Via ECF

The Honorable Arun Subramanian
Daniel Patrick Moynihan U.S. Courthouse
500 Pearl St., Courtroom 15A
New York, NY 10007

January 27, 2025

Re: *United States, et al. v. Live Nation Entertainment, Inc., et al.*, No. 1:24-cv-3973-AS

Dear Judge Subramanian:

Pursuant to the Court's January 23 Order, Plaintiffs submit this letter to address the Court's questions and demonstrate how Plaintiffs have sufficiently pled tying and damages claims. Plaintiffs request that the Court deny the motion with respect to both.

I. The Section 1 Tying Claim Should Not be Dismissed

A. The Facts Support a Tying Claim

1. Amphitheater Access and Promotion Services Are Separate Products.

Concert promotion services and access to large amphitheaters are distinct and offered to artists by different industry participants. *E.g.*, ECF 257 ("Compl.") ¶ 244. Defendants conflate these two distinct services because Live Nation conditions artists' access to its amphitheaters on the artists' agreement to also purchase promotion services. Other industry actors, however, disaggregate them. *See id.* ¶ 244. [redacted], for example, rents its amphitheater to artists, who separately choose their promoter. Exhibit A is an example of a rental contract between [redacted] and a promoter—in this case Live Nation—acting on behalf of a specific artist for a specific date. *See* Compl. ¶ 208. Similar to [redacted], other amphitheaters offer access unconditionally, and artists enjoy the benefits of competition between promoters.

Defendants' argument that promotion and venue services are always offered together is incompatible with their position that promoters are the customer in the amphitheater access market. Indeed, Defendants implicitly acknowledged that promotion and venue access are separate services when they admitted in previous litigation that *artists* are the consumer in each market: "[t]he relevant competition . . . is competition either among venues or among promoters for the patronage of artists." ECF 309-2 (MTD Opposition Ex. B), at 8, Br. of Live Nation in *IMP*. They have also admitted that "the artist and/or their management and agent teams always retain control over which venues to play." ECF 309-3 (MTD Opposition Ex. C), at 28, Live Nation's Mot. for Summary Judgment in *IMP*. Consistently, the Complaint alleges competition among venues regardless of the promoter. Compl. ¶ 25. Additionally, artist agents sometimes bypass a promoter and reach out directly to venues to reserve dates. *Id.* ¶ 208. Indeed, as one senior executive for another industry participant put it, "[redacted]" Dep Tr. (Sept. 27, 2023), at 53:18–54:3, attached as Ex. B. Further, there are certain bilateral economic terms and negotiations between artists and venues that are not shared with promoters, such as merchandising. Compl. ¶ 26.

2. *Additional Anticompetitive Conduct and Artists' Understanding of Live Nation's Conditional Sale Policy Demonstrates This Is Not a Unilateral Refusal to Deal.*

Plaintiffs' allegations and discovery answer this Court's inquiry as to (1) whether there is any "other separate anticompetitive conduct that's at issue" (Tr. at 7:11–12), and (2) whether "there are direct lines of communication between Live Nation and artists that are relevant to this tying claim and the anticompetitive conduct" (Tr. at 6:18–21). Plaintiffs allege that Live Nation enforces an unremitting policy conditioning access to its large amphitheaters on an agreement to also purchase concert promotion services from Live Nation. This policy is well-known in the industry, as Live Nation admits. *See* Compl. ¶¶ 113-116 ("if [artists] want to do an extensive amphitheaters tour with a lot of shows, they would typically be coming to us [for promotion services], and they do."); *id.* ¶¶ 207-14. Indeed, if artists were *unaware* of Live Nation's tying policy, artists would not feel compelled to use Live Nation's promotion services in those venues.

Plaintiffs expect that continued development of the record will support allegations that artists and their agents are not only familiar with Defendants' longstanding policy and practice—as illustrated by Defendants' statements (*see* Compl. ¶ 116) and the attached exhibits—but also that the artists and their agents take that policy and practice into account in choosing a promoter. As one industry participant explained, because of Live Nation's policy of conditioning amphitheater access on signing Live Nation as a promoter, "[redacted]." Ex. B, at 50:24–51:01. Exhibit C, for example, [redacted]. The next inferential step is clear: the promoter communicates the rejection and its rationale to the artist clients. This is exactly the sort of evidence that Plaintiffs will continue to develop through discovery (including in depositions).

Live Nation's longstanding and unremitting tying policy, its enforcement of that policy, and its communication of that policy to artists and their agents, is just the sort of "'assay by the monopolist into the marketplace' that interferes with the relationship between rivals and third parties" and distinguishes this case from a unilateral refusal to deal.[1] *New York v. Facebook*, 549 F. Supp. 3d 6, 31–32 (D.D.C. 2021) (citing *Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064, 1072 (10th Cir. 2013)). Because artists seeking to do an amphitheater tour know that they have to sign with Live Nation for promotion services if they want to play in Live Nation amphitheaters, Live Nation's conditional sale policy—which is coupled with a broad exclusivity clause in their tour contracts with Live Nation (as discovery has shown)—forces artists to choose Live Nation over competing promoters for their entire tour, including shows in non-Live Nation venues. *See* Compl. ¶ 41, 113, 116. Live Nation's policy can also interfere with the relationship between rival promoters and artists for tours that do not focus on amphitheaters, because artists often sign multi-year tour deals that include amphitheater legs and arena legs. Ex. B, at 51:22–52:12.

B. The Law Supports Plaintiffs' Tying Claim

Plaintiffs' allegations support a Section 1 tying claim under relevant case law. In addition to the material in our prior briefs, we note the following.

1. *The Concerted Action on the Section 1 Tying Claim Is the Conditioned Sale.*

[1] Defendants' tying policy not only restricts artists' choice of promoters but also reduces their compensation. Compl. ¶ 149.

In Defendants' reply brief, they raised for the first time the question of concerted action. On the Section 1 tying claim, the concerted-action requirement is satisfied by the contract that conditions artists' access to Live Nation amphitheaters on their purchase of promotional services from Live Nation. Compl. ¶ 41; *see Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 461 (1992); *Viamedia, Inc. v. Comcast Corp.*, 951 F.3d 429, 473 (7th Cir. 2020) ("A sale on the announced or implied condition that the buyer purchase the tied goods from the seller ordinarily satisfies the tying-agreement requirement.") (citing Areeda & Hovenkamp ¶ 1754 b-c, at 315-20); *Systemcare, Inc. v. Wang Lab'ys Corp.*, 117 F.3d 1137, 1142-43 (10th Cir. 1997) (en banc) ("[A] contract between a buyer and seller satisfies the concerted action element of section 1 of the Sherman Act where the seller coerces a buyer's acquiescence in a tying arrangement imposed by the seller."); *cf. Epic Games v. Apple,* Inc., 67 F. 4th 946, 982 (9th Cir. 2023) (even a "non-negotiated contract of adhesion" is concerted action under Section 1).

2. *Viamedia Is Directly Analogous to the Facts Here.*

Viamedia shows that tying is a distinct claim from a unilateral refusal to deal with a rival. Plaintiffs in *Viamedia* alleged both an illegal refusal-to-deal (with its rival in the ad rep market, Viamedia) and a tying arrangement (tying sales to MVPDs of Comcast's Interconnects with its ad rep services) under Section 2. *Viamedia*, 951 F.3d at 462, 474. The refusal-to-deal claim was based on Comcast's denial of Interconnect access to ad-rep rival Viamedia, and the tying claim was based on Comcast conditioning sales to MVPDs of Interconnect services on their use of Comcast's ad rep services. *Id.* at 453; *see id.* at 453-474. The court recognized that "[s]maller MVPDs . . . must work with an ad rep to interface with the Interconnects." *Id.* at 470-71. Notably, while recognizing that "the categories of conduct here are conceptually related and may overlap," *id*. at 453, the court did *not* apply the refusal-to-deal framework to the Section 2 tying claim. *Id.* at 466-474.

At the January 22 hearing, Your Honor, referencing *Viamedia*, asked what "Live Nation is doing" that is "separate" from its purported refusal to "rent these venues to rival promoters," Tr. at 12:19–25. The facts about tying in *Viamedia* are directly analogous to the allegations here.

First, the tying conduct here, as with the tying claim in *Viamedia*, is an interrelated "two-front strategy," 951 F.3d at 466, that is two sides of the same coin. *Id*. at 470 ("The entire purpose of [Comcast's] refusal to deal with Viamedia . . . was to force RCN and WOW! to become full-turnkey clients for ad rep services," and this forced sale of ad rep services was the "practical effect of banning from the Interconnects MVPDs that received ad rep services from Viamedia."). The court described "Comcast's . . . tying of Interconnect services to ad rep services" as being "implemented by refusing to deal with" Viamedia. *Id*. at 472. The refusal was the tying mechanism because, "[a]s a practical matter, [MVPDs] cannot self-provide ad rep services and must work with an ad rep to interface with the Interconnects." *Id*. at 471. Here, Plaintiffs similarly allege that Live Nation, as amphitheater owner, declines to contract with non-Live Nation promoters for the purpose of forcing artists "into its not-so-tender arms," *id*. at 474, which "[a]s a practical matter," *id*. at 471, leaves artists no choice but to hire Live Nation as their promoter. *See* Compl. ¶¶ 241-248.

Second, Plaintiffs also allege a "second anticompetitive act" directed toward artists. Namely, the Complaint alleges a "longstanding" Live Nation policy that "if an artist wants to use a Live Nation venue as part of a tour, he or she almost always must contract with Live Nation as the tour's concert promoter." Compl. ¶ 113. This is virtually identical in substance to Comcast's policy that "if an MVPD wants to get access to a Comcast [Spotlight] controlled Interconnect, it has to hire Comcast [Spotlight] as its ad sales representative." *Viamedia*, 951 F.3d at 470.

3. *Live Nation's Unremitting Conditional Sale Policy Is Sufficient.*

Contrary to Defendants' argument that Plaintiffs must allege a specific instance in which an artist directly attempted to rent an amphitheater from Live Nation and was rebuffed, Second Circuit law makes clear that Live Nation's long-standing, unremitting, and well-known policy is sufficient to establish coercion. *Hill v. A-T-O, Inc.*, 535 F.2d 1349, 1355 (2d Cir. 1976) ("[a]n unremitting policy of tie-in, if accompanied by sufficient market power in the tying product to appreciably restrain competition in the market for the tied product constitutes the requisite coercion"); *Park v. Thomson Corp.*, 2007 WL 119461 at *4 (S.D.N.Y. Jan. 11, 2007) ("[w]hen a policy of conditioned sales is demonstrated, proof of coercion on an individual basis is unnecessary" (discussing *Hill*)). There is no requirement that a plaintiff demonstrate coercion on an individual basis or any anticompetitive conduct apart from the unremitting policy described in the Complaint. *See* Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application ¶ 1754b ("The announced condition is thus the legal alternative for the express and unambiguous tying contract . . . That is all that is meant by 'coercion,' for the Supreme Court has made clear that the necessary condition is the key.").

4. Trinko *Does Not Apply to Section 1 of the Sherman Act.*

The Supreme Court has rejected the application of unilateral refusal-to-deal-with-rivals doctrine to Section 1 claims. *See Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 463 n.8 (1992). Lower courts have followed suit. *See* Pls.' Jan. 2025 Ltr., ECF 398. Defendants' sole support for this proposition is *Sambreel Holdings LLC v. Facebook*, *Inc.*, 906 F. Supp. 2d 1070, 1080 (S.D. Cal. 2012)), which misapplied the law (*see* Ex. D, Antitrust Division SOI at 2-3), and was found to be "not persuasive" by another court in the same district. *See Dream Big Media Inc. v. Alphabet Inc.*, 2024 WL 3416509, at *2, n.2 (N.D. Cal. July 15, 2024).

Trinko itself distinguishes Section 1 *concerted* actions from unilateral conduct under Section 2, noting that concerted action "presents greater anticompetitive concerns." *Verizon Commc'ns Inc. v. L. Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398, 410 n.3 (2004). *See also Am. Needle, Inc. v. Nat'l Football* League, 560 U.S. 183, 190-91 (2010) (concerted activity "deprives the marketplace of independent centers of decisionmaking that competition assumes and demands," and because concerted action is "discrete and distinct, a limit on such activity leaves untouched a vast amount of business conduct," there is "less risk of deterring a firm's necessary conduct" and "such conduct may be remedied simply through prohibition").[2]

C. Available Remedies Show that Plaintiffs Do Not Allege a Unilateral Refusal to Deal

The array of remedies available to Plaintiffs if they prevail on their tying claim also demonstrates that this claim is not a refusal to deal. In addition to the remedies described by Plaintiffs' counsel at the January 22 conference (Tr. at 10-12), the Court could prohibit Defendants from conditioning access to their amphitheaters on artists contracting with Live Nation for promotional services. *Artists* could work directly with venues, and separately with the promoter of their choosing, to put on a concert in a Live Nation amphitheater. This is not an

[2] Even assuming the refusal-to-deal doctrine applied to this Section 1 claim, even unilateral refusals to deal are not per se lawful. *See, e.g.*, *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 601 (1985); *Trinko*, 540 U.S. at 410 (approvingly citing *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973)). *Cf. Duke Energy Carolinas, LLC v. NTE Carolinas II, LLC*, 111 F.4th 337, 354 (4th Cir. 2024).

abstract remedy to an abstract harm: while promoters frequently reach out to venues on artists' behalf, artists already work directly with venues with respect to staging and lighting, and some artists use their agents to communicate with venues about available dates. *See* Compl. ¶¶ 26, 207-208; Ex. B, at 53:18–54:3. The fact that artists may be limited in their ability to self-promote their concerts, *see* Compl. ¶ 202, does not implicate their ability to separately work with venues and promoters. In the future, with such a remedy in place, artists (or their agent/manager representatives) might become the usual points of contact in negotiating amphitheater access.

D. Plaintiffs Should Be Permitted Leave to Amend the Complaint, as Necessary

While Plaintiffs believe they have sufficiently alleged a tying claim, should this Court dismiss that claim Plaintiffs request leave to amend. Discovery is far from complete, and additional evidence of the sort the Court has inquired about—artists' knowledge of Live Nation's policy and additional exclusionary conduct—can be developed through discovery. And because there is substantial factual overlap between this claim and Plaintiffs' amphitheater and promotions monopolization claims, Defendants would not be prejudiced by any amendment.

II. The Court Should Deny the Motion to Dismiss the State Plaintiffs' Federal Damages Claims

State Plaintiffs rest on their prior briefing and arguments of counsel, except to address the case law that Defendants identified for the first time in their January 21 letter. These cases do not undermine Plaintiffs' theory. At argument, Defendants invoked *Bakay v. Apple Inc.*, 2024 WL 3381034 (N.D. Cal. July 11, 2024), where plaintiffs lacked standing in part because the causal chain required multiple links to connect Apple's dealings with browser and engine developers to the increased cost of iPhones. *See also Feitelson v. Google Inc.*, 80 F. Supp. 3d 1019, 1027-28 (N.D. Cal. 2015) (multiple levels of distribution and plaintiffs failed to connect browser exclusivity to loss of innovation or supracompetitive prices for phones). Here, the chain of causation to consumer harm is but a single link. Defendants pay venues to limit consumers to only one ticketing option: Ticketmaster. The "site of Plaintiffs' injury" *is* the primary ticketing market. *Bakay*, 2024 WL 3381034, at *7.

Hogan v. Amazon.com, Inc., is similarly inapposite—simply put, in *Hogan*, plaintiffs did not pay for the allegedly monopolized product: merchants' purchases of logistics services. 2023 WL 3018866, at *2, *4–5 (W.D. Wash. Apr. 20, 2023); *see also Nypl v. JPMorgan Chase & Co.*, 2017 WL 1133446, at *5 (S.D.N.Y. Mar. 24, 2017) (plaintiffs claimed the end-user market was "completely different" from the corrupted market); *Palladino v. JPMorgan Chase & Co.*, 2024 WL 5248824, at *13–14 (E.D.N.Y. Dec. 30, 2024) (plaintiffs conceded that they were indirect purchasers and their claims were premised on injuries to third parties). Here, the retailer imposes a constraint, and even if it is characterized as "upstream," it forces consumers to pay more for, and enables retailers to profit more from, the retail product.[3]

[3] Whatever Defendants theorize about whether, absent that "upstream" constraint, some venues would have tried and succeeded in charging consumers more than in the actual world, drawing such inferences in Defendants' favor continues to be inappropriate at this stage. *See, e.g.*, *Apple Inc. v. Pepper*, 587 U.S. 273, 284 (2019) (denying motion to dismiss while acknowledging: "If the competitive commission rate were 10 percent rather than 30 percent but Apple could prove that app developers in a 10 percent commission system would always set a higher price such that consumers would pay the same retail price regardless of whether Apple's commission was 10 percent or 30 percent, then the consumers' damages would presumably be zero.").

Respectfully submitted,

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EXHIBIT A

(filed under seal)

EXHIBIT B

filed under seal)

EXHIBIT C

(publicly filed with redactions)

From: Marcus Fair [redacted]
Sent: 5/22/2024 8:56:47 PM
To: Velena Vego [redacted]
Subject: Re: Ameris Amp- Atlanta

[EXTERNAL]
Thank you for your email

Marcus (Snax) Allen
Pro Styles Entertainment
Director of Operations
[redacted]

On Wed, May 22, 2024 at 4:45 PM Velena Vego <[redacted]> wrote:
I'm sorry I could not help. V

LIVE NATION
Velena Vego | VP of 3rd Party Programming | Concerts
[redacted]
3060 Peachtree Rd NW, 19th Fl, Atlanta, Georgia, 30305, US

From: Marcus Fair <[redacted]>
Sent: Wednesday, May 22, 2024 4:44 PM
To: Velena Vego <[redacted]>
Cc: Jennifer Mendez <[redacted]>

Subject: Re: Ameris Amp- Atlanta

[EXTERNAL]
Straight concert .

On Wed, May 22, 2024, 4:44 PM Velena Vego <[redacted]> wrote:
Marcus we work with those two artist so I don't think I can get a green light to rent. is it for a chairty event or just straight concert?

Velena Vego | VP of 3rd Party Programming | Concerts
[redacted]
3060 Peachtree Rd NW, 19th Fl, Atlanta, Georgia, 30305, US

From: Marcus Fair <[redacted]>
Sent: Wednesday, May 22, 2024 4:42 PM
To: Velena Vego <[redacted]>
Subject: Re: Ameris Amp- Atlanta

[EXTERNAL]

Thank you for response

[redacted] or [redacted]

Marcus (Snax) Allen
Pro Styles Entertainment
Director of Operations
[redacted]

On Wed, May 22, 2024 at 4:38 PM Velena Vego <[redacted]> wrote:

Hi I need a little more information. Who are you trying to bring?

Velena Vego | VP of 3rd Party Programming | Concerts
[redacted]
3060 Peachtree Rd NW, 19th Fl, Atlanta, Georgia, 30305, US

EXHIBIT D

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

DREAM BIG MEDIA INC., et al.,

Plaintiffs

v.

ALPHABET, INC., et al.,

Defendants.

Case No.: 22-cv-02314-RS

STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA

Hon. Richard Seeborg

The United States respectfully submits this statement under 28 U.S.C. § 517, which permits the Attorney General to direct any officer of the U.S. Department of Justice to attend to the interests of the United States in any case pending in a federal court. The United States enforces the federal antitrust laws, including the Sherman Act, 15 U.S.C. §§ 1 and 2, et seq., and has a strong interest in their correct application.

The United States files this Statement of Interest in connection with the Court's order for additional briefing, ECF No. 61 ("Briefing Order"), relating to Defendants' Motion to Dismiss Plaintiffs' First Amended Complaint, which followed reassignment of the matter to this Court. The United States takes no position on the ultimate resolution of Defendants' Motion to Dismiss.

This statement addresses the prior court's overly broad holding in dismissing the original complaint in this case, which stated that "Google has the right to dictate the terms on which it will permit its customers to use and display its mapping services." ECF No. 45 ("MTD Order") at 5 (citing *Sambreel Holdings LLC v. Facebook, Inc.*, 906 F. Supp. 2d 1070, 1080 (S.D. Cal. 2012)). There is no such unqualified "right."

Defendants and the prior decision rely heavily on *Sambreel*. In *Sambreel*, the court disposed of a tying claim because plaintiff failed both to plead cognizable markets and to allege sufficient harm to competition. 906 F. Supp. 2d at 1080-81. In dicta, the *Sambreel* court opined that users "have no fundamental right to use Facebook" and that Facebook "has a right to dictate the terms on which it will permit its users to take advantage of the Facebook social network." *Id.* at 1080.

Relying on this dicta, the prior ruling previously disposed of the tying claim here on the ground that "Google has the right to dictate the terms on which it will permit its customers to use and display its mapping services." MTD Order at 5. And Google has argued the same in this Court on the pending motion. This reasoning is incorrect. As this Court has noted, under this reading of *Sambreel*, "it is difficult to imagine any circumstances under which a tying arrangement, positive or negative, could not be justified as merely an exercise of the defendant's 'right' to 'determine' or 'dictate' the terms on which its own product or service is used." Briefing Order at 3.

Indeed, in its historic monopolization case, the D.C. Circuit rejected a similar argument advanced by Microsoft. There, Microsoft argued that its "license restrictions are legally justified because, in imposing them, Microsoft is simply 'exercising its rights as the holder of valid copyrights.'" *United States v. Microsoft Corp.*, 253 F.3d 34, 62-63 (D.C. Cir. 2001) (quoting Microsoft's brief). The D.C. Circuit concluded this "argument borders upon the frivolous," as the claim that a company has "an absolute and unfettered right to use its intellectual property as it wishes" was "no more correct than the proposition that use of one's personal property, such as a baseball bat, cannot give rise to tort liability." *Id.* at 63.

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The *Microsoft* court's conclusion is consistent with long-standing precedent recognizing the antitrust laws impose limits on the "right" of a company to dictate the terms on which it will do business. As the Supreme Court recognized in *Lorain Journal Co. v. United States*, "[m]ost rights are qualified." 342 U.S. 143, 155 (1951). There is no unqualified right for a company to, for example, "select its customers and to refuse to accept advertisements from whomever it pleases" when its conduct runs into the Sherman Act's prohibitions. *Id.*; *see also Otter Tail Power Co. v. United States*, 410 U.S. 366, 380 (1973) (the Sherman Act imposes limits on a company's "uses of its dominant economic power"); *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919) (explaining that the Sherman Act imposes limits on a company's ability to "exercise his own independent discretion as to parties with whom he will deal"); *Chase Mfg. v. Johns Manville Corp.*, 2023 U.S. App. LEXIS 28328 at *23 (10th Cir. Oct. 25, 2023) (reversing grant of summary judgment where dominant firm threatened that its distributors must "stop doing business with [its rival] or lose access to [the dominant firm's] enormous thermal-insulation inventory").

The same principles apply here. Google has no unqualified right to determine how its mapping products may be used or displayed; rather, it is subject to the normal operation of the antitrust laws, including those governing positive and negative tying. It is important for this Court to reject the expansive and inaccurate holding from the prior ruling, which could be read to inappropriately limit the application of those laws.

Accordingly, the United States respectfully requests consideration of this Statement of Interest, and welcomes the opportunity to provide further assistance at the Court's request.

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Respectfully submitted,

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Dated: November 20, 2023