



February 4, 2020

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U.S. Department of Justice Antitrust Division
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Re: Amended Final Judgment: U.S v. Ticketmaster Entertainment, Inc., and Live Nation Entertainment, Inc.

Dear AAG Delrahim:

The American Antitrust Institute (AAI) writes in regard to the recent enforcement action taken by the U.S. Department of Justice (DOJ or Antitrust Division) in the matter of U.S v. Ticketmaster Entertainment, Inc., and Live Nation Entertainment, Inc.¹ In January 2020, the Antitrust Division submitted a Motion to Modify Final Judgment and Enter Amended Final Judgment (“Motion to Amend”) and Amended Final Judgment (“2020 Decree”) in this case.² The Motion to Amend proposed modifications to the decade-old Final Judgment (“2010 Decree”) that unsuccessfully settled the government’s competitive concerns regarding the merger of Live Nation, the world’s leading concert promoter and a nascent entrant into self-ticketing at the time, and incumbent ticketing behemoth Ticketmaster.³

For the reasons discussed in this letter, AAI believes a far stronger enforcement response than simply modifying the conduct remedies contained in the 2010 Decree is warranted in this case. Several factors support AAI’s view that the action taken by the DOJ does not address the failure of the remedies contained in the 2010 Decree, and will not restore competition lost by the merger or deter future anticompetitive conduct.⁴ These factors include: (1) the presumptive illegality of the Live Nation-Ticketmaster merger when it was originally proposed; (2) evidence of persistent violations of the conduct remedies contained in the 2010 Decree; and (3) the company’s ongoing

¹ The AAI is an independent, non-profit organization devoted to promoting competition that protects consumers, businesses, and society. For more information, see www.antitrustinstitute.org. AAI has a long history of research, education, and advocacy on competition in ticketing.

² United States v. Ticketmaster Entertainment, Inc. and Live Nation Entertainment Inc., Motion To Modify Final Judgment and Enter Amended Final Judgment, Case No. 1:10-cv-00139-RMC (D.D.C. Jan. 8, 2020) (“Motion to Amend”) and United States v. Ticketmaster Entertainment, Inc. and Live Nation Entertainment Inc., Amended Final Judgment, Case No. 1:10-cv-00139-RMC (D.D.C. Jan. 28, 2020) (“2020 Decree”).

³ United States v. Ticketmaster Entertainment, Inc., and Live Nation Entertainment Inc., Proposed Final Judgment, Case No. 1:10-cv-00139-RMC (D.D.C. Jul. 30, 2010) (“2010 Decree”).

⁴ For a discussion of using merger remedies to promote general deterrence, *see, e.g.*, Steven C Salop, *Merger Settlement and Enforcement Policy for Optimal Deterrence and Maximum Welfare*, 81 FORDHAM L REV 2647 (2013).

exercise of market power over the last decade against ticket resellers, facilitated by the ineffective remedies contained in the 2010 Decree.

The DOJ asked the court to forego public comment on the Amended Decree, which was entered without meaningful review under the procedures outlined in the Antitrust Procedures and Penalties Act (i.e., the Tunney Act).⁵ Given the serious implications of this matter for merger enforcement and for protecting competition and consumers, AAI is disappointed that the public was not given the opportunity to comment. We present analysis herein that supports our concerns.

I. THE IMPORTANCE OF THE COMPETITIVE ISSUES RAISED BY THE MERGER OF LIVE NATION-TICKETMASTER

The merger of Live Nation and Ticketmaster melded together artist management, concert promotion, venue operation, and ticketing in a monolithic, multi-level supply chain in the live music business. The \$2.5 billion transaction combined Ticketmaster, the market leader in artist management and dominant seller of tickets to live music events across the country, with Live Nation, the leading concert promoter. In 2008, Ticketmaster held contracts for more than 80% of large venues and Live Nation handled one-third of major concert events, was the second leading owner-operator of concert venues in the country, and also provided ticketing services.⁶

The DOJ's investigation of the proposed merger was joined by seventeen states. In challenging the deal, the government raised significant vertical and horizontal competitive issues related how the proposed merger would lessen competition substantially for primary ticketing services to major concert venues located in the United States.⁷ Vertical concerns centered on enhanced post-merger incentives for Live Nation-Ticketmaster to exclude rivals by "explicitly or practically" requiring venues to take: (1) their primary ticketing services if the venues only wanted concerts promoted by, or concerts by artists managed by, the merged company; or (2) concerts they promoted, or concerts by artists they managed, if those venues only wanted to obtain the merged company's primary ticketing services.⁸

Moreover, the horizontal combination of Ticketmaster's dominant position in primary ticketing services with Live Nation's upstart self-ticketing service eliminated an important rival that could have—but for the merger—grown to challenge Ticketmaster's dominance in primary ticketing.⁹ Nonetheless, DOJ approved the merger, subject to conditions contained in the 2010 Decree.¹⁰ The 2010 Decree set forth conduct remedies to address vertical concerns, including prohibitions on anticompetitive conduct and retaliation against venue owners.¹¹ The 2010 Decree also required the merged company to license its ticketing platform (Host) to AEG, the second leading concert promoter and an operator of a number of major venues, and to divest

⁵ Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)–(h).

⁶ John E. Kwoka and Diana L. Moss, *Behavioral merger remedies: Evaluation and implications for antitrust enforcement*, 57 ANTITRUST BULL. 979 (2012), at 990-992.

⁷ United States v. Ticketmaster Entertainment, Inc. and Live Nation Entertainment Inc., Amended Complaint, Case No. 1:10-cv-00139-RMC (D.D.C. Jan. 28, 2010) ("Amended Complaint"), at p. 6.

⁸ United States v. Ticketmaster Entertainment, Inc. and Live Nation Entertainment Inc., Competitive Impact Statement, Case No. 1:10-cv-00139-RMC (D.D.C. Jan. 25, 2010), at 17. *See also*, Kwoka and Moss, *supra* note 6.

⁹ Amended Complaint, *supra* note 7.

¹⁰ 2010 Decree, *supra* note 3.

¹¹ *Id.*, at 17.

Paciolan, the venue-based ticketing division, to Comcast-Spectacor, a small and primarily regional ticketing service.

II. THE PRESUMPTIVE ILLEGALITY OF THE MERGER GUARANTEED THE FAILURE OF THE CONDUCT REMEDIES CONTAINED IN THE 2010 DECREE

Retrospective analysis of consummated mergers plays an increasingly important role in informing merger enforcement. Empirical studies, policy analysis, and antitrust agency reports have identified numerous major failures of past merger remedies.¹² Of course, there is no more compelling evidence of failed remedies than that spelled out in the DOJ's Motion to Amend.¹³ It features accounts from six anonymous venue operators describing Live Nation-Ticketmaster's violations of the 2010 Decree since it went into effect. These violations include threats, conditions, and retaliation designed to force venue operators into contracting with Ticketmaster as their primary ticketing service.¹⁴ This long-term and unmitigated exercise of market power by Live Nation-Ticketmaster demonstrably restrained competition and harmed consumers.

Evidence that the parties persistently violated the 2010 Decree is highly relevant for DOJ's choice of enforcement path in responding to Live Nation-Ticketmaster's ongoing exercise of market power. The evidence proves that the conduct remedies imposed by the government did not deter future anticompetitive conduct by Live Nation-Ticketmaster.¹⁵ As such, the remedies failed to fully restore competition lost by the merger. Perhaps most important, evidence that Live Nation-Ticketmaster persistently violated the 2010 Decree confirms that the merger was illegal at the time it was challenged by the DOJ in 2010.

Vertical mergers in the mold of Live Nation-Ticketmaster should be treated as presumptively illegal. Section 7 of the Clayton Act is designed to prevent mergers that may enhance market power and lead to anticompetitive effects.¹⁶ The agencies treat highly concentrative horizontal mergers as presumptively illegal based on the high likelihood that they violate Section 7 by threatening to harm competition and consumers.¹⁷ In contrast to horizontal mergers, vertical mergers do not increase market concentration. But market concentration nonetheless reveals conditions under which vertical mergers are highly likely to facilitate the exercise of market power resulting from enhanced post-merger incentives to exclude rivals.

The DOJ did not need a crystal ball in 2010 to have predicted the imminent failure of its remedies contained in the 2010 Decree. Ticketmaster's monopoly in ticketing was a fact, as acknowledged by the government at the time: "Ticketmaster has dominated primary ticketing, including primary

¹² See, e.g., FTC's Merger Remedies 2006-2012, A Report of the Bureaus of Competition and Economics, Jan. 2017, www.ftc.gov/system/files/documents/reports/ftcs-merger-remedies-2006-2012-reportbureaus-competition-economics/p143100_ftc_merger_remedies_2006-2012.pdf; and A Study of the Commission's Divestiture Process, Bureau of Competition, Aug. 1999, www.ftc.gov/sites/default/files/attachments/merger-review/divestiture.pdf. See also, John E. Kwoka Jr., *Does Merger Control Work? A Retrospective on Enforcement Policy, Remedies, and Outcomes* 78 ANTITRUST LJ 619, 636 (2013).

¹³ Motion to Amend, *supra* note 2, at p. 7-10.

¹⁴ *Id.*

¹⁵ See, e.g., Diana L. Moss, *Realigning Merger Remedies with the Goals of Antitrust*, Chapter 3, THE GUIDE TO MERGER REMEDIES, Global Competition Review (2019).

¹⁶ See 15 U.S.C. § 18.

¹⁷ See *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 338 (1963) and *Brown Shoe Co. v. United States*, 370 U.S. 294, 317 (1962).

ticketing for major concert venues, for over two decades.”¹⁸ The merger “supercharged” the firm’s incentives to foreclose competing venue operators, or raise their costs, by cutting them off from access to critical inputs (i.e., concerts), unless they contracted with Ticketmaster for ticketing services. The harmful effects of the Live Nation-Ticketmaster merger were therefore virtually *guaranteed* by pairing up Live Nation’s concert promotion services with Ticketmaster’s entrenched monopoly in ticketing.

When the harmful effects of a merger are sufficiently obvious *ex ante* or – as we witness here – they are both obvious *ex ante* and confirmed *ex post* by evidence like that provided by venue operators and described in the Motion to Amend, merging parties should have to clear a higher bar. The government stopped short in 2010 of moving to obtain a full-stop injunction in the Live Nation-Ticketmaster merger, but that was the appropriate remedy then and it remains the appropriate remedy now.

III. THE INEFFECTIVE REMEDIES IN THE 2010 DECREE FACILITATED LIVE NATION-TICKETMASTER’S STRATEGY OF LEVERAGING ITS MARKET POWER THROUGHOUT THE TICKETING MARKET

The failed conduct remedies in the 2010 Decree did nothing to prevent Live Nation-Ticketmaster from engaging in the exclusionary conduct that animates the government’s Motion to Amend. The remedies did not restore, much less spur, competition in primary ticketing market. This outcome should come as no surprise. It is well established, for example, that behavioral remedies do nothing to change the merged firm’s incentive to exercise market power.¹⁹ They create a system of quasi-regulation under which conduct must be continually monitored – a task for which the agencies and courts are ill-suited.

Because conduct remedies invoke rules and requirements designed to constrain powerful profit motives that are driven by the exercise of market power, they create strong incentives for the merged company to find “workarounds” to the remedies. Moreover, conduct remedies rely heavily on smaller rivals to report violations of the consent decree – an expectation that is invariably quashed by rivals’ fear of retaliation from powerful incumbents. These problems were acknowledged by the current AAG for Antitrust when he stated in 2017 that “[i]nstead of protecting the competition that might be lost in an unlawful merger, a behavioral remedy supplants competition with regulation.”²⁰

In addition to foreclosing rival venue operators and blocking entry into the primary ticketing market, Live Nation-Ticketmaster has engaged in a systematic campaign to leverage its market power throughout the ticketing market. This market includes both primary and resale ticketing.²¹ Resale markets can enhance efficiency by providing a venue for fans to sell and buy tickets, balance supply and demand, and even expand demand for live music, to the benefit of artists and concertgoers alike. But Live Nation-Ticketmaster has acted to impede the development of resale ticketing through

¹⁸ Amended Complaint, *supra* note 7, at 10.

¹⁹ Kwoka and Moss, *supra* note 6.

²⁰ Makan Delrahim, Asst Att’y Gen, Dep’t of Justice, Antitrust Div, Keynote Address at American Bar Association’s Antitrust Fall Forum, Nov. 16, 2017, www.justice.gov/opa/speech/assistant-attorney-general-makandelrahim-delivers-keynote-address-american-bar.

²¹ See, e.g., *StubHub, Inc. v. Golden State Warriors, LLC*, No. C 15-1436 MMC (N.D. Cal. Nov. 5, 2015).

actions designed to disadvantage resellers. These include restrictions on the transferability of tickets, holding back ticket inventory, and releasing tickets only 48 hours before show times.²²

But for Live Nation-Ticketmaster's conduct – enabled by the ineffective remedies contained in the 2010 Decree – the benefits associated with resale ticketing would likely be higher today. Indeed, these problems are significant enough that a number of states have passed or are considering legislation to reform ticket resale laws.²³ The ineffective remedies contained in the 2010 Decree not only facilitated Live Nation-Ticketmaster's violations but also the exercise market power against resellers. These factors should have been a major factor in DOJ's decision to amend and extend the decree instead of pursuing stronger enforcement responses.

IV. VIOLATIONS OF THE 2010 DECREE WARRANTED STRUCTURAL REMEDIES, OBTAINED THROUGH ENFORCEMENT ACTIONS WITH A HIGHER PROBABILITY OF SUCCESS

The foregoing analysis tells a compelling story for why a different enforcement approach to addressing Live Nation-Ticketmaster's illegal conduct would have better served competition and consumers. In 2010 and today, the magnitude of the competitive problems raised by the Live-Nation-Ticketmaster merger cannot be understated. Indeed, one need look no further for a “durable” monopoly than the one that dominates the live music market. The harmful nature of the Live Nation-Ticketmaster merger is one of the best documented stories in U.S. merger history. For example, in 2018 the New York Times reported:

“Eight years after the merger, the ticketing business is still dominated by Live Nation and its operations extend into nearly every aspect of the concert world. Ticket prices are at record highs. Service fees are far from reduced. And Ticketmaster, part of the Live Nation empire, still tickets 80 of the top 100 arenas in the country. No other company has more than a handful. No competitor has risen to challenge its pre-eminence.”²⁴

The 2020 Decree is arguably a boon to Live Nation-Ticketmaster. With the extension of five and a half years, the 2020 Decree further codifies the conduct requirements that the company has so ably violated for the last decade. With amended conduct remedies, the company is free to engage in behavior that went undetected by the government or was not reported by market participants out of fear of retaliation, and to perfect new “workarounds.” Other avenues available to the Antitrust Division would have directly and effectively addressed demonstrated harms and the failure of the remedies contained in the 2010 Decree.

A far more effective enforcement approach in this case would have permanently reduced or eliminated Live Nation-Ticketmaster's incentive to engage in the anticompetitive conduct cited in the Motion to Amend and against ticket resellers. Structural remedies are the *only* remedial mechanism capable of deterring the anticompetitive conduct unsuccessfully addressed by the 2010 Decree. A structural remedy would have: (1) separated Ticketmaster's ticketing services from Live

²² See, e.g., Alejandra Reyes-Velarde, *Why the Black Keys shut out hundreds of fans, causing chaos at the Wiltern*, latimes.com, Sep. 20, 2019, <https://www.latimes.com/california/story/2019-09-20/black-keys-wiltern-tickets-ticketmaster>.

²³ See, e.g., *The Curious Case of U.S. Ticket Resale Laws*, seatgeek.com, Feb. 22, 2017, <https://seatgeek.com/tba/articles/ticket-resale-laws/>.

²⁴ Ben Sisario and Graham Bowley, *Live Nation Rules Music Ticketing, Some Say With Threats*, NYTIMES.COM, Apr. 1, 2018, <https://www.nytimes.com/2018/04/01/arts/music/live-nation-ticketmaster.html>.

Nation's concert promotion and venue operation; or (2) required divestiture of a share of Ticketmaster's position in the ticketing market sufficient to eliminate the demonstrated incentives to foreclose rivals or raise their costs.

A structural remedy could have been obtained by the Antitrust Division through a consummated merger challenge under Section 7. The agencies have imposed structural remedies in consummated mergers for which there is evidence of post-merger adverse effects, as is the case in Live Nation-Ticketmaster.²⁵ A Section 2 case against Live Nation-Ticketmaster would have obtained similar, if not stronger, relief. Documented evidence of abuse is the strongest basis upon which a Section 7 challenge or Section 2 case rests. Both of these alternatives would have been more effective in protecting competition and consumers from the harms enabled by ineffective remedies for a presumptively illegal merger.

In sum, the AAI believes that modifying the conduct remedies in the 2010 Decree does little or nothing to deter further anticompetitive conduct by Live Nation-Ticketmaster. Repeating a decade-old enforcement error, while expecting a different result, does a disservice to competition and consumers. A more effective approach the second time around would have furthered the goal of strengthening merger enforcement, including setting a precedent that conduct remedies are largely ineffective in restoring competition and thus counseling against their future use.

Respectfully,



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²⁵ See, e.g., *Chicago Bridge & Iron Co. v. FTC*, 515 F.3d 447 (5th Cir. 2008); Justice Department Reaches Settlement with Parker-Hannifin, Divestiture Will Restore Competition in Markets for Aviation Fuel Filtration Products, U.S. Department of Justice, Dec. 18, 2017, <https://www.justice.gov/opa/pr/justice-department-reaches-settlement-parker-hannifin>; and *Consummated Merger Challenges – The Past Is Never Dead*, Remarks of J. Thomas Rosch Commissioner, Federal Trade Commission, before the ABA Section of Antitrust Law Spring Meeting Washington, DC, Mar. 29, 2012, https://www.ftc.gov/sites/default/files/documents/public_statements/consummated-merger-challenges-past-never-dead/120329springmeetingspeech.pdf.

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