

## Litigator of the Week: Jonathan Jacobson

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Thanks to the Wilson Sonsini antitrust partner, one of the country's more colourful antitrust battles came to an end last week after a Maryland federal judge tossed out claims that entertainment giant Live Nation illegally forced touring artists to perform at its own arena.

Live Nation had been fighting claims since 2009 that it forced singers and bands to perform at its own venues when it promoted their national tours. The lawsuit was brought by DC music mogul and outspoken Live Nation critic Seth Hurwitz, who runs the Merriweather Post Pavilion south of Baltimore and alleges Live Nation pressured artists into playing at its own amphitheatre in Virginia instead of his.

The lawsuit survived motions to dismiss and a motion for summary judgment. Plaintiffs' lawyers, energised by the charismatic Hurwitz, were looking ahead to trial on the plaintiffs' central theory: that Live Nation used its

national clout in tour promotion to keep some of the world's biggest bands – the Goo Goo Dolls, Jonas Brothers and Panic! at the Disco among them – out of rival venues. Backing up their case was testimony from Harvard Law professor Einer Elhauge, a former Supreme Court clerk, adviser to President Obama and author of several influential antitrust textbooks.

That testimony ultimately proved the case's downfall, however. Not only did Judge Frederick Motz say Elhauge had it wrong about the market definition – tour promotion is an entirely local activity so it doesn't matter for this case that Live Nation runs tours all around the country, he said – he also excluded vast swathes of the antitrust expert's report for its methodology, which he said was “not based on sound logic or reasoning”.

For instance, Judge Motz said, Elhauge failed to show a market for artists who “prefer amphitheatres”, large open-air stadia with grass in the middle, because his figures about how much money musicians made from amphitheatre performances versus arena gigs did not show whether price increases would change that preference. He also faulted Elhauge for including data from plays and musicals that skewed the calculations in the plaintiffs' favour. These performances take place only once, either in an amphitheatre or not, Judge Motz said, and are therefore incapable of switching.

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Motz's problems with the testimony went on. Elhauge's deposition of Nine Inch Nails frontman Trent Reznor, in which the rock star explains why he prefers amphitheatres over arenas (an arena sometimes feels like a "cement dungeon", apparently) is contradicted by the band's own touring history, he said. He also slammed the report for its "arbitrary" conclusion that an artist who plays more than half their shows at an amphitheatre prefers that venue.

Wilson Sonsini Goodrich & Rosati partner Jacobson was lead counsel to Live Nation throughout the five years of litigation, and argued the *Daubert* and summary judgment in the Baltimore federal court in November. The results of his hard work – likely the first successful exclusion of Elhauge testimony and a strong order in his client's favour – make him *GCR's* first Litigator of the Week of 2015.