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Ram Bhadra

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RAM BHADRA*

Abstract

The United States Court of Appeals for the Ninth Circuit should reconsider the merits of hiQ Labs' antitrust arguments against Microsoft after the Supreme Court of the United States vacated the district court's judgement and remanded *hiQ Labs, Inc. v. LinkedIn Corp.* back to the district court. LinkedIn and its parent company Microsoft have violated Section 2 of the Sherman Antitrust Act by denying its direct competitor, hiQ Labs, in the downstream people data analytics market access to data available publicly and exclusively on LinkedIn. Limiting the consumers' and recruiters' option of downstream people data analytics tools to only the tools offered by LinkedIn is a violation of Section 2 of the Sherman Antitrust Act.

* Ram Bhadra is a Third-Year Law Student, with a focus in tech transactions and privacy law. After graduation, Ram wants to work with emerging companies and help them scale in an ethical manner.

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I. Introduction

The Ninth Circuit set a dangerous precedent in the *hiQ Labs, Inc. v. LinkedIn Corp.* case by dimssing hiQ's antitrust claims against LinkedIn.[1] LinkedIn continues to abuse it's dominant position in the newly emerging and lucrative downstream people data analytics market to unlawfully deny only hiQ and other competitors in this market access to publicly available portions of LinkedIn's website. LinkedIn's improper regulation and monopolization of a niche data analytics market by denying hiQ access to publicly available portions of LinkedIn's member profiles since 2017 is a violation of the Sherman Act.[2] The district court's failure to recognize the unprecedented, unique insights afforded by publicly available data generated on LinkedIn will allow Microsoft, LinkedIn's parent company, to abuse its market power to monopolize the marketplace of professional social data.

Antitrust laws in the United States were designed to prevent any person or corporation from taking private action to improperly interfere with the functioning of the competitive markets.[3] Emerging technologies pose significant challenges for the effective enforcement of these antitrust laws.[4] Legislatures have found it difficult to keep pace with the rapid changes to existing business practices or creation of a whole new market made possible due to emerging technologies.[5] Recent studies have highlighted the benefits of using social media platforms as a tool for political campaigning and fundraising, allowing individuals with very little name recognition to rapidly establish their brand by offering an authentic version of themselves.[6] While allowing direct access to constituents is an advantage for political newcomers, the more advanced advertising tools offered by social media websites hold enormous importance for well-funded leaders. In a recent interview to the *New York Times*, Congresswoman Ocasio-Cortez,

1. *hiQ Labs, Inc. v. LinkedIn Corp.*, 485 F. Supp. 3d 1137, 1142 (N.D. Cal. 2020).

2. Kieran McCarthy, *hiQ Labs v. LinkedIn Corp., the Web Scraping Saga Continues*, TECH. & L. MKTG. BLOG (Oct. 10, 2020), https://blog.ericgoldman.org/archives/2020/10/hiq-labs-v-linkedin-corp-the-web-scraping-saga-continues-guest-blog-post.htm.

3. *See generally* David Millon, *The Sherman Act and the Balance of Power*, 61 S. CAL. L. REV. 1219, 1258 (1988) (discussing how two or more competitors might agree among themselves to suppress competition, thereby creating a monopoly in a market in which there had previously been rivalry; consequently, these agreements should be held unenforceable).

4. Tom Wheeler, *Big Tech and antitrust: Pay attention to the math behind the curtain*. BROOKINGS INST. (July 31, 2020), https://www.brookings.edu/blog/techtank/2020/07/31/big-tech-and-antitrust-pay-attention-to-the-math-behind-the-curtain/.

5. Steve Lohr, *Forget Antitrust Laws. To Limit Tech, Some Say a New Regulator Is Needed*, N.Y. TIMES (Oct. 22, 2020), https://www.nytimes.com/2020/10/22/technology/antitrust-laws-tech-new-regulator.html.

6. *See How Social Media Is Shaping Political Campaigns*, WHARTON BUS. SCH. (Aug. 17, 2020), https://knowledge.wharton.upenn.edu/article/how-social-media-is-shaping-political-campaigns.

suggested, "the fact of the matter is if you're not spending $200,000 on Facebook with fund-raising, persuasion, volunteer recruitment, get-out-the-vote the week before the election, you are not firing on all cylinders."[7] The ability to collect and analyze large-scale data is one of the most lucrative business practices made possible by the recent advent of internet-based social media companies. Aggregation of large data has allowed social media giants to not only enter traditional fields such as political campaigning but also helped them create whole new markets that rely on various forms of aggregated data.[8] While these companies are the direct product of an unrestrained and unfettered competitive market that rewarded players for having the most creative and useful product, they are now using their dominant position in the market to engage in anticompetitive behavior.[9] Their consolidation of data collection and analytics has significantly increased the threshold for entry for newer companies, even if they have a more creative and useful product. It should be the judiciary's responsibility to preserve competition in these new areas by interpreting and applying the Sherman Act in a meaningful manner to emerging technologies, while legislatures deliberate meaningful amendments to the existing structure of antitrust laws.

Social media giants have gotten away with their anticompetitive behavior largely due to the lack of legislation and case-law dictating the application of the Sherman Act on the market of data analytics.[10] Over the past two decades companies like Google, Amazon, and Microsoft have been able to collect data at a level never witnessed or anticipated in the past. Amazon's consumer behavior data is essential for any analysis of U.S. e-commerce trends since over half of e-commerce transactions in the U.S. take place on Amazon.[11] Congressional oversight committees are also beginning to highlight how these companies' anticompetitive behavior goes beyond mere restricting access to unique data, but rather using this data to

7. Astead Herndon, *Alexandria Ocasio-Cortez on Biden's Win, House Losses, and What's Next for the Left*, N.Y. TIMES (Nov. 7, 2020), https://www.nytimes.com/2020/11/07/us/politics/aoc-biden-progressives.html.

8. *See* Laurence Goasduff, *Gartner Top 10 Trends in Data and Analytics for 2020*, GARTNER (Oct. 19, 2020), https://www.gartner.com/smarterwithgartner/gartner-top-10-trends-in-data-and-analytics-for-2020/.

9. Roger Mcnamee, *Big Tech Needs to Be Regulated. Here Are 4 Ways to Curb Disinformation and Protect Our Privacy*, TIME MAG. (July 29, 2020, 10:05 AM), https://time.com/5872868/big-tech-regulated-here-is-4-ways/.

10. *See* Sally Hubbard, *The case for why Big Tech is violating antitrust laws*, CNN (Jan. 2, 2019, 10:34 AM), https://www.cnn.com/2019/01/02/perspectives/big-tech-facebook-google-amazon-microsoft-antitrust/index.html.

11. Tugba Sabanoglu, *Projected Retail E-commerce GMV Share of Amazon in the United States from 2016 to 2021*, STATISTA (Dec. 1, 2020), https://www.statista.com/statistics/788109/amazon-retail-market-share-usa.

specifically quash competition and promote their own products.[12] While Amazon and Google can raise the argument that their users do not consent to their activity being publicly accessible, social media companies, especially LinkedIn, cannot raise the same defense since their consumers choose to make their profiles public. Thus, the most fundamental issue raised by LinkedIn's actions is whether a corporation the size of Microsoft in denying its competitors access to irreplicable, yet publicly available user data is an attempt to create a monopoly in violation of Section two of the Sherman Act.[13] In order to resolve this issue, these three specific questions must be answered: (1) Whether hiQ created a new 'People Analytics' market utilizing publicly-shared information on LinkedIn? (2) Does LinkedIn's cease and desist letter to hiQ in 2017 constitute an unlawful unilateral refusal to deal? and, (3) Did LinkedIn use its dominant market position to unlawfully lock-in its customers to use its premium analytics features?

II. Defining Downstream People Data Analytics Market

Pursuant to Section 2 of the Sherman Act, antitrust claims must be judged based on LinkedIn's conduct in the relevant product market.[14] The boundaries of hiQ's product are defined within the scope of identifying employees at the risk of flight and maximizing the workforce's efficiency by uncovering the full purview of current and potential employees' skillsets. The Ninth Circuit's analysis of the hiQ Lab's complaint and of the product market in its original decision was not consistent with the holding in the *In re Webkinz* case. In that case, the Ninth Circuit held that a product market must be defined by the product and the producers rather than the consumers and their anticipated needs.[15] The court further elaborated that, while considering the product and its substitutes, it is essential to consider whether the two products are reasonably interchangeable.[16] The product's interchangeability also determines whether these competitors would have the ability to deprive each other of significant levels of business.[17] Thus, any query like the one the district court undertook into the probability of success of an alternative product based on data scarped from Google and Facebook must ascertain whether the 'producers', individuals generating data on those websites, and the 'product', the information shared by these individuals, are

12. Ron Knoxx, *Congress's big tech report shows why antitrust history is so important*, WASH. POST (Oct. 8, 2020), https://www.washingtonpost.com/outlook/2020/10/08/congress-big-tech-anti-trust/.

13. The Sherman Antitrust Act of 1890, 15 U.S.C. § 2.

14. *Cty. of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1157 (9th Cir. 2001).

15. *In re Webkinz Antitrust Litig.*, 695 F. Supp. 2d 987, 993 (N.D. Cal. 2010).

16. *Id.* at 994.

17. *Thurman Indus., Inc. v. Pay 'N Pak Stores, Inc.*, 875 F.2d 1369, 1374 (9th Cir. 1989).

interchangeable with the 'product' and 'producers' in LinkedIn's data marketplace. Establishing the vast difference in the quality of data available on LinkedIn versus other social media and search engine sites, thus representing its own submarket, will also form the basis of antitrust claims against the monopolization of this submarket of people data.[18]

A. Submarket of People's Professional Data

LinkedIn has created a new submarket of downstream people data analytics by adopting a strategy that prioritized quality over quantity of users, or 'producers', and empowering these users with robust tools to help generate in-depth and relevant data, or 'product'. LinkedIn's business model differs greatly from Facebook and Twitter. While the latter two are focused on growing the sheer volume of users on their platform, the former has narrowly tailored its focus to creating an effective and professional social media experience. Despite this approach of quality over quantity, LinkedIn has still managed to make 1/7th of the world population a registered member on its website.[19] The district court acknowledged that there is a difference in the quality of data available on LinkedIn versus other sources; thus, it is a question of fact whether there is some elasticity of demand between them and whether those products are a part of the same market.[20] The difference between LinkedIn and Facebook's approaches to resolving the issue of fake accounts highlights the superiority of LinkedIn's safeguards. Facebook largely depends on reporting from its users to spot fake accounts.[21] On the other hand, LinkedIn reported that 95% of fake accounts were spotted and proactively blocked during the sign-up process.[22] LinkedIn achieved a high success rate at spotting fake accounts by "building automated fake account detection systems at scale for detecting and taking action against fake accounts. These allow LinkedIn to protect their members from bad activity by bad actors."[23] By reducing the number of fake or spam profiles on their platform, LinkedIn is able to prevent any drop in standards of the average LinkedIn user. Facebook and Twitter both allow users to have multiple

18. *Id.*

19. Aslam Salman, *Linkedin by the Numbers: Stats, Demographics & Fun Facts*, OMNICORE (June 29, 2021), https://www.omnicoreagency.com/linkedin-statistics/.

20. *Brown Shoe Co. v. U.S.*, 370 U.S. 294, 326 (1962).

21. Jack Nicas, *Does Facebook Really Know How Many Fake Accounts It Has?*, N.Y. TIMES (Jan. 30, 2019), https://www.nytimes.com/2019/01/30/technology/facebook-fake-accounts.html.

22. Jenny Colgate, *Fake LinkedIn Accounts – What to Do and What LinkedIn is Doing*, JDSUPRA (Sept. 9, 2020), https://www.jdsupra.com/legalnews/fake-linkedin-accounts-what-to-do-and-46153/.

23. Andrew Hutchinson, *LinkedIn Details Efforts to Stamp Out Fake Accounts in New Report*, SOC. MEDIA TODAY (Sept. 13, 2018), https://www.socialmediatoday.com/news/linkedin-details-efforts-to-stamp-out-fake-accounts-in-new-report/532218/.

accounts without violating user agreements. Users can lawfully generate content under different accounts without using their own names for any of the accounts.[24] While such usage may not always pose harm to the integrity of the platform, it still dilutes the authenticity of the users or producers in generating the data. On the other hand, LinkedIn limits its users to creating an account either under their own name or their business's name. This policy does not guarantee 100% success at preventing the dilution of the user base but increases the probability that the users allowed on the platform will generate data relevant for recruiters and companies.[25]

The second part of LinkedIn's strategy to elevate the quality of the data being generated involves the actual user interface of the website or app. Rather than focusing on integrating numerous gimmicks with the hope of attracting the widest range of users, LinkedIn has focused on building tools that allow users to highlight information that is relevant to a professional setting. Creating a section for users to submit their CVs simultaneously drives up the quality of the employee data while rendering several legacy recruitment portals obsolete. Giving the users and producers the option to verify their skills and knowledge through subject-specific tests increases the reliability of the people data. Facebook's reliance on several third-party solutions to create a space on the website for users to host their CVs makes it more difficult to analyze large data sets due to the lack of uniformity, in addition to raising serious privacy concerns.[26] At the same time, there is no avenue for users to generate professional data on Google unless Google redirects to the user's public LinkedIn profile. The extensive list of differences in LinkedIn's approach to creating a social network, compared to Facebook and Twitter, highlights the unique characteristics and uses of the product generated in LinkedIn's submarket of people's professional data.[27] However, hiQ's analysis goes a step forward by integrating this in-depth professional data with the user behavior data that is also publicly available on LinkedIn. hiQ's data analytics tools are not only able to identify the ideal candidates based on their professional skillset, but they also inform recruiters of potential employees who might become available for hiring, or of existing employees whose behavior on LinkedIn would suggest that they might be preparing to leave their position within the company. Despite

24. *How to Manage Multiple Accounts*, TWITTER, https://help.twitter.com/en/managing-your-account/managing-multiple-twitter-accounts.

25. Bruno Aziza, *Why LinkedIn is More Valuable than Facebook*, LINKEDIN (Aug. 31, 2015), https://www.linkedin.com/pulse/why-linkedin-more-valuable-than-facebook-bruno-aziza/.

26. Sophie Deering, *LinkedIn vs. Facebook: Battle of the Professional Networks*, UNDER RECRUITER, https://theundercoverrecruiter.com/linkedin-vs-facebook-battle-professional-network-infographic/.

27. *Brown Shoe Co. v. U.S.*, 370 U.S. 294, 326 (1962).

Twitter and Facebook's enormous user base, they cannot provide this level of insight simply because employees do not rely on these platforms for professional growth, making it extremely difficult to identify relevant trends based on their activities on these platforms.

The district court's initial judgement also raised the possibility of companies using internal data from their own Human Resources department as an alternative to the downstream people data. This query was a direct result of the district court's failure to recognize the clearly defined product offered by hiQ. One of the essential parts of hiQ's analysis involves identifying wider industry trends that require incorporating people data not limited to only the company's current employees. Forcing recruiters to revert to relying solely on their internal data would set the entire recruiting industry back a decade and prevent it from leveraging the cutting-edge data analytics technology. The historical usage of paper-filing systems or legacy human capital management systems within the HR department creates another barrier for recruiters to incorporate this data into modern analytics tools. hiQ was one of the first companies to identify the narrowly tailored downstream people data generated on LinkedIn as the ideal solution to most of the traditional HR problems.

The final step in proving that LinkedIn's downstream people data is its own unique submarket involves looking at public recognition. While under the product market analysis, public recognition or consumer demand cannot suffice as proof, as evidenced by the ruling in *Brown Shoe Co.* which allowed the submission of public recognition as one of the factors to prove the existence of a submarket.[28] Over 80% of B2B leads in the U.S. come through LinkedIn, and over 95% of recruiters in the U.S. rely on LinkedIn for finding the ideal candidate compared to only 66% relying on Facebook.[29] These statistics underscore the recruiters' and corporations' reliance on LinkedIn's downstream people data to help identify those employees that were at the highest risk of leaving the company, as well as uncover the full scope of current and potential employees' skills. By limiting the features and user interface to ensure an ideal professional social network experience, LinkedIn also limited the number of irrelevant actions users could take on the website. The direct benefit of this design is the streamlining of the data sorting process for data aggregators like hiQ and LinkedIn, itself. Hence, the data generated on this platform gives a dramatically more thorough insight into the behavior of current and potential employees by taking into account their actual behavior beyond the skills listed on their resume but does not muddy the data with irrelevant information - such as their 'likes' on Facebook.

28. *Id.*

29. Mansoor Iqbal, *LinkedIn Usage and Revenue Statistics (2020)*, BUS.OF APPS, https://www.businessofapps.com/data/linkedin-statistics (last updated Nov. 6, 2020).

B. Denial of Access to Essential Facility

This also presents an opportunity to reexamine the intellectual property issues that have led to the Federal Circuit's blanket reluctance to apply the essential facility doctrine to all technological innovations.[30] In order to successfully regulate social media companies, it is imperative that the Ninth Circuit creates clear boundaries that define and separate the companies' intellectual property from the user generated data, which usually consists of several innovative technological components.[31] Allowing social media companies to threaten third parties with copyright infringement suits for accessing publicly available data would be wrong as a matter of law, because the social media companies have no ownership over the user generated data. However, as established in the previous section, this user generated data is the key product, so denying access to this product goes beyond the scope of mere exclusionary conduct and is an attempt to create unlawful monopolies by denying competitors access to the essential facility. The Seventh Circuit established the four elements that are necessary to prove liability under the essential facilities doctrine: "(1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility."[32]

The question of LinkedIn's control of the essential facility is easy to answer because LinkedIn directly owns the marketplace and has unfettered control over granting access to its competitors. The publicly available data on LinkedIn's website is an essential facility of the downstream people data analytics market. The district court in *Daisy Mountain Fire Dist. v. Microsoft Corp.* held that the essential facility doctrine applies only to tangible assets and not technological innovations. However, both the plaintiff and the court in that case were citing the fact that Microsoft's refusal to share their technology and innovation did not constitute an antitrust violation.[33] The application of the essential facilities doctrine as prescribed in *Daisy Mountain Fire Dist* does not compel LinkedIn to share access to its own proprietary data analytics tools or the source code of the website.[34] LinkedIn has valid intellectual property rights over their technology.

On the other hand, as the facts pled in hiQ Labs' First Amended Complaint and in the previous section suggest, the user data constitutes a

30. *Daisy Mountain Fire Dist. v. Microsoft Corp.*, 547 F. Supp. 2d 475, 489 (D. Md. 2008).

31. Peter Brown, *Social Media Postings May Risk User Copyrights*, N.Y. L. J. (May 20, 2020). https://www.law.com/newyorklawjournal/2020/05/20/social-media-postings-may-risk-user-copyrights/.

32. *MCI Commc'ns Corp. v. Am. Tel. & Tel. Co.*, 708 F.2d 1081, 1095 (7th Cir. 1983).

33. *Daisy Mountain Fire Dist.*, 547 F. Supp 2d at 489.

34. *Id*.

tangible commodity that is essential for any companies involved in the downstream data analytics market, and separate from LinkedIn's own intellectual property.[35] LinkedIn has no legal claim over the data generated by users on its platform, and neither does this data constitute any form of technological innovation. Despite having no legal claim of ownership over the user generated data, LinkedIn is in a unique position as being a competitor in this market while also wielding unfettered power over the regulation of the marketplace. LinkedIn's central argument is built around its desire to protect its user's intellectual property, rather than its own, raising serious question about LinkedIn's standing and motives. LinkedIn have could successfully plead a case of copyright infringement if the hiQ Labs used the data from LinkedIn's website to create a similar professional social media website. The hiQ Labs use of the public data does not create a competing product with LinkedIn's professional social media forum.[36]

The extensive discussion in the previous section about the lack of any alternatives to data available on LinkedIn answers the second element of the test. Competitors such as hiQ simply cannot replicate the high-quality professional people data from any other source. Even if a company launched a hypothetical direct competitor to LinkedIn's professional social media website, it would take several years for it to generate a fraction of the data generated at LinkedIn daily since LinkedIn isn't just the market leader, but the sole player.[37] The third element is fulfilled by the cease-and-desist letter sent by LinkedIn to all its competitors in 2017.[38] This letter was a clear abuse of LinkedIn's control of the essential facility. LinkedIn cannot legally nor physically restrict access to this essential facility, because it is a part of the internet that is accessible to everyone without any cost or permission. This fact also sets the current case apart from another Microsoft case, because LinkedIn has not been ordered to take any steps to facilitate the hiQ Labs's access to the data.[39] This difference also explains LinkedIn's decision to resort to baseless legal threats to deny its competitors (such as hiQ) access to the essential facility, since there were no demands or attempts by the hiQ Labs to access Microsoft's legally protected intellectual property. The fact that LinkedIn sent the cease-and-desist notice only to its competitors is significant proof that LinkedIn's actions were fueled by the desire to create

35. *hiQ Labs, Inc. v. LinkedIn Corporation*, 485 F. Supp. 3d 1137, 1143, 1152 (N.D. Cal. 2020).

36. *Id*. at 1149.

37. Jörgen Sundberg, *Why Doesn't LinkedIn Have Any Serious Competitors?*, UNDER COVER RECRUITER, https://theundercoverrecruiter.com/linkedin-competitors/.

38. *hiQ Labs, Inc*., 485 F. Supp. 3d at 1144.

39. *Daisy Mountain Fire Dist.*, 547 F. Supp. 2d at 477.

an unlawful monopoly within the downstream people data analytic rather than any attempt at protecting its users' interests.

LinkedIn's use of legal threats to block access to the publicly available data on its website proves that there was a higher cost for LinkedIn to block access to the essential facility than the cost of simply allowing its competitors to continue accessing the public profiles. Furthermore, hiQ's analytics business does not impose any additional cost on LinkedIn's professional social media business.[40] hiQ does not rely on any of LinkedIn's data aggregation tools; rather, hiQ employs its own data scraping tools to collect publicly available data on LinkedIn. Finally, there is a compelling rebuttal to any intellectual property argument LinkedIn might raise under the theory laid out in *Daisy Mountain Fire Dist*. The potential to leverage this enormous data set for commercial gains and improving recruitment practices drove hiQ to create an innovative data scraping and analytics tool.[41]

The facts and legal arguments presented above prove the existence of a niche downstream people data analytics market. A close analysis of LinkedIn's behavior also raises doubts over any defenses LinkedIn might put forth to justify its unlawful regulation of this newly emerging market. LinkedIn does not have any intellectual property claim over the content generated by its users. The cease-and-desist letter LinkedIn sent hiQ and other competitors was a blatant attempt at unlawful monopolization of this market by targeting its main competitors and denying them access to the essential facility. The Ninth Circuit's failure to recognize the product market as pled by hiQ labs will create unreasonable standards to successfully plead the boundaries of the product market in emerging industries allowing social media giants to monopolize several different product markets emerging from their own platforms.

III. Definition of Voluntary Course of Dealing

For several years, LinkedIn lacked its own sophisticated data analytics tools and was pleased to let hiQ scrap data from its website to help LinkedIn users, especially recruiters, leverage the downstream people data.[42] On May 23, 2017, LinkedIn abruptly ended this mutually beneficial relationship by sending a cease-and-desist letter to hiQ.[43] The Supreme Court of the United States has held that, while private businesses are free to conduct business with whom they desire and are free to refuse to conduct business with whom

40. Drake Bennett, *The Brutal Fight to Mine Your Data and Sell It to Your Boss, Bloomberg* (Nov. 15, 2017), https://www.bloomberg.com/news/features/2017-11-15/the-brutal-fight-to-mine-your-data-and-sell-it-to-your-boss.

41. *hiQ Labs, Inc*., 485 F. Supp. 3d at 1137.

42. *Id* at 1151.

43. *Id*.

they do not, there is a narrow exception to this freedom.[44] The court has held that businesses have a qualified right to refuse to conduct business with a competitor as long as that refusal is not a purposeful means of monopolizing intersate commerce in violation of the Sherman Act.[45] The court has reasoned that, under the principle of voluntary course of dealings, it is unlawful for a business to maintain its monopoly by suddenly refusing to conduct business with its direct rivals after several years of mutually beneficial commercial relations if termination of such relations results in short-term losses for the business.[46] The court emphasized the businesses' right to exclude cannot be infringed by antitrust laws.[47] Instead, it laid out the test to differentiate between lawful exclusion and anti-competitive behavior by drawing a distinction "between practices which tend to exclude or restrict competition on the one hand and the success of a business which reflects only a superior product, a well-run business, or luck, on the other."[48] The court in Aspen, citing FTC v. Qualcomm, laid out three specific circumstances that would establish a defendant's anticompetitive behavior: "(1) it "unilateral[ly] terminat[es] . . . a voluntary and profitable course of dealing"; (2) "the only conceivable rationale or purpose is 'to sacrifice short-term benefits in order to obtain higher profits in the long run from the exclusion of competition'"; and (3) the refusal to deal involves products that the defendant already sells in the existing market to other similarly situated customers."[49] LinkedIn's conduct checks the boxes for these three circumstances since it unilaterally terminated its profitable relation with hiQ in 2017 and specifically refused its competitors access to publicly accessible areas of its website.

LinkedIn already sold in the existing market to other similarly situated customers.[50] Under the totality of circumstances, LinkedIn's conduct checks the boxes for three circumstances since it unilaterally terminated its profitable relation with the hiQ Labs in 2017 and specifically refused its competitors access to publicly accessible areas of its website.

A. Legally Permissible Competition vs. Anticompetitive Conduct

The district court initially also erred in demanding that the hiQ Labs establish LinkedIn's conduct met all three circumstances individually because it is impossible to index every possible anticompetitive outcome of

44. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 606, 611 (1985).
45. *Lorain Journal Co. v. United States*, 342 U.S. 143, 155 (1951).
46. *Novell, Inc. v. Microsoft Corp*. 731 F.3d 1064 (2013).
47. *Aspen Skiing Co.*, 472 U.S. at 585.
48. *Id*. at 596.
49. *Federal Trade Commission v. Qualcomm Incorporated*. 969 F.3d 974, 993 (2020).
50. *hiQ Labs, Inc*., 485 F. Supp. 3d at 1151.

a company's refusal to deal with its competitors. As a solution to this issue, the Tenth Circuit instead suggested to focus on, "whether, based on the evidence and experience derived from past cases, the conduct at issue before us has little or no value beyond the capacity to protect the monopolist's market power"[51] As established in the prior sections, the hiQ Labs's access of the publicly available LinkedIn pages came at no additional cost to LinkedIn, thus eliminating cost cutting as a reason for LinkedIn's unilateral refusal to deal. Additionally, the court must also consider if LinkedIn had any other compelling reason, such as consumer complaints about the aggregation, to justify its unilateral termination of its dealing with the hiQ Labs. However, it would be difficult for LinkedIn to raise any of these theories as well since the hiQ Labs did not violate any copyright or privacy laws while accessing the public profiles.

It must be noted that only LinkedIn's competitors lost access to its data market, while other large corporations, such as Google and Bing, continue to access LinkedIn's website and aggregate the user data. This is an example of the third circumstance seeing that LinkedIn refused access to the product solely to competitors while continuing to permit free access to others. Proving that LinkedIn's conduct met the first two circumstances as well is more challenging due to lack of a formal relationship between the hiQ Labs and LinkedIn. It is difficult to point to specific data that would serve as the proof of the profitability of their relationship. Instead, the court should employ creative methods to analyze whether LinkedIn's conduct met the first two circumstances. The district court correctly noted that after filing the cease-and-desist letter, LinkedIn did not reduce the price of its analytical tools to unlawfully eliminate its competition. However, a more nuanced look at LinkedIn's pricing and state of competition from 2017 to present day reveals that LinkedIn did lose profits in order to eliminate competition. In the early half of 2017, LinkedIn made some crucial changes to the pricing strategy for its most lucrative product, job postings.[52] There is a high probability that recruiters, whether subscribed to LinkedIn's Recruiter premium package or relying on external services such as the one provided by the hiQ Labs at the time, would continue making extensive use of the job posting function. Thus, LinkedIn took concerted steps to further consolidate its position as the sole professional social media platform prior to serving its competitors in the analytics market the cease-and-desist notice. The price

51. *Novell, Inc.*, 731 F.3d at 1072.

52. Sue Winkler & Kevin MacTaggart, *LinkedIn's New Pricing Model for Job Postings*, HR SOURCE (May 23, 2017), https://www.hrsource.org/maimis/Members/Articles/2017/05/May_23/LinkedIn_s_New_Pricing_Model_for_Job_Postings.aspx.

change in 2017 hurt LinkedIn's competitors, like Indeed, in job portal industry as well.

In the latter half of the year LinkedIn essentially rendered the hiQ Labs's downstream people data analytics business obsolete by denying it access to over 75% of the relevant data.[53] Despite consolidating the downstream data analytics market since 2017, LinkedIn has not increased the price for any of its premium features, not even in response to an average inflation rate of 2.01% per year since 2017.[54] Therefore, a nuanced analysis of LinkedIn's behavior since 2017 reveals that it has been sacrificing short-term profits in order to eliminate its competition entirely. This behavior fulfills the second circumstances prong. Unfortunately, the informal nature of the hiQ Labs's voluntary course of dealing with LinkedIn makes it extremely difficult to establish the mutual profitably of the relationship.

Several experts have raised the issue that data is getting increasingly saturated within the hands of the traditional giants. Furthermore, the district court's first ruling in this case will entirely eradicate the competition in the downstream people data analytics market. LinkedIn's data analytics tools will have access to over 75% of relevant data, in stark contrast to the hiQ Labs and other competitors, who will have to try to scrap as much of the remaining publicly available people data as possible.[55] hiQ Labs recognizes that granting some of the claims laid out in hiQ Labs' FAC would have required the court to utilize a seldomly applied antitrust law in a bold new manner. However, the court's reluctance to reign in LinkedIn's unilateral termination of a voluntary and profitable course of dealing will empower Microsoft and other social media companies to unlawfully assert the right to exclude whomever they choose from user data they have no copyright claim over. Companies like Google and Facebook especially, in-addition to Microsoft, will abuse this lack of regulation to create a whole new set of intellectual property rights where none exist, and then assert these rights to thwart competition through baseless cease and desist letters.

B. Illegal Tying

While LinkedIn has sacrificed short-term profits in order to eliminate competition, it has abused its monopoly over the downstream people data market in order to unlawfully tie its analytical tools with job posts. By

53. Maddy Osman, *Mind-Blowing LinkedIn Statistics and Facts (2020)*, KINSTA (Oct. 19, 2020), https://kinsta.com/blog/linkedin-statistics/.

54. *Current US Inflation Rates: 2009-2020*, US INFLATION CALCUATOR (Oct. 10, 2020), https://www.usinflationcalculator.com/inflation/current-inflation-rates/.

55. Eric Goldman, *hiQ Labs v. LinkedIn Corp., the Web Scraping Saga Continues*, TECH. & MKTG. L. BLOG (Oct. 10, 2020), https://blog.ericgoldman.org/archives/2020/10/hiq-labs-v-linkedin-corp-the-web-scraping-saga-continues-guest-blog-post.htm.

eliminating competitors in the downstream data analytical market, LinkedIn is creating the implied condition that recruiters interested in maximizing the effectiveness of their job postings on LinkedIn need to also purchase LinkedIn's analytics tools.[56] Thus, in this scenario the job postings are the tying product, and the data analytics services are the tied product. The Ninth Circuit has defined a 'tying arrangement' as a "device used by seller with market power in one product market to extend its market power to distinct product market by conditioning sale of one product (tying product) on buyer's purchase of second product (tied product)." [57] To test whether LinkedIn has created implied conditions around the use of the job postings that meet the requirements of a tying agreement, the court needs to analyze users' reliance on this feature and whether consumers are forced to also use LinkedIn's analytics feature as a part of meaningfully using the job postings feature.

IV. Use of Dominant Position to Lock-In Customers/Tying

The court in *Joseph v. Amazon* outlined three factors that need to be established to prove a case of illegal tying: "(1) that the defendant tied together the sale of two distinct products or services; (2) that the defendant possesses enough economic power in the tying product market to coerce its customers into purchasing the tied product; and (3) that the tying arrangement affects a 'not insubstantial volume of commerce' in the tied product market."[58] Under the rule of reason analysis, the hiQ Labs only need to establish a prima facia case of antitrust against LinkedIn's alleged tying practices.[59] The characteristics that set LinkedIn apart from other job portals are sufficient to establish a prima facia case for LinkedIn's analytics products being entirely distinct from its regular job posting products. In the prior section, it was established that users share a wide variety of rich data that includes explicitly stating their hard skills and revealing more individualized aspects of their personalities through their behavior on the website. Even though LinkedIn performs this extra function, it also offers the same services offered by traditional job portals. From this point, any competitor would only need to plead facts that would show attempts by LinkedIn to offer these two products in a tying agreement.

LinkedIn cannot be held in violation of any antitrust laws for the quality of its social media network that is an essential facility, not only in the

56. *BookLocker.com, Inc. v. Amazon.com, Inc.*, 650 F. Supp. 2d 89, 98 (D. Me. 2009).

57. J*oseph v. Amazon.com, Inc.*, 46 F. Supp. 3d 1095, 1102 (W.D. Wash. 2014).

58. *Id.*

59. Herbert Hovenkamp, *The Rule of Reason,* 70 FLA. L. REV. 81, 103-04 (2018).

downstream people data market, but also in the overall talent acquisition and optimization industry. LinkedIn has been able to consolidate this market share through the quality of their product. However, this amount of market dominance also implies that LinkedIn is capable of imposing illegal tying agreements. The important statistics to include in the analysis of this issue are that 92% of B2B marketers include LinkedIn in their digital marketing strategy and 6 out of 10 recruiters use LinkedIn's Industry Insight tools, which are a part of their premium recruiter packages. There is also a significant barrier to entry for LinkedIn's competitors because of LinkedIn's market share of both downstream people data market and the overall talent acquisition and optimization industry.

Secondly, it is sufficient for competitors to raise a reasonable expectation of restraint to output or price increase. By limiting the number of companies that can produce valuable insights using downstream people data to one, LinkedIn is restraining the output of the industry. At the same time, monopolization of the data analytics market allows LinkedIn to raise the prices for their premium packages for the recruiters, while continuing to maintain low prices for individual users.[60] This would create a predicament for recruiters and undermine any arguments LinkedIn could raise under the 'Fixed Sum' theory of Chicago School.[61] Therefore, even if recruiters realize that the second tied in product, in this case the analytics tools, is not worth the prize, the demand for the first product will not go down because LinkedIn will continue to be the essential facility for employees to showcase their skills and share data that can be used to identify valuable market trends. This gives LinkedIn the ability to enforce tying agreements by exploiting their consumers' reliance on one of their products. In 2001, the Supreme Court of the United States ruled that Microsoft could not take away its consumers' choice of browser once the consumers had purchased the computer.[62] The facts of the two cases are analogous because PC and LinkedIn both constitute an essential facility for the relevant industry. Their dominance stems from their user's ability to use the platforms to take advantage of cutting-edge technology. The internet browser was the cutting-edge technology in the Microsoft case and advanced analytics tools was the technology in LinkedIn's case. Just like Microsoft, only LinkedIn currently has the market power to create a platform that can collect narrowly tailored data at such a high rate. Neither Microsoft nor LinkedIn are the only competitors in the market who can create tools and technology to make the best use of this platform. Accordingly, the district court should sustain its original ruling of

60. *Id.* at 86.

61. *Tying: The Current Balance Between Per Se And Rule Of Reason Analysis, C137 Ali-Aba* 233, 235 (Jan. 26, 1995).

62. *United States v. Microsoft Corp*., 253 F.3d 34, 49 (D.C. Cir. 2001).

not permitting LinkedIn to use its control over the industry's essential facility to deny consumers access to valuable technologies created by competing firms.

To avoid antitrust scrutiny, LinkedIn has not explicitly tied the purchase of job postings with the purchase of LinkedIn's analytics tools. Instead, LinkedIn has used its dominant position in the market to create implied conditions that would force recruiters purchasing to also purchase the analytics tools. Accordingly, the court here should employ a similar approach as the Tenth Circuit in *SCFC ILC, Inc. v. VISA USA, Inc*.[63] In that case, the court ruled that, when the challenged tying conduct is thought to be exclusionary rather than collusive, the competitors need to show that at least one substantial and presumptively efficient rival or potential rival has been excluded.[64] For this reason, the hiQ Labs' First Amended Complaint adequately pled its tying case against LinkedIn by showing that LinkedIn excluded one of its biggest and most efficient rival, hiQ.

LinkedIn offers two distinct services, hosting narrowly tailored downstream people data and analyzing downstream people data. While being distinct in the function they perform, these services complement each other very well. Any attempt to offer these products together should raise antitrust concerns. A closer scrutiny of LinkedIn's suppression of competition within the analytics field through unlawful regulation reveals the foundation for LinkedIn to enforce tying agreements. The Supreme Court of the United States has established that denying consumers alternatives to a particular product amounts to unlawful tying of that product. Accordingly, the Ninth Circuit should recognize LinkedIn's illegal tying to prevent other social media giants from tying their own competing services in industries that rely on these companies very own platform for essential commodities like the data.

V. Conclusion

In sum, supportors of preservering strong competitive markets should join hiQ in urging the Ninth Circuit to overturn its original decision and hold LinkedIn in violation of Section 2 of the Sherman Act for its unlawful attempts to regulate a competitive market and enforce illegal tying agreements. There is the potential for mass antitrust abuses by social media giants if the district court fails to reverse. Primarily, for the purposes of Section 2 of the Sherman Act, there is a very lucrative and narrowly defined downstream people data analytics submarket. Secondly, the hiQ LinkedIn's website is an essential facility within this niche submarket, and this gives

63. *SCFC ILC, Inc. v. Visa USA, Inc.*, 36 F.3d 958 (10th Cir. 1994).

64. *Id*.

LinkedIn significant market power within this submarket. Finally, denying competitors the ability to offer their products to consumers by companies that have significant market power amounts to unlawful tying to the company's own product. Further, courts should focus on the spirit of the U.S. antitrust laws that are designed specifically to ensure that no one player can utilize their dominant market position to unlawfully restrict competition. Without new legislation, there will continue to be litigation on antitrust issues raised by emerging technologies. During this period, the Ninth Circuit can set a strong precedent by acknowledging the power to leverage large data that is at the heart of a significant number of these new industries. This will guide other courts around the nation to ensure that large social media corporations do not abuse their market dominance in collecting data.