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## **JURISDICTIONAL STATEMENT**

In a complaint filed on November 1, 2001 (J.A. 12<sup>1</sup>), appellant, Cavalier Telephone, LLC (“Cavalier”), brought claims against Verizon Virginia Inc. (“Verizon”) for violation of the federal antitrust laws, § 43(a) of the Lanham Act, the federal Communications Act of 1934, an order of the Federal Communications Commission (“FCC”), and Virginia law.

The district court had jurisdiction of Cavalier’s claims against Verizon under §§ 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26, pursuant to 28 U.S.C. §§ 1331 and 1337. The district court had jurisdiction of Cavalier’s claims under § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), pursuant to 15 U.S.C. §§ 1116 and 1117 and pursuant to 28 U.S.C. § 1338. The district court had jurisdiction of Cavalier’s claims for violations of §§ 201 and 202 of the Communications Act of 1934 pursuant to 47 U.S.C. § 207 and 28 U.S.C. § 1331, and of Cavalier’s claims for violation of an FCC order pursuant to 47 U.S.C. § 401(b). Cavalier alleged jurisdiction of its claims under Virginia law pursuant to 28 U.S.C. §§ 1332 and 1367.

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<sup>1</sup> Throughout this brief, references to the Joint Appendix are indicated as “J.A.” followed by the relevant page number(s) in the Joint Appendix.

On March 27, 2002, the district court entered a memorandum opinion and final order granting in full Verizon's motion to dismiss Cavalier's complaint with prejudice and disposing of all parties' claims. (J.A. 1140, 1161.) On March 28, 2002, Cavalier timely filed its Notice of Appeal from the district court's final order. (J.A. 1162.) This Court therefore has jurisdiction of this appeal pursuant to 28 U.S.C. § 1291.

## STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the district court erred by dismissing Cavalier's federal antitrust claims by finding that Verizon's alleged conduct violated only the Telecommunications Act of 1996, without analyzing whether Cavalier had pled sufficient facts to allege a violation of the federal and state antitrust laws.
2. Whether the district court erred by dismissing Cavalier's claims under the Virginia antitrust laws although the Telecommunications Act of 1996 does not preempt the Virginia antitrust laws.
3. Whether the district court erred by dismissing Cavalier's claims under § 43(a) of the Lanham Act, because it found that Cavalier did not allege fraud with particularity, even though fraud is not an element of such a claim, and because it did not grant Cavalier leave to amend.
4. Whether the district court erred by dismissing Cavalier's claims under §§ 201 and 202 of the Communications Act of 1934 on the grounds that Cavalier's interconnection agreement with Verizon abrogated the applicability of those sections of the statute.
5. Whether the district court erred by dismissing Cavalier's claims for Verizon's breach of its interconnection agreement between the parties on the grounds that the Virginia State Corporation Commission must hear the dispute.
6. Whether the district court erred by dismissing Cavalier's claims for Verizon's violation of the BA/GTE Merger Order, because it ignored specific allegations of how Verizon violated that Order and because it did not grant Cavalier leave to amend.
7. Whether the district court erred by dismissing Cavalier's claims under Virginia state law for lack of diversity jurisdiction, and further erred by dismissing those claims with prejudice, when dismissal was based solely on lack of federal subject matter jurisdiction.

## STATEMENT OF THE CASE

In a civil action commenced on November 1, 2001, Cavalier sought \$135 million in treble damages, \$500 million in punitive damages, and injunctive relief against Verizon, based on Verizon's violation of the federal and state antitrust laws and other laws and regulations. (J.A. 12-49.) Cavalier alleged that Verizon had used its control of last-mile facilities to maintain its monopoly over the provision of basic telecommunications services in Virginia markets, to harm competition by denying consumers lower prices and service innovations in those markets, and to reduce or eliminate Cavalier's ability to reach consumers in those markets and compete with Verizon. (J.A. 17, Compl. at ¶¶ 28, 30.<sup>2</sup>)

The factual basis for Cavalier's claims included allegations that:

- Verizon generally refused to make last-mile facilities available to Cavalier in a manner that would allow Cavalier to compete on an equal basis. (Compl. ¶ 46).
- Verizon's Yellow Pages and retail sales personnel improperly contacted existing and prospective Cavalier customers to make intentional misrepresentations about Cavalier, trying to persuade or intimidate those customers into not obtaining service from Cavalier (Compl. ¶¶ 68-71).

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<sup>2</sup> Throughout this brief, references to the complaint are given by relevant page(s) of the Joint Appendix, with an added citation to the relevant paragraph as "Compl. ¶¶ xx-xx" as appropriate. In the indented text on this page and the next page, references are only to paragraphs of the complaint. The complaint is located at J.A. 12-49.

- Verizon intentionally blocked Cavalier's access to almost 25% of the customers in the relevant markets by misrepresenting the technical feasibility of allowing access to customers served on integrated digital loop carriers, or "IDLC" (Compl. ¶¶ 92-93).
- Verizon caused the disconnection of basic telecommunications services to Cavalier's customers by intentionally refusing to coordinate the disconnection of Verizon's services and the delivery of last-mile facilities to Cavalier (Compl. ¶ 105).
- Verizon intentionally refused to talk to customers who had switched to Cavalier but were still improperly receiving bills from Verizon (Compl. ¶¶ 106-107).
- Verizon intentionally imposed unreasonable processes for directory listings, forcing up Cavalier's effective costs of providing service by requiring Cavalier to hire additional personnel to deal with the resulting problems (Compl. at ¶¶ 109-113).
- Verizon deliberately changed its policy on providing certain high-capacity loops, cutting Cavalier off from a large percentage of one type of business customer to which Cavalier had initially been able to offer services (Compl. ¶¶ 115-118).
- Verizon refused to let Cavalier provide digital subscriber line, or DSL, services on loops beyond a certain length, because Verizon's equipment did not allow it, even though Cavalier's equipment allows Cavalier to offer its service (Comp. ¶ 121).
- Verizon intentionally raised the effective cost of last-mile facilities to a point where that cost is higher than the retail cost of Verizon's own competing service (Compl. ¶¶ 117, 122).
- Verizon intentionally prevented a unified solution to problems with the use of utility poles and underground conduit (Compl. ¶ 130).

- Verizon intentionally misrepresented that it was not technically feasible to “reserve” spare fiber, and then underscored the falsity of its own misrepresentation by changing its position on the issue in another state—but not in Virginia—when authority to offer in-region, interLATA service was at issue (Compl. ¶¶ 131-133).
- Verizon intentionally made its bills to Cavalier a costly, difficult process, burdening Cavalier with voluminous paper bills and leaving it unable to discern its actual accounts payable (Compl ¶¶ 137, 143).
- Verizon intentionally refused to adjust its charges to third parties, causing Cavalier to become embroiled in disputes with municipalities over E911 charges (Compl. ¶ 141).

Cavalier further alleged in detail how Verizon’s conduct has harmed competition in the relevant markets, by driving competitors out of business and by depriving consumers of lower prices and innovations in service (J.A. 32-33, Compl. ¶¶ 144-152), and how Verizon’s conduct has harmed Cavalier, by delaying its entry into the relevant markets, by imposing unnecessary and additional costs, by causing Cavalier to lose customers, by harming Cavalier’s reputation and good will, and by incurring higher investment and financing costs for Cavalier (J.A. 33, Compl. ¶¶ 153-159). Finally, Cavalier alleged that Verizon engaged in outright monopolization (J.A. 35, Compl ¶¶ 171-175), refusal to deal (J.A. 35, Compl. ¶ 176), denial of essential facilities (J.A. 36, Compl. ¶¶ 177-180), a price squeeze (J.A. 36, Compl. ¶¶ 181-182), attempted monopolization (J.A. 37, Compl ¶¶ 188-191), and leveraging (J.A. 37, Compl. ¶¶ 192-193).

In its complaint, Cavalier alleged that Verizon's conduct violated other laws in addition to federal and state antitrust laws (J.A. 17, Compl. ¶ 29). Cavalier asserted claims for some of those violations. See J.A. 38-48, Compl. ¶¶ 198-205 (Lanham Act) ¶¶ 206-218 (Communications Act of 1934), ¶¶ 219-228 (FCC's Bell Atlantic/GTE Merger Order), ¶¶ 229-269 (Virginia's Uniform Trade Secrets Act and common law). Cavalier had sought relief from state and federal regulatory agencies for some of the anticompetitive and otherwise illegal behavior in which Verizon had engaged, but that those agencies did not provide effective relief (J.A. 33-34, Compl. ¶¶ 160-169).

Although Cavalier specifically alleged that “[s]ome of Verizon's anticompetitive conduct... independently violates other laws” (J.A. 17, Compl. ¶ 29) and that “both [state] and [federal regulators] appear to lack the tools to address the many competitive obstacles created by Verizon” (J.A. 34, Compl. ¶ 169), Verizon urged the district court to ignore these realities and dismiss Cavalier's complaint as governed exclusively by the Telecommunications Act of 1996, Public Law No. 104-104, and the regulations promulgated under that Act. (J.A. 171-194.)

The district court accepted Verizon’s argument, and dismissed Cavalier’s antitrust claims because the “categories” of alleged conduct might ostensibly violate the Telecommunications Act of 1996 (J.A. 1150). The district court then proceeded to dismiss Cavalier’s other claims under federal law based on the flawed arguments advanced by Verizon (J.A. 1151-1155), and also dismissed Cavalier’s claims for breach of contract and violation of Virginia statutory and common law with prejudice, even though it could have heard the claims under supplemental or diversity jurisdiction pursuant to 28 U.S.C. §§ 1332 and 1367 (J.A. 1155-1159). Cavalier timely brought this appeal (J.A. 1162).

## **STATEMENT OF FACTS**

On November 1, 2001, Cavalier filed its Complaint in Civil Action No. 3:01CV736, alleging violations of federal and state antitrust laws and other claims against Verizon (J.A. 12). On December 26, 2001, Verizon moved to dismiss the complaint with prejudice (J.A. 166). Cavalier opposed the motion on January 18, 2002 (J.A. 784), and Verizon filed its reply on February 1, 2002 (J.A. 993).

After hearing the motion on February 8, 2002 (J.A. 1095), the district court granted the motion in full on March 27, 2002 (J.A. 1161). On March 28, 2002, Cavalier filed its Notice of Appeal in this case (J.A. 1162).

## SUMMARY OF ARGUMENT

Relying upon its contention that Verizon's alleged conduct might ostensibly violate the Telecommunications Act of 1996, Public Law 104-104 ("the 1996 Act"), the district court erroneously dismissed Cavalier's federal antitrust claims even though it said that those claims were not precluded through implied repeal of the antitrust laws by the 1996 Act, and even though it did not even analyze whether the alleged conduct also violated the antitrust laws. Similarly, the district court erred by dismissing Cavalier's antitrust claims under Virginia law, even though those claims remained valid and were not preempted by the 1996 Act.

The district court also erroneously dismissed Cavalier's claims under the FCC's BA/GTE Merger Order<sup>3</sup> and under § 43(a) of the Lanham Act, both for lack of specificity; and erroneously dismissed Cavalier's claims under §§ 201 and 202 of the Communications Act of 1934, on the putative basis that those sections of the statute were abrogated by an interconnection agreement between Cavalier and Verizon. Finally, Cavalier's claims under Virginia law were all improperly dismissed, and improperly dismissed with prejudice, for lack of subject matter jurisdiction.

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<sup>3</sup> *GTE Corp., Transferor, and Bell Atlantic Corp., Transferee, For Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, Dkt. No. 98-184, FCC 00-221, 15 FCC Rcd 14032 (June 16, 2000).

## ARGUMENT

### Standard of Review

This Court reviews *de novo* a district court's legal ruling on a motion to dismiss. Mylan Labs., Inc. v. Matkari, 7 F.3d 1130, 1134 (4<sup>th</sup> Cir. 1993).

- 8. The district court erred by dismissing Cavalier's federal antitrust claims by finding that Verizon's alleged conduct violated only the Telecommunications Act of 1996, without analyzing whether Cavalier had pled sufficient facts to allege a violation of the federal and state antitrust laws.**

The district court stated the proper standard for deciding Verizon's motion to dismiss, the correct test for probing the validity of Cavalier's allegations, and the correct analysis of implied repeal under the federal antitrust laws. However, it then failed to apply the test that it had set forth and improperly effected an implied repeal.

As the district court noted, Cavalier's claims could be dismissed only if Cavalier "can prove no set of facts in support of [its] claim which would entitle [it] to relief," that the court itself was constrained to "confine itself to the allegations in the pleadings," and that "[t]he factual allegations in the complaint are accepted as true and the plaintiff is given the benefit of any reasonable inference that can be drawn from the allegations." (J.A. 1142, citations omitted.) With respect to the validity of Cavalier's antitrust allegations, the

court properly stated that “[t]he correct test is whether the factual allegations contained in the Complaint amount to antitrust violations.” (J.A. 1144-1145.)

However, the district court never reached the issue of whether Cavalier’s allegations “amount to antitrust violations.” Instead, the district court accepted Verizon’s incorrect contention that Cavalier could allege no antitrust violations because Verizon’s alleged conduct might ostensibly violate the Telecommunications Act of 1996, Public Law No. 104-104 (“the 1996 Act”). The district court apparently based its analysis on the flawed notion that “Cavalier cannot state a claim under § 2 of the Sherman Act if it alleges violations of affirmative duties created by the 1996 Act” (J.A. 1144).

The district court simply did not consider that the same alleged conduct might violate both § 2 of the Sherman Act and affirmative duties created by the 1996 Act. Such an overlap between the two laws is both logically and legally sound. As a logical matter, if Verizon’s alleged conduct consisted of exclusionary acts sufficient to state a claim for violation of § 2 of the Sherman Act, and the 1996 Act also happens to regulate some (or even all) of that conduct, then that anticompetitive conduct would almost certainly also violate affirmative, pro-competitive duties under the 1996 Act. As a legal

matter, the D.C. Circuit faced this same situation, albeit with the Civil Aeronautics Act and not the 1996 Act, and concluded as follows:

[T]he same set of facts may give rise to both a violation of [the Act and] the antitrust laws. Although the second does not necessarily follow from the first, but is bottomed on its own statutory standards, the antitrust remedy of treble damages is not defeated by the fact that the Civil Aeronautics Act is also violated.

S.S.W., Inc. v. Air Tans. Ass'n of Am., 191 F.2d 658, 664 (D.C. Cir. 1951).<sup>4</sup>

The district court improperly precluded itself from reaching the same result as the D.C. Circuit in S.S.W. It did so by sidestepping the core question of whether Cavalier had pled an antitrust claim. In lieu of that analysis, the district court analyzed whether most of Cavalier's claims—as recharacterized by Verizon and the district court—violated the 1996 Act (J.A. 1145-1150), found that most of them did (id.), and concluded that “it is evident that Cavalier is not asserting a monopolization claim under the Sherman Act, but rather is detailing alleged violations of duties imposed upon Verizon by the 1996 Act.” (J.A. 1150.)

This reading of the antitrust laws and the 1996 Act improperly effected an implied repeal of the federal antitrust laws, despite the two explicit savings clauses in the 1996 Act itself and the district court's explicit finding that no legal

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<sup>4</sup> See also Morton v. Mancari, 417 U.S. 535, 551 (1974) (“when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective”).

basis existed for implied repeal (J.A. 1143 n. 1). The district court’s *de facto* repeal harks back to Goldwasser v. Ameritech Corp., 222 F.3d 390 (7<sup>th</sup> Cir. 2000), in which the Seventh Circuit properly rejected claims that alleged violations of the 1996 Act automatically violated the federal antitrust laws, but also improperly rejected other allegations that the Seventh Circuit characterized as “inextricably linked” to alleged violations of the 1996 Act. In fact, the district court relied upon Goldwasser to dismiss Cavalier’s allegations that Verizon made intentional misrepresentations to Cavalier’s customers as “at best, an extension of Cavalier’s contentions about ordering—an issue covered by the 1996 Act and its mandate that Verizon provide interconnection, unbundled access, and collocation under reasonable rates and conditions.” (J.A. 1147 n. 3.)

Goldwasser’s “inextricably linked” language was part of an analysis that led the Seventh Circuit to find that “[t]he 1996 Act is...more specific legislation that must take precedence over the general antitrust laws, where the two are covering precisely the same field.” 222 F.3d at 401. That conclusion created the same *de facto* immunity that mars the district court’s conclusion that Cavalier’s claims cannot state a claim for monopolization. A clash in remedial schemes is but one of the two elements of implied repeal; the other element is a legislative intent to repeal. North Carolina v. P.I.A. Ashville, Inc.,

740 F.2d 274, 280 (4<sup>th</sup> Cir. 1984). In this case, the district court found that this other requisite element for implied repeal was lacking. (J.A. 1143 n. 1.) The district court therefore improperly immunized Verizon from antitrust liability, even though its own analysis showed that such immunity was improper.

Instead of conducting a taxonomic vivisection of Cavalier's complaint (and granting Verizon *de facto* immunity in the process), the district court should have analyzed whether Cavalier's factual allegations stated a claim for violation of the federal antitrust laws. To state a claim for monopolization under § 2 of the Sherman Act, Cavalier must allege (1) the possession of monopoly power in a relevant market, and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. U.S. v. Grinnell Corp., 384 U.S. 563, 570-571 (1966); Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 481-483 (1992). Cavalier met that burden by alleging a relevant market (J.A. 16-17, Compl. ¶¶ 24-27), anticompetitive conduct by Verizon aimed at maintaining Verizon's near-complete monopoly of that relevant market (J.A. 17-19, Compl. ¶¶ 28-48), and anticompetitive effects that included driving competitors out of business (J.A. 32, Compl. ¶¶ 144-147) and depriving consumers of lower prices, better services, and innovation (J.A. 32-33, Compl.

¶¶ 148-152). Cavalier summed up these allegations as monopolization in ¶¶ 171-175 of its complaint (J.A. 35).

Cavalier also described Verizon’s conduct as an illegal refusal to deal in ¶ 176 of its complaint (id.). The district court seemingly discounted the possibility of any refusal to deal claim, asserting that “[e]ven a monopolist does not have a responsibility to help its competitors” (J.A. 1143). However, the Supreme Court has held that a monopolist’s right not to deal with other firms does not extend to situations in which the plaintiff can show the defendant’s specific intent to monopolize a market or the use of “exclusionary” or “predatory” practices. Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 602 (1985).

In a footnote, the district court sweepingly dismissed all of Cavalier’s allegations about Verizon as allegations “concern[ing] the manner in which Verizon is meeting its responsibilities under the 1996 Act....[that] do not amount to predatory conduct.” (J.A. 1150 n. 4.) As set forth above in Cavalier’s Statement of the Case, Cavalier alleged numerous types of intentional misconduct by Verizon that amounted to outright denial—or effective denial—of access to last-mile facilities.<sup>5</sup> The district court summed up those allegations as almost

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<sup>5</sup> See, e.g., J.A. 19-31, Compl. ¶ 46, ¶¶ 68-71, ¶¶ 92-93, ¶ 105, ¶¶ 106-107, ¶¶ 109-113, ¶¶ 115-118, ¶ 121, ¶¶ 117, 122, ¶ 130, ¶¶ 133-133, ¶¶ 137, 143, ¶ 141.

innocuous assertions that “a particular process is overly complex, that overbilling has occurred, and that certain databases and interfaces contain inaccurate information....” (J.A. 1150 n. 4.)<sup>6</sup>

This dismissive summary did not fulfill the district court’s own announced test for gauging the sufficiency of Cavalier’s allegations. Under longstanding precedent, the district court should have simply applied the monopolization analysis that dates back to the Supreme Court’s 1966 decision in Grinnell, and earlier. The fact that Verizon’s conduct is regulated to some extent does not preclude such an analysis, as the Seventh Circuit demonstrated in MCI Communs. Corp. v. AT&T, 708 F.2d 1081, 1105-1111 (7<sup>th</sup> Cir. 1983) (assessing impact of regulation on monopolization claims presented to jury). Like the Seventh Circuit in MCI, the district court should have integrated the fact of regulation into its analysis, but not found that the fact of regulation precluded Cavalier’s federal antitrust claims.

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<sup>6</sup> The district court’s reductivist and dismissive summary of these allegations of pervasive and intentional anticompetitive behavior is completely inconsistent with this Court’s standards for 12(b)(6) motions. See Mylan Labs., *supra*, 7 F.3d 1130, 1134 n. 4 (4<sup>th</sup> Cir. 1993). Particularly in an antitrust case, “dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly,” and the standard for dismissal is “rigorous.” Adv. Health Care Servs., Inc. v. Radford Commun. Hosp., 910 F.2d 139, 144 (4<sup>th</sup> Cir. 1990).

The district court also should have analyzed Cavalier’s essential facilities claim, (J.A. 16-19, 36, Compl. ¶¶ 21-22, ¶¶ 39-48, ¶¶ 177-180), but it did not. In fact, the district court did not even mention the essential facilities doctrine in its opinion, nor did it address whether Cavalier had alleged an essential facilities claim. The elements of such a claim are “(1) control of the essential facility by a monopolist; (2) a competitor’s inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility.” *MCI, supra*, 708 F.2d at 1132-1133. The above-cited paragraphs of Cavalier’s complaint properly alleged such a claim. The district court therefore should not have dismissed Cavalier’s claims under § 2 of the Sherman Act.<sup>7</sup>

Like the essential facilities claim, the district court also did not even mention Cavalier’s price squeeze claim. *See* J.A. 21-30, 36, Compl. ¶¶ 58-62, ¶ 66, ¶¶ 83-84, ¶¶ 91, 104-105, ¶¶ 111-122, ¶ 130, ¶ 137, and ¶¶ 181-182. A price squeeze is a long-recognized form of predatory conduct under § 2 of the

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<sup>7</sup> Although the district court did not address Cavalier’s essential facilities claim, it did appear to adopt Verizon’s argument that Cavalier’s complaint was mainly concerned with “the quality and timeliness” of interconnection, collocation, unbundled loops, and other aspects of the essential, last-mile facilities. (J.A. 1146-1149.) As Cavalier pointed out below, ineffective or delayed access is equivalent to a denial of access, and is actionable as an essential facilities claim. (*See* J.A. 799-800, and cases cited therein.)

Sherman Act. See, e.g., Cities of Anaheim, etc. v. FERC, 941 F.2d 1234, 1238 (D.C.Cir. 1991); City of Kirkwood v. Union Elec. Co., 671 F.2d 1173, 1179 (8<sup>th</sup> Cir. 1982); U.S. v. Aluminum Co. of Am., 148 F.2d 416, 437-438 (2d Cir. 1945). It was therefore error for the district court not to consider this claim without explicitly addressing it.

Cavalier’s claims for attempted monopolization met an even briefer end than its monopolization claims. Although it properly cited (i) specific intent to monopolize the relevant market, (ii) predatory and anticompetitive acts, and (iii) a dangerous probability of success, as the elements of an attempted monopolization claim (J.A. 1151 n. 6), the district court did not apply that standard to Cavalier’s claims. Instead, it asserted that “[s]ince Cavalier’s allegations do not state a claim for monopolization, they cannot...support a claim of attempted monopolization.” (J.A. 1151.)

This ruling was erroneous. As noted above, Cavalier alleged specific instances of intentionally predatory and anticompetitive acts by Verizon, conduct that could not possibly have been motivated by a legitimate business interest.<sup>8</sup> Cavalier also alleged a specific intent by Verizon to maintain its monopoly power

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<sup>8</sup> See, e.g., J.A. 19-31, Compl. ¶ 46, ¶¶ 68-71, ¶¶ 92-93, ¶ 105, ¶¶ 106-107, ¶¶ 109-113, ¶¶ 115-118, ¶ 121, ¶¶ 117, 122, ¶ 130, ¶¶ 133-133, ¶¶ 137, 143, ¶ 141.

in the relevant market.<sup>9</sup> Finally, Cavalier alleged a dangerous probability of success both directly (J.A. 37, Compl. ¶¶ 190-191) and indirectly, through current market power (J.A. 15, Compl. ¶¶ 17, 28) and the demise of competitors (J.A. 32, Compl. ¶¶ 146-147). These allegations stated a claim for attempted monopolization, just as similar allegations were held to state such a claim in Stein v. Pacific Bell Tel. Co., No. C 00-2915 SI (N.D.Cal. Feb. 14, 2001), at J.A. 906-907. See also Davis v. Pacific Bell, Nos. C 01-0260 SI, 01-0585 SI (N.D.Cal. Jan. 10, 2002), at J.A. 920-923. It was error for the district court to forswear the type of straightforward analysis followed in Stein and Davis and summarily dismiss Cavalier’s attempted monopolization claim without applying the proper standard of analysis to Cavalier’s specific allegations.

In addition to the claims discussed above, Cavalier also alleged a leveraging violation, claiming that Verizon had used its market power over last-mile facilities to foreclose competition and to destroy competitors in the market for basic telecommunications services. (J.A. 37, Compl. ¶ 37.) Without passing upon whether it constitutes a cognizable claim, this Court has described a leveraging claim as an alleged “use of [monopoly] power [in one market], however lawfully acquired, to foreclose competition, to gain a competitive

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<sup>9</sup> See, e.g., J.A. 12, 17, 19, 21, 29, , 37, Compl. ¶ 1, ¶ 28, ¶¶ 47-48, ¶ 62, ¶ 125, ¶ 189.

advantage, or to destroy a competitor in another distinct market.” M&M Med. Supplies & Serv., Inc. v. Pleasant Valley Hosp., 981 F.2d 160, 168-169 (4<sup>th</sup> Cir. 1992) (brackets in M&M, internal quotation marks and citations omitted). In light of this Court’s precedent concerning this species of claim, it was error for the district court to dismiss it without any specific or explicit analysis. Advanced Health-Care Servs., Inc. v. Radford Community Hosp., 910 F.3d 139, 149-150 and 149 n. 17 (4<sup>th</sup> Cir. 1990) (reversing dismissal of leveraging claim pursuant to Fed.R.Civ.P. 12(b)(6)).

With respect to all six of Cavalier’s theories of liability, the error in the district court’s dismissal of Cavalier’s federal antitrust claims is exacerbated by the lack of attention to these theories in Verizon’s motion to dismiss and the clear explanation of these theories provided by Cavalier at argument on the motion. Compare J.A. 183-194 (urging dismissal of antitrust claims based on Goldwasser and purported flaws in essential facilities claim, but not addressing other theories of case) with J.A. 1112-1114 (describing six theories of antitrust liability, citing to specific paragraphs of complaint). Summary dismissal of Cavalier’s federal antitrust claims, without any analysis of the theory behind those claims, or the elements of a cause of action under those theories, was plain error that this Court should reverse.

Finally, Verizon moved to dismiss Cavalier’s complaint with prejudice (J.A. 166), and it was error for the district court to grant the motion in full (J.A. 1161), without affording Cavalier any opportunity to amend its claims.<sup>10</sup> As this Court has noted, “[i]n light of the standard of review, we traditionally have viewed even poorly drafted complaints in a light most favorable to the plaintiff,” in part because “the Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits....” Mylan Labs., *supra*, 7 F.3d 1130, 1134 n. 4 (4<sup>th</sup> Cir. 1993) (citations omitted). In this case, dismissal with prejudice was particularly inappropriate because dismissal was premised so broadly on the district court’s rewriting of Cavalier’s allegations—without any analysis of Cavalier’s specific allegations—and when the district court rejected claims of predatory or exclusionary conduct by improperly comparing the general legal standard to the district court’s own broadly stated and watered-down summary of Cavalier’s allegations.

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<sup>10</sup> Cavalier specifically requested leave to amend with respect to its Lanham Act claims (J.A. 819), but the district court did not even address the request (J.A. 1151-1153).

**9. The district court erred by dismissing Cavalier’s claims under the Virginia antitrust laws although the Telecommunications Act of 1996 does not preempt the Virginia antitrust laws.**

Included in Cavalier’s allegations were claims for violation of the Virginia antitrust laws. See J.A. 36-38, Compl. ¶¶ 185-186 (monopolization), ¶¶ 196-197 (attempted monopolization). In its motion to dismiss, Verizon did not specifically address Cavalier’s antitrust claims under Virginia law. (J.A. 166-209.) Cavalier argued that the claims were unopposed, but the district court nonetheless dismissed them with prejudice, in a two-sentence footnote, stating that “since the Virginia Antitrust Act is to be harmonized with federal antitrust law, Cavalier’s state law antitrust claims must fail if its federal antitrust claims fail.” (J.A. 1150 n. 5.)

As Cavalier argued before the district court, the 1996 Act does not preempt the Virginia antitrust laws. (See J.A. 804-806, and cases cited therein.) Both the text of § 253(a) of the 1996 Act (47 U.S.C. § 253(a)) and the applicable preemption analysis, as recently set forth in Crosby v. Nat’l Foreign Trade Council, 530 U.S. 363, 372, 373 (2000), support the continued enforcement of the Virginia antitrust laws despite enactment of provisions such as §§ 251 and 252 of the 1996 Act.

While the Virginia antitrust laws should indeed be interpreted and applied in harmony with federal antitrust law, under Va. Code § 59.1-9.17, the telecommunications laws enacted by the General Assembly amount to little more than a mandate that competition replace monopoly, as alleged in ¶ 31 of Cavalier's complaint. (J.A. 17.) Virginia law embraces no affirmative, pro-competitive duties of the type enacted under the 1996 Act, and the general pro-competitive mandates of Va. Code § 59.1-9.2 remain in effect. Moreover, for the reasons stated above, Cavalier has advanced valid allegations of monopolization and attempted monopolization, under six distinct theories of liability, and this Court should therefore reverse the district court's erroneous dismissal of Cavalier's claims under the Virginia antitrust laws, for the same reasons stated above in connection with Cavalier's claims under the federal antitrust laws.

- 10. The district court erred by dismissing Cavalier's claims under § 43(a) of the Lanham Act, because it found that Cavalier did not allege misrepresentations with particularity, even though fraud is not an element of such a claim, and because it did not grant Cavalier leave to amend.**

Relying on a statement by this Court in MyLAN Labs., *supra*, 7 F.3d 1130, 1138 (4<sup>th</sup> Cir. 1993), the district court found that Cavalier had not alleged fraud with sufficient particularity to state a claim under § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a). (J.A. 1152-1153.) That is the wrong standard.

As Cavalier explained in opposition to Verizon’s motion to dismiss, the particularity required for alleging fraud under Fed.R.Civ.P. 9(b) does not apply to claims of misrepresentation under § 43(a) of the Lanham Act. (J.A. 818-819.) Judge Rakoff emphasized this point by stating that “[n]o matter how parsed, a claim of false advertising under the Lanham Act—one of a panoply of trademark torts created by the Act—is not identical to a claim of fraud.” John P. Villano, Inc. v. CBS, Inc., 176 F.R.D. 130, 131 (S.D.N.Y. 1997). That result is consistent with the lower court’s previously stated reluctance “to participate in the chipping away of yet another portion of our system of notice pleading,” Reynolds Metal Co. v. Columbia Gas System, Inc., 694 F.Supp. 1248, 1251 (E.D.Va. 1988), as well as the Supreme Court’s forceful rejection of heightened pleading requirements in a recent decision, Swierkiewicz v. Sorema, N.A., 2002 U.S. Lexis 1374, 70 U.S.L.W. 4152 (Feb. 26, 2002).

Cavalier alleged an adequate factual basis for a claim under § 43(a) in its complaint. (J.A. 22, Compl. ¶¶ 68-71.) The district court’s conclusion that “Cavalier’s allegations...remain far too vague to meet the particularity requirement” simply is not supported by the case law. As Cavalier pointed out to the district court (J.A. 818), this Court stated that a plaintiff “has set forth in the complaint sufficiently particularized allegations of false or misleading

representations” in a case in which the alleged representations actually did involve fraud. Mylan Labs., *supra*, 7 F.3d at 1138 (4<sup>th</sup> Cir. 1993). Specifically, the plaintiff alleged that “approval of of the defendants’ ANDAs had been obtained through ‘fraud.’” Id.

That is not the case with Cavalier’s allegations. As the district court noted, Cavalier alleged “that Verizon employees made misrepresentations to an unspecified number of potential or existing Cavalier customers....on multiple occasions for the apparent purpose of winning customers away from Cavalier.” (J.A. 1152.) The district court wrongly passed on the merits by dismissing these claims, when it was not apparent from the face of the allegations that Cavalier could advance no set of facts to prove these allegations, and dismissal was therefore error. The district court compounded that error by not even addressing Cavalier request “that the Court grant it leave to amend,” (J.A. 819) and instead granting Verizon’s motion to dismiss with prejudice. This Court should reverse those errors.

**11. The district court erred by dismissing Cavalier’s claims under §§ 201 and 202 of the Communications Act of 1934 on the grounds that Cavalier’s interconnection agreement with Verizon abrogated the applicability of those sections of the statute.**

The district court also wrongly dismissed Cavalier’s claims under §§ 201 and 202 of the Communications Act of 1934, 47 U.S.C. §§ 201 and 202, because “Cavalier...has an interconnection agreement with Verizon” and therefore “must seek resolution of its claims under § 251 and § 252, not § 201 and § 202.” (J.A. 1154.) The sole basis this finding was ¶ 611 of the FCC’s Local Competition Order.<sup>11</sup>

As Cavalier argued, the 1996 enactment of §§ 251 and 252 did not vitiate the viability of a claim for violation of other, intact portions of the pre-existing Communications Act of 1934. (J.A. 806-810.) That much is clear from the Supreme Court’s statement that “the 1996 Act was adopted, not as a freestanding enactment, but as an amendment to, and hence part of” the Communications Act of 1934. AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 378 n.5 (1999).

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<sup>11</sup> First Report and Order, *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 15809, ¶ 611 (1996), cited in J.A. 1153. This paragraph is set forth in full in the Addendum to this Brief.

Moreover, ¶ 611 of the Local Competition Order simply does not say what the district court asserted. The paragraph deals with whether a requesting carrier can seek collocation for interstate services under §§ 251 and 252, or under the FCC's Expanded Interconnection Rules. The FCC merely stated that such a carrier could order a tariffed interstate collocation service under the Expanded Interconnection Rules or negotiate collocation an interconnection agreement under §§ 251 and 252, but could not pursue both. The FCC made no sweeping statements saying that either §§ 201 and 202, or §§ 251 and 252, but not both, would apply to interconnection between two carriers like Cavalier and Verizon. Further, it would take more than a statement by the FCC to render two provisions of a Congressionally enacted statute completely inoperative.

This Court should reverse the district court's erroneous dismissal of Cavalier's claims under §§ 201 and 202 as abrogated by the existence of the parties' interconnection agreement.

**12. The district court erred by dismissing Cavalier's claims for Verizon's breach of its interconnection agreement between the parties on the grounds that the Virginia State Corporation Commission must hear the dispute.**

In dismissing Cavalier's claims for breach of contract, the district court improperly limited its decision to whether it had subject matter jurisdiction under 47 U.S.C. § 252(e)(6), and did not address the claim for breach of contract as

cognizable under supplemental or diversity jurisdiction. Second, the district court relied upon an inapposite decision involving the Maryland Public Service Commission (“PSC”) to support its ruling that—even though it dismissed the claims with prejudice—Cavalier should pursue its claims before the Virginia State Corporation Commission (“SCC”). Dismissal of the breach of contract claims should thus be reversed.

With respect to jurisdiction, Cavalier alleged a straightforward claim for breach of contract (J.A. 47, Compl. ¶ 270), cognizable under the court’s diversity and supplemental jurisdiction pursuant to 28 U.S.C. §§ 1332 and 1367 (J.A. 14, Compl. ¶¶ 9-10). However, the district court assessed only whether it had subject matter jurisdiction to hear the claim pursuant to 47 U.S.C. § 252(e)(6), a contention that Cavalier never advanced. The court first stated that even if an SCC interpretation or enforcement could be reviewed under § 252, “then this Court must dismiss this claim and allow the SCC to make the determination.” (J.A. 17; see also J.A. 17 nn. 12 and 13.) The court then proceeded to rule that “the role of federal courts in regard to interconnection agreements is limited,” that “[n]o SCC determination has been made that this Court can review,” and that Verizon’s motion was thus granted. Because jurisdiction did not rest on review of an SCC determination, the dismissal on this basis should be reversed.

Second, the district court ruled, without any explanation, that “To the extent that these alleged breaches implicate matters falling with [*sic*] the expertise of SCC [*sic*], they should be resolved before the SCC.” (J.A. 16-17.) The district court did not make any explicit finding of primary jurisdiction (a point argued by the parties), nor did it indicate whether or to what extent any breach of contract claims actually did fall within the SCC’s expertise. Further, the only decision cited to this ruling, Bell Atlantic-Maryland, Inc. v. MCI Worldcom, Inc., 240 F.3d 279 (4<sup>th</sup> Cir. 2001), is inapposite.

Bell Atlantic-Maryland did not involve a question of whether a breach of contract claim must be brought before the PSC and could not be brought in court. Rather, this Court found that a federal district court did not have subject matter jurisdiction, pursuant to 47 U.S.C. § 252(e)(6) or 28 U.S.C. § 1331, to review a prior decision by the PSC itself. Bell Atlantic-Maryland, *supra*, 240 F.3d at 304. In this case, no legal basis supports the district court’s finding. As Cavalier asserted, in an argument that the district court did not address, “nothing gives [the SCC] the right to interpret a contract between two parties in a judicial sense just because the parties happen to be certified telecommunications carriers.” (J.A. 814, quoting BellSouth Telecomms. Inc. v. MCIMetro Access Transmission Servs., Inc., 278 F.3d 1223 (11<sup>th</sup> Cir. 2002)). However, as even

the district court acknowledged, Cavalier also contended that no specialized issues would require referral on primary jurisdiction grounds, and that the Virginia SCC—unlike the Maryland PSC—has ruled that it lacks jurisdiction to award monetary damages. (J.A. 1157 n. 14.)

What the district court failed to take into account was the fact that the SCC’s putative inability to award damages, by itself, distinguished Cavalier’s claims from the situation at issue in Bell Atlantic-Maryland.<sup>12</sup> See BellSouth Telecomms., Inc. v. Vartec Telecom, Inc., 185 F.Supp.2d 1280, 1284 n. 4 (N.D.Fla. 2002) (distinguishing MCIMetro, *supra*, because of specific Florida statute allowing PSC to resolve disputes between carriers, and lack of analogous Georgia statute in MCIMetro). Cavalier could only seek effective relief in court, and in this instance, that meant seeking relief before the district court, in a civil action against Verizon.

Finally, it was plain error for the district court to rule that Cavalier’s claims must be brought before the SCC, but then also to dismiss those claims

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<sup>12</sup> Further, nothing in Bell Atlantic-Maryland indicated that the parties were compelled to bring a breach of contract claim before the Maryland PSC. Even if such a requirement existed, it does not exist in this case. The contract at issue here specifically provides that, while the parties may seek expedited resolution of any issues before the SCC, “[t]his provision shall not preclude the parties from seeking relief available in any other forum.” See J.A. 239-240 (text of contract).

with prejudice. Thus, if this Court can find a reason to affirm the district court's ruling, it should reverse the dismissal with prejudice and require a dismissal without prejudice.

**13. The district court erred by dismissing Cavalier's claims for Verizon's violation of the BA/GTE Merger Order, because it ignored specific allegations of how Verizon violated that Order and because it did not grant Cavalier leave to amend.**

The district court dismissed Cavalier's claims that Verizon violated the FCC's BA/GTE Merger<sup>13</sup> Order on the grounds that Cavalier relied on "just one example" that the BA/GTE Merger Order purportedly did not address specifically. However, the district court neglected other allegations in the complaint in reaching this conclusion.

First, the district court conflated Cavalier's contentions about high-capacity loops and billing for last-mile facilities, describing as "one example" Cavalier's allegations that "Verizon is now declining to offer high-capacity loops if certain components are not present in each circuit and that the wrong rates are being applied to last-mile facilities." (J.A. 1155.) The two items are not part of one example but were separate and distinct. Cavalier plainly alleged that Verizon had

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<sup>13</sup> *GTE Corp., Transferor, and Bell Atlantic Corp., Transferee, For Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, Dkt. No. 98-184, FCC 00-221, 15 FCC Rcd 14032 (June 16, 2000).

not provided appropriate billing discounts consistent with the requirements of the BA/GTE Merger Order. (J.A. 31, Compl. ¶ 139.) Cavalier highlighted this example in its memorandum in opposition to Verizon’s motion. (J.A. 811.)

Second, the district court dismissed the applicability of a “best practices” provision to high-capacity loops because the Order purportedly “does not contain specific provisions applying to high-capacity loops.” (J.A. 1155.) However, the BA/GTE Merger Order did impose specific requirements on Verizon. If Cavalier alleged in its complaint that Verizon had violated those requirements (including a “best practices” requirement), through its practices involving high-capacity loops, then the district court should not have summarily dismissed the allegation.

Third, as Cavalier contended in its opposition to Verizon’s motion, it was sufficient for purposes of notice pleading for Cavalier to allege that Verizon’s conduct violated the BA/GTE Merger Order. (See J.A. 811.) As noted above with respect to Cavalier’s Lanham Act claims, the district court should have hewn to notice pleading requirements rather than impose heightened standards on Cavalier at Verizon’s behest. It should have been the function of discovery for Verizon to have inquired about what specific provisions of the BA/GTE Merger Order were allegedly violated, and by what specific alleged conduct.

Alternatively, it was Cavalier's burden of proof to identify the relevant provisions of the BA/GTE Merger Order, and to prove their violation by Verizon, in any hearing or trial on injunctive relief.

Finally, the district court again dismissed with prejudice Cavalier's claims, based on a purported lack of specificity. Dismissal on these grounds should have been without prejudice.

For all of these reasons, this Court should reverse the district court's dismissal of Cavalier's claims for violation of the BA/GTE Merger Order.

**14. The district court erred by dismissing Cavalier's claims under Virginia state law for lack of diversity jurisdiction, and further erred by dismissing those claims with prejudice, when dismissal was based solely on lack of federal subject matter jurisdiction.**

Cavalier's remaining four claims under Virginia law were also improperly dismissed with prejudice by the district court, which impermissibly resolved a disputed factual issue to find that Cavalier's parent corporation has its principal place of business in Virginia.

As established by Cavalier's president, Cavalier's parent corporation, Cavalier Telephone Corporation ("CTC"), is a Delaware corporation that is the sole member of Cavalier, which is in turn the sole member of Cavalier Telephone Mid-Atlantic, LLC ("CTMA"). (J.A. 991.) The direct subsidiary, Cavalier, operates solely in Virginia, and the indirect subsidiary, CTMA,

operates in Pennsylvania, Maryland, Delaware, New Jersey, and the District of Columbia. (Id.) The board of directors is dispersed among Massachusetts, Texas, and Virginia; and board meetings have been held in Philadelphia, Boston, and Richmond. (Id.) Because of its dispersed management and operations, CTC therefore really has no principal place of business. (J.A. 992.)

This situation closely resembles the facts at issue in Nun v. Telectronics Pacing Systems, Inc., 1994 U.S. District LEXIS 9373 (S.D.N.Y. July 11, 1994), in which a holding company had no principal place of business. It does not resemble the facts at issue in the lone decision relied upon by the district court, Hereth v. Jones, 544 F.Supp. 111 (E.D.Va. 1982). As described by the district court, Hereth, a holding company “incorporated in Georgia [that] existed for the sole purpose of being the corporate general partner in a nursing home venture in Virginia.” (J.A. 1158.) The holding company in Hereth therefore only had assets in Virginia, while CTC has assets spread throughout a six-state area. Hereth therefore was not dispositive of the issue of CTC’s principal place of business.

Moreover, as the First Circuit stated in Taber Partners I v. Merit Builders, 987 F.2d 57 (1<sup>st</sup> Cir. 1993), the proper analysis is not merely to look at assets, but to determine CTC’s principal place of business by inquiring into where the

holding company operates. Again, CTC operates throughout a six-state area and beyond, with board members in Texas, Massachusetts, and Virginia; financing decisions centered in Boston; and board meetings held in Philadelphia, Boston, and Richmond. (J.A. 991.)

With respect to CTC's actual places of operation, or with respect to its directly and indirectly owned assets, the factual record therefore did not show conclusively that CTC's principal place of business was in Virginia. Rather, Cavalier had presented issues sufficient to raise a disputed issue with respect to its parent corporation's principal place of business. As this Court has previously emphasized, a district court should grant a Rule 12(b)(1) motion like that brought by Verizon "only if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law." Evans v. B.F. Perkins Co., 166 F.3d 642, 647 (4<sup>th</sup> Cir. 1999), quoting Richmond, Fredericksburg & Potomac R. Co. v. U.S., 945 F.2d 765, 768 (4<sup>th</sup> Cir. 1991). Dismissal for lack of jurisdiction was thus error and should be reversed.

Finally, the district court granted Verizon's motion in its entirety (J.A. 1161), which was for dismissal of all claims with prejudice (J.A. 166). The district court therefore improperly dismissed with prejudice Cavalier's four remaining claims under Virginia law, when it should have dismissed them

without prejudice to allow Cavalier to bring the claims in state court. If this Court does not reverse the district court's finding on subject matter jurisdiction, then it should reverse the improper dismissal with prejudice.

### CONCLUSION

For the reasons stated above, appellant, Cavalier Telephone, LLC, respectfully requests that this Court reverse the district court's decision dismissing with prejudice Cavalier's complaint. Alternatively, should the Court affirm any aspect of the district court's dismissal of Cavalier's claims, then Cavalier respectfully requests that this Court reverse the dismissal with prejudice and order a dismissal without prejudice.

Respectfully submitted,

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Stephen T. Perkins  
Alan M. Shoer  
Donald F. Lynch, III  
Cavalier Telephone, LLC  
2134 West Laburnum Avenue  
Richmond, Virginia 23227

*Counsel for Appellant  
Cavalier Telephone, LLC*

## STATEMENT REGARDING ORAL ARGUMENT

Appellant, Cavalier Telephone, LLC, respectfully requests that the Court hear oral argument in this case to address fully the novel legal issues presented by the district court's decisions involving Cavalier's claims under the federal and Virginia antitrust laws, and to address fully the legal arguments involved with the district court's decision regarding the other eight claims advanced by Cavalier.

Respectfully submitted,

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Stephen T. Perkins  
Alan M. Shoer  
Donald F. Lynch, III  
Cavalier Telephone, LLC  
2134 West Laburnum Avenue  
Richmond, Virginia 23227

*Counsel for Appellant  
Cavalier Telephone, LLC*