

## Concerted Dominance: The Antitrust Implications of Live Nation Entertainment’s Refusal To Deal

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### TABLE OF CONTENTS

I.	INTRODUCTION .....	1
II.	REFUSAL TO DEAL IN THE EYES OF THE SIXTH CIRCUIT .....	2
III.	THE GOLIATH OF LIVE NATION ENTERTAINMENT .....	4
IV.	LIVE NATION’S REFUSAL TO DEAL IS ANTI-COMPETITIVE .....	6
V.	CONCLUSION .....	7

### I. INTRODUCTION

In antitrust jurisprudence, the doctrine of “refusal to deal” is a pivotal area of scrutiny.<sup>1</sup> This doctrine refers to situations where a company with sufficient market power or a dominant market position strategically refuses to conduct business with certain customers or competitors, and this refusal potentially leads to anti-competitive effects or otherwise harms competition.<sup>2</sup> Recent in this discourse is the conduct of Live Nation Entertainment (LNE), a behemoth in the entertainment industry, whose business practices provides fertile ground for exploring the nuances of anticompetitive behavior. This article examines the interplay between ostensibly legitimate business strategies and other underlying intentions that may potentially erode the competitive process—particularly in the context of a company with significant market power like LNE.

Many complain that LNE, which manages over 500 musical artists<sup>3</sup> including industry titans like Drake,<sup>4</sup> has improperly used its management control to pressure event venues into contracting with its subsidiary, Ticketmaster. Specifically, the allegations state that venue operators will lose high-grossing performances if Ticketmaster is not used as a vendor when selling

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<sup>1</sup> See, e.g., Reynolds C. Seitz, *Exclusive Agreements and Refusal to Deal Problems*, 11 VAND. L. REV. 85, 85 (1957); Ellen Meriwether, *Putting the Squeeze on Refusal to Deal Cases: Lessons from Trinko and linkLine*, 24 ANTITRUST 65, 65 (2010).

<sup>2</sup> See Charles F. Barber, *Refusals to Deal Under the Federal Antitrust Laws*, 103 U. PA. L. REV. 847, 872–74 (1955).

<sup>3</sup> Tim Ingham, *Live Nation Companies Now Manage over 500 Artists Worldwide*, MUSIC BUS. WORLDWIDE (Feb. 27, 2017), <https://www.musicbusinessworldwide.com/live-nation-companies-now-manage-500-artists-worldwide/> [<https://perma.cc/8H8B-2ZB7>].

<sup>4</sup> *Browse Artists*, LIVENATION (last visited Jan. 1, 2024), <https://www.livenation.com/artist-sitemap> [<https://perma.cc/MZT9-74EP>].

concert tickets.<sup>5</sup> Are LNE's actions in violation of the Sherman Act which prohibits monopolistic activity?<sup>6</sup> This article argues in the affirmative, relying on Sixth Circuit jurisprudence to evaluate the company's refusals to deal.

## II. REFUSAL TO DEAL IN THE EYES OF THE SIXTH CIRCUIT

The Sixth Circuit's opinion in *St. Luke's Hospital v. ProMedica Health System* offers rich context for understanding the intricacies of antitrust jurisprudence.<sup>7</sup> This case looks into the application of the refusal-to-deal doctrine within the healthcare market by examining the termination of a contract between St. Luke's Hospital and ProMedica Health Systems.<sup>8</sup> The Sixth Circuit's decision to side with ProMedica<sup>9</sup>—thereby declining to find an antitrust violation—hinged on several key considerations that resonate with broader antitrust discussions.

Initially, ProMedica and St. Luke's had a collaborative relationship in which Paramount, ProMedica's insurance subsidiary, included St. Luke's within its network of healthcare providers.<sup>10</sup> As a result, ProMedica could direct patients needing advanced care to St. Luke's facilities, and St. Luke's had a consistent supply of patients.<sup>11</sup> However, another large healthcare company's acquisition of St. Luke's lead ProMedica to reassess its relationship and ultimately terminate its agreements with the hospital.<sup>12</sup>

St. Luke's sued ProMedica, alleging that the termination of the contract violated the Sherman Act.<sup>13</sup> In particular, St. Luke's claimed that ProMedica's termination constituted a "refusal to deal" that was prohibited by Section 2 of the Act.<sup>14</sup> The court noted that a refusal to deal, while normally a business right, should be scrutinized as a potential antitrust concern when exercised by a dominant market player without a rational justification.<sup>15</sup> The Sixth Circuit,

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<sup>5</sup> 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/Q5LP-BEQB>].

<sup>6</sup> See 15 U.S.C. §§ 1–38.

<sup>7</sup> *St. Luke's Hosp. v. ProMedica Health Sys., Inc.*, 8 F.4th 479 (6th Cir. 2021).

<sup>8</sup> *Id.* at 482–83.

<sup>9</sup> *Id.* at 493.

<sup>10</sup> *Id.* at 484.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 485.

<sup>13</sup> *St. Luke's*, 8 F.4th at 485. Specifically, Section 2 of the Sherman Act makes it illegal to "monopolize, or attempt to monopolize...any part of the trade or commerce among the several States." In some instances, this Section also prohibits a company from refusing to contract with another company if such refusal to deal would aid anti-competitive practices. See 15 U.S.C. § 2. See also *St. Luke's*, 8 F.4th at 486 (citing *Verizon Comms. Inc. v. Law Offs. of Curtis Trinko*, 540 U.S. 398, 408 (2004)).

<sup>14</sup> *St. Luke's*, 8 F.4th at 487.

<sup>15</sup> *Id.* at 486.

however, rejected this antitrust claim and found that ProMedica's actions were not anticompetitive.<sup>16</sup>

In its analysis of the refusal-to-deal doctrine, the court emphasized the difference between competitive harm and mere harm to a competitor.<sup>17</sup> To violate the Sherman Act, a company's actions must harm the competitive process rather than merely harm one or more competitors.<sup>18</sup> The court held that ProMedica's actions, given the change in the competitive landscape following St. Luke's acquisition, were based on legitimate business reasons and not an intent to harm competition.<sup>19</sup> The court also noted the importance of distinguishing refusals to deal from obligations to do so, suggesting that mandated collaboration between rivals could potentially harm competition.<sup>20</sup> The court's holding displays a judicial tendency to scrutinize the competitive landscape rather than simply penalize market leaders for their dominant positions.<sup>21</sup>

Furthermore, the court emphasized that Paramount, despite being part of ProMedica, only held a 17% market share in the relevant medical insurance market, making it unlikely that its actions would lead to anticompetitive monopolies.<sup>22</sup> Finally, the court concluded that the "change in control" provision in the divestiture agreement, which allowed ProMedica to terminate its contracts with St. Luke's upon a change in ownership, was not anticompetitive. Instead, it was a contractual term agreed upon by both parties and aimed at adapting to changing business circumstances.<sup>23</sup>

Therefore, the court's holding underscores that antitrust laws aim to protect competition, not competitors, and that businesses are allowed to adapt to changing market conditions. ProMedica's actions were seen as a legitimate response to the evolving competitive landscape rather than an attempt to monopolize the market. This case highlights the delicate balance courts must strike in antitrust matters. In doing so, the court's opinion explicitly recognizes that refusal-to-deal claims face a difficult obstacle to succeed and must overcome the foundational presumption that individuals and businesses are free to choose to business with whomever they please.

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<sup>16</sup> *Id.* at 493.

<sup>17</sup> *Id.* at 486.

<sup>18</sup> *Id.* (citing *United States v. Microsoft Corp.*, 253 F.3d 34, 58 (D.C. Cir. 2001) (per curiam)).

<sup>19</sup> *Id.* at 487.

<sup>20</sup> *St. Luke's*, 8 F.4th at 489.

<sup>21</sup> *See Pac. Bell Tel. Co. v. linkLine Comms., Inc.*, 555 U.S. 438, 447–48 (2009) (noting that the mere possession of monopoly power does not violate the Sherman Act).

<sup>22</sup> *St. Luke's*, 8 F.4th at 489.

<sup>23</sup> *Id.* at 488.

### III. THE GOLIATH OF LIVE NATION ENTERTAINMENT

In 2010, Live Nation, an events promoter and venues operator, and Ticketmaster, a ticket sales giant, merged to create the entity known today as Live Nation Entertainment, Inc.<sup>24</sup> Today, LNE controls an estimated 70% of the ticketing and live events market.<sup>25</sup> With its market dominance, LNE has immense leverage over the live entertainment market and has allegedly abused this power. While LNE is no stranger to criticism,<sup>26</sup> antitrust concerns have recently gained momentum, particularly as a result of the company's failure to meet consumer demand for highly anticipated and demanded concert tours.<sup>27</sup> With this, the company is being scrutinized for its alleged anticompetitive practices.

In November of 2022, Taylor Swift announced North American tour dates for her highly anticipated The Eras Tour, which promised musical performances spanning Swift's wide discography.<sup>28</sup> Leading up to the pre-sale of tickets, Ticketmaster noted the "historically unprecedented demand" for Swift's tickets.<sup>29</sup> Not long after the pre-sale window opened, there were numerous reports of site crashes, extremely long wait times, and other technical issues.<sup>30</sup> As a result, many fans reported being unable to purchase the highly coveted

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<sup>24</sup> Prior to merging, Live Nation was the largest producer of live concerts in the world and was responsible for hosting 22,000 concerts in 57 countries. In addition to this, Ticketmaster led the world in number of tickets sold and was valued at over \$8.9 billion. Today, both companies still exist in their individual capacities. See Joint Press Release, Live Nation, Inc. and Ticketmaster Entertainment, Inc., Live Nation and Ticketmaster Entertainment Complete Merger (Jan. 25, 2010), <https://www.sec.gov/Archives/edgar/data/1335258/000119312510012287/dex991.htm> [https://perma.cc/WPD8-EWJ6].

<sup>25</sup> 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#:~:text=Live%20Nation%20Entertainment%20is%20composed,and%20live%20event%20venues%20market> [https://perma.cc/29LQ-EEZ3].

<sup>26</sup> See, e.g., David Segal, *Calling Almost Everyone's Tune*, N.Y. TIMES (Apr. 24, 2010), <https://www.nytimes.com/2010/04/25/business/25ticket.html> [https://perma.cc/7CQV-T9HH].

<sup>27</sup> Lorsch, *supra* note 25.

<sup>28</sup> Chris Willman, *Taylor Swift Announces 2023 'Eras Tour' of U.S. Stadiums*, VARIETY MAG. (Nov. 1, 2022), <https://variety.com/2022/music/news/taylor-swift-announces-2023-tour-1235419454/> [https://perma.cc/349L-J9S4]; see Melissa Ruggieri, *Taylor Swift Set List: Here Are All The Songs on Her Epic Eras Tour*, USA TODAY (Mar. 18, 2023), <https://www.usatoday.com/story/entertainment/music/2023/03/18/taylor-swift-set-list-eras-tour/11499422002/> [https://perma.cc/CC8Q-Q66Y].

<sup>29</sup> Marisa Dellatto, *Demand for Taylor Swift Tickets 'Historically Unprecedented,' Ticketmaster Says*, FORBES (Nov. 15, 2022), <https://www.forbes.com/sites/marisadellatto/2022/11/15/demand-for-taylor-swift-tickets-historically-unprecedented-ticketmaster-says/?sh=71fd47981435> [https://perma.cc/G83M-CP39].

<sup>30</sup> *Id.*

tickets.<sup>31</sup> Simultaneously, however, various tickets for Swift's concerts began appearing on resale websites and were priced at over \$12,000.<sup>32</sup>

After this disastrous pre-sale experience, Ticketmaster decided to forego its scheduled general sale of Eras Tour tickets, citing "insufficient remaining ticket inventory."<sup>33</sup> This process highlighted Ticketmaster's dominance of the ticketing market whereby Ticketmaster's collapse during the pre-sale process left many consumers without an adequate alternative to purchase tour tickets. This disaster surrounding the sale of Eras Tour tickets is further exacerbated by the fact that many concert venues were forced to use Ticketmaster as their ticketing service, given that refusal to do so would likely preclude them from consideration of hosting the big star.

There have been numerous instances of LNE refusing to deal with concert venues if they declined to use Ticketmaster as the authorized method of ticket sales and distribution. For example, the Gwinnett Center, following its decision to replace Ticketmaster with another ticketing service controlled by a competitor, was bypassed as the location to host the band Matchbox Twenty on its 2013 tour and had its number of tour shows cut in half the following year.<sup>34</sup> This issue is so pervasive that some competitors of LNE have opted to structure their bids in order to address concerns about venues losing artist performances, including promising a flat rate fee as high as \$250,000 for any performance that LNE inevitably decides to pull.<sup>35</sup>

Artists' attempts at combatting LNE/Ticketmaster's dominance of the live entertainment market have been futile. The popular country singer, Zach Bryan, boycotted Ticketmaster on his national Burn, Burn, Burn Tour.<sup>36</sup> However, it was not long before Bryan announced that he would return to using Ticketmaster on his next tour, stating that the live entertainment system is "intentionally broken" and an "unfair market."<sup>37</sup> With the LNE's clear

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<sup>31</sup> Tatum Hunter, *Angry Taylor Swift Fans Rail About Ticketmaster Glitches*, WASH. POST (Nov. 15, 2022), <https://www.washingtonpost.com/technology/2022/11/15/taylor-swift-ticketmaster/> [<https://perma.cc/26A6-PXCH>].

<sup>32</sup> *Id.*

<sup>33</sup> Zack Sharf & Jem Aswad, *Ticketmaster Cancels Taylor Swift Tour's Public Tickets Sale due to 'High Demand' and 'Insufficient Inventory'*, VARIETY MAG. (Nov. 17, 2022), <https://variety.com/2022/music/news/ticketmaster-cancels-taylor-swift-public-ticket-sales-eras-tour-1235435965/> [<https://perma.cc/Y2CC-MEAF>].

<sup>34</sup> Sisario & Bowley, *supra* note 5.

<sup>35</sup> *Id.*

<sup>36</sup> Ethan Millman, *Zach Bryan Returns to Ticketmaster: 'One Guy Can't Change the Whole System'*, ROLLING STONE (Sept. 5, 2023), <https://www.rollingstone.com/music/music-news/zach-bryan-uses-ticketmaster-for-2024-tour-1234818815/> [<https://perma.cc/59WK-F5EM>]. Zach Bryan even named his following album "All My Homies Hate Ticketmaster." Chris Willman, *Zach Bryan Drops Live Album, Titled 'All My Homies Hate Ticketmaster,' While Vowing to Find Ticketing Work-Around for 2023 Tour*, VARIETY MAG. (Dec. 25, 2022), <https://variety.com/2022/music/news/zach-bryan-live-album-all-my-homies-hate-ticketmaster-statement-ticket-costs-tour-1235472757/> [<https://perma.cc/S2LN-53ET>].

<sup>37</sup> Millman, *supra* note 36.

dominance and bullying of competitors, our jurisprudence suggests that the company's conduct may be in violation of antitrust principles.

#### IV. LIVE NATION'S REFUSAL TO DEAL IS ANTI-COMPETITIVE

LNE's threats and actions of withdrawing performers from those who do not contract with its subsidiary are in violation of anti-competitive principles as highlighted by the Sixth Circuit's jurisprudence. LNE's strategic decisions, which often manifest as leveraging its dominant position to pressure stakeholders, tests the limits of antitrust law. While these actions may be framed by LNE as standard industry practices aimed at maximizing efficiency and market reach, a closer examination reveals a more troubling dimension.

The crux of the issue lies in discerning the thin line between legitimate business conduct and maneuvers aimed at stifling competition. The Sixth Circuit emphasized that ProMedica's decision to terminate its contract with St. Luke's was defensible given that it was grounded in legitimate business rationale.<sup>38</sup> Likewise, in LNE's case, executives of the company might proffer that the company's practices are driven by a desire to offer integrated and unparalleled services to both artists and concert-goers, and thereby enhancing the overall market efficiency.

However, this surface-level legitimacy is undercut by the company's apparent intent to maintain and expand its market dominance. As the Sixth Circuit noted, the issue is not merely harm to LNE competitors but harm to competition.<sup>39</sup> This harm to competition within the live entertainment industry is particularly evident in how LNE's practices limit the entry of new competitors and restrict existing ones, which has the effect of bottlenecking the market.<sup>40</sup> LNE's refusals to deal, while disguised under the rationale of business efficiency, subtly undercuts the essence of competitive fairness that antitrust laws seek to preserve.

Moreover, as seen in the recent events that unfolded with Swifties,<sup>41</sup> the harm to the competitive process extends beyond immediate market players. It percolates down to the consumer level, where reduced competition often translates to limited choices, inflated prices, or even an outright barrier to entry. For example, LNE's market dominance grants the company the ability to increase service charges at an astounding rate, and consumers are forced to absorb the expense. These service fees can be as much as 30% of a ticket's face

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<sup>38</sup> *St. Luke's*, 8 F.4th at 488.

<sup>39</sup> *Id.* at 492.

<sup>40</sup> Lorsch, *supra* note 25.

<sup>41</sup> Taylor Swift fans call themselves "Swifties." See Marisa Dellatto, *More than Half of U.S. Adults Say They're Taylor Swift Fans*, *Survey Finds*, FORBES (Mar. 14, 2023), <https://www.forbes.com/sites/marisadellatto/2023/03/14/more-than-half-of-us-adults-say-theyre-taylor-swift-fans-survey-finds/?sh=20203d216877> [<https://perma.cc/T8B6-6E6K>].

value.<sup>42</sup> Furthermore, these fees tend to increase as the price of tickets increase.<sup>43</sup> This is significantly troublesome because Ticketmaster has been reported to artificially inflate its own prices through rewarding ticket scalpers.<sup>44</sup> The economic theory of market contestability posits that the threat of potential competition is crucial in keeping market leaders in check.<sup>45</sup> LNE's refusal to deal virtually diminishes this threat, leaving the market more susceptible to monopolistic tendencies.

Additionally, the significance of LNE's comparative market share cannot be overstated in this analysis. While ProMedica's subsidiary held a mere 17% of the insurance market share,<sup>46</sup> Ticketmaster stands in stark contrast. Ticketmaster controls more than 70% of the market for ticketing services, operating as the sole provider for nearly 80% of both domestic amphitheatres and top grossing arenas.<sup>47</sup> Holding a commanding position in the live entertainment sector, the company's actions undoubtedly have a magnified impact on market dynamics. A refusal to deal, when enacted by a firm with a smaller market presence, might be inconsequential as suggested by the Sixth Circuit. However, the same action by LNE carries the weight of potentially distorting market equilibrium. This disproportionate influence is the linchpin in arguments advocating for a more stringent application of antitrust principles in such scenarios.

## V. CONCLUSION

While LNE's business practices might be defensible under the illusion of efficiency and thoughtful market strategy, a deeper analysis reveals a pattern of behavior that runs counter to the principles of fair competition. LNE's significant market share and ability to coerce compliance creates a scenario

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<sup>42</sup> Mark Dent, *The Sneaky Economics of Ticketmaster*, HUSTLE (Apr. 11, 2023), <https://thehustle.co/the-sneaky-economics-of-ticketmaster/> [<https://perma.cc/FS43-PZHL>].

<sup>43</sup> *Id.*

<sup>44</sup> Anastasia Tsioulcas, *Ticketmaster Has Its Own Secret 'Scalping Program,' Canadian Journalists Report*, NPR (Sept. 20, 2018), <https://www.npr.org/2018/09/20/649666928/ticketmaster-has-its-own-secret-scalping-program-canadian-journalists-report> [<https://perma.cc/UB8B-CRQF>].

<sup>45</sup> Daniel Liberto, *Contestable Market Theory: Definition, How It Works, and Methods*, INVESTOPEDIA, <https://www.investopedia.com/terms/c/contestablemarket.asp#:~:text=According%20to%20contestable%20market%20theory,existing%2C%20well%2Destablished%20companies> [<https://perma.cc/7GMC-Q82L>] (updated July 31, 2022).

<sup>46</sup> *St. Luke's*, 8 F.4th at 489.

<sup>47</sup> Adam Hayes, *Is Ticketmaster a Monopoly?*, INVESTOPEDIA, <https://www.investopedia.com/is-ticketmaster-a-monopoly-6834539> [<https://perma.cc/F5BD-L29D>] (Feb. 18, 2023); *see also* Press Release, New Report Exposes Live Nation-Ticketmaster's Monopoly Control of Top Arenas and Amphitheatres Worldwide, Am. Econ. Liberties Project (June 15, 2023), <https://www.economicliberties.us/press-release/new-report-exposes-live-nation-ticketmasters-monopoly-control-of-top-arenas-and-amphitheatres-worldwide/> [<https://perma.cc/33KW-FEKE>].

where the refusal to deal transcends mere business prerogative and ventures into the realm of anticompetitive conduct. Inspired by the Sixth Circuit's analysis of the refusal-to-deal doctrine, it is clear that LNE's actions are in direct violation of the principles of fair competition. As such, it becomes imperative for antitrust authorities to continue to scrutinize LNE's actions, ensuring that market fairness is not stifled under the weight of a single dominant player.