of the cases Cavalier cites.²⁴ See *United States v. AT&T*, 461 F. Supp. at 1328 n.43 (finding referral inappropriate where agency lacked authority to award injunctive relief); *Long Lake Energy Corp. v. Niagara Mohawk Power Corp.*, 700 F. Supp. 186, 189 (S.D.N.Y. 1988) (same); *City of Mishawaka v. Indiana & Mich. Elec. Co.*, 560 F.2d 1314, 1325 (7th Cir. 1977) (same).²⁵

V. THE COURT SHOULD DISMISS CAVALIER’S LANHAM ACT CLAIM.

Cavalier has failed to plead an essential element of a Lanham Act claim: that any alleged statements were disseminated widely enough to the “relevant purchasing public” to be considered commercial “advertising” or “promotion” within the meaning of the Lanham Act. See *Gordon & Breach Sci. Publishers S.A. v. American Inst. of Physics*, 859 F. Supp. 1521, 1536 (S.D.N.Y. 1994); cf. *id.* at 1543 (declining to permit plaintiffs to “make use of the Lanham Act to gain access to court-sanctioned discovery”). Nothing in Cavalier’s complaint indicates that any alleged statements were disseminated widely enough to reach the level of circulation that the Lanham Act requires. See *Medical Graphics Corp. v. SensorMedics Corp.*, 872 F. Supp. 643, 650 (D. Minn. 1994); *Licata*

²⁴ Moreover, state commissions have commonly instituted “performance penalties” and other provisions for the payment of money directly to CLECs under the 1996 Act.

²⁵ The specter of inconsistent interpretations and conflicting obligations looms particularly large in the case of interconnection agreements. Verizon must offer the individual terms of “any agreement approved under this section to which it is a party” to any other requesting carrier. 47 U.S.C. § 252(i) (emphasis added); see also 47 C.F.R. § 51.809. This requirement does not apply to judgments of the federal district courts, which bind only the parties before them (and are not approved under section 252). Thus, individual competitive carriers could obtain a better deal in court (or perhaps a worse one), thereby frustrating the statutory plan of competitive neutrality ensured by state commission oversight and enforcement of all interconnection agreements.

& Co. v. Goldberg, 812 F. Supp. 403, 408 (S.D.N.Y. 1993).

Indeed, the very cases relied upon by Cavalier make clear that “both the required level of circulation and the relevant ‘consuming’ or ‘purchasing’ public addressed by the dissemination of false information will vary according to the specifics of the industry.” *Seven-Up Co. v. Coca-Cola Co.*, 86 F.3d 1379, 1385 (5th Cir. 1996); *Mobius Mgt. Sys., Inc. v. Fourth Dimension Software, Inc.*, 880 F. Supp. 1005, 1020-21 (S.D.N.Y. 1994). That test means that, “[w]here the potential purchasers in the market are *relatively limited in number*, even a single promotional presentation to an individual purchaser *may be enough to trigger the protections of the Act.*” *Seven-Up*, 86 F.3d at 1386 (emphasis added); *Mobius*, 880 F. Supp. at 1020-21. But, under the same test, where the relevant purchaser class is large, the required distribution cannot be miniscule in comparison. *See Seven-Up*, 86 F.3d at 1385.

Cavalier has identified the “relevant ‘consuming’ or ‘purchasing’ public” as “Cavalier’s existing or potential customers” – *i.e.*, the population of Virginia, or roughly 7 million individuals. *Opp.* at 34.²⁶ This case is thus at the opposite end of the spectrum from *Seven-Up* and *Mobius*, both of which involved a relevant purchasing public that was “quite small,” *Seven-Up*, 86 F.3d at 1386 (quoting *Mobius*, 880 F. Supp. at 1020–21). At best, Cavalier has pled isolated contacts with individual customers by retail sales personnel – a far cry from the specially developed presentations for a small group of potential purchasers at issue in *Seven-Up*. *See* 86 F.3d at 1386.

Furthermore, Cavalier persists in refusing to identify even one allegedly false or misleading statement to support its Lanham Act claim, a fact that Cavalier practically concedes by seeking leave to replead its complaint. *See Opp.* at 36. Instead, Cavalier perfunctorily recites legal conclusions that are insufficient to state a claim – *i.e.*, that Verizon personnel “made misrepresentations of the type prohibited by § 43(a) of the Lanham Act.” *Opp.* at 34. Even notice pleading has its limits. The Fourth Circuit has made clear that a complaint must plead sufficient

²⁶ According to the U.S. Census Bureau, the population of the Commonwealth of Virginia numbered 7,078,515 in 2000. Even limiting the relevant population to areas where Cavalier presently provides services, *e.g.*, the Northern Virginia and Tidewater areas, would involve several million potential customers. *See Compl.* ¶ 27.

facts to allow a defendant to determine if the essential elements of the claim can be satisfied; “otherwise, Rule 12(b)(6) would serve no function, for its purpose is to provide a defendant with a mechanism for testing the legal sufficiency of the complaint.” *District 28, United Mine Workers of Am., Inc. v. Wellmore Coal Co.*, 609 F.2d 1083, 1085-86 (4th Cir. 1979). On a motion to dismiss, “[i]f the plaintiff has not alleged the facts necessary to support his claim, such facts will not be assumed by the court to exist.” *Virginia Vermiculite, Ltd. v. W.R. Grace & Co.*, 965 F. Supp. 802, 812 (W.D. Va. 1997). Cavalier’s failure to specify the content of even a single allegedly false or misleading statement is a fatal defect in its Complaint under any standard.

Cavalier’s attempt to avoid the strictures of Rule 9(b) fares no better. Numerous courts have required Lanham Act plaintiffs who make fraud-like allegations of false statements to plead with specificity any alleged misrepresentations attributed to the defendant. *See, e.g., Sanderson v. Brugman*, No. IP 00-459-C H/G, 2001 WL 699876, at *8 (S.D. Ind. May 29, 2001); *In re Century 21-RE/MAX Real Estate Adver. Claims Litig.*, 882 F. Supp. 915, 927 (C.D. Cal. 1994); *Barr Labs., Inc. v. Quantum Pharmics, Inc.*, 827 F. Supp. 111, 118 (E.D.N.Y. 1993); *Max Daetwyler Corp. v. Input Graphics, Inc.*, 608 F. Supp. 1549, 1556 (E.D. Penn. 1985).²⁷ These courts adopt the common-sense principle that “the policies which underlie Rule 9’s requirement that the nature of an alleged misrepresentation be pleaded with specificity are equally applicable to the type of misrepresentations claims” in which “one party is charged with making false statements.” *See Max Daetwyler Corp.*, 608 F. Supp. at 1556.

The Fourth Circuit implicitly adopted this reasoning in *Mylan Labs., Inc. v. Matkari*, 7 F.3d 1130 (4th Cir. 1993). Cavalier’s effort to distinguish *Mylan Labs* as involving a “claim of actual

²⁷ Cavalier’s reliance on *Stubbs Collections, Inc. v. Davis*, No. CIV. A. 3-99CV2440-P, 2000 WL 381947 (N.D. Tex. Apr. 14, 2000), is misplaced. The Lanham Act claim in that case did not involve false statements or misrepresentations. *Id.* at *5. Thus *Stubbs* had no occasion to address the issue of fair notice. Likewise, *John P. Villano, Inc. v. CBS, Inc.*, 176 F.R.D. 130 (S.D.N.Y. 1997), provides no support for Cavalier’s position. *Villano* concerned easily identifiable representations such as “printed flyers, mailings . . . newspaper advertisements and . . . [radio] commercials.” *See John P. Prods., Inc. v. CBS, Inc.*, 10 F. Supp. 2d 395, 396 (S.D.N.Y. 1998). Therefore, fair notice was not an issue in *Villano*. By contrast, Cavalier’s Lanham Act claim is based on unspecified oral representations. To the extent that *Villano* can be read to suggest that Lanham Act claims of false advertising are never subjected to a heightened pleading standard, it is contrary to precedent in the Fourth Circuit and this Court.

fraud” is unavailing. *See* Opp. at 35. The Fourth Circuit made clear that a Lanham Act plaintiff must plead “sufficiently particularized allegations” of false or misleading representations. *Mylan* at 1138. Whatever label one chooses to place on this standard, Cavalier’s complaint falls well short of it.²⁸

VI. THE COURT SHOULD DISMISS CAVALIER’S REMAINING STATE LAW CLAIMS.

The “jurisdiction in a suit by or against [an unincorporated] entity depends on the citizenship of all the members.” *Carden v. Arkoma Assocs.*, 494 U.S. 185, 195 (1990). Because Cavalier Telephone Corporation (“Cavtel”) is Cavalier’s sole member, the Court must ascertain Cavtel’s principal place of business. *Maday v. Toll Bros., Inc.*, 72 F. Supp. 2d 599, 604 (E.D. Va. 1999).

Cavalier erroneously asserts that Cavtel’s principal place of business is not in Virginia. Cavalier has pled that its principal place of business is in Richmond, Virginia. *See* Compl. ¶ 2. Cavalier also avers, “Cavtel’s *sole* business is the ownership and management of investment assets in [Cavalier] a Virginia limited liability company that operates only in Virginia.” Opp. Exh. 11, ¶ 2 (emphasis added). Employing the analysis set forth in *Carden* and *Hereth v. Jones*, 544 F. Supp. 111 (E.D. Va. 1982), Cavtel’s principal place of business is Virginia. *See Bialac v. Harsh Bldg. Co.*, 463 F.2d 1185, 1186 (9th Cir. 1972) (*per curiam*); *Pine Ridge Realty Corp. v. Block & Co.*, Civ. No. 97-2076-JWL, 1997 WL 292126 at *8 (D. Kan. May 16, 1997); *Bonar Inc. v. Schottland*, 631 F. Supp. 990 (E.D. Penn. 1986); *Hanna Mining Co. v. Minnesota Power & Light Co.*, 573 F. Supp. 1395 (D. Minn. 1983), *aff’d*, 739 F.2d 1368 (8th Cir. 1984).

Cavalier attempts to escape *Hereth*’s reach by urging this Court to look to the location of the assets of Cavalier Telephone Mid-Atlantic, LLC (“CTMA”), “which is a Delaware limited liability company that operates in Pennsylvania, Maryland, Delaware, New Jersey, and the District of

²⁸ Cavalier’s attempt to draw support from *Reynolds Metal Co. v. Columbia Gas Sys., Inc.*, 694 F. Supp. 1248 (E.D. Va. 1988), and *Haigh v. Matsushita Elec. Corp. of Am.*, 676 F. Supp. 1332 (E.D. Va. 1987), is equally unavailing. Neither case involved Rule 9(b), fraud, or the Lanham Act. Cavalier’s selective quotation of these cases is misleading, given that the court focused in both instances on the distinction between Rule 12(b)(6) motions to dismiss and Rule 56 motions for summary judgment, not the standard for a well-pled complaint. *See Haigh*, 676 F. Supp. at 1340; *Reynolds Metal*, 694 F. Supp. at 1251.

Columbia.” Opp. at 37. But it is *Cavalier*, not *Cavtel*, that is the member of CTMA. See Opp. Exh. 11, ¶ 2. *Cavalier* states *in its pleading* that the “sole business of *Cavtel* is the ownership and management of investment assets in *Cavalier*, a Virginia limited liability company that operates solely in Virginia, *and* [CTMA], a Delaware limited liability company that operates in Pennsylvania, Maryland, Delaware, New Jersey, and the District of Columbia.” Opp. at 36–37 (emphasis added). This statement is highly misleading and is directly at odds with the supporting affidavit. The attached affidavit of Brad Evans, *Cavtel*’s President and CEO, flatly states: “*Cavtel*’s *sole* business is the ownership and management of investment assets in [*Cavalier*], a Virginia limited liability company *that operates only in Virginia*. *Cavalier* is in turn the *sole* member in [CTMA], a Delaware limited liability company that operates in Pennsylvania, Maryland, Delaware, New Jersey, and the District of Columbia.” Opp. Exh. 11, ¶ 2 (emphasis added). In other words, all *Cavtel* does is manage an entity that does business exclusively in Virginia. That *Cavalier* is a member of an entity that has activities outside of Virginia is irrelevant. *Cavalier* has pled that *Cavalier*’s principal place of business is in Virginia and it is bound by its pleadings. See *Graham v. Bank of Damascus*, 528 F. Supp. 596, 597 (W.D. Va. 1981). Because *Cavtel*’s sole function is ownership and management of a Virginia citizen, it too must be considered a Virginia citizen.

Consideration of the activities of CTMA finds no support in *Carden* or *Hereth* and would contravene Congress’s purpose in amending the diversity statute to include a corporation’s principal place of business to determine its citizenship. By “expanding corporate citizenship,” Congress sought to “deny federal court access to essentially local corporations which were incorporated in outside states.” *Maday*, 72 F. Supp. 2d at 604 n.19; *Hanna Mining Co.*, 573 F. Supp. at 1400. In so doing, Congress sought to limit “the risks to federalism involved when a federal court decides issues of state law.” *Hanna Mining Co.*, 573 F. Supp. at 1398. *Cavalier* concedes that the sole business of *Cavtel* is the management and ownership of *Cavalier*, which operates only in Virginia. Opp. Exh. 11, ¶ 2. Even under “the operations test,” which *Cavalier* maintains is the applicable test in this circuit, Opp. at 36, *Cavalier*’s activity in Virginia dwarfs *Cavtel*’s isolated and dispersed management activities. Thus, *Cavtel*’s principal place of business is in Virginia. See *Maday*, 72 F.

Supp. 2d at 604 (citing *Athena Auto., Inc. v. Digregorio*, 166 F.3d 288, 290 (4th Cir. 1999)).

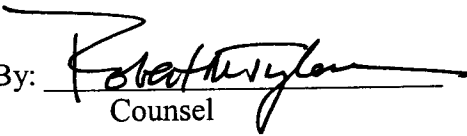
Because the parties are not diverse, and because Cavalier has failed to state any valid federal claims, no basis for jurisdiction over the state-law claims exists. Accordingly, Cavalier's complaint should be dismissed in its entirety.

CONCLUSION

For the reasons stated here and in Verizon's opening brief, the Court should dismiss Cavalier's complaint.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on February 1, 2002, a copy of the above pleading was hand-delivered to the

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