

The Antitrust Case Against Live Nation Entertainment

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ABSTRACT

One of many “Ticketmaster horror stories” is the ticketing fiasco of the 2022 Taylor Swift tour, with tickets removed from baskets and fans kicked out of the queue, unable to buy tickets. Live Nation Entertainment, the combination of promoter Live Nation and ticketing company Ticketmaster, blamed unexpected demand.

But while the company had an incentive to cast blame elsewhere, it also had no reason to care about quality. As a monopolist, it was not subject to a competitive marketplace. It could offer a bad product and not worry about customers fleeing from bots and cyberattacks. Ticketmaster has had control over the ticketing market for decades. And after its merger with Live Nation, the top U.S. entertainment provider, in 2010, its power expanded into promotion, where it has relationships with many of the top artists. Together, the combined company appears to have engaged in multiple antitrust violations.

For starters, Ticketmaster harmed ticketing rivals by locking venues into multiyear contracts to take its ticketing services. This is “exclusive dealing.” For any venues not part of these arrangements, the company threatened: “You want our artist? You must take our tickets.” This is a classic “tying” violation. It engaged in deception when it used “bait-and-switch tactics” in selling tickets to fans that led to a settlement with the Federal Trade Commission (FTC). Putting together all of these—and other—actions presents an overall course of conduct that constitutes monopolization.

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The typical remedies for antitrust violations lean toward the modest rather than aggressive side. This case is different. The 2010 merger of Ticketmaster and Live Nation required the company to not force venues wishing to book Live Nation artists to use Ticketmaster's ticketing. But there were so many breaches that the consent decree was extended. Given its numerous blatant violations, the company cannot be trusted to undertake actions a court might compel. For that reason, a breakup of Ticketmaster and Live Nation should be the preferred remedy.

Taylor Swift fans rightly were upset when Ticketmaster bungled the roll-out of tickets for her 2022 tour. We should all be upset. This Article highlights the strong antitrust case against the company and remedy that can fix this.

INTRODUCTION

In November 2022, millions of Taylor Swift fans were angry. For the first time since 2018, Swift was going on tour. Demand was through the roof. But the process of getting tickets was a disaster. Some fans waited for hours in a queue before being kicked out.¹ Others made "multiple failed attempts" to buy tickets that "had been removed from their basket without adequate time to check out."² And some "Verified Fans" were waitlisted, unable to buy tickets until the general public sale. Adding insult to injury, this sale was canceled.³

Live Nation Entertainment, the combination of promoter Live Nation and ticketing company Ticketmaster, blamed unexpected demand. President Joe Berchtold said "industrial-scale ticket scalping" from automated "bots" was "the real problem, with a \$5 billion market in secondary sales standing between artists and fans."⁴ Chairman of the Board Greg Maffei explained that

¹ Chris Willman & E.J. Panaligan, *Taylor Swift Says Ticketmaster Fiasco "Pisses Me Off": "It's Excruciating for Me to Just Watch Mistakes Happen,"* VARIETY (Nov. 18, 2022), <https://variety.com/2022/music/news/taylor-swift-addresses-eras-tour-ticketmaster-fiasco-1235436036/> [<https://perma.cc/6Q3H-AJEJ>].

² Ashley Cullins, *Taylor Swift "Ticket Sale Disaster" Sparks Suit Against Ticketmaster, Live Nation,* HOLLYWOOD REPORTER (Dec. 5, 2022), <https://www.hollywoodreporter.com/news/music-news/taylor-swift-fans-lawsuit-ticketmaster-live-nation-eras-tour-1235275035/> [<https://perma.cc/2TRS-3ZP2>].

³ Willman & Panaligan, *supra* note 1.

⁴ Anna Edgerton & Leah Nysten, *Senators Fault Ticketmaster "Monopoly" for Taylor Swift Debacle,* BLOOMBERG (Jan. 24, 2023), <https://www.bloomberg.com/news/articles/2023-01-24/senators-blame-ticketmaster-monopoly-for-taylor-swift-debacle?embedded-checkout=true> [<https://perma.cc/5THL-FBUW?type=standard>].

“[i]t’s a function of Taylor Swift,” as “the site was supposed to open up for 1.5 million verified Taylor Swift fans” but “had 14 million people hit the site, including bots, which are not supposed to be there.”⁵ And former Ticketmaster CEO Fred Rosen had “no sympathy for people whining about high ticket prices” because “[t]he public brought all this on itself.”⁶

The company had every reason to cast blame elsewhere. But it also had no reason to care about quality. As a monopolist, it was not subject to a competitive marketplace.⁷ It could offer a bad product and not worry about customers fleeing from bots and cyberattacks. In fact, it could continue raising prices.

Taylor Swift asked Ticketmaster “multiple times” if it “could handle this kind of demand” and was “assured” it could.⁸ Obviously, it could not (or chose not to). Swift lamented that even the more than two million people who were able to obtain tickets felt like “they went through several bear attacks to get them.”⁹

Such a fiasco is not unique to this event. Many fans have “a Ticketmaster horror story” of tickets “disappearing” in the checkout cart or “prices jumping due to ‘dynamic pricing’ or ‘unapparent fees’ attached to tickets at the end of the purchasing process.”¹⁰ These long-known quality concerns, however, have

See also id. (“Industrial scalpers breaking the law using bots and cyberattacks to try to unfairly gain tickets contributes to an awful consumer experience.”).

⁵ Sarah Whitten, *Ticketmaster’s Largest Shareholder Blames Massive Demand—including from Bots—for Taylor Swift Ticket Fiasco*, CNBC (Nov. 17, 2022), <https://www.cnbc.com/2022/11/17/taylor-swift-ticketmaster-fiasco-due-to-demand-bots-liberty-media-ceo-says.html> [https://perma.cc/DJ8Y-527H].

⁶ August Brown, *How Ticketmaster Became the Most Hated Name in Music*, L.A. TIMES (Jan. 23, 2023), <https://www.latimes.com/entertainment-arts/music/story/2023-01-23/ticketmaster-live-nation-taylor-swift-pearl-jam> [https://perma.cc/4CVR-LH75].

⁷ *See* Dave Brooks, *Live Nation’s Michael Rapino Admits Some Ticket Fees “Not Defendable,”* BILLBOARD (Oct. 13, 2017), <https://www.billboard.com/pro/michael-rapino-deposition-ticketmaster-fees-songkick-shuts-down/> [https://perma.cc/54JC-LQHY] (Live Nation CEO admits that some Ticketmaster fees are “not defendable”).

⁸ David McCabe & Ben Sisario, *Justice Dept. Is Said to Investigate Ticketmaster’s Parent Company*, N.Y. TIMES (Nov. 18, 2022), <https://www.nytimes.com/2022/11/18/technology/live-nation-ticketmaster-investigation-taylor-swift.html> [https://perma.cc/ZKX3-TQST].

⁹ Rebecca Klar, *How a Taylor Swift Tour Thrust Antitrust Concerns Into the Spotlight*, THE HILL (Nov. 19, 2022), <https://thehill.com/policy/technology/3742563-how-a-taylor-swift-tour-thrust-antitrust-concerns-into-the-spotlight/> [https://perma.cc/NVX6-5N4K].

¹⁰ *Id.*

not resulted in fans using alternative options. As Swift explained: “I didn’t have many alternatives,” as “I had to play these venues in big cities, and that’s where Ticketmaster’s market power manifests.”¹¹

Ticketmaster has had control over the ticketing market for decades. And after its merger with Live Nation, the top U.S. entertainment provider, in 2010, its power expanded into promotion, where it has relationships with many of the top artists. Together, the combined company appears to have engaged in multiple antitrust violations.

For starters, Ticketmaster harmed ticketing rivals by locking venues into multiyear contracts to take its ticketing services. This is “exclusive dealing.”¹²

For any venues not part of these arrangements, the company threatened: “You want our artist? You must take our tickets.” This is a classic “tying” violation.¹³

It engaged in deception when it used “bait-and-switch tactics” in selling tickets to fans that led to a settlement with the Federal Trade Commission (FTC).¹⁴

Putting together all of these—and other—actions presents an overall course of conduct that constitutes monopolization.¹⁵

Typical remedies for antitrust violations lean toward the modest rather than aggressive side, such as an injunction to stop engaging in particular conduct like tying or exclusive dealing. This case is different. The reason is that the more modest approach already has been tried. The U.S. Department of Justice (DOJ) allowed the 2010 merger of Ticketmaster and Live Nation to proceed on the condition that the company do certain things, like not forcing venues wishing to book Live Nation artists to use Ticketmaster’s ticketing. In the vast majority of these “consent decrees,” the parties follow the terms. In this case, however, there were so many breaches that the consent decree was extended, which almost never happens.¹⁶

¹¹ Brown, *supra* note 6 (quoting Swift).

¹² See *infra* Part VI.

¹³ See *infra* Part VII.

¹⁴ See *infra* notes 401–407 and accompanying text.

¹⁵ See *infra* Part IX (discussing (1) criminal misappropriation harming ticketing rivals, (2) radius clauses injuring promoters, and (3) tying promotion to venues, and (4) leveraging various markets to control arenas harming other promoters and non-Ticketmaster-affiliated venues).

¹⁶ See Press Release, U.S. Dep’t of Justice, Justice Department Will Move to Significantly Modify and Extend Consent Decree with Live Nation/Ticketmaster (Dec. 19, 2019), <https://www.justice.gov/opa/pr/justice-department-will-move-significantly-modify-and-extend-consent-decree-live> [<https://perma.cc/664V-XTGB>] (extension

Given its numerous blatant infractions, the company cannot be trusted to undertake actions a court might compel as a remedy for antitrust liability. For that reason and because a structural remedy is more promising in addressing the core harms threatened by the company,¹⁷ a breakup of Ticketmaster and Live Nation should be the preferred remedy. Additional remedies could require the company to sell venues and end exclusive dealing arrangements, impose injunctive relief against deception, and address behavior that is part of the overall course of conduct.

This Article first traces the history of Ticketmaster and Live Nation. It next offers an overview of the relevant antitrust framework and explores the company's power in several markets. It then examines harm to various parties, in particular, consumers, and explores the company's inconsistent approach to secondary ticketing. The succeeding four parts then analyze antitrust theories of exclusive contracts with venues, tying promotion and tickets, deception, and an overall course of conduct. The Article concludes by discussing remedies.

I. HISTORY

Before beginning the antitrust analysis of a case that could be brought against Live Nation Entertainment, some stage-setting is in order. This Part offers a quick primer on the relevant markets and then provides background on two of the company's divisions, the ones central to this Article: Ticketmaster and Live Nation.¹⁸

A. *Relevant Markets*

As Live Nation Entertainment has explained, “[t]he live music industry includes concert promotion and/or production of music events or tours.”¹⁹ To

of decree was “the most significant enforcement action of an existing antitrust decree by the Department [of Justice] in 20 years”).

¹⁷ See *infra* notes 499–501 and accompanying text.

¹⁸ As mentioned above, see *supra* note 4, the overall company, Live Nation Entertainment, consists of divisions including ticketing-based Ticketmaster and promotion-based Live Nation.

¹⁹ Live Nation Entertainment, Inc., Annual Report (Form 10-K), at 4 (Dec. 31, 2022), <https://investors.livenationentertainment.com/sec-filings/annual-reports/content/0001335258-23-000014/0001335258-23-000014.pdf> [https://perma.cc/J3XU-SJWF] [hereinafter Live Nation 10-K].

go on tour or set up live music events, “booking agents contract with artists to represent them” and the agents work with promoters to arrange events.²⁰ Promoters, who “earn revenue primarily from the sale of tickets, . . . market events, sell tickets, rent or otherwise provide venues[,] and arrange for local production services, such as stages and equipment.”²¹

Venues are “the physical locations where concerts occur.”²² Venue operators “typically contract with promoters to have their venues rented for specific events on specific dates,” and provide “services such as concessions, parking, security, ushering and ticket scanning at the gate.”²³

Ticketing services “generally refers to the sale of tickets primarily through online and mobile channels” and “also includes sales through phone, outlet and box office channels.”²⁴ Ticketing companies “will contract with venues and/or promoters to sell tickets to events over a period of time, generally three to five years.”²⁵

Live Nation Entertainment has power in all of these markets.²⁶ But that was not always the case.

B. Ticketmaster’s Growth

When Ticketmaster entered the market in the late 1970s, the industry leader was Ticketron, whose \$100 million in sales dwarfed Ticketmaster’s \$1 million.²⁷ In 1982, Fred Rosen took over leadership of Ticketmaster. Rosen believed that “the real money was in concerts, not sporting events” because of the “fanatic followers willing to shell out big bucks simply for the chance to attend . . . one-time events.”²⁸

Rosen increased the then-\$1 service charge and shared it with “appreciative promoters and venue managers.”²⁹ Ticketmaster’s deals “represented

²⁰ *Id.*

²¹ *Id.*

²² Competitive Impact Statement at 3, U.S. v. Ticketmaster Entertainment, Inc., No. 1:10-cv-00139 (D.D.C. Jan. 25, 2010).

²³ Live Nation 10-K, *supra* note 19, at 4.

²⁴ *Id.*

²⁵ *Id.*

²⁶ See *infra* Part III. The company also has power in artist management. See *infra* notes 104–105 and accompanying text.

²⁷ Eric Boehlert, *Ticketmaster Is Under Fire: How David Became the Industry’s Goliath*, 106 BILLBOARD 1, 97 (1994).

²⁸ *Id.*

²⁹ *Id.*

found money, a net of several hundred thousand dollars a year” for major-market arenas, and also helped promoters, who were “hurt at the time by the increasingly large guarantees demanded by artists.”³⁰ In offering “the revenue share and the mechanisms to earn it, Ticketmaster required full inventory of all tickets sold to the public and an exclusive agreement to provide ticketing services for each client.”³¹

Rosen would tell the venues:

Right now you have a cost center, it's called your box office. You pay for the equipment and you have to pay for the labor to sell the tickets. I'm going to give you the equipment for free. I'm going to equip your entire box office with terminals. I'm going to teach your people how to sell tickets over those terminals, and I'm going to support those people. What I'm going to ask you to do is close down the first day of sale on concerts and let me sell those tickets through my outlets. So now you don't even have to pay the labor on the first day of sale. But if that's not enough, I'm going to give you a piece of every ticket I sell. So I've just turned your cost center into a profit center.³²

That was not all. The venue “would get an advance on future sales . . . and, occasionally, a signing bonus.”³³ And “[o]nce the advance was recouped, the buildings and promoters would get annual rebates as part of a revenue share of the service fees with Ticketmaster.”³⁴ The company's sharing of the spoils with promoters and venues aligned the incentives of each to benefit from higher fees. Even better for the promoters and venues (though not the fans), Ticketmaster recognized that “[b]uying a ticket is not a real enjoyable process” and agreed to “take the bruises from people who don't like the process.”³⁵

³⁰ *Id.*

³¹ DEAN BUDNICK & JOSH BARON, *TICKET MASTERS: THE RISE OF THE CONCERT INDUSTRY AND HOW THE PUBLIC GOT SCALPED* 72 (2012). *See also id.* (“Everything was exclusive from day one in every building.”).

³² *Id.* at 75.

³³ *Id.* at 116–17. *See, e.g.*, Fred Goodman, *The Price Is Not Right*, *ROLLING STONE* (Oct. 6, 1994), <https://www.rollingstone.com/music/music-news/the-price-is-not-right-183787/> [<https://perma.cc/L52P-F5ND>] (noting that Ticketmaster “has become a de facto bank,” with, for example, a “five-year exclusive deal with the New Jersey Sports and Exposition authority guarantee[ing] the Meadowlands venue about \$6.5 million—including \$1 million for signing”).

³⁴ BUDNICK & BARON, *supra* note 31, at 117.

³⁵ *Id.* at 73 (“Part of the unspoken agreement, or maybe even spoken, was that we will be the face of ticketing.”); *id.* (Ticketmaster's senior vice president for new media stated that in return for the exclusive contracts, the company “agreed to take it on the chin”); Jem Aswad, *John Oliver Blasts Ticketmaster in Scathing Broadside Against Ticket*

C. Ticketmaster and Live Nation

Ticketmaster's exclusive contracts with venues allowed it to amass significant power in ticketing.³⁶ From roughly 1990 until 2009, as the DOJ explained, Ticketmaster "dominated the market for primary ticketing services to major [U.S.] concert venues" with more than an 80 percent share of the market.³⁷ By 2008, however, the company's "longstanding dominance faced a major threat."³⁸

Live Nation was "the largest concert promoter in the United States, . . . promoting shows representing 33%" of the revenues at "major concert venues"³⁹ and owning or operating roughly 70 of these venues.⁴⁰ From 1998 to 2007, Live Nation was in an exclusive arrangement to use Ticketmaster for ticketing at its venues.⁴¹ Perhaps seeing "the potential to compete directly and cut out Ticketmaster," Live Nation ended that arrangement,⁴² which likely played a role in Ticketmaster's profits falling 78 percent.⁴³

Prices, Fees, Secondary Market, VARIETY (Mar. 14, 2022), <https://variety.com/2022/music/news/john-oliver-ticketmaster-prices-fees-secondary-market-1235204410> [<https://perma.cc/MY3Q-BMKM>] (video at 5:36 to 5:54) (Ticketmaster "was set up as a system where they took the heat for everybody. Within that service charge are the credit card fees, the rebates to the buildings, rebates sometimes to artists, sometimes rebates to promoters. Ticketmaster is like the IRS—we deliver bad news.").

³⁶ Ticketmaster also expanded its universe in 2008 by acquiring artist management company Front Line. Phil Gallo, *Ticketmaster Takes Over Front Line*, VARIETY (Oct. 23, 2008), <https://variety.com/2008/music/markets-festivals/ticketmaster-takes-over-front-line-111799450> [<https://perma.cc/E2TC-4BLU>].

³⁷ Competitive Impact Statement, *supra* note 22, at 8. See *infra* note 78 and accompanying text.

³⁸ *Id.* at 10.

³⁹ *Id.* at 4.

⁴⁰ *Id.* at 5.

⁴¹ Maureen Tkacik & Krista Brown, *Ticketmaster's Dark History*, AM. PROSPECT (Dec. 21, 2022), <https://prospect.org/power/ticketmasters-dark-history/> [<https://perma.cc/EK7L-3D6X>] (referring to Live Nation's predecessor, SFX, using its "reasonable best efforts" to "exclusively employ Ticketmaster in every venue that hosted one of its events"); Amended Complaint, *United States v. Ticketmaster Entertainment, Inc.* ¶¶ 24–25 (D.D.C. Jan. 28, 2010).

⁴² Krista Brown, *Better than Revenge: Swifties Help Expose Ticketmaster's Monopoly*, ROLLING STONE (Nov. 23, 2022), <https://www.rollingstone.com/music/music-features/taylor-swift-ticketmaster-live-nation-monopoly-antitrust-commentary-1234635257/> [<https://perma.cc/7C2H-7Y6C>].

⁴³ Janet Morrissey, *Ticketmaster, Live Nation: Obama's Antitrust Test*, TIME (June 10, 2009), <https://content.time.com/time/business/article/0,8599,1903447,00.html> [<https://perma.cc/5VVT-R33S>].

Entering the primary-ticketing market in December 2008,⁴⁴ Live Nation was uniquely positioned to compete against Ticketmaster because it “could achieve sufficient scale to compete effectively . . . simply by ticketing its own venues” and “could bundle access to important concerts with its ticketing service.”⁴⁵ Less than two months later, the two companies agreed to merge.⁴⁶

At the time, there was significant concern with the merger. For example, Bruce Springsteen lamented that “the one thing that would make the current ticket situation even worse for the fan than it is now would be Ticketmaster and Live Nation coming up with a single system, thereby returning us to a near monopoly situation in music ticketing.”⁴⁷ A promoter warned that if the merger took place, “all independent promoters” would be at “an irreparable, competitive, disadvantage.”⁴⁸ And a producer was worried that the two companies “are both Goliaths” and that “their unification will create a business with extraordinary market power and clout unlike any that I have ever seen in my lifetime.”⁴⁹

⁴⁴ *Id.*

⁴⁵ Competitive Impact Statement, *supra* note 22, at 10.

⁴⁶ Morrissey, *supra* note 43. *See also* Boehlert, *supra* note 27 (noting that Ticketron could not compete with Ticketmaster, which was funded by billionaire Jay Pritzker, and that when Ticketron caught on to what its rival was doing, Ticketmaster raised the stakes, offering upfront guarantees of service charges).

⁴⁷ Daniel Kreps, *Bruce Springsteen “Furious” at Ticketmaster, Rails Against Live Nation Merger*, ROLLING STONE (Feb. 4, 2009), <https://www.rollingstone.com/music/music-news/bruce-springsteen-furious-at-ticketmaster-rails-against-live-nation-merger-97368/> [<https://perma.cc/B4Y9-3GNX>].

⁴⁸ *The Ticketmaster/Live Nation Merger: What Does It Mean for Consumers and the Future of the Concert Business: Hearing before the Subcomm. on Antitrust, Competition Policy and Consumer Rights*, 111th Cong. 12 (2009) (statement of Seth Hurwitz, Co-Owner, I.M.P. Productions and 9:30 Club), <https://www.govinfo.gov/content/pkg/CHRG-111shrg54048/html/CHRG-111shrg54048.htm> [<https://perma.cc/B2N4-JLGK>]. *See also id.* (explaining that the promoter’s “biggest competitor will have access to all of my sales records, customer information, on-sale dates for tentative shows, [and] ticket counts” and “can control which shows are promoted and much more,” which “would be like Pepsi forcing Coke to use its services as distributor”).

⁴⁹ *Id.* at 11 (statement of Jerry Mickelson, Chairman and Executive Vice President, Jam Productions, LLC). *See also, e.g.*, Ben Sisario, *Justice Dept. Clears Ticketmaster Deal*, N.Y. TIMES, Jan. 25, 2010, <https://www.nytimes.com/2010/01/26/business/26ticket.html> [<https://perma.cc/J2S2-Y7SE>] (noting that merger “has faced vocal opposition from consumer groups, politicians, and independent concert promoters”); David Balto, *The Ticketmaster-Live Nation Merger: What Does It Mean for Consumers and the Future of the Concert Business?*, CAP ACTION 20 (Feb. 24, 2009), <https://www.americanprogressaction.org/article/>

The DOJ nonetheless allowed the merger to proceed subject to certain conditions.⁵⁰ As discussed below, however, the merged company breached its promises, which resulted in an extension of the consent decree.⁵¹ With each passing day, Live Nation Entertainment increases its power, and without any legitimate justification, harms multiple levels of the industry, including, as discussed below, artists, venues, promoters, and consumers.⁵² The next Part sets out the broadest outlines of an antitrust claim.

the-ticketmaster-live-nation-merger-what-does-it-mean-for-consumers-and-the-future-of-the-concert-business/ [https://perma.cc/Y3LA-3N7P] (merger “raises serious competitive concerns and could potentially lead to significantly higher prices for the hundreds of thousands of consumers who purchase tickets every day”); *see also id.* (“By acquiring Live Nation, Ticketmaster will cut off the air supply for any future rival to challenge its monopoly in the ticket distribution market,” and “[t]he merged firm will control hundreds of venues, including the key venues and many of the crucial marquee artists that produce the most lucrative tours.”).

⁵⁰ *See infra* note 358 and accompanying text (discussing prohibition of (1) conditioning availability of concerts on use of Ticketmaster’s ticketing and (2) retaliation for venues using other ticketing companies). In addition, the settlement “requir[ed] Ticketmaster to license its ticketing platform to AEG, another major promoter and owner of some of the country’s most significant venues,” and mandated that the company “divest to Comcast-Spectacor its Paciolan line of business,” which “allows venues to host their own primary ticketing service on their own websites.” Christine A. Varney, Ass’t Att’y Gen’l, DOJ Antitrust Div., The TicketMaster/Live Nation Merger Review and Consent Decree in Perspective, Address (Mar. 18, 2010), https://www.justice.gov/atr/speech/ticketmasterlive-nation-merger-review-and-consent-decree-perspective#N_7_ [https://perma.cc/7JWJ-59U4].

In a statement that appears to have been overly optimistic, the head of the Antitrust Division believed that these conditions addressed any competitive concerns that the merger presented. *See id.* (“We believe that the creation of two new competitors to Ticketmaster, employing two very different business models, will give existing independent players and people thinking of getting into the business a more varied package of choices as to how they will try to best serve consumers in the live music business,” as “[t]hey can choose to find their place within the Ticketmaster / Live Nation model, the AEG model, the Paciolan model, or another model of their own design.”). The Assistant Attorney General continued: “[W]hat we protect is competition, not competitors, and so the task of making those models work for them has to be theirs, not ours,” as “[w]e believe that we have provided a fair playing field on which they can compete, and we hope that they can take this opportunity to show that consumers prefer the product that they can provide.” *Id.*

⁵¹ *See infra* notes 358–370 and accompanying text.

⁵² *See infra* Part IV.

II. ANTITRUST FRAMEWORK

The primary antitrust claim a plaintiff could bring against Live Nation Entertainment would be monopolization.⁵³ This offense has two elements: monopoly power and exclusionary conduct.⁵⁴

The first element is monopoly power, which has been defined as “the power to control prices or exclude competition.”⁵⁵ Monopoly power can be shown in one of two ways. First, it can be proved indirectly by examining a defendant’s market share along with barriers to entry that could entrench that market position.⁵⁶ A market share of at least 70 percent “generally establishes a prima facie case of monopoly power,” with some courts finding such power between 50 percent and 70 percent.⁵⁷ The leading antitrust treatise suggests a presumption of monopoly power from a “share of a well-defined market protected by sufficient entry barriers” that “has exceeded 60 percent for the five years preceding the complaint.”⁵⁸

⁵³ The Article focuses on a case a government agency could bring. Private plaintiffs could use these arguments though they also would need to satisfy standing requirements. *See, e.g., generally*, IIA PHILLIP E. AREEDA, HERBERT HOVENKAMP, ROGER D. BLAIR, & CHRISTINE PIETTE DURRANCE, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* ¶¶ 335–59 (5th ed. 2020) (discussing standing).

⁵⁴ *E.g.*, *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966).

⁵⁵ *United States v. E.I. duPont de Nemours & Co.*, 351 U.S. 377, 391 (1956).

⁵⁶ *See* HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE* § 6.2b, at 359–60 (5th ed. 2016) [hereinafter HOVENKAMP].

⁵⁷ ABA SECTION OF ANTITRUST LAW, *ANTITRUST LAW DEVELOPMENTS* 230–32 (7th ed. 2012) [hereinafter *ANTITRUST LAW DEVELOPMENTS*]. *See, e.g.*, *FTC v. Facebook, Inc.*, 560 F. Supp. 3d 1, 18 (D.D.C. 2021) (noting that alleged market share of 60 percent “might sometimes be acceptable”); *BRFHH Shreveport, LLC v. Willis Knighton Med. Ctr.*, 176 F. Supp. 3d 606, 611 (W.D. La. 2016) (denying motion to dismiss where market share was 60 percent to 75 percent); *Lenox MacLaren Surgical Corp. v. Medtronic, Inc.*, 762 F.3d 1114, 1124 (10th Cir. 2014) (fact-finder “could reasonably consider . . . 62% market share as evidence of monopoly power”); *Royal Mile Co. v. UPMC*, No. 10-1609, 2013 WL 5436925, at *31 (W.D. Pa. Sept. 27, 2013) (defendant “sufficiently alleged . . . monopoly power” based on market share that “exceeded 60%”); *Image Tech. Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1207 (9th Cir. 1997) (65 percent sufficient for monopoly power); *Syufy Enterprises v. Am. Multicinema, Inc.*, 793 F.2d 990, 996 (9th Cir. 1986) (finding “market share of 60-69% . . . adequate to support a jury determination of monopoly power”).

⁵⁸ IIBB HERBERT HOVENKAMP, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* ¶ 801a, at 427 (5th ed. 2022). *See also id.* ¶

Second, monopoly power can be proved directly.⁵⁹ In *United States v. Microsoft*, the D.C. Circuit found a “clear” example of such proof when a firm could “profitably raise prices substantially above the competitive level.”⁶⁰ Similarly, the Third Circuit in *Broadcom v. Qualcomm* stated that “[t]he existence of monopoly power may be proven through direct evidence of supra-competitive prices and restricted output.”⁶¹ Most generally, direct evidence can take the form of “the actual exercise of control over prices and/or the actual exclusion of competition from the relevant market.”⁶²

The second element of monopolization is predatory or exclusionary conduct. The Supreme Court in *United States v. Grinnell Corporation* articulated the oft-cited test: whether the conduct reflects the “willful acquisition or maintenance of [monopoly] power” as opposed to a “superior product, business acumen, or historic accident.”⁶³ The Court in *Aspen Skiing v. Aspen Highlands Skiing* elaborated, finding it “relevant to consider [the conduct’s] impact on consumers and whether it has impaired competition in an unnecessarily restrictive way.”⁶⁴ Similarly, the *Broadcom* court stated that anticompetitive conduct “is generally defined as conduct to obtain or maintain monopoly power as a result of competition on some basis other than the merits.”⁶⁵ Even more guidance is provided when a company engages in conduct that constitutes long-recognized forms of potentially anticompetitive behavior. Most of this Article analyzes such conduct: exclusive ticketing contracts with venues, tying promotion to ticketing, deception, and an overall course of conduct.⁶⁶

801a2, at 430 (explaining that presumption is strengthened by recent increases in market share).

⁵⁹ ANTITRUST LAW DEVELOPMENTS, *supra* note 57, at 69–70 (noting that “direct proof has provided the basis for findings of substantial anticompetitive effects in some prominent cases”).

⁶⁰ 253 F.3d 34, 51 (D.C. Cir. 2001); *see also, e.g.*, *Ball Mem’l Hosp., Inc. v. Mut. Hosp. Ins., Inc.*, 784 F.2d 1325, 1335 (7th Cir.1986) (explaining that market power is “the ability to cut back the market’s total output and so raise price”); *In re Nexium (Esomeprazole) Antitrust Litig.*, 968 F. Supp. 2d 367, 388 n.19 (D. Mass. 2013) (stating that “[w]here direct evidence of market power is available, . . . a plaintiff need not attempt to define the relevant market” and finding that that was the case when a brand-name drug company was able to “maintain the price of [a] drug . . . at supracompetitive levels without losing substantial sales . . .”).

⁶¹ 501 F.3d 297, 307 (3d Cir. 2007).

⁶² ANTITRUST LAW DEVELOPMENTS, *supra* note 57, at 226.

⁶³ 384 U.S. 563, 570–71 (1966).

⁶⁴ *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 (1985).

⁶⁵ *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 308 (3d Cir. 2007).

⁶⁶ *See infra* Parts VI–IX.

III. MONOPOLY POWER

The first issue is monopoly power. This Part considers this inquiry in three markets: primary ticketing,⁶⁷ promotion, and venues.⁶⁸

As a starting point, market definition depends on substitutability from the purchaser's standpoint. As the Supreme Court explained in *United States v. E.I. du Pont de Nemours*, a relevant market is based on the array of "commodities reasonably interchangeable by consumers."⁶⁹ Demand substitution, which "focuses on buyers' views of which products are acceptable substitutes or alternatives," thus plays a critical role in defining the market.⁷⁰

The scope of the market need not cover the broadest possible collection of products. In *International Boxing Club of N.Y. v. United States*, for example, the Supreme Court upheld a finding of a separate market for "championship boxing contests" as opposed to all such contests.⁷¹ Similarly, the Court in *NCAA v. Board of Regents of University of Oklahoma* found a separate market in "intercollegiate football telecasts" because they "generate an audience uniquely attractive to advertisers" and "competitors are unable to offer programming that can attract a similar audience."⁷²

In this case, three markets reveal monopoly power.⁷³ The remainder of this Part highlights the company's market share. These findings are buttressed

⁶⁷ Distinguished from primary ticketing is secondary (or resale) ticketing, which "refers to the sale of tickets by a holder who originally obtained the tickets from a venue or other entity, or a ticketing services provider selling on behalf of a venue or other entity." See Live Nation 10-K, *supra* note 19, at 4; see also *That's the Ticket: Promoting Competition and Protecting Consumers in Live Entertainment*, Hearing Before the S. Comm. Jud., 118 Cong. 96–113 (2023) (testimony of Jerry Mickelson, CEO and President, Jam Productions, LLC), <https://www.congress.gov/event/118th-congress/senate-event/333501/text?s=1&r=92> [<https://perma.cc/8GB5-9BN3>]; *infra* note 173 and accompanying text.

⁶⁸ As mentioned above, the company also has power in artist management. See *infra* notes 104–105 and accompanying text.

⁶⁹ 358 U.S. 377, 395 (1956).

⁷⁰ *Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act*, DOJ ARCHIVES (2009), https://www.justice.gov/archives/atr/competition-and-monopoly-single-firm-conduct-under-section-2-sherman-act-chapter-2 - N_54 [<https://perma.cc/3H27-T2W4>].

⁷¹ 358 U.S. 242, 250 (1959).

⁷² 468 U.S. 85, 111 (1984).

⁷³ The geographic scope of each of the markets is the United States. In its 2010 complaint, the DOJ alleged a market based on "[m]ajor concert venues purchasing primary ticketing services . . . located throughout the United States." *Ticketmaster Amended Complaint*, *supra* note 41, ¶ 36. In another 2010 filing, the DOJ

by direct evidence⁷⁴ discussed throughout this Article like increased prices and reduced quality in the ticketing market and exclusion of competition in the promotion and venue markets.

A. Primary Ticketing

The first market covers primary ticketing. As the DOJ explained in its 2010 complaint against Ticketmaster and Live Nation (which, as discussed above,⁷⁵ was settled by consent decree), “[m]ajor concert venues that generate substantial income from live music events can be readily identified, and market power can be selectively exercised against them, because there is no reasonable substitute service to which the customers could turn.”⁷⁶

Ticketmaster has had control over this market for decades.⁷⁷ In the complaint, the DOJ explained how Ticketmaster “dominated primary ticketing, including primary ticketing for major concert venues, for over two decades.”⁷⁸ At that time, Ticketmaster’s share was more than 80 percent, and other than merging partner Live Nation, “no other competitor . . . ha[d] more than a four percent share.”⁷⁹

This high market share was entrenched by several factors, including renewal rates of at least 85 percent,⁸⁰ the integration of ticketing with promotion and artist management,⁸¹ Ticketmaster’s “economies of scale, long-term contracts, and brand recognition,” and “the technological hurdles necessary to compete in primary ticketing.”⁸² Major concert venues, as the DOJ has

“include[d] only major concert venues located in the United States” in the relevant market on the grounds that “the merged firm could price discriminate,” which would mean that “any effects of the proposed transaction on foreign venues would be distinct from any effects on domestic venues.” Plaintiff United States’ Response to Public Comments at 5, *U.S. v. Ticketmaster Entertainment, Inc.*, Case. 1:10-cv-00139 (D.D.C. June 21, 2010).

⁷⁴ See *supra* notes 55–62 and accompanying text.

⁷⁵ See *supra* note 50 and accompanying text.

⁷⁶ *Ticketmaster Amended Complaint*, *supra* note 41, ¶ 35.

⁷⁷ For a discussion of antitrust investigations and litigation Ticketmaster has faced, see Tkacik & Brown, *supra* note 41 and accompanying text.

⁷⁸ *Ticketmaster Amended Complaint*, *supra* note 41, ¶ 21.

⁷⁹ *Id.* (providing figures from 2008).

⁸⁰ *Id.* ¶ 2.

⁸¹ *Id.* ¶ 43.

⁸² *Id.* ¶ 5.

explained, are required to have “the most sophisticated ticketing services,” which leaves them with “few ticketing options.”⁸³

This dominance has continued unabated. For the largest U.S. venues today, the company is widely understood to have an 80 percent market share of the primary ticketing market. One source concluded that Ticketmaster “tickets 80 of the top 100 arenas in the country,” with “[n]o other company” having “more than a handful.”⁸⁴ A senior Ticketmaster official agreed with the suggestion in 2021 that the “market share within the primary market” is “about 80 percent.”⁸⁵

Recent figures support these findings. In 2022, Ticketmaster provided ticketing services for 87 percent of Billboard’s Top 40 U.S. tours.⁸⁶ Similarly, 89 percent of U.S. shows in “Billboard’s 2022 Top 25 Stadiums were ticketed by Ticketmaster.”⁸⁷ Showing its reach across the country, those stadiums were in Arlington, Texas; Atlanta, Georgia; Charlotte, North Carolina; Chicago, Illinois; Denver, Colorado; East Rutherford, New Jersey; Foxborough, Massachusetts; Houston, Texas; Inglewood, California; Las Vegas, Nevada; Miami, Florida; Orlando, Florida; San Diego, California; Santa Clara, California;

⁸³ Plaintiff United States’ Response to Public Comments at 5, *U.S. v. Ticketmaster Entertainment, Inc.*, Case 1:10-cv-00139-RMC (D.D.C. June 21, 2010). For a discussion of how the DOJ believed its conditions addressed the competitive concerns presented by the merger, see *supra* note 50 and accompanying text.

⁸⁴ Ben Sisario & Graham Bowley, *Live Nation Rules Music Ticketing, Some Say With Threats*, N.Y. TIMES (Apr. 1, 2018), <https://www.nytimes.com/2018/04/01/arts/music/live-nation-ticketmaster.html> [<https://perma.cc/3F8Z-RF8L>].

⁸⁵ *Joint Public Hearing, To Examine Potentially Unfair and Deceptive Practices Occurring in New York State’s Primary and Secondary Ticket Marketplaces for Live Events in Order to Identify Any Legislative and Policy Reforms*, N.Y. Senate Standing Comm. on Investigations and Government Operations and Standing Comm. on Commerce, Econ. Devel., & Small Bus., 17–18 (Apr. 22, 2021), https://www.nysenate.gov/calendar/public_hearings/april-22-2021/joint-public-hearing-examine-potentially-unfair-and [<https://perma.cc/7DEQ-XMY2>].

⁸⁶ *That’s the Ticket: Promoting Competition and Protecting Consumers in Live Entertainment*, Hearing Before the S. Comm. Jud., 118 Cong. 5 (2023) (statement of Jerry Mickelson, CEO and President of Jam Productions, LLC), <https://www.judiciary.senate.gov/imo/media/doc/Testimony%20-%20Mickelson%202023-01-24.pdf> [<https://perma.cc/9SRB-QER7>]. This figure has been consistent across Top 25 stadiums (89%), other stadiums (89%), Top 50 venues (15,000+ capacity) (86%), Top 25 venues (10,000–15,000 capacity) (79%), other amphitheaters (94%), other arenas (81%), theaters (82%), and Atlantic City beach (100%). The remaining 13% was split among AXS (7%), Paciolan (3%), Tickets.com (2%), SeatGeek (1%), Amp Tickets (0%), and eTix (0%). See *id.* at Exhibit G.

⁸⁷ *Id.* at Exhibit H. 17 of the 25 stadiums are in the United States.

and Washington, D.C. with only stadiums in Boston, Massachusetts and Chicago, Illinois not ticketed by Ticketmaster.⁸⁸

The level below stadiums consists of amphitheaters, with capacities between 5,000 and 30,000.⁸⁹ There is power here too. One study found that Ticketmaster was “the sole ticketing provider” for 82 percent of U.S. amphitheaters.⁹⁰ As a leading promoter explained, the company’s use of 68 amphitheaters ensures that it “has no competition during the summer months in its outdoor venues.”⁹¹

Professional sports teams provide a final example of Ticketmaster’s power. The company has exclusive ticketing agreements with 87 percent of NBA teams, 88 percent of NHL teams, and 93 percent of NFL teams.⁹²

B. Promotion

The second market covers promotion. Promoters play a unique role in the music ecosystem, working “on behalf of the venue or event organizers” to “book[] artists, arrang[e] logistics, market[] the event, and ensur[e] its success.”⁹³ After receiving the proceeds from ticketing, promoters pay the “performer, venue, and other expenses,” taking on the financial risks of the event.⁹⁴

Concert promoters “were historically small independent shops that often boosted the local music scene.”⁹⁵ But SFX, Live Nation’s predecessor, “spent \$2 billion purchasing these independent players” between 1996 and 1999, “consolidating the industry” and drawing a DOJ antitrust investigation.⁹⁶

⁸⁸ *Id.* The two non-Ticketmaster venues were ticketed by Tickets.com.

⁸⁹ *Id.* at Exhibit I.

⁹⁰ Krista Brown, *The Depth of Live Nation’s Dominance*, AM. ECON. LIBERTIES PROJECT (June 2023), <https://www.economicliberties.us/our-work/the-depth-of-live-nations-dominance/#> [<https://perma.cc/G8EZ-BDQB>].

⁹¹ Mickelson, *supra* note 86, at 6.

⁹² *Id.* at 4–5. A primary reason why ticketing rivals have focused on the secondary market is because Ticketmaster “has the primary ticket marketplace mostly locked down.” *Joint Statement on Ticketmaster/Live Nation*, FUTURE OF MUSIC (Jan. 24, 2023), <https://www.futureofmusic.org/news/2023/1/24/joint-statement-on-ticketmasterlive-nation> [<https://perma.cc/3XTB-5ZUL>].

⁹³ Antonia Sulley, *What Does a Live Music Promoter Do?*, GROOVER BLOG (Sept. 2, 2022), <https://blog.groover.co/en/tips/live-music-promoter/> [<https://perma.cc/36KB-6DS2>].

⁹⁴ *Ticketmaster Amended Complaint*, *supra* note 41, ¶ 17.

⁹⁵ Brown, *supra* note 42.

⁹⁶ *Id.*

In the past 15 years, the company has expanded control over the promotion market. Before merging with Ticketmaster, Live Nation was “the country’s largest concert promoter.”⁹⁷ But even after the merger, it continued its acquisitions, purchasing the third largest concert promoter in the world, OCESA, in 2021.⁹⁸ The promotion market is particularly important today given how essential touring is for artists to make money.⁹⁹ Along these lines, Live Nation’s power is even more critical.

It has been widely reported that the company “controls 60% of the promotion business for major concerts.”¹⁰⁰ That number is even higher for the largest concerts. In 2018, the company’s president said during an investor call that it “expect[ed] to promote 20 of the top 25 global tours” during the year.¹⁰¹ And in 2021, Live Nation promoted 73 percent of the top 25 U.S. concert tours by gross revenue.¹⁰² AEG, the second-ranking promoter, is far behind with roughly 20 percent of the market.¹⁰³

In a filing with the Securities and Exchange Commission (SEC), Live Nation underscored its power in several promotion-related markets:

We believe that we are the largest live entertainment company in the world, connecting over 670 million fans across all of our concerts and ticketing platforms in 48 countries during 2022. We believe we are the largest

⁹⁷ *Ticketmaster Amended Complaint*, *supra* note 41, ¶ 3.

⁹⁸ Andrew Mies, *Explained: How Ticketmaster & Live Nation Control the Live Music Industry*, WHISKEYRIFF (June 28, 2023), <https://www.whiskeyriff.com/2023/06/28/explained-how-ticketmaster-live-nation-control-the-live-music-industry/> [<https://perma.cc/5YG3-V8ZM>].

⁹⁹ Devon Delfino, *How Musicians Really Make Their Money—And It Has Nothing To Do with How Many Times People Listen to their Songs*, BUS. INSIDER (Oct. 19, 2018), <https://www.businessinsider.com/how-do-musicians-make-money-2018-10> [<https://perma.cc/2XJD-V75D>] (noting that in 2017, U2 made 95 percent, Garth Brooks 89 percent, and Metallica 71 percent of their earnings from touring).

¹⁰⁰ Jennifer Oliver, *Live Nation Threatens Anyone Who Doesn’t Play Along, Plaintiffs Allege*, MORGAN RUBIN (May 4, 2023), <https://blog.moginrubin.com/ticketmaster-live-nation-get-booed-concert-goers-file-class-action-for-unchecked-abuse-of-market-power> [<https://perma.cc/QH4C-J9N3>].

¹⁰¹ Matthew Blake, *Is Live Nation Legal?*, LOS ANGELES BUS. J. (Sept. 6, 2018), <https://labusinessjournal.com/media/live-nation-legal/> [<https://perma.cc/J3GR-RXHQ>].

¹⁰² Jack Groetzinger, *That’s the Ticket: Promoting Competition and Protecting Consumers in Live Entertainment Before the S. Comm. On the Judiciary*, 118th Cong. 4 (2023) (statement of Jack Groetzinger, Co-Founder and CEO, SeatGeek), <https://www.judiciary.senate.gov/imo/media/doc/Testimony%20-%20Groetzinger%20-%202023-01-24.pdf> [<https://perma.cc/M7RR-Q4UT>].

¹⁰³ Oliver, *supra* note 100.

producer of live music concerts in the world, based on total fans that attend Live Nation events as compared to events of other promoters, connecting over 121 million fans to more than 43,600 events for over 7,800 artists in 2022. We believe we are one of the world's leading artist management companies based on the number of artists represented.¹⁰⁴

As of the time this Article was published, Live Nation had “relationships with more than 500 artists.”¹⁰⁵

Live Nation stated in its SEC filing that “[d]espite the concert business not fully emerging from closures and mandated restrictions until well into the first quarter of 2022,” the company “still had its best year ever, breaking both financial and operational records.”¹⁰⁶ It highlighted some of its top acts during the year: “Coldplay, Harry Styles, Bad Bunny, and Billie Eilish,” together with “nearly 150 festivals” that “attracted over 13 million fans globally, powered by global brands including Lollapalooza, Electric Daisy Carnival, and Rock in Rio Brazil.”¹⁰⁷

C. Venues

The third market consists of major concert venues. As the DOJ explained in its 2010 complaint, these venues, which “generate substantial income from live music events, can be readily identified, and market power can be selectively exercised against them, because there is no reasonable substitute service to which the customers could turn.”¹⁰⁸

As far back as 1994, Ticketmaster had exclusive contracts with 63 percent of the venues that hosted roughly 10 million concert tickets, with two commentators noting that the company “unquestionably had exclusive contracts with the majority of venues that hosted large-scale concerts” and that it “had a firm grasp on the most coveted” venues.¹⁰⁹

In a case brought against Ticketmaster, a court in 2003 found that the company “has exclusive contracts which cover 75% of the tickets sold” in the

¹⁰⁴ Live Nation 10-K, *supra* note 19, at 2.

¹⁰⁵ Live Nation Entertainment, *Live Nation's Artist Nation Division Redefines the Music Industry with Unified Rights Model* (Oct. 16, 2007), <https://www.livenationentertainment.com/2007/10/live-nations-artist-nation-division-redefines-the-music-industry-with-unified-rights-model/> [<https://perma.cc/3T36-ZZ9T>].

¹⁰⁶ Live Nation 10-K, *supra* note 19, at 30.

¹⁰⁷ *Id.*

¹⁰⁸ *Ticketmaster Amended Complaint*, *supra* note 41, ¶ 35.

¹⁰⁹ BUDNICK & BARON, *supra* note 31, at 136–37.

larger arenas in “31 of the 41 regional areas” and that “[i]n 25 of the regional areas,” its share “was about 90%.”¹¹⁰ Ticketmaster provided ticketing services to 87 of the top 100 U.S. venues in 2007 and 84 in 2008,¹¹¹ and it had roughly 83 percent market share at the time of the merger in 2010.¹¹²

One witness at a congressional hearing stated that “Ticketmaster would contend” that it “only control[s] about 50 percent of the venue market” but that likely includes “small venues holding less than a few thousand people” and “small community theaters.”¹¹³ The witness stated that “[t]he number is almost certainly at 80 percent or above.”¹¹⁴

A general consensus of “industry experts” has found that “70% to 80% of major U.S. venues have exclusive contracts with Ticketmaster.”¹¹⁵ Similarly, in a congressional hearing, Senators cited “various estimates” that “Ticketmaster controls the ticketing at 70 to 80 percent of major concert venues in

¹¹⁰ *Ticketmaster Corp. v. Tickets.Com, Inc.*, No. CV99-7654-HLH(VBKX), 2003 WL 21397701, at *2 (C.D. Cal. Mar. 7, 2003), *aff'd*, 127 F. App'x 346 (9th Cir. 2005). Based on the venues preferring long-term exclusive contracts and the plaintiff ticketing rival's ability to compete for contracts, the court granted Ticketmaster's motion for summary judgment. *Id.* at *5–6.

¹¹¹ BUDNICK & BARON, *supra* note 31, at 321. *See id.* (“Despite their best efforts to obscure the fact, it was clear that Live Nation and Ticketmaster controlled the majority of the country's premier venues.”).

¹¹² *Ticketmaster Amended Complaint*, *supra* note 41, ¶ 21.

¹¹³ *That's the Ticket: Promoting Competition and Protecting Consumers in Live Entertainment*, Hearing Before the S. Comm. Jud., 118 Cong. 241 (2023) (responses of Sal Nuzzo, Senior Vice President, The James Madison Institute, to Questions for the Record), <https://www.judiciary.senate.gov/download/2023-01-24-qfr-responses-nuzzo> [<https://perma.cc/G9MP-EW7T>].

¹¹⁴ *Id.*

¹¹⁵ Mark Dent, *The Sneaky Economics of Ticketmaster*, THE HUSTLE (Dec. 10, 2022), <https://thehustle.co/the-sneaky-economics-of-ticketmaster/> [<https://perma.cc/FWV5-K63E>].

the United States.”¹¹⁶ More generally, one commentator noted that “most . . . of the stadiums have relationships with Ticketmaster.”¹¹⁷

Live Nation has stated that it “owns, operates, has exclusive booking rights for, or has an equity interest for which [it has] a significant influence in 338 venues globally, including House of Blues music venues and prestigious locations such as The Fillmore in San Francisco, Brooklyn Bowl, the Hollywood Palladium, the Ziggo Dome in Amsterdam, 3Arena in Ireland, Royal Arena in Copenhagen, and Spark Arena in New Zealand.”¹¹⁸ Empirical analysis has found that Live Nation operates 64 percent of the top 88 U.S. amphitheaters and Ticketmaster services 78 percent of the 68 top grossing arenas in the country.¹¹⁹

¹¹⁶ Ben Sisario & Matt Stevens, *Ticketmaster Cast as Powerful “Monopoly” at Senate Hearing*, N.Y. TIMES (Jan. 24, 2023), <https://www.nytimes.com/2023/01/24/arts/music/ticketmaster-taylor-swift-senate-hearing.html> [https://perma.cc/N6U8-8VYR]. See also AMERICAN ANTITRUST INSTITUTE (AAI), *BUSTING THE LIVE NATION-TICKETMASTER MONOPOLY: WHAT WOULD A BREAK-UP REMEDY LOOK LIKE?*, at 2 (July 11, 2023), <https://www.antitrustinstitute.org/work-product/busting-the-live-nation-ticketmaster-monopoly-what-would-a-break-up-remedy-look-like/> [https://perma.cc/SEX7-8PVB] (Live Nation is “estimated to have exclusive contracts with about 70% of venues.”) [hereinafter AAI REPORT].

¹¹⁷ Nilay Patel, *Taylor Swift vs. Ronald Reagan: The Ticketmaster Story*, THE VERGE (Mar. 21, 2023), <https://www.theverge.com/23645057/taylor-swift-ticketmaster-eras-tour-beyonce-antitrust-monopoly-reagan-senate-hearing-congress> [https://perma.cc/7YD5-J3UY].

¹¹⁸ Live Nation 10-K, *supra* note 19, at 2. As a leading concert promoter explained:

Live Nation owns, operates, has exclusive booking rights for, or has an equity interest in 320 venues that include 68 outdoor amphitheaters (5,000 to 30,000 capacity), 21 arenas (5,000 to 20,000 capacity), 104 theatres (1,000 to 6,500 capacity), 57 clubs (less than 1,000 capacity), 15 music halls (1,000 to 2,000), 39 festival sites and 15 other venues.

Mickelson testimony, *supra* note 86, at 4. See also *That’s the Ticket: Promoting Competition and Protecting Consumers in Live Entertainment*, Hearing Before the S. Comm. Jud., 118 Cong. 219–38 (2023) (responses of Jerry Mickelson, CEO and President of Jam Productions, LLC, to Questions for the Record), <https://www.judiciary.senate.gov/imo/media/doc/2023-01-24%20-%20QFR%20Responses%20-%20Mickelson1.pdf> [https://perma.cc/F7N8-D52V] (last visited Nov. 12, 2023) (“Live Nation operates or is affiliated with 226 of the best North American venues, including the overwhelming majority of amphitheaters and best outdoor festivals, important segments in our industry.”).

¹¹⁹ See Brown, *supra* note 90, at 3–4. One example of the company’s advantages is offered by the San Antonio City Council’s decision to choose Ticketmaster for an exclusive contract because it ensured \$2,050,000 that the city could allocate “anywhere they choose” while its rival offered a modestly lower number, but with the

In summary, Live Nation Entertainment has roughly 60 percent to 80 percent market share in the markets for primary ticketing, promotion, and venues. This high market share has been consistent over a very long period of time: roughly 30 years.¹²⁰ As mentioned above, it is entrenched by barriers to entry that include economies of scale, long-term contracts, brand recognition, and technological hurdles.¹²¹ And as will be discussed throughout this Article, these market share findings are buttressed by direct evidence like increased prices and reduced quality in the ticketing market and exclusion of competition in the promotion and venues markets. The company, in short, has monopoly power.¹²²

IV. HARM TO CONSUMERS AND OTHERS

Central to an antitrust claim against Live Nation Entertainment is consumer harm. This Part discusses harms that consumers—namely fans—have suffered in the form of higher prices and reduced quality. Nor is it just fans who have suffered. As explained in Section A, several major industry players have been harmed.

A. *Industry Harm*

Live Nation Entertainment’s anticompetitive behavior has injured artists, venues, and promoters.¹²³

revenue “stay[ing] at the Tobin [Center,] which the city did not own” in contrast to Ticketmaster funds that “could be utilized by the City and would not be earmarked” Texas County of Bexar, City of San Antonio, Meeting Minutes: City Council B Session, at 4–5 (Sept. 18, 2019), <https://webapp9.sanantonio.gov/FileNetArchive/{FF3B10D8-C4D8-4FAB-A3D0-56907941475A}/{FF3B10D8-C4D8-4FAB-A3D0-56907941475A}.pdf> [<https://perma.cc/8BTV-9X2L>]. *See also id.* at 6 (highlighting Ticketmaster’s advantages from being “internationally known,” with consumers “naturally migrat[ing]” to it “when purchasing tickets”).

¹²⁰ *See supra* notes 78 & 109 and accompanying text (33 years in ticketing and 29 years with venues).

¹²¹ *See supra* notes 80–83 and accompanying text.

¹²² *See also supra* note 58 and accompanying text (suggesting presumption of monopoly power from “share of a well-defined market protected by sufficient entry barriers” that “has exceeded 60 percent for the five years preceding the complaint”). IIIB HOVENKAMP, *supra* note 58, ¶ 801a, at 427.

¹²³ *See* Mickelson QFR Responses, *supra* note 118, at 9 (pointing to harm suffered by “promoters, primary and secondary ticketing companies, artist management firms, venue management companies, and artist merchandise companies”).

1. Artists

First, artists suffer from the company's control over each segment of the supply chain. As a consequence of Ticketmaster's exclusive contracts with venues and Live Nation Entertainment's tying of promotion to ticketing, artists are forced to use Ticketmaster for ticketing.¹²⁴ Those who do not want to use Ticketmaster end up with limited venue options.¹²⁵ And even when artists (other than the most successful ones) enter into deals, their lack of bargaining power "forces them into lopsided revenue-sharing agreements with venues."¹²⁶

One example is provided by a Live Nation memorandum leaked in 2020 that reduced "artist guarantees (the money artists are assured to receive, regardless of turnout) . . . 20 percent from 2020 rates."¹²⁷ The new terms also increased the "financial burden for the cancellation of a concert due to poor ticket sales" from "100 percent of the guarantee . . . to 25 percent."¹²⁸ And in a change that *Billboard* magazine called "unheard of in the music industry," it required artists "to repay the promoter two times their fee," which was

¹²⁴ See *infra* Parts VI & VII.

¹²⁵ Juliana Kaplan, *It's Not Just Taylor Swift*, BUS. INSIDER, (June 8, 2023), <https://www.businessinsider.com/musicians-make-money-touring-taylor-swift-tickets-ticketmaster-live-nation-2022-12> [<https://perma.cc/FF5M-R3N4>] (quoting one expert: "When you're an artist the size of Taylor Swift . . . [y]ou're pretty much locked in to touring with these well-established big arenas, and it's hard to find substitutes for them."); see also *id.* (Swift "could choose a different venue if she isn't happy with a particular partner that they're dealing with. But then she would have to skip the market in a lot of these cases, because there's only one stadium in that city.").

¹²⁶ AAI REPORT, *supra* note 116. See *infra* notes 277–282 and accompanying text (explaining how integration of previous separate worlds of promotion and venue operation harms artists). See also Your Favorite Band Sucks, *Ticketmaster Sucks*, APPLE PODCASTS, at 1:06:30–1:07:55 (Apr. 1, 2023), <https://podcasts.apple.com/us/podcast/ticketmaster-sucks-and-so-does-pearl-jam-taylor-swift/id1322283290?i=1000606909278> [<https://perma.cc/9XJH-KRDN>] (noting how top artists received 100 percent—or even more—of door sales, how they in turn paid a percentage of their merchandise sales to the venue, how this has harmed smaller and mid-tier artists who "don't have a leg to stand on when it comes to negotiating," and how such an arrangement "became standard because someone . . . making millions of dollars is getting a sweetheart deal that mid-tier bands and lower-level bands can never get" even though "they still have to pay their cut").

¹²⁷ Michael Broerman, *Live Nation Details Contract Changes For Artists Including Pay Cuts, Shifts in Financial Burden for Canceled Events*, LIVE FOR LIVE MUSIC (June 18, 2020), <https://liveforlivemusic.com/news/live-nation-contract-changes/> [<https://perma.cc/2VHB-YWKA>].

¹²⁸ *Id.*

“essentially, a hefty fine.”¹²⁹ Even if some of these terms were modified after a “strong backlash,” they still “serve[] as a compelling example of just how brazenly Live Nation feels it can wield its market power.”¹³⁰

The universe of artists that can attain success also is restricted, with “emerging and diverse artists” having fewer opportunities given Live Nation’s “emphasis on well-known, established acts.”¹³¹ And more generally, the “specter of dealing with a monopolistic provider of services in the live events market can chill incentives for innovation in the creative arts.”¹³²

2. Venues

Venues that are not in exclusive contracts also suffer by being forced to take Ticketmaster’s ticketing services as a condition of obtaining access to Live Nation artists.¹³³ Nor is this harm theoretical. As discussed below, Ticketmaster and Live Nation “repeatedly conditioned and threatened to condition Live Nation’s provision of live concerts on a venue’s purchase of Ticketmaster ticketing services” and “retaliated against venues that opted to use competing ticketing services—all in violation of the plain language of

¹²⁹ *Id.* (emphasis omitted).

¹³⁰ Future of Music Coalition, Artist Rights Alliance, American Association of Independent Music, Music Workers Alliance, & Union of Musicians & Allied Workers, *Joint Statement on Ticketmaster/LiveNation*, (Jan. 24, 2023), <https://www.futureofmusic.org/news/2023/1/24/joint-statement-on-ticketmasterlive-nation> [<https://perma.cc/LA76-HPM7>].

¹³¹ Mickelson QFR Responses, *supra* note 118, at 9.

¹³² AAI REPORT, *supra* note 116.

¹³³ *See infra* Part VII. For a discussion of the harms from exclusive long-term venue deals with Ticketmaster, see *infra* Part VI. When a Live Nation venue enters an area, independent venues face a potential loss of shows and even threats to their viability. See Matt Wild, *Common Council Gives Final Approval to FPC Live Concert Venues in Deer District*, MILWAUKEE RECORD, (Nov. 1, 2022), <https://milwaukee-record.com/music/common-council-gives-final-approval-to-fpc-live-concert-venues-in-deer-district/> [<https://perma.cc/6CKY-YNZ2>] (venue operator stated: “Live Nation will be directly across the street from us. They want their artists and concert tours to appear at their venues, which cuts out the independent venues like us. This threatens our viability and very existence, which relies upon revenue from live concert performances.”); Rich Rovito, *3 Issues with Milwaukee’s Proposed New Music Venues*, MILWAUKEE (Dec. 8, 2022), <https://www.milwaukee-mag.com/3-issues-with-milwaukee-proposed-new-music-venues/> [<https://perma.cc/68SV-8FP7>] (venue operator explains that “[i]f there is a Live Nation facility in a city, no other venue there has a chance to bid on that band”).

the [consent] decree.”¹³⁴ In fact, the companies’ “well-earned reputation for threatening behavior and retaliation . . . has so permeated the industry that venues are afraid to leave Ticketmaster lest they risk losing Live Nation concerts, hindering effective competition for primary ticketing services.”¹³⁵ In at least two cases, Live Nation punished venues that sought to use ticketing companies other than Ticketmaster by cutting their number of tours in half.

First, seemingly in response to the decision by the Gwinnett Center, a popular arena outside Atlanta, to use AEG instead of Ticketmaster for ticketing a concert by the band Matchbox Twenty, Live Nation decided not to use the venue.¹³⁶ The venue’s booking director wrote to a Live Nation official: “Don’t abandon Gwinnett If there’s an issue or issues let’s address.”¹³⁷ But that official wrote back: “Issue? . . . Three letters. Can you guess what they are?”¹³⁸ In case there were any doubt about its intentions, the following year, Live Nation “cut the number of tours it brought to Gwinnett in half, from four to two,” and the Gwinnett official explained that “he had expected the drop-off because Live Nation ‘warned us that they would put us in a literal boycott.’”¹³⁹

A second example is provided by the Barclays Center in Brooklyn. In 2021, the venue switched its ticketing services from Ticketmaster to rival SeatGeek.¹⁴⁰ After that, the number of tours it put on fell from “about two dozen” to thirteen.¹⁴¹ One year into a seven-year contract, the venue “cancel[ed] its partnership with SeatGeek and return[ed] to Ticketmaster.”¹⁴² One commentator could not “think of a time over the last decade where a major venue has dropped a ticketing platform early on in the deal cycle.”¹⁴³

¹³⁴ See *infra* note 360.

¹³⁵ See *infra* note 360 and accompanying text.

¹³⁶ Sisario & Bowley, *supra* note 84.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.* See also *id.* (noting that “AEG provided The New York Times with copies of those emails, and others, to support its account of threats”).

¹⁴⁰ Ben Sisario, *Barclays Center Drops a New Ticket Vendor for Its Old One: Ticketmaster*, N.Y. TIMES, Jan. 13, 2023, <https://www.nytimes.com/2023/01/13/arts/music/barclays-center-ticketmaster-seatgeek.html> [<https://perma.cc/6R52-PGKP>].

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

3. Promoters

Promoters also are harmed by Live Nation Entertainment's behavior. The company's control over artists and ticketing prevents smaller firms from being able to obtain top talent and attract audiences. One company that has produced "thousands of indoor arena-level concerts" saw its production of 50 top-tier performers plummet from 1,677 shows since 1974 to 94 shows after 2010 (when Live Nation merged with Ticketmaster), 13 after 2015, and 1 after 2019.¹⁴⁴

In fact, Live Nation Entertainment has used promotion as a "loss leader"¹⁴⁵ to increase ticketing. In a 2009 hearing, the CEO of then-Live Nation acknowledged that the company lost \$70 million on artist guarantees.¹⁴⁶ In 2019, Ticketmaster gained \$232 million in operating income while the overall company, Live Nation Entertainment, suffered a \$53 million loss.¹⁴⁷ And a 2023 source stated that "[f]or each of the past five years, Live Nation's concert division has run at a loss" and that it "will sometimes offer 100% or more of revenue from the face value of tickets . . . to attract top artists."¹⁴⁸

One analyst explained that margins in the concert business are around 1 percent, with Live Nation "making the bulk of its cash through ticketing, sponsorships, and advertising."¹⁴⁹ Ticketing offers substantial margins because of its "lower costs and higher user fees."¹⁵⁰ In particular, "[s]elling tickets has a much lower 'overhead' cost structure than putting on concerts,"

¹⁴⁴ Mickelson QFR Responses, *supra* note 118, at 5.

¹⁴⁵ See *infra* notes 148 and 159 and accompanying text.

¹⁴⁶ See BUDNICK & BARON, *supra* note 31, at 322.

¹⁴⁷ Live Nation Entertainment, Inc., Annual Report (Form 10-K), at 35 (Dec. 31, 2019), <https://investors.livenationentertainment.com/sec-filings/all-sec-filings?page=26> [<https://perma.cc/4MCW-SHBT>] (figures rounded to nearest million).

¹⁴⁸ THE CAPITOL FORUM, LIVE NATION ENTERTAINMENT: INDUSTRY PLAYERS' DESCRIPTIONS OF LIVE NATION'S DOMINATION OF THE LIVE MUSIC INDUSTRY MIRROR FTC LAWSUIT'S NARRATIVE OF AMAZON'S DOMINATION OF ECOMMERCE 3 (2023), <https://library.thecapitolforum.com/docs/797htd75zwqb> [<https://perma.cc/E7QF-VMTT>].

¹⁴⁹ Alexandra Canal, *Live Nation Would Be a "Shell of Itself" Without Ticketmaster: Analyst*, YAHOO! FINANCE, (Jan. 25, 2023), <https://finance.yahoo.com/news/live-nation-would-be-a-shell-of-itself-without-ticketmaster-analyst-212935847.html> [<https://perma.cc/W2YC-BPDP>].

¹⁵⁰ LARRY WAYTE, PAY FOR PLAY: HOW THE MUSIC INDUSTRY WORKS, WHERE THE MONEY GOES, AND WHY, Chap. 19 (2023) (ebook), <https://opentext.uoregon.edu/payforplay/chapter/chapter-19-the-live-music-industry/> [<https://perma.cc/G43E-MU37>].

which “requires a great deal of coordination and effort, including venue rental, marketing, talent booking, management and maintenance, food and beverage concessions, security, sound, lighting, stage construction and design, [and] merchandising management.”¹⁵¹ As one commentator explained, without “Ticketmaster in the center of . . . that machine, the parts wouldn’t hold together as well.”¹⁵²

Live Nation Entertainment’s earning reports show the outsized position of ticketing in its profits. During the first three quarters of 2023, of \$16.9 billion in total revenues, \$13.9 billion came from concert promotion.¹⁵³ Ticketing, by contrast, accounted for only \$2.2 billion.¹⁵⁴ In other words, more than 80 percent of Live Nation Entertainment’s *revenues* are in concert promotion while ticketing accounts for a mere 13 percent.

When looking at these figures in the context of the businesses’ costs, however, Live Nation Entertainment’s use of its multi-level dominance to funnel profits through ticketing becomes clear. In considering adjusted operating income, which reflects the *profits* in the business segments,¹⁵⁵ Ticketmaster accounts for roughly half of Live Nation Entertainment’s total (\$880 million of \$1.745 billion).¹⁵⁶ In other words, while Ticketmaster accounts for 13 percent of Live Nation Entertainment’s sales, it makes up more than 50 percent of the company’s profits.

These figures are even more extreme in shorter periods. For example, in the first quarter of 2023, ticketing accounted for \$271 million in adjusted

¹⁵¹ *Id.* See also *id.* (ticketing “involves far less complexity and costs” and allows the company to charge service fees).

¹⁵² Canal, *supra* note 149.

¹⁵³ Live Nation Entertainment, Inc., Quarterly Report (Form 10-Q), at 20 (Sept. 30, 2023), <https://investors.livenationentertainment.com/sec-filings/all-sec-filings/content/0001335258-23-000102/0001335258-23-000102.pdf> [<https://perma.cc/CY85-8ZW5>] (figures rounded to nearest hundred million).

¹⁵⁴ *Id.* (figure rounded to nearest hundred million). In addition, there was roughly \$840 million from sponsorship and advertising. *Id.*

¹⁵⁵ *Income Information*, UNCLE STOCK, <https://www.unclestock.com/documentation/income.html> [<https://perma.cc/TG22-L7GY>] (last visited Nov. 30, 2023) (defining adjusted operating income as “[t]he amount of profit realized from a business’s operations after taking out operating expenses”).

¹⁵⁶ Live Nation Entertainment Form 10-Q, *supra* note 153, at 21. The figures are even higher (63 percent) for operating income (which differs from adjusted operating income because it includes depreciation, amortization, and other factors): \$727 million in ticketing out of \$1.148 billion overall. *Id.* at 21, 31 (figures rounded to nearest million).

operating income, 85 percent of the total \$320 million.¹⁵⁷ In contrast, less than \$1 million (0.3 percent) was contributed by concert promotion.¹⁵⁸

The company's loss-leader strategy of undercharging in promotion to overcharge in ticketing harms other promoters, who are not able to compete with Live Nation's artificially low prices. The ability to rely on ticketing gives the company an ability to continue amassing power in the market for promotion.¹⁵⁹

B. *Consumer Harm*

In addition to the harms suffered throughout the industry, consumers also have been injured by Ticketmaster's power. This section focuses on two harms: fees and quality.

1. Fees

Anyone who has ever purchased a ticket using Ticketmaster does not need a reminder about its high fees. A report by the N.Y. Attorney General found that the fees charged in the ticketing industry tend to be higher than by online vendors such as Amazon, Etsy, Expedia, and Priceline.¹⁶⁰ Nor is it clear what services the fans obtain through "convenience charges," "service fees," and "processing fees" collected by online vendors," especially with the shift online in recent years, which reduced costs.¹⁶¹ A 2016 report by the National Economic Council found that "in most cases," these fees "are not connected to any additional goods and services beyond that of receiving the purchased ticket."¹⁶²

¹⁵⁷ Live Nation Entertainment, Inc., Quarterly Report (Form 10-Q), at 18 (Mar. 31, 2023), https://investors.livenationentertainment.com/sec-filings/all-sec-filings?form_type=10-Q&year= [<https://perma.cc/GX48-YDZV>].

¹⁵⁸ *Id.*

¹⁵⁹ See also BUDNICK & BARON, *supra* note 31, at 317 (noting that this competitive strength is buttressed from Ticketmaster's "access to highly sensitive information"); *infra* notes 454–455 and accompanying text.

¹⁶⁰ N.Y. ATT'Y GEN., OBSTRUCTED VIEW: WHAT'S BLOCKING NEW YORKERS FROM GETTING TICKETS 31 (2016), https://ag.ny.gov/sites/default/files/reports/Ticket_Sales_Report.pdf [<https://perma.cc/2ZWL-HE5R>].

¹⁶¹ *Id.*

¹⁶² NATIONAL ECONOMIC COUNCIL, THE COMPETITION INITIATIVE AND HIDDEN FEES 11 (2016), https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/hiddenfeesreport_12282016.pdf [<https://perma.cc/XM9D-WJ9H>].

It is no surprise, then, that an empirical survey found that 99 percent of consumers said they thought Ticketmaster's fees "were too high."¹⁶³ A report by the U.S. Government Accountability Office (GAO) in 2018 generally concluded that 27 percent of ticketing companies' prices are fees.¹⁶⁴ And an analysis of "fees on 40 tickets to recent concerts, including [Taylor Swift's] Eras Tour" found that "the average fees took up [roughly] 28% of a ticket's face value."¹⁶⁵ These fees are even more debilitating given that prices "more than tripled" from the mid-1990s to 2022.¹⁶⁶

Some fans have paid more in fees than the price of the ticket.¹⁶⁷ One artist noted that "[a]lthough many ticketing companies have large fees, in our experience, Ticketmaster's are typically the highest, with us having seen as much as an 82% fee."¹⁶⁸ One venue owner stated that Ticketmaster "directly encourages them to further raise ticket fees," urging: "You know you could charge more, you could put more into the fee."¹⁶⁹ For "an April 2016 concert in Nashville," for example, Ticketmaster "added a \$14.75 fee on top of a \$36 ticket for a show in an amphitheater Live Nation owned,"¹⁷⁰ which the CEO admitted was "not defensible."¹⁷¹ The company's position as a self-proclaimed "leading artist management compan[y]" provides an incentive to not challenge high fees that would benefit the artists who gain from the fees.¹⁷²

¹⁶³ Dent, *supra* note 115.

¹⁶⁴ U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-347, EVENT TICKET SALES: MARKET CHARACTERISTICS AND CONSUMER PROTECTION ISSUES 6 (2018), <https://www.gao.gov/products/gao-18-347> [<https://perma.cc/9VA8-D6AU>].

¹⁶⁵ Dent, *supra* note 115.

¹⁶⁶ Aswad, *supra* note 35 (presenting figures based on face value as opposed to secondary-market price).

¹⁶⁷ Alyssa Lukpat, *The Cure Says Ticketmaster Will Refund Fans Who Paid "Unduly High" Fees*, WALL ST. J. (Mar. 17, 2023), https://www.wsj.com/articles/the-cure-says-ticketmaster-will-refund-fans-who-paid-unduly-high-fees-81a6c930?mod=pls_whats_news_us_business_f [<https://perma.cc/2WJR-EULK>].

¹⁶⁸ *That's the Ticket: Promoting Competition and Protecting Consumers in Live Entertainment Before the S. Comm. On the Judiciary*, 118th Cong. 3 (2023) (statement of Clyde Lawrence, singer-songwriter), <https://www.judiciary.senate.gov/imo/media/doc/Testimony%20-%20Lawrence%20-%202023-01-24.pdf> [<https://perma.cc/8DR3-J72V>].

¹⁶⁹ THE CAPITOL FORUM, *supra* note 148, at 5.

¹⁷⁰ Sisario & Bowley, *supra* note 84.

¹⁷¹ *Id.*

¹⁷² See *supra* notes 104–105 and accompanying text.

High fees and prices characterize not only tickets sold on the primary market but also secondary tickets.¹⁷³ The GAO report found that these tickets are, on average, marked up 31 percent to the buyer in addition to 10 percent to the seller.¹⁷⁴ One commentator noted that Ticketmaster “makes a much higher margin on resale tickets” because it “keeps all of the fees it charges—typically 10 percent of the sale price for the seller and another 20 percent for the buyer,” in contrast to primary ticket sales, where it keeps a much smaller percentage.¹⁷⁵

In general, selling in the secondary market, sometimes called “scalping,” can harm fans by removing seats they may be interested in and “dramatically

¹⁷³ For a discussion of secondary (or resale) markets, see Mickelson testimony, *supra* note 67. Ticketmaster’s interest in the secondary market is heightened because of the performer’s role in setting price in the primary market. See, e.g., Daniel A. Rascher & Andrew D. Schwarz, *The Antitrust Implications of “Paperless Ticketing” on Secondary Markets*, 9 J. COMP. L. & ECON. 655, 694 (2013). This thus differs from the case in which “an upstream monopolist can extract monopoly rents from the downstream market . . . by pricing appropriately in the upstream market,” and reveals a “true leveraging of the monopolist’s power in the primary market.” *Id.*

¹⁷⁴ U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 164, at 6, 18. The fees on the primary market are lower: 27 percent to buyers and no fees to sellers; see *id.*

¹⁷⁵ Dave Brooks, *Taylor Swift’s Eras Tour on Track to Sell \$590M in Tickets. Here’s Where That Money Goes*, BILLBOARD (Dec. 16, 2022), <https://www.billboard.com/pro/taylor-swift-eras-tour-ticket-sales-who-gets-paid/> [<https://perma.cc/6EEM-Z6AM>]; see *id.* (noting that fees from primary market are shared with venues and promoters).

Ticketmaster has admitted that its market share in the secondary market “is likely in the 20–25% range.” Daniel M. Wall letter to Sen. Jud. Comm., Feb. 14, 2023, at 13, <https://www.livenationentertainment.com/wp-content/uploads/2023/02/Response-to-Senate-Judiciary-Written-Questions-2.14.23-FINAL1.pdf> [<https://perma.cc/9PLS-UQP4>]. A 2016 government report noted that Ticketmaster had the “second-largest market share” of the secondary market. U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 164, at 4. And a congressional letter in 2021 noted that the company is “one of the largest ticket resellers in the United States.” Letter from Bill Pascrell, Jr. et al. to Att’y Gen. Merrick Garland & Acting FTC Chair Rebecca Kelly Slaughter, Apr. 19, 2021, https://pascrell.house.gov/uploadedfiles/letter_to_attorney_general_garland_and_acting_chairwoman_slaughter_on_line_investigation_-_final.pdf [<https://perma.cc/399N-DH4M>]. Live Nation stated in a 2022 filing that “[o]ur resale business continued to grow, with nearly \$4.5 billion . . . in gross transaction value for 2022, more than doubling resale gross transaction value in 2019.” Live Nation 10-K, *supra* note 19, at 31. In terms of a combined ticketing market share over both primary and secondary ticketing, a Bloomberg analytics service found that Ticketmaster “earned 65% of U.S. sales among major ticketing platforms in 2022.” Edgerton & Nylén, *supra* note 4.

increas[ing] the price of these tickets.”¹⁷⁶ The N.Y. report found that the prices of resold tickets increased by “49% on average” and “sometimes by more than 1,000%” or even 7,000 percent.¹⁷⁷ In the first nine months of 2022, “the average secondary ticket price in the U.S.” was “almost twice that of a primary ticket.”¹⁷⁸

One famous example is Bruce Springsteen’s 2009 tour. Springsteen “had set ticket prices low on purpose” but Ticketmaster directed fans to a reseller that charged the fans “hundreds of dollars over face value.”¹⁷⁹ Springsteen responded: “The abuse of our fans and our trust by Ticketmaster has made us as furious as it has made many of you.”¹⁸⁰ In response, Ticketmaster’s CEO apologized.¹⁸¹ More recent examples offered in 2023 congressional testimony included Weyes Blood tickets that “have a face value of \$25 but are listed on Ticketmaster for \$654/ticket” and Lizzy McAlpine tickets that “have a face value of \$34.50 for the Second Balcony,” but “are listed on Ticketmaster for \$7,193 to \$9,371.”¹⁸²

The company is not bashful about its high prices. In a 2022 SEC filing, it boasted of “upward pricing momentum,” a euphemism for higher prices.¹⁸³

¹⁷⁶ Mickelson testimony, *supra* note 86, at 8.

¹⁷⁷ N.Y. ATT’Y GEN., *supra* note 160, at 4.

¹⁷⁸ Live Nation Entertainment, *Third Quarter 2022 Supplemental Operational and Financial Information*, at 1 (2022) (last visited Nov. 14, 2023), https://d1io3yog0oux5.cloudfront.net/_d2b887510cdc4efb0a99d3749abb92db/livenationentertainment/db/670/6235/supplemental_operational_and_financial_information/Q3+2022+Supplemental+Operational+and+Financial+Information.pdf [https://perma.cc/36F8-26L6].

¹⁷⁹ Daniel de Visé, *From Pearl Jam to Congress to Springsteen: Five of the Biggest Ticketmaster Dustups*, THE HILL (Nov. 19, 2022), <https://thehill.com/changing-america/enrichment/arts-culture/3742639-from-pearl-jam-to-congress-to-springsteen-five-of-the-biggest-ticketmaster-dustups/> [https://perma.cc/D9RS-A8CF].

¹⁸⁰ *Id.*

¹⁸¹ In 2022, a Springsteen concert again received widespread attention for high ticket prices, which the N.Y. Times called “The Case of the \$5,000 Springsteen Tickets.” *Id.*; see Ron Lieber, *The Case of the \$5,000 Springsteen Tickets*, N.Y. TIMES (July 26, 2022), <https://www.nytimes.com/2022/07/26/your-money/bruce-springsteen-tickets.html> [https://perma.cc/N73Q-MDRN]. In response, Springsteen’s manager stated that the “average ticket price” was “in the mid-\$200 range” and Ticketmaster “reported that only 1.3 percent of buyers had paid four figures.” The pricing, however, led “many Springsteen fans” to “walk[] away from the sale feeling that their working-class hero had sold out.” de Visé, *supra* note 179.

¹⁸² Mickelson QFR Responses, *supra* note 118, at 1.

¹⁸³ Live Nation 10-K, *supra* note 19, at 31. See also *id.* (“Overall pricing on our fee-bearing tickets for the year is up 20% compared to 2019 as consumer demand for

And it proclaimed: “Our fee-bearing ticket sales for the year were a record breaking 281 million, over 50 million higher than our previous best year.”¹⁸⁴ But Ticketmaster’s gain is fans’ loss. And again, consumers are forced to pay higher ticketing prices and fees because Live Nation has decided to make its profits in that market.¹⁸⁵

2. Quality

Perhaps high fees could be the downside of high quality. Alas, that is not the case. The Taylor Swift fiasco described in the Introduction is just one example of the shoddy quality that often has characterized the Ticketmaster experience. As discussed above, Swift fans suffered harms like waiting in a queue for hours before being kicked out and being prevented from buying tickets until the general public sale, which was then canceled.¹⁸⁶ Nor is this an aberration from an especially popular concert. Many fans have suffered a “Ticketmaster horror story” of disappearing tickets and “jumping” prices.¹⁸⁷

In a competitive market, these failings would be followed by rivals gaining market share, Ticketmaster improving its services, or both. Neither of these has happened. The quality issues have continued, and Ticketmaster has maintained its dominance over rivals.

The lack of quality is confirmed by the ease with which the Swift disaster could have been avoided. One approach could have been to “minimiz[e] the time it takes to complete a transaction by only allowing the fans to choose ‘Best Available’” tickets.¹⁸⁸ Instead, “Ticketmaster decided to slow the process down by using ‘Pick A Seat’ mode to increase ticket prices,” which increased the fees it received.¹⁸⁹ The company also could have “[p]ut fewer shows on sale at the same time” or “stagger[ed] the times the Verified Fans could get into the queue.”¹⁹⁰ But by “announcing all 52 dates at once,” it “created untenable

premium seats and VIP experiences has continued unabated, occasionally outstripping supply.”).

¹⁸⁴ *Id.* at 31.

¹⁸⁵ *See supra* notes 146–152 and accompanying text.

¹⁸⁶ *See supra* notes 1–9 and accompanying text.

¹⁸⁷ *See supra* note 10 and accompanying text.

¹⁸⁸ Mickelson testimony, *supra* note 86, at 7.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 8.

demand that crashed its website” rather than spreading them out “over the course of a week, which is often what happens.”¹⁹¹

None of this is a surprise. A leading Ticketmaster official conceded that the company is “not trying to sell all” of its tickets “in one minute” but is “trying to figure out how to sell tickets in a more modern way.”¹⁹² Reading through the corporate-speak, Ticketmaster is trying to slow the process down to “drive[] the price up since the supply is being manipulated to limit its release.”¹⁹³

Another example of quality harms comes from denying fans entry to concerts. In December 2022, more than 1,600 fans were turned away from a Bad Bunny concert in Mexico.¹⁹⁴ The “sold-out stadium’s floor was half empty” and some fans “scal[ed] the stadium fence after their tickets . . . were rejected as fakes by malfunctioning scanning machines.”¹⁹⁵ Ticketmaster “claimed that the tickets were counterfeit, but an investigation determined those allegations to be false.”¹⁹⁶ The incident “caught the attention” of the President of Mexico, and “[t]he Mexican government secured refunds for fans and fined Ticketmaster Mexico.”¹⁹⁷

One final example of inferior quality is presented by bots. A bot is “software that automates ticket-buying” to “(1) perform each transaction at lightning speed, and (2) perform hundreds or thousands of transactions simultaneously.”¹⁹⁸ Bots tend to “crowd out human purchasers and . . . snap up most of the good seats” immediately as tickets are initially listed.¹⁹⁹ For

¹⁹¹ Patel, *supra* note 117. To the extent any of the decisions in the paragraph in the text involved Taylor Swift or her promoter, they came after Swift “asked [the company], multiple times, if they could handle this kind of demand” and “w[as] assured they could.” McCabe & Sisario, *supra* note 8.

¹⁹² Mickelson testimony, *supra* note 86, at 7 (quoting Ticketmaster official David Marcus).

¹⁹³ *Id.*

¹⁹⁴ See Olivia Nacionales, *Ticketmaster and Live Nation Know Antitrust Laws All Too Well*, CARDOZO ARTS & ENT. L.J. (Mar. 1, 2023), <https://cardozoelj.com/2023/03/01/ticketmaster-and-live-nation-know-antitrust-laws-all-too-well/> [<https://perma.cc/DK9S-G2VC>]; Maria Abi-Habib, *Spending a Month’s Salary to See Bad Bunny, Only to Be Turned Away*, N.Y. TIMES (Dec. 16, 2022), <https://www.nytimes.com/2022/12/16/world/americas/bad-bunny-ticketmaster-mexico.html> [<https://perma.cc/CBE4-9QC2>].

¹⁹⁵ Abi-Habib, *supra* note 194.

¹⁹⁶ Nacionales, *supra* note 194.

¹⁹⁷ *Id.*

¹⁹⁸ OBSTRUCTED VIEW, *supra* note 160, at 8 (emphasis omitted).

¹⁹⁹ *Id.* More specifically, bots (1) “constantly monitor ticketing sites to detect the release, or ‘drop,’ of tickets”; (2) “automate the search for and reservation of tickets

example, for the 2015 U2 tour, bots bought more than 1,000 tickets in 1 minute and 15,000 tickets in one day.²⁰⁰

Because issues presented by bots play an important role in assessments of quality and the justifications Ticketmaster would offer in support of its conduct,²⁰¹ the next Part addresses them in greater detail.

V. QUALITY CONCERN: TWO-FACED TREATMENT OF BOTS AND SECONDARY TICKETING

On the issue of bots and secondary ticketing more generally, Ticketmaster has stated a desire to address the conduct, but it has actively undermined these purported objectives. This Part shows how Ticketmaster’s ineffectiveness in addressing the bot problem is not an accident.

A. *Stated Desire to Address Bots*

As far back as the 2010 merger between Live Nation and Ticketmaster, the then-Ticketmaster CEO stated that “scalping and resales should be illegal” and that there should not “be a secondary market at all.”²⁰² Since then, the company has claimed to be engaging in its best efforts to address the issue.

Ticketmaster has stated that the “unauthorized resale of tickets for profit does not promote fair and equitable distribution of tickets, and drains tickets away from the primary market, thus restricting the opportunity for genuine fans to purchase them legitimately.”²⁰³ In a securities filing, the company

that are up for sale”; (3) “automate the process of purchasing tickets, using dozens or hundreds of purchaser names, addresses, and credit card numbers”; and (4) “defeat the anti-Bot security measures” by being “train[ed]” to “read” CAPTCHAs or “transmit[ing] in real-time images of the CAPTCHAs . . . to armies of ‘typers.’” *Id.* at 15–17.

²⁰⁰ *Id.* at 18 fig. 6. See also Adam Hetrick, *Ticketmaster Sues Scalping Company that Bought Nearly 30,000 Hamilton Tickets*, PLAYBILL (Oct. 4, 2017), <https://playbill.com/article/ticketmaster-sues-scalping-company-that-bought-nearly-30-000-hamilton-tickets> [<https://perma.cc/C8CL-XS55>].

²⁰¹ See *infra* note 474 and accompanying text.

²⁰² Robert Cribb & Marco Chown Oved, *We Went Undercover as Ticket Scalpers—and Ticketmaster Offered to Help Us Do Business*, TORONTO STAR (Sept. 19, 2018), https://www.thestar.com/news/investigations/we-went-undercover-as-ticket-scalpers-and-ticketmaster-offered-to-help-us-do-business/article_475cbd40-6c6b-555f-83a3-7d225694669d.html [<https://perma.cc/7HXD-7C39>].

²⁰³ *Id.*

warned that “[t]he techniques used to obtain unauthorized access, automate or expedite transactions or other activities on our platform (e.g., “bots”), [or] disable or degrade service or sabotage systems . . . may change frequently and as a result, may be difficult for our business to detect,” thus “impact[ing] the efficacy of our defenses and/or the products and services we provide.”²⁰⁴ For example, for the Taylor Swift concert in November 2022, “significant bot activity in connection with a large ticket onsale significantly contributed to a degraded website experience for customers and our eventually needing to pause the on-sale to address these issues.”²⁰⁵

Ticketmaster claims to be addressing the problem. It has explained that it has “expended significant capital and other resources to protect against and remedy . . . potential security breaches, incidents, and their consequences, including the establishment of a dedicated cybersecurity organization.”²⁰⁶ Similarly, a senior Ticketmaster official testified that the company “spend[s] an inordinate amount of time and money defending our site against bots[,] working with third parties, building our own software, using our new smart-key platform, and having teams in real-time at every on-sale, trying to identify bot traffic and defend against it.”²⁰⁷ The company even purports to have “hands-down the most sophisticated bot fighting technologies in the world,” doing “more to fight bots than all others in the industry combined.”²⁰⁸

Along those lines, Ticketmaster’s terms of use, in order to “discourage unfair ticket buying practices,” provide: “When purchasing tickets on our Site, you are limited to a specified number of tickets for each event,”²⁰⁹ which

²⁰⁴ Live Nation 10-K, *supra* note 19, at 19. *See also id.* at 2 (“We actively develop and apply methods to mitigate the impact of . . . bots.”).

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ N.Y. STATE S., INVESTIGATIVE REP.: LIVE EVENT TICKETING PRACTICES, at 20 (2021), https://www.nysenate.gov/sites/default/files/article/attachment/nys_senate_igo_committee_report_-_live_event_ticketing_practices.pdf [<https://perma.cc/5NSJ-UVMK>]. *See also* Robert Cribb & Marco Chown Oved, *Ticketmaster’s “TradeDesk” Scalper Tool Explained*, TORONTO STAR (Sept. 25, 2018), https://www.thestar.com/news/investigations/ticketmaster-s-tradedesk-scalper-tool-explained/article_579131a4-73dd-5369-93e9-09a45a5648d6.html [<https://perma.cc/7FY5-S362>] (company “spend[s] a ton of money and a ton of time doing things like building software that prevents bots from buying tickets” and claims to “have gotten pretty effective at blocking people from buying lots of tickets”).

²⁰⁸ *See* Wall, *supra* note 175, at 5.

²⁰⁹ *Purchase Policy*, TICKETMASTER, <https://ticketmaster-us.zendesk.com/hc/en-us/articles/10465798887953-Purchase-Policy> [<https://perma.cc/HG2L-B846>] (last updated Jan. 1, 2021).

is “typically six or eight seats per buyer.”²¹⁰ In addition: “Multiple accounts may not be used to circumvent or exceed published ticket limits,” and “[i]f you exceed or attempt to exceed the posted ticket limits,” the company “reserve[s] the right to cancel, without notice, any or all orders and tickets, in addition to prohibiting your ticket purchasing abilities.”²¹¹

Similarly, the terms of use allow those accessing the site to obtain a conditional license only if they do not “[u]se any automated software or computer system to search for, reserve, buy, or otherwise obtain tickets” or “[u]se any computer program, bot, robot, spider, offline reader, site search/retrieval application, or other manual or automatic device, tool, or process to retrieve, index, data mine, or in any way reproduce or circumvent the security structure, navigational structure, or presentation of the Content or the Site.”²¹²

Users also must agree not to “[r]equest more than 1,000 pages of the Site in any 24-hour period,” “[m]ake more than 800 reserve requests on the Site in any 24-hour period,” or refresh the ticketing page “more than once during any three-second interval.”²¹³ The company reserves the right to block users from buying tickets if they “refresh[] [their] browser too frequently” because “[o]ur system thinks you’re a bot, an automated program trying to scoop up tickets, and we automatically block bots!”²¹⁴ In addition, a user “may inadvertently trigger an error if you’re using a [virtual private network²¹⁵] or other software that makes it look like you’re using multiple IPs.”²¹⁶

²¹⁰ Cribb & Oved, *supra* note 202.

²¹¹ *Purchase Policy*, *supra* note 209.

²¹² *Terms of Use*, TICKETMASTER, <https://ticketmaster-us.zendesk.com/hc/en-us/articles/10468830739345-Terms-of-Use> [<https://perma.cc/RNC5-FNJL>] (last updated July 2, 2021).

²¹³ *Id.*

²¹⁴ *Buy Tickets*, TICKETMASTER, <https://help.ticketmaster.com/hc/en-us/articles/9787702587409-Why-am-I-getting-a-blocked-forbidden-or-403-error-message-> [<https://perma.cc/SZB8-TKZC>] (last visited Nov. 20, 2023).

²¹⁵ A virtual private network (VPN) is “an encrypted connection over the Internet from a device to a network.” *What Is a Virtual Private Network (VPN)?*, CISCO, <https://www.cisco.com/c/en/us/products/security/vpn-endpoint-security-clients/what-is-vpn.html#:~:text=A%20virtual%20private%20network%2C%20or,user%20to%20conduct%20work%20remotely> [<https://perma.cc/2AYK-42U4>] (last visited Dec. 6, 2023).

²¹⁶ *Id.*

B. Actively Undermining its Purported Objectives

Ticketmaster, in short, talks a good game in its terms of use and claimed resources addressing bots, but all of these promises must be taken with a grain of salt. Not only is Ticketmaster not pursuing these objectives, but it also is directly *undermining* them. The example that reveals all is TradeDesk, which Ticketmaster has quietly created to facilitate scalping. TradeDesk is not “mentioned anywhere on Ticketmaster’s website or in its corporate reports,” and “[t]o access the company’s TradeDesk website, a person must first send in a registration request.”²¹⁷

In 2018, CBC and the Toronto Star sent undercover reporters to a live-entertainment conference where “representatives for Ticketmaster pitched them on TradeDesk, the company’s invite-only proprietary platform for reselling tickets.”²¹⁸ The reporters “capture[d] a rep on camera saying that Ticketmaster’s ‘buyer abuse’ team will look the other way when such practices take place on its own platforms.”²¹⁹

The TradeDesk executive admitted: “We don’t spend any time looking at your Ticketmaster.com account. I don’t care what you buy. It doesn’t matter to me. . . . There’s a total separation between Ticketmaster and our division. It’s church and state.”²²⁰ The executive understood that if “the ticket limit is six or eight (seats), you’re not going to make a living.”²²¹ And if staff detect “unusual activity in the purchasing patterns of a Trade Desk user, such as the use of bots,” they wouldn’t “ask for information” as they “don’t share reports” and “don’t share names.”²²² Undercover reporters “asked a sales executive how many TradeDesk users have multiple Ticketmaster accounts” and the executive responded: “I’d say pretty damn near every one of them” as “I can’t think of any of my clients that aren’t using multiple (accounts).”²²³

Journalists found out that “despite the existence of a Ticketmaster ‘buyer abuse’ division that looks for suspicious online activity in ticket sales,” the

²¹⁷ Dave Seglins, Rachel Houlihan & Laura Clementson, ‘*A Public Relations Nightmare: Ticketmaster Recruits Pros for Secret Scalper Program*’, CBC NEWS (Sept. 19, 2018), <https://www.cbc.ca/news/business/ticketmaster-resellers-las-vegas-1.4828535> [<https://perma.cc/WGT9-NLGT>].

²¹⁸ Aswad, *supra* note 35.

²¹⁹ *Id.*

²²⁰ Cribb & Oved, *supra* note 202.

²²¹ *Id.*

²²² *Id.*

²²³ Cribb & Oved, *supra* note 207.

company “turns a blind eye to its TradeDesk users who grab lots of tickets.”²²⁴ A sales representative conceded that some brokers have “literally a couple of hundred accounts” on TradeDesk, and “[it’s] not something that [they] look at or report.”²²⁵ Further, Ticketmaster’s president of North America operations conceded that “[w]e probably don’t do enough to look into TradeDesk,” as “[t]he reality” is that TradeDesk users “could have more than their ticket limit.”²²⁶

Why doesn’t Ticketmaster “want to catch scalpers using multiple accounts[?]”²²⁷ Because it has “spent millions of dollars on this tool,” and it does not want to “get brokers caught up to where they can’t sell inventory with [Ticketmaster].”²²⁸ According to a Trade Desk sales executive, “[w]e’re not trying to build a better mousetrap” as “the last thing we want to do is impair your ability to sell inventory” as that is “our whole goal . . . on the resale side of the business.”²²⁹

Nor is that all. Believe it or not, Ticketmaster provides *incentives* for large reselling activity. TradeDesk “brings an immediate 3 percent discount on Ticketmaster’s usual 7 percent selling fee on a resale ticket.”²³⁰ Users who “hit \$500,000 in sales” get “a percentage point . . . shaved off their fees,” and “[a]t \$1 million another percentage point falls off.”²³¹ Showing how fans really are not the company’s priority, “[s]calpers get preferential treatment over consumers.”²³² An “average consumer would not need this software to list

²²⁴ Amy X. Wang, *Ticketmaster Has Secretly Been Cheating You With Its Own Scalpers*, ROLLING STONE (Sept. 19, 2018), <https://www.rollingstone.com/pro/news/ticketmaster-cheating-scalpers-726353/> [<https://perma.cc/2HQL-TRV4>].

²²⁵ *Id.*; *Ticketmaster’s Statements to CBC News*, CBC NEWS, at *7, <https://www.documentcloud.org/documents/4891602-TICKETMASTER-S-STATEMENTS-to-CBC-NEWS-2FTORONTO> [<https://perma.cc/TCL7-RLUY>] (Ticketmaster never responded to questions from CBC News on issues such as: why it was important to “directly sync a user’s Ticketmaster inventory for online resale” in tension with the “terms of use and code of conduct that stipulate strict ticket purchasing limits,” why the company had “a presence at a convention for ticket brokers,” or why “all Trade Desk users have multiple Ticketmaster accounts, in some cases hundreds of them, for the purpose of obtaining large quantities of tickets,” with “Ticketmaster Resale . . . aware of, and facilitat[ing] that activity without penalty”).

²²⁶ Cribb & Oved, *supra* note 207.

²²⁷ *Id.*

²²⁸ *Id.* See also Seglins et al., *supra* note 217 (touting TradeDesk as “[t]he most powerful ticket sales tool. Ever.”).

²²⁹ Cribb & Oved, *supra* note 207.

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.*

the ticket they could no longer use,” but the incentive structure is employed “to assist . . . scalpers in processing more and more tickets faster.”²³³

Just as concerning, public awareness of Ticketmaster’s two-faced behavior does not seem to have stopped the company. Three years after the undercover operation was publicized, Ticketmaster returned to “market its services to ticket resale operations” at the World Ticket Conference in Las Vegas.²³⁴

In short, its claims notwithstanding, Ticketmaster actively encourages the use of bots and the secondary market to increase the fees it receives.

The discussion in the last two Parts on the widespread harms and the encouragement of the resale market are important building blocks in the discussion that follows, which applies antitrust law to the company’s behavior. The next four Parts weave together a story of a multi-pronged attack on competition utilizing the company’s control of multiple business lines.

First, Live Nation Entertainment engaged in exclusive dealing by locking up most of the venues able to host large concerts, foreclosing rival ticketing services. Second, venues not in exclusive contracts confronted a tying arrangement that required them to use Ticketmaster’s ticketing if they wished to book one of Live Nation’s many artists. Third, several of these schemes were exacerbated by deception. And fourth, an overall course of conduct consisted of all of this activity as well as additional behavior.²³⁵

The next four Parts will describe the elements of each of the offenses. But one general comment deserves mention. Because the setting is monopolization, “technical requirements” like the tests for “tying and exclusive dealing” are “relax[ed].”²³⁶ A leading hornbook explains that this is mandated by “the general test for monopolization,” which “requires an exclusionary practice” that “harms rivals unnecessarily, whether or not the technical tying [or exclusive dealing] requirements have been met.”²³⁷

²³³ *Id.*

²³⁴ Dave Clark, *Ticketmaster Resale Returns to Broker-Focused Conferences Despite Past Controversy*, TICKET NEWS, <https://www.ticketnews.com/2021/07/ticketmaster-resale-returns-to-broker-focused-conferences-despite-past-controversy/> [<https://perma.cc/YHC3-NLWM>] (last visited Nov. 27, 2023).

²³⁵ The tying and exclusive dealing claims can be viewed under the umbrella of “conditional refusals to deal,” which are “actions in which the rights holder expresses a willingness to deal only if some condition is met.” See Herbert Hovenkamp, *FRAND and Antitrust*, 105 CORNELL L. REV. 1683, 1697 (2020) (explaining that “[t]he basis for antitrust attacks on conditional refusals is much broader than for unconditional refusals” and that “[t]ying and exclusive dealing are two common examples”).

²³⁶ HOVENKAMP, *supra* note 56, § 7.6(c), at 406.

²³⁷ *Id.* See also Hovenkamp, *supra* note 235, at 1701 (“when the defendant has a dominant position in its own market, then the foreclosure requirement is less categorical”).

VI. EXCLUSIVE DEALING

The first claim a plaintiff could bring is exclusive dealing. This targets Ticketmaster’s multiyear contracts with venues that block ticketing rivals from the market and harm competition.

A. Law

An exclusive dealing arrangement “is a contract under which a buyer promises to buy its requirements . . . exclusively from a particular seller.”²³⁸ The primary concern with such an agreement is that it could foreclose a supplier’s competitors from selling their products to the buyer.²³⁹ “Exclusive contracts” such as this may represent the “wrongful act” element of monopolization claims.²⁴⁰

As discussed above,²⁴¹ the courts have been more flexible when considering market share and the relevant effects of exclusive dealing claims in monopolization cases, finding liability “even though the contracts foreclose less than the roughly 40% or 50% share usually required” to establish a Section 1 violation.²⁴² The reason, as the leading antitrust treatise explains, is that in non-monopolization cases, “a higher foreclosure percentage is necessary to establish the requisite anticompetitive effects,” but “[w]hen the defendant has an upstream market monopoly, . . . a smaller foreclosure percentage may have much greater effects.”²⁴³ As a consequence, “the general test for monopolization—whether the conduct injured rivals unnecessarily without a sufficient business justification—controls.”²⁴⁴

²³⁸ HOVENKAMP, *supra* note 56, § 10.9, at 587.

²³⁹ ANTITRUST LAW DEVELOPMENTS, *supra* note 57, at 208.

²⁴⁰ See *U.S. Healthcare, Inc. v. Healthsource, Inc.*, 986 F.2d 589, 597 (1st Cir. 1993).

²⁴¹ See *supra* notes 236–237 and accompanying text.

²⁴² See *United States v. Microsoft Corp.*, 253 F.3d 34, 70 (D.C. Cir. 2001).

²⁴³ HERBERT HOVENKAMP, MARK D. JANUS, MARK A. LEMLEY, & CHRISTOPHER R. LESLIE, *IP AND ANTITRUST: AN APPLICATION OF ANTITRUST PRINCIPLES APPLIED TO INTELLECTUAL PROPERTY LAW* § 2 I.8c, at 21–182 (2d ed. 2014).

²⁴⁴ *Id.* See also ANTITRUST LAW DEVELOPMENTS, *supra* note 57, at 254 (“most courts [that] consider exclusive dealing” begin the analysis by assessing “substantial foreclosure” and then, “in much the same way as other monopolization claims, conducting a rule of reason analysis to determine if the exclusive dealing conduct caused anticompetitive harm”).

For non-monopolization exclusive dealing cases, *Tampa Electric Co. v. Nashville Coal Co.* plays a central role.²⁴⁵ In that case, the Court put forward a “qualitative substantiality” approach that requires judges to “weigh the probable effect of the contract on the relevant area of effective competition . . . and the probable immediate and future effects which preemption of that share of the market might have on effective competition therein.”²⁴⁶ As a leading hornbook explains, “[n]early all lower courts today follow *Tampa*’s suggested rule of reason approach.”²⁴⁷ Plaintiffs generally need to show foreclosure of 30 percent to 40 percent of the market, and once they do, courts analyze the factors in the *Tampa* opinion.²⁴⁸ The extent of foreclosure, however, is still important. Courts “routinely condemn” agreements foreclosing at least 50 percent of the market “when the practice is complete exclusion by a contract of fairly long duration.”²⁴⁹ And “[t]he test is not total foreclosure, but whether the challenged practices bar a substantial number of rivals or severely restrict the market’s ambit.”²⁵⁰

In addition to foreclosure, one of the most important factors for analyzing an exclusive dealing arrangement is duration. Agreements with terms that span a longer time period raise greater concern because they foreclose the market more substantially.²⁵¹ Courts have struck down arrangements lasting two,²⁵² three,²⁵³ and ten²⁵⁴ years.

Contracts with shorter terms are more likely to be upheld, but “when, as a matter of practical economics, termination is difficult or infeasible,” courts have invalidated the agreements.²⁵⁵ In *McWane v. FTC*, for example,

²⁴⁵ 365 U.S. 320 (1961).

²⁴⁶ *Id.* at 329.

²⁴⁷ HOVENKAMP, *supra* note 56, § 10.9e, at 596.

²⁴⁸ *Id.* § 10.9e, at 596 n.307 (citing cases). *See infra* note 263 for a listing of factors courts consider.

²⁴⁹ XI HERBERT HOVENKAMP, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* ¶ 1821c, at 207 n.35 (4th ed. 2018) (citing cases with 84 percent, 62 percent, and 50 percent foreclosure).

²⁵⁰ *United States v. Dentsply Int’l, Inc.*, 399 F.3d 181, 191 (3d Cir. 2005).

²⁵¹ *ANTITRUST LAW DEVELOPMENTS*, *supra* note 57, at 216 (citing cases invalidating agreements lasting one year, ten years, and seven to twenty years).

²⁵² *See Mytinger & Casselberry, Inc. v. FTC*, 301 F.2d 534, 539 (D.C. Cir. 1962).

²⁵³ *See L.G. Balfour Co. v. FTC*, 442 F.2d 1, 23 (7th Cir. 1971) (upholding FTC order).

²⁵⁴ *See Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 676 F.2d 1291, 1308 (9th Cir. 1982); *see also* *FTC v. Motion Picture Advert. Serv. Co.*, 344 U.S. 392, 393–95 (1953) (one to five years). *See generally* XI HOVENKAMP, *ANTITRUST LAW*, *supra* note 249, at 103–04 n.85.

²⁵⁵ *ANTITRUST LAW DEVELOPMENTS*, *supra* note 57, at 217.

the court rejected the argument that a program was “presumptively legal” because it was nonbinding and short-term²⁵⁶ on the grounds that distributors purchasing competing products could lose their accrued rebates and be unable to purchase the manufacturer’s products.²⁵⁷ The court found that the “practical effect” of the program was to “make it economically infeasible” for distributors to switch to a rival.²⁵⁸

Similarly, the court in *United States v. Dentsply* addressed a policy by which a dominant manufacturer of artificial teeth restricted distributors from dealing with rivals.²⁵⁹ Even though the defendant sold the product “on an individual transaction basis,” which was “essentially” an at-will arrangement, the court recognized that the defendant’s large market share and “its conduct excluding competing manufacturers . . . realistically make the arrangements here as effective as those in written contracts.”²⁶⁰ And the court found that, by “help[ing to] keep sales of competing teeth below the critical level necessary for any rival to pose a real threat to [the defendant’s] market share,” the arrangements were anticompetitive.²⁶¹ As Doug Melamed has generally explained: “[I]f one manufacturer is uniquely able to use the exclusive agreement to gain or maintain market power (because, for example, it already has a large market share), it would be uniquely able to share supracompetitive profits with the distributor” and then could “retain the exclusive arrangement regardless of the duration of its contract with the distributor or, indeed, without entering into any cognizable agreement at all.”²⁶²

²⁵⁶ 783 F.3d 814, 833 (11th Cir. 2015).

²⁵⁷ *Id.* at 820–21.

²⁵⁸ *Id.* at 834.

²⁵⁹ 399 F.3d 181, 184 (3d Cir. 2005). *See also id.* at 190 (explaining that defendant “had supremacy over the dealer network” and “has been able to exclude competitors from the dealers’ network”).

²⁶⁰ *Id.* at 193.

²⁶¹ *Id.* at 191. A similar example of companies not having the practical ability to deal with a dominant firm’s rivals was presented in *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951). In that case, a newspaper publisher refused to accept advertising from parties that had advertised on a local radio station. *Id.* at 149. The Court found that, based on the publisher’s significant market share, the conduct “forced numerous advertisers to refrain from using [the rival]” and the refusal “often amounted to an effective prohibition.” *Id.* at 149–50, 153. *See also id.* at 153 (noting that “[n]umerous . . . advertisers wished to supplement their local newspaper advertising with local radio advertising but could not afford to discontinue their newspaper advertising in order to use the radio”).

²⁶² A. Douglas Melamed, *Exclusive Dealing Agreements and Other Exclusionary Conduct—Are There Unifying Principles?*, 73 ANTITRUST L.J. 375, 405 (2006).

Other factors that courts have examined include the likelihood of industry collusion, the extent to which other firms use exclusive dealing, entry barriers, distribution alternatives, and other anticompetitive or procompetitive effects.²⁶³ On the last issue, the typical procompetitive justifications considered are “preventi[ng] free riding” and encouraging dealers to more rigorously promote suppliers’ products.²⁶⁴

B. Application

Applying the caselaw, Live Nation engages in exclusive dealing in the form of multiyear contracts by which venues are required to use Ticketmaster’s ticketing service.

Rival ticketing companies are foreclosed from offering their services to most large venues, which prevents them from effectively competing with Ticketmaster, depriving them of scale economies, data, and market credibility that could potentially constrain the market leader.²⁶⁵ It is generally understood that Ticketmaster has exclusive contracts with 70 percent to 80 percent of major U.S. venues.²⁶⁶ The company operates 64 percent of the top U.S. amphitheatres and 78 percent of the top U.S. arenas.²⁶⁷ Nor is it just ticketers that are harmed. For example, during Taylor Swift’s 2022 tour, rival promoter AEG lamented that “Ticketmaster’s exclusive deals with the vast majority of venues . . . required . . . ticket[ing] through their system” and “didn’t [give them] a choice.”²⁶⁸

In terms of duration, a senior Ticketmaster official testified that the company “contract[s], usually, a multi-year agreement.”²⁶⁹ This is not new. As

²⁶³ HOVENKAMP, *supra* note 56, § 10.9e, at 597.

²⁶⁴ *Id.* § 10.9e, at 598 (citing cases).

²⁶⁵ See *supra* Part III.C and *infra* notes 467–469 and accompanying text.

²⁶⁶ See *supra* notes 115–117 and accompanying text.

²⁶⁷ See *supra* note 119 and accompanying text.

²⁶⁸ Julian Mark, *Taylor Swift’s Ticketmaster Meltdown: What Happened? Who’s To Blame?*, WASH. POST (Nov. 18, 2022), <https://www.washingtonpost.com/business/2022/11/18/ticketmaster-taylor-swift-faq/> [<https://perma.cc/228W-WNGV>]. The company’s exclusive dealing arrangements reach expansively. See *Golden State Warriors and Ticketmaster Extend Partnership to Chase Center*, TICKETMASTER BUSINESS (June 10, 2019), <https://business.ticketmaster.com/business-solutions/golden-state-warriors-and-ticketmaster-extend-partnership-to-chase-center/> [<https://perma.cc/W6WX-VDES>] (discussing “exclusive partnerships with thousands of venues, artists, sports leagues, and performing arts centers and theaters”).

²⁶⁹ *Joint Public Hearing*, *supra* note 85, at 19.

early as 1994, the Ticketmaster CEO conceded that the exclusive deals “have durations of three to five years.”²⁷⁰ This continues to be the case, as a 2022 company filing makes clear that ticketing companies “will contract with venues and/or promoters to sell tickets to events over a period of time, generally three to five years.”²⁷¹ Recently, according to industry insiders, Ticketmaster has entered into “longer exclusive agreements with venues, sometimes as long as ten years.”²⁷² This may have occurred in response to oversight, which has led the company to “try[] to lock things down so that if there is more pressure, they’ve at least signed a lot of these decade-long deals.”²⁷³

These long terms are exacerbated by two realities. First, as discussed in the next Part, is Ticketmaster’s tying of promotion to ticketing.²⁷⁴ Venues that wish to book one of the company’s many artists are required to use its ticketing services. As a result, the share of venues contractually confined to Ticketmaster through exclusive dealing understates the share that are unavailable as a practical matter to ticketing rivals.

Second, Ticketmaster has a renewal rate over 100 percent, which means that it adds more venues than it loses each year. For example, in the first half of 2013, the company “had a net client renewal rate in excess of 100%.”²⁷⁵ Similarly, an industry report from 2016 found “a renewal rate over 100% for the past six years.”²⁷⁶ This is further evidence that, at a minimum, an exceedingly small number of venues (if any) do not renew their contracts with Ticketmaster, which shows a lack of real competition when the agreements expire.

²⁷⁰ BUDNICK & BARON, *supra* note 31, at 135.

²⁷¹ Live Nation 10-K, *supra* note 19, at 4.

²⁷² Groetzinger testimony, *supra* note 102, at 7. *See also* Brown, *supra* note 6 (quoting promoter who explained that in the United States, “venues have 5- to 10-year exclusive contracts with ticketing platforms like Ticketmaster”). *See also National Hockey League and Ticketmaster Announce Landmark 10-Year Deal*, CISION (May 27, 2019), <https://www.prnewswire.com/news-releases/national-hockey-league-and-ticketmaster-announce-landmark-10-year-deal-300857071.html> [<https://perma.cc/8WWN-TSAT>] (ten-year deal with NHL).

²⁷³ Video: Sen. Jud. Comm. Hrg., Jan. 24, 2023 (1:30:06-1:30:37), <https://www.judiciary.senate.gov/committee-activity/hearings/thats-the-ticket-promoting-competition-and-protecting-consumers-in-live-entertainment> [<https://perma.cc/YHJ6-7DT2>].

²⁷⁴ *See infra* Part VII.

²⁷⁵ Live Nation Entertainment, Inc., Second Quarter 2013 Supp. Operational and Financial Info., at 1, Aug. 6, 2013, https://d1io3yog0oux5.cloudfront.net/_b33a81b8f18a41ae36642223bbc59159/livenationentertainment/db/670/5088/supplemental_operational_and_financial_information/Q2+2013+Supplemental+Operational+and+Financial-Information.pdf [<https://perma.cc/2T5H-U52T>].

²⁷⁶ Groetzinger testimony, *supra* note 102, at 9.

In addition to harms to ticketers and fans (who are forced to pay higher prices), the agreements hurt artists—particularly those who are not the most successful ones—because of the integration of the previously separate worlds of promotion and venue operation.²⁷⁷ As one artist explained: “In a world where the promoter and the venue are not affiliated with each other, we can trust that the promoter will look to get the best deal from the venue.”²⁷⁸ As this observer further testified: “Live Nation acts as the exclusive ‘promoter’ for a large percentage of the venues throughout the country, including many, such as the House of Blues chain, that they own directly,” and “[f]or any of these venues, when an artist chooses to put on a show there, they have no choice but to have Live Nation act as the ‘promoter.’”²⁷⁹

In theory, the promoter “should be a true partner” to the artist: “Since both our pay and theirs is theoretically a share of the show’s profits, we should be aligned in our incentives: keep costs low while ensuring the best fan experience.”²⁸⁰ But instead, because “the promoter and the venue are part of the same corporate entity, . . . the line items are essentially Live Nation negotiating to pay itself.”²⁸¹ More concretely: “If [Live Nation] want[s] to take 10% of every ticket and call it a ‘facility fee,’ they can (and have); if they want to charge us \$250 for a stack of 10 clean towels[,] they can (and have).”²⁸²

In fact, this collapsing of the roles of promoter and venue reveals the dishonesty of Ticketmaster’s attempts to “point the finger at venues and artists and promoters who set the fees that they end up charging.”²⁸³ The company, for example, has claimed that the “fees are negotiated with the venue, and typically set at the venue’s direction,” with Ticketmaster “look[ing] to them

²⁷⁷ Artists also are harmed because those who “want to play a certain size venue in a particular city . . . are sometimes left [with] no choice other than to use Live Nation,” and “if they would like to use another ticketer other than Ticketmaster, . . . that is not an option.” Emily Lorsch, *Why Live Nation and Ticketmaster Dominate the Live Entertainment Industry*, CNBC (Jan. 25, 2023), <https://www.cnbc.com/2023/01/25/the-live-nation-and-ticketmaster-monopoly-of-live-entertainment.html> [<https://perma.cc/UR5Y-PGZ4>].

²⁷⁸ *Id.*

²⁷⁹ Lawrence testimony, *supra* note 168, at 1.

²⁸⁰ *Id.*

²⁸¹ *Id.* at 2.

²⁸² *Id.* See also *id.* (“[D]ue to Live Nation’s control across the industry, we have practically no say or leverage in discussing these line items, nor are we afforded much transparency surrounding them.”).

²⁸³ *Joint Public Hearing, supra* note 85, at 217.

for guidance on what the fee schedule should look like.”²⁸⁴ All the while, it “neglect[s] to mention” that “those same promoters and venues and artists, and Ticketmaster itself, are all owned by the same company, Live Nation Entertainment.”²⁸⁵

The company could attempt to offer justifications for the agreements.²⁸⁶ Based on a contract available online, Ticketmaster provides hardware that includes “up to four (4) POS Terminals,²⁸⁷ up to four (4) Ticket Printers, one (1) Access Control Server, one (1) Router, up to two (2) Access Points, [and] up to three (3) Scanners,”²⁸⁸ as well as “computerized ticketing software.”²⁸⁹ The company could claim that it does not wish to have its efforts in developing the hardware and software exploited by rivals.

The typical procompetitive effects,²⁹⁰ however, of preventing free riding and encouraging dealers to more heavily promote suppliers’ products are not implicated here.

Suppliers often use exclusive dealing to prevent free riding, which occurs when one retailer takes advantage of another’s promotional activities and exploits the other’s “facilities or goodwill.”²⁹¹ For example, a firm that develops an expensive product would be less likely to employ showrooms and knowledgeable employees to demonstrate the product’s features if it knew that another firm not making similar investments could piggyback on these services and sell its product at a lower price.²⁹²

²⁸⁴ *Id.* at 21. *See also id.* at 36 (“the fees that we charge are typically set by the client [the venue]”).

²⁸⁵ *Id.* at 217.

²⁸⁶ XI HOVENKAMP, *supra* note 249, ¶ 1822e, at 237 (defendant has burden “to provide sufficient evidence of a reasonable justification showing that the exclusive dealing in question reduces costs or risk or addresses significant problems of inter-brand free riding”).

²⁸⁷ A point-of-sale (POS) terminal “is a hardware system for processing card payments at retail locations.” Clay Halton, *Point-of-Sale Terminal: What it is and How It Works*, INVESTOPEDIA (Aug. 23, 2021), <https://www.investopedia.com/terms/p/point-of-sale-terminal.asp> [<https://perma.cc/2FV9-Q7D2>].

²⁸⁸ City of San Gabriel Staff Report from Mark Lazzaretto on Amendment to Ticketmaster User Agreement to Honorable Mayor and City Council (Feb. 4, 2020), <https://www.sangabrielcity.com/DocumentCenter/View/12408/Item-4D---Ticketmaster-Agreement-for-Ticket-Services-for-the-Mission-Playhouse> [<https://perma.cc/4Q5U-6MGC>].

²⁸⁹ *Id.* at 13.

²⁹⁰ *See supra* note 264 and accompanying text.

²⁹¹ HOVENKAMP, *supra* note 56, § 10.9(d), at 593.

²⁹² XI HOVENKAMP, *supra* note 249, ¶ 1812a, at 173.

Exclusive dealing arrangements addressing free riding are particularly important for “luxury brands, new products and services, [and] complex products and services that are difficult for customers to evaluate without the provision of technical or other information by the distributor.”²⁹³ In these cases, the concern is that without an exclusive dealing arrangement, “retailers would curtail these pre-sale efforts, the producer’s brand goodwill would be diminished, and interbrand competition would decline.”²⁹⁴

This is not the case here. The nature of the product demonstrates that the typical free riding concern is inapt. Ticketmaster is not spending money to promote its ticketing product, with rivals piggybacking on those efforts. Nor is it likely that ticketing rivals could offer tickets at lower cost because they do not pay to promote the event. As discussed above, ticketing fees have little connection with the services provided.²⁹⁵ In fact, the company uses a loss-leader strategy that, as discussed above, involves *undercharging* in the promotion market, which is not consistent with needing to exploit investments in that market.²⁹⁶ Finally, it is not likely that a venue would steer customers to a ticketer other than Ticketmaster to get a bigger revenue share. Venues initially flocked to—and have stayed with—Ticketmaster because it increased the fees, shared them with the venues, and took “the bruises from people who don’t like the process.”²⁹⁷

Considered expansively, Ticketmaster could claim that rivals could exploit equipment that is not customer-facing such as ticketing software and hardware. But the software and hardware are owned and licensed by Ticketmaster. For example, one contract provides that the “[h]ardware and [s]oftware is, and shall at all times be and remain, personal property which shall, at all times, remain the sole and exclusive property of Ticketmaster.”²⁹⁸

²⁹³ *Free Riding*, CONCURRENCES, <https://www.concurrences.com/en/dictionary/Free-riding> [<https://perma.cc/RR9F-9T7C>] (last visited Dec. 18, 2023).

²⁹⁴ *Id.*

²⁹⁵ See *supra* notes 161–162 and accompanying text.

²⁹⁶ See *supra* notes 146–159 and accompanying text.

²⁹⁷ See *supra* note 35 and accompanying text.

²⁹⁸ Bill No. 2022-15, A Resolution of the City of West Plains, Missouri Authorizing the City Administrator to Execute an Agreement with Ticketmaster for a Three-Year Term, enclosing Ticketmaster User Agreement at 11, June 21, 2022, <https://westplains.gov/wp-content/uploads/2022/10/Resolution-2022-15-Ticketmaster.pdf> [<https://perma.cc/LP7Y-R3WB>]. See also *id.* at 5 (“This Agreement may be terminated by Ticketmaster in the event any act by Principal threatens to cause any infringement of any Ticketmaster (or Ticketmaster licensor) Intellectual Property or other property right”).

As a result, venues would not be able to share Ticketmaster's software²⁹⁹ or hardware with rival ticketing companies. Providing one example, the 2010 consent decree required Ticketmaster to make its software available to competitor AEG, allowing the rival to modify the software and providing a license with "a copy of the source code," which would not have been needed if rivals could use the software.³⁰⁰

There could be more plausible concerns if the company's hardware were shared with a competitor. But the hardware does not seem to be a significant cost. Even for small venues, POS terminals,³⁰¹ ticket printers,³⁰² routers,³⁰³ and scanners³⁰⁴ are not expensive, costing only thousands, or even hundreds,

²⁹⁹ The software links venues' systems with Ticketmaster's ticket selling operation, offering the functionality needed to operate online and offline ticket sales. See ELIZABETH POPE, LAURA QUINN, CHRIS BERNARD, KYLE HENRI ANDREI, & TYLER CUMMINS, UNDERSTANDING SOFTWARE FOR PROGRAM EVALUATION, IDEALWARE 14 (2013), <https://www.michiganfoundations.org/system/files/documents/2021-09/Understanding-Software-for-Program-Evaluation-Idealware.pdf> [<https://perma.cc/SL8Q-JZX7>].

³⁰⁰ [Proposed] Amended Final Judgment, *United States v. Ticketmaster Entertainment, Inc.*, No. 1:10-cv-00139-RMC, at 8-9 (D.D.C. Jan. 8, 2010), <https://www.justice.gov/atr/case-document/file/1233416/dl?inline> [<https://perma.cc/PUM9-WYJT>]. AEG "never licensed" the software "because, it said, it did not view the technology as cutting edge." Sisario & Bowley, *supra* note 84.

³⁰¹ See, e.g., David Rivera, *How Much Does a POS System Cost*, FIT SMALL BUSINESS (July 18, 2023), <https://fitsmallbusiness.com/pos-system-cost/> [<https://perma.cc/H9FJ-R33C>] (stating that POS systems cost roughly \$4,000 to \$10,000 annually); Isobel O'Sullivan, *How Much Does a POS System Cost? Hardware, Software & More*, TECH.CO (July 28, 2023), <https://tech.co/pos-system/pos-system-cost> [<https://perma.cc/PRQ5-HB75>] (finding that POS system "rang[es] from \$1,200 to \$6,500 for the first year, and \$600 to \$1200 for each subsequent year").

³⁰² *Ticket Printing*, TICKETSOURCE, <https://www.ticketsource.us/features/ticket-printers> [<https://perma.cc/6RFS-5RLK>] (last visited Jan. 15, 2024) (discussing printers); *Citizen America CL-S521-GRY CL-S521 Series Direct Thermal Barcode and Label Printer with USB/Serial Connection*, AMAZON, <https://www.amazon.com/Citizen-America-CL-S521-GRY-Connection-Resolution/dp/B01CLLPPN2> [<https://perma.cc/GVR8-7PVN>] (last visited Jan. 15, 2024); Boca Systems, <https://www.bocasystems.com/config.html> [<https://perma.cc/HM74-HK4L>] (last visited Jan. 15, 2024) (listing printer costs, with most expensive model costing \$3,200).

³⁰³ Ry Crist, *Best Wi-Fi Routers for 2024*, CNET (Jan. 3, 2024), <https://www.cnet.com/home/internet/best-wi-fi-router/> [<https://perma.cc/3D9Y-3EYB>] (recommending "best" routers, which range between \$75 and \$500).

³⁰⁴ The ticket scanners, which are similar in technology to a smartphone, often cost less than \$1,000. San Antonio Stock Show & Rodeo, *Scanner Training – Ticketmaster Training*, YOUTUBE, <https://www.youtube.com/watch?v=jUv8jgu3-kU> [<https://perma.cc/K8CC-8PNS>] (last visited Jan. 12, 2024); see, e.g., *High-Quality*

of dollars, and not providing substantial value relative to the cost of the software. Ticket sales, for example, are dominated by the online market, which does not even use POS terminals or ticket printers.³⁰⁵ In 2022, the company sold 98 percent of its primary tickets online, with only 2 percent sold through ticket outlets.³⁰⁶

Nor is the second primary justification present. Ticketmaster is not offering a product that the venue is directly promoting. In the typical case, “exclusive dealing leads dealers to promote each manufacturer’s brand more vigorously,” which could lower “the quality-adjusted price to the consumer (where quality includes the information and other services that dealers render to their customers).”³⁰⁷ Here, in contrast, and as discussed above,³⁰⁸ ticketing is not the focus. It is not like the venues are offering ticketing as their primary product and rivals are piggybacking on the venues’ marketing of Ticketmaster’s services. Rather, they are selling shows, with ticketing just serving as a means to attain this goal.

The fact that venues benefit from exclusive arrangements is not dispositive.³⁰⁹ Ever since Ticketmaster turned the then-existing business model on

Ticket Scanner, VBO TICKETS, <https://www.vbotickets.com/site/features/ticket-scanners> [<https://perma.cc/YCB3-HBVX>] (last visited Jan. 12, 2024).

³⁰⁵ Tickets purchased digitally do not need to be printed at the venue, nor is a point-of sale terminal required. Scanners are used to identify tickets on a mobile app. *See How Do I Use Mobile Entry Tickets?*, TICKETMASTER, <https://ticketmaster-us.zendesk.com/hc/en-us/articles/9786597785617-How-do-I-use-Mobile-Entry-tickets> [<https://perma.cc/KR7K-LHLZ>] (last visited Jan. 12, 2024).

³⁰⁶ Live Nation 10-K, *supra* note 19, at 5. The company sold 56 percent through mobile apps and 42 percent through websites. *Id.* *See also* Groetzinger testimony, *supra* note 102, at 9 (citing J.P. Morgan report that company’s renewal rate over 100 percent “is explained by realizing that venue owners’ desire to sign with Ticketmaster is less about hardware or software, and more about filling seats with Live Nation produced concerts”) (emphasis omitted); *see also id.* (citing Barron’s report that company’s “contractual moat” is “compounded by Live Nation’s frequent practice of installing its own hardware at the venue, using proprietary software to process tickets”).

³⁰⁷ *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 395 (7th Cir. 1984)

³⁰⁸ *See supra* note 295 and accompanying text.

³⁰⁹ *See, e.g., Ticketmaster Corp. v. Tickets.Com, Inc.*, No. CV99-7654-HLH(VBKX), 2003 WL 21397701, at *5 (C.D. Cal. Mar. 7, 2003) (finding that the venues “prefer long-term exclusive contracts” because of compatibility with computers, not needing to change retail outlets, “simplif[ying] . . . bookkeeping and reduc[ing] the cost of renegotiating the contracts every few years,” fixing costs “for a longer, more predictable future,” and “obtain[ing] cash up-front from the ticket servicer . . . at the cost of a long term contract, so that the ticket servicer may amortize the cost with the expected income over the years of the contract”).

its head by increasing fees and sharing them with venues, awarding advances, signing bonuses, and rebates to venues and agreeing to “take the bruises from people who don’t like the process,”³¹⁰ venues have benefitted from entering into exclusive agreements with the company.³¹¹ At a minimum, it is plausible that exclusive arrangements are not needed to recover investments but instead entrench control of the market by sharing the spoils with the venues.³¹²

Along these lines, the setting presents conduct analogous to what has taken place in the pharmaceutical industry. “Pay for delay” settlements involve a brand-name drug company settling patent litigation by paying a potential generic rival to drop its patent challenge and delay entering the market.³¹³ Such conduct benefits the brand firm by ensuring that it can maintain monopoly profits and the generic firm by providing the certainty of payment and entry before the end of the patent term.³¹⁴ The benefits for the settling parties, however, are not shared by consumers who suffer from the absence of generic drugs when potentially invalid patents³¹⁵ avoid scrutiny.³¹⁶

Applying a monopolization-centered test that focuses on unnecessarily injuring rivals would lead to the same result. Exclusive contracts foreclosing 70 percent to 80 percent of venues prevent rivals from exercising a competitive restraint on Ticketmaster and more generally harm the market. And it would seem to be unnecessary harm. As discussed above, the typical procompetitive justifications of addressing free riding and encouraging dealer promotion are not implicated here.³¹⁷ The setting is different from the typical free riding scenario in which a manufacturer is seeking to protect its investment in a luxury, new, or complex product. Nor does an exclusive contract lasting five

³¹⁰ BUDNICK & BARON, *supra* note 31, at 73. *See supra* note 35 and accompanying text.

³¹¹ *See id.*

³¹² *See* Melamed, *supra* note 262, at 405 (explaining that a manufacturer with market power can “share supracompetitive profits with the distributor” and then “retain the exclusive arrangement regardless of the duration of its contract” or “without entering into any cognizable agreement at all”).

³¹³ *See, e.g.*, *FTC v. Actavis*, 570 U.S. 136 (2013).

³¹⁴ *Id.* at 154.

³¹⁵ *See* C. Scott Hemphill & Bhaven Sampat, *Drug Patents at the Supreme Court*, 339 *SCIENCE* 1386, 1387 (2013) (finding that 89 percent of patents in settled litigation are secondary patents covering ancillary aspects of drug innovation and that the brand firm is far less likely to win on these patents (32 percent) than it is on active ingredient patents (92 percent)).

³¹⁶ *E.g.*, Michael A. Carrier, *Three Challenges for Pharmaceutical Antitrust*, 59 *SANTA CLARA L. REV.* 615, 632 (2020).

³¹⁷ *See supra* notes 290–297 and accompanying text.

or ten years with the vast majority of U.S. venues seem necessary to recover expenditures on software or hardware.³¹⁸ Ticketmaster does not need to use exclusive dealing to prevent free riding or enhance dealer promotion.³¹⁹

In short, the unnecessary harm to rivals, substantial foreclosure, entry barriers, and lack of a procompetitive justification would support a court's finding that Live Nation's exclusive contracts constitute monopolization.

VII. TYING PROMOTION AND TICKETS

A second action exacerbating the competitive harms of the first is tying. Venues not locked into multiyear exclusive deals could conceivably select their ticketing provider. But through tying, Live Nation forces venues who wish to book its artists to use Ticketmaster for ticketing.³²⁰

A. Law

The central element of a tying claim is that a customer who wishes to purchase one product (the "tying product") is forced to also purchase a second product (the "tied product").³²¹ As discussed above, the technical requirements of tying are "relax[ed]" in the monopolization setting, with the focus instead on whether rivals have been harmed unnecessarily.³²² For a full exposition, this Article analyzes all of the potentially relevant factors.

Some tying arrangements are treated as "per se" illegal. Such a label does not reflect the typical per se approach, for which the existence of the conduct

³¹⁸ See *supra* note 306 and accompanying text.

³¹⁹ There would be liability under the approach proposed by the leading antitrust treatise as well. See XI HOVENKAMP, *supra* note 249, ¶ 1822c, at 233 ("where entry barriers are significant and foreclosure percentages are substantial, the case for presumptive illegality is very strong, and the defendant can prevail only by offering proof of a truly significant defense").

³²⁰ Artists promoted by Live Nation also could be harmed by the tie. Those with the largest following who want to perform in certain cities could be limited to one or a few venues, and even venues not locked into exclusive contracts have no choice but to use Ticketmaster for their ticketing services. See *supra* notes 125–126 and 133–135 and accompanying text.

³²¹ See, e.g., *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958) ("a tying arrangement may be defined as an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product").

³²² See *supra* notes 236–237 and accompanying text.

automatically leads to liability.³²³ Nor does it reflect the more nuanced actual analysis, which resembles the comprehensive “Rule of Reason” approach.³²⁴ Nonetheless, this Article applies such a framework, which offers elements that constitute a subset of those making up the related Rule-of-Reason approach.³²⁵

The per se tying approach requires four elements: (1) two separate products or services; (2) conditioning or coercion to purchase a second product; (3) sufficient market power in the tying product market to restrain trade in the market for the tied product; and (4) a “not insubstantial” amount of commerce in the tied product market.³²⁶ As mentioned, courts also have applied a Rule-of-Reason analysis to tying arrangements. Although the content of this framework is “not well defined,”³²⁷ the primary difference is the inclusion of a fifth element: an “actual effect . . . on competition” in the tied product market.³²⁸

The first requirement is the existence of two products. In *Jefferson Parish Hospital District No. 2 v. Hyde*, the Supreme Court explained that the key inquiry in determining whether there are two products is “the character of the demand for the two items.”³²⁹ A tie requires the foreclosure of competition “in a product market distinct from the market for the tying item.”³³⁰

³²³ See FTC, *The Antitrust Laws*, <https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws> [<https://perma.cc/3KDZ-6LX2>] (last visited Dec. 27, 2023) (noting that “arrangements among competing individuals or businesses to fix prices, divide markets, or rig bids . . . are ‘per se’ violations of the Sherman Act” for which “no defense or justification is allowed”).

³²⁴ *In re Cox Enterprises*, 871 F.3d 1093, 1097 (10th Cir. 2017) (per se tying rule is “dramatically more nuanced” than the typical per se rule).

³²⁵ See *infra* notes 326–342 and accompanying text.

³²⁶ See, e.g., *Amey, Inc. v. Gulf Abstract & Title, Inc.*, 758 F.2d 1486, 1502–03 (11th Cir. 1985); ANTITRUST LAW DEVELOPMENTS *supra* note 57, at 176.

³²⁷ ANTITRUST LAW DEVELOPMENTS, *supra* note 57, at 202.

³²⁸ *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 29 (1984); tying can be challenged under Section 3 of the Clayton Act or Section 1 of the Sherman Act, but the test “has evolved so as to be largely the same.” HOVENKAMP, *supra* note 56, § 7.6(c), at 405.

³²⁹ *Jefferson Parish*, 466 U.S. at 19.

³³⁰ *Id.* at 21.

The second factor involves coercion, in other words, “[c]onditioning the availability of one product . . . on the purchase of another.”³³¹ The Supreme Court has explained:

Our cases have concluded that the essential characteristic of an invalid tying arrangement lies in the seller’s exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all or might have preferred to purchase elsewhere on different terms. When such “forcing” is present, competition on the merits in the market for the tied item is restrained and the Sherman Act is violated.³³²

The third requirement is market power in the tying product market.³³³ The Court in *Jefferson Parish* stated that the seller has such power when it has a large market share or offers a unique product that rivals cannot provide.³³⁴ Courts generally require a market share of at least 30 percent for a finding of market power.³³⁵ One concern with the use of this power is that it could result in “a potentially inferior product” being “insulated from competitive pressures.”³³⁶

Fourth, there must be a “not insubstantial” amount of commerce in the tied product.³³⁷ This is typically not an onerous hurdle. The test analyzes “the absolute dollar amount of the commerce affected” rather than “whether it represents a substantial share of the market.”³³⁸ The standard is “whether a total amount of business, substantial enough in terms of dollar-volume so as not to be merely *de minimis*, is foreclosed to competitors by the tie.”³³⁹ Courts have found dollar volumes as low as \$1,500 and \$6,000 to satisfy this standard.³⁴⁰

³³¹ ANTITRUST LAW DEVELOPMENTS, *supra* note 57, at 182.

³³² *Jefferson Parish*, 466 U.S. at 12.

³³³ ANTITRUST LAW DEVELOPMENTS, *supra* note 57, at 188 (discussing requirement of “sufficient economic power with respect to the tying product to produce an appreciable restraint in the market for the tied product”).

³³⁴ *See Jefferson Parish*, 466 U.S. at 17.

³³⁵ ANTITRUST LAW DEVELOPMENTS, *supra* note 57, at 190. *See also* Hovenkamp, *FRAND and Antitrust*, *supra* note 235, at 1704 (“tying law usually finds competitive significance in market shares in the range of 30% to 40%”).

³³⁶ *Jefferson Parish*, 466 U.S. at 14.

³³⁷ *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 11 (1958).

³³⁸ ANTITRUST LAW DEVELOPMENTS, *supra* note 57, at 196.

³³⁹ *Fortner Enterprises, Inc. v. U.S. Steel Corp.*, 394 U.S. 495, 501 (1969).

³⁴⁰ ANTITRUST LAW DEVELOPMENTS, *supra* note 57, at 197 (citing cases). *See also* *Tic-X-Press, Inc. v. Omni Promotions Co. of Georgia*, 815 F.2d 1407, 1419–20 (11th Cir. 1987) (\$10,091.07 sufficient); *Thompson v. Metro. Multi-List, Inc.*, 934 F.2d 1566, 1578 (11th Cir. 1991) (range of \$30,000 to \$70,000 “is clearly substantial”); *Bell v. Cherokee Aviation Corp.*, 660 F.2d 1123, 1130 n.8 (6th Cir. 1981) (“we are not prepared to say that \$40,000 a year is insubstantial”); *McAlpine v.*

In addition, when applying the Rule of Reason to tying arrangements, courts have analyzed anticompetitive effects in the tied product market. Although there is not “a consensus on how much evidence the plaintiff must introduce to show the requisite level of foreclosure,”³⁴¹ at a minimum, there must be “some competition in the tied product” that “could be affected by imposition of the tie.”³⁴²

One example of a tying case bearing some similarity to the facts at issue here is *Nobody in Particular Presents v. Clear Channel Communications, Inc.*³⁴³ In that case, a music concert promoter sued Live Nation’s predecessor, SFX, which (as Clear Channel Communications’ national concert promotions division) was “the largest concert producer and entertainment promoter in the nation.”³⁴⁴ The plaintiff alleged that “Clear Channel uses its position in rock-format radio to intimidate and coerce rock artists and their record labels into signing with SFX/Clear Channel Entertainment and Clear Channel Radio Festivals for promotion of the artists’ concerts.”³⁴⁵ In particular, it claimed that “rock artists and labels are afraid that Clear Channel radio stations will refuse to give artists’ songs as many spins as Clear Channel would if the artist signed with SFX/Clear Channel Entertainment or Clear Channel Concerts/Clear Channel Radio Festivals.”³⁴⁶

The court first found that there were two separate products because the plaintiff showed that “the demand for rock radio air play and radio promotional support, as evidenced through the existence of ‘indies,’³⁴⁷ exists separately from the demand for concert promotional services.”³⁴⁸ Second, coercion was demonstrated by the “threat of losing the tying product” based on “evidence of at least four record labels and/or agents agreeing to the tying arrangement under threat of losing air play and/or promotional support.”³⁴⁹ Third, the plaintiff showed that “Clear Channel’s share of the rock radio market is sufficiently high” to show market power.³⁵⁰ And fourth, there was a

AAMCO Automatic Transmissions, Inc., 461 F. Supp. 1232, 1242 (E.D. Mich. 1978) (same).

³⁴¹ ANTITRUST LAW DEVELOPMENTS, *supra* note 57, at 199.

³⁴² *Id.*

³⁴³ 311 F. Supp. 2d 1048 (D. Colo. 2004).

³⁴⁴ *Id.* at 1056.

³⁴⁵ *Id.* at 1061.

³⁴⁶ *Id.*

³⁴⁷ Indies are “independent record promoters that represent record labels.” *Id.* at 1060.

³⁴⁸ *Id.* at 1093–94.

³⁴⁹ *Id.* at 1094.

³⁵⁰ *Id.* at 1097.

“greater than a *de minimis*” amount of commerce in the market for concert promotions.³⁵¹

The next five sections demonstrate how a plaintiff could bring a successful tying case against Live Nation Entertainment for its tying of promotion and ticketing services.³⁵²

B. Two Products

First, there are two products. As discussed above, promoters “market events, sell tickets, rent or otherwise provide venues[,] and arrange for local production services, such as stages and equipment.”³⁵³ In contrast, ticketing services “generally refers to the sale of tickets primarily through online and mobile channels” and “also includes sales through phone, outlet, and box office channels.”³⁵⁴ These differences are illustrated, for example, by the disparate services performed by promoter AEG and ticketing company StubHub.³⁵⁵

As the Court explained in *Jefferson Parish*, the “character of the demand” is the key to whether there are two products.³⁵⁶ In this case, the demand for artist promotion is quite different from the demand for ticketing. Observers naturally would distinguish between putting on concerts and selling tickets, and none would reasonably believe they are the same.³⁵⁷

³⁵¹ *Id.* The court found that the plaintiff did not introduce sufficient evidence to “prove a tying claim under rule of reason analysis.” *Id.* at 1098.

³⁵² For a discussion of potential justifications for the tying arrangement, see *infra* notes 472–475 and accompanying text.

³⁵³ See *supra* note 21 and accompanying text.

³⁵⁴ See *supra* note 24 and accompanying text.

³⁵⁵ For information on AEG, see *supra* note 103 and accompanying text; for information on StubHub, see *infra* notes 461–462 and accompanying text. The fact that StubHub primarily operates in the resale market is not material to the difference between the ticketing and promotion markets. See also *Joint Statement on Ticketmaster*, *supra* note 92 (explaining that ticketing rivals have focused on the secondary market because Ticketmaster “has the primary ticket marketplace mostly locked down”).

³⁵⁶ 466 U.S. 2, 19 (1984).

³⁵⁷ See, e.g., *id.* at 23 (noting that “[t]he record amply supports the conclusion that consumers differentiate between anesthesiology services and the other hospital services provided by petitioners”). Promotion and ticketing are, at a minimum, at least as dissimilar as anesthesiology and other hospital services.

C. Coercion

Second is coercion. Is a venue that wishes to book an artist that Live Nation promotes forced to take Ticketmaster's ticketing services?

In the typical case, a plaintiff alleges a lack of choice. It claims that it wants the tying product and is forced to take the tied product. The question is whether it really is forced to make this purchase. This case is different. For a plaintiff would have not just a *claim* of coercion but actual *evidence*. This evidence is front and center in the DOJ's motion to extend the 2010 consent decree.

Recognizing the potential harm from a merger between Ticketmaster and Live Nation, the decree "prohibited the merged company from retaliating against concert venues for using another ticketing company" or "conditioning or threatening to condition Live Nation's provision of concerts and other live events on a venue's purchase of Ticketmaster's ticketing service."³⁵⁸

In its motion to extend the decree in 2020, the DOJ pulled no punches, stating that the merging companies "failed to live up to their end of the bargain."³⁵⁹ In particular, they "repeatedly conditioned and threatened to condition Live Nation's provision of live concerts on a venue's purchase of Ticketmaster ticketing services" and "retaliated against venues that opted to use competing ticketing services—all in violation of the plain language of the decree."³⁶⁰ In fact, the companies' "well-earned reputation for threatening behavior and retaliation . . . has so permeated the industry that venues are afraid to leave Ticketmaster lest they risk losing Live Nation concerts,

³⁵⁸ Plaintiff United States' Mem. in Supp. of Mot. To Modify Final J. and Enter Am. Final J. 1 (hereinafter Memorandum in Support), Case 1:10-cv-0039-RMC, <https://www.justice.gov/atr/case-document/file/1233396/download> [<https://perma.cc/XM6R-DJQ6>]. For a discussion of other conditions of the decree, see *supra* note 50.

³⁵⁹ Memorandum in Support, *supra* note 358, at 1. See also *Justice Department Moves to Modify and Extend Consent Decree*, *supra* note 16 (extending decree five-and-one-half years and including new provisions on, among other issues, threats, withholding concerts, an independent monitor, an antitrust compliance officer, and a penalty). For an argument that the terms of the extension were "tepid," see Katherine Van Dyck & Lee Hepner, *The Case Against Live Nation-Ticketmaster*, at 6, AM. ECON. LIBERTIES PROJECT (Jan. 2024), <http://www.economicliberties.us/wp-content/uploads/2024/01/20240104-AELP-Livenation-Brief-FINAL.pdf> [<https://perma.cc/TD3S-ZRH2>] (lamenting a "revised consent decree that did not strengthen or otherwise expand any of the behavioral remedies," that "assessed a paltry \$3 million fine," and that "created opaque monitoring and compliance programs that do little to protect venues, artists, and fans").

³⁶⁰ *Id.*

hindering effective competition for primary ticketing services.”³⁶¹ The DOJ provided six examples in its motion to extend the decree.

In one, while evaluating ticketing services, a venue “informed Live Nation that it was planning to choose Ticketmaster’s competitor.”³⁶² At that point, a senior official at the company “threatened to withhold all Live Nation concerts . . . if it did not renew its contract with Ticketmaster,” warning: “if you move in that direction, you won’t see any Live Nation shows.”³⁶³ Despite these threats, the venue “selected a Ticketmaster competitor,” at which point “Live Nation stopped contacting the arena about any possible concerts or booking shows.”³⁶⁴ When the venue agreed to contract with Ticketmaster a short time later, “Live Nation began to get ‘geared back up’ to bring concerts” because the venue was “back in the family.”³⁶⁵

The other five examples are similar:

- A Live Nation promoter “explicitly threatened to withhold concerts from Venue A if it did not select Ticketmaster”³⁶⁶;
- “[I]f Venue C went with a competing ticketer, Ticketmaster’s response ‘would be “nuclear”’ and ‘though [the official] would deny it . . . Live Nation would never do a show in our building . . . [and] would find other places for their content’”³⁶⁷;
- A senior Ticketmaster executive “reiterated his threat that if Venue D went with another primary ticketing provider, Live Nation would pull concerts . . . and reduce the volume of shows”³⁶⁸;
- Two Live Nation executives “threatened that Venue E would not get Live Nation shows unless it switched to Ticketmaster,” and “[w]hen Venue E refused to switch . . . Live Nation followed

³⁶¹ *Id.* at 1–2. See also Sisario & Bowley, *supra* note 84 (quoting former Ticketmaster executive who conceded: “We were not saying, certainly, ‘If you don’t go with us you are losing’” artists, but “I would imagine that that is what [arenas] assumed to be the case.”). See also Memorandum in Support, *supra* note 358, at 6 (venues “c[a]m[e] to expect that refusing to contract with Ticketmaster” would “result in the venue receiving fewer Live Nation concerts or none at all”).

³⁶² *Id.* at 8.

³⁶³ *Id.*

³⁶⁴ *Id.*

³⁶⁵ *Id.*

³⁶⁶ *Id.* at 7.

³⁶⁷ *Id.* at 8–9.

³⁶⁸ *Id.* at 9.

through on its threats and retaliated . . . by reducing the number of concerts³⁶⁹; and

- “Immediately after learning that Venue F had switched ticketers, Ticketmaster’s President contacted the local Live Nation President responsible for placing concerts in the region to suggest that Live Nation book more shows at Venue F’s nearby rival venue”; “[i]n the two years following . . . Live Nation significantly reduced the number of shows . . . in retaliation.”³⁷⁰

Consistent with these instances are two examples discussed above: the Gwinnett Center and Barclays Center having their tours cut in half after deciding not to use Ticketmaster for ticketing.³⁷¹ In fact, SeatGeek, which lost its contract with the Barclays Center, structures some bids to address venues’ concerns about losing top artists. In 2017, when the company “tried to unseat Ticketmaster from its contract at the TD Garden in Boston, it included in its bid a promise to pay the arena \$250,000 for every show that Live Nation pulled.”³⁷² Ticketmaster still won the contract, with SeatGeek explaining that when it “sell[s] to teams,” it has “heard fears about losing concerts if they choose us.”³⁷³

In the typical tying case, it may not be clear if there actually is coercion. This case is different because we have the receipts: numerous examples of Live Nation threatening, and following through on threats, not to have shows at venues that use a ticketing service other than Ticketmaster.

D. Market Power in Tying Product Market

As discussed above, Live Nation has market power in the market for the tying product: artist promotion. For starters, there is direct evidence of market power. The fact that Live Nation was able to coerce unwilling venues to deal with Ticketmaster in order to have access to Live Nation’s artists shows its control of the market.

There also is compelling indirect evidence of market power. There are a limited number of artists capable of filling large arenas and amphitheaters, and Live Nation has roughly 60 percent to 80 percent of this promotion

³⁶⁹ *Id.* at 10.

³⁷⁰ *Id.*

³⁷¹ See *supra* notes 136–143 and accompanying text.

³⁷² Sisario & Bowley, *supra* note 84.

³⁷³ *Id.*

market.³⁷⁴ In its own words: “We believe we are one of the world’s leading artist management companies based on the number of artists represented.”³⁷⁵

Live Nation “typically locks up much of the best talent by offering generous advances to artists and giving them a huge percentage of the ticket revenue from the door.”³⁷⁶ It “can afford to” because it “has so many other related revenue streams on which to draw: sponsorships for the tour, concessions at venues, and most of all, ticket fees,” which “supply about half of Live Nation’s earnings.”³⁷⁷ As discussed above, this is part of its “loss leader” strategy by which it is willing to lose money on promotion and make up for it with ticketing.³⁷⁸

One analyst explained that “[t]here’s really no one that’s been able to get the type of scale that Live Nation has. The closest comparable is [AEG] with their own kind of internal ticketing platform. But they made a statement that speaks to the market power of Ticketmaster, which is that they used Ticketmaster to ticket Taylor Swift.”³⁷⁹ It’s “a business that a lot of people have looked at,” but even though “[t]hey’ve spoken about wanting to get into it, . . . no one’s really been able to grab enough market share to really be a meaningful player.”³⁸⁰ Given the significant quality issues with Ticketmaster’s services,³⁸¹ rivals’ inability to gain market share reflects “a potentially inferior product” being “insulated from competitive pressures.”³⁸²

A final way of considering the company’s power in the promotion market is to compare its size with that in the ticketing market. In the first three quarters of 2023, while Ticketmaster’s ticketing revenue was \$2.2 billion, Live Nation’s concert business was \$13.9 billion, more than six times larger.³⁸³ In other words, the company’s significant market share in the promotion market is buttressed by a staggering amount of revenue.

³⁷⁴ See *supra* notes 100–102 and accompanying text.

³⁷⁵ See *supra* note 104.

³⁷⁶ Sisario & Bowley, *supra* note 84.

³⁷⁷ *Id.*

³⁷⁸ See *supra* notes 146–152 and accompanying text.

³⁷⁹ Lorsch, *supra* note 277.

³⁸⁰ *Id.*

³⁸¹ See discussion *supra* Part IV.B.2.

³⁸² See *supra* note 336 and accompanying text.

³⁸³ 2023 Live Nation Entertainment Form 10-Q, *supra* note 153, at 20.

E. Commerce

Whether Ticketmaster's ticketing market offers a "not insubstantial" amount of commerce barely deserves discussion. Controlling the majority of ticket sales in the country obviously exceeds a threshold that courts have found to be satisfied by a few thousand dollars. Live Nation Entertainment's ticketing revenue in 2022 was \$2.2 billion.³⁸⁴

F. Anticompetitive Effects in Tied Market

Considering the final factor—relevant to a Rule-of-Reason analysis—of anticompetitive effects in the tied market would not alter the analysis. Rival ticketing companies are injured by being deprived of the opportunity to compete for venues that wish to have access to Live Nation's many artists. And that injury weakens the competitive discipline they exercise against Ticketmaster. Venues that stick with, or switch back to, Ticketmaster show that the tying materially raises the obstacles facing competitors. The lack of effective rivals allows Ticketmaster to continue to harm competition.

The company has leveraged its significant market power (such as ticketing 80 percent of the top 100 arenas in the country³⁸⁵) to impose high prices and fees that have harmed artists, venues, and promoters.³⁸⁶ Consumers have suffered anticompetitive effects in the form of high fees and inferior quality.

Just to repeat two examples,³⁸⁷ ticketing prices "more than tripled" from the mid-1990s to 2022³⁸⁸ and 99 percent of consumers believe Ticketmaster's fees are "too high."³⁸⁹ Consumers have suffered by not being able to buy tickets, being denied entry to concerts, and suffering numerous other quality harms.³⁹⁰ If Ticketmaster faced the additional competition from other

³⁸⁴ Live Nation 10-K, *supra* note 19, at 5. That figure is only increasing. See Dylan Smith, *Live Nation Touts "Biggest Quarter Ever" in Q3 Earnings Report As Revenue Tops \$8 Billion*, DIGITAL MUSIC NEWS (Nov. 3, 2023), <https://www.digitalmusicnews.com/2023/11/03/live-nation-earnings-q3-2023/> [<https://perma.cc/SU43-5TVB>] (noting \$832.6 million in revenue in third quarter of 2023, up 57 percent over the previous year).

³⁸⁵ Sisario & Bowley, *supra* note 84.

³⁸⁶ See discussion *supra* Part IV.

³⁸⁷ See discussion *supra* Part IV.B.1.

³⁸⁸ See *supra* note 166 and accompanying text.

³⁸⁹ See *supra* note 163 and accompanying text.

³⁹⁰ See discussion *supra* Part IV.B.2.

ticketers that it would face without the tying coercion, it would not be able to so aggressively increase price and neglect quality.

In short, each of the five requirements for a claim that Live Nation Entertainment tied promotion to ticketing is satisfied.

If the inquiry focuses more specifically on whether the conduct “injures competition unnecessarily,”³⁹¹ the company also would be liable. It is evident that competition from rival ticketing companies is injured. And this injury does not seem to be linked to any legitimate justification. The company, for example, has never shown that Ticketmaster’s ticketing must be used because its rivals are unreliable or do not provide the level of services that Ticketmaster does. Even if there were concerns about bots and inferior quality with other companies (which, again, have not been shown), Ticketmaster’s two-faced treatment, illustrated by the TradeDesk smoking gun,³⁹² shows that this is a pretense.

VIII. DECEPTION

A third claim would target Ticketmaster’s deception of consumers in various aspects of its ticketing services.

A. Law

A court could find that deception constitutes monopolization under one of two approaches.³⁹³ The first, adapted from the leading antitrust treatise,³⁹⁴

³⁹¹ See *supra* notes 236–237 and accompanying text.

³⁹² See discussion *supra* Part V.B.

³⁹³ A third approach, applied in the Fifth and Seventh Circuits, does not apply liability in this setting. For a critique of such a hands-off analysis, see Michael A. Carrier, *Don’t Die! How Biosimilar Disparagement Violates Antitrust Law*, 115 Nw. U.L. REV. ONLINE 119, 135 (2020) (a monopolist engaging in deception “could entrench its position in the market” with conduct that “could be viewed as ‘tend[ing] to impair the opportunities of rivals’ and ‘not further[ing] competition on the merits,’” and that “resemble[s] more the ‘willful acquisition or maintenance of [monopoly] power’ than a ‘superior product, business acumen, or historic accident’”) (citing *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966) and *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 n.32 (1985)). See also Michael A. Carrier & Rebecca Tushnet, *An Antitrust Framework for False Advertising*, 106 IOWA L. REV. 1841, 1850–53 (2021) (providing additional critique).

³⁹⁴ PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* (5th ed. 2022).

applies a presumption that the exclusionary effects of disparagement are *de minimis*.³⁹⁵ The plaintiff can rebut such a presumption by showing that the alleged anticompetitive conduct is (1) clearly false, (2) clearly material, (3) clearly likely to induce reasonable reliance, (4) made to buyers without knowledge of the subject matter, (5) continued for prolonged periods, and (6) not readily susceptible to neutralization or other offsets by rivals.³⁹⁶

A second approach applies a more general case-by-case analysis. Courts applying this approach have appreciated that anticompetitive conduct takes “too many different forms, and is too dependent upon context, for any court or commentator ever to have enumerated all the varieties.”³⁹⁷ For example, the Sixth Circuit in *Conwood v. U.S. Tobacco* found that a company’s providing misleading information, destroying a rival’s display racks, and entering into exclusive agreements could support a finding of monopolization.³⁹⁸

One factor that courts have analyzed in this setting is the extent to which false statements lock in decision-making. In *United States v. Microsoft*, the D.C. Circuit found that Microsoft’s deceptive statements to Java-based software developers about the interoperability of Windows-based systems with other platforms resulted in the inadvertent development of software compatible only with Windows and demonstrated anticompetitive conduct.³⁹⁹

B. Facts

An antitrust case could challenge several actions as potentially deceptive conduct that sustained its monopoly position.⁴⁰⁰

³⁹⁵ See *Carrier*, *supra* note 393, at 135 (citing cases from the Second, Sixth, Ninth, Tenth, and Eleventh Circuits).

³⁹⁶ *E.g.*, *Duty Free Americas, Inc. v. Estee Lauder Companies, Inc.*, 797 F.3d 1248, 1269 (11th Cir. 2015). See generally *Carrier*, *supra* note 393, at 136–37 (discussing illustrative case in which court found that plaintiff satisfied test).

³⁹⁷ *E.g.*, *Caribbean Broad Sys. v. Cable & Wireless PLC*, 148 F.3d 1080, 1087 (D.C. Cir. 1998).

³⁹⁸ *Conwood Co., L.P. v. U.S. Tobacco Co.*, 290 F.3d 768, 783, 788 (6th Cir. 2002).

³⁹⁹ 253 F.3d 34, 76–77 (D.C. Cir. 2001).

⁴⁰⁰ A challenge by the FTC to this behavior could rely on not only monopolization but also Section 5 of the FTC Act, which provides that “unfair or deceptive acts or practices in or affecting commerce . . . are . . . declared unlawful.” 15 U.S.C. § 45(a)(1) (2006). The FTC’s Policy Statement on Deception defines deception as “a representation, omission, or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer’s detriment.” Letter from James C. Miler, FTC Chairman, FTC Policy Statement on Deception (Oct. 14, 1983),

An example of one set of behaviors stems from a 2010 settlement with the FTC concerning “deceptive bait-and-switch tactics to sell event tickets to consumers.”⁴⁰¹ In its statement accompanying the settlement, the FTC explained that consumers looking for tickets to concerts to Bruce Springsteen & The E Street Band received a “No Tickets Found” message that “indicate[d] that no tickets were available at that moment to fulfill their request.”⁴⁰² Ticketmaster then deceptively “steer[ed] unknowing consumers” to its resale site TicketsNow, where “tickets were offered at much higher prices—in some cases double, triple, or quadruple the face value.”⁴⁰³ According to the FTC, Ticketmaster “displayed the same misleading Web page to consumers looking to buy tickets for many other events between October 2008 and February 2009.”⁴⁰⁴

In addition to misrepresenting the existence of tickets, Ticketmaster “[c]ompound[ed] this deception” by “fail[ing] to tell buyers that many of the resale tickets advertised on TicketsNow.com were not ‘in hand’—in other words, they were not actual tickets secured for sale at the time they were listed and bought.”⁴⁰⁵ Some of the tickets were “sold speculatively,” which meant they were “merely offers to try to find tickets.”⁴⁰⁶ The FTC provided the example of consumers “hoping to go to a Springsteen concert at the Verizon Center in Washington, DC in May 2009” paying for tickets in February “that never materialized” while “Ticketmaster kept the sales proceeds for more than three months without a reasonable basis for believing it could fulfill the orders.”⁴⁰⁷

Although the conduct is not recent, it provides an example of how deception-based tests could apply. Applying the treatise framework, given the availability of tickets, a representation that there are no tickets is clearly false. It is material as consumers wind up paying significantly more for tickets. Because fans must depend on Ticketmaster for information, they have no

https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf [<https://perma.cc/ERZ3-YPPV>].

⁴⁰¹ Press Release, Fed. Trade Comm’n, Ticketmaster and TicketsNow Settle FTC Charges of Deceptive Sales Tactics, Refunds for Springsteen Concertgoers Provided; FTC Warns Other Ticket Resellers (Feb. 18, 2010), <https://www.ftc.gov/news-events/news/press-releases/2010/02/ticketmaster-ticketsnow-settle-ftc-charges-deceptive-sales-tactics-refunds-springsteen-concertgoers> [<https://perma.cc/6ZMZ-2SFZ>].

⁴⁰² *Id.*

⁴⁰³ *Id.*

⁴⁰⁴ *Id.*

⁴⁰⁵ *Id.*

⁴⁰⁶ *Id.*

⁴⁰⁷ *Id.*

knowledge of which tickets are available and reasonably rely on Ticketmaster. Finally, the deception continued for a long period, with the opaque nature of the transactions preventing neutralization by rivals.

This behavior also would seem to result in liability under a case-by-case approach. Similar to the *Microsoft* case, false statements related to ticket availability lock in decision-making.⁴⁰⁸ This is especially the case given the information asymmetry between the fans and Ticketmaster, materiality of ticket availability, and reasonable reliance on the company.

Another example is presented where buyers are not made aware of whether tickets are “eligible for transfer” until after purchase and where Ticketmaster could use the lack of notice to harm rival resale ticketers.⁴⁰⁹ Consumers reasonably expect that they can resell their tickets, and when there is no notice to the contrary, it could be deceptive to prevent transfers.

One example is provided by a 2019 show in Los Angeles involving the Black Keys. For this concert, the “transferability feature [was] turned off completely,”⁴¹⁰ and the venue would not accept tickets issued by third-party ticketers.⁴¹¹ Fans did not receive any “notice that their tickets were no good, even as they waited in line.”⁴¹² Employees of the resale vendors said that Ticketmaster never indicated that tickets would not be transferable.⁴¹³ And Pollstar, a leading provider of information on the concert industry, “was unable to find any mention that tickets purchased via the secondary market would be banned in any of the announcements regarding the presales and general onsale for the gig.”⁴¹⁴ One employee of a resale site had “never seen something like this happen” and explained that it was “unfair . . . because everyone had a valid ticket.”⁴¹⁵ Ticketmaster acknowledged its failings in the process, stating

⁴⁰⁸ See *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001); see also *supra* note 399 and accompanying text.

⁴⁰⁹ See *How Do I Transfer Tickets?*, TICKETMASTER, <https://ticketmaster-us.zendesk.com/hc/en-us/articles/9612097694481> [<https://perma.cc/FJ6C-LB5S>] (last visited Nov. 24, 2023).

⁴¹⁰ Sarah Pittman, *The Black Keys' Wiltern Snafu Thrusts SafeTix Into Spotlight*, POLLSTAR (Sept. 26, 2019), <https://news.pollstar.com/2019/09/26/the-black-keys-wiltern-snafu-thrusts-safetix-into-spotlight/> [<https://perma.cc/8V6V-WZSL>].

⁴¹¹ See Alejandra Reyes-Velarde, *Why the Black Keys Shut Out Hundreds of Fans, Causing Chaos at the Wiltern*, L.A. TIMES (Sept. 20, 2019), <https://www.latimes.com/california/story/2019-09-20/black-keys-wiltern-tickets-ticketmaster> [<https://perma.cc/8RVM-NQUY>].

⁴¹² *Id.*

⁴¹³ *Id.*

⁴¹⁴ Pittman, *supra* note 410.

⁴¹⁵ Reyes-Velarde, *supra* note 411.

that for future “communicat[ions about] the non-transferability process,” it promised to “ensure that this messaging is more prominently and frequently communicated moving forward.”⁴¹⁶

Two episodes of deception were alleged in a complaint filed in 2018 in a case that ultimately settled.⁴¹⁷ Proof of these allegations would provide additional examples.

First, plaintiffs claimed that Ticketmaster harmed fans through its website, which “seamlessly integrate[d] its primary and secondary ticket exchange inventory in a single seating map.”⁴¹⁸ The company “provide[d] no transparency to consumers about how and why tickets wind up on one or another exchange,” and Ticketmaster and its suppliers “deceptively slip[ped] tickets between primary and secondary markets to manipulate consumer pricing and squelch competition.”⁴¹⁹ In addition to the deception, whether fans use the primary or secondary market is material: the fees generally are higher in the secondary market, and the proceeds are kept by the ticketing company as opposed to being shared with the venues and promoters.⁴²⁰

Second, Ticketmaster allegedly “sabotage[d] its [former] Verified Fan program,”⁴²¹ which it publicized as a means to provide special advance tickets to a special set of consumers with codes, by releasing the same tickets for sale simultaneously at the box office, without requiring any special code, and with full knowledge that ticket resellers will staff the box office to purchase the ticket immediately.⁴²² Similarly, fans trying to see a show at Madison Square

⁴¹⁶ Pittman, *supra* note 410.

⁴¹⁷ Answer of Renaissance Ventures LLC and Prestige Entertainment West Inc. to Second Amended Complaint and Counterclaims, *Ticketmaster LLC v. Prestige Entertainment West, Inc.*, No. 2:17-cv-07232-ODW-JC (C.D. Cal. June 25, 2018). For the settlement of the case, see Jeffrey D. Neuberger, *Ticketmaster Reaches Settlement with Ticket Broker over Unauthorized Use of Automated Bots*, NAT'L L. REV. (July 24, 2019), <https://www.natlawreview.com/article/ticketmaster-reaches-settlement-ticket-broker-over-unauthorized-use-automated-bots> [<https://perma.cc/4S5W-2KW9>].

⁴¹⁸ Renaissance Answer, *supra* note 417, ¶ 4.

⁴¹⁹ *Id.*

⁴²⁰ See *supra* note 175 and accompanying text.

⁴²¹ In 2023, “[f]ollowing a tidal wave of bad press (and several lawsuits) stemming from the Taylor Swift Eras Tour pre-sale fiasco,” Ticketmaster “quietly rebranded its ‘Verified Fan’ program as ‘advance registration.’” Dylan Smith, *Ticketmaster Quietly Replaces Its “Verified Fan” Program With “Advance Registration” Following Taylor Swift Pre-Sale Disaster*, DIGITAL MUSIC NEWS (June 20, 2023), <https://www.digital-musicnews.com/2023/06/20/ticketmaster-advance-registration/> [<https://perma.cc/EU6P-ZNVU>].

⁴²² Renaissance Answer, *supra* note 417, ¶ 9.

Garden in New York noticed that “[i]mmediately after the tickets went on sale” for a concert utilizing the program, “there were hundreds of tickets on StubHub.”⁴²³ This behavior could be deceptive in offering a program that it claimed was introduced to benefit fans⁴²⁴ but actually is used to mask activity in the resale market.

At a minimum, behavior like that at the heart of the 2010 settlement with the FTC, as well as instances of a lack of notice in the years since, could demonstrate deception that maintains the company’s monopoly position.

IX. OVERALL COURSE OF CONDUCT

Finally, a court could consider the entirety of Live Nation Entertainment’s conduct together. This includes not only the conduct discussed in the previous three Parts but also additional behavior discussed in Section IX.B below.

A. Law

Courts have considered defendants’ conduct not only for its particular elements but also as part of an overall course of conduct.⁴²⁵ The Supreme

⁴²³ Brando Rich, *Is TicketMaster’s Verified Fan Program Working for Real Fans?*, CASHORTRADE (Sept. 19, 2017), <https://cashortrade.org/blog/is-ticketmasters-verified-fan-program-working-for-real-fans> [<https://perma.cc/AWL5-XYXT>]; *see id.* (stating that it was “hard to believe that hundreds of fans bought these tickets only to turn around and resell them immediately”).

⁴²⁴ *See* Anne Steele, *Ticketmaster Asks: Are You a Big Enough Fan?*, WALL ST. J. (Sept. 5, 2017), <https://www.wsj.com/articles/ticketmaster-asks-are-you-a-big-enough-fan-1504636200> [<https://perma.cc/R8C8-CVW9>] (senior official at Ticketmaster states: “[i]nstead of fighting an arms race, we decided we could take advantage of a deep database of info on ticket buyers and identify the behaviors that real fans exhibit”).

⁴²⁵ *See also, e.g.*, *LePage’s Inc. v. 3M*, 324 F.3d 141, 162 (3d Cir. 2003) (“The relevant inquiry is the anticompetitive effect of 3M’s exclusionary practices considered together.”); *In re Suboxone (Buprenorphine Hydrochloride & Naloxone) Antitrust Litig.*, 13-MD-2445, 2017 WL 36371, at *8 (E.D. Pa. Jan. 4, 2017) (“in certain circumstances, a plaintiff can allege a series of actions that when taken together make out antitrust liability even though some of the individual actions, when viewed independently, are not all actionable”); *In re Gabapentin Pat. Litig.*, 649 F. Supp. 2d 340, 359 (D.N.J. 2009) (“If a plaintiff can allege that a series of actions, when viewed together, [was] taken in furtherance and as an integral part of a plan to violate the antitrust laws, that series of actions, as an overall scheme, may trigger antitrust liability.”);

Court has explained that “plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each.”⁴²⁶ In these cases, it is appropriate to consider the “overall combined effect” of individual acts as courts “are dealing with what has been called the ‘synergistic effect’ of the mixture of the elements.”⁴²⁷ Application of this theory makes particular sense when multiple behaviors “harm[] competition only slightly” but create a “cumulative effect” that “is significant enough to form an independent basis for liability.”⁴²⁸ Specific acts might not fully support a monopolization claim on their own but might in combination, especially when one compounds the effect of another so that the aggregate conduct crosses the line into monopolization.

To fully assess the competitive effects of this range of behavior, an overall course of conduct claim could be considered under the Rule-of-Reason framework. The D.C. Circuit in *United States v. Microsoft* articulated such an analysis. First, the plaintiff “must demonstrate that the monopolist’s conduct . . . has the requisite anticompetitive effect.”⁴²⁹ Second, if this is shown, the defendant “may proffer a ‘procompetitive justification’ for its conduct.”⁴³⁰ The plaintiff then can rebut that justification, and failing that, can “demonstrate

In re Neurontin Antitrust Litig., 2009 WL 2751029, at *15 (D.N.J. Aug. 28, 2009) (same); *Abbott Labs. v. Teva Pharm. USA, Inc.*, 432 F. Supp. 2d 408, 428 (D. Del. 2006) (“Plaintiffs are entitled to claim that individual acts are antitrust violations, as well as claiming that those acts as a group have an anticompetitive effect even if the acts taken separately do not.”). *But see* *New York v. Facebook, Inc.*, 549 F. Supp. 3d 6, 46 (D.D.C. 2021) (doctrine does “not allow unilateral refusals to deal that are lawful . . . to be considered as part of a ‘monopoly broth’ or ‘course of conduct’ that violates Section 2”).

⁴²⁶ *Cont’l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962); *see also* *City of Mishawaka, Ind. v. Am. Elec. Power Co.*, 616 F.2d 976, 986 (7th Cir. 1980) (“It is the mix of the various ingredients of utility behavior in a monopoly broth that produces the unsavory flavor.”); *CarePoint Health Sys. Inc. v. RWJ Barnabas Health, Inc.*, No. 22CV5421 EP CLW, 2023 WL 7986429, at *7 (D.N.J. Nov. 17, 2023) (plaintiff “alleges numerous instances of [defendant’s] conduct that, evaluated together, plausibly coalesce into an alleged scheme”).

⁴²⁷ *City of Anaheim v. S. California Edison Co.*, 955 F.2d 1373, 1376 (9th Cir. 1992).

⁴²⁸ *United States v. Microsoft Corp.*, 253 F.3d 34, 78 (D.C. Cir. 2001) (“the District Court did not point to any series of acts, each of which harms competition only slightly but the cumulative effect of which is significant enough to form an independent basis for liability”).

⁴²⁹ *Id.* at 58–59.

⁴³⁰ *Id.* at 59.

that the anticompetitive harm . . . outweighs the procompetitive benefit.”⁴³¹ Offering a variation, the Ninth Circuit in *Epic Games v. Apple* considered not only anticompetitive effects, procompetitive justifications, and balancing, but also whether there were “substantially less restrictive alternatives” that achieved the defendant’s objectives.⁴³² And as one hornbook explains, “courts . . . typically ask whether the conduct, even if supported by a justification, hinders competition ‘in an unnecessarily restrictive way.’”⁴³³

B. *Application*

In addition to the conduct discussed in the previous three Parts—(1) exclusive dealing with venues, (2) tying of promotion to ticketing, and (3) deception—a plaintiff could introduce four other forms of behavior. Each of these four types of conduct is anticompetitive, and each exacerbates the effects of other behavior.

The first is illegal conduct to harm a rival that the company viewed as a threat.⁴³⁴ In one example, which culminated in Ticketmaster’s payment of a \$10 million criminal fine, the rival offered artists “the ability to sell presale tickets” and created “a password-protected app that provided real-time data about tickets sold through the . . . company.”⁴³⁵

Ticketmaster engaged in an array of illegal behavior to harm this rival, including “repeatedly—and illegally—access[ing]” its computers “without authorization using stolen passwords” and “brazenly [holding] a division-wide

⁴³¹ *Id.*

⁴³² *Epic Games, Inc. v. Apple, Inc.*, 67 F.4th 946, 983–94 (9th Cir. 2023).

⁴³³ ANTITRUST LAW DEVELOPMENTS, *supra* note 57, at 324; *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 (1985) (“it is relevant to consider” the “impact” of the defendant’s conduct “on consumers and whether it has impaired competition in an unnecessarily restrictive way”); *Multistate Legal Stud., Inc. v. Harcourt Brace Jovanovich Legal & Pro. Publications, Inc.*, 63 F.3d 1540, 1550 (10th Cir. 1995) (“Predatory practices are illegal if they impair opportunities of rivals and are not competition on the merits or are more restrictive than reasonably necessary for such competition.”).

⁴³⁴ Press Release, U.S. Attorney’s Office, E.D.N.Y., Ticketmaster Pays \$10 Million Criminal Fine for Intrusions into Competitor’s Computer Systems (Dec. 30, 2020), <https://www.justice.gov/usao-edny/pr/ticketmaster-pays-10-million-criminal-fine-intrusions-competitor-s-computer-systems-0> [<https://perma.cc/SQ7H-8CUM>]. See also Brooks, *supra* note 7 (Songkick alleged in lawsuit that Ticketmaster (and former Songkick) employee “used old logins to access Songkick’s systems in order to misappropriate information”).

⁴³⁵ *Id.*

‘summit’” where the passwords “were used to access the victim company’s computers.”⁴³⁶ One employee even kept a spreadsheet of every web page of the company so that Ticketmaster could identify the rival’s clients and “attempt to dissuade them from selling tickets” through the rival.⁴³⁷ A Ticketmaster executive conceded that the goal was to “choke off” the rival, and a senior employee promised that Ticketmaster “could ‘cut [the victim company] off at the knees’ if they could win back presale ticketing business” for an “artist that was a client of the victim company.”⁴³⁸

A second type of conduct⁴³⁹ involves “radius clauses” that “restrict[] acts from playing within a specified radius of a booked show for a specified period of time,” which “prevent[s] competing venues from booking artists.”⁴⁴⁰ These provisions threaten to reduce the number of artists performing live, which increases the price of performances and “causes reductions in the quality and quantity of both music festivals and concert venues.”⁴⁴¹ Radius clauses particularly threaten “[s]maller to mid-tier acts” that “need to be able to tour and make money out on the road,” but “are literally having to travel 500 miles every night, which is dangerous and expensive . . . [i]f they can’t play markets that are within reasonable drives.”⁴⁴²

⁴³⁶ *Id.*

⁴³⁷ *Id.*

⁴³⁸ *Id.*

⁴³⁹ *Artists to Take Pay Cuts with Live Nation’s 2021 Plans*, SLIPNSLIDE RECORDS, <https://www.slipnslicerecords.com/artists-to-take-pay-cuts-with-live-nations-2021-plans/> [<https://perma.cc/4WSB-95LB>] (last visited Dec. 17, 2023) (Live Nation memo provides consequences to artist violating radius clause).

⁴⁴⁰ Jennifer Oliver, *DOJ: Event Powerhouse Live Nation Punished Concert Venues for Using Competing Ticketers Despite Bar*, MOGIN RUBIN (Mar. 19, 2020), <https://blog.moginrubin.com/doj-event-powerhouse-live-nation-punished-concert-venues-for-using-competing-ticketers-despite-bar> [<https://perma.cc/8SW6-CXLY>]. See also Mickelson QFR Responses, *supra* note 118, at 9 (radius clauses “limit[] the ability of artists to work with a different promoter in a geographic[] area”).

⁴⁴¹ Trevor Lane, *Defining Unreasonable Radius Clauses for American Music Festivals*, 42 SEATTLE U. L. REV. 1247, 1249 (2019).

⁴⁴² Katie Bain, *How the Music Industry Uses a Pervasive Secret Weapon To Keep Bands from Freely Touring*, LA WEEKLY (Apr. 18, 2017), <https://www.laweekly.com/how-the-music-industry-uses-a-pervasive-secret-weapon-to-keep-bands-from-freely-touring/> [<https://perma.cc/LZW9-H4YX>]. See also Matt Pollock, *How One Insanely Popular Music Festival Is Keeping You From Seeing Your Favorite Bands*, MIC (June 16, 2014), <https://www.mic.com/articles/91181/how-one-insanely-popular-music-festival-is-keeping-you-from-seeing-your-favorite-bands> [<https://perma.cc/AT9U-GAJ8>] (“for every superstar who’s dodged the clause, there’s a midlevel band . . . whose summer tour schedule, mysteriously or not, skips over Detroit, St. Louis, Indianapolis,

Radius clauses also harm promoters, such as one who “lost hundreds of bookings” because of the clauses.⁴⁴³ This harm is exacerbated by “consolidation,” evidenced through Live Nation’s acquisition of “myriad festival brands,” which “makes it possible for talent buyers to offer artists multiple festival dates over the course of the touring season, effectively buying out talent and, in some cases, making it nearly impossible for other promoters to book them.”⁴⁴⁴ Smaller festivals have lamented the challenges they faced when trying to “book bigger artists and . . . bands,” who “were all playing the bigger festivals” and were blocked from playing smaller festivals.⁴⁴⁵

A third behavior involves tying. In particular, the company has leveraged its control over the promotion market to gain exclusive venue operation contracts. In 2023, for example, Live Nation threatened a tie: if the city of Irvine, California wanted Live Nation artists to perform at a planned amphitheater, it was required to enter into an exclusive arrangement for the venue.⁴⁴⁶ The city negotiated with the company, and in what one commenter called a “classic case of bait and switch,” Live Nation requested revisions to the agreement approved by City Council that “would shift significantly increased costs . . . to the City” and “introduce additional revenue streams for Live Nation.”⁴⁴⁷

and Milwaukee,” which is “a huge blow” in an industry “increasingly dependent on live concerts as almost exclusive sources of revenue”).

⁴⁴³ Bain, *supra* note 442. *See id.* (“Radius clauses hurt all independent promoters”).

⁴⁴⁴ *Id.* *See also* Mickelson QFR Responses, *supra* note 118, at 10 (“radius clauses built into festival offers . . . limit[] the ability [of] artists to work with a different promoter in a geographical area”).

⁴⁴⁵ Bain, *supra* note 442.

⁴⁴⁶ Doug Elliott, *Opinion: Funny Valentine? Say “No” to Live Nation Bait and Switch, “Yes” to a Smaller Amphitheater*, IRVINE WATCHDOG (Feb. 12, 2023), <https://irvinewatchdog.org/city-hall/city-council/opinion-funny-valentine-say-no-to-live-nation-bait-and-switch-yes-to-a-smaller-amphitheater/> [<https://perma.cc/JEJ8-6SEB>] (noting that Live Nation “demands an exclusive right to host all events with more than 5,000 attendance anywhere in the park”).

⁴⁴⁷ *Id.*; *see also* *Five Points Amphitheater is Gone*, REDDIT, https://www.reddit.com/r/orangecounty/comments/17dn4cy/five_points_amphitheater_is_gone/ [<https://perma.cc/W7DG-WV2E>] (last visited Dec. 18, 2023) (“Live Nation continued to change the terms of the deal to get more and more of the revenue out of the new venue while the city had to cover more and more of the expenses. With every revision the deal was worse for the city and better for Live Nation.”). For example, the company’s changes would increase the city’s construction costs; design costs; and furnishings, fittings, and equipment costs by \$37 to \$54 million; shift to the city liability for a possessory interest tax; and make the city liable for liquidated damages “if construction isn’t timely completed.” *Id.* *See also id.* (“The Council-approved deal provided for a \$5 per ticket surcharge, with revenues to be split 50/50 between the

Live Nation indicated that the promotion of concerts was tied to its status as exclusive operator of the Irvine amphitheater. A city councilwoman said that Live Nation “suggested—behind closed doors—[that] they wouldn’t come [and offer concerts] unless they controlled the venue.”⁴⁴⁸ Live Nation “absolutely discussed” this and said that “they simply won’t throw acts our way.”⁴⁴⁹ The threats are reminiscent of the company’s tying of promotion and ticketing, revealing coercion in a setting in which the company has power in the markets for both promotion and venues.⁴⁵⁰

A final type of conduct similarly extends the company’s reach. A leading promoter has explained that Live Nation has “effectively eliminated the arena part” of the business by “[p]urchasing tours for their outdoor amphitheaters,” “[l]everaging . . . outdoor amphitheater shows to procure indoor shows,” “[l]everaging . . . summer festivals to procure indoor concerts,” “[t]hreatening financial penalties . . . if artists wanted to work for [a rival promoter],” and “[p]aying a band 100% or more of the gross ticket sales.”⁴⁵¹ To similar effect, one source noted industry experts’ views that “Live Nation’s squeeze on independent venues is getting tighter as the company rolls out its strategy to own or manage club-sized venues across the country.”⁴⁵² Such behavior adds to the hurdles facing potential rival promoters.

This array of conduct, in combination with each other and with the collection of behavior discussed throughout the Article, has a cumulative effect. For example, ticketing rivals face an uphill climb as the vast majority of venues are out of reach because of exclusive deals, with many of the others subject to the tying of promotion and ticketing, and others subject to the criminal conduct discussed above.⁴⁵³ Promoters are injured by radius clauses that operate as another form of exclusivity combined with the arena conduct described in the previous paragraph, and Live Nation’s willingness to sustain losses in promotion that it makes up in ticketing.⁴⁵⁴ Venues not affiliated with

parties to cover maintenance costs. The surcharge was to be increased by 10 percent every three years; Live Nation now wants to drop those increases.”).

⁴⁴⁸ Noah Biesiada, *Irvine Kills Negotiations With Live Nation, Wants Amphitheater to Generate City Revenue*, VOICE OF OC (July 25, 2023), <https://voiceofoc.org/2023/07/irvine-kills-negotiations-with-live-nation-wants-amphitheater-to-generate-city-revenue/> [https://perma.cc/XU2U-UTX2].

⁴⁴⁹ *Id.*

⁴⁵⁰ See *supra* Parts III.B. & III.C.

⁴⁵¹ Mickelson QFR Responses, *supra* note 118, at 10.

⁴⁵² THE CAPITOL FORUM, *supra* note 148, at 4.

⁴⁵³ See *supra* notes 434–438 and accompanying text.

⁴⁵⁴ See *supra* notes 145–159 and accompanying text.

Live Nation are harmed by conduct like what occurred in Irvine and also are forced to take Ticketmaster's ticketing services.

1. Anticompetitive Effects

As discussed throughout this Article, significant anticompetitive effects that harm the market as a whole have been suffered by consumers, artists, venues, and promoters. As shown above, consumers have suffered high fees and inferior quality, while (1) artists (particularly smaller and mid-tier ones) suffer from Live Nation's power, (2) venues not in exclusive contracts are required to take Ticketmaster's ticketing services, and (3) promoters work with fewer artists and are forced to use Ticketmaster.⁴⁵⁵

All of this evidence of market power has been entrenched and exacerbated by the conduct described in this Article. Exclusive dealing prevents rival ticketing companies from effectively competing with Ticketmaster by foreclosing the vast majority of U.S. venues and not enabling them to achieve the economies of scale needed to compete.⁴⁵⁶ Tying promotion and ticketing forces venues that wish to book Live Nation artists to use Ticketmaster for ticketing.⁴⁵⁷ Rival ticketing companies, again, are injured for reasons similar to those imposed by exclusive dealing. Deception leads to consumers suffering from misrepresentations like "bait and switch" tactics and a lack of notice on transferability that entrench Ticketmaster's monopoly power. And additional behavior considered as part of an overall course of conduct magnifies these effects: criminal misappropriation harms ticketing rivals; radius clauses injure promoters; and the tying of promotion to venues and leveraging of various markets to arenas harms other promoters and non-Ticketmaster-affiliated venues.

Harms are further revealed by considering potential advantages offered by other ticketing companies that would gain market share in a competitive marketplace. SeatGeek, for example, is preferred by customers, who give it a "Net Promoter Score" (a "customer loyalty metric that measures customers' willingness to return for another purchase as well as to make a recommendation to their family, friends, or colleagues"⁴⁵⁸) of 85, higher than Ticketmaster's

⁴⁵⁵ See *supra* Part IV.A.

⁴⁵⁶ See *supra* Part VI.B.

⁴⁵⁷ See *supra* Part VII.B.

⁴⁵⁸ Net Promoter Score explained, CUSTOMER GURU, <https://customer.guru/net-promoter-score> [<https://perma.cc/Y93F-LZP3>] (last visited Nov. 11, 2023).

66.⁴⁵⁹ One reason fans may prefer SeatGeek is that it has engaged in significant attempts “to eliminate bot traffic” by using “sophisticated algorithms and machine learning techniques to detect and block bots in real time,” manually reviewing ticket purchases to “check[] for unusual behavior,” and limiting ticket purchases.⁴⁶⁰ Nor is the company alone in offering potential benefits over Ticketmaster’s services.

StubHub offers a “FanProtect Guarantee” that guarantees that buyers “will get . . . tickets in time for the event,” that the tickets “will be valid for entry,” that they “will be the same as or comparable to those . . . ordered,” and that “[i]f any of these things do not occur . . . we will find you comparable or better tickets to the event, or offer you a refund of what you paid for your purchase or credit of the same amount for use on a future purchase.”⁴⁶¹ On the other side, the policy protects sellers by ensuring that they “will receive payment for all tickets you sell and deliver in accordance with our User Agreement and all policies,” that “[i]n most cases, buyers or prospective buyers are not permitted to contact you,” and that “[y]ou can adjust your ticket prices any time before they sell.”⁴⁶²

Similarly, SeatGeek offers a Buyer Guarantee that “works to ensure that . . . [y]our tickets will be delivered in time for the event; . . . [y]our tickets will provide valid entry to the event; . . . [t]he tickets you receive will be the same as those you ordered; and . . . [i]f any of these things do not occur, we will work with you on a case-by-case basis to resolve any verified issue(s) covered by this Buyer Guarantee, by providing you with comparable or better tickets to the event, a refund, or, subject to applicable law, a credit.”⁴⁶³ SeatGeek also

⁴⁵⁹ SeatGeek.com Net Promoter Score 2023 Benchmarks, CUSTOMER GURU, <https://netpromoterscore.guru/seatgeek-com> [<https://perma.cc/6BXT-7TYW>] (last visited Nov. 11, 2023); Ticketmaster.IE Net Promoter Score 2023 Benchmarks, CUSTOMER GURU, <https://netpromoterscore.guru/ticketmaster-ie> [<https://perma.cc/3X3J-US74>] (last visited Nov. 11, 2023). See also Groetzinger testimony, *supra* note 102, at 2–3 (noting that SeatGeek has the “highest [score] of any major ticketing provider”).

⁴⁶⁰ *That’s the Ticket: Promoting Competition and Protecting Consumers in Live Entertainment*, Hearing Before the S. Comm. Jud., 118 Cong. 205 (2023) (responses of Jack Groetzinger, CEO, SeatGeek, to Questions for the Record), <https://www.congress.gov/event/118th-congress/senate-event/333501/text?s=1&r=92> [<https://perma.cc/8GB5-9BN3>].

⁴⁶¹ FanProtect Guarantee, STUBHUB, <https://www.stubhub.com/legal/?section=fp> [<https://perma.cc/W8EE-CDEE>] (last visited Nov. 30, 2023).

⁴⁶² *Id.*

⁴⁶³ *Buyer Guarantee*, SEATGEEK, <https://seatgeek.com/buyer-guarantee> [<https://perma.cc/QMB5-XB7E>] (last updated Mar. 9, 2023). See also N.Y. REPORT,

protects sellers by making clear that it will “remit to [the] Seller” the appropriate payment after receiving it from the buyer.⁴⁶⁴

More generally, the head of one ticketing industry association testified that independent ticketing companies “have multiple platforms” that they “market [their] tickets from,” in contrast to Ticketmaster, which “only sells exclusively.”⁴⁶⁵ As a result, a performer “would have a great benefit to selling their tickets through [other] exchanges,” which could “give[] it more visibility” and offer “lower fees.”⁴⁶⁶ Similarly, another company stated that “100 percent of our sites allow consumers to see the total final cost of the ticket before they enter any personal identifiable information.”⁴⁶⁷

Even more generally, Ticketmaster’s power prevents innovation that could benefit the industry such as “greater transparency and analytics for artists” and “advancements in handling the problematic secondary ticketing market,” such as “facilitating a safer and fairer system that keeps prices lower while allowing artists to benefit in the resale of their tickets.”⁴⁶⁸ One analyst explained that “Live Nation would be a shell of itself without Ticketmaster . . . because that’s where they get all the data on consumers that powers the rest of their business.”⁴⁶⁹ Ticketmaster’s combination of exclusive dealing and

supra note 160, at 127, 153 (ticketing service Vivid Seats testified that it “definitely know[s] who [its] sellers are,” that “if we don’t know you, you can’t sell tickets on our website,” and that it has “a large antifraud team” and “carefully vet[s] our sellers before we put them on the site, . . . mak[ing] sure people are certain that they have what they need to get in”).

⁴⁶⁴ *Seller Terms*, SEATGEEK, <https://seatgeek.com/terms/seller> [<https://perma.cc/HW94-YYEV>] (last updated Mar. 9, 2023).

⁴⁶⁵ *Joint Public Hearing*, *supra* note 85, at 139.

⁴⁶⁶ *Id.*

⁴⁶⁷ *Id.* at 154. *See also* Letter from Amy Klobuchar, Sen. Minn., to Michael Rapino, CEO, Live Nation Entertainment, Inc. (Oct. 25, 2023), https://www.klobuchar.senate.gov/public/_cache/files/b/8/b874cd8f-b53b-4ed1-9440-92e35ea4588d/231BC5D578F16FCC56E141B11444646F.10.25.23-senator-klobuchar-letter-to-live-nation.pdf [<https://perma.cc/HML9-ZAY7>] (noting that “Live Nation-Ticketmaster . . . has not yet made the all-in ticket price—including fees—the default setting for its platform” and that “[f]or many events, including those for its own venues, it is still too difficult to see the all-in price before checkout”).

⁴⁶⁸ Lawrence testimony, *supra* note 168, at 3.

⁴⁶⁹ Canal, *supra* note 149. The data can be expansive, including “[y]our personal phone number, your IP address, everything they can possibly do to track you, put things on your website, or on your browser, to track you.” N.Y. hearing, *supra* note 85, at 133–34. *See also* Lawrence testimony, *supra* note 168, at 3 (musician lamented that “[w]hen fans buy tickets, all of their personal info goes exclusively to Ticketmaster, while none of it is shared with the artist”).

tying of promotions deprives ticketing rivals of access to data that they would need to compete with the company.

A final vantage point on the harms is provided by the United Kingdom's English Premier League, an example of a competitive market. The venues that host these teams "do not rely on concerts for revenue" and thus "do not rely on Live Nation."⁴⁷⁰ As a result, venues "choose a ticketing platform based on the merits of the technology," which would appear to have played a role in Ticketmaster providing ticketing for "only twenty percent" of the teams.⁴⁷¹

2. Procompetitive Justifications

Once a plaintiff demonstrates anticompetitive effects, the burden shifts to the defendant to offer a procompetitive justification. The company could raise two primary justifications: (1) tying promotion and ticketing to enhance quality and (2) addressing free riding through exclusive contracts.⁴⁷²

Live Nation Entertainment's tying of promotion and ticketing would not implicate most of the justifications typically advanced for such arrangements such as: (1) protecting product quality (for example, where a company's product "works well only with particular supplies"); (2) "reduc[ing] costs or rais[ing] value"; (3) "increasing price competition through indirect or selective price cuts"; and (4) bringing "a guaranteed volume of patronage in the tied market that might aid its entry into that market."⁴⁷³

Considered expansively, the quality justification could be relevant. Live Nation Entertainment could claim that it requires its promoted concerts to use Ticketmaster ticketing because of the potential quality harms from using rivals. As discussed above, the company has explained that it has "expended significant capital and other resources to protect against and remedy . . . potential security breaches, incidents and their consequences" and "spend[s] an inordinate amount of time and money defending our site against bots; working with third parties, building our own software, using our new smart-key platform, and having teams in real-time at every on-sale, trying to identify bot traffic and defend against it."⁴⁷⁴

⁴⁷⁰ Groetzinger testimony, *supra* note 102, at 10.

⁴⁷¹ *Id.*

⁴⁷² The company likely would take issue with conduct being labeled deceptive as opposed to offering a justification for the behavior. It also would likely not admit to illegally accessing rivals' computers. *See supra* notes 434–438 and accompanying text.

⁴⁷³ IX HERBERT HOVENKAMP, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* ¶1703g, at 54–56 (4th ed. 2018).

⁴⁷⁴ *See supra* notes 206–207 and accompanying text; *see generally supra* Part V.

For a justification for exclusive dealing, the company could claim that exclusive contracts are needed to recoup investments in ticketing hardware and software and that venues prefer the contracts.⁴⁷⁵

These justifications are likely to be rebutted. For starters, rivals like StubHub and SeatGeek have implemented policies that reflect their reliability.⁴⁷⁶ StubHub, for example, offers guarantees that buyers will obtain valid tickets and sellers will receive payment.⁴⁷⁷

More generally, for tying and any other behavior that relies on a defense based on security or quality, Ticketmaster's two-faced treatment of secondary ticketing reveals its lack of seriousness.⁴⁷⁸ While it claims to be focused on the issues of rooting out bots and improving quality, its actions tell another story. In particular, undercover reporting revealed how the company has refused to take action against blatant violations of its policies on ticket limits.⁴⁷⁹ Journalists found out that "despite the existence of a Ticketmaster 'buyer abuse' division that looks for suspicious online activity in ticket sales," the company "turns a blind eye to its TradeDesk users who grab lots of tickets," with a sales representative conceding that some brokers have "literally a couple of hundred accounts" on TradeDesk and it's "not something that we look at or report."⁴⁸⁰

In addition, Ticketmaster provides *incentives* for large reselling activity. TradeDesk "brings an immediate 3 percent discount on Ticketmaster's usual 7 per cent selling fee on a resale ticket."⁴⁸¹ Users who "hit \$500,000 in sales" get "a percentage point . . . shaved off their fees," and "[a]t \$1 million, another percentage point falls off."⁴⁸² An incentive scheme that promotes bots and higher sales in the secondary market belies the claim that Ticketmaster can offer a legitimate procompetitive justification based on addressing fraud and bots.

⁴⁷⁵ See *supra* note 309 and accompanying text (stating that venues "prefer long term exclusive contracts" because of the compatibility of computers, not needing to change retail outlets, "simplif[y]ing] . . . bookkeeping and reduc[ing] the cost of renegotiating the contracts every few years," fixing costs "for a longer, more predictable future," and "obtain[ing] cash up-front from the ticket servicer . . . at the cost of a long term contract, so that the ticket servicer may amortize the cost with the expected income over the years of the contract").

⁴⁷⁶ See *supra* notes 458–467 and accompanying text.

⁴⁷⁷ See *supra* note 461 and accompanying text.

⁴⁷⁸ See *supra* Part V. Quality justifications also would not support a requirement to enter into exclusive venue contracts to obtain Live Nation's promoted acts. See *supra* notes 446–450 and accompanying text.

⁴⁷⁹ See *supra* Part V.

⁴⁸⁰ Wang, *supra* note 224. See *supra* note 225 and accompanying text.

⁴⁸¹ Cribb & Oved, *Undercover Ticket Scalpers*, *supra* note 202.

⁴⁸² *Id.*

The response to exclusive contracts, again, is that the typical explanations based on preventing free riding and encouraging dealer promotion do not apply here. As discussed above,⁴⁸³ the nature of the product distinguishes this case from the typical free-riding scenario involving luxury, new, or complex products offered directly to consumers.⁴⁸⁴ In addition, Ticketmaster is not spending money to promote its ticketing product, with rivals piggybacking on those efforts. Nor is it likely that ticketing rivals could offer tickets at lower cost because they do not pay to promote the event. Again, ticketing fees have little connection with the services provided.⁴⁸⁵ In fact, the company uses a loss-leader strategy that, as discussed above, involves *undercharging* in the promotion market, which is not consistent with needing to exploit investments in that market.⁴⁸⁶ Finally, it is not likely that a venue would steer customers to a ticketer other than Ticketmaster to get a bigger revenue share. Venues initially flocked to—and have stayed with—Ticketmaster because it increased the fees, shared them with the venues, and took “the bruises from people who don’t like the process.”⁴⁸⁷

For similar reasons, justifications based on dealer promotion are likely to be rebutted. And as discussed above, the fact that venues benefit from exclusive arrangements is not dispositive.⁴⁸⁸

In short, a plaintiff is likely to rebut any procompetitive justifications that the company offers.

3. Less Restrictive Alternatives

A court likely would not accept Live Nation Entertainment’s justifications for tying and exclusive dealing. But even if it did, alternatives could achieve the company’s objectives in a manner less restrictive of competition.

If the company claims that it needs to engage in tying of promotion to ticketing to ensure safety, there is an obvious less restrictive alternative: enforcing its rules. The smoking-gun evidence showed that it did not enforce

⁴⁸³ See *supra* notes 290–297 and accompanying text.

⁴⁸⁴ See *supra* notes 293–294 and accompanying text.

⁴⁸⁵ See *supra* note 295 and accompanying text.

⁴⁸⁶ See *supra* note 296 and accompanying text.

⁴⁸⁷ See *supra* note 297 and accompanying text. For a discussion of issues relating to hardware and software, see *supra* notes 298–306 and accompanying text.

⁴⁸⁸ See *supra* note 313 and accompanying text. See also Melamed, *supra* note 262, at 405 (explaining that manufacturer with market power can “share supracompetitive profits with the distributor” and then “retain the exclusive arrangement regardless of the duration of its contract” or “without entering into any cognizable agreement at all”).

rules on: the number of tickets allowed, not using multiple accounts to avoid ticket limits, not using automated computer programs, requesting no more than a certain number of pages within a two-hour period, and not refreshing a browser too quickly.⁴⁸⁹ Simply enforcing these rules offers an alternative that is less restrictive than tying activity that harms ticketing rivals and entrenches the company's monopoly power. At the same time, the rules target automated bots that "crowd out human purchasers,"⁴⁹⁰ thereby promoting objectives related to safety and quality.⁴⁹¹

For exclusive dealing, given the nature of the product, justifications related to free riding are not central.⁴⁹² But even if the company sought to protect investments in its ticketing hardware or software, it could do so by protecting it with intellectual property—in particular, patents or copyrights—that would prevent rivals from using them.⁴⁹³ Even the exclusive dealing contracts could be shortened significantly below the current five-to-ten-year periods to recoup any investments.⁴⁹⁴

⁴⁸⁹ See *supra* notes 209–233 and accompanying text.

⁴⁹⁰ See *supra* notes 198–199 and accompanying text.

⁴⁹¹ Another potential less restrictive alternative is to allow other ticketing companies to provide their services for Live Nation concerts (as long as this is warranted by their reliability). As shown above, ticketing rivals like StubHub and SeatGeek have implemented measures to promote safety and quality. See *supra* notes 460–464 and accompanying text. Allowing such rivals to compete would foster competition in the ticketing market while providing venues with more choices.

⁴⁹² See *supra* notes 295–297 and accompanying text.

⁴⁹³ Peter S. Menell, *Economic Analysis of Network Effects and Intellectual Property*, 34 BERKELEY TECH. L.J. 219, 261 (2019); Copyright Registration of Computer Programs (Circular 61), U.S. COPYRIGHT OFFICE, <https://www.copyright.gov/circs/circ61.pdf> [<https://perma.cc/X3D3-TJ5L>]; Hardware Technology Intellectual Property Law, Stanton IP Law Firm, P.A., <https://stantoniplaw.com/industries/hardware-technology/> [<https://perma.cc/8P8N-BPQR>] (last visited Dec. 19, 2023).

⁴⁹⁴ See *supra* note 306 and accompanying text (citing J.P. Morgan report that company's renewal rate over 100% "is explained by realizing that venue owners' desire to sign with Ticketmaster is less about hardware or software, and more about filling seats with Live Nation produced concerts") (emphasis omitted); see also Iris Dimmick, *San Antonio City Council Awards Contract to Ticketmaster over Tobin Center*, SAN ANTONIO REPORT (Sept. 19, 2019), <https://sanantonioreport.org/san-antoniocity-council-awards-contract-to-ticketmaster-over-tobin-center/> [<https://perma.cc/52YV-HLSZ>] (in bidding over venues in San Antonio, Ticketmaster pledged to annually contribute \$50,000 to a fund to support local arts and entertainment, in addition to a \$250,000 signing bonus and one-time payments totaling \$40,000 in a deal that was expected to bring in \$2 million annually for the city).

4. Balancing

A court likely would not credit the company's justifications or find that there were no less restrictive alternatives. But if it did, the analysis would proceed to a balancing of anticompetitive and procompetitive effects. At this stage, Live Nation Entertainment most likely would lose.

As discussed throughout the Article, the significant anticompetitive effects range throughout the entire ecosystem, preventing ticketing companies from constraining the company's monopoly power, burdening fans with high fees and inferior quality, and harming artists, venues, and promoters by limiting choices and blocking markets. Again, the justification side of the ledger would not be robust. Any balancing of the two effects likely would lead to the anticompetitive effects emerging paramount.⁴⁹⁵

X. REMEDY

The typical remedy for an antitrust violation is to stop the offending conduct or pay damages.⁴⁹⁶ In this case, an injunction would mean ending the exclusive deals, not tying promotion to ticketing, not engaging in deceptive conduct, and not employing the other behavior that makes up an overall course of conduct.

This is not the typical case, however. We have evidence on a silver platter that the company cannot be trusted to follow a consent decree. For that is exactly what Live Nation and Ticketmaster did after entering into the 2010 agreement. As the DOJ stated: the merging companies "failed to live up to their end of the bargain" by "repeatedly condition[ing] and threaten[ing] to

⁴⁹⁵ Applying the analysis of unnecessarily harming rivals would support the results from balancing as rivals suffer significant harm that is not necessary to attain Live Nation Entertainment's objectives. *See supra* notes 317–319 & 391–392, and accompanying text. A similar analysis would apply to the conduct hindering competition "in an unnecessarily restrictive way." *See supra* note 433 and accompanying text.

⁴⁹⁶ *See, e.g.,* Herbert J. Hovenkamp, *Is Antitrust's Consumer Welfare Principle Imperiled?*, 45 J. CORP. L. 65, 88 (2019) (explaining that when anticompetitive provisions "are identified and proven to be anticompetitive, the appropriate remedy for them would most likely be an injunction or treble damages in the case of private plaintiffs"). For a more comprehensive analysis of remedies, see A. Douglas Melamed, *Afterword: The Purposes of Antitrust Remedies*, 76 ANTITRUST L.J. 359, 359–68 (2009) (noting four purposes: (1) "[c]ompensation of victims of unlawful conduct"; (2) [p]unishment and deterrence of unlawful conduct"; (3) [t]erminating and preventing the recurrence of unlawful conduct"; and (4) "[r]estoring competitive conditions to the market harmed by the unlawful conduct").

condition Live Nation's provision of live concerts on a venue's purchase of Ticketmaster ticketing services" and "retaliat[ing] against venues that opted to use competing ticketing services—all in violation of the plain language of the decree."⁴⁹⁷ In fact, the companies' "well-earned reputation for threatening behavior and retaliation . . . has so permeated the industry that venues are afraid to leave Ticketmaster lest they risk losing Live Nation concerts, hindering effective competition for primary ticketing services."⁴⁹⁸

The combination of promotion and ticketing is at the core of Live Nation Entertainment's anticompetitive behavior. The power the company amasses from having control of popular artists provides it with an asset that venues find indispensable. And any promises it makes not to retaliate against or threaten venues that do not use its ticketing services are not worth the paper they are written on. Even if the company could be trusted on the other conduct—exclusive dealing and not engaging in deception—its inability to follow the dictates of the agreement do not give comfort to those advocating for a more limited behavioral remedy. In fact, because it is difficult for a court to anticipate all of the ways in which the company could evade a behavioral remedy, a structural remedy offers advantages.

A structural remedy also is more promising in addressing the core harms threatened by the company. Divesting Ticketmaster would foster competition in the ticketing market and allow rivals to achieve the scale needed to challenge the company.⁴⁹⁹ It would break the company's loss-leader model that prevents other promoters from effectively competing with Live Nation.⁵⁰⁰ And it would not threaten the loss of any meaningful efficiencies.⁵⁰¹

Divestiture also would promise to create competition in multiple markets. The vertically integrated Live Nation Entertainment has little interest in

⁴⁹⁷ See *supra* notes 359–360 and accompanying text.

⁴⁹⁸ See *supra* note 361 and accompanying text. This evidence offers an example of the hazards of behavioral remedies. As John Kwoka & Diana Moss have explained: "The common feature of behavioral remedies is that they are in effect attempts to require a merged firm to operate in a manner inconsistent with its own profit-maximizing incentives," and "allowing the merger and then requiring the merged firm to ignore the incentives inherent in its integrated structure is both paradoxical and likely difficult to achieve." John E. Kwoka & Diana L. Moss, *Behavioral Merger Remedies: Evaluation and Implications for Antitrust Enforcement*, at 4–5, Nov. 2011, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1959588 [<https://perma.cc/EQK4-ULCT>].

⁴⁹⁹ This would be even more effective if action were taken to address the exclusive contracts with venues.

⁵⁰⁰ See *supra* notes 145–159 and accompanying text.

⁵⁰¹ See *supra* Part IX.B.2.

allowing rivals at any level to compete, as this would threaten to reduce its profits. As Jonathan Baker has explained, “[a] dominant firm that sells complementary products can take customers away from an unintegrated rival, thereby reducing the rival’s scale of operations and so raising its costs.”⁵⁰²

Timothy Bresnahan and Shane Greenstein offer an example of the benefits of a decentralized structure in the computer industry, noting that “[s]hifts in [a] dominant platform” are rare and tend to arise in “situations of divided technical leadership” where “sellers of . . . various components” engage in “vertical competition for control of a platform.”⁵⁰³ Analyzing personal computer platforms in the 1980s, the authors explain that IBM, the “leading seller of microcomputer hardware,” focused on “incremental technical progress.”⁵⁰⁴ But the company’s loss of its dominant position, together with the rise of Microsoft’s operating system, resulted in a division of technical leadership that resulted in rapid shifts in the platform.⁵⁰⁵ A structural remedy promises similar benefits in the case of Live Nation Entertainment, harnessing competition in multiple markets to foster quality improvements and enhanced innovation.

Breaking up a company for a monopolization violation is rare.⁵⁰⁶ Standard Oil in 1911, for example, controlled more than 90 percent of U.S. oil-related assets and its status as a holding company “made it easy for enforcers to break . . . up into subsidiaries.”⁵⁰⁷ And AT&T in 1982 “voluntarily entered into the settlement that divided it up and helped the government to determine how the breakup should occur.”⁵⁰⁸

The typical challenge with breaking up a merged company is “unscrambl[ing] the eggs,” in other words, separating the previously distinct companies after they have merged. Breakups in the monopolization setting are even harder, as it is unclear in the typical case where the lines of division

⁵⁰² Jonathan B. Baker, *Exclusion As A Core Competition Concern*, 78 ANTITRUST L.J. 527, 540 (2013).

⁵⁰³ Timothy F. Bresnahan & Shane Greenstein, *Technological Competition and the Structure of the Computer Industry*, 47 J. INDUS. ECON. 1, 23 (1999).

⁵⁰⁴ *Id.* at 26.

⁵⁰⁵ *Id.* at 27–28.

⁵⁰⁶ See Matthew Lane, *The Great Antitrust Breakup: Often Threatened, Rarely Executed*, DISCO (Mar. 13, 2018), <https://www.project-disco.org/competition/031318-the-great-antitrust-breakup-often-threatened-rarely-executed/> [<https://perma.cc/TDE4-YQ4W>] (noting that it has only happened three times in non-merger cases).

⁵⁰⁷ *Id.*

⁵⁰⁸ *Id.* As Matthew Lane explains, the third case, *United States v. United Shoe Machinery*, 391 U.S. 244 (1968), “was an unusual case where the company was forced to sell off assets after a court-ordered conduct remedy failed.” *Id.*

in a monopolization case lie.⁵⁰⁹ In a case not involving a merger, “there are rarely clear lines between business units that allow an enforcer to break off a fully functioning company from the larger whole.”⁵¹⁰

In this case, however, none of this presents a stumbling block. As is evident from its most recent quarterly results, the company divides itself into various business lines: Live Nation Concerts, Venue Nation, Ticketmaster, and Live Nation Sponsorship.⁵¹¹ Ticketmaster, in addition, is organizationally separate: a subsidiary of Live Nation Entertainment.⁵¹² Observers have noted that Live Nation “appears to have kept Ticketmaster’s operations mostly separate, with differing focuses on ticketing and venue management.”⁵¹³ As one commentator explained: “They weren’t direct competitors when DOJ approved the merger, and they’re less closely tied to each other now than if they’d merged supply chains and workforces.”⁵¹⁴ The business lines therefore can readily be separated.

If it were to bring a lawsuit, the DOJ would be justified in seeking a remedy that would split apart Ticketmaster from Live Nation.⁵¹⁵ Such a remedy would directly address the failing of the 2010 decree, which was not successful in stopping the tying of the promotion and the ticketing markets.⁵¹⁶ Because (1) the merger enabled anticompetitive conduct, (2) the parties have proven that they cannot be counted on to comply with behavioral restrictions, and (3) the company’s post-remedy breaches have done significant

⁵⁰⁹ *Id.*

⁵¹⁰ *Id.*

⁵¹¹ *Live Nation Entertainment Reports Third Quarter 2023 Results*, LIVE NATION ENTERTAINMENT (Nov. 2, 2023), <https://www.livenationentertainment.com/2023/11/live-nation-entertainment-reports-third-quarter-2023-results/> [<https://perma.cc/C5JY-4QCA>].

⁵¹² Live Nation 10-K, *supra* note 19, at Exhibit 21.1, at 7.

⁵¹³ *Bad Blood: Swifties Start Wave of Ticketmaster Monopoly Scrutiny*, AELP (Nov. 18, 2022), <https://www.economicliberties.us/media/bloomberg-law-bad-blood-swifties-start-wave-of-ticketmaster-monopoly-scrutiny/#> [<https://perma.cc/SWY4-FAYJ>].

⁵¹⁴ *Id.*

⁵¹⁵ *Cf.* Mickelson QFR Responses, *supra* note 118, at 18 (promoter who testified before Congress states that Live Nation “should be forced to sell all of its venues (indoor and outdoor), divest themselves from Ticketmaster, stop managing artists, and cease block booking tours”). In addition, the remedy should prevent Live Nation from creating a new ticketing company.

⁵¹⁶ In the context of remedial theory, divestiture can be justified as necessary to prevent a recurrence of the anticompetitive conduct. In addition, it would restore competition in the market. *See* Melamed, *supra* note 496, at 362–64.

harm, undoing the merger is necessary to remove the company's ability to continue harming the market.

In addition to breaking up the company, a government plaintiff would be justified in pursuing additional remedies.⁵¹⁷ The most critical one would target the company's exclusive agreements with venues that deprive ticketing rivals of the ability to compete with Ticketmaster. An appropriate remedy would require the company to sell or divest ownership interest in venues, end the exclusive dealing arrangements, or both. Another would include injunctive relief against deceptive conduct. And the last would address behavior that is part of the overall course of conduct.

XI. CONCLUSION

Antitrust often is called upon to address complex issues. Has competition really been harmed? How should legitimate justifications be considered? Are there alternatives that would attain the defendant's objectives without imposing similar harm to competition?

This nuance is not present here. In fact, this is a straightforward antitrust case. The harms cannot be missed. Crashing websites. Ever-increasing unjustified fees. A range of deceptive conduct. Even the rare "smoking gun" evidence of Ticketmaster officials, on camera, conceding that they do not enforce the policies they so proudly trumpet.

All of this is buttressed by power throughout the industry. Live Nation is the largest promoter. Ticketmaster is the largest ticketer. Most of the large-scale venues are locked up for years.

Antitrust violations are typically met with a modest remedy. Antitrust tends not to skip over such remedies to impose extreme measures. But this is not the typical case. This is a case in which Live Nation and Ticketmaster agreed to not threaten tying promotion and ticketing in the 2010 consent decree. And they violated those obligations with flying colors. In fact, they did so in such an egregious manner that the decree was extended, which almost never happens.

Bringing another antitrust case but imposing similar behavioral remedies thus does not make sense. The company has proven that it will not follow the rules. As a result, breakup is the appropriate remedy. And because

⁵¹⁷ For a discussion of private plaintiffs' additional burden based on standing, see *supra* note 53 and accompanying text.

the company keeps its business lines separate, it would not be as hard as it usually is.

In the classic *Peanuts* cartoon, Lucy holds a football while Charlie Brown comes running up to kick it.⁵¹⁸ But every time he arrives at the ball, Lucy removes it, causing him to fly in the air.⁵¹⁹ Consumers, artists, venues, and promoters should not be forced to play the role of Charlie Brown while Live Nation Entertainment continues to yank away its promises.

Taylor Swift fans rightly were upset when Ticketmaster bungled the roll-out of tickets for her 2022 tour. We should all be upset. This Article highlights the strong antitrust case against the company and remedy that can fix this.

⁵¹⁸ *Football gag*, PEANUTS WIKI, https://peanuts.fandom.com/wiki/Football_gag [<https://perma.cc/68TH-G8CZ>] (last visited Oct. 28, 2023).

⁵¹⁹ *Id.*