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Title: LIVE *AID*? ASSESSING THE ABILITY OF THE TICKETMASTER-LIVE NATION CONSENT DECREE TO RESTORE COMPETITION LEVELS IN THE PRIMARY TICKETING MARKET

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ABSTRACT:

On February 10, 2009, Ticketmaster and Live Nation entered into a definitive merger agreement. The merger, when consummated, would create Live Nation Entertainment ("LNE") by combining, inter alia, Live Nation's event promotion business, its venue ownership or operation arm, and its primary ticketing services with Ticketmaster's primary ticketing services business, its talent management operations, and its secondary ticketing sales. Over the following eleven and a half months, the Antitrust Division of the United States Department of Justice conducted an investigation into the potential anti-competitive effects of the proposed merger. The Antitrust Division concluded that the combination of Ticketmaster and Live Nation would likely substantially lessen competition in the provision and sale of primary ticketing services for major concert venues in the United States.

Rather than attempting to stop the merger, the Antitrust Division and merging parties entered into a settlement agreement creating remedial conditions for the merger to go forward. To address the potential anticompetitive effects of the transaction, the remedy combines a divestiture package with certain behavioral restrictions governing the conduct of the merged firm towards its competitors. On July 30, 2010, the merger between Ticketmaster and Live Nation was consummated.

Although the long-term implications of this transaction are currently unclear, some of the early information, such as the dramatic increase of Ticketmaster's contractual renewal rate with venues from 85% to 95% as well as AEG's decision to forgo a key structural component of the remedy and work with Outbox rather than Ticketmaster's Host, give early indication that the remedy may be weaker than portrayed. The goal of this paper is to provide an apparatus that will allow individuals to monitor how well the consent order is restoring the competition lost as a result of the merger. This paper identifies a number of independent, easy to monitor, indicia that observers can employ to assess whether or not the consent decree is working.

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LIVE AID? ASSESSING THE ABILITY OF THE TICKETMASTER-LIVE NATION CONSENT DECREE TO RESTORE COMPETITION LEVELS IN THE PRIMARY TICKETING MARKET

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I. <u>INTRODUCTION</u>

On July 30, 2010, following the public comment period required under the Clayton Act, the U.S. District Court for the District of Columbia approved the consent agreement permitting a merger between Ticketmaster and Live Nation.[1] To address the potential anticompetitive effects of the transaction, the Antitrust Division and the merged entity agreed to a judicial order requiring divestitures and mandating certain conduct remedies.[2] Although the long-term implications of this transaction are currently unclear, the goal of this paper is to provide an apparatus that will allow individuals to monitor how well the consent order is restoring the competition lost as a result of the merger.

The manner in which both Ticketmaster and Live Nation came to dominate their respective markets stems from a trend of ongoing consolidation within the live events industry.[3] Both entities have managed to acquire important firms that they had formerly competed with, as well as other firms that are vertically associated with their core business.[4] As a result, both entities have arguably acquired the ability to suppress meaningful competition within their respective industries and cause harm to consumers.[5] Since the consolidation of the concert industry began nearly 12 years ago, the average ticket price for the country's top 100 musical tours has increased by nearly *160%!*[6] The merger furthers this trend of industry consolidation by allowing these giants to unite.[7]

This paper is structured as follows. Section II provides a general overview of the structure of the concert industry and the parties to the merger. Section III discusses the Department of Justice's investigation of the merger. Section IV explores the provisions of the consent decree designed to address the anticompetitive effects of the transaction. Finally, Section V identifies a number of independent, easy to monitor, indicia that observers can employ to assess whether or not the consent decree is working.

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1 Final Judgment, *United States v. Ticketmaster Entm't Inc., et al.,* No.1:10-cv- 00139 (D. D.C. Jul. 30, 2010) Proposed consent judgments in antitrust cases brought by the United States are subject to a sixty-day comment period, during which a court determines whether entry of the proposed Final Judgment "is in the public interest." 15 U.S.C. § 16(e)(1).

2 Plaintiff United States' Response To Public Comments, *United States v. Ticketmaster Entm't Inc., et al.,*, No.1:10-cv-00139-RMC (D. D.C. Jun. 21, 2010) [hereinafter Response to Public Comments].

3 *See infra* Section II and accompanying notes and text. Although the live events industry encompasses more than musical performances (e.g., sporting events), this paper focuses solely on concerts.

4 *Id*.

5 Opposition to the [Proposed] Final Judgment, *United States v. Ticketmaster Entm't Inc., et al.*, No.1:10-cv- 00139, at 7 (D. D.C. Jun. 21, 2010) [hereinafter Exhibit B – Jam Productions].

6 The increase is 90%, after adjustment for inflation through application of the Consumer Price Index.. Between 1996, the year SFX began, and 2000, the year SFX was sold to Clear Channel, the average ticket price increased 58%, from $25.81 to $40.74. Between 2000 and 2005, the year Clear Channel spun off Live Nation into its own publicly traded company, the average ticket price for the country's top 100 musical tours rose from $40.74 to $56.88, an additional 39% increase. In 2008 the average ticket price for the top 100 tours jumped to $67.35. *Id.*

7 See *infra* Section III and accompanying notes and text.

II. <u>CONCERT INDUSTRY</u>[8]

A. Structure

Presenting a live music concert requires coordination among multiple parties. [9] First, a manager or agent representing an artist books the event with a promoter, such as Live Nation.[10] In turn, these promoters contract with a venue, coordinate production services with local companies, and advertise for the event. In addition to providing the venue itself, the venue operators also coordinate concessions and security at the event.

A primary ticketing agent, such as Ticketmaster, works with the venue to provide a working infrastructure to sell the concert tickets.[11] The agent is responsible for distributing primary ticket inventory through channels such as the Internet, independent sales outlets, telephone, and sometimes the venue's box office. The ticketing company also provides the technology and hardware that allow venues to manage fan entry at the event.[12] Although this is the general structure of the market, some venues provide their own primary ticketing services.

B. Parties

1. TICKETMASTER:

For over two decades, Ticketmaster has been the dominant primary ticketing service provider to major concert venues throughout the United States.[13] Ticketmaster's business model involves levying a variety of "service" (or "convenience") fees, for the ability to "use" its computerized ticketing platform, which are then added to the face value of the ticket.[14] These fees are the primary source of Ticketmaster's revenues, although Ticketmaster typically shares a percentage of the money from these fees with venues.

Primary ticketing, the initial marketing and sale to customers of tickets to an event, has been a lucrative operation for Ticketmaster.[15] Prior to the merger, Ticketmaster offered two primary ticketing services to venues, Host and Paciolan. Host is a Ticketmaster-managed platform for selling tickets through Ticketmaster's website as well as ancillary sales

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8 For an excellent overview of the operations of the concert industry, please see: James D. Hurwitz, *Commentary: Ticketmaster – Live Nation*, AAI White Paper (2009), http://www.antitrustinstitute.org/files/TICKETMASTER%20Revised.4.28.09_043020092221.pdf.

9 Amended Compl., *United States v. Ticketmaster Entm't Inc., et al.,* No.1:10-cv- 00139, at 8 (D. D.C. Jan. 25, 2010).

10 *Id.* at 8-9.

11 Competitive Impact Statement, *United States v. Ticketmaster Entm't Inc.*, *et al.,* No.1:10-cv- 00139, at 3 (D. D.C. Jan. 25, 2010) [hereinafter CIS].

12 Amended Compl., *supra* note 9, at 9.

13 *Id.* at 10.

14 *Id.*

15 CIS, *supra* note 11, at 3.

channels.[16] Paciolan is a venue-managed platform used for selling tickets through the venue's own website and other sales channels.

Ticketmaster's market dominance can be attributed in large part to ongoing consolidation within the primary ticketing industry and the technological superiority of its platform. Ticketmaster was founded to address the concerns of promoters and venue owners, who were often unable to sell out shows despite high demand for concerts.[17] At the time, buyers were solely reliant on different vendors to purchase tickets to a concert. If a particular vendor was sold out of their allotted tickets, concertgoers were unable to purchase tickets even though more tickets might have been available from other vendors within the area.[18] In response, Ticketmaster developed a computerized ticket vending platform that could concurrently facilitate ticket sales and shield promoters from some of the financial risks required to present a concert.[19]

Under Ticketmaster's system, concert-goers are charged “service fees” on individual ticket sales to “secure” their attendance at an event.[20] Venue owners or operators and promoters are then given their agreed percentage of the profits from the service fees that Ticketmaster collects. In exchange for securing their investments, venue owners, and sometimes promoters, give Ticketmaster the exclusive right to ticket at their shows.[21]

These exclusive agreements have resulted in the exodus or absorption of a majority of Ticketmaster's former competitors.[22] With minimal competition present, Ticketmaster has continued to grow. It has increased the number of its exclusive ticketing agreements throughout the country while continuing to acquire former competitors and vertically associated companies.[23]

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[16] *Id.* at 4.

[17] Ticketmaster Group, Inc., Business Information, Profile, and History, p. 3 (2005) *available at* http://companies.jrank.org/pages/4428/Ticketmaster-Group-Inc.html

[18] *Id.*

[19] United States Securities and Exchange Commission, Form 10-K, filed by Ticketmaster Entertainment, Inc, p. 1 (Feb. 25, 2010) *available at* http://phx.corporate-ir.net/phoenix.zhtml?c=194146&p=irol-SECTicketmaster. [hereinafter Ticketmaster 10-K]**.**

[20] Amended Compl., *supra* note 9, at 10.

[21] The Company will generally enter into written agreements with individual clients to provide primary ticket sale services for specified multi-year periods, typically ranging from 3 to 5 years. While under these exclusive contracts, clients may not utilize, authorize or promote the services of third party ticketing companies or technologies. Ticketmaster 10-K, *supra* note 19, at 2.

[22] *See* Steve Knopper, *Everyone Hates Ticketmaster — But No One Can Take It Down,* WIRED*,* (Nov. 1, 2010) *available at* http://www.wired.com/magazine/2010/11/mf_ticketmaster/. (stating that “Ticketmaster didn’t come to rule an industry by suffering interlopers. Over the past 30 years, the company has killed or eaten nearly every competitor: Ticketron, TicketWeb, TicketsNow, Paciolan, and Musictoday”).

[23] Prior to it's merger with Live Nation, Ticketmaster acquired a majority interest in Front Line Management Group, Inc., the largest artist management group in the country. Front Line represents over 200 artists. In 2008, Front Line's artists accounted for nearly 25% of gross sales for the top 50 tours in 2008 in North America. Response to Public Comments*, supra* note 2, at 28.

This dominance within the primary ticketing market has been further solidified by Ticketmaster's e-commerce arm. Ticketmaster.com is the number three e-commerce site in the world.[24] In 2009, tickets sold on Ticketmaster.com represented 77% of Ticketmaster's Primary Ticketing Sales.[25] Digital delivery has also significantly lowered Ticketmaster's distribution costs.[26] Consequentially, Ticketmaster's revenues from providing primary ticketing services have been far in excess of its nearest competitor.

As of 2011, Ticketmaster is the largest provider of primary ticketing services to major concert venues in both the United States and throughout the world.[27] It provides primary ticketing services to more than 80% of the major concert venues in the United States.[28] None of Ticketmaster's rivals, other than Live Nation before it merged with Ticketmaster, acquired more than a 4 % stake within this market.[29] Ticketmaster's contract renewal rate with venues typically exceeds 85 %. In 2010, following the merger, this renewal rate notably increased to ***95%!***[30]

2. Live Nation

Live Nation is the largest concert promoter in the United States, earning more than $1.3 billion in revenue from its U.S. promotions business in 2008 and promoting shows representing 46% of the concert tickets sold at major concert venues in 2009.[31] Live Nation is also the second largest owner/operator of venues in the U.S. It owns or operates over 75 entertainment venues representing 90% of the outdoor amphitheaters within the United States.[32] Live Nation's North American Music business principally involves the promotion of live music events at Live Nation owned and/or operated

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24 Live Nation Entertainment Inc., *Investor Presentation,* at 6 (Oct. 1, 2010) *available at* http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9Mzk3NzkyfENoaWxkSUQ9NDA0MjE5fFR5cGU9MQ==&t=1.

25 *Id. at 5*

26 Amended Compl., *supra* note 9, at 11. The cost-per-ticket to Ticketmaster for tickets sold through its website is significantly lower than the cost-per-ticket for tickets sold at retail outlets or over the telephone.

27 *Id.*

28 "Major concert venues" are the 500 U.S. venues generating the greatest concert revenues in 2008. Concert ticket revenues from events at these venues represent more than 90% of the concert ticket revenues at all venues reported in Pollstar. CIS, *supra* note 11, at 4.

29 *Id.* at 9. The only other primary ticketing companies with greater than a 1% share in 2008 were Tickets.com (4%), Front Gate Tickets (3%), New Era Tickets (2%), MusicToday (2%), and Tessitura (1%).

30 Live Nation Entertainment Inc., *Investor & Analyst Day Presentation,* at 83 (Jul. 15, 2010) *available at* http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9NTM4Nzh8Q2hpbGRJRD0tMXxUeXBlPTM=&t=1. [hereinafter LNE Investor & Analyst Presentation].

31 Exhibit B – Jam Productions, *supra* note 5 at 4. The market share of its closest competitor, AEG Live, was under 20 %,

32 Live Nation controls 40 of the 48 amphitheaters with fan capacity in excess of 15,000 fan capacity. Opposition to the [Proposed] Final Judgment, *United States v. Ticketmaster Entm't Inc., et al.,*, No.1:10-cv- 00139, at 11 (D. D.C. Jun. 21, 2010) [hereinafter Exhibit A – It's My Party, Inc., et al.] Live Nation also maintains a monopoly over or controls the only amphitheater in 18 of the largest 25 designated market areas in the United States. *Id.*

venues and in rented third-party venues within the United States and Canada.[33]

Similar to Ticketmaster, Live Nation's market dominance can be in large part attributed to rapid consolidation within its respective market.[34] Live Nation emerged from SFX, a company that began purchasing high volumes of radio stations in the early 1990's.[35] This consolidation accelerated following the enactment of the 1996 Telecommunications Act. At the end of 1996, SFX owned over 70 stations in 20 markets.

In 1997, SFX entered the concert promotion industry, employing essentially the same consolidation-centered tactics it used within the radio market.[36] In order to develop a company that was capable of operating on a national level, SFX began acquiring local concert promoters.[37] These acquisitions allowed SFX to submit bids to promote entire tours, as opposed to individual dates.[38] Independent promoters that were operating in only one city or region could not compete with these national tour offers and many were forced to exit the business.[39] By 1998, after only 1 year in the market, SFX asserted that it had gained control of more than 40 % of the concert promotion market nationwide.[40] This aggressively expansionist behavior eventually prompted the U.S. Justice Department to launch an informal investigation inquiring whether SFX was attempting to monopolize the concert promotions business.[41] No formal action followed, however.

In 2000, SFX was acquired by Clear Channel Communications, creating Clear Channel Entertainment, an entertainment powerhouse that owned numerous venues and maintained holdings in the radio and promotions markets.[42]

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[33] *Id.*

[34] Exhibit B – Jam Productions, *supra* note 5 at 3. Live Nation is made up of 24 promoters whose businesses were acquired beginning in 1996; Contemporary Productions, Sunshine Promotions, Cellar Door, Pace, Nederlander, Delsener/Slater, the Don Law Company, Oakdale Concerts, A. H. Enterprises, Bill Graham Presents, Avalon, DiCesare-Engler, Evening Star, Universal Concerts/House of Blues, Belkin Productions, Electric Factory Concerts, Magicworks, Fantasma, Concert Productions International, Concerts/Southern Promotions, the Entertainment Group, New Era Promotions, Feyline Concerts and Cardenas Fernandez Associates.

[35] United States Securities and Exchange Commission, Form 10-K, filed by SFX Entertainment Inc., p. F-7. (Apr. 28, 2000), *available at* http://google.brand.edgar-online.com/EFX_dll/EDGARpro.dll?FetchFilingHTML1?ID=633138&SessionID=shY_Hex104xhmw7 [hereinafter SFX 10-K, 2000].

[36] *See* Melinda Newman, *Indie Concert Promo Biz Reshaped by SFX's Rise*, BILLBOARD, September 4, 1999, at 1, *available at* http://www.allbusiness.com/retail-trade/miscellaneous-retail-retail-stores-not/4624309-1.html

[37] Exhibit A – It's My Party, et al., *supra* note 32, at 7.

[38] *Id.*

[39] *Id.* at 8.

[40] *Id.*

[41] SFX 10-K, 2000, s*upra* note 35, at 20.

[42] At the time of this acquisition, Clear Channel owned 867 radio stations and 19 television stations in the United States, as well as 550,000 outdoor advertising displays. SFX owned or operated 120 entertainment venues in 31 of the top 50 U.S. markets, including 16 amphitheaters in the top 10 markets. United States Securities and Exchange Commission, *Joint Press Release – Clear Channel Communications, Inc. and SFX Entertainment, Inc. Announce Merger*, filed by SFX Entertainment, Inc, p. 2 (Feb. 29, 2000) *available at* http://google.brand.edgar-online.com/EFX_dll/EDGARpro.dll?FetchFilingHtmlSection1?SectionID=483291-1579-12399&SessionID=OA2WHj8AoLr9qs7.

Clear Channel allegedly used this synergy to the disadvantage of its competitors. Competitors have asserted that Clear Channel required artists promoted by the company to appear at venues controlled by the company, while artists promoted by competitors were precluded from appearing at these venues.[43] In addition, independent venue owners and operators were prohibited from providing competing venue services to artists that Clear Channel Entertainment promoted.[44]

These business practices put the few independent promoters and venue owners that remained in the market at an insurmountable competitive disadvantage. Ultimately, many were either acquired by Clear Channel or forced to exit the business entirely.[45] Like SFX before it, Clear Channel's aggressively expansionist conduct also triggered antitrust scrutiny. Several antitrust actions were filed against Clear Channel alleging that the company had unlawfully acquired monopoly power in the concert promotion market and engaged in numerous anticompetitive actions to maintain and exploit this power.[46]

In 2005, Clear Channel's live event operations were sold to Live Nation, which had recently acquired its biggest competitor, House of Blues.[47] These two acquisitions made Live Nation the largest concert promoter in the nation, a position it has maintained, virtually unchallenged, since.[48] To illustrate this, in 2009, Live Nation promoted shows representing 46% of the concert tickets sold at major concert venues. The market share of its closest competitor, AEG Live, was under 20 %. This left more than a 25% cushion between Live Nation and its nearest "competitor."[49]

With the reduction of competition, ongoing industry consolidation has been especially devastating for consumers. Between 1996, the year SFX began, and 2000, the year SFX was sold to Clear Channel, the average ticket price for the country's top 100 musical tours increased by 58%![50] These substantial price increases have become a continuing pattern. Between 2000 and 2005, the year Clear Channel spun off Live Nation into its own publicly traded company, the average

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[43] Exhibit A – It's My Party, Inc., et al., *supra* note 32, at 7.

[44] *Id.* at 8.

[45] *Id.*

[46] *Nobody In Particular Presents, Inc. v. Clear Channel*, 311 F. Supp. 2d 1048 (D. Col, 2004). (Alleging that Clear Channel used its market power in the rock-format radio market to leverage its dominance and foreclose competition in the promotion of artists' live concerts); *Heerwagen vs. Clear Channel Inc.*, 2003 WL 24467832 (S.D.N.Y., 2003) (Class action alleging sharp increases in ticket prices that were unrelated to inflation - specifically that from 1991 to 1996, concert ticket prices rose by 21 percent while the Consumer Price Index showed that all prices grew by 15 percent).

[47] Jim DeRogatis, *Monster Deal Could Oust the Little Guy: Live Nation's Acquisition of House of Blues Could Mean the Beginning of the End for Independent Promoters*, CHI. SUN-TIMES, (Jul. 16, 2006), at D6 *available at* http://www.jimdero.com/News%202006/HouseofBluesAcquisition.htm. (explaining that "Live Nation [SFX] set out to create a giant national monopoly, spending billions of dollars buying up regional concert promoters").

[48] CIS, *supra* note 11, at 4.

[49] *Id.* at 4.

[50] Even when adjusted to remove the impact of inflation through application of the Consumer Price Index, the increase is still a huge 48.3%. Exhibit B – Jam Productions, *supra* note 5, at 7.

ticket price for the top 100 musical tours in the country climbed from $40.74 to $56.88, an additional 39% increase.[51] In 2008 the average ticket price for the top 100 tours jumped *again* to $67.35![52]

III. Merger

A. *Competition*

Prior to 2008, Live Nation had an exclusive, long-term contract designating Ticketmaster as the company through which it would sell concert tickets. At the end of 2008, Live Nation announced that it would not renew its contract with Ticketmaster and would begin competing against Ticketmaster in the primary ticketing business. Using technology licensed from the leading ticketing services provider in Germany, CTS-Eventim, Live Nation launched its own primary ticketing service. Live Nation intended initially to use this service for the venues it controlled, until the service's reliability became established and it could compete effectively for other venues.[53] Next, Live Nation entered into an agreement with SMG - the largest venue management company in the nation - to provide exclusive ticketing services for SMG's venues.[54] This agreement helped Live Nation to establish an even greater presence within the venue management and primary ticketing markets.

Live Nation was at this point in a far better position than any other prior competitor to challenge Ticketmaster's dominance in the primary ticketing market.[55] As Ticketmaster's largest (and now former) customer, Live Nation had been responsible for selecting the primary ticketing provider for over seventy-five live entertainment venues throughout the United States; these venues had been the source of 17% of Ticketmaster's 2007 ticket sales.[56] In addition, Live Nation's agreement with SMG removed Ticketmaster's second largest customer and the source of 6% of its revenues.[57] Finally, as a promoter, Live Nation's relationships with many third-party venues gave it the ability to offer access to primary ticketing as well as to promotions.

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51 The increase is 23.1%, after adjustment for inflation through application of the Consumer Price Index. *Id.*

52 This increase is 18.4%, or 7.5% when adjusted for inflation. *Id.* Live Nation Entertainment recently reported losses of $228.4 million for 2010, citing high ticket prices as the primary cause. Ben Sisario, "*Weak Ticket Sales Contribute to Large Loss for Live Nation*," NEW YORK TIMES, (Feb. 28, 2011), at B8 *available at* http://www.nytimes.com/2011/03/01/business/media/01live.html?_r=1.

53 Live Nation entered into an agreement with CTS Eventim, Europe's largest ticket seller and the second largest primary ticket seller worldwide. The agreement provided Live Nation with licenses to use and adapt CTS Eventim's software. Amended Compl., *supra* note 9, at 12.

54 As the largest venue management company in the United States, SMG had the ability to control or influence the selection of primary ticketing companies at more than 40 major concert venues. CIS, *supra* note 11 at 10.

55 Jeff Leeds, "*Top Concert Promoter Sets up a Challenge to Ticketmaster*," NEW YORK TIMES, (Dec. 21, 2007), http://www.nytimes.com/2007/12/21/business/21music.html?_r=1&pagewanted=print Dec. 21, 2007.

56 Hurwitz, *supra* note 8 at 15.

57 *Id.* at 17.

Live Nation had also expected to compete on price with Ticketmaster.[58] According to Live Nation, its concert promotion business operated on substantially smaller margins than Ticketmaster's margins from ticketing. This enabled Live Nation to charge lower service fees *and* operate profitably. Thus, entry into primary ticketing created an opportunity for Live Nation to increase its overall profit margin and disrupt Ticketmaster's business model by lowering service fees.

Live Nation was able to leverage these assets to emerge as a viable competitor to Ticketmaster within the primary ticketing market.[59] Within only three months of entry, Live Nation had secured a 16.5% stake in the market, decreasing Ticketmaster's market share from 82.9% to 66.4%.[60] Venue owners benefitted from the competitive pressure that Live Nation exerted on Ticketmaster.[61] In order to secure long term deals with customers before Live Nation could sign them, Ticketmaster began offering more attractive renewal terms to customers with expiring contracts than it had customarily offered.[62] Despite (or rather, because of) this promising competitive outlook between the two entities, Ticketmaster ultimately moved to eliminate Live Nation's competitive presence from the market. In early 2009, Ticketmaster and Live Nation announced their intention to merge.[63]

B. *Investigation*

On February 10, 2009, Ticketmaster and Live Nation entered into a definitive merger agreement.[64] The merger, when consummated, would create Live Nation Entertainment ("LNE") by combining, inter alia, Live Nation's event promotion business, its venue ownership or operation arm, and its primary ticketing services with Ticketmaster's primary ticketing services business, its talent management operations, and its secondary ticketing sales. The agreement also included the international operations of the two companies.[65] The transaction, therefore, would put the largest seller of primary tickets, the world's largest promoter, the third-ranked e-commerce site worldwide, the second largest owner/operator of venues, the second largest secondary seller (i.e., reseller) of tickets, and the leading music sponsorship company in the

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58 Amended Compl., *supra,* note 9, at 12.

59 *Id.* at 13. The company began directly competing with Ticketmaster for ticketing contracts, successfully defeating Ticketmaster to secure the ticketing rights to the Roseland Ballroom in New York City.

60 *Id.* at 13.

61 CIS, *supra* note 11, at 11. Ticketmaster also acquired a controlling interest in Front Line, an artist management firm. This acquisition enabled Ticketmaster to offer venues a package of primary ticketing services and concert content that could rival Live Nation's ticketing-and-content package.

62 *Id.*

63 Amended Compl., *supra,* note 9, at 13.

64 *Id*. The transaction was executed on an all-stock "merger of equals" basis with a combined estimated enterprise value of $2.5 billion.

65 Live Nation Entertainment Inc., *Investor & Analyst Day Presentation*, *supra* note 30, at 93.

world all under the same roof.[66]

Over the following eleven and a half months, the Antitrust Division of the United States Department of Justice conducted an investigation into the potential anti-competitive effects of the proposed merger. It concluded that the combination of Ticketmaster and Live Nation would likely lessen competition in the provision and sale of primary ticketing services for major concert venues in the United States.[67] The Department's findings are discussed below.

1. Vertical Issues

Although the Antitrust Division did not officially challenge the merger on vertical grounds, the Department contends that it did consider whether the vertical combination of Ticketmaster's ticketing business, its Front Line artist management business and Live Nation's concert promotion business would have adversely affected competition in the concert promotion market.[68] The Antitrust Division concluded that this was unlikely for two reasons.[69] First, despite remaining an important player in the artist management business, the Department determined that the merged firm would not have the ability to exclude promotional competitors from the market.[70] Since a manager owes a fiduciary obligation to secure the best deal for its clients, a managed artist could simply sign with another artist manager if the merged firm acted or threatened to act contrary to the interests of that artist. Second, the Department reasoned that artists would have the ability and incentive to prevent the merged firm from exercising its market power in the concert promotion market.[71] The two primary ways the merged firm could exercise this market power would be through reducing the compensation paid to artists or restricting the number of concerts that could be booked, both of which would harm the economic interests of artists. Thus, if the merged firm chose to behave in this manner, the acts could simply turn to another promoter. The Department of Justice concluded that these factors would minimize the threat of the merged entity using its management arm to exclude promotional competitors from the market.[72]

As a result, the Division determined that it could not prove that the vertical integration resulting from the merger would significantly harm competition in the concert promotion market and declined to include vertical elements in its

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66 Live Nation Entertainment, *Investor Presentation,* at 6, 8. *(*Oct. 1, 2010), *available at* http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9MzM5MjMwOXxDaGlsZElEPTM5Nzc5MnxUeXBlPTI=&t=1 (last visited Feb. 3, 2011).

67 Response to Public Comments, *supra* note 2, at 4.

68 Response to Public Comments, *supra* note 2, at 15-16. CIS, *supra* note 11, at 16.

69 Response to Public Comments, *supra* note 2, at 27.

70 *Id.* CIS, *supra* note 11, at 17.

71 Response to Public Comments, *supra* note 2, at 28.

72 CIS, *supra* note 11, at 16.

case.[73] It therefore, chose to focus solely on the merger's horizontal impact within the primary ticketing market.

2. Horizontal Issues

Examining the horizontal impact of the merger, the Antitrust Division identified the product market as the provision of primary ticketing services to major concert venues throughout the United States.[74] Upon measuring and comparing market share and the number of consumer choices available pre-merger and post-merger, the Antitrust Division found that after the merger, the newly-created entity, Live Nation Entertainment ("LNE"), would control over 82% of the market for providing primary ticketing services to major concert venues. By contrast, no other company would possess more than a 5% market share.[75]

The Antitrust Division was particularly concerned that the merger would eliminate one of the only companies that could compete head-to-head against Ticketmaster within the primary ticketing services market.[76] Post-merger, no other companies would possess the combination of reputation for reliability, experience, scale of operation, and technology that had enabled Live Nation to emerge as a viable competitor to Ticketmaster.[77] As a result, the merged firm would have the ability unilaterally to force major concert venues to accept higher convenience and service fees, thereby increasing the overall amount consumers would have to pay for their tickets. The Antitrust Division also feared that this dominant position would eliminate incentives for LNE to innovate, as no other viable market participants could challenge the merged entity on these grounds.[78]

The Department could not identify any countervailing factors that outweighed these anticompetitive concerns. It determined that, post-merger, companies entirely new to the industry would be unable to enter the market in a timely, successful, and profitable way.[79] The merging entities could now combine their individual expertise to bundle primary ticketing services and concert promotion, requiring a new entrant to offer both of these services to major venues in order to compete effectively.[80] In addition, the technology required to provide primary ticketing services to major concert venues

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[73] Response to Public Comments, *supra* note 2, at 15.

[74] The Department determined that because the merged firm could price discriminate domestically any effects of the proposed transaction on foreign venues would be distinct from any effects on domestic venues, and thus it was appropriate to include only major concert venues located in the United States within the relevant market. *Id.* at 5.

[75] Amended Compl., *supra* note 9, at 15.

[76] Response to Public Comments, *supra* note 2, at 5.

[77] Amended Compl., *supra* note 9, at 17.

[78] *Id.* at 16.

[79] CIS, *supra* note 11, at 9.

[80] *Id.* at 11.

was complicated and costly.[81] Because of the high volume of inquiries and purchases, especially when tickets are first offered for sale, an established reputation for reliability and the capacity to manage such circumstances was extremely desirable to concert venues.[82] Furthermore, the nature of the industry was conducive to concert venues renewing contracts at a high rate. The cost of retraining employees and using new technology discouraged venues from switching to another primary ticketing company.[83] Therefore, the large profit margins Ticketmaster had enjoyed prior to the merger would be even more sheltered after the transaction.

As a result, the Antitrust Division determined that the proposed merger between Ticketmaster and Live Nation would likely substantially lessen competition for primary ticketing services to major concert venues in the United States, in violation of Section 7 of the Clayton Act.[84] This loss of competition would eliminate the financial benefits that venues enjoyed during the period when Live Nation exerted competitive pressure against Ticketmaster. The proposed transaction would also heighten the barriers to entry and expansion in the market for primary ticketing services. The Antitrust Division concluded that this resulting increase in market concentration, loss of competition, and absence of any reasonable prospect of significant new entry or expansion by market incumbents would likely result in higher prices for major concert venues and reduce innovation in primary ticketing services.[85] Rather than attempting to stop the merger, the Division entered into a settlement agreement creating remedial conditions for the merger to go forward. Off the record interviews with officials reveal that one consideration was the recognition that Live Nation had previously contracted with Ticketmaster for distribution services. Had the merger been prohibited, it was said, this type of contract could easily have been reinstated, thus leaving the industry structure no more competitive than if the merger had not been challenged at all.

On January 25, 2010, the Antitrust Division filed a civil antitrust Complaint seeking to enjoin the proposed merger.[86] At the same time, the United States filed a Hold Separate Stipulation and Order ("Hold Separate") and a proposed Final Judgment designed to eliminate the anticompetitive effects of the acquisition.[87] Unless they agreed to comply with the

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81 *Id.,*

82 *Id.*

83 *Id.*

84 *Id.* at 2. 15 U.S.C. § 18.

85 Response to Public Comments, *supra* note 2, at 6.

86 *Id.,* at 2. The Antitrust Division was joined in the suit by the Attorneys General of the States of Arizona, Arkansas, California, Florida, Illinois, Iowa, Louisiana, Nebraska, Nevada, Ohio, Oregon, Rhode Island, Tennessee, Texas, and Wisconsin, and the Commonwealths of Massachusetts and Pennsylvania. An Amended Complaint was filed on January 28, 2010, adding the States of New Jersey and Washington as plaintiffs.

87 United States' Motion and Supporting Memorandum to Enter Final Judgment, *United States v. Ticketmaster Entm't Inc., et al.,* No.1:10-cv- 00139 (D. D.C. Jun. 29, 2010). The Hold Separate Order provided that the proposed Final Judgment may be entered by the Court after the completion of the procedures required by the APPA. *Id.* The APPA requires a sixty-day period for the submission of public comments on a proposed Final Judgment. 15 U.S.C. § 16(b).

conditions of the Consent Decree, Ticketmaster and Live Nation were prohibited from consummating the merger. The transaction, of course, proceeded pursuant to the consent agreement and was consummated.

The combined entity now describes itself on its website as follows:

> "Live Nation Entertainment is the world's leading live entertainment and eCommerce company, comprised of four market leaders: Ticketmaster.com, Live Nation Concerts, Front Line Management Group and Live Nation Network. Ticketmaster.com is the global event ticketing leader and one of the world's top five e-Commerce sites, with over 26 million monthly unique visitors. Live Nation Concerts produces over 20,000 shows annually for more than 2,000 artists globally. Front Line is the world's top artist management company representing over 250 artists. These businesses power Live Nation Network, the leading provider of entertainment marketing solutions, enabling nearly 800 advertisers to tap into the 200 million consumers Live Nation delivers annually through its live event and digital platforms."[88].

Without doubt, therefore, Live Nation Entertainment, is a multi-dimensional powerhouse. The Department of Justice, however, is relying on the remedy contained in the consent agreement to protect and promote competition.

IV. Remedy

The remedy is designed to preserve competition in the market for primary ticketing services to major concert venues in the United States by requiring divestitures of assets and mandating certain behavioral restrictions.[89] The goal of the Department of Justice in designing the remedy was to create two additional "independent and economically viable" firms that could emerge as competitors to the merged firm.[90]

The remedy is made up of two primary structural components and several behavioral provisions to which LNE must adhere.[91] Structurally, the remedy requires the merged firm to divest Ticketmaster's entire Paciolan line of business to Comcast-Spectacor, one of the firms currently providing limited competition to Ticketmaster in the primary ticketing services market.[92] The remedy also attempts to facilitate the entry of Anschutz Entertainment Group (AEG), the second leading promoter in the U.S. behind Live Nation, into the primary ticketing service market though a mandated option to "lease" Ticketmaster's Host ticketing software coupled with a further option to purchase.[93] Finally, the merged firm must abide by anti-retaliation provisions governing its conduct when dealing with venue owners and other competitors.[94]

This section begins by discussing the structural components of the remedy. A background overview of the new

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88 Live Nation Entertainment, *About Live Nation* (2011), *http://www.livenation.com/h/about_us.html?tm_link=tm_homeA_i_aboutln.*

89 CIS, *supra* note 11, at 2.

90 *Id.* at 15.

91 *Id.* at 14.

92 By contrast with Host, Paciolan's software allows venues to manage their own ticket sales. *Id.*

93 Final Judgment, *supra* note 1, at 9.

94 *Id.* at 19.

entrants to the primary ticketing services market, AEG and Comcast-Spectacor, is also provided. Next, the behavioral provisions of the remedy are examined. The section concludes by providing information relevant to how the Department of Justice will enforce these behavioral provisions.

A. *Structural Provisions*

1. Comcast-Spectacor

The first structural provision of the remedy requires Ticketmaster to divest their entire Paciolan business, complete with contracts and intellectual property, to Comcast-Spectacor, L.P. ("Comcast-Spectacor").[95] Comcast-Spectacor is a vertically-integrated sports and entertainment firm with assets that include facility management, concessions, marketing of naming rights and sponsorships, and ticketing.[96] Comcast-Spectacor also owns two major venues, operates 15 others and provides primary ticketing services to venues representing 2% of major concert venue capacity through its New Era Tickets ("New Era") subsidiary, one of many licensees of the Paciolan platform prior to the divestiture. Comcast-Spectacor's ticketing business model differs from Ticketmaster's, because it is Comcast-Spectacor's venue clients, rather than Comcast-Spectacor, independently, that set service fees and maintain ownership of their ticketing data.[97]

As a wholly owned subsidiary of Comcast-Spectacor, Paciolan will operate as a separate entity from Comcast-Spectacor's New Era Tickets division.[98] In 2008, Paciolan directly handled the sale for more than 9 million concert and sporting tickets and licensed its software to 3% of major concert venues. It also provided in-house ticketing solutions for more than 250 clients, including college athletic programs and professional sports teams.[99] Paciolan will have the right to list events that it services on Ticketmaster.com in order to help clients reach more consumers and sell more tickets.[100]

The Department of Justice believes that combining Paciolan's ability to provide ticketing for sports franchises with Comcast-Spectacor's strength in providing venue management, concession, and marketing services to arenas and other buildings, can bring Comcast-Spectacor/Paciolan to sufficient scale to compete with AEG and LNE.[101] Comcast-Spectacor foresees an industry-wide shift towards a "venue-centric" approach. By allowing Comcast to acquire Paciolan, the remedy

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95 *Id.* at 9.

96 CIS, *supra* note 11, at 15.

97 *Id.*

98 Paciolan and New Era have historically pursued a differentiated ticketing strategy under which their venue customers control all ticketing fees. New Era plans to continue using this business model. Response to Public Comments, *supra* note 2, at 8.

99 *Id.*

100 *Id.*

101 Response to Public Comments, *supra* note 2, at 22.

seeks to provide these core components in one entity to facilitate this competing self-enablement model.[102]

2. AEG

The second structural component of the remedy attempts to facilitate the entry of AEG Live, a subsidiary of Anschutz Entertainment Group, Inc., ("AEG"), into the primary ticketing service market by mandating Ticketmaster to offer AEG an option to lease, and later to acquire a perpetual license, to its Host platform.[103] AEG is the second largest promoter in the United States (behind Live Nation), promoting shows representing about 20% of all the concert tickets sold at major concert venues in 2009.[104] AEG owns, operates, or manages more than 30 major concert venues, representing about 8% of the capacity at major U.S. concert venues. AEG also owns 50% of an important management agency, which represents clients such as Justin Timberlake and the Jonas Brothers.[105] The Antitrust Division believes AEG's vertically-integrated presence in promotions, venues, and artist management makes it the company best positioned to overcome the entry barriers and achieve the necessary scale to compete successfully with LNE in the market for primary ticketing services to major concert venues.[106]

More specifically, the remedy aims to establish AEG as an entrant into the primary ticketing services market through a two-step process.[107] Within six months of the merger's consummation, LNE was required to provide AEG with its own branded website utilizing Ticketmaster's Host platform, complete with upgrades and enhancements.[108] AEG maintained the right to use the site to sell tickets to events at venues it currently owns, operates, and manages as well as to events at other venues for which AEG had secured the right to provide primary ticketing services.[109] The merged firm would exert no control over AEG's final prices. AEG would maintain the freedom to compete with Ticketmaster on the prices AEG charges to venues for ticketing services and on the service fees that AEG adds to the price of a ticket.[110]

The second stage of the remedy requires the merged entity to provide AEG with an option to purchase a perpetual

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102 *Id.* at 17.

103 Final Judgment, *supra* note 1, at 9.

104 No company other than AEG or Live Nation promotes concerts representing more than 3% of the concert tickets of major concert performers. CIS, *supra* note 11, at 13.

105 *Id.*

106 Response to Public Comments, *supra* note 2, at 16.

107 Final Judgment, *supra* note 1, at 8. Response to Public Comments, *supra* note 2, at 6.

108 The site would last for up to 5 years, and was to be created and operated in a manner that will enable AEG to compete effectively. CIS, *supra* note 11, at 7.

109 *Id.* The site was to be designed by AEG and if requested, LNE was required to post links in its website to all events handled by AEG's private label ticketing service.

110 Final Judgment, *supra* note 1, at 10.

license to Ticketmaster's Host Platform in 2014.[111] If AEG chooses to exercise this option, the merged firm will be required to install a fully functioning ticketing system and website in AEG's facilities.[112] The remedy includes built-in incentives for AEG to exercise this option.[113] LNE is prohibited from providing primary ticketing services to AEG's venues after AEG's right to use the AEG-branded ticketing website expires, which will take place five years after execution of the license.[114] These provisions are intended to "immediately provide AEG incentives to compete" and "guarantee" that within five years, AEG either will remain a full-fledged primary ticketing services competitor or will bolster another competitor in the market for primary ticketing services by contracting with it to meet the ticketing needs of AEG's venues.[115]

The Department contends that it took into account the potential competitive impact of vertical integration on the primary ticketing services market when designing the remedy. Specifically, the Department asserts that it was aware of both: (a) the concern that it may become more important for ticketing service companies to also provide live entertainment content in order to compete in primary ticketing for major concert venues; and (b) that venues may pursue other avenues for ticketing services, such as venue management companies.[116] The Department argues that that AEG's established concert promotion business and venue management experience position it to emerge as a viable competitor to the merged firm when competing for ticketing contracts in these venues.[117]

Time will tell whether the Department's optimism is warranted. Insofar as this rather creative remedy is concerned, AEG recently chose to move away from licensing Host. Instead, AEG recently entered into a joint venture with Outbox Technology Inc. which, within the next year, should begin providing ticketing services for AEG.[118] Outbox Technology provides a means by which venues can manage their own ticket sales and retain control over their own customer data. No matter what platform is utilized, if, and until, AEG can convince venues that it can both reliably manage and improve the platform on its own to provide service comparable to LNE's, it is doubtful that AEG will be able to attract venues from LNE and become a significant rival. In the meantime, absent meaningful new competition from Paciolan, LNE is likely to continue enjoying – for at least the near term – any monopoly rents it currently is receiving as a consequence of its market

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[111] If AEG chooses not to exercise the option, the license is also transferrable to other parties. Final Judgment, *supra* note 1, at 9.

[112] *Id.* The merged firm must also provide the training and support required to modify the source code and independently operate the system.

[113] Response to Public Comments, *supra* note 2, at 7.

[114] Final Judgment, *supra* note 1, at 9.

[115] Response to Public Comments, *supra* note 2, *at 7.*

[116] *Id.* at 21.

[117] *Id.* at 17.

[118] *See* infra Section V and accompanying notes and text.

dominance.

B. Behavioral Provisions

The remedy incorporates several prohibitions to ensure that Live Nation Entertainment does not abuse its competitive breadth post-merger. The remedy prohibits the merged firm from engaging in certain conduct that could weaken the ability even of equally efficient firms to compete effectively.[119] These behavioral restrictions can be divided into two aspects: misuse of ticketing data and retaliation. Each is discussed below. Although the complaint is not formulated in terms of vertical violations of the antitrust laws, these behavioral remedies reflect primarily vertical concerns.

The first behavioral provision prohibits the sharing of "competitively sensitive" information between LNE's ticketing, promotion and artist management operations. This data misuse or "firewall" provision has three aspects. First, the merged firm may not disclose client ticketing data to "covered" employees except on the same terms that it would provide the data to another independent promoter or manager.[120] Second, the merged firm may not provide client ticketing data to any "exempted" employees except to enable those employees to perform day-to-day functions in the operation of LNE's venues, promotions or artist management business.[121] Finally, if one of LNE's current primary ticketing clients declines to renew its contract, the merged firm is required to provide that client with its ticketing data promptly upon request.[122]

The second behavioral restriction limits retaliatory measures that LNE might otherwise employ to undermine the efforts of AEG and Comcast-Spectacor to emerge as viable competitors or of other incumbents to compete effectively. Thus, LNE cannot retaliate against any venue owner who contracts or considers contracting for primary ticketing services with one of the merged firm's competitors.[123] LNE also may not require, or threaten to require, that venues use LNE's primary ticketing services in order to present concerts either that Live Nation promotes or that are performed by artists that Front Line manages. Conversely, the merged entity is precluded from explicitly or practically requiring venues, or threatening to require venues, to take concerts that Live Nation promotes or that Front Line-managed artists perform in order to purchase the merged firm's primary ticketing services.[124]

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[119] Final Judgment, *supra* note 1, at 19. Response to Public Comments, *supra* note 2, at 8.

[120] "Covered Employee" means any Live Nation Entertainment employee whose principal job responsibility involves the operation or day-to-day management of the merged firm's venues, concert promotions, or artist management services. *Id*. at 4.

[121] "Exempted Employee" refers to any non-Covered employee of Live Nation Entertainment., including (a) any senior corporate officer, director or manager with responsibilities that include oversight of Live Nation Entertainment's provision of Primary Ticketing Services; and (b) any employee whose primary responsibilities solely include accounting, human resources, legal, information systems, and/or finance. *Id.*

[122] Response to Public Comments, *supra* note 2, at 9.

[123] Final Judgment, *supra* note 1, at 19. Response to Public Comments, *supra* note 2, at 8.

[124] Response to Public Comments, *supra* note 2, at 9. Final Judgment, *supra* note 1, at 19.

C. Enforcement

In order to ensure that LNE adheres to the conditions of the consent decree, the Division has established an infrastructure via a new Compliance Committee that monitors industry developments and encourages consumers and competitors to report conduct violations by LNE.[125] In addition, the remedy inherently provides the Division with a number of tools to ensure compliance on behalf of the merged firm. The Division can interview or depose any LNE employee and demand corporate documents.[126] If requested, LNE is also required to provide the DOJ with written reports regarding any matters relating to the proposed Final Judgment.[127]

It will be important to carefully observe how the Division responds to complaints levied against LNE. If the remedy is to operate successfully in practice, rigorous monitoring and enforcement of the conduct provisions will be critical. Failure by DOJ to react quickly to indications that LNE is misusing data, for example, could potentially be harmful to independents and the new competitors.[128] This concern is heightened given the history of allegations of anti-competitive behavior and anti-consumer practices that both Ticketmaster and Live Nation have accumulated.[129] In fact, while this merger was being investigated by the Antitrust Division, Ticketmaster was simultaneously reaching a settlement with the Federal Trade Commission in response to charges that the company had engaged in fraud and deception in the sales of tickets.[130]

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[125] Telephone Interview with Robert Kramer, Chair of the Compliance Committee, U.S. Department of Justice - Antitrust Division (Feb. 9, 2011).

[126] Response to Public Comments, *supra* note 2 at 34.

[127] *Id*. at 33. LNE asserts that they have instituted technical safeguards to uphold their obligations with regard to the firewall. The merged entity created a corporate policy governing access to this information, disseminated that policy to all employees, and instituted a training program to ensure that those with access to sensitive data understand and uphold their obligations. *Id.* Whether this will actually deter violations remains to be seen.

[128] *See* David Segal, *Ticketmaster Joins Live Nation, and an Industry Quakes*, N.Y. TIMES, Apr. 24, 2010, at BU1 a*vailable at* http://www.nytimes.com/2010/04/25/business/25ticket.html?_r=1&pagewanted=1. *(*emphasizing that independent promoters and consumer advocates have been vocal about the importance of Antitrust Division diligence when it comes to monitoring LNE's actions). According to Mitchell Frank, who books shows for the Los Angeles club, Echoplex: "There is supposed to be this Chinese wall at the company...but really, what is to stop them from mining all the data that I collect?" *Id.* John Scher, co-CEO of Metropolitan Talent, also stressed the importance of oversight, noting, "We're hopeful that the Justice Department is as serious about the following up on this merger as they were when they approved it. They need to be if the competitive landscape has any chance of surviving."*Id.*

[129] *See, In RE: Live Concert Antitrust Litigation*, 247 F.R.D. 98 (C.D. Cal. 2007) (Alleging that Clear Channel had foreclosed competition in the radio and concert promotion markets by leveraging its market power in the radio market to increase its market power in the concert promotion market) Compl. ¶ 35-40; *Nobody In Particular Presents, Inc. v. Clear Channel*, 311 F. Supp. 2d 1048 (D. Col, 2004) (Alleging that Clear Channel used its market power in the rock-format radio market to leverage its dominance and foreclose competition in the promotion of artists' live concerts); *Campos v. Ticketmaster Corp*., 140 F. 3d 1166 (8th Cir. 1998) (Alleging that Ticketmaster attempted to monopolize and monopolized markets for the distribution of tickets to large-scale popular music concerts, in violation of Section 2 of the Sherman Act).

[130] Federal Trade Commission v. Ticketmaster L.L.C., et al,, Stipulated Final Judgment and Order for Permanent Injuction and Other Equitable Relief, Case No. 1:10-cv-01093 (N.D. Ill. 2/18/10).

The consent order is not overly detailed in outlining exactly what behavior will constitute "retaliation" and trigger DOJ enforcement. It is difficult to assess whether, in practice, this breadth will work to the advantage of the Department for purposes of enforcement. Officials have argued, off the record, that a vague consent order gives them significant bargaining leverage. On the other hand, retaliatory conduct can occur by implication or in secret, making it difficult to discover and even more difficult to prove. In this regard, it is important to note that the merged entity is permitted to bundle its products/holdings under the consent order. Moreover, since the merged firm may chose the entities with which it does or does not want to conduct business, a lost contract is not sufficient by itself to demonstrate retaliation.[131] This ambiguity gives LNE some ground to challenge any efforts on the part of the DOJ to enforce it. As a result, it is unclear how effective these behavioral provisions will actually be.

V. INDICIA TO EVALUATE SUCCESS

A. *Two-Step Approach*

The easiest way for observers to monitor whether or not the remedy is working is to apply a two-step approach. The first step requires observers to ascertain the amount of competition that has been lost within the primary ticketing market as a result of the merger.[132] Then, observers must evaluate whether, and how quickly, AEG and Comcast-Spectacor/Paciolan are replacing this figure.[133]

For example, using a market definition of major venue capacity for concerts, when Live Nation withdrew its business from Ticketmaster in 2008 and began actively competing on its own, Ticketmaster's share of the primary ticketing services market declined markedly. The merger rejoins these two blocks of market share, combining Ticketmaster's 66.4% market share of major venue capacity with Live Nation's 16.5% stake to give LNE an 82.9% share of the primary ticketing market to major concert venues.[134]

Since a remedy for an otherwise illegal merger should leave the industry in a no-less-competitive condition, the remedy attempts to help resolve this discrepancy by requiring Ticketmaster to divest its Paciolan business to Comcast-Spectacor. Prior to the merger, Paciolan held a 3% share in the primary ticketing market from licensing its software to major concert venues.[135] Paciolan also maintained a 4% stake in the market through sub-licensing its technology to individual

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[131] Furthermore, the day-to-day functions of an employee of the merged firm may entail numerous tasks, all of which could be inter-connected between the holdings of the merged entity.

[132] For purposes of this exercise, "competition" refers to Major Concert Venue Capacity.

[133] General resources to consult to obtain the information discussed below include Pollstar, Ticketnews, Billboard.biz and Venues Today. For more specific information about a particular company, consult SEC filings on behalf of the company such as 10-K's, as well as Corporate Investor Presentations and Earnings Calls.

[134] Ticketmaster controlled 66.4% share of major venue capacity after Live Nation entered the market. Amended Compl., *supra* note 9, at 14.

[135] Response to Public Comments, *supra* note 2, at 8.

venues. However, half of this 4% figure already belonged to New Era Tickets, a subsidiary of Comcast-Spectacor.[136] Thus, the Paciolan divestiture only gave Comcast-Spectacor an additional 5% stake within the primary ticketing market that it did not already have before the merger. This leaves roughly 11% by which AEG, Paciolan, or other LNE rivals, must increase their aggregate market share in order for the remedy to successfully replace the competition lost from the merger. One question is whether this is likely to be accomplished. Even if the answer is affirmative, two additional questions are how long this restoration of competition will take and what will be the cost to consumers in the interim? The following section suggests some indicia that might reveal whether or not the remedy is successfully restoring the competition lost due to the merger.

B. *Indicia to Observe*

1. Have AEG or Paciolan signed any independent/additional 3rd party venues?

The remedy does not immediately replace the all of the competition that was lost within the primary ticketing market as a result of the merger. The only way that AEG and Paciolan can make up for the difference is by securing ticketing contracts with venues. These venues may either be former clients of Ticketmaster's or independent.[137] As newcomers in the market, AEG and Paciolan will need to offer venues something that is unique to their respective operations. Two potential ways that the entrants can accomplish this are: (i) offering venue owners favorable provisions on renewal of their ticketing contracts or (ii) acquiring talent that they can offer along with their ticketing services.

a. Advantageous Terms on Renewal?

AEG and Comcast-Spectacor may be able to entice venues away from LNE by offering venue owners generous terms when their ticketing contracts come up for renewal. One such provision that the entrants could employ are flat brokerage fees, under which venue owners pay a flat fee to the ticketing brokers (taken out of the service and convenience fees) and then keep the remaining amount of those fees for themselves.[138] If the entrants are competing for an especially desirable venue, they could increase the percentage of service fees that are allocated to that venue.

Venue operators are hopeful that the new competitors will utilize this strategy as an opportunity to emerge.[139]

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[136] CIS, *supra* note 11, at 9.

[137] With regard to Independent venues, it is important to note that, outside of the specific conduct provisions, LNE is also allowed to compete for these 3rd party contracts as well. As a result, it is possible for AEG and Paciolan to lose market share as a result of this remedy. Final Judgment, *supra* note 1, at 19.

[138] Jim DeRogatis, *The State of the Concert and Live Sporting Events Industries*, WBEZ, (Jun. 10, 2010), *available at* http://www.wbez.org/print/73040. (reporting that "What's going to happen in the next couple of years is that [the venue will] pay a flat fee–$2 or $2.50 [to the ticket broker for their services]—and then [the venue will] keep everything above that [from the service fee; in other words, on a $10 per ticket service or convenience charge, $8 or $7.50 will go to the venue and the rest to the primary ticketing services provider].

[139] *Id. (*interviewing the operator of the Prudential Center who stresses the importance of this provision to venue owner/operators, "The only way you [as a venue owner/operator] make money is off the ancillaries...I don't see the buildings giving that up too easily.")

However, it is important that the entrants act quickly. If LNE begins to offer similar provisions, AEG and other rivals will have to offer increasingly lucrative deals in order to secure venues. If LNE's practices to retain venues resemble the loss-leading strategy that its promotional arm employs to book tours, there will be a point at which the entrants will use their better fiscal judgment and leave the bargaining table.[140] If the entrants cannot compete with the terms that LNE offers venues, the merged firm will retain its holdings and competition in the market will not be restored.

b. Signed Content To Secure Venues?

The new entrants may also increase their likelihood of securing venues by acquiring talent or promotional bookings. This will enable the entrants to offer venues a package of primary ticketing services and concert content when they are competing for ticketing contracts with LNE. Ticketmaster employed a similar strategy during the short period when it was competing with Live Nation by acquiring Front Line Entertainment. Potential sources from which AEG and Comcast-Spectacor can acquire new content are (i) artist management agencies and (ii) major record labels. Currently, two of the four major recording labels, EMI and Warner Brothers, are up for sale.[141] This gives the entrants an opportunity to quickly increase the content they can offer with their ticketing.

2. Have Ticketmaster's Renewal Rates Declined?

The second indicia that observers should consider is whether the renewal rates of Ticketmaster's primary ticketing service contracts with venues have declined. The remedy did not disturb the exclusivity agreements that Ticketmaster had secured with venues prior to merging with Live Nation.[142] Ticketmaster's contractual renewal rates for its exclusive agreements with venues has typically exceeded 85 %.[143] In 2010, with 20% of these exclusivity agreements expiring, Ticketmaster's renewal rate did not decline but rather managed to *increase* to *95%*.[144]

AEG, Paciolan, and other competitors of LNE need to secure collectively an 11% share of the primary ticketing market to major concert venues if these rivals are to successfully replace the competition lost due to the merger. In order for this to happen, Ticketmaster's renewal rates have to drop. If they do not, the ability of AEG and LNE's other rival providers

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140 Exhibit B – Jam Productions, *supra* note 5, at 16. Live Nation routinely submits excessive offers to artists in order to prevent the performers from contracting with competing promoters and venues. These offers are so outrageous that *the company loses money even if the event sells out completely*.

141 Jacob Ganz, *Citigroup Takes Over EMI*, NPR, (Feb. 1, 2011), *available at* http://www.npr.org/blogs/therecord/2011/02/01/133406179/citigroup-takes-over-emi. LNE has recently submitted a bid to purchase Warner Music Group's recorded music operation. Ed Christman, *Wall Street Analysts, Investors Unenthusiastic About Possible Live Nation-Warner Music Union*, Billboard.biz, Apr. 4, 2011. http://www.billboard.biz/bbbiz/industry/touring/wall-street-analysts-investors-unenthusiastic-1005110592.story

142 Response to Public Comments, *supra* note 2, at 34-35.

143 Amended Compl., *supra* note 9, at 5.

144 LNE Investor & Analyst Presentation, *supra* note 30, at 83 (Jul. 15, 2010) *available at* http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9NTM4Nzh8Q2hpbGRJRD0tMXxUeXBlPTM=&t=1

of primary ticketing services to secure new venues and replace the competition lost as a result of the merger appear to be bleak. Therefore, a decline in Ticketmaster's traditionally high renewal rates may evidence that the remedy is beginning to restore competition within the primary ticketing market. Conversely, if Ticketmaster's renewal rates remain at their perennially high levels, or even increase, the entrants will be unable to emerge as viable competitors. The increase to 95%, therefore, may be an early indicator that the remedy is not working.

3. Has Live Nation Arenas Signed Any New Venues?

The third factor that observers should consider is whether Live Nation Arenas has secured any major concert venues that were not previously controlled by a branch of LNE. Live Nation Arenas is a subsidiary of LNE that is devoted to acquiring and managing arenas. With regard to independent venues, it is important to note that, outside of the specific conduct provisions, LNE is also allowed to compete with the entrants to contract with these third party venues (i.e. venues not owned by AEG). Post-merger, Live Nation Arenas has already secured Conseco Fieldhouse, a venue that had been previously managed by AEG.[145]

By securing for LNE any of the few remaining venues for which AEG and Comcast can reasonably compete with LNE for ticketing contracts, Live Nation Arenas presents yet another obstacle that AEG and other LNE rivals must overcome in order to emerge as viable competitors within the primary ticketing services market. When coupled with Ticketmaster's 95% venue renewal rate, Live Nation Arenas threatens to significantly weaken the ability of the entrants to successfully restore pre-merger competition levels. Therefore, observers should carefully monitor any venues that Live Nation Arenas is able to secure, as such developments may serve to frustrate the efforts of the new entrants to effectively compete with the merged firm.

4. Have Major Concert Venues begun adopting non-legacy platforms to meet their ticketing needs?

The fourth, and perhaps most important, indicator that observers should monitor is the adoption rate of non-legacy ticketing platforms at major concert venues. Ticketmaster's Host platform helps account for much of the success that the company has experienced when securing renewal contracts with venues, and the Division determined that the strength of the Host ticketing software was one of the disadvantages that entrants face when competing with LNE in the primary ticking services market.

However, a “one-size fits all” platform like Ticketmaster’s Host may not be the best choice for venues in the future, especially considering the increasingly important role that social networking is playing in ticketing and promotions. Moreover, Host is antiquated and inflexible in some ways, and unless and until Host is modernized, rival primary ticket sellers can use these weaknesses to their advantage when competing with LNE for ticketing contracts in the future. Thus, it

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145 *Live Nation Arenas Signs First Deal with Conseco Fieldhouse*. Venues Today, Oct. 18, 2010. http://venuestoday.wordpress.com/2010/10/18/live-nation-arenas-signs-first-deal-with-conseco-fieldhouse/

will be important to monitor the rates at which major concert venues adopt platforms that are inherently distinct from Host.

A number of companies, such as Ticketfly, have already begun to emerge as reliable ticketing providers to smaller venues.[146] These companies utilize an entirely different infrastructure than Ticketmaster's Host, primarily relying on social networking platforms to facilitate the distribution of tickets to consumers.[147] For example, the core of Ticketfly's offering is an integrated content management system that allows a promoter to enter show data once and have it populate its website, ticketing pages, email newsletter, iPhone app, and social networks.[148]

This integration facilitates increasingly efficient and cost-effective operations by concert promoters. Under a non-integrated system, every time a concert promoter confirms an act, he must repetitively enter that event in multiple locations (i.e. ticketing software, website, Facebook, Twitter, MySpace, email newsletter, etc.). This is a hugely inefficient, expensive and time consuming process. Using an integrated platform, promoters can bypass fragmented technologies and disparate software systems that are unable to communicate with one another.[149]

Effective use of social marketing allows venues and promoters to spend less money buying traditional media such as print ads. Social networks present exponentially greater sales and marketing opportunities for promoters. Live events have an inherently social nature and the technological efficiencies gained through a platform integrated with social media allow venues and promoters to spend less money buying traditional media such as print ads to promote the event. This savings could then be passed along to the consumer, possibly reflected in lower "fees," a step that Ticketmaster has notoriously avoided.[150] Thus, the increased efficiency and lower operating costs offered by integrated ticketing platforms give competitors using these systems an additional advantage that they can employ when competing with LNE for ticketing contracts.

Significantly, AEG recently announced its decision to eschew the remedy's provision for licensing Ticketmaster's Host. Instead, AEG entered into a joint venture with Outbox Technology and former Ticketmaster CEO Fred Rosen, named

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146 Richard Kastelein, *Ticketfly Continues to Eat Primary Ticket Market Share from Live Nation Entertainment in the USA,* EU Ticketnews, Jan. 24, 2011. http://www.euticketnews.com/201101241070/ticketfly-continues-to-eat-primary-ticket-market-share-from-live-nation-entertainment-in-the-usa.html

147 Jay Smith, *That's The Ticket! Talking With Ticketfly CEO Andrew Dreskin,* POLLSTAR, Jan. 14, 2011. http://www.pollstar.com/blogs/news/archive/2011/01/14/753140.aspx

148 Kyle Bylin, *Ticketfly CEO: New Business Opportunities Emerged From Ticketmaster, Live Nation Merger*, Hypebot.com, Dec. 2010, *available at* http://www.hypebot.com/hypebot/2010/12/ticketfly-ceo-new-business-opportunities-emerged-from-ticketmaster-live-nation-merger.html

149 J. Smith, *supra* note 147.

150 Karen Lindell, *Fees Bloat Cost of Entertainment Tickets*, Ventura County Star, Dec. 21, 2010. http://www.vcstar.com/news/2010/dec/21/fees-bloat-cost-of-entertainment-tickets/

Outbox Enterprises.[151] AEG will cease licensing Host, therefore, and use Outbox's technology to provide its ticketing services. This decision adds even greater significance to the reliance on non-legacy technology as an indicator of competition in the primary ticketing market.

Outbox's technology and business model are significantly different from Ticketmaster's. Instead of selling tickets on a centralized website, as Ticketmaster does, Outbox offers venue operators what is called a "white label" system, in which consumers buy tickets through the venue's website.[152] This "white-label" model allows the venue to brand its own ticketing operation and have more flexibility on how tickets are sold. The venues control the service fees, inventory management, and the use of data. AEG expects to start selling its tickets through Outbox in late 2011 or early 2012, and to have nearly all its venues throughout the world on the new system within two years.[153]

The Outbox platform currently handles ticketing operations for Cirque du Soleil, the Montreal Canadiens and the Bell Centre in Montreal, and the Kodak Theatre in Los Angeles.[154] Although competing providers such Ticketfly currently service primarily smaller venues, they are also capable of servicing larger ones.[155] However, in order to do this, all of these emerging platforms must gain the reputation for reliability that is required to convince major concert venues that they are a legitimate alternative to Ticketmaster's Host. This may take some time. Therefore, it is important to monitor the rates that major concert venues are adopting platforms that are inherently distinct from Host.

VI. CONCLUSION

On February 10, 2009, Ticketmaster and Live Nation entered into a definitive merger agreement to create Live Nation Entertainment. The merger combines Live Nation's event promotion business, its venue ownership or operation arm, and its primary ticketing services with Ticketmaster's primary ticketing services business, its talent management operations, and its secondary ticketing sales. Over the following eleven and a half months, the Antitrust Division of the United States Department of Justice conducted an investigation into the potential anti-competitive effects of the proposed merger. The Division concluded that the combination of Ticketmaster and Live Nation would likely substantially lessen competition in the market for the provision and sale of primary ticketing services for major concert venues in the United States.

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[151] Ethan Smith, *Promoter Crowds Ticketmaster*, WALL ST. J., Feb. 3, 2011 (http://online.wsj.com/article/SB10001424052748704775604576120361649762354.html).

[152] *Id.*

[153] *Id.*

[154] Ray Waddell, *AEG's Leiweke And Outbox's Rosen Talk to .Biz About Competing With The Ticketmaster Juggernaut*, Billboard.biz, Feb. 4, 2011. http://www.billboard.biz/bbbiz/industry/touring/aeg-s-leiweke-and-outbox-s-rosen-talk-about-1005022192.story

[155] J. Smith, *supra* note 147.

Rather than attempting to stop the merger, the Division entered into a settlement agreement creating remedial conditions for the merger to go forward. The remedy combines a divestiture package with certain behavioral restrictions governing the conduct of the merged firm towards its competitors. The goal of the Department of Justice in designing the remedy was to create two additional "independent and economically viable" firms that could emerge as competitors to LNE in the market for providing primary ticketing services to major concert venues in the United States.[156] In order to accomplish this goal, the remedy combines a divestiture package with certain behavioral restrictions governing the conduct of the merged firm towards its competitors.[157]

Although this is certainly a creative attempt to replace the competition lost from the merger, more than creativity will be required if the remedy is to successfully operate in practice. If, and until, AEG can convince venues that it can both reliably manage and improve a ticketing platform on its own and provide service comparable to LNE's, it is doubtful that AEG will be able to attract venues from LNE and become a significant rival. In the meantime, absent meaningful new competition from Paciolan, LNE is likely to continue enjoying any monopoly rents it currently is receiving as a consequence of its market dominance.

Even if the remedy eventually restores pre-merger competition levels, it is unclear: (a) how long this will take and (b) how much harm consumers will be forced to endure during the interim. Although it is premature to evaluate the remedy, some of the early information, such as the dramatic increase of Ticketmaster's renewal rate from 85% to 95% and the choice of AEG to work with Outbox rather than Ticketmaster's Host, give early indication that the remedy may be weaker than portrayed. Therefore, it is critical that observers continue to monitor how well the consent order is restoring the competition lost as a result of the merger.

The remedy that the Antitrust Division adopted for the Ticketmaster/Live Nation merger has significance beyond just this individual case. The Department has employed comparable regulatory responses for several other recent mergers, such as Comcast/NBC and Google/ITA. As a result, it is especially important to monitor the ability of DOJ both to construct effective remedial conditions and to effectively enforce them.

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[156] CIS, *supra* note 11, at 15.

[157] *Id.* at 2.